THE WORLD TRADE ORGANIZATION:

LEGAL, ECONOMIC AND POLITICAL ANALYSIS

VOLUME I

Edited by

Patrick F. J. Macrory
Arthur E. Appleton
Michael G. Plummer

Springer

The World Trade Organization: Legal, Economic and Political Analysis

Volume I

The Editors

PATRICK F. J. MACRORY, Director, International Trade Law Center, International Law Institute, Washington, D.C.

ARTHUR E. APPLETON, Counsel, White & Case (Geneva)

MICHAEL G. PLUMMER, Professor of International Economics, Johns Hopkins University, SAIS-Bologna

Editorial Advisory Board

RICHARD BERNAL, Director General of the Caribbean Regional Negotiating Machinery

RAJ BHALA, University of Kansas Law School

MARICE CREMONA, Queen Mary's and Westfield College, University of London

ESPERANZA DURAN, Agency for International Trade Information and Cooperation, Geneva

ROBERT HERZSTEIN, Miller & Chevalier, Washington, D.C.

GARY HORLICK, Wilmer, Cutler, Pickering, Hale & Dorr, Washington, D.C.

ROBERT LITAN, The Brookings Institution, Washington, D.C.

MITSUO MATSUSHITA, Seikei University, Tokyo

ERNST-ULRICH PETERSMANN, European University Institute, Florence

ALAN SYKES, University of Chicago Law School

The World Trade Organization: Legal, Economic and Political Analysis

Volume I

Editors

Patrick F. J. Macrory
Director, International Trade Law Center, International Law Institute, Washington, D.C.

Arthur E. Appleton
Counsel, White & Case (Geneva)

Michael G. Plummer
Professor of International Economics, Johns Hopkins University, SAIS-Bologna

Springer

INTERNATIONAL LAW INSTITUTE ILI

Library of Congress Cataloging-in-Publication Data

The World Trade Organization : legal, economic and political analysis / editors Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer.
p. cm.
Includes bibliographical references and index.
ISBN 0-387-22685-0 (alk. paper)
1. World Trade Organization. 2. Foreign trade regulation. 3. Labor laws and legislation, International. 4. International trade. I. Macrory, Patrick F. J. II. Appleton, Arthur Edmond. III. Plummer, Michael G., 1959–

HF1385.C654 2005
382′.92—dc22
2004052576

© 2005 Springer Science+Business Media, Inc.
All rights reserved. This work may not be translated or copied in whole or in part without the written permission of the publisher (Springer Science+Business Media, Inc., 233 Spring Street, New York, NY 10013, USA), except for brief excerpts in connection with reviews or scholarly analysis. Use in connection with any form of information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now know or hereafter developed is forbidden.
The use in this publication of trade names, trademarks, service marks and similar terms, even if the are not identified as such, is not to be taken as an expression of opinion as to whether or not they are subject to proprietary rights.

Printed in the United States of America.

9 8 7 6 5 4 3 2 1 SPIN 11055563

springeronline.com

CONTENTS

Table of Cases xi

Foreword xxvii
Supachai Panitchpakdi

Introduction xxix
The Editors

VOLUME I

I. BACKGROUND

1. **An Interpretative History of the Uruguay Round Negotiation** 3
   Gilbert R. Winham
2. **The Politics of Trade Policy Development—the New Complexity** 27
   Peter Sutherland
3. **The Democratic Roots of the World Trade Organization** 39
   Mike Moore

II. THE LEGAL FRAMEWORK OF THE WORLD TRADE ORGANIZATION

A: Institutional Issues

4. **Institutional Framework** 51
   William J. Davey

B: The Multilateral Agreements

5. **GATT 1994** 89
   Kevin Kennedy
6. **The Agreement on Agriculture** 187
   Joseph A. McMahon
7. **The Agreement on the Application of Sanitary and Phytosanitary Measures** 231
   Denise Prévost and Peter Van den Bossche
8. **The Agreement on Technical Barriers to Trade** 371
   Arthur E. Appleton
9. **The Agreement on Textiles and Clothing** 411
   Simon Lester
10. **The Agreement on Trade-Related Investment Measures** 437
    Martha Lara de Sterlini

11. The Anti-Dumping Agreement 485
Patrick F.J. Macrory

12. The Agreement on Customs Valuation 531
Ian Forrester, Q.C., and Omar E. Odarda

13. The Agreement on Preshipment Inspection 573
Rolf M. Jeker and Nigel Balchin

14. The Agreement on Import Licensing Procedures 591
Patrick F.J. Macrory

15. The Agreement on Rules of Origin 601
Hiroshi Imagawa and Edwin Vermulst

16. The Agreement on Subsidies and Countervailing Measures 679
Peggy A. Clarke and Gary N. Horlick

17. Injury Determinations in Antidumping and Countervailing Duty Investigations 735
Peggy A. Clarke and Gary N. Horlick

18. The Agreement on Safeguards 749
Yong-Shik Lee

19. The General Agreement on Trade in Services 799
Mary E. Footer and Carol George

20. Financial Services 955
Sydney J. Key

21. Telecommunications Services 989
Marco Bronckers and Pierre Larouche

22. The Agreement on Trade-Related Aspects of Intellectual Property Rights 1041
Thomas Cottier

C: The Plurilateral Agreements

23. The Agreement on Government Procurement 1123
Peter Trepte

24. The Agreement on Trade in Civil Aircraft and Other Issues Relating to Civil Aircraft in the GATT/WTO System 1165
Richard O. Cunningham and Peter Lichtenbaum

D: Dispute Settlement

25. Consultations 1197
Christiane Schuchhardt

26. The Panel Process 1233
Werner Zdouc

27. The Appellate Body: Institutional and Procedural Aspects 1277
Victoria Donaldson

28. Implementation and Enforcement of Dispute Settlement Decisions 1341
Andrew W. Shoyer, Eric M. Solovy and Alexander W. Koff

29. A Re-Appraisal of Non-Violation Complaints Under the WTO Dispute Settlement Procedures 1371
Frieder Roessler and Petina Gappah

30. Some Thoughts on the Appellate Body 1389
Mitsuo Matsushita

31. The Application of Non-WTO Rules of International Law in WTO Dispute Settlement 1405
Joost Pauwelyn

32. The Intervention of Private Entities and States as "Friends of the Court" in WTO Dispute Settlement Proceedings 1427
Brigitte Stern

33. The WTO Agreement in European Community Law: Status, Effect and Enforcement 1459
Philippe Ruttley and Marc Weisberger

E: Other Issues

34. Special and Differential Treatment of Developing Countries 1523
Kevin Kennedy

35. The National Security Provision—GATT Article XXI 1571
Alan S. Alexandroff and Rajeev Sharma

36. Tariff Classification 1581
Ian S. Forrester, Q.C. and Tashi Kaul

Author Biographies 1601

Index 1615

VOLUME II

III. ECONOMIC, POLITICAL, AND REGIONAL ISSUES

A: Economic Perspectives

37. Economic Principles of International Trade 3
Mordechai E. Kreinin and Michael G. Plummer

38. Computational Analysis of Multilateral Trade Liberalization in the Uruguay Round and Doha Development Round 23
Drusilla K. Brown, Alan V. Deardorff, and Robert M. Stern

39. Safeguards 43
Chad P. Bown and Meredith A. Crowley

40. Anti-dumping and Competition Law 67
P. J. Lloyd

41. Subsidies and Countervailing Measures 83
Alan O. Sykes

42. Agriculture 109
Kym Anderson

43. Environmental Issues 137
Chad P. Bown and Rachel McCulloch

44. Labor Standards 171
Charles Pearson

45. Services: The Case of Postal versus Express Delivery Services 189
Michael G. Plummer

B: Regional Issues

46. Regulating Regional Trade Agreements—a Legal Analysis 203
Robert E. Herzstein and Joseph P. Whitlock

47. The Economies in Transition, the WTO and Regionalism 247
Richard Pomfret

48. Rules of Origin and Rules of Preference and the World Trade Organization: The Challenge to Global Trade Liberalization 263
William E. James

49. Services in Regional Trading Arrangements 293
Christopher Findlay, Sherry Stephenson, and Francisco Javier Prieto

50. Rules for Foreign Direct Investment at the WTO: Building on Regional Trade Agreements 313
Michael Gestrin and Alan Rugman

51. Regional Trading Arrangements and Developing Countries 325
Maurice W. Schiff and L. Alan Winters

C: Developing Country Perspectives

52. LDCs in the Multilateral Trading System 341
Ratnakar Adhikari

53. Textiles and Developing Countries 383
Magda Shahin

54. The Trips Agreement and Developing Countries 419
Carlos M. Correa

55. Trade-Related Technical Cooperation and Capacity Building 457
Esperanza Durán

D: New Issues

56. Trade and Electronic Commerce 469
Stewart Baker and Maury Shenk

57. Trade and Competition Policy 487
Merit E. Janow

58. Trade and the Environment 511
Matthew Stilwell and Jan Bohanes

59. Trade and Labor I 571
Friedl Weiss

60. Trade and Labor II 597
Janelle M. Diller

61. Trade and Human Rights I 623
Ernst-Ulrich Petersmann

62. Trade and Human Rights II 663
Sheldon Leader

63. Trade and Gender 697
Eugenia McGill

64. Trade and Culture 747
Ivan Bernier

Author Biographies 795

Index 807

VOLUME III

IV. COUNTRY REPORTS

65. Argentina 01
Julio J. Nogués

66. Canada 29
Michael Hart

67. China 47
Yaotian Wang and Guiquo Wang

68. Colombia 73
Felipe Jaramillo

69. Egypt 91
Adel M. Khalil

70. The European Union 111
Hugo Paemen

71. Indonesia 137
H.S. Kartadjoemena

72. Japan 171
Minoru Endo

73. Korea 183
Chulsu Kim

74. Mexico 215
Antonio Ortiz Mena L.N.

75. Mongolia 249
Damdin Tsogtbaatar

76. New Zealand 269
David J Walker

77. Russia 287
Julia Selivanova

78. Singapore 335
Barry Desker

79. South Africa 351
Gerhard Erasmus

80. The United States 379
Amelia Porges and Daniel M. Price

V. CONCLUDING THOUGHTS—THE WAY FORWARD

81. Pursuing Global Free Trade: A Small Open Economy Perspective 437
David J. Walker

82. Global Integration: Currents and Counter-Currents 457
Sylvia Ostry

APPENDIX—WTO MINISTERIAL DECLARATIONS AND DOHA WORK PROGRAMME DECISION ADOPTED BY THE GENERAL COUNCIL

Singapore Ministerial Declaration (13 December 1996) 475
Ministerial Declaration on Trade in Information Technology (Singapore 13 December 1996) 483
Geneva Ministerial Declaration (20 May 1998) 488
Geneva Declaration on Global Electronic Commerce (20 May 1998) 491
Doha Ministerial Declaration (14 November 2001) 492
Implementation Issues (Doha 14 November 2001) 503
Doha Declaration on the TRIPS Agreement and Public Health (14 November 2001) 510
Cancun Ministerial Statement (14 September 2003) 512
Doha Work Programme (1 August 2004) 513

Author Biographies 531

Index 539

TABLE OF CASES

WTO Decisions

Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil:
Report of the Panel, WT/DS241/R (2003): I:507, I:511, I:512, I:513, I:517, I:523

Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy:
Report of the WTO Panel (not appealed), WT/DS189/R (2001): I:506, I:513, I:514, I:515, I:516, I:517, I:1351

Argentina—Definitive Safeguard Measure on Imports of Preserved Peaches:
Report of the WTO Panel (not appealed), WT/DS238/R (2003): I:755, I:766, I:768, I:772, I:786

Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items:
Report of the WTO Panel, WT/DS56/R (1997): I:143, I:1224
Report of the Appellate Body, WT/DS56/AB/R (1998): I:109, I:111, I:1259, I:1260, I:1273, I:1336, I:1416

Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather:
Arbitration Under Article 21.3(c), WT/DS155/10 (2001): I:1352, I:1356

Argentina—Safeguard Measure on the Imports of Footwear:
Report of the WTO Panel, WT/DS121/R (1999): I:737, I:739, I:740, I:744, I:745, I:755, I:766, I:772, I:773, I:786, I:789, I:795, II:238, II:239, II:240
Report of the Appellate Body, WT/DS121/AB/R (1999): I:147, I:153, I:740, I:745, I:755, I:765, I:768, I:772, I:773, I:786, I:795, I:796, I:1303, I:1307, I:1332, I:1336, II:235, II:238, II:240, II:429

Australia—Measures Affecting the Importation of Salmon:
Report of the WTO Panel, WT/DS18/R (1998): I:246, I:253, I:263, I:266, I:271, I:281, I:284, I:287, I:288, I:289, I:290, I:296, I:307, I:309, I:313, I:314, I:316, I:317, I:320, I:321, I:323, I:324, I:354, I:1273
Report of the Appellate Body, WT/DS18/AB/R (1998): I:264, I:266, I:280, I:281, I:282, I:283, I:284, I:289, I:290, I:309, I:311, I:312, I:314, I:316, I:317, I:318, I:320, I:321, I:322, I:324, I:328, I:353, I:354, I:1216, I:1254, I:1265, I:1270, I:1273, I:1303, I:1336, I:1597, II:523, II:525, II:526, II:545
Arbitration Under Article 21.3(c), WT/DS18/9 (1999): I:1351, I:1356, I:1357, I:1358
Recourse to Article 21.5 by Canada, WT/DS18/RW (2000) I:248, I:265, I:282, I:285, I:297, I:321, I:323, I:324, I:1442, I:1443

Australia—Subsidies Provided to Producers and Exporters of Automotive Leather:
Report of the WTO Panel (not appealed), WT/DS126/R (1999): I:697, I:698, I:699, I:700, I:1175
Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW (2000): I:1345

Brazil—Export Financing Programme for Aircraft:
Report of the WTO Panel, WT/DS46/R (1999): I:1167, I:1187, I:1205, I:1218, I:1220
Report of the Appellate Body, WT/DS46/AB/R (1999): I:699, I:1184, I:1188, I:1205, I:1218, I:1243, I:1256, I:1273, I:1309, I:1310, I:1311, I:1317, I:1325, I:1336
Arbitration under Article 22.6 of DSU, WT/DS46/ARB (2000): I:1354, I:1363
Recourse by Canada to Article 21.5 of the DSU, WT/DS46/RW (2000), I:1189
Recourse by Canada to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS46/AB/RW (2000): I:1336, I:1350, I:1354
Second Recourse to Article 21.5 by Canada, WT/DS46/RW/2 (2001): I:698, I:1187, I:1189, I:1190, III:201
Recourse to Article 22.2 of the DSU, WT/DS46/16 (2000): I:1363

Brazil—Measures Affecting Desiccated Coconut:
Report of the WTO Panel, WT/DS22/R (1996): I:1206, I:1207
Report of the Appellate Body, WT/DS22/AB/R (1997): I:686, I:1066, I:1216, I:1244, I:1273, I:1336, II:548

Canada—Certain Measures Affecting the Automotive Industry:
Report of the WTO Panel, WT/DS139/R, WT/DS142/R (2000): I:458, I:462, I:463, I:467, I:468, I:469, I:483, I:886, I:888, I:890, II:234, II:237, II:238, II:657
Report of the Appellate Body, WT/DS/139/AB/R, WT/DS/142/AB/R (2000): I:463, I:483, I:690, I:697, I:699, I:875, I:884, I:885, I:886, I:888, I:889, I:1270, I:1273, I:1336, III:33, III:201
Arbitration Under Article 21.3(c), WT/DS139/12, WT/DS142/12 (2000): I:1352, I:1357, I:1358, I:1359

Canada—Certain Measures Concerning Periodicals:
Report of the WTO Panel, WT/DS/31/R (1997): I:103, I:875, I:876, I:879, I:881, I:1391, II:538, II:756, II:757, II:759, II:760, II:782
Report of the Appellate Body, WT/DS31/AB/R (1997): I:103, I:119, I:121, I:122, I:875, I:877, I:878, I:879, I:881, I:887, I:1066, I:1301, I:1332, I:1336, I:1391, II:474, II:475, II:539, II:756, II:757, II:758, II:759, II:763, II:764, II:766

Canada—Export Credits and Loan Guarantees for Regional Aircraft:
Report of the WTO Panel (not appealed), WT/DS222/R (2002): I:698, I:701, I:1187, I:1193

Canada—Measures Affecting the Export of Civilian Aircraft:
Report of the WTO Panel, WT/DS70/R (1999): I:1167, I:1175, I:1176, I:1186, I:1218, I:1219, I:1220, I:1397
Report of the Appellate Body, WT/DS70/AB/R (1999): I:689, I:692, I:697, I:699, I:717, I:1184, I:1185, I:1186, I:1256, I:1258, I:1261, I:1262, I:1263, I:1273, I:1301, I:1309, I:1310, I:1311, I:1317, I:1329, I:1336, I:1397
Recourse to Article 21.5 of the DSU, WT/DS70/RW (2000): I:1186, I:1193
Recourse to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS70/AB/RW (2000): I:1186, I:1336, I:1354, II:548

Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products:
Report of the WTO Panel, WT/DS103/R, WT/DS113/R (1999): I:212, I:595, I:1356, III:274

Report of the Appellate Body, WT/DS103/AB/R, WT/DS113/AB/R (1999): I:212, I:699, I:1317, I:1336, I:1351, I:1360, III:274
Recourse to Article 21.5 of the DSU, Report of the Panel, WT/DS103/RW, WT/DS113/RW (2001): I:212, I:213
Recourse to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS103/AB/RW, WT/DS113/AB/RW (2001): I:1336
Second Recourse to Article 21.5, Report of the Appellate Body, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (2003): I:1258, I:1273, I:1336

Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain:
Report of the WTO Panel, WT/DS276/R (2004): I:149, I:150, I:458, I:459

Canada—Patent Protection for Pharmaceutical Products:
Report of the WTO Panel, (not appealed) WT/DS114/R (2000): I:1065, I:1066, I:1079, I:1094, I:1095, II:424, II:425, II:428, II:430, II:431, II:432, II:435, II:436, II:442, II:445, II:446, II:648
Arbitration Under Article 21.3(c), WT/DS114/13 (2000): I:1066, I:1351, I:1356, I:1357, I:1358, I:1359

Canada—Term of Patent Protection:
Report of the WTO Panel, WT/DS170/R (2000): I:1066, I:1097
Report of the Appellate Body, WT/DS170/AB/R (2000): I:1097, I:1320, I:1336, II:424, II:425
Arbitration Under Article 21.3(c), WT/DS170/10 (2001): I:1352, I:1359

Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products:
Report of the WTO Panel, WT/DS207/R (2002): I:203, I:206, I:755, I:766, I:775
Report of the Appellate Body, WT/DS207/AB/R (2002): I:1247, I:1257, I:1264, I:1273, I:1298, I:1307, I:1337

Chile—Taxes on Alcoholic Beverages:
Report of the WTO Panel, WT/DS87/R, WT/DS110/R (2000): I:103, I:1012
Report of the Appellate Body, WT/DS87/AB/R, WT/DS110/AB/R (2000): I:104, I:121, I:612, I:1269, I:1271, I:1273, I:1303, I:1336,
Arbitration Under Article 21.3(c), WT/DS87/15, WT/DS110/14 (2000): I:1351, I:1356, I:1357, I:1359, I:1360

Egypt—Definitive Anti-Dumping Measures on Steel Rebar From Turkey:
Report of the WTO Panel (not appealed), WT/DS211/R (2002): I:513, I:514, I:516, III:100

European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India:
Report of the WTO Panel, WT/DS141/R (2000): I:505, I:511, I:525, I:709, I:743, I:1220, I:1227, I:1239, I:1274, I:1444, I:1551, II:415, III:100
Report of the Appellate Body, WT/DS141/AB/R (2001): I:434, I:505, I:523, I:1260, I:1274, I:1294, I:1313, I:1337, I:1351, II:413, II:415, III:100
Recourse to Article 21.5, WT/DS/141/RW (2002): III:201
Recourse to Article 21.5, Report of the Appellate Body, WT/DS141/AB/RW (2003): I:1274, I:1303, I:1331, I:1337
Agreement under Art. 21.3 (b) of the DSU, WT/DS141/10 (2001): I:1358

European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings From Brazil:
Report of the Appellate Body, WT/DS219/AB/R (1998): I:504, I:1300, I:1337

European Communities—Conditions for the Granting of Tariff Preferences to developing Countries:
Report of the Appellate Body, WT/DS246/AB/R (2004): I:1544

European Communities—Customs Classification of Certain Computer Equipment:
Report of the WTO Panel, WT/DS62, WT/DS67, WT/DS68 (1998): I:1224, I:1375, I:1479, I:1480, I:1584, I:1595
Report of the Appellate Body, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (1998): I:112, I:1245, I:1246, I:1274, I:300, I:301, I:1302, I:1337, I:1411, I:1412, I:1480, I:1584, I:1585, I:1586, I:1589, I:1591, I:1592, I:1594, I:1595, I:1596, I:1597, II:478, III:130, III:201

European Communities—Measures Affecting Asbestos and Asbestos-Containing Products:
Report of the WTO Panel, WT/DS135/R (2000): I:406, I:844, I:1224, , I:1239, I:1375, I:1377, I:1379, I:1380, I:1394, II:653
Communication from the Appellate Body (Additional Procedures), WT/DS135/9 (November 8, 2000): I:1400, I:1444, II:564, II:644, II:645
Report of the Appellate Body, WT/DS135/AB/R (2001): I:83, I:119, I:120, I:171, I:245, I:256, I:377, I:378, I:383, I:389, I:390, I:393, I:395, I:405, I:406, I:409, I:844, I:845, I:1066, I:1237, I:1273, I:1301, I:1302, I:1307, I:1320, I:1323, I:1324, I:1326, I:1328, I:1332, I:1337, I:1380, I:1381, I:1382, I:1394, I:1400, I:1401, I:1437, I:1438, I:1445, I:1450, I:1452, I:1458, I:1586, I:1588, II:440, II:527, II:528, II:539, II:589, II:613, II:614, II:615, II:631, II:644, II:652, II:654, II:687, II:688, III:130

European Communities—Measures Affecting the Importation of Certain Poultry Products:
Report of the WTO Panel, WT/DS69/R (1998): I:134, I:206, I:207, I:592, I:595, I:596, I:597, I:598
Report of the Appellate Body, WT/DS69/AB/R (1998): I:136, I:206, I:207, I:592, I:596, I:598, I:1265, I:1270, I:1274, I:1302, I:1303, I:1320, I:1337, I:1351

European Communities—Measures Concerning Meat and Meat Products:
Report of the WTO Panel, WT/DS26/R, WT/DS48/R (1998): I:244, I:245, I:246, I:248, I:249, I:250, I:252, I:253, I:256, I:263, I:270, I:271, I:272, I:273, I:274, I:278, I:280, I:281, I:286, I:291, I:292, I:293, I:294, I:295, I:296, I:310, I:311, I:312, I:313, I:314, I:318, I:348, I:354, I:1066, I:1256, I:1274, I:1392, I:1402, I:1492, II:150, II:151, II:163, II:655, II:733, III:130
Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R (1998): I:160, I:250, I:256, I:257, I:260, I:261, I:262, I:264, I:265, I:266, I:267, I:268, I:272, I:273, I:274, I:276, I:277, I:278, I:280, I:281, I:282, I:283, I:284, I:286, I:287, I:288, I:290, I:291, I:292, I:293, I:294, I:295, I:296, I:298, I:299, I:301, I:304, I:305, I:307, I:308, I:309, I:310, I:311, I:314, I:315, I:316, I:318, I:319, I:346, I:349, I:351, I:352, I:353, I:354, I:384, I:394, I:399, I:788, I:1066, I:1248, I:1253, I:1254, I:1256, I:1258, I:1261, I:1262, I:1264, I:1265, I:1266, I:1274, I:1300, I:1302, I:1303, I:1317, I:1318, I:1328, I:1337, I:1343, I:1353, I:1392, I:1402, I:1412, I:1492, I:1495, II:142, II:150, II:151, II:163, II:439, II:440, II:523, II:524, II:525, II:529, II:544, II:545, II:546, II:648, II:649, II:655, II:733, III:129, III:130

Arbitration Under Article 21.3(c), WT/DS26/15, WT/DS48/13 (1998): I:1351, I:1356, I:1357, I:1358, I:1361, I:1366
Arbitration Under Article 22.6, WT/DS26/ARB, WT/DS48/ARB (1999): III:130

European Communities—Regime for the Importation, Sale and Distribution of Bananas:
Report of the WTO Panel, WT/DS27/R (1997): I:68, I:69, I:105, I:133, I:204, I:406, I:458, I:460, I:466, I:467, I:468, I:469, I:482, I:875, I:878, I:879, I:880, I:881, I:885, I:886, I:1230, I:1237, I:1239, I:1248, I:1256, I:1273, I:1274, I:1420, I:1486, I:1492, I:1493, I:1494, II:657, III:129, III:132
Report of the Appellate Body, WT/DS27/AB/R (1997): I:133, I:136, I:204, I:460, I:467, I:482, I:592, I:595, I:596, I:875, I:878, I:879, I:880, I:881, I:882, I:883, I:884, I:885, I:886, I:887, I:888, I:1066, I:1213, I:1214, I:1216, I:1230, I:1237, I:1239, I:1241, I:1245, I:1246, I:1248, I:1273, I:1274, I:1298, I:1300, I:1311, I:1313, I:1315, I:1316, I:1317, I:1318, I:1319, I:1320, I:1332, I:1337, I:1343, I:1350, I:1410, I:1492, I:1493, II:424, II:475, II:782, III:65, III:129, III:132
Arbitration Under Article 21.3(c) of the DSU, WT/DS27/15 (1998) I:1351, I:1356
Arbitration under Article 22.6 of the DSU, WT/DS27/ARB (2000): I:134, I:1111, I:1353, I:1354, I:1362, I:1363, I:1376, II:51 (has listed as 1999), II:424, III:129
Recourse to Article 21.5, Report of the Panel, WT/DS27/RW/ECU (2001), I:133, I:1353, I:1354, I:1497, I:1501

European Communities—Trade Description of Sardines:
Report of the Panel, WT/DS231/R (2002): I:377, I:398, I:399, I:406, I:407
Report of the Appellate Body, WT/DS231/AB/R (2002): I:377, I:378, I:384, I:385, I:396, I:397, I:398, I:399, I:400, I:405, I:1240, I:1260, I:1266, I:1268, I:1274, I:1299, I:1300, I:1307, I:1312, I:1320, I:1321, I:1322, I:1323, I:1325, I:1326, I:1327, I:1328, I:1332, I:1333, I:1337, I:1438, I:1439, I:1440, I:1447, I:1453

Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico:
Report of the WTO Panel, WT/DS60/R (1998): I:512
Report of the Appellate Body, WT/DS60/AB/R (1998): I:300, I:430, I:512, I526, I:1236, I:1245, I:1246, I:1274, I:1282, I:1313, I:1337, I:1420

Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico:
Report of the WTO Panel (not appealed), WT/DS156/R (2000): I:511, I:513, I:514, I:515, I:516, I:523, I:524, I:709, I:710, I:712, I:713, I:724, I:1207

India—Measures Affecting the Automotive Sector:
Report of the WTO Panel, WT/DS146/R, WT/DS175/R (2002): I:123, I:128 I:458, I:464, I:465, I:468, I:469, I:483, II:657
Report of the Appellate Body, WT/DS146/AB/R, WT/DS175/AB/R (2002): I:123, I:128, I466, I:483, I:1307, I:1327, I:1328, I:1337, III:201

India—Patent Protection for Pharmaceutical and Agricultural Chemical Products:
Report of the WTO Panel, WT/DS50/R (1997): I:1064, I:1216, I:1224, II:424, II:428, II:429, II:430, II:433, II:434, II:441
Report of the Appellate Body, WT/DS50/AB/R (1997): I:1064, I:1065, I:1205, I:1216, I:1217, I:1218, I:1225, I:1242, I:1245, I:1255, I:1264, I:1274, I:1302, I:1332, I:1337, I:1356, I:1422, II:424, II:433, II:434, II:441

India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products:
Report of the WTO Panel, WT/DS90/R (1999): I:65, I:84, I:595, I:1178
Report of the Appellate Body, WT/DS90/AB/R (1999): I:65, I:1236, I:1259, I:1262, I:1275, I:1303, I:1337, I:1351, I:1534

Indonesia—Certain Measures Affecting the Automobile Industry:
Report of the WTO Panel (not appealed), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (1998): I:103, I:126, I:300, I:440, I:458, I:459, I:461, I:462, I:466, I:467, I:469, I:470, I:471, I:472, I:482, I:702, I:703, I:734, I:1066, I:1178, I:1239, II:424, II:539, II:657, II:763, II:782, III:201
Arbitration Under Article 21.3(c), WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (1998): I:1351, I:1356, I:1357, I:1360

Japan—Measures Affecting Agricultural Products:
Report of the WTO Panel, WT/DS76/R (1998): I:246, I:302, I:306, I:321, I:323, I:324, I:346, I:350, I:351, I:354, I:1219
Report of the Appellate Body, WT/DS76/AB/R (1999): I:257, I:258, I:260, I:261, I:262, I:263, I:264, I:278, I:280, I:282, I:302, I:304, I:305, I:306, I:307, I:308, I:320, I:337, I:339, I:340, I:346, I:347, I:350, I:353, I:354, I:1263, I:1265, I:1275, I:1303, I:1337, I:1351, I:1453, I:1454, II:523, II:526, II:527, II:545, II:546

Japan—Measures Affecting Consumer Photographic Film and Paper:
Report of the WTO Panel (not appealed), W/DS44/R (1998), I:123, I:136, I:171, I:172, I:781, I:875, I:890, I:891, I:1237, I:1238, I:1241, I:1275, I:1375, I:1377, I:1382, I:1510, II:99, II:492, II:495, II:496, II:563

Japan—Measures Affecting the Importation of Apples:
Report of the WTO Panel, WT/DS245/AB/R (2003): I:246, I:257, I:258, I:259, I:285, I:286, I:287, I:289, I:290, I:302, I:303, I:338, I:347
Report of the Appellate Body, WT/DS245/AB/R (2003): I:262, I:280, I:285, I:287, I:303, I:304, I:348, I:351, I:353, I:354, I:1298, I:1303, I:1338,

Japan—Taxes on Alcoholic Beverages:
Report of the WTO Panel, WT/DS8R, WT/DS10/R, WT/DS11/R (1996): I:103, I:121, I:736, I:1588, II:758, II:763
Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996): I:80, I:103, I:105, I:116, I:117, I:118, I:120, I:121, I:122, I:300, I:301, I:315, I:389, I:390, I:877, I:878, I:883, I:1066, I:1178, I:1302, I:1319, I:1329, I:1338, I:1376, I:1422, I:1588, II:240, II:429, II:484, II:757, II:758, II:763
Arbitration Under Article 21.3(c), WT/DS8/15, WT/DS10/15, WT/DS11/13 (1997): I:1351, I:1356, I:1365, I:1366

Korea—Definitive Safeguard Measure on the Imports of Certain Dairy Products:
Report of the WTO Panel, WT/DS98/R (1999): I:755, I:767, I:769, I:770, I:771, I:772, I:774, I:775, I:776, I:781, I:782, I:783, I:784, I:785, I:788, I:789, I:790, I:791, I:795
Report of the Appellate Body, WT/DS98/AB/R (1999): I:153, I:206, I:542, I:755, I:758, I:768, I:774, I:782, I:786, I:787, I:790, I:1245, I:1246, I:1259, I:1265, I:1275, I:1303, I:1318, I:1338, I:1351, II:766, III:203

Korea—Measures Affecting Government Procurement:
Report of the WTO Panel (not appealed), WT/DS163/R (2000): I:1123, I:1130, I:1138, I:1139, I:1157, I:1224, I:1375, I:1377, I:1378, I:1407, I:1408, III:203

Korea—Measures Affecting Imported of Fresh, Chilled and Frozen Beef:
Report of the WTO Panel, WT/DS161/R, WT/DS169/R (2000): I:206, I:209, I:595, I:1275
Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R (2000): I:124, I:206, I:209, I:210, I:256, I:393, I:845, I:1275, I:1338, I:1351, II:528, II:638, II:652, III:203
Agreement under Art. 21.3(b), WT/DS161/12, WT/DS169/12 (2001): I:1358

Korea—Taxes on Alcoholic Beverages:
Report of the WTO Panel, W/DS75/R, W/DS84/R (1998): I:103, I:1012, I:1205, I:1223, I:1224, I:1227, I:1228, II:500
Report of the Appellate Body, W/DS75/AB/R, W/DS84/AB/R (1999): I:103, I:121, I:1265, I:1269, I:1275, I:1300, I:1301, I:1303, I:1338, III:203, II:500
Arbitration Under Article 21.3(c), WT/DS75/16, WT/DS84/14 (1999): I:1351, I:1356, I:1357, I:1358

Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States:
Report of the WTO Panel (not appealed), WT/DS132/R (2000): I:511, I:521, I524, I:709, I:711, I:719, I:724, I:746, I:747, I:1351,
Recourse to Article 21.5, Report of the Appellate Body, WT/DS132/AB/RW (2001): I:1204, I:1221, I:1222, I:1241, I:1243, I:1245, I:1253, I:1269, I:1270, I:1271, I:1275, I:1303, I:1318, I:1331, I:1338,

Mexico—Measures Affecting Telecommunications Services:
Report of the Panel (not appealed), WT/DS204/R (2004): I:874, I:891, I:892, I:893, I:997, I:999, I:1001, I:1002, I:1003, I:1004, I:1005, I:1006, I:1007, I:1013, I:1020, I:1032, I:1033, I:1036, I:1218

Thailand—Antidumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland:
Report of the WTO Panel, WT/DS122/R (2001): I:504, I:505, I:511, I:526, I:527, I:709, I:738, I:739, I:743
Report of the Appellate Body, WT/DS122/AB/R (2001): I:737, I:740, I:743, I:1246, I:1259, I:1262, I:1275, I:1309, I:1310, I:1311, I:1312, I:1320, I:1322, I:1328, I:1338, I:1351, I:1446, I:1447, I:1452

Turkey—Restrictions on Imports of Textile and Clothing Products:
Report of the WTO Panel, WT/DS34/R (1999): I:419, I:429, I:430, I:1224, I:1248, I:1275, II:227, II:235
Report of the Appellate Body, WT/DS34/AB/R (1999): I:1275, I:1338, I:1351, II:227, II:235, II:236, II:240

United States—Anti-Dumping Act of 1916:
Report of the Appellate Body, WT/DS136/AB/R, WT/DS162/AB/R (2000): I:141, I:500, I:510, I:512, I:1242, I:1256, I:1275, I:1317, I:1318, I:1338, I:1410
Arbitration Under Article 21.3(c), WT/DS136/11, WT/DS162/14 (2001): I:1351, I:1356, I:1357, I:1359

United States—Anti-Dumping and Countervailing Duty Measures on Steel Plate from India:
Report of the WTO Panel (not appealed), WT/DS206 (2002): I:516, I:525

United States—Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea:
Report of the WTO Panel (not appealed), WT/DS99/R (1999): I:512, I:522, I:723, I:742, III:202

United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan:
Report of the WTO Panel, WT/DS184/R (2001): I:521, I:526, I:714, I:715, I:745
Report of the Appellate Body, WT/DS184/AB/R (2001), I:501, I:513, I:516, I:520, I:527, I:714, I:737, I:738, I:739, I:745, I:746, I:1265, I:1276, I:1302, I:1325, I:1339, I:1412, III:201
Arbitration under Article 21.3(c) of the DSU, WT/DS184/9 (2001): I:1352

United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel and Strip from Korea:
Report of the WTO Panel (not appealed), WT/DS/179/R (2001): I:506, I:507, I:508, I:1351, III:202
Agreement under Art. 21.3 (b) of the DSU, WT/DS179/5 (2001): I:1358

United States—Continued Dumping and Subsidy Offset Act of 2000:
Report of the WTO Panel, WT/DS/ 217/R, WT/DS/234/R (2003): I:510, I:712, I:732, I:1230, III:202
Report of the Appellate Body, WT/DS217/AB/R, WT/DS/234/AB/R (2003): I:510, I:527, I:528, I:712, I:732, I:1247, I:1248, I:1276, I:1299, I:1300, I:1302, I:1304, I:1310, I:1311, I:1312, I:1317, I:1318, I:1320, I:1339, II:63, III:201, III:202

United States—Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products From Germany:
Report of the WTO Panel, WT/DS213/R (2002): I:742
Report of the Appellate Body, WT/DS213/AB/R (2002): I:512, I:742, I:1260, I:1266, I:1275, I:1298, I:1302, I:1303, I:1329, I:1338

United States—Countervailing Measures Concerning Certain Products from the European Communities:
Report of the WTO Panel, WT/DS212/R (2002): I:693, I:694
AB report: I:693, I:694, I:722, I:723, I:1297, I:1298, I:1299, I:1320, I:1323, I:1329, I:1338

United States—Definitive Safeguard Measures on Imports of Certain Steel Products:
Report of the WTO Panel, WT/DS248∼DS259/R (2003): I:755, I:766, I:767, I:768, I:769, I:770, I:773, I:786, I:787, I:791, I:794, III:202, III:274
Report of the Appellate Body, WT/DS248∼DS259/AB/R (2003): I:153, I:755, I:766, I:769, I:791, I:792, I:794, I:1303, I:1317, I:1318, I:1323, I:1325, I:1339, III:202

United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea:
Report of the WTO Panel, WT/DS/202/R (2001): I:755, I:766, I:768, III:202
Report of the Appellate Body, WT/DS/202/AB/R (2002): I:736, I:755, I:774, I:775, I:783, I:789, I:795, I:1224, I:1327, I:1328, I:1339, II:234, II:235, II:238, III:202

United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities:

Report of the WTO Panel, WT/DS166/R (2000): I:737, I:744, I:745, I:755, I:766, I:768, I:769, I:770, I:772, I:773, I:774, I:781, I:783, I:789, I:791, I:794

Report of the Appellate Body, WT/DS166/AB/R (2000): I:206, I:755, I:772, I:774, I:783, I:791, I:794, I:1263, I:1264, I:1265, I:1276, I:1303, I:1339, I:1351, II:234, II:235, II:238

United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*:*

Report of the Appellate Body, WT/DS257/AB/R (2004): I:690, I:694, I:716, I:1301, I:1304, I:1314, I:1323, I:1327, I:1328, I:1339

United States—Final Dumping Determination on Softwood Lumber from Canada:

Report of the Appellate Body, WT/DS264/AB/R (2004): I:504 I:507

United States—Import Measures on Certain Products from the European Communities:

Report of the WTO Panel, WT/DS165/R (2000): I:565, I:1354, I:1355, I:1361, I:1362

Report of the Appellate Body, WT/DS165/AB/R (2000): I:1271, I:1275, I:1338, I:1355 I:1361, I:1362

United States—Import Prohibition of Certain Shrimp and Shrimp Products:

Report of the WTO Panel, WT/DS58/R (1998): I:844, I:1239, I:1393, I:1399, I:1431, II:147, II:149, II:150, II:151, II:163, II:165, II:166, II:637

Report of the Appellate Body, WT/DS58/AB/R (1998): I:80, I:83, I:154, I:163, I:164, I:165, I:300, I:374, I:383, I:844, I:886, I:1069, I:1075, I:1226, I:1238, I:1239, I:1240, I:1261, I:1276, I:1297, I:1298, I:1307, I:1316, I:1317, I:1320, I:1321, I:1322, I:1332, I:1339, I:1356, I:1379, I:1386, I:1393, I:1399, I:1412, I:1429, I:1430, I:1431, I:1432, I:1433, I:1434, I:1435, I:1436, I:1441, I:1442, I:1443, I:1447, I:1457, II:147, II:149, II:150, II:151, II:163, II:165, II:166, II:414, II:436, II:514, II:521, II:522, II:537, II:540, II:560, II:564, II:587, II:588, II:589, II:610, II:611, II:613, II:614, II:616, II:637, II:643, II:652, II:653, II:678, II:691

Recourse to Article 21.5, WT/DS58/RW (2001): I:165, I:1225, I:1226, I:1330, I:1331, I:1416, I:1421, II:560

Recourse to Article 21.5 of the DSU, Appellate Body Report, WT/DS58/AB/RW (2001): I:165, I:383, I:392, I:1226, I:1307, I:1322, I:1330, I:1331, I:1339, II:523, II:540, II:587, II:615, II:637, II:653, II:678, II:680, II:691

United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom:

Report of the WTO Panel, WT/DS138/R (2000): I:693, I:1276, I:1395, I:1443

Report of the Appellate Body, WT/DS138/AB/R (2001): I:83, I:352, I:692, I:693, I:717, I:722, I:723, I:731, I:737, I:738, I:1276, I:1299, I:1300, I:1304, I:1321, I:1328, I:1332, I:1339, I:1395, I:1399, I:1436, I:1437, I:1439, I1440, I:1441, I:1449, I:1451, I:1452, I:1455, I:1457, II:101, II:564, II:644

United States—Investigation of the International Trade Commission in Softwood Lumber from Canada:

Report of the WTO Panel, WT/DS277/R (2004): I:741, I:746, I:747, I:748

United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services

Report of the WTO Panel, WT/DS285/R (2004): I:874

United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India:
Report of the WTO Panel, WT/DS33/R (1997): I:422, I:424, I:425, I:427, I:428, I:429, II:408, II:413, II:414
Report of the Appellate Body, WT/DS33/AB/R (1997): I:346, I:348, I:422, I:428, I:467, I:864, I:1258, I:1259, I:1270, I:1271, I:1276, I:1302, I:1313, I:1339, I:1410, I:1413, II:408, II:413, II:414

United States—Measures Treating Export Restraints as Subsidies:
Report of the WTO Panel (not appealed), WT/DS194/R (2001): I:688, I:691, I:1190

United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada:
Report of the WTO Panel (not appealed), WT/DS236/R (2002): I:690, I:694, I:719, I:721, I:722

United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear:
Report of the WTO Panel, WT/DS24/R (1996): I:422, I:424, I:425, I:426, I:427, I:428, I:429, I:1224, I:1228, II:408, II:413, II:415
Report of the Appellate Body, WT/DS24/AB/R (1997): I:135, I:422, I:423, I:1319, I:1339, I:1361, II:408, II:413, II:415

United States—Rules of Origin for Textiles and Apparel Products:
Report of the WTO Panel (not appealed), WT/DS243/R (2003): I:433, I:603, I:612, I:613, I:614

United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia:
Report of the WTO Panel, WT/DS177/R, WT/DS178/R (2000): I:755, I:767, I:768, I:771, I:772, I:774, I:786, I:789, III:274
Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R (2001): I:153, I:206, I:428, I:738, I:740, I:743, I:745, I:746, I:755, I:771, I:772, I:774, I:789, I:790, I:791, I:1267, I:1276, I:1307, I:1317, I:1325, I:1339, I:1351, III:274

United States—Section 110(5) of U.S. Copyright Act:
Report of the WTO Panel (not appealed), WT/DS160/R (2000): I:1079, I:1083, I:1084, I:1085, I:1239, I:1276, I:1351, I:1441, I:1443, I:1444, II:425, II:426, II:428, II:430, II:431, II:436, II:442, II:656
Recourse to Arbitration under Article 25 of the DSU,WT/DS160/ARB25/1 (2001): I:1112, I:1342, I:1366, II:214, II:656
Arbitration Under Article 21.3(c), WT/DS160/12 (2001): I:1352, I:1357, I:1358

United States—Section 211 Omnibus Appropriations Act of 1998:
Report of the WTO Panel, WT/DS176/R (2001): I:1063, I:1226, II:430
Report of the Appellate Body, WT/DS176/AB/R (2002): I:1057, I:1063, I:1111, I:1265, I:1276, I:1301, I:1320, I:1339, II:425, II:426, II:431

United States—Section 301–310 of the Trade Act of 1974:
Report of the WTO Panel (not appealed), WT/DS152/R (1999): I:81, I:1224, I:1430, II:422, II:437, II:626, III:201

United States—Standards for Reformulated and Conventional Gasoline:
Report of the WTO Panel, WT/DS2/R (1996): I:103, I:118, I:256, I:394, I:409, I:844, I:1391, II:438, II:587, II:588
Report of the Appellate Body, WT/DS2/AB/R (1996): I:103, I:154, I:155, I:156, I:157, I:162, I:163, I:300, I:315, I:844, I:877, I:886, I:1258, I:1276, I:1302, I:1305, I:1319, I:1330, I:1339, I:1361, I:1393, I:1406, I:1422, II:438, II:439, II:514, II:519, II:520, II:538, II:540, II:563, II:588, II:589, II:613, II:652

United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan
Report of the Appellate Body, WT/DA244/AB/R (2004): I:522, I:1301, I:1338

United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina:
Report of the WTO Panel, WT/DS268/R (2004): I:523

United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan:
Report of the WTO Panel, WT/DS192/R (2001): I:422, I:424, I:425, I:426, I:429
Report of the Appellate Body, WT/DS192/AB/R (2001): I:422, I:426, I:429, I:1259, I:1266, I:1275, I:1302, I:1338, I:1408, I:1412, II:413, II:416

United States—Tax Treatment for Foreign Sales Corporations:
Report of the Appellate Body, WT/DS108/AB/R (2000): I:213, I:689, I:690, I:698, I:699, I:1225, I:1253, I:1275, I:1301, I:1318, I:1325, I:1326, I:1327, I:1328, I:1338, I:1385, I:1412, II:95, III:129, III:130
Arbitration under Article 22.6, WT/DS108/ARB (2002): I:1366, III:129, III:131
Recourse to Article 21.5, Report of the Panel, WT/DS108/RW (2001): III:131
Recourse to Article 21.5, Report of the Appellate Body, WT/DS108/AB/RW (2002): I:698, I:1257, I:1276, I:1279, I:1313, I:1314, I:1320, I:1325, I:1338, III:131

GATT Panel and Working Party Reports

Australian Subsidy on Ammonium Sulphate, BISD, 2nd Supp. 188 (Adopted April 3, 1950): I:103, I:104, I:171, I:1374, I:1375, I:1376

Border Tax Adjustments, Report of the Working Party, BISD, 18th Supp. 97 (Adopted December 2, 1970): I:103, I:104, I:118

Brazil—Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, BISD, 41st Supp. 467 (Adopted by the SCM Committee, April 28, 1994): I:739

Brazilian Internal Taxes, Report of the Working Party, BISD, 2nd Supp. 181 (1949): I:103

Canada—Administration of the Foreign Investment Review Act, BISD, 30th Supp. 140 (Adopted February 7, 1984): I:123, I:154, I:444, I:445, I:464, I:482, II:657

Canada—Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies, BISD, 35th Supp. 37 (Adopted March 22, 1988): I:112, I:150

Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, BISD, 39th Supp. 27 (Adopted February 18, 1992): I:117, I:135, I:149

Canada—Import Restrictions on Ice Cream and Yoghurt, BISD, 36th Supp. 68 (Adopted December 5, 1989): I:129, I:130

Canada—Import Quotas on Eggs, BISD 23rd Supp. 91 (Adopted February 17, 1976): I:197

Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, BISD, 35th Supp. 98 (Adopted March 22, 1988): I:129, I:155, I:162, I:163, I:375, II:586

Canada—Measures Affecting the Sale of Gold Coins, L/5863 (September 17, 1985) (unadopted): I:103, I:126

Canada—Withdrawal of Tariff Concessions, BISD, 25th Supp. 42 (Adopted May 17, 1978): I:109, I:110

Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber, 36th Supp. BISD 167 (Adopted July 19,1989): I:103, I:105, I:1584, I:1587, I:1588, I:1592, I:1593, I:1594, I:1598, I:1599

Canadian Countervailing Duties on Grain Corn from the United States, SCM/140 (Adopted by the SCM Committee, March 26, 1992): I:739, I:740, I:744, I:745

Ceylon—Article XVIII Applications, BISD, 6th Supp. 112 (1957): I:1532

Ceylon—Notifications Under Article XVIII:C, BISD, 6th Supp. 75 (1958): I:1535

DISC—United States Tax Legislation, Report of the Working Party, BISD 23rd Supp. 98 (presented to the Council of Representatives on November 12, 1976): II:95

European Communities—Refunds on Exports of Sugar, complaint by Australia, BISD 26th Supp. 290 (Adopted November 6, 1979): I:198

European Communities—Refunds on Exports of Sugar, complaint by Brazil, BISD 27th Supp. 69 (Adopted November 10, 1980): I:198, I:1536

European Community—Anti-Dumping Duties on Audio Tapes in Cassettes Originating from Japan ADP/136(April 28, 1995) (unadopted): I:498, I:507

European Community—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, BISD 42nd Supp. 17 (Adopted by the ADP Committee, October 30, 1995): I:498, I:525

European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, L/5776 (February 7, 1985) (unadopted): I:171, I:1374, I:1375

European Economic Community—Follow-Up on the Panel Report "Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins", BISD 39th Supp. 91 (March 31, 1992) (unadopted): I:202, I:1375, I:1376, III:416

European Economic Community—Measures On Animal Feed Proteins, L/4599—25S/49 (Adopted March 14, 1978): I:103, I:104, I:122, I:1588

European Economic Community—Member States' Import Regimes for Bananas (Bananas I), DS/32/R (June 3, 1993) (unadopted): III:129

European Economic Community—Member States' Import Regimes for Bananas (Bananas II), DS38/R (February 11,1994) (unadopted): I:460, III:129

European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, BISD, 37th Supp. 86 (Adopted January 25, 1990): I:126, I:128, I:171, I:201, I:206, I:686, I:1237, I:1273, I:1374, I:1377, II:95

European Economic Community—Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, L/5778 (February 20, 1985) (unadopted): I:171, I:1374, I:1375

European Economic Community—Programme on Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables, BISD, 25th Supp. 68 (Adopted October 18, 1978): I:128, I:197, I:593

European Economic Community—Quantitative Restrictions Against Imports of Certain Products from Hong Kong, BISD, 30th Supp. 129, (Adopted July 12, 1983): II:585

European Economic Community—Regulation on Imports of Parts and Components, BISD, 37th Supp. 132, (Adopted May 16, 1990): I:116, I:497, I:499

European Economic Community—Restrictions on Apples from Chile, BISD, 27th Supp. 98 (adopted November 10, 1980): I:197

European Economic Community—Restrictions on Imports of Dessert Apples, complaints by Chile, BISD 36th Supp. 93 (Adopted June 22, 1989): I:130, I:134, I:136, I:197, I:593, I:1536, I:1537, I:1591

European Economic Community—Restrictions on Imports of Apples, complaints by the United States, BISD, 36th Supp. 135 (Adopted June 22, 1989): I:133, I:593

European Economic Community—Subsidies on Exports of Pasta Products, SCM/43 (May 19, 1983) (unadopted): I:199

European Economic Community, Subsidies on Export of Wheat Flour, SCM/42 (March, 21, 1983) (unadopted): I:198, I:199

Exports of Potatoes to Canada, BISD, 11th Supp., at 88 (Adopted November 16, 1962): I:540

France—Assistance to Exports of Wheat and Wheat Flour, Complaint by Australia, BISD, 7th Supp. 46 (Adopted November 21, 1958): I:197

Greece—Special Import Taxes, BISD, 1st Supp. 48 (Adopted November 3, 1952): I:117

Italian Discrimination Against Imported Agricultural Machinery, BISD, 7th Supp. 60 (Adopted October 23, 1958): I:123, I:126, I:880, II:500, II:585

Italian Restrictions Affecting Imports from Israel, BISD, 10 Supp. 130 (Adopted December 9, 1961): II:584

Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD, 34th Supp. 83 (Adopted November 10/11, 1987): I:103, I:117, I:118, I:120, I:145

Japan—Measures on Imports of Leather, BISD, 31st Supp. 94 (Adopted May 15/16, 1984): I:170, I:593, II:585

Japan—Restrictions on Imports of Certain Agricultural Products, BISD, 35th Supp. 163 (Adopted February 2, 1988): I:130, I:135, I:161, I:196, I:197

Japan-Trade in Semi-conductors, BISD, 35th Supp. 116 (Adopted May 4, 1988): I:128, I:171, I:761, I:1374, I:1375, I:1386, II:495

Korea—Antidumping Duties on Imports of Polyacetal Resins from the United States, BISD, 40th Supp. 205 (Adopted by the ADP Committee, April 27, 1993): I:497, I:736, I:746, III:201

New Zealand—Imports of Electrical Transformers from Finland, BISD, 32nd Supp. 55 (Adopted July 18, 1985): I:497

Norway—Restrictions on Imports of Certain Textile Products, BISD, 27th Supp. 119 (Adopted June 18, 1980): I:132, I:758

Norway—Restrictions on Imports of Apples and Pears, BISD, 36th Supp. 306 (Adopted June 21/22, 1989): I:54

Republic of Korea—Restrictions on Imports of Beef, BISD, 36th Supp. 268 (Adopted November 7, 1989): I:150, I:162, I:1534, III:191, III:201

Spain—Measures Concerning Domestic Sale of Soyabean Oil, L/5142 (June 17, 1981) (unadopted): I:103

Spain—Tariff Treatment of Unroasted Coffee, L/5135—28S/102 (Adopted June 11, 1981): I:103, I:103, I:105, I:1589, I:1592, I:1593, I:1594

Swedish Antidumping Duties, BISD, 3rd Supp. 81 (Adopted February 26, 1955): I:141, I:497

Thailand—Restrictions on Importation of and National Taxes on Cigarettes, BISD, 37th Supp. 200 (Adopted November 7, 1990): I:149, I:155, I:158, I:159, I:256, I:391, I:393, I:595, II:439, II:528, II:540, II:615, II:652, II:687, II:688

Treatment by Germany of Imports of Sardines, BISD, 1st Supp. 53 (Adopted October 31, 1952): I:103, I:171, I:1374, I:1375, I:1376, I:1592, I:1597, I:1598

United States—Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico, ADP/82, (September 7, 1992) (unadopted): I:497, I:509, I:510, I:711, I:718, III:233

United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, BISD, 38th Supp. 45 (Adopted July 11, 1991): I:142, I:686, II:95

United States—Customs User Fee, BISD, 35th Supp. 245 (Adopted February 2, 1988): I:102, I:111, I:143

United States—Definition of Industry Concerning Wine and Grape Products, BISD, 39th Supp. 436 (Adopted by the SCM Committee, 28 April 1992): I:103

United States—Denial of Most-favoured-nation Treatment as to Non-Rubber Footwear from Brazil, BISD, 39th Supp. 128 (Adopted June 19, 1992): I:95, I:102, I:103, I:103, I:124, I:683, I:1542

United States—Imports of Certain Automotive Spring Assemblies, BISD, 30th Supp. 107 (Adopted May 26, 1983): I:156

United States—Imports of Sugar from Nicaragua, BISD, 31st Supp. 67 (Adopted March 13, 1984): I:133, I:1575, I:1576

United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, BISD 41st Supp. 229 (Adopted by the ADP Committee, April 28, 1994): I:498, I:507, I:510

United States—Imposition of Anti-dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, ADP/47 (August 20, 1990) (unadopted): I:497, I:510, I:710, I:711

United States—Imposition of Countervailing Duty on Imports of Fresh and Chilled Atlantic Salmon from Norway, BISD, 41st Supp. 2 (Adopted by the SCM Committee, April 27, 1994): I:497, I:711, I:739

United States—Manufacturing Clause, BISD, 31st Supp. 75 (Adopted May 15/16, 1984): I:54

United States—Measures Affecting Alcoholic and Malt Beverages, BISD, 39th Supp. 206 (Adopted June 19, 1992): I:103, I:117, I:121, I:126, II:538, II:759

United States—Measures Affecting Imports of Softwood Lumber From Canada, BISD, 40th Supp. 358 (Adopted October 27, 1993): I:214, I:709, I:710

United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco, DS44/R, 41S/131 (Adopted October 4, 1994): I:117, I:125

United States—Prohibition of Imports of Tuna and Tuna Products from Canada, BISD, 29th Supp. 91 (Adopted February 22, 1982): I:130, I:155, I:156, I:157, I:162, I:163, I:196,

United States—Restrictions on Imports of Tuna, BISD, 39th Supp. 155 ((September 3, 1991) (unadopted): I:144, 1:155, I:162, I:391, II:139, II:147, II:149, II:150, II:151, II:162, II:163, II:166, II:533, II:538, II:585, II:586, II:652, II:653, III:233, III:419

United States—Restrictions on Imports of Tuna, DS 29/R, (June 10, 1994) (unadopted): II:615

United States—Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, BISD, 37th Supp. 228 (adopted on November 7, 1990): I:171, I:1374, I:1375

United States—Section 337 of the Tariff Act of 1930, BISD, 36th Supp. 345 (Adopted November 7, 1989): I:117, I:124, I:154, I:155, I:156, I:158, I:160, I:161, I:1067, II:439, II:445

United States—Taxes on Automobiles, DS31/R (October 11, 1994) (unadopted): I:103, I:391, I:1390, II:538

United States—Taxes on Petroleum and Certain Imported Substances, BISD, 34th Supp.136 (Adopted June 17, 1987): I:103, I:117, I:170, I:868, I:1516, III:233

United States—Trade Measures Affecting Nicaragua, Report of the Panel (unadopted), L/6053, (October 13, 1986): I:1576, I:1577

Uruguayan Recourse to Article XXIII, BISD, 11th Supp. 95 (Adopted November 16, 1962): I:171, I:1374, I:1375

FOREWORD

Supachai Panitchpakdi

In the relatively short time since the World Trade Organization (WTO) was founded, both the institution itself and the vast and complex set of rules it administers have generated enormous debate and controversy, both in the meeting rooms of Geneva and in legislatures, in the press, and on the streets of countries around the world. Interestingly, discussions in and about the WTO have tended to mirror not only the trade-related concerns of the world today but also concerns about a wide variety of other issues whose relationship to the WTO is still being defined.

From one perspective, the WTO is a system of trading rules; from another, it is a forum to implement those rules and to negotiate new ones. As an intergovernmental institution with a broad membership and a wide mandate, the WTO's ultimate success or failure will depend heavily on the effectiveness of those who guide it, rather than those who make demands upon it. But to appreciate fully the importance of, and the potential for, the WTO to make a positive contribution to the well-being of the world requires more than a casual understanding of what the WTO is and is not, its experiences to date, and its possibilities for the future.

At a time when the WTO has embarked on a major new effort through the Doha Development Agenda to further refine itself in some areas and to extend itself in others, this book is a major contribution to helping people around the world understand what the WTO is, where it has been, and where it is headed. Authored by a highly qualified group of individuals, it reviews the experience to date with WTO rules, discusses a wide array of political and economic issues related to these rules, and provides a series of commentaries on the WTO from the perspective of particular WTO Members—large and small, original and new, and developed and developing.

What has been achieved in the WTO since 1995 has been nothing short of remarkable, which fosters expectations of greater success in the years ahead. While most of what has occurred to date has focused on the implementation of the results of the Uruguay Round, including the successful establishment and operation of an efficient system for the settlement of trade disputes, the case for the WTO's core business of continued trade liberalization remains as valid today as it ever was. Such course of action will continue to help raise material standards of living around the world, and will also help to ensure that developing countries, especially the least-developed countries, secure a greater share in the growth of international trade in the future.

I congratulate all those who have worked so hard to produce this impressive new publication. It is an outstanding contribution to our collective understanding of today's world trading system as embodied in the WTO.

INTRODUCTION

The international trading system came of age on January 1, 1995, with the establishment of the World Trade Organization ("WTO"). The vast majority of international trade is now subject to this rule-based trading system. Almost all of the major trading nations can be counted among its 148 Members,[1] and with just a very few exceptions, those that are not members are seeking to accede.[2]

Many of the WTO Agreements are technical and complex. This obscures the fact that the WTO is built on many of the time-tested principles of the 1947 General Agreement on Tariffs and Trade ("GATT"). The GATT-based trading system provided a strong economic, philosophical and political underpinning for the WTO, and the 1947 General Agreement forms a part of the WTO Agreements.

The GATT was however organizationally flawed. Indeed, it was never intended to be an organization, and only took on this role by default when the International Trade Organization was still-born. The GATT dispute settlement system was weak. While the successive rounds of multilateral trade negotiations held under the auspices of the GATT did produce massive tariff reductions, particularly on imports of manufactured goods by developed countries, the GATT was less successful in reducing non-tariff barriers, which became greater obstacles to trade as tariffs came down. For example, in the 1980s administrative actions restricting trade grew in significance and "voluntary" export restraints ("VERs") became more commonplace, even as tariffs on manufactures were reduced to post-war lows. There were significant exceptions to the rules governing trade in agricultural goods, and trade in textiles fell outside the GATT system altogether. Trade in services, insignificant in 1947 when the GATT came into being, was not covered by the Agreement, yet was becoming an increasingly important component of international trade. These omissions and shortcomings, many of which operated to the detriment of developing countries, provided the negotiators of the WTO Agreements with the inspiration to strengthen and broaden the system.

Unlike its GATT predecessor, the WTO is a full-fledged international organization. In addition to trade in goods, the only form of trade that was covered by the GATT, the WTO covers trade in services and trade-related aspects of intellectual property. The separate trade regime long applicable to textiles trade has been phased out. The Agreement also seeks, albeit with less success, to impose "GATT discipline" on trade in agricultural goods. The flawed GATT approach to dispute settlement, which allowed the losing party to block adoption of a panel report, has been replaced by a highly developed and frequently used dispute settlement system. It would thus be wrong to regard the WTO as the mere offspring of the GATT; in many ways it is an evolutionary step forward, albeit imperfect, and riddled with loopholes waiting to be plugged when sufficient political will again arises.

The WTO has been in place long enough to justify an in-depth analysis. Ideally, like John Jackson's magisterial 1969 analysis of the GATT,[3] the book should be written by one person. However, the WTO covers so much more than the GATT, and has become so complex, that no one person could produce a work of the detail we had in mind. This

[1] August 2004.

[2] For example, Russia, Saudi Arabia, Algeria and Kazakhstan.

[3] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT.

work, finalized as the Doha Development Agenda negotiations make fitful progress, is perhaps the first to offer such an in-depth analysis of each of the covered agreements and to integrate panel and Appellate Body decisions into this analysis. It is also the first to offer in the same text economic and political points of view, commentaries on new trade issues, and the perspective of diplomats who participated in the Uruguay Round of trade negotiations.

Our first goal was to produce a legal work that would be easy to use, practical in nature, and which would appeal to practitioners, government officials, professors, scholars and students alike. For each of the covered agreements we sought to find a practitioner, scholar, diplomat or WTO official who had special knowledge and experience with the particular agreement. We chose top names in the field—or individuals whom we were convinced would become top names. With only a couple of exceptions, almost everyone that we approached accepted our invitation to contribute. Occasionally we were too good in our selection process. In three cases authors had to withdraw when they accepted senior positions in the WTO or government service. We are pleased to offer a foreword by the Director-General of the WTO, and chapters by two of his predecessors. We also have contributions from a past Deputy Director-General, two Appellate Body Members, and past and present Members of the WTO Secretariat and the diplomatic corps. We are also fortunate to count among our contributors top legal practitioners and well-known professors of law and economics.

Our second goal was to provoke debate but to avoid rhetoric. This being said, we did not shy away from controversial new issues, nor have we avoided development-related concerns. Controversial chapters were presented to the Editorial Board and outside experts for review. Balance was further achieved by presenting more than one point of view, and by seeking geographical, economic and political diversity among contributors.

Our third goal was to produce a readable and lively work. This necessitated an enormous amount of patience and time on the part of our contributors—many of whom have revised and updated their chapter several times. It has also necessitated the patience of several members of the Editorial Board to whom we have turned for advice. The result, we hope, is a challenging and often lively treatment of the WTO Agreements, made only somewhat uniform by templates provided to each author in an attempt to avoid a "cacophony of styles".

We had originally planned to limit the book to the legal aspects of the WTO. However, the publisher urged us to expand its scope to include economic and political aspects of the international trading system, as well as a series of chapters examining the WTO from the viewpoint of a number of individual members. We hope that readers find these additional topics useful and informative.

The book is divided into five principal parts. The first part is introductory in nature. One chapter discusses the history of the Uruguay Round. Other chapters deal with the politics of trade policy development and organizational aspects of the WTO.

Part II analyses the Legal Framework governing the international trade system. It is divided into two sections, Institutional Issues and the Uruguay Round Agreements, with the latter including an examination of both the multilateral and the plurilateral agreements. This part is divided into three subsections: (1) a detailed legal analysis of each of the substantive "Covered Agreements", (2) ten chapters on the Dispute Settlement system, merited because it is one of the most significant achievements of the Round, and (3) an examination of other important legal issues, more specifically Special and Differential Treatment of developing countries, national security, transparency and customs classification. Customs classification, while falling under the purview of the World

Customs Organization rather than that of the WTO, is included in this subsection because of its importance in international trade and because classification issues have arisen in the context of the WTO.

Part III of the book deals with what we have called "Economic and Political Issues". This part begins with an analysis of the basic economic principles applicable to international trade, then turns to economic questions associated first with some of the more important WTO Agreements, and second to economic questions associated with key trade policy issues such as environmental and labor-related issues. Part III then examines important and timely political issues as regionalism, developing country concerns, and new and controversial issues that are not now covered by the WTO system but are, at least in some cases, candidates for inclusion in the system in the future. These include E-commerce, investment, competition, labor rights, environmental issues, human rights, and gender issues.

Part IV consists of a series of what we have called "country reports"—an analysis of the WTO system from the viewpoint of particular countries, ranging from the Quad countries (the United States, Canada, the EU, and Japan) to one of the smallest members, Mongolia. We hope that these chapters, most of whose authors are present or former senior trade officials, will provide a useful and slightly different perspective.

Part V, while not a Conclusion as such, looks toward the future, touching briefly on important issues such as the Doha Work Program and globalization.

We are grateful to many people for their assistance in the creation of this book. Alex Schwartz, formerly of Kluwer Academic, had the idea for the book. We particularly wish to thank Marilea Fried and Jill Strathdee of Springer for their unfailing support and enthusiasm. Members of the Editorial Board have been extremely helpful, as have Kevin Kennedy and Simon Lester, both of whom have given very freely of their time. Lastly, we gratefully acknowledge the contributions of Ali Oromchian and Boris Figeli.

Finally, we wish to dedicate this book to the memory of Anna Morner of Queen Mary's and Westfield College, University of London, one of the original editors, who died in a tragic accident in the fall of 2000.

Patrick Macrory
Washington, D.C.

Arthur E. Appleton
Geneva

Michael Plummer
Bologna

Part I Background

CHAPTER 1

AN INTERPRETATIVE HISTORY OF THE URUGUAY ROUND NEGOTIATION

Gilbert R. Winham*

TABLE OF CONTENTS

I. Introduction 4
II. Resume of the Uruguay Round 4
A. Overview 4
B. Chronology 6
III. The Launch of the Uruguay Round Negotiation 8
A. Declining Performance of the World Economy 9
B. The Decline of Agriculture 10
C. Trade in Services 11
D. Developing Countries 12
E. The Growth of Trade Dependence 13
F. The Choice of Reforming or Losing a World Trade Regime 14
IV. The Conclusion of the Uruguay Round Negotiation 15
A. Policy Reform 15
B. Globalization 18
1. Global Financial Transactions 18
2. Foreign Direct Investment 20
V. Impact of Globalization on the Uruguay Round 23
VI. Conclusion 25

* Professor Emeritus of Government and Political Science, Dalhousie University.

I. Introduction

The Uruguay Round negotiation was the eighth postwar multilateral trade negotiation conducted under the General Agreement on Tariffs and Trade ("GATT"). As with other GATT negotiations, its purpose was to liberalize trade. One might have expected the Uruguay Round, as with other GATT negotiations, to continue the steady movement toward a more open and predictable international trade regime. It did not do this. Instead, the Uruguay Round produced a profound alteration of the trade regime in response to an equally profound transformation of international economic relations. It amounted to system change in the world economy.

The task for this chapter is to examine what factors precipitated the Uruguay Round, and what pressures led to its successful conclusion. This examination is less straightforward than would be the case regarding other negotiations held under the GATT. Since the formation of the European Economic Community ("EEC", or "Common Market") in the late 1950s, there have been three multilateral trade negotiations under GATT auspices. The first was the Kennedy Round of 1963–67. The Round was initiated by the Kennedy Administration in response to the creation of the EEC and the fear that American products would be shut out of an integrated European market.[1] The second negotiation was the Tokyo Round of 1973–79. It was established in the wake of the U.S. decision in 1971 to abandon the Bretton Woods link between the dollar and gold, which created a crisis in the postwar system of fixed exchange rates.[2] As part of this decision, the United States applied a surcharge on imports and demanded international action to address its first trade deficit in the 20th century.

Both the Kennedy and Tokyo Rounds were induced by large-scale policy change in leading countries. By comparison, there was no comparable challenge to the multilateral trade system by a leading actor in the run-up to the Uruguay Round. Instead, the early 1980s in which the Uruguay Round was conceived was a recessionary period that affected all countries, and it contributed to widespread uncertainty about the performance of the world economy. In these circumstances, the factors that led to the Uruguay Round negotiation were less evident than were those that precipitated the Kennedy or Tokyo Rounds. The reasons that led to its eventual successful conclusion were also opaque.

This chapter will therefore explore the reasons that the Uruguay Round was initiated, and why it was concluded some eight to twelve years later. It will focus on systemic factors that affected the trade policies of all countries, and not those factors that were specific to individual countries. The chapter will make the argument that the world economic system underwent profound changes in the 1980s and early 1990s, and that the Uruguay Round can be seen as a collective adaptation to those changes.

II. Resume of the Uruguay Round

A. Overview

How significant was the Uruguay Round? One way to assess the Uruguay Round is to compare it to the Tokyo Round of 1973–1979, which in its time was regarded as the most significant multilateral negotiation undertaken within the GATT. The significance

[1] Ernest H. Preeg, Traders in a Brave New World: the Uruguay Round and the Future of the International System 28 (1995).

[2] GATT, International Trade 1985–86 (1986) at 26. *See also* Gilbert R. Winham, International Trade and the Tokyo Round Negotiation (1986).

of any negotiation is a function of the parties, issues, and results of the negotiation. The active *parties* in the Tokyo Round were mainly developed countries, and the developing countries were less involved. By the conclusion of the Round, few developing countries had signed even one of the nine agreements produced in the negotiation.[3] By contrast, the Final Act of the Uruguay Round (which committed countries to accept the Uruguay Round Agreements subject to ratification) was signed by 111 countries, the majority being developing countries.[4] Developing countries were active in all phases of the Uruguay Round, and their involvement broadened the potential for tradeoffs and the package deal that ultimately was agreed upon. The strong support of developing countries was instrumental in encouraging the major parties—the United States and European Union—to settle. It is true that the diplomatic behaviour of the Uruguay Round still reflected the bipolar structure that had characterized the Tokyo Round, but the former was nevertheless impacted by new actors that had the capacity to force changes in the process and outcome of the negotiations.

The *issues* negotiated seriously in the Tokyo Round included tariffs—which had been the exclusive subject of most previous GATT negotiations—and a number of non-tariff measures, including government procurement which had not previously been addressed in GATT negotiations. In the Uruguay Round, participating countries took up all of the issues that had been on the Tokyo Round agenda, plus the "new" issues (services, intellectual property and investment), institutional issues (dispute settlement and the creation of the WTO), and textiles, which had been excluded from GATT multilateral disciplines. Finally, agriculture and safeguards, which failed in the Tokyo Round, were again dealt with on the Uruguay Round agenda. The conclusion is that negotiators attempted a much broader and more significant agenda in the Uruguay Round than they did in the Tokyo Round.

The main *results* of the Tokyo Round were multilateral tariff concessions plus six codes on non-tariff measures that were binding only on those Contracting Parties which chose to accept them. With the exception of government procurement, most of these codes simply extended existing GATT articles. By contrast, the results of the Uruguay Round were remarkable on several dimensions. Not a person for overstatement, the late Professor Raymond Vernon observed shortly after the conclusion of the Uruguay Round that "the agreements, if taken at their face value, show promise of reshaping trade relationships throughout the world."[5] Vernon's statement, if taken at face value, reflects the stunning accomplishment of the negotiation.

One dimension of the Uruguay Round results was the creation of a new international organization, the World Trade Organization ("WTO"), that completed in form the work begun with the aborted International Trade Organization ("ITO") of 1948. Prominent in the new organization was the dispute settlement system that operationalized the concept of compulsory arbitration in trade disputes between Members. Second, liberalizing agreements were established in agriculture and textiles, two areas that are critical to developing countries and other primary products exporters, and which had been carved out of GATT disciplines for most of the post-war period. In agriculture particularly, the agreements placed limitations on internal support programs and export subsidies, and provided for improved market access. Third, the Uruguay Round produced agreements in new areas

[3] By March 31, 1994, only 29 developing and transitional countries had signed one or more of the Tokyo Round Agreements, GATT, GUIDE TO GATT LAW AND PRACTICE 1056–59 (1994).

[4] *Results of the Uruguay Round Signing Ceremony of April 15th, 1994 in Marrabesh, Morocco.* GATT, NUR086, 18 April 1994.

[5] Raymond Vernon, *The World Trade Organization: A New Stage in International Trade and Development*, 36 HARVARD INTERNATIONAL LAW JOURNAL 329 (Spring 1995).

such as services and intellectual property, thereby sharply expanding the scope of the old General Agreement and keeping it abreast of new developments in the international economy. Overall, the Uruguay Round substantially deepened the obligation of countries to practice more liberal trade policies.

In sum, the accomplishments of the Uruguay Round dwarfed those of the Tokyo Round. The Tokyo Round was an important achievement, but it should be understood mainly as a methodological breakthrough in that it developed in the GATT the capacity to define and negotiate non-tariff measures.[6] By contrast, the Uruguay Round was a substantive breakthrough; it successfully applied the Tokyo Round methodology of non-tariff negotiation to the broad range of trade issues that arose in the 1980s. The Uruguay Round represented a major deepening of the international trade regime, and was perhaps as significant as the creation of the GATT itself.

B. Chronology[7]

The chronology of the Uruguay Round unfolded in stages, which is typical of the negotiation process. Stages are usually delineated by important events, or stopping points, in a negotiation, but their main analytical value is that they signal a change in the behaviour of the parties, and hence a change in process. In the Uruguay Round, there were five such stages. This is not counting the pre-negotiation (1981–86), which was a process with a different objective, namely, to set an agenda for the subsequent negotiation.

The Uruguay Round commenced formally on September 20, 1986 with the adoption of the Uruguay Declaration at a Ministerial Meeting of the GATT Contracting Parties held in Punta del Este, Uruguay. However, the impetus for this action had begun in the United States after 1979, when a domestic campaign got underway to promote the inclusion of services in a new GATT negotiation. This campaign was carried by US diplomats to the OECD and the GATT, where European Community officials who were initially sceptical gradually became proponents of a new negotiation that would include trade in services. In 1982, after sustained pressure by the United States and its supporters, a GATT Ministerial Meeting was held ostensibly to examine the multilateral trading system, but also to consider initiating a new negotiation. The Meeting failed to find consensus on the latter point, but it did produce a Work Program that permitted analysis of negotiable issues to continue.

The main cause of division at the 1982 Ministerial Meeting was the opposition by developing countries to a new negotiation that would include services and other new issues before adequate progress had been made on traditional issues such as textiles and agriculture. This opposition led to one of the severest tests of the trading system in GATT history, and was only partially reconciled by the time the Uruguay Round got underway. In the Uruguay Declaration of 1986, following a difficult week-long Ministerial Meeting that produced a tenuous consensus between developed and developing countries, a formula was accepted that called for services to be negotiated separately from goods. This formula permitted the Uruguay Round to begin, but it became progressively ignored as the negotiation took shape after 1986.

[6] WINHAM, *supra* note 2, Chapter 2, "Background: Creating the Capacity to Negotiate."

[7] The reader is encouraged to consult two excellent histories and two excellent memoirs: JOHN CROOME , RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND (1995); PREEG, *supra* note 1; ALAN OXLEY, THE CHALLENGE OF FREE TRADE (1990); and HUGO PAEMEN AND ALEXANDRA BENSCH, FROM THE GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND (1995).

The *first* stage of the Uruguay Round negotiation, from September 1986 to December 1988, encompassed the initiation of the negotiation through to the Mid-Term Review of December 1988, an event negotiators intended as a stocktaking session to prepare for the final movement toward an agreement. The main effort of negotiation at this stage was the exploration of country positions, and the development of policy mechanisms (such as the concept of the "aggregate measure of support" in the negotiations on agriculture) to discipline national trade practices. The Mid-Term Review established solid progress in many areas (e.g., dispute settlement), but it failed to produce an acceptable interim position on agriculture, with the result that four extra months were needed to regain forward momentum in the negotiation.

The *second* stage, from December 1988 to December 1990, was a drive toward final agreement, and was marked by an effort to produce definitive wordings in legal drafts, and to settle a myriad of bilateral and multilateral issues between parties. The negotiations were largely technical and were intended to conclude at the Brussels Ministerial Meeting in December 1990; however, failure began to become evident by the summer of 1990 as countries were unable to establish the convergence necessary for negotiations to reach closure. The momentum of the negotiations required that the Brussels Meeting take place, but it was clear before it began that the absence of convergence in the draft agreements insured that the meeting would be a failure. Again the Uruguay Round recorded a failure, with the result the negotiators were forced to realize the full enormity of the task before them.

The *third* stage, from December 1990 to December 1991, began with a sustained political effort by Director General Arthur Dunkel to restart the negotiation, which produced an agreement on a revised formula for the agricultural negotiation. Following this, the third stage picked up where the second stage left off, and was mainly a continuation of technical negotiation. Draft texts were under construction in most areas, and bracketed text, indicating disagreement, was removed in a step-by-step process. A deadline was set for December 1991, but again it became apparent by autumn that the needed political decisions were unlikely to be forthcoming to allow completion of the negotiation. In December, 1991, the negotiations were halted, but in a remarkable move, the GATT Director-General—in the absence of general political agreement between governments—asked the chairmen of negotiating groups to table a document that represented their own view of a consensus text in their area of responsibility. These documents, which were partially but not completely negotiated texts, were compiled in the "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", ("DFA") known also as the Dunkel Draft. *Faute de mieux*, the DFA was the point of departure for much of the remaining negotiation in the Round. The DFA symbolized the power, but also the limitations, of the technical side of negotiation to shape the political decisions that lie behind negotiated agreements.

The *fourth* stage, from December 1991 to June 1993, was wholly different from the preceding stages. In complex negotiation there has to be a balance between progress on technical and political decision-making. By January,1992, it was clear that the former had occurred, but the latter was seriously in arrears, with the result that the Round essentially stalled in Geneva. The cause was the agricultural negotiation. Protectionism in agricultural trade has been a longstanding problem for many countries in the GATT system, but in the Uruguay Round the inherent difficulties of the agriculture portfolio became compounded by the fact that this issue pitted the interests of the major players—the United States and the European Union—against one another. These differences stemmed mainly from the fact that since the 1960s Europe established a protectionist policy under

the Common Agricultural Policy, while the United States was moving toward a comparative advantage in agricultural exports. The negotiation thus turned into a politicized contest between superpowers, and for eighteen months the main activity of the Uruguay Round was a series of bilateral encounters between U.S. and EU officials. This blockage halted progress in areas other than agriculture, and even between other countries. Before the end of this period, the European Union and the United States reached a partial resolution of their difficulties in the "Blair House" accord on agriculture, but agriculture continued to be the major stumbling block to a general agreement until very late in the negotiation.

The *fifth* stage, from June to December 1993, was relatively brief. It started with a preliminary agreement on market access reached between the United States, European Union, Japan and Canada at the Tokyo Economic Summit in July 1993, and continued with an accelerated negotiation process in Geneva under the leadership of newly-appointed GATT Director-General Peter Sutherland. Tariff reductions and service access commitments received disproportionate attention as the negotiation moved toward a conclusion: these issues represented calculable monetary concessions offered to trade partners, and were therefore among the last issues to be negotiated. Encouraged by the Director-General, the negotiation was conducted at a higher political level than had been the case previously. The U.S.-EU dispute over agriculture continued to be problematic, and was only resolved in a second "Blair House agreement" on December 5, 1993. This agreement paved the way for a frantic final round of multilateral tariff and service concessions, and for final agreements in troublesome areas such as anti-dumping and audio visual services. The negotiation concluded on December 15, 1993, the deadline that had been announced by Director-General Sutherland the previous September.

In reflecting on the events of the Uruguay Round, one is struck by two features of this negotiation: first, it was extraordinarily difficult to get the negotiation started; and second, the main lines of the agreements were effectively settled about eighteen months before the negotiation could be concluded politically. Both these features suggest that even though the Uruguay Round was a hard-fought bargain between parties, it was even more a deliberate decision by all parties, especially the major parties, to move toward a substantially changed regime in their trade and economic relations. These features direct the main explanation of the Uruguay Round to factors that lie outside the immediate exchange of proposals by the parties. The factors that most influenced the outcome of the negotiation lay in the world economy itself, especially the changes that were occurring in that economy before and during the negotiation of the Uruguay Round.[8]

III. The Launch of the Uruguay Round Negotiation

Nations enter negotiations with certain national objectives, and these were summarized in the early period by the delegates to the Uruguay Round. For example, consider the statement of the U.S. delegate to a GATT preparatory session in 1985. As recorded in the minutes: "The representative of the *United States* . . . accepted certainly what the representative of India had said that the real objective [of a new negotiation] was to

[8] Odell has examined market conditions as an explanation for international economic negotiations, which is analogous to the argument presented here. *See* John Odell, *Understanding International Trade Policies: An Emerging Synthesis*, 43 WORLD POLITICS 139 (October 1990).

re-establish confidence in the multilateral system."[9] But what had caused countries to lose confidence in the system in the first place? In short, what events propelled countries to commence an undertaking as far-reaching as the Uruguay Round eventually became? The most plausible explanation is that the Uruguay Round was initiated because countries recognized that the early 1980s were a turning point for the world economy, and that fundamental changes were occurring that would call into question the traditional GATT structure. This recognition led the United States to take the lead in calling for a new negotiation, but other countries, especially Japan, the small developed countries and some developing countries, also supported the early U.S. initiative.[10] These countries were motivated by diverse concerns, as noted below, but they shared a common goal to preserve the multilateral trading system and to make it more responsive to the economic problems they faced in their domestic economies.

A. Declining Performance of the World Economy

In the discussions leading up to the Punta del Este Declaration, GATT parties had been concerned about the slowing of the world economy which became evident in the 1970s. From the early 1950s onward, the international economy enjoyed a period of prosperity that was hitherto unknown in the Twentieth Century. For example, in a study of 32 countries (including 15 developing countries), Angus Maddison found that the average annual compound growth rate for the period 1950–73 was 5.1 per cent, approximately double the rates of two earlier periods in the century.[11] For developing countries, the rate was even higher at 5.3 per cent for the period. Growth rates of trade were also exceptionally high in the 1950–73 period, and arguably contributed strongly to general economic growth. Underlying both trade and economic growth were annual increases in productivity (GDP/person-hour), which in OECD countries rose to 4.5 per cent for 1950–73 period, from an average of 1.9 per cent in the first half of the century.[12]

The economic strength of the period from 1950 onward resulted from the stability of the post-war international economic system, coupled with the domestic and international policies pursued by the major countries. The international system explicitly promoted development, as evidenced by steady flows of capital, including foreign aid, to developing countries. Domestic policies in developed countries were directed toward an expansion of demand and employment. Capital investment was everywhere emphasized, and where it occurred overseas in the form of foreign investment, it promoted technology transfer and accelerated economic development.[13]

After 1970 the situation changed, as indicated by the changes in total world production and total exports. The growth in world production and exports slowed to 3.4 and

[9] Senior Officials Group, *Record of Discussions: Note by the Secretariat* (GATT Doc., SR.SOG/2 of November 22, 1985) at 17. This observation was supported by the Chief Negotiator of the European Union: "Its [the Uruguay Round] aim was quite simply to carry out a complete overhaul of the multilateral trading system, whilst at the same time broadening and deepening its scope." Paemen and Bensch, *supra* note 7, at 89.

[10] A former Australian Head of Delegation to the Uruguay Round has observed: "When the United States started advocating a new trade round, its first supporters were Japan, the smaller industrialized countries and some of the Latin Americans, mainly the agricultural exporters. The European Community was ambivalent." Oxley, *supra* note 7, at 97.

[11] Angus Maddison, The World Economy in the 20th Century 36, 67 (1989).

[12] *Id*. at 88.

[13] Sylvia Ostry, The Post-Cold War Trading System: Who's on First? (1997), esp. Chapter 5, "The East Asian Challenge".

4.5 per cent respectively in the period 1973–87, down from a high of 5.1 and 7.7 per cent in the 1950–73 period.[14] Data compiled by the GATT itself confirm Maddison's generalizations, and present an even starker picture of declining economic performance as the 1960s gave way to the 1970s. For example, GATT figures show that world production and world exports grew yearly at 6 per cent and 8.5 per cent over the period 1963–73, but fell to 2.5 per cent and 3.5 per cent over 1974–85, the period immediately preceding the Uruguay Round negotiation.[15] These figures reflect especially the serious impact of the recession of the early 1980s on international trade. The conclusion to be drawn is that by the mid-1980s the world economy was going from bad to worse.

Inflation was contained in the 1960s, but it began to increase after the break-up of the Bretton Woods monetary system in 1971, and then accelerated rapidly with the shock of increasing oil prices after 1973. The oil shock had an immediate effect on production and trade in OECD countries, but other less dramatic factors had even greater impact. Productivity growth which had been at historically high levels began to slip, and the average annual productivity growth rate of 4.5 per cent for the period 1950–73 fell to 2.2 per cent for the period 1973–86.[16] A further factor was domestic economic policy, which gradually shifted from maintaining high demand to fighting inflation. The focus on inflation—with attendant high interest rates—forced countries to accept a slowdown of growth and an associated rise in the level of unemployment.[17]

World production recovered sharply in 1976, but then trended downward for the next six years to conclude in the recession of 1982. Trade performance was equally dismal. The combination of high interest rates, a further oil price escalation, and reduced trade and investment flows, brought many developing countries to the brink of fiscal collapse and focused attention on emergency programs for debt restructuring and relief. In sum, by the early 1980s, it appeared to many that the world economy was performing poorly for developed countries, and contributing to crisis and dislocation in developing countries. This situation created an incentive for governments to re-examine international trade policy.

B. The Decline of Agriculture

Agriculture was an historic and politically important component of trade, and its decline was a central concern for those countries that sought a new trade negotiation. By the 1980s, agriculture had long since fallen to a small proportion of industrialized country economies, but it continued to be a major component of the economies of developing countries. However, its share of the domestic economy in both developing and industrial countries had been dropping in recent decades. As for international trade, agriculture represented almost half of world merchandise trade in 1950, but its share had declined to about fourteen per cent by the mid-1980s.[18] This decline was relative and not absolute, and is related to the secular trend toward manufactures (and later toward services) in modern industrial economics in the postwar period. The natural decline of agricultural trade was compounded by an increase of protectionism by major importers, particularly the European Community, as exporters brought increasing pressure on domestic producers in a slow-growing market.

[14] MADDISON, *supra* note 11 at 67.
[15] Data compiled from GATT, INTERNATIONAL TRADE, Vols 1981/82, 1983/84, 1985/86, and 1986/87.
[16] MADDISON, *supra* note 11, at 88.
[17] PAUL KRUGMAN, THE AGE OF DIMINISHED EXPECTATIONS: U.S. ECONOMIC POLICY IN THE 1990S (1992), Chapter 3.
[18] GATT, INTERNATIONAL TRADE, Vol. 1987/88, 29.

The effect of slow growth in agricultural trade was especially felt in countries that were agricultural exporters. For example, Argentina's exports grew only from 8.4 percent of GDP in 1950 to 8.7 percent in 1986, while in Australia the equivalent ratio actually fell from 22.0 to 13.5.[19] As a result, both countries failed to benefit from a major source of growth enjoyed by many countries in the post-war period. Thus, the continuing decline of agricultural trade motivated agricultural exporters from Argentina to the United States to try again to liberalize agricultural trade in the Uruguay Round.

Attempts had been made to liberalize trade in agriculture in the Kennedy and Tokyo Rounds, but they failed mainly because of the unwillingness of the European Union to modify the protection afforded by its Common Agricultural Policy. By the 1980s, liberalization of agriculture had become a litmus test for many countries of the possibility of achieving any reform of the multilateral trade system. As the representative of New Zealand stated: "The longer a gross imbalance against agriculture in the international trading system remained the greater was the threat to the credibility of an international trading system committed to non-discriminatory treatment and maximizing opportunities for trade. Agriculture was a sector of key importance for developed and developing countries alike. It had assumed the touchstone of commitment to the new round proposal."[20] The statement of New Zealand, which was echoed by many other countries, made it clear that the demand for the liberalization of agricultural trade created pressure for a new multilateral negotiation.

C. Trade in Services

In the run-up to the Punta del Este Declaration, the discussions focussed very much on services. The role of services in the international economy is by now well known, but in the early 1980s the situation was much more opaque. Services such as transport costs or insurance were generally categorized as "invisibles", and were treated inconsistently in the current account statistics of different nations. GATT statistics focused on merchandise trade, and not services. However, governments were well aware of the increasing importance of services at the domestic level, and by the mid-1980s this information was being published by the GATT.[21]

As noted earlier, the issue of services divided the developed and developing countries during the pre-negotiation to the Uruguay Round. Data from the GATT indicate that in the thirty years from 1950 to 1980, all countries showed a decline in the work force in agriculture, and a corresponding increase of labour in industry and services.[22] However, the decline of agriculture and the movement into services was much greater in developed as opposed to developing countries. It was recognized that unless trade in services was expanded, there would be little prospect that trade would continue to promote the growth of developed countries in the future, as it had done in the past.[23] A further issue was that some services (e.g., insurance or financial services) were linked to merchandise trade,

[19] MADDISON, *supra* note 11, at Table D-6, 143.

[20] *Senior Officials' Group, supra* note 9 (GATT doc. SR.SOG/2 of November 22, 1985), at 8.

[21] *See Services in the Domestic and Global Economy*, GATT INTERNATIONAL TRADE 1988–1989 Vol. I , at 23–43 (1989).

[22] *Id*. at 25.

[23] *See* William E. Brock, *A Simple Plan for Negotiating on Trade in Services* 5:3 THE WORLD ECONOMY 229 (November 1982). *See also* PAEMEN AND BENSCH, *supra* note 7, at 17: "For societies keen to retain the privileges of wealth, the limits to the development of the North-North trade in goods provide justification enough for launching a new initiative to conquer new markets. When it comes to expanding markets, the services sector appears to be promising."

and failure to liberalize the former would restrict growth of the latter. Finally, although trade data show that trade in services is only about one-fifth of total world exports, statistics from the 1980s showed trade in services growing at 7.5 per cent on average against an average of 5.5 per cent for merchandise for the decade.[24] The unavoidable conclusion from these data was that liberalization of trade in services was necessary to maintain the GATT as a relevant instrument of international trade policy for developed countries.

The United States took the lead in pushing for the inclusion of trade in services in a new GATT negotiation. "In today's world," stated a U.S. representative at a preliminary meeting, "the services sectors were the engine of growth of the world economy and were a major contribution to technological improvement and competitiveness for goods and services."[25] This policy reflected the economic interests of the United States, which had a higher share of services in the domestic economy than other OECD countries.[26] However, the U.S. lead was quickly followed by the smaller industrialized countries, as indicated in a statement from a Swedish representative: ". . . the Nordic countries . . . considered that one of the important objectives of a new trade round should be the creation of a system that was capable of handling not only the trade policy problems of today but also those of tomorrow."[27] Thus the attraction of adding services to the GATT agenda was that it promised to keep the trade policy agenda consistent with the changes that were already occurring—or about to occur—in actual trade relations between countries.

The United States attempted to convince the European Union in the early 1980s to support a new negotiation centring on trade in services, but it made little headway until the GATT Ministerial Meeting at Punta del Este in 1986. The EU delegation was sensitive to the opposition to the inclusion of services among some influential developing countries, and attempted to find a middle ground. However, what convinced the Europeans was the recognition that Western Europe accounted for over half of the world trade in services by the mid-1980s.[28] Moreover, services were likely to be as much a growth area for Europe as for the United States in the future. The economic interests of the EU clearly supported a GATT negotiation on services.

D. Developing Countries

Developing countries were instrumental in building momentum toward a new trade negotiation. This was overshadowed by the fact that a group of developing countries led by India and Brazil conducted a campaign of pitched opposition to the inclusion of some issues like services on the negotiating agenda.[29] The reality, however, was that a changing world economy both made developing countries important to the international trade system, and in turn reform of the system important to developing countries.

Developing countries were important in two respects. On the one hand, some developing countries were assuming a much larger role in the international trade system by the

[24] GATT International Trade 1990–91 *Vol*. II, 1 (1990).

[25] *Senior Officials' Group, Record of Discussions: Note by the Secretariat* (GATT doc. SR.SOG/9 of November 22, 1985), at 1.

[26] In 1987, the United States had 68 per cent of its GDP in services, 30 per cent in industry, and 2 per cent in agriculture.

[27] *Senior Officials' Group, supra* note 25 at 6.

[28] GATT, International Trade 1988–89 Vol. I (1989), Tables 22, 31. Western Europe had 58 per cent of services trade (exports plus imports), followed by Asia with 18 per cent and North America with 14 per cent.

[29] *See* Gilbert R. Winham, *Explanations of Developing Country Behaviour in the Uruguay Round*, 21 World Competition 109–34 (March 1998).

1980s than had been the case previously. By 1985, China, Hong Kong, Korea and Saudi Arabia were included among the world's top twenty exporters and importers, while Brazil and Taiwan joined the list as exporters and Singapore joined as an importer.[30] Developing country trade was becoming increasingly industrialized, and by 1987, manufactures accounted for nearly half of developing country exports, up by twenty per cent from 1980.[31] Developing countries were also becoming an increasingly important market for developed countries, and by 1987 they took approximately one-third of merchandise exports from Japan, one-fourth of exports from North America, and one-eighth of exports from West Europe.[32] These circumstances motivated developed countries to seek a new negotiation to incorporate developing countries more firmly into GATT rules.

On the other hand, developing countries had their own reasons to seek a new negotiation. The recession and debt crisis of the early 1980s devastated many developing country economies, and resulted in sharply increased debt repayments with a consequent decline in imports, which constituted the real cost of the debt crisis.[33] The experience of the 1980s led developing country governments to recognize the stake they had in expanded exports and in an open trade system more generally. For example, consider the following extract from the GATT discussions in 1985: "The representative of *Brazil* said that. . . . his country was interested in promoting economic growth on the basis of an economy open to foreign trade, and needed to generate trade surpluses in a very large magnitude for the servicing of the external debt which consumed only in interest payments around 40 per cent of export earnings."[34] The position of Brazil was echoed by numerous other developing countries in the preparatory meetings for the Uruguay Round.

E. The Growth of Trade Dependence

Apart from specific concerns over their performance in the world economy, some countries had general concerns over the increasing interdependence between national economies in the world economy. For countries like Switzerland or Austria, this phenomenon had been a factor in economic policy throughout the postwar period, and it led those countries to pursue liberal trade policies.[35] Other effects of increasing interdependence can be seen in Canada's decision to initiate free trade with the United States. Following the recession of the early 1980s, the government assessed Canada's future economic prospects and concluded that Canada's market was too small to stimulate efficient production by itself, and that an increase in productivity—on which the standard of living was based—could only be achieved through freer trade. This assessment led the Canadian Government to support freer trade bilaterally with the United States, and multilaterally in the Uruguay Round.

Increasing interdependence and rising trade to GDP ratios also influenced large as well as smaller industrialized countries. In Europe, the importance of exports grew rapidly. Even in economies where trade volumes were historically low relative to the domestic market, trade dependence increased rapidly after 1950. For example, the export/GDP ratio of Japan more than doubled (4.7 to 10.8 per cent) from 1950 to 1986, while that of

[30] GATT, International Trade 1985–1986 (G 1986), Table 1.9, 23.
[31] GATT, International Trade 1987–1988, Vol. II (1988), at 39.
[32] *Id*.
[33] GATT, International Trade, 1987–1988, Vol. I, at 18 (1988).
[34] *Senior Officials' Group, Record of Discussions: Note by the Secretariat* (GATT doc. SR.SOG/10 of November 22, 1985), at 13.
[35] *See* Peter J. Katzenstein, Small States in World Markets: Industrial Policy in Europe (1985).

the United States went from 3.6 to 5.2 per cent.[36] In the latter country, exports constituted over 20 per cent of industrial output.[37] These figures led many Americans to conclude by the 1980s that: "The United States has become heavily dependent on the world economy."[38]

The evidence of increasing trade dependence encouraged officials in the United States as well as in other countries to pursue the option of a new trade negotiation. Rising trade dependence meant that national economies were becoming increasingly externalized, and therefore were more vulnerable to the actions of other governments. Negotiating new international trade rules was a means to promote market access and economic security in the external economy, which is similar to the role governments have often performed in domestic economies.

F. The Choice of Reforming or Losing a World Trade Regime

There was widespread agreement at the start of the Uruguay Round that the objective of the negotiation was to restore confidence in the GATT multilateral trade system. The reason governments felt a need to revitalize the system was the mismatch between the GATT system and the direction the world economy was taking by the early 1980s. The GATT contract was established to expand trade. However, it was questionable whether this purpose was being served, given the slowdown of the international economy in the 1970s and early 1980s; the inability of the GATT to tackle protectionism in agriculture or textiles; and the development of the service economy.

There were incentives other than developments in the world economy that encouraged countries to negotiate the Uruguay Round. One was the threat to multilateralism posed by regional trade agreements, especially the expansion of the European Union, and the start of a bilateral trade negotiation between Canada and the United States. Another was the widespread use of voluntary restraint agreements, or other similar mechanisms, designed to circumvent the fundamental MFN requirements of the GATT. Yet a third incentive was the use of unilateral trade sanctions by the United States, inspired partly by the struggle of the U.S. Congress to take control of trade policy from the Executive.[39] All these actions were indicative of a world trade system that was not working well, and they likely did encourage countries to enter a negotiation to improve that system. However, the principal incentive to negotiate was that the world economy was becoming a different entity from the one which the GATT was created for, and trading countries faced a choice either of revitalizing multilateral trade rules or risking their loss altogether.

International negotiations proceed more on the basis of fear than opportunity, and often a sense of apprehension or threat is the catalyst that initiates the process. In the Kennedy and Tokyo Rounds, that catalyst was provided by the actions of large trading countries, which created an incentive to negotiate in their trading partners. In the Uruguay Round, the threat was more diffuse, and it originated with systemic changes in the world economy that were not under the control of any one or several countries. The threat took time to comprehend, and as a result it took some six years for GATT members to complete the pre-negotiation stage and to initiate formally a new negotiation. It was clear by the mid-1980s that the direction the world economy was taking, and the concern this

[36] MADDISON, *supra* note 11, 27.

[37] C. Fred Bergsten, *The United States and the World Economy*, 294 THE ANNALS 12 (March 1982).

[38] *Id*.

[39] *See* PATRICK LOW, TRADING FREE: THE GATT AND US TRADE POLICY (1993). Low suggests that unilateral actions alarmed U.S. trading partners including the EU and may have created an incentive to negotiate.

created for the relevance of the trade system, were the reasons why governments felt a new negotiation was needed.

IV. The Conclusion of the Uruguay Round Negotiation

There are differences between the beginning and the conclusion of a negotiation. At the start, the parties' relationship to the negotiating environment is a distinctive feature. That environment, and parties' evaluation of it, largely determine whether parties will find benefit in collaboration, or instead will pursue their own solutions to policy problems. At the beginning of a negotiation, there are less likely to be trade-offs, or deals, or possible bargained solutions yet on the table that might distract the parties from an analysis of the general circumstances in which they find themselves.

The conclusion of a negotiation is different: the situation is much more complicated. There are of course the issues on the table, and the behaviour of negotiating partners in relation to those issues. But then there may be further pressure from the external environment. Events do not stand still while negotiators deliberate, even less when these deliberations involve the international economy. As much as the world economy had appeared to change by 1986 when the Uruguay Round was started, there was even greater perception of change between 1986 and 1993 while the Uruguay Round was underway. These changes were *policy reform* and *globalization.* Both these changes generated renewed pressure to settle outstanding issues and conclude the GATT multilateral negotiation.

A. Policy Reform

The Uruguay Round was negotiated in a period which saw a startling shift in economic ideology toward the free market. The most prominent event of that shift was the breakup in 1989 of the Soviet bloc and Communist governments, which was a defining moment in the long contest between alternative systems.[40] The immediate effect of this event was felt in the easing of security arrangements that had been prominent during the previous forty-plus years of the Cold War. However, the more enduring impacts were political and economic. The fall of communism ensured the ascendancy of democracy as a preferred governing institution throughout the world. With democracy came greater communication with parts of the world that were theretofore isolated, especially communication based on greater concern for individual rights and representative government. The prospect for world cooperation was expanded, and the danger of division and international conflict was reduced.[41] This was a positive influence on a negotiation striving to reshape trade relations in the world.

In economic terms, the fall of communism also ensured the ascendancy of market principles in the world economy, which are the principles on which the GATT had been founded. Western countries were quick to recognize the value of this turn of events. For example, the Economic Declaration of the Houston G-7 Economic Summit of July 11, 1990 proclaimed unreserved support for ". . . the increasing recognition of the principles of the open and competitive economy," and it asserted that ". . . freedom and economic

[40] Lipsey has noted: "Rarely in human history has such a decisive verdict been delivered on two competing systems." Richard G. Lipsey, *Global Change and Economic Policy*, in THE CULTURE AND POWER OF KNOWLEDGE (Nico Stehr and Richard V. Ericson eds. 1992) 279–283.

[41] *See generally,* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

prosperity are closely linked and and mutually reinforcing." The Summit Communique further noted that: "The advance of democracy accompanied by market-oriented reforms is not just a European phenomenon," in reference to reform then taking place in various countries in the developing world. Indeed, the greatest impact of the fall of communism on the Uruguay Round was the disappearance of the model of the command economy, and the further discrediting of government intervention as a means to manage international trade relations. Add to this the loss of the Soviet Union and Eastern Europe as a hegemonic trading bloc, and the resulting pressure for economic change in many countries was intensified.

The enormity of the fall of communism obscured the fact that market-based reform had been occurring in various countries throughout the decade. Following the Second World War and up until the 1980s, developing countries largely pursued economic policies of import substitution industrialization ("ISI"). These policies called for import protection to stimulate the rapid development of industry, and led to government interventionism and bureaucratic control of the domestic economy. Most important, ISI policies led developing countries to resist integration into the world economy by maintaining restrictions on trade, investment and financial flows. Resistance to trade liberalization carried out in GATT multilateral negotiations was also part of this overall economic strategy.

Economic reform began in the early 1980s, although it took on different guises depending on the circumstances of individual countries. It commenced with the move toward deregulation in the domestic economies of the United States and the United Kingdom.[42] Deregulation only touched selected areas of the economy such as transport (e.g., trucking, air carriers, telecommunications), but it created a strong demonstration effect throughout the economy. Although such reform mainly constituted internal change, the size of the U.S. and U.K. economies insured that it would have a wider impact in the international economy.

The recession of 1981/82 produced a crisis in many countries that further hastened economic reform. The Mexican government came perilously close to default on its international payments, and then commenced a rejection of the policy of economic nationalism that it had pursued since the Revolution of 1910. In Canada a similar pattern unfolded. Stung by the recession, the Canadian government established a body—the Macdonald Royal Commission—to examine economic policy for the future. The main thrust of the Commission's report was that "we Canadians must significantly increase our reliance on market forces", and this conclusion formed the rationale for the recommendation to negotiate free trade with the United States.[43] The subsequent establishment of a bilateral free trade agreement marked the end of a century of trade protection under Canada's National Policy of 1879.

The need for a larger market to support domestic economic growth was the principal motivation for Canada's initiative for free trade with its largest trading partner. A similar motivation had previously led small European democracies to undertake liberal economic policies,[44] and it also inspired the export promotion strategies adopted in the 1970s by

[42] Cerny has defined deregulation as meaning "... the lifting or abolishing of government regulations on a range of economic activities in order to allow markets to work more freely ...." Philip G. Cerny, *The Limits of Deregulation: Transnational Interpenetration and Policy Change*, 19 European Journal of Political Research 173 (1991).

[43] Report of the Royal Commission on the Economic Union and Development Prospects for Canada, I, at 66 (1985) ("Report").

[44] Peter Katzenstein, Small States in World Markets: Industrial Policy in Europe (1985).

Taiwan and Korea.[45] By the mid-1980s, the movement toward reform was evident in many countries in the developing world, especially in Latin American countries such as Chile and Argentina, and in the ASEAN countries of Malaysia, Thailand and Indonesia. Reform continued into the 1990s, and in 1991 the largest GATT signatory, India, responded to a crisis in its external payments by liberalizing its domestic and foreign economic policies.

A similar move toward market reform was launched in the second superpower engaged in the Uruguay Round: the European Union. Concerned particularly about Japanese growth and the prospect that Europe might become a third ranking economic power behind Japan, the European Commission initiated "Europe 1992" as a plan to restructure intra-EU relations to be more consistent with market principles, and thereby to increase the internal coherence and external impact of the EU itself. The motivation for this action was consistent with reforms undertaken in other countries, for as noted by Sandholtz and Zysman: "In an era when deregulation—the freeing of the market—became the fad, it made intuitive sense to extend the European internal market as a response to all ailments."[46] With the EU thus engaged in market reform, it ensured that the movement toward deregulation was a worldwide phenomenon affecting both developed and developing countries in the world economy. Deregulation was part and parcel of a profound shift in economic values,[47] and in the aggregate could be fairly claimed to have created a revolution in national trade policies.

The move toward deregulation revealed some interesting policy differences between large and smaller countries in the international economy. The larger actors, particularly the United States and the European Union, were able to achieve reform through their own actions; consequently they directed their efforts toward their internal markets. For smaller countries, with typically a larger ratio of trade to GDP, it was convenient and perhaps necessary to use trade policy to promote change throughout the domestic economy. For example, in Canada the Macdonald Commission clearly underlined the link between trade policy and economic policy with the statement that: "Free trade is the main instrument in this Commission's approach to industrial policy."[48] In the developing world, trade policy served a similar purpose as observed by Alan Oxley, former Australian ambassador to the GATT:

> Trade liberalization will not address all developmental problems. But of all the options available to the industralizing world to address developmental problems over the next decade, it is the one within reach which can have the most dramatic effect.[49]

The conclusion is that for many countries trade policy served as a surrogate for deregulation as they struggled to liberalize their economies and to meet the challenges thrown up by the world economy of the 1980s.

Economic reform was pursued differently from one country to another, but its cumulative effect improved the prospects for a negotiated settlement at the Uruguay Round. What all countries wanted at the Uruguay Round was increased market access from their

[45] ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION (1990).

[46] Wayne Sandholtz and John Zysman, *1992: Recasting the European Bargain*, 42:1 WORLD POLITICS 95, 112 (October 1989).

[47] *See e.g.*, Thomas J. Biersteker, *The 'Triumph' of Liberal Economic Ideas in the Developing World*, in GLOBAL CHANGE, REGIONAL RESPONSE: THE NEW INTERNATIONAL CONTEXT OF DEVELOPMENT (Barbara Stallings ed. 1995).

[48] REPORT, I, *supra* note 43, at 60.

[49] OXLEY, *supra* note 7, at 42.

trading partners, which would be accomplished through the liberalization of trade. The presence of economic reform insured that the demands for change that arose from the Uruguay Round negotiation were consistent with the changes already underway in various countries. Compliance with the actions requested by trading partners was made less onerous by the fact that those actions were already consistent with domestic policy. The Uruguay Round was an international step in a direction that many countries were already moving in their domestic economies.

B. Globalization

Globalization as a concept became commonplace in the early 1990s, but the term was neither consistent nor clear. Generally it expressed the sense of change and transformation that many perceived were occurring in the world economy. For example, two analysts expressed this perception as follows: "The world economy is changing in fundamental ways. The changes add up to a basic transition . . . ."[50]; while another claimed: "We are living through a transformation that will rearrange the politics and economics of the coming century . . . . There will no longer be national economies, at least as we have come to understand that concept . . . ."[51] The importance of globalization is that it was seen as a threat to national economies and the nation state itself, and it put pressure on national leaders to demonstrate that they were still in control of the economic forces that impacted their countries.

There were many factors that created the impression of a globalizing world. Some included "the simple extension of economic activities across national boundaries"[52], such as increasing communication or transportation, or rising proportions of foreign trade in national economies. Other factors involved "the functional integration of . . . internationally dispersed activities"[53], which could include the changes brought by the combination of foreign investment and modern information technology.

Of the various factors involved in globalization, two stand out as being particularly salient to the economic decision makers of the 1990s: *global financial transactions* and *foreign direct investment* ("FDI"). In both these areas, changes accumulated in the 1980s in a way that made decision-makers recognize the need to control change and to subsume it in the context of multilateral rules and governance. It is useful to review these factors to appreciate how changing circumstances increased the incentives for national governments to conclude the Uruguay Round negotiation.

1. Global Financial Transactions

The international economy underwent great change during the postwar period, but none was more striking than the scale of global finance.[54] From a low point following the Depression and World War II, international financial transactions were re-established by the late 1950s and then began to accelerate in the 1970s. By the 1990s, the daily turnover

[50] COHEN AND ZYSMAN , MANUFACTURING MATTERS: THE MYTH OF THE POST-INDUSTRIAL ECONOMY 4 (1987).

[51] ROBERT REICH, THE WORK OF NATIONS 3 (1991).

[52] PETER DICKEN, GLOBAL SHIFT: TRANSFORMING THE WORLD ECONOMY 5 (1998).

[53] *Id*.

[54] Cohen has defined global finance as encompassing "... all types of cross-border portfolio-type transactions—borrowing and lending, trading of currencies or other financial claims, and the provision of commercial banking or other financial services. It also includes capital flows associated with foreign direct investment . . . ." Benjamin J. Cohen, *Phoenix Risen: The Resurrection of Global Finance*, 48 WORLD POLITICS 268, 269 (January 1996).

on foreign exchange markets simply dwarfed figures on global output, trade and overseas production, which were the indicators usually relied upon to measure the extent of the global economy.[55]

The expansion of foreign exchange trading was rapid. For example, in March 1973 during a currency crisis, a high of $3 billion was exchanged into European currencies in one day; but by the late 1970s, daily turnover on foreign exchange markets was estimated at $100 billion, and by the late 1980s the estimate was $650 billion.[56] Goldstein *et al*. compiled data on the expansion of foreign exchange trading in ten developed countries over the approximate period of the Uruguay Round negotiation, and show that daily foreign exchange turnover increased by 37 per cent from 1989 to 1992; the estimate for worldwide net turnover was $1 trillion, which was nearly double the total non-gold reserves of all industrial countries (i.e., $555.6 billion) in April 1992.[57]

The reasons for the growth in global finance are complicated and subject to academic disagreement.[58] The explanation likely begins with the movement toward a fluctuating exchange rate system in the early 1970s, which reduced the need for central banks to retain capital controls to defend national currencies at fixed values. Advances in information technology which facilitated the movement of capital between countries also played a role. Whatever the exact stimulus, governments in the 1980s proceeded to liberalize international capital movements, which in turn promoted competition between national financial institutions and greatly expanded the menu of financial instruments available in international commerce.[59] The lending activities of international banks accelerated quickly and were particularly instrumental in promoting the expansion of global financial markets. The gross size of the international banking market became larger than the total amount of world trade during the period of the initiation of the Uruguay Round, and was more than double (215.6 per cent) world trade by 1991.[60]

Global finance grew steadily from the early 1970s, but the impact of this phenomenon was not fully appreciated until the late 1980s when the enormity of the foreign exchange market led to popular speculation about the capacity of the global economy to overwhelm national economies and government policy making.[61] Given the hyperbole associated with global financial markets, it is important to assess what was new and not new about the circumstances of the early 1990s. First, the move toward globalization since mid-century was not a new phenomenon, but largely a reopening of an international economy closed down by depression and two world wars. The period

[55] Goldblatt *et al* have stated: "The ratio of foreign-exchange turnover to world trade has climbed from 10:1 in the early 1980s to more than 60:1 today." David Goldblatt, David Held, Anthony McGrew and Jonathan Perraton, *Economic Globalization and the Nation-State: Shifting Balances of Power*, 22 ALTERNATIVES 269, 276 (1997).

[56] JOHN B. GOODMAN, MONETARY SOVEREIGNTY: THE POLITICS OF CENTRAL BANKING IN WESTERN EUROPE 18 (1992).

[57] MORRIS GOLDSTEIN, DAVID FOLKERTS-LANDAU, PETER GARBER, LILIANA ROJAS-SUAREZ, AND MICHAEL SPENCER, INTERNATIONAL CAPITAL MARKETS: PART I. EXCHANGE RATE MANAGEMENT AND INTERNATIONAL CAPITAL FLOWS 24 (1993).

[58] *See* Cohen, *supra*, note 54.

[59] Examples include central and local government securities, corporate debt, equities, commercial paper, bank certificates of deposit, asset-backed securities, and exchange-traded and over-the-counter derivatives. *See* MORRIS GOLDSTEIN *et al*., *supra* note 57, at 2.

[60] WORLD INVESTMENT REPOPRT: TRANSNATIONAL CORPORATIONS, EMPLOYMENT AND THE WORKPLACE 120 (UNCTAD, 1994).

[61] *See, e.g.,* HOWARD M. WACHTEL THE MONEY MANDARINS: THE MAKING OF A NEW SUPRANATIONAL ECONOMIC ORDER (1990); and RICHARD MCKENZIE AND DWIGHT LEE QUICKSILVER CAPITALISM: HOW THE RAPID MOVEMENT OF WEALTH HAS CHANGED THE WORLD (1991).

1870–1913 represented a high point of international integration, during which restrictions on capital movements were minimal, cross-national ownership of securities was high, and capital outflows from investing countries reached very high portions of GDP.[62] Second, however rapid the rise of international financial flows, this did not create a single global market for capital which would be characterized by converging national interest rates. Most investment is financed domestically, and even though capital mobility rose continuously since the 1970s, it still did not reach the relative levels achieved in the 1920s.[63] Finally, the globalization of finance did not mean an end of the power of the state to direct and even control the national economies. Against the constraints introduced by capital mobility and fluctuating exchange rates, the state still retained the fundamental powers to tax, spend, and to direct transfers. In most countries, government spending as a proportion of GDP increased steadily since the 1960s.[64]

What was new about the world economy of the 1990s is that the global financial market included many more players than were present in earlier periods of high globalization, ranging from private actors such as pension funds, to bond-issuing subnational governments, to national governments that did not exist prior to mid-century. The sheer size of the foreign exchange market in comparison to world trade and output was unique in historical terms. The foreign exchange market is a largely open market, brought about in part by the liberalizing policies of nation states themselves. The result was that market morality became an inescapable condition and point of departure for actors in the world economy of the 1990s, with which the liberalizing thrust of the Uruguay Round was consistent.

2. Foreign Direct Investment

Foreign investment has caused a profound change in the international economy over the past three decades. The change is less a matter of the simple extension of economic activities across national boundaries, but, increasingly, a matter of the formal integration of geographically dispersed activities. More than any other economic variable, FDI is responsible for the passage from shallow integration to deep integration in the international economy.[65]

Foreign investment takes place when ". . . an investor based in one country (the home country) acquires an asset in another country (the host country) *with the intent to manage that asset*."[66] The reference to management is important, and distinguishes FDI from portfolio investment, which consists mainly of ownership of foreign stocks, bonds and other financial instruments. Historians generally agree that there were significant flows of FDI before World War I, particularly from Britain to its current or former colonies. However, war in 1914, then depression, and then again war in 1939 brought a retrenchment

[62] WORLD INVESTMENT REPORT: TRANSNATIONAL CORPORATIONS, EMPLOYMENT AND THE WORKPLACE, *supra*, note 60, at 120.

[63] *Capital Goes Global* (Schools Brief) THE ECONOMIST October 25, 1997, at 87. *See also* Alan M. Taylor, *International Capital Mobility in History: The Saving-Investment Relationship* (Working Paper 5743) (Cambridge, MA: National Bureau of Economic Research, September, 1996).

[64] *Survey: The World Economy*, THE ECONOMIST September 20, 1997, at 7–8.

[65] Shallow integration refers to "the spread of market linkages through greater trade and factor flows", while deep integration involves "participation in the international division of labour at the level of production", and "establishes a more lasting linkage between economic agents located in different countries." WORLD INVESTMENT REPORT (UNCTAD, 1994), at 118.

[66] RICHARD BLACKHURST AND ADRIAN OTTEN, TRADE AND FOREIGN DIRECT INVESTMENT: NEW REPORT BY THE WTO 6 (1996) (emphasis supplied).

in foreign investment as it did in financial flows more generally. After 1945, foreign investment resumed in what can be seen from the perspective of the 1990s as a series of three stages.

First, beginning in the 1950s, U.S. companies expanded manufacturing in Canada and Europe, and made heavy investments in oil and mineral production throughout the world. At this time FDI was viewed largely as an American phenomenon, and it stimulated concerns over sovereignty and the takeover of domestic industry by foreign interests.[67]

Second, by the early 1970s, FDI flows began to diversify as European companies invested abroad in sectors like textiles, clothing and footwear in order to take advantage of lower labour costs outside Europe. Concurrently, nationalistic objections to foreign investment began to attenuate, in part because European investors helped to diversify concerns away from investment as an American phenomenon, and as well because FDI was becoming increasingly valued as a tool for economic development.

Third, in the mid-1980s a sharp increase occurred in FDI flows, mainly from Japan and Europe, as multinational firms sought to contest global markets by accessing foreign technology and improving economies of scale. The boom in FDI flows started in 1985 following the recession of the early 1980s, continued to 1990, and then resumed after a brief downturn in 1990–91. The impact of surging flows during the 1985–90 boom was to more than double the accumulated world stock of FDI over the decade, from $517 billion in 1980 to $1.6 trillion in 1990.[68]

The 1985–90 FDI boom changed the structure of the international economy. Although FDI is a small proportion of domestic investment in all countries, from 1985 onward the growth of FDI was considerably more rapid than the growth of domestic investment. This indicates an increasing orientation toward the international economy by investors in many countries. Furthermore, the pattern of foreign investment changed. Many countries emerged as sources of foreign investment, including countries like Canada that had traditionally been host states for FDI. As well, developed countries that had mainly been the source of investment became major destinations for FDI; for example, by the late 1980s the U.S. share of outward stocks of international direct investment had fallen, and its share of inward stocks had risen to a nearly equal level.[69] Indeed, the 1985–90 FDI boom was largely a developed country phenomenon, and it was not until the early 1990s that developing countries began to increase their share of FDI inflows.

Finally, the FDI boom changed the relationship of global foreign production to trade. For the whole decade of the 1980s, foreign investment flows averaged an annual increase of thirty per cent, which was about three times faster than the growth of world exports and four times faster than growth in the world gross national product. The result was that the global foreign production of companies where ownership and financing lay outside the host country exceeded the total of world trade; for example, in 1992, some 207,000 foreign affiliates generated sales of US$5.8 trillion, while the value of global exports of goods and services was US$4.7 trillion.[70] It is clear that FDI and foreign production

[67] *See e.g.*, Jean Jacques Servan-Schreiber, The American Challenge (1969).

[68] Rutter defined stocks as "the cumulative historical book value of direct investors' equity (including reinvested earnings) in, and net outstanding loans to, their foreign affiliates." Flows are "annual direct investment capital flows (equity, reinvested earnings and intercompany debt)...." John Rutter, *Recent Trends in International Direct Investment* (Washington, D.C.: U.S. Department of Commerce, Investment Analysis Division, August, 1992), at 1.

[69] *Id*, at 8. In 1989, the U.S. share of world outward stocks of IDI was 27.9 per cent, and its share of inward stocks was 26.85. per cent.

[70] Recent Developments in International Investment and Transnational Corporations: Trends in Foreign Direct Investment 5 (1995).

had become an equal if not more important route to foreign markets as international trade.

An economic definition of globalization can have many aspects,[71] but the basic mechanism of change is foreign investment. As defined by the OECD, the globalization of industry is "... the transborder operations of firms undertaken to organise their development, production, sourcing marketing and financing activities."[72] The essence of globalization is the integration of production across national boundaries, or as Richard Lipsey has observed, a globalized economy is one which "... increasingly integrates both the financial and the production sectors of the economies of many individual countries."[73]

Globalization is important because it affects trade and trade policy. Again as noted by the OECD, "... international trade is being increasingly restructured by international investment and international collaboration between firms, as they expand and organize operations more broadly ..."[74] One effect of this in the 1980s was to reorganize trade on a regional basis, but in the 1990s this changed more toward a reorganization across regions. For example, OECD data indicated that although foreign affiliates generally produced for the markets in which they are located, the sales of U.S. and Japanese affiliates became less regionally concentrated over the 1980s, and increasingly directed toward inter-regional or global markets.[75] This was consistent with statements made about globalization in the auto industry, that: "In a global industry ... optimization on only a national or regional basis is not sufficient. Significant competitive advantage accrues to companies which can deploy their core capabilities with facility on a broad geographical scale."[76]

As for the impact of globalization on trade policy, it is undeniable that globalization exerted pressure on governments for more liberal trade policies.[77] This has led some to suggest the State is in decline, but as previously noted the evidence on this matter goes in the opposite direction.[78] What does occur, however, is that states will come under pressure from their business sectors to liberalize trade policy, and an example of this pressure has been the demands by business for faster tariff cuts than those established in the WTO (and NAFTA) accords. Beyond liberalization, there were demands for global trade policies that corresponded to the global markets that firms were increasingly engaged with. As

[71] For example, Ostry defines it as follows: "The ever tightening and more complex linkages among nation-states, first by trade, then by financial flows, and more recently by a surge of foreign direct investment have greatly enhanced the power and ubiquitousness of the multilateral enterprise in the international arena. This deepening integration of the world economy, fed or even led by the continuing revolution in information and communication technology has reinforced the shift to trade policy inside the border and the latent push to system harmonization." Ostry, *supra* note 13, at xvi–xvii.

[72] OECD, GLOBALIZATION OF INDUSTRY: OVERVIEW AND SECTOR REPORTS 15 (1996).

[73] Lipsey, *supra* note 40 at 285.

[74] GLOBALIZATION OF INDUSTRY, *supra* note 72, at 31.

[75] *Id*. at 37, 39 and accompanying tables.

[76] Paul F. Anderson, Hugh M. Dickinson and Gerald Komlofske, *Globalization: Its Meaning for the Automotive Industry*, 15.2 *JAMA Forum* (October 1996) at 3.

[77] The OECD report notes: "[Globalization] reinforces the general policy prescriptions of trade liberalisation and non-discriminatory trade and investment regimes .... it also underscores the costly and ineffective character of discriminatory policies at a time when "domestic" firms and products are more difficult to recognise and interlinkages and policy leakages are the order of the day." GLOBALIZATION OF INDUSTRY, *supra* note 72, at 42.

[78] *See The World Economy: The Future of the State*, THE ECONOMIST, September 20, 1997; and Robert Wade *Globalization and Its Limits: Reports of the Death of the National Economy are Greatly Exaggerated* in NATIONAL DIVERSITY AND GLOBAL CAPITALISM 60-88 (Suzanne Berger and Ronald Dore eds. 1996).

noted in a Report of the OECD's Group of Thirty, "... the reality is that global companies competing in global markets ultimately require global rules ..."[79] The need for global rules was a powerful incentive to complete the Uruguay Round.

V. Impact of Globalization on the Uruguay Round

The lesson of the past decade was that it had become necessary to think differently about international trade. It was necessary to recognize that trade, which historically had always been the main economic link between national societies, was now being integrated into a broader set of relationships that included foreign investment, corporate alliances and other forms of collaboration. Trade in goods and services has been, and probably always will be, the mainstay of economic relations in the international economy, but it had become an element in a broader picture that had a different dynamic.

Was this lesson understood by the government leaders who directed and negotiated the Uruguay Round? The answer is not clear. It was of course understood by high-level observers, as demonstrated in the aforementioned paper published for the Washington-based Group Of Thirty describing the new policy agenda facing international trade.[80] But for those responsible for the conduct of trade negotiations, the specific (and competitive) issues of the negotiation likely commanded more attention than any broad generalities about change in the world trading system. In the communications between negotiators (especially from the United States and European Union), the focus was on defending the requests and offers previously put on the table, and there was less comment on reasons for concluding the negotiation than there had been previously for starting it. In the context of the heated debates that occur in the endgame of a negotiation, any indication that one regards an agreement as important or necessary can unfortunately be interpreted as a sign of weakness.

On the other hand, in GATT negotiation generally, there is one individual whose task is to get an agreement and who is therefore constitutionally empowered to speak for the importance of reaching an agreement. That individual is the mediator, who in GATT negotiations has traditionally been the Director-General of the GATT. In the Uruguay Round, Peter Sutherland served as Director-General for the last six months of the negotiation. He presented a series of speeches over that period, and then spoke out even more vigorously in the year following the Uruguay Round's conclusion as various countries undertook the critical ratification phase of the agreement. These speeches were designed to win support for a proposed new international trade regime, much as two centuries before the *Federalist Papers* were written to win support of the American people for a proposed new federal constitution for the United States. Just as the *Federalist Papers* provide clues as to why Americans accepted constitutional government, the Director-General's speeches provide some evidence as to the arguments he felt would convince governments to support the Uruguay Round Agreements.

One theme enunciated by the Director-General was the theme of change. "It was undeniable," said Sutherland, "that the GATT and the Uruguay Round are about change ... the changes that have, in any event, taken place in the world economy over the past two

[79] Geza Feketekuty, The New Trade Agenda at 29, Occasional Paper 40 (Washington, D.C.: Group of Thirty, 1992).

[80] The paper commenced with the statement: "As the Uruguay Round draws to a close ... a whole new set of challenges [vi3, globalization of production and markets] has emerged since the Uruguay Round was launched." The report concluded: "The multilateral trading system must inevitably adapt to the process of internationalization and globalization." *Id*. at 1, 31.

decades and . . . the change which will take place in the years to come."[81] That change was external and autonomous, and not something created and forced on governments by the GATT itself. As the Director-General said: "The GATT is an effect [and] not a cause of developments taking place at the most fundamental levels of national life."[82]

What were these changes? In the global economy, argued Sutherland, ". . . policies relating to money, finance and trade have become inextricably linked."[83] Stability in finance was necessary for expansion in trade, and a credible trade system was necessary for monetary stability. The system was more integrated, which resulted from the liberalization of exchange and capital restrictions, technological change, and innovations in the organization of international business operations.[84] Finally, led by FDI, the system was globalizing, and "liberalisation of international capital flows was in the vanguard of the current process of globalization of markets."[85]

The challenge presented by global economic change was one of structure and organization. Speaking at Davos, the Director-General said that ". . . change has certainly outstripped the existing structures for economic cooperation."[86] The result was ". . . a structural deficit in the world economy, in terms of both the making of policies and their execution."[87] Trade policy needed to be put on "a sounder institutional footing", in order to address the "increasing mismatch between GATT coverage and the realities of world trade [e.g., the growth of trade in services]."[88]

Finally, the solution was one of rulemaking and governance. Invoking Hayek's language that "where there is no law there is no freedom"[89], the Director-General argued that the multilateral rules represented by the Uruguay Round Agreements ". . . ensure freedom for economic agents to operate in their commercial interests across national frontiers . . . [and] also *enhance* the freedom of governments in their trade policy interventions, by defining the scope of actions permissible within the confines of international law."[90] The purpose of rulemaking was to govern change. "Multilateral trade negotiations are crucial," said Sutherland, ". . . because change needs to be harnessed and encouraged against the background of reasonable multilateral rules and disciplines. Without the GATT, the change will take place anyway but the law of the jungle will prevail."[91]

To sum up, the Director-General of the GATT presented a coherent line of argument in support of the Uruguay Round Agreements, based on the developments that had occurred

[81] *Countdown for the Uruguay Round*, Address by Peter Sutherland to the Forum de l'Expansion, Paris, October 19, 1993, at 1.

[82] *Id*. at 2–3.

[83] Statement by Peter D. Sutherland, Director-General of GATT, to the Interim Committee of the International Monetary Fund, Washington, D.C., September 26, 1993, at 1.

[84] *Economic Relations: A Necessary Basis for Peace*, Address by Peter D. Sutherland, Director-General, World Trade Organization, to the Inaugural Conference of UCC 150, University College, Cork, January 3, 1995, at 2.

[85] Sutherland went on to say that: "The achievement of the Uruguay Round [was] to extend liberalisation to international markets for goods, services and technology." *Consolidating Economic Globalization*, Address by Peter D. Sutherland to the Canadian Club, Toronto, March 21, 1994, at 2–3.

[86] *Key Issues in the Global Economy-How the WTO Contributes to Global Solutions*, Address by Peter D. Sutherland, Director-General, World Trade Organization, to senior media representatives, Davos, January 29,1995, at 2–3.

[87] *Id*. at 9.

[88] *Leaders and Choices: What the Uruguay Round Needs to Succeed*, Address by Peter D. Sutherland to the National Conference of the Confederation of British Industry, Harrogate, November 15, 1993, at 5.

[89] *A New Framework for International Economic Relations*, Third Hayek Memorial Lecture by Peter Sutherland, Director-General GATT to the Institute of Economic Affairs in London, June 16, 1994, at 6.

[90] *Id*. at 6.

[91] *Countdown for the Uruguay Round*, *supra* note 81, at 2–3.

and were occurring in the world economy. In the absence of evidence to the contrary, and given that the Uruguay Round succeeded, one can assume that the Director-General's arguments were not only influential, but likely represented what national delegations may have felt but were constrained by the circumstances of the negotiation from voicing. The arguments were profound, and went to the heart of the problem of governance of the world economy. As observed in the *Wall Street Journal* on the eve of the successful conclusion of the negotiation, "... the [Uruguay Round] is not just a matter of pettifogging trade rules, it represents a fundamental decision about the direction of politics in the 21st century."[92]

VI. Conclusion

The Uruguay Round began with one set of concerns and ended with another. It started with the fear that the world economy was slowing while at the same time trade was becoming more important, and that trade problems such as agriculture, services and textiles—as well as relations between developed and developing countries—were long past the point where they needed urgent attention. It concluded with the recognition that the world economy was becoming globalized, and that the GATT trade regime needed a fundamental overhaul for it to be relevant to a changed international environment. In this negotiation, national decision makers appeared to appreciate the importance of the international economy for national economies. Presumably there was a link between problems in the international economy and the policies designed to address them.

On the other hand, there is an argument that in analyzing government actions, one often assumes that more order exists in policy-making than was the case when the decisions were made. Thus Paul Krugman has observed that: "Policy is rarely a coherent response to perceived problems; more often it represents the outcome of bargains and struggles between groups. . . ."[93] The Uruguay Round could well have been an example of Krugman's observation. It was a hard fought multilateral negotiation with an enormous agenda: surely it would be plausible to expect the outcome would be simply a vast collection of expedient exchanges, with little if any reference to the broader forces at work in the world economy. And as for being a coherent response to policy problems, no one associated with negotiations in GATT would claim that coherence was the strong suit of the process.

And yet the Uruguay Round did produce a result that was relevant to the perceived problems of the day. Decision makers appeared to make the right choices at the Uruguay Round, which have been confirmed in the passage of time since the completion of the Uruguay Round. Despite the problems the WTO has had in its brief history, including the aborted Seattle Ministerial Meeting and the continuing difficulties of the Doha Round, there has been no serious movement to renounce the rules-based multilateral trading system created by the Uruguay Round Agreements. The WTO owes its success to the fact that it was a largely appropriate response to the problems thrown up by the world economy at the end of the Twentieth Century.

[92] Editorial, WALL STREET JOURNAL, December 15, 1993.

[93] PAUL KRUGMAN, THE AGE OF DIMINISHED EXPECTATIONS: U.S. ECONOMIC POLICY IN THE 1990s 61 (1992).

CHAPTER 2

THE POLITICS OF TRADE POLICY DEVELOPMENT—THE NEW COMPLEXITY

Peter Sutherland*

TABLE OF CONTENTS

I. Introduction 28
II. The Politics of Trade Policy Development 28
A. Finding a Balance in Capitals—a Proliferation of Lobbies 28
B. Business Sector Maintains a Strong but Often Divided Voice 29
C. Local Political Interests can be Conflicting 29
D. Legislative Oversight is Getting Tougher 30
E. The Media is a Double-Edged Sword for Policy Makers 30
F. NGOs have Become a Telling New Force in Trade Policies 31
G. What Happened to the Voice of Labor? 31
H. Consumer Interests in Trade Appear to have Changed 32
I. How to Ensure the Interests of all Trade Stakeholders are Heard 32
J. There are Now Still Wider Political Calculations to be Made 33
K. Geneva and the WTO—are they Equipped to Cope? 34
L. WTO Delegations have Widely Differing Relationships to their Capitals 35
M. A Changing Role for the WTO Secretariat 35
N. New Mechanisms to Broaden Debate and Increase Efficiency 36
O. Wider Intersections at the Multilateral Level 37
III. Conclusions 38

* Peter Sutherland was the last Director-General of the GATT and the first Director-General of the WTO. He is currently chairman of BP plc and of Goldman Sachs International.

I. Introduction

The politics of trade have never been straightforward. They have always been a complicated balance between commercial, economic, political and consumer interests. In recent years, the scene seems to have become even more encumbered with multiple interests and lobbies, requiring governments to add endlessly to their juggling skills. Where once, if consultations were required at all, they were probably restricted to trade associations and sometimes trade unions, now an extensive and growing collection of interested parties seek involvement and a say. Indeed, they are often entitled to a say by law or regulation.

Perhaps this is a natural development; trade policy itself is now more complex. It is no longer simply a matter of protection at the border, technical barriers, subsidies, or government procurement regulations. The policies with which officials and ministers have to deal are increasingly sensitive in themselves and, as a consequence, increasingly impacted by other policy areas—development, environment, labor, food safety, competition policy, investment rules, even security issues, human rights and foreign policy.

This complexity was in part recognized as the World Trade Organization and the broad range of trade rules that it encompasses were being negotiated in the Uruguay Round. Indeed, the sheer scope of the Marrakesh agreement was seen as both a major step forward in multilateralism and a challenge, in some minds at least, for national sovereignty. It may be, of course, that the WTO is required to do too much and is overextended into fields in which it has no business. For the moment, at least, a winding back of the Organization's powers and reach is not on the table and nor, in my view, should it be. On the contrary, the current Doha Round of multilateral trade negotiations could well further extend the purview of the WTO in a significant manner—into general investment rules and competition policy, in particular. So the real question is how to deal with the complexity and ensure that business is done as effectively and efficiently as possible.

For one thing is sure, if it was ever true that the world trade body—in the form of the GATT or the WTO—operated as an ivory tower, it cannot do so now and never will again. This paper looks at the kind of influences and inputs with which, first, governments must deal in formulating trade policies and, second, the WTO must cope at the multilateral level if it is to continue moving forward coherently and positively. It also considers the various interfaces of the WTO with other international and regional bodies, including the United Nations family, which have also become an integral part of the picture.

II. The Politics of Trade Policy Development

A. Finding a Balance in Capitals—a Proliferation of Lobbies

The need for policy makers and ministers in capitals to interact and consult with a profusion of interest groups has never been greater. Not only in advanced industrial democracies but in many parts of the developing world too, there is a constant scramble to be heard as WTO and other positions are developed and as decisions in the context of strictly domestic trade regulation are formulated. Arguably, as the numbers of interest groups to be heard have grown, their indvidual capacities to influence may have diminished. Certainly, the balance has changed with traditional lobbies having to work that much harder and new voices sometimes having a disproportionate impact.

B. Business Sector Maintains a Strong but Often Divided Voice

Naturally it is the business sector which has traditionally been most associated with driving trade policy development in capitals. After all, trade policies are essentially about how companies do business across borders and how foreign firms are treated within borders. Trade officials need to heed the business view—indeed, in the United States they are required to do so by statute; hence the web of industry advisory committees that feed into the USTR and Department of Commerce. Elsewhere the relationships are sometimes more arm's-length, sometimes less transparent, but always telling. A specific requirement to listen to, and take account of, other views is rare even if, whether for reasons of genuine national interest or political necessity, it is usually the case in practice that they are heard.

Yet as greater and greater proportions of national economies become dependent on trade, the job of finding a single national "industry view" becomes ever more difficult. Certainly, the sectors which have traditionally been those most forcibly demanding protection are still noisy—textiles, clothing, footwear, agriculture, white goods, steel and so on, depending on country and level competitiveness. But now governments must increasingly listen to the services sector—certainly in the advanced countries where services industries are expanding rapidly and are increasingly active in overseas markets. Driven in part by the WTO's successful General Agreement on Trade in Services ("GATS"), banks, insurance firms, telecommunications companies and professional services, among others, have been pushed into the front line of trade policy formulation. Further, trade officials must keep in mind increasingly the interest of the high-tech and Internet-based sectors for which keeping governments out of their businesses—and away from the temptation to regulate trade—is often the prime motivation.

Clearly there are major conflicts of interest among and within these broad areas of industry—and it is no less the case for developing countries. Larger groupings like the Conference Board in the United States, the Keidanren in Japan, or the Union of Industrial Employer's Confederations of Europe and the European Round Table of Industrialists struggle endlessly to devise coherent and comprehensive positions for WTO and other trade negotiations. In fact, the multiplicity and even confusion of industry voices—and their differing interests—has probably made it easier for other, more focused, interest groups to be heard.

C. Local Political Interests can be Conflicting

The growing complexity of economies must also make local political judgements more difficult. It is not so many years since the voices of local textiles, steel and motor vehicle firms dominated all others simply because they were the *only* major sources of employment in their areas. Local political representatives had little choice but to back calls for trade protection—their constituency seats often depended on it. It was much the same in agriculture. Inevitably ministers had to take account of the political interests in play for their own political survival and that of the governments they represented.

Judgements were relatively straightforward. In many instances, admittedly, it remains the case that simple political calculations are still made when, because of import competition, local industries get into trouble. More often, however, the political judgements are becoming troublesome. An area previously wholly dependent on, for instance, textile mills may now have a balance of employers which includes high-tech companies, accountancy firms or the administrative headquarters of a manufacturing company. A region

which may have seen the virtual disappearance of steel production may now have a car production implant from the Far East or a pharmaceuticals research center as far bigger employers. Local politicians who chose to back calls for protection from fading industrial sectors must now understand—or they will be told, forcibly—that such action could damage the prospects of more promising sources of employment. There are still plenty of populist causes—backing agricultural subsidies and market access barriers, for instance—but the costs are less and less easy to ignore.

D. Legislative Oversight is Getting Tougher

However, if local political interests are getting too complicated for easy judgements to be made, national legislatures are beginning to take a more active interest in trade issues as a whole. Whether it is the U.S. Congress, the European Parliament, the Japanese Diet or the Indian Lok Sabha, all have seen intense interest and animated debate about WTO issues as well as domestic trade concerns. Whether political parties have a properly considered position on trade or simply respond to the winds of public and media opinion, the result is the same: more complication for policy makers and, particularly, ministers. The examples where GATT and WTO negotiations have had to be put on hold while France, the United States, Germany and others hold presidential or legislative elections are many. Indeed, the entire course of a trade round can be constructed around the timing of such events.

Interest at the legislative level has raised the issue of whether legislators should be more directly involved in WTO affairs. One view would be that keeping them in the loop might ensure they are not over-influenced by interest groups in domestic debate. Another would argue that well-informed and involved legislators can provide a useful counterbalance to governments themselves. Of course, it is open to governments to include legislators in their delegations to WTO meetings: some do so regularly at ministerial conferences. Going further would seem to me both impractical and undesirable.

E. The Media is a Double-Edged Sword for Policy Makers

The media is also an element not to be forgotten in the formulation of trade policies at the national level. It can be a positive influence, reminding political leaders, for instance, that policies that may be attractive electorally at home can be highly damaging to national standing and, often, negotiating credibility overseas—particularly in the WTO context. On the other hand, media pressure can be negative and damaging. This is particularly the case where governments feel themselves driven to use trade weapons for fear of being portrayed as timid and unconcerned with domestic interests. We have seen this frequently in transatlantic trade relations.

Furthermore, balanced press coverage of trade policies has been further undermined by highly committed, but narrowly focused, activist groups, especially non-governmental organizations ("NGOs"), that are adept at getting across challenging new ideas. The challenge of communicating conviction and good sense in pursuing open trade policies is hardly new. The plight of unemployed steel workers put out of work, allegedly by import competition, always provides a more dramatic and telling image than an assertion, however true, that more jobs are created by the more efficient allocation of resources. But now there are new and emotive images that appear to discredit open trade: environmental degradation, child labor, cultural invasion, food safety scandals, access to medicines, poverty in the developing countries and so on. The links between these issues and trade

policy are seldom explained and often barely exist. Nevertheless, because of media pressure many politicians now feel the need to respond as if the links were self-evident.

F. NGOs have Become a Telling New Force in Trade Policies

Now that the NGOs have learnt how to link trade and other causes in the public mind, they are having an increasing impact at the national level in trade policy making. Environmental and development lobbies are, quite reasonably, seeking to ensure either that trade policies do not cut across their own interests or that those interests are reinforced by using trade policy tools, notably the WTO rules. Moreover, NGO involvement does not stop with political opinion forming; increasingly governments are involving the more responsible NGOs in policy formation. Interestingly, it is to NGOs that many governments in the poorest countries, particularly in Africa, turn in establishing negotiating positions for the WTO. After all, it is such groups that have often invested most locally, in terms of people, expertise and commitment, to poverty reduction, rural development and so on. Understandably they have local credibility. Whether the advice they offer is appropriate to the countries concerned is another matter.

However, once again these are interests that cannot be ignored. Some NGOs have many thousands of members in the countries where they exercise influence at policy-making levels. It is not appropriate to see them, in the manner they often promote themselves, as representing the views of "civil society". In democracies, governments have the obligation to adequately reflect the needs of society as a whole. Yet NGOs do represent strands of coherent public opinion that need to be heard. The recent efforts of the European Commission to establish a workable dialogue with NGOs is an admirable example of what can be done. The United States is also broadening its consultative processes. These are far from the only examples.

G. What Happened to the Voice of Labor?

The success of the environmental and development lobbies appears to have been partly at the cost of two longer standing interest groups, labor and consumers. Labor unions still have influence, of course. In rich nations as well as poor, the highly unionized areas of the economy tend often to be precisely in the sectors which are struggling with international competition. Among them, steel, automobiles and farming stand out. In recent years, public service unions have also become active in the trade field, largely because of misplaced and exaggerated concerns that the GATS agreement was designed to force the privatization and deregulation of health, education, water and other public services. The campaign, however misdirected, has generated a further battalion of anti-WTO, anti-globalization critics in the ranks of organized labor.

However, the labor movement has continued to juggle its domestic interests, in regularly seeking protection for industries in competitive difficulties, with its wider concern for the conditions and rights of workers around the world. These are contradictory interests, of course, and lead to the appearance, at least, of a degree of hypocrisy. They have also led to a twenty-year long campaign—which straddled the entire Uruguay Round and the early years of the WTO—to find an acceptable means of tying trade concessions to the observance of internationally recognized labor standards. Governments in the industrialized countries have shown varying degrees of sympathy. It was the United States that pushed hardest for work to be undertaken directly in the WTO, others contenting themselves with proposals for some sort of parallel process largely

focused on the International Labor Organization, the body responsible for the development of labor standards. Developing countries have held out successfully, and rightly, against the WTO route. They have seen the attempts to establish a formal trade-labor link as essentially motivated by protectionist ambitions no matter how hard its supporters have worked to suggest otherwise. Since the 2001 Doha ministerial meeting of the WTO, which failed to agree anything of substance on labor rights, the issue appears, for the moment, to be dead. Nevertheless, the labor lobby—particularly allied to other elements of the anti-globalization movement—will continue to be one that governments must keep in mind if a public consensus broadly in favor of open-markets is to be maintained.

H. Consumer Interests in Trade Appear to have Changed

The same ought to be true of the consumer interest lobby. After all, open markets and competition have long been correctly viewed as benefiting consumers of products and services—and particularly poor people. It is a simple concept, almost a matter of common sense: protecting under-performing industries may be politically seductive, but it is taxpayers and consumers who pay the price.

As "influencers" of political policy, consumer groups are a relatively new phenomenon. For many years they were a vocal lobby for free trade. The last decade or so, however, has seen a marked change. Now the tendency is to suggest that consumers have an interest in being protected from the rigors of market economics. Whether they like it or not, consumers have found their voices integrated into anti-WTO campaigns related to the environment, food safety, labor rights and development. Oddly, even in the poorest countries consumer groups appear to have forgotten that the most disadvantaged communities are precisely those which have most to gain from their governments encouraging competition among producers and suppliers. Such groups are pushing governments in the opposite direction. The countervailing force to producer interests that used to be, and ought to be, provided by consumer organizations is less and less evident.

I. How to Ensure the Interests of all Trade Stakeholders are Heard

Given all these conflicting sources of pressure on policy-makers, it is tempting to conclude that trade officials and ministers ought to feel safe in making decisions on an objective basis, in the national interest. For, surely, in the arena of public, media and political opinion the disparate interests must largely cancel each other out. Sadly, national politics in most countries are not like that. Votes hang on the very particular and immediate interests of narrow constituencies, not on generalized sentiment about the theory or value of free trade. Many trade experts have long argued that the best way out is for governments to conduct—or have conducted by independent authorities—trade policy audits which provide a clear account of the gains and losses from particular options. Some countries—Australia—for instance have introduced such systems. Others do it on an *ad hoc* and largely opportunistic basis; for instance, to calm activist lobbies like the environmental groups. Certainly, the complexity of reaching coherent trade policy decisions and formulating negotiating positions, especially given the higher profile of trade in the public consciousness, will argue increasingly in favor of credible, transparent and inclusive examination.

J. There are Now Still Wider Political Calculations to be Made

Yet trade policy in many capitals is something more than a question of juggling a collection of special interests, in one hand, an overall calculation of the national interest, in the other, and measuring the conclusion against WTO and other obligations. The era of raised public consciousness of the process we refer to as globalization has added a further dimension, at least for ministers if not necessarily for trade officials. This is not the place to discuss the nature of globalization or the validity of the concerns it raises. The question is merely whether the phenomenon is creating new complications in policy-making and in the work of the WTO.

In many capitals the answer has to be, yes. Even if much of the debate has been manipulated by interest groups, the media and, indeed, by political leaders, the issue needs to be taken seriously. The first problem is that too much is placed on the doorstep of globalization. Food safety crises, factory closures, climate change, poverty, child-labor, even international terrorism, are supposedly all a reflection of what is too frequently seen as an essentially malign phenomenon. The second problem is that it is trade policy—and especially the WTO—which is seen as the driving force behind globalization. That is the widely held perception; it matters little if it measures up to reality or where the real cause-effect relationships exist. Few political leaders have shown any willingness to wind down the globalization phobia.

Indeed, even faced with the most outrageous and violent outbursts by anti-globalization activists at major international meetings, few politicians have spoken out firmly on the underlying issues, only on the behavior of demonstrators. The impression—and indeed it has been said explicitly—is that despite their excesses, the activists must have a point and the point ought to be taken into account in international negotiations or domestic policy-making. I would not imply that this is an entirely wrong-headed stance to adopt—it may make sense both politically and substantively—but it certainly adds a major new layer of complication in policymaking. Let me take just a few examples.

One response to activist pressure is the concept of "sharing the benefits" of globalization. It is a notion that has appeared in various communiqués from major international gatherings, and it is a politically attractive one. Most political leaders understand that globalization is here to stay and is the underpinning of much of the world's evolving wealth. But surely the advantages it brings could be better managed; it ought to be the answer to poverty, disease and even military conflict. So the reaction must be to put the international institutions to work to correct the imbalance, starting with the World Trade Organization. The intention is, of course, faultless (if genuine); but the problem is that neither the WTO nor any other of the current global institutions is designed for such a task. The danger—and it is actual rather than potential—is that trade negotiations which traditionally operate on a rather self-interested basis are being sidetracked away from their core business. Instead of creating conditions in which global trade will grow and, as has generally been the case in the past, benefit all those who wish to participate as open economies in the global system, it is chasing the hare of equality—not of opportunity but of actual results. The result will be disappointment, more disillusionment with the system and more political discontent. Another headache for trade policy makers and negotiators. For the most part, the responses to poverty, and the imbalances in the impact of globalization, lie in a multitude of policy areas; some of which are the appropriate responsibility of international organizations, some of which must stay with governments.

Another facet of the globalization debate concerns citizens at the other end of the wealth scale. Somehow, goes the argument, we may be getting richer but the quality

of life is falling. As market barriers are lowered and the regulatory opportunities open to governments fall away, we are inundated with the entertainment values of foreign cultures, foreign food, unsafe food produced through genetic engineering or under poor hygienic conditions, a private sector culture we do not want and so on. The WTO has been accused of being an agent of forcibly reduced health and safety standards. It is sometimes blamed for peasant farmers leaving their alpine meadows. Little if any of this is even remotely true, yet it is widely believed and, again, undermines the policy-making environment and the opportunities of using the WTO for positive and worthwhile ends. At the very least, politicians judge that there is a malaise among ordinary citizens faced with the demands and pressures of globalization; there is a degree of discomfort that needs to be recognized. That is probably a reasonable assumption; it is the policy responses that can be worrisome.

By the same token, political leaders, in the years since the WTO was founded, have also had to factor in lingering concerns about sovereignty. One of the biggest problems they face in poorer countries—and in some smaller advanced countries also—is that globalization removes some of the tools of government. In other words, they face a harsh choice. They can open up to the world and accept that they are no longer fully masters of their own future: many policies will be dictated by global economic realities, some by the WTO and other rule-based systems. Alternatively, they can remain wholly in protected command—but face a very gloomy future, locked out of the big game. It is certainly the case that the global economy brings benefits at the cost of a narrowing of policy choices. But it is precisely the WTO that returns a degree of self-determination to governments that have no negotiating leverage outside. Multilateralism is a tool of empowerment in an era of globalization; it prevents a return to the rule of the jungle where might is always right. Sadly, we still see political speeches arguing exactly the opposite: the WTO is to be feared; it robs countries of their sovereign rights.

All these are examples of the new politics of the global economy. They are all distortions and all make trade policy making that much more troublesome. Yet somehow the system must learn how to correct them or to live with them without losing direction and energy.

K. Geneva and the WTO—are they Equipped to Cope?

Given the complexity of the external policy-making environment, how does the WTO, as a negotiating and decision-making vehicle, measure up to the challenge? In purely structural terms, not much has really changed since the days when technocrats and customs experts ruled the roost in Geneva and nobody took too much notice of an institution whose impact appeared distant and sometimes irrelevant to citizens and even to business. In reality the work of the GATT was crucially important and the underpinning of three decades of impressive economic and trade growth. But the activities of the institution in Geneva were followed only intermittently in capitals and the manner of doing business attracted still less attention.

Yet the essential balance was much as it is now, even if a much wider range of constituencies observes more closely and seeks to influence the WTO's operations. The interactions that effectively dominate the activities of the organization are those between governments in capitals, their delegations and ambassadors in Geneva, and the WTO Secretariat. Since the launch of the WTO in 1995 there has probably been less attention paid to these interactions and relationships—and their intersection with other

constituencies—than was warranted. Are they, in fact, appropriate for the job of managing global trade policies?

L. WTO Delegations have Widely Differing Relationships to their Capitals

Up to now we have focused largely on the policy-making processes in capitals. How are these translated into action in Geneva by the delegations of WTO Members? Naturally there is a wide variation. At one end of the spectrum, the Geneva delegations of the European Union—the Commission, Council and Member States—are tightly bound to the machinery of Brussels and to well-informed trade departments and closely involved ministers in capitals. Co-ordination of EU positions takes place regularly in the Commission headquarters in Geneva and it is Commission officials, almost uniquely, who speak for the European Union as a whole in the WTO bodies.

The United States has less of a challenge of co-ordination in Geneva but its representatives there are required to follow, very closely, briefs developed in Washington. Naturally, the Geneva office of the U.S. Trade Representative—which also houses officials from the Departments of Agriculture and Commerce—feeds its assessments of local sentiment and the negotiating positions of other players into the Washington mix. Nevertheless, the room for maneuver for U.S. delegates in Geneva is limited.

The capitals of other industrial countries and the more advanced developing nations have the necessary capacity and expertise to guide, if not always dictate, the positions taken by their delegates to the WTO nations. Yet, few of the very large number of poorer WTO members—developing and transition economies—have that ability. Some such countries do not even have permanent missions in Geneva. Others may have an office of one or two people to service the vast number of processes in the WTO. More importantly they may have no one back in their capitals capable of providing solid guidance or even monitoring some of the crucially important issues in the WTO court. In turn, there may be nobody to maintain the interest or ensure the engagement of ministers in the long periods between WTO ministerial conferences. Indeed, it has not been unheard of for governments to be pursuing significant programs of economic liberalization domestically while their representatives pursue quite different—and sometimes apparently contradictory—positions in Geneva. This lack of capacity has been extremely concerning; it is the reason that much attention is now directed at technical assistance activities, notably in the context of the Doha Round.

Of course, few delegations operate in isolation in Geneva. Certain regional groups, like those covering Africa, ASEAN and South and Central America, meet regularly to co-ordinate positions. Other active alliances include the group of 49 least-developed countries and the Cairns Group of agricultural exporters. The "Quad"—the United States, European Union, Canada and Japan—used to be very active but has diminished in importance, with the two main transatlantic powers tending to do most of the running together. So long as these and other groups do not dig themselves too deeply into unsustainable positions their capacity to co-ordinate can and does help expedite efficient business in the WTO.

M. A Changing Role for the WTO Secretariat

So where does the WTO Secretariat fit in? The 500-strong Secretariat includes, apart from its heavy contingent of translators, document printers, interpreters and other services, a series of expert divisions designed to support the work of specific delegate bodies. It is the

"institutional memory" of the organization, equipped to provide the analytical and legal backup to negotiations, the settlement of disputes and other activities. But its role does seem to have changed. In recent years, delegations have emphasized that the WTO is a "member-driven" organization. That is clearly the case: all substantive decision-making powers are in the hands of governments, as Members. At the same time, governments—certainly throughout the history of the GATT and I see no reason why it should be less the case now—have tended to need an "honest broker" or a facilitator of consensus. They also appreciated the value of what was sometimes referred to as a "brotherhood" of people whose allegiance was to the principles and rules of the multilateral trading system rather than to any passing policy fad or special interest. These were the roles of the Secretariat and, especially, its Director-General. That the Secretariat is now seen only in a support position—with little or no scope for taking initiatives—is unfortunate, but in part reflects the far greater political sensitivities of trade policymaking in the era of anti-globalization sentiment.

It may also be the case that governments see the assertion of their own roles—and the downplaying of the Secretariat's influence—as an element in the public perception of the institution's accountability and legitimacy. In other words, as we have already seen, the issues with which the WTO now deals are complex and sensitive; too sensitive for there to be even the appearance of an unelected, secretive bureaucracy in control. The price to pay may be a meandering, inefficient process, often lacking direction. However, it may be a necessary price if governments are to generate, or hang on, to sufficient public support for gradually edging the system forward rather than seeing it collapse in disrepute.

If such a view were correct then it would be logical to examine the working methods of the institution to see if there are opportunities for improving efficiency while not diminishing legitimacy. Much attention has focused on the processes of consultation that inevitably precedes formal decisions in delegate bodies. It is sometimes suggested that consultations in the old GATT were less than inclusive, especially for many developing countries. While it was certainly the case that limited consultations often were confined to countries with direct trade interests in the issues under discussion, it was always understood that all other delegations needed to be kept informed either directly or through their regional groups. Certainly, nothing was ever agreed without an opportunity for further consideration in the formal delegate bodies concerned.

N. New Mechanisms to Broaden Debate and Increase Efficiency

At the same time it is easy to understand that times have changed. Certainly there are now many more WTO delegations able and willing to play active roles in the organization. As important, it is evident that given the high profile of the institution and the potential impact of much of its work, few trade diplomats can run the risk that they are excluded from any meaningful process or negotiation in Geneva. Hence the challenge of marrying efficiency with inclusiveness and legitimacy. That challenge may require organizational change. One proposal is to put in place a management board to deal with routine matters. Just as necessary, however, is some means of introducing the broader aspects of national debates on trade policy, to which I have already referred, to the Geneva process. Debate as of now tends to be blinkered and fixated on the precise demands and disciplines of the WTO agreements. There is little opportunity—save, perhaps, the useful open symposia which have been introduced over several years—for WTO delegates to understand the wider contexts in which positions are formulated. In the GATT, there was a vehicle for

such a debate. The Consultative Group of 18 (ultimately there were about 24 participants) was perhaps too exclusive in its representation. But it served an important purpose, which is missing today. It also served to bring senior policy-makers from capitals to Geneva on a regular basis—something that is sorely lacking now.

There are other aspects of the Geneva process which will continue to attract attention, among them the issues of transparency and the involvement of non-governmental constituencies. The opening up of the WTO's work—and especially the release of its documents—has already gone a long way further than would have been imaginable even a decade ago. It is to be hoped however that rash decisions are not taken on the widening of active involvement from solely government representatives. This would be a slippery slope and would be neither in the interests of the fundamentals of the multilateral system nor of most of its participants. On that score, governments must safeguard the system however much they are bludgeoned by activists. A degree of opaqueness is bound to be associated with a negotiating machine. If governments want merely a talking machine, they will open it up fully to unrelenting and unmodulated public scrutiny.

O. Wider Intersections at the Multilateral Level

One final dimension remains in this patchwork of policy intersections and conflicts against which trade policy-making and WTO activities now take place: the regional and multilateral perspective.

Regional trade agreements are here to stay and we can expect them to continue their proliferation in the years to come. Countries like Japan, Singapore, Korea and India, that previously had shown no interest in anything but the multilateral trading system, are now active in seeking new bilateral and wider regional relationships. The EU will certainly continue to make its own bilateral links as will, for political purposes, the United States. A Free Trade Area of the Americas may come to pass someday, while regionalism in Africa will probably deepen as an alternative to complete integration into the global economy. I do not intend here to rehearse the arguments for and against this clear trend.

However, if regionalism is to grow it is even more important that the multilateral system is seen to work effectively both in its own right—and its capacity to deliver real trade benefits—and in its ability to oversee regional agreements as it is required to do under Article XXIV of GATT 1994. This latter obligation of the WTO is on the agenda of the current round of trade negotiations and it is to be hoped that a solid result will emerge. Until now, it cannot be pretended that the WTO has delivered effective oversight and discipline to any of the agreements it has been required to review. In almost every case, delegations have had to agree to disagree on Article XXIV consistency. That situation cannot be permitted to continue. All the more so since dubious and inconsistent regional agreements not only undermine the multilateral system, they impose a further level of complexity for policy makers. One day, perhaps, all free-trade agreements will be rolled into the WTO as a single zero-tariff commitment. That day is a long way off. Until then, the WTO and regional groups must co-exist productively.

A further multilateral complexity is the drive to push together the trade rules with a variety of global concerns overseen by other multilateral agencies. The environment, labor rights, human rights and poverty elimination are the best examples, each the territory of distinct United Nations bodies. We have already looked at these policy intersections at the national level. The tendency to associate the WTO closely with other agencies is understandable—indeed, it is an easy way to dampen the anti-trade instincts of the

activists—but potentially dangerous. The WTO is a very different kind of organization to those within the UN system—essentially because it is founded on a system of rights and obligations which are enforceable in its unique dispute-settlement system. Unfortunately there is a temptation to use the toughness of the trading system in fighting other causes—rather than seeing the efficiency and success of the trading system, in its own right, as one tool that ultimately will help provide the environment of economic growth in which such causes will succeed.

That is not to say that the WTO must live in a world apart from other global institutions. Crucially, the best way to deliver effective trade-related technical assistance to the developing and transition economies is through a joint effort among the economic and development organizations. Certainly the WTO does not have the capacity itself. Indeed, admirable efforts to co-ordinate such capacity building aid have been made in recent years. More needs to be done. Most immediately, work needs to be focused on generating the necessary numbers of skilled negotiators and policy-makers in the trade area. Other forms of capacity building—for instance, in customs service reform—are almost as urgent and should proceed hand-in-hand. However, without a solid base at the trade policy level, too many countries will continue to be ineffective in Geneva, and that is not an asset for the system, quite the contrary.

III. Conclusions

This chapter is not intended to be a rigorous analysis of trade policy making in the era of the World Trade Organization and globalization. I hope it does, however, demonstrate the extraordinary complexity in a policy field where most of the world's citizens rely on good sense prevailing. The WTO is an attempt to ensure that good sense does, generally, win out over conflicting political pressures and short-term narrow interests. Yet it is far from easy to make the system work with so many counter-currents.

At some point soon governments will need to consider far more carefully how they are to order and come to terms with the complexity. At present we are getting by, often more by luck than judgement. It would not be so difficult for something as dynamic as the anti-globalization campaign to overturn the apple cart. Structures within which a more balanced trade policy debate can take place will need to be put into place at the national level in many countries. At the same time the WTO will have to become a more worldly institution, able to provide its members with mechanisms in which wider policy concerns can be aired alongside the practical, detailed business of the day.

CHAPTER 3

THE DEMOCRATIC ROOTS OF THE WORLD TRADE ORGANIZATION

Mike Moore*

TABLE OF CONTENTS

I. Introduction 40
II. The Value of Consensus 43
III. Democracy and the WTO 45
IV. Conclusion 47

* Mike Moore was Director-General of the World Trade Organization from 1999 to 2002. He has served as New Zealand Minister of Overseas Trade and Marketing (1984–1990), Minister of Foreign Affairs (1990), Deputy Minister of Finance (1988–1990) and Prime Minister (1990).

I. Introduction

The claim that the World Trade Organization is "undemocratic" starts from a basic fallacy. The WTO is not imposed on countries. Countries choose to belong to the WTO. No one is told to join. No one is forced to sign our agreements. Each and every one of the WTO's rules is negotiated by Member governments, agreed by consensus, and ratified by parliaments. Countries choose to participate in an open, rules-based multilateral trading system for the simple reason that it is overwhelmingly in their interest to do so. The alternative is a less open, less prosperous, more uncertain world economy—an option few countries would willingly choose. It is difficult to conceive of a system that could be more democratic.

This explains the multilateral trading system's remarkable expansion, and why so many countries are queuing up to join. It began with just 23 Members in 1947. The WTO now has nearly 150 Members—including, recently, China and Chinese Taipei—and this number could easily reach 170 or more within a decade. This also explains why Members have repeatedly agreed to widen and deepen the system's body of rules. The multilateral trading system was initially concerned mainly with trade in goods, and it was based not on a permanent organization but on a provisional treaty, the General Agreement on Tariffs and Trade ("GATT"). By the end of the Uruguay Round in 1994, the system contained sweeping new rules for services, intellectual property, subsidies, textiles, and agriculture. It was also established on a firm institutional foundation, the new WTO, with a strengthened mechanism for settling disputes. Nor is there any sign that the system has stopped moving forward. In the most recent Round, launched in Doha in November 2001, governments agreed to expand the scope of existing agreements in key areas such as industrial goods, agriculture, and services and to try to build a framework of rules on issues of investment, competition policy, government procurement, and trade facilitation, although the first three of these were dropped from the agenda at a General Council meeting held in Geneva in July 2004 (*see* WT/L/579, August 1, 2004). No other international body oversees rules that extend so widely around the world, or so deeply into the fabric of economies. Yet at the same time, no other body is as directly run by Member governments, or as firmly rooted in consensus decision-making and collective rule. The multilateral trading system works precisely because it is based on persuasion, not coercion—rules, not force.

Two fundamental principles underpin the equal rights of WTO members. One is the principle of non-discrimination. The WTO treats all Members alike, be they rich or poor, big or small, strong or weak. The same rules apply to everyone, even the world's largest and most powerful economies. Central among these rules is the "most-favored-nation" obligation—which prevents WTO Members from discriminating between foreign goods, or treating products from one WTO Member better than those from another[1]—and the "national treatment" rule—which obliges governments to treat foreign- and

[1] The most-favored-nation ("MFN") obligation is embodied in Article I of the GATT, Article II of the General Agreement on Trade in Services ("GATS"), and Article 4 of the TRIPs Agreement. Some exceptions are allowed to MFN. For example, under GATT Article XXII countries within a region can set up a free trade agreement that does not apply to goods from outside the group. Or a country can raise barriers against products from specific countries that are considered to be traded unfairly. And in services, countries are allowed, in limited circumstances to discriminate. But the agreement only permits these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners—whether rich or poor, strong or weak.

domestically-produced products equally.[2] Non-discrimination has been key to the multilateral trading system's success. Preferential trade blocs and alliances, by definition, exclude and marginalize non-member countries. This not only hurts the countries themselves, but can be harmful for the system as a whole. It is widely accepted that competition and conflict amongst trade blocs in the inter-war years was a major cause of global instability—paving the way for a descending spiral of tit-for-tat protectionism, economic depression and ultimately world war. The multilateral trading system—based on a uniform set of international rules under which all countries are treated equally—was designed precisely to avoid a world of inward-looking trade blocs and self-destructive factionalism. From a national perspective, the principle of non-discrimination has also allowed countries to liberalize their economies and integrate into the world trading system at their own pace. MFN and National Treatment do not demand "harmonization" towards universal norms or rules. On the contrary, these rules were designed precisely to allow countries to maintain their own policy "space", to set their own standards and priorities, so long as all economic actors—foreign and domestic—were treated equally. Non-discrimination has provided the essential underpinning for the huge expansion of global trade over the past half century, and for the broad political consensus to move the system forward into new sectors and wider responsibilities. Non-discrimination has also enshrined universality as a central objective of the trading system. It is certainly one major reason why the GATT/WTO system has emerged, especially after the Cold War, as a major force for integrating developing and transition countries into the world economy.

Equally central to the multilateral trading system is the principle of consensus decision-making. Unlike other international agencies, the WTO has no executive body with delegated authority to take decisions on behalf of member governments. With a few limited exceptions, there are no provisions for majority or "weighted" voting.[3] And the small WTO Secretariat has only limited independent authority and initiative-taking rights, but no grants or loans to hand out, no licenses to issue, and no influence over individual countries' policies (although technical advice is offered, and some analytical comments are provided in regular trade policy reviews). In short, the WTO does not tell governments what to do. Governments tell the WTO. All decisions—from the creation of the GATT to last year's launch of the Doha Development Agenda—have been taken collectively by the member governments themselves.[4] Each WTO member has equal rights and an equal

[2] The national treatment obligation does not prevent countries from imposing tariffs (on an MFN basis, and not higher than maximum levels bound in tariff schedules) and applies long after goods have been cleared from customs. However, it is applied slightly differently in different WTO agreements. For example, under the GATS the obligation is not unconditional and exceptions to the national treatment principle can be written into country schedules. Special and differential treatment for developing countries in the form of tariff preferences is also allowed, as are preferences extended to countries which are part of regional trade agreements.

[3] Where consensus is not possible, the WTO agreement allows for voting (a vote being on the basis of "one country one vote") in the following four limited situations: (1) An interpretation of any of the multilateral trade agreements can be adopted by a majority of three-quarters of WTO Members; (2) The Ministerial Conference can waive an obligation imposed on a particular member by a multilateral agreement, also through a three-quarters majority; (3) Decisions to amend provisions of the multilateral agreements can be adopted through approval either by all members or by a two-thirds majority depending on the nature of the provision concerned, but the amendments only take effect for those WTO members which accept them; (4) A decision to admit a new member is taken by a two-thirds majority in the Ministerial Conference, or the General Council in between conferences.

[4] Members make decisions through numerous councils and committees, whose membership consists of all WTO members. Topmost is the ministerial conference, which has to meet at least once every two years.

vote under the agreements. Because no decision is taken unless all member governments agree, effectively every country—from the largest to the smallest—has the power of veto. Even the enforcement of rules is undertaken by the members themselves under agreed procedures that they negotiated. Sometimes enforcement includes the threat of sanctions. But those sanctions are imposed by Members not by the organization.

This is not to say that the day-to-day workings of the WTO are perfect. Far from it. One problem is that the system continues to rely on major new negotiating rounds—and "package" deals—to create new rules or to clarify existing ones.[5] This means that reforms to the system occur episodically and infrequently. Seven years elapsed between the end of the Tokyo Round and the beginning of the Uruguay Round; eight years between the Uruguay Round's completion and the launch of the Doha Development Agenda in November 2001. And the Uruguay Round itself spanned eight years from beginning to end. One reason for the successful launch of the Doha Development Round was a series of important reforms to WTO decision-making processes since the failed launch of negotiations at the Seattle Ministerial in 1999. In Geneva, thousand of hours were spent in plenary discussions and in meetings of heads of delegations. Every issue and every national position had been fully aired and explored before Doha. At the Conference itself, every effort was made to keep ministers and delegations fully involved in the negotiations. When more limited—or "Green Room"—meetings were held they typically involved more and a wider representation of countries than the whole of the original GATT. The transparency and inclusiveness—which is to say the "legitimacy"—of the process helps to explain why member governments were more prepared and more willing to reach agreement.

Another challenge is that not all governments are equipped to participate in WTO processes as effectively as they would like—certain least-developed countries cannot even afford to maintain offices in Geneva. The scope, complexity and value of the WTO's legal system continues to expand. Much of the controversy about implementation of Uruguay Round commitments stemmed from the human and resource constraints faced by developing countries in adapting legislation to new obligations and building the infrastructure needed to implement them. These constraints should concern every member, not just the countries subject to them. As the WTO embarks on new negotiations and rule-making as a result of Doha—and as its membership continues to widen—the system's future success will hinge directly on the ability of all Members to participate more fully in the process and to feel ownership of the outcome. That is why an increasingly important function of the WTO is technical assistance and capacity building—helping transitional, developing and least-developed countries to integrate into the multilateral trading system and to participate fully in negotiations. The WTO Secretariat has embarked on a range of new programs to explain how the system works and how Members can meet their obligations and maximize benefits under the system, and also to help train government officials and negotiators. One key objective, as a result of Doha, is to empower officials to better identify their negotiating objectives and to analyze the many proposals that will be forthcoming from other partners.[6] Many of these activities are organized jointly with

Since 1994, ministers have met in Singapore (1996), Switzerland (1998), the United States (1999), Qatar (2001) and Mexico (2003).

[5] One rationale for the creation of the WTO was to put an end to rounds by creating a permanent forum for negotiations, but so far this promise has not been realized.

[6] Members have approved an increased WTO Secretariat budget to assist in this work. They have also established the Doha Development Agenda Global Trust Fund to provide secure and predictable resources to build capacity.

other international organizations, as a way of achieving a more "coherent" approach to global economy policy-making and development.

Another goal is to help member-governments make better use of dispute settlement. The WTO has expanded the rules of international trade manifold compared to the GATT, and has created a new dispute settlement system—a "world trade court"—with a possibility of appeal. Legal advice in trade matters is expensive, thus creating potential problems of access to justice for developing countries. To help redress this imbalance the Advisory Center for WTO Law was opened in October, 2001. It marks the start of a true legal aid center on an international scale. Individuals appearing as defendants before War Crimes Tribunals have always been able to call upon *pro bono* legal aid. The International Court of Justice has a small fund out of which costs of legal assistance can be paid for countries who need such help. But the Advisory Center for WTO Law marks the first time that a true legal aid center has been established within the international legal system, with a view to combating the unequal possibilities of access to international justice as between states.

The fact remains that the multilateral trading system—for all its imperfections—gives even the smallest and poorest countries far greater leverage and security than they would ever have outside the system. Multilateral negotiations allow weaker countries to pool their collective influence and interests—as opposed to bilateral or even regional negotiations in which they have virtually no negotiating clout. In the same way, a system which replaces the role of "power" in international trade relations with the rule of "law" is invariably to the advantage to the smallest and weakest countries. The alternative is no rules and no impartial dispute settlement—a world where commercial relations are based on economic and political power alone, where small countries are at the mercy of the largest.

The fact that there has been a "flood" of cases brought by both developed and developing countries to the WTO's dispute settlement system—more than 300 cases in less than ten years—clearly demonstrates the faith that members place in the system.[7] The majority of disputes notified to the WTO have been resolved "out of court", without recourse to the full adjudication process. And almost all those countries that have been the subject of an adverse decision have voluntarily implemented the recommendations without the need for enforcement measures. Threats of unilateral measures by the major industrialized countries that undermined confidence in the trading system in the 1980s have virtually disappeared. The WTO system has successfully resolved disputes between the largest economies, involving billions of dollars of trade, without bilateral conflict and without drawn-out processes that could prolong uncertainty for the commercial interests affected. All of this, in turn, has facilitated the huge expansion of world trade in the 1990s—by an average of five per cent a year for industrialized countries, and a remarkable ten per cent a year for developing countries.

II. The Value of Consensus

It is an article of faith among opponents of the WTO that the system is "undemocratic". The irony is that many of the things they do not like about the WTO stem from too much democracy, not too little. They want the WTO to force open markets, preserve union

[7] As of October, 2003, developing countries, as a group, had initiated 109 of the 302 disputes (70 against developed countries; 45 against developing countries). Brazil, India, Mexico and Thailand were the most active.

jobs, strengthen labor standards, protect animal rights, preserve the environment, watch over indigenous people, save the developing world from capitalism, and a lengthening list of other goals—even when these goals are resisted by sovereign countries. They grasp that the dispute settlement system, and its threat of trade sanctions, gives the WTO unique power to impose policies on recalcitrant governments—if only the WTO could be made to exercise those powers. In a muddled way, the argument is that the WTO is too "democratic". Many who say the WTO is too powerful, in fact want it to take on wider powers.

Some argue that consensus rule-making should be reconsidered because reaching agreement among nearly 150 governments is simply too slow, cumbersome, "bureaucratic". Since every Member effectively has a veto, it is claimed that the WTO can only move at the speed of its slowest or most obstinate member—which is too slow for a fast-globalizing world. Still others suggest that the issues now facing the WTO are too complex to be effectively debated and decided upon by all of its member governments acting as a "committee of the whole". As one trade expert puts it, "mass membership simply does not lend itself to operational efficiency or serious policy discussion".[8] This is why proposals for the creation of a smaller executive body—like the World Bank's Development Committee or even the UN's Security Council—are heard from time to time. But the more fundamental argument is political. The fact is that on certain issues international consensus simply *does not exist.* The rationale for circumventing consensus—through executive powers, weighted voting, trade sanctions—is basically that objectives which cannot be reached through persuasion should be reached through coercion. Of course, the consensus principle can sometimes be taken to unproductive extremes. When a national interest is involved that is fine. However, it does not always work so well in micro or practical "housekeeping issues" which are not of national interest, such as who is to speak at a seminar, but which are used as leverage by some representatives to get attention elsewhere.

The notion that consensus can—and should—be overruled on basic policy questions is easily the most dangerous idea confronting the WTO. Leave aside for a moment the obvious fact that the WTO has no policy expertise or competence in these areas.[9] The WTO has an ambitious enough mandate without making it a substitute for the whole of the international system. The more fundamental objection is that imposing policies on unwilling Members is "undemocratic". Who determines "correct" standards? What gives the WTO the right to act as judge, jury, and police over sovereign governments? Only governments can decide that. And what makes us think that coercion and threats can produce lasting solutions? Not only are we asking the multilateral trading system to perform a role which runs contrary to its basic principles, but worse, coercion is the surest way of poisoning the spirit of international cooperation that is so desperately needed to begin building a consensus around broader global solutions. Unilateralism will not convince any country of the rationale or validity of the objectives which another asserts. Nor will trade sanctions serve as a wake up call to bring public opinion on board. Coercion is a sign of weakness not strength. It reflects a basic lack of confidence that one's ideas or values can be freely shared and embraced by others.

[8] Jeffrey J. Schott, Institute for International Economics, Washington, quoted in WTO, *Trading into the Future* (April, 1999), at 63.

[9] As UN Secretary General Kofi Annan has argued, "attempting to use the multilateral trading system to solve problems in these and other areas would place it under great strain, and would be much less effective than adopting policy solutions in the sectors themselves". Opening Statement by Kofi Annan, Secretary General of the United Nations, to the 1998 ECOSOC meeting.

The WTO system is the result—not the cause—of a broadening consensus about the value of open trade, painstakingly built up over fifty years. If its success proves anything, it is that persuasion, not coercion, is the key to international cooperation and peace. What is most striking about the multilateral trading system is not how often agreement has eluded countries, but how often difficult and seemingly intractable agreements have been struck. The "death of the GATT" has been announced too many times to count, yet eight major rounds of negotiations have been successfully completed, and a ninth, arguably the most ambitious, is now underway. Meanwhile international institutions with "powerful" executives and more "efficient" systems of voting have often proven less successful than the WTO in advancing global cooperation.

There are several reasons for this. The most important is that consensus decision-making gives all Members—rich and poor, big and small, developed and developing—"ownership" of the system: its decisions, its rules, its rights and its obligations. The effectiveness of the WTO depends fundamentally on its legitimacy, on the willingness of its member governments to abide by its rules and rulings. A precondition for this willingness to be "bound" by the WTO is participation in the negotiation of the rules—as well as the right, in the end, to withhold agreement. What the consensus rule embodies is the fundamental notion that countries should have a say in the making of treaties that will bind them. It is about the right to sovereignty, free choice, self-government—in other words "democracy" in its most basic sense.

III. Democracy and the WTO

There is no meaningful "democratic deficit" in the WTO unless one takes the position that governments do not legitimately represent their citizens and their interests. Some argue just that. Many NGOs claim a right of direct participation, alongside governments, in the decisions of the WTO and other international bodies. Some even propose a new "democratic" international order in which NGOs would offer an alternative form of representation in competition with governments.[10] Others go further still. They would have us treat the world as if it were a nation state writ large. There would be world elections to a world parliament and even a world government—exercising the kind of sovereign powers now reserved for nations states. Every citizen—not just every nation—could have a vote. This is not a new idea. Generations of idealists have dreamed of Alfred Lord Tennyson's "Parliament of Man".

Dream on. The international community is manifestly not ready for world government. Hopefully it never will be. Anyway, it is not going to happen. Who are "we the people" in a world where pride in culture and nation is so strong, and where shared global identity is so weak? Who represents a world electorate? Does anyone really believe that a body politic exists at the global level with a strong enough sense of community that it could legitimize decisions and the exercise of power based on world majority option? It does not exist. The philosopher Leo Strauss predicted that the "universal and homogenous state" would be a tyranny. Too many countries, cultures, and peoples would see world government as just that—a thinly veiled disguise for imperialism, neo-colonialism, more a tyranny than a democracy.

Nation-states remain the only viable foundations for democracy in a globalizing world. Political scientists Robert Keohane and Joseph S. Nye make the point that:

[10] CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY 4 (2001).

> International institutions lack the key features that make democracy possible, and that, in democracies, facilitates accountability: an acknowledged public, operating within a political community in which there is a general consensus on what makes public decisions legitimate . . . . Most meaningful voting and associated democratic political activities occur within the boundaries of national states that have democratic constitutions and processes. Minorities are willing to acquiesce to a majority in which the may not participate directly because they feel they participate in some larger community. This is absent at the global level . . . .[11]

Martin Wolf goes further. He argues that globalization and the growing need to manage interdependence through bodies like the WTO, far from weakening nation-states, actually make them more important: "The ability of society to take advantage of the opportunities offered by international economic integration depends on the quality of public goods, such as property rights, an honest civil service, personal security, and basic education".[12] The success of international governance rests on the ability of individual states to provide stability and to articulate shared goals.

It may be convenient to blame the WTO for a lack of democracy. But democratic accountability rests with governments and governments alone. If WTO negotiations are shrouded in too much secrecy, or if citizens are left in the dark, or if certain Ministers only listen to "big business" and national elites, then it is a failure of governments—and their obligation to represent all their citizens' interests—not a failure of the WTO.[13] Democracy, like charity, begins at home. There are many ways that governments could improve their accountability in the WTO—so people can judge whether their government is carrying out its mandate in Geneva, and to improve the connection between votes and issues that are of growing concern to them. For a start, they could do much more to educate people about the WTO and its activities. They could also develop better procedures for informing parliaments and voters about their ongoing work at the WTO—including through mandated parliamentary reviews and periodic testimonials. More might be done to involve members of parliament, congressmen, and legislators in the WTO's work, by including more elected officials in delegations. Parliamentarians could, if given the opportunity, assist governments to bridge the gap between the WTO and voters by holding public hearings and better engaging the public at home in the creation and implementation of policy. Indeed, parliamentarians already play a very important part in the WTO as they are charged with the responsibility of ratifying our agreements. In this regard, we have advanced new ways of involving Parliamentarians, in seminars, through publications, etc.

Finally, governments could work with each other to negotiate new rules and guidelines to make the WTO's processes more "transparent". Much could be done to derestrict WTO documents (and perhaps the arguments and reasoning that shape their formation) when the information does not compromise business or government confidentiality. There is also growing pressure to open up the Trade Policy Review process and even the dispute settlement panels and appeals body. After all, few national courts can afford to operate behind closed doors—it is neither lawful nor useful in terms of preserving legitimacy and public support.

However, these issues—like all issues before the WTO—are for member governments to decide. The WTO's External Relations Division can promote dialogue and

[11] Robert O. Keohane and Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy*, quoted in BARFIELD, *supra* note 10, at 100.

[12] Martin Wolf, *Will the Nation States Survive Globalization?*, 80 FOREIGN AFFAIRS 178, 189 (January/February 2001).

[13] Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization,* 17(1) UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW 331 (1996).

information sharing with civil society. Organizing conferences and symposia, where NGOs are invited to discuss and debate a range of trade-related issues, is also a growing feature of the Secretariat's work. And hundreds of NGOs are accredited to the WTO ministerial conferences, based on guidelines set out by the General Council. Meanwhile many governments already conduct open and wide ranging national-level consultations on trade policy, including reflecting NGO views in their policy positions and involving NGOs in their delegations. But all of this is undertaken by individual governments because they choose to do so, and because their voters demand it. Nothing in the WTO agreements tells governments how to undertake relations with their citizens, consult on trade policy, or prepare for negotiations. Member governments have repeatedly re-affirmed that they, and they alone, are responsible for dialogue with their citizens, and for determining how best to represent the interests of their countries. This is of course exactly as it should be in a rules-based, member-driven organization such as the WTO. As Martin Wolf has argued:

> A civilized society is one in which the state alone has a monopoly power of coercive power, exercised under law, by a government responsible to the electorate as a whole. To grant *any* private interests a direct voice in negotiations over how coercion is to be applied is fundamentally subversive to constitutional democracy . . . . Only elected governments can be properly responsible for the making of law, domestically and internationally.[14]

IV. Conclusion

The WTO is at the center of the debate about democracy because of its successes, not its failings. More and more countries want to participate. More and more people recognize that the WTO matters. More actors—businesses, unions, church groups, environmentalists, development NGOs—want the multilateral system to reflect their causes and their concerns. The WTO is not a "global government"; but it *is* a key forum where governments cooperate globally. It is not a "world democracy"—in the sense of being a government of the world's people—but it *is* the most democratic international body in existence today. It provides an answer to perhaps the central political question of our time—how to manage a globalizing world when democracy remains rooted in the nation-state? In a way, the WTO—together with an expanding web of other global treaties and agreements—is more interesting than a new layer of government. From trade to the environment, human rights to war crimes, the world is moving towards rules, not power, persuasion, not coercion—a world of mutual respect, rights, and freedoms.

This looks like a brave new world, but its root can be traced back over half a century. The generation that emerged from the devastation of the Second World War pledged "never again". They dreamed of creating a new kind of global order based on common and universal values—of law, cooperation, shared prosperity and individual rights. They launched the Marshall Plan, where for the first time in modern history the victors rebuilt their former enemies—the opposite of what had happened under the ill-fated Treaty of Versailles. They created a constellation of international institutions that, a half century later, are the bedrock of our global order today: the UN, the IMF, the World Bank, and the GATT, and now the WTO.[15] This system was the embodiment of a revolutionary

[14] Martin Wolf, *Uncivil Society: The Ill-Fated Multilateral Agreement on Investment Shows the Need to Confront the Claims of Pressure Groups Hostile to Globalisation*, FINANCIAL TIMES, September 1, 1999, at 14.

[15] This new international architecture was initially intended to comprise an International Trade Organization ("ITO") as well as the UN and the Bretton Woods institutions. The first discussion on the proposed ITO took place at the 1946 United Nations Conference on Trade and Employment, and a year and a half later, in Havana, a draft charter finally emerged. In the end neither the Havana Charter for the ITO even came

idea: That freedom—free democracies, free markets, the free co-existence of nations and peoples—was the surest guarantee of peace. And that a free world could, in turn, only be built on the foundations of the international rule of law.

It is sometimes easy to forget—when even the Cold War is a fading memory—how spectacularly successful that idea has been. UNDP reminds us that poverty has been reduced more in the past fifty years than in the previous five hundred.[16] Life expectancy in the developing world has risen by over twenty years, and living standards by 190 per cent. Literacy is up 34 percent in China, 33 percent in India, 39 percent in Sub-Saharan Africa, and 41 percent in North Africa. In the first half of the twentieth century, there were but a handful of democracies, and the future seemed a contest between the twin totalitarianisms of fascism and communism. By the century's end, 120 of the 192 governments in the world were electoral democracies.[17] Never before in human history have so many people enjoyed the freedom of the market-place and the ballot box. As Pope John Paul II eloquently observed in his 50th anniversary address to the UN:

> On the threshold of a new millennium we are witnessing an extraordinary global acceleration of that quest for freedom which is one of the great dynamics of human history. This phenomenon is not limited to any one part of the world; nor is it the expression of any single culture. Men and women throughout the world, even when threatened with violence, have taken the risk of freedom, asking to be given a place in social, political, and economic life which is commensurate with their dignity as free human beings. This universal longing for freedom is truly one of the distinguishing marks of our time.[18]

The existing system of international rules is not alone responsible for this world-wide march of freedom. But the promise of a "free world" would be inconceivable without it.

The debate about democracy and the international system is to be welcomed. Encouraged. This is particularly true at a time when government cannot ensure clean air, and a clean environment, run an airline, organize a tax system, attack organized crime, solve the plagues of our age—AIDS, poverty, genocide—without the cooperation of other governments and international institutions. The threat to democracy is not debate, but silence, complacency, the indifference and ennui that comes with familiarity. The Russian novelists had a word for it, "ostranonie"—defamilialization. The value of the protests in Seattle, Prague, Washington, and Genoa is that they have wakened us from our complacency and ignited a much needed debate. They have forced the world to look anew at fifty year-old institutions, not only to examine what might be wrong, but to remind what is right—and what is enduring. A measure of civilized society is how it manages its differences. Is it by the rule of law or by force? By that measure the WTO has a lot to be proud of. With all its imperfections, the world would be a more dangerous, less democratic place without the WTO. It is worth defending.

into being, largely because the U.S. Congress did not approve the agreement. In the meantime, as part of the preparatory work for the ITO, a handful of governments had been negotiating a General Agreement on Tariffs and Trade, the GATT, in order to operationalize the results of tariff negotiations before the ITO came into being. With the failure of the ITO, the GATT lived on, with less than fully developed legal status, to provide the basis for the conduct of international trade relations until the creation of the WTO in 1994. It is an irony of post-war history that the institution that began on the weakest footing has emerged as arguably the strongest pillar of a rules-based global system.

[16] UNDP, HUMAN DEVELOPMENT REPORT at 2 (1997).

[17] World Democracy Forum (2001).

[18] Speech by John Paul II to the 50th Anniversary Celebration of the United Nations.

Part II The Legal Framework of the World Trade Organization

A. Institutional Issues

CHAPTER 4

INSTITUTIONAL FRAMEWORK

William J. Davey*

TABLE OF CONTENTS

I. GATT and Its Institutional Inadequacies 53
A. GATT and the ITO 53
B. ICITO as the Legal Entity 54
C. Pragmatic Adaptation and Its Limitations 54
II. Uruguay Round Negotiations on Institutional Issues 55
A. The "FOGS" Group 55
B. Proposals for a New Institution 56
III. The Marrakech Agreement Establishing the World Trade Organization 56
A. Establishment and Scope of the World Trade Organization 56
B. The Functions of the WTO 57
1. Negotiations 57
2. Dispute Settlement 58
3. Trade Policy Review 58
4. Coherence in Global Economic Policymaking 59
C. The Governance Structure of the WTO 60
1. Ministerial Conference 60
2. General Council 63
3. Sectoral Councils and Subsidiary Bodies 64
4. WTO Committees 64
5. Meetings 67
6. Organization of Negotiations 67
D. Decision-Making in the WTO 67
1. General Rules and Practice (Consensus and Voting) 67
2. Interpretations 68
3. Waivers 69
4. Amendments 70
5. Accessions 70
E. Organizational Issues 71
1. WTO Secretariat 71
2. Status of the WTO 71
3. WTO Relations with Intergovernmental and Nongovernmental Organizations 72

* Edwin M. Adams Professor of Law, University of Illinois; Former Director, WTO Legal Affairs Division (1995–1999). The author would like to thank Jeff Gertler, John Kingery and Gabrielle Marceau of the WTO Secretariat for comments on an early draft of this chapter.

F. Membership in the WTO 73
1. Original Members 73
2. Accession of New Members 74
3. Non-application among Members 78
4. Withdrawal 79
G. Miscellaneous 79
1. Preamble to the WTO Agreement 79
2. Continuation of GATT Practices 80
3. Resolution of Conflicts Between WTO Agreements 80
4. Requirement to Conform National Laws to WTO Rules 80
5. Reservations 81
IV. Appraisal of the WTO's Institutional Arrangements 81
A. Decision-Making Difficulties 81
1. Routine Decisions 81
2. Relationship of the "Legislative" Institutions to the DSB 83
3. Amendment Procedures 85
B. Transparency 85
1. Internal Transparency 85
2. External Transparency 86

This Chapter outlines the institutional arrangements of the World Trade Organization. It begins with a bit of history, in which the institutional inadequacies of GATT are considered, since those were in large part the impetus for the creation of a new organization in the Uruguay Round. After a brief description of the negotiations on institutional arrangements in that Round, the bulk of the Chapter examines the resulting institution in detail. In doing so, it largely follows the structure of the WTO Agreement.[1] The Chapter concludes with an overall assessment of the WTO's institutional arrangements, including an analysis of a number of weaknesses that could ultimately undermine the effectiveness of the WTO if its Members do not correct them.

I. GATT and Its Institutional Inadequacies

A. GATT and the ITO

The General Agreement on Tariffs and Trade ("GATT") was signed in 1947 during the course of broader negotiations aimed at the establishment of the International Trade Organization ("ITO").[2] The ITO was to be the third leg of an international economic triad consisting of the International Bank for Reconstruction and Development (generally known as "the World Bank") and the International Monetary Fund ("IMF"). These organizations were intended to promote economic development, the reconstruction of Europe and the expansion of world trade. In particular, the IMF was to provide liquidity to countries running trade deficits so as to enable the ITO to work for the reduction of tariffs and other trade barriers.

The GATT contained a series of rules that were intended to implement and protect the results of tariff reductions that had been agreed upon during the ITO negotiations.[3] It was expected that the GATT would promptly be subsumed under the mantle of the ITO once the ITO came into existence.[4] Unfortunately, it never did. An ITO charter, known as the Havana Charter,[5] was agreed upon, but the U.S. Congress failed to ratify it, even though the United States had been a prime mover in the negotiations. Consequently, GATT was orphaned at the very beginning. However, because it was intended to protect the integrity of tariff reduction commitments, it included most of the trade-related provisions of the Havana Charter.[6] Although no organization or secretariat was provided for in the GATT, there were some general governance provisions that enabled the GATT contracting parties to cobble together a workable, even if shaky, governance structure. Thus, GATT was able

[1] *Marrakesh Agreement Establishing the World Trade Organization* ("The WTO Agreement"), in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 4 (1995) ("THE LEGAL TEXTS").

[2] *See generally* WILLIAM A. BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE (1950); CLAIR WILCOX, A CHARTER FOR WORLD TRADE (1949).

[3] BROWN, *supra* note 2, at 131–134.

[4] *See* GATT, Art. XXIX, which deals with the relationship between the GATT and the Havana Charter of the ITO.

[5] The Havana Charter of the International Trade Organization is formally known as the Final Act of the United Nations Conference on Trade and Employment, March 24, 1948, UN Doc. E/Conf.2/78. It was published by the U.S. Dept. of State as HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, COMMERCIAL POLICY SERIES 114 (PUB. NO. 3206, 1948).

[6] In some cases the provisions were not in the exact form contained in the Havana Charter. The principal differences between the GATT and the Havana Charter were that only the Havana Charter contained provisions (i) regulating restrictive business practices, (ii) regulating the use of export subsidies, (iii) regulating intergovernmental commodity agreements, (iv) calling for the promotion of full employment and economic development and reconstruction and (v) establishing detailed institutional provisions. Some of the Havana Charter's provisions on export subsidies were later added to GATT Article XVI.

to play the role that was thrust upon it as the only significant multilateral trade agreement, even though it had these constitutional infirmities.

This initial tentative aspect of GATT was also evidenced by the fact that the GATT contracting parties brought the GATT into effect only on a provisional basis through the Protocol of Provisional Application.[7] Significantly, this Protocol provided that the parties could maintain in force indefinitely existing legislation inconsistent with their obligations under Part II of the GATT, which includes most of GATT's substantive obligations, other than the most-favored-nation obligation (Article I) and the tariff concessions (Article II). This "loophole" was interpreted narrowly in GATT dispute settlement proceedings,[8] but it remained available until it was abolished in the Uruguay Round (with one exception).[9]

B. ICITO as the Legal Entity

During the Havana Conference, an Interim Commission for the International Trade Organization ("ICITO") was established.[10] It was intended to prepare for the expected coming into existence of the ITO. It met only once, at Havana, and delegated its powers to an Executive Committee. An Executive Secretary was also appointed. The GATT contracting parties early on decided to avail themselves as necessary of the services of ICITO for secretariat functions.[11] After a short period of time, ICITO's only function was to perform such services for GATT. As a practical matter, the head of GATT (initially called the Executive Secretary and later the Director-General of GATT) was also the Executive Secretary of ICITO; the employment contracts of those working for the GATT Secretariat were technically with ICITO; and the bank accounts and other "GATT property" were held in ICITO's name. Since ICITO was an organization under the UN umbrella, the employees of the GATT Secretariat participated in the UN pension plan. After 1950, the Executive Committee of ICITO rarely met—only to elect each new head of GATT as ICITO Executive Secretary and in connection with the transfer of the property and employees to the WTO Secretariat.

C. Pragmatic Adaptation and Its Limitations

Both because GATT was expected to be subsumed under the ITO and because U.S. officials believed that President Truman had the authority to commit the United States to a trade agreement (like GATT) but not to an organization, the GATT contained no formal organizational structure,[12] beyond providing for meetings of the parties at which they

[7] *Protocol of Provisional Application*, IV GATT, BISD 76–77 (1969).

[8] To qualify as "existing legislation," measures were required to be legislation in the formal sense, predate the Protocol and be mandatory in character. Report of the GATT Panel (adopted), *Norway—Restrictions on Imports of Apples and Pears*, BISD 36th Supp. 306 (1990); Report of the GATT Panel (adopted), *United States—Manufacturing Clause*, BISD 31st Supp. 75 (1985).

[9] The WTO Agreement carries over the existing legislation exemption only in respect of certain cabotage measures that may be inconsistent with the GATT. In practical terms, the exception applies only to the United States. *WTO Agreement, Annex 1A, General Agreement on Tariffs and Trade 1994*, Note 3(e). As of 2002, the continuing need for the exemption is currently under review by the WTO's General Council. WTO General Council, *Annual Report* (2000), WT/GC/44, p. 28 (February 12, 2001). The review was not mentioned in the Council's 2001 Annual Report, but the matter appeared on the Council's agenda in 2002.

[10] This history is recounted in GATT, Analytical Index: Guide to GATT Law and Practice 1119–1125 (Updated 6th Edition 1995) ("GATT Analytical Index").

[11] John H. Jackson, GATT and the Law of World Trade 145 (1969).

[12] *Id.* at 119–121.

might take certain decisions collectively.[13] As a practical matter, however, GATT was able to function as an organization. The power of the parties to act collectively and the *de facto* existence of a secretariat worked. Nonetheless, this jerrybuilt, informal structure was viewed as a shortcoming. In particular, the annual meetings of the contracting parties were not sufficient to deal with the business of the organization. That specific problem was addressed by the creation in 1960 of the GATT Council to handle GATT's business in between meetings of the contracting parties.[14] It remained the case, however, that the GATT's organizational structure was generally viewed as deficient.

The structural inadequacies were plain to see in the results of the Tokyo Round of trade negotiations (1973–1979). That round resulted in a number of agreements on specific topics (e.g., customs valuation, dumping, subsidies, civil aircraft, standards, government procurement, import licensing, and dairy and beef products), but only some, mainly industrialized, contracting parties accepted those agreements, a sort of GATT *a la carte.* That limited membership was a problem, but so was the lack of a formal GATT structure where these agreements could be placed. As a result, each had its own governing body and dispute settlement system and its relationship to the GATT was not always clear.

A third problem could be seen in the inadequacies of the decision-making process. The practice of consensus slowed progress on resolving issues and undermined the effectiveness of the dispute settlement system by giving a single country—usually the losing party—the power to veto adoption of a panel report. The rules for amendment were such that it was thought difficult, if not impossible, to amend the agreement.[15]

These various problems, while not fatal, helped create a favorable climate for the discussions described below in the Uruguay Round.

II. Uruguay Round Negotiations on Institutional Issues

A. The "FOGS" Group

At the time the Uruguay Round negotiations were launched, it was agreed that there would be negotiations on the functioning of the GATT system ("FOGS"). The Uruguay Round Ministerial Declaration provided that the negotiations would be aimed at (i) improving regular monitoring of trade policies of contracting parties; (ii) improving the overall effectiveness and decision-making of GATT as an institution, *inter alia*, by increasing ministerial level involvement; and (iii) improving coherence in global economic policy-making.[16]

The FOGS negotiations progressed relatively rapidly on the first point,[17] and in April 1989, the GATT contracting parties adopted a decision to establish a trade policy review mechanism,[18] which was carried over into the WTO Agreement, as described below.[19] There was not much progress in the FOGS group on other issues, although

[13] GATT, Art. XXV.

[14] GATT Analytical Index, *supra* note 10, at 1100–1110.

[15] For a catalog of these and other problems, see John H. Jackson, William J. Davey and Alan O. Sykes, Legal Problems of International Economic Relations 214–216 (2002).

[16] *Ministerial Declaration of September 20, 1986*, Part I(E), BISD, 33rd Supp. 19, 26 (1987).

[17] For a general history of the Uruguay Round, including descriptions of the activities of the FOGS Group, see John Croome, Reshaping the World Trading System: A History of the Uruguay Round 129–136, 229–235 (2d ed.1999). This volume was prepared for and published by the WTO.

[18] *Decision of April 12, 1989*, BISD, 36th Supp. 403–409 (1990).

[19] *See* text accompanying notes 40–45 *infra.*

eventually a declaration on coherence in global economic policy-making and a decision relating to improving notification procedures were adopted at the end of the Uruguay Round.[20]

B. Proposals for a New Institution

At the outset of the Uruguay Round in 1986, there were no plans to create a new organization. In the course of the negotiations, occasional reference was made to the need to improve GATT's organization framework, but it was not until 1989 that consideration of a new organization began to receive serious attention. Such an idea was promoted by Professor John H. Jackson,[21] and in the course of 1990 proposals were put forward by Canada and the EC.[22] The EC supported its proposal by noting, *inter alia*, (i) the need for a proper legal basis for GATT; (ii) the desirability of a common institutional framework for the existing side agreements, as well as the agreements on new subjects such as services; and (iii) the advantages of a single dispute settlement system.[23]

There was no agreement on creating a new institution at the time of the 1990 Brussels ministerial, but as part of the effort to reach consensus on the text of agreements at the end of 1991, negotiators succeeded in hammering out a short agreement on establishing a new organization. Indeed, the text included in the so-called Dunkel Draft Final Act,[24] bears considerable similarity to what was eventually agreed upon. As of 1991, the United States was of the view that a new organization was unnecessary, but it finally accepted the creation of such an organization at the very end of the Uruguay Round negotiations.[25]

III. The Marrakech Agreement Establishing the World Trade Organization

A. Establishment and Scope of the World Trade Organization

Article I of the WTO Agreement provides for the establishment of the World Trade Organization ("WTO"). In accordance with the Final Act of the Uruguay Round, the heads of delegations to GATT in Geneva met in December 1994 and decided that the WTO Agreement would enter into force on January 1, 1995.[26] At the same time, a special session of the GATT Contracting Parties decided that the General Agreement on Tariffs and Trade of 1947 would terminate on December 31, 1995. The provisions of the GATT 1947 continue in force, of course, through their inclusion in GATT 1994, one of the agreements

[20] *Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking and Declaration on Notification Procedures*, in THE LEGAL TEXTS, *supra* note 1, at 386, 388.

[21] JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990).

[22] CROOME, *supra* note 17, at 233–234.

[23] *Id*.

[24] *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA (December 20, 1991), Annex IV.

[25] For an excellent, complete description of the negotiation of the WTO Agreement, see Debra Steger, *The World Trade Organization: A New Constitution for the Trading System*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOR OF JOHN H. JACKSON 135, 143–146 (Marco Bronckers and Reinhard Quick eds. 2000).

[26] The Final Act of the Uruguay Round provided for a ministerial decision (¶ 3), but ministers agreed at Marrakech that the implementation conference would be held at the level of heads of delegations. MTN.TNC/45(MIN). For more details on the transition arrangements from GATT 1947 to the WTO, see GATT ANALYTICAL INDEX, *supra* note 10, at 1087–1093.

annexed to the WTO Agreement.[27] Pursuant to Article XVI:6 of the WTO Agreement, it is registered with the United Nations in accordance with Article 102 of the U.N. Charter.[28]

The WTO is intended to provide the "common institutional framework for the conduct of trade relations among its Members in matters related to the [WTO] agreements."[29] The term "WTO agreements" includes the so-called Multilateral Trade Agreements, which are defined as the agreements in Annexes I, II and III of the WTO Agreement. Those three annexes contain GATT 1994 and the related trade-in-goods agreements (i.e., the agreements on agriculture, sanitary and phytosanitary measures, textiles and clothing, technical barriers to trade, trade-related investment measures, anti-dumping, customs valuation, preshipment inspection, rules of origin, import licensing procedures, subsidies and countervailing measures, and safeguards, all in Annex 1A); the General Agreement on Trade in Services (Annex 1B); the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C); the Dispute Settlement Understanding (Annex 2); and the Trade Policy Review Mechanism (Annex 3). Pursuant to Article II:2 of the WTO Agreement, all of the Multilateral Trade Agreements are binding on all WTO Members.

The requirement that all WTO Members accept this package of agreements is known as the "single undertaking". As noted earlier, one of the problems associated with the GATT system was that many GATT Contracting Parties were not parties to the various Tokyo Round codes on dumping, valuation, subsidies and so on.[30] The WTO Agreement ends this "GATT *a la carte*" approach, with the exceptions described in the next paragraph.

In addition to the Multilateral Trade Agreements, there were also four so-called plurilateral agreements contained in Annex 4 to the WTO Agreement. These agreements were on trade in civil aircraft (the Tokyo Round agreement, as negotiations to update it in the Uruguay Round were not successful); government procurement (a new agreement negotiated in the Uruguay Round, which came into force on January 1, 1996, and effectively replaced the Tokyo Round agreement); dairy products (terminated as of December 31, 1996); and bovine meat (terminated as of December 31, 1996). Membership in the plurilateral agreements is optional, and most Members are not members of the agreements on civil aircraft and government procurement.

B. The Functions of the WTO

The functions of the WTO are specified in Article III of the WTO Agreement, which lists five specific functions. Most generally, the WTO is mandated to facilitate the implementation, administration and operation of the WTO agreements and to further their objectives.[31] The other four functions areas follows:

1. Negotiations

The WTO Agreement explicitly provides that the WTO shall provide a forum for negotiations among its Members as to matters dealt with in the WTO agreements. In fact, the

[27] The definition of GATT 1994 includes a number of understandings that effectively modify or supplement the provisions of GATT 1947. Article II:4 of the WTO Agreement specifies the foregoing distinction between GATT 1947 and GATT 1994.

[28] GATT 1947 was also so registered and the United Nations published it and the various additions to it over the years in the United Nations Treaty Series. In the case of the WTO, it appears that the U.N. will not publish the schedules to the various WTO agreements.

[29] *WTO Agreement*, Art. II:1.

[30] *See* text accompanying notes 14–15 *supra*.

[31] *WTO Agreement*, Art. III:1. It is also to provide such a framework for the Plurilateral Trade Agreements. *Id*.

WTO is the locus of negotiations all of the time. In many cases, such negotiations have been provided for in WTO agreements or the ministerial decisions taken in establishing the WTO. For example, in the case of GATS, there have been negotiations in respect of financial services, telecommunications and movement of natural persons, and protocols were added to GATS on each subject.[32] There have also been negotiations, provided for by GATS, on so-called GATS rules (e.g., relating to subsidies, safeguards and government procurement), which have not yet led to new agreements.[33] Further negotiations started in 2000 on services trade generally, as provided for in GATS Article XIX:1. Since the end of the Uruguay Round, negotiations on rules of origin have been ongoing, as required by the Agreement on Rules of Origin.[34] Many other examples could be cited as well. In addition to negotiations provided for in the WTO agreements, the Ministerial Conference or General Council may authorize additional negotiations, as recently happened at Doha.[35]

The WTO is also the locus of other negotiations. Although not specifically authorized by the Ministerial Conference, negotiations at the Singapore Ministerial among a number of WTO Members and accession candidates resulted in an agreement on trade in information technology products, which required adherents to bind their tariffs on such products at zero, following a transition period.[36] While the commitment is not a WTO agreement, it has led to changes in tariff bindings that constitute enforceable WTO commitments.

Finally, it should be noted that the WTO is also the locus of bilateral (or other limited) negotiations between Members. For example, such negotiations may occur under the tariff renegotiation provisions of GATT Article XXVIII or under the consultation requirements found in many WTO provisions.[37]

2. Dispute Settlement

The third function of the WTO is to administer the Dispute Settlement Understanding ("DSU").[38] The operation of the DSU is discussed in Chapters 25 *et seq* of this book. In this chapter, we consider below the relationship of the dispute settlement function of the WTO and its "legislative" function, focusing in particular on the tensions that may arise when one of the functions operates much more effectively than the other.[39]

3. Trade Policy Review

The fourth function of the WTO is to administer the Trade Policy Review Mechanism ("TPRM").[40] The TPRM is intended "to contribute to improved adherence by all [WTO]

[32] WTO, *Second GATS Protocol: Revised Schedules of Commitments on Financial Services*; WTO, *Third GATS Protocol: Schedules of Specific Commitments relating to Movement of Natural Persons;* WTO, *Fourth GATS Protocol: Schedules of Specific Commitments concerning Basic Telecommunications*; WTO, *Fifth GATS Protocol*: *Schedules of Specific Commitments and Lists of Exemptions from Article II concerning Financial Services.* There was no First Protocol.

[33] GATS, Arts. X:1 (safeguards); XIII:2 (procurement); XV:1 (subsidies).

[34] *Agreement on Rules of Origin*, Art. 9.

[35] *Ministerial Declaration* (on the Doha Development Agenda), adopted November 14, 2001, WT/MIN(01)/DEC/1 (November 20, 2001).

[36] *Ministerial Declaration on Trade in Information Technology Products*, WT/MIN(96)/16(December 13, 1996) (issued by the ministers of fourteen Members and accession candidates, accounting for over eighty percent of trade in such products).

[37] *See generally* Anwarul Hoda, Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices (2001).

[38] *WTO Agreement*, Art. III:3.

[39] *See* text accompanying notes 179–189 *infra*.

[40] *WTO Agreement*, Art. III:4.

Members to rules, disciplines and commitments made under the Multilateral Trade Agreements."[41] As such, the TPRM provides a mechanism that allows WTO Members, collectively and on a regular basis, to examine and comment on the trade policies and practices of individual WTO Members and the effect that those policies and practices have on the functioning of the multilateral trading system.[42]

Under the TPRM procedures, each Member to be reviewed is required to submit a detailed report on its trade policies and practices in light of the coverage of the Multilateral Trade Agreements. The Secretariat also prepares a report, based on information gathered in a visit to the Member and on other information available to it. The Trade Policy Review Body ("TPRB"), which is the General Council performing the trade policy review function under a separate chair, then holds a meeting at which the reports are discussed. The practice is to have two Members lead the discussion and for the TPRB chair to summarize it. In addition to the minutes of the meeting, there are press releases issued based on the Secretariat's report and the chair's summary. Since September 2001, the reports and press releases are available on the WTO website.

Generally speaking, Annex 3 to the WTO Agreement requires the four largest trading entities (at the moment, the United States, the European Community, Japan and Canada) to be reviewed by the TPRB every two years; with the next sixteen largest trading entities being reviewed every four years; and with the rest of the membership being reviewed every six years (less often for least-developed countries). This is an ambitious commitment, but the TPRM is quite active. Through the end of 2000, 74 WTO Members had been reviewed and 135 reviews had been conducted.[43] In 2001, 21 Members were scheduled to be reviewed.[44]

The TPR process is an important part of the WTO's efforts at promoting transparency in the multilateral trading system. Indeed, the reports are probably in most cases the only comprehensive description of a country's trade policies. Since WTO obligations cut across a wide range of subjects, they are normally dealt with by many different government departments and agencies, none of which is likely to be in a position to produce such an overview on its own.

In addition, Annex 3 requires the TPRB to undertake annually an overview of developments in the multilateral trading system. In connection with that review, the WTO Director-General prepares a detailed annual report on such developments.[45]

4. Coherence in Global Economic Policymaking

The fifth specific function of the WTO is to cooperate with the IMF and the World Bank so as to achieve greater coherence in global economic policymaking. To this end, the WTO entered into agreements with both of those institutions.[46] The agreements provide for various levels of cooperation, for example, through provision of information, invitations to observe meetings of governing and other bodies, and consultations on certain issues. The most controversial aspect of the agreements related to the extent that either the IMF

[41] *WTO Agreement*, Annex 3, para. A(i).

[42] Annex 3 specifically provides that the TPRM "is not . . . intended to serve as a basis for the enforcement of specific obligations under the [WTO agreements] or for dispute settlement procedures, or to impose new policy commitments on Members." *WTO Agreement*, Annex 3, para. A(i).

[43] WTO, ANNUAL REPORT 2001, at 105. Each trade policy review is published as a separate volume. The reports of the Secretariat and individual members are also available on the WTO website.

[44] WT/TPR/89/Rev.3 (February 19, 2001).

[45] WT/TPR/OV/—. The 2001 report is found in WT/TPR/OV/7 (December 10, 2001) and is over 100 pages long.

[46] The agreements with the IMF and the World Bank are found in WT/L/195 (November 18, 1996). The General Council decision approving the agreements is found in WT/L/194 (November 18, 1996).

or the World Bank would have a role in WTO dispute settlement proceedings. As finally agreed, and as elaborated upon in the General Council decision approving the agreements, such a role is quite limited. The decision specifies how the IMF may indirectly submit information to a panel and the circumstances and procedures under which the IMF or the World Bank may be invited to a meeting of the Dispute Settlement Body.[47]

The aim of the WTO-IMF-World Bank cooperation is to ensure that the three institutions are following mutually supportive policies. This cooperation has led to the establishment of the Integrated Framework for Trade-Related Assistance to the Least-Developed Countries ("IF"). The IF was established in 1997 by six international agencies: the WTO, IMF, World Bank, UNCTAD, UNDP and ITC; it was revamped in 2000. The aim of the IF is to assist the least-developed countries to incorporate trade priorities into their national plans for economic development and poverty reduction strategies. Currently, the IF is being implemented on a pilot basis in three countries.[48] The WTO-IMF-World Bank cooperation is also manifested in the involvement of the WTO in poverty reduction strategies of the World Bank and the IMF.[49]

C. The Governance Structure of the WTO

1. Ministerial Conference

The WTO Agreement provides that all decision-making powers shall reside in a Ministerial Conference, which is to be held at least every two years.[50] Such a conference is attended by ministers from all WTO Members. This implements the desire expressed at the outset of the Uruguay Round to have greater ministerial involvement in the operation of the organization, in hopes that the it would function more effectively.[51] To date, there have been four ministerial conferences. The first was held in Singapore at the end of 1996. The second was held in Geneva in May 1998 in conjunction with the 50th anniversary celebration of the multilateral trading system. In November 1999, the third ministerial was held in Seattle, with the fourth being held two years later in Doha, Qatar. The fifth ministerial was held in Cancun, Mexico, in September 2003; the sixth is to be held in Hong Kong in 2005.

(a) Singapore—December 1996. At the Singapore Ministerial, two declarations were issued. The general Ministerial Declaration was noteworthy for its statement on core labor standards and for the decisions to establish working groups to examine (i) the relationship between trade and investment; (ii) issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices; and (iii) transparency in government procurement practices, in each case with a view to identifying topics that might merit further consideration in the WTO framework. It also directed the Council for Trade in Goods to undertake exploratory and analytical work on the simplification of trade procedures in order to assess the scope for WTO rules in this area.[52]

[47] WT/L/194, para. 4(a)–(b) (November 18, 1996). Although the IMF and the World Bank are generally observers to WTO meetings, no non-governmental observers are normally allowed at DSB meetings.

[48] Additional information on the IF is available at the WTO website.

[49] WTO, ANNUAL REPORT 2001, at 112.

[50] *WTO Agreement*, Art. IV.

[51] CROOME, *supra* note 17, at 130–131.

[52] *Singapore Ministerial Declaration*, WT/MIN(96)DEC (December 18, 1996), ¶¶ 4, 20 and 21 (reproduced in the Appendix to this book).

In respect of core labor standards, the declaration stated that ministers renewed their commitment to the observance of internationally recognized core labor standards[53] and that the International Labor Organization ("ILO") was the competent body to set and deal with such standards. The ministers also rejected the use of labor standards for protectionist purposes.

As noted earlier,[54] negotiations at the Singapore Ministerial among a number of WTO Members and accession candidates resulted in an agreement on trade in information technology products, which required adherents to bind their tariffs on such products at zero, following a transition period.[55]

(b) Geneva—May 1998. The 1998 Geneva Ministerial was held only one and one-half years after the Singapore Ministerial in order to celebrate the Fiftieth Anniversary of the multilateral trading system (GATT came into effect on January 1, 1948). One of the three meeting days was set aside for celebrating that anniversary. Little of substance was accomplished at the ministerial. The main new element in the declaration was the setting of a work program for the General Council to prepare for the next ministerial.[56] There was also a declaration on global electronic commerce, which established a work program to examine all trade-related issues relating to that subject, and in which it was "declare[d] that Members will continue their current practice of not imposing customs duties on electronic transmissions."[57] The Geneva Ministerial was noteworthy for raising the profile of the WTO. As part of the Fiftieth Anniversary celebrations, there were speeches by a number of world leaders, including U.S. President Clinton, U.K. Prime Minister Blair (the United Kingdom was then President of the European Council), South African President Mandela, Brazilian President Cardoso, Cuban President Castro and President Santer of the EC Commission.[58]

(c) Seattle—November 1999[59]. The hope going into the Seattle Ministerial was to launch a new round of multilateral trade negotiations and to give some direction to those negotiations that were already scheduled to commence in 2000 under the so-called "Built-in Agenda" of the Uruguay Round, particularly in respect of agriculture. The meeting was accompanied by extensive and violent street protests. The meeting ended in failure; no declaration was issued. The causes for the failure were multiple. Generally speaking, there seemed to have been inadequate preparation, due in large part to the fact that the first Director-General, Renato Ruggiero and all three of the Deputy Directors-General

[53] Those standards include the right to organize and bargain collectively and prohibitions on forced labor, child labor and discrimination. See Chapters 59 and 60 of this book.

[54] *See* text accompanying note 36 *supra*.

[55] *Ministerial Declaration on Trade in Information Technology Products*, WT/MIN(96)/16 (December 13, 1996) (issued by the ministers of fourteen Members and accession candidates, accounting for over eighty per cent of trade in such products) reproduced in the Appendix to this book.

[56] *Ministerial Declaration of May 20, 1998*, WT/MIN(98)/DEC/1 (May 25, 1998), reproduced in the Appendix to this book.

[57] *Ministerial Declaration on Global Electronic Commerce*, WT/MIN(98)/DEC/2 (May 25, 1998), reproduced in the Appendix to this book: An interesting question is the enforceability of the commitment on customs duties. Since the declaration is not one of the so-called "covered agreements" under the DSU, could its violation give rise to a claim in WTO dispute settlement? Or in some other forum?

[58] Foreshadowing problems to come, Geneva also witnessed extensive and violent demonstrations against the WTO during the ministerial.

[59] For a flavor of the commentary on the Seattle Ministerial, *see* THE WTO AFTER SEATTLE (Jeffrey A. Schott ed. 2000); *Quick Reactions to Seattle*, 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 167 (2000)(five brief articles).

left office at the end of April. Ruggiero's successor was not appointed until late July (and then only after a particularly divisive selection process) and his deputies were not selected until shortly before the Seattle meeting. That meant that there was no senior Secretariat leadership in place when the bulk of the preparatory work should have been done and that the atmosphere among delegates in Geneva was not conducive to compromise. Thus, the meeting probably started with too many open issues to expect agreement. Progress at the meeting itself was significantly hindered by developing country concerns about a U.S. proposal to have the WTO analyze trade-related labor issues, particularly after President Clinton suggested in an interview that eventually he hoped that the WTO would incorporate core labor standards and that "ultimately I would favor a system in which sanctions would come for violating any provision of a trade agreement".[60] The effect of the street protests was probably not all that great, except to the extent that they may have convinced the United States, which chaired the meeting, that there was insufficient political advantage in making any significant compromises to try to launch a new round of negotiations. The protests did, however, create a significant public relations problem for the WTO, one that has not yet been overcome.[61] The problems in trying to reach agreement also revealed significant internal decision-making problems in the WTO, which are discussed later.[62]

(d) Doha—November 2001. Following the failure of the Seattle ministerial, it was felt by many knowledgeable observers that the WTO badly needed a successful ministerial at Doha, so as to avoid trade policy negotiating activity becoming more and more the preserve of regional arrangements. From that standpoint, the Doha ministerial was a success. The Doha Ministerial Declaration established a broad work program for the WTO to be completed as a single undertaking by January 1, 2005.[63] Among the topics for negotiations are a continuation of the services market access negotiations started in 2000; negotiations on agriculture to reduce (with a view to ultimately phasing out) export subsidies; the reduction of industrial tariffs (including tariff peaks, high tariffs and tariff escalation); WTO rules on dumping, subsidies and regional trade agreements; various trade and environment issues; and the continuation of the work program on electronic commerce. In respect of what are known as the Singapore issues (competition, investment and transparency in government procurement), the declaration provided that negotiations would take place after the next ministerial on the basis of a decision to be taken at that meeting on modalities of negotiation. In respect of labor rights, the declaration simply reaffirmed the Singapore declaration and noted the work of the International Labor Organization on the social dimension of globalization.

One of the more controversial issues in the preparations for the Doha conference was what, if anything, should the ministers say about the relationship of the TRIPS Agreement to public health. This has become a major issue in the developing world, where there are concerns that pharmaceutical companies are exercising their patent rights on drugs in a way that effectively makes those drugs unavailable to any significant degree in developing countries. More specifically, there has been concern about the availability of drugs to fight AIDS, particularly in Africa. The declaration adopted by ministers provides, *inter*

[60] Kimberly Ann Elliott, *Getting Beyond No . . . ! Promoting Worker Rights and Trade*, in SCHOTT, supra note 59, at 187, 188, citing *Seattle Post-Intelligencer*, Dec. 1, 1999, p.1.

[61] One aspect of this problem is the WTO's relations with non-governmental organizations, which is discussed in the text accompanying notes 216–220 *infra. See also* Chapter 82 of this book.

[62] *See* text accompanying notes 192–195 *infra.*

[63] WT/MIN(01)/DEC/1 (November 20, 2001).

alia, that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all." The declaration also notes that the TRIPS Agreement contains various "flexibilities" that can be invoked to achieve these public health goals.[64] The exact legal status of the declaration is not clear. While it is not a formal interpretation of the TRIPS Agreement, it is likely that a dispute settlement panel or the Appellate Body would take its emphasis on flexibilities into account in the event that a developing country's action in this area were challenged. In any event, the consensus adoption of the declaration will probably make such a challenge unlikely. At the insistence of developing countries, a furthur clarification of Members' rights to protect public health was adopted immediately prior to the Cancun ministerial (*see* Chapter 22 of this book).

(e) Cancun, September 2003. The Cancun ministerial meeting was originally intended to occur more or less at the midpoint of the Doha Development Agenda negotiations, which were originally planned to be completed in 2005. Because little progress had occurred in the negotiations prior to the Cancun meeting, it was hoped that there would be agreements reached on more detailed negotiating frameworks for the subjects under negotiation, particularly for agriculture. In addition, the meeting was intended, as agreed at Doha, to consider modalities for negotiations on the four so-called Singapore issues—investment, competition, trade facilitation and transparency in government procurement. The meeting ended in failure when no agreement on how to deal with the Singapore issues could be reached. At the time the meeting ended, it was uncertain whether agreements on other difficult issues such as agriculture could have been reached.

An attempt to resuscitate the Doha Development Agenda succeeded in July 2004 at a WTO General Council meeting in Geneva. Although not a ministerial conference, it was attended by ministers from key players and a decision on the Doha Work Programme was adopted on 1 August 2004 (WT/L/579, reproduced in the Appendix to this book). It contains a framework for establishing modalities in agriculture and in market access for non-agricultural products, as well as recording an explicit consensus to commence negotiations on trade facilitation. The framework agreements are not as detailed as an agreement on modalities would have been, but it appears that they will serve to give a badly needed impetus to the Doha negotiations. The framework in agriculture calls for cutting domestic support by twenty percent and ending export subsidies and certain longer term export credits, as well as giving special attention to the cotton sector. In the words of the framework agreement, it "offer[s] the additional precision required at this stage of negotiations and thus the basis for the negotiation of full modalities in the next phase." In contrast to trade facilitation, the other three so-called Singapore issues—competition, investment and transparency in government procurement—will not be included in the Doha negotiations.

2. General Council

In between meetings of the Ministerial Conference, its powers may be exercised by the General Council, which is composed of representatives of all WTO Members and

[64] *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (November 20, 2001), especially ¶¶ 4 and 5, reproduced in the Appendix to this book.

meets from time to time as appropriate in Geneva, where most WTO Members have permanent representatives. Indeed, it is becoming increasingly common for Members to have separate missions in Geneva dealing with WTO matters exclusively (as opposed to UN and other matters). The General Council is charged with supervising the WTO's dispute settlement system and in so doing convenes as the Dispute Settlement Body ("DSB").[65] It is also responsible for the operation of the trade policy review mechanism and in that connection convenes as the Trade Policy Review Body ("TPRB").[66] To date, the General Council, DSB and TPRB have had separate chairpersons, as the Agreement permits. The General Council, as such, meets on a regular basis every other month, with special meetings as necessary. It met in special sessions (outside of its regular meetings) to prepare for the Seattle and Doha ministerials.

As its position in the WTO governance structure implies, the General Council deals with a broad range of issues, as can be seen in its annual reports.[67] It deals with budget and administrative matters and general personnel issues, including the appointment of the Director-General; approves actions proposed by other bodies, such as waivers, accessions, etc; oversees relations with other organizations; and so forth. The other WTO bodies report, directly or indirectly, to the General Council on an annual basis.[68] These reports give the most detailed available overview of WTO activities, mentioning many issues that do not receive coverage in the WTO's annual report.

3. Sectoral Councils and Subsidiary Bodies

There are three specialized councils under the General Council: The Council for Trade in Goods; the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights.[69] The three councils may also have subsidiary bodies (committees, working parties, etc.) and there are many such bodies in the case of the Goods and Services Councils. For example, there are separate committees supervising each of the multilateral agreements on trade in goods and committees for various service sectors under GATS. The Councils and committees are charged with carrying out the responsibilities assigned to them in the various agreements. Membership in all WTO bodies is open to all WTO Members wishing to participate.

4. WTO Committees

There are five WTO committees that deal with matters of general concern and report to the General Council directly. These include Committees on Trade and Development; Balance-of-Payments Restrictions; Budget, Finance and Administration; Trade and the Environment; and Regional Trade Agreements. The first three mentioned committees are provided for in the WTO Agreement.[70] The Committee on Trade and Environment was established at Marrakech in April 1994. In 1996, the General Council created a Committee on Regional Trade Agreements. The basic activities of these committees are as follows.

[65] *WTO Agreement* Art. IV:3

[66] *Id*., Art. IV:4.

[67] WT/GC/5 (February 7, 1996); WT/GC/7 (November 20, 1996); WT/GC/10 (January 7, 1998); WT/GC/10/Add.1 (May 8, 1998) (a partial year report prepared for the Geneva ministerial); WT/GC/15 (January 26, 1999); WT/GC/28 (November 12, 1999); WT/GC/44 (February 12, 2001); WT/GC/53 (November 5, 2001). The reports are quite summary and reference to the minutes of the meetings referred to is necessary to understand the issues involved and the action taken. The minutes are found in document series WT/GC/M/—.

[68] WT/L/105 (November 24, 1995).

[69] *WTO Agreement*, Art. IV:5.

[70] *WTO Agreement*, Art. IV:7.

(a) Committee on Trade and Development. The terms of reference of the WTO Committee on Trade and Development are, *inter alia*, (i) to serve as a focal point for consideration and coordination of work on development in the WTO and its relationship to development-related activities in other multilateral agencies, (ii) to keep under review developing country participation in the multilateral trading system and to consider measures and initiatives to assist them in the expansion of their trade and investment opportunities, (iii) to review periodically, and consider any questions arising from, the application of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favor of developing country Members and report to the General Council for appropriate action; and (iv) to provide guidelines for, and to review periodically, the technical cooperation activities of the WTO as they relate to developing country Members.[71] Under the Committee on Trade and Development, there is a Sub-Committee on Least-Developed Countries, which has a similar mandate, but with respect to the problems of least-developed countries.[72]

It should be noted that the WTO has an extensive technical cooperation operation, designed to assist developing countries to implement their WTO obligations. In this regard, WTO Members have contributed substantial funds, beyond the regular budget, to fund such activities, and the WTO cooperates with other multilateral agencies (particularly the World Bank and the International Monetary Fund) in providing such assistance. The general issue of technical cooperation has become more pressing over time, as developing countries argue that they cannot be expected to take on additional obligations in new rounds of negotiations until they have the capacity to implement the obligations that they have already undertaken.[73]

(b) Committee on Balance-of-Payments Restrictions. The Committee on Balance-of-Payments Restrictions carries out regular consultations with WTO Members that have imposed restrictive import measures for balance-of-payments ("BOP") purposes under GATT Article XII or XVIII:B. There are both full and simplified consultation procedures, which are elaborated upon in the Uruguay Round Understanding on the Balance-of-Payments Provisions of GATT 1994 and related decisions. The committee reports on the consultations to the General Council, which typically approves the report. The Understanding provides that the General Council, in approving a report in which there is a planned phase-out of BOP measures, may recommend that the Member be deemed in compliance with the BOP provisions as long as it adheres to the phase-out.[74] Under the WTO, the committee has not been very active. For example, in 2001, it reported to the General Council on consultations with only two Members—Pakistan and Bangladesh.[75]

The relative roles of the General Council and BOP Committee *vis à vis* panels and the Appellate Body in assessing compliance with GATT Articles XII and XVIII:B was the subject of a dispute between the United States and India. The panel and the Appellate Body concluded that the dispute settlement system could appropriately decide the issue of whether import restrictions imposed for BOP purposes were in compliance with those articles.[76] That conclusion was controversial, in part because of its implications for the

[71] WT/L/46 (February 23, 1995).
[72] WT/COMTD/2 (July 18, 1995).
[73] On development issues generally, *see* Chapter 34 of this book.
[74] *Understanding on the Balance-of-Payments Provisions of GATT 1994*, para. 13.
[75] General Council, *Annual Report (2001)*, WT/GC/53, at 5 (November 5, 2001).
[76] Reports of the WTO Panel and the Appellate Body, *India—Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, WT/DS90/R and AB/R (1999).

respective competences of the WTO's "judicial" and "legislative" branches, an issue to which we revert at the end of this Chapter.

(c) The Committee on Budget, Finance and Administration. The WTO Committee on Budget, Finance and Administration deals with budgetary and financial issues. For the most part, the documents considered and produced by this committee remain restricted. The committee also deals with personnel matters. It was, for example, the focus of the negotiations that resulted in the establishment of new staff regulations for the WTO secretariat and the creation of a WTO Pension Plan. According to its 2001 annual report, the Committee's major areas of activities in 2000–2001 were the introduction of a performance award program as part of the professional compensation scheme and the drafting of guidelines on the acceptance by the WTO of contributions from non-governmental donors.[77]

The budget of the WTO is relatively small, given the importance of the organization. That probably reflects the fact that Members, as the GATT Contracting Parties before them, have desired to keep the Secretariat small and under Member control. The budget for 2001 was CHF 134,000,000 (US$ 81,000,000 at December 2001 rates), with extra-budgetary pledges of CHF 5,330,000 for technical cooperation and training.[78] This amount is about fifteen percent over the Swiss franc budget amounts for the first three years of the WTO's existence, although in U.S. dollar terms the budget has declined almost fifteen percent over the years because of the increased relative value of the U.S. dollar. By way of comparison, the budget of the Organization for Economic Cooperation and Development ("OECD") is about $200,000,000, even after having been reduced significantly since 1996.[79] The budget of the United Nations Conference on Trade and Development ("UNCTAD") is $45,000,000, with another $24,000,000 in extra-budgetary resources.[80] These are all dwarfed by the budgets of the IMF ($622 million in 2000)[81] and the World Bank ($1.4 billion).[82]

Member contributions to the WTO budget are based on each Member's share of international trade. For 2001, they ranged from CHF 20.8 million ($12.6 million) for the United States to CHF 19,935 ($12,051, the minimum contribution assessed of the least active Members).[83]

(d) Committee on Trade and Environment. The Committee on Trade and Environment was established pursuant to a ministerial decision taken at Marrakech. Its work is discussed in Chapter 58 of this book.[84]

(e) Committee on Regional Trade Agreements. The Committee on Regional Trade Agreements was established in 1996 and was charged with carrying out the examination

[77] WT/BFA/55 (October 10, 2001). This was the only committee document publicly available on the WTO website in late 2001.

[78] WTO, ANNUAL REPORT 2001, at 147–148. CHF 14.4 million of the budget is the WTO's contribution to the operation of an independent agency, the International Trade Center, which is also supported by UNCTAD.

[79] OECD, ANNUAL REPORT 2001, at 9.

[80] From the UNCTAD website (visited December 13, 2001) http://www.unctad.org/en/aboutorg/aboutorg.htm).

[81] From IMF website (visited July 9, 2002)(http://www.imf.org/external/np/tre/ffo/2001/fin.htm).

[82] From the World Bank website (visited July 9, 2002) (http://www.worldbank.org/annualreport/2001/pdf/appendix.pdf).

[83] WTO, ANNUAL REPORT 2001, at 148–151.

[84] *See* also Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics Of The WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1 (2001).

of such agreements in accordance with the procedures and terms of reference adopted by the Goods Council, the Services Council or the Committee on Trade and Development (which has jurisdiction over certain such agreements entered into pursuant to the Enabling Clause)[85], and thereafter presenting its report to the relevant body for appropriate action. It was hoped that the Committee would be able to standardize and consolidate the process of reviewing regional trade agreements.[86] This was viewed as a considerable problem because the GATT practice of establishing an *ad hoc* working party for each agreement had not been very successful in that almost no agreement had been found either to meet or not to meet the requirements of Article XXIV, nor had recommendations been adopted under Article XXIV:7.[87] Unfortunately, the Committee has faced the same problems that the working parties faced, and, as of the end of 2001, it had not completed the examination of any agreement. The issue of regional trade agreements in the WTO/GATT system is treated extensively in Chapter 46 of this book.

5. Meetings

The large number of WTO councils and committees has resulted in a plethora of WTO meetings. Indeed, developing countries have complained that Members with small delegations in Geneva find it impossible to attend every meeting, and even some major Members at times seem unable to cover all meetings. While attempts are made to avoid scheduling more than two major meetings at the same time, complaints continue to be heard.

6. Organization of Negotiations

The organization of negotiations, such as those ongoing as a result of the Doha ministerial, is done on an ad hoc basis. In the case of the Doha negotiations, the overall conduct of the negotiations is under the supervision of a Trade Negotiations Committee, acting under the authority of the General Council.[88] The specific subjects under negotiation in the Doha negotiations are sometimes treated in special sessions of regular WTO bodies, under separate chairs (e.g., the Committees on Agriculture, Services, DSB), and sometimes assigned to new bodies (e.g., separate negotiating groups on market access (covering non-agricultural market access issues in the goods area) and rules (covering dumping, subsidies and regional agreements)).[89]

D. Decision-Making in the WTO

1. General Rules and Practice (Consensus and Voting)

The WTO Agreement provides that the WTO shall continue the practice of decision-making by consensus used by the GATT in the past.[90] However, if a decision "cannot be arrived at by consensus", the agreement provides for voting. It specifies that at meetings

[85] Decision of the CONTRACTING PARTIES of November 28, 1979, on *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, BISD, 26th Supp. 203 (1980) (known as the Enabling Clause).

[86] WT/L/127 (February 7, 1996). The Committee is also charged with considering the systemic implications of regional agreements and initiatives for the multilateral trading system and the relationship between them, and making appropriate recommendations to the General Council.

[87] GATT ANALYTICAL INDEX, *supra* note 10, at 817–818.

[88] *Doha Ministerial Declaration*, ¶ 46.

[89] TN/C/1, 4 February 2002.

[90] *WTO Agreement*, Art. IX:1.

of the Ministerial Conference and General Council each Member shall have one vote,[91] with decisions being taken on the basis of the majority of votes cast, unless otherwise provided. As of December 2001, consensus decision-making remained the rule. Although requests for a vote are occasionally made, they have not been pressed.[92] It should be noted that voting in subsidiary bodies on substantive issues is not provided for. The rules of procedures of those bodies typically provide that matters on which there is no consensus may be referred to a higher body in the hierarchy (ultimately the General Council or Ministerial Conference) for decision.[93]

The process of building consensus is complex and has been occasionally criticized. Essentially, the proponent(s) of a proposal, either directly or through the relevant committee chair, consults with an ever-widening group of Members so as to build support for the proposal and to modify it where necessary to avoid opposition. The necessity of achieving consensus means that an attempt is normally made to ensure that all major Members and any other Members with particular interests are involved in the consultations early on. However, those Members that are not consulted early on may, of course, feel slighted. This was a particular problem at the Seattle Ministerial. While most Members do not stand alone so as to block an emerging consensus, the General Council (and other WTO) decision-making processes can easily be slowed and even blocked by any determined Member.[94] The problems of consensus decision-making are explored further in the last section of this Chapter.

2. Interpretations

The Ministerial Conference and General Council have the right to adopt interpretations of the WTO Agreement and the various Multilateral Trade Agreements by a vote of three-quarters of the membership.[95] This right is exclusive, which is another way of saying that results of the dispute settlement process do not in themselves constitute formal interpretations of the agreements (although they may in practice do so to the extent that their reasoning is followed in subsequent dispute settlement proceedings).[96] The agreement specifically states that the right of interpretation is not to be used so as to undermine the amendment provisions, discussed in subsection 4 below. Under

[91] The number of votes cast by the European Community and its member states may not exceed the number of member states. *WTO Agreement*, Art. IX, footnote.

[92] For example, at one point in 1999 Egypt suggested that given the absence of a consensus on any one individual, the Director-General should be chosen by voting, as provided for in Article IX, but the chair chose to continue to seek a consensus, which was eventually achieved. WT/GC/M/40/Add.4, at 10 (July 5, 1999). Earlier in 1999, the EC had requested a vote on whether to overturn a ruling of the chair of the DSB in connection with the *EC Bananas* dispute, but the chair declined to take a vote. WT/DSB/M/54, at 26–30 (April 20, 1999).

[93] *See, e.g.*, S/L/15 (October 19, 1995) (Rule 33 of the rules of procedure of the Services Council provides: "Where a decision cannot be arrived at by consensus, the matter shall be referred to the General Council for decision.").

[94] The rules of procedure of WTO bodies generally require that the first item of business of a meeting is to adopt the proposed agenda of the meeting, which like everything else is normally done by consensus. Threatening to block consensus on the adoption of the agenda has occasionally been used in the DSB and elsewhere informally to force items to be removed from the agenda. In dealing with a lack of consensus on adoption of the agenda in a DSB meeting relating to the *EC Bananas* dispute, the chair of the DSB ruled that the meeting at issue would go forward on the basis of the proposed agenda, even in the absence of consensus. WT/DSB/M/54, at 1–10 (April 20, 1999). Any other result could defeat the automatic nature of the dispute settlement system. It is unclear whether the DSB chair's decision would apply in other contexts.

[95] *WTO Agreement*, Art. IX:2.

[96] DSU, Art. 3.2, 3.9.

GATT, there were no specific provisions on adoption of interpretations, although GATT Article XXV:1, under which decisions could be taken by majority vote, could be read to encompass such power.

As of the end of 2001, there had been no interpretations adopted in the WTO, although one had been requested in connection with the *EC Bananas* dispute.[97]

3. Waivers

The Ministerial Conference and the General Council have the power to waive obligations under the WTO Agreement and the Multilateral Trade Agreements, by a vote of three-quarters[98] of the membership.[99] (Under GATT, only a two-thirds vote was required.) The Ministerial Conference or General Council considers requests for waivers concerning the WTO Agreement. Waivers concerning other agreements are first submitted to the relevant sectoral council for consideration. That council is to report on the request to the Ministerial Conference or General Council within ninety days.

Waivers are to be granted only in "exceptional circumstances" and the decision granting the waiver is to state what those circumstances are, specify the terms and conditions of the waiver and the date on which it terminates.[100] If the waiver extends for more than one year, it must be reviewed annually to see if the exceptional circumstances still exist and whether the terms and conditions are being met. The increase in the approval requirement (from two-thirds to three-quarters), the requirement of an expiration date and the annual review process, were all intended to add more rigor to the waiver-granting process, compared to the GATT system. To date, however, the annual reviews have been pro forma.[101]

Most waivers to date have involved conversions of tariff schedules (e.g., to conform to the latest version of the Harmonized System) and preferences for developing countries,

[97] WT/GC/W/133 (January 25, 1999). The General Council took no action on the request, which concerned the so-called sequencing problem and which has been the subject of further negotiations and proposals to amend the DSU. *See* Chapter 28 of this book.

[98] Consensus is required to waive obligations with respect to transition periods or a period of staged implementation. WTO Agreement, Art. IX:3, footnote.

[99] *WTO Agreement*, Art. IX:3. In actual practice, waivers are granted by the General Council if there is a consensus to do so at a meeting of the General Council, even if fewer than three-quarters of the Members are present. This is done pursuant to a General Council decision. WT/L/93, November 24, 1995. The decision, which also applies to accessions, notes, "if any Member has a particular problem with a proposed decision regarding a request for a waiver or an accession to the WTO, it should ensure its presence at the meeting in which this matter will be considered. The absence of a Member will be assumed to imply that it has no comments on or objections to the proposed decision on the matter." In the absence of such a pragmatic practice, a postal ballot would sometimes be needed (because attendance at General Council meetings is sometimes less than three-quarters of the Members), and it would likely be difficult to obtain the return of sufficient ballots within the prescribed thirty-day period for voting, particularly in the case of routine waivers. The Ministerial Conference has not adopted an analogous decision, but reference was made at Doha to the General Council's practice when the various accessions and waivers considered at Doha were adopted by consensus without a formal vote.

[100] *WTO Agreement*, Art. IX:4.

[101] GATT 1994 includes an *Understanding in Respect of Waivers of Obligations Under GATT 1994*. The relationship of the Understanding to the rules of the WTO Agreement is not completely clear, although it appears to be intended to add additional rules, but for GATT waivers only. The Understanding requires that a request of a waiver from a GATT obligation include a description of the policy objectives the Member seeks to pursue and the reasons GATT-consistent measures cannot achieve those policy objectives. It also provides that existing GATT waivers would expire two years after the entry into force of the WTO Agreement unless extended and that claims of nullification and impairment of benefits as a result of (i) a waiver or (ii) a failure to meet the terms and conditions of a waiver, can be brought in dispute settlement

although specific obligations under the agreements on agriculture, customs valuation and trade-related investment measures have also been waived with respect to individual countries.[102]

4. Amendments

The WTO agreements may be amended under certain circumstances.[103] The process is complicated, but in most cases is as follows. The Ministerial Conference or the General Council considers a proposal for an amendment, which may be made by any WTO Member or sectoral council. If consensus cannot be reached (normally within a ninety-day time limit), the amendment may be proposed by a two-thirds vote of the Members.

Amendments of certain WTO rules,[104] however, do not become effective unless all Members formally accept them by depositing an instrument of acceptance.[105] Otherwise, in the case of an amendment that does not alter rights and obligations, it becomes effective for all WTO Members on formal acceptance by two-thirds of WTO Members.[106] In the case of an amendment that does alter rights or obligations, the amendment becomes effective only when two-thirds of the Members have formally accepted it and then only in respect of those Members that formally accept it.[107] The Ministerial Conference or General Council may decide, however, by a three-quarters vote, that an amendment "is of such a nature that any Member which has not accepted it within a period specified . . . shall be free to withdraw from the WTO or remain a Member with the consent of the Ministerial Conference."[108] While not clearly worded, the aim of this provision, which derives from GATT 1947 Article XXX:2, is apparently to provide a mechanism for forcing Members either to accept an amendment that is widely supported or withdraw from the WTO. Finally, the addition of a plurilateral agreement to Annex IV of the WTO Agreement requires a consensus decision; deletion of such an agreement from Annex IV is authorized when requested by the parties thereto.[109]

5. Accessions

Approval of accessions requires a two-thirds vote of WTO Members.[110] The accession process is discussed below under Membership.

[102] The annual reports of the General Council catalog the new waivers granted each year and the multi-year waivers reviewed. *See, e.g.*, WT/GC/53, at 6–9 (November 5, 2001).

[103] *WTO Agreement*, Art. X.

[104] These include the amendment and decision-making rules of the WTO Agreement (Articles IX and X); the MFN provisions of GATT (Article I), GATS (Article I:1) and TRIPS (Article 4); and GATT Article II (tariff schedules). WTO Agreement, Art. X:2. Consensus is also needed to amend the Dispute Settlement Understanding, which is contained in Annex 2 to the WTO Agreement. *WTO Agreement*, Art. X:8. A DSU amendment takes effect immediately upon adoption by the Ministerial Conference or General Council, without the need for formal acceptance by Members through deposits of instruments of acceptance.

[105] *WTO Agreement*, Art. X:7.

[106] *WTO Agreement*, Art. X:4. In the case of GATS, this rule applies to amendments to Parts IV, V and VI of GATS (and annexes thereto). *WTO Agreement*, Art. X:5. Formal acceptance is not necessary in respect of certain amendments to the TRIPS Agreement proposed pursuant to TRIPS Article 71.2; nor in respect of amendments to the DSU and TPRM. *WTO Agreement*, Art. X:6, X:8.

[107] *WTO Agreement*, Art. X:3, X:5.

[108] *WTO Agreement*, Art. X:3, X:5.

[109] *WTO Agreement*, Art. X:9. The procedures for amendments to plurilateral agreements are governed by the agreement in question. *WTO Agreement*, Art. X:10.

[110] *WTO Agreement*, Art. XII:2. The General Council, under the same practice as applies to waivers, normally takes accession decisions on a consensus basis. WT/L/93 (November 24, 1995). *See* note 99 *supra.*

E. Organizational Issues

1. WTO Secretariat

The WTO Agreement provides for the appointment by Members of a Director-General, who is the head of the WTO Secretariat and appoints the staff thereof.[111] Following its establishment as of January 1, 1995, the WTO took over the headquarters of the GATT in Geneva in the Centre William Rappard, the former International Labor Organization building overlooking Lake Geneva. Although the WTO later took over the one-half of the Rappard building that had not been occupied by the GATT, in the year 2000 its expanded functions required it to lease additional office space in Geneva.

After long discussions over terms and conditions of employment, the personnel of the GATT Secretariat became the WTO Secretariat on January 1, 1999.[112] The staff of the secretariat is relatively small as international organizations go, consisting of only about 550 employees. Its main function is to provide support services for the activities of the WTO: negotiations on trade issues, oversight committees, dispute settlement proceedings, technical cooperation, and trade policy courses for officials from developing countries. The WTO Agreement provides that the staff shall be "exclusively international in character". Staff members are not to seek or accept instructions from any governments or other external authority, and WTO Members are under an obligation not to seek to influence staff members in the discharge of their duties.[113]

There were only four Directors-General of the GATT: Eric Wyndham-White (1947–1968), Olivier Long (1968–1980), Arthur Dunkel (1980–1993) and Peter Sutherland (1993–1995). The first Director-General of the WTO was Renato Ruggiero (1995–1999). The Members had considerable difficulties in choosing his successor and finally agreed that the two leading candidates would have successive three-year terms: Mike Moore (1999–2002) and Dr. Panitchpakdi Supachai (2002–2005). The Directors-General have often played important roles in helping WTO Member conclude trade negotiations. In particular, Directors-General Dunkel and Sutherland played an important role in pushing the Uruguay Round to a successful conclusion, in particular, through the submission by Dunkel of a draft final act at the end of 1991. Although the negotiations continued for two more years, the draft final act served to sharply focus the negotiations.

2. Status of the WTO

The WTO Agreement provides that the WTO shall have legal personality and shall be accorded by its Members with such privileges and immunities as are necessary for the exercise of its functions.[114] Similarly, Members are required to accord WTO officials and Member representatives such privileges and immunities as are necessary for the

[111] *WTO Agreement*, Art. VI:1–3. General regulations setting out the powers, duties, conditions of service and term of office of the Director-General have not yet been adopted, although they are provided for in Article VI:2.

[112] In the 1995–1999 period, they served the WTO but remained technically employees of the Interim Commission of the International Trade Organization (ICITO), which was the formal employer of the GATT Secretariat. *See* text accompanying notes 10–11 *supra.* ICITO had previously transferred all of the assets it held for GATT to the WTO and on transfer of the personnel, this relic of the Havana Charter negotiations ceased to exist.

[113] *WTO Agreement*, Art. VI:4.

[114] *WTO Agreement*, Art. VIII:1–2. The privileges and immunities are to be similar to those stipulated in the 1947 UN Convention on Privileges and Immunities of the Specialized Agencies. WTO Agreement, Art. VIII:4.

independent exercise of their functions in connection with the WTO.[115] In this regard, the WTO has a Headquarters Agreement with Switzerland that deals with a number of these issues.[116]

3. WTO Relations with Intergovernmental and Nongovernmental Organizations

(a) Intergovernmental Organizations. The WTO Agreement provides that the General Council shall make appropriate arrangements for effective cooperation between the WTO and other intergovernmental organizations ("IGOs") that have responsibilities related to those of the WTO.[117] In light of the global economic coherence mandate, the two most closely related IGOs to the WTO are the IMF and the World Bank, and the WTO's relations with them is discussed in connection with the coherence mandate.[118] The WTO has entered into agreements with various other international intergovernmental organizations with related mandates, as well, such as the World Intellectual Property Organization ("WIPO") and the International Telecommunications Union.[119]

The WTO is not formally a part of the United Nations system, although it has close contacts with that system, particularly in respect of administrative matters in Geneva. It has, however, no general agreement with the UN. The two organizations have merely exchanged letters in which they agree to continue the relationship that existed between the UN and GATT.[120] Of course, the relationship has changed in that the Secretariat staffers are no longer employees of a UN-connected entity nor do they participate in the UN Pension Plan.

As of December 2001, the General Council had not been able to agree on general rules for dealing with requests from IGOs to be observers at General Council meetings. Consequently, since the advent of the WTO only the United Nations, UNCTAD, IMF, World Bank, FAO, WIPO and OECD have been observers at General Council meetings, as they were at GATT Council meetings. Other WTO bodies have permitted different IGO observers depending on the work of the body. There are no IGO observers at DSB meetings, except occasionally the IMF when a dispute has involved it or its rules. Many more IGOs have observer status at Ministerial Conferences.

(b) Nongovernmental Organizations. The WTO Agreement provides that the General Council may make appropriate arrangements for consultation and cooperation with nongovernmental organizations ("NGOs") concerned with matters related to those of the WTO.[121] In this regard, the General Council adopted guidelines for arrangements with NGOs.[122] The goal of the guidelines is "to improve transparency and develop communication with NGOs." In the guidelines, the Secretariat is instructed to play a more active role in direct contacts with NGOs. While NGOs are recognized as being capable of making valuable inputs to the WTO, the guidelines state "there is currently a broadly held

[115] *WTO Agreement*, Art. VIII:3.
[116] WORLD TRADE ORGANIZATION, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, VOLUME I, 59–77 (2002).
[117] WTO Agreement, Art. V:1.
[118] *See* text accompanying notes 46–49 *supra.*
[119] The agreement with WIPO is found in IP/C/6 (December 13, 1995); the agreement with the ITU is found in S/C/11 (September 21, 2000).
[120] The letters are set out in WT/GC/W/10 (November 3, 1995); they were simply noted by the General Council. WT/GC/M/8, point 10 (December 13, 1995).
[121] *WTO Agreement*, Art. V:2.
[122] WT/L/162 (July 23, 1996).

view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings."[123]

In implementation of the guidelines, the WTO has, *inter alia*, sponsored a number of symposia involving NGOs, briefed them on WTO activities, set up a system for informing WTO Members of materials received by the Secretariat from NGOs and granted many of them observer status for ministerial meetings.[124] An important issue, discussed in detail below, in the WTO's relations with NGOs and other "outsiders" is the degree of transparency in respect of the WTO's documentation and meetings.

F. Membership in the WTO

As of August 1, 2004, there were 147 WTO Members, and another twenty-eight countries with observer status.[125] The latter are either in or expected soon to start the accession process.[126] The two principal non-Members, in terms of international trade volume, were Russia and Saudi Arabia, both of whom were in the accession process.

Article XII provides that any country or "separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements" may accede to the WTO.[127] Thus, separate customs territories of a country may become WTO Members, even though they are not independent national states. This was also true under the General Agreement. Hong Kong and Macao, for example, were GATT parties and are now WTO Members, and Chinese Taipei became a WTO Member on January 1, 2002. The European Community is also a Member, as well as its member countries.

1. Original Members

Article XI of the WTO Agreement provides that any Contracting Party to GATT 1947 or the European Communities could become an original member of the WTO by accepting the WTO Agreement (including the annexed Multilateral Trade Agreements), so long as it had schedules annexed to GATT 1994 and GATS. In fact, almost all GATT Contracting Parties became original Members of the WTO.[128] There does not seem to be any difference in status within the WTO or under any of the WTO agreements between "original Members", as defined by Article XI:1 and WTO Members who have acceded under Article XII.

Article XI:2 specifies that least developed countries, as defined by the United Nations, are "only . . . required to undertake commitments and concessions to the extent consistent

[123] For a further discussion of the relationship between the WTO and NGOs, *see* Chapter 82 of this book.

[124] WTO, ANNUAL REPORT (2001), at 113.

[125] The observer governments were Algeria, Andorra, Azerbaijan, the Bahamas, Belarus, Bhutan, Bosnia & Herzegovina, Cape Verde, Equatorial Guinea, Ethiopia, Kazakhstan, Laos, Lebanon, Russia, Samoa, Sao Tome & Principe, Saudi Arabia, Serbia & Montenegro, Seychelles, Sudan, Tajikistan, Tonga, Ukraine, Uzbekistan, Vanuatu, Vietnam and Yemen. All except Equatorial Guinea and Sao Tome & Principe have commenced the accession process. Requests for accession had also been received from Iran, Libya and Syria, but no action had been taken on their requests. Nepal's accession had been granted subject to ratification by the Government of that country.

[126] The Holy See (Vatican) is also an observer, but is not expected to accede.

[127] *WTO Agreement*, Art. XII:1.

[128] The exceptions were Yugoslavia, which did not participate in the Uruguay Round, and five GATT parties whose schedules were not completed in time to be annexed to the WTO Agreement. Those five acceded to the WTO under expedited procedures. *See* note 132, *infra.*

with their individual development, financial and trade needs or administrative and institutional capabilities."

2. Accession of New Members

Article XII of the WTO Agreement establishes the procedures for accession to the WTO. It does not provide much detail on the accession process; it simply provides that accession is to be "on terms agreed between [the acceding country or territory] and the WTO".[129] Once those terms are agreed, the accession (and the terms) must be approved by a two-thirds majority of the WTO.[130] In practice, accession decisions are made on a consensus basis in the General Council or Ministerial Conference.[131] As of November 1, 2003, the WTO had approved the accession of twenty countries and territories: Albania, Armenia, Bulgaria, Cambodia, China, Chinese Taipei, Croatia, Ecuador, Estonia, Georgia, Jordan, the Kyrgyz Republic, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Nepal, Oman, and Panama.[132] As noted above, many other countries are in the accession process.

To become a WTO Member, a country seeking accession first becomes an observer to the WTO. When it formally requests accession (which could be at the same time as its request for observer status), the General Council establishes a working party to consider the accession. The membership of the working party is open to all interested WTO Members. There are essentially four steps to the accession process.[133]

(a) Foreign Trade Regime Memorandum. The first step in the working-party process is the submission by the applicant of a detailed memorandum describing its foreign trade regime. The required format for this memorandum is designed to elicit information on all aspects of a country's trade regime that will be affected by WTO rules.[134] For example, the memorandum is expected (i) to discuss the applicant's economy in general and describe its economic policy, (ii) to explain its framework for making and enforcing

[129] *WTO Agreement*, Art. XII:1.

[130] There was an easier path to GATT membership for some countries that was not carried over into the WTO Agreement. Under GATT Article XXVI:5(c), a country that gained its independence from a GATT contracting party could become a GATT contracting party automatically if its parent country applied GATT to the territory in question and sponsored the admission. This method was easier than the normal accession procedure because no terms of accession had to be negotiated and it was usually the case that few of the sponsored territory's tariffs were subject to GATT bindings. Consequently, former colonies could gain the benefits of GATT membership without undertaking significant obligations under the GATT, and many did so. The requirements of Article XI on original membership, and particularly the requirement that all original Members have schedules, was designed to ensure that all WTO Members have made tariff and other commitments, even if they had not done so in GATT.

[131] WT/L/93 (November 23, 1995).

[132] Technically, there were five GATT parties that did not become original members of the WTO because negotiations on their schedules were not completed in time. They were permitted to accede under expedited procedures, without involvement of a working party, when their schedules were completed. *See* WTO/L/30 (February 7, 1995). The five countries were Grenada, Qatar, Papua New Guinea, St. Kitts & Nevis, and the United Arabs Emirates. *See* World Trade Organization, *WTO Analytical Index* 95–96 (1st ed. 2003). The WTO website does not mention these parties as having acceded to the WTO.

[133] For a detailed explanation of the accession process, *see* WT/ACC/7/Rev.2 (November 1, 2000), which is a technical note by the WTO Secretariat on the accession process.

[134] The outline of the memorandum is specified in WT/ACC/1 (March 24, 1995), entitled "Accession to the World Trade Organization: Procedures for Negotiations Under Article XII: Note by the Secretariat)". There are also four technical notes by the Secretariat dealing with information to be provided in respect of agriculture (WT/ACC/4), services (WT/ACC/5), SPS and TBT matters (WT/ACC/8) and intellectual property protection (WT/ACC/9).

foreign trade policies, (iii) to describe in detail its regulation of imports and exports and its internal policies affecting trade in foreign goods, (iv) to describe in detail its trade-related intellectual property and services regimes, and (v) to describe the institutional basis for its trade and economic relations with third countries. In addition, the applicant is expected to supply extensive statistical data and copies of all relevant legislation. The applicant then must respond to the many written questions that members of the working party typically ask in order to clarify issues raised by the memorandum. Needless to say, the preparation of a memorandum such as this takes considerable time and expertise. Applicants typically receive technical assistance from the WTO Secretariat, as well as from private consultants, whose expenses may be defrayed by governmental or intergovernmental foreign assistance programs.[135] Some countries present their memorandum at the time the working party is established; others take years to prepare it.[136]

(b) Bilateral Negotiations. In the second stage of the accession process, the applicant engages in bilateral negotiations with all interested WTO Members. Those Members have been liberalizing trade with each other for over fifty years, and, in order to gain the benefits that those many years of trade negotiations have produced, a prospective member may have to take significant market-opening measures in respect of imports from WTO Members. These negotiations are bilateral. Each WTO Member will have a different list of trade concessions that it seeks from a prospective Member. However, because of the most-favored-nation requirement, all WTO Members benefit from the market-opening concessions obtained by other Members. The negotiation process for the acceding member can be rather difficult, as each WTO Member will have its own negotiating goals for specific products and services and may not want to compromise them simply because some other Members have obtained their goals for other products and services. Since consensus is required in the end, there is a lot of pressure on acceding countries, especially those with significant economies, to make broad market access commitments.

It is difficult to give an indication of a "typical" result of these bilateral negotiations. For example, the average bound tariff rates on non-agricultural goods of the first sixteen acceding countries ranged from 4.8 per cent (Chinese Taipei) and 5.7 per cent (Moldova) to 20 per cent (Mongolia) and 20.1 per cent (Ecuador). Over time, the average bound rates accepted by acceding countries seem to have declined a bit, but meaningful generalizations are impossible to draw. However, the WTO Secretariat has published general summaries of the market access commitments that acceding countries have made in goods and services,[137] and these do give useful background information.

(c) The Accession Protocol and Working Party Report. The third stage of the accession process is the negotiation of the accession protocol. In fact, this takes place while the bilateral negotiations are ongoing. In the course of the protocol negotiations, existing Members give careful consideration to the extent that the foreign trade regime of the acceding country complies with WTO rules. To the extent that it does not, changes

[135] A description of technical assistance provided by the WTO Secretariat, along with some information on other sources of assistance, can be found in WTO/ACC/10 (Dec. 21, 2001), at pp. 32–35.

[136] For a timetable setting out the time taken by the various stages of the accession process for the first sixteen accessions, *see* WTO/ACC/10 (December 21, 2001), pp. 10–11.

[137] For tariff bindings, *see* WTO/ACC/10 (December 21, 2001), Table 2, at pp. 23–26; for services commitments, *see id.*, Table 3, at pp. 30–31.

will be required. Any applicable transitional provisions and reporting requirements are specified in the protocol (or in the report of the working party that sets the terms of the protocol, to the extent that the report is incorporated into the protocol).

Protocols of accession are typically brief.[138] The standard protocol provides that the applicant becomes a WTO Member when the protocol comes into force, which is thirty days after its formal acceptance by the applicant. The goods and services schedules of the applicant are, of course, annexed to the protocol. Probably the only other significant provision in the protocol is that which specifies that the protocol includes specified commitments made by the applicant that are included in the working party report and that the protocol shall be an integral part of the WTO Agreement. This practice is unfortunate, since it means that it is necessary to page through the relevant working party report to determine the complete contents of the protocol. A more transparent practice would be desirable.

The one exception to the use of the standard protocol involved China.[139] China's accession protocol,[140] the initial drafting of which pre-dated the WTO, contains many provisions—some of which simply restate its WTO obligations, but others of which impose on China obligations that go beyond those found in the WTO Agreement. Among those provisions are those on transparency of laws and regulations, judicial review of administrative actions and the right to trade.[141] China also accepts that it may be subject to certain special product-specific safeguards actions by other WTO Members during a transitional period.[142]

Although most protocols are quite short, as mentioned above, they typically incorporate commitments found in the working party reports. The WTO Secretariat summarizes the kind of commitments found in working party reports and incorporated into protocols as follows:[143]

- statements of fact that do not actually impose any commitment
- commitments to abide by existing WTO rules (sometimes these commitments specify national measures that need to be amended or elaborate on the WTO obligations)
- obligations not to have recourse to WTO provisions (typically transition provisions regarding TRIPS and customs valuation)
- identification of specific transition provisions that are applicable for the acceding country (e.g., customs valuation, TRIMs)
- authorization of temporary departures from WTO rules or commitments (e.g., internal taxes, import licensing, technical barriers and agriculture support)
- additional obligations (i.e., obligations not found in WTO agreements) with respect to, for example, privatization, sub-central governments, government procurement, trade in civil aircraft, transparency

As the foregoing list makes clear, these additional commitments cover a wide range of topics. The WTO Secretariat has compiled all of these commitments into one document

[138] The standard accession protocol is set out in WTO/ACC/10 (December 21, 2001), at pp. 39–40.
[139] Most protocols have deviated from the standard protocol in minor respects. *See* WT/ACC/10 (December 21, 2001), at pp. 40–41 for the provisions in question.
[140] WT/L/432 (November 23, 2001). The position of China in the WTO is discussed in more detail in Chapter 67.
[141] WT/L/432 (November 23, 2001), Secs. I(2)(C)–(D), I(5).
[142] *Id.*, Sec. I(16).
[143] WTO/ACC/10 (December 21, 2001), at p. 43.

for reference, and it takes more than one hundred pages to list them all.[144] The most interesting categories are those dealing with transition periods and additional obligations.

Pressure is put on acceding countries to implement their WTO obligations immediately, without the benefit of transition periods.[145] Indeed, the standard accession protocol provides that transition periods in WTO agreements are normally to be measured for acceding countries as of the entry into force of the WTO Agreement, i.e. January 1, 1995.[146] At this point, most of those transition periods have expired. The theory seems to be that acceding countries know that they will have to implement all WTO obligations when they start the accession process. Thus, it is argued, the accession process is essentially their transition period and, when that process is completed, they should be in compliance with their obligations.

The inclusion of additional obligations in protocols seems to stem from two separate concerns. First, in a number of instances, the additional obligations have simply been to accede or negotiate accession to the two plurilateral agreements—the Government Procurement Agreement and the Agreement on Civil Aircraft.

Second, some of the additional obligations seem to arise from concerns that the applicant's status as a country in transition from a non-market economy requires additional obligations in order to ensure that it fits into the WTO. Similar concerns existed in GATT, which had some difficulties in respect of accession of non-market economies.[147] Indeed, some of the commitments in the Chinese accession protocol—for example, the creation of a right to trade and the right of other WTO Members to use selective safeguards—address concerns that are similar to those that motivated analogous provisions in the GATT accession protocols for non-market economies. The issue of how to deal with countries in transition in the WTO has been a particularly significant one since roughly one-half of the countries that are in or have completed the WTO accession process are former Communist states. Since the easiest way to avoid problems associated with non-market economies is to encourage them to become market economies, the accession process puts pressure on countries to speed the transformation of their economies, although there are generally no specific requirements imposed beyond transparency and notification requirements in respect of privatization and pricing polices.[148]

To date, there have been no cases in dispute settlement arising out of commitments made in or incorporated into accession protocols. Given the extensive commitments

[144] *Id.*, at pp. 43–157.

[145] For the case of LDCs, *see* Part III.F.2d *infra*.

[146] WTO/ACC/10 (December 21, 2001), at p. 39 (Part I(3)).

[147] Three non-market economies in Eastern Europe – Hungary, Poland and Romania—acceded to GATT. The first was Poland, and in order to allay concerns that imports into Poland could be kept artificially low by the policies of state-trading enterprises charged with importing, the Polish accession protocol contained a commitment by Poland to increase its imports each year by a specified amount. Because of balance of payments problems, Poland was not able to comply with this obligation. The second of these countries to accede to GATT was Romania. In its accession protocol, Romania committed to increase its imports from other GATT parties in line with its increase of imports generally. That provision also failed to work effectively. In the case of Hungary, no such import commitment was required, as the Hungarians successfully argued that they had a working tariff system and that a commitment to bind tariffs was sufficient. Because of concerns over whether exports to these countries would increase, the other GATT parties reserved the right in the protocols of accession to use selective safeguards against imports from the three countries. All in all, the experience of trying to admit non-market economies into GATT seemed generally negative. *See generally* M.M. Kostecki, East-West Trade and the GATT System (1978); Jackson, Davey & Sykes, *supra* note 15, at 1150–1152.

[148] WT/ACC/10 (December 21, 2001), at pp.46–53 (compiling commitments on state ownership and privatization, and pricing policies).

made by China and the importance of China in the trading system, the first such cases may well arise out of its commitments, although that remains to be seen.

(d) Approval of Accession. Once the bilateral and protocol negotiations are completed, the bilateral commitments are consolidated into annexes to the protocol and the accession working party adopts its report recommending accession and sends it to the General Council (or Ministerial Conference), where both the report and the approval of the accession are adopted by consensus.

Overall, the process of accession can be arduous. The Chinese accession negotiations lasted over fifteen years. Indeed, the median time for completing accession for the first sixteen countries to accede to the WTO was over six years.[149] While efforts are made from time to time to speed up the process, for the most part, it remains a long and difficult one. At the end of 2002, however, the General Council adopted special rules for the accession of least-developed countries (LDCs).[150] These rules provide, inter alia, that Members shall exercise restraint in seeking market access commitments from LDCs; that special and differential treatment in WTO agreements shall apply to LDCs; that transitional periods and arrangements will be granted to LDCs (taking into account their needs, and accompanied by action plans for future compliance with WTO rules); and that LDCs will not be required to accede to any plurilateral agreements. The decision notes that no LDC has yet to accede to the WTO under the current accession procedures, although nine are in the accession process.[151]

3. Non-application among Members

Article XIII:1 of the WTO Agreement allows a WTO Member to decide in certain circumstances that the WTO Agreement (and the Multilateral Trade Agreements in Annexes 1 and 2 (which includes the DSU)) shall not apply between it and another WTO Member.

In respect of original Members of the WTO, such a decision on non-application was permitted only if the non-application provision of GATT (GATT Article XXXV) had been invoked and was in effect between the two Members at the time the WTO Agreement came into force for them.[152] This was the situation in the case of the United States and Romania, and the United States invoked Article XIII.[153] It subsequently withdrew that invocation in 1997.[154]

In the case of new Members, the non-application provision must be invoked prior to the time that the terms of accession for a new Member are approved.[155] Under the WTO Agreement, the non-application clause has been invoked seven times. The United States has invoked the clause five times, in respect of Mongolia, the Kyrgyz Republic,

[149] WT/ACC/10 (December 21, 2001), at pp. 10–11.
[150] *Accession of Least-Developed Countries*, WT/L/508 (January 20, 2003).
[151] The nine are Bhutan, Cambodia, Cape Verde, Laos, Nepal, Samoa, Sudan, Vanuatu and Yemen. Since the decision, a working party on the accession of Ethiopia has been established. The two observer countries to the WTO that are not now in the accession process—Equatorial Guinea and Sao Tome & Principe—are LDCs. For general information on the accession of LDCs, including a description of technical assistance provided to them in respect of accession, *see Summary State of Play in Working Parties on the Accession of Least-Developed Countries*, WT/ACC/12 (July 4, 2002).
[152] *WTO Agreement*, Art. XIII:2.
[153] WT/L/11 (January 27, 1995).
[154] WT/L/203 (February 20, 1997).
[155] *WTO Agreement*, Art. XIII:3.

Georgia, Moldova and Armenia.[156] It has maintained the non-application status until the U.S. Congress has acted to remove the country in question from the application of the so-called Jackson-Vanik provisions of the U.S. Trade Act of 1974, which impose certain conditions on granting MFN treatment to certain former Communist countries.[157] As of May 2003, the United States had revoked its invocation of Article XIII in respect of Mongolia, the Kyrgyz Republic and Georgia, which means that only its invocations in respect of Moldova and Armenia remain in effect.[158] The only other invocations of Article XIII through May 2003 were by El Salvador in respect of China[159] and Turkey in respect of Armenia.[160]

The Ministerial Conference may review the operation of Article XIII in a particular case on request. There have been no such reviews.[161] In the case of plurilateral agreements, non-application is governed by the agreement in question.[162]

As noted above, a similar provision existed in the GATT (GATT Article XXXV). The negotiating history of the provision and its use through 1995 is detailed in the *GATT Analytical Index*.[163]

4. Withdrawal

Article XV of the WTO Agreement provides that any member may withdraw from the agreement on six months' notice. The withdrawal automatically applies to all of the Multilateral Trade Agreements as well.[164] Withdrawal from a plurilateral agreement is governed by that agreement.[165]

G. Miscellaneous

In its preamble and in Article XVI, the WTO Agreement contains a number of provisions that have been important for other than institutional purposes and we will refer to them only briefly here.

1. Preamble to the WTO Agreement

Compared to the preamble to GATT 1947, the preamble to the WTO Agreement is noteworthy for adding wording in respect of protecting and preserving the environment, the

[156] Mongolia-WT/L/159 (July 17, 1996); Kyrgyz Republic-WT/L/275 (October 12, 1998); Georgia-WT/L/318 (October 1, 2000); Moldova-WT/L/395 (May 4, 2001); Armenia-WT/L/505 (December 10, 2002).

[157] On the Jackson-Vanik rules, see JACKSON, DAVEY AND SYKES, *supra* note 15, at 445–446. The Jackson-Vanik rules required Communist countries to meet certain criteria with respect to freedom of emigration before they were eligible to receive MFN treatment from the United States. At the time of their adoption, they effectively prevented the entry into force of a trade agreement between the United States and the Soviet Union that had been negotiated by President Nixon. However, under certain circumstances the President could waive the rules from time to time, subject to being overruled by Congress. In recent years, the annual Presidential decisions to extend MFN treatment to China were often controversial, although they were never reversed by Congress, which removed China from the coverage of the Jackson-Vanik rules effective on its accession to the WTO.

[158] Mongolia-WT/L/306 (July 8, 1999); Kyrgyz Republic-WT/L/363 (September 20, 2000); Georgia-WT/L/385 (January 10, 2001).

[159] WT/L/429 (November 7, 2001).

[160] WT/L/501 (December 3, 2002).

[161] *WTO Agreement*, Art. XIII:4.

[162] *WTO Agreement*, Art. XIII:5.

[163] GATT ANALYTICAL INDEX, *supra* note 10, at 1031–1038. *See also* Chapter 5 of this book.

[164] *WTO Agreement*, Art. XV:1.

[165] *WTO Agreement*, Art. XV:2.

objective of sustainable development, and the development of developing countries.[166] Since the basic treaty interpretation rules of the Vienna Convention refer to a treaty's preamble as part of the context in which treaty terms are interpreted,[167] the preamble could potentially play an important role in dispute settlement cases presenting environmental or development issues. To date, the most noteworthy example has been the Appellate Body's citation of the preamble in its decision in the so-called *Shrimp-Turtle* case.[168]

2. Continuation of GATT Practices

Article XVI:1 of the WTO Agreement explicitly states that, except as otherwise provided, the WTO shall be guided by past GATT decisions, procedures and customary practices.[169] In practice, this has meant that past GATT decisions (e.g., on procedures for selection of Deputy Directors-General) have been viewed as having been carried forward into the WTO context. Such decisions, however, are not generally regarded as treaty text subject to amendment rules. Rather, they are viewed in the same way as normal WTO decisions, subject to change by the appropriate WTO body.

As to the specific situation of GATT panel reports, the Appellate Body has cited this provision as grounds for stating that adopted GATT panel reports "create legitimate expectations among WTO Members, and should be taken into account where they are relevant to any dispute", even though they are not technically binding in subsequent disputes.[170]

3. Resolution of Conflicts Between WTO Agreements

The WTO Agreement provides that it prevails in the event of a conflict between it and any of the annexed Multilateral Trade Agreements.[171] The situation of conflicts between other WTO agreements is dealt with in other provisions, throughout the agreements. For example, a general interpretative note to Annex 1A (the annex containing the WTO agreements relating to trade in goods) provides that in the event of a conflict between GATT 1994 and another Annex 1A agreement, the Annex 1A agreement prevails. There are also conflict resolution provisions in some specific agreements. For example, the Agreement on Agriculture provides that the other goods agreements are subject to its provisions.[172] There are no explicit provisions for conflicts between GATT 1994 and GATS or the TRIPS Agreement, or between GATS and the TRIPS Agreement.

4. Requirement to Conform National Laws to WTO Rules

Article XVI:4 of the WTO Agreement provides that WTO Members shall ensure that their laws, regulations and administrative procedures conform to their obligations under the Multilateral Trade Agreements and the plurilateral agreements.[173] While this could be viewed as a simple statement that WTO Members are required to respect

[166] *WTO Agreement*, *Preamble.*
[167] *See* Chapter 37 *infra.*
[168] *Report of the Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, ¶¶ 129–131 (1998). *See* Chapter 5 *infra.*
[169] *WTO Agreement*, Art. XVI:1.
[170] Report of the Appellate Body, *Japan—Taxes on Alcoholic Beverages, AB-1996-2, WT/DS8*, 10 & 11/AB/R, p. 14 (1996).
[171] *WTO Agreement*, Art. XVI:3.
[172] *Agreement on Agriculture*, Art. 21.
[173] *WTO Agreement*, Art. XVI:4.

their obligations under the WTO agreements, it has been cited in dispute settlement proceedings as supporting the possibility of challenging legislation "as such" in dispute settlement proceedings, even if the legislation has not been applied in a specific case.[174]

5. Reservations

Unlike many treaties, the WTO Agreement explicitly provides that no reservations may be made to it, and reservations may be made to other agreements only insofar as explicitly permitted therein.[175] Generally speaking, those other agreements do not permit reservations.

IV. Appraisal of the WTO's Institutional Arrangements

The WTO Agreement solves a number of the institutional problems that were perceived to exist in the GATT system.[176] It establishes a clear legal basis for the organization and its activities. It provides a unified governance framework for the various multilateral trade agreements that have been negotiated, as well as a unified dispute settlement system in which to resolve all disputes. Moreover, it is conceived as a single undertaking, so that all WTO agreements apply to all WTO Members (the two plurilateral agreements excepted). These innovations have all worked quite well, with the exception perhaps of the overly complex governance structure in the trade in goods area. However, while the resultant abundance of meetings taxes the delegates in Geneva, and is a perennial concern of smaller developing countries, it is not a problem of a fundamental nature.

There are, however, problems with the WTO's institutional arrangements. They stem mainly from the continuation of GATT decision-making practices, and, in particular, of the consensus requirement. A second problem that arises from the increased visibility of the WTO relates to the "transparency" of the WTO's work and, in particular, to its relations with NGOs.

A. Decision-Making Difficulties

The WTO's decision-making problems manifest themselves in three specific ways: difficulties in making routine decisions in a timely manner; the relative impotence of the General Council in relation to the dispute settlement system; and the uncertain viability of the amendment procedures. Each of these problems is addressed below.

1. Routine Decisions

There are many decisions that the WTO needs to take on a routine basis, particularly in respect of budget and personnel matters and general "house-keeping" issues, but also in respect of waiver requests and other regularly occurring issues. In practice, the consensus requirement has too often greatly delayed decisions on these matters. For example, the annual approval of the budget has been delayed (albeit for only a relatively short period) because of the objections of only one or two Members. The adoption of staff rules and

[174] *See, e.g.*, Report of the WTO Panel, *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, ¶¶ 7.41–7.42 (1999).

[175] *WTO Agreement*, Art. XVI:5. Reservations to a plurilateral agreement may be made pursuant to the terms of the agreement.

[176] *See* text accompanying notes 1–15 *supra.*

the transfer of the staff from ICITO to the WTO Secretariat did not occur until four years after the WTO came into existence, because a number of important (and wealthy) Members kept raising budgetary issues. While rules on the de-restriction of documents were adopted in 1996, the review of those rules to be completed by July 1998 was not completed until mid-2002; and the adoption of rules on admission of intergovernmental observers to General Council meetings has been under discussion for seven years. The four-year review of the DSU, to be completed by the end of 1998, dragged on throughout much of 1999 and ended without reaching any conclusions.

The foregoing matters could be viewed as relatively inconsequential. In fact, while it would have been desirable to have prompt decisions on these matters, decisions were eventually implemented in those cases where they were really needed. In cases described above where matters remain pending, one can argue that no decision is critically needed. For example, the major IGOs have *de facto* observer status in the General Council, so no decision on observership is crucial. Since Members expressed general satisfaction with the DSU in the DSU review and since what is perhaps the only critical need for amendment—to clarify the so-called "sequencing" issue[177]—has been solved pragmatically on a case-by-case basis, it is arguable that the DSU review accomplished all that was necessary.

Nonetheless, the continued pendency of these longstanding, unresolved issues has a corrosive impact on the day-to-day operation of the organization. More importantly, the failure to take some routine decisions can damage the organization. Indeed, the inability of the General Council to agree on a successor to Director-General Ruggiero until three months after he left office put the organization in a state of near paralysis at a time when progress in preparations for the Seattle Ministerial was urgently needed. In 2000–2001, there was considerable difficulty in promptly handling waiver requests—from a number of developing countries in respect of the TRIMs Agreement and from the EC in respect of its partnership agreement with the so-called ACP countries. The lack of progress on these issues was not conducive to maintaining a healthy climate in Geneva for constructive interaction.

It could be argued that certain types of issues—here called routine—should be handled other than on a consensus basis. Such a shift would require defining which issues are routine. While the definition process would be difficult, it would seem that such matters as budget and personnel issues and basic organizational issues (e.g., de-restriction of documents and observership) clearly fall within the "routine decisions" classification. I would consider placing waivers here as well, or at least the review and extension of waivers, although that would be a more controversial step.[178]

For such routine decisions, consensus would remain the preferred decision-making mechanism, but if consensus could not be achieved within a specified time—such as

[177] *See* Chapter 28 of this book.

[178] In this regard, it should be noted that the standard practice with respect to waivers is to provide that a Member adversely affected by the waiver may bring a non-violation nullification or impairment complaint. *See, e.g.*, *Understanding in Respect of Waivers of Obligations Under GATT 1994*, ¶ 3. Thus, although a waiver does alter the balance of rights and obligations (even though it does not impose new obligations), affected parties are not left without the possibility of recourse to obtain a rebalancing of rights and obligations. While most Members would presumably not avail themselves of the possibility of initiating such an action, it would be a safety valve for Members who feel that their interests have not been properly or adequately considered in the negotiations over the terms and conditions of the waiver. Since voting on waivers was the practice in GATT and since the possibility of asking for a vote is specifically mentioned in the General Council decision on procedures for adoption waivers (WT/L/93, November 24, 1995), what is proposed would not be a complete innovation, although it would obviously change current practice.

by the end of November for the budget; within ninety days of a scheduled completion date for a review of organizational matters or of a request for a waiver—then voting would be in order, if requested. Such a practice would improve the functioning of the organization and still maintain the right of Members not to have substantive obligations imposed upon them without their consent. Needless to say, negotiations on substantive rules would remain subject to the consensus rule.

2. Relationship of the "Legislative" Institutions to the DSB

The Uruguay Round resulted in a much strengthened dispute settlement system for the WTO, one in which the decisions of panels and the Appellate Body are automatically adopted, absent consensus to the contrary.[179] A fundamental aspect of dispute settlement in a rule-based system is that decision-makers in dispute settlement must interpret the text of the agreements setting out the rules. In some cases, the meaning of those texts will be quite clear; but often there will be some gaps or a degree of ambiguity in the texts, or the application of a clearly specified standard in the text will involve the exercise of judgment in situations where reasonable minds could reach different results. All of this would seem to be unexceptional; indeed, it is fundamental to dispute settlement. However, many WTO Members have felt a considerable degree of frustration when they believe that the dispute settlement system has interpreted a text in a way that they claim they did not foresee when they negotiated the text. Usually, this view is expressed mainly by the loser in a particular dispute settlement proceeding and does not appear to be shared by the winner or by other neutral Members to any significant degree. Occasionally, however, a decision is made that attracts a great deal of criticism by a large number of Members. To date, the prime example of that has been a series of Appellate Body decisions related to its right and the right of panels to accept in dispute settlement proceedings *amicus curia* submissions from non-Members (i.e., NGOs or individuals).[180]

The problem faced by Members who disagree with such a decision is that they cannot prevent its adoption by the DSB or adopt a contrary formal interpretation under Article IX or amend the WTO agreements to negate the decision without consensus support, which is difficult to obtain.[181] For example, in respect of *amicus* submissions, the decision by the Appellate Body in *EC Asbestos* to establish procedures in that case by which non-Members could apply for leave to file such submissions led to a torrent of criticism at a special meeting of the General Council held to discuss those procedures. At the meeting, views were expressed directly or indirectly (through a group representative) by more than 50 Members.[182] Although only the United States offered unqualified support for the Appellate Body's ruling, the General Council was not in a position to change the ruling.

[179] *See* Chapter 26 of this book.

[180] Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, ¶¶ 99–110 (1998) (Panels have the authority to accept and consider unsolicited submissions from non-Members); Report of the Appellate Body, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, AB-2000-1, WT/DS138/AB/R, ¶¶ 36–42 (2000) (Appellate Body has the authority to accept and consider submissions from non-Members); Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, AB-2000-11, WT/DS135/AB/R, ¶¶ 50–57 (2001) (Appellate Body issued procedures for applying to it for permission to submit *amicus* briefs in the case, but then rejected all applications).

[181] Technically, of course, interpretations and amendments may be proposed in absence of a consensus and adopted by a vote, *see* text accompanying notes 95–97 and 103–109 *supra*, but in practice consensus decision-making is followed.

[182] WT/GC/M/60 (January 23, 2001).

It is arguable, however, that the intense reaction against and criticism of the procedures in fact resulted in a retreat by the Appellate Body, as it ultimately rejected all of the applications to submit *amicus* briefs in the *EC Asbestos* case.

Another example was presented by the *India Quantitative Restrictions* case.[183] That case arose out of India's application of quotas and other import restrictions for balance-of-payments purposes, as is permitted by GATT Article XVIII:B. The question presented was whether India's underlying balance-of-payments situation satisfied the criteria for imposing such restrictions. The consultations that occurred in the Balance-of-Payments Committee were inconclusive as no agreement could be reached on a phase-out plan. In the course of those negotiations, six developed-country Members requested consultations with India under the DSU. India was later able to settle on a six-year phase-out with five of them, but the United States insisted on a shorter period and requested the DSB to establish a panel to consider the matter, which occurs automatically. In the dispute settlement proceeding, India argued that only the Balance-of-Payments Committee had jurisdiction to decide if the India measures were justified by balance-of-payments difficulties. The United States argued that such an issue was justiciable in dispute settlement and the panel and the Appellate Body agreed. While the relevant agreement text and GATT practice would seem to support the US position,[184] the case highlights the fact that the lack of consensus in a WTO body results in no action, while the dispute settlement system produces results quickly and automatically.

For those for whom these examples demonstrate a problem, two types of solutions have been proposed. One type focuses on rebalancing the judicial-legislative balance in the WTO system through reducing the power of the dispute settlement system, either by removing certain kinds of cases altogether (such as claims related to justification of balance-of-payments measures)[185] or by limiting access to dispute settlement for inappropriate cases and by allowing a minority of Members to block adoption of panel reports.[186] The other type of solution focuses on improving the ability of the General Council to modify dispute settlement decisions and thereby provide a more effective counterweight to the dispute settlement system.[187]

A discussion of these issues is beyond the scope of this Chapter. In general, the proposals focus on changing dispute settlement practices and not the general institutional arrangements of the WTO. Two points should be made, however. First, despite the special pleading of those who have lost cases, it is not at all clear that the dispute settlement system is imposing new obligations on Members.[188] Second, as to proposals to limit

[183] *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90.

[184] *See* William J. Davey, *Comment*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 329 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian and Americo Beviglia Zampeti eds. 2001).

[185] *See* Frieder Roessler, *Are the Judicial Organs of the World Trade Organization Overburdened*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 184, at 308.

[186] *See, e.g.*, CLAUDE BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION 111–129 (2001).

[187] *See, e.g.*, John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, 1 JOURNAL OF INTERNATIONAL ECONOMIC LAW 329 (1998).

[188] The prime complaint of WTO Members in this regard concerns the Appellate Body's decisions regarding *amicus* briefs, see text accompanying notes 180–182 *supra*, which do not impose new substantive obligations. Indeed, despite its position that it could, the Appellate Body has not yet relied on such briefs. On the issue of the extent to which the WTO dispute settlement system has resulted in decisions that go beyond what reasonable interpretation of the agreements would predict, *see generally* William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 79 (2001) (concluding that the system has not done so).

access to dispute settlement or to remove the automaticity of adoption of panel reports, it would seem perverse to undermine a functioning dispute settlement system because of problems in the "legislative" decision-making process. Rather, the legislative process should be strengthened, if necessary.[189]

3. Amendment Procedures

A third troublesome aspect of the WTO's decision-making process arises because of the difficulty of amending the WTO agreements. By the early 1960s, it was thought that amending GATT 1947 was probably impossible,[190] yet the GATT amendment provisions were carried over into the WTO Agreement.[191] The negotiations launched by the Doha ministerial are supposed to result in a single undertaking accepted by all WTO Members. To the extent that the texts of agreements need to be changed, the amendment process will have to be used and that will mean that Members will only be bound when they formally accept the amendments and no one will be bound until two-thirds of the Members accept the amendments. To the extent that Members undertake specific commitments in their tariff, agricultural or service schedules, they will be bound only when they formally accept the protocol adding those schedules to the relevant agreement. Thus, it is quite possible that for some time following the conclusion of the negotiations, many Members will not be bound by the results. In fact, this situation has already arisen in respect of the post-Uruguay Round services protocols, where some Members signed protocols, but have not formally accepted them even after four years. Of course, to the extent that the "major players" all accept the agreements, the problem is less significant, but it would be unfortunate if some agreements applied in amended form to most of the membership, while they applied in original form to others.

The difficulty of the amendment process has caused some to suggest, with tongue in cheek, that it will be necessary to repeat what was done in 1994 each time significant amendments to the WTO agreements are needed, i.e., create a new organization (WTO II, WTO III, etc.) to replace the WTO, with the ratifying Members withdrawing from the original WTO. This would, of course, give a considerable impetus for non-ratifying Members to ratify. Time will tell whether such a procedure is the only practicable one.

B. Transparency

There are two transparency issues frequently discussed in WTO circles. The first is known as internal transparency and is related to the WTO's decision-making process. The second is external transparency and arises in the context of the WTO's relations with NGOs.

1. Internal Transparency

The consensus-building process typically used in WTO decision-making requires consultations and discussions with an increasing number of Members. By its nature, that process brings Members into discussions at different stages, which may annoy those Members who are brought in at the later stages, particularly if the proposal is presented to them as a *fait accompli* that cannot be changed. While this has always been a problem, it has become more serious as more and more developing countries have become more

[189] *See* Davey, *supra* note 184, at 331–332.

[190] JACKSON, DAVEY & SYKES, *supra* note 15, at 214. GATT was amended in the 1950s, but some amendments proposed at that time never came into force because of Uruguay's refusal to accept them. JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 310 (1986).

[191] The WTO amendment procedures are described in the text accompanying notes 103–109 *supra.*

active in the WTO. The issue came to a head at the Seattle Ministerial when a number of African and Caribbean countries stated that because of a lack of internal transparency, they would not support any declaration.[192] Since there was no declaration, their resolve was never tested, but their concerns became the subject of further discussions in the WTO.

In summarizing the result of those discussions in July 2000, the chair of the General Council noted that (i) Members did not see any need for any major institutional reform that would alter the basic character of the WTO as a Member-driven organization and its consensus decision-making process and (ii) that informal open-ended consultations (i.e. consultations open to all) played an important role in facilitating consensus, as did consultations within smaller groups. As to the latter, he noted that it was important that (i) those Members with a specific interest in the issue under consideration should be given the opportunity to make their views known; (ii) that no assumptions should be made that one Member "represents" other Members absent a clear agreement to such an arrangement; and (iii) the outcome of such consultations should be reported back to the full membership expeditiously.[193] There were no further discussions in 2001,[194] and the Doha Ministerial did succeed where the Seattle Ministerial had not, probably because of better pre-conference preparation, which was possible in part because there was an additional two years to discuss the basic issues. There have been extensive discussions in 2002, though no decisions had been taken at the time of writing (December 2002).[195]

2. External Transparency

The problem of external transparency concerns how the WTO deals with the outside world. There are a number of sub-issues: (i) the role of the Secretariat in promoting the WTO; (ii) the role of NGOs in the WTO and the relationship of the Secretariat to them; and (iii) the openness of the WTO in terms of meetings and documentation.[196]

Many WTO Members take the view that it is for the Members themselves, and not the Secretariat, to promote the organization.[197] Of course, the Director-General and other Secretariat staff make many speeches and the Secretariat prepares reports and studies on various topics, which generally tend to cast the WTO in a favorable light. Nonetheless, the Secretariat does less of this than might be expected, in part because of Member attitudes, which seem unlikely to change.

The role of the NGOS in the WTO can be usefully divided into two sub-issues. The first concerns whether NGOs should have any participatory role in WTO meetings and negotiations, as they do in some other international organizations. Notwithstanding their role in UN organizations, I think that the arguments against such a role for NGOs in the WTO are quite strong. Despite their claims to represent various constituencies, they do not represent those constituencies in the usual democratic sense of the word. Rather they

[192] *Moore, Barshefsky Stress Need for New WTO Rules after Breakdown*, INSIDE US TRADE, December 4, 1999.

[193] WT/GC/M/57, at 24–25 (September 14, 2000). *See also* WTO, ANNUAL REPORT 2001, at 47.

[194] The 2001 Annual Report of the General Council does not mention the internal transparency issue. WT/GC/53 (November 5, 2001).

[195] *See* WT/GC/M/74 (Meeting of May 13–14,2002) at 17–32; WT/GC/M/75 (Meeting of July 8 and 31, 2002) at 7–27.

[196] There are also transparency issues that arise in dispute settlement, which are discussed in Chapter 30 of this book.

[197] *See 1999 Annual Report of the General Council*, WT/GC/28, at 14–15 (November 12, 1999) and materials cited therein.

represent those who control the NGOs.[198] As such, there is simply no justification for them to have a substantive voice in the WTO.[199]

The WTO, of course, has to deal with NGOs and the General Council has adopted some limited guidelines for doing so.[200] Under the guidelines, the Secretariat distributes documents received from NGOs to its Members (and others), briefs NGOs on WTO developments and sponsors symposia on topics of NGO interest to which NGOs and trade officials are invited. Beyond that, NGOs have informal contacts with some Secretariat officials on a regular basis, and, of course, have contacts with Members in Geneva and at home.

Finally there is the issue of the openness of meetings and the availability of WTO documentation. Meetings of WTO bodies are generally closed to the public and NGOs, with the notable exception of ministerial conferences at which NGOs are observers. While it would not be possible or desirable to have informal or negotiating sessions open to the public, it would seem that over time, the WTO should open more meetings to the public, especially those of the major decision-making bodies, such as the General Council.

As for documentation, most WTO documents are issued as unrestricted documents, including all documents related to specific disputes, but some WTO documents are still issued as restricted documents, including minutes of meetings.[201] In the case of minutes, it may be several months after the meeting before they are available. While they are derestricted 45 days after they are circulated to Members, they may not be so circulated until three (or more) weeks after the meeting occurs. Generally, the 2002 changes to the derestriction policy move in the direction of greater openness, although more openness is still possible and desirable.

[198] Permitting NGOs participatory rights would probably require giving virtually all NGOs such rights. This would include business groups as well as various activist groups, despite the fact that the latter often view themselves as morally superior to business groups, as it would be difficult to divide NGOs into "legitimate" NGOs and other NGOs. Creating rules for establishing such legitimacy would be difficult, as many NGOs would probably find it difficult to accept having to disclose funding sources and governance practices and the other sort of similar transparency issues that are relevant to legitimacy (at least where the NGOs claim is that it "represents" some group).

[199] For a detailed elaboration of this position, *see* BARFIELD, *supra* note 206, at 97–110, 135–143. For development of the argument that the WTO needs to be more inclusive in order to be "legitimate", *see* Robert O. Keohane and Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy* and comments thereon by Robert E. Hudec and Daniel C. Esty; and Robert Howse and Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far* and comments thereon by Steve Charnowitz and Gary N. Horlick in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, *supra* note 184, at 227–307.

[200] WT/L/162 (July 23, 1996).

[201] The current rules for circulation and derestriction of documents are found in WT/L/452 (May 16, 2002).

B. The Multilateral Agreements

CHAPTER 5

GATT 1994

Kevin Kennedy*

TABLE OF CONTENTS

I. Introduction 91
A. The MTN Rounds 92
B. The Tokyo Round 94
C. The Uruguay Round 95
1. The Transition from GATT 1947 to GATT 1994 96
2. The Uruguay Round MTAs, Decisions, and Understandings 98
II. The Five Pillars of GATT 1994 99
A. Article I, The Unconditional Most-Favored-Nation Obligation 100
1. The Antecedents of MFN 101
2. Conditional vs. Unconditional MFN Treatment 101
3. Overview of the GATT Article I MFN Clause 102
4. The Meaning of the Term "Like Product" 103
5. Additional MFN Commitments in GATT 1994 105
6. Additional MFN Commitments in the MTAs 106
B. GATT Article II, Tariff Bindings 107
1. Tariff Negotiations 108
2. Tariff Modification and Withdrawal 109
3. "Other Duties or Charges" 111
4. Valuation of Imports 111
5. Import Monopolies 112
6. Tariff Classification 112
7. The Marrakesh Protocol 112
C. GATT Article III, The National Treatment Obligation 114
1. Internal Taxes and Other Charges 116
2. Article III:2, First Sentence 117
3. The "Like Product" Determination 118
4. Article III:2, Second Sentence 120
5. Internal Regulations Affecting Imports 122
6. Additional Article III Commitments 124
7. National Treatment Exceptions 125
D. GATT Article XI, The Elimination of Quotas 127
1. The Exception for Agricultural Products 129
2. The Balance-of-Payments Exception 131
3. The Allocation of Quotas 132

* Kevin Kennedy is professor of International Trade Law at Michigan State University College of Law.

E. GATT Article X, Publication and Administration of Trade Regulations 134
1. The Trade Policy Review Mechanism 136
2. Additional Transparency Commitment in the MTAs 138
III. Other Non-Tariff Barriers to Trade 140
A. Article V, Freedom of Transit 140
B. Article VI, Antidumping and Countervailing Duties 140
C. Article VII, Valuation for Customs Purposes 142
D. Article VIII, Fees and Formalities Connected with Importation 143
E. Article IX, Marks of Origin 144
F. Articles XIV and XV, Exchange Controls and Exchange Arrangements 146
G. Article XVI, Subsidies 148
H. Article XVII, State Trading Enterprises 148
I. Article XIX, Emergency Action on Imports of Particular Products 151
IV. General and Security Exceptions 154
A. Article XX, General Exceptions 154
1. The Article XX Chapeau 155
2. The Public Morals Exception 157
3. Protection of Human, Animal, or Plant Life or Health 157
4. Measures Against Deceptive Practices and to Protect Intellectual Property 160
5. Measures to Conserve Exhaustible Natural Resources 162
6. Other Article XX Exceptions 165
B. Article XXI, Security Exceptions 166
V. Dispute Settlement 168
A. Article XXII, Consultation 169
B. Article XXIII, Nullification or Impairment 169
1. GATT Article XXIII:1(a) Violation Complaints 170
2. Non-violation Complaints Under GATT Article XXIII:1(b) 170
3. GATT Article XXIII:1(c) Situation Complaints 172
VI. Customs Unions and Free-Trade Areas 172
A. GATT Article XXIV Criteria for Establishing An RTA 172
B. Types of RTAs 175
C. The Uruguay Round Understanding on Article XXIV 176
VII. Institutional Provisions 178
VIII. Special Provisions for Developing Countries 180
A. Article XVIII, Governmental Assistance to Economic Development .. 180
B. Articles XXXVI–XXXVIII, Trade and Development 181
IX. Summary and Appraisal 182
X. The Future 182

I. Introduction

Contemporary international trade law had its genesis in 1947 with the signing of the General Agreement on Tariffs and Trade ("GATT").[1] For 47 years GATT performed the dual roles of being the world's only multilateral trade agreement and multilateral trade organization. The World Trade Organization assumed GATT's legal and institutional functions on January 1, 1995.

The negotiators who drafted GATT worked with the experience of the Great Depression, the trade protectionist measures of the 1930s, and, of course, World War II, deeply etched in their minds. Among the more notorious of the trade protectionist measures was the infamous Smoot-Hawley Tariff Act of 1930, which was a major contributor to deepening the Depression globally. Such trade protectionist measures played no small role in creating an opportunity for political radicals in Europe and Japan to seize power, which in turn precipitated World War II.[2]

Against this backdrop, a comprehensive plan for post-World War II reconstruction and economic development was proposed by the United States and the United Kingdom at Bretton Woods, New Hampshire, in 1944. The creation of three international economic and financial institutions was contemplated at the Bretton Woods Conference. Two of these institutions, the International Bank for Reconstruction and Development (the World Bank) and the International Monetary Fund, were in fact established for the purpose of responding to investment and international balance-of-payment issues, respectively. The institutional triad was to include the International Trade Organization ("ITO").

The United States introduced a draft Charter in September 1946 that served as the basis for discussions at the First Session of the Preparatory Committee on the Havana Charter.[3] Pending approval of the Havana Charter by national legislatures, international negotiations on tariff reductions and their implementation were concluded and the results codified in the GATT, which was approved provisionally by national representatives, effective January 1, 1948. Thus, GATT's *raison d'être* was to serve as an interim agreement until the ITO and its organic document, the Havana Charter, could be definitively approved by national legislatures. To underscore the provisional status of GATT, GATT Article XXIX plainly states that once the Havana Charter entered into force, and with it the ITO, Part II of GATT that contains the bulk of the international legal commitments (other than the MFN obligation and tariff commitments) would be

[1] General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

[2] *See* Richard N. Cooper, *Trade Policy and Foreign Policy, in* U.S. Trade Policies in a Changing World Economy 291–92 (Robert M. Stern ed. 1987).

[3] The members of the Preparatory Committee were Australia, Belgium, Luxembourg, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, the Netherlands, New Zealand, Norway, South Africa, the USSR, the UK, and the United States. With the exception of the former Soviet Union, all of these countries became GATT contracting parties under Protocols of Provisional Application.

For a history of the preparatory work on GATT, *see* World Trade Organization, Analytical Index: Guide to GATT Law and Practice, vol. 1, at 1–9 (1995); John H. Jackson, World Trade and the Law of GATT 35–57 (1969); Kenneth W. Dam, The GATT: Law and International Economic Organization 10–16 (1970); Olivier Long, Law and Its Limitations in the GATT Multilateral Trade System 4–6 (1985); Robert E. Hudec, The GATT Legal System and World Trade Diplomacy (1990); Armin von Bogdandy, *International Trade Law*, *in* U.S. Trade Barriers: A Legal Analysis 74–76 (E. Grabitz and A. von Bogdandy eds. 1991).

suspended.[4] In the end, of course, the Havana Charter never entered into force. Even though the Charter was far more comprehensive than GATT both substantively and institutionally, with articles covering employment, economic development, restrictive business practices, and dispute resolution, no acceptances of the Charter were ever received by the United Nations, the depositary for Charter accessions. Once it became clear that the Havana Charter had no chance of being approved by the neo-isolationist U.S. Senate, the State Department issued a statement in 1950 that the Charter would not be submitted again to Congress.As a consequence, GATT was pressed into service by default to fill the institutional and legal vacuum, with all of its warts and pimples. Defying the odds, GATT became the fountainhead of international trade law, doubling as the premier multilateral trade agreement and international trade forum for its contracting parties—which by 1994 numbered 114—for nearly five decades.

GATT was applied provisionally by the contracting parties (as the signatories to GATT 1947 were called) under Protocols of Provisional Application or Protocols of Accession to the General Agreement.[5] All Protocols of Provisional Application and of Accession grandfathered preexisting national legislation that discriminated against imports vis-à-vis the like domestic product, and preexisting national laws authorizing import quotas.

The total absence of institutional provisions in GATT underscores the point that GATT was never intended by its drafters to be an international organization. In fact, during its 47-year term, GATT's secretariat services were provided by the Interim Commission for the International Trade Organization, which was established by the United Nations Conference on Trade and Development in 1948 to perform certain interim functions pending approval of the ITO.[6] Nevertheless, considering these organic flaws, GATT was able to execute its role as the premier international trade organization remarkably well.

A. The MTN Rounds

Eight multilateral trade negotiation sessions or Rounds have been completed under GATT auspices. A ninth round, informally named the Doha 'Development' Round, was launched in December 2001 at the conclusion of the fourth WTO Ministerial Conference. It was scheduled to be completed by the end of 2004, but this deadline has been moved to at least the end of 2005. Each multilateral trade negotiation ("MTN") round has had the broad goal of liberalizing trade by reducing tariffs on trade. In the last three MTN rounds—the Kennedy, Tokyo, and Uruguay Rounds—the additional goals of clarifying existing trade rules, broadening GATT's scope of coverage, and eliminating nontariff barriers to trade among the world's trading countries have figured prominently in the negotiations.[7] GATT has sponsored the following eight MTN rounds and the WTO is sponsoring the ninth round:

[4] GATT Article XXIX provides in pertinent part:

> 2. Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.
> 3. If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.

[5] *Id.* at 6. For an analysis of the Protocol of Provisional Application, *see* Guide to GATT Law and Practice, *supra* note 3, vol. 2, at 1071–84.

[6] *See* Guide to GATT Law and Practice, *supra* note 3, vol. 2, at 1119, 1123.

[7] *See* Phillip Evans and James Walsh, The Economist Intelligence Unit Guide to the New GATT 1–13 (1994); Congressional Budget Office, The GATT Negotiations and U.S. Trade Policy 15–45 (1987).

Round	Location	Dates	Countries Participating
First Round	Geneva	1947	23
Second Round	Annecy	1949	33
Third Round	Torquay	1950–51	34
Fourth Round	Geneva	1955–1956	22
Dillon Round	Geneva	1961–1962	45
Kennedy Round	Geneva	1964–1967	48
Tokyo Round	Geneva	1974–1979	102
Uruguay Round	Geneva	1986–1994	118
Doha Development Round	Geneva	2001–	147

The primary focus of the first five GATT MTN rounds was the progressive reduction of tariffs and the elimination of quantitative restrictions. For example, the first round of negotiations yielded 45,000 tariff concessions affecting $10 billion worth of world trade. By the time of the third MTN round, 8,700 concessions were negotiated, resulting in tariff reductions of twenty-five percent compared to 1948 levels. In the sixth MTN Round, the Kennedy Round, existing customs duties were lowered an average of thirty-five percent affecting $40 billion worth of global trade.[8]

Average tariffs were forty percent *ad valorem* at the end of World War II. Over the course of the eight MTN Rounds average tariffs of developed countries on all goods have been reduced to less than three percent *ad valorem*. The progressive reduction and elimination of tariffs helped increase world trade by an average of eight percent annually during the decades of the 1950s and 1960s. World merchandise exports increased an average of 5.5 percent annually in the 1990s.[9] As the level of customs duties was reduced and resort to quotas eased, new obstacles to trade emerged, referred to collectively as nontariff barriers to trade ("NTBs"). Many of these NTBs had been in place for years as a form of contingent protection, but they had minimal adverse effects on trade flows because tariff levels were so high that many foreign goods could not clear the high tariff wall in any event. Other NTBs were put in place as a quick fix for dealing with the deteriorating economic climate of the 1970s. Once tariff rates began to decline, NTBs became the weeds of international trade, blocking and choking the growth of trade. NTBs replaced tariffs to protect weak domestic industries in many developed countries. Thus, while in the sixth, seventh, and eighth MTN rounds (the Kennedy, Tokyo, and Uruguay Rounds, respectively) GATT contracting parties continued to negotiate tariff reductions, they devoted more of their attention to negotiating legal disciplines on the use of NTBs.

With the experience of the first five MTN rounds behind them, GATT contracting parties were familiar with the process of multilateral negotiations on the reduction of tariffs and the elimination of quantitative restrictions. However, negotiating the elimination of NTBs presented them with thorny negotiation problems. First, NTBs are far more varied than tariffs, making trade-offs in negotiations difficult. Second, NTBs are less transparent than tariffs, making it difficult at times to pinpoint government policies that are *de facto* or *de jure* protectionist. Third, because most developed-country tariffs rates are bound, they cannot be increased quickly or discreetly without violating GATT commitments. NTBs, on the other hand, are comparatively more easy to impose. Fourth,

[8] *See* John B. Rehm, *Developments in the Law and Institutions of International Economic Relations—The Kennedy Round of Trade Negotiations,* 62 Am. J. Int'l L. 403 (1968).
[9] *See* WTO, Annual Report 2000 (2000).

unlike tariffs, it is difficult at times to quantify the protective effect of NTBs. Fifth, NTBs may be politically difficult to remove for the governments imposing them because their *raison d'être* may not have been to shield a domestic industry from import competition, even though that is the indirect consequence of their implementation.

It is a tribute to the flexibility of the GATT system and the persistence of the GATT contracting parties that the problem of NTBs and the threat they pose to liberal trade was tackled head-on by extending the scope of the last three MTN rounds to include negotiations on a broad range of NTBs.

B. The Tokyo Round

The Tokyo Round was distinguished from earlier MTN rounds by its focus on and successful conclusion of nine agreements refining, and in some cases extending, existing GATT obligations. The nine NTB agreements concluded in the Tokyo Round were an improved Anti-Dumping Agreement (first negotiated in the 1965 Kennedy Round), the Subsidies Code, the Agreement on Import Licensing, the Agreement on Civil Aircraft, the Agreement on Technical Barriers to Trade (the Standards Code), the Agreement on Customs Valuation, the Government Procurement Code, the Bovine Meat Agreement, and the Dairy Products Agreement. The Tokyo Round agreements or Codes were open to all GATT contracting parties, but a GATT contracting party was not required to become a signatory to any of these agreements as a condition of continued GATT membership.[10] Thus, the Tokyo Round Codes were not core GATT obligations applicable to all GATT contracting parties under the most-favored-nation commitment, but rather separate legal instruments negotiated under GATT auspices and existing parallel to, but not fully integrated into, GATT.

What explains this departure from GATT multilateralism and shift to plurilateralism? A number of factors have been identified that explain why the Tokyo Round Codes were not made integral parts of GATT: the press of time (the President's fast-track negotiating authority[11] was to expire on January 3, 1980), the practical difficulty of amending GATT, the problem of free riders expected to enjoy the benefits of concessions made by other countries without themselves making reciprocal concessions, and the broad sweep of subjects covered in the Tokyo Round Codes. The Tokyo Round Codes became side agreements to GATT, not an integral part of it. Benefits under the Codes were available to signatories only. Each Code had its own dispute resolution mechanism.

[10] As of December 31, 1993, the Anti-Dumping Code had been signed by 25 countries; the Subsidies Code by 26, the Agreement on Import Licensing by 29, the Agreement on Civil Aircraft by 22, the Standards Code by 46, the Agreement on Customs Valuation by 34, the Government Procurement Code by 12, the Bovine Meat Agreement by 26, and the Dairy Products Agreement by 16. For a table of the signatories to the respective Tokyo Round codes, *see* U.S. Intl Trade Comm'n, The Year in Trade 1993: Operation of the Trade Agreements Program 43–44 (USITC Pub. 2769, 1994).

[11] Under fast-track negotiating authority (now called "trade promotion authority"), Congress authorizes the President to negotiate and conclude regional (e.g., NAFTA) and multilateral (e.g., WTO) trade agreements subject to a straight up-or-down vote by Congress within a specified time without amendment. Fast-track negotiating authority became necessary following Congress's refusal to approve the Kennedy Round Antidumping Agreement. That experience left U.S. trading partners reluctant to enter into future trade negotiations with the United States unless they had some assurance that agreements negotiated by the U.S. Trade Representative had a high probability of receiving congressional approval. Fast-track negotiating authority provided that assurance. The President was first given fast-track authority in the Trade Act of 1974. It expired in 1993, and was not renewed until 2002. *See* Section 2103 of the Trade Act of 2002, P.L. 107–210, 116 Stat. 933. *See generally* Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 Brook. J. Int'l L. 143 (1992).

Most-favored-nation unconditionality had been replaced with reciprocity and conditionality. Pragmatism triumphed over multilateralism.

As the GATT agenda became more ambitious and as GATT began to evolve into a more comprehensive set of rules governing most aspects of international trade in goods, the more serious of its congenital defects began to emerge. One of its most serious flaws was its lack of an adequate dispute settlement mechanism, as discussed in Part V of this Chapter. In addition, GATT's lack of coverage of trade in services and intellectual property protection was of growing concern to developed countries that had shifted from a goods-oriented to a services-oriented economy. Moreover, serious questions of the compatibility of the Tokyo Round Codes with the Article I MFN commitment were raised by commentators and GATT contracting parties alike, thus sparking an interest in fully integrating those Codes into GATT.[12]

The eighth and most ambitious MTN round, the Uruguay Round, resolved these issues by establishing a comprehensive and binding dispute settlement mechanism and by integrating most of the Tokyo Round Codes into the GATT-WTO system.[13]

C. The Uruguay Round

After eight years of negotiations that began in 1986, the most far-reaching and comprehensive development in world trade since 1947 took place in 1994 with the successful completion of the Uruguay MTN Round.[14] Peter Sutherland, the first Director-General of the World Trade Organization, described the conclusion of the Uruguay Round as a defining moment in modern history.[15]

As part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations signed in Marrakesh on April 15, 1994 (the Final Act),[16] several

[12] For example, Brazil complained that the U.S. countervailing duty law violated the MFN obligation because countries like Brazil, that were not Subsidies Code signatories, did not receive the benefit of the injury determination before such duties were levied on their imports. The panel agreed with Brazil that the United States had violated the MFN obligation of GATT Article I. *See* Report of the GATT Panel (adopted), *United States—Denial of Most-favoured-nation Treatment as to Non-Rubber Footwear from Brazil*, BISD, 39th Supp. 128, 150–51 (1992). *See also* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 32; Gary Clyde HUFBAUER AND JEFFREY J. SCHOTT, TRADING FOR GROWTH: THE NEXT ROUND OF TRADE NEGOTIATIONS 20–22 (1985).

[13] *See Agreement Establishing the World Trade Organization,* Arts. XI, XII. An exception exists for the two remaining plurilateral agreements on government procurement and trade in civil aircraft.

[14] For additional reading on the Uruguay Round, *see generally* RAJ BHALA AND KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL TRADE ARRANGEMENTS, AND U.S. LAW (1998); TERENCE P. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) (1993); JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND (1995); ERNEST H. PREEG, TRADERS IN A BRAVE NEW WORLD: THE URUGUAY ROUND AND THE FUTURE OF THE INTERNATIONAL TRADING SYSTEM (1995); THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYERS PERSPECTIVE (Jacques Bourgeois ed. 1994); EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION (1996); THE WORLD TRADE ORGANIZATION: THE MULTILATERAL FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION (Terence P. Stewart ed. 1996); THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT: UNDERSTANDING THE FUNDAMENTAL CHANGES (Harvey M. Applebaum and Lyn M. Schlitt eds. 1995); JOHN KRAUS, THE GATT NEGOTIATIONS: A BUSINESS GUIDE TO THE RESULTS OF THE URUGUAY ROUND (1994); JEFFREY J. SCHOTT AND JOHANNA W. BUURMAN, THE URUGUAY ROUND: AN ASSESSMENT (1994); URUGUAY ROUND TRADE AGREEMENTS, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. 316, vol. 1, 103d Cong., 2d Sess. 659–67 (1994).

[15] *See* EVANS AND WALSH, *supra* note 7, at 1.

[16] *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, done at Marrakesh, April 15, 1994, *reprinted in* 33 INT'L LEGAL MATERIALS 1130 (1994). The Final Act, as well as all of the Agreements, Understandings, Decisions, and Declarations adopted at the conclusion of the

Understandings and Multilateral Trade Agreements were concluded that are made an integral part of the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement). A series of Ministerial Decisions was also taken to further clarify certain provisions of the Multilateral Trade Agreements. These Understandings, Agreements, and Decisions have a profound impact on GATT 1994.

1. The Transition from GATT 1947 to GATT 1994

One of the first items of business that the Uruguay Round participants had to address was the application of GATT 1947 between countries that were still GATT contracting parties and those that had acceded to the WTO Agreement. Because countries could become Members of the WTO within two years after entry into force of the WTO Agreement,[17] a seamless transition only was possible if all WTO Members continued as GATT 1947 contracting parties until all GATT contracting parties became WTO Members.[18] Accordingly, the parties to GATT 1947 concluded an arrangement defining the scope of legal obligations of countries that remained GATT 1947 contracting parties during a transitional period after they joined the WTO.

On January 1, 1995, when the WTO Agreement entered into force, GATT 1947 and the World Trade Organization co-existed under the *Decision on the Transitional Co-existence of the GATT 1947 and the WTO Agreement*.[19] The Decision provided for the termination of GATT 1947 on January 1, 1996, on which date GATT 1947 would be absorbed into the GATT-WTO system as GATT 1994. Paragraph 1 of the GATT 1947-WTO Agreement Co-Existence Decision provides:

> 1. The contracting parties that are Members of the WTO may, notwithstanding the provisions of the GATT 1947,
>
> (a) Accord to products originating in or destined for a Member of the WTO the benefits to be accorded to such products solely as a result of concessions, commitments or other obligations assumed under the WTO Agreement without according such benefits to products originating in or destined for a contracting party that has not yet become a Member of the WTO; and
> (b) Maintain or adopt any measure consistent with the provisions of the WTO Agreement.

Paragraph 1(a) clearly was aimed at restricting the reach of the most-favored-nation commitment by relieving a WTO Member which remained a GATT 1947 contracting

Uruguay Round, may be found in THE LEGAL TEXTS—THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999).

[17] *See WTO Agreement*, Art. XIV:1.

[18] *See generally* Patrick M. Moore, *The Decisions Bridging the GATT 1947 and the WTO Agreement*, 90 AM. J. INT'L LAW 317 (1996).

[19] *Decision on Transitional Co-Existence of the GATT 1947 and the WTO Agreement*, adopted Dec. 8, 1994, GATT Doc. PC/12-L/7583. Similar co-existence decisions were concluded to resolve the issue of whether a country that withdrew from GATT 1947 would be obligated to complete dispute settlement proceedings initiated before its withdrawal under the Tokyo Round Anti-Dumping and Subsidies Codes. A dispute initiated under either Code could not be refiled under the WTO Agreement. *See Decision on Transitional Co-Existence of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization*, adopted Dec. 8, 1994, GATT Doc. PC/13-L/7584; *Decision on the Transitional Co-Existence of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization*, adopted Dec. 8, 1994, GATT Doc. PC/16-L/7587. *See* Moore, *supra* note 18, at 324–26.

party during the transitional period from any obligation to extend to other GATT 1947 contracting parties that were not yet WTO Members any of the WTO benefits that were more favorable than those under GATT 1947. Consequently, GATT contracting parties were prevented from invoking the MFN clause of GATT 1947 to claim WTO benefits and were thus given an incentive to join the WTO quickly in order to receive the benefits under the WTO Agreement that were unavailable under GATT 1947. One of the most important of these WTO benefits was the lower tariff rates negotiated during the Uruguay Round.

Paragraph 1(b) addressed the converse problem of applying to GATT 1947 contracting parties those provisions of Uruguay Round Multilateral Trade Agreements that are more protectionist than their GATT 1947 counterparts (*e.g.*, the rules on trade in textiles and agriculture).[20] For example, certain bound tariff rates on agricultural products are higher under the Uruguay Round Agreement on Agriculture than under GATT 1947.[21] Also, the test for imposing quantitative restrictions on textile imports in order to protect a domestic industry from serious injury is more lax under the Uruguay Round Agreement on Textiles and Clothing than the test under Article XIX of GATT 1947, but still an improvement over the test used under the protectionist Multifiber Arrangement which the Agreement on Textiles and Clothing replaces. In short, Paragraph 1(b) prevented GATT 1947 contracting parties that had not become WTO Members from challenging actions taken by a WTO Member under an Uruguay Round Agreement that were inconsistent with GATT 1947.

Another important provision of the Co-Existence Decision is paragraph 3. It provides:

> 3. The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.

This paragraph not only established a deadline for co-existence, but it also provided a termination date for the Protocols of Provisional Application or Accession to GATT 1947. It was designed to prod signatories to the Agreement Establishing the WTO (the WTO Agreement) to expedite domestic procedures for WTO accession. Although Article XIV:1 of the WTO Agreement gave original signatories two years within which to join the WTO, it was not inconsistent with paragraph 3. The latter dealt solely with termination of the GATT 1947 Protocols; the purpose of the former being to set the terms of WTO accession. If a country joined the WTO within the two-year grace period, then it did so on the basis of the concessions it had negotiated during the Uruguay Round. However, if an original signatory failed to join within two years, then it would have the same status as a country that was not an original signatory. In that event, it faced the prospect

[20] *See* Chapters 6 and 9 of this book.

[21] These higher tariffs are the product of the "tariffication" process that all WTO Members undertook under the Agreement on Agriculture, discussed in Chapter 6 of this book. The process of tariffication—converting non-tariff measures into ordinary customs duties—yields a tariff that is equivalent to the level of protection afforded by the non-tariff measures that the new tariff replaces. It requires Members to convert existing measures into ordinary customs duties and to bind them, subject to special safeguard provisions applicable in cases of rapidly increasing agricultural imports. The tariffication process is far from an exact science. It can result in a duty rate that is prohibitive, as illustrated by the phenomenon known as "dirty tariffication." WTO Members have allegedly manipulated the tariffication methodology in many instances, resulting in declared tariffs higher than the estimated tariff equivalents. *See* Jeffrey J. Steinle, *The Problem Child of World Trade: Reform School for Agriculture,* 4 Minn. J. Global Trade 333, 348–49 (1995).

of having to renegotiate the trade deal it had previously concluded during the Uruguay Round.[22]

Finally, the WTO Agreement provides that GATT 1994 and GATT 1947 are legally distinct.[23] Thus, when a contracting party withdrew from GATT 1947 and joined the WTO, it had no GATT obligations to contracting parties that had not joined the WTO. However, while GATT 1994 and GATT 1947 are legally distinct, the WTO Agreement maintains continuity with the past by providing that the WTO shall be guided by the decisions, procedures, and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.[24]

2. The Uruguay Round MTAs, Decisions, and Understandings

The Final Act embraces all agreements negotiated in the Uruguay Round, with tariff reductions, agreements on disciplines governing nontariff barriers to trade in goods, and the specific market access commitments on trade in services being recorded in national Schedules of Concessions (for tariffs) and Commitments (for services trade). The most important of the Uruguay Round agreements is the Agreement Establishing the World Trade Organization,[25] under which the institutional functions of GATT 1947 are replaced by the World Trade Organization. The WTO Agreement establishes a single institutional framework that encompasses (1) GATT 1994, (2) six Understandings that amend GATT 1947, and (3) fourteen multilateral trade agreements covering trade in goods, services, and intellectual property rights. Of equal importance is the vastly improved dispute settlement mechanism codified in the Understanding on Rules and Procedures Governing the Settlement of Disputes. The following Annexes are appended to the WTO Agreement and are an integral part of it:

- GATT 1994, as amended (Annex 1A)
- General Agreement on Trade in Services (Annex 1B)
- Agreement on Trade Related Aspects of Intellectual Property Rights (Annex 1C)
- Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2)
- Trade Policy Review Mechanism (Annex 3)
- Plurilateral Trade Agreements (Annex 4).

The agreements listed in Annexes 1A-C, 2, and 3 comprise the Multilateral Trade Agreements (MTAs). The MTAs are integral parts of the WTO Agreement and are binding on all WTO Members.[26] Annex 1A includes the following Understandings that amend and clarify GATT 1947:

- Understanding on the Interpretation of Article II:1(b)
- Understanding on the Interpretation of Article XVII
- Understanding on Balance-of-Payments Provisions
- Understanding on the Interpretation of Article XXIV

[22] *See* Moore, *supra* note 18, at 323–24.

[23] *WTO Agreement*, Art. II:4.

[24] *WTO Agreement*, Art. XVI:1. Countries acting jointly under GATT 1947 were referred to as the "CONTRACTING PARTIES." The Ministerial Conference replaces the CONTRACTING PARTIES in this role.

[25] *Marrakesh Agreement Establishing the World Trade Organization, reprinted in* 33 INT'L LEGAL MATERIALS 1125 (1994). *See* Amelia Porges, *The Marrakesh Agreement Establishing the World Trade Organization, in* THE WORLD TRADE ORGANIZATION, *supra* note 14, at 63.

[26] *See WTO Agreement*, Art. II:1–2.

- Understanding in Respect of Waivers of Obligations
- Understanding on the Interpretation of Article XXVIII

These six Uruguay Round Understandings; GATT 1947, as amended and modified; waivers granted under GATT 1947 and still in force on the date of entry into force of the WTO Agreement; and the Marrakesh Protocol, to which the WTO Members' schedules of market access commitments are appended, are referred to collectively as "GATT 1994."

The following twelve subject-specific multilateral agreements on trade in goods (the MTAs) also are listed in Annex 1A:

- Agreement on Agriculture
- Agreement on the Application of Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade
- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [Antidumping]
- Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 [Customs Valuation]
- Agreement on Preshipment Inspection
- Agreement on Rules of Origin
- Agreeent on Import Licensing Procedures
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards

In the event of a conflict between the WTO Agreement and any of the MTAs, the WTO Agreement prevails.[27] In the event of a conflict between the MTAs and GATT 1994, the MTAs prevail.[28]

II. The Five Pillars of GATT 1994

The structure of GATT 1994 is built around five legal principles or pillars that form the core of the legal obligations undertaken by WTO Members. These five pillars are (1) the unconditional most-favored-nation obligation, (2) tariff bindings, (3) the national treatment obligation, (4) the elimination of quantitative restrictions, and (5) transparency of government regulations affecting trade.

The unconditional most-favored-nation ("MFN") obligation requires that a WTO Member treat imports from all other Members on an equal, nondiscriminatory basis vis-à-vis all other Members' imports. The MFN obligation is unconditional in the sense that MFN treatment must be accorded all imports from WTO Members, regardless of country of origin, and regardless of whether the exporting Member negotiated reciprocal trade concessions with the importing Member. The MFN obligation is not absolute, however. Two of the most important exceptions are the GATT Article XXIV exception for free trade areas and customs unions discussed in Part VI of this Chapter and Chapter 46 of this book, and the exception for special and differential treatment of developing countries, discussed in Chapter 34 of this book.

[27] *See WTO Agreement*, Art. XVI:3.
[28] *See WTO Agreement, General Interpretative Note to Annex 1A of the Agreement.*

The economic rationale for the MFN commitment is that discrimination can lead to wasteful trade diversion. Without the benefit of the MFN principle, the most efficient producers may not have access to a foreign market because of discriminatory trade preferences in favor of less efficient producers from other countries. The unconditional MFN principle gives assurance to the most efficient producers that they will not be denied market access because of the country of origin of the goods, thereby promoting the most efficient allocation of resources. This in turn lowers the costs of production, increases consumer choices, and promotes world economic growth. Unconditional MFN also facilitates trade negotiations by giving a country that has negotiated a trade concession the peace of mind of knowing that whatever trade deal it has struck with another country, it will not be denied the benefit of its bargain if the latter country later strikes a more favorable deal with a third country concerning the same goods. The unconditional MFN commitment multilateralizes the benefit of all bargains that are struck during an MTN round.

The second pillar of the GATT-WTO system is tariff bindings. Tariffs, or customs duties, are the one form of trade protection that GATT authorizes. However, if, in GATT parlance, negotiated tariff concessions are "bound," they cannot be increased above the bound duty rate unless compensation is paid to other adversely affected WTO Members in the form of lowered tariffs on other items of interest to those Members. Failing compensation those members will be entitled to retaliate by raising duties on goods of export interest to the Member raising its tariff. Tariff bindings thus enable foreign producers to better plan their entry into an export market by locking in one variable in the price structure—the duty rate imposed on their product at the time of importation. Working hand-in-glove with tariff bindings is the MFN clause. Through the operation of the unconditional MFN commitment, negotiated tariff concessions are generalized and multilateralized.

The third GATT-WTO pillar is the national treatment obligation. The principle of nondiscrimination embodied in the MFN commitment is carried over to the national level, so that Members are required, first, to treat imports no less favorably than the domestic like product respecting internal measures, and second, not to tax imports in excess of the amount of indirect taxes imposed on the like domestic product.

The fourth of the GATT-WTO pillars is the obligation to eliminate quantitative restrictions on imports and exports. This obligation includes a prohibition on border measures that have the effect of restricting the quantity of goods imported from or exported to a WTO Member. It thus allows the law of supply and demand to determine the price of goods, rather than allowing prices to be set by an artificial short supply created by a government restriction on the quantity of a product that may be imported or exported.

The fifth and final GATT pillar, the transparency obligation, requires that all national laws and regulations of general application affecting trade be published and readily available. It is in essence a due process guarantee and a partial shield against arbitrary government action.

A. Article I, The Unconditional Most-Favored-Nation Obligation

The unconditional MFN obligation of GATT Article has been described as "the foundation of the GATT system," "the cornerstone of GATT," and "the touchstone of the GATT." What is the unconditional MFN commitment? What explains its prominence in the GATT

architecture in the face of criticism from international trade lawyers, economists, and politicians alike?[29]

1. The Antecedents of MFN

The MFN obligation can be traced back to the Middle Ages and has been commonplace since the seventeenth century.[30] Today, the unconditional MFN principle lies at the very heart of international trade law.[31] In its 1978 annual report, the International Law Commission prepared draft articles on most-favored-nation clauses.[32] The Commission defined "most-favored-nation treatment" as

> treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.[33]

More tersely, the *Restatement (Third) Foreign Relations Law of the United States* defines MFN treatment as "an obligation to treat that state, its nationals or goods, no less favorably than any other state, its nationals or goods."[34] Under the unconditional MFN commitment, all tariffs and nontariff barriers to trade are applied equally to all imports regardless of origin.[35]

2. Conditional vs. Unconditional MFN Treatment

What distinguishes the conditional from the unconditional MFN obligation? The hallmark of the conditional MFN commitment is reciprocity; that of unconditional MFN, nondiscrimination. Under a conditional MFN commitment, Country A will extend to Country B the trade concessions that Country A has granted to Country C, provided that Country B reciprocates by granting to Country A concessions that Country A deems satisfactory. In other words, Country B does not automatically receive the benefit of the trade concessions that Country A accords to the trade of Country C. At first blush there is something instinctively "fair" about a conditional MFN obligation. Why should Country B be the windfall beneficiary of the trade deal that Country C negotiated with Country A, i.e., why should Country B be allowed to "free ride"? Although several arguments have been advanced in support of an unconditional MFN trade policy, the various arguments can be distilled to a single word: nondiscrimination. The nondiscrimination argument has two dimensions, one political, the other economic.

[29] The unconditional MFN principle has not received universal acclaim. In the words of one commentator, "The unconditional MFN principle has always enjoyed more affection in the textbooks than in the daily life of commercial policy." Gary C. Hufbauer, *Should Unconditional MFN Be Revived, Retired or Recast?, in* Issues in World Trade Policy 33 (R.H. Snape ed. 1986). *See also* Warren F. Schwartz and Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 Int'l Rev. L. & Econ. 27 (1996).

[30] For the history of the MFN principle, *see* McGovern, *supra* note 14, § 8.3; Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 Wis. Int'l L.J. 246 (1996).

[31] For a discussion of the MFN commitment in GATT, *see* McGovern, *supra* note 14, § 8.32; Jackson, *supra* note 3, at 249–72 (1969).

[32] *Report of the International Law Commission on the Work of Its Thirtieth Session*, [1978] 2 Y.B. Int'l L. Comm'n 5, UN Doc. A/33/192 (1978), *reprinted in* 17 Int'l Legal Materials 1518 (1978).

[33] *Id*. Art. 5.

[34] Restatement (Third) Foreign Relations Law of the United States § 801(1) (1987).

[35] A note of caution is in order here. This general prohibition on preferential trade arrangements has several broad exceptions, most notably customs unions (e.g., the European Union), free trade areas (e.g., the North American Free Trade Agreement), and trade preferences for developing countries (e.g., the Generalized System of Preferences).

The political argument in support of nondiscrimination is that by pursuing international trade on a nondiscriminatory basis, the unconditional MFN principle helps suppress aggression in international relations. Trade conducted on an unconditional MFN basis promotes the development of multilateralism, which in turn acts as a prophylactic against discriminatory trade barriers, which further reduces trade frictions among trading nations. As noted in a U.S. State Department statement at the end of World War II issued in support of creating the ITO:

> The fundamental choice is whether countries will struggle against each other for wealth and power, or work together for security and mutual advantage. . . . The experience of cooperation in the task of earning a living promotes both the habit and the techniques of common effort and helps make permanent the mutual confidence on which the peace depends.[36]

The attack on Pearl Harbor was triggered at least in part by the U.S. trade embargo against Japan on oil and rubber. The three wars fought between France and Germany within the span of seventy years during the Nineteenth and Twentieth Centuries were the inspiration for the European Coal and Steel Community that "internationalized" two industries essential to war-making.

The economic argument for unconditionality has two prongs. The first prong focuses on locking in the benefit of the bargain obtained in the course of MTN rounds. The unconditional MFN principle ensures that the value of bilateral trade concessions will not be eliminated by a later and more favorable trade concession to a third country competing for the same export market in the same goods. The second prong of the economic argument takes its cue from efficiency. By preventing discriminatory trade patterns from developing, unconditional MFN trade concessions ensure that the most efficient producers will have equal access to export markets regardless of country of origin.

3. Overview of the GATT Article I MFN Clause

GATT Article I:1 contains the core MFN obligation. Within its scope are four areas of government activity, three that take place at the border and a fourth that treats goods once they have entered the customs territory of a WTO Member.

Article I:1 provides that with respect to (1) customs duties and charges of any kind imposed on importation or exportation,[37] (2) the method of levying those duties and charges, (3) all rules and formalities in connection with importation and exportation,[38] and (4) all matters referred to in paragraphs 2 and 4 of Article III concerning national treatment in internal taxation and regulation

> any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other contracting party shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

The text of Article I:1 is plain that the rule of nondiscrimination among WTO Members applies unconditionally. The MFN obligation also applies equally to imported goods

[36] *United States Proposals*, Dep't of State Pub. No. 2411, at 1–2 (1946).

[37] The term "charges of any kind" has been given a broad interpretation consistent with its plain language to include the customs user fee imposed by the United States. *See* Report of the GATT Panel (adopted), *United States—Customs User Fee*, BISD, 35th Supp. 245, 289–90, ¶ 122–23 (1988).

[38] This phrase has also received an interpretation consistent with the breadth of its plain language. For example, in Report of the GATT Panel (adopted), *United States—Non-Rubber Footwear from Brazil*, BISD, 39th Supp. 128, 150, ¶ 6.8 (1992), the panel concluded that the rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation.

regardless of whether they are subject to bound or unbound tariffs.[39] In addition, a Member cannot cite more favorable treatment in one instance to offset less favorable treatment in another instance and, thereby, claim observance of the MFN obligation on balance.[40]

4. The Meaning of the Term "Like Product"

Although a number of GATT panels, WTO panels, and the Appellate Body have construed the various parts of the MFN obligation, most dispute settlement proceedings brought under Article I:1 have focused on the interpretation of the term "like product." If imports from two WTO Members are "like products," then those imports are entitled to identical treatment regardless of their country of origin.[41]

[39] Report of the GATT Panel (adopted), *Spain—Tariff Treatment of Unroasted Coffee*, BISD, 28th Supp. 102, 111, ¶ 4.3 (1981). A WTO Member is not relieved of its MFN obligation because it did not enter into a tariff binding on the imported item.

[40] Report of the GATT Panel (adopted), *United States—Denial of Most-favoured-nation Treatment as to Non-Rubber Footwear from Brazil*, BISD, 39th Supp. 128, 151, ¶ 6.10 (1992).

[41] In addition to being found in Article I, the term "like product" is used in Articles II:2(a), III:2, III:4, VI:1(a), VI:1(b), IX:1, XI:2(c), XIII:1, XVI:4, and XIX:1 of GATT 1994. In addition, the term "like commodity" appears in Article VI:7, and the term "like merchandise" is used in Article VII:2 of GATT 1994. The term is also used in the SCM Agreement, the Antidumping Agreement, and the Safeguards Agreement.

The meaning of the term "like product" has been addressed in a number of GATT and WTO reports. *See, e.g.*, Report of the Working Party (adopted), *Brazilian Internal Taxes*, BISD, II/181 (1949) (Article III:2 of GATT 1947); Report of the Working Party (adopted), *The Australian Subsidy on Ammonium Sulphate*, BISD, II/188 (1950)(Articles I and III:4 of GATT 1947); Report of the GATT Panel (adopted), *Treatment by Germany of Imports of Sardines*, BISD, 1st Supp. 53 (1952)(Articles I and XIII of GATT 1947); Report of the Working Party (adopted), *Border Tax Adjustments*, BISD, 18th Supp. 97 (1970)(Articles II, III and XVI of GATT 1947); Report of the GATT Panel (adopted), *EEC—Measures on Animal Feed Proteins*, BISD, 25th Supp. 49 (1978)(Articles I, III:2 and III:4 of GATT 1947); Report of the GATT Panel (adopted), *Spain—Tariff Treatment of Unroasted Coffee*, BISD, 28th Supp.102 (1981)(Article I:1 of GATT 1947); Report of the GATT Panel (unadopted), *Spain—Measures Concerning Domestic Sale of Soyabean Oil*, L/5142 (1981) (Article III:4 of GATT 1947); Report of the GATT Panel (unadopted), *Canada—Measures Affecting the Sale of Gold Coins*, L/5863 (1985)(Article III:2 of GATT 1947); Report of the GATT Panel (adopted), *United States—Taxes on Petroleum and Certain Imported Substances*, BISD, 34th Supp.136 (1987)(Article III:2 of GATT 1947); Report of the GATT Panel (adopted), *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic*, BISD, 34th Supp. 83 (1987)(Article III:2 of GATT 1947); Report of the GATT Panel (adopted), *Canada/Japan—Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, BISD, 36th Supp.167 (1989)(Article I:1 of GATT 1947); Report of the GATT Panel (adopted, SCM committee) *United States—Definition of Industry Concerning Wine and Grape Products*, BISD, 39th Supp. 436 (1992)(Article VI of GATT 1947); Report of the GATT Panel (adopted), *United States—Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil*, BISD, 39th Supp. 128 (1992)(Article I:1 of GATT 1947); Report of the GATT Panel (adopted), *United States—Measures Affecting Alcoholic and Malt Beverages*, BISD, 39th Supp. 206 (1992)(Articles III:2 and III:4 of GATT 1947); Report of the GATT Panel (unadopted), *United States—Taxes on Automobiles*, DS31/R (1994)(Articles III:2 and III:4 of GATT 1947); Report of the WTO Panel, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, as modified by the Appellate Body Report, WT/DS2/AB/R (1996)(Article III:4 of GATT 1994); Report of the WTO Panel, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996)(Article III:2 of GATT 1994); Report of the Appellate Body, *Japan—Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996)(Article III:2 of GATT 1994); Report of the WTO Panel, *Canada—Periodicals*, WT/DS31/R, as modified by the Appellate Body Report, WT/DS31/AB/R (1997)(Articles III:2 and III:4 of GATT 1994); Report of the WTO Panel, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WTDS64/R (1998)(Articles I:1 and III:2 of GATT 1994); Report of the WTO Panel, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R (1999)(Article III:2 of GATT 1994); Report of the Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, (1999)(Article III:2 of GATT 1994); Report of the WTO Panel, *Chile—Taxes on Alcoholic Beverages*,

When a complaint is brought alleging discriminatory treatment in violation of Article I:1, resolution of the complaint usually turns on whether an item imported into Member C from Member A is a product "like" that imported from Member B, and therefore entitled to the same treatment by Member C.

Because no definition of the term "like product" is included in GATT, decisions on this question are made on a case-by-case basis after applying a variety of criteria that GATT panels have found to be relevant, including the product's end-uses in a particular market, consumer tastes and habits, and the product's characteristics.[42] In the Article I "like product" context, an early suggestion was made to accept national tariff classification and tariff structures as presumptively conclusive in answering the question whether two products are like each other for MFN purposes.[43] In favor of this approach is the fact that tariff classifications are generally drafted on the basis of the physical characteristics of the goods themselves. Considerations of the processes or methods by which goods are produced are irrelevant. Although the other criteria mentioned above also are considered, the use of tariff classifications and nomenclature are often dispositive in an Article I "like product" analysis.

Illustrative of the "like product" analysis in the Article I context is the 1950 GATT Working Party report that adopted the tariff-classification methodology for "like product" determinations in a case dealing with two types of fertilizers, ammonium sulphate and sodium nitrate. The Working Party concluded that the two items were not like products because the importing country, Australia, as well as other countries, classified them as separate items in their tariff schedules, notwithstanding the fact that in the national schedules of some of those countries the tariff rates were the same for both products.[44]

In a 1978 GATT panel report, the panel rejected the argument that the term "like product" is synonymous with "directly competitive or substitutable product" that is employed in *Ad* Article III:2 dealing with national treatment in the taxation of fungible goods.[45] The panel feared that if this view were adopted it would lead to a broad "like product" definition encompassing far more items than would be the case using tariff classifications.

Although the trend of GATT panels has been to employ a tariff classification methodology in Article I MFN "like product" determinations, GATT panels have not adhered slavishly to this approach when the importing country's tariff schedules are aberrational in comparison with other countries' schedules, deviate from a scheme that focuses on the physical characteristics of the goods, or are based on distinctions that are not commercial in nature. In such cases, the presumption that tariff schedules are a legitimate basis for

WT/DS87/R, WT/DS110/R, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R (2000)(Article III:2 of GATT 1994). *See also* Rex J. Zedalis, *A Theory of the GATT "Like Product" Common Language Cases*, 27 VAND. J. TRANSNAT'L L. 33 (1994).

[42] *See, e.g.*, Report of the GATT Working Party (adopted), *Border Tax Adjustments*, BISD, 18th Supp. 97, 102, ¶ 18 (1970).

[43] First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/C.II/PV/12, at 7–8 (1946).

[44] *See* Report of the Working Party (adopted), *Australian Subsidy on Ammonium Sulphate*, BISD, II/188, 191, ¶ 8 (1950). Unlike a GATT or WTO panel proceeding which is adversarial, a Working Party is an *ad hoc* inquisitorial body open to all interested WTO Members and established to study and report on the issues submitted to it for its consideration. A Working Party submits a report of its investigation to the General Council. Working Parties were used to resolve disputes in the early years of the GATT, before the practice developed of establishing panels consisting of individuals who were not nationals of the disputing countries.

[45] *See* Report of the GATT Panel (adopted), *EEC—Measures on Animal Feed Proteins*, BISD, 25th Supp. 49, 63, ¶ 4.1–4.2 (1978). The panel found significant the different duty rates, tariff classifications, and physical characteristics of the imported products under review.

distinguishing among imported products is rebutted by evidence that they are instead a disguised form of discrimination. For example, in a 1981 panel report involving Spain's five-part tariff classification scheme for unroasted coffee, a GATT panel concluded that all types of unroasted coffee are a like product, notwithstanding admitted differences among the types of coffee involved, based largely on the fact that no other country applied different duty rates to different types of coffee and that all coffee had the same end-use.[46]

Similarly, an exporting country challenging an importing country's tariff classification scheme must make a "like product" argument that is based on a classification scheme that has some measure of international acceptance. Thus, consistent with the "like product" methodology that deems an importing Member's tariff classification scheme as presumptively valid, the burden falls on the exporting Member to show that the importing Member's tariff differentiations are a disguised form of protectionism. In that connection, a 1989 GATT panel report on softwood lumber from Canada noted that tariff differentiation is a legitimate means of trade protection, and that countries have wide latitude in structuring their national tariff and classification schemes. The panel concluded that Japan's tariff classification scheme that gave duty-free treatment to certain softwood lumber imports but imposed an eight percent duty on the Canadian imports was not an MFN violation because the two imported products were not "like products."[47] The panel observed that Canada's proffered tariff classification scheme did not have international acceptance.[48]

WTO panels and the Appellate Body have adopted the factors laid down in GATT panel reports when undertaking a like product analysis.[49] For example, the Appellate Body in *Japan—Alcoholic Beverages* noted that a uniform tariff classification can be relevant, but cautioned that there is a major difference between tariff classification nomenclature and tariff bindings or concessions made by WTO Members under GATT Article II, the latter often having a broader scope than the former.[50] The Appellate Body observed "that there is a major difference between tariff classification nomenclature and tariff bindings or concessions . . . . [Many WTO Members] have bindings in their tariff schedules which include broad ranges of products that cut across several different HS [Harmonized Tariff Classification and Nomenclature System] tariff headings."[51] The Appellate Body issued a word of caution that like product determinations will not invariably be the same wherever that term is used in GATT 1994: "The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied."[52]

Besides the GATT Article I context, the MFN commitment can be found in several other articles of GATT 1994 and in many of the WTO MTAs.

5. Additional MFN Commitments in GATT 1994

GATT 1994 contains nine other subject-specific MFN commitments, in addition to the one of general application contained in Article I:1:

[46] *See Spain—Unroasted Coffee*, *supra* note 41, ¶ 4.11.

[47] *See* Report of the GATT Panel (adopted), *Japan—Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, BISD, 36th Supp. 167, 197–98, ¶¶ 5.7–5.10 (1989).

[48] *See id*. at 199, ¶ 5.15.

[49] *See, e.g.,* Report of the WTO Panel, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, ¶¶ 7.62–63 (1997).

[50] Report of the Appellate Body, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 22 (1996).

[51] *Id.*

[52] *Id*. at 18.

- Article III:7 provides that "[n]o internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply."
- Article IV(b) relates to movies and provides that "screen time . . . shall not be allocated formally or in effect among sources of supply."
- Articles V:5 and V:6 extend MFN treatment to traffic and products in transit through the territory of a WTO Member.
- Article IX:1, concerning marks of origin, provides for MFN treatment in connection with all marking requirements.
- Article XIII:1 provides for the nondiscriminatory administration of quantitative restrictions. The equal allocation of a quota among all WTO Members—in literal compliance with the MFN commitment—could operate unfairly against those Members that are major suppliers of the product under quota vis-à-vis Members that neither produce nor export the product. For example, giving each of the 147 WTO Members a 1/147 share of an import quota would be perfectly nondiscriminatory on its face, but it would discriminate in effect against those Members which are major suppliers by reducing disproportionately their exports of that product relative to the exports of other Members. Accordingly, Article XIII:2 tempers the strict MFN commitment with a rule that permits the *pro rata* allocation of quotas among supplier Members.
- Article XVII:1 commits state trading enterprises—government purchasing monopsonies and sales monopolies—to act on an MFN basis in all their purchases and sales. This obligation has a particular bearing for Members whose economies are in transition from a planned to a market economy.
- Article XVIII, Section C, permits developing countries to provide otherwise impermissible subsidies to infant industries. However, Article XVIII:20 qualifies this exception by providing that whenever a developing country does provide assistance to promote the establishment of a particular industry, such assistance cannot authorize deviations from the MFN principle. For example, a developing country cannot assess tariffs on imports from Member A that are higher than those assessed on like imports from Member B as a way of protecting an infant industry from international competition.
- The eighth and ninth instances of MFN commitments outside of Article I are found in Article XX, the general exceptions provision. The preamble or chapeau to Article XX provides that when measures are taken, they not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Paragraph (j) of Article XX provides that if a Member imposes export restrictions on products that are in local short supply, those restrictions "shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products."

6. Additional MFN Commitments in the MTAs

In addition to the nine supplementary MFN provisions within GATT 1994 proper, several of the WTO MTAs covering trade in goods contain their own MFN or MFN-like clauses. For example, Article 2.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures provides that "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where

identical or similar conditions prevail . . . .” Article 2.1 of the Agreement on Technical Barriers to Trade (the TBT Agreement) provides that “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded . . . to like products originating in any other country.” Articles 5.1.1 and 5.2.1 of the TBT Agreement further provide for MFN treatment in conformity assessment procedures.

Article 2.1 of the Agreement on Preshipment Inspection provides that “[u]ser Members shall ensure that preshipment inspection activities are carried out in a non-discriminatory manner, and that the procedures and criteria employed in the conduct of these activities are objective and are applied on an equal basis to all exporters affected by such activities.” Finally, Article 1.3 of the Agreement on Import Licensing Procedures provides that “[t]he rules for import licensing shall be neutral in application and administered in a fair and equitable manner.”

The two MTAs outside the goods sector, the General Agreement on Trade in Services (the GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), also contain their own MFN clauses. Article II:1 of the GATS provides that “[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.”

Article 4 of the TRIPS Agreement provides that “[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.” These two MFN clauses obviously mirror, *mutatis mutandis,* the core Article I:1 MFN commitment.[53] However, in a significant departure from the unconditional MFN principle, GATS Article II:2 permits Members to exempt measures from the GATS Article II MFN commitment if the conditions of the GATS Annex on Article II Exemptions are met. Eighty-three WTO members have entered 424 MFN exemptions.[54]

B. GATT Article II, Tariff Bindings

Tariffs (customs duties) on imported goods are the one form of trade protection that the GATT does not specifically prohibit. On the contrary, the imposition of tariffs is permitted with very few qualifications, the most important being that they be imposed on an MFN basis. GATT Article II:1(a) sets out this basic obligation:

> Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

The GATT preamble and Article XXVIII *bis* provide for multilateral tariff negotiations to reduce tariff rates and to bind tariff concessions. When tariff concessions are “bound,” the duties assessed on the “bound” items may not be greater than the bound rate. Bindings give legal assurance that tariffs will not be increased above that maximum tariff level. Members are free to set a tariff at any level they wish below the bound rate without prejudice to their right to increase the tariff to the bound rate at a later date. With bound tariff rates exporters can price goods destined for a foreign market knowing exactly what

[53] Article III of the plurilateral Agreement on Government Procurement is an MFN clause.

[54] See OECD, *Trade in Services: A Roadmap to GATS MFN Exemptions*, TD/TC/WP(2001)24 (2001).

the duty rate on the goods will be when they arrive at the foreign destination, thus keeping an important element of a good's total price fixed.

If an importing Member increases a duty rate above the bound tariff rate, adversely affected trading partners are entitled to compensation. Compensation can include tariff reductions by the importing Member on goods of export interest to the adversely affected exporting Members. Failing agreement on adequate compensatory adjustments, adversely affected Members may retaliate by increasing their tariffs on items of special interest to exporters in the Member making the tariff withdrawal.

Besides encouraging the reduction of tariff levels, the GATT recognizes tariffs as the only form of permissible financial charge that may be imposed on imported goods. It undergirds this policy through other GATT Articles, such as Article III, prohibiting discriminatory internal taxes, and Article VII, prohibiting excessive charges associated with customs procedures.

Once tariff concessions are negotiated, insuring their integrity and preventing their circumvention is one of GATT's main objectives. In this connection, GATT Articles I, II and III play mutually supportive roles. The unconditional MFN obligation ensures that if Member A has negotiated specific tariff reductions on goods it exports to Member B in exchange for tariff cuts on goods that Member B exports to Member A, Member A can rest assured that it will not lose the benefit of its bargain if Member B thereafter negotiates an even lower tariff rate on those same goods with Member C. Unconditional MFN ensures that goods originating from Member A will receive the same tariff treatment from Member B that Member B accords to goods originating from Member C.

In order to prevent circumvention of tariff bindings through devices that either improperly inflate the price of imported goods or lower the price of the like domestic product, GATT employs a number of devices, including (1) rules on valuation that prevent an importing country from overvaluing imported goods and thereby eliminating the benefit of any tariff concession,[55] and (2) rules on national treatment that require imported goods and the like domestic product to be treated equally for purposes of internal taxes and regulations.[56]

1. Tariff Negotiations

Article XXVIII *bis* establishes the framework for negotiating tariff concessions. It calls for negotiations

> on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation of even minimum quantities. . . .[57]

Although the term "reciprocal" is used, GATT does not deal formally with the "free-rider" problem where a Member enjoys the benefit of other Members' tariff concessions under the unconditional MFN clause, but makes few, if any, concessions in return. Developing countries, for example, argue that non-reciprocity is their right because their shaky economies do not permit the negotiation of reciprocal trade concessions.[58]

[55] GATT Art. VII; *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, discussed in Chapter 12 of this book.

[56] GATT Art. III.

[57] GATT Art. XXVIII:1 *bis*.

[58] *See* Samuel Laird and Alexander Yeats, *Tariff-Cutting Formulas—and Complications, in* THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS 89 (J. Michael Finger and Andrzej Olechowski eds. 1987).

In order to facilitate tariff negotiations between countries which have previously made deep cuts in their tariffs and those that have not, Article XXVIII:2(a) *bis* provides that "[t]he binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties." Although there is no GATT rule on the subject, the accepted practice for measuring the value of concessions is to multiply the volume of trade in the goods under negotiation by the percentage points of the proposed tariff reduction. Paragraph 2(a) of Article XXVIII *bis* states no preference for the conduct of negotiations, suggesting that they be carried out on a product-by-product basis or "by the application of such multilateral procedures as may be accepted by the contracting parties concerned." The growing complexity of tariff negotiations led to the abandonment of the product-by-product negotiating approach in the Kennedy and Tokyo Rounds in favor of a formula applied to a large number of products in linear (across-the-board) fashion. The Kennedy Round used a 50-percent linear cut as a starting point, with certain products being exempted from the linear cut.[59] After the linear cut was made, parties negotiated exceptions to further tariff reductions on a sector-by-sector, product-by-product basis. Although the overall level of tariffs was reduced in the Kennedy Round, in the Tokyo Round negotiators were confronted with tariff "spikes" or duty rates on many products greatly in excess of the average duty rate. In order to chop down the spikes and to align them more closely with the average duty rate, Switzerland proposed a formula that would accomplish this goal.[60] With the exception of negotiations on specific non-agricultural sectors where the Quad members (Canada, the EU, Japan, and the United States) negotiated "zero-for-zero" reductions and negotiations on agricultural products, the Uruguay Round returned to the traditional bilateral "request-and-offer" format between principal supplier countries.

In ranking the many achievements of the GATT-WTO system, among the most significant is the deep reduction in developed-country tariffs from high double-digit figures in 1947 to low single-digit numbers today.[61]

2. Tariff Modification and Withdrawal

GATT Article XXVIII governs the modification and withdrawal of tariff concessions. It is supplemented by the Uruguay Round Understanding on the Interpretation of Article XXVIII of GATT 1994. Members adversely affected by a proposed tariff modification or withdrawal have rights of tariff renegotiation and compensation.[62] GATT divides adversely affected Members that have negotiating or consultation rights into three

[59] *See* CONGRESSIONAL BUDGET OFFICE, THE GATT NEGOTIATIONS AND U.S. TRADE POLICY 29 (1987).

[60] The Swiss formula was $T_1 = aT_0/(a + T_0)$, where T_0 is the existing tariff, a is a co-efficient, and T_1 is the resulting tariff. Thus, if $a = 16$, and $T_0 = 10\%$, then $T_1 = 6.15\%$, or a 38% tariff cut. In the case of a tariff spike, again if $a = 16$, and $T_0 = 40\%$, then $T_1 = 11.42\%$, or a 68% cut. For a study of the various modalities used in tariff negotiations, *see* Negotiating Group on Market Access, *Formula Approaches to Tariff Negotiations*, Note by the Secretariat, TN/MA/S/3 (Sept. 9, 2002).

[61] The Secretariat has prepared a profile of all WTO Members' = tariffs that shows the percentage of tariff bindings for each Member, the simple average tariff rate, the standard deviation, the maximum duty rate, the last year of implementation, and other duties and charges. *See* Negotiating Group on Market Access, *WTO Members' Tariff Profiles*, Note by the Secretariat, TN/MA/S/4 (Sept. 11, 2002).

[62] If a Member wishes to convert specific duties to *ad valorem* duties, the conversion is also the subject of mandatory negotiations under Article XXVIII. *See* Report of the GATT Panel, *Canada—Withdrawal of Tariff Concessions*, BISD, 25th Supp. 42, 47, ¶ 14 (1979). Similarly, the imposition of specific duties when only *ad valorem* duties are bound is sufficient to establish a violation of Article II when it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule of Concessions. *See* Report of the Appellate Body, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, ¶ 55 (1998).

categories: (1) Members with which the concession was initially negotiated, (2) a Member determined to have a "principal supplying interest," and (3) Members determined to have a "substantial interest." Members in the first two categories have the right to negotiate a compensation agreement with the importing Members. Members in the third category have a right to be consulted only.

With respect to the first category of adversely affected Member, more than one country may fall within this category for any single product. For example, if Member A agreed to a tariff concession on steel wire rod with Member B during the Kennedy Round, and thereafter made a concession on steel wire rod with Member C during the Tokyo Round, then Members B and C would both have initial negotiating rights. Members with initial negotiating rights are identified by name in Members' Schedules of Concessions.

With respect to the second category of adversely affected Member, a country with a principal supplying interest is normally limited to the one country with the greatest market share in the subject product that is also greater than the country or countries with which the concession was initially negotiated. *Ad* Article XXVIII:4 states that "[i]t would . . . not be appropriate for the CONTRACTING PARTIES to determine that more than one contracting party . . . had a principal supplying interest," although in exceptional circumstances a second country may be designated a principal supplier if its trade that is affected by the tariff withdrawal or modification "constitutes a major part of the total exports of such contracting party."[63] The 1994 Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994 expands the category of Members qualifying as having a "principal supplying interest" to include a Member "which has the highest ratio of exports affected by the concession . . . to its total exports."[64] This modification is intended to give developing countries a chair at the renegotiation and compensation table.

The third category of adversely affected Member includes countries that have at least a ten-percent share of the import market of the particular good based on the prior three years' trade statistics.[65]

A Member wishing to modify or withdraw a concession must first attempt to secure the agreement of the Members in the first two categories, although Members in the third category have a right to consultation.[66] If no agreement is reached, the concession may nevertheless be withdrawn, but Members in the three categories are free to withdraw substantially equivalent concessions.[67] What constitutes "substantially equivalent concessions" is not defined in GATT, but a GATT panel has suggested using a methodology that estimates the value of the exports that would have occurred but for the withdrawal of the tariff binding.[68]

In situations where a tariff binding is replaced with a tariff-rate quota, the 1994 Understanding provides a ten-percent formula that results in compensation equal to the amount by which future trade prospects exceed the level of the quota.[69] Future trade prospects are based on the greater of (1) average trade over a recent three-year period, increased by the average annual growth rate of imports in that same period or ten percent, whichever is greater, or (2) the trade in the most recent year increased by ten percent.[70]

[63] Ad Article XXVIII:5.

[64] *Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994*, ¶ 1.

[65] *See* Interpretative Note 7 *ad* Article XXVIII:1.

[66] *See* Article XXVIII:1.

[67] *See* GATT Article XXVIII:3.

[68] *See Canada—Withdrawal of Tariff Concessions*, *supra* note 62, at 42.

[69] *See Understanding on Article XXVIII*, *supra* note 64, ¶ 6

[70] *See id.*

Article XXVIII:1 entitles WTO Members to renegotiate their tariff bindings on a three-year cycle (the current benchmark is January 1, 1994, although the WTO Ministerial Conference can change this cycle[71]). Guidelines were adopted in 1981 on procedures for conducting Article XXVIII negotiations.[72] But as noted by McGovern, "This procedure is now very rarely used. It was invoked by Korea in 1986, and by the EC in 1992 regarding oilseeds following the panel finding that the EC had nullified or impaired its zero tariff binding."[73]

3. "Other Duties or Charges"

Beyond the basic Article II obligation to respect tariff bindings when duties are assessed on imported goods, Article II:1(b) exempts bound items "from all other duties or charges of any kind imposed on or in connection with importation." Although Article II does not define "other duties or charges," the term is recognized to include import surcharges, revenue duties, special import taxes, economic development taxes, and import or security deposits.[74]

Article II:2 excepts from the term "other duties or charges" internal taxes that are also imposed on domestic like products; antidumping and countervailing duties; and "fees or other charges commensurate with the cost of services rendered," such as charges for health and safety inspections.[75]

A contracting party was not required under GATT 1947 to record with GATT its "other duties or charges" under Article II. The Uruguay Round Understanding on the Interpretation of Article II:1(b) corrects this lack of transparency by requiring Members to record in their schedule of concessions all such "other duties or charges" levied on bound tariff items. All such recorded charges and duties are bound, and the assessment of any new or omitted "other duties or charges" on bound tariff items is prohibited.[76] The 1994 Understanding further requires Members to record in their schedule of concessions the nature and level of all other duties or charges, regardless of whether those duties and charges are imposed on goods that are subject to a tariff binding. Such recordation is without prejudice to the right of other WTO Members to challenge at any time the GATT-consistency of such "other duties or charges."

4. Valuation of Imports

To prevent the erosion of the benefit of tariff concessions, Article II:3 provides that "[n]o contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement." Without this restriction a WTO Member that had made a ten-percent concession on tariffs, for example, could wipe out the benefit of the concession by altering its valuation or currency conversion methodologies with a ten-percent upward adjustment. Building on Article II:3, Article VII, as amended and clarified by the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the Customs Valuation Agreement), lays down

[71] *See Ad* Article XXVIII:1. *See also* McGovern, *supra* note 14, § 5.132.

[72] *See Guidelines on Procedures for Negotiations under Article XXVIII*, BISD, 27th Supp. 26 (1981).

[73] McGovern, *supra* note 14, § 5.132.

[74] *See Argentina—Footwear*, *supra* note 62 (invalidating a "statistical tax" as violative of Article II:1(b)).

[75] A GATT panel report invalidated the U.S. customs user fee to the extent it was not limited in amount to the approximate cost of services rendered. *See United States—Customs User Fee*, *supra* note 37, at 276–79, ¶¶ 78–82, 84–86. *See also* Guide to GATT Law and Practice, *supra* note 3, vol. 1, at 271–76.

[76] *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*, ¶¶ 1, 2, and 7.

methodologies that WTO Members are to adhere to when making valuation determinations. The basic valuation methodology is to accept the transaction value, or invoice value, of the imported goods as the basis for valuing the imports and assessing *ad valorem* duties. The Customs Valuation Agreement is analyzed in a separate chapter of this book.[77]

5. Import Monopolies

Article II:4 restricts import monopolies from providing protection in excess of the amount of protection provided in the appropriate Schedules. Policing this rule requires a comparison of the purchase and resale prices of the import monopoly, with allowances being made for reasonable transportation costs and related overhead costs, and a reasonable margin of profit.[78]

6. Tariff Classification

In the event an exporting Member considers that a product it has exported to another Member is not receiving the treatment from the importing Member that the exporting Member believes to have been contemplated by a concession provided for in the importing Member's Schedule of Concessions, the exporting Member may bring the matter to the attention of the importing Member. If the importing Member's response is that it agrees with the position of the exporting Member, but that it cannot adjust the situation because a court or other national authority has ruled that the product cannot be classified under the importing Member's customs laws so as to permit the treatment sought by the exporting Member, the two Members are to enter into negotiations with a view to a compensatory adjustment. In *European Communities—Computer Equipment*, the Appellate Body ruled that reliance on the subjective views of the exporting Member's expectations as to how a product would be classified upon importation into another Member would undermine the security and predictability of the reciprocal arrangements directed to the substantial reduction of tariffs and other barriers to trade.[79] The Appellate Body pointed out that the text of Article II:5 does not support the view that the legitimate expectations of the exporting Member are a vital element in the interpretation of Article II:1, given that the second sentence of that paragraph refers to the treatment contemplated by both the exporting and importing Members.[80]

7. The Marrakesh Protocol

The Marrakesh Protocol to GATT 1994 is the vehicle by which national schedules of tariff concessions are made legally binding following the Uruguay Round. All tariff concessions and market access commitments are set forth in schedules annexed to the Marrakesh Protocol and are an integral part of GATT 1994.[81] Each Member's schedule

[77] *See* Chapter 12.

[78] *See* Interpretative Note *ad* Article II:4. In Report of the GATT Panel (adopted), *Canada—Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies,* BISD, 35th Supp. 37, ¶¶ 4.10, 4.15, 4.16 (1989), the panel concluded that any margin of profit would on the average have to be the same for both domestic and imported products in order to prevent undermining the value of tariff concessions. For extensive discussions of this panel report and of Interpretative Note *ad* Article II:4, *see* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 88–96; MCGOVERN, *supra* note 14, at §§ 5.11-9, 5.11-10.

[79] *See* Report of the Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, ¶¶ 82–87 (1998).

[80] *See id.* ¶ 81.

[81] *See General Agreement on Tariffs and Trade 1994, Interpretative Note,* ¶ 1(d).

lists concessions under the following four general categories:[82]

Part I Most-Favored-Nation Tariffs
Section I
A. Agricultural Products (tariffs)
B. Agricultural Products (tariff quotas)
Section II Other Products (tariffs)
Part II Preferential Tariffs (this pertains only to the preferential schemes registered under Article I:2 of GATT 1947 when it was first signed)
Part III Non-Tariff Concessions
Part IV Commitments Limiting Subsidization of Agricultural Products
Section I Domestic Support
Section II Export Subsidies (budgetary and quantity commitments)
Section III Export Subsidies (commitments limiting scope of export subsidies)

Addressing the free-rider problem, countries that are not original WTO Members (i.e., were not contracting parties to the GATT at the time the WTO Agreement entered into force), but instead accede to the WTO after its entry into force, must submit a schedule of concessions that includes substantial tariff reductions in line with those made by WTO Members.[83] If an original Member accedes to the WTO Agreement after its entry into force, that Member must implement all of the tariff reductions that have already been required of other WTO Members and the reduction required of them by January 1 of the year following accession, in the absence of an accession agreement to the contrary.[84]

The Marrakesh Protocol provides that as a general rule WTO Members will implement their tariff reductions in five equal stages, with the first reduction taking place on the date the WTO Agreement entered into force (January 1, 1995), and with each successive reduction being implemented on January 1 of each of the following years. The staging does not apply to tariff reductions for agricultural products. Members are free to implement reductions sooner, but the final cut must have been implemented no later than January 1, 1999.

As noted above, over the course of the eight MTN rounds, average tariffs in developed countries have been significantly reduced. Following the Uruguay Round average tariffs rates in developed countries on all goods on manufactured goods stand at an average of three percent on imports from other developed countries, down from the 5.5-percent pre-Uruguay Round average, a 45-percent reduction. While average tariff levels in developed countries have fallen dramatically over the past 55 years, tariff structures have not changed as dramatically, with tariffs remaining persistently high on certain finished manufactured goods, including textiles and footwear.[85] Developed countries' average tariff rates on

[82] *See* THE YEAR IN TRADE 1993, *supra* note 10, at 4.
[83] *See Marrakesh Agreement Establishing the World Trade Organization*, Article XII. *See also* Chapter 4 of this book.
[84] *Id.* Art. XIV:2.
[85] At the start of the Uruguay Round, average tariff rates in the Quad on finished manufactures were 6.9 percent in the United States, 8.1 percent in Canada, 7 percent in the EU, and 6.4 percent in Japan. Average tariff rates on raw materials at the same time were 1.8 percent in the United States, 2.6 percent in Canada, 1.6 percent in the EU, and 1.4 percent in Japan. *See* HUFBAUER AND SCHOTT, *supra* note 12, at 14. The post-Uruguay Round average tariff rates in developed countries on raw materials is 1 percent; on semi-manufactured goods, under 3 percent; and on finished products, under 5 percent. *See* EVANS AND WALSH, *supra* note 7, at 74.

imported goods from developing countries stand at 4.8 percent post-Uruguay Round, 1.8 percent higher than the average duty rate on imported goods from developed countries.[86] Developed countries' average tariffs on textiles and footwear—goods of obvious export interest to developing countries—remain high even after the Uruguay Round, at 12.4 percent and 7.1 percent, respectively.[87]

Developed countries reached agreement in the Uruguay Round on tariff concessions that result in bound tariff rates on 99 percent of the value of imported manufactured goods and on 98 percent of the value of all imports to developed countries from all sources.[88] Although this figure is impressive, it represents only a marginal improvement on the Tokyo Round results, which bound 94 percent of all developed countries' tariffs.[89] What is impressive about the Uruguay Round results on this score, however, is that as part of the market access package of agreements, the Quad Members agreed to eliminate most tariffs in several sectors, including pharmaceuticals, construction equipment, medical equipment, steel, beer, spirits, furniture, toys, paper, and farm equipment; to reduce tariffs for other products by an average of one-third; and to chop tariff "spikes" of fifteen percent or greater.[90] Given the multilateralizing effect of the unconditional MFN obligation, all WTO Members benefit from these tariff cuts.

Many developing countries bound a large percentage of their tariffs as well. After the Uruguay Round, 61 percent of the tariffs on manufactured goods imported by developing countries will have a bound duty rate, compared with a figure of thirteen percent pre-Uruguay Round.[91] Several developing countries, mainly in Latin America, agreed to bind one hundred percent of their tariffs on manufactured goods, while the average in Asia was seventy percent on manufactured goods. India, Korea, Malaysia, the Philippines, Singapore, and Thailand bound between 60 and 89 percent of their tariffs on manufactured goods.[92]

With the conclusion of the Uruguay Round Agreement on Agriculture, a wide range of nontariff barriers on agricultural products, including quotas, voluntary restraint agreements, and variable import levies, were eliminated and "tarrified," *i.e.*, converted into tariff equivalents that provide approximately the same level of trade protection as the previous nontariff barriers.[93] Developed countries made a commitment to reduce agricultural tariffs by 36 percent over six years. Developing countries committed to a 24 percent reduction over ten years.[94] Tariffs on agricultural products will be high for the foreseeable future and are the subject of on-going tariff-reduction negotiations.

C. GATT Article III, The National Treatment Obligation

The third pillar in the GATT structure is the Article III national treatment obligation. GATT Article III's general theme is to prohibit Members from circumventing tariff concessions through the use of discriminatory internal taxes or other measures that might

[86] *See* Marcelo de Paiva Abreu, *Trade in Manufactures: The Outcome of the Uruguay Round and Developing Countries Interests, in* THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES 56 (Will Martin and L. Alan Winters eds. 1995).

[87] *See* EVANS AND WALSH, *supra* note 7, at 73.

[88] *See* de Paiva Abreu, *supra* note 86, at 55; EVANS AND WALSH, *supra* note 7, at 72.

[89] *See id.*

[90] *See* THE YEAR IN TRADE 1993, *supra* note 10, at 5.

[91] *See id.* at 55.

[92] *See id.*

[93] *See Agreement on Agriculture*, Art. 4. The Agreement is discussed in detail in Chapter 6 of this book.

[94] *See id.* Arts. 4, 15.

undermine the benefit of a tariff reduction. However, the national treatment obligation applies to all imported goods regardless of whether they are subject to a tariff binding or not. Like its MFN counterpart, national treatment is a nondiscrimination obligation, but imposed at the national level. Once imports have entered a Member's territory, (1) internal taxes must not be applied to imports compared to the like domestic product and similar domestically-produced goods in such a way as to afford protection, and (2) national regulations other than taxes must not treat imports "less favorably" than the like domestic product. By way of backdrop, national treatment clauses are standard in bilateral treaties of friendship, commerce, and navigation concluded between the United States and many of its trading partners, and are thus not unique to GATT Article III.[95]

The broad purpose of Article III, as stated in Article III:1, is to ensure that internal tax and regulatory measures are not applied to imported or domestic products in a way that affords protection to domestic products. To that end, WTO Members are obligated to provide equality of competitive conditions—what is metaphorically referred to as a "level playing field"—for imported goods vis-à-vis like domestic products once they have entered the country of importation and any applicable tariffs have been paid.[96]

In order for national regulations to be valid under Article III, they must be based on the characteristics of the imported products themselves, not on the process or method by which those products were produced or manufactured, and must apply equally to imported and domestic goods. Article III:1 sets forth the general national treatment obligation:

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

[95] *See, e.g., Treaty of Commerce and Navigation, Feb. 21, 1911, United States-Japan*, Art. VI, 37 Stat. 1504, T.S. No. 558; *Treaty of Friendship, Commerce, and Consular Rights, Dec. 8, 1923, United States-Germany*, Art. VIII, 44 Stat. 2132, T.S. No. 725 ("The nationals and merchandise of each High Contracting Party within the territories of the other shall receive the same treatment as nationals and merchandise of the country with regard to internal taxes, transit duties, charges in respect to warehousing and other facilities and the amount of drawbacks and bounties"); *Treaty of Friendship, Commerce, and Consular Rights, United States-Hungary, June 24, 1925*, Art. VIII, 44 Stat. 2441, T.S. No. 748 (same); *Treaty of Friendship, Commerce, and Consular Rights, June 19, 1928, United States-Austria*, Art. VIII, 47 Stat. 1876, T.S. No. 838 (same).

[96] The difficulties introduced by the Protocol of Provisional Application—which accorded grandfather rights to existing domestic legislation that was inconsistent with the GATT—have essentially been eliminated under the WTO Agreement. No broad exemptions for existing national laws that are inconsistent with GATT 1994 are permitted. However, one narrow exception exists in paragraph 3(a) of the General Agreement on Tariffs and Trade 1994, appended to the WTO Agreement as Annex 1A. Paragraph 3(a) provides in pertinent part:

> The provisions of Part II of GATT 1994 shall not apply to measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone.

This is the only national law grandfathered under GATT 1994. It refers to provisions of the U.S. Jones Act concerning foreign-vessel cabotage in U.S. coastal waters and was demanded by the United States in order to preserve certain preferences for the U.S. coastal shipping industry. The Ministerial Conference was to have reviewed this exemption by 2000 and every two years thereafter as long as the exemption is in force. *Id.* ¶ 3(b). The General Council initiated the five-year review of the Jones Act exemption in July 1999, and continued to consider this matter at its meetings in October and November 1999; in February, May and July 2000; and in July 2002. No conclusions could be agreed during these discussions. *See* General Council, *Minutes of Meeting Held 7, 8, 11 and 15 December 2000*, WT/GC/M/61 (Feb. 7, 2001); General Council, *Minutes of Meeting Held 8 and 31 July 2002*, WT/GC/M/75 (Sept. 27, 2002).

Although Article III:1 sounds precatory (certain measures "*should* not be applied"), while the specific national treatment commitments regarding internal taxes, charges, and the other obligations in paragraphs 2, 4, 5, and 7 of Article III use the compulsory term "*shall*," the general principle of Article III:1 informs the rest of Article III. According to the Appellate Body in *Japan—Alcoholic Beverages*:

> The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation.[97]

In addressing the question whether a Japanese tax on imported alcoholic drinks that were directly competitive with or substitutable for the domestic product (shochu) afforded protection to the domestic product, the Appellate Body noted that dissimilar taxation does not necessarily result in affording protection to the domestic product. In reviewing a tax on imported goods that are directly competitive with or substitutable for the domestic product, the proper inquiry is whether if in the application of the tax, protection of the similar domestic product is provided. This is not a matter of discriminatory intent, the Appellate Body noted, but of application.[98] The magnitude of the tax differential is often determinative.

1. Internal Taxes and Other Charges

Article III:2 is the source of the specific national treatment commitment with respect to the discriminatory application of internal taxes and charges. It provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The function of Article III:2 is in part to defend the integrity of Article II tariff bindings. However, a WTO Member is held to the national treatment obligation even if the imported product is not subject to a tariff binding.[99] With regard to the collection of internal taxes and other charges, and the enforcement of internal regulations that apply equally to imports and domestic products, Interpretative Note *Ad* Article III states:

> Any internal tax or other internal charge, or any law, regulation or requirement . . . collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

The GATT-legality of a financial charge on imports thus will initially turn in part on whether it is a border tax measure or an internal tax measure. If it is the former, it

[97] *Japan—Taxes on Alcoholic Beverages*, *supra* note 50, at 18.

[98] *See id.*

[99] *See id.* § F, at 17 and n. 39 ("This obligation clearly extends also to products not bound under Article II."); Report of the GATT Panel (adopted), *European Economic Community—Regulation on Imports of Parts and Components*, BISD, 37th Supp. 132, 191–92, ¶ 5.4 (1990).

is subject to scrutiny under Article II; if it is the latter, then it must be examined for consistency with Article III.

2. Article III:2, First Sentence

The rule stated in the first sentence of paragraph 2 is applied strictly in order to prevent discrimination between like domestic products and imports.[100] If the imported product and the competing domestic product are "like products," then any indirect tax (e.g., sales or excises taxes but not income taxes) that is imposed on the imported product that is "in excess of" the tax imposed on the like domestic product violates Article III:2, first sentence. The policy reasons for which the tax is imposed is irrelevant if it has a protectionist effect.[101]

The trade effects of a Member's internal taxes or regulations are equally irrelevant. Even if there is no trade in the particular product that is the subject of the tax or regulation, if the internal tax or regulation nevertheless discriminates between imports and domestic like products, it violates the national treatment commitment. As several GATT panels and the Appellate Body have noted, the purpose of Article III is to protect the expectation that a competitive relationship will exist between imports and the domestic like product, subject to any tariffs that might be assessed on the imported product.[102] Article III is designed to protect not only current trade but also to create the predictability needed to plan future trade. Consequently, the prohibition in the first sentence of Article III:2 on discriminatory taxes and regulations is not conditioned on a "trade effects test,"[103] is not qualified by a *de minimis* exception,[104] and is not subject to an offsets rule where less favorable treatment on some imported products can be balanced against more favorable treatment for other imported products.[105] Moreover, even if a given regulation does not currently discriminate against imports in its application, it violates the national treatment obligation if it poses the risk of discrimination in the future.[106]

No discrimination is permitted in the computation of the base figure on which the tax is assessed, although customs duties may be included in the valuation of imported goods.[107] Similarly, it is impermissible to assess taxes on products made with local inputs at a rate lower than the rate charged to imports.[108]

[100] *See* Report of the GATT Panel (adopted), *United States—Taxes on Petroleum and Certain Imported Substances*, BISD, 34th Supp. 136, ¶ 5.1.1 (1988); Report of the GATT Panel (adopted), *Japan—Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, BISD, 34th Supp. 83, ¶ 5.8 (1988).

[101] *See* Report of the GATT Panel (adopted), *Greece—Special Import Taxes*, BISD, 1st Supp. 48, 49, ¶ 5 (1952); *United States—Taxes on Petroleum*, *supra* note 100, ¶ 5.2.4.

[102] *See, e.g.*, *Japan—Taxes on Alcoholic Beverages*, *supra* note 50, at 16 ("Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."); *United States—Taxes on Petroleum*, *supra* note 100, at 158, ¶ 5.1.9 (1987)(3.5 cent per barrel tax differential between imported and domestic oil violates Article III); Report of the GATT Panel (adopted), *United States—Measures Affecting Alcoholic and Malt Beverages*, BISD, 39th Supp. 206, 270–71, at ¶ 5.6 (1992)(national treatment violation even though only one percent of domestic beer benefitted from tax reduction).

[103] *See* Japan—*Taxes on Alcoholic Beverages*, *supra* note 50, at 23.

[104] *See id.*

[105] *See* Report of the GATT Panel (adopted), *United States—Section 337 of the Tariff Act of 1930*, BISD, 36th Supp. 345, 387, ¶ 5.14 (1989).

[106] *See* Report of the GATT Panel (adopted), *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco,* BISD, 41st Supp. 131 ¶¶ 92–93, 95–98 (1994).

[107] *See* Report of the GATT Panel (adopted), *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD, 39th Supp. 27, ¶ 5.24 *et seq.* (1992).

[108] *See United States—Malt Beverages*, *supra* note 41, ¶¶ 5.21, 5.22.

3. The "Like Product" Determination

The question of whether an imported product is like, directly competitive with, or substitutable for a domestic product has been the focus of several reports by GATT Working Parties, GATT panels, WTO panels, and the Appellate Body. For example, in the 1970 *Working Party Report on Border Tax Adjustments*,[109] the results of a survey of panel reports dealing with this question were summarized:

> With regard to the interpretation of the term "like or similar products," which occurs some sixteen times throughout the General Agreement, it was recalled that considerable discussion has taken place . . . but that no further improvement of the term has been achieved. The Working Party concluded that problems arising from the interpretation of the terms should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.[110]

In short, as is the case with the Article I "like product" determination, the criteria generally used in analyzing "likeness" are (1) the properties, nature, and quality of the products; (2) the end-uses of the products; and (3) consumers' tastes and habits.

GATT panels dealing with the like product question in the Article III context have focused on product characteristics, end-uses, and tariff classifications. The panel report in *Japan—Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*,[111] observed generally that a definition of like product as "more or less the same product" is too narrow a definition.[112] The WTO panel in *United States—Reformulated Gasoline* made a like product determination in the course of resolving a complaint brought by Venezuela and Brazil charging that U.S. Clean Air Act regulations on gasoline violated Article III:4.[113] In light of the Working Party's conclusions in its *Border Tax Adjustments* report, the panel found that since imported and domestic gasoline are chemically-identical, have the same end-uses and tariff classification, and are perfectly substitutable, that they were like products for purposes of Article III:4.[114]

The Appellate Body in *Japan—Alcoholic Beverages*, summarized the Article III "like product" methodology in the following terms:

> No one approach to exercising judgement will be appropriate for all cases. The criteria on *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed.[115]

The Appellate Body added that the use of the Harmonized Tariff Classification and Nomenclature System is a recognized, and often useful, practice in judging the likeness

[109] Report of the Working Party (adopted), *Border Tax Adjustments*, BISD, 18th Supp. 97 (1970).
[110] *Id.* at 102, ¶ 18.
[111] Report of the GATT Panel (adopted), Japan –*Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, BISD, 34th Supp. 83, 113–15 (1987).
[112] *See Japan—Customs Duties on Alcoholic Beverages*, *supra* note 111, at 113–15.
[113] *See United States—Reformulated Gasoline*, *supra,* n.41.
[114] *Id.,* ¶ 6.9.
[115] *Japan—Taxes on Alcoholic Beverages*, *supra* note 50, at 21.

of products.[116] The Appellate Body has thus concluded that like product determinations must be made on a case-by-case basis with discretion in considering various product characteristics.[117]

In one of the most intriguing reports to address the meaning of the term "like product," the Appellate Body in *European Communities—Asbestos* was asked to determine whether products are "like" for purposes of Article III:4 based on their associated health risks.[118] Specifically, the Appellate Body was called upon to decide whether Canadian products containing chrysotile asbestos fibers are "like" certain other domestically produced fibers, namely polyvinyl alcohol, cellulose, and glass fibers (collectively referred to as "PCG fibers"). At the panel level it was concluded that chrysotile asbestos and PCG fibers are all "like products" under Article III:4 based on the products' physical characteristics, end uses, and consumer tastes and habits. The panel next examined whether cement-based products containing chrysotile asbestos fibers are "like" cement-based products containing one of the PCG fibers. The panel also concluded that all these cement-based products are "like" as well.[119]

In focusing on the carcinogenicity of chrysotile asbestos fibers, the Appellate Body rejected the panel's conclusion that the imported and domestic products were like products, stating:

> This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres. The evidence indicates that PCG fibres, in contrast, do not share these properties, at least to the same extent. We do not see how this highly significant physical difference cannot be a consideration in examining the physical properties of a product as part of a determination of "likeness" under Article III:4 of the GATT 1994.
>
> ****
>
> In sum, in our view, the Panel reached the conclusion that chrysotile asbestos and PCG fibres are "like products" under Article III:4 of the GATT 1994 on the following basis: the Panel disregarded the quite different "properties, nature and quality" of chrysotile asbestos and PCG fibres, as well as the different tariff classification of these fibres; it considered no evidence on consumers' tastes and habits; and it found that, for a "small number" of the many applications of these fibres, they are substitutable, but it did not consider the many other end-uses for the fibres that are different. Thus, the only evidence supporting the Panel's finding of "likeness" is the "small number" of shared end-uses of the fibres.
>
> For the reasons we have given, we find this insufficient to justify the conclusion that the chrysotile asbestos and PCG fibres are "like products" and we, therefore, reverse the Panel's conclusion, . . .[120]

Turning to the question of whether the cement-based products containing the different fibers were like products, the Appellate Body reiterated that "[i]n examining the physical

[116] *See id.* at 25.

[117] In *Canada—Periodicals*, for example, the Appellate Body stated that the proper test for making a like product determination is to construe Article III:2, first sentence, narrowly on a case-by-case basis, examining factors that include the product's end-uses in a given market; consumer tastes and habits; and the product's properties, nature, and quality. *See* Report of the Appellate Body, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R, Part V.A, at 21 (1997)(reversing the panel's "like product" determination based on a faulty comparison).

[118] Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001).

[119] *See id.* ¶ 84.

[120] *Id.* ¶¶ 114, 125, 126.

properties of the two sets of cement-based products, it cannot be ignored that one set of products contains a fibre known to be highly carcinogenic, while the other does not. . . . We, therefore, reverse the Panel's finding . . . that these health risks are not relevant in examining the 'likeness' of the cement-based products."[121]

4. Article III:2, Second Sentence

In contrast to the relatively bright-line obligation established in the first sentence of paragraph 2, the precise contours of the obligation set forth in the second sentence of paragraph 2 are somewhat blurred. How could internal taxes be imposed on imports in a manner inconsistent with paragraph 1 that is not already proscribed by the first sentence of paragraph 2? Interpretative Note *ad* Article III:2 sheds light on the cryptic reference back to Article III:1. It provides:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

The scope of product coverage in the second sentence is broader than that of the first sentence, given that the set of products that are "directly competitive or substitutable" includes "like" products. At the same time, the second sentence of paragraph 2 is intended to reach taxes that violate the general principle of Article III:1 because they "afford protection to domestic production." Under Article III:2, first sentence, discriminatory internal taxes are deemed *per se* to cause adverse trade effects, while under Article III:2, second sentence, discriminatory internal taxes must be shown to "afford protection" to the domestic product.[122] As noted above, the prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a trade effects test, nor is it qualified by a *de minimis* standard.

Where no substantial domestic production of a product like an imported product exists, but the imported product is directly competitive with or substitutable for an existing domestic product, such as imported natural rubber and domestic synthetic rubber, then one is presented with a situation involving a "directly competitive or substitutable" product. While a discriminatory internal tax on imported natural rubber would not violate the first sentence of Article III:2 *per se* (natural rubber not being a product "like" synthetic rubber), dissimilar taxation of imported natural rubber compared to domestic synthetic rubber that afforded protection to domestic production would violate the second sentence of Article III:2.[123]

The following three questions must be addressed to determine whether an internal tax is inconsistent with Article III:2, second sentence:

1. Are the imported product and the domestic product in competition with each other?
2. Are the directly competitive or substitutable imported product and the domestic product dissimilarly taxed?
3. Is the dissimilar taxation applied so as to afford protection to domestic production?[124]

[121] *Id.* ¶ 128 (emphasis in original).
[122] *See Japan—Customs Duties on Alcoholic Beverages*, *supra* note 111, ¶ 5.5.
[123] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 159–60.
[124] *See Japan—Taxes on Alcoholic Beverages*, *supra* note 50, § H.2, at 24.

First, are the imported product and the domestic product in competition with each other? The determination of whether an import is directly competitive with or substitutable for a domestic product is made on a case-by-case basis. Panels have looked at physical characteristics, common end-uses, tariff classifications, and the marketplace. An important but not decisive criterion is whether two products have common end-uses as shown by the cross-price elasticities of demand of the two products.[125] This is the inquiry: for every sale of product A at price X, how many sales of product B at price Y are lost? If for every sale of the import there is one lost sale of the domestic product, then the two products are perfect substitutes and in direct competition. In a case of perfect substitutability, the imported and domestic products are like products and are covered under Article III:2, first sentence.[126] Instances of less-than-perfect substitutability are addressed under Article III:2, second sentence.

For example, in *Japan—Alcoholic Beverages,* the WTO panel concluded that although several imported and domestic alcoholic beverages were not like products, they were nevertheless directly competitive or substitutable.[127] The Appellate Body concurred with the panel's conclusion that based on cross-price elasticities of demand, imported whisky, brandy, rum, and gin are directly competitive with or substitutable for Japanese shochu.[128] In *Canada—Periodicals*, the Appellate Body found that periodicals with a mainly current news content are directly competitive or substitutable with other news magazines, even though advertising might be targeted at different markets.[129]

The second question is whether the directly competitive or substitutable imported product and the domestic product are dissimilarly taxed. Consistent with the fundamental legal principle of treaty interpretation that all words in the text of a treaty are to be given meaning and effect, the phrase "in excess of" in the first sentence of Article III:2 must mean something different from the phrase "not similarly taxed" in Interpretative Note *ad* Article III:2, second sentence. If the former phrase means any amount of tax on imported products greater than the tax on domestic like products, then the latter phrase must mean something else.[130] Accordingly, there may be an instance of excess taxation of imported products that is not enough to warrant the conclusion that the products are not similarly taxed. The Appellate Body in *Chile—Alcoholic Beverages* concluded that the tax burden on the imported products must be heavier than that on directly competitive or substitutable domestic products, and the amount of the differential must be more than *de minimis.*[131] What a *de minimis* amount is must be determined on a case-by-case basis.[132]

The third and final inquiry under the second sentence of Article III:2 is to determine whether directly competitive or substitutable products are not similarly taxed so as to afford protection to domestic production. The Appellate Body made clear in *Japan—Alcoholic Beverages* that this is not an issue of legislative or regulatory intent.[133] The

[125] *See id.* at 28. Report of the Appellate Body, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R, ¶¶ 129, 131–134 (1999).
[126] *See Canada—Periodicals*, *supra* note 41, ¶¶ 6.7–6.19.
[127] *See* Report of the WTO Panel, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/R, at 117, ¶ 5.7 (1996). *Accord United States—Malt Beverages*, *supra* note 41, at 277, ¶ 5.26.
[128] *See Japan—Taxes on Alcoholic Beverages*, *supra* note 50, at 25.
[129] *See Canada—Periodicals*, *supra* note 41, Part VI.B.1, at 28.
[130] *See Japan—Taxes on Alcoholic Beverages*, *supra* note 50, at 26.
[131] *See* Report of the Appellate Body, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/AB/R, ¶ 49 (2000).
[132] *See Japan—Taxes on Alcoholic Beverages*, *supra* note 50, at 27; *Canada—Periodicals*, *supra* note 41, Part VI.B.2, at 29.
[133] *See Japan—Taxes on Alcoholic Beverages*, *supra* note 50, at 27.

inquiry is whether the dissimilar taxation has trade-distorting effects, as evidenced by the application and structure of the tax measure in question for domestic as compared to imported products. In some cases the magnitude of the dissimilar taxation may be sufficient to show a violation.[134] In *Japan—Alcoholic Beverages*, for example, the Appellate Body had no difficulty in concluding that the dissimilar taxation afforded protection to domestic production where taxes on imported products were four to six times greater than those on domestically-produced shochu. This disparity contributed to Japanese shochu producers' success in capturing 75 percent of Japan's distilled spirits market, while limiting imports to eight percent of the domestic market.[135]

Other than a gross disparity in the applicable taxes as proof of a trade-distorting effect, evidence may show that a measure by its very design and structure affords protection to domestic production.[136] However, evidence of protective intent is not totally irrelevant, as demonstrated in the Appellate Body's report in *Canada—Periodicals.*[137] There, the Appellate Body concluded that the prohibitive magnitude of the difference in taxation, coupled with the statement of policy objectives by Canadian government officials, provided sufficient evidence that the design and structure of the Canadian excise tax scheme on foreign periodicals were clearly to afford protection to the production of Canadian periodicals.[138] Again, a tax measure is inconsistent with Article III:2, first sentence, if the imported product is taxed in excess of the domestic like product. Evidence of protectionist intent need not be shown because such a discriminatory tax *per se* affords protection to domestic production.[139]

5. Internal Regulations Affecting Imports

While Article III:2 is the source of specific national treatment commitments on internal taxes and charges, Article III:4 is the source of specific national treatment commitments with respect to internal laws, regulations, and requirements other than taxes that affect imports. Article III:4 provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

By its express terms, Article III:4 is limited to laws, regulations, and requirements affecting like products, not directly competitive or substitutable products.[140] Unlike Article III:2 and Article III:5, Article III:4 makes no express reference to Article III:1. Nevertheless, the Appellate Body in *Japan—Alcoholic Beverages* noted that Article III:1 "constitutes part of the context of each of the other paragraphs in Article III."[141]

[134] *See id.* at 29–30.

[135] *See WTO Appeals Panel Upholds U.S. In Liquor Tax Ruling Against Japan*, 13 Int'l Trade Rep. (BNA) 1551 (1996).

[136] *See Canada—Periodicals*, *supra* note 41, Part VI.B.3, at 30–32.

[137] *See id.*

[138] *See id.* ¶¶ 6.22–6.27.

[139] *See Japan—Taxes on Alcoholic Beverages*, *supra* note 50, at 18 ("the first sentence of Article III:2 is, in effect, an application of [the] general principle [in Article III:1 that internal taxes not be applied to imported or domestic products so as to afford protection to domestic production].").

[140] *See* Report of the GATT Panel, *EEC—Measures on Animal Feed Proteins*, BISD, 25th Supp. 49, 65–66, ¶¶ 4.10–4.12 (1978).

[141] *Japan—Taxes on Alcoholic Beverages*, *supra* note 50, at 18.

The operative word in paragraph 4 is "affecting"—a broad term that includes internal laws and regulations that not only govern the sale, purchase, or distribution of imported products, but also those which have a negative effect on the competitive opportunities enjoyed by imports vis-à-vis the like domestic product in the importing Member's home market.[142] Thus, for example, a 1984 GATT panel report condemned as violative of the national treatment obligation a requirement in the Canadian Foreign Investment Review Act ("FIRA") that as a condition on government approval of a foreign investment, inputs had to be purchased locally if they were "competitively available". Unless the foreign investor agreed to purchase goods of Canadian origin in preference to imports, provided the former were "competitively available," its investment ran the risk of not being approved by the Canadian government.[143] Even though the obligation was imposed on investors and not importers and even though the obligation was contained in an undertaking between the investor and the Canadian government making it contractual in nature, the undertaking was nevertheless deemed to be a "requirement" that was violative of Article III:4. The holding in the *Canada-FIRA* dispute was codified in the Agreement on Trade-Related Investment Measures (the TRIMs Agreement).[144]

Can internal laws and regulations that treat imported goods and the like domestic product identically still violate Article III:4? The answer is "yes." Internal regulations that are *de jure* neutral may still violate Article III:4 if they adversely affect the equality of competitive opportunities of imports in the domestic market. In the GATT panel report, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial*

[142] *See, e.g.*, Report of the WTO Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, ¶¶ 10.379–10.380 (1998)(the standard of effective equality of competitive conditions on the internal market is the standard of national treatment required under Article III:4); Report of the GATT Panel (adopted), *Italian Discrimination Against Imported Agricultural Machinery*, BISD, 7th Supp. 60, 64, at ¶¶ 11–13 (1959); *United States—Section 337*, *supra* note 105, at ¶ 5.11; *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, *supra* note 107, ¶ 5.6.

[143] *See* Report of the GATT Panel, *Canada—Administration of the Foreign Investment Review Act*, BISD, 30th Supp. 140, 159–61, ¶¶ 5.7–5.11 (1984).

[144] *See also* Report of the WTO Panel, *India—Measures Affecting the Automotive Sector,* WT/DS146/R and WT/DS175/R, (1999)(an obligation to use a certain portion of local parts and components in the manufacture of cars violates Article III:4), *appeal withdrawn by India*, Report of the Appellate Body, *India—Measures Affecting the Automotive Sector*, WT/DS146/AB/R (2002).

The TRIMs Agreement, discussed in detail in Chapter 10 of this book, represents a modest attempt to reinforce GATT rules respecting national treatment and the prohibition on import quotas, but falls short of being a comprehensive set of rules regulating either international investment or restrictive business practices, topics much discussed in trade circles. The TRIMs Agreement builds on Article III, which requires Members to provide national treatment to imported products, and Article XI, which prohibits Members from imposing quantitative restrictions on the importation or exportation of goods. Although Article III:4, 5, and 7 do apply to certain aspects of investment laws, the GATT panel dispute involving the Canadian Foreign Investment Review Act spotlighted the need for Article III repair through the adoption of specific and unambiguous rules on certain trade-distorting investment measures, in particular local content requirements.

Article 2.1 of the TRIMs Agreement stipulates that "no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994." Article 2.2 refers to the illustrative list of TRIMs that are inconsistent with Articles III:4 and XI:1 of GATT 1994. The TRIMs Annex provides that measures must be enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage. Next, these measures are prohibited if they require the purchase or use of domestic products (*i.e.*, local content requirements), limit the purchase or use of imported products to an amount related to the volume or value of local products that are exported (*i.e.*, trade-balancing requirements), or tie access to foreign exchange to an investor's foreign exchange earnings (*i.e.*, foreign exchange balancing restrictions). The prohibited measures listed in the illustrative Annex to the TRIMs Agreement underscore the close link between foreign investment and international trade. The prohibitions of the TRIMs Agreement apply equally to measures imposed on domestic firms, not just on foreign investments, and cover both new and existing investments.

Marketing Agencies,[145] the panel concluded that Canadian minimum price regulations for beer undermined one of the fundamental purposes of Article III:4, which is to ensure that internal regulations do not dilute or eliminate the benefit of Article II tariff concessions. Even though the two products are treated identically (*e.g.*, as in the case of minimum price regulations), a national treatment violation nevertheless exists if the imported product could have undersold the domestic like product but for the minimum price control.

At the same time, a formal difference in treatment between imported and like domestic products is neither necessary nor sufficient to show a violation of Article III:4. As the Appellate Body observed in *Korea—Beef*, "Whether or not products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products."[146]

Regulations that in some instances favor imports but in others discriminate against them also violate Article III:4. In this connection, in *Section 337 of the Tariff Act of 1930*, the GATT panel rejected the contention that a balancing test should be used under which administrative proceedings in the United States that were less favorable to some imported products could be offset by ones that treated other imported products more favorably.[147] The panel noted:

> If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.[148]

In short, just as tariff bindings afford exporters a minimum level of certainty regarding pricing, the national treatment obligation prevents importing Members from using internal regulations in a way that frustrates exporters' ability to reasonably assess the legal and regulatory climate in a target export market.

6. Additional Article III Commitments

Paragraphs 5, 6, and 7 of Article III lay down rules on internal quantitative regulations. Paragraph 5 elaborates on the rules stated in Article III:4. Paragraph 7 in turn is an MFN obligation. Paragraphs 5 and 7 provide:[149]

> 5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

[145] Report of the GATT Panel (adopted), *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD, 39th Supp. 27, 84–85, ¶ 5.30 (1992).

[146] Report of the Appellate Body, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, ¶ 137 (2000)(emphasis in original).

[147] *See United States—Section 337*, *supra* note 105, at 387, ¶ 5.14. *Accord* Report of the GATT Panel (adopted), *United States—Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, BISD, 39th Supp. 128, 151, ¶ 6.10 (1992).

[148] *United States—Section 337*, *supra* note 105, at 387, ¶ 5.14.

[149] Article III:6 is a grandfather clause that permitted otherwise GATT-inconsistent internal quantitative regulations to remain in place on the dates specified in that paragraph. It has been superceded by the Agreement Establishing the WTO.

* * * * * *

> 7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

The prohibited activities mentioned in paragraph 5 are a more specific subset of those listed in paragraph 4. In *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*,[150] a GATT panel examined the U.S. Domestic Marketing Assessment (DMA) that required domestic manufacturers of cigarettes to use at least 75 percent domestic tobacco or be subject to penalties in the form of a nonrefundable marketing assessment. The panel noted that "both Article III:5 and Article III:4 deal with internal regulations, but Article III:5 is the more specific of the two provisions."[151] The panel concluded that the DMA was an internal quantitative regulation relating to the use of tobacco in specified amounts or proportions which required, directly or indirectly, that a minimum specified proportion of tobacco be supplied from domestic sources, inconsistently with Article III:5, first sentence.[152]

Paragraph 7 expands on paragraph 5 by prohibiting any allocation among foreign suppliers with respect to products subject to internal mixing regulations. The objective of paragraph 7 is to secure non-discrimination as between foreign suppliers with respect to products subject to internal mixing regulations. Accordingly, paragraph 7 was added to Article III as the best method of securing MFN treatment.[153]

As broad as the rules are in paragraphs 4 and 5 to prevent trade protection through the use of discriminatory internal regulations, negotiators at the Uruguay Round concluded two agreements that elaborate upon these two Article III provisions. The first agreement is the Agreement on Technical Barriers to Trade (the TBT Agreement), the successor agreement to the Tokyo Round Standards Code. The second is the TRIMs Agreement. They are fully discussed in other chapters of this book.[154]

7. National Treatment Exceptions

Four express exceptions to the national treatment obligation are (1) government procurement of goods and services, (2) the payment of subsidies exclusively to domestic producers, (3) state and local laws that derogate from GATT-WTO commitments, and (4) the exhibition of films.

First, GATT Article III:8(a) excepts government purchases of goods from the national treatment obligation so long as the purchases are for governmental purposes and not made with a view to resale. (In a parallel provision, GATS Article XIII excepts government purchases of services for a government's own use.) Governments are thus permitted to discriminate in favor of local suppliers of goods and services free of any constraints that would otherwise be imposed by the national treatment obligation. The plurilateral Agreement on Government Procurement imposes a national treatment obligation for WTO Members that are signatories to it. The Government Procurement Agreement is analyzed in a separate chapter of this book.[155]

[150] Report of the GATT Panel (adopted), *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, BISD, 41st Supp. 130 (1994).

[151] *Id.* ¶ 72.

[152] *Id*. ¶ 68. Interpretative Note *Ad* Article III:5 provides that a regulation is not consistent with the second sentence of paragraph 5 even when the allocations among imported and domestic products are equitable.

[153] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, at 189.

[154] The TBT Agreement is discussed in Chapter 8 of this book, the TRIMs Agreement in Chapter 10.

[155] *See* Chapter 23.

Second, Article III:8(b) provides that nothing in Article III prevents

> the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

Panel and Appellate Body reports are consistent in holding that the phrase "payment of subsidies" is a term of art, so that a reduction in taxes exclusively for the benefit of domestic producers is not the payment of a subsidy and does not pass muster under the Article III:8(b) exception.[156] A reduction in tax rates, postal rates, or transportation rates for domestic producers does not qualify for the Article III:8(b) exception.[157] The Article III:8(b) exemption also does not include a financial advantage that benefits domestic producers indirectly. The subsidies must have been provided directly to the producers.[158] If the subsidy benefit to producers derives from indirect taxes, then there must be a prior collection of such taxes on a non-discriminatory basis.[159]

Even though Article III:8(b) permits discriminatory domestic subsidy programs, a WTO Member may nevertheless raise a claim of non-violation nullification or impairment of GATT benefits pursuant to GATT Article XXIII:1(b) if it loses export sales as a result of underpricing by the subsidized domestic product.[160]

Third, Article XXIV:12 provides that "[e]ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by regional and local governments and authorities within its territory." This so-called "federal clause" qualified the basic obligation of every GATT contracting party to ensure the observance of GATT obligations by regional and local governments in countries with a federal constitutional structure, *e.g.*, Australia, Canada, Germany, Mexico, and the United States. The drafting history of Article XXIV:12 indicates that it applies only to those regional and local measures that the federal government cannot control because the measures fall outside the central government's jurisdiction under the constitutional distribution of powers.[161] In the unadopted GATT panel report, *Canada—Measures Affecting the Sale of Gold Coins*, the panel concluded that in cases where a national treatment violation by a sub-central governmental body is alleged, the benefit of the doubt must go to the responding contracting party where the exact distribution of powers between the federal and sub-federal units of governments remains to be determined by the competent national judicial or political bodies.[162]

The Uruguay Round Understanding on the Interpretation of Article XXIV of the GATT 1994 makes a significant change to Article XXIV:12 that corrects an imbalance that had existed between Members with federal constitutions and those Members with unitary

[156] *See, e.g., Canada—Periodicals*, *supra* note 41, Part VII, at 33–34; *United States—Malt Beverages*, *supra* note 41, ¶¶ 5.10, 5.12.

[157] *See Canada—Periodicals*, *supra* note 41, Part VII, at 34.

[158] *See* Report of the WTO Panel, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, ¶¶ 14.119–14.121 (1998).

[159] *See id.*

[160] *See, e.g.*, *Italy—Discrimination Against Imported Agricultural Machinery*, *supra* note 142; Report of the GATT Panel (adopted), *EEC -Oilseeds*, BISD, 37th Supp. 86 (1990). For a discussion of non-violation nullification or impairment claims, *see* Chapter 29 of this book.

[161] *See, e.g.*, *United States—Malt Beverages*, *supra* note 41, at 296, ¶ 5.79. *See also* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 830–36.

[162] *See* Report of the GATT Panel (unadopted), *Canada—Measures Affecting the Sale of Gold Coins*, L/5863, ¶ 58 (1985).

forms of government. With regard to the legal responsibility of federal governments for laws and regulations of their sub-federal levels of government that violate WTO agreements, the Understanding confirms the view held by some experts that federal governments are "fully responsible under GATT 1994 for the observance of all provisions of GATT 1994 . . . . "[163] GATT-inconsistent measures taken by their sub-federal units of government, such as states, provinces, or municipalities may be the subject of a GATT Article XXIII:1(a) violation nullification or impairment complaint.[164] If a state law or regulation is found to be in conflict with GATT 1994, the responsible Member must take such measures as are available to it to ensure the observance of GATT-WTO obligations by its sub-federal governmental bodies.[165] In the event that the offending local measure is not removed or amended, the Understanding makes plain that the prevailing Member is entitled to compensation: "The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance."[166]

The fourth GATT exception to the national treatment obligation is contained in Article III:10 and Article IV. Article III:10 provides that nothing in Article III prevents any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematographic films and meeting the requirements of Article IV. Article IV permits Members to establish quotas for the exhibition of cinematographic films (movies) that favor films of national origin.[167] Such screen quotas may require the exhibition of films of national origin during a specified proportion of total screen time over a period of not less than one year in the commercial exhibition of all films of whatever origin. Screen time may not be allocated formally or in effect among sources of supply. This Article was the subject of consultations requested by the United States in 1991 concerning EU member-country measures restricting the showing of non-European films on television. The EU's response was that the question of broadcasting belonged to the area of services.[168] This subject is now largely subsumed under the GATS.

D. GATT Article XI, The Elimination of Quotas

The fourth pillar of the GATT-WTO system, and the most important of the original GATT 1947 commitments respecting nontariff barriers to trade, is the Article XI commitment to eliminate quantitative restrictions (quotas) on imports and exports. Article XI prohibits quantitative restrictions for two reasons. First, quotas lack the transparency of customs duties. Second, by creating an artificial short supply, quotas prevent the law of supply and demand from determining the price at which domestic and imported goods should be sold.

[163] *Understanding on the Interpretation of Article XXIV of the GATT 1994*, ¶ 13.
[164] *See id.* ¶ 14.
[165] *See id*. Alternatively, the DSU provisions relating to compensation to the complaining Member apply in cases where the offending law or regulation is not amended or withdrawn. *See id.* ¶ 13. Failing that, the complaining Member may retaliate by suspending concessions pursuant to DSU procedures. *See id.* ¶ 13.
[166] *Id*. ¶ 14.
[167] At the 1965 Review Session, it was agreed to incorporate Article IV into Article III:10. However, the Protocol to effect this amendment never entered into force and was abandoned in 1967. *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 211.
[168] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 210.

GATT Article XI, *General Elimination of Quantitative Restrictions*, plainly states the rule respecting quotas:

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

Article XI's prohibitions on quantitative restrictions are broad. First, both import and export quotas are prohibited. Second, government measures that may lead to the implementation of an export or import quota are prohibited. In this connection, the GATT panel in *Japan–Semi-Conductors*[169] rejected Japan's argument that "administrative guidance" by the government to Japanese semi-conductor producers did not come within the Article XI prohibition because it was not legally binding or mandatory. The panel noted that Article XI:1, unlike other GATT provisions, does not refer solely to laws, regulations, or requirements (as does Article III:4), but rather more broadly to "measures." Therefore, initiatives taken by a WTO Member that effectively restricts the flow of exports or imports is prohibited under Article XI:1, even though the legally binding nature of the government initiative as a formal matter may be in doubt. The panel added, however, that not all types of government action—such as "jawboning" by government officials—necessarily fall within the ambit of Article XI:1. In order to come within the Article XI:1 proscription, a government measure must satisfy two criteria: (1) there must be reasonable grounds to believe that sufficient incentives or disincentives exist for observing non-mandatory measures; and (2) government action or intervention is required to restrict exports or imports once certain triggering events take place.[170]

As is the case with national treatment violations, whether a quantitative restriction has actual trade effects is irrelevant. The existence of a quantitative restriction, regardless of whether it actually impedes imports or exports, violates Article XI:1 because it adversely affects the equality of competitive conditions.[171]

In addition to prohibitions on imports or exports, other measures have been found to violate Article XI:1 as well. For example, a measure imposing minimum export prices for goods was held to be inconsistent with Article XI:1,[172] and a minimum import price for vegetables that was enforced through security deposits was also found to violate that Article.[173]

There are four important GATT-authorized exceptions to the general prohibition on quantitative restrictions. The first exception deals with quotas imposed on agricultural products as part of a government market stabilization program. The second is an exception under Article XII for quotas imposed to correct a balance-of-payments problem. The third

[169] *See* Report of the GATT Panel (adopted), *Japan—Trade in Semi-Conductors*, BISD, 35th Supp. 116, 153–55, ¶¶ 104–09 (1988).

[170] *Id.* at 155, ¶ 109.

[171] *See* Report of the GATT Panel (adopted), *EEC -Oilseeds*, BISD, 37th Supp. 86, at 130, ¶ 150 (1990).

[172] *See Japan—Semi-Conductors*, *supra* note 169.

[173] *See* Report of the GATT Panel (adopted), *EEC—Programme on Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, BISD, 25th Supp. 68 (1979). *See also* Report of the WTO Panel, *India—Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R (1999)(an obligation to balance the importation of car parts and components with exports of equal value as a condition to receipt of an import license violates Article XI), *appeal withdrawn by India*, Report of the Appellate Body, *India—Measures Affecting the Automotive Sector*, WT/DS146/AB/R (2002).

is an exception for quotas imposed as a remedy under an Article XIX safeguards action. (This third exception is discussed briefly below in connection with Article XIX.) The fourth exception is export and import quotas on textiles and clothing under the provisions of the Agreement on Textiles and Clothing.[174]

1. The Exception for Agricultural Products

Article XI:2 sets forth a set of three exceptions that generally permit quantitative restrictions on agricultural and fisheries products to the extent necessary to enforce government measures designed to stabilize national markets for these products. Paragraph 2(a) of Article XI permits "[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party." Paragraph 2(b) permits "[i]mport and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade."

In the 1988 GATT panel report, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, the panel examined Canada's claim that its regulations prohibiting the exportation of unprocessed herring and salmon were permitted under Article XI:2(b), inasmuch as the fish were "commodities" and the regulations were "standards" dealing with "marketing," all of which were deemed necessary to maintain Canada's quality standards for these fish.[175] The panel rejected Canada's interpretation as overly broad. Accepting Canada's interpretation would mean in effect that import or export restrictions that protected a domestic industry and facilitated its ability to sell abroad would be exempted from the general prohibition on export and import restrictions.[176] Such a sweeping interpretation would swallow the Article XI:1 prohibition.

Paragraph 2(c) of Article XI permits import restrictions on any agricultural or fisheries product necessary to the enforcement of governmental measures that operate in one of the following three ways: (i) to restrict the quantities marketed or produced of a like or directly substitutable domestic product, (ii) to remove a temporary surplus of the like or directly substitutable domestic product by making it available to domestic consumers either free or at below market price, or (iii) to restrict the quantities of any animal product the production of which is directly dependent on the imported commodity, if the domestic production of that commodity is relatively negligible. Arguments made to extend the paragraph 2(c) exception to industrial products were rejected out of hand by the GATT 1947 drafters. They were quick to point out that agricultural products, unlike industrial products, are subject to the caprice of the weather and the whims of the market. These uncontrollable variables will in some seasons give a country's farmers and fishermen a bumper crop or a huge catch of fish that will in turn drive down the price for their products, preventing a fair return to farmers and fishermen.[177]

In the 1989 GATT panel report on *Import Restrictions on Ice Cream and Yoghurt*,[178] the panel summarized the elements and burden of proof regarding claims under paragraph 2(c)(i):

[174] The Agreement on Textiles and Clothing is analyzed in Chapter 9 of this book.

[175] *See* Report of the GATT Panel (adopted), *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD, 35th Supp. 98, 112, ¶ 4.2 (1988).

[176] *See id.* at 112, ¶ 4.3.

[177] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 328.

[178] Report of the GATT Panel (adopted), *Canada—Import Restrictions on Ice Cream and Yoghurt*, BISD, 36th Supp. 68, 85–86, ¶ 62 (1989).

> As the party invoking an exception, it was incumbent upon Canada to demonstrate that the measures applied to imports of ice cream and yoghurt met each of the conditions under Article XI:2(c)(i) and XI:2(c) last sub-paragraph, in order to qualify in terms of these provisions for exemption from Article XI:1. These conditions are:
>
> — the measure on importation must constitute an import restriction (and not a prohibition);[179]
> — the import restriction must be on an agricultural or fisheries product;
> — the import restriction and the domestic marketing or production restriction must apply to "like" products in any form (or directly substitutable products if there is no substantial production of the like product);
> — there must be governmental measures which operate to restrict the quantities of the domestic product permitted to be marketed or produced;
> — the import restriction must be necessary to the enforcement of the domestic supply restriction;
> — the contracting party applying restrictions on importations must give public notice of the total quantity or value of the product permitted to be imported during a specified future period; and
> — the restrictions applied must not reduce the proportion of total imports relative to total domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions.[180]

Substantial similarity of the imported and domestic product is the key to fulfilling the requirements of paragraph 2(c).[181] Processed forms of the fresh product can be products "like" the fresh product, provided they meet the two criteria of Interpretative Note *ad* Article XI:2(c): (1) they are in an early stage of processing and still perishable; and (2) they compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

The burden of proof is on the Member invoking the Article XI:2(c) exception,[182] a heavy one for responding Members.[183] In fact, no contracting party or WTO Member has ever successfully defended a challenge to quantitative restrictions on agricultural products in a GATT panel proceeding using an Article XI:2(c) defense.[184]

While paragraph 2(c) is not meant to protect domestic producers against foreign competition, its lack of flexibility means that it is often honored in the breach. Disputes brought under Article XI in which the Article XI:2(c) exception has been invoked were played out against the backdrop of one of the most serious failures of GATT 1947: the nearly total lack of GATT discipline in the area of agricultural trade. The WTO Agreement on

[179] Several GATT panels have specifically noted that import prohibitions, whether *de facto* or *de jure*, are *per se* disqualified from the paragraph 2(c) exception. *See, e.g.,* Report of the GATT Panel (adopted), *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD, 29th Supp. 91, 107, ¶ 4.6 (1982); Report of the GATT Panel (adopted), *Japan—Restrictions on Imports of Certain Agricultural Products*, BISD, 35th Supp. 163, 244, ¶ 6.4 (1988).

[180] *See Canada—Ice Cream and Yoghurt*, *supra* note 178, at 85–86, ¶ 62. *Accord* Report of the GATT Panel (adopted), *EEC—Restrictions on Imports of Dessert Apples*, BISD 36th Supp. 93, 124–25, ¶ 12.3 (1989).

[181] *See, e.g., Canada—Ice Cream and Yoghurt*, *supra* note 178, at 87, ¶¶ 66–67 (raw milk not like ice cream or yoghurt); *Japan—Restrictions on Certain Agricultural Products*, *supra* note 179, at 232, ¶ 5.3.1.4 (fresh milk not like products prepared from it); at 239, ¶ 5.3.11 (prepared pineapple not like fresh pineapple).

[182] *See Japan—Restrictions on Certain Agricultural Products*, *supra* note 179, at 227, ¶ 5.1.3.7.

[183] *See Canada—Ice Cream and Yoghurt*, *supra* note 178, at 84–85, ¶ 59.

[184] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 326–48; MCGOVERN, *supra* note 14, § 14.31.

Agriculture, discussed in a separate chapter,[185] is designed to restore GATT disciplines to the agricultural sector, although it does so in a very modest fashion. By requiring Members to replace all nontariff barriers to agricultural trade with tariffs that are equivalent in effect to those preexisting nontariff barriers, the Agreement on Agriculture prohibits Members from applying nontariff barriers to agricultural imports. This prohibition substantially diminishes the importance of Article XI:2(c)(i) in the overall GATT scheme.[186] Whether the Agreement on Agriculture renders Article XI:2(c)(i) a dead letter remains to be seen.

2. The Balance-of-Payments Exception

The second Article XI exception is Article XII, which permits the imposition of import quotas for balance-of-payment purposes. Article XVIII:B is a corresponding provision applicable to developing countries. These two Articles permit the use of quantitative restrictions to safeguard a country's balance-of-payments ("BOP") position under certain narrowly circumscribed circumstances. Under Article XII, a Member may restrict the quantity or value of imports to the extent necessary to prevent or forestall a serious decline in foreign exchange reserves or, when reserves are low, to achieve a reasonable increase in such reserves. Under the special BOP provision reserved for developing-country Members, Article XVIII:B, import restrictions may be imposed "to ensure a level of reserves adequate for the implementation of its programme of development."[187]

Although by their express terms the only border measure permitted under both Articles is quantitative restrictions, an alternative practice developed of using price-based measures in lieu of quotas. The 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes[188] (supplemented and clarified by the 1994 Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994) formally approves the use of price-based measures, such as import surcharges and import deposit schemes, in preference to quotas taken to safeguard a country's BOP position.[189] The 1994 Understanding excepts such measures from Article II tariff bindings, provided they are less disruptive to trade flows than comparable quantitative restrictions would be.[190] Paragraph 4 of the 1994 Understanding further provides that "restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation." New quantitative restrictions are to be avoided unless the Member imposing the quota can establish that price-based actions are not adequate to address the BOP problem.

[185] *See* Chapter 6 of this book.

[186] Article 4.2 of the Agreement on Agriculture provides that "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties. . . . " A footnote to this paragraph list the measures affected, including "quantitative import restrictions, variable import levies, minimum import prices, . . . voluntary export restraints, . . . but not measures maintained under balance-of-payments provisions or under other general, non-agricultural-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

[187] GATT Article XVIII:B, ¶ 9.

[188] *Declaration on Trade Measures Taken for Balance-of-Payments Purposes*, BISD, 26th Supp. 205 (1979).

[189] For a discussion of GATT Working Party and panel reports dealing with import surcharges and import deposit schemes prior to the 1979 Tokyo Round Declaration, *see* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 363–65.

[190] GATT Article XII:3(c); GATT Article XVIII:10; *1979 Tokyo Round Declaration*, ¶ 1(a); *Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*, ¶ 2.

Any Member invoking Article XII must publish a schedule for the removal of the restriction (only one type of restriction is permitted per product), and must enter into consultations with the Committee on Balance of Payments Restrictions to review such restrictions.[191] A simplified, documentary review procedure is established for developing and least-developed country Members.[192] If a Member refuses to provide a timetable for removing restrictive import measures taken for BOP purposes, then it must justify its refusal. In addition, the Understanding requires a government whose BOP measures are the subject of consultations to provide detailed, written information on those measures, including (1) an overview of its BOP situation, (2) a full description of its BOP restrictions, (3) the measures it has taken since the last consultation to liberalize import restrictions, and (4) a plan for the reduction and elimination of remaining restrictions. These transparency requirements are major improvements on the 1979 Tokyo Round Declaration.

3. The Allocation of Quotas

If quotas are used for any of the permissible grounds described above, then quota allocations must be made without discrimination among the other WTO Members.[193] Paragraph 1 of Article XIII provides:

> No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined in the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

It is obviously not possible to attain perfection in the allocation of quotas. It is inevitable that some supplying Member will be slightly more or slightly less favored than another supplying Member. Article XIII instructs Members to use quantitative restrictions in the least trade-distorting manner possible. Accordingly, Article XIII:2 requires Members to allocate quotas on the basis of the shares that exporting Members might be expected to enjoy in the absence of quotas. This general principle is explained in subsequent sub-paragraphs.

First, wherever practicable quotas representing the total amount of permitted imports must be fixed.[194] Second, in cases where quotas are not practicable, the import restrictions may be imposed through import licenses without a quota.[195] Third, except for purposes of operating a quota under sub-paragraph (d), Members shall not require that import licenses or permits be utilized for the importation of the product concerned from a particular country or source.[196] Fourth, Article XIII:2(d) provides that in cases in which a quota is allocated among supplying countries, the Member applying the restrictions should seek agreement on the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. Where this method is

[191] *See Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*, ¶¶ 1–3, 5–6.

[192] *See id.* ¶ 8. For an overview of the Article XII and Article XVIII:B consultation procedures, *see* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 378–92.

[193] *See, e.g.*, Report of the GATT Panel (adopted), *Norway—Restrictions on Imports of Certain Textile Products*, BISD, 27th Supp. 119, 125–26, ¶¶ 15–16 (1980). The panel noted that when Norway concluded six bilateral agreements limiting imports of textiles, it violated Article XIX when it failed to allocate a quota for Hong Kong.

[194] GATT Art. XIII:2(a).

[195] GATT Art. XIII:2(b).

[196] GATT Art. XIII:2(c).

not practicable, a Member must allot quota shares to Members with a substantial interest in supplying the product based on proportions supplied by Members during a previous representative period.[197]

Regarding which Members are considered to have a "substantial interest in supplying the product," no precise import share has ever been established for determining whether a Member has a substantial interest in supplying a product in the Article XIII context. Interestingly, in the context of Article XXVIII's rules on negotiation rights in the event of a proposed tariff modification or withdrawal, a ten-percent market-share rule has been applied to determine whether a Member has a "substantial interest."[198] While refusing to adopt a bright-line test, the WTO panel in *European Communities—Bananas* concluded that for purposes of Article XIII:2(d), Costa Rica and Colombia had a substantial supplying interest in supplying bananas to the EU, with 19.7-percent and 15.7-percent market shares, respectively. The panel rejected out of hand the EU's contention that Nicaragua, with a 1.7-percent share, and Venezuela, with less than a 0.1-percent share, had "substantial supplying interest" status.[199]

In *European Communities—Bananas,*[200] the Appellate Body found that the EU's allocation of a tariff-rate quota through agreement with some supplying Members not having a substantial interest in supplying the EU banana market, while at the same time not reaching agreement with other Members having a substantial interest in supplying the EU banana market, was inconsistent with Article XIII. According to the Appellate Body, the terms of Article XIII:2(d) are clear: the combined use of agreements and unilateral allocations to Members with a substantial supplying interest is not permitted.[201] If a Member wishes to allocate shares to other Members not having a substantial supplying interest, as the EU had done, then such shares must be allocated to all such suppliers.[202]

[197] GATT Art. XIII:2(d).

[198] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 941. The inequity of this approach has been pointed out by at least one developing country. *See* Committee on Market Access, *Implementation-Related Issues and Concerns: Meaning to Be Given to the Phrase "Substantial Interest" in Paragragh 2(D) of Article XIII of GATT 1994*, Communication from Saint Lucia, G/MA/W/30/Add.1, ¶ 7 (Oct. 31, 2002)("It seems somewhat surreal that a Member with even 70% of its exports [in a single product] entering a particular market could be deemed by the WTO not to have a substantial interest in supplying the product to that market" in the context of Article XIII:2(d)). The Market Access Committee agreed that the Secretariat should undertake additional case studies based on Saint Lucia's concerns. *See* Committee on Market Access, *Report (2002) of the Committee on Market Access*, G/L/582, ¶ 13 (Oct. 30, 2002).

[199] *See* Report of the WTO Panel, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, ¶¶ 7.84, 7.85 (1997). The panel also found that as to countries without a substantial supplying interest, the EC could not discriminate among them with regard to the importation of bananas. This finding was affirmed by the Appellate Body. *See* Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, at 74, ¶¶ 161, 162 (1997). The Article XIII complaints brought under GATT 1947 typically were based on blatant discrimination against certain contracting parties. *See, e.g.,* Report of the GATT Panel (adopted), *EEC—Restrictions on Imports of Apples*, BISD, 36th Supp. 135 (1989)(retroactive application of quota allocation violates GATT 1947). For example, Nicaragua brought a complaint against the United States when the latter cut Nicaragua's sugar quota by ninety percent in 1983 in an attempt to deny Nicaragua foreign currency with which to finance military operations in Central America. *See* Report of the GATT Panel (adopted), *United States—Imports of Sugar from Nicaragua*, BISD, 31st Supp. 67, 73, at ¶ 4.3 (1984). The GATT panel agreed that the greatly reduced U.S. sugar quota allocated to Nicaragua was inconsistent with Article XIII:2.

[200] Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997).

[201] *See id.* at 74–75, ¶¶ 161–163. *Accord* Report of the WTO Panel, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU, ¶ 6.41 (1999).

[202] *See European Communities—Bananas*, *supra* note 200, at 74–75, ¶¶ 161–163.

Therefore, when an importing Member is faced with making an allocation among Members with and Members without a substantial supplying interest, the importing Member will have to use a general "others" category for all suppliers other than suppliers with a substantial supplying interest. Under such an allocation, new market entrants will have some market access and, theoretically, an opportunity to achieve "substantial supplying interest" status.

Members are entitled to allow non-Members to participate in the allocation of the quota, but are not required to do so.[203] As for the determination of a "previous representative period," the prior three-year period is normally considered to be the appropriate period. However, under GATT practice it is necessary that the representative period be the most recent period not distorted by import restrictions.[204] If no representative period can be determined, a Member has the alternative of using a global quota or a country-specific allocation by agreement.[205] Article XIII:4 permits the Member imposing the quantitative restriction to select the representative period initially, subject to consultation with Members with a substantial supplying interest.

Article XIII:3 sets forth rules on the administration of quotas, including licensing procedures. The subject of licensing procedures is comprehensively addressed in the Agreement on Import Licensing Procedures which is discussed in another chapter.

E. GATT Article X, Publication and Administration of Trade Regulations

Together with the MFN and national treatment obligations, tariff bindings, and the prohibition on quantitative restrictions, transparency commitments could be considered the fifth pillar of the GATT-WTO system. The smooth functioning of a multilateral trade system requires transparency of the trade laws, regulations, decisions, and other measures adopted by its Members affecting international trade. With that goal in mind, GATT Article X, *Publication and Administration of Trade Regulations*, sets forth guidelines governing the publication of national rules and regulations affecting import and export trade.

The chief publication requirement is found in Paragraph 1 which provides:

> 1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. [The balance of paragraph 1 provides that business confidential and law enforcement information need not be disclosed.]

The panel reports addressing issues of compliance with Article X are a mixed bag. For example, in a 1989 panel report, *EEC–Restrictions on Imports of Dessert Apples*,[206]

[203] *See* Report of the WTO Panel, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R, ¶ 229 (1998).

[204] *See* Decision of the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 22.6 by the EC*, WT/DS27/ARB, ¶¶ 5.25–5.26 (1999).

[205] *See id.* ¶ 5.28.

[206] *EEC—Dessert Apples*, *supra* note 199, at 166–67, ¶¶ 5.20–5.23.

the panel examined the GATT-consistency of quotas imposed by the EEC on imports of apples, both in terms of the allocation of the quotas among supplying countries and the manner in which the quota allocations were notified retroactively. The quota allocation was announced in April 1988, but covered a period which began in February 1988 and ended in August 1988. The panel found that since the EEC had given public notice of the quota allocation two months after the quota period had begun, the EEC was in breach of Article X which, the panel concluded, prohibits backdated quotas. The panel offered no views on the meaning of the term "promptly" or what that obligation might entail, other than to observe that no period of time need lapse between the publication of a regulation and its entry into force.[207]

A similar result was reached in the 1992 panel report in *Canada–Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*.[208] In that case the United States complained that the liquor board of British Colombia had shared information with domestic brewers relating to pricing policy before that same information was made available to U.S. brewers. The United States also claimed that Article X had been violated when the Ontario legislative assembly announced a new pricing policy for beer only five days before its entry into force. The panel disagreed with the United States, concluding that Article X's requirement to promptly publish trade regulations did not require contracting parties to make information affecting trade available to domestic and foreign suppliers precisely at the same time, and did not require contracting parties to publish trade regulations in advance of their entry into force.[209]

Although GATT panels have concluded that no specific time interval need lapse between the publication of a law or regulation and its entry into force, the soundness of those panel reports is suspect in light of Article X:2. Article X:2 does require that measures of general application be published on or before the date they take effect. Article X:2 provides:

> 2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

As noted by the Appellate Body in *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, "Members and other persons affected . . . by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures."[210] A measure is "of general application" even though addressed to a specific country. However, measures addressed to individual firms or shipments do not generally meet the "of general application" criterion.[211] Nevertheless, administrative

[207] *See id.* ¶ 12.29.

[208] *See Canada—Imports of Certain Alcoholic Drinks*, *supra* note 107, at 85–86, ¶ 5.34.

[209] In a GATT panel proceeding involving a challenge to a Japanese quantitative restriction on the ground of inconsistency with Article XI, the panel declined to address the subsidiary claim that the laws or regulations bringing such quantitative restriction into effect also violated Article X, stating simply that Article X deals with "the administration of quotas that may be applied consistently with the General Agreement." *Japan—Restrictions on Certain Agricultural Products*, *supra* note 179, at 242, ¶ 5.4.2 (emphasis added). *See also* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 298–300.

[210] *See* Report of the Appellate Body*, United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, Part VI (1997).

[211] *See id.*

rulings issued in cases involving specific companies may be of general application if such rulings establish or amend principles applicable in future cases.[212]

Not only must national rules and regulations affecting international trade be transparent, but as Article X:3(a) makes clear, so too must the manner in which they are administered:

> 3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

As the Appellate Body observed in *EC-Poultry Products*,[213] "the requirements of 'uniformity, impartiality and reasonableness' do not apply to the laws . . . . *themselves*, but rather to the *administration* of those laws . . . ."[214] Thus, challenges to the substantive content of laws and rules, rather than to their publication or administration, must be made under the provisions of one of the WTO MTAs. *De minimis* differences in the manner in which laws and regulations are administered do not constitute a breach of paragraph 3(a).[215]

Finally, Article X:3(b) obligates Members to "maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters." These tribunals and procedures must be independent of the agencies entrusted with administrative enforcement. The tribunal's decisions must also be binding on the administrative agency whose action is under review. However, paragraph 3(c) grandfathers procedures already in force at the time of accession although not fully or formally independent, provided they provide for an objective and impartial review.

1. The Trade Policy Review Mechanism

While Article X of GATT is designed as a prophylactic to forestall resort to byzantine and obscure internal and border measures affecting trade, its shortcomings have been the topic of discussions within the GATT-WTO system.[216] In 1964, the GATT CONTRACTING PARTIES adopted two Reports and a Recommendation on notification of internal trade regulations, urging contracting parties to promptly forward to the GATT Secretariat copies of all laws, regulations, and decisions of the kind described in Article X:1. Contracting parties continued to use internal rules and regulations to curb import competition, but failed to notify other contracting parties of those measures, in blatant disregard of Article X:1. It was clear to most observers that the time for tightening up the transparency commitment was long overdue.

In preparation for the Tokyo Round, major exporting countries compiled a list of eight hundred measures that had not been notified to GATT that were being used by importing countries to block or suppress trade.[217] As one commentator candidly noted, "If the

[212] *See, e.g.*, *Japan—Film*, *supra* note 142, ¶ 388.

[213] Report of the Appellate Body, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R (1998).

[214] *EC-Poultry Products*, *supra* note 213, ¶ 115 (emphasis in original; quoting from Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997)).

[215] *See EEC—Dessert Apples, supra* note 199, ¶ 12.30.

[216] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 300. *See also* Council for Trade in Goods, *Trade Facilitation: Article X of GATT on the Publication and Administration of Trade Regulations*, Communication from Canada, G/C/W/379 (2002).

[217] *See* LONG, *supra* note 3, at 74.

notifications had been submitted by the countries imposing them, it is certain that the inventory would have been very much shorter."[218] Recognizing the need to improve the exchange of notifications, the Tokyo Round negotiators concluded an Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.[219] Paragraphs 2 and 3 of this Understanding provide the following in connection with notification:

> Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification.
>
> Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would be without prejudice to views on the consistency of measures with or their relevance to obligations under the General Agreement. Contracting parties should endeavor to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly *ex post facto*. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned.

Perhaps better indicia of the seriousness with which the WTO Members take the transparency issue, and of the general level of dissatisfaction with Members compliance with the GATT-WTO notification and publication requirements, are the two Uruguay Round agreements dealing with transparency. The first is the Trade Policy Review Mechanism ("TPRM"), the successor to the Trade Policy Review Mechanism first created in 1989.[220] The second is the Decision on Notification Procedures, a partial successor arrangement to the 1979 Tokyo Round Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.[221]

The purpose of the TPRM is to improve WTO Members' adherence to GATT-WTO commitments through the periodic review of Members' trade policies and practices by the Trade Policy Review Body.[222] The Quad Members are subject to TPRM review every two years. The next sixteen Members in terms of shares of world trade are subject to review every four years. The remaining Members are subject to review every six years, with a longer period for least-developed country Members.

The Decision on Notification Procedures advances the transparency goal as well. In that Decision the Members reaffirm their commitment to notify and publish measures affecting the operation of GATT 1994 and create a central registry for filing notifications. The Council for Trade in Goods is responsible for reviewing notification obligations and procedures under the MTAs. The Decision contains an Annex, *Indicative List of Notifiable Measures*, that lists the types of measures subject to notification: tariffs; tariffs quotas and surcharges; quantitative restrictions, including voluntary export restraints and orderly marketing arrangements affecting imports; other nontariff measures, such as licensing, mixing requirements, and variable levies; customs valuation; rules of origin; government procurement; technical barriers; safeguard actions; antidumping actions; countervailing actions; export taxes; export subsidies, tax exemptions and concessionary export financing; free-trade zones, including in-bond manufacturing; export restrictions,

[218] *Id.*

[219] *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, BISD, 26th Supp. 210 (1979).

[220] *See Decision Creating a Trade Policy Review Mechanism*, BISD 36th Supp. 203 (1989).

[221] The balance of the 1979 Understanding was absorbed in the Uruguay Round *Understanding on Rules and Procedures Governing the Settlement of Disputes.*

[222] The results of the reviews are available on the WTO website, www.wto.org, and provide an excellent description of the trade policies of the countries under review.

including voluntary export restraints and orderly marketing arrangements; other governmental assistance, including subsidies and tax exemptions; the role of state-trading enterprises; foreign exchange controls related to imports and exports; government-mandated countertrade; and any other measure covered by the MTAs.

2. Additional Transparency Commitment in the MTAs

In addition to the commitments in Article X, the TPRM, and the Uruguay Round Decision to notify and publish all rules, regulations, and measures affecting international trade, several of the MTAs contain their own transparency provisions.

First, Article 18.2–.3 of the Agreement on Agriculture requires Members to submit notifications on the implementation of commitments made under the Agreement generally, and specifically to notify promptly any new domestic support measure.

Second, Article 7 of the Agreement on the Application of Sanitary and Phytosanitary Measures obligates Members to "notify changes in their sanitary and phytosanitary measures and . . . provide information on [such] measures in accordance with the provisions of Annex B." Annex B, *Transparency of Sanitary and Phytosanitary Regulations*, requires Members to publish promptly all such regulations in a manner that enables interested Members to become acquainted with them, and to allow a reasonable passage of time between promulgation and entry into force of such regulations "in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member."[223]

Third, Article 2.9 of the TBT Agreement requires Members to publish advance notice of any proposed product standard in order to give other Members a reasonable opportunity to comment on the proposal before it takes effect. Annex 3 of the TBT Agreement, *Code of Good Practice for the Preparation, Adoption and Application of Standards*, provides guidelines that governmental and non-governmental standardizing bodies are to follow when preparing standards, including notice and an opportunity to comment by interested persons.[224]

Fourth, the Agreement on Textiles and Clothing is sprinkled with express notification requirements.[225]

Fifth, in Article 6.1 of the TRIMs Agreement, Members "reaffirm, with respect to TRIMs, their commitment to obligations on transparency and notification in Article X of GATT 1994, in the undertaking on Notification contained in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance adopted on 28 November 1979 and in the Ministerial Decision on Notification Procedures adopted on 15 April 1994."

Sixth, Article 2.5 of the Agreement on Preshipment Inspection provides that "User Members shall ensure that preshipment inspection activities are conducted in a transparent manner." Article 2.6 of the Preshipment Inspection Agreement further requires that exporters be provided with a list of all the information that is necessary for exporters to comply with inspection requirements.

Seventh, the Agreement on Rules of Origin, whose long-range goal is the eventual harmonization of Members' non-preferential rules of origin, commits Members during

[223] *See Agreement on the Application of Sanitary and Phytosanitary Measures*, Annex B:2.

[224] *TBT Agreement*, Annex 3, *Code of Good Practice for the Preparation, Adoption and Application of Standards*.

[225] *See, e.g.*, *Agreement on Textiles and Clothing*, Arts. 2.3, 2.4, 2.7, 2.17, 2.18, 3.3, 3.4, 3.5.

and after the transition period to publish their laws, regulations, judicial decisions, and administrative rulings relating to rules of origin as if they were subject to, and in accordance with, the provisions of Article X:1 of GATT 1994.[226] As part of the long-range harmonization program, Members are further obligated to provide the WTO Secretariat with their rules of origin, and judicial decisions and administrative rulings relating to rules of origin.[227]

Eighth, Article 1.3 of the Agreement on Import Licensing Procedures echoes the spirit of Article X:3(a) by requiring that "the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner." Article 5 of the Agreement requires Members instituting licensing procedures to notify the Committee on Import Licensing.

Ninth, Article 22 of the Agreement on Subsidies and Countervailing Measures requires that a notice of the initiation of an investigation, preliminary and final determinations, the imposition of provisional measures, and suspension or termination of an investigation be published. Article 23 mandates that all administrative determinations must be subject to judicial or arbitral review by an independent body. Article 25 of the SCM Agreement directs Members to submit notifications of subsidies annually in sufficient detail to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programs.

Tenth, the Antidumping Agreement contains transparency provisions that parallel those contained in the SCM Agreement.[228]

Eleventh, Article 3 of the Agreement on Safeguards requires public notice of all investigations and an opportunity for interested parties to present evidence. Article 12 of the Agreement obligates Members to notify the Committee on Safeguards when initiating any safeguards proceeding or granting any escape clause relief. Article 13, *Surveillance*, charges the Committee on Safeguards with monitoring Members' compliance with the Agreement.

Twelfth, in order to enhance the transparency of state trading enterprises, the Uruguay Round Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994 obligates Members to notify the Council for Trade in Goods of all state trading enterprises.

Finally, the GATS and the TRIPS Agreement have their own transparency provisions. GATS Article III, *Transparency*, requires Members to publish promptly all relevant measures of general application that affect the operation of GATS, and to notify annually any new laws or amendments to existing laws that significantly affect trade in services. Similarly, Article 63 of the TRIPS Agreement, *Transparency*, requires Members to publish all laws, regulations, and decisions dealing with the subject matter of the Agreement, and to notify the Council for TRIPS of all such laws, regulations, and decisions.

Much has been said about the critical importance of the MFN obligation, tariff commitments, the national treatment obligation, and the prohibition on quantitative restrictions to the overall functioning of the GATT-WTO system. Nevertheless, based on the extent to which GATT 1994 and the MTAs are peppered with transparency obligations, a strong case can be made for including transparency as one of the GATT pillars. Transparency is clearly important not only as a formal matter, but also as a practical matter in the overall functioning of the international trade system. Transparency introduces the rule of law

[226] *See Agreement on Rules of Origin*, Arts. 2(g), 3(e).
[227] *See id.* Art. 5.1.
[228] *See Agreement on Antidumping*, Arts. 12, 13, and 16.

into national legal systems that might not be accustomed to such principles. Scrutinizing WTO Members' trade policies and practices is an important check against a slide into noncompliance with GATT disciplines.

III. Other Non-Tariff Barriers to Trade

The balance of commitments in the GATT-WTO system serve mainly to buttress the five pillars by prohibiting Members from erecting nontariff barriers to trade as a substitute for tariffs and quotas. These commitments concern freedom of transit, antidumping and countervailing duties, valuation, fees and formalities connected with importation, marks of origin, state trading enterprises, safeguards relief, and national standards and technical regulations on imported goods.

A. Article V, Freedom of Transit

Article V ensures that goods shipped from Country A to Country C may pass through Country B on their way to Country C. This guarantee is particularly important for land-locked countries. Article V:2 provides:

> There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of the vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or of other means of transport.[229]

Members may require that traffic in transit be entered at the proper customs house.[230] However, such traffic may not be subject to unnecessary delays or restrictions, and are exempt from customs duties and all transit duties or other charges imposed in respect of transit.[231] Article V:5 further provides that with respect to charges, regulations, and formalities in connection with transit, "each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to and from any third country." Thus, a WTO Member must not only accord MFN treatment with regard to all charges and regulations imposed on traffic in transit to or from the territories of other Members, but discrimination on the ground that goods have passed through any particular country is prohibited as well.

B. Article VI, Antidumping and Countervailing Duties

Although GATT Article VI recognizes that private-firm pricing of exports below normal value—usually the home-market price or the cost of production—is to be "condemned" if it causes or threatens material injury to an established industry,[232] it does not seek to prevent the practice, since the GATT only regulates the conduct of governments. Instead, Article VI acknowledges the unilateral right of countries to impose duties to counteract

[229] These rules also apply to air transit of goods. *See* GATT Art. V:7. For additional legal analysis of Article V, *see* Council for Trade in Goods, *Article V of the GATT 1994—Scope and Application*, Note by the Secretariat, G/C/W/408 (Sept. 10, 2002).

[230] GATT Art. V:3.

[231] *Id.* A Member may impose a charge for transportation or for administrative expenses entailed by transit. *Id*.

[232] GATT Art. VI:1.

the effect of dumping in their domestic markets, and imposes rules designed to ensure that this right is not abused in a protectionist fashion.

The 1955 GATT panel report, *Swedish Antidumping Duties*, considered whether a reference price system is consistent with Article VI.[233] The Swedish government imposed fixed minimum prices on imported nylon stockings. When it established these basic prices, the Swedish government did not consider the differential costs of production in the home market (Italy) or Sweden, nor did it ensure that these prices were related to the actual price of nylons in the home market. Sweden imposed an antidumping duty on imported nylons whenever the importer's invoice price was below the basic price. The GATT panel found Sweden's system of fixed minimum prices consistent with Article VI as long as these prices were equal to or below the actual price of nylons in the market of the lowest cost producer.

Article VI imposes no affirmative obligation on the country of exportation to prevent or punish alleged dumping by firms within its territory. It is thus left to the country of importation to respond to injurious dumping if it chooses to do so by imposing a duty "not greater in amount than the margin of dumping,"[234] which is designed to offset the effect of the dumping. Article VI:3 also places a cap on the amount of any countervailing duty that may not exceed the amount of the subsidy granted on the imported product.

In *United States—Anti-Dumping Act of 1916*, the Appellate Body held that the Article VI remedy for injurious dumping is exclusive of any other domestic remedy.[235] In connection with the claim that the 1916 Act does not target dumping, the Appellate Body found that the express language of the Act provides for the recovery of damages and the imposition of criminal penalties when persons import products for sale at a price less than the price for which the products are sold in the country of export or, in certain cases, a third-country market. "In other words," the Appellate Body concluded, "the civil and criminal proceedings and penalties contemplated by the 1916 Act require the presence of the constituent elements of 'dumping,"' thus making GATT Article VI:1 applicable to the 1916 Act.[236] The Appellate Body also rejected the contention that the 1916 Act's *scienter* requirement—an antitrust-type intent—somehow transforms the Act and takes it outside the scope of Article VI. Even though the 1916 Act contains an intent element not found in Article VI:1, the 1916 Act is nevertheless "a specific action against dumping" within the meaning of Article 18.1 of the WTO Antidumping Agreement.[237]

Having concluded that the 1916 Act is within the scope of Article VI, the Appellate Body agreed with the panel that by providing for the imposition of fines, imprisonment, and an award of treble damages—remedies not available under Article VI:2—the 1916 Act violates Article VI:2.[238]

With regard to subsidies and countervailing duties, Article VI:3 permits Members to impose a countervailing duty in an amount equal to the estimated bounty or subsidy that has been granted on the manufacture, production, or export of the imported product. The countervailing duty is designed to remedy the injury to domestic producers caused by imported goods that have been subsidized by the country of exportation. (The terms of Article VI:3 need to be read in conjunction with Article XVI on subsidies which is

[233] *See* Report of the GATT Panel (adopted), *Swedish Antidumping Duties*, BISD, 3rd Supp. 81 (1955).
[234] GATT Art. VI:2.
[235] *See* Report of the Appellate Body, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (2000).
[236] *See United States—Anti-Dumping Act of 1916*, *supra* note 235, ¶ 130.
[237] *See id.* ¶ 132.
[238] *See id.* ¶ 138.

discussed below.) As a GATT panel observed in *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, "the decision as to the existence of a subsidy must result from an examination of all relevant facts. . . . [T]he issue was . . . whether the facts which the United States did take into account were all the facts relevant for the determination to be made."[239]

The terms of Article VI with regard to both antidumping and countervailing duties have been largely overshadowed by three Uruguay Round MTAs: the Antidumping Agreement (formally known as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994), the Agreement on Subsidies and Countervailing Measures, and the Agreement on Agriculture. These three MTAs, which are analyzed in separate chapters of this book,[240] add significant substantive rules and procedural provisions to the antidumping and countervailing duty administrative process to be observed by national authorities.

C. Article VII, Valuation for Customs Purposes

Once tariff concessions are negotiated, ensuring their integrity and preventing their circumvention is one of the main objectives of GATT 1994. In order to prevent circumvention of tariff bindings through devices that improperly inflate the price of imported goods, GATT 1994 employs rules on valuation that prevent an importing country from overvaluing imported items and thereby wiping out the benefit of any tariff concession.[241] Valuation rules are important because customs duties usually are assessed on an *ad valorem* basis, i.e., on the basis of the value of the imported merchandise.

Besides the rules on valuation found in Article II:3 on tariff bindings,[242] Article VII, as amended and clarified by the Agreement on Customs Valuation, lays down methodologies that WTO Members are to adhere to when making valuation determinations. Article VII:2(a) states a preference for the use of a valuation methodology that is based on the actual value of imported merchandise, or of like merchandise. That same paragraph admonishes Members to avoid using methodologies that are based on the value of merchandise of national origin or on arbitrary or fictitious values. Article VII:2(b) defines "actual value" as the price at which such or like merchandise is sold or offered for sale "in the ordinary course of trade under fully competitive conditions." Quantity discounts may be accounted for in determining actual value. The Interpretative Notes to Article VII:2(b) state that "actual value" may be represented by the invoice price, but that transactions may be excluded where the buyer and seller are not independent of each other and the price is not the sole consideration.[243]

The Agreement on Customs Valuation (formally known as the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994) is essentially the same as its predecessor agreement, the Tokyo Round Valuation Code. Given the Valuation Agreement's breadth and detail, it effectively supplants Article VII. The Agreement identifies the acceptable valuation methodologies that importing countries

[239] Report of the GATT Panel (adopted), *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, BISD, 38th Supp. 45 (1991).

[240] *See* Chapters 6, 11, and 16.

[241] GATT Art. VII; Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

[242] Article II:3 provides that "[n]o contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement."

[243] Interpretative Notes 1 and 2 ad Article VII.

may use, stating a strong preference for the transaction value (i.e., invoice price) of the goods as the proper basis for assessing customs duties. It eliminates the use of arbitrary or fictitious methodologies, thereby providing a good measure of uniformity, transparency, and certainty in the customs valuation process. The subject of customs valuation and the Valuation Agreement are analyzed in a separate chapter of this book.[244]

D. Article VIII, Fees and Formalities Connected with Importation

Article VIII on fees and formalities works hand-in-glove with Article II:2(c) which permits the imposition of customs fees or other charges commensurate with the cost of services rendered.[245] Article VIII:1(a) underscores that all fees and charges (other than duties and taxes within the purview of Article III) are to be limited in amount to the approximate cost of services rendered and "shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes." In 1988, the GATT Council adopted a GATT panel report that held that a flat *ad valorem* fee charged by the U.S. Customs Service on all entries of merchandise was inconsistent with Article VIII because it was not limited in amount to the approximate cost of services rendered.[246] The GATT panel found that "the ordinary meaning of the term 'cost of services rendered' would be the cost of those services rendered to the individual importer in question. That meaning was also in keeping with the general practice when 'services' are charged for, which is to charge the same fee for the same service received."[247]

Article VIII:3 prohibits the imposition of substantial penalties for minor breaches of customs regulations or procedural requirements. Specifically, no penalty imposed for an omission or mistake in customs documentation that is easily rectifiable and obviously made without fraudulent intent or gross negligence may be greater than necessary to serve merely as a warning.

The provisions of Article VIII extend to all fees, charges, and formalities imposed by governmental authorities in connection with importation and exportation, including charges relating to consular invoices and certificates (e.g., certificates of origin), quantitative restrictions, licensing, exchange control, statistical services, documentation, inspection, and quarantine.

Finally, Article VIII:1(c) recognizes the need to reduce the number and complexity of import and export formalities and documentation requirements. With this admonition in mind, the Members negotiated the Agreement on Import Licensing Procedures as part of the package of MTAs. A number of countries use a system of "automatic" and "non-automatic" licensing systems to monitor and regulate imports. An "automatic" licensing system is used to monitor, but not to regulate, the importation of goods. Governments use "non-automatic" systems to administer quotas and tariff-rate quotas. Under a non-automatic license regime, only a limited number of licenses are issued.

The Agreement on Importing Licensing Procedures builds on the Tokyo Round Licensing Code and strengthens the rules governing import licensing by improving the transparency and predictability of such procedures. The Agreement establishes firm

[244] *See* Chapter 12.

[245] For additional legal analysis of Article VIII, *see* Council for Trade in Goods, *Article VIII of the GATT 1994-Scope and Application*, Note by the Secretariat, G/C/W/391 (July 9, 2002).

[246] *See United States—Customs User Fee*, *supra* note 37, ¶¶ 75, 78. *See also* Report of the WTO Panel, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, ¶ 6.73 (1997)(condemning as violative of Article VIII an *ad valorem* "statistical tax" that had no cap).

[247] *United States—Customs User Fee*, *supra* note 37, at 276–77.

deadlines for the publication of new or revised import license requirements and imposes time limits on processing import license applications. The Agreement also establishes a limit on the number of government agencies an importer must contact in order to obtain a license (three, with a stated preference for one).

Article 2 of the Licensing Agreement governs "automatic" license systems. In order to qualify as an "automatic"system, completed applications must be approved immediately and in no case more than ten days after submission.

Article 3 governs "non-automatic" license systems. Governments using them must publish licensing criteria in a manner that is understandable. Denials of applications must be accompanied by reasons. An aggrieved applicant must be afforded an opportunity to appeal. Licensing systems that administer quotas must publish the amount of the quota, the quota allocations among supplying countries, and the opening and closing dates of quotas. Applications must be processed within thirty days on a first-come, first-served basis. If applications are considered simultaneously, then they must be processed within sixty days.

The Agreement on Import Licensing Procedures is analyzed in a separate chapter of this book.[248]

E. Article IX, Marks of Origin

Article IX of GATT sets forth rules on country-of-origin marking requirements. Underlying this Article is a basic tension between two policy concerns. On the one hand, marking requirements are recognized as protecting legitimate consumer and producer interests. On the other hand, marking requirements ought not to be an unreasonable burden on international trade. To address the second concern, Article IX:1 applies the MFN principle to marking requirements. A WTO Member is precluded from using these requirements to discriminate against imported articles from one particular Member or group of Members. There is, however, apparently no requirement of national treatment in Article IX. The 1991 GATT panel report in *United States—Tuna* rejected Mexico's argument that a United States law restricting the use on tuna products of the label "Dolphin Safe" violated Article IX:1, noting that Article IX:1 was intended to regulate marks of origin of imported products but not the marking of products generally.[249]

A 1958 Recommendation on Marks of Origin adopted by the GATT Contracting Parties[250] states that "[t]he national provisions concerning marks of origin should not contain any other obligation than the obligation to indicate the origin of the imported product."[251] This Recommendation in effect restates the Article IX:2 admonition that laws pertaining to country of origin markings "should be reduced to a minimum" to avoid "difficulties and inconveniences" caused to commerce and industry.

GATT Articles IX:3 and 4 also promote the policy of minimizing burdens on trade. Article IX:3 urges flexibility in country-of-origin marking laws, suggesting that WTO Members permit marks of origin to be affixed at the time of importation, if it is administratively practicable to do so. Article IX:4 provides that compliance with marking

[248] *See* Chapter 14.

[249] *See* Report of the GATT Panel (unadopted), *United States—Restrictions on Imports of Tuna*, BISD, 39th Supp. 155, 193–94, ¶¶ 5.9, 5.11, 5.12 (1991).

[250] *Recommendation on Marks of Origin*, BISD, 7th Supp. 30 (1958). The Recommendation was drawn from the Report of the Working Party, *Certificates of Origin, Marks of Origin and Consular Formalities,* BISD, 7th Supp. 117 (1958). *See* Guide to GATT Law and Practice, *supra* note 3, vol. 1, at 288.

[251] *Recommendation on Marks of Origin*, *supra* note 250, ¶ 4.

requirements should not result in serious damage to, or material reduction in value or unreasonable increase in cost of, the imported article. Article IX:5 urges restraint in imposing penalties for failure to comply with marking requirements. Unless corrective marking is "unreasonably delayed," "deceptive marks have been affixed," or the requisite mark has been "intentionally omitted," a penalty ought not to be imposed.

The balance of the other provisions of Article IX are designed to promote consumer and certain producer interests. Article IX:2 acknowledges the necessary role that marking laws play in "protecting consumers against fraudulent or misleading indications." Regarding the protection of producer interests, Article IX:6 obligates WTO Members to cooperate with each other, and "accord full and sympathetic cooperation" to each other, in order to prevent the use of trade names in a manner that would misrepresent the true origin of a product. Such use, of course, would adversely affect the distinctive regional or geographical names of products of a particular Member that are protected by its legislation. (An example might be champagne from the French province of Champagne.) In practice, whether use of a trade name misrepresents the true origin of a product is likely to depend in part upon how prominently the product label displays the name of the producing country. For example, in *Japan—Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, a GATT panel noted that labels on Japanese liquor products were written partly in English or French with European styles and symbols, employed foreign terms to describe the Japanese products (*e.g.*, "whisky," "brandy," "chateau," and "reserve"), and used the names of grape varieties.[252] However, because the Japanese manufacturers provided sufficient information on their labels to indicate the Japanese origin of the product, the panel could not find any detriment to a distinctive regional or geographical product name with respect to European liquor products.[253] Moreover, the panel noted that Article IX:6 lacks a definition of "trade name."[254] In short, while Article IX:6 is supposed to help consumers make informed product choices, the extent of its obligations is limited.

The protection of geographical names is addressed in the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement).[255] Articles 22 through 24 of the Agreement govern the protection and use of geographical indications. These three Articles are especially important in view of the lack of significant progress in other international fora to regulate the subject.[256]

TRIPS Article 22 defines "geographical indications" as indications that identify a good as originating in the territory, region, or locality of a Member, where a particular quality, reputation, or other characteristic of the good is essentially attributable to its geographic origin (*e.g.*, a Swiss watch or Colombian coffee). Article 22.2 requires Members to provide interested parties the legal means by which to prevent the use of product descriptions that mislead the public regarding the geographic origin of a good or that constitute an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention. Article 22.3 further requires Members to refuse registration or invalidate trademark registrations for goods that use product descriptions that mislead

[252] *See Japan—Customs Duties on Alcoholic Beverages*, *supra* note 111, at 118, ¶ 5.15.

[253] *See id.* at 125, ¶ 5.14.

[254] *See id.* at 126, ¶ 5.15.

[255] The TRIPS Agreement is discussed in detail in Chapter 22 of this book.

[256] Other international agreements that address the subject of geographical indications include the 1958 Madrid Arrangement for the Repression of False or Deceptive Indications of Source of Goods; the 1967 Additional Act on the Madrid Arrangement; the 1967 Lisbon Arrangement for the Protection of Appellations of Origin and Their International Registration; and Articles 10 and 10*bis* of the Paris Convention. The texts of these agreements are available from the WIPO website at <http://www.wipo.org/eng/iplex/index.htm>.

the public regarding the geographic origin of a good. Also prohibited are geographic indications that, although literally true as to the territory, region, or locality in which the goods originate, falsely represent to the public that the goods originate in another territory (*e.g.*, a geographical indication that perfume is from Paris, but fails to mention that the place is Paris, Michigan, not Paris, France).[257]

Nothing is to prevent a person from using that person's own name or the name of that person's predecessor in business, even though it happens to be a place name, provided such use is not misleading to the public.[258] Geographical indications that have fallen into disuse in the country of origin or have become the common name for goods or services in the territory of that Member need not be protected by other Members.[259]

Special protection for wines and spirits is provided under Article 23. Articles 23.1 and 23.2 provide that (1) geographical indications for wines or spirits that do not originate in the location indicated may be challenged by an interested party, and (2) such indications may not be used or registered, even though the true geographical origin is indicated on the product or is accompanied by expressions such as "kind," "type," "style," "limitation," or the like. An exception is made for homonymous geographical indications for wines (*e.g.*, "Bordeaux" when used as a noun describes the region in France where a type of wine is produced; when used as an adjective it describes the variety of grape from which Bordeaux wine is made). This exception is subject to the qualification that such homonymous indications not mislead consumers, and to the restriction previously mentioned on literally true indications that falsely represent the origin of goods.

F. Articles XIV and XV, Exchange Controls and Exchange Arrangements

At the conclusion of World War II, the participants at the Bretton Woods Conference called for the establishment of three international organizations that would put the nations of the world back on their economic feet: the International Trade Organization, the World Bank, and the International Monetary Fund.[260] As noted earlier in this chapter, although the ITO was stillborn, GATT was pressed into service in order to fill the institutional vacuum. The International Monetary Fund (IMF) was designed to repair the international monetary system that had been destroyed by the War. The World Bank was created for the purpose of stimulating international investment. The IMF and GATT were to collaborate on exchange and trade policies.

The jurisdiction of both the WTO and the IMF can be triggered when a country that is experiencing balance-of-payments difficulties imposes exchange controls on international payments in connection with international trade in goods. For example, a country faced with a balance-of-payments deficit might repair the situation by imposing quotas on imports of foreign goods.

In the Uruguay Round Ministerial Declaration on the Relationship of the World Trade Organization with the International Monetary Fund, trade ministers reaffirmed as follows:

> [T]he relationship of the WTO with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, will be based on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund.

[257] *See TRIPS Agreement*, Art. 22.4.
[258] *See id*. Art. 24.8.
[259] *See id*. Arts. 24.6, 24.8.
[260] *See generally,* Gerald M. Meier, *The Bretton Woods Agreement—25 Years After*, 39 STAN. L. REV. 235 (1971).

Two closely related GATT 1994 provisions, Articles XIV and XV, address the questions of exchange controls and coordination between the International Monetary Fund and the WTO.[261]

First, under Article XIV, a WTO Member invoking the Article XII balance-of-payments exception may also deviate from the provisions of Article XIII on the allocation of quotas pursuant to amendments to the General Agreement that entered into force in 1957 and 1961. Article XIV:1 permits such a deviation "in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply" under provisions of the Agreement of the International Monetary Fund. This paragraph incorporates relevant provisions of the IMF Agreement on protecting a country's balance-of-payments position in an attempt to coordinate the IMF Agreement with GATT 1994. Under Article XIV:2, a Member may, with the consent of all WTO Members, temporarily deviate from Article XIII "in respect of a small part of its external trade where the benefits to the contracting party . . . substantially outweigh any injury which may result to the trade of other contracting parties." Since 1961, no contracting party or WTO Member has invoked Article XIV.[262]

Second, Article XV:4 lays down a general principle that Members must not "frustrate" the intent of GATT 1994 through exchange action, nor may they frustrate the intent the IMF's Articles of Agreement by trade action. The Interpretative Note to Article XV states that the term "frustrate" is intended to indicate that violations of the letter of GATT 1994 by exchange action is not to be regarded as a violation of Article XV "if, in practice, there is no appreciable departure from the intent of the Article." The Note gives as an example that a requirement that payment for a Member's exports may be made in its own currency or in the currency of other IMF members will not be deemed to contravene Articles XI or XIII. Another example is if a Member specifies on an import license the country from which the goods may be imported, "for the purpose not of introducing any additional element of discrimination in its import licensing system but of enforcing permissible exchange controls." Article XV:5 directs the Ministerial Conference to notify the IMF if it considers that exchange controls in connection with imports are being applied inconsistently with the GATT exceptions for quantitative restrictions.[263]

Article XV was designed to establish more effective machinery for consultation and coordination between the IMF and GATT.[264] Among the WTO's responsibilities, Article III of the WTO Agreement lists cooperation with the IMF and the World Bank to achieve greater coherence in global economic policymaking.[265] The WTO concluded cooperation agreements with the IMF in December 1996, and with the World Bank in April 1997. The agreements provide for the exchange and sharing of information, and accord each other observer status at meetings of the other's decision-making bodies.

[261] GATT Article II:6 provides that if the par value of a Member's currency is reduced by more than twenty percent in accordance with the IMF's Articles of Agreement, then specific duties may be adjusted to take account of such a reduction. With the replacement of floating exchange rates for par value in the early 1970s, this paragraph is of historical interest only.

[262] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 419.

[263] Paragraphs 6 and 7 of Article XV are intended to prevent a Member which does not belong to the IMF from frustrating GATT's objectives through exchange controls. Such Members are obligated to conclude a special exchange arrangement with the WTO on terms generally consistent with those of the IMF. Few such agreements were ever concluded, and no such arrangement has been in force for several years. *See* MCGOVERN, *supra* note 14, at § 7.13.

[264] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 429.

[265] As noted by the Appellate Body in *Argentina—Footwear*, the agreement between the IMF and the WTO does not modify, add to, or diminish the rights and obligations of Members. *See Argentina –Footwear*, *supra* note 42, ¶ 72.

G. Article XVI, Subsidies

Article XVI:1 requires a WTO Member to notify the other Members if it maintains a "subsidy" that operates directly or indirectly to increase exports or reduce imports of any product. If "subsidization" causes or threatens to cause "serious prejudice" to the interests of any other Member, then the subsidizing Member is obligated to discuss the possibility of limiting the "subsidization." Article XVI:3 encourages Members to avoid the use of "subsidies" on the export of primary products (*i.e.*, products of farm, forest, or fisheries). If a Member maintains this type of "subsidy," then it should not apply it in such a manner that gives the Member more than an equitable share of world export trade in the product during a previous representative period.

Nowhere in XVI does a definition of "subsidy" or "subsidization" appear.[266] Article XVI is generally broad and mainly hortatory. Thus, it imposes no meaningful disciplines on the use of subsidies. These lacunae have been filled by two Uruguay Round MTAs. The Agreement on Subsidies and Countervailing Measures (the SCM Agreement) establishes a comprehensive legal regime regarding the use of domestic and export subsidies, as well as disciplines over the use of countervailing duties to offset the effect of subsidies. The SCM Agreement's provisions on export subsidies differ dramatically from the export subsidy disciplines in GATT Article XVI. Given the detail of the SCM Agreement, it has largely eclipsed Article XVI, relegating that Article to playing an extremely minor role in the overall regulation of government subsidies to industry. An analysis of the SCM Agreement is left to a separate chapter in this work.[267] On the specific subject of subsidies on agricultural products, the grant of such subsidies is now governed by the Agreement on Agriculture, which is also analyzed in another chapter of this book.[268]

H. Article XVII, State Trading Enterprises

To generalize, state trading enterprises ("STE") have a relationship with government, through the grant of a right or privilege, and conduct an activity that influences the level and direction of imports and exports. An STE engages in the following kinds of activities: (1) controls or conducts imports or exports; (2) administers multilaterally or bilaterally agreed quotas, tariff quotas or other restraint arrangements, or other import or export regulations; (3) issues licenses/permits for importation or exportation; (4) determines domestic sales prices of imports; and (5) enforces the statutory requirements of an agricultural marketing scheme and/or stabilization arrangement.

The potential anti-competitive and trade-distortive effects of state-run monopolies are widely recognized. Article XVII does not prohibit a Member from establishing import or export monopolies, but it does regulate their operation and effect on trade when they make purchases or sales. Article XVII commits state trading enterprises—government-owned or government-controlled purchasing monopsonies and sales monopolies—to act on an MFN basis in all their purchases and sales.[269] Article XVII also covers any enterprise that

[266] Nor are the terms defined in Article VI, which authorizes the use of countervailing duties to counteract the injurious effect of subsidies.

[267] *See* Chapter 16.

[268] *See* Chapter 6.

[269] Article XVII:1(a) provides:

> Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in all its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

has been given exclusive or special buying or selling privileges, "formally or in effect." An Interpretative Note to Article XVII:1(a) adds that governmental measures imposed to insure quality standards, or privileges for the exploitation of natural resources that do not also authorize the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges."

Article XVII:1(b) requires that state trading enterprises make their purchases and sales

> solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

An Interpretative Note to Article XVII:1(b) provides that a country receiving a tied loan may take such loans into account as a "commercial consideration" when making foreign purchases. Article XVII:1(b) further provides that state trading enterprises must "afford enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in [the monopoly's] purchases or sales." Thus, a WTO member which has authorized a private import or export monopoly could be found to be in violation of GATT if it allowed such a monopoly to, in effect, abuse its dominant position by acting in a manner inconsistent with the Article III national treatment obligation.[270] The competition policy message of Article XVII is clear: If countries create or authorize state trading enterprises, they must not allow those enterprises to abuse their monopoly buying and purchasing power. Article XVII:1(c) adds that no Member shall prevent any enterprise under its jurisdiction from acting in accordance with the principles of paragraph 1(a) and (b).

The Uruguay Round Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994 provides the following working definition of a state trading enterprise:

> Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.

In order to enhance the transparency of state trading enterprises, the Understanding obligates Members to notify the Council for Trade in Goods of all state trading enterprises. The Working Party on State Trading Enterprises was established by the Council for Trade in Goods in 1995, pursuant to paragraph 5 of the Understanding. The mandate

Most WTO Members—developed countries, developing countries, as well as economies in transition—still maintain state trading enterprises. Marketing boards are not all that uncommon in developed countries.

[270] *See, e.g.*,*Canada—Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, *supra* note 107, at 85, ¶ 5.31; Report of the GATT Panel, *Thailand—Restrictions on Importation of and National Taxes on Cigarettes*, BISD, 37th Supp. 200, 223–26, ¶¶ 76–81 (1990)("[t]he Thai government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes"); Report of the WTO Panel, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, ¶ 6.150 (2004), (no showing that Canadian Wheat Board does not afford enterprises of other Members adequate opportunity to compete for participation in its sales). The panel's decision was upheld in its entirety by the Appellate Body. *See* Report of the Appellate Body, *Canada–Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R (Aug. 30, 2004) (upholding panel's findings that the United States failed to establish that Canada acted inconsistently with its obligations under GATT Article XVII:1). The panel's findings that certain provisions of Canadian legislation do violate GATT Article III were not appealed.

of the Working Party, as set out in paragraph 5 of the Understanding, is (1) to review notifications and counter-notifications on state trading; (2) to review, in the light of the notifications received, the adequacy of the questionnaire on state trading and the coverage of state trading enterprises notified under paragraph 1 of the Understanding; and (3) to develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities engaged in by these enterprises, which may be applicable to Article XVII of GATT 1994.[271]

Under Article XVII of GATT 1994 and paragraph 1 of the Understanding, all Members are required to submit annual notifications of their state trading activities. New and full notifications were first required in 1995 and, subsequently, every third year thereafter, while updating notifications are to be made in the intervening years, indicating any changes since the new and full notification. New and full notifications for 1995 were received from 59 Members and for 1998 from 39 Members. Updating notifications were received from 32 Members in 1996, from 33 Members in 1997, from 31 Members in 1999, and from 20 Members in 2000.[272] In light of the poor compliance record since 1995, it was decided at the July 2000 meeting of the Working Party that the Chairman would write to those Members who had made no state trading notification thus far in order to urge them to do so. In November 2000, such a letter was sent by the Chairman to those Members who had not yet made—a state trading notification.[273] In 2001, the Working Party received 25 new and full notifications from Members.[274]

Government procurement of goods is excepted from the substantive obligations of Article XVII, as well as from the notification requirements of the Uruguay Round Understanding, provided such purchases are for ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for resale.[275] Not surprisingly, the Interpretative Note to Article XVII:2 states that the term "goods" does not include the purchase or sale of services. Interestingly, the General Agreement on Trade in Services has no article that parallels Article XVII.

Although no GATT or WTO panel has ever found a measure to be in violation of Article XVII *per se*, GATT panels have found that Article XVII state trading enterprises have violated the Article XI prohibition on import or export quotas and Article III national treatment.[276]

[271] That illustrative list was completed in July 1999. *See* Working Party on State Trading Enterprises, *Illustrative List of Relationships between Governments and State Trading Enterprises and the Kinds of Activities Engaged in by These Enterprises*, G/STR/4 (1999).

[272] *See Report (2000) of the Working Party on State Trading Enterprises*, G/L/418, ¶ 7 (2000).

[273] Those Members were Angola; Antigua and Barbuda; Bangladesh; Belize; Benin; Brunei Darussalam; Burkina Faso; Burundi; Cameroon; Central African Republic; Democratic Republic of Congo; Republic of Congo; Cuba; Djibouti; Dominica; Dominican Republic; Ecuador; El Salvador; Estonia; Gabon; Georgia; Ghana; Grenada; Guinea Bissau; Guyana; Jordan; Kenya; Kuwait; Kyrgyz Republic; Lesotho; Madagascar; Malawi; Mali; Maldives; Mauritania; Mozambique; Myanmar; Nicaragua; Niger; Panama; Papua New Guinea; Rwanda; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Sierra Leone; Solomon Islands; Sri Lanka; Suriname; Swaziland; Tanzania; Togo; and Zimbabwe. *See Report (2000) of the Working Party on State Trading Enterprises*, G/L/418, ¶ 9 (2000).

[274] *See Report (2001) of the Working Party on State Trading Enterprises*, G/L/491, ¶ 7 (2001).

[275] *See* GATT Art. XVII:2; *Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994*, ¶ 1.

[276] *See, e.g.,* Report of the GATT Panel (adopted), *Canada—Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, BISD, 35th Supp. 37, 90, ¶ 4.27 (1988)(Article XI violated); Report of the GATT Panel (adopted), *Republic of Korea—Restrictions on Imports of Beef*, BISD, 36th Supp. 268, 301–02, ¶¶ 114–15 (1989)(Article XI violated); *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain, supra* note 270, ¶¶ 6.341–350 (discriminatory railway revenue cap violates Article III:4 because it makes imported grain more costly to transport by rail).

I. Article XIX, Emergency Action on Imports of Particular Products

As noted above in the discussion of exceptions to the prohibition on quantitative restrictions (Section II.D), a third GATT exception to this prohibition is Article XIX safeguards relief. Safeguards relief is available to domestic industries that are injured by fairly-traded imports. Article XIX permits Members to escape from their GATT obligations and raise trade barriers to safeguard a domestic industry seriously injured or threatened with serious injury by import competition. When the conditions for imposing escape clause relief are satisfied, a Member may suspend a GATT obligation in whole or in part, or withdraw or modify a tariff concession, on a temporary basis usually not to exceed four years.[277] This temporary relief is designed to give a domestic industry a breathing space within which to adjust to import competition.

Why should any domestic industry be shielded from fairly-traded imports? The rationale for safeguards relief has been explained on at least four grounds. One explanation is that it gives a domestic industry injured by fairly traded import competition a breathing space to adjust to the new competition, thereby restoring competitiveness. A second explanation is that it allows an orderly contraction of sunset industries within a country. A third explanation is that safeguards relief acts as a political safety valve when protectionist pressures build within a society. A fourth explanation for safeguards relief is based on public choice theory. Public choice theory posits that such relief encourages WTO Members to agree to trade concessions knowing that there is a "snapback" device to fall back on if domestic industries are seriously injured by the new import competition.[278]

Article XIX, *Emergency Action on Imports of Particular Products*, provides in part:

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

Thus, the elements of an Article XIX safeguards action are (1) "as a result of unforeseen developments", (2) imports are increasing in such quantities, (3) as to cause serious injury to domestic producers, (4) of like or directly competitive products. If these four elements are satisfied, then relief from imports may be imposed "to the extent and for such time as may be necessary." Before adoption of the Agreements on Safeguards, if safeguards relief was granted to an injured domestic industry, exporting countries were entitled to compensation if the import relief took the form of increased tariffs on products for which a tariff binding existed. This compensation factor made safeguards relief unattractive to importing countries. In addition, establishing the causal connection between increasing imports and serious injury to the domestic industry was often problematic. Consequently, because the "compensation bill" could be quite high in cases where safeguards relief was granted and bound tariffs were raised, and because proving the elements of a safeguards action was not always easy, many importing countries bypassed Article XIX altogether and instead entered into "voluntary restraint agreements" with exporting countries.

Thus, an important *de facto* exception to both the Article XI proscription on quantitative restrictions and the Article XIII requirement of nondiscrimination in the allocation of quotas was the voluntary restraint agreement (VRA), sometimes referred to as a voluntary

[277] *See Agreement on Safeguards, Art*. 7.1.

[278] *See* Raj Bhala, International Trade Law: Theory and Practice 1118–23 (2001).

export restraint (VER). Under the terms of a VRA, exporting countries of a product agreed to limit the volume of their exports to an importing country. These so-called "gray area" measures were neither GATT legal nor GATT illegal, but they certainly violated the spirit if not the letter of GATT by stemming the free flow of goods across national borders on the basis of quality and price.[279] The proliferation of these "grey-area" measures[280] (a neologism for GATT-inconsistent) represented a serious threat to the continued relevance of GATT both as an institution and as a legal instrument for regulating international trade. The remedy of choice for most domestic industries that were being injured by fairly-traded imports was to ask their governments to enter into VRAs with exporting countries to restrict the flow of fairly-traded exports. Resort to these grey-area measures was attributable in large part to certain defects in GATT Article XIX on safeguards relief. The Uruguay Round Agreement on Safeguards repaired the more glaring defects in Article XIX and directly addressed the subject of VRAs, requiring Members to phase them out over a five-year period and thereafter making them illegal.[281] In short, another GATT-authorized exception to Article XI's prohibition on quantitative restrictions is Article XIX, as supplemented by the 1994 Agreement on Safeguards.

In an effort to breathe new life into the virtually moribund and sketchy GATT Article XIX on safeguards, and to state definitively that voluntary restraint agreements are WTO-illegal, the Uruguay Round negotiators concluded the Agreement on Safeguards. Articles 2 to 7 of the Safeguards Agreement resolve the ambiguities of GATT Article XIX. In order to impose a safeguards measure, imports must be increasing absolutely or relatively compared to the share of the domestic market owned by the domestic product. Those increasing imports must be the cause of serious injury to the domestic industry. The safeguards remedy may take the form of increased tariffs, quotas, or a blend of the two, but imports from all sources must be subject to the safeguards remedy (that is, the remedy must be applied on an MFN basis). The period of relief may last for an initial period of four years, subject to renewal for an additional four years. The import restrictions must be progressively relaxed over the period of relief.[282]

One of the leading explanations for why GATT Article XIX was bypassed is its requirement that compensation be paid to the countries whose exports were the subject of a safeguard action. (Of course, if a tariff is not bound or if the applied rate of duty is currently set below the bound rate, then it may be raised unilaterally without invoking Article XIX and the Agreement on Safeguards.[283]) This Article XIX price tag was usually too dear to pay, which explains in part the resort to voluntary restraint agreements that did not carry the compensation price tag. In a major amendment to Article XIX, Article 8.3 of the Agreement provides that exporting countries may not seek compensation or retaliation during the first three years that a safeguard measure is in effect, provided the measure was taken in response to an absolute increase in imports and otherwise complies with the Agreement.

[279] *See* Kevin C. Kennedy, *Voluntary Restraint Agreements: A Threat to Representative Democracy,* 11 HASTINGS INT'L & COMP. L. REV. 1 (1987).

[280] At the time the Uruguay Round was launched, 96 VRAs were in force affecting products ranging from steel, machine tools, transportation equipment, electronic products, footwear, textiles, agricultural products, and automobiles. Of these 96 arrangements, 53 protected EEC markets and 32 protected the U.S. market. *See* Gary Samson, *Safeguards, in* THE URUGUAY ROUND HANDBOOK, *supra* note 58, at 143, 144–45.

[281] *See Agreement on Safeguards*, Art. 11.2.

[282] Special rules apply to developing countries that permit them to impose safeguard relief for up to ten years, and exempts them from any safeguards action if the combined imports from all developing countries is less than nine percent of the total volume of imports.

[283] *See* MCGOVERN, *supra* note 14, § 10.213.

Practice has favored the imposition of increased customs duties over quantitative restrictions in a ratio of about two to one. In allocating import quotas among supplying countries, a Member may either seek agreement with Members having a substantial interest in supplying the product, or allocate quotas based on the proportion of the product supplied by other Members during a previous representative period.[284] A Member imposing safeguard measures must not discriminate among sources of the imported product.[285]

Article 2.1 of the Agreement states that Members may apply safeguards measures to a product that is being imported in increased quantities and is causing or threatening to cause serious injury to a domestic injury, without specifying the additional GATT Article XIX requirements that the increase in imports be the result of "unforeseen developments" and "the effect of obligations" under the GATT. It appeared, therefore, that these two requirements had been made obsolete by the Agreement. However, at least three Appellate Body reports have held that the Agreement on Safeguards does not replace Article XIX and that the two requirements must still be met. For example, in *United States—Safeguard Measures on Imports of Lamb Meat*,[286] the Appellate Body addressed this very issue in the following terms:

> In our Reports in *Argentina—Footwear Safeguard* and *Korea—Dairy Safeguard*, we examined the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* and, in particular, whether, with the entry into force of the *Agreement on Safeguards*, Article XIX continues to impose obligations on WTO Members when they apply safeguard measures. We observed in those two appeals that "the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement", and we said that these two texts must be read "harmoniously" and as "an inseparable package of rights and disciplines".[287]

Thus, in any domestic proceeding involving the grant or denial of safeguards relief, the national administering authorities are required to take into account the "unforeseen developments" criterion when making their determinations. However, the Appellate Body has not explained what "unforeseen developments" means. In the *United States—Lamb Meat* report, the Appellate Body stated:

> In conducting such an examination now, we note that the text of Article XIX provides no express guidance on this issue. However, as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, "in order for a safeguard measure to be applied". . . .
>
> . . . . As Article XIX:1(a) of the GATT 1994 requires that "unforeseen developments" must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of "unforeseen developments" is, in our view, a "pertinent issue[ ] of fact and law", under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a "finding" or "reasoned conclusion" on "unforeseen developments".[288]

Safeguards actions are analyzed more fully in a separate chapter of this book.[289]

[284] *See Agreement on Safeguards*, Art. 5.2(a).

[285] *See id.* Art. 2.2.

[286] Report of the Appellate Body, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R (2001).

[287] Report of the Appellate Body, *United States—Safeguard Measures on Imports of Lamb Meat*, *supra* note 286, at ¶ 69.

[288] *Id.* ¶¶ 72, 73, *quoting from* Report of the Appellate Body, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (2000) (footnote omitted). *Accord*, Report of the Appellate Body, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS 248, 249, 251, 252, 253, 254, 258, 259/AB/R, ¶¶ 275–280 (2003).

[289] *See* Chapter 18.

IV. General and Security Exceptions

A. Article XX, General Exceptions

Article XX permits Members to derogate from GATT obligations in limited circumstances. A WTO Member that is initially unsuccessful in defending a measure against the charge that it is inconsistent with a GATT obligation will thus often argue in the alternative that one or more of the Article XX exceptions applies. However, any Member invoking Article XX in defense of a challenged measure carries the burden of proving that the measure meets the criteria for an Article XX exception.[290]

Article XX consists of a chapeau or preamble, followed by ten specific exceptions. Subject to the qualifications set forth in the chapeau, nothing in GATT 1994 is to be construed to prevent adoption or enforcement of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the exportation of gold or silver;
(d) necessary to secure compliance with laws or regulations . . . relating to customs enforcement, . . . the protection of [intellectual property rights], and the prevention of deceptive practices;
(e) relating to the products of prison labor;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement . . . ;
(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a government stabilization plan . . . ; or
(j) essential to the acquisition or distribution of products in general or local short supply. . . .

As explained more fully below, the term "necessary" used in Article XX(b) and (d) is shorthand for the minimum derogation principle, *i.e.*, there must not be available any less trade restrictive alternative measure that would be equally effective. The term "relating to" the conservation of exhaustible natural resources that is used in Article XX(g) has been interpreted to mean that a measure must be "primarily aimed at" such conservation.

The Appellate Body has made it abundantly clear that an Article XX analysis is two-tiered. First, the challenged measure must meet the criteria of one of the specific Article XX exceptions; second, the measure must pass muster under the Article XX chapeau.[291]

GATT practice in resolving Article XX disputes has been to construe the exceptions so as not to defeat the legal obligations of GATT; to place the burden on the Member invoking

[290] *See, e.g.*, *United States—Section 337*, *supra* note 105, at 393, ¶ 5.27; *Canada –Foreign Investment Review Act*, *supra* note 143, at 164, ¶ 5.20.

[291] *See* Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, Part IV, at 22 (1996); Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶¶ 117–119 (1998).

the Article XX exception to justify its invocation; and to examine Article XX exceptions only if they are invoked. As a corollary, a two-pronged test has emerged against which measures taken under Article XX are evaluated: (1) the measure must pass a means-end, rational relationship test, that is, the measure must be reasonably calculated to achieve the objective stated in the Article XX exception; and (2) no other measure that is less trade restrictive must be reasonably available that would be as effective.[292] GATT panels and the Appellate Body have adopted a "less trade restrictive" principle—usually referred to as the minimum derogation principle—when assessing measures for consistency with Article XX. The minimum derogation principle asks whether there are alternative measures reasonably available that would be as effective as the one adopted that are less trade restrictive than the measure adopted.[293] If such alternative measures do exist, then the measure fails to meet the Article XX exception.

One commentator has suggested a third prong, that of proportionality.[294] Under this proportionality prong, a measure must not be disproportionate to the objective being sought. For example, a ban on exports of all artistic works in order to protect national treasures would be a disproportionate response to the objective being sought. While it is possible for a measure to be sufficiently means-end related, and the only effective method for achieving the objective stated in Article XX, it could nevertheless be disproportionate to that objective. No GATT or WTO panel has cited disproportionality as a reason for invalidating a measure taken pursuant to one of the Article XX exceptions.

1. The Article XX Chapeau

The chapeau or preamble to Article XX provides as follows:

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

Any Member invoking an Article XX exception must satisfy the two preconditions set out in the chapeau. First, the Member must show that its measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Second, any such measure must not amount to a disguised restriction on trade. Two GATT panel reports and an Appellate Body report that have analyzed the "arbitrary or unjustifiable discrimination" precondition are instructive.

First, in a 1982 panel report, *Prohibition of Imports of Tuna and Tuna Products from Canada,*[295] the GATT panel examined a U.S. import ban on tuna and tuna products from Canada that was imposed in retaliation for Canada's seizure of U.S. fishing vessels in disputed waters. The panel concluded that although the import ban was directed solely at Canada, and thus discriminatory on its face, similar actions had been taken against tuna

[292] *See, e.g.,* Report of the GATT Panel (adopted), *Thailand –Restrictions on Importations of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200 (1990).

[293] *See, e.g.*, *United States—Gasoline*, *supra* note 41, at 27; Report of the GATT Panel (unadopted), *United States—Restrictions on Imports of Tuna*, *reprinted in* 33 Intl Legal Materials 839 (1994); *Canada—Unprocessed Herring and Salmon*, *supra* note 175, at 113–15, ¶¶ 4.4–4.7. *See also United States—Section 337*, *supra* note 105, at 392–393, ¶¶ 5.25–5.27.

[294] *See* McGovern, *supra* note 14, § 13.111.

[295] Report of the GATT Panel (adopted), *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD, 29th Supp. 91 (1982).

imports from Costa Rica, Ecuador, Mexico, and Peru for similar reasons. Consequently, in the panel's view, the discrimination against Canada "might not necessarily have been arbitrary or unjustifiable."[296]

Second, one year later in *Imports of Certain Automotive Spring Assemblies*, [297] another GATT panel considered a U.S. International Trade Commission exclusion order banning imports of automotive spring assemblies on the ground that they infringed U.S. patents. The panel concluded that because the exclusion order banned imports of the infringing products from all sources, not only Canada, the order was not applied in a manner constituting an arbitrary or unjustifiable discrimination in violation of Article XX's preamble.[298]

These same two panels also considered whether the preamble's "disguised restriction on international trade" prohibition had been violated. In neither case did the panels find that the U.S. measures were applied in a manner that constituted a disguised restriction on international trade. In what may have been an overly facile conclusion in the *Tuna* case, however, the panel concluded that because the U.S. prohibition on imports of tuna from Canada had been taken as a trade measure and publicly announced as such, it could not be a "disguised" restriction on international trade,[299] a conclusion with which Canada took sharp exception.[300] In an intellectually more satisfying analysis in the *Automotive Spring Assemblies* report, the panel found that because the International Trade Commission had concluded that patent infringement was taking place only after evidence was produced that clearly established both the validity of the patent and its infringement, and that the exclusion order was applied to all infringing imports regardless of country of origin, the exclusion order was not a disguised restriction on international trade.[301]

Finally, in the Appellate Body's inaugural report, *Standards for Reformulated and Conventional Gasoline,*[302] the Appellate Body offered the following views on the breadth of the Article XX chapeau:

> [T]he chapeau says that "*nothing in this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . " The exceptions listed in Article XX thus relate to all of the obligations under the *General Agreement:* the national treatment obligation and the most-favored-nation obligation, of course, but others as well. . . .
>
> * * * * * *
>
> "Arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international

[296] *See id.* at 108, ¶ 4.8.

[297] Report of the GATT Panel (adopted), *United States—Imports of Certain Automotive Spring Assemblies*, BISD, 30th Supp. 107 (1983).

[298] *See id.* at 125, ¶ 55. The panel report was adopted with the understanding that it was without prejudice to future complaints challenging Section 337 of the Tariff Act of 1930, pursuant to which the exclusion order was issued. That challenge was considered and parts of Section 337 invalidated in the 1989 GATT panel report, *United States—Section 337*, *supra* note 105.

[299] *See United States—Prohibition of Imports of Tuna*, *supra* note 295, at 108, ¶ 4.8.

[300] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 565.

[301] *See United States—Automotive Spring Assemblies*, *supra* note 297, at 125, ¶ 56.

[302] *See United States—Gasoline*, *supra* note 41.

> trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. . . . The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[303]

The Appellate Body thus clearly disagrees with the views expressed in the GATT panel report in *Prohibition of Imports on Tuna* that a publicly-declared measure cannot be a "disguised" measure in violation of Article XX.

2. The Public Morals Exception

The first of Article XX's exceptions permits WTO Members to adopt measures "necessary to protect public morals." Although there is no GATT practice that sheds light on the scope of this exception, it evidently deals in part with border measures to prohibit the importation of obscene materials and possibly drugs, although there is no GATT or WTO practice on either of these points. Under U.S. law, the U.S. Customs Service is authorized to seize not only obscene materials imported into the United States, but also materials advocating treason or insurrection against the United States.[304] Given the value-laden nature of the term "morals," and the open-ended quality of the term "public morals," the potentially broad sweep of the public morals exception could easily swallow many GATT obligations.[305]

A public morals exception is also contained in Article XIV of the GATS. Unlike its Article XX(a) counterpart, GATS Article XIV(a) adds the words "necessary to protect public morals *or to maintain public order* [emphasis added]."[306] A footnote to this exception states that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." What constitutes a "fundamental interest of society" is anyone's guess. It is unimaginable that WTO Members, with their diverse social, cultural, political, and economic conditions, could ever reach a consensus on this question.

3. Protection of Human, Animal, or Plant Life or Health

In the arsenal of weapons at a country's disposal to block the free flow of goods across national borders, one of the most insidious and potentially effective is product standards. What makes product standards insidious is that the same standard can be a legitimate health and safety regulation and at the same time act as a disguised restriction on trade.

[303] *Id.* at 24–25 (emphasis in original).

[304] 19 U.S.C. § 1305(a) provides in part:

> All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material. . . .

For cases applying § 1305, *see, e.g.*, *United States v. 1903 Obscene Magazines*, 907 F.2d 1338 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990); *United States v. Various Articles of Obscene Merchandise*, 705 F.2d 41 (2d Cir. 1983).

[305] *See,* e.g., Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor,* 20 YALE J. INT'L L. 361 (1995).

[306] *Compare* Article 8.1 of the TRIPS Agreement, which provides:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors vital to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

For example, a country could decide to set comparatively high environmental, health, and safety regulations out of a legitimate concern for the health and welfare of consumers within its borders. Those same regulations could also protect local manufacturers and retailers from import competition.

Even when national product standards are not designed to block imports, standards often differ from one country to another, impeding the free flow of goods. Because of such differences, minor but costly modifications must often be made to a product destined for foreign markets.

Once tariff reductions were progressively implemented and market access began to significantly improve with trade flows substantially increasing, differences in national product standards and certification systems began to present a significant barrier to trade. As imports were tested to determine whether they conformed to domestic standards, the suspicion grew that national standards and certification procedures were being used as a gossamer-thin disguise to restrict trade. From an economic perspective, this suspicion, if true, was unwelcome. From a legal perspective, if any technical regulation or conformity assessment procedure expressly discriminates against imports, such regulation or procedure in all likelihood violates the Article III national treatment commitment (in the case of an internal measure) or the Article XI prohibition of quantitative restrictions (in the case of a border measure). However, any alleged inconsistency of product standards with Articles III and XI must be further tested against the general exception in Article XX(b) for measures to protect human, animal, or plant life or health. Nevertheless, even if a health or safety regulation passes muster under the specific Article XX exception, that regulation still must not, in the words of the chapeau to Article XX, "be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction to international trade . . . ."

Article XX(b) authorizes measures "necessary to protect human, animal or plant life or health." This provision allows Members to give priority to health over trade liberalization, provided a measure is "necessary." GATT panels have on several occasions interpreted the term "necessary" in the context of Article XX(b) and (d), the latter dealing with measures relating to customs enforcement, the prevention of restrictive business practices, and intellectual property protection. One highly instructive report, *Thai Cigarettes,*[307] concluded that the term "necessary" has the same meaning under both Article XX(b) and (d). Having concluded that the Thai ban on imported cigarettes violated Article XI's prohibition on quantitative restrictions, the panel then proceeded to assess the Thai import ban against the yardstick laid down in the *Section 337* panel report of whether the measure was "necessary:"

> [A] contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" . . . if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[308]

The panel's interpretation of "necessary" restates the minimum derogation principle, *i.e.*, any measure taken pursuant to one of the Article XX exceptions must be the least trade restrictive measure available. In response to Thailand's claim that the ban on imported

[307] *Thailand—Cigarettes*, *supra* note 292.

[308] *See United States—Section 337*, *supra* note 105, ¶ 5.26.

cigarettes was necessary in order to implement the government's program to control smoking, the panel accepted that smoking constitutes a serious risk to human health and that measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). Nevertheless, Thailand's import restrictions could be considered "necessary" only if there was no alternative measure less inconsistent with GATT that Thailand could reasonably be expected to employ in order to achieve its health policy objectives. The panel in fact identified two alternative GATT-consistent measures.

In response to Thailand's concern about ensuring the quality of imported cigarettes, the panel suggested that non-discriminatory, mandatory labeling requirements requiring complete disclosure of ingredients, in conjunction with a ban on unhealthy substances, would be an alternative consistent with GATT. Second, in response to Thailand's concern about the quantity of cigarettes consumed, the panel pointed to the World Health Organization's recommendation to ban cigarette advertising and promotions, especially those that target the youth market. Increasing the price of tobacco through nondiscriminatory, government-mandated price controls could also be an effective tobacco control strategy.[309] The panel concluded, therefore, that Thailand's ban on the importation of foreign cigarettes, while at the same allowing the sale of domestic-produced cigarettes, was not "necessary" within the meaning of Article XX(b).

A recurring issue under Article XX(b) has been one of transparency, *i.e.*, the lack of adequate publication, notification, and consultations concerning measures taken under paragraph (b). For example, in 1989 Chile complained that sales of fruit exports to the United States were lost because of a U.S. ban on Chilean fruit following the discovery of toxic chemicals in Chilean grapes. Chile urged the establishment of a system for the expeditious notification and review of such measures to ensure that the measures adopted were proportionate to the threat. Later that year the Director-General offered a recommendation to the GATT Council, *Streamlined Mechanism for Reconciling the Interests of Contracting Parties in the Event of Trade-Damaging Acts*. Its three recommendations are (1) a measure taken should not be any more severe, and should not remain in force any longer, than necessary to protect the human, animal, or plant life or health involved; (2) the importing country should notify the Director-General as quickly as possible by telephone followed by a written communication to all contracting parties; and (3) the importing country should submit to expeditious informal consultations with the principally concerned contracting party as soon as a trade-damaging act has occurred with a view to reaching a mutually satisfactory resolution of the dispute.[310]

Two Uruguay Round agreements substantially supplement the Article XX(b) exception. These agreements are the Agreement on the Application of Sanitary and Phytosanitary Measures ("the SPS Agreement"), and the Agreement on Technical Barriers to Trade ("the TBT Agreement"). Before the SPS Agreement and the TBT Agreement (and the TBT Agreement's predecessor, the Tokyo Round Standards Code) were added to the GATT-WTO legal regime, Article XX(b) was the only GATT provision dealing expressly with the subject of sanitary and phytosanitary measures and product standards.

Briefly, the SPS Agreement is the first multilateral trade agreement with a fully articulated set of rules governing a country's use of SPS measures in connection with imported goods. The SPS Agreement circumscribes the use by WTO Members of such measures as a nontariff barrier to trade. The SPS Agreement applies to all sanitary and phytosanitary

[309] *See Thailand—Cigarettes*, *supra* note 292, at 222–226, ¶¶ 73–81.
[310] C/M/236, BISD, 36th Supp. 67 (1989), *reprinted in* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 1, at 571–72.

measures that may, directly or indirectly, affect international trade.[311] The SPS Agreement does not create any substantive sanitary or phytosanitary measures *per se*. Instead, the Agreement sets forth a number of general procedural requirements to ensure that a sanitary or phytosanitary measure is in fact a scientifically-based protection against the risk asserted by the Member imposing the measure, and not a disguised barrier to trade.[312] The Agreement expressly recognizes that Members have a legitimate right to protect human, animal, and plant life and health, and to establish a level of protection for life and health that they deem appropriate. The provisions of the SPS Agreement are designed to preserve the ability of Members to act while guarding against the use of SPS measures that are designed to protect a domestic industry from foreign competition. The Agreement establishes criteria and procedures to distinguish the former from the latter.[313]

The TBT Agreement builds on the 15-year experience of the Tokyo Round Standards Code. The TBT Agreement restates, clarifies, and modestly expands the Code. The TBT Agreement balances the ability of governments and the private sector to implement legitimate standards and the procedures for assessing product conformity with those standards against their unjustified use to protect a domestic industry. The TBT Agreement establishes rules on distinguishing legitimate standards and product conformity assessment procedures from protectionist measures and procedures in three areas: (1) the preparation and adoption of technical regulations and standards, (2) conformity assessment procedures and mutual recognition of other countries assessments, and (3) information and assistance about technical regulations, standards, and conformity assessment procedures. Like its predecessor, the TBT Agreement does not establish or prescribe standards, technical regulations, or conformity assessment procedures. Rather, it establishes general procedural requirements to be observed when adopting or using such measures so that they do not create unnecessary obstacles to trade.

The SPS and TBT Agreements are discussed in later chapters of this book.[314]

4. Measures Against Deceptive Practices and to Protect Intellectual Property

Article XX(d) permits Members to take measures necessary to secure compliance with laws relating to customs enforcement, the protection of intellectual property rights, and the prevention of deceptive practices. One of the leading panel reports analyzing Article XX(d) is the 1989 GATT panel report, *Section 337 of the Tariff Act of 1930*.[315] Section 337 of the Tariff Act of 1930, a special U.S. law for enforcing intellectual property rights at the border, was examined against the charge that it violates the national treatment clause of Article III:4 because it treats imported products less favorably than the like

[311] *See generally* Marsha A. Echols, *Sanitary and Phytosanitary Measures, in* THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 191 (Terence P. Stewart ed. 1996); John J. Barcelo III, *Product Standards to Protect the Local Environment—the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 CORNELL INT'L L.J. 755 (1994); Robert M. Millimet, *The Impact of the Uruguay Round and the New Agreement on Sanitary and Phytosanitary Measures: An Analysis of the U.S. Ban on DDT*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 443 (1995). The WTO Secretariat has published a booklet, UNDERSTANDING THE WORLD TRADE ORGANIZATION AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES (1996).

[312] *See* David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines,* 27 CORNELL INT'L L.J. 817 (1994).

[313] This is not always an easy task, as illustrated by the interminable dispute between the United States and the EU over the 1987 EU ban on U.S. beef from cattle fed with growth-inducing hormones. *See* Report of the Appellate Body, *European Communities—EC Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R (1998).

[314] *See* Chapters 7 and 8.

[315] *See United States—Section 337*, *supra* note 105.

domestic product. The United States responded in part that even if Section 337 does violate Article III:4, that Section 337 is "necessary" to enforce U.S. patent laws against infringing imports, as that term is used in Article XX(d).

After concluding that Section 337 is inconsistent with Article III:4,[316] the panel identified three conditions that must be met before GATT-inconsistent measures can be sustained under Article XX(d):

1. The laws or regulations with which compliance is being secured are themselves "not inconsistent" with GATT.
2. The measures must be "necessary to secure compliance" with those laws or regulations.
3. The measures must not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade," which are the criteria stated in the Article XX chapeau.

The panel agreed that Section 337 is not otherwise inconsistent with GATT, that is, GATT contracting parties are permitted to enact laws that protect intellectual property rights at the border.[317]

With regard to the second prong of the three-prong test, the panel concluded that the Section 337 procedures for resolving allegations of violations of U.S. patent laws could not be justified as necessary within the meaning of Article XX(d) so as to permit an exception to the basic national treatment obligation contained in Article III:4. The panel observed that if a contracting party could reasonably secure a desired level of enforcement in a manner that is not inconsistent with other GATT provisions, it is required to do so.[318]

[316] The panel found that Section 337 discriminates against imported articles vis-à-vis the domestic like product in six respects. First, a Section 337 complainant has a choice of two fora—the ITC or federal district court—in which to challenge imported articles, whereas articles manufactured domestically in the United States may only be challenged in federal court. Second, foreign producers and importers of challenged products are at a potential disadvantage vis-à-vis their U.S. domestic counterparts, given the strict time limits applicable in Section 337 proceedings (described below), with no corresponding time limits applicable in federal court actions. Third, a Section 337 respondent cannot bring a counterclaim (*e.g.*, a counterclaim alleging an antitrust violation by the complainant for abusing its exclusive rights under a patent, trademark, or copyright), whereas a federal court defendant has that option. Fourth, relief in the form of a general exclusion order against infringing imports is available in a Section 337 proceeding. In contrast, no corresponding remedy is available against infringing articles of U.S. origin in a federal court proceeding. Fifth, exclusion orders are automatically enforced by the U.S. Customs Service, whereas any injunctive relief ordered by a federal court in a private civil action requires for its enforcement separate contempt proceedings brought by the successful plaintiff. Sixth, foreign producers and importers of challenged imports face the prospect of defending parallel or successive administrative and judicial proceedings. In contrast, products of U.S. origin are not exposed to the same gauntlet. In addition, the panel concluded that Section 337 does not meet the criteria of the Article XX(d) exception because it is not a measure "necessary" to protect IPRs at the border. *See id.* at 392–93, ¶¶ 5.25–5.27.

[317] The first condition also was examined in the 1988 panel report in *Japan Restrictions on Imports of Certain Agricultural Products*, *supra* note 179. In response to Japan's invocation of the Article XX(d) exception in justification of import restrictions administered by an import monopoly, the panel found that "Article XX(d) only exempts from the obligations under the General Agreement measures necessary to secure compliance with those laws and regulations which are not inconsistent with the provisions of [the General] Agreement. Article XX(d) therefore does not permit contracting parties to operate monopolies inconsistently with the other provisions of the General Agreement." *Id*. at 230, ¶ 5.2.2.3. The panel concluded that the enforcement of laws and regulations providing for an import restriction made effective through an import monopoly that was inconsistent with Article XI:1 could not be justified under Article XX(d).

[318] *See United States—Section 337*, *supra* note 105, at 396, ¶ 5.35.

The term "necessary to secure compliance" in the Article XX(d) context was also examined in the Appellate Body's report in *Korea—Beef*. where the Appellate Body offered the following views as to the meaning of the term "necessary":

> We believe that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[319]

The Appellate Body rejected Korea's claim that its dual retail system for domestic and imported beef was necessary to protect against fraud in the sale of beef, finding that Korea could achieve its desired level of enforcement through conventional GATT-consistent enforcement measures.[320]

The third prong of the *Section 337* panel's three-prong test is analyzed above in connection with the discussion of the Article XX chapeau and the Appellate Body's report in *Standards for Reformulated and Conventional Gasoline*.

5. Measures to Conserve Exhaustible Natural Resources

Several panels and the Appellate Body have considered the Article XX(g) exception for measures taken to conserve natural resources. For example, in the 1988 *Herring and Salmon* panel report, the GATT panel rejected Canada's reliance on paragraph (g) in justification of regulations that required that all unprocessed herring and salmon caught in Canadian waters be landed first in Canada before leaving Canadian waters. The panel concluded that Canada's regulations were not "primarily" aimed at the conservation of an exhaustible natural resource and were thus not justified under Article XX(g).[321]

In the 1982 panel report on *Prohibition of Imports of Tuna and Tuna Products from Canada*, the panel rejected the U.S. invocation of Article XX(g) in justification of its ban on imports of tuna from Canada because the United States had not restricted the domestic consumption of tuna as required by paragraph (g).[322]

In the unadopted panel report, *Restrictions on Imports of Tuna*,[323] the panel concluded that Article XX(g) could not justify measures to conserve exhaustible natural resources that are beyond the territorial jurisdiction of the importing Member.[324]

In *Standards for Reformulated and Conventional Gasoline*, the Appellate Body rejected the panel's conclusion that the U.S. regulations did not qualify under Article XX(g) as a measure for the conservation of an exhaustible natural resource—in this case, clean air—made effective in conjunction with domestic conservation measures. Although the U.S. clean air regulations passed muster under Article XX(g), the Appellate Body

[319] *Korea—Beef*, *supra* note 276, ¶ 161 (footnote omitted).
[320] *See id.* ¶ 180.
[321] *See Canada—Unprocessed Herring and Salmon*, *supra* note 175, at 113–15, ¶¶ 4.4–4.7.
[322] *See United States—Tuna and Tuna Products from Canada*, *supra* note 295, at 107–09, ¶¶ 4.5–4.6, 4.9–4.12.
[323] *See United States—Restrictions on Imports of Tuna, supra* note 293.
[324] *See id.* ¶ 5.31.

nevertheless concluded that the United States had failed to satisfy the preconditions in the chapeau to Article XX, namely, that the measures adopted not unduly discriminate against foreign gasoline.[325] In particular, the United States was faulted by the Appellate Body for not pursuing cooperative agreements with exporting countries.[326]

In *United States—Shrimp*, the Appellate Body agreed with the United States that the phrase "exhaustible natural resources" is not limited to non-living natural resources, but includes living resources as well.[327] As noted, Article XX(g) exempts from the MFN and national treatment commitments trade measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." Rejecting Malaysia's "original intent" argument that Article XX(g) was intended to cover non-living resources only, the Appellate Body stated:

> The words of Article XX(g), "exhaustible natural resources,"were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. . . .
>
> From the perspective embodied in the preamble of the WTO Agreement [explicitly acknowledging the objective of sustainable development], we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary."[328]

Moreover, the Appellate Body added, two adopted GATT 1947 panel reports, *United States—Prohibition of Imports of Tuna and Tuna Products from Canada,*[329] and *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon,*[330] found fish to be an "exhaustible natural resource" within the meaning of Article XX(g). Accordingly, the Appellate Body held that measures to conserve exhaustible resources, whether living or non-living, may fall within Article XX(g).[331] The Appellate Body further found that sea turtles are an exhaustible natural resource.

Turning next to the issue of whether the U.S. measure was one "relating to the conservation of" exhaustible natural resources, the Appellate Body found a substantial relationship between Section 609 of the Endangered Species Act[332] and its implementing regulations, on the one hand, and the conservation of sea turtles, on the other. "The means [i.e., turtle excluder devices or "TEDs"] are, in principle, reasonably related to the ends [i.e., the conservation of sea turtles]."[333]

Addressing the last Article XX(g) criterion—that the measure is made effective in conjunction with restrictions on domestic production or consumption—the Appellate Body found that this requirement was easily satisfied. U.S. shrimpers who failed to use TEDs faced serious civil and criminal penalties, including forfeiture of their trawlers.

[325] *See United States—Gasoline*, *supra* note 41, Part III.B, at 16.

[326] *See id*. Part IV, at 27–28.

[327] *See United States—Shrimp*, *supra* note 291, ¶¶ 128–131. *See also* Eric L. Richards and Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law*, 71 U. Colo. L. Rev. 295 (2000); Bruce Neuling, *The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate*, 22 Loy. L.A. Int'l & Comp. L. Rev. 1 (1999).

[328] *Id.* at 48, ¶¶ 129–130.

[329] Report of the GATT Panel (adopted), *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD, 29th Supp. 91 (1983).

[330] Report of the GATT Panel (adopted), *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD, 35th Supp. 98 (1989).

[331] Report of the Appellate Body, *Shrimp and Shrimp Products*, *supra* note 291, at 50, ¶ 131.

[332] 16 U.S.C. § 1537.

[333] Report of the Appellate Body, *Shrimp and Shrimp Products*, *supra* note 291, at 53, ¶ 141.

"We believe," the Appellate Body concluded, "that, in principle, Section 609 is an even-handed measure."[334]

Having concluded that Section 609 is provisionally justified under the Article XX(g) exception, the Appellate Body next tackled the thorny issue of whether Section 609 violates the Article XX chapeau. Reflecting on the language of the preamble to the Agreement Establishing the WTO that calls for "the optimal use of the world's resources in accordance with the objective of sustainable development," and the creation of the Committee on Trade and Environment and its terms of reference, the Appellate Body noted that these developments "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994."[335] Nevertheless, the Appellate Body found it unacceptable

> for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.[336]

The Appellate Body added that the protection and conservation of highly migratory species of sea turtles demands concerted and cooperative efforts on the part of the many countries whose waters are traversed by sea turtles. With the exception of the Inter-American Convention for the Protection and Conservation of Sea Turtles, the United States had failed to exhaust multilateral efforts, in the Appellate Body's view.[337] Rather than attempt to exhaust international mechanisms, the United States instead pursued the unilateral application of Section 609. In a footnote, the Appellate Body underscored this point with the observation that the United States, a party to CITES,[338] made no attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee.[339] The Appellate Body also faulted the United States for acting in a discriminatory manner vis-à-vis shrimp exporting members (Central and South American shrimp exporters were given preferential treatment under Section 609 vis-à-vis shrimpers from the four complaining Asian members), as well as for the lack of adequate transparency in the administration of the Section 609 certification procedures.

Anticipating the backlash of criticism that its decision would generate within the environmental community, the Appellate Body closed with the following observations:

> In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and they should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or

[334] *Id.* at 55, ¶ 144.
[335] *Id.* at 58, ¶ 153.
[336] *Id.* at 65, ¶ 164.
[337] *Id*. at 67, 70, ¶¶ 167–168, 171–172. Parties to the Inter-American Convention include Brazil, Costa Rica, Nicaragua, Venezuela, and the United States.
[338] *Convention on International Trade in Endangered Species*, March 3, 1973, *entered into force* Jan. 7, 1975, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243. *See* William Burns, *CITES and the Regulation of International Trade in Endangered Species of Flora: A Critical Appraisal*, 8 Dick. J. Int'l L. 203 (1990); OECD, Experience With the Use of Trade Measures in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), OCDE/GD(97)106 (1997).
[339] Report of the Appellate Body, *Shrimp and Shrimp Products*, *supra* note 291, at 70 n.174.

> multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and they do.[340]

In sum, the Appellate Body found Section 609 flawed chiefly in the manner in which the United States administered it, not with the substance of the law *per se* or its objectives. It recognized a country's right to protect sea turtles, provided that country did so by negotiating bilateral or multilateral species protection agreements rather than by imposing its preferences unilaterally.

In subsequent panel proceedings involving a challenge by Malaysia to an alleged lack of compliance by the United States with the Appellate Body's report, the reviewing panel concluded that the United States has an obligation to make serious good faith efforts to reach a multilateral agreement before resorting to unilateral measures.[341] In assessing whether such good faith efforts had been made, the panel concluded that the Inter-American Convention could reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of protection and conservation of sea turtles. The panel concluded:

> [O]ur understanding of the Appellate Body findings is that the United States would be entitled to maintain the implementing measure if it were demonstrated that it was making serious good faith efforts to conclude an international agreement on the protection and conservation of sea turtles. The Panel is of the view that the US efforts since 1998 meet the standard established by the Appellate Body Report. In this respect, the Panel notes the sustained pace of the negotiations and the prospect of their conclusion in 2001, as well as the effective contribution of the United States in the context of these negotiations. . . . Finally, the Panel notes that Malaysia did not submit convincing evidence that the United States had not made serious good faith efforts in relation to the negotiation of an international agreement on the protection and conservation of sea turtles since the adoption of the reports of the Original Panel and the Appellate Body.[342]

The panel added that a multilateral agreement is clearly to be preferred and that unilateral measures such as those taken by the United States may only be accepted under Article XX(g)(1) if they are allowed under an international agreement, or (2) if they are taken to further the completion of serious good faith efforts to reach a multilateral agreement. The Appellate Body affirmed the panel's conclusion.[343]

6. Other Article XX Exceptions

Rounding out the other Article XX exceptions are (1) the importation or exportation of gold and silver;[344] (2) the products of prison labor;[345] (3) the protection of national treasures,[346] which is enforced at the international level through the Convention on the

[340] *Id.* at 75, ¶ 185 (emphasis in original). For additional analyses of the Shrimp/Turtle reports, see Neuling, *supra,* note 327; Richards and McCrory, *supra,* note 327.

[341] *See* Report of the WTO Panel, *United States—Import Prohibitions on Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WT/DS58/RW, ¶ 5.67 (2001).

[342] *Id.* ¶ 5.87.

[343] Report of the Appellate Body, *United States—Import Prohibitions on Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WT/DS58/AB/RW, ¶ (2001).

[344] GATT Art. XX(c).

[345] GATT Art. XX(e). Although there is no GATT practice under this exception, the U.S. law on the subject is designed to protect domestic industries from import competition from goods produced through prison labor. *See* Section 307 of the Tariff Act of 1930, 19 U.S.C. § 1307. The Article XX(e) prison labor exception is not a general labor standards exception that permits importing Members to exclude goods that are produced either by child labor or in factories that fail to enforce core labor standards on work safety, minimum wages, or maximum hours.

[346] GATT Art. XX(f).

Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;[347] (4) export restrictions on products subject to price controls;[348] and (5) products in short supply.[349]

B. Article XXI, Security Exceptions

Article XXI lists government measures that are exempt from regular GATT obligations when taken on national security grounds. They are (1) furnishing information the disclosure of which the Member considers contrary to its essential security interests; (2) taking action for the protection of the Member's essential security interests relating to fissionable materials or arms traffic, or taken in time of war or other international emergency; and (3) taking action in pursuance of a Member's obligations under the UN Charter for the maintenance of international peace and security.

The practice under Article XXI has centered around Article XXI(b)(iii): action which a Member considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations. For example, in 1975, Sweden imposed a global import ban on certain footwear on the ground that "the decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of the country's security policy."[350] Many contracting parties raised doubts about Sweden's justification of its import ban.[351] It terminated the ban in 1977.

During the Falklands war in 1982 the EC, Canada, and Australia imposed a two-month import ban on goods from Argentina. Argentina complained that this action violated, *inter alia*, Articles I, II, and XI. The countries taking the measure stated that Article XXI did not require notification. The upshot was a Decision Concerning Article XXI of the General Agreement adopted by GATT on November 30, 1982, which stated cryptically that contracting parties affected by action taken under Article XXI retain their full rights under the General Agreement.[352]

In 1985, the United States imposed a trade embargo on Nicaragua, invoking the Article XXI(b)(iii) exception. Following a complaint from Nicaragua, a panel was established to examine the U.S. measures, but its terms of reference precluded the panel from judging

[347] Nov. 14, 1979, entered into force, Dec. 2, 1983, 823 U.N.T.S. 231, *reprinted in* 10 Intl Legal Materials 289 (1983). The Convention Prohibiting the Illicit Import, Export and Transfer of Cultural Property is intended to protect the world's cultural property by obligating parties, *inter alia*, to require that exports of cultural property be accompanied by a certificate of authorization, and to impose penalties on any person responsible for violating the prohibitions of the Convention. *Id.* Art. 5. The Convention is one of a handful of bilateral and multilateral agreements intended to protect cultural property. *See generally* Jeanette Greenfield, The Return of Cultural Treasures (1995). Two other important agreements in this field are the *Treaty of Cooperation Between the United States and Mexico Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties*, July 17, 1970, entered into force, March 24, 1971, 22 U.S.T. 494, T.I.A.S. 7088, 791 U.N.T.S. 313; and the *Convention for the Protection of the World Cultural and Natural Heritage*, Nov. 23, 1973, entered into force, Dec. 17, 1975, 27 U.S.T. 37, T.I.A.S. 8226. *See also Convention on the Return of Stolen Cultural Property, reprinted in* 34 Intl Legal Materials 1322 (1995). In the United States, the implementation of import restrictions to prevent the illicit trade of cultural property is contained in 19 U.S.C. §§ 2601 *et seq.*

[348] GATT Art. XX(i).

[349] GATT Art. XX(j).

[350] *Quoted in* Guide to GATT Law and Practice, *supra* note 3, vol. 2, at 603.

[351] *See id.*

[352] *Decision Concerning Article XXI of the General Agreement*, adopted November 30, 1982, *reprinted in* Guide to GATT Law and Practice, *supra* note 3, vol. 2, at 605–06.

the validity or motivation for the invocation of Article XXI(b)(iii).[353] In 1991, the EC, Canada, the United States, Japan, and several other countries imposed trade sanctions on the former Yugoslavia. Because of the uncertainty over the status of the successor government, a GATT complaint was not acted upon.

Before 1996, the GATT security exceptions had not been a source of serious disruption of the GATT-WTO system. However, with the enactment in 1996 of a controversial U.S. law designed to tighten trade sanctions against Cuba, an area of international trade that had been relatively calm began to stir.

On March 12, 1996, President Clinton signed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, popularly known as the Helms-Burton Act,[354] which was designed to tighten the U.S. trade embargo on Cuba that was formalized under the Cuban Democracy Act of 1992.[355] The Act broadens the U.S. embargo against Cuba by barring U.S. foreign aid to countries that provide assistance to Cuba; authorizing U.S. nationals who had property confiscated by the Cuban government since 1959 to sue foreign companies if they are "trafficking" in the property that was expropriated by the Cuban government after the Cuban revolution; and barring the issuance of visas to aliens, including officers of trafficking companies and members of their family, who, after the effective date of the Act, confiscate, convert, or traffic in property expropriated from a U.S. citizen.

The Helms-Burton Act has triggered diplomatic protests and threats of retaliation from several U.S. trading partners, including Canada, Mexico, and the EU.[356] The EU approved blocking legislation in 1996 to prevent enforcement in EU-member state courts of U.S. judgments entered pursuant to Title III of Helms-Burton.[357] In 1996 the EU filed a complaint with the WTO Dispute Settlement Body against the United States, alleging that the Helms-Burton Act violated GATT Articles I (MFN), III (national treatment), V (freedom of transit), XI (the prohibition on quotas), and XIII (the allocation of quotas); and GATS Articles I (scope), III (transparency), VI (impartial administration of domestic regulations), XVI (market access), and XVII (national treatment). It was anticipated that the United States would defend the Helms-Burton Act on Article XXI national security grounds. It also was feared that the United States would reject any standard terms of reference for a panel and judge for itself whether its national security interests were

[353] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 601.

[354] *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, Pub. L. No. 104–114, 110 Stat. 785, *codified at* 22 U.S.C. § 6021. *See* Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act,* 90 AM. J. INT'L L. 419 (1996); Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law,* 90 AM. J. INT'L L. 434 (1996); Jonathan R. Ratchik, *Cuban Liberty and Democratic Solidarity Act of 1995*, 11 AM. U.J. INT'L L. & POL'Y 343 (1996).

[355] *The Cuban Democracy Act of 1992*, Pub. L. No. 102–84, Oct. 23, 1992, *codified at* 22 U.S.C. §§ 6001–6010 (1994), gave a belated congressional imprimatur on the trade embargo first imposed by President Kennedy against Cuba in 1962. *The Embargo on All Trade with Cuba*, Proclamation 3447 of Feb. 3, 1962, 27 Fed. Reg. 1085 (1962).

[356] *See EU Formally Questions U.S. Policy Toward Cuba, Requests WTO Procedure*, 13 INT'L TRADE REP. (BNA) 719 (1996); *Christopher Offers Reassurances to Mexico on Helms-Burton Act*, 13 INT'L TRADE REP. (BNA) 761 (1996); *OECD Talks on Investment Agreement Distracted by U.S. Cuba Policy Debate*, 13 INT'L TRADE REP. (BNA) 889 (1996). Canada and Mexico sought consultations with the United States under NAFTA Chapter 20.

[357] *See EU Approves Blocking Legislation in Reaction to Helms-Burton Act*, 13 INT'L TRADE REP. (BNA) 1243 (1996). Canada and Mexico have enacted similar blocking legislation in response to Helms-Burton. *See "Antidote" Bill to Helms-Burton Approved by Mexican Lawmakers,* 13 INT'L TRADE REP. (BNA) 1575 (1996); *Canadian House of Commons Approves Legislation to Combat Helms-Burton*, 13 INT'L TRADE REP. (BNA) 1589 (1996); Jurgen Huber, *The Helms-Burton Blocking Statute of the European Union,* 20 FORDHAM INT'L L.J. 699 (1997).

genuinely implicated. Following negotiations with the United States in April 1997, the EU requested a suspension of the WTO panel proceedings, pursuant to Article 12.12 of the Dispute Settlement Understanding,[358] following an agreement with the United States that an effort would be made to secure from Congress waiver authority under Title IV, which denies U.S. entry to any foreigner trafficking in U.S. property confiscated in Cuba.[359] Pursuant to Presidential authority granted by Congress, President Clinton waived the right to sue persons trafficking in confiscated property for six-month periods, as has President Bush.

Finally, Article XXI(c) authorizes action taken in pursuance of a Member's obligations under the United Nations Charter for the maintenance of international peace and security.

Considering the disruption to the stability of the GATT-WTO system that the phrase "essential security interests" could cause if interpreted broadly or unilaterally by the Member invoking it, it is fortunate that Article XXI has not evolved into the exception that swallowed GATT. If every WTO Member arrogates for itself the right to be the final arbiter on questions relating to trade and national security, such action could deliver a mortal blow to the GATT-WTO system.

V. Dispute Settlement

Criticisms of the GATT 1947 dispute settlement process are legion.[360] The most frequently recurring complaints about dispute settlement under GATT 1947 included the following:

- GATT lacked a single dispute settlement procedure, with the Tokyo Round Codes containing separate dispute settlement mechanisms.
- GATT disputes were sometimes resolved through the grant of waivers.
- The adoption of panel reports could be blocked by a single member, often the losing party.
- The *ad hoc* composition of the panels, and the lack of a reviewing body, often led to inconsistent decisions.
- Small countries were handicapped in achieving effective results against large countries.
- The GATT panel process was lengthy and subject to delaying tactics.
- GATT contained no provision for the automatic establishment of a panel.

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding or DSU) addresses almost all of these criticisms. As noted in DSU Article 3.2, "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral

[358] Communication from the Chairman of the Panel, *United States—Cuban Liberty and Democratic Solidarity Act*, WT/DS38/5 (1997). *See U.S., EU Approve Plan to Resolve Dispute Over Helms-Burton, Officials Say,* 14 Int'l Trade Rep. (BNA) 686 (1997).

[359] *See EU Said Not Planning to Revive Challenge to Helms-Burton Challenge,* 14 Int'l Trade Rep. (BNA) 1040 (1997); *EU Warns It Will Reinstate Complaint On Helms-Burton if Congress Tightens Law*, 14 Int'l Trade Rep. (BNA) 1069 (1997); *For and Against Punishing US Allies on Cuba,* Christian Sci. Monitor, June 3, 1997.

[360] For an analysis of dispute settlement under GATT 1947 and criticisms of that process, *see* Robert E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System (1993); John H. Jackson, Restructuring the GATT System (1990); U.S. Int'l Trade Comm'n, Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements (USITC Pub. 1793 1985); Pierre Pescatore, Handbook of GATT Dispute Settlement (1992).

trading system." To that end, the DSU establishes an integrated, comprehensive, rules-based dispute settlement process which includes a right of appellate review. The DSU virtually assures that all panel or Appellate Body reports will be adopted expeditiously and without modification. The dispute settlement clauses in the MTAs state for the most part that consultations and dispute settlement are governed by GATT Articles XXII and XXIII as elaborated and applied by the DSU. The only exceptions are the Valuation Agreement, the Antidumping Agreement, and the GATS. Thus, GATT Articles XXII and XXIII, the key dispute settlement provisions of GATT and at best skeletal ones, have been substantially fleshed out by the DSU. Nevertheless, DSU Article 3.1 recognizes the continuing influence of GATT: "Members affirm their adherence to the principles and management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."

WTO dispute settlement is exhaustively analyzed in separate chapters of this book.[361] Here, the GATT predecessor provisions covering dispute settlement are briefly discussed.

A. Article XXII, Consultation

Article XXII obligates Members to "accord sympathetic consideration to, and . . . to afford adequate opportunity for consultation regarding," request of other Members with respect to any matter affecting the operation of GATT. Building on this commitment, the DSU lays down timetables for consultations and adds mechanisms for resolving disputes short of a panel proceeding.[362]

The Director-General, acting in an *ex officio* capacity, may offer good offices, conciliation, and mediation with a view to assisting disputing Members to settle their dispute.[363] Good offices, conciliation, and mediation are voluntary procedures that the disputing Members may request and undertake at any time, are confidential, and are without prejudice to their rights. They may be terminated at any time and may continue while the panel process proceeds.[364]

B. Article XXIII, Nullification or Impairment

The key concept in WTO dispute settlement is that of "nullification or impairment." Article XXIII:1 provides:

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
> (c) the existence of any other situation,
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to

[361] *See* Chapters 25, *et seq.*
[362] The process is discussed in detail in Chapter 25 of this book.
[363] *See* DSU Art. 5.6.
[364] *See id*. Arts. 5.1–5.5.

be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

Thus, a complaint may be made either on the basis that a benefit has been nullified or impaired, or on the basis that the attainment of an objective is being impeded. In GATT practice, the latter has never been the basis for a complaint.

Article XXIII:2 lays out a rough procedure for further review by the CONTRACTING PARTIES of disputes that are not satisfactorily resolved by the disputing parties themselves. Article XXIII is silent on the question of dispute settlement panels. Supplementing Article XXIII are three pre-Uruguay Round documents that elaborate and codify the GATT 1947 dispute settlement process, including the procedures for the establishment of panels under GATT 1947.[365]

Complaints brought under Article XXIII:1(a) are referred to as violation nullification or impairment complaints. Complaints brought under Article XXIII:1(b) are known as non-violation nullification or impairment complaints. Complaints brought under Article XXIII:1(c) are referred to as "situation" complaints.

1. GATT Article XXIII:1(a) Violation Complaints

Complaints alleging a violation of a GATT obligation are brought pursuant to Article XXIII:1(a). In cases where there is an infringement of the obligations assumed under GATT, the action is considered *prima facie* to constitute a case of nullification or impairment.[366] Actual adverse trade effects need not be shown; they are presumed.[367] Once a *prima facie* case has been established, according to established GATT practice, it is up to the responding Member to rebut the presumption that nullification or impairment has actually occurred.[368] While the presumption is in theory rebuttable, in GATT practice it is *de facto* irrebuttable for the simple reason that the presumption may not be rebutted by showing that the violation has had no or insignificant trade effects. The GATT panel in *United States—Taxes on Petroleum and Certain Imported Substances*, rejected the U.S. argument that the challenged tax had either no trade effects or at most *de minimis* effects, adding that "while the CONTRACTING PARTIES had not explicitly decided whether the presumption that illegal measures cause nullification or impairment could be rebutted, the presumption had in practice operated as an irrefutable presumption."[369]

2. Non-violation Complaints Under GATT Article XXIII:1(b)

While the term "non-violation nullification or impairment" does not appear in the negotiating history or early GATT practice, it appears to have been added to the GATT vocabulary by international trade scholars.[370] The gravamen of a non-violation nullification or impairment complaint is that benefits accruing to the complaining Member under a WTO agreement have been nullified or impaired by a measure of another Member

[365] *See Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979*, BISD, 26th Supp. 210 (1979); Ministerial Declaration of 29 November 1982, *Decision on Dispute Settlement*, BISD, 29th Supp. 13 (1982); *Decision on Dispute Settlement of 30 November 1984*, BISD, 31st Supp. 9 (1984).

[366] *See* Annex to Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979, *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement*, BISD, 26th Supp. 210, 216, ¶ 5 (1979).

[367] *See* Report of the GATT Panel (adopted), *Japan—Measures on Imports of Leather*, BISD, 31st Supp. 94, 112–13, ¶ 55 (1984). This presumption is now codified in DSU Article 3.8.

[368] *See id.*

[369] *United States—Taxes on Petroleum*, *supra* note 100, at 158, ¶ 5.1.7.

[370] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 657 n. 67.

that does not violate GATT 1994 or other WTO MTA. GATT and WTO panels have approached the non-violation nullification or impairment remedy with caution because such claims challenge otherwise GATT-legal measures of the responding Member.[371]

In order for an Article XXIII:1(b) complaint to succeed, the challenged government action must be of a kind that could not have been reasonably anticipated by the complaining Member at the time the tariff concession was negotiated.[372] Few non-violation nullification or impairment complaints have been brought, and even fewer have succeeded.[373] The panel reports in the *EEC—Oilseeds* case and the *Kodak-Fuji Film* dispute confirm that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.[374] The reason for this caution is straightforward: Members negotiate the rules that they agree to follow and only in the rarest of cases would expect to be challenged for actions not in contravention of those rules.

A claim of Article XXIII:1(b) non-violation nullification or impairment has three elements. A complaint must allege that (1) benefits accruing to the complaining member under GATT or a WTO agreement have been (2) nullified or impaired (3) "by the application of another contracting party of any measure," although that measure is not prohibited under GATT or any WTO agreement.

The complaining party must submit a detailed justification in support of its complaint.[375] In GATT practice, non-violation nullification or impairment claims have arisen where a country that made a tariff concession thereafter acted in a way that frustrated the reasonable expectations of market access created by the concession.[376] The reasonable expectations element is a temporal element: a comparison must be made of the competitive relationship between the domestic and imported products at the time when a relevant

[371] *See, e.g., Japan—Film*, *supra* note 142, ¶ 10.36.

[372] *See id.* ¶ 10.76.

[373] There have been ten cases in which panels or working parties have substantively considered Article XXIII:1(b) claims. *See* Report of the Working Party (adopted), *Australian Subsidy on Ammonium Sulphate*, BISD, II/188 (1950); Report of the GATT Panel (adopted), *Treatment by Germany of Imports of Sardines*, BISD, 1st Supp.53 (1952); Report of the GATT Panel (adopted), *Uruguayan Recourse to Article XXIII*, BISD, 11th Supp. 95 (1962); Report of the GATT Panel (unadopted), *EC—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, GATT Doc. L/5576 (1985); Report of the GATT Panel (unadopted), *EEC—Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes*, GATT Doc. L/5778 (1985); Report of the GATT Panel (adopted), *Japan—Trade in Semi-Conductors*, BISD, 35th Supp.116 (1988); Report of the GATT Panel (adopted), *EEC—Oilseeds*, BISD, 37th Supp. 86 (1990); Report of the GATT Panel (adopted), *United States—Agricultural Waiver*, BISD, 37th Supp. 228 (1990); Report of the WTO Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (1998); Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS/135/AB/R (2001). *See also* Ernst-Ulrich Petersmann, *Violation Complains and Non-Violation Complaints in Public International Trade Law*, 34 GERMAN Y.B. INT'L L. 175, 192 (1991). Complainants were successful in *EEC—Oilseeds, Australian Subsidy on Ammonium Sulphate, Treatment of Germany of Imports of Sardines,* and in *Canned Peaches, Canned Pears*.

[374] In *EEC—Oilseeds*, the United States stated that it "concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept." *EEC—Oilseeds*, BISD, 37th Supp. 86, 118, ¶ 114. The EEC in that case stated that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty". Id. ¶ 113. *See Japan—Film*, *supra* note 142, ¶ 10.36. *See also* MCGOVERN, *supra* note 14, at § 2.27, at 2.27-1 ("If these provisions were taken literally their potential scope would be enormous.").

[375] *See* DSU Art. 26.1(a).

[376] *See, e.g., EEC—Oilseeds*, *supra* note 160, ¶ 148. *See generally* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 657–58.

tariff concession was made and at the current time. In order for a non-violation claim to succeed, the action taken by the responding member could not have been reasonably anticipated by the complaining member at the time the concession was first negotiated.[377]

DSU Article 26.1 codifies GATT practice by requiring that complaints concerning a non-violation measure be supported by a detailed justification. Under DSU Article 26.1, there is no obligation to withdraw such a measure even where it is found to have caused nullification and impairment (in contrast to the situation where a violation of an Agreement is found to have occurred), and the panel or Appellate Body is to recommend that the parties reach a mutually satisfactory adjustment of their dispute. Compensation may be part of a mutually satisfactory adjustment as a final settlement of the dispute.

3. GATT Article XXIII:1(c) Situation Complaints

The other non-violation complaint provision, Article XXIII:1(c), permits a complaint to be brought if benefits accruing to a member under GATT or a WTO agreement are being nullified or impaired "as the result of the existence of any other situation." As rare as Article XXIII:1(b) complaints are, Article XXIII:1(c) complaints are even rarer. Article XXIII:1(c) has never been applied by a GATT or WTO panel. DSU Article 26.2 sets out special procedures applicable to GATT Article XXIII:1(c) complaints that will do nothing to encourage its use. Under those DSU rules, if benefits accruing to a Member under an Uruguay Round agreement are being nullified or impaired "as the result of the existence of any other situation," the DSU procedures apply only up to the point where the panel report is circulated to the Members.[378] Beyond that point, the dispute settlement rules and procedures contained in the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures apply to issues of adoption, surveillance, and implementation of recommendations.[379] This means that in GATT Article XXIII:1(c) cases, there is no Appellate Body review, and the GATT 1947 practice of adopting panel reports by consensus, as opposed to the DSU rule of rejection by consensus, applies.[380] In other words, a single member can block adoption of the report.

VI. Customs Unions and Free-Trade Areas

A. GATT Article XXIV Criteria for Establishing An RTA

What are free trade areas and customs unions? Article XXIV:8 provides the following definitions:

> (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories so that
>
> (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect

[377] *See, e.g., Japan—Film*, *supra* note 142, at ¶ 10.76.

[378] An example of a GATT Article XXIII:1(c) situation is a 1983 complaint by the EC against Japan that the benefits of successive negotiations with Japan had not been realized due to factors peculiar to the Japanese economy which have resulted in a lower level of imports. *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 670–71. The United States has expressed similar concerns about the structural impediments to market access caused by the Japanese *keiretsu* system of vertical integration and interlocking directorships. The *keiretsu* system purportedly prevents parts suppliers outside Japan from competing with Japanese parts suppliers in the sale of their parts to Japanese assemblers when the suppliers and assemblers belong to a *keiretsu*.

[379] *Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures*, BISD, 36th Supp. 61 (1989).

[380] *See Decision of 12 April 1989*, *supra* note 379, at G.3.

to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and

(ii) subject to the provisions of paragraph 9 [dealing with trade preferences between colonial powers and their former colonies in existence at the time of GATT's creation], substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

The constituent members of a free trade area agree to eliminate barriers to "substantially all the trade" between the members, but the constituent members retain their respective tariff schedules for trade from countries outside the free trade area. Customs unions are identical to free trade areas in the first respect, but take the additional step of adopting a common external tariff for trade from countries outside the union.

In establishing a customs union, Article XXIV lays down three requirements that must be met: (1) substantially all the trade between the constituent territories must be covered;[381] (2) duties and regulations on non-member country goods after the formation of the union must not on the whole be higher or more restrictive than the general incidence of the duties and regulations that existed before the union was formed;[382] and (3) the agreement must include a plan for the formation of the union "within a reasonable length of time."[383] The same requirements exist for free trade areas, with the qualification in the second requirement that duties and regulations on non-member country goods in place after the formation of the free trade area shall not be higher or more restrictive than the corresponding duties and regulations existing before the formation of the free trade area.[384]

Since the conclusion of the Uruguay Round, there has been an explosion in the number of regional trade arrangements (RTAs).[385] At the conclusion of the Uruguay Round, the number of preferential trade agreements notified under GATT Article XXIV was 106, with 36 of these notifications coming since 1990.[386] For all its successes—and they are many—the Uruguay Round did little to check the proliferation of RTAs. As of December 2003, no fewer than 273 RTAs had been notified to the GATT and the WTO.[387]

In its 1985 publication, *Trade Policies for a Better Future: Proposals for Action,* the GATT Secretariat reported that many of the RTAs concluded under Article XXIV had fallen short of complying with that Article's criteria. As a consequence, ambiguities and exceptions were introduced that threatened to weaken the rules governing the multilateral

[381] GATT Art. XXIV:8(b).

[382] GATT Art. XXIV:5(a). The term "on the whole" has been interpreted to mean the average level of tariffs on all goods for the entire customs union before and after formation, not the average tariff on each individual product. *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 803.

[383] GATT Art. XXIV:5(c). The 1994 Understanding on the Interpretation of Article XXIV states that the "reasonable length of time" should exceed ten years only in exceptional cases.

[384] GATT Art. XXIV:5(b).

[385] RTAs are discussed in more detail in Chapters 46–51 of this book.

[386] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 858–70.

[387] *See* Report (2003) of the Committee on Regional Trade Agreements to the General Council, WT/REG/13, ¶ 4 (2003). Of these 273 RTAs, 227 agreements were notified under GATT Article XXIV, of which 143 are still in force today; 19 agreements were notified under the Enabling Clause; and 27 were notified under GATS Article V.

trade system.[388] These observations were reiterated in 1995 in the WTO's report, *Regionalism and the World Trading System,* where it was noted that of the 69 GATT Working Parties established to assess the conformity of proposed free trade areas and customs unions with Article XXIV, only six Working Parties had reached a consensus that the proposed arrangement under review complied with Article XXIV.[389]

The ambivalence of the WTO toward RTAs is evidenced by the Singapore Ministerial Declaration where the Ministers issued the following statement regarding regional arrangements:

> We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system. In this context, we note the importance of existing regional arrangements involving developing and least-developed countries. The expansion and extent of regional trade agreements make it important to analyze whether the system of WTO rights and obligations as it related to regional trade agreements needs to be further defined. We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements; and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules. In this regard, we welcome the establishment and endorse the work of the new Committee on Regional Trade Agreements. We shall continue to work through progressive liberalization in the WTO Agreement and Decisions adopted at Marrakesh, and in so doing facilitate mutually supportive processes of global and regional trade liberalization.[390]

Despite the judgment that RTAs threaten the GATT-WTO system because they pose a risk of trade and investment diversion,[391] economists, lawyers, and the WTO Secretariat itself counter that RTAs have had broadly positive effects on multilateral economic integration.[392] The picture is less clear, however, on whether RTAs have been economic building blocks and catalysts for a more integrated GATT-WTO system.

[388] *See* GATT, Trade Policies for a Better Future: Proposals for Action 41 (1985).

[389] *See* World Trade Organization, Regionalism and the World Trading System 16 (1995). The six agreements are the Southern Rhodesia-South Africa Customs Union Agreement; the El Salvador-Nicaragua Free Trade Agreement and the Agreement on the Participation of Nicaragua in the Central American Free Trade Area; the Caribbean Free Trade Agreement and the subsequent Caribbean Community and Common Market Agreement; and the Czech Republic-Slovak Republic Customs Union Agreement. For a table listing the Working Parties and decisions under Article XXIV, *see id.* at 77–87; Guide to GATT Law and Practice, *supra* note 3, vol. 2, at 849–57.

[390] *Singapore Ministerial Declaration*, adopted 13 December 1996, ¶ 7, WT/MIN(96)/DEC.

[391] *See* Carnegie Endowment for International Peace, Reflections on Regionalism: Report of the Study Group on International Trade 57 (1997); *Spoiling World Trade*, The Economist, Dec. 7, 1996, at 15, 16 ("Most [regional trade] agreements are a mixture of good and bad.").

[392] *See, e.g.*, Regionalism and the World Trading System, *supra* note 389, at 62; Paul Carrier, *An Assessment of Regional Economic Integration Agreements After the Uruguay Round*, 9 N.Y. Int'l L. Rev. 1 (1996); C. Michael Hathaway and Sandra Mazur, *The Right Emphasis for U.S. Trade Policy for the 1990's: Positive Bilateralism,* 8 B.U. Int'l L.J. 207 (1990). For a discussion of the trade-creation and trade-diversion effects of RTAs, *see, e.g.*, Robert Z. Lawrence, *Emerging Regional Arrangements: Building Blocks or Stumbling Blocks? in* Finance and the International Economy 23 (Richard O'Brien ed. 1991); Paul R. Krugman, *Is Regionalism Bad? in* International Trade and Trade Policy (E. Helpman and A. Razia eds. 1991); Soogil Young, *Globalism and Regionalism: Complements or Competitors?, in* Institute for Int'l Economics, Pacific Dynamism and the International Economic System 11 (C. Fred Bergsten and Marcus Noland eds. 1993). *See generally* Joseph L. Brand, *The New World Order of Regional Trading Blocks,* 8 Am. U.J. Int'l L. & Polly 155 (1992); William A. Lovett, *Current World Trade Agenda: GATT, Regionalism, and Unresolved Asymmetry Problems*, 62 Fordham L. Rev. 2001 (1994); Richard H. Steinberg, *Antidotes to Regionalism: Responses to Trade Diversion Effects of the North American Free Trade Agreement*, 29 Stan. J. Int'l L. 315 (1993).

B. Types of RTAs

RTAs are categorized by the extent of economic integration undertaken by the participating countries.[393] On a continuum that runs from the least economically integrated to the most economically integrated, RTAs include free trade areas, customs unions, common markets, and economic unions. In their most basic form, a free trade area eliminates barriers to trade in goods between or among its members, but the members retain all of their preexisting tariffs and other trade barriers in their trade relations with third countries. The North American Free Trade Agreement is an example of a free trade area.

A customs union, which also eliminates barriers to trade in goods between or among its members, adopts a common external tariff that all members of the customs union apply to trade from countries outside the union. The Andean Group or Pact, comprised of Bolivia, Colombia, Ecuador, Peru, and Venezuela, is an example of a customs union.[394]

A common market not only eliminates all barriers to trade in goods among the members and adopts a common external tariff, but it also permits the free movement of goods, services, people, and capital within the market. The Southern Common Market (MERCOSUR) and the European Communities are examples of common markets.

Lastly, an economic union includes all of the features of a common market, plus a common monetary and fiscal policy and a common currency for its members. The European Union ("EU") is an example of an economic union, at least for certain members.

By way of comparison, NAFTA, as a free trade area, is far less economically and socially integrated than the EU in at least four respects. First, workers cannot move freely between NAFTA Parties, unlike their EU counterparts. Second, the NAFTA Parties, unlike EU-Member States, take antidumping actions against one another. Third, the NAFTA Parties have retained their own separate tariff rates on trade from third countries, while the EU has a common external tariff. Fourth, the NAFTA countries do not have a common monetary or fiscal policy or a common currency.

The WTO includes within its definition of RTAs preferential trading arrangements between or among developed and developing countries, and between or among developing countries *inter se*. The ASEAN Free Trade Area is an example of a preferential trade arrangement among developing countries *inter se*.

From the standpoint of the volume of trade affected, by far the most important departures from the unconditional MFN obligation are GATT Article XXIV and GATS Article V. These two parallel provisions authorize RTAs that liberalize trade in goods and services, respectively. Historically, Article XXIV may be the one provision in the GATT-WTO system most honored in the breach. By one account, only six of eighty RTAs surveyed comply with GATT rules.[395]

Without an exception to unconditional MFN commitment, every free trade area and customs union would violate the MFN obligation to the extent that more favorable treatment is accorded to imports from member countries than to imports from non-member countries. Why does GATT permit this departure from the MFN principle? The economic rationale for this MFN exception—reiterated in the Uruguay Round Understanding on the Interpretation of Article XXIV—is that RTAs can be trade creating. As long as they

[393] For a discussion of the economic distinctions between free trade areas and customs unions, *see* FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM 172–73 (1995).

[394] *Agreement on Andean Subregional Integration, May 26, 1969, Bolivia-Colombia-Chile-Ecuador-Peru*, *reprinted in* 8 INT'L LEGAL MATERIALS 910 (1969).

[395] *See Regional Trade Blocs Are In; Global Group Draws Yawns,* CHRISTIAN SCI. MONITOR, May 1, 1996, at 7.

are trade creating, then they are considered desirable. If they lead to trade diversion, however, then they are cause for concern.

Article XXIV:4 memorializes the aspiration that RTAs be instruments of trade creation, not trade diversion:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries party to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.[396]

In other words, the GATT rules on the formation of customs unions and free trade areas cannot be used to justify the imposition of unnecessary trade restrictions on other countries in violation of other GATT rules.[397] Professor Kenneth Dam explains:

> [C]ustoms unions and free-trade areas are excepted from the most-favored-nation clause . . . [because], although they are technically incompatible with the [MFN] principle and are undeniably discriminatory, such arrangements are, or at least once were, thought to constitute a movement toward the GATT goal of freer trade.[398]

Professor Dam identifies economic considerations as a partial explanation for Article XXIV's existence. Political considerations also explain why countries have tolerated the lax observance of Article XXIV's rules on the formation of free trade areas and customs unions.

C. The Uruguay Round Understanding on Article XXIV

In an effort to reinvigorate the legal disciplines of Article XXIV, the 1994 Understanding on the Interpretation of Article XXIV in the Uruguay Round provides in its preamble that WTO Members are

> *Convinced* also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements[.][399]

The Understanding answers a number of unresolved issues concerning the legal requirements for the formation of customs unions and free trade areas. Most importantly, the Understanding clarifies Article XXIV's more nagging ambiguities. However, it does not by any means set a new course for increased multilateralism and away from regionalism.

First, the Understanding provides generally that in order to comply with Article XXIV, RTAs must comply with paragraphs 5, 6, 7, and 8 of Article XXIV.[400]

Second, the Understanding interprets the requirement that "substantially all the trade" between the members be covered. Earlier proposals that coverage of "substantially all the trade" is deemed to be achieved when the volume of liberalized trade reaches eighty or ninety percent of total trade had been rejected by the GATT CONTRACTING PARTIES for two reasons.[401] The first reason was that the term "substantially all the trade" has a qualitative meaning. Qualitatively, if any sector, such as agriculture, was excluded from the free trade

[396] *See also* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 796–97.
[397] *See* MCGOVERN, *supra* note 14, § 8.41 (1996).
[398] Dam, *supra* note 3, at 19.
[399] *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, Preamble.
[400] *See Understanding on the Interpretation of Article XXIV*, ¶ 1.
[401] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 824–25.

agreement, then it could not satisfy the "substantially all the trade" requirement. The second reason is that, quantitatively, trade barriers left intact after formation of a customs union or free trade area could be so high that one hundred percent of all observable trade could in fact be liberalized trade, but no account would be taken of the trade that did not occur because of prohibitively high trade barriers that were not dismantled.[402] The preamble to Understanding states that "the contribution [to the expansion of world trade] is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector or trade is excluded."

Third, the 1994 Understanding interprets the Article XXIV requirement that the general incidence of duties after formation should not on the whole be higher than before formation. The Understanding states that this assessment is to be based on weighted average tariff rates and duties collected during a representative period on a tariff-line basis for each country of origin.[403] The methodology used by the WTO Secretariat in computing the weighted average tariff rates and duties collected is the same as that used in assessing duty-rate offers in the Uruguay Round.[404] The duties taken into consideration are the *applied* rates of duty, *i.e.*, all duty rates, not just bound duty rates.[405]

In the case of regulations that are arguably more restrictive than those in effect prior to the formation of the customs union, the Understanding recognizes the difficulty of quantifying the impact of such regulations and provides that such regulations may have to be assessed on a case-by-case basis.[406]

Fourth, the Understanding addresses the issue of customs unions and the common external tariff. If the resulting common external tariff on non-member country goods after the formation of the union is increased from the preexisting bound duty rate on an item, adversely affected countries are entitled to compensation, "due account [being] taken of the compensation already afforded by the reductions brought about in the corresponding duty of the other constituents of the union."[407] The Understanding in this respect is thus a reiteration of the Article XXIV:6 requirement that in determining the compensation non-member countries are entitled to when a WTO Member joins a customs union and adopts the common external tariff, the Members take into account the fact that when that WTO Member joins the customs union, it may also lower its tariffs on specific products, thereby offsetting the adverse trade effects of tariff increases on other products under the customs union's common external tariff. For example, if before joining a customs union Country A's duty rate on steel wire rod is 5 percent *ad valorem*, but after joining the customs union its duty rate increases to 7.5 percent *ad valorem* when it adopts the common external tariff, non-member countries are entitled to compensatory adjustments on the 2.5 percent duty rate increase, all other things being equal. However, all other things seldom are equal, that is, Country A will certainly have high duties on other products of export interest to non-member countries that will be lowered when Country A adopts the common external tariff. The Understanding contemplates that credit will be given if Country A's duty rates on other items decrease by a corresponding amount after joining the union.

[402] *See id.*
[403] *See Understanding on the Interpretation of Article XXIV*, ¶ 2.
[404] *See id.*, ¶ 2; GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 824–25.
[405] *See Understanding on the Interpretation of Article XXIV*, ¶ 2.
[406] *See id.*
[407] *See id.*, ¶ 6.

Examples of Article XXIV:6 compensation negotiations include the enlargement of the EC with the accessions of Spain and Portugal in 1986, and of Austria, Finland, and Sweden in 1995. The United States sought compensation for anticipated decreases in exports of certain agricultural products after Spain and Portugal adopted the common external tariff on agricultural products. The EC responded that any such losses would be more than offset by increased sales of U.S. computer products to those two countries, whose pre-accession duty rates on such goods were higher than the common external tariff. In the end, the United States and the EC compromised with the EC promising to import a minimum dollar volume of U.S. agricultural products. In the case of the accessions of Austria, Finland, and Sweden to the EU in 1995, the EU cut tariffs on a number of products exported by the United States to the EU, including semiconductors, agricultural products, and chemicals, estimated to be worth more than $4 billion in savings to U.S. exporters over ten years.[408] The EU-15 became the EU-25 in May 2004, and compensation negotiations between the United States and the EU were Scheduled to begin in Fall 2004.

The Understanding notes that if agreement on acceptable compensation cannot be reached in a reasonable period of time, the customs union may go forward with the modification of its tariffs. In that event, countries adversely affected by those changes are free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

Finally, the 1994 Uruguay Round Understanding calls for a biennial report by all RTAs on their operation.[409] To monitor this process, the Understanding directs the establishment of a Committee on Regional Trade Agreements to review RTAs to ensure their compliance with both the letter and spirit of Article XXIV.[410]

At the Doha Ministerial Conference, the Members agreed to "negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements."[411]

VII. Institutional Provisions

The subject of institutional provisions is fully addressed in Chapter 4. A few of the more important provisions will be briefly highlighted here.

Decision-making within the WTO is governed by provisions contained in the Agreement Establishing the WTO. The WTO Agreement carries forward the GATT rules and adds a few new voting rules of its own. Article IX of the WTO Agreement continues the GATT practice of decision-making by consensus.[412] Where consensus cannot be reached, a matter is decided by voting. It is noteworthy, however, that under GATT 1947 there

[408] *See USTR Announces Signing of Accords With EU on Enlargement Compensation, WTO Grain Dispute*, 13 Int'l Trade Rep. (BNA) 1242 (1996).

[409] *See id.* ¶ 11.

[410] *See id*. ¶¶ 7–11.

[411] WTO Ministerial Conference, Fourth Session, 9–14 November 2001, *Ministerial Declaration adopted on 14 November 2001*, WR/MIN/(01)/DEC/W/1, ¶ 29(2001).

[412] Footnote 1 of Article IX:1 explains:

> The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

Article XVI of the WTO Agreement further provides that "the WTO shall be guided by the decisions, procedures and customary practices followed by the contracting parties to GATT 1947 and the bodies established in the framework of GATT 1947."*See* Mary E. Footer, *The Role of Consensus in GATT/WTO Decision-Making,* 17 Nw. J. Int'l L. & Bus. 653 (1996–97).

had not been a vote on a policy matter (other than waivers and terms of accession) since 1959.[413] Voting in the WTO follows the UN formula of one-member, one-vote (the EU holds a block of twenty-five votes, one for each of its member states). If decisions are voted upon, then they generally are taken by a majority of votes cast in the Ministerial Conference and the General Council. Exceptions to the simple majority rule exist for interpretations, waivers, amendments, and the adoption of panel reports by the Dispute Settlement Body. These matters essentially concern issues of substance as opposed to procedure.

Requests for waivers from the obligations of an MTA must be directed first to the Council responsible for the MTA in issue. Waivers of an obligation under an MTA may be granted only in exceptional circumstances, only by the Ministerial Conference, and only by a three-fourths majority vote of the Members.[414] Unless otherwise extended, all waivers granted under GATT 1947 expired on their termination date or at the end of 1996, whichever was earlier.[415] All waivers granted for more than one year are reviewed annually by the General Council to determine whether the requisite "exceptional circumstances" continue to exist. There were 115 waivers granted under GATT 1947.[416] Only two requests for a waiver were ever denied.[417] Among the waivers that have been granted under GATT 1947 and GATT 1994 are the waiver for the U.S. Caribbean Basin Economic Recovery Act of 1983,[418] the waiver granted to the European Communities in 1994 for the Fourth Lomé Convention,[419] the waiver granted to developing countries in 1971 for the Generalized System of Preferences,[420] and the so-called "conflict diamonds" waiver granted to eleven WTO members in May 2003.[421] Through May 2003, a total of 139 decisions granting waivers or extensions of waivers have been reached under Annex 1 of the WTO Agreement.[422]

GATT Article XXXV, Non-Application of the Agreement Between Particular Contracting Parties, has been superceded by Article XIII of the Agreement Establishing the WTO. Pursuant to Article XIII:1 of the WTO Agreement, if a WTO Member does not consent to application of GATT 1994 between itself and another Member at the time either joins the WTO, then the WTO Agreement and the MTAs will not apply as between those Members. This opt-out provision is qualified for original WTO Members, however,

[413] *See* STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 14, at 662.

[414] *See* Agreement Establishing WTO, Art. IX:3. The Secretariat has prepared a list of all waivers that have been granted in the WTO and a description of the procedures used in reaching agreement on their adoption. *See* Council for TRIPS, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Information on Waivers*, Note by the Secretariat, IP/C/W/387 (Oct. 24, 2002).

[415] *See Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994,* ¶ 2. A list of the 37 GATT waivers in effect under Annex 1A to the WTO Agreement can be found in footnote 7 on pages 11 and 12 in Part II of WTO document MTN/FA, dated December 15, 1993, and in WTO document MTN/FA/Corr.6, dated March 21, 1994. Many of the unexpired waivers deal with preferential trade arrangements. *See* MCGOVERN, *supra* note 14, § 1.23.

[416] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 887. A list of all such waivers is at pages 892–906 of GUIDE TO GATT LAW AND PRACTICE.

[417] *See id.*

[418] *See* Report of the Working Party, *United States– Caribbean Basin Economic Recovery Act of 1983*, BISD, 31st Supp. 180 (1984).

[419] *See* Report of the Working Party, *European Communities—Fourth ACP-EEC Convention of Lomé*, BISD, L/7604 (1994).

[420] *See* Report of the Working Party, *Generalized System of Preferences*, BISD, 18th Supp. 24 (1971).

[421] *See* General Council, *Decision of 15 May 2003, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, WT/L/518 (May 27, 2003).

[422] *See id.;* Council for TRIPS, *Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Information on Waivers*, Note by the Secretariat, IP/C/W/387, ¶ 3 (Oct. 24, 2002).

by the requirement that (1) original Members must have invoked the non-application provision of Article XXXV of GATT 1947, and (2) the non-application still is effective at the time the WTO Agreement entered into force for that Member.[423]

Countries that do not qualify as original WTO Members, i.e., countries that were not GATT 1947 contracting parties at the time GATT 1994 entered into force, must notify the Ministerial Conference of such non-application before the terms of accession have been approved by the Conference.[424]

The provisions of the WTO Agreement relating to non-application differ from the GATT predecessor rules in one important respect. The latter prohibited a contracting party from engaging in tariff negotiations with an applicant if it intended to invoke non-application at the time the new applicant acceded to GATT. Under Article XIII of the WTO Agreement, a WTO Member may enter into such negotiations, thereby ensuring that the acceding country will apply the negotiated tariff rates to the Member's imports if at some point in the future the Member decides to apply GATT 1994 to the acceding country.

As one commentator has observed, GATT 1994 continues the paradox in international law that two countries can simultaneously be Members of the same international convention and yet not have that convention apply to them in their relations *inter se*.[425]

VIII. Special Provisions for Developing Countries

A. Article XVIII, Governmental Assistance to Economic Development

The GATT Contracting Parties took steps in 1955 to more fully integrate developing countries into the GATT system by substantially redrafting Article XVIII, Governmental Assistance to Economic Development. The current text of Article XVIII, which took effect in 1957, is derived from two 1955 GATT Working Party reports, the Report of the Review Working Party on Quantitative Restrictions,[426] and the Report of the Review Working Party on Schedules and Customs Administration.[427]

The Report of the Review Working Party on Quantitative Restrictions summarized the new direction of the redrafted Article XVIII in the following terms:

> The general concept of the new Article is that economic development is consistent with the objectives of the General Agreement and that the raising of the general standard of living of the underdeveloped countries which should be the result of economic development will facilitate the attainment of the objectives of the Agreement. In that sense, the new text represents a new and more positive approach to the problem of economic development with the obligations undertaken under the General Agreement regarding the conduct of commercial policy.[428]

This general concept is given expression in Article XVIII's preamble and four sections.[429] Section A authorizes developing countries whose economies only can support a low

[423] *See* WTO Agreement, Art. XIII:2.

[424] *See id.* Art. XIII:3.

[425] *See* Lei Wang, *Non-Application Issues in the GATT and the WTO,* 28 J. World Trade L. 49 (1994). For a list of the 79 invocations of GATT Article XXXV, see Guide to GATT Law and Practice, *supra* note 3, vol. 2, at 1034–37. The overwhelming majority of invocations were in respect of Japan, followed by Portugal and South Africa.

[426] *Report of the Review Working Party on Quantitative Restrictions*, BISD, 3rd Supp. 170 (1955).

[427] *Report of the Review Working Party on Schedules and Customs Administration*, BISD, 3rd Supp. 205 (1955).

[428] *Report of the Review Working Party on Quantitative Restrictions*, BISD, 3rd Supp. 170, 179, ¶ 35 (1955).

[429] *See generally* Guide to GATT Law and Practice, *supra* note 3, vol. 1, at 488–511.

standard of living and are in the early stages of development to modify or withdraw tariff concessions in order to promote the establishment of an industry. Section B authorizes the imposition of import quotas for balance-of-payment purposes. Section C authorizes resort to certain GATT-inconsistent measures as necessary to promote the establishment of a particular industry. Section D permits developing countries that do not qualify as countries with a "low standard of living" to nevertheless derogate from GATT for the purpose of establishing a particular industry with the permission of other GATT contracting parties. GATT Article XVIII is explored more fully in the chapter on developing countries.[430]

B. Articles XXXVI–XXXVIII, Trade and Development

In 1957, the GATT Contracting Parties appointed a panel of experts to report on trends in international trade, "in particular the failure of the trade of less developed countries to develop as rapidly as that of industrialized countries, excessive short-term fluctuations in prices of primary products, and widespread resort to agricultural protection."[431] The report, *Trends in International Trade*, also known as the "Haberler Report" after Gottfried Haberler, the panel's chairman, galvanized the Contracting Parties to examine ways in which developing countries could achieve greater access for their exports in world markets.[432] Part IV of GATT, entitled Trade and Development, was added to GATT by the Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development,[433] and became effective in 1966. It is in no small measure the end product of the 1958 Haberler Report, as well as a response to the restiveness of developing countries that were turning to alternative trade policy fora, such as UNCTAD, in the 1960s.[434]

Part IV consists of three Articles, Articles XXXVI–XXXVIII. Although Part IV makes these three new Articles an integral component of a binding legal instrument, i.e., GATT, they are drafted in language that is mainly precatory, not compulsory, in tenor. In other words, developed countries made few legal commitments to developing countries in Part IV.

In brief, Article XXXVI is a statement of principles and objectives. Their thrust is greater market access for the products of developing countries. Article XXXVII states the commitments the Contracting Parties agree to make to ensure developing countries do in fact attain increased access to world markets. Article XXXVIII provides for joint action by the Contracting Parties. GATT Part IV is discussed fully in the chapter on developing countries.

Further expanding on special and differential treatment for developing was the 1971 waiver granted under the Generalized System of Preferences (GSP). Under this waiver, developed countries permitted, but not required, to give imports from developing countries preferential tariff treatment without regard to the MFN obligation. The waiver was replaced by the Tokyo Round Enabling Clause adopted in 1979. The GSP is discussed in the chapter on developing countries.[435]

[430] *See* Chapter 34 of this book.
[431] BISD, 6th Supp. 18 (1957).
[432] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 3, vol. 2, at 1040–41.
[433] Done at Geneva, Feb. 8, 1965, entered into force for the United States on June 17, 1966, 17 U.S.T. 1977, 572 U.N.T.S. 320.
[434] *See* DAM, *supra* note 3, at 236–37.
[435] *See* Chapter 34 of this book.

IX. Summary and Appraisal

The underlying economic premise of the entire GATT-WTO system is open or liberal trade. One commentator has explained open trade (sometimes referred to as liberal trade) in the following terms:

> In a liberal economic system, government does not thwart private parties in their attempts to enter voluntary transactions, and taxes are stable, predictable, and non-prohibitive. The General Agreement on Tariffs and Trade (GATT) is liberal in this sense . . . . Interventions [by governments] in liberal exchange across frontiers to make trade fair may be the political price of liberalism, but such interventions are themselves its antithesis.[436]

Why open trade? Simply stated, liberal trade policies that observe the law of comparative advantage permit the unrestricted flow of goods and services across national borders, thereby increasing total world wealth. How does GATT achieve its goal of promoting liberal trade? It does so primarily through five core legal commitments or five pillars of GATT: (1) the unconditional most-favored-nation obligation that prohibits discrimination between and among WTO Members in their trade laws and tariffs, (2) the national treatment obligation that requires that imports have equality of competitive opportunity vis-à-vis the like domestic product insofar as internal taxes and other domestic regulations are concerned, (3) binding commitments to reduce tariffs on imports, (4) the elimination of quotas on imports and exports, and (5) transparency of all national laws and regulations governing international trade.

While not solely responsible for the liberalization of international trade, the rules-based GATT-WTO system deserves much of the credit for the increased integration of national economies into a world economy. GATT 1994 and the liberal trade philosophy it embodies weathered a series of protectionist storms reasonably well over its fifty-year legacy. Even though GATT from its inception never was intended to be a permanent agreement or an international trade organization, against extraordinary odds it acquitted itself reasonably well in both roles. The success of GATT in promoting trade liberalization is indisputable.

X. The Future

At the conclusion of the fourth Ministerial Conference in Doha, Qatar in December 2001, the WTO Members launched what has been informally called the "Development Round" of multilateral trade negotiations. The primary focus of this Round is on developing countries and their capacity to implement the commitments that they made in the Uruguay Round. Other agenda items included the issues of whether agreements on competition policy and foreign investment should be negotiated under WTO auspices. At the third Ministerial Conference held in Seattle in in December 1999, several WTO members (including the EU, Japan, and Korea), academics, and other commentators urged that the WTO include on its agenda negotiations leading to multilateral rules on investment and antitrust.[437] As GATT 1994 has progressively removed or lowered

[436] Martin Wolf, *Why Trade Liberalization is a Good Idea, in* THE URUGUAY ROUND HANDBOOK, *supra* note 58, at 14.

[437] *See, e.g., The Border of Competition,* THE ECONOMIST, July 4, 1998, at 69; *Co-operate on competition*, THE ECONOMIST, July 4, 1998, at 16; *Prospects Diminishing for Talks on Rules Covering Investment, Competition*, 16 Int'l Trade Rep. (BNA) 1598 (1999). Other countries supporting WTO negotiations on competition policy rules were Switzerland and the Central European Free Trade Agreement countries (Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia). *See generally* F.M. SCHERER, COMPETITION

government barriers to trade, the focus of policymakers has shifted to private barriers to market access that could undermine the progress of the GATT-WTO system. To what extent do private anti-competitive practices, as opposed to government barriers, block access to foreign markets? If they do inhibit market access to a significant extent, what should policymakers' response be? The best method for removing these private barriers to market access, some argue, is through vigorous application of national competition laws.[438] National competition legislation directed at private anti-competitive conduct, the argument runs, is a natural complement to a set of international rules regulating government barriers to market access. Others counter that a more appropriate response is to negotiate a multilateral agreement on binding rules and principles on competition policy. The proponents of a global response look to the World Trade Organization as the forum for negotiating, administering, and enforcing these multilateral rules and principles. The question pending before the WTO is whether the mutually-reinforcing roles that international trade and competition policy play in opening markets to foreign goods, services, and capital should be integrated into a WTO multilateral agreement on competition policy. In June 1999, the OECD sponsored a conference attended by 200 trade and competition officials, academics, and business and labor groups from the 29 OECD countries and 30 non-member countries. No consensus on the inclusion of competition policy in the next round of WTO multilateral trade negotiations emerged;[439] on the contrary, in August 2004 the issues of trade and investment and trade and competition policy were dropped from the Doha Round negotiations.[440] In short, building a consensus for a multilateral agreement on competition policy continues to be a work in progress.[441]

The World Trade Organization has been buffeted by a storm of criticism from almost every conceivable front. The 1999 street demonstrations in Seattle during the WTO's third ministerial conference showed the disdain of many groups and organizations of every stripe and persuasion, from environmental, human rights, labor, to consumer, for the WTO and their disaffection in general with globalization. The demonstrations also proved that the WTO and GATT 1994 are poorly understood, if they are understood at all. Broadly, non-governmental organizations have criticized the WTO for being undemocratic, closed, and secretive. Specifically, environmental and labor rights groups have condemned the WTO as being callous to environmental and labor rights issues, respectively. Consumer groups have blasted the WTO for being insensitive to food safety issues.

POLICIES FOR AN INTEGRATED WORLD ECONOMY (1994); Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future,* 44 DEPAUL L. REV. 1289 (1995); Mitsui Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097 (1995); Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1 (1995).

[438] The term "competition laws" refers to that body of national legislation dealing with anti-competitive conduct in four broad areas: (1) horizontal restraints, e.g., agreements among competing firms to fix prices; (2) vertical restraints, e.g., agreements between a manufacturer and distributor on resale price maintenance; (3) abuse of a dominant position or, as described under U.S. antitrust law, unlawful monopolization; and (4) mergers and acquisitions. The term "competition policy" refers to the goals that competition law is to designed to achieve, that is, competition law is the means to accomplishing the ends of competition policy. Competition policy thus informs the drafting, implementation, and enforcement of competition law.

[439] *See OECD Antitrust/Trade Conference Shows Disparate Approaches Toward Reconciliation*, 77 Antitrust & Trade Reg. Rep. (BNA) 41 (July 8, 1999).

[440] *See* Decision of the General Council adopted on August 1, 2004 (WT/L/579), reproduced in the Appendix to this book.

[441] For an analysis of this question, *see* KEVIN KENNEDY, COMPETITION LAW AND THE WORLD TRADE ORGANIZATION: THE LIMITS OF MULTILATERALISM (2001). The issue is discussed further in Chapter 57 of this book.

The debacle at the WTO's Seattle ministerial meeting in December 1999 was in part fueled by myths and misinformation about the WTO, free trade, and globalization. It is true that accelerated trade liberalization worldwide has led to the increased globalization of business and the interdependence of national economies. Environmental fear-mongers proclaim that we are on the brink of a global environmental collapse, thanks in large part to free trade. Labor unions condemn the labor rights record of developing countries. But many environmental and labor rights groups view the world as a zero-sum game: to the extent the WTO succeeds at promoting globalization, then in equal measure do the environment and labor rights suffer. One can only pause and wonder whether they silently fear global economic interdependence and wish *sub rosa* for autarchy. In the words of former presidential economic adviser Murray Weidenbaum:

> If the full policy agenda of the anti-global activists were adopted, the long-run effect would be for the United States and other industrialized nations to lose the benefits of the specialization of labor, and suffer severe declines in standards of living. Ironically, the economic costs would soon be translated into environmental costs. Wealthier countries can afford to devote more resources to achieving a cleaner environment, and they do so. Poorer countries do far less to clean up the environment.[442]

Unilateralists/isolationists within national legislatures (here, read "some members of the U.S. Congress") view the WTO as a threat because to them it represents a loss of national sovereignty. "Dismantle the WTO" is the rallying cry for many of its critics. I have found most of the criticisms of the WTO to be the product of misinformation, distortion, and a lack of understanding of what the various WTO agreements actually provide. On the other side are the WTO's supporters who sometimes fall into the trap of viewing the WTO as a panacea that should have its portfolio enlarged to include multilateral agreements on everything tangentially related to trade, including labor, the environment, foreign direct investment, and competition policy.

What the critics fail to fully appreciate is that the WTO is not a top-down, supranational organization that directs nations what to do. Rather, it is a bottom-up forum where member governments meet and, occasionally, reach agreement on the conduct of world trade. The main attraction of the WTO for many non-trade groups is the WTO's binding dispute settlement mechanism. When environmentalists criticize the WTO, they speak with the voice of the green-eyed monster of envy. The WTO's dispute settlement mechanism is coveted by environmental and labor rights groups that have been unsuccessful in creating their own parallel international dispute settlement body. Because they have been unsuccessful in co-opting the WTO, they now want to trash it.

A December 1999 article in The Economist asked rhetorically, "Who needs the WTO?"[443] The article makes the following bold but highly defensible claim that "[f]or five decades the world's multilateral trade-liberalising machinery—known first as the General Agreement on Tariffs and Trade (GATT) and more recently as the World Trade Organisation (WTO)—has, in all likelihood, done more to attack global poverty and advance living standards right across the planet than has any other man-made device."[444] In answer to the question, "Who needs the WTO?" the answer is, of course, everyone. By increasing people's economic freedom, the WTO has enhanced people's political freedom and made most of them economically better off than they would have been in the absence of such an organization.

[442] Murray Weidenbaum, *Globalization Myths*, Christian Sci. Monitor, Dec. 16, 1999, at 9.
[443] *See Who Needs the WTO?* The Economist, Dec. 4, 1999, at 74.
[444] *Id.*

BIBLIOGRAPHY

Books

FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM (1995)

RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE (2001)

RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW (1998)

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, REFLECTIONS ON REGIONALISM: REPORT OF THE STUDY GROUP ON INTERNATIONAL TRADE 57 (1997)

CONGRESSIONAL BUDGET OFFICE, THE GATT NEGOTIATIONS AND U.S. TRADE POLICY (1987)

JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND (1995)

KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970)

PHILLIP EVANS & JAMES WALSH, THE ECONOMIST INTELLIGENCE UNIT GUIDE TO THE NEW GATT (1994)

THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT: UNDERSTANDING THE FUNDAMENTAL CHANGES (Harvey M. Applebaum & Lyn M. Schlitt eds. 1995)

ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1990)

ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993)

DOUGLAS IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE (1996)

JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969)

JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990)

JOHN KRAUS, THE GATT NEGOTIATIONS: A BUSINESS GUIDE TO THE RESULTS OF THE URUGUAY ROUND (1994)

G.J. LANJOUW, INTERNATIONAL TRADE INSTITUTIONS (1995)

OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM (1985)

EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION (1996)

ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT, REGIONALISM AND ITS PLACE IN THE MULTILATERAL TRADING SYSTEM (1996)

PIERRE PESCATORE, HANDBOOK OF GATT DISPUTE SETTLEMENT (1992)

ERNEST H. PREEG, TRADERS IN A BRAVE NEW WORLD: THE URUGUAY ROUND AND THE FUTURE OF THE INTERNATIONAL TRADING SYSTEM (1995)

JEFFREY J. SCHOTT & JOHANNA W. BUURMAN, THE URUGUAY ROUND: AN ASSESSMENT (1994)

TERENCE P. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) (1996)

THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYERS' PERSPECTIVE (Jacques Bourgeois ed. 1994)

URUGUAY ROUND TRADE AGREEMENTS, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. 316, vol. 1, 103d Cong., 2d Sess. (1994)

U.S. INT'L TRADE COMM'N, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND THE TOKYO ROUND AGREEMENTS (USITC Pub. 1793 1985)

THE URUGUAY ROUND, A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS (J. Michael Finger & Andrzej Olechowski eds. 1987)

ARMAND VAN DORMAEL, BRETTON WOODS: BIRTH OF A MONETARY SYSTEM (1978)

CLAIR WILCOX, A CHARTER FOR WORLD TRADE (1949)

THE WORLD TRADE ORGANIZATION: THE MULTILATERAL FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION (Terence P. Stewart ed. 1996)

WORLD TRADE ORGANIZATION, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE (1995)

WORLD TRADE ORGANIZATION, REGIONALISM AND THE WORLD TRADING SYSTEM 16 (1995)

Articles

Leonard Bierman, Donald R. Fraser & James W. Kolari, *The General Agreement on Tariffs and Trade: World Trade From A Market Perspective*, 17 U. PA. J. INT'L ECON. L. 821 (1996)

Joseph L. Brand, *The New World Order of Regional Trading Blocks,* 8 AM. U.J. INT'L L. & POL'Y 155 (1992)
Gerald A. Bunting, *GATT and the Evolution of the Global Trade System: A Historical Perspective*, 11 ST. JOHN'S J. LEGAL COMMENT. 505 (1996)
Paul Carrier, *An Assessment of Regional Economic Integration Agreements After the Uruguay Round*, 9 N.Y. INT'L L. REV. 1 (1996)
Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law,* 90 AM. J. INT'L L. 434 (1996)
William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987)
Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123 (1995)
Thomas J. Dillon, *The World Trade Organization: A New Legal Order for World Trade?,* 16 MICH. J. INT'L L. 349 (1995)
Mary E. Footer, *The Role of Consensus in GATT/WTO Decision-Making,* 17 NW. J. INT'L L. & Bus. 653 (1996–97)
Gary C. Hufbauer, *Should Unconditional MFN Be Revived, Retired or Recast?, in* ISSUES IN WORLD TRADE POLICY 33 (R.H. Snape ed. 1986)
Robert E. Hudec, *A Statistical Profile of the GATT Dispute Settlement Cases: 1948–1989,* 2 MINN. J. GLOBAL TRADE 1 (1993)
Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT'L L.J. 246 (1996)
William A. Lovett, *Current World Trade Agenda: GATT, Regionalism, and Unresolved Asymmetry Problems*, 62 FORDHAM L. REV. 2001 (1994)
Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act,* 90 AM. J. INT'L L. 419 (1996)
Patrick M. Moore, *The Decisions Bridging the GATT 1947 and the WTO Agreement*, 90 AM. J. INT'L LAW 317 (1996)
David Palmeter, *International Trade Law in the 21st Century,* 18 FORDHAM INT'L L.J. 1653 (1995)
Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not,* J. INT'L ARB. 53 (Dec. 1987)
Jonathan R. Ratchik, *Cuban Liberty and Democratic Solidarity Act of 1995*, 11 AM. U.J. INT'L L. & POL'Y 343 (1996)
Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275 (1997)
Warren F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 INT'L REV. L. & Econ. 27 (1996)
G. Richard Shell, *Trade Legalism and International Relation Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995)
Richard H. Steinberg, *Antidotes to Regionalism: Responses to Trade Diversion Effects of the North American Free Trade Agreement*, 29 STAN. J. INT'L L. 315 (1993)
Kendall W. Stiles, *The New WTO Regime: The Victory of Pragmatism,* 4 J. INT'L L. & PRAC. 3 (1995)
Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996)
Symposium: Uruguay Round–GATT/WTO, 29 INT'L LAW. 335 (1995)
Symposium: Negotiating the Free Trade Labyrinth, 18 WHITTIER L. REV. 1 (1997)
Raymond Vernon,*The World Trade Organization: A New Stage in International Trade and Development,* 36 HARV. INT'L L.J. 329 (1995)
Lei Wang, *Non-Application Issues in the GATT and the WTO,* 28 J. WORLD TRADE L. 49 (1994)
Rex J. Zedalis, *A Theory of the GATT "Like Product" Common Language Cases*, 27 VAND. J. TRANSNAT'L L. 33 (1994)

CHAPTER 6

THE AGREEMENT ON AGRICULTURE

Joseph A. McMahon*

TABLE OF CONTENTS

I. Introduction 189
II. Agriculture under the GATT 189
A. Introduction 189
B. The Attitude of the Contracting Parties 190
1. The United States 190
2. The European Community and the Common Agricultural Policy 191
C. The Haberler Report 192
D. Multilateral Trade Negotiations 193
1. The Kennedy Round 193
2. The Tokyo Round 195
E. Trade Disputes Under the GATT 196
1. Article XI(2)—Import Restrictions 196
2. Article XVI—Export Subsidies 197
F. Conclusion 200
III. The Agreement on Agriculture 200
A. The Negotiations 200
B. The Major Provisions of the Agreement 202
1. Market Access 202
a) Tariffication 203
b) Tariff Reductions 205
c) Special Safeguard Measures 205
d) General Exceptions 206
e) Dispute Settlement 206
2. Domestic Support 207
a) The Provisions of the Agreement 207
b) Dispute Settlement 209
3. Export Subsidies 210
a) The Provisions of the Agreement 210
(i) Reduction Commitments 210
(ii) Anti-Circumvention Provisions 211
b) Dispute Settlement 211
4. "The Peace Clause" 214
5. Developing Countries 215
a) Special and Differential Treatment 215
b) The Net Food-Importing Developing Countries Decision 215

* Professor of Commercial Law, University College, Dublin.

IV. Towards a New Agreement? 217
A. Introduction 217
B. The Negotiating Proposals 218
1. Market Access 218
2. Domestic Support 220
3. Export Subsidies 221
4. Special and Differential Treatment 222
5. Non-Trade Concerns 223
C. The July 2004 Framework 224
D. Conclusion 228

I. Introduction

Governments intervene in the agricultural sector for a number of reasons, including the desire to provide adequate food for the population, to achieve self-sufficiency and to promote rural welfare. Concerns of this sort are not present in any other trade sector. Although at least in theory the GATT covered trade in agricultural products, the Contracting Parties were unwilling to subject their domestic agricultural policies to the same disciplines as industrial products. As a result, distortions, in the form of high tariff and non-tariff barriers, characterized the international market for agricultural goods. In addition, many developed countries, in particular the United States and the European Community ("EC"),[1] have given huge amounts of support to their farmers, and surplus production generated by this support has been disposed of on the international market with the help of subsidies.

Despite efforts in the various GATT trade rounds to reduce these distortions, success was not achieved until the Uruguay Round. However, although most of the commitments on market access, domestic support and export subsidies in the Uruguay Round Agreement on Agriculture had been implemented at the time of writing (August, 2004), agricultural trade is still highly restricted. The principal achievement of the Agreement was to create a framework for the further systematic liberalization of trade in agricultural products. Such liberalization may result from the recently-launched Doha Round, which is discussed at the end of this chapter. Before that, the Part II of this chapter examines the regulation of agricultural trade under the GATT, to provide a historical context for the Uruguay Agreement. Part III analyses the Uruguay Round Agreement in detail, and discusses the dispute resolution cases that have arisen under the Agreement.

II. Agriculture under the GATT

A. Introduction

The failure of the U.S. Congress to ratify the Havana Charter for World Trade, which would have established an International Trade Organization ("ITO"), had a profound effect on the post-war regulation of international trade in agricultural products.[2] What was salvaged from the Havana Charter was a series of rules on commercial policy that would become the General Agreement on Tariffs and Trade ("GATT"). The Charter chapters dealing with employment and economic activity, economic development and reconstruction, and international commodity agreements did not come into force. Whereas the Charter aimed to establish a comprehensive framework for the regulation of international trade, the primary focus of the GATT was the reduction of tariffs and other barriers to trade.

Only one of the provisions of the GATT, Article XI:2, would specifically refer to agriculture, while Article XVI referred to primary commodities, which include agricultural products. Differences between Article 25 of the Havana Charter and GATT Article XVI on the use of subsidies would not be reconciled until the 1955 GATT Review Session.[3] By that time, serious damage had been done to the credibility of the GATT. The bifurcation of treatment in international trade between industrial and agricultural products, occasioned

[1] Although the reference to the European Community is only legally correct since the Treaty of Maastricht (1993), it is used throughout this chapter for the sake of convenience.

[2] For a discussion of the Havana Charter, *see* Claire Wilcox, A Charter for World Trade (1949), and Richard Gardner, Sterling Dollar Diplomacy in the Current Perspective (1980).

[3] *See* Robert Hudec, The GATT Legal System and World Trade Diplomacy 15(1975).

by the failure of the ITO and events in the early history of the GATT, has only recently begun to be eliminated.

Attempts at the 1955 Review Session to reactivate Chapter VI of the Havana Charter on commodity agreements through the proposed Special Agreement on Commodity Arrangements ("SACA") were unsuccessful. The SACA would have operated alongside, rather than within, the GATT, but the exact nature of the legal relationship that would have existed between the two bodies was unclear. The SACA would have provided an opportunity for Contracting Parties to submit problems arising out of trade in primary commodities, and, if such problems could be alleviated by joint international action, a mechanism to negotiate such action. Although some Contracting Parties began negotiations on the SACA, the lack of support from the United States, which considered that existing mechanisms were sufficient to deal with commodity issues, was the crucial factor in its demise. In the end, those Contracting Parties who had supported the SACA had to be content with a resolution that promised to review the trends and developments of commodity trade within a specially established GATT committee.[4] Resolution of the problems of international commodity trade would eventually be addressed by the United Nations Conference on Trade and Development.[5]

This part of the chapter seeks to outline the impact of the establishment of the GATT on the international regulation of agricultural trade. It examines the attitudes of the Contracting Parties towards such regulation and the influence of agricultural trade on the implementation of domestic policy. It also discusses multilateral attempts to promote trade liberalization and examines agricultural trade disputes between the Contracting Parties. The discussion illustrates the extensive problems that the Uruguay Round Agreement on Agriculture has had, and continues to have, to contend with.

B. The Attitude of the Contracting Parties

1. The United States

The position of the United States illustrates the extent of the difficulties facing the GATT in its early days. Although the United States negotiators generally espoused the principles of free trade during the drafting of the GATT, they insisted that despite the general ban on quantitative restrictions contained in Article XI, a provision be included that permitted the retention of quantitative import restrictions when necessary to enforce domestic agricultural programs.[6] This provision, Article XI:2(c), legalized the retention of Section 22 of the U.S. Agricultural Adjustment Act of 1933, which allowed quotas to be imposed whenever imports threatened to impair domestic support programs. This Act was amended in 1951 to provide that no international agreement entered into by the United States was to be applied in a manner inconsistent with the requirements of Section 22. The United States requested a waiver under Article XXV:5 to eliminate any possible inconsistency between its obligations under the GATT and those under the amended Section 22.[7]

[4] BISD 5th Supp. 26 and 87 (1957). The reports of this Committee appear at BISD 7th Supp. 42 (1959), 8th Supp. 76 (1960) and 10th Supp. 83 (1962).

[5] For discussion of UNCTAD efforts to promote international commodity trade, *see for example*, KABIR KHAN, THE LAW AND ORGANIZATION OF INTERNATIONAL COMMODITY AGREEMENTS (1982).

[6] For example, import restrictions could be seen as necessary to enforce a price support system in order to prevent large quantities of imports from undermining the system.

[7] BISD 3rd Supp. 32 and 141(1955). Prior to the waiver, the GATT had authorised the Netherlands to retaliate against the United States with respect to Section 22 restrictions on dairy products. *See* Decision of the Contracting Parties, *United States—Import Restrictions on Dairy Products, Complaints by the Netherlands and Denmark*, BISD 1st Supp. 32, 62–64 (1953) and BISD 2nd Supp. 16 (1954).

The amended Section 22 sought to assert the primacy of the U.S. domestic agricultural program over the GATT, especially when that program required the imposition of import restrictions.

In the Working Party established to consider the waiver request, the U.S. representative argued that the nature of U.S. domestic agricultural support programs meant that unless restricted, imports would be attracted in such large quantities as to adversely affect these programs. The U.S. representative successfully argued against the imposition of various restrictions on the waiver, for example, that it should be defined in scope and limited to those products that were actually under restriction at the time or that the restrictions applied under the waiver should be eliminated after a specified date.[8] By rejecting such restrictions and by granting the U.S. request for an open-ended waiver, the Contracting Parties dealt a serious blow to the potential application of the GATT to the agricultural policies of other Contracting Parties. As one commentator noted:

> At a time when other exporters were highly agitated about agricultural trade restrictions, the architect of the trading system and the custodian of liberalism was itself giving primacy to national interests and demanding sanction for the use of a barrier which the agreement had set out to control and eliminate, namely quotas.[9]

The only obligation imposed on the United States was that it should submit periodic reports on the application of the waiver, and these simply served to underline the extent of the damage that had been inflicted on the GATT.[10] Besides creating a situation where the rights and obligations of the Contracting Parties in this area had become unbalanced, one review of the waiver also noted that it was frustrating the process of liberalizing international agricultural trade.[11]

The example afforded by the U.S. waiver would not be lost on other Contracting Parties, including the EC as it established its Common Agricultural Policy ("CAP") in the 1960s.

2. The European Community and the Common Agricultural Policy

The GATT Working Party established in 1956 to examine the compatibility of the Treaty of Rome establishing the EC with Article XXIV of the GATT (covering regional arrangements) expressed concern over the provisions of the Treaty dealing with agriculture. Several factors contributed to the concern, notably, the absence of a precise plan showing how these provisions would be applied, as well as the wide area of discretion left to the EC institutions in this area. The major concern was that the proposed policy would lead to restrictions on the level of agricultural exports to the EC from other Contracting Parties. The Working Party considered that ". . . the particular measures envisaged by the Treaty

[8] BISD 3rd Supp. 141. A document attached to the deliberations of the Working Party noted the dates on which initial controls were to be imposed on the import of manufactured dairy products (July 1, 1953), oats (December 23, 1953), rye (April 1, 1954) and barley (October 1, 1954).

[9] Thorald K. Warley, *Western Trade in Agricultural Products,* in INTERNATIONAL ECONOMIC RELATIONS OF THE WESTERN WORLD 1959–71, VOLUME 1, POLITICS AND TRADE 287, 347 (Andrew Shonfield ed. 1976).

[10] As part of the decision it was recognised that: "The United States will remove or relax each restriction permitted under this waiver as soon as it finds that the circumstances requiring such restriction no longer exist or have changed so as no longer to require its imposition in its existing form." *Supra* note 7, p. 34 (¶ 5 of the decision). Section 22 restrictions were still in place at the end of the Uruguay Round. For further discussion of the waiver *see* George Welch, *United States Agricultural Import Quotas and the General Agreement on Tariffs and Trade,* 1 FLORIDA INT'L L.J. 209 (1986).

[11] BISD 8th Supp. 173, 177 (1960): "Governments of other countries were under constant pressure from their producers to follow protectionist policies and even small progress towards the removal by the United States of restrictions would be an encouragement to other countries to take similar action."

carried a strong presumption of increased external barriers and a substitution of new internal barriers in place of existing tariffs and other measures."[12] However, the Working Party Report reached no firm conclusions. It merely recommended that the GATT should set up suitable machinery "to follow and consider together with the Six" the measures to be taken in the implementation of the CAP and the relationship between these measures and the relevant provisions of the GATT. The Working Party Report failed to influence the development of the CAP.

The CAP involved the introduction of common organizations of the market for various products that were based on three core principles, common prices, common financing, and Community preference. Not surprisingly, the establishment within the CAP of a common cereals price that was closer to the existing German price level rather than the more efficient French level led to over-production and excessive consumer prices.[13] Given the importance of the common cereals price to other common organizations of the market, problems soon began to emerge in the CAP. By ignoring the recommendations of the Haberler Report (discussed in the next section) and basing its policy on interventionism and external protection, the CAP became a major source of conflict between the EC and other Contracting Parties.[14] The operation of the EC's variable levy system, which sought to insulate domestic producers from the impact of price changes on the international market but which was also a cause of instability in that market, was of particular concern.[15] Attempts within the GATT to challenge the consistency of the system with the GATT were to be unsuccessful.[16] Coupled with the U.S. waiver, the outlook for international trade in agricultural products was not promising.

C. The Haberler Report

A wider attempt to influence the agricultural policies of all Contracting Parties was made in the agricultural section of the 1958 report of a Panel of Experts established to consider trends in international trade, including agricultural trade. The report, best known after its Chairman as the Haberler Report, recognized that the domestic agricultural policies of the Contracting Parties were major factors in restraining the growth of international

[12] BISD 6th Supp. 71, 88 (1958).

[13] This had been predicted by GATT Committee II, which had been set up in 1958 to consider the agricultural aspects of the Haberler Report, discussed in the next section.

[14] For example, the United States filed complaints against import restrictions maintained by France. *French Import Restrictions*, BISD 11th Supp. 55 (1963). The complaint resulted in a partial liberalization in 1962, which was completed in 1972. A Panel was also requested by both the United States and the EC to establish the level of compensation for the United States arising out of the withdrawal of tariff concessions by the EC on poultry. *US/EEC Negotiation on Poultry*, BISD 12th Supp. 65 (1964). On the latter *see* Herman Walker, *Dispute Settlement: The Chicken War*, 58 American Journal of International Law 671 (1964).

[15] In the case of the common organisation of the market in cereals, for example, a threshold price was established so that the price of an imported product would be equal to that of the target price, which was the price it was hoped that producers would be able to obtain on the internal market. In essence the variable levy covers the difference between the world price and the internal Community price, ensuring that imports could never undercut domestic products. For further discussion see Thomas Grennes, *Economic Interdependence and the Variability of Tariffs,* 14 J. World Trade Law 242 (1980); Gary Sampson and Richard Snape, *Effects of the EEC's Variable Import Levies,* 88 J. Pol. Econ. 1026 (1980).

[16] See for example, Uruguay's complaint against fifteen developed countries, which was later amended to include a request for a ruling on the GATT compatibility of the variable levy system and the CAP, BISD 11th Supp. 95 (1963) and follow-up reports, BISD 13th Supp. 35 and 45 (1965). The Panel concluded that the issue of the legality of the CAP has not been properly raised and that it was "not appropriate" to rule on the legality of the variable levy system.

agricultural trade.[17] Summarizing the current state of international trade in agricultural products, the report noted:

> . . . whether or not agricultural protectionism has increased in the highly developed countries, there are two incontrovertible facts. First, agricultural protectionism exists at a high level in the most industrialised countries; and second, the development of production and consumption of agricultural production in such countries has been such as to make net agricultural imports into these countries more and more marginal in relation to their total domestic production and consumption of such products.[18]

Having identified the aim of these domestic policies as being stabilization and/or protection, the Report went on to urge Contracting Parties to give preference to policies based on a system of deficiency payments rather than intervention.[19] The advantages of such an approach would be the emphasis given to income support under the deficiency payments scheme rather than price support under the intervention approach. This would encourage greater responsiveness by producers to market signals and reduce the risk of over-production. External protection was identified as a factor leading to instability in international trade.[20]

Although the recommendations of the Report were not adopted, its publication led to the establishment of various committees within the GATT. A dispute arose as to the terms of reference of Committee II, which was established to consider the agricultural aspects of the report.[21] Some members of the Committee considered the GATT to be a code of rules of commercial policy, while others considered it a mechanism to safeguard the effectiveness of mutually-agreed tariff concessions. This dispute reflected differences of opinion as to the extent of the possible impact of the GATT on domestic agricultural policies but it did not prevent the Committee from reaching a series of conclusions. Whilst reaffirming the need to moderate agricultural protection, the Committee did not recommend, as the Haberler report had, a move to income support. It argued instead for a change in the nature of price support under which prices would be set at a level that would be remunerative to efficient producers rather than providing a price guarantee to all producers.[22] As noted above, the EC did not follow this approach, and protectionism continued. However, an opportunity for change would soon emerge as a result of a change in U.S. trade policy.

D. Multilateral Trade Negotiations

1. The Kennedy Round

After the conclusion in 1962 of the Dillon Round, which was directed primarily at the negotiation of compensatory adjustments under GATT Article XXIV:6 with respect to the creation of the EC, the Contracting Parties planned to launch another round of multilateral

[17] GATT, Secretariat Trends in International Trade (1958).
[18] *Id*. at 87.
[19] *Id.* at 102.
[20] *Id*. at 67–68.
[21] The mandate of Committee II was to assemble data on the use of non-tariff barriers by the Contracting Parties to support domestic agricultural incomes; to examine the effects of these measures on international trade in agricultural products; to consider the adequacy of the GATT rules on non-tariff barriers to trade; and to suggest procedures for further consultation between all Contracting Parties on agricultural policy. BISD 8th Supp. 121 (1960). The mandate of Committee I was to examine tariff reductions and that of Committee III to look at other barriers to trade. BISD 7th Supp. 27 (1959).
[22] BISD 10th Supp. 135 (1962).

trade negotiations. One of the prime motivations for this round was a change of emphasis in American agricultural policy that sought to reduce the levels of domestic price support for major products towards prices prevailing on the international market. In contrast with its attitude during the 1950s, the United States now sought to use the GATT to promote agricultural trade liberalization. In 1961, the United States had started the process of reducing domestic support prices towards the prices prevailing on the world markets, as part of its efforts to alleviate balance-of-payments problems. This change of policy was reflected in the Declaration that launched the Kennedy Round, which listed as one of the negotiating objectives the need to provide for "acceptable conditions of access to world markets for agricultural products."[23] Agriculture would therefore be an integral part of multilateral trade negotiations for the first time.

At the heart of the Kennedy Round agricultural negotiations was the EC proposal, referred to as either Mansholt II or the *montant de soutien* (margin of support), which reflected the EC's belief that the impact of domestic agricultural policies on the world market resulted in distortion of competition.[24] The first of the two elements of the proposal was the establishment of a mechanism through which the level of support provided by each Contacting Party to its agricultural producers would be measured by comparing the guaranteed domestic support price with the price of the product on the international market. The second element of the proposal involved the binding of these levels of support, which would then form the basis for future negotiations on agriculture. In effect these bindings would prevent countries from increasing the protection afforded to their producers, and this consolidation of the levels of support would have led to restrictions on the domestic agricultural policies of the Contracting Parties. For example, the competitive use of export subsidies would have been curtailed as a consequence of the obligation to respect the established negotiated reference price. In essence what the EC was proposing was the internationalization of the existing mechanisms of the CAP.

However, the proposal also suffered from a number of defects, most notably the failure to consider the amount of protection afforded by tariffs and non-tariff barriers, and the assumption that world prices represented the true cost of production, thereby ignoring the impact of domestic agricultural programs on the international market price. Moreover, the fact that the plan provided for limited trade expansion, as a result of its maintenance of the present levels of support, was one of the reasons that led to its rejection by other Contracting Parties.[25] In particular the plan did not meet the negotiating objectives of the United States, which sought arrangements for the expansion of international agricultural trade over the short and longer terms. The significance of the EC's proposal was that it represented an attempt to reach international agreement on agricultural policies. The poor reception of the plan by other Contracting Parties was due in part to the belief that what was being proposed was a mechanism to ensure international acceptance at least of the EC's variable levy system, and perhaps of the entire CAP, as a means of protecting its domestic producers. The result was that:

[23] BISD 12th Supp. 36 (1964).

[24] *See* for further discussion, Warley, *supra* note 9, and GIAN CARLO CASADIO, TRANSATLANTIC TRADE: USA-EEC CONFRONTATION IN THE GATT NEGOTIATIONS (1973), Chapter 6. Both authors also discuss the previous (1961) EC proposal.

[25] One commentator has observed that ". . . what ensured that Mansholt II would meet with violent opposition from the exporters was that the Community proposed that the *montant de soutien* be used not as a basis for further negotiations but as a substitute for them." JOHN EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY 210 (1972).

> . . . on the central issues nothing substantial had been accomplished. Apart from an enhanced understanding of the issues involved, the principal legacies were heightened friction between the two major protagonists (the United States and the EC) and a polarisation of views as to the basic conditions under which agricultural trade should be conducted in the future.[26]

The 1967 Future Work Program of the Contracting Parties attempted to reconcile these views by establishing an Agriculture Committee to examine the problems in the agricultural sector and to explore opportunities for mutually acceptable solutions to these problems that would help realize GATT objectives.[27] Nothing positive would emerge from this Committee.[28] In retrospect the failure of the Kennedy Round marked a major turning point for the GATT's treatment of agriculture, as in the years that followed the EC completed the implementation of the CAP through the introduction of more common organizations of the market. Although the Kennedy Round failed with respect to agriculture, it was reasonably successful in other respects; for example, the Round brought the GATT close to its goal of eliminating tariff barriers as an obstacle to trade in manufactured goods. The focus of GATT negotiations would now shift to non-tariff barriers.

2. The Tokyo Round

The Tokyo Round Declaration recognized the need to reduce or eliminate non-tariff measures, and where this was not appropriate, to reduce or eliminate the negative trade effects of such measures.[29] In addition to the usual tariff reductions, the Round produced a series of codes seeking to reduce or eliminate non-tariff barriers.[30] Little progress was made with respect to agriculture. One reason for this was the limited mandate given to the EC Commission by the Member States, which stressed that the principles and mechanisms of the CAP should not be called into question and that they should not constitute a matter for negotiation.[31] The approach dictated by the EC mandate emphasized the need to expand trade through market stabilization. Such stability would be achieved through international agreements, either commodity agreements or orderly marketing arrangements, for what were referred to as "main products".[32]

Others did not share the EC's view that stabilization of international agricultural trade should be the principal goal. The United States, for example, believed that the aim should be to establish rules promoting greater efficiency. The resulting conflict between

[26] Warley, *supra* note 9, at 377.

[27] BISD 15th Supp. 67 (1968). The terms of reference of the Committee were: "to examine the problems in the agricultural sector and to explore the opportunities for making progress in the attainment of the objectives of the General Agreement in the agricultural field. The examination would cover all agricultural products important in international trade. This examination should prepare the way for subsequent consideration of positive solutions which could be mutually accepted by all Contracting Parties concerned."

[28] *See, e.g., Report of the Agriculture Committee*, BISD 17th Supp. 110 (1970).

[29] BISD 20th Supp. 19, para. 3(b) (1974).

[30] Agreements were concluded, for example, on Subsidies and Countervailing Measures, Anti-Dumping, Government Procurement, Technical Barriers to Trade, Customs Valuation and Import Licensing, *see* BISD 26th Supp. (1980). The agreements were plurilateral rather than multilateral, i.e., they were only binding on those Contracting Parties who chose to sign them.

[31] For a discussion of the mandate and its impact on the negotiation *see, e.g.,* STUART HARRIS, EEC TRADE RELATIONS WITH THE USA IN AGRICULTURAL PRODUCTS (1977).

[32] These were products that were essential for human consumption and which were determining factors in the maintenance of a balance in the agricultural sector; they included cereals, rice, sugar and homogenous milk products.

the "main protagonists" was one of the reasons for the limited success of the Tokyo Round with respect to agriculture. In addition to the usual tariff concessions in the agricultural sector, estimated to cover thirty percent of trade and yielding an unweighted average tariff reduction of forty percent, the Tokyo Round ended with two international agreements on agriculture, limited to bovine meat and dairy products respectively.[33] Two other agreements concluded during the Round had some application to agricultural trade. The Agreement on Technical Barriers to Trade sought to ensure that unnecessary barriers to trade were not created by regulations adopted by the Contracting Parties, while the Code on Subsidies and Countervailing Duties aimed to improve the limited discipline provided by Article XVI:3 GATT.[34] The Subsidies Code recognized the legitimacy of subsidies as instruments of social and economic policy whilst trying to ensure to control the impact of such subsidies on other Contracting Parties. Disputes in the early 1980s would show the limited impact of the Code on agriculture.

E. Trade Disputes Under the GATT

1. Article XI(2)—Import Restrictions

As previously noted, the only agriculture-specific GATT provision incorporated from the ITO Charter was Article XI:2(c).[35] This provides that the general prohibition on import restrictions contained in Article XI:1 would not extend to:

> Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
>
> (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
>
> (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
>
> (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

This provision was subject to extensive (and exhaustive) legal analysis in the Panel Report on the U.S. complaint against quantitative import restrictions on twelve product categories maintained by Japan.[36] The Panel concluded that:

- to qualify for the exemption there must be a governmental measure which operates to restrict (rather than prohibit) the quantities of a product permitted to be marketed or produced.[37]

[33] BISD 26th Supp. 84 (Arrangement on Bovine Meat) and 91 (International Dairy Agreement) (1980).
[34] *Id,* at 8 (Agreement on Technical Barriers to Trade) and 69 (Subsidies).
[35] For a more extensive discussion of this provision see MELAKU DESTA, THE LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS (2002), Chapter 2.
[36] Report of the GATT Panel (adopted), *Japan—Restrictions on Imports of Certain Agricultural Products,* BISD 35th Supp. 163 (1987).
[37] *Id.*, ¶¶ 5.1.3.1, 5.1.3.3. *See also,* Report of the GATT Panel (adopted), *US—Prohibition of Imports of Tuna from Canada,* BISD 29th Supp. 91 (1983).

- a product and a product processed from that product could not be considered "like" products with the meaning of Article XI:2(c).[38]
- the import restriction must not exceed what is necessary to the enforcement of the domestic supply restriction.[39]
- paragraph (c) quotas could only be applied if they defined the quantity or value for each product subject to quota, and the quotas must reflect the proportion between domestic production and imports during a previous representative period and any "special factors" that affected or might affect trade in the relevant concerned product.
- the contracting party invoking paragraph 2(c)(i) must show that all the conditions were met.

Applying these rules to the case before it, the Panel concluded that none of the restrictions imposed by Japan was justified. This was the first time that Article XI:2 had been the subject of such an extensive legal analysis.[40] The guidance provided by the Panel would be used in subsequent disputes, notably one concerning EC restrictions on the imports of apples.[41] The strict interpretation of Article XI:2 is in stark contrast to the approach of the GATT panels to Article XVI, as now discussed.

2. Article XVI—Export Subsidies

Added at the 1955 Review Session, Article XVI:3 of the GATT provides that no Contracting Party should acquire "more than an equitable share of world export trade" in primary products through the use of export subsidies. This provision gave rise to a number of problems, particularly in relation to the definition of the term "more than an equitable share."[42] Moreover, to be successful any complainant would have to show the existence of a causal connection between the grant of the subsidy and the acquisition of more than an equitable share of world trade. An effort was made during the Tokyo Round to deal with these problems. Article 10(2) of the Code on Subsidies and Countervailing Duties defined "more than an equitable share of world export trade" as including "any case in which the effect of an export subsidy . . . is to displace the exports of another signatory bearing in mind developments on world markets."[43]

The inconclusive Panel reports on the complaints made by Australia and Brazil concerning EC export refunds on sugar demonstrated that the new definition of "equitable

[38] *Japan—Agricultural Products, supra* note 36, ¶ 5.1.3.4. However, the Interpretative note to Article XI permits restrictions on "the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective."

[39] *Id.*, para. 5.1.3.5. See also the *Working Party Report on Quantitative Restrictions*, BISD 3rd Supp. 190.

[40] Previous panel reports dealing with Article XI:2 include Report of the GATT Panel (adopted), *Canada—Import Quotas on Eggs*, BISD 23rd Supp. 91 (1977); Report of the GATT Panel (adopted), *EC—Programme on Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, BISD 25th Supp. 68 (1979); and Report of the GATT Panel (adopted), *EC—Restrictions on Imports of Apples from Chile*, BISD 27th Supp. 98 (1981).

[41] See Report of the GATT Panels (adopted), *European Economic Communities—Restrictions on Imports of Dessert Apples*, complaints by Chile, BISD 36th Supp. 93 (1990) and the United States, BISD 36th Supp. 135 (1990). It is noteworthy that a previous complaint about the EC regime on the import of apples had found it to be consistent with Article XI:2(c). *See* Report of the GATT Panel*, EEC Restrictions on Imports of Apples From Chile*, *supra* note 40 at ¶ 4.10.

[42] See Report of the GATT Panel (adopted), *France—Assistance to Exports of Wheat and Wheat Flour, Complaint by Australia*, BISD 7th Supp. 46 (1959), for a discussion of this issue.

[43] BISD 26th Supp. 69 (1980). For discussion *see* Patrick Low, *Definition of Export Subsidies in GATT*, 16 JWTL 375 (1982), and Belayneh Seyoum, *Export Subsidies under the MTN,* 18 JWTL 512 (1984).

share" did not remedy the problems.[44] The Panels were unable to conclude that the EC had acquired more than an equitable share of world trade or that there was a causal connection between the increase in exports by the EC and the decline in exports of the complainants.[45] All that the Panels did find was that the EC system had depressed world sugar prices, indirectly causing prejudice to Australian and Brazilian interests.[46] Given the significance of the export subsidy system to the CAP, this conclusion may have been politically acceptable to the EC as it maintained the integrity of the system whilst forcing the EC to engage in consultations on possible ways of limiting the adverse effects of the system. Such consultations were mandated by Article XVI:1, under which the contracting party granting a subsidy could be asked to enter into consultations with other contracting parties to discuss the possibility of limiting the subsidization in cases "in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidisation."

Subsequent attempts by Australia and Brazil to resolve the issue within the GATT failed to eliminate the prejudice (or threat of prejudice) caused by the EC export subsidy system.[47] In the Working Party established under Article XVI:1 to discuss possible limits on EC sugar export subsidies, the EC argued that it had met the notification obligations imposed on it by Article XVI. However, a majority of the Working Party considered that the EC had not advanced any meaningful possibility of limiting the subsidization and, therefore, the prejudice (or threat of prejudice) found by the GATT Panels would continue.[48] Although the EC amended its common organization of the market in sugar by introducing an element of producer responsibility, further complaints were made about the EC sugar regime by the United States and Argentina. These did not proceed beyond consultations.[49]

A number of high profile cases in the early 1980s further highlighted the problems of Article XVI in particular and the GATT dispute settlement mechanism in general. In the first of these cases the United States alleged that the EC export subsidy system for wheat flour violated the Tokyo Round Subsidies Code.[50] The EC world market share for

[44] Reports of the GATT panels (adopted), *European Communities—Refunds on Exports of Sugar,* complaint by Australia, BISD 26th Supp. 290 (1980); complaint by Brazil, BISD 27th Supp. 69 (1981). As the findings of both Panels are identical, further references relate only to the Australian complaint. For further discussion, see Ian Smith, *GATT: EEC Export Refunds Dispute,* 15 JWTL 95 (1981); Colin Phegan, *GATT Article XVI:3: Export Subsidies and 'Equitable Shares'*, 16 JWTL 251 (1982).

[45] BISD 26th Supp. at 318. The EC's market share had increased by seventy-five percent during the period 1976–78. Such an increase, it was argued, could not have happened without the use of export subsidies given that the support price of sugar within the EC was well above that of the world market. Despite this the Panel could not find a causal connection between the increased EC exports and the reduced exports of the complainants.

[46] *Id*, at 319.

[47] *See* Jeffrey Estabrook, *European Community Resistance to the Enforcement of GATT Panel Decisions on Sugar Export Subsidies,* 15 CORNELL INT'L L.J. 397 (1982).

[48] BISD 28th Supp. 80 (1982) and 29th Supp. 82 (1983).

[49] For a discussion of an Argentinean complaint against the EC sugar regime, *see* J. Kodwo Bentil, *Attempts to Liberalize International Trade in Agriculture and the Problem of the External Aspects of the Common Agricultural Policy of the European Economic Community*, 17 CASE WESTERN RESERVE J. INT'L. L. 335 (1985).

[50] Report of the GATT Panel (unadopted), *European Economic Community, Subsidies on Export of Wheat Flour,* SCM/42 (1983), The filing of the case constituted a "breach" of the implied understanding between the United States and the EC reached during the Tokyo Round that the former would not use the Subsidies Code to attack the CAP. *see* Robert Hudec, '*Transcending the Ostensible': Some Reflections on the Nature of Litigation between Governments,* 72 MINN. L REV. 101 (1987), for discussion of this understanding.

wheat flour had risen from 18 percent to 62 percent since the introduction of the CAP, suggesting that it had acquired more than an equitable share of world trade. The Panel was unable to reach a decision, given the problems arising from the concept of "more than an equitable share". The United States resisted adoption of the report, naturally advocated by the EC, and it remained unadopted.[51]

The United States also attacked the EC export subsidy system for pasta.[52] This dispute raised even greater problems than the wheat flour case and in the initial period the EC refused to consult with the United States. Arguing that the dispute involved a misinterpretation of Article 9 of the Subsidies Code, the EC insisted that the matter be referred to the Committee established under the Code before the dispute could proceed. Eventually, a Panel was established and it concluded, by a majority, that there was a breach of the Subsidies Code. However, given the history of the dispute, in particular the involvement of the Committee on Subsidies, and the fact that other contracting parties had adopted a subsidy system similar to that at issue in this dispute, it was obvious that the Panel report would not be adopted.[53] The case was settled through a bilateral agreement between the parties, as was a further U.S. complaint against the EC's system of production aids for canned fruit.[54]

The results in these cases, especially in the *Wheat Flour* and *Pasta* cases, highlighted the problems inherent in the concept of "more than an equitable share of world export trade" and the need for reform in this area. The 1985 GATT-sponsored Leutwiler Report concluded:

> We believe this concept is economically misconceived, since it impliedly endorses market-sharing. It is also too vague and subjective to permit clear judgment on whether a subsidy is acceptable or not—as was shown by the result of a U.S. complaint to the GATT about European exports of subsidised flour. A better test of legitimacy than that of equitable share is needed for subsidies on primary products.[55]

This series of disputes and the Leutwiler report highlighted the need to "bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines", in the words of the Uruguay Round Declaration. Such rules and disciplines would only be effective, however, if they were accompanied by agreement on, and solutions to, the problems posed by the domestic agricultural policies of the Contracting Parties. A start on this latter problem had been made with the establishment in 1982 of a GATT committee to find lasting solutions to the problems of trade in agricultural products.[56]

[51] The response of the United States was to sell at less than half the market price, thus eliminating the EC from the world's largest market for wheat flour, Egypt. *See* Marsha Echols, *Just Friends: The US-EEC Agricultural Export Subsidies Stand-off,* PROCEEDINGS OF THE 77TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 119 (1983).

[52] For discussion of the complaints *see* Massimo Coccia, *Settlement of Disputes in GATT under the Subsidies Code: Two Panel Reports on EEC Export Subsidies,* 16 GEORGIA J INT'L AND COMP L 1 (1986); Phegan *supra* note 44.

[53] Report of the GATT Panel (unadopted), *European Economic Community—Subsidies on Exports of Pasta Products,* SCM/43 (19 May 1983). Adoption of the report was blocked by the EC, *see* BISD 30th Supp. 39, 42.

[54] *See* OJ 1989 L 275/36 and *GATT Focus* No. 38, p. 1.

[55] TRADE POLICIES FOR A BETTER FUTURE 40 (1985).

[56] BISD 29th Supp. 16–17 (1983), *see also* Reports of the Committee, BISD 30th Supp. 100 (1984) and 31st Supp. 10 and 209 (1985).

F. Conclusion

Reflecting on the history of dispute settlement under the GATT, Hudec concluded:[57]

> In sum, dispute settlement data provides no support at all for the widely held view that GATT law is much weaker in the agricultural sector than elsewhere. As stated before, however, we know that dispute settlement data does not give us an accurate picture. What the data really shows is that the GATT legal system has not yet been able to engage agricultural trade policy in a significant way.

The reason why the data did not give an accurate picture was that "the main problems in agriculture are not yet within the reach of the legal system at all."[58] The preceding brief analysis of the dispute settlement cases confirms Hudec's conclusion. The Contracting Parties were unwilling to let the GATT influence the development and/or implementation of their agricultural policies. Although the increasingly legalistic nature of GATT dispute settlement led to an improved understanding of Article XI, the same cannot be said of Article XVI as attempts to solve the problems inherent in that article met with limited success. There was clearly a need for a new start, but this would require the Contracting Parties to submit their domestic agricultural policies to multilateral disciplines. The lessons from GATT history were not encouraging.

III. The Agreement on Agriculture

A. The Negotiations

The Punta del Este Declaration that launched the Uruguay Round stated that:

> The Contracting Parties agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions . . . so as to reduce the uncertainty, imbalances and instability in world agricultural markets.
>
> Negotiations shall aim to achieve greater liberalisation of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations, by:
>
> (i) improving market access through, *inter alia*, the reduction of import barriers;
> (ii) improving the competitive environment by increasing discipline on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade, including the phased reduction of their negative effects and dealing with their causes;
> (iii) minimising the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements.[59]

Despite the preparatory work undertaken by the GATT Committee on Trade in Agriculture since its establishment in 1982, the progress of the negotiations was slow, which was

[57] Robert Hudec, Enforcing International Trade Law 336 (1993).
[58] *Id*, p. 332.
[59] BISD 33rd Supp. 19, 24 (1987)

hardly surprising given the contrasting negotiating positions of the various Contracting Parties.[60]

As in the Tokyo Round, the initial negotiating position of the EC, in addition to defending the CAP, sought to reduce the level of internal support and external protection offered by domestic agricultural policies. The EC position envisaged that once the level of support that could be granted to agricultural producers had been agreed, each country would be able to decide what method to use to support its domestic producers. In contrast, the United States, supported by the Cairns Group,[61] wished to see greater competition, which would benefit the more efficient producers.[62] Export subsidies provide an excellent example of the contrast between the EC and the United States. The United States proposed that such subsidies should be phased out over a five-year period, while the EC supported reduction (and rebalancing) of subsidies but did not consider abolition as an option.

This major philosophical difference ensured that the negotiations would be protracted. In addition, a number of difficult trade disputes between the Contracting Parties involving agriculture emerged. The most significant of these was between the EC and the United States in the oilseeds sector.[63] Despite the lack of progress the mid-term review reaffirmed the commitment of the Contracting Parties to the objectives set forth in the Punta del Este Declaration. The review document set the end of 1990 as the date for agreement on the long-term reform program and the implementation period as part of the overall package that would lead to the conclusion of the round.[64] The Contracting Parties continued the negotiations, and in June 1990 the Chairman of the Agriculture Negotiating Group proposed a final negotiating text which was endorsed by the Group of Seven meeting in Houston in July that year.[65] Although there was a good deal of optimism that agreement could be reached by December, the Ministerial meeting in Brussels resulted in stalemate.

Disagreements between the EC Member States and the on-going oilseeds dispute undoubtedly contributed to the lack of agreement at the Ministerial Meeting. It was 1992 before each of these issues would be resolved. Discussions within the EC began in 1991 on a far-reaching reform of the CAP, and decisions were reached in 1992 that involved a reduction in the level of support prices within the EC, coupled with increased compensatory payments to farmers. With respect to the oilseeds dispute, although the EC had introduced a new subsidy regime, a GATT Panel concluded that impairment of the

[60] The one area where there was little difference between the Contracting Parties was recognition of the need for special and differential treatment for developing countries, in the form of longer implementation periods and other concessions. The April 1989 mid-term review document stated that special and differential treatment should be "an integral element" of the negotiations. It agreed that government assistance measures aimed at agricultural and rural development were an integral part of the development programs of developing countries and that a method should be found to alleviate the possible negative effects of the reform process on net food-importing developing countries. *GATT Focus* No. 61 (May 1989).

[61] At that time the group included Argentina, Brazil, Chile, Colombia, Indonesia, Malaysia, the Philippines, Thailand and Uruguay.

[62] For a discussion of the progress of negotiations see John Breen, *Agriculture*, in THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–94) (Terence Stewart, ed., 1993 and 1999) Vol. I at 125–254 and Vol. IV at 1–179. *See also* Bernard Hoekman, *Agriculture and the Uruguay Round*, 23 JWTL 83 (1989), for discussion of the original negotiating positions of the various parties.

[63] Report of the GATT Panel (adopted), *EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, BISD 37th Supp. 86 (1991). The Panel concluded that the subsidy payments to EC processors for processing EC-produced oilseeds violated Article III:4 and that they nullified or impaired earlier tariff concessions on oilseeds.

[64] GATT *Newsletter Focus* No. 69 (May 1989), pp. 4–5.

[65] GATT *Newsletter Focus* No. 72 (July 1990), p. 12.

1962 tariff binding continued.[66] Consultations following the EC request for renegotiation of the tariff binding foundered on the issue of compensation. The EC blocked the U.S. request for authority to retaliate, so the United States announced that it would impose a two hundred percent tariff on $300 million of EC imports in December 1992.[67] Before the tariff was actually imposed, consultations between the EC and the United States eventually led to a resolution of the dispute and to agreement on a number of issues relating to the negotiations on domestic and export subsidies. Despite this agreement, usually referred to as the Blair House agreement, the negotiations continued into 1993 and it was only after a slight revision to that agreement that further progress was made in the negotiations.

The Uruguay Round was formally concluded by the Marrakesh Declaration of April 15 1994, adopted by the 124 governments (and the EC) that had participated in the negotiations. The Uruguay Round was a historic achievement with respect to agriculture, as it was in so many other areas. The Agreement on Agriculture, which considerably strengthened the GATT rules on agriculture, was designed to shape the future agricultural policies of the Members of the newly created World Trade Organization. This was to be achieved through the adoption of specific commitments to increase market access and to reduce domestic support and export subsidies, which would, in the words of the Preamble, lead to "substantial reductions in agricultural support and protection sustained over an agreed period of time."[68] The agreed implementation period, according to Article 1(f) of the Agreement, was six years, save in the case of Article 13, the "Peace Clause", which limited the possibility of disputes and which would remain in effect for nine years.

B. The Major Provisions of the Agreement

As noted previously, the three major ways in which the Agreement seeks to reduce restrictions on trade in agricultural products are by increasing market access and reducing domestic support measures and export subsidies. Commitments made by the WTO Members in each of these areas were to be implemented within six years in the case of developed countries and ten years in the case of developing countries (least-developed countries were not required to make any commitments). This section discusses the provisions of the Agreement with respect to each of the three areas, and describes the important dispute settlement cases that have arisen under them. It will then discuss the so-called "Peace Clause", and will conclude with a discussion of the Net Food-Importing Developing Countries Decision, which was designed to alleviate the impact of the reforms in agricultural trade on certain developing countries.

1. Market Access

The two major components of the market access provisions of the Agreement were the requirement that almost all non-tariff measures be converted to tariffs, and the commitment

[66] *See* Report of the GATT Panel, *Follow up on the Panel Report "European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins,"* BISD 39th Supp.91 (1993).

[67] *See* documents from Council meetings of 19 June (C/M/257), 29 September (C/M/259) and 4–5 November 1992 (C/M/260).

[68] Unlike the GATT, which provided no definition of agricultural product, Annex 1 of the Agreement on Agriculture specifies that the Agreement covers all products listed in Chapters 1 through 24 of the Harmonised System except fish and fish products, as well as certain other specified items.

to reduce tariffs over the implementation period. The Agreement also provides a special safeguard mechanism that can be invoked with respect to products that were subject to non-tariff barriers but which have now undergone tariffication.

(a) Tariffication. A major aspect of the market access provisions was the elimination of nearly all types of non-tariff barriers, which were to be converted into tariff equivalents, under a process known as "tariffication".[69] Under Article 4.2 of the Agreement, in the future "members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties."[70] This is perhaps the most significant aspect of the entire Agreement, since it means that virtually all agricultural protection is now in the form of tariffs, which are more transparent and easier to negotiate than non-tariff measures.

Details of how the process of tariffication is to be undertaken are contained not in the Agreement itself but in a document usually referred to as the Modalities Agreement.[71] According to paragraph 2 of Annex 3 of the Modalities Agreement, tariff equivalents are to be fixed "using the actual difference between the internal and external prices in a transparent manner using data, data sources and definitions as specified in Annex 2." Annex 2 provides that countries are to submit lists of commitments and supporting material for each of the reduction commitments in the Agreement on Agriculture. Annex 3 defines internal price as generally being a representative wholesale price on the domestic market of the country and the external price as generally the actual average c.i.f. unit values for the importing country. The result of the calculation, for which the base period was 1986 to 1988, could be expressed as either specific or *ad valorem* rates.

Once the base period for the data had been agreed the actual conversion of non-tariff barriers was left to each Member, who not surprisingly chose data that would allow the highest possible tariffs. This exaggeration of the difference between the internal and external prices during the reference period is often referred to as "dirty tariffication".[72] The resulting tariff ceilings were not always applied in practice; however, they reduced the impact of the reform process since reduction of the tariff from the nominal amount counted towards the tariff reductions required by the Agreement without actually increasing market access. As a result, a number of WTO members—notably the United States and the EC—have not significantly increased access to their markets.[73] The Agenda 2000 reforms of the CAP adopted by the EC did not lower import tariffs, thus increasing the amount of "dirt" in its tariff.[74]

[69] According to Article 4.2 the process of tariffication does not apply to "measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of the GATT 1994 or of other Multilateral Trade Agreements in Annex 1A of the WTO."

[70] Footnote 1 to Article 4.2 states that these measures include "quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties. . . ." As for the scope of this provision, *see* Report of the GATT Panel, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products,* WT/DS207/R, ¶¶ 7.17-7.102 (2002).

[71] *Modalities for the Establishment of Specific Binding Commitments under the Reform Programme,* MTN.GNG/MA/W/24 (1993).

[72] *See* Merlindo Ingco, *Tariffication in the Uruguay Round: How much Liberalisation?,* 19(4) THE WORLD ECONOMY 425 (1996).

[73] *See* Kym Anderson, Erwidodo and Merlinda Ingco, *Integrating Agriculture into the WTO: The Next Phase,* paper presented to the WTO/World Bank Conference on Developing Countries in the Millennium Round (Geneva, 20–21 September 1999, pp. 8–9).

[74] *See* Alan Swinbank, *CAP Reform and the WTO: Compatibility and Developments*, 26 EUROPEAN REVIEW OF AGRICULTURAL ECONOMICS 389, 396–99 (1999).

The process of converting quotas (and other non-tariff barriers) into tariffs could of course reduce market access where the quota had been small and tariffication produced a high tariff. To avoid this effect each Member is required to include minimum and current access requirements for all tariffied products in its Schedules.

- *Minimum access opportunities* were to be established in those situations where the historic level of imports was below five per cent of domestic consumption. In the first year of the implementation period such opportunities were to represent three per cent of domestic consumption in the base period and they were to rise to at least five per cent by the end of the six-year implementation period.
- *Current access commitments* apply where imports of a product represented at least five per cent of domestic consumption in the 1986 to 1988 base period. According to Paragraph 6 of the Modalities Agreement such imports are to be maintained and increased over the implementation period.[75] The mechanism to achieve this is, according to Annex 3B of the Modalities Agreement, the creation of terms and conditions for imports at least equivalent to those in the 1986 to 1988 base period.

Both commitments were implemented through tariff-rate quotas, the lower rate applying to the current or minimum access requirement. The Modalities Agreement provides that the expansion of access opportunities is to be provided on a most-favored-nation basis.[76] This implies that country-specific access opportunities should reflect the historic share of imports, in accordance with GATT Article XIII:2.[77]

Annex 5 to the Agreement contains two exceptions to the tariffication requirement. These exceptions are designed to deal with concerns raised during the negotiations relating to the tariffication of non-tariff barriers on particularly sensitive products. Annex 5A covers products that have been designated as subject to special treatment based on non-trade concerns such as food security and environmental protection. A number of conditions must be met, suggesting that there will be few exemptions under this provision.[78] This particular exception was introduced at the request of Japan and Korea and will only apply if a reservation is made in the Member's Schedule of Concessions.[79] Annex 5B exempts from the tariffication requirement primary agricultural products that are the predominant staple in the traditional diet of a developing country. Both exemptions are conditional upon the provision of minimum access commitments.[80]

[75] Paragraph 6 does not set a figure for the increase but notes that in "the expansion of current access, due account is to be taken of reduction commitments in the export competition area." No figure for the increase is set in paragraph 11 of Annex 3B of the Modalities Agreement.

[76] *Supra* note 71, ¶ 14.

[77] This provision requires that the allocation of quotas should seek to achieve a distribution of trade in the product "approaching as closely as possible" the shares that Members would have in the absence of restrictions. On the interpretation of this provision *see* Report of the Appellate Body and Report of the Panel, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R and WT/DS27/R (1997).

[78] Imports of the designated product must have comprised less than three percent of domestic consumption during the base period (1986–88), no export subsidies must have been provided with respect to the product since 1986, and effective production-restricting measures must be applied to the primary agricultural product. In addition, minimum access opportunities must be provided equal to four percent of base period domestic consumption during the first year of the implementation period, increasing by 0.8 percent per year throughout the period.

[79] Reservations were made by four countries—Japan, Korea and the Philippines for rice and Israel for cheese and sheepmeat.

[80] The commitment is equal to one percent of base period domestic consumption in the first year of the implementation period, increasing by equal annual instalments to four percent after ten years.

(b) Tariff Reductions. The tariff reduction commitments, which under Article 4.1 of the Agreement were recorded for each Member in their national schedule of concessions annexed to the Uruguay Round Protocol that forms an integral part of the Final Act, apply to both traditional tariffs [81] and new tariffs, that is the tariffs resulting from the process of tariffication. For developed Members the average reduction was to be 36 percent over six years, whereas for developing Members the average reduction was to be 24 percent to be implemented over a ten-year period. Least-developed Members were not required to undertake any reduction commitments, although they were required to tariffy and bind their tariffs. To reflect the comprehensive nature of the market-access negotiations, all participating Members were required to make minimum reductions on each tariff line, fifteen per cent per tariff line for developed countries and ten percent for developing countries.

(c) Special Safeguard Measures. While the exceptions to the tariffication requirement provided in Annex 5 were tailored to specific concerns raised during the Uruguay Round, Article 5 of the Agreement provides a more general exception. Under this provision special safeguard measures may be taken with respect to tariffied products where the volume of imports exceeds a specified trigger level or the price of imports falls below a specified trigger price.[82] A Member may invoke the safeguard measures on the basis of either import volumes or import prices but not both.

Volume-Based Safeguard. A volume-based safeguard may only remain in effect until the end of the year in which it was imposed, and it may not exceed one third of the regular tariff. The trigger level is defined in Article 5.4 on the basis of market access opportunities, *i.e.*, imports as a percentage of domestic consumption for the last three years of available data. Base trigger levels of 125 percent, 110 percent, and 105 percent are set where the market access opportunities for a product are respectively less than or equal to ten percent, between ten and thirty percent, and greater than thirty percent. The special safeguard duty may be imposed whenever imports of the product in question exceed the sum of (a) the base trigger level multiplied by the average quantity of imports in the three preceding years and (b) the absolute volume change in domestic consumption of the product in the most recent year for which data is available compared with the preceding year.[83] The trigger level must be at least 105 percent of the average quantity of imports in the preceding three years.[84]

Price-Based Sqfeguard. The additional duty that may be imposed if a Member uses the import price approach is established according to a sliding scale schedule set out in Article 5.5. It is based on the difference between the import price, defined as the c.i.f. import price, and the trigger price, which is defined as the average reference price during the period 1986–88. If the difference is less than ten percent no special safeguard duty may be imposed. As the difference increases so too does the amount of the additional duty permitted. Members

[81] In the case of bound tariffs, the reduction was to be from the bound rate, in the case of unbound tariffs, from the rate in effect on September 1986. *Modalities Agreement*, *supra* note 71, ¶ 3.

[82] In order to have recourse to the special safeguard provision, a Member must also have designated the product in question in its Schedule using the symbol SSG. *See* Article 5:1 of the Agreement. For details of the designations, *see* Committee on Agriculture, *Special Agricultural Safeguard*, Background Paper by the Secretariat, G/AG/NG/S/9 (Tables 2 and 3).

[83] Suppose, for example, that imports of wheat during the previous three years averaged 100,000 tons, reflecting 25 percent of total domestic consumption, and that domestic consumption had increased by 25,000 tons in the most recent year. The trigger level would be (100,000 × 110%) + 25,000 = 135,000 tons. The question of whether this safeguard can be imposed when the volume of domestic consumption is actually falling is an interesting one. In such an event, it would seem be more logical to apply the price-based safeguard rather than the volume-based safeguard.

[84] *See* TIMOTHY JOSLING, STEFAN TANGERMANN AND THORALD WARLEY, AGRICULTURE IN THE GATT 192(1996), for criticisms of the EC approach to trigger prices.

are encouraged not to use the import price method to impose special safeguards whenever import volumes are declining.

In the case of perishable and seasonable products, Article 5:6 allows for shorter time periods to be used in the case of a volume-based safeguard and for different reference prices for different periods in the case of a price-based safeguard. Other Members must be given the opportunity to consult with the Member introducing the measures on the conditions giving rise to the measure. Article 5.8 prohibits the use of general safeguards with respect to products that are subject to special safeguards under Article 5. Article 5 will remain in force for the duration of the reform process, for which Article 20 does not set an end-date.

(d) General Exceptions. In addition to the exceptions to the tariffication commitments provided in the Agreement on Agriculture itself, there are also the general, non-agriculture specific exceptions found in other trade agreements and in the GATT itself. Because of the prohibition on non-tariff measures in Article 4.2 of the Agreement on Agriculture, the scope of the existing agriculture-specific exception, GATT Article XI:2(c), appears now to be limited to fish and fish products and those agricultural products not referred to in Annex 1 of the Agreement on Agriculture.[85] The exception with the most continuing relevance within the GATT is Article XX, which was raised in cases filed by the United States and Australia concerning Korean measures affecting imports of fresh, chilled and frozen beef. The Appellate Body Report upheld the Panel's findings that a dual retail system requiring imported beef to be sold only in specialized beef stores or in separate sales areas in department stores under signs indicating that the beef was imported was contrary to Article III:4 and not justified under Article XX(d).[86]

(e) Dispute Settlement. The proper interpretation of Article 5 was central in the complaint by Brazil against certain measures adopted by the EC affecting the import of certain poultry products.[87] At issue was the following phrase in Article 5.1(b), which determined

[85] It has been pointed out that a breach of Article XI:1 necessarily constitutes a breach of Article 4.2 of the Agreement on Agriculture, Report of Panel, *Korea—Measures Affecting Imported of Fresh, Chilled and Frozen Beef*, WT/DS161/R and WT/DS169/R (2000), ¶ 7.62.

[86] *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R and WT/DS169/AB/R (2000). While not directly relevant to the Agreement on Agriculture, a series of Appellate Body and panel decisions involving agricultural products has produced a greater understanding of the scope of the Agreement on Safeguards and GATT Article XIX. For further discussion, see Chapter 18 of this book. The decisions are: Report of the Appellate Body, *Korea—Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/AB/R (1999); Report of the Appellate Body, *United States—Quotas on the Import of Wheat Gluten from the EC*, WT/DS166/AB/R (2000); Report of the Appellate Body, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R (2001); and Report of the WTO Panel, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products,* WT/DS207/R (2002).

[87] *EC—Measures Affecting Importation of Certain Poultry Products*, Report of the Appellate Body, WT/DS69/AB/R and Report of the Panel, WT/DS69/R (1998). A bilateral agreement between the EC and Brazil concluded during the Uruguay Round established a duty-free global annual tariff-rate quota for frozen poultry meat. The agreement was one of the results of a GATT Panel report in *EC—Oilseeds, supra* note 63, and it was implemented by EEC Regulation 774/94 (OJ 1994 L 91/1) and Regulation 1431/94 (OJ 1994 L 156/9). In the resulting Uruguay Round Schedule the EC reserved the right to introduce an additional duty on out-of-quota imports of poultry if the conditions of Article 5 were satisfied, *see* Regulation 3290/94 (OJ 1994 L 349/105) amending the regulation establishing the common organisation of the market in poultry (Regulation 2775/75 (OJ 1975 L 282/77) and Regulation 1484/95 (OJ 1994 L 145/47) on the detailed rules for the application of the safeguard mechanism.

when the special safeguard mechanism is triggered: " the price at which imports of that product may enter the customs territory of the Member . . . , as determined on the basis of the c.i.f. import price of the shipment concerned." The Appellate Body disagreed with the majority view of the Panel that this referred to the duty-paid price of the imports by pointing to the use of the words "customs territory" rather than "domestic market" in Article 5.1(b). It therefore interpreted the phrase to mean the c.i.f. price without customs duties and taxes, a conclusion supported by the rest of Article 5.1 and Article 5.5.[88]

2. Domestic Support

(a) The Provisions of the Agreement

Aggregate Measure of Support. The centerpiece of the commitments in the area of domestic support is the concept of the Aggregate Measurement of Support ("AMS"), which is defined in Article 1(a) as "the annual level of support, expressed in monetary terms, provided for an agricultural product in favor of the producers of the basic agricultural product or non-product-specific support provided in favor of agricultural producers in general . . . ."[89] Annex 3 to the Agreement gives detailed guidance on the calculation of the AMS. According to the provisions of this Annex, the AMS is to be calculated on a product-specific basis for each product receiving any type of non-exempt support. The purpose is to calculate the value of all of the financial factors that influence the decision of a farmer to produce a particular product.

Annex 3 identifies three kinds of support that are to be included in the calculation of the AMS:

- *Market price support*, which is based on the difference between a fixed external reference price and the applied administrative price; this is then multiplied by the quantity of production that is eligible to receive the applied administrative price. The applied administrative price is the price that the government determines producers should receive. The external reference price is based on the period from 1986 to 1988, and is country-specific. For a net exporting country, it is generally the average f.o.b. value for the product and for a net importing country it is generally the average c.i.f. value for the product, adjusted if necessary for quality differences.[90]
- *Non-exempt direct payments*, which consist of payments that are dependent on a "price gap" calculated on the difference between a fixed external reference price

[88] *EC—Poultry Products, supra* note 87, ¶ 146. According to the Appellate Body "to read the inclusion of customs duties into the definition of the c.i.f. import price in Article 5.1(b) would require us to read words into the text of that provision that simply are not there." Having reversed the Panel's interpretation of Article 5.1, the Appellate Body went on to make a finding on the consistency of the implementing EC Regulation with Article 5.5. The relevant issue was whether this provision allowed an importing Member to offer a choice to the importer between the use of the c.i.f. price, as provided in Article 5.5, and another method of calculation. It concluded that there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties. (¶ 165). Although Article 3.1 of Regulation 1484/95 used this method, the fact that it was only available at the request of the importer and if the price so established was higher than the applicable representative price meant that the EC had acted inconsistently with Article 5.5. The Appellate Body also concluded (¶ 170) that the alternative method of calculation, the representative price, was inconsistent with Article 5.5.

[89] "Basic agricultural product" is defined in as "the product as close as practicable to the point of first sale".

[90] In those situations where a fixed external reference price cannot be calculated, Annex 4 of the Agreement provides for the calculation of an Equivalent Measurement of Support, to be based on the applied administrative price and the quantity of the product benefiting from this price or, if this is not possible, on budgetary outlays. According to Article 1(c) of the Agreement, budgetary outlays include revenue foregone.

and the applied administrative price multiplied by the quantity of production that is eligible to receive the applied administrative price. If the direct payments are not dependent on a price gap, the AMS calculation will be based on budgetary outlays.

- *Other non-exempt measures,* such as input subsidies and marketing-cost reduction measures, which are to be valued based on budgetary outlays.[91]

Total AMS. Having calculated the AMS by product,[92] the next step is to calculate the Total AMS. This is defined in Article 1(h) as being the sum of all non-exempt domestic support provided to agricultural producers. It includes all aggregate measurements of supports for basic agricultural products, all non-product-specific aggregate measurements of support, and all equivalent measurements of support for agricultural products. In Part IV of each Member's schedules, a table can be found which consists of several columns. The first column specifies a Base Total AMS, that is a figure for the support provided during the base period. The final column in the table is the Final Bound Commitments, which represents the effect of the implementation of the reduction commitment on the Base Total AMS. Between these two figures are the Annual Bound Commitments, which represent the AMS commitments for each year of the implementation period.

Reduction of Total AMS. Under the Modalities Agreement, each developed country Member is committed to reduce its Total AMS by twenty percent during the six-year implementation period.[93] Developing countries are committed to a 13.3 percent reduction over ten years, while no reduction is required in the case of the least developed countries. In order to comply with the reduction commitments, the Current Total AMS in any given year must not exceed the corresponding Annual or Final Bound Commitments specified in Part IV of the Member's Schedule.

Exemptions. Article 6 of the Agreement exempts a number of domestic support measures from the reduction commitment:

- *Developing Country Exemptions.* Article 6.2 exempts three types of measure from the calculation of the Current Total AMS (i.e. the Total AMS provided during any year of the implementation period and thereafter) of developing countries: generally available agricultural investment subsidies; agricultural input subsidies generally available to low-income and resource-poor producers; and domestic support to encourage diversification from growing illicit narcotic crops.
- *De Minimis Exemptions.* Under Article 6.4 of the Agreement, Members are not required to include either product-specific or non-product specific domestic support that falls below a certain percentage of the total value of production of a basic agricultural product during the relevant year. The level of *de minimis* support is set at five percent for developed countries and ten percent for developing countries. By virtue of Article 7.2(b), where a Member's schedule does not include a Total AMS commitment, the level of support must not exceed the relevant *de minimis* level.
- *Blue Box Exemptions.* Article 6.5 of the Agreement exempts from the reduction commitment direct payments under production-limiting programs provided that they are based on fixed areas and yields, or on 85 percent or less of the base

[91] Where budgetary outlays do not reflect the full extent of the subsidy, provision is made for calculating the difference between the price of the product benefiting from the measure and a representative market price for a similar product, which is then multiplied by the quantity of the product benefiting from the measure.

[92] Non product-specific support is to be aggregated into one number, which is included in the Total AMS. See Annex 3, ¶ 1, of the Agreement.

[93] *Modalities Agreement*, *supra* note 71, ¶ 8.

level of production or, in the case of livestock payments, on a fixed number of head. Payments under such programs need not be decoupled from production. This is the notorious "Blue Box," which was considered necessary to secure an overall agreement on agriculture, especially from the point of view of the EC. The "Blue Box" represents the continuation of the special treatment afforded to agriculture in the history of the GATT, as the measures included within the box have some trade distortion effects or effects on production, despite the fact that they are described as "production-limiting".[94] However, the countries using these measures, notably the EC, claim that their effects are not as severe as those measures covered by the AMS reduction commitment.

- *The Green Box Exemptions.* The final group of measures that need not be included within the commitment to reduce the Total AMS is defined in Annex 2 of the Agreement on Agriculture. Annex 2(1) states:

> Domestic support policies for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade distortion effects or effects on production. Accordingly, all policies for which exemption is claimed shall conform to the following basic criteria:
> (i) the support in question shall be provided through a publicly-funded government program (including government revenue foregone) not involving transfers from consumers; and,
> (ii) the support in question shall not have the effect of providing price support to producers.

Section 2 to 13 of the Annex goes on to list twelve specific types of policies, the so-called "Green Box" policies that will be excluded from the reduction commitment. Such policies are divided into two categories, (a) general services, such as public stockholding for food security purposes and domestic food aid, and (b) direct payments to producers, such as payments for relief from natural disasters and payments under environmental or regional assistance programs. If excluded, it is up to the Member to ensure that such policies remain consistent with the requirements of Annex 2. Article 7.2(a) makes it clear that in the event that they do not, they will be included in future calculations of the Total AMS.

The types of action that may be brought with respect to a domestic subsidy that fully conforms with a Member's commitments are limited by Article 13 of the Agreement, the "Peace Clause", which is discussed in Section 4 below.

(b) Dispute Settlement. Only one opportunity has arisen to date for an interpretation of the provisions of the Agreement on domestic support. This involved a claim by the United States that Korea had exceeded its Current Total AMS commitment levels for 1997 and 1998.[95] The first issue was what Korea's commitment level was, which was confused by the fact that Korea had provided two sets of figures, one in parentheses, in its

[94] On this point, at a meeting of the Agriculture Committee on June 28–29, 2001, Argentina requested the EC to supply data on its direct payment supports in 1992 for specific cereals under its "blue box" programs. The EC response was that a breakdown for individual cereals was not available because the payments were made on fixed areas and yields. Argentina reserved the right to raise this issue again in the Agriculture Committee, and is considering possible further steps. (G/AG/R/27, ¶¶ 2–16). *See* Swinbank, *supra* note 74, at 410; Joseph McMahon, *The Common Agricultural Policy: From Quantity to Quality* 53 NORTHERN IRELAND LEGAL QUARTERLY, 9, 22 (2002).

[95] *Korean Beef, supra* note 86.

schedule. The Appellate Body held that the Panel had selected the wrong set of figures, because it had failed to refer to an explanatory footnote in the schedule.[96]

The next issue was whether the Current AMS for beef should have been included in Korea's Current Total AMS. The Panel rejected Korea's claim that the figure for beef was below the ten percent *de minimis* level and therefore did not have to be included in Current Total AMS. The Appellate Body agreed with the Panel that the Current AMS had to be calculated based on the production that was *eligible* to receive the applied administered price, rather than the amount of production actually purchased.[97] However, in finding that Korea had exceeded the *de minimis* threshold for beef, the Panel had used an external reference price based on 1989–91 data, apparently on the assumption that this would be more favorable to Korea than data for the period specified in Annex 3 to the Agreement, 1986–88. The Appellate Body reversed this finding, saying that the Panel should have used 1986–88 data.[98] Since no such data was in the record, the Appellate Body was forced to reverse the Panel's overall finding that Korea had exceeded its Current Total AMS.

3. Export Subsidies

(a) The Provisions of the Agreement.

(i) Reduction Commitments. Article 8 of the Agreement prohibits Members from granting export subsidies that do not conform with the Agreement and the commitments in their Schedules. Article 9.1 lists the six types of export subsidy that are subject to the reduction commitments. [99] These are:

- Direct export subsidies
- Government exports of non-commercial stocks at a price lower than the domestic market price
- Export payments financed by government action (whether or not a charge on the public account is involved), including payments financed by a levy on the product
- Subsidies to reduce the cost of marketing exports, including handling, upgrading and other processing costs, and costs of international transport and freight
- Internal transport and freight charges on terms more favorable than for domestic shipments, if provided or mandated by governments
- Subsidies on agricultural products contingent on their incorporation in exported products

Under Article 3.3 a Member may not provide subsidies in these categories in excess of the commitments specified in Section II of Part IV of its Schedule. In contrast to the AMS Schedule, this part of the Schedule is disaggregated and maximum annual expenditure and volume levels are established for twenty-two different product categories.[100] Article 3.3 also prohibits Members from providing export subsidies for products not specified in the Schedule.

[96] *Korean Beef,* Report of the Appellate Body, *supra* note 87, at ¶ 105.

[97] *Id.,* at ¶ 122. The Appellate Body agreed with the Panel that Korea had also made errors with respect to the calculation of the market price support, the total value of production and the classification of certain support as "non-product specific support" when it was in fact product-specific. (¶¶ 118–121).

[98] *Id.,* at ¶ 126.

[99] Export subsidies are defined in Article 1(e) as "subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement."

[100] These 22 categories are: wheat and wheat flour, coarse grains, rice, oilseeds, vegetable oils, oilcakes, sugar, butter and butter oil, skimmed milk powder, cheese, other milk products, bovine meat, pig meat, poultry meat, sheepmeat, live animals, eggs, wine, fruit, vegetables, tobacco and cotton.

The export subsidy commitments relate to both the amount of money spent and the quantity exported. Under the Modalities Agreement, over the six-year implementation period, developed country Members are required to reduce their expenditure on export subsidies to a level 36 percent below the levels existing in the 1986–1990 base period, and to reduce the quantities benefiting from export subsidies by 21 percent.[101] The equivalent figures for developing countries are 24 percent and 14 percent, and Article 15.2 of the Agreement provides them with a ten-year period over which to make these reductions.[102] Least developed country Members are not required to undertake any reduction commitments.

Members are given a certain degree of flexibility with regard to their export commitments. Article 9.2(b) allows a Member to exceed its commitments in any given year by up to three percent of expenditure and 1.75 percent of the exported quantities, provided that it does not exceed the overall commitments over the entire implementation period. As in the case of domestic subsidies, export subsidies are subject to Article 13 of the Agreement, the Peace Clause, which limits the types of action that can be taken against subsidies and which is discussed in Section 4 below.

(ii) Anti-Circumvention Provisions. Article 10 contains various provisions designed to prevent circumvention of the export subsidy commitments. Under Article 10.1 Members may not apply subsidies of a type not listed in Article 9.1 (e.g. export credits or export insurance) in ways that circumvent their export subsidy commitments. This prohibition appears to apply to both scheduled and unscheduled products. Under Article 10.2 Members undertake to work toward developing disciplines governing the provision of export credit, export credit guarantees, and insurance programs.[103] Article 10.4, covering food aid, specifies that Members must ensure that:[104]

- the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries
- international food aid transactions are carried out in accordance with the FAO "Principles of Surplus Disposal and Consultative Obligations"
- the aid is provided to the extent possible in fully grant forms or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.

As a further means of avoiding circumvention of the export subsidy commitments, Article 11 restricts the export subsidy on a processed product to the amount that would be payable on the basic product.

(b) Dispute Settlement. One of the more important disputes in this area involved claims by the United States and New Zealand that Canada had provided export subsidies for dairy products in excess of its quantity commitments through the provision by producers of

[101] *Supra* note 71, Annex 8.

[102] Under Article 9.4, during the six-year implementation period, developing countries do not have to reduce two categories of subsidy: those designed to reduce the cost of export marketing and preferential internal transport and freight charges; provided that they are not applied in a manner that circumvents the reduction commitment.

[103] These efforts have been unsuccessful to date. *See* G/AG/NG/S/13, the WTO Secretariat background paper on export credits for details of these efforts and the nature of the problem posed by these measures. *See also* G/AG/NG/S/12 and Add.1.

[104] On the development of food aid under the Agreement, see G/AG/NG/S/3. See also Melaku Desta, *Food Security and International Trade Law* 35 JOURNAL OF WORLD TRADE 449 (2001).

low-cost milk for export under a program administered by provincial marketing boards.[105] The issue was whether the provision of the milk constituted an export subsidy. The Appellate Body first reversed the Panel's finding that the provision of the milk constituted the "provision by governments or their agencies of direct subsidies, including payments-in-kind", within the meaning of Article 9.1(a). The Appellate Body agreed with the Panel that the marketing boards were government agencies, even though their officers included dairy producers.[106] The marketing boards derived their powers from government, and they exercised government functions. However, the Appellate Body held that the Panel had wrongly assumed that a payment-in-kind was a direct subsidy, without considering whether it constituted a benefit.[107] On the other hand, the Appellate Body agreed with the Panel that the provision of milk did fall within the definition of Article 9.1(c), "payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved . . . ." It held that the term "payment" included payments-in-kind, and that although the cost of selling milk at a reduced price for exports was borne by the producers rather than the government, governmental action was indispensable to enable the supply of milk for export.[108]

In an attempt to comply with the ruling by the Appellate Body, Canada changed its program to allow the producers to freely negotiate the price of the milk with the exporters. The United States and New Zealand challenged the new program under Article 21.5 of the Dispute Settlement Understanding.[109] The Panel found that the new program still involved payments on the export of milk "that are financed by virtue of government action" within the meaning of Article 9.1(c), but the Appellate Body reversed. In order to determine whether the sale of the milk by the producers to the exporters involved "payments", the Panel had compared the prices of the sales with the domestic market price. The Appellate Body said that this was incorrect, as that price was an administered price fixed by the Canadian government and was no doubt favorable to the producers. Thus, the fact the milk was sold for export at a lower price did not necessarily mean that the producer had "foregone a portion of the proper value of the milk to it."[110] The Appellate Body found that the alternative benchmark used by the panel, world market prices, was equally invalid, but for the opposite reason—it was possible that the export milk could be sold at world market prices *because* it was receiving a subsidy.[111] The Appellate Body held that the appropriate standard for determining whether the sale of milk to exporters involved a "payment" within the meaning of Article 9.1(c) was the average total cost of production. Since the Panel had made no factual findings on this issue, the Appellate Body felt itself unable to complete the analysis.[112] Because of this

[105] *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Appellate Body, WT/DS103/AB/R and WT/DS113/AB/R; Report of the Panel, WT/DS103/R and WT/DS113/R (1999). The case also involved a challenge with respect to Canadian tariff-rate quotas on imports of milk and cream. This aspect of the case did not involve an interpretation of the Agreement on Agriculture, but rather Article II:1(b) of the GATT 1994. The Appellate Body held that Canada's restriction of access to its tariff-rate quota on fluid milk to consumer packaged milk was consistent with its obligations under Article II:1(b), but that its limiting such access to entries valued at less than C$20 was inconsistent.

[106] *Id.,* Report of the Appellate Body at ¶ 102.

[107] *Id.,* at ¶ 92.

[108] *Id.,* ¶¶ 113, 122.

[109] *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Recourse to Article 21.5 of the DSU by New Zealand and the United States,* Report of the Appellate Body, WT/DS103/AB/RW, WT/DS113/AB/RW, Report of the Panel, WT/DS103/RW, WT/DS113/RW (2001).

[110] *Id.,* Report of the Appellate Body at ¶ 81.

[111] *Id.* at ¶ 84.

[112] *Id.,* at ¶ 103.

conclusion, the Appellate Body did not rule on the Panel's finding that the sales were "financed by virtue of government action", although it did say that it disagreed with the Panel's finding that the program "oblig[ed] producers, at least *de facto,* to sell outside-quota milk for export."[113]

After the Appellate Body ruling, the United States and New Zealand filed a second request for an Article 21.5 Panel. Applying the cost of production standard enunciated by the Appellate Body, the Panel found that the sale of milk for export did constitute "payments" within the meaning of Article 9.1(c), since the price was little more than half of the cost of production.[114] The Panel also found that the payments "were financed by virtue of government action", since the overall milk program encouraged production of more milk than needed to fill quotas for the domestic market and producers had no choice but to sell the over-quota milk for export or, at much lower prices, for animal feed.[115] It accordingly concluded that the sale of milk to exporters did constitute a subsidy within the meaning of Article 9.1(c).[116]

The dispute concerning U.S. tax treatment of Foreign Sales Corporations involved claims under the Agreement on Agriculture, although the case was not limited to trade in agricultural products.[117] The Appellate Body reversed the Panel's finding that the FSC measure, a tax exemption for a portion of export-related foreign source income, was a subsidy "to reduce the cost of marketing exports" under Article 9.1(d) of the Agreement and therefore violated Article 3.3.[118] As a consequence, the Appellate Body had to consider the alternative claim that there was a breach of Articles 8 and 10.1. It first found that the FSC measures were export subsidies within the definition in Article 1(e) of the Agreement, since they constituted "revenue foregone" and were "contingent on export performance". It observed that under the Agreement Members were obliged not to provide export subsidies of the type listed in Article 9.1 for scheduled products in excess of the scheduled commitments and not to provide any Article 9.1 subsidies with respect to unscheduled products. Although the FSC measures did not fall within the Article 9.1 definitions, which did not include revenue foregone, they nevertheless provided a way to circumvent the commitment not to provide export subsidies on unscheduled products in violation of Article 10.1,[119] since

> Members would certainly have 'found a way round', a way to 'evade', this prohibition if they could transfer, through tax exemptions, the very same economic resources that they are prohibited from providing in other forms under Article 3.3 and 9.1.[120]

With respect to scheduled agricultural products, the Appellate Body concluded that the unlimited nature of the FSC subsidies meant that there was a threat of circumvention

[113] *Id.* at ¶ 117.
[114] Report of the WTO Panel, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Second Recourse to Article 21.5 of the DSU by New Zealand and the United States,* WT/DS103/RW2, WT/DS113/RW2 (2002), ¶ 5.89.
[115] *Id.* at ¶ 5.134.
[116] The Panel also found in the alternative (¶ 5.174), in case the Appellate Body reversed the Article 9.1(c) finding, that the program constituted an export subsidy "not listed in paragraph 1 of Article 9 . . . applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments", in violation of Article 10.1 of the Agreement.
[117] Report of the Appellate Body, *United States—Tax Treatment of "Foreign Sales Corporations"*, WT/DS108/AB/R (2000).
[118] *Id*, ¶¶ 131–132.
[119] Article 10.1 provides that "[e]xport subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to leads to, circumvention of export subsidy commitments. . . ."
[120] *Supra,* n. 117, ¶ 150.

of the scheduled commitments, and therefore a violation of Article 10.1. The decision of the Appellate Body confirms the intimate links between Part V of the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures.

4. The "Peace Clause"

The Blair House agreement between the United States and the EC included a "peace clause" under which the parties agreed to exercise "due restraint" in the initiation of countervailing duty investigations or other GATT challenges to various categories of subsidies. The scope of this particular undertaking was expanded when the agreement was "renegotiated" in 1993, for example, the duration of the peace clause was extended from six to nine years and the scope of the agreement was broadened. This bilateral commitment between the United States and the EC was extended to all other Members through Article 13 of the Agreement on Agriculture. Article 13 limited in the following manner the type of actions that could be brought against domestic and export subsidies on agricultural products.

- Green Box subsidies as defined in Annex 2 of the Agreement were completely exempt from challenge.
- Domestic and export subsidies that conform to a Member's commitments under the Agreement could only be subjected to countervailing duties if "a determination of injury or threat thereof" was made in accordance with GATT Article VI and Part V of the SCM Agreement. As those provisions do not ever permit the imposition of countervailing duties in the absence of the finding of an injury or threat of injury, the Peace Clause limitation appears meaningless.[121] Presumably, it was included as a rhetorical "face-saver", to enable one of the negotiating parties to claim to its domestic constituency that it had gained an important concession. In addition, under Article 13, "due restraint shall be shown in initiating any countervailing duty investigations." It is not clear what this language means, and again it may have been included as a "face-saver".[122]
- Domestic subsidies that complied with a Member's commitments could not be challenged either (a) as a violation of GATT Article XVI or of the SCM Agreement, or (b) as a "non-violation" nullification or impairment of benefits,[123] provided that they did not grant support to a specific commodity in excess of that decided during the 1992 marketing year.

[121] *See* GATT Article VI:6(a).

[122] Under United States law, for example, a countervailing duty investigation must be initiated upon the filing of a petition in proper form, and the government has no discretion to exercise "due restraint". The due restraint provision may simply mean that Members agree not to self-initiate investigations as opposed to initiating upon a petition filed on behalf of a domestic industry. If so, it is a fairly meaningless concession because it is extremely rare for governments to self-initiate countervailing duty investigations. The United States has only self-initiated one countervailing duty investigation, *Certain Softwood Lumber From Canada,* 57 Fed. Reg. 22570 (1992). A GATT Panel held that the initiation was not inconsistent with Article 2 of the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade. Report of the GATT panel (adopted) *United States—Measures Affecting Imports of Softwood Lumber From Canada,* BISD 40th Supp. 358 (1994).

[123] Most actions brought in the WTO Dispute Settlement system are based on alleged violations of the WTO Agreements. However, an action can be brought even in the absence of a violation where the Member claims that benefits accruing to it under the GATT (e.g. tariff concessions) have been "nullified or impaired" by the action of another member, even though that action did not violate a WTO Agreement. Such "non-violation" actions are rare. *See* Chapter 29 of this book.

- Export subsidies that complied with a Member's commitments could not be challenged as a violation of GATT Article XVI or Part III of the SCM Agreement. This appears to have left open the possibility of a non-violation action.

The Peace Clause did not prevent disputes from emerging, as evidenced by the discussion above.[124] However, the nature of the commitment of the Members to exercise "due restraint" remains ambiguous and no Member has yet initiated a non-violation action with respect to export subsidies.[125]

5. Developing Countries

Like most of the WTO Agreements, the Agreement on Agriculture contains a number of provisions granting special and differential treatment to developing and least-developed countries. Special attention has also been paid to the impact of the changes required by the Decision on net food-importing countries.

(a) Special and Differential Treatment. Examples of special and differential treatment for developing countries, such as the lower reduction commitments and a longer implementation period, have already been described. To summarize the most important Special and Differential Treatment provisions:

> *Market Access.* Annex 5B exempts primary agricultural products that are the predominant staple in the diet of a developing country from the requirement to tarrify non-tariff barriers.
>
> *Domestic Support Measures.* The commitments for domestic support reduction are lower for developing countries and may be implemented over a longer period. Developing countries are entitled to a greater *de minimis* percentage than developed countries and certain programs are exempted from the reduction commitments. Least developed countries are not required to make any commitments.
>
> *Export Subsidies*. As in the case of domestic subsidies, developing companies have lower commitment requirements and a longer period of time over which to implement them. Developing countries were not required to reduce certain types of subsidy until 2000. Again, least developed countries are not required to make any commitments.
>
> *Export Restrictions.* Article 12 of the Agreement requires Members introducing export prohibitions or restrictions on foodstuffs to relieve critical domestic shortages, in accordance with GATT Article XI.2(a), to notify the Committee on Agriculture and to consult with any importing country upon request. Under Article 12.2 of the Agreement, however, these requirements do not apply to developing country Members unless they are net food exporters of the foodstuff in question.

(b) The Net Food-Importing Developing Countries Decision. The special treatment accorded to the least-developed countries is further enhanced by the Decision on

[124] *See also* WT/DS167/1, *United States—Countervailing Duty Investigation with Respect to Live Cattle From Canada*, a Canadian request for consultations concerning the initiation of a countervailing duty investigation by the United States, made on 22 December 1998, with respect to live cattle from Canada. Canada contended that initiation of the investigation was inconsistent with U.S. obligations under Article 13 of the Agreement on Agriculture, as well as obligations under the Agreement on Subsidies and Countervailing Measures. The matter was dropped after the investigation resulted in a negative determination.

[125] For further discussion, *see* Didier Chambovey, *How the Expiry of the Peace Clause (Article 13 of the WTO Agreement on Agriculture) Might Alter Disciplines on Agricultural Subsidies in the WTO Framework,* 36 J. WORLD TRADE 305 (2002).

Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries ("NFIDC"),[126] which was reached at the conclusion of the Uruguay Round. The Decision recognizes that implementation of the reform package in agriculture may have negative effects on these countries in relation to the supply of food imports on reasonable terms and conditions.

To ameliorate these negative effects, it was agreed that the level of food aid would be reviewed periodically and that guidelines would be adopted to ensure that an increasing proportion of such aid is in grant form and/or supplied under appropriate concessional terms. In addition, greater consideration would be given to providing technical and financial assistance for agricultural development and infrastructure projects in these countries. Under paragraph 4 of the Decision any future agreement on agricultural export credits would make appropriate provisions for the differential treatment of the least developed and net food-importing countries. Finally, under paragraph 5 those developing countries experiencing short-term difficulties in financing their normal level of commercial imports could draw on the resources available from international financial institutions, the IMF and World Bank, either existing or specially created to deal with this problem. Subsequent Ministerial Conferences and the Committee on Agriculture were to review and monitor the provisions of this decision.[127]

The limited impact of the Decision led the Committee on Agriculture to make a number of recommendations on the NFIDC to the Doha meeting of the General Council of the WTO in September 2001.[128] With respect to food aid, the Committee recommended that early action be taken by food aid donors to review their contributions with a view to improving the identification and meeting of the food aid needs of least-developed and net food-importing developing countries. Donors of food aid were also encouraged to ensure that the levels of food aid to developing countries are maintained during periods of rising world prices. The Committee recommended that food aid for the least developed countries be fully in grant form and that food aid for the remaining net-food importing countries be in grant form to the maximum extent possible.

The Committee also recommended that developed country Members should continue to give full and favorable consideration to technical and financial assistance to improve agricultural productivity and infrastructure in the context of their aid programs. In addition, the General Council was urged to encourage the relevant international development organizations to enhance their provision of, and access to, technical and financial assistance for this priority area. Finally, the Committee recommended the establishment of an inter-agency panel to report on the question of finance to the General Council not later than 30 June 2002.[129] The mandate of the Panel would be to explore mechanisms to improve access by the least-developed and net food-importing developing countries to multilateral programs and facilities to assist with short-term difficulties in financing normal levels of commercial imports of basic foodstuffs. This would include the concept and feasibility of a proposal submitted to the Committee for a Food Financing

[126] The decision is reproduced in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999) at 392.

[127] For details of action taken within the framework of the Decision as notified by the Members, *see* GA/AG/NG/S/4.

[128] *See* G/AG/11 for further details.

[129] The Panel would be constituted by financial and commodity experts and would involve the participation of the World Bank, the IMF, the FAO, the International Grains Council and the UNCTAD.

Facility.[130] The Doha Ministerial Conference Decision on Implementation-related Issues and Concerns duly noted the report of the Committee on Agriculture.[131]

The Inter-Agency Panel Report was published in June 2002 and it notes that there has been no clear upward trend in the aggregate food import bills of the least developed and net-food importing developing countries since the Agreement on Agriculture entered into force.[132] The Report offers several points to be considered in the impending review of the IMF's Compensatory Financing Facility.[133] With respect to the proposed Food Financing Facility, it concluded that an *ex-post* revolving fund to support food imports in times of need would be of limited usefulness, but the feasibility of an *ex-ante* financing mechanism aimed at food importers should be explored.[134] The report was to be considered at the General Council meeting of 31 July but it was postponed to its next meeting, at which the Chairman of the Committee on Agriculture was to report on the consultations held with interested Members on how to advance the proposed *ex-ante* financing mechanism. However, as of the time of writing (August 2004), consultations were still continuing. It remains to be seen whether any substantial action will be taken to assist the least-developed and net food-importing developing countries. Indeed the Agreement on Agriculture has produced very limited results for developing countries and it is no surprise that they are seeking a more equitable outcome in the negotiations for a renewed Agreement on Agriculture.[135]

IV. Towards a New Agreement?

A. Introduction

Article 20 of the Agreement on Agriculture recognized that the process of reform is ongoing, and it was agreed that negotiations for continuing that process would begin one year before the end of the implementation period. The objective of such negotiations was to continue fundamental reforms leading to "substantial progressive reductions in support and protection." After the failure of the Ministerial Conference in Seattle, a new round of agricultural negotiations was launched on March 23, 2000, in Geneva. Phase One of the negotiations ended in early 2001 after proposals had been submitted on behalf of one hundred and twenty-one members, and Phase Two concentrated on in-depth work on the options for reform set forth in the proposals.

The Doha Declaration not only reconfirmed the commitment of the Members to the Article 20 program of long-term reform but also committed the Members to "comprehensive negotiations aimed at substantial improvements in market access; reductions of, with a view to phasing out all forms of export subsidies; and substantial reductions in trade-distorting domestic support."[136] Special and differential treatment of developing countries would, according to the Declaration, be an integral part of all elements of the

[130] The proposal for the Facility, which would have resources of around $1.4 billion, was made by Cuba, Dominican Republic, Egypt, Honduras, Ivory Coast, Jamaica, Kenya, Mauritius, Morocco, Pakistan, Peru, Senegal, Sri Lanka, St. Lucia, Trinidad and Tobago, Tunisia, and Venezuela. *See* G/AG/W/49 and Add. 1 and Corr.1.

[131] WT/MIN(01)/17, point 2.2.

[132] WT/GC/63 (G/AG/13), ¶ 160(a).

[133] *Id.*, ¶ 168(a).

[134] *Id.*, ¶ 168(b).

[135] On the issue of trade performance of developing countries, *see* WTO Secretariat Study, G/AG/NG/S/6 and Rev.1—*Agricultural Trade Performance of Developing Countries 1990–1999*.

[136] WT/MIN(01)/DEC/W/1, ¶ 13.

negotiations. The Declaration also takes note of "the non-trade concerns" reflected in the negotiating proposals submitted by Members, and confirms that they will be taken into account as reflected in Article 20 of the Agreement on Agriculture. The modalities for the negotiation of new commitments were to be established by 31 March 2003, and all the negotiations initiated under the Doha Declaration were to be concluded, as a single package, by 1 January 2005. The members failed to meet the March 2003 deadline for establishing the modalities, and the deadline for completion of the negotiations has been delayed as a result of the General Council meeting held in Geneva in July 2004. See subpart C below.

B. The Negotiating Proposals

The proposals for the next stage of the reform process reveal a range of approaches. Some Members, notably the United States and the Cairns Group, view the negotiations as a major step, or perhaps the final step, in the full integration of agriculture into the disciplines of the WTO. The EC and Japan are part of another group of Members that seek to limit the extent of the changes to the Agreement or to promote changes that would allow them to maintain their existing agricultural policies. A final group, which includes most developing countries, wishes to ensure a more reasonable balance of the benefits and obligations under the Agreement that would promote the process of sustainable development. Each of these approaches is discussed below based on the framework provided by the Agreement. The discussion ends by addressing the issue of non-trade concerns, which includes the relatively new concept of multifunctionality, which is seen by many countries as a pretext on the part of the EC for justifying continued protection.

1. Market Access

The U.S. objective for the market access negotiations is "to maximize market access opportunities for all countries and to make more uniform the level and structure of tariff bindings for all countries in all products."[137] The U.S. proposal calls for a substantial reduction or elimination of disparities in tariff levels and for a reduction of tariff escalation. The Special Safeguard provision in Article 5 of the Agreement would be abolished and existing tariff rate quotas would be subject to substantial increases over an implementation period.[138] The U.S. proposal is supported by the Cairns Group, whose goal is to achieve market access for agricultural goods on similar terms to those applying to other goods.[139]

Other Members have opposed such a dramatic change in market access opportunities. Japan, for example, argues for the retention of the special safeguard provision of the

[137] G/AG/NG/W/15, *U.S. Proposal for Comprehensive Long-Term Agricultural Trade Reform*. *See also,* G/AG/NG/W/32, *Statement by the United States to the Second Special Session of the Committee on Agriculture*.

[138] *See* G/AG/NG/W/58, *U.S. Proposal for Tariff Rate Quota Reform*. The proposal refers to various background papers prepared by the Secretariat. On tariff rate quotas, see various background papers of the WTO Secretariat, G/AG/NG/S/7, 8, 8/Rev.1, and 20.

[139] The Cairns group now includes Argentina, Australia, Bolivia, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, the Philippines, South Africa, Thailand and Uruguay. *See* G/AG/NG/W/54, *Cairns Group Negotiating Proposal—Market Access,* and statement by Australia on the proposal, G/AG/NG/W/60, in which it is noted that the average tariff on agricultural products is more than eight times higher than the average tariff on industrial products. *See also, e.g., G*/AG/NG/W/12, *WTO Negotiations on Agriculture Market Access—A Negotiating Proposal by Canada,* and a statement by Canada in support of the Cairns Group proposal, G/AG/NG/W/23.

Agreement, although it has suggested that the mechanism become more transparent.[140] Japan also clams that the existing system has a fundamental problem of imbalance in rights and obligations between importing and exporting countries, and therefore should be improved.[141] In essence, Japan claims that the Agreement endorses a particular model of agriculture that it cannot support, as the Agreement, in its opinion, does not recognize the multifunctionality of agriculture. Whilst supporting improvements in market access, the EC proposes establishment of a close link between market access and fair competition.[142] This would be accomplished through more effective protection against usurpation of names for agricultural products, greater protection of the right to use geographical indications, and improved regulation of labeling.[143] Such an approach seeks recognition of the multifunctionality of agriculture, and in particular the consumer aspects of this concept.

The developing countries that are not members of the Cairns Group have expressed their concerns about the limited results achieved by the Agreement on Agriculture.[144] One developing country submission lists the particular market access problems facing developing countries, including dirty tariffication and tariff peaks, tariff escalation, unweighted tariff reductions, complex and non-transparent tariffs, and various problems with tariff quotas.[145] The developing countries naturally seek to resolve these particular problems to ensure that the renegotiated Agreement on Agriculture results in greater market access and increased exports to developed countries.[146]

None of the negotiating proposals has seriously questioned the continuing expansion of the market access commitments undertaken in the Agreement on Agriculture. The only questions relate to the pace of expansion and the need to ensure equitable distribution of its benefit. The Doha Declaration calls for substantial improvements in market access; however, it is unlikely that such improvements will achieve the goal of the Cairns Group, i.e., similar market access conditions to those applying to non-agricultural products. The principal challenge will be to ensure that all developing countries derive real benefits from the new commitments, in contrast to their limited gains from the Uruguay Round Agreement.

[140] G/AG/NG/W/91, ¶¶ 14–15 and G/AG/NG/W/116, *Statement by Japan to the Fifth Special Session of the Committee on Agriculture*. *See also,* an earlier statement by Japan to the Second Special Session of the Committee on Agriculture, G/AG/NG/W/27.

[141] *Id*, para. 9. Other Members support this approach, *see* G/AG/NG/W/98, *Korea—Proposal for WTO Negotiations on Agriculture*, ¶ 3 and G/AG/NG/W/101, *Norway—WTO Agriculture Negotiations*, ¶ 12.

[142] G/AG/NG/W/90, *EC Comprehensive Negotiating Proposal*, ¶ 3. *See also,* G/AG/NG/W/18, *Communication from the EC—Food Quality—Improvement in Market Access* and EC "non-paper" submitted to the Special Session of the Committee on Agriculture Informal Meeting, 24–26 September 2001, available at http://www.europa.eu.int/comm/agriculture/external/wto/officdoc/geogr_en.htm.

[143] Switzerland has expressed support for these proposals, G/AG/NG/W/94, ¶¶ 5.1 and 5.2.

[144] *See* in particular, G/AG/NG/W/130, WTO Negotiations on Agriculture, proposal by Nigeria, p.1.

[145] G/AG/NG/W/37, *Submission on Market Access* by Cuba, the Dominican Republic, EL Salvador, Honduras, Kenya, India, Nigeria, Pakistan, Sri Lanka, Uganda and Zimbabwe. This submission cites a number of studies that show that developing countries have not yet benefited to the extent anticipated. *See also,* proposals by India on Market Access, G/AG/NG/W/102, pp. 6–9 and statements by India to the Fourth and Sixth Special Sessions of the Committee on Agriculture, G/AG/NG/W/114 and G/AG/NG/W/176.

[146] In addition to the proposals noted above (notes 144 and 145), *see also,* proposals by Swaziland (G/AG/NG/W/95), Mauritius (G/AG/NG/W/96), Small Island Developing States (G/AG/NG/W/97), Mali (G/AG/NG/W/99), CARICOM (G/AG/NG/W/100), Morocco (G/AG/NG/W/105), Egypt (G/AG/NG/W/107), Congo (G/AG/NG/W/135), Kenya (G/AG/NG/W/136), Senegal (G/AG/NG/W/137), Mexico (GA/NG/W/138), Jordan (G/AG/NG/W/140), the African Group (G/AG/NG/W/142), Namibia (G/AG/NG/W/143) and Burkina Faso (G/AG/NG/W/185).

2. Domestic Support

The Cairns Group proposal notes that assuming that the EC, Japan and the United States have met their domestic support reduction commitments by the end of the Uruguay Round Agreement implementation period, they will still be providing over US $110 billion annually in domestic support payments, in addition to the unlimited amounts permitted under the Green and Blue Boxes.[147] Since the members of the Cairns Group are highly competitive agricultural producers, they advocate a major reduction (fifty per cent in the first year of the implementation period) in trade- and production-distorting domestic support.[148] They also propose the disaggregation of the reduction commitments to ensure that support for all agricultural products is reduced. There would be no Blue Box, and the criteria governing the Green Box policies would also be revisited to ensure that these policies have no or at least minimal effects on trade and production.

The United States is also concerned about the Green Box criteria, and it has proposed simplifying the disciplines on domestic support.[149] Existing support, irrespective of which Box it is currently in, would be classified into two categories: exempt support, defined as having, at most, minimal distorting effects on production and trade, and non-exempt support, which would be subject to reduction commitments. In contrast to the Cairns Group proposal, the reduction commitments would be achieved in equal installments over the implementation period.

The EC approach to the issue of domestic support asserts that the arrangements in the Agreement "constitutes the right framework for addressing domestic support issues."[150] Although it agrees that the criteria for the Green Box should be revisited to ensure that while meeting important societal objectives these policies continue to have minimal impact on trade, it advocates retention of the Blue Box. Retention of the Blue Box is supported by Japan who, like Korea, has proposed an adjustment to the scope and criteria of the Green Box so as to reflect the multifunctionality of agriculture.[151]

A number of developing countries have made similar proposals on domestic support issues.[152] It has been proposed that the *de minimis* threshold for developed countries should be reduced or eliminated, while at the same time developing countries should be given more flexibility in its use. It is also proposed that support reductions should be on a disaggregated basis. The Green Box would be re-examined and current Green Box measures would be quantified and disciplined. The Blue Box would either be eliminated over a period of time, or at least there would have to be substantial reductions in the level of subsidies allowed within it. A special box, the Development Box, would be created for developing countries to allow these countries to deviate from their commitments to meet

[147] G/AG/NG/W/40, *Statement by Australia*, introducing the Cairns Group proposal on domestic support to the Third Special Session of the Committée on Agriculture. *See also,* G/AG/NG/W/13, Proposal by Cuba, Dominican Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Sri Lanka and El Salvador on Green Box Subsidies, which offers statistics on support levels in the OECD countries.

[148] G/AG/NG/W/35, page 2. Canada took up this idea in a separate proposal on domestic support, G/AG/NG/W/92. *See also,* G/AG/NG/W/112 for a statement by Canada on the proposal.

[149] G/AG/NG/W/16. *See also* G/AG/NG/W/15, *supra* note 137 and G/AG/NG/W/49, *Statement by the United States on Domestic Support Reform* to the Third Special Session of the Committee on Agriculture.

[150] *Supra* note 142, ¶ 10.

[151] Japan, *supra* note 140, ¶¶ 17–22 and Korea, *supra* note 141, ¶¶ 20–23. This approach is supported by a number of European countries, *see* for example, G/AG/NG/W/103, *Proposal by Poland*, which suggests that every Member should have the right to introduce and maintain Blue Box payments.

[152] *See* the proposals listed *supra* note 146 and the proposal by Cuba and other countries, *supra* note 145. *See also,* G/AG/NG/W/106, Proposal by Turkey, and the accompanying statement in G/AG/NG/W/172.

their development and food security needs. If a special Development Box is not created, the Green Box would have to be expanded to cover the trade, financial and development needs of developing countries.

The area of domestic support represents a great challenge for the WTO Members in the forthcoming negotiations, as the actual discipline imposed in this area is weak, largely because of the introduction of the Blue Box. The most significant change for the developing countries would be the inclusion of a Development Box as part of a wider movement to make the WTO more responsive to the development needs of these countries.

3. Export Subsidies

It is interesting to note that whereas the Doha Declaration calls for substantial improvements in market access and substantial reductions in trade-distorting domestic support but without their elimination, it calls for the reduction "with a view to phasing out" of all forms of export subsidies.[153] This position on export subsidies is consistent with the Cairns Group proposal, which is that the elimination be achieved following a substantial reduction, of at least fifty per cent, in budgetary outlays and export quantities benefiting from export subsidies in the first year of the implementation period.[154] The U.S. proposal mirrors that of the Cairns Group and also calls for the elimination of variable export taxes and the introduction of disciplines governing export-state trading enterprises.[155] The objective here is to ensure that Members do not circumvent their obligations to eliminate subsidies by resorting to other measures that would distort export competition.

The EC proposal recognizes that additional reductions in the budgetary outlays and export quantities are inevitable, although it does not envisage the complete elimination of export subsidies.[156] However, it would require the additional reductions to apply to all forms of support provided to exports of agricultural and food products, particularly export credits, which are not currently covered.[157] The EC also calls for greater discipline in the areas of food aid and the activities of State Trading Enterprises.[158] Japan supports a similar approach as part of its wider goal of ensuring that the renegotiated Agreement establishes an appropriate balance between the rights and obligations of importing and exporting countries, especially in the area of food security.[159]

[153] However, it should be noted that this commitment was made "without prejudging the outcome of the negotiations," thus allowing an argument to be made that elimination is not an agreed objective. This qualification was inserted in the last hours of the Doha meeting at the insistence of the EC.

[154] G/AG/NG/W/11. *See also, Statement by Australia on Behalf of the Cairns Group to the Second Special Session of the Committee on Agriculture*, G/AG/NG/W/21, and the statement by New Zealand, G/AG/NG/W/29.

[155] *Supra* note 139. The Cairns Group later submitted a negotiating proposal on Export Restrictions and Taxes, G/AG/NG/W/93.

[156] *Supra* note 142, ¶¶ 5–9.

[157] *See* G/AG//NG/W/34, *EC Proposal on Export Competition* and G/AG/NG/W/45, Statement by the EC to the Third Special Session of the Committee on Agriculture. The EC position was supported at this meeting by the Czech Republic, G/AG/NG/W/44 and later by a proposal by the members of MERCOSUR, Bolivia, Chile, Costa Rica, Guatemala, India and Malaysia, G/AG/NG/W/139. However, see G/AG/NG/W/39 for criticism of the contingent nature of the EC proposal by Argentina.

[158] *See also* the proposal by Argentina, Brazil, Paraguay, Uruguay, Chile and Colombia on State-Trading Enterprises, G/AG/NG/W/104.

[159] *Supra* note 140, ¶ 23. The proposal goes on to note that "negotiations on these future rules and disciplines on exports should be conducted, by making sure that an appropriate balance can be achieved with the outcome on negotiations on imports, in order to reach a fair and equitable agreement that can be accepted by both exporting and importing countries alike." (¶ 24)

The concern of food security is especially significant for the developing countries. A discussion paper from a group of developing countries notes that "the perpetuation of export subsidies constitutes, in fact, a special and differential treatment in favor of some rich developed countries."[160] The vast majority of developing country proposals recommend the elimination of export subsidies because of their trade-distorting effect.[161] During the phase-out period existing levels of preferential treatment for developing countries should be continued or even extended. The development of disciplines in other areas, particularly export credits, is proposed, with adequate flexibility for developing countries and especially those countries benefiting from the NFIDC Decision.

The negotiations on export subsidies will present a significant challenge to the WTO Members. This challenge arises in part from the goal set in the Doha Declaration, since not all Members are convinced that export subsidies should be completely phased out. The fact that the Agreement applies only to certain types of export subsidy will be another challenge. There are still no internationally agreed disciplines on the use of export credits, despite the fact that Article 10.2 encouraged the development of such disciplines, and export credits can be used to circumvent a Member's reduction commitments.[162] Discussions within the OECD failed to reach agreement. One advantage of using the WTO to reach agreement on this issue is that it will be more inclusive. The activities of State-Trading Enterprises can also circumvent the export subsidy obligations assumed by Members under Part V of the Agreement, so greater discipline on the activities of these enterprises, which would lead to greater transparency, is necessary to ensure the effective implementation of the Agreement on Agriculture

4. Special and Differential Treatment

As previously noted, the Doha Declaration confirmed that special and differential treatment of developing countries would be an integral part of all the elements of the agriculture negotiations. The Declaration also recognizes that trade can play a "major" role in the promotion of economic development and the alleviation of poverty."[163] In an effort to place the needs and interests of these countries at the heart of the WTO's activities over the next few years, the Declaration notes the important roles to be played by "enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programs."[164] One question that arises in this context is the meaning to be attributed to special and differential treatment. It appears from the proposals made to the Committee on Agriculture, including that from the influential Cairns Group, that the bulk of such treatment will take the form of lower percentage reductions to be effected over a longer implementation period rather than substantive differences in commitments, except of course in the case of least developed countries.

[160] G/AG/NG/W/38, *Export Subsidies—Food Security or Food Dependency?*, presented by Argentina, Brazil, Paraguay and Uruguay (MERCOSUR), Chile, Bolivia and Costa Rica.

[161] The following discussion uses the proposals referred to *supra* note 146. See also G/AG/NG/W/55 Submission by ASEAN on Special and Differential Treatment for Developing Countries in World Agricultural Trade.

[162] *See* G/AG/11 in which the Committee on Agriculture discusses the implementation of Article 10.2. See also OECD AGRICULTURAL POLICIES IN OECD COUNTRIES (2001) in which the OECD reports that U.S. export credits in 1998 totalled $3.93 billion at the end of 1998. The equivalent figure for the EC was $1.25 billion.

[163] *Supra* note 136, ¶ 2. Paragraph 3 promises particular attention to the need of the least-developed countries.

[164] *See also* in this respect the *Decision of the Ministerial Conference on Implementation-Related Issues and Concerns*, WT/MIN(01)/DEC/W/1, part 2 of which deals with the Agreement on Agriculture.

5. Non-Trade Concerns

The Doha Declaration noted that the non-trade concerns identified in various negotiating proposals would be taken into account "as provided for in the Agreement on Agriculture." Article 20(c) of the Agreement states that non-trade concerns will be taken into account in the reform process but does not define these concerns. Only two non-trade concerns are specifically identified in the Preamble to the Agreement, namely food security and the need to protect the environment. Proposals have been made which would address the issue of food security ranging from the U.S. proposals to renew the commitment to food aid in the NFIDC Decision and to continue with the anti-circumvention disciplines of Article 10.4, to India's proposal that there should be a Food Security Box.[165]

A more contentious non-trade concern that has been raised by a number of WTO Members relates to what they refer to as the "multifunctionality of agriculture."[166] One starting point is the EC claim that in order to promote future liberalization and expansion of international agricultural trade:[167]

> . . . it is vital to muster strong public support, which can only be achieved if other concerns are met, in particular the multifunctional role of agriculture, which covers the protection of the environment and the sustained vitality of rural communities, food safety and other consumer concerns including animal welfare.

As noted above, protection of the environment is already identified as a legitimate non-trade concern. The reference to the sustained vitality of rural communities and various consumer concerns raises particular problems. On food safety, the EC proposes that the WTO address food safety issues through greater use of the precautionary principle, however, it is recognized that this will require clarification of the scope of the principle.[168] On animal welfare, the EC proposal recognizes that consumer pressure places limits on the ways in which it should produce its food.[169] The EC approach to multifunctionality stresses the non-commercial, societal and cultural aspects of agriculture, and asserts that the net contribution made by agriculture to a series of societal goals is greater and more valued by society than the net contribution of equivalent sectors.[170] Other European countries have endorsed this concept.[171]

[165] *U.S. Proposal*, *supra* note 137 and *Indian Proposal*, *supra* note 145. The issue of food security is also addressed in a number of the proposals submitted by developing countries, *supra* note 146.

[166] *See* G/AG/NG/W/36, *Note on Non-Trade Concerns* submitted by Barbados, Burundi, Cyprus, Czech Republic, Estonia, the EC, Fiji, Iceland, Israel, Japan, Korea, Latvia, Liechtenstein, Malta, Mauritius, Mongolia, Norway, Poland, Romania, Saint Lucia, Slovak Republic, Slovenia, Switzerland and Trinidad and Tobago. See various statements on this note, G/AG/NG/W/59, 61, 62 ,64–67, 69–71, 73–77, 81, 82.

[167] *EC Comprehensive Negotiating Proposal*, *supra* note 142, ¶ 1.

[168] *Id*, ¶ 18. For a very critical comment on this proposal by Australia, *see* G/AG/NG/W/41.

[169] G/AG/NG/W/19, *Animal Welfare and Trade in Agriculture*. In recognition of the likely competitive impact of increased costs associated with high animal welfare standards, the EC questions whether or not it would be legitimate to provide compensation to producers. Animal welfare would therefore become a Green Box policy.

[170] The concerns evident in the European approach to multifunctionality may be contrasted with the Japanese approach, which concentrates on the issues of food safety and food security, and informs their proposals in all of the core areas of the negotiations. *Supra* note 140, ¶¶ 42–49 and Annex.

[171] *See*, *e.g.*, *Statement by Switzerland* to the Seventh Special Session of the Committee on Agriculture, G/AG/NG/W/155, and the discussion paper by *Switzerland, Specific Characteristics of Agriculture and the Need to Treat Agriculture Separately Within WTO*, G/AG/NG/W/36/paper one. The Annex reproduces the constitutional provision on agriculture. *See also Statement by Hungary* on behalf of 13 East European Countries to the Fifth Special Session of the Committee on Agriculture, G/AG/NG/W/131, and the statement by Norway to Sixth Special Session of the Committee on Agriculture, G/AG/NG/W/182.

Other WTO Members question the use of the concept of multifunctionality. One comment by Cuba, Honduras and the Dominican Republic noted:[172]

> Concepts have been introduced which, as far as we are concerned, are nothing more than a pretext for continuing with the distortions in the agricultural sector, such as the multifunctionality of agriculture, the non-trade concerns of the developed countries, like environmental protection, animal welfare, and so on.

Australia has noted that the discussion of non-trade concerns seems to be a non-issue.[173] It recognizes that all countries have non-trade concerns and that they must be accommodated by policies that do not distort production or trade. It is the belief that the concept of multifunctionality is being used as a pretext by some developed countries to slow, or even reverse, the process of liberalization initiated by the Agreement on Agriculture, that gives rise to objections.

Although Article 20(c) of the Agreement on Agriculture indicates that non-trade concerns will be taken into account in the negotiations, it also makes specific reference to the long-term objective, as agreed at the mid-term review of the Uruguay Round negotiations, of establishing a fair and market-oriented agricultural trading system. This objective is also recognized in the Preamble to the Agreement, as is the objective of securing "substantial progressive reduction in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets." These objectives form the twin pillars of the reform process and, as Argentina has asserted, "non-trade concerns should be pursued consistently with the objectives of these negotiations, not at the expense of other trading partners."[174] If the Agreement on Agriculture is to incorporate the concept of multifunctionality, it must be shown that the public goods produced by agriculture are greater or more valued by society than the public goods produced by other sectors. When this can be shown, the next step will be to establish the parameters of legitimate measures under the Agreement on Agriculture that will protect the multifunctional nature of agriculture in all WTO Members. This will be a considerable challenge, particularly given the hostility toward the concept on the part of a number of members.

C. The July 2004 Framework

The failure of the WTO Members to meet the agreed deadline of March 31, 2003, for agreement on the modalities for further commitments, despite the publication of two sets of modalities by the Chair of the special (negotiating) session of the Committee on Agriculture, only served to emphasis the divergent negotiating positions of the Members.[175] It was agreed in July 2003 that proposals for a "modalities framework" could be attached to the draft Ministerial text for the Cancun Ministerial Conference. The first attempt to provide such a framework was made by the EC and the United States on August 13, 2003, when they issued a "Joint Text" at an informal Heads of Delegation consultation.[176] This

[172] G/AG/NG/W/164, *Statement to Seventh Special Session of the Committee on Agriculture*. *See also Statements by ASEAN to the Sixth Special Session of the Committee on Agriculture*, G/AG/NG/W/180.
[173] G/AG/NG/W/59, *Statement to the Fourth Special Session of the Committee on Agriculture*.
[174] G/AG/AG/W/88, *Legitimate Non-Trade Concerns*, p. 3.
[175] TN/AG/W/1 and TN/AG/W/1/Rev. 1 (commonly referred to as the Harbinson drafts). *See also* TN/AG/6 *Negotiations on Agriculture: Overview,* issued by Harbinson in December 2002.
[176] JOB(03)/157.

produced a number of counter-proposals.[177] The structure of the Joint Text became the basis for the draft Ministerial text, although it was amended to reflect the content of some of the counter proposals that had emerged.[178] The Cancun Ministerial Conference concluded on September 14, 2003, without agreement, although the Chair had issued a revised draft text on Agriculture.[179]

The brief Ministerial Statement that ended the Fifth Ministerial (Cancun) Conference stated that "more work needs to be done in some key areas to enable us to proceed towards the conclusion of the negotiations in fulfillment of the commitments we took at Doha." To this end officials were instructed to continue working on outstanding issues and a General Council meeting in December would decide the best way to move the process forward. Although there was no major breakthrough at the December General Council Meeting, Members did agree to restart negotiations and it was recognized that the negotiations on agriculture would be central to the overall success of the mandate given at Doha.[180] Negotiations on agriculture did not resume until the special (negotiating) session of the Committee on Agriculture, held in March 2004, which set the end of July as the date for agreement on a framework text on modalities for future agriculture negotiations. The re-launched negotiations have been conducted in a series of special negotiating sessions (agriculture weeks) and informal mini-ministerials, which have been discussed new proposals for reform.[181] As a result of the progress made in these negotiations the Chairman of the General Council and the Director-General submitted a Draft General Council Decision that included a draft framework for establishing modalities in Agriculture, which after slight amendment was agreed on July 31, 2004.[182]

Not unexpectedly, the Framework takes as its starting point paragraph 13 of the Doha Ministerial Declaration. The modalities that will be eventually agreed will incorporate provisions for the special and differential treatment of developing countries and will build on the long-term objective of the Agreement on Agriculture to establish a fair and market-oriented trading system. Fundamental reforms will occur in each of the three pillars of the Agreement and the Framework recognizes that "the reforms in all three pillars form an interconnected whole and must be approached in a balanced and equitable manner."[183]

In the Market Access pillar, the tiered formula found in the Harbinson drafts is retained, although the number of bands, their thresholds and the level of tariff reduction within each tier remain to be established.[184] It is therefore unclear whether the Doha Declaration mandate for "substantial improvements in market access" will be achieved, although the text does promise this for all products and for each product. All Members will be allowed to designate an "appropriate" number of tariff lines as sensitive, with substantial

[177] *See for example* the proposal of G-20, a coalition of developing countries including China, India and Brazil amongst others, JOB(03)/162 (re-circulated as WT/MIN(03)/W/6) and the proposal from the G-90, a coalition of least developed countries, member of the African Union and the African, Caribbean and Pacific Group, WT/MIN(03)/17.

[178] JOB(03)/150/Rev.1 (commonly referred to as the Castillo text).

[179] JOB(03)/150/Rev.2 (commonly referred to as the Derbrez text).

[180] WT/GC/M/84.

[181] For a summary of the negotiations in early 2004 *see Agriculture Negotiations at the WTO: 'Framework Phase' Update Report*, Quarterly Intelligence Report No 11, ICTSD, Geneva (June 2004), available at http://www.ictsd.org/issarea/atsd/products/docs/AgricultureNegotiations11.pdf.

[182] *See* JOB(04)/96 (16 July 2004) and the final agreed text in WT/GC/W/535.

[183] WT/GC/W/535, Annex A, ¶ 3.

[184] *Id*, ¶¶ 27–44.

improvements in access being made through "combinations of tariff quota commitments and tariff reductions." The issue of tariff escalation will be addressed through a formula to be agreed, and the issue of tariff simplification and the special agricultural safeguard remain under negotiation. Among the measures that reflect the need for special and differential treatment for developing Members to be an integral part of the negotiations are the usual methods of lower tariff reduction formulas and longer implementation periods. In addition, a Special Safeguard Mechanism will be established and using the criteria of food security, livelihood security and rural development, developing country Members will be able to designate an "appropriate" number of products as Special Products.

In relation to Domestic Support, Annex A paragraph 6 of the Framework provides that "there will be a strong element of harmonisation in the reductions made by developed Members. Specifically, higher levels of permitted trade-distorting domestic support will be subject to deeper cuts."[185] This will require the negotiation of a tiered formula. In the first year of implementation of the new Agreement there will be a twenty percent reduction in the Final Bound Total AMS plus permitted *de minimis* plus the Blue Box payments. To prevent the circumvention of this objective through transfers of unchanged domestic support between different support categories a methodology will be agreed for the capping of product-specific AMSs. The existing criteria for use of the Blue Box will be reviewed and additional criteria may be negotiated subject to conditions, for example that they would "not have the perverse effect of undoing ongoing reforms." It was agreed that the criteria for use of the Blue Box payments would ensure that they are "less trade-distorting than AMS measures" and that Blue Box payments would not exceed five percent of a Member's average total value of agricultural production during an historical period. This period would be established in the negotiations. Criteria for the use of Green Box measures would also be reviewed and clarified, for example to take account of non-trade concerns, to ensure that payments meet the criteria of having no, or at most minimal, trade-distorting effects or effects on production. Provision is made for the special and differential treatment of developing countries in the form of longer implementation periods and lower reductions as well as an exemption to the negotiated reductions in *de minimis* for those developing countries that allocate almost all *de minimis* support for subsistence and resource-poor farmers.

In the area of export competition, the Framework provides for the elimination of export subsidies, export credit guarantees or insurance programmes with repayment periods beyond 180 days, and the trade distorting practices of exporting State Trading Enterprises.[186] The date for the elimination of these measures is to be agreed. Disciplines are to be negotiated for export credits, export credit guarantees or insurance programmes with repayment periods of 180 days or less, and existing disciplines on export prohibitions and restrictions in Article 12.1 of the Agreement on Agriculture will also be strengthened. As an element of special and differential treatment in this area, State Trading Enterprises in developing country Members that enjoy special privileges to preserve domestic consumer price stability and to ensure food security will receive special consideration for maintaining monopoly status. On the issue of food aid, disciplines will be negotiated to eliminate aid that results in commercial displacement. These disciplines which will address the role of international organizations with respect to the food aid provided by Members will also address the issue of providing food aid exclusively in fully grant

[185] *Id*, ¶¶ 6–16.
[186] *Id*, ¶¶ 17–26.

form. Developing country Members will once again benefit from longer implementation periods and will continue to benefit from the provisions of Article 9.4 of the Agreement on Agriculture for a reasonable period; again this period is to be negotiated. Differential treatment is also provided for those developing countries benefiting from the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.

The Framework agreed on July 31, 2004, adds another issue to the negotiations—cotton.[187] This is a product that has come to the fore recently. Part of the reason for this was the Brazilian complaint against U.S. subsidies provided to producers, users and exporters of upland cotton.[188] Brazil alleged that the subsidies were contrary to the Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture. The United States had countered this allegation by claiming that the disputed subsides were covered by the peace clause. Although the report of the Panel had not been published at the time of writing, it has been reported that the Panel found that some of the U.S. subsides which it claimed were allowed under the Green Box were in fact prohibited subsidies and had exceeded the limits agreed to by the United States.[189] Given the importance of the dispute, not only to the parties but also the negotiations on agriculture, it seems likely that the decision of the Panel will be appealed.

The reference to cotton in the Framework also relates to another complaint about the impact of cotton subsidies granted by developed countries; this time by four African producers of cotton. Rather than pursue a complaint through the dispute settlement Understanding, four African producers of cotton (Benin, Burkino Faso, Chad and Mali) raised the issue in both the General Council and the agriculture negotiations. Having outlined the damage that subsidies in developed countries cause them, the four called for them to be eliminated and for compensation to be paid for the damage suffered by such subsidies.[190] The proposal called for a decision at the Cancun Ministerial Conference but no decision was reached. Discussions of the proposal reveal a difference of opinion between the WTO members as to how this should be dealt with, either separately or as part of the agriculture negotiations, and on the issue of compensation. The Framework provides that the issue should be addressed "ambitiously, expeditiously, and specifically, within the agriculture negotiations." Whilst recognising that the Sectoral Initiative offers one approach to the resolution of the problems, the Framework is also seen as the basis for addressing the problem. So the special session of the Committee on Agriculture, will establish a subcommittee on cotton which will examine all trade-distorting polices affecting the sector in the three pillars of the Agreement. The subcommittee will meet periodically and report to special session of the Committee on Agriculture to allow it to review progress. As for the development aspects of the Sectoral Initiative, the Director-General of the WTO is instructed by paragraph 1.b of the General Council decision to consult and work with multilateral institutions, including the Bretton Woods Institutions and the Food and Agriculture Organisation.

The level of ambition set by the Doha Declaration will continue to be the basis for the negotiations on agriculture. However, a significant amount of the detail needs to be filled in. Under the original Doha agenda, the Members were to have agreed the modalities

[187] *Id*, ¶¶ 4, 5 and 46. *See also* ¶ 1.b of the General Council Decision.

[188] *See United States-Subsidies on Upland Cotton*, WT/DS267/1 for details of the original complaint, and WT/DS267/7—Request for the Establishment of a Panel by Brazil.

[189] *See* Bridges Monthly May 2004 No. 5, p. 7 and June 2004 No 6, p. 2, available at www.ictsd.org.

[190] *See* TN/AG/GEN/4, *Poverty Reduction: Sectoral Initiative in Favour of Cotton*, for details of the proposal.

for reform by March 2003. Instead, agreement was finally reached on a Framework for Establishing Modalities in July 2004. One consequence of this is that the deadline set by the Doha Declaration for concluding the talks, 1 January 2005, will be missed and the latest General Council Decision does not set a new deadline. It merely calls for reports to be made to the Sixth Ministerial Conference, which will be held in Hong Kong in December 2005.

However, there is cause to be optimistic about the future of the Agreement on Agriculture. Much remains to be agreed in the area of market access, although the reference to sensitive products should please the EC, Japan and Switzerland, just as the negotiations on Special Products and the Special Safeguard Mechanism should please developing countries. The United States will be pleased with the Framework provisions on the Blue Box as it should allow the counter-cyclical payments to be notified as Blue Box payments, and therefore not included in the Total AMS. Developing countries, especially India, will also be pleased with the proposed changes to the *de minimis* provisions in domestic support and the agreement by the developed countries to eliminate export subsidies. The lack of a definite time frame and the skeletal provisions in some areas are however causes of concern.

D. Conclusion

The Agreement on Agriculture has established a framework for negotiations on the core issues; substantial improvements in market access, reductions in trade-distorting domestic support and the phasing out of all forms of export subsidies. As the negotiating proposals outlined above indicate each area of the negotiations presents potential difficulties. These may include tariff quotas or tariff escalation in the area of market access, continuation of the Blue Box or the negotiation of a development box in the area of domestic support, and export credits and state trading enterprises in the case of export subsidies. Even if the negotiations succeed, implementation of the results may give rise to difficulties as the Uruguay Round was only the start of the process and did not have a significant impact on agricultural policy. This will not be the case in this round, which has more ambitious goals. Further difficulties will arise from the negotiations with respect to non-trade concerns. These could have a negative influence on the core agenda unless the negotiators maintain their focus on the twin goals of the Agreement on Agriculture—the establishment of a fair and market-oriented agricultural trading system, and substantial progressive reduction in agricultural support and protection in order to reduce distortion of world agricultural markets.

The U.S. Farm Bill[191] of 2002 has been heavily criticized by other Members as running contrary to the core objectives of the negotiations.[192] Although the Bill included various export measures, it is the increase in support for domestic producers that has attracted the most criticism. In particular new payments, referred to as counter-cyclical payments, are introduced for producers of different products whenever income falls below a certain target price. One effect of these changes is that it may reduce the ability of the United States to agree further reduction commitments on domestic support, as it is estimated that payments under the Bill will come close to reaching the annual AMS commitment

[191] *The Farm Security and Rural Investment Act 2002*, signed on 13 May, 2002.

[192] See http://www.ictsd.org/weekly/02-05–15/story2.htm for a summary of these criticisms, including a possible legal challenge by Mercosur.

level.[193] However, the Secretary for Agriculture has authority under the Bill to ensure that the WTO commitments of the United States are not exceeded.

The negative impact that passage of the Bill had on the negotiations has been alleviated by the latest U.S. proposal, which employs a two-phase process for further reform. In the first phase, which would last five years, export subsidies would be eliminated and tariffs and trade-distorting domestic support would be reduced. In the second phase all tariffs and trade-distorting domestic support would be eliminated.[194] It should also be noted that, at present, U.S. tariffs and domestic support expenditure still fall below those of the EC. The mid-term review of the CAP would not change this fact, it is a redistribution of, rather than a reduction in, expenditure.[195] It seems that the factors motivating governmental intervention in the agricultural sector are as prevalent today as they were at the birth of the GATT. The question for the future is: will these factors frustrate the process of agricultural trade reform initiated by the Agreement on Agriculture and affect the overall credibility of the WTO?

[193] *See* http://www.europa.eu.int/comm/agriculture/external/wto/usfarmbill/index_en.htm, and in particualr, MEMO/02/04 *Questions and Answers—U.S. Farm Bill*.

[194] For details *see* http://www.fas.usda.gov/itp/wto/proposal.htm.

[195] For details of the outcome of the review, *see* Regulation 1782/2003(2003), OJ270/1. It is worth compating the outcome with the Commission Communication that launched the mid-term review, COM (2002) 394 *Mid-Term Review of the Common Agricultural Policy.*

CHAPTER 7

THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Denise Prévost and Peter Van den Bossche*

TABLE OF CONTENTS

I. Introduction 233
A. International Trade and SPS Measures 233
1. An Uneasy Relationship 233
2. The Importance of Rules 234
B. Rules on SPS Measures before the SPS Agreement 236
1. GATT 1947, Articles III, XI and XX(b), and the Tokyo Round Standards Code 236
2. Insufficiency of the GATT 1947 Rules and the Standards Code 238
C. Uruguay Round Negotiations on the SPS Agreement 239
1. Negotiating History 239
2. Position of the Major Trading Nations 240
3. Role of Developing Countries 242
D. Overview of the Main Features of the 1994 SPS Agreement 242
II. Substantive Provisions of the SPS Agreement as Applied and Interpreted in Case Law 244
A. Scope of Application of the SPS Agreement (Article 1.1 and Annex A, paragraph 1) 244
1. Definition of an SPS Measure (Annex A, paragraph 1) 245
2. Direct or Indirect Effect on International Trade (Article 1.1) 247
3. Other Issues relating to the Scope of Application 248
4. Relationship with other WTO Agreements 250
B. Basic Rights and Obligations (Article 2) 254
1. Right to Take SPS Measures (Article 2.1) 254
2. Limits to the Right to Apply SPS Measures (Articles 2.2 and 2.3) 255
C. Harmonization (Article 3) 266
1. SPS Measures Based on International Standards (Article 3.1) 269
2. SPS Measures which Conform to International Standards (Article 3.2) 275
3. SPS Measures Resulting in a Higher Level of Protection (Article 3.3) 276

* Denise Prévost is a lecturer at Utrecht University, The Netherlands. Peter Van den Bossche is Professor of International Economic Law at the Universiteit Maastricht and formerly Counsellor to the Appellate Body of the WTO. The authors gratefully acknowledge that they have benefited from the comments of Mariëlle Matthee of the Asser Institute on an earlier draft of this chapter as well as from a discussion with Gretchen Stanton of the Agriculture and Commodities Division of the WTO Secretariat. They are also grateful for the valuable assistance of Karla Vanessa Araujo, Jurga Stancuite and Eline Post graduate students at the Universiteit Maastricht. Any errors that remain are those of the authors. This chapter takes account of developments through July, 2004.

D. Risk Assessment (Article 5.1–5.3) 279
1. Concept of "Risk Assessment" (Annex A, paragraph 4) 280
2. Factors Taken into Account (Article 5.2 and 5.3) 292
3. The "Based on" Requirement (Article 5.1) 294
E. Provisional Application of SPS Measures (Article 5.7) 297
1. Relationship between Article 5.7 and the Precautionary Principle ... 297
2. Conditions for Application of Article 5.7 302
3. Relationship between Article 5.7 and Article 2.2 308
F. Risk Management (Article 5.3–5.6) 308
1. Determination of the Appropriate Level of Protection (Annex A, paragraph 5) 308
2. Limits to the Right to Determine the Appropriate Level of Protection (Article 5.4 and 5.5) 309
3. Requirement of the Least-Trade Restrictive Measure (Article 5.6) ... 319
G. Other Substantive Provisions 324
1. Equivalence (Article 4) 324
2. Adaptation to Regional Conditions (Article 6) 333
III. Institutional and Procedural Provisions of the SPS Agreement 336
A. Transparency (Articles 5.8 and 7, and Annex B) 336
1. Scope of Application of Notification Obligation 336
2. Notification Procedure 338
3. Request for Reasons for SPS Measures (Article 5.8) 339
4. Infrastructure for Transparency 340
B. Control, Inspection and Approval Procedures (Article 8 and Annex C) .. 340
C. The SPS Committee (Article 12) 342
1. Composition 342
2. Functions 342
3. Overview of Work (1995–2002) 344
D. Dispute Settlement (Article 11) 345
1. Special Dispute Settlement Rules and Procedures 346
2. Overview of Dispute Settlement Relating to the SPS Agreement 354
IV. Developing Countries and the SPS Agreement 355
A. Technical Assistance (Article 9) 356
B. Special Rules for Developing Countries (Articles 10 and 14 and Annex B) 358
1. Special and Differential Treatment (Article 10) 358
2. Reasonable Adaptation Period (Annex B, paragraph 2) 359
3. Special Provisions on Notification (Annex B, paragraphs 8 and 9) ... 359
4. Transitional Periods (Article 14) 359
C. Problems with Implementation 360
D. Doha Decision on Implementation 360
V. Conclusion 362
A. An Evaluation of the SPS Agreement as a Balancing Act 362
B. Evaluation of the Balance Achieved 362
C. Context for Possible Clarifications or Amendments 365
D. Key Issues for the Future 366

I. Introduction

A. International Trade and SPS Measures

1. An Uneasy Relationship

The protection of human, plant and animal life and health is clearly a duty of all governments within their sovereign sphere. For this purpose, governments have in place regulatory measures aimed at the protection of health[1] in their territories against risks contained in food and agricultural products. These health measures can focus on human or animal life or health (sanitary measures) or on plant life or health (phytosanitary measures). Together, they are termed sanitary and phytosanitary ("SPS") measures and can take many forms. One can think of examples such as regulations setting maximum residue levels for toxins or contaminants,[2] approval procedures for additives, quarantine requirements to minimize the spread of pests and diseases, labeling requirements to notify consumers of potentially-harmful foodstuffs (such as allergen-containing products), regulations governing the process or production method whereby the product is made, inspection or certification requirements or outright bans on potentially hazardous products.[3] These are all SPS measures.

In recent years we have witnessed a proliferation of SPS measures. This can be attributed to three main factors. First, there is an increase in the number and variety of potential risks contained in food and agricultural products due to both increasing use of new technologies in agriculture and food processing (such as pesticides, additives and genetic modification) and the growth in imports from developing countries whose domestic food-safety infrastructures are often inadequate. Second, regulators have to respond to rising consumer expectations and demands with regard to food safety in developed countries, resulting from increased affluence and consumer awareness of food-related risks. Third, regulators are confronted with pressure from the agriculture and food industry lobbies in the face of increased competition due to agricultural trade liberalization. As a result, more and more SPS regulations are adopted and market access for food and agricultural products is greatly reduced.[4]

[1] For purposes of this chapter, unless otherwise specified, a reference to "health" or "public health" should be taken to mean human, animal or plant life or health. Similarly, "health measures" refer to measures for the protection of human, animal or plant life or health.

[2] The EC's maximum residue levels for aflotoxins are an example of such an SPS measure.

[3] For example, many countries banned beef imports from the EC in response to the outbreak of foot-and-mouth disease in 2001.

[4] Several studies have been conducted into the trade impact of SPS measures and technical barriers to trade more generally. Some have focused on the impact on developing country exports. Although quantification of the effect of these measures has proved difficult due to the complexity of the impact of standards on supply and demand, it is widely acknowledged that SPS measures can have significant negative effects on trade flows. *See* for example Tsunehiro Otsuki *et al.*, *Measuring the Effect of Food Safety Standards on African Exports to Europe*, in THE ECONOMICS OF QUARANTINE AND THE SPS AGREEMENT (Kim Anderson, *et al.,* eds. 2001); Tsunehiro Otsuki *et al., Saving Two in a Billion: A Case Study to Quantify the Trade Effect of European Food Safety Standards on African Exports,* Working Paper, Development Research Group, World Bank (2001); Spencer Henson and Rupert Loader, *Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements,* 29 WORLD DEVELOPMENT 85 (2001); T. Ademola Oyejide *et al.*, *Quantifying the Trade Impact of Sanitary and Phytosanitary Standards: What Is Known and Issues of Importance for Sub-Saharan Africa*, Paper presented at the WORKSHOP ON QUANTIFYING THE TRADE EFFECT OF STANDARDS AND REGULATORY BARRIERS: IS IT POSSIBLE?, April 27, 2000; John S. Wilson *et al.*, AGRICULTURE IN THE WTO—THE ROLE OF PRODUCT ATTRIBUTES IN THE AGRICULTURAL NEGOTIATIONS Commissioned Paper number 17, April, The International Agricultural Trade Research Consortium (2001).

SPS measures can have an important impact on international trade. Currently there is a large volume of trade in food and agricultural products.[5] Not only are consumer tastes, especially in developed countries, increasingly international so that demand for foreign food products is growing, but there has also been a growth in the number of countries, especially developing countries, that participate in food and agricultural trade.[6] When one bears in mind the vast array of differing SPS standards that exist in different countries, reflecting their national priorities, stage of economic development and consumer preferences, it becomes clear that the possibilities exporters have of exploiting economies of scale on the international market are significantly reduced. The high cost of meeting the plethora of health standards means that exporters are forced to charge higher prices for their products on the export market or are even completely excluded from this market.

Many SPS measures are based on legitimate health concerns but others are based on more questionable motives. Clearly governments, under the influence of domestic industry pressure groups, may misuse SPS measures as disguised trade barriers for protectionist purposes. It is for this reason that all free trade regimes, including the WTO, contain rules to mediate the conflict between the competing goals of trade liberalization (and thus economic growth) and the protection of human, animal and plant health from risks contained in food and agricultural products.

2. The Importance of Rules

(a) For Developed Countries. Traditionally, developed countries have primarily been food importers. Increasing affluence gives rise to increased consumer demand, not only in terms of quantity of food but also with regard to variety. Developed country consumers also expect their governments to ensure high food quality and safety standards. For this reason, developed country regulators impose a large number of SPS measures. It is important for these regulators that international trade agreements recognize their right to impose SPS measures and lay down clear rules regarding any limitations to this right. This avoids the situation under the relevant GATT rules where it was left to dispute-settlement panels to flesh out the rather rudimentary provisions of the Article XX(b) exception for health measures, reading into it increasingly complex requirements that GATT contracting parties had to comply with in order to defend a measure from challenge.

Developed countries are also exporters of food and agricultural products. For this reason, producers in developed countries benefit from disciplines on the ability of importing countries to impose SPS measures in a way that restricts market access for their products. Clear rules provide security for producers and encourage them to invest in producing goods for export. There is an increased use of sophisticated technologies in the agricultural and food industries of some developed countries, which entail huge investment. Some of these technologies have been the subject of much controversy and have led to consumer health concerns. Examples such as the use of hormones in cattle feed to enhance growth, the administration of the hormone bovine somatropin ("BST") to increase

[5] The share of trade in agricultural products in world trade in goods amounted to 10.5 percent in 1998 (larger than sectors such as iron and steel, automobiles, textiles and clothing, chemicals). In that year, food products made up eighty percent of total agricultural trade. WTO Secretariat, THE AGREEMENT ON AGRICULTURE, July 1999.

[6] W.C.K. Hammer, *Food Trade and Implementation of the SPS and TBT Agreements: Current Status of Food Trade, Including Food Quality and Safety Problems*, Paper presented at the CONFERENCE ON INTERNATIONAL FOOD TRADE BEYOND 2000: SCIENCE-BASED DECISIONS, HARMONIZATION, EQUIVALENCE AND MUTUAL RECOGNITION, Melbourne, Australia, October 11–15, 1999, at 1.

milk production in dairy cows, and the genetic modification of crops to make them resistant to pests and herbicides come to mind. Regulations restricting market access have proliferated as a result of consumer concerns and public opinion regarding such new technologies. Developed countries employing such new technologies have an interest in ensuring that rules exist prohibiting the rejection of their products on the import market on the basis of ungrounded public fears and ensuring that scientific evidence of risk underlies regulatory decisions.

In many cases, agricultural producers in developed countries have become accustomed to generous government support.[7] Attempts to liberalize the agricultural sector at the national level, even though they make economic sense for the country concerned, are made difficult by the strength of the agricultural lobby.[8] Now, with increasing reduction of traditional market barriers in the agricultural sector due to WTO disciplines, as achieved by the Agreement on Agriculture and ongoing negotiations for the further liberalization of trade in agricultural products,[9] regulators in developed countries are subject to increasing pressure from the agricultural lobby to restrict market access by other means. Typically, technical standards and health regulations are measures open to abuse for protectionist purposes. The creation of international rules imposing disciplines on non-tariff barriers to trade enables governments to reject calls for protectionism with the convenient excuse that their hands are tied by the rules they have negotiated at the international level. Open markets in the agricultural sector are often to the economic advantage of developed countries as this provides them with access to cheaper agricultural imports, which are beneficial to expanding processed-food industries in these countries.

(b) For Developing Countries. Agriculture is a sector of primary importance for trade in most developing countries. It comprises a much larger share of economic output in developing countries than in developed countries,[10] and accounts for a large part of developing countries' exports and foreign exchange earnings.[11] In addition, several developing countries rely on exports of only a few agricultural products. These countries are thus extremely vulnerable to trade barriers in this sector. A reduction in market access for agricultural products from developing countries has far-reaching effects not only on

[7] Total support for agriculture in OECD countries was estimated to be U.S.$327 billion in 2000. Organization for Economic Cooperation and Development, AGRICULTURAL POLICIES IN OECD COUNTRIES—MONITORING AND EVALUATION (2001), *quoted in* World Trade Organization, ANNUAL REPORT 2002, 36 (2002).

[8] The difficulty of liberalization of the agricultural sector has been ascribed to the distribution of the costs and benefits of agricultural subsidies. The costs are borne by a diffuse group of consumers and taxpayers who are unlikely to organize to lobby for policy reform. On the other hand, the benefits go to an identifiable, already highly organized group of farming interests, who are experienced in exerting political pressure to secure protection and support from their governments. Furthermore, concerns regarding excessive dependency on food imports to meet domestic food requirements as well as concerns over the impact of reduced agricultural activity on the environment and the survival of rural communities, have strengthened the opposition to liberalization of the agricultural sector.

[9] Now taking place in the context of the Doha Development Round, launched in Doha on November 14, 2001.

[10] In 1997, agriculture accounted for three percent of the GDP of developed countries, but 26 percent of GDP for developing countries and fifty percent of the GDP of least-developed countries. Food and Agriculture Organization, *Issues at Stake Relating to Agricultural Development, Trade and Food Security*, FAO Symposium on AGRICULTURE, TRADE AND FOOD SECURITY: ISSUES AND OPTIONS IN THE FORTHCOMING WTO NEGOTIATIONS FROM THE PERSPECTIVE OF DEVELOPING COUNTRIES, September 23–24, 1999, at 12–15.

[11] In developing countries, agricultural exports account for on average 27 percent of total merchandise exports whereas in developed countries this share is only four percent. Thomas C. Beierle, FROM URUGUAY TO DOHA: AGRICULTURAL TRADE NEGOTIATIONS AT THE WORLD TRADE ORGANIZATION 4, Resources for the Future (2002).

export revenues, which are crucial for the development needs of these countries, but also on income and rural employment in these countries.[12]

With the increasing liberalization of the agricultural sector by means of disciplines on traditional trade barriers (such as quotas) under WTO rules, the focus has started to shift to non-tariff barriers, such as SPS regulations and standards, as obstacles to market access. As is to be expected, there is a large difference in consumer expectations in developed and developing countries regarding food safety and vast differences in the standard of the food-safety and animal and plant health systems in place to ensure that food and agricultural products meet the standards set in a particular country. As a result, developing countries increasingly face the rejection of their food and agricultural exports, causing great financial losses. It is therefore crucial for developing countries to ensure that effective disciplines are in place to deal with non-tariff barriers in the form of SPS measures, in order to prevent their misuse for protectionist purposes in lieu of traditional market barriers. In addition, it is important for developing countries that the rules in place take account of their financial and human resource constraints in meeting those SPS standards that are legitimate.

With the creation of a rules-based system for international trade, the WTO has strengthened the position of developing countries in the international arena *vis-à-vis* their trading partners. Now developing countries can challenge the trade-restrictive measures of other Members in accordance with WTO rules, by means of the WTO dispute settlement system.[13] The creation of clear and enforceable disciplines, in an international agreement, that enhance trade opportunities in an area of crucial interest to developing countries, namely the food and agricultural sector, provides tools for developing countries to use in securing market access for their export products.

B. Rules on SPS Measures before the SPS Agreement

1. GATT 1947, Articles III, XI and XX(b), and the Tokyo Round Standards Code

The trade disciplines in GATT 1947 covered the use of non-tariff measures, including SPS regulations, as trade barriers, and tried to limit the possibilities for their misuse for protectionist purposes. The disciplines of GATT 1947, now incorporated by reference into GATT 1994, contained provisions that were (and still are) applicable to health regulations and standards, to the extent that they discriminate against imports. The most important provisions in this regard are Articles III, XI and XX(b) of the GATT.

Article III contains what is commonly known as the National Treatment provision, which prohibits discriminatory tax and regulatory treatment of imported products from WTO Members once they have crossed the border. Under Article III:4, Members agree to provide imported products treatment "no less favorable" than that granted to "like" domestic products by means of all laws, regulations and requirements affecting their

[12] While in developed countries only nine percent of the population is employed in the agricultural sector, in developing countries this is more than fifty percent. *Id.*

[13] The WTO dispute settlement system is discussed in Chapters 25 *et seq* of this book, so it will not be described here. It should, however, be remembered that the dispute settlement system includes a consultation phase during which a mutually acceptable solution to a trade dispute (in accordance with WTO rules) can be agreed upon without recourse to the panel procedure. Thus, even if developing countries lack the resources to make use of the full dispute settlement procedure of the WTO, they still benefit from the rules of the SPS Agreement according to which they can raise challenges to trade-restrictive SPS measures in consultations with their trading partners. In Part III D, below, we briefly discuss a few specific issues of WTO dispute settlement that have arisen in the context of disputes on SPS measures.

sale, purchase, distribution, transportation or use. Thus any health regulation, such as a maximum residue level for pesticides, must be applied equally to imports and "like" domestic products. Article XI, on the other hand, focuses on border measures and prohibits quantitative restrictions, such as bans or other restrictions, on imports from Members, except in very limited cases. Import bans that are imposed on products for health reasons would be prohibited by this provision unless covered by an exception to the general rules.

It is clear that in some cases regulations that discriminate against imports or set quantitative restrictions on imported products are a justifiable exercise of the sovereign duty of a government to protect certain societal values in its territory. For this reason, the GATT provides, in Article XX, for certain qualified exceptions to its rules for measures aimed at particular policy objectives. One of these exceptions, contained in Article XX(b), is that for measures *necessary* to protect the life or health of humans, animals and plants. Such measures are allowed, provided that they are not applied in a manner constituting arbitrary or unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, in terms of the *chapeau* of Article XX.

The early negotiating rounds under the auspices of the GATT focused on tariff negotiations, and were quite successful in reducing tariff levels. As a result, the relative importance of standards and regulations as trade barriers increased. At the same time, growing consumer awareness of health and environmental issues was leading to a proliferation of regulations and standards in these areas, particularly in developed countries. Thus, in the Tokyo Round of trade negotiations,[14] there was a shift in focus towards tackling this form of trade barrier and four codes on non-tariff barriers were adopted. One of these was the Agreement on Technical Barriers to Trade, commonly known as the "Standards Code". The Standards Code did not focus specifically on regulations for the protection of human, plant or animal life or health, but was aimed broadly at all technical regulations and standards, as is the Uruguay Round Agreement on Technical Barriers to Trade ("TBT Agreement"). The Standards Code was not binding on all GATT Contracting Parties but only on those 32 Contracting Parties that were signatories to it.[15]

The Standards Code reiterated the GATT obligation of "national treatment" for like imported products. However, unlike the GATT, it applied also to non-discriminatory measures, laying down disciplines for the setting and application of standards and regulations even where they applied to domestic and imported products alike. Under the Standards Code, signatories agreed to adopt only standards and regulations that were necessary to achieve a legitimate aim, such as the protection of public health, and not to apply these measures in a manner that would constitute a disguised restriction on trade or create unnecessary obstacles to trade. More importantly, the Code required signatories to apply relevant international standards where they existed, unless these were deemed inadequate to meet the intended goal, thus introducing the first reference to harmonized standards into the international trade regime. In addition (and perhaps the main achievement of the Code) it introduced transparency requirements for the adoption of regulations and standards that were not "substantially the same" as international standards.

[14] These negotiations lasted from 1973–1979.

[15] Under the GATT regime it was possible for GATT contracting parties to choose whether or not to become signatories to the agreements which were negotiated to supplement the basic GATT disciplines. In the Uruguay Round, in contrast, all WTO Members undertook to be bound to all the multilateral agreements as part of a "single undertaking".

The Standards Code included a dispute-settlement mechanism that established the possibility for review by a panel or a technical group of experts of regulations or standards that could have "the effect of creating unnecessary obstacles to international trade". Thus, a Member could challenge the regulations or standards of another Member on the grounds that they violated a provision of the Standards Code. Despite the fact that no dispute-settlement proceeding was ever conducted under the Code, it did assist in the resolution of a few trade disputes involving industrial standards.[16]

2. Insufficiency of the GATT 1947 Rules and the Standards Code

The rules of GATT 1947 were insufficient in several respects to address the problem of the increasing use of SPS measures to restrict trade in agricultural and food products. First, GATT disciplines on national regulations focus on prohibiting discrimination against imported products. Thus, the rules do not catch non-discriminatory SPS measures that have trade restrictive effects. Most SPS measures apply not only to imports but also to domestic products. For this reason, they often escaped GATT disciplines. Second, the exception provided in Article XX(b) to the usual GATT rules for measures necessary to protect human, animal or plant life or health does not contain detailed rules disciplining the use of such measures. For example, no risk assessment is required as a basis for a health measure, nor are Members required to publish their proposed health measures in advance. Lastly, there is no recognition in the GATT of the *right* of governments to enact regulations for the protection of human, animal and plant life or health in their territories. Instead, health measures are seen as an *exception* to the usual GATT disciplines and thus the government imposing the measure bears the burden of proving that it falls within the scope of the exception provided in Article XX(b).

The Standards Code also had certain inherent shortcomings that limited its effectiveness in disciplining the use of regulations for the protection of human, animal and plant life and health as barriers to trade. First, it was only binding on its 32 signatories, thus excluding the majority of GATT Contracting Parties from its rules. Second, it did not directly apply to non-product-related processes and production methods ("NPR-PPMs").[17] Thus, regulations on how a specific product was produced fell outside its scope and were dealt with in terms of the usual GATT disciplines. Third, the dispute settlement mechanism created in the Standards Code, like that in GATT 1947, required consensus among WTO Members for the establishment of a panel or technical expert group to review a complaint. It was thus possible for a Member whose regulation was being challenged to block the establishment of a panel or review group. Further, even if review of the measure were not blocked, the findings of the relevant panel or review group had to be adopted by consensus of the signatories to the Standards Code in the Committee on

[16] Vogel discusses a few cases where agreement was reached in bilateral consultations following a challenge on the basis of the Standards Code. David Vogel, *Ships Passing in the Night: GMOs and the Politics of Risk Regulation in Europe and the United States*, Paper prepared for the CONFERENCE ON REGULATORY ISSUES OF GENETICALLY MODIFIED ORGANISMS, Maastricht, June 24–25, 2002, at 152–153.

[17] The definition in the Standards Code of a measure that would fall under its disciplines was "(a) specification contained in a document which lays down the characteristics of a product such as levels of quality, performance, safety or dimensions". This implicitly excludes process and production standards to the extent that they are not reflected in the product characteristics themselves. However, under Article 14 of the Standards Code, a signatory could challenge a PPM measure under the Code where it considered that the requirements had been drafted in the form of regulations on PPMs in order to avoid the Standards Code disciplines.

Technical Barriers to Trade in order to become binding. This created a second possibility for a signatory to block the dispute settlement process. Finally, no enforcement mechanism existed to ensure compliance with adopted dispute settlement reports, and thus compliance depended on the good faith of the Members and the shaming effect of the ruling.

In the 1980s, a dispute arose between the United States and the European Communities ("EC"), concerning an EC ban on the use of hormones for growth-promotion purposes in livestock farming, and an import prohibition on hormone-treated meat.[18] Despite attempts to address this dispute in informal discussions and later in dispute settlement proceedings under the Tokyo Round Standards Code, the conflict remained unresolved.[19] This ongoing dispute served to highlight the insufficiency of the existing rules with respect to the use of measures for the protection of human, animal or plant life or health in ways that restrict international trade. This resulted in an increased awareness of the need for new rules.[20]

C. Uruguay Round Negotiations on the SPS Agreement

1. Negotiating History

One important aim of the Uruguay Round negotiations was the liberalization of the agricultural sector. This sector had remained subject to much protection, despite the existing GATT rules. Thus, agricultural liberalization was one of the main driving forces behind the launching of the Uruguay Round of trade negotiations in September 1986. The agenda for these negotiations was set out in the Punta Del Este Declaration.[21] The Declaration called for the liberalization of trade in agricultural products and for bringing "... all measures affecting import access ... under strengthened and more operationally active GATT rules and disciplines" by, *inter alia*, "minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements."[22]

During the Uruguay Round negotiations on agricultural trade liberalization and on what would eventually become the Agreement on Agriculture, negotiators were very aware of the possibility that progress towards lowering trade barriers in the agricultural sector could be made ineffective by the increased use of SPS measures for protectionist purposes. Thus special disciplines for SPS measures were seen as crucial and inherently linked to the attempts to liberalize the agricultural sector.

[18] Council Directive of December 31, 1985, *Prohibiting the Use in Livestock Farming of Certain Substances having a Hormonal Action*, 1985 O.J. (L.382) 228. For details of the various EC Directives and proposals on this issue as well as this history of this dispute, *see* Dale E. McNiel, *The First Case under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban,* 39 VIRGINIA JOURNAL OF INTERNATIONAL LAW 89, 99–107 (1998).

[19] In 1987, after unsuccessful consultations on this dispute between the United States and the EC, the United States requested that the matter be referred to a technical expert group. The EC blocked the establishment of this expert group.

[20] Patterson discusses possible reasons why, before the Uruguay Round, disciplines for SPS measures were not negotiated despite the fact that the abuse of SPS measures for protectionist purposes was not new. Briefly, these are the importance attached to national sovereignty in health matters and the fact that agreement on uniform rules is made difficult by the fact that national health priorities differ widely. *See* Eliza Patterson, *International Efforts to Minimize the Adverse Trade Effects of National Sanitary and Phytosanitary Regulations*, 24 JOURNAL OF WORLD TRADE 91, 95–96 (1990).

[21] *Ministerial Declaration on the Uruguay Round: Declaration of September 20, 1986,* ("*Punta Del Este Declaration*") GATT B.I.S.D. 33S/19 (1987).

[22] *Punta Del Este Declaration, supra* note 21, at 20.

Originally, the idea was to strengthen the rules in the Standards Code with respect to SPS measures. However, as negotiations progressed, the issue of SPS measures was seen as meriting special attention, apart from the larger genus of technical standards.[23] This led to the creation of a separate Working Group on Sanitary and Phytosanitary Regulations and Barriers in 1989, under the Negotiating Group on Agriculture. As a result, two separate agreements on technical barriers to trade emerged from in the Uruguay Round: first, the Agreement on Technical Barriers to Trade ("TBT Agreement")[24] applicable to technical regulations, standards and conformity assessment procedures other than sanitary or phytosanitary measures; and second, the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement").[25]

2. Position of the Major Trading Nations

In the negotiations that led to the conclusion of the SPS Agreement, the leading role was taken primarily by those countries that account for the largest share of agricultural trade, namely the Cairns Group[26] of agriculture exporting countries, the United States and the EC.[27]

By the mid-term review of the Uruguay Round negotiations in December 1988, five priorities had been agreed upon for SPS disciplines, namely (1) international harmonization of SPS measures around standards set by international organizations; (2) the establishment of an effective notification procedure for SPS measures; (3) improvements to the multilateral dispute settlement system; (4) the possibility of obtaining scientific input and expertise, relying on the international organizations; and (5) an effective mechanism for bilateral settlement of disputes.[28] After the creation of the Working Group on Sanitary and Phytosanitary Regulations and Barriers in 1989, negotiations proceeded on this basis.

Written proposals were submitted to the Working Group. In these proposals, the United States, the EC and the Cairns Group all supported harmonization of SPS measures around the standards set by the Codex Alimentarius Commission, the International Plant

[23] Reasons that have been suggested for this view are the close link between agriculture and SPS standards, the importance of the beef hormone dispute, and the fact that SPS measures were thought to raise problems different from those linked to other technical standards, for example the greater importance of scientific risk assessment, the greater divergence in national approaches to standard setting and the crucial role of national regulatory authorities in deciding on the need for regulation and the measures to be taken. *See* David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines,* 27 CORNELL INTERNATIONAL LAW JOURNAL 817, 824 (1994).

[24] Agreement on Technical Barriers to Trade, Annex 1A to the Marrakesh Agreement, reprinted in GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 6–18 (1994). This Agreement elaborates on and replaces the Tokyo Round Standards Code of 1980. The TBT Agreement goes further than the Standards Code in that it applies to both mandatory technical regulations and optional standards, and extends not only to products but also to related processes and production methods. The TBT Agreement is discussed in Chapter 8 of this book.

[25] Agreement on the Application of Sanitary and Phytosanitary Measures, Annex 1A to the Marrakesh Agreement, reprinted in THE RESULTS OF THE URUGUAY ROUND, *supra* note 24, at 69–84. The scope of the SPS Agreement and its relationship to the TBT Agreement are discussed *infra* Part II(A).

[26] At the time of the Uruguay Round negotiations the Cairns Group was composed of: Argentina, Australia, Brazil, Canada, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand and Uruguay.

[27] Significant input was also provided by Japan and the Nordic group of countries. Israel, Korea, Austria, Morocco, Brazil and Colombia made proposals on SPS issues within their proposals for the agriculture negotiations in general.

[28] Simonetta Zarrilli and Irene Musselli, THE SPS AGREEMENT AND THE DEVELOPING COUNTRIES, World Bank (2002).

Protection Convention and the International Office of Epizootics or, for matters not covered by these organizations, around standards set by other relevant international organizations open for full participation by WTO Members. However, the proposals initially differed with respect to the strength of the harmonization provision. The United States and the Cairns Group envisaged a presumption of consistency with either the requirement of sound scientific evidence[29] or with the disciplines of Article XX(b)[30] of the GATT for SPS measures based on international standards, requiring Members that impose more stringent standards to prove that their measure was consistent with sound scientific evidence or the relevant GATT provisions. By contrast, the EC saw the international standards as constituting only a "principal source of scientific or technical advice when considering the sanitary and phytosanitary aspects of international trade" and emphasized the need "to provide for countries that have reached a high health status to be able to continue to apply standards more stringent than the international standards, where appropriate".[31] A convergence in positions resulted when, during the negotiations, the EC was faced with restrictions on its wine exports to the United States due to the presence of the pesticide procymidone, while Codex was in the process of adopting a maximum residue level for this pesticide. The EC then realized the potential benefits of harmonized standards and strengthened its support for a stricter harmonization provision.

There was general consensus on the inclusion of a non-discrimination principle and a requirement that the measure not constitute a disguised restriction on trade. In addition, the importance of ensuring transparency by means of notification procedures was agreed upon. The EC and the Cairns Group also indicated the need for technical assistance and special and differential treatment with regard to developing countries, with the Cairns proposal going further in calling for phased introduction of new SPS measures, longer time frames for compliance by developing countries, assistance for dispute settlement, and compensation where SPS measures more stringent than necessary are applied to developing country products.

The Working Group drew up a draft text of the SPS Agreement in October 1990. In the last months of 1990, however, the Uruguay Round negotiations faltered and the Brussels Meeting at which the Round should have been completed ended in deadlock. The deadlock was largely due to disagreement on issues relating to the liberalization of agricultural trade. To break the deadlock, in December 1991 the then Director-General of the GATT tabled what is now known as the "Dunkel Draft", embodying an overall compromise position. With respect to the SPS Agreement the Dunkel Draft closely followed the text of the 1990 draft prepared by the Working Group on Sanitary and

[29] Negotiating Group on Agriculture, *Submission of the United States on Comprehensive Long-Term Agricultural Reform,* MTN.GNG/NG5/W/118 *referred to in* Negotiating Group on Agriculture, Working Group on Sanitary and Phytosanitary Regulations and Barriers, *Synoptic Table of Proposals Relating to Key Concepts: Note by the Secretariat. Revision,* MTN.GNG/NG5/WGSP/W/17/Rev.1, May 29, 1990 at Table 3.

[30] Negotiating Group on Agriculture, *Sanitary and Phytosanitary Issues—Supplementary Communication for the Cairns Group,* MTN.GNG/NG5/W/164 *referred to in* Negotiating Group on Agriculture, Working Group on Sanitary and Phytosanitary Regulations and Barriers, *Synoptic Table of Proposals Relating to Key Concepts: Note by the Secretariat. Revision,* MTN.GNG/NG5/WGSP/W/17/Rev.1, May 29, 1990 at Table 3.

[31] Negotiating Group on Agriculture, *Submission of the European Communities on Sanitary and Phytosanitary Regulations and Measures*, MTN/GNG/NG5/W/146 *referred to in* Negotiating Group on Agriculture, Working Group on Sanitary and Phytosanitary Regulations and Barriers, *Synoptic Table of Proposals Relating to Key Concepts: Note by the Secretariat. Revision,* MTN.GNG/NG5/WGSP/W/17/Rev.1, May 29, 1990 at Table 3.

Phytosanitary Regulations and Barriers and this formed the basis for the final text of the SPS Agreement.[32]

3. Role of Developing Countries

Apart from those developing countries that were members of the Cairns group at the time of the Uruguay Round negotiations,[33] developing country participation in the negotiation of the SPS Agreement was very limited. Some developing country Cairns Group members, such as Argentina and Chile, made statements and actively participated in the discussions in the meetings of the Working Group. However, only Brazil and Colombia, acting jointly, and Morocco (not a Cairns Group member) submitted written negotiating proposals in this area, as part of their broader submissions for the agriculture negotiations. These developing countries emphasized the importance of harmonization of SPS measures on the basis of standards set by the international standard-setting organizations, as well as technical assistance and special and differential treatment for developing countries. In addition, it was proposed by Brazil and Colombia that when, without sound scientific evidence, Members apply stricter SPS measures to developing country products than to products from other countries, resulting in a reduction of the market share of developing countries or their exclusion from the relevant market, it should be possible to claim equitable compensation in dispute settlement.[34]

The lack of broader participation from developing countries in the negotiations leading to the drafting of the SPS Agreement can be attributed to their limited resources and the resulting wish to focus on those aspects of the negotiations that they perceived as being of most direct relevance to them (such as the agriculture and textiles negotiations). The technical nature of negotiations regarding disciplines on sanitary and phytosanitary measures may have further discouraged their participation, due to their lack of technical expertise in this area.

D. Overview of the Main Features of the 1994 SPS Agreement

The SPS Agreement tries to balance the right of Member governments to enact measures for the protection of human, animal and plant life or health in their territories against risks contained in imported products, with the goal of liberalizing trade in agricultural and food products. It thus aims to reconcile free trade with the legitimate concerns of governments for the life and health of humans, animals and plants. It does this by recognizing the right

[32] Some significant differences between the Dunkel Draft and the final version of the SPS Agreement were: (1) the addition of a footnote clarifying what the "scientific justification" required when an SPS measure deviates from an international standard is composed of; (2) the change in the initial requirement of Article 5.6 that SPS measures be least restrictive to trade, to indicate that they must be no more trade restrictive that required to achieve their appropriate level of sanitary or phytosanitary protection; (3) the indication in Article 5.3 that the requirement that economic factors be taken into account in a risk assessment does not apply to human health risks; and (4) the extension of the transitional period for implementation of the SPS Agreement from two years to five years, for least-developed country Members. THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1994), VOL. IV: THE END GAME 44–45 (Terence P. Stewart ed. 1999).

[33] *See supra* note 26.

[34] Negotiating Group on Agriculture, *Meeting of 27–28 November 1989—Proposal on Special, Differential and More Favourable Treatment for Developing Countries—Communication from Brazil and Colombia,* MTN.GNG/NG5/W/132 *referred to in* Negotiating Group on Agriculture Working Group on Sanitary and Phytosanitary Regulations and Barriers, *Synoptic Table of Proposals Relating to Key Concepts: Note by the Secretariat. Revision,* MTN.GNG/NG5/WGSP/W/17/Rev.1, May 29, 1990 at Table 6.

of Members to enact SPS measures[35] and to determine the level of health protection they want to ensure in their territories,[36] while setting certain limits for the exercise of these rights.

The SPS Agreement lays down specific rules and disciplines applicable to SPS measures. Going further than a mere elaboration and clarification of Article XX(b) of GATT 1994,[37] the SPS Agreement establishes a new, comprehensive set of norms for the adoption, maintenance and enforcement of SPS measures. Unlike the new TBT Agreement, the SPS Agreement emphasizes the role of scientific justification for the validity of national health measures.

The SPS Agreement introduces scientific disciplines for SPS measures. It requires that Members base their SPS measures on science, in the form of a risk assessment.[38] Certain requirements are set for risk assessments. Further, it encourages, without obliging, Members to harmonize their SPS measures around international standards, where these exist.[39] The SPS Agreement makes specific reference to three international standard-setting organizations in the area of SPS standards. Members are obliged to participate fully, within the limits of their resources, in international standard setting in these organizations. If Members wish to adopt SPS measures that are not based on international standards, they must provide scientific justification for these deviating measures. Where scientific evidence is insufficient, Members are allowed to take provisional measures, subject to certain requirements.[40]

In addition to the scientific disciplines on SPS measures, the SPS Agreement incorporates and elaborates GATT disciplines relevant to measures for the protection of human, animal or plant life or health. For example, SPS measures must be necessary to protect human, animal or plant life or health.[41] Members may not adopt measures that are more trade restrictive than required to achieve their chosen level of protection and must take into account the aim of minimizing negative trade effects when choosing their appropriate level of protection.[42] The SPS Agreement prohibits SPS measures that discriminate between Members or between a Member's own territory and that of other Members or are applied so as to constitute a disguised restriction on trade.[43] Members may not make arbitrary or unjustifiable distinctions in the levels of protection they deem appropriate in different but comparable situations.[44]

[35] Contained in Article 2.1of the SPS Agreement and discussed *infra* Part II(B)(1).

[36] *See infra* Part II(F)(1).

[37] Previously Article XX(b) of GATT 1947.

[38] The scientific disciplines are contained in Articles 2.2 and 5 of the SPS Agreement and are discussed *infra* Parts II(B)(2)(b) and II(D) respectively.

[39] The rules in respect of harmonization are contained in Article 3 of the SPS Agreement and are discussed *infra* Part II(C).

[40] Rules on provisional measures are contained in Article 5.7 of the SPS Agreement and discussed *infra* Part II(E).

[41] The "necessary" test is found in Article 2.2 of the SPS Agreement and discussed *infra* Part II(B)(2)(a). It reflects the "necessary" requirement of Article XX(b) of the GATT.

[42] The least-trade-restrictive requirement is found in Article 5.6 and (in non-mandatory form) in Article 5.4 of the SPS Agreement, discussed *infra* Parts II(F)(3) and II(F)(2) respectively, and reflects one element of the "necessary" test in Article XX(b) of the GATT.

[43] This non-discrimination provision is found in Article 2.3 of the SPS Agreement, discussed *infra* Part II(B)(2)(c). It encompasses the national treatment obligation of Article III of the GATT as well as the most favored nation treatment obligation of Article I of the GATT. It also reflects the requirements of the *chapeau* of Article XX of the GATT but is broader in scope.

[44] The goal of consistency in levels of protection is contained in Article 5.5 of the SPS Agreement, discussed *infra* Part II.(F)(2). It is a concrete application of the prohibition on arbitrary or unjustifiable discrimination or disguised restrictions on trade embodied in the *chapeau* to Article XX of the GATT.

The SPS Agreement also creates novel disciplines, specifically designed to minimize the trade-restrictive effect of legitimate SPS measures. It obliges Members to accept different SPS measures as equivalent to their own where they have been shown to achieve the same level of protection,[45] and to adapt their measures to take account of differences such as pest- and disease free status (and low pest and disease prevalence) in different countries and regions.[46]

Further, the SPS Agreement sets out procedural rules to ensure that the adoption and application of legitimate SPS measures do not unnecessarily limit trade. It requires that new or amended SPS measures be notified in advance to other Members and that a reasonable period of time be provided for Members to adapt to the new measures.[47] It also obliges Members to restrict administrative procedures for control, inspection and approval to ensure that they are no more burdensome, lengthy or costly than is reasonable and necessary.[48] An SPS Committee is established to oversee the operation and implementation of the SPS Agreement[49] and special rules are established to deal with scientific expertise in dispute settlement.[50]

Finally, particular rules are in place to address the special position of developing countries. These rules are aimed at the provision of technical assistance to developing country Members[51] as well as special and differential treatment of developing countries.[52]

II. Substantive Provisions of the SPS Agreement as Applied and Interpreted in Case Law

A. Scope of Application of the SPS Agreement (Article 1.1 and Annex A, paragraph 1)

Before examining the substantive disciplines of the SPS Agreement, it is necessary to determine what falls within its scope. Article 1.1 sets out the scope of application of this Agreement. It provides that the SPS Agreement applies to "all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade."

Thus, as set out by the Panel in *EC—Hormones*, there are two requirements for the SPS Agreement to apply:

> According to Article 1.1 of the SPS Agreement, two requirements need to be fulfilled for the SPS Agreement to apply: (i) the measure in dispute is a sanitary or phytosanitary measure; and (ii) the measure in dispute may, directly or indirectly, affect international trade.[53]

[45] The disciplines on recognition of equivalence are found in Article 4 of the SPS Agreement, discussed *infra* Part II(G)1.

[46] Rules on adaptation to regional conditions are found in Article 6 of the SPS Agreement, discussed *infra* Part II(G)2.

[47] The transparency obligations are contained in Article 7 and Annex B of the SPS Agreement, discussed *infra* Part III(A).

[48] The rules on control, inspection and approval procedures are found in Article 8 and Annex C of the SPS Agreement, discussed *infra* Part III(B).

[49] The provisions relating to the SPS Committee are found in Article 12 of the SPS Agreement, discussed *infra* Part III(C).

[50] Special rules with regard to dispute settlement under the SPS Agreement are found in Article 11 of the SPS Agreement, discussed *infra* Part III(D).

[51] Rules regarding technical assistance for developing countries are found in Article 9 of the SPS Agreement, discussed *infra* Part IV(A).

[52] Provisions relating to special and differential treatment are found in Article 10 of the SPS Agreement, discussed *infra* Part IV(B)(1).

[53] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, WT/DS48/R/CAN (1997), ¶ 8.39 (footnotes omitted); Report of the WTO Panel, *EC—Measures*

The first step is therefore to determine whether the measure is an SPS measure, after which the effect on international trade needs to be examined.

1. Definition of an SPS Measure (Annex A, paragraph 1)

Not all measures imposed for the protection of health are SPS measures for purposes of the SPS Agreement. The term SPS measure is defined in Annex A of the SPS Agreement, which provides in relevant part that an SPS measure is:

> . . . any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

It is clear from this definition that whether a measure falls under the SPS Agreement depends on its purpose or goal. Broadly speaking, the definition covers measures aimed at protecting humans and animals from food-borne health risks and protecting humans, animals and plants from risks from pests or diseases. Measures addressing other health risks relevant for international trade (such as a ban on toys made from toxic plastics or on products containing asbestos) and measures not directly aimed at health protection, but rather at consumer information or ethical concerns (such as requirements for labeling of biologically-grown vegetables or free-range eggs) do not fall under this definition. Such measures would thus not be subject to the disciplines of the SPS Agreement and would have to be analyzed under the relevant provisions of GATT 1994 and the TBT Agreement.[54]

While the characterization of a measure as an SPS measure depends on the purpose or goal of this measure, we are of the opinion that it is not the purpose or goal that a Member ascribes to the measure that is the determining factor.[55] If that were the case, a Member could avoid the application of the Agreement by denying that the purpose of its measure is one of those falling within the Annex A definition. We believe that to establish whether

Concerning Meat and Meat Products (Hormones), Complaint by the United States, WT/DS26/R/USA (1997), ¶ 8.36. It should be noted that in this dispute, the complaints by the United States and Canada regarding the EC ban on hormone-treated beef were dealt with separately by two Panels. However, since the two Panels had the same composition and heard and decided the two complaints together, we will refer to the Panels as "the Panel" (singular). The Panel did, however, circulate two separate reports, which were largely identical. Thus, where reference is made to this dispute, the relevant paragraphs of each of the two reports will be mentioned.

[54] In a recent case the Appellate Body found that a French ban on asbestos products from Canada could be challenged under the TBT Agreement and GATT 1994. *See* Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001), ¶ 75.

[55] *See also* McNiel, *supra* note 18, at 112.

a measure is an SPS measure one has to determine objectively the regulatory goal of the measure (for example by examining the formulation of the measure, its structure or design, and its effect), rather than trying to determine the subjective intent of the Member imposing the measure.

Health protection may be only *one of several* goals or objectives pursued by a measure. How does this affect the characterization of a measure as an SPS measure?[56] Could the Member imposing a measure argue that the other goals or objectives predominate and that the measure is thus not an SPS measure? Would the mere existence of one of the health objectives listed in paragraph 1 of Annex A be sufficient to characterize the measure as an SPS measure? This question has not received any attention in the case law so far. In all four cases to date, the Member defending its measure actually claimed that its purpose was the protection of health.[57]

Once it is established that a measure falls within one of the definitions in Annex A, paragraph 1, it is also important to determine precisely which definition applies since this affects the kind of risk assessment required to support the measure.[58] The risk assessment required differs depending on whether the measure is classified as a measure against food-borne risks (definition in paragraph 1(b)) or as a measure against risks from pests or diseases (definitions in paragraphs 1(a), 1(c) and 1(d)).

In *Australia—Salmon*, the Panel examined whether an Australian ban on imports of fresh, chilled or frozen salmon to prevent the importation of exotic diseases was a "sanitary measure" within the meaning of Annex A, paragraph 1(a) or (b), and stated as follows:

> In the circumstances at hand, we consider that the definition of a "sanitary measure" in paragraph 1(a) encompasses the coverage sought by Australia under the definition in paragraph 1(b). The definition in paragraph 1(a) deals with risks arising from "the entry, establishment or spread of pests, diseases ... or disease-causing organisms" in general. In the context of disease-causing organisms, the definition in paragraph 1(b) is limited in the sense that it only addresses risks arising from "disease-causing organisms in foods, beverages or feedstuffs" (hereafter also referred to as food-borne risks). We are of the view that, even though both definitions of a "sanitary measure" invoked by Australia might be applicable to the measure in dispute, the *objectives for which that measure is being applied* are more appropriately covered by the definition in paragraph 1(a). These objectives have been clearly expressed by Australia on several occasions.[59] (Emphasis added)

It appears in this case that the Panel first objectively determined which of the provisions of Annex A applies, before affirming its conclusion by reference to the fact that Australia had expressed this objective.

Significantly, the definition in Annex A specifies that the measures must aim to protect human, animal or plant life or health "within the territory of the Member." Thus measures

[56] *See also* Joost Pauwelyn, *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: EC—Hormones, Australia—Salmon and Japan-Varietals,* 2 JOURNAL OF INTERNATIONAL ECONOMIC LAW 641, 643 (1999).

[57] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.12; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.25; Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon,* WT/DS18/R (1998), ¶ 8.32; Report of the WTO Panel, *Japan—Measures Affecting Agricultural Products,* WT/DS76/R (1998), ¶ 8.12. Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/R (2003), ¶ 4.33. The Panel decisions in each of these cases was appealed. *See* notes 70, 97, 112, and 141 for citations to the Appellate Body Reports. The Appellate Body finding in the cases are discussed extensively in this chapter.

[58] This issue will be discussed *infra* Part II(D)(1).

[59] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.34.

aiming at the extra-territorial application of domestic health standards are excluded from the application of the SPS Agreement. This issue relates to the treatment of measures with respect to processes and production methods ("PPMs") under the SPS Agreement. Although the definition of SPS measures in Annex A of the SPS Agreement expressly includes PPMs, this is qualified by the requirement that SPS measures aim to protect health "within the territory of the Member". Thus, while, for example, rules relating to hygiene in foreign packaging or processing plants or abattoirs would fall within the definition of SPS measures as they aim to prevent health risks in the importing Member, rules on, for example, foreign forestry practices aimed at protecting plant health in the exporting Member would not be considered SPS measures for purposes of the SPS Agreement. Such extra-territorial PPMs would fall under the rules of the GATT[60] or possibly the TBT Agreement.[61]

The definition in Annex A, paragraph 1, goes on to state that SPS measures "include all relevant laws, decrees, regulations, requirements and procedures . . ." and gives a broad, illustrative, non-exhaustive list of such measures ranging from end-product criteria and quarantine requirements to certification and sampling procedures. The SPS Agreement therefore provides broad coverage of legal measures and is clearly intended to cover all measures aimed at one of the above-mentioned purposes, whether by means of legislation, administrative regulation or procedural rules. Thus, if the measure at issue is aimed at one of the goals mentioned in points (a) to (d) of the definition, it is an SPS measure for the purposes of the SPS Agreement, regardless of the specific form it takes.

The scope of application of the SPS Agreement is not limited to discriminatory measures. WTO Members negotiating the SPS Agreement realized that a test based on discrimination does not adequately distinguish between legitimate SPS measures and those used for protectionist purposes.[62] It is possible for a measure which neither discriminates de facto nor de jure between domestic products and imports to have a negative impact on international trade, and thereby serve to protect domestic industry from foreign competition. For example, a low maximum residue level for the presence of a specific chemical used in pesticides, applicable to both domestic and imported fruit, may have the effect of excluding fruit exports from many countries from the domestic market. The SPS Agreement is thus also applicable to non-discriminatory SPS measures that affect international trade. The application of the Agreement therefore extends beyond the scope of GATT 1994, which is limited to discriminatory measures. An SPS measure is subject to the disciplines of the SPS Agreement even if it is neither directly nor indirectly discriminatory and is thus GATT-consistent.

2. Direct or Indirect Effect on International Trade (Article 1.1)

The second requirement set forth in Article 1.1 for the application of the SPS Agreement is that it must be shown that the relevant measure may directly or indirectly affect international trade. It would appear that this is not an empirical standard, necessitating proof

[60] There has been extensive discussion in the literature regarding whether, under GATT law, Members are allowed to distinguish between products in their regulations on the basis of PPMs. The debate focuses on whether products made using different PPMs are to be considered "like products" for purposes of the non-discrimination rules of the GATT. If so, the question remains open whether the exceptions in Article XX of the GATT could in limited cases justify extra-territorial measures dealing with PPM issues.

[61] There is some debate regarding whether PPMs that do not affect the characteristics of the product fall under the definition of a "technical regulation" for purposes of the TBT Agreement. Since the TBT Agreement is dealt with in Chapter 8 of this book, this issue will not be addressed here.

[62] David R. Hurst, *Hormones: European Communities—Measures Affecting Meat and Meat Products,* 9 European Journal of International Law 182, 182 (1998).

that the measure has led to a reduction in trade flows, but rather a theoretical standard, met by showing that the measure applies to imports and can therefore be presumed to have a negative impact on trade.[63] In *EC -Hormones* the Panel agreed with both parties that this requirement had been met and stated that "it cannot be contested that an import ban affects international trade."[64] This requirement should be easy to fulfill, and has yet to be discussed in any SPS case.

3. Other Issues relating to the Scope of Application

(a) Applicability to Bodies Other than Central Government Bodies (Article 13). The applicability of the disciplines in the SPS Agreement to bodies other than the central government is addressed in Article 13 of the SPS Agreement. This provision states:

> Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.

The compliance Panel in *Australia—Salmon* in this regard found, with respect to the applicability of the SPS Agreement to a measure taken by a state government (Tasmania), as follows:

> Article 13 of the SPS Agreement provides unambiguously that: (1) "Members are fully responsible under [the SPS] Agreement for the observance of all obligations set forth herein"; and (2) "Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies". Reading these two obligations together, in light of Article 1.1 of the SPS Agreement referred to earlier, we consider that sanitary measures taken by the Government of Tasmania, being an "other than central government" body as recognized by Australia, are subject to the SPS Agreement and fall under the responsibility of Australia as WTO Member when it comes to their observance of SPS obligations.[65]

Thus the rules contained in the SPS Agreement will not only have an impact on the central government bodies of a Member, but indirectly also on other bodies under its responsibility charged with duties in the area of sanitary and phytosanitary protection. It is the task of the Member to ensure that these bodies comply with the disciplines of the SPS Agreement.

(b) No Requirement of Prior Proof of GATT Violation. Before the coming into force of the SPS Agreement, Members were only required to justify their health measures under

[63] McNiel, *supra* note 18, at 113.

[64] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.23; and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, *supra* note 53, ¶ 8.26.

[65] Report of the WTO Compliance Panel, *Australia—Measures Affecting the Importation of Salmon, Recourse to Article 21.5 by Canada*, WT/DS18/RW (2000), ¶ 7.13.

Article XX(b) of the GATT once a violation of GATT disciplines had been shown. This is a logical consequence of the rule/exception relationship between Articles III and XI on the one hand and Article XX on the other. The Panel in *EC—Hormones* was faced with the question whether a prior violation of the GATT 1994 must be shown before the SPS Agreement is applicable to a dispute. The EC argued that since the Preamble of the SPS Agreement explicitly states as one of its aims the elaboration of rules for the application of the provisions of the GATT 1994 relating to SPS measures, particularly Article XX(b), the SPS Agreement is not an independent agreement but only an interpretation of Article XX(b). It would thus only apply in cases where Articles I, III or XI of the GATT 1994 had been violated and recourse could be had to the Article XX(b) exception.[66] The Panel rejected this argument, finding that the SPS Agreement is an independent agreement, imposing substantive obligations that go beyond those of the GATT.[67] After referring to the two requirements of Article 1.1, it held:

> . . . There are no additional requirements. The SPS Agreement contains, in particular, no explicit requirement of a prior violation of a provision of GATT which would govern the applicability of the SPS Agreement, as asserted by the European Communities.[68]

Thus, prior proof of a violation of the GATT is not a precondition for the applicability of the SPS Agreement.[69] This finding is clearly correct, since the scope of the SPS Agreement is broader than that of the GATT. As noted above, an SPS measure that is non-discriminatory and thus in compliance with GATT rules could still fall foul of the disciplines of the SPS Agreement, for example by not being based on a risk assessment. While, as has been stated above, the negotiations on the SPS Agreement started out, *inter alia,* as an attempt to clarify Article XX(b) of the GATT, it is clear that the result went far beyond this. The SPS Agreement now lays down a comprehensive set of rights and obligations, independent of those contained in GATT 1994 and covers all SPS measures that could have an impact on international trade, not only those that are discriminatory in nature or effect. Therefore it is clear that a violation of the GATT cannot be a prerequisite for the applicability of the SPS Agreement.

(c) Temporal Scope of Application. The temporal scope of application of the SPS Agreement also deserves attention here. In EC— *Hormones* the EC argued that, as its measure

[66] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 4.4; and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, *supra* note 53, ¶ 4.3.

[67] The Panel based its finding on the following grounds: (1) under the plain language of Article1.1 which governs the applicability of the SPS Agreement, the only requirements are that the relevant measure be an SPS measure as defined in Annex A and that it affect international trade. No prior violation of GATT is required. (2) The SPS Agreement does not only elaborate on GATT provisions but establishes its own substantive obligations in order to further, *inter alia*, the harmonization of SPS measures. (3) Under Article 2.4 of the SPS Agreement, measures that conform to the SPS Agreement are deemed to comply with GATT provisions, in particular Article XX(b). (4) Article 3.2 of the SPS Agreement states that measures conforming to international standards are presumed consistent with GATT 1994. These presumptions imply that the SPS Agreement contains at least as many and probably more obligations than Article XX(b) of the GATT 1994.

[68] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.39 (footnotes omitted); Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.36.

[69] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶¶ 8.42–8.44 (footnotes omitted); Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶¶ 8.39–8.41.

predated the entry into force of the SPS Agreement on January 1, 1995, the SPS Agreement was not applicable to it. The Appellate Body agreed with the Panel's finding that the SPS Agreement nevertheless governed the dispute. The Appellate Body held as follows:

> If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly. Articles 5.1 and 5.5 do not distinguish between SPS measures adopted before 1 January 1995 and measures adopted since; the relevant implication is that they are intended to be applicable to both.[70]

The Panel had based its conclusion on Article 28 of the Vienna Convention on the Law of Treaties[71] which provides that—as a rule—a treaty cannot apply to acts, facts or situations ceasing to exist before the treaty came into force. As the EC measure continued to exist after the entry into force of the SPS Agreement and since there were no provisions in the SPS Agreement itself limiting its temporal application, the Agreement was held to apply to the measure in question.[72] The Appellate Body also pointed to Article XVI:4 of the Marrakesh Agreement which obliges Members to ensure the conformity of their laws, regulations and procedures with their obligations under the annexed Agreements.[73] It is thus apparent that Members have to review their existing SPS measures in the light of the new disciplines of the SPS Agreement, in particular those relating to the scientific basis for SPS measures.

Recognizing the difficulties that this could cause for Members, particularly in the light of the requirement contained in the SPS Agreement that measures be based on risk assessments, the Appellate Body pointed to the qualification to this obligation in Article 5.1, which provides for a degree of flexibility by requiring only a risk assessment "as appropriate to the circumstances."[74]

From the above discussion it is apparent that the SPS Agreement has a very broad scope of application. The disciplines it establishes will have a far-reaching impact on national measures for the protection of health falling within the definition of SPS measures.

4. Relationship with other WTO Agreements

Where a measure for the protection of health is at issue, it could fall under any of the following three WTO agreements, namely the SPS Agreement, the TBT Agreement or GATT 1994, depending on the nature and content or objective of the measure. While both the SPS Agreement and the TBT Agreement circumscribe the measures to which they apply,[75] GATT 1994 rules[76] generally apply to discriminatory measures applicable

[70] Report of the Appellate Body, *EC—Measures Concerning Meat* and *Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 128.

[71] Concluded in Vienna on May 23, 1969, 8 I.L.M. 679 (1969).

[72] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.25; and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, *supra* note 53, ¶ 8.25.

[73] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 128.

[74] *Id.* ¶ 129.

[75] The SPS Agreement applies to SPS measures as defined in Annex A thereto and the TBT Agreement applies to technical regulations, standards and conformity assessment procedures, as defined in Annex 1 thereto, except where these are covered by the SPS Agreement.

[76] Most relevant for our purposes are Articles III:4, XI and XX(b) of GATT 1994, the provisions of which are described briefly *supra* Part I(B)(1).

to trade in goods.[77] Thus, the treatment of measures for the protection of health under WTO law is determined by the relevant provisions of these three agreements within their respective spheres of application. The relationship between these agreements will therefore be addressed. In addition, the relationship between the SPS Agreement and the Agreement on Agriculture also deserves attention here due to the close link between the aims of these agreements.

(a) The TBT Agreement. As discussed above, during the Uruguay Round negotiations it was agreed that separate disciplines were necessary for SPS measures aside from those applicable to technical standards generally.[78] This led to the drafting of two separate agreements on technical barriers: the SPS Agreement and the TBT Agreement.

The importance of establishing which of these two agreements applies when dealing with a technical regulation or standard for the protection of health comes from the fact that the two agreements apply different disciplines to measures falling within their respective ambits. The rules in the TBT Agreement are less strict; they are primarily aimed at ensuring that technical regulations, standards and conformity assessment procedures do not constitute unnecessary barriers to trade, while recognizing the right of governments to pursue legitimate objectives by means of such measures. In brief, the TBT Agreement prohibits discrimination in the preparation, adoption and application of technical regulations, standards and conformity assessment procedures, establishes a Code of Good Practice for standardizing bodies, mandates the use of the least-trade-restrictive measure available, obliges transparency in the regulatory process and encourages the adoption of international standards. However, unlike the SPS Agreement, it sets no scientific requirements for the adoption of measures and it allows deviation from international standards where necessary to fulfill a legitimate objective, without requiring scientific justification for the deviation.

It is clear, therefore, that it would be to the advantage of a complaining Member to challenge a measure under the SPS Agreement rather than the TBT Agreement. However, this choice is not left to the complaining Member. Instead, the TBT Agreement provides in Article 1.5:

> The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

Thus, once a measure falls within the definition of an SPS measure in Annex A of the SPS Agreement, it falls under the disciplines of the SPS Agreement to the exclusion of the TBT Agreement.

(b) GATT 1994 (Article 2.4). The insufficiency of Article XX(b) of GATT 1947 to deal with the complexities of SPS regulations was one of the factors that led Members to negotiate the SPS Agreement in the Uruguay Round, as set out above. Members sought to flesh out Article XX(b), thereby establishing limits on the use of health measures in ways that could adversely affect international trade. However, the resultant SPS Agreement goes further than a mere elaboration of Article XX(b). Instead, it establishes a new, comprehensive set of norms for the adoption and maintenance of SPS measures.

[77] The scope of application of GATT 1994 is thus at once narrower (including only discriminatory measures) and broader (including all such measures, not only SPS measures) than that of the SPS Agreement.

[78] For a more detailed discussion of the negotiating history, *see supra* Part I(C).

The Panel in *EC—Hormones* held the following on the relationship between the SPS Agreement and Article XX(b) of GATT 1994:

> . . . we find the EC claim that the SPS Agreement does not impose "substantive" obligations additional to those already contained in Article XX(b) of GATT not to be persuasive. It is clear that some provisions of the SPS Agreement elaborate on provisions already contained in GATT, in particular Article XX(b). The final preambular paragraph of the SPS Agreement provides, indeed, that the Members desired "to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)". Examples of such rules are, arguably, some of the obligations contained in Article 2 of the SPS Agreement. However, on this basis alone we cannot conclude that the SPS Agreement only applies, as Article XX(b) of GATT does, if, and only if, a prior violation of a GATT provision has been established. Many provisions of the SPS Agreement impose "substantive" obligations which go significantly beyond and are additional to the requirements for invocation of Article XX(b). These obligations are, *inter alia,* imposed to "further the use of harmonized sanitary and phytosanitary measures between Members"[79] and to "improve the human health, animal health and phytosanitary situation in all Members".[80] They are not imposed, as is the case of the obligations imposed by Article XX(b) of GATT, to justify a violation of another GATT obligation (such as a violation of the non-discrimination obligations of Articles I or III).[81]

The SPS Agreement, however, does not expressly supplant the relevant provisions of GATT 1947 (now incorporated by reference in GATT 1994) applicable to health measures. Nor is it subordinate to the GATT. Instead, the two agreements now operate as complements to each other and to the TBT Agreement.[82]

Where the measure at issue is an SPS measure as defined in Annex A of the SPS Agreement, it may fall within the scope of application of the SPS Agreement and, to the extent that it is also discriminatory, within that of GATT 1994. Therefore, both these agreements would, in principle, apply to such a measure. The relationship between GATT 1994 and the other multilateral agreements on trade in goods, including the SPS Agreement, in case of conflict is defined in the General Interpretative Note to Annex 1A of the WTO Agreement, which provides:

> In the event of conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO (referred to in the Agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

Therefore, in the case of a conflict between the applicable GATT rules and the SPS Agreement, the latter prevails. The SPS Agreement could be seen as a kind of *lex specialis* specifying rules applicable to SPS measures, aside from the more generally applicable rules of the GATT 1994.

However, the possibility for conflict between GATT rules and the disciplines of the SPS Agreement is slim, as the SPS Agreement incorporates the relevant GATT disciplines. This fact is reflected in Article 2.4 of the SPS Agreement, which, unlike the case with

[79] Preambular ¶ 6 of the SPS Agreement [Footnote in original].

[80] Preambular ¶ 2 of the SPS Agreement [Footnote in original].

[81] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.38, and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, *supra* note 53, ¶ 8.41.

[82] A detailed discussion on the relationship between the GATT, the SPS Agreement and the TBT Agreement can be found in Gabrielle Marceau and Joel P.Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation* 36 JOURNAL OF WORLD TRADE 811 (2002).

the other Annex 1A agreements, contains a presumption of consistency with GATT 1994 for measures conforming to its provisions. Article 2.4 of the SPS Agreement provides:

> Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

We consider that one can infer from the presumption of consistency in Article 2.4 that the provisions of Article XX(b) of the GATT 1994 and all other relevant provisions of that Agreement could be regarded as being subsumed into the SPS Agreement, to the extent that they would apply to discriminatory SPS measures.

When an SPS measure is at issue, it is therefore logical to examine this measure under the SPS Agreement first.[83] This argument is borne out by the finding of the Panel in *EC—Hormones* which, when it addressed the question of which of the two agreements to examine first, held:

> The SPS Agreement specifically addresses the type of measure in dispute. If we were to examine GATT first, we would in any event need to revert to the SPS Agreement: if a violation of GATT were found, we would need to consider whether Article XX(b) could be invoked and would then necessarily need to examine the SPS Agreement; if, on the other hand, no GATT violation were found, we would still need to examine the consistency of the measure with the SPS Agreement since nowhere is consistency with GATT presumed to be consistency with the SPS Agreement. For these reasons, and in order to conduct our consideration of this dispute in the most efficient manner, we shall first examine the claims raised under the SPS Agreement.[84]

Also, in *Australia—Salmon*, the Panel first examined the SPS Agreement, holding:

> Canada recognizes that the SPS Agreement provides for obligations additional to those contained in GATT 1994, but, nevertheless, first addresses its claim under Article XI of GATT 1994. Australia invokes Article 2.4 of the SPS Agreement, which presumes GATT consistency for measures found to be in conformity with the SPS Agreement, to first address the SPS Agreement. We note, moreover, that (1) the SPS Agreement specifically addresses the type of measure in dispute, and (2) we will in any case need to examine the SPS Agreement, whether or not we find a GATT violation (since GATT consistency is nowhere presumed to constitute consistency with the SPS Agreement). In order to conduct our consideration of this dispute in the most efficient manner, we shall, therefore, first address the claims made by Canada under the SPS Agreement before addressing those put forward under GATT 1994.[85]

While the presumption of GATT-consistency of measures found to be in compliance with the SPS Agreement could in theory perhaps be rebutted, in which case the provisions of

[83] In favor of this position, *see* Reinhard Quick and Andreas Blüthner, *Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case,* 2 JOURNAL OF INTERNATIONAL ECONOMIC LAW 603 (1999). *See also contra,* Pierre Pescatore, *The Reconciliation of Interests and the Revision of Dispute Resolution Procedures in the Framework of the WTO*, paper presented at the expert meeting FREE WORLD TRADE AND THE EUROPEAN UNION Academy of European Law, Trier, June 11–12, 1998, at 23 (summarized in Quick and Blüthner, at 627), where it is argued that the SPS Agreement is subordinate to GATT principles and therefore the first question in a dispute should always be whether there is a violation of GATT rules which can give rise to the application of Article XX(b) and consequently to SPS rules.

[84] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.42; and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, *supra* note 53, ¶ 8.45.

[85] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.39.

the GATT 1994 would subsequently need to be examined,[86] it is difficult to think of any examples where this would be the case.[87] In our opinion, the relevant GATT rules are best seen as having been subsumed into the disciplines of SPS Agreement, and this leads us to the conclusion that the presumption of GATT-consistency contained in Article 2.4 should be regarded as irrebuttable.

(c) The Agreement on Agriculture. It was clear to the negotiators of the Agreement on Agriculture that special disciplines for SPS measures were crucial and inherently linked to the attempts to liberalize trade in agricultural products. This link is made explicit in Article 14 of the Agreement on Agriculture, which states that "Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures."

This provision is, legally speaking, redundant, since all WTO Members are bound to give effect to *all* multilateral WTO agreements including the SPS Agreement. However, this provision does serve to emphasize the negotiators' acknowledgement of the importance of the disciplines in the SPS Agreement in securing the gains for agricultural trade liberalization achieved in the Agreement on Agriculture.

The SPS Agreement and the Agreement on Agriculture are complementary in nature. Both have the common aim of enhancing market access in the agricultural sector by creating disciplines on trade-restrictive measures. However, the SPS Agreement covers measures affecting not only agricultural but also food products. In addition, while the Agreement on Agriculture addresses the traditional trade barriers in the agricultural sector, the SPS Agreement was negotiated to deal with trade barriers that were not covered by the disciplines of the Agreement on Agriculture, namely sanitary and phytosanitary measures. Thus, together these two agreements represent an important step forward in securing market access for food and agricultural products.

B. Basic Rights and Obligations (Article 2)

1. Right to Take SPS Measures (Article 2.1)

Article 2 of the SPS Agreement sets out the basic rights and obligations under the Agreement. They are further elaborated in subsequent articles. This article reflects the underlying aim of the SPS Agreement of balancing the legitimate right of sovereign governments to take health protection measures, with the goal of promoting free trade and preventing protectionism. Article 2, under the heading *Basic Rights and Obligations* provides in relevant part as follows:

[86] *See* Quick and Blüthner, *supra* note 83, at 628.

[87] Quick and Blüthner argue that an interpretation of those SPS rules which are similar to GATT disciplines (such as those in Articles 2.3 and 5.5 of the SPS Agreement), in a way that diverges from that given to the relevant GATT provision (Article XX), would make it possible for a challenging Member who loses the case under the SPS Agreement, to "easily" rebut the presumption of compatibility and pursue its challenge under the GATT. This result would go against the aim of the SPS Agreement to clarify and give further meaning to the relevant GATT provisions (while going further than GATT). Thus they argue that the panels and Appellate Body should interpret these SPS rules in the light of existing GATT jurisprudence to avoid this possibility. *Id.* At 630–632. On the other hand, Goh and Ziegler claim that where an SPS measure is at issue, the SPS Agreement should apply exclusively, making recourse to the GATT impossible. Gavin Goh and Andreas R. Ziegler, *A Real World Where People Live and Work and Die: Australian SPS Measures after the WTO Appellate Body's Decision in the Hormones Case,* 35 JOURNAL OF WORLD TRADE 271 (1998). This would imply that the presumption of compatibility with the relevant GATT provisions is irrebuttable.

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.
2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.
3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Significantly, paragraph 1 of Article 2 explicitly recognizes the *right* of Members to take SPS measures necessary for the protection of human, plant or animal life or health provided that they conform to the provisions of the SPS Agreement. This is an important provision as it represents a movement away from the situation under GATT 1994 where discriminatory health measures are, in principle, prohibited unless they can be justified under the exception provided in Article XX(b). Thus, under the GATT rules, the burden of proof rests on the Member imposing the SPS measure to prove that it meets the requirements of Article XX(b) and the *chapeau* of Article XX. On the contrary, Article 2.1 of the SPS Agreement makes clear that SPS measures are, in principle, allowed and it is therefore for the complaining Member to prove that the measure is not consistent with the provisions of the SPS Agreement.

However, the right of Members to impose SPS measures is not unlimited but subject to the disciplines set out in the rest of the SPS Agreement. These disciplines can usefully be divided into two categories: first, the new scientific disciplines on the use of SPS measures, introduced by the SPS Agreement, and, second, the familiar GATT trade disciplines, which are reiterated in the SPS Agreement.[88] These disciplines are first reflected in paragraphs 2 and 3 of Article 2 and are further elaborated in later provisions.

2. Limits to the Right to Apply SPS Measures (Articles 2.2 and 2.3)

Article 2.2 lays down three requirements for SPS measures: they must be (a) applied only to the extent necessary to protect human, animal or plant life or health; (b) based on scientific principles; and (c) not maintained without sufficient scientific evidence, except as provided for in Article 5.7. Article 2.3 contains the familiar GATT prohibitions on arbitrary or unjustifiable discrimination and disguised restrictions on trade.

(a) Applied Only To the Extent Necessary to Protect Human, Animal or Plant Life or Health (Article 2.2). The obligation on Members, contained in the first part of Article 2.2, to ensure that SPS measures are applied "only to the extent necessary to protect human, animal or plant life or health" reflects the well-known discipline contained in Article XX(b) of GATT 1994 justifying measures with health-policy objectives. This requirement of Article 2.2 has not yet been subject to dispute settlement. However, cases decided under Article XX(b) of GATT 1994 can usefully be examined to determine how this discipline is likely to be interpreted by panels and the Appellate Body in future cases

[88] The prohibition on arbitrary or unjustifiable discrimination and disguised restrictions on trade is contained in the *chapeau* of Article XX of GATT 1994 and the necessary test in paragraph (b) of that article.

under the SPS Agreement.[89] In particular, those aspects of the "necessary" test under Article XX(b) of the GATT that are not already reflected in later provisions of the SPS Agreement,[90] would probably be addressed under Article 2.2. It should, however, be borne in mind that while GATT Article XX(b) represents an exception to the normal disciplines, and thus the burden of proof to show that its requirements are met rests on the Member imposing the health measure, under the SPS Agreement this rule-exception relationship is not present and it is for the complaining Member to prove that this obligation has not been fulfilled.

(b) Based on Scientific Principles and Not Maintained Without Sufficient Scientific Evidence (Article 2.2). Article 2.2 of the SPS Agreement also requires that SPS measures be based on scientific principles and not be maintained without sufficient scientific evidence. The importance of these basic scientific disciplines, which are further elaborated in Article 5.1 and which mediate between the goals of national health protection and the liberalization of trade, was made explicit in *EC—Hormones*, where the Appellate Body stated:

> The requirements of a risk assessment under Article 5.1, as well as of "sufficient scientific evidence" under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.[91]

Article 2.2 raises the question of the meaning of "scientific principles" and "scientific evidence", as well as what will be regarded as "sufficient", both in terms of the quantity of evidence required and its quality or scientific validity.[92]

Although this issue was raised in *EC—Hormones*, the Panel found violations of Articles 3 and 5 and thus did not consider it necessary to decide whether Article 2 was also violated (*see* note 53, *supra*). The Appellate Body agreed with this application of judicial economy, but stated that it would have been more logical for the Panel to start

[89] The likelihood that a similar interpretation will be followed can be inferred from the presumption in Article 2.4 SPS that measures conforming to the SPS Agreement are in accordance with GATT obligations, in particular Article XX(b), discussed *supra* Part II(A)(4)(b). See in this regard the argument of Quick and Blüthner, set out *supra* note 87.

[90] The Panel in *U.S.—Gasoline* identified two requirements for the test of Article XX(b) of the GATT to be met, namely that the policy aimed at by the measure falls within the ambit of policies designed to protect human, animal or plant life or health, and that the measure imposed be necessary to achieve this objective. Report of the WTO Panel, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (1996) ¶ 6.20. The first part of this test is already covered by the definition of SPS measures in the SPS Agreement. Measures not falling within the policy objective of this definition will not be covered by the SPS Agreement. It is the second element of the test that is more interesting here, namely the "necessity" test. To the extent that it has been interpreted in Article XX case law to require the least-trade restrictive measure reasonably available that achieves a Member's appropriate level of protection, it is already embodied in Article 5.6 of the SPS Agreement. Report of the GATT Panel, *Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200 (1991), ¶ 75. However, the Article XX(b) case law also establishes an element of weighing and balancing of factors, including the contribution made by the measure to the aim it pursues, the importance of the common interests of values protected by the measure and the trade restrictive effect of the measure. Report of the Appellate Body, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (2000), ¶¶ 162–164; Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products,* supra note 54, ¶ 172. We argue that this element will be of importance in the interpretation of the first requirement of Article 2.2 of the SPS Agreement.

[91] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 177.

[92] McNiel, *supra* note 18, at 117.

by focusing on Article 2, which sets out the basic rights and duties, before considering Article 5 (*see* note 70, *supra*).

In *Japan—Apples*,[93] the Panel, for the first time, examined the meaning of the words "scientific evidence" in Article 2.2. It held that in order to be "scientific" the evidence must be gathered through scientific methods.[94] It also established that both direct and indirect evidence can be scientific, although the probative value ascribed to each would differ.[95] According to the Panel, "evidence" excludes insufficiently substantiated information and non-demonstrated hypotheses.[96]

In *Japan—Agricultural Products,* the Panel and the Appellate Body were once again faced with the issue of the meaning of "sufficient scientific evidence" in Article 2.2, and they established a very vague test for sufficiency. The Appellate Body stated:

> The ordinary meaning of "sufficient" is "of a quantity, extent, or scope adequate to a certain purpose or object". From this, we can conclude that "sufficiency" is a relational concept. "Sufficiency" requires the existence of a sufficient or adequate relationship between two elements, *in casu,* between the SPS measure and the scientific evidence.
>
> The context of the word "sufficient" or, more generally, the phrase "maintained without sufficient scientific evidence" in Article 2.2, includes Article 5.1 as well as Articles 3.3 and 5.7 of the SPS Agreement.[97]

In examining this context of the term "sufficient", the Appellate Body first agreed with the Panel that the Appellate Body's finding in *EC—Hormones* regarding Article 5.1 provides guidance for the interpretation of Article 2.2.[98] In *EC—Hormones* it had held that the requirement in Article 5.1 that a measure be "based on" a risk assessment, read together with Article 2.2, means that there must be a rational relationship between the measure and the risk assessment. Second, the Appellate Body looked at Article 3.3 which allows Members to introduce or maintain measures resulting in a higher level of protection than those based on the relevant international standard, *inter alia* if there is sufficient scientific justification. The Appellate Body held that there is sufficient scientific justification if there is a rational relationship between the measure and the available scientific information.[99] Third, the Appellate Body turned to Article 5.7, which allows Members to adopt provisional measures in case of insufficient scientific evidence. It held that this is a qualified exemption from Article 2.2 and that a too-broad interpretation of Article 2.2 would render it meaningless.[100]

The Appellate Body then concluded:

> . . . we agree with the Panel that the obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence. Whether there is a rational relationship between an SPS measure and the scientific evidence is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence.[101]

[93] *Supra*, note 57.
[94] *Id.* ¶ 8.92.
[95] *Id.*, ¶¶ 8.91 and 8.98–8.99.
[96] *Id.*, ¶ 8.93.
[97] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R (1999), ¶¶ 73–74.
[98] *Id.* ¶ 76.
[99] *Id.* ¶ 79.
[100] *Id.* ¶ 80.
[101] *Id.* ¶ 84.

The Appellate Body then proceeded to agree with the Panel that Japan's SPS measure, the varietal testing requirement,[102] was maintained without sufficient scientific evidence for four of the eight products at issue.[103]

In *Japan—Apples*, the meaning of the word "sufficient" in Article 2.2 was again at issue. The Panel followed the interpretation of the Appellate Body in *Japan—Agricultural Products,* namely that sufficiency is a relational concept and thus that there must be a sufficient or adequate relationship between the SPS measure and the scientific evidence. The Panel took this to mean an objective or rational relationship.[104] It then stated that although the term "sufficient" is clearly to be considered in relation to the phytosanitary measure itself, "scientific evidence relates to a risk and is supposed to confirm the existence of a given risk."[105] It thus linked the concept of sufficiency in Article 2.2 to the extent to which the scientific evidence indicates the existence of a risk.

After examining the evidence submitted to it, the Panel held that a *negligible*[106] risk of transmission of fire blight through apple fruit was shown and there was no sufficient scientific evidence that apple fruit was likely to serve as a pathway for the entry, establishment or spread of fire blight in Japan.[107] In order to come to this conclusion, the Panel disassembled the sequence of events on the transmission pathway for fire blight, in order to identify the risk, and then compared the risk so identified with the measure at issue.[108] As a result, the Panel held that Japan's measure, which consisted of a range of cumulative requirements that had to be met for importation to be allowed,[109] was

[102] The varietal testing requirement refers to Japan's requirement that different varieties of eight agricultural products, which are potential hosts of codling moth, be tested before importation to ensure the efficacy of the quarantine treatment.

[103] The Panel's decision was based on a factual finding of an absence of a causal link between varietal differences and test differences with respect to the relationship between the fumigant concentration and the time period of fumigation (CxT value) and the dose required to kill 50 percent of codling moths (LD50 value). The experts advising the panel were of the view that the differences in CxT and LD50 values could have been caused by a number of factors not related to varietal differences (*e.g.*, leakage in the fumigation chamber, sorption by the packaging material and experimental errors). The Appellate Body understood this finding to indicate the absence of a rational relationship between the varietal testing requirement and the scientific evidence.

[104] Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶¶ 8.101–8.103.

[105] *Id.*, ¶ 8.104.

[106] One of the experts consulted by the Panel, Dr Hayward, indicated that the standard scientific definition of "negligible" was a likelihood of between zero and one in one million.

[107] Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶¶ 8.169 and 8.176.

[108] The Panel based this finding on its conclusions on the basis of the evidence available to it with regard to mature symptomless apples and other apples. With regard to mature, symptomless apples, it found that infection with fire blight had not been established; that populations of endophytic bacteria have not been found and epiphytic bacteria are very rare; and that the risk of completion of the transmission pathway is negligible. With regard to apples other than mature, symptomless fruit, it held that infected apples are capable of harbouring populations of bacteria which could survive through the various stages of commercial handling, storage and transportation; that risks of errors of handling or illegal actions could legitimately be taken into account, although the experts considered these risks small or debatable; but that completion of the last stage of the transmission pathway (the transmission of the bacteria to the host plant) was not shown to be likely. This was because only a reduced number of bacteria would survive commercial storage, handling and transportation and the existence of a vector (such as rain splash or bees), which could transmit the bacteria from the imported apples to the host apple plant in Japan, had not been established. Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶¶ 8.136, 8.139, 8.153, 8.157, 8.161, 8.168.

[109] These conditions are: that the apples are produced in designated fire blight-free orchards; that the orchard is free of fire blight-infected plants and other host plants of fire blight; that the orchard is surrounded by

"clearly disproportionate" to the negligible risk identified.[110] The Panel thus introduced a *proportionality test* into the "rational relationship" requirement in Article 2.2.[111]

On appeal, the Appellate Body accepted as appropriate the methodology of the Panel of disassembling the sequence of events and comparing the risk to the measure, in its Article 2.2 analysis, but noted that this does not exhaust the range of possible methodologies and that the circumstances of each case will determine the appropriateness of a given methodology.[112] The Appellate Body also did not take issue with the Panel's view that "clear disproportion" between the risk and the measure implies that a "rational or objective" relationship does not exist.[113] It rejected Japan's contention that the Panel should have accorded Japan a "certain degree of discretion" in the way in which it chose, weighed and evaluated the scientific evidence, finding that deference by panels to the findings of national authorities would not be compatible with the standard of review[114] applicable to panels.[115]

The "rational relationship-test" developed in the case law does not lay down clear guidelines on what will be regarded as "sufficient scientific evidence", beyond establishing a proportionality requirement. By leaving wide discretion to panels to make *ad hoc* decisions based on their evaluation of the circumstances of the case, it explicitly gives panels the mandate to evaluate the quality or weight of the scientific evidence presented. Are panels, which are primarily composed of trade experts, qualified for this task?[116] It has been argued that a panel should limit its enquiry to the question whether there is scientific consensus or scientific uncertainty regarding the issue at hand. Scientific uncertainty is most often the case and is evinced by the presence of a good faith difference of opinion among scientists. In such cases, a panel should determine which of the alternative accounts are found plausible by scientists and which are not. If there is any reputable scientific support for the Member's measure, it should be held to be based on "sufficient scientific evidence".[117]

Article 2.2 embodies the core SPS obligation establishing the role of science as a crucial part of the disciplines in respect of SPS measures. This provision sets science as

a 500-meter buffer zone; that the orchard and buffer zone are inspected at least three times per year; that the harvested apples, harvesting containers and interior of the packing facility be disinfected; that apples destined for Japan be kept separate from other apples after harvesting; that US officials certify that the apples are not infested or infected with fire blight and were disinfected; and that Japanese officials confirm the certification and carry out inspections themselves.

[110] Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶¶ 8.181 and 8.198.

[111] The Panel proceeded to examine two elements of Japan's measure, namely the buffer-zone requirement and the requirement of inspections three times yearly, as instances of elements most obviously maintained without sufficient scientific evidence either as such or when applied cumulatively with other elements. *Id.*, ¶¶ 8.182–8.197.

[112] Report of the Appellate Body, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R (2003), ¶ 164.

[113] *Id.*, ¶ 163.

[114] It is well-established case law that the standard of review to be applied by panels is that of an "objective assessment" of the matter, which implies neither total deference by panels to national authorities' determinations, nor *de novo* review. The issue of the appropriate standard of review is discussed *infra* Part III(D)(1)(c).

[115] Report of the Appellate Body, *Japan—Measures Affecting the Importation of Apples, supra* note 112, ¶ 165.

[116] The issue of the composition of the Panels is discussed further *infra* Part III(D)(1).

[117] Vern R. Walker, *Keeping the WTO from Becoming the "World Trans-science Organization": Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute,* 31 Cornell International Law Journal 251, 280 (1998).

the touchstone against which SPS measures are judged for validity. However, today the notion of "universal science" as neutral, objective and valid for all is widely rejected. The same factual situation can lead to different, equally valid, scientific conclusions.[118] This situation is commonly referred to as the problem of "dueling science." Regulation thus involves a choice between various scientifically plausible alternatives. It therefore becomes necessary to ask: *whose* science must measures be tested against? In judging the validity of an SPS measure against the scientific criteria of Article 2.2, must a panel defer to the scientific approach of the government imposing the measure, or can it substitute its own judgment for that of the government?

The U.S. Administration's Statement of Administrative Action that accompanied the bill to implement the Uruguay Round Agreements into U.S. law claimed that the requirement of "sufficient scientific evidence" does not authorize a panel to substitute its judgment for that of the government imposing the measure. It stated that by requiring only "sufficient scientific evidence," rather than a weighing of the preponderance of the evidence, this provision recognizes the existence of scientific uncertainty and the fact that decisions are based on choices between differing scientific views.[119] This approach would leave the evaluation and choice between the different scientific views in the hands of the government imposing the measure, and would require panels and the Appellate Body to defer to these decisions. This interpretation of Article 2.2 by the U.S. Administration is, of course, not an authoritative statement of the way in which this provision must be understood and applied. In fact, as will be seen in the following discussion, the positions taken by panels and the Appellate Body to date regarding scientific evidence do not indicate such complete deference. While the Appellate Body has shown greater deference to national choices than panels, recognizing the right of regulatory health authorities to rely on minority opinions and to act with caution in life-threatening situations, it reserves for panels the ability to rule on the quality and weight of the scientific evidence. Members imposing SPS measures must be able to offer evidence that would be acceptable to prominent scientists and that indicates a risk proportional to the measure imposed.[120]

In *EC—Hormones*, the issue of competing scientific opinions did not arise as there was unusually broad consensus among scientists that the use of hormones for growth-promotion purposes, in accordance with good veterinary practice, is safe. A single scientist, Dr. Lucier, was of the opinion that using oestrogen for growth promotion could raise the risk of breast cancer by up to one in one million. His opinion was deemed, by the Panel and Appellate Body, to be of insufficient weight to overturn the contrary results of the other studies referred to by the EC (which confirmed the safety of the hormones at issue, when used in accordance with good agricultural practice), in

[118] *See* Wirth, *supra* note 23 at 842. Wirth notes that "there is unlikely to be a single, unique way to analyze even the purely scientific significance of much empirical data. . . And even if we could somehow get a group of scientists to endorse a consensus position, it would be, in the first place, only tentative and subject to revision with the arrival of new discoveries; and in the second place, it may be entirely wrong. In science, the majority does not rule, as the history of science amply demonstrates".

[119] Statement of Administrative Action ("SAA"), H.R. Doc. 103–316, at 746, *quoted in* McNiel, *supra* note 18, at 118.

[120] McNiel, *supra* note 18, at 118. *See* Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 194, where the Appellate Body held (for purposes of Article 5.1) that a risk assessment may embody a minority opinion, provided it comes from a "qualified and respected source". As Article 5.1 is a specific application of Article 2.2, this finding is also relevant to the interpretation of "sufficient scientific evidence" in the latter article (held in the Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products, supra* note 97, ¶ 77).

particular because this opinion was not based on studies, carried out by him or under his supervision, specifically focused on hormone residues in meat from cattle on which such hormones were used for growth-promotion purposes. This does not necessarily imply, however, that if his opinion had been so based, it could have overturned the majority opinion. Whether there is "sufficient scientific evidence" will be determined on a case-by-case basis, depending on the circumstances of the case, including not only the specificity of the studies conducted but also the quantity and quality of scientific evidence.[121] In addition, the seriousness, i.e. the life-threatening nature, of the risks involved may affect the determination whether there is "sufficient scientific evidence" within the meaning of Article 2.2. It may be expected that the more serious the risks, the easier it will be to have "sufficient scientific evidence".[122]

(i) Relevance of the Precautionary Principle for Article 2.2

Another important issue raised in *Japan—Agricultural Products* was that of the applicability of what is known as the precautionary principle, to the interpretation of Article 2.2.[123]

The precautionary principle has gained wide acceptance on the international level,[124] particularly in the field of environmental protection, in response to the increasing realization of scientific uncertainty. According to the precautionary principle, in cases where there are threats of serious or irreversible harm, lack of full scientific certainty should not be used as a reason for postponing measures to prevent such harm.[125] In *Japan—Agricultural Products*, Japan contended that since it had established that certain products were potential hosts of codling moth (a pest of great significance for Japan), it was entitled to adopt a precautionary attitude and require testing of each variety of imported product, rather than accept the results for one variety. Thus, it argued that Article 2.2's requirement of "sufficient scientific evidence" must be interpreted in the light of the precautionary principle.

This claim was rejected by the Appellate Body,[126] which referred back to its decision on the use of the precautionary principle to soften the application of SPS disciplines in *EC—Hormones*.[127] In the latter case, the Appellate Body considered (in the context of its review

[121] *See* Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products, supra* note 97, ¶ 84.

[122] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 124.

[123] For further discussion of the role of the precautionary principle in the SPS Agreement, *see* Wirth, *supra* note 23, at 838–840.

[124] The precautionary principle is recognized in the following international instruments amongst others: the Treaty establishing the European Community, as amended by the Treaty on the European Union, in Article 174 (with regard to environmental protection), 31 I.L.M. 247 (1992); the United Nations Framework Convention on Climate Change, in Article 3.3, 31 I.L.M. 849 (1992); Agenda 21 of the United Nations Conference on the Environment and Development U.N. Doc.A/CONF.151/26, (1992); the Rio Declaration on Environment and Development, United Nations Conference on the Environment and Development, in Principle 15, U.N. Doc. A/CONF.151/5/Rev.1 31 I.L.M. 876 (1992); and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, in Articles 10.6 and 11.8, 39 I.L.M. 1027 (2000). For an interesting discussion on whether the precautionary principle has emerged as a norm of customary international law, *see* Owen McIntyre and Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law* 9 JOURNAL OF ENVIRONMENTAL LAW 221 (1997).

[125] This definition was adapted from the one appearing in Principle 15 of the Rio Declaration, *supra* note 124.

[126] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products, supra* note 97, ¶ 81.

[127] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 125.

of the Panel's findings on Articles 5.1 and 5.2) that it would be "unnecessary and probably imprudent" for it to decide whether the precautionary principle now forms part of general customary international law (as opposed to customary international environmental law, where it has gained wide acceptance).[128] However, it held that even if this were the case, the specific rule for cases of scientific uncertainty in Article 5.7 of the SPS Agreement overrides any such general principle.[129] Thus, according to the Appellate Body, the precautionary principle cannot be used to justify an otherwise inconsistent measure except to the extent provided for in Article 5.7.[130] The Appellate Body did, however, recognize that:

> . . . a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.[131]

It is as yet unclear what effect this directive to panels will have in practice on the interpretation of Article 2.2.[132] In our opinion, however, this directive will, for extreme cases of risks to human life or health, lower the threshold for finding "sufficient scientific evidence" within the meaning of Article 2.2. The Appellate Body's finding on the precautionary principle in *EC—Hormones* applies not only to the interpretation of Article 5.1,[133] but also to all science-based rules in the SPS Agreement (as evidenced by the reference thereto in *Japan—Agricultural Products* with respect to Article 2.2). Thus, under the current case law, the precautionary principle cannot be used as an interpretative principle with regard to the scientific disciplines of the SPS Agreement. Instead, all situations of insufficient scientific evidence must be dealt with by means of provisional measures under Article 5.7.[134]

[128] *Id.*, ¶ 123. Pauwelyn has criticized this ruling on the grounds that the Appellate Body was obliged to make a finding regarding whether the precautionary principle is part of customary international law or not, since if it is and if it were shown to have emerged later in time than the SPS Agreement and be in conflict with it, it would prevail over the treaty rule, in the absence of an intention to continue applying the SPS Agreement as *lex specialis. See* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW—THE EXAMPLE OF THE WORLD TRADE ORGANIZATION: INTERNAL HIERARCHY AND HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 312, Doctoral Thesis, Faculty of Law, University of Neuchâtel (2001).

[129] This ruling presupposes a hierarchy or norms in international law where treaty rules have priority over custom. This idea has been criticized. *See* PAUWELYN, *supra* note 128, at 60–61, where the wide support for the idea that there is no inherent hierarchy or norms is discussed.

[130] The question whether Article 5.7 SPS deals adequately with the issue of lack of certainty in science will be discussed *infra* Part II(E).

[131] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 124.

[132] The Appellate Body in *Japan—Agricultural Products, supra* note 57, and in *Japan—Apples, supra* note 112, did not address the effect of this directive for the interpretation of Article 2.2, probably because what was at stake in those cases was a threat to plant health rather than human health whereas the directive is limited to cases of irreversible risks to human health.

[133] *See* discussion of Article 5.1 *infra* Part II(D).

[134] Article 5.7 of the SPS Agreement will be discussed *infra* Part II(E), where the question whether it sufficiently incorporates the precautionary principle with respect to the different aspects of risk analysis will be raised. It should be noted that under the points for negotiation raised in the failed Seattle Ministerial Conference was the need to strengthen the precautionary principle in the SPS Agreement, as Article 5.7 is not perceived as going far enough in recognizing it.

This conclusion is supported by the Appellate Body's finding with regard to the relationship between Article 2.2 and Article 5.7, where it stated:

> . . . it is clear that Article 5.7 of the *SPS Agreement,* to which Article 2.2 explicitly refers, is part of the context of the latter provision and should be considered in the interpretation of the obligation not to maintain an SPS measure without sufficient scientific evidence. Article 5.7 allows Members to adopt provisional SPS measures "[i]n cases where relevant scientific evidence is insufficient" and certain other requirements are fulfilled.[135] Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless.[136]

Thus it would appear that the Appellate Body would prefer to limit the scope for deviation from the scientific disciplines of Article 2.2 to the "qualified exemption" provided for by Article 5.7. Increased flexibility in the interpretation of Article 2.2 by application of the precautionary principle is thus rejected by the Appellate Body on the grounds that it would make Article 5.7 "meaningless".

(ii) Relationship between Article 2.2 and Articles 5.1 and 5.2

The question of the relationship between Article 2.2 and other, more specific, provisions needs to be addressed. Does Article 2.2 impose independent obligations on Members, or are its general disciplines subsumed by the specific rules contained in the later provisions of Articles 5.1 and 5.2? This question arose in *EC—Hormones,* where the Panel, after finding violations of Articles 3.1, 5.1 and 5.5, applied, as already discussed above, the principle of judicial economy to refrain from ruling on the Article 2.2 challenge. The Appellate Body confirmed the Panel's application of judicial economy. It agreed that Article 5.1 can be seen as "a specific application of the basic obligations contained in Article 2.2",[137] and thus once a violation of Article 5.1 is established, it is unnecessary to determine whether Article 2.2 has also been violated. However, the Appellate Body expressed its surprise that the Panel had not followed the more "logically attractive" route of starting with an analysis of the basic obligations contained in Article 2.[138] The Appellate Body did not elaborate further on the relationship between Articles 2 and 5, aside from expressing the view that Articles 2.2 and 2.3 inform Articles 5.1 and 5.5 respectively and these articles must thus be read together.[139]

In *Australia—Salmon* the Appellate Body again had the opportunity to address this relationship, and it clarified that Article 2.2 is more general than Articles 3 or 5.1–2. It thus agreed with the Panel that, while a violation of the specific rules regarding risk assessment contained in Articles 5.1 and 5.2 necessarily implies a violation of the more general requirements of "sufficient scientific evidence" and a basis in "scientific principles" embodied in Article 2.2,[140] due to the more general nature of Article 2.2

[135] The Appellate Body here cited ¶ 89 of the same report, where it set out the four requirements of Article 5.7.

[136] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 80.

[137] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 180.

[138] *Id.* ¶ 250.

[139] *Id.* ¶¶ 180, 212 and 250. The Appellate Body held that further analysis of the relationship between these articles "should await another case."

[140] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon, supra* note 57, ¶ 8.52.

not all violations of Article 2.2 are subsumed into Articles 5.1 and 5.2.[141] In *Japan—Agricultural Products*[142] the Appellate Body rejected as textually unfounded Japan's proposition that Article 2.2 should only be directly applied in cases where scientific evidence is patently insufficient and that the case at issue should be dealt with under Article 5.1 instead. The Appellate Body emphasized that the finding in *EC—Hormones* that Article 5.1 is a specific application of the basic obligation contained in Article 2.2, does not justify limiting the scope of Article 2.2 in favor of Article 5.1. It thus appears that the Appellate Body is at pains to make clear that Article 2.2 sets disciplines which are broader than those contained in the more specific provisions of Article 5 and lays down independent obligations against which measures can be directly challenged, without recourse to Article 5.

(c) No Arbitrary or Unjustifiable Discrimination or Disguised Restriction on International Trade (Article 2.3). Article 2.3 imposes a general prohibition on SPS measures which arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members, and on the application thereof so as to constitute a disguised restriction on international trade. Article 2.3 thus clearly embodies certain familiar GATT trade disciplines. In this regard, the Appellate Body in *Australia—Salmon* held:

> This provision takes up obligations similar to those arising under Article I:1 and Article III:4 of the GATT 1994 and incorporates part of the "chapeau" to Article XX, of the GATT 1994. Its fundamental importance in the context of the *SPS Agreement* is reflected in the first paragraph of the preamble of the *SPS Agreement*.[143]

It is necessary to examine how a violation of Article 2.3 can be established. This issue was raised before the *Australia—Salmon* compliance Panel. In that case, Canada claimed that Article 2.3, first sentence, was violated since Australia imposed import requirements for salmonids from Canada but had no control measures in place regarding the internal movement of dead Australian fish. It alleged that this constituted discrimination between Canada and Australia. The compliance Panel identified the requirements for proof of a violation of Article 2.3 as follows:

> . . . three elements, cumulative in nature, are required for a violation of this provision:
>
> (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;
> (2) the discrimination is arbitrary or unjustifiable; and
> (3) identical or similar conditions prevail in the territory of the Members compared.
>
> In respect of the first element we only note the following. Given: (1) the Panel and Appellate Body finding[144] in the original dispute that discrimination contrary to Article 5.5 by implication entails discrimination contrary to Article 2.3, first sentence; and (2) that under Article 5.5 different situations including *different* products can be

[141] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon,* WT/DS18/AB/R, ¶ 137.
[142] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 82.
[143] Report of the Appellate Body, *Australia—Measures Affecting Importation of Salmon*, *supra* note 141, ¶ 251.
[144] Panel report, *op. cit.*, ¶¶ 8.109 and 8.160 and Appellate Body report, *op. cit.*, ¶¶ 178 and 252. [Footnote in original.]

> compared,[145] we are of the view that—contrary to what Australia argues—discrimination in the sense of Article 2.3, first sentence, may also include discrimination between *different* products, e.g. not only discrimination between Canadian salmon and New Zealand salmon, or Canadian salmon and Australian salmon; but also discrimination between Canadian salmon and Australian fish including non-salmonids, as referred to by Canada in this case.[146]

Therefore, Article 2.3 prohibits not only discrimination between similar products but also between different products (in this case salmonids from Canada and other dead fish from Australia). This represents a significant deviation from the position under GATT 1994, which only prohibits discrimination between "like"[147] or "directly competitive or substitutable"[148] products. The aim of this broader prohibition on discrimination is to take into account the fact that different products can pose the same or similar health risks (one could think here of the possibility that different fruits may be vectors for the same pest, or that various animals can be carriers of foot and mouth disease). The breadth of the prohibition is tempered by the second and third requirements of Article 2.3, namely that the discrimination must be arbitrary or unjustifiable and identical or similar conditions must prevail in the territories of the Members subject to different treatment. With regard to the third requirement, the compliance Panel held:

> . . . we also harbor doubts as to whether "identical or similar conditions" in the sense of the third element of Article 2.3, first sentence, prevail in the territories of both Canada and Australia in respect of the situations compared. We note, for example, the substantial difference in disease status between Canada and Australia.
>
> We thus find that Australia has not acted inconsistently with Article 2.3, first sentence.[149]

As has been stated above, Article 2 lays down core disciplines, which are further specified in later articles. In this way, the prohibition contained in Article 2.3 is reflected again in Article 5.5, which proscribes arbitrary or unjustifiable distinctions in the levels of protection that a Member deems appropriate. The relationship between these two articles therefore deserves attention here. In *EC—Hormones,* when dealing with Article 5.5, the Appellate Body stated the following regarding Article 2.3:

> It is well to bear in mind that, after all, the difference in levels of protection that is characterizable as arbitrary or unjustifiable is only an element of (indirect) proof that a Member may actually be applying an SPS measure in a manner that discriminates between Members or constitutes a disguised restriction on international trade, prohibited by the basic obligations set out in Article 2.3 of the *SPS Agreement*.[150]

In *Australia—Salmon*, the issue of the relationship between Articles 2.3 and 5.5 was raised before the Appellate Body by Canada, which argued that the Panel had erred in only applying Article 2.3 through Article 5.5 and not independently. The Appellate Body found

[145] As long as they have a risk of entry, establishment or spread of the same or a similar disease, *or* a risk of the same or similar associated potential biological and economic in common, *different* products can be compared under Article 5.5. *See supra* ¶ 7.89. [Footnote in original]

[146] Report of the WTO Compliance Panel, *Australia—Measures Affecting Importation of Salmon, Recourse to Article 21.5 by Canada*, *supra* note 65, ¶¶ 7.111–7.112.

[147] Article I:1 (most favored nation treatment) and Article III:2 and 4 (national treatment).

[148] Add Note to Article III:2 (in respect of taxes).

[149] Report of the WTO Compliance Panel, *Australia—Measures Affecting Importation of Salmon, Recourse to Article 21.5 by Canada*, *supra* note 65, ¶¶ 7.113–7.114 (in relevant part).

[150] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 240.

that the Panel had not intended to deny that Article 2.3 contains an obligation independent of Article 5.5[151] but had merely refrained from addressing Article 2.3 separately on grounds of judicial economy. Further discussing the relationship between Articles 2.3 and 5.5, the Appellate Body in *Australia—Salmon* held:

> We recall that the third—and decisive—element of Article 5.5, discussed above, requires a finding that the SPS measure which embodies arbitrary or unjustifiable distinctions in levels of protection results in "discrimination or a disguised restriction on international trade". Therefore, a finding of violation of Article 5.5 will necessarily imply a violation of Article 2.3, first sentence, or Article 2.3, second sentence. Discrimination "between Members, including their own territory and that of others Members" within the meaning of Article 2.3, first sentence, can be established by following the complex and indirect route worked out and elaborated by Article 5.5.[152] However, it is clear that this route is not the only route leading to a finding that an SPS measure constitutes arbitrary or unjustifiable discrimination according to Article 2.3, first sentence. Arbitrary or unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without any examination under Article 5.5.[153]

It is therefore clear that Article 2.3 contains disciplines broader than those embodied in Article 5.5 and thus a violation thereof may be found independently of a violation of Article 5.5.

C. Harmonization (Article 3)

Pursuant to the preamble of the SPS Agreement, one of the primary objectives of the SPS Agreement is:

> . . . to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, . . . without requiring Members to change their appropriate level of protection of human, animal or plant life or health. . . .[154]

The use of internationally harmonized SPS measures would obviously promote trade and eliminate trade restrictions. Yet the SPS Agreement does not oblige Members to use harmonized SPS measures. It rather encourages the use of such harmonized measures and, at the same time, acknowledges the sovereign right of each Member to determine its own appropriate level of protection of human, animal and plant life and health.

[151] Report of the Appellate Body, *Australia—Measures Affecting Importation of Salmon*, *supra* note 141, ¶ 248. The Appellate Body here quoted the Panel's finding that "given the more general character of Article 2.3, not all violations of Article 2.3 are covered by Article 5.5." Report of the WTO Panel, *Australia—Measures Affecting Importation of Salmon*, *supra* note 57, ¶ 8.109.

[152] (Footnote in original) In *European Communities—Hormones* we characterized Article 5.5 as "marking out and elaborating a *particular* route leading to the same destination set out in Article 2.3" (emphasis added). Adopted February 13, 1998, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 212.

[153] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon, supra* note 141, ¶ 252.

[154] This aim is expressed in the sixth paragraph in the Preamble. It is notable that the preamble makes no mention of scientific disciplines on remaining (not harmonized) SPS measures. *See* David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years,* 32 JOURNAL OF INTERNATIONAL LAW AND POLITICS 868, 884 (2000), where the author claims that harmonization is the principal objective of the SPS Agreement. However, after analyzing the interpretation of Article 3 by panels and the Appellate Body, Victor comes to the conclusion that the SPS Agreement will not lead to harmonization of SPS measures and appropriate levels of protection set by Members, but will rather lead to harmonization of national SPS procedures, such as requiring risk assessments. *Id*. at 936.

In *EC—Hormones*, the Appellate Body elucidated the aim of Article 3 as follows:

> In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both "necessary to protect" human life or health and "based on scientific principles", and without requiring them to change their appropriate level of protection.[155]

Article 3 of the SPS Agreement, entitled "Harmonization", sets out how this aim is to be achieved. Article 3 provides:

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.
2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.
3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.[156] Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.
4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.
5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

[155] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 177.

[156] For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection. [Footnote in original].

The rules contained in Article 3 and their interpretation by the Appellate Body deserve particular attention here, as they provide a good illustration of the use of science in conjunction with the promotion of harmonization in the policing of national health regulations in the SPS Agreement. Briefly, Article 3.1 expresses the aim of harmonizing SPS measures on as wide a basis as possible, and states the obligation of Members to "base" their SPS measures on international standards, guidelines or recommendations, where they exist, except as provided for in Article 3.3. Article 3.2 creates a presumption of consistency with GATT 1994 and the SPS Agreement for measures that "conform to" international standards. Article 3.3 recognizes the right of Members to use SPS measures which result in a higher level of protection than would be achieved by measures "based on" the relevant international standards and sets certain requirements for this.

The Appellate Body in *EC—Hormones* identified the various options open for Members under these provisions. It rejected the Panel's approach of seeing Articles 3.1 and 3.2 as the general rule and Article 3.3 as the exception.[157] Instead, it identified *three autonomous options* available to Members under these provisions. The Appellate Body first noted:

> It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship discussed below,[158] which is qualitatively different from the relationship between, for instance, Articles I or III and Article XX, of the GATT 1994. Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement, that is, where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard. . . . [159]

It subsequently held:

> Under Article 3.2 of the *SPS Agreement*, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994.
>
> Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; . . .
>
> Under Article 3.3 of the *SPS Agreement*, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not "based on" the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.[160]

Each of the three options identified by the Appellate Body will now be examined in detail.

[157] *Id.* ¶ 168.
[158] (Footnote in original) ¶¶ 169–172 of this Report.
[159] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 104.
[160] *Id.* ¶¶ 170–172.

1. SPS Measures Based on International Standards (Article 3.1)

(a) International Standards (Annex A, paragraph 3). It is necessary to begin with an examination of what the term "international standards, guidelines or recommendations" specifically refers to in Article 3. The WTO is not a regulatory body with norm-setting capacity. Thus, it does not establish the harmonized international standards itself, but relies on those set by the international organizations listed in Annex A, paragraph 3. Members are obliged under Article 3.4 to participate in the work of these organizations, to the extent that their resources permit, and to promote development and periodic review of SPS standards. Article 3.5 mandates the SPS Committee to establish a procedure to monitor the process of international harmonization in co-ordination with the relevant international organizations.[161]

Paragraph 3 of Annex A of the SPS Agreement defines the term "standards, guidelines or recommendations" broadly, with reference to the three main international standard setting organizations in the area of health. The definition indicates that international standards, guidelines and recommendations for purposes of the SPS Agreement refer to those set by: (1) the Codex Alimentarius Commission ("CAC") in the area of food safety; (2) the International Office of Epizootics ("OIE") in the area of animal health; (3) the International Plant Protection Convention ("IPPC") in the area of plant health; and (4) certain other relevant international organizations for matters not covered by the three mentioned organizations. The CAC, OIE and IPPC are often referred to as "the three sisters" in WTO jargon. Each of these standard-setting organizations has its own structure and standard-setting procedure. These are dictated by its own statutes and not by the WTO. In general, the activities of these organizations may be characterized as taking risk management decisions (such as laying down guidelines or setting standards, which embody a certain level of protection) on the basis of scientific information from risk assessments. However, the way in which they do this varies considerably.

There are no requirements in the definition of "standards, guidelines or recommendations" in the SPS Agreement relating to the procedure by which the relevant norm was created, such as requirements regarding the degree of support the norm should have (*e.g.*, a qualified majority or a consensus in favor), the role of civil society interest groups in standard setting or the extent of participation by developing countries in the setting of the norm. It is only provided that the relevant organizations should be "open for Membership to all Members." The latter requirement, however, says nothing about the actual participation by all Members in norm setting, or about the effectiveness of the participation that does occur.[162]

Further, no distinction is made in the SPS Agreement between standards, guidelines and recommendations although they are clearly quite different international norms and are not intended to have the same status by the international organizations creating them.

[161] Article 12 of the SPS Agreement reiterates this obligation, stating that the SPS Committee must develop a procedure to monitor the process of international harmonization. *See infra* Part III(C)(2)(b). A provisional procedure was adopted on October 22, 1997(*see* G/SPS/11) and thereafter extended. Six Annual Reports have been prepared by the SPS Committee on the basis of this procedure. *See* G/SPS/13, G/SPS/16, G/SPS/18, G/SPS/21, G/SPS/28 and G/SPS/31.

[162] The problematic nature of developing country participation in international standard setting is discussed *infra* Part IV(B)(1). In addition, concerns have been raised with regard to the weak role of civil society NGOs as opposed to industry interest groups in the standard-setting process, both as observers and as members of national delegations, in certain standard-setting bodies. See, for example, Natalie Avery *et al*, CRACKING THE CODEX. AN ANALYSIS OF WHO SETS WORLD FOOD STANDARDS, National Food Alliance, (1993). These participatory problems call into question the legitimacy of the use of the standards adopted by these standard-setting organisations as benchmarks by the SPS Agreement.

This issue has been raised in the context of the Codex Alimentarius Commission. On September 29, 1997, a question was sent by the CAC to the SPS Committee regarding whether the obligations in Article 3 of the SPS Agreement applied equally and without distinction to standards, guidelines and recommendations set by the CAC. This was important to CAC Members in order to know what effect the norms they set would have on their obligations under the SPS Agreement.[163] This issue was discussed in the SPS Committee meetings[164] and a response was drafted and later revised.[165] In this response, the SPS Committee[166] stated that the SPS Agreement makes no distinction between the three types of norms, namely standards, guidelines and recommendations, in the Annex A definition or later provisions and that they would thus be equally applicable to the disciplines set by Article 3 of the SPS Agreement. However, the Committee noted that the substantive content of a Codex text might have an impact on how a Member could show that its measure was based thereon—for example a standard such as a "maximum residue level"[167] provides a high degree of numerical precision whereas a guideline or recommendation may allow greater discretion as to the choice of measures which can be regarded as based thereon.[168] It is thus the content rather than the category of the Codex text that affects its application. The SPS Committee also emphasized the fact that there is no legal obligation on Members under the SPS Agreement to apply any Codex texts.

The Codex Executive Committee noted this response[169] and agreed that it should be brought to the attention of all Codex Committees. It further agreed that the Codex Committee on General Principles should examine the possibility of developing a set of appropriate preambular statements explaining the intent of different types of Codex texts. However, the Committee on General Principles decided that, in view of the response of the SPS Committee, there was no need to develop such a set of preambular statements.[170]

In *EC—Hormones* the issue arose whether either the type of international measure at issue, the date of its adoption or the standard-setting procedure used were relevant to the application of the disciplines in Article 3 of the SPS Agreement. In this context, with respect to the international standards referred to in Article 3.1, the Panel noted that:

> Article 3.1 unambiguously prescribes that "... Members shall base their sanitary ... measures on international standards ... *where they exist* ..." (emphasis added). Paragraph 3 of Annex A of the SPS Agreement states equally clearly that the international standards

[163] Victor notes that Codex codes of conduct and guidelines are intended to augment the application of core Codex standards rather than to act as main standards themselves and are often adopted by the CAC where agreement cannot be reached on a commodity or residue standard. *See* Victor, *supra* note 154, at 886. It would thus be inappropriate to give these looser norms the same status as applies to commodity and residue standards under the SPS Agreement although this seems to be the intention of the Annex A definition. It should be pointed out that, contrary to the view of Victor, this does not give guidelines "potentially binding application" since no international norms are made binding by the disciplines of the SPS Agreement. This point is discussed *infra* Part II(C)(1).

[164] SPS Committee meetings of October 1997 and March 1998.

[165] *See* G/SPS/W/86 and G/SPS/W/86/Rev.1.

[166] The SPS Committee began by noting that it is not competent to formally interpret the provisions of the SPS Agreement. Thus, this opinion is not binding.

[167] A maximum residue level sets a numerical limit for the amount of residue of a potentially harmful substance (for example of a pesticide) that is permissible.

[168] This draft response was formally adopted by the SPS Committee in its meeting of March 12–13, 1998 (G/SPS/R/10, ¶ 50).

[169] Codex Executive Committee, *Report of the Forty-Fifth Session of the Executive Committee of the Codex Alimentarius Commission*, ALINORM 99/3, June 3-5, 1998, ¶ 44.

[170] Codex Committee on General Principles, *Report of the Thirteenth Session of the Codex Committee on General Principles*, ALINORM 99/33. September 7–11, 1998, ¶ 54.

> mentioned in Article 3:1 are "for food safety, the standards . . . *established by the Codex Alimentarius Commission* relating to . . . *veterinary drug* . . . *residues* . . . " (emphasis added). No other conditions are imposed in the SPS Agreement on the relevance of international standards for the purposes of Article 3. Therefore, as a panel making a finding on whether or not a Member has an obligation to base its sanitary measure on international standards in accordance with Article 3.1, we only need to determine whether such international standards exist. For these purposes, we need not consider (i) whether the standards reflect *levels* of protection or sanitary *measures* or the *type* of sanitary measure they recommend, or (ii) whether these standards have been adopted by consensus or by a wide or narrow majority, or (iii) whether the period during which they have been discussed or the date of their adoption was before or after the entry into force of the SPS Agreement.[171]

This issue was not raised on appeal.

In *Australia—Salmon*, the question of the existence of relevant international standards was once again at issue, as the guideline that had been drafted by the OIE did not cover all 24 of the diseases at which the Australian measure was aimed. The Panel found that:

> . . . Paragraph 3(b) of Annex A to the SPS Agreement indicates that the international standards, guidelines or recommendations referred to in Article 3 *for animal health* (the concern at issue in this dispute) are those developed under the auspices of the International Office of Epizooties ("OIE"). Both parties agree that the International Aquatic Animal Health Code adopted by the OIE in 1995 ("OIE Code") provides international guidelines on a disease-by-disease basis. However, they also agree that as of today no relevant OIE guideline exists which deals with salmon on a product specific basis. Moreover, both parties also agree that OIE guidelines do not exist for all of the 24 diseases of concern to Australia. Therefore, even if we were to examine first, if and how many relevant international guidelines exist and second address the question of whether Australia deviates from these guidelines, we would thereafter still need to examine either (1) in the event Australia does deviate from any such guidelines contrary to Article 3, whether the measure in dispute could not be based on Australia's concern for any of the other diseases for which no international guideline exists (*in casu*, under Articles 2 and 5); or (2) in the event Australia's measure is based on and/or conforms to any such guidelines, whether that part of the measure for which no guidelines exist, is consistent with the provisions of the SPS Agreement other than Article 3 (*in casu*, Articles 2 and 5). In this respect, we are of the view, however, that the fact that in this case no international guidelines exist for *all* 24 diseases of concern does not mean that an international guideline which applies to only *one* of these diseases cannot be relevant (or, according to the language of Article 3.1, does not 'exist') for the measure at issue.[172]

Further, the Panel found that "the SPS Agreement (paragraph 3(b) of Annex A) explicitly directs us to the OIE and the standards, guidelines and recommendations it develops. . . The fact that the OIE Code is subject to revision or the way it has been adopted in our view does not change its validity for our purposes".[173] There was no appeal on this point in this dispute. From these findings it appears that a broad and unqualified acceptance of all norms adopted by the "three sisters" for purposes of the Article 3 disciplines is currently the approach followed by panels.

It should be noted, however, that the term "standards, guidelines or recommendations" is qualified by the adjective "international". This would therefore exclude standards set on the regional level, intended to address specifically regional health concerns. An example

[171] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, *supra* note 53, ¶ 8.72, Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, *supra* note 53, ¶ 8.69.

[172] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.46.

[173] *Id.* ¶ 7.11.

would be the standards set by the regional offices of the International Plant Protection Convention, or those adopted by the Codex Alimentarius Commission on a proposal by one of the regional committees for purposes of that region only (such as the Codex guidelines for street vending of foods, explicitly intended to apply to African countries only). The omission of the requirement of an international nature would have led to the anomalous situation that Members outside the relevant region for which the standard was set would have to scientifically justify their deviation from a standard or guideline neither intended nor appropriate for their adoption. This was confirmed by the SPS Committee.[174] The Committee further stated that even if based on scientific evidence, regional standards are intended to apply only within a specific geographic region. However, it recognized that scientifically sound regional standards could form a foundation for the creation and adoption of international standards.[175]

(b) The "Based On" Requirement. Article 3.1 embodies the obligation to "base" national SPS measures on international standards, guidelines and recommendations. The meaning of "based on" in Article 3.1 was addressed in *EC—Hormones.* The Panel had held that Article 3.1 does not define "based on" but that Article 3.2 equates measures "based on" international standards with those which "conform to" these standards.[176] They had also held that to be "based on" an international standard, the measure must achieve the same level of sanitary protection as that standard, a conclusion implied by Article 3.3.[177] The Appellate Body rejected this reasoning, finding that the plain meaning of the terms "based on" and "conform to" differ.[178] It held:

> In the first place, the ordinary meaning of "based on" is quite different from the plain or natural import of "conform to". A thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is supported by" the latter. In contrast, much more is required before one thing may be regarded as "conform[ing] to" another: the former must "comply with", "yield or show compliance" with the latter. The reference of "conform to" is to "correspondence in form or manner", to "compliance with" or "acquiescence", to "follow[ing] in form or nature". A measure that "conforms to" and incorporates a Codex standard is, of course, "based on" that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure.
>
> In the second place, "based on" and "conform to" are used in different articles, as well as in differing paragraphs of the same article. Thus, Article 2.2 uses "based on", while Article 2.4 employs "conform to". Article 3.1 requires the Members to "base" their SPS measures

[174] This was in its response to a question of the CAC, regarding the status of Codex regional standards and related texts. *See supra* note 165.

[175] Committee on Sanitary and Phytosanitary Measures, *Clarification of References to Codex Texts: Draft Response to the Codex Alimentarius Commission, Note by the Chairman. Revision,* G/SPS/W/86/Rev.1, March 13, 1998, adopted in the decision contained in the report of the SPS Committee meeting of March 12–13, 1998. Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 12–13 March, 1998,* G/SPS/R/10, April 30, 1998, ¶ 50. It should be noted, however, that the CAC is moving away from the adoption of regional standards as much as possible.

[176] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.72, and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, *supra* note 53, ¶ 8.75.

[177] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.73 and *EC—Measures Concerning Meat and Meat Products (Hormones)*, Complaint by Canada, *supra* note 53, ¶ 8.76.

[178] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones*, *supra* note 70, ¶ 163–166.

> on international standards; however, Article 3.2 speaks of measures which "conform to" international standards. Article 3.3 once again refers to measures "based on" international standards. The implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement. Canada has suggested the use of different terms was "accidental" in this case, but has offered no convincing argument to support its suggestion. We do not believe this suggestion has overturned the inference of deliberate choice.[179]

The Appellate Body also pointed out that the Panel's interpretation was contrary to the object of Article 3, which sets the harmonization around international standards as a goal to be achieved in the future, not as a current obligation on Members.[180] In this regard, it stated:

> . . . the object and purpose of Article 3 run counter to the Panel's interpretation. That purpose, Article 3.1 states, is "[t]o harmonize [SPS] measures on as wide a basis as possible . . . ". The preamble of the *SPS Agreement* also records that the Members "[d]esir[e] to *further the use of harmonized [SPS] measures between Members* on the basis of international standards, guidelines and recommendations developed by the relevant international organizations . . . ". (emphasis added) Article 12.1 created a Committee on Sanitary and Phytosanitary Measures and gave it the task, *inter alia*, of "furtherance of its objectives, in particular with respect to harmonization" and (in Article 12.2) to "encourage the use of international standards, guidelines and recommendations by all Members". It is clear to us that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a *goal*, yet to be realized *in the future*. To read Article 3.1 as requiring Members to harmonize their SPS measures *by conforming those measures with international standards*, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the *SPS Agreement* would be necessary.[181]

The Appellate Body thus made it clear that "based on" in Article 3.1 could not be understood to mean "conform to". The Appellate Body also emphasized that the voluntary standards set by the relevant international organizations did not become mandatory through the operation of the SPS Agreement.[182]

The Appellate Body proceeded to explain the consequences for a Member of choosing the option under Article 3.1. Noting that although a Member that merely bases its

[179] *Id*. ¶¶ 163–164.
[180] *Id*. ¶ 165.
[181] *Id*.
[182] Before the panels, the EC had argued that CAC members were used to adopting voluntary standards and were not aware that the standards for hormones in beef would in effect become mandatory through the operation of the SPS Agreement. Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.68; and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.71.

measure on an international standard does not benefit from the presumption of consistency contained in Article 3.2, it stated that a Member is also "not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant article of the *SPS Agreement* or of the GATT 1994."[183]

The question which then arises is what the benefits of choosing the option under Article 3.1 are. As noted by the Appellate Body, a Member that merely bases its SPS measures on international standards, without conforming to them, does not enjoy a presumption of compliance of its measures with the SPS Agreement and GATT 1994. Still, it seems logical that there should be an advantage over the situation set forth in Article 3.3. It seems that as a measure based on an international standard is automatically based on a risk assessment (namely the risk assessment used by the relevant international organization in drafting its standard), the measure may be assumed to comply with Article 5.1–5.3. Thus, an evaluation of whether the strict requirements for a risk assessment are met is rendered unnecessary. This is of particular importance to developing countries, which often lack the resources and infrastructure to conduct their own risk assessments.

Despite the more lenient interpretation of the requirements of Article 3.1 given by the Appellate Body in *EC—Hormones*, the EC ban was obviously not "based on" the existing Codex standards and did not adopt any elements thereof. The Appellate Body thus continued by analyzing the measure under the requirements of Article 3.3 for measures that are not based on international standards.[184]

The Appellate Body also refrained from deciding on the correctness of the rest of the Panel's analysis on the meaning of "based on", including the finding that "for a sanitary measure to be *based on* an international standard . . . , that *measure* needs to reflect the same level of sanitary protection as the *standard*."[185] The Appellate Body stated:

> It appears to us that the Panel reads much more into Article 3.3 than can be reasonably supported by the actual text of Article 3.3. Moreover, the Panel's entire analysis rests on its flawed premise that 'based on', as used in Articles 3.1 and 3.3, means the same thing as "conform to" as used in Article 3.2. As already noted, we are compelled to reject this premise as an error in law. The correctness of the rest of the Panel's intricate interpretation and examination of the consequences of the Panel's litmus test, however, have to be left for another day and another case.[186]

Although the question was thus left open by the Appellate Body, it would appear that the Panel was correct in informing the term "based on" in Article 3.1 with reference to the use of the same term in Article 3.3.[187] Thus, we argue that in order to be regarded as "based on" an international standard, the SPS measure must not only adopt at least some of the elements of the international standard but also result in *the same level of protection*.

[183] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 171.

[184] *Id*. ¶¶ 176–177.

[185] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.76; and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.73.

[186] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 168.

[187] It does not seem that the Appellate Body's general comment that the Panel reads more into Article 3.3 than is supported by the text would contradict this conclusion, since this reading of the meaning of "based on" is firmly grounded in the text of Article 3.1 and 3.3. In any case, the Appellate Body decided to leave the examination of the correctness of the Panel's interpretation for another day.

If it is not "based on" the international standard, it must then meet the requirements of Article 3.3.

(c) Nature of the Obligation under Article 3.1. One could ask whether Article 3.1 obliges Members to maintain at least the minimum level of health protection that is reflected in relevant international standards, while allowing higher, but not lower, levels of protection. This would seem to be the case from an examination of the words of the relevant provisions, since a Member is obliged to adopt measures that are "based on" international standards, that is, achieving the same level of protection, unless the provisions of Article 3.3 are complied with. The latter article allows SPS measures resulting in a *higher* level of protection under certain conditions. Nowhere are measures aimed at a lower level of protection mentioned.

It has been argued that a measure should not be analyzed under Article 3.3 simply because the Member imposing it claims that the measure achieves a higher level of protection than the international standard, but that it should first be determined whether the measure actually does so.[188] However, it seems unlikely that a positive obligation of a certain minimum level of health protection was intended or would be accepted by WTO Members. The international standards are used as a ceiling that Members cannot exceed without complying with the additional science disciplines of Article 3.3, rather than as a floor that all Members must reach. No provisions specifically deal with the possibility of challenging measures that fall below the relevant international standards.[189] This can be explained by the fact that the role of the WTO is regarded as limited to disciplines relating to trade barriers and thus does not extend to the promotion of health objectives. There are other international organizations that have mandates in the area of promotion of public health, such as the World Health Organization. Further, it is hard to imagine one Member challenging another within a trade forum for having too low a level of health protection for its own citizens, a situation which could have no negative trade implications for other Members.[190]

2. SPS Measures which Conform to International Standards (Article 3.2)

(a) The "Conform To" Requirement. The second option a Member has is to promulgate an SPS measure that conforms to the relevant international standard, guideline or recommendation. What is required for a measure to "conform to" an international standard

[188] McNiel, *supra* note 18, at 126.

[189] A Member could arguably base a challenge on Article 3.1, claiming that the lax measure is not "based on" an international standard and cannot be justified by Article 3.3 as the latter only refers to stricter measures. However, the obligation to base a measure on international standards cannot be read to require that a Member adopt at least the level of protection embodied in the international standard. This would go against the aim and purpose of the SPS Agreement, which is to promote free trade rather than to ensure a minimum level of health protection.

[190] *See contra* Victor, *supra* note 154, at 884, who argues that the requirements of Article 5 apply whether a Member's standards are stricter or looser than international standards. He states that for manufactured food products, lax standards could have the effect of benefiting local producers who do not have to comply with expensive stricter standards. The SPS Agreement could be used to force a higher level of health protection in these countries. He does acknowledge that such challenges would be rare due to the difficulty of proving a trade effect from weak SPS measures. The correctness of this argument can be questioned, however, since producers in countries with strict SPS standards can, and often do, export food and agricultural products of lesser quality to countries with lower standards. They are thus not bound by high local standards for their exports. Therefore it is doubtful that lax standards could constitute a trade barrier. More compelling, however, is the legal argument that the provisions of Article 3.3 refer only to a "higher level of sanitary or phytosanitary protection".

was addressed by the Appellate Body in *EC—Hormones*, where it stated:

> Under Article 3.2 of the *SPS Agreement*, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard.[191]

The measure must thus completely embody the international standard. This would seem to mean that they must be identical in both structure and desired level of protection.

(b) Presumption of Consistency. The SPS Agreement promotes measures conforming to international standards by granting them a presumption of consistency with the SPS Agreement and GATT 1994. This presumption was held to be rebuttable in *EC—Hormones*.[192] The Appellate Body in this case also addressed the implications of the presumption of consistency, stating as follows:

> The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*.[193]

It has been argued that the fact that a measure, which is in accordance with international standards, enjoys a presumption of validity, increases the importance of standard setting on international level.[194] This is because international standards have hereby become the benchmarks against which national SPS measures are judged.

3. SPS Measures Resulting in a Higher Level of Protection (Article 3.3)

(a) Higher Level of Protection. The third option open to Members is to promulgate SPS measures providing a higher level of protection than would result from measures "based on" the relevant international standards. This provision recognizes the right of Members to choose their own level of protection, an important principle in the SPS Agreement. The Appellate Body held in *EC—Hormones* that the "right of a Member to establish its own level of sanitary protection under Article 3.3 of the *SPS Agreement* is an autonomous right and *not* an 'exception' from a 'general obligation' under Article 3.1".[195]

However, as recognized by the Appellate Body, this is not an "absolute or unqualified right". Two science-related conditions are set in the alternative. Either there must be a

[191] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 170.

[192] *Id*. The implications of this presumption for the burden of proof are discussed further *infra* Part III(D)(1)(a).

[193] *Id*. ¶ 102.

[194] As pointed out by Quick and Blüthner, *supra* note 83, at 613, this does not mean that international standards become (either directly or indirectly) binding on WTO members as a result of SPS disciplines. The standards only give content to the provisions of the SPS Agreement. It is the latter provisions that have binding force. However, the effect of the SPS provisions on harmonization is to encourage the adoption of international harmonized standards and thus they do increase the status and relevance of these standards for WTO Members.

[195] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 172.

scientific justification for the measures,[196] or they must be the result of the higher level of protection chosen by the Member in accordance with Article 5.1–5.8. It is not quite clear why Article 3.3 provides for two alternative conditions or how exactly they differ. What is clear, however, is that in both cases the measures must be consistent with all other provisions of the SPS Agreement.[197]

In *EC—Hormones,* the EC argued that since there was a "scientific justification" for its measure, it need not be in accordance with the provisions of Article 5.1–5.8, which are required only for the second situation. It thus claimed that no risk assessment was required as a basis for its ban on hormone-treated beef, despite the fact that it deviated from Codex standards. The Appellate Body held that the distinction between the two situations identified in Article 3.3, is more apparent than real.[198] In fact, both situations require a risk assessment in accordance with Article 5. The Appellate Body in *EC—Hormones* stated:

> Article 3.3 is evidently not a model of clarity in drafting and communication. The use of the disjunctive "or" does indicate that two situations are intended to be covered. These are the introduction or maintenance of SPS measures that result in a higher level of protection:
>
> (a) "if there is a scientific justification"; or
> (b) "as a consequence of the level of . . . protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5".
>
> It is true that situation (a) does not speak of Articles 5.1 through 5.8. Nevertheless, two points need to be noted. First, the last sentence of Article 3.3 requires that "all measures which result in a [higher] level of . . . protection", that is to say, measures falling within situation (a) as well as those falling within situation (b), be "not inconsistent with any other provision of [the SPS] Agreement". "Any other provision of this Agreement" textually includes Article 5. Secondly, the footnote to Article 3.3, while attached to the end of the first sentence, defines "scientific justification" as an "examination and evaluation of available scientific information in conformity with relevant provisions of this Agreement . . . ". This examination and evaluation would appear to partake of the nature of the risk assessment required in Article 5.1 and defined in paragraph 4 of Annex A of the *SPS Agreement*.
>
> On balance, we agree with the Panel's finding that although the European Communities has established for itself a level of protection higher, or more exacting, than the level of protection implied in the relevant Codex standards, guidelines or recommendations, the European Communities was bound to comply with the requirements established in Article 5.1. We are not unaware that this finding tends to suggest that the distinction made in Article 3.3 between two situations may have very limited effects and may, to that extent, be more apparent than real. Its involved and layered language actually leaves us with no choice.[199]

Thus this ruling should be understood as requiring that a Member claiming scientific justification for its deviation from international standards, must base such a claim on a valid risk assessment, in the same way as a Member that justifies its deviation from the international standard on the grounds that it has chosen a different level of protection

[196] A footnote to Article 3.3 clarifies the term "scientific justification" (quoted *supra* at note 155). This footnote was not present in the Dunkel Draft but was added to the final text of the SPS Agreement due to controversy regarding the meaning of the "scientific justification" requirement for deviation from international standards. Wirth, *supra* note 23, at 827.

[197] *See* last sentence of Article 3.3.

[198] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 175.

[199] *Id.*, ¶¶ 173–175.

than that achieved by the international standard.[200] The Appellate Body went on to indicate its "... belief that compliance with Article 5.1 was intended as a countervailing factor in respect of the right of Members to set their appropriate level of protection"[201] and pointed out that the scientific requirements of Articles 2.2 and 5.1 are crucial in maintaining the delicate balance between the competing goals of trade liberalization and health protection.[202] Thus, the Appellate Body sees science as the scale on which these interests are balanced.

In *Japan—Agricultural Products*, the Appellate Body again faced the question of what a Member needs to show when it claims there is "scientific justification" for a deviating measure. It held:

> In our opinion, there is a "scientific justification" for an SPS measure, within the meaning of Article 3.3, if there is a rational relationship between the SPS measure at issue and the available scientific information.[203]

This finding seems to stop short of actually requiring a risk assessment in the case of reliance on a "scientific justification". However, in order to prove that the measure is based upon "available scientific information," it seems unavoidable that a Member will have to show a risk assessment.

It has been argued that the reason behind distinguishing between the two different situations mentioned in Article 3.3 is to emphasize the difference in the scope of review in each case.[204] The first situation deals with the Member's judgment, on the basis of scientific information, that the international standards are inadequate to meet its level of protection. This could, for example, be the case where, due to local peculiarities, the international standard is ineffective in securing the desired level of health protection.[205] The second situation deals with the choice of a different level of protection by a Member, which is a policy choice. One could thus speak of a scientific justification and a policy justification.[206] Scientific justifications could be more rigorously reviewed than policy justifications and thus harmonization of the former more vigorously promoted than the latter.[207]

What is clear from an examination of this harmonization provision in the SPS Agreement is the role of science, in the form of scientific justification or risk assessment, in providing norms or rules in the absence of harmonization. Free trade necessitates harmonized health standards in order to do away with the barriers created by disparate requirements in various countries. However, the lack of a rule-making body in the

[200] McNiel, *supra* note 18, at 126.

[201] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 177.

[202] *Id.*

[203] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 79.

[204] Walker, *supra* note 117, at 275–276.

[205] *See* Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.84. Here the Panel stated that both Canada and the EC interpreted the first situation as existing where the relevant international standard is outdated, inadequate, faulty or obsolete from a scientific perspective, for example where it in fact does not provide the level of protection it was intended to provide.

[206] *See contra* Wirth, *supra* note 23, at 827, where he argues that the footnote explaining the term "scientific justification" might be taken to mean that there are scientific constraints on the choice of the appropriate level of protection. However, it seems that the scientific analysis mandated by that footnote is directed at the question of whether the international standards are effective in achieving the Member's chosen level of protection, rather than at the choice of an appropriate level of protection.

[207] Walker, *supra* note 117, at 276.

WTO to take on the task of providing generally applicable health standards creates an institutional gap.[208] Article 3 attempts to fill this gap by making use of another, universally accepted and thus authoritative provider of uniform standards, namely science. Where a large degree of scientific consensus appears to exist, as embodied in standards set by international organizations,[209] Members are encouraged to use these standards. International standard-setting bodies use recognized risk assessment procedures conducted by scientific committees or expert groups to draw up standards. In the alternative, where no such standards exist or where Members wish to deviate from these standards, "scientific justification will operate to generate norms and rules".[210] The reason for this approach is the fact that science is seen to be a universal body of knowledge, based on physical experience and neutral and thus valid for all. Therefore, requiring that national regulations which differ from harmonized standards follow the dictates of science as embodied in risk assessment, should result in greater uniformity of health measures by promoting gradual regulatory convergence across national borders.

While this would be the case if science were really universal and absolute, the lack of consensus that exists among scientists as to the true state of scientific knowledge makes it of limited effect in achieving greater uniformity in national health measures.

D. Risk Assessment (Article 5.1–5.3)

Members are obliged, under Article 5.1 of the SPS Agreement, to base their SPS measures on a risk assessment. Articles 5.2 and 5.3 list factors that Members must take into account in the assessment of risks. Paragraphs 1 to 3 of Article 5 state:

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.
3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

[208] This is unlike the situation that exists in the EU where negative integration (lowering of trade barriers) is accompanied by positive integration (setting of general norms or rules). This is possible due to the norm-setting capacity of the EU institutions, which can operate on a supranational level, a characteristic that is absent in the WTO.

[209] The Secretariat of the Codex Alimentarius Commission released a paper on the role of science in the Codex decision-making process. *See* Codex Alimentarius Doc. CX/GP 94/4.

[210] Jeffrey Atik, Symposium -*Institutions for International Economic Integration: Science and International Regulatory Convergence,* 17 Journal Of International Law And Business 736, 739 (1997).

Before proceeding to an analysis of what the obligation to base an SPS measure on a risk assessment entails, it is first necessary to determine what is meant by a "risk assessment" for purposes of Article 5.

1. Concept of "Risk Assessment" (Annex A, paragraph 4)

Paragraph 4 of Annex A to the SPS Agreement defines two types of risk assessment. The *first* type is the "evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences". The *second* type is the "evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs."

The Appellate Body examined these definitions in four cases.[211] The interpretation of these definitions is important in assessing what will be required of Members who impose SPS measures not conforming to international standards. The cases dealing with these definitions will be addressed in the order in which they were decided, as later cases referred back to the findings in earlier cases.

In *EC—Hormones*,[212] the second type of risk assessment was at issue. The Panel had held that there were two steps to this kind of risk assessment, namely that it should:

(i) *identify* the *adverse effects* on human health (if any) arising (in that case) from the presence of the hormones at issue when used as growth promoters *in meat or meat products*, and
(ii) if any such adverse effects exist, *evaluate* the *potential* or probability of occurrence of these effects.[213]

The Appellate Body did not take issue with the two-step test, but regarded the Panel's use of "probability" as an alternative for "potential" as cause for concern as the word implies a higher degree of potentiality and seems to introduce a quantitative element.[214] The Appellate Body addressed the appeal of the EC on the point that the Panel was "in effect requiring a Member carrying out a risk assessment to quantify the potential for adverse effects on human health",[215] and found:

> It is not clear in what sense the Panel uses the term "scientifically identified risk". The Panel also frequently uses the term "identifiable risk"[216], and does not define this term either. The Panel might arguably have used the terms "scientifically identified risk" and "identifiable risk" simply to refer to an ascertainable risk: if a risk is not ascertainable, how does a Member ever know or demonstrate that it exists? In one part of its Reports, the Panel

[211] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 141; Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon, supra* note 132; Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97; and Report of the Appellate Body, *Japan—Measures Affecting the Importation of Apples, supra* note 112.
[212] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 182.
[213] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.101; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.98.
[214] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 184–186.
[215] *Id.*, ¶ 185.
[216] U.S. Panel Report, ¶¶ 8.124, 8.134, 8.136, 8.151, 8.153, 8.161, 8.162; Canada Panel Report, ¶¶ 8.127, 8.137, 8.139, 8.154, 8.156, 8.164, 8.165. [Footnote in original].

> opposes a requirement of an "identifiable risk" to the uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects.[217] We agree with the Panel that this theoretical uncertainty is not the kind of risk which, under Article 5.1, is to be assessed. In another part of its Reports, however, the Panel appeared to be using the term "scientifically identified risk" to prescribe implicitly that a certain *magnitude* or threshold level of risk be demonstrated in a risk assessment if an SPS measure based thereon is to be regarded as consistent with Article 5.1.[218] To the extent that the Panel purported to require a risk assessment to establish a minimum magnitude of risk, we must note that imposition of such a quantitative requirement finds no basis in the *SPS Agreement*.[219]

Thus it is clear that in the view of the Appellate Body, theoretical uncertainty is not the kind of risk to be assessed under Article 5.1. Such uncertainty always exists since it is not possible for science to ever completely rule out the possibility of risk.[220] Instead, there must be proof of an actual risk, not just uncertainty about whether a risk exists or not. However, no quantitative requirement that a certain magnitude of risk be shown is contained in the second definition. A panel may only determine whether the measure is sufficiently supported or reasonably warranted by the risk assessment and not whether a threshold level of risk has been shown.[221] Further, the Appellate Body stated that the risk assessment may go beyond the controlled conditions in a scientific laboratory, and take account of the actual potential for adverse effects in the real world.[222]

In *Australia—Salmon*,[223] the first type of risk assessment was relevant as the concern did not relate to food safety but rather to fish diseases that could be introduced through the importation of adult, wild, ocean-caught Pacific salmon from Canada. Referring to the definition in Annex A, the Panel clarified the risks that must be evaluated in this type of risk assessment:

(1) the risk of entry, establishment or spread of a disease and
(2) the risk of the associated potential biological and economic consequences.[224]

The Appellate Body in this case agreed with the Panel which had set out a three-pronged test that must be met by a risk assessment of the type described in the first definition of risk assessment in Annex A.[225] In terms of this test, the risk assessment must:

(1) *identify* the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;

[217] U.S. Panel Report, ¶¶ 8.152–8.153; Canada Panel Report, ¶¶ 8.155–8.156. [Footnote in original].
[218] U.S. Panel Report, footnote 331; Canada Panel Report, footnote 437. [Footnote in original].
[219] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 186.
[220] *See contra* Walker, *supra* note 117, at 305. He states that: "On the continuum between a merely speculative risk and a conclusively demonstrated one lies a vast stretch of undemonstrated, unquantified, but scientifically plausible risks. Within that zone, the risk of harm is real so long as safety is unproven."
[221] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 186.
[222] *Id.*, ¶ 187.
[223] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon, supra* note 141, ¶ 120.
[224] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.72.
[225] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 121.

(2) *evaluate the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and
(3) evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied*.[226]

Australia had contended that its 1996 Final Report constituted a risk assessment in terms of Article 5.1. The Panel examined the Australian risk assessment and found that it met the first requirement of the test as it identified up to twenty diseases whose establishment or spread Australia was trying to prevent. Second, the Panel found that Australia had evaluated *some* elements of possibility and probability regarding the likelihood of entry or spread of these diseases. Third, the Panel held that Australia had considered a range of risk reduction factors to mitigate these risks. It accordingly assumed that the three-pronged test was met by Australia's risk assessment. This finding was overturned by the Appellate Body due to Australia's failure to meet the second and third requirements. The Appellate Body addressed each of the three requirements in turn.

With regard to the first requirement, the Appellate Body in *Australia—Salmon* agreed that Australia had identified the relevant diseases and that this requirement was thus met.[227] With regard to the second and third requirements, the Appellate Body examined the meaning of the term "evaluation of the likelihood". The Appellate Body pointed to the different language used in the first and second definitions of risk assessment in Annex A.[228] While the second calls for an evaluation of the "potential" for adverse effects, the first requires the evaluation of the "likelihood" of entry, establishment or spread of pests or diseases and their associated biological or economic consequences. The Appellate Body held that, contrary to the EC's assertion, these substantial differences in the two kinds of risk assessment should not be diminished.[229] Further, it stated:

> We note that the first definition in paragraph 4 of Annex A speaks about the evaluation of "likelihood". In our report in *European Communities—Hormones,* we referred to the dictionary meaning of "probability" as "degrees of likelihood" and "a thing that is judged likely to be true", for the purpose of distinguishing the terms "potential" and "probability".[230] For the present purpose, we refer in the same manner to the ordinary meaning of "likelihood", and we consider that it has the same meaning as "probability". On this basis, as well as on the basis of the definition of "risk" and "risk assessment" developed by the Office international des épizooties ('OIE') and the OIE *Guidelines for Risk Assessment,* we maintain that for a risk assessment to fall within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, it is not sufficient that a risk assessment conclude that there is a *possibility* of entry, establishment or spread of diseases and associated biological and economic consequences. A proper risk assessment of this type must evaluate the

[226] *Id*. It should also be noted that in *Japan—Agricultural Products* the Appellate Body once again endorsed this three-pronged test and found that a risk assessment, on which Japan argued it had based its measure, did not refer to any SPS measure which could be taken to reduce the risk, and thus did not comply with the third requirement. Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 113. This test was also used by the compliance Panel in *Australia—Salmon.* Report of the WTO Compliance Panel, *Australia—Measures Affecting the Importation of Salmon, Recourse to Article 21.5 by Canada*, *supra* note 65, ¶ 7.41. In *Japan—Apples* the Appellate Body again used this test to evaluate Japan's risk assessment. Report of the Appellate Body, *supra* note 112, ¶ 196.

[227] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon, supra* note 141, ¶ 126.

[228] *Id.* ¶ 123.

[229] *Id.* n.69. The EC was a third party participant in this dispute.

[230] Adopted February 13, 1998, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 184. [Footnote in original].

> "likelihood", i.e., the "probability", of entry, establishment or spread of diseases and associated biological and economic consequences as well as the "likelihood", i.e., "probability", of entry, establishment or spread of diseases *according to the SPS measures which might be applied*.[231]

It seems likely that the different terminology in the two definitions of risk assessment was intended to set less stringent requirements in cases where human health is more likely to be at risk, namely where food safety is at issue, than in cases where the risk relates to pests or diseases, which are more likely to affect plants or animals.[232]

The Appellate Body went on to find that the second and third requirements of this definition of risk assessment were not met by just *some* evaluation of likelihood.[233] In this regard, it held:

> We note that, although the Panel stated that the definition of a risk assessment for this type of measure requires an "evaluation of the likelihood", for the purpose of satisfying the second and third requirements,[234] it subsequently was hesitant in applying these requirements, by stating or suggesting in paragraphs 8.80, 8.83, 8.89 and 8.91, that *some* evaluation of the likelihood or probability would suffice. We consider this hesitation unfortunate. We do not agree with the Panel that a risk assessment of this type needs only *some* evaluation of the likelihood or probability. The definition of this type of risk assessment in paragraph 4 of Annex A refers to "the evaluation of the likelihood" and not to *some* evaluation of the likelihood. We agree, however, with the Panel's statements in paragraph 8.80 that the *SPS Agreement* does not require that the evaluation of the likelihood needs to be done quantitatively. The likelihood may be expressed either quantitatively or qualitatively. Furthermore, we recall, as does the Panel,[235] that we stated in *European Communities—Hormones* that there is no requirement for a risk assessment to establish a certain magnitude or threshold level of degree of risk.[236]

In coming to the conclusion that Australia's 1996 Final Report did not meet the requirement of an "evaluation of likelihood" of the entry, establishment or spread of the relevant diseases and of their associated potential biological and economic consequences, the Appellate Body relied on findings of the Panel based on statements of the experts

[231] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 123.

[232] Contrary to the EC's contention, it is not the case that both definitions apply equally to human life or health and plant and animal life or health. In fact the second definition omits plants. While the second definition refers to animal health as well as human, clearly the human health consideration was paramount in the setting of a more lenient criterion to satisfy the obligation to conduct a risk assessment in this definition. The first definition, referring to the entry, establishment or spread of pests or diseases is obviously most likely to affect animals and plants, and a stricter requirement was set. While not explicitly stated, it seems that risks to human health were not envisaged as likely to fall within the first definition. It would, in any case, appear unlikely that pests or diseases that can be spread by cross-border movement of goods that are not food or beverages (or they would fall under the second definition) could be transferred to humans. It should, however, be noted that the definition of SPS measures in Annex A expressly includes, in paragraph 1(c), measures to protect *human* health from risks from pests or diseases carried by animals or plants or products thereof. Thus the possibility of risks to humans falling under the first definition of risk assessment cannot be excluded. In such a case, the wisdom of interpreting the first definition to lay down a stricter requirement can be questioned.

[233] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 124.

[234] Panel Report, ¶ 8.72. [Footnote in original].

[235] Panel Report, ¶ 8.80. [Footnote in original].

[236] Adopted February 13, 1998, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 186. [Footnote in original].
The case cited is: Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, supra note 141, ¶ 124.

advising the Panel.[237] These experts expressed the view that the 1996 Final Report lent more weight to unknown and uncertain elements of the assessment and looked at the *possibilit*y of adverse effects occurring rather than assessing the *probability* thereof.[238] The Appellate Body pointed out that the existence of unknown or uncertain elements does not justify a departure from the requirements for a risk assessment.[239]

While in *EC—Hormones* the Appellate Body had expressed concern that the Panel's use of the term "probability" might introduce a quantitative element into the second definition, in *Australia—Salmon*[240] it found that likelihood or probability in the first definition could be expressed quantitatively or qualitatively. However, Australia's evaluation of the probability as "low" or "small" was not deemed sufficient.[241] It is not clear what kind of qualitative determination of probability would satisfy this requirement.

Further, the Appellate Body in *Australia—Salmon* confirmed the finding in *EC—Hormones* that the risk assessment need not establish a certain magnitude or threshold level of risk. Thus, even a very small, demonstrated probability of risk is sufficient. The Appellate Body[242] distinguished between the evaluation of risk, which must show an ascertainable risk, not just a theoretical uncertainty, and the determination of an appropriate level of protection, which may be premised on a zero-risk level. It is thus possible for a Member (once an actual risk, however small, has been proven to have a *certain quantitative or qualitative probability*) to choose a zero-risk level of protection and institute SPS measures to achieve this level.[243] The usefulness of the determination of probability is thus doubtful, since no matter how small the probability of the risk, the state's chosen level of protection cannot be challenged on grounds of proportionality.[244] The more stringent criterion ("probability" as opposed to "potential") thus only serves to make it harder to satisfy the risk assessment requirement without serving any real purpose with regard to disciplining the resulting SPS measure.

With respect to the third element of this definition of a risk assessment, namely the evaluation of likelihood "according to the SPS measures which might be applied", the Appellate Body in *Australia—Salmon* agreed with the Panel that this term refers to those measures that reduce the risks of concern.[245] In *Australia—Salmon (21.5)*, the compliance Panel further clarified what is required under this element. It rejected the contention that, in order for the third element of the definition to be met, the SPS measure applied must

[237] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon, supra* note 141, ¶ 129.

[238] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon, supra* note 57, ¶ 8.83.

[239] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon, supra* note 141, ¶ 130.

[240] *Id.* ¶ 124.

[241] It should be noted that the OIE, which is recognized in the SPS Agreement as the relevant standard-setting organization in the area of animal health, defines a qualitative risk assessment as "[a]n assessment where the conclusions on the likelihood of the outcome or the magnitude of the consequences are expressed in qualitative terms such as high, medium, low or negligible". *See* OIE, *Diagnostic Manual for Aquatic Animal Diseases*, 3rd edition (2000), Article 1.4.1.3.

[242] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon, supra* note 141, ¶ 125 (quoted *infra* Part II(F)(1)).

[243] This point is discussed further *infra* Part II(F)(1).

[244] This can be compared to the situation under EC law, where the exception for health measures, which requires that the measure be "necessary" to protect human life or health, has been interpreted by the ECJ to include the requirement that the measure be proportional to the aim it seeks to achieve.

[245] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon, supra* note 57, ¶ 132.

be shown to be linked with the risk assessment. It stated as follows:

> Canada's claim . . . raises the question of whether the definition of risk assessment *as such*, requiring Members to assess risk "according to the [sanitary] measures which might be applied", can be construed so as to include the obligation to make the link between the assessment, the measures *finally selected* and the necessity to use these measures in order to achieve the ALOP.[246] We find it difficult to read such a requirement into paragraph 4 of Annex A.
>
> In our view, the rights and obligations in respect of these linkages are set out *not* in the definition of risk assessment itself—which logically *precedes* the selection of measures—but, *inter alia*, in the obligation to *base* sanitary measures *on* a risk assessment in Article 5.1 and to ensure that sanitary measures are not more trade-restrictive than required to achieve the ALOP in the sense of Article 5.6. To examine these questions of relationship between the risk assessment, the measures selected and the ALOP under the definition of risk assessment—as Canada . . . seem[s] to do—would, in our view, run the risk of adding to or diminishing the more specific rights and obligations of Members set out in other SPS obligations, contrary to Article 19.2 of the DSU.
>
> . . . In any event, we prefer to address this question of relationship between the measures selected and the risk assessment under the obligation to *base* measures *on* a risk assessment pursuant to Article 5.1 rather than under the very definition of risk assessment referred to in the same provision.[247]

Thus, the third element of the three-pronged test, requiring the evaluation of the likelihood of entry, establishment or spread of the relevant diseases *according to the SPS measure that might be applied* does not necessitate a determination of the link between the measure applied and the risk assessment itself. Instead, it only requires that the risk be determined according to the different options available to mitigate the risk.

In *Japan—Apples*, the Panel found that Japan had not evaluated the risk according to the SPS measures which might be applied, as its risk assessment examined only the SPS measure it had imposed to address the risk of fire blight. The Panel held that "consideration should be given not just to those specific measures which are currently in application, but at least to a potential range of relevant measures."[248]

On appeal, the Appellate Body found:

> We agree with the Panel that this phrase "refers to the measures *which might* be applied, not merely to the measures which *are being* applied." The phrase "which might be applied" is used in the conditional tense. In this sense, "might" means: "were or would be or have been able to, were or would be or have been allowed to, were or would perhaps". We understand this phrase to imply that a risk assessment should not be limited to an examination of the measure already in place or favoured by the importing Member. In other words, the evaluation contemplated in paragraph 4 of Annex A to the *SPS Agreement* should not be distorted by preconceived views on the nature and the content of the measure to be taken; nor should it develop into an exercise tailored to and carried out for the purpose of justifying decisions *ex post facto*.[249]

Risk assessments must therefore evince an evaluation of a range of possible SPS measures which could be applied to address the risk at issue, and their relative effectiveness,

[246] "ALOP" is an abbreviation for Appropriate Level of Protection. [Note added by the authors].

[247] Report of the WTO Compliance Panel, *Australia—Measures Affecting the Importation of Salmon, Recourse to Article 21.5 by Canada*, *supra* note 65, ¶¶ 7.68–7.70.

[248] Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶ 8.285.

[249] Report of the Appellate Body, *Japan—Measures Affecting the Importation of Apples, supra* note 112, ¶ 208 (footnotes omitted).

not merely address the measure actually applied. Otherwise they could be regarded as prejudging their own outcome[250] by showing that the measure actually applied is appropriate and effective, without regard for possible alternatives.

From the above discussion of its interpretation of the requirements for the two types of risk assessment, it is apparent that the Appellate Body takes a more realistic view of the scientific assessment of risks than do the Panels. It would appear that the Appellate Body is trying to make provision for the difficulties inherent in risk assessment by: (1) allowing the probability to be established quantitatively or qualitatively, (2) not requiring a minimum level of risk to be shown, and (3) finding that the risk to be ascertained is not only that which can be established under controlled conditions in science laboratories, but includes that occurring in the "real world".

Aside from the findings regarding the specific requirements of each of the two definitions, the decisions in these cases also address common issues relating to risk assessment in general. It is useful to identify certain common elements.

(a) Specificity. One of the issues common to both types of risk assessment is the *requirement of specificity* in the analysis of risk. On this issue, the Appellate Body in *EC—Hormones* stated:

> . . . [the studies submitted by the respondent] constitute general studies which do indeed show the existence of a general risk of cancer; but they do not focus on and do not address the particular kind of risk here at stake—the carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes—as is required by paragraph 4 of Annex A of the *SPS Agreement*. Those general studies, are in other words, relevant but do not appear to be sufficiently specific to the case at hand.[251]

Further, the Appellate Body in *EC—Hormones* agreed with the Panel that a risk assessment must be comprehensive, i.e. it must cover each of the substances at issue. Thus, the Appellate Body upheld the Panel's finding that "there was no risk assessment with regard to MGA",[252] one of the six growth hormones at issue, stating that "[i]n other words, there was an almost complete absence of evidence on MGA in the Panel proceedings."[253] On this point, the Panel explained that, "one of the basic principles of a risk assessment appears to be that it needs to be carried out for each individual substance."[254]

When dealing with the second element of its three-pronged test, the Panel in *Australia—Salmon* emphasized the need for specificity in a risk assessment, finding:

> . . . given the definition of risk assessment applicable in this case (the "evaluation of the likelihood of entry, establishment or spread of a . . . *disease*", in the singular form), a risk assessment for the measure at issue in this dispute at least has to *identify* risk on a disease specific basis, i.e., it has to identify the risk for any given disease of concern separately, not simply address the overall risk related to the combination of all diseases of concern. . . . The experts advising the Panel on this issue confirmed this. In the *EC—Hormones* case

[250] This comment was made by one of the experts advising the Panel in *Japan—Apples*. Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶ 6.177.

[251] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 200.

[252] *Id*. ¶ 201.

[253] *Id*.

[254] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.255; and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.258.

> as well, both the panels and the Appellate Body required some degree of specificity for a risk assessment—or a study or report allegedly part thereof—to be in accordance with the requirements imposed in Article 5.1.[255]

Although the Appellate Body agreed with the Panel that Australia had identified the risk on a disease-specific basis in its risk assessment, it held that Australia had not assessed or evaluated this risk and had thus not complied with the requirements of a risk assessment. On the relevance of studies on one product category for a risk assessment in respect of another product category, the Panel in *Australia—Salmon* addressed Australia's submission that to the extent that a disease agent was common to wild Pacific and other Canadian salmon products, its risk assessment (contained in the 1996 Final Report) with regard to the former product was equally valid for the latter. The Panel noted:

> (. . .) [W]e do not consider—nor has Australia claimed—that the 1996 Final Report (which is explicitly limited to adult, wild, ocean-caught Pacific salmon) constitutes a risk assessment, in the sense of Article 5.1, for the other categories of salmon products covered by the measure in dispute. We do, however, agree with Australia that some of the evidence, assessments and conclusions contained in the 1996 Final Report might be relevant for the risk assessment to be carried out (or relied upon) for the other categories of salmon products and that, therefore, a completely new risk assessment for these other categories of salmon products might not be necessary.[256]

The issue of specificity was again addressed in *Japan—Apples*, where the Panel examined Japan's risk assessment which evaluated the risk of entry, establishment and spread of fire blight through a collection of possible hosts, including apples. The Panel found that as Japan's risk assessment did not evaluate the risks in relation to apple fruit separately from those posed by other hosts, whereas scientific evidence showed that the risks vary significantly depending on the vector (host plant) involved, it did not meet the requirement of specificity.[257] On appeal, Japan argued that the methodology of a risk assessment is not regulated by the SPS Agreement and a Member may thus decide for itself whether to analyse the risk on the basis of a particular pest or disease, or on the basis of a particular commodity.[258] The Appellate Body upheld the Panel's finding, holding that it did not limit a Member's choice of risk assessment methodology. Members are free to organise their risk assessments along the lines of pests or diseases, or of the commodity imported, provided that a likelihood of entry, establishment or spread of the disease is attributed to *each agent specifically*.[259] The Appellate Body emphasised that, as held in *EC—Hormones*, the risk to be specified in a risk assessment is the harm concerned *as well as* the precise agent that may cause the harm.[260]

Therefore, a rather high degree of specificity is required in a risk assessment. It has to focus and address the particular kind of risk at stake from the product at issue, not just generally establish that the substance may be harmful. It must assess the risk for each type of disease or harmful substance at issue separately it must also specify due risk from the specific agent at issue. Although a completely new risk assessment is not

[255] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.74.
[256] *Id.* ¶ 8.58.
[257] Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶¶ 8.268–271.
[258] Report of the Appellate Body, *Japan—Measures Affecting the Importation of Apples, supra* note 112, ¶ 204.
[259] *Id*.
[260] *Id.*, ¶ 202.

necessary for each product category, a risk assessment for one product cannot be regarded as constituting a risk assessment for related product categories.[261]

(b) "As Appropriate to the Circumstances" (Article 5.1). The requirement of Article 5.1 that SPS measures be based on a risk assessment is qualified by the phrase "as appropriate to the circumstances." It is therefore necessary to examine what this qualification entails to determine whether circumstances such as scientific uncertainty, the fact that the measure predates the coming into force of the SPS Agreement, or the lack of economic resources or scientific capabilities of a Member might mitigate the strict requirements relating to risk assessments. When addressing the applicability of the SPS Agreement to those measures adopted before the entry into force of the WTO Agreement, the Appellate Body in *EC—Hormones* noted the following:

> We are aware that the applicability, as from 1 January 1995, of the requirement that an SPS measure be based on a risk assessment to the many SPS measures already in existence on that date, may impose burdens on Members. It is pertinent here to note that Article 5.1 stipulates that SPS measures must be based on a risk assessment, *as appropriate to the circumstances*, and this makes clear that the Members have a certain degree of flexibility in meeting the requirements of Article 5.1.[262]

However, what this flexibility would entail in practice is not clear, as the Appellate Body did not seem to relax any of the normal disciplines in its ensuing assessment of whether the EC had met the requirements for a risk assessment in this case. In respect of Australia's claim that its risk assessment for one product category was equally valid with respect to other product categories to which the same disease agent was common, the Panel in *Australia—Salmon* referred back to the above-mentioned finding of the Appellate Body in *EC—Hormones* and noted:

> As to the product coverage of Article 5.1, the reference contained in Article 5.1 to base sanitary measures on an assessment "as appropriate to the circumstances" cannot, in our view, annul or supersede the substantive obligation resting on Australia to base the sanitary measure in dispute (irrespective of the products that measure may cover) on a risk assessment. We consider that the reference "as appropriate to the circumstances" relates, rather, to the way in which such risk assessment has to be carried out.[263] Only Article 5.7 allows for an exception to the obligation to base sanitary measures on a risk assessment.[264]

Turning to an examination of Australia's 1996 Final Report, to determine if it constituted a risk assessment in respect of adult, wild, ocean-caught salmon, the Panel further stated:

> Following Article 5.1, a risk assessment needs to be "appropriate to the circumstances". Answering a Panel question in this respect, Canada is of the view that the circumstances thus referred to are the source of the risk (e.g., an animal pathogen or a chemical contaminant) and the subject of the risk (i.e., whether it is to human, animal or plant life or health). For Australia, the phrase "as appropriate to the circumstances" confers a right and obligation on WTO Members to assess the risk, on a case by case basis, in terms of product, origin and destination, including, in particular, country specific situations. We

[261] The Panel's finding of the absence of a risk assessment with regard to the other product categories ("other Canadian salmon") covered by the measure was not appealed.

[262] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 129.

[263] *See further* in ¶ 8.70. [Footnote in original].

[264] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.57.

> agree that both interpretations may be covered by the term "as appropriate to the circumstances". In our view, also the OIE risk assessment techniques as well as the scientific opinions we gathered, may shed light on what is a risk assessment "appropriate to the circumstances".[265]

The Panel, however, did not proceed to evaluate whether Australia's 1996 Final Report met the requirements of a risk assessment, but merely assumed it did so[266] and went on to determine whether the measure was "based on" the Final Report. The Appellate Body in this case did not find it appropriate to base its examination of Article 5.1 on this assumption of the Panel, and thus examined itself the question whether Australia's 1996 Final Report was a risk assessment within the meaning of Article 5.1. In its finding that the second requirement of a risk assessment (the evaluation of the likelihood of the risk) was not met, it stated as follows:

> . . . the existence of unknown and uncertain elements does not justify a departure from the requirements of Articles 5.1, 5.2 and 5.3, read together with paragraph 4 of Annex A, for a risk assessment. We recall that Article 5.2 requires that "in the assessment of risk, Members shall take into account available scientific evidence". We further recall that Article 2, entitled "Basic Rights and Obligations", requires in paragraph 2 that "Members shall ensure that any sanitary . . . measure . . . is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.[267]

Although the Appellate Body was not specifically addressing the question of the meaning of the phrase "as appropriate to the circumstances", it did not seem to allow the existence of scientific uncertainty to mitigate the requirements for a risk assessment in Article 5.1.

In *Japan—Apples*, the Panel examined what is meant by a risk assessment "as appropriate to the circumstances". It held that this factor, together with the consideration of the risk assessment techniques developed by the relevant international organizations,[268] pervades the entire risk assessment as defined in Annex A and is therefore relevant to the evaluation of the risk assessment as a whole. It therefore addressed this first, before looking at other requirements for a risk assessment.[269] The Panel first found, rather obviously, that as Japan's measure was a phytosanitary measure, it must focus on risks related to plant life and health.[270] It then noted that the term "as appropriate to the circumstances" has been interpreted, in *Australia—Salmon*, to provide some flexibility for risk assessments, on a case-by-case basis, including consideration of country-specific situations. It therefore found that Japan's fire blight-free status and its climatic conditions, which were favorable to the spread of fire blight, were relevant "circumstances" to be taken into account in Japan's risk assessment, and noted that they related to some of the factors required to be considered under Article 5.2.[271]

From the above discussion it appears that the qualifying phrase "as appropriate to the circumstances" has been interpreted by panels to indicate that the *manner* of conducting a risk assessment may differ, depending on the source of the risk (e.g. chemical or pathogen), subject of the risk (human, plant or animal), product involved, and country-specific situations regarding the country of origin or destination of the product. What the

[265] *Id.* ¶ 8.71.
[266] *Id.* ¶ 8.83 and 8.92.
[267] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 130.
[268] This factor is discussed *infra* Part II(D)1(c).
[269] Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶ 8.237.
[270] *Id.*, ¶ 8.238.
[271] *Id.*, ¶ 8.240 and note 372. Article 5.2 is discussed *infra* Part II(D)2.

appropriate manner of conducting a risk assessment is in a specific case is determined with reference to the opinions of scientific experts, and risk assessment techniques established by international standard-setting organizations in the area at issue.

(c) "Taking into Account Risk Assessment Techniques Developed by the Relevant International Organizations."(Article 5.1). Article 5.1 further requires that a risk assessment take into account the risk assessment techniques which are developed by the relevant international organizations. It can be assumed that these organizations are those referred to in the definition of "international standards, guidelines and recommendations" in Annex A, paragraph 3, namely primarily the CAC, OIE and IPPC, since these are the most relevant for SPS matters. In *Australia—Salmon*, as noted above, the Panel took account of the risk assessment techniques developed by the OIE as part of its consideration of what is covered by the term "as appropriate to the circumstances".[272] In *Japan—Apples*, however, the Panel examined this issue separately, as one of the two factors which pervade the evaluation of a risk assessment. After noting that Article 5.1 merely requires that these risk assessment techniques be "taken into account", rather than that a risk assessment be "based on" or "in conformity with" them, the Panel found that:

> . . . such techniques should be considered relevant, but that a failure to respect each and every aspect of them would not necessarily, *per se*, signal that the risk assessment on which the measure is based is not in conformity with the requirements of Article 5.1. Nonetheless, reference to these risk assessment techniques can provide very useful guidance as to whether the risk assessment at issue constitutes a proper risk assessment within the meaning of Article 5.1.[273]

It is thus clear that the risk assessment techniques developed by the relevant international organizations, while useful, are not determinative to the determination whether a risk assessment complies with Article 5.1.

(d) Borrowed Risk Assessments. On the question whether the risk assessment relied upon must be conducted by the Member itself, the Appellate Body in *EC—Hormones* pointed out that the SPS Agreement is not prescriptive as to *who* carries out the risk assessment. It stated that:

> Article 5.1 does not insist that a Member that adopts a sanitary measure shall have carried out its own risk assessment . . . The SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization.[274]

Thus it is sufficient if the measure is *based on* a risk assessment, whatever its origin. This is particularly significant for developing countries, which often lack the financial and technical capacity to carry out their own risk assessments. They may thus rely on those risk assessments conducted in the relevant standard-setting organizations or in other countries, to the extent that they are applicable to their own situations.

[272] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon, supra* note 57, ¶ 8.71.

[273] *Id*. ¶ 8.241. In this context, the Panel examined two relevant standards set by the International Plant Protection Convention, ISPM 2 on Guidelines for Pest Risk Analysis, and ISPM 11 on Pest Risk Analysis for Quarantine Pests. The parties agreed that both instruments build upon the same framework, thus the Panel focused on the key issue of whether Japan's risk assessment sufficiently identified and assessed the possible pathways for the introduction and spread of fire blight through apple fruit and the likelihood for their being realised, as required by both instruments. *Id.,* ¶ 8.244.

[274] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 190. This finding was recalled by the Appellate Body in *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, n. 68.

(e) Risk Assessment as Distinct from Risk Management. To further elucidate what a risk assessment entails, it is useful to distinguish it from risk management. There is a commonly-drawn distinction in risk analysis methodology between *risk assessment* (the science-based process of determining the existence of a risk and the likelihood of it occurring according to the SPS measures which could be applied), and *risk management* (a policy-based choice of the level of protection deemed appropriate by a state, taking into account various societal value judgments such as the citizens' tolerance of risk, economic considerations, *etc.* and the choice of measure to achieve this level of protection).[275] While a Member's risk assessment must be founded on scientific analysis, scope is left for risk management decisions in the setting of an appropriate level of protection and the choice of a measure to achieve this level of protection. This distinction was recognized by the Panel in *EC—Hormones*.[276] However, it used this distinction to exclude from the scope of a risk assessment certain non-scientific reports as well as opinions of the European Parliament and the Economic and Social Committee, which evaluated reports submitted to them, and the question of risks associated with the problem of control of the use of hormones. It viewed these issues as having to do with social-value judgments and thus as not scientifically based and belonging under "risk management" rather than "risk assessment". The Appellate Body rejected the Panel's distinction, stating that the SPS Agreement nowhere refers to the term "risk management" but only to "risk assessment".[277] Thus the Panel's use of the distinction to limit the scope of what falls under risk assessment was held to have no basis in the text. The Appellate Body held:

> . . . The Panel observed that an assessment of risk is, at least with respect to risks to human life and health, a "scientific" examination of data and factual studies; it is not, in the view of the Panel, a "policy" exercise involving social value judgments made by political bodies.[278] The Panel describes the latter as "non-scientific" and as pertaining to "risk management" rather than to "risk assessment".[279] We must stress, in this connection, that Article 5 and Annex A of the *SPS Agreement* speak of "risk assessment" only and that the term "risk management" is not to be found either in Article 5 or in any other provision of the *SPS Agreement*. Thus, the Panel's distinction, which it apparently employs to achieve or support what appears to be a restrictive notion of risk assessment, has no textual basis. The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.[280]

[275] For a more detailed analysis of this distinction, *see* Walker, *supra* note 117, at 256–277. In addition, risk communication forms part of the risk analysis process. It is defined as follows in Article 1.3.2.7 of the OIE *International Animal Health Code*: "Risk communication is the process by which information and opinions regarding hazards and risks are gathered from potentially affected and interested parties during a risk analysis, and by which the results of the risk assessment and proposed risk management measures are communicated to the decision-makers and interested parties in the *importing* and *exporting countries*. It is a multidimensional and iterative process and should ideally begin at the start of the risk analysis process and continue throughout." (Emphasis in original). This aspect of risk analysis is party covered by the rules on transparency in the SPS Agreement, dealt with in Part III(A) below.

[276] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.98; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.95.

[277] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 181.

[278] U.S. Panel Report, ¶ 8.94; and Canada Panel Report, ¶ 8.97.[Footnote in original].

[279] U.S. Panel Report, ¶ 8.95; and Canada Panel Report, ¶ 8.98. [Footnote in original].

[280] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 181.

While it is true that the term "risk management" is not explicitly mentioned in the SPS Agreement, the Agreement deals in different ways with the Members' obligation to base their SPS measures on a risk assessment and their right to establish their own level of protection and choose a measure to achieve this level of protection. The former is subject to strict scientific criteria, whereas the latter choices are not reviewable, provided they takes into account the aim of reducing negative trade effects when determining the appropriate level of protection,[281] and avoid arbitrary or unjustifiable distinctions in the levels of protection established in different situations, and ensure that the measure taken is the least restrictive.[282] The criteria against which the choice of the level of protection is evaluated do not have a scientific basis. This recognizes the sovereign right of Members to make their own policy choices in the area of public health, taking into account various non-scientific considerations. The choice is ultimately one based on societal value judgments. The latter area of decision-making is commonly known as risk management.

It would perhaps have made more sense for the Appellate Body to take issue only with the Panel's classification of the risks associated with control as non-scientific and thus belonging under risk management and not under risk assessment, rather than objecting to the Panel's distinction between risk management and risk assessment. Such an approach would be in line with the Appellate Body's view, expressed in *EC—Hormones*, that a risk assessment deals with real-world risks and not just risks ascertainable by means of laboratory experiments.[283]

2. Factors Taken into Account (Article 5.2 and 5.3)

Although the SPS Agreement does not specify a methodology to be used in making a risk assessment,[284] it does list in Article 5.2 and 5.3 the scientific (in a broad sense) and economic factors that Members must take into account.

First, Article 5.2 provides that Members must take certain objectively ascertainable factors into account when assessing risks. These are: available scientific evidence, relevant processes and production methods, relevant inspection sampling and testing methods, prevalence of specific diseases or pests, existence of pest- or disease-free areas, relevant ecological and environmental conditions, and quarantine or other treatment. As stated above, the Panel in *EC—Hormones* held that the risks relating to detection and control of failure to observe good veterinary practice should be excluded from risk assessment *a priori* because they are non-scientific and thus do not fall within the scope of Article 5.2's provision on "relevant inspection sampling and testing methods", but rather are taken into account in risk management. The Appellate Body rejected this finding, holding that the scope of Article 5.2 allowed consideration of these risks. The Appellate Body noted:

> The listing in Article 5.2 begins with "available scientific evidence"; this, however, is only the beginning. We note in this connection that the Panel states that, for purposes of the EC measures in dispute, a risk assessment required by Article 5.1 is "a *scientific* process aimed

[281] Article 5.4 SPS.

[282] Article 5.5 SPS and Article 5.6 SPS.

[283] As will be discussed below, the Appellate Body did overrule the Panel's decision that risks from failure to observe good veterinary practice and problems relating to detection and control of such failure must be rejected *a priori* because they are unscientific and thus do not belong under risk assessment. The Appellate Body found that the Panel had misinterpreted the scope of Article 5.2 and that these considerations did, in fact, belong thereunder. Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 187.

[284] However, Members are required, in Article 5.1, to take account of the risk assessment techniques developed by the relevant international organizations.

> at establishing the *scientific* basis for the sanitary measure a Member intends to take".[285] To the extent that the Panel intended to refer to a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions, the Panel's statement is unexceptionable. However, to the extent that the Panel purports to exclude from the scope of a risk assessment in the sense of Article 5.1, all matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences, we believe that the Panel is in error. Some of the kinds of factors listed in Article 5.2 such as "relevant processes and production methods" and "relevant inspection, sampling and testing methods" are not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology. Furthermore, there is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list. It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[286]

The Appellate Body further stated:

> It should be recalled that Article 5.2 states that in the assessment of risks, Members shall take into account, in addition to "available scientific evidence", "relevant processes and production methods; [and] relevant inspection, sampling and testing methods". We note also that Article 8 requires Members to "observe the provisions of Annex C in the operation of control, inspection and approval procedures . . . ". The footnote in Annex C states that "control, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification". We consider that this language is amply sufficient to authorize the taking into account of risks arising from failure to comply with the requirements of good veterinary practice in the administration of hormones for growth promotion purposes, as well as risks arising from difficulties of control, inspection and enforcement of the requirements of good veterinary practice.[287]

The Appellate Body qualified its finding, however, as follows:

> [T]he *SPS Agreement* requires assessment of the potential for adverse effects on human health arising from the presence of contaminants and toxins in food. We consider that the object and purpose of the *SPS Agreement* justify the examination and evaluation of all such risks for human health whatever their precise and immediate origin may be. We do not mean to suggest that risks arising from potential abuse in the administration of controlled substances and from control problems need to be, or should be, evaluated by risk assessors in each and every case. When and if risks of these types do in fact arise, risk assessors may examine and evaluate them. Clearly, the necessity or propriety of examination and evaluation of such risks would have to be addressed on a case-by-case basis. What, in our view is a fundamental legal error is to exclude, on an *a priori* basis, any such risks from the scope of application of Articles 5.1 and 5.2.[288]

Thus, the Appellate Body has clarified that the SPS Agreement requires an assessment of the potential for adverse effects on human, animal or plant life or health from contaminants or toxins in food, or pests or diseases, regardless of their origin. Whether a specific risk must be examined should be determined on a case-by-case basis but no risk should be excluded *a priori*.

[285] U.S. Panel Report, ¶ 8.107; Canada Panel Report, ¶ 8.110. [Footnote in original].
[286] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 187.
[287] *Id.* ¶ 205.
[288] *Id.* ¶ 206.

Article 5.3 sets out certain economic factors to be taken into account in assessing risks to animal or plant life or health and in determining which SPS measure should be applied. These economic factors listed in Article 5.3 are "the potential damage in terms of loss of production or sales in the event of entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks." This list of factors implies a recognition of the fact that risk assessments are not purely science-based but involve economic considerations as well. It is significant that in the assessment of human health risks these economic factors are not required to be taken into account.[289] Thus, governments are not required to weigh economic factors against the protection of human health.

3. The "Based on" Requirement (Article 5.1)

Article 5.1, quoted above, sets out the requirement that SPS measures be "based on" an assessment of the risks to human, animal or plant life or health, as appropriate to the circumstances and taking into account risk assessment techniques developed by the relevant international organizations.

The meaning of "based on" in Article 5.1 was discussed in *EC—Hormones*.[290] In this case, the Panel read a procedural requirement into the term, obliging Members to take a risk assessment into account when enacting or maintaining SPS measures.[291] It looked to preambles of EC Directives for evidence that this was in fact done.[292] The Appellate Body rejected this subjective requirement as having no basis in the text. It found:

> The term "based on", when applied as a "minimum procedural requirement" by the Panel, may be seen to refer to a human action, such as particular human individuals "taking into account" a document described as a risk assessment. Thus, "take into account" is apparently used by the Panel to refer to some subjectivity which, at some time, may be present in particular individuals but that, in the end, may be totally rejected by those individuals. We believe that "based on" is appropriately taken to refer to a certain *objective relationship* between two elements, that is to say, to an *objective situation* that persists and is observable between an SPS measure and a risk assessment. Such a reference is certainly embraced in the ordinary meaning of the words "based on" and, when considered in context and in the light of the object and purpose of Article 5.1 of the *SPS Agreement*, may be seen to be more appropriate than "taking into account". We do not share the Panel's interpretative construction and believe it is unnecessary and an error of law as well.[293]

[289] As mentioned previously, this exclusion of human health risks from Article 5.3 in the final text of the SPS Agreement was not present in the Dunkel Draft. *See supra* note 32.

[290] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶¶ 188-209.

[291] Thus, the panel found that the EC could not rely on new scientific evidence regarding the risks posed by hormone-treated beef, published in journals in 1995 and 1996, since it could not have been considered by the EC at the time of imposing the import ban. Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.113; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.116.

[292] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶¶ 8.116–8.119; and Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.114.

[293] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 189.

The Panel also found that Article 5.1 contained a substantive requirement, namely that the scientific conclusions reached in the risk assessment and those implicit in the SPS measure should *conform*.[294] The Appellate Body agreed with the relevance of the relationship between the two sets of conclusions, but emphasized that this is only one of the relevant factors. It held:

> The relationship between those two sets of conclusions is certainly relevant; they cannot, however, be assigned relevance to the exclusion of everything else. We believe that Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, requires that the results of the risk assessment must sufficiently warrant—that is to say, reasonably support—the SPS measure at stake. The requirement that an SPS measure be "based on" a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment.[295]

The Appellate Body further clarified what the requirement of "based on" entails in cases of divergent scientific views as follows:

> We do not believe that a risk assessment has to come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure. The risk assessment could set out both the prevailing view representing the "mainstream" of scientific opinion, as well as the opinions of scientists taking a divergent view. Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. . . . In most cases, responsible and representative governments tend to base their legislative and administrative measures on "mainstream" scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety. Determination of the presence or absence of that relationship can only be done on a case-to-case basis, after account is taken of all considerations rationally bearing upon the issue of potential adverse health effects.[296]

This conclusion has been criticized for leaving intact the issue of dueling science and opening the door for the use of "hired scientists" in future dispute settlement cases.[297] However, it should be recognized that this is the only realistic approach that could be taken in the light of a lack of consensus that frequently exists within the scientific community. For this reason, the Appellate Body has recognized that Members may in some cases base their SPS measures on minority scientific views, if they come from qualified and respected sources. Whether such measures will be regarded as "based on" a risk assessment will depend on the circumstances of each case.

The Appellate Body's ruling in *EC—Hormones* on the "based on" requirement leaves, considerable scope for discussion as to what kind of relationship would be considered "rational". Would a measure based on a single divergent scientific opinion be considered rationally related to the risk assessment?

[294] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.120. Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.119.

[295] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 193.

[296] *Id.* ¶¶ 193–194.

[297] McNiel, *supra* note 18, at 134.

It does not necessarily follow that if the EC in the *EC—Hormones* dispute had found a single scientist willing to report that human consumption of beef treated with hormones for growth-promotion purposes poses a real risk of cancer, this would meet the requirement of Article 5.1. Such a result would seem to frustrate the SPS Agreement's goal of using science to create clear rules and disciplines.[298] It would also encourage the "purchasing" of scientific opinions by national governments. Instead, it appears the ruling of the Appellate Body, that the determination of whether a rational relationship exists between an SPS measure and a divergent scientific view will be done on a case-by-case basis taking into account all relevant considerations. Where serious and imminent threats to public safety are at issue, it will be easier for measures based on minority scientific opinions to fulfill the criterion of having a "rational relationship" to a risk assessment and thus be based thereon for purposes of Article 5.1.

It is also important to determine *when* the risk assessment needs to have been made in order for a measure to be "based" thereon. Obviously there are a multitude of SPS measures that were in existence long before the coming into force of the SPS Agreement. It is possible that many of these were not based on a risk assessment, particularly in Members whose resources are too scarce to permit them to undertake thorough risk assessments before enacting SPS measures. As discussed above, the SPS Agreement applies also to those measures predating its coming into force, provided the measures are still in existence.[299] The question arises whether Article 5.1 may be an exception to this rule.

With respect to the risk assessment requirement for SPS measures enacted *before* the entry into force of the SPS Agreement, the Panel in *EC—Hormones* noted:

> [Article 5.1] does not prevent that with respect to a sanitary measure enacted *before* the entry into force of the SPS Agreement, the risk assessment is carried out or invoked *after* the entry into force of that Agreement (and thus *after* the enactment of the sanitary measure in question). However, the fact that a sanitary measure may be enacted *before* the entry into force of the SPS Agreement does not mean that, once the SPS Agreement entered into force, there is no obligation for the Member in question to base that measure on a risk assessment.[300]

The Appellate Body in that case confirmed this finding.[301]

The same approach was followed by the Panel in *Australia—Salmon*, which stated:

> Article 5.1 does not qualify—either in terms of application in time or product coverage—the substantive obligation imposed on all WTO Members to base their sanitary measures on a risk assessment.[302]

Therefore, it is clear that the requirement in Article 5.1 that SPS measures be based on a risk assessment also applies to SPS measures in existence before the coming into force of the SPS Agreement. However, it is not necessary for the risk assessment to precede the enactment of the SPS measure in order for the latter to be regarded as "based on" a risk

[298] *Id.* at 93.

[299] *See supra* Part II(A)(3)(c).

[300] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.102 [footnote omitted]; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.99.

[301] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 129.

[302] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.56.

assessment. This added flexibility is only applicable to measures predating the coming into force of the SPS Agreement in order to lessen the burdensome consequences of the fact that the SPS Agreement also applies to measures already in existence.[303]

Before the compliance Panel in *Australia—Salmon*, Canada claimed that the new Australian measures could not be said to be based on a risk assessment, because the publication of the new measures, on July 19, 1999, preceded the publication in its final form of Australia's new risk assessment, contained in the 1999 Import Risk Analyses ("IRA"), on November 12, 1999. The Panel rejected this argument as follows:

> We note that the final form of the 1999 IRA, though only edited and published in book form on 12 November 1999, is still dated July 1999 and that . . . the amendments made in the final 1999 IRA "do not alter the substance or the conclusions of the report as announced on 19 July".
>
> On these grounds, we find that the fact that the 1999 IRA was only published in final form subsequent to the date the new sanitary measures were taken, does not, in this case, preclude the measures from being *based on* the 1999 IRA. All substantive elements of the risk assessment we looked at earlier were already included in the draft 1999 IRA of July 1999, i.e. *before* the new measures were taken.[304]

From these findings of the compliance Panel in *Australia—Salmon*, it appears that for measures postdating the SPS Agreement at least the substantive elements of the risk assessment must already have been in existence at the time of adoption of the measure. The fact that the risk assessment was *published* only after the measure was adopted is of no relevance to the question whether the measure can be regarded as "based on" the risk assessment.

E. Provisional Application of SPS Measures (Article 5.7)

1. Relationship between Article 5.7 and the Precautionary Principle

It is generally accepted that there are situations where governments need to take measures to prevent risks to health even when sufficient scientific evidence confirming the risk is lacking.[305] Thus, governments may act with precaution in order to protect against risks without waiting for the conclusive results of scientific analyses. This is in line with the old adage "better safe than sorry", and is particularly important where risks to health are concerned. Citizens prefer their governments to err on the side of caution when faced with decisions on the protection of health where complete information is lacking. This is commonly referred to as acting in accordance with the precautionary principle.[306]

It is necessary to examine the extent to which the precautionary principle is taken into account in the SPS Agreement. Article 5.7 of the SPS Agreement allows for provisional measures to be taken by Members when there is insufficient scientific evidence, under certain conditions, and thus could be said to reflect a particular formulation of the

[303] *See supra* Part II(A)(3)(c) regarding the temporal scope of application of the SPS Agreement.

[304] Report of the WTO Compliance Panel, *Australia—Measures Affecting the Importation of Salmon, Recourse to Article 21.5 by Canada*, *supra* note 65, ¶¶ 7.76–7.77.

[305] For an interesting discussion on the prevalence of uncertainty in SPS risk analysis and reasons for this, *see* Mark Powell, *Science in Sanitary and Phytosanitary Dispute Resolution*, Discussion Paper 97–50, RESOURCES FOR THE FUTURE, 5–11 (1997).

[306] It should be noted that some countries, such as the United States, prefer the term "precautionary approach" in order to avoid the implication that an overriding general principle of law has emerged in this respect. In addition, there is a difference of opinion among Members, particularly the EC and the U.S., regarding at which stage of risk analysis (i.e. risk assessment or risk management) precaution should play a role.

precautionary principle. Article 5.7 provides:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

However, the question arises whether this provision represents the only scope for the precautionary principle in the SPS Agreement. In *EC—Hormones*, the EC had categorized its SPS measure as final, rather than provisional and thus did not rely on Article 5.7. Nevertheless, it contended that scientific uncertainty existed regarding the health effects of growth hormones in beef. Therefore, it tried to rely on the precautionary principle outside the framework of Article 5.7, as a general customary rule of international law or at least a general principle of law, applying to the interpretation of both risk assessment and risk management disciplines in the SPS Agreement.[307]

The Appellate Body in this case expressed its doubts as to whether the precautionary principle has developed into a principle of general or customary international law, outside the field of international environmental law, but found it unnecessary to decide this issue.[308] The Appellate Body stated:

> The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[309]

Further, the Appellate Body stated that Article 5.7 does not exhaust the relevance of the precautionary principle, which it found to be reflected also in the sixth paragraph of the

[307] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 16. It is interesting to note that the EC Commission's recent Communication on the Precautionary Principle, adopted partly as a reaction to the Appellate Body decision in *EC—Hormones* reflects a departure from the view that the precautionary principle applies to both phases of risk analysis. The communication (at 15) states that the appropriate role for the precautionary principle is in risk management decisions, where scientific uncertainty precludes a full risk assessment. It distinguishes this situation from the prudential approach that scientists take in their assessment of data, in order to deal with the scientific uncertainties inherent in risk assessment. It identifies certain prudential techniques adopted by risk assessors to deal with uncertainties, for example the use of animal models to establish potential effects in humans, adopting a safety factor when evaluating an acceptable daily intake to take account of inter- and intra-species variability, not adopting an acceptable daily intake for recognised carcinogens, etc. *See* European Commission, *Communication from the Commission on the Precautionary Principle,* COM(2000)1, Brussels, February 2, 2000. It seems that the Commission's change in approach is a reaction to the Appellate Body's refusal in its report in *EC—Hormones* to see the precautionary principle as allowing deviation from the explicit provisions of Article 5.1 on risk assessment, except as provided for in Article 5.7. It thus cannot influence the application of the risk assessment disciplines. The Commission thus now prefers to view the principle as a risk management tool.

[308] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 123.

[309] *Id.*

Preamble to the SPS Agreement and Article 3.3.[310] However, we wonder what the Appellate Body might have meant with this statement. The sixth paragraph of the Preamble and Article 3.3 both refer to the right of Members to set their own level of protection, even if it is higher than that embodied in international standards. However, these provisions are in our opinion not reflections of the precautionary principle. Logically, *before* a Member can decide on the level of protection it wants to achieve with regard to a particular risk, it needs to conduct a risk assessment on the basis of scientific information to determine if a risk exists. On grounds of this scientific evaluation, the Member takes the risk management decision regarding a level of protection. However, the precautionary principle is precisely at issue where a lack of scientific evidence hinders the conduct of a proper risk assessment, yet prompt action is necessary to address suspected risks. Thus, the fact that a Member may determine its own level of protection when the risk is certain does nothing to incorporate the precautionary principle into SPS disciplines.[311]

The Appellate Body then held that the precautionary principle (presumably whatever its legal status in international law) could not override the explicit requirements of Articles 5.1 and 5.2, in cases of scientific uncertainty.[312] On the relationship between the "precautionary principle" and the SPS Agreement, the Appellate Body noted the following four elements:

> First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement. Secondly, the precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*. (. . .) Thirdly, a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned. Lastly, however, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*.[313]

This statement follows the traditional view of the hierarchy of norms in international law, according to which customary international law norms (unless they have developed into mandatory rules of *ius cogens*) do not override the express terms of treaty provisions but are only useful in interpreting treaty provisions. In the *Gabcikovo—Nagymaros* case,[314] referred to by the Appellate Body,[315] the International Court of Justice ("ICJ") declined to

[310] *Id.* ¶ 124.

[311] The Appellate Body appears to be confusing the precautionary principle with the protective principle. The latter principle is a forerunner of the precautionary principle, dealing with the duty of governments to provide protection from risks that have been *established scientifically*. Thus the ability of a government to set a high level of protection once a risk has been proved falls under the protective principle. The precautionary principle represents a step forward in that it requires government action in the face of suspected risks that *cannot* be scientifically proven in the current state of scientific knowledge. It evolved precisely due to the need to address the regulatory paralysis that results from a lack of scientific certainty. *See* H. HOHMANN, PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW 10 (1994).

[312] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 125, where it held, "We accordingly agree with the finding of the Panel that the precautionary principle does not override the provisions of the *SPS Agreement*."

[313] *Id.* ¶ 124.

[314] *Case Concerning the Gabcícovo-Nagymaros Project (Hungary/Slovakia)* I.C.J. Judgment, September 25, 1997 ¶¶ 111–114 (not yet reported in the I.C.J. Reports), 37 I.L.M. 162 (1998)

[315] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 123 and n.93.

find that newly developed norms and standards in environmental law could override treaty obligations. Instead it emphasized the principle of *pacta sunt servanda*. In a separate, concurring opinion, Judge Korma held that the ICJ's ruling "represents a significant statement by the Court rejecting the argument that obligations assumed under a validly concluded treaty can no longer be observed (. . .) as a result of the emergence of a new wave of legal norms, *irrespective* of their legal character or quality."[316] Clearly then, in terms of this view, the question whether the precautionary principle has evolved into a customary international law norm would not affect the fact that it is subordinate to the express provisions agreed upon by Members in the SPS Agreement and thus cannot override clear provisions in the Agreement.[317]

Even if the view were taken that customary international law norms are equal in status to, and thus can override, express treaty provisions, the limited mandate of panels and the Appellate Body prevents them from relying on non-WTO norms or rules to overturn express treaty provisions. Article 3.2 of the Dispute Settlement Understanding ("DSU") expressly provides that the recommendations and rulings of the Dispute Settlement Body "cannot add to or diminish the rights and obligations provided in the covered agreements."

However, the matter does not end here. If the precautionary principle can be said to have developed into a principle of customary international law or a general principle of international law, it has the effect of guiding the interpretation of treaty articles.[318] It is a customary international law principle of interpretation that, as parties to a treaty are presumed not to have intended to violate other relevant norms of international law, including customary international law, the treaty provisions are interpreted as far as possible in conformity with these norms. This general international law principle of interpretation is known as the presumption against conflicts,[319] and finds reflection in Article 31.3(c) of the Vienna Convention on the Law of Treaties (the "Vienna Convention"), which requires that *any* relevant rule of international law applicable in the relations between the parties to a treaty be taken into account together with the context in which the treaty must be interpreted. Article 31 of the Vienna Convention has been recognized by the Appellate Body[320] as constituting part of the "customary rules of interpretation of public

[316] Emphasis added.

[317] There is wide support for the view that there is no inherent hierarchy of norms in international law, and thus that treaty provisions do not necessarily have precedence over customary international law norms or general principles of international law. However, Pauwelyn argues that genuine conflicts between treaty law and custom or general principles of law are exceptional, due to the fact that custom and general principle emerge gradually over time and therefore constitute more a "process" which interacts with other norms of international law, rather than a "rule" with which other norms of international law can conflict. *See* Pauwelyn, *supra* note 128, at 60–62.

[318] In *U.S.—Shrimp/Turtle*, the Appellate Body recognised that its task is to interpret the language of WTO agreements "seeking additional interpretative guidance, as appropriate, from the general principles of international law". Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998), ¶ 158.

[319] This general principle of treaty interpretation was recognised by the Appellate Body in *Guatemala-Cement* and by a panel in *Indonesia-Automobiles* with regard to conflicts between different WTO Agreements. Report of the Appellate Body, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico,* WT/DS60/AB/R (1998), ¶ 65; Report of the WTO Panel, *Indonesia—Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, (1998), ¶ 14.28.

[320] In *U.S.—Gasoline*, the Appellate Body held that Article 31.1 of the *Vienna Convention* constitutes customary rules of interpretation of public international law. Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, (1996), 17. This finding was confirmed and extended to include the whole of Article 31 and Article 32 of the Vienna Convention in *Japan—Alcoholic Beverages* and *EC—Computer Equipment.* Report of the Appellate Body *Japan—Taxes on Alcoholic Beverages*,

international law" which panels and the Appellate Body are bound to apply in clarifying the provisions of the covered agreements under Article 3.2 of the DSU. Thus the Appellate Body's statement that ". . . the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation"[321] reveals a misunderstanding of the issue at stake. In fact, it is precisely the "normal principles of treaty interpretation"[322] referred to by the Appellate Body, that require that the precautionary principle be used to guide the interpretation of the provisions of the SPS Agreement, *if* it can be shown that this principle is now a customary international law norm or a general principle of international law.[323]

For this reason, we argue that the Appellate Body was wrong to state that it was "unnecessary" for it to take a position on this question.[324] In fact, the answer to this question is crucial to the determination of the role of the precautionary principle in the SPS Agreement. While it could not result in the non-application of treaty obligations, the precautionary principle could be important in giving meaning to vague terms in the SPS Agreement, such as the "sufficient scientific evidence" requirement[325] in Article 2.2, or the requirement that SPS measures be "based on" a risk assessment, "as appropriate to the circumstances" in Article 5.1. Most importantly, if a customary international law precautionary principle or a general principle of international law has emerged, its content would be a crucial guide to the interpretation of Article 5.7 itself.

Since, despite the absence of a precedent system in WTO dispute settlement, it is the practice of panels and the Appellate Body to follow the interpretations adopted in previous decisions, the Appellate Body's decision with respect to the role of the precautionary principle in the SPS Agreement is likely to be definitive on this issue. As the case law now stands, the Appellate Body's decision in effect limits the applicability of the precautionary principle under the SPS Agreement to the situation covered by Article 5.7.[326] It is therefore necessary to examine the provisions of Article 5.7 SPS to determine to what extent they give expression to this principle and deal with the exigencies it was developed to address.

WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996), 11–12; Report of the Appellate Body, *European Communities-Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (1998), ¶ 84.

[321] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 124.

[322] The normal principles of treaty interpretation that are part of customary international law must be used in the interpretation of the provisions of the WTO Agreements, according to Article 3.2 of the DSU.

[323] This is due to the fact, set out above, that Article 31.3(c) of the Vienna Convention on the Law of Treaties provides that "any relevant rules of international law applicable in the relations between the parties" are part of the "context" which guides the interpretation of treaty provisions. Clearly, customary international law rules are rules of international law that apply to the relations between Members of the WTO and must thus be taken into account.

[324] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 123.

[325] It is perhaps arguable that the Appellate Body itself recognised this possibility, in a confusing *obiter* statement in *EC—Hormone*s that in interpreting Article 2.2, a panel should bear in mind that responsible governments act "from perspectives of prudence and precaution" in case of risks of irreversible damage to human health. Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 124. (quoted *supra* in text accompanying note 122). Although the interpretation of Article 2.2 was not at issue in this case, the Appellate Body seems to have recognised the possibility of interpreting this article in the light of a rather restrictive formulation of the precautionary principle.

[326] And possibly, to a limited extent, to the interpretation of Article 2.2 SPS. *See supra* note 325.

2. Conditions for Application of Article 5.7

The requirements of Article 5.7 were set out in *Japan—Agricultural Products*. The Appellate Body held that Article 5.7 lays down four requirements for provisional measures. Under the first sentence, the measure may be imposed if it is:

(1) imposed in respect of a situation where "relevant scientific information is insufficient"; and
(2) adopted "on the basis of available pertinent information."

Under the second sentence, the measure may not be maintained unless the Member:

(3) seeks to "obtain the additional information necessary for a more objective assessment of risk"; and
(4) reviews the measure accordingly "within a reasonable period of time".

These requirements were held to be cumulative. The Appellate Body rejected Japan's claim that the words "except as provided for in Article 5.7" in Article 2.2 refer only to the first sentence of Article 5.7, holding that the text of Article 2.2 does not support this proposition as it refers to Article 5.7 as a whole.[327] Thus, all four conditions of Article 5.7 must be met in order to avoid the scientific disciplines of Articles 2.2 and 5.1 of the SPS Agreement.

When the four requirements of Article 5.7 are met, Members may take provisional measures. Provided that these requirements are interpreted in a flexible way to allow recourse to precautionary measures when science gives no clear-cut answers and a plausible case can be made for the existence of a risk on the basis of existing information, Article 5.7 would seem to provide an adequate vehicle for the incorporation of the precautionary principle into SPS disciplines, to the extent that they apply to risk management decisions.

(a) Insufficiency of Relevant Scientific Evidence. The first requirement, namely that "relevant scientific evidence is insufficient", is what triggers the application of Article 5.7. Where this requirement is not met, there is no legitimate reason for resort to provisional measures.[328] It is thus crucial to determine in what circumstances this criterion will be met. For reasons of judicial economy, the Panel in *Japan—Agricultural Products* had found it unnecessary to decide this issue. The Appellate Body upheld this decision.[329]

In *Japan—Apples,* the first requirement of Article 5.7 was addressed for the first time in the case law, making this a particularly interesting case for the understanding of the role of the precautionary principle in the SPS Agreement.

In this case, the Panel held that the fact that a measure has been found to be maintained "without sufficient scientific evidence" under Article 2.2 does not automatically mean

[327] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 90.

[328] It would thus seem logical to start the analysis of the requirements of Article 5.7 in dispute settlement cases by examining whether this criterion is met. However, in *Japan—Agricultural Products* the Panel began by examining the requirements of the second sentence of Article 5.7 and the Appellate Body did not take issue with this order of analysis.

[329] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 91. While it is clear that, since the requirements of the second sentence of Article 5.7 were not met, Japan could not rely on Article 5.7 to justify its measure and it was unnecessary to go on to investigate whether Japan complied with other two requirements of Article 5.7, it would seem more logical to have started the analysis by determining whether Article 5.7 is applicable to the case at all. For this purpose, it would have been useful to examine the first requirement, which triggers the application of this article when "scientific evidence is insufficient." The EC expressed the view in its third party submission before the Appellate Body in *Japan—Agricultural Products* that both the requirements of the first sentence are the triggers for the operation of Article 5.7 and should therefore be examined first. *Id.* ¶ 64.

that "relevant scientific evidence is insufficient" under Article 5.7, which is a separate question.[330] The sufficiency requirement under Article 2.2 requires that the evidence *supporting* the SPS measure applied be sufficient, whereas the evidence to be considered under Article 5.7 "includes not only evidence supporting Japan's position, but also evidence supporting other views."[331] In this case, the Panel found that a wealth of relevant, high quality, scientific evidence was available[332] on the matter at issue and that this was thus "clearly not the type of situation Article 5.7 was intended to address."[333] According to the Panel, Article 5.7 was instead "obviously designed to be invoked where little, or no, reliable evidence was available on the subject matter at issue."[334] It thus concluded that the first requirement of Article 5.7 was not met and that Japan's measure could therefore not be justified under this Article.[335]

Japan challenged the Panel's finding of non-compliance with the first requirement of Article 5.7 on appeal, arguing that the insufficiency of the evidence should be interpreted to relate to a *particular* measure or a *particular* risk, but not to the subject matter *in general*. The Appellate Body, on the contrary, held that Japan's reliance on this distinction was misplaced.[336] Instead, the Appellate Body identified a contextual link between the first requirement of Article 5.7 and the obligation to perform a risk assessment in Article 5.1.[337] Thus, relevant scientific evidence will be "insufficient" for purposes of Article 5.7 if it "does not allow, in qualitative or quantitative terms, the performance of an adequate assessment of risks as required under Article 5.1."[338] According to the Appellate Body, the factual findings of the Panel showed that the scientific evidence available *did* permit the performance of a risk assessment under Article 5.1 and the relevant scientific evidence was thus not insufficient within the meaning of Article 5.7.

Japan also appealed the Panel's finding that Article 5.7 is intended only to address situations where little, or no, reliable evidence is available on the subject matter at issue. Japan argued that this would not provide for situations of "unresolved uncertainty". According to Japan, Article 5.7 covers not only situations of "new uncertainty" (where a new risk is identified) but also "unresolved uncertainty" (where there is considerable scientific evidence but still uncertainty remains). The Appellate Body, however, upheld the Panel's finding, pointing out that Article 5.7 "is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence".[339] Moreover, it held that the Panel's finding referred to the availability of *reliable* evidence, and thus

[330] Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶ 8.215.
[331] *Id.*, ¶ 8.216. The Panel later concluded that the term "insufficient scientific evidence" in Article 5.7 refers to evidence in general on the SPS question at issue (in this case the risk of transmission of fire blight through apple fruit). *Id.*, ¶ 8.218.
[332] The Panel noted that much relevant evidence had been submitted by the parties and panel experts, and scientific studies and practical experience on the matter had accumulated for the past 200 years. *Id.*, ¶¶ 8.216 and 8.219.
[333] *Id.*, ¶ 8.219.
[334] *Id.*, ¶ 8.219.
[335] *Id.*, ¶ 8.222.
[336] Report of the Appellate Body, *Japan—Measures Affecting the Importation of Apples, supra* note 112, ¶ 179.
[337] The Appellate Body found these contextual elements in the following: first, the concepts of relevance and insufficiency in Article 5.7 imply a relationship between scientific evidence and something else; second, Article 5.1, obliging Members to base their measures on a risk assessment, contains a key discipline under Article 5 and informs the other provisions of Article 5; and third, Article 5.7 itself refers to "a more objective assessment of risks". *Id.*, ¶ 179.
[338] *Id.*, ¶ 179.
[339] *Id.,* ¶ 184.

did not exclude cases "where the available evidence is more than minimal in quantity, but has not led to reliable or conclusive results."[340]

This analysis of the first requirement of Article 5.7 is groundbreaking. It clarifies the role of Article 5.7, establishing that it is there to address situations where there is a true lack of sufficient scientific evidence regarding the risk at issue, either due to the small quantity of evidence on new risks, or due to the fact that accumulated evidence is inconclusive or unreliable. In either case, the insufficiency of the evidence must be such as to make the performance of an adequate risk assessment impossible. Thus Article 5.7 cannot be used to justify measures that are adopted in disregard of existing scientific evidence. The Panel and Appellate Body's findings establish the fact that the precautionary principle, as embodied in Article 5.7, does not create a broad loophole in the scientific disciplines of the SPS Agreement through which protectionist measures can slip. Rather, it creates a limited exception for cases where there is a true lack of relevant and reliable scientific evidence on the risk at issue.

(b) Based on Available Pertinent Information. The second criterion contained in Article 5.7 requires that the provisional measure be adopted "on the basis of available pertinent information." Judicial economy made it unnecessary to examine this requirement in *Japan—Agricultural Products*[341] and in *Japan—Apples*.

The Appellate Body's interpretation of "based on" in Article 5.1 suggests, however, that under Article 5.7, the SPS measure adopted must be reasonably supported by whatever information exists. In other words, the available information must support a reasonable concern that harm could result.[342] Obviously, the information need not amount to conclusive evidence otherwise recourse to Article 5.7 would not be necessary. However, the measure may not be contrary to what little information is available. Where contradictory information is present, it would appear that the measure need not reflect the preponderance of evidence, but could be based on a minority view that a potential for harm exists, provided this view is held by qualified and respected scientists.[343]

The word "pertinent" indicates that the information must have a bearing upon or be relevant to the suspected risk. It would appear to indicate that the risk must be at least theoretically plausible on the basis of what evidence exists. However, it is unlikely that the term "pertinent" will be interpreted to require an indication of a certain threshold level of risk, since this is also not required for SPS measures based on a proper risk assessment as required by Article 5.1.

The question whether the available pertinent information must indicate a certain level or seriousness of risk can be further elucidated by reference to the developing concept

[340] *Id.*, ¶ 185.

[341] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 91, where the Appellate Body held: "We, therefore, conclude that the Panel did not err in its application of Article 5.7 by first examining whether the varietal testing requirement meets the requirements of the second sentence of Article 5.7. Having established that the requirements of the second sentence of Article 5.7 are not met, there was no need for the Panel to examine the requirements of the first sentence."

[342] This requirement is embodied in most treaties that incorporate the precautionary principle. *See* James Cameron and Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 1 (1991), for a brief discussion of the treaties that incorporate the precautionary principle.

[343] The EC Commission supports this view (COM(2000)1, *supra* note 307, at 17), referring to the following statement by the Appellate Body: "In some cases, the very existence of divergent views presented by qualified scientists who have investigated the particular issue at hand may indicate a state of scientific uncertainty." Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 194.

of the precautionary principle in international law.[344] In earlier environmental treaties embodying the precautionary principle, the available evidence had to indicate a threat of serious or irreversible harm before recourse to the precautionary principle was justified.[345] However, more recently there has been a tendency to lower this evidentiary threshold or leave it out altogether.[346] It would appear that the average evidentiary threshold now required is a non-negligible threat of harm, but beyond that the formulation of the principle in the relevant treaty depends on the relevant context of its negotiation.[347] As Article 5.7 in the SPS Agreement incorporates the precautionary principle with respect to human, animal and plant life and health, rather than environmental protection, it seems clear, in the absence of an explicit provision requiring a stricter standard in Article 5.7, that no more than a non-negligible threat should be required to be indicated by the available information.[348]

(c) Obtain Information Necessary. Article 5.7 further prohibits the maintenance of a provisional measure unless a Member "seeks to obtain the information necessary for a more objective assessment of the risk." The term "more objective assessment" seems to imply that there must have been an original evaluation of the risk before the provisional measure was imposed, although this need not have been altogether objective.[349] The Member is then required to try to gather the information necessary to enable it to conduct a proper risk assessment that would meet the requirements of Article 5.1–5.3.

In *Japan—Agricultural Products*, Japan argued that the requirement to seek additional information was met by gathering information through the experience of the successful importation of varieties, specifically by requiring exporting countries to submit data when

[344] The argument that the precautionary principle, to the extent that it has developed into a principle of customary international law, should guide due interpretation of the SPS Agreement, and particularly Article 5.7, was developed *supra*, Part II(E)(1).

[345] It could perhaps be argued that the Appellate Body seemed to support this high evidentiary threshold for the use of the precautionary principle outside the framework of Article 5.7, to interpret the requirement of "sufficient scientific evidence" in Article 2.2 when it stated that panels should bear in mind that governments act with precaution when *serious (irreversible) threats to human health* are at stake. Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 124, discussed *supra* note 325.

[346] For example, while the Bergen Ministerial Declaration on Sustainable Development in the ECE Region (Bergen, May 16, 1990) required the threat of "serious or irreversible" damage for the application of the precautionary principle (in Article 7), the Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, January 29, 1991, 30 I.L.M. 773) incorporates the precautionary principle (in Article 4(3)(f)) without requiring the threat of serious or irreparable harm. Similarly, the Cartagena Protocol on Biosafety (Cartagena, January 28, 2000), not yet in force pending ratification) refers only to "potential adverse effect." Both the latter conventions specifically relate to threats to humans as well as the environment, which could explain the lower threshold. *See* further P. SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I—FRAMEWORKS, STANDARDS AND IMPLEMENTATION 210–211 (1995).

[347] James Cameron and Juli Abouchar, *The Status of the Precautionary Principle in International Law* in THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION, 44 (Freestone and Hey eds. 1996).

[348] In its *Communication on the Precautionary Principle*, the EC Commission suggests that recourse to the precautionary principle should be allowed when it can be concluded from an evaluation of existing information that the desired level of protection could potentially be jeopardized by inaction. COM(2000)1, *supra* note 307, at ¶ 6.2.

[349] *Id*. ¶ 4. The EC Commission recommends that the evaluation of existing evidence constitute as complete a scientific evaluation as possible, encompassing both an inventory of existing evidence and an identification of the possible gaps in knowledge as well as the degree of scientific uncertainty at each stage (*Id.* ¶ 6.1).

applying for the approval of additional varieties. It claimed that Members are obliged to seek information but no actual results are required.[350] The United States submitted that the information sought by Japan was not relevant to the question whether different varieties of products have different sorption levels. It thus did not enable Japan to review its measure and therefore did not meet the third requirement.[351] The Appellate Body held in this regard:

> Neither Article 5.7 nor any other provision of the *SPS Agreement* sets out explicit prerequisites regarding the additional information to be collected or a specific collection procedure. Furthermore, Article 5.7 does not specify what actual results must be achieved; the obligation is to "seek to obtain" additional information. However, Article 5.7 states that the additional information is to be sought in order to allow the Member to conduct "a more objective assessment of risk". Therefore, the information sought must be germane to conducting such a risk assessment, i.e., the evaluation of the likelihood of entry, establishment or spread of, *in casu*, a pest, according to the SPS measures which might be applied. We note that the Panel found that the information collected by Japan does not "examine the appropriateness" of the SPS measure at issue and does not address the core issue as to whether "varietal characteristics cause a divergency in quarantine efficacy".[352] In the light of this finding, we agree with the Panel that Japan did not seek to obtain the additional information necessary for a more objective risk assessment.[353]

Thus, although this element of Article 5.7 seems to embody an obligation of endeavor rather than of result, it does require the Member maintaining a provisional measure to attempt to obtain information that would enable it to conduct a proper risk assessment. Engaging in general information collection exercises is not sufficient.

(d) Review within a Reasonable Period of Time. The last requirement contained in Article 5.7 is the obligation to review the measure within a "reasonable period of time." Article 5.7 therefore creates only a limited exemption from the normal SPS disciplines, pending review of the measure in the light of new evidence.

The Appellate Body in *Japan—Agricultural Products* had to decide on what constitutes a "reasonable period of time" within which to review the measure. It held:

> In our view, what constitutes a "reasonable period of time" has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review *and* the characteristics of the provisional SPS measure. In the present case, the Panel found that collecting the necessary additional information would be relatively easy. Although the obligation "to review" the varietal testing requirement has only been in existence since 1 January 1995, we agree with the Panel that Japan has not reviewed its varietal testing requirement "within a reasonable period of time".[354]

The requirement of review within a reasonable period of time is clearly linked to the provisional nature of the SPS measure allowed by this article. In *Australia—Salmon*, the Panel noted:

[350] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 13.
[351] *Id.* ¶ 26.
[352] The Panel pointed out that the information provided by exporting countries was based on studies designed and carried out to *comply* with Japan's varietal testing requirement. Thus they did not examine the appropriateness of the requirement itself. Report of the WTO Panel, *Japan—Measures Affecting Agricultural Products*, *supra* note 56, ¶ 8.56. [Footnote added by authors].
[353] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 92.
[354] *Id.* ¶ 93.

> Only Article 5.7 allows for an exception to the obligation to base sanitary measures on a risk assessment, namely "in cases where relevant scientific evidence is insufficient" . . . In this dispute Australia has not invoked Article 5.7. Nor do we consider that this provision applies to the measure in dispute, given the fact that it was imposed more than 20 years ago and can thus hardly be seen as a measure "provisionally" adopted.[355]

While there is no time limit expressed in Article 5.7 on the existence of a "provisional measure", it seems logical that an indirect time limit is inherent in the requirement of review within a reasonable period. Thus, it is not the length of time for which a measure has been in existence that is crucial to its "provisional" nature, but rather the review thereof, within a reasonable period, which indicates that the measure is not final. It would have made more sense, therefore, for the Panel to highlight this aspect to support its finding that the measure was not "provisional" within the meaning of Article 5.7 rather than focus on the time of its existence, *per se*.

It is interesting to note in this regard that, in its *Communication on the Precautionary Principle*,[356] the European Commission interpreted the requirement of review "within a reasonable period of time" to include the time needed for completion of the necessary scientific work as well as the time needed for performance of a risk assessment based on the conclusions drawn there from. Thus, the provisional nature of measures under Article 5.7 was argued to be dependent on the development of scientific knowledge, rather than on a specific time limit.[357] This interpretation is partially supported by the Appellate Body's finding that one of the factors to be considered in the determination of what constitutes a reasonable period of time in a given case is the difficulty of obtaining the additional information necessary for the review. Clearly, the state of scientific knowledge has a direct impact on the difficulty of obtaining the required information and would thus affect the determination whether a "reasonable period" has elapsed. This is significant in that it waters down the temporary nature of measures allowed under Article 5.7 and makes provision for circumstances where scientific uncertainty persists for extended periods or where the risks involved are only expected to materialize in the long term.

However, it is important to note that the difficulty of obtaining information is not the sole criterion. The specific circumstances of the case will be evaluated, including factors such as the characteristics of the SPS measure at stake, amongst others, in order to establish whether the requirement of review within a reasonable period has been met.[358] Nonetheless, it seems important to make sure that the determination of what constitutes a "reasonable period" in each case be made with particular regard to the reality that the state of scientific knowledge has a decisive influence on whether a "more objective assessment of risk" can be conducted. Therefore, artificially linking the requirement of review within a "reasonable period of time" to specific deadlines should be avoided. In this way, Members need not fear that reliance on Article 5.7 to justify their measures will compromise their ability to maintain the measure as long as is necessary for scientists to find clear answers.[359]

[355] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.57.

[356] COM(2000) 1, *supra* note 307, at ¶ 6.3.5.

[357] *Id*.

[358] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 93.

[359] The fact that the EC supports this interpretation of a "reasonable period of time" could explain why it has changed its approach from the one it followed in *EC—Hormones* (where it did not rely on Article 5.7 and thus did not classify its ban on hormone treated meat as a "provisional measure"—fearing

3. Relationship between Article 5.7 and Article 2.2

As has been mentioned, Article 2.2 refers explicitly to Article 5.7, stating that measures may not be maintained without sufficient scientific evidence, except as provided in Article 5.7. The Appellate Body in *Japan—Agricultural Products* addressed the relationship between Article 5.7 and Article 2.2, emphasizing that Article 5.7 is only a *qualified* exemption from the scientific discipline in Article 2.2 and warning that an overly flexible interpretation of Article 2.2 would deprive Article 5.7 of meaning.[360] Thus the Appellate Body seems to regard a less-flexible interpretation of the rather vague requirement of "sufficient scientific evidence" in Article 2.2 as justifiable or even necessary due to the possibility provided in Article 5.7 for an exemption from this requirement.

While there are indications, from the interpretation given to those elements of Article 5.7 addressed in the case law so far, that Article 5.7 will be interpreted in a flexible way and will thus adequately take account of the precautionary principle in risk management decisions, this does not exhaust the relevance of this principle. In our opinion, precaution also plays a role in the scientific aspect of the regulatory process, and may determine the assumptions used and rules of thumb followed in risk assessment in dealing with the gaps and uncertainties inherent in scientific analysis. For this reason, the evolving concept of the precautionary principle in international law could usefully be drawn upon in the interpretation of the requirement of "sufficient scientific evidence" in Article 2.2 and the qualification that measures be based on risk assessments "as appropriate to the circumstances" in Article 5.1. This should not "render Article 5.7 meaningless" as suggested by the Appellate Body, since Article 5.7 deals with a different application of the precautionary principle, namely in respect of the situation where uncertainties in science make a risk assessment either impossible to conduct or too inconclusive to form the basis for an SPS measure.

F. Risk Management (Article 5.3–5.6)

1. Determination of the Appropriate Level of Protection (Annex A, paragraph 5)

A Member's "appropriate level of protection" is defined in paragraph 5 of Annex A as "[t]he level of protection *deemed appropriate by the Member* establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory." (emphasis added). Thus, the SPS Agreement recognizes a Member's right to choose its own appropriate level of protection, or in other words to decide freely what standard of sanitary and phytosanitary protection it will aim at with its SPS measures.

that the temporary nature of such a measure would undermine its hormones regime). More recently, in statements claiming that it is now in compliance with the Appellate Body's ruling in *EC—Hormones,* the EC averred that its continued ban on meat treated with the relevant hormones (except 17-beta oestradiol, for which it adopted a permanent ban based on conclusions from new studies in 2000) is a provisional measure in terms of Article 5.7, pending the results of studies to determine the effects of the relevant hormones on human health. ICTSD, *Dispute Settlement, EC Move Fans the Flames under Beef Row,* 21(4) Bridges Weekly Trade News Digest (2000). An additional seventeen studies were conducted regarding the toxicological aspects, potential abuse and control problems and environmental aspects of the six relevant hormones, on the basis of which the EU Scientific Committee on Veterinary Measures relating to Public Health confirmed its previous opinions concluding that no acceptable daily intake could be established for any of the hormones evaluated. *See* European Commission, Press Releases, *Growth Promoting Hormones Pose Health Risk to Consumers, Confirms EU Scientific Committee,* IP/02/604, April 24, 2002.

[360] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 80, quoted *supra* Part II(B)(2)(b).

Therefore the determination of an appropriate level of protection (risk management) must be clearly distinguished from the evaluation of risk (risk assessment), which is subject to scientific disciplines.[361] This was not done by the Panel in *Australia—Salmon* which stated:

> . . . we consider that a risk assessment, on which to base an import prohibition in accordance with Article 5.1, cannot be premised on the concept of "zero risk". Otherwise, all import prohibitions would be based on a risk assessment since there is a risk (i.e., a *possibility* of an adverse event occurring), however remote, associated with most (if not all) imports.[362]

The Appellate Body in that case, noted to the contrary:

> . . . it is important to distinguish—perhaps more carefully than the Panel did—between the evaluation of "risk" in a risk assessment and the determination of the appropriate level of protection. As stated in our Report in *European Communities—Hormones*, the "risk" evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is "not the kind of risk which, under Article 5.1, is to be assessed." This does not mean, however, that a Member cannot determine its own appropriate level of protection to be "zero risk".[363]

Once it is established that there is scientific evidence of risk, Members are free to choose their own appropriate level of protection. The choice of a particular level of protection is what is typically called a *risk management* decision. Such decisions are taken by national administrations on grounds of societal value judgments on issues such as what level of risk is considered acceptable, what is economically or technically feasible or what consumers prefer, not purely on the basis of scientific analysis of risk. In other words, once it has scientifically been established that a health risk exists and what the likelihood or potential of that risk occurring is, by means of a risk assessment, other policy issues come into play in the actual crafting of the regulation. SPS measures seldom have the protection of health as their sole objective. Instead several other significant factors are incorporated into the decision. The decision is at core a political one, reflecting societal value choices. The SPS Agreement recognizes this by not requiring a scientific basis for the choice of the appropriate level of protection. Thus, particularized national health measures result even where the scientific basis for the measures is the same everywhere.[364]

2. Limits to the Right to Determine the Appropriate Level of Protection (Article 5.4 and 5.5)

The choice of an appropriate level of protection is, however, subject to some limitations. These limitations are set out in Articles 5.4 and 5.5. Article 5.4 provides:

> Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

The use of the word "should" rather than "shall" indicates that this is not a mandatory provision but rather a recommendation. The effect of this provision was explained by the

[361] *See contra* Victor, *supra* note 154, at 883, where he argues that the requirement that measures be based on risk assessments could be interpreted as a requirement that a Member's appropriate level of protection also be based on a risk assessment. He states, "Indeed, how can one logically assess the risks of SPS measures without assessing the risks associated with the level of protection as well? Levels and measures are two sides of the same coin."

[362] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.81.

[363] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 125.

[364] This point is made by Atik, *supra* note 210, at 737.

EC—Hormones Panel as follows:

> Guided by the wording of Article 5.4, in particular the words "should" (not "shall") and "objective", we consider that this provision of the SPS Agreement does not impose an obligation. However, this objective of minimizing negative trade effects has nonetheless to be taken into account in the interpretation of other provisions of the SPS Agreement.[365]

Article 5.5, in contrast, creates both a long-term goal and a binding obligation with respect to a Member's choice of an appropriate level of protection.[366] It provides:

> With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

What are precisely the disciplines embodied in Article 5.5? In *EC—Hormones*, the Appellate Body found:

> The objective of Article 5.5 is formulated as the "achieving [of] consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection". Clearly, the desired consistency is defined as a goal to be achieved in the future. To assist in the realization of that objective, the Committee on Sanitary and Phytosanitary Measures is to develop *guidelines for the practical implementation of Article 5.5*, bearing in mind, among other things, that ordinarily, people do not voluntarily expose themselves to health risks. Thus, we agree with the Panel's view that the statement of that goal [consistency] does not establish a *legal obligation* of consistency of appropriate levels of protection. We think, too, that the goal set is not absolute or perfect consistency, since governments establish their appropriate levels of protection frequently on an *ad hoc* basis and over time, as different risks present themselves at different times. It is only arbitrary or unjustifiable inconsistencies that are to be avoided.[367]

Therefore, it is clear that there is no immediate obligation of consistency in appropriate levels of protection. This is only a long-term goal. However, Members are obliged to ensure that the distinctions in the levels of protection they choose meet the requirements

[365] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.169; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.166.

[366] After five years of deliberation, at its meeting on March 15–16, 2000, the SPS Committee drew up a final draft of guidelines for the implementation of Article 5.5. These guidelines are not legally binding but are intended as aids to assist officials in applying Article 5.5 when deciding on appropriate levels of protection or adopting and implementing SPS measures. These guidelines were provisionally adopted at the following meeting of June 21–22, and Members having objections to the final adoption were asked to make these known by July 14. Since no objections were raised by that date, the guidelines are now adopted. Committee on Sanitary and Phytosanitary Measures, *Guidelines to Further the Practical Implementation of Article 5.5*, G/SPS/15, July 18, 2000. *See* WTO *SPS Committee Completes Draft on Risk "Consistency"* 45 FOCUS NEWSLETTER Mar.–Apr. 2000 at 12; and ICTSD *WTO Meets on SPS and Risk Management*, 4(25) BRIDGES WEEKLY TRADE NEWS DIGEST, June 27, 2000.

[367] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 213.

of Article 5.5, namely that they are not arbitrary or unjustifiable and do not lead to discrimination or disguised trade restrictions.

(a) Elements of Article 5.5. The Appellate Body in *EC—Hormones*[368] set out the elements required for a violation of Article 5.5 to be shown. These are that: (1) the Member has set its own level of protection in different situations; (2) the levels of protection show arbitrary or unjustifiable differences in their treatment of different situations; and (3) these arbitrary or unjustifiable differences lead to discrimination or a disguised restriction on trade (referring to the effect of the measure used to reflect the particular level of protection).[369] These elements were found to be cumulative, thus proof of different treatment of different situations is not sufficient, though it might serve as a warning signal that the measure might be discriminatory or a disguised restriction on trade.[370]

It is obvious that not all health risks can or should be treated in the same way. Thus, with regard to the first element for proving a violation of Article 5.5, the Appellate Body in *EC—Hormones* found that to compare the different levels of protection deemed appropriate by a Member, the situations dealt with must be comparable, that is, have some common element or elements.[371] On this issue, the Appellate Body stated:

> Clearly, comparison of *several* levels of sanitary protection deemed appropriate by a Member is necessary if a panel's inquiry under Article 5.5 is to proceed at all. The situations exhibiting differing levels of protection cannot, of course, be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable. If the situations proposed to be examined are *totally* different from one another, they would not be rationally comparable and the differences in levels of protection cannot be examined for arbitrariness.[372]

In this case the Panel found that two situations, namely the treatment given to natural hormones administered for growth-promotion purposes and the treatment given to hormones occurring endogenously in meat and other foods or administered for therapeutic or zootechnical purposes, were comparable as the same substance was involved (natural hormones) and the same adverse health effect was at stake in both cases (namely carcinogenicity).[373] In addition, although different substances were involved, the Panel regarded as comparable the treatment given by the EC to the synthetic hormones in dispute and the treatment given to natural hormones occurring endogenously in meat and

[368] *Id.* ¶ 214.

[369] These elements were reiterated in the Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 140.

[370] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 215.

[371] The Panel in *EC—Hormones* noted that both parties agreed that Article 5.5 covers situations which deal with the same substance or the same averse health effect. Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.179; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.176.

[372] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 217.

[373] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶¶ 8.189–8.190; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶¶ 8.186–8.187.

other foods due to their common adverse health effect (carcinogenicity).[374] Lastly, the Panel held that the treatment given to five of the six hormones[375] in dispute was comparable to that given to carbadox and olaquindox,[376] two antimicrobial growth promoters used in swine production, as they also both had carcinogenicity in common as an adverse health effect.[377]

Similarly, the Appellate Body in *Australia—Salmon* was faced with the question of the comparability of "different situations". In this case, the situations compared were the treatment applied to imports of Canadian adult, wild, ocean-caught salmon for human consumption and that applied to whole frozen herring used as bait and ornamental finfish. The Appellate Body stated:

> Situations which involve a risk of entry, establishment or spread of the same or a similar disease have some common elements sufficient to render them comparable under Article 5.5. Likewise, situations with a risk of the same or similar associated potential biological and economic consequences also have some common elements sufficient to render them comparable under Article 5.5. We, therefore, consider that for "different" situations to be comparable under Article 5.5, there is no need for both the disease *and* the biological and economic consequences to be the same or similar.[378]

The Appellate Body further stated:

> We believe that for situations to be comparable under Article 5.5, it is sufficient for these situations to have in common a risk of entry, establishment or spread of *one* disease of concern. There is no need for these situations to have in common a risk of entry, establishment or spread of *all* diseases of concern.[379]

In this case, the situations were deemed comparable as the potential consequences of the risk occurring were the same, regardless of whether the disease entered Australia via salmon or herring.

In response to Australia's argument that a "situation" cannot be compared under Article 5.5 if no risk assessment has been made in respect of it, the Panel in *Australia—Salmon* noted:

> . . . we consider that even though Australia has not yet conducted import risk analyses for the other products compared under Article 5.5, Australia does, nevertheless, have a level of protection it considers to be appropriate for these other products. Australia currently has a sanitary regime, imposing specific sanitary measures or refraining from such regulation, for these other products. This sanitary regime (whether or not specific measures are enacted) reflects a level of protection. To have a specific level of protection, there is no need to first complete a risk assessment . . . Article 5.5 directs us to compare for different situations the related levels of protection as they are currently considered to be appropriate by Australia and this whether or not the sanitary measures enacted to achieve that level are based on a risk assessment. Of course, such comparison would be easier and more accurate if for both situations

[374] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶¶ 8.211–8.212; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶¶ 8.208–8.209.

[375] The hormone MGA was dealt with separately.

[376] The U.S. complaint dealt only with carbadox, not olaquindox, whereas the Canadian complaint dealt with both.

[377] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.223–8.224; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.221.

[378] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 146.

[379] *Id.* ¶ 152.

> an appropriate risk assessment were available. However, according to Article 5.5 and our mandate set out in Article 11 of the DSU (to make an "objective assessment of the matter before [us], including an objective assessment of the facts of the case"), we are called upon in this case to make this comparison and to do so on the basis of the evidence before us.[380]

To establish if the first element has been met, it is furthermore necessary to determine whether the Member has imposed *different* levels of protection in different (but comparable) situations. The Panel in *EC—Hormones* found that there was a difference in the levels of protection applied by the European Communities in the comparable situations of administered hormones and naturally-occurring hormones or those administered for therapeutic or zootechnical purposes as in the former case a "no-residue level" (a ban) was applied, whereas in the latter an unlimited-residue level was permitted (complete tolerance).[381] Similarly, the Panel identified differences between a no-residue level of protection and an unlimited-residue level of protection applied respectively to synthetic hormones as opposed to natural hormones occurring endogenously in meat and other foods,[382] as well as to the hormones in dispute as opposed to the relevant antimicrobial agents used in swine production.[383]

With regard to how to determine whether Australia imposed *different* levels of protection for the situations compared, the Panel in *Australia—Salmon* stated:

> . . . the appropriate level of sanitary protection will normally be reflected in the sanitary measures imposed for a specific situation. We consider, moreover, that the level of protection achieved by a specific sanitary measure will also depend on the degree of risk against which that measure is intended to protect. In that sense, we agree with Australia that imposing the same sanitary measure for different situations does not necessarily result in the same level of protection. Indeed, in many situations (e.g., situations representing different risks) the same sanitary measure might result in different levels of protection. On the other hand, different sanitary measures for different situations might ensure the same level of protection. Indeed, one given situation might only represent a small risk for which a lenient sanitary measure will achieve a high level of protection, whereas another situation might pose very high risks requiring a very strict and different sanitary measure in order to meet that same high level of protection.
>
> To determine whether Australia makes a distinction in the levels of protection it considers to be appropriate for the situations compared, we thus need to examine the sanitary measures Australia currently imposes for these different situations . . . Since we have found that these situations are comparable as "different situations" under Article 5.5 . . . and since we will consider the potential difference in the degree of risk posed by these different situations under the second element of Article 5.5, we will for present purposes assume that if there is a difference in the sanitary *measures* imposed for the different situations we compare under Article 5.5, this difference does reflect a distinction in *levels of protection* achieved in—and considered to be appropriate by—Australia.[384]

[380] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.126.

[381] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.193–8.194; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶¶ 8.190–8.191.

[382] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶¶ 8.214–8.215; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶¶ 8.211–8.212.

[383] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.229; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.226.

[384] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶¶ 8.123–8.124.

This finding was not appealed.[385] However, in dealing with the determination of the appropriate level of protection under Article 5.6, the Appellate Body in *Australia—Salmon* noted that nothing in the SPS Agreement or the DSU permits a panel or the Appellate Body to imply the Member's appropriate level of protection from the measure it applies to attain that level of protection.[386]

Regarding the second element, namely that of arbitrary or unjustifiable differences in the levels of protection, the Appellate Body in *EC—Hormones* disagreed with the Panel's finding that both the added hormones and naturally-occurring hormones pose the same risks and practical difficulties of control,[387] and that the difference in the level of protection must therefore be arbitrary. The Appellate Body stated as follows:

> . . . we consider there is a fundamental distinction between added hormones (natural or synthetic) and naturally-occurring hormones in meat and other foods. In respect of the latter, the European Communities simply takes no regulatory action; to require it to prohibit totally the production and consumption of such foods or to limit the residues of naturally-occurring hormones in food, entails such a comprehensive and massive governmental intervention in nature and in the ordinary lives of people as to reduce the comparison itself to an absurdity.[388]

Regarding this same element, the Panel in *Australia—Salmon* found that the different levels of protection applied by Australia against risks from imports of salmon and from imports of other fish were "arbitrary or unjustifiable". It based its finding on the fact that since the level of protection in the case of salmon was higher, one could expect that a higher risk was present for salmon than for other fish. However, the evidence pointed to the opposite conclusion, namely that there was ". . . a higher risk of disease introduction associated with imports of bait fish and live ornamental fish than the risk posed by imports of salmon products for human consumption."[389] Thus, Canada had raised a presumption in this regard which had not been rebutted by Australia. The Panel therefore held that the differences in levels of protection applied by Australia were arbitrary and unjustifiable, a finding upheld by the Appellate Body. This is the only case thus far where a finding was made of a violation of Article 5.5.

The fact that the second element of Article 5.5 limits the prohibition to *arbitrary or unjustifiable* distinctions, not all distinctions,[390] is sensible in the light of the exigencies of health protection decision-making. Regulators make decisions regarding the level of protection to be secured on a case-by-case basis, as the need arises. The difficulty in evaluating the justifiability of distinctions lies in the problem of explaining why a society accepts some risks but not others or values some goals more than others. This fact

[385] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, n. 106.

[386] *Id.*, ¶¶ 199–200. This issue is dealt with further *infra* Part II(F)(3)(b).

[387] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.190; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.187.

[388] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 221 (footnote omitted). When comparing the levels of protection for hormones used for growth promotion purposes and hormones used for therapeutic and zootechnical purposes—a comparison not further pursued by the panels—the Appellate Body, referring to the differences in frequency and scale of the two treatments and the strict mode of administration of the latter treatment, found that the distinction in levels of protection "is not, in itself, 'arbitrary or unjustifiable"'. *See* ¶¶ 222–225.

[389] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.137.

[390] As emphasised in Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 213.

was explicitly recognized by the drafters in their direction to the SPS Committee to take into account "the exceptional character of human health risks to which people voluntarily expose themselves" in the Committee's formulation of guidelines for the implementation of Article 5.5.[391]

Even if it is shown that the different levels of protection chosen by a Member in different but comparable situations are arbitrary or unjustifiable, it is necessary to show that they result in discrimination or disguised trade restrictions, under the third element of Article 5.5, before a violation of this Article can be said to exist. According to the Appellate Body in *EC—Hormones,* the third element of Article 5.5 is the "most important".[392]

On the relationship between the second and third elements of the three-pronged test, the Appellate Body in *EC—Hormones* stated:

> The second element alone would not suffice. The third element must also be demonstrably present: the implementing measure must be shown to be applied in such a manner as to result in discrimination or a disguised restriction on international trade. The presence of the second element—the arbitrary or unjustifiable character of differences in *levels of protection* considered by a Member as appropriate in differing situations — may in practical effect operate as a 'warning' signal that the implementing *measure* in its application *might* be a discriminatory measure or *might* be a restriction on international trade disguised as an SPS measure for the protection of human life or health. Nevertheless, the measure itself needs to be examined and appraised and, in the context of the differing levels of protection, shown to result in discrimination or a disguised restriction on international trade.[393]

On the third requirement of Article 5.5, the Appellate Body in *EC—Hormones* disagreed with the Panel's finding that the decisions in *U.S.—Gasoline*[394] with respect to Article XX of the GATT 1994 and that in *Japan—Alcoholic Beverages*[395] regarding Article III:2 of GATT 1994 can be used as precedents for the interpretation of Article 5.5.[396] It reversed

[391] In its guidelines on Article 5.5, the SPS Committee has noted that reasons for a significant difference in the appropriate level of protection for human health "may, in exceptional circumstances, include a risk which humans voluntarily accept. Such circumstances might arise with respect to traditional foods or some other products for which consumers knowingly accept a higher risk than that generally considered to be appropriate for food products." Committee on Sanitary and Phytosanitary Measures, *Guidelines to Further the Practical Implementation of Article 5.5*, G/SPS/15, July 18, 2000, ¶ A.8.

[392] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 240.

[393] *Id.* ¶ 215.

[394] Report of the Appellate Body, *United States-Standards for Reformulated and Conventional Gasoline, supra* note 320, ¶ 22.

[395] Report of the Appellate Body, *Japan-Taxes on Alcoholic Beverages*, *supra* note 320.

[396] In the Report of the Appellate Body, *United States-Standards for Reformulated and Conventional Gasoline, supra* note 320, ¶ 22, the Appellate Body had found that "arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction on international trade" in Article XX impart meaning to each other and that the fundamental theme is the purpose and object of avoiding abuse or illegitimate use of the exceptions in Article XX. Thus the same considerations used to determine if a measure amounts to arbitrary or unjustifiable discrimination can be used to decide if the measure is a disguised restriction on international trade. The Appellate Body in *EC—Hormones* found that the structural differences between the *chapeau* of Article XX of GATT 1994 and Article 5.5 of the SPS Agreement are too great for this analogous interpretation to be made. In its argument, the EC pointed out that the three elements of the chapeau of Article XX of GATT 1994 are in the alternative, whereas those in Article 5.5 of the SPS Agreement are cumulative. *See* Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 239. In the Report of the Appellate Body, *Japan-Taxes on Alcoholic Beverages, supra* note 320, it was held that a large difference in the taxation applied to imports and that applied to domestic products could be sufficient to prove that it was applied so as to afford protection to domestic products, contrary to Article III of GATT 1994. The Appellate Body in *EC—Hormones*, ¶ 239, distinguished the reasoning in the Report of the Appellate Body, *Japan-Taxes on Alcoholic Beverages*, regarding tax differentials from the different question in this case regarding different levels of health protection. As tax is always expressed quantitatively

the Panel's finding, on the basis of the degree of difference in levels of protection in certain comparable situations, that the EC measure in question constituted discrimination or a disguised restriction on international trade, finding that:

> . . . the degree of difference, or the extent of the discrepancy, in the levels of protection, is only one kind of factor which, along with others, may cumulatively lead to the conclusion that discrimination or a disguised restriction on international trade in fact results from the application of a measure or measures embodying one or more of those different levels of protection. Thus, we do not think that the difference between a "no residues" level and "unlimited residues" level is, together with a finding of an arbitrary or unjustifiable difference, sufficient to demonstrate that the third, and most important, requirement of Article 5.5 has been met . . . Evidently, the answer to the question whether arbitrary or unjustifiable differences or distinctions in levels of protection established by a Member do in fact result in discrimination or a disguised restriction on international trade must be sought in the circumstances of each individual case.[397]

In *Australia—Salmon*, the Panel had relied on what it called three "warning signals" (i.e., elements which are "not conclusive in [their] own right"[398]) and three "other factors more substantial in nature" or "additional factors"[399] taken cumulatively, to support its finding that the third element of Article 5.5 was met.[400] The three warning signals identified by the Panel were (1) "the arbitrary character of the differences in levels of protection";[401] (2) "the rather substantial difference in levels of protection";[402] and (3) its earlier "two findings of inconsistency (with both Article 5.1 and 2.2)" which make it "seem that the measure at issue constitutes an import prohibition, i.e., a restriction on international trade, 'disguised' as a sanitary measure".[403]

The Appellate Body in this case addressed Australia's contention, on appeal, that the Panel had erroneously regarded proof of arbitrary and unjustifiable distinctions in the levels of protection, that is the second element of Article 5.5, as evidence that the third element, that of discrimination or a disguised restriction on trade, was met. The Appellate Body held:

> According to Australia, the Panel erred in according the first "warning signal", the status of evidence which demonstrates that the measure results in a disguised restriction on international trade. We note however, that it appears clearly from the Panel Report, and in particular, from the reference therein to our Report in *European Communities—Hormones*, that the Panel considered the arbitrary or unjustifiable character of differences in levels of protection as a "warning signal" for, and not as "evidence" of, a disguised restriction on international trade.[404]

and affects the competitiveness of imports, a tax differential necessarily protects domestic products. There is no such link between differences in levels of health protection and the issue of discrimination or a disguised restriction on international trade. The extent of the difference is only one factor among others to be taken into account in determining whether there is discrimination or a disguised restriction on trade. Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, at n.251. Regard must be had to the circumstances of each case.

[397] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 240.

[398] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.151.

[399] *Id.* ¶ 8.152.

[400] *Id.* ¶ 8.159.

[401] *Id.* ¶ 8.149.

[402] *Id.* ¶ 8.150.

[403] *Id.* ¶ 8.151.

[404] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 162.

Thus, it is clear that while the fact that the second element is established can be one indication (or a "warning signal") that the third element is also met, the former cannot be regarded as conclusive proof of the latter. This is so even if the distinction in levels of protection is great. Instead, each element must be determined separately and its existence must be determined on a case-by-case basis, taking into account all relevant circumstances.

However, the degree of difference in level of protection has been recognized to constitute a separate "warning signal" that the third element for a violation of Article 5.5 may be met. The Appellate Body in *Australia—Salmon* agreed with the Panel that the rather substantial difference in levels of protection provided by an import prohibition on ocean-caught Pacific salmon, as opposed to the tolerance of both imports of herring used as bait and imports of live ornamental fish, was a separate (second) warning signal.[405] It held that the degree of difference in the level of protection justified this factor being treated as a separate warning signal distinct from the first.

The Appellate Body also agreed with the Panel in respect of the third warning signal, stating:

> We note that a finding that an SPS measure is not based on an assessment of the risks to human, animal or plant life or health—either because there was no risk assessment at all or because there is an insufficient risk assessment—is a strong indication that this measure is not really concerned with the protection of human, animal or plant life or health but is instead a trade-restrictive measure taken in the guise of an SPS measure, i.e., a "disguised restriction on international trade".[406]

The Panel also took account of three "additional factors" in its decision on the third element of Article 5.5. It derived these "additional factors" from the architecture and structure of the measures applied to implement the different chosen levels of protection. The "additional factors" were: (1) that the two substantially different SPS measures (import prohibition versus import tolerance) applied by Australia lead to discrimination between salmon on the one hand and herring used as bait and live ornamental finfish on the other; (2) that there was a sudden, unexplained change in the conclusion of Australia's earlier Draft Report (which recommended the conditional allowing of the importation of ocean-caught Pacific salmon) and the Final Report (which recommended the import prohibition); and (3) the absence of controls on internal movement of salmon products within Australia compared to the import prohibition with respect to ocean-caught Pacific salmon.[407] On the basis of these considerations, the Panel held that Article 5.5 and, for that reason, also Article 2.3, was violated.[408]

The Appellate Body agreed with the Panel's conclusion,[409] although it reversed the Panel's finding in respect of the first additional factor, holding that it was no different from the first "warning signal" and should be excluded from consideration as a separate factor.[410]

[405] *Id.* ¶ 164.
[406] *Id.* ¶ 166.
[407] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶¶ 8.153–8.158.
[408] *Id.* ¶ 8.160.
[409] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 177.
[410] *Id.* ¶¶ 167–169. The Panel noted that the substantial distinctions in the *levels of protection* applied by Australia to salmon products and to herring and finfish were expressed in two different implementing *measures*, namely import prohibition and import tolerance. It found that as the two products were considered

Whether different levels of protection resulted in discrimination or a disguised restriction on trade also arose as an issue in *EC—Hormones.* In this case, the Panel in support of its finding that the difference in the level of protection for hormones and that for anti-microbial agents, Carbadox and Olaquindox, resulted in discrimination or a disguised restriction on trade, pointed to certain factors. These were: (1) the great difference in level of protection (a no-residue level for the relevant hormones as opposed to an unlimited-residue level for Carbadox and Olaquindox); (2) the absence of a plausible justification for this significant difference; and (3) the nature of the EC measure, an import prohibition, which necessarily restricts international trade.[411]

The Panel in *EC—Hormones* also looked at three "additional factors", namely: (1) the objectives, besides health protection, it believed the European Communities had in mind when enacting and maintaining the ban, which it deduced from the fact that the preambles of the relevant directives, the reports of the European Parliament, and the opinions of the EC Social and Economic Committee indicated that the measure was aimed at harmonization of laws within the European Communities, the removal of distortions of competition and barriers to intra-Community trade, the increase of beef consumption and the reduction of internal surpluses; (2) the fact that before the coming into force of the ban, fewer animals were treated with hormones for growth promotion in the European Communities than in Canada and the United States; and (3) that the hormones are used in the bovine sector, where the European Communities wants to limit supply, whereas Carbadox and Olaquindox are used in the pork sector, where the EC has no surpluses.[412]

The Appellate Body rejected the Panel's conclusion, stating that it did not attach the same importance as the Panel to the multiple objectives of the measure. It pointed to the demonstrated concerns within the EC regarding the studies showing the carcinogenicity of hormones, consumer concerns and the problems of abuse. It stated that the harmonization of regulations was a result of the EC's mandate to establish a Common Market and that the reduction of beef surpluses not only benefited the EC but also other non-hormone beef producers. It thus concluded that it did not agree with the Panel's inference that the import ban was aimed at restricting beef imports from Canada and the United States rather than protecting the EC's population from the risk of cancer.[413] The Panel's finding that there was a violation of Article 5.5 was thus reversed.[414] The Appellate Body's decision makes it clear that the mere incorporation of various non-scientific considerations in the decision to impose a certain health measure is not sufficient to invalidate the measure by rendering it a "disguised restriction on trade". This decision implies a positive recognition by the

comparable (as "different situations" under Article 5.5) and the risk arising therefrom was the same, the different implementing measures suggested that Australia was effectively discriminating between salmon products on the one hand and herring and finfish on the other. The Panel viewed "disguised restriction on international trade" under Article 5.5 as including restrictions amounting to arbitrary or unjustifiable discrimination *between products*. Australia contended that the Panel's concept of discrimination under Article 5.5 was wrong, as discrimination here refers to discrimination *between countries*.

[411] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶ 8.244; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶ 8.241.

[412] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶¶ 8.245–8.246; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶¶ 8.242–8.243.

[413] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 245.

[414] *Id.* ¶ 246.

Appellate Body of the important role of societal value judgments in the making of risk management decisions.

(b) Relationship between Article 5.5 and Article 2.3. As mentioned previously, Article 5.5 can be regarded as a specific application of the general obligation contained in Article 2.3. The Panel and Appellate Body in *EC—Hormones* found that Article 5.5 must be read together with the basic obligation of Members to avoid discrimination and disguised restrictions on trade in Article 2.3.[415] Article 2.3 reiterates the obligations set out in the *chapeau* (headnote) to Article XX of GATT 1994.[416] The Appellate Body in *EC—Hormones* held regarding the relationship between Article 5.5 and Article 2.3:

> Article 5.5 must be read in context. An important part of that context is Article 2.3 of the *SPS Agreement*, . . .
>
> When read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3.[417]

The most concrete reflection of Article 2.3 is found in the third element of Article 5.5. Regarding the relationship between the third element of Article 5.5 and Article 2.3, the Appellate Body in *EC—Hormones* noted:

> . . . We also recall our interpretation that Article 5.5 and, in particular, the terms "discrimination or a disguised restriction on international trade", have to be read in the context of the basic obligations contained in Article 2.3, which requires that "sanitary . . . *measures* shall not be *applied in a manner which would constitute a disguised restriction on international trade*". (emphasis added)[418]

There is thus a close link between these two articles and a violation of Article 5.5 will necessarily imply a violation of the broader obligation of Article 2.3.

3. Requirement of the Least-Trade Restrictive Measure (Article 5.6)

Another aspect of the risk management process is the choice of a measure to achieve the level of protection deemed appropriate by the government. Measures are typically chosen with regard not only to their technical effectiveness, but also to considerations of cost and ease of application. It is clear that the characteristics of the measure chosen can have a significant effect on trade. While a Member has the right to determine for itself the level of protection it deems appropriate, its choice of a measure can be subject to disciplines to ensure that the trade effect is limited. To this purpose, Article 5.6 of the SPS Agreement provides:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

This amounts to a discipline on the choice of measure rather than on the selection of an appropriate level of protection.

[415] *Id.* ¶ 212.
[416] Article 2.3 of the SPS Agreement is discussed *supra* Part II(B)(2)(c).
[417] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 70, ¶ 212.
[418] *Id.* ¶ 238.

In a footnote, the SPS Agreement defines what is meant by "a measure not more trade restrictive than required". This footnote provides:

> For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

In *Australia—Salmon*[419] the Panel set out the three elements of this definition, which it held to be cumulative, namely that a measure is more trade restrictive than required only if there is another SPS measure which: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member's appropriate level of sanitary protection; and (3) is significantly less trade restrictive than the contested measure. The Appellate Body agreed with this three-pronged test[420] and added:

> These three elements are cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met. If any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account technical and economic feasibility, *or* if the alternative measure does not achieve the Member's appropriate level of sanitary or phytosanitary protection, *or* if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6.[421]

This finding was reiterated by the Appellate Body in *Japan—Agricultural Products*.[422] It is now useful to examine each of these requirements in turn to determine what needs to be proved if a measure is challenged under Article 5.6.

(a) No Alternative Measure that is Reasonably Available. The first element of the three-pronged test is that another SPS measure is reasonably available taking into account technical and economic feasibility. It is important to note that in determining the existence of an alternative measure within the meaning of Article 5.6 both the *technical* and *economic* feasibility of the measure must be taken into account. This reflects the recognition that an alternative less-trade-restrictive measure could have high regulatory or compliance costs or could be impractical to implement.[423] This is particularly significant for developing countries. It seems logical that the question of economic and technical feasibility will be determined on the basis of the resources and capacity of the importing Member, rather than by looking in abstract at the alternative measures. This should result in greater flexibility in the application of this discipline to developing countries.

In *Australia—Salmon*, the Panel stated as follows with regard to options considered in the relevant risk assessment as technically and economically feasible alternatives:

> . . . all four alternative options . . . were presented in the 1996 Final Report itself as options which merit consideration and this in contrast to two other options—removal of all quarantine restrictions and banning the importation of all salmon products—which were thought of as options which could not "reasonably be considered as appropriate, having regard to associated quarantine risks" and were therefore "not discussed further". In our view, this

[419] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 95.
[420] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 194.
[421] *Id.*
[422] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 95.
[423] Goh and Ziegler, *supra* note 87, at 280.

> implies that the 1996 Final Report put forward the four alternatives we examine as technically and economically feasible policy options. Nothing in the 1996 Final Report—nor any other evidence before us—implies that any of these four alternatives would be technically or economically unfeasible.[424]

The compliance Panel in *Australia—Salmon*, when examining one of the four alternatives proposed by Canada for the challenged Australian measure, stated as follows:

> . . . [s]ince one can assume that current Australian requirements are "reasonably available taking into account technical and economic feasibility", also a regime without the consumer-ready requirements [the current Australian requirements] . . . would be so. Given that inspection and control to release from quarantine only product that meets the consumer-ready requirements would no longer be necessary, a regime without the consumer ready requirements would be even more reasonably available in the sense of Article 5.6.[425]

In *Japan—Agricultural Products*, the Panel also examined whether testing by product was a technically and economically feasible alternative to the measure at issue, namely varietal testing, and found this to be so.[426] This issue was not appealed. From the above findings it is clear that a panel will look concretely at the facts of each case, including the characteristics of the SPS measure actually applied and the alternative measures considered in the risk assessment, to determine which measures can be considered feasible alternatives.

(b) No Alternative Measure which Achieves the Appropriate Level of Protection. The Panel in *Australia—Salmon*[427] examined the second element required for proof that a measure is more trade restrictive than required, namely that an alternative measure achieves the Member's appropriate level of protection. It found that the level of protection deemed appropriate by a Member could be implied from the level reflected in the SPS measure it adopts. Thus it must be determined whether the alternative measures meet the level of protection achieved by the measure actually imposed. The Appellate Body disagreed, holding as follows:

> We do not believe that Article 11 of the DSU, or any other provision of the DSU or of the *SPS Agreement*, entitles the Panel or the Appellate Body, for the purpose of applying Article 5.6 in the present case, to substitute its own reasoning about the implied level of protection for that expressed consistently by Australia. The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as "the level of protection deemed appropriate by the Member establishing a sanitary . . . measure", is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body.[428]

The Appellate Body distinguished the appropriate level of protection, which is an objective, and the measure used to achieve that level, which is an instrument to attain this objective.[429] It continued:

[424] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 56, ¶ 8.171. The Appellate Body noted the panel's "factual finding" in this respect and considered, therefore, that the first element was met. Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 195.

[425] Report of the WTO Compliance Panel, *Australia—Measures Affecting the Importation of Salmon, Recourse to Article 21.5 by Canada*, *supra* note 65, ¶¶ 7.146–7.149.

[426] Report of the WTO Panel, *Japan—Measures Affecting Agricultural Products*, *supra* note 57, ¶ 8.78

[427] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon, supra* note 57, ¶ 8.173.

[428] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 199.

[429] *Id.* ¶ 200.

> It can be deduced from the provisions of the *SPS Agreement* that the determination by a Member of the "appropriate level of protection" logically precedes the establishment or decision on maintenance of an "SPS measure".[430]

The Appellate Body noted that the correlation between the appropriate level of protection and the relevant SPS measure is most clearly illustrated by Article 5.6 and held:

> . . . The words of Article 5.6, in particular the terms "*when establishing or maintaining* sanitary . . . protection", demonstrate that the determination of the level of protection is an element in the decision-making process which logically *precedes* and is *separate* from the establishment or maintenance of the SPS measure. It is the appropriate level of protection which determines the SPS measure to be introduced or maintained, not the SPS measure introduced or maintained which determines the appropriate level of protection. To imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member. That clearly cannot be the case.[431]

Thus the appropriate level of protection determines what SPS measure will be used, not *vice versa*.[432] Applying this finding to the case at hand, the Appellate Body stated:

> We note that, in this case, the level of protection *reflected* in the SPS measure at issue, i.e., the import prohibition, is undisputedly a "zero-risk level" of protection. However, Australia determined explicitly that its *appropriate* level of protection is:
>
> > . . . a high or "very conservative" level of sanitary protection aimed at reducing risk to "very low levels", 'while not based on a zero-risk approach.[433]
>
> It is clear, in this case, that the *appropriate* level of protection as determined by Australia is definitely *not* at least as high as the level of protection *reflected* in the SPS measure at issue".[434]

Further, the Appellate Body held that although there is no explicit obligation on Members to determine their appropriate level of protection, this obligation is implicit in paragraph 3 of Annex B, and Articles 4.1, 5.4 and 5.6. It found:

> We do not believe that there is an obligation to determine the appropriate level of protection in quantitative terms. This does not mean, however, that an importing Member is free to determine its level of protection with such vagueness or equivocation that the application of the relevant provisions of the *SPS Agreement,* such as Article 5.6, becomes impossible. It would obviously be wrong to interpret the *SPS Agreement* in a way that would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape from their obligations under this Agreement. While in this case Australia determined its appropriate level of protection, and did so with sufficient precision to apply Article 5.6, we believe that in cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied. Otherwise, a Member's failure to comply with the implicit obligation to determine its appropriate level of protection—with sufficient precision—would allow it to escape from its obligations under this Agreement and, in particular, its obligations under Articles 5.5 and 5.6.[435]

[430] *Id.* ¶ 201.
[431] *Id.* ¶ 203.
[432] *Id*.
[433] (Footnote in original) Panel Report, ¶ 8.107.
[434] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 197.
[435] *Id.* ¶¶ 205–207.

Thus, if a Member does not determine its appropriate level of protection, or does so with insufficient clarity, panels may determine the appropriate level based on the level reflected in the measure actually applied.

This finding is important in that it prevents the discipline in Article 5.6 from limiting the ability of governments to adopt measures that achieve the level of protection they have chosen. It recognizes that the choice of level of protection is the sole prerogative of national decision-makers. Thus alternative measures must always be judged against the Members' own chosen level of protection and not simply compared to the measure currently in place. Only in cases where a government does not adequately determine its level of protection, may a panel infer it from the measure applied in order to prevent the avoidance of disciplines under the SPS Agreement.

This approach was followed in *Japan—Agricultural Products*, where the Panel, when dealing with the second element of Article 5.6, stated:

> Both parties agree that it is up to Japan to determine its appropriate level of phytosanitary protection with respect to codling moth. We agree since the SPS Agreement (in paragraph 5 of Annex A) defines the "appropriate level of . . . phytosanitary protection" as "[t]he level of protection *deemed appropriate by the Member* establishing a . . . phytosanitary measure to protect . . . plant life or health within its territory",[436] *in casu*, the level deemed appropriate by Japan.[437]

(c) No Alternative Measure which is Significantly Less Restrictive to Trade. With regard to the third requirement, it is notable that the alternative measure must be *significantly* less trade-restrictive before a Member's measure will be deemed "more trade-restrictive than required." Thus a small difference in the trade impacts of the two measures is not sufficient to oblige a Member to adopt the alternative measure.

This requirement was examined by both the Panel and the compliance Panel in *Australia—Salmon*, and by the Panel in *Japan—Agricultural Products.*[438] It appears from these cases that the issue relates to whether market access will be substantially improved under an alternative measure as compared to the measure currently imposed. This examination turns on the relevant facts of the case. For example, in *Japan—Agricultural Products,* Japan did not contest that two alternative measures, namely testing the efficacy of the quarantine treatment by product rather than by each variety of the product;[439] and determining the sorption levels of different varieties of products,[440] were significantly less trade-restrictive than its varietal-testing requirement. The Panel agreed, noting that market access would be obtained either automatically or significantly more easily under the alternatives.[441] In *Australia—Salmon*, the Panel found that even the most stringent

[436] (Footnote in original) Emphasis added.

[437] Report of the WTO Panel, *Japan—Measures Affecting Agricultural Products*, *supra* note 57, ¶ 8.81.

[438] Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.182; Report of the WTO Compliance Panel, *Australia—Measures Affecting the Importation of Salmon*, *Recourse to Article 21.5 by Canada*, *supra* note 65, ¶¶ 7.150–7.153; Report of the WTO Panel, *Japan—Measures Affecting Agricultural Products*, *supra* note 56, ¶¶ 8.79, 8.89, 8.95–8.96 and 8.103–8.104.

[439] In other words, once the efficacy of quarantine treatment for a product has been shown and the product has been approved, no further testing would be required for any other varieties of the product. Report of the WTO Panel, *Japan—Measures Affecting Agricultural Products*, *supra* note 57, ¶ 8.73.

[440] This would require that once a particular variety of a product is approved, if it can be demonstrated that the sorption level of an additional variety is not higher than that of the initial variety, the same treatment can be applied to both varieties without further testing or approval requirements. If the sorption level of the additional variety is demonstrated to be higher, further testing could be required. *Id.* ¶ 8.96.

[441] With regard to the alternative of testing by product, the Panel noted that market access for additional varieties would be automatic as no additional testing would be required. *Id.* ¶ 8.79. Regarding the alternative

of the four alternative measures examined (requiring retail-ready filleting, evisceration, beheading and gilling of salmon before importation) would be significantly less trade-restrictive than Australia's requirement of heat treatment for salmon, as this amounted to a prohibition on the importation of fresh, chilled or frozen salmon.[442] Australia changed its requirements with respect to the importation of salmon after its measures were judged in violation of the SPS Agreement.[443] With respect to its new measure, and in particular the "consumer-ready" requirement for the importation of salmon,[444] the compliance Panel found that the alternatives proposed[445] would result in significantly more salmon products being allowed for direct release from quarantine.[446] On the basis of evidence before it, the compliance Panel found that demand existed in Australia for non-consumer ready salmon, for use in hotels, restaurants and institutions as well as large families. Therefore, increased market access would result from the alternative measures.[447]

G. Other Substantive Provisions

1. Equivalence (Article 4)

In order to ensure the protection of human, animal and plant health in its territory, a country needs to be satisfied that imported products meet its SPS standards. However, there may be marked differences in the SPS regulations applied as well as the control and inspection systems in place to ensure that the local standards are met in the country where the products are produced as compared to those in the importing country. These differences are not only due to differences in the levels of health protection deemed appropriate by the importing and exporting countries, they may also be due to differences

of determination of sorption levels, the Panel noted that if the determination showed no higher sorption level for other varieties, no additional testing would be necessary, thus resulting in market access being obtained significantly more easily. If a higher sorption level was shown, additional testing could be required, in which case market access would be obtained in circumstances no more difficult than under the current regime. *Id.* ¶ 8.96.

[442] As the Panel in this case incorrectly viewed the requirement of heat-treatment for salmon products as the measure at issue (as opposed to the ban on fresh, chilled or frozen salmon), it proceeded to discuss how heat treatment changes the nature of the product and limits its use since heat-treated salmon cannot be consumed as fresh salmon. In contrast, eviscerated, headless and filleted salmon can be consumed as fresh or cooked salmon. Thus the latter requirement is significantly less trade restrictive. Report of the WTO Panel, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 57, ¶ 8.182.

[443] The Appellate Body overturned the Panel's finding with regard to Article 5.6 since the Panel had made its finding on the wrong premise—that the SPS measure at issue was the heat-treatment requirement. There were insufficient factual findings for the Appellate Body to reach a conclusion on whether the actual SPS measure at issue (the import prohibition) was consistent with Article 5.6. Report of the Appellate Body, *Australia Measures Affecting the Importation of Salmon*, *supra* note 141, ¶¶ 213 and 241–242.

[444] This entailed that only salmon ready for household use (defined as cutlets of less than 450g, skinless fillets of any weight, skin-on fillets of less than 450g, eviscerated, headless pan-size fish of less than 450g or products processed even further) could be released from quarantine. Other salmonid products were required to be processed to a consumer-ready stage at an approved processing plant before release from quarantine. These requirements aimed to avoid the risk that imported salmon would be processed commercially in Australia, leading to substantial concentrations of waste material (skin, fins etc) that would create the risk of pests or diseases.

[445] Canada proposed as alternatives either the current Australian regime *without* the consumer-ready requirements or the current regime with *different* consumer-ready requirements (in particular, removing the weight limitations and requiring the product to be individually and commercially wrapped).

[446] In particular, skin-on salmon weighing more than 450g would be able to be imported for direct sale.

[447] Report of the WTO Compliance Panel, *Australia—Measures Affecting the Importation of Salmon*, *Recourse to Article 21.5 by Canada*, *supra* note 65, ¶¶ 7.150–7.151.

in the conditions prevalent in each country[448] which may affect the efficacy of particular SPS measures and make it possible for alternative measures to be used which result in the same level of health protection.[449] As a result, it is possible for importing countries to rely on the SPS measures and control and inspection systems in place in exporting countries, even where these may be different from their own, when such measures or systems have been demonstrated to achieve the level of protection sought by the importing Member, *i.e.*, to be equally effective in reducing risk. This is known as the recognition or acceptance of "equivalence".

Countries can accept the equivalence of different SPS measures on an *ad hoc* basis or by means of bilateral or regional equivalence agreements. The acceptance of equivalence on an *ad hoc* basis commonly occurs with regard to specific products or technical aspects of SPS measures.[450] In equivalence agreements criteria are often set out for the acceptance of different SPS measures as equivalent on either a system-wide or product-by-product basis. Further, agreements can be concluded in which countries agree that the standards and food safety systems used by each are sufficient to guarantee the level of protection each aims to secure. As a result, they mutually bind themselves to allow each other's products to enter their respective markets despite differences in the SPS measures or control systems applied. The latter type of agreement is known as a "mutual recognition agreement"[451] and may be concluded for specific food or agricultural products or all food and agricultural products and may apply to only certain food safety requirements (for example only conformity assessment procedures or only food safety standards) or to all such requirements.[452] If effectively implemented, equivalence could reduce the barriers created by onerous, but legitimate SPS measures. It is a useful method of eliminating the trade restrictive effect[453] of SPS measures in the absence of complete harmonization.[454]

[448] For example, the prevalence of particular pests or diseases may differ, as may climatic conditions that may be more or less conducive to the proliferation of pests or the spread of diseases. In addition it has been noted that developing countries may face rather different developmental and technological conditions which also result in differences in SPS measures. *See* Simonetta Zarrilli, WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries, T.R.A.D.E. Working Paper 3, 17, South Centre (1999).

[449] Digby Gascoine, *Harmonisation, Mutual Recognition and Equivalence—How and What Is Attainable?* Paper presented at the Conference on International Food Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition, Melbourne Australia, October 11–15, 1999, at 6.

[450] This fact was emphasized in discussions on equivalence in the SPS Committee. Such acceptance occurs on a technical level and is not reflected in formal bilateral agreements. *See* Committee on Sanitary and Phytosanitary Measures, *Equivalence—Note by the Secretariat,* G/SPS/W/111, July 4, 2001. An example of this is the determination of the United States Department of Agriculture on December 14, 1999, that 32 of the 36 countries exporting meat and poultry to the United States had an inspection system equivalent to that of the U.S. See USDA, Office of the Inspector General, Food Safety and Inspection Service, *Imported Meat and Poultry Inspection Process Phase 1*, Rep. No. 24099-3-Hy (2000).

[451] An example of a mutual recognition agreement is that signed by the EU and Argentina in June 1996, where they agreed to full mutual recognition of each other's sanitary and phytosanitary standards. *See Argentina and EU Sign SPS Agreement,* 351 Animal Pharm 14, 14 (1996).

[452] *See* Gascoine, *supra* note 449, at 5.

[453] *See* Victor, *supra* note 154, at 877–878, where the author notes, "Assuming that exporters have an interest in identifying the least trade restrictive measure, this "equivalence" requirement could automatically ensure that SPS rules are not more discriminatory than necessary (. . .)". It may perhaps be more correct to say that the result would be rules that are least trade-restrictive, since SPS measures need not be discriminatory at all to fall under the SPS Agreement.

[454] This may be the case either where no international standards exist in the specific area or where the existing international standards are inappropriate since they do not achieve the level of protection chosen by the importing Member. In these cases the principle of equivalence could nevertheless result in open markets. It should be noted that the SPS Committee has emphasized that equivalence does not replace the need for

As has been discussed above,[455] Members are not obliged to adopt harmonized standards where these do not meet their chosen levels of protection. However, by recognizing as equivalent divergent SPS measures that meet the relevant appropriate level of protection, Members can avoid creating unnecessary trade barriers while continuing to provide the level of protection they deem appropriate. This is of particular importance to developing countries since their SPS measures and food safety systems often differ from those in place in importing developed countries, due to the developmental and technological constraints faced by developing countries. If their measures nonetheless achieve the level of protection aimed at by the importing country, they should be recognized as equivalent.[456]

However, the recognition of equivalence is not to be used as an instrument for discrimination between countries nor should it result in additional barriers to trade. Neither is it intended to replace the need for the development and use of international standards.[457]

Article 4 of the SPS Agreement aims to promote the recognition of equivalence, both on an *ad hoc* basis and by means of equivalence agreements, and in this way minimize the trade barriers caused by divergent SPS measures.

(a) Acceptance of Equivalence (Article 4.1). Article 4 of the SPS Agreement makes provision for acceptance by WTO Members of the equivalence of different SPS measures provided that the measure achieves the appropriate level of protection chosen by the importing Member. In paragraph 1, it obliges Members to accept as equivalent different SPS measures that have been proven to achieve their chosen level of health protection.

(b) Conditions. In order for Members to be obliged to recognize the equivalence of other Members' SPS measures, Article 4.1 requires that the exporting Member "objectively demonstrate" to the importing Member that its SPS measures achieve the latter's appropriate level of protection. The burden of proof is on the exporting Member to adduce scientific proof that its measure is equally effective in reducing the health risk posed by its export. In addition, the exporting Member must allow reasonable access to the importing Member on request, to conduct its own inspections, tests and other procedures to verify the efficacy of the measure.

(c) Agreements on Recognition of Equivalence (Article 4.2). It is possible for the recognition of equivalence to occur not only on an *ad hoc* basis but also by means of bilateral,

the development and use of international standards. Committee on Sanitary and Phytosanitary Measures, *Equivalence—Note by the Secretariat,* G/SPS/W/111, July 4, 2001, ¶ 3. *See also* Victor, *supra* note 154, at 878, where he refers to the similar concept of "mutual recognition" in the context of the EC single market which "created a strong market-opening dynamic by allowing legal production from any European country into any other European national market." In this regard he refers to Linda Horton, *Mutual Recognition Agreements and Harmonization*, 29 SETON HALL LAW REVIEW 692, 708–729 (1998).

[455] *See supra* Part II(C).

[456] In the meetings of Members in the SPS Committee regarding equivalence, it was stressed that the purpose of equivalence is to facilitate trade and that the recognition of equivalence should enhance developing country access to export markets, including those in developed countries, by allowing them to meet the importer's chosen level of protection by means of alternative measures. *See* Committee on Sanitary and Phytosanitary Measures, *Equivalence: Consideration of Article 4 of the SPS Agreement: Summary of Informal Discussions on Equivalence. Second Report by the Chairman,* G/L/445, March 21, 2001, ¶ 7.

[457] Committee on Sanitary and Phytosanitary Measures, *Equivalence—Note by the Secretariat,* G/SPS/W/111, July 4, 2001, ¶ 3.

regional or multilateral agreements[458] in which criteria are set out for acceptance of different SPS measures as equivalent. Therefore, the SPS Agreement, in Article 4.2, encourages the conclusion of equivalence agreements between Members by obliging Members to enter into consultations to this end upon request. However, there is no obligation to actually conclude such agreements.

Some Members are reluctant to enter into negotiations for the conclusion of formal equivalence agreements due to the lengthy and costly nature of such negotiations. However, once in place, formal agreements can make the subsequent recognition of equivalence easier and less costly as the general criteria and conditions for the recognition of equivalence are already established in such agreements.[459]

(d) Procedure. Article 4 does not provide for specific procedures for the recognition of equivalence or the conclusion of equivalence agreements. It is thus left to Members to determine how they will give effect to this provision, in particular what procedures they will establish and which criteria they will apply for the recognition of equivalence.[460] Although these procedures may be laid down in formal equivalence agreements, the Chairman of the SPS Committee made clear in his 2001 Report to the General Council that equivalence does not necessarily require formal equivalence agreements but can be achieved on different levels. He noted:

> In the Committee's discussions in November 2000, Members recognized that there were several different levels of equivalence, which ranged from (i) formal agreements recognizing the equivalence of sanitary and phytosanitary systems; to (ii) agreements of equivalence for specific products; to (iii) acceptance, on an ad hoc basis, of the equivalence of specific technical aspects of certain sanitary and phytosanitary measures. In the March 2001 discussions, it was also suggested that equivalence could be considered for either: (i) inspection and control systems; (ii) processing techniques; and (iii) for product standards.[461]

The Chairperson also reported that delegations had stressed that regardless of the level at which equivalence is recognized, certain obligations exist for both the importing country and the exporting country. These obligations stem from the fact that the SPS measures of the exporting country, in order to be accepted as equivalent, must meet the appropriate level of protection of the importing country. Therefore, the importing country must clearly identify the level of protection its measure aims to achieve and the exporting country must provide appropriate, science-based technical information to

[458] Johanson and Bryant have noted that, "[i]n practice, the definition of equivalency and criteria for recognizing equivalent practices is likely to emerge from bilateral consultations, regional agreements, and the exchange of views encouraged by the Sanitary and Phytosanitary Committee. . . ". David S. Johanson and William L. Bryant, *Eliminating Phytosanitary Trade Barriers: The Effects of the Uruguay Round Agreements on California Agricultural Exports,* 6 SAN JOAQUIN AGRICULTURAL LAW REVIEW 1, 6 (1996).

[459] Argentina has suggested that all formal equivalence agreements should contain a section establishing general principles, aims and requirements for the recognition of equivalence, and deal with specific products in annexes to the agreement. *See* Committee on Sanitary and Phytosanitary Measures, *Equivalence—Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures,* G/SPS/GEN/268, August 15, 2001. *See also* Zarrilli and Musselli, *supra* note 28, at 8.

[460] The Decision on Equivalence, discussed *infra*, provides some guidelines with regard to the procedure to be followed.

[461] Committee on Sanitary and Phytosanitary Measures, *Equivalence: Consideration of Article 4 of the SPS Agreement: Summary of Informal Discussions on Equivalence. Second Report by the Chairman,* G/L/445, March 21, 2001, ¶ 4.

demonstrate that its alternative measure meets this level of protection.[462] The Secretariat has noted that, in identifying their appropriate level of protection, Members should take into account the Guidelines to Further the Practical Implementation of Article 5.5,[463] which were adopted by the SPS Committee in June 2000.[464] The question of a Member's identification of its chosen level of protection is addressed in these Guidelines as follows:

> A Member should indicate the level of protection which it considers to be appropriate with respect to risks to human life or health, to animal life or health or to plant life or health in a sufficiently clear manner so as to permit examination of the extent to which any sanitary or phytosanitary measure achieves that level.
>
> Such an indication may be contained in a published statement or other text generally available to interested parties. The statement of the appropriate level of protection may be qualitative or quantitative, and should serve to guide its consistent implementation over time, and also to increase the transparency of the sanitary or phytosanitary regime. Examples might include government policy statements with regard to appropriate levels of protection in response to certain risks, or documents on animal health protection objectives or with respect to plant protection. The use of quantitative terms, where feasible, to describe the appropriate level of protection can facilitate the identification of arbitrary or unjustified distinctions in levels deemed appropriate in different situations.[465]

The Guidelines also indicate,[466] as decided by the Appellate Body in *Australia—Salmon*,[467] that although the SPS Agreement contains no express obligation on a Member to determine its appropriate level of protection, this obligation is implicit in several provisions including Article 4.

Once the appropriate level of protection of the importing Member is known, and the exporting Member produces evidence to support its claim that its SPS measure achieves this level of protection, the importing Member makes its determination of equivalence. The equivalence of different types of SPS measures (such as ban on a potential host of a pest and a requirement of fumigation treatment prior to importation) could be determined by examining the effectiveness of each by means of scientific evidence. In contrast, when different control and inspection systems are compared, a more subjective element is present as the quality of the system and qualifications of personnel are evaluated.[468]

(e) Notification. The notification of equivalence agreements or *ad hoc* recognition of equivalence is not mandatory under the SPS Agreement. In the informal discussions on equivalence in the SPS Committee, several Members expressed concern regarding the lack of transparency with regard to equivalence agreements.[469] A notification obligation

[462] Committee on Sanitary and Phytosanitary Measures, *Equivalence—Note by the Secretariat,* G/SPS/W/111, July 4, 2001, ¶ 6; Committee on Sanitary and Phytosanitary Measures, *Equivalence: Consideration of Article 4 of the SPS Agreement: Summary of Informal Discussions on Equivalence. Second Report by the Chairman,* G/L/445, March 21, 2001.

[463] Committee on Sanitary and Phytosanitary Measures, *Guidelines to Further the Practical Implementation of Article 5.5,* G/SPS/15, July 18, 2000. These non-binding guidelines relate to the objective of consistency in the choice of appropriate level of protection and are discussed *supra* Part II(F)(2).

[464] Committee on Sanitary and Phytosanitary Measures, *Equivalence—Note by the Secretariat,* G/SPS/W/111, July 4, 2001, ¶ 11.

[465] Committee on Sanitary and Phytosanitary Measures, *Guidelines to Further the Practical Implementation of Article 5.5,* G/SPS/15, July 18, 2000, ¶ A.1.

[466] *Id*. ¶ B

[467] Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 205.

[468] This point is made by Johanson and Bryant, *supra* note 449, at 6.

[469] Committee on Sanitary and Phytosanitary Measures, *Equivalence—Note by the Secretariat,* G/SPS/W/111, July 4, 2001, ¶ 19.

would facilitate the recognition of equivalence of SPS measures of developing countries by enabling developing countries to make a request to become party to a notified equivalence agreement by showing that they meet the conditions set out therein. A notification obligation would also facilitate the recognition of equivalence by making it easier for developing countries to conclude a similar bilateral agreement with the importing country. However, it was pointed out in the Committee meeting that all Members' national Enquiry Points[470] are obliged to respond to questions regarding, *inter alia* the *ad hoc* recognition of equivalence and equivalence agreements.[471] Nevertheless, the SPS Committee endorsed a conclusion stating that Members will inform the SPS Committee of their recognition of the equivalence of the SPS measures of other Members.[472] The Secretariat proposed a format for the notification of determinations of equivalence and equivalence agreements, where such recognition of equivalence may have a significant effect on the trade of the Member that requested the determination or on the trade of other Members.[473] The SPS Committee adopted the recommended procedures and format for the notification of equivalence agreements at its meeting of June 25–26, 2002.[474]

(f) Examples. In practice, the recognition of equivalence most often takes place informally, on a technical or administrative level for specific products. An example of such recognition of equivalence is that of Australia with regard to Switzerland's measures applicable to hard cheeses. Australia requires pasteurization or thermization of milk in the production of cheeses in order to achieve its "safe food use" level of protection for cheese consumption. Switzerland sought to demonstrate that its manufacturing process for cheeses achieved Australia's level of protection by means of a risk assessment. The risk assessment showed, according to Australia, that hard cheeses made following the Swiss process achieved the same level of pathogen destruction as hard cheese subject to pasteurization, but this was not the case with soft cheeses. Australia thus recognized Emmental, Sbrinz and Gruyere as safe due to the equivalence of the Swiss process with regard to hard cheeses.[475]

Currently, the recognition of equivalence by means of formal agreements is taking place in very limited cases, in the context of bilateral or regional agreements. In particular, it occurs between the Member States of the European Union, the Members of NAFTA, and between Australia and New Zealand.[476] In addition, in certain cases Members have

[470] The Enquiry Points will be discussed *infra* Part III(A)(4).

[471] This obligation is contained in Annex B.3(d) and was confirmed by the SPS Committee in its meeting of March 13, 2001. Committee on Sanitary and Phytosanitary Measures, *Equivalence: Consideration of Article 4 of the SPS Agreement: Summary of Informal Discussions on Equivalence. Second Report by the Chairman,* G/L/445, March 21, 2001, ¶ 11(ii).

[472] *Id*. ¶ 11(iii).

[473] Committee on Sanitary and Phytosanitary Measures, *Proposed Format for the Notification of Agreements of Equivalence,* G/SPS/W/114/Rev.1, May 21, 2002.

[474] Committee on Sanitary and Phytosanitary Measures, *Notification of Determination of the Recognition of Equivalence of Sanitary or Phytosanitary Measures, Decision by the Committee. Addendum,* G/SPS/7/Rev.2/Add.1, July 25, 2002.

[475] Committee on Sanitary and Phytosanitary Measures, *An Example of Equivalence: Statement by Australia at the Meeting of 14–15 March, 2001,* G/SPS/GEN/243, April 9, 2001. Other examples of *ad hoc* recognition of equivalence were provided by New Zealand. *See* Committee on Sanitary and Phytosanitary Measures, *Experience in Recognizing Equivalence of Phytosanitary Measures: Submission by New Zealand,* G/SPS/GEN/232, February 28, 2001.

[476] For examples of the recognition of equivalence in the EU and NAFTA and the mutual recognition agreement between Australia and New Zealand (which has since been replaced by a joint food authority, the ANZFA), *see* Zarrilli, *supra* note 448, at 17–18. The recognition of equivalence by the United States of the new Australian meat inspection system is discussed in J.J. Kastner and R.K. Pawsey, *Harmonising*

negotiated agreements laying down the conditions and requirements for the recognition of each other's SPS measures as equivalent for specific products or sectors. An example of such an equivalence agreement is that concluded between the European Union and Canada, where they have established a mechanism, laying down procedures and criteria for the recognition of equivalence of sanitary measures relating to trade in live animals and animal products.[477]

(g) Problems with Implementation. The implementation of Article 4 of the SPS Agreement to date leaves much to be desired. Developing countries have repeatedly raised the concern that developed countries demand "sameness" rather than equivalence of standards and control and inspection systems.[478] This deprives countries of the flexibility in their choice of measures that Article 4 intends to achieve. In addition, some Members[479] are of the opinion that the negotiation of formal equivalence agreements or determinations is too time consuming and resource intensive, imposing administrative burdens on both the importing and the exporting countries, whereas the gains in trade achieved thereby are limited. They therefore hold the view that recourse to other provisions of the SPS Agreement (such as the rules on risk assessment, transparency, technical assistance and control and inspection procedures) would yield more immediate trade benefits in the form of market access.[480] However, other Members note that although importing countries may view the administrative burden of an equivalence agreement as unjustified with regard to the limited trade benefits it can bring, the improved market access through recognition of equivalence can be very important for developing countries.[481] This is because developing country exports are often limited to a small range of products and involve few enterprises. Thus the recognition of equivalence with regard to the few products of export interest to a developing country could have great benefits for its export trade, while being less costly and burdensome than if equivalence negotiations across a wide range of products were necessary.

In its first periodic review of the implementation of the SPS Agreement,[482] the SPS Committee noted that although there had been an increase in the recognition of equivalence and in the negotiations towards bilateral agreements in this respect, greater efforts in this area were necessary. The Committee pointed in this regard to the importance of the recognition of equivalence for developing countries. The Committee requested Members

Sanitary Measures and Resolving Trade Disputes through the WTO-SPS Framework. Part II: A Case Study of the U.S.—Australia Determination of Equivalence in Meat Inspection, 13 FOOD CONTROL 57 (2002).

[477] *Agreement between the European Community and the Government of Canada on Sanitary Measures to Protect Public and Animal Health in respect of Trade in Live Animals and Animal Products*, OJ L071, 3, 1999/03/18. Similar agreements have been concluded with the United States, New Zealand and the Czech Republic.

[478] World Trade Organization, *Equivalence: Consideration of Article 4 of the SPS Agreement: Summary of Informal Discussions on Equivalence. Second Report by the Chairman,* G/L/445, March 21, 2001, ¶ 5.

[479] *See* Committee on Sanitary and Phytosanitary Measures, *Equivalence: Submission from the United States,* G/SPS/GEN/212, November 7, 2000, ¶ 16.

[480] Committee on Sanitary and Phytosanitary Measures, *Equivalence—Note by the Secretariat,* G/SPS/W/111, July 4, 2001, ¶ 5. *See also* Committee on Sanitary and Phytosanitary Measures, *Equivalence: Submission from the United States,* G/SPS/GEN/212, November 7, 2000, ¶ 20.

[481] Committee on Sanitary and Phytosanitary Measures, *Equivalence—Note by the Secretariat,* G/SPS/W/111, July 4, 2001, ¶ 6.

[482] Committee on Sanitary and Phytosanitary Measures, *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures: Report of the Committee* G/SPS/12, March 11, 1999, ¶ 20.

to provide more information on equivalence agreements that they have concluded bilaterally. In addition, the work of Codex and other international organizations to promote the recognition of equivalence was welcomed by the SPS Committee.[483]

(h) International Guidelines on Equivalence. Since the SPS Agreement does not lay down specific procedures or criteria for the recognition of equivalence, international guidelines in this regard would be useful. They would also reduce the costs of equivalence negotiations by providing a framework against which equivalence can be judged.[484]

In order to facilitate the recognition of equivalence among trading partners,[485] the Codex Alimentarius Commission has established international guidelines on the development of equivalence agreements,[486] on the design, operation, assessment and accreditation of food import and export inspection and certification systems,[487] and for the judgment of equivalence of sanitary measures associated with food inspection and certification systems.[488] The Equivalence Decision[489] mandates the SPS Committee to formally encourage the Codex Alimentarius Committee to complete its work with regard to equivalence as expeditiously as possible, and to formally encourage the OIE and IPPC to elaborate guidelines on equivalence as appropriate.

The SPS Committee has done so, and the International Committee of the OIE has since adopted the Guidelines for Reaching a Judgment on Equivalence of Sanitary Measures.[490] The Interim Commission on Phytosanitary Measures of the IPPC took note of the request of the SPS Committee and agreed to include, as priorities in its work programme, work on the equivalence and efficacy of measures, which is considered a pre-requisite to an international standard for phytosanitary measure on equivalence.[491] Such work is currently underway.

(i) The Equivalence Decision. At its Special Session on Implementation on October 18, 2000, the General Council referred the issue of implementation of Article 4 to the SPS

[483] Gretchen Stanton, *A Review of the Operation of the SPS Agreement*, Paper presented at the Conference on Agriculture and the New Trade Agenda in the WTO 2000 Negotiations, Geneva, October 1–2, 2000, at 5.

[484] It has been noted that in the absence of guidelines on the methodology for judging equivalence, specific bilateral issues are more likely to arise and the methodological concerns of developing countries are more likely to be neglected. Zarrilli and Musselli, supra note 28, at 8.

[485] One of the recommendations resulting from an FAO conference in 1999, under the heading "Food trade and implementation of WTO Agreements," was the recognition of the urgency of the development of Codex guidelines on the judgment of equivalence, initially in a generic sense and subsequently in relation to specific topics such as equivalence of inspection and certification systems and food hygiene measures. *See* Food and Agriculture Organization, Report of the Conference on International Food Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition, Melbourne, Australia, October 11–15, 1999, at Appendix II A.2. In addition, in discussions on equivalence in the SPS Committee, Members noted with regard to the concern about the time and resources needed to conclude equivalence agreements, that international guidelines for systemic application of the principle would be useful. The progress made by the CAC in this regard was noted. *See* Committee on Sanitary and Phytosanitary Measures, *Equivalence: Consideration of Article 4 of the SPS Agreement: Summary of Informal Discussions on Equivalence. Second Report by the Chairman,* G/L/445, March 21, 2001, ¶ 7.

[486] CAC/GL/34-1999, adopted by the CAC in its 23rd Session in 1999.

[487] CAC/GL/26-1997, adopted by the CAC in its 22nd Session in 1997.

[488] ALINORM 03/03A, Appendix II, ¶¶ 8–16, adopted by the CAC in its 25th session in 2003.

[489] *See infra* Part II(G)(1)(i).

[490] These guidelines were adopted at the 71st General Session of the OIE, which took place in Paris, France, on May 18–23, 2003.

[491] This occurred at the 5th Session of the Interim Commission on Phytosanitary Measures, held in Rome, Italy, on April 7–11, 2003.

Committee.[492] The SPS Committee held informal and special meetings on equivalence and also addressed the issue in its regular meetings.[493] The result of these discussions[494] was the adoption in November 2001 of the Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter the Equivalence Decision)[495] by the SPS Committee.[496]

The Equivalence Decision[497] sets out some guidelines for any Member who requests the recognition of equivalence of their SPS measures and for the importing Member who is the addressee of such a request. In particular, the importing Member should, on request, supply information regarding the aim and rationale of its SPS measure, clearly identify the risks it addresses and indicate its chosen appropriate level of protection. The explanation should be accompanied by a copy of the underlying risk assessment for the measure or a technical justification based on a relevant international standard, guideline or recommendation. The importing Member must respond in a timely manner to the request for recognition of equivalence, normally within six months. The exporting Member must provide science-based and technical information to show that its measure achieves the level of protection chosen by the importing Member, and provide reasonable access for testing and inspection. The importing Member should evaluate the scientific and technical information with a view to determining if the SPS measure of the exporting Member achieves its level of protection and must give full consideration to requests for technical assistance for the implementation of Article 4.[498] The procedure for determining equivalence must be accelerated for products historically imported from the exporting Member. The consideration of equivalence may not be a reason to disrupt or suspend

[492] The General Council requested the SPS Committee "to examine the concerns of developing countries regarding the equivalence of SPS measures and to come up with concrete options as to how to deal with them." *See* General Council, *Minutes of Meeting: Special Session on Implementation*, WT/GC/M/59, October 18, 2000, ¶ 12.

[493] The informal meetings on equivalence were held on November 7, 2000, March 13, 2001 and July 9, 2001. The formal meetings where equivalence was considered were those of November 8–9, 2000 and July 10–11, 2001. In addition, two Special Meetings on equivalence were held on September 18–19, and October 24, 2001.

[494] The discussions on equivalence are summarized in Committee on Sanitary and Phytosanitary Measures, *Equivalence: Consideration of Article 4 of the SPS Agreement: Summary of Informal Discussions on Equivalence. Second Report by the Chairman,* G/L/445, March 21, 2001, ¶ 7.

[495] Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures,* G/SPS/19, October 24, 2001.

[496] The Ministerial Conference at Doha took note of this Decision. Ministerial Conference, *Implementation-Related Issues and Concerns, Decision of 14 November 2001,* WT/MIN(01)/17, November 20, 2001, ¶ 3.3.

[497] The legal status of the Equivalence Decision brings up interesting questions. It was adopted under the authority of the SPS Committee to carry out the functions necessary to implement and further the objectives of the SPS Agreement under Article 12.1 SPS. However, the question arises whether this decision can be enforced in dispute settlement, since it is not a "covered agreement" for purposes of the DSU, and only claims pursuant to a "covered agreement" fall within the jurisdiction of panels or the Appellate Body. *See* Articles 1.1, 3.1 and 3.2 DSU. The Equivalence Decision cannot be the legal basis for a complaint of violation before panels or the Appellate Body. However, this does not mean that the Equivalence Decision could not be considered in the interpretation of Article 4 of the SPS Agreement. Arguably, it could constitute a subsequent agreement between the parties regarding the interpretation of the SPS Agreement and should thus be considered together with the context for interpreting the agreement in terms of Article 31.3(a) of the Vienna Convention on the Law of Treaties, which reflects customary international law with regard to treaty interpretation.

[498] This technical assistance may be in the form of help in identifying and implementing equivalent measures, otherwise enhancing market access opportunities, or the development and provision of science-based information to support the recognition of equivalence requests.

on-going imports of the relevant product from the exporting Member. Members must actively participate in the work of the international standard-setting organizations on equivalence and are encouraged to notify bilateral equivalence agreements to the SPS Committee.

The Equivalence Decision also creates obligations for the SPS Committee. It must revise its notification procedures to provide for the notification of equivalence agreements[499] and must reinforce the obligation of national Enquiry Points to provide information in this regard. Further, it must formally encourage the international standard-setting organizations to develop guidelines on equivalence. It must also develop a program to further the implementation of Article 4, with particular regard for the problems encountered by developing countries.

At its meeting of March 19–21, 2002, the SPS Committee adopted a program for further work on equivalence,[500] setting out the main issues for discussion in 2002 and 2003. The work program included discussions regarding the clarification of the following paragraphs of the Equivalence Decision: paragraph 5 (regarding accelerated steps for determining equivalence for products historically imported from the exporting Member); paragraph 6 (with respect to the relationship between current imports and potential compliance problems) and paragraph 7 (regarding the examination of scientific and technical information to determine equivalence of SPS measures). These discussions have taken place in steps, culminating in the adoption of clarifying texts.[501]

The SPS Committee completed the work programme on equivalence in March 2004. However, it agreed to keep equivalence as a standing item on the agenda of its meetings. A second, revised, version of the Equivalence Decision was adopted in 2004, providing updated information on the actions that have been undertaken pursuant to the Decision.[502]

2. Adaptation to Regional Conditions (Article 6)

The prevalence of pests and diseases is not determined by national boundaries, and may differ between various regions within a country. This may be the case either due to variations in climatic, environmental or geographic conditions within a country, or due to the efforts of the regulatory authorities to eradicate a pest or disease from specific areas. In practice, however, it is common to ban products from an entire country where it has been established that a pest or disease of significance for the importing country occurs, even if its prevalence is limited to certain regions.[503] If importing countries were instead to adapt their SPS measures to the conditions prevailing in the region of origin of the product,

[499] As mentioned above, the SPS Committee has since adopted a notification procedure for equivalence agreements or determinations. Committee on Sanitary and Phytosanitary Measures, *Notification of Determination of the Recognition of Equivalence of Sanitary or Phytosanitary Measures, Decision by the Committee. Addendum,* G/SPS/7/Rev.2/Add.1, July 25, 2002.

[500] Committee on Sanitary and Phytosanitary Measures, *Equivalence—Programme for Further Work, Decision by the Committee,* G/SPS/20. March 21, 2002.

[501] Clarifications to ¶¶ 5 and 6 of the Equivalence Decision were adopted by the SPS Committee at its meeting of November 7–8, 2002. These clarifications are contained in G/SPS/19/Add.1. In June 2003, a clarification to ¶ 7 was adopted (contained in G/SPS/A/Add.2) and a further clarification to ¶ 5 was adopted in March 2004 (G/SPS/19/Add.2).

[502] Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Revision,* G/SPS/19/Rev.2, July 23, 2004.

[503] For example, in 1995 Ecuador banned the importation of fruit hosts of the oriental fruit fly from the United States after a few oriental fruit flies had been detected in Southern California. This example was noted in Johanson and Bryant, *supra* note 458.

this could greatly improve market access possibilities. Article 6.1 therefore requires that Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area from which the product originated and to which the product is destined. This adaptation of SPS measures to regional conditions is especially significant for large developing countries where conditions vary greatly from region to region, as the costs of eradicating a pest or disease or keeping pest- or disease-free status can be limited by focusing on specific areas.

(a) Factors to Be Taken into Account (Article 6.1). In determining what the sanitary or phytosanitary characteristics of a region are, Article 6.1 obliges Members to take into account the level of prevalence of specific pests or diseases, and the existence of eradication or control programs and guidelines developed by international organizations. This is not an exhaustive list of factors.

It is significant that international guidelines are mentioned as a factor that must be considered. The OIE has specific procedures in place pursuant to which, after an investigation and evaluation of the evidence, it officially recognizes the disease-free status of a country or region with regard to foot-and-mouth disease,[504] rinderpest and contagious bovine pleuropneumonia.[505] The Director General publishes a list of countries that meet the requirements for disease free status. With regard to these and other diseases the OIE lays down guidelines according to which a country can declare itself, or a *zone* within the country, free of a particular disease. To do so, the country must provide epidemiological information that conforms to the standards laid down in the *Animal Health Code,* to the importing country in support of its declaration. The IPPC has also laid down guidelines for the establishment of pest-free status[506] and for the determination of pest status in an area.[507] Further, the IPPC has created guidelines for the establishment of pest-free production sites and areas of production.[508] All these guidelines should facilitate the implementation of Article 6, as they clarify what is meant by a pest- or disease-free country or region and how this can be established.

However, concerns have been raised that even the official recognition of a Member as disease-free by the OIE is in practice not accepted by other Members as proof of disease-free status and the exporting Member is required to supply anew all the evidence it has in support of its claim of disease-free status to the importing country.[509] This situation seems to be contrary to the aim of Article 6.

(b) Recognition of Pest- or Disease-free Areas or Areas of Low Pest or Disease Prevalence (Article 6.2). Annex A, paragraph 6 defines a pest- or disease-free area as an area which

[504] OIE International Committee, *Establishment of a List of Foot and Mouth Disease (FMD) Free Countries Where Vaccination is not Practiced*, Resolution XI and *Procedure for the Recognition of the Foot and Mouth Disease Status of Member Countries*, Resolution XII, 63rd General Session, (1995)

[505] A specific procedure for recognition of disease-free status was created for rinderpest and contagious bovine pleuropneumonia and will soon also be created for BSE. It should be noted that with regard to rinderpest, only whole countries and not regions can be officially recognised as rinderpest-free by the OIE.

[506] International Plant Protection Convention, *Requirements for the Establishment of Pest Free Areas*, ISPM 4, FAO (1996).

[507] International Plant Protection Convention, *Determination of Pest Status in an Area*, ISPM 8, FAO (1998).

[508] International Plant Protection Convention, *Requirements for the Establishment of Pest Free Places of Production and Pest Free Production Sites*, ISPM 10, FAO (1999).

[509] Committee on Sanitary and Phytosanitary Measures, *Articles 6(2), 6(3) and Annex A(3)(B): Recognition of the Concept of Pest- or Disease-Free Areas as an International Standard, Guideline or Recommendation: Submission by South Africa,* G/SPS/GEN/139, November 2, 1999.

can be all or part of a country or of several countries, as identified by the competent authorities, in which a pest or disease does not occur. This area may adjoin an area where the pest or disease does occur, but is subject to regional control measures such as protection, surveillance or buffer zones that confine or eradicate the pest or disease. An area of low pest- or disease prevalence is defined as an area, which can be all or part of a country or of several countries, as identified by the competent authorities, in which a pest or disease occurs at low levels and is subject to effective surveillance, control or eradication measures.

Article 6.2 specifically creates the obligation on Members to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. These areas shall be determined with regard to factors such as geography, ecosystems, epidemiological surveillance and the effectiveness of SPS controls.

(c) Obligations on Exporting Members (Article 6.3). In terms of Article 6.3, an exporting Member that claims that regions within its territory are pest- or disease-free or have low pest or disease prevalence must provide the necessary evidence to objectively demonstrate this fact to the importing Member. For this purpose, it must give the importing Member reasonable access for inspection, testing and other relevant procedures.

Once again, it can be argued that the official recognition of the pest-free status of a country by the OIE and the publication of this status in the official Bulletin of the OIE should be accepted as constituting the "necessary evidence" for an objective demonstration of disease-free status. Members that refuse to accept such evidence could therefore be challenged under Article 6.

(d) Ongoing Work on Regionalization. Several Members, particularly developing countries, have raised concerns that the full benefits of regionalization, as provided for in Article 6, are not being reaped due to problems with the implementation of this provision. These Members have emphasized the importance of regionalization in reducing barriers to trade. As a result, the SPS Committee is currently conducting work in this area. Informal meetings of the SPS Committee have been held, dedicated to the regionalization issue, where the submissions of Members have been discussed,[510] and representatives of the OIE and IPPC have made presentations.[511] At these meetings, Members have stressed the crucial role of the international organizations in creating specific standards in this area, in order to facilitate the recognition of pest- and disease-free areas and areas of low pest and disease prevalence. Chile has submitted a proposal, later revised, regarding the

[510] Submissions were made by Mexico, Argentina, Chile and Peru (G/SPS/GEN/388, G/SPS/GEN/440, G/SPS/GEN/417, G/SPS/GEN/418, G/SPS/GEN/445, G/SPS/W/129, G/SPS/W/140, G/SPS/GEN/381, G/SPS/GEN/433), followed later by other Members.

[511] The OIE representative indicated that in May 2004, the OIE would consider for adoption simplified definitions and procedures for regionalization, which would provide Members with recommendations on regionalization for a broad range of diseases of terrestrial animals. Similar work would be undertaken with regard to aquatic animals but was delayed due to the complexity of the issue. The concept of regionalization is part of existing OIE recommendations for how countries could achieve, maintain, and regain pest-free status for most major diseases. The IPPC representative described the ongoing efforts to develop standards related to the designation of pest-free areas and areas of low pest prevalence. The relevant existing standards are ISPM 4 (containing detailed requirements for the establishment of pest-free areas) and ISPM 10 (containing information on pest-free areas of production) and the draft standard on requirements for the establishment, maintenance and verification of areas of low pest prevalence. However, there is as yet no IPPC procedure for officially recognizing pest-free areas. *See* Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 17–18 March 2004, Note by the Secretariat*, G/SPS/R/33, May 7, 2004, ¶¶ 109–110.

adoption of procedural guidelines for the implementation of regionalization measures by the SPS Committee.[512] This proposal has been supported by several Members, who suggest that the Committee address the regionalization issue in a similar way to the work it has done on equivalence and transparency.[513] Although the SPS Committee agreed that further work on regionalization is necessary, there was no consensus on whether the Committee should develop guidelines and procedures. The Chairman thus proposed that work continue in informal mode on this issue.

III. Institutional and Procedural Provisions of the SPS Agreement

The SPS Agreement contains several provisions dealing with institutional or procedural matters. Some of these provisions impose obligations of an institutional or procedural nature on Members, for example those requiring Members to follow certain procedures and set up certain institutions with respect to notification and transparency and those disciplining Members' use of control, inspection and approval procedures, in order to minimize their trade effects. Other provisions deal, instead, with the institutions and procedures necessary for the smooth and effective implementation of the SPS Agreement. Both these categories of institutional and procedural provisions have an important impact on the effectiveness of the SPS Agreement in achieving its goals, and will be discussed in detail below.

A. Transparency (Articles 5.8 and 7, and Annex B)

An important hurdle faced by exporters of food and agricultural products is a lack of transparency regarding SPS measures with which they must comply. SPS measures are often complex and subject to change, as a result of which exporters have no certainty that their products will have access to the markets in the country of destination. Obtaining the necessary information regarding the SPS measures with which they must comply is often a costly and burdensome process for exporters. In addition, the lack of information regarding SPS measures is problematic for Members whose exporters are faced with SPS barriers to trade, as they need to obtain full information about these measures in order to identify whether they are legitimate measures or whether they could be challenged under the SPS Agreement.

For these reasons, the transparency and notification obligations in the SPS Agreement are crucial in facilitating market access for exports since the cost and difficulty of obtaining information on their trading partners' SPS measures are thereby greatly reduced. In addition, the transparency obligations make it possible for Members to become acquainted with proposed SPS measures before they come into force, enabling them to raise their concerns regarding these measures at an early enough stage to influence the final measure adopted.

1. Scope of Application of Notification Obligation

It is useful to start by identifying when the notification obligation applies. Article 7 of the SPS Agreement obliges Members to notify changes in their SPS measures and to provide

[512] Committee on Sanitary and Phytosanitary Measures, *Draft Decision on the Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Proposal by Chile, Revision,* G/SPS/W/140/Rev.1, October 30, 2003.

[513] Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 17–18 March 2004, Note by the Secretariat*, G/SPS/R/33, May 7, 2004, ¶¶ 115.

information on their SPS measures in accordance with Annex B. In terms of Annex B.1, Members must publish all adopted "SPS regulations" in a way that enables all interested Members to become acquainted with them. A footnote to this paragraph defines "SPS regulations" as SPS measures such as laws, decrees or ordinances of general application. The Appellate Body in *Japan—Agricultural Products* noted with regard to this definition:

> We consider that the list of instruments contained in the footnote to paragraph 1 of Annex B is, as is indicated by the words "such as", not exhaustive in nature. The scope of application of the publication requirement is not limited to "laws, decrees or ordinances", but also includes, in our opinion, other instruments which are applicable generally and are similar in character to the instruments explicitly referred to in the illustrative list of the footnote to paragraph 1 of Annex B.
>
> The object and purpose of paragraph 1 of Annex B is "to enable interested Members to become acquainted with" the sanitary and phytosanitary regulations adopted or maintained by other Members and thus to enhance transparency regarding these measures. In our opinion, the scope of application of the publication requirement of paragraph 1 of Annex B should be interpreted in the light of the object and purpose of this provision.[514]

Further, Annex B.5 provides that Members must notify proposed new SPS measures in cases where no international standard, guideline or recommendation exists or where the Member's SPS measure is "not substantially the same" as the international standard, and the measure may have a significant effect on trade. The question arises whether a measure that is substantially the same as an international standard for purposes of Annex B.5 and thus does not have to be notified is a measure "based on" an international standard under Article 3.1, or a measure that "conforms to" an international standard under Article 3.2. It would appear that a measure "not substantially the same" as an international standard is a measure that does not "conform to" the international standard under Article 3.2, although the reason for the difference in terminology is not clear. This view is supported by the fact that measures which do "conform to" international standards benefit from a presumption of consistency with the SPS Agreement and thus also with its Annexes, including the transparency provisions of Annex B, whereas measures that are simply "based on" international standards do not. Therefore, if a measure is merely "based on" an international standard, it seems likely that it will be regarded as "not substantially the same" as the international standard for purposes of Annex B.5 and will have to be notified.

In addition, the notification procedures of Annex B.5 apply only if the relevant SPS measure "may have a significant effect on trade of other Members". The Secretariat has established non-binding guidelines for what is meant by a "significant effect on trade".[515] According to these guidelines, this term may refer to the import-enhancing or import-reducing effect on trade in a specific product, group of products or products in general of a single SPS measure or various SPS measures in combination, between two or more Members. The guidelines further set out various factors that Members should take into account when determining if there is a significant effect on trade.[516]

[514] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶¶ 105–106.

[515] Committee on Sanitary and Phytosanitary Measures, *Recommended Notification Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7),* G/SPS/7/Rev.2, April 2, 2002, ¶ 6.

[516] These include the value or importance of the imports for the importing and/or exporting Members concerned, the potential development of these imports and difficulties for producers, particularly in developing countries, to comply with the proposed SPS measure.

In *Japan—Apples,* the issue arose whether certain changes in Japan's measure "may have a significant effect on trade of other Members" and should thus have been notified. The Panel referred to the guidelines on this concept adopted by the SPS Committee and held that:

> . . . the most important factor in this regard is whether the change affects the conditions for market access for the product concerned, that is, would the exported product (apple fruit from the United States in this case) still be permitted to enter Japan if they complied with the prescription contained in the previous regulations. If this is not the case, then we must consider whether the change could be considered to potentially have a *significant* effect on trade of other Members. In this regard it would be relevant to consider whether the change has resulted in any increase in production, packaging and sales costs, such as more onerous treatment requirements or more time-consuming administrative formalities.[517]

The crux of the issue is therefore whether the changes have an actual or potential effect on the conditions for market access. If so, the changes must be notified.

When all the conditions of Annex B.5 are met, Members have to comply with the notification procedure set out in the rest of the Annex.

2. Notification Procedure

Annex B.5–10 sets out the notification procedure to be followed. In terms of this procedure, the proposal for a new measure must be published early enough to allow other Members to become acquainted with the proposal. In addition, the products to be covered and the objective and rationale for the proposed measure must be notified to other Members through the WTO Secretariat,[518] allowing a reasonable time for comments from other Members. These comments must be discussed upon request and must be taken into account by the Member imposing the SPS measure. In urgent cases, Members may follow a shorter procedure under Annex B.6. Members are not obliged to disclose confidential information that could hamper the enforcement of their SPS measures or prejudice the legitimate interests of enterprises.[519]

A special meeting of the SPS Committee on the operation of the transparency provisions of the SPS Agreement was held five years after the coming into force of the SPS Agreement.[520] The Secretariat has established guidelines on transparency, contained in the handbook *How to Apply the Transparency Provisions of the SPS Agreement*.[521] These are particularly aimed at helping developing countries comply with their transparency obligations. In addition, the Secretariat has established detailed guidelines for notifications under both the normal and the urgent procedure, including a specific format to be

[517] Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶ 8.314. After comparing the two existing measures (which predated the SPS Agreement) with the two new measures, the Panel did not consider that the changes in one measure could have a significant effect on the trade of other Members, and was unable to determine if the changes to the second measure were strictly editorial or introduced substantial changes. It therefore found that the US had failed to make a *prima facie* case of violation of Article 7 SPS.

[518] Notifications received by the Secretariat are circulated to Members as part of the official document series G/SPS/N/*.

[519] Annex B.11(b).

[520] Committee on Sanitary and Phytosanitary Measures, *Summary of the Special Meeting of the SPS Committee on the Transparency Provisions of the SPS Agreement, 9 November 1999, Note by the Secretariat,* G/SPS/R/16, January 20, 2000.

[521] Published in November 2000, available at: www.wto.org/english/tratop_e/sps_e/spshand_e.pdf. The guidelines are non-binding and are not intended as a legal interpretation of the relevant provisions of the SPS Agreement.

used when notifying new SPS measures.[522] These guidelines have since been revised.[523] The new guidelines state that where previously notified measures are changed so as to apply to new Members or new products they should be re-notified by means of the submission of a Revision. An additional sixty days are allowed for comments. The revision was originally proposed by New Zealand in response to an implementation proposal of Brazil,[524] which called for the re-notification of measures if they may have negative trade effects on trade opportunities of developing countries.[525]

Other proposals being considered for the amendment of the notification guidelines relate to the notification of special and differential treatment. These are, first, the proposal of Egypt to include a box on special and differential treatment in the notification formats, where Members should indicate *ex ante* what special treatment they are providing to affected developing countries.[526] Second, there is a Canadian proposal to oblige Members, *ex post*, to notify requests for special and differential treatment arising from their notified measures, indicating whether such treatment has been provided, giving reasons in case of a refusal to do so.[527] It is interesting to note that the Secretariat is obliged, under paragraph 9 of Annex B, to draw the attention of developing country Members to any notifications relating to products of particular interest to them. As it is difficult for the Secretariat to establish which notifications affect products significant to developing countries, it fulfils this obligation by circulating, to all Members, monthly lists of notifications.

3. Request for Reasons for SPS Measures (Article 5.8)

An additional provision in the SPS Agreement that contributes to transparency is Article 5.8. According to this provision, an exporting Member may request an importing Member to provide reasons for the latter's SPS measure where it is not based on international standards and it constrains or could potentially constrain exports. The importing Member is then obliged to provide such reasons.

This obligation is significant as it can assist a Member in establishing a *prima facie* case that another Member's SPS measure is not based on a risk assessment or sufficient scientific evidence. In *Japan—Agricultural Products*, the Appellate Body noted the

[522] Committee on Sanitary and Phytosanitary Measures, *Recommended Notification Procedures,* G/SPS/7/Rev.1, November 26, 1999.

[523] Committee on Sanitary and Phytosanitary Measures, *Recommended Notification Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7),* G/SPS/7/Rev.2, April 2, 2002. This revision was adopted at the SPS Committee meeting of meeting of March 19–21, 2002.

[524] Committee on Sanitary and Phytosanitary Measures, *Agreement on the Application of Sanitary and Phytosanitary Measures. Proposal by Brazil,* G/SPS/W/108, June 22, 2001.

[525] Brazil's proposal followed a dispute with Canada in February 2001 due to a ban by Canada of Brazilian beef imports due to BSE concerns. The ban was based on a previously notified regulation and was therefore not notified to the WTO although it was applied to Brazil for the first time. ICTSD, *SPS Committee Resolves Implementation Issue, Discusses Biotech,* 6(11) BRIDGES WEEKLY TRADE DIGEST March 26, 2002.

[526] This proposal was supported by many developing countries, who believe it would encourage developed countries to build into their measures leniency for developing countries, such as longer compliance periods. Developed countries (EC, Canada, U.S.) questioned whether this would be effective in ensuring special and differential treatment.

[527] The Egyptian proposal was carried forward to the next meeting of the SPS Committee, where Canada set out its proposal (contained in G/SPS/W/127) that the special and differential treatment provided by a Member be notified later, by means of an addendum to the original notification. After amendments to this proposal following comments by Members, the revised proposal was adopted at the meeting of March 24, 2004 (G/SPS/W/132/Rev.2) provided no objections were raised. Malaysia objected to the adoption, due to the fact that it places the onus on the developing country to raise its concerns regarding the notified measure. At the SPS Committee meeting of June 22–23, 2004, Members again failed again to reach agreement on the Canadian proposal due to opposition of Malaysia.

following with respect to the establishment of a *prima facie* case under Article 2.2:

> (. . .) The United States could have requested Japan, pursuant to Article 5.8 of the *SPS Agreement*, to provide "an explanation of the reasons" for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a strong indication that there are no such studies or reports.[528]

4. Infrastructure for Transparency

Members are further required to create the infrastructure necessary for the implementation of their notification obligations. Under Annex B.10, Members must designate a single central government authority as responsible for implementing the notification procedures in Annex B.5–8 on a national level. The Secretariat regularly updates and circulates lists of Members' National Notification Authorities.[529]

Also as part of the infrastructure necessary for transparency, the SPS Agreement obliges each Member to establish a national Enquiry Point. The Secretariat maintains an updated list of Enquiry Points, which it circulates to Members.[530] A Member's national Enquiry Point must provide answers to all reasonable questions from other Members as well as provide relevant documents regarding: any adopted or proposed SPS measures in its territory; the risk assessment basis for the measure; control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures; and the Member's participation in international or regional SPS systems as well as bilateral or multilateral agreements within the scope of the SPS Agreement. Requested copies of documents must be supplied to other Members at the same price as to nationals.

By June 18, 2004, of the then 147 WTO Members, 127 had established National Notification Authorities and 136 had established Enquiry Points.[531]

In order to address the problems that Members experience with the operation of Enquiry Points, the SPS Committee has held a special meeting on this issue in June 2003. Prior to the meeting, a questionnaire was circulated by the Secretariat on the operation of Enquiry Points and National Notification Authorities, to which eighty responses were received. At the meeting, officials from Members' Enquiry Points and National Notification Authorities came together for in-depth discussions focusing on the problems encountered with the operation of these bodies and the identification of possible solutions.[532] The Secretariat will use the information gathered to identify best practice models to help developing countries operate their Enquiry Points effectively.

B. Control, Inspection and Approval Procedures (Article 8 and Annex C)

In addition to imposing SPS standards, countries also have mechanisms in place to check compliance with these standards and to approve new products. Where these mechanisms

[528] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 100, ¶ 137.

[529] These can be found in the G/SPS/NNA/* series of official WTO documents.

[530] These can be found in the G/SPS/ENQ/* series of official WTO documents.

[531] These numbers include the 25 Member States of the European Union, together with the European Communities, in respect of which a single Notification Authority, the European Commission Directorate General for Health and Consumer Protection, is responsible for notifications. Separate Enquiry Points have been notified for the European Communities and each of its Member States. See Committee on Sanitary and Phytosanitary Measures, *Implementation of the Transparency Obligations as of 18 June 2004, Note by the Secretariat, Revision,* G/SPS/GEN/27/Rev.13, June 21, 2004.

[532] Committee on Sanitary and Phytosanitary Measures, *Special Meeting of the SPS Committee on the Operation of Enquiry Points held on 31 October 2003,* G/SPS/R/32, February 6, 2004.

are complex and lengthy, they may effectively restrict market access. They may also be duplicative of domestic conformity assessment procedures in the exporting country, unnecessarily adding to the costs of exportation. Thus the SPS Agreement establishes rules in Article 8 and Annex C to prevent Members from using technical procedures to monitor compliance with their SPS standards as a way to restrict the importation of foreign products. According to Article 8, Members must comply with Annex C as well as the other provisions of the SPS Agreement in the operation of their control, inspection and approval procedures. This includes their national systems for approval of additives and establishment of tolerances for contaminants in food, beverages and feedstuffs.

Annex C contains the detailed rules applicable to control, inspection and approval procedures. These are mainly aimed at ensuring that the procedures are not more lengthy or burdensome than reasonable and necessary and do not discriminate between imports and like domestic products. In addition, Members may not charge fees for the control, inspection or approval procedures that are higher than the actual cost of the service. A review procedure must be in place for complaints regarding the operation of the control, inspection or approval procedure. Where Members require approval for the use of additives or have a system in place for the determination of tolerances for contaminants, they are encouraged to use the relevant international standard as the basis for allowing importation until a final determination is made.[533] In addition, exporting Members are obliged to facilitate the work of other Members' controlling authorities on their territories where the SPS measure relates to control at the level of production.

The relevance of these disciplines on control, inspection and approval procedures can be illustrated by the following example. In a meeting of the SPS Committee in November 2000, Thailand raised its concerns in respect of Australia's pre-shipment inspection requirements for durian fruit. Australia required that for shipments of less than 1000 fruits, samples of 450 fruits be randomly selected and cut open to check for the presence of seed borers and for shipments of more than 1000 fruits, samples of 600 fruits be thus cut open. The result was that, in many cases, for each fruit to be exported to Australia, a pre-shipment volume of two fruits was necessary, thus doubling the cost of durian in each shipment. Due to the existence of disciplines on control, inspection and approval procedures in the SPS Agreement, Thailand was able to raise its concerns before the SPS Committee regarding the compatibility of this measure with the provision in Annex C.1(e) which stipulates that any requirements for control, inspection and approval of individual specimens of a product must be limited to what is reasonable and necessary.[534] In its response to Thailand's statement,[535] Australia noted that its cutting requirement was in accordance with the internationally accepted approach. However, it noted that due to Thailand's concerns, the Australian authority had amended the proposed cutting

[533] This provision takes into account the fact that it is common practice among regulatory authorities to prohibit products containing new additives or contaminants until the exporter has established the safety of the additive or the tolerance level for the contaminant to the satisfaction of the authority in the country of import. Once the additive is approved or a tolerance level established for the contaminant, the product may be imported.

[534] Committee on Sanitary and Phytosanitary Measures, *Australia's Import Restrictions on Durian: Statement by Thailand at the Meeting of 8–9 November, 2000,* G/SPS/GEN/217, November 22, 2000, ¶ 3.1.

[535] Committee on Sanitary and Phytosanitary Measures, *Australia's Import Restrictions on Durian. Response from Australia to Thailand's Statement at the Meeting of 8–9 November 2000*, G/SPS/GEN/218, November 22, 2000 ¶¶ 6–7.

requirement to allow culled fruits to be included in the samples taken from the export shipment, thus reducing its economic impact.[536]

C. The SPS Committee (Article 12)

1. Composition

A Committee on Sanitary and Phytosanitary Measures (the "SPS Committee") is established under Article 12.1 of the SPS Agreement. The SPS Committee consists of representatives of all WTO Members[537] and takes its decisions by consensus. Observer status[538] is granted to governments that have observer status in higher WTO bodies as well as representatives from certain international intergovernmental organizations with a mandate in this area. Observers may be invited to speak at meetings and table papers, but do not participate in decision-making in the Committee. The SPS Committee is serviced by the Agriculture and Commodities Division of the WTO Secretariat. The SPS Committee usually holds three meetings per year, and may convene informal meetings as necessary.

2. Functions

In terms of Article 12.1, the SPS Committee has as its goal to provide a regular forum for consultations and further the implementation of the SPS Agreement and the achievement of its aims, in particular the harmonization of SPS measures.[539] The specific tasks of the SPS Committee in the fulfillment of these objectives are elaborated in the other paragraphs of Article 12.

(a) Forum for Consultations (Article 12.1). Article 12.2 mandates the SPS Committee to encourage and facilitate consultations between Members on specific SPS issues. Coupled with the transparency obligations, this provision may go a long way towards helping countries to solve SPS conflicts in a low-cost manner, without resort to dispute settlement. Discussions on notified changes in SPS legislation take place, with concerns being raised by exporting Members and clarifications given by the Member imposing the measure.[540] This could lead to the revision of the notified measure or further bilateral consultations between the Members involved. In this way, disputes can be resolved without recourse to the expensive and time-consuming process of formal dispute settlement. In a

[536] However, at a recent meeting of the SPS Committee in June 2002, Thailand reiterated its concern regarding the cutting requirement and the excessive sample size. Australia indicated that it was willing to consider alternatives to destructive sampling if their efficacy was shown. Joint trials indicated that x-ray technology was promising and Australia agreed to keep the SPS Committee informed in this regard. *See* Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 25–26 June 2002, Note by the Secretariat*, G/SPS/R/27, August 2, 2002, ¶¶ 133–134.

[537] Members may send representatives of their choice, and normally send officials from their food safety authorities or veterinary or plant health officials.

[538] Criteria used in decisions to grant observer status are: the mandate, scope and area of work of the applicant organization and reciprocity with regard to the grant of observer status to the WTO. Committee on Sanitary and Phytosanitary Measures, *Criteria for Observer Status,* G/SPS/GEN/229, February 23, 2001.

[539] In terms of this power, the SPS Committee adopted the Equivalence Decision in 2001, in order to facilitate the implementation of Article 4 of the SPS Agreement. This decision is further discussed *supra* Part II(G)(1)(i).

[540] The Secretariat provides a summary of all specific trade-related concerns raised in the SPS Committee, together with an indication of the resolution of the issue, if notified. Committee on Sanitary and Phytosanitary Measures, *Specific Trade Concerns: Note by the Secretariat. Revision,* G/SPS/GEN/204/Rev.2, February 15, 2002.

recent study[541] it was shown that approximately 120 SPS issues have been raised in the SPS Committee, almost half involving complaints by developing countries or transition economies.[542]

(b) Monitoring and Encouraging the Process of Harmonization (Article 12.2–12.6). Article 12 of the SPS Agreement allocates various tasks to the SPS Committee regarding the process of international harmonization of SPS standards. It must encourage the use of international standards, guidelines and recommendations by all Members, and sponsor technical consultation and study in this regard.[543] It must also maintain close contact with the three main international standard-setting organizations in order to obtain the best possible scientific advice for the administration of the SPS Agreement and avoid duplication of effort.[544] Further, the SPS Committee must develop a procedure to monitor the process of international harmonization and the use of international standards.[545] A provisional procedure was established[546] and extended three times.[547] In conformity with this procedure,[548] the SPS Committee draws up annual reports based on information and comments from Members and international standard-setting organizations regarding the use of existing international standards, the need for new international standards and work on the adoption of such standards. Further, to avoid duplication, Article 12.5 allows the SPS Committee to use information gathered by the international organizations. Finally, on the initiative of a Member the Committee may, in terms of Article 12.6, invite the international organizations to examine specific matters with regard to a particular standard, guideline or recommendation, including the basis for explanations of non-use of the standard.

(c) Periodic Review of the Operation and Implementation of the SPS Agreement (Article 12.7). The SPS Committee is obliged by Article 12.7 to review the operation and implementation of the SPS Agreement three years after its entry into force, and thereafter as the need arises. Where appropriate, the SPS Committee may make proposals to the Council for Trade in Goods regarding amendments to the SPS Agreement. The SPS Committee established a procedure for this review[549] and the first review was conducted in 1998, resulting in a report of the SPS Committee.[550] However, no amendments were

[541] Micheal Friis Jensen, *Reviewing The SPS Agreement: A Developing Country Perspective,* Working Paper 02.3, Centre for Development Research (2002), at 18, table 1.

[542] It is however, significant that almost all developing country complaints come from the developing countries that are part of the Cairns group of agricultural exporting Members and from India and Mexico, while African and least-developed country complaints are almost non-existent. *Id*.

[543] Article 12.2 of the SPS Agreement.

[544] Article 12.3 of the SPS Agreement.

[545] Article 12.4 of the SPS Agreement.

[546] Committee on Sanitary and Phytosanitary Measures, *Procedure to Monitor the Process of International Harmonization: Decision of the Committee,* G/SPS/11, October 22, 1997.

[547] Committee on Sanitary and Phytosanitary Measures, *Decision to Extend the Provisional Procedure to Monitor the Process of International Harmonization: Decision of the Committee of 8 July, 1999,* G/SPS/14, July 12, 1999; Committee on Sanitary and Phytosanitary Measures, *Decision to Extend the Provisional Procedure to Monitor the Process of International Harmonization,* G/SPS/17, July 19, 2001.

[548] *Procedure to Monitor the Process of International Harmonization, supra* note 546, ¶ 10.

[549] Committee on Sanitary and Phytosanitary Measures, *Procedure to Review the Operation and Implementation of the Agreement,* G/SPS/10, October 21, 1997.

[550] Committee on Sanitary and Phytosanitary Measures, *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures: Report of the Committee,* G/SPS/12, March 11, 1999.

proposed as a result of this review. The SPS Committee noted that the review had not been comprehensive and recognized that Members could raise any issue for the consideration of the Committee at any time.

The Ministerial Decision on Implementation adopted in Doha, instructs the SPS Committee to review the operation and implementation of the SPS Agreement at least once every four years.[551]

The WTO Secretariat has noted that, as a result, the report of the next review should be prepared for the Sixth Session of the Ministerial Conference. It has therefore proposed a procedure for the review process, in consultation with the Chairman of the SPS Committee. This procedure consists of a series of informal meetings, back-to-back with the regular SPS Committee meetings, where issues identified by Members will be discussed. Members will be invited to submit papers in advance of the meetings and the Chairman will report on the results of the meetings to the each regular SPS Committee meeting.[552]

3. Overview of Work (1995–2002)

Each year, the SPS Committee holds an average of three regular committee meetings. In addition, it holds informal meetings to discuss specific issues as the need arises. At each regular meeting, specific trade concerns raised by Members are discussed, often in response to notifications received and circulated by the SPS Committee under the transparency provisions of Article 7 and Annex B.[553] In addition, there are standing items on the agenda of SPS Committee meetings relating to technical assistance and special and differential treatment for developing countries and the use of international standards, and Members are encouraged to raise concerns they may have in these areas and report on progress made.

Since the entry into force of the SPS Agreement through October 1, 2003, the SPS Committee received and circulated over 3,600 notifications of SPS measures.[554] In addition, it adopted non-binding guidelines for the implementation of Article 5.5.[555] The Committee adopted and revised recommended procedures for notification,[556] including notification of equivalence agreements,[557] as well as a procedure for the monitoring of harmonization. It has drawn up six annual reports on the monitoring of harmonization. The SPS Committee maintains close working relationships with the CAC, OIE and IPPC and receives regular updates of their activities. The SPS Committee also conducts informal consultations with various international intergovernmental organizations on the recognition of their observer status at meetings of the SPS Committee. Regular observer status has been granted to the CAC, OIE, IPPC, Food and Agriculture Organization, World Health Organization, International Organization for Standardization, International Trade

[551] Ministerial Conference, *Implementation-Related Issues and Concerns, Decision of 14 November 2001,* WT/MIN(01)/17, November 20, 2001 ¶ 3.4.

[552] Committee on Sanitary and Phytosanitary Measures, *Proposed Process for the Review of the Operation and Implementation of the Agreement, Note by the Secretariat,* G/SPS/W/147, June 10, 2004.

[553] The specific trade concerns raised are summarized in revisions of document G/SPS/GEN/204 (in revision 4 at the time of writing).

[554] World Trade Organization, *Report (2003) on the Activities of the Committee on Sanitary and Phytosanitary Measures,* G/L/661, November 18, 2003, ¶ 6. This report also notes that in the period January 1, 2003 to October 1, 2003, over 650 notifications were received.

[555] *See supra* note 366.

[556] *See supra* note 522.

[557] Committee on Sanitary and Phytosanitary Measures, *Notification of Determination of the Recognition of Equivalence of Sanitary or Phytosanitary Measures, Decision by the Committee. Addendum,* G/SPS/7/Rev.2/Add.1, July 25, 2002.

Center, United Nations Conference on Trade And Development, World Bank, International Monetary Fund and observer status on an *ad hoc* meeting-by-meeting basis to the group of African, Caribbean and Pacific countries, European Free Trade Association, Inter-American Institute for Cooperation on Agriculture, Organization for Economic Cooperation and Development, Regional International Agricultural Health Organization, and Latin American Economic System. Existing requests for observer status from the International Organization for Vine and Wine, the Asia Pacific Coconut Community, and the Convention on Biodiversity and its Cartagena Protocol on Biosafety[558] continued to be considered.

In 2001, the Committee adopted the Equivalence Decision in terms of its powers under Article 12.1 and has adopted a future work program on the subject of equivalence. In terms of this work program, the Committee, as discussed above, has adopted clarifications to the Equivalence Decision.[559] As mentioned above, work regarding regionalization under Article 6 of the SPS Agreement is currently ongoing. The SPS Committee also circulated a questionnaire in July 1999 on the subject of technical assistance, to gather information on technical assistance that Members have asked for, received and provided in relation to the implementation of the SPS Agreement.[560] In October 2001, a second questionnaire was circulated to identify the technical assistance needs of developing countries.[561] The SPS Committee has also considered various proposals regarding special and differential treatment which the General Council referred to it in May 2003, and has established a work plan for the consideration of these proposals. It has reported to the General Council on the progress made in this regard.[562]

At its meetings of November 7–8, 2002, and October 29–30, 2003, the SPS Committee conducted a transitional review, under paragraph 18 of the Protocol of Accession of the Peoples Republic of China. Under this review, Members put questions in writing to China regarding its implementation of the SPS Agreement. China responded both to these questions and to others raised in the meeting.[563]

D. Dispute Settlement (Article 11)

In order to enforce their rights under the SPS Agreement, Article 11.1 provides that Members can have recourse to the dispute settlement system of the WTO, as embodied in Articles XXII and XXIII of GATT 1994 and elaborated in the Dispute Settlement Understanding (the "DSU"), except as otherwise specifically provided in the SPS Agreement. Thus, the DSU applies fully and unconditionally to disputes under the SPS Agreement.[564] In addition, Article 11.3 provides that nothing in the SPS Agreement impairs Members' rights under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations

[558] World Trade Organization, *Report (2003) on the Activities of the Committee on Sanitary and Phytosanitary Measures,* G/L/661, November 18, 2003, ¶ 11.

[559] *See supra* note 501.

[560] Committee on Sanitary and Phytosanitary Measures, *Questionnaire on Technical Assistance: Note by the Secretariat,* G/SPS/W/101, July 23, 1999.

[561] Committee on Sanitary and Phytosanitary Measures, *Questionnaire on Technical Assistance,* G/SPS/W/113, October 15, 2001.

[562] These reports were circulated as G/SPS/27 and G/SPS/30.

[563] World Trade Organization, *Report (2003) on the Activities of the Committee on Sanitary and Phytosanitary Measures,* G/L/661, November 18, 2003, ¶ 10.

[564] The dispute settlement system is discussed in detail in Chapters 25 *et seq.* of this book. Here attention will only be given to specific aspects applicable to SPS disputes.

or established under any international agreement. In addition to the normal rules of the DSU, the SPS Agreement contains a special provision with regard to dispute settlement, dealing with the authority of panels to seek expert advice.[565]

Three issues regarding the settlement of disputes arising under the SPS Agreement deserve particular attention: the burden of proof; the standard of review; and the use of scientific experts and expert review groups.

1. Special Dispute Settlement Rules and Procedures

(a) Burden of Proof. Due to the complexity of the facts and scientific evidence in SPS disputes, the question of which party bears the evidentiary burden is particularly significant in cases involving health measures. In *EC—Hormones* the Appellate Body emphasized the importance of this issue, in the light of the "multiple and complex issues of fact" that may arise under the SPS Agreement.[566]

The Appellate Body first set out the burden of proof rules generally applicable in WTO disputes in *U.S.—Wool Shirts and Blouses*.[567] There it recognized that various international tribunals and most national jurisdictions apply the rule that the party that asserts a fact, whether plaintiff or respondent, must prove it. Once a party has adduced sufficient evidence to create a presumption that what is claimed is true, in other words has established a *prima facie* case, the evidentiary burden shifts to the other party who must rebut the presumption or lose the case. In *EC—Hormones* the Appellate Body held that this rule applies equally to disputes under the SPS Agreement. It rejected the Panel's finding that the SPS Agreement allocates the burden of proof to the Member imposing the SPS measure.[568]

The question of the burden of proof under the SPS Agreement arose again in *Japan—Agricultural Products*.[569] The Panel found that Japan's varietal testing requirement was maintained without "sufficient scientific evidence" contrary to Article 2.2, with regard to apples, cherries, nectarines and walnuts.[570] However, it did not consider that there was sufficient evidence before it to extend this finding to apricots, pears, plums and quince. This was due to the fact that the parties had not submitted any evidence for the latter products. The Panel had also asked the experts advising it whether their statements

[565] Article 11.2 of the SPS Agreement, discussed *infra* Part III(D)(b). Article 1.2 of the DSU provides that its rules and procedures apply subject to such additional rules and procedures on dispute settlement as are identified in Annex 2 to the DSU. Article 11.2 of the SPS Agreement is one of the provisions identified in Annex 2 of the DSU.

[566] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 97.

[567] Report of the Appellate Body, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (1997), 14–16.

[568] In *EC—Hormones*, *supra* note 70, ¶¶ 102–105, the Appellate Body dealt with the three grounds for the Panel's finding in turn. First, it rejected the Panel's conclusion that the fact that many SPS provisions are worded "Members shall ensure that . . . " has any logical connection to the allocation of the evidentiary burden. Second, contrary to the Panel's ruling, it held that Article 5.8 (pursuant to which a Member may ask for an explanation of an SPS measure from another Member and the latter is obliged to comply with the request) does not address burden of proof issues. Instead Article 5.8 is most likely to be used in pre-dispute situations in order to enable a Member to acquire information that it could later use to meet its burden of proof. Third, the Appellate Body dismissed as a *non-sequitur* the reverse inference made by the Panel from Article 3.2, that if a measure does not conform to international standards, the Member imposing the measure bears the burden of proving its consistency with the SPS Agreement in case of a challenge.

[569] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶¶ 132–139.

[570] Report of WTO the Panel, *Japan—Measures Affecting Agricultural Products*, *supra* note 57, ¶ 8.45.

with regard to the former group of products applied to the latter as well. The experts affirmed this but did not elaborate. Thus the Panel found that the United States had not adduced sufficient evidence to raise a presumption (i.e. make a *prima facie* case) that the measure was maintained without sufficient scientific evidence with regard to apricots, pears, plums and quince.

The United States appealed this ruling, arguing that the Panel's interpretation imposed on it an impossible burden of proof, requiring it to prove a negative (namely that there were no relevant studies or reports supporting Japan's measure). The United States contended that the Panel's finding amounted to holding that because there was insufficient evidence of the existence or relevance of varietal differences, the Panel could not find that there was insufficient evidence to support the measure.[571] The Appellate Body rejected this argument, finding that the United States was not being required to prove a negative, but merely to raise a presumption that there were no relevant studies or reports. According to the Appellate Body, this is not an impossible burden. The United States could have requested Japan, under Article 5.8, to provide an "explanation of the reasons" for its measure as it related to the products at issue. The failure of Japan to do so would have amounted to a strong indication that such studies or reports did not exist. Further, the United States could have questioned the Panel's experts or submitted an opinion of its own experts on the question whether such reports exist. Instead, the United States submitted no evidence on the point. Therefore, the Appellate Body agreed with the Panel's refusal to find a violation of Article 2.2 with regard to the products at issue.[572]

This decision is significant as it establishes that it is the challenging Member's duty to make a *prima facie* case for the absence of scientific evidence in support of an SPS measure. Only once this has occurred does the defending Member have to submit evidence to rebut this presumption. A mere contention that scientific evidence is lacking and an omission to submit any evidence are insufficient to create a duty of rebuttal. It would be too onerous to require Members to defend their SPS measures on the basis of scientific evidence without any indication that the measures violate the SPS Agreement.

The issue of burden of proof arose again in *Japan—Apples*. In that case, the US had argued that there was insufficient scientific evidence, for purposes of Article 2.2, that mature, symptomless apples could form a transmission pathway for fire blight. To counter these arguments, Japan averred that, due to failures in export control systems, infected or immature apples could be exported, and these apples could serve as a pathway for fire blight. The US limited its arguments to the issue of mature, symptomless apples. On the basis of the scientific evidence presented to it, the Panel agreed with the US that Japan's measure, as it applied to mature, symptomless apples, was maintained without sufficient scientific evidence and concluded that it had not been established with sufficient scientific evidence that infected or immature apples could serve as a pathway for the transmission of fire blight.[573] On appeal, Japan argued that the Panel had erred in shifting the burden of proof to Japan in respect of infected or immature apples before the US had made a *prima facie* case in that regard. The Appellate Body rejected Japan's contention, holding:

[571] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 38.
[572] *Id.* ¶ 137.
[573] This was due to the fact that Japan did not present sufficient scientific evidence that the last stage of the transmission pathway of fire blight from the infected imported apple to the host plant, was likely to be completed. Report of the WTO Panel, *Japan—Measures Affecting the Importation of Apples, supra* note 57, ¶ 8.168.

> It is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof. In fact, the two principles are distinct. In the present case, the burden of demonstrating a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence, rested on the United States. Japan sought to counter the case put forward by the United States by putting arguments in respect of apples other than mature, symptomless apples being exported to Japan as a result of errors of handling or illegal actions. It was thus for Japan to substantiate those allegations; it was not for the United States to provide proof of the facts asserted by Japan. Thus, we disagree with Japan's assertion that "the shift of the burden of proof to Japan was made prematurely *before* the demonstration of a *prima facie* case by the United States." There was no "shift of the burden of proof" with respect to allegations of fact relating to apples other than mature, symptomless apples, for Japan was solely responsible for providing proof of the facts it had asserted. Moreover, it was only after the United States had established a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence, that the Panel had to turn to Japan's attempts to counter that case.[574]

This finding is useful in clarifying the issue of the burden of proof in cases where there are several hypotheses regarding the perceived risks underlying an SPS measure. It is not necessary for the complainant to address all possible hypotheses and establish that there is insufficient evidence of risk for each.[575] According to the Appellate Body in this case, the Panel had evidently found it sufficient for the US to address whether mature symptomless apples could serve as a transmission pathway for fire blight. It noted, referring to its previous finding in *US-Wool Shirts and Blouses* that "the nature and scope of evidence required to establish a *prima facie* case 'will necessarily vary from measure to measure, provision to provision, and case to case.'"[576]

Once a *prima facie* case is established, the respondent will bear the burden of proving the allegations it makes to refute the complainant's case.

Aside from the general issue of the burden of proof under the SPS Agreement, the harmonization provision contained in Article 3 presents interesting specific burden of proof issues. In *EC—Hormones* the Panel derived, from the presumption of consistency in favor of a measure that conforms to an international standard in Article 3.2 and from its finding of a rule/exception relationship between Articles 3.1 and 3.3, a burden of proof for a defending Member whose SPS measure deviates from the relevant international standard.[577] The Appellate Body rejected this finding as having no textual basis. It denied that Article 3.3 embodies an exception to the general rule contained in Article 3.1, finding that the relationship between Articles 3.1, 3.2 and 3.3 is qualitatively different from that between Articles I or III (non-discrimination obligations) and Article XX, (exceptions) of GATT 1994. Instead, it held that Article 3.1 of the SPS Agreement merely excludes from its scope situations falling under Article 3.3. Article 3.3 contains an autonomous option available to Members and it is for the challenging Member to prove the failure

[574] Report of the Appellate Body, *Japan—Measures Affecting the Importation of Apples, supra* note 112, ¶ 157 (footnotes omitted).

[575] This was argued by Japan but rejected by the Appellate Body. *Id.*, ¶ 159.

[576] Report of the Appellate Body, *Japan—Measures Affecting the Importation of Apples, supra* note 112, ¶ 160. In footnote, the Appellate Body referred to the Appellate Body Report, p. 14, DSR 1997:I, 323, at 335

[577] Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by the United States, *supra* note 53, ¶¶ 8.54 and 8.87–7; Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones),* Complaint by Canada, *supra* note 53, ¶¶ 8.57 and 8.89–8.90.

to meet conditions laid down in Article 3.3 with respect to SPS measures not based on international standards.[578] To hold otherwise would result in penalizing a Member who chooses a higher level of protection than that aimed at by the international standard, a right expressly recognized in the Preamble of the SPS Agreement.[579] The Appellate Body's ruling on the burden of proof pursuant to Article 3 is particularly important in the light of the problematic aspects, discussed elsewhere, of standard setting by international bodies.[580]

A second question raised by Article 3 is that of the consequences of the presumption of consistency with the SPS Agreement and GATT 1994, for measures that conform to the relevant international standards contained in Article 3.2. Clearly, this provision is intended to encourage Members to adopt international standards, thus resulting in increasing harmonization of SPS measures and promoting free trade. In *EC—Hormones*, the Appellate Body held this presumption to be rebuttable.[581] However, it would seem that a higher standard of proof would be required from the challenging Member due to this presumption than would be the case if the challenging Member only had to establish a *prima facie* case of inconsistency. Bearing in mind the difficulties of meeting the requirements for a risk assessment under the SPS Agreement, particularly for developing countries that often lack the necessary scientific expertise, this constitutes a considerable advantage and thus a strong incentive to adopt international standards.

(b) Consultation with Experts (Article 11.2). Disputes between WTO Members, including those under the SPS Agreement, are heard by dispute settlement panels, which are usually composed of trade diplomats or academics with an expertise in international trade law.[582] In SPS disputes, these panelists are often faced with complex scientific issues of fact. An attempt to deal with the lack of scientific expertise of panelists is reflected generally in Article 13 of the DSU, and for SPS matters more specifically in Article 11.2 of the SPS Agreement. Article 13.1 of the DSU authorizes panels to seek information and technical advice from any individual or body. Article 13.2 allows panels to seek information from any source and to consult experts or request advisory reports.[583] Article 11.2 of the SPS Agreement states that in SPS disputes involving scientific or technical issues, a panel should consult experts chosen by it in consultation with the parties. For this purpose, the panel may set up advisory technical experts groups or consult relevant international organizations.

In *EC—Hormones*[584] the Appellate Body affirmed the panel's right to receive opinions from experts in their individual capacity rather than set up expert review groups. Articles

[578] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 104.

[579] ¶ 6 of the Preamble to the SPS Agreement provides: "Desiring to further the use of sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by international organizations. . . without requiring Members to change their appropriate level of protection of human, animal or plant life or health."

[580] Certain concerns regarding the standard setting process in international organisations have been mentioned *supra* Part II(C)(1)(a). *See* also *infra* Part IV(B)(1) regarding the problems that developing countries face in participating effectively in international standard setting.

[581] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 170.

[582] The composition of panels is dealt with in Article 8 of the DSU.

[583] The rules and procedures applying to expert review groups are laid down in Appendix 4 of the DSU.

[584] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 147.

11.2 and Article 13.2 of the DSU, together with Appendix 4, do not limit this right. These provisions leave it to the discretion of the panel to determine whether an expert review group should be established. Both provisions require the panel to consult the parties to the dispute in the selection of experts. Since experts were chosen in terms of procedures agreed upon by the parties in this case, the Appellate Body found that the Panel had acted consistently with the Article 13.2 and Appendix 4 of the DSU and Article 11.2 of the SPS Agreement.

To date, in all three disputes heard under the SPS Agreement, the panels have consulted individual experts rather than set up expert review groups. This was partly due to the time constraints in the dispute settlement procedure. If time had to be provided for an expert review group to reach an agreement on scientific issues, it is probable that the tight deadlines within which panels should reach a decision would be far exceeded. In addition, panelists were interested in hearing the individual opinions of the scientists consulted in each case. In this regard, it should be noted that scientists consulted individually are more likely to provide a clear picture of the state of scientific knowledge on an issue, particularly when there is a divergence in scientific opinion. The views of scientists reflect the scientific tradition of which they are a part.[585] It is therefore important for the panel to hear from a variety of scientists rather than only hear a final consensus opinion arrived at within an expert review group. An expert review group is less conducive to understanding the range of possible interpretations of scientific data.[586]

In *Japan—Agricultural Products*[587] the Appellate Body examined the interaction between the obligation of a party to prove a *prima facie* case of inconsistency and the investigative authority of a panel. The United States argued that Japan's varietal testing requirement was more trade restrictive than required to meet Japan's appropriate level of protection, contrary to Article 5.6. It claimed that testing by product was an alternative measure, meeting the Article 5.6 requirements. The Panel found that this measure would not meet Japan's appropriate level of protection. However, it went on to deduce another alternative measure, namely the determination of sorption levels, which had neither been claimed nor argued by the United States, from the opinions given by its expert advisors.[588] Although the Panel acknowledged that the United States had not argued that the determination of sorption levels met any of the three requirements of Article 5.6, it held that it could be presumed that the requirements were met and that the United States had offered views consistent with this.

This finding was appealed and the Appellate Body found that the United States was obliged to establish a *prima facie* case that an alternative measure exists meeting all three requirements of Article 5.6. Since the United States had not claimed that determination of sorption levels was such a measure, it had not complied with this obligation. The Appellate Body recognized that a panel is entitled under Article 13 of the DSU to seek

[585] According to Atik, *supra* note 201, at 757, scientists are more likely to recognize a scientific justification for a measure where the scientific assertion is accepted in the scientific community to which they belong. *See* Wirth for an interesting discussion on the problematic nature of adjudication in respect of scientific controversies. Wirth, *supra* note 23, at 841–845.

[586] *Contra see* Joost Pauwelyn, *The Use of Experts in WTO Dispute Settlement*, 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 325, 327–329 (2002) and Theofanis Christoforou, *Settlement of Science-Based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty*, NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL 622 (2000).

[587] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶¶ 120–131.

[588] Report of the WTO Panel, *Japan—Measures Affecting Agricultural Products*, *supra* note 57, ¶ 8.74.

information from any relevant source and to consult experts, and that it is instructed under Article 11.2 of the SPS Agreement to seek expert advice in technical and scientific matters. However, it held that this authority cannot be used to rule in favor of a party that has not established a *prima facie* case of inconsistency. The expert advice sought by the Panel is intended to help it understand and evaluate the evidence submitted and arguments made by the parties, not to make the complainant's case for it.

In *Japan—Apples*, Japan referred to this finding by the Appellate Body to challenge on appeal the Panel's use of experts. Japan argued that the US had not made claims or submitted evidence in respect of the risk of transmission of fire blight by apples other than mature symptomless apples, yet the Panel had made findings of fact with regard to these "other" apples. Japan claimed that the Panel had thus exceeded the bounds of its investigative authority.[589] The Appellate Body rejected Japan's argument, finding that the Panel had acted within the limits of its investigative authority, as "it did nothing more than assess the relevant allegations of fact asserted by Japan, in the light of the evidence submitted by the parties and the opinions of the experts."[590] It thus clarified that a panel may use the evidence of its experts to assist it in assessing not only the claims of the complaining Member, but also the allegations of the responding Member. In doing so, it cannot be said to be exceeding its authority under Article 11.2.

These findings are important in clarifying the respective roles of the panel, the experts and the parties. They establish that a panel procedure is adversarial, with the panel acting as an impartial arbiter, rather than inquisitorial, A panel's investigative authority is meant only to help its own understanding and evaluation of the case presented by the parties. Thus the role of panel experts is limited to assisting the panel in its understanding of the complex issues before it. The evidence of these experts cannot be used to make the case for one of the parties.

(c) Standard of Review. The issue of the appropriate standard of review is important, as it raises the question of whether panels are entitled to interfere in a Member's regulatory determinations, or whether they must defer to such decisions and confine themselves to the question of whether procedural rules related to decision-making have been followed. This is crucial to establishing the limits of regulatory review and deference to national standards under the SPS Agreement.

In *EC—Hormones*[591] the question of the appropriate standard of review was first examined. The EC argued that the Panel had failed to apply the appropriate standard of review, which it asserted to be a "deferential reasonableness standard", as exists for the Anti-Dumping Agreement.[592] Under such a standard, the panel is not to substitute its judgment for that of the national investigative authority that led to the establishment of the measure. It must limit itself to determining whether the procedure set by WTO rules has been followed. Thus, if the Member has properly established the facts and conducted an objective, unbiased examination thereof, its conclusions should be deferred to by the panel, even if the panel would have reached a different conclusion based on the facts. The EC argued that the Panel had instead undertaken a *de novo* standard of review, under

[589] *Id.*, ¶ 158.

[590] *Id.*.

[591] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 133.

[592] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Annex 1A to t he Marrakesh Agreement, reprinted in THE RESULTS OF THE URUGUAY ROUND, *supra* note 24, at 168–196, ("Anti-Dumping Agreement") at Article 17.6(i).

which it exercised complete freedom to examine the factual and procedural validity of the decision and to come to a different conclusion.

The Appellate Body rejected the application of the standard of review set in the Anti-Dumping Agreement to the SPS Agreement,[593] holding that this standard is textually specific to the former agreement and there is no evidence of an intention to adopt it in the latter agreement.[594] Instead, it focused on the need for the standard of review applied to the SPS Agreement to reflect the balance created in that agreement between the jurisdictional competences transferred by Members to the WTO and those retained by them. Neither a panel nor the Appellate Body is authorized to change this balance.[595]

The Appellate Body found that although the SPS Agreement is silent on the issue of the standard of review, Article 11 of the DSU articulates this standard both for the determination of the facts and the legal characterization of these facts.[596] The standard of review established by this article is neither total deference nor *de novo* review, but rather the "objective assessment of the facts" (with respect to fact-finding) and an objective assessment of the matter, including the applicability of and conformity with the relevant covered agreements (with respect to legal issues).

The issue of whether the appropriate standard of review was used thus depends, according to the Appellate Body in *EC—Hormones*, on whether there was an objective assessment of the matter, including an objective assessment of the facts.[597] It held that failure to conduct an objective assessment requires proof that there has been deliberate disregard of or refusal to consider submitted evidence or willful distortion or misrepresentation of the evidence.[598] These do not indicate a mere error of judgment but imply an egregious error, which calls into question the good faith of the panel. It is apparent that the Appellate Body will not lightly find that this element of bad faith is present, as can be seen from its findings in *EC- Hormones* that although the Panel had misquoted and misinterpreted the evidence,[599] its actions had not been

[593] This refusal to extend the standard of review laid down in the Anti-Dumping Agreement to other WTO agreements was affirmed in the Report of the Appellate Body, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* WT/DS138/AB/R (2000), ¶ 51, where the Appellate Body held that Article 11 of the DSU sets the standard of review for disputes under the Agreement on Subsidies and Countervailing Measures.

[594] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70,¶ 114. Further, this standard applies only to the factual assessment of the matter and not to the legal analysis applied thereto.

[595] *Id.* ¶ 115.

[596] *Id.* ¶ 116.

[597] The utility of this "objective assessment" standard has been criticized on the grounds that it does not clarify the required standard of review. *See* Axel G. Desmedt, *Hormones: "Objective Assessment" and (or as) Standard of Review,* 1 JOURNAL OF INTERNATIONAL ECONOMIC LAW 695, 698 (1998).

[598] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 133.

[599] The Appellate Body in *EC—Hormones* agreed with the EC that the Panel had misquoted the evidence of an EC expert, Dr. Lucien. Further, in response to the EC's contention that the panel had distorted the views of Dr. André by stating that they supported those of the other panel experts when, in fact, they rather supported the views of EC scientists, the Appellate Body stated, "Whether or not the views of Dr. André support the statements made by the other Panel experts or the opinions expressed by the EC scientists may be an issue of fact; it does require some technical expertise to deal with it. However, even if the Panel has interpreted the views of Dr. André incorrectly, we see no reason, and no reason was advanced, to consider this mistake as a *deliberate disregard* or *distortion* of evidence." Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶¶ 138–139. Provided the mistake is not deliberate, it would appear that the Appellate Body grants some leeway to the panel based on its lack of "technical expertise".

deliberate and there had thus been no failure to make an objective assessment of the facts.[600]

Due to the scope given by the Appellate Body to the obligation to conduct an objective assessment, it is clear that panels have broad discretion in assessing the evidence before them and that it is difficult for parties to a dispute to challenge the assessment of the evidence made by panels. This is problematic when one bears in mind the composition of panels and their lack of expertise in scientific matters. The lack of certainty that often exists in the scientific arena means that a panel's ability to consult experts does not constitute a real safeguard against the possibility of mistakes. In *EC—Hormones*[601] the Appellate Body recognized that the panel had misrepresented the statements of its own expert advisors on the potential for abuse in a regime where the use of hormones was allowed. However as the mistake was not egregious, it did not amount to a failure to make an objective assessment of the facts.

The Appellate Body's decision on the standard of review thus has two problematic aspects. Firstly, the decision that the applicable standard of review is an "objective assessment" of the factual and legal aspects of the case, without a precise definition of what this standard entails, gives cause for concern. While this was held to mean neither complete deference nor *de novo* review, what it does mean is not clear aside from the fact that a panel must act in good faith. Secondly, since only "willful distortion" or "deliberate disregard" of evidence will constitute a failure to make an "objective assessment" of the facts, the situation could arise that a case is incorrectly decided on the basis of a good faith misunderstanding of scientific evidence by a panel, without this mistake constituting a ground for overturning the panel decision.

This is problematic since the disciplines of the SPS Agreement are primarily science-based, and thus cases decided under its provisions will most likely turn on the evaluation of scientific evidence. Since the Appellate Body may not review issues of fact on appeal, an appeal will not be able to correct this situation but will instead be decided on the basis of this mistaken understanding of the facts. In order to avoid this unacceptable situation, it seems imperative that the question of the appropriate standard of review under the SPS Agreement be reassessed to allow for deference to national decisions regarding the quality and weight of scientific evidence. Provided that the scientific support for a measure is plausible and comes from respected sources, and that a Member has met all the procedural requirements relating to the conduct of a risk assessment and setting an appropriate level of protection, a panel should refrain from evaluating the scientific evidence itself, a task for which it is demonstrably poorly suited.

An additional issue which arises with regard to the standard of review to be applied, is whether the precautionary principle should guide a panel's evaluation of the evidence before it. This issue arose in *Japan—Apples*. Japan argued, on appeal, that the Panel had failed to adequately take into account the precautionary principle in its evaluation of the evidence. The panel experts in this case had recognized the need for caution with respect to the elimination of the phytosanitary measures protecting Japan from fire blight. According to Japan, this fact should have been given greater weight by the Panel

[600] This trend continued in both *Australia—Salmon* and *Japan—Agricultural Products*, where errors of the Panel in the appreciation of evidence were not characterized by the Appellate Body as failures to make an objective assessment of the facts, due to lack of an egregious nature. *See* Report of the Appellate Body, *Australia—Measures Affecting the Importation of Salmon*, *supra* note 141, ¶ 266, and Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, *supra* note 97, ¶ 142.

[601] Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones), supra* note 70, ¶ 144.

in considering the evidence regarding the completion of the transmission pathway for fire blight.[602] The Appellate Body noted that Japan did not argue that the precautionary principle should have been applied as distinct from the provisions of the SPS Agreement, nor did it argue that the Panel should have used the precautionary principle as part of its interpretative analysis of the Agreement. Instead, it understood Japan to argue that the principle was embodied in the cautionary opinions of the experts and *should have been given greater weight* in the Panel's conclusions on the completion of the pathway. The Appellate Body then noted that it is established case law that the credibility and weight to be properly ascribed to a particular piece of evidence is in the discretion of a panel as the trier of facts. This discretion is limited only by a panel's duty to make an "objective assessment" of the facts. Since Japan made no argument challenging the objectivity of the Panel's assessment, it failed to establish a violation of Article 11.[603]

This finding of the Panel reinforces the conclusion that the possible relevance of the precautionary principle for purposes of the SPS Agreement is limited to the particular formulation it has been given in Article 5.7. Outside this article, the precautionary principle plays no role, according to the case law, in guiding the interpretation of the SPS Agreement or the evaluation of the evidence. The standard of review to be applied by panels remains an "objective assessment" of the matter, even in cases of scientific uncertainty.

2. Overview of Dispute Settlement Relating to the SPS Agreement

To date (July 2004), there have been thirty formal complaints under the SPS Agreement regarding twenty-six separate issues, three of which only involved minor SPS issues. No African country or LDC has initiated a complaint under the SPS Agreement. Consultations are still pending in fifteen cases. A mutually agreed solution has been reported in six cases.[604] Eight disputes,[605] regarding five separate issues, have proceeded to adjudication by a panel under the SPS Agreement[606] and four panel reports have thus far been issued.[607] All of these have been appealed, resulting in four Appellate Body reports.[608]

[602] This evidence was considered for purposes of the Panel's finding under Article 2.2 SPS.

[603] Report of the Appellate Body, *Japan—Measures Affecting the Importation of Apples, supra* note 112, ¶ 283.

[604] *Korea—Measures Concerning the Shelf-Life of Products (Complaint by the United States)*, WT/DS5; *Korea—Measures Concerning Bottled Water (Complaint by Canada)*, WT/DS20; *Australia—Measures Affecting the Importation of Salmonids (Complaint by the United States)*, WT/DS21; *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Complaint by the European Communities)*, WT/DS96; *Turkey—Certain Import Procedures for Fresh Fruit (Complaint by Ecuador)*, WT/DS237; and *Mexico—Certain Measures Preventing the Importation of Black Beans from Nicaragua (Complaint by Nicaragua)*, WT/DS284.

[605] These eight disputes are the separate complaints by the United States and Canada in *EC—Hormones* (WT/DS48, WT/DS26) that were heard by separate panels, composed of the same panelists, which issued separate but largely identical reports; the complaint by the United States in *Japan—Agricultural Products II* (WT/DS76); the complaint by Canada in *Australia—Salmon* (WT/DS18); the complaint by the United States in *Japan—Apples*, (WT/DS245), and the separate complaints by the United States, Canada and Argentina in *EC—Biotech* (WT/DS291, WT/DS292, WT/DS293) which is being heard by a single panel. This count does not include the compliance disputes under Article 21.5 DSU in *Australia—Salmon* (WT/DS18) and *Japan—Apples* (WT/DS245).

[606] The dispute *EC—Asbestos* (WT/DS135) also proceeded to adjudication by a panel and the Appellate Body, but the claims under the *SPS Agreement* were not pursued in the adjudication process.

[607] See the WTO Panel Reports in *EC—Hormones, Australia—Salmon, Japan—Agricultural Products,* and *Japan—Apples*. The findings in these cases have been discussed in previous sections where relevant.

[608] See the Appellate Body Reports in *EC—Hormones, Australia—Salmon, Japan—Agricultural Products,* and *Japan—Apples*. The findings in these cases have been discussed in previous sections where relevant.

One dispute is currently still before a panel.[609] Developing countries[610] have been involved in thirteen disputes, in nine cases as complainant[611] and in nine as defendant.[612] In only one of these disputes involving developing countries, namely *EC—Biotech Products*, has the dispute proceeded to adjudication.[613]

IV. Developing Countries and the SPS Agreement

The general disciplines of the SPS Agreement apply equally to developed and developing countries. However, the SPS Agreement does take into account the financial and technical resource constraints that developing countries face. This consideration finds its first reflection in the preamble to the SPS Agreement, which recognizes that:

> (. . .) developing country Members may encounter special difficulties in complying with sanitary and phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary and phytosanitary measures in their own territories, and desiring to assist them in their endeavors in this regard; . . . [614]

For this reason, special provisions exist that take into account the special position of developing countries. These provisions relate to the provision of technical assistance to developing countries as well as to special and differential treatment in favor of developing countries. In addition, some of the disciplines in the SPS Agreement contain elements of flexibility that can be used to the benefit of developing countries.[615]

[609] A panel was established on to address the complaints of the US, Argentina and Canada against the EC's measure with regard to the products of biotechnology (WT/DS291, 292 and 293).

[610] Developing countries here is interpreted broadly to include economies in transition.

[611] *Croatia—Measure Affecting Imports of Live Animals and Meat Products (Complaint by Hungary),* WT/DS297; *European Communities—Measures Affecting the Approval and Marketing of Biotech Products (Complaint by Argentina)*, WT/DS293; *Mexico—Certain Measures Preventing the Importation of Black Beans from Nicaragua (Complaint by Nicaragua)*, WT/DS284; *Australia—Certain Measures Affecting the Importation of Fresh Pineapple (Complaint by the Philippines),* WT/DS271; *Australia—Certain Measures Affecting the Importation of Fresh Fruit and Vegetables (Complaint by the Philippines),* WT/DS270; *Turkey—Import Ban on Pet Food from Hungary (Complaint by Hungary),* WT/DS256; *Turkey—Certain Import Procedures for Fresh Fruit (Complaint by Ecuador),* WT/DS237; *Egypt—Import Prohibition on Canned Tuna with Soybean Oil (Complaint by Thailand),* WT/DS205; and *EC—Restrictions on Certain Import Duties on Rice (Complaint by India),* WT/DS134.

[612] *Croatia—Measures Affecting Imports of Live Animals and Meat Products (Complaint by Hungary),* WT/DS297; *Mexico—Certain Measures Preventing the Importation of Black Beans from Nicaragua (Complaint by Nicaragua)*, WT/DS284; *India—Import Restrictions Maintained Under the Export and Import Policy 2002–2007 (Complaint by the European Communities),* WT/DS279; *Turkey—Import Ban on Pet Food from Hungary (Complaint by Hungary),* WT/DS256; *Turkey—Certain Import Procedures for Fresh Fruit (Complaint by Ecuador),* WT/DS237; *Egypt—Import Prohibition on Canned Tuna with Soy Oil (Complaint by Thailand),* WT/DS205; *Mexico—Measures Affecting Trade in Live Swine (Complaint by the United States),* WT/DS203, *Slovak Republic—Measures Concerning the Importation of Dairy Products and the Transit of Cattle (Complaint by Switzerland),* WT/DS133; and *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Imports (Complaint by the European Communities),* WT/DS96.

[613] In *Australia—Certain Measures Affecting the Importation of Fresh Fruit and Vegetables (Complaint by the Philippines)*, WT/DS270, the Philippines requested the establishment of a panel once, on July 10, 2003. This panel request was blocked by Australia. The Philippines has not yet submitted its second panel request to the DSB (at which time the decision to establish a panel would be taken by reverse consensus in the DSB and could therefore not be blocked), and thus no panel has yet been established to hear this dispute. In *Turkey—Certain Import Procedures for Fresh Fruit (Complaint by Ecuador)*, WT/DS237, a panel request was submitted by Ecuador on June 14, 2002, but a mutually agreed solution was subsequently reached.

[614] In the 7th preambular paragraph of the SPS Agreement.

[615] For example, Article 5.1 requires a risk assessment "as appropriate to the circumstances" and Article 5.6 allows technical and economic feasibility to be taken into account in the choice of an SPS measure.

A. Technical Assistance (Article 9)

The technical assistance needs of developing countries encompass not only the improvement of their understanding of the rules applicable under the SPS Agreement, but also the acquisition of the technical and scientific capacity required to meet their obligations and enforce their rights under the SPS Agreement, and to comply with the SPS measures imposed by their trading partners. Thus technical assistance is a broad term, including: the provision of information to enhance Members' understanding of their rights and obligations under the SPS Agreement; the provision of practical and detailed training on the operation of the SPS Agreement; the provision of "soft" infrastructure (training and formation of technical and scientific personnel and the development of national regulatory frameworks); and "hard" infrastructure (laboratories, equipment, veterinary services and the establishment of disease free areas).[616]

The provision of technical assistance to developing countries involves several actors, including other WTO Members, the WTO Secretariat, as well as other international organizations such as the FAO (including Codex and the IPPC), the WHO, the OIE and the World Bank. It should be noted that the active participation and contribution of developing countries in this process is essential in order to ensure that the provision of technical assistance is effective and demand-driven.

Under Article 9.1, Members agree to facilitate the provision of technical assistance to other Members, especially developing countries, either bilaterally or through international organizations. This assistance may take various forms, including advice, credits, and grants and donations, and may be in the areas of processing technologies or research and infrastructure, including the creation of national regulatory bodies. Such assistance may also aim at helping developing countries adjust to and comply with SPS measures affecting their export markets.

Article 9.2 refers specifically to the case where the SPS measures put in place by an importing Member necessitate substantial investments in order for a developing country exporting Member to be able to comply with these measures. In such a case, the importing Member must consider providing technical assistance that will enable the developing country Member to maintain and expand its market access opportunities for that product. However, there is no obligation to actually provide such technical assistance.

Technical assistance is a standing item on the agenda of SPS Committee meetings, where Members are encouraged to identify specific technical assistance needs and report on technical assistance activities. The SPS Committee[617] has undertaken a survey of technical assistance needs and activities by means of questionnaires,[618] and drawn up a technical assistance typology.[619] In addition, informal discussions on technical assistance

[616] This typology was drawn up by the WTO Secretariat. Committee on Sanitary and Phytosanitary Measures, *Technical Assistance Typology: Note by the Secretariat,* G/SPS/GEN/206, October 18, 2000.

[617] A compilation of all documents submitted to and drafted by the SPS Committee on this issue was circulated to all Members. Committee on Sanitary and Phytosanitary Measures, *Technical Assistance and Capacity Building in the Context of the SPS Committee, Note by the Secretariat,* G/SPS/GEN/332, June 24, 2002.

[618] In July 1999, a questionnaire was circulated to Members by the Secretariat, to gather information on technical assistance requested, received or provided under the SPS Agreement but few developing countries replied. Committee on Sanitary and Phytosanitary Measures, *Questionnaire on Technical Assistance: Note by the Secretariat,* G/SPS/W/101, July 23, 1999. In October 2001 a second questionnaire was circulated regarding technical assistance needs to which 35 Members have responded to date. Committee on Sanitary and Phytosanitary Measures, *Questionnaire on Technical Assistance,* G/SPS/W/113, October 15, 2001. *See* addenda to Committee on Sanitary and Phytosanitary Measures, *Technical Assistance—Responses to the Questionnaire,* G/SPS/GEN/295, February 6, 2002.

[619] *See supra* note 552.

and co-operation have been held in the SPS Committee. In these discussions, concrete proposals were put forward to improve the effectiveness of the technical assistance provisions, including creating a coherent program for the provision of technical assistance, regardless of the source of the assistance, and placing emphasis on the development of human resources.[620] Further, high-level as well as technical meetings have been held between the WTO and other international organizations to co-ordinate the provision of technical assistance.[621] In November 2002, prior to the SPS Committee meeting, the WTO Secretariat organized a seminar on SPS-related technical assistance and capacity building. At this seminar, information was presented by international and regional organizations as well as developing country Members regarding their experiences with technical assistance in the SPS area.[622]

The Doha Development Agenda recognizes the importance of technical assistance and capacity building for developing countries in order to enable these Members to benefit fully from the multilateral trading system. For this reason, a Doha Development Agenda Trust Fund has been established, to which donor countries have pledged 30 million Swiss francs. The WTO Secretariat regularly provides technical assistance to developing countries for the implementation of the SPS Agreement, in particular through training programs organized by the WTO or through WTO participation in training programs organized by other organizations or institutions.[623] However, it should be noted that the role of the WTO Secretariat in the provision of technical assistance is necessarily limited. Other international organizations, and in particular the three standard-setting organizations (CAC, OIE and IPPC) as well as the World Bank, with which the WTO co-operates closely, are better suited to the provision of technical assistance in areas requiring scientific or technical expertise, such as building regulatory systems or strengthening infrastructure in the SPS sector.[624]

[620] The first meeting was held in July 2001. Committee on Sanitary and Phytosanitary Measures, *Discussion on Technical Assistance and Cooperation—Informal Meeting of the SPS Committee of 9 July, 2001,* G/SPS/GEN/267, July 16, 2001 and the second on March 18, 2002 (no report yet derestricted).

[621] General Council, Special Session on Implementation, *Actions to Increase the Participation of Developing Country Members in the Work of the Relevant International Standard-Setting Organizations: Report by the Director-General,* WT/GC/42, December 11, 2000; General Council, *Actions to Increase the Participation of Developing Country Members in the Work of Relevant International Standard-Setting Organizations—Information from Financial Institutions,* WT/GC/46/Rev.1, July 16, 2001; General Council, *Actions to Increase the Participation of Developing Country Members in the Work of Relevant Sanitary and Phytosanitary International Standard-Setting Organizations,* WT/GC/54, November 7, 2001; General Council, Special Session on Implementation, *Actions to Increase the Participation of Developing Country Members in the Work of Relevant Sanitary and Phytosanitary International Standard-Setting Organizations: Second Report by the Director General,* WT/GC/45, March 7, 2001.

[622] WTO Seminar on Technical Assistance and Capacity Building Related to the SPS Agreement, November 5, 2002, Geneva. The PowerPoint presentations delivered at this seminar are available at: www.wto.org/english/tratop_e/sps_e/sem_nov02_e/programme_e.htm.

[623] WTO Secretariat, annual report 2002 (2002). For a list of planned technical assistance activities in the SPS area for 2003, see Committee on Trade and Development, *2003 Technical Assistance Activities, Note by the Secretariat. Revision*, WT/COMTD/W/104/Add.1/Rev.1, November 7, 2002, at 33.

[624] In this context, it is worth mentioning that, on September 27, 2002, the World Bank and the WTO established a new fund, called the *Standards and Trade Development Facility* ("STDF"). This fund aims to provide funding to assist developing countries to meet SPS standards. The World Bank has pledged US$ 300 000 to this fund and the WTO has contributed to it from the Doha Development Trust Fund. In its list of technical assistance activities for 2003, the WTO Secretariat proposed a contribution of CHF 100 000 to the STDF (*see supra* note 567). The fund will be administered by the WTO. The FAO, WHO and OIE are part of this initiative. *See* Committee on Sanitary and Phytosanitary Measures, *The Standards and Trade Development Facility, Note by the Secretariat*, G/SPS/GEN/371, February 18, 2003. *See also* WTO Press Release 314 *World Bank Grant Kicks off Bank-WTO Assistance on Standards,* September 27, 2002.

B. Special Rules for Developing Countries (Articles 10 and 14 and Annex B)

1. Special and Differential Treatment (Article 10)

Special and differential treatment in the SPS Agreement relates to the aim of ensuring that the special constraints faced by developing countries are taken into account in the implementation certain provisions of the SPS Agreement. This may refer to the implementation of provisions of the agreement in a manner favorable to developing countries by other Members, additional flexibility in the obligations contained in the SPS Agreement for developing countries, or actions by the SPS Committee or Secretariat to assist developing countries.

Article 10.1 obliges Members to take account of the special needs of developing country Members, and in particular least-developed country Members when preparing and applying SPS measures. However, there is no obligation to adapt the SPS measure or its application to address developing country needs. This can therefore be characterized as a "best endeavor" obligation.

Article 10.2 makes provision for phased-in introduction of new SPS measures. It encourages Members, without obliging them, to allow longer time frames for compliance with new SPS measures for developing country Members, where the appropriate level of protection of the importing Member allows scope. This is aimed at allowing developing countries to maintain their export opportunities while adjusting to the new measures.

Article 10.3 allows the SPS Committee to grant developing countries, upon request, specified, time-limited exemptions from all or some of their obligations under the SPS Agreement. This is done with the aim of enabling developing countries to comply with their obligations by giving them extra time to adjust to their new obligations, and takes account of their financial, trade and development needs. However, to date no developing country has requested an exemption under Article 10.3 despite the fact that certain developing countries remain in breach of certain obligations under the SPS Agreement, such as the obligation to establish a National Notification Authority and Enquiry Point, or to publish and notify all new SPS measures.

According to Article 10.4, Members should encourage and facilitate the active participation of developing countries in relevant international organizations. This is clearly a reference to the international standard-setting organizations. The issue of developing country participation in international standard setting is very contentious. Participation in the numerous committees of the international organizations where standards are developed and proposed for adoption requires not only financial and human resources, but also technical capabilities for the formulation of positions regarding standards of interest to the country. Although in recent years the number of developing country delegates attending meetings of the standard-setting organizations has increased and their participation has been more active, there remains considerable room for improvement. This has led to assertions that the standards set by the international organizations do not cover areas of interest for developing countries and do not reflect a level of protection that is realistic or desirable for developing countries. However, Article 10.4 is purely hortatory and contains no binding obligations. It should, nevertheless, be noted that the international standard-setting organizations themselves are taking steps to address this problem.[625]

[625] For instance, in the Codex Alimentarius Commission's Strategic Framework, adopted at its 24th Session in 2001, the issue of improving developing country participation is included as an objective. Codex Alimentarius Commission, *Report of the 24*th *Session*, July 2–7, 2001 ALINORM 01/41, Appendix II, ¶ 16. The objectives of the Strategic Framework will be implemented through a Medium Term Plan for

2. Reasonable Adaptation Period (Annex B, paragraph 2)

Under paragraph 2 of Annex B, Members are obliged to allow a reasonable period between the publication of an SPS measure and its entry into force for exporting Members (especially developing countries) to adapt to the new measure, except in cases of urgency. Although this provision is not a special and differential treatment provision in that the reasonable adaptation period must be granted equally to both developed and developing country exporting Members, it does hold particular advantages for developing countries as they often face more difficulties in adapting to new SPS measures than do their developed counterparts. For this reason, the provision makes specific reference to developing countries.

3. Special Provisions on Notification (Annex B, paragraphs 8 and 9)

Compliance with the transparency obligations of the SPS Agreement can be costly and burdensome for developing countries. Under the transparency provisions of Annex B, paragraph 8, developing countries are exempted from the obligation to provide copies of the documents, or in case of lengthy documents, summaries of the documents covered by a specific notification in one of the official languages of the WTO. This exemption from translation and summarizing obligations is clearly an attempt to reduce the burden on developing countries that results from compliance with the transparency provisions.

In addition, developing countries do not always benefit from increased transparency if they do not have the skilled manpower to monitor the notifications and identify those of interest to them. For this reason, under Annex B.9, the Secretariat is obliged to draw the attention of developing countries to any notifications relating to products of interest to them. In this way, developing countries can benefit fully from the increased transparency resulting from the disciplines of the SPS Agreement despite the fact that they may lack the resources to keep track of all notifications. As it is difficult to determine which notifications may be of interest to each developing countries Member, the Secretariat implements this obligation by circulating monthly lists of notified SPS measures to all WTO Members.[626] Further, in order to address the problems Members face in translating proposed regulations of other Members into a language in which they can work, the Secretariat has recently established a mechanism to circulate information on the availability of unofficial translations of draft regulations notified by Members.[627]

4. Transitional Periods (Article 14)

Article 14 of the SPS Agreement made provision for delayed implementation of the obligations under the Agreement for developing and least-developed country Members. Least-developed Members were granted a five-year period, from the entry into force of

2003–2007. In addition, on February 14, 2003 at the Extraordinary Meeting of the Codex Alimentarius Commission, the Directors General of the FAO and WHO officially launched the *FAO/WHO Trust Fund for Participation of Developing Countries and Countries in Transition in the Work of the Codex Alimentarius Commission*, which is expected to run for 12 years on a budget of $40 million and aims to help developing countries and countries in transition increase their participation in Codex activities. *See* Codex Alimentarius Commission, *Trust Fund for the Participation of Developing Countries and Countries in Transition in the Work of the Codex Alimentarius Commission, FAO/WHO Project and Fund for Enhanced Participation in Codex. Progress Report*, ALINORM 03/25/4, February 13–15, 2003.

[626] Committee on Sanitary and Phytosanitary Measures, *Electronic Transmission of Notifications to national Enquiry Points. Note by the Secretariat,* G/SPS/GEN/136, August 9, 1999. These lists can be found in the series G/SPS/GEN/* by searching under the keyword "notifications".

[627] Committee on Sanitary and Phytosanitary Measures, *Unofficial Translation, Note by the Secretariat,* G/SPS/GEN/487, April 23, 2004.

the WTO Agreement, for delayed implementation of their obligations. Other developing Members were given a two-year grace period, where lack of technical expertise, infrastructure or resources prevented immediate implementation of their obligations. However, this possibility did not extend to their transparency and information obligations. The period for delayed application expired in January 2000 for least-developed Members and in January 1997 for other developing Members.

C. Problems with Implementation

Despite the existence of these provisions on technical assistance and special and differential treatment, developing countries have often raised concerns that their needs are not taken into account by developed country Members. These concerns form part of the broader discussion on implementation of the WTO agreements, which has been going on since the Seattle Ministerial Conference and, in a more concrete fashion, during the preparations for the Doha Ministerial Conference. The SPS Committee was asked by the General Council to examine implementation concerns relating to the SPS Agreement, and the Committee held discussions on this issue.[628] During these discussions, developing countries have complained that the provisions on technical assistance and special and differential treatment are either couched in non-mandatory language or constitute at most "best-endeavor" obligations without being fully operational.[629] In particular, they have noted that additional time for compliance with new SPS measures has seldom been granted and that they do not receive technical assistance to facilitate adjustment to SPS measures that affect their trade. In addition, their continued problems with regard to effective participation in international standard setting have been pointed out.

These and other concerns of developing countries with regard to implementation of the WTO agreements have been the focus of special sessions in the General Council,[630] which have resulted in the adoption of the Decision on Implementation-Related Issues and Concerns (the "Decision on Implementation") on November 14, 2001 at the Ministerial Conference in Doha.

D. Doha Decision on Implementation

The Decision on Implementation adopted at the Ministerial Conference in Doha urges the WTO Director-General to continue co-operative efforts with the international standard-setting organizations to facilitate the provision of technical and financial assistance to ensure the effective participation of least-developed countries.[631] In addition, Members

[628] As background to these discussions, the Secretariat prepared a document summarizing implementation concerns raised at SPS Committee meetings. Committee on Sanitary and Phytosanitary Measures, *Special and Differential Treatment: Note by the Secretariat,* G/SPS/W/105, May 9, 2000.

[629] *See e.g.*, the statement by India on this point. Committee on Sanitary and Phytosanitary Measures, *Implementation of the Provisions for Special and Differential Treatment: Statement by India at the Meeting of 21–22 June, 2000,* G/SPS/GEN/197, July 21, 2000.

[630] On May 3, 2000, the General Council adopted a decision to meet in special sessions to address outstanding implementation issues. Special Sessions were held in October and December 2000 and April, July and October 2001. Specific issues were referred to the relevant WTO bodies, including the SPS Committee for further work, which resulted in reports from these bodies to the General Council.

[631] At the Doha Ministerial Conference, the Director-Generals of the WTO, FAO, and OIE and the President of the World Bank declared their commitment to promote the participation of developing countries in international standard setting. Ministerial Conference, *Participation of Developing Countries in the Development and Application of International Standards, Guidelines and Recommendations on Food Safety,*

are urged to provide technical and financial assistance to least-developed countries to enable them to respond to SPS measures that may negatively affect their trade as well as to ensure that technical assistance is provided to these countries in response to the special problems they face in implementing the SPS Agreement.[632]

The Decision on Implementation establishes a longer time frame for compliance under Article 10.2—"normally a period of not less than 6 months" where there is scope for phased introduction of the new measure. Where such phased introduction is not possible, if a Member identifies specific problems it faces with regard to the new measure, the importing Member must enter into consultations with a view to reaching a mutually satisfactory solution, while continuing to achieve the importing Member's appropriate level of protection.[633]

In addition, the Decision on Implementation sets the reasonable adaptation period under Annex B.2 at "normally a period of not less than 6 months," but notes that the particular circumstances of the measure and the actions needed for its implementation must be considered. In addition, it clarifies that the entry into force of SPS measures that liberalise trade should not be unnecessarily delayed.[634] This takes into account the fact that some new SPS measures may establish lower or easier requirements than existing ones.

The Decision on Implementation represents a step towards the strengthening of the provisions in the SPS Agreement in favor of developing countries. However, much remains to be done if these special provisions are to be fully operationalized. For this reason, work is ongoing in the Special Session of the Committee on Trade and Development with respect to the identification of ways to make the special and differential treatment provisions in WTO agreements more effective.[635] The Doha Ministerial Declaration provides that outstanding implementation issues are to be addressed as a matter of priority by the relevant WTO bodies. In May 2003, the General Council referred five proposals, containing twelve specific recommendations, on special and differential treatment to the SPS Committee. The Committee adopted a work programme with regard to these proposals on June 25, 2003.[636] The SPS Committee has held an informal meeting on special and differential treatment. The proposals on special and differential treatment are also a standing item on the agenda of SPS Committee meetings. At the meeting of March 2004, no comments were made regarding these proposals.[637]

Animal and Plant Health: Joint Statement Circulated by the Directors-General of the Food and Agriculture Organization of the United Nations, the Office International Des Epizooties, the World Health Organization, the World Trade Organization and the President of the World Bank, WT/MIN(01)/ST/97, November 11, 2001.

[632] Ministerial Conference, *Implementation-Related Issues and Concerns, Decision of 14 November 2001,* WT/MIN(01)/17, November 20, 2001, ¶¶ 3.5–3.6.

[633] *Id.* ¶ 3.1

[634] *Id*. ¶ 3.2

[635] This ongoing work in the area of special and differential treatment is mandated in the Doha Ministerial Declaration, which endorses the Work Programme on special and differential treatment set out in the Implementation Decision. Ministerial Conference, Fourth Session, Ministerial Declaration, Adopted on November 14, 2001, WT/MIN(01)/DEC/1, November 20, 2001, ¶ 44; Ministerial Conference, *Implementation-Related Issues and Concerns, Decision of 14 November 2001,* WT/MIN(01)/17, November 20, 2001, ¶ 12.1. The outstanding issues are to be found in a Secretariat compilation. WTO Secretariat, *Compilation of Outstanding Implementation Issues Raised by Members, Revision,* JOB(01)/152/Rev.1, October 27, 2001.

[636] The work programme is contained in G/SPS/26.

[637] Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 17–18 March 2004, Note by the Secretariat*, G/SPS/R/33, May 7, 2004, ¶ 100.

V. Conclusion

A. An Evaluation of the SPS Agreement as a Balancing Act

An evaluation of the SPS Agreement must logically examine its effectiveness in achieving its aims. As was discussed in the introduction to this Chapter, the SPS Agreement has the objective of balancing the right of Members to impose measures for the protection of human, plant and animal life or health, with the goal of liberalization of trade in the food and agricultural sector. This is an extremely delicate balance, as on one side of the scale is a policy area of significant public concern, namely that of health. Health issues tend to be emotionally charged and politically sensitive. Members need to have sufficient flexibility to be able to respond to the legitimate demands of their citizens for effective protection in this area. On the other side of the scale is another important goal, namely that of market access for food and agricultural products, creating economic growth and prosperity. The importance of this value is often underplayed by critics of the SPS Agreement who see the protection of health as trumping all other considerations. However, when one bears in mind the crucial importance of the agricultural sector for the export trade of developing countries, and takes into account the fact that the export revenue earned in this sector is necessary to finance basic services such as education and health, it becomes clear that market access considerations should also be given sufficient weight in the balancing process. For these reasons, it is critical that this balance be finely struck.

A complicating factor in evaluating the balance struck between these competing aims is the fact that WTO Members have vastly different levels of economic development. This affects a variety of factors of relevance to the disciplines of the SPS Agreement. First, it plays a role in the level of SPS protection expected by citizens and thus the demands that they make on their regulators. Second, it affects the export interests of Members, with developing countries being much more dependent on the food and agricultural sector for their export earnings than industrialized countries. Third, the level of development of a Member is often reflected in the strength and efficacy of the sanitary and phytosanitary systems, consisting of both regulations and infrastructure, in place in that country to secure a particular level of SPS protection. The ability of a Member to guarantee the safety and pest- or disease-free status of its food and agricultural products and meet the requirements of its trading partners is dependent on the effectiveness of its SPS system. Finally, the ability of a Member to enforce its rights and meet its obligations under the SPS Agreement is conditional on the availability of financial and human resources which can be dedicated to this purpose by that Member. For these reasons, a realistic evaluation of the SPS Agreement must determine whether it takes sufficient account of the varying levels of economic development of WTO Members and has effective mechanisms in place to ensure that all Members benefit from its disciplines.

B. Evaluation of the Balance Achieved

In respect of allowing sufficient scope for Members to regulate in the area of human, animal or plant life and health, the SPS Agreement represents a significant achievement as compared to the situation under the GATT 1947. Now the imposition of SPS measures is no longer viewed as an exceptional situation requiring justification. By recognizing the right of Members to regulate in this area, the SPS Agreement has shifted the burden of proof to the Member who wishes to challenge an SPS measure. In addition, the SPS Agreement recognizes the right of Members to set the level of protection they deem fit,

even if this level of protection is higher than that embodied in international standards. Also this possibility is regarded as an autonomous right rather than an exception from the harmonization disciplines. Thus it is for the challenging Member to show that relevant measure is not scientifically justified.

It is with the disciplines on Members' right to regulate in the SPS area, that the balance struck in the SPS Agreement becomes apparent. The Agreement represents an innovation from the previous GATT approach in that it uses *science* to mediate the conflict between the competing values of health protection and free trade. Some concerns arise in connection with the scientific disciplines in the SPS Agreement. Given the strict interpretation that has been given to the requirement of a risk assessment, the lack of clarity regarding the requirement of "sufficient scientific evidence" and the limitation of the role of the precautionary principle to the provisions of Article 5.7, concerns can be raised regarding the ability of the SPS Agreement, as it has been interpreted in the case law, to deal with the uncertainties inherent in scientific analysis. By using science as if it were a neutral benchmark against which SPS measures can be tested for legitimacy, the SPS Agreement may reflect a naïve and outdated view of the nature of science. The Appellate Body has gone some way towards taking into account the realities of risks in the real world, rather than looking only at laboratory science, and has also accepted that divergent risk assessments can occur in a particular situation and that SPS measures can legitimately be based on minority opinions. However, it has stopped short of allowing the presence of unknown factors and uncertainties to influence the interpretation of the requirements for a risk assessment or sufficient scientific evidence, or the evaluation by panels of the scientific evidence before them.

It is argued here that account should be taken of the prevalence of uncertainties and differing scientific opinions in all aspects of the regulatory process, not just the risk management stage. For this reason, the emerging concept of the precautionary principle, to the extent that it develops into a general principle of international law or a customary international law principle, should be taken into account in interpreting the requirements of "sufficient scientific evidence" and of risk assessment "as appropriate to the circumstances". However, this taking into account must be carefully circumscribed to avoid introducing unpredictability into the trade regime in this area and shifting the carefully negotiated balance in the SPS Agreement too far towards the side of health protection, undermining the market access achievements of the disciplines in the Agreement.

Another area that merits attention with respect to how the balance is struck in the SPS Agreement relates to the use of international standards set by the "three sisters" as reference standards. The possibility of deviating from international standards without a shift in the burden of proof ensures that Members' right to choose their own level of protection is respected. At the same time, the harmonization of standards holds real benefits in terms of facilitating market access and is particularly useful for developing countries that lack the resources and infrastructure to set their own standards. However the standard-setting process leaves much to be desired. Until such time as these international standard-setting organizations have effectively resolved the problems of developing country participation in standard setting and the politicization of the standard-setting process, the standards they set are of doubtful legitimacy as the touchstone against which SPS measures are judged for presumptive validity with the SPS Agreement and the GATT. Reforms to the standard-setting process are necessary to ensure that these standards reflect the needs of all Members, including developing countries.

Perhaps one of the most significant achievements of the SPS Agreement is the improvement it has brought about with regard to transparency of SPS measures. This has

increased predictability in the international market for food and agricultural products, by enabling exporters to determine, in advance, what requirements their products have to meet. The requirement of a reasonable interval between publication of a measure and its entry into force[638] gives exporters time to adjust to new measures. In addition, the transparency requirement of advance notification of new non-harmonized measures to allow for comments as well as the possibility to discuss notified measures in the SPS Committee enables Members to raise their concerns regarding SPS measures that affect their exports and to try to get these measures amended before they come into force. This means that disagreements regarding SPS measures can be resolved quickly and simply without recourse to the more costly process of dispute settlement.

However, the full potential of the transparency obligations to enhance market access has not been realized due to the flexibility in the transparency provisions. Although the Doha Decision on Implementation has taken a step towards tightening these obligations, a lot remains to be done. It has been pointed out that the content and quality of the information provided in notifications varies between countries, the period allowed for comments on proposed measures is sometimes insufficient, comments are often not taken into account and documentation is sometimes not promptly provided.[639] Further work in the area of notification is thus necessary.

Other disciplines that hold significant potential for increasing market access for food and agricultural products, without bringing into question the level of protection maintained by an importing Member, are those relating to the recognition of equivalence and adaptation to regional conditions. These provisions make it possible for Members to limit the negative effects of legitimate SPS measures of their trading partners on their exports. This can be done either by requesting that the effectiveness of their own different measures in achieving the appropriate level of protection of the importing Member be recognized or by proving that regional conditions in their territories (such as pest- or disease-free status) justify an adaptation (or non-application) of the measure with regard to that region. Due to the best-endeavor nature of these provisions, they have been dogged by problems of lack of implementation. The SPS Committee's Equivalence Decision and the clarification thereto adopted through the work programme in this area, have gone some way towards clarifying and operationalizing the provision on equivalence. It now remains to be seen whether this work will bear fruit, in promoting the recognition of equivalence in practice. Similarly, it is hoped that the informal discussions initiated on the regionalization provision will lead to a similar work programme for the establishment of procedural guidelines to further the full use of this provision.

It is now necessary to evaluate whether the disciplines of the SPS Agreement sufficiently take account of the special constraints faced by developing countries. The rules of the SPS Agreement entail high costs for developing countries first of all in terms of establishment of the infrastructure required for transparency and risk assessment, but also in terms of participation in the SPS Committee, participation in international standard-setting and enforcement of SPS disciplines in dispute settlement. In order for developing countries to be able to meet these costs and thus benefit from the Agreement, it is important that the rules on technical assistance and special and differential treatment in the SPS Agreement be effectively implemented by developed Members. As most of these provisions are either non-mandatory or at best create best-endeavor obligations,

[638] As discussed *supra* Part IV(D), this period has been specified in the Doha Decision on Implementation as normally not less than six months.

[639] Zarilli, *supra* note 448, at 19.

many complaints have been raised regarding the inadequate implementation of these provisions.[640] It is clear that a tightening of these rules is necessary if developing countries are to reap the full benefits of the SPS Agreement.

C. Context for Possible Clarifications or Amendments

The SPS Agreement is *not* on the agenda for negotiations for the Doha Round. This would appear to be due to the difficulty in reaching agreement in this contentious area. Members thus prefer to work with the disciplines they have already negotiated in this area, rather than risk reopening the Agreement and not being able to reach agreement on the amendment of its provisions.[641] However, this does not mean that it will not be possible to agree on amendments to or clarifications of specific provisions of the SPS Agreement either in the context of other negotiations that form part of the Doha Development Agenda or through the SPS Committee outside the Doha Round.[642]

In the first place, SPS concerns have been raised in the context of the ongoing agriculture negotiations. Three facts could be regarded as opening the door for this possibility: first, the reference to the SPS Agreement in Article 14 of the Agreement on Agriculture;[643] second, the identification of market access (which in principle includes non-tariff barriers such as SPS measures) as one of the "three pillars"[644] of the ongoing agriculture negotiations; and third the explicit reference in Article 20 of the Agreement on Agriculture to "non-trade concerns"[645] as one of the elements to be taken into account in the mandated negotiations. Already several proposals in the area of agriculture contain

[640] That is not to say that no technical assistance relating to SPS concerns has been delivered. In fact several Members have submitted papers to the SPS Committee documenting the technical assistance they have provided to developing countries. Amongst others, *see* G/SPS/GEN/181;Committee on Sanitary and Phytosanitary Measures, *Discussion on Technical Assistance and Cooperation—Informal Meeting of the SPS Committee of July 9, 2001,* G/SPS/GEN/267, July 16, 2001; Committee on Sanitary and Phytosanitary Measures, *Summary of the Replies to the Questionnaire on Technical Assistance: Note by the Secretariat,* G/SPS/GEN/143/Rev.1/Add.1, June 16, 2000; Committee on Sanitary and Phytosanitary Measures, *Technical Assistance to Developing Countries Provided by the United States: Submission by the United States,* G/SPS/GEN/181, June 15, 2000; Committee on Sanitary and Phytosanitary Measures, *Technical Cooperation and Assistance: Submission by the United States,* G/SPS/GEN/78, June 9, 1998; Committee on Sanitary and Phytosanitary Measures, *Quarantine and Other Sanitary and Phytosanitary Capacity Building and Training Activities Undertaken by Australia: Submission by Australia,* G/SPS/GEN/124, June 15, 1999; Committee on Sanitary and Phytosanitary Measures, *Technical Assistance to Developing Countries: Statement by the European Communities at the Meeting of March 14–15, 2001,* G/SPS/GEN/244, April 27, 2001. What remains a concern is the inadequacy of the technical assistance given thus far to overcome the barriers to developing country products created by stringent SPS standards. *See* Committee on Sanitary and Phytosanitary Measures, *Special and Differential Treatment and Technical Assistance: Submission Made by India at the Meeting of June 10–11, 1998,* G/SPS/GEN/85, July 23, 1998, at 4.

[641] This does not mean that the possibility that the SPS Agreement could be reopened for negotiation in this Round is entirely excluded, as the negotiations may go beyond the initial agenda set. However, for the reasons mentioned, this would be unlikely in this case.

[642] *See* Denise Prévost and Mariëlle Matthee, *The SPS Agreement as a Bottleneck in Agricultural Trade between the European Union and Developing Countries: How to Solve the Conflict*, 29 LEGAL ISSUES OF ECONOMIC INTEGRATION 43, 44–45 (2002).

[643] Article 14 states that Members agree to give effect to the SPS Agreement. This serves to underscore the link between the SPS Agreement and the Agreement on Agriculture.

[644] The other two pillars are export competition and domestic support.

[645] Food-safety issues (including issues such as GMO labeling, the application of the precautionary principle and consumer concerns) have been identified in some proposals as one of the non-trade concerns relevant to the agriculture negotiations.

references to SPS issues and could serve to open the door for discussion of SPS matters.[646] Perhaps amendments to specific provisions of the SPS Agreement could be agreed upon and included in the results of the Doha Round without the need to reopen the whole SPS Agreement for negotiation.

Second, the SPS Committee views its mandate under Article 12.1 of the SPS Agreement to "carry out the functions necessary to implement the provisions of this Agreement and the furtherance of its objectives" as encompassing the power to make binding rules, clarifying the provisions of the SPS Agreement. It has already exercised this power in adopting the Equivalence Decision.[647] While the enforceability of such decisions in dispute settlement remains an open question, at the very least they will be taken into account by panels and the Appellate Body in interpreting the provisions of the Agreement as either "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" under Article 31.3(b) of the Vienna Convention on the Law of Treaties[648] or as a "rule of international law applicable to the relations between the parties" pursuant to Article 31.3(c) thereof. It is therefore possible that certain ambiguous obligations could be given content by decisions of the SPS Committee, provided these do not go as far as to amend the rules or create new obligations.

Third, the SPS Agreement itself, in Article 12.7, provides a mechanism for review of the Agreement and the proposal of amendments to the Council for Trade in Goods. This Council would then forward the proposed amendments to the Ministerial Conference for adoption under the amendment mechanism contained in Article X of the WTO Agreement. While Article 12.7 provides that after the first review of the SPS Agreement reviews shall take place "as the need arises", the Doha Decision on Implementation now obliges the SPS Committee to undertake such reviews at least once every four years.[649] Members could usefully have recourse to this possibility to address remaining concerns with the rules of the SPS Agreement.

D. Key Issues for the Future

Equivalence and regional adaptation remain key issues. The work done by the SPS Committee in the area of equivalence will hopefully ensure that the provisions on equivalence live up to their potential in respect to increasing market access.[650] A similar exercise has been initiated with regard to regionalization. It should encompass clarifications to the procedure and requirements that Members should follow in order to have pest- or disease-free status recognized. In particular, it is important to specify that once a Member

[646] *See e.g.*, G/AG/NG/W/37, G/AG/NG/W/142, G/AG/NG/W/136, G/AG/NG/W/94, G/AG/NG/W/98, G/AG/NG/W/96, G/AG/NG/W/90, and G/AG/NG/W/97 (including Corr. 1 and 2).

[647] This Decision is discussed *supra* Part II(F)(1).

[648] Articles 31 and 32 of the *Vienna Convention* are regarded as a codification of customary rules of public international law with regard to treaty interpretation. Thus panels and the Appellate Body are bound to apply them in interpreting provisions of the WTO agreements under Article 3.2 of the Dispute Settlement Understanding.

[649] Ministerial Conference, Fourth Session, *Implementation-Related Issues and Concerns, Decision of 14 November 2001,* WT/MIN(01)/17, November 20, 2001, ¶ 3.4.

[650] Informal discussions by the SPS Committee have focused on the Work Programme on equivalence, and in particular on clarifications of paragraphs 5–7 of the Equivalence Decision. For a summary of the Chairman's report on these discussions, *see* Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 25–26 June 2002, Note by the Secretariat*, G/SPS/R/27, August 2, 2002, ¶ V(a). As mentioned *supra* Part III(C)(3), the SPS Committee agreed to clarifications to ¶¶ 5 and 6 of the Equivalence Decision at its meeting of November 7–8, 2002. *See supra* note 501.

(or a region in its territory) has officially been declared pest- or disease free by the relevant international organization, other Members should recognize such a declaration and not require that proof of pest- or disease-free status be provided from scratch.

The gaps in the notification obligations are also an important area for future work. The notification guidelines issued by the SPS Committee are a useful tool in specifying the procedures and requirements of notification but these guidelines are non-binding and failure to comply with them can thus not be challenged in dispute settlement. It is therefore suggested that binding rules in this respect should be worked out by Members in the SPS Committee as part of the next review of the SPS Agreement and submitted to the Council for Trade in Goods, under the possibility for amendment of the SPS Agreement created in Article 12.7 thereof.

With respect to special and differential treatment for developing countries, we have noted that the implementation problems encountered with regard to special and differential treatment provisions in WTO agreements were the subject of discussions in the General Council. On the basis of these discussions, the Decision on Implementation was adopted at the Doha meeting of the Ministerial Conference.[651] This Decision instructs the Committee on Trade and Development ("CTD") of the WTO to examine the possibility of making mandatory those special and differential treatment provisions that are currently non-mandatory as well as other ways of improving the effectiveness of these provisions. The CTD was asked to report to the General Council with clear recommendations for a decision by July 31, 2002.[652] For this purpose, the Special Session of the CTD was established. Discussions in the Special Session of the CTD on this issue were contentious and it was difficult to reach agreement on key issues.[653] Three proposals were received with respect to the special and differential treatment provisions of the SPS Agreement.[654] On July 24, 2002, the Members in the Special Session of the CTD reached agreement on a report[655] that was presented at the meeting of the General Council on July 31, 2002. In this report, the deadline for recommendations for a decision on special and differential treatment was postponed until December 2002.[656] In addition, the report recommended *inter alia* that the Special Session of the CTD be instructed to continue its examination of Agreement-specific proposals, utilizing, as appropriate, the expertise available in other WTO bodies.[657] Subsequently, on February 10, 2003 the CTD adopted a report requesting the General Council to clarify its mandate regarding special and differential treatment negotiations. The General Council failed to adopt this report due to opposition from

[651] This Decision is discussed *supra* Part IV(D).

[652] Ministerial Conference, Fourth Session, *Implementation-Related Issues and Concerns, Decision of 14 November 2001,* WT/MIN(01)/17, November 20, 2001, ¶ 12.1. This work program was endorsed in the Doha Ministerial Declaration. Ministerial Conference, Fourth Session, Ministerial Declaration. *Adopted on 14 November 2001*, WT/MIN(01)/DEC/1, November 20, 2001

[653] These issues deal with basic matters such as the timeline, the relationship between two tracks that have been identified for the discussions, namely agreement-specific issues and cross-cutting issues and the question whether agreement-specific issues would be more appropriately dealt with in the relevant WTO bodies responsible fort he various agreements. ICTSD, *Arduous Process Yields Agreement on S&D Report,* 6(28) Bridges Weekly Trade Digest July 24, 2002.

[654] These proposals were from India (TN/CTD/W/6), the African Group (TN/CTD/W/3/Rev.1 and 2, not yet derestricted), and the Like-Minded Group, consisting of Cuba, the Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania, and Zimbabwe (TN/CTD/W/2).

[655] Committee on Trade and Development, Special Session, *Report to the General Council,* TN/CTD/3 and Corr.1, July 26, 2002.

[656] *Id.* ¶ 14.

[657] *Id.* ¶ 15.

developed countries and the negotiations were deadlocked.[658] With the failure of the Cancun Ministerial Conference in September 2003, progress in negotiations on special and differential treatment stalled. Since the adoption of the new framework text on the Doha work program by the General Council in Geneva on July 31, 2004, negotiations are restarting. Although no agreement was reached on the adoption of amendments to special and differential treatment provisions as part of the 'July package', the text includes an instruction by the General Council to the Special Session of the Committee on Trade and Development to expeditiously complete its condideration of proposals in this regard and to report to the General Council, with clear recommendations for a decision, as soon as possible and no later than July 2005. Similarly, the Council instructs all WTO bodies to which proposals have been referred, to expeditiously complete the consideration of these proposals and report to the General Council with clear recommendations by July 2005.

Since special and differential treatment is a standing agenda item for SPS Committee meetings, and certain proposals on special and differential treatment have been forwarded to the SPS committee under the Doha mandate discussions on this topic between the delegates to the SPS Committee who have specific expertise in this area could provide useful input for the Special Session of the CTD.[659] It is to be hoped that with regard to the special and differential treatment provisions in the SPS Agreement, Members will succeed in agreeing to new rules or to the tightening of existing provisions to fully operationalize these provisions.[660]

The issue of technical assistance is also of fundamental importance and is currently receiving attention not only within the SPS Committee,[661] but also in other international

[658] *See* ICSTD, *S&D Review in Limbo as General Council Fails to Adopt Report* 7(5) BRIDGES WEEKLY TRADE NEWS DIGEST, February 12, 2003.

[659] Until recently, developing countries made little use of this possibility to raise concerns or make suggestions under this agenda item, preferring to keep discussions on special and differential treatment within the CTD. However, it is interesting to note the recent Egyptian and Canadian proposals in the SPS Committee on ways to enhance transparency regarding the provision of special and differential treatment under the SPS Agreement by modifying the recommended notification format to include information on the provision of special and differential treatment, either *ex ante* (Egyptian proposal) or *ex post* by means of an Addendum to the notification after bilateral discussions on this issue between the importing and exporting Members (Canadian proposal) . Committee on Sanitary and Phytosanitary Measures, *Enhancing Transparency of Special and Differential (S&D) Treatment within the SPS Agreement, Submission by Canada,* G/SPS/W/127, October 30, 2002. *See* further *supra* note 525.

[660] At time of writing, prospects for this seem bleak, as discussions in the CTD regarding the relevant provisions in the SPS Agreement have not led to progress in reaching agreement. Developed countries have indicated that they regard developing country proposals in this regard as unrealistic or impractical, placing too many restrictions on the implementation of SPS measures, thus endangering health, or requiring unlimited funding for technical assistance. Instead, they suggest more effective use of the current provisions on special and differential treatment and further consultations in the SPS Committee when new SPS measures are likely to cause difficulties for developing countries. In addition, developed countries oppose changes to the language of special and differential treatment provisions in the agreements, as this would alter the balance of rights and obligations. Developing countries counter that their proposals do not require lowering SPS standards but rather meaningful and mandatory technical and financial assistance in order to meet new SPS measures. According to developing countries, the current under-utilisation of special and differential treatment provisions is due to the vagueness of the language used therein, which is precisely what was meant to be addressed under the CTD's mandate. *See* ICTSD, *WTO: S&D Review Struggles for Agreement* 6(39) BRIDGES WEEKLY TRADE NEWS DIGEST, November 14, 2002.

[661] The relevant discussions and documents circulated in the SPS Committee on technical assistance and capacity building are summarized in a Secretariat document. *See* Committee on Sanitary and Phytosanitary Measures, *Technical Assistance and Capacity Building in the Context of the SPS Committee, Note by the Secretariat,* G/SPS/GEN/332, June 24, 2002.

organizations and bilaterally.[662] Much is being done by the WTO Secretariat to encourage the effective implementation of technical assistance provisions.[663] Informal discussions have taken place in the SPS Committee on this issue and specific proposals were discussed.[664] Some of the suggestions put forward were the integration of all technical assistance into a single coherent framework, irrespective of the source of the assistance; placing emphasis on improving human resources, aiming technical assistance at the establishment or improvement of national regulatory systems in the area of SPS, as well as assisting developing countries to meet the SPS standards of their trading partners.[665] It would be of great consequence if these discussions were to result in a coherent framework for the provision of technical assistance.[666]

Finally, with respect to the problems of standard setting in international organizations, it should be borne in mind that this is outside the scope of action of the WTO. The standard-setting organizations are fully independent of the WTO and operate according to their own rules and statutes. Any initiatives for reform of the standard setting process must thus come from these organizations themselves or Members acting in their capacity as members of the standard-setting organizations. It is interesting to note that an evaluation of the Joint FAO/WHO Food Standards Program has recently been conducted. This involved a review of the Codex standard-setting process and the problems of participation of developing countries. The results of this review were discussed within the Codex[667] and recommendations were made to the FAO and WHO governing bodies regarding reforms to the Codex structure and decision-making process. Consequently several important changes to the CAC Rules of Procedure were considered at the twenty-seventh session of the CAC in 2004. Similarly, the IPPC established a trust fund for technical assistance in 2003, aimed at helping developing countries to participate in standard-setting activities and meetings and to implement resulting standards.[668] In addition, a Trust Fund for the

[662] At the SPS Committee meeting of June 2002, the U.S.A., EC, Codex, ITC and IICA highlighted some of their recent technical assistance activities. *See* Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 25–26 June 2002, Note by the Secretariat*, G/SPS/R/27, August 2, 2002, paras 102–106. More detailed information on some of these activities can be found in G/SPS/GEN/181/Add.2, G/SPS/GEN/335, G/SPS/GEN/344 and G/SPS/GEN/333.

[663] For example, by the gathering of information on the technical assistance needs of developing countries by means of questionnaires. *See supra* Part IV(A). In the June 2002 meeting of the SPS Committee, the Secretariat drew Members' attention to the Coordinated WTO Secretariat Annual Technical Assistance Plan for 2002 and indicated that it will do its best to include in its 2003 program the technical assistance requests that emerge from the responses to the questionnaire. However, it pointed out that due to resource constraints, most technical assistance requests would have to be addressed bilaterally or by other international organizations. *See* Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 25–26 June 2002, Note by the Secretariat*, G/SPS/R/27, August 2, 2002, ¶ 97.

[664] *See supra* Part IV(A).

[665] Committee on Sanitary and Phytosanitary Measures, *Discussion on Technical Assistance and Cooperation—Informal Meeting of the SPS Committee of 9 July, 2001,* G/SPS/GEN/267, July 16, 2001.

[666] In addition, it should be noted that the Agriculture and Commodities Division of the WTO Secretariat is participating in the creation of a technical assistance database. *See* Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 25–26 June 2002, Note by the Secretariat*, G/SPS/R/27, August 2, 2002, ¶ 97.

[667] Extraordinary sessions of the Codex Alimentarius Commission and its Executive Committee were convened in Geneva on February 10–15, 2003, to discuss the conclusions and recommendations emanating from this evaluation. A statement resulting from these discussions was adopted for submission to the governing bodies of the FAO and WHO. Further work will be undertaken by the Commission in this regard. See Codex Alimentarius Commission, *Report of the 25th (Extraordinary) Session*, February 13–15, 2003 ALINORM 03/25/5, Appendix II.

[668] Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 17–18 March 2004, Note by the Secretariat*, G/SPS/R/33, May 7, 2004, ¶ 140.

Participation of Developing Countries and Countries in Transition in the Work of the Codex Alimentarius Commission[669] was launched on February 14, 2002.[670]

In conclusion, we argue that the SPS Agreement represents a significant achievement in addressing the potential for conflict between trade liberalization and the protection of health. It is the first WTO agreement to deal specifically with the interface between free trade and a specific social policy area. As any such new initiative, it contains both promises and pitfalls. The experience gained during the nine years of existence of the SPS Agreement has served to highlight these two aspects of the Agreement, and can be usefully examined in order to address the issue of whether, and if so which, reforms to the Agreement or clarifications thereof may be necessary. It is hoped that the discussion in this Chapter may stimulate thinking and debate in this area.

[669] *See supra* note 625.

[670] At the SPS Committee meeting of March 17–18, 2004, the CAC representative reported that the contributions to the FAO/WHO Trust Fund have reached the threshold of US$500,000 needed to operationalize it. However, as this amount is insufficient to significantly increase developing country participation in the work of the CAC, he encouraged further contributions.

CHAPTER 8

THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Arthur E. Appleton*

TABLE OF CONTENTS

I. Introduction 373
II. Brief Historical Overview 374
A. The GATT 374
B. The Tokyo Round Standards Code 375
III. The TBT Agreement 376
A. Terminology in the TBT Agreement 376
1. Technical Regulation 376
2. Standard 379
3. Conformity Assessment Procedure 380
B. Structure and Scope of the TBT Agreement 380
1. Not Applicable to Trade in Services 381
2. TBT Agreement vs. Government Procurement Specifications: Procurement Carved Out 381
3. SPS vs. TBT Measures: SPS Carved Out 381
4. Probably Inapplicable to Non-Product-Related Processes and Production Methods 382
5. Applicability to Import Prohibitions 383
6. Retroactive Application of the TBT Agreement 384
IV. Applicability of the TBT Agreement at Various Governmental and Non-Governmental Levels 385
A. Technical Regulations (Articles 2 and 3) 385
B. Standards (Article 4 and the Code of Good Practice) 386
C. Conformity Assessment Procedures (Articles 5–9) 386
1. Central Government Bodies (Articles 5 and 6) 387
2. Local Government Bodies (Article 7) 387
3. Non-Governmental Bodies (Article 8) 387
4. International and Regional Application (Article 9) 388
V. Major Principles Applicable (in Various Forms) Throughout the TBT Agreement 388

* Arthur E. Appleton, J.D., Ph.D., Of Counsel, White & Case. The author wishes to thank Patrick Macrory, Peter Van den Bosche, Marielle Matthee and Veijo Heiskanen for their comments and suggestions on various drafts. Any errors that remain are those of the author. Portions of this chapter draw from a training manual produced by the author for the United Nations Conference on Trade and Development ("UNCTAD"), *Course on Dispute Settlement, World Trade Organization, 3.10 Technical Barriers to Trade* (2003). The discussion of *EC—Sardines* is drawn in part from a paper co-authored with Veijo Heiskanen, that was presented in autumn 2002 at the annual conference of the World Trade Law Association in London. It will appear in the WORLD TRADE LAW ASSOCIATION YEARBOOK.

A. The Non-Discrimination Principle 388
1. "Like Products" 389
B. The Prevention of Unnecessary Obstacles to International Trade 390
1. Legitimate Objectives 391
2. Necessity 393
C. Harmonization—Use of Relevant International Standards 395
1. The Characterization of Codex Standard 94 as a Relevant International Standard 396
2. Whether Codex Standard 94 Was Used as a Basis for the EC Regulation 397
3. Ineffective or Inappropriate Means 398
4. Rebuttable Presumption Favoring the Use of Certain Harmonized Standards 399
D. Equivalence and Mutual Recognition 400
E. Transparency 401
F. Derogations from Transparency in the Event of Urgent Problems 402
VI. Other Important Provisions of the TBT Agreement 402
A. Technical Assistance—Article 11 402
B. Special and Differential Treatment—Article 12 403
C. Consultations And Dispute Settlement—Article 14 405
1. EC—Asbestos (Miscellaneous Points) 406
2. EC—Sardines (Miscellaneous Points) 406
D. Institutional Considerations 407
1. The Work of the Committee on Technical Barriers to Trade 407
2. Built-in Reviews of the TBT Agreement—Articles 12.10, 15.3 and 15.4. 407
3. Web Resources 408
4. Doha Work Program 408
VII. Conclusion 408

I. Introduction

Technical regulations and standards play an important part in everyday life. Governments apply "technical regulations" (mandatory measures) and "standards" (voluntary measures), and they rely on measures to assess the conformity of goods with standards and regulations ("conformity assessment procedures") for many widely accepted domestic policy purposes, among them to:

- protect the health and safety of citizens and workers
- preserve the environment
- increase consumer confidence
- prevent deceptive marketing practices
- protect national security
- protect animal and plant life and health
- to assure product uniformity, compatibility and interchangeability.

There is however a darker side to the use of technical regulations and standards. With the progressive reduction in tariffs since 1948, WTO Members, like GATT Contracting Parties before them, have turned to technical regulations, standards and conformity assessment procedures as a means of protecting domestic producers. Such protectionism is sometimes overt—for example a requirement that a product sold in a country incorporate an environmental technology only manufactured in that country. At other times it is less overt, as in the case of an economically small country that establishes standards for the dimensions of an appliance that differ from those of other countries, making it harder for foreign manufacturers to supply the domestic market.[1]

The Uruguay Round Agreement on Technical Barriers to Trade ("TBT Agreement") is designed to allow WTO Members to pursue what they have agreed are legitimate regulatory and standardization interests, while at the same time attempting to ensure that such regulations and standards do not become unnecessary obstacles to international trade in goods. This is a difficult balance to achieve since regulatory measures may have legitimate as well as protectionist purposes. The TBT Agreement is also intended to make the process of formulating, implementing and applying technical regulations, standards, and conformity assessment procedures transparent—so that Members are aware of regulations and standards that exist in other Members' jurisdictions and can influence their development and monitor their application.

These competing goals are reflected in the TBT Agreement's preamble or recitals which sets forth the philosophy of this Agreement.[2] These recitals set the TBT Agreement

[1] Large foreign manufacturers with substantial economies of scale might find it uneconomical to retool their factories to compete for market share in a small market.

[2] In relevant part the TBT Agreement's preamble provides:

> *Recognizing* the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;
>
> *Desiring* therefore to encourage the development of such international standards and conformity assessment systems;
>
> *Desiring* however to ensure that technical regulations and standards, including packaging, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;
>
> *Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for

squarely in the context of the Uruguay Round Agreement and the objectives of GATT 1994. However, the recitals go further. They establish the preference, given voice in the Agreement, for the use of "international" standards and conformity assessment procedures. The recitals also establish the important policy objective, again repeated in the TBT Agreement, of assuring that regulations, standards and conformity assessment procedures do not create unnecessary obstacles to international trade.[3]

The preamble evidences that the drafters of the TBT Agreement sought to achieve a balance between assuring that technical regulations, standards and conformity assessment procedures do not become unnecessary obstacles to international trade and allowing Members the regulatory autonomy to protect legitimate interests through the use of these potential barriers.[4] If the TBT Agreement is applied too strictly, the legitimate policy interests of Members will be thwarted. If the TBT Agreement is applied too laxly, technical regulations may be used for protectionist purposes and the gains Members have achieved through progressive rounds of tariff reductions may be lost.

The result is that some sensitivity is required when dealing with TBT issues, in particular from a developing country viewpoint. Developing countries fear that technical regulations and standards imposed by developed countries purportedly for social policy goals may in reality be for protectionist purposes. Developed countries fear that the TBT Agreement will be applied too strictly and that trade measures designed to pursue legitimate social policy objectives will be struck down.

This chapter provides a detailed examination of the provisions of the TBT Agreement. As of August 2004, there have only been two WTO dispute settlement decisions interpreting the TBT Agreement. What little experience that exists is incorporated into the following analysis.

II. Brief Historical Overview

A. The GATT

The 1947 General Agreement on Tariffs and Trade ("GATT") does not treat technical regulations and standards in much detail. Although the term "regulation" appears in several places in the GATT Agreement, and the term "standards" is mentioned in Article XI, only GATT Articles III:4, XI:2, and Article XX are significant.[5] Article III:4 of

> the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;
>
> *Recognizing* that no country should be prevented from taking measures necessary for the protection of its essential security interest;
>
> *Recognizing* the contribution which international standardization can make to the transfer of technology from developed to developing countries;
>
> *Recognizing* that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavors in this regard . . .

[3] Packaging, marking and labeling requirements are singled out for special attention in the preamble's fifth recital as potential obstacles to international trade.

[4] Based on the Appellate Body's decision in *U.S.—Shrimp*, it can be inferred that both the preamble to the WTO Agreement and the preamble of the TBT Agreement will play a role in the interpretation of the TBT Agreement. *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Appellate Body, WT/DS58/AB/R (1998) ("*U.S.—Shrimp")*, ¶¶ 152–155.

[5] Article XX's introductory paragraph ("chapeau") uses the term "measure" which would include a regulation. Article XX(d) specifically uses the term "regulations".

the GATT Agreement requires that the principle of "national treatment" be applied to regulations and requirements affecting the "internal sale, offering for sale, purchase, transportation, distribution or use" of "like products". It is the GATT Article with the greatest relevance to the treatment of regulations and standards, as well as procedures for assessing whether products conform with regulations and standards.[6] The basic principle is that regulations and standards should not be applied so as to discriminate between "like" foreign and domestic products, that is to say, similar foreign and domestic products, sold within a country.[7]

Article XI:2 of the GATT Agreement applies to commodities—a term of art among trade lawyers.[8] It permits import and export prohibitions necessary for the application of standards and regulations for the classification, grading or marketing of commodities in international trade. It operates as an exception to the general Article XI rule that only duties, taxes and other charges should be applied to restrict imports and exports.

Lastly, Article XX(b) and (g) of the GATT Agreement establish exceptions to GATT obligations, in practice often to Article III of the GATT Agreement, that may be applicable to technical regulations and standards. Among other goals, these exceptions are designed to offer GATT Contracting Parties, and now WTO Members, a means of protecting, when "necessary", human, animal or plant life and health, as well as enacting regulatory measures relating to the protection of exhaustible natural resources. They can be used to justify certain regulatory and standardization measures provided that, in the words of Article XX's chapeau, the measures do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The above provisions of GATT 1947 do not establish a comprehensive legal structure for the treatment of technical regulations and standards. However, the important principles contained in these GATT provisions served as a basis for the Tokyo Round Standards Code, and later the WTO TBT Agreement. In particular, the TBT Agreement contains a general obligation of non-discrimination that draws inspiration from GATT Articles I and III, and provides room for exceptions similar to those present in GATT Articles XX and XXI.

B. The Tokyo Round Standards Code

This first step toward the establishment of a more comprehensive legal structure to discipline the application of technical regulations and standards came with the growing realization that GATT Article III:4 is subject to abuse. It is not particularly difficult for

[6] GATT Article III:4 provides in part that:

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

In brief, the national treatment principle requires that foreign and domestic "like products" be subjected to similar tax and regulatory treatment. The national treatment principle, together with the MFN principle (Article I), form the principle of non-discrimination that is fundamental to the WTO system. See Chapter 5 of this book.

[7] The phrase "like product" is a term of art. It is discussed *infra* Part V(A)(1).

[8] The term commodity usually refers to food or metal products. Such products are frequently traded by investors. In Report of the GATT panel, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon,* L/6268, BISD 35S/98, 112 (1988), ¶¶ 4.2–4.3, herring and salmon appear to have been accepted by the panel to be commodities for purposes of Article XI:2(b). The panel report dealt with whether a particular Canadian law was a marketing regulation for commodities (fish products).

a government to implement technical regulations that comply with Article III:4, but that nevertheless act as non-tariff barriers. Non-tariff barriers, in the form of domestic regulations, make excellent protectionist tools and were used by certain GATT Contracting Parties, including Japan,[9] to protect domestic producers. The use of non-tariff barriers to protect domestic manufacturers necessitated the establishment of a stronger regime governing the application of technical regulations and standards. Negotiations on the reduction of non-tariff barriers during the Tokyo Round eventually led to the Tokyo Round Agreement on Technical Barriers to Trade,[10] usually known as the "Standards Code", a title that remains useful because it distinguishes the Tokyo Round TBT Agreement (the Standards Code) from the Uruguay Round TBT Agreement.

The Standards Code came into effect on January 1, 1980. It was a plurilateral agreement—meaning that GATT Contracting Parties could but were not required to become members. Nevertheless, 32 Contracting Parties, primarily developed and advanced developing countries, opted to join. Despite the fact that its membership was limited and the Standards Code lacked a strong dispute settlement mechanism (which, like much of the GATT regime, was dependent on a consensus of its members), it provided a good testing ground for how best to discipline the use of technical regulations and standards. Significant portions of the WTO TBT Agreement are drawn from the Standards Code.

III. The TBT Agreement

The Uruguay Round Agreement on Technical Barriers to Trade entered into force on January 1, 1995. Much was learned from the Tokyo Round experience, and weaknesses present in the Tokyo Round Standards Code are addressed in the TBT Agreement. Two examples illustrate this point: (1) the TBT Agreement is an integral part of the single undertaking that forms the WTO Agreement—meaning that the TBT Agreement is a multilateral undertaking and as a result all WTO Members are bound by its obligations; and (2) the TBT Agreement has a much stronger enforcement mechanism, being subject to the WTO Agreement's Dispute Settlement Understanding ("DSU") which does not require consensus for adoption of panel and Appellate Body recommendations.

A. Terminology in the TBT Agreement

The TBT Agreement is applicable to "technical regulations", "standards", and "conformity assessment procedures"—procedures used to assess compliance with technical regulations and standards. Each of these terms is defined in Annex 1 of the TBT Agreement.

1. Technical Regulation

A technical regulation is defined in Annex 1 Paragraph 1 of the TBT Agreement as a:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

[9] Jackson singles out the case of Japan. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 222 (1997).

[10] The (Tokyo Round) Agreement on Technical Barriers to Trade, GATT, BISD, 26/S 8 (1980), (*entered into force* January 1, 1980), *reprinted in* 18 ILM 1079 (1979).

In *EC—Asbestos* the Appellate Body set forth a three-part test, derived from Annex 1.1 of the TBT Agreement, for a "document" to be classified as a technical regulation:

1) The document must apply to an *identifiable* product or group of products,
2) The document must lay down one or more *product characteristics*, and
3) Compliance with the product characteristics must be *mandatory*.[11]

One example of a technical regulation would be a law stating that only kitchen ovens that are one meter wide may be sold in State X. A second example would be a law stating that toys could not be sold in State X unless their packaging was recyclable. Kitchen ovens or toy packaging that do not comply with the terms of these technical regulations would not be permitted to be sold in State X, whether produced in State X or imported.

Being mandatory, technical regulations have the greatest potential to restrict international trade. This is because the sale of products with "characteristics" that do not meet applicable technical regulations will be prohibited by law.

The three criteria presented in *EC—Asbestos* were reiterated and applied in *EC—Sardines* where both the Panel and the Appellate Body examined as a threshold issue whether a particular trade measure was a technical regulation within the sense of Annex 1.1 of the TBT Agreement.[12] Since this important TBT case is referred to several times in this chapter, a brief description of the facts is provided below.

EC—Sardines concerned a complaint by Peru against the European Communities. The case involved the marking or labeling for sale of preserved and canned fish products made from two small and rather similar fish species—*Sardina pilchardus Walbaum* which is primarily found in the Eastern North Atlantic, Mediterranean and Black Seas, and *Sardinops sagax sagax*, which is found off the Peruvian and Chilean coasts. Both belong to the same family and sub-family, but to a different genus.[13]

In June 1989 the European Union adopted Council Regulation (EEC) No. 2136/89 ("EC Regulation"), which lays down common marketing standards for preserved sardines.[14] The EC Regulation reserved the use of the name "sardines" to *Sardina pilchardus*, a species found in or near European waters, thereby effectively prohibiting Peru from marketing its *Sardinops sagax sagax* as preserved "sardines" in the European Union.

The Panel found that "... the EC regulation is a technical regulation as it lays down product characteristics for preserved sardines and makes compliance with the provisions contained therein mandatory."[15] The EC appealed this decision, arguing that the measure is not a technical regulation based on the test established in *EC—Asbestos* since the regulation allegedly failed to meet the first and second criteria of the test.[16] More specifically the EC argued that the product was not identifiable since the product coverage

[11] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products,* Appellate Body Report, WT/DS135/AB/R (2001) ("*EC—Asbestos*"), ¶¶ 66–70 (emphasis added).

[12] *European Communities—Trade Description of Sardines*, Report of the Panel, WT/DS231/R, ¶¶ 7.24–7.35; and *European Communities—Trade Description of Sardines*, Report of the Appellate Body, WT/DS 231/AB/R (2002) ("*EC—Sardines*"), ¶¶ 173–195.

[13] *Sardina pilchardus Walbaum* and *Sardinops sagax sagax* both belong to the *Clupeidae* family and the *Clupeinae* sub-family. They belong to the genus *Sardina* and *Sardinops* respectively. *EC—Sardines*, Report of the Panel, *supra* note 12, ¶¶ 2.1–2.2.

[14] *Council Regulation (EEC) 2136/89 of June 21, 1989 Laying Down Common Marketing Standards for Preserved Sardines*. The EC Regulation is appended to the Panel Report, Annex 1. *See EC—Sardines*, Report of the Panel, *supra* note 12, ¶¶ 2.5–2.6.

[15] *EC—Sardines*, Report of the Panel, *supra* note 12, ¶ 7.35.

[16] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶¶ 173–174 (*citing EC—Asbestos*).

of its regulation is limited to preserved *Sardina pilchardus*, and the EC measure does not regulate fish made from *Sardinops sagax* or any other species.[17] Second, it argued that the requirement to state a certain name on the label does not involve just a labeling requirement but also a "substantive naming rule". It sought to draw a distinction between labeling requirements, which it accepted are covered by the TBT Agreement, and naming rules, which it argued do not reflect product characteristics and are therefore not covered by the TBT Agreement.[18]

The Appellate Body rejected both arguments. With respect to the first argument the Appellate Body found that a product does not have to be mentioned explicitly in a document for the product to be identifiable, and that identifiable does not mean expressly identified.[19] The Appellate Body upheld the Panel's finding that the EC Regulation is applicable to an identified product, "preserved sardines". More importantly it rejected the EC's contention that preserved sardines only referred to *Sardina pilchardus.* In doing so, it followed its reasoning in *EC—Asbestos*, that product identification relates to "aspects of compliance and enforcement"; since the EC Regulation had been enforced against imports of *Sardinops sagax*, *Sardinops sagax* was an identifiable product for purposes of the EC regulation.[20]

Next the Appellate Body turned to the question of whether the EC Regulation laid down product characteristics. Again turning to its findings in *EC—Asbestos* the Appellate Body reiterated that product characteristics "include not only 'features and qualities intrinsic to the product', but also those that are related to it, such as the 'means of identification'."[21] It found it unnecessary to determine whether the TBT Agreement distinguishes between "labeling" and "naming", holding instead that the requirement that "preserved sardines" be prepared exclusively from *Sardina pilchardus* establishes a product characteristic "intrinsic to" preserved sardines. Further, it agreed with the Panel's finding that "a means of identification" is a "product characteristic".[22]

The Appellate Body's decision in *EC—Sardines* is significant as it clarifies what is a technical regulation for TBT purposes—a threshold issue that will arise in other TBT cases. The EC's position was untenable, both legally and from a policy perspective. In effect the EC argued that product identification should be determined based on a strict reading of the text of its regulation and not based on the legal consequences of its regulation for imports. Had the EC's position prevailed, it would have become far easier to use product names to evade the classification of a trade measure as a technical regulation. The Appellate Body's decision thus helped preserve the effectiveness of the TBT Agreement.

The definition in the TBT Agreement of a technical regulation is broad. Nevertheless, Article 2.8 of the TBT Agreement does establish a preference for specifying technical

[17] *Id.* ¶ 173.
[18] *Id.* ¶ 174.
[19] *Id.* ¶ 180.
[20] *Id.* ¶¶ 185–186, *citing EC—Asbestos*, ¶ 70 which states:

> A "technical regulation" must, of course, be applicable to an identifiable product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible [. . .] Although the TBT Agreement clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise expressly identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does not expressly identify products by name, but simply makes them identifiable—for instance, through the "characteristic" that is the subject of regulation.

[21] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶ 189 (*citing EC—Asbestos* ¶ 67).
[22] *EC—Sardines*, Report of the Appellate Body, *supra* note 12,¶ 190.

regulations based on product requirements rather than design or descriptive standards. By so doing, the Agreement leaves the Members with the maximum discretion to determine how to address legitimate TBT objectives. An example of a technical regulation based on a product requirement would be a provision requiring that a car bumper be able to withstand an impact at a speed of six kilometers/hour without damage. The same type of requirement based on a design or descriptive standard might require that car bumpers be made of a certain grade of steel and be mounted on specific springs designed to recoil a minimum amount upon impact.

2. Standard

The TBT Agreement is also applicable to standards. A standard is defined in Annex 1 Paragraph 2 of the TBT Agreement as a:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.[23]

The critical distinction between a technical regulation and a standard is that a technical regulation is mandatory and a standard is voluntary. A merchant can still try to sell a product that does not meet an applicable standard. Likewise an importer can import products that do not meet an established standard.

An example of a standard would be a guideline issued by a standardizing body establishing a common format for DVDs (digital video disks). Manufacturers whose DVD players use the common format would be able to advertise their conformity with the standard. Such DVD players would probably be more attractive to consumers given that consumers want to be able to rent DVDs that will work on their players. DVD players that use a different format could still be sold but the manufactures would lose any marketing benefits conferred by using the common standard. A familiar example of standards that illustrates how important standards can be, is the competition that occurred between two video standards—VHS and Betamax. The VHS standard triumphed over Betamax. Consumers who had purchased a video-recorder that used the Betamax standard eventually found that they were unable to rent movies recorded using the Betamax standard.

Another example of a standard would be rules or guidelines governing the use of a "recyclable symbol". Products conforming to the "rules, guidelines or characteristics for products" established by the standardizing authority would be able to bear the recyclable symbol.[24] Products that do not meet these criteria would not be permitted to bear the symbol, but would still be permitted to be sold.

Voluntary "standards" are used for many reasons, chief among them to assure proper performance, uniformity and interchangeability of a particular good. For example, manufacturers of products requiring batteries usually adapt their products to standardized voltages, and manufacturers of machines benefit by using standardized nuts and bolts so that repairs are more easily made. In the latter example, the manufacturers benefit by being able to buy standard nuts and bolts instead of producing them themselves; the users benefit by being able to make repairs more easily.

Neither a WTO panel nor the Appellate Body has had the opportunity to rule in a case involving a Member's standards. A dispute involving standards also never arose under the Tokyo Round Standards Code.

[23] *TBT Agreement*, Annex 1.2.

[24] *See TBT Agreement*, Annex 1 ¶ 2.

3. Conformity Assessment Procedure

Lastly, the TBT Agreement is applicable to conformity assessment procedures. A conformity assessment procedure is defined in Annex 1 Paragraph 3 of the TBT Agreement as:

> Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.
>
> Explanatory note:
>
> Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

Conformity assessment procedures are, as the term suggests, procedures for determining whether a given product conforms to an applicable technical regulation or standard. For example, if a WTO Member requires as a condition for the sale of a machine tool that a special guard be present to protect the hands of users, an inspection to determine if the guard is in place would be a conformity assessment procedure implemented to verify compliance with a technical regulation.

Likewise, if a WTO Member establishes standards whereby certain products may bear a "recyclable symbol", a test to make sure that a product meets the standards required to bear the symbol would be a conformity assessment procedure implemented to verify compliance with a standard. Regardless of whether the product conforms to the standard, it can be sold. The question is only whether or not the product will be permitted to bear the symbol.

B. Structure and Scope of the TBT Agreement

The scope of the TBT Agreement is set forth in TBT Article 1, and by reference to Annex 1 which defines the key terms, including: "technical regulations", "standards" and "conformity assessment procedures". Technical regulations, standards, and conformity assessment procedures are treated in separate portions of the TBT Agreement. Technical regulations are dealt with in Articles 2–3. Standards are governed by Article 4 and Annex 3—the Code of Good Practice for the Preparation, Adoption and Application of Standards. This Code sets forth almost all of the substantive provisions governing the treatment of standards. Conformity assessment procedures fall under Articles 5–9. The remainder of the Agreement, Articles 10–14, deals with transparency, technical assistance, special and differential treatment, institutional issues and dispute settlement.

Pursuant to the respective definitions set forth in Annex 1, technical regulations and standards are given form in "documents". Written form is thus implied. Technical regulations and standards may relate to product characteristics, terminology, symbols, packaging, marking or labeling requirements. As the principal difference between a technical regulation and a standard is that compliance with a technical regulation is mandatory while compliance with a standard is voluntary, technical regulations require a certain degree of product standardization, while standards merely encourage standardization. Conformity assessment procedures serve to verify whether this standardization has occurred through sampling, testing, inspection, evaluation, verification, registration, accreditation and approval procedures.

The TBT Agreement does not apply to all technical regulations, standards and conformity assessment procedures. Several provisions within the WTO Agreement, and more specifically the TBT Agreement, limit its scope. They are described in the first five

subsections below. One Appellate Body decision establishes the retroactive scope of the TBT Agreement. It is described in the sixth subsection.

1. Not Applicable to Trade in Services

The TBT Agreement is a portion of Annex 1A of the WTO Agreement. Annex 1A contains the Multilateral Agreements on Trade in Goods. These covered agreements, including the TBT Agreement, do not apply to trade in services. As a result, trade in services does not fall within the TBT Agreement.

2. TBT Agreement vs. Government Procurement Specifications: Procurement Carved Out

Pursuant to Article 1.4 of the TBT Agreement, the TBT Agreement is not applicable to government procurement activities—more specifically purchasing specifications prepared by governmental bodies for the production or consumption requirements of governmental bodies. Government purchasing specifications may fall instead under the WTO Agreement on Government Procurement ("AGP"). The AGP is a plurilateral agreement and the majority of developing countries, as well as a few developed countries, have not joined the AGP. Their procurement activity falls neither under the TBT Agreement nor under the AGP.

3. SPS vs. TBT Measures: SPS Carved Out

Pursuant to Article 1.5 of the TBT Agreement, the TBT Agreement is not applicable to sanitary and phytosanitary measures as defined in Annex A of the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement"). This is an explicit carve-out of SPS measures from the purview of the TBT Agreement. As a result, to understand the scope of the TBT Agreement, one must review Annex A(1) of the SPS Agreement. This provision defines an SPS measure as any measure applied:

> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

Despite the fact that Article 1.3 of the TBT Agreement provides that the TBT Agreement is applicable to agricultural products, it is the SPS Agreement and not the TBT Agreement that applies when a Member is protecting animal, plant or human health from the entry,

spread or establishment of pests, diseases, additives, contaminants, toxins or disease carrying organisms within its territory.

Cases do exist where different aspects of a product's "life-cycle" may fall under the coverage of both agreements. For example, agricultural products might be subject to an SPS inspection for pests at the border, then incorporated into a canned soup that is subject to labeling requirements requiring (1) the specification of the product's nutritional content and (2) whether the container is recyclable (both falling under the TBT Agreement).[25] However, it is virtually impossible that the two agreements would apply simultaneously to the same subject matter. A hypothetical instance where the distinction is somewhat blurred could be the case of hormone-treated meat. If an SPS measure is introduced to prevent health risks allegedly associated with the consumption of hormone-treated meat, the SPS Agreement would apply. If there are no health risks, the TBT Agreement might still be applicable, for example to a technical regulation introduced to prevent deceptive practices (arguably a labeling requirement intended to alert consumers to the fact that they are purchasing meat from an animal that was treated with hormones). Admittedly this example does raise questions related to the treatment of non-product-related production methods which are discussed in the following section.

4. Probably Inapplicable to Non-Product-Related Processes and Production Methods

The definitions of a "technical regulation" and a "standard" quoted above are ambiguous as to whether the TBT Agreement applies to technical regulations and standards regulating manufacturing "processes and production methods" ("PPMs") when the PPMs utilized are not detectable in the final product—so-called "non-product-related processes and production methods" ("NPR-PPMs"). This is a controversial issue. The view generally held in the trade community is that the TBT Agreement was not intended to apply to PPMs, unless the PPM is product-related (detectable in the final product).[26]

For example, it is highly unlikely that the TBT Agreement would apply to a law prohibiting the importation of aluminum produced using electricity derived from nuclear power. Instead, it is probable that GATT Article XI would be applied in a challenge to such a regulation on the grounds that generally only duties, taxes and other charges may be applied to restrict imports.

Nevertheless, there is one slight uncertainty. As just noted, an ambiguity exists in the definitions of "technical regulation" and "standard" in Annex 1 of the TBT Agreement—it is somewhat unclear whether NPR-PPMs were meant to be excluded from the definitions of technical regulations and standards, and thus from the TBT Agreement. As a result, and although highly improbable, room may exist to argue that the TBT Agreement could, in certain instances, also be applied to NPR-PPMs.

It bears noting that WTO Members have notified certain NPR-PPMs to the TBT Committee (for example, eco-labeling schemes based on a life-cycle analysis).[27] Such

[25] The SPS Agreement and not the TBT Agreement would apply to a labeling requirement if the intent or purpose of the labeling requirements is sanitary or phytosanitary in nature within the meaning of Annex A ¶ 1 of the SPS Agreement.

[26] *See generally* ARTHUR E. APPLETON, ENVIRONMENTAL LABELLING PROGRAMMES: INTERNATIONAL TRADE LAW IMPLICATIONS 92–94 (1997).

[27] "Notification" in the TBT sense of the term means to inform officially other WTO members of a particular action through the WTO Secretariat. Eco-labeling schemes are usually voluntary labeling programs where a label is awarded to environmentally friendlier products based on an environmental assessment of all phases of a products life-cycle—including, production, use, and disposal.

notifications do not seem to be evidence that a particular Member believes the TBT Agreement applies to NPR-PPMs. They are instead indicative of the efforts that certain WTO Members have made to ensure the transparency of their eco-labeling schemes.

Some may argue that the Appellate Body's decisions in *U.S.—Shrimp* suggests a willingness of the Appellate Body to close its eyes to the NPR-PPM debate, and from this draw the conclusion that the TBT Agreement should be applied to NPR-PPMs. In *U.S.—Shrimp*, the Appellate Body found (without discussing the PPM issue) that a U.S. regulatory measure, applicable to an NPR-PPM, and which violated GATT Article XI, satisfied an exception to GATT Article XX, but failed to meet the conditions of Article XX's chapeau.[28] In a subsequent proceeding under Article 21.5 of the DSU,[29] the Appellate Body ruled that a modified version of the U.S. measure met the conditions of Article XX's chapeau. This latter decision allowed the United States to impose an import ban based on an NPR-PPM.

The relevance of *U.S.—Shrimp* for purposes of the TBT Agreement has not been established. *U.S.—Shrimp* did not involve the TBT Agreement and the provisions at issue are not the same. It is doubtful that *U.S.—Shrimp* lends much legal support for the argument that the TBT Agreement should be applied to NPR-PPMs, although from a policy perspective *U.S.—Shrimp* does seem to take a friendlier view of trade-related environmental measures based on NPR-PPMs.[30]

5. Applicability to Import Prohibitions

The definition of "technical regulation" contained in Annex 1 to the TBT Agreement does not list import prohibitions or bans among the covered measures. However, the *EC—Asbestos* decision established that the TBT Agreement is applicable to import prohibitions and bans that are based on product characteristics, and exceptions to the prohibition or ban (based also on particular product characteristics) exist. In *EC- Asbestos* the Appellate Body found:

> Like the Panel, we consider that, through these exceptions, the measure sets out the "applicable administrative provisions, with which compliance is mandatory" for products with certain objective "characteristics". The exceptions apply to a narrowly defined group of products with particular "characteristics". Although these products are not named, the measure provides criteria which permit their identification, both by reference to the qualities the excepted products must possess and by reference to the list promulgated by the Minister.
>
> Viewing the measure as an integrated whole, we see that it lays down "characteristics" for all products that might contain asbestos, and we see also that it lays down the "applicable administrative provisions" for certain products containing chrysotile asbestos fibers which are excluded from the prohibitions in the measure. Accordingly, we find that the measure is a "document" which "lays down product characteristics . . . including the applicable administrative provisions, with which compliance is mandatory." For these reasons, we conclude that the measure constitutes a "technical regulation" under the TBT Agreement.[31]

[28] *U.S.—Shrimp*, *supra* note 4, ¶¶ 125–145.

[29] *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, WT/DS58/AB/RW (2001), ¶¶ 91–93.

[30] "Notification" in the TBT sense of the term means to inform officially other WTO members of a particular action through the WTO Secretariat. Eco-labeling schemes are usually voluntary labeling programs where a label is awarded to environmentally friendlier products based on an environmental assessment of all phases of a products life-cycle—including, production, use, and disposal.

[31] *EC—Asbestos*, *supra* note 11, ¶¶ 74–75. (footnote omitted)

6. Retroactive Application of the TBT Agreement

In *EC—Sardines* the Appellate Body dealt with whether the TBT Agreement applies to technical regulations adopted before the entry into force of the Uruguay Round Agreement on January 1, 1995. More specifically, the question posed was whether the EC had an obligation pursuant to Article 2.4[32] of the TBT Agreement to reassess its existing technical regulations in light of the adoption of new international standards.

The Appellate Body recalled that under Article 28 of the Vienna Convention treaties do not generally apply retroactively. According to the Appellate Body, this principle of interpretation was relevant to the interpretation of the covered agreements.[33] The Appellate Body then examined the EC's argument that the TBT Agreement applied only to the preparation and adoption of technical regulations, but not to their maintenance. The Appellate Body found that the text of Article 2.4 of the TBT Agreement did not support the EC's contention. The Appellate Body referred to its reasoning in *EC—Hormones*, where it addressed the temporal scope of the SPS Agreement. There, the Appellate Body stated:

> We agree with the Panel that the SPS Agreement would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the SPS Agreement reveals a contrary intention. We also agree with the Panel that the SPS Agreement does not reveal such an intention. The SPS Agreement does not contain any provision limiting the temporal application of the SPS Agreement, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the SPS Agreement, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly.[34]

Like the trade measure in *EC—Hormones*, the EC Regulation at issue in *EC—Sardines* was an existing regulation that had not "ceased to exist." Nothing in Article 2.4 of the TBT Agreement suggested that there was a "contrary intention" to exclude the applicability of the Agreement to existing measures. Article 2.4 was a "central provision" of the TBT Agreement, and in the Appellate Body's view it could not "just be assumed that such a central provision does not apply to existing measures."[35]

[32] Article 2.4 of the TBT Agreement provides:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis of their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

[33] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶ 200.

[34] *European Communities—Measures Concerning Meat and Meat Products ("EC—Hormones")*, Report of the Appellate Body, WT/DS26/AB/R and WT/DS48/AB/R (1998), 128. (footnote omitted)

[35] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, 208. The Appellate Body also rejected the EC's argument that the Appellate Body's ruling in *EC—Hormones* was not relevant to Article 2.4 of the TBT Agreement because, unlike Articles 2.2, 2.3, 3.3 and 5.6 of the SPS Agreement, Article 2.4 of the TBT Agreement did not contain the word "maintain." The Appellate Body noted that its analysis in *EC—Hormones* focused on Article 5.1 and 5.5 of the SPS Agreement, which also did not include the word "maintain." Similarly, the Appellate Body rejected the EC's argument that the context of Article 2.4 of the TBT Agreement demonstrates that it was not intended to cover the application of technical regulations because, when a provision was intended to do so, this was specifically mentioned. The Appellate Body agreed with the Panel's analysis, noting that the title of Article 2 specifically mentioned the term "application" ("Preparation, Adoption and Application of Technical Regulations by Central Government Bodies"). *Id.* ¶¶ 209–12.

The Appellate Body also noted that Article XVI:4 of the WTO Agreement required each Member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the [covered] agreements."[36] The Appellate Body stated that this provision established a clear obligation on all WTO Members to ensure the conformity of their existing laws, regulations and administrative procedures with the obligations in the covered agreements. Indeed, in the Appellate Body's view, the EC's reading of Article 2.4 of the TBT Agreement "[flew] in the face of the object and purpose of the TBT Agreement."[37] The TBT Agreement is replete with provisions recognizing the important role of international standards in the promotion of harmonization and facilitation of trade. The Appellate Body specifically noted the obligations established in Article 2.5 and 2.6 of the TBT Agreement.[38] The Appellate Body's decision in *EC—Sardines* means that Article 2.4 of the TBT Agreement applies to technical regulations that were adopted prior to January 1, 1995 and which have not ceased to exist.[39]

IV. Applicability of the TBT Agreement at Various Governmental and Non-Governmental Levels

The TBT Agreement sets forth rules and disciplines applicable to international, regional, governmental and non-governmental organizations at different levels of society. Within the limits of what is politically acceptable, the TBT Agreement has a wide field of application. This is in response to the fact that technical regulations, standards, and conformity assessment procedures are not only administered by national authorities, but also by international, regional and local authorities, as well as non-governmental organizations (all defined in Annex 1 of the Agreement). The TBT Agreement thus seeks to bring discipline to technical barriers established and applied at many different levels of society. The application of the basic TBT rules differs slightly depending on the level of application, *e.g.*, whether by a governmental versus non-governmental organization, and whether technical regulations, standards, or conformity assessment procedures are involved. These distinctions are addressed in the following sections.

A. Technical Regulations (Articles 2 and 3)

Pursuant to Article 2 of the TBT Agreement, Members have an obligation to ensure that "central government bodies" abide by the provisions of the TBT Agreement governing technical regulations. A central government body is defined in Annex 1 of the Agreement as the "Central government, its ministries and departments or any body subject to the

[36] *Id.* ¶ 213. There is a similar provision in Article 15.2 of the TBT Agreement, not noted by the Panel, imposing an obligation upon each Member, "promptly after the date on which the WTO Agreement enters into force for it, [to] inform the Committee [on Technical Barriers to Trade] of measures in existence or taken to ensure the implementation and administration of this Agreement." The provision appears to have an object only if the TBT Agreement is interpreted to require Members to bring their existing technical regulations into conformity with their obligations under the TBT Agreement.

[37] *Id.* ¶ 214.

[38] In ¶ 214 the Appellate Body noted that Article 2.5 of the TBT Agreement "establishes a rebuttable presumption that technical regulations that are in accordance with relevant international standards do not create unnecessary obstacles to trade". The Appellate Body also noted in the same paragraph that Article 2.6 "encourages Members to participate in international standardizing bodies with a view to harmonizing technical regulations on as wide a basis as possible".

[39] *Id.* ¶ 216.

control of the central government in respect of the activity in question." The definition of central government bodies is very wide with "control" being the important element.

With only very minor exceptions, pursuant to Article 3 of the TBT Agreement Members also have an obligation to take reasonable measures to ensure that "local governmental"[40] and "non-governmental bodies"[41] within their territories comply with the rules set forth in the TBT Agreement governing technical regulations. In addition, Members are not allowed to take measures that would require or encourage local government or non-governmental bodies to act inconsistently with the rules governing technical regulations.

Article 3.1 of the TBT Agreement establishes two exceptions. A Member is not responsible for taking reasonable measures to ensure that non-governmental bodies, and local governmental bodies beyond the level directly below the central government body, comply with the requirement to notify a technical regulation to other Members through the WTO Secretariat (1) when an international standard does not exist or a measure is not in conformity with an international standard, or (2) when urgent problems of safety, health, environmental protection or national security arise or threaten to arise.[42]

B. Standards (Article 4 and the Code of Good Practice)

Article 4 of the TBT Agreement references the "Code of Good Practice for the Preparation, Adoption and Application of Standards" ("Code of Good Practice"). The Code of Good Practice is found in Annex 3 of the TBT Agreement. The Code is designed to regulate the use of voluntary standards. It is open for acceptance by standardizing bodies within a WTO Member, whether at the central, local or non-governmental level. It is also open to regional standardizing bodies.

Standardizing bodies that accept the Code of Good Practice assume the well-known obligations discussed in Part V of this chapter, including most-favored-nation treatment, national treatment, harmonization, mutual recognition and transparency obligations. Pursuant to Article 4(1) of the TBT Agreement, Members must ensure that central government standardizing bodies accept and comply with the Code of Good Practice. Members must also take "such reasonable measures as may be available to them" to ensure that local governmental, non-governmental and regional standardizing bodies (of which they are a member) accept and comply with the Code. As with technical regulations, Members are not permitted to take measures that would require or encourage local government or non-governmental bodies to act inconsistently with the Code.[43] Article B of the Code requires standardization organizations accepting or withdrawing from the Code to notify the International Standardization Organization.

C. Conformity Assessment Procedures (Articles 5–9)

Articles 5–9 of the TBT Agreement set forth provisions relevant to determining the scope and applicability of the TBT Agreement to conformity assessment procedures.

[40] A local government body is defined in Annex 1 as a "Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.) its ministries or departments or any body subject to the control of such a government in respect of the activity in question."

[41] A non-governmental body is defined in Annex 1 as a "Body other than a central governmental body or a local governmental body, including a non-governmental body which has legal power to enforce a technical regulation."

[42] These exceptions are provided rather clumsily in Article 3.1 which contains a cross-reference to Article 2—specifically paragraphs 9.2 and 10.1.

[43] TBT Article 4(1).

Article 5 provides for most-favored-nation treatment, national treatment, harmonization of assessment procedures, notice, transparency, equivalence, and exceptions in case of urgent problems. Article 6 provides for equivalence, accreditation, mutual recognition, and foreign participation in conformity assessment procedures. These principles are discussed in Part V of this chapter.

Articles 5 and 6 govern conformity assessment by central government bodies and are particularly important—they set out the applicable legal obligations. They also provide a reference point for Articles 7–9 which govern the application of the TBT Agreement to local government bodies, non-governmental bodies and international and regional systems.

1. Central Government Bodies (Articles 5 and 6)

Members have an obligation pursuant to Articles 5 and 6 to ensure that central government bodies abide by the provisions of the TBT Agreement governing conformity assessment. Not only does Article 5 implement many of the general principles applicable throughout the TBT Agreement to conformity assessment procedures, it also establishes very detailed procedural obligations governing transparency, notice, harmonization, procedural requirements and confidentiality.

2. Local Government Bodies (Article 7)

Members are required pursuant to Article 7 to take reasonable measures to assure that local government bodies within their territory comply with Articles 5 and 6 of the TBT Agreement. No indication is given in the TBT Agreement as to what measures would be considered reasonable.[44] Article 7.1 provides an exception with respect to the obligation to notify proposed procedures not in accordance with the relevant guidelines of international standardizing bodies, as well as an exception to notify urgent problems of safety, health, environmental protection, and national security that arise or threaten to arise.[45]

Members must also ensure that the conformity assessment procedures of local government bodies on the level directly below the central government body are notified in accordance with Articles 5.6.2 and 5.7.1, except when the technical content of the local procedures is substantially the same as that previously notified by the central government body.

Members must not take measures that encourage local government bodies within their territories to act inconsistently with Articles 5 and 6 of the TBT Agreement. This obligation mirrors the obligation established at the central government level. Furthermore, Article 7.5 of the TBT Agreement makes Members fully responsible for the observance of Articles 5 and 6 by local government bodies. Members are required to implement a legal mechanism to "support the observance" of the provisions of Articles 5 and 6 by other than central government bodies.

3. Non-Governmental Bodies (Article 8)

Pursuant to Article 8 Members must take reasonable measures to ensure that non-governmental bodies within their territories that operate conformity assessment procedures comply with the provisions of Articles 5 and 6 of the TBT Agreement. As with the treatment of local government bodies described above, no indication is given in the TBT Agreement as to what measures would be considered reasonable. Members are not

[44] Possibly relevant Appellate Body and GATT decisions do exist. They define "reasonable" but in a different context. *See infra* Part V(B)(2).

[45] TBT Articles 5.6.2 and 5.7.1 respectively.

required to ensure that non-governmental conformity assessment bodies comply with the requirement to *notify* proposed measures. However, Members are not permitted to take measures that have the effect of requiring or encouraging non-governmental conformity assessment bodies to act inconsistently with Articles 5 and 6.

Members must also ensure that central government bodies do not rely on conformity assessment procedures operated by non-governmental bodies unless these bodies comply with the legal obligations set forth in Articles 5 and 6 (except for the obligation to notify proposed conformity assessment procedures).

4. International and Regional Application (Article 9)

Article 9 encourages Members to formulate and adopt international systems for conformity assessment, become members of such systems, and participate in these systems. Members must also take reasonable measures to assure that international and regional conformity assessment bodies in which relevant bodies within their territory participate, comply with the obligations set forth in Articles 5 and 6, and that central government bodies only rely on international and regional assessment systems to the extent that these systems comply with Articles 5 and 6.

V. Major Principles Applicable (in Various Forms) Throughout the TBT Agreement

There are common principles that are applicable throughout the TBT Agreement whether technical regulations, standards or conformity assessment procedures are involved. An understanding of these principles, many of which appear in other covered agreements and in GATT 1947, is required to comprehend the TBT Agreement. The following principles are analyzed in turn:

(A) Non-discrimination
(B) The Prevention of Unnecessary Obstacles to International Trade
(C) Harmonization
(D) Equivalence and Mutual Recognition
(E) Transparency
(F) Derogations from TBT Disciplines in the Event of Urgent Circumstances

A. The Non-Discrimination Principle

As applied in the GATT, the non-discrimination obligation contains two elements: "most-favored-nation treatment" ("MFN treatment"), and "national treatment". MFN treatment is an obligation not to use customs duties, charges, rules, regulations and formalities to discriminate between "like products" imported from different WTO Members.[46] National treatment is similarly an obligation not to use taxes, charges and regulations to discriminate between domestic and imported "like products."[47]

An example will help to illustrate the non-discrimination obligation. State A manufactures televisions, and also imports televisions from States B and C. All three States are WTO Members. Assuming that all televisions in question are "like products," State A has an obligation to apply the same taxes, duties and regulatory treatment to television

[46] *See generally* GATT Article I.
[47] *See generally* GATT Article III.

imports from States B and C (MFN treatment); and an obligation not to apply taxes, charges and regulations to favor domestic televisions over television imports from States A or B (national treatment).

Turning more specifically to the TBT Agreement, the "non-discrimination" obligation is an obligation to ensure that technical regulations, standards and conformity assessment procedures are not applied to favor domestic over imported like products, or like products from one Member over those from another Member.[48] If two products are not like products, the non-discrimination principle does not apply as between those products. This raises the important question of what constitutes a like product for TBT purposes.

1. "Like Products"

Whether two products are "like products" and thus require similar or identical treatment is one of the more perplexing legal questions arising under the WTO Agreement. In part this is because the term "like product" is not defined in the WTO Agreement. As a result, product likeness is determined on a case-by-case basis. In what has become a famous but unhelpful passage, the Appellate Body noted in its interpretation of GATT Article III:2 (a taxation provision) that:

> The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.[49]

The two most important WTO Appellate Body decisions interpreting product likeness are *Japan –Alcoholic Beverages*[50] and *EC—Asbestos*.[51] They set forth four factors that are relevant in varying degrees:

(1) physical characteristics (the properties, nature and quality of a product),
(2) HS classification,[52]
(3) consumers' tastes and habits (perception and behavior), and
(4) product end uses.[53]

At the time of writing there has not been a TBT case in which the term "like product" has been interpreted or defined. WTO cases interpreting GATT Article III have examined the phrase "like product", but their relevance to the interpretation of the TBT Agreement has not been formally established. In both *Japan—Alcoholic Beverages* and *EC—Asbestos* the Appellate Body even warned "against the automatic transposition of the interpretation of "likeness" under the first sentence of Article III:2 to other provisions where the phrase

[48] The principle of non-discrimination is found in the following provisions of the TBT Agreement: Article 2.1 (technical regulations); ¶ D of the Code of Good Practice (standards), and Article 5.1.1 (conformity assessment procedures).

[49] *Japan—Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996) ("*Japan—Alcoholic Beverages")*, Part H(1)(a).

[50] *Id.* This case involved a tax scheme that was found by the Appellate Body to violate GATT Article III:2.

[51] *EC—Asbestos*, *supra* note 11. This case involved a regulatory measure that was found to violate GATT Article III:4.

[52] HS is the Harmonized System of tariff classification administered by the World Customs Organization. It is used by countries to classify products for tariff purposes. *See* Chapter 36 of this book.

[53] *EC—Asbestos*, *supra* note 11, ¶ 101.

"like products" is used".[54] Given however that the like product provisions of the TBT Agreement appear to be a logical extension of the non-discrimination obligations, and that GATT Article III:4 specifically deals with regulatory discrimination, it is probable that GATT non-discrimination disputes, in particular those dealing with GATT Article III:4, will provide guidance in the interpretation of the term "like product" which appears in various places in the TBT Agreement, in particular Article 2.1.[55] There is no reason why the same four factors should not receive consideration in a TBT dispute.

B. The Prevention of Unnecessary Obstacles to International Trade

As a general rule, technical regulations, standards and conformity assessment procedures must not be prepared, adopted or applied so as to create unnecessary obstacles to international trade. This provision lies at the heart of the TBT Agreement. The prevention of unnecessary obstacles to international trade is a principle applicable to technical regulations, standards and conformity assessment procedures,[56] but its application is not necessarily identical in all three areas. The treatment of technical regulations receives considerable attention below. The treatment of standards and conformity assessment procedures, where different from that of technical regulations, is indicated.

The prevention of unnecessary obstacles to international trade is set forth within the context of technical regulations in Article 2.2 of the TBT Agreement:

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

As defined in Article 2.2, technical regulations must:

- not be more trade restrictive than *necessary* to achieve a policy goal (the least trade restrictive measure), and
- fulfill a *legitimate objective*, taking into account the *risks* that non-fulfillment would create.

With respect to standards, the phrase "prevention of unnecessary obstacles to international trade" is not defined in either Article 3 or in the Code of Good Practice. Nor is it defined in any WTO panel or Appellate Body decision considering the TBT Agreement. Given the similarities between technical regulations and standards (the primary regulatory difference is that one is mandatory and the other voluntary), it is probable that the same

[54] *EC—Asbestos*, *supra* note 11, ¶ 88 n.60 (*citing* the Appellate Body Report in *Japan—Alcoholic Beverages* at 113).

[55] Article 2.1 of the TBT Agreement provides:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.

[56] The prevention of unnecessary obstacles to international trade is set forth in Article 2.2 (technical regulations); ¶ E of the Code of Good Practice (standards); and Article 5.1.2 (conformity assessment procedures).

definition applicable to technical regulations would also apply in the case of standards, but this remains to be proven.

With respect to conformity assessment procedures, the phrase "unnecessary obstacles to international trade" is defined in Article 5.1.2:

> . . . *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

Articles 2.2 and 5.1.2 of the TBT Agreement suggest a multi-part test wherein the following factors, analyzed below, must be considered:

(1) legitimacy of the objective, and the
(2) necessity of the measure—including:
    (a) its reasonableness, and
    (b) the risk of non-fulfillment of the legitimate objective.

1. Legitimate Objectives

Technical regulations must fulfill a legitimate objective. Examples of legitimate objectives are set forth in a *non-exclusive* list in Article 2.2. Legitimate objectives for technical regulations include:

- National security requirements
- Prevention of deceptive practices
- Protection of human health or safety
- Protection of animal life or health
- Protection of the environment

The phrase "legitimate objective" is not used in the analogous provision relating to standards.[57] However, there is no reason to believe that the objectives enumerated for technical regulations would not be considered legitimate for "standards". This point has not yet been addressed in a dispute settlement proceeding.

Many of the objectives deemed legitimate for the purpose of technical regulations will be familiar to readers as exceptions under GATT Article XX (General Exceptions) and Article XXI (National Security).[58]

Other objectives that are probably legitimate for TBT purposes but are not listed in Article 2.2 include:

(1) Product quality: regulations and standards establishing quality norms are widely applied to grade and standardize products, including agricultural products and consumer goods.
(2) Product compatibility/uniformity: Regulations and standards establishing norms regarding voltage, amperage, wattage, bandwidth, size, form, unit of

[57] ¶ E of the Code of Good Practice.

[58] Some of the panel reports interpreting Article XX of GATT 1947 may have influenced the development of the legitimate exceptions contained in Article 2.2 of the TBT Agreement. *See, e.g., Thailand—Restrictions on Importation of and Internal Taxes of Cigarettes*, Report of the Panel, BISD 39S/155 (1990); *United States—Restrictions on Imports of Tuna*, Report of the Panel, BISD 40S/155, *reprinted in* 30 ILM 1594 (1991) (unadopted); *United States—Restrictions on Imports of Tuna*, Report of the Panel, *reprinted in* 33 ILM 842 (1994) (unadopted); and *United States—Taxes on Automobiles*, Report of the Panel, *reprinted in* 33 ILM 1399 (1994) (unadopted).

> measurement, etc. are widely applied to household appliances, communications gear (radios and televisions), computer equipment, automobiles, and many other technical products. Such product standardization facilitates economies of scale, and may also serve to improve consumer confidence.

Regulations and standards furthering product quality and product compatibility/uniformity exist throughout the developed world, and increasingly in developing countries. They have not been the subject of a panel proceeding under the TBT Agreement. The drafters' failure to specifically identify these objectives in Article 2.2 of the TBT Agreement as "legitimate objectives" may have been an oversight given that their importance as objectives of the TBT Agreement is suggested in the Agreement's preamble.[59]

A much more controversial question at the "outer limits" of an analysis of the TBT Agreement is whether labor and human rights objectives should be considered among the "legitimate objectives" for purposes of Article 2.2 of the TBT Agreement. At the root of this question one finds other additional and controversial WTO issues, such as the applicability of the TBT Agreement to NPR-PPMs, and the relationship between the TBT Agreement and international labor and human rights conventions. One also finds other questions including whether human rights and labor norms are the type of standardization activity the Members intended to regulate when they negotiated the TBT Agreement, and whether the TBT Agreement is really the right legal instrument for addressing cross-border human rights and labor norms.[60]

Labor and human rights objectives are not specifically mentioned in Article 2.2 of the TBT Agreement as legitimate objectives. Nevertheless, the protection of human life and health is deemed a legitimate objective. Just conceivably this provision might be "stretched" to encompass certain labor and human rights objectives. Although from a trade-policy perspective it was once easy to argue that when NPR-PPMs are at issue the TBT Agreement does not apply, this question seems to have become more complicated in light of the Appellate Body's decision in *U.S.—Shrimp* (Article 21.5 proceeding) wherein the United States successfully invoked GATT Article XX to justify import restrictions against shrimp that were not caught in conformity with U.S. environmental laws (an NPR-PPM).[61] *U.S.—Shrimp* was, of course, not a TBT decision, and any such argument would only be by analogy.

The relationship between the WTO Agreement and human rights and labor norms is the subject of several chapters in this book.[62] It need only be pointed out here that including labor and human rights norms in the WTO framework is controversial, and opposed by many developing country Members. Developing country Members tend to view labor and human rights norms, and their application and supervision, as being within the scope of

[59] The preamble of the TBT Agreement is reproduced *supra* note 2.

[60] Many other unanswered questions exist. Are U.N. organizations, such as the International Labor Organization, international standardizing bodies within the meaning of the TBT Agreement? Annex 1 ¶ 4 of the TBT Agreement defines an "international body or system" as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members." More generally, how should principles of public international law, such as the primacy of certain human rights norms, and the responsibility of States under certain international human rights treaties and labor agreements, be treated from the perspective of the TBT Agreement?

[61] *See supra* note 28 and accompanying text. The U.S. measure was only authorized after Malaysia's continued refusal to enter into an international cooperative arrangement that would have protected certain endangered sea turtles from being killed when shrimp are netted.

[62] *See* Chapters 59–62 of this book, where these subjects are addressed in detail.

other international agreements and organizations.[63] Many developing countries also fear that labor and human rights norms will be invoked by developed countries for protectionist purposes, and that the labor and human rights practices of certain developing countries may make them particularly vulnerable to cross-border trade measures, enacted for what developed countries allege to be human rights and labor motives.

2. Necessity

The concept of "necessity" is found in the provisions applicable to regulations, standards and conformity assessment procedures.[64] Article 2.2 of the TBT Agreement provides that "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create." It is probable that the negotiators were influenced by language in panel reports defining "necessary" within the context of GATT Article XX (General Exceptions). In the *Thai Cigarettes* dispute a GATT Panel concluded that a measure could be considered to be "necessary" in terms of GATT Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which a contracting party could "*reasonably*" be expected to employ to achieve its regulatory (health policy) objective.[65]

The term "reasonable" does not appear in the definition of "necessary" in the TBT Agreement, but without the requirement that a less restrictive trade measure be reasonably available, the "necessity" test would be unworkable—establishing a standard that would be extraordinarily difficult to meet. Legitimate TBT measures might be found to violate the TBT Agreement too easily, and as a result the regulatory autonomy and sovereignty of WTO Members could come under considerable challenge.[66] Therefore, it seems certain that a requirement of reasonableness will be read into TBT Article 2.2, as it was into GATT Article XX by GATT panels and the Appellate Body.

In both the *Korea—Beef* [67] and the *EC—Asbestos*[68] decisions the Appellate Body examined what constitutes a "reasonably available" measure for purposes of the exceptions set forth in GATT Article XX(b) and (d). The Appellate Body found that: (1) a determination of whether a WTO consistent alternative measure is reasonably available requires a "weighing and balancing process" in which an assessment is made as to whether the alternative measure "contributes to the realization of the end pursued";[69] (2) the more vital or important the common interests or values pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends;[70] (3) a measure should be sufficient to achieve a member's chosen level of health protection;[71] and (4) a measure does not cease to be "reasonably" available simply because it involves administrative

[63] For example the International Labor Organization, the various United Nations human rights organizations, and the instruments produced by these organizations.

[64] Article 2.2, ¶ E of the Code of Good Practice, and Article 5.1.2 respectively.

[65] *Thailand—Taxes On Cigarettes*, *supra* note 57, ¶¶ 74–75. The "least restrictive trade measure test" is given voice in the Article 2.2 definition of "necessary".

[66] *See generally* REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW (Thomas Cottier and Petros C. Mavroidis eds. 2000).

[67] *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R (2001) ("*Korea—Beef")*, ¶¶ 159–166.

[68] *EC—Asbestos*, *supra* note 11, ¶¶ 169–175.

[69] *Id.* ¶ 171 (*citing Korea-Beef*, *supra* note 66, ¶¶ 166 and 163).

[70] *Id.* ¶ 172 (*citing Korea-Beef*, *supra* note 66, ¶ 162.)

[71] *Id.* ¶ 174.

difficulties for a Member.[72] It is probable that a panel or the Appellate Body would read a similar test into the TBT Agreement.

The evaluation of whether a technical regulation is more trade-restrictive than necessary to fulfill a legitimate objective requires consideration of the "risks non-fulfillment [of the legitimate objective] would create." A non-exclusive list of elements that can be considered in an examination of the risk of not fulfilling a legitimate objective is provided in Article 2.2 of the TBT Agreement:

- available scientific and technical information,
- related processing technology, and
- intended end-uses of products.

This assessment of risk is different from the formal science-based risk assessment required in the SPS Agreement,[73] as science if relevant is only one component to be taken into account. Furthermore, many of the matters for which technical regulations and standards are applied are not closely related to scientific considerations (*e.g.*, consumer and worker protection). Although it would seem that this examination of risk should be related to the reasonableness of the TBT measure and therefore its necessity, like most of the TBT Agreement, no decisions interpreting this provision exist.

No mention of an analysis of the "risks" of non-fulfillment is present in the analagous provisions of the TBT Agreement governing standards and conformity assessment proceedings, but the derogations discussed in Part V(F), which are related to urgent problems of safety, health or environment, may imply examining the risk of not fulfilling a legitimate objective.

The necessity test is further elaborated in Article 2.3 of the TBT Agreement which sets forth provisions governing changed circumstances. Article 2.3 provides that:

> Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

This provision implies, among other things, a continuing obligation to review technical regulations in light of new objectives, new circumstances and new technological developments.

Changed circumstances are not mentioned in the Code of Good Practice, but the concept nevertheless seems implicit in assuring that standards do not become unnecessary obstacles to international trade. This is further illustrated by Article 5.2.7 (applicable to conformity assessment procedures) which limits the conformity assessment procedures employed to verify that a standard is met when product specifications have been changed. If a product's specifications are changed after the product has been found to conform with a technical regulation or standard, pursuant to Article 5.2.7 the conformity assessment procedure for the modified product is to be limited to what is necessary to provide adequate confidence that the product still conforms with the technical regulation or standard. This provision assures that only necessary conformity assessments will be conducted and reduces the potential that conformity assessments will be applied to impede trade.[74]

[72] *Id.* ¶ 169 (*citing United States—Standards for Reformulated and Conventional Gasoline*, Report of the Panel, WT/DS2 (1995)).

[73] *See* Chapter 7 of this book.

[74] Instances may nevertheless arise when significant changes in a product's specifications necessitate a complete conformity reassessment.

To summarize this rather long discussion of necessity, the "necessity test" requires that a given trade measure be the least trade-restrictive measure that would achieve a legitimate policy goal. A requirement of reasonableness should be read into this test, thereby allowing a weighing and balancing of the measure in terms of the end pursued and the risk of non-fulfillment of the legitimate objective.[75] There is also a continuing obligation to assess changed circumstances, and to alter a TBT measure in the event of changed circumstances to assure that the trade measure remains the least trade-restrictive.

C. Harmonization—Use of Relevant International Standards

As a general rule, Members are encouraged to participate in the international harmonization of standards, and to use agreed international standards as a basis for domestic technical regulations, standards and conformity assessment procedures.[76] The use of technical regulations that are in accordance with relevant international standards to achieve one of the legitimate objectives explicitly mentioned in Article 2.2 of the TBT Agreement[77] is rebuttably presumed not to create an unnecessary obstacle to international trade.

The emphasis on harmonization in the TBT Agreement is based on the view among WTO Members that (a) trade is disrupted less if Members use internationally-agreed standards as a basis for domestic regulations and standards, (b) producers and consumers benefit from a degree of harmonization (in part because of economies of scale and technical compatibility), and that (c) conformity assessments are facilitated if Members follow international guidelines and procedures for such assessments.

With respect to technical regulations, there are three provisions that will be referred to in the following discussion. These provisions are set forth in their entirety:

> 2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.
>
> 2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.
>
> 2.6 With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

In general, analogous provisions exist and have already been noted for standards and conformity assessment procedures.[78]

Turning to the last and least complicated provision first, Article 2.6 requires Members, within the limits of their resources, to participate in the work of international

[75] This may be one step closer to a requirement that a trade measure be proportional and adequate.

[76] The following provisions govern harmonization: Article 2.4–2.6 (technical regulations); Paragraphs F–G of the Code of Good Practice (standards); and Articles 5.4 and 5.5 (conformity assessment procedures).

[77] *See supra* Part V(B)(1).

[78] *Id.*

standardization organizations with respect to products for which they have adopted or expect to adopt technical regulations and standards. Members also have a similar participation obligation with respect to the preparation of standards and "guides and recommendations" for conformity assessment procedures.[79]

The remaining provisions, Articles 2.4 and 2.5, were the subject of the *EC—Sardines* dispute and merit considerable attention. Pursuant to Article 2.4, the use of *relevant* international standards, or the relevant parts of an international standard, as a *basis* for domestic technical regulations, is *required* "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued". Thus, even a measure that is non-discriminatory may violate the TBT Agreement if it is not based on international standards. Article 2.4 provides three examples of when it might not be appropriate to use international standards as a basis for domestic technical regulations: (1) fundamental climatic factors, (2) fundamental geographical factors, and (3) fundamental technological problems.

The Panel and the Appellate Body decisions in *EC—Sardines* addressed many points (underlined above) relevant to the interpretation of TBT Article 2.4. The decision examined whether the standard at issue was relevant; whether the international standard was used as a basis for the EC's technical regulations; and what is meant by the Article 2.4 phrase "ineffective or inappropriate means . . . ". These three points are addressed in the first three subsections below, and Article 2.5 is addressed in the fourth subsection.

1. The Characterization of Codex Standard 94 as a Relevant International Standard

Peru's complaint against the EC measure was predicated on its position that CODEX STAN 94-1981, Rev.1-1995 ("Codex Standard 94") was a relevant international standard for purposes of Article 2.4 of the TBT Agreement. A contrary finding would have meant that Article 2.4 of the TBT Agreement would not have applied. The EC argued that only standards adopted by consensus are relevant international standards. Second, it argued that even if Codex Standard 94 is a standard, it is not relevant since the EC Regulation only covers preserved sardines and Codex Standard 94 covers "sardine-type" products as well as preserved sardines.[80]

With respect to the EC's contention that only standards adopted by consensus are relevant, the Appellate Body found that the Explanatory Note to Annex 1.2 supports the conclusion that consensus is not required for the adoption of a standard.[81]

With respect to the EC's second argument, that Codex Standard 94 was not a relevant international standard, both Parties accepted that the ordinary meaning of the term "relevant" is "bearing on or relating to the matter in hand; pertinent".[82] The EC sought to convince the Appellate Body that the broader scope of Codex Standard 94 meant that it was not "relevant" to the dispute.[83] The Appellate Body reasoned instead that the Codex standard was relevant because it applies to *Sardina pilchardus.*[84] Therefore the standard can be said "to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved *Sardina pilchardus.*"[85] It further reasoned that the standard was relevant

[79] These provisions are located in the following TBT provisions: Article 2.6 (technical regulations); ¶ 3(G) of the Code of Good Practice (standards); and Article 5.5 (conformity assessment procedures).

[80] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶ 218.

[81] *Id.* ¶ 222. In relevant part the Explanatory Note to Annex 1.2 of the TBT Agreement provides: "This Agreement covers also documents that are not based on consensus."

[82] *Id.* ¶ 227.

[83] *Id.* ¶ 230.

[84] *Id.* ¶ 231.

[85] *Id.*

because twenty fish species specified in the standard, in addition to *Sardina pilchardus*, were legally affected by the exclusion in the EC Regulation.[86]

2. Whether Codex Standard 94 Was Used as a Basis for the EC Regulation

The EC also appealed the Panel's finding that Codex Standard 94 was not used "as a basis" for the EC Regulation. Section 6.1.1(ii) of Codex Standard 94 provides:

> The name of the product shall be:
>
> . . .
>
> (ii) "X Sardines" *where X is the name of* a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer. (emphasis added)

The EC, relying on the ambiguity of the English language version of this provision, argued that paragraph 6.1.1(ii) of Codex Standard 94 gives each country the option of designating the product at issue "X sardines" or using the common name of the species.[87] More specifically, the EC argued that the phrase: "the common name of the species in accordance with the law and custom of the country in which the product is sold", should be interpreted as a self-standing option for "naming" independent of the formula "X sardines".[88] This would have allowed the EC to restrict the use of the term "Sardines" to *Sardina pilchardus*.

The Appellate Body rejected the EC argument, favoring instead the textual interpretation put forth by the Panel.[89] The Appellate Body found that paragraph 6.1.1(ii) envisages combining the term "sardines" with one of the four alternatives (the X in "X sardines") presented in paragraph 6.1.1(ii), stating "that section 6.1.1(ii) permits the marketing of non-*Sardina pilchardus* as 'sardines' with one of four qualifiers."[90] A review of the French version of the provision, which was also authentic, further confirmed the Appellate Body's interpretation.[91]

The Appellate Body next examined whether the EC used section 6.1.1(ii) "as a basis" for its technical regulation.[92] The EC argued that interpretation of this phrase required consideration of the text as a whole, and that the criterion to be applied is not whether the standard is the "principal constituent" of the technical regulation, but instead whether there is a "rational relationship" between the standard and the technical regulation as regards the substantive aspects of the standard at issue.[93]

The Appellate Body rejected this argument. In seeking to establish the proper meaning of the phrase "as a basis for", which appears in Article 2.4 of the TBT Agreement, the Appellate Body turned first to its decision in *EC—Hormones* where a similar issue was addressed—the meaning of the phrase "based on" which appears in Article 3.1 of the SPS Agreement. This phrase was interpreted in *EC—Hormones* to mean "'stands' or is 'founded' or 'built' upon or 'is supported by' the latter."'[94] The Appellate Body went on

[86] *Id.* ¶ 232.
[87] *Id.* ¶ 236.
[88] *Id.* ¶ 236.
[89] *Id.* ¶¶ 238–239.
[90] *Id.* ¶ 239.
[91] *Id.* ¶ 239.
[92] *Id.* ¶¶ 240–258.
[93] *Id.* ¶ 241.
[94] *Id.* ¶ 242 (*citing EC—Hormones*, *supra* note 34, ¶ 166). In ¶¶ 163–166 of *EC—Hormones* the Appellate Body concluded that "based" does not mean "conform to". In *EC—Sardines* the Appellate Body refrained from deciding whether "as a basis" in Article 2.4 of the TBT Agreement has the same meaning as "based on" in Article 3.1 of the SPS Agreement. *EC—Sardines*, ¶ 244, n.169.

to uphold the Panel's finding that "basis" means "principal constituent" and "fundamental principal or theory",[95] adding that "basis" also means "the main constituent", [a] thing on which anything is constructed", and "a determining principle".[96] The Appellate Body concluded that "there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other."[97]

The Appellate Body found no support in Article 2.4 of the TBT Agreement for the EC's "rational relationship" standard,[98] and further found that an international standard cannot be considered the basis for a technical regulation if the two are contradictory.[99] The Appellate Body next identified a manifest contradiction between the international standard and the EC Regulation, noting that the effect of Article 2 of the EC Regulation was to prohibit preserved fish products prepared from twenty species from being labeled as sardines, while Codex Standard 94 permits these same fish products to be labeled as "X sardines", where X stands for one of four qualifiers.[100] Based on these determinations, the Appellate Body concluded that the Codex standard had not been used "as a basis for" the EC Regulation.[101]

3. Ineffective or Inappropriate Means

Article 2.4 of the TBT Agreement provides an exception to the obligation to use relevant international standards when "such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued. . . ." In its analysis of Article 2.4, the Appellate Body examined the meaning of "ineffective or inappropriate means" as well as the meaning of the term "legitimate objectives".[102] With respect to the first examination, the Appellate Body upheld the Panel's findings that:

> . . . the term "ineffective or inappropriate means" refers to two questions—the question of the *effectiveness* of the measure and the question of the *appropriateness* of the measure—and that these two questions, although closely related, are different in nature. The Panel pointed out that the term "ineffective" "refers to something which is not 'having the function of accomplishing', 'having a result', or 'brought to bear', whereas [the term] 'inappropriate' refers to something which is not 'specially suitable', 'proper', or 'fitting"'.[103]

The Appellate Body also reaffirmed the Panel's finding that:

> . . . in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfillment of the legitimate objective pursued. . . . The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.[104]

[95] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶ 243.
[96] *Id*. ¶ 244.
[97] *Id.*
[98] *Id*. ¶ 247.
[99] *Id*. ¶¶ 248–249. The Appellate Body also found that the "relevant parts" of the international standard are all of those "that relate to the subject-matter of the challenged prescriptions or requirements." *Id.* ¶¶ 250–251.
[100] *Id*. ¶ 257–258.
[101] *Id*.
[102] *Id.* ¶¶ 285–291.
[103] *Id.* ¶ 285 (*citing* Report of the Panel, ¶ 7.116).
[104] *Id.* (*citing* Report of the Panel, ¶ 7.116).

In the Appellate Body's view, an international standard is effective if it has the capacity to accomplish the legitimate objectives set forth, and it is appropriate if it is suitable for the fulfillment of these objectives.[105] "Ineffective" and "inappropriate" thus have different meanings and it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective.[106]

With respect to the second question, the meaning of the term "legitimate objectives" as used in Article 2.4, the Appellate Body upheld the Panel's finding that the legitimate objectives referred to in Article 2.4 must be interpreted in the context of Article 2.2 which also refers to legitimate objectives.[107] The Appellate Body noted two implications of this finding: (1) the legitimate objectives within Article 2.4 covered those enumerated in Article 2.2 (national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment), and that (2) the use of the term "*inter alia*" in Article 2.2 means that the legitimate objectives in Article 2.4 extend beyond the list of specific objectives listed in Article 2.2.[108]

Applying these findings to the facts before it in *EC—Sardines*, the Appellate Body determined that the Complainant had the burden of establishing that the international standard was an effective and appropriate means for the fulfillment of the "legitimate objectives" pursued through the EC Regulation—namely market transparency, consumer protection, and fair competition.[109] To satisfy this burden of proof the Complainant must establish a *prima facie* case.[110] If the Complainant succeeds in doing so, then a presumption arises that the Respondent must rebut in order for its defense to prevail.[111] If the Complainant establishes a *prima facie* case that the Respondent is unable to rebut, the Respondent must, consistent with its obligation under the TBT Agreement, use the international standard "as a basis for" its regulations as the international standard will have been shown to be both effective and appropriate to fulfill the "legitimate objectives" being pursued by the Respondent.[112]

The Appellate Body thus found that the burden of proof standard enunciated in *EC—Hormones*,[113] an SPS dispute, should also be applied in *EC—Sardines*. The Complainant challenging a measure as inconsistent with Article 2.4 of the TBT Agreement bears the burden of proving that: (1) the standard was not used as a basis for the challenged regulation, and (2) the international standard is not ineffective and inappropriate to fulfill the legitimate objectives at issue.[114]

4. Rebuttable Presumption Favoring the Use of Certain Harmonized Standards

Pursuant to Article 2.5 a Member that prepares, adopts or applies a technical regulation that may have a significant effect on the trade of other Members shall upon the request of another Member explain the justification of the regulation in terms of

[105] *Id.* ¶ 288.
[106] *Id.* ¶ 289 (*citing* Report of the Panel, ¶ 7.116).
[107] *Id.* ¶ 286.
[108] *Id.*
[109] *Id.* ¶ 287. Note that fair competition (in particular) is not a legitimate objective explicitly set forth in Article 2.2.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *EC—Hormones*, *supra* note 34.
[114] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶¶ 275–282.

Articles 2.2–2.4 of the TBT Agreement. In *EC—Sardines* the Appellate Body notes that the Panel was concerned the Complainant might not be in a position to spell out the legitimate objectives of the technical regulation and to assess the appropriateness of the relevant international standard.[115] The Appellate Body found that this concern was not justified since the TBT Agreement established a mechanism in Article 2.5 for Members to seek information about the objectives of technical regulations.[116] Members were bound to abide by their obligation to provide information pursuant to this provision in good faith and in accordance with the principle of *pacta sunt servanda* embodied in Article 26 of the Vienna Convention, and it could not be assumed that they would not comply with their obligation.[117] In addition, Article 10.1 of the TBT Agreement requires Members to establish an "enquiry point" for purposes of addressing queries from other Members. This serves as a further mechanism for Members to obtain information about the objectives of particular technical regulations, and the appropriateness and effectiveness of international standards to serve as a basis for these technical regulations.[118]

If a Member bases a domestic regulation (1) on an international standard, and if (2) the domestic regulation is for one of the legitimate objectives explicitly mentioned in Article 2.2, pursuant to Article 2.5 it is "rebuttably presumed" not to create an unnecessary obstacle to international trade.[119] This presumption makes it more difficult for a Member challenging the WTO-consistency of a technical regulation based on an international standard to make a *prima facie* case that the trade measure at issues creates an unnecessary obstacle to international trade. This portion of Article 2.5 has not yet been tested. In *EC—Sardines* both the Panel and the Appellate Body found that the technical regulation at issue was not based on an international standard so this presumption was inapplicable.

It is conceivable that the rebuttable presumption that a measure does not create an unnecessary obstacle to international trade will provide a mild incentive for international harmonization as well as for reliance on international standards. It would however appear that as a result of the Appellate Body's decision to graft the *EC—Hormones* interpretation of how the burden of proof should be applied into the TBT Agreement, the Complainant already shoulders a sizable burden of proof. It is unclear how Article 2.5 affects or alters the application of this burden of proof.

D. Equivalence and Mutual Recognition

The TBT Agreement incorporates provisions on both equivalence and mutual recognition.[120] Members are encouraged to accept foreign technical regulations as "equivalent" to their own technical regulations (even if they differ) provided that they fulfill the same objectives.[121] Likewise, Members are encouraged to accept foreign conformity assessment procedures as "equivalent" to their own procedures provided that they are assured of conformity with standards and technical regulations equivalent to their own.[122] The notion of equivalence is not mentioned in the Code of Good Practice (applicable to standards), nor is it defined in the TBT Agreement.

[115] *Id.* ¶ 276.
[116] *Id.* ¶ 277.
[117] *Id.* ¶ 278.
[118] *Id.* ¶ 279.
[119] These legitimate objectives are discussed *supra* Part V(B)(1).
[120] The provisions on equivalence and mutual recognition are found in the following TBT articles: equivalence for technical regulation—Article 2.7; equivalence for conformity assessment procedures Article 6.1; mutual recognition for conformity assessment procedures—Article 6.3.
[121] TBT Article 2.7.
[122] TBT Article 6.1.

Members are encouraged to enter into negotiations for the mutual recognition of the results of conformity assessment procedures.[123] By accepting the results of another Member's conformity assessment procedures, testing costs are reduced and less time is lost. Confidence in a trading partner's testing procedures would seem to be a prerequisite for the acceptance of a mutual recognition agreement.[124]

Although mutual recognition and equivalence may be worthwhile objectives, there is skepticism among some WTO Members concerning the effectiveness of international standardization efforts, and the extent to which equivalence, mutual recognition (and for that matter harmonization) can be increased between countries at different levels of development.

E. Transparency

"Transparency" is the process whereby the creation, terms, and application of technical regulations, standards and conformity assessment procedures are made public, and opportunities are provided for the public (including other Members) to comment on proposed technical regulations, standards and conformity assessment procedures. Transparency obligations are found throughout the TBT Agreement.[125] They take several different forms and are applicable at different points in the promulgation and application of a TBT measure. With respect to standards, some of these obligations are only applicable to Members when the relevant standardizing bodies have accepted the Code of Good Practice.

Transparency obligations generally include the following requirements:

1) *Pre-enactment publication*: A WTO Member is required to publish a notice prior to the enactment of a technical regulation, standard or conformity assessment procedure ("measure").[126] The publication and timing of the notice must be sufficient to allow interested parties to become acquainted with the proposed measure at an early appropriate stage.The TBT Agreement does not specify where the notice must be published.
2) *Notification*: A Member is required to notify other WTO Members through the WTO Secretariat prior to the enactment of a technical regulation or a conformity assessment procedure (when amendments to the measure can still be introduced). This notification must include the products to be covered and a brief indication of the objective and rationale for the technical regulation or procedure.[127] No such obligation is imposed with respect to standards.
3) *Provision of copies*: Upon request, a WTO Member must provide other Members with copies of draft technical regulations, standards, and conformity assessment procedures.[128]
4) *Allowance of time for comments*: Prior to the enactment of a measure, a Member must allow other Members a reasonable time for written comment, and for

[123] TBT Article 6.3.
[124] TBT Article 6.
[125] Transparency provisions are found in: Articles 2.9, 10 (technical regulations); Article 10 and Paragraphs J-Q of the Code of Good Practice (standards); and Articles 5.5 and 10 (conformity assessment procedures).
[126] Pre-implementation notice provisions are contained with respect to technical regulations in Article 2.9.1; with respect to standards in ¶ L of the Code of Good Practice; and with respect to conformity assessment procedures in Article 5.6.1.
[127] Notification is required by: Article 2.9.2 (technical regulations); and Article 5.6.2 (conformity assessment procedures).
[128] The provision of copies is required by Article 2.9.3 (technical regulations), ¶ M of the Code of Good Practice (Standards); and Article 5.6.3 (conformity assessment procedures).

discussions concerning proposed measures.[129] For draft standards, a sixty day period must be provided for comments.[130]

5) *Publication of measures*: WTO Members are obliged to publish or otherwise make available technical regulations, standards and conformity assessment procedures to other Members and to interested parties.[131]
6) *Creation of inquiry points*: Members are required to establish "inquiry points" to answer reasonable inquiries from and provide relevant documents to Members and other interested parties concerning technical regulations, standards and conformity assessment procedures.[132] Inquiry points have the responsibility to provide information concerning a WTO Member's participation in regional and international standardization and conformity assessment bodies. Inquiry points also have the responsibility of providing certain information concerning the activities of non-governmental standardization organizations.[133]

For example, a Member seeking to enact an environmental law regulating engine exhaust (a technical regulation) would be required, prior to enactment of the law, to provide drafts of the measure to other Members, allow comments from them, publish the measure, and notify Members through the WTO Secretariat of the measure. A Member's inquiry point would be responsible for providing information and relevant documents relating to the law.

F. Derogations from Transparency in the Event of Urgent Problems

Transparency measures applicable prior to the adoption of technical regulations and conformity assessment procedures may be omitted in the event of urgent problems related to safety, health, the environment or national security.[134] In such cases, *post-facto* obligations exist to notify Members of the measures enacted, make copies available upon request, and to consider comments from other Members. With respect to draft standards, the sixty day period allowed for comment may be shortened in the event of urgent problems related to safety, health, or the environment.

For example, if State A discovers that a type of packing material produces deadly emissions when burned and immediately outlaws its production and use within its territory, it must immediately notify other WTO members of the ban, make copies of the ban available upon request, and permit comments from all Members on the regulatory measure.

VI. Other Important Provisions of the TBT Agreement

A. Technical Assistance—Article 11

Technical assistance is the provision of expert assistance to developing countries by other Members, the WTO Secretariat, or third parties. TBT Article 11 sets forth a broad range

[129] Written comments must be permitted with respect to technical regulations in Article 2.9.4; standards: Paragraphs L and N of the Code of Good Practice; and conformity assessment procedures: Article 5.6.4.
[130] ¶ L of the Code of Good Practice (standards).
[131] Publication is required with respect to technical regulations in Article 2.11; standards in ¶ O of the Code of Good Practice, and in Article 5.8 for conformity assessment procedures.
[132] Article 10.
[133] Article 10.1.4 and 10.3.
[134] Provisions applicable to urgent problems appear in the following provisions: Technical Regulations: Article 2.10; Standards: Annex 3, ¶ L, Code of Good Practice; Conformity Assessment Procedures: Article 5.7.

of technical assistance provisions. WTO Members are required to:

- Advise other Members, especially developing country Members on the preparation of technical regulations.
- Provide technical assistance, in particular to developing countries, regarding the establishment of national standardizing bodies, and participation in these bodies, and encourage their national standardizing bodies to do likewise.
- Take reasonable measures to arrange for regulatory bodies within their territories to advise other Members, in particular developing country members. Provide technical assistance on agreed terms regarding the establishment of regulatory and conformity assessment bodies, and assistance on the methods by which their technical regulations can best be met.
- Take reasonable measures, in particular with respect to developing country Members, to advise on the establishment of bodies for the assessment of conformity with standards.
- Grant technical assistance, especially to developing country Members, regarding the steps that should be taken by foreign producers seeking access to conformity assessment systems operated by governmental and non-governmental bodies.
- Encourage organizations within their territory which are members of, or participants in, international or regional conformity assessment systems to advise other Members, and consider requests for technical assistance from other Members (in particular developing countries) regarding the establishment of institutions which would enable relevant organizations within their territories to fulfill the obligations of membership or participation in international and regional conformity assessment systems.
- Grant other Members, especially developing country Members, technical assistance on the institutions and legal framework of international and regional systems for conformity assessment sufficient to enable them to fulfill the obligations of membership or participation in such systems.
- Give priority to the needs of the least-developed country Members.

B. Special and Differential Treatment—Article 12

The TBT Agreement requires Members, in particular developed country Members, to provide more favorable treatment to developing countries based on the financial and trade needs of the developing country in question. Article 12 of the TBT Agreement sets forth a broad range of provisions "intended" to provide more favorable treatment to developing countries.[135] Although Article 12 does not provide developing countries

[135] More specifically, Article 12 requires that Members provide differential and more favorable treatment to developing countries by:

— Giving particular attention to the provisions of this Agreement concerning the rights of developing country Members.
— Taking into account the special development, financial and trade needs of developing country Members in the implementation of the TBT Agreement at the national level.
— Taking into account the special development, financial and trade needs of developing country Members in the implementation of the TBT Agreement*'s* institutional arrangements.
— Assuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members. Members are to do this by taking into account the special development, financial and trade needs of developing country Members in the preparation and application of technical regulations, standards and conformity assessment procedures.

with permanent derogations to the substantive provisions of the TBT Agreement, the pro-developing country character of Article 12 is unambiguous although not particularly meaningful. Many of the provisions are non-binding and probably not enforceable.

The provisions set forth in Article 12 related to special and differential treatment ("SDT") take several different forms. They require Members to:

(a) *Recognize and to take into account* the special needs of developing countries in the promulgation and application of technical regulations, standards and conformity assessment procedures. Factors to be recognized include the developmental, financial and trade needs of developing country Members, and the preservation of indigenous technology and production methods.
(b) *Facilitate the participation* of developing countries in international standardization and conformity assessment bodies. One means of facilitation is to encourage developing country participation in the standardization and conformity assessment process; a second means is to take measures to ensure that international standards are prepared for products of interest to developing countries.

— Recognizing that developing country Members may adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs.
— Recognizing that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.
— Recognizing and taking fully into account that developing country Members may face special problems, including institutional and infrastructure problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures.
— Recognizing and taking fully into account that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement.
— Taking reasonable measures to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.
— Taking reasonable measures to ensure that international standardizing bodies, upon request of developing country Members (if practicable) prepare international standards concerning products of special interest to developing country Members.
— Providing, in accordance with TBT Article 11, technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, Members are required to take into account the stage of development of the requesting Members, in particular least-developed country Members. This requirement is found in Article 12.7.
— Bearing in mind during "consultations" the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures.
— Granting time-limited exceptions to obligations arising under the TBT Agreement. (This is potentially a very important form of special and differential treatment.)
— Taking into account, during consultations, the special difficulties experienced by developing countries in regard to formulating and implementing technical regulations, standards, and conformity assessment procedures; taking into account the special needs of developing countries with respect to financing, trade and development. This last requirement, which appears in TBT Article 12.9, is not well drafted. Some may seek to argue that assistance concerning financing, trade and development is only required during consultations. If so, such assistance would be too late to be of much use.

(c) *Provide technical assistance*.[136]
(d) *Grant time-limited exceptions*:[137] pursuant to Article 12.8, the TBT Committee is authorized to grant a "time-limited exception" to obligations under the TBT Agreement in order to ensure that developing countries are able to comply with the TBT Agreement. In granting such exceptions the Committee is to consider:
— The special problems experienced by developing countries in the preparation and application of technical regulations, standards and conformity assessment procedures,
— The special development and trade needs of the developing country Member, and
— The stage of technological development of the particular developing country.

C. Consultations And Dispute Settlement—Article 14

Pursuant to Article 14.1 of the TBT Agreement, alleged violations of the TBT Agreement are treated pursuant to the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied in the WTO Agreement's Dispute Settlement Understanding ("DSU").[138] This is the normal manner in which WTO disputes are handled.

Under Article 14.2 of the Agreement parties to a TBT dispute or panels hearing a TBT dispute may establish a "technical expert group" to assist in questions requiring technical expertise. Annex 2 of the TBT Agreement sets forth a procedure governing the role of experts. In particular, it provides who may serve as an expert, establishes the authority of experts to seek information and advice, protects confidential information, and allows the Members concerned (parties and third parties to a dispute) to comment on the draft report developed by a Technical Expert Group.

Article 14.4 provides that the dispute settlement provisions can be invoked when a Member considers that another Member has not achieved satisfactory results under TBT Articles 3,[139] 4,[140] 7, 8 and 9[141] and its trade interests are "significantly affected". Each of these five provisions impose an obligation on Members to take "reasonable measures" to ensure that local government bodies, non-government bodies, and international and regional systems, comply with the terms of the TBT Agreement. In the event that Members do not take reasonable measures to ensure compliance with the applicable provisions, they are responsible for the acts of the various bodies mentioned in Articles 3, 4, 7, 8 and 9 as if the bodies were themselves Members of the WTO

As of the time of writing,[142] there have only been two disputes where the TBT Agreement received significant attention, *EC—Asbestos* and *EC—Sardines*. However only *EC—Sardines* was decided based on the TBT Agreement. These decisions have been discussed throughout this chapter. Some miscellaneous points not treated above are discussed in the two subsections that follow.

[136] *See* TBT Article 11 and Article 12.7.
[137] *See* Article 12.8 and the discussion of Article 13 *infra* Part VI(D).
[138] The DSU is contained in Annex 2 of the WTO Agreement.
[139] Article 3 governs the Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies.
[140] Article 4 governs the Preparation, Adoption and Application of Standards.
[141] Article 7, 8 and 9 govern respectively: Procedures for Assessment of Conformity by Local Government Bodies, Procedures for Assessment of Conformity by Non-Governmental Bodies and International and Regional Systems.
[142] August 2004.

1. EC—Asbestos (Miscellaneous Points)

The *Asbestos* decision examined the applicability of the TBT Agreement, and more particularly what constitutes a technical regulation, but did not examine substantive issues involving the TBT Agreement. What constitutes a technical regulation has already been examined in Part III(A)(1).

EC—Asbestos also dealt with the relationship between the GATT 1994 and the TBT Agreement and the order of analysis in a dispute settlement proceeding when both GATT 1994 and the TBT Agreement are applicable to a particular trade measure. The Panel in *EC—Asbestos* found:

> Both the GATT 1994 and the TBT Agreement form part of Annex 1A to the WTO Agreement and may apply to the measures in question. Consequently, although we do not in principle exclude application of the TBT Agreement and/or the GATT 1994 to the Decree, we have to determine the order in which we should consider this case. According to the Appellate Body in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, when the GATT 1994 and another Agreement in Annex 1A appear *a priori* to apply to the measure in question, the latter should be examined on the basis of the Agreement that deals "specifically, and in detail," with such measures.[143]

The Panel first examined whether the trade measure at issue was a technical regulation. If it were a technical regulation within the meaning of the TBT Agreement, the TBT Agreement would apply, since it is the agreement that deals with the measure in the "most specific and most detailed" manner.[144] The Panel however ruled that the portion of the decree containing the import ban was not a technical regulation pursuant to the TBT Agreement.[145] Although this finding was reversed by the Appellate Body,[146] the Appellate Body chose not to complete the TBT analysis based on the unavailability of undisputed facts and sufficient factual findings at the Panel level, and based on its determination that the "novel" TBT claims had not been explored in depth before the Appellate Body.[147]

2. EC—Sardines (Miscellaneous Points)

EC—Sardines was the first dispute decided entirely based on the TBT Agreement. It will almost certainly encourage further TBT disputes. Recalling the Appellate Body's decision in *EC—Bananas III* wherein the Appellate Body stated that when two agreements apply simultaneously, a Panel should consider the more specific agreement before the more general agreement,[148] the Panel acceded to Peru's request to examine its TBT claim before its GATT Article III claim.[149]

Peru's primary argument, and the one that prevailed before both the Panel and the Appellate Body, was that the EC measure was inconsistent with Article 2.4 of the TBT Agreement because the EC did not use Codex Standard 94 as a basis for its technical regulation despite the fact that the standard would be an effective and appropriate means to

[143] *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, Report of the Panel, WT/DS135/R (2001) ¶ 8.16.
[144] *Id.* ¶ 8.17.
[145] *Id.* ¶¶ 8.72–8.73.
[146] *EC—Asbestos*, Report of the Appellate Body, *supra* note 11, ¶ 76.
[147] *Id.* ¶¶ 79–83.
[148] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (1997), ¶ 204.
[149] *EC—Sardines*, Report of the Panel, *supra* note 12, ¶ 7.15.

fulfill the legitimate objectives of the EC Regulation.[150] Neither the Panel nor the Appellate Body reached Articles 2.1 and 2.2 of the TBT Agreement or Article III of the GATT. As a result, and a point worthy of emphasis, each made a finding of a violation of Article 2.4 of the TBT Agreement without a formal finding that the EC's trade measure was discriminatory. The important TBT issues in this decision have already been examined in depth above.

D. Institutional Considerations

1. The Work of the Committee on Technical Barriers to Trade

Article 13 of the TBT Agreement creates a Committee on Technical Barriers to Trade. Representatives of each of the Members are entitled to participate. The Committee meets as necessary, but at least once a year. The TBT Committee has numerous responsibilities: (1) it provides Members with an opportunity to consult on TBT issues; (2) it carries out whatever responsibilities the Members may assign to it, and establishes working parties and other bodies to carry out these responsibilities; (3) it works to avoid duplication between its activities and the work of governments in other technical bodies; and (4) it grants "time-limited exceptions" to obligations arising under the TBT Agreement.[151]

2. Built-in Reviews of the TBT Agreement—Articles 12.10, 15.3 and 15.4.

The TBT Agreement contains many provisions that mandate its review by the Members. Article 15.3 of the TBT Agreement requires that the TBT Committee annually review the implementation and operation of the TBT Agreement taking into account the objectives of the Agreement. Article 15.4 requires that every three years the TBT Committee must conduct a review of the implementation and operation of the TBT Agreement, with a view to recommending adjustments of the rights and obligations of the Agreement where necessary. This review is designed to ensure mutual economic advantage and the balance of rights and obligations, without prejudice to the provisions concerning special and differential treatment contained in Article 12. Based on the implementation experience, the TBT Committee is entitled to submit proposals to amend the TBT Agreement to the Council. Two triennial reviews have been held, the first in 1997,[152] and the second in 2000.[153] These documents, referenced by number, are available on the WTO's web site. They offer a somewhat critical review of the successes and failures under the TBT Agreement.[154]

The TBT Committee is also required pursuant to TBT Article 12.10 to "examine periodically the special and differential treatment, as laid down in this Agreement, granted

[150] *Id*. ¶ 3.1(a).

[151] *See* TBT Articles 12.8 and 13. This point is mentioned *supra* Part V(B) in the discussion of special and differential treatment.

[152] WTO Document No. G/TBT/5 (97–5092) November 19, 1997.

[153] WTO Document No. G/TBT/9 (00–4811) November 13, 2000.

[154] The first report noted, among other findings, that the status of implementation of the TBT Agreement was not satisfactory. Transparency and developing country concerns (including the need for more technical assistance, and the need to make operational the special and differential treatment provisions) are also set forth. The second report provides a list detailing which Members have notified inquiry points and measures taken to ensure the implementation of the TBT Agreement. Activities organized by the TBT Committee are also listed. Information exchange, capacity building, technical assistance and special and differential treatment were also concerns. Again, the TBT Committee found that the status of implementation needed to be improved.

to developing country Members on national and international levels." It has done so in each of two triennial reviews conducted pursuant to Article 15.4.

3. Web Resources

The WTO maintains a comprehensive website at <www.wto.org>. One can find background information concerning the TBT Agreement, the complete text of the TBT Agreement, the results of the annual and triennial TBT Committee Reviews, Member notifications, training information, national TBT inquiry points, minutes of TBT Committee meetings, working documents of the TBT Committee, a list of standardizing bodies that have accepted the Code of Good Practice, and many other TBT-related documents.

4. Doha Work Program

The TBT Agreement was not the subject of major attention during the Doha Ministerial meeting. The "Decision on Implementation-Related Issues and Concerns"[155] does however define the "reasonable interval" between publication and entry into force of a technical regulation as a period of not less than six months (except in certain specified urgent circumstances).[156] In addition, one crosscutting issue present in the same instrument may have implications for the TBT Agreement. The Decision on Implementation-Related Issues and Concerns instructs the Committee on Trade and Development to identify mandatory and non-binding provisions governing special and differential treatment and to consider the implications of converting non-binding SDT provisions into mandatory provisions, as well as to consider how SDT provisions can be made more effective. Given that the SDT provisions in the TBT Agreement are not particularly meaningful for developing countries, and since the TBT Agreement's preamble does hold out some hope of benefits for developing countries,[157] these provisions may be ripe for review during the negotiations on the Doha Work Program.

VII. Conclusion

The TBT Agreement seeks to achieve a balance between permitting Members the regulatory autonomy to protect legitimate interests (through the use of technical regulations, standards and conformity assessment procedures), and assuring that technical regulations, standards and conformity assessment procedures do not become unnecessary obstacles to international trade. The TBT Agreement cannot be applied too strictly or the legitimate interests of Members will be thwarted. But it cannot be applied too laxly or the value achieved through progressive rounds of tariff reductions will be lost.

Further complicating this fine balance are various actors in civil society with divergent interests. For example, the environmental community is afraid that the TBT Agreement will be applied narrowly and that what they view as "legitimate" environmental measures will not meet the requirements of the TBT Agreement. Likewise, labor and human rights

[155] *Implementation-Related Issues and Concerns*, Decision of November 14, 2001, WTO/MIN(01)/17, November 20, 2001, ¶ 5.2.

[156] *See* Transparency, *supra* Part V(E).

[157] Recital seven of the TBT Agreement's preamble suggests that international standardization can facilitate the transfer of technology to developing countries, but fails to explain how or why. Recital eight expresses the desire of the Members to assist developing countries in formulating and applying technical regulations, standards and conformity assessment procedures.

organizations are concerned that these items are not specifically mentioned in the TBT Agreement—even though the protection of human life and health is deemed a legitimate interest in Article 2.2.

On the other side, developing countries are often suspicious that trade measures (technical regulations and standards) allegedly taken by developed countries for social policy goals are in reality for protectionist purposes. Likewise, many in the business community react negatively to the possibility that trade measures will be applied to further social policy objectives for fear of being economically disadvantaged by protectionist measures.

Perhaps as a result of these competing interests, and a desire not to subject the GATT and later the WTO to criticism, until recently panels avoided applying the Tokyo Round Standards Code and now the TBT Agreement, tending to resolve potential TBT cases under GATT rules.[158] With the Appellate Body's decision in the *Asbestos* case holding that the TBT Agreement was applicable to the import ban in question and that it is proper to begin the analysis of a trade measure with the most specific agreement, as well as the 2002 decision in the *Sardines* dispute, this situation is changing. We can expect to see more panels and the Appellate Body deciding regulatory disputes involving trade in goods through the application of the TBT Agreement. We can also expect to see an increase in TBT disputes, primarily because, despite the need for domestic policy autonomy to address legitimate interests, technical regulations, standards, and conformity assessment procedures are sometimes used as protectionist devices.

Since it is probable that TBT disputes will increase, it is time to address another problem during the Doha Round. Although the TBT Agreement contains provisions in favor of developing countries concerning the grant of special and differential treatment and technical assistance, there is a need to increase the level of technical assistance available, and to evaluate whether the provisions governing special and differential treatment are sufficient and effective. It is also time to ascertain whether international standardization efforts have been effective, and the extent to which harmonization, equivalence and mutual recognition can or should be increased.

[158] No case was ever decided under the Tokyo Round Standards Code. Until recently decisions were also avoided under the Uruguay Round TBT Agreement. *See, e.g., United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 71, ¶ 6.43 where, having decided the case based on the provisions of the GATT 1994, the Panel chose not to address the TBT questions that were presented.

CHAPTER 9

THE AGREEMENT ON TEXTILES AND CLOTHING

Simon Lester*

TABLE OF CONTENTS

I. Introduction 412
II. Background: Regulation of Textiles Trade during the GATT 1947 Era 412
III. The Uruguay Round Negotiations 415
A. The Speed of Integration 416
B. Quota Growth Rates 416
C. The Scope of Products to be Integrated 417
D. The Development of a Special Safeguard Mechanism 417
E. The Role of a Monitoring Body 417
F. Linkage to Other GATT Rules 418
IV. The Agreement on Textiles and Clothing 418
A. Notification of Existing Restrictions 419
B. Integration of Products into GATT 1994 420
C. Growth Rate of Continuing MFA Restrictions 420
D. Special Safeguard Mechanism 421
1. Overview 421
2. Procedural Steps 423
3. Substantive Requirements 424
E. The Textiles Monitoring Body 426
F. Circumvention 427
G. Product Coverage 427
V. ATC Jurisprudence—Development of Systemic Principles 427
A. Standard of Review 428
B. Burden of Proof 428
C. Evidentiary Scope of Review 428
D. Role of the Textiles Monitoring Body 429
VI. Current Issues 430
A. "Backloading" of Integration 430
B. U.S. Rules of Origin Requirements 432
C. Accelerated Implementation 433
VII. The Future: Trade in Textiles and Clothing under the WTO System 434

* Simon Lester is the President of WorldTradeLaw.net LLC, which runs an on-line subscription service on WTO disputes (http://www.worldtradelaw.net). Mr. Lester previously worked as a Legal Affairs Officer in the WTO's Appellate Body Secretariat.

I. Introduction

For most of the period after World War II, a special regime has existed for trade in textiles, outside the normal multilateral trade rules. During the Uruguay Round negotiations, however, the GATT contracting parties agreed to integrate textile products into the GATT/WTO system. The means by which this integration would occur was the Agreement on Textiles and Clothing ("ATC"), which provides for the gradual integration of these products into normal GATT/WTO rules, to be completed by January 1, 2005.

The ATC has proved to be one of the most controversial of the Uruguay Round Agreements. The existence of the ATC is due in large part to what has been described as the "Grand Bargain" struck during the negotiations, under which the developing countries agreed to the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights in exchange for greater access to developed country markets for the products of most interest to them—textiles and clothing, and agricultural products. In practice, though, many developing countries have expressed the view that the access that has actually been achieved so far under the ATC (and the Agreement on Agriculture) has been much less than what was promised. The alleged deficiencies in market access for textiles and clothing are said to be due primarily to delays in integrating key products and, at least in the first years of the Agreement, abuse of the special safeguard mechanism in the ATC.

This chapter will examine the regulation of trade in textiles from the GATT era up until the present. It will begin by reviewing the origins of the special regime for textiles under the GATT. It will then examine the Uruguay Round negotiations on textiles and clothing, which led to the ATC. Next, it will look at the ATC itself, discussing in detail its specific provisions and their interpretation through WTO dispute settlement. Finally, it will discuss some current issues of contention in the area of textiles and clothing trade, and provide some thoughts on the future treatment of textiles and clothing under the WTO system after integration has been completed.

II. Background: Regulation of Textiles Trade during the GATT 1947 Era

The textile industry has long been subject to a special set of rules within the multilateral trading system. This special status results in large part from trade tensions between rich and poor countries. Because textile production is relatively uncomplicated compared to other manufacturing industries, it is often an important stepping-stone in a country's industrialization process. For developed countries, textile production was part of the early stages of an industrialization process that took place many years ago. Although developed country economies have evolved substantially since this time, the textile industry remains as a mature industry, and still employs large numbers of workers,[1] although it uses production methods that rely heavily on mechanization. At the same time, the economies of developing and least-developed countries, which are in the early stages of their own industrialization process, rely heavily on textile production as a first step before moving up to more technically demanding industries. Developing and least-developed countries are able to take advantage of their low wages and access to cheap inputs to make labor-intensive, textile products that are very competitive in international markets. As a result of these different production patterns, cheap textiles and clothing products from developing countries often compete with more expensive products from developed

[1] The U.S. textile industry, for example, employs nearly half a million people. *See* note 3, below.

countries.[2] This puts enormous pressure on the industries in developed countries, which have difficulty competing with the cheaper foreign products. In response, the textile industry in developed countries often lobbies for protection from imports.[3]

In the early years of the GATT, trade in textiles did not cause much tension. At its inception, the GATT was seen as a "rich nations' club," with only a few developing countries as contracting parties. Therefore, textile trade among the contracting parties did not raise significant problems.

By the late 1950s, however, the situation had changed. Japan, which had substantial production of low-priced textiles, acceded to the GATT in 1955.[4] Then in 1958, West European currencies became externally convertible, which removed the balance-of-payments justification for certain quantitative restrictions imposed by these countries, including those on textiles. Finally, a number of important developing country exporters emerged at around this time. All of these factors combined to cause the developed countries to look for a response to "low wage imports" from developing countries. While textiles were not the only products at issue, they were a prime concern.

As a response, the Short-Term Arrangement Regarding International Trade in Cotton Textiles ("STA") was established, lasting from October 1961 to September 1962.[5] In October 1962, the Long-Term Arrangement Regarding International Trade in Cotton Textiles ("LTA") came into effect.[6] This latter instrument remained in force (with extensions) until 1973. These two Arrangements constituted derogations from GATT rules (although no formal waiver was ever obtained). They were designed to allow developed countries to impose quantitative restrictions on textile imports when these imports caused or threatened to cause "market disruption," while at the same time providing for gradual increases in the quota amounts.[7]

The LTA was limited to trade in cotton textiles. By the mid-1960s, however, synthetic fibers and yarns experienced significant production growth, and wool exports had also increased. In many instances, restrictions were being imposed on these products outside the context of the LTA. To address this development, a new agreement, the so-called

[2] Not all of these products compete, however. In recent years, a pattern has developed under which labor-intensive operations are undertaken in developing countries, and the resulting products are shipped to the developed countries for the higher value-added, mechanized operations. As a result of this internationalization of the industry, the very complex rules of origin applicable to textiles are extremely important and have given rise to a good deal of controversy. *See* Part VI.B below.

[3] For example, the key vote in the U.S. House of Representatives in late 2001 in favor of the bill granting the President Trade Promotion Authority was cast by a Congressman from South Carolina in exchange for important concessions on textiles. *See, e.g.,* Joseph Kahn, *Price of Bush's Trade Powers? Protectionism,* New York Times, December 8, 2001. The textile industry in the United States tends to be concentrated in certain regions, and consequently has a great deal of influence over politicians in these regions. According to the American Textile Manufacturers Institute, in 2001 there were over 300,000 textile employees in the states of North Carolina, South Carolina, Georgia and Alabama out of 443,000 employees in the U.S. overall. See *Quick Facts about U.S. Textiles*, available at <http://www.atmi.org/newsroom/qckfacts.htm>, visited April 12, 2002.

[4] A number of Contracting Parties refused to apply the GATT to Japan even after it had joined the GATT, based on the non-application provision, Article XXXV. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 101–102 (1969). This refusal was based in large part on their concern about competition from Japanese textiles.

[5] *Arrangement Regarding International Trade in Cotton Textiles*, July 21, 1961, 12 U.S.T. 1675, T.I.A.S. No. 4884.

[6] *Long-Term Arrangement Regarding International Trade in Cotton Textiles*, February 9, 1962, 13 U.S.T. 2673, T.I.A.S. No. 5240.

[7] *See* Henry R. Zheng, *Defining Relationships and Resolving Conflicts Between Interrelated Multinational Trade Agreements: The Experience of the MFA and the GATT*, 25 Stan. J. Int'l Law 45, 55–56 (1988).

Multi-Fiber Arrangement ("MFA"),[8] was negotiated to address trade in textiles on a more comprehensive basis. The MFA entered into force in January 1974.[9]

In essence, the MFA provided a special set of rules and guidelines for trade in textiles. As described in Article 1.2 of the MFA, its objective was:

> to achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalization of world trade in textile products, while at the same time ensuring the orderly and equitable development of this trade and avoidance of disruptive effects in individual markets and on individual lines of production in both importing and exporting countries.

To achieve this end, the MFA permitted the imposition of country-specific restraints on textile imports.[10] In this regard, exporting and importing countries were encouraged to negotiate *bilateral* restraints on textile imports when the domestic market of the importing country was disrupted by imports.[11] The MFA also allowed importing countries to impose *unilateral* restraints where "market disruption" existed and bilateral restraints could not be agreed.[12] The restraints, whether bilateral or unilateral, were to be increased by a specified percentage each year, thus allowing for the "orderly" expansion of trade. In addition, the MFA established the Textiles Surveillance Body ("TSB") to oversee the operation of the MFA. The TSB could make recommendations, but not give binding rulings, with respect to unilateral restraints.

The MFA was created as a four-year agreement entering into force on January 1, 1974. However, it was later extended through several Protocols of Extension, and remained in effect until December 31, 1994.[13] Although its precise legal status is difficult to ascertain, and there was never any formal waiver under the GATT, the MFA has been described by many commentators as a "derogation" from the GATT.[14]

The original MFA provided for restraints on textiles made of cotton, wool and synthetics. Its coverage was later extended to include almost all fibers, with the exception

[8] *Arrangement Regarding International Trade in Textiles*, TEX.NG/1, BISD, 21st Supp. 3 (1975).

[9] While the STA, LTA and MFA were not technically part of the GATT, all three agreements were negotiated under the auspices of the GATT.

[10] Brenda Jacobs, *Renewal and Expansion of the Multifiber Arrangement*, 19 L. POL. INT'L BUS. 9 (1987); *see also*, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) 261–277 (Terence P. Stewart ed. 1993).

[11] MFA, Articles 3.4, 4.

[12] MFA, Article 3.5. Annex A to the Agreement provides that a determination of "market disruption" was to be based on a finding of "serious damage" or "actual threat" of serious damage to the domestic industry. This damage must be caused by a "sharp and substantial" increase or imminent increases in imports which are sold at prices lower than domestic products or other imported products in the market of the importing country. Unilateral restraints differed from safeguards imposed under GATT Article XIX in several important respects. First, they were imposed against specific exporting countries rather than on an MFN basis. Second, no compensation was required. Third, the imposition of such restraints could not be challenged under the GATT dispute resolution process.

[13] *Draft Protocol Extending the Arrangement Regarding International Trade in Textiles*, GATT Doc. No. COM.TEX/W/47 (Dec. 14, 1977); *Protocol Extending the Arrangement Regarding International Trade in Textiles*, GATT Doc. No. L/5726 (Dec. 23, 1981); *Protocol Extending the Arrangement Regarding International Trade in Textiles*, GATT Doc. No. L/6030 (Aug. 7, 1986). *See* Jacobs, *supra* note 10, at 9.

[14] Presumably, the "derogations" were from GATT Article XI, which provides for the general elimination of quantitative restrictions, and GATT Article XIX, which governs the use of safeguard measures. *See* Jacobs, *supra*, note 10, at 9; Stewart, *supra* note 10, at 265; Zheng, *supra* note 7, at 69. It is important to note, however, that not all members of the MFA were GATT Contracting Parties, and not all GATT Contracting Parties had signed on to the MFA. China, for example, was a member of the MFA but was not a GATT contracting party after the 1950 withdrawal by the Nationalist Government.

of pure silk. As of 1991, approximately two-thirds of the world's trade in textiles were subject to the MFA framework.[15]

At the beginning of the Uruguay Round negotiations, nine developed countries (counting the European Community as one country) were participating in the MFA, although not all were applying restraints: Austria, Canada, the European Community, Finland, Japan, Norway, Sweden, Switzerland and the United States.[16] When the Uruguay Round ended, only Canada, the European Community, Norway and the United States were imposing restraints.[17]

III. The Uruguay Round Negotiations

It is beyond the scope of this chapter to systematically document every aspect of the Uruguay Round negotiating history. Other authors have already done so.[18] Instead, this Section will highlight certain important features of these negotiations, focusing on the views of the different actors involved and the key issues with which they dealt.

The Ministerial Declaration that initiated the Uruguay Round negotiations stated the following regarding the negotiations on textiles and clothing:

> Negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade.[19]

Thus, the primary goal of the negotiations was the "eventual integration" of the sector into the GATT. By contrast, "liberalization" of trade in this sector appeared to be of lesser importance, a secondary goal to which "integration" would contribute.

The vagueness of the Ministerial Declaration led to some initial disagreement as to the scope of the negotiations. The countries facing restrictions under the MFA were of the view that the objective of the negotiations was simply to integrate the *products subject to MFA restraints* into the GATT system. By contrast, the restraining countries argued that *other restrictions*, outside of MFA restraints, should also be discussed.[20] These other restrictions included restrictions not consistent with the GATT (*e.g.*, restrictions claimed to be for BOP purposes, but not meeting those requirements) as well as GATT-consistent restrictions (*e.g.*, unbound tariffs). In addition, the developed countries emphasized the importance of the strengthened GATT rules and disciplines (referred to as "SGRAD") being discussed by other Uruguay Round negotiating groups. This difference of viewpoint is not surprising, since developed countries imposed most of their restrictions on textile imports under the MFA, whereas trade barriers imposed on these products by developing countries usually arose through a failure to follow general GATT disciplines.

[15] *See* Stewart, *supra* note 10, at 260.

[16] *Id.*, at 268. Japan and Switzerland were not relying on the MFA to impose restrictions. However, these two countries imposed restrictions on imports through other measures. *Id.*, at 274. In addition, textile and clothing exports have been subject to a number of restrictions, outside the context of the MFA, by developing countries. *Id.*, at 275–277.

[17] For information on the specific restraints imposed by these four at the time the WTO Agreement came into force, *see* Part IV below.

[18] *See* Marcelo Raffaelli and Tripti Jenkins, The Drafting History of the Agreement on Textiles and Clothing (1995); Stewart, *supra* note 10, at 259–380.

[19] *Ministerial Declaration on the Uruguay Round*, MIN.DEC, September 20, 1986.

[20] *See* Raffaelli and Jenkins, *supra* note 18, at 19; *see also Communication from Pakistan*, MTN.GNG/NG4/W/10 (February 15, 1988).

A series of negotiating groups was formed to conduct the Uruguay Round negotiations. Four groups were established to deal with so-called "market access" questions, covering textiles and clothing, tariffs, non-tariff measures and tropical products. The negotiating group on textiles and clothing began its work in February of 1987. The most active individual developing countries were Hong Kong, India, Indonesia and Pakistan. In addition, the International Textiles and Clothing Bureau ("ITCB"), an inter-governmental organization founded in 1984 by a number of textile exporting developing countries, also played an important role, as did the ASEAN countries acting jointly. Those developed countries that were applying restrictions under the MFA at that time—Canada, the European Community, Norway and the United States—were very active. Japan and Switzerland also played key roles.

The most contentious issues that came up in the negotiations were the following:

- the length of the time period in which textile and clothing trade was to be integrated into the GATT system
- the rate at which existing MFA quotas that would not be immediately integrated would grow
- the scope of the products to be integrated
- the nature of the special safeguard mechanism that would be available during the integration period
- the role of a monitoring body
- the application of other GATT rules to textile and clothing trade.

Each of these issues is discussed below.

A. The Speed of Integration

It was agreed early on that the final goal of the negotiations was the integration of textiles and clothing into the GATT/WTO system. However, the question of how long this integration would take was strongly contested, and was one of the last issues agreed upon. There were two aspects to this issue: the *time period* within which final integration would occur, and the *pace of integration* within that time period.

With regard to the time period for integration, proposals ranged from five to ten years, with developing countries generally favoring a shorter period, and developed countries generally preferring a longer period.[21] As discussed in Part IV.B below, the final period agreed upon was ten years.

As for the pace of integration, the debate centered around the percentage of products to be integrated at each of various stages of integration. Again, developing countries favored a faster integration schedule, with developed countries preferring a slower one.[22] The final text attempted to balance these opposing views.

B. Quota Growth Rates

For those products subject to MFA-restraints that were not immediately integrated into the GATT 1994, and therefore would remain subject to these restraints during the transition period, there was discussion as to the level at which these quota amounts would grow. Once again, this issue was marked by a split between developed and developing countries.

[21] RAFFAELI AND JENKINS, *supra* note 18, at 57.
[22] *Id.* at 62–65.

Developed countries argued for slower growth in the quota levels, whereas developing countries preferred faster growth.[23]

C. The Scope of Products to be Integrated

With regard to product coverage, countries facing MFA restraints generally argued that only those products subject to MFA restraints should be covered by the proposed Agreement and subject to gradual integration. Any textile and clothing products not currently subject to these restraints should be deemed integrated, and therefore subject to normal GATT rules immediately. By contrast, developed countries urged that a much wider range of textile and clothing products should be subject to the integration process and integrated on a gradual basis, in order to allow them to delay the integration of the import-competing products currently subject to restraints.[24] As discussed in Part IV.G below, the final agreement covers a broad range of products.

D. The Development of a Special Safeguard Mechanism

Having agreed to bring textiles and clothing into the multilateral trading system, developed countries wanted to ensure that they had a means of protecting domestic industries from the effects of increased imports. To this end, a special safeguard mechanism was proposed that could be invoked to restrict textile and clothing imports (despite the fact that some countries suggested that there was no need for any special mechanism, as the GATT Article XIX safeguards provision would provide an appropriate mechanism).[25]

A variety of different views were expressed regarding the specific aspects of any such mechanism. A key issue was the economic test to be used in order to impose restraints—proposed standards included "injury," "damage," and "market disruption." As explained in more detail in Section IV below, a "serious damage" test was used in the final text. Another important issue was whether the special safeguard mechanism would be applied "selectively," rather than on an MFN basis, and therefore would mirror the restraints imposed under MFA rules.[26] To address this concern, Canada proposed an approach called "global approach/selective application." Under this approach, the importing country would first determine whether there had been an increase in *total* imports, and examine the economic effect of those imports. After this determination, the country would identify the exporting countries to whom the damage was attributable, and the safeguard measure would be applied to those specific countries.[27] As discussed in Part IV.D below, the approach taken in the Canadian proposal was the one used in the final agreement.

E. The Role of a Monitoring Body

Under the MFA, the TSB had served as a monitoring body to oversee the rules governing textiles trade, and the actions taken by specific countries under those rules. During the Uruguay Round negotiations, there was a general consensus that any agreement in this

[23] *Id.* at 37–39, 73–74.
[24] *Id.* at 65–66.
[25] *Id.* at 57, 66–68, 108–109.
[26] *Id.* at 39.
[27] *Id.* at 67–68.

area would also need some form of monitoring body, both for the integration process itself and for the purposes of dispute settlement. The European Community envisioned a body along the lines of the TSB, but strengthened. This body would verify that measures were in conformity with the proposed agreement, and would review the process of the progressive elimination of restrictions.[28]

Key issues related to this proposed monitoring body were: whether its decisions would be binding; the relationship of this body to other GATT bodies; and the recourse open to parties if they were unable to accept recommendations of the body.[29] As finally agreed, the Textiles Monitoring Body ("TMB") issues recommendations, not binding decisions, and when these are not followed Members can resort to the WTO dispute resolution process.

F. Linkage to Other GATT Rules

There was concern among some developed countries that textiles and clothing faced a number of other restrictions, aside from those in the MFA. For example, the European Community raised issues related to high bound tariff rates and the existence of non-bound tariffs on these products; licensing, quantitative restrictions and import prohibitions; safeguards, anti-dumping measures and subsidies; intellectual property rights; and measures taken under balance of payments and "infant industry" provisions. In a 1988 communication, the European Community stated the following:

> The EC wishes to emphasize from the start that the modalities which will permit the final integration of the sector into GATT are to be found in the strengthening of GATT rules and disciplines, that is in the creation of permanent equitable conditions of trade for all parties.[30]

Thus, to address this problem, the European Community argued that integration of textiles and clothing should go hand-in-hand with strengthened GATT rules and disciplines. This goal is reflected in Article 7 of the final negotiated agreement.

IV. The Agreement on Textiles and Clothing

The ATC is one of the Annex 1A agreements on trade in goods that are part of the WTO Agreement. As anticipated in the Uruguay Round Ministerial Declaration, the ATC provides for the integration of trade in textiles and clothing into the WTO system. In this regard, the Preamble states: "*Recalling* that Ministers agreed at Punta del Este that 'negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade.'" Along the same lines, Article 1.1 of the ATC provides that this agreement "sets out provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into GATT 1994." As this latter provision makes clear, the ATC is really just a transitional agreement, lasting for a defined period and expiring at the end of that period. Article 9 of the ATC confirms this

[28] *Communication from the European Community*, MTN.GNG/NG4/W/47 (May 14, 1990).
[29] RAFFAELI AND JENKINS, *supra* note 18, at 70.
[30] *Communication from the European Community*, MTN.GNG/NG4/W/12 (May 24, 1988); *see also Communication from the European Community*, MTN.GNG/NG4/W/24 (July 20, 1989).

by providing that the ATC will terminate on January 1, 2005, at which point the textiles and clothing sectors will be fully integrated into GATT 1994. Article 9 also states that there will be no extension of the Agreement.

This section provides a detailed review of the key provisions of the ATC and their implementation to date. The interpretation of the ATC by panels and the Appellate Body in several disputes is also discussed.[31]

A. Notification of Existing Restrictions

ATC Article 2.1 required that all quantitative restrictions imposed under the MFA, whether based on bilateral agreements or unilateral action, that were in effect on the day before the entry into force of the WTO Agreement (January 1, 1995), were to be notified to the TMB within sixty days. The notifications were to include the restraint levels, growth rates and flexibility provisions. As of the date of entry into force of the WTO Agreement, all such restrictions are to be governed by the ATC.

At the time the ATC entered into force, only four WTO Members—Canada, the EC, Norway and the United States—had MFA restrictions in effect, and their notifications were as follows:[32]

- Canada: 205 quotas plus 39 sub-limits affecting 26 WTO Members.
- EC: 199 quotas plus nineteen sub-limits involving fourteen Members.
- Norway: 54 quotas involving sixteen WTO Members plus twelve quotas maintained on imports from three non-WTO Members, as well as a non-automatic import licensing procedure on imports of four product categories from Chinese Taipei.
- United States: 650 quotas affecting 25 WTO Members plus 250 quotas with respect to twelve countries that were not then Members.[33]

Article 2.4 then states that the notified restrictions shall be deemed to constitute the "totality" of such restrictions applied by the respective Members, and that "[n]o new restrictions" shall be introduced except under the provisions of the ATC or the relevant GATT 1994 provisions.[34]

In addition, ATC Article 3.1 requires that restrictions on textiles and clothing imports other than those maintained under the MFA (*e.g.*, restrictions maintained for balance-of-payments reasons) must be notified to the TMB, whether these restrictions are consistent with the GATT 1994 or not. In the 1997 Report, 29 Members submitted notifications under Article 3.1 (ten of these Members reported that they did not maintain any restrictions of

[31] Three disputes under the ATC have been the subject of WTO panel and Appellate Body reports. These cases are discussed in detail later in this chapter. In addition, one panel report, although principally involving GATT Article XXIV, also discussed the ATC.

[32] *Comprehensive Report of the Textiles Monitoring Body to the Council for Trade in Goods on the Implementation of the Agreement on Textiles and Clothing During the First Stage of the Integration Process*, G/L/179, 31 July 1997 ("*1997 Report"*).

[33] *Id.*, ¶¶ 183–189.

[34] The meaning of Article 2.4 was elaborated by the panel in *Turkey—Textiles*. There, the panel interpreted Article 2.4 to mean that, in addition to a prohibition on restrictions that are *entirely* new, existing restrictions that have been notified may not be "increased." The panel then noted that Turkey did not have any restrictions in place at the time of the entry into force of the ATC. Accordingly, it said, any restrictions on textiles and clothing applied by Turkey would be "new," as defined in Article 2.4. Report of the WTO Panel, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (1999) ("*Turkey—Textiles*") ¶¶ 9.70–9.81.

the type referred to in this Article).[35] Under Article 3.2, such restrictions must be brought into conformity with the GATT 1994 within one year or phased out "progressively."

B. Integration of Products into GATT 1994

ATC Article 2 sets out specific timetables and reduction commitments for removing products from MFA coverage and integrating them into GATT 1994. Once a product is integrated, any existing MFA restrictions on that product must be lifted, and no special safeguards under Article 6 of the ATC (see below) may be imposed. Under Article 2.6, on the date of entry into force of the WTO Agreement—January 1, 1995—each Member was required to integrate products that accounted for at least sixteen percent of the total volume of the Member's 1990 imports of the products covered by the ATC.[36] The products to be integrated had to include products from each of the following four categories: tops and yarns, fabrics, made-up textile products, and clothing. However, there was no requirement that specified quantities or percentages of each group be included.

Article 2.8 then establishes a staged reduction process for the integration of remaining textile and clothing imports not integrated in the initial stage: products accounting for an additional seventeen percent of the total volume of the Member's 1990 imports were to be integrated by January 1, 1998; and another eighteen percent were to be integrated by January 1, 2002. Finally, all remaining products must be integrated by January 1, 2005.[37]

According to the two Comprehensive Reports completed by the TMB as of the date of writing (December 2002), no Member had failed to integrate the required percentages in the first two phases (1995 and 1998), and the proposed Phase Three (2002) integration plans that had been notified to the TMB also met the necessary percentage.[38]

C. Growth Rate of Continuing MFA Restrictions

As explained above, restrictions applied under the MFA were subject to annual growth rates, which averaged between three and six percent. ATC Article 2.13 and 2.14 provide that these growth rates are to be increased at each stage of integration for all products still under MFA restraint, the so-called "growth-on-growth" requirement. Specifically, during stage one of integration (from January 1, 1995 to December 31, 1997) the MFA growth rate was to be increased by sixteen percent. For stage two (from January 1, 1998 to December 31, 2001), the "growth-on-growth" rate was 25 percent, and for stage three (from January 1, 2002 to December 31, 2004), it is 27 percent. The following example, based on a six percent growth rate in 1994, helps to illustrate the rules on quota-growth rates:

[35] *1997 Report,* ¶228.

[36] These products are listed in the Annex to the ATC. Countries that did not have existing MFA restrictions and did not retain the right to use the Article 6 special safeguard mechanism were deemed to have integrated all of their products immediately, since the only significance of non-integration is the right to maintain existing MFA restrictions and to impose special safeguards. *See* ATC Article 2.9.

[37] Article 2.10 makes clear that accelerated integration is permitted, stating that "[n]othing in this Agreement shall prevent a Member which has submitted an integration programme pursuant to paragraph 6 or 8 from integrating products into GATT 1994 earlier than provided for in such a programme."

[38] *See 1997 Report,* ¶¶ 14, 28; *Comprehensive Report of the Textiles Monitoring Body to the Council for Trade in Goods on the Implementation of the Agreement on Textiles and Clothing During the Second Stage of the Integration Process*, G/L/459, 31 July 2001 ("*2001 Report*") ¶¶ 47–56, 79–91. Not all of the Phase 3 integration plans had been notified. *Id.* at ¶ 86.

Year	Previous Years' Quota Growth Rate	Growth Rate Increase	Current Year's Quota Growth Rate
1995	6%	16%	6.96% (6% × 1.16)
1996			6.96%
1997			6.96%
1998	6.96%	25%	8.70% (6.96% × 1.25)
1999			8.70%
2000			8.70%
2001			8.70%
2002	8.70%	27%	11.05% (8.70% × 1.27)
2003			11.05%
2004			11.05%

D. Special Safeguard Mechanism

As explained in Section III above, one of the key issues during the negotiation of the ATC was the establishment of a special safeguard mechanism that would apply to textile and clothing imports that were not yet integrated into the GATT 1994. ATC Article 6 sets out rules for the application of this mechanism. Note that this mechanism is simply a "transitional" one, and does not apply to products that have been integrated into the GATT 1994. Once integration has occurred, the only safeguard remedy available with respect to textile imports is that provided by GATT 1994 Article XIX and the Agreement on Safeguards.

1. Overview

The Article 6 safeguard mechanism may be applied in the following circumstances. For Members that applied restrictions under the MFA, the transitional safeguard mechanism may be applied to any of the products listed in the Annex to the Agreement without prior notification, except those integrated into the GATT 1994 under ATC Article 2. Members that did not apply such restrictions, on the other hand, were required to notify the TMB as to whether they wished to retain the right to invoke the Article 6 safeguard mechanism.[39] Once this notification has been made, they, too, may apply the transitional safeguard mechanism to products in the Annex that have not yet been integrated. As noted above, under Article 2.9, Members that did not wish to retain this right would be deemed to have integrated their products immediately. Article 6.1 urges Members to apply the transitional safeguard "as sparingly as possible . . . ."

The United States has made a total of 28 requests for consultations pursuant to Article 6.7 (as required when Members propose a transitional safeguard action): twenty-four in 1995, one in 1996 and two in 1997, and one in 1998. Fourteen resulted in agreement

[39] The 1997 Report noted that 55 Members had notified that they wished to retain the right to use the provisions of Article 6, whereas nine Members notified that they did not wish to retain the right to use the provisions of Article 6. The 1997 Report also observed that a significant number of Members had not submitted a notification under this provision, despite the requirement in Article 6.1 to do so. Subsequent to the issuance of the 1997 Report, two additional Members notified that they did not wish to retain the right to use Article 6, and three notified that they did wish to retain this right. In January of 2002, China, which became a WTO Member in December of 2001, reserved its right to take transitional safeguard actions. *See China to Reserve 'Transitional Safeguard' Right on Textiles*, Xinhua News Service, January 22, 2002.

on the imposition of restraints, while others resulted in the imposition by the United States of unilateral restraints[40] Three of the latter were the subject of dispute resolution proceedings, and in each case the United States was found to have acted in violation of Article 6.[41]

The frequent invocation of Article 6 by the United States immediately after the entry into force of the ATC caused concern among some WTO Members. In this regard, the 1997 Report notes:

> In a communication sent in response to the request for information by the TMB (G/TMB/11), one Member stated with respect to Article 6 that "it is a fact to be noted by the TMB that a Member, which is the largest single importer of textile products, heralded the WTO era by initiating more than two dozen additional restraints on their imports. Though technically the actions for such restraints were taken under the provisions of the ATC, the fact that so many restraints were initiated during the first few months of the opening year of the ATC, indicates lack of sincerity on the part of this largest importing country for an effective phasing out of restraints. It is also noteworthy that many of these restraints did not stand the scrutiny of the TMB and the only cases which ultimately reached the DSB Panels were decided against this importing Member". That Member further stated that "it is a welcome trend that restraints have begun to be examined by DSB panels. This will ensure that the WTO rules are properly followed and implemented in the textile sector and will also help the international trade in the textile products to graduate into the WTO regime, by the time the phase out period is over. Another issue is the need for a mechanism to ensure proper compliance of the recommendations of TMB as well as the Dispute Panels. Since the new restraints under Article 6 of the ATC are permissible for a period of three years, it may be possible for the importing countries to achieve their objective just by delaying the implementation of the recommendations of the TMB or the Dispute Panel to cover such period."[42]

Other countries have invoked Article 6, though none to the extent of the United States, as shown in the following table of requests for consultations:[43]

The TMB noted the substantial decline in the use of the transitional safeguard mechanism as from the beginning of the year 2000. It stated that the sustained growth in the world economy up until the last quarter of 2000 might partially explain the decline. In addition, it said that the disciplines embodied in, and the control exercised by, the WTO system have made a significant contribution in this regard. In particular, "the dispute settlement system, through the respective panel and Appellate Body reports, has

[40] *1997 Report,* ¶ 85; *2001 Report,* ¶ 119, 123.

[41] Report of the WTO Panel, *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R (1996) ("*U.S.—Underwear*, *panel*") and Report of the Appellate Body, *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R (1997) ("*U.S.—Underwear*, *Appellate Body*"); Report of the WTO Panel, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R (1997) ("*U.S.—Shirts and Blouses*, *panel*") and Report of the Appellate Body, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (1997) ("*U.S.—Shirts and Blouses*, *Appellate Body*"); Report of the WTO Panel, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R (2001) ("*U.S.—Cotton Yarn*, *panel*") and Report of the Appellate Body, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R (2001) ("*U.S.—Cotton Yarn*, *Appellate Body*"). These cases are discussed in Subsections 2 and 3 below and in Part V of this chapter. In a fourth case, the United States decided to remove the restraint, and the complainant requested the termination of the panel proceedings. *United States—Measures Affecting Imports of Women's and Girl's Wool Coats*, Complaint by India, WT/DS32.

[42] *1997 Report,* ¶ 172.

[43] The figures in the table are taken from the 2001 Report, ¶¶ 234, 236

	1995	*1996*	*1997*	*1998*	*1999*	*2000*	*2001 (first half)*
United States	*24*	*1*	*2*	*1*	—	—	—
Brazil	*7*	—	—	—	—	—	—
Colombia	—		—	—	*9*	—	—
Poland	—	—	—	—	*1*	—	*1*
Argentina	—	—	—	—	*17*	—	—

set jurisprudence, provided detailed guidelines to Members and established appropriate standards on which the TMB has been able to rely, or from which it has been able to take further inspiration."[44] Certainly, it is widely believed that an important reason for the sharp decline in use of Article 6 by the United States after the initial burst was the successful challenges brought by Costa Rica and others.

2. Procedural Steps

Before a Member imposes a transitional safeguard measure, certain steps must be taken. Paragraph 7 of Article 6 provides that a Member proposing to take safeguard action shall first seek consultations with the Member or Members that would be affected by such action. Under paragraph 8, if there is agreement among the Members involved (both the exporting and importing Members) that restraints are called for, restraints may be imposed at the agreed level—which must not be lower than the actual level of imports from the exporting Member in the twelve-month period ending two months before the request for consultations—and the TMB notified. However, pursuant to paragraph 10, if no agreement can be reached, the proposed restraints may be applied "after the expiry of the period of 60 days from the date on which the request for consultations was received," and the matter referred to the TMB at the request of any of the Members involved. Upon referral, the TMB shall conduct an examination of the matter, and make "appropriate recommendations" to the Members concerned.[45]

One of the issues in the *U.S.—Underwear* dispute was the earliest permissible date of application of safeguard restraints, pursuant to paragraph 10. There, Costa Rica argued that the United States violated Article 6.10 by retroactively applying the safeguard restraint back to the date of the U.S. request for consultations (under Article 6.7). The panel concluded that the United States was permitted to backdate the quotas to the date of *publication* of its request for consultations. However, the Appellate Body reversed this finding, concluding that no backdating was allowed. It noted that Article 6.10 establishes that a Member "may ' *after expiry of the period of 60 days*' from the date of receipt of the request for consultations without agreement having been reached, ' *apply the restraint* (measure)' 'within 30 days following the 60-day period for consultations . . . ." The Appellate Body emphasized the term "apply," which it defined as "putting such measure into operation." It concluded that, in the absence of express authorization to backdate, the plain language of Article 6.10 creates a presumption that "a measure may be applied only prospectively."[46]

[44] *2001 Report*, ¶¶ 238–239.

[45] As explained in more detail below, the TMB's recommendations are merely hortatory, and may be ignored by the restricting Member.

[46] *U.S.—Underwear*, *Appellate Body*, *supra* note 41, page 14.

3. Substantive Requirements

In addition to the procedural steps in paragraphs 7 though 10, paragraphs 2 through 4 of Article 6 establish certain substantive requirements that must be demonstrated by a domestic investigating authority before a transitional safeguard measure is imposed, similar to the requirements of GATT Article XIX and the Safeguards Agreement. While the rules are much less detailed and restrictive than those for normal safeguard procedures under GATT Article XIX and the Safeguards Agreement, they do serve to prevent abuse with regard to this type of safeguard restraint.

In general, in order to impose a safeguard measure under Article 6, increased quantities of total imports of the product in question must be causing or threatening serious damage to the domestic industry producing like or directly competitive products. In addition, the serious damage or threat thereof must be attributed to the Member against whom the restraints are to be applied. These requirements have been elaborated in WTO dispute settlement proceedings, as follows.

(a) Serious Damage. Although there is no explicit definition of "serious damage" in the Agreement, paragraph 3 provides a non-exclusive list of "relevant economic variables" that are to be considered in determining whether serious damage or threat thereof exists. The provision notes that none of these factors "either alone or combined with other factors, can necessarily give decisive guidance." The MFA contained a similar requirement.

The serious damage provision of the ATC has been interpreted by panels and the Appellate Body in several WTO disputes. In the first case dealing with this issue, *U.S.—Underwear*, the panel said that ATC Article 6.3 does not provide "sufficient and exclusive guidance in this case," and therefore the panel "refrain[ed] from making a finding on this point of law." The panel said that it was "not in a position to conclude" that the United States had failed to demonstrate "serious damage."[47] However, later panels examining this issue did not have the same reservations about reaching a conclusion. For example, the *U.S.—Shirts and Blouses* panel applied these provisions and found that the United States, as the responding party in that case, had not demonstrated that serious damage existed, in violation of the ATC.[48] The panel found that in its Market Statement (the determination that safeguard restraints were appropriate), the United States had failed to discuss eight of the eleven factors enumerated in paragraph 3 in the context of the particular industry involved and had given no reason for this failure. The information it did provide was "vague and imprecise." On the other hand, the panel in *United States—Cotton Yarn* rejected various challenges to the factual underpinning for the U.S. finding of "serious damage", although it did find that the finding was flawed because of the investigating authority's incorrect inductry definition, as well as its improper attribution of the serious damage.[49] In addition, the panel concluded that the U.S. determination of "actual threat of serious damage" was not justifiable, because the determination was based entirely on the assumption that the *existing* serious damage found by the United States would continue if imports were to continue as before. The panel considered that such an analysis *could* be reasonable, except that, as in this case, if the finding of serious damage is flawed is flawed, then by definition the dependent threat determination must be flawed as well. The panel explained that an authority *could* also make an "independent"

[47] *U.S.—Underwear*, *panel*, *supra* note 41, ¶ 7.45.
[48] *U.S.—Shirts and Blouses*, *panel*, *supra* note 41, ¶ 7.51–7.52.
[49] *U.S.—Cotton Yarn*, *panel*, *supra* note 41, ¶ 7.121.

finding of threat, through an adequate analysis of prospective events. However, the panel could find no such analysis in the 1998 Market Statement. Therefore, the Panel concluded that the U.S. determination of "actual threat of serious damage" was not "justifiable."[50]

(b) Causation. In addition to proving that serious damage or actual threat thereof exists, Members imposing ATC safeguard restraints must also show that the imported products at issue have *caused* the damage. Paragraph 2 provides that the serious damage or actual threat thereof "must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference."[51] In the *U.S.—Underwear* case, the panel could not find any "discussion or demonstration of causality" in the relevant Market Statement, other than mere assertions that imports were responsible for the damage. Moreover, the panel noted that the Market Statement suggested other possible causes of serious damage, such as rising cotton prices, but that these were not considered in the causation analysis. On this basis, the panel found that the United States had failed to comply with the obligation to demonstrate causation.[52] Similarly, in *U.S.—Shirts and Blouses*, the panel found that the United States had failed even to mention the possibility of other causes, in violation of the causation requirement,[53] which it said required consideration of whether the state of the industry concerned was due to technological changes or changes in consumer preferences rather than increased imports.

(c) Attribution. Once it has been established that an increase in total imports has caused or is threatening to cause serious injury to the domestic industry, paragraph 4 requires that the serious damage or threat thereof be *attributed* to the Member or Members against whom the restraint is to be applied on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of those imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction. Thus, in contrast with the situation under the MFA, safeguard measures are not simply to be imposed selectively against one Member at the discretion of the importing Member, but rather must be *attributed* to the appropriate Members under the conditions set out in paragraph 4, including the sharp and substantial increase in imports.

As with the "causation" and "serious damage" provisions, the attribution provisions of the ATC have been interpreted by panels and the Appellate Body in several WTO disputes. In the *U.S.—Underwear* case, the panel concluded that while imports from Costa Rica had increased, the Market Statement had failed to compare imports from Costa Rica with those from other sources. Moreover, the panel stated that during the period immediately following imposition of the restraint, the United States had concluded agreements with five other exporting nations in this same matter, establishing a quota that represented an increase of 478 percent, which was incompatible with the U.S. finding that an increase of imports from Costa Rica of only 22 percent had caused serious damage. The panel also noted that the TMB had concluded that the United States had

[50] *Id.*, ¶¶ 7.137–141.

[51] Note that this standard is similar to the "market disruption" test from the MFA, which also referred to serious damage or threat thereof caused by imports. However, the "price factor" examined under the MFA was not carried over to the ATC.

[52] *U.S.—Underwear*, *panel*, *supra* note 41, ¶ 7.46.

[53] *U.S.—Shirts and Blouses*, *panel*, *supra* note 41, ¶ 7.49–7.50.

not demonstrated that imports were causing serious damage. On this basis, the panel found that the United States failed to comply with the attribution requirements of ATC Article 6.4.[54]

Similarly, in *U.S.—Cotton Yarn*, Pakistan argued that by failing to examine individually imports from Mexico, the largest exporter of the product in question to the United States, the United States did not carry out a proper attribution analysis under ATC Article 6.4.[55] The Panel agreed with Pakistan, and the Appellate Body upheld this finding. It concluded that, "[a]n assessment of the share of total serious damage, which is proportionate to the damage actually caused by imports from a particular Member, requires, therefore, a comparison according to the factors envisaged in Article 6.4 with all other Members (from whom imports have also increased sharply and substantially) taken individually."[56] Applying this principle to the facts in that case, the Appellate Body observed that it was undisputed that Pakistan was not the only Member from whom imports increased sharply and substantially and that Mexico also fell within this category. Therefore, the Appellate Body stated that "the share of the serious damage attributable to imports from Pakistan can be properly assessed only in the light of the effects of the imports from Mexico."[57]

E. The Textiles Monitoring Body

Under the MFA, the TSB played an important supervisory role. In a similar vein, Article 8.1 establishes the Textiles Monitoring Body ("TMB") to "supervise the implementation of this Agreement," to "examine all measures taken under this Agreement and their conformity therewith," and to "take the actions specifically required of it by this Agreement." ATC Article 8.1 provides that the TMB shall consist of a Chairman and ten members, and that its membership shall be "balanced and broadly representative of the Members and shall provide for rotation of its members at appropriate intervals." The TMB members are to be appointed "by Members designated by the Council for Trade in Goods to serve on the TMB," with their functions to be discharged in a personal capacity rather than as representatives of their countries.

Article 8.5 provides that in the absence of any mutually agreed solution in bilateral consultations under the ATC, "the TMB shall, at the request of either Member, and following a thorough and prompt consideration of the matter, make recommendations to the Members concerned." TMB recommendations are not binding, although under Article 8.9 "Members shall *endeavour* to accept in full the recommendations of the TMB" (emphasis added).

Finally, under Article 8.10, if a Member considers itself unable to conform with the recommendations of the TMB, it shall provide the TMB with the reasons therefor not later than one month after receipt of such recommendations. Following thorough consideration of the reasons given, the TMB is to issue any further recommendations it considers appropriate. If the matter remains unresolved after the TMB's further recommendations, either Member may invoke normal WTO dispute settlement procedures.

Issues regarding the impact and nature of TMB recommendations have arisen in two WTO disputes. In *U.S.—Underwear*, Costa Rica argued that the United States violated

[54] *U.S.—Underwear*, *panel, supra* note 41, ¶ 7.48–7.51.
[55] *U.S.—Cotton Yarn*, *panel*, *supra* note 41, ¶ . 7.123.
[56] *U.S.—Cotton Yarn*, *Appellate Body*, *supra* note 41, ¶¶ 121–124.
[57] *Id.*, ¶¶ 125–126.

ATC Article 8 by refusing to follow the TMB recommendations and failing to submit a report explaining its inability in that regard. The panel rejected this claim, noting that the only TMB recommendations given had been for the parties to engage in further consultations, something that did in fact take place. Therefore, it concluded that the United States had followed the TMB recommendations and that the United States did not violate ATC Article 8.[58] In addition, in *U.S.—Shirts and Blouses*, India claimed that the U.S. restraint was inconsistent with ATC Article 6 because prior consultations were never held on the specific measure for which the TMB gave its endorsement (*i.e.*, the United States had ultimately imposed a restraint to compensate for *actual threat* of serious damage, while the TMB endorsed a restraint to compensate for *current* serious damage). The panel rejected India's claim regarding the need for TMB endorsement, noting that ATC Article 6.10, as confirmed by Article 8.9, makes clear that TMB endorsement is *not* a necessary prerequisite to imposing restraints. It emphasized that Members are free to impose restraints, as long as they *refer* the matter to the TMB for appropriate recommendations.[59]

F. Circumvention

Circumvention of MFA restraints, through such devices as transshipment, false declarations of origin, and misclassification of merchandise, was a significant concern of the developed countries. At their insistence, therefore, ATC Article 5 requires Members to establish the necessary legal provisions and administrative provisions and to take appropriate action to counter circumvention.

G. Product Coverage

As stated in Article 1.7, the integration provisions of the ATC apply only to the products listed in the Annex. The products listed are to be integrated pursuant to the integration time-frames. The Annex lists textile and clothing products defined by Harmonized Commodity Description and Coding System (HS) codes at the six-digit level. Specifically, it lists a number of products in each of Chapters 50–63 of the HS, as well as certain other products in Chapters 30–49 and 64–96. Many of the products to be integrated had not been subject to MFA restraints. As discussed in Part VI.A below, developed countries were therefore able to structure their integration program so as to delay integration of the most import-sensitive products, by focusing initially on less sensitive products.[60]

V. ATC Jurisprudence—Development of Systemic Principles

The substantive issues in the three disputes directly involving the ATC that have gone to panels and the Appellate Body have been discussed already in Part IV. However, these and other reports also contain some useful discussion of procedural and systemic issues under the ATC, which are summarized in this section.

[58] *U.S.—Underwear*, *panel*, *supra* note 41, ¶¶ 7.73–7.74.
[59] *U.S.—Shirts and Blouses*, *panel*, *supra* note 41, ¶ 7.57.
[60] *Statement Circulated by the International Textiles and Clothing Bureau*, WT/MIN(01)/ST/27, November 10, 2001. This would not have been possible had the Agreement required immediate integration of all products not under MFA restraint. *See* Part III above.

A. Standard of Review

The *U.S.—Underwear* panel observed that the ATC does not contain a specific provision that explicitly deals with the standard of review. It considered the most relevant WTO provision to be DSU Article 11, which requires panels to make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Applying this provision, the panel rejected a policy of "total deference" to the findings of national authorities on transitional safeguard matters. On the other hand, the panel pointed out that its review should not be a "substitute" for the proceedings conducted by the investigating authority or the TMB. In other words, the review should not be *de novo*.[61] The panel concluded that, based on the language of DSU Article 11, "an objective assessment would entail an examination of whether the [U.S. investigating authority] had examined all relevant facts before it . . . , *whether adequate explanation had been provided of how the facts as a whole supported the determination made*, and, consequently, whether the determination made was consistent with the international obligations of the United States."[62] Soon thereafter, the *U.S.—Shirts and Blouses* panel confirmed the finding of the *U.S.—Underwear* panel that DSU Article 11 provides the standard of review for cases involving transitional safeguard measures under the ATC.[63]

B. Burden of Proof

In *U.S.—Shirts and Blouses* the panel had concluded that the party challenging the Article 6 restraint had the burden of proof, and that it was for India to "put forward factual and legal arguments in order to establish that the US restriction was inconsistent with Article 2 of the ATC and that the US determination for a safeguard action was inconsistent with the provisions of Article 6 of the ATC."[64] On appeal, India challenged the panel's findings on burden of proof, arguing that ATC Article 6 is an *exception* to WTO obligations and therefore represents an affirmative defense for which the respondent should bear the burden of proof. The Appellate Body disagreed, finding that ATC Article 6 does not constitute an affirmative defense. In particular, the Appellate Body described Article 6 as a "fundamental part of the rights and obligations of WTO Members . . . during the [ATC] transitional period." Because it is part of the rights provided under the ATC, a Member claiming that these rights have been violated must "assert and prove its claim."[65]

C. Evidentiary Scope of Review

A number of disputes have addressed aspects of the evidentiary scope of review. In *U.S.—Underwear*, the panel limited the evidentiary scope of its review to the first "Market

[61] *U.S.—Underwear*, *panel*, *supra* note 41, ¶¶ 7.9–7.12.

[62] *Id.,* ¶ 7.13 (emphasis added). This standard of review has been confirmed and elaborated in the context of the Safeguards Agreement, *e.g.*, in *U.S.—Lamb Safeguards. See* Report of the Appellate Body, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, , WT/DS177,178/AB/R (2001).

[63] *U.S.—Shirts and Blouses*, *panel*, *supra* note 41, ¶ 7.16.

[64] *U.S.—Shirts and Blouses*, *panel*, *supra* note 41, ¶ 7.12.

[65] *U.S.—Shirts and Blouses*, *Appellate Body*, *supra* note 41, pp. 15–16. This ruling rejected the reasoning of the panel in *U.S.—Underwear,* which considered Article 6 to constitute an *exception* to the broad prohibition in Article 2.4, so that the burden of proof was on the country invoking the exception (i.e., in that case, the United States). *U.S.—Underwear, panel, supra* note 41, ¶ 7.15–7.16.

Statement" issued by the United States in the context of the safeguard investigation, and refused to consider statements made subsequent to that document, except for the narrow purpose of verifying the accuracy of statements made in the Market Statement.[66]

Later, in *U.S.—Shirts and Blouses*, the panel stated: "When assessing the WTO compatibility of the decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure." It also said that panels should make an objective assessment as to whether the Member respected the requirements of the ATC at the time of the determination, such that a panel should not consider developments subsequent to the initial determination.[67]

Finally, in *U.S.—Cotton Yarn* the parties disagreed over whether the panel should accept evidence submitted by Pakistan that was not available to, and therefore never examined by, the U.S. investigating authority at the time of the investigation. In addressing this issue, the panel agreed with the decisions in *U.S.—Underwear* and *U.S.—Shirts and Blouses* that panels should not reinvestigate the market situation, explaining that panels "are less equipped and might have less expertise in fact-finding than national authorities." Given this limitation, the panel stated that it would not examine any of the new evidence submitted by Pakistan "for the purpose of reinvestigating the market situation." However, it then explained that it *would* examine "any evidence, without regard to whether it was available or considered at the time of investigation, for the purpose of evaluating the thoroughness and sufficiency of the investigation underpinning the decision of the US authority."[68]

On appeal, the United States argued against one narrow aspect of the panel's ruling. Specifically, the United States claimed that the panel erred in considering evidence that did not *exist* at the time of the investigation. The Appellate Body agreed, and found that by admitting this evidence, the panel failed to make an "objective assessment," as required by DSU Article 11. However, the Appellate Body did not address the broader issue of the circumstances in which evidence not on the record of the underlying investigation may be considered by a WTO panel.[69]

D. Role of the Textiles Monitoring Body

The *U.S.—Shirts and Blouses* panel examined the role of the TMB in relation to dispute settlement under the DSU. In this regard, the panel noted the broad function of the TMB to supervise and examine measures taken relating to textile and clothing trade, a task that includes wide-ranging investigative tools and the need to operate by consensus. By contrast, panels established under the DSU have narrow terms of reference; they are not permitted to consider subsequent developments; and they need not operate by consensus.[70]

Similarly, the *Turkey—Textiles* panel addressed two questions related to the role of the TMB: the requirement of exhaustion of TMB procedures and the jurisdiction of the TMB versus that of dispute settlement panels. With regard to the former, Turkey claimed that India was required to exhaust the special dispute settlement procedures under the ATC before it could refer the matter to the DSB, and that, because India had

[66] *U.S.—Underwear*, *panel*, *supra* note 41, ¶ 7.26–7.27.
[67] *U.S.—Shirts and Blouses*, *panel*, *supra* note 41, ¶ 7.21.
[68] *U.S.—Cotton Yarn*, *panel*, *supra* note 41, ¶¶ 7.28–7.32.
[69] *U.S.—Cotton Yarn*, *Appellate Body*, *supra* note 41, ¶¶ 62–80.
[70] *U.S.—Shirts and Blouses*, *panel*, *supra* note 41, ¶¶ 7.18–7.20.

not done so, the panel had not been established properly. In a preliminary ruling, the panel rejected this claim. In doing so, the panel observed that the special and additional dispute settlement procedures for the TMB apply when measures are imposed pursuant to the ATC. However, Turkey, in its own notifications to the Committee on Regional Trade Agreements and to the TMB, stated that the import restrictions at issue were justified and had been introduced pursuant to its agreement with the European Community and in conformity with GATT 1994 Article XXIV. In the panel's view, then, India's claim under ATC Article 2.4 was simply a reflection of its claims under GATT 1994. Since the measures at issue were alleged to have been imposed pursuant to GATT 1994, the panel rejected Turkey's request that the TMB should have taken jurisdiction over the matter under ATC Article 8.[71]

The panel next addressed the issue of the relationship between the jurisdiction of the panel and that of the TMB. Citing the Appellate Body report in *Guatemala—Cement*,[72] the panel considered that the provisions of the ATC and the provisions of the DSU may both apply together. Therefore, even if the TMB has jurisdiction to determine what constitutes a "new" measure in the sense of the ATC and whether a violation of the ATC has taken place, a panel is nevertheless entitled to interpret the ATC to the extent necessary to determine whether Turkey benefits from a defense to India's claims under GATT Articles XI and XIII based on the provisions of the ATC. The panel then said that, in any case, the measures under examination are not measures applied pursuant to the ATC itself, and therefore the ATC could not provide a defense to a finding of violation of GATT Articles XI and XIII.[73]

VI. Current Issues

Although importing Members have generally complied with their integration commitments under the ATC, several contentious issues have arisen that are worth discussing in some detail.[74]

A. "Backloading" of Integration

The so-called "backloading" of integration commitments by major textile importing countries has been the most contentious issue under the ATC, giving rise to accusations

[71] *Turkey—Textiles*, *panel*, *supra* note 34, ¶¶ 9.14–9.16.

[72] Report of the Appellate Body, *Guatemala—Antidumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R (1998).

[73] *Turkey—Textiles*, *panel*, *supra* note 41, ¶¶ 9.82–9.83.

[74] One additional issue appears to have been resolved. The 2001 Report refers to concerns over "the continuation of [U.S.] visa requirements for products included in [the Stage 2 integration program]." Specifically, the U.S. Committee for the Implementation of Textile Agreements had announced that the United States would continue to require visas for products integrated on and after January 1, 1998, before entry would be permitted. In the view of some Members, this requirement violated Article 2.8(a). Certain Members requested the TMB to review the matter under Articles 8.1 and 2.21 of the ATC and make appropriate recommendations, but the review was never carried out because the United States removed the requirements in the face of these objections. (*2001 Report*, ¶¶ 58–62)

This issue emerged again in 2001. In response to a question from the TMB, the United States said that a decision would be made later in the year as to whether or not a visa requirement would be retained for goods exported in 2002. (*See U.S. Notification under Articles 2.8(b) and 2.11*, G/TMB/N/360/Add.1, February 22, 2001, p. 3.) In December of 2001, the issue was resolved. The United States announced that visa requirements would not be applied to textile and clothing products integrated during stage 3 with respect to imports from WTO Members. (*Amendment of Export Visa Requirements for Textiles and Textile Products Integrated into GATT 1994 in the Third Stage*, 66 Fed. Reg. 63,225 (2001).)

by the developing countries that while the developed countries may have complied with the letter of the Agreement, they certainly have not lived up to its spirit. As explained in Part IV above, the ATC requires that trade in textiles and clothing be integrated into the GATT 1994, but allows a great deal of flexibility in the way this integration is carried out. Not surprisingly, developed countries appear to have used this flexibility in the early stages of integration so as to integrate products that will have the least impact on domestic industries and which have therefore not been subject to MFA quotas. Products that are subject to quota have been saved for later integration stages. In the first two stages of integration the United States had lifted only thirteen of its more than six hundred quotas, while the European Union had lifted only fourteen of some two hundred.[75] Furthermore, in the first two stages of integration, most integrated products came from the low value-added group (tops and yarns) and relatively few from the high value-added sector (clothing). For example, in the European Community, by 1997 only 4.18 percent by value of total restrained imports had been liberalized; in the United States, the figure was 6.12 percent. (Norway, on the other hand, chose to accelerate the process and at the end of 1998, 94 percent by volume of its restraints had been removed.)[76]

A number of developing countries have complained about this "backloading" of the integration process. As expressed in the 1997 Comprehensive Report, one Member stated that "[s]ome importing countries have technically met the ATC stipulations without any effective integration, in that almost all of the products which they have integrated during the first two stages have either been totally outside restraints or they are covered by group limits or substantially under utilized restraints."[77] In other words, since there were no effective restraints on any of the products integrated, integration has had little impact. The 2001 Report expressed similar sentiments: "the significant number of restrictions still in place and the perceived lack of integration of products having a potential significance to trade, have caused serious disappointment to exporting Members in terms of expectations towards progressive integration and *pro rata* implementation of the provisions of the ATC."[78] The ITCB made a formal statement related to these concerns at the Doha Ministerial Conference:

> We remain deeply disappointed and concerned that major developed countries have not yet delivered on their commitment to liberalize trade in textiles and clothing in any meaningful manner, for developing countries to benefit from. Seven years from the Uruguay Round Agreement on Textiles and Clothing (ATC), few quota restrictions have been phased out. The plans announced for the remainder of the ten-year period are no more encouraging. Unless major improvements are effected, the large bulk of quotas will remain until the end of the transitional period on 1 January 2005: 701 out of 758 in the United States, 167 out of 219 in the EU, 239 out of 295 in Canada.[79]

The "back-loading" phenomenon has given rise to another concern. Because the United States and the European Community have put off integration of the most import-sensitive imports until the end of the implementation period, domestic textile and clothing manufacturers in many countries will face a sudden shock after the ATC expires. After years

[75] ITCB, *Agreement on Textiles and Clothing: Evaluation of Implementation*, August 3, 1999 (available at <http://www.itcb.org>, visited February 21, 2002).

[76] Agency for International Trade Information and Cooperation, *The World Trade Organization Agreement on Textiles and Clothing (ATC),* June 1999.

[77] *1997 Report*, ¶ 63.

[78] *2001 Report*, ¶ 678.

[79] *Statement Circulated by the International Textiles and Clothing Bureau*, WT/MIN(01)/ST/27, November 10, 2001.

of delay, quotas will be removed on a wide range of products, causing a great deal of disruption. Some have likened the situation faced by domestic manufacturers to "walking off a cliff."[80] The reaction of these domestic producers to this import surge will have important implications for the future of textile and clothing trade. They will no doubt seek alternative forms of protection, and a surge of anti-dumping and countervailing duty cases has been predicted. Some of the smaller textile exporting countries are also extremely concerned about the prospect of unrestrained competition with the larger and more efficient exporting countries in the developed country markets.

B. U.S. Rules of Origin Requirements

Because of the quota system that continues to apply to many textile and clothing products, a product's country of origin is crucial. Each country has only a limited quota amount of products that it can export to the developed country markets. Therefore, decisions on where to source products are heavily influenced by domestic rules of origin requirements.

Determining a product's country of origin is more difficult with textiles and clothing than most industries. The textiles and clothing industry has a very "international" production pattern, in the sense that production of materials to be used in finished products often takes place in multiple countries. The various materials are then shipped to another country to complete the finished product. As a result, the specific rules of origin to be applied are very important for any determination as to the country of origin for a product. The country of origin for textile and clothing products can vary depending on the rules of origin applied.

The U.S. rules of origin for textiles and clothing imports have caused concerns for a number of WTO Members. As part of its legislation implementing the results of the Uruguay Round, the United States altered its rules for determining the origin of these imports.[81] These new rules, which took effect on July 1, 1996, and were later modified as part of the Trade and Development Act of 2000,[82] led to a number of important changes.

First, under the old rules, the origin of fabric was determined either by where the fabric was formed or, if the fabric underwent dyeing and printing, by where it was processed. Under the new rules, by contrast, the origin of fabric is determined by where it is formed, regardless of whether it may have been dyed, printed and finished in another country. The same approach is taken for products falling within HS Chapter 63.

Second, under the old rule, the origin of a garment depended upon whether it was a "finished garment" or a "simple assembly item." For finished clothes, sewing was origin conferring. For assembly items, the place of cutting to shape was the country of origin. As stated by the ITCB, this recognizes "multi-country processing," whereas the new rules confer origin with reference to a vague standard, *i.e.*, where the most important assembly operation is undertaken.[83]

According to the ITCB, these changes have "adversely affected" exports by its members to intermediary countries. In addition, they have disrupted normal trade patterns and created a "psychological impact" for importers, causing them to source their materials elsewhere, *i.e.*, from countries free of the possibility of being restrained through quotas.[84]

[80] *See* John Whalley, *Note on Textiles and Apparel in the Next Trade Round*, Conference on Developing Countries in the Next WTO Trade Round, held at Harvard University, November 5/6, 1999.

[81] Section 334, Uruguay Round Agreements Act, Pub. L. 103–465, 108 Stat. 4809 (1994); 19 CFR §102.21.

[82] Section 405, H.R. 434, Pub. L. 106–200 (2000).

[83] 19 CFR §102.21; *see Agreement on Textiles and Clothing: Evaluation of Implementation*, *supra* note 75.

[84] *Id.*

The new U.S. rules were the subject of two complaints by the European Community. The first of these was withdrawn, and the second was settled.[85] Subsequently, in January of 2002, these rules were the subject of a challenge by India. India's Request for Consultations pointed out that prior to the new rules, textile and apparel products, like other industrial products, could be conferred the origin of a country if they had undergone "substantial transformation" in that country. Now, under Section 334 of the Uruguay Round Agreements Act:

- Fabrics are deemed to originate in the country where they were formed in the greige state by weaving or knitting. Dying, printing and other finishing operations that are ordinarily performed to turn greige fabric into a useful article of commerce no longer confer origin.
- A wide range of made-up non-apparel products, such as silk scarves, blankets as well as bed, table and kitchen linen, are deemed to originate in the country where their constituent fabrics are formed into the greige state.
- For apparel products, the origin is deemed to be the country where the assembly takes place, which means that the country where the component parts were cut into shape can no longer be the country of origin.[86]

According to India, "[t]he main objective of the above changes appears to have been to protect the United States' textiles and clothing industry against import competition."[87] Furthermore, India explained that the changes introduced by the United States in 1996 and 2000 resulted in "extraordinarily complex rules under which the criteria that confer origin vary between similar products and processing operations." In addition, the structure of the changes, the circumstances under which they were adopted and their effect on the conditions of competition for textiles and apparel products "suggest that they serve trade policy purposes." On this basis, India argued that these changes are inconsistent with paragraphs (b), (c), (d) and (e) of Article 2 of the Agreement on Rules of Origin, according to which rules of origin shall not be used as instruments to pursue trade objectives; shall not pose unduly strict requirements; shall not themselves create restrictive, distorting or disruptive effects on international trade; shall not be discriminatory; and shall be administered in a consistent, uniform, impartial and reasonable manner.[88]

The Panel rejected all of India's claims.[89] On many issues it found that India had failed to produce evidence in support of its claims. India did not appeal the Panel decision.

C. Accelerated Implementation

Partly in response to the problem of "backloading" described above, a number of developing countries began to demand that implementation of commitments under the ATC

[85] *See* Request for Consultations, *United States—Measures Affecting Textiles and Apparel Products*, WT/DS85/1, G/RO/D/1, G/TBT/D/13 (June 3, 1997); Request for Consultations, *United States—Measures Affecting Textiles and Apparel Products (II)*, WT/DS151, G/TMB/N/341, G/RO/D/3, G/TBT/D/19, G/L/279 (November 25, 1998); *see also* Franklin Dehousse, Katelyne Ghemar, Philippe Vincent, *The EU–US Dispute Concerning the New American Rules of Origin for Textile Products*, 36 J. WORLD TRADE 67 (2002).

[86] Request for Consultations, *United States—Rules of Origin for Textiles and Apparel Products*, WT/DS243/1, G/L/507, G/RO/D/4 (January 22, 2002).

[87] *Id*.

[88] *Id*.

[89] Report of the Panel (not appealed), *United States—Rules of Origin for Textiles and Apparel Products*, WT/DS243/R (2003).

be accelerated. During the Doha Ministerial Conference, this issue was very prominent. However, although several drafts of the Ministerial Decision called for expansion of the quota levels on non-integrated products, the issue remained contentious up until the last minute of the negotiations,[90] and in the end the developed countries were able to force a deferral of any formal agreement on this matter. Rather than reach agreement on this issue, the text resulting from the Doha negotiations instead "[r]equests the Council for Trade in Goods to examine [these] proposals" and "make recommendations to the General Council by 31 July 2002 for appropriate action."[91] As of this writing, this issue has not been resolved.[92]

VII. The Future: Trade in Textiles and Clothing under the WTO System

As of January 1, 2005, the ATC will expire, and the products that it covered will be subject to the normal WTO rules. However, it should be kept in mind that WTO rules allow Members to restrain imports through a variety of means. As a result, even after textiles and clothing are brought within the normal rules, barriers to imports may persist.

The most common method of restraint is the same as it was fifty years ago: tariffs. While the GATT system has encouraged countries to lower tariffs, and prohibits them from charging tariffs that are higher than the bound rate, countries may choose not to bind tariff rates on certain products, or they may bind the rates at very high levels. This has been the case with regard to tariffs imposed by many developed countries on textiles and clothing products. For example, as noted in the WTO's 2001 Trade Policy Review for the United States, "[m]ost exports of textiles and clothing products to the United States are subject to quotas or to import duties, with the latter ranging to 33%."[93]

In addition to normal tariffs, after textiles and clothing are integrated into the WTO system they may face an increase in the use of trade remedy measures. In particular, anti-dumping, countervailing duty, and safeguard measures may be applied as a means to keep out cheap imports.[94] This approach has been used effectively by domestic industries in other sectors, such as steel, particularly in the United States. Thus, while all trade in textiles and clothing will formally be subject to WTO rules as of January 1, 2005, protection for these products may still be quite prevalent.

Clearly, the desire to maintain restrictions on imports of textiles and clothing will remain strong. In fact, the use of such restrictions might be considerable, given the significant import competition faced by both developed countries and smaller developing countries. In particular, the accession of China to the WTO could lead to a surge in textile and clothing imports that gives rises to a wide range of new trade barriers.[95]

[90] *See Textiles Remain Tough Issue at WTO, Pakistan Takes Hardline*, INSIDE U.S. TRADE, November 12, 2001.

[91] *See Decision on Implementation-Related Issues and Concerns*, Point 4, WT/MIN(01)/W/10, 14 November 2001; *see also*, BRIDGES MONTHLY REVIEW, Vol. 5, No. 9, November/December 2001, p. 8.

[92] *See ITCB Urges Adoption of Doha Proposals on Textiles*, at http://www.itcb.org/Documents/ITCB-MI31.pdf (visited September 9, 2002).

[93] *Trade Policy Review for the United States*, Report by the Secretariat, WT/TPR/S/99, August 15, 2001, p. 87.

[94] An EC anti-dumping duty on cotton-type bed linen was successfully challenged in a WTO dispute. *See* Report of the Appellate Body, *European Communities—Anti-Dumping Duties on Imports Of Cotton-Type Bed Linen from India,* WT/DS141/AB/R (2001).

[95] Note, however, that the full effects of the impact of Chinese textile exports might not be felt until several years after the ATC expires. As part of China's WTO accession, a special system of safeguards was established for Chinese textile exports, with effect until December 31, 2008. *See Report of the Working Party on the*

Nonetheless, despite any lingering restraints in these sectors, bringing textiles and clothing into the system is an important step. The rules that will now apply to these sectors are much stricter, more transparent, and better developed. Moreover, disputes involving trade in textiles and clothing can be taken to the WTO dispute settlement process, whereas there was no effective mechanism for settling disputes under the MFA. As a result, abuse of the rules is more difficult. While the future of trade in this industry remains somewhat uncertain, the situation is clearly better than at any time since the early years of the GATT.

Accession of China, WT/ACC/CHN/49 (1 October 2001), ¶¶ 241–242. In September, 2002, the American Textile Manufacturers Institute filed a petition with the U.S. government asking for new quotas on knit fabric, bras, gloves, nightwear and textile luggage to be imposed under this special system. In response, China warned the U.S. against imposing new restrictions on textile imports when the present quotas end in 2005, saying such measures would undermine Beijing's co-operation in the new round of global trade talks. *See* Richard McGregor, *China Warns US Over Quotas on Textiles*, FINANCIAL TIMES, November 23, 2002.

CHAPTER 10

THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES

Martha Lara de Sterlini*

TABLE OF CONTENTS

I. Introduction 439
II. The Economics of Trade-Related Investment Measures 440
A. The Economic Rationale of TRIMs and Other Performance Requirements 440
B. Are TRIMs and Other Performance Requirements Effective? 442
III. Legal Background: The FIRA Panel Case 444
IV. The Uruguay Round Negotiations on TRIMs 445
A. Launching the Negotiations 445
B. Negotiating Positions 446
C. The Outcome 447
V. The TRIMs Agreement 448
A. General Features 448
B. The Provisions of the TRIMs Agreement 449
Preamble 449
Article 1—Coverage 449
Article 2 and the Illustrative List (Annex)—Basic Obligations 449
Article 3—Exceptions 450
Article 4—Developing Countries 451
Article 5—Notification and Transitional Arrangements 451
Article 6—Transparency 452
Article 7—Committee on Trade-Related Investment Measures 452
Article 8—Consultation and Dispute Settlement 453
Article 9—Review by the Council for Trade in Goods 453
VI. Operation of the TRIMs Agreement 453
A. Notification Obligations 454
B. The Extension of the Transition Periods 455
VII. Dispute Settlement Cases Involving The TRIMs Agreement 458
A. Outline of the Cases 460
1. *European Communities—Regime for the Importation, Sale and Distribution of Bananas* 460
2. *Indonesia—Certain Measures Affecting the Automobile Industry* 461
3. *Canada—Certain Measures Affecting the Automotive Industry* 462
4. *India—Measures Affecting the Automotive Sector* 464

* The author is a Counsellor in the Trade and Finance Division of the WTO Secretariat. The views expressed in this article are personal and should not be attributed to the WTO or its Member States.

B. Relationship Between the TRIMs Agreement and Relevant Articles of GATT 1994 466
C. Substantive Issues Addressed by the Panel in *Indonesia—Autos* 469
1. Relationship Between the TRIMs Agreement and the SCM Agreement 469
2. Prior Determination that a Measure is a Trade-Related Investment Measure 470
3. Characterization of a Measure as an "Investment Measure" 470
4. The Trade-Related Nature of Investment Measures 471
VIII. The TRIMs Agreement: Current Debate and Prospects 472
A. The Article 9 Review 472
B. The Outstanding Implementation Issues 473
C. Work on S&D Proposals 476
D. The Working Group on the Relationship Between Trade and Investment 476
E. The TRIMs Agreement: What Prospects? 478
IX. Conclusion 480

Bibliography 481

I. Introduction

Over the past decades, national policies toward foreign direct investment ("FDI") have been liberalized world-wide, reflecting a change in perceptions of the role of FDI in host countries' development. At the same time, countries have often resorted to the use of performance requirements (frequently accompanied by incentives) in an attempt to channel and maximize the contribution of FDI to their development.

By the early 1980s, some capital-exporting countries, led by the United States, expressed concern at what they perceived as the trade-restricting and distorting effects of performance requirements and proposed that they be subject to disciplines in the framework of the General Agreement on Tariffs and Trade ("GATT"). Developing countries opposed the initiative, calling into question the competence of GATT to deal with investment policy. An important development in this context was the 1982 GATT dispute brought by the United States against Canada's administration of its Foreign Investment Review Act ("FIRA"), which showed that GATT rules were applicable to certain investment measures in as much as they affected trade. Efforts to bring trade-related investment measures ("TRIMs") into the GATT materialized in 1986 with the inclusion of the topic in the Uruguay Round trade negotiations.

Given the polarization of positions between developed and developing countries, the Agreement on Trade-Related Investment Measures ("TRIMs Agreement") that ensued from the negotiations constituted a modest outcome. In essence, it only clarified the application of GATT rules on national treatment and on the prohibition of quantitative restrictions to certain investment measures (local content, foreign exchange-balancing and trade-balancing requirements), and provided for transitional periods to remove inconsistent measures. The TRIMs Agreement included a provision for its own review (Article 9), which can, in principle, lead to either amendments or to an expansion of its disciplines to cover investment and competition policy. Difficulties encountered in the notification process, the lack of a mechanism to ensure compliance with obligations at the end of the transition periods, as well as the absence of specific criteria for extending these periods have given rise to some problems in the implementation of the Agreement. Questions on the adequacy of the transition periods to respond to developing countries' adjustment needs have also been raised. To date, the TRIMs Agreement has been involved in only a few dispute settlement cases that resulted in panel proceedings. A common feature among them is that the TRIMs Agreement has never been invoked on its own but rather in conjunction with other WTO provisions, notably Articles III and XI of the GATT 1994.

Nearly ten years after its entry into force, the TRIMs Agreement is still the object of debate in several WTO fora. Aside from the ongoing Article 9 review, the operation of the TRIMs Agreement is being discussed as part of the implementation review agenda of the Uruguay Round Agreements. Issues pertaining to the use of performance requirements by developing countries have also been raised in the Working Group on the Relationship between Trade and Investment in the context of the WTO Work Program launched at the Doha Ministerial Conference in November 2001.

This article provides an overview of the origins of the TRIMs Agreement, its operation and the current debate about its results and prospects. Part II deals with the economics of TRIMs and other performance requirements and the long-standing debate on their impact on development and trade. Part III highlights the main results of the *FIRA* panel case, which exposed the need for clarifying the application of GATT rules to trade-related

investment measures. Part IV addresses the negotiating history of the TRIMs Agreement. An analysis of the provisions of the Agreement is provided in Part V, while Part VI reviews its operation since its entry into force. The disputes in which the TRIMs Agreement has been invoked are dealt with in Part VII; special attention is given to the only dispute in which the panel made findings under the TRIMs Agreement (*Indonesia-Autos*). Finally, Part VIII is concerned with the current WTO debate on the review and implementation of the TRIMs Agreement and the possible outcomes from it.

II. The Economics of Trade-Related Investment Measures

A. The Economic Rationale of TRIMs and Other Performance Requirements

The TRIMs Agreement applies to investment measures related to trade in goods, which are referred to as trade-related investment measures or "TRIMs". The Agreement provides that Members shall not apply any TRIM that is inconsistent with the provisions of Article III (national treatment) and Article XI (general elimination of quantitative restrictions) of the GATT 1994. Although the Agreement does not offer a generic definition of the term "TRIM", some guidance as to its coverage is provided in an Illustrative List annexed to the Agreement, which identifies certain measures deemed to be inconsistent with the above GATT provisions. These pertain essentially to local content requirements, foreign exchange-balancing requirements, trade-balancing requirements and export restrictions. Other performance requirements not covered by the TRIMs Agreement include, *inter alia*, export performance requirements, manufacturing requirements, product mandating requirements, technology transfer requirements, joint-ventures requirements and local equity requirements.[1]

Performance requirements are frequently employed within the framework of host countries' regulatory policies on FDI, where they are specifically aimed at influencing the activities of foreign investors. Typically, these measures are applied to foreign firms as conditions for obtaining authorization to establish and operate in the host country or for receiving incentives. Performance requirements are also applied to domestic firms in the context of industrial development policies.

TRIMs and other performance requirements tend to concentrate in specific industries, in particular the automotive, chemical and petrochemical, and computer/informatics industries.[2] While local content requirements have been used more intensively in the automotive sector, export performance requirements are more common in the computer/informatics industry. A combination of both measures has been found in the chemical and petrochemical industries.[3] Empirical studies show that performance requirements have been employed over time by both developed and developing countries, but that their use has been more frequent in the latter.[4] Studies have also found

[1] *See* for example, the list of measures identified by Patrick Low and Arvind Subramanian, *TRIMs in the Uruguay Round: An Unfinished Business?*, presented at The Uruguay Round and the Developing Economies, A World Bank Conference 4 (1995). *See also* UNCTAD's Illustrative list of "host country operational measures", which includes not only performance requirements but also investment incentives and other administrative requirements that impinge on the activity of foreign investors. UNCTAD, HOST COUNTRY OPERATIONAL MEASURES, UNCTAD Series on issues in International Investment Agreements 8–9 (2001).

[2] *See* UNCTC, THE IMPACT OF TRADE-RELATED INVESTMENT MEASURES ON TRADE AND DEVELOPMENT, 3 (1991).

[3] *Id.*

[4] *Id*.

that many developed countries abandoned the use of these measures by the end of the 1980s, and that, since then, there has also been a decline in their use by developing countries.[5]

Traditionally, TRIMs and other performance requirements have been employed by host countries as an instrument to promote development objectives, such as industrialization, import-substitution and export growth. For example, developing countries have resorted to local content measures, which require producers to use or purchase domestically-produced inputs, with the aim of encouraging the expansion of domestic component industries or of shifting into higher-value added products. Export performance requirements have been used in order to induce export-oriented industrialization or to enhance production efficiency *via* the economies of scale associated with higher production volumes than those otherwise warranted by the domestic market. Trade-balancing requirements, which link access to imports to export performance, have been applied as a means of managing foreign capital flows associated with the activities of foreign subsidiaries.[6]

Through the use of TRIMs and other performance requirements, developing countries have also sought to enhance the contribution of FDI to their technological development, to the generation of employment, to the acquisition of managerial and workforce skills, to the promotion of regional development, to the improvement of their balance-of-payments situation and to address competition policy concerns.[7] Developing countries have often imposed performance requirements in an attempt to offset market failures and the monopolistic power of multinational firms operating in their territories,[8] as well as prevent foreign subsidiaries from crowding domestic enterprises out of the local market. From a political economy perspective, developing countries have justified the use of performance requirements (in particular local equity requirements) as a means of asserting national sovereignty for fear that unrestricted FDI access might threaten their economic and political independence.[9]

On the other hand, as home countries of most multinational enterprises, developed countries are concerned with the potential impact of performance requirements on the ability of firms to establish in host countries and to operate according to market conditions and corporate strategies. More generally, developed countries perceive performance requirements as protectionist devices having the effect of restricting and distorting trade and investment flows. They also question the efficiency of TRIMs and similar measures in achieving developmental or trade policy objectives and stress that host countries jeopardize their own development prospects by applying them. Ultimately, they contend, such requirements lead to global welfare losses.[10]

The divergent views described above have led to a long and controversial debate on the development and trade effects of performance requirements, which has not

[5] WTO/UNCTAD, *Trade-Related Investment Measures and Other Performance Requirements, Part II, Evidence on the Use, the Policy Objectives, and the Impact of Trade-Related Investment Measures and Other Performance Requirements*, Joint Study by the WTO and UNCTAD Secretariats, Document G/C/W/307/Add.1 (2001), at 1.

[6] *Id.* at 19–21.

[7] *Id.* at 20–21.

[8] Edward M. Graham and Paul R. Krugman, *Trade-Related Investment Measures*, in COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS 148 (Jeffrey J. Schott ed. 1990).

[9] Paul Civello, *The TRIMs Agreement: A Failed Attempt at Investment Liberalization*, 8 MINNESOTA JOURNAL OF GLOBAL TRADE 101 (1999).

[10] *Id.* at 100.

been settled to date. The debate has tended to be quite politicized, rather than being based on a systematic analysis of the actual use and effects of performance requirements. But what do theory and empirical evidence tell us about the impact of these measures?

B. Are TRIMs and Other Performance Requirements Effective?

Economic theory predicts that, under standard assumptions of perfect competition, performance requirements, like other forms of intervention, produce adverse effects leading to resource misallocation and welfare deterioration.[11] For example, by increasing the price of domestic inputs, local content requirements reduce welfare because the costs incurred by the producers of final goods exceed the benefits accruing to input suppliers. On the other hand, under conditions of imperfect competition, public intervention may be warranted to compensate for market failures. In such circumstances, performance requirements may help capture a share of the rents and externalities generated by foreign subsidiaries, thus enhancing host country welfare.[12] However, even assuming that market imperfections do exist, performance requirements may not always result in welfare creation, and they are only second-best options as their objectives may be achieved through other instruments that directly address the source of distortions.[13]

Empirical studies on the effectiveness of performance requirements show mixed results, suggesting that the effects of such measures may vary significantly depending on the specific context in which they are applied. In particular, there are divergent results as regards the effectiveness of local content requirements as a policy tool. Some studies have concluded that local content requirements have been effective in offsetting information asymmetries and other market failures, thus inducing multinational firms to source locally, license the local manufacture of components, identify and develop local suppliers capabilities and provide them with technology and know how.[14] By contrast, other studies have found that local content requirements, used as an import-substitution device, have often proved to be very costly and inefficient, especially when associated with suboptimal-sized projects and excessive import protection. In this context, they have led to resource misallocation, higher prices and reduced consumption, and have failed to create strong backward linkages to the local economy and to stimulate technology transfer.[15]

There is some positive evidence that export performance requirements have been effective in inducing export-focussed investments and linking local manufacturers to regional and global supply networks. For example, an empirical study by Moran concludes that export performance requirements have proved to be a useful means for correcting market failures and compensating for investment-location distortions in the automotive,

[11] UNCTC, *supra* note 2, at 60.

[12] *Id*.

[13] *Id.* at 61.

[14] *See* Nagesh Kumar, *Use and Effectiveness of Performance Requirements: What can be learned from the experiences of Developed and Developing Countries*, THE DEVELOPMENT DIMENSION OF FDI: POLICY AND RULE-MAKING PERSPECTIVES, PROCEEDINGS OF AN EXPERT MEETING, United Nations, New York and Geneva, 65 (2002). *See* also V. N. Balasubramanyam, *Putting TRIMs to Good Use*, 19 WORLD DEVELOPMENT 9 (1991).

[15] THEODORE H. MORAN, FOREIGN DIRECT INVESTMENT AND DEVELOPMENT. THE NEW POLICY AGENDA FOR DEVELOPING COUNTRIES AND ECONOMIES IN TRANSITION 4–5 (1998). *See* also WTO/UNCTAD, *supra* note 5, at 28–29.

petrochemical and electronics/computer industries.[16] He found that these measures have played a crucial role in attracting world-scale investment projects and in inducing foreign investors to establish sourcing networks in host countries.[17] The resulting export-oriented facilities, operating under parent-company supervision, have brought valuable benefits in terms of rapid technological up-grading, managerial skills, cost-efficient production and international quality standards, as well as spillovers and externalities for the local suppliers associated with those operations.[18]

Notwithstanding this positive evidence, Moran warns that the outcome of performance requirements cannot be assumed to be beneficial or welfare-enhancing in all cases. This is because designing the appropriate form of intervention is a demanding task, which involves complex cost-benefit analysis of the objectives pursued and of the overall impact of intervention on national welfare. Thus, if improperly designed (especially when they perpetuate protection from competition), such measures may have a magnified negative impact on the host-country's prospects of economic development. A further complication is that, where host countries engage in a competition to attract FDI, the use of performance requirements linked to investment incentives may lead to a "beggar-thy-neighbor" scenario, where the net effect is likely to be a loss of welfare for all countries involved.[19]

As regards the trade effects of performance requirements, economic analysis predicts that, given certain assumptions, these measures may have an impact on trade in different ways.[20] However, some of the main empirical studies carried out during the 1980s on the trade effects of performance requirements did not find these effects to be significant. As a recent survey indicates, the results of such studies suggest that the aggregate trade impact of performance requirements has been relatively small.[21] Similarly, the same studies found that performance requirements had only a marginal effect on firm behavior and on the location of investment.[22] Such results may be explained by the fact that many performance requirements, although included in statutory regulations, are indeed discretionary and negotiable, and are often not applied. Additionally, many of these measures may be redundant in that they require a course of action that foreign firms would have pursued anyway.[23]

[16] *Id.* at 35. The author identifies two kinds of market failures that would warrant intervention by developing countries. One is the "stickiness" or initial reluctance of foreign firms to establish export-oriented investments. He observes that once this reluctance is overcome through the use of export performance requirements, a quick follow-the-leader reaction will take place. Such reaction is in itself indicative of the second market failure: the inability of first movers to "appropriate" sufficient returns to compensate for assuming the burden of the initial risk. Other rationales for host country intervention to compensate for distortions generated elsewhere are: the use of locational investment incentives by developed countries, and the presence of investment-diverting trade measures, such as preferential rules of origin with high local content and protectionist antidumping measures. *See id.* at 85–114.

[17] *Id.* at 6, 35.

[18] *Id.* at 82.

[19] *Id.* at 34.

[20] For a survey of economic analysis and empirical evidence on the impact of TRIMs and other performance requirements on trade, investment, economic growth and development *See* WTO/UNCTAD, *supra* note 5, at 21–31.

[21] *Id.* at 74. The empirical studies surveyed were: U.S. International Trade Commission, Foreign Performance Requirements and Trade (1982); H. Peter Gray and Ingo Walter, *Investment Related Trade Distortions in Petrochemicals*, 17 Journal of World Trade Law 4 (1984); E. Stephen Guisinguer and Associates, Investment Incentives and Performance Requirements (1985), and Theodore Moran and Charles Person, Trade-Related Investment Performance Requirements (1987).

[22] *Id.* at 25–26.

[23] UNCTC, *supra* note 2, at 3, 6.

III. Legal Background: The FIRA Panel Case

Until the early 1980s, investment issues received only marginal attention in the context of the GATT.[24] However, in 1982 a GATT dispute settlement proceeding initiated by the United States against Canada's implementation of its Foreign Investment Review Act ("FIRA") brought the subject of trade-related investment measures to the forefront of GATT discussions.[25] At issue were certain undertakings required from foreign investors by the Canadian authorities in exchange for the approval of investment projects in Canada, which the United States claimed had trade-distorting effects and violated several GATT provisions. The undertakings were of three types: those requiring foreign investors to buy goods of Canadian origin or from Canadian sources; undertakings to manufacture goods in Canada; and undertakings requiring foreign investors to export specified quantities or proportions of their local production.

Several contracting parties expressed doubts about the competence of a GATT panel to settle the dispute, as investment legislation was not covered by the General Agreement. Eventually, the panel was allowed to hear the dispute on the understanding that its findings would be limited to trade-specific issues falling within the scope of the GATT.[26]

The Panel concluded that Canada's purchase undertakings were inconsistent with the national treatment obligation contained in GATT Article III:4 because they discriminated against imported products.[27] In its analysis, the Panel dismissed Canada's argument that the purchase undertakings did not constitute laws, regulations or requirements within the meaning of Article III:4 because they were not mandatory but private contracts entered into freely by investors. The Panel ruled that the word "requirement" in Article III:4 covered not only mandatory measures but also voluntary commitments undertaken by firms in return for an advantage (*i.e.*, the approval of their investment proposals).[28]

The Panel, however, found that the undertakings to purchase Canadian goods did not prevent the importation of goods as such and were therefore not inconsistent with Article XI:1 of the GATT,[29] which prohibits quantitative restrictions on imports (and exports).[30]

[24] Efforts to address investment issues within the multilateral trading system date back to the drafting of the 1947 Havana Charter, which envisaged the creation of the International Trade Organization ("ITO"). The ITO Charter contained provisions both on trade and on foreign investment, however, the failure to ratify it meant that only the trade rules incorporated in the GATT were adopted.

[25] Report of the GATT Panel (adopted), *Canada—Administration of the Foreign Investment Review Act*, Complaint by the United States, BISD, 30S/140 (1984).

[26] *Id.*, at 141–142 .

[27] *Id.* at 158–162. GATT Article III:4 applies to measures that discriminate against imported products once they have cleared customs. In relevant part, this provision reads as follows:

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

[28] *Canada—Administration of the Foreign Investment Review Act*, *supra* note 25, at 158–159.

[29] GATT Article XI:1 reads as follows:

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

[30] *Canada–Administration of the Foreign Investment Review Act*, *supra* note 25, at 162–163.

With this ruling, the Panel confirmed the interpretation that Article XI applies to the *importation* of goods, while Article III is concerned with the treatment of *imported* goods. As will be seen below, this distinction is reflected in the Illustrative List annexed to the TRIMs Agreement.

Similarly, the Panel rejected the U.S. claim that export performance requirements were contrary to GATT Article XVII:1(c) (which prevents governments from prohibiting an enterprise—whether or not a state-trading enterprise—from acting in a non-discriminatory manner and in accordance with commercial considerations), and considered that such requirements fell outside the GATT's competence.[31] The Panel did not rule on the GATT consistency of the manufacturing requirements as it considered that this issue was not within its terms of reference.[32]

The Panel also considered a submission by Argentina, as a third party, that the arguments invoked against Canada could not be used against developing countries by virtue of the exception allowing these countries to adopt GATT inconsistent measures in order to promote a particular industry. While the Panel recognized that developing countries enjoyed special concessions under GATT Article XVIII:C, it did not rule on the applicability to developing nations of its decision concerning purchasing requirements.[33]

The *FIRA* Panel decision was important in that it clarified that GATT rules, in particular the national treatment obligation in Article III, were applicable to performance requirements imposed in the context of investment policies, in as much as these measures resulted in trade distortion. Also significant was the Panel's decision that export performance requirements fell outside the coverage of GATT, exposing the limit of GATT disciplines with respect to this type of measure. Finally, it is worth mentioning that the Panel made it very clear that the dispute before it pertained to the consistency with GATT rules of certain trade-related investment measures applied by Canada and not to Canada's right to regulate FDI.[34]

IV. The Uruguay Round Negotiations on TRIMs

A. Launching the Negotiations

The United States was the main advocate for introducing TRIMs and other investment issues into the GATT framework. In 1981, drawing on a joint study by the World Bank and the International Monetary Fund which concluded that performance requirements could have trade-distorting effects,[35] the United States suggested that the issue be discussed in the GATT context. While the European Community and Japan expressed some support for the U.S. proposal, this met with opposition from the developing countries, who argued that performance requirements were outside the remit of the GATT.[36]

The *FIRA* decision, which underscored the need for clarifying the relationship between GATT's disciplines and investment measures, provided the proponents with an additional

[31] *Id.* at 163–164. The Panel found that there was no provision in the General Agreement which prohibited requirements to sell goods in foreign markets in preference to the domestic market.
[32] *Id.* at 158.
[33] *Id*.
[34] *Id.* at 157.
[35] See Graham and Krugman, *supra* note 8, at 150.
[36] *Id*. *See also* Daniel M. Price and P. Bryan Christy III, *Agreement on Trade-related Investment Measures (TRIMS): Limitations and Prospects for the Future*, in THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 446–447 (Terence P. Stewart ed. 1996).

justification for bringing the issue to the negotiating table. However, it was not until the preparatory process of the Uruguay Round that attempts to place investment measures on the GATT's work program gathered momentum. In 1986, the United States succeeded in having the subject included in the agenda of the Uruguay Round negotiations, albeit with a limited mandate that reflected the prevailing resistance among the negotiating parties to deal with investment issues in the GATT.

The Punta del Este Ministerial Declaration, launching the multilateral trade talks, established the following mandate for the negotiations on trade-related investment measures:

> Following an examination of the operation of GATT Articles related to the trade-restrictive and trade-distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade.[37]

This carefully drafted mandate limited the scope of the negotiations to an examination of the trade-restrictive and distorting effects of investment measures and the extent to which they were covered by GATT rules. Contrary to the initial proposals by the United States, the negotiations were not aimed at addressing investment policies *per se*.[38]

B. Negotiating Positions

The Negotiating Group on Trade-Related Investment Measures initiated discussions in March 1987. From the outset, fundamental differences emerged between developed and developing countries as to the need, the nature and the coverage of possible new disciplines.[39]

The developed countries, particularly the United States and Japan, sought to introduce strong disciplines on trade-related investment measures, which they felt were not adequately addressed by existing GATT rules. They proposed the prohibition of a wide range of measures in addition to the local content requirements already found to be inconsistent with GATT Article III:4 by the FIRA Panel. These included, *inter alia*, manufacturing requirements, trade balancing requirements, exchange restrictions, domestic sales requirements, export performance requirements, product mandating, technology transfer requirements and local equity requirements.[40] The United States and Japan also proposed that other investment measures, while not prohibited, should be subject to general disciplines in so far as they might also lead to trade distortions. The European Community and the Nordic countries took a somewhat more nuanced approach, by focusing only on measures that had a direct and significant restrictive impact on trade and a direct link to existing GATT disciplines.[41] More generally, at least at the outset, the proponents of the

[37] Ministerial Declaration on the Uruguay Round, September 20, 1986 (MIN.DEC).

[38] Price and Christy, *supra* note 36, at 447.

[39] For a full account of the evolution of the negotiations of the TRIMs Agreement, including references to the negotiating texts, *See* William A. Fennell and Joseph W. Tyler, *Trade-Related Investment Measures*, in THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) at 1(Terence P. Stewart ed. 1993).

[40] *See* Communication from the United States (MTN.GNG/NG12/W/24, 1990) and Submission by Japan (MTN.GNG/NG12/W/20, 1989). *See also* Mina Mashayekhi and Murray Gibbs, *Lessons from the Uruguay Round Negotiations on Investment* 33 JOURNAL OF WORLD TRADE 6, 7–10 (1999).

[41] *See* Submission by the European Communities (MTN.GNG/NG12/W/22, 1989) and Submission by the Nordic countries (MTN.GNG/NG12/W/23, 1989). Mashayekhi and Gibbs, *supra* note 40, at 8.

TRIMs Agreement saw the negotiations as a first step for bringing investment issues into future GATT rounds.[42]

By contrast, the central concern of the developing nations, led by India, Egypt and some Latin American countries, was to preserve their freedom to use TRIMs as an instrument of development policy. In their view, the objective of the Punta del Este mandate was to focus on the trade-restrictive and trade-distorting effects of TRIMs, and not to limit the capacity of countries to employ investment measures *per se*. Consequently, only the adverse trade effects of TRIMs could be subject to eventual disciplines. Furthermore, since existing GATT rules already addressed such effects, they saw no need for provisions prohibiting their use. Instead, developing countries insisted on establishing an "effects test", based on empirical evidence and a case-by-case examination of investment measures in order to determine whether they had direct and significant adverse effects on trade. If this proved to be the case, means to address the adverse effects would have to be found, taking into account situations in which developmental considerations might outweigh such effects.[43] In joint submissions, developing countries listed the main development objectives which they pursued by applying investment measures. These included ensuring the fullest contribution of FDI to host economies; maximizing employment opportunities; facilitating structural adjustment under sociably acceptable conditions; promoting disadvantaged regions; alleviating pressures on foreign exchange; upgrading technological capabilities; and expanding exports.[44] In addition, India and other countries proposed that the negotiations should address the restrictive business practices of multinational enterprises,[45] since one of the reasons why developing countries resorted to TRIMs was precisely the need to offset such practices.[46] Not surprisingly, developed countries adamantly opposed discussing non-governmental measures in the GATT context.

C. The Outcome

Given the polarization of positions, the TRIMs negotiations produced a modest outcome. The compromise that eventually emerged is essentially limited to an interpretation and clarification of the application to trade-related investment measures of GATT provisions on national treatment and on quantitative restrictions on imports and exports. The TRIMs Agreement did not create new obligations that went beyond those already established under the GATT. Thus, many of the measures proposed for regulation during the negotiations, such as export performance and technology transfer requirements, were excluded from the coverage of the Agreement. Moreover, no new disciplines regarding the treatment of foreign investment *per se* were established.

The debate on the trade effects of investment measures was never really settled. It was based more on legal and theoretical arguments, rather than on a systematic analysis of

[42] Price and Christy, *supra* note 36, at 448.

[43] Mashayekhi and Gibbs, *supra* note 40, at 9.

[44] *See* Communication from Argentina, Brazil, Cameroon, Colombia, Cuba, Egypt, India, Nigeria, People's Republic of China, United Republic of Tanzania and Yugoslavia (MTN.GNG/NG12/W/25, 1990) and the Draft Declaration on Trade-Related Investment Measures submitted by Bangladesh, Brazil, Colombia, Cuba, Egypt, India, Kenya, Nigeria, Pakistan, Peru, Tanzania and Zimbabwe (MTN.GNG/NG12/W/26, 1990).

[45] These practices include the segmentation of markets to be served by specific companies of a corporate group, the designation of corporate suppliers for foreign subsidiaries, limitations on licensing or transfer of technology by subsidiaries and transfer pricing, among others.

[46] *See* Submission by India (MTN.GNG/NG12/W/18, 1989).

empirical evidence. Besides, no serious attempt was made to define an effective "trade effects test" for measures not warranting prohibition.[47]

Developing countries succeeded in limiting the scope of the TRIMs Agreement to the application of existing GATT rules with respect to a few investment measures. However, they accepted outright prohibitions on the use of such measures, regardless of their actual trade effects. From the point of view of developed countries, the Agreement failed to cover most of the investment measures which they had hoped would be prohibited, and it was, at best, a very modest inroad for bringing investment issues under the new WTO framework.

It should be noted, however, that although the TRIMs Agreement does not create any new substantive obligations, it does have value in that it introduces transition periods for the elimination of inconsistent measures and establishes notification requirements through which it has introduced some degree of transparency in the use of TRIMs.

V. The TRIMs Agreement

A. General Features

The WTO Agreement on TRIMs, which entered into force on January 1, 1995, is one of the agreements regulating trade in goods contained in Annex 1A to the Agreement Establishing the World Trade Organization. Before analyzing the scope and nature of the provisions of the TRIMs Agreement, it is useful to point out some of its particular features.

First, because the TRIMs Agreement essentially codifies and clarifies Articles III and XI of GATT 1994, its disciplines are trade-oriented. That is, they are concerned with the discriminatory treatment of imported and exported products and do not regulate the issue of entry and treatment of foreign investment as such. By the same token, the disciplines of the TRIMs Agreement apply only to *goods* and do not cover trade in services.

Second, although the measures covered by the TRIMs Agreement are normally applied in the framework of FDI policies, the disciplines of the Agreement do not differentiate as to the origin (ownership) of the investment and they apply equally to measures imposed on foreign and domestic investments. Likewise, it is irrelevant whether a given measure discriminates against foreign investors. For instance, a local content requirement imposed on domestic and foreign investors alike is inconsistent with the national treatment obligation of the TRIMs Agreement, because it involves discriminatory treatment of domestic products over imported products. Thus, what the TRIMs Agreement prohibits is discriminatory treatment of imported goods, rather than discriminatory treatment of foreign firms.

Third, the Agreement makes no distinction with regard to the phase of the investment at which a measure is imposed, *i.e.*, its disciplines cover measures applied both at the moment of entry of the investment as well as afterwards.

Finally, a further consequence of the trade orientation of the TRIMs Agreement is that its disciplines are narrower in scope than the provisions governing performance requirements of some international agreements, such as the North American Free Trade Agreement ("NAFTA") and several bilateral investment agreements. The latter deal with performance requirements as part of a set of disciplines regulating investment policy and thus tend to encompass a wider range of measures.

[47] Fennell and Tyler, *supra* note 39, at 73.

B. The Provisions of the TRIMs Agreement

Preamble

The objectives of the TRIMs Agreement, as stated in its preamble, are:

> . . . to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition.[48]

It will be noted that the reference to progressive liberalization is made only in connection with world trade, not with investment flows. The preamble also takes into account the particular trade, development and financial needs of developing countries, and recognizes that certain investment measures can cause trade-restrictive and distorting effects.

Article 1—Coverage

Article 1 defines the coverage of the TRIMs Agreement as follows: "This Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs")."[49] As noted above, this provision confines the coverage of the Agreement to trade in goods and makes it clear that it does not apply to trade in services. It will also be observed that no attempt is made to define the term "TRIMs". However, some guidance as to the measures covered by the Agreement is provided in an Illustrative List.

Article 2 and the Illustrative List (Annex)—Basic Obligations

Article 2.1, the core obligation of the Agreement, requires Members not to apply any TRIM that is inconsistent with the provisions of Article III (national treatment) or Article XI (prohibition of quantitative restrictions on imports or exports) of GATT 1994.[50] Since the Agreement does not offer a definition of the term "trade-related investment measures", Article 2.2 refers to an Illustrative List annexed to the Agreement, which identifies a number of measures that are inconsistent with Article III: 4 or Article XI:1.

Three aspects of the Illustrative List are worth mentioning here. First, the Illustrative List covers both measures which are mandatory or enforceable under domestic law or under administrative rulings as well as measures with which compliance is necessary to obtain an advantage.[51]

Second, the term "advantage" is not defined, but its meaning would appear to be broader than the notion of subsidies under the WTO Agreement on Subsidies and Countervailing Measures, as interpreted by the Panel in the *Indonesia-Autos* dispute (see Part VII below).

Third, given its illustrative nature, the List is not intended to be an exhaustive one. Therefore, there might be other measures which, although not explicitly mentioned in the List, would still be inconsistent with Article 2 of the TRIMs Agreement.

Paragraph 1 of the Illustrative List identifies measures that are inconsistent with Article III:4 of the GATT 1994 and which pertain to the *purchase or use* of products by an

[48] *Agreement on Trade-Related Investment Measures* ("*TRIMs Agreement*"), *Preamble,* in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS 163 (1994).

[49] *Id.* Article 1.

[50] Article 2.1 of the TRIMs Agreement provides, "Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994."

[51] *TRIMs Agreement*, *Annex*, ¶¶ 1 and 2 of the Illustrative List.

enterprise. Paragraph 2 identifies measures that are inconsistent with Article XI:1 and which concern the *importation or exportation* of products by an enterprise. The difference results from the above-mentioned distinction between Article III, which is concerned with *internal* measures, and Article XI, which deals with *border* measures.

Paragraph 1(a) of the Illustrative List covers measures commonly known as local content requirements, which relate to the purchase or use by an enterprise of products of domestic origin or domestic source.

Paragraph 1(b) covers trade-balancing requirements, measures that limit the purchase or use of imported products by an enterprise to an amount related to the volume or value of local products that it exports. In both instances, the inconsistency with Article III:4 stems from the fact that the measure discriminates against imported products by subjecting their purchase or use by an enterprise to less favorable conditions than the purchase or use of domestic products.

Paragraph 2(a) of the List refers to measures that limit the importation by an enterprise of products used in its local production in general terms or to an amount related to the volume or value of local production exported by the enterprise. This provision is similar to that in Paragraph 1(b) to the extent that it is also a trade-balancing requirement. The difference, however, is that while Paragraph 1(b) deals with internal measures affecting the purchase or use of products once they have been imported, Paragraph 2(a) is concerned with border measures restricting the importation of products, which are contrary to the prohibition on quantitative restrictions in Article XI:1 of GATT 1994.

Paragraph 2(b) of the List covers measures that restrict imports through the imposition of a foreign exchange balancing requirement. Under such requirement the ability of an enterprise to import products used in or related to its local production is limited indirectly by restricting the enterprise's access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise. Foreign exchange balancing requirements act like import quotas and are thus incompatible with Article XI:1.

Paragraph 2(c) covers measures that involve restrictions on the exportation of or sale for export of an enterprise, whether specified in terms of particular products, volume or value of products or in terms of a proportion of volume or value of the enterprise's local production. It should be noted that, as a codification of Article XI:1, Paragraph 2(c) only refers to measures that *restrict* exports. Thus, other measures relating to exports, such as export performance requirements and export incentives are not covered by the TRIMs Agreement.

Article 3—Exceptions

General exceptions to the obligations of the TRIMs Agreement are contained in Article 3. This provision states that all exceptions under GATT 1994 shall apply, as appropriate, to the TRIMs Agreement. It follows that the exceptions and conditions which under GATT 1994 apply to the obligations under Article III and XI are also applicable to the prohibition contained in Article 2 of the TRIMs Agreement. An example would be a

local content requirement applied in the context of government procurement of goods, which is excluded from the national treatment obligation, as established in Article III:8 of GATT 1994.

Article 4—Developing Countries

In addition to transition periods, the TRIMs Agreement provides some flexibility to developing countries in Article 4. This provision allows developing countries to deviate temporarily from the obligations in Article 2 by invoking the exceptions provided for in Article XVIII of GATT 1994 (Governmental Assistance to Economic Development) and other safeguard provisions for situations of balance-of-payments difficulties. These are the Understanding on the Balance-of-Payments Provisions of GATT 1994 and the Declaration on Trade Measures taken for Balance-of-Payments Purposes adopted on November 28, 1979.[52]

Article 5—Notification and Transitional Arrangements

Although the TRIMs Agreement reaffirmed pre-existing GATT obligations, it provided for a transitional period during which Members were allowed to maintain existing TRIMs that were inconsistent with GATT provisions, subject to certain conditions. Article 5 sets forth the requirements relating to the transitional mechanism.

Under Article 5.1, Members were required to notify to the Council for Trade in Goods ("CTG"), within ninety days of the entry into force of the WTO Agreement (*i.e.*, by March 31, 1995), any existing TRIM that was inconsistent with the TRIMs Agreement.[53]

Article 5.2 provides that measures notified under Article 5.1 shall be eliminated within specified time-periods. The length of the transition periods depends upon the level of economic development of the Member in question: two years after the entry into force of the WTO Agreement for developed countries; five years for developing countries, and seven years in the case of least-developed countries. It should be pointed out that the Agreement did not provide for a specific phase-out schedule or for a mechanism to monitor actions taken by individual Members to eliminate TRIMs at the expiry of the transition period.

A decision adopted by the WTO General Council in April 1995 provided that countries which were not Members of the WTO on January 1, 1995, but were entitled to become original Members within two years after that date, should be allowed to submit TRIMs notifications under Article 5.1 within ninety days from the date of their acceptance of the WTO Agreement.[54] The decision clearly stated, however, that the duration of the transition periods for the phase-out of TRIMs would continue to be governed by reference to the entry into force of the WTO Agreement. The decision also clarified that the transition period for countries negotiating their accession to the WTO would be determined in their respective protocols of accession.[55]

Under Article 5.3, the Council for Trade in Goods may authorize an extension of the transition period for the elimination of notified TRIMs, on request by a developing

[52] The Understanding on the Balance-of-Payments Provisions of GATT 1994 is contained in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS, *supra* note 48, at 27. The Declaration on Trade Measures taken for Balance-of-Payments Purposes can be found in BISD, 26S/205–209, 1980.

[53] Notifications under Article 5.1 were submitted by 26 Members. *See* Part VI below.

[54] Decision adopted by the General Council on April 3, 1995, WT/L/64.

[55] *Id*.

or a least-developing country that demonstrates that it has "particular difficulties" in implementing the provisions of the Agreement. The Council is required to take into account the "individual development, financial and trade needs" of the Member in question when considering such a request. The provision does not define what is to be understood by "particular difficulties" nor does it provide a procedure for assessing "the individual development, financial and trade needs" of developing countries that would justify the granting of an extension of the transition period. As discussed in Part VI below, several Members have availed themselves of their rights under this provision.

Pursuant to Article 5.4, the possibility of maintaining TRIMs during the transition period provided for under Article 5.2 only applies with respect to measures that were introduced no later than 180 days before the entry into force of the WTO Agreement. This provision was intended to prevent countries from introducing inconsistent TRIMs shortly before the entry into force of the WTO Agreement in order to benefit from the transition period. It also meant that the transition provisions were not to be understood as allowing Members to introduce new inconsistent measures during the transition periods. In addition, Article 5.4 prevents Members from modifying TRIMs notified under Article 5.1 in a manner that would increase their inconsistency with the Agreement. Nevertheless, after having notified a TRIM, a Member may during the transition period apply the same TRIM to a new investment if this is necessary to prevent distortions of the conditions of competition between the new investment and existing investments (Article 5.5).

Article 6—Transparency

Article 6 contains provisions aimed at ensuring transparency in the implementation of the TRIMs Agreement. Article 6.1 incorporates by reference the transparency obligations established in Article X of the GATT 1994 (Publication and Administration of Trade Regulations) and other WTO related provisions.[56] Under Article 6.2, Members are required to notify to the WTO Secretariat the publications in which TRIMs may be found. Finally, Article 6.3 requires each Member to give sympathetic consideration to requests for information by another Member and to allow opportunity for consultation on matters arising from the Agreement. The exception pertaining to confidential information, as provided in Article X of the GATT 1994, is also incorporated.

Article 7—Committee on Trade-Related Investment Measures

Article 7 establishes a Committee on Trade-Related Investment Measures, which shall meet not less than once a year or upon request by any Member. The main responsibilities of the TRIMs Committee are to monitor the operation and implementation of the Agreement and to provide a forum for consultation among Members on any matter arising from its implementation.

The Committee is required to report annually to the Council for Trade in Goods, which may assign to it other responsibilities. For example, in February 1995, the Council agreed that the TRIMs Committee would carry out the tasks pertaining to the notification of

[56] These are the undertaking on "Notification" contained in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance adopted on November 28, 1979 and the Ministerial Decision on Notification Procedures adopted on April 14, 1994.

TRIMs. More recently, in May 2002, the Council decided to assign the TRIMs Committee the responsibility for conducting work on a number of implementation issues related to the TRIMs Agreement.

Article 8—Consultation and Dispute Settlement

Pursuant to Article 8, consultations and the settlement of disputes under the TRIMs Agreement are subject to the integrated dispute settlement procedure of the WTO, as set forth in Articles XXII and XXIII of GATT 1994 and as elaborated by the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). To date, only five disputes related to the TRIMs Agreement have resulted in panel proceedings under the DSU. These are analyzed in Part VII of this chapter.

Article 9—Review by the Council for Trade in Goods

Article 9 requires the Council for Trade in Goods to review the operation of the TRIMs Agreement no later than five years after the entry into force of the WTO Agreement. The review offers the opportunity to propose to the Ministerial Conference, as appropriate, amendments to the text of the Agreement. Furthermore, Article 9 stipulates that during this review, the Council for Trade in Goods shall consider whether the Agreement should be ". . . complemented with provisions on investment policy and competition policy."

By including this review clause, the Uruguay Round negotiators seem to have recognized the limitations of the TRIMs Agreement and the need to move forward in future negotiations. At the same time, Article 9 was considered as a sort of trade-off. On the one hand, developed countries saw in this provision a basis for bringing investment policy into the WTO system in future talks. On the other hand, the reference to competition policy was established at the insistence of developing countries, which saw TRIMs as a way of offsetting certain anti-competitive practices by multinational firms and were, therefore, concerned that their elimination would leave them without appropriate means of addressing such practices.[57]

However, Article 9 provides no specific procedure on how to undertake the review nor does it establish a date for its completion. Thus, although the review was formally initiated in the Council for Trade in Goods in October 1999, it remains inconclusive to date. The lack of progress is also explained by the fact that the review has been held "hostage" as a result of discussions taking place in other WTO bodies, including the Working Groups on Trade and Investment and Trade and Competition Policy, established at the Singapore Ministerial Conference (1996), and the implementation review of the Uruguay Round Agreements.

VI. Operation of the TRIMs Agreement

This section is concerned with the factual aspects of the operation of the TRIMs Agreement, focusing on notification and on the process leading to the extension of transition periods. Members' views on the implementation of the Agreement are presented in Part VIII.

[57] *See* Mashayekhi and Gibbs, *supra* note 40, at 10.

A. Notification Obligations

During the first years of the operation of the TRIMs Agreement, attention was focused on aspects relating to the notification requirements established in the Agreement.[58] Notifications under Article 5.1 were submitted by 26 Members, almost all developing countries, but including one least-developed country (Uganda).[59] In the vast majority of cases, the notifications referred to measures applied in the automotive sector, followed in importance by measures taken in the agricultural sector. Many of the measures notified were local content measures, within the meaning of Paragraph 1(a) of the Illustrative List. The second most frequently notified measures pertain to foreign exchange balancing.

Although the record of compliance with notification obligations was relatively good in that most Members having inconsistent measures proceeded to notify them, a number of problems were detected in the process.

Some notifications were submitted well after the expiry of the relevant deadline, which gave rise to discussions in the TRIMs Committee as to the legal implications of such late notifications. In the view of some Members, timely notification was a substantive obligation of the TRIMs Agreement and failure to comply with it would prevent a Member from availing itself of the transition period provided for under Article 5.2. Other Members argued that the main substantive obligation in the Agreement was to eliminate inconsistent TRIMs within the prescribed time-periods, regardless of the date on which they were notified. Moreover, some developing countries complained that the ninety day period to notify measures had been too short.

The relationship between the provisions of the TRIMs Agreement and those of the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") also raised some difficulties. Some Members argued that due to the overlap between the two agreements, it had not always been easy to determine under which agreement a particular measure should be notified. This would have prevented some Members from notifying measures under the TRIMs Agreement within the prescribed deadline, thus losing their right to benefit from the transition period.

It should also be noted that some measures were introduced by Members after the entry into force of the WTO Agreement and for which the transition mechanism of Article 5 was not applicable. Such measures pertained in particular to the automotive industry and were the subject of consultations and dispute settlement proceedings. The proceedings are described in Part VII below.

Although not an obligation, some Members have notified the Committee that they do not apply any TRIM inconsistent with the Agreement.[60] No notifications have been submitted under Article 5.5, which permits Members to apply notified TRIMs to new

[58] In carrying out the tasks assigned to it by the Council for Trade in Goods, the TRIMs Committee adopted specific formats for the different notifications required under the Agreement. These are: Notifications under Article 5.1 of the TRIMs Agreement (G/TRIMS/1, 1995), Notifications under Article 5.5 of the TRIMs Agreement (G/TRIMS/3, 1995) and Notifications under Article 6.2 of the TRIMs Agreement (G/TRIMS/5, 1996).

[59] Notifications under Article 5.1 are found in the document series G/TRIMS/N/1/(Country)/ . . . For a list of notifying Members see Annex 1 to the Annual Report (2002) of the TRIMs Committee, G/L/589. It should be noted that a number of Members that submitted notifications under Article 5.1 subsequently notified or informed the Committee that the measures they had notified were no longer in force or had been eliminated, or that they intended to eliminate them in advance of the expiry of the transition period.

[60] A list of the Members which made such notifications is contained in Annex 2 to the Annual Report (2002) of the TRIMs Committee. *See supra* note 59.

investments during the transition period under certain conditions. Lastly, a number of notifications have been submitted under Article 6.2, which requires Members to notify to the WTO Secretariat any publications in which information on TRIMs can be found.[61]

B. The Extension of the Transition Periods

For the majority of Members who submitted notifications under Article 5.1, the date by which the notified TRIMs were to be eliminated was January 1, 2000, the deadline for developing countries. Given that the TRIMs Agreement does not provide for a phase-out schedule or for a mechanism to monitor steps taken by individual Members to fulfill this commitment, no information on implementation plans was submitted by the notifying Members before this deadline. Instead, several Members did announce their intention to request an extension of the transition period under Article 5.3.

In 1999, during the preparatory process for the Third WTO Ministerial Conference (Seattle), a number of developing countries sought to obtain a horizontal decision by Ministers, which would extend the transition period for all developing country Members. However, after the collapse of the Seattle Conference in December 1999, when it became clear that a horizontal solution was not possible, a number of individual requests for an extension were submitted to the Council for Trade in Goods.

Out of the 26 Members that had notified TRIMs, ten applied for an extension of the transition period. Eight of them (Argentina, Colombia, Chile, Malaysia, Mexico, Romania, Pakistan and the Philippines) submitted their requests before the end of the transition period (December 31, 1999) or shortly thereafter. Another request was received in May 2000 (Thailand) and another one in March 2001 (Egypt). Although the TRIMs Agreement did not establish a deadline for the submission of requests for extension, some Members questioned the legal validity of such late requests.[62] More problematic, however, was the fact that the Agreement does not define any procedure or specific criteria for granting the extensions. Article 5.3 only provides that, in considering a request, the Council for Trade in Goods is to take into account the individual development, financial and trade needs of the Member in question.

In justifying their request for an extension, Members referred primarily to financial and structural adjustment problems. Some of them pointed to the adverse repercussions of financial crises they had recently experienced on their ability to undertake the reforms necessary to fulfill their TRIMs obligations.[63] Other Members justified their request on developmental and social grounds. For example, Pakistan argued that the elimination of TRIMs would run counter to its development objectives, by preventing it from optimally exploiting domestic resources, promoting employment, backward and forward linkages with domestic industries and the transfer of technology.[64] The arguments provided by

[61] For a compilation of such notifications see the document Notifications under Article 6.2 of the TRIMs Agreement of Publications in which TRIMs may be found (G/TRIMS/N/2/Rev.9 and Addenda 1–8, 2001–2002.

[62] In particular, this was the case with Egypt's request (G/C/W/249, February 2001).

[63] *See* the requests of Argentina (G/C/W/176 + Corr.1), Malaysia (G/C/W/174), the Philippines (G/L/325) and Thailand (G/C/W/203). *See also* Bijit Bora, *Trade-Related Investment Measures*, in DEVELOPMENT, TRADE AND THE WTO: A HAND BOOK 171, 173 (Bernard Hoekman, Aaditya Mattoo, and Philip English eds. 2002).

[64] Pakistan's request (Request by Pakistan for an Extension of the Transition Period under the Provisions of Article 5.3 of the Agreement on Trade-Related Investment Measures, G/C/W/173, 2000).

Colombia for maintaining domestic absorption policies for agricultural products included the need for replacing illegal crops (crop substitution), and the unfavorable effects on its agricultural sector that have resulted from the change of its economic model since 1991.[65]

The need to ensure coherence with other international agreements is another factor explaining the requests for extensions.[66] Argentina specifically referred to its engagement in negotiations to develop a Common Automotive Policy with its MERCOSUR partners. Although unmentioned in its request, in the case of Mexico the request for an extension was probably motivated by the fact that NAFTA provided for a longer phase-out period for the elimination of certain performance requirements.[67] Finally, in a couple of cases the requests for extension were based on time constraints derived from the internal legislative process (Chile) or from contractual obligations (Romania).[68] The length of the extensions requested ranged from one year (Chile) to a minimum of seven years (Pakistan). In most cases the additional period requested was over four years.

The process leading to the granting of extensions of the transitional period was long and controversial. The Council for Trade in Goods met in a number of occasions in both formal and informal sessions to consider the matter. Exchanges of questions-and-answers and bilateral consultations also took place between the requesting countries and other interested Members. One contentious issue was whether the Council should decide on each request separately, according to its merits (which was the position taken by the United States and other developed countries) or whether all requests should be treated collectively.[69] This was the position adopted by the requesting Members, presumably to ensure that no single request be left out of a "package" solution or be granted on less advantageous terms.[70]

A more controversial issue was whether the granting of extensions should be conditioned upon the submission by the Members concerned of a phase-out program within a specified time-frame. Developed countries insisted on this requirement to ensure that TRIMs would be effectively removed at the end of the additional period. However, although some requesting Members were ready to accept this condition, others firmly opposed it as they did not wish to bind themselves to a particular phase-out program nor to a definitive date for the removal of TRIMs. Furthermore, these Members argued that the Agreement did not establish a limit for the duration of the extensions granted pursuant to Article 5.3. Thus, the length of the additional period and the conditions under which it should be authorized became the central issues in the debate.

[65] Colombia's request (Request by Colombia under the provisions of Article 5.3 of the Agreement on Trade-Related Investment Measures, G/C/W/169, 1999).

[66] Bora, *supra* note 63, at 173.

[67] Mexico's request (Request by Mexico under Article 5.3 of the Agreement on Trade-Related Investment Measures, G/C/W/171, 1999).

[68] In the case of Chile, the legislation mandating the elimination of TRIMs was awaiting parliamentary approval (Request by Chile under the Provisions of Article 5.3 of the Agreement on Trade-Related Investment Measures, G/C/W/172/Add.1, 2000). As for Romania, although the required legislative changes to comply with the TRIMs Agreement had been made, the termination of a TRIM applied in the context of a governmental contract with a particular enterprise would have meant a breach of the government's contractual obligations.

[69] Attempts were made by the requesting Members and others to obtain a decision from the Ministerial Conference in Seattle granting authorization for all the requests for extension. These did not succeed.

[70] Some requesting Members complained that they had been asked to give additional concessions (*e.g.* tariff cuts) as a condition to be granted the requested extensions.

A May 2000 decision by the WTO General Council recognized the need to preserve the multilateral character of the process for granting extensions, and directed the Council for Trade in Goods to give positive consideration to individual requests presented in accordance with Article 5.3 of the TRIMs Agreement.

After more than a year of protracted talks, a package solution eventually emerged, whereby eight requesting Members[71] were granted an extension of the transition period until December 31, 2001, with the possibility of requesting an additional extension of up to two years. Members requesting an additional extension were asked to state the particular difficulties they continued to face in implementing their TRIMs obligations and to describe the steps that they had taken or would take to eliminate their remaining TRIMs. They were also required to submit a reasonable phase-out plan for the removal of TRIMs no later than December 31, 2003, and to submit periodic reports to the Council on progress made thereon.

Under the so-called "2 + 2 formula", requesting Members were allowed a maximum extension of four years from the expiry of the initial transition period, almost two of which had already elapsed by the time the Council adopted the relevant decisions (July 31, 2001).[72] Requests for an additional extension were submitted by the eight Members concerned,[73] all of which were approved in November 2001.[74] Accordingly, transition periods for these Members were extended until December 31, 2003, except for the Philippines (June 30, 2003) and Romania (May 31, 2003). Progress reports to the Council were due by December 31, 2002, with the exception of those from Romania (September 15, 2002) and the Philippines (September 30, 2002).

As noted above, the lack of specific criteria in Article 5.3 of the TRIMs Agreement contributed to the difficulties encountered in the process leading to the granting of extensions. In the view of some Members, however, the crucial problem arising from the

[71] These were Argentina, Colombia, Malaysia, Mexico, Pakistan, the Philippines, Romania and Thailand. Given that Thailand's request was submitted several months after the end of the transition period, it was addressed as a waiver request under Article IX of the WTO Agreement. It was approved by the General Council following a recommendation from the Council for Trade in Goods. Because of the lateness of Egypt's request, it was not considered as part of the package solution. In the case of Chile, the extension became irrelevant as the period for which it had been requested elapsed before the final decision on the extensions was reached.

[72] Separate decisions for each requesting Member were adopted. See documents entitled "Extension of the Transition Period for the Elimination of Trade-Related Investment Measures Notified under Article 5.3 of the Agreement on Trade-Related Investment Measures": Argentina (G/L/460, August 2001), Colombia (G/L/461, August 2001), Malaysia (G/L/462, August 2001), Mexico (G/L/463, August 2001), Philippines (G/L/464, August 2001), Romania (G/L/465, August 2001), Pakistan (G/L/466, August 2001), and Thailand: Extension of the Transition Period for the Elimination of Trade-Related Investment Measures Notified under Article 5.1 of the Agreement on Trade-Related Investment Measures (WT/L/410, August 2001).

[73] *See* documents entitled "(Country-name)—Request for Extension of the Transition Period under the Agreement on Trade-Related Investment Measures": Argentina (G/C/W/295, August 2001), Colombia (G/C/W/296 and G/C/W/296/Corr.1, September 2001), Malaysia (G/C/W/291, August 2001; G/C/W/291/Rev.1, November 2001 and G/C/W/291/Rev.2, December 2001), Mexico (G/C/W/293, August 2001), Philippines (G/C/W/289, August 2001), Romania (G/C/W/290, August 2001 and G/C/W/290/Corr.1, September 2001), Pakistan (G/C/W/294, August 2001) and Thailand (G/C/W/292, August 2001). In addition, Colombia requested a waiver under Article IX of the WTO Agreement with respect to measures applied to an agricultural product which had not been previously notified; see: Request for Waiver from the Government of Colombia concerning the Implementation of Article 5.2 of the Agreement on Trade-Related Investment Measures (G/C/W/340, November 2001) and Colombia- Extension of the Application of Article 5.2 of the Agreement on Trade-Related Investment Measures (G/C/W/343, November 2001).

[74] The decisions are found in documents G/L/497–504. The decision approving Colombia's waiver request was taken by the General Council on December 20, 2001 (WT/L/441).

process was that of the inadequacy of the length of the transition periods to allow Members to make the structural reforms required to comply with their TRIMs obligations. Some comments are worth making in this regard. First, as explained below, several of the requests for extension were motivated by factors other than lack of capacity to undertake structural reform, such as legislative or contractual time constraints, or the need to ensure coherence with other international commitments. Moreover, in one case, the request for extension was made at the very last moment, after the Member concerned had initially announced that it would not do so. This would suggest that, at least in half of the cases, structural adjustment difficulties did not constitute a major problem.

Second, with a few exceptions, the Members that requested an extension did not seem to have designed or implemented a phase-out program during the transition period. Clearly, under such circumstances, it is not possible to draw any conclusion as to the adequacy of the transition periods to undertake policy reform. In fact, it would appear that, in the absence of a specific phase-out plan, structural adjustment tends to be postponed indefinitely.

Third, while maintaining the ability to decide the appropriate pace of reform may be regarded as a legitimate reason for not committing to specific time frames, the fundamental question is whether TRIMs are indeed effective in achieving the development objectives sought with their application. As noted earlier, while there is no agreement on this subject, economic analysis and recent empirical studies indicate that measures such as local content requirements may not be an effective development tool. To what extent TRIMs "bite" in practice is another relevant question in this context. For example, where measures require a course of action that firms would pursue even in their absence, structural reform would appear to be less problematic.[75]

VII. Dispute Settlement Cases Involving The TRIMs Agreement

Recourse to dispute settlement in connection with the TRIMs Agreement has been rather limited as measures that benefited from the transition provisions obviously could not be the subject of dispute settlement during the transition period.[76]

Reference to the TRIMs Agreement has been made in only five disputes that have resulted in panel proceedings. These are: (i) *European Communities—Regime for the Importation, Sale and Distribution of Bananas* ("*EC—Bananas III*"); (ii) *Indonesia—Certain Measures Affecting the Automobile Industry* ("*Indonesia—Autos*"); (iii) *Canada—Certain Measures Affecting the Automotive Industry* ("*Canada—Auto Pact*"), (iv) *India—Measures Affecting the Automotive Sector* ("*India—Autos*"), and (v) *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*.

Claims under the TRIMs Agreement were also made in a dispute settlement proceeding concerning measures applied by the Philippines in the motor vehicle sector,[77] but the

[75] Bora points out that local content targets have amply been met by two of the countries that requested extensions, which in his view suggests that any structural adjustment would not have posed an immediate problem as such requirements were not affecting the production decisions of firms. *See* Bora, *supra* note 63, at 175.

[76] During the discussions for the extension of the transition periods under Article 5.3, the legal situation of the measures maintained by the requesting Members remained unclear as the initial transition period to eliminate inconsistent measures had already expired. Notwithstanding this situation, the United States requested consultations under the DSU with respect to certain measures maintained by the Philippines and for which an extension had been requested.

[77] *See Philippines—Measures Affecting Trade and Investment in the Motor Vehicle Sector*. Request for Consultations by the United States (WT/DS195/1, May 2000).

case did not proceed as the parties concerned settled their dispute before the panel was formed.[78] Recently, the TRIMs Agreement has been cited in requests for consultations in two dispute settlement proceedings concerning the U.S. Patent Code[79] and Venezuela's import licensing system for agricultural products.[80] Consultations in both cases were still pending at the time of writing.

Although in all disputes that have been completed the complainants sought a ruling on alleged violations of the TRIMs Agreement, only in the *Indonesia—Autos* case did the Panel make a finding under the Agreement. The explanation for this lies in the fact that in all the disputes involving the TRIMs Agreement so far, its provisions have never been invoked as the sole basis for contesting the legality of the measures at issue. In particular, claims under the TRIMs Agreement have been accompanied by claims under Article III of the GATT 1994, and, in one instance, also under Article XI. The provisions of the SCM Agreement and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs") have also been cited in conjunction with TRIMs provisions. Thus the panels have been confronted with the question as to whether their findings should be made under the TRIMs Agreement and/or the GATT 1994 (or another WTO Agreement). The panels have also addressed the question of the sequence of the examination of claims under different agreements.

After a brief presentation of the relevant cases[81], this section examines the different approaches taken by the panels on the question of the relationship between the TRIMs Agreement and the GATT 1994. It is followed by a thematic analysis of the findings in the *Indonesia—Autos* case, where the panel offered some clarifications on specific provisions of the TRIMs Agreement.

[78] Other cases in which the TRIMs Agreement was invoked but did not result in panel proceedings concerned certain measures in the automotive sector applied by Brazil (*Brazil—Certain Measures Affecting Trade and Investment in the Automotive Sector*, Request for Consultations by the United States, WT/DS65/1, 1997 and Request for Consultations by the European Communities, WT/DS81/1, 2001), and measures affecting pork and poultry applied by the Philippines (*Philippines—Measures Affecting Pork and Poultry*, Request for Consultations by the United States, WT/DS74/1, 1997).

[79] *United States—U.S. Patents Code*, Request for Consultations by Brazil, WT/DS224/1 (2001).

[80] *Venezuela—Import Licensing Measures on Certain Agricultural Products*, Request for Consultations by the United States, WT/DS275/1 (2002).

[81] The Reports of the Panel in *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain* (WT/DS276/R, April 2004) were not available at the time of writing and therefore were not included in this analysis. This case involved, *inter alia*, certain measures relating to Canada's bulk grain handling system, which the United States claimed were inconsistent with Article III of the GATT 1994 and Article 2 of the TRIMs Agreement because they accorded imported grain less favourable treatment than that accorded to like domestic grain. The Panel found that two of the Canadian measures at issue were inconsistent with Article III:4 of the GATT 1994, and exercising "judicial economy" decided not to examine the claims under Article 2 of the TRIMs Agreement. The Panel also found that the United States had failed to establish that a third Canadian measure was inconsistent with Article III:4 of the GATT 1994 and with Article 2 of the TRIMs Agreement. One aspect of the Panel's findings is worth mentioning as it illustrates the difficulties that may arise form the absence of a generic definition of what a trade-related investment measure is under the TRIMs Agreement. This refers to Canada's request for a preliminary ruling that the United States' claim should be dismissed because it did not provide any indication as to the nature of the investment measure that it alleged was inconsistent with the TRIMs Agreement, thus failing to meet the requirement imposed by Article 6.2 of the Dispute Settlement Understanding (DSU) that a panel request "identify the specific measure at issue". The Panel found that Article 6.2 of the DSU did not require the Unite States to establish, in its panel request, that the measures at issue were trade-related investment measures within the meaning of the TRIMs Agreement, or that they fitted within one of the investment measures enumerated in the illustrative list annexed to the agreement. In the Panel's view, this was a matter to be established by the United States in its written and oral submissions, through evidence and argument. Therefore, the Panel rejected Canada's assertion that the United States' panel request was inconsistent with Article 6.2 of the DSU and saw no reason not to address these claims. See WT/DS276/R, ¶¶ 47–52.

A. Outline of the Cases

1. European Communities—Regime for the Importation, Sale and Distribution of Bananas[82]

The *EC—Bananas III* dispute concerned several aspects of the EC's regime for the importation, sale and distribution of bananas. The essence of the claims was that, by granting preferential treatment to EC and African, Caribbean and Pacific ("ACP") bananas at the expense of bananas from third-countries, the EC's regime violated a number of WTO provisions. Specifically, the complainants (Ecuador, Guatemala, Honduras, Mexico and the United States) alleged that the regime's allocation of import quotas and its import licensing procedures were inconsistent with a number of WTO provisions, including Article III of GATT 1994 and Article 2 of the TRIMs Agreement, as well as provisions of the General Agreement on Trade in Services ("GATS"), the Agreement on Import Licensing Procedures and the Agreement on Agriculture.

In its report, rendered on May 22, 1997, the Panel found that the EC's regime was inconsistent with several GATT and GATS provisions. Of specific relevance for the present discussion was the Panel's finding that the allocation of a certain proportion of import licenses to a particular category of operators was inconsistent with the national treatment obligation in Article III:4 of GATT 1994.[83] The Panel first dismissed the EC's argument that, being a border measure rather than an internal measure, the import licensing regime did not fall within the purview of GATT Article III:4. In contrast, the Panel found that the administration of licensing procedures and the eligibility criteria for allocating the licenses to operators formed part of the EC's internal legislation, affecting the internal sale, purchase and distribution of imported bananas within the meaning of Article III:4.[84]

As regards the complainants' claim that the license allocation system acted as a requirement or incentive to buy EC bananas in order to be eligible to import bananas from third-countries at lower tariff rates within a specific tariff quota, the Panel adopted as its own the findings of a previous GATT panel in respect of the same issue.[85] This panel had found that a requirement to buy a domestic product in order to obtain the right to import a product at lower rates under a tariff quota was a requirement affecting the purchase of a product within the meaning of Article III:4, and that the preferred allocation of part of the tariff quota to importers who purchased EEC bananas was inconsistent with this provision.[86]

Having found that the "operator category rules" violated Article III:4, the Panel in *EC—Bananas III* did not consider it necessary to rule on their consistency with Article 2 of the TRIMs Agreement (see Section B below).

The Panel report was appealed by the European Communities. In its report of September 9, 1997, the Appellate Body upheld the Panel's main findings, including the finding that the EC's import licensing regime violated Article III:4 of the GATT 1994.[87]

[82] Report of the WTO Panel, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (1997).
[83] *Id.* ¶ 7.182.
[84] *Id.* ¶ 7.178.
[85] Report of the GATT Panel, *EEC—Import Regime for Bananas*, DS38/R, ¶¶ 144–148, (1994) (unadopted).
[86] *Id.* ¶ 146.
[87] Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997).

2. Indonesia—Certain Measures Affecting the Automobile Industry[88]

The *Indonesia—Autos* dispute concerned a number of measures applied by Indonesia in the context of its 1996 National Car Program and related programs. Specifically, the claims concerned three sets of measures: (i) import duty relief for parts and components of cars and sales tax reductions on certain categories of motor vehicles, based on compliance with local content requirements; (ii) import duty exemptions on parts and components and tax exemptions on all sales for manufacturers in Indonesia having "Pioneer" or National Car company status, also based on the satisfaction of local content requirements; and (iii) the provision of "Pioneer" benefits for cars manufactured in a foreign country by Indonesian nationals that met certain local content requirements. The complainants, the EC, Japan and the United States, alleged that these measures were inconsistent with Articles I, III and X of GATT 1994, Article 2 of the TRIMs Agreement, and several articles of the SCM Agreement and the TRIPS Agreement.[89]

In its report of July 2, 1998, the Panel found that Indonesia's measures constituted a violation of Article 2.1 of the TRIMs Agreement.[90] The Panel first rejected Indonesia's argument that there was a conflict between Article III (and consequently the TRIMs Agreement) and the SCM Agreement, and that it should be resolved by giving priority to the more specific rules on subsidies. The Panel found that Article III and the SCM Agreement do not conflict with each other because they have different coverage and do not impose the same type of obligations. The Panel then considered whether the Indonesian car programs could be covered simultaneously by the provisions of the TRIMs Agreement and those of the SCM Agreement. It found that, since these agreements cover different subject matters, they were both applicable to the dispute[91] (see also Section C below). As regards the relationship between the TRIMs Agreement and Article III of GATT 1994, the Panel noted that the former had an autonomous legal existence, independent from Article III of the GATT 1994. It therefore determined that claims under these provisions should be addressed separately, and decided to examine the claims under the TRIMs Agreement first, because this Agreement was more "specific" to the issues under consideration[92] (see Section B below).

The Panel considered whether Indonesia's measures were TRIMs. First, it examined whether they were "investment measures". In its analysis, the Panel confirmed that the TRIMs Agreement was not limited to measures taken specifically in regard to *foreign* investment.[93] In addition, since the texts of the Indonesian regulations showed that the measures were aimed at promoting the domestic car industry, the Panel concluded that they would necessarily have an impact on investment in that sector, and could thus be characterized as "investment measures". The Panel also considered that, if the measures at issue were local content requirements, they would necessarily be "trade-related", because local content requirements, by definition, favor the use of domestic over imported products, and therefore affect trade.[94]

[88] Report of the WTO Panel, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R (1998). Not appealed.

[89] *See Indonesia—Certain Measures Affecting the Automobile Industry*, Request for Consultations by the European Communities (WT/DS54/1, 1996), Request for Consultations by Japan (WT/DS55/1 and WT/DS64/1, 1996), and Request for Consultations by the United States (WT/DS59/1, 1996).

[90] *Indonesia—Certain Measures Affecting the Automobile Industry*, *supra* note 88, ¶ 14.91.

[91] *Id.* ¶¶ 14.52 and 14.55.

[92] *Id.* ¶¶ 14.62–14.63.

[93] *Id.* ¶ 14.73. India, as a third party, had put forward the argument that the TRIMs Agreement was basically aimed at measures affecting foreign investment (*See* Section C below).

[94] *Id.* ¶¶ 14.80 and 14.82.

The Panel then proceeded to examine whether the measures fell within the scope of item (1) of the TRIMs Illustrative List. It noted that the Indonesian measures required the "purchase" and "use" of domestic products in order to obtain the tax and custom benefits, and concluded that these benefits constituted "advantages" within the meaning of the chapeau of the Illustrative List, and that, as such, the Indonesian measures fell within the scope of Item 1 of the Illustrative List of TRIMs.[95] The Panel dismissed Indonesia's argument that the measures were not local content requirements because they were not binding (see Section C-4 below). Based on the above, the Panel ruled that the Indonesian measures violated Article 2.1 of the TRIMs Agreement.[96] It also noted that Indonesia had not invoked any of the exceptions contained in Articles 3 and 4 of the TRIMs Agreement, nor claimed that the measures enjoyed the transition period provided for in Article 5.[97]

The Panel reasoned that action to remedy the inconsistencies it had found under the TRIMs Agreement would also remedy any inconsistency that it might have found under Article III:4 of the GATT 1994. Therefore, exercising the principle of judicial economy, the Panel saw no need to address the claims under Article III:4 of the GATT 1994.[98]

The Panel also accepted the complainants' claims that the Indonesian measures violated Articles I and III:2 of the GATT and Article 5(c) of the SCM Agreement, but rejected the rest of the claims. Its report was adopted on July 23, 1998.

3. Canada—Certain Measures Affecting the Automotive Industry[99]

The *Canada—Auto Pact* dispute concerned several measures taken by Canada in the framework of its 1965 Auto Pact agreement with the United States, and implemented through the 1988 Motor Vehicle Tariff Order ("MVTO"), several Special Remission Orders ("SROs") and letters of undertaking from Canadian car manufacturers. The measures provided for custom duty exemptions for the importation of certain motor vehicles and parts by car manufacturers established in Canada. In order to qualify for the import duty exemptions, a car manufacturer had to meet three conditions: (i) it had to have had a manufacturing presence in Canada (in the base year 1963–64) with respect to motor vehicles of the class imported; (ii) it had to achieve a minimum amount of Canadian value-added, which applied to goods and services ("CVA requirements"), and (iii) it had to comply with a production-to-sales ratio requirement ("ratio requirement").

The claimants, in this case Japan and the EC, contended that Canada's measures were inconsistent with Articles I:1, III:4, and XXIV of GATT 1994; Article 2 of the TRIMs Agreement; Article 3 of the SMC Agreement, and several GATS articles.[100] In its report, circulated on February 11, 2000, the Panel accepted most of these claims, including those under Article III:4 of GATT 1994.

The Panel decided to examine the claims under GATT Article III:4, before considering those under the TRIMs Agreement (see Section B below). It first dismissed Canada's

[95] *Id.* ¶ 14.89.

[96] *Id.* ¶ 14.91.

[97] *Id.*¶ 14.92. In this regard, it should be mentioned that Indonesia had originally notified one of its car programs under Article 5 of the TRIMs Agreement, but it subsequently withdrew its notification on the grounds that the measure was not a TRIM but rather a subsidy.

[98] *Id.* 14.93.

[99] Report of the WTO Panel, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/R and WT/DS142/R (2000).

[100] *See Canada—Certain Measures Affecting the Automotive Industry*, Request for Consultations by Japan (WT/DS139/1, 1998) and Request for Consultations by the European Communities (WT/DS142/1, 1998).

argument that the CVA requirements did not affect the internal sale or use of imported products because they did not in law or in fact require the use of domestic products, and because they could be easily met on the basis of other elements of value added (*e.g.*, labor costs). In the Panel's view, the CVA requirements, which conferred an advantage (*i.e.*, eligibility for duty exemptions) upon the use of domestic products but not upon the use of imported products, should be regarded as measures "affecting" the internal sale or use of imported products within the meaning of Article III:4, notwithstanding the fact they did not *in law* require the use of domestic products.[101]

The Panel therefore found that the CVA requirements affected the internal sale or use in Canada of imported parts, materials and non-permanent equipment for use in the production of motor vehicles. It also found that the CVA requirements accorded "less favorable treatment" to imported products than to like domestic products because, by granting an advantage for the use of domestic products but not for the use of imported products, they adversely affected the equality of competitive opportunities of imported products vis-à-vis like domestic products.[102] Moreover, the Panel noted that the fact that the advantage could also be obtained by means other than the use of domestic products did not preclude that imported products were being treated less favorably.[103]

In light of the above considerations, the Panel concluded that Canada violated Article III:4 of GATT 1994 as a result of the application of the CVA requirements under the MVTO and the SROs.[104] The Panel arrived at the same conclusion with respect to the letters of undertakings submitted by certain auto manufacturers to the Canadian authorities. After determining that the involvement of the Canadian Government in the action taken by the companies was such that the CVA commitments contained in the letters amounted to "requirements" within the meaning of GATT Article III:4, the Panel found that Canada had also violated this provision as a result of the conditions contained in the letters.[105] Having found that Canada's CVA requirements were inconsistent with Article III:4 of the GATT 1994, the Panel did not consider it necessary to make a ruling on whether such requirements were also inconsistent with Article 2.1 of the TRIMs Agreement (see Section B below).[106]

Finally, the Panel found that the effect of the ratio-requirements was not a limitation on the internal sales of vehicles, but rather a limitation on the value of vehicles that could be imported duty-free.[107] Noting that GATT Article III:4 is not concerned with limitations on the conditions for importation, the Panel found that the effect of the ratio requirements did not constitute a grounds for finding a breach of this provision and rejected this claim. It also rejected the claim that the ratio requirements were inconsistent with Article 2.1 of the TRIMs Agreement.[108] Canada appealed certain issues of law covered in the Panel report and legal interpretations developed by the Panel, however none of these include the Panel's findings with respect to Article III:4 of the GATT 1994.[109]

[101] *Canada—Certain Measures Affecting the Automotive Industry*, *supra* note 99, ¶ 10.82.
[102] *Id.* ¶ 10.85.
[103] *Id.* ¶ 10.87.
[104] *Id.* ¶ 10.90.
[105] *Id.* ¶¶ 10.123 and 10.130.
[106] *Id.* ¶¶ 10.91 and 10.131.
[107] *Id.* ¶ 10.148.
[108] Id. 10.149–10.150.
[109] Report of the Appellate Body, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R (2000).

4. India—Measures Affecting the Automotive Sector[110]

This dispute involved certain measures applied by India that affected the automotive sector. Under India's Public Notice No. 60 ("PN 60"), adopted in December 1997, car manufacturers wishing to import car kits were required to sign a "Memorandum of Understanding" ("MOU"), whereby they were asked to fulfill a number of conditions. In particular, these included: (i) a requirement that car manufacturers achieve specified minimum local content levels ("indigenization requirement"), and (ii) a trade balancing requirement, under which car manufacturers were required to balance the value of their imports of car kits and car parts against the value of their exports of cars and car parts.

At the time the dispute was brought before the Panel, India maintained import restrictions and an import licensing system on a range of products, including cars and car parts. Manufacturers who did not sign an MOU could be denied a license to import car kits and car parts. The EC and the United States raised claims challenging the conformity of India's measures with Articles III:4 and XI:1 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMs Agreement.[111]

After dealing with some preliminary objections, the Panel considered the order in which it should examine the substantive claims, and decided to begin with the claims under GATT 1994 (see Section B below). With respect to the indigenization requirement, the Panel accepted the complainants' arguments and ruled that such requirements were inconsistent with Article III:4 of GATT 1994.[112] First, the Panel found that the automotive parts and components of domestic and foreign origin were like products within the meaning of Article III:4 of GATT 1994.[113] It then determined that the indigenization condition in both PN 60 and the MOUs was a "requirement" because it constituted a necessary condition for obtaining the right to import the restricted car kits and components.[114] The Panel's view that the MOUs constituted "requirements" within the meaning of Article III:4 of GATT 1994 was based on GATT case law[115] and on the express language of the chapeau of the Illustrative List.[116] The Panel also found that, by requiring car manufacturers to purchase Indian parts and components rather than imported products, the indigenization requirement modified the conditions of competition between the domestic and imported products in the Indian market, thus affecting the internal sale, purchase and use of imported parts and components.[117] The Panel therefore concluded that the indigenization condition, as contained in PN 60 and the MOU, was inconsistent with Article III:4 of GATT 1994.[118]

Having found that the indigenization requirement was inconsistent with Article III:4 of the GATT 1994, the Panel did not see the need to examine whether the same

[110] Report of the WTO Panel, *India—Measures Affecting the Automotive Sector*, WT/DS146/R and WT/DS175/R (2001).

[111] *See India—Measures Affecting the Automotive Sector*, Request for Consultations by the European Communities (WT/DS146/1, 1998), and Request for Consultations by the United States (WT/DS175/1, 1999).

[112] *India—Measures Affecting the Automotive Sector*, *supra* note 110, ¶ 7.204.

[113] *Id.* ¶ 7.176.

[114] *Id.* ¶ 7.193.

[115] The Panel referred to the *Canada—FIRA* panel, which had concluded that private contractual obligations entered into by investors (*i.e.*, undertakings signed by car manufactures with the Canadian authorities) should not adversely affect the rights of GATT contracting parties under Article III:4 of the GATT. Cited in *India—Measures Affecting the Automotive Sector*, *supra* note 110, at footnote 396.

[116] *India—Measures Affecting the Automotive Sector*, *supra* note 110, ¶ 7.192.

[117] *Id.* ¶ 7.197.

[118] *Id.* ¶ 7.204.

requirement was inconsistent with Article XI:1 of GATT 1994 and exercised judicial economy.[119]

With respect to the trade balancing requirement, the Panel ruled that it was contrary to Article XI:1 of GATT 1994. It first determined that the trade balancing requirements, as contained in PN 60 and the MOUs, constituted a "measure" within the meaning of Article XI:1.[120] The Panel then examined whether the trade balancing requirement was a "restriction on importation". It noted that, although the trade balancing condition did not set an absolute numerical limitation on imports, it in fact amounted to an import restriction, because the number of car kits and components a manufacturer could import would be determined by the quantity of exports it could commit to make. The Panel concluded that the limits placed on the amount of imports, which resulted from the link with export commitments, acted as a restriction on importation contrary to Article XI:1 of GATT 1994.[121]

In response to India's invocation of the balance-of-payments exception contained in Article XVIII:B of the GATT 1994, the Panel found that India had failed to make a *prima facie* case that its measures could be justified under this provision.[122]

The Panel then examined the claim that the trade balancing requirement was inconsistent with Article III:4 of the GATT 1994, because it required car manufacturers that purchased restricted kits and components on the Indian market to count the value of these purchases against their trade balancing obligations. The Panel found that, by requiring that the purchaser of an imported kit or component take on an additional obligation to export cars or components of equal value, the trade balancing requirement acted as a disincentive to the purchase of imported products, and thus made them more difficult to dispose of on the internal market. Therefore, this element of the trade balancing obligation accorded less favorable treatment to imported products than to like domestic products. The Panel thus concluded that the trade balancing requirement violated Article III:4 of the GATT 1994.[123]

After finding that the indigenization requirement was inconsistent with Article III:4 of the GATT 1994 and that the trade balancing requirements were inconsistent with both Articles III:4 and XI:1 of the GATT 1994, by virtue of the principle of judicial economy, the Panel determined that it was unnecessary to make separate findings under the relevant provisions of the TRIMs Agreement.[124]

Finally, the Panel dismissed India's arguments that PN 60 could not be inconsistent with the GATT and the TRIMs Agreement because the import restrictions that were to be administered under PN60 had been removed by April 1, 2001. The Panel found that the outstanding obligations contained in the MOUs with respect to both the indigenization and trade balancing requirements continued to be binding and were not altered by the elimination of import restrictions. They also remained inconsistent with GATT Articles III:4 and XI:1.[125]

India appealed the Panel report, but subsequently withdrew its appeal. Consequently, the Appellate Body issued a short report outlining the procedural history of the case, but

[119] *Id.* ¶ 7.208.
[120] *Id.* ¶ 7.253.
[121] *Id.* ¶ 7.278.
[122] *Id.* ¶ 7.292.
[123] *Id.* ¶ 7.309. *See also* ¶¶ 7.301–7.308.
[124] *Id.* ¶ 7.324.
[125] *Id.* ¶¶ 8.47 and 8.61.

did not address the substantive legal issues raised by India in its appeal.[126] The Appellate Body and Panel reports were adopted on April 5, 2002.

B. Relationship Between the TRIMs Agreement and Relevant Articles of GATT 1994

Confronted with concurrent claims, the Panels in the four disputes discussed above have taken different approaches to the question of whether their findings should be made both under the TRIMs Agreement and the GATT 1994. In considering this issue, they have made a number of interesting observations concerning the relationship between these two agreements which deserve closer attention.

In ***EC—Bananas III***, after finding that the allocation of import licenses to a particular category of operators was inconsistent with Article III:4 of GATT 1994, the Panel considered whether it should also make a ruling under Article 2 of the TRIMs Agreement. For that purpose, it examined the relationship between the TRIMs Agreement and the GATT provision, and noting that "the TRIMs Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related measures are concerned", it concluded that "... the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related measures".[127]

In light of the above, the Panel in *EC—Banana III* saw no need to make a finding with respect to the claims under the TRIMs Agreement, and it explained its decision as follows:

> ... we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to the eligibility criteria for the different categories of operators and the allocation of certain percentages of import licenses based on operator categories. On the one hand, a finding that the measure in question would not be considered a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with the obligations under the TRIMs Agreement.[128]

The Panel in ***Indonesia—Autos*** took a different approach on this issue, by emphasizing the legal independence and the "specificity" of the TRIMs Agreement. It began by recognizing that the TRIMs Agreement introduced special transition provisions and notification requirements, which supported the conclusion that "... the TRIMs Agreement has an autonomous legal existence, independent from that of Article III."[129] Therefore, in contrast with the previous panel, it determined that claims under Article III:4 and the TRIMs Agreement should be dealt with separately.[130] As to the sequence of the examination of claims, the Panel in *Indonesia—Autos* settled the issue by invoking the notion of *lex specialis* (*i.e.*, the prevalence of the specific rule over the general rule):

[126] Report of the Appellate Body, *India– Measures Affecting the Automotive Sector*, WT/DS146/AB/R and WT/DS175/AB/R (2002).
[127] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, *supra* note 82, ¶ 7.185.
[128] *Id.* ¶ 7.186.
[129] *Indonesia—Certain Measures Affecting the Automobile Industry*, *supra* note 88, at ¶ 14.62.
[130] *Id*.

> As to which claims, those under Article III:4 of GATT or Article 2 of the TRIMs Agreement, to examine first, we consider that we should first examine the claims under the TRIMs Agreement since the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned.[131]

As noted earlier, having found that certain measures applied by Indonesia were inconsistent with Article 2.1 of this Agreement, the Panel determined that it was unnecessary for it to examine the consistency of the measures with GATT Article III:4 on the following grounds:

> Under the principle of judicial economy,[132] a panel only has to address the claims that must be addressed to resolve a dispute or which may help a losing party in bringing its measures into conformity with the WTO Agreement. The local content requirement aspects of the measures at issue have been addressed pursuant to the claims of the complainants under the TRIMs Agreement. We consider therefore that action to remedy the inconsistencies that we have found with Indonesia's obligations under the TRIMs Agreement would necessarily remedy any inconsistency that we might find with the provisions of Article III:4 of GATT. We recall our conclusion that non-applicability of Article III would not affect as such the application of the TRIMs Agreement. We consider therefore that we do not have to address the claims under Article III:4, nor any claim of conflict between Article III:4 of GATT and the provisions of the SCM Agreement.[133]

The Panel in ***Canada—Auto Pact***, following a similar approach to the Panel in *EC—Bananas III*, decided to examine the claims under Article III:4 before considering those under the TRIMs Agreement. Its reasoning was as follows:

> While we are aware of the statement made by the Appellate Body in *EC—Bananas III*, and referred to by the panel in *Indonesia—Autos*, that a claim should be examined first under the agreement which is the most specific with respect to that claim, we are not persuaded that the TRIMs Agreement can be properly characterized as being more specific than Article III:4 in respect of the claims raised by the complainants in the present case. Thus, we note that there is disagreement between the parties not only on whether the measures at issue can be considered to be "trade-related investment measures" but also on whether the Canadian value added requirements and ratio requirements are explicitly covered by the Illustrative List annexed to the TRIMs Agreement. It would thus appear that, assuming that the measures at issue are "trade-related investment measures", their consistency with Article III:4 of the GATT may not be able to be determined simply on the basis of the text of the Illustrative List but may require an analysis based on the wording of Article III:4. Consequently, we doubt that examining the claims first under the TRIMs Agreement will enable us to resolve the dispute before us in a more efficient manner than examining these claims under Article III:4.[134]

Having found that Canada's CVA requirements were inconsistent with Article III:4 of the GATT, the Panel decided that it was not necessary to make a specific ruling under the TRIMs Agreement:

> We believe that the Panel's reasoning in *EC—Bananas III* as to why it did not make a finding under the TRIMs Agreement after it had found that certain aspects of the EC's licensing procedures were inconsistent with Article III:4 of the GATT also applies to the present case. [footnote omitted] Thus, on the one hand, a finding in the present case that the CVA requirements are not trade-related investment measures for the purposes of the

[131] *Id.* ¶ 14.63.
[132] As defined by the Appellate Body in *Shirts and Blouses*, op. cit., pp. 17–20 [footnote in original].
[133] *Indonesia—Certain Measures Affecting the Automobile Industry*, *supra* note 88, at ¶ 14.93.
[134] *Canada—Certain Measures Affecting the Automotive Industry*, *supra* note 99, ¶ 10.63.

> TRIMs Agreement would not affect our finding in respect of the inconsistency of these requirements with Article III:4 of the GATT since the scope of that provision is not limited to trade-related investment measures. On the other hand, steps taken by Canada to bring these measures into conformity with Article III:4 would also eliminate the alleged inconsistency with obligations under the TRIMs Agreement.[135]

The Panel in ***India—Autos*** was also confronted with simultaneous claims under both GATT 1994 and the TRIMs Agreement. It considered first whether a particular order in the examination of claims was desirable. As in *EC—Bananas III* and *Canada—Auto Pact*, the Panel did not endorse the argument that the TRIMs Agreement was more specific than the relevant GATT provisions. Although it concurred that the TRIMs Agreement had an "autonomous legal existence", it noted that the substance of its obligations referred directly to Articles III and XI of the GATT. The fact that the TRIMs Agreement's provisions on notification introduced specific rights and obligations was not deemed by the Panel to be a sufficient basis for it to conclude that "... the TRIMs Agreement could inherently be characterized as more specific than Articles III:4 and XI:1 of GATT 1994."[136]

Further, the Panel in *India—Autos* considered that where a particular measure might benefit from the transition period granted to notified TRIMs, then examining a claim first under the TRIMs Agreement might be relevant. However, it noted that in the present case India had not claimed that it had notified the measures in dispute. Therefore, the Panel saw no reason for examining the claims in any particular order.[137] Eventually, the Panel decided to examine first the claims under GATT 1994.[138] It explained its decision as follows:

> It seems that an examination of the GATT provisions in this case would be likely to make it unnecessary to address the TRIMs claims, but not vice-versa. If a violation of the GATT claim was found, it would be justifiable to refrain from examining the TRIMs claims under the principle of judicial economy. Even if no violation was found under the GATT claims, that also seems an efficient starting-point since it would be difficult to imagine that if no violation has been found of Articles III or XI, a violation could be found of Article 2 of the TRIMs Agreement, which refers to the same provisions. Conversely, if no violation of the TRIMs Agreement were found, this would not necessarily preclude the existence of a violation of GATT Articles III:4 or XI:1 because the scope of the GATT provisions is arguably broader if India's argument was accepted that there is a need to prove that a measure is an investment measure and its assertion that this is not the case with the measures before this panel.[139]

After finding that India's indigenization requirements were inconsistent with Article III:4 of the GATT 1994, and that the trade balancing requirements were contrary to Articles III:4 and XI:1 of GATT 1994, the Panel in *India—Autos* invoked the principle of judicial economy and decided not to consider the claims under the TRIMs Agreement separately.[140]

******

[135] *Id.* ¶ 10.91.
[136] *Panel Report, India—Measures Affecting the Automotive Sector*, *supra* note 110, ¶ 7.157.
[137] *Id.* ¶ 7.158.
[138] *Id.*¶ 7.162.
[139] *Id.* ¶ 7.161.
[140] *Id.* ¶ 7.324.

In three out of the four disputes examined above, the panels, having found a violation of the relevant GATT provisions, declined to make a ruling under the TRIMs Agreement. Several aspects of the panels' reasoning stand out.

First, while recognizing the independent legal status of the TRIMs Agreement and its special transition and notification provisions, the panels were not persuaded that this Agreement could be characterized as more specific than the relevant GATT provisions, consequently they decided to examine first the claims under the GATT 1994.

Second, some of the panels' remarks suggest that they found the coverage of the TRIMs Agreement to be more limited than that of Article III:4 (and Article XI:1) of GATT 1994, because it applies only to investment measures related to trade. For example, after finding a violation of Article III:4 of the GATT 1994, the panels in *EC-Bananas III* and in *Canada-Auto Pact* explained their decision not to examine the claims under the TRIMs Agreement by noting that a finding that the measures at issue were not "trade-related investment measures" would not affect a previous finding on their inconsistency with Article III:4 of GATT 1994, since the scope of this provision was not limited to TRIMs. Moreover, both panels considered that steps taken to eliminate the inconsistency with GATT Article III:4 would also eliminate the alleged inconsistency with the TRIMs Agreement. The Panel in *India—Autos* elaborated further on this point. It noted that if no violation was found under GATT Articles III and XI, it was difficult to imagine that a violation could be found under Article 2 of the TRIMs Agreement, whereas the opposite was not true (*i.e.*, a finding that there was no violation of the TRIMs Agreement did not preclude a violation of GATT Articles III:4 and XI:1), because the scope of the GATT provisions was arguably broader, if India's argument that it was necessary to prove that a measure was indeed an investment measure were to be accepted.

Third, by refraining from examining the claims under the TRIMs Agreement, the three panels did not address the question whether the measures at issue were trade-related investment measures and, if so, whether they were covered by the Illustrative List in the TRIMs Agreement. By contrast, The Panel in *Indonesia—Autos* did consider these issues, including the question as to whether a separate analysis of the nature of a measure as a trade-related investment measure is required under the TRIMs Agreement.

C. Substantive Issues Addressed by the Panel in Indonesia—Autos

Indonesia—Autos is the only case in which a Panel made findings under the TRIMs Agreement. The Panel report addressed some substantive issues concerning the interpretation of the TRIMs Agreement which are worth pointing out.

1. Relationship Between the TRIMs Agreement and the SCM Agreement

As noted above, claims were raised regarding Indonesia's car programs under Article III of GATT 1994, the TRIMs Agreement and the SCM Agreement. In considering an argument advanced by Indonesia that the measures at issue were covered only by the SCM Agreement, the Panel analyzed, *inter alia*, whether a measure could be covered simultaneously by the TRIMs Agreement and the SCM Agreement and whether there was a conflict between them. In this context, the Panel made some useful clarifications concerning the types of obligations and the subject matters covered under each of these two agreements:

> With respect to the nature of obligations, we consider that, with regard to local content requirements, the SCM Agreement and the TRIMs Agreement are concerned with different types of obligations and cover different subject matters. In the case of the SCM Agreement,

> what is prohibited is the grant of a subsidy contingent on use of domestic goods, not the requirement to use domestic goods as such. In the case of the TRIMs Agreement, what is prohibited are TRIMs in the form of local content requirements, not the grant of an advantage, such as a subsidy.
>
> A finding of inconsistency with Article 3.1(b) of the SCM Agreement can be remedied by removal of the subsidy, even if the local content requirement remains applicable. By contrast, a finding of inconsistency with the TRIMs Agreement can be remedied by a removal of the TRIM that is a local content requirement even if the subsidy continues to be granted. . . . Clearly the two agreements prohibit different measures. . . .[141]

The Panel thus found that there is no conflict between the SCM and TRIMs Agreement ". . . as they cover different subject matters and do not impose mutually exclusive obligations".[142] Therefore, the Panel concluded that since Indonesia's car programs involved TRIMs as well as subsidy elements, both the TRIMs Agreement and the SCM Agreement were applicable to the dispute.[143]

The Panel also made an interesting remark concerning the term "advantage" in paragraph 1 of the Illustrative List of the TRIMs Agreement. It understood this term to be broader in scope than the notion of subsidy under the SCM Agreement. First, it explained that a local content requirement applied as a condition for the receipt of a subsidy would remain inconsistent with the TRIMs Agreement even if the subsidy were replaced by some other type of incentive. It then stated its view on the wider scope of the term "advantage" as follows: "We note also that under the TRIMs Agreement, the advantage made conditional on meeting a local content requirement may include a wide variety of incentives and advantages, other than subsidies".[144]

2. Prior Determination that a Measure is a Trade-Related Investment Measure

The Panel in *Indonesia—Autos* noted that the disputing parties had divergent views on whether the TRIMs Agreement requires a prior determination that a measure is a "trade-related investment measure" or whether it is sufficient to find that the measure is covered by the Illustrative List. The Panel adopted a pragmatic approach on this issue: it reasoned that if it were to consider that the measures at issue in the present case were in any event trade-related investment measures, it would not be necessary for it to rule on the general question of whether the TRIMs Agreement requires a separate determination that a measure is a trade-related investment measure. The Panel thus proceeded to examine whether the Indonesian measures were investment measures, then whether they were trade-related, and finally whether they were covered by the Illustrative List of TRIMs in the Agreement .[145]

3. Characterization of a Measure as an "Investment Measure"

The Panel began by examining whether the Indonesian measures were "investment measures". In this context, it made some interesting comments on the neutrality of the TRIMs Agreement as regards the origin of investments. The Panel rejected an argument put forward by India, as a third party, that the TRIMs Agreement is basically aimed at

[141] *Indonesia—Certain Measures Affecting the Automobile Industry*, *supra* note 88, ¶¶ 14.50–14.51.
[142] *Id.* ¶ 14.52.
[143] *Id.* ¶ 14.55.
[144] *Id.* ¶ 14.51. As noted earlier, the Panel eventually concluded that the tax and custom duty benefits contingent on local content under Indonesia's car programs were "advantages" within the meaning of paragraph 1 of the Illustrative List. *Id.* ¶ 14.91.
[145] *Id.* ¶¶ 14.71–14.72.

foreign investment and that, therefore, it does not cover measures relating to internal taxes or subsidies. The Panel made it clear that the TRIMs Agreement is not concerned only with foreign investment, and that the national origin of the investment is irrelevant for the purposes of the Agreement:

> We note that the use of the broad term "investment measures" indicates that the TRIMs Agreement is not limited to measures taken specifically in regard to *foreign* investment. . . . [N]othing in the TRIMs Agreement suggests that the nationality of the ownership of enterprises subject to particular measure is an element in deciding whether that measure is covered by the Agreement.[146]

The Panel in *Indonesia—Autos* also noted that the TRIMs Agreement is not concerned with internal tax advantages and subsidies *per se*, but rather with local content requirements, compliance with which may be encouraged through the provision of such advantages. Moreover, the Panel did not see why an internal measure would not govern the treatment of foreign investment.[147]

The Panel then examined the legislation pursuant to which the Indonesian measures were applied to determine whether they were "investment measures". It noted that the relevant legislation had investment objectives and investment features, and concluded that since the aim of the measures was to promote the development of a local manufacturing capability for finished motor vehicles and parts and components, they would necessarily have an impact on investment in these sectors and could thus be reasonably construed as "investment measures" within the meaning of the TRIMs Agreement.[148] This conclusion was not affected by the fact that the Indonesian Government did not regard the measures as investment measures or because they were not embodied in investment acts. In this regard, the Panel stated:

> . . . there is nothing in the TRIMs Agreement to suggest that a measure is not an investment measure simply on the grounds that a Member does not characterize the measures as such, or on the grounds that the measure is not explicitly adopted as an investment regulation.[149]

This seems a rather broad interpretation, since it would suffice for a measure, taken, for example, in the context of an industrial promotion program, to have a potential impact on investment in a given sector in order to be construed as an investment measure.

4. The Trade-Related Nature of Investment Measures

Having found that the Indonesian measures were "investment measures", the Panel considered whether they were "trade-related". It first made the general statement that local content requirements are necessarily trade-related, because, by definition, they favor the use of domestic products over imported products, thus affecting trade.[150]

The Panel, nevertheless, went on to examine whether the measures applied by Indonesia were covered by Item (1) of the Illustrative List of the TRIMs Agreement. It found that, under the Indonesian car programs, compliance with provisions for the purchase and use of products of domestic origin was necessary to obtain the tax and customs duty benefits.[151] The Panel also found that these benefits constituted "advantages" within the

[146] *Id.* ¶ 14.73. Italics in original.
[147] *Id.*
[148] *Id.* ¶ 14.80.
[149] *Id.* ¶ 14.81.
[150] *Id.* ¶ 14.82.
[151] *Id.* ¶ 14.88.

meaning of the chapeau of paragraph 1 of the Illustrative List. Thereupon, the Panel concluded that the Indonesian measures were covered by the List and constituted a violation of TRIMs Article 2.1.[152]

Two aspects of the Panel's reasoning are worth mentioning. First, by rejecting Indonesia's argument that the custom duty benefits were not an *internal* measure within the meaning of Article III.4 of GATT 1994, the Panel clarified that what is relevant is not the nature of the benefit, but rather the internal regulations that provide for an incentive to use domestic products:

> . . . We do not consider that the matter before us in connection with Indonesia's obligations under the TRIMs Agreement is the custom duty relief as such but rather the internal regulations, *i.e.* the provisions on purchase and use of domestic products, compliance with which is necessary to obtain an advantage, which advantage here is the customs duty relief.[153]

Second, the Panel confirmed the emphasis placed by the TRIMs Agreement on the "enforceability" of measures, whether this is achieved through mandatory regulations or through incentives. Indeed, in dismissing Indonesia's argument that the measures were not classical local content requirements because they were not mandatory, the Panel stated: "The wording of the Illustrative List makes it clear that a simple advantage conditional on the use of domestic goods is considered to be a violation of Article 2 of the TRIMs Agreement even if the local content requirement is not binding as such. . . ."[154]

VIII. The TRIMs Agreement: Current Debate and Prospects

Discussions on the operation of the TRIMs Agreement have taken place in several parallel tracks in the WTO. One is the review mandated under Article 9 of the TRIMs Agreement, which is conducted by the Council for Trade in Goods. Another is the work undertaken by the TRIMs Committee on certain implementation issues related to the TRIMs Agreement. The latter is part of a broader "implementation agenda" under the WTO Work Program launched at the Doha Ministerial Conference (November 2001), which seeks to address a number of outstanding implementation issues and concerns raised by Members in relation to the Uruguay Round Agreements. The TRIMs Committee has also considered certain proposals pertaining to the TRIMs Agreement in the context of the review of the special and differential treatment (S&D) provisions of the WTO Agreements pursuant to paragraph 44 of the Doha Ministerial Declaration. In addition, certain aspects related to performance requirements have also been raised in discussions in the Working Group on the Relationship between Trade and Investment.

A. The Article 9 Review

As noted above, Article 9 requires the Council for Trade in Goods to review the operation of the TRIMs Agreement within five years of the entry into force of the WTO Agreement (*i.e.* no later than the end of 1999). The review offers the possibility of proposing amendments to the provisions of the Agreement, as appropriate, and to consider whether it should be complemented with provisions on investment policy and competition policy.

The Council formally initiated the Article 9 review in October 1999, but no substantive progress had been made by the Summer of 2004. In early 2002, Members discussed a

[152] *Id.* ¶ 14.89 and 14.91.
[153] *Id.* ¶ 14.89.
[154] *Id.* ¶ 14.90.

study jointly prepared by the WTO and UNCTAD Secretariats on the use of TRIMs and other performance requirements and their effects on international trade, investment, economic growth and development.[155]

Members' views as to the nature and scope of the Article 9 review differ fundamentally. Some developing countries (India, Brazil, Pakistan and others) see the review as an opportunity to amend the Agreement so as to allow for TRIMs, particularly local content requirements, to be used flexibly when applied in pursuance of development policies. On the other hand, the main concern of developed countries (United States, European Communities, Japan, Canada) in connection with the review is to avoid any erosion of current TRIMs disciplines, especially to the extent they are based on key GATT provisions.

In October 2002, Brazil and India submitted a joint proposal to the Council for Trade in Goods to amend Article 4 of the TRIMs Agreement.[156] The proposal seeks to increase the range of situations in which developing countries are allowed to deviate temporarily from the prohibition to apply TRIMs. Accordingly, it is proposed that developing countries be free to use TRIMs for the achievement of developmental objectives such as the promotion of domestic manufacturing capabilities; the transfer of technology; domestic competition and correction of restrictive business practices; the development of disadvantaged regions, sustainable development through the promotion of environmental-friendly methods and products, the increase of export capacity and the development of small- and medium-sized enterprises so as to contribute to job creation.[157] The proposal was discussed in several meetings of the Council for Trade in Goods, where it met with strong opposition from the developed countries, which have objected to any attempt to lower current TRIMs disciplines (see Section B below).

A recent proposal by Brazil, India and other developing countries for an additional study on the trade, investment and development effects of the TRIMs notified under the Agreement and of their removal has also met with resistance from developed countries. The United States, the European Communities and Canada argue that the Article 9 review has already been exhausted without reaching consensus on the necessity to amend the TRIMs Agreement and see no need for further studies. While they have expressed willingness to consider on a case-by-case basis the problems that individual Members might encounter in implementing the Agreement, they do not consider that the review under Article 9 should result in fundamental changes to the TRIMs provisions.

Given the lack of a deadline for its completion, the marked differences in Members' positions and the fact that issues relating to the TRIMs Agreement are also being discussed in other WTO contexts, it seems unlikely that the Article 9 review will be concluded in the near future. However, the review under Article 9 will continue to provide an avenue for those Members seeking to revisit the disciplines of the TRIMs Agreement.

B. The Outstanding Implementation Issues

Prior to the Third WTO Ministerial Conference held in Seattle in 1999, a group of developing countries expressed dissatisfaction with the implementation of the Uruguay Round Agreements, including the TRIMs Agreement. They submitted a large number

[155] WTO/UNCTAD, *supra* note 5.

[156] *See* Communication from Brazil and India (G/C/W/428, 2002), also submitted to the TRIMs Committee in the context of the discussions on outstanding implementation issues (G/TRIMS/W/25, 2002).

[157] *Id.* ¶ 12.

of proposals to correct what they saw as imbalances and shortcomings in the current disciplines.[158] Many of the proposals entailed important changes to the agreements in the form of less onerous commitments for developing countries. The proposed changes were not endorsed by developed countries—nor by a number of developing nations—as they were perceived as fundamentally altering the existing balance of rights and obligations. No agreement was reached on the outstanding implementation issues at the Seattle Ministerial Conference, as the meeting collapsed failing to produce any results, and despite intensive discussions conducted under the supervision of the General Council little progress was made in this area during the period 2000–2001.

At the Doha Ministerial Conference (Qatar, November 2001), it was agreed that negotiations on the outstanding implementation issues shall be an integral part of the WTO Work Program launched at Doha. Ministers also agreed that those issues for which they had not provided a specific negotiating mandate, should be addressed as a matter of priority by the relevant WTO bodies, which were required to report to the Trade Negotiations Committee ("TNC") by the end of 2002 for appropriate action.[159]

Accordingly, the TRIMs Committee was assigned the responsibility for conducting work on the outstanding implementation issues related to the TRIMs Agreement (contained in "Tirets" 37–40 of a document compiling all implementation proposals), and for reporting regularly to the Council for Trade in Goods on this matter.[160] With the exception of Tiret 37, which calls for a new opportunity for developing countries to notify TRIMs and to be granted a new transition period, the main thrust of the proposals is to amend the Agreement so as to allow developing countries flexibility to use TRIMs otherwise prohibited. This is particularly the case of Tiret 40, under which the proposal by Brazil and India referred to above was submitted, and which faced strong opposition from the developed countries.

Discussions in the TRIMs Committee on the outstanding implementation issues have been quite controversial, as reflected in the report of the Committee to the Council for Trade in Goods (November 2002).[161]

Essentially, a number of developing countries argue that, by establishing uniform obligations, the TRIMs Agreement has failed to take into account the structural inequalities and disparities in the levels of development among Members. They contend that, aside from the transitional provisions, the Agreement does not contain any clauses for special and differential treatment ("S&D") that would allow developing countries to address their specific economic, financial and social concerns. Moreover, they complain that the

[158] As regards the TRIMs Agreement, *see*, for example, the submissions by India (WT/GC/W/203, 1999), Brazil (WT/GC/W/27, 1999) and Colombia (WT/GC/W/311, 1999).

[159] Doha Ministerial Declaration, paragraph 12(b), Adopted on November 14, 2001, WT/MIN(01)/DEC/1, November 20, 2001.

[160] Tirets 37 to 40 of the document which compiles the outstanding implementation issues read as follows:

— Tiret 37: Developing countries shall have another opportunity to notify existing TRIMs measures which they would be then allowed to maintain till the end of the new transition period.
— Tiret 38: The provisions of Article 5.3 must be suitably amended and made mandatory.
— Tiret 39: Developing countries shall be exempted from the disciplines on the application of domestic content requirement by providing for an enabling provision in Articles 2 and 4 to this effect.
— Tiret 40: Specific provisions shall be included in the Agreement to provide developing countries the necessary flexibility to implement development policies (intended to address, among others, social, regional, economic, and technological concerns) that may help reduce the disparities they face *vis-à-vis* developed countries.

[161] G/L/588. *See also* the Minutes of the TRIMs Committee's meetings of June 2002 (G/TRIMS/M/13), August 2002 (G/TRIMS/M/14) and October 2002 (G/TRIMS/M/15 and G/TRIMS/M/15Add.1).

transitional periods provided for in the Agreement were not long enough and did not constitute the appropriate solution for overcoming the structural problems developing countries face in implementing the Agreement. In short, the TRIMs Agreement has failed to incorporate the development dimension in an effective manner.

Developing countries also argue that the developed nations were free to use TRIMs over a long period of time to achieve industrialization, and that this flexibility is currently denied to lower-income countries. In their view, TRIMs have proved to be a useful policy tool for countries at an intermediate stage of development to address developmental objectives, to pursue industrialization and to offset the trade-distorting effects of certain forms of corporate behavior. As for the trade-effects of TRIMs, developing countries insist that there is no conclusive empirical evidence to support the theoretical assumption on which the Uruguay Round decision to prohibit the use of TRIMs was based, *i.e.*, that such measures, *a priori*, have trade-restricting and distorting effects. In light of the above, they see a need to revisit the disciplines of the Agreement so as to provide flexibility for developing countries to use TRIMs in order to achieve specific technological, regional, economic and environmental development objectives. Such flexibility, as they see it, should not be limited to transitional arrangements, but should be incorporated in the substantive disciplines of the Agreement.

It should be noted that the position described above is not endorsed by all developing countries. Indeed, several developing-country Members, particularly those which have undertaken policy reforms to comply with their TRIMs obligations are not likely to favor a fundamental change in the current balance of rights and obligations in the TRIMs Agreement.

For their part, developed countries argue that the TRIMs Agreement already provides enough flexibility to accommodate developing countries' needs. In their view, the TRIMs Agreement is in itself a form of S&D treatment, since it allowed developing countries transition periods to eliminate measures that were inconsistent with GATT Articles III and XI. The current proposals would undermine these basic principles. They also point to Article 4, which allows developing countries to use TRIMs in certain circumstances, and to the possibility of extending the transition periods provided for under Article 5.3, which has been successfully used by several developing-country Members. In addition, they argue that further flexibility can be sought through the WTO Article IX provision on waivers and through Article XVIII of the GATT 1994, under which the needs of developing countries can be addressed on a case-by-case basis. Their concern with the present proposals is that they would alter the existing balance of rights and obligations under the TRIMs Agreement, including against those developing countries which have already complied with their commitments.

In the view of developed countries, TRIMs have been proved to have distorting effects on trade and do not constitute an effective development tool. They point to recent empirical evidence showing that these measures lead to resource misallocation and welfare reduction, and can discourage investments in the countries imposing them. They consider the proposals under discussion are at odds with recent trends in investment liberalization by several developing countries, where TRIMs and other investment restrictions have been removed in order to attract FDI. They also argue that there are other more efficient instruments to achieve the objectives that are sought through the use of TRIMs, such as through the application of competition policy in the case of abusive corporate behavior.

The fundamental differences in Members' positions as regards the TRIMs implementation issues are not likely to be narrowed in the near future. On the one hand, there seems

to be no prospect of developed Members accepting a relaxation of the TRIMs disciplines. On the other hand, Brazil and India have underlined the "extreme importance" their respective governments attach to their proposal. At the time of writing, no decision on the substance of the TRIMs implementation issues had been taken by the Trade Negotiations Committee.

C. Work on S&D Proposals

In response to concerns expressed by a number of developing and least-developed countries (LDCs) regarding the operation of the special and differential treatment provisions in WTO Agreements, the Doha Ministerial Conference instructed the Committee on Trade and Development ("CTD") in Special Session to review all S&D treatment provisions with a view to strengthening them and making them more precise, effective and operational.[162] In carrying out this task, the CTD in Special Session has considered a number of Agreement-specific proposals submitted by Members, mostly by the African Group and the LDCs.

In May 2003, two proposals concerning the TRIMs Agreement were referred by the General Council to the TRIMs Committee for consideration.[163] Basically, one of the proposal seeks to make it easier for developing and least-developed country Members to resort to the temporary exemption in TRIMs Article 4, which allows these countries to use otherwise prohibited TRIMs for balance-of-payments purposes by invoking Article XVIII of the GATT 1994. The other proposal calls for further extensions or new transition periods to eliminate TRIMs for least-developed country Members and low-income developing countries.

The S&D proposals were discussed in detail in the TRIMs Committee during the first half of 2003, but given the divergent positions taken by Members[164] the Committee was unable to adopt them or to recommend alternative compromise solutions.[165] Currently, the CTD in Special Session is considering possible ways on how to take forward the S&D review, including the outstanding Agreement-specific proposals.

D. The Working Group on the Relationship Between Trade and Investment

At the First WTO Ministerial Conference held in Singapore in 1996, Members agreed to begin analytical work on the relationship between trade and investment. A Working Group was established to examine this subject "having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement."[166] The Working Group on the Relationship between Trade and Investment ("WGTI") initiated its discussions in 1997. It

[162] *See* Paragraph 44 of the Doha Ministerial Declaration, *supra* note 159, and paragraph 12 of the Decision on Implementation-Related Issues and Concerns, Adopted on November 14, 2001, WT/MIN(01)/17, November 20, 2001.

[163] *See* proposals by the African Group, TN/CTD/W/3/Rev.2.

[164] While some developed country Members might have been prepared to agree to certain flexibility for African countries and LDCs to use TRIMs, they did not seem prepared to extend such flexibility to all other developing countries.

[165] *See* Report by the Chairman of the Committee on Trade-Related Investment Measures to the General Council, G/L/638, July 21, 2003.

[166] Singapore Ministerial Declaration, paragraph 20, WT/MIN(96)/DEC, December 18, 1996. A Working Group on the Interaction between Trade and Competition Policy was also established under this mandate.

examined the links between trade and investment from several points of view, including the contribution of foreign investment to economic development and the potential advantages and disadvantages for WTO Members of bilateral, regional and multilateral rules on investment.

At Doha, WTO Ministers recognized "the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment".[167] They agreed that negotiations in the WTO on this subject would take place after the Fifth Ministerial Conference "on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations".[168] They instructed the WGTI, in the period up to the Fifth Ministerial Conference (Cancun, September 2003), to focus on the clarification of a number of core elements pertaining to a possible multilateral framework of WTO disciplines on investment.[169]

Among the elements that the Working Group was instructed to clarify in the run-up to Cancun were the "development provisions" of an eventual multilateral framework on investment. Ministers also determined that any such framework should take due account of the development policies and objectives of host governments and of the "special development, trade and financial needs of developing countries and least-developed countries".[170]

Accordingly, in discussions in the Working Group on this topic, several Members stressed the need for developing countries to preserve their ability to apply investment policies in accordance with their development objectives. For some, this means allowing these countries to retain flexibility in regulating the entry and operations of foreign investment and in applying certain policies aimed at enhancing the contribution of FDI to their national development. Because TRIMs and other performance requirements are perceived by some developing nations as useful development tools, demands for flexibility in this area, including the possibility of revisiting current disciplines, were also raised in the context of the Working Group, although the topic of performance requirements is not among those listed in paragraph 22 of the Doha Ministerial Declaration.[171]

Launching negotiations on a multilateral framework on investment, however, has proved quite controversial. Since 1999, the proponents of negotiations on investment, notably the European Communities, Japan, Canada and Korea, met with opposition from a number of developing countries, led by India and other Asian countries, who strongly resisted the idea of an investment agreement in the WTO for reasons that ranged from fears that it would limit their domestic "policy space" to concerns that the remit of the WTO was already overextended. The United States, while supporting the launch of negotiations, took a low profile in the discussions.[172] Most Latin American countries were, in principle, prepared to join the talks, provided that enough progress was made in

[167] Doha Ministerial Declaration, paragraph 20, *supra* note 159.

[168] *Id*.

[169] Ministers identified seven core elements, namely: scope and definition; transparency, non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payment safeguards; consultation and the settlement of disputes between Members. *Id.* ¶ 22.

[170] Doha Ministerial Declaration, *supra* note 159, ¶ 22.

[171] *See* Communication from India on Development Provisions, WT/WGTI/148, ¶¶ 7 and 9 (2002).

[172] The United States has been skeptical about the possibility of negotiating a high-standard investment agreement in the WTO, preferring to pursue its investment protection and liberalization objectives through bilateral and regional agreements.

other areas of the Doha Round, namely in agriculture. For their part, the least-developed countries (LDCs), and African countries in particular, raised concerns about their lack of institutional capacity to adequately participate in investment negotiations in the WTO.

At the Fifth Ministerial Conference, held in Cancun, Mexico on 10–14 September 2003, Members' positions on the investment issue became further polarized, partly as a result of the lack of progress in other areas of the Doha Round of major interest to the developing nations (i.e. the elimination of farm subsidies in general and in the cotton sector in particular). Thus, a large group of developing countries, mainly LDCs and African countries, firmly rejected the launch of negotiations on investment and other so-called "Singapore issues".[173] Eventually, given the deep divide among WTO Members regarding these issues as well as other areas of the negotiations, notably the modalities for agricultural trade liberalization, the Cancun Ministerial Conference concluded without consensus on any of the areas under discussion.

E. The TRIMs Agreement: What Prospects?

The review of the TRIMs Agreement could, in principle, lead to two alternative outcomes: keeping the Agreement unchanged or introducing amendments to its provisions. Given the stalemate in the discussions, it seems unlikely that a consensus could emerge on the desirability of amending the Agreement, at least in the near future. While maintaining the *status quo* would suit those Members that have firmly opposed the relaxation of TRIMs disciplines and probably also those countries that have adjusted their policies to comply with the Agreement, such a result would not satisfy the demands of those Members seeking to introduce flexibility in the use of TRIMs.

Even if Members agreed to reopen the Agreement, the options for amendment appear rather limited. One way would be to modify its scope. However, reducing the coverage of the measures subject to the prohibition in Article 2 does not seem to be a viable option because attempts to change the scope of this provision would have legal implications for Article III and Article XI of the GATT 1994. On the other hand, while no proposal to expand the coverage of prohibited measures has been made, if a fundamental review of the TRIMs Agreement were to take place, calls by some Members for relaxing its current provisions might be countered by pressure from other Members to prohibit additional categories of performance requirements.[174]

The transitional provisions of the Agreement could also be revisited. For example, one of the implementation proposals called for allowing Members to submit new notifications

[173] The "Singapore issues" are: trade and investment; trade and competition policy; transparency in government procurement and trade facilitation. They are so named because the Singapore Ministerial Conference (1996) established the working groups responsible for studying these issues. On the last day of the Cancun Conference, a proposal emerged to launch negotiations on trade facilitation and transparency in government procurement, while discontinuing work on the other two Singapore issues. However, this proposal was not accepted by the group of LDCs and African countries (the "G–90") who opposed negotiations on all four Singapore issues, at which point the Chairman of the Conference decided to conclude the meeting.

[174] For example, during the preparatory process for the Seattle Ministerial Conference, the United States argued in favor of expanding the prohibition to use TRIMs to export performance, technology transfer and product mandating requirements. *See* Communication from the United States, WT/GC/W/115, November 19, 1998. European business groups have also called for the progressive elimination of export, joint-ventures and technology transfer requirements, UNICE, "Position on WTO Investment Negotiations", Brussels, May 6, 1999.

of existing TRIMs and for a new transition period.[175] In addition, specific criteria could be established for phasing-out the inconsistent measures in order to avoid the difficulties encountered at the expiry of the first transition period.[176] This outcome, however, is not likely to satisfy those Members that have questioned the adequacy of transition arrangements for addressing structural adjustment problems. On the other hand, it is doubtful whether developed countries would be in a position to accept such a general approach as they have repeatedly stressed their preference for addressing implementation problems on a case-by-case basis. In this context, it should be mentioned that from the eight developing-country Members that obtained an extension of the transition period up until end-2003, only one found it necessary to request for a further extension, beyond that date, in order to phase-out its remaining TRIMs.[177]

As proposed by some Members, another option for amending the TRIMs Agreement could be to provide for new exceptions under which developing countries would be entitled to use TRIMs in order to pursue certain developmental objectives. This option might respond to developing countries' demands for flexibility and policy space but, as noted before, it faces strong opposition from developed countries. Even if Members agreed to explore such an approach, in practice reaching agreement on what development policies or objectives might justify the use of TRIMs and under which circumstances could prove very difficult.[178] This would raise questions as to the effectiveness of specific measures in achieving the proposed objectives, an issue on which no consensus exists. In any event, the introduction of new flexibility would have to be reconciled with the need to maintain the relevance and integrity of TRIMs disciplines as well as the legal obligations contained in Articles III and XI of the GATT 1994. Moreover, whatever approach were to be adopted to make the TRIMs Agreement more flexible, due account would need to be taken of the effects of TRIMs on the trade and investment interests of third countries, and of the situation of those developing countries which have already taken steps to comply with their TRIMs obligations.

In principle, the review of the TRIMs Agreement could also entail complementing it with provisions on investment and competition policy as foreseen in Article 9. To date, however, the discussions have not focused on these aspects and, so long as they remain the subject matter of other WTO bodies, it does not seem likely that they will be addressed within the context of the review of the TRIMs Agreement.

[175] This corresponds to the proposal under tiret 37 of the outstanding implementation issues, though it should be noted that this proposal was originally submitted in the pre-Seattle process, that is before the original transition period had expired.

[176] An academic expert proposes that a compromise solution would be to allow for a new phase-out period in order to accommodate developing countries' adjustment concerns, while at the same time establishing a specific schedule for the removal of TRIMs, which would help insure that adjustment is made in an orderly fashion. *See* Theodore Moran, *The Relationship Between Trade, Foreign Direct Investment and Development: New Evidence, Strategy, And Tactics Under The Doha Development Agenda Negotiations*, Paper prepared for the Asian Development Bank's Study on Regional Integration and Trade: Emerging Policy Issues for Selected Developing Members Countries, mimeo, September 2002, at 21.

[177] *See Pakistan's Request for Extension of the Transition Period under the Agreement on Trade-Related Investment Measures*, G/C/W/478, December 22, 2003. The request is currently being considered by the Council for Trade in Goods.

[178] In this connection, it has been suggested that exceptions for developing countries to deviate from the provisions of the TRIMs Agreement could be linked to a per capita manufacturing value-added threshold, so that all countries falling below such threshold would qualify for the exceptions. *See* Kumar, *supra* note 14, at 73.

Aside from the Article 9 review, the WTO Work Programme on Trade and Investment provided an additional venue for Members wishing to pursue the debate on TRIMs and other related measures. In fact, issues pertaining to TRIMs disciplines were raised during the course of discussions on the developmental dimension of a possible multilateral framework of rules on investment.

Discussing investment policies from a broader perspective could offer an opportunity to consider other investment measures that have potential distorting effects on international trade and investment patterns, but which have not so far been subject to multilateral disciplines. Although not mentioned in the Doha mandate, a case in point are the so-called locational incentives (e.g., up-front grants and tax breaks) which are frequently used by host countries to attract high-value investments.[179] Studies have shown that transnational corporations often stimulate competition between potential locations in order to obtain the most attractive incentive packages.[180] Such competition may put developing countries that lack the resources to match the incentives offered by richer countries at a disadvantage. Furthermore, incentive-based competition often leads to a "beggar thy neighbour" situation where all participants end up worse than they would have been had they refrained from engaging in such wasteful competition. This suggests that exploring ways to achieve some kind of multilateral co-operation in this area would make sense.[181]

Nevertheless, the outcome of the Cancun Ministerial Conference has raised uncertainties as to the prospects of future work on investment in the WTO. A number of the developing countries that opposed launching negotiations on investment at Cancun have since insisted that, with the exception of trade facilitation, the other Singapore issues be dropped from the Doha Work Program or even from the WTO altogether. It is therefore unclear how, if at all, WTO work on trade and investment might be pursued in the future.[182]

IX. Conclusion

While the proponents of the Uruguay Round TRIMs negotiations sought strong disciplines on a wide range of performance requirements and other investment aspects, fundamental differences of view among participants as to the trade effects of these measures and the treatment that they should be given led to an agreement which is limited in scope and coverage. Nevertheless, the TRIMs Agreement has the merits of having clarified the application of key GATT articles to certain investment measures, and having reaffirmed WTO Members' commitment to better observance of trade rules by requiring

[179] It has been suggested that in order to level the playing field in the competition for FDI, efforts should also be made to prevent the use of protectionist antidumping legislation, preferential rules of origin with high domestic content and other strategic trade policies often employed by developed countries, which may also have the effect of distorting investment flows. *See* Moran (1998), *supra* note 176, at 34.

[180] *Id.*, at 35.

[181] Interestingly, before the Cancun Ministerial Conference, a group of developing countries proposed that investment incentives and performance requirements, among other issues, be addressed by the Working Group on the Relationship between Trade and Investment. Their proposal called for the Working Group to continue the process of clarification initiated at Doha, as opposed to launching negotiations on investment. *See* Communication from Bangladesh, Botswana, China, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Uganda, Venezuela, Zambia and Zimbabwe, WT/GC/W/154, August 28, 2003.

[182] A Decision adopted by the WTO General Council in August 2004 made it clear that the issue of the Relationship between Trade and Investment would not form part of the Work Program set out in the Doha Ministerial Declaration and that no work towards negotiations on this issue would take place within the WTO during the Doha Round. The same treatment will apply to the issues of Trade and Competition and Transparency in Government Procurement. Doha Work Program. Decision Adopted by the General Council on August 1st, 2004 (WT/L/579.)

the elimination of GATT inconsistent measures (without this Agreement many TRIMs might have remained in place). Through its notification requirements, the Agreement also introduced some degree of transparency on the use of TRIMs.

The implementation of the TRIMs Agreement has not been without problems. A short notification deadline and difficulties in identifying which measures were to be notified prevented some developing countries from complying with this obligation in a timely manner, thus precluding them from the benefit of the transition period. Moreover, certain new TRIMs were introduced after the entry into force of the Agreement. Some Members have questioned the adequacy of the length of the transition periods and of the mechanism itself to overcome structural problems in implementing the Agreement. Another view is that the lack of a monitoring mechanism to ensure compliance with commitments at the expiry of the transition periods and of precise criteria for extending such periods complicated the implementation of the Agreement.

As of now, little jurisprudence is available with respect to the interpretation of key provisions of the TRIMs Agreement, since it has been invoked in a few dispute settlement cases, and in only one of them did the panel make rulings under the Agreement. However, the expiry of the extended transition period at the end of 2003 means that the possibility of new disputes involving TRIMs cannot be discounted.

Today, the debate on the effects of TRIMs on trade and economic development has returned to the forefront of discussions concerning the operation of the Agreement. In the context of the Article 9 review, the implementation agenda, and in the Working Group on the Relationship between Trade and Investment, some developing countries have maintained that the current disciplines impose undue restraints on their ability to pursue developmental policies and have called for a relaxation of the TRIMs Agreement. For their part, developed countries have so far focused their efforts on avoiding any erosion of existing TRIMs disciplines. Nevertheless, in the event of a major review of the Agreement, they might seek to extend the coverage of TRIMs disciplines to a larger number of performance requirements.

There seem to be few policy options to reconcile demands for greater flexibility based on developmental grounds, on the one hand, and preserving the effectiveness of current TRIMs disciplines on the other. While it is essential for developing countries to apply the policies that are best suited to their particular circumstances, consideration should also be given to empirical evidence suggesting that certain measures such as local content requirements have more often than not proved to be ineffective and may even lead to national and global resource misallocation and welfare deterioration. At the same time, other investment measures may also give raise to trade and investment distortions. This would seem to suggest that maintaining TRIMs disciplines and addressing other distorting measures would be in the interest of the multilateral trading system.

BIBLIOGRAPHY

BALASUBRAMANYAM, V. N., *Putting TRIMs to Good Use*, 19 WORLD DEVELOPMENT 9 (1991).

BORA BIJIT, *Trade-Related Investment Measures*, in DEVELOPMENT, TRADE AND THE WTO. A HAND BOOK (Bernard Hoekman, Aaditya Mattoo, and Philip English eds. 2002).

CIVELLO PAUL, *The TRIMs Agreement: A Failed Attempt at Investment Liberalization*, 8 MINNESOTA JOURNAL OF GLOBAL TRADE (1999).

FENNELL WILLIAM A. AND JOSEPH W. TYLER, *Trade-Related Investment Measures*, in THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992), (Terence P. Stewart ed.) (1993).

GRAHAM EDWARD M. AND PAUL R. KRUGMAN, *Trade-Related Investment Measures*, in COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS, (Jeffrey J. Schott ed. 1990).

GUISINGER STEPHEN, *Investment related to trade*, in THE URUGUAY ROUND, A GUIDE TO THE MULTILATERAL TRADE NEGOTIATIONS (Michael J. Finger and Andrzej Olechowski compilators) World Bank (1987).

HOEKMAN BERNARD AND KAMAL SAGGI, *Assessing the Case for Extending WTO Disciplines on Investment-Related Policies*, 15 JOURNAL OF ECONOMIC INTEGRATION 4 (2000).

KUMAR NAGESH, *Use and effectiveness of performance requirements: What can be learnt from the experiences of developed and developing countries?* in THE DEVELOPMENT DIMENSION OF FDI: POLICY AND RULE-MAKING PERSPECTIVES. Proceedings of an Expert Meeting,UNCTAD (2003).

LOW PATRICK AND ARVIND SUBRAMANIAN, *TRIMs in the Uruguay Round: An Unfinished Business?*, presented at The Uruguay Round and the Developing Economies, A World Bank Conference (1995).

MASHAYEKHI MINA AND MURRAY GIBBS, *Lessons from the Uruguay Round Negotiations on Investment*, 33 JOURNAL OF WORLD TRADE 6 (1999).

MORAN THEODORE H., FOREIGN DIRECT INVESTMENT AND DEVELOPMENT. THE NEW POLICY AGENDA FOR DEVELOPING COUNTRIES AND ECONOMIES IN TRANSITION (1998).

MORAN THEODORE H., THE RELATIONSHIP BETWEEN TRADE, FOREIGN DIRECT INVESTMENT AND DEVELOPMENT: NEW EVIDENCE, STRATEGY, AND TACTICS UNDER THE DOHA DEVELOPMENT AGENDA NEGOTIATIONS, Paper prepared for the Asian Development Bank's Study on Regional Integration and Trade: Emerging Policy Issues for Selected Developing Members Countries, mimeo (September 2002), availabe at www.adb.org/Documents/Events/2002/ADF/theodore_moran.pdf

PRICE DANIEL M. AND P. BRYAN CHRISTY III, *Agreement on Trade-related Investment Measures (TRIMS): Limitations and Prospects for the Future*, in THE WORLD TRADE ORGANIZATION. THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION (Terence P. Stewart ed. 1996).

SCHLEGELMILCH RUPERT, *WTO: Why Still No Multilateral Rules for Foreign Direct Investment?*, 6 INTERNATIONAL TRADE LAW & REGULATION 3 (2000).

UNCTC, THE IMPACT OF TRADE-RELATED INVESTMENT MEASURES ON TRADE AND DEVELOPMENT (1991).

UNCTAD, HOST COUNTRY OPERATIONAL MEASURES, UNCTAD Series on Issues in International Investment Agreements (2001).

_____, WORLD INVESTMENT REPORT 2002. TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS, United Nations (2002).

_____, WORLD INVESTMENT REPORT 2003. FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES, United Nations (2003).

Selected GATT and WTO Documents

GATT Panel Report (adopted), *Canada—Administration of the Foreign Investment Review Act, Complaint by the United States*, BISD, 30S/ (1984).

Ministerial Declaration on the Uruguay Round, MIN.DEC (September 20, 1986).

Agreement on Trade-Related Investment Measures, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS (1994).

Singapore Ministerial Declaration, WT/MIN(96)/DEC (December 18, 1996).

Doha Ministerial Declaration, WT/MIN(01)/DEC/1 (November 20, 2001).

Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (1997).

Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997).

Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R (1998).

Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/R and WT/DS142/R (2000).

Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R (2000).

Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R and WT/DS175/R (2001).

Appellate Body Report, India—*Measures Affecting the Automotive Sector*, WT/DS146/AB/R and WT/DS175/AB/R (2002).

WTO/UNCTAD, *Trade-Related Investment Measures and Other Performance Requirements*, G/C/W/307/ and G/C/W/307/Add.1 (2001).

CHAPTER 11

THE ANTI-DUMPING AGREEMENT[1]

Patrick F. J. Macrory*

TABLE OF CONTENTS

I. Introduction 487
II. A History of Anti-Dumping 493
A. The Origins of Anti-Dumping Enforcement. 493
B. Article VI of the GATT 494
C. The Kennedy Round International Anti-Dumping Code 494
D. The Tokyo Round Anti-Dumping Code 496
E. Litigation in the GATT 497
III. The Uruguay Round Negotiations 498
IV. The Anti-Dumping Agreement 500
ARTICLE 1—PRINCIPLES 500
ARTICLE 2—DETERMINATION OF DUMPING 501
A. The Basic Comparison 501
B. Sales Below Cost 502
C. Cost Determinations 503
D. Constructed Export Price 505
E. Fair Comparison 505
F. Currency Conversion 506
G. Price Averaging 507
H. Transshipment 508
I. Like Product 508
J. Non-Market Economies 508
ARTICLE 3—DETERMINATION OF MATERIAL INJURY 508
ARTICLE 4—DEFINITION OF DOMESTIC INDUSTRY 508
ARTICLE 5—INITIATION AND SUBSEQUENT INVESTIGATION 509
A. Support for Application 509
B. Evidence Required for Initiation 510
C. Publicizing of Petition 511
D. Time Limits for Investigation and Immediate Termination 512

* Director of the International Trade Law Center at the International Law Institute, Washington, D.C., and Editor-in-Chief of this book. I am extremely grateful to Spencer Griffith, Gary Horlick, John Miller, and Edwin Vermulst for helpful suggestions on this chapter, and to Ali Oromchian for his invaluable editorial assistance.

[1] The full name of the Agreement is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. In this chapter, it is referred to as "the Anti-dumping Agreement," "the Agreement" or "the ADA." The term "anti-dumping" is often written as one word without the hyphen. However, GATT Article VI and the ADA include the hyphen, and I have therefore followed this spelling throughout this chapter.

ARTICLE 6—EVIDENCE 512
A. Submission of Evidence and Time Limits 513
B. Confidential Information 514
C. Verification 514
D. Facts Available 515
E. Informing Parties of Essential Facts 516
F. Individual Margins 516
G. Consumers and Industrial Users 517
H. Small Companies 517
ARTICLE 7—PROVISIONAL MEASURES 517
ARTICLE 8—PRICE UNDERTAKINGS 518
ARTICLE 9—IMPOSITION AND COLLECTION OF ANTI-DUMPING DUTIES 519
ARTICLE 10—RETROACTIVITY 520
ARTICLE 11—DURATION AND REVIEW OF ANTI-DUMPING DUTIES AND PRICE UNDERTAKINGS 521
A. Changed Circumstance Reviews 522
B. Sunset Reviews 522
ARTICLE 12—PUBLIC NOTICE AND EXPLANATION OF DETERMINATIONS 523
ARTICLE 13—JUDICIAL REVIEW 524
ARTICLE 14—ANTI-DUMPING ACTION ON BEHALF OF A THIRD COUNTRY 524
ARTICLE 15—DEVELOPING COUNTRIES 525
ARTICLE 16—COMMITTEE ON ANTI-DUMPING PRACTICES 525
ARTICLE 17—CONSULTATION AND DISPUTE SETTLEMENT 525
ARTICLE 18—FINAL PROVISIONS 527
V. The Doha Development Agenda 528

"Through their want of intelligent direction the great 'Trust' of American ironmasters, a gang of energetic, narrow-minded furnace owners, had smelted far more iron than the whole world had any demand for. . . . It is manifestly just that people who do headlong stupid things of this sort should suffer, but in the old days it was quite possible, it was customary for the real blunderers in such disasters, to shift nearly all the consequences of their incapacity. [There was nothing] to prevent the sudden frantic underselling of some trade rival in order to surprise and destroy his trade, secure his customers for one's own distended needs, and shift a portion of one's punishment on him. This operation of spasmodic underselling was known as 'dumping'. The American ironmasters were now dumping on the British market"
H.G. Wells, *In the Days of the Comet* (1906).

I. Introduction

Anti-dumping is one of the most controversial subjects in international trade.[2] The use of anti-dumping laws, designed to offset the effect of imports that are deemed to be sold below "normal" value, has proliferated in the last few decades. In 1958, contracting parties of the General Agreement on Tariffs and Trade ("GATT") had only thirty-seven anti-dumping measures in force, South Africa alone accounting for twenty-two.[3] By contrast, more than sixteen hundred investigations were launched in the 1980s,[4] and between 1995 and 2003, members of the World Trade Organization ("WTO") initiated almost two thousand five hundred investigations and imposed more than fifteen hundred anti-dumping measures.[5] As of July 2004, eighteen cases—almost a quarter of all decided cases—involving anti-dumping issues had been the subject of panel and/or Appellate Body reports in the WTO dispute settlement system (ten of these cases were brought against the United States, two against the EC, and six against developing countries).

There has also been a dramatic increase in the number of countries using anti-dumping laws. Once the preserve of the developed world, anti-dumping laws are now being used by an increasing number of developing countries. Thus, between 1980 and 1989, around 95 percent of all anti-dumping measures were imposed by Australia, Canada, the EC, and the United States, and only about two percent by developing countries.[6] Between 1995 and 2003, by contrast, developing countries imposed more than half of the total number of measures.[7] As of October, 2003, 75 WTO members had reported that they had anti-dumping legislation on their books, and 41 had reported that they had imposed anti-dumping measures.[8]

Table 1 lists the most frequent users of anti-dumping laws. As can be seen, although the traditional users of anti-dumping laws are still very active, a number of the more advanced developing countries are beginning to rival them. And, of course, on a trade-weighted basis the newer users have far outstripped the United States and the EC. A recent

[2] One indication of this is the enormous literature on the subject, much of it written by economists. *See, e.g.,* the bibliography attached to Bruce A. Blonigen and Thomas J. Prusa, *Antidumping* 37–42 (National Bureau of Econ. Research Working Paper No. 8398, 2001) (available at www.nber.org), which lists over one hundred books and articles on the subject, most of which were written in the last thirteen years. Another useful source of recent papers on the subject is http://www.uoregon.edu/~bruceb/adpage.html.

[3] J. Michael Finger, *The Origins and Evolution of Antidumping Regulation*, in ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT at 26 (J. Michael Finger ed. 1993). This number did not include anti-dumping duties imposed by Canada and New Zealand, which were applied by customs officials without a formal decree.

[4] *Id.* at 6.

[5] *Statistics on Anti-Dumping,* WTO Website, <http://www.wto.org>.

[6] *See* J. Michael Finger, *Antidumping is Where the Action is,* in Finger, *supra* note 3 at 4.

[7] *See Statistics on Anti-Dumping,* WTO Website, <http://www.wto.org>.

[8] *See* 2002 Report of the WTO Committee on Anti-Dumping, G/L/653 (October 2003).

Table 1: Principal Users of Anti-Dumping Laws 1995–2003

	Initiations	Measures
India	379	273
United States	329	205
EC	274	187
Argentina	180	138
S Africa	166	108
Australia	163	50
Canada	122	72
Brazil	109	58
Mexico	73	62

Source: WTO Statistics on Anti-Dumping, www.wto.org.

Table 2: Principal Targets of Anti-Dumping Laws 1995–2003

	Initiations	Measures
EC and member countries (15)*	360	195
PRC	356	254
Korea	182	107
United States	135	73
Taiwan	123	79
Japan	106	76
India	98	50
Thailand	91	57
Russia	86	71
Brazil	71	55

Source: WTO Statistics on Anti-Dumping, www.wto.org
**Note:* Initiations and measures involving the same product from different individual members countries of the EC counted separately.

study showed that Argentina had imposed more than thirty times as many measures as the United States compared with its level of imports, India and South Africa more than twenty times, and Brazil more than five times.[9]

Table 2 shows the principal target countries of anti-dumping actions brought by WTO members between 1995 and 2003, and Table 3 indicates the industrial sectors most often subject to anti-dumping cases. The predominance of Base Metal reflects the fact that steel producers have been by far the most frequent users of anti-dumping laws.

In part at least, the increased activity on the part of developing countries is undoubtedly the result of their lowering of tariffs, which has created pressure from domestic industries for other forms of protection from imports.[10] In addition, developing countries recognized

[9] *See* J. Michael Finger, Francis Ng, and Sonam Wangchuk, *Antidumping as Safeguard Policy,* World Bank Policy Research Working Paper 2730 (December 2001) at 6.

[10] *See* Brink Lindsey and Dan Ikenson, *Coming Home to Roost: Proliferating Antidumping Laws and the Growing Threat to U.C. Exports* (Cato Institute Trade Policy Analysis No. 14, 2001, available at <*http://www.cato.org*>), which contains a chart at page 6 showing a clear correlation between the increase in the number of anti-dumping actions brought by non-traditional users and the decline in tariffs.

Table 3: Major Sectors Affected by Anti-dumping Laws, 1995–2003

	Initiations	Measures
Base metal	745	528
Chemicals	471	285
Plastics and rubber	298	178
Machinery, elec. equip.	206	121
Textiles	159	109

Source: WTO Statistics on Anti-Dumping, www.wto.org.

that developed countries would be unlikely to challenge their use of anti-dumping laws since they were such frequent users of these laws themselves.

As discussed in Part II of this chapter, anti-dumping laws were first enacted in the early Twentieth Century as a defense against predatory dumping. The concern was that oligopolistic industries with protected home markets would use the high prices they were able to charge in those markets to subsidize low-priced exports with the aim of eliminating competitors in the importing countries. Once competition was eliminated, the exporters would be able to charge high prices there as well. There is however a flaw in this reasoning, at least in today's conditions. A strategy of this sort would only be successful if the dumping companies could keep competitors out of the foreign market even after they had raised prices, and this would rarely if ever be possible given the generally low tariffs now in effect in the industrialized countries. In the words of an OECD Report:

> Predatory pricing . . . is a complex form of anticompetitive conduct. It requires the perpetrator to incur substantial losses or at least to forego present profits in the hope that these losses can be more than recouped in the future through the exercise of market power. Thus, market conditions play a key role in determining whether price predation is a feasible tactic for a form to employ. The predator must have a very substantial share of the market or at least the capacity to acquire such a share.[11]

The OECD Report concluded that "cases of predation may arise but at most only very rarely."[12] Other studies have reached the same conclusion.[13] A review by the OECD of anti-dumping cases in Australia, Canada, the EC and the United States concluded that in at least ninety percent of the cases the sales practices would not have been found anti-competitive under competition law.[14]

Today's proponents of strong anti-dumping laws no longer claim that dumping is carried out with the intent of *destroying* competition, but is rather aimed at weakening it.

[11] OECD, PREDATORY PRICING 75 (1989), *quoted in* RAJ KRISHNA, ANTIDUMPING IN LAW AND PRACTICE 1 (1997) (World Bank Paper, available at <http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1800series/gps1823/wps1823.pdf>).

[12] *Id.* In a 1986 case involving allegations of predatory dumping the U.S. Supreme Court observed: "The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. . . . [T]here is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful". *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 589 (1986) (emphasis in original).

[13] *See*, *e.g.*, Alan F. Deardorff, *Economic Perspectives on Anti-dumping Law*, in ANTI-DUMPING LAW AND PRACTICE 35 (John Jackson and Edwin Vermulst eds. 1990).

[14] Finger, *supra,* note 6 at 4.

> A secure closed home market or sanctuary market encourages companies to make aggressive production and expansion decisions because they can be certain of selling a percentage of their production at home at good prices. . . . From a sanctuary market, it is also possible to dump in the markets of foreign competitors to depress the profit margins of those competitors and reduce their funds available for investment in R&D and marketing. Companies from countries with open markets do not enjoy this luxury. . . . Over time, this puts companies in open-market countries, such as the United States, at a serious disadvantage in competition with companies with sanctuary home markets.[15]

Many commentators have expressed concern about the use (or abuse) of anti-dumping laws as a protectionist device. In 1988, the *Economist* observed that "[a]nti-dumping suits are emerging as the chemical weapons of the world's trade wars."[16] Judge Richard Posner has commented that:

> Of course, the concerns that actually animate anti-dumping, countervailing duty, and other measures directed against allegedly 'unfair' trade practices of foreign producers go far beyond a concern with predatory pricing. The dominant concern is to protect U.S. industry from foreign producers that have genuinely lower costs, whether because they pay lower wages, incur fewer pollution-control and other regulatory costs, are better managed, have better workers, or have more modern plants and equipment.[17]

It appears that the cost of anti-dumping duties to consumers in terms of higher prices often outweighs any gain to the domestic industry receiving protection. An analysis by the U.S. International Trade Commission in 1995 estimated that removal of all outstanding anti-dumping and countervailing duty orders in 1991 would have produced a welfare gain to the U.S. economy of $1.9 billion, and that the gain would have been far greater had the more than one hundred orders entered since 1991 been factored in.[18]

Despite the widespread agreement that active enforcement of anti-dumping laws imposes significant welfare losses on a country's economy, attempts in the WTO to curb what is seen as over-exuberant enforcement of anti-dumping laws have met with great hostility in the U.S. Congress, which sees the U.S. anti-dumping law as a vital bulwark against "unfair" imports.[19] While many economists believe that there is little or no economic rationale for anti-dumping laws,[20] they are sometimes defended by proponents of liberal trade on the basis that they provide a political safety valve that alleviates pressure for more protectionist action.[21]

Anti-dumping measures have become the remedy of choice for domestic industries seeking relief from import competition, as compared with countervailing duty or safeguard measures. Since 1995 the number of anti-dumping investigations initiated by WTO members has been eight times as high as the number of countervailing duty and

[15] GREG MASTEL, ANTIDUMPING LAWS AND THE U.S. ECONOMY 42–43 (1998). In his former position as Chief Trade Counsel to the U.S. Senate Committee on Finance, which has jurisdiction over U.S. trade laws, Dr. Mastel was closely involved with the development of U.S. anti-dumping policy.

[16] *The Antidumping Dodge,* ECONOMIST, Sept. 10, 1988, at 97.

[17] RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 310–11 (1992).

[18] UNITED STATES INTERNATIONAL TRADE COMMISSION, THE ECONOMIC EFFECTS OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS AND SUSPENSION AGREEMENTS, PUB. NO. 2900, x–xi, III (1995).

[19] As discussed in Part V of this Chapter, Congress was strongly opposed to inclusion of anti-dumping and countervailing duties in the Doha Development Agenda negotiations.

[20] *See* Chapter 40 of this book.

[21] *See, e.g.,* JAGDISH N. BHAGWHATI, PROTECTIONISM 35 (1988); Finger, *supra* note 3 at 26–27; Richard Boltuck and Robert E. Litan, *America's Unfair Trade Law,* in DOWN IN THE DUMPS 1, 13 (Richard Boltuck and Robert E. Litan eds. 1991).

safeguard investigations combined, and the ratio is almost the same in terms of measures imposed.[22] There are several reasons for this. *First*, the injury standard imposed by the GATT/WTO rules—"material" injury—appears on its face to be a good deal easier to satisfy than the "serious injury" test applied in safeguard cases. *Second*, since dumping is considered to be an unfair trade practice, no compensation or retaliation is required when anti-dumping measures are imposed, unlike the case of safeguards.[23] *Third,* given the intricacies of the margin calculations, particularly where cost is involved, it is easy for an authority to find dumping margins if it wishes to do so.[24] In addition, the fact that in many circumstances export sales below fully allocated cost will be treated as dumped[25] makes it virtually impossible for capital-intensive industries, such as steel, to avoid dumping during downturns in the business cycle.[26] *Fourth*, the anti-dumping laws of some of the major users of anti-dumping laws, such as the United States, give little or no discretion to the authorities to choose not to apply an anti-dumping measure, so that when the necessary findings of dumping and injury have been made, imposition of anti-dumping duties is more-or-less automatic. In the case of safeguards, on the other hand, the authorities usually have quite wide discretion to weigh the domestic industry's need for protection against broader concerns such as consumer interests and international economic policy considerations. *Finally,* countervailing duty actions have never been as popular as anti-dumping cases, perhaps because they rarely result in significant duty levels. And in recent years governments have been less inclined to provide subsidies, at least to the industrial sector.

Part II of this chapter discusses the history of anti-dumping, beginning with the first anti-dumping laws passed in the early part of the last century, and then describes the various efforts within the GATT to control use of such laws. Part III describes the Uruguay Round negotiations that led to the Anti-Dumping Agreement. Part IV analyses the Agreement article-by-article, and discusses the Panel and Appellate Body reports relating to the Agreement. Finally, Part V describes the issues that are being discussed with respect to anti-dumping in the Doha Round.

[22] Between 1995 and 2003 a total of 2416 anti-dumping investigations were initiated by WTO members, and 1511 measures imposed. *Statistics on Anti-Dumping,* available at www.wto.org. By contrast, over the same period Members notified the WTO of only 168 countervailing duty initiations and the imposition of 100 countervailing duty measures. *Statistics on Subsidies and Countervailing Measures,* available at www.wto.org. Between 1995 and October 2003, the WTO Committee on Safeguards had received notification of 137 investigations and 105 measures. Committee on Safeguards, *Annual Reports,* available at www.wto.org.

[23] Moreover, safeguard measures must be applied on a most-favored-nation basis, increasing the cost of compensation or retaliation, whereas anti-dumping measures are targeted against individual countries.

[24] Between 1995 and 2003, the United States initiated 329 anti-dumping investigations and imposed 205 measures, a petitioner success rate of 62 percent. *See* Table 1, *supra.* Almost all of the negative outcomes resulted from negative injury findings rather than findings of no dumping. *See* Congressional Budget Office, *Antidumping Action in the United States and Around the World: an Update* (June 2001), Chapter One, p. 2. According to Blonigen and Prusa, *supra* note 2 at 22, between 1990 and 2000 the U.S. Department of Commerce issued only four negative dumping determinations out of a total of nearly four hundred decisions. Between 1921 and 1967, by contrast, only 75 out of 706 U.S. investigations resulted in the imposition of anti-dumping measures. J. Michael Finger, *The Origins and Evolution of Antidumping Regulation,* in Finger, *supra* note 3 at 26.

[25] *See* text accompanying notes 77–84 *infra.*

[26] Similarly, it is virtually impossible for agricultural producers to avoid selling below cost at certain points in the crop cycle, since they generally have little control over market prices and, particularly in the case of perishable produce, cannot withhold their products from the markets when it is ripe. However, as noted below (*see* discussion of ADA Article 2, Subpart B, in Part IV below), the ADA does take account of this factor, whereas it does not in the case of capital-intensive producers.

First, however, it may be helpful to provide a brief outline of the way in which anti-dumping proceedings are typically conducted. This will help to familiarize the reader with some of the terms used in this rather technical agreement.

Anti-dumping investigations are carried out by government agencies, referred to in the Agreement as *authorities*. An investigation is normally initiated by means of an *application* filed by or on behalf of a domestic industry, which must include evidence of dumping, injury and a causal connection between the two. In a few countries, such as Canada, the United States, and Argentina, the dumping and injury investigations are conducted by separate agencies. In most countries, however, a single agency makes both assessments. The investigation determines whether or not there has been dumping, which exists where the *export price* is below *normal value*, which is normally the price of the *like product* in the home market, so long as that price is at or above cost of production. Where home market sales cannot be used, normal value may be based on prices of sales to *third countries*, or *constructed value,* which is cost of production plus profit. Elaborate adjustments are made to home market (or third country) prices and export prices to ensure that the comparison is fair. The investigation also determines whether the dumped imports have caused or threaten to cause *material injury* to a domestic industry producing the like product.

If the dumping and injury determinations are both affirmative, a *definitive anti-dumping duty* is imposed on future imports. In some countries, notably the United States, the duty is assessed on a *retrospective* basis. Imports must be accompanied by estimated duties in the form of cash deposits, and each year the authorities conduct a review upon request to determine the actual margin based on the difference between the export price of the imported goods and the contemporaneous normal value. This approach has the advantage of assessing duties on a current basis, so that exporters can avoid duties by raising their prices. On the other hand, importers do not know their ultimate liability for anti-dumping duties until as much as two years after importation. Other countries, such as the EC, assess duties on a *prospective* basis, i.e., anti-dumping duties are collected at the time of importation at the margin rate determined during the investigation. Importers thus know their liability at the time of importation, but will be assessed duties even if the dumping has ceased. They can apply for refunds in this situation. In a variant of the prospective system, the Canadian authorities announce the normal value applicable to imports, so that exporters can avoid duties by setting their price at or above normal value.

Provisional measures may be imposed during the course of an investigation, after preliminary dumping and injury determinations have been made. These take the form of bonds or cash deposits required to accompany all future imports, and those imports will be subject to definitive anti-dumping duties in the event that an anti-dumping measure is issued. Dumping investigations may be suspended or terminated if the exporter gives a *price undertaking*, i.e., an undertaking to revise its prices to eliminate the injurious effects of the dumping.

Anti-dumping measures must be *terminated* after five years unless the authorities determine that this would lead to renewed or continued injurious dumping. They must also be terminated at any time that they are no longer necessary to counteract dumping or to prevent injury.

II. A History of Anti-Dumping

A. The Origins of Anti-Dumping Enforcement.

Dumping was traditionally defined as selling for export at prices below those prevailing in the home market.[27] In many cases, this may simply benefit consumers in the importing countries. As explained above, there was, however, concern that industries enjoying protected home markets could use the excess profits they were able to earn in those markets to export at low prices with the aim of driving industries in the importing countries out of business, at which point they would be able to charge high prices to customers in those countries as well.

The first anti-dumping statute was passed by Canada in 1904, in response to concern that U.S. steel producers were dumping steel rails into Canada.[28] This was followed by a number of British Commonwealth countries, New Zealand (1905), Australia (1906) and South Africa (1914).[29] Each of these laws authorized Customs officials to determine whether dumping of particular imports was occurring, and if so, to levy additional duties designed to bring the price of the imported product up to a "fair" or "normal" value.

The first attempt by the United States to deal with dumping took a different approach. The Revenue Act of 1916 (often referred to as the "Anti-Dumping Act of 1916") was an amendment to the Clayton Act, an antitrust law, which declared dumping with the intent of "destroying or injuring" a U.S. industry to be a criminal offense and also to be answerable in treble damages in civil actions.[30] The difficulty of proving the necessary degree of intent on the part of a foreign producer made it difficult for plaintiffs to win cases.[31] Accordingly, five years later the U.S. Congress passed the Anti-dumping Act of 1921, which authorized the U.S. Treasury Department to impose anti-dumping duties after it had been found that dumping had occurred and had injured or threatened to injure a U.S. industry. Passage of the statute was pushed particularly hard by the U.S. chemical industry, which feared intense competition after World War I from German chemical manufacturers, which were highly cartelized and were protected against import competition in the German market by high tariffs.[32]

[27] However, as discussed below (*see* Part IV below, discussion of Article 2 of the ADA, Subpart B), in recent years sales below cost of production have also in effect been treated as dumped under certain circumstances.

[28] *See* Finger, *supra* note 3 at 14–16. It is ironic, to say the least, that the industry that was the target of the first anti-dumping law is now one of the major users of anti-dumping law.

[29] *See* Krishna, *supra* note 11 at 14.

[30] Act of September 8, 1916, Ch. 403, § 801, 39 Stat. 798. As discussed below (*see* text accompanying Note 70), the Act was held by the WTO Appellate Body to be inconsistent with Article VI of the GATT and several provisions of the ADA.

[31] Only a handful of civil cases have been brought under the statute, and few if any resulted in an award of damages, although some confidential settlements have occurred. In one case that did come to final judgment, the plaintiff failed to prove intent. *Matsushita Electric Industrial Co. v. Zenith Radio Corp., supra,* note 12. So far as is known, there have been no criminal prosecutions under the 1916 Act.

[32] Greyson Bryan, Taxing Unfair International Trade Practices: a Study of U.S. Antidumping and Countervailing Duty Laws 608 (1980). Jacob Viner, the economist who has been described as the intellectual architect of anti-dumping law, mentions "the accusation, so common during the war, that Germany was accumulating vast stocks of goods in order to dump them on the markets of the world, with the object of crushing the new industries fostered by the wartime conditions, re-establishing her foreign commerce, and regaining in the field of economic warfare what she was losing on the military battlefield." Jacob Viner, Dumping: A Problem in International Trade 65 (1923) Viner points out that in reality Germany found herself at the end of the war without the goods, the financial resources, or the trade connections to be able to mount a large-scale dumping campaign. *Id.*

B. Article VI of the GATT

The drafters of the Havana Charter and the GATT made no attempt to regulate dumping, since it is the action of a private entity rather than a government and therefore not subject to GATT rules.[33] Their concern instead was to prevent overzealous enforcement of anti-dumping laws that would restrict fairly priced as well as dumped imports.[34] Accordingly, Article VI of the GATT authorizes the use of anti-dumping duties to counteract the effect of dumping but sets forth certain basic rules regulating such use.[35] The two most important of these are that anti-dumping duties may not be levied unless "the effect of the dumping . . . is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry",[36] and that the anti-dumping duties may not exceed the margin of dumping.[37] The margin of dumping is defined as the difference between the export price and "normal" value, which in turn is defined as:

(a) The comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or;
(b) In the absence of such price, either
    (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
    (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit[38]

Article VI:1 also provides that in making the price comparison, "[d]ue allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability."

C. The Kennedy Round International Anti-Dumping Code

Like its predecessors, the sixth round of multilateral negotiations organized under the auspices of the GATT—the Kennedy Round (1964–67)—focused largely on tariff cutting. However, the round also resulted in one of the first GATT agreements to deal with non-tariff barriers, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, generally known as the International Agreement on Anti-dumping ("IAA"),[39] which was designed to introduce various substantive and procedural disciplines into the use of national anti-dumping laws, which some believed were being used in trade-restrictive ways. For example, the U.S. anti-dumping law allowed imposition of provisional measures, which can have a significant impact on trade, without a preliminary

[33] In 1955 New Zealand proposed a GATT discipline on dumping, but it was blocked by the United States, which was concerned about its agricultural exports. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 412 (1969). GATT Art. VI:1 declares that dumping "is to be condemned" if it causes or threatens material injury to an industry in the importing country. However, nothing in Article VI or in the Anti-Dumping Agreement requires Members to have anti-dumping legislation on their books. As noted above, only a minority of WTO Members are active enforcers of anti-dumping laws.

[34] The United Kingdom argued that dumping was not harmful and that the GATT should instead ban the imposition of anti-dumping duties. Blonigen and Prusa, *supra* note 2 at 4, n. 1.

[35] GATT Art. VI also provides rules regulating countervailing duty actions. See, Chapter 16 of this book.

[36] Art. VI:6(a)

[37] GATT Art. VI:2.

[38] GATT Art. VI:1.

[39] *International Agreement on Anti-dumping,* BISD, 15S/24 (1968).

finding of injury.[40] In the United Kingdom, anti-dumping duties could be imposed without notice or opportunity for the interested parties to be heard.[41] The IAA was also designed to require contracting parties to comply with the requirements of Article VI. Canada, for example, did not require a finding of injury before applying anti-dumping measures; a practice that it claimed was protected by the Protocol of Provisional Application ("PPA") by which the GATT was applied.[42] By signing the IAA, it committed itself to applying the injury test.

The IAA was optional, binding only on those contracting parties who signed it. It imposed a number of substantive and procedural requirements designed to limit the abuse of anti-dumping laws, many of which have been carried forward with few or no changes into the ADA. For example:

- The IAA introduced the concept of a "fair" comparison, requiring the export and domestic price to be compared "at the same level of trade, normally at the ex factory level, and in respect of sales made at as nearly as possible the same time." (Art. 2(f)).
- The causation standard was raised, requiring dumping to be "demonstrably the principal cause" of material injury.[43] (Art. 3). Authorities were required to weigh the effect of dumping against all other factors that might be affecting the domestic industry, examples of such factors being the volumes and prices of non-dumped imports, competition between the domestic producers themselves, and contraction in demand due to substitution of other products or changes in consumer tastes.
- The IAA defined the term "domestic industry." (Art. 4).
- The IAA introduced the concept of regional injury. (*Id.*).
- In response to criticisms by the EC and the UK that investigations in the United States were taking too long, dumping and injury investigations were to be conducted simultaneously. (Art. 5(b)).
- A number of due process-type protections were imposed, including the right of all interested parties to present evidence and to see all relevant information that was not confidential. (Art. 6).
- On-site verifications were authorized. (*Id.*).
- Price undertakings were authorized. (Art. 7).
- Provisional measures could only be imposed after preliminary findings of dumping and injury, and could not be in place for more than three months (six months at the request of the exporter and importer). (Art. 10).
- In certain situations anti-dumping duties could be imposed on imports entering up to ninety days prior to the imposition of provisional measures ("Critical Circumstances"). (Art. 11).
- A permanent Committee on Anti-Dumping Practices was established to oversee the operation of the Agreement. (Art. 12).

The IAA ran into difficulty in the U.S. Congress, which took the position that the U.S. negotiators in the Kennedy Round had only had authority to negotiate tariff reductions,

[40] KENNETH W. DAM, THE GATT: LAW AND ECONOMIC ORGANIZATION 177 (1970).

[41] *Id.*

[42] Id. at 174. The PPA is discussed in Part I of Chapter 5 of this book.

[43] GATT Article VI merely required that the effect of the dumping "cause or threaten" material injury. The 1979 Anti-dumping Code and the Uruguay Round Agreement reverted to the Article VI standard.

and not agreements on non-tariff barriers. The Administration claimed that existing U.S. law was consistent with the IAA, so that U.S. law did not have to be changed to comply with the Agreement, but Congress disagreed. It was particularly concerned that the higher causation standard as well as the requirement of a finding of "material" injury (or threat of material injury) before dumping duties could be imposed, would make it harder for U.S. industry to obtain relief than the simple "injury" test required by U.S. law.[44] It accordingly enacted legislation declaring that U.S. law took precedence over any obligations created by the Agreement.[45]

D. The Tokyo Round Anti-Dumping Code

The Tokyo Bound resulted in a number of plurilateral agreements, or "Codes," binding only on those GATT contracting parties that signed them. One of these was the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, usually referred to as the "Anti-dumping Code" ("Code"), which replaced the 1967 Agreement.[46] In fact, it made few changes to the 1967 Agreement. Most importantly, perhaps, it instituted time limits for investigations, which were normally to be completed within one year. (Art. 5.5). It elaborated the rules relating to price undertakings. (Art. 7). It added a provision requiring that "special regard" be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures, and it required that "constructive remedies" be explored before applying anti-dumping duties where they would affect the essential interests of developing countries. (Art. 13). The Code also established a dispute settlement procedure, under which the Committee on Anti-Dumping Practices, established by the Code, was to attempt conciliation, and if that failed, to appoint a panel to examine the matter. (Art. 15).

In one significant respect, the Code weakened the Kennedy Round Agreement. Instead of requiring the dumped imports to be a "'principal cause" of material injury, dumped imports merely had to be "causing" injury. The authorities were no longer required to weigh the effect of dumping against other factors, although they were required not to attribute to the dumped imports injury caused by other factors (Code Art. 3.4).[47]

Twenty-five GATT contracting parties signed the Code. The ADA has incorporated most of the Code provisions.

[44] Article VI of the GATT itself imposes a "material injury" standard, but the United States took the position that its plain "injury" test was protected by the "grandfather" rights conferred by the Protocol of Provisional Application. *See* note 42, *supra.*

[45] Pub. L. No. 90-634, Title II, § 201, 82 Stat. 1347 (codified as amended in 19 U.S.C. 160 (note)). The "Fast-Track" procedure adopted by Congress in 1994 in connection with the legislation giving the President negotiating authority for the Tokyo Round was in part designed to overcome the threat to the credibility of U.S. trade negotiators caused by what was perceived as a failure by the United States to implement the IAA. *See, e.g.,* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 93–95 (1997)

[46] BISD 26S/171 (1980).

[47] As in the case of the Kennedy Round Agreement, the U.S. Congress was very reluctant to change the existing "injury" test under U.S. law to "material injury" to comply with the Code, fearing that this would make it more difficult for U.S. industries to obtain relief. However, the EC insisted on the change being made. JOHN H. JACKSON, JEAN-VICTOR LOUIS, AND MITSUO MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 1145 (1994). Congress made the change, but defined "material injury" as any injury that is not "inconsequential, immaterial, or unimportant", and made clear in the legislative history that the U.S. International Trade Commission, the agency charged with conducting injury investigations, was to apply the same standard that it had been using under the old "injury" standard. BRYAN, *supra* note 32, at 63–64. *See also,* JACKSON, *supra* note 45 at 268.

E. Litigation in the GATT

Ten matters involving anti-dumping were taken to GATT panels, and eight of these were decided between 1990 and 1995. Indeed, only one anti-dumping case, *Swedish Anti-Dumping Duties*, was decided in the first 38 years of the GATT system, presumably reflecting the fact that anti-dumping laws were little used until the last thirty years or so. A brief summary of the cases follows:

- *Swedish Anti-Dumping Duties.*[48] The Panel found that the Swedish anti-dumping system, which was based on minimum prices, was not a violation of Article VI of the GATT *per se,* although it cautioned that in practice the system could lead to a violation.
- *New Zealand—Imports of Electrical Transformers from Finland.*[49] The Panel upheld the finding of dumping but found that the injury determination was inconsistent with Article VI of the GATT. It rejected New Zealand's argument that an injury determination could not be challenged in the GATT.
- *EEC—Regulation on Imports of Parts and Components.*[50] The panel found that the EEC's "screwdriver" regulations, which imposed anti-dumping duties on parts and components imported into the EEC for assembly into finished products which were themselves already subject to an anti-dumping duty order, violated the national treatment obligations imposed by Article III of the GATT and could not be justified under the Article XX (d) exception for measures "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement." The Panel did not rule on the question whether the regulations violated GATT Article VI.
- *United States—Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden,*[51] The Panel held that the anti-dumping investigation had been improperly initiated because the United States authorities had not determined that the application was filed by or on behalf of a domestic industry. The United States blocked adoption of the Report.
- *United States—Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico.*[52] The Panel found that the United States had improperly initiated the anti-dumping investigation because it had failed to determine whether "all or almost all" of the producers in the regional market at issue supported the petition, as required by the Code. The United States blocked adoption of the Report.
- *Korea—Anti-Dumping Duties on Imports of Polyacetal Resins From the United States.*[53] The Panel found that various aspects of the injury determination were inconsistent with Article 3 of the 1979 Anti-dumping Code. In particular, the Panel criticized the failure of the Korean authorities to indicate whether the determination was based on threat of material injury, actual material injury, or material retardation of an industry. *Id.* at ¶¶ 223–224.
- *United States—Anti-Dumping Duties on Imports of Stainless Steel Plate From Sweden.*[54] The Panel held that the rejection by the U.S. International Trade

[48] BISD 3S/81 (adopted February 26, 1955).
[49] BISD 32S/55 (adopted July 18, 1985).
[50] BISD 37S/132 (adopted May 16, 1990).
[51] ADP/47 (August 20, 1990) (unadopted).
[52] ADP/(2 (September 7, 1992) (unadopted).
[53] BISD 40S/205 (adopted April 27, 1993).
[54] ADP/117 and Corr.1 (February 24, 1994) (unadopted).

Commission of a request by the exporter to conduct a "changed circumstances" review was in violation of Article 9.2 of the 1979 Anti-Dumping Code. The United States blocked adoption of the Report.

- *United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway.*[55] The Panel held that the failure by the United States Department of Commerce to show that the sample of salmon farms it had selected was representative, its use of "facts available" with respect to one farm, and its failure to take proper account of different weight categories in calculating cost of production violated the 1979 Code. However, the Panel rejected various other claims made by Norway with respect to the dumping finding, and all of its claims with respect to the injury determination.
- *EC—Anti-Dumping Duties on Audio Tapes in Cassettes Originating from Japan.*[56] The Panel found that the EC had acted inconsistently with Article 2.6 of the 1979 Anti-Dumping Code by failing to make adjustments for differences in indirect selling expenses incurred in the home and export markets. However, it held that the EC's method of comparing a weighted-average home market price and failing to give credit for negative dumping margins ("zeroing out") was not necessarily a failure to conduct a "fair comparison," which Japan had argued was required under Articles 2.1 and 2.6 of the 1979 Code. It also rejected Japan's claims with respect to the calculations of profit and selling, general and administrative expences ("SG&A"), as well as its claims with respect to the injury determination. The EC blocked adoption of the Report.
- *EC—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*.[57] The Panel rejected a series of challenges by Brazil to an anti-dumping measure, which included an attack on the EC's failure to take account in its price comparison of an exchange rate freeze taken in response to high inflation, to various aspects of the injury determination, and to the EC's alleged failure to taken account of Brazil's status as a developing country, as required by Article 13 of the 1979 Anti-Dumping Code.

III. The Uruguay Round Negotiations

At the beginning of the Uruguay Round, there were no plans to amend the Tokyo Round Anti-Dumping Code. The Committee on Anti-Dumping Practices had reported in 1982 and 1985 that the Code "was basically sound," and that the "problems of implementation that arose could effectively be addressed within the Committee."[58] The Ministerial Declaration that initiated the Round made no mention of anti-dumping.[59] However, as the negotiations continued, issues relating to anti-dumping began to emerge. There were two camps. A number of countries raised concerns about various practices engaged in by certain countries—notably the United States and the EC—which, although not necessarily illegal under GATT Article VI or the Anti-dumping Code, seemed to be unfair. These included:

[55] BISD 41S/229 (adopted April 27, 1994).
[56] ADP/136 (April 28, 1995) (unadopted).
[57] BISD 42 S/17 (adopted October 30, 1995).
[58] THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) 1464 (Terence P. Stewart ed. 1993).
[59] GATT *Ministerial Declaration,* Punta Del Este, Uruguay (September 20, 1986). By contrast, safeguards and subsidies and countervailing measures were mentioned as subjects for negotiation.

- The U.S. and EC practice of comparing individual home market prices with a weighted average of home or third country prices, which, coupled with the "zeroing out" of negative margins, was more-or-less guaranteed to produce a dumping margin whenever prices fluctuated during the period of investigation.[60]
- The U.S. statutory requirement that the allowance for selling expenses and profit included in the calculation of constructed value be a minimum of ten and eight percent of costs respectively. Many countries believed that these minima, particularly with respect to profit, were much higher than was normal for many industries and therefore generated artificially high dumping margins.
- The arbitrary use of "facts available" to determine margins when a party failed or refused to supply necessary information.
- The low *de minimis* standard (0.5 percent) applied by the United States to comply with the requirement under the 1979 Code that investigations be immediately terminated where the dumping margin was determined to be negligible.
- The failure of the United States to use the "sunset" procedure applied by many other countries, under which anti-dumping (and countervailing duty) orders were automatically reviewed from time to time to determine whether they were still necessary to prevent injurious dumping.

As discussed below, the ADA addressed each of these concerns.

On the other hand, the United States and the EC wanted the new agreement to endorse practices designed to close what they perceived to be significant enforcement loopholes. For example, they wanted the rules that they were currently applying to deal with "circumvention" of anti-dumping orders to be embodied in the international agreement.[61] However, the negotiators were unable to reach agreement on this issue, and instead referred the matter to the Committee on Anti-Dumping[62], which to date has made no progress. The United States and the EC were also unsuccessful in obtaining inclusion of rules concerning input dumping and "recidivist" dumping. The United States did however succeed in including a provision authorizing authorities to disregard under certain circumstances below-cost sales in determining normal value, thus endorsing the practice that many countries, including the United States, had been applying since the

[60] To use a simple example, suppose that the only sales made by the exporter were a home market sale and an export sale on Day 1 of the investigation at a price of 10, and another home market sale and export sale on Day 365 at a price of 12. Clearly there is no price discrimination. Yet, under the U.S. and EC practice normal value would be 11 (assuming that each sale was of the same quantity), and the export sale on Day 1 would be treated as dumped. The exporter would receive no credit for the fact that the sale on Day 365 was sold above normal value; the sale would be treated as one at a zero margin rather than one at a margin of minus 1.

[61] As noted in Part II.E *supra,* a GATT panel had held that the "screwdriver" regulations promulgated by the EC to prevent circumvention of anti-dumping measures through assembly operations in the EC using imported parts violated Article III:2 and III:4 of the GATT (national treatment) and could not be justified under Article XX(d). The EEC did not attempt to justify the measures under Article VI, so the Panel did not rule on this issue. *EEC—Regulation on Imports of Parts and Components, supra* note 50. The United States applies similar rules, but to date they have not been challenged. It has been argued that the imposition of anti-dumping duties on parts and components that have not been the subject of findings of dumping or injury violates Article VI of the GATT. *See*, *e.g.*, David Palmeter, *A Commentary on the WTO Anti-Dumping Code,* 30(4) J. WORLD TRADE 43, 66 (1996). Incorporation of the rules into the ADA would of course have insulated them from challenge, since any conflict between the GATT and any other agreement in Annex 1A to the WTO Agreement is to be resolved in favor of the latter. *See*, *WTO Agreement*, *General Interpretative Note to Annex 1A*.

[62] *See Uruguay Round Ministerial, Decision on Anti-Circumvention*, reproduced in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 397 (1999) ("THE LEGAL TEXTS").

mid-1970s.[63] In addition, the ADA now authorizes the technique of "cumulation", under which the injurious effect of dumped imports from different countries can be considered together.[64] This practice had also been in effect in a number of countries, including the EC and the United States, for a number of years.

The United States also sought to impose an extremely narrow standard of review on panels reviewing disputes involving anti-dumping, in an effort to prevent panels from second-guessing the decisions of national authorities. Although the language proposed by the United States was not adopted, the ADA is the only one of the Uruguay Agreements to contain its own standard of review, which was designed to be narrower than the general standard contained in Article 11 of the Dispute Resolution Understanding that is applicable to all other disputes in the WTO system.[65]

The ADA negotiations were extremely contentious and threatened the success of the entire Round. They have been described as having "aroused passions like no other."[66] Anti-dumping was one of the four areas where it was not possible to provide a proposed text for the GATT Ministerial Meeting held in Brussels in 1990, which was intended to be the last Uruguay Round meeting.[67] In an attempt to break the impasse, the Director-General of the GATT produced the so-called "Dunkel Draft" in 1991, which with some modifications became the text of the ADA, although final agreement was not reached until the closing stages of the Round.

IV. The Anti-Dumping Agreement

The ADA, which builds on the 1979 Code, lays out in considerable detail the principles that Members must follow when they conduct anti-dumping investigations and apply anti-dumping measures. It provides elaborate rules on how the dumping margins are to be calculated, as well as specifying the factors that must be considered in injury determinations. It also contains detailed procedural rules designed to provide the parties in anti-dumping proceedings with a measure of due process. These procedural rules are very similar, though not identical, to those contained in Part V of the Agreement on Subsidies and Countervailing Measures, dealing with countervailing duty proceedings.[68]

ARTICLE 1: PRINCIPLES

Article 1 of the ADA requires that anti-dumping investigations and measures comply with the provisions of GATT Article VI and the Agreement. In *United States—1916 Act,* the Appellate Body held that this provision, as well as Article 18.1, limits anti-dumping measures to those expressly authorized by GATT Article VI and the ADA, i.e., definitive anti-dumping duties, provisional measures and price undertakings.[69] It upheld a panel ruling that by providing criminal penalties and treble damage remedies in the case of

[63] *See* discussion of ADA Art. 2.2.1 in Part IV, *infra.*

[64] *See* Chapter 17 of this book.

[65] *See* discussion of ADA Art. 17.6 in Part IV, *infra.*

[66] HUGO PAEMEN AND ALEXANDRA BENSCH, FROM THE GATT TO THE URUGUAY ROUND: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND 158 (1995). For a excellent discussion of the negotiations, *see* Gary N. Horlick and Eleanor C. Shea, *The World Trade Organization Antidumping Agreement,* 29(1) J. WORLD TRADE 5 (1995).

[67] THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, *supra* note 59 at 1525.

[68] *See* Chapter 16 of this book.

[69] Report of the Appellate Body, *United States—Anti-Dumping Act of 1916,* WT/DS136/AB/R, WT/DS162/AB/R (2000) ("*United States—1916 Act*").

intentional dumping, the U.S. Anti-Dumping Act of 1916 (see Part II A, *supra*) was inconsistent with Article 1, as well as with Article VI:1 and VI:2 of the GATT and various other provisions of the ADA.

ARTICLE 2: DETERMINATION OF DUMPING

Article 2 of the ADA sets forth detailed rules relating to the determination of dumping. As mentioned above, many of these rules were contained in the 1979 Anti-Dumping Code but others were introduced to meet concerns that were raised during the Uruguay Round negotiations.

A. The Basic Comparison

Articles 2.1 and 2.2 amplify Article 1 of GATT Article VI in stating that (i) dumping occurs when the export price of a product is "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country," and that (ii) when home market sales are non-existent or do not permit a proper comparison because of their low volume or "the particular market situation", normal value may be based on exports to an appropriate third country[70] or the cost of production in the county of origin plus a reasonable amount for selling, general and administrative costs ("SG&A")[71] and for profits. A footnote indicates that home market sales will normally be considered sufficient where they are equal to at least five percent of the volume of exports to the investigating country and that a lower ratio may be acceptable where the sales are of "sufficient magnitude".

In *United States—Hot-Rolled Steel From Japan*, the Appellate Body reviewed the U.S. practice of automatically excluding from the determination of normal value all sales by the producer to affiliates at prices more than 0.5 percent below the average price to unaffiliated parties, on the ground that they were outside the "ordinary course of trade," without giving the producer an opportunity to show that the sales were in fact in the ordinary course of trade.[72] Affiliated party sales that were above the average price to unaffiliated parties, on the other hand, were included unless the exporter demonstrated that they were "aberrationally high", and the U.S. Department of Commerce had provided no guidelines as to what this term meant. The Appellate Body stated that while Members had discretion in selecting the proper methodology for determining when sales were in the ordinary course of trade, this discretion was limited and must be exercised "in an even-handed way that is fair to all parties affected by an anti-dumping investigation."[73] By systematically raising normal value and thereby raising dumping margins, the U.S. methodology was inconsistent with Article 2.1.[74]

In the same case the Appellate Body ruled that Article 2.1 does not preclude the use of "downstream" sales by affiliates of the producer in the determination of normal value where the sales to those affiliates are excluded as being outside the ordinary course of trade.[75]

[70] This differs from GATT Art. VI:1(b)(i), which refers to the "highest comparable price" for export to "any" third country.

[71] GATT Art. VI:1(b)(ii) refers only to selling costs.

[72] Report of the Appellate Body*, United States—Anti-Dumping Measures on Certain Hot-Rolled Steel from Japan,* WT/DS184/AB/R (2001) (*"United States—Hot-Rolled Steel from Japan AB"*).

[73] *Id.* ¶ 148.

[74] *Id.* ¶ 154.

[75] *Id.* ¶ 172.

B. Sales Below Cost

Article 2.2.1 specifies that sales in the home or third country markets below unit cost of production (fixed and variable) plus administrative, selling and general costs may under certain conditions be treated as not being in the ordinary course of trade and disregarded in determining normal value. This provision, which had not been included in the 1979 Anti-dumping Code,[76] reflects one of the most important developments in anti-dumping enforcement since passage of the original laws. In 1974, the U.S. Congress enacted an amendment to the U.S. anti-dumping law—reportedly in response to a powerful Senator's concern about a particular case[77]—that was designed to impose anti-dumping duties on imports that were sold below cost, even they were not sold below home market value. This had to be accomplished in a roundabout fashion, since simply to declare imports priced below cost as below normal value would have violated GATT Article VI:1, which only permits normal value to be based on constructed value (cost plus profit) where there are no or insufficient home market sales in the ordinary course of business. Congress achieved essentially the same result by declaring home market sales below cost to be outside the ordinary course of business and therefore not to be used in the calculation of normal value.[78]

Most countries that were actively enforcing anti-dumping laws followed suit quite quickly. The sales-below-cost concept revolutionized anti-dumping enforcement. Cost became the key factor in the majority of cases.[79] Exporting companies were more likely be found to be dumping since they were now effectively required to meet two benchmarks on their export sales, home market (or third country price) *and* cost of production. It is particularly difficult for capital-intensive industries, with high fixed costs, to sell at or above full cost during downturns in the business cycle. It is generally considered that in the short-term at least, it makes economic and business sense for a company to sell below full cost, so long as the selling price covers variable cost and contributes towards fixed costs.[80] It has also been observed that under most anti-monopoly laws, selling below full cost is not considered anti-competitive, and that only sales below marginal or variable cost are penalized.[81]

[76] However, in 1978, Australia, Canada, the EC, and the United States reached an understanding that it would be appropriate to disregard below-cost sales as outside the ordinary course of business. Finger, *supra* note 3, at 29.

[77] *Id.*

[78] That this approach amounts to treating below-cost exports as dumped can be illustrated by a simple example. Assume that cost of production is 100, and export price is 90. If the home market price is at or above 100, then the export sale is below normal value and dumped in the traditional sense. If home market sales are at prices below 100, they will be disregarded and normal value may be based on constructed value, i.e. cost of production plus profit (100 + profit), in which case the export sale will again be treated as dumped. Thus, even it the home market price is at or below 90, so that there is no dumping in the traditional sense, the export sale will still be treated as dumped.

[79] One hundred out of 141 anti-dumping findings by the U.S. Department of Commerce between 1995 and 1998 relied wholly or partially on cost analysis. Brink Lindsey, *The U.S. Antidumping Law—Rhetoric versus Reality,* 34(1) J. WORLD TRADE 1, 14 (2000).

[80] *See*, *e.g.*, Deardorff, *supra* note 13 at 30. Assume that a manufacturer has fixed costs of 1000 per month and produces 100 units per month at a variable cost of five per unit. Fully-allocated costs per unit are (1000/100 + 5) = 15. If the market price is 12 and the manufacturer continues to produce and sell, it will make a loss of three per unit, for a total loss of 300. If on the other hand it ceases production, it will lose its entire fixed costs of 1000. Clearly, then, it makes economic sense for the manufacturer to continue producing and selling so long as it can recover more than its variable costs.

[81] *See,* Deardorff, *supra* note 13 at 31; JACKSON, *supra* note 45 at 264–65; Alan Sykes, *Antidumping and Antitrust: What Problems Does Each Address?, in* BROOKINGS TRADE FORUM 1998 at 1, 14 (Robert Z.

It should be noted that disregarding sales below cost in determining home market or third country value is permissive, not mandatory, so that a country may choose to include below-cost sales in its calculation of normal value. In addition, Article 2.2 imposes a number of conditions that must be met before below-cost sales may be disregarded:

- They must be made *"within an extended period of time,"* which is defined in Note 4 to the Agreement as "normally one year but shall in no case be less than six months".
- They must be *"in substantial quantities."* This is defined as occurring where (i) at least twenty percent of the sales under consideration are below cost, or (ii) the weighted average selling price of the transactions under consideration is below the weighted average per unit cost. The latter provision appears to be designed for cases involving highly perishable products, where it is common for a high proportion of sales to be made below cost because of the impossibility of storing the product during periods of low prices.[82]
- Sales at prices which *recover all costs over a "reasonable period of time"* may not be disregarded.[83] Sales that are *below unit cost at the time of sale but above weighted average unit costs for the period of investigation* are to be considered to provide for recovery of costs within a reasonable period.

C. Cost Determinations

The authorities must determine production costs in two situations. *First*, where they are investigating whether sales in the home market or third countries are below production cost and therefore should be disregarded in the determination of normal value under Article 2.1 of the Agreement. *Second*, where they are basing normal value on constructed value in the absence of a viable home or third country market (either because there are no insufficient sales to such markets or because all such sales are below cost). Determining the cost of a particular item produced by a multi-product company can be quite subjective and many manufacturers do not attempt in the ordinary course of their business to cost

Lawrence ed., 1998). It has been suggested that the sales-below-cost provision was inconsistent with the national treatment requirement of GATT Article III, because it subjected imported goods to more rigorous pricing standards than competing domestic products. *See, e.g.,* Gary Horlick, *The United States Anti-dumping System*, *in* Jackson and Vermulst, *supra,* note 13 at 134; Ronald A. Cass and Stephen J. Narkin, *Antidumping and Countervailing Duty Law: The United States and GATT,* in Boltuck and Litan*, supra,* note 21 at 200, 212. Of course, now that the sales below cost provision is embodied in the Anti-Dumping Agreement, no such argument could be made, since General Interpretative Note to Annex 1A of the Uruguay Round Agreements provides that in the event of a conflict between GATT 1994 and one of the other Annex 1A agreements, the other agreement prevails.

[82] *See* the Statement of Administrative Action in MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS, H.R. Doc.NO. 316, 103rd Cong., 2ND Sess. (1994) at B.3. The U.S. Department of Commerce had developed a rule that sales below cost of highly perishable products would only be disregarded if they exceeded fifty percent of total sales. The rule in the Agreement is a modification of that approach.

[83] Nothing in the Agreement limits the "reasonable period of time". To be consistent with economic principles and normal business practices, the period of measurement should be the full business cycle. Jackson, *supra,* note 45 at 265. In the 1970s, when the U.S. Treasury Department was administering the U.S. anti-dumping law, it measured cost recovery over the full business cycle. J. Miranda, R. Torres, and M. Ruiz, *The International Use of Antidumping:1987–1997*, 32(5) J. WORLD TRADE 5, 62, n. 41 (1998). But the United States, and, so far as is known, other countries that apply the sales-below-cost provision now define "reasonable period of time" as the period of investigation.

each product.[84] The authorities must make judgments on how to allocate costs that benefit more than one product, such as research and development, depreciation of machinery used to produce more than one product, and overhead. Articles 2.2.1.1 and 2.2.2, which are both new to the ADA, are designed to limit the discretion of investigating authorities in this respect, since the cost area, more than any other in the anti-dumping field, lends itself to arbitrary decision-making. Article 2.2.1.1 specifies that costs are normally to be based on the producer's records provided that they are in accordance with generally accepted accounting principles of the exporting country and that they reasonably reflect the costs associated with the production and sale of the product. All available evidence must be considered with respect to the proper allocation of costs, including the method historically used by the exporter or producer, especially in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. In *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (2004), the Appellate Body reversed the Panel finding that Article 2.2.1.1 never requires investigating authorities to compare different allocation methodologies to assess their advantages and disadvantages, and said that they may have to make such comparisons depending on the circumstances of the case (¶¶ 135–139).

Article 2.2.1 also requires that non-recurring cost items, including start-up costs, that benefit future and/or present production be taken into account.[85] Note Six to the ADA specifies that the adjustment made for start-up operations is to reflect costs at the end of the start-up period, or, if that period extends beyond the period of investigation, the most recent costs that can reasonably be taken into account.

Article 2.2.2, which was proposed by the EC, was aimed at preventing the fairly arbitrary determination of selling, general and administrative expenses ("SG&A") and profit engaged in by some countries, in particular the United States where by statute SG&A were required to be a minimum of ten percent of direct costs, while profit was required to be at least eight percent of direct costs plus SG&A.[86] This of course created artificially high dumping margins wherever actual costs and profits were below these figures. Article 2.2.2 specifies that where possible SG&A and profit are to be based on actual data relating to production and sales in the ordinary course of business of the like product by the exporter or producer under investigation.[87] Where this is not possible, they can be based on any of the following:

- The producer's SG&A and profit on sales of the same general category of products in the domestic market[88]

[84] Some of the difficulties in determining production costs are described in JACKSON, *supra* note 45 at 264–65.

[85] The prior practice of countries such as the United States with respect to recognizing start-up costs had been quite uneven.

[86] The minimum profit requirement was clearly in violation of Article 2.4 of the 1979 Code, which specified that generally "the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin."

[87] By specifying that SG&A and profit be based on sales "in the ordinary course of business", Article 2.2.2 permits exclusion of below-cost sales in the calculation. It has been pointed out that this practice leads to systematic overstatement of profit in a way that would not be permitted by securities regulators. Horlick and Shea, *supra* note 66 at 18–20. In *European Communities—Anti-Dumping Duties on Malleable Cast-Iron Tube or Pipe Fittings From Brazil,* WT/DS219/AB/R (2003), the Appellate Body ruled that it was permissible to include low-volume sales in the calculation of SG&A and profit, even though Article 2.2 of the ADA explicitly authorizes exclusion of such sales in the determination of normal value.

[88] In *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland,* WT/DS122/R (2001) *("Thailand—Steel")*, a WTO panel held that it was

- The weighted average of the amounts incurred and realized by other exporters and producers subject to investigation with respect to the production and sale of the like product in the domestic market[89]
- Any other reasonable method, provided that the profit does not exceed that normally realized by other exporters and producers of the same general category in the domestic market

A WTO panel has ruled that the first two approaches, unlike the last, do not require a test of reasonableness.[90] The panel also ruled that there is no hierarchy among the three methods, and that the investigating authorities are free to choose between them.[91]

D. Constructed Export Price

Article 2.3 provides that where there is no export price, or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, export price may be constructed based on the price at which the imported product is first resold to an independent buyer, or, if not resold to an independent buyer or not resold in the condition in which imported, on any reasonable basis. This provision comes into play most frequently when the importer is related to the exporter through stock ownership.[92] Various adjustments are made, essentially to strip out any costs incurred in the importing country prior to resale, together with any associated profit, as specified by Article 2.4.

E. Fair Comparison

Article 2.4 specifies that the comparison between export price and normal value must be "fair." It also provides a number of detailed rules relating to the comparison:

- The comparison is to be made at the same *level of trade*, normally at the *ex-factory level*, and of sales made at *as nearly as possible the same time*. The ex-factory requirement means that all costs incurred in transporting the product from the factory to the point of sale (e.g. inland freight, ocean freight, insurance) must be deducted from both the export price and the prices used to determine normal value.
- Allowance is to be made for differences affecting price comparability, including differences in *conditions and terms of sale*, *taxation, levels of trade, quantities, physical characteristics*, and any other differences, which affect price

appropriate to use the narrowest category of products for which separate profit data were available. *Id.* at ¶ 7.117.

[89] The Appellate Body has held that the term "weighted average" implies more than one other producer, so that if there is only one besides the producer under investigation, this method cannot be used. *See* Report of the Appellate Body, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,* WT/DS141/AB/R (2001) ("*EC—Bed Linen AB*") ¶¶ 72–77. In the same case it held that sales outside the ordinary course of trade may not be excluded when using this method. *Id.* at ¶¶ 80–84.

[90] Report of the WTO Panel, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,* WT/DS141/R (2001) ("*EC—Bed Linen Panel")*, ¶ 6.97; *See also*, *Thailand—Steel, supra* note 88 at ¶ 7.128.

[91] *EC—Bed Linen Panel*, *supra* note 90 at ¶ 6.62. Neither of these last two issues was appealed.

[92] U.S. law specifies a wide range of relationships that will disqualify the price between exporter and importer and require use of a price constructed from the first unrelated sale. *See,* Tariff Act of 1930, as amended, Section 771(33), 19 U.S.C. § 1677(33).

comparability.[93] In *United States—Korean Stainless Steel,* a WTO panel held that an adjustment for bad debt incurred on sales to an unrelated importer could not be justified under this provision.

> [W]e fail to see how the fact that a customer who has purchased on credit subsequently went bankrupt and failed to pay for his purchases could be deemed 'a circumstance under which sales are made', at least in a case such as this one where the seller had no knowledge of the precarious financial situation of the purchaser.[94]

- Where export price is based on the first resale to an independent buyer, allowance should be made for *costs, including duties and taxes, incurred between importation and resale*, together with profit. The panel in *United States—Korean Stainless Steel* held that no adjustment could be made under this provision with respect to bad debt incurred by a related importer, since it is not a cost occurring between importation and resale.

> To deduct costs which not only were incurred after the date of resale but which were entirely unforeseen at that time would not result in a "reliable" export price in the sense of the price that would have been paid by the related exporter had the sale been made on a commercial basis.[95]

The same panel observed that the term "should" is not mandatory, so that authorities are not required to make adjustments under this provision.[96]

- Where price comparability is affected, normal value is to be established at a level of trade equivalent to the level of trade of the constructed export price, or an allowance is to be made for the difference.
- The authorities are to indicate to the parties what information is necessary to ensure a fair comparison, and are not to impose an unreasonable burden of proof in this respect.

F. Currency Conversion

Article 2.4.1 specifies that currency conversions are to be made using the rate of exchange on the date of sale, although when a forward sale of currency is directly linked to the export sale, that rate is to be used. Exchange rate fluctuations are to be ignored, and in an investigation (but not, apparently, in a review) exporters are to be allowed at least sixty days to adjust their export prices to reflect sustained movements in exchange rates during the period of investigations. The requirement that the exchange rate on the date of sale be used reflected concern that the previous U.S. practice of using quarterly exchange rates could create artificial dumping margins. In *United States—Korean Stainless Steel* the WTO panel held that where home market sales are denominated in the same

[93] A WTO panel has held that an investigating authority must make adjustments for all physical differences significantly affecting price comparability, not just the most important ones, even if making the adjustment for the others would be complex. Report of the WTO Panel (not appealed), *Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy,* WT/DS189/R (2001) (*"Argentina—Floor Tiles"*), ¶ 6.117.

[94] Report of the WTO Panel (not appealed), *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea,* WT/DS179/R (2001) *("United States—Korean Stainless Steel"),* ¶ 6.76

[95] *Id.* ¶ 6.100.

[96] *Id,* ¶ 6.93. The Panel reasoned that failure to make such adjustments would raise constructed export price and therefore lower the dumping margin.

currency as the export sales, it is inconsistent with this provision to perform a double currency conversion, from the export currency to the home market currency and back again.[97]

G. Price Averaging

Under Article 2.4.2, the comparison in the investigation phase must normally be on a weighted average to weighted average or transaction-to-transaction basis.[98] This provision was included because of concern over the practice of some countries—notably the United States and the EC—of comparing the price of each individual export sale with a normal value that was based on all home market or third country sales during the period of investigation.[99] It is easy to see how this practice could generate artificial dumping margins where prices fluctuated during the period of investigation, even though the export and home market prices were the same on any given date.[100] However, because of U.S. concern that use of average prices might mask dumping targeted at particular regions of the country or particular customers, Article 2.4.2 also provides that individual export prices may be compared with a weighted average normal value if there is "a pattern of export sales which differ significantly among different purchasers, regions or time periods," and the authorities explain why these differences cannot be taken into account using average-to-average or transaction-to-transaction comparisons.

In *EC—Bed Linen,*[101] the Appellate Body struck down the EC's practice of "zeroing" negative dumping margins calculated on a model-by-model basis. The EC had calculated a separate margin for each "model" or "type" within the broad 'product category under investigation. It had then calculated a weighted average of the individual margins, but ascribed zero to those models that had negative margins (i.e., the export price was higher than normal value). The Appellate Body concluded that this practice was improper. It reasoned that Article 2.1 of the ADA declared that a "product" was deemed dumped when its export price was lower than the home market price. Having defined the product as "bed linen" for purposes of the investigation, the authority could not then determine separate margins for subcategories of that product.[102]

The panel in *United States—Korean Stainless Steel* ruled that the use of multiple averaging periods based simply on the fact that the normal value (expressed in the export currency) had changed significantly in relation to the export value because of a devaluation was inconsistent with this provision. Only a change in prices *and* differences

[97] *Id.* ¶ 6.41.

[98] One panel has held that weighted average normal value must be based on all domestic transactions, and not on a statistical sample. Report of the Panel (not appealed), *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil,* WT/DS241/R (2003) ("*Argentina—Poultry*").

[99] During the Uruguay Round negotiations two GATT panels had concluded that this methodology was not *per se* inconsistent with the requirement in Article 2.6 of the Anti-dumping Code that the comparison between normal and export value be "fair", but that fairness would have to be judged in the light of the facts of each case. *United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway*, *supra* note 55, at ¶ 481; *EC—Audio Cassette Tapes*, *supra* note 56 at ¶ 355.

[100] *See* note 60 *supra.*

[101] *Supra,* note 89.

[102] A GATT panel had ruled that zeroing was not necessarily a violation of the general obligation under Articles 2.1 and 2.6 of the 1979 Anti-dumping Code to make a "fair" comparison. *EC—Audio Cassette Tapes*, *supra* note 56 ¶ 358. In *United States—Final Dumping Determination on Softwood Lumber From Canada,* WT/DS264/AB/R (2004), the Appellate Body upheld the panel's finding that the "zeroing" methodology used by the United States in that case was impermissible.

in the relative weights by volume during the POI of sales in the home market as compared with the export market would justify use of multiple averaging periods.[103]

By its terms, the averaging rule applies only to the "investigation phase," and not to duty assessment.[104]

H. Transshipment

Article 2.5 provides that where goods are imported not directly from the country of origin but from a third country, the export price from the third country is normally to be compared with the comparable price in that country, though the price comparison may be made with the price in the country of origin if the goods are merely transshipped through the third country, such products are not produced in the third country, or there is no comparable price for them in the country of export.

I. Like Product

Article 2.6 defines "like product" as "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." The like product definition is relevant to the definition of the domestic industry for standing and injury purposes (ADA Articles 3 and 4), as well as to identification of the home market or third country sales to be used as the basis for normal value.

J. Non-Market Economies

By reference to a supplementary provision to Article VI of the GATT 1994, Article 2.7 authorizes members to deviate from the Article 2 rules in investigations involving imports from" a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State".[105] Since prices and costs in such countries are not based on market forces, the practice has developed of using "surrogate" prices and costs from market economy countries. The United States, for example, determines the quantity of each factor of production (e.g., hours of labor and quantity of materials and energy) that go into production of the exported article, and then values those factors based on prices in a market economy at a similar level of economic development.[106]

ARTICLE 3—DETERMINATION OF MATERIAL INJURY

This Article, together with the corresponding Article in the Agreement on Subsidies and Countervailing Measures ("ASCM"), is discussed in Chapter 17 of this book.

ARTICLE 4—DEFINITION OF DOMESTIC INDUSTRY

The definition of the term "domestic industry" is relevant both to the question of standing, since an application to initiate an investigation must be filed on behalf of a domestic

[103] *United States—Korean Stainless Steel*, *supra* note 94 ¶ 6.123.

[104] The United States, for example, normally uses the average-to-average method in investigations but the average-to-transaction method in investigations. 19 C.F.R. 351.414(c)(1) and (2).

[105] GATT Ad Article VI, Paragraph 1.2.

[106] *See* Section 773(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(c).

industry (see commentary on Article 5, below) and to the issue of injury, as discussed in Chapter 17 of this book. Article 4.1 defines the term as "the domestic producers as a whole of the like products or . . . those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." There are two exceptions. *First*, producers that are related to the exporters or importers or producers that import themselves may be excluded from the domestic industry.[107] *Second*, the producers in a regional market may be treated as a separate industry where (a) they sell "all or almost all" of their production in that market; (b) demand in the market is not supplied to any substantial degree from domestic producers outside the market; and (c) dumped imports are concentrated in that market. In such a situation, an injury determination may be made if the dumped imports are causing injury to the producers of "all or almost all" the production in the regional market, without regard to conditions in the rest of the country.[108] This issue is discussed in more detail in Chapter 17 of this book.

A regional industry finding raises the question of whether anti-dumping duties may be levied on imports from the country in question that do not enter the regional market. Article 4.2 specifies that normally duties may be imposed only on imports destined for the region, but recognizes that some Members may face constitutional difficulties in limiting the application of anti-dumping measures in this way. In such a case, duties may be levied on all imports into the country if (a) the exporters have been given an opportunity to cease exporting at dumped prices to the region or otherwise to give assurances under Article 8 (see below) and such assurances have not been promptly given, and (b) duties cannot be levied on a regional basis.

ARTICLE 5—INITIATION AND SUBSEQUENT INVESTIGATION

Article 5 lays out stringent conditions relating to the initiation of an investigation. It specifies the degree of support for an application that is required before an investigation may be initiated (except where the national authority self-initiates under Article 5.6). It sets out the evidence that must be included in an application, and it defines the level of evidence that an authority must have before initiating an investigation (a separate issue). Finally, it sets time limits for an investigation.

A. Support for Application

Normally, initiation can only take place upon application filed by or on behalf of the affected domestic industry,[109] which as explained above is defined by Article 4.1 of the Agreement as "the domestic producers as a whole of the like products" or those "whose collective output of the products constitutes a major proportion of those products. . . ." This language, which originated in the Kennedy Round Agreement, gave rise to several

[107] Footnote 11 to the ADA defines the term "related" quite broadly. Producers are deemed to be related to exporters or importers if (a) one directly or indirectly controls the other; (b) both are directly or indirectly controlled by a third person; or (c) they together directly or indirectly control a third person, provided that the relationship causes the producer to behave differently from other producers. Control is deemed to exist where one party is legally or operationally in a position to exercise restraint or direction over the other.

[108] As noted earlier, a GATT panel held that producers of all or almost all the production in the regional market must support an application for a regional investigation. *United States—Mexican Cement, supra* note 53.

[109] *See* ADA, Art. 5.1. Article 5.6 does permit authorities to initiate an investigation without an application in special circumstances, provided that they have sufficient evidence of dumping, injury, and a causal link between them, to justify initiation. Self-initiation of anti-dumping investigations is rare.

GATT challenges to the U.S. practice of assuming that a petition was filed on behalf of a domestic industry unless one or members of the industry affirmatively objected.[110] The ADA therefore requires the authorities to examine whether the petition has sufficient support from the industry and mandates that the petition be supported by domestic producers that account for (a) at least 25 percent of total domestic production, and (b) more than fifty percent of production by producers who either support or oppose the application.[111] The purpose of the second part of the test is to ensure that an application cannot be accepted where there is more opposition to than support for the petition, even if the 25 percent minimum is met.[112] It recognizes that in some situations certain domestic producers may prefer to remain neutral with regard to an application.

The Appellate Body reversed a ruling by a WTO panel that the so-called Byrd Amendment to the U.S. anti-dumping law, which requires anti-dumping and countervailing duties to be paid to the petitioning companies, was inconsistent with Article 5.4 since it created a financial incentive for domestic producers to initiate and support petitions. The Appellate Body held that Article 5.4 simply required a formal assessment of the support for a petition, without an examination of the motives for the support. In particular, it rejected the Panel's conclusion that in enacting the Byrd Amendment the United States had not "acted in good faith."[113]

B. Evidence Required for Initiation

Article 5.2 specifies that the application must include evidence of dumping, injury and a causal link between them, and that it must contain more than "[a] simple assertion, unsubstantiated by relevant evidence." It provides that the following information must be included in the petition to the extent that it is reasonably available to the applicant:

- Identity of the applicant, volume and value of its production of the like product. Where the application is on behalf of a domestic industry, the application must list all known producers (or associations) and to the extent possible the volume and value of domestic production of the like product that each accounts for.

[110] In *United States—Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products From Sweden, supra* note 51, a GATT panel noted that absence of opposition "could result from ignorance, indifference, disapproval but failure to express it, or tacit approval," and held that failure of the U.S. Department of Commerce to satisfy itself that the petition did have adequate support was inconsistent with the requirements of the 1979 Anti-dumping Code. *Id.* at ¶ 5.17. The panel report was blocked by the United States, as was the panel report in *United States—Mexican Cement, supra* note 52, which reached a similar conclusion. In *United States—Salmon From Norway, supra* note 55, on the other hand, a GATT Panel held that the Department had been justified in relying on statements in the petition certifying that the firms supporting the petition represented a substantial majority of production. *Id.* at ¶ 362–63.

[111] ADA, Art. 5.4. Under U.S. law the 50 percent and 25 percent tests apply to workers as well as to producers, so that unions could file a petition alone. *See* § 732(b)(4)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1773a(b)(4)(A). Although this seems inconsistent with ADA Article 5.4, which speaks only of "producers", Footnote 14 to the Agreement acknowledges the U.S. practice: "Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation . . . ."

[112] The U.S. Revenue Act of 1916 was found to be inconsistent with this provision as well as numerous other provisions of the ADA because it permitted a single company to file suit, without the specified minimum representation of a U.S industry. *United States—1916 Act*, *supra* note 69, ¶¶ 134–135.

[113] Report of the Appellate Body, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WD/DS217/AB/R,WT/DS234/AB/R (2003) ("*U.S.—Byrd Amendment*") ¶ 291. However, as discussed below, the Appellate Body upheld the Panel's findings that the Byrd Amendment violated Article 18.1 of the ADA and Article 32.1 of the SCM Agreement.

- Complete description of the allegedly dumped product, the country or countries of origin, and the names of the producers, exporters and importers.
- Home market prices (or, where appropriate, third country prices or constructed value) and export prices.
- Volume of allegedly dumped imports, the effect of the imports on prices of the like product, and consequent effects on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the domestic industry, such as those listed in Articles 3.2 and 3.4.

In *Mexico-HCFS,* the Panel held that an application is not required to include information with respect to *all* of the factors and indices listed in Articles 3.2 and 3.4, but merely enough to be illustrative of the state of the industry.[114] Raw numerical data without analysis has been held by a WTO panel to constitute "relevant evidence" under this provision.[115]

Article 5.3 requires the investigating authority to satisfy itself that there is sufficient evidence to justify initiation, based on an examination of the adequacy and accuracy of the evidence in the application. WTO panels have held that national authorities have a good deal of discretion in this regard. In *EC—Bed Linen*, the panel stated that Article 5.3 "says nothing regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out."[116] In *Guatemala—Cement II* the panel held that the investigating authority is not limited to the information in the petition in making this determination, but may gather data from other sources.[117] In *Mexico-HFCS*, the panel stated that the quantity and quality of evidence required at this stage is less than that required for a preliminary or final determination of dumping or injury, and the authority does not have to resolve all underlying issues of fact.[118]

Despite this latitude, an initiation will be held invalid if it rests on inadequate evidence. In *Guatemala-Cement II,* the only evidence relating to normal value consisted of two invoices for single bags of cement, and it was clear that these sales were at a different level of trade from the sales on which the export value allegations were based, each of which was for several thousand bags. In the view of the panel, this "should have triggered at a minimum some reflection on the part of the investigating authorities as to the possible non-comparability of the sales in question".[119] On the injury side, there was no evidence that imports had increased relative to domestic consumption and no evidence concerning the effect of the relevant imports on cement prices in the domestic market.[120] The panel held that the initiation had failed to meet the Article 5.3 standard.[121]

C. Publicizing of Petition

Article 5.5 provides that the filing of the application may not be publicized until a decision to initiate has been made. The purpose of this requirement is presumably to avoid the

[114] Report of the WTO Panel (not appealed), *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States,* WT/DS132/R (2000) (*"Mexico—HFCS"*), ¶ 7.73.
[115] *Thailand—Steel, supra* note 88 ¶ 7.77.
[116] *EC—Bed Linen Panel, supra* note 90 ¶ 6.198.
[117] Report of the WTO Panel (not appealed), *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico,* WT/DS156/R (2000) *("Guatemala—Cement II"),* ¶ 8.62.
[118] *Mexico—HFCS*, *supra* note 114 ¶¶ 7.94, 7.110.
[119] *Guatamala-Cement II*, supra note 117 ¶ 8.29.
[120] *Id.* ¶¶ 8.49, 8.50.
[121] *See also, Argentina—Poultry, supra* note 98, ¶¶ 7.73, 7.81, and 7.85.

industry uncertainty and disruption that would be likely to occur if word got out that an application for an investigation had been filed. However, the government of the exporting country is to be notified after receipt of a properly documented application and before initiation.[122]

D. Time Limits for Investigation and Immediate Termination

Article 5.10 of the ADA provides that investigations are normally to be concluded within one year and that in no circumstances may they take more than eighteen months.[123] In addition, under Article 5.8 an application must be rejected and an investigation terminated promptly as soon as the authorities are satisfied that there is insufficient evidence of dumping or injury to justify proceeding with the case.[124] An investigation is also to be terminated immediately if the authority determines that the margin of dumping is *de minimis* or the volume of imports is negligible. A margin is deemed to be *de minimis* if it is less than two percent *ad valorem*, and imports from a particular country are to be considered negligible if they account for less than three percent of total imports, unless countries individually accounting for less than three percent account collectively for more than seven percent.[125] A WTO panel has held that since Article 5.10 speaks of "investigations," the *de minimis* provision does not apply in duty assessment proceedings.[126] And the Appellate Body, reversing a panel decision, held that under a similar provision in the ASCM the *de minimis* standard set out in the Agreement does not apply to sunset reviews. (See commentary on Article 11 below.)[127]

ARTICLE 6—EVIDENCE

Article 6 establishes rules designed to ensure that all parties to an investigation have an adequate opportunity to present evidence, to see all of the information (other than confidential information) relevant to the case, and generally to defend their interests. It

[122] The failure of the U.S. 1916 Anti-Dumping Act to require such notification was one of the many grounds on which it was found to be inconsistent with the ADA. *United States—1916 Act* (Panel), *supra* note 69, ¶ 6.216. A WTO panel held that Guatemala's failure to notify Mexico of the formal initiation of an anti-dumping investigation violated Article 5.5. even though no action was taken in the investigation until after Mexico had been notified, some months later. Report of the WTO Panel, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico,* WT/DS60/R (1998) *("Guatemala—Cement I"), reversed on procedural grounds,* WT/DS60/AB/R (1998).

[123] As explained above (Part IID), the 1979 Anti-dumping Code introduced the notion of a time limit for anti-dumping investigations, providing that they are "generally" to be concluded within one year, thus leaving room for longer investigations in exceptional circumstances.

[124] In *Argentina—Poultry, supra* note 98, the panel held that Article 5.8 had been violated when the investigating authority failed to terminate the investigation immediately upon receiving a negative injury assessment from the separate body in charge of injury investigations, but instead held the file open and later decided to initiate the investigation based on the submission of supplemental information by the applicant. *Id.* at ¶ 7.107.

[125] *Id.* It is interesting to note that unlike the ASCM, the *de minimis* level is the same for developed and developing countries. *See* ASCM Arts. 11.9 and 27.10. Also, the "negligible" imports provision in the ASCM only applies to developing countries, whereas the ADA provision applies to all countries. *Id.*

[126] Report of the WTO Panel (not appealed), *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea,* WT/DS99/R (1999) *("United States—DRAMS"),* ¶ 6.89.

[127] Report of the Appellate Body, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R (2002) *("United States—German Steel"),* ¶ 92.

also sets limits on the use by investigating authorities of "facts available" when parties fail to provide relevant information.

A. Submission of Evidence and Time Limits

Article 6.1.2 provides that once an investigation has been initiated, the application must be made available to the known exporters, to the authorities of the exporting member, and to other parties on request. All interested parties[128] in an investigation must be given notice of the information required by the authorities, as well as ample opportunity to present in writing all evidence that they believe relevant.[129] According to the Panel in *Argentina—Floor Tiles,* this requirement means that a party cannot be faulted for not providing information it was not clearly asked to submit.[130]

Under Article 6.1.1, exporters and foreign producers are to be given at least thirty days to reply to questionnaires, and extensions are to be given for good cause wherever practicable.[131] As discussed below (subpart D), the Appellate Body has ruled that while the investigating authority may impose time limits for the submission of evidence (which must be extended in appropriate circumstances), failure to comply with these limits does not by itself entitle an authority to reject evidence submitted and instead use facts available.[132]

Article 6.1.2 requires that evidence submitted by one party be made available promptly to other parties, subject to the need for confidentiality.[133] In addition, Article 6.2 provides that all interested parties are to have a full opportunity to defend their interests. They are to be given the opportunity to meet those parties with adverse interests so that opposing views and rebuttal arguments can be presented.

Article 6.1.3 requires the authorities, once an investigation has been initiated, to provide the full text of the application to the known exporters and to the authorities of the exporting Member. According to one panel, this requires the authorities to actively provide the information to the designated parties, and not merely to make it available.[134]

[128] The term "interested parties" is defined as including:

- An exporter, foreign producer, or imporder of the product under investigation or a trade or business association a majority of whose members are exporters, foreign producers, or members;
- The government of the exporting Member;
- A producer of the like product in the importing Member or a trade or business association a majority of whose members produce the like product in the territory of the importing Member.

ADA, Art. 6.11.

[129] The failure to set time limits for the submission of arguments and evidence during the final stage of the investigation is not in and of itself a violation of this requirement. *Guatemala—Cement II, supra* note 117, ¶ 8.119.

[130] *Argentina—Floor Tiles*, *supra* note 93, ¶ 6.54.

[131] The time limit is to be counted from the date of receipt of the questionnaire, which is deemed to have been received one week after it was sent to the respondent or transmitted to a diplomatic representative of the exporting Member. ADA, Note 15. The thirty-day requirement has been held to apply only to the original questionnaire, and not to supplemental requests for information. Report of the WTO Panel (not appealed), *Egypt—Definitive Anti-Dumping Measures on Steel Rebars From Turkey,* WT/DS211/R (2002) ("*Egypt-Rebar*"), ¶¶ 7.278–279.

[132] *United States—Hot-Rolled Steel from Japan AB*, *supra* note 72, ¶¶ 73–75.

[133] If each party is required to serve its submissions on the other parties, or the investigating authority undertakes such service itself, there may be no need to provide access to the official files. But where service does not take place, regular and routine access to the files may be necessary to comply with this provision. *Guatemala—Cement II, supra* note 117, ¶¶ 8.133–135.

[134] *Argentina—Poultry, supra* note 98, ¶ 7.172.

B. Confidential Information

Much of the information used in anti-dumping investigations, such as price and cost data, names of customers, and profitability, is regarded by the parties providing it as highly confidential. They may be reluctant to submit such information to the authorities unless they have some assurance that it will not fall into the hands of their competitors. Article 6.5 of the ADA tries to draw a balance between the need to protect confidential information and the need to give other parties the right to comment on that information. It provides that information which by its nature is confidential is to be treated as confidential and not disclosed without specific permission of the party submitting it.[135] However, to give other parties some opportunity to comment, the supplier must be required to supply a non-confidential summary, "in sufficient detail to permit a reasonable understanding of the substance" of the confidential information, unless it is not susceptible of summary in which case reasons why it cannot be summarized must be supplied.[136] A WTO panel has held that an authority is not justified in rejecting a response simply because the information in the non-confidential summary is not sufficient to allow calculation of normal value, export price, and the margin of dumping.[137] If the authorities find that a request for confidentiality is not justified, and the submitter is unwilling to make the information public or authorize its disclosure in generalized or summary form, they may disregard it unless they are satisfied from appropriate sources that it is correct.

C. Verification

Article 6.6 requires the authorities to satisfy themselves as to the accuracy of the information supplied by interested parties upon which the findings are based (except where a determination is made on the basis of "facts available"). This is often accomplished through on-site verification, an audit-type process carried out at the producer's premises designed to determine whether the information supplied to the Department matches the regular books and records of the company. Article 6.7 permits (but does not require) authorities to carry out on-site investigations, provided that the firms involved agree and the country of export does not object. A panel has held that since on-site, or "on-the-spot" verifications are not required, verifications may be carried out by "mail-order."[138]

Annex 1 to the ADA sets out detailed procedures to be followed in on-site, or "on-the-spot" investigations. These include the following:

- The firms involved must be given sufficient advance notice, and they should be advised in advance of the general nature of the information to be verified and of any further information to be provided, although additional details may be requested on the spot.
- The firms involved and the exporting Member's authorities are to be informed if the investigating team includes any non-government experts, who must be subject to effective sanctions for breach of confidentiality requirements.[139]

[135] Some countries, notably the United States, allow representatives of the parties access to confidential information submitted by other parties, subject to strict conditions designed to preserve its confidentiality. *See, e.g.,* Section 777(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f(c). However, this is not required by the ADA.

[136] The U.S. Department of Commerce requires non-confidential summaries of numerical data to include the numbers ranged to within ten percent of the actual numbers. *See* 19 C.F.R. § 351.304(c).

[137] *Argentina—Floor Tiles*, *supra* note 93, ¶ 6.38–39.

[138] *Egypt—Rebar, supra* note 131, ¶¶ 7.322–328.

[139] The Panel in *Guatemala—Cement II* held that nothing in the ADA prohibits inclusion of non-governmental experts with a conflict of interest in the verification team. *Guatemala—Cement II*, *supra*

D. Facts Available

Investigating authorities of course have no legal power to compel foreign producers and exporters to provide information. Their only sanction against foreign parties that fail to provide relevant information is to base their decision on whatever other information is available to them, which may be unfavorable to the foreign party if the failure was deliberate. Article 6.8 provides that where an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation," preliminary and final determinations may be made based on "the facts available." The 1979 Anti-dumping Code contained identical language, but concern was expressed in the Uruguay Round negotiations that some countries had been applying "facts available" in too cavalier a fashion. Annex II to the ADA therefore spells out rules for the use of facts available in considerable detail. The most important rules are the following:

- Parties must be warned that if they do not provide information requested within a reasonable time, the authorities may make determinations based on the facts available, including those in the application for the investigation.
- The authorities may not request the party to use a computer system other than that used by the party. They may not request a computerized response if the party does not maintain computerized accounts and if computerization of the response would impose an unreasonable extra burden.
- All verifiable information that is appropriately submitted so that it can be used in the investigation "without undue difficulties" is to be taken into account in making determinations. Even though the information "may not be ideal in all respects," this does not justify the authorities from disregarding it, "provided the interested party has acted to the best of its ability."
- If information is not accepted, the supplying party must be provided with the reasons and given an opportunity to provide further explanations within a reasonable period.[140]
- If the authorities have to base their findings on secondary source information, including information in the application for the investigation, they must do so "with special circumspection." Where practicable they should check the information against other independent sources, such as published price lists, official import statistics, and customs returns, as well as information supplied by other parties during the investigation. However, if a party does not cooperate, "this situation could lead to a result which is less favorable to the party than if the party did cooperate."[141]

The Appellate Body has held that use of the term "reasonable period" in Article 6.8 means that an authority may not reject information and apply facts available solely on the ground that it was submitted after the deadline for questionnaire responses.[142] Instead, the authority must consider such factors as: the nature and quantity of information submitted;

note 117, ¶ 8.189. However, the Panel also held that the responding company was justified in objecting to verification under these circumstances, and that Guatemala's application of "facts available" in this situation was unreasonable. *Id.* ¶ 8.250.

[140] In *Argentina—Floor Tiles, supra* note 93, ¶ 6.50, a WTO panel held that the Argentinean authority had failed to comply with this provision.

[141] In this situation, the authorities are said to apply "adverse" facts available.

[142] As noted above, under Article 6.1.1 investigating authorities must provide respondents at least thirty days to reply to the original questionnaire.

the difficulties encountered by the exporter in obtaining the information; the verifiability of the information and the ease with which it can be used by the authority; whether other parties would be prejudiced if the information is used; whether acceptance of the information would compromise the authority's ability to conduct the investigation in a timely fashion; and the amount of time by which the exporter missed the deadline.[143] In that case, the Appellate Body upheld the Panel's finding that the rejection by the U.S. Department of Commerce of weight-conversion factors submitted by two producers after the deadline for questionnaire responses but before verification, and its consequent use of facts available, was inconsistent with Article 6.8.

In the same case the Panel and the Appellate Body considered the application by the Department of Commerce of adverse facts available to a third producer. The producer had made a number of sales to a fifty percent-owned U.S. affiliate, and had several times requested the affiliate to supply information on its resales of the product to enable an export price to be constructed. The affiliate, which was a member of the petitioning group, refused. The Appellate Body noted that although the producer had reported its difficulties to the Department, the Department had provided no guidance or assistance to the producer, and did not ask the affiliate directly for the information. It had even refused to allow the producer to attend a meeting with petitioners' counsel to discuss the issue. The Panel found, and the Appellate Body agreed, that there was no basis for the Department's finding that the producer had failed to cooperate, and no basis, therefore, for applying adverse facts available.[144]

A WTO panel rejected the argument of the United States that under Article 6.8 an authority may base its entire determination on facts available if *any* necessary information is not provided.[145] Instead, it must use all verifiable information (in this case U.S. price information) unless the problems with the other information (in this case home market sales data and cost information) undermine the usability of the valid information.

E. Informing Parties of Essential Facts

Article 6.9 provides that before a final determination is made, the authorities are to inform all interested parties of the essential facts that form the basis for the decision in sufficient time for them to defend their interests.[146] The Panel in *Argentina—Floor Tiles* held that merely referring the exporters to the complete file on the investigation did not comply with this requirement, since the exporters could not have been aware of essential facts that led to the determination and therefore could not defend their interests.[147]

F. Individual Margins

Under Article 6.10, individual margins are as a rule to be calculated for each known exporter or producer, except where this is impracticable because of the large number of exporters, producers, importers or types of products. In this case, the authorities may

[143] *United States—Hot-Rolled Steel from Japan*, *supra* note 72, ¶ 85–89.
[144] *Id.,* ¶¶ 99–110. *See Egypt—Rebar, supra* note 131, for an extremely detailed discussion of the use of facts available.
[145] Report of the WTO Panel (not appealed), *United States—Anti-Dumping and Countervailing Duty Measures on Steel Plate from India,* GT/DS206 (2002) *("United States—Steel Plate from India"),* ¶¶ 7.57–59.
[146] *See Guatemala-Cement II*, in which the Panel ruled that disclosure of the essential facts that were the basis for the preliminary determination of *threat* of material injury was inadequate for disclosure of the final determination, which was based on *actual* material injury. *Guatemala—Cement II*, *supra* note 117 ¶ 8.228.
[147] *Argentina—Floor Tiles*, *supra* note 93, ¶¶ 6.125–129.

limit the investigation to a reasonable number of interested parties or products by using statistically valid samples, or they may investigate the largest percentage of the volume of exports that can reasonably be investigated. Even in this situation, an individual margin must normally be calculated for each exporter or producer that is investigated.[148] The fact that an exporter did not supply all of the information needed to calculate the dumping margin has been held not to relieve the investigating authority of this obligation, since they are allowed to complete the analysis using facts available.[149]

Where the investigation is limited:

- The selection of exporters, producers, importers or types of products is if possible to be made in consultation with and the consent of the exporters, producers or importers concerned.
- Wherever practicable, an individual margin of dumping is to be determined for any exporter or producer not initially selected who submits the necessary information in time for it to be considered.

G. Consumers and Industrial Users

In some cases the harm caused by the imposition of anti-dumping duties to purchasers of the imported product, as a result of increased prices and/or reduced availability, may outweigh the benefit to the petitioning industry. The anti-dumping laws of some jurisdictions—for example the EC—include a public interest test, which allows them to decline to apply anti-dumping duties where they find that this would be against the public interest. A number of countries, including Hong Kong, Singapore, and Korea, proposed during the Uruguay Round negotiations that the ADA require such a test, but this was opposed by the United States[150] The U.S. Congress believes strongly in the "automaticity" of the anti-dumping and countervailing duty laws, and would not allow their enforcement to be subject to Executive Branch discretion. To acknowledge the concern, however, Article 6.12 of the ADA provides that the authorities are to provide opportunities to industrial users and consumer organizations to provide information relating to dumping, injury and causation. It should be noted that industrial users and consumer organizations are not included in the definition of "interested parties," and therefore do not have the right to full participation in investigations.[151]

H. Small Companies

Article 6.13 directs the authorities to take account of any difficulties experienced by interested parties, especially small companies, in supplying information requested, and to provide any assistance practicable.

ARTICLE 7—PROVISIONAL MEASURES

As discussed below, Article 10 of the ADA provides the domestic industry with a measure of protection while the investigation is in progress by permitting the retroactive

[148] *Id*., ¶ 6.90.
[149] *Argentina—Poultry, supra* note 98, ¶ 7.216.
[150] *See* Kofi Oreng Kefeor, *The Developing Countries and the Shaping of GATT/WTO Antidumping Law*, 32(6) J. WORLD TRADE 167, 178–179 (1998).
[151] *See* ADA, Art. 6.2.

assessment of anti-dumping duties on imports made after a certain point during the investigation, in the event that a final anti-dumping measure is subsequently imposed. The assumption is that since they are at risk, importers may be a little more circumspect in their selling practices even before the investigation is concluded. Article 7 provides for the application of provisional measures to ensure payment of any retroactively imposed anti-dumping duties that are ultimately imposed. Provisional measures generally take the form of withholding of final duty appraisement and the payment of estimated duties in the form of bonds or cash deposits.

Article 7.1 provides that provisional measures may only be applied if (i) an investigation has been initiated, public notice given of the investigation, and interested parties given adequate opportunity to submit information and make comments; (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and (iii) the authorities judge that such measures are necessary to prevent injury during the investigation. Under Article 7.3 provisional measures may not be applied sooner than sixty days after the date of initiation, and Article 7.4 provides that they must be limited to as short a period as possible, not to exceed four months, or, upon request by exporters representing a significant portion of the trade involved, six months.[152]

ARTICLE 8—PRICE UNDERTAKINGS

This Article, which had its origins in the Kennedy Round IAA, specifies that an investigation may be suspended or terminated based on undertakings from the exporters to revise their prices or to cease exports to the area in question at dumped prices so as to eliminate the injurious effect of the dumping. The advantage of a price undertaking from the exporters' point of view is that the importers do not have to pay anti-dumping duties. Nevertheless, the domestic industry will receive the same relief—higher prices—as it would have if anti-dumping duties had been imposed.

Article 8.2 provides that price undertakings may not be sought or accepted unless there have been preliminary findings of dumping and injury. The 1979 Code merely required that an investigation have been initiated before undertakings are accepted, and there was concern that authorities were coercing exporters to provide undertakings at too early a stage in the investigation, before there was any evidence of dumping or injury other than that in the petition.

Price undertakings are optional on both sides. Under Article 8.3 the authorities need not accept undertakings where this would be impracticable, if for example the number of exporters is too great, although where possible they must provide reasons for rejecting an undertaking. Similarly, Article 8.5 provides that exporters may not be forced to accept an undertaking. The fact that an exporter does not offer or accept a price undertaking is not to prejudice the outcome of the case, though the authorities may determine that threat of injury is more likely to occur if the dumped imports continue.

Article 8.4 provides that if an undertaking is accepted, the investigation is to be completed at the exporter's request or if the authorities so decide. In this situation the undertaking is to lapse if there is a negative determination of dumping or injury (unless the negative determination is due in large part to the undertaking); otherwise it is to continue.

[152] Some national laws allow the exporting interests to request an extension of time between the preliminary and final dumping determinations on condition that they also request extension of the period for provisional measures. The periods are extended to six and nine months respectively where the authorities examine whether a duty lower than the dumping margin would be sufficient to remove injury. ADA, Art. 7.4.

Article 8.6 authorizes the authorities, once an undertaking has been accepted, to require the exporters to provide relevant information and to submit to verification, to ensure that the undertaking is being fulfilled. When an undertaking is violated, the authorities may impose provisional measures, based on the best information available, immediately. They may also levy definitive anti-dumping duties on imports entering within the previous ninety days, but only after the violation has occurred.

ARTICLE 9—IMPOSITION AND COLLECTION OF ANTI-DUMPING DUTIES

As explained above, the actual collection of anti-dumping duties may be carried out on a prospective or retrospective basis. In a prospective system, exemplified by the EC, the duty rate is established at the time the anti-dumping measure is imposed, and the duties collected on the imports are viewed as final duties, although the importer can apply for a refund by showing that the rate was too high.[153] In a retroactive system, such as that of the United States, estimated duties in the form of cash deposits are levied at the time the imports enter, and the authorities subsequently conduct a review to determine the rate of duty to be assessed based on the price of the imports and the current normal value. The advantage of a prospective system is that importers know what their duty liability is at the time of importation, whereas with a retroactive system they may have to wait for as much as two years (or more if the determination is appealed) before knowing their ultimate liability. On the other hand, under a retroactive system duties are assessed on the basis of contempotaneous prices and costs, so that an exporter can avoid anti-dumping duties by raising its prices, whereas in a prospective system it does not have that opportunity.

Article 9.1 of the Agreement encourages, but does not require, Members to impose duties less than the dumping margin "if such lesser duty would be adequate to remove the injury to the domestic industry." If, for example, the dumping margin was fifteen percent, but imports were only underselling their domestic counterparts by ten percent, under the "lesser duty" approach a duty of ten percent would be applied.[154] The EC and Australia apply the lesser duty rule; the United States and Canada do not.[155]

Under Article 9.2, anti-dumping duties are to be assessed on a non-discriminatory basis on imports from all sources found to be dumped and causing injury. Thus, the authorities may not choose to assess duties on imports from one country subject to an anti-dumping measure but not on imports from another.

Article 9.3 establishes time limits for the assessment of anti-dumping. In a retroactive system, final liability for anti-dumping duties must normally be assessed within twelve months of a request for a final assessment and in no case more than eighteen months. Any refund of the difference between the cash deposit and the finally assessed duty must normally be made within ninety days of the assessment. In a prospective system, refunds

[153] For a variety of reasons, refund applications in the EC are rare. *See,* Jean-Francois Bellis, *The EEC Anti-Dumping System,* in Jackson and Vermulst, *supra* n. 13, at 433. In the past refund proceedings took up to three years to complete, Krishna, *supra* note 11, at 27, n.115, although under Article 9.3 of the ADA they are supposed to take a maximum of eighteen months.

[154] In the EC system, if actual prices are depressed by the dumped imports the authorities establish a "target" price based on cost of production plus a reasonable profit, and use this to compute the margin. Krishna, *supra* note 11, at 56–57.

[155] Edwin A. Vermulst, *The Anti-dumping Systems of Australia, Canada, the EEC and the USA: Have Anti-dumping Laws Become a Problem in International Trade?,* in Jackson and Vermulst, *supra,* n. 13, at 433.

are normally to take place within twelve months, in exceptional cases eighteen months, after the date a refund request "duly supported by evidence," is made.

Under Article 9.33, in determining the amount of reimbursement where constructed export price is used,[156] the authorities are to take account of any change in normal value, any change in costs incurred between importation and sale, and any movement in the resale price. This rather obscurely-worded provision was designed to allow the EC to continue its practice of deducting any anti-dumping duties paid in calculating export price unless the importer proves that it has passed on the duties to its customers.[157] The export price is to be calculated with no deduction for anti-dumping duties paid when evidence that the duties have been passed on is provided.

Article 9.4 establishes rules with respect to the so-called "all others" rate, the rate of duty applied to producers and exporters that have not been individually investigated.[158] This rate may not exceed either (i) the weighted average dumping margin for the investigated exporters or producers, or (ii) where duties are assessed based on a prospective normal value, the difference between the normal value for the investigated exporters and producers and the export prices of the non-investigated producers or exporters. However, in neither case may any zero or *de minimis* margins be included or margins based on facts available. In *United States—Hot-Rolled Steel from Japan,* the Appellate Body rejected the U.S. argument that this provision only requires exclusion of margins based entirely on facts available, and held that no margin that is based even in part on facts available can be used in the determination of the "all others" rate.

> Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to "all others" were, as the U.S. suggests, calculated—due to the failure of investigated parties to supply certain information—using margins "established" even in part based on facts available.[159]

The Appellate Body recognized that under this interpretation there could be situations in which there were no margins on which to calculate an "all others" rate, but stated that it did not need to decide in the case at hand how to overcome this lacuna in the ADA.

Under Article 9.5, new shippers, i.e., exporters and producers that did not export the product in question during the period of investigation and are not related to any exporters or producers in the exporting country that are subject to anti-dumping duties, are entitled to accelerated reviews to determine their individual dumping margins.[160] Anti-dumping duties are not to be levied against the new shipper while the review is pending, though appraisement may be withheld and bonds required so that anti-dumping duties can be levied retroactively to the date of initiation of the review.

ARTICLE 10—RETROACTIVITY

Article 10 lays out the conditions under which anti-dumping duties may be applied retroactively after an anti-dumping measure has been imposed. *First*, where there is a

[156] *See* text accompanying note 92 *supra.*

[157] *See* Horlick and Shea, *supra* note 66, at 20. The EC approach means that the importer must raise its prices by double the amount of the dumping margin to avoid paying anti-dumping duties. *Id.* at 26–27.

[158] Individual margins or normal values are to be applied to exporters or producers who submitted voluntary responses in accordance with Article 6.10.2. ADA, Art. 9.4.

[159] *United States—Hot-Rolled Steel from Japan AB, supra* note 72, ¶ 123 (emphasis in original).

[160] Article 9.5 does not specify how quickly such reviews must be carried out, but simply states that they must be accelerated in comparison to the normal review process.

determination of present (as opposed to threatened) material injury, anti-dumping duties may be assessed retroactively on all imports that took place during the period in which provisional measures were in effect. However, under Article 10.3, if the definitive anti-dumping duty is higher than the provisional duty, the difference is not to be collected, while if it is lower the difference is to be reimbursed. Thus, the provisional duty during the period before the issuance of a definitive measure acts as a cap on the amount of definitive duties that may be collected.

Second, where the injury determination is of threat of material injury or material retardation of an industry, rather than present material injury, duties may only be assessed from the date of that determination unless the effect of the dumped imports would have led to a current material injury determination in the absence of provisional measures.[161]

Third, under the so-called "critical circumstances" provision, anti-dumping duties may be levied on imports entering up to ninety days before the date of application of provisional measures (but not before the date of initiation of the investigation) if:

(i) There is a history or injurious dumping or the importer was or should have been aware that the exporter practiced injurious dumping, and
(ii) The injury is caused by massive dumped imports in a relatively short time which in light of the timing and volume of imports and other circumstances (such as a rapid build-up of inventory) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty.

The purpose of this provision is to deter importers from stockpiling imports after initiation of the investigation but before the application of provisional measures. Article 10.7 provides that the authorities may take such measures as withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively under the critical circumstances provision. In the words of a WTO panel, "Article 10.7 measures serve the same purposes as an order at the beginning of a lawsuit to preserve the *status quo*—they ensure that at the end of the process, effective measures can be put in place should the circumstances warrant."[162]

ARTICLE 11—DURATION AND REVIEW OF ANTI-DUMPING DUTIES AND PRICE UNDERTAKINGS

One of the major topics during the Uruguay Round negotiations was the duration of anti-dumping measures. Most countries that were active anti-dumping enforcers had so-called "sunset" provisions, under which anti-dumping measures were automatically reviewed at specified intervals[163] to determine whether there was still a need for them to stay in effect. However, in the United States, there was no automatic review. Instead, anti-dumping measures would only be lifted if the export interests could show that there had been no dumping for at least three years or that circumstances had changed in a

[161] Although a "determination" that the effect of the dumped imports would have led to an injury determination in the absence of the provisional measures is not necessary, the final determination by the investigating authority must contain a specific statement indicating that the issue was properly considered and decided. *Mexico—HFCS*, *supra* note 114, ¶ 7.191.

[162] Report of the Panel, *United States—Anti-dumping Measures on Certain Hot-Rolled Steel from Japan,* WT/DS184/R(2000) ("*US—Hot-Rolled Steel Panel*"), ¶ 7.163.

[163] For example, the EC and Canada conducted sunset reviews every five years, Australia every two. Krishna, *supra* note 11, at 28, n.125.

way that the order was no longer necessary.[164] These were difficult burdens to meet, and orders often stayed in effect for many years.[165] Article 11 requires all members to conduct five-year sunset reviews, and it also codifies the right to a changed circumstance review. Both types of review are applicable to price undertakings as well as to definitive anti-dumping measures.

A. Changed Circumstance Reviews

Article 11.1 makes the general statement that an anti-dumping duty is to remain in force only as long as and the extent necessary to counteract injurious dumping. Article 11.2 specifies that the authorities are to review the need for the continued imposition of the duty—i.e., "whether the injury would be likely to continue or recur if the duty were to be removed or varied"—on their own initiative where warranted, or, if a reasonable time has elapsed since the imposition of the definitive anti-dumping duty, upon request of any interested party that submits positive information substantiating the need for a review. In *United States—DRAMS,* a WTO Panel held that the U.S. regulation governing termination of orders was inconsistent with this provision in that it only permitted termination of an order on a finding that dumping or injury would be "not likely" to recur in the absence of the order. According to the Panel:

> A finding that an event is "likely" implies a greater degree of certainty that the event will occur than a finding that the event is not "not likely." For example, in common parlance, a statement that it is "likely" to rain implies a greater likelihood of rain than a statement that rain is not unlikely, or not "not likely."[166]

However, the Panel held that the mere fact that an exporter had not dumped for three and a half years did not require the authority to self-initiate a review under this provision.[167]

The anti-dumping duty is to be terminated immediately if the authorities determine that it is no longer warranted. However, the fact that the most recent assessment review found no dumping does not require termination.[168]

B. Sunset Reviews

Under Article 11.3 any definitive anti-dumping duty is to be terminated no later than five years after it went into effect unless the authorities determine in a review conducted on their own initiative or at the request of the domestic industry that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. In *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan,* WT/DS244/AB/R (2004), the Appellate Body held that while the ADA did not *require* authorities to rely on dumping margins determined in administrative reviews in deciding whether dumping was likely to continue or recur if the order was lifted, if they did so those margins must have been calculated in

[164] Changed circumstances could involve a change in the domestic industry or the market, or an indication from the domestic industry that it was no longer interested in enforcement of the anti-dumping measure.

[165] A study by the U.S. Congressional Budget Office estimated that the median length of anti-dumping measures in the Unided States was 10.6 years, far longer than in other countries that were active users of anti-dumping laws. Congressional Budget Office, *Antidumping Action in the United States and Around the World: An Analysis of International Data* (1998), Section 5, available at www.cbo.gov.

[166] *United States—DRAMS, supra* note 126, ¶ 6.46.

[167] *Id.,* ¶ 6.59.

[168] *See* ADA, n. 22; *United States—DRAMS, supra* note 126, ¶ 6.32.

accordance with the requirements of Article 2.4 of the Agreement. However, although it appeared that the margins relied upon by the U.S. Department of Commerce in that case had been calculated based on some type of zeroing methodology, in the absence of factual findings by the Panel on this issue the Appellate Body was unable to decide whether or not that methodology violated Article 2.4.[169] In that case the Appellate Body upheld the decision by the Department of Commerce to base its likelihood determination on an order-wide basis, holding that the Article 6.10 requirement that separate margins should normally be calculated for each producer was not applicable to sunset reviews.

In *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina,* WT/DS268/R (2004), *appeal pending*, a WTO panel held that provisions of the U.S. anti-dumping law that created a presumption of continued dumping where an exporter had explicitly waived the right to participate in the sunset review or was deemed to have waived the right because it failed to provide a complete response to the notice of initiation of the review, were inconsistent with Article 11.3. According to the panel, such a presumption could not be the basis for a "determination supported by reasoned and adequate conclusions based on the facts", as required by Article 11.3 (¶ 7.93). The panel also held that a regulation that did not allow the U.S. Department of Commerce ("DOC") to take into account evidence submitted by an exporter in an incomplete response to the notice of initiation, or evidence submitted after failure to respond to the notice, was inconsistent with Articles 6.1 and 6.2 of the Agreement (¶ 7.128). In addition, the panel found that a provision in the DOC's Sunset Policy Bulletin that the likelihood of continuation or recurrence of dumping would "normally" be determined to exist where any one of three factual scenarios existed was inconsistent with Article 11.3. The complaining Member, Argentina, had shown that the DOC had relied on one of these scenarios in every case in which it had found likelihood, indicating to the panel that it regarded the provision as "conclusive" (¶ 7.165).

Article 11.4 provides that changed circumstance and sunset reviews must normally be completed within twelve months.

ARTICLE 12—PUBLIC NOTICE AND EXPLANATION OF DETERMINATIONS

Transparency is an important aspect of the Anti-dumping Agreement, as with the other Uruguay Round Agreements. Article 12.1 requires that when the authorities are satisfied that there is enough evidence to justify initiation, they are to notify the exporting Member(s) concerned and any interested parties.[170] They must also provide a public notice, which must include information on the following: (i) name of exporting country(ies) and product involved; (ii) date of initiation of the investigation; (iii) basis on which dumping is alleged in the application; (iv) summary of the factors on which the injury allegation is based; (v) the address to which representations by interested parties must be sent; and (iv) the time limits for interested parties to make their views known. If the specified information is contained in a separate report, the public notice must refer to that report.[171] However, WTO panels have held that the notice is not required to contain an explanation

[169] In *EC—Bed Linen, supra* note 89, the Appellate Body had held that the "zeroing" methodology used by the EC in their case was inconsistent with ADA Article 2.4.2. *See* text accompanying note 101, *supra*.

[170] The authorities must make reasonable efforts to obtain the necessary contact information for the foreign producers and exporters. *Argentina—Poultry, supra* note 98, ¶ 7.132.

[171] *Guatemala—Cement II*, supra note 117, ¶ 8.95.

of the authority's conclusion that there is sufficient evidence to justify initiation.[172] Nor is it required to contain an explanation of the factors underlying the definition of the relevant domestic industry.[173]

Under Article 12.2, public notice is to be given of preliminary and final determinations, decisions to accept undertakings, and terminations of undertakings or definitive anti-dumping duties. The notices must contain, or be accompanied by a report, which contains, "in sufficient detail," the findings and conclusions of fact and law that the authorities consider material. The notices must be sent to the exporting Member(s) and to other interested parties.

Articles 12.2.1 and 12.2.2 specify additional information that must be included in notices of imposition of provisional measures and of final determinations imposing a definitive duty or accepting a price undertaking. A provisional measures notice must include: (i) the names of the suppliers, or, if impracticable, the supplying countries; (ii) a description of the product that is sufficient for customs purposes; (iii) the margins of dumping and a full explanation of the reasons for the methodology used in establishing and comparing export price and normal value; (iv) considerations relevant to the injury determination; and the main reasons leading to the determination. A final determination must contain the same information, as well as the reasons for accepting or rejecting relevant arguments or claims made by the exporters and importers (but not, interestingly, those by the domestic industry).

The same rules apply as appropriate to the initiation and completion of reviews under Article 11, and to decisions under Article 10 to apply duties retroactively.

ARTICLE 13—JUDICIAL REVIEW

Article 13 requires each Member that has an anti-dumping law to maintain judicial, arbitral or administrative tribunals for the prompt review of final determinations and Article 11 reviews of determinations. The tribunals must be independent of the authorities responsible for the determinations and reviews.

ARTICLE 14—ANTI-DUMPING ACTION ON BEHALF OF A THIRD COUNTRY

Under Article 14.1, the authorities of a third country may request another member to bring an anti-dumping action. This would be the situation where Country A claims that imports from Country B are being dumped in Country C, causing injury to an industry in Country A, and asks Country C to bring an action. The decision whether to proceed with such a case rests entirely with the importing country, which in considering the application must consider the effects of the dumping on the relevant industry in the third country as a whole, not only on the third country exports to the importing country or even the third country exports as a whole. It is difficult to see why an importing country would ever initiate a third-country anti-dumping investigation. If its own domestic industry is not complaining, or it has no domestic industry, why should it subject customers for the product to the higher prices that would result if the determination is affirmative? Moreover, Article 14.4 requires approval of the WTO Council on Goods before a third-country anti-dumping duty may be imposed, and it is highly unlikely that consensus (including the exporting country) for such approval could be obtained.

[172] *Mexico—HFCS*, supra note 114, ¶ 7.88. *See also, Guatemala—Cement II*, *supra* note 117, ¶ 8.89.
[173] *Mexico—HFCS*, *supra* note 114, ¶¶ 7.86–87.

ARTICLE 15—DEVELOPING COUNTRIES

Most of the Uruguay Round agreements provide special and differential treatment for developing countries in the form of different substantive requirements, more time for implementation, and an obligation on the part of developed countries to provide technical assistance. Perhaps reflecting the extreme sensitivity of the subject, the ADA contains no provisions of this kind. Article 15 merely recognizes that "special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures", and requires that "[p]ossibilities of constructive remedies" provided for in the Agreement be explored before applying anti-dumping duties that would affect the essential interests of developing country Members. This provision is of little value to developing countries, since although the WTO Panel in *EC—Bed Linen* held that it imposes an obligation on the investigating authority to actively *consider* the possibility of a constructive remedy—either a price undertaking or imposition of a duty lower than the dumping margin but sufficient to remedy the injury[174]—another panel held that failure to *apply* such a remedy was not a violation.[175] As we have seen, Article 8 gives investigating authorities discretion to refuse to accept price undertakings.

ARTICLE 16—COMMITTEE ON ANTI-DUMPING PRACTICES

Article 16.1 establishes a Committee on Anti-Dumping Practices, "composed of representatives of each of the Members." It is to meet not less than twice a year and is to provide Members the opportunity to consult on any matters relating to the Agreement. Members are to report "without delay" all preliminary and final anti-dumping actions taken by them, and are to submit semi-annual reports of any anti-dumping actions taken by them in the previous six months. These reports are available on the WTO website.[176] Members are also to notify the Committee as to which of its authorities are competent to initiate and conduct anti-dumping investigations, and of its procedures governing the initiation and conduct of investigations.

ARTICLE 17—CONSULTATION AND DISPUTE SETTLEMENT

Article 17 provides that a Members may request consultations with another Member whenever it considers that benefits under the Agreement are being nullified or impaired, or "the achievement of any objective is being impeded," and that the other Member must "afford sympathetic consideration" to such a request. Under Article 17.4, where consultations do not produce a mutually agreed solution, and the importing Member has taken a provisional measure having a significant impact or final action to levy definitive anti-dumping duties or to accept price undertakings, the requesting Member may take the matter to the Dispute Settlement Body ("DSB"). Although this language could be read as requiring that one of the three specified actions—provisional measures having

[174] *EC—Bed Line Panel*, *supra* note 90, ¶ 6.238 (this issue was not appealed).

[175] *United States—Steel Plate from India*, *supra* note 145, ¶¶ 7.114–115. A GATT Panel construing the identically-worded provision in the 1979 Anti-dumping Code (Article 13) had reached the same conclusion. *EC—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn From Brazil*, *supra* note 57, ¶ 589. That panel also held that the "essential interests" of a developing country that could be affected by the impocition of anti-dumping duties could include a strategic industry dependent on export trade. *Id.* ¶ 583.

[176] www.wto.org.

a significant impact, definitive anti-dumping duties, or price undertakings—have been taken before a matter can be referred to the DSB under the ADA, the Appellate Body has held that it does not preclude a Member from challenging anti-dumping legislation "as such", rather than only bringing challenges in the context of particular anti-dumping decisions.[177] Instead, according to the Appellate Body, Article 17.4 simply serves to limit the type of action in an anti-dumping proceeding that can be challenged, to ensure that each step, however small, is not the subject of dispute settlement proceedings. There is no such limitation in the SCM Agreement, which means that initiation of a CVD investigation can be challenged immediately, whereas initiation of an anti-dumping investigation cannot be challenged until, at the earliest, the imposition of provisional measures.[178]

Under Article 17.5, the DSB is, upon request, to establish a panel to examine the matter based upon (i) a written statement of the Member explaining its claim of nullification or impairment or impeding the achieving of the objectives of the Agreement, and (ii) the facts made available to the investigating authorities.[179] However, a panel may not consider evidence that was not before the investigating authority.[180]

The ADA is unique among the Uruguay Round Agreements in that it contains its own standard of review.[181] The other Agreements are subject to the general standard of review set forth in Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which directs each panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. . . ." Reflecting the concern of the United States that panels might try to second-guess the decisions of national authorities in anti-dumping decisions, Article 17.6 attempts to prevent panels from substituting their own judgment for that of the authorities.[182] Thus, with respect to the facts of a case, Article 17.6(i) directs the panel simply to determine whether "the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective."[183] If so, the evaluation may not be overturned "even though the panel might have reached a different conclusion." The Appellate Body has held that a panel is not required under Article 17.6 to confine its review of the "analysis and reasoning" of the authority to the documents that were available to the interested

[177] *Guatemala—Cement I*, *supra* note 122, ¶ 75.

[178] The EC has proposed in the Doha Round discussions that the ADA be amended to allow immediate challenges to "flawed initiations" that fail to meet the minimum standing, evidentiary, and procedural requirements of the Agreement. *See EU Proposal for Challenging AD, CVD Initiations Gets Mixed Reviews,* INSIDE US TRADE, March 28, 2003.

[179] *Thailand—Steel*, *supra* note 88, ¶¶ 115, 118.

[180] *United States—Hot-Rolled Steel Panel, supra* note 162, ¶¶ 7.6–7.

[181] The Uruguay Round *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (LEGAL TEXTS, *supra* note 62, at 397) stated that the special standard of review established by Article 17.6 of the ADA would be reviewed after three years to consider whether it was capable of general application. There has been no decision to apply the Section 17.6 standard to other agreements.

[182] It has been reported that the U.S. negotiators regarded this provision, which was agreed to on the last night of the negotiations, as a deal breaker for the entire round. Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948,* 31 COMM. MARKET L.R. 1157, 1204 (1994).

[183] It has been suggested that this standard essentially codified the existing practice of GATT panels. Gary Horlick and Peggy Clarke, *Standards for Panels Reviewing Anti-Dumping Determinations Under the GATT and the WTO,* in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann, ed., 1997) at 6, 11, 13.

parties and/or their legal counsel at the time of the final determination, but may also consider confidential facts that were not available to the parties.[184]

With respect to the law, the panel is to interpret the relevant provisions of the Agreement "in accordance with customary rules of interpretation of public international law."[185] If the panel finds that more than one interpretation of the Agreement is permissible, the panel is to find the authority's measure to be consistent with the Agreement "if it rests upon one of those permissible interpretations." It has been observed that this provision is self-contradictory, because the customary rules of interpretation—i.e., primarily Sections 31 and 32 of the Vienna Convention on the Interpretation of Treaties—are designed to produce a *single* interpretation, not more than one.[186]

In practice, the supposedly narrower standard of review does not seem to have inhibited panels and the Appellate Body, which have been quite ready to find the practices of particular countries to be inconsistent with the ADA and with GATT Article VI. The vast majority of the cases involving substantive aspects of the ADA that have reached the panel or Appellate Body stage resulted in findings of violations of the ADA. In many of these cases, the panel and/or Appellate Body examined the facts relating to dumping and injury in considerable detail, and did not appear reluctant to invalidate the findings of the investigating authorities. In addition, the Appellate Body has held that Article 17.6 supplements rather than replaces Article 11 of the DSE.[187] Thus, although Article 17.6(i) does not expressly require panels to conduct an "objective assessment of the facts" as does DSU Article 11, "it is inconceivable that Article 17.6(i) should require anything other than that panels make an 'objective assessment of the facts of the matter.'"[188]

ARTICLE 18—FINAL PROVISIONS

Article 18.1 provides that no specific action may be taken against dumping of exports from another Member except in accordance with GATT 1994, "as interpreted by this Agreement." The Appellate Body in *United States—1916 Act* ruled that the U.S. Anti-Dumping Act of 1916, which provides civil damage remedies and criminal penalties for intentional dumping,[189] violates Article 18.1 as well as Article 1. In *United States—Byrd Amendment,* the Appellate Body upheld a panel ruling that a U.S. statute that authorizes payment of anti-dumping (and countervailing) duties to the petitioning companies violated Article 18.1 (as well as Article 32.1 of the SCM Agreement), because it was a "specific action against dumping" but not one of the three types of permitted action identified by the Appellate Body in *United States—1916 Act*,[190] namely definitive anti-dumping measures, provisional measures, and price undertakings.[191] The Appellate Body found that the Byrd Amendment was a specific action against dumping because it would result in the financing of United States competitors through the transfer to the latter of the duties collected on those exports, thus giving foreign producers and exporters "an

[184] *Thailand—Steel*, *supra* note 88, ¶ 119.
[185] ADA Art. 17.6(ii).
[186] Palmeter, *supra* note 61, at 63; Edwin Vermulst and Folkert Graafsma, *WTO Dispute Settlement with Respect to Trade Contingency Measures—Selected Issues,* 35(2) J. WORLD TRADE 209, 211 (2001).
[187] *United States—Hot-Rolled Steel AB, supra* note 72, ¶¶ 55–56.
[188] *Id.*
[189] *See* notes 30–31 *supra* and accompanying text.
[190] *Supra,* note 69.
[191] *United States—Byrd Amendment*, *supra* note 113.

incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices".[192]

V. The Doha Development Agenda

Prior to the Doha Ministerial, the United States took the position that anti-dumping should be kept off the negotiating table, as it had before the Seattle Ministerial. The furthest it was prepared to go was a two-stage approach—a two-year study period with a decision whether or not to begin negotiations to be made at the 2003 Ministerial.[193] However, at the insistence of other members the Doha Ministerial Declaration included an agreement "to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures. . . . "[194] But of vital importance to the United States negotiators, who as usual faced strong opposition to any possible weakening of U.S. anti-dumping and countervailing law from members of the U.S. Congress and various powerful domestic industries, the proviso "while preserving the basic concepts, principles and effectiveness of these Agreements," was included in the Declaration. The Declaration also calls for the needs of developing and least-developed countries to be taken into account, and, in a gesture towards the original U.S. proposal for a two-year study period, states that "[i]n the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices [another sop to the United States], that they seek to clarify and improve in the subsequent phase."

Following the cues in the Ministerial Declaration, the United States is focusing on the need to preserve the effectiveness of the trade remedy laws, and to "address more effectively underlying trade-distorting practices". In a submission to the Negotiating Group on Rules, it stated:

> A government's industrial policies or key aspects of the economic system supported by government inaction can enable injurious dumping to take place. Although these policies take on many forms, they can provide similar artificial advantages to producers. For instance, these policies may allow producers to earn high profits in a home "sanctuary market", which may in turn allow them to sell abroad at an artificially low price. Such practices can result in injury in the importing country since domestic firms may not be able to match the artificially low prices from producers in the sanctuary market.[195]

The United States has also raised the question of the dispute settlement process, in particular whether panels and the Appellate Body are following the appropriate standard of review and are avoiding imposing obligations on national authorities that are not contained in the Agreement. This of course is a reaction to the string of losses by the United States in cases involving its enforcement of its anti-dumping laws. Finally, the United

[192] *Id.* at ¶ 256.

[193] *See, e.g., U.S. Refuses WTO Trade Law Negotiations Under Mounting Pressure,* INSIDE U.S. TRADE, October 26, 2001. Prior to the Seattle Ministerial a senior official in the Office of the U.S. Trade Representative reportedly accused Japan of trying to undermine the new round merely by insisting that anti-dumping rules should be included in the round. *U.S. Official Contrasts U.S. Approach to New WTO Talks with EU, Japan,* INSIDE U.S. TRADE, October 22, 1999. *See also, [Secretary of Commerce] Daley Lays out U.S. Case Against Reopening WTO Antidumping Agreement,* INSIDE U.S. TRADE,October 1, 1999; *Deputy USTR Says Textiles, AD Rules off the Table in New WTO Negotiations,* INSIDE U.S. TRADE, August 13, 1999.

[194] *Ministerial Declaration,* November 14, 2001, WT/MIN(01)/DEC/1, reproduced in the Appendix to this book.

[195] *Basic Concepts and Principles of the Trade Remedy Rules,* Communication from the United States to the Negotiating Group on Rules, October 17, 2002, TN/RL/W/27.

States is also calling for increased transparency and procedural fairness in anti-dumping and countervailing duty proceedings, recognizing that with the greatly expanded use of anti-dumping laws by WTO members, U.S. exporters are being increasingly subjected to investigations.[196]

Other countries, on the other hand, are seeking to tighten the ADA disciplines, which they believe at present allow too much room for overreaching by zealous anti-dumping enforcers. A group of members known informally as the "Friends of Anti-Dumping Negotiations" expressed their viewpoint as follows;

> Anti-dumping measures have proliferated as a mechanism to provide often unduly excessive protection for domestic industries from international competition rather than to counteract injurious dumping, notwithstanding the efforts during the Uruguay Round to improve disciplines on the imposition of such measures. It is our concern that anti-dumping measures, when abused and misused, significantly undermine sincere and serious efforts that Members have been making and will make in various WTO agreements for trade liberalization, including tariff concessions.[197]

The "Friends" group has raised many areas where they believe that disciplines over anti-dumping enforcement should be strengthened, including:

- Clearer definitions of some of the terms in the ADA, such as "ordinary course of trade"
- The problem of cyclical industries, where "dumping" is unavoidable at certain times
- Higher *de minimis* levels
- Mandatory use of the "lesser duty" rule, under which the duty imposed is less than the dumping margin if that is enough to correct the injurious effect
- The public interest to be taken into greater account[198]

Given the diametrically-opposed position of these countries from that of the United States, anti-dumping is likely to be as contentious a subject in the Doha negotiations as it was in the Uruguay Round.

[196] Issues the United States has raised as possible points for negotiation in this area include:

- Access to non-confidential information for all parties to an investigation
- Maintenance of a public record
- Greater disclosure of decisions and calculations underlying findings
- Greater clarity with respect to verifications, including requirement that verification reports be issued and made available to parties.
- Access to confidential information for representatives of parties
- Additional details of procedures and policies to be made public

Investigatory Procedures Under the Anti-Dumping and Subsidies Agreements, Submission by the United States, December 2, 2002, TN/RL/G/35.

These are all areas in which the United States has a good record, and would not have to change its practices if these requirements were built into the ADA. The United States has also expressed an interest in identifying ways in which costs can be reduced for developing and least-developed members, including the possibility of creating a regional trade authority that would conduct trade remedy cases on behalf of its members.

[197] *General Contribution to the Discussion of the Negotiating Group on Rules on Rules on Anti-Dumping Measures,* Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong; China; Israel; Mexico; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand; and Turkey, November 14, 2002, TN/RL/W/28.

[198] More recently the "Friends" group has proposed tighter standards for the "fair comparison" required by Article 2.4 of the ADA. *See, Friends Group Pushes to Refine Fair Comparison in Antidumping,* INSIDE U.S. TRADE, June 18, 2004.

CHAPTER 12

THE AGREEMENT ON CUSTOMS VALUATION

Ian Forrester, Q.C., and Omar E. Odarda*

TABLE OF CONTENTS

I. Introduction 533
II. Historical Background 534
A. From the GATT 1947 to the Tokyo Round 534
B. From the Tokyo Round to the World Trade Organization 536
III. Overview of the Current Legal Instruments 537
A. Article VII of GATT 1994 537
B. The Agreement on Implementation of Article VII of the GATT 1994 . 538
1. General Introductory Commentary 539
2. The Preamble and the Guiding Principles of Customs Valuation ... 539
3. Scope of the Agreement 540
4. The Substantive Provisions 540
5. Administration and Dispute Settlement 540
C. Relationship between Article VII of the GATT 1994 and the CVA 541
IV. Methods of Customs Valuation 543
A. The Primary Method of Customs Valuation: Transaction Value of the Goods (Method 1) 543
1. The Definition of Transaction Value 544
2. Adjustments to the Price Paid or Payable 546
3. Departures from TV 553
B. Transaction Value of Identical (Method 2) or Similar Goods (Method 3) 556
1. The Definitions of "Identical" and "Similar" Goods 556
2. Requirements for Qualifying as "Identical" or "Similar" Goods ... 557
3. Different Alternatives for the Determination of the Customs Value Under Methods 2 and 3 557
C. Deductive Value (Method 4) 558
1. The Basis for the DV Calculation 558
2. Adjustments to the Unit Price 559
D. Computed Value (Method 5) 559
1. Calculation of the CV 560
2. Access to the Necessary Information 561
E. Fall Back Method of Valuation (Method 6) 561
1. Requirements For Applying the Fallback Method 562
2. Prohibited Methods 562

* Ian S. Forrester is Visiting Professor in European Law at the University of Glasgow and practices law in Brussels as a partner of White & Case, LLP. Omar E. Odarda is an Argentine lawyer, currently working as an associate of White & Case, LLP, based in Geneva.

V. Basic Customs Valuation Disciplines 563
A. Currency Conversion 563
B. Powers of the Customs Authorities 564
C. Importers' Rights 564
1. Right to Request Written Explanations 565
2. Right to Appeal 565
3. Right to Have the Goods Released 565
D. Confidential Information 565
E. Transparency 566
VI. Special and Differential Treatment 567
A. Transitional Periods 567
B. Reservations Regarding the Deductive and Computed Value Methods . 568
C. Technical Assistance 568
VII. Issues Related to the Implementation of the Agreement 568
A. The Doha Implementation-Related Issues 569
B. Developing Countries' Systemic and Structural Problems in Implementing the Agreement 571
VIII. Conclusion 572

I. Introduction

Customs officials assess the amount of duties to be levied on imported products in light of the economic *origin* of the products, their nature or *classification* and, normally, their *value*.[1] Origin for preferential purposes is governed by fairly stringent criteria.[2] Classification offers some limited opportunity for the exercise of discretion.[3] Valuation is the most plastic of the three determinations and the one most prone to fraud, administrative arbitrariness and prolonged error.

In a perfect world, the goods being imported would be sold by their manufacturer to the buyer who had ordered the goods and accepted the price proposed by the manufacturer in its price list. The manufacturer would include in the price freight to the buyer's port. No brokers, agents, intermediaries or other persons would complicate the sale. The diligent customs officer would be able to verify the order, the acceptance of the order, the shipping documents, the invoice and the payment documents. If enquiry were made, it would emerge that the manufacturer sold identical goods in identical quantities to other buyers in the same country at identical prices.

The customs officer in such ideal circumstances could be confident that the price paid was a reliable, undistorted price which could serve as a valid basis for determining the duty to pay. The elements to be included in the price had been included; there was an abundance of confirmation that the price was a normal price, identical to the price for identical merchandise; and there was no ground for concern that the price had been distorted by the relationship between the parties. In actual practice, life is more complicated, less transparent, and more prone to variations. A high percentage of import transactions are between buyers and sellers who are related. Thus the price payable may reflect special arrangements which are legitimate (the buyer, being a very large and regular customer, gets an exceptionally low price), or doubtful (the seller wishes to give a subsidy to the buyer by supplying goods at a low price, there are tax advantages to taking the bulk of the profit in the importing country, or the seller and the buyer have privately agreed to declare only a portion of the true price, the balance to be handed over in cash when next they meet), or entangled (the goods are made in a factory in country A which assembles components it does not own, then delivers the goods for painting and testing to another factory in country B which takes title to the goods from the owner of the components and then transfers title to another affiliated company in country C which sells them to yet another company in country D which is the owner at the moment of customs clearance into country E).

In such circumstances, the importing customs officer may consider using the price declared at the port of entry, but adjusting it to remedy any distortions (usually increasing it), or may reject the price as unreliable and then select some alternative means of valuation. Great debate has swirled around the question of whether the importer could insist on the price actually paid or whether the customs officer could systematically apply an "uplift" to that price, or whether a completely different means of valuing could be insisted upon by either the importer or the customs officer. As we will see, over the past 55 years, the level of discretion conferred upon the customs officer has gradually

[1] Duty is normally calculated on an *ad valorem* basis, as a percentage of the dutiable value. For a minority of products, duty is based on quantity or weight (e.g., two cents per pound), rather than value, when it is known as a specific rate duty.

[2] *See* Chapter 15 of this book.

[3] *See* Chapter 36 of this book.

diminished, while the level of precision called for in the import declaration documents has gradually increased.

The principal functions of customs duties are revenue-raising and protection. Agreement on customs duty rates would be pointless without consensus on how these rates, usually *ad valorem* percentage duties, will be levied and on what. Although customs duties have gradually been declining as between the world's wealthiest nations, they remain a significant consideration in absolute and relative terms. They may have a large impact on domestic industry; they may make imports effectively impossible; and they may represent an important source of revenue, especially in the less developed countries where it is more difficult to raise taxes. The establishment of an internationally applied uniform and stable customs valuation system has many advantages. An ideal system would permit a degree of certainty and forward planning for trading parties; customs administration would be facilitated; fewer disputes would arise; transparency would prevail; and the imports from each country would be treated approximately equally.

Article VII of General Agreement on Tariffs and Trade of 1994 ("GATT 1994") and the Agreement on Implementation of Article VII of the GATT 1994 ("Customs Valuation Agreement" or "CVA") constitute the current multilateral legal framework for customs valuation and may fairly be called uniform and stable. The CVA, in particular, sets forth the methodologies and rules that WTO Members must use to value imports for customs purposes. The objective of this chapter is to discuss in detail those methodologies and rules and to provide an overview of problems relating to the implementation of the Agreement by developing country Members.

II. Historical Background

A. From the GATT 1947 to the Tokyo Round

The 1947 General Agreement on Tariffs and Trade ("GATT 1947") was the starting point for today's considerably harmonised process of customs valuation. Article VII of GATT 1947, which is still in force, set out some general principles of valuation; however, it allowed GATT's Contracting Parties substantial flexibility in defining the value of imported goods. Moreover, some countries' valuation methods pre-dating the GATT were "grandfathered," meaning that those countries were permitted, by the Protocol of Provisional Application of GATT 1947, to continue applying inconsistent valuation methods.

Thereafter, two major customs valuation systems coexisted until the Tokyo Round: i) the notional concept of the Brussels Definition of Value, and ii) the positive concept of value followed by Australia, Canada, New Zealand and the United States.

In 1950, the Convention on the Valuation of Goods for Customs Purposes adopted the so-called "Brussels Definition of Value" ("BDV"), in an effort to achieve greater harmonization of valuation practices.[4] By the beginning of the Tokyo Round (1973), more than one hundred countries, including the European Economic Community ("EC")[5] were applying the BDV, but Australia, Canada, New Zealand and the United States refused to join in.

The BDV was based on the notional concept of "normal price," i.e. the price that the goods would fetch under open market conditions, between unrelated buyer and seller,

[4] Brussels, December 15, 1950; in force since July 28, 1953.

[5] For convenience the term "EC" is used to describe the European Economic Community, the European Community and the European Union.

under specified conditions of time and place.[6] Based on the assumption that most imports are subject to a *bona fide* sale consistent with the terms of the BDV, the transaction price could be taken as a valid basis for valuation of the majority of imports. In cases where it could not be used, the BDV provided that customs authorities could use another suitable basis to determine the normal price, using information available to them, and taking into account the actual conditions relating to the transaction being valued. While the BDV principles used the transaction or invoice price as the normal point of departure and ideal basis for valuation, they provided customs administrations with a safeguard against evasion: distorted invoice prices could be rejected and the value determined by other appropriate methods. In the days when most transactions involved unrelated parties, the BDV could work quite predictably; but the BDV became a source of arbitrariness once a high percentage of transactions involved related parties. Customs administrations could reject the price paid or payable as unreliable, but often simply increased it by five percent or ten percent without having any special grounds favouring an uplift in this amount or indeed any other figure. This meant rapid customs clearance if a possibly excessive level of duty were paid. The BDV gave customs authorities substantial discretion in the choice of "other appropriate methods". The BDV valuation system was not always applied uniformly, and importers complained about discretionary and unjustified rejection of the invoice price by customs authorities who routinely raised the declared value not because they affirmatively believed it was too low, but because the buyer and seller were related.[7] If prices fell, reflecting a competitive advantage, the downstream price remained high until the notional price was adjusted by the customs administration. New and rare products were often not captured in the lists, which made determination of the "normal price" difficult.

Australia, Canada, New Zealand and the United States instead used their own systems based on the invoice price. These systems, which followed a "positive" concept of value, reflected a desire to restrict the discretion of customs authorities in determining value. They also laid down standards that were based on the prices actually agreed on in sales either for export or for domestic consumption.[8]

In addition, some countries, like the United States and Canada continued to use certain methodologies that were later completely outlawed.[9] The United States used for certain products, such as benzenoid chemicals and footwear, the controversial American Selling Price ("ASP"), which based valuation on the price of domestically-produced products which were the competitors of the imported products. U.S. trading partners bitterly criticized this method as a protectionist measure, since the domestic producer indirectly controlled the customs duty payable for foreign competing goods. The ASP also contravened the GATT 1947 Article VII:2 (a) prohibition against basing customs value "on the value of merchandise of national origin;" however, the United States could still make use of it thanks to its grandfather rights under the Protocol of Provisional Application.[10]

[6] Vinod Rege, *Customs Valuation and Customs Reform*, in DEVELOPMENT, TRADE AND WTO. A HANDBOOK 128 (Bernard Hoekman, Aaditya Mattoo, and Philip English eds. 2002); EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION. GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY 150–151 (1986); SAUL L. SHERMAN AND HINRICH GLASSHOFF, COMMENTARY ON THE GATT CUSTOMS VALUATION CODE 54 (1998).

[7] Luc De Wulf, *Implementing the WTO Valuation Agreement in Developing Countries*, paper, WCO Seminar on Capacity Building and the WTO Valuation Agreement, Brussels, October 25, 2002, at 3.

[8] Vinod Rege, *supra* note 6, at 129.

[9] *See* Article 7:2 of the Customs Valuation Agreement. *See* Part IV.E below.

[10] *See* Chapter 4 of this book.

The Canadian system was also criticized because it often based valuation on prices for home consumption in the country of export.[11]

B. From the Tokyo Round to the World Trade Organization

Partly as a result of the skirmishes caused by the ASP and partly as a result of the widespread dissatisfaction with the less predictable methods of valuation (which encouraged corruption as a result of granting economically important arbitrary powers to comparatively low-ranking and low-wage officials), it was decided that a common customs valuation scheme should be crafted. Such a scheme was intended to be applicable to different transactions, goods and countries. It was proposed that the scheme should eliminate the administrative effort, the charges of discrimination and protectionism, and the potential for arbitrary application that had dogged its predecessors. The uniform method should be based on the principles of fairness, uniformity and neutrality, and take into account commercial practices in the real world.

The Tokyo Round of Multilateral Trade Negotiations took place from 1973 to 1979. Ninety-nine countries participated. One objective of the Tokyo Round was to reduce or control non-tariff distortions to international trade. As a potential non-tariff barrier, customs valuation was put on the priority list of those negotiations.

Initial negotiations resulted in a tentative agreement proposed by the EC, mainly based on the BDV and its explanatory notes. Although developing countries participating in these negotiations fully supported the EC proposal, Australia, Canada, New Zealand and the United States completely rejected it. The situation changed at a November 1977 meeting when the EC, following a secret understanding with the United States, changed its position and opted for a positive approach, instead of the notional approach of the BDV. The EC argued that the new proposal was based on what it "believed" to be the good features of the U.S. valuation system.[12] Developing countries strongly opposed the new proposal. In particular, they noted that requiring customs authorities to accept the transaction value reflected in invoices submitted by importers would impede detection of cases in which imported goods were undervalued to reduce the incidence of duties. This would lead in turn to a significant loss of revenue. They contended that the draft agreement would not enable them to take action against under-invoicing, which was more prevalent in their countries due to their much higher tariff levels as compared to those applied by developed countries. In the end, developing countries' objections were partly met by way of special and differential treatment provisions (notably permission to delay the application of the agreement for some time so as to build up their capacity to implement it). However, their major concern—the lack of authority to reject transaction prices substantially out of line in the face of prevalent under-valuation, and fears of revenue loss—did not make progress against a broad consensus of industrialised countries which wished to reduce the opportunities for arbitrary exactions.[13]

The Tokyo Round ended with the adoption in 1979 of the Agreement on Implementation of Article VII of the GATT (or the "Customs Valuation Code"). The agreement drew from both the BDV and the U.S. system, adding much that was new and not based on either previous system. The basic concern was to design a new system that would be uniformly applied, despite former differences in customs valuation practices.[14] However,

[11] Sherman and Glasshoff, *supra* note 6, at 54.
[12] Vinod Rege, *supra* note 6 , at 129, Luc De Wulf, *supra* note 7, at 3.
[13] Vinod Rege, *supra* note 6, at 129; Luc De Wulf, *supra* note 7, at 3.
[14] Sherman and Glasshoff, *supra* note 6 at 54.

not all GATT Contracting Parties joined the Customs Valuation Code.[15] During the pre-WTO period, GATT Contracting Parties could decide whether or not to join agreements that were negotiated to supplement or clarify the original GATT 1947.[16]

The Customs Valuation Code was not subject to negotiation during the Uruguay Round.[17] It was included in the package of the Uruguay Round agreements for reasons of completeness and because of its relationship with two decisions on customs valuation that were adopted by the Marrakesh Ministerial in 1994.[18] The Uruguay Round Agreement on Implementation of Article VII of the GATT 1994 ("CVA") is virtually identical to the 1979 Tokyo Round Code. As an integral part of the Marrakesh Agreement Establishing the WTO ("WTO Agreement"), the CVA became binding on all Members.[19]

The Uruguay Round also introduced one major innovation: WTO Members, under strong pressure from some developing countries, issued a "Decision Regarding Cases Where Customs Have Reasons to Doubt Truth or Accuracy of the Declared Value." While this decision seeks to strengthen the ability of customs authorities to deal with cases of under- and over-invoicing, it does not leave them any margin of discretion as regards the use of alternative customs valuation methods.[20]

III. Overview of the Current Legal Instruments

Article VII of GATT 1994[21] and the CVA constitute the current multilateral legal framework for customs valuation.

A. Article VII of GATT 1994

Article VII lays down a set of general principles of valuation to which Members undertake to give effect in respect of all products subject to import duties. These principles are as follows:

- Customs value should not be arbitrary, fictitious or based on the value of merchandise of national origin.[22]
- *Actual Value* should be the basic rule of customs valuation. Article VII:2(a) states that the value for customs purposes of imported merchandise should be assessed on the "actual value" of imported merchandise, or of like merchandise.

[15] As of December 31, 1993, the Customs Valuation Code had been signed by 34 countries.

[16] The Tokyo Round Agreements or "Codes" were open to all GATT contracting parties, but a GATT contracting party was not required to become a signatory to any of these agreements as a condition of continued GATT membership. At the same time, unless a contracting party became a Code signatory, it could not benefit from any of the Code provisions. The Tokyo Round Codes were not core GATT obligations applicable to all GATT contracting parties, but rather were stand-alone legal instruments negotiated under GATT auspices and existing side by side, but not fully integrated into GATT. *See* RAJ BHALA AND KEVIN KENNEDY, WORLD TRADE LAW 3–4 (1998).

[17] The Uruguay Round begun in 1986 and was formally concluded in Marrakesh on April 15, 1994.

[18] *Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value* and *Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distri butors and Sole Concessionaires, in* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 398 (1999).

[19] Article II:2 of the WTO Agreement.

[20] Luc DeWulf, *supra* note 7, at 4.

[21] The General Agreement on Tariffs and Trade 1994 ("GATT 1994") consists of the GATT 1947 (as amended and modified), six Uruguay Round Understandings, waivers granted under GATT 1947 and still in force on the date of entry of the WTO Agreement, and the Marrakesh Protocol, to which the WTO Members' schedules of market access commitments are appended.

[22] Article VII:2 (a).

Article VII:2 (b): defines "actual value" as the price at which, "at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the *ordinary course of trade under fully competitive conditions*" (emphasis supplied). The Interpretative Note *Ad Article VII* explains that "actual value" may be represented by the invoice price of imported merchandise, plus any non-included charges for legitimate costs and abnormal discounts or other reductions from ordinary competitive price.[23] The Interpretative Note also provides that a transaction is not in the "ordinary course of trade under fully competitive conditions" where the buyer and seller are not independent of each other and price is not the sole consideration.[24] In addition, prices involving special discounts limited to exclusive agents would not be under "fully competitive conditions."[25] A point worth noting in view of the contrast it provides with the CVA is that countries are free under this definition to determine value either on the basis of the price of the particular merchandise or on that of the general price level of like merchandise.[26] However, the "actual value" definition is not always easy to translate into practice in a uniform way and its terms create ambiguity and room for manipulation.[27]

- *The nearest ascertainable equivalent of such value* as a substitute rule. Article VII:2 (c) states that when it is not possible to determine the actual value, the value for customs purposes should be based on the "the nearest ascertainable equivalent of such value." Some critics claim that this provision is flawed since it is impossible to approximate a value that is undiscoverable; defenders would say that it is better to establish some mechanism to address difficult cases.[28]
- *Exclusion of certain internal taxes*. Article VII:3 provides that the value must not include an internal tax from which imported merchandise is exempted or has been or will be relieved by means of refund.
- *Transparency*. Article VII:5 sets forth the principle of transparency in the following terms: "the bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes."

In addition, Article VII:4 gives some guidance regarding currency conversion when, for the purpose of determining the actual value, the Member needs to convert into its own currency a price expressed in the currency of another country.

Given the many variables which influence the setting of price and valuation for import purposes, all the above principles and guidelines fall well short of constituting a stringent legal framework that would prevent customs officials from making an arbitrary use of valuation procedures, or Members from using customs valuation for protectionist purposes.

B. The Agreement on Implementation of Article VII of the GATT 1994

The CVA aims to elaborate further rules for the application of Article VII of GATT 1994, in order to provide greater uniformity and certainty in its implementation.[29] The CVA,

[23] Paragraph 2:1 of *Ad Article VII.*
[24] Paragraph 2:2 of *Ad Article VII.*
[25] Paragraph 2:3 *Ad Article VII.*
[26] Paragraph 2:4 *Ad Article VII.*
[27] Bhala and Kennedy, *supra* note 16, at 317.
[28] *Id.*
[29] *Preamble to the CVA.*

adopted during the Uruguay Round, consists of: i) a general introductory commentary; ii) a preamble; iii) four parts; and iv) three annexes. We provide below a brief overview of the basic features of the Agreement, as an introduction to more detailed discussion of certain provisions.

1. General Introductory Commentary

The General Introductory Commentary constitutes an authoritative text which may be used as an aid to interpreting and understanding the Agreement.[30] The commentary introduces the rationale of the substantive provisions contained in Part I of the Agreement. In particular, it explains the hierarchical relationship between the different rules on customs valuation, highlighting the primacy of Transaction Value.

2. The Preamble and the Guiding Principles of Customs Valuation

The Preamble, which fulfills a similar role to the General Introductory Commentary, states the underlying principles and objectives of the agreement. The Preamble recalls "the need for a fair, uniform and neutral system for the valuation of the goods for customs purposes that precludes the use of arbitrary or fictitious customs value." Fairness, uniformity and neutrality are therefore the guiding principles of the worldwide system of customs valuation the CVA intends to establish.

- *Fairness.* The concept of "fairness" implies respect for the principle of non-discrimination, one of the pillars of the WTO legal system. Customs valuation should not be used as a non-tariff means to protect domestic industry by treating imported goods unfairly.[31] In addition, valuation procedures should be of general application without distinction between sources of supply, in compliance with the Most Favored Nation Principle. The agreement contains several provisions aimed to avoid discretion and arbitrary procedures, and establishes a careful set of valuation rules, including basic rights and obligations for both customs and importers.
- *Uniformity.* The principle of uniformity is ensured by requiring all WTO Members to harmonize their national laws on the basis of the rules of the Agreement, and to apply them in a consistent and coherent manner.[32] If the valuation system is consistent around the world, life will be easier and more predictable for traders. A uniform system also facilitates cooperation between customs authorities of different countries, who can better consult. Of course, a uniform system of valuation does not establish uniform values for goods or uniform duties. Adopting the invoice price as the basis for customs valuation means the value of the same goods will very often differ even from one shipment to another at the same time and place. Likewise, although all WTO Members will share the same valuation system, this will not mean that there will be a uniform interpretation and application of the system everywhere.[33]
- *Neutrality.* The Preamble calls for a "neutral" system of valuation to prevent arbitrary and fictitious customs values. The CVA provides for transaction value as the main basis of customs value, and for a series of four alternative methods of valuation to be applied in a hierarchical order, plus a residual method of last resort when the transaction value is incapable of being used. Such valuation practices

[30] Sherman and Glasshoff, *supra* note 6 at 59.
[31] Sherman and Glasshoff, *supra* note 6, at 61.
[32] CVA Article 22:1.
[33] Sherman and Glasshoff, *supra* note 6, at 52, 61.

ought not to enhance protection or restrict trade. The adoption of a "positive" value instead of a notional value (i.e. BDV) was a major step towards an objective basis for valuation.[34]

3. Scope of the Agreement

The CVA provisions apply only to the valuation of imported goods for the purpose of levying *ad valorem* duties on such goods. The CVA therefore does not contain obligations concerning valuation for the purposes of determining export duties or quota administration based on the value of goods, nor does it lay down conditions for the valuation of goods for internal taxation or foreign exchange control. Moreover, the Preamble states that "valuation procedures should not be used to combat dumping," and the same could be said for subsidized imports. Anti-dumping or countervailing duties are the proper remedies in those cases.[35]

4. The Substantive Provisions

Part I of the Agreement, which consists of seventeen articles, sets out the substantive rules on customs valuation. Annex I to the Agreement provides interpretative notes on most of those provisions. These notes form an integral part of the Agreement and its articles are to be read and applied in conjunction with their respective notes.[36] Articles 1 to 8 define how the customs value of imported goods is to be established under the provisions of the Agreement. Article 15 defines some key terms, and the remaining provisions establish a set of valuation disciplines, some of which refer to the rights and obligations of customs and importers. Finally, Article 20 (Part III) and Annex III to the Agreement grant special and differential treatment to developing countries.

5. Administration and Dispute Settlement

From an institutional point of view, Article 18 establishes two committees, a Committee on Customs Valuation and a Technical Committee on Customs Valuation.[37] The Committee on Customs Valuation comprises representatives of each WTO Member and meets annually in Geneva to consult on matters relating to the administration of the customs valuation system. The Technical Committee on Customs Valuation ("TCCV") is created under the auspices of both the WTO and the World Customs Organization.[38] Annex II to the Agreement sets out its responsibilities, organization and decision-making procedures. In principle, every Member has the right to be represented in the TCCV. The Chairman can also admit observers not representing WTO Members. The TCCV meets

[34] Carmen Luz Guarda, *The Pivotal Role of Customs Valuation in Trade Facilitation*, WCO Seminar on Capacity Building and the WTO Valuation Agreement, Brussels, October 17–18, 2002.

[35] In a 1962 case against Canada, the United States argued that Canada's "value for duty" on imported potatoes was "arbitrary or fictitious" in contravention of Article VII:2 (a). In effect, Canada applied an anti-dumping duty to the amount by which the actual export price fell below a notional "value for duty", the average value of potatoes imported into-Canada during the previous 36 months. The Canadian regime almost guaranteed the levying of anti-dumping duty whenever prices went below their notional average price. The GATT panel's report found that "value for duty" was a concept different from valuation for customs purposes. Canada's anti-dumping technique did not meet GATT anti-dumping standards. Report of the GATT Panel (adopted), *Exports of Potatoes to Canada*, BISD, 11th Supp., at 88 (1963). *See* Bhala and Kennedy, *supra* note 16, at 317–318.

[36] CVA Article 14.

[37] CVA Article 18.

[38] The CVA refers to the Customs Co-operation Council ("CCC"), which became later the World Customs Organization. *See* Chapter 36 of this book for a description of the WCO.

periodically in Brussels and seeks to ensure, at a technical level, uniformity in interpretation and application of the Agreement. The responsibilities of the Technical Committee include advising on specific technical matters as requested by Members or by a panel in a dispute. The TCCV renders advisory opinions, commentaries, explanatory notes, carries out studies and prepares reports on the customs valuation laws of WTO members.[39] Although these instruments prepared by the TCCV are not binding, they are normally followed by WTO Members.

From a dispute settlement point of view, the CVA refers to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[40] The CVA also contains special dispute settlement rules and procedures that apply when the provisions of the CVA are the issue of a dispute. These special provisions, which prevail in case of conflict with the DSU provisions,[41] refer to the role of the TCCV and to the protection of confidential information in a dispute settlement procedure. The TCCV, as an expert group, is responsible for carrying out an examination of any question requiring technical consideration at the request of a panel. The terms of reference for the TCCV are set by the panel, and the panel in turn is required to take the Committee's report into consideration in its own deliberations. If the Committee is unable to reach consensus on the matter in question, the panel will afford the parties an opportunity to present their views on the matter.[42] In addition, and unlike any other expert group under the other WTO agreements, the TCCV is also directed to provide, upon request, advice and assistance to Members engaged in consultations.[43]

So far as the authors are aware, save for the early GATT case described in note 35, *supra*, and a short reference in one WTO panel report discussed in Part V-C(3) below, there is no GATT/WTO case law on customs valuation. Few conflicts have been brought before the WTO, and none has progressed beyond the consultations stage.[44] This low level of contention on customs valuation could be explained by the fact that most of the disagreements have been solved in discussions within the TCCV; it may also suggest that Members are approaching the text in a proper spirit and are refraining from systemic abuses.

C. Relationship between Article VII of the GATT 1994 and the CVA

Because of the lack of contentious cases, neither the Appellate Body nor any panel has had the opportunity to discuss the inter-relationship between Article VII of GATT 1994 and the CVA. However, when analyzing the inter-relationship between the different Multilateral Trade Agreements that govern the world trading system under the WTO, the Appellate Body stated:

> 74. . . . It is now well established that the WTO Agreement is a "Single Undertaking" and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously [. . .] In this context, we note that Article II:2 of the *WTO Agreement* provides that:

[39] All TCCV instruments are contained in a compendium published by the WORLD CUSTOMS ORGANIZATION, CUSTOMS VALUATION—WTO AGREEMENT AND TEXTS OF THE TECHNICAL COMMITTEE ON CUSTOMS VALUATION, 2ND EDITION, (1997) (LOOSE-LEAF PUBLICATION AMENDING SUPPLEMENTS. LAST SUPPLEMENT WAS PUBLISHED ON SEPTEMBER 2000).

[40] CVA Article 19.

[41] DSU Article 1.2. *See* also DAVID PALMETER AND PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION 99 (1999).

[42] CVA Article 19.4

[43] CVA Article 19.3.

[44] *See* WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/9, October 29, 2002.

> "The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are *integral parts* of this Agreement, *binding on all Members*."
>
> 75. We note, furthermore, that the GATT 1994 was incorporated into the *WTO Agreement* as one of the Multilateral Agreements on Trade in Goods contained in Annex 1A to the *WTO Agreement*. The GATT 1994 consists of:
>
> (a) the provisions of the GATT 1947, as rectified, amended or modified before the entry into force of the *WTO Agreement*;
> (b) provisions of certain other legal instruments which entered into force under the GATT 1947 and before the date of entry into force of the *WTO Agreement*;
> (c) a number of Uruguay Round Understandings on the interpretation of certain GATT articles; and
> (d) the Marrakesh Protocol to GATT 1994. The *Agreement on Safeguards* is one of the thirteen Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*.
>
> It is important to understand that the *WTO Agreement* is *one* treaty. The GATT 1994 and the *Agreement on Safeguards* are both Multilateral Agreements on Trade in Goods contained in Annex 1A, which are integral parts of that treaty and are equally binding on all Members pursuant to Article II:2 of the *WTO Agreement*.[45]

The rationale explained above may also be applied by analogy to establish the relationship between GATT 1994 (i.e. Article VII) and the CVA, two of the Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement. Thus, as both Article VII of GATT 1994 and the CVA are binding on Members as *one* treaty, the question is not *whether* they apply, but *how* they apply.

The Appellate Body has interpreted the WTO agreements according to the principles set forth by the Vienna Convention on the Laws of the Treaties ("the Vienna Convention"). The Appellate Body has also on several occasions recognized the principle of effectiveness in the interpretation of treaties for determining the inter-relation between these agreements:

> 80. . . . . The principle of effectiveness . . . requires that a treaty interpreter: [. . .]
> must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.
>
> 81. In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to *"read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously."* An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole. Article II:2 of the *WTO Agreement* expressly manifests the intention of the Uruguay Round negotiators that the provisions of the *WTO Agreement* and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole.[46]

Accordingly, all the provisions of the CVA and the Article VII of GATT 1994 need to coexist harmoniously, and the parts and sections of each text need to be read as a whole. Considering that a treaty is to be interpreted based upon the ordinary meaning to be given

[45] Report of the Appellate Body, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, ¶¶ 74–75 (1999) (emphasis in original).
[46] *Id.*, ¶¶ 80–81 (emphasis in original).

to the terms of the treaty in their context, and in the light of its objective and purpose,[47] one could argue that while the CVA is *lex specialis* to the subject-matter, since it deals exclusively with customs valuation issues, Article VII is *lex generalis* since it is part of the GATT 1994, which has customs valuation as one of its many topics. In short, the two texts should be read together, the CVA being more likely to offer specific answers to detailed questions.

IV. Methods of Customs Valuation

The Agreement establishes in Part I (Articles 1–7) a system that consists of a set of alternative valuation methods which customs officers should consider, one after another, applying to any particular import, until a method is found that can be applied. This was the major feature of the new valuation regime which emerged in the Tokyo Round. Paragraphs 1–4 of the General Interpretative Note in Annex I to the Agreement elaborate on their order of use.

Customs authorities must determine the customs value of goods by applying the primary method of valuation, the "transaction value" (*Method 1*). If that is not possible, they must resort to the secondary methods of valuation, in the following order: a) the transaction value of identical goods (*Method 2*); b) the transaction value of similar goods (*Method 3*); c) the "deductive value" (*Method 4*); d) the "computed value" (*Method 5*); finally, if none of these methods is valid they must apply any reasonable means of valuation, as a fallback valuation method (*Method 6*). At the request of the importer, the application of Methods 4 and 5 may be reversed, Method 5 (computed value) being considered first. Even if the importer does so request, should computed value turn out to be impossible to determine, the deductive method prescribed in Method 4 is to be used.[48]

As there is no GATT/WTO case law, our detailed analysis will be largely based on the technical interpretations issued by the TCCV.

A. The Primary Method of Customs Valuation: Transaction Value of the Goods (Method 1)

The primary method for customs valuation is defined in Article 1 of the CVA, which provides that the customs value of imported goods shall be the Transaction Value ("TV") of the goods themselves. The TV aims to put into practice the general rule under Article VII:2 (a) of GATT that the customs valuation of imported goods should be based on their "actual value." The Preamble stresses that this method should be used "to the greatest extent possible," so that situations which allow departure from it should be interpreted restrictively.

As noted at the start of this chapter, TV was a corrective reaction to the practice widespread around the world of arbitrarily-asserted "uplifts", informally negotiated between customs officer and importer or customs agent, a sort of parallel fiscal universe, whereby dutiable value was based not on the invoice price but the invoice price increased by a negotiated percentage. The need to negotiate a figure was predicated on the presumptive unreliability of the price payable. TV means that customs value must be calculated on the basis of the terms of each individual transaction, even if they can be said to be

[47] Article 31 of the Vienna Convention.
[48] CVA Annex I, General Note, ¶ 3.

unusual for the type of contract in question. The CVA therefore prefers the price agreed between the parties rather than a notional price. This implies in turn that two shipments of the same product from the same place and going to the same place at the same time might not have the same dutiable value.

In applying the TV, customs and traders must necessarily consider:

- The evidence of a sale for export to the country of importation. The importer must supply a declaration relating to customs value and any documents produced to support those particulars (e.g. commercial invoices, contracts, purchase orders). The declaration will reflect the "invoice price."
- The possible need for adjustment of the invoice price by making certain additions or deductions in order to arrive at the TV ("Adjustments") (to ensure that extraneous elements are not included and that essential elements are not forgotten).
- Some special situations that may justify a departure from the basic rule of customs valuation.

We provide below a detailed explanation of the definition of TV, the adjustments to be undertaken and the possible grounds for departure from TV.

1. The Definition of Transaction Value

Article 1:1 of the CVA defines TV as the price actually paid or payable for the goods when sold for export to the country of importation, adjusted in accordance with the provisions of Article 8, provided that none of the grounds for rejecting the TV applies. The following clarification should be made with regard to this definition:

- The *price actually paid or payable* is the total payment made or to be made by the buyer, to or for the benefit of, the seller for the imported goods.[49]
- The *agreed price.* The price may be expressed in cash or in kind (goods or the rights to services) or partly in cash and partly in kind. The only requirement is that the goods must have an agreed price. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. It may be made directly or indirectly. An example of indirect payment would be the settlement by the buyer of a debt owed by the seller.[50]
- *The price for the goods.* The CVA makes it clear that TV is to be based on the particular shipment of goods being valued.[51] The major previous valuation

[49] Annex I, Note to CVA Article 1, paragraph 1.

[50] *Id.*

[51] A special situation may arise with regard to computer software, which may be of immense value not because of the physical characteristics of the imported goods, but because of what is electronically recorded thereon. Such electronic material could be transmitted by telephone, cable or satellite and recorded on the medium. How to value such items was decided by the decision on the valuation of carrier media bearing software for data processing equipment (VAL/8) adopted by the GATT Committee on Customs Valuation on September 24, 1984. It recommends that [. . .] "in determining the customs value of imported carrier media bearing data or instructions (software), only the cost or value of the carrier medium itself shall be taken into account. The customs value shall not, therefore, include the cost or value of the data or instructions, provided that this is distinguished from the cost or the value of the carrier medium. For the purpose of this Decision, the expression "carrier medium" shall not be taken to include integrated circuits, semiconductors and similar devices or articles incorporating such circuits or devices; the expression 'data or instructions' shall not be taken to include sound, cinematic or video recordings." The rationale for this decision is that it is essentially the carrier media itself (i.e. the magnetic disk), which is liable for duty under the customs tariff. *See* Sherman and Glasshoff, *supra* note 6, at 86.

system (the BDV) looked not at the price of the particular shipment being valued, but at some typical, hypothetical or ideal transaction involving the same kind of goods. Under the CVA, only the price of the goods in their condition at the time of importation or valuation is relevant.[52] Thus the flow of dividends or other payments from the buyer to the seller which do not relate to the imported goods is not as such part of the customs value.[53]

- *The price in this transaction.* In ascertaining the TV, the CVA looks at the price in the current transaction, not at a pattern or pricing structure, not at a market, and not at how the parties arrived at the price. The invoice price is simply accepted, and adjusted as provided in Article 8 or rejected on one of the recognized grounds for rejecting TV.[54] The mere fact that a price is lower than prevailing market prices for identical goods does not necessarily lead to rejection under TV, subject of course to the right of customs authorities to satisfy themselves as to the truth or accuracy of any statement, document or declaration.[55] In other words, subject to only few exceptions, whatever is accepted by the business world is to be accepted by customs in duty valuation.[56] The same reasoning applies to subsidized or dumped products, whose prices should not be rejected during the valuation process as such. The WTO legal system provides for other instruments to combat them: antidumping and countervailing duties.[57]
- The phrase *actually paid or payable* expresses the intention that the customs value should include the entire price, whether or not it has already been fully or partly paid. The entire agreed contract price remains the basis for TV and the assessment of customs duty, even if the buyer defaults and fails to pay.[58]
- *Changes in the agreed price.* The word "actually" preceding "paid or payable" suggests yet another series of problems which may arise when the agreed price changes. In commercial practice, some contracts may include a price review clause whereby the price payable is only provisionally fixed, its final determination being subject to certain factors specified in the provisions of the contract itself (such as a discount for late delivery or formula pricing, which recognizes increases or decreases of elements such as labor and raw materials).[59] If the parties revise the price before the goods reach the country of importation, the contract has simply been amended. In this case, the TV is to be based on the new price, whether higher or lower than the old one.[60] The situation is different where price review clauses are linked to variables that come into play some time after the goods have been imported. The TCCV states that price review clauses should not of themselves preclude valuation under Article 1 of the CVA. Customs may

[52] Sherman and Glasshoff, *supra* note 6, at 85.
[53] Annex I, Note to CVA Article 1, paragraph 4.
[54] Sherman and Glasshoff, *supra* note 6, at 78.
[55] *See* CVA Article 17, Annex III:6 to the Agreement and the Uruguay Round Ministerial Decision, *Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value*. The powers of customs authorities are discussed in Part V.B of this Chapter.
[56] Bhala and Kennedy, *supra* note 16, at 324.
[57] *See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-dumping) and *Agreement on Subsidies and Countervailing Measures*, discussed in chapter 11 and 16 of this book.
[58] Sherman and Glasshoff, *supra* note 6, at 82.
[59] TCCV Commentary 4.1 on *Price Review Clauses.*
[60] Sherman and Glasshoff, *supra* note 6, at 83.

have to proceed on the basis of its own best evidence as to the appropriate adjustment. In addition, any necessary steps must be taken to keep the duty assessment procedure open.[61] However, if in the end there is no acceptable price because the original price no longer applies and the new one is not properly established, there may be no TV, and one of the alternative bases of valuation must then be applied.[62]

- *No time requirement.* The meaning of the phrase " *when sold for export to the country of importation*" requires clarification. It should not be regarded as giving an indication of the time to be taken into consideration when deciding whether a price is valid for the purposes of Article 1; it merely indicates the type of transaction involved, namely one in which the goods were sold for export to the country of importation. Thus lapse of time alone does not justify rejecting the TV. It should be accepted irrespective of the time at which the sale contract was concluded, and hence irrespective of any market fluctuations after the date when the contract was concluded.[63]
- *Identification of the targeted transaction.* Finally, the phrase "when sold for export to the country of importation" also refers to the requirement for identification of the transaction to be considered for valuation purposes. The TCCV states that the fact that the goods are presented for valuation in itself establishes their importation, which in turn establishes the fact of their exportation. It follows that only transactions involving an actual international transfer of goods may be used for valuing merchandise under the TV method.[64] In this respect, there is no need for the sale to take place in a specific country of exportation. In addition, the immediate or last sale will normally be the one that took place with a view to exporting the goods to the country of importation (i.e. the "targeted transaction"), unless the importer proves otherwise in the context of successive sales.[65]

2. Adjustments to the Price Paid or Payable

The price actually paid or payable for the goods when sold for export to the country of importation may require to be adjusted by making certain additions or deductions, in order to arrive at the TV. A TV without certain elements would be incomplete and with other included elements would be excessive. The following table shows the possible adjustments to be made when applicable to the price paid or actually paid.

[61] TCCV Commentary 4.1 notes that Article 13 of the CVA provides the possibility of delaying the final determination of the customs value. Articles 13 states: "If , in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable. The legislation of each Member shall make provisions for such circumstances."

[62] Sherman and Glasshoff, *supra* note 6, at 84.

[63] TCCV, Explanatory Note 1.1, ¶¶ 3–4.

[64] TCCV, Advisory Opinion 14.1, ¶ 2. The TCCV illustrates its Advisory Opinion with several examples.

[65] For example, Article 147 of the implementing EC Customs Code Regulation (Regulation 2454/93, as amended) provides that when the customs declarant wants to rely on an earlier sale to establish the TV, it must demonstrate to the satisfaction of the customs authorities that the sale in question took place contemplating export into the EU. *See* Hans-Joachim Priess and André Fiebig, *Determining the Customs Value of Goods Subject to Successive Sales: Recent Developments in EU Customs Law*, [1995] 4 International Trade Regulation, at 137.

POSSIBLE ADDITIONS TO THE PRICE	POSSIBLE DEDUCTIONS FROM THE PRICE
1) Selling commissions and brokerage incurred by the buyer 2) Packing costs 3) The value of any assist 4) Any royalties or license fee paid by the buyer as a condition of the sale 5) Proceeds of any subsequent resale, disposal, or use of the merchandise that accrues to the seller	1) Construction/maintenance work undertaken after importation on imported goods 2) Cost of transportation after importation 3) Duties and taxes of the country of importation 4) Charges for interest under a financing arrangement relating to the purchase of imported goods.
Cost of international transportation and related insurance and handling charges: depending on whether the importing country Member value values goods on a CIF or FOB basis, these charges will be added to the actual price (if not already included in the price) or deducted from it (if included) to reach TV.	
Cost of storage: on a case-by-case basis additions may be applicable.	

(a) Additions. Article 8:1 provides an exhaustive list of costs that must be added to the price paid or payable for the imported goods if the relevant cost has been actually assumed by the buyer and is not already included in the price. No other hypothetical (normal or usual) costs are to be included in the TV.[66] These additions are designed to prevent the under-valuation of goods and so to protect the customs duty revenues of the importing country.

(i) *Selling commissions and brokerage paid by the buyer.* The TV must include any selling commission or brokerage paid by the buyer to the seller or the seller's agent.[67] A "selling commission" is paid to an agent commissioned by the seller to locate a buyer or negotiate a sale. "Brokerage" is the broker's remuneration, usually a percentage of the business concluded as a result of its activities. Brokers are middlemen working to promote a transaction and often not clearly defined as representing either party. To avoid doubt, Article 8 of the CVA also provides that brokerage fees paid by the buyer must be included in the price. The rationale for this adjustment is that typically a selling commission would be paid by the seller, who would include these fees as a cost in calculating its selling price.[68] If the buyer pays the selling commission or the brokerage separately and apart from the agreed price, it will be relieving the seller from an obligation, and the payment will be an indirect payment to the seller and thus a part of the price.[69] The payment in either case may be made directly or indirectly by the buyer to the agent. The key issue is not the payment route, but rather whether the payment benefits the seller.[70]

However, "buying commissions" must not be considered as part of the TV. The Note to Article 8 explains that the term "buying commissions" means

[66] CVA Article 8:4.

[67] CVA Article 8:1 (a) (i).

[68] The TCCV in its Explanatory Note 2.1 states: "it is clear from the provisions of Article 8 that commissions or brokerage payable by the seller but which are not charged to the buyer could not be added to the price actually paid or payable."

[69] Sherman and Glasshoff, *supra* note at 109.

[70] Bhala and Kennedy, *supra* note at 327.

fees paid by an importer to the importer's agent for the service of representing the importer abroad in the purchase of the goods being valued.[71] Normally the buying agent's remuneration is paid by the importer, separately from payment for the goods.[72]

The CVA does not provide guidance on whether payments made to intermediaries by the buyer and not included in the price should be added to that price. Since the existence and the nature of services rendered by intermediaries in connection with a sale are not apparent from the commercial documents, customs administrations will need to take all reasonable measures to ensure the proper application of Article 8.[73]

Finally, the term "commission" as used in Article 8.1 (a) (i) does not cover different costs of financing such as confirming commissions,[74] which are not paid for the goods but for securing payment or credit.

(ii) *Packing costs*. Packing costs incurred by the buyer must be included in the TV. The CVA provides for the addition of: i) the cost of containers which are treated as being one with the goods in question for customs purposes (e.g. perfume bottles and packaging which go to the consumer);[75] and ii) the cost of packing (e.g. packing of the imported merchandise in a condition ready for overseas shipment to the point of importation or delivery).[76] These provisions are intended to cover only items which have no economic purpose of their own and are generally classified under the tariff code of the goods packed in them. The word "containers" does not refer to containers used for long-distance transport and then re-used for other shipments.[77]

(iii) *The value of any assist.* The value of any "assist" must be included in the TV. An "assist" refers to the value of goods or services which the buyer provides directly or indirectly, free of charge or at a reduced cost, to the seller for use in the production or sale of the imported goods being valued.[78] The term "assist" is not used in the CVA, but is a term of art in customs parlance. Thus where the buyer supplies roughly-hewn wood, woodworking equipment, jigs, varnish and a design template for the seller's use in making an exported table, these elements should be captured to increase the otherwise low price to be charged for the table.

Article 8:1 (b) provides an exhaustive list of four categories of dutiable assists:

— materials, components, parts and similar items incorporated in the imported goods;

[71] Note to CVA Article 8, Paragraph 1(a)(i).

[72] TCCV, Explanatory Note 2.1.

[73] TCCV, Explanatory Note 2.1. The TCCV in its Commentary 17.1 provides several guidelines on the evidence needed to establish under what circumstances fees paid by the buyer to an intermediary may be considered as a buying commission.

[74] A confirming commission is a fee charged by a bank acting for or on behalf of the seller in a transaction, in return for its guaranteeing payment of a letter of credit in the event the buyer's bank is unable to fulfill the commitment. *See* Sherman and Glasshoff, *supra* note 6, at 110. *See also* TCCV Explanatory Note 5.1 on "Confirming Commissions."

[75] CVA Article 8:1 (a) (ii).

[76] CVA Article 8:1 (a) (iii).

[77] Commercial containers are modes of transport which may be taken into account as an element in transportation costs in CIF countries. *See* Sherman and Glasshoff, *supra*, note 6, at 111.

[78] CVA Article 8:1 (b).

— tools, dyes, moulds and similar items used in the production of the imported goods;
— materials consumed in their production; and
— engineering, development, artwork, design work, and plans and sketches undertaken (in the sense of carried out)[79] elsewhere than in the country of importation and necessary for the production of the goods.

The Interpretative Note to Article 8 gives some guidance as to how to value certain types of assists (e.g. tools, dyes, moulds and similar items used in the production of imported goods). The value of an assist is measured by the cost of acquiring the assist from an unrelated seller, or of making the assist by the importer or a party related to the importer. This value may be adjusted downward to reflect the fact that the importer previously used the assist. No profit to the importer (or a related supplier) is to be included in the value of the assist. It is not clear from the Note whether the costs of shipping the assist to the foreign supplier should be included in the value of the assist. A case could be made that it should not, on the grounds that such considerations are relevant to the valuation of the assist when it enters the seller's country, but are not relevant to determining the neutral value of the assist.

Finally, once the value for the assist has been determined, it is necessary to apportion that value to the imported goods in a reasonable manner, appropriate to the circumstances and in accordance with generally accepted accounting principles. Apportionment could take various forms, including an allocation over the number of units produced up to the time of the first shipment, or over the entire anticipated production. The method of apportionment used will depend on the documentation provided by the importer.[80] However, when the proceeds are dutiable but cannot be valued, the TV is to be rejected.[81]

(iv) *Royalties or license fee paid as a condition of the sale.* Article 8:1 (c) provides that the TV must include any royalty or license fee the buyer pays directly or indirectly to the seller of imported goods, or to a third party holding a relevant intellectual property right (patents, trademarks and copyright), as a condition of the sale. In addition, the CVA requires that the royalty or license fee must relate to the goods being valued. Thus if the buyer must pay a sum per bottle of imported whisky in order to have the right to use its trademark when selling the whisky in the country of importation, that sum is to be included in the TV.

The payment of a royalty or license fee is always a "condition of sale" when the goods would not have been sold at the agreed price or terms without such payment of royalty or license fee. Correspondingly, the payment of a royalty or license fee to a third party will only be a condition of the sale if the seller was obliged to pay the royalty or license fee to the third party and if the importing purchaser makes the payment for the benefit of and in agreement with the seller.[82]

In any event, whether a royalty or license fee is dutiable will be determined on a case-by-case basis, the key factors being whether the buyer had to pay

[79] *Decision on the Meaning of the Word "Undertaken" in Article 8:1 (b) (iv) of the English text of the Agreement*, adopted by the Tokyo Round Committee on March 3 1983 (VAL/M/6, paragraph 18). *See* WTO document G/VAL/W/1, April 28, 1995.
[80] Interpretative Note to CVA Article 8, ¶ 1 (b)(ii).
[81] CVA Article 1 (c).
[82] Sherman and Glasshoff, *supra* note 6, at 125.

it as a condition of sale, and to whom and under what circumstances it was paid.[83] It is thus not the case that TV is to be increased whenever the buyer makes payments to the seller in addition to those paid ostensibly as the invoice price.

However, charges for the right to reproduce the imported goods in the country of importation will not be added to the price actually paid or payable for the imported goods in determining the customs value.[84] The rationale for this exclusion is that a right to reproduce imported goods is not related to the goods being valued but to other not yet existing goods to be produced in the country of importation.[85]

(v) *The proceeds of any subsequent resale, disposal, or use of the merchandise that accrue to the seller.* Article 8:1 (d) requires that any proceeds accruing directly or indirectly to the seller of any subsequent resale, disposal, or use of the imported merchandise by the buyer must be included in the TV. Failing valuation of any dutiable proceeds, the TV is to be rejected.

The CVA does not provide much guidance as to what constitute dutiable proceeds. However, it is possible to define some implied requirements of this type of indirect payment for imported goods from the general context of the provision. First, an obligation on the buyer to share the proceeds with the seller requires an agreement in the contract of sale (i.e. a condition of sale). Second, payments from the buyer to the seller must relate to the imported goods (CVA Articles 1 and 8, and the relevant Interpretative Notes thereto). Accordingly, the proceeds of any subsequent resale, disposal or use of the imported goods should not be confused with the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods.[86]

An example will help clarify the kind of situation that falls within the scope of Article 8:1 (d). Suppose that at the end of the year, the importer must pay the manufacturer five percent of the revenues derived from reselling the imported merchandise. In this case, the sums remitted are the proceeds of a subsequent resale of the imported goods which accrue directly to the seller, and the amount is to be added to the price paid or payable as an adjustment under the provisions of Article 8:1 (d).[87]

(b) Deductions

(i) *Costs accruing after importation.* The Interpretative Note to Article 1 provides that TV must not include three categories of charges or costs if they are already included in the actual price. However, these items may be deducted only if they can be "distinguished from the price actually paid or payable for the imported goods." The rationale for this provision is that these charges or costs which accrue after importation of the goods are normally the responsibility of the buyer, and should not be dutiable. The three categories are:

[83] Bhala and Kennedy, *supra* note 16, at 329. The TCCV illustrates the applicability or not of CVA Article 8:1 (c) with different examples in Advisory Opinions 4.1 to 4.13.

[84] Note to CVA Article 8, Paragraph 1 (c).

[85] The TCCV in its Commentary 19.1 provides some examples and further guidance as to the meaning of the expression "right to reproduce the imported goods" within the meaning of the Interpretative Note to CVA Article 8:1 (c).

[86] TCCV Case Study 2.2; Sherman and Glasshoff, *supra* note 6, at 156–157.

[87] TCCV provides different examples in Case Study 2.2.

- Charges for construction, erection, assembly, maintenance or technical assistance undertaken after importation on imported goods such as industrial plant, machinery or equipment. These charges include both services (labour) and materials. The list of examples is purely illustrative. This provision mainly refers to "turnkey arrangements," where the equipment, facility or machinery is to be delivered to the purchaser in operating condition, so that the importer need only turn the key to start up the plant or facility. The provision would ordinarily not apply to less complex imports such as food or clothing.[88]
- The cost of transport after importation (inland freight), i.e. freight charges incurred from the point of importation to an interior point where the goods are to be delivered to the buyer. This may be an issue when the country of importation has adopted the CIF system for customs valuation, because the cost of transportation up to the point of importation must be added to the price actually paid or payable to arrive to the TV. In some cases, the two parts of the freight costs are already distinguished in the bill of lading received from the carrier. In other cases, when there is a single "through rate" covering both portions of the transportation, a breakdown will be necessary. The CVA leaves each Member free to adopt an appropriate method of allocation. In countries that base their customs valuation on the FOB system, the cost of transportation in general, including the cost of transport to the point of importation, must be deducted from the price actually paid or payable, to the extent that it is included in the price.
- Import duties and taxes in the country of importation. The importer normally bears the burden of paying import duties and any other taxes payable in the country of importation or sale of the goods. If the importer actually pays them, they will not be included in the price to be valued and there will be no need to deduct them. However, it may be necessary to apply a deduction if the seller pays the duties or taxes (e.g. as part of a delivered duty-paid price at the buyer's plant) and they are included in the actual price.[89]

(ii) *The treatment of interest charges under a financing arrangement.* The decision of the Tokyo Round Committee of April 26, 1984,[90] on the treatment of interest charges in the customs value of imported goods provides that charges for interest under a financing arrangement entered into by the buyer and related to the purchase of imported goods will not be regarded as part of the customs value, provided that:

- the charges are distinguished from the price actually paid or payable for the goods;
- the financing arrangement was made in writing; and
- the buyer can demonstrate that i) such goods were actually sold at the price declared as the price actually paid or payable, and ii) the rate of interest claimed does not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided.

The Decision further provides that it should apply regardless of whether the finance is provided by the seller, a bank or another natural or legal person. It will apply,

[88] Sherman and Glasshoff, *supra* note 6, at 172.

[89] *Id.* at 173.

[90] VAL/M/9, ¶ 38. *See also* WTO Doc. G/VAL/W/1.

if appropriate, where goods are valued under a method other than the transaction value.

(c) The Cost of International Transportation and Related Charges. The GATT Contracting Parties could not reconcile two opposing systems during the Tokyo and Uruguay Rounds. Australia, Canada, New Zealand, the United States and a few other countries value imported goods on a FOB basis, excluding from customs value the cost of transportation to the country of importation. The EC and most of the rest of the world, which previously applied the BDV, value imported goods on a CIF basis (i.e. including transportation and related costs to the point of importation in customs value).

The CVA accordingly leaves Members wide discretion on whether to base their customs valuation system on a FOB (Free on board) or CIF (cost, insurance and freight) basis. Article 8:2 provides that Members shall provide for the *inclusion in* or *exclusion from* the customs value, *in whole* or *in part*, of the following items: i) the cost of transport of the imported goods to the port or place of importation; ii) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and iii) the cost of insurance.

In implementing Article 8:2, Members are free to establish the CIF system that best suits their interests. They can include the items listed in that provision "in whole or in part". In general, Members will include in the CIF value all costs which are directly related to the physical movement of the goods, from the place of first loading in the country of exportation to entry into the customs territory of the country of importation. These costs should therefore end with the arrival of the goods at the first port or place in the country of importation. In any event, this provision does not cover the costs of transportation after importation, which the CVA excludes from the TV.[91]

Opinion as to the relative merits of each system is sharply divided. Under the CIF system, the State's revenue is higher given that duty is levied not only on the price of the goods themselves but also on the cost of their transport to the importing country. Conversely, under the FOB system, the State's revenue is lower.[92] While the alternatives have financial consequences, another explanation is probably the attractiveness of that which is familiar.

Finally, it is worth noting that the additions for freight costs required in a CIF country and the deductions from freight required in a FOB country are made regardless of the terms of the transaction agreed upon between the parties. As a result, the CVA places uniform treatment of importation into a country above respect for the terms agreed upon by the parties to the transaction.

(d) The Treatment of Storage and Related Expenses. It is worth noting that storage costs are not mentioned under Articles 1 and 8. The TCCV in its Commentary 7.1 gives a non-exhaustive list of possible situations regarding storage, and proposes the following solutions:

- The goods are in storage abroad at the time of the sale for export to the country of importation. In this case, the warehousing expenses should be added to the price, since they are normally borne by the seller which will try to recover them in the price.

[91] Interpretative Note to CVA Article1, ¶ 3 (b).

[92] For a complete account of the relative advantages and disadvantages of the CIF and FOB basis for customs valuation, *see* comparative table in LUX, GUIDE TO COMMUNITY CUSTOMS LEGISLATION 200–202 (2002).

- The goods are put into storage abroad subsequent to their purchase but prior to their export to the country of importation. In this case, the warehousing expenses should not be added to the price, since they are normally borne by the buyer after purchase.
- The goods are put into storage in the country of importation prior to their clearance for home use. In this case, the answer will depend on who placed the goods in the warehouse: the seller (the cost should be added to the customs value) or the buyer (the cost should not be added to the customs value).
- The goods are temporarily stored as an incident of their transport. In a CIF system this cost should be considered as charges associated with transport, and thus included in customs value.

The purpose of this discussion has been to note the situations where elements should be added in or taken away from an otherwise acceptable invoice price in order to reach TV. The next section describes what to do when the invoice price is not an acceptable basis for TV.

3. Departures from TV

There are six grounds for not applying the TV method. It will be necessary in those cases to have recourse to the other valuation methods, in the sequence given in the CVA. The six cases are as follows:

(a) Absence of "Sale" or "Price of the Goods" for Export to the Country of Importation. TV is based on the "price . . . for the goods when sold for export to the country of importation"; therefore, there can be no TV if there is no such sale and thus no such price. The term 'sale' has not been defined in the CVA. The TCCV expressed the opinion that ". . . in conformity with the basic intention of the Agreement that the TV of imported goods should be used to the greatest extent possible for customs valuation purposes, uniformity of interpretation and application can be achieved by taking the term 'sale' in the widest sense, to be determined only under the provisions of Articles 1 and 8 of the CVA read together.[93] In those cases where the existence of a "sale" is disputed, local law should be sufficient to clarify the situation, amplified if necessary by the UN Convention on the Uniform Law on the International Sale of Goods.

The TCCV provides a non-exhaustive list of situations in which imported goods would be deemed not to have been the subject of a sale.[94] The list includes: i) free items (gifts, samples, promotional objects); ii) goods imported under consignment; iii) goods imported by intermediaries who do not purchase the goods and sell them after importation; iv) goods imported under a leasing contract; v) goods supplied on loan which remain the property of the sender; vi) goods (waste or scrap) imported for destruction in the country of importation, with the sender paying the importer for its services.

(b) Restrictions as to the Disposal or Use of the Goods by the Buyer, Which Substantially Affect the Value of the Goods. TV does not apply when the goods sold for export to the country of importation are subject to restrictions on their disposal or use, as set forth in Article 1:1(a). The key test here is whether a specific restriction substantially affects the value of the imported goods being valued, and does not correspond with restrictions usual

[93] TCCV, Advisory Opinion 1.1.
[94] TCCV, Advisory Opinion 1.1.

in the trade. The rationale is that restrictions on the seller's freedom to dispose of the property adversely affect the value of the merchandise, hence making a TV unreliable.[95]

The CVA refers to restrictions other than those which (i) are imposed or required by law or by the public authorities in the country of importation; (ii) limit the geographical area in which the goods may be resold; or (iii) do not substantially affect the value of the goods. These restrictions do not affect TV.

The TCCV has provided some guidance to enable authorities to determine when to disregard the restriction in the contract of sale.[96] The Committee lists certain factors to be taken into consideration, including the nature of the restriction, the nature of the imported goods, the nature of the industry and its commercial practices and whether the effect on the value is commercially significant. These factors may vary from case to case since a small effect on the value in a case involving one type of goods may be treated as substantial, while a much greater change in the value of goods of another type may not be treated as substantial. An example of a restriction that could have substantial effect on the value of the imported goods is a machine sold at a nominal price on condition that the buyer uses it only for charitable purposes.[97] A trivial one would be a requirement that imported laptop computers not be used in connection with nuclear engineering.

(c) Sale or Price Subject to Conditions or Considerations for Which Value Cannot be Determined. Article 1:1(b) of the CVA provides that the TV value is not applicable when the sale of the goods is subject to some condition between the buyer and the seller for which a value cannot be determined. Here the TV is incomplete, and cannot be defined more accurately because of the indeterminate value of the condition.[98] The Interpretative Note to this provision gives the following examples:[99] the buyer must also buy other goods; the buyer must sell other goods to the seller; the buyer buys semi-finished goods and pays by delivering to the seller a specified quantity of the finished product. Cases of barter, reciprocal transactions, compensatory deals, package deals, and the like will frequently offer no obvious TV. However, as the Note points out, conditions or considerations relating to the production or marketing of the imported goods need not result in the rejection of the TV: the buyer may furnish the seller with engineering and plans undertaken in the country of importation, or the buyer may undertake on its own account, by agreement with the seller, activities relating to the marketing of the imported goods.[100] In these cases importers should disclose the conditions to customs and furnish evidence that the prices in these transactions are not affected by each other or, if they are, try to distinguish the price elements which have to be added to or deducted from the nominal price of the imported goods being valued (minutes or memoranda on the negotiations reflecting the structuring of the prices might be helpful).[101]

[95] Bhala and Kemedy, *supra* note 16, at 333.

[96] TCCV, Commentary 12.1.

[97] The Interpretative Note provides the following example of a restriction that would not render the TV unacceptable: where a seller requires a buyer of automobiles not to sell or exhibit them prior to a fixed date which represents the beginning of a model year. Commentary 12.1 also provides the following example of an acceptable restriction: where a firm of cosmetics imposes a requirement on all importers that its product be sold to consumers exclusively through individual sales representatives undertaking house-to-house sales, since its whole distribution system and advertising approach are based on this kind of sales effort.

[98] Bhala and Kennedy, *supra* note 16, at 333.

[99] Note to CVA Article 1, ¶ 1(b).

[100] *Id.*

[101] Sherman and Glasshoff *supra* note 6, at 183.

(d) Proceeds of Subsequent Resale Accrue to the Seller. Article 1:1 (c) provides that the TV is not applicable when part of the proceeds of any subsequent resale, disposal, or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made, for example where the seller takes a percentage to be negotiated of the downstream price paid to the buyer (see Section 2(a)(v) above). If possible, an addition of the proceeds is to be made under Article 8, and TV is to be rejected only if it is impossible to make the addition. Article 1.1 (c) must be understood to refer only to situations where the proceeds are dutiable under Article 8.1 (d) but cannot be valued.[102]

(e) Related Parties, When the Relationship May Influence the TV. The significance of links between buyer and seller has been referred to frequently above. However, the fact that buyer and seller are related is not in itself sufficient for regarding the TV as unacceptable.[103] The Agreement defines the concept of "related persons" in Article 15:4, listing eight situations in which persons must be deemed to be related. The list includes situations of legal partnership, control,[104] employment and family relationships. However, Article 15:5 provides that the relationship of sole agent, sole distributor or sole concessionaire should not in itself make the parties related for the purposes of Article 1.1(d) unless the other criteria of relationship set forth in Article 15:4 are met.[105] Thus a license agreement does not in itself establish a relationship within the meaning of the Agreement.[106]

Article 1:2(a) provides that the TV in a situation of related parties shall be accepted if the circumstances surrounding the sale did not influence the price. If, in the light of the information provided by the importer or from other sources, the customs authorities have no doubts about the acceptability of the price, the TV should be accepted without requesting further information from the importer.[107] However, if customs authorities are unable to accept the TV without further inquiry, they should communicate the grounds to the importer and give it "reasonable" opportunity to supply such further detailed information as may be necessary to enable them to examine the circumstances surrounding the sale. The importer has a right to be heard, but is also free not to disclose the additional information and take the consequences of letting customs authorities depart from the TV method.

If the importer chooses to cooperate, it must demonstrate that the TV of imported goods closely approximates to one of the "test values" of Article 1:2(b), i.e., one of the other principal valuation methods. These test values are not a substitute for the TV but merely a comparison.[108] If one of the test values is met, the TV is to be accepted as a base for customs valuation. When this happens, it is not necessary to examine the question of

[102] *Id.* at 184.

[103] CVA Article 1.2 (a)

[104] Note to CVA Article 15, ¶ (e) aims to clarify the notion of control: "one person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter."

[105] The TCCV in its Explanatory Note 4.1 clarifies the relationship under CVA Article 15:5, read in conjunction with Article 15.4. The Explanatory Note states that the wording of Article 15:5 of the Agreement has two objectives: 1) to provide a clear departure from the concept held in certain valuation systems that sole agents are by their nature related to their suppliers; 2) to direct consideration of the relationship of parties solely within the provisions of Article 15:4. The questions which must be considered is whether the terms or conditions of the contract are such as to meet one of the provisions of Article 15:4.

[106] Sherman and Glasshoff, *supra* note 6, at 189.

[107] Note to CVA Article 1 (¶ 2), ¶ 4.

[108] McGovern, *supra* note 6, at 155.

influence under Article 1:2(a).[109] In making such comparisons, allowances must be made for differences in commercial levels and quantities, for adjustments under Article 8, and for the extra sale costs which an independent seller would incur.[110]

(f) Data Unavailable to Make the Appropriate Adjustments Under Article 8. The CVA requires that certain adjustments be made to the price actually paid or payable in order to arrive at the TV. However, the additions to that price listed in Article 8 must be made "only on the basis of objective and quantifiable data."[111] The Interpretative Note to Article 8 states that where such data do not exist, the TV cannot be determined under the provisions of Article 1. As a consequence, the customs valuation of the imported goods must be undertaken by applying one of the other valuation methods. The provision reflects broader policy goals, of encouraging the use of TV whenever possible, but of accepting that it cannot always be achieved if data are simply unavailable.

This requirement is to be linked to Article 13 (discussed in Part V.C below), which allows customs authorities to delay the final determination of the customs value of imported goods for a reasonable period of time, when the relevant information is not available at the time of importation. However, the primary method of valuation should be abandoned when it is definitely impossible to put a value on any of the items listed in Article 8.

B. Transaction Value of Identical (Method 2) or Similar Goods (Method 3)

TV should relate to the imported goods being appraised. If it is not possible to ascertain that value, the CVA provides that the customs value must be the TV of identical goods (Method 2), or failing that valuation, the TV of similar goods (Method 3). These two methods seek to base valuation on another transaction which previously qualified under TV and whose essential features are more or less the same.

Whether the good is identical or similar to the imported good whose value is being appraised depends on a variety of factors, such as the export date of the shipments, the quantity of the goods and the commercial level at which the sale is made. In addition, there may also be room for argument as to what goods are identical or similar to the imported goods.[112]

Articles 2 and 3 of the CVA provide in similar terms for the valuation methods of the TV of identical and similar goods respectively.

1. The Definitions of "Identical" and "Similar" Goods

"Identical goods" are goods which are the same in all respects, including physical characteristics, quality and reputation. Minor differences in appearance would not preclude goods otherwise conforming to the definition from being regarded as identical.[113] "Similar goods" are goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and be commercially interchangeable. Various factors can be taken into consideration in determining whether goods are similar, such as the quality of the goods, their reputation and the existence of a trademark are among the factors.[114]

[109] Note to CVA Article 1 (¶ 2), ¶ 4.
[110] CVA Article 1:2(b) and Note.
[111] CVA Article 8:3.
[112] Bhala and Kennedy, *supra* note 16, at 325.
[113] CVA Article 15:2 (a).
[114] CVA Article 15:2 (b). Goods bearing a trademark known to purchasers will ordinarily not be similar to goods bearing no trademark.

Where all the criteria to consider the goods "identical" or "similar" are met, the fact that the person who produced them is different from the person who produced the goods being appraised is irrelevant when there are no identical or similar goods produced by the same person.[115]

2. Requirements for Qualifying as "Identical" or "Similar" Goods

To be eligible for the application of methods 2 and 3, identical or similar goods must have been:

- *Sold for export to the same country of importation*.
- *Exported at, or about, the same time*. The TCCV states that the words "or about" should be regarded as intended simply to make the term "at the same time" somewhat less rigid. In addition, it should be noted that "at or about the same time" should be taken to cover a period, as close to the date of exportation as possible, within which commercial practices and market conditions which affect price remain the same. In the final analysis, the question must be decided on a case-by-case basis within the overall context of the application of Articles 2 and 3.[116]
- *Produced in the same country*.[117] Although presented in Article 15 as a feature of identity and similarity, this is an additional requirement to those set forth in Articles 2 and 3.

3. Different Alternatives for the Determination of the Customs Value Under Methods 2 and 3

The following sequence must be respected for determination of the customs value of the goods being appraised based on the TV of identical or similar goods:[118]

First: use of the TV of identical/similar goods in a sale at the "same commercial level" and in "substantially the same quantities" as the goods being valued. If this is not possible, then:

Second: use of the TV of identical/similar goods in a sale at "different commercial level and/or in different quantities", adjusted as appropriate to take into account differences attributable to commercial level or quantity. The Agreement requires that the adjustments be made on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustment, such as valid price lists containing prices referring to different levels or quantities. If no objective criteria exist for making such adjustments, methods 2 and 3 should not be used. The agreement does not provide any guidance as to what should be understood as "different commercial level", so this should be determined on a case-by-case basis. These provisions thus contemplate a recognition of the price consequences of level of trade, whereas GATT Article VII permits determination of value on the basis of the general price level of similar merchandise.[119]

Finally, some further points are to be noted:

- When more than one TV of identical or similar goods is found, the lowest is to be used.[120] This provision will of course give a lower figure and lower duty.

[115] CVA Article 15:2 (e).
[116] TCCV, Explanatory Note 1.1, *Time Element in Relation to Articles 1, 2, and 3 of the Agreement.*
[117] CVA Article 15:2 (d). The determination of the country of production is subject to rules of origin of the country of importation. *See* Sherman and Glasshoff, *supra* note 6, at 203.
[118] *See* CVA Article 2:1 (b) and 3:1 (b) and the respective Interpretative Notes.
[119] McGovern, *supra* note 6 at 158.
[120] CVA Article 2:3 and 3:3.

- Article 2 must be exhausted before Article 3 can be invoked. Thus, the fact that the time of exportation of similar goods (as opposed to identical goods) is closer to that of the goods to be valued cannot reverse the order of application of Articles 2 and 3.[121]
- The adjustment required in case of use of TV of identical/similar goods in a sale at different commercial level or in different quantities must not be confused with the adjustments called for in Article 8:1. There is no need to make adjustments under this provision, since the TV of identical or similar goods already includes them.
- When transportation costs have been included in the TV of identical/similar goods (the CIF system), an adjustment must be made to take account of significant differences in such costs between the imported goods and the identical/similar goods in question arising from differences in distances and modes of transport.[122]

C. Deductive Value (Method 4)

Where it is not possible to calculate the TV of imported goods using identical or similar goods, the value of imported goods must be appraised according to the deductive value (DV) method. However, the importer may elect to use computed value instead of DV.[123]

DV is the resale price in the country of importation, adjusted as appropriate, of the goods actually imported, or identical or similar imported goods, to persons not related to the seller. The basic goal in calculating DV is to determine a notional FOB contract price as of the port of shipment, or a notional CIF contract price as of the port of importation, for the goods being appraised, by working backwards from the resale price and deducting the appropriate costs. DV may be calculated by reference to the resale price of the good being appraised, or identical goods or similar goods. We will use the term "goods concerned" to refer to each of these possibilities.

1. The Basis for the DV Calculation

The starting point in applying the DV method is to identify a "unit price" for the product concerned. That starting price depends on the time it is re-sold in the country of importation and the condition in which it is re-sold.[124] The "unit price," in turn, is based on the "greatest aggregate quantity" at which the good is sold. The greatest aggregate quantity refers to a sale to an unrelated buyer in the country of importation at the first commercial level after importation, or after further processing, in a volume that is both greater than the total volume sold at any other price and sufficient to establish a unit price. In other words, the common-sense idea behind that phrase is to ensure that a non-representative price resulting from a small or unusual transaction is not used as the starting point of the calculation.[125]

The CVA identifies three alternatives for determining the unit price, which should be applied in the following order:

[121] TCCV, Explanatory Note 1.1. A comparable situation may arise if similar goods (as opposed to identical goods) were produced by the same person. In this case, the same rule applies.

[122] CVA Article 2:3 and 3:3.

[123] CVA Article 4. Developing country Members may make a reservation permitting them to refuse the request to reverse the order of the fourth and fifth valuation methods (CVA Article 4). *See* Part VI *infra*.

[124] Bhala and Kennedy, *supra* note 16, at 334.

[125] *Id.* at 335. *See also* Interpretative Note to CVA Article 5 for examples of unit price at which goods are sold in the greatest aggregate quantity.

- when the goods concerned are re-sold in the same condition as imported, at or about the date of importation of the goods being valued.[126]
- when the goods concerned are re-sold in the same condition as imported, but not at or about the date of importation of the goods being valued. In this case the DV must be based on the unit price at which the goods concerned are resold, no later than ninety days after the date of importation of the goods being valued.[127]
- when the goods concerned are re-sold in the country of importation in a condition different from the condition in which they were imported (usually after further processing). However, DV may be calculated in this manner only if the importer so requests.[128] The Interpretative Note states that this scenario will normally not be applicable when, as a result of the further processing, the imported goods have lost their identity and it is not possible to determine the value added by the processing accurately without unreasonable difficulty.[129]

The TCCV stresses that the CVA does not specify whether the DV method should only be based on the sales of the imported goods or identical or similar imported goods made by the importer of the imported goods, or whether it could also be based on the sales of identical or similar goods imported by other importers. The TCCV suggests that in this case, the customs authorities would have to decide, having regard to the circumstances of each individual case.[130]

2. Adjustments to the Unit Price

Once the unit price has been identified, it is necessary to make certain adjustments to reduce that price to the relevant customs value. In all scenarios, the following deductions are to be made:

- The commissions usually paid or payable, or the additions usually made for profit and general expenses, in connection with sales in that country of imported goods of the same class or kind;
- The usual costs of transport and insurance and associated costs incurred within the country of importation;
- Where appropriate, the costs and charges referred to in paragraph 2 of Article 8 (CIF charges);
- The customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods; and
- The value added after importation by further processing on the goods being appraised, when applicable.

D. Computed Value (Method 5)

Recourse to the Computed Value ("CV") method may take place either because the earlier methods in the hierarchy are unavailable or because the importer has opted to use the CV before the DV method.[131] CV determines the customs value on the basis of the cost

[126] CVA Article 5:1 (a)
[127] CVA Article 5:1 (b)
[128] CVA Article 5:2. Developing country Members may reserve the right to apply the DV method whether or not the importer so requests (Annex III:4 to the Agreement). *See* Part VI, *infra*.
[129] *Interpretative Note to CVA Article 5*, ¶ 12.
[130] TCCV, Commentary 15.1.
[131] CVA Article 4.

of production of the goods being valued, plus an amount for profit and general expenses usually reflected in sales from the country of exportation to the country of importation of goods of the same class or kind.[132] Although of course all manufactured goods are equally eligible to use this method, the production of electrical goods which have a large number of components whose costs must be precisely monitored lends itself particularly to this method what uplift would be appropriate. CV essentially requires a "ground-up" calculation involving the elements of cost of production. In contrast, TV and DV are "top-down" calculations in that adjustments are made to a marketplace price.[133]

1. Calculation of the CV

Article 6:1 of the CVA provides that CV shall consist of the sum of the value of the following items:

- *The cost or value of materials and fabrication or other processing employed in producing the imported goods*. The Interpretative Note to Article 6 provides that this cost is to be determined on the basis of information relating to the production of the goods being valued, supplied by or on behalf of the producer, which may be in a country other than the country of exportation. Modern cost accounting techniques can deliver such costs with great precision. The aim is to find the "actual" production cost of the item being valued, not the costs applicable to similar items produced at the time of exportation or importation.
- *The cost of packaging, containers and assists.* The Interpretative Note also provides that the cost or value of materials and fabrication will include, as in the TV calculation: packing and container costs provided for in Article 8:1 (a)(ii) (iii) and any assists provided for in Article 8:1 to the extent they are paid for by the producer.
- *Amount for profit and general expenses*.[134] This is to be determined on the basis of information supplied by or on behalf of the producer, and this information must be comparable ("equal") to the figures usually reflected in the sales of goods 'of the same class or kind'[135] as the goods being valued, which are made by other producers in the country of exportation for export to the country of importation. In other words, profit and general expenses for the producer in question should be in line with profit and general expenses for that producer's competitors in its home country. The implication may be that CV cannot be used unless there are goods of the same class or kind from the same country as the goods being appraised.[136] Where the producer's own figures for profit and general expenses are not consistent with those of its competitors in its home country, the amount for profit and general expenses may be based on relevant information other than that supplied by or on behalf of the producer of the goods.[137]

[132] Developing country Members may delay the application of the CV method for three additional years, following the implementation of all other provisions of the Agreement (Article 20:2). *See infra* Section 6.

[133] Bhala and Kennedy, *supra* note 16 at 339.

[134] According to the Interpretative Note to CVA Article 6, the term "general expenses" covers direct and indirect costs of producing and selling the goods for export which are not included under Article 6:1(a). However, this definition does not in fact clarify the real extent of that term. In addition, there may be some borderline cases between production costs and general expenses.

[135] CVA Article 15:3 defines "goods of the same class or range" as goods which fall within a group or range of goods produced by a particular industry or industry sector, and including identical or similar goods.

[136] Bhala and Kennedy, *supra* note 16, at 339.

[137] Interpretative Note to CVA Article 6.

The Interpretative Note states that the amount for profit and general expenses has to be taken as a whole. It follows that if in any particular case the producer's profit figure is low, while its general expenses are high, its profit and expenses taken together may nevertheless be consistent with that usually reflected in sales of goods of the same class or kind. Furthermore, a producer must show that valid commercial reasons justify its low profits and that its pricing policy reflects the usual pricing policies of the industry sector in question.

- *The cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under Article 8:2.* This requirement, relating to the cost of transportation and insurance of imported goods to their place of introduction in the importing country, will be applicable only to countries which have chosen the CIF system for valuation purposes.

Current fashion holds that CV is unlikely to be acceptable in many cases, because importing customs authorities will rarely be able to satisfy themselves that the alleged costs of production are comparable to those of other producers in the country of production. In actual practice, customs officials often accepted the detailed cost accounting records of the manufacturer without giving much attention to whether competitors' costs were similar. However, it is to be noted that in past years, CV was quite popular with well-regulated producers and customs authorities, notably in the United States; one may assume that the supposed difficulties of CV are not in practice insuperable.

2. Access to the Necessary Information

The access to the necessary information to apply this valuation method is a key issue for its successful application. As a general rule, customs value is determined under the CVA on the basis of information readily available in the country of importation. However, CV calls for the cost of production of the goods being imported, the general expenses incurred by the producer and its profits from selling such goods. Accordingly, the CVA requires that this information be based upon the producer's commercial accounts, provided those accounts are consistent with generally accepted accounting principles applied in the country of production. This information is very sensitive. If the producer is not related to the importer, the producer/seller will normally be unwilling to reveal such sensitive details to the importer/buyer; if they are members of the same group, there will probably be no difficulty. The Interpretative Note to Article 6 acknowledges that use of the CV will generally be limited to cases where buyer and seller are related and the producer is prepared to provide the necessary information and allow verification.

In addition, Article 6:2 provides that no Member may require or compel any person not resident in its own territory to produce for examination, or to allow access to, any accounts or other records for the purposes of determining a computed value. However, information supplied by the producer of the goods for the purposes of determining the customs value under the provisions of this Article may be verified in another country by the authorities of the country of importation, with the agreement of the producer, provided they give sufficient advance notice to the government of the country in question and the latter does not object to the investigation.

E. Fall Back Method of Valuation (Method 6)

In extremely rare cases, where the value of imported goods cannot be determined using the TV, deductive, or computed value formulas, the CVA allows Members to

use a "fallback" or "default" method relying on information available in the country of importation.[138]

Article 7 provides guidance for applying this default method.[139] It also contains a list of prohibited methods, thus limiting the margin of discretion of customs authorities.[140] The Agreement seeks to prevent Members from reverting to one of the old methods not adopted in the Agreement, or from putting particular imports at a disadvantage.[141]

1. Requirements For Applying the Fallback Method

When applying Article 7, the following guidelines must be respected:

- *Consistency with the Principles and general provisions of the CVA and Article VII of GATT 1994.* This requirement stresses that although Members have a certain margin of discretion to apply the default method, they are not free to do so arbitrarily.
- *Flexible application of the Agreement valuation methods*. Article 7 allows the use of any "reasonable means" to determine the customs value. Paragraph 2 of the Interpretative Note to Article 7 specifies that the preferred fallback valuation methods are those laid down in Articles 1 through 6, applied with reasonable flexibility. Thus it is appropriate to review every step taken by the authorities in the process of attempting (unsuccessfully) to apply Articles 1 to 6 to the goods being valued, to see whether there were some 'near misses,' which could, by slightly stretching the CVA provisions, furnish a basis for valuation. This review should re-examine each limitation set down in the specified methods of valuation which could not be met, and each set of figures that was rejected.[142] In addition, where several methods can be used to determine customs value under Article 7, the sequence of Articles 1 to 6 should be followed.[143] The Interpretative Note gives an example of "reasonable flexibility" related to "identical goods" and "similar goods": the values of identical or similar goods may be accepted even if exported earlier or later than the goods being valued, even if they come from a different country, or even if they were valued using deductive or computed methods.

  Thus only if customs value cannot be determined by using these methods flexibly should it be determined, as a last resort, on the basis of other reasonable methods not precluded by Article 7:2 and consistent with the general principles and provisions of the CVA and Article VII.[144]
- *Use of available data in the country of importation.* The source of information is not relevant, since it may originate outside the country of importation and may even be provided by the importer. What matters is that customs are satisfied as to its truth and accuracy.[145]

2. Prohibited Methods

A number of methods are expressly excluded from the default method. The elimination of some of those methods was a major objective in the negotiation of the CVA.

[138] Vinod Rege, *supra* note 6, at 130.
[139] CVA Article 7:1.
[140] CVA Article 7:2.
[141] Sherman and Glasshoff, *supra* note 6, at 235.
[142] *Id.* at 236–237.
[143] TCCV, Advisory Opinion 12.2.
[144] TCCV, Advisory Opinion 12.1, *Flexible Application of Article 7 of the Agreement.*
[145] TCCV Advisory Opinion 12.3 on the use of data from foreign sources in applying Article 7.

They are in general contrary to the general principles contained in the Preamble that guide the interpretation of the different provision of the Agreement. The prohibited methods are:

- the selling price in the country of importation of domestically produced goods[146]
- any system which adopts the higher of two alternative values
- the exporting country's domestic price[147]
- the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6
- the price of the goods for export to a third country
- minimum customs values[148]
- arbitrary or fictitious values.

V. Basic Customs Valuation Disciplines

The CVA provides for a set of customs valuation disciplines, including a number of basic rights and obligations for customs authorities and traders.

A. Currency Conversion

The CVA sets basic guidelines for currency conversion which are necessary for the determination of the customs value where the parties to the transaction set the invoice price in a currency different from that of the country of importation, or computed value, requiring production costs in the country of production, is used. Article 9 echoes the GATT Article VII:4 fall-back rule: the conversion rate must effectively reflect the current value of the currency in commercial transactions. However, Article 9 does not maintain the main GATT Article VII:4 rule that currency conversions should be made on the basis of the International Monetary Fund par values. The reason for this change was the collapse of the par value system.[149]

The applicable guidelines for currency conversions are therefore:[150]

- the exchange rate to be used must be published by the country of importation
- the published rate must reflect as effectively as possible the "current value" of that currency in commercial transactions in terms of the currency of the country of importation
- the conversion rate to be used must be that in effect at the time of exportation or importation,[151] as specified by the country of importation. The "current value" will therefore mean the rate at or about the time of either importation or exportation, as the Member may decide.

[146] This provision is directed at the so-called American Selling Price ("ASP") method formerly used in the United States for certain products.

[147] This provision is directed at the former Canadian approach to valuation, which used valuation as a weapon against supposedly dumped imports.

[148] Developing country Members may make a reservation to retain the system of officially established minimum values on a limited and transitional basis (Annex III:2 to the Agreement). *See* Part VI *infra*.

[149] McGovern, *supra* note 6, at 150.

[150] TCCV Advisory Opinion 20.1 provides guidance on currency conversion where the contract provides for a fixed rate of exchange.

[151] The Interpretative Note to this provision states that "time of importation" may include the time of entry for customs purposes.

The CVA leaves Members room to implement this provision and to provide further guidance for the conversion of foreign currencies. There will doubtless be problems in those countries where official and unofficial exchange rates vary significantly.

B. Powers of the Customs Authorities

Customs valuation based on the transaction value method is largely dependent on documentary input from the importer. For this reason, under the CVA, importers are required to provide an accurate and complete declaration of value to accompany the customs entry. Customs authorities should rely on that declaration to determine the value of imported goods unless there are grounds to reject it.

Article 17, in conjunction with Annex III:6 to the Agreement, stresses that nothing in the CVA should be construed so as to restrict or call into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes. Customs administrations may need to make enquiries aiming to verify that the elements of value declared or presented to customs in connection with a determination of customs value are complete and correct. Annex III:6 adds that Members, subject to their national laws and procedure, have the right to expect full cooperation by importers in these enquiries.

In response to the concerns of some developing countries, and as an attempt to strengthen the ability of customs authorities to deal with cases of under and over-invoicing, a Ministerial "Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value" was adopted at Marrakesh.[152] This Decision allows customs authorities in such cases to ask importers to provide further explanations, documents or other evidence to establish that the declared value represents the total amount actually paid or payable for the imported goods, adjusted in accordance with the provisions of Article 8. If a reasonable doubt still exists after receipt of further information (or in the absence of a response), the authorities may decide that the value cannot be determined according to the TV method and turn to the other available methods. Before a final decision is taken, the authorities must communicate to the importer, in writing if requested, grounds for doubting the truth or accuracy of the particulars or documents produced, and the importer must in turn be given a reasonable time to respond. When a final decision is made, the customs administration must notify the importer in writing of its decision and the grounds therefor.

This Ministerial Decision confirms that customs authorities may reject application of the TV when "reasonable doubts" persist as to the truth or accuracy of the declared value, something that is not clearly stated in the CVA. At the same time the Decision places a heavier burden on the importer, who is expected to provide further evidence in support of its statements when the authorities so request. Finally, the Decision also specifies that it is entirely acceptable under the Agreement for Members to seek the cooperation of other Members when verifying the truth or accuracy of the declared value. It is too soon to say whether the Decision is helpful in the delicate balance between speed and thoroughness, scepticism and trust, efficiency and meticulousness.

C. Importers' Rights

The CVA also recognizes several basic rights of importers.

[152] *See* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 398 (1999).

1. Right to Request Written Explanations

The importer should play an important role in cooperating with customs authorities by providing the information needed to assess the customs value of the imported goods. In return Article 16 of the CVA grants the importer a general right to written explanations as to how the customs value of the importer's goods was determined. Customs authorities must provide those explanations upon written request by the importer. CVA Article 7:3 grants a similar right, but specifically related to the so-called "fall-back method": the importer has the right to be informed of the method used to determine the value of the imported goods, when none of the five other methods are applicable.

2. Right to Appeal

The CVA grants the importer or any other person liable for the payment of the duty a right to both administrative and judicial appeals against the customs valuation determination. Article 11 states that each Member's legislation must provide for specific appeal procedures. The first appeal may be to an authority within the customs administration or to an independent body, but in either case there must be an ultimate right of appeal to a judicial authority. The appellant must be informed of any right of further appeal, which it should be able to exercise without being subject to a fine or threat of fine merely because it has chosen to make use of that right. The appeal decision must be communicated in writing to the appellant and it must be reasoned.

3. Right to Have the Goods Released

With regard to the release of goods, Article 13 provides that where the final determination of customs value is delayed, the importer has the right to withdraw the goods immediately, although the authorities may require a surety or deposit to ensure payment of the duties ultimately found to be due. Thus, Article 13 allows customs to make a careful study to determine customs value without delaying trade. In many countries, physical clearance occurs before there is close scrutiny of the reliability of the documents offered by the importer.

In a case related to the WTO consistency of increased bonding requirements imposed by the US on certain products imported from the EU, the panel held that "Article 13 of the Customs Valuation Agreement allows for a guarantee system when there is uncertainty regarding the customs value of the imported products, but is not concerned with the level of tariff obligations as such. Article 13 of the Customs Valuation Agreement does not authorise changes in the applicable tariff levels between the moment imports arrive at a US port of entry and a later date once imports have entered the US market. As we discuss further below, the applicable tariff [. . .], must be the one in force on the day of importation, the day the tariff is applied."[153]

D. Confidential Information

The CVA deals with the protection of confidential information in two instances: i) during the administrative process of customs valuation (Article 10); and ii) in the context of

[153] Panel Report, *US—Import Measures on Certain Products from the European Communities*, WTO/DS165/R, ¶¶ 6.77 (2000). It is worth noting that there was no disagreement in that dispute between the parties on the customs value of the EC listed imports. However, the panel discussed CVA Article 13 in response to a defense raised by the US. The panel finally concluded that CVA Article 13 was of no relevance to the present dispute.

a dispute settlement procedure in the WTO (Article 19:5). Disclosure of confidential commercial information is crucial for the smooth functioning of the system. Much of the information required for the determination of the value of imported goods may be sensitive, in particular when customs undertake special inquiries regarding, *inter alia*, royalty arrangements, arrangements between related companies or costs and profits or commissions of importers and exporters.

Article 10 gives a broad definition of what is to be considered confidential: "all information which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation." It also requires that such information be treated as strictly confidential "by the authorities concerned." This means that customs authorities must give assurance—and respect such assurance—that the confidential information will be used only for the purposes for which it is furnished by the parties to the transaction. This should prevent the customs authorities from sharing such information with another government department in the same country (e.g. tax authorities) or even the customs authorities of another country. Article 10 also provides that disclosure may only take place with the specific permission of the person or government providing the information, except insofar as required in the context of judicial proceedings. Ultimately, the efficacy of this provision will largely depend on how Members implement it in their respective laws.

Article 19:5 also prohibits disclosure of confidential information provided to a WTO panel without the formal authorization of the submitter, in such cases a non-confidential summary should be provided.

E. Transparency

The general principle of transparency, one of the pillars of the multilateral trading system, also applies in relation to customs valuation. This principle is basically reflected in the CVA through two provisions. Article 12 states that laws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement must be published in conformity with Article X of GATT 1994—the fundamental rule governing transparency in the WTO system—by the country of importation concerned. Publicizing the relevant legal framework is necessary not only to enable traders to estimate with a reasonable degree of certainty the value for customs purposes, as stated by Article VII:5 of GATT 1994, but also to limit the discretion allowed to customs officials and avoid any protectionist use of customs valuation by the importing country.

In addition, Article 22 imposes on Members the obligation to notify the Committee on Customs Valuation of any changes in their laws and regulations relevant to the Agreement or the administration of those laws and regulations. This Article should be read in conjunction with the Decisions on Notification and Circulation of National Legislation and on the Checklist of Issues adopted by the Committee.[154] Essentially the first Decision states that, "Members will submit the complete texts of their national legislations (laws, regulations, etc.) on customs valuation in one of the three official WTO languages as soon as possible to the Secretariat which will circulate them as Committee documents

[154] The Decision and Checklist are contained in *Decisions Concerning the Interpretation and Administration of the Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation),* WTO Doc. G/VAL/5 (1995), a compendium issued by the WTO Committee on Customs Valuation of decisions originally made by the Tokyo Round Committee on Customs Valuation and adopted by the WTO Committee.

to the other Members in the language submitted." The second Decision, designed to facilitate understanding of each Member's legislation, requires Members to respond to fifteen questions in the checklist regarding their the legislation.[155]

VI. Special and Differential Treatment

The CVA, like the other WTO agreements, contains provisions on "special and differential treatment" for developing country Members.[156] These provisions aim to offer these Members some flexibility in the implementation and application of the Agreement. In addition, developed-country Members are committed to provide developing countries with technical assistance in meeting their new obligations.

A. Transitional Periods

The CVA grants two kinds of transitional periods for implementing the Agreement to developing country Members who were not party to the Tokyo Round Code.

- There was a general five year transitional period (i.e. until January 1, 2000) to delay implementation of the Agreement as a whole. Beneficiaries could request an extension of this grace period before the end of the five-year term. The requesting Member had to show "good cause" for its request to which the other Members should give "sympathetic consideration."[157] This delay might seem quite generous, but it must be remembered that import duties are still a primary source of government revenue for many developing countries, and they inevitably were reluctant to forego opportunities to keep that income stream intact.[158]
- A specific transitional period to delay the application of the computed value method (Method 5) for another three years, following the implementation of all other provisions of the Agreement.[159] This was no doubt established to address the anticipated unfamiliarity of the CV technique.

In addition, developing country Members may make a reservation to retain the system of officially established minimum values on a limited and transitional basis under such terms and conditions as may be agreed by the Members.[160] This provision delays the implementation of Article 7:2 (f) of the CVA, which expressly prohibits determination of the customs value on the basis of a system of minimum customs values. A justified request for permission to deviate from the standard TV methodology and use the prohibited system is made to the Customs Valuation Committee.

[155] These questions are contained in *Decisions, supra* note 153.

[156] *See* PETER GALLAGHER, GUIDE TO THE WTO AND DEVELOPING COUNTRIES 160–162 (2000).

[157] Annex III:1. According to the Report (2002) of the Committee on Customs Valuation to the Council for Trade in Goods, during the period under review (i.e. 2002), one Member (Sri Lanka) maintained an extension of the delay in accordance with the provisions of Annex III:1. At the time of writing three requests for extensions were still pending approval by Members. *See* Doc. G/L/590, November 12, 2002.

[158] Bhala and Kennedy, *supra* note 16 at 322.

[159] CVA Article 20:2.

[160] Annex III:2. According to the Report (2002) of the Committee on Customs Valuation to the Council for Trade in Goods (WTO Doc. G/L/590, November 12, 2002) , during the period under review (i.e. 2002), six Members maintained reservations granted under Annex III:2 for minimum values (Colombia, Gabon, Guatemala, Honduras, Nicaragua and Jamaica).

B. Reservations Regarding the Deductive and Computed Value Methods

Developing country Members may also make the following reservations regarding application of the deductive (Method 4) and computed value (Method 5) methods:

- Developing country Members which consider that the reversal of the sequential order of the fourth and fifth methods of valuation (i.e. the deductive and computed value methods) at the request of the importer[161] may give rise to real difficulties for them, may make a reservation permitting them to refuse such requests.[162]
- When applying the deductive value method, if neither the imported goods nor identical nor similar goods are sold in the country of importation in the condition of importation, then, if the importer so requests, the customs value will be based on the unit price at which the imported goods are sold in the country of importation after further processing.[163] However, developing country Members may reserve the right to apply the deductive valuation method in this situation, whether or not the importer so requests.[164]

C. Technical Assistance

Developing country Members have the right to request and obtain technical assistance from developed country Members. This may include training of personnel, assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, or advice on the application of the provisions of the agreement.[165]

Finally, when applying Method 1, developing country Members which face problems regarding the non-inclusion in the customs value of special discounts and commissions obtained by sole agents, sole distributors and sole concessionaires[166] may ask the Customs Valuation Committee to undertake a study of this question with a view to finding appropriate solutions.[167]

VII. Issues Related to the Implementation of the Agreement

The CVA has been in force in most developed country Members for about a quarter of a century, since the end of the Tokyo Round. The Uruguay Round made implementation of the agreement mandatory for all WTO members, subject to the application of Special and Differential Treatment provisions in favor of developing country members. By late 2002, after the expiry of the initial five-year transitional period, many developing countries had started to implement the agreement. However, a large number of developing or least-developed countries ("LDC") had not yet reported their implementation status (in particular LDCs).[168] In any event, it is widely recognized that developing countries are still confronted with difficulties in implementing the CVA.

[161] CVA Article 4.
[162] Annex III:3 sets forth the terms in which this reservation is to be requested.
[163] CVA Article 5:2.
[164] Annex III:4, gives the formula for making this reservation.
[165] CVA Article 20:3.
[166] CVA Articles 1 and 8.
[167] Annex III:5.
[168] Fifty-six Members (of which one has an Article IX waiver from its obligations under the Agreement and three have requested extensions of the Article 20.1 delays) have not yet made any notification. *Report (2002) of the Committee on Customs Valuation to the Council for Trade in Goods*, Doc. G/L/590, November 12, 2002.

Two sets of implementation-related problems are described below. The first are issues which developing country Members identified as part of the preparatory works for the Doha Ministerial meeting that took place in November 2001. The list includes concerns related to specific provisions of the CVA which in certain cases may still entail the amendment of the agreement. The second set are problems relating to systemic and structural matters which developing countries encounter in the implementation of the agreement.

A. The Doha Implementation-Related Issues

The commitment to address the concerns of developing country Members on implementation-related issues of WTO Agreements, including the CVA, was essential for reaching the consensus needed to launch a new round of multilateral negotiations (the "Doha Development Round").

Members adopted a Ministerial Decision on "Implementation-Related Issues and Concerns,"[169] in which they confirmed some of the special and differential treatment provisions of the CVA. In particular, Members agreed to give positive consideration to requests by least developed countries to delay the implementation of the CVA or the elimination of the system of officially established minimum values.[170] In addition, the Ministerial Decision directed the Committee on Customs Valuation to identify and assess practical means of ensuring cooperation and assistance on the exporting Member to the importing country customs authorities, in the context of the 1994 *Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value*.[171] The mandate suggests that such cooperation could take the form of an exchange of information, which may include information on export values. This mandate could raise some concern because of the reference to "export value," which is indeed not consistent with the CVA's rejection of export value as a basis for customs valuation.[172]

As part of the "Work Program" of the Doha Development Round, Members also agreed to launch negotiations on a list of outstanding implementation issues raised by some developing countries, including:[173]

- The residual method of determining customs value under Article 7 should cover every last resort process, thus allowing valuation based on domestic market price or export price to a third country, with appropriate adjustments.[174] The proposal seeks to allow the use of two currently prohibited methods (the price of goods on the domestic market of the country of exportation, and the price of goods for export to a country other than the country of importation),[175] subject

[169] WT/MIN(01)/17, November 14, 2001.
[170] WT/MIN(01)/17, ¶¶ 8.1 and 8.2.
[171] WT/MIN(01)/17, ¶ 8.3.
[172] CVA Articles 7:2 (c) and (e).
[173] The Doha Ministerial Declaration contains the "work program" for the Doha Development Round. WT/MIN/(01)/DEC/1, November 14, 2001. Paragraph 12 of the Declaration contains the mandate to the relevant WTO councils and committees to negotiate a list of outstanding implementation issues as a "matter of priority," and to report on their progress to the Trade Negotiations Committee by the end of 2002 for "appropriate action." The WTO document, *Compilation of Outstanding Implementation Issues Raised by Members*, JOB (01)/152/Rev.1, October 27, 2001, identifies these implementation-related issues.
[174] JOB (01)/152/Rev.1, Tiret 58.
[175] CVA Articles 7:2 (c) and (e).

to the appropriate adjustments, as a means of determining customs value under Article 7. However, many Members have opposed this proposal, arguing that allowing the inclusion of these prohibited methods would compromise the fundamental principle of the Agreement that valuation procedures should not be used to combat dumping.[176] Other objections to this proposal included how the prices in the exporting country would be obtained, which country would be used for third-market comparisons and so forth,[177] each of these being controversial in the context of dumping.

- The Agreement should be amended to provide for the highest value when more than one transaction value of identical or similar goods is found.[178] Articles 2:3 and 3:3 of the CVA state that if in applying these Articles more than one transaction value is found, the lowest such value should be used to determine the customs value. Furthermore, the list of prohibited methods in Article 7 of the CVA includes "a system which provides for the acceptance for customs purposes of the higher of two alternative values." Proponents have explained that providing for the highest value would prevent misuse of Articles 2:3 and 3:3 by unscrupulous traders. For example, some traders clear first small pilot consignments through customs at low values. These are then followed by larger consignments for which the TV cannot be used so that the lower values previously assessed have to be used under the provisions of Articles 2:3 and 3:3. In response, other Members have suggested that this is a problem of enforcement, not really a valuation problem. Critics also say that the proposal is motivated by a desire for higher valuation and increased revenue rather than to address fraud or problems with implementation.[179]
- Buying commissions should be taken into account in the determination of customs value of imported goods, as this forms a legitimate component of the landed cost of imported goods.[180] Article 8:1 (a) (i) provides that commissions and brokerage, except buying commissions, should be added to the invoice price insofar as they are incurred by the buyer but not already included in the price. The proponent claims that customs administrations of developing countries have difficulty in distinguishing buying commissions from other sources of commission; sometimes brokers act for both parties and the limits of buying and selling commissions are difficult to discern. However, most Members oppose this proposal on the ground that buying agents are acting on behalf of the buyer and the benefits of their activities do not accrue to the seller. Including these commissions would therefore penalize those importers which rely on buying agents and would create a disincentive to trade in general. Some Members even consider that the proposal is punitive in nature and would represent an extreme solution to a domestic enforcement problem.[181]

[176] To determine whether or not imports are dumped, their price is usually compared with the price of a similar product sold in the home market or exported to a third country. *See* Chapter 11 of this book.

[177] *Report of the Committee on Customs on Customs Valuation to the Trade Negotiations Committee on the Implementation-related Issues in Accordance with Paragraph 12 of the Ministerial Declaration*, G/VAL/49, November 25, 2002, ¶¶ 10–13.

[178] JOB (01)/152/Rev.1, Tiret 59.

[179] G/VAL/49, ¶¶ 14–17.

[180] JOB (01)/152/Rev.1, Tiret 60.

[181] G/VAL/49, ¶¶ 18–21.

B. Developing Countries' Systemic and Structural Problems in Implementing the Agreement

Developing countries are reluctant to implement the CVA, or have difficulty in doing so, for the following reasons:[182]

- *Lack of "ownership"*. Developing countries were not very active in the negotiation of the agreement. The CVA was the result of an agreement between developed countries (principally the EU and the United States) during the Tokyo Round, which did not take into account the fiscal dependence of developing countries on customs revenue, or their different trading environment and infrastructure constraints. In addition, the CVA was not opened to re-negotiation during the Uruguay Round. For this reason, many developing countries may not feel any urgency about changing their customs valuation systems.
- *Fear of losing revenue*. Customs revenue still accounts for a relatively high proportion of the total revenue of many developing countries, as compared to OECD countries. This is the result of a combination of high import tariffs and low domestic tax collection, which in turn is due to high levels of internal tax evasion and the predominance of the "informal economy". In this context, many developing countries are very sensitive to a possible loss of revenue resulting from the implementation of the CVA agreement. These countries suspect that most imports are under-invoiced and believe that the CVA does not provide them with enough means to act against such cases. The concern over under-invoicing could be the result of a trading environment that fosters fraud: high import tariffs, predominance of informal trade that uses unreliable invoices, trade in second hand goods etc. In addition, the political authorities are not fully committed to implementation of the CVA and put pressure on customs officials to achieve a certain budget revenue target. In this climate, the establishment of a fair, neutral and transparent valuation system is therefore not a priority.
- *Infrastructure limitations.* Customs valuation in many developing countries is hampered by i) lack of data, poor means of information and communication; ii) heavy administrative constraints, i.e., lack of qualified personnel, poor or non-existent training facilities, and low public service salaries; iii) limited information technology equipment (e.g. computers); iv) inadequate organization and poor management. All these infrastructure constraints make implementation of the CVA difficult, in particular, when customs have "reasonable doubts" about the validity of the invoice value and have to verify the additional information requested to the importer, or they must have recourse to the alternative valuation methods and information is scarce or not available. As a result, developing countries have to resort to the fall-back method for a substantial part of their imports, which is a far from ideal situation.

Analysts suggest various initiatives to help developing countries overcome the problems they encounter in implementing the CVA. First, Members should address the ownership issue by encouraging developing country Members to air their concerns on the CVA at the WTO. Second, Members and international organizations (e.g. WCO) must make effective and improve technical assistance in order to better explain the details of the CVA to customs officers and the business community in developing countries.

[182] *See* Luc De Wulf, *supra* note 6, at 5; Vinod Rege, *supra* note 7, at 131.

Third, Members must act to fight customs fraud, for example by i) simplifying the import tariff regime; ii) using pre-shipment inspection services (although this solution could be controversial); iii) making exchange of information between customs agencies on issues related to customs valuation effective; and iv) helping customs in developing countries to develop their own computerized commercial databases and price lists and keep them updated, which should enable customs officials to detect cases of under or over-valuation and other customs frauds. However, analysts recognize that these are just partial solutions to problems whose roots go beyond customs valuation and raise more general structural issues.

VIII. Conclusion

Customs valuation is an integral part of the process of trade. It can play a major role in facilitating or hindering trade. The last fifty years have seen exceptional progress towards the elaboration of a worldwide system. The fact that the CVA was not opened to re-negotiation during the Uruguay Round, and that Members only included few implementation-related issues specific to customs valuation as part of the Doha Round of negotiations, show that the CVA is not an intrinsically controversial agreement. WTO Members seem to agree that the CVA is a good agreement which establishes a single worldwide customs valuation system that is fair, uniform and neutral. Its methods and disciplines should therefore contribute to create predictability and facilitate international trade of goods.

Nevertheless, the plain truth is that the CVA's valuation system does not correspond in most cases with the reality of developing country Members, and is too theoretical to address their practical concerns of revenue-raising. The problems developing country Members face in implementing the CVA is a reflection of the kinds of problems these Members encounter to integrate into the world trading system. Acceptance of the CVA may succeed if it is remembered that while the CVA has not been designed as a mean of increasing revenue collection, neither was it designed to decrease revenue. Customs valuation does not operate in isolation, since it is part of the overall customs operational and management system. For this reason, the implementation of the CVA should be part of an integral plan to modernize customs administration in developing countries, with the full support of political authorities, the engagement of the business community and the technical and financial assistance of bilateral or multilateral donors through adequate capacity-building programs.

CHAPTER 13

THE AGREEMENT ON PRESHIPMENT INSPECTION

Rolf M. Jeker* and Nigel V. Balchin**

TABLE OF CONTENTS

I. Introduction 574
II. Uruguay Round Negotiations 575
III. The Agreement 575
Preamble 575
Article 1: Coverage—Definitions 575
Article 2: Obligations of User Members 576
Article 2.1: Non-Discrimination 576
Article 2.2: Governmental Requirements 577
Article 2.3: Site of Inspection 577
Article 2.4: Standards 577
Articles 2.5 to 2.8: Transparency 578
Articles 2.9 to 2.13: Protection of Confidential Business Information .. 579
Article 2.14: Conflicts of Interest 580
Article 2.15: Time for Inspection 580
Article 2.16: Issuance of Report 580
Article 2.17: Preliminary Price Verification 581
Article 2.20: Price Verification 582
Article 2.21: Appeals Procedures 583
Article 2.22: Derogation 583
Article 3: Obligations of Exporter Members 584
Article 4: Independent Review Procedures 584
Article 5: Notification 585
Article 6: Review 585
Articles 7 and 8: Consultation and Dispute Settlement 585
IV. Recommendations of the WTO Working Party on Preshipment Inspection . 585
A. December 1997 Report 585
B. March 1999 Report 586
V. Assessment of the API 587

APPENDIX Selected Provisions of International Federation Inspection Agencies Code of Practice 589

* Executive Vice President, Trade Assurance Services, SGS Société Générale de Surveillance S.A., Geneva
** Vice President, SGS, Geneva

I. Introduction

A number of developing and transition economy countries require imported goods to be inspected for customs and/or foreign exchange purposes in the country of exportation prior to shipment. This Preshipment Inspection ("PSI") is carried out by private companies under contract with, or mandate[1] from, the government of the importing country. The Agreement on Preshipment Inspection ("API"), which is designed to ensure that PSI is carried out in a fair and non-discriminatory way, is one of the shortest and least controversial of the Uruguay Round Agreements. Negotiation of the Agreement was not particularly contentious, and the Agreement has not been the subject of any dispute resolution proceedings under the WTO.

The PSI programs were originally designed for foreign exchange purposes. The first program was introduced in the Democratic Republic of Congo (Zaire) in 1965, and was aimed at preventing capital flight caused either by exporters swindling importers with inferior or overpriced goods or by importers colluding with exporters to overprice the goods and pay the balance into a foreign bank account on behalf of the importers. The Zaire program required the PSI company to inspect the goods prior to shipment in the country of supply by verifying the quality, quantity and the price of the goods. If satisfactory, the PSI company would issue a Clean Report of Findings ("CRF") which was one of the documents needed by the exporter to receive payment for the goods. If discrepancies were detected and were not rectified by the exporter, the PSI company would issue a Non-Negotiable Report of Findings which prevented the exporter from receiving payment. Similar foreign exchange programs were introduced in other developing countries in the 1970s and 1980s.

In 1985, the first PSI program for Customs purposes was introduced in Indonesia. It was designed to facilitate trade by improving the speed and efficiency of customs clearance procedures, ensuring uniform application of import regulations and customs valuation and classification, encouraging foreign investment by guaranteeing transparency and predictability of import procedures, and facilitating the collection of import duties and taxes.

Originally, only one company provided government-mandated PSI services, the Geneva-based SGS Société Générale de Surveillance S.A. , but in 1984 other companies followed suit.

In the 1980s the expansion of foreign exchange PSI programs provoked concern from some exporters who were unhappy about their contract prices being reviewed and claimed that PSI acted as a trade barrier. In Germany the Government issued a regulation requiring PSI companies to obtain a licence from the Government. In the USA, some Florida trade associations petitioned the U.S. Government demanding that action be taken against several Latin American and Caribbean Governments which had introduced PSI to prevent capital flight. A compromise was reached whereby the U.S. Government undertook to pursue bilateral discussions with the countries concerned, raise the question of PSI within GATT, and to request the United States International Trade Commission ("USITC") to undertake an investigation[2]. The International Chamber of Commerce ("ICC"), based on the concerns of their members, held discussions with the International Federation

[1] The term "mandate" is usually used for those programs where there is no contract *per se*, and the PSI entity is authorized or accredited to perform PSI by a decree promulgated by the government.

[2] *Preshipment Inspection Programs and Their Effects on U.S. Commerce*. Report to the President of the Investigation No. TA-332-242. USITC Publication 2003, Washington D.C. (1987).

of Inspection Agencies ("IFIA") concerning principles which should be followed in the conduct of PSI.

All these developments set the scene for the inclusion of PSI in the Uruguay Round.

II. Uruguay Round Negotiations

Although it was the developed countries which placed PSI on the GATT Agenda, the proposal to include it in the Uruguay Round was supported by some PSI user countries. The end result, in the form of the Agreement on PSI, was a compromise that recognized the need for developing countries to have recourse to PSI for as long as necessary, while laying down some good practice rules and disciplines requiring the user governments to ensure that the PSI entities operate in a non-discriminatory fashion, and that they protect confidential business information.

III. The Agreement

Preamble

The Preamble to the API recognizes the need for developing countries to have recourse to PSI "for as long and in so far as it is necessary to verify the quality, quantity, or price of imported goods". Nevertheless, PSI is essentially an interim measure which may be used until such time as the user Government has modernized its customs service through capacity building and implementation of new systems. Ideally, PSI should form an integral part of a customs modernization program under which PSI is to be progressively phased out.

Article 1: Coverage—Definitions

Article 1.1 specifies that the Agreement applies to preshipment inspection activities that are (a) carried out on the territory of WTO Members, and (b) contracted or mandated by a WTO Member government or government body. Thus, the API is not applicable to preshipment inspection activities which are (i) contracted exclusively by non-government parties, such as importers and exporters;[3] (ii) contracted or mandated by governments of countries that are not Members of the WTO; or (iii) carried out on the territories of countries that are not Members of the WTO. In practice, however, when the government of a non-member country contracts for PSI activities, the contract between the government and the PSI entity frequently contains a clause to the effect that, to the extent applicable, the PSI will be conducted in conformance with the provisions of the API. In other words, the API is often used as a "code of good practice" even in situations where it is not legally applicable. Similarly, the API is used for PSI activities which are contracted for by a WTO Member but are to be carried out on the territory of a non-WTO Member country.

Article 1.2 defines "user Members" as those Members that have contracted or mandated PSI activities, and it is of course only those Members that are bound by the terms

[3] Since the API is only applicable to activities contracted or mandated by governments, the term "Preshipment Inspection" is frequently, but incorrectly, regarded as being synonymous with such government contracts or mandates. In fact, however, any inspection carried out prior to the shipment of the goods is a "Preshipment Inspection" and most preshipment inspections are voluntarily requested by the private sector to verify that the goods ordered are in conformance with contractual requirements.

of the API.[4] Since in practice it is the PSI entities that are responsible for implementing and complying with many of the obligations under the Agreement, user Members must ensure that their contract with, or mandate to, the PSI entity requires the entity to conduct PSI activities in conformance with the applicable provisions of the Agreement.

Article 1.3 defines PSI as "all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be exported to the territory of the user Member." A preshipment inspection program may include one, some, or all of these activities. The price verification may be designed to provide an opinion on the export price for foreign exchange purposes or government information purposes and/or to provide technical advice for customs purposes.[5]

Article 1.4 defines the term "preshipment inspection entity" as "any entity contracted or mandated by a Member to carry out preshipment inspection activities." PSI entities are generally private sector companies most of which are members of the International Federation of Inspection Agencies, the organization nominated by the WTO to represent PSI entities in connection with the independent review procedures provided for in API Article 4.

Article 2: Obligations of User Members

Article 2.1: Non-Discrimination

Article 2.1 requires user Members to ensure that "preshipment inspection activities are carried out in a non-discriminatory manner, and that the procedures and criteria employed in the conduct of these activities are objective and applied on an equal basis to all exporters affected by such activities." User Members must also ensure "uniform performance of inspection by all inspectors of the preshipment inspection entities contracted or mandated by them."

This does not mean that the procedures and criteria will be identical for every shipment, but that the rules for determining the circumstances under which particular procedures and criteria are applicable must be applied in a uniform and non-discriminatory manner to all exporters. The transparency requirements under which the details of the PSI procedures must be made publicly available,[6] are a key aspect in assisting exporters to verify that the procedures are being correctly applied.

Differences in procedures and criteria may arise depending upon the level of risk which takes into account such factors as the type, location and circumstances of the shipment. For example, physical inspection of bulk cargoes must normally be performed at the time of loading of a vessel, whereas most other goods can be inspected prior to loading, frequently at the supplier's premises. Similarly, a shipment of frozen chickens is more likely to be subject to sampling for laboratory analysis than a consignment of ashtrays.

Differences in procedures and criteria may also arise depending upon the requirements and scope of the PSI program of the user government. For example, the import regulations of user governments may vary with regard to import licensing, prohibited goods, procedures for importation of second-hand goods, and labeling requirements, among other factors.

[4] For a list of WTO Members currently requiring preshipment inspection, *see www.ifia-federation.org*.

[5] Although not included in the API definition of PSI activities, verification of compliance with import regulations such as those concerned with health and safety, is often included in PSI programs. *See* API Article 2.2 (Governmental Requirements).

[6] *See* API Article 2:5-8.

Article 2.2: Governmental Requirements

Most governments using PSI require the PSI entity to assist in verifying that the goods to be imported comply with their import regulations with regard to health requirements, agricultural requirements, prohibited imports, second-hand goods, and the like. Article 2.2 requires user Members to ensure that in the course of preshipment inspection activities relating to their laws, regulations and requirements, the national treatment requirements of Article III:4 of GATT 1994[7] are respected to the extent that they are relevant.

Article 2.3: Site of Inspection

In order to assure predictability for exporters, Article 2.3 provides that all PSI activities, including issuance or non-issuance of a Clean Report of Findings, are to be conducted in the customs territory of exportation of the goods,[8] or, if this is not possible owing to the complex nature of the goods, or if the exporter and PSI entity agree, in the customs territory of manufacture of the goods.

Inspection in the customs territory in which the goods are manufactured is typically necessary when:

- Tests that must be performed or witnessed by the PSI entity can only be done on the manufacturer's premises. It is common in "turnkey" projects for individual items of equipment to be manufactured in several different customs territories and assembled in the customs territory of exportation. Tests that must be performed on the individual items of equipment prior to assembly, such as pressure vessel testing and non-destructive testing of welds, must frequently be done at the manufacturer's premises.
- Access to the goods is not possible in the customs territory of exportation, such as when the goods are in bond.
- It is not practicable to unpack the goods in the customs territory of exportation.

Article 2.4: Standards

Article 2.4 requires user Members to "ensure that quantity and quality inspections are performed in accordance with the standards defined by the seller and the buyer in the purchase agreement and that, in the absence of such standards relevant international standards apply". The international standards referred to are published by organizations such as the International Standards Organization (ISO) and the International Electrochemical Commission (IEC). However, some importing countries may have local import regulations which stipulate particular requirements and which would prevail over the requirements of the contract or international standards. If the user government has instructed the PSI entity to verify compliance of the goods with such import regulations,[9] the PSI entity would inform the seller and buyer if there are discrepancies between the standards prescribed in the contract and the import regulations.

[7] GATT Art. III:4 provides in relevant part that "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. " *See* Chapter 5 of this book.

[8] The term "customs territory from which the goods are exported" has been interpreted flexibly. Thus, part of a consignment may be inspected in one customs territory and part in another or several other customs territories if it is composed of goods of different origin that need to be inspected prior to packing in the countries of origin or prior to consolidation in a third country

[9] *See* API Article 2.2.

Articles 2.5 to 2.8: Transparency

Articles 2.5–2.8 are designed to assure transparency with respect to preshipment inspection activities. Article 2.6 requires user Members to ensure that PSI entities, when initially contacted by exporters, "provide to the exporters a list of all the information which is necessary for the exporters to comply with the inspection requirements." Typically, when a PSI entity receives notification of an inspection order from the country of importation, or from the exporter, it gives the exporter a Request for Information Form that asks for further details of the consignment, the address of the location of the goods, and the date of availability for inspection. Included with this Form is the list of the information needed by the exporter to comply with the inspection requirements.

Article 2.6 also provides that the information to be made available to the exporter is to include a reference to the PSI laws and regulations of the importing country, as well as the procedures and criteria used for inspection and for price and currency exchange rate verification purposes, the exporters' rights vis-à-vis the inspection entities, and the appeals procedures set up under Article 2.21.

The documents made available to the exporter typically include at least the following:

- The PSI entity's Guidelines for Exporters, which outlines the procedures and criteria used for physical inspection; price verification for export price and customs valuation purposes; currency exchange rate verification; customs classification; and internal appeals procedures in accordance with Article 2.21 of the API.
- The PSI entity's country data sheets for exporters, which provide country-specific information, including the applicable valuation methodology and a reference to the laws and regulations of the user government relating to PSI activities. This includes details of the minimum order value subject to PSI and a list of goods exempt from PSI.
- Independent Entity Guidelines on Independent Review Procedures, which provide further information for those exporters who are dissatisfied with the outcome of the internal appeal procedures and wish to refer the matter to an independent review in accordance with Article 4 of the Agreement.

The provision of information about an importing country's regulations and requirements is intended to facilitate trade and helps to avoid the shipment of non-compliant goods. Article 2.6 specifies, however, that (a) exporters are not relieved from responsibility for ensuring that their shipment complies with the import regulations of the importing country and (b) the PSI entity should not introduce any changes to its procedures after the inspection date unless required by new regulations issued by the user government, or in emergency situations covered by Articles XX or XXI of the GATT.[10]

Article 2.7 requires user Members to ensure that the information referred to in Article 2.6 is made available to exporters in a convenient fashion and that the PSI offices maintained by PSI entities serve as information points where this information is available.

Finally, Article 2.8 requires user Members to "publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them."

[10] Article XX of the GATT covers "General Exceptions", including those necessary to protect public morals; to protect human, animal or plant life or health; and to secure compliance with laws or regulations including those relating to customs enforcement. *See* Chapter 5 of this book. Article XXI covers "Security Exceptions" including protection of national security; and the pursuance of obligations under the UN Charter for the maintenance of international peace and security. *See* Chapter 35 of this book.

Articles 2.9 to 2.13: Protection of Confidential Business Information

Much of the information required by governments for customs purposes, such as actual prices and names of customers, is of a confidential nature. Most governments have procedures designed to ensure that such information is not disclosed publicly. Articles 2.9 to 2.13 of the API seek to impose similar procedures on PSI entities as those imposed on customs authorities by Article 10 of the WTO Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ("Agreement on Customs Valuation" or "ACV"). Thus, Article 2.9 provides generally that user Members ensure that PSI entities treat all information received in the course of preshipment inspection as business confidential to the extent that such information is not public.[11]

In order to ensure a common approach towards the maintenance of internal confidentiality procedures by PSI entities, the International Federation of Inspection Agencies ("IFIA"), has included provisions relating to the protection of confidential business information in its Code of Practice, set forth in the Appendix to this chapter.

Article 2.10 states that user Members are to provide information upon request about the way in which they are ensuring compliance with Article 2.9. The extent to which WTO Members have utilized this paragraph, if at all, is not known. Article 2.11 requires user Members to ensure that PSI entities do not divulge confidential business information to any third party, and that any confidential business information which they receive from PSI entities contracted or mandated by them is adequately safeguarded. It further provides that preshipment inspection entities may share confidential business information with the governments contracting or mandating them only to the extent that such information is customarily required for letters of credit or other forms of payment or for customs, import licensing, or exchange control purposes.

Under Article 2.12, user Members are to ensure that preshipment inspection entities do not request exporters to provide information regarding:

- manufacturing data related to patented, licensed or undisclosed processes, or to processes for which a patent is pending
- unpublished technical data other than data necessary to demonstrate compliance with technical regulations or standards
- internal pricing, including manufacturing costs
- profit levels
- the terms of contracts between exporters and their suppliers unless it is not otherwise possible for the entity to conduct the inspection in question.[12]

Information of this type is generally of no relevance to the PSI entity's task of carrying out price verification, which is either for the purpose of forming an opinion on the validity of the export price (for foreign exchange purposes), or to provide technical advice to

[11] Information generally available to third parties or public sources is not regarded as business confidential, even if received in the course of PSI. Examples of such generally available information may include general price lists, quotations, specification sheets, press articles and reports, and advertisements.

[12] This exception typically applies when the exporter is acting not as a principal but as the agent of another party, such as a commission agent for the supplier of the goods or a buying agent acting for the purchaser. In this situation (and depending on the requirements of the user government), the terms of the contract between the agent and supplier may be needed in order to verify the exact source and origin of the goods and/or to verify certain terms of the transaction such as the amount of commission and the price exclusive of commission. This is particularly relevant where the user government has import regulations relating to the charging of buying or confirming commissions.

the customs authorities in the importing country to facilitate their determination of the customs value of the goods in question.

Verification of the export price is based on the normal price at which identical or similar goods are available in the export market and has nothing to do with the exporter's internal manufacturing processes, internal price structures, or profits. Similarly, provision of technical advice for customs valuation is generally in conformance with either (i) the ACV, under which the customs value is, in the majority of cases, based on the price actually paid or payable, or (ii) the Brussels Definition of Value, under which it is based on the normal export price.[13]

In certain circumstances exporters may wish to provide information of the type listed in Article 2.12, and Article 2.13 specifies that they are free to do so if they wish. For example, although the ACV normally requires that customs value be based on the transaction value, i.e., the price actually paid or payable, this is subject to compliance with certain conditions, including that either (a) the buyer and seller not be related,[14] or (b) if the buyer and seller are related, the relationship must not influence the price charged by the seller. Sometimes sellers, especially multinational companies which are exporting to their subsidiaries, voluntarily provide the PSI entity with relevant supporting information, such as a transfer pricing agreement, in order to support the use of the transaction value. Similarly, if the user Member required the PSI entity to assist its customs authority with the verification of information related to "Computed Value" under ACV Article 6, such verification would only be undertaken based on information voluntarily provided by the producer of the goods.

Article 2.14: Conflicts of Interest

Article 2.14 requires user Members to ensure that PSI entities maintain procedures designed to avoid conflicts of interest, especially to avoid situations where they would be carrying out PSI with respect to goods being exported by a related party.

Article 2.15: Time for Inspection

Article 2.15 requires user Members to ensure that preshipment inspection entities avoid unreasonable delays in inspection of shipments. PSI companies normally specify a minimum advance notice period (typically three working days) that exporters should give when requesting physical inspection of the goods to be exported.

Exporters sometimes complain that this advance notice period creates a delay in the shipment of the goods. This is usually an unreasonable objection since the exporter has to book space on the ocean vessel or aircraft ahead of time, and notice can be given to the PSI company at the same time. The inspection itself does not normally take more than a few hours. The PSI company will usually endeavor to arrange an urgent inspection where necessary, while for frequent routine shipments (such as daily or weekly), a regular inspection schedule can be established.

Article 2.16: Issuance of Report

Under Article 2.16, user Members are to ensure that PSI entities issue a Clean Report of Findings ("CRF"), or a detailed written explanation of non-issuance of the CRF, within five working days of receipt of final documents and completion of the inspection.

[13] Generally, only those countries that have obtained an extension of the five-year implementation period of the ACV are still using the Brussels Definition. These are few in number.

[14] *See* ACV Art.15.4 for a definition of "related".

Some user government regulations stipulate issuance within a shorter time period, and in practice, most PSI companies issue the CRF or an explanation of non-issuance within two or three working days.[15] The written explanation specifying the reasons for non-issuance normally takes the form of either a Discrepancy Report or a Non-Negotiable Report of Findings (NNRF).[16]

When the CRF is required for payment purposes, the PSI Entity should send the CRF, or equivalent report (e.g., a security label attached to the seller's invoice) to the seller but in any case as soon as possible after receipt of the final documents, within the time limit published by the PSI entity in its Guidelines for Exporters. Additionally, if the CRF is not required for payment purposes, the PSI entity may send a copy or advice of issuance of CRF to the seller for information.[17] For customs purposes, the CRF data is normally transmitted electronically to the PSI entity's office in the country of importation so that the CRF may be distributed to the importer and the customs authorities.

Article 2.17: Preliminary Price Verification

Article 2.17 requires user Members to ensure that whenever so requested by the exporters, preshipment inspection entities undertake, prior to the date of physical inspection, a preliminary verification of the price and, where applicable, of the currency exchange rate, on the basis of the contract between exporter and importer, the pro-forma invoice and, where applicable, the application for import authorization. User Members are required to ensure that "a price or currency exchange rate that has been accepted by a preshipment inspection entity on the basis of such preliminary verification is not withdrawn, providing the goods conform to the import documentation and/or import license", and that, after a preliminary verification has taken place, "preshipment inspection entities immediately inform exporters in writing either of their acceptance or of their detailed reasons for non-acceptance of the price and/or currency exchange rate."

Article 2.17 is of greater relevance in PSI programs for foreign exchange purposes where the PSI entity is required to form an opinion on the normal export price, in the country of supply, of the goods to be exported. The PSI entity opinion of the export market price is based on a range of prices of identical and/or similar goods sold under similar terms and conditions in the same country of exportation. In the event that the export price declared by the exporter in the commercial invoice to the importer is higher than the PSI entity's opinion of the export market price, the PSI entity will request the exporter to provide additional information to support the invoice price.[18]

If the exporter is unable to provide satisfactory information to support a higher invoice price, this could lead to the exporter being required to amend the invoice price in order to obtain a Clean Report of Findings. Consequently, exporters may wish to take advantage of this preliminary price verification facility so that any questions may be resolved before the goods are made ready for shipment.

[15] Article 2.18 requires PSI entities to send the CRF to exporters or their designated representatives as expeditiously as possible. Article 2.19 requires user Members to ensure that, in the event of a clerical error in the Clean Report of Findings, preshipment inspection entities correct the error and forward the corrected information to the appropriate parties as expeditiously as possible.

[16] An NNRF is normally only issued in connection with an inspection for foreign exchange purposes.

[17] *See* WTO Working Party on PSI, Recommendation (B)(a)(3), which provides that "In addition to providing hard copies, PSI entities should be encouraged to communicate Clean Reports of Findings (CRFs) to importers and exporters through electronic means". WTO Working Party on PSI Report, G/L/214, December 2, 1997.

[18] A finding that the invoice price is lower than the export market price would not prevent the issuance of a CRF, but might result in an uplift in the PSI entity's valuation opinion for customs purposes.

Article 2.20: Price Verification

Article 2.20 covers price verification conducted "to prevent over- or under-pricing and fraud".

Such price verifications conducted by PSI entities fall into two main categories :-

(i) price verification for determining an opinion of the export price, for foreign exchange or government information purposes, which are carried out in conformance with the guidelines of Article 2.20 (a) to (e); or

(ii) price verification for determining a valuation opinion for customs purposes, which under footnote 4 to the API, are carried out based on the obligations accepted by the user Member under the WTO Agreements, more specifically the Agreement on Customs Valuation.[19]

Concerning price verification category (i) when determining an opinion of the export price, Article 2.20(a) specifies that a PSI entity may only reject a contract price agreed to between an exporter and an importer if it can demonstrate that its finding of an unsatisfactory price is based on a verification process that conforms with the following rules:

- The PSI entity is to base its price comparison "on the price(s) of identical or similar goods offered for export from the same country of exportation at or about the same time, under competitive and comparable conditions of sale, in conformity with customary commercial practices and net of any applicable standard discounts."
- Only prices providing a valid basis for comparison may be used, taking into account the relevant economic factors pertaining to the country of importation and a country or countries used for price comparison.
- The PSI entity may not rely upon the price of goods offered for export to different countries of importation to arbitrarily impose the lowest price upon the shipment.
- The preshipment inspection entity must provide the exporter with an opportunity to explain the price at any stage in the process (Article 2.20(b)(iv)), i.e. if, in the opinion of the PSI entity, the contract price appears to be higher than that commonly charged for identical or similar goods, under comparable circumstances of sale, the PSI entity must invite the seller to provide additional information to support the contract price. In the event that the seller is unable to provide adequate information, the PSI entity will normally request that the seller's invoice be revised to reflect the price commonly charged in the open market before it will issue a Clean Report of Findings. If the seller disagrees, a Non-Negotiable Report of Findings will be issued and the matter is referred to the authorities in the importing country.
- Appropriate allowances are to be made for the terms of the sales contract and other factors relating to the transaction, including the commercial level and quantity of the sale, delivery periods and conditions, price escalation clauses, quality specifications, special design features, special shipping or packing specifications, order

[19] This would not apply to those developing countries that have obtained WTO approval for a further extension of the five year deferment specified in Article 20.1 of the Agreement on Customs Valuation. Most user governments that have not yet implemented the Agreement on Customs Valuation use the Brussels Definition of Value (BDV) or a variation thereof including export market price. As noted above, these are few in number. The BDV is based on the normal notional open market price concept, i.e. the price which the goods would fetch on a sale in the open market between a buyer and seller independent of each other. *See* CUSTOMS VALUATION: CONVENTION, RECOMMENDATIONS, OPINIONS, NOTES AND STUDIES (World Customs Organisation) and CUSTOMS VALUATION: EXPLANATORY NOTES TO THE BRUSSELS DEFINITION OF VALUE (World Customs Organisation).

size, spot sales, seasonal influences, license or other intellectual property fees, services rendered as part of the contract if they are not customarily invoiced separately, and the contractual relationship between exporter and importer (Article 2.20 (c)).
- The verification of transportation charges must relate only to the agreed price of the mode of transport in the country of exportation as indicated in the sales contract (Article 2.20 (d)).
- Article 2.20 (e) specifies that the following may not be used for price verification purposes:
  — the selling price in the country of importation of goods produced in such country
  — the price of goods for export from a country other than the country of exportation
  — the cost of production
  — arbitrary or fictitious prices or values

Although most PSI programs were originally for foreign exchange purposes alone, the liberalization of foreign exchange controls over the years has meant that almost all programs today are either solely for customs purposes or, in some cases, a combination of foreign exchange and customs purposes.

Concerning price verification category (ii), for customs purposes, the objective is to facilitate, through provision of technical advice, the determination of customs value by the customs authorities in the importing country for the calculation of the import duties payable by the importer. This type of price verification has no influence on the contract price agreed between seller and importer. Even if the price verification does not validate the seller's commercial invoice value, this is not grounds for withholding a Clean Report of Findings, which will, regardless of the value declared by the seller, state the PSI entity's opinion for the guidance of Customs in their assessment of the customs value.

Article 2.21: Appeals Procedures

User Members are required by Article 2.21 to ensure that PSI entities establish procedures to handle grievances raised by exporters. User Members must assure that the procedures conform with guidelines which require that: (a) PSI entities designate officials who are to be available during normal business hours in each city or port in which they maintain a PSI administrative office to consider exporters' appeals or grievances; (b) exporters provide in writing to the designated official the facts concerning the specific transaction in question, the nature of the grievance, and a suggested solution; and (c) the designated official afford sympathetic consideration to exporters' grievances and render a decision as soon as possible.

In order to ensure a uniform approach amongst PSI entities, the International Federation of Inspection Agencies has included provisions relating to appeal procedures in its Code of Practice.[20] As discussed below, Article 4 of the API also requires that review by an independent body be available to exporters in the event that they are not satisfied with the results of the internal appeal.

Article 2.22: Derogation

Article 2.22 provides that user Members are to specify a minimum value below which shipments are not to be inspected, except in exceptional circumstances. The PSI entities'

[20] *See* the Appendix to this chapter.

country data sheets for exporters provide information about the floor value beneath which shipments are exempted from PSI. This varies from country to country, but is typically in the region of US$ 2,000 to 5,000.

Article 3: Obligations of Exporter Members

Article 3 of the API imposes relatively minimal requirements on exporter Members. Their laws and regulations relating to preshipment inspection activities must be applied in a non-discriminatory manner, and they must be published. Few exporter Members have promulgated laws or regulations relating to PSI. The most important examples of exporter Member regulations are those of the EU[21] and Switzerland.[22] They each require that PSI entities performing work in their territories submit notifications of their mandates/contracts and amendments thereto to the specified agencies.

In addition, Article 3 also requires that exporter Members provide user Members, upon request, technical assistance with respect to PSI. Up until now WTO technical assistance has tended to be limited to providing training courses/seminars on various aspects of the WTO Agreement including the ACV, though more intensive assistance may be provided as a result of the Doha Work Programme and the General Council decision of August 1, 2004.

Article 4: Independent Review Procedures

As noted above, in addition to the internal appeal mechanism required by Article 2.21, the API also mandates an independent review procedure to be used if the internal appeal does not resolve the problem. Article 4(a) calls for the establishment of an Independent Entity ("IE") to administer this process. In December 1995, the WTO General Council decided to create the IE as a subsidiary body of the Council for Trade in Goods in order to provide panelists who are appointed to hear cases with the privileges and immunities accorded to WTO officials and Member representatives under Article VIII:3 of the WTO Agreement.[23]

Under Article 4, an exporter or a PSI entity may refer a matter to independent review within two working days after submission of a grievance to internal appeal in accordance with Article 2.21. The IE then establishes a three-member panel. One member is selected from a list of experts nominated by an organization representing PSI entities, one from a list nominated by an organization representing exporters, and the third from a list of independent experts nominated by the IE.[24] In its December 1995 decision,[25] the WTO General Council named the International Federation of Inspection Agencies as the PSI entities' organization, and the International Chamber of Commerce as the exporters' organization. The independent expert acts as the chair of the panel and makes the necessary administrative decisions, e.g., whether a panel meeting is required and if so, where. The parties are to be given the opportunity to present their views in person or in writing. The panel is to take its decision by majority vote within eight working days of the request for

[21] EC Regulation No.3287/94 of December 22, 1994.

[22] Swiss Ordinance No. RS946.202.8; RO1995 2100 of May 17, 1995.

[23] API Article 4 was implemented in a Decision of the General Council dated December 13, 1995 and published as *Operation of the Independent Entity Established under Article 4 of the Agreement on Preshipment Inspection*, WT/L/125/Rev.1, February 9, 1996.

[24] Alternatively, the parties can choose to have the review conducted solely by an independent trade expert on the IE list. Article 4(e).

[25] *See supra* note 23.

independent review unless the time limit is extended by agreement of the parties. Costs are to be apportioned by the panel, and the panel decision is binding on the parties.

As of the date of writing, no exporters have resorted to the independent review procedures. Possible reasons for this are discussed in Part V below.

Article 5: Notification

Article 5 requires Members to provide the WTO Secretariat with copies of laws and regulations relating to PSI, as well any changes to these laws. Changes in laws and regulations relating to PSI may not be put into effect until they have been officially published.

Article 6: Review

Article 6 calls for a review by the Ministerial Conference of the operation of the API at the end of the second year after the entry into force of the WTO Agreement and every three years thereafter. Rather than conduct the review itself, the 1996 Singapore Ministerial Conference established a WTO Working Party which issued its first report in December 1997 and a final report in March 1999 (after issuing an interim report in November 1998). Copies of the 1997 and 1999 reports are available on the WTO's Website. The conclusions of these Reports are summarized in Part IV of this chapter.

Articles 7 and 8: Consultation and Dispute Settlement

These articles provide that consultations and dispute settlement are to be governed by Articles XXII and XXIII of GATT 1994, as applied by the WTO Dispute Settlement Understanding. As noted above, no case has been taken to dispute settlement under the API, and no Article XXII consultations have been held under the Agreement.

IV. Recommendations of the WTO Working Party on Preshipment Inspection

As noted above, a WTO Working Party on Preshipment Inspection was established by the Singapore Ministerial Conference in December 1996 and carried out a review of the API between January 1997 and March 1999. The Working Party published two main Reports, in December 1997 and March 1999.[26] The principal recommendations of the reports were as follows:

A. December 1997 Report

- Clarification that PSI verification for customs purposes is not designed to determine the customs value, but simply to provide technical advice to the customs authorities to assist them in determining the customs value.
  Comment: By contrast, a PSI entity providing price verification for foreign exchange purposes does provide an opinion as to whether the export price is reasonable.
- A PSI entity should respond to a dispute on price verification within ten days.
- PSI entities should establish local contact points in countries where they do not have a physical presence and should establish websites.
  Comment: All major PSI entities have established websites.

[26] Documents G/L/214 and G/L/300, available at www.wto.org

- In addition to providing hard copies, PSI entities should communicate Clean Reports of Findings to exporters and importers by electronic means.
  Comment: The reference to importers, who are not referred to at all in the API, reflects the fact that today most PSI is conducted for customs purposes, and importers need the CRF for customs clearance.
- PSI entity fee structures should not create the potential for conflicts of interest.
  Comment: This recommendation responded to a concern that some PSI entities charged an *ad valorem* fee based on the entity's opinion of the value of the goods, which obviously created an incentive to inflate the value. *Ad valorem* fees are now based on the value declared by the exporter or importer, and are therefore unaffected by the PSI entity's opinion.

B. March 1999 Report

- User Members should consider using the model contract with PSI entities provided in Annex B to the Report.
  Comment: The model contract incorporates a number of provisions of the API. In practice, however, most governments use a form of contract that incorporates the relevant provisions of the API by reference, thus avoiding repetition. Most PSI entities are members of the PSI Committee of the International Federation of Inspection Agencies ("IFIA"), which has published a Code of Practice that is modeled on the API.[27]
- Governments should consider using the principles of selectivity and risk assessment in contracting for PSI activities.
  Comment: This recommendation responded to a concern that most PSI programs required inspection of every shipment, even where identical goods were shipped on a regular basis. It was felt that PSI should follow the modern-day customs approach, as reflected in the General Annex (Chapter 6) of the 1999 revised International Convention on the Simplification and Harmonization of Customs Procedures (known as the Revised Kyoto Convention), of using sampling techniques based on risk assessment. Because the risk of misdeclaration and fraud is higher in most developing countries than in developed countries, there has been a tendency for the customs authorities in developing countries to continue with the traditional one hundred percent inspection or at least to require a systematic PSI in lieu of a customs inspection on arrival. Nevertheless, with the gradual introduction of new computerized systems, which facilitate risk profiling, there has been gradual acceptance of a selective approach to both customs examination and PSI.
- Governments that consider having their PSI programs audited should be guided by the principles found in the Annex to the Report,[28] or, if alternative criteria are used, by the API principles such as non-discrimination and national treatment.
  Comment: This recommendation responded to a relatively new development—the appointment by some user governments of private auditors to audit the work of the PSI entities. Since the API does not envision auditing of PSI entities,

[27] *See* the Appendix to this chapter. IFIA Members performing PSI activities are required to comply with the Code.

[28] Under these principles the auditing process: (1) should not lead to duplication of PSI work (2) should always be applied consistently with GATT and WTO principles and Agreements (3) should be undertaken by entities that satisfied reliable auditing credentials; and (4) should be undertaken under conditions of independence, confidentiality and integrity.

there was concern that the private auditors do not duplicate the work of the PSI entities (for example, by contacting exporters to request information) and that they comply with the provisions of the API.

- Future monitoring of the API should be carried out by the WTO Committee on Customs Valuation, since most PSI programs are now for customs purposes.

There has been no formal follow-up to these recommendations, but this could change after the next triennial review.[29]

V. Assessment of the API

PSI has generally proved to be a highly effective interim measure to assist developing countries and countries in transition in dealing with capital flight and the evasion of import duties, while at the same time benefiting exporters and importers by speeding up the clearance of goods through customs and reducing the cost of such clearance. PSI has received support from most importers and local manufacturers, since it has helped to create a more level playing field and has provided protection from unfair (undervalued or misclassified) imports. As one might expect, however, PSI has received strong opposition from those parties that wish to evade the rules.

The API was designed largely to address the concerns of exporters who had been complaining about PSI activities. The fact that more than nine years after the API came into force, the WTO Independent Entity still has not received any disputes from exporters suggests that the API has been effective in improving the PSI process and addressing many of the concerns of exporters.[30] The common set of transparent rules and the availability of an internal review process have undoubtedly helped in this regard.

Another reason for the apparent lack of disagreement concerning the operation of the API is the fact that with the liberalization of foreign exchange regulations in recent years, there are now only a few PSI programs requiring price verification for foreign exchange purposes. As has been explained, most PSI programs were originally for foreign exchange reasons. The fact that the PSI entity could question the exporter's contract price was a major cause of friction between exporters and PSI entities, since it sometimes resulted in the exporter having to reduce the contract price in the event that it could not provide sufficient information to support the original price. Today, most PSI programs are for customs purposes and the PSI entity does not interfere with the contract price. Instead it simply provides an opinion to the customs authorities which serves as technical advice to facilitate the determination of the customs value on the basis of which the importer pays import duties. The final responsibility for the determination of the customs value rests with the authorities. *WTO Ministerial Decision Regarding Cases where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value*, in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 398 (1999). Since it is the importer rather than the exporter that may be affected by the price verification of the PSI entity, friction between exporters and PSI entities has been reduced.

[29] As of August, 2004, the second triennial review had not taken place.

[30] However, it is possible that exporters have been reluctant to utilize the Independent Review process because of its cost. Both the exporter and the PSI entity are required to submit to the Independent Entity an advance deposit of 17,500 Swiss francs, although as explained above, ultimate liability for costs is usually based on the merits. In addition, exporters may be reluctant to challenge PSI entities with which they will have to conduct business in the future.

PSI is regarded as an interim measure which will be phased out when the user government's objectives have been achieved.[31] Perhaps what was not foreseen was the difficulties currently being encountered by some developing and transition economy countries in implementing the WTO Agreement on Customs Valuation. Originally, the view had been expressed, in some quarters, that once countries adopted the WTO Agreement on Customs Valuation there would be no role for PSI to play in respect of price verification because, in general, customs authorities should accept the price paid or payable (the "transaction value") based on the importer's declaration. Although this is generally true for developed countries where, in most cases, Customs can rely on the truthfulness of the importers' Customs Declarations, this is frequently not the case in many developing and transition economy countries where import duties and taxes tend to be much higher and often provide an incentive for importers to misdeclare and submit fraudulent documents. This has important financial implications in those countries where a significant part of government revenues are derived from import duties and taxes. It is often difficult for a Customs administration in the country of importation to obtain information which provides a basis for them to question the importer's Customs Declaration. PSI has proven to be a very useful tool by verifying, in the countries of supply, the information declared by importers and thereby identifying those transactions where the authorities may have reason to doubt the truth and accuracy of the declaration in line with the WTO Ministerial Decision[32]. In essence, PSI, through risk profiling, is able to assist customs authorities to quickly identify the compliant transactions (which can receive green channel treatment) and to focus on the minority of transactions where there may be reasons to doubt the importer's declaration and are worthy of further examination. Hence PSI can assist Customs to enhance revenue collections whilst at the same time facilitating trade for compliant importers.

Finally, it will be recalled that the term "PSI" is used to cover any one or all of the activities relating to verification of quality, quantity, price, and customs classification. It is not necessary for all these activities to be performed in a PSI service—they can be selective based on risk profiling and can be limited to sensitive or problematic imports only. The current trend is for PSI companies to provide modular services which address a client government's specific requirements and facilitate trade.

[31] UN/CEFACT *Trade Facilitation Recommendation No. 27 on Preshipment Inspection* (www.uncefact.org).

[32] The importer may appeal against the customs decision of customs value based on local appeal procedures as foreseen in ACV Art. 11.

APPENDIX

SELECTED PROVISIONS OF INTERNATIONAL FEDERATION OF INSPECTION AGENCIES CODE OF PRACTICE

Provisions Dealing with Protection of Confidential Business Information

Staff Non-Disclosure Agreement (Section_2.10.1)

All staff employed by IFIA PSI Members shall be required, as a condition of employment, to sign a Non-Disclosure Agreement prohibiting the disclosure of any confidential business information, obtained during the course of employment, to other parties. Potential employees shall be notified of this requirement in the job offer and shall be required to sign the Agreement by the first day of employment.

Office Security: (2.10.2)

IFIA PSI Members shall implement adequate security measures in their offices containing confidential business information to ensure that (i) access is restricted to authorized personnel only (ii) documents/data are stored in designated secure areas and disposed of by shredding, disintegration or incineration under supervision of authorized personnel.

Specific Assurances: (2.10.3)

IFIA PSI Members shall be committed to providing, upon request, specific assurances to the trade concerning the protection of their confidential business information and to enter into specific security agreements where required.

Provisions Relating to Appeal Procedures

Complaints: (2.21.1)

(i) In the first instance, exporters with any complaints concerning preshipment inspection activities shall be requested to contact the appropriate Department Manager of the IFIA PSI Member giving details of the case.
(ii) the IFIA PSI Member shall undertake to investigate the complaint expeditiously.
(iii) if the exporter is not satisfied with the response from the IFIA PSI Member, the exporter may proceed to an Appeal in accordance with the procedures of 2.21.2 below.

Appeals: (2.21.2)

(i) Exporters who have grievances concerning preshipment inspection activities, which have not been resolved by discussion with the appropriate department manager of the IFIA PSI Member, under the complaints procedure of

Article 2.21.1 above, may appeal to the IFIA PSI Member's senior management by completing and submitting a "Preshipment Inspection Internal Appeal Form" giving details of the case. This form shall be issued by the IFIA PSI Member based on Annex A, attached hereto, which also takes into consideration the requirements of the WTO Agreement on Preshipment Inspection. The exporter shall send the completed form to the IFIA PSI Member's Senior Manager(s) whose name(s) shall be available upon request from the IFIA PSI Member.

(ii) The IFIA PSI Members designated Senior Manager shall undertake to investigate the dispute and respond to the exporter in writing, normally within two working days of receipt of a fully completed "Preshipment Inspection Appeal Form", by either (a) giving the result of the Appeal, with detailed explanations, or (b) advising that further investigation is required and that the result will follow as soon as possible but not later than within 10 days of receipt of the Appeal. For disputes on price verification the Result of the Appeal should set forth the basis of the IFIA PSI Member's opinion by reference to the specific applicable elements of the price verification criteria.

CHAPTER 14

THE AGREEMENT ON IMPORT LICENSING PROCEDURES

Patrick F.J. Macrory*

TABLE OF CONTENTS

I. Introduction 592
II. GATT Article XIII 593
III. The Tokyo Round Code 594
IV. The Uruguay Round Negotiations 594
V. The Agreement on Import Licensing Procedures 595
A. General Principles 595
B. Automatic Import Licensing 597
C. Non-Automatic Import Licensing 597
D. Other Provisions 598
VI. Recommendations for Change 599

* Director of the International Trade Law Center at the International Law Institute, Washington, D.C., and Editor-in-Chief of this book.

I. Introduction

With only eight articles and occupying a mere six pages of text, the Agreement on Import Licensing Procedures ("AILP" or "Agreement") is one of the shortest and least controversial of the Uruguay Round Agreements.[1] Only one WTO panel decision has interpreted the Agreement, and even there the AILP was not the central focus of the dispute.[2] The AILP differs little from the identically-named Tokyo Round agreement (often referred to as the Import Licensing Code), although there were a few changes designed to tighten up the procedures to be followed by Members in operating import licensing programs. Most significantly, of course, the Code only applied to those GATT contracting parties who chose to sign it. The AILP, as one of the multilateral Uruguay Round agreements, is binding on all members of the WTO.

There are two basic types of import licensing. *Automatic licensing* is usually aimed at collecting statistical data or enforcing regulations, such as those relating to the importation of dangerous items (e.g., explosives or firearms). Provided that the importer is appropriately qualified (for example, in the case of imports of firearms is registered with the relevant authorities in the importing country), issuance of the license is automatic. *Non-automatic licensing*, by contrast, is normally used as a means of allocating import quotas among importers. Today non-automatic licenses are mostly used in connection with the tariff-rate quotas ("TRQs") that have replaced straight numerical quotas on imports of many agricultural products.[3] While this type of licensing system is obviously necessary to effectively enforce import restrictions, it can clearly lend itself to abuse and can create significant obstacles to trade. Some of the concerns were described as follows by John Jackson:

> One of the serious problems of a quota system is the method of granting licenses. Should they be granted on a first-come, first-served basis? Suppose the line at the door of the licensing agency on opening day is too long to accommodate all within the quota? Should equitable allocations between exporting countries be made? Should licenses be auctioned off?. . . . Can licensing policy contribute to national plans when such plans exist? Is there danger of license officials accepting bribes or extending licenses for political considerations?[4]

Part II of this chapter discusses the treatment of import licensing under the GATT 1947. Part III describes the Tokyo Round Import Licensing Code. The brief negotiating history of the Uruguay Round Agreement is described in Part IV, and Part V provides a section-by-section analysis of the Agreement. Finally, Part VI discusses some of the suggestions for reform that have been made in the Doha Development Agenda discussions.

[1] It is important to note that, as explained in Part V of this chapter, the Agreement only applies to the *procedures* governing import licensing, and not to the underlying rules governing license allocation.

[2] Report of the WTO Panel, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R (1998) ("*EC—Poultry*"), *upheld* in Report of the Appellate Body, *European Communities—Measures Affecting the Importation of Certain Poultry Products,* WT/DS69/AB/R (1998) ("*EC—Poultry (AB)*"). However, nearly fifty requests for consultations have included allegations of violations of the AILP. *See* WTO Website, www.wto.org.

[3] *See* Chapter 6 of this book. The Appellate Body has ruled that import licensing procedures for TRQs are within the scope of the AILP. Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997) ("*EC—Bananas*") at ¶ 195.

[4] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 306 (1969).

II. GATT Article XIII

Automatic licensing systems were held by a GATT panel not to constitute quantitative restrictions on imports within the meaning of Article XI of the GATT 1947.[5] Non-automatic licensing systems, by contrast, do constitute such restrictions,[6] and are therefore governed by Article XIII of the GATT, which sets forth rules for the allocation of quantitative restrictions designed to ensure that such restrictions are applied on a non-discriminatory basis. Most of these rules are substantive rather than procedural, for example the requirement in Article XIII: 2 that the distribution of trade subject to import restrictions should approach as closely as possible the shares which the contracting parties might have been expected to obtain in the absence of restrictions. However, Article XIII:3 does impose certain transparency requirements applicable to the quantitative restrictions and the import licensing systems used to enforce them. Thus:

- Upon request of any contracting party having an interest in trade in the product concerned, the contracting party applying the restrictions must provide all relevant information concerning the administration of the restrictions, the import licenses granted over a recent period, and the distribution of the licenses among supplying countries
- In the case of quotas, the contracting party is to give public notice of the total quantity or value of the product that may be imported during a specified future period and of any change in such quantity or value[7]
- In the case of quotas allocated among supplying countries, the contracting party applying the restriction is to promptly inform all other contracting parties having an interest in supplying the product in question of the shares in the quota currently allocated, by quantity or value, to the various supplying countries, and to give public notice of that information.

The AILP contains similar, though more detailed, requirements.

In 1950 at the Torquay Round of multilateral negotiations the Contracting Parties adopted a Working Party Report on a proposed Code of Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls, that was designed to bring greater discipline to import licensing systems.[8] Among the recommendations of the Report—which were to be "regarded as a code for the guidance of the

[5] *See* Report of the GATT Panel (adopted), *European Community Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, BISD 25th Supp. 68 (1978), ¶ 4.1.

[6] *See, e.g.,* Report of the GATT Panel (adopted), *European Economic Community—Restrictions on Imports of Apples—Complaint by the United States*, BISD 36th Supp. 135, ¶ 5.2 (1989). In that case the EC made no attempt to argue that the licensing system at issue was not an import restriction within the meaning of Article XI, but instead claimed that it fell within one of the Article XI exceptions. *See also,* Report of the GATT Panel (adopted), *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37th Supp. 200, ¶ 67 (1990); Report of the GATT Panel (adopted), *Japanese Measures on Imports of Leather*, BISD 31st Supp. 94 , at ¶ 44 (1984).

[7] A GATT panel held that the allocation of back-dated quotas, i.e., "quotas declared to have been already filled at the time of their announcement", violated this requirement. Report of the GATT Panel (adopted), *EEC—Restrictions on Imports of Dessert Apples*, BISD 36th Supp. 93, ¶ 12.26 (1989).

[8] GATT CP5/30 Rev. 1, adopted November 30, 1950, ¶¶ 94–95 ; cited at WTO, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 405-06 (1995).

Contracting Parties and not as additional obligations imposed upon them"—were the following:

- The grant of an import license should imply that the necessary foreign exchange would be available
- Applications for import and export licenses and exchange permits should be acted upon within a reasonably short period
- A license or permit should be valid for a sufficient period to allow for the production or delivery of the goods
- The period set for applications for quotas should be sufficiently long to allow for exchange of communications with likely foreign suppliers and the conclusion of purchase contracts
- Customs authorities should be given discretion to grant reasonable tolerance for variations in quantity or value of individual shipments.

These concepts are also reflected in the AILP.

III. The Tokyo Round Code

One of the optional agreements, or Codes, negotiated during the Tokyo Round was the Agreement on Import Licensing Procedures ("Code"). Originally there were nineteen signatories—mostly developed countries—and by 1994, 27 countries had accepted the Code.[9] The purpose of the Agreement was:

> to ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of the GATT including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing countries.[10]

Most of the provisions in the Code were repeated in the AILP, and are discussed in Part V of this Chapter.

IV. The Uruguay Round Negotiations

The United States, which was concerned about the proliferation of import licensing systems around the world, and the obstacles to trade that they were creating, took the lead in calling for reform of the Code during the Uruguay Round negotiations. In September 1989 it and Hong Kong submitted a major proposal calling for substantial revision of the AILP.[11] The principal aims were to improve predictability and transparency, to impose firm deadlines on the publication of information on new or revised licensing requirements and the time for processing license applications, and to limit the number of agencies to whom applications had to be made. By and large these proposals were adopted.

[9] ANALYTIC INDEX OF THE GATT (WTO 1995), vol. 2, App. VI.

[10] Code, Art. 1.2

[11] *Proposal by the United States and Hong Kong with Respect to the Improvement of the Agreement on Import Licensing Procedures,* GATT Doc. No. MTN.GNG/NG8/W/53 (Sept. 27, 1989).

V. The Agreement on Import Licensing Procedures

As already explained, the AILP is based largely on the Tokyo Round Code, with a number of changes designed to impose tighter restrictions on the use of import licensing systems. In particular, the AILP imposes firm deadlines on the time for publication of new or revised licensing regulations and for processing license applications. It also places a limit on the number of government agencies that a license applicant can be required to approach.

It is important to understand that, as explained by the Appellate Body in *EC—Bananas,*[12] the Agreement only applies to import licensing procedures and their administration, and not to the underlying rules governing licensing allocation. Thus, if the rules themselves are discriminatory or impose restrictions on imports that are inconsistent with GATT Article XI, they cannot be attacked under the AILP, but must instead be challenged under the appropriate provision(s) of the GATT 1994. As the Appellate Body observed in *EC—Bananas*, the AILP does not preclude "the imposition of different import licensing systems on like products when imported from different Members."[13] In that case the Appellate Body upheld the Panel's ruling that the import licensing system in question was inconsistent with GATT Article 1. Following this ruling, a WTO panel held that a challenge to the fact that license entitlement was based on export performance was a challenge to the rules themselves, rather than to the procedures, and therefore could not be considered under the AILP.[14]

The AILP begins by setting forth general principles applicable to all import licensing systems. It then specifies in turn rules that apply to automatic licensing systems and to non-automatic systems. The remainder of the Agreement consists of administrative provisions dealing with such matters as the establishment of a Committee on Import Licensing, notification requirements and consultation and dispute settlement.

A. General Principles

Article 1.1 of the AILP defines import licensing as

> administrative procedures[15] used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation. . . .

Article 1.2 and 1.3 lay out two key general principles that must be followed in all import licensing systems, automatic or non-automatic. *First,* the administrative procedures must conform to the relevant provisions of GATT 1994 "with a view to preventing trade distortions that may arose from an inappropriate operation of those procedures".[16] *Second,*

[12] *EC—Bananas, supra* note 3, at ¶ 197.

[13] *Id.,* at ¶ 198.

[14] *EC—Poultry, supra* note 2, at ¶ 254. *See also, e.g.*, Report of the WTO Panel, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R (1999) at ¶ 5.131 (import licensing system violates GATT Article XI:1); Report of the WTO Panel, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/R, WT/DS169/R (2000) at ¶ 784. In *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS 103/R and WT/DS/113/R, the Panel having decided that restrictions imposed by Canada on access to TRQs on milk were inconsistent with GATT Article II, stated that there was no need to decide whether they also violated Article 3 of the AILP. *Id*., at ¶ 7.157. The Appellate Body did not discuss the point. WT/DS103/AB/R (1999).

[15] Those procedures referred to as 'licensing' as well as other similar administrative procedures [footnote in original].

[16] Article 1.2 specifies that the economic development purposes and financial needs of developing country Members are to be taken into account in this connection.

the rules for import licensing procedures "shall be neutral in application and administered in a fair and equitable manner." In *EC—Poultry* Brazil had challenged the EC licensing system by which the EC regulated its poultry TRQs, *inter alia* on the ground that contrary to its expectations, its percentage share of the EC poultry market had been falling since the introduction of the TRQs, which it claimed was evidence that they had caused trade distortion. The Panel rejected the claim, noting that Brazil's reference to its percentage share referred to its total exports to the EC, including over-quota shipments, which constituted the majority of its exports to the EC. Since the TRQ licenses issued to imports from Brazil had been fully utilized, and the total volume of poultry exports from Brazil to the EC had generally been increasing, the Panel said that it failed to understand the relevance of the decline in overall percentage share to a possible violation of the AILP, and rejected the claim.[17] This finding was upheld by the Appellate Body.[18]

The remainder of Article 1 sets forth various administrative procedures that must be followed with respect to all import licensing systems, automatic or non-automatic. These are designed to to make the process transparent, as well as to simplify it as much as possible, to ensure that imports are not bound up in unnecessary red tape. Under Article 1.4(a), the applicable rules, as well as information concerning procedures, are to be published in such a manner as to enable governments and traders to become acquainted with them,[19] and are to be notified to the WTO.[20] Wherever practicable, publication is to take place at least 21 days before the effective date of the requirement, but in no case later than the effective date. Application and renewal forms and procedures are to be as simple as possible (Article 1.5), and applicants are to be given at least 21 days for the submission of license applications (Article 1.6). Applicants should normally only have to apply to one administrative body, and in no case more than three (*id.*).

Article 1.7 provides that importers must not be unduly penalized for inadvertent mistakes. Applications are not to be refused for minor documentation errors, and any mistakes that are obviously not based on fraud or gross negligence may not receive greater punishment than necessary to serve as a warning (Article 1.7). Licensed imports may not be refused for minor variations in value, quantity, or weight from the amount on the license (Article 1.8).

Article 1.9 provides that foreign exchange to pay for licensed imports is to be made available to license holders on the same basis as to importers of goods not requiring licenses. Finally, Article 1.10 specifies that the security exceptions of GATT Article XXI apply, and Article 1.11 provides that Members are not required to disclose confidential information that would impede law enforcement, be contrary to the public interest, or prejudice the commercial interests of public and private enterprises.

[17] *EC—Poultry, supra* note 2, at ¶ 249.

[18] *EC—Poultry (AB)*, *supra* note 2, at ¶ 126.

[19] The publishing Member must give consideration to written comments from other Members, as well as an opportunity to discuss the comments. Article 1.4(b).

[20] Many Members have failed to make the necessary notifications. As of October 2003, 27 Members had made no notifications whatever to the WTO Committee on Import Licensing, and only 94 including the EC as one Member had notified their laws and regulations pursuant to Article 1.4(a). Committee on Import Licensing, *Report (2003) of the Committee on Import Licensing to the Council for Trade in Goods, G/L/652* (October 28, 2003), ¶¶ 5, 10. In *EC—Poultry* the Panel refused to accept the EC's explanation for non-notification that it was unclear until the Appellate Body's decision in *EC—Bananas* that the AILP applied to TRQs. *EC—Poultry, supra* note 2, ¶ 244.

B. Automatic Import Licensing

Article 2 of the AILP lays down certain rules applicable to automatic import licensing, defined as import licensing "where approval is granted in all cases" (Article 2.1). The procedures must not be administered in a way that would restrict the imports subject to automatic licensing. More specifically:

- Anyone who fulfils the legal obligations of the importing Member for importing the product in question must be equally eligible to apply for and to obtain import licenses (Article 2.2(a)(i))
- Applications for licenses must be allowed to be submitted on any working day prior to the customs clearance of the goods (Article 2.2(a)(ii))
- Applications must be approved immediately upon receipt to the extent feasible, but in no case more than ten days (Article 2.2(a)(iii))

Under Article 2.2(b), automatic import licensing may be maintained as long as the circumstances that gave rise to its introduction prevail and its underlying purpose cannot be achieved in a more appropriate way.

C. Non-Automatic Import Licensing

The rules governing non-automatic import licensing, which are set forth in Article 3 of the AILP, are a good deal more detailed that those applying to automatic licensing, because of the greater opportunities for discrimination. Non-automatic import licenses are defined as import licenses that are not automatic, as defined in Article 2.1. Anyone who fulfils the applicable legal and administrative requirements is to be equally eligible to apply for and to be considered for a license (Article 3.5(e)). Except for circumstances beyond the control of the Member, the period for processing is to be no more than thirty days when the applications are considered as they are received, and no more than sixty days where they are all considered together (Article 3.5(f)). The period of license validity must be reasonable, and not too short to preclude imports (Article 3.5(g)). Members may not prevent importation in accordance with the issued licenses, and they may not discourage the full use of quotas (Article 3.5 h)). Members are to "take account" of the desirability of issuing licenses for products in commercial quantities (Article 3.5(i)).[21]

The transparency rules set forth in Article 3 are considerably more elaborate than the general rules in Article 1. Thus, Article 3.4 requires that the following information be published:

- where the purpose of the licensing system is the administration of quotas, the overall amount of the quotas by quantity and/or value, the shares allocated to the various supplying countries, and the opening and closing dates of quotas
- The basis for granting and/or allocating licenses, where the purpose of the system is not the administration of quotas
- Information on how to make a request for exceptions or derogations from a licensing requirement, if this is permitted

[21] In *EC—Poultry* the Panel rejected Brazil's claim that the EC system infringed this provision, noting that the fact that the licenses had been filled meant that they must have been issued in "economic" quantities. *EC—Poultry, supra* note 2, at ¶ 262. The fact that the licenses had been filled also led the Panel to reject Brazil's claim that speculation in licenses had discouraged full utilization of the TRQ, in violation of Articles 3.5(h) and (j). *Id.* at ¶ 259.

In addition, under Article 3.5(a) Members must provide upon request[22] to any other Member having an interest in trade in the product in question, all relevant information concerning:

- The administration of the restrictions
- The import licenses granted over a recent period
- The distribution of licenses among supplying countries
- Where possible, import statistics with respect to the product in question.[23]

Also, any applicant who fulfilled the relevant legal requirements for a license but did not receive one must upon request be informed of the reason, and must be given the right to appeal the decision. Article 3.5(e).

When allocating licenses, Members should consider the past performance of license applicants, in particular their failure to fully utilize licenses during a recent representative period. Members must also give consideration to ensuring reasonable distribution of licenses to new importers, and in this regard special consideration is to be given to importers who are importing from developing countries, especially from least-developed countries. Article 3.5(j).

Brazil challenged the EC import licensing system in *EC—Poultry* on a number of grounds. Several of these have already been mentioned. Another was that the frequent changes in the rules and procedures made it difficult for governments and traders to become familiar with the rules, in violation of Articles 1.4, 3.3, 3.5(b), 3.5(c) and 3.5(d). The Panel said that while it sympathized with Brazil, changes in the rules *per se* did not violate the Agreement.[24] Another basis for challenge was that the EC had based the allocation of licenses on *export* performance, which Brazil claimed was in violation of Articles 1.3 and 3.5(j). The Panel said that although the export performance requirement was unusual, the issue was clearly one of the rules themselves, not the administration or application of import licensing procedures, so that Article 1.3 did not apply.[25] Also, Article 3(j) was hortatory, and did not necessarily prohibit consideration of factors other than import performance.[26]

Brazil also claimed that speculation in licenses discouraged the full utilization of the TRQ, and that this violated Articles 3.5 (h) and (j). The Panel dismissed this claim also, noting that any speculation in licenses had not prevented full utilization of quotas.[27] The Appellate Body upheld all of the Panel's findings with respect to the AILP.[28]

D. Other Provisions

Article 4 of the AILP establishes a Committee on Import Licensing, consisting of representatives from each Member. The Committee meets periodically and issues annual

[22] In *EC—Poultry* Brazil claimed that the EC had violated this requirement by failing to provide the specified information. The Panel rejected the claim, observing that Brazil had not demonstrated that the EC had ever failed to provide information on request, and that this provision did not require Members to provide the information voluntarily, but only on request. *EC—Poultry, supra* note 2, at ¶ 265.

[23] Article 3.5(a)(iv) states that developing country Members are not expected to take additional administrative or financial burdens in this respect.

[24] *EC—Poultry, supra* note 2, at ¶ 246.

[25] *Id.,* ¶ 254.

[26] *Id.,* ¶ 255.

[27] *Id.,* ¶ 259.

[28] *EC—Poultry (AB), supra* note 2, at ¶¶ 126–128.

reports, which can be viewed on the WTO website, www.wto.org. Under Article 5 the Committee is to be notified of the institution of, and changes in, import licensing procedures. Article 5.2 spells out the detailed information that is required. The Committee is required by Article 7 of the AILP to review the implementation and operation of the Agreement at least every two years.

Under Article 6 consultations and settlement of disputes arising under the Agreement are to be governed by GATT Articles XXII and XXIII and the Dispute Settlement Understanding.

VI. Recommendations for Change

Reform of the AILP is not a major item on the Doha Development Agenda. However, as already explained, non-automatic import licenses are frequently used to administer agricultural TRQs, and concern has been raised in the WTO Committee on Agriculture about the issue of unfilled quotas.[29] Some Members have suggested that this problem is caused by the systems used to administer the licenses, and have recommended various solutions, such as carrying over unused portions to subsequent periods or preventing imports at out-of-quota rates until the quotas have been filled. Others believe that unfilled quotas result from supply and demand conditions, and should not be viewed as a problem. The United States has recommended that licensees be required to surrender unused licenses if they cannot arrange shipments within specified time periods so as to allow commercially viable opportunities for other importers.[30] The United States has also proposed greater transparency, for example requiring Members to publish quota allocation dates, license validity periods, standard communication mediums, and procedures for changes in the quota system.

The EC has proposed that import licensing systems be streamlined and simplified through progressive automation and application of modern customs controls.[31] The EC recommends that the data requirements be the minimum necessary, and that license applicants should be required to apply to only one agency, which would be responsible for any necessary coordination with other agencies.

[29] *See* note by the Secretariat, *Summary of Meeting held on 14 November 2000*, G/AG/R/25, at 14–17.

[30] *Proposal for Tariff Rate Quota Reform, Submission from the United States,* G/AG/NG/W/58 (November 14, 2000). The proposal also recommends substantive changes with respect to TRQs that would not involve changes to the AILP, since, as explained above, the Agreement has been held to apply only to the administration of import licensing systems, and not to the rules themselves. These recommendations include:

- Ensuring that imports are not limited to unprocessed bulk commodities to the disadvantage of processed products
- Preventing end-use specifications that limit imports
- Preventing mixing requirements or other domestic purchase criteria
- Preventing restrictive re-export requirements

[31] *Council for Trade in Goods—Trade Facilitation—Trade Facilitation in Relation to Existing WTO Agreements—Communication From the European Communities,* G/C/W/136, G/L/299, S/C/W/101, IP/C/W/131 (March 10, 1999).

CHAPTER 15

THE AGREEMENT ON RULES OF ORIGIN

Hiroshi Imagawa* and Edwin Vermulst**

TABLE OF CONTENTS

I. Introduction 603
A. Rationale for Rules of Origin 603
B. Basic Concepts 604
1. The Percentage Criterion Test 605
2. The Change in Tariff Heading Test 607
3. The Technical Test 608
C. Why the Need for a WTO Agreement on Rules of Origin? 609
II. Agreement on Rules of Origin 609
A. The Agreement 609
B. Dispute Settlement 612
III. Harmonization Work Programme and Technical Analyses 614
A. Harmonization Work Programme—Overview 615
1. Technical examination in the Technical Committee (July 1995–May 1999) 615
2. Negotiations in the Committee on Rules of Origin (after June 1999) . 618
B. General Provisions and the Architecture of the Harmonized Non-Preferential Rules of Origin 619
1. Architecture of the HRO 619
2. Primary rules and residual rules 628
3. Minimal operations or processes 634
4. Other provisions of General Rules and Appendix 2 Rules 636
5. Issues related to the Harmonized System 639
C. Wholly-obtained Goods (Appendix 1) 648
1. Preparatory Discussion at the First Session 648
2. TCRO's First Text of Definitions of Wholly-Obtained Goods 649
3. The TCRO's Further Elaboration of Definitions of Wholly-Obtained Goods 650
4. The CRO's Elaboration of Definitions of Wholly-Obtained Goods ... 651
5. Elaboration of Definition 2—Goods Obtained Outside the Country .. 652
D. Product-Specific Rules of Origin (Appendix 2) 654
1. Agricultural Products (HS Chapters 1 to 24) 654
2. Textiles and Textile Articles (HS Chapters 50 to 63) 655
3. Machinery, Transport Equipment and Photocopying Apparatus (HS Chapters 84 to 90) 656

* Customs and Tariff Bureau, Ministry of Finance, Tokyo, Japan.
** Vermulst, Waer & Verhaeghe, Brussels, Belgium; editor of, among others, RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE STUDY (1994).

E. Implications of the Implementation of the HRO for Other WTO Agreements 657
1. Initiation of a Study on the Implications of the Implementation of the HRO for Other WTO Agreements 657
2. Restraints on the Application of the HRO to Certain WTO Instruments Enumerated in Art. 1.2 of the Origin Agreement 658
3. Applicability of the HRO to WTO Instruments not Enumerated in Art. 1.2 of the Origin Agreement 659
4. Report by the Chairman of the CRO to the WTO General Council and the Current State of Play 660
IV. Conclusion 662

List of Annexes

Annex 1: Outline of the TCRO's final text of the architecture of the Harmonized Non-Preferential Rules of Origin and the text of Appendix 2, Rule 2 (as of April 30, 1999)
Annex 2: CRO's latest text of the architecture of the Harmonized Non-Preferential Rules of Origin (as of June 25, 2002)

List of Tables

Table 1. Comparative Table of Two Sets of Disciplines
Table 2. Disciplines for Preferential Rules of Origin
Table 3. Example of Split Subheadings
Table 4. Progress made by the TCRO and the CRO
Table 5. Summary of Positions with Regard to Definition 2

I. Introduction

In this chapter we will analyze the WTO Agreement on Rules of Origin ("Origin Agreement" or "ARO") and the ongoing negotiations towards harmonization of non-preferential origin rules.[1] The fact that the negotiations are still dragging on more than nine years from the date of entry of the WTO and more than six years after the negotiations were supposed to have been concluded, testifies to the complexity of this technical area of international trade law.

However, there have not been many WTO disputes invoking the Agreement since the inception of the WTO.[2] Thus, one may wonder whether harmonization is in fact considered a priority by the main players.

In the first section of this chapter, we will discuss the basic concepts underlying the use of origin rules. In the second section, we will analyze the Agreement itself. In the third section, we will describe the harmonization process and its likely outcome. The last section sets out some concluding remarks.

A. Rationale for Rules of Origin

Rules of origin exist because of discriminatory restrictions on international trade. In a completely open world economy, there would be little need for rules of origin because for most purposes it would be immaterial where goods and services originate. Even in a less than open world economy, the importance of rules of origin would be limited as long as trade-restrictive measures were applied across-the-board, *i.e.* on a non-discriminatory basis.

Despite the globalization process, rules of origin remain relevant for a number of reasons:

(i) the increase in the use of contingent trade measures (i.e., antidumping and countervailing duties and safeguards);[3]
(ii) quotas on imports of textiles and clothing as well as tariff-rate quotas on agricultural imports.
(iii) preferential tariff arrangements under various forms of free trade agreements and customs unions;
(iv) the Generalized System of Preferences ("GSP") and other positive discrimination regimes extended by developed to developing countries; and
(v) ancillary reasons, such as government procurement, country-of-origin marking, and compilation of trade statistics.

Few will contest that origin rules are an indispensable device to support the effectiveness of discriminatory trade régimes.[4] However, during the 1990s, rules of origin sometimes

[1] As explained below, the ARO does not call for harmonization of preferential rules of origin, although it does lay down some general rules for their use.

[2] An Indian challenge to U.S. rules of origin for textiles and apparel products was rejected by a panel. Report of the WTO Panel (not appealed), *United States—Rules of Origin for Textiles and Apparel Products*, WT/DS243/R(2003) (discussed in Part II.B *infra*). A complaint by the EC about the U.S. rules of origin concerning certain textile products was bilaterally resolved.

[3] *See* Chapters 11 and 16 of this book. *See also, e.g., Impact of Anti-Dumping and Countervailing Duty Actions*, Background Note by the UNCTAD Secretariat (TD/B/COM.1/EM.14/2 24 October 2000); *Compare* Jorge Miranda, Raul Torres, and Miguel Ruiz, *The International Use of Anti-Dumping—1987–1997*, 32(5) J. World Trade 5 (1998).

[4] Although opinions might differ as to the necessity and/or desirability of discriminatory trade régimes.

took on a life of their own and developed into trade-restrictive measures in themselves where such restrictions did not necessarily, let alone automatically, follow from the application of other trade law instruments. Thus, for example, jurisdictions such as the United States and the EC used rules of origin as the legal justification for imposing anti-dumping duties on third country exports produced with components from the country with respect to which anti-dumping duties had been imposed following findings that the third country products had not acquired third country origin. Since no investigation had been conducted to determine whether the third country exports had been dumped and thereby caused injury, rules of origin were effectively used as a shortcut for imposing anti-dumping duties on exports from a third country, although the international legal basis for doing so was ambiguous, to say the least.[5]

One of these authors has argued previously[6] that rules of origin not only have the potential of developing into trade policy instruments, but will in fact by definition impact on international trade flows. This seems to be seldom accepted by importing country administrators who tend to claim that the formulation of rules of origin and the application of such rules to concrete cases are technical exercises in which policy considerations play no role. This makes the administrators an easy target for domestic special interests.[7]

Most countries distinguish between *preferential* and *non-preferential* rules of origin. *Preferential* rules of origin are used to determine whether certain products originate in a preference-receiving country—either a fellow member of a free trade area, or a developing country entitled to benefits under the Generalized System of Preferences or some other preferential program—and hence can qualify for preferential treatment. *Non-preferential* rules of origin are used for all other purposes, including MFN treatment, anti-dumping and countervailing duties, safeguard measures (including those under the Agreement on Textiles and Clothing), origin markings, discriminatory quantitative restrictions or tariff-rate quotas, trade statistics and government procurement. Because the Agreement of Rules of Origin deals almost exclusively with non-preferential rules of origin, with merely an annexed declaration on preferential rules, this chapter focuses mostly on non-preferential rules.

In fact, a variety of jurisdictions, including the European Communities, the United States, Canada and Australia do not merely have one set of preferential and one set of non-preferential origin rules, but have *different* sets of preferential origin rules.[8] Clearly, this proliferation of different rules of origin is a major reason for the widely perceived complexity of the subject.

B. Basic Concepts

In order to determine the origin of a product, the first question is whether the product is *wholly obtained or produced* in one country or whether two or more countries have been

[5] Edwin Vermulst and Paul Waer, *Anti-Diversion Rules in Anti-dumping Proceedings: Interface or Short-Circuit for the Management of Interdependence?,* 11 MICH. J. INT. LAW 201 (1990).

[6] Edwin Vermulst and Paul Waer, *European Community Rules of Origin as Commercial Policy Instruments?,* 24(3) J. WORLD TRADE 55 (1990).

[7] *See* RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE STUDY (. Edwin Vermulst, Paul Waer, and Jacques Bourgeois eds. 1993).

[8] Thus, for example, the U.S. GSP program and the U.S./Israel Free Trade Agreement use a simple value-added test. The U.S./Jordan Free Trade Agreement also uses a value-added test, but with special rules for textiles. The North American Free Trade Agreement ("NAFTA"), on the other hand has separate rules of origin for virtually every tariff classification. It has been estimated that NAFTA has more than eleven thousand individual rules of origin, using seven different basic approaches, and occupying 148 pages of text. *See* RAJ BHALA AND KEVIN KENNEDY, WORLD TRADE LAW 364, 368 (1999).

involved in the manufacture of the product. If a product is wholly obtained or produced in one country, it clearly has the origin of that country, and origin in this context has not proven controversial.

Frequent problems, however, arise if the origin must be determined of a product in the manufacture of which two or more countries have been involved. In such cases, the general concept is that the product will have the origin of the country where the *last substantial transformation* took place. There are three main methods that are utilized to ascertain whether substantial transformation occurred:

- an *ad valorem* percentage rule, often called the percentage criterion test;
- a change in tariff heading ("CTH") test; and
- a technical test.

The term *process criterion* is sometimes used to describe the latter two methods.[9]

1. The Percentage Criterion Test

This test occurs in three forms. In its first form, as the *import content* method, it imposes a ceiling on the use of imported parts and materials through a maximum allowable percentage of such parts and materials. In its second form, as the *domestic content* test, it requires a minimum percentage of local value-added in the last country in which the product was processed. The third form, the *value-of-parts* test, examines whether the originating parts reach a certain percentage of the total value of parts. This test appears rather unfair as it focuses only on parts values and does not take into account assembly and overhead costs in the local production operation. The value-of-parts test is used in the EC in the product-specific origin regulations for radio and television receivers and tape recorders as a subsidiary test where the primary test of 45 percent value-added is not met.

The percentage criterion test directly[10] or indirectly[11] specifies that a certain percentage of value-added in the last production process is necessary to confer originating status; if such a percentage cannot be reached, the last production process will not give origin and origin will be given to another country in the case of non-preferential rules or to no country at all where preferential agreements are concerned.[12]

The percentage criterion, in particular the domestic content variant, requires an analysis of production costs. Production costs can be broken down in cost of manufacture and overhead costs. The cost of manufacture, in turn, can be divided into costs of materials, direct labor costs and manufacturing overhead.

(a) Cost of Materials

This is the purchase price of parts, components, and the like. As explained above, the percentage criterion calculates either the maximum allowable import content or the minimum required domestic content. In either case, the question arises at what level imported, non-originating parts ought to be valued, i.e. in ascending order: ex works, FOB, CIF or into-factory (delivered). The answer to this question is important because each subsequent level leads to a higher price and thereby makes satisfaction of the import/domestic content

[9] *See Digest of Rules of Origin*, UNCTAD/TAP/133/Rev.6, at 6 (1990).

[10] Under the 'pure' domestic content test.

[11] Under the import content test.

[12] If, for example, the last production process is performed in a GSP beneficiary country, but not enough value is added, preferential treatment will be denied without a positive determination about the 'real' origin of the merchandise.

test more difficult. It may be noted that Recommended Practice 5 of the Kyoto Convention's Annex D.1[13] endorses use of an *ex works* price.[14]

Countries generally value non-originating materials at their FOB[15] or CIF[16] value. A CIF valuation base means that all costs incurred in sending the parts from the factory to the importing country border would be treated as non-originating costs and that all post-border costs, such as inland freight in the importing country, customs duties, indirect taxes, etc. would be treated as originating costs. A FOB valuation base would also treat the cost of ocean freight and insurance as originating cost items. Originating materials are normally valued on an into-factory basis.

(b) Direct Labor Costs

These comprise all the costs of the direct labor which can be identified or associated with production of the merchandise, such as basic pay, overtime pay, incentive pay, bonuses, shift differentials, employee benefits, such as housing, holiday pay, retirement, social security programs, and any other employee-related expenses.

(c) Manufacturing Overhead

This includes all indirect expenses incident to and necessary for the production of the product, such as indirect labor, supervision, depreciation, production royalties, rent, power, maintenance and repairs, and product-related R&D.[17] Manufacturing overheads would normally also include financing costs related to the production process (as opposed to financing costs related to the sales process)[18] which typically covers the financing costs of such items as raw materials, work in progress, the factory and the production line.

(d) General Overhead Expenses

These are often called selling, general and administrative expenses or SGA. Such SGA expenses cover all other expenses incurred (typically those related to the management and sales functions) for example, salaries of executives and salesmen, telecommunication expenses, outward freight and insurance, and legal and accounting fees. SGA also cover non-operating expenses (income) such as financing costs related to the sales process and exchange loss (gain).

Addition of all these cost items gives the fully allocated cost; the fully allocated cost plus the profit gives the sales price. The import content can easily be calculated by totaling the FOB or CIF cost of all non-originating materials. The domestic content can be calculated either by deducting the cost of non-originating materials from the sales

[13] The International Convention on the Simplification and Harmonization of Customs Procedures (the Kyoto Convention) entered into force in 1974. Annex D.1 (rules of origin), Annex D.2. (documentary evidence of origin) and Annex D.3. (control of documentary evidence of origin) provide for standard provisions, recommended practices and commentary. See footnote 57 for the revised Kyoto Convention.

[14] Recommended Practice 5 provides that for calculation of domestic content percentages, imported materials shall be valued at the dutiable value at importation (normally the CIF price) and produced goods shall be valued at the ex works price or the price at exportation. Although Annex D.1 does not express a preference for the ex works price over the price at exportation, there would appear to be a certain consensus that the ex works price is more appropriate, see, *e.g.*, Customs Cooperation Council, Permanent Technical Committee, *Rules of Origin of Goods*, Secretariat Note, 29.215E T7-3231, at 20 (2 November 1982).

[15] For example, the United States.

[16] For example, the EC, Australia and Canada.

[17] Non-product-related R&D will generally be included in SGA as general expenses.

[18] Financing costs related to the sales process would normally be reported as an SGA expense.

price[19] or by adding up all items of local value-added.[20] These two calculation methods would in theory lead to the same result. In practice, however, this is not always the case.

The sales price as such is seldom used as the denominator in percentage criterion tests. Most jurisdictions rather rely on other denominators, such as an ex-works price or an FOB price, which require certain adjustments to be made to the sales price.

It will be clear from this discussion that there are many variations between jurisdictions with respect to both the constituent elements—numerator and denominator—of the percentage criterion. Also, the allowable import/required domestic percentages are often different, even within the same jurisdiction where they appear to depend on the objective of the law that they are designed to support. The various preferential and non-preferential rules of origin with respect to color televisions in the EC are a good example of this.

Apart from this lack of uniformity in applying the percentage criterion among jurisdictions, a disadvantage of the percentage criterion is that it penalizes low cost and/or efficient production operations where labor and/or assembly costs will be lower than in high cost/inefficient facilities. Also, domestic content and import content calculations may change as a result of fluctuations in world market prices for raw materials[21] and in exchange rates, creating uncertainty as to whether particular products meet the rules. Finally, domestic content calculations provide a certain amount of discretion to administrators and technically would require detailed on-the-spot visits to check the accuracy of data provided. In general, the import content test seems preferable over the domestic content test because it is easier to apply and leaves the importing country administrators with less discretion. This is because it is simply based on the prices paid by the producer, which can easily be checked through invoices, thereby obviating the need for complete cost of production calculations and allocations.

2. The Change in Tariff Heading Test

The CTH test confers origin if the manufacture results in a product which falls under a Harmonized System ("HS")[22] number that differs at a specified level—usually the four digit level—from the numbers under which the non-originating parts/materials fall. The CTH test is the primary test for the EC's preferential origin rules and for NAFTA. Japanese non-preferential rules of origin by and large also use the CTH test.

The advantages of the CTH test are its conceptual simplicity, its ease of application and its lack of discretion. Furthermore, the adoption by almost all countries[23] of the HS system means that a similarly-applied CTH test[24] will normally lead to uniform determinations of origin in such countries. It is therefore convenient that it was decided early on in the Uruguay Round negotiations, at U.S. insistence,[25] that any harmonization of

[19] This is done, for example, under the EC and Canadian GSP rules and also under other EC preferential arrangements.

[20] This is done, for example, under the U.S. and Australian GSP rules.

[21] This is especially the case with respect to primary commodities whose prices tend to fluctuate widely almost as a matter of course.

[22] For a description of the Harmonized System, *see* Chapter 36 of this book. *See also* Part III.B.5(a) *infra.*

[23] As of May 2004, the HS Code had 116 signatories. At least 73 other countries use the HS on a *de facto* basis.

[24] This is presently not the case. For example, under the NAFTA, the change in tariff heading required for a change in origin may vary from a two-digit chapter level change to an eight-digit statistical level change.

[25] This is perhaps surprising as the United States 'discovered' the existence of the CTH test fairly late and first adopted it only in the 1989 U.S.-Canada Free Trade Agreement.

non-preferential rules of origin delegated to the Customs Cooperation Council ("CCC")[26] will be principally based on the HS CTH test.

However, the HS system is primarily designed as a dual-purpose commodity classification and statistics system and may therefore not always be an appropriate basis for conferring originating status. This has been realized by importing country administrators early on and has led to two lists of exceptions: (i) a list of products with respect to which a change in tariff heading is *not* sufficient to confer origin, which additionally requires a domestic content or import content requirement and/or a requirement that specific manufacturing operations are carried out or materials sourced in the country in which the last production process takes place and (ii) a list of exceptions with processing operations sufficient to confer origin even if they do *not* lead to a change in tariff heading. Such lists can be found, for example, in the EC GSP.

Another drawback of the CTH test is that it requires in-depth knowledge of the HS, with respect to both the finished products and the raw materials, not only on the part of exporting country administrators (who are not necessarily customs experts) but also on the part of producers/exporters. This point is often made in UNCTAD discussions about the functioning of the GSP.

3. The Technical Test

This test prescribes certain production or sourcing processes that may (*positive* test) or may not (*negative* test) confer originating status. The technical test is used in the United States for certain rules in the non-preferential and preferential area, in the latter case generally in combination with a domestic content test, and by the EC in the majority of non-preferential product specific origin regulations.

The advantage of the technical test is that of the three tests, it is best equipped to deal with the specifics of the situation at hand. However, it is also most easily abused by domestic interests as the U.S. Department of Commerce and EC determinations that the origin of integrated circuits depends on the place of diffusion show. Prior to these trade policy-fueled decisions, customs authorities had generally conferred origin on the country of assembly of integrated circuits on the ground that this was the last substantial process or transformation. As many Japanese IC producers were assembling the ICs in the United States and the EC, this traditional approach, however, would have precluded the U.S. and EC anti-dumping authorities from imposing anti-dumping duties on the imported components of such ICs. Also, it is extremely laborious to devise technical tests for an enormous array of products and to keep them updated. Finally, it may be difficult to verify the information on specific production processes performed in third countries.

An additional drawback of the *negative* technical test is that it only delineates those production or sourcing processes that do *not* confer origin and therefore leaves it unclear whether other production or sourcing processes *do*. This causes obvious uncertainty. The EC product specific origin regulation with respect to photocopiers (the "Ricoh" rule) is a good example of a negative technical test. Although couched in general terms, the rule was really a producer-specific origin rule as it held that certain production processes performed by the Japanese producer Ricoh in an American plant were *not* sufficient to confer origin, thereby leaving it open which production processes would be considered sufficient.

[26] The CCC adopted the working name "World Customs Organization" ("WCO") on October 3, 1994. The ARO refers to the CCC.

The Agreement on Rules of Origin in principle prohibits the use of negative technical tests, but provides two exceptions which still allow negative technical tests during the transitional period (i) as part of a clarification of a positive test or (ii) in individual cases where a positive determination of origin is not necessary. The wording of the second exception seems to leave importing country authorities substantial discretion to resort to negative technical tests during the transitional period.

It may be seen from the above discussion that none of the available tests are perfect. There is, in other words, no 'one size fits all' rule that works well for the origin determination of thousands of products. This may also explain why rules of origin tend to be so complicated.

C. Why the Need for a WTO Agreement on Rules of Origin?

Until the 1990s, rules of origin were an obscure field in which legal processes were by and large absent and government officials agreed in *in camera* sessions upon both policy formulation and policy implementation. Discussions about rules of origin were felt to be a government affair in which private companies, let alone foreign companies, had no standing. The lack of interest was fuelled by the widespread perception of rules of origin as technical rules applied by technicians on the basis of technical considerations. This may explain why the GATT draftsmen did not consider it necessary to include provisions on rules of origin, instead leaving it "within the province of each importing member country to determine, in accordance with the provisions of its law, for the purpose of applying the most-favored-nation provision, whether goods do in fact originate in a particular country."[27]

While some lackadaisical efforts were made in a variety of fora[28] to agree upon certain common principles in the period from 1947 to 1989, none of these was particularly successful. For a variety of reasons,[29] not least the realization that certain formulations/interpretations of origin rules in the early 1990s by the EC[30] and the United States were politically motivated and had trade-restrictive or -distortive ramifications, a number of countries agreed fairly late in the Uruguay Round that an 'Agreement' on rules of origin would be worthwhile. Consensus on a concept Agreement was reached surprisingly fast.

II. Agreement on Rules of Origin

A. The Agreement

The Agreement on Rules of Origin consists of a preamble, four parts and two annexes. Part I provides definitions and coverage. Part II provides the disciplines. Part III covers various procedural arrangements, while Part IV is devoted to the harmonization process. Annex I concerned the Technical Committee on Rules of Origin ("Technical Committee" or "TCRO") set up under the auspices of the World Customs Organization ("WCO"),[31] while Annex II contains a common declaration on preferential origin rules.

[27] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 468 (1969).

[28] Such as UNCTAD, the OECD, the CCC and GATT. For more detail, *see The Impact of Rules of Origin on U.S. Imports and Exports*, Report to the President on Investigation No. 332-192 Under Section 332 of the Tariff Act of 1930, USITC, at 70–72 (1985).

[29] *See* Vermulst and Waer, *supra* note 6, at 55–57.

[30] *See* BRIAN HINDLEY, FOREIGN DIRECT INVESTMENT: THE EFFECTS OF RULES OF ORIGIN (1990), at 4.

[31] For a description of the WCO, *see* Chapter 36 of this book.

Article 1.1 establishes that Parts I to IV apply only to non-preferential origin rules, while Article 1.2 makes clear that the Agreement covers all rules of origin used in non-preferential commercial policy instruments, such as MFN, anti-dumping and countervailing duties under Article VI of GATT 1994, safeguard measures under Article XIX of GATT 1994, origin marking requirements under Article IX of GATT 1994, and any discriminatory quantitative restrictions or tariff quotas. They also include rules of origin used for government procurement and trade statistics. The deceptively simple footnote 1, however, provides that Article 1.2 is without prejudice to those determinations made for purposes of defining 'domestic industry' or 'like products of domestic industry' or similar terms (typically used in the context of commercial defense legislation). In reality, however, this opens an enormous loophole by declaring rules of origin not applicable to the definition of the domestic industry in trade defense instruments. Thus, there is no requirement that the like product manufactured by domestic producers actually has domestic origin. At least in theory, this allows, for example, simple assemblers of a product to complain about dumping of foreign like products even though they themselves only assemble.

Part II then distinguishes between disciplines applicable during the transitional period pending completion of the harmonization process (Article 2), and disciplines applicable afterwards (Article 3). Understandably, the latter are more stringent. The transitional period was supposed to last for only three years, until July 1998, but, as we have seen, and as will be explained in detail in the next section, the harmonization process still has not been completed. As a result, at the time of writing (August 2004), the transitional disciplines still apply.

At this stage, it may be useful for the reader to compare the two sets of disciplines with each other:

Table 1: Comparative Table of Two Sets of Disciplines

Transitional disciplines	Ultimate disciplines
a. Requirements to comply with administrative determinations of general application must be clearly defined	a. Rules of origin shall be applied equally for all purposes
b. Rules should not be used to pursue trade objectives directly or indirectly	b. Origin rules to be based on wholly obtained or last substantial transformation
c. Rules shall not create restrictive, distorting or disruptive effects on international trade	Presumably taken care of by a and b above
d. Rules must observe national treatment and MFN requirements	c. Rules must observe national treatment and MFN requirements
e. Rules must be administered in consistent, uniform, impartial and reasonable manner	d. Rules must be administered in consistent, uniform, impartial and reasonable manner
f. Rules must be based on positive standard	Presumably moot because of b above
g. Laws, regulations, judicial decisions and administrative rulings of general application must be published	e. Laws, regulations, judicial decisions and administrative rulings of general application must be published
h. Establishment advance ruling procedure	f. Establishment advance ruling procedure
i. Prospective nature of changes or new rules	g. Prospective nature of changes or new rules
j. Independent review of administrative actions	h. Independent review of administrative actions
k. Confidentiality of information	i. Confidentiality of information

One of the more interesting innovations of the Agreement is the advance ruling procedure, which is required for both non-preferential rules[32] and preferential rules.[33] The fairly detailed requirements of the Agreement, including a 150 day time limit for the administering authorities and a publication requirement,[34] have led to the establishment of a ruling procedure in most jurisdictions with respect to both non-preferential *and* preferential rules of origin.

Article 4.1 establishes the Committee on Rules of Origin ("CRO") while Article 4.2 creates the Technical Committee on Rules of Origin ("TCRO") under the auspices of the WCO. The Technical Committee is in charge of carrying out the technical work of Part IV. Annex I sets forth the Committee's responsibilities, as well as dealing with some procedural issues.

Article 5 requires WTO Members to publish any new rules of origin, or modifications of existing ones, at least sixty days before their entry into force.

Article 6 contain rules on review of the Agreement and the harmonization process. Articles 7 and 8 provide that disputes under the Agreement are to be subject to the consultations and dispute settlement procedures of GATT Articles XXII and XXIII and the WTO Dispute Settlement Understanding.

Article 9 deals with the harmonization process. Article 9.1 sets out the principles and objectives which are to guide the Harmonization Work Programme ("HWP") (these largely mirror the disciplines in the table above). Article 9.2 instructs the Technical Committee to draw up harmonized definitions of wholly obtained goods on the one hand and of minimal operations or processes that do not by themselves confer origin on the other hand. As regards substantial transformation, Article 9.2(c)(ii) establishes the key principle that the main criterion shall be a change in tariff classification (subheading or heading). Percentage or technical tests may be used as 'supplementary criteria' only where the exclusive use of the HS nomenclature does not allow for the expression of substantial transformation.

It is important to reiterate that the whole harmonization process only covers non-preferential origin rules. Preferential origin rules, whether autonomous or negotiated, are therefore not covered. Many consider this the major shortcoming of the ARO. However, Annex II does extend many of the disciplines imposed upon non-preferential origin rules also to preferential rules, as the following table shows:

Table 2: Disciplines for Preferential Rules of Origin

a. Requirements for compliance with administrative determinations of general application must be clearly defined
b. Rules of origin to be based on positive standard
c. Laws, regulations, judicial decisions and administrative rulings of general application must be published
d. Advance ruling procedure
e. New rules or changes to existing rules not to be applied retroactively
f. Independent review of administrative actions
g. Confidentiality of information

[32] ARO, Articles 2(h) and 3(f).

[33] ARO, Annex II, ¶ 3(a).

[34] Technically, the draft Agreement would only require the authorities to make rulings publicly available. However, effective implementation of this requirement would appear to necessitate publication in the official gazettes of the jurisdiction.

These disciplines are similar to many of those pertaining to non-preferential rules during and after the transitional period. However, several of the key disciplines have been omitted, in particular the specification of the wholly obtained and substantial transformation rules, thereby clearly reflecting the desire of key negotiators to reserve significant discretion in the use of preferential origin rules.[35]

When the HWP is completed, its results will constitute Annex III (Harmonized Non-Preferential Rules of Origin) as an integral part of the ARO.

B. Dispute Settlement

Thus far, there has been only one WTO dispute settlement decision involving the Agreement on Rules of Origin, United *States—Rules of Origin for Textiles and Apparel Products*, WT/DS243/R (2003) (not appealed), a case brought by India.

India claimed that new U.S. rules of origin, along with the relevant customs regulations, violated Article 2 (b), (c) and (d) of the ARO. The rules concern fabrics and certain made-up non-apparel articles assembled in a single country from single country fabric. India's exports of "flat goods" (e.g. bed linen and home furnishing articles) were affected by the modifications.

The new U.S. rules of origin included:

1. *Section 334 of the Uruguay Round Agreements Act (1996)* providing that flat goods from sixteen HS headings originate in the country where the fabric is woven, knitted or otherwise formed, regardless of any further finishing operations which may have been performed (the "fabric formation" rule).
2. *Section 405 of the Trade and Development Act (2000*) (enacted following requests for consultations by the EC (DS85 and DS151)) contains two exceptions:
   a. *Fabric* classified as silk, cotton, man-made or vegetable fibre originates in the country in which the fabric is both dyed and printed (the "DP2" rule) when accompanied by two or more designated "finishing operations" (the "DP2 operations"), except wool fabric.
   b. Certain *made-up non-apparel articles,* namely seven out of the sixteen HS headings, are also subject to the DP2 rule, except where such articles are classified under the relevant headings as of cotton or of wool, or consisting of fibre blends containing sixteen percent or more, by weight, of cotton.

The Panel first noted that Article 2 of the ARO sets out what rules of origin should not do, but they do not prescribe what a Member must do, and thus leave for Members themselves discretion to decide what, within those bounds, they can do (¶ 6.24). The parties agreed that Article 2 does not prevent Members from determining the criteria which confer origin, changing those criteria over time, or applying different criteria to different goods.

With respect to Article 2(b), the Panel noted that the design, architecture and structure of the measure in question are pertinent for this analysis (referring to *Chile—Taxes on Alcoholic Beverages*, DS/87/AB/R and DS/110/AB/R), and that protecting the domestic

[35] Other disciplines imposed on non-preferential rules during the transitional period that are not applicable to preferential rules include that rules of origin are not to be used to pursue trade objectives, and that rules are not to create restrictive, distorting or disruptive effects on international trade. Similarly, the requirement that non-preferential rules must be administered in a consistent, uniform, impartial and reasonable manner during and after the transitional period is not imposed on preferential rules.

industry against import competition and favoring imports from one Member over imports from another may constitute "trade objectives" (¶ 6.36). However, as to Section 334 the Panel rejected India's arguments that the United States was the only country using such a rule of origin (¶ 6.73), and that it was irrational, ruling that there is no requirement in Article 2 for use of any particular type of rule, and that the rule is not on its face unreasonable (¶ 6.74). Moreover, the fact that the origin-conferring operation does not add the most value does not necessarily indicate that the United States pursues trade objectives (¶ 6.75). Furthermore, India had not provided evidence on the effects on the textile quota allocation (¶ 6.83). Finally, the Panel makes a distinction between the use of rules of origin to implement and support a quota regime (which is permitted) and the use of rules of origin to supplement the protective effect of the quota regime (which is prohibited). Using rules of origin which render a quota regime more restrictive (for example, to more accurately reflect where the most significant production activity occurs or prevent quota circumvention) may be consistent with using rules of origin to implement and support such a regime (¶ 6.86). The claim that Section 405 is an instrument to favor imports from the EU was rejected, on the grounds that it applies equally to goods from all Members, and furthermore, that settling a bilateral trade dispute (with the EC) does not imply an intention to disfavor Members which are not parties to the settlement agreement (¶ 6.117).

With respect to Article 2(c), first sentence, providing that rules of origin shall not create restrictive, distorting or disruptive effects, the Panel interpreted the various terms used ("themselves", "create", etc.) With regard to the term "effects on international trade", the Panel did not resolve the question whether this covers effects on trade in intermediate stages of production or just trade in finished goods. However, the Panel found that it did not apply to different, even "closely similar" goods (¶ 6.147). It also found that measure must affect the trade of more than just the complaining Member (¶ 6.148). The Panel rejected India's argument that the measures have restrictive effects by reducing the level of exports from countries such as India which export greige fabric to third countries to be further processed into made-up articles before export to the United States. India had not provided the evidence required, namely: (1) which countries are under quota in the United States with respect to relevant downstream goods (e.g, cotton bed linen); (2) which countries are important suppliers of the relevant upstream goods (e.g., cotton fabric); and, (3) the price and quality of the upstream goods made by those countries and their production capacity (¶ 6.159). The Panel rejected India's claim that the U.S. rules of origin have distorting effects by favoring exports of product of interest to the EU, because according to the Panel, Article 2(c) did not cover effects on trade in different types of goods, and India had failed to prove either the existence of a competitive relationship between the goods, or that the measures favored the EU. India claimed that the measures have disruptive effects because of: (1) the sheer complexity of the rules; (2) the arbitrary nature of the criteria used, and (3) the imposition of certain administrative burdens (¶ 6.172). The Panel rejected these arguments, noting that: (1) rules of origin are by their nature complex and India has not shown that the measures are more complex than necessary (¶ 6.179), (2) the criteria used are specifically identified in Article 2(a)(iii) (¶ 6.180), and (3) it was not clear how the requirements referred to by India were linked to the measures at issue (¶ 6.181).

Concerning Article 2(c), second sentence, providing that rules of origin shall not pose unduly strict requirements or the fulfillment of a certain condition, the Panel explained that "'strict' requirements are [. . .] those requirements which make the conferral of origin conditional on conformity with an exacting or rigorous (technical) standard", and

that an origin requirement can be considered to be "unduly" strict if it is "excessively strict". The Panel rejected India's interpretation that rules of origin are "unduly strict" if they are "burdensome and need not be imposed to determine the country with which the good in question has a significant economic link," and that the measure at issue did not assist the United States in determining the country with which the products has the most significant economic link. India's argument that the measures made a distinction between three types of goods, and that these product distinctions constituted "conditions" in the meaning of Article 2(c), second sentence was rejected "as a matter of logic" (¶ 6.218).

Lastly, regarding the Article 2(d) requirement that rules of origin shall not discriminate between other Members, India had claimed that section 405 discriminates in favor of the EU because it results "in unjustifiably differential treatment of closely related (Indian and European) products", because the type of goods covered by the exemption are mainly those which undergo value-added or substantial transformation operations in the EU, while developing countries mainly export cotton fabric. The Panel observed that India's claim is based on three cumulative assumptions (¶ 6.244), namely that:

1. First, Members have an obligation to apply the same rule of origin, or at least equally advantageous rules, to "closely related" products (e.g., silk scarves and cotton scarves) imported from different Members.
2. Second, not only de *jure*, but also *de facto* discrimination between Members is prohibited; and,
3. Third, that an assessment of whether rules of origin discriminate, de facto, between Members calls for an examination of whether those rules impose differentially disadvantageous consequences on certain Members which are justifiable.

The Panel rejected the first assumption, thus deciding that Article 2(d) only applies to products which are "the same" (¶ 6.249). The Panel accepted the other two assumptions on an *arguendo* basis (¶ 6.250).

The Panel then analyzed the consistency of Section 405, and accepted *arguendo* India's assertion that Section 405 results, de facto, in differential treatment between goods of interest to the EU and goods of interest to developing countries (¶ 6.259). The Panel also accepted *arguendo* that India had identified only one set of products which are "the same" (namely goods made of fabric containing sixteen percent or more cotton and goods made of fabric containing less than sixteen percent) (¶ 6.265). However, on the point whether the discrimination is unjustifiable the Panel concluded that it was justifiable, among others because it appears to be consistent with the structure of the HS, and India had not shown that the sixteen percent threshold operates in such a way that producers cannot adjust their production, or can only do so at an excessive cost (¶ 6.270).

III. Harmonization Work Programme and Technical Analyses

This Part discusses the Harmonization Work Programme during the interim period: (i) the technical examination undertaken by the Technical Committee on Rules of Origin between the *de facto* launching of the HWP in 1994 and the end of May 1999; and (ii) the continuing negotiations by the Committee on Rules of Origin from June 1999 to its most recent session (as of the time of writing) in May 2004.[36] By May 1999 the TCRO had prepared a provisional text consisting of General Rules, Appendix 1 (definitions

[36] This meeting was devoted to the election of officers only. The CRO has continued to hold informal meetings on an every other month basis.

of wholly-obtained goods) and Appendix 2 (product-specific rules of origin). Product-specific rules had been agreed upon by consensus within the TCRO for nearly half of the 1,241 Harmonized System tariff headings (1996 edition). The product-specific rules for the other half remained undecided; about five hundred issues[37] were then referred to the CRO for decision. In June 2002, the CRO decided to submit about one hundred core policy issues, including twelve crucial issues, to the WTO General Council.[38] For the remaining technical issues, the CRO will select the options that are most suitable from the trade policy standpoint from among the technically possible alternatives elaborated and sent to it by the TCRO.

Section A of this Part provides a chronological overview of the negotiations. Section B explains the general provisions and the architecture of the Harmonized Non-Preferential Rules of Origin ("HRO"). As of the time of writing (August 2004), the latest text compiled by the WTO Secretariat is that of June 25, 2002 (G/RO/45/Rev.2). This has not yet been completely agreed, but provides an indication of what the HRO will look like, as well as the implications of applying the HRO to particular cases, such as anti-dumping measures or quantitative restrictions.[39] Next, Section C explains the definitions of wholly-obtained goods. A new concept has been introduced into the structure of definitions of wholly-obtained goods, i.e., two different sets of definitions applicable to: (i) goods obtained in the country; and (ii) goods obtained outside a country. The former is almost identical to the Kyoto Convention definitions, and the latter appears to be a logical development from the Kyoto text. Section D is devoted to selected product-specific rules of origin, namely, those for the agricultural, textiles and machinery sectors. Section E discusses the implications of the implementation of the HRO for other WTO Agreements.

Almost all of the information on the results of the technical examination by the TCRO (1995–1999) and the continued negotiations in the CRO (1999–June 2002) has been made available to the public.[40] It should be noted, however, that any opinion expressed in this chapter does not represent the official position of the WCO and WTO Secretariats.

A. Harmonization Work Programme—Overview

1. Technical examination in the Technical Committee (July 1995–May 1999)

(a) The Technical Committee on Rules of Origin and the WCO Origin Project. Since the World Customs Organization had made a commitment to the GATT Secretariat to contribute to the harmonization of non-preferential rules of origin, the WCO started preparatory work on the Harmonization Work Programme even before the Marrakesh Agreement Establishing the World Trade Organization entered into force. The Technical Committee on Rules of Origin was still to be established. The WCO Council, the

[37] The scope of an issue varies from one split (sub)heading to several HS Chapters. Therefore, the fact that there were five hundred issues does not mean that there are unresolved product-specific rules for five hundred headings.

[38] WTO Doc. G/RO/52, ¶ 5.1.

[39] There have been arguments in the CRO on the applicability of the HRO to other WTO instruments. This issue is referred to as "the implications issue" and has been forwarded from the CRO to the WTO General Council. For further details, *see* Section III.E *infra.*

[40] The WTO has published almost all official documents related to the Harmonization Work Programme on its website (www.wto.org). In this respect, WCO documents submitted to the WTO are accessible as part of WTO documents. Readers can trace the negotiations by referring to WTO document series G/RO/45 (as of August 2004, Add.1-16/Rev.1–3 version is the latest). The WCO has decided to make its historical documents available to the public (with a few exceptions). These documents can be accessed on the WCO website (www.wcoomd.org).

Organization's highest decision-making body, decided to assign top priority to the completion of the HWP. Accordingly, a project team was set up within the WCO Secretariat in September 1994 to serve as the secretariat to the Technical Committee when it came into being.

Members of the WTO are automatically Members of the TCRO.[41] The HWP was itself officially initiated by a letter sent by the Chairman of the CRO to the Chairman of the TCRO on July 20, 1995, requesting the commencement of the three-year work programme. Within three years the TCRO was supposed to prepare and consider definitions of wholly-obtained goods; definitions of minimal operations or processes that do not by themselves confer origin on a good; criteria for substantial transformation based on change in tariff heading; and, where the exclusive use of CTH does not allow for the expression of substantial transformation, supplementary criteria.

Despite its tremendous efforts, the TCRO was unable to finish its task within the initial three-year period. This was mainly due to the huge volume of work involved and the technical complexity and political sensitivity of the issues. In July 1998, the CRO agreed to extend the deadline for another year to November 1999.[42] In order to complete the HWP by the new deadline, in July 1998 the WTO General Council endorsed the CRO's plan and extended the deadline for completing the technical examination by the TCRO to May 1999 and the policy examination by the CRO to November 1999. In May 1999 the TCRO forwarded to the CRO the provisional text of the Harmonized Non-Preferential Rules of Origin as the final result of the technical review, together with a series of referral documents setting out the unresolved issues and the possible options for resolving them.[43]

(b) Working method. Based on Art. 9.2 of the ARO, it was initially planned that Phase I *(definitions of wholly-obtained goods and minimal operations or processes)* of the HWP should be completed by October 1995; Phase II *(substantial transformation—change in tariff classification)* by October 1996; and Phase III *(substantial transformation—supplementary criteria)* by October 1997. The TCRO also committed itself to undertaking any work requested by the CRO during the remaining nine months' life span of the HWP (*coherence exercise*).

For the work of Phase I, the WCO Secretariat (Origin Project) prepared working documents on definitions of wholly-obtained goods and minimal operations or processes. After extensive discussions at the First and Second Sessions, the TCRO was able to produce a single draft of definitions of wholly-obtained goods by October 1995. However, the TCRO decided to defer the elaboration of definitions of minimal operations or processes until the end of Phase III with a view to carefully examining the relationship of these definitions to substantial transformation criteria.

For the Phase II work, the TCRO requested Members to submit written proposals to the Secretariat in accordance with an agreed tabular format, so that the Secretariat could produce a comparative table of proposals on an HS heading basis. The TCRO also decided to examine product sectors according to the following order of HS Chapters: 25–27, 41–49, 64–71, 91–97, 72–81, 1–24, 28–40, 50–63, and 82–90. The aim was to complete the easier sectors before tackling the more contentious ones, such as textiles and machinery.

[41] *See* ARO Annex I, ¶ 4.

[42] WTO Doc. G/RO/M/18, ¶ 1.1.

[43] The WCO Secretariat has compiled the provisional text in three volumes of A4-size files entitled "*Consolidated Text of the Technical Committee on Rules of Origin*".

A unique management method was devised by the then Chairman of the TCRO, categorizing the decisions of the TCRO into the following three types[44]:

Basket 1: The rule indicated was approved and should apply as specified. The Basket 1 rules were to be transmitted to the CRO for endorsement.

Basket 2: The TCRO needed to conduct further research and analysis, and the rule would be examined later in Phase II. Basket 2 decisions could be converted to Basket 1 or Basket 3, as appropriate, as a result of subsequent examination.

Basket 3: Examination of rules for the particular product should be undertaken in Phase III.

This approach made it clear that the TCRO intended to send results to the CRO once a consensus was reached at the TCRO on the rule for a particular product. However, this working 'principle' was not maintained for long. Divergent opinions were often found to stem from countries' trade and industrial policies, and it was therefore extremely difficult to convince delegations that a particular proposal was the most technically suitable. The TCRO then came up against policy issues which were intrinsic to the technical questions. Consequently, in many product sectors, several technically possible options were sent to the CRO for its consideration, rather than a single (Basket 1) draft for the CRO's endorsement.

As already explained in Part I of this chapter, a "change-in-classification criterion" was synonymous with the "change of heading" rule. Article 9.2(c)(ii) of the ARO permits the use of a change-in-subheading rule ("CTSH") as well as a CTH rule. Furthermore, the TCRO did not interpret the meaning of "the use of change in tariff subheading or heading" and "the exclusive use of the HS nomenclature" (Art. 9.2(c)(ii) and (iii) of the ARO) in a rigid manner. Instead the TCRO created, for the purposes of rules of origin, subdivisions of headings or subheadings entitled "split headings" or "split subheadings" to confer origin on a good with respect to which substantial transformation could occur within the scope of a particular heading or subheading in the 1996 version of the Harmonized System. These subdivisions of headings or subheadings (HS 1996) are expressed with the prefix "ex", together with a precise description of the goods, as shown in Table 3 below.

Table 3: Example of Split Subheadings

HS Code Number	Description of Goods	Origin Criteria
71.06	**Silver (including silver plated with gold or platinum), unwrought or in semi-manufactured forms, or in powder form.**	*See subheadings*
7106.10	-Powder	*See split subheading*
ex7106.10(a)	Flakes classified with powder[1]	CTSHS
ex7106.10(b)	Powder	CTSH

(*Sources:* Consolidated Text of the TCRO)

[1]The HS classifies flakes with powder of subheading 7106.10 when 90 percent or more by weight passes through a sieve having a mesh aperture of 0.5 mm (see HS Subheading Note 1 to Chapter 71).

[44] *See* Annex C/1 to WCO Doc. 39.870 and *Consolidated Text*, *supra*, note 43.

The TCRO considered that, in this way, a change of tariff classification could be optimized. For instance, the expression "CTSHS" (a change of split subheading rule) in the above table means that a substantial transformation takes place when flakes classified with powder of split subheading ex7106.10(a) are produced from powder classified in the same subheading 7106.10 (see Table 3), even though a change of subheading does not occur (both are 7106.10). On the other hand, powder of split subheading ex7106.10(b) must meet a CTSH for substantial transformation to occur. This means that production of powder from unwrought silver classifiable in subheading 7106.91 or any other goods classified outside subheading 7106.10 does constitute substantial transformation. However, producing powder from flakes classified with powder of split subheading ex7106.10(a) is not considered to be substantial transformation.

(c) Second examination. The TCRO finished the 'first reading' of proposals for substantial transformation (Phases II and III together) by the Eighth Session in June/July 1997. A second examination of Basket 2 issues then started at the same session, and a new and standard reporting format to the CRO was introduced. This format was called a "referral document" or "template document" which pinpointed the unresolved issues and suggested technically possible options for decision by the CRO.

The second examination was completed in May 1999 at the Seventeenth Session of the TCRO. By that time, the TCRO's provisional text of the HRO consisted of General Rules, Appendix 1 (definitions of wholly-obtained goods) and Appendix 2 (product-specific rules of origin) (see Annex 1 to this chapter). The product-specific rules of origin for 511 HS headings (or 41 percent) out of 1,241 were agreed upon by consensus.[45] There were 66 referral documents covering 486 product-specific unresolved issues, involving 730 headings transmitted to the CRO for decision. Definitions of minimal operations or processes were presented as General Rule 5 and ¶ 2 of Appendix 1 of the TCRO's final text.

2. Negotiations in the Committee on Rules of Origin (after June 1999)

Having passed the agreed deadline of November 1999, the CRO made its management plan for completing the HWP (the Notional Work Programme for 2000).[46] On December 15, 2000, the WTO General Council adopted a decision to complete the HWP by the time of the Fourth Ministerial Conference[47], or by the end of 2001 at the latest. In December 2001, the General Council agreed that the CRO should report the core policy issues to it for discussion and decision and that the overall deadline would be further extended to the end of 2002.[48]

The CRO made tremendous progress in 2001. In addition to thirty issues that had already been resolved from 1997 to 2000, it resolved 300 of the 486 issues that had been referred to it.[49] However, progress slowed down in 2002, and only ten issues were

[45] The majority of the agreed rules were the tariff-shift rules. This figure covers headings that were fully agreed only. When a rule proposed for one subheading of a heading has not yet been agreed despite the fact that other rules for the remaining subheadings have all been agreed, that heading is not counted in this figure as agreed. Chapter notes which are applicable to all or specified headings of the Chapter are not taken into account for the purposes of the above calculation.

[46] *See* WTO Doc. G/RO/M/27.

[47] Under the Doha Ministerial Declaration (November 2001), the HWP was dealt with as part of the implementation-related issues and concerns (WTO Doc. WT/MIN(01)/DEC/W/1). The Ministerial Conference took note of the report of the CRO (G/RO/48) and urged the CRO to complete its work by the end of 2001 (WTO Doc. WT/MIN(01)/W/10).

[48] *See* WTO Doc. G/RO/52.

[49] *Id*.

resolved in April, eight in June and one in November.[50] In July 2002, the Chairman of the CRO submitted to the General Council 94 core policy issues, of which twelve were considered crucial, more particularly the contentious implications issue.[51] The General Council agreed to discuss first the twelve crucial issues. Consensus was not achieved despite the best efforts to break the impasse by way of informal/formal consultations made by the General Council itself and the Chairman of the CRO in its capacity representing the Chairman of the General Council. The CRO's Chair presented a packaged proposal as a common ground to wrestle with the overarching implications issue and the 93 product-specific issues. Some Members strongly rejected any understanding that fundamentally altered or undermined the basic objectives of the Agreement on Rules of Origin. Others cited the need for more flexibility and political will. There was, however, broad understanding that the package of the CRO's Chair provided a working tool to press for the completion of the Harmonization Work Programme. The deadline for completion of negotiations on the core policy issues has now been extended for the sixth time to July 2005. The CRO has to complete the remaining technical issues by December 2005. Resolving issues however does not always mean agreeing to the articulation of rules of origin for a particular good or product sector. Finalization of the Integrated Negotiation Text ("INT") and the review for overall coherence of the HRO will follow afterwards. As of August 2004, the CRO had resolved 349 issues (71.8 percent) out of 486 (*see* Table 4).

Amendments to the 1996 edition of the Harmonized System came into effect on January 1, 2002. The TCRO has already informally started the technical rectification exercise, adjusting the rules agreed based on HS 1996. The next amendments to the HS are scheduled to come into effect in 2007. The HRO will then have to be rectified accordingly. Detailed implementation measures may be needed, together with capacity-building activities for developing countries, to ensure smooth implementation of the HRO. The tasks before the CRO, and to an even greater extent the TCRO, remain far from simple and they are contentious.

B. General Provisions and the Architecture of the Harmonized Non-Preferential Rules of Origin

1. Architecture of the HRO

(a) Background. The ARO was silent with regard to several aspects of rules of origin. For example, the details of implementation were left completely untouched and the preparation of "general rules", including "residual rules", was not explicitly required by the Agreement. However, it was obvious that the definitions of wholly-obtained goods and the criteria for substantial transformation needed to be guided by some *general* provisions which would govern the entire set of rules.

In order to apply definitions of wholly-obtained goods and the substantial transformation criteria *per se*, delegations needed to have a clear idea based on their own experience with existing preferential and non-preferential rules of origin. However, when the applicable substantial transformation criteria were not satisfied, it was not clear how to treat a good that has been transformed (but not *substantially* transformed or regarded as

[50] *Id*., ¶ 2.2.

[51] The twelve crucial issues relate to: (1) implications of the implementation of the HRO for other WTO Agreements; (2) dyeing and printing of textile products; (3) coating of steel products; (4) assembly of machinery; (5) assembly of vehicles; (6) refining of sugars; (7) roasting of coffee; (8) slaughtering of live animals; (9) refining of oils; (10) fish taken from the sea of the exclusive economic zone; (11) footwear; and (12) dairy products (*Id*., ¶ 5.1). *See also* WTO Doc. G/RO/W/92.

Table 4: Progress made by the TCRO and the CRO (As of August 2004)

Product groups	Number of HS headings agreed[52] by the TCRO	Number of issues referred to the CRO	TCRO referral document number	WTO document number[53]
1–24 (Agricultural products)	92/201 (46 percent)	125	42,146, 42,146/Cor., 42,536, 42,574, 42,574/Cor., OC0028/2	G/RO/45/Add.8/Rev.3
25–27 (Mineral products)	39/66 (59 percent)	10	41,611, 42,535, 42,695	G/RO/45/Add.3/Rev.2
28–40 (Chemicals)	166/220 (75 percent)	38	42,626, 42,627, 42,695, OC0014/1, OC0016/1, OC0023/2, OC0032/1	G/RO/45/Add.9/Rev.2
41–43 (Leather)	7/21 (33 percent)	8	41,612, 41,737, 41,737/Cor., 42,268, OC0023/2, OC0031/1	G/RO/45/Add.4/Rev.1
44–49 (Wood & paper)	48/68 (71 percent)	11	42,633, OC0023/2, OC0031/1	G/RO/45/Add.6/Rev.2
50–63 (Textiles)	14/149 (9 percent)	83	42,271, 42,271/Cor., 42,357, OC0023/2	G/RO/45/Add.1/Rev.2
64–67 (Footwear)	6/20 (30 percent)	14	41,823, 42,269, 42,533, OC0023/2	G/RO/45/Add.2/Rev.2
68–70 (Ceramics)	40/49 (82 percent)	12	41,824, 42,269, 42,583, 42,695, OC0012/2	G/RO/45/Add.10/Rev.2
71 (Precious stones & metals)	9/18 (50 percent)	5	42,383, 42,695, OC009/2	G/RO/45/Add.11/Rev.1
72–73 (Steel)	34/55 (62 percent)	12	42,621, 42,695	G/RO/45/Add.12/Rev.2
74–81 (Other base metals)	31/76 (41 percent)	24	42,672	G/RO/45/Add.13/Rev.2
82–83 (Articles of metal)	12/26 (46 percent)	17	42,511, 42,576, OC0025/2, OC0026/2	G/RO/45/Add.14/Rev.2
84–90 (Machinery)	1/204 (0 percent)	86	42,147, 42,269, OC0023/2, OC0031/1	G/RO/45/Add.15/Rev.1
91 (Clocks & watches)	0/14 (0 percent)	6	41,610, OC0023/2, OC0035/1	G/RO/45/Add.16/Rev.2
92 (Musical instruments)	1/9 (11 percent)	2	41,841, OC0035/1	G/RO/45/Add.5
93–97 (Miscellaneous articles)	11/45 (24 percent)	33	42,269, OC0023/2, OC0033/1, OC0035/1	G/RO/45/Add.7/Rev.2
TOTAL	**511/1,241 (41%)**	**486**	9/1997–9/2000: 22 issues, 5 percent of the total resolved; 11/2000: 8 (30) issues, 2 percent (6 percent) of the total resolved; 2001: Mar., 24 (54) issues, 5 percent (11 percent); May, 42 (96) issues, 9 percent (20 percent); July, 67 (163) issues, 14 percent (34 percent); Sep.–Oct., 115 (278) issues, 24 percent (57 percent); Nov./Dec., 52 (330) issues, 11 percent (68 percent); 2002: Apr., 10 (340) issues, 2 percent (70 percent); June, 8 (348) issues, 2 percent (72 percent); Nov., 1 (349) issues, 0 percent (72 percent) of total resolved. **349** issues (**71.8 percent**) resolved (137 outstanding issues left)	

(Source: WTO and WCO documents)

[52] This column does not cover headings which have been agreed in part. Chapter notes/rules are disregarded for this calculation.

[53] Latest version of the Integrated Negotiating Text of the WTO as of August 2004 (Documents available on the WTO public Web site).

having undergone a minimal operation or process) from non-originating materials. The idea of "residual rules", which had been proposed by the Secretariat as the "secondary rules" at the inaugural session, was to remind the TCRO that, under the future HRO, there should not be a single good in the world for which the country of origin could not be determined.[54] This argument was compelling in the light of the broad coverage that the HRO were to have under Art. 1.2 of the ARO (even rules of origin used for trade statistics were to be covered). The TCRO therefore decided to draft "residual rules" as part of the general rules; the CRO endorsed this idea.

In the case of preferential rules of origin, the rules lead to either a "yes" (qualified) or "no" (not qualified) answer. Therefore, the concept of "residual rules" does not exist. Moreover, even in the context of current non-preferential trade it appears that a clear distinction between the country of origin and the exporting country has not always been made, except in the case of some sensitive product sectors. In fact, 41 Members did not have non-preferential rules of origin as of October 2003.[55] Consequently, the drafting of the "residual rules" was a lengthy process which involved a great deal of work.

The ARO also did not deal with the day-to-day implementation of the HRO, in particular the certification and verification of origin. The TCRO requested the WCO Secretariat to undertake an exhaustive study on this issue at the Eighteenth Session in February 2000.[56] At its Twentieth Session, the TCRO examined the same issue and felt that it was not necessary, in the context of the TCRO, to harmonize the procedural aspects of implementing the HRO. After completion of the HWP, this issue would be reviewed by the WCO in the context of Annex K (Origin) to the revised Kyoto Convention.[57]

(b) Elaboration of the architecture of the Harmonized Non-Preferential Rules of Origin. While the TCRO adopted an item-by-item approach[58] to the "general rules", the CRO suggested that the TCRO devise an overall structure for the HRO, i.e., look at how to

[54] The "residual rules" should be applicable to a good when a change of heading ("CTH") rule as a "primary rule", for instance, is not satisfied in the country in question.

[55] These Members include: Bolivia; Brazil; Brunei Darussalam; Burundi; Chad; Chile; Costa Rica; Cyprus; Dominica; Dominican Rep.; El Salvador; Fiji; Guatemala; Haiti; Honduras; Iceland; India; Indonesia; Jamaica; Kenya; Macao, China; Malaysia; Maldives; Malta; Mauritius; Mongolia; Namibia; Nicaragua; Oman; Pakistan; Panama; Papua New Guinea; Paraguay; Philippines; Singapore; Suriname; Thailand; Trinidad & Tobago; Uganda; United Arab Emirates and Uruguay (WTO Doc. G/RO/57: Ninth Annual Review of the Implementation and Operation of the Agreement on Rules of Origin).

[56] Based on 85 Members' replies to the questionnaire, a study paper entitled "*Comparative Study on Systems of Certification and Verification as well as Documentation for Customs Clearance With Respect to Non-preferential Rules of Origin*" was prepared by the WCO Secretariat for the 20th Session (WCO Doc. OC0067).

[57] The revised International Convention on the Simplification and Harmonization of Customs Procedures (the revised Kyoto Convention) was adopted by the WCO Council in June 1999, and the Protocol of Amendment to bring the revised Kyoto Convention into force was then opened for signature. The Protocol requires the accession of forty current Contracting Parties to the Kyoto Convention. As of August 2004, the revised Kyoto Convention had not entered into force. Annexes D.1 to D.3 to the Kyoto Convention (1974) have been maintained with minor amendments and are now located as Annex K (Chapter 1— *Rules of Origin;* Chapter 2— *Documentary Evidence of Origin*; and Chapter 3— *Control of Documentary Evidence of Origin*). The full text is available on the WCO website (www.wcoomd.org).

[58] Although a number of Members had *general* provisions in their preferential or non-preferential rules of origin, no specific existing rules of origin were used as a basis for the TCRO's consideration. At the time, there appeared to be a strong feeling among delegations that the TCRO should create a new set of non-preferential rules of origin, instead of harmonizing a number of existing non-preferential rules of origin. In other words, Members preferred not to be influenced by a couple of major trading economies that had been using certain established phrases or terms enshrined in their legal system. Consequently, several draft texts for the "general rules" were proposed by delegations, item by item.

place, format and present the *general* provisions and the product-specific rules. The CRO referred to the structural framework of the HRO as the "overall architecture" or "architecture", with its decision in November 1995 to request the TCRO to "forward . . . a general format establishing the overall architectural design within which the results of the different phases of the Harmonization Work Programme will be finalized as provided for in Article 9.4".[59]

Responding to the request of the CRO, the TCRO drafted the "provisional text of the Technical Committee on Rules of Origin at its Third Session"[60]. The basic structure consisting of General Rules, Appendix 1 (*wholly-obtained goods*), Appendix 2 (*product-specific rules of origin*) and Appendix 3 (*minimal operations or processes*) was proposed and agreed. The sequential application principle between Appendices 1 and 2 was also agreed.

Two meetings in Canada provided a good opportunity to overcome an impasse in respect of the architecture. The first informal meeting (in Ottawa) in September 1996 paved the way, *inter alia*, for the Appendix 2 rules for goods (e.g., coal) that had been wholly-obtained (e.g., undergone a mining operation) in Country A, were subsequently imported into Country B but did not undergo substantial transformation there (e.g., they were merely put in sacks), and were exported further to Country C. In this scenario, there was a clear agreement that the country of origin should be determined by application of Appendix 1 (wholly-obtained goods) when goods were traded between Countries A and B, and by Appendix 2 (product-specific rules of origin) when traded between Countries B and C (the case where "more than one country (*Countries A and B*) is concerned in the production of the good"[61]). This scenario also confirmed a general acceptance as to the sequence of when to invoke the Appendix 1 definitions and Appendix 2 rules to settle the country of origin.

(c) "Ottawa language". In seeking to draft the Appendix 2 rules to cover the above-mentioned scenario, one delegation proposed to refer directly to "wholly-obtained", whereas others opposed that idea because wholly-obtained goods had to be dealt with under Appendix 1 only, based on the sequential application principle. Thus, to achieve consensus, the text should not include the term "wholly-obtained". Wording the rule therefore required technical skills.

The delegations attending the Ottawa informal session devoted some time to this issue and arrived at an agreed principle. Based on this agreement, at its subsequent session the TCRO endorsed three types of standard text, known as the "Ottawa text" or "Ottawa language":

(i) For scrap and waste, the rule was to be based upon the country where the scrap or waste was derived;
(ii) For goods having antecedents, the rule was to be based on change of tariff classification with exclusions; and
(iii) For goods having no antecedents, the rule was to be based on the country where the good or material was obtained in its natural or unprocessed state.[62]

[59] *See* WTO Doc.G/RO/M/3, ¶ 4.3(a). The content of the General Rules and the architecture were at first discussed separately. However, in the later stages of the technical examination, all questions other than the product-specific rules of origin were deemed to fall under the architecture issues, including the substance of the General Rules.
[60] Annex G/2 to WCO Doc. 39.870.
[61] Art. 9.1(b) of the ARO.
[62] Annex C/2 to WCO Doc. 40.510.

The second category (goods having antecedents) may need some explanation. For example, the rule "CTH, except from heading 18.01 or 18.02" is proposed for heading 18.03 (cocoa paste, whether or not defatted). This rule means that to obtain origin, cocoa paste may not be produced either from non-originating cocoa beans (heading 18.01) or from non-originating cocoa shells, husks, skins and other cocoa waste (heading 18.02). The only way to produce originating cocoa paste is to use originating materials[63], i.e., the cocoa paste would have to be produced as a wholly-obtained good in that country. It should be noted that, in the case of this particular good (cocoa paste), a straight CTH rule (without exception) has also been proposed.[64]

(d) Evolution of "Ottawa language". In the later stages of the HWP, the "Ottawa language" has evolved to ensure greater clarity of the rule. One example is the rule for goods with antecedents. Yoghurt, for example, has an antecedent, milk. Consequently, for those who do not recognize a change from milk to yoghurt as substantial transformation, a Change of Chapter ("CC") or CTH except from headings of milk should have been the ideal rule. However, this rule required a "residual rule" which determines the origin of yoghurt produced from non-originating milk. If a "primary rule" is able to determine the origin of goods in all cases, that would be an ideal situation. Thus, the expression "the country of origin of the goods of this subheading shall be the country in which *the milk* is obtained in its natural or unprocessed state" replaced the initial presentation of the "Ottawa language"[65].

The rule for live animals provides another good example. The following rule was proposed to the TCRO:

> The country of origin of the goods of this heading shall be the country in which the animal was born (and raised).

Instead of using the initial expression "the material (or the good) of this heading is obtained in its natural or unprocessed state", the proponents made it clear that the "material" in the "Ottawa text" should mean the animal. Consequently, the appropriate verb which is equivalent to the term used in definitions of wholly-obtained goods, is employed.[66] It was also pointed out that the initial "Ottawa text" could be interpreted in different ways. In the case of vegetable saps and extracts of split heading ex 13.02(a), the initial "Ottawa text" could be understood to mean that the country of origin of the vegetable saps and extracts is:

> The country in which the vegetable saps and extracts (good) were extracted (obtained) from a plant (material wholly-obtained in a country, not further processed), regardless of the origin of the plant; or The country in which the plant (wholly-obtained material), from which the vegetable saps and extracts were extracted, grew (obtained in its natural state in that country).[67]

[63] Non-originating seasonings or any other materials which are not excepted in the rule can be added. Therefore, this rule does not require the good to be wholly-obtained in the strict sense of the term. *See* further explanation for the term "solely" of Definition 1(i) of Appendix 1.

[64] If the straight CTH rule is finally agreed, a change from cocoa beans to cocoa paste will be considered to be substantial transformation.

[65] Annex C/1 to WCO Doc. 41.755, ¶ 58. However, a number of rules based on the initial "Ottawa" text were sent to the CRO once they were agreed, and the CRO subsequently endorsed them. It is therefore anticipated that the consistency of the text will need to be completely examined during the coherence review.

[66] For example, the verbs used in the rules for goods of Chapters 1 to 24 include: hatched, gathered, captured, raised, born, born and raised, farmed, extracted, grew, grown and harvested, or derived (*Id*., ¶¶ 59–60).

[67] *Id*., ¶ 61. As of the time of writing, a CC rule has been widely supported for split heading 13.02(a).

(e) "Ottawa" type rules. Since the evolved "Ottawa language" was able to designate certain processes or operations to be considered as substantial transformation, a number of supplementary criteria for Chapters 1 to 24 were proposed based on the evolved "Ottawa language". The criteria proposed were, for example, weight or fattening period, or even both, to indicate the growth of animals as follows:

> The country of origin of the goods of this heading shall be the country in which the animal was fattened for at least 6 months.

At this stage, a clear distinction can be made between the initial "Ottawa text" and its evolved version on the one hand, and the text designating a particular process or operation on the other hand. The first category targeted a good that was wholly-obtained in another country or a good the material of which was wholly-obtained in another country. The latter category did not target a wholly-obtained good or material; an animal can be imported and origin conferred in that country if the required condition is met. These supplementary criteria were often informally referred to as "Ottawa" type rules.[68] It should be noted, however, that this technical jargon was not included in the legally binding text and has never been formally defined by the TCRO.

(f) Meech Lake recommendations. During the second informal meeting (in Meech Lake, Canada) in September 1998, the participating delegations reached broad agreement on the shape of the architecture of the HRO which was to be submitted to the CRO as the final result of the technical examination. The recommendations[69] were that:

(i) definitions and the content of Appendix 3 (*Minimal Operations or Processes*)[70] can be placed in the appropriate places in the architecture;
(ii) rules in Appendix 2 (*Product-Specific Rules of Origin*) are applicable to a good when a definition under Appendix 1 (*Wholly-Obtained Goods*) does not confer origin on the good (sequential application between Appendices 1 and 2);
(iii) two types of origin rules, i.e., "primary rules" and "residual rules", may be set forth in Appendix 2[71];
(iv) in Appendix 2, "primary rules" can be placed at the beginning of the Chapter or in the matrix[72] when they are applicable to a particular heading, subheading, split heading or split subheading;
(v) the "primary rules" that confer origin ("positive primary rules") are co-equal and there is no hierarchy;
(vi) the "primary rules" may preclude certain operations or processes from conferring origin ("negative primary rules");

[68] In several reports of the Technical Committee, the expression "Ottawa type rules" has been used. However, there is no clear understanding whether the evolved "Ottawa text" is categorized in the "Ottawa" type rule. Some delegations use the expression "Ottawa language" for all rules that have a similar narrative presentation to the initial "Ottawa text" in the matrices in Appendix 2, whereas other delegations distinguish the original "Ottawa text" from the "Ottawa" type rules.

[69] The numbering and the sequence of the outline do not correspond to the original recommendations.

[70] Appendix 3 was deleted accordingly.

[71] The naming of the "primary rules" and "residual rules" was accepted as a preliminary term. At the Fourteenth and Fifteenth Sessions, the TCRO agreed that the expressions "primary rules" and "residual rules" be formally used in the provisional text of the architecture.

[72] A tabular format attached to Appendix 2 on a Chapter basis has been informally called the "matrix". Thus, product-specific rules of origin set out in the matrix are often called "matrix rules".

(vii) the "residual rules" are applicable to a good only when the "primary rules" do not confer origin on the good;
(viii) the "residual rules" can be placed at the beginning of Appendix 2 or at the level of the Chapter; and
(ix) within the "primary rules" and within the "residual rules" the selection of the rule applied is governed by the time sequence, i.e., the rule that is last satisfied confers origin on a good.[73]

(g) Basic framework of the architecture. Although item (ix) was contested, the TCRO endorsed the Meech Lake recommendations in most cases and reconstructed the architecture of the draft HRO. The provisional text of the TCRO, as revised at the Fourteenth Session (October 1998), had the following structure:

Preamble[74]
General Rules (*general provisions to govern the HRO*)
- General Rule[75] 1 to General Rule [6]
Appendix 1 (*definitions of wholly-obtained goods*)
- Scope of application
- Definitions and Notes
Appendix 2 (*product-specific rules of origin*)
- Paragraph[76] 1 to paragraph 6 (*general provisions to govern Appendix 2*)
- "Matrix" rules (*HS Chapters 1 to 97*)
  - Chapter rules, Chapter notes[77], definitions (*placed at the beginning of the Chapter similar to HS Notes to Section, Chapter or subheading*)
  - Product-specific rules at a heading or subheading level (*such as CTH placed inside the "matrix", Chapter by Chapter*)

(h) Co-equal primary rules and elaboration of residual rules. At the early stage of the technical examination, several delegations proposed more than one rule to express substantial transformation for one (split) heading or (split) subheading, e.g., for the chemical products' sector, the rule proposed was meeting either a chemical reaction rule or CTSH. The TCRO decided that: (i) the chemical reaction rule should confer origin on chemicals even without a change of classification, as long as the change meets the required definition of a chemical reaction;[78] and (ii) the chemical reaction rule and its definition should be placed at the beginning of the Chapter, instead of reproducing a cumbersome text for each subheading. This does not mean that the chemical reaction rule has priority over the CTSH rule; it is simply a means of saving space.

[73] WCO Doc. 42,703.
[74] At the Fifteenth Session, the TCRO decided that the preamble was not necessary.
[75] At the Fourteenth Session, the TCRO decided to replace "Articles" with "General Rules" (General Rules 1 to [6]).
[76] Paragraphs were renamed as Rules (Rule 1 to Rule 6) at the Sixteenth Session of the TCRO. *See* also the explanation in B.2(b), *The criterion of the "essential character" for the general residual rules*.
[77] HS Notes to Section, Chapter or subheading are not reproduced in the "matrices". The HS Notes were not included in order to save space. However, there is no doubt that such Notes are applicable when the goods are classified under the HS. Although this is purely a matter of terminology, future users of the HRO should not confuse "Chapter Notes" for the purposes of rules of origin with "HS Notes to Section, Chapter or subheading".
[78] Thousands of chemicals can be transformed into other chemicals while remaining within the same HS subheading. It is obviously not appropriate to split a subheading into thousands of split subheadings in order to utilise a CTSHS (change of split subheading) rule.

As of the Fourteenth Session, the TCRO confirmed that there should be general (or final) residual rules at the Appendix level to determine the origin of a good when none of the other residual rules determines the origin of the good, that the primary rules, such as the chemical reaction rule or the CTSH rule, are co-equal, and that more specific residual rules must be applied prior to the general residual rules. Therefore, the order of application of rules should be:

(i) primary rules;
(ii) product-specific residual rules;
(iii) general residual rules.

This means that there is no sequential application among primary rules with the exception of the "Ottawa language", which will be further explained later.

(i) The issue of "the country where the last substantial transformation has been carried out". Art. 9.1(b) of the ARO could be understood to mean that the country of origin determined by application of Appendix 2 rules (including residual rules) or at least the primary rules should be "the country where the last substantial transformation has been carried out". Item (ix) of the Meech Lake recommendations, (i.e., within the "primary rules" or within the "residual rules", the rule that is last satisfied confers origin on a good) was governed by this interpretation. At the same time, this was the starting point of the most contentious issue of the architecture, i.e., the adoption of the "tracing-back" approach.

Two questions were raised.[79] Firstly, given that all primary rules express substantial transformation, and given that more than one primary rule may be applicable to a good, how will the architecture identify the rule which determines the country of "last substantial transformation"? Secondly, when should the search for a primary rule to determine origin be exhausted, such that a residual rule is then applied? Although the agreed governing principle is the time sequence (the rule that is last satisfied determines origin), the TCRO had not decided how this principle was to be applied. At the Fourteenth Session, the Chairman's formulation was accepted as follows: (i) classify within the Harmonized System the good whose origin is to be determined; (ii) find the primary rule or rules for that good; and (iii) apply those rules to determine whether any of them were satisfied in the country of exportation.[80] Therefore, if a primary rule is satisfied in the country of exportation (assuming also that no negative primary rule negates the determination), the country of origin has been established and the inquiry is at an end. However, there was debate on how to deal with the scenario when no primary rule applicable to a good is satisfied in the country of exportation (i.e. the good does not undergo substantial transformation in that country). Two divergent opinions were expressed: (i) if the possibility of applying primary rules is exhausted, the origin of the good should be determined by reference to an applicable residual rule; and (ii) if a good does not meet a primary rule by undergoing a substantial transformation in the country of exportation, the next level of analysis should be whether a primary rule was satisfied in any preceding country which was involved in the production of the good (the "tracing-back approach").[81]

The EC, Norway and Switzerland were against the "tracing-back" approach. A good which had undergone some processing in the country of exportation but had not undergone substantial transformation was not the same good as the good before processing. If

[79] For details *see* Annex C/1 to WCO Doc. 42.711.
[80] *Id*.
[81] *Id*. Under the second option, the residual rule could be invoked only if there was no country in which a primary rule of origin was met.

the origin of the processed good was to be determined by applying the rule to the good before processing, the rules in their application would not be taking account of economically justified processing operations performed on the processed (but not substantially transformed) good in the country of exportation.[82] Furthermore, the "tracing-back" approach would impose a considerable administrative burden on traders and administrations.

Argentina, Australia, Canada, Egypt, Hong Kong, Japan, New Zealand, Senegal, Singapore and the United States supported the "tracing-back" approach.[83] In their view, it was implicit in and required by the Agreement, because under Art. 9, ¶ 1(b) the HRO should provide for the country of origin of a good to be "the country where the last substantial transformation has been carried out." To stop the inquiry at the country of exportation, and not to try to find a substantial transformation in preceding countries under the primary rules would amount to ignoring the primary rules and placing excessive reliance upon the residual rules. The extensive use of residual rules would have the effect of reducing the predictability of the rules of origin and thereby frustrate trade facilitation.[84]

The TCRO devoted a considerable amount of time at two sessions (Fourteenth and Fifteenth) in 1998 to this issue alone. The "tracing-back" approach was also discussed as part of the concept of "origin-retaining", which focused on the result of processing in the chain of manufacture of goods, i.e., once origin is conferred on a good or a material in a country, the origin is retained even in the subsequent countries as long as no substantial transformation takes place there. At the last stage of the technical examination, the term "tracing-back" was scarcely used by its proponents, primarily due to the implications of the 'heavy administrative burden'. A consensus was not reached and the issue was therefore referred to the CRO after the Fifteenth Session. While lengthy formal debates continued at the CRO meetings, several bilateral consultations among the active key players brought about a solution before the concluding TCRO session in May 1999, which was not to adopt the "tracing-back" approach or to narrow the scope of the "origin-retaining" principle.

The "tracing-back" approach might have served better for enforcement of anti-dumping measures or quantitative restrictions. However, since the HRO will be used for multiple purposes as provided in Art. 1.2 of the ARO, ease of administration seemed to be the determining policy consideration in this case. One of the key players conducted thorough research into the administrability of the "tracing" procedures and came to the conclusion that "tracing-back" would not be possible in most industrial sectors unless present commercial practices were drastically changed. The Member did not publish details of the study, but its essence was widely shared with Members.[85]

Since the time sequence was no longer a decisive principle for applying the primary rules, it was decided during the TCRO's sessions that if two or more primary rules were applicable to a good, there was no need to prove which primary rule was last satisfied in a country. If origin had been conferred in a country by the application of a primary rule, it did not matter whether other primary rules are also satisfied in the same country.

(j) Multiple countries of origin. Based on a provision of the ARO stating that "rules of origin should provide for the country to be determined as the origin of a particular good" (Art. 9, ¶ 1(b)), it appeared that there was a common understanding that one

[82] Annex C/1 to WCO Doc. 42.711, ¶ 31.

[83] Colombia and Thailand joined this group at the Fifteenth Session.

[84] Annex C/1 to WCO Doc. 42.711, ¶¶ 29–30.

[85] Consequently, by May 1999, the supporters of the "tracing-back" approach dwindled to five Members (Brazil; Hong Kong, China; India; Malaysia and the Philippines). These Members finally joined the other group at a later meeting of the CRO.

good can have only one country of origin. In most cases, this understanding was well reflected in the text of the draft HRO. While a good for which rules of origin are applied is to be identified under the Harmonized System as specified in columns A and B of the "matrix", that understanding could be taken to express a principle of one good, one classification and one country of origin. However, there were some proposals which: (i) did not recognize goods classified together in one (sub)heading under the HS as one good; or (ii) did recognize a good classified in one (sub)heading as one good, but where origin is conferred on the components instead of the good itself.

Case (i) covers a collection of parts that are presented as unassembled or disassembled. Although classified in a (sub)heading by virtue of General Rules 2(a) for the Interpretation of the Harmonized System ("General Interpretative Rules" or "GIR")[86], the individual parts retain their origin prior to such collection (for details, see Section III B.5(e)(iii) below). Putting up in sets [or kits] (Rule 6) is another example.There is a proposal suggesting that goods put up in sets, which are to be classified in a heading, should retain the origin of the individual articles in the set (for details, see Section III B.5(h) below. Case (ii) is that, as the last applicable residual rule proposed by India, "[in the event of two or more countries equally contributing major portions of those materials, the good shall be assigned a multi-country origin]".

* * * *

Several core elements of the architecture have been described above. The "Ottawa language" was also explained as a prerequisite to understanding the draft HRO. A rough yet determinant shape of the final architecture was established at the Meech Lake informal session and its recommendations are still valid in many aspects; the co-equality of the primary rules and the limit to the application of the primary rules have also been mentioned. In the history of the harmonization of non-preferential rules of origin, it should be remembered that the Meech Lake recommendations and a series of elaborations by the TCRO provided the guiding principles for drafting the residual rules. The sequential application between Appendices 1 and 2, and of Appendix 2 Rules (determination of origin) were agreed by the TCRO. The order of provisions for the residual rules has become one of the most crucial issues tackled by the TCRO and the CRO and this is dealt with in the next subsection.

2. Primary rules and residual rules

(a) In-depth discussions on the residual rules. Extensive discussions on the residual rules finally started at the Fifteenth Session of the TCRO in December 1998. Reflecting the aforementioned positions on the issue of the "last" substantial transformation, each proponent suggested modifications to the architectural structure of the residual rules. The first group[87], supported by the EC and Norway, now proposed that a few generic residual rules should be presented at the level of Appendix 2.[88] A newly identified proposal[89] by Switzerland preferred to indicate the nature and the application of the principle of the

[86] "2(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled."

[87] This position was referred to as "Option B" in the referral document (WCO Doc. 42.774).

[88] Annex C/1 to WCO Doc.42.820 (Report of the Fifteenth Session), ¶ 15.

[89] Referred to as "Option C" (WCO Doc. 42.774).

residual rules in Appendix 2, while providing a cross-reference to the specific residual rule which would apply for each Chapter. The last group[90] proposed that generic ultimate residual rules be presented in Appendix 2, with other residual rules being specified at Chapter or even heading or subheading level; this was in contrast to the first group which did not require product-specific residual rules.[91]

The first and the second groups were heavily criticized by the third group on the point that relinquishing the application of the primary rules at an early stage could lead to a situation where origin was assigned *administratively* instead of pursuing the country where the last *substantial* transformation was carried out. It appeared that the third group's argument was based on the assumption that the primary rules are the criteria to determine substantial transformation; thus, the country of origin determined by application of the residual rules does not reflect substantial transformation.

The EC refuted this argument.[92] When more than one country is involved in the production of goods, the origin is determined by the concept of "last substantial transformation". Therefore, the residual rules should indicate which operation is considered to be the last substantial transformation for the goods which do not meet the primary rules. If the transformation which the goods *last* underwent cannot be considered as substantial, the origin should be determined on the basis of the *penultimate* transformation (which is then considered to be the last *substantial* transformation). When two or more materials of different origins are used, the last substantial transformation should be the production of the materials that impart the essential character[93] to the final goods.

The second group's position was almost identical to that of the first. The main difference is in the use of a value-added criterion for the general residual rule. The third group maintained the hierarchical structure as agreed at the Fourteenth Session, i.e., (i) the primary rules, (ii) the product-specific residual rules, and (iii) the general residual rules.[94]

(b) The criterion of "essential character" for the general residual rules. The expression "essential character" is used in the HS General Interpretative Rules. The question arose as to whether the meaning of *essential character* in terms of origin should be the same as in the HS. The HS Explanatory Note to GIR 3(b)[95] indicates that the factor which determines essential character will vary, and may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. For some Members, GIR 3(b) was itself a sufficient standard. Origin could be determined under a residual rule which specifies that origin follows from the origin of the material or component giving the

[90] Referred to as "Option A" supported by Argentina, Australia, Canada, Colombia, Egypt, Hong Kong China, Japan, New Zealand, Senegal, Singapore, Thailand and the United States (WCO Doc. 42.774).

[91] The EC did not completely abandon the idea of establishing product-specific residual rules (WCO Doc. 42.771).

[92] *EC Position Paper*, WCO Doc. 42.771, ¶ 3.

[93] The EC proposed that the essential character could be determined, in general terms, by the non-originating material or materials that predominate by weight, volume or value. The applicable criterion would be chosen based on the function of the good and be listed at the appropriate place in the relevant Chapter (WCO Doc. 42.771, ¶ 4).

[94] This group did not put forward a single text for the general residual rules. Several alternative rules were proposed.

[95] "(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, . . . , shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

good its essential character which determines the classification of the good. Under this view, "essential character" would have the same meaning as under the Harmonized System. Other Members questioned the applicability of GIR 3(b). They wondered whether a classification rule designed for mixtures, composite goods and sets should be applied in respect of the origin of any kind of good which has not undergone substantial transformation under a primary rule. In the TCRO, the factors of volume, weight and value of materials have been considered generally appropriate, although Members differ on particulars (Annex C/1 to WCO Doc. 42.820, ¶¶ 21–23).

Elaboration of the general residual rules continued at the Sixteenth Session of the TCRO. Faced with a deadline only a few months away, the Chairman instructed the Secretariat to draft a compromise text for the general residual rules. After lengthy discussions based on the Secretariat text, the TCRO was finally able to agree to a single draft text (with several square brackets) for the general residual rules. From this text onwards, paragraphs in Appendix 2 were replaced with "Rules"; these were often referred to as "Appendix 2 Rules".[96] A broad notion of essential character seemed to be universally applied, but with differing criteria for identifying essential character. It was also unanimously accepted that the initial origin of goods was to be "carried forward" when the goods underwent minimal operations or processes.

In the compromise text, the following aspects regarding the formulation of residual rules still needed to be settled: (i) whether to take into account both originating and non-originating materials or only non-originating materials; (ii) whether to take into account the materials which do not satisfy the conditions set out in the primary rules or all of the materials; (iii) whether to include a provision to confer origin if at least fifty percent of the materials by value, volume or weight are originating; (iv) whether a criterion based on value is needed in the residual rules; and (v) whether to take account not only of materials but also of related processing and assembly.[97]

(c) The TCRO's final text of Appendix 2, Rule 2 (May 1999). In the TCRO's final text of Rule 2[98] to Appendix 2 (*Product-Specific Rules of Origin*) agreed at the Seventeenth Session (see Annex 1 to this chapter), the expression "essential character" has disappeared. It was finally agreed that the last residual rule (Rule 2(g)) to determine the country of origin of the good is: "the country in which the major portion of those materials originated, as determined on the basis specified in each Chapter". Thus, such criteria as value, weight and volume proposed for the general residual rules at the Sixteenth Session now appear at the Chapter level. It can be opined that this conclusion was intended to refrain from using the conceptual expression "essential character" but still utilize the practical part of GIR 3(b).[99]

Rule 2(c)(ii) has three alternative texts seeking to convey the same message. For instance, when a wooden kitchen table (subheading 9403.40) is imported and painted with non-originating paints of Chapter 32, the painted wooden kitchen table is still classified in

[96] *See* Annex O/2 to WCO Doc. OC0010E3 for the agreed single text of Rule 2 developed from the Secretariat's compromise text.

[97] Annex O/1 to WCO Doc. OC0010E3, ¶ 5.

[98] As explained below (B.2.(d)), in September 2000 the CRO renumbered Rule 2 as Rule 3.

[99] It should be noted, however, that when the specified criterion does not determine the major portion of the materials, e.g., assuming that the materials originating in Country A and the ones in Country B have the same weight, in this case, under the text formulated in May 1999 there is no way to determine the country of origin of the good in question.

subheading 9403.40. In this case, the table does not change its classification[100] (remaining in subheading 9403.40), but other materials (paints) undergo a change of classification from Chapter 32 to subheading 9403.40. By application of Rule 2(c), the origin of the painted wooden kitchen table should be the country where the wooden (unpainted) kitchen table originated.

Rule 2(g) would lead to several different countries of origin depending on the following square-bracketed texts: (i) "(whether or not originating)"; and (ii) "that did not undergo the change of classification or otherwise satisfy the primary rule applicable to the good". The following hypothetical example[101] highlights the difference.

> *Country A exports manioc pellets (heading 07.14; 100 kg) produced from originating fresh manioc (cassava) (heading 07.14; 200 kg, $50), together with flour of manioc originating in Country B (heading 11.06; 50 kg, $150) and binder (molasses) originating in Country C (heading 17.03; 3 kg, $20). The product-specific (primary) rule for heading 07.14 is CTH, except from heading 11.06. Assuming that the criterion for applying Rule 2(g) is by weight, which country (A, B or C) is the origin of the manioc pellets?*

In this example, the primary rule is not an "Ottawa"-type rule which has the fixed narrative text starting with "The country of origin of the goods of this (sub)heading is the country where . . . "; Rule 2(a) is not applicable. The primary rule is not satisfied due to the use of non-originating flour of manioc (heading 11.06); Rule 2(b) is not applicable. A non-origin-conferring operation (i.e., "negative rules") is not set out for this heading; Rule 2(c)(i) is not applicable. The non-originating material or article that has the same classification as the resulting good (i.e., manioc of heading 07.14) is not used; Rule 2(c)(ii) is not applicable. Assuming that no Chapter residual rule is applied, Rule 2(d) is not applicable. The materials come from more than one country; thus, Rules 2(e) and 2(f) are not applicable. Finally, it falls to Rule 2(g) to determine the country of origin of the manioc pellets.

The qualifying text "(whether or not originating)" makes clear the coverage of Rule 2(g). The proponents of Rule 2(g) with this qualifying text considered that the last applicable residual rule should cover not only non-originating materials, but also the originating materials. Several delegations supported the inclusion of this text, because there was no rational reason why the originating materials should be discriminated against and excluded from the calculation formula.[102] Therefore, the answer to the hypothetical question is Country A where the originating fresh manioc (the major portion 200 kg) was supplied.

However, the proponents of Rule 2(g) without this qualifying text argued that Rule 2(g) should target non-originating materials only. The residual rules are intended to determine the country of origin from among those countries which supplied materials, rather than giving a "second chance" to the country in which the manufacturer failed to meet the primary rule.[103] In this context, another delegate was of the view that the primary rule and the residual rule should not contradict each other[104]; if the same origin results from both the primary and the residual rules, the primary rule would seem pointless (even

[100] The rule for heading 94.03 has been agreed as "CTH; or change from subheading 9403.90".

[101] This example was developed by the Secretariat during the elaboration of the residual rules. Since then it has been used for the WCO technical assistance activities.

[102] *See* Annex H/2 to WCO Doc. OC0030E/2.

[103] WCO Doc. 42.771, ¶ 5.

[104] Only a few delegations supported this view, already pointed out at the Meech Lake meeting.

replaceable with the residual rule).[105] Consequently, the answer to the question should be Country B from which 50 kg of flour of manioc (the supplier of the major portion between Countries B and C).

The qualifying text "that did not undergo the change of classification or otherwise satisfy the primary rule applicable to the good" was proposed to maintain the close link between the primary rule and the residual rule. If the applicable primary rule is change of heading "except from a specified heading", then obviously the intent of the primary rule is that the specified change does not result in substantial transformation. It is thus logical and appropriate to focus on the origin of the materials which do not undergo the required change.[106] The answer to the question then becomes Country B from which the precluded content, i.e., flour of manioc (heading 11.06), was imported. The opponents to the inclusion of that text pointed out, however, that in the residual rules, origin should be based upon the origin of all the materials used, without distinction.[107]

(d) The CRO's latest text of Rules 2 and 3 (as of June 2002). Elaboration of the architecture by the CRO progressed steadily, item by item. In September 2000, the plurilateral meeting agreed to "place the provision [on rules of application] between Rule 1 (scope of application) and Rule 2 (determination of origin), as it was more logical to have rules of application preceding the determination of origin".[108] Consequently, Rule 2 (TCRO's final text) was renumbered as Rule 3 (hereinafter referred to as Rule 3); Rule 3 (TCRO's final text) was subsequently numbered as Rule 2 (hereinafter referred to as Rule 2) with its new title "Application of Rules". In September 2000, the plurilateral meeting also agreed that Rule 2 should contain: (i) a link between the classification of the good in the HS and the corresponding product description in the HRO; (ii) a provision stipulating that primary rules should apply only to non-originating materials; (iii) the concept that all primary rules are co-equal, and that in their application account should be taken of Chapter Notes; and (iv) reconfirmation of the sequence of application of Rules 3(c) through (f).[109]

Rule 3(a) was queried as to whether its coverage "should be expanded in order to deal with the situation in which origin was to be conferred on the basis of a designated stage of manufacture".[110] At the February 2002 meeting of the CRO, a footnote to Rule 3(b) was added to clarify its coverage. Some delegations even questioned the appropriateness of Rule 3(a). As of June 2002 (the latest text at the time of writing), one Member made a new proposal for Rule 3(a). Another Member suggested reversing the order of Rules 3(a) and 3(b) (see commentaries on Rule 3 in Annex 2 to this chapter).

In December 2000, the proponent of the first alternative of Rule 3(c) offered to drop its proposed text "on condition that this resulted in consensus on the first alternative of Rule 3(f), and with the clear understanding that Rule 3(c) applied to goods that were almost finished, i.e., maintaining the same Harmonized System description as the processed good".[111] In May 2001, the participants of the informal meeting deemed that any further technical discussion with regard to Rules 3(c) and (f) would be fruitless. The group therefore was "increasingly interested in the package offered by the proponent of the

[105] *See* Annex H/2 to WCO Doc. OC0030E/2.
[106] *Id*.
[107] *Id*.
[108] WTO Doc. G/RO/M/32, ¶ 1.1.
[109] *Id*.
[110] WTO Doc. G/RO/M/28, ¶ 1.1.
[111] WTO Doc. G/RO/M/34, ¶ 1.1.

first alternative or Rule 3(c)".[112] As of June 2002, there was consensus on the text of Rules 3(b), (d) and (e). As the commentaries on Rule 3 indicated (see Annex 2 to this chapter), there was also a general agreement among Members on the basic approach to Rule 3, namely, the application of primary rules in the last country of production as the first test, the application of the origin-retaining concept as the second test, and the application of major portion concept as a final test. The proposals for Rules 3(f) and (g) still retain the crucial difference as to whether the major portion should be determined by considering: (i) both originating and non-originating materials expressed by "(whether or not originating)" (proposed by India); (ii) both originating and non-originating materials, which do not satisfy a primary rule applicable to the goods[113] (proposed by the United States); or (iii) non-originating materials only (proposed by the EC). It was also noted that Rule 3(e) might not be necessary, since the application of Rules 3(f) and (g) would result in the same origin outcome.

As described above, the CRO has simplified and refined the text. Although 94 core-policy issues have been forwarded to the WTO General Council, drafting issues relating to the architecture were retained in the CRO as part of the remaining technical issues. However, these issues will only be dealt with by the CRO when all the core policy issues have been resolved. It is therefore premature to conclude how the provisions of Rule 3 affect the determination of the country of origin of goods. The CRO has not yet specified the criteria for Rule 3(f) or 3(g) to be applied to each HS Chapter. The criteria for the agricultural sector would differ from those for the textile sector or the machinery sector. The CRO may also further develop Chapter-specific residual rules for certain Chapters.

(e) Substantial transformation and the residual rules. To date, no conclusion has been reached as to whether the country of origin attained by application of the residual rules is the reflection of substantial transformation. The CRO appears to be reluctant to touch upon this grey area. It is clear from the views of the proponents of the "tracing-back" approach that, for several Members, assigning origin by application of the residual rules is determined by administrative needs.[114] Although all proponents have already withdrawn their position concerning the "tracing-back" approach, that fundamental notion of how the residual rules should be defined is deemed to be valid. This was one of the reasons why the title of the Appendix 2 rules could not use the term "substantial transformation". Similar arguments took place when the TCRO discussed the provision of interchangeable goods and materials (Rule 5); the assignment of origin on a rather arbitrary basis to goods which have not undergone processing seemed contrary to the concept of last substantial transformation.[115] It was then clarified that a rule on interchangeable goods and materials was not intended itself as a rule of origin to determine whether or not goods are substantially transformed, but as a practical way of assigning origin regardless of whether goods are substantially transformed.[116]

[112] WTO Doc. G/RO/M/35, ¶ 1.1.

[113] The U.S. subdivided its proposal into Rule 2(f)—the single country providing the materials which did not satisfy a primary rule and Rule 2(g)—the country, among several countries, providing the major portion of the materials which did not satisfy a primary rule.

[114] The implication of adopting this position might be that, in its application, it is possible to differentiate the status of the origin conferred by the primary rules as truly substantially transformed and by the residual rules as administratively assigned. Consequently, only goods that have satisfied the primary rules could be treated as originating goods for the purposes of quota allocation, etc.

[115] Annex C/1 to WCO Doc. 42.820, ¶ 80.

[116] *Id*.

In this discussion, a strong argument was put forward by the Republic of Korea.[117] First of all, the ARO does not provide a mandate to the CRO and TCRO to establish criteria other than those for expressing substantial transformation. Setting out residual rules may be acceptable, but this must be undertaken within the framework of the ARO, i.e., the residual rules must be prepared as part of the criteria for substantial transformation. When a new category of rules (other than the criteria for substantial transformation) is created, the ARO should be amended accordingly.

3. Minimal operations or processes

(a) Initial discussions at the First and Second Sessions of the TCRO. Definitions of minimal operations or processes were briefly discussed at the First Session of the TCRO; fuller discussions were held at the Second Session. With regard to the definitions, Members agreed that: (i) minimal operations or processes should neither take away origin nor confer it; (ii) minimal operations or processes should be re-examined together with the general rules at a later stage; (iii) packaging sometimes went beyond a minimal operation as it could require the use of complex processes and could add more than negligible value to the goods (several countries opposed this point); and (iv) packaging for transport should be separated from the other types of packaging to be discussed later.[118] Reflecting such discussions, the texts of Definitions 1 and 2 and the Explanatory Notes to the definitions were adopted at the Second Session, subject to further consideration throughout Phases II and III of the HWP.[119]

Definition 2 stated that minimal operations or processes should not be taken into account in determining whether a good had been wholly-obtained in one country. Therefore, even if there is an operation to facilitate transportation of the wholly-obtained goods, that operation does not negate the status of wholly-obtained goods. The last paragraph of the Explanatory Notes provided that a minimal operation or process or a combination thereof shall not preclude conferring origin on a good if a substantial transformation occurred as a result of other operations or processes. Similar to Definition 2 above, when one of the origin criteria such as a CTH rule is met, an operation to facilitate transportation should not negate the originating status of the goods.

(b) Placement of minimal operations or processes. After the Third Session, these definitions and Explanatory Notes were placed in Appendix 3. However, in view of the "one-page-only" layout of the Appendix, it was agreed to merge its content into the General Rules at the Fourteenth Session. Further details were discussed at the Fifteenth Session. In this process, the principle of minimal operations or processes was presented in Appendices 1 and 2 in differing formulations. Appendix 1 specified that minimal operations or processes were not to be taken into account while Appendix 2 specified that operations were not origin-conferring.[120] This modification was thought to offer a more precise description of how the principle of minimal operations or processes would be applied in the respective Appendices.[121]

The text of the Explanatory Notes prepared at the Second Session was deleted with the exception of the last paragraph and an illustrative list of minimal operations or processes.

[117] The Korean position was consistent from the very early stages through to the end of the technical examination.

[118] Annex E/1 to WCO Doc. 39.488.

[119] For details, *see* Annex E/2 to WCO Doc. 39.488.

[120] Annex C/1 to WCO Doc. 42.820, ¶ 65.

[121] *Id*.

At the request of several Members, the list which had been fully deleted at the Fourteenth Session was reinstated at the Fifteenth Session[122] as part of General Rule 5 as a non-binding, non-exhaustive list of examples.[123] Thus, in the TCRO's final text of General Rule 5, there were no longer Explanatory Notes to the definitions of minimal operations or processes.

(c) Relationship with origin-conferring rules. There were two divergent opinions as to whether the scope of minimal operations or processes should, or should not, cover Appendix 2. India, the Philippines and Switzerland argued that: (i) there was no need to set forth a general provision in General Rules because a primary rule has already taken into account whether that rule may confer origin on a good by a minimal operation or process; (ii) otherwise origin conferred by such a primary rule will be overruled by the general provision. Thus, in Appendix 2 the issue of minimal operations or processes should be addressed by a Chapter Note (negative standards) or an individual primary rule, where appropriate.[124]

Canada, the EC, Morocco and the United States, on the other hand, stressed that minimal operations or processes should cover both Appendices 1 and 2; they argued that: (i) Art. 9.2(c)(i) of the ARO requires the TCRO to develop the definitions in a horizontal manner; (ii) those definitions must apply to the entire HRO. The General Rules must have a safety valve to prevent minimal operations or processes from conferring origin on a good.[125] The EC further argued that General Rule 5 (TCRO's final text) should be applicable to the change of classification rule only because the process rules were articulated to confer origin on the particular good in any condition, if the specified process requirements are satisfied.[126]

(d) Negotiations in the CRO after June 1999. In December 2000, consensus was reached to apply General Rule 5 (TCRO's final text) only to Appendix 1.[127] It was also decided to delete the list of examples, even though one delegation pointed out that an indicative list might be useful.[128] Consequently the provision was moved to its appropriate place under Appendix 1 as Rule 2.[129] The agreed text limits the scope of operations or processes to those for the following purposes: (i) ensuring preservation of goods in good condition for the purposes of transport or storage; (ii) facilitating shipment or transportation; and (iii) packaging or presenting goods for sale (see the full text in Annex 2 to this chapter). The commentary on Appendix 1, Rule 2 of the latest CRO text indicated that consensus

[122] These Members considered that the list was a highly important aid to interpretation and application of the provision of minimal operations or processes. However, other Members did not favour inclusion of the list being cognizant of the fact that no list could be comprehensive; the items now listed might contradict certain primary rules; and not all the operations listed (e.g., testing and calibration) corresponded to the operations enumerated in the legal definition (Annex C/1 to WCO Doc. 42.820, ¶ 66).

[123] Examples of minimal operations or processes include: ventilation; spreading out; drying; chilling; removal of damaged parts; application of grease, anti-rust paint or protective coating; removal of dust; cleaning; washing; sifting or screening; sorting; classifying or grading; testing or calibration; breaking bulk; packing, unpacking or repacking; grouping of packages; affixing of marks, labels or distinguishing signs on goods or their packages; dilution with water or any other aqueous solution; ionizing; salting; husking; shelling (unshelling); stoning; and crushing (Annex C/2 to WCO Doc. 42.820).

[124] Annex H/2 to WCO Doc. OC0030/2.

[125] *Id*.

[126] *Id*.

[127] WTO Doc. G/RO/M/34, ¶ 1.1.

[128] *Id*.

[129] *Id*.

on Rule 2 was confirmed, and that the possibility of application of Rule 2 of Appendix 1 to Appendix 2 should be reconsidered at a later stage when the work was virtually completed. Under the current text, the origin of a good which has merely undergone minimal operations or processes in a country will be determined, in many cases, by application of Rule 3(c) (a residual rule providing the origin-retaining concept) from the standpoint of whether the good has changed its HS classification, although Rule 3(c) would also cover the 'gray area' (cases falling in between the substantial transformation and the minimal operation or process).

4. Other provisions of General Rules and Appendix 2 Rules

In the TCRO's final text, several provisions were placed in square brackets. In addition, the order of the rules and the placement of the rules were of a preliminary nature. The CRO has refined the text and endeavoured to remove the square brackets. Among the General Rules and Appendix 2 Rules, the following may need further explanation.

(a) Determination of Origin—General Rule 3. This General Rule confirmed the agreed principles: (i) General Rules are the governing rules for the application of both Appendices 1 and 2; (ii) the sequential application between Appendix 1 and Appendix 2.[130]

(b) Neutral Elements—General Rule 4. "Neutral elements" refers to such factors of production as plant and equipment, fuel, machinery and other elements whose origin is not to be taken into account in determining the origin of a good. The TCRO discussed this matter at the Fourteenth and Fifteenth Sessions. An exhaustive list seemed impossible, while an indicative list might introduce ambiguity or uncertainty. One view was that such a provision would provide clarification and certainty. Another view was that a provision was not needed because the exclusion of neutral elements from origin determination was too obvious to need mentioning. It was also argued whether there was a possible contradiction between the exclusion of neutral elements from origin determination and the use of added value criteria. The calculation of value of materials would necessarily include the cost or price of plant, machinery, etc. On this basis, it was suggested that the provision on neutral elements should include the proviso "unless otherwise provided . . . ". Others saw no such contradiction and hence did not favour including any proviso. At its Fifteenth Session, the TCRO reached broad agreement that the origin of neutral elements should not, in general terms, be a factor in the determination of origin. Materials were normally incorporated in a good and their origin was essential to origin determination under most origin criteria.[131]

During the discussions in the CRO, the only delegation having reservations regarding the text lifted them. Thus, the text has been unbracketed since April 2001, except for the phrase "unless otherwise provided in this Annex" which remained in brackets (see the full text in Annex 2 to this chapter).[132]

[130] The plurilateral meeting of the CRO agreed to delete General Rule 3 (definitions—TCRO's final text) at the June 2000 meeting; renumbered General Rule 3 (determination of origin) appeared in the WTO document as from December 2000 (WTO Doc. G/RO/M/34, ¶ 1.1).

[131] Annex C/1 to WCO Doc. 42.820.

[132] WTO Doc. G/RO/M/35, ¶ 1.1. The latest text of the CRO confirmed consensus on the unbracketed text of General Rule 4. However, one delegation requested that the bracketed text be included in the provision until a complete picture was obtained.

(c) Intermediate materials—Appendix 2, Rule 4. At its Fourteenth and Fifteenth Sessions, the TCRO held lengthy discussions on this issue and concluded that: (i) once origin is conferred on a good (or material) in a country, the good (or material) will not lose its originating status by subsequent processing undertaken in the same country; (ii) a good produced [solely[133]] from originating materials has the same country of origin as the materials; and (iii) the concept was relevant to the primary origin-conferring rules of Appendix 2, and probably not to any other part of the Harmonized Rules of Origin.[134]

Under several existing preferential and non-preferential rules of origin, this concept is known as the "roll-up" method or "absorption" concept for calculating the value of originating and non-originating materials.[135] It might be anticipated that if and when the value-added rules proposed for some Chapters are finally accepted by the CRO, the "roll-up" approach might be needed for the calculation method. However, there was no substantive discussion during the sessions concerning how to deal with the intermediate materials provision in connection with the value-added rules.[136] For a tariff shift rule, which is the dominant rule in the draft HRO, the required changes must always be made from non-originating materials; therefore, once a component of a machine meets the origin rule (for components), that component is no longer subjected to the tariff shift rule for the machine even though non-originating parts were used for the production of the component.

Specific issues were also discussed, for example whether non-originating steel spoons (subheading 8215.99, for which a CTH rule has been agreed) underwent substantial transformation when the spoons were melted and cast into ingots in one factory and reprocessed to new spoons in another factory (subheading 8215.99). In this example, there was no change in classification between the source materials and the final products. The common understanding of the delegations was that the non-originating steel spoons underwent substantial transformation when the spoons changed into the steel ingots (heading 72.06, for which a CTH rule has been agreed). The new spoons produced solely from originating steel ingots had to be regarded as originating in the same country. However, when intermediate materials are produced in the course of successive plant operations leading to the final goods yet the same intermediate materials *per se* do not appear on the market, there may be some difficulty in administering Rule 4. The TCRO discussed a hypothetical case where used steel rails (heading 73.02) are recast into new steel rails (heading 73.02) without being interrupted at any intermediate process. The used steel rails were first placed for melting at a steel mill, then further processed automatically by the plant, and finally changed to the shape of the new steel rails. In this hypothetical case, an intermediate material (e.g., ingots or bars) was not offered on the market and, consequently, there was no independent transaction for these materials. The state of an intermediate material might have existed for a moment, but it kept changing shape

[133] Added by the author for clarification.

[134] Annex C/1 to WCO Doc. 42.820, ¶ 75.

[135] *See* N. ZAIMIS, EC RULES OF ORIGIN 154–155 (1992); N. KOMURO, SAISHIN GENSANCHI-KISOKU (Rules of Origin Updates) 258–260 (1995).

[136] The calculation method for the value-added rules should be further elaborated in the future in order to deal with cases where intermediate materials do not satisfy the product-specific rules of origin: either (a) such intermediate materials being considered to be 100 percent non-originating materials (the "roll-down method"); or (b) non-originating material used for the intermediate materials being counted as non-originating materials (the tracing method). For further details, *see* Vermulst, Waer and Bourgeois, *supra* note 7, at 167–172; Komuro, *supra* note 136.

and moving towards the final product (steel rails). Several delegations shared the view that the steel rails produced from the used steel rails should be considered substantially transformed.

During the negotiations in the CRO, it was confirmed that all Members accepted the principle of this provision (see also the full text in Annex 2 to this chapter). However, it should be noted that there is no explicit text in the current architecture to confer origin on a good which is produced solely from intermediate materials, except for Rule 3(e) (*a single country provided all the materials to produce a good*).

(d) [De minimis—Appendix 2, Rule 7]. Although the idea of a *de minimis* rule had been presented at its Third Session, the TCRO only started the examination of *de minimis* rules at the Fourteenth Session. Proponents were of the opinion that *de minimis* rules were useful and trade-facilitating and would help reduce over-dependence on residual rules in determining the origin of goods.[137] On the other hand, several delegations felt that the concept of *de minimis* could serve no practical purpose because the existing primary rules coupled with residual rules would be sufficient to determine the origin of goods; thus, the *de minimis* rules would involve extra work and resources on documentation which would only add to the burden of traders.[138]

Discussions continued at the Fifteenth Session. Several negative points were made, namely that: (i) it did not seem possible to apply a *de minimis* threshold to a process-based primary rule; (ii) it seemed difficult to set thresholds on a rational basis; and (iii) the administration of thresholds would be difficult and costly for developing countries. Those in favour of this rule gave broad support to the idea of making the application of *de minimis* rules mandatory. It was also generally understood that a *de minimis* rule should be applied positively to permit a primary rule to give a result, and never negatively to prevent a result under a primary rule. Only if the primary rule(s) did not give an outcome should *de minimis* rules be applied to exclude from the calculus any non-originating materials which might have prevented a result under primary rules. If it is determined that no result is possible under primary rules, even with the benefit of *de minimis*, then residual rules are applied.[139]

The TCRO could not reach a consensus decision on this matter and proposed several alternative approaches at its Seventeenth Session. India, Malaysia, New Zealand, Philippines and Senegal opposed the inclusion of *de minimis* rules in the HRO. Morocco proposed that the *de minimis* rules should cover both Appendices 1 and 2, with the fixed threshold of twenty percent of the ex-works price. The EC proposed that the *de minimis* rules cover only Appendix 2, but the rules should be placed under the General Rules and their thresholds be indicated at Appendix 2 level. Canada and Switzerland proposed that the *de minimis* rules with a horizontally applicable threshold (twenty percent of the ex-works price—Switzerland; seven percent of the total weight for textiles, seven percent of the transactional value for non-agricultural goods or ten percent of the volume of the total alcoholic strength—Canada) be placed at Appendix 2 level only (see General Rule [5], [8] or [Rule 6] of the TCRO's final text for further details in WCO Doc. OC0029). Colombia, Egypt, Japan and Korea proposed that the *de minimis* rules be set out on a Chapter or product-sector basis. Although participants were still divided on the actual need for the rule, the plurilateral meeting (June 2000) confirmed growing consensus on its

[137] Annex C/1 to WCO Doc. 42.711, ¶ 19.
[138] *Id*.
[139] Annex C/1 to WCO Doc. 42.820.

application being limited to Appendix 2[140]; consequently the *de minimis* rule was moved from the General Rules ([5] (proposed) and [8]—TCRO's final text) to Appendix 2. In December 2000, it was confirmed that there was growing consensus on the mandatory character of this provision.[141] Since that meeting the facilitator's proposed text with the square-bracketed 10 percent threshold has been maintained as a single draft.[142] The commentary on [Rule 7 (*de minimis*)] of the latest text of the CRO states: "There was general support for this Rule. Some Members stated that the nature of this Rule should be optional for producers (although this Rule itself should be mandatory for all Members)" (see also the full text in Annex 2 to this chapter).

5. Issues related to the Harmonized System

(a) Harmonized System in brief. As a multipurpose nomenclature, the Harmonized System is used by 189 countries and Customs or economic unions (including 116 Contracting Parties to the HS Convention), representing about 98 percent of world trade (as of May 2004).[143] In the HRO, the HS is basically to be used for the following two purposes: (i) to identify (classify) goods in order to apply the relevant product-specific rules of origin set forth for the goods classified in that (split) heading or (split) subheading;[144] (ii) to serve as a basis for the change in tariff classification criterion to express substantial transformation.

Since the International Convention on the Harmonized Commodity Description and Coding System ("HS Convention") came into force on January 1, 1988, there have been three sets of amendments to the HS. The first involved minor (mainly editorial) changes to the initial edition and came into effect in 1992; the second set of amendments entered into force in 1996 as the second edition of the HS. The third edition of the HS came into force on January 1, 2002.[145] The next set of amendments is scheduled to take effect on January 1, 2007.

(b) General Rule 2: Harmonized System. In view of the amendments to the HS every five years, there must be a provision to determine which edition of the HS should be used for the HRO. Moreover, the TCRO has created a number of subdivisions in headings and subheadings and there must be some governing rules to apply to these subdivisions. General Rule 2, ¶ 1 (TCRO's final text) provided that the latest HS edition (as amended and in force) should be used, and that the subdivisions must be governed by the General Interpretative Rules and any relative Section, Chapter and Subheading Notes to the HS.

[140] WTO Doc. G/RO/M/30, ¶ 1.1.
[141] WTO Doc. G/RO/M/34, ¶ 1.1.
[142] WTO Doc. G/RO/45.
[143] The Harmonized System is used as the basis for: Customs tariffs; collection of international trade statistics; rules of origin; collection of internal taxes; trade negotiations (e.g., the WTO schedules of tariff concessions); transport tariffs and statistics; monitoring of controlled goods (e.g., wastes, narcotics, chemical weapons, ozone layer depleting substances, endangered species); and certain aspects of Customs controls and procedures, including risk assessment, information technology and compliance (*The Harmonized System—The Language of International Trade* (WCO, June 2002)).
[144] In Appendix 1 (definitions of wholly-obtained goods) the use of the HS is not referred to. Although there is no direct reference to the HS, the expression "waste" is used in both Definition 1(f) and the HS. It should also be noted that, in a few cases, a split heading corresponds exactly to the existing subheading. Consequently, when the HRO are implemented, references to the HS code may vary in practice depending on the purpose: for Customs declarations and statistics—headings and subheadings only; for origin purposes—split headings/subheadings.
[145] *See Amendments to the Harmonized System Nomenclature effective from 1 January 2002 Introduction*, WCO website, www.wcoomd.org.

Consequently, when the HS is amended, the "matrix" rules should be rectified accordingly. Columns A (HS code number) and B (Description of goods) can automatically be replaced with the new edition of the HS. However, the adjustment of column C (origin criteria) is not automatic.

The final TCRO text proposed that the TCRO could work on the technical rectification of the rules in time for when the amended edition of the HS enters into force (bracketed ¶ 2). The technical rectification does not entail the renegotiation of the agreed rules; it means that the application of the rectified rule should result in the same country of origin as the initial rule. The CRO agreed that it was necessary to adjust the presentation of rules of origin according to the HS nomenclature, but that doubts remained on whether ¶ 2 was the appropriate provision for any such statement.[146] One delegation suggested that Art. 6 of the ARO should be amended to insert such a provision.[147] In December 2000, the plurilateral meeting of the CRO noted that the majority of the group was in favour of its deletion as it was a rule of procedure falling under the scope of amendments to the HRO.

In subsequent plurilateral meetings, some delegations pointed out the need for a kind of mechanism regulating amendments to the HRO. The facilitator of the plurilateral meeting offered a new text in the box (commentary).[148] However, several delegations questioned the adequacy of the facilitator's proposal with reference to changes resulting from amendments to the HRO and some felt that it should also contain specific reference to the timely implementation of amended harmonized rules, and give them time for further consideration.[149] The latest text of the CRO indicates the Chairman's proposed text for a possible ¶ 2 of General Rule 2, together with the alternative text (see Annex 2 to this chapter).

(c) Review mechanism under Art. 6.3 of the Origin Agreement. At the request of the TCRO (Nineteenth Session), the issue of a mechanism for the submission of the views of the TCRO to the CRO with respect to amendments pursuant to Art. 6.3 of the ARO was carefully studied by the WCO Secretariat.[150] At the Twentieth Session (February 2002), this issue was discussed and the Secretariat's proposals were generally accepted by the TCRO. The latter's proposal was then submitted to the CRO for consideration in April 2002.[151] In his letter to the Chairman of the CRO, the Chairman of the TCRO observed that the TCRO was competent to carry out the technical tasks, in particular, technical rectifications to the harmonized non-preferential rules of origin, which would require (i) labor-intensive work by the Secretariat and (ii) extensive knowledge of both origin and the Harmonized System, and that the five-year review cycle adopted by the HS Committee should also be used for reviewing the HRO in order to make the rules more operational or to reflect technological changes.[152]

[146] WTO Doc. G/RO/M/30, ¶ 1.1.
[147] *Id*.
[148] WTO Doc. G/RO/M/35, ¶ 1.1.
[149] *Id*.
[150] The suggestions of the WCO Secretariat were provided in WCO Doc. OC0068.
[151] *See* Annex E/2 to WCO Doc. OC0071E2 or WTO Doc. G/RO/51.
[152] It was also observed that, since product cycles are becoming shorter, the pressure to keep the rules up to date will be great. On the other hand, more rapid amendment of the harmonized rules would appear problematic in view of the identified needs for stability and the inevitable legislative process to adopt these amendments. Therefore, a five-year review cycle would be most suitable in this respect (*id*.).

(d) Disassembly of goods into parts/components.

(i) A negative rule for disassembly

For the purposes of rules of origin, a change in tariff classification is the predominant criterion for expressing substantial transformation.[153] However, that does not mean that the HS always fully satisfies the requirement to be an "origin" nomenclature because the HS was not designed specifically with that purpose in mind. For instance, an assembly of numerous parts into an article entails a change of tariff classification in most cases; thus, such an assembly may be considered to constitute substantial transformation.[154] However, after some time the used and depreciated good may be disassembled into parts or components. Some of the parts or components may still be usable and exportable as second-hand parts, while others are discarded. In the case of computer processors, it is common practice to replace old processors with more rapid ones in order to upgrade PCs, though the PCs *per se* are still used. In those cases, a change of tariff classification of the old processor takes place from the PC falling under heading 84.71 to a cartridge contained microprocessor under heading 84.73; hence, a CTH or CTSH rule, if so agreed, will confer origin on the parts or components in the country where the disassembly takes place. This situation becomes an origin issue when these parts are exported.

There could be a way to prevent disassembly from conferring origin on the parts or components, i.e., by excluding a change from those particular headings or subheadings of the articles from which the parts or components could possibly be removed.[155] However, the TCRO recognized that it was almost impossible to articulate the same rule for parts that could be incorporated into any single "high-tech" good, e.g., semiconductors. Therefore, the TCRO decided to set out a negative rule at the Chapter level to deal with this question.[156]

(ii) Origin of disassembled (used) parts/components

When a negative rule is laid down, there must be an origin-conferring rule to determine the origin of the goods which were denied their originating status. Several proposals were tabled for Chapters 84 to 90, but not for other Chapters. It was understood that once the rule was decided for Chapters 84 to 90, the same principle would apply to other Chapters. The proposed rules are: (i) when the good from which the parts or components were removed *can* still perform its original function (e.g., *an almost brand-new properly-functioning China-made PC, whose US-made processor is changed to a faster one in India*), "The parts recovered from the good shall retain the country of origin of the

[153] *See also* Hironori Asakura, THE HARMONIZED SYSTEM AND RULES OF ORIGIN, 27(4) JOURNAL OF WORLD TRADE 5 (1993).

[154] There was very strong opposition to having an assembly of parts into a good of Chapters 84 to 90 (machine, motor vehicle, etc.) recognized as substantial transformation. The opponents proposed a value-added rule for those Chapters. For further details, *see* WCO Doc. OC0031.

[155] For example, one of the proposed rules for radiators (8708.91) was "CTSH, except from headings 87.01 to 87.06" (tractors, motor vehicles or chassis fitted with engines).

[156] For Chapters 42 to 46, 48, 49, 64, 66, 73 to 76, 78 to 81, 92 to 96, the following Chapter Note/Rule for disassembly was proposed and agreed as Basket 1 by the TCRO: "For the purposes of this Chapter, those rules which refer to a change of heading or subheading shall not apply to changes which result from disassembly". However, this text has not been endorsed as the final single text for all of the relevant Chapter Note/Rule.

good prior to disassembly" (One proposal only—*the origin of the processor is China*); and (ii) when the good from which the parts or components were removed *cannot* perform its original purpose without being restored or repaired (e.g., *a malfunctioning China-made PC whose complete hardware must be replaced; the monitor and keyboard still function. When the hardware is replaced in India, the PC is usable. When examining the malfunctioned hardware, the Malaysia-made modem is found still to be usable.*), four proposals were made.

The *first* proposal was "[the country where the parts are recovered]"; thus, the origin of the modem is India. This approach is easy to administer; however, the disassembly operation confers origin on the good. The *second* one was "[the country of origin of the good from which the parts are recovered]"; consequently, the origin of the modem is China. If all parts or components change their initial origin to the origin of the newly produced good, and if the disassembly operations do not confer origin on the parts or components, this approach seems to be convincing. The *third* suggestion was "[the initial country of origin of the parts]". The origin of the modem is Malaysia. This approach may not cause confusion when the parts or components bear the marking of the initial country of origin. Lastly, the *fourth* proposal was "[the general residual rules determine the origin of the parts]". It appears that there is no directly relevant rule to apply to this case in Appendix 2, Rule 3.

However, when the good from which the parts or components were removed *cannot* perform its original purpose *or* is not capable of being restored or repaired (e.g., *a China-made PC completely destroyed when the user's residence in India is flooded. However, locally made insulated cables are found still to be usable.*), Definition 1(h) of wholly-obtained goods determines the origin. In accordance with the definition "parts recovered in that country", the origin of the insulated cables is India (see sub-section C (wholly-obtained goods) for further information).

The TCRO questioned the consistency of rules for parts recovered from used goods and waste or scrap. The CRO examined these questions and observed that: (i) the TCRO's recommendation that disassembly should not be origin conferring had not yet been confirmed by the CRO; (ii) it would be beneficial for the origin result in this case to be the same as that provided in Appendix 1 with respect to the recovery of parts and raw materials; (iii) a rule basing origin on the country of recovery would be the easiest to administer among the options available, and would avoid the "tracing-back" problem; and (iv) in some circumstances the original origin of the recovered part may be readily known, by reason of the marking or otherwise.[157]

Finally, the CRO appeared to agree that the country of origin of the parts recovered from the goods is the country where the parts are recovered, unless the importer, exporter or any person with a justifiable cause to determine the origin of parts demonstrates another country of origin on the basis of verifiable evidence, such as origin marks on the part itself or documents.[158]

[157] WTO Doc. G/RO/M/29, ¶ 2.2.
[158] WTO Doc. G/RO/M/37, ¶ 1.1. The Minute described this proposal as gaining "growing consensus".

(e) Issues Relating to General Interpretative Rule 2(a)[159] *of the Harmonized System.*

(i) The "simple" assembly issue

GIR 2(a) seems to be one of the most difficult parts of the HS to apply in respect of rules of origin. There are positive and negative aspects. The positive ones include "a built-in mechanism to refrain simple processes or operations from conferring origin"[160] on a finished article or part manufactured from components or parts which have the essential character of the complete or finished ones. When a car without tyres is imported, that car is classified as a complete car, not as parts. Therefore, even if tyres are fitted to the car in the importing country, there is no change in classification. In this case, the classification process prior to applying proper rules of origin does deal successfully with one of the most difficult tasks of rules of origin, namely preventing simple assembly operations from conferring origin.

However, as described above under Section 2(b) 'the criterion of the "essential character" for the general residual rules', the classification principle might not always be appropriate for origin purposes. Thus, several delegations proposed that, in specified conditions, origin should be conferred on a good (e.g., finished steel spanners) manufactured from a material that has the essential character of the finished good (e.g., blanks of a steel spanner)[161], even though there is no change in classification.

(ii) Items Presented Unassembled or Disassembled

For the purposes of classification, the second part of GIR 2(a) is intended primarily to address situations where goods are divided into separate consignments purely for reasons of transport. For instance, a machine over fifty meters long may be transportable only if the machine is disassembled into several components. Those components are to be reassembled at the destination after completion of the Customs procedures. For the purposes of rules of origin, the expression "presented unassembled or disassembled" calls for particular attention. It should be noted that GIR 2(a) is not applicable to a set of materials which are to be further worked or processed before or during assembly, even if those materials are presented together to Customs. This means that only assembly operations of the components, whether or not complex, should take place in the importing country (for further details, see the Explanatory Note to GIR 2(a)).

(iii) Collections of parts

A few negative aspects were noted by the Technical Committee. When components or parts of goods are imported (either together or separately) for temporary storing and are finally exported as "kits" to another country in which these components or parts are to be physically assembled, a change of classification (from parts to articles) occurs by application of GIR 2(a) despite the fact that there is no substantial working or processing undergone in that country.

[159] GIR 2(a) "Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled."

[160] WCO Doc. OC0031, ¶ 50.

[161] The term "blank" is defined in Explanatory Note (II) to GIR 2(a).

However, if those components or parts are not exported together, i.e., they are presented to Customs piecemeal as separate export consignments, there is no change in classification; those components or parts remain to be classified as parts. Therefore, Australia and the United States proposed that a collection of parts should not be considered an origin-conferring event.[162]

India and Senegal shared a different opinion on this matter. These delegations argued that, in principle, once the HS was used for classifying goods as well as the basis for a substantial transformation criterion, any modifications applied for the purposes of rules of origin that differed from these applicable for classification purposes would cause difficulties for both Customs and traders. Therefore, the legally binding texts, such as the GIRs, should be applied in a strict manner. Consequently, a kit of parts or components which has the essential character of the complete or finished article should be considered substantially transformed from individual parts or components, when those parts or components as collected take the form of a kit with manuals or instructional documentation for assembly and a guarantee by the supplier. Under this proposal, the origin of "do-it-yourself furniture" is the country where each part or component is collected and arranged as a kit, regardless of the place of final assembly by the consumer.

The CRO finally agreed that where a change in classification results from the application of HS GIR 2(a) with respect to collections of parts that are presented as unassembled articles of another heading or subheading, the individual parts should retain their origin prior to such collection.[163]

(iv) *Assembly of collection of parts*

The origin of the goods that are assembled from the collected parts or components has to be addressed. When "unassembled or disassembled articles", i.e., components or parts which are classified as goods by application of GIR 2(a), are imported and finally assembled in a country, is a change-of-classification rule considered to be satisfied in that country? Two different positions were noted. One was that the origin of the goods assembled from "unassembled or disassembled articles" is the country where the goods were physically assembled from the parts or components. The other was that the origin is retained in the country where a kit of the components or parts was classified as an article by application of GIR 2(a).

The CRO agreed that goods assembled from a collection of parts classified as the assembled good by application of GIR 2 should have origin in the country of assembly, provided the assembly would have satisfied the primary rule for the good had each of the parts been presented separately and not as a collection.[164]

(f) Packing and packaging materials and containers—General Rule 5. The first draft text relating to the origin of packing and packaging materials and containers presented with the goods appeared in the architecture as early as at the Third Session. Since then the principle has been generally supported. The CRO finally agreed that, unless the provisions of Appendix 1 or Appendix 2 otherwise require, the origin of packing and packaging

[162] *See* proposed Chapter note in WCO Doc. OC0031.
[163] WTO Doc. G/RO/M/37, ¶ 1.1.; G/RO/45/Add.15/Rev.1, p.188.
[164] *Id*.

materials and containers presented with the goods therein should be disregarded in determining the origin of the goods under General Rule 3, provided that such packing and packaging materials and containers are classified with the goods under the HS. The packing and packaging materials and containers which are not classified with their contents are separate goods, and hence their origin shall be determined in accordance with the appropriate rules set forth in Appendices 1 and 2.[165]

Apart from the issue of packing and packaging materials and containers, there was a similar question addressed by the TCRO, namely, goods "put up for retail sale". Although there was no consensus reached on this issue, a number of delegations supported the idea that merely putting up for retail sale alone does not express a substantial transformation. That issue was, however, addressed on a product-specific basis at the heading or subheading level, since the qualifying text "put up for retail sale" is used in headings or subheadings of various HS Chapters. For example, heading 52.07 covers cotton yarn (other than sewing thread) put up for retail sale. When cotton yarn of heading 52.06 is properly cut and reeled (weighing 125 grams or less) for retail sale[166], a change of heading takes place. The approach taken was to disallow a change from the heading(s) and/or subheading(s) of the possible content of the package to the classification of the package itself that was put up for retail sale.[167]

(g) Accessories and spare parts and tools—General Rule 6. When this issue was first discussed at the Third Session concern was expressed by several delegations as to whether accessories, spare parts and tools should be assigned the same origin as the good with which they are associated, even if they are not presented with the good.[168] However, these points were no longer pressed by the end of the technical examination. Therefore, the scope of this provision was limited to accessories, spare parts, tools, etc. which are classified and presented with a good. The TCRO's final text was generally accepted by the CRO. In June 2000, this text was moved from Rule 5(a) (TCRO's final text) to General Rule 9 (currently General Rule 6) as it applies to both Appendices.[169] The CRO agreed that accessories, spare parts, tools and instructional or other informational material classified and presented with a good should be disregarded in determining the origin of that good under General Rule 3, provided that they are normally sold therewith and correspond, in kind and number, to the normal equipment thereof.[170]

[165] One delegation still proposes an alternative text for General Rule 5. According to the proponent, "the current text of General Rule 5 does not take into account the situation where a container gives the whole its essential character and the container with its contents are classified under the provision for the container. Attention is called to the last sentence of HS General Interpretative Rule 5(a)".

[166] *See* Note 4 to HS Section XI and the Explanatory Note I. B(3) to HS Section XI.

[167] For example, a proposed rule for split heading 52.07(c) (cotton yarn (other than sewing thread) put up for retail sale: other) was "CTH, except from headings 52.04 through 52.06" (cotton sewing thread and cotton yarn).

[168] It was observed that often they are invoiced together with the good, but are not imported at the same time. Several delegates reported that, as a policy matter, their Customs administrations treat spare parts and accessories delivered separately and invoiced separately as having the same origin as the goods with which they are associated. They advised the TCRO that this practice had been widely accepted and satisfactorily administered. Other delegates reported that their Customs administrations make a separate origin determination, and that they would not favour automatically giving the same origin status to spare parts as to the machines for which they are delivered (Annex G/1 to WCO Doc. 39.870).

[169] WTO Doc. G/RO/M/30, ¶ 1.1.

[170] WTO Doc. G/RO/M/30, ¶ 1.1.

(h) Putting up in sets [or kits]—Appendix 2, Rule 6. At the Third Session this issue was tabled and two proposals were considered by the TCRO. One was made jointly by New Zealand, Norway and Singapore, while the other was put forward by Japan. The first proposal offered two options: either (i) putting articles together into a set being origin-conferring subject to supplementary criteria; or (ii) setting out a general rule for sets based on a value-added rule. The latter proposal suggested that the country of origin of the set should be the country where the component that gave the set its essential character originated. At the Third Session, no particular preference was shown by delegations. The EC also proposed that the issue of sets should be addressed by residual rules to be presented at a later session. The TCRO then agreed to discuss this issue again when the residual rules were tabled. For that reason, none of the proposed texts was incorporated in General Rules at that time.

Two proposals for sets were presented by Canada and the United States at the Meech Lake informal meeting, together with a whole group of residual rules. At its Fourteenth Session, the TCRO thus resumed discussions with the addition of the EC proposal. All of these proposals suggested that merely putting articles into sets should not be substantial transformation. Canada took an essential character approach; the EC suggested the highest value of the articles; and the United States considered sets, with some exceptions, to be multiple goods, each of which should retain the individual country of origin. Subsequently, at the Fifteenth Session, a Working Group discussed this issue and arrived at a draft text containing each proponent's view as options, and identified the following three types of "sets"[171]: (i) goods explicitly mentioned as a set in an HS heading; (ii) goods classified as a set by virtue of HS GIR 3(b)[172]; and (iii) goods simply grouped together and not fulfilling the conditions laid down in GIR 3(b). It should be noted that "goods put up in sets for retail sale" mean goods which: (i) consist of at least two different articles which are, *prima facie*, classifiable in different headings; (ii) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (iii) are put up in a manner suitable for sale directly to users without repacking (HS Explanatory Note to GIR 3(b)).[173]

At its Sixteenth Session, the TCRO continued discussions and generally agreed on two propositions: that merely putting up goods in sets is not origin conferring; and that if a set is comprised entirely of articles originating in a single country, the set has origin in that country.[174] However, the concept of sets under the HS is limited in scope and there were varying views as to whether the grouping of goods without meeting GIR 3(b) (e.g., six fondue forks or bottles of wine and whisky) should be recognized as "sets" for the purposes of rules of origin. Agreement was not reached on this point. Finally, two alternative texts for "putting up in sets [or kits]" (one almost identical to the draft of the Working Group and another prepared by the United States) appeared in the architecture.

[171] Annex C/1 to Doc. 42.820, ¶ 29.

[172] GIR 3(b): "Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

[173] The Explanatory Notes (X) provide some examples of selections of products put up together which are thus not considered to be "goods put up in sets for retail sale": a can of shrimps (heading 16.05), a can of *pâté de foie* (heading 16.02), a can of cheese (heading 04.06), a can of sliced bacon (heading 16.02), and a can of cocktail sausages (heading 16.01); or a bottle of spirits of heading 22.08 and a bottle of wine of heading 22.04.

[174] Annex O/1 to WCO Doc. OC0010E3, ¶ 11.

These positions were maintained at the Seventeenth Session, and sent to the CRO for decision.

The CRO has not yet agreed on this Rule. Current Rule 6 has been renumbered several times. The latest text of the CRO maintains three possible options as the Chairman's proposal: A. goods put up in sets should retain the origin of the individual articles in the set (United States); B. the same as A except when such goods are explicitly mentioned as sets or kits or are classified as sets or kits by application of HS GIR 3(b), in which case the origin of the set or kit should be the country where it is put up (India); and C. merely putting articles into sets is not origin conferring (there is no need for a specific provision for sets) (Mexico).[175]

(i) Rules for mixtures. For the purposes of classification, mixtures are classified "as if they consisted of the material or component which gives them their essential character" (HS GIR 3(b)).[176] Rules for mixtures did not appear in the final text of the TCRO, though various aspects of the rules for mixtures had been discussed at an early stage of the negotiations. At the Third Session, a discussion started from the issue of a "mixture of fungible goods or materials"[177] and concluded that this issue should be addressed separately as the mixture on the one hand and fungible goods and materials on the other.[178] During the examination of agricultural products (mixtures of natural honey) at the Fourth Session, two approaches were proposed: (i) product-specific mixtures rules on a case-by-case or sector-by-sector basis; or (ii) a general rule for mixtures covering all products. The former approach was fully implemented by setting out a Chapter rule/note for mixtures during elaboration of product-specific rules of origin, in particular in the agricultural and chemical products sectors, while a draft text for the mixtures rule was proposed at a later session.

At the Thirteenth Session, the mixture issue was discussed as part of a residual rule which had to determine the origin of goods that failed to satisfy a change-of-classification rule, i.e., goods produced from materials with the same classification, by mixing them in many cases. The TCRO opted to deal with the mixtures issue by drafting residual rules, instead of introducing a General Rule for mixtures. At the Fourteenth Session, a draft text appeared in the architecture as Appendix 2, ¶ 4 (Special Provisions), subpara. (e)[179] stating the same message. At the Fifteenth Session, a Working Group prepared three alternative texts[180] to address the mixtures' issue as part of residual rules.

At the Sixteenth Session, some Members considered that the ultimate or final residual rules were sufficient to determine the origin of mixtures which did not satisfy primary rules; thus, there was no need for a specific mixtures provision in the Appendix 2 residual

[175] There is growing consensus on Option C. There was also growing consensus that putting up in sets was not origin-conferring, and that there was no need for a specific rule as well as for reference in Rule 2(d) of Appendix 2 (WTO Doc. G/RO/M/Rev.2.).

[176] Similar to goods put up in sets for retail sale, there are certain headings and subheadings which explicitly refer to mixtures, e.g., subheading 0710.90 (mixtures of vegetables).

[177] WCO Doc. 39.864, ¶¶ 39–42.

[178] At that stage of the technical examination, the elaboration of the rules did not make a clear-cut distinction between sets, unassembled goods under GIR 2(a), accessories and spare parts and mixtures (Annex A to WCO Doc. 39.865. Add.1., ¶ 1).

[179] Annex C/2 to WCO Doc. 42.711.

[180] These texts intended that the origin of mixture should be assigned to: (i) the country which contributed the greatest proportion of materials; (ii) the country which contributed the greatest proportion of a specific material; or (iii) the country where goods/materials are mixed, provided certain criteria are met. For further details, *see* Annex C/1 to WCO Doc. 42.820, ¶¶ 33–35.

rules. For other Members, it was important to preserve the option to employ residual rules designed for mixtures either at the Chapter or Appendix 2 level.[181] The three draft texts were maintained at the Sixteenth Session with the addition of a new paragraph. However, at the Seventeenth Session in May 1999 those texts were finally deleted. Thus, the general residual rules (Rule 3) will determine the issue of mixtures, unless the CRO provides specific mixture rules in the primary rules.[182]

C. Wholly-obtained Goods (Appendix 1)

An overview of the brief history of the Harmonization Work Programme and details of the architecture of the HRO have been described above. The next stage is to examine how rules at the Appendix level have been discussed and subsequently agreed or retained as issues. Firstly, an outline of the development of definitions of wholly-obtained goods by the TCRO is provided below. The treatment of the expressions "country", "vessel" and "scrap and waste" is then explained. Finally, a newly introduced concept of "outside a country" and related definitions will be considered.

1. Preparatory Discussion at the First Session

In the context of the first items mandated by the ARO (Art. 9.2(c)(i)), the WCO Secretariat prepared a working document on definitions of wholly-obtained goods for discussion by the TCRO at its inaugural session. The Secretariat's proposals, based on the text of Annex D.1 to the Kyoto Convention, contained several new suggestions.[183] For example, a definition of the term "country" was provided and several new concepts were inserted, such as "product of activities in territories not subject to the jurisdiction of a single country".

One of the contentious issues was the treatment of the term "country". The Secretariat draft referred to the first paragraph of the Explanatory Notes[184] to the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement") and provided a "geo-physical" definitions of the term "country".[185] Another issue raised concerned the treatment of Customs unions; the working document supported the idea that: "for origin purposes the definition of 'country' would also include customs union".[186]

Members welcomed the working document since it provided the TCRO with a good "starting point" for discussion. Although most of the conventional Kyoto-type definitions were supported by the delegations, none of the new suggestions was accepted. Members did not agree to use certain politically sensitive terms, such as "sovereignty", or refer

[181] Annex O/1 to WCO Doc. OC0010E3, ¶ 14.

[182] With regard to specific mixture rules for the agricultural sector, *See* D.1 below, *Agricultural Products (HS Chapters 1 to 24).*

[183] WCO Doc. 39.166.

[184] The first paragraph of the Explanatory Notes states that: "The terms 'country' or 'countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO".

[185] "For the purposes of the Agreement on Rules of Origin the term 'country' shall be taken to mean the land, including the airspace above and the soil and subsoil beneath the land, and the territorial sea appurtenant to the land, including the airspace above and the seabed and subsoil beneath the territorial sea, over which a country exercises sovereignty. The term 'country' shall also be taken to include free ports, free zones and in bond operations. The term 'territorial sea' shall be interpreted in accordance with international law as defined in the 1982 Convention on the Law of the Sea" (WCO Doc. 39.166, pp. 2 and 6.) These definitions were placed in the column entitled "Explanatory Notes" that were intended to be legally binding.

[186] WCO Doc. 39.166, ¶ 3. *See also* Annex D.1. to the Kyoto Convention, Commentary (2) to Definitions.

directly to the UN Convention on the Law of the Sea[187] to define "territorial sea". Several delegations explicitly expressed their opposition to including a Customs union as part of the definition of "country".[188] The treatment of the exclusive economic zone ("EEZ") was also controversial as to whether "country" should include the EEZ. It appears that these issues were too substantial for discussion at the one-week inaugural session, even though three months were allotted for the work of Phase I. Finally, the TCRO decided to refer to the CRO the issue of whether the definition of the term "country" was a matter clearly within the competence of the TCRO.[189]

2. TCRO's First Text of Definitions of Wholly-Obtained Goods

At its Second Session, the TCRO had to agree to the text and submit it to the CRO in time for the deadline of Phase I (October 1995). Many of the proposed definitions were readily agreed by the TCRO, with a slight modification or addition of terms. With regard to the definition of "scrap and waste", several delegations proposed to delete the expression "fit only for disposal or for the recovery of raw materials", while some Members opposed the idea on the ground that the expression was not an "end-use" provision but merely stated the current condition of the goods.[190] The distinction between "used goods" and "waste and scrap" was proposed by a delegation, taking into account the fact that the HS does not adequately define many types of scrap and waste.[191] On the other hand, several delegations were of the view that the "used articles" in question were implicitly covered by the term "scrap and waste". With regard to the addition of "articles collected" and "recovery of parts" to the text of the definition, one group emphasized the commercial reality of the international collecting and recycling trade, while another preferred to consider this issue during Phases II and III.[192] The TCRO decided to send the CRO two alternative texts, both in square brackets. The first text was the original Secretariat proposal from WCO Doc. 39.481, and the second one was a delegation's proposal, which consisted of two parts.

A number of delegations supported the view that the term "solely" (Definition 1(i)) should be applied in its literal sense, whereas several other Members preferred a flexible interpretation to be achieved by a General Rule, such as a *de minimis* rule or by means of an explanatory note.[193] The TCRO agreed to interpret the term "solely" in its strict sense.

Part 2 of the definitions dealt with goods obtained outside a "country". Consequently, the scope of this part could be clarified only once the term "country" was defined. In

[187] The UN Convention on the Law of the Sea entered into force on November 16, 1994; when the WTO Agreement came into force in January 1995, most of the major trading partners were not yet Contracting Parties to the Law of the Sea Convention. As of July 16, 2004, 145 countries have ratified, acceded to or succeeded to the UN Convention on the Law of the Sea. However, there were only 82 Contracting Parties in January 1995. (UN public Web site: www.un.org/Depts/los/reference_files/status2003.pdf) At a later stage of the negotiation, the CRO used the Law of the Sea Convention as a basis for discussion (WTO Doc. G/RO/M/32, ¶ 1.1.).

[188] WCO Doc. 39.310, ¶ 192.

[189] WCO Doc. 39.310, ¶ 201.

[190] Annex D/1 to WCO Doc. 39.488, ¶¶ 16 and 18.

[191] According to this delegation, "used articles" should be qualified with words to the effect that they can no longer perform their original purpose and cannot be repaired or restored. The WCO Director of Nomenclature and Classification commented that used articles that could not be re-used would normally be classified as scrap and waste. The HS Nomenclature contained headings for scrap and waste that could be classified according to the main material used. There was a problem, however, as to how to classify scrap and waste consisting of different materials (*Id*., ¶ 23.).

[192] Annex D/1 to WCO Doc. 39.488, pp. 4–12.

[193] *Id*., ¶ 40.

response to the TCRO's request, the CRO agreed to set up a drafting group to elaborate a definition of the term "country" for the sole purpose of the ARO.[194] The TCRO decided that it would review this matter when the CRO had finished its work on the definition of the term "country".

Several delegations opposed the proposed definition for the term "vessel" which linked only the country of origin to registration of a vessel. A number of countries suggested that chartering and leasing also be included. The TCRO decided to refer to the CRO the issue of whether Definitions 2(i) and (ii) should include the possibility that goods obtained on or by means of a chartered vessel or factory ship or on a leased structure or installation or spacecraft should be considered as being wholly obtained.[195]

3. The TCRO's Further Elaboration of Definitions of Wholly-Obtained Goods

The CRO supported most of the TCRO's first text with regard to definitions of wholly-obtained goods, but requested the TCRO to: (i) refine Definition 1(c) (products obtained from live animals); (ii) refine Definition 1(d) (plants and plant products harvested) with respect to the interpretation of "plant products" and "products obtained from a plant"; (iii) refine Definition 1(g) (goods obtained solely from other wholly-obtained goods) in terms of consistency between the interpretation of the term "solely" and Definition 2[196] in minimal operations or processes; (iv) address the issue of the origin of recovered parts with respect to renumbered Definition 1(g) (renumbered Definition 1(f)(i) as 1(g) and 1(g) as 1(h)); (v) revisit the Explanatory Notes on the basis that they are to be legally binding.[197] The CRO formulated an alternative text for Definition 2 and agreed that this issue required further deliberation and consultations. Several countries reserved their position on this issue. The CRO concluded that a general and abstract definition of the term "country" was not required at this time, and requested the TCRO to proceed with the Harmonization Work Programme in the absence of an abstractly constructed definition of the term "country"; and that the CRO should delay its consideration of this issue until the TCRO had forwarded all of the unresolved issues.

At the request of the CRO, the TCRO (Third Session) re-examined its first text of the definitions of wholly-obtained goods. The TCRO explained that Definition 1(c) was intended to cover, for example, "wool" as illustrated in the Explanatory Note, whereas renumbered 1(h) covers products made from "wool". The TCRO decided to retain the text of the definition, but to insert the expression "without further processing" into the legally binding Note to Definition 1(c).[198] Concerning Definition 1(d), the expression "plant products" was taken to cover, for instance, fruits that were not in themselves the whole plant and had not been obtained by processing the plant, but which were obtained from the plant, in a similar sense to milk obtained from a cow under Definition 1(c).[199]

With regard to interpretation of the term "solely" in renumbered Definition 1(h) (renumbered again as 1(i)—a new Definition 1(h) was inserted to cover parts or raw materials recovered) and the relationship of this definition to Definition 2 of minimal operations or processes, the CRO's question was related to its work on the overall

[194] WTO Doc. G/RO/M/2, ¶¶ 12–13.
[195] Annex D/1 to WCO Doc. 39.488, ¶ 69.
[196] Definition 2: "The minimal operations or processes defined above shall not be taken into account in determining whether a good has been wholly-obtained in one country." (TCRO's text at its Second Session)
[197] WTO Docs.: G/RO/M/3, ¶¶ 4.11–4.20 and 4.24–4.25; G/RO/M/5, ¶¶ 2.4–2.7, 2.9 and 2.12–2.14.
[198] Annex F/1 to WCO Doc. 39.870, ¶¶ 4–8.
[199] *Id*., ¶¶ 9–10.

architecture of the HRO.[200] To help clarify the interpretation of the term "solely", a draft legally binding note required that: the goods must have been obtained or produced from the wholly-obtained products of that country mentioned in Definitions 1(a) to (h); and the products of Definitions 1(a) to (h) must not have undergone processing in another country.[201] The TCRO decided that it would defer a decision on this draft note, and that a final decision on a legal note for renumbered Definition 1(i) should await a decision on the renumbered Definitions 1(g) (articles collected) and 1(h) (parts and raw materials recovered).[202]

The TCRO agreed that parts recovered in the same country from articles collected in that country were to be considered as wholly obtained in that country. However, it did not reach a consensus concerning the origin of parts recovered in a country from articles collected in another country. The following five possibilities for conferring origin were analysed: (i) country of origin of the parts; (ii) country of origin of the articles collected; (iii) country of consumption of the articles collected; (iv) country where the articles were collected; and (v) country where the parts were recovered.[203] A number of delegations were of the opinion that the wholly-obtained status should be conferred on the basis of where the parts were recovered, and they proposed the text for a new Definition 1(h).[204] One delegation made an alternative proposal and expressed a different technical opinion, namely that articles collected in a country deserved the origin of that country under the assumption that these articles were consumed in the country of collection. Consequently, the original origin was lost. For the same reason, the parts recovered from those articles deserved the origin of the articles collected, reflecting thereby the country where the parts had been consumed.[205] However, this proposal was criticized on the grounds that: (i) recovery of parts was no less demanding than collecting; (ii) finding out "true" origin of recovered parts was not possible; (iii) parts might be recovered from articles collected in several countries; and (iv) consumption and collection normally could not always take place in the same country.[206]

4. The CRO's Elaboration of Definitions of Wholly-Obtained Goods

The Informal Working Group, established by the CRO at its meeting on November 16, 1995, considered the parts issue and proposed a text[207] to be added to alternative 1 to draft Definition 1(h), which could resolve some policy concerns that were raised.[208] The CRO agreed to place the footnote, in square brackets, to alternative 1 to draft Definition 1(f).[209]

[200] *Id*. ¶ 11.
[201] *Id*. ¶ 12.
[202] *Id*. ¶ 13.
[203] *Id*. ¶¶ 16–18. The TCRO commented that due to the administrative burden and other technical problems (including lack of adequate proof of origin) in connection with the first three possibilities, the Technical Committee focused its work on the last two.
[204] "Parts or raw materials recovered in that country from articles which can no longer perform their original purpose nor are capable of being restored or repaired." (Annex F/2 to WCO Doc. 39.870)
[205] Annex F/1 to WCO Doc. 39.870, ¶¶ 21–22. "Parts or raw materials obtained in that country from articles collected in that country which are not fit for their original purpose nor are capable of being restored or repaired and are fit only for disposal or for the recovery of raw materials." (Annex F/2 to WCO Doc. 39.870)
[206] Annex F/1 to WCO Doc. 39.870, ¶¶ 23–27.
[207] "In the recovery of parts or raw materials, environmental considerations may arise, particularly for radioactive, hazardous and toxic waste that may result from the recovery of parts or raw materials from articles. In this connection, this rule is without prejudice to Members' rights to take WTO-consistent measures to protect the environment" (WTO Doc. G/RO/M/6, ¶ 2.4).
[208] *Id*.
[209] *Id*. ¶¶ 2.12–2.13.

With regard to Definitions 1(c), (d) and (i), the CRO approved the new text of the Notes to Definitions 1(c) and (d), and took note of the report by the TCRO concerning Definition 1(i).[210] Except for minor modifications, Definitions 1(a) to (g), 1(i) and the Notes to Definitions 1(a) to (f) are retained in the latest text of the CRO. At a later stage of the negotiations, the CRO agreed to adopt the text of alternative 1 for Definition 1(h) without the footnote, and to delete the Note to Definition 1(i) (See the full text in Annex 2 to this chapter).[211]

5. Elaboration of Definition 2—Goods Obtained Outside the Country

Since the TCRO sent its draft to the CRO as the First Report, Definition 2 has never been referred back to Brussels. At its meeting in February 1996, the CRO formulated the single alternative draft text.[212] The CRO was of the opinion that the alternative text presented a possible basis for an agreed definition.[213] At the meeting in May 1996, when the Informal Working Group considered this issue with the intention of presenting a proposal for a solution to the CRO for formal adoption, it was concluded that "regrettably, discussions in the Informal Working Group in the past few days had resulted in branching out that single alternative draft text into four options".[214]

At the October 1996 meeting, the WTO Secretariat circulated a succinct comparative analysis of the four options[215]; the CRO agreed to adopt the bracketed one-option draft for Definition 2 recommended by the Informal Working Group.[216] The Group further reviewed the text and reached consensus on the main body of the text of Definitions 2(i), 2(ii) and 2(iii). There was also agreement on the text of the note. At its meeting in February 1997, the CRO agreed with the single text.[217]

Argentina proposed an alternative text regarding the scope of the term "country".[218] In response to the Argentine proposal, most delegations strongly expressed the view that the definition of the term "country" should continue to focus on practical issues having

[210] *Id*. ¶¶ 3.2–3.8.
[211] WTO Docs. G/RO/M/32, ¶ 1.1., G/RO/M/34, ¶ 1.1.
[212] WTO Doc. G/RO/M/5, ¶ 2.12.
[213] *Id*.
[214] WTO Doc. G/RO/M/6, ¶ 2.14.
[215] As key legal issues, the four options are identical, except for (a) the geographical extent of a country's territory, and (b) the nationality of vessels. Concerning geographical extent of a country's territory: (i) Option I does not specify the geographical extent of a country's territory; (ii) Option II uses the term "maritime zones under national jurisdiction"; (iii) Option III uses the term "customs territory of a Member"; and (iv) Option IV uses the term "territorial sea". With regard to nationality of vessels: (i) Options I, II and III rely on registration of a vessel to determine its nationality; and (ii) Option IV requires a genuine link between the vessel and the user's country.
[216] WTO Doc. G/RO/M/8, ¶ 3.3. However, Japan and Korea reserved their position. Japan's comment was that the use of the term "country" without definition would cause legal problems as well as general confusion, and that the relationship between subparagraphs 2(i) and 2 (iii) needed further clarification (¶ 3.4.).
[217] Definition 2 : (i) Products of sea-fishing and other products taken from the sea outside a country are considered to be wholly-obtained in the country of registration of the vessel that carries out those operations. (ii) Goods obtained or produced on board factory ships are considered to be wholly-obtained in the country of registration of the factory ships, provided that those goods are manufactured from the products referred to in subparagraph (i) originating in the same country. (iii) Products taken from the seabed or subsoil beneath the seabed outside a country are considered to be wholly-obtained in the country that has the rights to exploit that seabed or subsoil (WTO Doc. G/RO/M/9, ¶ 3.2.).
[218] For Definition 2(i), the scope extends to the sea outside the territorial sea and maritime zones over which the coastal State has jurisdiction; while in Definition (iii), the scope extends to the area of the seabed and ocean floor and subsoil thereof outside national jurisdiction, as defined in the UN Convention on the Law of the Sea (*Id*.).

Table 5: Summary of positions with regard to definition 2

1. Products of sea-fishing and other products taken from the sea, and	
2. Goods obtained on board a factory ship	
(1) Within the territorial sea [including the Contiguous Zone (Argentina)]	Definitions 1(a), (b), (c), (d), (i)
(2) Within the Exclusive Economic Zone (EEZ)	Option A. Flag of the vessel or factory ship Option B. Registration of the vessel or factory ship Option C. The coastal State
(3) On the high seas	Option A. Flag of the vessel or factory ship Option B. Registration of the vessel or factory ship
3. Products taken from the seabed or subsoil beneath the seabed	
(1) Within the territorial sea [including the Contiguous Zone (Argentina)]	Definition 1(e)
(2) Within the continental shelf (EEZ)	Option A. The country that has the rights to exploit Option B. The coastal State
(3) Beyond the limit of national jurisdiction ("the Area")	The country that has the rights to exploit

(*Source:* WCO training material)

a bearing on the assignment of origin on products produced or obtained either within a country or outside a country. In this regard, it was agreed that the Argentine proposal required further consultations.[219] New Zealand also commented on the Note.[220] Japan, supported by Venezuela, recalled its proposal made during the informal consultations.[221]

The CRO deferred the issue until the June 2000 meeting. At that meeting, in the light of the new proposals made by two delegations, it was decided that any future discussion should focus on the following substantive issues: (i) the concepts of "territorial sea" and "exclusive economic zone"; and (ii) "nationality" of the vessel: flag as a single criterion to determine origin of fishery products outside the territorial sea.[222] In December 2000, one delegation submitted a new alternative text.[223] At the time of writing, six alternative texts are being tabled (see Annex 2 to this chapter). The above table illustrates the positions of delegations and the related key issues as at the time of writing.[224]

Definitions 1(a) to 1(i) have already been agreed by the CRO. However, the CRO may require more time to resolve Definition 2 issues. The definition of a "country" might not be provided for by the CRO; the treatment of the EEZ would implicitly provide an answer to this question. The treatment of a "Customs union" was discussed by the TCRO at an early stage in the negotiations; that question has not been examined. Furthermore, several early draft texts referred to products obtained in a spacecraft. It appears that these kinds of provision will be discussed again when the actual need arises.

[219] *Id*.

[220] The goods are considered to be wholly-obtained in a country that granted registration to chartered vessels or factory ships, provided that this registration was in accordance with the requirements of that country (*Id*.).

[221] A footnote to Definition 2(i) to read: "Further consideration should be given to the scope of the term "country" if necessary, in the course of the harmonization work programme".

[222] WTO Doc. G/RO/M/30, ¶ 1.1. The proponent of the "alternative" text for Definition 2 withdrew its proposal.

[223] G/RO/M/34, ¶ 1.1.

[224] This table does not reflect the full details of the proposals.

As explained in Sub-section B, definitions of wholly-obtained goods are placed in Appendix 1. Two governing Rules are provided before the texts of the definition. Rule 1 provides for scope of application, and Rule 2 covers minimal operations and processes. As already mentioned, "definitions of minimal operations or processes that do not by themselves confer origin to a good" (Art. 9.2(c)(i)) began as an independent Appendix and now finds its place as an Appendix 1 Rule).

D. Product-Specific Rules of Origin (Appendix 2)

As a brief history of Phases II and III of the negotiations indicates, the TCRO spent a considerable time elaborating product-specific rules of origin. A total of 486 product-specific issues were sent to the CRO for decision[225]; the TCRO's referral documents alone included some 650 pages of narrative explanation, and amounted in total to over 2,000 pages, including "matrices".[226] On the other hand, it is also a fact that 511 out of 1,241 headings or 41 percent of all the headings have been agreed by the TCRO (see Table 4).

As has been described earlier, the product-specific rules of origin are designed to determine the origin of goods the production of which involves more than two countries (Art.9.1(b)). Given that the sequential approach was agreed, Appendix 2 rules (product-specific rules of origin) are applicable only when a definition of Appendix 1 (definitions of wholly-obtained goods) does not determine the country of origin of a good. Two types of origin-conferring rules, i.e., the primary rules and the residual rules, must also be subject to that principle. When two or more primary rules are provided, these primary rules must be co-equal. However, this principle does not preclude the possibility of providing a set of primary and residual rules which have a hierarchical structure, i.e., the "cascading" approach proposed by the United States for Chapter Rules/Notes for Chapters 84 to 90.[227] By way of illustration, a summary of the discussions for three product sectors—agriculture, textiles and machinery—is set out below.[228]

1. Agricultural Products (HS Chapters 1 to 24)

The origin of agricultural goods is determined, in many cases, by application of a definition of wholly-obtained goods. In fact, Definitions 1(a) to (d) in Appendix 1 are applicable, exclusively or in most cases, to the agricultural sector. However, a major issue discussed—and still being argued in the CRO—relates to the origin of processed agricultural goods, for which two fundamental positions have been presented.

One argument is that the origin of agricultural products should always be carried forward from the original product (having been wholly obtained in that country) and cannot be changed by subsequent processing. Under this scenario there exists no substantial transformation for agricultural goods. To articulate this position, the initial or the evolved "Ottawa language" has been used. For those countries/semi-governmental organizations

[225] Some issues were treated as "horizontal" and were dealt with under the architecture.

[226] By August 2004 the CRO had resolved 349 issues out of 486, i.e. 71.8 percent (*see* Table 4 above).

[227] Under this approach a tariff-shift rule is applied first and a subsidiary rule, proposed for specific products only, is in the second row in the "matrix". When origin is not determined by the application of the primary rules in the "matrix", Chapter Rules/Notes are applied also as primary rules. If, despite the latter, the origin of the good cannot be determined, the product-specific residual rules set out as Chapter Rules/Notes are then applied in the order stipulated.

[228] *See also* Philippe Nell, *WTO Negotiations on the Harmonization of Rules of Origin : a First Critical Appraisal*, 33 JOURNAL OF WORLD TRADE 3 (1999).

having made a considerable investment in promoting the image of a particular commodity linked with the country of origin as a "brand name", retaining the origin of the source material was an uncompromisable option. Although these proponents recognize the economic reality of blending or mixing source materials originating in more than one country, their products must carry the name of the place where they were originally produced. It was at a very late stage in the negotiations that several delegations proposed to separate the issue of labeling for retail sale from the origin of goods for Customs purposes, in order to achieve a possible compromise. This proposal has been considered by delegations with interest.

Another argument is that the processing of agricultural raw materials is basically a substantial transformation, and origin should be conferred on the processed goods in the country where these processes are carried out. This would imply use of "Ottawa" type rules or tariff-shift rules with extensive use of split (sub)headings. This position was championed by countries which import source materials and then process them. However, it was not easy to draw a line between "simple" processes and substantial processes. For instance, chilling, freezing or shelling of fish could be agreed as a non-origin-conferring process because such operations are intended to keep the fish in good condition; on the other hand, drying, smoking or salting of fish has been subject to discussion as these processes change the original condition of the fish.

With regard to mixtures and blending, three divergent views were presented: (i) mixing or blending is origin conferring (the country where the goods are mixed or blended); (ii) mixing or blending is origin conferring, provided a specified criterion is met (either the country that supplies more than a specified level (by weight or volume)[229] of the source material or the country where the goods are mixed/blended); or (iii) mixing or blending is not origin conferring, and thus origin should be determined by application of the residual rules (origin is the country that provided the major portion of the source material).[230] Option (i) above was proposed for the primary rule. Option (ii) is a combination of the primary and the Chapter residual rules.[231] This seems to be securing growing support.

2. Textiles and Textile Articles (HS Chapters 50 to 63)

The textile sector was one of the most difficult areas of negotiation, since major importing countries have maintained their own well-established rules of origin under the Multifibre Arrangement ("MFA") or bilateral arrangements. From the outset, it was clear that an easy compromise was unlikely in view of the strong opposition by various textile lobbies in different Members. The negotiations naturally started with proposals identical to importing countries' current rules. Consequently, printing or dyeing of yarn and fabrics remains one of the most contentious issues in this sector. On the other hand, developing countries have tried to confer originating status on the goods they are actually producing. Lenient rules were thus favoured by those countries.

Under the circumstances, an important agreement was reached by the TCRO and the CRO. The production of: (i) yarn from fibre, (ii) fabric from yarn, and (iii) apparel, parts or accessories of garments knitted or crocheted to shape are, by themselves,

[229] The proposed criteria (primary rules) are: 50 percent in general, 85 percent and 75 percent in volume for wine; 85 percent in volume for spirits; 85 percent in weight for coffee; 75 percent in weight for olive oil.

[230] The term "mixing" is defined as the deliberate and proportionally controlled operations involving two or more identical or different interchangeable materials.

[231] When the primary rules for the mixture are not met, the Chapter residual rules determine the origin of the mixed goods to be the country where the mixing was carried out. Thus, the general residual rules (the country contributing the major portion) are not to be used.

origin conferring. The principle of a "two-stage/double jump" (e.g., fabrics from fibres, or garments from yarn), found in many preferential rules of origin, was not adopted. Furthermore, a number of processes have been recognized as substantial transformation by a majority of Members. Such processes include the production of: garments by assembly from parts that are cut to shape from fabric; and accessories (ties, gloves, etc.) by assembly from parts that are cut to shape.

3. Machinery, Transport Equipment and Photocopying Apparatus (HS Chapters 84 to 90)

Regardless of the size or value of the goods—e.g., from semiconductors or portable radios to gas turbines, oil tankers or spacecraft—the predominant production process for goods of Chapters 84 to 90 is an assembly operation. Thus, from the beginning of the negotiations, the single major issue has been clearly identified and argued, i.e., whether assembly operations alone should be recognized as origin conferring. For this generic issue, two divergent views were first presented. One position was to recognize a change from parts (suitable for use solely or principally with a particular kind of machine) to articles expressed by a change-of-classification rule to be origin conferring. The proponents of this view were confident that the inherent HS structure was suitable for purposes of origin determination; thus, a tariff-shift rule alone should be used. As the HS forms the basic foundation, the term "parts" is subject to the definition under the HS. Another position put forward was not to recognize a change from parts (suitable for use solely or principally with a particular kind of machine) to articles as origin conferring. This view begins with the premise that the HS is not created for purposes of origin determination; consequently, even the so-called screwdriver assembly meets a change-of-tariff-classification criterion. Paradoxically, when the quality of a good is improved significantly, the classification remains unchanged. The proponents argued that such assembly operations could be considered as substantial transformation when a specified *ad valorem* percentage of added value prescribed for a particular good was achieved.

Assembly operations are, of course, not limited to the transformation from parts to articles. The origin of parts became a new focus known as a "parts-to-parts" issue. Members realized that as more parts become progressively incorporated into other parts (subassemblies or components) in the production processes, the less likely they are to have been manufactured directly from raw materials. Under the current "e-commerce" practice or the "just-in-time" system of assembly, enterprises do not always produce those parts by themselves despite their capability to do so; they prefer to remain competitive in the market and procure parts from somewhere else at a lower cost and under more acceptable conditions.

The initial proposal for parts by the tariff-shift rule approach was, in most cases, CTH—requiring a change from outside the category of "parts suitable for use solely or principally for a particular machine". If this were the rule, certain production processes of parts, such as "a subassembly incorporating individual parts" or "a component consisting of numerous subassemblies", do not result in a change of classification. This situation led to the proponents of the tariff-shift rules splitting into two groups. One group (Canada, Japan, etc.) tried to resolve these issues by splitting the "parts" headings or subheadings. The intention was to confer origin on particular "parts" assembled from other parts of the same heading or subheading by meeting a simple "CTHS" or "CTSHS" rule. These proponents, however, argue that exhaustive splitting is not necessary and that there is an alternative, i.e., the general residual rules which are themselves sufficient. Another group (India, Singapore, Morocco and the United States) proposed the establishment of

definitions or requirements for assembly to be considered substantial, as well as to use the tariff-shift rules. These proponents wanted to avoid a situation where thousands or tens of thousands of parts are aggregated, based on the country of origin of the source parts, in order to apply the general residual rules. As already mentioned, under current commercial practice, parts are not always supplied from the same country. It appears that, in this case, the administrative cost of determination of origin may diminish the benefit of the harmonization of non-preferential rules of origin. The United States suggested the "cascading" approach mentioned earlier. The U.S. approach has been criticized for its complexity, but is recognized as a well-elaborated method to deal with issues of assembly of parts into other parts, emphasizing that the approach can determine the country of origin of any single good without using a value-added rule as well as the general residual rules.

The proponents (for all Chapters 84 to 90—the EC; for certain Chapters/headings—Brazil, Egypt and Turkey) of the value-added rules did not alter their position. They believed that value-added rules were undoubtedly able to address this "parts-to-parts" issue better, and could be administered much more easily than the complex "cascading" approach or the use of conceptual definitions. At the same time, they were of the view that further splitting of the "parts" headings or subheadings was definitely not the solution to the problem, primarily because a simple "CTHS" or "CTSHS" rule should not confer origin on the parts in question, given that their position did not recognize assembly of articles from components, or components from parts, as origin conferring.

E. Implications of the Implementation of the HRO for Other WTO Agreements

Although Arts. 3(a) and 9.1(a) of the ARO state explicitly that the HRO should be applied equally for all purposes as set out in Art. 1, two questions have been raised as to whether: (i) the HRO should not be applied to other WTO instruments (even though explicitly referred to in Art. 1.2 of the ARO) which might be governed by another set of disciplines; and (ii) the HRO should automatically be applied to all the WTO instruments (including those enumerated in Art. 1.2 of the ARO) where the country of origin needs to be determined in the course of trade in goods.

1. Initiation of a Study on the Implications of the Implementation of the HRO for Other WTO Agreements

The issue of the implications of the implementation of the HRO for other WTO Agreements was first taken up as an agenda item by the CRO in July 1998; it had never been discussed by the TCRO. India initiated this issue and suggested that the WTO Secretariat analyse the implications of how different proposals for the textiles sector would impact on the flow of trade and/or the rights and obligations under various WTO Agreements and instruments referred to in the ARO.[232] In response to this request, the WTO Secretariat prepared a working document which compiled the provisions relating to the rules of origin in various WTO Agreements.[233] In addition, several countries submitted proposals on this matter.[234]

[232] WTO Docs. G/RO/W/28/Rev.1 and 30.

[233] WTO Doc. G/RO/W/31. *See also* a general study paper prepared by UNCTAD, *Globalization and the International Trading System—Issues Relating to Rules of Origin*, UNCTAD/ITCD/TSB/2 (1998).

[234] Dominican Republic and Honduras (WTO Doc. G/RO/W/33); El Salvador (G/RO/W/34); Korea (G/RO/W/38); and United States (G/RO/W/32).

At the beginning of the discussions, India's concern was the implications of the proposed restrictive rules of origin to be applied to the existing textile trade. It felt that suppliers of raw textile materials should not be affected by the quantitative restrictions on textile articles by means of application of the substantial transformation criteria proposed by several countries.[235] Consequently, origin rules should be devised to have each processing stage of the textile production chain regarded as origin conferring. Otherwise, rules of origin are likely to have adverse implications for the implementation of a number of provisions in the Agreement on Textiles and Clothing.[236] The United States replied that the last substantial transformation was not always carried out in the country of export; the proposals themselves did not give rise to adverse effects. However, when the HWP was completed, every Member would use the same rules of origin, which would ameliorate the problems described by India.[237] The European Community was of the opinion that the establishment of the HRO should not be influenced by other WTO Agreements or by the desired outcome of various non-preferential commercial policies. Therefore, the EC did not agree with India's view that the last country of production should always be recognized as the country of origin. If one proposal did not recognize the cutting of fabric as a substantial transformation, for example, that did not mean that the proponent of the proposal intended to distort trade.[238]

2. Restraints on the Application of the HRO to Certain WTO Instruments Enumerated in Art. 1.2 of the Origin Agreement

The United States considered that there was no common understanding on the implications of the HRO for other WTO Agreements, and that more communication with other WTO bodies was needed.[239] The United States argued, from the very early stages of the negotiations, that the *use or application* of rules of origin for a particular administrative purpose may be a separate matter from the *development and implementation* of particular trade measures or commercial policy instruments (such as application of anti-dumping measures) that fall under the jurisdiction of other Agreements. Consequently, the issue is most certainly not a sector or product-specific matter, but broadly extends to all sectors of industry, from agriculture to a wide range of consumer products.[240] Considering the fact that many of the then 38 (currently 41) Members that had notified that they do not have non-preferential rules of origin were known to utilize anti-dumping measures, rules of origin were not being used for such measures. Consequently, the United States raised a question as to whether the existence of the HRO would require changes in those practices by those Members.[241]

A number of Members, however, have questioned the U.S. interpretation of the implications issue. The European Community made it clear that the HRO should be applied equally for all purposes as set out in Article 1 of the Agreement (Art. 3(a) of the ARO) and suggested an explicit common understanding: "If other WTO Agreements require that origin be determined for specific purposes of those Agreements, HRO would then have to be used."[242] Sharing the above view, Brazil understood that it was far beyond

[235] WTO Doc. G/RO/M/19, ¶ 2.3.
[236] WTO Doc. G/RO/W/42.
[237] WTO Doc. G/RO/M/26, ¶ 4.2.
[238] *Id*., ¶ 4.5.
[239] WTO Doc. G/RO/M/19, ¶ 2.6.
[240] WTO Doc. G/RO/W/32.
[241] WTO Doc. G/RO/M/40, ¶ 4.12. *See also* WTO Doc. G/RO/W/45.
[242] *Id*., ¶ 4.18.

the mandate of the CRO to specify each and every circumstance as the United States proposed, and also doubted the ability of other Committees definitively to foresee every possibility under the respective Agreements in which a determination of origin might be warranted. Subsequently, Brazil criticized the U.S. argument that "what was required by these delegations would be an explicit decision to overturn the applicability of the HRO to specific Agreements mentioned in Article 3 of the Agreement itself", and that it was "as if these delegations were seeking to withdraw their signature from portions of the Agreement".[243]

As far as the applicability of the ARO to other WTO Agreements was concerned, Canada opined that it was the other WTO Agreements that had to determine whether or not rules of origin would be applied to them and that, if Members had to use rules of origin, they then had to apply the HRO.[244] On the contrary, Argentina understood that since the provisions of the ARO were more specific than those of other WTO Agreements, the ARO had precedence over other WTO Agreements.[245]

Korea was of the view that the Agreement on Anti-Dumping had no direct relationship with rules of origin, because investigations were based on the market conditions prevailing in the exporting country, and not on the origin of a good. Where there were no sales of like products in the ordinary course of trade in the domestic market of the exporting country, or where an intermediate country was involved (Arts. 2.2 and 2.5 of that Agreement), the HRO should be applied to determine the country of origin and, by implication, the country subject to the investigation. As concerns circumvention of anti-dumping measures, although there was yet to be an agreement on this issue, the HRO could be useful.[246] Hong Kong, China considered that, in the case of anti-dumping, rules of origin were clearly relevant irrespective of whether anti-dumping was based on the concept of "exporting country" or "country of origin". The HRO should also be relevant since conscious decisions were needed in such cases to determine whether the products in question had originated in that exporting economy or originated from somewhere else for the purpose of determining the normal value for individual companies concerned.[247] India was of the opinion that, if for purposes of anti-dumping the term "like products [of domestic industry]" (Footnote 1 to Art. 1.2 of the ARO) may be defined differently than for the HRO, then it would be contrary to the principle of applying the HRO to all trade policy instruments.[248]

3. Applicability of the HRO to WTO Instruments not Enumerated in Art. 1.2 of the Origin Agreement

A proposal was tabled by Japan stating that the HRO should not be applied automatically to the domestic labelling requirements on foods, and that sanitary and phytosanitary ("SPS") measures should be placed outside the scope of the HRO.[249] Although the United States did not favour this idea, describing it as "a multilateral pick-and-choose approach"[250], the proposal appeared to gain support from Members at the April 2002 meeting of the CRO. Brazil echoed Japan's view that there would be no apparent inconsistency

[243] *Id*., ¶ 4.4.
[244] *Id*., ¶ 4.22.
[245] Stated as a preliminary comment. WTO Doc. G/RO/M/41, ¶ 5.10.
[246] WTO Doc. G/RO/M/19, ¶ 2.2.
[247] *Id*., ¶ 2.4.
[248] WTO Doc. G/RO/W/42, p. 5.
[249] WTO Doc. G/RO/M/40, ¶ 4.2.
[250] *Id*., ¶ 4.12.

between measures taken under SPS requirements or labelling requirements (origin labelling of all ingredients of a good, in addition to marking of the origin of the good) and rules of origin for Customs purposes.[251] New Zealand and Australia also supported that approach on the grounds that the objective of the SPS Agreement was to protect human, animal or plant life or health, and concerned the nature of the goods in and of themselves, irrespective of their origin, while the principle objective of the HRO, as applied by the Customs authorities at the border, was to attribute a single origin for each product imported in a country.[252] The purpose of domestic food labelling was to meet other trade objectives, such as consumer demand for product information or the prevention of deceptive practices; thus, Members should retain the right to determine their domestic labelling requirements for products sold in their domestic markets.[253] India added that the origin determination at the border was not an alternative to, but supplemental to, the requirements for SPS or labelling purposes, and that there was no hierarchy implicit or explicit in these two purposes and provisions of various WTO Agreements, since there was no conflict among them.[254] It was thus expected that a common understanding on the need for flexible treatment of domestic labelling and SPS requirements, if so agreed, would provide the HWP negotiations with a practical clue, particularly to assist with the impasse encountered in the agricultural sector.

4. Report by the Chairman of the CRO to the WTO General Council and the Current State of Play

The main stumbling block to progress in the CRO's work that had been identified by many delegations was the implications issue which was first raised in 1998. This was seen being closely related to the problem of circumvention of anti-dumping procedures and the application of SPS measures and quota regulations.[255] Informal consultations held with Members and robust discussion on the implication issue during the CRO meetings held in 2001–2002 could neither lead to agreement on it nor on concrete actions affecting product-specific issues. Thus, the Chairman of the CRO decided to submit this implications issue to the General Council demanding that it and the other eleven crucial issues among the 94 product-specific core policy issues brought before the Council be given priority attention.[256] The Chairman's proposal constitutes ¶ 4.2 of the Report by the Chairman of the CRO to the General Council (G/RO/52) and reads as follows:

1. Pursuant to Article 3(a) of the Agreement on Rules of Origin ("the Agreement"), Members should ensure, upon the implementation of the results of the HWP, that they apply the harmonized rules of origin (HRO) equally for all non-preferential commercial policy instruments as set out in Article 1 of the Agreement, in which rules of origin are used; and
2. Each Member, in accordance with its rights and obligations under the provisions of the WTO Agreements [other than this Agreement], is to decide whether rules of origin are used in its non-preferential commercial policy instruments.

In the Report, Australia and New Zealand raised the issue of "overall impact of the HWP" with a view to ensuring that the product-specific rules developed under the HWP, and

[251] *Id*., ¶ 4.3.
[252] *Id*., ¶¶ 4.7 and 4.9.
[253] *Id*., ¶ 4.9.
[254] *Id*., ¶ 4.10.
[255] WTO. Doc. WT/6C/M/75, ¶ 168.
[256] WTO Doc. G/RO/52.

the HWP as a whole, be consistent with the trade-facilitating objectives and principles of the Agreement. They stated that the General Council should consider all elements of the HWP as a package, which required the General Council to satisfy itself that the HRO made sense in terms of economic benefit, transparency and certainty, and a reduction in compliance and transaction costs (¶ 4.3).

In July 2003, the Chairman of the CRO reported to the General Council on the progress of the consultations on the 94 core policy issues, which he and the Vice-Chair had held with delegations in 2003. In order to bridge the existing gaps among Members, extensive, one-to-one small groups and open-ended consultations were held. The Chair circulated a proposal intended as a "balanced package", which was contained in informal document JOB(03)/132. Unfortunately, it was not possible to reach consensus on this. The Chair summarised the state of play as follows:

> There had been a discussion about the understanding among Members on three notions: (1) that the harmonized rules of origin should be applied only for goods, not for services or intellectual property; (2) that the harmonized rules of origin should be applied equally for non-preferential commercial policy instruments, whenever a Member was required—or in the absence of such requirement, voluntarily decided—to determine the country of origin; and (3) that there were some non-preferential commercial policy instruments where an origin determination was not necessary.[257]

There was almost agreement on the first two notions despite that some Members had raised a question as to whether any WTO agreement required a Member to apply rules of origin. The third notion yielded differing views. Some Members argued that the text proposed by the Chair should designate explicitly the specific commercial policy instruments for which an origin determination was irrelevant, such as marking and labelling requirements or SPS measures. Others disagreed to any carve-out of specific commercial policy instruments and rejected this view arguing that Article 3(a) of the Agreement did not create any new rights or obligations under the WTO Agreement. Thus, the disparity among Members remains wide and the implications issue "remains unresolved but resolvable".[258]

Completing the state of play with regard to the other 93 product-specific rules, the CRO Chairman admitted that there were several genuinely political issues, the resolution of which appeared impossible at the present stage, such as the issue of fish taken from the Exclusive Economic Zone, or the sugar issue. There were also other issues that were closely linked with other trade policy issues, such as circumvention of anti-dumping duties, export subsidy policies in agriculture, and textile quotas, the resolution of which appeared to be difficult unless the related issues were resolved in other bodies or sub-bodies of the WTO. While some Members cited the lack of political will rather than technical difficulties for the lack of progress, others indicated flexibility on several issues and constructive and pragmatic attitude mindful that a satisfying solution for each and every issue might not be possible. Nevertheless, many Members had considered the CRO Chair's proposal as a good basis for further work. There was a discussion on the need for a possible new working methodology in order to facilitate the negotiations.[259]

[257] WTO Doc. WT/GC/M/81, ¶ 171.
[258] WTO Doc. G/RO/M/43, ¶ 4.4.
[259] WTO Docs. WT/GC/M75 and 81.

IV. Conclusion

Nine years have passed since the work on the Harmonization of Non-Preferential Rules of Origin was formally launched in July 1995. The General Council and the CRO in Geneva continues its examination of the draft texts submitted by the TCRO. In this respect, progress has been steady albeit at times rather patchy. This reflects to a great extent the wide disparity among delegates on a host of crucial product-specific and other issues, and also highlights the difficulties inherent in the consensus approach. The negotiations have typically involved all the relevant governmental and industrial sectors. Consequently, a number of countries have often championed rules for a particular industrial sector which were totally inconsistent with those for another sector. The question then arises as to how the substantive part of the HRO should be evaluated.

Obviously, it is premature to undertake such an analysis before the final shape of the rules is known. Acknowledging the constraints, it should be pointed out that absolute consistency between product-specific rules of origin cannot be pursued as long as the results of the HWP are the fruit of compromise by Members. Reflecting such reality, speculation arises that the draft HRO may no longer deliver what some delegations had anticipated. Even where a delegation rallied to a particular option in order to help build consensus, it did not necessarily mean that the rule it had agreed would perfectly match its intentions. With regard to surrounding environments, it is a fact that over forty countries do not at present have non-preferential rules of origin in their Customs and trading systems. However, the absence of such legislation appears not to have posed particular problems or have adversely affected the trade of those countries. It is also a fact that under the terms of the Agreement on Textiles and Clothing the MFA will soon terminate. Furthermore, China and Chinese Taipei have joined the WTO, and the MFN rate of duty is now applicable to most of the major trading economies. If there is no need to differentiate between countries for tariff purposes, the HRO would not be used in practice for MFN purposes. Since free trade agreements on a bilateral or regional basis have proliferated, rules of origin are now more focused on and debated in the preferential field. These could be the underlying factors for some Members not to be particularly enthusiastic about the harmonization, although such feelings are also fairly common in the context of any lengthy negotiations.

It may also be worth considering whether the lack of enthusiasm derives from intrinsic "shortcomings" in the draft HRO. As a set of non-preferential rules of origin, the draft HRO so far agreed are formulated, to the extent possible, in a systematic and logical manner, but they are extremely voluminous, stretching to hundreds of pages. Applying a set of sophisticated residual rules will also be a new and difficult day-to-day exercise for both Customs and traders. As Australia and New Zealand have pointed out, there are certain concerns regarding the overall impact of the HRO in terms of trade-facilitating objectives and principles of the ARO. The WTO General Council is expected to "satisfy itself that the HRO make sense in terms of economic benefit, transparency and certainty, with a reduction in compliance and transaction costs".

Several Members consider it important to clarify the scope of the HRO and where they stand in relation to other WTO Agreements and their provisions. More specifically, one of the key players proposed that the CRO consider the interpretation of Article 1 of the ARO—"to apply rules of origin equally for all such purposes"—as not being synonymous with a future obligation to use rules of origin for all trade policy instruments. As several Members pointed out, there are some WTO instruments which do not require the country of origin to be determined. If not required, obviously there is no need to have recourse

to the HRO. However, it would appear to be a little presumptuous to conclude that the HRO are not to be used for the purposes of anti-dumping duties, knowing that one of the main factors which motivated the GATT/WTO to harmonize non-preferential rules of origin in the first place was the self-serving use of non-preferential rules of origin by a few countries with regard to anti-dumping procedures. From that standpoint, the "shortcoming" might have been rooted in the ambitious attempt of harmonization itself. If a particular WTO instrument needs its own set of rules of origin, another uniform set of rules of origin should be negotiated and used to meet those specific purposes, although a number of Members may consider that the HRO will be able adequately to meet the purposes concerned.

There have been differing ideas as to how the HRO would be presented. One option was to minimize the volume of Appendix 2 matrices. This could be achieved by setting out first the principal primary rule (e.g., CTH) at the Chapter Note level and enumerating a heading/subheading text only for exceptional cases (CTSH, etc.). Another option was the current presentation showing the entire HS headings and, where necessary, subheadings. According to the proponents of the latter option, this manner of presentation is the most user-friendly. It is anticipated that, when the HRO are finally agreed by the Ministerial Conference, the form of presentation in national legislation in their own languages will be left to the discretion of the Members. Where suitable, some countries may even wish to computerize and present the HRO together with the requirements of preferential rules of origin, e.g., a series of FTA rules of origin, heading by heading.

Lastly, it is important to note that transparency and consistency cannot be ensured without a clear standard. It could be said that the existence of a "far from perfect" standard is better than the absence of any standard whatsoever. When the HS was introduced in 1988, Customs officials and traders benefited from this "common language" for purposes of classification. It is anticipated that the implementation of the HRO will bring about the desired results. The key advantage of having the harmonized rules is that the rules in force in one country are also the rules applied in other countries. The fact that the draft HRO appears complex has prompted the WCO and WTO to take steps, even at an early stage, to provide technical assistance—especially to developing countries—to counter any perceived difficulties in the future implementation of the rules.[260]

Thus, it is desirable that the Harmonization Work Programme be completed as soon as possible so that the building stands.

[260] Inama analyses the situation that "applying a harmonized set of rules is a sophisticated and technical affair requiring a highly trained administration and an informed private sector"; consequently, the implementation burden falls on the developing countries. Stefano Inama, *Nonpreferential Rules of Origin and the WTO Harmonization Program*, Chapter 14, DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK (WORLD BANK 2002).

ANNEX 1

TCRO'S FINAL TEXT OF THE ARCHITECTURE OF THE HARMONIZED NON-PREFERENTIAL RULES OF ORIGIN
(As of May 28, 1999; Source: WCO Doc. OC0029)

CONTENTS

Definitions
General Rule 1 Scope of application
General Rule 2 Harmonized System
General Rule 3 Definitions (moved to the beginning of the Annex)
General Rule 4 Determination of origin
[General Rule 5 (proposed) De minimis]
General Rule 5 Minimal operations or processes
General Rule 6 Neutral elements
General Rule 7 Packing and packaging materials and containers
[General Rule 8 De minimis]
Appendix 1: Wholly-obtained Goods
Para. 1 Scope of application
Para. 2 Minimal operations or processes
Definitions 1(a) to (i) and [2]
Appendix 2: Product-Specific Rules of Origin
Rule. 1 Scope of application
Rule. 2 Determination of origin
[Principles of approach]
[Origin determination under Primary Rules : (a) to (c)]
[Origin determination under Residual Rules : (d) to (g) [(h)]]
Rule. 3 Rules of application
Rule. 4 Intermediate materials
Rule. 5 Special provisions
(a) Accessories and spare parts and tools
[(b) Fungible goods and materials]
(c) Putting up in sets [or kits]
[Rule. 6 De minimis]
Origin Criteria for Chapters 1–97 in Matrices

PROVISIONAL TEXT (APPENDIX 2, RULE 2) OF THE TCRO AS REVISED AT ITS 17TH SESSION

Rule 2 Determination of origin

[Principles of Approach]

[Origin Determination under Primary Rules

The country of origin shall be determined in accordance with the following provisions, applied in sequence;

(a) when a primary rule specifies that the origin of a good is the country in which the good was obtained in its natural or unprocessed state, the country of origin of the good shall be the country in which that good was obtained in that condition;

N.B. Reference to other Ottawa-type rules (where born, where raised, where grew) to be added when final decisions are made on product-specific rules;

(b) the country of origin of a good is the last country of production [provided] [where (IND)(PHI)(HK)(MAL)(BRA)] a primary rule applicable to the good was satisfied in that country;

[(c) (i) [when a good undergoes a non-origin-conferring operation, the origin of the good is the country from which the good originated immediately prior to such an operation.]

[(c) (ii)

alternative 1

[when no applicable primary rule was satisfied [in the last country of manufacture or processing— *deletion proposed by (PHI)*][and no applicable chapter residual rule was satisfied] but the good has been produced in that country by further processing of [a material or article] [an article] classified in the same provision as that of the good, the country of origin of the good is the country in which that [material or article] [article] originated, provided that any materials subsequently added to the [material or article][article] have undergone the change of classification or have otherwise satisfied any other requirement specified in the primary rule applicable to the good;]

alternative 2

[when the further processing of a good does not change the classification of the good, and any materials used in the further processing satisfy the primary rule for the good, the country of origin of the good is the country of origin prior to the further processing;]

alternative 3

[when no applicable primary rule was satisfied in the last country of manufacture or production [and no applicable chapter residual rule was satisfied] and the good was produced as a result of further processing which did not change its classification, the country of origin of the good is the country of origin prior to such further processing;]

[*Origin Determination under Residual Rules*

[(d) when no applicable primary rule has been satisfied [in the last country of production— *deletion proposed by (IND)*], the country of origin shall be determined as indicated in the applicable residual rule specified at the chapter level;]

(e) when no applicable primary rule was satisfied in the last country of manufacture or processing of the good [and no applicable chapter residual rule was satisfied— *deletion proposed by (PHI)*], and the good is produced from materials originating in a single country, the country of origin of the good is the country in which those materials originated;

[(f) when no applicable primary rule was satisfied [in the last country of manufacture or processing of the good—*deletion proposed by (PHI)*] [and no applicable chapter residual rule was satisfied], and the good is produced from materials originating in a single country that did not undergo the change of classification or otherwise satisfy the primary rule applicable to the good, the country of origin of the good is the country in which that material originated;]

Additional provision proposed for application before provision (g): [when the good is produced from originating or non-originating materials of more than one country and a primary rule has not been satisfied for the good, the country of origin of the good shall be the country of origin of the material that fulfills the major role with regard to the use of the good; (CAN)]

(g) when no applicable primary rule was satisfied [in the last country of manufacture or processing of the good—*deletion proposed by (PHI)*][and no applicable chapter residual rule was satisfied], and the good is produced from materials [(whether or not originating)] of more than one country [that did not undergo the change of classification or otherwise satisfy the primary rule applicable to the good—*deletion proposed by (IND*) *(CAN)*], the country of origin of the good shall be the country in which the major portion of those materials originated, as determined on the basis specified in each chapter.

[(h) the country of origin of the good shall be the last country of production. *(CAN)*]

ANNEX 2

CRO'S LATEST TEXT OF THE ARCHITECTURE OF THE HARMONIZED NON-PREFERENTIAL RULES OF ORIGIN
(As of June 25, 2002; Source: WTO Doc. G/RO/45/Rev.2)

CONTENTS

Definitions
General Rule 1 Scope of application
General Rule 2 Harmonized System
General Rule 3 Determination of origin
General Rule 4 Neutral elements
General Rule 5 Packing and packaging materials and containers
General Rule 6 Accessories and spare parts and tools
Appendix 1: Wholly-obtained Goods
Rule 1 Scope of application
Rule 2 Minimal operations and processes
Definitions 1(a) to (i) and [2]
Appendix 2: Product-Specific Rules of Origin
Rule 1 Scope of application
Rule 2 Application of rules
Rule 3 Determination of origin
Primary Rules : (a) to (b)
Residual Rules : (c) to (g)
Rule 4 Intermediate materials
Rule 5 [Interchangeable goods and materials]
Rule 6 Putting up in sets [or kits]
[Rule 7 De minimis]
Origin Criteria for Chapters 1–97 in Matrices

INTEGRATED NEGOTIATION TEXT FOR THE HARMONIZATION WORK PROGRAMME

OVERALL ARCHITECTURE

Note by the Secretariat

This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO

Revision

1. At its meeting on 10 May 1996, the Committee on Rules of Origin (CRO) decided to establish an Integrated Negotiating Text (INT) for the Harmonization Work Programme. The first INT was circulated in document G/RO/W/13 (24 May 1996), and had been periodically updated (G/RO/W/13/Rev.1–3, G/RO/W/13/Rev.3/Add.1 and 2). A further consolidated INT was circulated in document G/RO/41(3 September 1999), and has also been periodically updated (JOB(99)/5869, JOB (99)/7617, JOB(00)/1573, JOB(00)/3230, JOB(00)/5207 and JOB(00)/7194).
2. The attached document is the latest update of the negotiating text of the overall architecture and reflects the progress made by the CRO in April 2002.

HARMONIZED NON-PREFERENTIAL RULES OF ORIGIN

— Where no square bracket is placed in the text, it is understood that a general consensus has been reached on the text, subject to the overall coherence examination.

DEFINITIONS

References to "manufacturing", "producing" or "processing" goods include any kind of working, assembly or processing operation.

Methods of obtaining goods include manufacturing, producing, processing, raising, growing, breeding, mining, extracting, harvesting, fishing, trapping, gathering, collecting, hunting and capturing.

"Material" includes ingredients, parts, components, subassemblies and goods that were physically incorporated into another good or were subject to a process in the production of another good.

"Originating material" means a material whose country of origin, as determined under these rules, is the same country as the country in which the material is used in production.

"Non-originating material" means a material whose country of origin, as determined under these rules, is not the same country as the country in which that material is used in production.

"Customs Valuation Agreement" means the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

GENERAL RULES

General Rule 1: SCOPE OF APPLICATION

Rules of Origin provided in this Annex shall be as defined in Article 1, paragraph 1 of the Agreement on Rules of Origin annexed to the Agreement Establishing the World Trade

Organization (WTO), and shall be applied for the purposes set out in Article 1, paragraph 2 of the Agreement on Rules of Origin.

General Rule 2: HARMONIZED SYSTEM

References to headings and subheadings are references as they appear in the Harmonized Commodity Description and Coding System (hereinafter referred to as "Harmonized System" or "HS") as amended and in force. Classification of goods within headings and subheadings of the Harmonized System is governed by the General Interpretative Rules and any relative Section, Chapter and Subheading Notes to that System. Classification of goods within any additional subdivisions created for purposes of the rules of origin shall also be governed by the General Interpretative Rules and any relative Section, Chapter and Subheading Notes to the Harmonized System, unless the rules of this Annex otherwise require.

Chairman's proposed text for a possible paragraph 2:

The possible effects of amendments to the HS on harmonized non-preferential rules of origin shall be examined according to the review mechanism referred to in Article 6(3) of the ARO.

Alternative text:

When amendments to the Harmonized System are recommended by the CCC, their possible effect on [the results of origin determinations under— *brackets requested by IND and PHI*] the harmonized non-preferential rules of origin shall be examined by the CRO. Any amendments of the rules of origin resulting from such an examination shall take effect on the date approved by the Ministerial Conference.

General Rule 3: DETERMINATION OF ORIGIN

The country of origin of a good shall be determined in accordance with these General Rules and in accordance with the provisions of Appendix 1 and Appendix 2, applied in sequence.

General Rule 4: NEUTRAL ELEMENTS

[Unless otherwise provided in this Annex, *(MOR) (TUN)*] in order to determine whether a good originates in a country, the origin of the power and fuel, plant and equipment, including safety equipment, or machines and tools used to obtain a good or the materials used in its manufacture which do not remain in the good or form part of the good shall not be taken into account.

Consensus on the unbracketed text was confirmed. However, one delegation requested that the bracketed text be included in the provision until a complete picture was obtained.

General Rule 5: PACKING AND PACKAGING MATERIALS AND CONTAINERS

Unless the provisions of Appendix 1 or Appendix 2 otherwise require, the origin of packing and packaging materials and containers presented with the goods therein shall be disregarded in determining the origin of the goods under General Rule 3, provided such packing and packaging materials and containers are classified with the goods under the Harmonized System. The packing and packaging materials and containers which are not classified with their contents are separate goods, thus their origin shall be determined in accordance with the appropriate rules set forth in Appendix 1 and Appendix 2.

Consensus had already been reached at the previous session. However, one delegation requested that the alternative text be contained in the box until a complete picture was obtained.

Alternative text:

A. The origin of packing and packaging materials and containers presented with the goods therein shall be disregarded in determining the origin of the goods under General Rule 3, provided such packing and packaging materials and containers are classified with the goods under the Harmonized System,

B. When a container is presented with its contents and the container gives the whole its essential character so that the contents are classified with the container, the origin of the whole shall be determined on the basis of the origin of the container, as set forth in Appendix 1 and Appendix 2, and

C. When packing, packaging materials or containers and their contents are classified separately under the Harmonized System, their origin shall be separately determined in accordance with the appropriate rules set forth in Appendix 1 and Appendix 2.

Reason: The current text of General Rule 5 does not take into account the situation where a container gives the whole its essential character and the container with its contents are classified under the provision for the container. Attention is called to the last sentence of HS General Interpretative Rule 5(a). Draft General Rule 5(b), above, is intended to remedy that situation.

General Rule 6: ACCESSORIES AND SPARE PARTS AND TOOLS

Accessories, spare parts, tools and instructional or other informational material classified and presented with a good shall be disregarded in determining the origin of that good under General Rule 3, provided they are normally sold therewith and correspond, in kind and number, to the normal equipment thereof.

° ° °

APPENDIX 1—Wholly-obtained Goods

1. Rule 1: Scope of Application

This Appendix sets forth the definitions of the goods that are to be considered as being wholly-obtained in one country.

2. Rule 2: Minimal Operations and Processes

Operations or processes undertaken, by themselves or in combination with each other for the purposes listed below, are considered to be minimal and shall not be taken into account in determining whether a good has been wholly-obtained in one country:

(i) ensuring preservation of goods in good condition for the purposes of transport or storage;
(ii) facilitating shipment or transportation;
(iii) packaging or presenting goods for sale.

Consensus on this rule was confirmed. It was agreed that the possibility of application of this rule to Appendix 2 should be reconsidered at a later stage when the work was virtually completed.

Definitions	Notes
1. The following goods are to be considered as being wholly-obtained in one country:	
(a) Live animals born and raised in that country;	In Definitions 1 (a), (b), and (c) the term "animals" covers all animal life, including mammals, birds, fish, crustaceans, molluscs, reptiles, bacteria and viruses.
(b) Animals obtained by hunting, trapping, fishing, gathering or capturing in that country;	Definition 1 (b) covers animals obtained in the wild, whether live or dead, whether or not born and raised in that country.
(c) Products obtained from live animals in that country;	Definition 1 (c) covers products obtained from live animals without further processing, including milk, eggs, natural honey, hair, wool, semen and dung.
(d) Plants and plant products harvested, picked or gathered in that country;	Definition 1 (d) covers all plant life, including fruit, flowers, vegetables, trees, seaweed, fungi and live plants grown in that country.
(e) Minerals and other naturally occurring substances, not included in Definitions (a)–(d), extracted or taken in that country;	Definition 1 (e) covers crude minerals and other naturally occurring substances, including rock or solar salt, crude mineral sulphur occurring in free state, natural sands, clays, stones, metallic ores, crude oil, natural gas, bituminous minerals, natural earths, ordinary natural waters, natural mineral waters, natural snow and ice.
(f) Scrap and waste derived from manufacturing or processing operations or from consumption in that country and fit only for disposal or for the recovery of raw materials;	Definition 1(f) covers all scrap and waste, including scrap and waste resulting from manufacturing or processing operations or consumption in the same country, scrap machinery, discarded packaging and household rubbish and all products that can no longer perform the purpose for which they were produced, and are fit only for discarding or for the recovery of raw materials. Such manufacturing or processing operations include all types of processing, not only industrial or chemical but also mining, agricultural, construction, refining, incineration and sewage treatment operations.
(g) Articles collected in that country which can no longer perform their original purpose there nor are capable of being restored or repaired and which are fit only for disposal or for the recovery of parts or raw materials;	
(h) Parts or raw materials recovered in that country from articles which can no longer perform their original purpose nor are capable of being restored or repaired;	
(i) Goods obtained or produced in that country solely from products referred to in (a) through (h) above;	

	Definitions	Notes
	Alternative Text 1 (EC)	
[(2)]	[(i) Products of sea-fishing and other products taken from the sea, outside the territorial sea of a country, are considered to be wholly-obtained in the country whose flag the vessel that carries out those operations is entitled to fly. (ii) Goods obtained or produced on board a factory ship outside the territorial sea of a country are considered to be wholly-obtained in the country whose flag the ship that carries out those operations is entitled to fly, provided that these goods are manufactured from products referred to in subparagraph (i) originating in the same country. (iii) Products taken from the seabed or subsoil beneath the seabed, outside the territorial sea of a country, are considered to be wholly-obtained in the country that has the rights to exploit that seabed or subsoil in accordance with the provisions of the UN Convention on the Law of the Sea.] ([JPN], [MOR], [NOR], [US], [CAN], [KOR])	[For the purposes of point (2), the term "territorial sea of a country" is that as referred to in the United Nations Convention on the Law of the Sea.]
	Japan's alternative text for (iii) [(iii) Products taken from the continental shelf of a country are considered to be wholly-obtained in the coastal state, and the products taken from the seabed or subsoil beneath the seabed beyond the limits of the jurisdiction of a country are considered to be wholly-obtained in the country that has the right to exploit that seabed or subsoil in accordance with the provisions of the UN Convention on the Law of the Sea.]	
	Alternative Text 2 (Argentina)	
[(2)]	[(i) Products of sea-fishing and other products taken from waters beyond the sovereignty and jurisdiction of a State are considered to be wholly-obtained in the country whose flag the vessel that carries out those operations is entitled to fly. (ii) Goods obtained or produced on board a factory ship in the high seas are considered to be wholly-obtained in the country whose flag the ship is entitled to fly, provided that those goods are manufactured from the products referred to in subparagraph (i) above and according to that same subparagraph originating in the same country.	[In conformity with the 1982 UN Convention on the Law of the Sea (UNCLOS), the coastal State has customs jurisdiction in the Contiguous Zone. Thus any operation therein performed should be considered as carried out in that State.

	Definitions	Notes
	(iii) Mineral products obtained from the seabed and subsoil beyond the limits of national jurisdiction (the Zone) are considered: (a) obtained wholly in the State that has exploitation rights, granted by the International Seabed Authority, (b) obtained wholly in the sponsoring State of natural or juridical persona which has exploitation rights, granted by the Seabed Authority.]	No provision of this paragraph/part shall be interpreted in contradiction of the provisions of the 1982 Convention on the Law of the Sea.]
	Alternative Text 3	
[(2)]	[(i) Products of sea-fishing and other products taken from the sea outside a country are considered to be wholly-obtained in the country of registration of the vessel that carries out those operations. (ii) Goods obtained or produced on board factory ships are considered to be wholly-obtained in the country of registration of the factory ship, provided that those goods are manufactured from the products referred to in subparagraph (i) originating in the same country. (iii) Products taken from the seabed or subsoil beneath the seabed outside a country are considered to be wholly-obtained in the country that has the rights to exploit that seabed or subsoil.] [COL]	[The term "registration" in Definition 2(i) and (ii) includes registration that a country grants to chartered vessels or factory ships, provided this registration is in accordance with the requirements of that country.]
	Alternative Text 4 (Brazil)	
[(2)]	[(i) Products of sea-fishing and other products taken from the sea outside the exclusive economic zones, over which the coastal State has jurisdiction, are considered to be wholly-obtained in the country whose flag the vessel that carries out those operations is entitled to fly. (ii) Goods obtained or produced on board factory ships in the high seas are considered to be wholly-obtained in the country whose flag the ship is entitled to fly, provided that those goods are manufactured from the products referred to in subparagraph (i) originating in the same country. (iii) Products taken from the seabed or subsoil beneath the limits of the continental shelf of a coastal State are considered to be wholly-obtained in the country that has the rights to exploit that seabed or subsoil.]	[1. The term "flag" in Definition (i) and (ii) includes the registration that a country grants to chartered vessels or factory ships, provided this registration is in accordance with the requirements of that country. 2. Use of terms and scope for the purposes of this point (2) as defined in accordance with the provisions of the United Nations Convention on the Law of the Sea.]
	Alternative Text 5 (Philippines)	
[(2)]	[(i) Products of sea-fishing and other products taken from waters beyond the sovereignty and jurisdiction of a State are considered to be wholly-obtained in the country of registration of the vessel that carries out those operations.	

Definitions	Notes
(ii) Goods obtained or produced on board a factory ship from waters beyond the sovereignty and jurisdiction of a State are considered to be wholly-obtained in the country of registration of the factory ship that carries out those operations, provided that these goods are manufactured from products referred to in subparagraph (i) originating in the same country. (iii) Products taken from the seabed or subsoil beneath the seabed in waters beyond the sovereignty and jurisdiction of a State, are considered to be wholly-obtained in the country that has the rights to exploit that seabed or subsoil in accordance with the provisions of the UN Convention on the Law of the Sea.]	
Alternative Text 6 (India)	
[(2)] [(i) Products of sea-fishing and other products taken from the sea outside the territorial sea of a country but within its exclusive economic zone, are considered to be wholly-obtained in that country. (ii) Goods obtained or produced on board a factory ship, outside the territorial sea of a country but within its exclusive economic zone, are considered to be wholly-obtained in the country, provided that these goods are manufactured from products referred to in subparagraph (i) originating in the same country. (iii) Products of sea-fishing and other products taken from waters in the high seas are considered to be wholly-obtained in the country whose flag the vessel that obtains such products is entitled to fly. (iv) Goods obtained or produced on board a factory ship in the high seas are considered to be wholly-obtained in the country whose flag the ship is entitled to fly, provided that those goods are manufactured from the products referred to in subparagraph (iii) originating in the same country. (v) Products taken from the seabed, ocean floor or subsoil thereof, outside the territorial sea but within the continental shelf of a country, are considered to be wholly-obtained in that country. (vi) Products taken from the seabed, ocean floor or subsoil thereof beyond the limits of national jurisdiction, are considered to be wholly-obtained in the country that has the rights to exploit that seabed, ocean floor or subsoil thereof.]	The terms “territorial sea of a country”, “exclusive economic zone”, “continental shelf” and “high seas” have the same meaning as in the United Nations Convention on the Law of the Sea.

° ° °

APPENDIX 2—Product-Specific Rules of Origin

Rule 1: Scope of Application

This Appendix sets forth rules for determining the country of origin of a good when the origin of the good is not determined under Appendix 1.

Rule 2: Application of Rules

(a) The rules provided in this Appendix are to be applied to goods based upon their classification in the HS and any additional subdivisions created thereunder, as referred to in General Rule 2 of this Annex.
(b) All primary rules contained in this Appendix are co-equal.
(c) [Unless otherwise specified], primary rules shall apply only to non-originating materials.
(d) [Where the primary rules require a change in classification, the following changes in classification shall not be considered in determining the origin of the good :
- changes which result from disassembly;
- changes which result from packaging or repackaging;
- changes which result solely from application of General Rule of Interpretation 2 (a) of the HS with respect to collections of parts that are presented as unassembled or disassembled articles.
- changes which result from merely putting up in sets.

However, such changes shall not preclude conferring origin on a good if origin is conferred as a result of other operations.]
(e) Where none of the primary rules are satisfied, origin shall be determined according to Rule 3 (c) through (f)[(g)] of this Appendix.

Consensus was confirmed on Rule 2(a).
As regards Rule 2(b), the concept of the co-equality of primary rules was acceptable to all Members. Further fine-tuning of the text would be needed at a later stage when the work was virtually completed.
As regards Rule 2(c), consensus was achieved (subject to HK): The bracketed text would be reconsidered when a complete picture was obtained.
As regards Rule 2(d), it was agreed that this rule be reconsidered at a later stage when the work was virtually completed.
As regards Rule 2(e), no objection was raised.

Rule 3: Determination of origin

The country of origin shall be determined in accordance with the following provisions, applied in sequence:

Primary Rules

(a) [The country of origin of a good is the country designated as such in the applicable primary rule.](EC) [NOR](JPN)
[When a primary rule specifies that the origin of a good is the country in which the good was obtained in its natural or unprocessed state, the country of origin of the good shall be the [single (IND)] country in which the good was obtained in that condition;] (IND)
[When a primary rule requires that the country of origin of a good is the country in which:
(i) the good was obtained in its natural or unprocessed state, the country of origin of the good shall be the single country in which the good was obtained in that condition; or
(ii) a specifically designated stage of production was attained, the country of origin of the good shall be the single country in which such stage of production was attained;] (US)

[The country of origin is the country determined as such by the application of the primary rule] (CAN)[NOR]

(b) The country of origin of a good is the last country of production, provided that a primary rule applicable to the good was satisfied in that country[258];

Residual Rules:

(c) [When a good is produced by further processing of an article which is classified in the same subdivision[259] as the good, the country of origin of the good shall be the single country in which that article originated;]

[When a good undergoes one or more operations that do not result in a change in its classification, the origin of the resulting good is the single country from which the good originated immediately prior to such operations, provided that any material that might have been added satisfies any change of tariff classification rule applicable to the good;]

(d) The country of origin of the good shall be determined as indicated in the applicable residual rule specified at the chapter level;

(e) When the good is produced from materials all of which originated in a single country, the country of origin of the good shall be the country in which those materials originated;

(f) [When the good is produced from materials (whether or not originating) of more than one country, the country of origin of the good shall be the country in which the major portion of those materials originated, as determined on the basis specified in each chapter, [and in the event of two or more countries equally contributing major portions of those materials, the good shall be assigned a multi-country origin;]] (IND)

[When the good is produced from materials (whether or not originating) of more than one country, the country of origin is the single country of origin of the materials that did not satisfy a primary rule applicable to the goods;] (US)

[When the good is produced from materials of more than one country, the country of origin of the good shall be the country in which the major portion of the non-originating materials originated, as determined on the basis specified in each chapter. However, when the originating materials represent at least 50 percent of all the materials used, the country of origin of the good shall be the country of origin of those materials;] (EC)

(g) [When the good is produced from materials (whether or not originating) of more than one country that did not satisfy the primary rule applicable to the good, the country of origin of the good shall be the country in which the major portion of those materials originated, as determined on the basis specified in each chapter]. (US)

As regards Rule 3(a), one Member made a new proposal. Members stated that they needed more time to study this proposal. Another Member suggested reversing the order of Rules 3(a) and 3(b).

As regards Rules 3(b), (c) and (f), there was a general agreement among Members on the basic approach to Rule 3, namely, the application of primary rules in the last country of production as the first test, the application of the origin-retaining concept as the second test, and the application of major portion concept as a final test. The gap among the various approaches would become more bridgeable at a later stage when a complete picture was obtained.

Consensus was confirmed on Rules 3(d) and (e). However, it was noted that Rule 3(e) might not be necessary, since the application of Rules 3(f) and (g) would result in the same origin outcome.

[258] This applies also to primary rules requiring that the country of origin of a good is the country in which the good was obtained in its natural or unprocessed state. (PHI)

[259] The term "subdivision" relates to the [lowest] level of classification of the good, i.e. heading, subheading or split (sub)heading, as specified in Appendix 2.

Rule 4: Intermediate materials

[Except as otherwise provided in the Appendix, (US)] materials which have acquired originating status in a country are considered to be originating materials of that country for the purpose of determining the origin of a good incorporating such materials, or of a good made from such materials by further working or processing in that country.

The principle of this provision was acceptable to all Members. However, one delegation confirmed its request for the initial bracketed text to be included in the provision until a complete picture was obtained. Another delegation requested that the box should contain an indication whereby the originating status was acquired by fulfilling a primary rule or chapter residual rule.

Rule 5: [Interchangeable goods and materials]

[Where it is not commercially practical to keep separate stocks of interchangeable materials or goods originating in different countries, the country of origin of each of the commingled materials or goods may be allocated on the basis of an inventory management method recognized in the country in which the materials or goods were commingled. The use of this system shall not give rise to more products originating in a specific country than would have been the case had the commingled materials or goods been physically segregated.]

Some Members questioned the meaning of the interchangeable goods and what type of goods or materials were covered by this Rule. Accordingly, proponents of the Rule were requested to improve the text.

Rule 6: Putting up in sets [or kits (CAN)(NZ)(CH)(IND)]

Chairman's proposal

A distinction must be made between the following types of sets:

1. Sets which are explicitly mentioned in the HS (e.g. 82.14—manicure sets; 3006.50—first aid boxes and kits; 96.05—travel sets for personal toilet);
2. Goods which are classified as sets by application of GIR 3(b) or (c);
3. Goods merely put together that are not classified as sets by either GIR 3(b) or (c) or within the HS.

There are three possible options:

A. [US] Unless otherwise provided in this Appendix, goods put up in sets shall retain the origin of the individual articles in the set.

B. [IND] Goods put up in sets or kits shall retain the origin of the individual articles except when such goods are explicitly mentioned as sets or kits in a heading or subheading of the HS or are classified as sets or kits by application of GIR 3(b) of the HS, in which case the origin of the set or kit shall be the country where it is put up.

C. Merely putting articles into sets is not origin-conferring: with this option there is no need for a specific provision for sets, although it might be advisable to have this element included in the new rule 2(b)/old rule 3 (Application of Rules): the rule in this case might read "a CTH resulting from merely putting up in sets is not considered as origin-conferring". (MEX)

There is growing consensus on option C. As option C implies some further quest in the rules, following are the various possibilities:

[JPN][EC](CAN)(CH) There is no need to have a specific rule for sets. The country of origin of a set put up from articles that originate in more than one country shall be determined according to Residual Rule 3(f).

There was growing consensus that putting up in sets was not origin-conferring, and that there was no need for a specific rule as well as for reference in Rule 2(d) of Appendix 2. Three delegations reserved their positions.

[Rule 7: De minimis]

For the application of the primary rule, non-originating materials that do not satisfy the rule shall be disregarded, provided that the totality of such materials does not exceed [10 percent] in value, weight or volume, as specified in each chapter, of the good.

There was general support for this Rule. Some Members stated that the nature of this Rule should be optional for producers (although this Rule itself should be mandatory for all Members).

CHAPTER 16

THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Peggy A. Clarke and Gary N. Horlick*

TABLE OF CONTENTS

I. Introduction 681
II. Historical Perspective 681
A. GATT Subsidy Discipline 681
B. The 1979 GATT Subsidies Code 682
C. The Uruguay Round Negotiations 684
III. The Agreement on Subsidies and Countervailing Measures 686
Part I—General Provisions 687
Article 1: Definition of a Subsidy 688
1. Financial Contribution 689
2. A Benefit is Conferred Thereby 692
Article 2: Specificity 694
1. Subsidies Limited to Certain Enterprises 694
2. Regional Subsidies 695
Export and Import Substitution Subsidies 696
Part II: Prohibited Subsidies 696
Article 3: Prohibition 696
Article 4: Remedies for Prohibited Subsidies 699
Part III: Actionable Subsidies 701
Article 5: Adverse Effects 701
Article 6: Serious Prejudice 701
Article 7: Remedies 703
Part IV: Non-Actionable Subsidies 704
Article 8: Identification of Non-Actionable Subsidies 704
Article 9: Consultations and Authorized Remedies 706
Part V: Countervailing Measures 707
Article 10: Application of Article VI of GATT 1994 707
Article 11: Initiation and Subsequent Investigation 708
Article 11.1 and 2: Application for Imposition of Countervailing Measures 708
Article 11.3: Obligation to Review Evidence Prior to Initiation 709

* Ms. Clarke and Mr. Horlick are partners at Wilmer Cutler, Pickering, Hale and Dorr, LLP. Mr. Horlick was the first Chairman of the WTO's Permanent Group of Experts, established under Art. 25 of the ASCM. The authors wish to express their appreciation for the contributions of Kevin J. Cuddy, Andrea G. Staebler, and Sean McElduff, without whose assistance this chapter would not exist. The opinions expressed herein are solely those of the authors.

Article 11.4: Standing 710
Article 11.5–11.11: Initiation and Subsequent Investigation 711
Article 12: Evidence 712
Article 13: Consultations 715
Article 14: Calculation of the Amount of a Subsidy 716
Article 15: Determination of Injury 717
Article 16: Definition of Domestic Industry 717
Article 17: Provisional Measures 718
Article 18: Undertakings 719
Article 19: Imposition and Collection of Countervailing Duties 720
Article 20: Retroactivity 721
Article 21: Duration and Review of Countervailing Duties and Undertakings 722
Article 22: Public Notice and Explanation of Determinations 724
Article 23: Judicial Review 725
Part VI: Institutions 725
Article 24: Committee on Subsidies and Countervailing Measures and Subsidiary Bodies 725
Part VII: Notification and Surveillance 726
Article 25: Notifications 726
Article 26: Surveillance 727
Part VIII: Developing Country Members 727
Article 27: Special and Differential Treatment of Developing Country Members 727
Part IX: Transitional Arrangements 729
Article 28: Existing Programmes 729
Article 29: Transformation into a Market Economy 730
Part X: Dispute Settlement 730
Article 30: Dispute Settlement 730
Part XI: Final Provisions 731
Article 31: Provisional Application 731
Article 32: Other Final Provisions 731
IV. Conclusion 734

I. Introduction

The Agreement on Subsidies and Countervailing Measures ("ASCM" or "Agreement") interprets and expands on the subsidies and countervailing duty portions of Article VI and Article XVI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). It provides disciplines both over the use of subsidies that may distort trade and over the application of countervailing duties by individual Members of the WTO designed to offset the effect of subsidies. This chapter provides a detailed overview of the rights and obligations established by the ASCM and its interaction with other portions of the WTO Agreement. It will briefly discuss the history of subsidies and countervailing measures since the initiation of the GATT in 1947 and will then discuss each provision of the ASCM in detail. A separate chapter in this book (Chapter 17) discusses injury determinations in anti-dumping and countervailing duty investigations, as governed by the ASCM and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, also known as the Anti-dumping Agreement or ADA.

II. Historical Perspective

A. GATT Subsidy Discipline

In 1947 when the General Agreement on Tariffs and Trade ("GATT 1947") was signed, the Contracting Parties recognized that countervailing duties could constitute non-tariff barriers to trade. Accordingly, Article VI of the GATT 1947 set out rules on the use of countervailing duties, as well as anti-dumping duties, to prevent such measures from becoming non-tariff barriers on their own. These rules included the following:

- The duty could not be in excess of the estimated bounty or subsidy determined to have been granted (Article VI:3);
- No countervailing duties could be imposed by reason of exemption from, or refund of, taxes paid when destined for consumption in the home market (Article VI:4);
- No product should be subject to both anti-dumping and countervailing duties for the same situation of dumping or export subsidization (Article VI:5);
- No duty could be imposed unless it was found that the effect of the subsidization is to cause or threaten to cause material injury to an established industry, or to materially retard the establishment of such industry, in the country of importation (Article VI:6).[1]

The GATT Contracting Parties also recognized that subsidies or dumping could cause distortions to trade and could nullify or impair benefits negotiated in the GATT 1947.[2] However, the GATT 1947 addressed only subsidies that operate "directly or indirectly to increase exports,"[3] and merely required contracting parties to notify the GATT of any such subsidies, and to discuss with other Contracting Parties the possibility of limiting them where they caused or threatened serious prejudice to the interests of those contracting

[1] This requirement was weakened by the fact that the Protocol of Provisional Application to the GATT 1947 allowed the grandfathering of pre-existing laws. Because the United States already had a countervailing duty law that did not require an injury finding, the United States took the position that Article VI:6 of the GATT 1947 did not require it to conduct an injury investigation before imposing countervailing duties.

[2] The very first GATT subsidies case so held. *See* Report of the GATT Working Party, *The Australian Subsidy on Ammonium Sulphate*, CP.4/39, BISD, Vol. II 188 (1950).

[3] *See* GATT 1947, Art. XVI:1.

parties (Article XVI:1). There was some effort to discipline the use of *export* subsidies (although unlike "dumping" the term, "export subsidy" is not defined).[4] Article XVI:4 of the GATT 1947 provided for a standstill, noting that no Contracting Party shall extend the scope of subsidization of any non-primary product beyond that existing as of January 1, 1955. Article XVI:4 also anticipated that an agreement to abolish all remaining subsidies by January 1, 1958 would be reached by the end of 1957, or if not, that the standstill should be extended until such time as an agreement was reached.[5] However, no such agreement was reached and the Contracting Parties adopted an annual standstill agreement only until 1962.[6]

Despite the goal of reaching agreement on the elimination of export subsidies by the end of 1957, subsidies and countervailing duties were not the subject of further extensive negotiation until the Tokyo Round, which concluded in 1979.[7]

B. The 1979 GATT Subsidies Code[8]

By the time of the Tokyo Round of tariff negotiations, the use of subsidies and countervailing duties had become a more contentious issue. In part as a result of the lowering of tariffs, the use of non-tariff barriers and the impact of subsidies raised the level of interest in developing discipline over the use of both subsidies and countervailing duty procedures.[9]

While countries such as the United States sought greater discipline on the use of subsidies, there was significant counter-pressure to apply greater discipline to the imposition of countervailing duties, in particular to require the application of an injury test to all imports.

[4] *Compare* GATT 1947, Art. VI:1 *with* GATT 1947 Art. XVI:1.

[5] GATT 1947, Ad Art. XVI:4. The standstill was periodically extended. *See, e.g.*, GATT Declaration, *Extension of the Standstill Provisions of Article XVI:4*, BISD, 9th Supp. 33 (1960).

[6] In 1962, a declaration applying the obligations of Article XVI:4 was opened for signatures. However, for numerous reasons, many Contracting Parties were unwilling to sign the declaration. Thus, until the WTO Agreement, Article XVI:4 commitments were only binding on the few Contracting Parties that had signed onto the 1962 declaration.

[7] An Experts Group was formed in 1959 to consider the use of anti-dumping and countervailing duties; however, due to time constraints, the Group limited itself to anti-dumping duties. *See* Report of the GATT Working Group, *Anti-Dumping and Countervailing Duties*, L/978, BISD, 8th Supp. 145 (1959). In 1960, a GATT Working Party established an illustrative (non-exhaustive) list of export subsidies. *See* Report of the GATT Working Party, Provision of Article XVI:4, BISD, 9th Supp. 185 (1960). In contrast, dumping and anti-dumping duties had been the subject of serious negotiations, and an agreement in the Kennedy Round. *See* KENNETH W. DAM, THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION, pp. 174–177 (1970), and Chapter 11 of this book. After the Kennedy Round, the Contracting Parties again tried to address the subsidy issue. In December 1967, a GATT Working Party was formed. However, in large part due to a dispute between the United States and the European Communities, no agreement could be reached on the terms of reference and the Working Party never met. *See The Tokyo Round of Multilateral Trade Negotiations,* Report by the Director-General of the GATT at 55 (1979).

[8] *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*, BISD, 26th Supp. 56 (1980) ("*1979 Subsidies Code*").

[9] Additionally, in the early 1970s the United States expanded the coverage of its countervailing duty laws to include goods that entered the U.S. on a duty-free basis. Because these goods previously had not been subject to countervailing duties, the United States could not claim the protection of the Protocol of Provisional Application. In conformity with its GATT obligations, it therefore required an injury finding before duty-free goods could be subject to countervailing duties. As noted above, the United States, the main user of countervailing duty procedures, did not apply the injury test generally because it claimed the grandfathering of its existing laws under the Protocol of Provisional Application.

At the end of the Tokyo Round, the GATT Director General stated:

> The issue of government subsidies, and the countervailing duties that are applied to offset them, has been one of the most difficult, sensitive and important of the Tokyo Round negotiations. Production and export subsidies have had a growing and distorting influence on international trade, often protecting inefficient production at the expense of competitive industries. The use of countervailing duties has grown proportionately, and resort to both measures has been encouraged by increasing protectionist pressures over the past few years.[10]

The outcome was the 1979 Subsidies Code, which contained a "two-track" approach. The first track instituted disciplines for imposing countervailing duties, including detailed requirements for an injury finding,[11] while the second track contained disciplines on the use of subsidies. The discipline on the use of subsidies continued to reflect the considerable disagreement among the Contracting Parties regarding the benefits and costs of subsidies. The Code prohibited the use of export subsidies.[12] However, that prohibition did not apply to export subsidies for primary products (which, therefore, exempted agricultural products from any prohibition on the use of export subsidies) and developing countries were also exempted from the prohibition.[13]

Annex I to the Subsidies Code provided an "Illustrative List" of potential export subsidies. In addition, Article 11 contained the first statements on the use of domestic subsidies. This Article is notorious for its ambiguity, reflecting the division of views among the Contracting Parties. Article 11 noted that on the one hand there are many legitimate policy reasons for granting domestic subsidies, but that on the other hand there is recognition that such subsidies may nullify and impair benefits accruing to Contracting Parties under the GATT.

Article 11.3 contained the language that led to the practice of requiring a finding of specificity with respect to domestic subsidies before such subsidies could be countervailed.[14] It noted that the aims identified in paragraph 1 may be obtained by means of subsidies granted with the aim of giving advantages to "certain" enterprises, either by granting such subsidies regionally or by sector. It also contained an illustrative, but non-exhaustive, list of the forms such subsidies might take. This

[10] General Agreement on Tariffs and Trade, *Multilateral Negotiations*, *Statement by GATT Director-General on Tokyo Round*, *reprinted in* 18 I.L.M. 553, 569 (1979).

[11] The injury requirements were negotiated as part of the negotiations on the Anti-dumping Agreement and the language negotiated there was transferred into the Subsidies Code. The United States ultimately took the position in its national legislation implementing the Tokyo Round Agreements that it need only extend the injury test to products from countries that were signatories to the 1979 Subsidies Agreement, rather than to all Contracting Parties, or to countries that made similar commitments to the United States. This was challenged by India as a denial of Most Favored Nation ("MFN") treatment, but the dispute was settled without a ruling or change in practice. *See* ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM, (1993). *See also,* Report of the GATT Panel (adopted), *United States—Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear from Brazil*, DS18/R, BISD, 39th Supp. 128, 153–154 (1992) (finding no justification for retroactively applying an injury test to duty-free merchandise but not to dutiable merchandise, and, therefore finding a violation of GATT Article I:1 MFN requirements).

[12] 1979 Subsidies Code, Art. 9.

[13] Article 10 did however establish certain limits on the use of export subsidies with respect to primary products. Specifically, parties agreed not to grant export subsidies on primary products in a manner that resulted in that Contracting Party's primary product "having more than an equitable share of world export trade in such product." *Id.*, Art. 10.1. *See also, id.*, Art. 14.2.

[14] The specificity issue is discussed in detail in the commentary on Article 2 of the ASCM, *infra.*

provided substantial latitude to define what constituted a subsidy for countervailing duty purposes.

The 1979 Subsidies Code contained little effective discipline on subsidies. It provided for consultations[15] or resort to conciliation and general dispute settlement. In addition, any panel findings could be blocked by the losing party and frequently were (particularly in the later years prior to the entry into effect of the WTO Agreement).

Because subsidies were an area of considerable controversy, few countries ultimately signed onto the 1979 Subsidies Code, which only applied to those Contracting Parties to the GATT 1947 that specifically agreed to it.[16]

C. The Uruguay Round Negotiations

It soon became clear that the 1979 Subsidies Code had not resolved the problems of subsidies and countervailing measures. In 1985, the GATT Secretariat released a "Report of Eminent Persons on Problems Facing the International Trade System."[17] In this Report, the Eminent Persons stated that the increasing use of subsidies and the abuse of countervailing measures (as well as the growth in "voluntary export restraints") had resulted in the failure of the world economy to benefit from the promises of trade liberalization arising from the Tokyo Round. They also stated that the 1979 Subsidies Code had proven inadequate.[18] One particular need with respect to subsidies noted by the report was the need for a clear definition of what was included within the term "subsidy."[19]

As a result, the Uruguay Round of negotiations was launched with a mandate to improve "GATT disciplines relating to all subsidies and countervailing measures that affect international trade."[20] The main objective was "to restore the equilibrium of rights and obligations in terms of equivalent disciplines regarding subsidies on the one hand and countervailing measures on the other . . . "[21] The main concern was to improve disciplines in order to eliminate distortions to trade caused either by the use of subsidies or the unilateral application of countervailing measures. At the first meeting of the negotiating group, numerous concerns were identified. These were summarized in the minutes of that meeting, as follows:

> Several delegations considered that the international disciplines over the use of subsidies in world trade had faded and that there was little or no consensus over the meaning of vital provisions of the GATT and the Subsidies Code (hereinafter called "the Agreement"). Some rules were so vague as to invite differences of interpretation, some others were so

[15] *Id.*, Art. 12.

[16] The signatories to the 1979 Subsidies Code (both the original signatories and those who signed later) were: Argentina, Australia, Austria, Brazil, Canada, Chile, Colombia, Egypt, the European Economic Community, Finland, Hong Kong, India, Indonesia, Israel, Japan, Korea, New Zealand, Norway, Pakistan, Philippines, Sweden, Switzerland, Turkey, United States, and Uruguay.

[17] General Agreement on Tariffs and Trade: *Report of Eminent Persons on Problems Facing the International Trade System*, *reprinted in* 24 I.L.M. 716 (1985) ("*Leutwiler Report*").

[18] *Id.* at 735.

[19] *Id.*

[20] *GATT Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations*, Doc. No. MIN.DEC. (September 20, 1986) *reprinted in* 25 I.L.M. 1623, 1626 (1986).

[21] *See* Negotiating Group on Subsidies and Countervailing Measures ("NGSCM"): *Checklist of Issues for Negotiations,* Note by the Secretariat, Doc. No. MTN. GNG/NG10/W/9, at ¶ I (September 7, 1987) ("*Checklist*").

> weak as to provide few constraints over subsidy practices that adversely affected the interests of other countries. Furthermore, the dispute settlement provisions had not been able to provide effective recourse against these practices. It was also said that in certain instances, the GATT and the Agreement drew distinctions between permitted and prohibited subsidy practices that appeared to have little basis in sound economic policy. Some delegations thought that the problem was not only one of inadequacies, because even those rules which were clear had not been observed by governments. Several delegations pointed out that a number of problems existed also in the area of countervailing measures where loopholes in the existing rules permitted unilateral practices and interpretations, resulting in considerable arbitrariness, uncertainty and harassment of exporters. These problems were particularly acute for those developing country participants which, despite continuing efforts, could not obtain the Agreement's treatment from one important signatory [*i.e.*, the United States, the most significant user of countervailing measures].[22]

Thus, negotiations occurred on a broad range of issues. Among the most contentious were the balance between subsidy disciplines versus disciplines over the use of countervailing measures, special treatment for and the graduation of developing countries, and the definition of subsidy (including whether some subsidies were acceptable and others not).[23] A series of draft texts were issued through 1990. In December 1990, the overall negotiations were suspended because of an inability to resolve an impasse on agriculture—including subsidies—at the Brussels Ministerial Meeting. Chairman Dunkel tried to revive the negotiations in 1991 and late in the year issued a document entitled "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations."[24]

The final text of the Agreement on Subsidies and Countervailing Measures, ultimately agreed to in 1994, contains only a few changes from the language of the *Dunkel Text*.[25]

[22] *See* NGSCM: Meeting of 16–17 March 1987, Note by the Secretariat, MTN.GNG/NG10/1 at ¶ 5 (March 27, 1987).

[23] In 1988, the United States proposed eliminating the distinctions between primary and non-primary export subsidies. NGSCM: Communication from the United States, MTN.GNG/NG10/W/20 (June 15, 1988). Certain negotiators insisted that any discussions involving agricultural subsides could not be addressed until agreement was reached in the Negotiating Group on Agriculture, while other countries sought to limit the discussions concerning government practices regarding natural resources. *See, e.g.*, NGSCM: Meeting of 28–29 June 1988, Note by the Secretariat, MTN.GNG/NG10/8 (July 11, 1988); NGSCM: Meeting of 28–29 June 1989, Note by the Secretariat, MTN.GNG/NG10/12 (July 14, 1989); and Meeting of 30 November—1 December 1989, Note by the Secretariat, MTN.GNG/NG10/15 (January 10, 1990). As a result, there was no mention of primary products in the various draft texts, pending the outcome of the agriculture negotiations. Thus, the distinction between primary and non-primary product subsidies (other than agricultural subsidies) was eliminated in the final text.

[24] *GATT Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Doc. No. MTN.TNC/W/FA (December 20, 1991) ("*Dunkel Text*").

[25] The purpose of this chapter is not to provide a detailed description of the history of the Agreement or of the negotiations leading to the final agreement. This history is discussed in a number of places. *See, e.g.,* JOHN JACKSON, THE WORLD TRADING SYSTEM (1997); Gary N. Horlick and Peggy A. Clarke, *The 1994 WTO Subsidies Agreement*, 17 J. WORLD COMPETITION 41 (1994); Terry Collins-Williams and Gerry Salembier, *International Discipline on Subsidies: The GATT, the WTO and the Future Agenda,* 30 J. WORLD TRADE 5 (1996); G. Depayre, *The Results of the Uruguay Round Negotiations in the Field of Subsidies and Countervailing Measures*, in THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYERS' PERSPECTIVE, College of Europe, 18/19 (1994); and THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992), (Terence P. Stewart ed. 1994).

III. The Agreement on Subsidies and Countervailing Measures

The Agreement on Subsidies and Countervailing Measures that grew out of the Uruguay Round negotiations greatly expanded international discipline on both subsidies and countervailing measures.

Unlike the 1979 Subsidies Code or the GATT 1947, the ASCM provides an internationally agreed-upon definition of the term subsidy for use both generally identifying subsidies (whether or not actionable) and in determining what specific practices are actionable (*i.e.*, those practices against which either countervailing measures may be imposed or multilateral remedies pursued). Moreover, it provides more specific standards for the conduct of a countervailing duty investigation—requiring transparency, some due process, and specific time limits.[26] In addition, it established special detailed, enforceable rules for disputes involving subsidies in the context of the WTO dispute resolution system.[27]

Finally, in a significant change from the 1979 Subsidies Code, the ASCM is an integral part of the WTO Agreement, which must be interpreted as a whole. Prior to 1995, signatories to the 1979 Subsidies Code had the choice of bringing a subsidy dispute under *either* Articles VI and XVI of the GATT 1947 *or* under the 1979 Subsidies Code, as long as the other party to the dispute was also a signatory to the 1979 Subsidies Code.[28] This enabled parties to "forum shop" for the result they wanted. The Philippines-Brazil dispute put an end to such forum shopping and confirmed the unified nature of the WTO Agreement.

The Philippines resorted to WTO dispute settlement in order to challenge Brazil's 1995 decision to impose countervailing duties on imports of desiccated coconut from the Philippines, based on an investigation initiated prior to entry into force of the WTO Agreement. Article 32.3 of the ASCM states that the ASCM applies only to investigations or reviews initiated pursuant to an application made *after* entry into force of the WTO Agreement. While agreeing that the ASCM did not apply, the Philippines argued that Article VI of the GATT 1994 established rights and obligations applicable to such transitional procedures. Therefore, according to the Philippines, it had the right to invoke Article VI of the GATT 1994.[29]

The Panel, affirmed by the Appellate Body, found that the WTO Agreement was a unified whole to be interpreted together.

> The SCM Agreements do not merely impose *additional* substantive and procedural obligations on a potential user of countervailing measures. Rather the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures.[30]

[26] These standards are very similar to those imposed by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 on anti-dumping investigations. *See* Chapter 11 of this book.

[27] The problem of enforcement remains an issue. While the adoption of Panel decisions effectively can no longer be blocked, countries have developed many techniques for delaying implementation as long as possible.

[28] *See, e.g.,* Report of the GATT Panel (adopted), *United States-Countervailing Duties on Fresh, Chilled and Frozen Pork, Complaint by Canada*, BISD, 38th Supp. 30 (1991); Report of the GATT Panel (adopted), *European Economic Community-Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Complaint by the United States*, BISD, 37th Supp. 86 (1990).

[29] *See* Report of the Appellate Body, *Brazil-Measures Affecting Desiccated Coconut*, WT/DS22/AB/R at 5 (1997). Ms. Clarke was counsel to Brazil in this dispute. It should be noted that the United States, as a third party intervener, supported this interpretation of the separability of the rights and obligations of the ASCM and the GATT 1994, Art. VI.

[30] *Id.* at 16 (emphasis in original).

Therefore, because ASCM Article 32.3 precluded the application of the ASCM to the dispute, it also precluded the application of the GATT 1994, since both are integral parts of a single treaty—the WTO Agreement.

Aside from the unified nature there are other substantive differences from the 1979 Subsidies Code. International discipline over the use of subsidies by Members of the WTO is imposed through a two-track approach in the ASCM.[31] One track, known as "Track One", is that of unilateral countervailing duty measures, which may be imposed by any Member experiencing injury to its domestic industry in its domestic market as an effect of the import of another Member's subsidized goods. The ASCM recognizes the right of Members to take unilateral action in this fashion, but regulates the way in which they do so in order to prevent countervailing duties being used in a protectionist manner. "Track Two" refers to the use of multilateral measures through the discipline of the Agreement.[32] The Agreement controls the use of subsidies both through provisions prohibiting certain practices and through provisions setting forth remedies to be pursued by any Member that believes it has been seriously prejudiced by another Member's subsidies, including situations in which a Member's domestic industries are being injured in *any* market by the sale of the subsidized goods of another member.[33]

The 1979 Subsidies Code had very limited disciplinary provisions. A signatory could request a panel,[34] however, either party to the dispute could block adoption of the panel report and, in the 1980s, parties frequently did.[35] In contrast, the ASCM provides specific procedures, definitions of subsidies and "serious prejudice," and binding dispute resolution. As such, it is likely to be used much more frequently than the previous system.[36]

The Agreement is divided into several parts, discussed in detail in the remainder of this Chapter. Part I of the Agreement provides a definition of the term "subsidy. Part II deals with prohibited subsidies, which may be challenged by a Member without any showing of harm to that Member. Part III covers actionable subsidies, which while not prohibited, may be challenged by another Member whose interests are harmed by such subsidies. Part IV defines three types of subsidy that are not actionable, although this part of the Agreement is now in abeyance. Part V sets forth detailed rules covering the imposition of countervailing measures. The remaining parts of the Agreement deal with various procedural issues, as well as providing special and differential treatment for developing countries.

PART I—General Provisions

Part I of the Agreement deems a subsidy to exist if there is a "financial contribution" and a "benefit" is thereby conferred. It also provides that to be actionable under the Agreement

[31] ASCM, Art. 10, n. 35.

[32] The Track One remedy is faster and more effective than Track Two, since it results in the imposition of countervailing duties, whereas Track Two merely produces a recommendation that the Member come into compliance with the ASCM, and implementation is often lengthy. However, Track Two is the only available remedy where subsidies hurt a Member's exports to a third country or to the subsidizing Member, since countervailing measures only address harmful imports into the complaining Member's domestic market.

[33] ASCM, Art. 6.3.

[34] *1979 Subsidies Code*, Art. 12.

[35] Of the fifteen GATT panel disputes brought under GATT Articles VI, XVI, or the 1979 Subsidies Code from 1980 on, adoption of eight was blocked at least temporarily. In 1994 and 1995, three of the decisions that had previously been blocked were adopted with the completion of the Uruguay Round negotiations.

[36] From 1947 through 1994, there are records of resort to dispute resolution proceedings 42 times on subsidy and countervailing measures issues (subsidy disputes under GATT Articles VI, XVI or the 1979 Subsidies Code). Between January 1, 1995 and June 14, 2002, there have been 28 requests for consultations and 15 requests for panels involving subsidy disputes.

or to be subject to countervailing measures, a subsidy must be "specific," as defined in Article 2.

Article 1: Definition of a Subsidy

One of the key concerns expressed as the negotiating countries began the subsidy negotiations in the Uruguay Round was that there was a lack of discipline on the use of subsidies because there was no consensus on the definition of what constituted a subsidy. The resulting agreement contained several definitional provisions.

Article 1 of the ASCM defines the term "subsidy" as applying to either of two situations. The first is a financial contribution by a government or public body within the territory of a Member. The second is any form of income or price support in the sense of Article XVI of the GATT.[37] For the practice to qualify as a subsidy in either situation, it must confer a benefit on the recipient.

The two-step definition: a financial contribution (or price or income support) and a benefit conferred thereby, makes clear that not all government actions constitute subsidies. It is possible for the government to make a financial contribution that does not confer a benefit. An example would be a government loan at market rates. In such case, the contribution would not be a subsidy. Similarly, and perhaps more controversially, it is possible for a government to provide a benefit but not a financial contribution. An example would be a government restraint on exports, which may benefit users of the product by lowering the price in the domestic market, but is not a financial contribution.[38] Again, no subsidy is provided in such a case.

This two-step definition reflected a compromise between two broad schools of thought on the definition of a subsidy. During the negotiations the controversy was summarized by the GATT Secretariat as follows:

> Some delegations proposed a number of criteria to define an actionable subsidy while some others considered that the category of actionable subsidies should rather be a residual category, i.e., comprising those subsidies not fulfilling the criteria for either prohibited or non-actionable subsidies. Criteria proposed under the first approach were that a subsidy (i) had to confer a quantifiable benefit to the recipient, (ii) be limited to actions which imply expenditure of public funds or otherwise cost to a government (including revenue foregone) and (iii) be specific to a firm or an industry (the concept of specificity covering de jure and de facto specificity). Other delegations said that although they were not objecting to those criteria, they did not consider them as covering all cases. In their view, a charge on the public account was not always a necessary criterion for a subsidy to be countervailable or otherwise actionable. Other measures which were dependent for their enforcement on government action should also be included, for example any government action which conferred a benefit to the recipient firm.[39]

The final language reflected a rejection of the second approach. The United States (the chief proponent of the second approach) had sought to include a provision in the definition

[37] ASCM, Art. 1.1(a)(1) and (2). A 1960 Panel report, considered what constituted an "income or price support" within the meaning of Article XVI of the GATT 1947. The panel generally agreed that a system "under which a government, by direct or indirect methods, maintains such a price by purchases and resale at a loss is a subsidy." Report of the Panel, *Review Pursuant to Article XVI:5*, (adopted May 24, 1960) BISD, 9th Supp. 188, 191. The Panel also considered that there could be methods by which a government maintained a fixed price above the world price without resort to a subsidy. *Id.*

[38] Report of the WTO Panel, *United States—Measures Treating Export Restraints as Subsidies*, WT/DS194/R (2001) at ¶ 8.73 ("*U.S. Export Restraints*").

[39] *See NGSCM: Meeting of 30 November—1 December 1989*, Note by the Secretariat, MTN.GNG/NG10/15 at ¶ 6, (January 10, 1990).

that would permit action to be taken against measures that it claimed were trade distorting such as targeting[40] and other industrial policy measures.[41] However, Article 1.1 reflects a balancing of the various definitions proposed for a subsidy, between the U.S. proposal of any government action that conferred a benefit and other proposals that the definition should include only those government actions which resulted in a charge on the public accounts or a cost to the government.[42] It is possible to have a financial contribution that does not involve a cost to the government; for example, if the government were to provide a loan to a company at below market interest rates but above the government's cost of borrowing and administration, such a loan would fall within the definition of a subsidy although there would ultimately be no charge on the public accounts.[43]

1. Financial Contribution. Article 1.1(a)(1) defines the term "financial contribution," which is the first prong of the definition of a subsidy. It requires a financial contribution by a government or any public body, including quasi-governmental entities. Financial contribution is defined more broadly than a charge on the public accounts. Article 1.1(a)(1) identifies four categories of financial contribution, and makes clear that the four categories are an exclusive list of financial contributions, not an illustrative one.

The first category is the least controversial and the least open to debate. It involves a *direct transfer of funds* (*e.g.*, grants, loans, and equity infusions) and any potential direct transfers of funds (*e.g.*, loan guarantees).[44]

The second category indicates that there is a financial contribution if the government or public body *foregoes revenue that is otherwise due*.[45] In the *FSC* case, the Appellate Body clarified that this does not mean entitlement to the funds in the abstract because in theory, the government could claim entitlement to tax all revenues.[46] Thus, to establish whether revenue has been foregone, it is necessary to determine whether the definitions and tax regime applied established an initial government entitlement to the general category of

[40] In an early communication from the United States to the NGSCM, the United States (the chief proponent of addressing targeting through the ASCM) defined "targeting" as "a government plan or scheme of coordinated measures to assist specific export-oriented industries," and noted that not all practices encompassed by this term were clearly covered by subsidy disciplines. NGSCM: Communication from the United States, MTN.GNG/NG10/W/1 at ¶ III.A (March 16, 1987).

[41] *See, e.g., id.* (seeking to "clarify what remedies are available for the trade distortions and economic damage associated with targeting and other industrial policy measures that affect trade"); NGSCM: *Elements of the Framework for Negotiations,* Submission by the United States, MTN.GNG/NG10/W/29 (November 22, 1989) (proposing the following definition of subsidy "A subsidy is any government action or combination of government actions which confers a benefit on the recipient firm(s)").

[42] *See, e.g., NGSCM: Communication from the EEC*, MTN.GNG/NG10/W/7 (June 11, 1987) ("subsidies in international trade exist only when a financial charge has been incurred by a government or administrative authority on behalf of a beneficiary").

[43] The loan would provide a benefit to the recipient (by enabling it to borrow at below-market rates) and would meet the definition of financial contribution found in ASCM, Article 1.1(a)(1)(i) without cost to the government, since the government would receive back more in interest than it cost it to borrow. Article 1.1(b) requires that a benefit be conferred thereby. In *Canadian Civilian Aircraft I* the Appellate Body clarified that this meant a benefit to a recipient. Report of the Appellate Body, *Canada—Measures Affecting the Export of Civilian Aircraft*, AB-1999–2, WT/DS70/AB/R (1999) at ¶ 154 ("*Canadian Civilian Aircraft I*").

[44] ASCM, Art. 1.1(a)(1)(i).

[45] *Id.*, Art. 1.1(a)(1)(ii).

[46] *See* Report of the Appellate Body, *United States—Tax Treatment For "Foreign Sales Corporations"*, AB-1999-9, WT/DS108/AB/R (2000) ("*FSC*") at ¶ 90 ("This cannot, however, be entitlement in the abstract, because governments, in theory, could tax *all* revenues. There must, therefore, be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'". (emphasis in original)).

revenue and then exempted the revenue at issue from that entitlement. Applying that reasoning, the Appellate Body found that U.S. law defined taxable income to include the revenue that was subsequently excluded through the Foreign Sales Corporations provisions of the Internal Revenue Code.[47] Similarly in *Canadian Autos*, the Appellate Body found that because the Canadian government had established a 6.1 percent MFN import duty on imports of automobiles and then exempted from payment of that duty automobiles that met the terms of the Motor Vehicles Tariff Order, that exemption constituted revenue foregone that was otherwise due.[48]

The third category addresses the government *provision of goods or services* (other than general infrastructure) or the *purchase of goods*.[49] This category has the potential for controversy regarding the question of what constitutes a good and what constitutes a service. The advent of electronic commerce has raised the question of whether there exists another category of "thing" that is neither a good nor a service (*e.g.*, in which category does intellectual property fall). If so, does the government provision or purchase of this third category ever constitute a financial contribution?

A recent dispute addresses this provision in some detail.[50] Canada argued that the United States' preliminary determination that Canada's stumpage programs provided a good for less than adequate remuneration were not in accordance with the WTO. First it argued that "stumpage" (which Canada stated is the right to harvest standing timber) is not a good. The Panel however, concluded that what Canada was providing was standing timber, the "stumpage" at issue was merely the means of providing the timber.[51] The Panel further found that "timber" was a good within the meaning of the ASCM, noting that the term "goods" in Art. 1.1(a)(1)(iii) referred to "tangible or movable personal property, other than money."[52] The Panel also rejected a Canadian argument that Article 1.1(a)(1)(iii) does not apply to rights to exploit natural resources *in situ*.[53] According to the Panel, the term "goods and services" covers "the full spectrum of in-kind transfers the government may undertake by providing resources to an enterprise," the only exception being the one explicitly mentioned in Article 1.1(a)(1)(iii), the provision of general infrastructure.[54]

The fourth category is perhaps the most controversial and contains several parts. First, it states that a financial contribution exists when a government (but not necessarily a public body) makes *payments to a funding mechanism*. Second, a financial contribution

[47] *Id.* at ¶ 95.

[48] Report of the Appellate Body, *Canada—Certain Measures Affecting the Automotive Industry*, AB-2002-2, WT/DS139 and 142/AB/R (2000) at ¶¶ 90–94 ("*Canadian Autos*").

[49] ASCM, Art. 1.1(a)(1)(iii).

[50] Report of the WTO Panel (not appealed), *United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R (2002) ("*Softwood Lumber II*"). On May 3, 2002, Canada requested establishment of a Panel under the DSU with respect to the U.S. final determination to impose countervailing duties on imports of softwood lumber from Canada. The United States based its final subsidy analysis on the same basic methodology that it used for the challenged preliminary determination.

[51] *Id.* at ¶ 7.17 ("In our view the only way to supply *standing* timber to harvesting companies is by allowing them to harvest the timber. We consider that this is precisely what the stumpage agreements do. We therefore find that standing timber is provided to the tenure holders through the provincial stumpage programmes." (Emphasis in original)).

[52] *Id.* at ¶ 7.23. The Appellate Body subsequently adopted a somewhat broader definition of the term "goods," noting that the French and Spanish terms used included a wide range of property. *See United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, AB-2003-6, WT/DS257/AB/R (2004) at ¶ 59 (*"Softwood Lumber III Appellate Body Report"*).

[53] *Softwood Lumber II*, *supra* note 50, at ¶ 7.26.

[54] *Id.* at ¶ 7.28. This does not mean that the government provision of a good or service necessarily provides a subsidy, it must still be specific and provide a benefit to the recipient.

exists if a government *"entrusts or directs" a private body* to carry out one or more of the type of functions described in the first three categories, "which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments."[55]

Only one panel has addressed this category to date and there are no relevant Appellate Body discussions. In *U.S.—Export Restraints*, Canada claimed that U.S. law and practice established that the United States would find that restraints on exports of input products constituted a subsidy to the downstream product in violation of the ASCM.[56] Article 1.1(a)(1)(iv) provides that, in order for there to be a financial contribution, a government must entrust or direct a private body "to carry out one or more of the type of functions illustrated" in the first three categories; "which would normally be vested in the government," and that "the practice, in no real sense, differs from practices normally followed by governments."[57] The dispute decision hinged on the meaning of the term "entrusts or directs." The Panel found that the term encompassed three elements: (1) "an explicit and affirmative action, be it delegation or command;" (2) "addressed to a particular party;" and (3) "the object of which action is a particular task or duty."[58] In addition, the Panel found that the second two elements were aspects of the first element—an explicit and affirmative action of delegation or command.[59] It held that export restraints did not fall within this definition of financial contribution.[60]

In making this finding, the Panel rejected the argument of the United States that read this provision much more broadly to include actions, the effect of which was functionally equivalent to an affirmative action. According to the Panel,

> [g]overnment entrustment or direction is thus very different from the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market.[61]

In making such a finding, the Panel reaffirmed that not all government actions that confer a benefit necessarily constitute a subsidy. Thus, the Panel reaffirmed the negotiated balance of the subsidy definition as discussed above.

[55] ASCM, Art. 1.1(a)(1)(iv). In *U.S. Export Restraints*, the Panel notes with approval the interpretation by the Group of Experts of a 1960's panel on subsidies "reference to 'practice . . . in no real sense different from that normally followed by governments' was a general reference that to the *delegation* to private parties of particular government functions of taxation and expenditure of revenue, and *not* a reference to government market interventions in the general sense." *U.S. Export Restraints*, *supra* note 39, at ¶ 8.72 (emphasis in original).

[56] *U.S. Export Restraints, supra* note 38. Prior to the completion of the Uruguay Round, the United States had countervailed against restraints on leather exports imposed by the Government of Argentina and restraints on exports of logs imposed by the Government of British Colombia. *See*, *Leather From Argentina*, 55 Fed. Reg. 40,212 (Dep't Comm. October 2, 1990) (final determ.); *Certain Softwood Lumber Products From Canada*, 57 Fed. Reg. 22,570 (Dep't Comm. May 28, 1992) (final determ.). In each case the United States reasoned that the export restraints resulted in domestic users of the restrained products obtaining inputs at lower prices than would have prevailed without the restraints. Canada argued that the legislative history of the Uruguay Round implementing legislation and regulations promulgated under that legislation indicated that the United States would continue to countervail export restraints. Canada's challenge was to the U.S. law and practice "as such", rather than to their application in a particular case.

[57] *U.S. Export Restraints*, *supra* note 38, at ¶ 8.25.

[58] *Id.* at ¶ 8.29. This was the position Canada had taken as to the meaning of the phrase.

[59] *Id.* at ¶ 8.29.

[60] However, the Panel also found that U.S. law did not, as Canada had argued, require that export restraints be countervailed, and it therefore made no recommendations.

[61] *U.S. Export Restraints*, *supra* note 38, at ¶ 8.31.

2. A Benefit is Conferred Thereby. As explained above, it is possible to provide a financial contribution without conferring a benefit on the recipient. However, to be considered a subsidy within the meaning of the ASCM, a financial contribution must also confer a benefit on the recipient. Whether it requires a benefit to the recipient or a benefit to the manufacture, production, or export of the good in question has been debated. In *Canadian Civilian Aircraft I*, the Appellate Body stated: "A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a 'benefit' can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something."[62]

That the term "benefit" in Article 1.1(b) refers to a benefit to the recipient of the financial contribution, is supported by the language in the chapeau of ASCM Article 14 which provides guidance in calculating "the benefit to the recipient conferred pursuant to paragraph 1 of Article 1."[63] In finding that the term refers to a "benefit to the recipient" of the financial contribution, the Appellate Body has specifically rejected the notion that the "benefit" in Article 1.1(b) can be calculated in terms of the cost to the government of the financial contribution.[64]

Although the term "benefit" is not explicitly defined in the ASCM, panels have clarified that a benefit occurs when a company is placed in a better position financially than it otherwise would be absent the financial contribution or price support. In *Lead Bar*, the Appellate Body stated: "[t]he question whether a 'financial contribution' confers a 'benefit' depends, therefore, on whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[65] This is consistent with the previous findings on this issue. In *Canadian Civilian Aircraft I,* the Appellate Body articulated the requirement as follows:

> We also believe that the word 'benefit', as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.[66]

In addition to this question of what is meant by the term "benefit," the question of identifying the recipient has also proven controversial, with most countries objecting to the U.S. practice with respect to subsidies to privatized companies. Certain types of subsidies are considered to confer a benefit over several years.[67] However, with the waive of privatizations of formerly state-owned firms in the late 1980s and early 1990s, the question arose as to whether the newly private firm continued to benefit from such

[62] *Canadian Civilian Aircraft* I, *supra* note 43, at ¶ 154. This language was reiterated in the subsequent Report of the Appellate Body, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, AB-2001-1, WT/DS138/AB/R (2000) ("*Lead Bar*").

[63] ASCM, Art. 14.

[64] *See Canadian Civilian Aircraft I*, *supra* note 43, at ¶ 155.

[65] *Lead Bar, supra* note 62, at ¶ 68. This leaves open the question of how to determine if "strings" attached to a financial contribution (*e.g.*, to keep a facility open) mean that the recipient is *not* better off (or by how much) than without the financial contribution.

[66] *Canadian Civilian Aircraft I*, *supra* note 43, at ¶ 157.

[67] *See Report of the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures,* G/SCM/W415/Rev.1 (March 4, 1998) ("*Report of the Informal Group of Experts*").

long-term subsidies bestowed on the state-owned entity. The United States considered that the benefit did pass through the privatization, regardless of whether the sale of the company was at arm's-length, for fair market value.[68] The Appellate Body affirmed the Panel's conclusion that, based on the facts of the case (*i.e.*, an arm's-length sale for fair market value) no benefit existed.[69]

The case law at the WTO has indicated that since a benefit is to a "person," not to the productive assets, there must be an analysis, if raised, of subsequent events to see if the producer exporting the good at the time the duties are imposed is benefiting. The main dispute with the United States, however, has been whether an arms-length transaction for fair market value eliminates any benefit to the subsequent company. In *Lead Bar*, the Panel found that the question was whether or not the company was indirectly benefited from the original subsidy. Specifically, the Panel noted:

> As noted above, we consider that an untied, non-recurring "financial contribution" bestowed on a prior company may constitute a "financial contribution" bestowed indirectly on a successor company. This is because the untied, non-recurring "financial contribution" will be deemed to have been invested in the productive assets etc. of that company. Thus, when those productive assets etc. are acquired by the successor company, the successor company indirectly acquires the "financial contribution" embodied in those productive assets etc. Assuming "financial contributions" bestowed directly on BSC could be deemed to have been bestowed indirectly on UES and BSplc/BSES, this fact alone could not mean that pre-1985/86, untied, non-recurring "financial contributions" bestowed on BSC necessarily confer any "benefit" on UES or BSplc/BSES. *This would only be the case if those "financial contributions" were found to have been bestowed indirectly (i.e., through the relevant change-in-ownership transactions) on UES and BSplc/BSES respectively on terms more favourable that UES and BSplc/BSES respectively could have obtained in the market. We consider that such a finding would only be possible if fair market value were not paid for all productive assets etc. acquired by UES and BSplc/BSES respectively from BSC*.[70]

The United States then changed its methodology, arguing that the *Lead Bar* decision indicated that if it concluded that the new entity was essentially the "same person" as the pre-privatized entity, then there was no need to reconsider whether the benefit incurred to the new entity. This too was addressed by a WTO panel, which found that the United States' distinction between a company and its shareholders (the essence of its "same person" test) was not appropriate in the context of the ASCM. According to the Panel,

[68] Over the years, the United States has employed several methods of determining the measure, the most recent has been the "gamma" methodology, which assumed the benefit passed through but that some portion of the purchase price went towards repaying a portion of the pre-existing subsidies. *See* Report of the WTO Panel, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R at ¶ 6.61–6.62 ("*Lead Bar Panel Report*"), a*ff'd Lead Bar*, *supra* note 62. Subsequently, the United States (claiming it was implementing the *Lead Bar* decision and a decision of the U.S. courts which echoed the findings of *Lead Bar*) considered whether the newly privatized entity was the 'same person" as the entity prior to privatization. If it was then according to the United States, it continued to benefit from the pre-privatization subsidies. The United States virtually always found the entity to be the "same person" and this methodology has been rejected both by a WTO panel and the U.S. court. *See*, *e.g.*, Report of the WTO Panel, *United States—Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, ("*Privatization Subsidies*"); *aff'd in part*, *rev'd in part*, Report of the Appellate Body, *United States—Countervailing Measures Concerning Certain Products from the European Communities*, AB-2002-5, DS212/AB/R (2002) ("*Privatization Subsidies Appellate Body Report"); Allegheny Ludlum Corp. et al. v. United States*, 182 F. Supp. 2d 1357 (Ct. Int'l Trade 2002); *Acciai Speciali Terni S.p.A v. United States*, No. 99-06-00364, 2002 WL 342659 (CIT), 2002 Ct. Int'l Trade LEXIS 25, 24 ITRD 1108 (Ct. Int'l Trade Feb. 1, 2002).

[69] *Lead Bar*, *supra* note 62, at ¶ 68.

[70] *Lead Bar Panel Report*, *supra* note 68, at ¶ 6.81 (footnotes deleted, emphasis added).

the "concept of benefit is independent of the legal business structure established pursuant to national corporate law."[71] Thus, when confronted with information that a company has changed ownership since receipt of a subsidy, the authorities must examine the evidence to determine whether the company with new ownership still benefits from the prior subsidy—it may not "presume" such continued benefit.[72]

Another dispute on this issue also involved the United States. In *Softwood Lumber II*, the Panel found that the United States had incorrectly assumed that producers of the downstream product, lumber, benefited from subsidies to the upstream product provided by the licensing of the right to harvest timber (the input). The United States had before it evidence that there were producers of the downstream product who were not affiliated with the holder of the harvest rights (the alleged subsidy) and that a sizeable number of producers purchased log and lumber inputs from unrelated suppliers, allegedly at arm's length. Therefore, according to the Panel, the U.S. authorities should have determined whether and to what extent any benefit passed through to the lumber producers.[73]

Even if a practice does constitute a financial contribution and confers a benefit, it is not necessarily actionable, either multilaterally through the WTO dispute settlement mechanism, or unilaterally through the application of countervailing measures. Article 1.2 provides that a subsidy is actionable only if it is also specific[74] as defined in Article 2.

Article 2: Specificity

To be considered actionable or countervailable, a subsidy must be specific, as indicated in Article 1.2. Article 2 of the ASCM defines several situations in which a subsidy is deemed to be specific. The specificity requirement was a standard of U.S. countervailing duty law. The purpose of the requirement is to act as "an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy," since "all governments, including the United States, intervene in their economies to one extent or another, and to regard all such interventions as countervailable subsidies would produce absurd results."[75]

1. Subsidies Limited to Certain Enterprises. Article 2.1 provides that a subsidy is specific if it is limited to an enterprise or industry or group of enterprises or industries

[71] *Privatization Subsidies*, *supra* note 68, at ¶ 7.50, *aff'd*, *Privatization Subsidies Appellate Body Report*, *supra*, note 69 at ¶ 146.

[72] *See Privatization Subsidies Appellate Body Report, supra* note 68, at ¶ 147. The Appellate Body further noted that an arm's length privatization for fair market value presumptively extinguishes any benefit from prior subsidies. The effect of such privatization "is to shift to the investigating authority the burden of identifying evidence which establishes that the benefit from the previous financial contribution does indeed continue beyond privatization." *Id*. at ¶ 126.

[73] *See Softwood Lumber II, supra* note 50, at ¶ 7.78. In addition, the Panel noted that, at least in an investigation, the authorities must determine "whether and to what extent a subsidy has been granted to the producer of the subject merchandise." The authorities may not, as the United Sates did, simply assume the existence of a benefit. *Id*. at ¶ 7.75. This reasoning was later affirmed by the Appellate Body in a related case. *See Softwood Lumber Appellate Body Report*, *supra* note 52, at ¶¶ 146 and 158.

[74] ASCM, Art. 1.2.

[75] *See "Statement of Administrative Action"* in H.R. Rep No. 103–36, Vol. 1 at 929 (1995). It has been explained that "the purpose of the CVD law is to counteract government-induced distortions to the relative positions of firms within an economy." A. Holmer, S. Haggerty and W. Hunter, *Identifying and Measuring Subsidies under the Countervailing Duty Law: An Attempt at Synthesis*, in The Department of Commerce Speaks on Import Administration and export administration, 455 PLI/Corp. 301, (1984). Countervailing a subsidy that was generally available throughout the economy would not serve this purpose.

("certain enterprises") within the jurisdiction of the granting authority.[76] The subsidy is specific if the legislation or the granting authority explicitly limits the subsidy to certain enterprises ("*de jure*" specificity).[77] However, if eligibility is limited, based on explicit, verifiable, objective criteria (*i.e.*, criteria or conditions which are neutral, do not favor certain enterprises over others, are economic in nature, and are horizontal in application) the program is not specific, so long as eligibility is automatic and the criteria are strictly adhered to.[78]

Even if the program appears on its face to be non-specific, the program may be found to be *de facto* specific, based on the following factors:[79]

- Use by a limited number of enterprises;
- Predominant use by certain enterprises;
- The grant of disproportionately large amounts of subsidies to certain enterprises; and
- The manner in which discretion is exercised by administering authorities.

While this *de facto* specificity analysis was, again, similar to the test applied by the United States, the ASCM places restrictions on the analysis that were not found in U.S. practice and that reflect many countries' concerns regarding the U.S. practice in this area. In particular, in determining *de facto* specificity, the investigating authorities should take account of the diversification of economic activities in the subsidizing country and the length of time the program has been in operation. This first item would appear to be helpful to many smaller, or developing economies, which may have a limited range of economic activity in the country.

Moreover, the ASCM provides that in considering the discretionary application of a program, the investigating authorities "shall" consider, in particular, information on the frequency with which applications for a subsidy are approved or refused and the reasons for those decisions.[80]

2. Regional Subsidies. Article 2.2 states that a program available only to certain enterprises within a designated geographic region of the granting authority's jurisdiction is specific. This represents a significant decrease in the discipline from that proposed in the *Dunkel Text*,[81] which made all subsidies by sub-national governments, even if available to all enterprises within that sub-national government's jurisdiction, specific.[82]

[76] To a large extent, the language of this article tracks the definition of specificity that was applied by the United States, the largest user of countervailing duty laws at the time. There are, however, some differences from the U.S. approach.

[77] ASCM, Art. 2.1(a).

[78] *Id.*, Art. 2.1(b). This is one of the differences from the U.S. approach, which did not provide exceptions for limitations based on objective criteria.

[79] ASCM, Art. 2.1(c).

[80] This item can be problematic for the government of an exporting country defending a program. The authorities administering the subsidy program often do not maintain statistics of this type, or if they do, confidentiality rules within the country may prevent the disclosure of such information to the investigating authorities of the importing country. Failure to provide the information might then be used to justify a finding of specificity of a discretionary program.

[81] *See Dunkel Text*, *supra* note 24, at Art. 2.2.

[82] *Compare* ASCM, Art. 2.2 *with Dunkel Text*, Art. 2.2. The change from the *Dunkel Text* apparently was the result of a "deal" between the United States and Canada in late 1993 (which both countries will doubtless deny) in which the United States agreed to less discipline on subsidies in return for Canadian support for more trade-restrictive anti-dumping rules.

Export and Import Substitution Subsidies. Article 2.3 states that all prohibited subsidies as defined in Article 3, *i.e.*, export subsidies and import substitution subsidies, are specific.

Article 2.4 requires that any determination of specificity must "be clearly substantiated on the basis of positive evidence."[83] This requirement arguably places the burden of proof on the investigating authorities (or the complaining Member) to demonstrate specificity. Prior to this, at least in the United States, the practice was to presume a program was specific, unless positive evidence to the contrary was provided. Because the defending exporting Member is the entity most likely to have access to the information regarding specificity or the lack thereof, this has the potential for creating a significant hurdle to taking action.

PART II: Prohibited Subsidies

Part II of the Agreement covers prohibited subsidies, which consist of export subsidies and import-substitution subsidies. Members are required to eliminate such subsidies, which may be challenged by another member without a showing of harm to the interests of that member. Article 3 defines prohibited subsidies, while Article 4 provides for an expedited dispute resolution procedure in cases involving prohibited subsidies.

Article 3: Prohibition

In the 1979 Subsidies Code, only export subsidies were prohibited.[84] The ASCM expands that prohibition to include both export subsidies and import substitution subsidies, *i.e.*, subsidies the receipt of which is, at least in part, contingent upon the use of domestic over imported goods. A prohibited subsidy is by definition specific and therefore actionable.

The definition of an export subsidy appears to be more restrictive than the broad definition assumed prior to the ASCM. The 1979 Subsidies Code included a blanket prohibition on the granting of "export subsidies on products other than certain primary products."[85] The ASCM, however, provides a more limited prohibition by stating that only those "subsidies *contingent*, in law or in fact, . . . upon *export performance*" are prohibited.[86] This limitation is further clarified by a footnote which notes that to be contingent in fact, the subsidy must be tied to actual or anticipated exports or export earnings.[87] Finally, that footnote clarifies that the mere fact that the enterprise granted the subsidy is an exporter is not sufficient to make a subsidy contingent in law or in fact upon exportation.[88] Thus, the use of the term "contingent" arguably narrows the definition of what constitutes a prohibited subsidy.

[83] ASCM, Art. 2.4.

[84] *1979 Subsidies Code*, Art. 9.

[85] *Id.*

[86] ASCM, Art. 3.1(a) (emphasis added). It should be noted that until the ASCM, the term "export subsidy" was not defined, leaving it open to a broad range of interpretations. There was considerable discussion concerning how to define subsidies for purposes of prohibition. *E.g.*, *NGSCM, Submission by Japan*, MTV.GNG/NG10/W/27 (October 6, 1989) (suggesting that the Illustrative List of Export Subsidies in the Annex to the 1979 Subsidies Code be converted to an exhaustive, definitive list, with some modifications); NGSCM, Submission by the United States, MTV.GNG/NG10/W/29 (November 22, 1989) (suggesting that the prohibition be expanded to include all subsidies provided to firms predominantly engaged in export trade, as being in effect as trade distortive as a more traditional export subsidy).

[87] *Id.*, Art. 3.1(a) n.4.

[88] *Id.*

There have been several panel and Appellate Body reports addressing what constitutes a subsidy "contingent" upon exportation. The Appellate Body has indicated that in order to determine whether a subsidy is contingent upon export performance in law, one should consider whether the "condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure."[89] A condition to export can exist in law if it is implicitly in the instrument deriving the measure, *i.e.*, that such conditionality can be derived by necessary implication from the words actually used in the measure.[90] In the *Canadian Autos* case, the Appellate body found that the ratio requirements in the law required the company receiving the subsidy to export in order to maintain the ratios. The Appellate Body therefore found that the measure was contingent in law upon export performance.[91]

In *Canadian Civilian Aircraft I*, which involved an issue of whether the measure was contingent in fact upon export performance, the Appellate Body noted that it was not enough that a government granting the subsidy *anticipated* that exports would result. The prohibition requires that the granting of the subsidy be *contingent* upon export performance.[92] Moreover, the Appellate Body noted that the phrase "tied to" in the footnote indicated that this required that the export performance or earnings be a limit or restriction as to conditions.[93] In making such a decision, a panel must consider the structure and design of the measure as well as the specific facts of the case. In that case, the Appellate Body affirmed the Panel decision that the measure was contingent in fact upon export performance, based on the Panel's consideration of numerous factors.[94]

In another case involving the question of whether certain measures were contingent in fact upon export performance, a Panel ruled differently on two measures, in a manner that provides guidance on the meaning of the term "contingent in fact."[95] In *Australian Leather*, the Panel considered two subsidies, a grant and a loan, provided to a single company, Howe. In both cases, the Panel noted that the grant and the loan were part of a package of assistance that would not have been granted but for the removal of leather from eligibility for certain export subsidies. Similarly, it noted that Howe, in fact, exported a significant percentage of its production and that its continued economic viability was dependent on exporting some portion of its production. However, the two subsidies differed in certain respects. The contract providing for the grant established certain specific sales performance targets (overall sales, not export sales explicitly) and obligated Howe to make best efforts to meet those sales performance targets. The loan contract did not address Howe's sales performance at all and was secured by a lien on the assets and undertakings of Howe's parent company, ALH (which had other interests besides Howe).

After reviewing the facts, the Panel found that given the totality of the evidence and because the grant was specifically conditioned upon sales performance targets that could not be met without exporting, the grant constituted a prohibited export subsidy.[96] The Panel found that the loan, however, was not a subsidy that was contingent in fact upon

[89] *Canadian Autos*, *supra* note 48, at ¶ 100.
[90] *Id.* at ¶ 100.
[91] *Id.* at ¶ 104.
[92] *Canadian Civilian Aircraft I*, *supra* note 43, at ¶ 171.
[93] *Id.*
[94] *Id.* at ¶ 179.
[95] *See* Report of the WTO Panel, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R (1999) ("*Australian Leather*").
[96] *Id.* at ¶¶ 9.71–9.72.

export performance because there was nothing in "the terms of the loan contract itself which suggests a specific link to actual or anticipated exportation or export earnings."[97]

Thus, the cases indicate this provision requires that there be some explicit or implicit linkage in order for a subsidy to be considered contingent in law or fact upon export performance.

Annex I of the ASCM provides further guidance in determining whether a subsidy is a prohibited export subsidy by providing an Illustrative List of Export Subsidies. If a measure is defined in Annex I as not constituting an export subsidy (such as the non-excessive remission of import charges on imported inputs consumed in the production of the exported product), it does not fall within the scope of the prohibited subsidies of Article 3.1(a). It may, however, still be an actionable subsidy if it is otherwise specific.[98]

Panels and the Appellate Body have found that portions of the Illustrative List may be raised as an affirmative defense to the charge of maintaining prohibited export subsidies. For example, Item (k) of the Illustrative List identifies the grant of export credits at below market rates as an example of an export subsidy, in so far as they are used to secure a material advantage in the field of export credits. However, the second paragraph indicates that if the credits are granted by a Member that is also a party to an international undertaking on official export credits (this refers to the OECD Export Credit Arrangement)[99] or if the Member acts in conformity with the interest rate provisions of such undertaking (and it in practice applies those provisions) then such export credits are not an export subsidy. Several panel and Appellate Body reports have indicated that this second paragraph may be raised as an affirmative defense, but then the Member raising the defense has the burden of proof, which the panels and Appellate Body have interpreted strictly.[100]

Similarly, in addressing whether the United States tax program implemented to comply with the original ruling on *FSC*,[101] the Appellate Body agreed that the fifth sentence of footnote 59, which permits measures taken by Members to avoid double taxation in certain circumstances, was an affirmative defense. However, the Appellate Body found that the United States had not met its burden of proof that its measure in fact conformed to the requirements of that affirmative defense.[102] It is not clear, however, that all portions of the Illustrative List can be raised as an affirmative defense.[103]

The Illustrative List is not new. There was an Illustrative List in the 1979 Subsidies Code that was quite similar to the one found in the ASCM. One significant change, however, addresses the non-excessive remission or exemption of prior-stage cumulative

[97] *Id.* at ¶ 9.75. It is worth noting that the Panel implicitly rejected the United States' proposed broad reading of Article 3.1(a) when it found that the loan was not a prohibited export subsidy. The United States had argued that "if the totality of the circumstances reveals that the subsidy in question is designed to promote exports, then that subsidy comes within the ambit of Article 3.1(a), and is prohibited." *Id.* at ¶ 9.52.

[98] *See FSC*, *supra* note 46, at ¶ 93.

[99] The OECD Export Credit Arrangement is available from OECD on its website: www.OECD.org.

[100] *See, e.g.,* Report of the WTO Panel, *Canada—Export Credit and Loan Guarantees for Regional Aircraft*, WT/DS222/R (2002) ("*Canadian Regional Aircraft*") at ¶¶ 7.161 and 7.180 (it is an affirmative defense, but to meet its burden of proof, Canada had to demonstrate that as a matter of law its actions fell within the meaning of this provision. The Panel found Canada had failed to meet that burden.)

[101] *FSC*, *supra* note 46.

[102] *See* Report of the Appellate Body, *United States—Tax Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU*, AB-2001-8, WT/DS108/AB/RW (2002) at ¶ 186.

[103] *See* Report of the WTO Panel*, Brazil-Export Financing Programme for Aircraft (Second Recourse to DSU, Article 21.5)*, WT/DS246/RW(2), (2001) at ¶¶ 5.274–5.775 (finding that the first paragraph of Annex I, Item (k), does not contain any affirmative statement that a measure is not an export subsidy nor that a measure not satisfying the conditions of the paragraph is not prohibited. Therefore, the Panel found the first paragraph of Item (k) cannot provide an affirmative defense to claims of a violation of ASCM, Article 3.1(a)).

indirect taxes on goods or services used in the production of exported products.[104] This provision is of particular importance to countries that do not have a value-added tax regime. Essentially, the Illustrative List would permit the non-excessive remission of such cumulative taxes if they were levied on inputs that are "consumed in the production of the exported product." In the 1979 Subsidies Code, they were permitted only if they were levied on inputs that were physically incorporated in the exported product.[105]

The reason for this change was that in certain countervailing duty cases the concept of what was physically incorporated in the exported product was heavily debated. There were questions such as whether a catalyst that was consumed in the production of a good was incorporated in that good or whether fertilizer was physically incorporated in the flower that was ultimately harvested. The other area that had generated controversy was the consumption of energy in the production process. Therefore, as a result of the negotiations, this provision was revised to permit the non-excessive remission of taxes as long as the taxes had been levied on products *consumed* in the production of the exported product.[106]

The ASCM's prohibition on the use of export subsidies is narrower than the more general prohibition found in the 1979 Subsidies Code. However, the prohibition covers a broader scope of products than previously. While the 1979 Subsidies Code did not prohibit export subsidies for "certain primary products," the current Agreement extends the prohibition to all products, except as provided in the WTO Agreement on Agriculture. The WTO Agreement on Agriculture places restrictions on the use of export subsidies, and applies to a narrower category of products than did the term "certain primary products."[107]

Article 3.2 provides that Members may not grant or maintain prohibited subsidies.

Article 4: Remedies for Prohibited Subsidies

This Article has been used to challenge various alleged export subsidies.[108] The Article provides that any Member that has reason to believe that another Member is using a prohibited subsidy may request consultations with the other Member. The consultation request must include a statement of the available evidence with regard to the existence and nature of the subsidy in question.[109]

If the consultations do not result in a mutually agreed solution within thirty days of the request for consultations, any Member party to those consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.[110] This differs from requests under the Understanding on Rules and Procedures Governing the Settlement of

[104] ASCM, Annex I, Item (h).

[105] 1979 Subsidies Code, Annex I, Item (h).

[106] ASCM, Annex I, Item (h). Note, the ASCM also includes guidance for determining whether an input is consumed in the production process. *See* ASCM, Annex II. Nonetheless, this continues to be a controversial topic as an implementation issue.

[107] *See* Chapter 6 of this book.

[108] The following cases alleging the use of prohibited export subsidies have been through the dispute settlement process: *Australian Leather*, *supra* note 95; Report of the Appellate Body, *Brazil—Export Financing Programme for Civil Aircraft*, AB-1999-1, WT/DS46/AB/R (1999); *Canadian Civilian Aircraft I*, *supra* note 43; Report of the Appellate Body, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, AB-1999-4, WT/DS103, 113/AB/R (1999); *FSC*, *supra* note 46; and *Canadian Autos*, *supra* note 48. It should be noted that implementation issues linger for at least four of these six cases.

[109] ASCM, Art. 4.1 and 2.

[110] ASCM, Art. 4.4.

Disputes ("DSU").[111] When a Member requests a panel under the DSU, Article 6, the panel will be established at the meeting of the DSB following the meeting at which the panel is originally requested.

Once established, the panel may request the assistance of the Permanent Group of Experts ("PGE") with regard to whether the measure at issue is a prohibited subsidy.[112] None of the panels established through this mechanism to date have requested the assistance of the PGE.

While the panel is established under the auspices of the DSB and the DSU, it is subject to certain special rules that differ from those found in the DSU in several significant respects, as long as the claims are limited to Article 3 subsidies. If other claims are included, then the dispute would be subject to the normal rules of the DSU.

Most importantly, Article 4 disputes are subject to much shorter time limits than normal disputes. A panel may be requested thirty days after making the request for consultations, compared to sixty days under the DSU.[113] Once a panel is formed, the panel is to submit its final report to the parties within ninety days of the establishment of the terms of reference,[114] compared with the normal six months under the DSU.[115]

Similarly, under Article 4, the report of the panel is to be adopted within thirty days of circulation of the report to all the Members, unless appealed[116] (the normal period under the DSU is sixty days).[117] If appealed, the Appellate Body is to issue its decision to the Parties within thirty days of the notice of appeal, extendable to sixty days[118] (the comparable periods under the DSU are sixty and ninety days).[119] It should be noted that the parties to the dispute may agree to a different timetable for any part of the proceeding.

The timing of the dispute settlement procedures is not the only significant difference between an ASCM Article 4 proceeding and a proceeding under the general DSU procedures. Article 4 provides that *if* a panel finds the existence of a prohibited subsidy, the panel shall recommend that the party *withdraw the subsidy* without delay and *shall* specify the time period within which the measure must be withdrawn.[120] In the *Australian—Leather* case, this was interpreted as requiring a complete repayment of the export subsidy, not just the benefit remaining at the time of the Panel ruling.[121] The *Canadian Regional Aircraft* Panel addressing an argument raised by Canada concerning the prospective nature of WTO remedies noted that it was not obvious that the WTO

[111] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").
[112] *Id.*, Art. 4.5. *See also*, the discussion of Article 24, *infra,* describing the PGE.
[113] *Compare* ASCM, Art. 4.4 *with* DSU, Art. 4.7.
[114] ASCM, Art. 4.6.
[115] DSU, Art. 12.8.
[116] ASCM, Art. 4.8.
[117] DSU, Art. 16.4.
[118] ASCM, Art. 4.9.
[119] DSU, Art. 17.5.
[120] ASCM, Art. 4.7.
[121] Report of the WTO Panel*, Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Art. 21.5 of the DSU*, WT/DS126/RW (2000) ¶¶ 6.39–6.49. It should be noted that this decision by the Panel generated considerable surprise since it went beyond the remedy requested by either party. Rather, the parties had agreed to implementation in the form of repayment of the balance of the benefit remaining but sought arbitration to resolve the question of what that balance was. The Panel did not require repayment with interest, however—in effect blessing an interest-free loan contingent upon exportation, *i.e.*, a subsidy prohibited by Article 3. The parties settled based on partial repayment and some lowering of Australian duties on other products.

provided only for prospective remedies in the case of prohibited export subsidies; it may be that in certain instances the appropriate remedy is repayment of the subsidy.[122]

In contrast, under the DSU, if a panel finds that the measure in question is inconsistent with the Agreement, it shall recommend that it be *brought into conformity* and *may* suggest ways the Member could do so.[123] Thus, there is no requirement in the general DSU that a panel recommend the withdrawal of an inconsistent measure. Neither does the DSU direct the panel to establish the timetable for implementation.

PART III: Actionable Subsidies

Part III of the Agreement deals with subsidies which, while not prohibited, may be challenged through the multilateral dispute mechanism if they have "adverse effects" on the trade interests of another Member, or be subject to countervailing duty measures if they cause or threaten material injury to a domestic industry.[124] It defines the types of adverse effect that can give rise to an action and the remedies available. It also defines certain types of subsidy as "non-actionable," although this provision has lapsed.

Article 5: Adverse Effects

This Article begins the definition of what constitutes an actionable subsidy and what actions can be taken. The original basis for this provision is Article XVI of GATT 1947, which provided for consultations if the effect of a subsidy was to increase exports, directly or indirectly, such that it caused serious prejudice to another Contracting Party's interests.[125] The ASCM expands upon this, stating that no Member, through the use of a subsidy, shall cause adverse effects to the interests of another Member.[126]

Article 5 defines those adverse effects as taking any of three forms: (1) injury to the domestic industry of another Member in the sense that this term is used in Part V of the Agreement, dealing with countervailing duties; (2) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994;[127] or (3) serious prejudice to the interest of other Members.

It should be noted, however, that this article explicitly excludes from its reach subsidies on agricultural products, in conformity with Article 13 of the WTO Agreement on Agriculture.[128]

Article 6: Serious Prejudice

Article 6 defines the term "serious prejudice," one of the three types of "adverse effect" that form the basis of a challenge to an actionable subsidy. Paragraph 1 provides that serious prejudice will be presumed if any of four situations existed. In other words, if a

[122] *See Canadian Regional Aircraft*, *supra* note 100, at ¶ 7.170.

[123] DSU, Art. 19.1.

[124] ASCM, Art. 10, n.35 provides that while the provisions of Part II or III may be invoked in parallel with the provisions of Part V (countervailing measures), with respect to the effects of the subsidies in the domestic market of the complaining Member, only one form of relief shall be available (*i.e.*, relief through the imposition of countervailing measures *or* relief under the provisions of Parts II or III, not both).

[125] GATT 1947, Art. XVI:1.

[126] ASCM, Art. 5.1.

[127] The concept of "nullification and impairment" of benefits originated in Article XXIII of GATT 1947. *See* Chapter 5, Part V.B, of this book.

[128] Article 13, however, restricts the application of countervailing measures for agricultural subsidies only temporarily. It expired at the end of 2003. *See* Agreement on Agriculture, Articles 1(e) and 13, and Chapter 6 of this book.

complaining Member makes a *prima facie* showing that any of these situations exist, the burden of proof shifts to the responding Member to rebut the claim. The four situations are:

- A total *ad valorem* subsidization of a product exceeding five per cent;[129]
- Subsidies to cover operating losses sustained by an industry;
- Subsidies to cover operating losses sustained by a company other than one time, non-recurring and non-repeatable subsidies;
- Direct forgiveness of debt.

This paragraph had a five-year life before requiring renewal.[130] It lapsed in the aftermath of the Seattle WTO Ministerial Meeting in 1999, so that there is no longer any situation in which serious prejudice will be presumed.

Paragraph 3 indicates what must be demonstrated in order to make a *prima facie* case of serious prejudice in the absence of the paragraph 1 presumption. To make a *prima facie* case, the complaining Member must demonstrate with positive evidence that the effect of the subsidy is adverse to the complaining Member's trade interests through displacing or impeding its exports to the subsidizing Member's markets or to third country markets, price undercutting, price suppression or lost sales, or increasing the subsidizing Member country's share of world trade in a particular subsidized primary product or commodity.[131] This analysis must focus on the effects of the subsidy on the product "like" the subsidized product.[132]

Paragraph 4 provides that in order to demonstrate that the "effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market,"[133] a complaining Member may show a change in relative market shares over a representative period. This paragraph does not apply when the complaint alleges displacement or impedance of imports in the market of the subsidizing Member.[134]

Paragraph 5 provides that price undercutting may be shown by a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market, although it does not preclude other means. Where possible, the comparison is to be made at the same level of trade and at comparable times, and account is to be taken of other factors affecting comparability. To make an affirmative finding of serious prejudice through price undercutting, the panel must find that the complaining Member has demonstrated that the price undercutting is significant and is a result of the effect of

[129] ASCM, Art. 6.1(a). It should be noted that in accordance with Annex IV of the ASCM, the percentage of subsidization is calculated in accordance with the cost to the government, unlike in a countervailing duty investigation in which the percentage of subsidization is calculated as the benefit to the recipient. Suggestions on how to measure the degree of subsidization in accordance with Annex IV can be found in the report of an informal group of experts formed to determine just that. *See Report of the Informal Group of Experts*, *supra* note 67. It should be noted that, since most of the "experts" in this group come from the Members' authorities charged with administering countervailing duties, the methods contained in this report provide significant guidance as to the methodology to be used for determining benefits for purposes of countervailing duty actions as well.

[130] ASCM, Art. 31. *See also*, the discussion in Article 27 of the implications for developing countries of the lapsing of this provisions.

[131] The increase must be as compared with the Member's average share during the previous three-year period, and it must follow a consistent trend over a period when subsidies have been granted. This provision does not apply when other multilaterally-agreed rules apply to trade in the product or commodity in question.

[132] *See* Report of the WTO Panel, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54, 55, 59, 64/R (1999), at ¶ 14.164 ("*Indonesia—Automobile Industry*").

[133] ASCM, Art. 6.3(b).

[134] *See Indonesia—Automobile Industry*, *supra* note 132, at ¶ 14.208.

the subsidy.[135] The displacement or price undercutting, however, must be demonstrated with respect to product originating in the complaining Member's territory.[136]

One issue to be addressed in such cases is how to gather the necessary evidence to prove or rebut a claim of serious prejudice. The ASCM seeks to provide guidance in this regard. First, Paragraph 6 requires that the Member in whose market serious prejudice is alleged to have occurred shall make available to the panel *all relevant* information that can be obtained as to changes in market shares of the parties to the dispute and prices of the products involved. While the information to be provided by parties to a dispute is "all" relevant information, it is more limited if the serious prejudice is alleged to have occurred in a third country market.[137] Annex V to the ASCM prescribes procedures for collecting the necessary evidence. Paragraph 3 of that Annex, while acknowledging the right of the parties to seek information from the government of the third country Member where third country serious prejudice is alleged, places limits on the degree of cooperation required of the third country Member. A third country Member need only supply information that has already been gathered or that is readily available and need not provide information that is normally maintained as confidential by the government.[138] It is notable that there are no such limitations on the information to be provided by the parties to the dispute.

Among the procedures for collecting information is the designation by the DSB of a representative to facilitate the information-gathering process.[139] The information gathering should be completed within sixty days of the date on which the matter was referred to the DSB.

Annex V provides for the possibility of the failure of the subsidiary or a third-country Member to cooperate with the information-gathering process.[140] In such circumstances, the panel is to base its decision on the best information available to it and the complaining member may present its case based on the available information, which would include the fact that the subsidizing or third country Member had failed to cooperate.[141] Finally, the ASCM notes that in deciding to base its decision on the best information available, the panel should consider the advice of the DSB representative.[142] The panel is not obliged to follow that advice, however, only to consider it.

Article 7: Remedies

This Article provides for dispute settlement proceedings (1) in a case of serious prejudice, (2) when a Member has reason to believe that a subsidy as defined in Article 1 provided by another Member is injuring the complaining Member's industry, or (3) when the subsidy

[135] *See id.* at ¶ 14.255 (It should be noted that this is the only serious prejudice case to date to go to a panel and that the Panel found that the European Communities, one of the complaining Members, had demonstrated serious prejudice through significant price undercutting).

[136] *See id.* at ¶ 14.204. It is not sufficient that there be serious prejudice to a company of the complaining Member; the serious prejudice must be to a *product* of the complaining Member. *See id*. at ¶ 14.201 (finding that the United States could not establish serious prejudice on the basis of harm to the Indonesian subsidiaries of U.S. companies).

[137] ASCM, Article 6.6 notes that the requirement to provide all relevant information, when applied to third country Members, is subject to the provisions of Annex V, paragraph 3.

[138] ASCM, Annex V:3.

[139] ASCM, Annex V:4. It should be noted, however, that the *Indonesia—Automobile Industry* case is the only serious prejudice dispute brought to date and serious prejudice was only one of the claims of violation of the WTO Agreement.

[140] ASCM, Annex V:5.

[141] ASCM, Annex V:6.

[142] ASCM, Annex V:7.

results in nullification or impairment of the complaining Member's benefits under the WTO Agreement. Like the Article 4 remedy available in the case of prohibited subsidies, the procedures under Article 7 differ in a number of respects from the procedures in disputes covered by the Dispute Settlement Understanding.

To begin the proceedings, the Member requests consultations with the subsidizing Member. Such consultations should begin as quickly as possible. Under the DSU, a request for consultations must state the reasons for the request, including an "indication of the legal basis for the complaint."[143] Under ASCM, Art. 7.7, a request for consultations must also include a statement of the evidence with regard to the nature and existence of the subsidy in question and either the injury, serious prejudice, or nullification or impairment of benefits caused to the interests of the complaining Member.[144]

If no mutually acceptable solution has been agreed within sixty days of the request, any party to the consultations may refer the matter to the DSB for the establishment of a panel. The composition of the panel and the terms of reference are to be established within fifteen days of the request.[145] The panel is to review the matter and present its final report to the parties. That report is to be circulated to all Members within 120 days of the panel's establishment, in contrast to the six months provided under the DSU.[146] Within thirty days thereafter, the report is to be adopted, unless either appealed by one of the parties, or the DSB decides, by consensus, not to adopt the report. The normal DSU period is sixty days.[147] If appealed, the Appellate Body is to issue its report within sixty days, extendable by an additional thirty days. This is the same period as in regular DSU proceedings.

If a report is adopted in which it has been determined that a subsidy has resulted in an adverse effect to the interests of another party, then the subsidizing Member shall take appropriate steps to remove the adverse effects or to withdraw the subsidy. If such steps are not taken within six months from the date of the adoption of the report, the DSB may authorize countermeasures. Such countermeasures must be commensurate with the degree and nature of the adverse effects determined to exist.

PART IV: Non-Actionable Subsidies

Article 8: Identification of Non-Actionable Subsidies

Article 8 of the ASCM provides that non-specific subsidies are not actionable,[148] and it also defines three categories of "green light" subsidy that are not actionable even if they are specific.[149] For the first five years of the Agreement, green light subsidies could not be subjected to countervailing duties[150] or to discipline under the Agreement. However, Article 8 was a temporary provision subject to renewal.[151] In the aftermath of the 1999 Seattle Ministerial, this is one of the provisions that was allowed to lapse. All such "green

[143] DSU, Art. 4.4.
[144] ASCM, Art. 7.2.
[145] ASCM, Art. 7.4. This is a somewhat faster time frame than under the DSU. The DSU provides that a panel shall be established "at the latest at the DSB meeting following that at which the request first appears," in other words, approximately one month after the initial request for the panel is made. DSU, Art. 6.1. In addition, under the DSU, normally the panel composition and the terms of reference are determined within twenty days of the establishment of the panel. DSU, Art. 7.1.
[146] *Compare* ASCM, Art. 7.5 *with* DSU, Art. 6.8.
[147] DSU, Art. 16.4.
[148] ASCM, Art. 8.1.
[149] ASCM, Art. 8.2.
[150] *See ASCM,* Art. 10, n.35.
[151] ASCM, Art. 31.

light" programs are therefore currently actionable, and will remain so unless this Article is reinstated at some future date.

The first "green light" category consists of subsidies for research and development ("R&D") programs. Assistance for R&D would not be actionable if provided to firms, higher education facilities, or research establishments acting under contract to firms if:

i. The assistance covers not more than 75 percent of the costs of industrial research;[152] or
ii. The assistance covers not more than 50 percent of the cost of pre-competitive development research.[153]

Additionally, the assistance must be limited exclusively to:

i. Personnel costs for staff employed exclusively in the R&D activity;
ii. Costs of buildings and equipment, including instruments, used exclusively and permanently for the R&D activity;
iii. Consultancy or equivalent services used exclusively for the R&D activity (this would include technical knowledge and patents); or
iv. Other overhead and running costs incurred directly as a result of the R&D activity.[154]

Both the numerical limits and the definitions are considerably broader than the R&D green light category in the *Dunkel Text* (which allowed assistance only up to 25 and 50 percent, rather than 50 and 75 percent, and which stopped well short of allowing assistance for the creation of a prototype). This reflects the sudden and complete shift in U.S. position in November/December 1993, from the Bush Administration's attempt to remove green light categories to the Clinton Administration's attempt to expand them.[155]

The second category of green light subsidies concerns aid to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development.[156] For a subsidy to be non-actionable, each disadvantaged region must be a clearly designated, contiguous geographic area with a definable economic and administrative identity (*e.g.*, a county or district), and must be determined to be disadvantaged based on explicit, verifiable, neutral and objective criteria.[157] It is this requirement for

[152] "Industrial research" is defined as: ". . . planned search or critical investigation aimed at discovery of new knowledge with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services." ASCM, Art. 8.2(a) n. 28.

[153] "Pre-competitive development activity" is defined as: ". . . the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use." ASCM, Art. 8.2(a) n. 29.

[154] ASCM, Art. 8.2(a).

[155] *See* HUGO PAEMAN and ALEXANDRA BENSCH, FROM THE GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND 131 (1995). One of the Clinton Administration's goals was to protect its Partnership for a New Generation of Vehicles, a subsidy to U.S.-owned automobile companies, which expired after the payment of US $1.5 billion in grants.

[156] ASCM, Art. 8.2(b).

[157] The term "neutral and objective" means criteria that do not favor certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. The criteria must include a measurement of economic development based on either: (i) income per capita, household income, or GDP per capita, which must be at least fifteen percent below the average for the territory concerned; or (ii) unemployment level, which must be at least ten percent above the average for the territory concerned. ASCM, Art. 8.2(b)(ii) and (iii).

explicit, verifiable, neutral and objective criteria that has been the most difficult for a defending country to demonstrate. Often, while regions identified as disadvantaged are, in fact, disadvantaged when examined under these criteria, the original decision to provide the assistance was based more on political considerations than on established explicit economic criteria.

The final category of green light subsidies is assistance to companies to help them adapt to new environmental requirements (as long as the assistance is limited to twenty percent of the cost of the necessary adaptation and is given on a one-time only basis). This was the result of a last-minute Mexican proposal (drawn from a 1989 EC proposal) that the United States was unable to block (because the U.S. credibility in opposing green light status had been compromised by its change in position on R&D subsidies).

Finally, Article 8 requires that, to be considered to be non-actionable, a green light subsidy must be notified in advance to the Committee on Subsidies and Countervailing Measures.[158] Nonetheless, language was added at U.S. (and possibly EC) insistence in late 1993 that subsidies may be found to be green light subsidies, even if not notified to the Committee in advance. If, in the course of a proceeding, it is determined that a subsidy meets the requirements, then that subsidy shall be treated as non-actionable.[159] The Committee, upon request, will review the practice to determine if the requisite conditions have been met.[160]

Article 9: Consultations and Authorized Remedies

Although green light subsidies as defined by Article 8.2 were considered non-actionable, Article 9 provided for some remedy when such a subsidy resulted in serious adverse effects to the domestic industry of another Member. Article 9 permitted the Member whose domestic industry was experiencing serious adverse effects to request consultations with the Member granting or maintaining the subsidy.[161] The purpose of such consultations was to clarify the facts and to arrive at a mutually acceptable solution.[162]

If no mutually acceptable solution had been reached within ninety days of the request for consultations, the requesting Member could refer the matter to the SCM Committee.[163] The Committee would then immediately review the effects and evidence of adverse effects. If the Committee determined that adverse effects existed, it could recommend that the granting Member modify the subsidy so as to eliminate the adverse effects. The Committee was to present its conclusions within 120 days of the matter being referred to it.[164]

If the granting Member had not followed the recommendation within six months, the SCM Committee could authorize the requesting Member to take appropriate countermeasures. Such countermeasures must be commensurate with the degree of adverse effects found to exist.[165] The Article 9 procedure was not used during the five years that Articles 8 and 9 were in effect.

[158] ASCM, Art. 8.3.
[159] *Id.*, Art. 10, n. 35.
[160] *Id.*, Art. 8.3 and 4.
[161] *Id.*, Art. 9.1.
[162] ASCM, Art. 9.2.
[163] *Id.*, Art. 9.3.
[164] *Id.*, Art. 9.4.
[165] *Id.*

PART V: Countervailing Measures

While the previous sections of the ASCM deal with rules governing the use of subsidies by WTO Members, as well as setting forth the procedures under which subsidies may be challenged within the WTO system, Part V of the Agreement outlines the rules and procedures that Members must follow when they take unilateral action against subsidies through the imposition of countervailing measures. The purpose of the Part V provisions is to limit the use of such measures in order to ensure that they are not used in a protectionist manner.[166]

Article 10: Application of Article VI of GATT 1994

Article 10 of the ASCM provides the foundation for the Agreement's provisions on the conduct of a countervailing duty investigation and requirements that must be met before countervailing duties can be imposed. Members are permitted to impose countervailing duties *only after* they have initiated and conducted an investigation in accordance with the provisions of Part V of the ASCM. A countervailing duty is defined in Article 10 as "a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise."[167] The remedy provisions of Parts II and III of the ASCM regarding prohibited and actionable subsidies may be invoked in tandem with the procedural provisions of Part V, however, only one form of remedy, a countervailing duty or a form of countermeasure (as outlined in Articles 4 and 7) may be imposed to offset the impact of a particular subsidy.[168]

Illustrating the integrated nature of all of the WTO Agreements, Members are also obliged by Article 10 to take account of Article 13 of the WTO Agreement on Agriculture. Article 13, the Due Restraint clause,[169] outlines exceptions to the provisions of Part V of the ASCM. For example, domestic agricultural support measures for which a Member had claimed an exemption from reduction commitments[170] shall be "non-actionable subsidies for purposes of countervailing duties," exempt from remedy action taken under Article XVI of GATT 1994 and Part III of the ASCM on actionable subsidies, and "exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member."[171] Members are also required to use

[166] Countervailing measures are not applied as often or by as many countries as anti-dumping measures. Between 1995 and June 30, 2002, eleven WTO Members had imposed a total of 84 countervailing measures (fourteen Members had initiated a total of 147 investigations), compared with over eleven hundred anti-dumping measures imposed by 29 countries (and over 1900 investigations initiated). *See* statistics on the WTO Website (www.wto.org). The United States was by far the largest user, with 34 measures (and 59 initiations). It was followed by the EC with fifteen measures, and Mexico with seven.

[167] ASCM, Art. 10, n. 36.

[168] *Id.,* Art. 10, n. 35.

[169] Article 13 is also referred to as the Peace Clause. Given the contentious nature of agricultural trade in the multilateral trading system over the past fifty years, this "loophole" provision designed to prevent countervailing duty investigations against certain agricultural subsidies is aptly named. It will be interesting to see how the agriculture liberalization negotiations stemming from the Doha Round of multilateral trade negotiations will deal with countervailing duties on agricultural goods.

[170] *WTO Agreement on Agriculture* at Annex 2:1.

[171] *Id.*, Art. 13(a)(i), (ii), and (iii). In addition, this article provides that domestic agricultural support measures that conform with Article 6 of the WTO Agreement on Agriculture (which contains provisions regarding Member's domestic support commitments) shall be exempt from countervailing duties unless there has been a determination of injury or threat of injury to the domestic industry producing the like product in accordance with Article VI of GATT 1994 and Part V of the ASCM on countervailing measures. *Id.,* Art. 13(b)(i). Similarly Art. 13(c) provides that export subsidies conforming to Part V of the Agreement on Agriculture (*e.g.*, subject to reduction commitments), may only be countervailed upon a determination of injury or

"due restraint" with respect to the initiation of a countervailing duty investigation.[172] It should be noted that Article 13 exceptions applied only during the "implementation" period, which was defined as nine years beginning on January 1, 1995, *i.e.*, through December 31, 2003.[173] Arguments have already begun about the legal consequences of expiry—will all agricultural export subsidies be prohibited under Article 3 of the ASCM?

Article 11: Initiation and Subsequent Investigation

The ASCM requires a transparent investigative process that affords interested parties the opportunity to participate in the investigation prior to the imposition of countervailing duties.[174] The requirements outlined in the Agreement include: (1) standards that need to be met for the initiation of an investigation; (2) the determination of domestic industry support for the application for the imposition of countervailing duties; and (3) rules of evidence for access to, and ability to comment on, information submitted during an investigation.

Article 11.1 and 2: Application for Imposition of Countervailing Measures. Article 11.1 of the ASCM requires that a countervailing duty investigation be initiated after written application by or on behalf of the affected domestic industry that includes the following information: (1) the existence of a subsidy and its alleged amount, if possible; (2) the existence of injury to the domestic industry producing the like product; and (3) the existence of a causal link between the subsidized imports and the alleged injury to the domestic industry.[175] Applicants for the imposition of countervailing duties must go beyond a "[s]imple assertion, unsubstantiated by relevant evidence" in order to meet the requirements set forth for the initiation of a countervailing duty investigation.[176] In special circumstances, the authorities of an importing Member may self-initiate an investigation without receiving an application. In such circumstances, the authorities must meet the same evidentiary requirements as a written application.[177]

The application for the imposition of countervailing duties must contain the following information before it is considered sufficient for the administering authority to initiate an investigation: (1) the identity of the petitioning party and a description of the volume and value of domestic production of the like product by the petitioner;[178] (2) a "complete" description of the allegedly subsidized imported product, the country or countries of origin of that product, and the identity of each known exporter or foreign producer and

threat of injury to the domestic industry. Moreover, such export subsidies are not subject to actions based on ASCM, Art. 3, 5, or 6. However, since the ASCM already provides that no countervailing duty may be levied without a determination of injury or threat of injury to a domestic industry, the Article 13 limitation appears to have little practical effect for countervailing duty purposes, except for measures falling within Article 13(a) of the Agriculture Agreement. It has worked to prevent recourse to the multilateral disciplines of the ASCM.

[172] It is not clear what "due restraint" means in this context, but it may require Members not to self-initiate investigations as opposed to initiating upon receipt of an application. Self-initiation of countervailing duty investigations is extremely rare.

[173] *Id.*, Art. 1(f) and Art. 13.

[174] These procedural rules are quite similar though not identical to the rules found in the ADA. *See* Chapter 11 of this book. Interpretations of ASCM obligations can be derived from panel and Appellate Body decisions of the comparable obligations found in the ADA.

[175] ASCM, Art. 11.1 and 2.

[176] *Id.*, Art. 11.2.

[177] ASCM, Art. 11.6. As noted above, self-initiation by the Importing Member is extremely rare.

[178] *Id.*, Art. 11.2(i).

any known domestic importers;[179] (3) evidence regarding the nature and amount of the alleged subsidy;[180] and (4) evidence that the domestic industry is being injured by the subsidized imports "through the effects of the subsidies."[181]

Article 11.3: Obligation to Review Evidence Prior to Initiation. Each Member's administering authority is charged with reviewing the evidence presented in each application for the imposition of countervailing duties "to determine whether the evidence is sufficient to justify the initiation of an investigation."[182] It should be noted that while an applicant need only provide such evidence that is reasonably available, the administering authorities have a separate obligation to determine that the evidence before them is sufficient to justify initiating an investigation. Thus, if the evidence "reasonably available" to the applicant is not sufficient to justify initiation, the administering authorities have two possible actions they can take. The administering authorities can either reject the application and refuse to initiate an investigation or they can seek "sufficient evidence" from other sources. According to the Panel report in *Guatemalan Cement II*, interpreting similar language in the Anti-dumping Agreement, "investigating authorities need not content themselves with the information provided in the application but may gather information on their own in order to meet the standard of sufficient evidence for initiation."[183]

It should also be noted that, in line with past GATT practice, while the evidence of the various elements (subsidies and injury or threat of injury thereby) must be sufficient, it need not reach the level necessary to sustain an affirmative preliminary or final determination. The *Guatemalan Cement II* Panel noted that the "type of evidence needed to justify initiation is *the same subject–matter or type of evidence* as that needed to make a preliminary or a final determination, although the quality and quantity needed for the initiation of an . . . investigation is less than for a preliminary or final determination."[184]

[179] *Id.*, Art. 11.2(ii).

[180] ASCM, Art. 11.2(iii).

[181] *Id.*, Art. 11.2(iv).

[182] *Id.*, Art. 11.3. In *Thailand Steel*, a WTO panel reviewing an anti-dumping measure imposed by Thailand, citing the Report of the WTO Panel, *Mexico-Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (2000) ("*HFCS")*, noted that the Anti-dumping Agreement (which contains comparable requirements for an application) "does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations." The panel went on to conclude that "the fact that the application contains data that is relevant . . . but does not contain explanation or analysis of much of this data does not, in and of itself, lead to a violation." *See* Report of the WTO Panel, *Thailand—Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R (2001) at ¶¶ 7.75 and 7.76.

Similarly, in *EC Bed Linen*, a WTO panel concluded that the authorities must examine the evidence in the application to determine its sufficiency to warrant initiation, but the ADA (and also similar provisions in the ASCM) "says nothing regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out." *See* Report of the WTO Panel, *European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/R (2001) at ¶ 6.198.

In *Guatemalan Cement II*, the Panel said that an application must contain evidence of all the necessary elements—dumping, injury, and causation—and that the "evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation." Report of the WTO Panel, *Guatemala—Definitive Anti-dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R (2000) at ¶ 8.35 ("*Guatemalan Cement II*").

[183] *Guatemalan Cement II*, *supra* note 182, at ¶ 8.62.

[184] *Id*. at ¶ 6.57 (emphasis in original). *See also, HFCS, supra* note 182, at ¶ 7.74 .

Similarly, in the GATT dispute on *Softwood Lumber*, the panel stated that "in analyzing further what was meant by the term "sufficient evidence," the Panel noted that the quantum and quality of evidence to be

In interpreting similar obligations to be met prior to initiating an anti-dumping investigation, in *Guatemalan Cement II*, a WTO Panel found that the Guatemalan authorities had violated Article 5.3 of the ADA when they initiated an anti-dumping duty investigation of imports of cement from Mexico without sufficient information to justify initiation.[185] Mexico claimed that the original application for anti-dumping duties failed to provide sufficient information for the investigating authority to "have properly determined that there was sufficient evidence of dumping, still less of a threat of material injury, and of a causal link between the imports allegedly dumped and the alleged threat of material injury to the Guatemalan domestic industry, to justify initiation of an anti-dumping investigation."[186] For example, with respect to the existence of dumping, the application contained only two invoices as evidence of normal value in the Mexican market, and those invoices failed to identify the type of cement sold, the amount sold, and the source of the sale. In addition, the Panel concluded that, based on the evidence submitted in the application, normal value and export price sales were at a completely different level of trade. According to the Panel report, "{t}he existence of these stark differences in quantity and in level of trade, . . . should have triggered at a minimum some reflection on the part of the investigating authorities as to the possible non-comparability of the sales in question."[187] *Guatemalan Cement II* highlights the importance of the procedural rules established by the ADA and the ASCM. In order to be sufficient for initiation, an application for the imposition of anti-dumping or countervailing duties must provide positive evidence of dumping or subsidization that causes material injury to the domestic industry producing the like product that is not based merely on "[s]imple assertion."[188]

Article 11.4: Standing. The authorities are also charged with determining the degree of support for, and opposition to, the application for the imposition of duties and to examine whether the countervailing duty application is being made "by or on behalf of the domestic industry." Article 16 of the ASCM defines the domestic industry as the "domestic producers as a whole of the like products or . . . those of them whose collective output of the products constitute a major proportion of the total domestic production of those products."[189] Article 11.4 states that the application will be deemed to have been

required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination." Report of the GATT Panel, *United States—Measures Affecting Imports of Softwood Lumber from Canada*, at ¶ 332, SCM/162 (adopted 27 October, 1993) BISD, 40th Supp., 358.

[185] *Guatemalan Cement II*, *supra* note 182, at ¶ 8.39.

[186] *Id*., at ¶ 8.29.

[187] *Id*. at ¶ 8.37.

[188] ASCM, Art. 11.2. *See* Notice of Initiation of Countervailing Duty Investigation*: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil, Indonesia, Thailand, and Venezuela*, 64 Fed. Reg. 34,204, 34,207 (U.S. Dep't Comm. June 25, 1999) ("While Petitioners have documented the committed investment element of SIDOR's privatization, a simple assertion that the investment was a condition of SIDOR's sale is insufficient to demonstrate the existence of a direct or indirect financial contribution by the GOV to SIDOR. Thus, we are not investigating the investment commitments which were made a part of the privatization of SIDOR").

[189] ASCM, Art. 16.1. The "standing" of the applicants to submit an application was one of the most controversial issues under the 1979 Subsidies and Anti-dumping Codes, giving rise to several dispute proceedings. Article 16.1 and the comparable provision in the ADA reflect the negotiators' efforts to resolve the controversy by establishing clearer rules.

See, e.g. Swedish Steel, where a GATT panel ruled that the U.S. Department of Commerce had not "taken steps which could reasonably be considered to be sufficient to ensure that the initiation of this investigation was based on an application filed on behalf of the domestic industry affected." Report of the GATT Panel,

made on behalf of the domestic industry if it is supported by domestic producers whose collective output is at least 25 percent of the total production of the like product.[190] In addition, the domestic producers expressing support for the petition must account for at least fifty percent of the domestic production expressing an opinion either in favor of or against the petition.[191]

In *HFCS*, a WTO panel, interpreting identical language in the Anti-dumping Agreement, found that Mexico had acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.7 of that agreement when it conducted its standing analysis on only the market segment which sold sugar cane to industrial users, ignoring the segment of the industry that sold to households (which constituted 47 percent of the domestic industry).[192]

Article 11.5–11.11: Initiation and Subsequent Investigation. Article 11 also dictates timelines for the completion of an investigation and standards concerning when an administering authority is required to terminate an investigation. Under Article 11.11, countervailing duty investigations are to be concluded within one year of initiation and in no case shall they last longer than eighteen months. The administering authorities conducting an investigation are required to terminate the investigation "promptly" when they are satisfied that there is not sufficient evidence of subsidization or injury to the domestic industry.[193] For example, if the amount of a subsidy is determined to be

United States—Imposition of Anti-dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, ADP/47 (1990) (unadopted) at ¶ 5.19 ("*Swedish Steel* ").

In a case involving a regional market, a GATT panel in *Cement from Mexico* ruled that the United States had violated its GATT obligations "because the United States authorities did not satisfy themselves prior to initiation that the petition was *on behalf of producers of all or almost all of the production in the regional market*." Report of the GATT Panel, *United States—Anti-dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82 (1992) (unadopted) at ¶ 5.34 (emphasis added) ("*Cement from Mexico*").

See also, e.g., Salmon CVD, where a GATT panel determined that the U.S. Department of Commerce acted consistently with its obligations when it initiated anti-dumping and countervailing duty investigations against salmon imports from Norway based on a petition filed on behalf of the domestic salmon industry. Norway argued that the Department of Commerce failed to determine if the petitioning party actually represented the affected domestic industry. However, the Panel ruled that the Department of Commerce "could reasonably have relied on statements in the certified petition that these firms accounted for well over a majority of production. . . and that these firms supported" the petition (even though Commerce had received a letter from some of those domestic producers stating that they did not support the petition). Report of the GATT Panel, *United States—Imposition of Countervailing Duty on Imports of Fresh and Chilled Atlantic Salmon from Norway*, BISD, 41st Supp., Vol. II at 576 at ¶ 232 (1994) (adopted).

[190] This means all production, including production by firms that may be excluded for purposes of the fifty percent test, *i.e.*, those that are themselves importers of the subject product or affiliated with the foreign producers of the subject product.

[191] ASCM, Art. 11.4. In the United States, prior to the implementation of the ASCM and the Uruguay Round Agreements Act, the U.S. Department of Commerce practice was to accept at face value the petitioner's claim that it represented the domestic industry. The Department of Commerce would only question the petitioner's standing if another member of the domestic industry specifically expressed their opposition to the Department in writing. Even then, such a letter of opposition was only considered after an investigation had been initiated. In *Swedish Steel,* a GATT Panel rejected Department of Commerce practice concerning petitioner's standing. At the time, the United States blocked adoption of the decision of the Panel. *See Swedish Steel*, *supra* note 189.

During the Uruguay Round negotiations, the *Checklist* of issues specifically noted opposition to the U.S. approach of "assuming standing" unless a majority of the domestic industry actively opposed the petition, and noted that a petition or application should contain positive evidence that it is brought on behalf of the domestic industry. *Checklist*, *supra* note 21, at III.5.1.

[192] *See HFCS*, *supra* note 182.

[193] ASCM, Art. 11.9.

de minimis, *i.e.*, less than one percent *ad valorem*, or the volume of imports or material injury to the domestic industry are negligible, the administering authority must terminate the investigation.[194]

In *United States—CDSOA,* the Appellate Body reversed a panel finding that the U.S. Continued Dumping and Subsidy Offset Act (known as the "Byrd Amendment" after the Senator who introduced it), violated Article 11.4. The statute provides for the distribution of anti-dumping and countervailing duties collected by the U.S. Customs Service to the companies that supported the original petition resulting in the order under which the duties were collected. The Panel stated that the statute created:

> the spectre of an investigation being pursued where only a few domestic producers have been affected by the alleged dumping, but industry support is forthcoming because of the prospect of offset payments being distributed if dumping is found in consequence of the investigation and anti-dumping duties imposed. In consequence the CDSOA may be regarded as having undermined the value of AD Article 5.4/SCM Article 11.4 to the countries with whom the United States trades, and the United States may be regarded as not having acted in good faith in promoting this outcome.[195]

The Appellate Body disagreed. In its view Article 11.4 provided no basis for examining the motives of petitioners; "it is the "quantity", rather than the 'quality', of support that is the issue."[196] However, as noted below, the Appellate Body did uphold the Panel's finding that the statute violated Article 32.1 of the ASCM.

Article 12: Evidence

Article 12 establishes standards for rights of access to, and presentation of, data and information during an investigation. Interested parties[197] are to be given notice of the information that the administering authorities require to conduct the investigation[198] and they are to be given at least thirty days in which to respond to the questionnaires (requests for deadline extensions should be considered and granted where practicable).[199]

[194] *Id.*

[195] Report of the Panel, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/, 234/R (2002), ¶ 7.63.

[196] Report of the Appellate Body, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/, 234/AB/R (2003) (*United States—CDSOA")*, ¶ 283.

[197] *Id.* Art. 12.9 defines the term " interested parties" as including "(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and (ii) a producer of the like product in the importing Member or a trade and business association, a majority of the Members of which produce the like product in the territory of the importing Member." Interested Member governments are also allowed to present evidence during an investigation. In addition, Article 12.10 states that the administering authority shall also accept information from industrial users of the product under investigation, or from consumer groups if the product is commonly sold at the retail level. In practice, however, the effect or impact of user or consumer group input has been limited. For example, in the United States there is no evidence that authorities actually take account of the views of users or consumer groups. *See, e.g.*, Decision Memorandum accompanying the Notice of Final Determination of Sales at Less Than Fair Value: *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539 (U.S. Dep't Comm. April 2, 2002) (final determ.) (The Department of Commerce noted that it had received a case brief from a consumer group; however, none of the group's views were discussed in the Department's Decision Memorandum.)

[198] ASCM, Art. 12.1.

[199] *Id.*, Art. 12.1.1. This minimum time period was established by the negotiators to resolve controversies over what constituted a "reasonable opportunity" to respond.

The WTO panel in *Guatemalan Cement II* provided some clarification regarding the presentation of arguments and information. According to the Panel, Article 6.1 of the Anti-dumping Agreement (which corresponds to Article 12.1 of the ASCM) "does not require investigating authorities to set time-limits for the

The administering authority is required to provide a complete, full-text copy of the application for the imposition of countervailing duties to all interested parties as soon as an investigation has been initiated[200] and, in addition, the authorities are to ensure that all information presented by one interested party is made available to all other interested parties.[201] Confidential business information, the release of which could cause a "significantly adverse effect" upon the submitting party, shall be treated as confidential by the administering authorities.[202] Interested parties are required to provide non-confidential summaries that "provide a reasonable understanding of the information submitted in confidence" of any information for which confidential treatment had been requested.[203] Once the information has been submitted to the administering authorities by the interested parties, the authorities have the right under Article 12 to conduct on-site verification of any information submitted by any interested party during the course of the proceeding.[204]

If an interested party refuses access to, or otherwise does not provide the requested information within a reasonable time period, or significantly impedes the investigation (*e.g.*, the accuracy of the information presented is not verifiable), the administering authority may make its preliminary or final determinations on the basis of "facts

presentation of arguments and evidence during the final stage of the investigation." Article 6.1 only requires that investigating authorities provide respondents with "at least 30 days for replying to questionnaires" and that the authorities provide interested parties with 'ample' opportunity to present evidence and 'full' opportunity to defend their interests." *Guatemalan Cement II*, *supra* note 182, at ¶¶ 8.118 and 8.119.

[200] ASCM, Art. 12.1.3. The Panel in *Guatemalan Cement II* clarified the meaning of "as soon as," stating that this phrase "conveys a sense of substantial urgency" and that "'immediately' and 'as soon as' are considered to be interchangeable." Thus, full copies of the application for the imposition of duties must be presented to interested parties immediately upon initiation and not several days later. *Guatemalan Cement II*, *supra* note 182, at ¶ 8.101.

[201] ASCM, Art. 12.1.2. Similar provisions in the Anti-dumping Agreement have been reviewed by the Dispute Settlement Body. For example, in *Guatemalan Cement II,* the panel stated that Article 6.4 of the Anti-dumping Agreement "provides that an interested party shall have 'timely opportunities' to see all information that is relevant to the presentation of its case." However, if the authorities require parties to serve copies of all submissions on all other parties, access to the official file may not be necessary. In the event that the parties are not required to serve submissions, "access to the file may be the only practical means by which evidence presented by one interested party" may be "'made available promptly."' *Guatemalan Cement II*, *supra* note 182, at ¶ 8.133.

[202] ASCM, Art. 12.4. In the United States, confidential business information is submitted under an Administrative Protective Order, which binds the Order's signatories (usually the lawyers for the various parties) to not disclose any information marked as confidential. Mexico permits access to confidential business information only to Mexican lawyers and confidential information can only be reviewed at the offices of the administering authorities (after the parties have posted a large bond to ensure compliance with the protective order). The treatment of confidential information is extremely difficult for administering authorities. While interested parties need access to information in order to present arguments, companies, both applicants and exporters, are concerned that the application of rules such as those used by the United States in other countries, could lead to the inadvertent disclosure of their business and trade secrets.

In *Guatemalan Cement II*, the Panel ruled that an administering authority *cannot delay* making available evidence submitted by an interested party merely because the submitting party had requested confidential treatment for the information submitted. *Guatemalan Cement II*, *supra* note 182, at ¶ 8.143.

[203] ASCM, Art. 12.4.1.

[204] ASCM, Art. 12.5 states that the authorities shall "satisfy themselves as to the accuracy of the information supplied" by interested parties. Article 12.6 provides the authorities with the right to conduct on-site verification of information submitted by parties and governments in the territory of other Members so long as the companies involved agree and the Member's government is "notified and does not object." Further, Annex VI of the ASCM outlines the "Procedures for On-The-Spot Investigations Pursuant to Paragraph 6 of Article 12." Annex VI provides basic guidance with respect to the notification of parties of the need for on-the-spot investigations and the requirement that administering authorities notify interested parties in the exporting country of the nature of the information that they will be required to provide prior to the commencement of the on-the-spot investigation.

available."[205] However, "due account" is to be taken of any problems or difficulties experienced by interested parties, especially small companies, in providing the requested information in a complete and timely manner.[206] What constitutes appropriate "facts available," and when recourse to them is appropriate, is a matter of considerable controversy.

This issue of "facts available" is one area where the ASCM and the ADA rules differ.[207] The ADA contains an Annex providing guidance on the use of facts available. Paragraph 7 of the Annex notes that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."[208] This use of information leading to less favorable results is often used to justify the use of "adverse facts available" in the case of a non-cooperating respondent or a respondent that otherwise significantly impedes an investigation. Unlike the ADA, however, the ASCM contains no similar provision. Therefore, it is unclear that investigating authorities can ever justify the use of facts that systematically apply to the disadvantage of the responding party in a countervailing duty investigation or review.

Even if resort to adverse facts is permitted in countervailing duty cases, their use is highly controversial. U.S. practice with respect to the use of facts available, especially adverse facts available determinations, has come under attack in the WTO ADA. While the ADA provides more guidance than the ASCM on the use of facts available, a discussion of a key dispute on this issue may provide some guidance for ASCM purposes. In *Hot-Rolled Steel from Japan*, a WTO Panel ruled, and the Appellate Body affirmed, that the U.S. Department of Commerce had violated the relevant provisions in the ADA by unjustifiably assigning adverse facts available to three Japanese respondents during an anti-dumping duty investigation of hot-rolled steel imports from Japan.[209] Two of the respondent companies, NSC and NKK, received adverse facts available determinations because the Department of Commerce refused to accept requested information (in this case, a theoretical-to-actual weight conversion factor) on the grounds that the information was submitted after the pre-established deadlines outlined in the Department's regulations. The Panel ruled that, since the information was submitted before the start of verification, and was not information such as prices or costs that would impede the Department's ability to complete its investigation in a timely manner, "an objective and unbiased investigating authority could not . . . have reached the conclusion that NKK and NSC failed to provide necessary information within a reasonable period."[210] The inability of respondent companies to meet the often-tight deadlines established by administering authorities is a constant problem in both anti-dumping and countervailing duty proceedings. *Hot-Rolled Steel from Japan* provides guidance to the authorities as to what actually constitutes a "reasonable period" in which to expect respondents to provide requested information.

[205] ASCM, Art. 12.7.
[206] *Id.*, Art. 12.11.
[207] *Compare* ASCM, Art. 12.7 and 11 *with* ADA, Art. 6.8 and Annex II.
[208] ADA, Annex II.7.
[209] Report of the WTO Panel, *United States—Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (2001) ("*Hot-Rolled Steel from Japan*"), *aff'd* Report of the Appellate Body, *United States—Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, AB-2001-2, WT/DS184/AB/R (2001). It should be noted that the rules governing the use of facts available in the ADA are more detailed than those found in the ASCM. While the language in ASCM Art. 12.7 is identical to the first sentence of Article 6.8 of the ADA, the ADA also contains Annex II, which provides detailed guidance on the use of facts available. The ASCM does not contain similar guidance. Some Members have argued for inclusion in the ASCM of provisions similar to Annex II of the ADA.
[210] *Hot-Rolled Steel from Japan*, *supra* note 209, at ¶ 7.60.

The issues surrounding the U.S. Department of Commerce's facts available determination for the third company in *Hot-Rolled Steel from Japan*, KSC, illustrates why the procedural rules established by the WTO Agreement were necessary to regulate the conduct of trade remedy cases among Member states. KSC was requested by the Department of Commerce to provide resale prices and further manufacturing costs for an affiliated purchaser in the United States, California Steel Industries ("CSI"), a normal request in many anti-dumping proceedings. However, while CSI was fifty percent owned by KSC, KSC had no direct control over the company, as evidenced by the fact that CSI was one of the applicants in the case. KSC had requested that the Department of Commerce not require it to provide data on sales to CSI because of the inherent conflict present in the case. KSC had also presented the Department of Commerce with the correspondence demonstrating its efforts to obtain the requisite information from CSI and CSI's refusal to cooperate with KSC. In its determination, the Department of Commerce ruled that KSC had not acted to the best of its ability to obtain the requested reseller data and assigned an adverse facts available product-specific margin to KSC. The Panel ruled that since there was no disputing the fact that KSC had not provided the requested information, the Department of Commerce was justified under Article 6.8 of the ADA in making a determination based on facts available because KSC had not provided the requested information. However, the facts in this case demonstrated that KSC could not have reasonably been expected to provide affiliated reseller data when it did not have direct control over the reseller and the reseller was an applicant in the case and had interests directly opposed to those of the respondent, KSC.[211] Therefore, the application of *adverse* facts available was not appropriate.

Article 13: Consultations

When a countervailing duty application is filed with a Member government, Article 13 of the ASCM requires that Member to provide the opportunity for consultations, prior to initiation, to any Member government whose products may be subject to the countervailing duty investigation.[212] The pre-initiation consultations have the "aim of clarifying" the information submitted in the application, including the nature and amount of the subsidy, injury to the domestic import competing industry, and a causal link between the subsidized imports and the alleged injury.[213] The goal of the consultations is to encourage the parties to arrive at a "mutually agreed solution" to resolve the dispute. In practice, however, while pre-initiation consultations have sometimes resulted in a few subsidy programs not being investigated by the investigating authority (which in practical terms is a worthwhile outcome for the responding Member), they do not appear ever to have led to a complete withdrawal of a case.

Consultations are to be permitted throughout the countervailing duty investigation and are not to be limited to just the pre-initiation stage.[214] Note 44 of Article 13.2 specifies that "no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given." The Member's investigating authority is also required to provide affected Members with access to all non-confidential evidence presented during the investigation.[215] However, Article 13 does not prevent a Member

[211] *Id.* at ¶ 7.73.
[212] ASCM, Art. 13.1
[213] *Id.,* Arts. 11.2 and 13.1.
[214] *Id.*, Art. 13.2.
[215] *Id.*, Art. 13.4.

from proceeding "expeditiously" with respect to initiation of an investigation or reaching a preliminary or final determination, as long as the Member has provided affected Member governments the "reasonable" opportunity for consultations.[216]

Article 14: Calculation of the Amount of a Subsidy

Article 14 provides guidelines for the measurement of four types of subsidy in countervailing duty investigations:

- Government provision of *equity capital* is not to be regarded as conferring a benefit unless the investment decision is inconsistent with the usual investment practices of private investors in the Member country.
- The benefit from a *loan* is the difference between what the recipient pays for the government loan and what the recipient would pay for a comparable commercial loan.
- The benefit from a government *loan guarantee* is the difference between the amount the recipient pays for the guaranteed loan (including the guarantee fee) and the amount it would pay for a comparable commercial loan absent the government guarantee.
- The government *provision of a good or service* or *purchase of a good* is only to be treated as a benefit if the provision is made for less than adequate remuneration or the purchase for more than adequate remuneration. Article 14 does not define "adequate remuneration," though it does require that the adequacy of remuneration be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase.[217] It does not indicate how this is to be measured if the Government is the sole provider/purchaser of the good or provider of the service in the country in question; however, the language restricting the comparison to the market in the country of provision or purchase could be viewed as prohibiting cross-border comparisons.[218]

[216] *Id.*, Art. 13.3.

[217] ASCM, Art. 14(d).

[218] In *Softwood Lumber III*, however, the Appellate Body left the door open to the possibility of a cross-border comparison, although it stated that "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited." *Softwood Lumber III Appellate Body Report*, *supra* note 53, ¶ 102. The Appellate Body indicated that if the investigating authorities use an alternative benchmark, they have an "obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision. . . ." *Id.* at ¶ 106. While noting it might in certain instances be possible to use a benchmark from outside the country of provision, suitably adjusted, doing so would be extremely difficult. *See id.* at ¶¶ 108–109:

> . . . it seems to us that it would be difficult, from a practical point of view, for investigating authorities to replicate reliably market conditions prevailing in one country on the basis of market conditions prevailing in another country. First, there are numerous factors to be taken into account in making adjustments to market conditions prevailing in one country so as to replicate those prevailing in another country; secondly, it would be difficult to ensure that all necessary adjustments are made to prices in one country. . . . In any event, any comparative advantage would be reflected in the market conditions prevailing in the country of provision and, therefore, would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration, if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision.

In the view of the authors, it was not the intention of the drafter of the language to permit cross-border comparisions, nor was it of Mexico, the GATT Contracting Party which had pushed the language of Article 14 (d) to preclude the U.S. from substituting cross-border U.S. energy prices for Mexican ones.

Article 14 is the only Article to provide guidance on the measurement of the benefit conferred by actionable subsidies for countervailing duty purposes.[219] It provides for guidelines for measuring the benefit to the recipient for purposes of defining a subsidy under Article 1.1(b) of the ASCM (defining subsidy as a financial contribution or price or income support which confers a benefit on the recipient) for countervailing duty purposes.[220]

While the chapeau to Article 14 states that it provides guidance for countervailing measures purposes, it also indicates that it is to calculate the benefit to the recipient conferred pursuant to Article 1.1(b). Thus, this Article has been used by Panels to inform their determination of whether a subsidy existed under Article 1 for other purposes as well.[221]

Article 14 requires that any calculation methodology employed by an investigating authority be provided for either in the national legislation or in the investigating authority's implementing regulations.

Article 15: Determination of Injury

The provisions of the ASCM and of the Anti-dumping Agreement with regard to injury determinations are discussed in Chapter 17 of this book.

Article 16: Definition of Domestic Industry

Article 16 defines the term "domestic industry" for purposes of the ASCM. For countervailing duty purposes, the domestic industry must be identified both in order to determine if an application was submitted by or on its behalf (Article 11.1) and to assess whether the subsidized imports have caused or threaten to cause it material injury (Article 15). The definition is also important for multilateral action concerning the definition of adverse effects based on injury to a domestic industry (Article 5). Article 16.1 indicates that "domestic industry" can refer either to the producers as a whole *or* to those producers whose collective output constitutes a major proportion of the total domestic production of the like products. However, it explicitly permits the exclusion of those companies that are related to either the exporters or the importers of the allegedly subsidized products[222] or who are themselves importers of the allegedly subsidized products. This exception creates the potential to ignore a significant percentage of the domestic industry if an investigating authority so chooses. For example, the situation could arise in which there

[219] Annex IV to the ASCM provides guidance on the measurement of the benefit for purposes of serious prejudice analysis (Article 6.1(a) only, which has expired), but specifies that this Annex applies only to that situation. For Article 6.1(a) purposes, the Annex provides that the benefit shall be calculated as the cost to the government providing the subsidy. Article 14 provides means of calculating the benefit amount as the measure of the benefit to the recipient. This dichotomy of treatment represents the denouement of the theological battle that the European Communities and the United States waged throughout the 1980's about whether subsidies should be measured by the "cost to the Government" (the European Communities position, although the European Communities relied so frequently on "opportunity cost to the government" as to blur any distinction) and "value to the recipient" (the U.S. position, although the U.S. Department of Commerce refused to recognize that the value to the recipient could well be less than the face value if the subsidy carried with it obligations, either explicitly to keep an uneconomic plant open, or implicitly to maintain a bloated workforce).

[220] ASCM, Art. 14, chapeau. The Appellate Body has found that this textual reference to Article 1 in the chapeau of Article 14 indicates that benefit is used in the same sense in both Articles as referring to a benefit to the recipient. *See Canadian Civilian Aircraft I*, *supra* note 43, at ¶ 155; *Lead Bar*, *supra* note 62, at ¶ 57.

[221] *See, e.g., Canadian Civilian Aircraft I*, *supra* note 43.

[222] ASCM, footnote 48 defines the situations in which a producer will be deemed to be related to an exporter or importer.

were four domestic producers, each accounting for twenty-five percent of the domestic production, however three of those producers fall within the exception. In that circumstance, this paragraph permits the Member to define the "domestic industry" as the single company, which in reality accounts for only twenty-five percent of the domestic production. Thus, if this was the only company of the four suffering injury, whereas the other three producers were unharmed, the investigating authorities could still be entitled to find injury to the "domestic industry," *i.e.*, the one company. Moreover, this company could be considered to file on behalf of the domestic industry, even if the remaining seventy-five percent of production opposed the application. Nevertheless, Members that apply countervailing duty laws desired this exception out of concern that the related companies or importers would be sheltered from the negative effects of the subsidized imports or would place the interests of the exporting companies above their own domestic interests.

Article 16.2 and 16.3 deal with the situation where the producers in a regional market can be treated as a separate industry. This has primary relevance in the context of injury, and is discussed in Chapter 17 of this book. However, it is also relevant in terms of standing to file an application for an investigation. In brief, the producers in a regional market may be treated as a separate industry for both standing and injury purposes if they sell all or almost all of their production in that market, the demand in that market is not supplied to any substantial degree by other domestic producers, and the subsidized imports are concentrated in that market and are causing injury to the producers of all or almost all of the production in that market.[223]

Article 16.4 notes that where two or more countries have entered into a customs union within the meaning of Paragraph 8(a) of GATT 1994, Article XXIV, and have reached such a level of integration that they have the characteristics of a single, unified market, the term "domestic industry" applies to the producers in the entire customs union. This paragraph would require that the European Community treat the entire territory of the European Community as a single market for purposes of defining the domestic industry. Again, this is relevant for both standing and injury purposes.

Article 17: Provisional Measures

This article addresses the use of provisional measures in the course of a countervailing duty investigation. Provisional measures are designed to provide a certain degree of protection to domestic industries from the harmful effects of subsidized imports at a fairly early stage in the investigation. Any imports to which provisional measures are applied will be assessed for countervailing duties if a definitive measure is imposed at the end of the investigation, so that exporters are likely to exercise a little more caution after they have been applied.

Provisional measures may only be imposed if the following criteria are met:

- An investigation must have been initiated in accordance with Article 11 of the ASCM;
- There must have been public notice of that initiation;
- Interested parties must have had an adequate opportunity to submit information and make comments;
- There must have been a preliminary determination that a subsidy exists and that the domestic industry is injured by reason of the subsidized imports; and

[223] *See, e.g., Cement from Mexico*, *supra* note 189, at ¶ 5.22–5.23.

- The authorities must determine that such measures are necessary to prevent injury being caused during the investigation.[224]

Once those criteria are met, provisional measures may be imposed. The ASCM specifies what measures are acceptable. The only provisional measures permitted are the use of provisional countervailing duties guaranteed by cash or bonds equal to the amount of the provisionally calculated subsidization. Moreover, the provisional measures must be refundable. It should be noted that in applying the provisional measures, a Member must also follow the relevant provisions of Article 19, relating to the application of countervailing duties (discussed, *infra.*).

Finally, there are time limits on the application of provisional measures. Such measures should be applied for as short a period as possible, may not be applied sooner than sixty days after the date of initiation of the investigation, and may not exceed four months.[225] The application of these requirements was addressed in *Softwood Lumber II*. Canada had challenged the manner in which the United States had imposed provisional measures under the "critical circumstances" provision of ASCM, Art. 20.6. The Panel found that Article 20 did not permit an exception to the requirements of 17.3 and 4. The U.S. had argued that the period of application of Article 17.4 applied only to the time frame during which the duty deposit or bond was collected, but did not address the date of entry of the imports on which that duty or bond was assessed. The Panel rejected this argument, stating that such an approach would render meaningless the disciplines imposed by Article 17.[226] If the Member country's final determination is issued more than four months after the imposition of provisional measures, the imports during that post-four month gap period are not subject to the provisional measures and must be permitted entry without hindrance.

Article 18: Undertakings

This article deals with undertakings that may be the basis for suspension or termination of an investigation without the imposition of provisional measures or countervailing duties. In order to accept such an undertaking, the following criteria must be met:

- The undertaking must be voluntary;[227] and
- The authorities of the importing Member must have made a preliminary affirmative determination of subsidization and injury to the domestic industry therefrom.[228]

Undertakings may take two different forms: (1) an agreement by the government of the exporting Member to eliminate or limit the subsidy or to take other measures concerning its effects[229] or (2) an agreement by the exporter(s) to revise prices so as to eliminate the injurious effect of the subsidies. There are several restrictions on such exporter-based

[224] ASCM, Art. 17.1.

[225] ASCM, Art. 17.4. *Compare* ADA, Art. 7.4, permitting a two-month extension if requested by any exporters representing a significant percentage of the trade involved. *See HFCS*, *supra* note 182, at ¶ 7.181 (finding ADA, Art. 7.4, which contains a similar limit on the length of time provisional measures could be imposed, was not ambiguous and provisional measures could not be imposed for more than six months).

[226] *Softwood Lumber II*, *supra* note 50, at ¶ 7.102.

[227] *ASCM*, Art. 18.1

[228] *Id.*, Art. 18.2.

[229] Frequently the Government of the exporting Member imposes an export tax, thus receiving the revenue generated by the measures itself rather than allowing the importing Member to collect them in the form of duties.

undertakings. First, the price increases must not be higher than necessary to eliminate the amount of the subsidy and preferably will be less than the amount of the subsidy, if that lesser amount would be sufficient to remove the injury to the domestic industry.[230] In addition, exporter-based undertakings cannot be sought or accepted by the importing Member unless it has obtained the consent of the exporting Member.[231]

The importing Member need not accept an undertaking if it determines that such undertaking is not practical. In such case, the importing Member, to the extent practicable, must provide the exporters with an explanation of the reasons for considering such an undertaking inappropriate and provide the exporter an opportunity to comment on those reasons.[232] Similarly, while the importing Member may suggest an undertaking, it cannot force an exporter to enter into such an undertaking. Moreover, the fact that either party did not offer or accept an undertaking may not prejudice the outcome of the investigation.[233] However, in a regional domestic industry case, the importing Member must offer the exporters an opportunity to enter into an undertaking if the countervailing measures would be imposed nation-wide.[234]

Once an undertaking is accepted, if either the exporting Member requests it or the importing Member so decides, the investigation may be continued and completed. If, as a result, there is a negative finding of either subsidization or injury caused by the subsidized imports, then the undertaking must lapse.[235] The only exception is if the negative determination is due, in large part, to the existence of the undertaking. If that is the case, then the importing Member may require that the undertaking be continued for a reasonable period. It should be noted that "reasonable period" is not defined and there have been no dispute challenges on this issue yet to interpret the meaning of "reasonable period." If an affirmative determination of subsidization and injury is made, then the undertaking may continue, consistent with the requirements of the ASCM.[236]

Finally, this Article permits the authorities of the importing Member to require any government or exporter that has entered into an undertaking to provide information periodically, and permit verification of that information, concerning its fulfillment of the provisions of the undertaking.[237] If there is a violation, the authorities of the importing Member may, in conformity with the ASCM, immediately impose provisional measures based on the best information available.[238] Definitive duties may be levied in accordance with the ASCM on products entered for consumption not more than ninety days prior to the imposition of provisional measures, but in no case may the retroactive assessment apply to entries prior to the date of the violation of the undertaking.[239]

Article 19: Imposition and Collection of Countervailing Duties

This article provides the rules for the imposition and collection of countervailing duties. Specifically, the first paragraph notes that, if after consultations a Member makes a final determination regarding the existence and amount of a subsidy and finds that the

[230] ASCM, Art. 18.1(b).
[231] *Id.*, Art. 18.2.
[232] *Id.*, Art. 18.3.
[233] ASCM, Art. 18.5.
[234] *Id.*, Art. 16.3.
[235] *Id.*, Art. 18.4.
[236] *Id.*
[237] ASCM, Art. 18.6.
[238] *Id.*
[239] *Id.*

subsidized imports are thereby causing injury, it may impose countervailing duties unless the subsidy or subsidies are withdrawn. One issue that has been raised repeatedly is whether or not a Member should impose duties only to the level necessary to eliminate the injury caused by the effects of the subsidy. This is known as the "lesser duty" rule. The second paragraph of this article makes clear that use of the lesser duty rule is not required and that the decision of whether to impose a duty less than the level of subsidization found is a decision to be made by the importing Member country alone. Nonetheless, the paragraph notes that use of the lesser duty is desirable.[240]

Paragraph 3 provides some procedural safeguards. It requires that the imposition of a countervailing duty be levied on a non-discriminatory basis from all sources found to be subsidized and causing injury. In other words, if a Member country finds that imports from countries A, B, and C are subsidized and causing injury, it cannot impose duties only on imports from countries A and B.[241]

This paragraph also provides that an exporter that was not individually investigated, other than because it failed to cooperate with an investigation, is entitled to an expedited review in order to determine its individual countervailing duty rate.[242]

Finally, paragraph 4 of this article provides that no duty shall be levied on an imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the exported product. This requires that the amount of subsidy must have been determined in a manner consistent with the Agreement, before a duty can be levied. In other words, even if a Member's authorities calculate a per unit subsidy of 25 percent and impose a duty of 19 percent, that is unacceptable if the subsidy that would have been determined in an ASCM consistent manner was less than 19 percent.

Article 20: Retroactivity

This article prevents the application of retroactive duties. Specifically, paragraph 1 provides that provisional measures and countervailing duties may only be applied to products entered for consumption *after* the date on which the authorities make either a preliminary or final determination of subsidization and injury from subsidized imports through the effects of the subsidies.

Paragraphs 2 and 4 provide that countervailing duties may not be levied retroactively for the period for which provisional measures were applied, if the authorities only found a threat of injury. This is logical since, if injury is only threatened, the duties during the provisional measure period are not necessary to offset or prevent injury—there was none. The only exception is if a final finding of present injury would have been reached but for the effect of the provisional measures.[243]

Paragraph 3 provides that if the definitive duty is higher than that imposed under the provisional measures, the importing Member may not collect the difference. If the

[240] *Id.*, Art. 19.2. The United States does not apply the lesser duty rule. The European Union applies the rule and Canada may apply a lesser duty if it concludes such duty is in the public interest.

[241] If, however, the authorities find all three are subsidized but only A and B are causing injury, then the Member must limit the imposition of duties only to imports from countries A and B.

[242] In *Softwood Lumber II*, Canada raised a claim that U.S. law and regulation with respect to expedited reviews violated this provision in situations in which the United States made its initial subsidy determination on an aggregate basis. The Panel, however, found that U.S. law did not mandate action in violation of the ASCM, and that the expedited review process had not yet arisen in the underlying case (since there was not yet a final determination of subsidies at that point). It therefore rejected Canada's claims in this respect. *See Softwood Lumber II*, *supra* note 50, at ¶¶ 7.142 and 7.159.

[243] ASCM, Art. 20.2.

definitive duty is lower, then the importing Member must reimburse the provisional measure or release the bond expeditiously. Similarly, if the final determination of injury or threat thereof is negative, then the importing Member must refund the provisional measures or release any bond posted.[244]

The language of paragraph 6 creates a very limited exception to the prohibition of retroactive assessment, referred to as "critical circumstances."[245] For critical circumstances to exist there must have been injury from massive imports of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and the ASCM, *i.e.*, export and import-substitution subsidies. Thus, the only imports that should be included in the determination of massive imports (and injury therefrom) are those that actually benefited from the prohibited subsidies. In addition, the paragraph specifically provides only for the assessment of definitive countervailing duties on products entered not more than ninety days prior to the date of application of provisional measures. It does not create an exception to permit the application of provisional measures to those same entries prior to the application of definitive duties. Finally, the ninety-day period must be counterbalanced against the provision prohibiting the application of provisional measures not sooner than sixty days after the date of initiation of the investigation.[246]

Article 21: Duration and Review of Countervailing Duties and Undertakings

This article again reflects the Members' concerns about the trade restrictive effects of a countervailing duty. It begins by declaring that "a countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury."[247] From there, it notes the procedures for the review of the imposition of duties.

In general, authorities are instructed to review the need for the continued imposition of duties on their own or upon request from any interested party, assuming a reasonable period of time has elapsed since the imposition of the definitive countervailing duty.[248] While the term "reasonable period" has not been interpreted through the dispute resolution process, many countries provide for an annual review of the imposition of definitive duties. The second paragraph provides that interested parties shall have the right to request the authorities to examine whether the continued imposition of definitive duties is necessary to offset subsidization, whether injury would be likely to continue or recur if the duty were changed or eliminated, or both. This, however, is not an absolute right and Members may require the requesting party to submit positive evidence substantiating the need for such a review.[249] If after review, the authorities determine that the imposition of definitive duties is no longer warranted, the duties must be terminated immediately.

In conducting a review under Article 21.2,[250] the investigating authority need not examine all issues anew, but is entitled to make certain presumptions based on its previous

[244] *Id.*, Art. 20.5.
[245] *Id.*, Art. 20.6.
[246] *Id.*, Art. 17.3.
[247] ASCM, Art. 21.1.
[248] *Id.*, Art. 21.2.
[249] *Id.*
[250] The *Lead Bar* Appellate Body Report indicated that the United States' administrative review procedure, whereby it determines the amount of duties to assess for prior entries, fell within the purview of Article 21. This position was also taken by the Appellate Body in the *Privatization Subsidies* dispute. *See Privatization Subsidies Appellate Body Report*, *supra* note 68, at ¶ 140. *But cf. Softwood Lumber II, supra* note 50, at ¶ 7.151 (stating that Article 21.2 is silent on the question of administrative reviews).

findings. However, any presumptions used must be rebuttable and the investigating authority is required to review those findings on the basis of any evidence before it at the time of review. The Appellate Body in *Lead Bar* found that the United States was not entitled to presume that a benefit continued to flow after a company had been privatized. Specifically, the Appellate Body stated:

> In an administrative review pursuant to Article 21.2, the investigating authority may be presented with "positive information" that the "financial contribution" has been repaid or withdrawn and/or that the "benefit" no longer accrues. On the basis of its assessment of the information presented to it by interested parties, as well as of other evidence before it relating to the period of review, the investigating authority must determine whether there is a continuing need for the application of countervailing duties.[251]

In *Korean DRAMS,*[252] a panel considered an identical provision of the ADA.[253] Korea challenged the U.S. application of the standard of review for continuing an anti-dumping duty in the context of ADA, Article 11.2 (comparable to ASCM, Article 21.2). Specifically, the provision provides:

> Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

Korea challenged the U.S. regulations requiring the Department of Commerce to be satisfied that future dumping "is not likely" before it revokes an order.[254] The Panel determined that ADA 11.2 must be interpreted in light of Article 11.1: "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."[255] The Panel found that this "necessity" requirement established that there must be positive evidence demonstrating that objective conditions existed to demonstrate that circumstances "demand" the continued imposition of duties.[256] Thus, to continue a duty, the administering authorities must have positive evidence that continued subsidization or injury is likely if the duty is removed. Similarly, the Panel found that the U.S. standard that it must be demonstrated that dumping or subsidization and injury were "not likely" to continue or recur before an order would be revoked was not equivalent to the requirement established by the ADA, that the continuation or recurrence must be demonstrated to be likely for continuation of an order.[257] Rather, the panel found that determining something is likely to occur carries the same meaning as determining that it is "probable" that something will occur.[258]

Regardless of whether reviews under paragraph 2 occur, paragraph 3 provides that no definitive duties shall last longer than five years unless specific findings are made. The paragraph provides for termination after five years, but permits continuation of the duties in certain circumstances. Such wording creates a presumption that most duties will be

[251] *Lead Bar*, *supra* note 62, at ¶ 61. *See also Privatization Subsidies Appellate Body Report, supra* note 68, at ¶ 141.

[252] Report of the WTO Panel, *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R (1999) ("*Korean DRAMS*").

[253] *Compare* Anti-dumping Agreement, Art. 11.2 and 3 *with* ASCM, Art. 21.2 and 3.

[254] *Korean DRAMS*, *supra* note 252, at ¶¶ 6.35–6.54.

[255] *Compare* ADA, Art. 11.1 *with* ASCM, Art. 21.1.

[256] *Korean DRAMS*, *supra* note 252, at ¶ 6.42.

[257] *Id.* at ¶ 6.50.

[258] *Id.* at ¶ 6.48, n. 494.

terminated after five years and that the continued imposition of definitive countervailing duties will be the exception rather than the rule.[259] This provision was put in place to end the practice of keeping duties in place long after any economic rationale for the duties had ended. Prior to the establishment of the WTO, the United States was the only significant user of countervailing duty laws that had no such "sunset" provision. Subsequently, the United States put a provision in place, however, disputes have been raised as to the burden established by U.S. law.

Article 21.4 provides that the provisions of Article 12 regarding evidence and procedure apply to any review carried out under this Article and that any such review shall normally be concluded within twelve months of the date of initiation.[260] Finally, the Article provides that the review requirements apply equally to reviews of price undertakings entered into pursuant to Article 18.[261] Certain other provisions of the ASCM, such as Articles 15.3 and 19, also apply to review undertaken pursuant to Article 21.3.

Article 22: Public Notice and Explanation of Determinations

This is another article particularly concerned with procedural due process issues. Article 22 addresses the requirements of public notice and explanation of determinations. Paragraph 1 provides that if the authorities of an importing Member are satisfied that there is sufficient evidence to justify initiating a countervailing duty investigation pursuant to Article 11, they must provide public notice and, in addition, notify both the Member or Members whose products are subject to investigation and any other interested parties known to them.

Paragraph 2 identifies the minimum information required that must be included in the notice or in a separate report that is readily available to the public. To ensure that it is readily available, it is best to reference the existence of the report and whom to contact to obtain a copy in the public notice.[262] A separate report does not eliminate the requirement that there be public notice. Most countries fulfill the public notice requirement by publishing a notice in their official gazette or other legal publication. The minimum information that must be provided is: (1) the name of the exporting country(ies) and product(s) involved; (2) the date of the initiation of the investigation; (3) a description of the subsidy practices to be investigated; (4) a summary of the factors on which the allegation of injury is based;[263] (5) the address to which interested parties should send their information, statements, etc.; and (6) the time limits for interested parties to submit their views.

In addition to the public notice of initiation of a countervailing duty investigation, the importing Member must provide public notice of the following: any preliminary or final determination (whether affirmative or negative); any decision to accept an undertaking; the termination of an undertaking; and the termination of any definitive duty. Paragraph 3

[259] Several WTO Members have shorter time periods for the expiration of duties. For example, Chile provides for duties to last one year.

[260] ASCM, Art. 21.4.

[261] *Id.*, Art. 21.5.

[262] In *Guatemalan Cement II*, interpreting a similar provision in the ADA, the Panel found that failure to reference the separate report in Guatemala's public notice meant that the separate report was not "readily available." *See Guatemalan Cement II*, *supra* note 182, at ¶¶ 8.93 and 8.96.

[263] This requirement is only for a summary of the factors on which the allegation is based. Although it is desirable from a transparency standpoint, there is no obligation to include in a notice of initiation any *conclusions* that have been reached by the investigating authorities, such as which producers constitute the domestic industry. *See HFCS, supra* note 182, at ¶ 7.88.

requires that such public notices must set forth in "sufficient detail" the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. Finally, the importing Member is required to forward such notices and reports to the exporting Member or Members whose products are subject to the determination and to any other interested parties known to the importing Member. Thus, if the importing Member is aware of the specific exporters affected by the determination, this would require the importing Member to forward notice of the decision to those exporters.

Paragraph 4 sets forth specific notice requirements for the imposition of provisional measures. Specifically, the public notice or a publicly available separate report must contain a sufficiently detailed explanation of the preliminary determinations on the existence of a subsidy and injury and shall identify, or at least refer to, the matters of fact and law that lead to specific arguments being accepted or rejected. While recognizing the need to protect the confidentiality of information, the notice or report must contain: (1) the names of the suppliers—or if impracticable—the supplying countries; (2) a description of the product that is sufficient for customs purposes; (3) the amount of the subsidy established and the basis on which the existence of the subsidy has been determined; (4) considerations relating to injury as identified in Article 15; and (5) the main reasons leading to the determination.

Similar notice requirements exist for the notice of the decision to impose definitive duties, or the conclusion or suspension of an investigation pursuant to an undertaking. In addition to the information described above, the notice or report must address the reasons for acceptance or rejection of relevant arguments or claims by interested Members, the exporters, and the importers.[264] In addition, the public notice of the conclusion or suspension of an investigation pursuant to the acceptance of an undertaking must include or make available the non-confidential portion of the undertaking accepted.[265] These notice requirements also apply to any reviews undertaken pursuant to Article 21 and to any decisions pursuant to Article 20 to apply duties retroactively.[266]

Article 23: Judicial Review

This provides specific rules aimed at ensuring the rights of the various parties affected by a countervailing duty action. Article 23 requires that any Member whose national legislation provides for countervailing duty measures must maintain procedures for the prompt review of administrative actions relating to final determinations and reviews pursuant to Article 21. Those tribunals may be judicial, arbitral, or administrative in nature, but they must be independent of the authorities responsible for the determination in question. In addition, all parties that participated in the administrative proceeding and that are directly and individually affected by the administrative action must have access to such review.

PART VI: Institutions

Article 24: Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

This article establishes the institutional provisions for the Agreement and the Committee on Subsidies and Countervailing Measures ("SCM Committee"). Each Member has a

[264] ASCM, Art. 22.5.
[265] *Id.*, Art. 22.6.
[266] *Id.*, Art. 22.7.

representative on the Committee, which meets at least twice a year. Under the 1979 Subsidies Code, there was a similar Committee only for Code Signatories; however, the current SCM Committee includes all WTO Members.

In a departure from the institutions established under the 1979 Subsidies Code, Article 24 provides for the establishment of a Permanent Group of Experts ("PGE"). These experts are not representatives of the Member governments, rather they are five independent persons, highly qualified in the field of subsidies and trade relations. The experts serve for staggered five-year terms and are elected by the SCM Committee.

One responsibility of the PGE is to assist any panel established under Article 4 (remedies for the use of prohibited subsidies), if requested, by reviewing the evidence with regard to the nature and existence of the measure at issue and reporting its conclusions of whether or not the measure at issue is a prohibited subsidy to the panel, which must accept those conclusions without modification.[267] To date, none of the panels established pursuant to Article 4 have requested the assistance of the PGE. Outside of a panel, any Member may consult the PGE, which may issue advisory opinions as to the nature of any subsidy, proposed or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7. In the first five years of the PGE's existence, no such advisory opinions were requested.

The reasons for the lack of referral to the PGE are difficult to determine. The main reason appears to be the reluctance of panels to let the PGE do their work. The lack of requests for advisory opinions is more straightforward—governments do not want to ask for an opinion which may condemn one of their programs.

The SCM Committee is authorized to establish any other subsidiary bodies it deems appropriate.[268] In the course of carrying out their functions, the SCM Committee and any subsidiary bodies established may consult with and seek information from any source they deem appropriate.[269] This enables the SCM Committee and its subsidiary bodies to consult non-governmental organizations if they so choose. However, before the SCM Committee or subsidiary body seeks information from a source within the territory of a Member, it must inform the Member involved.[270] This final requirement respects the sovereignty of the individual Members and reflects the balance of interests between national sovereignty and a common international position.

PART VII: Notification and Surveillance

Article 25: Notifications

This Article reflects the desire of the negotiating countries to install some subsidy discipline through the use of transparency with respect to the granting of subsidies. Specifically, this Article provides that Members must notify any subsidy, within the definition of Article 1.1, granted or maintained within their territory that is specific within the meaning of Article 2.[271] Such notifications are to be submitted no later than June 30th of each year.[272]

Many of the Members do not submit the notifications provided for by this Article. There have been several discussions within the SCM Committee on ways to

[267] ASCM, Art. 4.5.
[268] *Id.*, Art. 24.2.
[269] *Id.*, Art. 24.5.
[270] *Id.*
[271] ASCM, Art. 25.2.
[272] *Id.*, Art. 25.1.

improve conformity. Most of the developed country Members conform to some extent. However, there can be a great degree of difficulty in notifying programs, particularly for programs provided by the sub-national governments. For example, the United States notifies over 200 programs, however, a search of the individual state websites indicates a wide range of state programs that have not been notified. Beyond that, there may also be subsidies provided at the municipal level that have never been notified.

In addition to the notification requirement, this Article permits Members to query other Members about the nature and extent of any subsidy granted or maintained by another Member, or the reasons why the maintaining Member does not consider such measure as subject to the notification requirement. Several Members are quite active in this regard.

In addition to the notification of subsidies, the Members are required to report expeditiously to the SCM Committee all preliminary or final actions taken with respect to countervailing duties.[273] The WTO issues a report every six months of any countervailing measures imposed within the preceding six months. It should be noted that these semi-annual reports are available on the WTO website (although some Members flout the requirement to report the value of subject imports, thus precluding the use of these data for sophisticated analysis).

Finally, Members are required to notify the SCM Committee of the competent authorities within the Members' governments designated to initiate and conduct investigations as well as the Members' domestic procedures governing the initiation and conduct of an investigation.[274] This information is also available on the WTO website.

Article 26: Surveillance

This Article operates in conjunction with Article 25 and provides for oversight by the SCM Committee of the notifications made pursuant to Article 25. Specifically, the SCM Committee is to examine new and full notifications of subsidies submitted at special sessions held every third year. The notifications in the interim period, which merely update the most recent full notification, are reviewed at each regular meeting of the SCM Committee.[275] Similarly, at each regular meeting, the SCM Committee examines the semi-annual reports of countervailing duty actions submitted pursuant to Article 25.11.[276]

PART VIII: Developing Country Members

Article 27: Special and Differential Treatment of Developing Country Members

This Article addresses the thorny issue of the proper role of subsidies in economic development. It begins by recognizing "that subsidies may play an important role in economic development programmes of developing country Members."[277] Nonetheless, while there are provisions for special and differential treatment with respect to the multilateral disciplines, the special and differential treatment to be accorded developing countries in the course of a countervailing duty proceeding is fairly minimal.

[273] *Id.*, Art. 25.11.
[274] *Id.*, Art. 25.12.
[275] ASCM, Art. 26.1.
[276] *Id.*, Art. 26.2.
[277] *Id.*, Art. 27.1.

In particular, Article 27 grants a permanent exemption for the least developed Members from the prohibition on export subsidies,[278] while they are granted eight years to phase out import- substitution subsidies.Other developing country Members are exempted from the prohibition on export subsidies for eight years from the date of entry into force of the WTO Agreement and from the prohibition on import-substitution subsidies for five years. In the wake of the Doha Ministerial Conference in 2001, there is considerable debate about extension of these time periods.

There are however considerable restrictions on the eight-year grace period for the phase-out of export subsidies by developing country Members. The level of the export subsidies may not be increased in that period. Moreover, if the use of such subsidies is inconsistent with the Member's development needs, the Agreement requires them to eliminate such export subsidies in a shorter period.[279] In addition, a developing country Member must phase out its export subsidies for any product within two years of its reaching export competitiveness.[280]

Special rules also apply with respect to the serious prejudice provisions when applied to developing country Members. Specifically, there may be no presumption of serious prejudice under Article 6.1 (as noted above, though, Article 6.1 lapsed at the end of 1999). Serious prejudice must be demonstrated by positive evidence.[281] No action may be taken with respect to actionable subsidies granted or maintained by a developing country, other than those described in Article 6.1, unless nullification or impairment of tariff concessions or other obligations under the GATT 1994 are found to exist as a result of the subsidy and that nullification or impairment occurs in such a way as to displace or impede the imports of a like product of another Member into the market of the subsidizing developing country Member or injury occurs to a domestic industry in the complaining Member's market.[282] In other words, no action can be taken because of harm suffered as a result of such subsidies in third country markets.

The lapsing of Article 6.1 also raises other questions with respect to the application of the serious prejudice provisions with respect to developing country Members. ASCM Article 27.9 provides that developing country Members are not subject to claims that their actionable subsidies have caused serious prejudice *unless* those subsidies fall under the provisions of ASCM Article 6.1. It might, therefore, be possible to argue that, because Article 6.1 has lapsed, there is no longer any situation in which a developing country Member may be subject to a serious prejudice claim. On the other hand, since the presumption of serious prejudice arising in Article 6.1 never applied to developing country

[278] These Members are defined in the ASCM, Annex VII, to include any Member designated as Least Developed by the United Nations, and certain specified countries (Annex VII(b)) as long as their GNP per capita remains below $1,000 per annum.

[279] ASCM, Art. 27.4. This last stricture to eliminate export subsidies in less than eight years if the export subsidies are inconsistent with the country's development needs is a peculiar construct. If they are inconsistent with the development needs of the country, presumably the country would eliminate them in its effort to meet its development needs although there may be instances in which the recipient is sufficiently powerful to block their elimination.

[280] ASCM, Art. 27.5. "Export competitiveness" is reached when that Member's exports of that product account for at least 3.25 percent of the world trade in that product for two consecutive calendar years. For least developed countries that have reached export competitiveness in a particular product, the ASCM provides for phase-out over an eight-year period. There is current discussion in the SCM Committee about what should occur if the developing country later loses that export competitiveness.

[281] *Id.*, Art. 27.8.

[282] *Id.*, Art. 27.9. Note that this paragraph also permits the application of countervailing duties if injury to the domestic industry of the importing Member is found by reason of these actionable subsidies.

Members, it could be argued that the definitional aspect of Article 6.1 still applies, in order to raise a serious prejudice complaint against a developing country Member.

With respect to countervailing duties, the only special and differential rules for developing countries concern the definition of *de minimis* subsidies and "negligible" levels of imports. Specifically, the Article requires that a countervailing duty investigation against a developing country Member be terminated immediately if the investigating authorities determine that the overall level of subsidies is no greater than two percent[283] (the *de minimis* level applicable to developed countries is one percent), or that the volume of subsidized imports represents less than four percent of the total imports of the like product in the importing Member. This was intended as a "safe harbor" such that developing countries would not have to pay the (often large) costs of defense if their exports represent a small part of the market.

This four percent limit is subject to the exception that if imports are cumulated among countries for injury purposes, then the four percent limit does not apply if all the developing countries accounting individually for less than four percent of the total imports of the like product, collectively account for more than nine percent of the total imports—which effectively removes the safe harbor.[284] In other words, if there are countervailing duty investigations of the same like product from three developing countries simultaneously and each country accounts for 3.5 percent of total imports of the like product, then the four percent negligible import limit would not apply. This is the case even though none of the developing countries can control the exports of the others, and if total imports are small, four or nine percent of those imports may be truly negligible in terms of impact on the overall market.

A final provision indicates that the provisions of Part III of the ASCM, covering actionable subsidies, does not apply to certain types of subsidies for developing countries. Those are direct forgiveness of debt, and subsidies to cover social costs—in whatever form—when directly linked to a privatization program of a developing country. Therefore, those specific types of subsidies, in the very limited circumstances of this provision, do not constitute actionable subsidies within the meaning of the ASCM for purposes of the multilateral disciplines of Part III.[285] This would not appear to prevent authorities from imposing countervailing duties on the use of such subsidies, since the provisions regarding countervailing duties are found in Part V of the ASCM.

Part IX: Transitional Arrangements

Article 28: Existing Programmes

Article 28 provides for bringing existing arrangements into conformity with the WTO Agreement after the date of entry into force of the WTO Agreement for that particular Member. Any subsidy programs that were established prior to the date on which the Member signed the WTO Agreement and that are inconsistent with the provisions of the ASCM must be notified to the SCM Committee within ninety days after the date of entry into force of the WTO Agreement for that Member and must be brought into conformity within three years after the date of entry into force of the WTO Agreement.[286] In addition,

[283] Three percent in certain circumstances. *See* ASCM, Art. 27.10(a) and 11.
[284] *Id.*, Art. 27.10(b).
[285] *Id.*, Art. 27.13.
[286] ASCM, Art. 28.1.

a Member may not extend the scope of such a program or renew it upon its expiry, even if that occurs within the three-year transition period.

Article 29: Transformation into a Market Economy

Article 29 establishes special rules for countries in the process of transformation from a centrally-planned economy to a market-based, free enterprise economy. Paragraph 1 provides that such Members may apply programs and measures necessary for such transformation. It should be noted that while this paragraph eliminates any prohibition on the use of specific types of subsidies, it does not restrict the actionability of any subsidies employed.

Paragraph 2 provides more specific rules concerning the actionability of such subsidies. It provides a seven-year phase-out period for otherwise prohibited subsidies (within the meaning of Article 3) and prevents the resort to dispute settlement under Article 4 during that phase-out period. The seven-year phase out applied from the date of entry into force of the WTO Agreement.[287]

This paragraph not only exempts the transition Members from the Article 4 disciplines, it affords them the exemptions from the serious prejudice dispute settlement accorded to developing countries under Article 27.9. In addition, unlike developing countries, that exemption from serious prejudice applies even if the program used involves debt-forgiveness.[288]

Paragraph 3 nevertheless attempts to establish transparency by requiring the transitional Member to notify its subsidy programs on the first practical date after the date of entry into force of the WTO Agreement. Additional notifications may be made up to two years after the entry into force of the WTO Agreement.

Finally, this Article permits such Members to depart from their notified programs and measures and their time frame for phase-out, in exceptional circumstances, if the SCM Committee deems such departures necessary for the process of transformation.[289]

Part X: Dispute Settlement

Article 30: Dispute Settlement

This article provides that the provisions of Articles XXII and XXIII of GATT 1994 (nullification or impairment) as elaborated in the DSU shall apply to disputes concerning the ASCM. It is the general rules that apply, except to the extent specifically provided in the ASCM.

While general dispute settlement is discussed in other chapters of this book, certain aspects specific to the ASCM are discussed here. First, as discussed earlier in this chapter, there are certain additional rules beyond the DSU that are established in the ASCM.[290] These apply to disputes brought under the auspices of Article 4 of the ASCM with

[287] When China acceded to the WTO, it agreed to eliminate all prohibited subsidies upon accession. In addition, China will view subsidies provided to state-owned enterprises as specific if those state-owned enterprises are the "predominant recipients" of such subsidies. *See Accession of the People's Republic of China,* WT/L/432, Article 10 (November 23, 2001).

[288] ASCM, Art. 29.2(a). Debt forgiveness may prove to be the most used type of program for a transition economy as it prepares state-owned companies for privatization.

[289] ASCM, Art. 29.4

[290] For a complete list, *see* Annex 2 to the DSU.

respect to prohibited subsidies, and to disputes brought under the auspices of Article 7 with respect to serious prejudice cases.

The standard of review to be applied to a dispute is the same as that applying in all cases brought under the DSU. Unlike the ADA, there is no special standard of review established for disputes concerning the ASCM.[291] It should be noted that the United States has unsuccessfully argued that the standard of review established in the ADA, Article 17.6, applies to the ASCM.[292] This was rejected by the Appellate Body in *Lead Bar*.[293]

The Ministers issued a "Decision on the Application and Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994" in which they indicated that ADA Article 17.6 was to be reviewed after three years, with a view to considering the question of whether it is capable of general application. However, there has been no subsequent decision of the Members to extend its application beyond the ADA. Therefore, it does not, at this time, apply to the ASCM. In addition, and of great importance, is that countervailing duty proceedings, unlike anti-dumping proceedings,[294] may be challenged as soon as the investigation is initiated.

Part XI: Final Provisions

Article 31: Provisional Application

This article indicates that Articles 6.1, 8, and 9 are to apply for a period of five years beginning with the entry into force of the WTO Agreement (*i.e.*, January 1, 1995). As discussed previously, Article 6.1 establishes a presumption of serious prejudice, and Articles 8 and 9 deal with non-actionable subsidies. Article 31 also provides for a review by the SCM Committee not later than 180 days before the end of this period (*i.e.*, December 31, 2000) to determine whether to continue the application of these provisions. In the aftermath of the 1999 Seattle Ministerial, however, no agreement could be reached on this issue. Therefore, as noted previously, Articles 6.1, 8, and 9 are no longer in effect.

Article 32: Other Final Provisions

Article 32.1 states that no specific action against a subsidy can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. This is the heart of the dispute brought by several countries against the United States' Continued

[291] The ADA is the only one of the Uruguay Round Agreements to contain its own standard of review.

[292] The United States has cited the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures* in support of its position. The Declaration states that the Ministers:

> *"Recognize*, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."

[293] *See Lead Bar*, *supra* note 62, ¶¶ 44–51.

[294] See ADA, Art. 17.4, which provides that only decisions to impose definitive anti-dumping duties or to accept price undertakings, or the imposition of provisional measures having a significant impact, may be the subject of dispute settlement proceedings.

Dumping and Subsidy Offset Act of 2000, described in the discussion of Article 11.4 above. On 21 December 2000, Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, and Thailand, requested consultations with the United States concerning this law. The complaining Members alleged, among other things, that the distribution of antidumping and countervailing duties to domestic producers that had supported the petition constituted specific actions against dumping or subsidies not in accordance with the provisions of GATT 1994. Upholding the Panel's finding that the United States was in violation of Article 32.1, the Appellate Body found that:

> the CDSOA has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors—producers of like products—through the transfer to the latter of the duties collected on those exports. Thus, foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices. Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action "against" dumping or a subsidy, within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*.[295]

Paragraph 2 of Article 32 prevents Members from entering into reservations with respect to the ASCM unless all Members consent. Thus, this would prevent a Member from reserving application of the Agreement to some newly acceding Member unless that acceding Member takes certain actions.[296]

Paragraphs 3 and 4 address transitional issues concerning the application of this Agreement. Specifically, paragraph 3 notes that the provisions of the ASCM do not apply to investigations or reviews initiated before the entry into force of the WTO Agreement for that Member. This was the critical provision that prevented the Philippines from bringing its dispute against Brazil concerning the imposition of countervailing duties on desiccated coconut, discussed *supra*.

Paragraph 4 establishes a starting date for determining when five-year reviews or termination of a measure are required under Article 21.3. Specifically, all measures in effect prior to the date of entry into force of the WTO Agreement for the administering Member, shall be deemed to have entered into force on the date of entry into force of the WTO Agreement for that Member. Thus, for the original Members, all countervailing duty measures in effect prior to January 1, 1995 were to be deemed to have gone into effect on January 1, 1995 for purposes of Article 21.3. This permitted the United States to extend existing countervailing duty measures a full five years, even if they had been in place for years.

Paragraph 5 is also a transitional provision, which states that Members must take all necessary steps to ensure that their laws, regulations, and administrative procedures comply with the provisions of the ASCM no later than the date of entry into force of the WTO Agreement for that Member.

[295] *United States—CDSOA, supra,* note 196, at ¶ 256. However, as explained above, the Appellate Body reversed the panel's finding that the U.S. statute violated Article 11.4 of the ASCM. It is worth noting that the question of whether the Byrd Amendment payments might be specific actionable subsidies to the industries receiving distributions has not be adjudicated.

[296] Under the 1979 Subsidies Code, certain Signatories, notably the United States, would require bilateral agreements with new Code Signatories before applying the 1979 Subsidies Code obligations to that country.

Paragraphs 6 and 7 are transparency provisions. Paragraph 6 requires notification to the SCM Committee of any changes to the laws and regulations or their administration that are relevant to this Agreement. Paragraph 7 provides for annual review of the implementation and operation of the ASCM.

Finally, Paragraph 8 states that the Annexes to the ASCM constitute an integral part of the ASCM.

Annex I contains the Illustrative List of Export Subsidies and is discussed in more detail in the comments on Article 3 of the ASCM, *supra* of this Chapter. Annexes II and III provide guidance on certain issues that have been controversial in the past in determining whether certain practices fall within the Illustrative List of Export Subsidies contained in Annex I. Specifically, Annex II provides guidelines for determining when a product is consumed in the production process.[297] Similarly, Annex III provides guidelines for determining when duty drawbacks or refunds on inputs consumed in the production process are determined to be in excess, and therefore, an export subsidy in accordance with Annex I(i). As discussed previously, Annex IV provides guidance in determining the total ad valorem subsidization for purposes of ASCM, Article 6.1.[298] Annex V provides guidance for procedures for developing information concerning a claim of serious prejudice.[299]

Annex VI provides guidance for verifications of exporting firms' responses in a countervailing duty investigation. During the course of a countervailing duty investigation, the administering authorities of the importing Member, may decide to investigate the responses at the company or government submitting the response in order to verify the accuracy of the information submitted. Annex VI establishes procedures for such "on-the-spot investigations," otherwise known as "verifications." They require that the firm and the government of the exporting Member be notified in advance of the trip. The administering authorities should obtain the explicit agreement of the firms to be visited. There should be "sufficient" advance notice. What constitutes "sufficient advance notice" has not been specified, however. In addition, the authorities should advise the firms concerned of the general nature of the information to be verified, and any further information which needs to be provided.[300]

The final annex, Annex VII, identifies the developing country Members referenced in ASCM, Article 27.2(a). These are the developing country Members to which the prohibition on the provision of certain types of subsidies, found in ASCM, Article 3.1(a), does not apply. These include those countries designated as "least developed" by the United Nations, that are Members of the WTO. In addition, certain countries are included until their GNP per capita reaches $1,000 per annum, after which time they will be subject to the eight-year phase-out of prohibited subsidies found in ASCM, Article 27.2(b).[301]

[297] *See* the discussion of rebate or remission of prior stage indirect taxes in text accompanying notes 104–106 *supra*.

[298] *See* discussion of Article 6.1 *supra.* It should be noted that, because Article 6.1 was of temporary duration and has expired, the reason for this Annex IV has also expired.

[299] *See* the discussion of Article 6, *supra*, for a description of the requirements of Annex V.

[300] ASCM, Annex VI(7). Note that this does not preclude the visiting officials from requesting further details during the visit, in light of the information obtained.

[301] ASCM, Annex VII(b). Those countries are: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka, and Zimbabwe.

IV. Conclusion

The ASCM is a comprehensive document that significantly expands on Articles VI, XIV, and XVI of the GATT, however, it remains a work in progress.

The mandate of the negotiations for the Uruguay Round included the mandate to improve "GATT disciplines relating to all subsidies and countervailing measures that affect international trade."[302] When negotiations began, the parties established that the main objective of the negotiations on subsidies and countervailing measures was to "restore the equilibrium of rights and obligations in terms of equivalent disciplines regarding subsidies on the one hand and countervailing measures on the other. . . . " While it is clear that the overall mandate has been met, in that there has been an improvement in GATT disciplines, there are still issues of concern regarding both the use of subsidies and the use of countervailing measures.

The extent to which the ASCM will be renegotiated in the Doha Round remains unclear. There are implementation issues, such as export competitiveness, that continue to be negotiated. Similarly, there remain issues concerning how parties implement the countervailing measures, including how they define subsidies, the use of adverse facts, the standing of parties to make an application, etc. The most important issue in terms of the success of the negotiations is the issue of incorporating agricultural subsidies into the overall subsidy discipline framework. This will likely drive much of the negotiations on this Agreement in the future. Beyond agriculture, however, looms the fact that, in practice, the current Agreement seems to provide at least some discipline on export subsidies and import substitution ("red light") subsidies, but little effective discipline on other ("amber") subsidies.[303]

[302] Ministerial Declaration on the Uruguay Round, GATT Doc. No. MIN.DEC (September 20, 1986) at 7.

[303] *See* Gary N. Horlick, *Subsidy Discipline Under WTO and US Rules*, in EUROPEAN COMPETITION LAW ANNUAL 1999: SELECTED ISSUES IN THE FIELD OF STATE AID, (Ehlermann and Everson, eds., 2001). The *Indonesia—Automobile Industry* dispute involved an allegation concerning an amber subsidy, among other non-ASCM issues. *See Indonesia—Automobile Industry, supra* note 132. This is the only dispute brought concerning an amber subsidy despite the numerous subsidies notified in accordance with ASCM, Art. 25.4.

CHAPTER 17

INJURY DETERMINATIONS IN ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

Peggy A. Clarke and Gary N. Horlick*

TABLE OF CONTENTS

I. Introduction 736
II. Determination of Injury and Threat of Injury Generally 736
A. Objective Examination of Positive Evidence (Articles 3.1 ADA and 15.1 ASCM) 737
B. Volume and Effect of Imports (Articles 3.2 ADA and 15.2 ASCM) 739
C. Cumulation (Articles 3.3 ADA and 15.3 ASCM) 740
D. Evaluation of Economic Factors (Articles 3.4 ADA and 15.4 ASCM) ... 742
E. Causation (Articles 3.5 ADA and 15.5 ASCM) 743
F. Domestic Industry (Articles 3.6 ADA and 15.6 ASCM) 745
G. Threat of Injury (Articles 3.7 ADA and 15.7 ASCM) 746
H. Special Care in Threat Cases (Articles 3.8 ADA and 15.8 ASCM) 747
III. Injury in Regional Markets 748
IV. Conclusion 748

* Ms. Clarke and Mr. Horlick are partners at Wilmer Cutler, Pickering, Hale and Dorr, LLP. In addition, Mr. Horlick was the first Chairman of the WTO's Permanent Group of Experts, established under Art. 25 of the ASCM. The authors wish to express their appreciation for the contributions of Kelly Brooke Snyder, Kevin J. Cuddy, Andrea G. Staebler, and Sean McElduff, without whose assistance this chapter would not exist. The opinions expressed herein are solely those of the authors.

I. Introduction

Article 3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("ADA") and Article 15 of the Agreement on Subsidies and Countervailing Measures ("ASCM") address the injury determination that an importing country must make before imposing antidumping or countervailing duty measures, while Articles 4.1(ii) of the ADA and 16.2 of the ASCM deal with the special situation of injury to regional industries. The language in the two Agreements is virtually identical. It is therefore convenient to consider injury issues under both Agreements in the same chapter, since Panel and Appellate Body decisions interpreting the provisions in one Agreement obviously have direct relevance to the other. In addition, much of the language is similar or identical to the injury provisions in the WTO Agreement on Safeguards.[1] Moreover, some of the language in Article 3 of the ADA and Article 15 of the ASCM reflect, with changes, the language concerning injury found in the 1979 Antidumping and Subsidies Codes. Panel and Appellate Body decisions interpreting the injury requirements in the Safeguards Agreement and the 1979 Codes can therefore provide some guidance in interpreting the ADA and ASCM injury provisions.[2]

II. Determination of Injury and Threat of Injury Generally

Article 3 of the ADA and Article 15 of the ASCM begin with a footnote defining injury as encompassing not only material injury, but also threat of material injury to a domestic industry or material retardation of the establishment of a domestic industry. At this time, it is not clear whether the injury requirement *may* be met by a finding of *any one or more* of the three forms, or if it *must* be based on a finding of *only one* of the three forms. In a decision interpreting a similar injury requirement in the 1979 Antidumping Code, a GATT Panel found that the three types of injury were mutually exclusive and that a finding must be based on a finding of one of the three forms.[3] In a recent decision, interpreting similar, but not identical, language in the WTO Safeguards Agreement, however, the Appellate Body reversed a parallel finding by a Panel, noting that the use of the conjunction, "or," does not exclude the finding of both serious injury and threat of serious injury at the same time.[4] However, unlike the injury requirements in the ADA and the ASCM which define different factors to be considered in making a present injury determination compared to a threat of injury determination, the Safeguards Agreement does not establish different factors.[5] Therefore, it may be that the language of the Safeguards Agreement is too dissimilar to provide guidance on the injury requirement of the ADA and the ASCM.

[1] *Agreement on Safeguards*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A: Multilateral Agreements on Trade in Goods (1994) ("*Safeguards Agreement*").

[2] WTO panel and Appellate Body practice has looked to prior GATT panel reports, especially adopted GATT panel reports, as providing useful secondary information to assist in the interpretation of the WTO Agreement. *See, e.g.,* Report of the WTO Panel, *Japan—Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/R (1996) at 21–22 ("*Japanese Liquor Taxes*").

[3] Report of the GATT Panel, *Korea—Antidumping Duties on Imports of Polyacetal Resins from the United States,* BISD, 40th Supp. at 205 (1993) (adopted) ("*Polyacetal Resin*"). The Panel faulted Korea for failing to state explicitly the type of harm experienced by the domestic industry and failing to spell out its analysis of the link between the imports and the harm. *Id.* at ¶¶ 222–224. Moreover, the Panel noted that a finding of material injury, which presupposed the existence of an industry, was inconsistent with a finding of material retardation of establishment of an industry. *Id.* at ¶ 222.

[4] Report of the Appellate Body, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea*, WT/DS202/AB/R (2002) at ¶ 177.

[5] *Compare* ADA, Art. 3.2, 4, and 7 and ASCM, Art. 15.2, 4, and 7 with *Safeguards Agreement*, Art. 4.2(a).

A. Objective Examination of Positive Evidence (Articles 3.1 ADA and 15.1 ASCM)

Article 3.1 of the ADA and Article 15.1 of the ASCM provide the overall chapeaux to the injury analysis and requirements. They require that the investigating authority base its decisions on positive evidence and an objective examination of that evidence. What constitutes "positive evidence" is a critical issue in these cases. In the *Hot-Rolled Steel from Japan Appellate Body Report*,[6] the Appellate Body interpreted the term to mean "that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[7] Such language prohibits the investigating authority from basing decisions on "assumptions."[8]

While the decision must be based on positive evidence, the investigating authority need not disclose publicly all the information on which it relies. The Appellate Body in *Thailand—Steel Appellate Body Report* found that the language requiring findings to be based on positive evidence and an objective examination allowed the investigating authority to rely on information not disclosed to the parties to the investigation, subject to procedural requirements of a right of defense.[9]

The data are also often an issue when the time period used for the determination is called into question. The Panel in *Wheat Gluten* (Safeguards) concluded that because the language of the injury requirement in the Safeguards Agreement, like that of the ADA and the ASCM, is in the present tense, the data used to support an injury finding must be from the recent past.[10] The injury must be present up to and including the end of the investigation period,[11] although improvements in some of the factors at the end of the period do not necessarily negate a finding of injury.[12] The authority is not required to update its information continuously, but must consider the most recent data available at the start of the investigation as the most relevant picture of the current state of the industry.[13] The Appellate Body, interpreting the Safeguards Agreement, further explained that a finding of threat of material injury, because it involves

[6] Report of the Appellate Body, *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, (2001) ("*Hot-Rolled Steel from Japan Appellate Body Report*").

[7] *Id.* at page 65, ¶ 192. It should be noted that although that decision dealt with the Antidumping Agreement, the language of Article 3.1 of the Antidumping Agreement is identical to the language of Article 15.1 of the ASCM, substituting the phrase "subsidized imports" for the phrase "dumped imports" in Article 3.1.

[8] The Appellate Body has rejected the use of assumptions instead of positive evidence in other circumstances as well. *See* Report of the Appellate Body, United States*—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, (2000) *("Lead Bar Appellate Body Report")* at ¶ 61 (finding that once an administering authority finds a "benefit" based on evidence, it may then adopt a presumption in later proceedings in the same matter (*e.g.*, an administrative review) that the benefit continues. However, if the issue of the benefit is raised in a later proceeding, the authority must review the presumption and base its decision on the positive evidence before it).

[9] Report of the Appellate Body, *Thailand—Antidumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (2001) at ¶ 107 ("*Thailand—Steel Appellate Body Report*"). Challenges to the failure to disclose confidential information should instead be brought under the procedural requirements that mandate publishing notifications and informing interested parties of all "essential facts." These are found elsewhere in the ADA and the ASCM, *i.e.*, Articles 12 and 6.9 of the ADA and Articles 22 and 12.8 of the ASCM, respectively.

[10] Report of the WTO Panel, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R (2000) at ¶ 8.8 ("*Wheat Gluten*").

[11] *Id.*

[12] *Id.* at ¶¶ 8.85–8.86.

[13] Report of the WTO Panel, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/R (1999). at ¶ 8.213 ("*Footwear*").

a projection of future events, requires even greater reliance on the most recent data.[14] In no case, however, should the investigating authority rely on particularly current data when doing so would distort the results by taking a short time period out of the broader context.[15]

The requirement that the injury determination involve an "objective examination" has also raised issues. In the *Hot-Rolled Steel from Japan Appellate Body Report*, the Appellate Body indicated that this phrase required that the "examination process," that is the way in which the evidence is gathered, inquired into, and evaluated, "must conform to the dictates of the basic principles of good faith and fundamental fairness."[16] Decisions on whether the investigating authority complied with this requirement are typically made in conjunction with the panel's assessment of the authority's evaluation of individual injury factors and its overall conclusions. In other words, the investigation must be conducted in an unbiased manner, without favoring the interests of any interested party.

For example, in the *Hot-Rolled Steel from Japan Appellate Body Report,* the Appellate Body stated that this "objective examination" obligation, in conjunction with the obligation in ADA, Art. 3.4 to examine the relevant factors, required that the investigating authorities not conduct the investigation "in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured." Furthermore, they noted that the investigation must be even-handed.[17]

In the *Thailand—Steel Panel Report*, the Panel interpreted the "objective examination" requirement of ADA Art. 3.1 in light of the unique standard of review established in ADA, Art. 17.6[18] to require that "the reasoning supporting the determination be 'formally or explicitly stated in documents in the record.'"[19] It is unclear, therefore, whether the same requirement would be found in the ASCM, which is not subject to the same standard of review.[20] Nonetheless the obligation to be able to discern the basis of the decision would logically be a requirement in any analysis.

[14] Report of the Appellate Body, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R (2001) at ¶ 136 ("*Lamb Meat Appellate Body Report*").

[15] *Id*. at ¶ 132.

[16] *Hot-Rolled Steel from Japan Appellate Body Report*, *supra* note 6, at ¶ 193.

[17] *Id.* at ¶ 154.

[18] Article 17.6 of the ADA requires the panel to determine whether the investigating authority's establishment of the facts was "proper" and whether its evaluation of the facts was "unbiased and objective". If so, the evaluation may not be overturned even though the panel might have reached a different conclusion. *See* G. Horlick and P. Clarke, *Standards for Panels Reviewing Anti-Dumping Determinations Under the GATT and WTO* in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann ed. 1996) for discussion of the negotiating history of the antidumping standard of review. In *Lead Bar* the Appellate Body rejected the argument by the United States that the same standard of review should be applied in countervailing duty disputes under the ASCM. *See Lead Bar Appellate Body Report*, *supra* note 8, at ¶¶ 51–52. Under Article 11 of the Dispute Settlement Understanding, a panel is to make an objective assessment of the matter before it, "including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements," which does not mean that the panel should accept the investigating authorities' explanation as reasoned or adequate if there is a plausible alternative reaction and the authorities' explanation appears inadequate in light of the alternative explanation. *See Lamb Meat Appellate Body Report*, *supra* note 14, at ¶ 206.

[19] Report of the WTO Panel, *Thailand—Antidumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R (2001) at ¶ 7.143 ("*Thailand—Steel Panel Report*").

[20] *See Lead Bar Appellate Body Report, supra,* note 8 at ¶¶ 51–52.

B. Volume and Effect of Imports (Articles 3.2 ADA and 15.2 ASCM)

These provisions explain the findings that must be made to assess the volume of dumped or subsidized imports and the effect of those imports on domestic prices. The investigating authority must find a significant increase in dumped/subsidized imports, either absolutely or relative to the importing country's production or consumption. Interpreting identical language in the 1979 Subsidies Code, the GATT Panel in *Salmon CVD* found that a finding of injury required a change in the volume of imports; merely continued high levels of imports are an insufficient basis for a finding of injury.[21] Similarly, the GATT Panel in *Milk Powder*[22] found that Brazil had failed to comply with the 1979 Subsidies Code because Brazil's determination focused on the large share of the domestic market held by the European Communities, rather than any increase in the European Communities' share of the market.[23] The GATT Panel reached this conclusion, despite the fact that it believed the data did, in fact, show an increase in the European Communities' share, because the language of the final determination did not make clear that the basis for Brazil's determination was the *increase* in imports.[24]

The WTO has not imposed such strict interpretations on Members' written explanation of their decisions. The finding of increased imports need not always be explicit. In the *Thailand—Steel Panel Report,* the Panel held that the investigating authority had found a significant increase in dumped imports where the language in the final report at least suggested that this issue was considered, even if it was not explicitly stated.[25]

Nonetheless, a decline in the share of subsidized imports relative to third countries need not prevent a finding of a significant increase in imports.[26] The *Salmon CVD* GATT Panel, however, cautioned that consideration of the relative import shares might be an "other factor," discussed below, that the investigating authority would be required to consider.[27]

To support a finding of present injury, the increase in imports must already have occurred; a projection of future increases will not suffice. Neither will a speculative projection of such future increases support a finding of threat of material injury.[28] The GATT Panel in *Grain Corn*, interpreting the 1979 Subsidies Code, noted that Canadian imports of U.S. grain corn had actually decreased.[29] The investigating authority's finding that an increase in imports was likely if Canada did not lower its prices was too speculative to support countervailing duties.[30]

In calculating an increase, the investigating authority must also be cautious in relying only on a comparison of the starting and ending points.[31] The Panel in *Footwear*

[21] Report of the GATT Panel, *United States - Imposition of Countervailing Duty on Imports of Fresh and Chilled Atlantic Salmon from Norway*, BISD, 41st Supp., Vol. II at ¶ 266–267 (1994) (adopted) ("*Salmon CVD*"). Note that other portions of this Panel's decision regarding the requirements of an injury investigation have subsequently been rejected by the Appellate Body in the *Hot-Rolled Steel from Japan Appellate Body Report*, but the analysis discussed here has not been rejected.

[22] Report of the GATT Panel, *Brazil—Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community*, BISD, 41st Supp. 467 SCM/179 (1994) ("*Milk Powder*").

[23] *Id.* at ¶¶ 319–321.

[24] *Id.* at ¶ 319.

[25] *Thailand—Steel Panel Report*, *supra* note 19, at ¶¶ 7.161–7.162.

[26] *Salmon CVD, supra* note 21, at ¶ 272.

[27] *Id.*

[28] Report of the GATT Panel, *Canadian Countervailing Duties on Grain Corn from the United States*, SCM/140 at ¶¶ 5.2.4–5.2.5 (1992) (unadopted) ("*Grain Corn*").

[29] *Id.* at ¶ 5.2.3.

[30] *Id.* at ¶ 5.2.4.

[31] *Footwear, supra* note 13, at ¶¶ 8.156–8.157.

(Safeguards) explained that where the choice of a different base year would alter the outcome or conflict with overall trends in the data, a comparison of endpoint data might be inadequate to establish an increase in imports.[32] Further, if imports decline during some segments of the investigation period, the authority must determine whether the declines are temporary or reflect part of a longer-term trend.[33]

Next, ASCM, Art.15.2 and ADA, Art. 3.2 require that when the investigating authority examines the impact of the dumped or subsidized imports on prices, it must consider whether the imports are undercutting domestic prices, depressing domestic prices, or preventing price increases that would otherwise have taken place. Any one of these effects can support an injury finding. The investigating authority is not required to show price undercutting in every case. Indeed, the price of the dumped or subsidized imports does not have to be lower than the price of the domestically produced goods. The effects, however, must be linked directly to the dumped or subsidized imports.[34] Again, however, these findings need not be explicit, but the language must make clear that the investigating authority considered whether price undercutting, depression, or suppression was significant.[35]

These articles conclude by noting that none of the factors in the paragraph are, in and of themselves, decisive. In two cases involving the Safeguards Agreement, the Appellate Body has emphasized the importance of looking at all relevant factors before drawing conclusions,[36] but suggested that findings of no injury with regard to certain factors would require compelling explanations by a country that nevertheless imposed measures. For example, while noting the possibility that the investigating authority could find injury even if most firms in the industry did not show declining profitability, the Appellate Body in the *Lamb Meat Appellate Body Report* stressed this possibility was probably a theoretical one.[37]

C. Cumulation (Articles 3.3 ADA and 15.3 ASCM)

The doctrine of cumulation was developed in the United States to deal with the situation where dumped or subsidized imports from a number of countries might collectively be injuring a domestic industry, even though the volume of imports from each individual country was too small to cause harm. Articles 3.3 and 15.3 recognize the right of investigating authorities to cumulate the impact of imports in this situation, but impose conditions on the exercise of that right.[38] The investigating authority may only look at the

[32] *Id.*

[33] *Id.* at ¶ 8.159.

[34] In *Grain Corn*, the GATT Panel faulted Canada for looking at the impact on Canadian prices of the decline in the world price, rather than of imports from the United States, even though the decline in the world price was due to U.S. subsidization. *Grain Corn*, *supra* note 28, at ¶ 5.2.6.

[35] *Thailand—Steel Appellate Body Report*, *supra* note 9, at ¶¶ 7.161–7.162.

[36] Report of the Appellate Body, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (2000) at ¶ 139 ("*Footwear Appellate Body Report*"); *Lamb Meat Appellate Body Report*, *supra* note 14, at ¶ 144 n. 99.

[37] *Lamb Meat Appellate Body Report*, *supra* note 14, at ¶ 144 n. 99.

[38] This issue of "cumulation" across countries in countervailing duty investigations, and its extension of cross-cumulation of impact with dumping investigations and across countries has been a contentious issue. As noted in the *Checklist*, subsidies (other than export and import-substitution subsidies) are not condemned and the disciplines are intended to ensure that countries use subsidies in a responsible manner and in a way that avoids harming the interests of other countries. Such subsidies should not be subject to mandatory countermeasures by aggregating the impact of several countries' actions, each of which individually may be non-distortive. It "'impedes countries' efforts to apply subsidies in a responsible manner, and deprives all countries equally of the protection against counter-measures." *See* Negotiating Group on Subsidies and Countervailing Measures*: Checklist of Issues for Negotiations,* Note by the Secretariat, Doc. No. MTN.GNG/NG10/W/9, at III.3.4 (September 7, 1987) ("*Checklist*").

cumulative effects if the products are under simultaneous antidumping or countervailing duty investigation, the level of dumping or subsidies in each exporting country is not *de minimis,* the volume of imports from each country is not negligible, and a cumulative assessment is appropriate given the conditions of competition both among the imported goods and between the imported and domestic goods.

The ADA and the ASCM define when the level of dumping or subsidies is *de minimis.*[39] The ADA specifies that the volume of imports from a particular country is negligible when it accounts for less than three percent of total imports of the like product, unless countries that individually account for less than three percent of total imports collectively account for more than seven percent.[40] The ADA does not distinguish between developed and developing countries in this regard. The ASCM, by contrast, only establishes a negligibility standard for imports from developing countries.[41] This is slightly higher than the ADA standard, the figures being four percent and nine percent respectively.

The cumulation provisions also raise the issue of whether, if imports are subject to simultaneous dumping and countervailing duty investigations, the investigating authorities can conduct a single injury investigation that considers the cumulative effect of the dumping and subsidization. Many countries, including the United States and Canada, do conduct a single investigation. It is, however, unclear how such a practice complies with the obligation in ADA Article 3.5 and ASCM Article 15.5 not to attribute injury caused by other known factors to the dumped or subsidized imports. In other words, ADA Article 3.5 prohibits the attribution of injury caused by other factors (such as subsidization) to the dumped imports. If the injury investigations are cumulated, this non-attribution obligation may be violated. So far, however, countries have avoided this issue in dispute settlement proceedings.[42]

One significant term in these provisions raises the question whether the ability to cumulate applies only to investigations and not to reviews.[43] There are several areas in the ADA and the ASCM in which the language appears to establish rules for investigations, but perhaps not for all types of review, *e.g.*, the *de minimis* standards (ADA, Art. 5.8 and ASCM, Arts. 11.9 and 27.10) and the cumulation provisions (ADA, Art. 3.3 and ASCM, Art. 15.3).[44] While no panels have ruled on this issue for cumulation purposes, the issue of whether the *de minimis* rules apply only to investigations has been examined and may shed some guidance on whether imports from various countries can be considered cumulatively

[39] ADA, Art. 5.8 (two percent *ad valorem* or less); ASCM, Art. 11.9 (one percent *ad valorem* or less for developed countries) and 27.10(a) (two percent *ad valorem* or less for developing countries).

[40] ADA, Art. 5.8. This can cause anomalous results, *e.g.*, if Country A had more than three percent but drops below three percent, it would be considered with Countries B and C. If Countries B and C each had less than three percent and collectively less than seven percent *until* considered with Country A but over seven percent when considered collectively with Country A, a potentially injurious level is reached solely because Country A sold *less*.

[41] ASCM, Art. 27.10 (b).

[42] *See* Report of the WTO Panel, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (2004) at ¶¶ 7.145–7.147 (noting that Canada explicitly did not claim that cross-cumulation of dumped and subsidized imports was *per se* a violation, and that any other claim of violation in this area was unclear, therefore finding that Canada had not made a *prima facie* showing of a violation) ("*Softwood Lumber ITC*").

[43] Specifically, ADA, Art. 3.3 and ASCM, Art. 15.3 permit the cumulation of imports from more than one country in certain circumstances *if* they "are simultaneously subject to [antidumping]/[countervailing] duty *investigations*" (emphasis supplied).

[44] In ADA, Art. 2.4.2, similar language may require the use of average-to-average or individual-to-individual price comparisons only in investigations. *See* the discussion in Chapter 11 of this book.

in a review. In the *Korean DRAMS* case,[45] the Panel found that the two percent *de minimis* standard in Article 5.8 of the ADA applies only to investigations without establishing a *de minimis* standard for administrative reviews.[46] A recent Appellate Body decision applying ASCM, Art. 15.3, also found that the *de minimis* provision did not apply in the case of reviews under ASCM, Art. 21.3 ("Sunset Reviews").[47] According to Article 21.3 the imposition of countervailing measures must be terminated after five years, unless upon review, the administering authorities find that injurious subsidization is likely to continue or resume if the measures are terminated.[48] Because Article 15.3 calls for the immediate termination of an investigation if the subsidies are *de minimis*, in the *Corrosion Resistant Steel* dispute, the EU argued and the Panel found that it would be contrary to the object and purpose of the Agreement if measures were permitted to continue based on a finding of a likelihood of continued or recurring *de minimis* subsidy levels.[49]

The Appellate Body determined, however, that because ASCM, Art. 21.4 established that certain provisions written for investigations (such as ASCM, Art. 12) applied to reviews under Article 21, the lack of reference to Article 11 implied that its provisions probably did not apply to Article 21. Moreover, the Appellate Body disagreed with the Panel's finding of a clear rationale for applying the *de minimis* rule in the case of a sunset review. Therefore, the Appellate Body found that the *de minimis* provision of ASCM, Art. 11.9 did not apply to sunset reviews.[50]

D. Evaluation of Economic Factors (Articles 3.4 ADA and 15.4 ASCM)

These provisions require investigating authorities to evaluate all relevant economic factors that have a bearing on the state of the industry. All of the factors listed in Articles 3.4 and 15.4 are presumptively relevant and must be considered by the investigating

[45] Report of the WTO Panel, *United States—Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea*, WT/DS99/R (1999) at ¶¶ 6.87–6.91 ("*Korean DRAMS*").

[46] *Id*. at 150. Interestingly, the United States, which argued for the Panel's determination in the Korean dispute, maintains that the cumulation provision applies to five-year reviews despite the fact that both ADA, Art. 5.8 (*de minimis*) and ADA, Art. 3.3 (cumulation) both refer to investigations. *Compare* ADA Art. 5.8, *with* ADA, Art. 3.3.

[47] *See* Report of the Appellate Body, *United States—Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products From Germany*, WT/DS213/AB/R (2002) ("*Corrosion Resistant Steel Appellate Body Report*"). It should be noted that there are different types of reviews of antidumping or countervailing duty orders. In the United States, for example, which uses a retroactive method of duty assessment (*see* Chapter 11 of this book) the most common is the annual review of the level of dumping or subsidization conducted upon request on entries during the preceding year in order to ensure that the amount of duty collected is not in excess of the level of dumping or subsidization, as required by ADA, Art. 9.3 and ASCM, Art. 19.4 (note that ADA Art. 9.3 provides explicit guidance on reviews in the case of retroactive assessment of duties, whereas ASCM, Art. 19.4 does not). Such reviews do not consider the question of injury. In addition, in certain circumstances the United States will conduct a "changed circumstance" review to determine whether or not there has been a sufficient change in circumstances such that continuation of the order is no longer necessary or appropriate, as provided for in ADA, Art. 11.2 and ASCM, Art. 21.2. Such reviews may be either of injury or of the level of dumping/subsidization. Finally, the United States conducts a review every five years, as required by ADA, Art. 11.3 and ASCM, Art. 21.3, to determine whether injury and dumping or subsidization is likely to continue or recur if the order is revoked. The Korean dispute involved the first type of review, to determine the level of dumping during a specific period of time. The *Corrosion Resistant Steel* dispute involved the last type, a five-year review to determine whether injurious subsidization was likely to continue or review if the order were removed.

[48] ASCM, Art. 21.3.

[49] *See* Report of the WTO Panel, *United States—Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products From Germany*, WT/DS213/R, at ¶ 8.80, *overturned on appeal.*

[50] *Corrosion Resistant Steel Appellate Body Report, supra* note 47, at ¶ 93.

authority, according to panel and Appellate Body reports.[51] In the *Thailand—Steel Panel Report*, the Panel held that, if a particular factor is irrelevant in a given case, the investigating authority must nevertheless do more than merely assert that the factor is relevant or irrelevant; it must provide a "persuasive explanation" of how its consideration of the factors led to a finding of injury.[52]

Panel conclusions on whether the authority has sufficiently considered a particular factor are very fact-sensitive. The *Thailand—Steel* Panel, for example, found a brief statement concerning "economy of scale" to be a proxy for "productivity" and a sufficient analysis of that factor.[53] The *Lamb Meat Appellate Body Report*, on the other hand, faulted the United States under the Safeguards Agreement for its finding that prices were falling, even though it provided the data for this conclusion, because it failed to explain its choice of a particular base year for comparison.[54]

The requirement that the investigating authority consider all of these factors, however, does not mean that each of them must be declining to warrant a finding of injury. Instead, as suggested by the *Lamb Meat Appellate Body Report*, the investigating authority must make its determination in light of the evidence as a whole.[55]

E. Causation (Articles 3.5 ADA and 15.5 ASCM)

Causation is one of the most contentious issues with respect to injury. In order to impose countervailing duty or antidumping measures, three elements must be present: (1) dumping or subsidization; (2) material injury or threat thereof (or the material retardation of the establishment of an industry); and (3) a causal nexus between the effects of the dumping or subsidization and the consequent injury to the domestic industry.

The language in ADA, Art. 3.5 and ASCM, Art. 15.5 reflects a change in wording from the 1979 Subsidies and Antidumping Codes[56] designed to clarify the causation

[51] *Thailand—Steel Panel Report*, *supra* note 19, at ¶ 7.224; *Thailand—Steel Appellate Body Report*, *supra* note 9, at ¶ 125; Report of the WTO Panel, *European Communities—Antidumping duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/R (2001), at ¶¶ 6.162–6.163 ("*EC Bed Linen*").

[52] *Thailand—Steel Panel Report*, *supra* note 19, at ¶ 7.236.

[53] *Id.* at ¶ 7.241.

[54] *Lamb Meat Appellate Body Report*, *supra* note 14, at ¶¶ 156–157.

[55] *Id.* at ¶ 144.

[56] *Compare 1979 Subsidies Code*, Art. 6.4:

> It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of the Agreement. There may be other factors, which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports. (footnotes omitted)

with ASCM, Art. 15.5:

> It must be demonstrated that the subsidized imports are, through the effects of the subsidies, causing injury within the meaning of the Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports, which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the pattern of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. (footnote omitted)

Also, *compare* 1979 *Antidumping Code*, Art. 3.4 *with* ADA, Art. 3.5. The causation requirement has been treated as identical, regardless of whether authorities are examining allegations of dumping or of subsidies.

obligation. The investigating authority must show that the dumped or subsidized imports are causing injury "through" the effects of the dumping or subsidies. In addition, the authorities may not attribute injury caused by other factors to the dumped or subsidized imports. Under the GATT 1947 and the 1979 Anti-Dumping and Subsidies Codes, what was required by this "non-attribution" requirement was the subject of much debate.[57] Neither panels nor Contracting Parties agreed on how the requirement should be met. Of particular debate were questions of whether authorities needed to isolate the injury caused by the dumped or subsidized imports and whether that injury had to be sufficient on its own, whether authorities had to explain why other factors were not the cause of the injury at a material level, or whether it was enough to merely "consider" other factors raised by the parties to the underlying proceeding.[58] The language developed during the Uruguay Round negotiations was an attempt to clarify these questions and to strengthen the obligation to establish the causal link and avoid attributing injury from other factors to the dumped or subsidized imports.[59]

The ADA and ASCM require the investigating authority to base its finding of causation on all relevant evidence. Unlike the list in Articles 3.4 and 15.4, the factors in Articles 3.5 and 15.5 are not mandatory in every case. For example, in interpreting a similar requirement in the Safeguards Agreement, the *Footwear* Panel noted that the Safeguards Agreement does not require a price analysis in every case because often imports and domestic products compete on factors other than price.[60] On the other hand, the exporting country may be able to prove a violation of the Agreement by showing that the investigating authority failed to consider factors that are relevant but are not included in the Article 3.5 or Article 15.5 list. The *Wheat Gluten Appellate Body Report*, also interpreting the Safeguards Agreement's language on causation, found that the investigating authority must consider any factors that it believes are relevant, even if they were not raised independently by interested parties during the investigation.[61]

The ADA and ASCM also mandate that the investigating authority not attribute to dumped or subsidized imports injury caused by other factors. The GATT *Grain Corn* Panel, interpreting similar, but less detailed, language in the 1979 Subsidies Code, for

[57] Article VI of GATT 1947 required that no antidumping (or countervailing) duty may be levied unless the importing country's authorities found that the effect of the dumping or subsidization was such as to cause or threaten material injury to an established domestic industry, or to materially retard the establishment of a domestic industry. In the Kennedy Round, as part of a negotiation on antidumping practices (but not countervailing duty), the resulting *International Agreement on Anti-dumping* ("IAA") increased the causation requirement. The IAA required that dumping must be "demonstrably the principal cause" of injury and required the authorities of the importing country to weigh the effect of dumping against other factors that might be affecting the domestic industry. The United States, among other countries, was concerned by this heightened causation requirement, and the United States Congress passed legislation stating that its domestic law took precedence over any standard established by the IAA and claimed that its existing injury test was protected by the grandfather rights in the Protocol of Provisional Application. *See* the discussion of the IAA in Chapter 11 of this book for more information. The requirement of weighing and the "demonstrably the principal cause" language were not included in the 1979 Codes.

[58] For a brief summary of the debate surrounding this provision of the 1979 Codes, *see* Horlick and Clarke, *supra* note 18 at 322–324.

[59] In describing the results of the Uruguay Round negotiations, the WTO stated: "The Agreement strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the domestic industry." WTO, *A Summary of the Final Act of the Uruguay Round: Agreement on Implementation of Article VI (Anti-Dumping)*, available at www.wto.org/english/docs_e/htm#fAgreement.

[60] *Footwear*, *supra* note 13, at ¶¶ 8.249–8.252.

[61] Report of the Appellate Body, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (2000) at ¶ 55 ("*Wheat Gluten Appellate Body Report"*).

example, refused to find that U.S. subsidies caused injury to Canadian grain corn because the decline in world price—triggered by the U.S. subsidies—would have had an adverse effect on Canadian producers even if Canada had imported no grain from the United States.[62] The Appellate Body has emphasized this non-attribution requirement; however, it has not yet given clear guidance on how to comply with the causation requirement once the non-attribution rule is fulfilled. In interpreting the similar causation requirement of the Safeguards Agreement, the Appellate Body has specifically rejected a requirement that imports by themselves must be the sole cause of the relevant degree of injury ("serious" for Safeguards Agreement and "material" for the ASCM or ADA).[63] The Appellate Body instead held that the investigating authority must find a "genuine and substantial" cause-and-effect relationship between imports and injury.[64] It suggested, but did not require, a three-step process for analyzing the causation problem. The investigating authority could first distinguish the effects that resulted from different sources, then attribute the injury caused by each to the appropriate source.[65] Finally, the investigating agency could then make a determination on a causal link between the relevant imports and the injury.[66]

In assessing the investigating authority's finding of causation, panels have relied on at least two different general tests. The *Footwear* Panel (Safeguards), whose explanation was upheld on appeal, said the key issue was whether an upward trend in imports coincided with downturns in the factors listed as indicators for injury.[67] A failure to find a coincidence in these trends is not fatal to an investigating authority's decision to impose sanctions, but the authority would have to provide a strong explanation for finding that imports were nevertheless causing the injury.[68] The Panel in *Hot-Rolled Steel from Japan* summarized the question simply as whether other factors break the causal link between increased imports and injury and whether mere coincidence may be eliminated as the explanation for the injury.[69]

The *Hot-Rolled Steel from Japan Appellate Body Report*, expressly rejecting the *Salmon AD* GATT Panel's analysis of the prior language in the 1979 Antidumping Code, found that at a minimum this paragraph required that the injury from the dumped (or subsidized) imports be isolated in order to avoid attributing injury from other factors to the effects of the dumped or subsidized imports.[70]

F. Domestic Industry (Articles 3.6 ADA and 15.6 ASCM)

Rarely addressed directly in panel reports, these provisions require the investigating authority to compare the data for dumped or subsidized imports to those for domestic

[62] *Grain Corn*, *supra* note 28 at ¶¶ 5.2.9–5.2.10.
[63] *Lamb Meat Appellate Body Report*, *supra* note 14, at ¶ 170; *Wheat Gluten Appellate Body Report*, *supra* note 60, at ¶ 70.
[64] *Lamb Meat Appellate Body Report*, *supra* note 14, at ¶¶ 177–178; *Wheat Gluten Appellate Body Report*, *supra* note 60, at ¶ 69.
[65] *Id.*
[66] *Id.*
[67] *Footwear*, *supra* note 13, at ¶ 8.238; *Footwear Appellate Body Report*, *supra* note 36, at ¶ 145.
[68] *Footwear*, *supra* note 13, at ¶ 8.238.
[69] Report of the WTO Panel, *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/D5184/R (2001).
[70] *Hot Rolled Steel from Japan Appellate Body Report*, *supra* note 6, at ¶ 228 ("... such an assessment must involve separating out and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports.")

production of the "like product" whenever possible. When domestic production of the "like product" cannot be separately identified, the investigator must look at the production of the narrowest group of goods that includes the like product for which separate data are available. Over the course of the investigation, the investigating authority may analyze the effect of imports on particular sectors of the domestic industry,[71] but it may not base its overall determination only on a sub-sector of the industry without providing an explanation of why that sub-sector is representative of the industry as a whole.[72] The Panel in *HFCS*[73] found that this provision allows the investigating authority, where necessary, to base its conclusions on a broader definition of domestic industry, but not on a narrower one.[74] This conclusion was reinforced by the *Hot-Rolled Steel from Japan Appellate Body Report*, which found that the U.S. authority's particular focus on the merchant market portion of the production (*i.e.*, the production facing direct competition from imports) without a similar focus on the captive production portion (*i.e.*, the portion sheltered from import competition) violated the objective examination requirement of Article 3.1 of the ADA.[75] In that case, the Appellate Body stated:

> "an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole . . . "[76]

G. Threat of Injury (Articles 3.7 ADA and 15.7 ASCM)

As noted above, the ADA and the ASCM allow the use of antidumping and countervailing measures in response to the threat of material injury as well as current material injury. Articles 3.7 of the ADA and 15.7 of the ASCM require that the finding of threat must not be speculative and that the event that would cause injury must be clearly foreseen and imminent. The *HFCS* Panel noted that a finding by the investigating authority that it could not "rule out" the possibility of continued imports was not equivalent to a determination of a "likelihood" of substantially increased imports, as required by the Agreements.[77]

The *Lamb Meat Appellate Body Report* (Safeguards), although examining a threat of "serious" rather than "material" injury, said that the words "clearly" and "imminent," also used in the ADA and the ASCM, require finding a high degree of likelihood that an injury is on the verge of occurring.[78] Similarly, the GATT Panel in *Polyacetal Resin* held that a finding of threat under the 1979 Antidumping Code required more than a determination that injury would result if imports continued to adversely affect domestic prices; the investigating authority also had to determine that it was likely that imports would continue to do so.[79] In *Softwood Lumber ITC*, the WTO panel found that these articles required "that some 'change of circumstances' must be clearly foreseen and imminent, and that it is this change of circumstance that would create a situation in which

[71] Report of the WTO Panel, *Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (2000) at ¶ 7.154 ("*HFCS*").
[72] *Id*. at ¶¶ 7.154–7.155.
[73] *Id.* at ¶ 7.147.
[74] *Id*. at ¶ 7.157.
[75] *Hot-Rolled Steel from Japan Appellate Body Report*, *supra* note 6, at ¶¶ 181–214.
[76] *Id.* at ¶ 206. Although the discussion was in relation to the objective examination requirement of Antidumping Agreement, Article 3.1, it reinforces the analysis of the *HFCS* panel report.
[77] *HFCS*, *supra* note 71, at ¶ 7.177.
[78] *Lamb Meat Appellate Body Report*, *supra* note 14, at ¶ 125.
[79] *Polyacetal Resin, supra* note 3, at ¶ 283.

injury would occur."[80] This change of circumstance, however, need not be identified as a single, or specific, event.[81]

Articles 3.7 and 15.7 list several factors, unique to a threat decision that the investigating authority must take into account in finding a threat of material injury.[82] Unlike the mandatory injury factors in Articles 3.4 and 15.4, however, the factors identified in 3.7 and 15.7 are not mandatory. Therefore, a failure either to adequately consider a particular factor or to consider it at all is not necessarily a violation of the provisions. The articles do require that the totality of the factors considered "lead to the conclusion that further dumped and subsidized exports are imminent and that, unless protective action was taken, material injury would occur."[83] *Softwood Lumber ITC* also provides guidance as to what constitutes adequate consideration of these factors. According to the WTO Panel, it must be apparent from the authority's written determination that "the investigating authorities have given attention to and taken [the factors] into account."[84]

The *HFCS* Panel held that in addition to considering the factors in Articles 3.7 and 15.7, the investigating authority must also look at the mandatory factors in Article 3.4 of the ADA to show what the impact of continued dumped imports would be.[85] This is to establish a background against which the impact of future dumped or subsidized imports could be assessed. As with other factors considered by the investigating authority, none of the factors listed in Articles 3.7 and 15.7 is itself decisive.

Finally, in addition to considering the factors in Article 3.4 and 3.7 of the ADA and Article 15.4 and 15.7 of the ASCM, for purposes of finding a threat of material injury, the investigating authority must also examine causation under Articles 3.5 and/or 15.5 as well. It is not sufficient to consider this, and to assure non-attribution of injury from other factors, in the context of a present material injury analysis if the final determination is of a threat of future material injury.[86]

H. Special Care in Threat Cases (Articles 3.8 ADA and 15.8 ASCM)

These provisions caution that decisions to use antidumping or countervailing measures in the face of threatened, rather than current, material injury must be made with "special care." Only one WTO Panel has addressed this issue and the Appellate Body has not yet addressed it. In *Softwood Lumber ITC*, the Panel noting that Canada, in raising a claim that the U.S. threat analysis violated the provisions of ADA Article 3.8 and ASCM Article 15.8, had not asserted that the need to use "special care" raised any

[80] *Softwood Lumber ITC, supra* note 42.

[81] *Id.,* at ¶ 7.58 ("... the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently.")

[82] Those factors are: the nature of the subsidy or subsidies (ASCM only); a significant rate of increase in the dumped/subsidized imports indicating the likelihood of substantially increased importation; either freely disposable capacity or an imminent increase in capacity indicated the likely of substantially increased subsidized/dumped imports, taking into account the ability of other markets to absorb the exports; whether imports are entering at prices that will have a significant depressing and suppressing effect on domestic prices, and would likely increase demand for further imports; and inventories of the product being investigated. ADA, Art. 3.7 and ASCM, Art. 15.7.

[83] *Softwood Lumber ITC, supra* note 42, at ¶ 7.69. Note in this case, the WTO Panel found that the totality of the circumstances did not support the authorities finding of threat. *Id.* at ¶ 7.96.

[84] *Id.* at ¶ 7.67.

[85] HFCS*, supra* note 71, at ¶¶ 7.126–7.127.

[86] *Softwood Lumber ITC*, *supra* note 42, at ¶¶ 7.134–7.137.

specific legal requirements. Rather, according to the Panel, Canada's argument was that these provisions imposed a stricter standard for threat cases, without indicating what the parameters of such a standard should be.[87] The Panel also failed to identify what these provisions require, beyond "a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases.[88]

The Panel merely found that it had no basis to find a violation of Articles 3.8 and 15.8 in the absence of a violation of a more specific provision of the Agreements. It did note in passing that, in theory, a violation of the special care requirement could be demonstrated in the absence of a violation of a more specific provision of the Agreements, but found that Canada had not so demonstrated.[89]

III. Injury in Regional Markets

Article 4.1(ii) of the ADA and Article 16.2 of the ASCM provide an exception to the definition of "domestic industry" as all or a major proportion of the domestic production. This exception permits the division of the importing country into two or more markets, in which case the producers within each market could be considered separate industries. This is also referred to as the "regional market" provision. A separate market may be established if two conditions are met: (1) the producers within the market sell all or almost all of their production of the good in question in that market and (2) the demand in that market is not to any substantial degree supplied by the producers of the subject product located elsewhere in the territory. Where such a regional market exists, injury may be found to exist for antidumping or countervailing duty purposes so long as the dumped or subsidized imports are concentrated into that isolated market and are causing injury to the producers of "all, or almost all" of the production within that market. The situation of the industry in the remainder of the country is irrelevant, even if it constitutes a major portion of the total domestic industry.[90]

IV. Conclusion

The injury analysis in an antidumping or countervailing duty action is complex and fact dependent. The WTO Agreement sought to clarify the most contentious issues arising from this analysis. Nevertheless, there are numerous complaints in cases around the world concerning whether the investigating authorities have favored the domestic industry in making their injury determination. This will likely continue to be an area of dispute in future cases as well because of its complexity and fact-specific nature.

[87] *Id.* at ¶¶ 7.32–7.34.
[88] *Id*. at ¶ 7.33.
[89] *Id*. at ¶ 7.34.
[90] ADA, Art. 4.2 and ASCM, Art. 16.3 follow the logical consequences of making an injury finding with respect to only part of the national market. They address how duties may be levied in such situations. *See* Chapters 11 and 16 of this book for a discussion of these provisions.

CHAPTER 18

THE AGREEMENT ON SAFEGUARDS

Yong-Shik Lee (Y. S. Lee), Ph.D.*

TABLE OF CONTENTS

I. Introduction: Political and Economic Aspects of Safeguard Measures 751
A. Definition of "Safeguard" 751
B. Origin of Safeguards 751
C. Justification for Safeguards 752
D. Objections to Safeguard Measures 752
E. Financial Crisis and Safeguard Measures 753
F. Trade Promotion and Safeguard Measures 754
II. GATT Article XIX 755
A. Increased Imports 757
B. Unforeseen Developments and the Effect of Tariff Concessions 757
C. Most-Favored Nation Treatment 758
D. Preferential Arrangements 758
E. Procedural Requirements 759
F. Compensation and Retaliation 760
III. Negotiations in the Uruguay Round 760
A. Selectivity 762
B. Gray-Area Measures 763
C. Compensation and Retaliation 763
D. Structural Adjustment 763
E. Special Rules for Developing Countries 764
F. Procedural Issues 764
IV. WTO Agreement on Safeguards 764
Article 1—General Provision 765
Article 2 –Conditions 765
1. Increase in Imports 765
2. Like or Directly Competitive Products 767
3. MFN Application of Safeguards 768
4. Unforeseen Developments 768
5. Other Provisions in Article 2 769
Article 3—Investigations 769
1. Inclusion of Reasoning in Reports 769
2. Selective Analysis of Domestic Industry 770
3. Confidential Information 770

* Prof. Y.S. Lee is an academician, lawyer (U.S.A. and U.K) and a former government counsel (Ministry of Foreign Affairs and Trade, Korea). Professor Lee is currently an associate editor of the Journal of World Trade.

Article 4—Serious Injury 771
1. Determination of Serious Injury 771
2. Factors to be Considered. 771
3. Threat of Injury. 772
4. Causation 772
Article 5—Application of Safeguard Measures 774
1. Extent of Measures 774
2. Form of Measures 775
3. Adjustment Plans 776
4. Quota Allocation 776
Article 6—Provisional Safeguard Measures 776
Article 7—Duration and Review of Safeguard Measures 776
Article 8—Compensation or Retaliation 777
Article 9—Developing Countries 779
Article 10—Termination of Pre-Existing Safeguard Measures 779
Article 11—Elimination of Gray-Area Measures 780
Article 12—Notification and Consultation 781
1. Timing of Notifications 781
2. Contents of Notifications 782
3. Consultations 782
Article 13—Surveillance 783
V Outstanding Issues in the Application of Safeguards 784
A. Relationship between GATT Article XIX and the Agreement on Safeguards 784
B. Burden of Proof 788
C. Standard of Review 789
D. Prohibition of "Gray-Area Measures" 792
E. The U.S. Steel Safeguard Case—A Test for Multilateralism in International Trade 793
VI. Conclusion 796

BIBLIOGRAPHY 797

I. Introduction: Political and Economic Aspects of Safeguard Measures[1]

A. Definition of "Safeguard"

The term "safeguard" or "safeguard measure" refers to trade measures that are applied to protect domestic industries from competition with imports causing or threatening to cause serious injury to them. Article XIX of the GATT and the WTO Agreement on Safeguards (hereinafter referred to as "the Safeguards Agreement" or "SA") authorizes Members to impose significant import restrictions designed to remedy or prevent serious injury to domestic industries that is caused by an increase in imports. Such general safeguard measures are to be distinguished from other special safeguard measures, which are either applied only to a specific category of imported product[2] or do not require the existence of injury to a particular domestic industry.[3]

In contrast, the general safeguard measures provided under the Safeguards Agreement and its predecessor, GATT Article XIX, can be applied to any category of imported products. Also, they can only be applied to remedy or prevent serious injury to a specific domestic industry that is caused by an increase in imports. Such safeguard measures are gaining increasing importance in world trade today.

Both general and special safeguards are distinct from other widely-used import restrictions such as antidumping and countervailing duties. While those latter types of measures are designed to offset the advantages gained by the exporters through "unfair" trade practices such as under-pricing and subsidization, safeguard measures are not concerned with the fairness of trade practices on the part of exporters. They are applicable solely on the basis of the condition of the domestic industry that is adversely affected by an increase in imports.

B. Origin of Safeguards

The first safeguard measure appeared in the 1942 United States Reciprocal Trade Agreement with Mexico,[4] where it was known as the "escape clause".[5] A similar provision was included in subsequent international trade agreements, including the General Agreement on Tariffs and Trade ("GATT"). Article XIX of the GATT, discussed in more detail in the next Part, authorizes a contracting party to restrict imports regardless of its bound concessions where an increase in imports attributable to those concessions causes serious injury or threat thereof to the domestic industry.

[1] Further discussion of the political and economic implications of safeguard measures as well as the examination of the current national and international rules on safeguards are provided in the author's treatise on safeguards, SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS (Kluwer Law International, 1st ed. 2003, 2nd ed. forthcoming 2005).

[2] For instance, "special safeguard measures" under Article 5 of the WTO Agreement on Agriculture and "transitional safeguards" under Article 6 of the WTO Agreement on Textiles and Clothing are only applicable to agricultural products and textile products, respectively. *See* chapters 6 and 9 of this book.

[3] The application of import restrictions under GATT Articles XII and XVIII:B (balance-of-payments) and the Uruguay Round Understanding on Balance of Payments does not require the existence of injury to a domestic industry.

[4] The relevant clause provides that "If, as a result of unforeseen developments and of the concession granted on any article enumerated and described in the Schedules annexed to this Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the concession, in whole or in part, or to modify it to the extent and for such time as may be necessary to prevent such injury." *Agreement on Reciprocal Trade*, Dec. 23, 1942, US-Mex., Art. XI, 57 Stat., 833, 845–866.

[5] Use of the term "escape clause" as a synonym for safeguard measures seems appropriate, since the provision allows a party to a trade agreement to "escape" from the commitments it made in the agreement.

C. Justification for Safeguards

Under the GATT/WTO system, Members are not allowed to impose tariffs on imports higher than their negotiated tariff concessions or to impose various forms of non-tariff measure, such as quotas. Safeguard provisions allow Members to depart from these commitments provided that increased imports cause or threaten to cause serious injury to a domestic industry. It can be argued that serious injury or the threat thereof to the domestic industry is not a legitimate ground for import restriction even though such injury may have been caused by the increase in imports.

After all, import concessions made in multilateral trade negotiations can be expected to lead to increases in imports, even at a speed or to an extent greater than originally anticipated by the importing country at the time of the concessions. Although the position of the competing domestic industry may deteriorate as the result of the competition from imports, international trade improves the overall economic welfare of the importing country by inducing an optimal re-distribution of resources.[6] This is the economic rationale in favor of international trade and should therefore be the reason for participating in the multilateral trade negotiations in the first place. Then, what is the justification for safeguard measures? Does the existence of safeguard measures contradict what Members try to achieve in economic terms through international trade?

One possible answer to this question is that a sudden increase in imports can cause acute social, political, as well as economic, problems in the importing country. Domestic producers may be driven out of business by import competition. The shut-down of businesses would then cause problems such as unemployment and, possibly, a series of adverse effects on other related industries, thereby magnifying the problem. Such economic difficulties, even if they are of a short-term and transitional nature, often cause serious social problems.

Safeguard measures can help prevent these problems from occurring by maintaining the *status quo* through temporary import restrictions. Safeguard measures under the WTO aim to facilitate economic adjustment by offering temporary protection to the domestic industry.[7] From the economic perspective, trade promotes economic welfare through redistribution of resources from inefficient domestic industries to more efficient ones.[8] However, proponents of safeguard measures point out that the redistribution of resources does not automatically take place. They say that in reality the transfer of resources may take a considerable amount of time. For instance, the labor force employed in the declining domestic industries has to be re-educated and re-trained before it can be employed elsewhere. This argument supports the necessity of safeguard measures in that the temporary protection of domestic industries would facilitate this economic adjustment, by giving the domestic industry and the government of the importing country the time needed to deal with the problems resulting from a sudden increase in imports.

D. Objections to Safeguard Measures

The question remains whether safeguard protection alone induces proper economic adjustment. While protection is being provided, the domestic industry and the government

[6] Ricardo's classical theory of comparative advantage establishes that international trade always promotes economic efficiency by redistribution of domestic resources. DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1817).

[7] The Preamble to the SA states in relevant part, "Members . . . Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets . . . Hereby agree as follows:".

[8] *Supra* note 6.

are not under immediate pressure to make any change. The maximum length of safeguard measures under the WTO Agreement on Safeguards is eight years including a one-time extension.[9] Eight years is a considerable amount of time, and after those eight years the situation may well have changed and the domestic products may no longer be threatened by imports.[10] A government may feel that the situation need not be dealt with in its lifetime, and may therefore adopt a wait-and-see attitude during the period of protection rather than force the industry to go through a potentially painful adjustment process.

Under the Agreement on Safeguards, Members are required to progressively liberalize safeguard measures that have a duration of more than one year[11]. Although the Agreement does not specify the speed of liberalization, a well-paced liberalization plan is expected to require economic adjustment because, under the liberalization plan, the protection offered to the domestic industry would be reduced at intervals over the lifetime of the safeguard measure. A responsible government would devise such a liberalization plan in consultation with the industry, in order to facilitate economic adjustment. The absence of an adequate liberalization plan would only delay potential problems until the safeguard measure expires.

Another objection to safeguard measures comes from the notion that safeguards distort trade and protect the welfare of domestic producers at the expense of consumers.[12] It might be economically more efficient to use non-trade measures such as government subsidies to remedy the harm to the domestic industry.[13] The difficulty with this position is that those subsidies may prove to be a significant fiscal burden to the government. For those governments with limited financial resources, particularly those of many developing countries, the option may be impractical.

E. Financial Crisis and Safeguard Measures

The value of safeguard measures can also be considered in conjunction with today's economic environment where trade patterns can be significantly affected, not only by the relative competitiveness of concerned industries, but also by extraneous factors such as foreign exchange rates, which can change significantly over a short period of time. For instance, a sudden and substantial devaluation of an exporting country's currency may lead to a rapid increase in its exports. Such economic changes may present a uniquely fitting situation for the application of safeguards.

For example, in 1997, the currencies of many Asian countries were sharply devalued due to the financial crisis in that region.[14] For instance, the value of the South Korean won fell by more than forty per cent in less than one month after the beginning of the crisis. The sharp devaluation reduced export prices significantly, giving Korean exporters a significant competitive edge. Many domestic industries that had been competing with

[9] *Agreement on Safeguards*, Art. 7.1 and 7.2.

[10] For instance, foreign producers of the products in question may have depended heavily on overseas export markets, and the loss of a major export market due to a safeguard measure may create difficulties for them and ultimately force them out of business.

[11] Article 7.4 of the Agreement on Safeguards provides in the relevant part that "In order to facilitate adjustment in a situation where the expected duration of a safeguard measure . . . is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application."

[12] For the impacts of import restrictions on economic welfare, *see* DOMINICK SALVATORE, INTERNATIONAL ECONOMICS 220–226, 258–260 (1995)

[13] J.S. Freebain, *Pros and Cons of Temporary Industry Assistance,* 22(3) AUSTRALIAN JOURNAL OF AGRICULTURAL ECONOMICS 194–205 (1978). Domestic subsidies are permitted under Article III:8(b) of the GATT.

[14] For the causes and developments of the financial crisis in certain Asian countries, see Andrew Berg, *The Asia Crisis—Causes, Policy Responses and Outcomes,* International Monetary Fund Working Paper, WP/99/138 (Oct. 1, 1999).

Korean exports, ranging from the U.S. steel industry to the Israeli plywood industry, were affected by the sharp increase in imports from South Korea.

Safeguard measures would have been an appropriate remedy to redress or prevent injury to those industries. The increase in imports from South Korea was due to the temporary devaluation of the South Korean currency. The increase in imports from South Korea was unlikely to be sustained on a permanent basis because the cause for the devaluation was Korea's short-term shortage of foreign currency. The Korean currency was bound to appreciate as capital flowed back into the country, which actually took place in the subsequent months. In the meantime, the Korean products quickly overwhelmed many foreign markets where domestic producers had competed with Korean exports. By applying safeguard measures, affected Members would have been able to protect their domestic industries from the temporary surge of imports from Korea, although they in fact refrained from doing so.

Affected importing countries, as a matter of policy, may choose not to apply safeguard measures in an effort to assist exporting countries to earn foreign currencies needed to recover from the financial crisis, but regardless of their final course of action, safeguards would remain an available option to protect affected domestic industries. The remedy would have been equally applicable had the devaluation been permanent. Safeguard measures would have offered affected domestic industries the time necessary to deal with the consequences on their domestic industries from this changed price factor.

F. Trade Promotion and Safeguard Measures

Finally, safeguard measures also provide the government with a political cushion in efforts to lower import barriers. Notwithstanding the overall benefits from the liberalization of trade, adversely affected domestic industries tend to resist opening up domestic markets to foreign competitors, and such resistance has proven to be a major barrier to liberalization efforts. Safeguards may be a way to lower barriers to imports since the existence of such measures can be perceived as a "safety net" for the survival of those adversely affected-domestic industries, even though it may only be a temporary means of protection. Knowing that safeguard measures will be available in the event of serious injury as a result of tariff reductions, governments would be better able to persuade domestic industries to accept further market opening. As the result, the existence of safeguard provisions make it more likely that nations will offer trade concessions.[15]

It should be noted that the political utility of safeguards might tempt governments to abuse safeguard measures. Trade measures are often considered when governments face problems with their domestic industries and find some possible association between the problems and the imports. Unfortunately, they are perceived as an easier way to deal with political pressure from declining domestic industries than coping with their own structural problems.[16] The improved disciplines of the WTO are designed to inhibit governments from abusing trade measures.

[15] *See* KENNETH W. DAM, THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 106 (1970) for this "safety valve theory."

[16] For example, while the U.S. Government justified its controversial 2002 safeguard measures imposed on a wide variety of steel products on the basis of injury caused by increased imports, many believe that the root cause of the U.S. industry's problems is not imports at all, but the enormous cost of its obligation to provide retirement benefits to its former employees. Some proposed that the Government should bail out the industry by taking on this obligation, but this would have involved a large budget item. The provision of import relief, on the other hand, imposes an "off-budget" cost to the economy, and was therefore politically more palatable.

An adequate understanding of the rules on safeguards is a prerequisite to their proper application. Although the new Agreement on Safeguards provides much more detailed rules on the application of safeguard measures than its predecessor, GATT Article XIX, some of those rules are still ambiguous and even controversial, as revealed in recent WTO panel and Appellate Body decisions.[17] The following Parts discuss the evolution of the rules on safeguards and examine the current rules on safeguards with an analysis of the relevant WTO panel decisions.

II. GATT Article XIX

GATT Article XIX provided the first multilateral rules on safeguards in the international trade system and has remained in force for over fifty years. In 1946 the United States had submitted a working proposal for the Charter of the International Trade Organization (ITO) that included an escape clause.[18] The escape clause was similarly worded to that in a bilateral US-Mexico Agreement.[19] Although the ITO never came into existence, an escape clause was included in the GATT.

The provisions of Article XIX are predicated on the notion that safeguards constitute an emergency action based on serious injury to a domestic industry. Article XIX, following the precedent of the US–Mexico Agreement, lay out conditions for the application of a safeguard measure: an increase in imports resulting from unforeseen developments and the effect of concessions made under the agreement, causing serious injury or threat thereof to domestic producers of like or similar products.

Article XIX is notable for its brevity and lacks detailed substantive and procedural requirements for the application of a safeguard measure. Paragraph 1(a) sets out the general conditions for the application of a safeguard measure. The other paragraphs deal with the following issues: safeguard measures in relation to a preferential trade

[17] As of August 2004, eight panels had been established under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), to review disputes concerning the applications of safeguard measures under the Agreement on Safeguards and GATT Article XIX. Those disputes are: *Korea—Definitive Safeguard Measure on the Imports of Certain Dairy Products* ("*Korea—Dairy Products*"), WT/DS98/R (Report of the Panel, dated June 21, 1999), WT/DS98/AB/R (Report of the Appellate Body, dated December 14, 1999); *Argentina—Safeguard Measure on the Imports of Footwear* ("*Argentina—Footwear*"), WT/DS121/R (Report of the Panel, dated June 25, 1999), WT/DS121/AB/R (Report of the Appellate Body, dated 14, 1999); United States*—Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities* ("*United States—Wheat Gluten*"), WT/DS166/R (Report of the Panel, dated July 31, 2000), WT/DS166/AB/R (Report of the Appellate Body, dated December 22, 2000); *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*United States—Lamb Meat*"), WT/DS177/R, WT/DS178/R (Report of the Panel, dated December 21, 2000), WT/DS177/AB/R, WT/DS178/AB/R (Report of the Appellate Body, dated May 1, 2001); *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe* ("*United States—Line Pipe*"), WT/DS202/R (Report of the Panel, dated October 29, 2001), WT/202/AB/R (Report of the Appellate Body, dated February 15, 2002); *Chile –Price Band System and Safeguard Measures relating to Certain Agricultural Products* ("*Chile—Agricultural Products*"), WT/DS207/R (Report of the Panel, dated May 3, 2002) (the issues in the case relating to safeguards were not appealed); *Argentina—Definitive Safeguard Measure on Imports of Preserved Peaches* (*"Argentina—Preserved Peaches"*), WT/DS238/R (Report of the Panel, dated February 14, 2003) (the panel rulings not appealed);*United States—Definitive Safeguard Measures on Imports of Certain Steel Products* ("*United States—Steel Products*"), WT/DS 248∼DS259/R (Report of the Panel, dated July 11, 2003), WT/DS248∼DS259/AB/R (Report of the Appellate Body, dated November 10, 2003).

[18] *United States Suggested Charter*, Dept. of State Pub. No.2598, Art. 29, at 22 (1946)

[19] *See supra* note 4.

arrangement (paragraph 1(b)), prior notice, consultation, provisional safeguard measures (paragraph 2) and compensation/retaliation (paragraph 3(a) and (b)).

Article XIX provides no guidelines with respect to the essential questions for the application of a safeguard measure such as the assessment of serious injury and the transparency of the investigation process. This deficiency made it difficult to challenge safeguard measures that were applied rather arbitrarily, without clear evidence of serious injury that is caused by an increase in imports. Many contracting members of the GATT considered it necessary to redress this problem by setting more detailed standards for the application of safeguards. Safeguard negotiations in the Tokyo Round were unsuccessful, and it was not until the Uruguay Round negotiations that an agreement on safeguards was finally concluded.

Although Article XIX was far from being a comprehensive set of rules for the application of safeguards, it nevertheless set out fundamental principles which were later adopted in the Safeguards Agreement. The provisions in the SA were built on the principles of Article XIX, with substantial refinements and modifications. The remainder of this Part reviews the provisions in Article XIX, which provide the foundation for the Agreement on Safeguards. Recent Appellate Body decisions[20] confirmed that the provisions of Article XIX are still effective to the extent that they are consistent with the new Agreement.

Paragraph 1(a) of Article XIX sets forth the general conditions for the application of safeguards, providing that

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

The leading GATT decision on the application of Article XIX, *Report on Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement ("Hatters' Fur Case")*[21], provided a summary of the essential elements for the application of a safeguard measure. The Report notes in relevant part that

> "In attempting to appraise whether the requirements of Article XIX had been fulfilled, the Working Party examined separately each of the conditions which qualify the exercise of the right to suspend an obligation or to withdraw or modify a concession under that Article. Three sets of conditions have to be fulfilled:
>
> (a) There should be an abnormal development in the imports of the product in question in the sense that:
> (i) the product in question must be imported in increased quantities:
> (ii) the increased imports must be the result of unforeseen developments and of the effect of the tariff concession; and
> (iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.
> (b) The suspension of an obligation or the withdrawal or modification of a concession must be limited to the extent and the time necessary to prevent or remedy the injury caused or threatened.

[20] *Supra* note 7.

[21] GATT/CP.6/SR.19 (adopted by the Contracting Parties on Oct. 22, 1951).

(c) The contracting party taking action under Article XIX must give notice in writing to the CONTRACTING PARTIES before taking action. It must also give an opportunity to contracting parties substantially interested and to the CONTRACTING PARTIES to consult with it. As a rule consultation should take place before the action is taken, but in critical circumstances consultation may take place immediately after the measure is taken provisionally."

Specific issues that have arisen under Article XIX include the following:

A. Increased Imports

The first requirement under paragraph 1(a) is the existence of increased quantities in imports. The question arose whether an increase that is only *relative* to domestic production, as opposed to an *absolute* increase in imports, would qualify as the requisite increase in imports under this provision. Where the absolute quantity of imports has decreased, but domestic production has decreased by a greater amount, should this be a basis for the application of a safeguard measure?

A relative increase could occur during a recession, and the early discussions of safeguards indicated that a relative increase in imports was intended to qualify for relief. The Working Party on "Modifications to the General Agreement," which met shortly after the Havana Conference in 1948, found that "It was also the understanding of the Working Party that the phrase 'being imported . . . in such increased quantities' in paragraph 1(a) of Article XIX was intended to cover cases where imports may have increased relatively . . ."[22] No GATT panel ruled on the issue of "relative increases" in imports.

Views on the inclusion of "relative increases" under Article XIX differed. An eminent scholar warned that the application of safeguard measures in the case of only a "relative increase" in imports would inflict damage to world trade in times of recession by causing a chain of retaliations.[23] Other scholars, on the other hand, have suggested that safeguards can be applied on the basis of a relative increase in imports because in economic conditions of recession or depression, domestic producers would consider more relevant the fact that imports account for a bigger proportion of production or consumption in the domestic market than that imports have decreased in absolute terms.[24] The issue is now moot, because Article 2.1 of the Safeguards Agreement clarifies that the increase can be "absolute or relative."

B. Unforeseen Developments and the Effect of Tariff Concessions

Paragraph 1(a) also requires as a condition for imposing safeguard measures that the increased imports be the result of "unforeseen developments and the effect of . . . tariff concessions". The meaning of "unforeseen developments" was discussed in the

[22] II/39, 43–44, ¶ 30, *cited in* WTO, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 518 (6th ed. 1995).

[23] *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 555 (1969). He notes, "This concept of "relative increase" seems inappropriate in an escape clause that is based on a policy of allocating the burdens of market readjustment . . . Here no actual increase in imports has occurred, so it seems very difficult to justify placing the burden on the foreign products. It appears that the "relative" increase concept is a protective device. It is a device that may have little relevance in a general period of increasing economic wealth, but it is a potentially dangerous device if general world economic conditions tend to decline. In that sense protective sentiments will be much more powerful anyway, and this outlet for that sentiment could accelerate a decline in trade and thus accelerate a general economic decline, as such nation tries to shift the burden of declining markets to foreign goods, evoking retaliation and a spiraling downward trade trend."

[24] RAJ BHALA AND KEVIN KENNEDY, WORLD TRADE LAW 910 (1998).

Hatter's Fur case, in which the members of the Working Party (other than the United States), agreed that

> the term 'unforeseen development' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[25]

In that case, a significant change in fashion was found to constitute an "unforeseen development".

Although the Safeguards Agreement does not refer to "unforeseen developments", and can be read as a self-contained agreement superseding Article XIX, several recent Appellate Body decisions held that Article XIX and the SA must be read together and that a Member applying a safeguard measure must demonstrate the existence of "unforeseen developments" as a matter of fact.[26]

With respect to the phrase, "effect of obligations incurred by a contracting party", the Appellate Body was of the view that the phrase only indicates that the increase in imports should be the result of obligations undertaken by the Member under the GATT 1994, including tariff concessions.[27] As discussed in Part V:*A* of this chapter, the Appellate Body's holdings in this regard rest on a somewhat questionable reading of the Safeguards Agreement. However, since these Appellate Body decisions on unforeseen developments stand unchanged to date, any future safeguards decision that does not include a finding that the increase in imports resulted from unforeseen developments will risk challenge.

C. Most-Favored Nation Treatment

Another issue under Article XIX was whether it required safeguard measures to be applied on a most-favored nation basis, since paragraph 1(a) does not expressly prohibit the selective application of a safeguard measure based on the origin of the product concerned. On the other hand, an explicit MFN provision was included in the Charter of the ITO at the Havana meeting.[28] Although the Charter never had any legal effect, the contracting parties generally recognized that the MFN principle applies to safeguard measures. This principle was confirmed in subsequent panel cases.[29]

D. Preferential Arrangements

Paragraph 1(b) of Article XIX provides that:

> If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers

[25] GATT/CP/106, report adopted on 22 Oct. 1951, GATT/CP.6/SR.19, at 10, ¶ 9.
[26] *Korea—Dairy Products*, *supra* note 17, Appellate Body Report, ¶ 85.
[27] *Id*. ¶ 84.
[28] WTO, ANALYTICAL INDEX, *supra* note 22, at 519.
[29] *See, e.g.,* Report of the GATT Panel (adopted), *Norway—Restrictions on Imports of Certain Textile Products*, BISD 27th Supp. 119 (1981). The panel decision emphasized that application of a safeguard measure must be non-discriminatory. It stated, "The Panel was of the view that the type of action chosen by Norway, i.e. quantitative restrictions limiting the importation of the nine textile categories in question, as the form of emergency action under Article XIX was subject to the provisions of Article XIII which provides for non-discriminatory administration of quantitative restrictions."

> of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

This provision, although not clearly drafted, was intended to protect benefits under preferential trade arrangements. According to the explanations offered at the London Preparatory Conference, this right of withdrawal or modification extends to cases where a country's trade is injured by reason of the loss in whole or in part of a preference which it previously enjoyed in another market.[30]

For instance, assume that the United States imports widgets from Canada. Under the NAFTA, they are duty-free. Also assume that the U.S. tariff on widgets imported from non-NAFTA countries is ten percent. The United States subsequently reduces the MFN tariff from ten to one percent in multilateral trade negotiations. As the result, Canadian widget manufacturers may sustain serious injury or threat of serious injury because of the reduced preference they now enjoy in the United States. Under Article XIX 1(b), Canada could request the United States to apply a safeguard measure to non-NAFTA imports of widgets. This provision appears never to have been applied, and it is difficult to see why the importing country would wish to impose safeguard measures on behalf of a third country, risking potential challenges. As the SA now applies, it could be argued that paragraph 1(b) is no longer applicable because of the absence of procedural requirements for its application (e.g. who should investigate the condition of the affected domestic industry?).[31]

E. Procedural Requirements

Paragraph 2 of Article XIX sets forth rather minimal procedural requirements for the application of safeguards. It provides that:

> Before any contracting party shall take action pursuant to the provisions of paragraph 1 of Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

The requirement of prior notification is to ensure that the countries affected by the safeguard measure have the opportunity to learn about the proposed action and prepare for its application. Consultations facilitate the exchange of opinions and negotiations between the affected countries and the country proposing to apply the measure. Paragraph 2 also provides for provisional safeguard measures, which can be taken without prior consultations if the circumstances call for immediate action. These concepts of notification,

[30] EPCT/C.II/PV/12.

[31] *See* author's previous work, *Destabilization of the Discipline on Safeguards—Inherent Problems with the Continuing Application of Article XIX after the Settlement of the Agreement on Safeguards*, 25 JOURNAL OF WORLD TRADE 1242–1245 (Dec. 2001).

consultation and provisional safeguard measures are also adopted in the SA, where they have been developed in more detail.[32]

F. Compensation and Retaliation

Paragraph 3(a) of Article XIX provides that

> If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTY do not disapprove.

Paragraph 3(b) further provides that:

> Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes and threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

The application of a safeguard measure is likely to upset the balance of concessions that has been maintained between the exporting and importing countries. Since safeguard measures are applied irrespective of any unfair practice on the part of exporters, it seems appropriate to restore the balance of concessions through adequate compensation for the loss of trade. If the parties fail to agree on compensation, paragraph 3(a) allows affected countries to retaliate by suspending concessions or other obligations to compensate for their loss of trade.

The paragraph stipulates that the suspension should be substantially equivalent to the extent of the safeguard measure.[33] However, the selection of products that will be subject to the suspension of concessions is not in any way restricted. Paragraph 3(b) also permits countries affected by provisional safeguard measures to suspend their concessions immediately if the measure causes or threatens to cause serious injury to their domestic producers and if delay would cause irreparable damage. The Agreement on Safeguards has made significant modifications in the area of compensation/retaliation. This subject is discussed further in Part IV below.

III. Negotiations in the Uruguay Round

A 1987 Secretariat Note on "Work Already Undertaken in the GATT on Safeguards" revealed a number of problems with Article XIX: i) lack of transparency in the application of safeguard measures; ii) inadequate notification and consultation process; iii) uncertain time duration for safeguard measures; iv) unclear definition of serious injury; and

[32] The procedural requirements of the Agreement on Safeguards are discussed in Part IV *infra*.

[33] "Substantial equivalence" involves difficult practical problems in implementation. The subject is further discussed in Part IV:G below.

v) violation of the MFN principle in the application of safeguard-type measures (gray-area measures).[34]

Attempts were made to provide more precise and clear disciplines on safeguards. Safeguards became a major issue in the Tokyo Round, which started in 1973, and serious efforts were made to produce a uniform code on safeguards. However, unlike in the areas of dumping and subsidies, the negotiations proved to be unsuccessful because participants could not agree on a number of important issues.[35] Efforts to develop an improved safeguard mechanism continued after the Tokyo Round. The *GATT Work Programme*, agreed upon in 1979, recognized the ongoing negotiations on safeguards as being an essential element in the future work of the GATT.[36] The subsequent Ministerial Declaration adopted in November 1982 also recommended the adoption of a comprehensive safeguard mechanism. It declared that the contracting parties should undertake, individually and jointly, to bring into effect expeditiously a comprehensive understanding on safeguards to be based on the principles of the General Agreement.[37]

The need for a new agreement was also emphasized by the proliferation of "gray-area measures" in the 1980s. The term refers to voluntary restrictions on imports agreed upon between exporting and importing countries. Those measures include orderly marketing arrangements ("OMAs"), voluntary restraint agreements ("VRAs"), voluntary export restraints ("VERs")[38], and other similar bilateral agreements restraining exports. Countries negotiated gray-area measures outside the GATT disciplines, although those measures were deemed inconsistent with GATT Articles XI and XXIII.

Gray-area measures proliferated in the 1980s as a popular means of restricting imports because, unlike safeguards, those measures required neither proof of serious injury to the domestic industry nor provision of compensation.[39] Also, they were much less susceptible to legal contest in the GATT, since neither the party accepting the restrictions nor a third party was likely to challenge them.[40] In early 1991, 284 gray-area measures were known to be in force whereas only twenty-four safeguard measures under Article XIX were in effect.[41]

[34] GATT Document MTN.GNG/NG9/W/1 (April 8, 1987).

[35] GATT, *The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT*, April 1979, at 90–95 and the *Supplementary Report of January 1980*, at 14–17. The key areas of disagreement included: selectivity (i.e., application on a non-MFN basis), surveillance, dispute settlement, the definition of "serious injury" and the need for structural adjustment.

[36] GATT Document L/4884/Add.1/Annex VI, adopted on November 28, 1979, 26S/219, 220, ¶ 2.

[37] GATT Document L/5424, Ministerial Declaration adopted on November 29, 1982, 29S/9, 12, ¶ 7(vi)

[38] The terms, "OMA", "VRA" and "VER" tend to be used imprecisely. Under U.S. foreign trade law, an "orderly marketing arrangement" is a formal bilateral trade agreement by the U.S. government restraining trade, concluded under the provisions of sections 201–203 of the Trade Act of 1974. Under a VRA the exporting country applies the restraints, whereas under an OMA the importing country does so.

[39] An example of a gray-area measure was Japan's VRA on its exports of automobiles to the United States in the early 1980s. After the U.S. industry lost a safeguards case (*Certain Motor Vehicles and Certain Chassis and Bodies Therefor,* USITC Inv. No. TA-201-44, 45 Fed. Reg. 85194 (1980)), there was significant pressure in Congress for quota legislation against imports from Japan. Japan gave in to this pressure by voluntarily restricting its exports. *See* Kevin C. Kennedy, *Voluntary Restraint Agreements: A Threat to Representative Democracy*, 11 HASTINGS INT'L & COMP. L. REV. 34–35 (1987).

[40] However, the restraints could be challenged by a third country to which exports had been diverted as a result of the gray-area measures. In the late 1980s, the European Community brought a case challenging the U.S.-Japan semiconductor agreement before the GATT panel. See *Japan—Trade in Semi-Conductors*, BISD 35S/116, (Report of the Panel adopted on May 4 1988). The GATT Panel found that the Japanese export monitoring system, as agreed with the United States was inconsistent with GATT Article XI.

[41] The GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992), 1728–1729 (Terence P. Stewart ed. 1993).

The proliferation of gray-area measures was inconsistent with the principal objective of the GATT, which was to prevent governments from arbitrarily interfering with exports and imports. The fairness of gray-area measures was also questionable because they could be imposed by an importing country against an exporting country whose economy might depend largely on the market of the one demanding the agreement, and which may have therefore had little option but to agree to the measure. The duration of gray-area measures was often uncertain, allowing their trade-distorting effect to continue without proper check. Those measures therefore also needed to be addressed in the negotiations and brought under the new safeguard disciplines.

Multilateral negotiations on safeguards resumed in the Uruguay Round (1986–1994). The Ministerial Declaration launching the Round set the directions for the negotiations. It stated that an agreement on safeguards i) should be based on the basic principles of the GATT; ii) should contain, *inter alia*, the following elements: transparency, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, degressivity (i.e. the measure should be progressively relaxed during its lifetime) and structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement; and iii) should clarify and reinforce the disciplines of the General Agreement and should apply to all contracting parties.[42]

The major negotiating issues were as follows:

A. Selectivity

The developing countries, including India and the Pacific Rim countries (in particular, Australia, Hong Kong, Korea, New Zealand, Japan and Singapore), were concerned that their exports would be the target of selective application of protective measures, and therefore strongly supported the adoption of the MFN principle in the application of safeguard measures.[43] The EC on the other hand, wished to preserve a degree of flexibility in the selective application of safeguard measures.[44] The United States also supported the principle of selectivity.[45] Proponents of the selective application of safeguard measures argued that it would be reasonable to restrain those imports that hurt domestic industries the most and to leave the others unaffected by the safeguard measure.

Resolution of this issue took several years. In the final compromise, the MFN principle was adopted for the application of a safeguard measure, thereby prohibiting the application of safeguards on a selective basis. However, the need for selectivity was also recognized to a limited extent; while quotas are to be allocated to supplying Members based on their share of imports during a "previous representative period", account may be taken of "any special factors which may have affected or may be affecting the trade in the product."[46]

[42] *Ministerial Declaration on the Uruguay Round,* GATT Doc. No. GATT/MIN.DEC 86–1572, Section 1.D, 33S/19, 24–25.

[43] Stewart, *supra* note 41, at 1761–1762.

[44] *Id.,* at 1764.

[45] *Id.,* at 1768–1769.

[46] SA, Article 5.2(a). This phrase is designed to ensure that countries which contributed to the problem significantly by increasing their exports rapidly in recent years are not rewarded by receiving a large quota share. *See* Stewart, *supra* note 41, at 1795–1796.

B. Gray-Area Measures

The United States submitted a position paper on safeguards to the negotiating group in 1987 titled, "*US Thoughts on Safeguards*."[47] In the paper, the United States provided five options, ranging from the total elimination of gray-area measures to the legitimization of the measures, subject to more clear and precise discipline. Developing countries generally favored elimination of the measures,[48] and by November 1989, most countries supported having gray-area measures phased out or brought into conformity with the agreement.[49]

C. Compensation and Retaliation

Under Article XIX, compensation and retaliation were designed to protect the interests of countries adversely affected by safeguard measures. The drafters of the GATT believed that the provision for compensation and retaliation would be a strong check against the abuse of safeguard measures. During the Uruguay Round negotiations most countries supported preservation of the right to compensation and retaliation in some form. On the other hand, Countries had resorted to gray-area measures rather than safeguards to avoid the requirement of compensation as well as the possibility of retaliation under Article XIX.

In order to encourage Members to comply with the rules on safeguards rather than apply gray area measures, it was agreed that the right to retaliation would be suspended for the first three years of the application of a safeguard, provided that the measure conforms to the agreement, and that the measure is based on an absolute, rather than relative, increase in imports.[50] This compromise meant that countries would have an incentive to channel their import restrictions into safeguards and to apply measures for a shorter period of time because then they would not be forced to compensate or be subject to retaliation.[51]

D. Structural Adjustment

If safeguard measures are to achieve the goal of remedying or preventing serious injury to a domestic industry, they should facilitate structural adjustment of that domestic industry. Some countries therefore felt that the implementation of a structural adjustment plan by the industry seeking relief should be required as a condition of relief. Others, including the United States and Japan, opposed the inclusion of a structural adjustment requirement in the Agreement.[52]

A compromise was reached under which the text would note that the purpose of safeguard measures was to facilitate adjustment but there would be no specific requirement of structural adjustment for an application of a safeguard measure. On the other hand,

[47] *United States Thoughts on Safeguards,* MTN.GNG./NG9/W/12 (Dec. 9, 1987).
[48] Stewart, *supra* note 41, at 1771.
[49] GATT document MTN.GMG/NG9/13 (Dec. 12, 1989).
[50] Stewart, *supra* note 41, at 1798.
[51] In this connection it is interesting to note that the safeguards imposed by the United States in 2002 against steel imports have a duration of three-year plus one day. Proclamation 7529 of March 5, 2002—*To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Product;* Memorandum of March 5, 2002—*Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products by the President of the United States*, 67 Fed. Reg. 10551, 10593 (Mar. 7, 2002).
[52] Stewart, *supra* note 41, at 1774–1775.

evidence that the structural adjustment was taking place would be required for extension of the measure beyond the initial term of up to four years.[53]

E. Special Rules for Developing Countries

The Uruguay Round participants were generally prepared to accommodate the development needs of the developing countries. Proposals were made in support of granting favorable treatment to developing countries, including a longer period for the application of safeguard measures and a lower injury standard.[54] The developed countries were willing to offer some degree of special treatment, although they were reluctant to relax the general conditions for the application of safeguards (e.g. lowering the injury criteria) for the benefit of developing countries.

The negotiators agreed that safeguard measures for products originating from a developing country should not be applied where both the market share taken by the product from that developing country and the aggregate market share of such product from all developing countries were below specified levels. It was also agreed that developing countries could apply a safeguard measure for a longer period of time, and could also apply a measure to a product that had previously been subject to a safeguard measure after a shorter waiting period than that applicable to developed countries. However, a proposal to exempt the least developed countries from the application of safeguard measures was not adopted.

F. Procedural Issues

The United States emphasized the need for more precise and transparent procedures for the application of safeguards, including prior notification and monitoring of import relief actions. It also stressed that safeguard measures should be transparent, temporary, degressive, and subject to review and termination when no longer necessary.[55]

As discussed above, the lack of precise procedural requirements under Article XIX created ambiguities in the application of safeguard measures and created significant room for abuse. Therefore, other countries generally agreed on the need for transparency and for more precise procedural requirements to achieve such transparency. The result was the adoption of elaborate procedural requirements on the conduct of investigations, including the need for midterm reviews, detailed notification requirements, a consultation process and a monitoring system to ensure that safeguard measures were being properly applied. These procedural requirements are discussed in detail in the next Part.

IV. WTO Agreement on Safeguards

The Agreement on Safeguards, an important achievement of the Uruguay Round,[56] is intended to provide clear and precise substantive and procedural requirements for the

[53] GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,* MTN.TNC/W/FA (Dec. 20, 1991).

[54] Stewart, *supra* note 41, at 1775.

[55] Stewart, *supra* note 41, at 1764–1765.

[56] The Agreement has been described as "a substantial achievement, and indeed a heroic statement of principle." JOHN H. JACKSON, THE WORLD TRADING SYSTEM 210 (1997). *See*, Y.S. Lee and Jai. S. Mah, *Reflections on the Agreement on Safeguards in the WTO*, 21 WORLD COMPETITION 25–31 (1998), for a discussion of the general characteristics of this Agreement

application of safeguards. Although the SA was built on the underlying concept of safeguards in Article XIX, it substantially refines and expands upon the provisions of Article XIX. The refinements include the specification of injury factors to be considered in determining serious injury and the temporary suspension of the right to retaliation under certain conditions. The new text also specifies the maximum period of a safeguard measure, sets forth detailed requirements for the process of investigation, and provides for a midterm review. Gray-area measures are now prohibited under the new Agreement.

Although the Agreement on Safeguards is regarded as one of the major achievements of the Uruguay Round, certain provisions of the Agreement remain ambiguous. The remainder of this Part reviews each provision of the Agreement with an analysis of relevant panel cases. The next Part provides a discussion of outstanding issues in the application of safeguards.

Article 1—General Provision

Article 1 of the Agreement states that the Agreement establishes rules for the application of safeguard measures "which shall be understood to mean those measures provided for in Article XIX of GATT 1994".

Article 2 –Conditions

Article 2 of the Safeguards Agreement provides that:

> a Member may apply a safeguard measure to a product only if that Member has determined that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

The SA has adopted three major conditions contained in paragraph 1(a) of Article XIX: (i) an increase in imports, (ii) causing or threatening to cause (iii) serious injury or threat thereof to the domestic industry that produces a like or directly competitive product. Article 2.1 makes no reference to "unforeseen developments."

1. Increase in Imports

Article 2.1 expressly stipulates that a relative increase in imports compared with domestic production, as well as an absolute increase, is sufficient to meet the increased imports standard. Increased imports are also one of the injury factors enumerated in Article 4.2(a) of the Agreement as discussed below. Under a recent Appellate Body ruling, the increase in imports must have been "recent enough, sudden enough, sharp enough and significant enough" to qualify under the requirements of Article 2.1 and 4.2(a).[57] The Appellate Body based its conclusion on its reading of the relevant phrase in Article 2.1, *"such product is <u>being</u> imported"* (emphasis added), which it interpreted as meaning current and continuing imports in increased quantities. This interpretation was based on the emergency nature of safeguard measures.[58]

This decision has important implications for national authorities seeking to apply a safeguard measure. They will not be able to rely merely on an increase in imports unless the increase is sufficient, radical and recent. It means that a mere comparison of the

[57] *Argentina—Footwear*, *supra* note 17, Appellate Body Report, ¶ 131.
[58] *Id.*, ¶¶ 131 and 132.

beginning and end points of the period of investigation would not be sufficient, because an "increasing trend" identified by simply comparing those points would not necessarily mean the requisite increase in imports, required by the Appellate Body cited above. As explained below, the national authorities would not be able to rely on a sporadic increase in imports without regard to overall import trends in the investigation period. Temporary fluctuations in imports do not necessarily determine the existence of the increase in imports required under Articles 2.1 and 4.2 (a).[59]

The national authorities' obligation to conduct a reasoned analysis of import trends has been emphasized in two cases, *Chile—Agricultural Products* and *Argentina—Preserved Peaches.* The Panel in *Agricultural Products* did not approve of the national authority's finding of an increase in imports where the amount of imports had fallen significantly in the period immediately preceding the investigation.[60] The Panel found that even if a significant import increase is observed between certain time periods, the national authorities are still required to provide a reasoned analysis regarding the significance of the import volumes where they were lower than import volumes in a preceding time period.[61]

The importance of the qualitative evaluation of import trends was again emphasized in *Argentina—Preserved Peaches*. Following the Appellate Body rulings in *Argentina—Footwear*, the Panel found that identification of a mathematical increase in imports is insufficient. In other words, the national investigating authorities must establish an increase in imports through *qualitative* evaluation of overall import trends.[62] The Panel did not believe that consideration of an increase in imports without regard to the entire import trends was sufficient where imports had increased toward the end of the investigation period but had decreased substantially up to an earlier point in the period.[63] According to the Panel, the import increase should have been considered in the context of the previous substantial decline of imports.[64]

The requirement that there be an increase in imports was also an important issue in the panel decision in *United States—Steel Products.* Following the previous Appellate Body decision in *Argentina—Footwear*, the Panel considered that the import increase must indicate "a certain degree of recentness, suddenness, sharpness and significance".[65] Nonetheless, the Panel, also considered that the increase in imports need not continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of investigation, although the increase still had to be "recent".[66] The Panel considered that the question as to whether a decrease in imports at the end of the period of investigation would prevent a finding of increased imports

[59] The *Wheat Gluten* panel held that a decrease in imports early in the period of investigation, followed by a sharp and recent increase in imports, would not be necessarily inconsistent with the threshold requirement of an increase in imports. *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶ 8.33. In *United States—Line Pipe,* the Panel did not believe that the increase in imports had to continue up to the very end of the period of the investigation. *United States—Line Pipe*, *supra* note 17, Panel Report, ¶ 7.210. This decision has been criticized as the decrease in imports might have been the beginning of a downturn in which case application of a safeguard might not be necessary. *See* Lee, *supra* note 1, at 124–125. The Appellate Body did not rule on this issue as it was not appealed.

[60] *Chile—Agricultural Products*, *supra* note 17, Panel Report, ¶ 7.155.

[61] Lee, *supra* note 1, at 124–125.

[62] *Argentina—Preserved Peaches, supra* note 17, Panel Report, ¶ 7.54.

[63] *Id.* ¶¶ 7.53–7.69.

[64] *Id.* ¶ 7.61.

[65] *United States—Steel Products, supra* note 17, Panel Report, ¶ 10.167. The Appellate Body affirmed the Panel's position on this issue. *United States—Steel Products, supra* note 17, Appellate Body Report, ¶ 361.

[66] *United States—Steel Products, supra* note 17, Panel Report, ¶ 10.162.

would depend on the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature of the increase that took place beforehand reflected by, for instance, its sharpness and the extent.[67] The Panel also found that the national investigating authority is not obligated to consider data made available *after* its determination of increased imports.[68]

2. Like or Directly Competitive Products

Under Article 2.1 of the Agreement, a safeguard measure may only be applied where an increase in imports causes or threatens to cause serious injury to the domestic industry that produces "like or directly competitive products". The identification of the "like or directly competitive products" is therefore a critical part of the injury assessment. The Agreement itself does not provide a standard for defining "like or directly competitive" products.

The important elements in defining the "like" products are their physical and functional similarities to the imports in question. In *United States—Lamb Meat,* the Panel found that "like" products means "like" end products,[69] and held that the feeders and growers of live lambs were not part of the relevant domestic industry since imported lamb meat and live lambs were not like products. The degree of integration in the production process involving the two products in question was found to be irrelevant.

The concept of a "directly competitive product", based on commercial substitutability, expands the range of products that can be included in the domestic industry.[70] The question whether live lambs could be "directly competitive" with lamb meat was not considered, as the U.S. International Trade Commission ("USITC") had not discussed this issue in its decision recommending safeguard action.

The inclusion of "directly competitive products" allows certain physically and functionally dissimilar products to be included in the category of domestic products, provided that there is sufficient market competition between them. Thus, in the previous application of a safeguard measure against imports of certain skimmed milk powder products ("SMPP"), the national authority included raw milk as a directly competitive domestic product despite physical dissimilarities between raw milk and SMPP. The significant overlap between the end use of raw milk and that of SMPP was the reason for its inclusion, and the decision to include raw milk was not challenged in the subsequent panel proceedings.[71]

It has been suggested that a comparison and contrast of the sizes, designs, inputs, add-on components, direct and derivative uses, wholesale and retail costs, manufacturing methodologies, and a range of other features of the two products, would be permitted in the determination of like or directly competitive products.[72] Since it is the purpose of the application of a safeguard measure to protect a domestic industry, the key is to identify the domestic products that are being displaced by the imports in question. Therefore, the most important factor is the existence of market competition between domestic products and imports. Relevant economic indicators, such as cross-elasticity of demand[73],

[67] *Id.,* ¶ 10.163.
[68] *Id.,* ¶ 10.173.
[69] *United States—Lamb Meat*, *supra* note 17, Panel Report, ¶ 7.109.
[70] *Id.,* ¶ 7.177.
[71] *Korea—Dairy Products*, *supra* note 17, Panel Report.
[72] BHALA AND KENNEDY, *supra* note 24, at 911.
[73] The cross-elasticity of demand is the degree of the change of quantity in one good occurring as a result of a unit change of the price in the other good. If it is positive, substitutability between those two products exists.

would be useful in assessing market competition between domestic products and imports.[74]

3. MFN Application of Safeguards

Article 2.2 requires Members to apply safeguard measures on a non-discriminatory basis. In *United States—Wheat Gluten,* the exclusion of Canadian exports from the application of a U.S. safeguard measure by reason of the North American Free Trade Agreement ("NAFTA") was found inconsistent with this requirement.[75]

4. Unforeseen Developments

As noted above, the Article XIX requirement that the increase in imports result from "unforeseen developments" is not repeated in the Safeguards Agreement, and it would be reasonable to assume that the negotiators of the Agreement had decided to drop this condition.[76] However, a number of decisions of the Appellate Body[77] have held that Article XIX and the Agreement must be read together, and that a Member is therefore still obliged to demonstrate that the increase in imports causing the injury has taken place "as a result of unforeseen developments".

A recent Panel also held that "it must be clear from the published report that the investigating authorities examined the existence of unforeseen developments and came to a reasoned conclusion in this regard."[78] The Panel in *Argentina—Preserved Peaches* considered that Article XIX:1(a) requires, as a minimum, some discussion by the competent authorities as to why they were unforeseen at the time the relevant obligation was negotiated, and why conditions in the second clause of Article XIX:1(a) occurred "as a result" of circumstances in the first clause.[79] The Panel in *United States—Steel Products* also emphasized the importance of the logical connection between the unforeseen

[74] An interesting question is raised where imports not only compete with certain domestic end products but also adversely affect those domestic producers who supply parts to those end products. Should they be also included in the domestic industry? The degree of integration in the production process involving two products was found to be irrelevant in the determination of "like" products in *United States—Lamb Meat*. But, how should it be determined in the consideration of "directly competitive products"? For instance, numerous parts producers are involved in the production of an automobile. They would undoubtedly be adversely affected by a decline in domestic automobile sales caused by increased imports. Should they therefore be included in the ambit of domestic producers? The answer would appear to be "no" because the parts would not be "directly" competitive with the finished automobiles.

[75] *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶ 8.182. Canadian exports had been excluded from the measure based on a provision in the NAFTA implementing legislation that only permits safeguard measures to be applied to imports from a NAFTA member when there is a finding that those imports account for a substantial share of total imports and contribute importantly to serious injury or threat thereof. The Panel held that the exclusion of Canadian exports from the application of the safeguard measure when the injury determination had been based on imports from all sources, including Canada, was inconsistent with Article 2.1. The Panel did not decide whether or not, as a general principle, a member of a customs union can exclude imports from other members of that particular customs union from the application of a safeguard measure. The national authority's obligation to match the scope of investigation and that of safeguard application is also called the requirement of *parallelism* and also became an issue in *United States—Line Pipe, supra* note 17, and *United States—Steel Products, id*. For more discussion of this issue, *see* Y.S. Lee, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 1, chapter 9.1.

[76] *See* the relevant discussion in Part IV:A infra.

[77] *Korea—Dairy Products*, *supra* note 17, Appellate Body Report, ¶ 90, *Argentina—Footwear*, *supra* note 17, Appellate Body Report, ¶ 97.

[78] *United States—Line Pipe*, *supra* note 17, Panel Report, ¶¶ 7.296–7.297.

[79] *Argentina—Preserved Peaches*, *supra* note 17, Panel Report, ¶¶ 7.23 –7.28.

developments and the increase in imports.[80] It also considered that the national authorities must support their conclusion with specific data that the unforeseen developments led to the increase in imports causing or threatening to cause serious injury to the domestic industry.[81] In addition, it found that the national authorities are obligated to demonstrate the "unforeseen developments" with respect to each product subject to the safeguard.[82] The Appellate Body affirmed these Panel findings.[83] This issue is discussed further in Part IV:*A* of this chapter.

5. Other Provisions in Article 2

A recent Panel found that the phrase "under such conditions" in Article 2.1 does not require Members to perform a price analysis of the imported products to examine the conditions under which they were imported.[84]

Article 3—Investigations

Article 3 regulates the conduct of investigations, and is designed to ensure that the process is transparent and that the parties receive due process.[85] Article 3.1 requires competent national authorities to issue public notice of the investigation, to hold a public hearing, and to publish a report setting out its "findings and reasoned conclusions reached on all pertinent issues of fact and law". Article 3.1 also stipulates that all interested parties should be given the opportunity to present their views and to respond to the presentations of other parties

1. Inclusion of Reasoning in Reports

Recent Panel decisions have held that that the competent authorities must provide sufficient reasoning for their conclusions, and that those conclusions must be based on sufficient data.[86] Furthermore, all the reasoning and data must be included in the final investigation report upon which the authority bases its decision.[87] In *Korea—Dairy Products* the Panel held that Korea's investigation was inadequate because, *inter alia,* it failed to include all the necessary reasoning for its finding of serious injury in its final investigation report.[88] Korea had argued that its published mid-investigation report included an analysis of an injury factor that was not subsequently repeated in its final report and that provided additional explanations for its conclusion in the course of the panel proceedings. The Panel held that the analysis and explanations were inadequate because they were not included in the final report.[89]

[80] *United States—Steel Products*, *supra* note 17, Panel Report, ¶ 10.104.
[81] *Id.* ¶¶ 10.121–10.123.
[82] *Id.,* ¶¶ 10.124–10.126.
[83] *United States—Steel Products, supra* note 17, ¶¶ 316, 326, 329.
[84] *Korea—Dairy Products*,*supra* note 17, Panel Report, ¶¶ 7.51–7.52, *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶ 8.108.
[85] As noted above, GATT Article XIX contains no provisions requiring that investigations take place or regulating their conduct.
[86] The Panel in *United States—Wheat Gluten* indicated that it would not examine whether the national authorities should have considered more data where such data were not before the authorities for investigation. *United States—Wheat Gluten, supra* note 17, Panel Report, ¶¶ 8.4–8.6.
[87] *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 7.58.
[88] *Id.*, ¶¶ 7.58–7.59.
[89] *Id.*, ¶ 7.69.

The Panel in *United States—Steel Products* considered the acceptability of a supplemental report issued by the national authorities after the original report which addressed the issue of "unforeseen developments". The complainants argued that the supplemental report should be disregarded as it was not part of the original USITC report and was an *ex post* attempt to demonstrate the existence of "unforeseen developments."[90] The Panel considered that the national authority's report may be produced in parts as long as they form a coherent and integrated explanation satisfying the requirements of Article XIX and the Agreement on Safeguards. It took the supplemental report into consideration.[91]

2. Selective Analysis of Domestic Industry

The *Korean Dairy Products* Panel held that Members may analyze distinct segments of the domestic industry rather than the entire industry. However, unless all segments are considered, an explanation must be provided of how the selected segments are representative of the entire industry.[92] Similarly, if all producers are not examined, the authority must explain how the selected producers provide an objective picture of the domestic industry.[93]

3. Confidential Information

Article 3.2 protects information submitted to the national authorities on a confidential basis. An assessment of injury to the domestic industry requires detailed information from the relevant industry, much of which may be sensitive and liable to cause harm to members of the industry if it is disclosed to their competitors.[94] Unless the confidentiality of such information can be guaranteed, relevant parties will be reluctant to make it available to the authorities.

In *United States—Wheat Gluten,* certain information that was used in the USITC's safeguard investigation had been redacted from the public version of the USITC Report. The EC complained that the USITC's findings were thereby rendered unreviewable and unverifiable.[95] The Panel upheld the USITC's decision not to disclose confidential information, finding that the provisions of Article 3.2 gave national authorities broad discretion to protect information that is deemed confidential.[96]

A related problem in *United States—Wheat Gluten* involved the Panel's request of confidential information and the subsequent failure of the United States to provide such information. The Panel noted that the request for the information and the subsequent failure by the United States to submit the information had presented a serious systematic problem "as to the relationship between, on the one hand, the confidentiality obligations under Article 3.2 of a Member's investigating authorities with respect to confidential information obtained in the course of a domestic safeguards investigation and, on the other hand, the duties of Members when faced with a panel request for such confidential information under Article 13 DSU."[97]

[90] *United States—Steel Products, supra* note 17, Panel Report, ¶ 10.47.
[91] *Id.,* ¶ 10.50.
[92] *Id.,* ¶ 7.58.
[93] *Id.*,¶ 7.73.
[94] Some confidential information, e.g., as to inventories and expansion plans, may be also requested from foreign producers.
[95] *United States—Wheat Gluten, supra* note 17, Panel Report, ¶ 8.13
[96] *Id.*, ¶ 8.20.
[97] *Id.*, ¶ 8.11.

Article 4—Serious Injury

1. Determination of Serious Injury

Article 4 is one of the key provisions in the SA in that it specifies the conditions for the determination of serious injury, one of the core elements for the application of a safeguard measure. Serious injury, which was not defined in Article XIX, is now defined as "a significant overall impairment in the position of a domestic industry" (Article 4.1).[98] Article 4.1 also defines "threat of serious injury" as being "serious injury that is clearly imminent."[99] Recognizing that a determination of a threat of injury can be somewhat speculative, the Article requires that "[a] determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility."[100] Finally, Article 4.1 defines "domestic industry" as:

> "the producers as a whole, of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitute a major proportion of the total domestic production of those products."

2. Factors to be Considered.

One of the notable features of the Agreement is that it clearly spells out the factors that must be considered in connection with the determination of serious injury or threat. Article 4.2(a) provides that

> "In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to domestic industry, the authorities are now required to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, *the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses*, and *employment*." (Emphasis added.)

By specifying the injury factors that must be considered, the Article attempts to establish objective criteria for the assessment of injury. Recent WTO panels have provided guidance with respect to the interpretation of this important provision. First, the examination of *all* eight factors is mandatory.[101] In *Korea—Dairy Products,* the Panel did

[98] The Appellate Body has held that the threshold for "serious injury" is much higher than that for "material injury", the standard used for antidumping and countervailing duty case (see the Agreement on Application of Article VI (antidumping) and the Agreement on Subsidies and Countervailing Measures). *United States—Lamb Meat*, *supra* note 17, Appellate Body Report, ¶ 124

[99] According to the Appellate Body, the phrase "clearly imminent" indicates that the domestic industry is on the brink of suffering serious injury. *United States—Lamb Meat*, *supra* note 17, Appellate Body Report, ¶ 125.

[100] Article 4.1(b) of the Agreement. A panel decision set forth the guidelines for the determination of a threat of serious injury as follows:

> (i) that a threat determination needs to be based on an analysis which takes objective and verifiable data from the recent past (i.e. the latter part of an investigation period) as a starting-point so as to avoid basing a determination on allegation, conjecture or remote possibility; (ii) that factual determination from the recent past complemented by fact-based projections concerning developments in the industry's condition, and concerning imports, in the imminent future needs to be taken into account in order to ensure an analysis of whether a significant overall impairment of the relevant industry's position is imminent in the near future; (iii) that the analysis needs to determine whether injury of a serious degree will actually occur in the near future unless safeguard action is taken.

See United States—Lamb Meat, *supra* note 17, Panel Report, ¶ 7.129.

[101] *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 7.55.

not believe that all eight factors would be important in assessing injury to the domestic industry in every case, but nevertheless required a Member proposing to apply a safeguard measure to consider each and every factor listed under Article 4.2(a) before dismissing some of them as not having a bearing on the situation of that industry.[102] This position was also affirmed in the Panel and Appellate Body decisions in *Argentina—Footwear*.[103]

Every factor need not point to serious injury or its threat, but an overall analysis of all the relevant factors should indicate an actual or threatened significant overall impairment of the domestic industry.[104] According to a recent Panel decision, "it is essential that *current* serious injury be found to exist, up to and including the very end of the period of investigation."[105] Members may assign different weights to each factor depending on the circumstances[106], but they must provide a reasonable explanation of how their analysis has led to their conclusion.[107]

A recent Appellate Body decision held that the national authorities should not limit their examination to the eight specified injury factors. Instead, they must analyze all the factors that they consider relevant, and they have a duty to actively seek out pertinent information rather than simply depend on the evidence presented by the parties.[108]

3. Threat of Injury.

A recent Appellate Body decision held that where a safeguard measure is applied on the basis of a threat of serious injury, the national authorities' examination should focus on the most recent data to determine the imminence of the injury.[109] The Appellate Body, however, also emphasized that the recent data should be considered in the context of a longer trend (for example, a decline in domestic industry performance towards the end of the investigation period may be part of a normal economic cycle).[110]

4. Causation

Article 4 also requires the establishment of a causal link between the increased imports and serious injury or threat thereof. Article 4.2(b) provides that:

> "The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, *on the basis of objective evidence*, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." (Emphasis added.)

[102] *Id.*

[103] *Argentina—Footwear*, *supra* note 17, Panel Report, ¶ 8.206 and Appellate Body Report, ¶ 136.

[104] *Argentina—Footwear*, *supra* note 17, Appellate Body Report, ¶¶ 138 and 139.

[105] *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶ 8.81.

[106] *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 7.59.

[107] *Id.,* ¶ 7.55.

[108] *United States—Wheat Gluten*, *supra* note 17, Appellate Body Report, ¶ 53.

[109] In *United States—Lamb Meat*, both the Panel and the Appellate Body noted that the Agreement on Safeguards does not provide any methodology to be followed for the determination of the threat of serious injury. *United States—Lamb Meat*, *supra* note 17, Panel Report, ¶ 7.127 and Appellate Body Report, ¶ 137.

[110] *United States—Lamb Meat*, *supra* note 17, Appellate Body Report, ¶ 138. In line with this position, the Panel in *Preserved Peaches* also warned that "if the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading." *Argentina—Preserved Peaches*, *supra* note 17, Panel Report, ¶ 7.106.

The Panel in *Argentina—Footwear* prescribed a three-pronged test in the determination of causation.[111] The first prong of the test is whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why the data nevertheless show causation. The second is whether the conditions of competition in the domestic market between imported and domestic products demonstrate, on the basis of objective evidence, a causal link between the imports and any injury. The third prong is whether other relevant factors have been analyzed and whether it is established that any injury caused by factors other than the imports has not been attributed to the imports.[112]

Establishing a causal link is often a complicated task and requires both economic and legal analyses.[113] Under the frame of the three-prong test above, the first prong can be tested by a comparison of relevant import data and data relating to domestic production. In *United States—Wheat Gluten,* the Panel held that a general coincidence of an upward trend in imports and a negative trend in injury factors over the period of investigation would be sufficient to meet the first test, and that precise coincidence in every injury factor was not required.[114]

The mere coincidence of an upward trend in imports and a negative trend in injury factors would not alone be sufficient evidence for a causal link because such coincidence might be only the temporal overlapping of two unrelated events. Competition between the imports and domestic products must exist in the domestic market to establish that the injury is attributable to the increase in imports, as domestic products are being displaced by the imports. To determine the degree of competition existing between the imports and domestic products, the relevant economic measurements such as the cross-elasticity of demand can be employed.

The third prong requires the examination of other possible causes. The question has been raised whether a causal link is established where factors other than the increase in imports simultaneously contribute to the injury to the domestic industry.[115] The relevant provision of Article 4.2(b) states, "When factors other than increased imports are causing serious injury to the domestic industry at the same time, such injury *shall not be attributed to increased imports*" (emphasis added). The Panel in *United States—Wheat Gluten* found

[111] *Argentina—Footwear*, *supra* note 17, Panel Report, ¶ 8.229. The Appellate Body affirmed this test, and it was also followed by the Panel in *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶ 8.91, and in *United States—Steel Products, supra* note 17, Panel Report, ¶ 10.285.

[112] In applying this three-prong test, the Panel in *United States—Steel Products* concluded that that the causation requirement had not been met with respect to all product categories except one. The Panel found that the USITC had failed to establish the coincidence between the increasing trends in imports and decreasing trends in the injury factors, and that it had also failed to provide any other compelling argument as to why the causal link nevertheless existed. In the view of the Panel, the USITC's analysis of competition between imports and domestic products was inadequate, and it also failed to properly separate and assess the nature and extent of the injurious effects of factors other than increased imports by improperly dismissing a number of factors (i.e., declining domestic demand, domestic capacity increases, intra-industry competition and legacy costs) in its non-attribution analysis, even though although it had acknowledged that those factors were causing injury to the industry. *United States—Steel Products, supra* note 17, Panel Report, ¶¶ 10.278-10.586. For the measure-by-measure analysis, *see id.,* ¶¶ 10.361–10.586.

[113] Econometric tests such as the "Granger causality test" are often employed to determine the economic impact of imports on the domestic industry. *See* Lee and Mah, *supra* note 56, at 29.

[114] *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶¶ 8.97–8.102.

[115] *See* the author's previous work, *Critical Issues in the Application of the WTO Rules on Safeguards—In the Light of the Recent Panel Reports and the Appellate Body Decisions,* 34 JOURNAL OF WORLD TRADE 140–142 (2000).

that the increase in imports needs not be the sole cause for the injury.[116] The Appellate Body agreed with this finding but disagreed on another aspect of the Panel ruling—that the increase in imports alone ("in and of itself") should have been sufficient to cause serious injury where other factors are also contributing to the injury.[117] The Appellate Body ruled that it is enough to establish a causal link if the increase in imports made a sufficiently clear contribution to the injury although the import increase by itself could have not caused the injury.[118] It should also be noted that according to the Appellate Body ruling in *United States—Lamb Meat*, an examination of the relative weight of different factors would not be sufficient to meet the non-attribution requirement under Article 4.2(b). It found that the injurious effects of the other contributing factors need to be separated from those of increased imports and examined.[119]

Article 5—Application of Safeguard Measures

1. Extent of Measures

Article 5.1 provides that "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." The extent of a safeguard measure is an important issue, since excessive measures would reduce imports by more than the amount necessary to remedy or prevent serious injury to the domestic industry, thereby unnecessarily restricting trade.

The question has been raised whether the provisions in Article 5.1 require Members to prove that the extent of the proposed measure is necessary to prevent or remedy injury and to facilitate adjustment. Although Members should endeavor to avoid excessive measures, such proof may well require a series of extensive and complicated economic analyses that would be both difficult and costly. Many economists also doubt the strength of such proof even if an economic test is somehow devised and conducted.

In *Korea—Dairy Products,* the Panel found that the first sentence of Article 5.1, quoted above, requires a Member to justify the extent of its safeguard measure.[120] However, although the Appellate Body acknowledged that Article 5.1 creates a general obligation on Members to apply a non-excessive measure, it also concluded that Members are not obliged to justify their measure unless the measure is a quantitative restriction and is below the average level of imports over the last three years, as prescribed in Article 5.1.[121] This Appellate Body decision gave significant relief to national authorities—those

[116] *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶ 8.138. This position was also followed by the Panel in *United States—Lamb Meat*, *supra* note 17, Panel Report, ¶ 7.239.

[117] The Panel in *United States—Lamb Meat* similarly found that the increase in imports should be sufficient to cause serious injury. *United States—Lamb Meat*, *supra* note 17, Panel Report, ¶ 7.241. The Appellate Body, citing its own decision in *United States—Wheat Gluten*, again held that the increase in imports need not have been sufficient alone to have caused the injury. *United States—Lamb Meat*, *supra* note 17, Appellate Body Report, ¶ 171.

[118] *United States—Wheat Gluten*, *supra* note 17, Appellate Body Report, ¶ 67. According to the Appellate Body, the last sentence of Article 4.2(b) (non-attribution requirement) requires national authorities to examine the existence of "a genuine and substantial relationship of cause and effect" between the increase in imports and the injury and distinguish injurious effects caused by the other factors from that by the increase in imports. *United States—Wheat Gluten*, *supra* note 17, Appellate Body Report, ¶ 69.

[119] *United States—Lamb Meat*, *supra* note 17, Appellate Body Report, ¶¶ 184–185.

[120] *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 7.101.

[121] *Korea—Dairy Products*, *supra* note 17, Appellate Body Report, ¶ 99. The Appellate Body in a later case stated, "The Member imposing a safeguard measure must, in any event, meet several obligations under the Agreement on Safeguards. And, meeting those obligations should have the effect of clearly explaining and "justifying" the extent of the application of the measure." *United States—Line Pipe*, *supra* note 17, Appellate Body Report, ¶ 236.

of developing countries in particular—whose available expertise and resources would not allow them to conduct extensive economic analyses to prove the adequacy of their measure.

In *United States—Line Pipe,* the Appellate Body confirmed that Article 5.1 of the SA requires Members to apply safeguard measures only to the extent of such injury that is attributed to the increase in imports.[122] It is possible to address that portion of injury attributable to increased imports only after first separating and distinguishing the injurious effects of increased imports from those of the other factors under the requirement of Article 4.2(b). Therefore, the Appellate Body considered that by establishing a violation of Article 4.2(b), the complainant establishes a *prima facie* case that the safeguard measure is not limited to the permissible extent under Article 5.1.[123]

The Panel in *Chile—Agriculture Products* enunciated another test for compliance with the first sentence of Article 5.1. The Panel held that there must be a rational connection between the measure and the objective of preventing or remedying serious injury and facilitating adjustment. It found that there was no such connection in that case where the extent of the safeguard measure was determined by the lower threshold of the Price Band System of Chile, which was calculated on the basis of international prices and had no rational connection to the state of the domestic industry.[124]

2. Form of Measures

The Agreement does not prescribe any particular type of safeguard measure. The commonly used forms are quotas, tariff increases, or a combination of the two methods.

Article 5.1 places a minimum limit on the size of quotas, as follows:

> If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

The term "last three representative years for which statistics are available" is somewhat ambiguous.[125] Does it mean the last three years ending before the investigation or up to the time the decision to apply a safeguard measure is made? The importers may increase imports after the beginning of the investigation in anticipation of a possible safeguard. The term, "representative" is also imprecise. This ambiguity gives national authorities a fair amount of flexibility to choose a period that will yield the greatest increase in imports and therefore the smallest possible quota level.[126]

[122] *United States—Line Pipe*, *supra* note 17, Appellate Body Report, ¶ 260.

[123] Nonetheless, the Appellate Body did not hold that a violation of Article 4.2(b) implies an automatic violation of the first sentence of Article 5.1 of the SA. It stated, "For even if the USITC failed to separate and distinguish the injurious effects of the increased imports from the injurious effects of the other factors, it is still possible that the safeguard measure may have been applied in such a manner that it addressed only a portion of the identified injurious effects, namely, the portion that is equal to or less than the injurious effects of increased imports. *Id.* ¶ 261. The burden of the proof to rebut the presumption of violation seems to rest on the Member defending its measure.

[124] *Chile—Agricultural Products*, *supra* note 17, Panel Report, ¶¶ 7.183 and 7.184.

[125] In *Korea—Dairy Products*, a question was raised concerning the "three representative years" as a reference period for the determination of the quota amount. The Panel did not consider it necessary to address this issue because it had already found that Korea's measure was inconsistent with Article 5.1.

[126] Compare the greater precision of Article 6.8 of the Agreement on Textiles and Clothing, which provides that the level of a transitional safeguard measure "shall be fixed at a level not lower than the actual level of exports and imports from the Member concerned during the 12-month period terminating two months preceding the month in which the request for consultation was made."

3. Adjustment Plans

The question has also arisen whether Article 5.1 requires national authorities to consider adjustment plans proposed by the domestic industry in deciding whether to impose safeguard measures.[127] As discussed above, safeguards are designed to give temporary protection to domestic industries to enable them to adjust to import competition.[128] It would therefore be prudent to devise a proper adjustment plan to ensure that the safeguard measure would facilitate the adjustment. The Panel in *Korea—Dairy Products* considered this issue and concluded that Article 5.1 does not require the domestic industry to develop an adjustment plan as a condition of obtaining safeguard relief. It noted however that the examination of an adjustment plan would be "strong evidence that the authorities considered whether the measure was commensurate with the objectives of preventing or remedying serious injury and facilitating adjustment."[129]

4. Quota Allocation

Article 5.2 calls for most-favored nation treatment in the allocation of quotas to individual Members. It specifies that unless the Member applying the quotas can reach agreement on allocation with all other Members having a substantial interest in supplying the product in question[130], quotas are to be allocated based on the proportions supplied by those Members during a previous representative period. However, to avoid rewarding countries that may have caused or at least contributed to the problem by rapidly increasing their exports in recent years, Members may depart from this principle where there has been a disproportionate increase in imports from certain Members.[131]

Article 6—Provisional Safeguard Measures

A provisional safeguard measure may be applied following a preliminary determination of the existence of serious injury or threat thereof in critical circumstances where delay would cause damage that would be difficult to repair, for example in the case of perishable products. The concept of a provisional safeguard measure was adopted from Article XIX, but unlike its predecessor, Article 6 limits the form of a provisional safeguard measure to a tariff and also limits its application to a maximum period of two hundred days. Members have applied provisional measures, some of which were converted to definitive measures after the investigation required under Article 3.[132]

Article 7—Duration and Review of Safeguard Measures

Article 7.1 limits the initial period of a safeguard measure to four years. The measure can be extended once only if there is evidence that the industry is adjusting (Article 7.2).

[127] *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 4.611.

[128] The Preamble of the Agreement also provides in relevant part, "*Recognizing the importance of structural adjustment* and the need to enhance rather than limit competition in international markets . . . " (Emphasis added.)

[129] *Korea—Dairy Products, supra* note 17, Panel Report, ¶ 7.108.

[130] The term "substantial interest" is not defined in the Safeguards Agreement. A ten per cent market share has been generally viewed as constituting a "substantial interest". *Analytical Index: Guide to GATT Law and Practice*, *supra* note 22, at 941, citing TAR/M/16, p.10.

[131] *See* discussion in Part III *supra.* Some have considered that the provision for this MFN deviation in quota allocation seems to presage a strategy for dealing with potential import surges from China. JEFFREY J. SCHOTT, THE URUGUAY ROUND, AN ASSESSMENT (1994), at 114.

[132] Ten provisional measures were taken between Oct 29, 2002 and Oct 20, 2003, three of which were converted to definitive safeguard measures. *See* Annex 2 of the Report (2003) of the Committee on Safeguards to the Council for Trade in Goods, G/L/651 (Oct. 24, 2003).

Extension of the measure requires a determination, pursuant to the procedures set forth in Articles 2, 3, 4, and 5, that continuation of the measure is necessary to prevent or remedy serious injury. The total period of application of a safeguard measure may not exceed eight years (Article 7.3).[133]

If the duration of a safeguard measure is over one year, the measure must be liberalized at regular intervals (Article 7.4). If the duration of the measure exceeds three years, the Member applying the measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw the measure altogether or increase the pace of liberalization (Article 7.4).

A safeguard measure may not be applied to a product that was previously subject to a safeguard until it has been free of safeguards for at least as long as the previous safeguard measure was in effect, subject to a minimum of two years (Article 7.5).[134] However, a shorter period applies if the safeguard measure has been applied for 180 days or less (Article 7.6).

Article 8—Compensation or Retaliation

A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure must endeavor to maintain a substantially equivalent level of concessions (Article 8.1) by offering compensation to the exporting Members that will be affected by the measure.

The assessment of adequate compensation can be a difficult task. First, the estimated amount of the trade loss, which should be the basis for the compensation, can differ widely depending on the calculation methodology. For instance, as the result of an application of a safeguard measure, affected foreign exporters may find themselves virtually excluded from their major foreign market. They may also find it impossible to re-enter the foreign market subsequently after the expiration of the measure as a result of factors such as loss of sales network or change of business environment. In this case, the exporting country may want to obtain adequate compensation for the injury resulting from the weakened competitive position of their exporters that may continue even after the expiration of the measure, while the importing country would likely limit the extent of the exporters' trade loss only to that which had actually occurred during the application of the measure. Even in cases where parties agree on the duration which compensation should cover, they may well disagree on the actual calculation of trade loss.

The SA does not prescribe the form of compensation. The reference in Article 8 to the aim of maintaining a "substantially equivalent level of concessions" suggests a tariff reduction by the country imposing the safeguard measure on other items of interest to the exporting countries, and this is the usual form that compensation takes. No compensation has been offered since the beginning of the WTO, because of the political opposition that is likely to be generated by the domestic industries that will be affected by the tariff reductions and of the suspension of the retaliatory action under Article 8.3. Payment of a monetary sum, which would avoid these difficulties, cannot be ruled out, although has not occurred to date.[135] The difficulty of assessing economic loss to the exporters is

[133] However, as discussed in the commentary on Article 9 below, developing countries may apply safeguard measures for up to ten years.

[134] The period is shorter for developing countries. *See* commentary on Article 9, below.

[135] Governments might also find it politically difficult to pay out money as compensation. Nevertheless, where an increased tariff is applied as a form of a safeguard measure, some portion of the tariff revenue could perhaps be used for the payment of compensation.

likely to yield a rather crude measure of compensation based on the value of the affected imports.

Article 8 also provides the right of retaliation should there be no agreement on compensation. If an agreement on compensation cannot be reached within thirty days, Article 8.2 permits the affected exporting Members to retaliate within ninety days of the application of the measure by suspending "substantially equivalent concessions" (i.e. raising tariffs and/or applying quotas) with respect to imports from the Member applying the safeguard measure.

Suppose that Member A increases tariffs to automobiles imported from Member B by 30 per cent. To determine an appropriate retaliatory measure, Member B may identify the amount of trade affected by this tariff increase and also find the amount collectable by Member A through increased tariffs. Then it can increase tariffs on exports from Member A so that the amount collectable by increased tariffs would become substantially equivalent to the original safeguard.[136] Where a safeguard measure places quantitative restrictions, the decrease in value of shipments could be used as the reference to the retaliatory measure. Any imported products may be the subject of the retaliation as long as the extent of the retaliation does not exceed that of the safeguard measure already applied.[137]

There is an important limit on the right to retaliate. Article 8.3 provides that if a safeguard measure has been taken as a result of an absolute increase in imports and if it also conforms to the provisions of the SA, the right of retaliation may not be exercised during the first three years during the application of the measure. This restriction is designed to encourage Members to apply safeguard measures for shorter terms and to comply with the SA, rather than adopt gray-area measures.[138]

The timing and the procedure of retaliation require attention where the three-year bar to retaliation is not applied because either a safeguard measure is found inconsistent with the provisions of the Agreement on Safeguards or the measure is based on a relative rather than absolute increase in imports. Initially, consultations on compensation should take place under the provision of Article 12.3 (see below). Retaliation is only permitted if an agreement on compensation is not reached within thirty days of the beginning of the consultations. When Members decide to suspend concessions or other obligations, they must notify the Council for Trade in Goods of the proposed suspension[139], and retaliation may not take place before the expiration of thirty days from the notice.

Difficulties could arise where either the conformity of a safeguard measure with the SA or the existence of an absolute increase in imports is in dispute between parties. The complaining Member may choose to refer the dispute to the DSB and not proceed to suspend its concessions as a retaliatory measure, in order to avoid a chain of retaliations

[136] For instance, the EC adopted this method in calculating its retaliatory tariff increase in response to the US steel safeguard measures in 2002. WTO Doc. G/SG/43 (May 15, 2002).

[137] The EC's proposed retaliation list included products such as various fruits, vegetables, clothes as well as steel products from the United States. *Id.*

[138] *See* the discussions on gray-area measures in Parts III and V.D. of this chapter.

[139] Article 8.2 of the SA also provides that Members are free to suspend the application of substantially equivalent concessions not later than ninety days after the measure is applied. It is not clear whether that ninety-day limit is the time limit for the actual implementation of the retaliatory measure or for the determination and notice of such measure which could be implemented later in time. The EC notified its proposed retaliation against the recent U.S. steel safeguard measures within the ninety-day limit but did not actually apply the measure within the time frame. For the proposed retaliatory measure and the time frame, *see* WTO Doc. G/SG/43 (May 15, 2002).

between the importing country and itself. The DSB may ultimately adopt a decision in favor of the complaining Member. Nevertheless, the complaining Member would not be able to suspend its concessions because the ninety-day time limit would have already expired. This ninety-day limit may be extended where there is an agreement between the Member applying the measure and the affected exporting Members to extend the thirty-day time limit for negotiations on compensation.[140]

There is also a question of whether exporting Members would be entitled to retaliate in the fourth year of a safeguard measure, after having been barred from retaliation for the first three years. Under the provision of Article 8.3, the right to retaliation would be suspended only for the first three years and can be exercised afterwards if the safeguard measure is still in effect. However, the affected Members would not be able to suspend their concessions and other obligations if they had not entered into consultations and subsequently failed to reach an agreement under Article 8.2.

Article 9—Developing Countries

Article 9.1 of the Agreement attempts to balance the desirability for preferential treatment to developing countries and the interest in providing safeguard protection. It provides that safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed three per cent, provided that developing country Members with less than a three per cent import share collectively account for not more than nine per cent of total imports of the product concerned.

The text of the provision does not specify whether those percentages are in terms of import volume or value, though volume would make the most sense. Article 9.2 also gives developing countries the right to apply safeguard measures for two years more than the normal eight-year maximum, and also shortens the time that must lapse between applications of safeguard measures with respect to the same product (see Article 7.5).[141]

Article 10—Termination of Pre-Existing Safeguard Measures

Under Article 10, all safeguard measures that were in effect when the WTO Agreement became effective (January 1, 1995) were to be terminated within eight years of their application or by January 1, 2000, whichever comes later.

[140] The ninety-day limit was extended by the decisions of the Contracting Parties where two parties agreed to do so. WTO, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, *supra* note 22 at 525–526. This practice of agreement for extension has also continued after the WTO entered into force. For instance, in April 2000, the EC agreed with Argentina to extend the ninety-day limit with respect to Argentina's safeguard measure and made an Article 12.5 notification to the Council for Trade in Goods. WTO Doc. G/SG/N/12/EEC/3 (April 19, 2000). *See also* the subsequent agreements on the extension of the ninety-day period between the United States and various other Members with respect to the U.S. steel safeguard measures applied in March 2002. WTO Docs G/SG/N/12/USA/6 (May 16, 2002), G/SG/N/12/USA/7 (May 16, 2002), G/SG/N/12/USA/8 (May 17, 2002), G/SG/N/12/USA/9 (May 17, 2002), G/SG/N/12/USA/10 (June 14, 2002).

[141] Critics have argued that the three percent ceiling as provided in Article 9 of the Agreement is too low, and that the two year additional extension of a safeguard measure, as well as the shortening of the period before its re-application, is not particularly helpful for developing countries. *See* the relevant discussion in Jai S. Mah, *Injury and Causation in the Agreement on Safeguards*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 380–382 (2001). For proposed changes, *see* Y.S. Lee, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM (Cambridge University Press, forthcoming 2005).

Article 11—Elimination of Gray-Area Measures

As discussed above, the prohibition of gray-area measures was considered to be one of the most important objectives of the Agreement on Safeguards. As discussed in Part III of this chapter, gray-area measures, which refer to voluntary measures of export restrictions such as VRAs and OMAs, proliferated in the 1980s. They became a serious impediment to free trade, for at least two reasons.

First, gray-area measures distort trade and significantly diminish the economic gains from international trade. By arbitrarily maintaining a reduced level of imports, domestic production and prices are kept at a higher level than they would be in the absence of import restrictions. As a result, the economic welfare of consumers is sacrificed for the benefit of producers. Since the welfare loss to consumers resulting from import restrictions is generally greater than the welfare gain to producers, there is a net loss to the economy as a whole. On the international plane, the quantity of trade is reduced, causing a net loss to the global economy. Safeguard measures also reduce economic efficiency, but they are applied under strict conditions and only for a fixed period of time.

Second, gray-area measures were often focused on products from a certain group of nations, namely, Japan and newly industrializing countries in Asia. The rapid expansion of exports from these countries was an important reason for the growth of gray-area measures. Gray-area measures usually took the form of an "agreement", but there was often a question whether the agreement was fair and voluntary for both sides. Many developing countries—Asian countries in particular—depended on the markets of the developed countries in North America and Western Europe for their economic development. Often they had no real option to refuse to agree to a gray-area measure demanded by the developed countries. As discussed in Part III of this chapter, in the early 1980s Japan agreed to a voluntary restraint on exports of automobiles to the United States to forestall highly protectionist legislation threatened by the U.S. Congress.

Article 11 of the Agreement on Safeguards flatly prohibits all forms of gray-area measures, making safeguard measures the only authorized form of general emergency import restrictions to remedy or prevent serious injury to domestic industries.[142] Members may not "seek, take or maintain" those measures that include "actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members" (Article 11.1(b)). Examples of prohibited practices are listed in the footnote to Article 11.[143] All existing gray-area measures were to be phased out within four years, although each Member could retain one measure for six years.

An interesting and significant addition to Article 11 appears in its last paragraph, which provides, "Members shall not encourage or support the adoption or maintenance by public or private enterprises of non-government measures equivalent to those referred to in paragraph 1." (Article 11.3) In the rapidly globalizing world today, major producers in a given industry could be few in number worldwide, and any market arrangement among them could have the same effect as gray-area measures agreed between governments. The provisions of Article 11 cannot directly prohibit the conduct of private parties since the

[142] As explained above, special safeguard measures are permitted under the Agreement on Agriculture and the Agreement on Textiles and Clothing. Articles XII and XVIII of the GATT allow Members to take measures to protect their balance-of-payments, but these are not designed to protect particular domestic industries.

[143] Those examples include "export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection". *Agreement on Safeguards,* Art. 11, n. 4.

GATT/WTO rules directly regulate only the conduct of Members, and not the behavior of their private citizens. Nevertheless, Article 11 prohibits any government endorsement and/or support of trade-distorting arrangements by private parties.[144]

Article 12—Notification and Consultation

This Article elaborates on the notification and consultation requirements set forth in GATT Article XIX. Notification and consultation are important procedural requirements. The notification ensures that the affected Members stay informed of the progress of the investigation, and consultation provides affected Members with an opportunity to exchange views with other parties in the hope of reaching a mutually agreeable settlement.

Under the provisions of the SA, Members are required to notify the WTO Committee on Safeguards at various stages of a safeguard proceeding: at the initiation of the investigation (Article 12.1(a)); upon the finding of serious injury or threat thereof (Article 12.1(b)); and finally, upon the decision to apply or extend a safeguard measure (Article 12.1(c)). Article 12.1 specifies that the required notifications must be made *immediately* after the relevant decisions, and the recent Panels have emphasized the importance of timely notification.[145] In particular, the notification under Article 12.1(c) pertaining to the proposed measure must be made *before* the implementation of the measure so that affected Members may have an opportunity to discuss the proposed measure in the subsequent consultations, and the result of such discussions may be incorporated in the final implementation of the measure.[146]

1. Timing of Notifications

The timing of Article 12 notifications has been the subject of disputes. *In Korea—Dairy Products*,[147] the Panel affirmed that the notifications should be made immediately after the relevant actions of the national authorities. It rejected Korea's argument that the timing of their notifications was adequate since they were made as soon as practically possible. The Panel concluded that "as soon as practically possible" was not equivalent to "immediately," and found certain delays in Korea's notifications unacceptable. It, however, did not provide any standard for the determination of the required immediacy of notifications. The problem was that the notifications could not be made overnight due to the inevitable administrative and logistical issues such as translation.

The Panel in *United States—Wheat Gluten* also dealt with this issue. It held that the fifteen days of delay between the initiation by the United States of the investigation and

[144] Since private arrangements of this nature would also violate the anti-monopoly laws of many countries, the question may be asked whether failure by a Member to enforce those laws against such an arrangement would be contrary to Article 11. Given that the WTO does not yet regulate competition policy and restrictive business practices, it is doubtful that the mere lack or insufficient enforcement of the anti-monopoly laws would be considered to be government support/endorsement of trade-restricting private arrangements prohibited by Article 11. In *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, (1998), the Panel did not find that the alleged "business restrictive practices and measures" of Japan impaired or nullified benefits accruing to the United States within the meaning of GATT Article XXIII:1(b) nor accorded less favourable treatment to imported photographic film and paper within the meaning of GATT Article III:4. *Id.* ¶¶ 10.402–10.404.

[145] *See Korea—Dairy Products* (Panel), *supra* note 17, Panel Report, ¶¶ 7.130–7.145; *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶¶ 8.189–8.207. *See also* the relevant discussion in Part IV below.

[146] See *United States—Wheat Gluten*, *supr*a note 17, Panel Report, ¶¶ 8.205–8.207.

[147] *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶¶ 7.130–7.145.

its notification, and the twenty-six days between its finding of serious injury and its subsequent notification were not acceptable. On the other hand, the Panel noted that the five days between the U.S. decision to take a safeguard measure and the final notification under Article 12.1(c) satisfied the immediacy requirement of the notification. Nevertheless, the timing of the final notification was still found inconsistent with Article 12.3 (see below) since it was made *after* the application of the safeguard measure and therefore did not provide the other affected Members with sufficient time to prepare and enter into the consultations. The Panel found that the notification pertaining to the proposed measure must be made *before* the implementation of the measure.[148]

2. Contents of Notifications

Article 12.2 lays down specific requirements for the contents of the notifications. It provides in relevant part:

> "... the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with *all pertinent information*, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall be also provided ...." (Emphasis added.)

In *Korea—Dairy Products,* the scope of "all pertinent information" that should be included in the notifications was at issue. The EC contended that all the details of the recommendations and reasoning contained in the report of the competent authorities should be included in the notifications.[149] Both the Panel and the Appellate Body rejected this argument as too broad. The Appellate Body ruled that, at a minimum, notifications should include all the items expressly listed in Article 12.2 above and should also address the injury factors listed in Article 4.2(a).[150] The analysis of the injury factors could be extensive, and it is not still sufficiently clear how much has to be included in the notifications. It would appear to be necessary to include the assessment of injury factors and the reasoning behind the injury determination, so that affected Members may be informed of the basis for the injury determination.

3. Consultations

Article 12.3 provides for prior consultations before the application of a safeguard measure. It provides that:

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

Consultations are also an essential part of the procedural requirements. The objectives of the consultation are to exchange views on the proposed measure in order to reach a mutually satisfactory settlement, and to find a way to maintain the balance of concessions that is likely to be upset by the application of a safeguard measure. The timing of

[148] *Id.,* ¶¶ 8.189–8.207.
[149] *Id.*, ¶¶ 4.693–4.697.
[150] *Korea—Dairy Products*, *supra* note 17, Appellate Body Report, ¶ 108.

consultation is therefore important to achieve those ends. Members proposing to apply a safeguard measure should hold those consultations well before the implementation of a safeguard measure so that the results of those consultations can be incorporated in its implementation.[151] Members are not required to either modify or withdraw their measures following the consultations, but their revisions, where necessary, to accommodate the interests and concerns of affected parties would minimize the potential for disputes and retaliations.

The adequacy of consultations was also at issue in *United States—Wheat Gluten* and *United States—Line Pipe*. In *Wheat Gluten,* consultations were held without information as to the specific quota shares for individual countries made available. The Appellate Body considered that the EC was not able to "assess accurately the likely impact of the measure being contemplated, nor to consult adequately on overall equivalent concessions with the United States" without this information.[152] In *Line Pipe*, the Appellate Body also held that the adequate opportunity for consultations was not provided where the measures applied after the consultations were substantially different from those that had been announced in an earlier press release.[153] The period of eighteen days between the announcement of the final U.S. measure and its implementation was held not to be sufficient for entering into new consultations.[154]

Article 13—Surveillance

Article 13 establishes a Committee on Safeguards to monitor implementation of the Agreement. In addition to receiving the notifications required under the SA, the Committee also reviews upon request the equivalency of concessions and other obligations that are to be suspended by the Member. Article 13.2 also requires the publication of annual reports on the implementation of the Agreement.

* * * * * *

To summarize, the Agreement on Safeguards significantly improves the safeguards regime in both substantive and procedural ways. Emergency import restrictions have been channeled into safeguard measures, and the proliferation of costly gray-area measures seem to have been inhibited since the implementation of the SA.[155] This achievement should be attributed largely to the improved effectiveness of the WTO system as well as to the effectiveness of the Agreement itself. Both developed and developing countries seem generally satisfied with the improved safeguards regime although preferential treatment

[151] In *Korea—Dairy Products*, the timing of consultation held between Korea and the EC was at issue. The Panel commented on the importance of the timing and subsequently found that Korea's modification of its original quota level, in consideration of the EC's concern, indicated that the timing of the consultations had in fact allowed for a meaningful exchange of views, which then led to the modification of Korea's measure. *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 7.152. The importance of the timing of consultation was reiterated in *United States—Wheat Gluten, supra* note 17, Panel Report, ¶¶ 8.215–8.219. The Panel emphasized the importance of consultation as a means to achieving the important aim of Article 8.1, which is the settlement of compensation to maintain the balance of concessions.

[152] *United States—Wheat Gluten, supra* note 17, Appellate Body Report, ¶ 141.

[153] *United States—Line Pipe, supra* note 17, Appellate Body Report, ¶¶ 102–113.

[154] *Id.,* ¶¶ 107–108. It may be noted that the United States applied its steel safeguard measures only fifteen days after announcing them. This was an obvious violation of Article 12, in light of the *Line Pipe* decision, but it was not raised in the WTO challenge.

[155] *See*, however, Part V.D below, for a discussion of one bilateral agreement entered after implementation of the WTO Agreement that had the hallmarks of a gray-area measure.

for developing countries has been criticized as somewhat insufficient.[156] Certain ambiguities have been also pointed out with respect to some provisions of the Agreement.[157] Some of those ambiguities led to controversies as to the interpretation of the relevant provisions of the SA. Modifications of those provisions would help to clarify the ambiguities and to ensure the proper application of safeguard measures.[158]

V. Outstanding Issues in the Application of Safeguards[159]

A. Relationship between GATT Article XIX and the Agreement on Safeguards

As discussed above, the Agreement on Safeguards provides detailed substantive conditions and procedural rules for the application of safeguard measures, revising and expanding upon the provisions of GATT Article XIX. There has been considerable controversy as to whether the old provisions of Article XIX are still applicable after entry into force of the SA. In *Korea—Dairy Products*, Korea and the United States both argued that the Agreement on Safeguards is the sole articulation of the rules on safeguards[160] while the EC maintained that Article XIX is still effective and provides additional rules that are not expressly included in the SA.[161]

The SA does not contain any provision describing its legal relationship with Article XIX.[162] However, Article II:2 of the Marrakesh Agreement Establishing the World Trade Organization, which provides that "the agreements and associated legal instruments included in Annexes 1,2, and 3 [hereinafter referred to as 'Multilateral Trade Agreements'] are integral parts of this Agreement, binding on all Members," confirms the general applicability of Article XIX, since it is included in Annex 1 of the Marrakesh Agreement as part of GATT 1994.[163] Should there be any conflict between the provisions of Article XIX

[156] *See supra* note 141.

[157] Lee and Mah, *supra* note 56, at 26–30.

[158] *See* Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 1, Appendix 4.

[159] Much of the discussion in this Part is drawn from the author's previous work, *Destabilization of the Discipline on Safeguards?—Inherent Problems with the Continuing Application of Article XIX after the settlement of the Agreement on Safeguards*, 35 JOURNAL OF WORLD TRADE 1235–1246 (Dec. 2001). *Critical Issues in the Application of the WTO Rules on Safeguards—In the Light of the Recent Panel Reports and the Appellate Body Decisions,* 34 JOURNAL OF WORLD TRADE 131–147 (Apr. 2000) and *Review of the First WTO Panel Case on the Agreement on Safeguards: Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products and Its Implications for the Application of the Agreement*, 33 JOURNAL OF WORLD TRADE 27–46 (Dec. 1999).

[160] *Korea—Dairy Products, supra* note 17, Panel Report, ¶¶ 4.418, 4.169–4.195, 5.4–5.8.

[161] *Id*., ¶¶ 4.142–4.146 and 4.149–4.168.

[162] The SA only states that the Agreement establishes rules for the application of safeguard measures "provided for in Article XIX of GATT 1994" (Article 1). In contrast, Article 1 of the Agreement on Implementation of Article VI of the GATT 1994 sets forth the legal relationship between that Agreement and the relevant provisions of the GATT:

> [A]n antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under antidumping legislation or regulation.

[163] This position has been affirmed by the Panel in *Korea—Dairy Products,* which stated, "It is now well established that the WTO Agreement is a 'Single Undertaking' and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously unless there is a formal conflict between them." (Footnote omitted.) *Korea—Dairy Products, supra* note 17, Panel Report, ¶ 7.38.

and the provisions of the SA, the latter should prevail according to the General Interpretative Note to Annex 1A of the WTO Agreement.[164]

As noted in Part IV above, a major issue that has arisen with respect to the relationship between GATT Article XIX and the SA is whether the "unforeseen developments" phrase, which is included in the provision of Article XIX:1(a)[165] but does not appear in the SA creates a legal requirement for the application of a safeguard measure.[166]

In *Korea—Dairy Products*, the EC argued that the existence of "unforeseen developments" was a condition under Article XIX:1(a) that had to be proven by the Member applying a safeguard measure, although this particular clause was not included in the Agreement.[167] Korea, on the other hand, argued that there was a conflict between the provisions of Article XIX:1(a) and Article 2.1 of the Agreement, and that the "unforeseen developments" provision was not effective since the new provisions in Article 2.1 does not include this particular phrase. The United States, as a third party, shared Korea's view.[168]

The Panel in *Korea—Dairy Products* found that there is no conflict between paragraph 1(a) GATT Article XIX:1 and the relevant provisions of the Agreement on Safeguards.[169] However, contrary to the EC's argument, the Panel characterized the "unforeseen developments" not as a requirement for an application of a safeguard measure but merely "an explanation of why an Article XIX measure may be needed, taking into account the fact that at the time (1947) the CONTRACTING PARTIES had just agreed (for the first time) on multilateral tariff bindings and on a general prohibition against quotas".[170] Although the Panel also declared that in principle "the Safeguards Agreement does not supersede or replace Article XIX",[171] this ruling affirmed that the SA is in fact the sole articulation of the rules on safeguards.

[164] The Note provides:

> In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreement in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

[165] Article XIX:1(a) provides:

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

[166] Article 2.1 of the Agreement provides:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (Footnotes omitted.)

[167] *Korea—Dairy Products, supra* note 17, Panel Report, ¶¶ 4.142–4.146 and 4.149–4.168.
[168] *Id.,* ¶¶ 4.418, 4.169–4.195, 5.4–5.8.
[169] *Id.*, ¶ 7.39.
[170] *Id.,* ¶ 7.42.
[171] *Id.*, ¶ 8.56.

The Panel in *Argentina—Footwear*[172] arrived at the same conclusion. It stated, "safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards agreement satisfy the requirement of Article XIX of GATT. Therefore, we see no basis to address the EC's claims under Article XIX of GATT separately and in isolation from those under the Safeguard Agreement."

The Appellate Body reversed the Panel decisions. In *Korea—Dairy Products* it stated, "Although we do not view the first clause in Article XIX:1(a) as establishing independent conditions for the application of a safeguard measure, additional to the condition set forth in the second clause of that paragraph, *we do believe that the first clause describes certain circumstances which must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994,*" (Emphasis added.)[173]

The Appellate Body distinction between "an independent condition" and "circumstances which must be demonstrated as a matter of fact", is rather unclear, and both of those phrases impose legal requirements for the imposition of safeguard measures.[174] The Appellate Body justified its decision that the emergency nature of the measure calls for the presence of "unforeseen developments".[175] However, this decision seems to create certain ambiguities and uncertainties in the application of safeguard measures.[176]

First, according to the Appellate Body decisions, a Member proposing to apply a safeguard measure must demonstrate the existence of "unforeseen developments" as a matter of fact. But it is difficult to set objective standards for proving that a particular development was in fact "unforeseen". The Panel in *United States—Lamb Meat* found that the distinction drawn by the Appellate Body in *Korea—Dairy Products* between the terms, "*unforeseen*" and "*unforeseeable*"[177] is important, and concluded that the former term implies a lesser threshold, "unexpected" than the latter one, which it equated with "unpredictable."[178] Unfortunately, this distinction is rather vague and not very helpful in setting the standard for adequate proof of "unforeseen developments."[179] The Panel in *United States—Steel Products* decided that the standard for unforeseen developments was objective rather than subjective. The Panel was of the view that the appropriate focus is on what *should or could have been* foreseen in light of the circumstances; not "what the specific negotiators had in mind but rather what they could (reasonably) have had in mind."[180] In other words, the test is whether the developments in question

[172] *Argentina—Footwear*, *supra* note 17, Panel Report, ¶ 8.69.

[173] *Korea—Dairy Products*, *supra* note 17, Appellate Body Report, ¶ 85.

[174] According to a recent Panel, although the latter term could be read to imply a lesser threshold than the former, a demonstration of the existence of "unforeseen developments" is a legal requirement. *United States—Lamb Meat*, *supra* note 17, Panel Report, ¶ 7.19.

[175] *Argentina—Footwear*, *supra* note 17, Appellate Body Report, ¶ 93 and *Korea—Dairy Products*, *supra* note 17, Appellate Body Report, ¶ 86.

[176] *See also* Lee (2000), *supra* note 159, at 132–137, for a discussion of this issue.

[177] *Korea—Dairy Products*, *supra* note 17, Appellate Body Report, ¶ 84

[178] *United States—Lamb Meat*, *supra* note 17, Panel Report, ¶¶ 7.19–7.22.

[179] The ambiguity of the requirement has led to a disagreement between the Appellate Body and a subsequent Panel. The Panel in *Argentina—Preserved Peaches* stated that it "did not agree with the statement by the Appellate Body in *Argentina—Footwear (EC)* that "the increased quantities of imports should have been 'unforeseen' or 'unexpected'. The text of Article XIX:1(a), together with the Appellate Body's own discussion of it and earlier conclusion regarding the logical connection between the circumstances in the first clause of Article XIX:1(a)—including unforeseen developments—and the conditions in the second clause—including an increase in imports—show that this is not a requirement for the imposition of a safeguard measure." (Footnote omitted.) *Argentina—Preserved Peaches, supra* note 17, Panel Report, ¶ 7.24.

[180] *United States—Steel Products*, *supra* note 17.

were *unforeseeable* rather than *unforeseen*, which is the approach taken by the GATT *Hatter's Fur* panel as discussed above.[181] However, as noted above, in *Dairy Products* the Appellate Body applied the less stringent test of "unforeseen".[182]

Second, certain provisions in the SA indicate that all the conditions for the application of safeguards are presumed to be included in the Agreement.[183] As explained, the general conditions stated in Article 2.1 of the SA neither include the "unforeseen developments" clause nor make any reference to the provisions of Article XIX. In addition, under Article 8.3, the right to retaliation does not apply where a safeguard measure is based on an absolute increase in imports and *"conforms to the provisions of this Agreement."* (Emphasis added.) If Article XIX was intended to preserve any requirement not included in the SA, the three-year bar to retaliation should have been made inapplicable to a safeguard measure that is inconsistent *either* with the Agreement *or* Article XIX, but Article 8.3 makes no reference to Article XIX. This reference to the SA alone in Article 8.3 suggests that the Agreement was intended to be the sole articulation of the rules on safeguards.

This intent is also found in the negotiating history of the Agreement on Safeguards. The earlier version of the draft agreement on safeguards did contain the "unforeseen developments" clause. By mid-1990, however, the clause disappeared from the draft entirely, while other conditions of Article XIX were repeated almost verbatim.[184] Based on this history, it is only reasonable to consider that this omission was intentional. National safeguards legislation of most countries, including that of the EC and the United States, do not include the "unforeseen developments" clause. The phrase in the Preamble of the Agreement, "Recognizing further that . . . *a comprehensive agreement*, applicable to all Members and based on the basic principles of GATT 1994, is called for" (emphasis added), also affirms that the SA should be understood as a comprehensive agreement, containing all the terms and conditions for the application of a safeguard measure.

In conclusion, it serves no useful purpose to require the existence of "unforeseen developments" as a prerequisite for the application of a safeguard measure. Had a Member foreseen the rapid increase in imports causing or threatening to cause serious injury to its domestic industry at the time of concession, most likely it would not have offered

[181] *See* text accompanying note 25, *supra.* The *Steel* Panel cited this decision, saying that it characterized unforeseen developments as "developments [. . .] which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated". *United States—Steel Products*, *supra* note 17.

[182] *Supra* note 177.

[183] The Appellate Body refers to the provisions of Article 1 and Article 11.1(a) of the Agreement as justification for the cumulative application of both Article XIX and the Agreement. In its opinion, the reference to Article XIX indicates the continuing applicability of Article XIX. *Korea—Dairy Products, supra* note 17, Appellate Body Report, ¶ 77. However, the phrase in Article 1, "This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994" cannot be interpreted to require full legal effect to be given to every clause in Article XIX. In addition, the relevant phrase in Article 11.1(a), "A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article *applied in accordance with this Agreement"* (emphasis added) seems to only confirm, contrary to the opinion of the Appellate Body, that the SA prevails in the application of safeguards.

[184] GATT document MTN.GNG/NG9/W/25 (June 27, 1989). A respected academic also states that:

> A 1990 draft of an agreement included ['unforeseen developments'] and amplified it by imposing the obligation to establish an 'unforeseen, sudden and significant increase in imports '. Both the United States and the EU rejected this terminology as being too difficult or restrictive to apply.

PIERRE DIDIER, LES PRINCIPAUX ACCORDS DE L'OMC ET LEUR TRANSPOSITION DANS LAW COMMUNAUTE EUROPEENE (Bruyland, 1997) at 271–272.

the concession to the extent that it did in the first place.[185] The characterization of the clause by the Panel in *Korea—Dairy Products* as being "explanatory" therefore seems more consistent with the language and purpose of the SA. The Appellate Body decision subjects Members to an ambiguous and unnecessary condition.

B. Burden of Proof

Another significant issue has been who has to prove the validity of the safeguard measure should the national authority's injury determination and/or its compliance with other safeguards requirements be challenged in the WTO panel proceedings. Most advanced legal systems require the complainant to prove its claim (i.e., the "burden of proof" is on the complainant).

The Panel in *Korea—Dairy Products* confirmed the above principle, finding that "as a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process."[186] On the other hand, the Panel also ruled that once the EC made a *prima facie* case, Korea had to provide an effective refutation of the EC's case.[187] The Panel also said that at the end of the process, it would assess and weigh the evidence and arguments of both parties to determine whether the EC claims were well-founded. The Appellate Body subsequently concurred with the Panel position.

According to this decision, the first hurdle for the complainant is the establishment of a *prima facie* case. If the respondent believes that the complainant has not established a *prima facie* case, it can request that the case be dismissed. The question is what is the appropriate threshold standard for the establishment of a *prima facie* case. The Panel *in Korea—Dairy Products* considered this issue. It followed the definition of a *prima facie* case provided by the Appellate Body on *European Communities—Measures Concerning Meat and Meat Products (* hereinafter, *European Communities—Hormones)*[188]. According to this definition, a *prima facie* case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[189]

Despite this definition by the Appellate Body, it is not altogether clear what level of evidence would be sufficient to establish a *prima facie* case. Many national laws recognize that a *prima facie* case is established as long as the evidence presented *tends* to support the claim made, although it is not conclusive.[190] The recent Appellate Body decision also held that the complainant may establish a *prima facie* case by demonstrating a violation

[185] Even in the unlikely situation where a Member foresaw possible developments that might cause injury to its domestic industry but nevertheless proceeded to grant import concessions, believing that safeguard measures would be available should they be needed , the granting of import concessions in reliance of the availability of a safeguard measure helps to promote free trade; the Member might not have even considered making import concessions without knowing that it would have recourse to safeguard measures if necessary. The requirement of "unforeseen developments" therefore serves no useful purpose and may even adversely affect Members' willingness to make concessions. Y.S. LEE, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 1, at 106.

[186] *Korea—Dairy Products, supra* note 17, Panel Report, ¶ 7.23.

[187] *Id.*, ¶ 7.24.

[188] *European Communities—Measures Concerning Meat and Meat Products (EC—Hormones),* WT/DS26/AB/R (Report of the Panel, dated Jan. 16, 1998).

[189] *Korea—Dairy Products, supra* note 17 , Panel Report, ¶ 7.24.

[190] *See State v. Harenza,* 213 Kan. 201, 515 P.2d 1217, 1222 (Nov. 3, 1973), *Godesky v. Provo City Corp.,* Utah, 690 P.2d 541, 547 (Sep. 12, 1984), *Mitsui Petrochemicals (America)* v. *United States*, 21 C.I.T. 882, 885, 1997 WL 438840, 3 (Jul.3, 1997).

of the requirement on the part of the defendant, and it does not necessarily have to address and rebut specific information included in the defendant's investigation report which may be inconsistent with the complainant's claim.[191]

The Panel in *Argentina—Preserved Peaches* stated that it "will follow consistent practice in relation to the burden of proof, according to which the party who asserts a fact, or the affirmative of a particular claim or defense, whether the complainant or the respondent, bears the burden of proof of that fact, or the affirmative of that claim or defense. If that party adduces evidence sufficient to raise a presumption that what is asserted is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." (Footnote omitted.) This means that Members proposing to apply a safeguard measure or seeking to complain about one should be prepared to defend their case with stronger evidence and arguments as long as the other party presents some evidence to support its own case, although such evidence may not be conclusive.

C. Standard of Review

The Agreement on Safeguards contains no specific provision on the standard of review. The Panel in *Korea—Dairy Products* referred to the Appellate Body's finding in *European Communities—Hormones* that the provisions of Article 11 of the DSU are applicable if the relevant WTO multilateral trade agreement does not provide for a specific standard of review. Article 11 provides that "a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements."[192]

Panels have emphasized that they will not engage in *de novo* review of investigations by national authorities, but that at the same time they will not give complete deference to the findings of the national authorities.[193] While national authorities have discretion to make substantive safeguards findings and conclusions, the Panel would nevertheless examine (i) whether the national authorities had examined all the facts in their possession, as well as those which they should have obtained, (ii) whether an adequate explanation had been provided of how the facts as a whole supported the determinations, and, consequently, (iii) whether the determination made was consistent with the international obligations of the Member applying a safeguard measure.[194]

The Panels therefore reviewed both adequacy of the reasoning by the national authorities and scope of facts examined by them. These Panel decisions have created certain ambiguities and difficulties for the Member applying a safeguard measure. First, the Panels did not specify how the adequacy of the national authorities' reasoning should be determined. The determination of the adequacy of reasoning is inherently a subjective task. What are the objective criteria? The need for objective standards has become all

[191] *United States—Line Pipe, supra* note 17, Appellate Body Report, ¶¶ 186 and 187.

[192] *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 7.26.

[193] *Id.,* ¶ 7.30; *Argentina—Footwear*, *supra* note 17, Panel Report, ¶ 8.124; *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶ 8.5; *United States—Lamb Meat*, *supra* note 17, Panel Report, ¶ 7.3.

[194] *Korea—Dairy Products, supra* note 17, Panel Report, ¶ 7.30. Concurring with this position, the Appellate Body in *United States—Lamb Meat* stated, "a panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a *formal* matter, evaluated *all relevant factors* and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations." *United States—Lamb Meat*, *supra* note 17, Appellate Body Report, ¶ 141 (emphasis in original).

the more apparent as the Appellate Body recently determined that panels are obliged to examine the adequacy of national authorities' reasoning closely and to consider in their examination any claim that is contrary to their reasoning and conclusions. In *United States—Lamb Meat*, the Appellate Body found that the Panel had failed to apply the appropriate standard of review where it conducted only a cursory examination of the national authority's reasoning.[195]

The adequacy of reasoning is also an issue where two different conclusions can be reasonably drawn from the same set of facts. The Appellate Body in *United States—Lamb Meat* found that "A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."[196] According to this finding, a national authority's decision would have to be rejected if the alternative reasoning refutes the authority's explanations for its decision. The Panel has also found that the national authority's explanations and reasoning for its conclusion may not be accepted unless they were already included in its original investigation report.[197] The Appellate Body supported the Panel decision.[198]

Those decisions mean that the national authority must consider all the possible reasoning and conclusions that can be drawn from the given facts and then justify its own conclusion in the light of these. Furthermore, all of the reasoning and conclusions must be included in its original investigation report. This seems onerous to the national authority. It is only fair that the authority should be given an opportunity to defend its conclusion with supplementary reasoning, if necessary, before the panel.[199] However, the Panel in *Korea—Dairy Products* did not allow such an opportunity.[200]

The Panel in *Korea—Dairy Products* also ruled that it would consider whether the national authorities had examined all the facts in their possession, as well as those which *they should have obtained.*[201] In conjunction with the requirement of Article 4.2(a), national authorities would have to examine all relevant factors based on available data.[202] Attention should be given to the collection and use of the data. The collection of relevant data is often a difficult task, and discerning the exact data of which scope would be precise for the subject of investigation may be even more difficult.[203] This difficulty is greater in developing countries which may have limited statistical data bases.

[195] *United States—Lamb Meat*, *supra* note 17, Appellate Body Report, ¶ 148.

[196] *Id.*, ¶ 106.

[197] *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶¶ 7.72, 7.76.

[198] *Korea—Dairy Products*, *supra* note 17, Appellate Body Report, ¶¶ 137–138.

[199] The Appellate Body considered that it would be unlikely that the interested parties may withhold arguments from national authorities. *United States—Lamb Meat*, *supra* note 17, Appellate Body Report, ¶ 115. On the contrary, they may well come up with new arguments against the national authorities' reasoning after the publication of the investigation report and present them during the panel process.

[200] In *Korea—Dairy Products*, Korea's justifications for many of its findings were not accepted since they were not included in the final investigation report. *See* Lee (1999), supra note 159, at 39.

[201] In *Korea—Dairy Products*, the Panel stated, "For us, an objective assessment entails an examination whether the KTC [Korea's investigation authority] had examined all facts in its possession or *which it should have obtained* in accordance with Article 4.2 of the Agreement on Safeguards . . . " (Emphasis added.) *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 7.30.

[202] *See* the discussion in Part IV *supra* concerning the national authority's duty to examine "all" relevant data.

[203] In *Korea—Dairy Products*, the Panel did not consider Korea's analysis of the domestic industry's profits and losses since, *inter alia*, the data used by the Korean investigating authorities were "too broad," as it included profits and losses from businesses other than those related to the production and sale of domestic products. *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 7.71.

To what extent are data discrepancies resulting from the limited availability of statistics acceptable? The Panel in *Korea—Dairy Products* did not seem to permit such discrepancies and required that national authorities make a reasonable estimate where actual data are not available.[204] The Panel's decision seems tantamount to directing national investigating authorities how to conduct their own investigations, which Panels have repeatedly declared that they will not do.

The issue of the collection and examination of data was addressed again recently in *United States—Wheat Gluten.* The Panel stated, "It is not our role to collect new data, nor to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not," indicating that the Panel review is not a substitute for the investigation conducted by the national authorities.[205] The decision recognized the discretion of the national authorities in the collection and examination of data. However, the Appellate Body reversed this decision and effectively limited their discretion by finding that the national authorities should not only rely on the information submitted by the parties but should also seek out pertinent information necessary to assess the injury to the domestic industry.[206]

The Appellate Body in *United States—Lamb Meat,* provided some guidance on the sufficiency of data. It stated that the data before the competent authorities must be sufficiently representative to give a true picture of the domestic industry.[207] It acknowledged that a requirement for data that includes all domestic producers may not be practical in many instances. It also considered that what is sufficient in any given case would depend on the "particularities" of the domestic industry at issue.[208] The Panel and Appellate Body decisions in *Lamb Meat* indicate that unless the data collected and used for the examination constitute a statistically valid sample, there must be a plausible explanation as to why the partial data are representative of the industry as a whole.

In *United States—Steel Products*, the Panel noted that the USITC Commissioners made divergent findings that were impossible to reconcile given that they were based on differently defined products.[209] (Some Commissioners considered that those products should be included together in a larger category of products and others considered them separate products.) The Panel found that a Member is not permitted to base a safeguard measure "on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other."[210]

The Appellate Body disagreed with the Panel and reversed its decision, concluding that the affirmative findings based on different product groupings are not necessarily mutually exclusive.[211] The Appellate Body was of the view that nothing in the SA prevents the

[204] *Korea—Dairy Products*, *supra* note 17, Panel Report, ¶ 7.82.
[205] *United States—Wheat Gluten*, *supra* note 17, Panel Report, ¶ 8.6.
[206] *United States—Wheat Gluten*, *supra* note 17, Appellate Body Report, ¶ 53–55.
[207] *United States—Lamb Meat*, *supra* note 17, Appellate Body Report, ¶ 132.
[208] *Id.*, ¶ 132.
[209] *United States—Steel Products, supra* note 17, ¶ 10.194. The Panel further explained, "For the purposes of the Agreement on Safeguards, with regard to, for instance, the question of whether imports have increased, it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products. The difference is that the import numbers for different product definitions will not be the same." *Id.,* ¶ 10.195. With respect to stainless steel wire, *see id.,* ¶ 10.261.
[210] *Id.,* ¶¶ 10.195,10.262
[211] The Appellate Body stated, "We do not believe that an affirmative finding with respect to a broad product grouping, on the one hand, and an affirmative finding with respect to one of the products contained in that broad product grouping, on the other hand, are, necessarily, mutually exclusive." *United States—Steel Products,* Report of the Appellate Body, *supra* note 17, ¶ 413.

national investigating authority from basing its determination on multiple findings, and that it is the Panel's obligation to consider each of them separately to assess whether any one of them provides a reasoned and adequate explanation of the final determination.[212] This decision raises the question whether a panel should conclude that the investigating authority has provided a reasoned conclusion even if the different explanations offered for the determination are inconsistent with each other.

D. Prohibition of "Gray-Area Measures"[213]

As discussed in Part IV of this chapter, the Safeguards Agreement requires all pre-existing gray-area measures to be terminated within a specified period of time, and prohibits new gray-area measures. The Committee on Safeguards has reported that all notified pre-existing measures, covered by Articles 10 and 11 of the Agreement, were phased out by January 1, 2000, in accordance with Article 11.2.[214]

It is, however, still possible that gray-area measures are taken without being notified to the Committee. The attractions of gray-area measures still exist.[215] The prohibition of gray-area measures under Article 11 of the Agreement on Safeguards may be limited by the fact that there is usually little incentive for anyone to challenge a gray-area measure. The recent adoption of the special safeguard mechanism in the Protocol on China's entry to the WTO also raises a concern about a revival of gray-area measures.[216]

The 1996 United States—Canada Softwood Lumber Agreement ("SLA")[217] was a five-year agreement entered into to head off a threatened countervailing duty investigation of Canadian imports of softwood lumber. The Agreement required the Canadian government to levy fees on exports of softwood lumber to the United States that exceeded specified levels, in return for which the United States undertook not to initiate any trade action against the import of softwood lumber from Canada (Articles I and II). This agreement was a form of a voluntary export restraint and therefore appears to have violated the provisions of Article 11. However, it was not challenged in the WTO, and the measure was not even notified to the Committee on Safeguards.[218]

Although the SLA expired on March 31, 2001, the prevalence of those types of agreements could undermine one of the most important objectives of the Agreement on Safeguards—the prohibition of gray-area measures. Given the clear and unequivocal prohibition of gray-area measures under the Article, Members may find it increasingly difficult to disregard the requirement of Article 11 altogether and enter into such

[212] *Id.* ¶ 414.

[213] *See* the discussions in Parts III and IV of this chapter of the history and economic implications of gray-area measures.

[214] Report (2000) of the Committee on Safeguards, G/L/209 (November 23, 2000), ¶ 23.

[215] As discussed in Part IV, the absence of compensation and retaliation as well as the unlikelihood of legal review made gray-area measures a popular form of trade restriction in the 1980s.

[216] *See* the author's recent work on the issue of the revival of gray-area measures: *Revival of Gray-Area Measures?—The US-Canada Softwood Lumber Agreement: Conflict with the WTO Agreement on Safeguards,* 36 JOURNAL OF WORLD TRADE 155–165 (Feb. 2002), *Specific Safeguard Mechanism in the Protocol on China's accession to the WTO—A Serious Step Backward from the Achievement of the Uruguay Round,* 5 JOURNAL OF WORLD INTELLECTUAL PROPERTY 219–231 (Mar. 2002).

[217] The Department of Foreign Affairs and International Trade of Canada makes the entire text of the agreement accessible on its website: http://www.dfait-maeci.gc.ca/~eicb/softwood/Archive/treaty-e.pdf (Canada Treaty Series 1996/16).

[218] Since it was not notified, the SLA did not qualify under the exception provided by Article 11.2. In any rate, it continued until 2001, long past the deadline of 1999 by which all existing gray-area measures were required to expire.

arrangements. Nevertheless, the surveillance role of the Committee of Safeguards would be vital to preserving the disciplines of Article 11. The Committee should closely monitor the implementation of the Agreement—the requirements of Article 11, in particular—and be vigilant against any violation.

Although not a gray-area measure as such, since it has been adopted by the WTO as a whole, the Transitional Product-Specific Safeguard Mechanism ("SSM") in the Protocol on China's entry to the WTO[219] raises similar concerns. Section 16 of the Protocol requires China to take actions to remedy or prevent "market disruption" to importing countries—in effect to adopt voluntary export restraints—failing which those countries may impose safeguard measures against imports from China alone.[220] Not only is the "market disruption" injury standard substantially lower than the SA requirement of "serious injury", but the measures are imposed on a selective basis rather than the MFN basis required by the SA. Unlike the SA, the Protocol does not provide for compensation and curtail China's right to retaliation.[221] Although the SSM is temporary,[222] this selective and discriminatory treatment against a particular country seems unfair and hardly justifiable.[223]

E. The U.S. Steel Safeguard Case—A Test for Multilateralism in International Trade[224]

On March 20, 2002, the United States applied safeguard measures, consisting of increased tariffs of up to thirty percent and a tariff-rate quota, to imports of several key steel products.[225] These measures were among the most controversial and significant

[219] Section 16 of the Protocol on the Accession of the People's Republic of China, WT/L/432, 8–9 (Nov. 23, 2001).

[220] In contract to the requirement of serious injury or threat thereof under the Agreement on Safeguards, the Protocol permits the application of a safeguard measure against imports from China on the basis of market disruption (Section 16.1). Section 16.4 of the Protocol provides that market disruption shall exist if domestic industry sustains material injury (or its threat) due to the increase in imports from China. The extent of injury required for material injury is considered less than that of serious injury.

[221] Article 16.1 of the Protocol provides in the relevant part:

> If a measure is taken as a result of a relative increase in the level of imports, China has the right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than two years. However, if a measure is taken as a result of an absolute increase in imports, China has a right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than three years.

[222] The SSM expires twelve years after China's accession to the WTO.

[223] Many Members have felt significant political pressure from their domestic producers to keep inexpensive Chinese imports in check, but such pressure cannot be considered a valid reason for deviating from established trade principles. Creating an exceptional arrangement in response to domestic political pressure creates an undesirable precedent for compromising and undermining the general principles of the multilateral trade regime.

[224] The discussion in this sub-part has been drawn from the author's article, *Safeguard Measures: Why Are They Not Be Applied Consistently With the Rules?—Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards*, 36 J.W.T 641–673 (2002).

[225] The products subject to the U.S. safeguard measures included slabs, flat steel, hot-rolled bar, cold-finished bar, rebar, certain welded tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, tin mill products and stainless steel wire. For the specifics of the measures, refer to Proclamation 7529 of March 5, 2002—*To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products* and the Memorandum of March 5, 2002—*Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products by the President of the United States of America*, *supra,* note 51.

trade measures in recent times, and resulted in vociferous criticism around the world. It was widely believed that the measures were imposed largely for political reasons, in order to bolster support for the Republican Party in a number of key states and districts in the November 2002 mid-term elections. Another justification advanced by some close to the Administration was that the measures were necessary to secure the votes of representatives from a number of steel-making districts in support of the bill giving the President trade negotiating ("Fast-Track") authority. [226]

Several countries immediately challenged the U.S. measures in the WTO.[227] The surrounding circumstances did not seem to provide a sound legal basis for the U.S. measures: it is widely considered that imports, which have declined in recent years in most categories,[228] are not the major problem facing the U.S. steel industry, but rather the high production costs and the enormous financial cost of the heavy pension obligations faced by the industry.[229]

The WTO Panel and the Appellate Body held that the safeguard measures violated GATT Article XIX and the SA in a number of respects, as discussed earlier in this Chapter. In brief, the United States was found to have failed (1) to show that unforeseen developments had led to the increase in imports; (2) for most products, to show that there was a causal link between the increased imports and any actual or threatened injury to the domestic industry; (3) for certain products, to show that there had been an increase in imports. In addition, the U.S. decision to exempt imports from some countries, including its NAFTA partners, from the measures after having considered the impact of imports from *all* sources in its injury determination, was found to be inconsistent with the requirement of Article 2.2 of the Agreement on Safeguards.[230] The United States withdrew the measures after the Appellate Body had affirmed the Panel decision finding it to be illegal.[231]

The steel safeguard measures appears to have violated the SA in certain other respects, although these were not challenged in the WTO case. For example, the U.S. International Trade Commission failed to provide an analysis of every injury factor listed under Article 4.2(a), such as productivity,[232] even though WTO panels and the

[226] Support for this view is provided by the fact that after the Congressional vote on the trade promotion authority legislation, the Administration granted a large number of exemptions from the measures, as described below. These exemptions were loudly criticized by U.S. steel producers and unions. *Bush Scales Back Tariffs on Steel,* N.Y. TIMES, Aug. 23, 2002, at A1.

[227] *United States—Definitive Safeguard Measures on Imports of Certain Steel Products—Request for the Establishment of a Panel by the European Communities*, WT/DS248/12 (May 8, 2002). Several other countries, including Korea, New Zealand, China, Norway, Switzerland and Brazil, subsequently joined the EC.

[228] According to the U.S. Census Bureau, U.S. imports of steel products decreased substantially from 34,433,707 metric tons in 2000 to 27,350,808 metric tons in 2001. U.S. Census Bureau, *U.S. Imports for Consumption of Steel Products (Census Basis)*, Exhibit 1: All Steel Products (released Feb. 21, 2002).

[229] A state of over-capacity has existed in steel industries worldwide, causing downward pressure on price. This condition has led many less efficient U.S. still mills to close down and even affected larger steel producers, resulting in significant job losses. The U.S. government has been responsive to the call for help from the steel industry, implementing trade measures (for instance, around half of current antidumping actions are on imports of steel products although steel accounts only for two percent of total imports) and offering subsidies. Prior to the U.S. safeguard action, an immediate, comprehensive import relief had been demanded by the steel industry. *Recommended Action to Solve the Steel Import Crisis*, Steel Manufacturers Association, May 9, 2001.

[230] *See* text accompanying note 71, *supra; United States—Wheat Gluten, supra* note 17, Panel Report at ¶ 8.176; Appellate Body Report at ¶ 98–100.

[231] WTO doc. G/SG/N/10/USA/6/Suppl.8 (December 12, 2003).

[232] The analysis of productivity is important particularly where a claim for injury is based on an increase in unemployment as in the steel case. The unemployment is an important motivator of the application of a safeguard measure as it often causes serious social and political problems. However, an increase in unemployment

Appellate Body have held that all of the listed factors must be considered.[233] Also, as noted above, the United States implemented the safeguard measures only fifteen days after it had been announced. This was even less than the eighteen-day period that was found to be insufficient under Article 12.3 of the SA in *United States—Line Pipe.*[234]

Prior to the Appellate Body's Panel decision, the United States had already removed a number of products, around 25 percent in terms of tonnage, from its safeguard list.[235] The action may have been prompted at least in part by proposals for significant retaliation by major U.S. trading partners such as the EU and Japan. The EU and Japan did not implement their retaliatory measures in light of these US concessions, followed by the subsequent withdrawal of the safeguards.[236]

The U.S. measures also triggered trade restrictions in other countries, as the EU and China applied provisional safeguard measures against steel imports to prevent a "diversion" of the imports from the United States to their own markets.[237] The EU justified its decision on the basis that the measures were necessary to prevent a large amount of steel exports from being diverted to the EU market from the U.S. market by the U.S. safeguard. However, this sort of "preventive" safeguard measure raises significant questions under the SA. Article 6 of the Agreement provides that a provisional safeguard measure may be applied "in critical circumstances where delay would cause damage which it would be difficult to repair . . . pursuant to a preliminary determination that there is *clear evidence* that increased imports have caused or are threatening to cause serious injury." (Emphasis added.) It is not clear that such critical circumstances existed for the EU steel industry. As the basis for the EU measure was the *possible* diversion of steel exports to its own market rather than the existence of current serious injury, the question is whether there was any *clear evidence* that increased imports were threatening to cause serious injury under the requirement of Article 6. According to the EC, the Community market constituted the only viable market for steel diverted from the United States, so that diversion would be inevitable.[238] However, at least one country, Korea, one of the major steel exporters, was reported as having increased its own domestic demand in order to absorb its surplus

may not be necessarily indicative of serious injury in the domestic industry where the increase in unemployment is a result of increasing productivity. The adoption of labor saving production and management technology may result in the corresponding increase in unemployment.

[233] *See Korea—Dairy Products, supra* note 17, ¶ 7.55; *Argentina—Footwear, supra* note 17, Panel Report at ¶ 8.206 and Appellate Body Report at ¶ 136.

[234] *United States—Line Pipe*, *supra* note 17, Appellate Body report at ¶ 107.

[235] United States Department of Commerce, *Department of Commerce and USTR Announce Final Set of Products to Be Excluded From Safeguard on Steel Products*, *Commerce News*, August 22, 2002 <www.ita.doc.gov/media>. The excluded products accounted for 320 million tons out of a total of 1,310 million tons subject to the original safeguards. Although this press release stated that the exclusion was based on U.S. consumer needs and on the determination that the exclusion would not undermine the effectiveness of the safeguard measures, it was widely considered that the purpose of the exclusion was to avoid serious trade conflict with the major trading partners of the United States. *Tariff Exemptions Expanded*, WASHINGTON POST, August 23, 2002, p. E02.

[236] The EC Commission "welcomed" the US exemption of certain steel products from its safeguard measures. Press release, Brussels, August 23, 2002. In the subsequent Report, the Commission stated that it did not propose to implement the first phase of the retaliatory measures (Annex I of Regulation 1031/2002) to be implemented before a decision from the DSB. *See* Commission of the European Communities, *Report to the Council from the Commission on Steel Re-balancing action* (September 24, 2002).

[237] The European Commission adopted a provisional safeguard measure. G/SG/N/7/EEC/1 (Apr. 2, 2002). China also adopted a provisional safeguard measure. G/SG/N/6/CHN/1 (May 23, 2002). The EC and China subsequently decided to apply definitive safeguard measures. G/SG/N/10/EEC/1 (Sep. 11, 2002), G/SG/N/10/CHN/1 (Nov. 5, 2002).

[238] Commission Regulation (EC) No 560/2002 of 27 March 2002, as amended by Commission Regulation (EC) No 950/2002 of 3 June 2002 and Commission Regulation (EC) No 1287/2002 of 15 July 2002.

steel production.[239] The EC also failed to provide an explanation as to why the expected damage would be difficult to repair.[240]

VI. Conclusion

Safeguard measures are gaining increasing importance in world trade. While 150 measures were reported over the GATT era, an average of three a year, as many as 26 definitive measures and 15 provisional measures were notified to the Committee on Safeguards between October 2001 and October 2002 alone.[241] The improved clarity and specificity of the safeguard rules under the new Agreement have contributed to stabilizing the safeguard mechanism, the misuse of which could have led to serious disruption of world trade.

WTO Panels and the Appellate Body have scrutinized disputed safeguard measures based on a close textual reading of the Safeguards Agreement and Article XIX. Strict application of the rules on safeguards is necessary to prevent the possible misuse of the measure that could stir protectionism, as shown in the recent U.S. steel case. On the other hand, excessively strict review of safeguard measures might induce Members to consider alternative trade restrictions that are far less desirable and undisciplined than safeguards, such as gray-area measures.

For this reason, the recent Appellate Body decisions that gave legal effects to the "unforeseen developments" provision in Article XIX raises concern, since it subjects Members to an ambiguous condition that does not seem to serve any useful purpose[242]. As discussed above, the negotiating history of the Safeguards Agreement indicates that Members intended the Agreement to be the sole embodiment of the safeguards discipline.[243] Perhaps the text of the Agreement should be modified to clarify this point.[244]

More broadly, the economic rationale of safeguard measures has been subject to controversy which is unlikely to be resolved in the near future. Nevertheless, a safeguard measure with well-paced liberalization plans can, at a minimum, provide an opportunity for economic adjustment and at the same time enable Members to avoid acute social and political problems that result from the surge of imports.[245] The need for safeguards has increased with the prohibition of gray-area measures. Well-regulated safeguard measures would reduce adverse effects of import restrictions on international trade and therefore prove a much better measure than those undisciplined as gray-area measures.

[239] *Chosun Ilbo* (newspaper), Apr. 23, 2002, <www.chosun.com>.

[240] As discussed above, panels and the Appellate Body have repeatedly found that the national authorities are obliged to provide reasoning for their conclusions. See the relevant discussion of the standard of review above.

[241] *See* Report (2002) of the Committee on Safeguards to the Council for Trade in Goods, G/L/583, dated Nov. 4, 2002.

[242] *See* the relevant discussion on this issue in Part V.*A supra.*

[243] The Appellate Body stated, "if they intended to expressly omit the clause, the Uruguay Round negotiators would have and could have said so in the Agreement on Safeguards. They did not." *Argentina—Footwear, supra* note 17, Appellate Body Report, ¶ 88. This view of the Appellate Body seems difficult to justify since the Agreement does not refer to the other relevant provisions of Article XIX whenever it modifies and repeals them. On the other hand, the express provision in the Agreement may be indeed necessary to avoid confusion and to ensure the stability of the safeguard mechanism.

[244] Modifications should also be considered concerning other ambiguous provisions. Lee (2002), *supra* note 17, Part III. *See also* the author's book, SAFEGUARD MEASURES IN WORLD TRADE, *supra* note 17, Appendix 4.

[245] *See* the discussion on economic adjustment in Part I *supra*.

Discussions on the adoption of a safeguard mechanism for trade in services are also under way.[246] Members have considered the Agreement on Safeguards as a model for the safeguard mechanism for the trade in services. However, the unique characteristics of services trade would require modifications of the safeguards discipline applicable to the trade in goods.[247]

Finally, it needs to be emphasized that the welfare of domestic consumers of society as a whole are inevitably compromised by the application of import restrictions.[248] Competent national authorities should therefore carefully balance the diverse and often-conflicting interests among various parties and should decide to apply a safeguard measure only sparingly as a last resort.[249] The consistent and effective application of the rules on safeguards is essential to preserving the integrity and stability of the international trading system. On the other hand, politically-motivated applications of safeguards lacking clear legal grounds will only invite protectionist responses from other countries and therefore will undermine the trade interests of all countries involved, as shown by the 2002 U.S. steel safeguard case.

BIBLIOGRAPHY

Berg, Andrew, *The Asia Crisis—Causes, Policy Responses and Outcomes,* International Monetary Fund Working Paper, WP/99/138 (Oct. 1, 1999).

Bhala, Raj & Kennedy Kevin, World Trade Law (Lexis Law Publishing, Charlottesville, Virginia, 1998), at 897–938.

Kenneth W. Dam, The GATT, Law and International Economic Organization (1970), at 106.

Didier, Pierre, Les pricipaux accords de L'OMC et leur transoposition dans law Communaute Europeene (Bruyland, 1997), at 271–272.

Freebain, J.S., *Pros and Cons of Temporary Industry Assistance,* Australian Journal of Agricultural Economics, 22(3) (1978), p. 194–205.

Hufbauer, Gary Clyde and Walda, Erika, *Steel Quotas: A Rigged Lottery* (Institute for International Economics, June 1999).

Jackson, John H., World Trade and the Law of GATT, (Indianapolis: Bobbs-Merill, 1969), at 555.

Jackson, John H., The World Trading System, (The MIT Press, Cambridge, Mass., 1997), p. 175–211.

Kennedy, Kevin C., *Voluntary Restraint Agreements; A Threat to Representative Democracy,* 11 Hastings Int'l & Comp. L. Rev (1987), at 34–35.

Lee,Y.S., Safeguard Measures in World Trade: *Legal Analysis* (Kluwer Law International, 2003).

Lee, Y.S. and Mah, Jai S., Reflections on the Agreement on Safeguards in the WTO, 21 W. Comp. 6, p. 25–31.

[246] Article X of the General Agreement on Trade in Services ("GATS") requires the holding of multilateral negotiations on the question of emergency safeguard measures.

[247] *See Emergency Safeguard Measures in GATS: The Applicability of Concepts applied in the WTO Agreement on Safeguards*—Note by the Secretariat, S/WPGR/W/8 (Mar. 6, 1996). *See also* Y.S. Lee, *Emergency Safeguard Measures under Article X in GATS—Applicability of the Concepts in the WTO Agreement on Safeguards*, 33 JOURNAL OF WORLD TRADE 47–59 (Aug. 1999) for further discussion of a safeguard mechanism for service trade.

[248] It has been estimated that the annual cost to American households per steel job saved of the proposed steel quota legislation in 1999 would have exceeded $800,000. Gary Clyde Hufbauer and Erika Wada, *Steel Quotas: A Rigged Lottery* (Institute for International Economics, Washington, D.C., June 1999).

[249] Domestic producers tend to be better organized than consumers and therefore are often in a better position to influence the government's decision. The national authorities should therefore seek out the opinions of consumers and other interested parties and consider their interests and positions as well.

Lee, Y.S., *Review of the First WTO Panel Case on the Agreement on Safeguards: Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products and Its Implications for the Application of the Agreement*, 33(6) J.W.T. (December 1999), at 27–46.

Lee.Y.S., *Emergency Safeguard Measures under Article X in GATS—Applicability of the Concepts in the WTO Agreement on Safeguards*, 33(4) J.W.T. 4 (August, 1999), at 47–59.

Lee, Y.S.,*Critical Issues in the Application of the WTO Rules on Safeguards—In the Light of the Recent Panel Reports and the Appellate Body Decisions,* 34(2) J.W.T. (April 2000), at 131–147.

Lee, Y.S. *Destabilization of the Discipline on Safeguards?—Inherent Problems with the Continuing Application of Article XIX after the settlement of the Agreement on Safeguards*, 35(6) J.W.T (Dec. 2001), at 1235–1246.

Lee.Y.S., *Revival of Gray-Area Measures?—The US-Canada Softwood Lumber Agreement: Conflict with the WTO Agreement on Safeguards,* 36(1) J.W.T (Feb. 2002), at 155–165.

Lee.Y.S., *Specific Safeguard Mechanism in the Protocol on China's accession to the WTO—A Serious Step Backward from the Achievement of the Uruguay Round,* 5 Journal of World Intellectual Property (Mar. 2002), at 219–231.

Lee. Y.S., *Safeguard Measures: Why Are They Not Applied Consistently With the Rules?—Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards,* 36(4) J.W.T. (Aug. 2002), at 641–673.

Mah, Jai S., *Injury and Causation in the Agreement on Safeguards*, 4 Journal of World Intellectual Property 3 (May 2001), at 373–382.

Ricardo, Principles of Political Economy and Taxation (1817)

Salvatore, Dominick, International Economics (1995), at 220–226, 258–260.

Schott, Jeffrey J., The Uruguay Round, An Assessment (1994), at 114.

Steel Manufacturers Association, *Recommended Action to Solve the Steel Import Crisis*, May 9, 2001.

Stewart, Terence, P.(ed.), The GATT Uruguay Round: A Negotiating History (1986–1992), (Kluwer Law and Taxation, The Hague, 1993), at 1717–1820.

WTO, Analytical Index: Guide to GATT Law and Practice, 6th Edition (WTO: Geneva, 1995), p. 515–559.

WTO, The Result of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (WTO: Geneva, 1995)

CHAPTER 19

THE GENERAL AGREEMENT ON TRADE IN SERVICES

Mary E. Footer and Carol George*

TABLE OF CONTENTS

I. INTRODUCTION 802
II. BACKGROUND 803
A. History and Development of Trade in Services 803
1. The GATT 803
2. Other International and National Fora 805
3. Regional Approaches to the Regulation of Trade in Services: European Communities and NAFTA 807
III. THE URUGUAY ROUND 811
A. Goals 811
1. The QUAD Members (United States, EC, Japan and Canada) ... 812
2. The Goals of Developing Countries 817
B. Course of the Negotiations 818
C. Overview of the Results 820
IV. THE AGREEMENT 820
Part I. Scope and Definition 822
A. Scope and Definition (Article I) 822
1. Definition 822
2. Scope 822
3. Modes of Supply 823
Part II. General Obligations 826
A. Most-Favored Nation (MFN) Treatment (Article II) 827
1. The Basic Rule 827
2. MFN Exemption 829
3. Contiguous Frontier Zones 831
B. Transparency (Article III and Article III bis) 831
C. Increasing Participation of Developing Countries (Article IV) 832
D. Economic Integration (Article V) 833
1. The Exemption 833
2. Substantial Coverage 833
3. Elimination of Discriminatory Measures 834
4. Notification and Examination 834
5. Developing Countries 835
6. Trade Creation 835

* Mary E. Footer, Deputy Director, Amsterdam Center for International Law, and Member, Department of International Law, Universiteit van Amsterdam, and Carol George, Attorney, Baker & McKenzie, London. With a contribution from Dale B. Honeck, Counsellor, WTO Services Division, on Domestic Regulation.

E. Labor Markets Integration Agreements (Article V bis) 835
F. Domestic Regulation (Article VI) 836
1. Unconditional Obligations 836
2. Conditional Obligations 837
3. Mandated Development of Regulatory Disciplines 837
4. Period Pending the Development of Regulatory Disciplines 838
5. Implementing the Domestic Regulation Mandate 839
G. Recognition (Article VII) 839
H. Monopolies and Exclusive Service Supplies (Article VIII) 841
I. Business Practices (Article IX) 841
J. Payments and Transfers (Article XI) 841
K. Restrictions to Safeguard the Balance of Payments (Article XII) ... 842
L. General Exceptions (Article XIV) 843
M. Security Exceptions (Article XIV bis) 845
Part III. Specific Commitments 846
A. Market Access (Article XVI) 846
1. Overview 846
2. The Relationship Between Market Access and National Treatment 847
B. National Treatment (Article XVII) 849
1. Overview 849
2. National Treatment and Modes of Supply 849
3. "Like Services and Service Suppliers" 851
C. Additional Commitments (Article XVIII) 853
Part IV. Progressive Liberalization 854
A. Negotiation of Specific Commitments (Article XIX) 854
B. Scheduling of Commitments (Article XX) 854
1. Overview 854
2. Horizontal Commitments 856
3. Sectoral Commitments 856
C. Classification of Services 864
D. Modification of Schedules (Article XXI) 865
Part V. Institutional Arrangements 865
A. Dispute Settlement Procedures (Article XXII and XXIII) 866
1. Trade in Services—General Application 866
2. Consultations (Article XXII) 866
3. Dispute Settlement and Enforcement (Article XXIII) 867
4. Specific Service Sectors 868
B. Council for Trade in Services (Article XXIV) 870
C. Technical Cooperation (Article XXV) 872
D. Relationship with Other International Organizations (Article XXVI) 872
Part VI. Final Provisions 873
A. Denial of Benefits (Article XXVII) 873
B. Annexes (Article XXIX) 874
V. DISPUTE SETTLEMENT CASES 874
A. Canada—Periodicals 875
B. EC—Bananas III 878
1. Effective Date of GATS Obligations 879
2. Application of the GATS 880
3. Service Suppliers 881

4. Scope of Article II: De Facto Discrimination 882
5. EC Licensing Procedures 883
C. Canada—Certain Measures Affecting the Automotive Industry 884
1. GATS Article I: Measures Affecting Trade in Services 886
2. GATS Article II:1 888
3. GATS Article XVII: Import Duty Exemption and CVA Requirements 889
D. Japan—Photographic Film and Paper (Kodak-Fuji) 890
E. Mexico—Telecommunications Services 891
1. Interconnection with a Major Supplier at Cost-Oriented Rates .. 891
2. Prevention of Anti-Competitive Practices 892
3. Access to and Use of Public Networks and Services on Reasonable Terms and Conditions 892
VI. THE GATS BUILT-IN AGENDA: COMPLETING THE FRAMEWORK 893
A. Special Negotiating Sessions 894
1. Overview 894
2. Progressive Liberalization and Current Negotiations 896
3. Outstanding Issues 897
B. Domestic Regulation 900
1. Legal Form of Regulatory Disciplines 901
2. Sectoral vs. Horizontal Disciplines 901
C. Emergency Safeguards, Government Procurement and Subsidies .. 902
1. Emergency Safeguard Measures ("ESMs") (Article X) 902
2. Government Procurement in Services (Article XIII) 904
3. Subsidies (Article XV) 905
D. Sectoral and Other Annexes 906
1. Annex on Article II Exemptions 906
2. Annex on Movement of Natural Persons 908
3. Annex on Air Transport Services 909
4. Proposed Annex on Tourism 910
E. Implementation Issues 911
VII. CONCLUSIONS AND FURTHER DEVELOPMENTS 911

Appendix A Classification Issues 913
1. Overview 918
2. Guidelines for the Scheduling of Specific Commitments under GATS 919
3. Committee on Specific Commitments 919
4. Cluster and Checklist Approaches 920
5. The Twelve W/120 Services Sectors 921
Appendix B Implementing the Domestic Regulation Mandate 942
1. Working Party on Professional Services 942
2. MRA Guidelines 942
3. Accountancy Disciplines 943
4. Working Party on Domestic Regulation 944

I. Introduction

The significance of the General Agreement on Trade in Services ("GATS")[1] cannot be overestimated. For the first time in history, this framework agreement extends multilaterally agreed commitments and rules to the area of international trade that has grown the fastest over the last fifteen years. It is estimated that the annual growth rate of exports of services during the period 1985–1999, measured on a balance-of-payments basis and primarily covering cross-border supply and consumption abroad, amounted to over nine percent per annum, while the growth in exports of goods amounted to 8.2 percent per annum.[2] In fact, based on a conservative estimate, trade in services would appear to have trebled in that fifteen-year period to $ 1.2 trillion in 1999 and now accounts for a quarter of all cross-border trade.

However, the actual extent of trade in services may be far greater due to the large and, often unmeasured, range of services that do not themselves cross national borders because it is instead the "service supplier" (branch or subsidiary of a foreign bank) or the "service consumer" (foreign tourist) that does. Linked to this is a further factor. The invisibility and intangibility of most types of services means that even when they do cross borders customs officials may not necessarily record them.[3]

The GATS raises a number of important issues. First, trade in services, while constituting a large sector of the global economy, may not be susceptible to adequate measurement. Second, a large proportion of trade in services penetrates deeply *inside* national economies, so that the GATS influences national domestic laws and regulations in a way that the GATT goods régime never has, simply because it is largely concerned with border measures. The closest analog in the GATT to the central challenge in the field of services trade is to be found in the Agreement on Technical Barriers to Trade, which is designed to curb the trade-distorting impact of domestic regulations and standards.[4]

A third point is that GATS still has a long way to go in terms of liberalization of international services trade. The Uruguay Round services package was simply a beginning in terms of the number and scope of services commitments that Members have thus far taken to open their markets, comparable to the initial limited tariff-cutting undertaken when the GATT was launched in 1947. At the time of its completion at the end of Uruguay Round in 1994, the GATS was heralded as an important attempt to create a regulatory framework for the liberalization of trade in services,[5] but it is far from complete; significant barriers to services trade still exist. In fact, many of the commitments merely

[1] *General Agreement on Trade in Services*, Apr. 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION ("WTO Agreement"), Annex 1B, 33 INTERNATIONAL LEGAL MATERIALS (I.L.M.) 1125 (1986), *reprinted in* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATION (1999) ("THE LEGAL TEXTS") at 284–319.

[2] *Trade in Services: Using Openness to Grow*, in GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES, World Bank (2002), chapter 3, at 69, 71 (source *Fifth Balance of Payments Manual* IMF, 1993) (" *IMF BoP Rev. 5*" or " *BPM5"*)).

[3] *See id*. at 90, footnote 3.

[4] *Agreement on Technical Barriers to Trade*, Apr. 15, 1994, *WTO Agreement, Annex 1A*, *Article* 2.2., which requires that domestic standards should neither create unnecessary obstacles to international trade nor be more trade-restrictive than necessary to fulfill a legitimate objective (health, safety, environmental, etc.), taking account of the risks non-fulfillment would create.

[5] John H. Jackson, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 306 (1997); Geza Feketekuty, *Assessing and Improving the Architecture of GATS* in GATS 2000, NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 85 (Pierre Sauvé and Robert M. Stern eds. 2000); and Mary E. Footer, *The International Regulation of Trade in Services following Completion of the Uruguay Round*, 29(2) INTERNATIONAL LAWYER 453, 481 (1995).

bound existing levels of market access rather than extending them and thus further liberalization is still needed. Members are being asked to negotiate on the withdrawal, or phasing out, of domestic regulatory barriers, which are often opaque, and to deal with the attitudes and co-operation of national regulators towards regulatory reform. Unlike tariff negotiations, there are no quick and easily discernible gains to be made in negotiations on trade in services. Instead, the process is a long drawn-out one and gains can only be made incrementally.

The real difficulty that WTO Members face with respect to the GATS is that it requires them to engage in a delicate balancing act. While negotiating further market access and additional commitments on services and service suppliers[6] they must disclose their discriminatory or burdensome domestic regulatory requirements,[7] decide whether to commit to their withdrawal or phase them out, then bind the results in national schedules[8] and apply those commitments as far as possible on an MFN-basis.[9] The GATS is probably best characterized as a broad set of multilateral negotiations on the removal of domestic regulatory barriers to trade in services.

There are also methodological and systemic problems with achieving rapid progress on services liberalization and multilateral regulation. One is a lack of adequate information on services trade, particularly statistical data. Additionally, a lot of work remains to be completed on classification and scheduling, although there have been some noteworthy developments in this area. Another factor is that up until now there have been relatively few services disputes that have gone all the way to panel or Appellate Body rulings. Members are therefore left with few pointers as to how existing GATS disciplines, such as MFN and national treatment, might be interpreted and applied when addressing future complaints.

II. Background

A. History and Development of Trade in Services

1. The GATT

Attempts to bring services under international discipline spanned several decades. In 1954 the GATT Contracting Parties took a decision to consider proposals that would ensure that the principle of non-discrimination applied in the field of transport insurance, since in situations where customs valuation was based on c.i.f. (cost, insurance, freight) prices, transport insurance and freight costs would be covered by Article VII of the GATT. The subsequent review eventually led to a Recommendation on "Freedom of Contract in Transport Insurance" that was adopted by the GATT Contracting Parties in 1959.[10]

However, early GATT attempts to regulate services were isolated events since they were confined to specific services issues (insurance and transport) that were bound up with the movement of goods across borders. It was not until the GATT Tokyo Round of Multilateral Trade Negotiations (1973–1979) that the U.S. Government took the initiative in putting services on the trade agenda. Even so, initial progress was slow and limited to conducting research on trade in services. This was due largely to the fact that available

[6] GATS *Article XIX* (Negotiation of Specific Commitments).
[7] Feketekuty, *supra* note 5, at 93.
[8] GATS *Article XX* (Schedules of Specific Commitments).
[9] GATS *Article II* (Most-Favoured-Nation Treatment).
[10] *Freedom of Contract in Transport Insurance*, May 27,1959, BISD 8th Supp. 26 (1960).

statistical information on services was either non-existent or, where it was kept, was divorced from statistics relating to trade in goods. For example, governments traditionally recorded their international trade in services in terms of balance of payment statistics, wherein services transactions between resident and non-resident transactions were listed alongside other foreign exchange receivables such as returns from foreign investment, royalties and other non-resident transactions, or so-called "invisibles."[11]

The process of building a consensus on trade in services among GATT contracting parties began slowly and was strongly influenced by the United States, which was instrumental in persuading the Organization for Economic Cooperation and Development ("OECD") Trade Committee to study trade in services.[12] At approximately the same time, the GATT Consultative Group of Eighteen ("CG-18")[13] was considering its future as a small but representative group of Contracting Parties, which met at regular intervals to discuss existing and emerging trade policy issues, on the basis of documentation provided by the Contracting Parties, or studies prepared by the Secretariat, one issue being trade in services.[14] At its meeting in 1980, the CG-18 subsequently issued a report recommending that trade in services might be a "proper concern of the GATT" despite a divergence of views among its members as to the nature, scope and complexity of services and thus the feasibility of extending GATT to encompass trade in services.[15]

Following the lead of the United States in the matter, the Ministerial Declaration adopted at the thirty-eighth session of the GATT Contracting Parties in 1982, recommended that those GATT Contracting Parties with an interest in services trade should undertake national examinations of the services sector in their own countries, in addition to compiling and distributing information among themselves on the most uniform basis possible, prior to the next review that had been scheduled for 1984.[16]

At the 1984 Session of the GATT Ministerial Council, the discussion regarding inclusion of trade in services on the trade agenda became divided over the question of the exchange of information and a U.S. proposal for the establishment of a working party on the matter. The U.S. proposal was supported by Canada, Israel, and Sweden (on behalf of the Nordic countries).[17] Argentina, Egypt, India and Cuba, broadly representing

[11] *See* Part III.B. *infra*, for a discussion of the implications of this statistical record-keeping when it came to assessing trade flows and its impact on the definition of services trade leading up to formal negotiations on trade in services.

[12] Bernard Ascher, *Multilateral Negotiations on Trade in Services: Concepts, Goals, Issues*, 19 GA. J. INT'L & COMP. L. 392, 395 (1989).

[13] The Consultative Group of Eighteen ("CG-18") consisted of eighteen GATT Contracting Parties and was formed by a Decision of the GATT Council in 1975 (*see Decision of the Council*, GATT Doc. L/4204 (July 11, 1975), BISD 22nd Supp. 15–16 (1974–1975). Its mandate was to assist the Contracting Parties of the GATT by following international trade developments, forestalling disturbances that threatened the multilateral trading system and monitoring the international adjustment process and coordination between GATT and the IMF.

[14] *Report of the Consultative Group of Eighteen to the Council of Representatives*, GATT Doc. L/5066, BISD 27th Supp., 68 (1979–1980).

[15] *Report of the Consultative Group of Eighteen to the Council of Representatives*, GATT Doc. L/5210, BISD 28th Supp., 71, 74 (1980–1981).

[16] *Ministerial Declaration*, GATT Doc. L/5424 (November 29, 1982), BISD 29th Supp., 9, 21–22 (1983). For a detailed overview of the interpretative "fall-out" from the 1982 *Ministerial Declaration*, the process of the national services studies and the subsequent debate on whether trade in services should be included in the GATT negotiations, *see* Jimmie V. Reyna, *Services*, in II THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986–1992) 2346–2358 (Terence P. Stewart ed. 1993).

[17] Reyna, *id.*, at 2352.

developing GATT contracting parties on the matter, were opposed. They believed the formation of a working party to be premature because the mandate in the 1982 Ministerial Declaration called for informal consultations and the exchange of information process had not yet been completed.[18] The EC representative questioned the GATT Secretariat's limited activity in services issues.[19]

Eventually the process of informal consultations, including review of the results of national services studies, won the day despite a heated debate between the United States and developing countries on the matter. In April 1985 twenty-five OECD members resolved that GATT multilateral negotiations on trade in services should be held as soon as possible. Eventually after some stalling, mostly by developing GATT contracting parties, the Preparatory Committee (set up at the annual GATT meeting in 1985) was instructed to identify 'the subject matter, modalities for, and participation in trade negotiations'.[20]

Following the work of the Preparatory Committee, the U.S. proposal to include services in the next round of GATT talks was endorsed by the EC, Japan, and Canada at the meeting of the Quadrilateral Trade Minister's conference held in Sintra, Portugal on September 5 and 6, 1986.[21] Several weeks later, an agreement to include services in the negotiations was reached by the GATT Contracting Parties and recorded as part of the *Ministerial Declaration of the Uruguay Round*, adopted at Punta del Este,[22] which launched the MTN. The overall objective of negotiations on services was described as follows:

> To establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying services and shall take into account the work of relevant international organizations.

The *Ministerial Declaration* also established a Group on Negotiating Services that began its work based on a five-point agenda, for the initial phase of the negotiations.[23] The negotiations were to include: (i) definition of services and gathering of statistical data on services; (ii) establishment of the broad concepts on which the principles and rules for trade in services, including possible disciplines for individual sectors, might be based; (iii) a multilateral framework and coverage of services trade; (iv) determination of the relationship of existing disciplines and arrangements to trade in services; and (v) establishment of a regulatory framework for services dealing with measures and practices contributing to, or limiting, the expansion of trade in services to which conditions of transparency and progressive liberalization might be applied.

2. Other International and National Fora

The development of regulation of international trade in services has not been the province of the GATT/WTO system alone. Some of the earliest work, particularly on the economic and trade impact aspects of the sector, was undertaken in other *fora*, most notably as we have already seen at the OECD. Based on an earlier report by a high level group of

[18] *Id. See also Minutes of Meeting of the Council*, GATT Doc. C/M/183 (December 10, 1984), ¶¶ 41–45.
[19] Reyna., *supra* note 16, at 2352.
[20] *Id.* at 2355.
[21] *Id*. at 2358.
[22] *Ministerial Declaration on the Uruguay Round*, Declaration of September 20, 1986 BISD 33rd Supp. 19, 28 (1986), *reprinted in* 25 I.L.M. 1623 (1986).
[23] Annex 4 to the *Ministerial Declaration*, *id.* at 48–49.

experts,[24] the OECD launched a work program on trade in services in the early 1980s,[25] which led to the production of a key study that eventually came to form the basis for including services in multilateral trade negotiations.[26]

The United Nations Conference on Trade and Development ("UNCTAD") also undertook similar groundwork on trade in services prior to the Uruguay Round MTN, focusing mostly on the market for trade in services from a developing country perspective. Just prior to the launch of the Uruguay Round, a study by the UNCTAD Secretariat concentrated on the role of services in the context of growth and development of the domestic economy and issues relating to services in the international context of relevance to the development process, with particular emphasis on public interest consideration and the role of services regulation, services in the international trade context, and the existing framework and proposals for action.[27] This stock-taking exercise sought to cover the landscape of services trade as it existed on the eve of the Uruguay Round, to note (1) the studies, institutional and organizational research on the matter, (2) the relative role of actors such as transnational corporations, international and various international organizations and programs involved in the field of services, and (3) the treaty-based approaches (multilateral and bilateral) that regulated conduct of States in particular services sectors.

The UNCTAD report concluded with a set of recommendations to its Trade and Development Board concerning any comprehensive multilateral co-operation framework for development of trade in services.[28] The recommendations were of the "soft" type and included: setting specific goals in the areas of training and research, external financing, transfer of adequate technology and technical assistance, as well as reaching agreed principles on migration; commissioning studies on the role of services in the development of individual economies; and providing for the improved and harmonized collection of services data at both the national and international level.[29]

Similarly, and not insignificantly, the International Chamber of Commerce ("ICC") played a key role in developing an international consensus among its members in the business community from both developed and developing countries in support of multilateral trade negotiations aimed at liberalization of trade in services.[30] In 1981, a full five years ahead of the launch of the Uruguay Round, the ICC urged governments of its members countries "to enter into reciprocal and mutually advantageous undertakings to reduce impediments to international trade in services" since this was "the best guarantee for the continued growth of international trade in both visibles and invisibles."[31] In its view, free trade in services was "the standard against which the liberalization process should be measured."[32]

Additionally, in some countries service industry groupings helped raise public interest in services generally and the interest of the business community in particular. Alongside promoting the interests of their members, such organizations as the U.S.-based

[24] *Report by the High Level Group on Trade and Related Problems*, OECD (1972). *See* Geza Feketekuty, International Trade in Services: An Overview and a Blueprint for Negotiations 297–298 (1988).
[25] Murray Gibbs, *Continuing the International Debate on Services* 19 J. World Trade Law 199, 200 (1985).
[26] *Elements of a Conceptual Framework for Trade in Services*, OECD, Paris (1987); *see* for details Feketekuty, *supra* note 24, at 314–318.
[27] UNCTAD Secretariat, *Services and the Development Process*, 42 UN Doc. TD/B/1008/Rev.1 (1985)
[28] *Id*. at xi.
[29] *Id*.
[30] *See* Feketekuty, *supra*, note 24, at 310, for details.
[31] *Id*. at 71 and 310.
[32] *Id*.

Coalition of Services Industries, the British Invisible Exports Council, and its Liberalization of Trade in Services Committee, the European Community Services Group, and the Japanese Business Federation (Nippon Keidanren) provided valuable inputs into the formulation of government policies on developing overall concepts, issue and definitions of services, which could be considered in negotiating a multilateral framework for the regulation of services.[33]

3. Regional Approaches to the Regulation of Trade in Services: European Communities and NAFTA

Before discussing the Uruguay Round negotiations on services, it may be helpful to outline the approach taken to services trade in the two most significant regional trade arrangements in the world, the European Communities and the North American Free Trade Agreement ("NAFTA").

(a) European Communities. The EC approach to the regulation of trade in services is somewhat different to that of the GATS and that of the NAFTA.[34] One reason for this is that the EC has pursued different objectives in the field of services, a key one being the completion of the internal market. In the European Communities the market in services is based on principles derived from the basic freedoms that are fundamental to the European internal market.

The fundamental principle of "free movement of services" is principally dealt with in Title III of the Treaty of Rome as amended,[35] alongside "free movement of persons" and "free movement of capital" although the freedom to provide services (Chapter 3 of Title III)[36] is considered subsidiary to the chapter on "right of establishment" (Chapter 2 of Title III).[37] Neither the GATS nor the NAFTA adopt a similar approach with respect to right of establishment.

However, where the EC Treaty system comes close to the GATS and the NAFTA is in singling out those service sectors that are most sensitive, or that provide crucial infrastructures for other services, the key ones being financial services, transport and telecommunications. Thus, under the EC Treaty the all-important transport sector is regulated separately in Title V[38] although it should be noted that no article in the EC Treaty precludes the application of the provisions on freedom of establishment (Chapter 2 of Title III) from applying to transport.[39] Similarly, banking and insurance

[33] PHEDON NICOLAIDES, LIBERALIZING SERVICE TRADE: STRATEGIES FOR SUCCESS, 89 (CHATHAM HOUSE PAPERS) (1989).

[34] The following sections draw in part on Mary E. Footer *Global and Regional Approaches to the Regulation of Services*, 43 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 661–678 (1994).

[35] TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C224) 1 (1992), ("EC Treaty"), *Article 50*, *reprinted* in EUROPEAN UNION CONSOLIDATED TREATIES, Luxembourg (1997), 59.

[36] The principle *Article*s are EC Treaty *Article 49* and EC Treaty *Article 50*, *id*. 59.

[37] For example EC Treaty *Article 43*, which prohibits any "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State," *id*. 57. *See* for an overview of the relationship between trade in services and freedom of establishment and the principle of non-discrimination, PIET EECKHOUT, THE EUROPEAN INTERNAL MARKET AND INTERNATIONAL TRADE 13–18 (1994), and Piet Eeckhout, *Constitutional Concepts for Free Trade in Services*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES (Gráinne de Búrca and Joanne Scott eds. 2001).

[38] Principally in EC Treaty *Articles 70–80*, *supra* note 35, 67–69.

[39] *See* Case C-466/98, *Commission* v. *United Kingdom*, judgement of November 5, 2002, *not yet reported*, ¶ 40; similarly in the following cases of even date: Cases C-467/98 *Commission* v. *Denmark*, ¶ 123; C-468/98 *Commission* v. *Sweden*, ¶ 114; C-469/98 *Commission* v. *Finland*, ¶ 119; C-471/98 *Commission* v. *Belgium*, ¶ 132; C-472/98 *Commission* v. *Luxembourg*, ¶ 123; C-475/98 *Commission* v. *Austria*, ¶ 131; and C-476/98 *Commission* v. *Germany*, ¶ 145 *all not yet reported*.

services, in so far as they are connected with the movement of capital, are taken up elsewhere in relation to the free movement of capital and payments (Chapter 4 of Title III).

Additionally, EC Treaty Article 49 prohibits restrictions on the freedom to supply services by nationals of one Member State (State A), who are established in another Member State (State B), other than the one where the service is consumed (State C).[40] This leads to the result that where a service is supplied on an "establishment basis", which requires a commercial presence, the activity is covered by the rules governing the "right of establishment" (EC Treaty Article 43) and not those pertaining to "freedom to provide services" (EC Treaty Articles 49–50). In all other cases, the rules on "freedom to provide services" apply. Indeed, there is even a provision in Article 49 of the EC Treaty that allows for the extension of the provisions of Chapter 3 of Title III to third country nationals on certain conditions. Article 50 of the EC Treaty makes it clear that activities are treated as services where they are not covered by other provisions relating to free movement of goods, free movement of persons and free movement of capital.

"Freedom to provide services" in the EC must not be impeded by rules capable of hindering, directly or indirectly, actually or potentially, intra-Community trade, including such restrictions on the provision of services by virtue of the nationality of the person or the fact that the person does not habitually reside in the national territory or any other measure which may prevent or otherwise obstruct the activities of the person providing the service.[41] Just as in the famous *Cassis de Dijon* case of 1979,[42] where the European Court of Justice extended the scope of free movement of goods to "indistinctly applicable measures" or "equivalent measures" (and also "inaugurated the principle of mutual recognition"[43]), as well as introducing the concept of "mandatory requirements" that may justify such restrictions on certain occasions, the Court has also dealt with the freedom to provide services and equivalent measures in a similar fashion.

In the *Säger* case of 1990[44] the matter concerned a piece of legislation that was equally applicable to domestic and foreign service providers. The Court in that case held that EC Treaty Article 59 (now EC Treaty Article 49) requires not only the elimination of all forms of discrimination against a service provider on grounds of nationality but also the abolition of any restriction, irrespective of whether it applies without distinction to national service providers and those of Member States, when it is likely to impede the activities of a service provider established in another Member State where that service is lawfully carried out. Even so, as in *Cassis de Dijon*, the *Säger* case also determined that there might be permissible restrictions that are justifiable on grounds of "imperative reasons relating to the public interest" (a sort of public policy

[40] EC Treaty, *Article 49*, *supra* note 35. *See* Case 33/74, *Johannes Henricus Maria van Binsbergen* v. *Bestuur van Bedrijfsvereniging voor de Metaalnijverheid* (1974) ECR 1299 (*Van Binsbergen*); Case 39/75, *Robert Gerardus Coenen et al.* v. *Sociaal-Economische Raad* (1975) ECR 1547; Case 205/84, *Commission* v. *Germany* (1986) ECR 3755 and Case C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avocati e Procuratori di Milano* (1995) ECR I-4165.

[41] Case 33/74, *Van Binsbergen*, (1974) ECR 1299, at 1309. This case reflects the approach to import restrictions on goods that the Court dealt with in Case 8/74, *Procureur du Roi* v. *Dassonville*, (1974) ECR 837.

[42] Case 120/78, *Rewe* v. *Bundesmonopolverwaltung für Branntwein* (1979) ECR 649.

[43] *See* Eeckhout, *supra* note 37, at 213.

[44] Case Cg76/90, *Säger* v. *Dennemeyer* (1991) ECR 1-4221.

exemption) provided that there is no discrimination and the principle of proportionality is applied.[45]

However, such a public policy (including public safety) argument may not always win the day. In the transport sector, with respect to air services, the European Court of Justice has held in a series of cases involving the conclusion of so-called "open skies" agreements with third countries (*in casu* the U.S.), that no restrictions may be placed on "ownership" and "effective control" of Community airlines, as part of the exercise of the freedom of establishment by nationals of Members States on the basis of EC Treaty Article 52 (now EC Treaty Article 43) and companies or firms, which are assimilated to them on the basis of EC Treaty Article 58 (now EC Treaty Article 48).

(b) NAFTA. The North American Free Trade Agreement ("NAFTA")[46] is similar to the GATS when it comes to regulating trade in services. Building on the experience of the earlier Canada-United States Free Trade Agreement ("CUSFTA"),[47] which it largely superseded,[48] it contains general provisions with respect to (cross-border) trade in services,[49] i.e. "measures respecting . . . the production, distribution, marketing, sale and delivery of a service; . . . the purchase, or use of, or payment for a service" and "the presence in its territory of a service provider of another Party."[50]

As in the case of the GATS, Chapter Twelve of the NAFTA sets out the basic principles governing trade in services, together with a number of sector-specific annexes, which contain extensive reservations, including reservations relating to professional services (especially the legal and engineering professions)[51] and transportation (especially land transportation).[52] There are also some service sectors or substantive issues that are excluded entirely from coverage in the NAFTA, namely air services, public procurement (including procurement by federal or state entities) and government subsidies.[53] Just as in the case of the GATS and the EC Treaty, two specific service sectors are treated separately in the NAFTA due to the sensitivity of the sectors and their pivotal role in the economy

[45] *See* Eeckhout, *supra* note 37, at 214.

[46] *North America Free Trade Agreement, Dec. 8–17, 1992, Canada-Mexico-United States*, 32 I.L.M. 289 (containing chs. 1–9) and 32 I.L.M 605 (containing chs. 10–22) (1993), entered into force Jan. 1, 1994 ("NAFTA").

[47] *Free Trade Agreement, Jan. 2, 1988, Canada-United States*, 27 I.L.M. 281 (1989) ("CUSFTA").

[48] D.A. Ruth, *The US-Canada Services Agreement: Review and Assessment* in THE CANADA-UNITED STATES FREE TRADE AGREEMENT: THE IMPACT ON SERVICE INDUSTRIES at 45 (Earl H. Fry and Lee H. Radebaugh eds., 1988). It should be noted that the NAFTA in turn influenced the course of negotiations on GATS during the Uruguay Round.

[49] The heading to Chapter Twelve entitled "Cross-Border Trade in Services" is somewhat misleading if read in the context of the GATS. The definitions clause of NAFTA at *Article 1213* makes clear that what is intended here is more than just Mode 1 (cross-border supply) under the GATS, when it states that "cross-border provision of a service or cross-border trade in services" means the provision of a service:

(a) from the territory of a Party into the territory of another Party;
(b) in the territory of a Party by a person of that Party to a person of another Party, or
(c) by a national of a Party in the territory of another Party,

but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment—Definitions), in that territory.' In other words it may not necessarily include Mode 3 (commercial presence), or establishment-based services, as found in the GATS.

[50] NAFTA *Article* 1201 : 1, *supra* note 46; MICHAEL J. TREBILCOCK AND ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE, 2nd edition (1999), chapter 11, Trade in Services, 276–277 and endnote 20.

[51] NAFTA *Article 1210.5*, especially Section B, *supra* note 46; TREBILCOCK AND HOWSE, *id*.

[52] NAFTA *Article 1212*.

[53] NAFTA *Article 1201.2*, ¶¶ (b) (c) and (d); TREBILCOCK AND HOWSE, *supra* note 50, 277;

under sector-specific chapters. One of these is NAFTA Chapter Thirteen, which covers the telecommunications sector,[54] and the other is NAFTA Chapter Fourteen, which deals with financial services.[55]

The NAFTA adopts a "negative list" approach to the listing of obligations under the Agreement, i.e. reservations are noted only in respect of those service sectors, and for those measures within certain sectors, to which one of the parties does not want certain obligations to apply.[56] This is, *prima facie*, the reverse of the "positive listing" approach taken in the GATS, in which Members undertake no obligation to liberalize a particular sector unless it has been specifically itemized in the Schedule. In fact, the GATS approach is a "hybrid" of the two, for once a positive sectoral commitment is made, it is considered to be a full commitment—to permit delivery of services by each of the four modes—unless limitations are further specifically itemized (See Part IV of this chapter, commentary on GATS Article XX below for further details on scheduling of services commitments in the GATS). While one view criticizes the "negative" listing approach for its facilitation of "carve-outs", the NAFTA approach is generally considered most conducive to liberalization because all items that are not specifically identified are automatically liberalized. This approach also corresponds to that used most widely in relation to foreign direct investment, and is thus one with which government officials are familiar.

While the NAFTA rules build upon the earlier CUSFTA, there are two significant differences.[57] First, unlike the CUSFTA the NAFTA contains an explicit MFN obligation that calls upon parties to NAFTA to accord each other's service providers treatment no less favourable that they accord to service providers of any other party or of a non-party (Article 1203).[58] Second, both national treatment (Article 1202)[59] and MFN (Article 1203) in the NAFTA are applied to services generally although the national treatment and MFN treatment provisions are repeated specifically for the financial services sector.[60]

Where the NAFTA differs from the rules under the EC Treaty is on "right of establishment"(Article 43 of the EC Treaty) in not requiring that a service supplier from another NAFTA partner maintain a residence or office in its territory as a condition for supplying a service (Article 1205).[61] However, where the NAFTA approximates the EC rules is in requiring that a party to NAFTA shall endeavor not to use measures such as professional licensing or certification procedures as a barrier to entry in their respective services markets (Article 1210),[62] thereby applying the principle of non-discrimination as in EC law. Even so, parties to the Agreement are entitled to maintain certain existing discriminatory measures, subject to liberalization commitments, as set out in Annex I to

[54] NAFTA, Chapter Thirteen.

[55] NAFTA, Chapter Fourteen.

[56] Trebilcock and Howse, *supra* note 50, at 277; Frederick M. Abbott, Law and Policy of Regional Integration: The NAFTA and Western Hemispheric Integration in the World Trade Organization System 1, 80 (1995) .

[57] TREBILCOCK AND HOWSE, *id.*, 276.

[58] NAFTA *Article 1203*. The MFN obligation for financial services is contained separately in Chapter Fourteen, at NAFTA *Article 1406*, *id*, 658. There is no separate MFN obligation for telecommunications in Chapter Thirteen.

[59] NAFTA *Article 1202*. The national treatment obligation is repeated for the separate sector of financial services, regulated in Chapter Fourteen, at NAFTA *Article 1405*, which applies to foreign financial investors. There is no separate national treatment obligation for telecommunications in Chapter Thirteen.

[60] *See supra* note 58.

[61] NAFTA *Article 1205.*

[62] NAFTA *Article 1210*; *see also* Footer, *supra* note 34, at 671.

NAFTA,[63] as well as to adopt and maintain certain other discriminatory measures, which are not subject to future liberalization, in accordance with NAFTA Annex II.[64]

Another aspect of the NAFTA, which is not reflected in either the EC or the GATS, is a "federal clause" in Article 1206. In particular, this allows the United States and Canada, where state and provincial governments respectively may be extensively involved in the regulation of services (for example professional services), to list reservations in an Annex that reflect the regulatory competence of a state or province in the matter.[65] By contrast under GATS, where individual states and/or provinces in the territory of a WTO Member retain a degree of regulatory competence, the Member in question cannot make such a reservation but must list the geographical scope of the measure (and related restrictions for the territory covered) as a limitation on national treatment under one of the modes of supply (often mode 3—commercial establishment). (*See* Part IV of this chapter, commentary on GATS Article I below).

(c) Summary. Trade in services under the EC Treaty is allocated discrete coverage under Articles 49 and 50 but the subject matter has always been considered subsidiary, even residual in character to the free movement of goods, free movement of capital and the right of establishment,[66] in contrast to the NAFTA and the GATS. In the case of both the GATS and NAFTA, measures relating to trade in services are determined in accordance with the means (or mode) by which they are supplied.

However, a similarity between the three regimes is that each recognizes that there may be a need to provide for more specific rules in certain sectors, which have been in existence for some time or are particularly sensitive or constitute key infrastructural sectors. In the case of both GATS and NAFTA telecommunications, transportation, and financial services are accorded separate treatment with more detailed rules in separate chapters or annexes respectively. In the case of the EC Treaty only transport is covered under a separate Title V.

III. The Uruguay Round

A. Goals

The goals of the negotiating parties with respect to the GATS varied enormously in the early stages of the Uruguay Round. In the following subsections, the goals of four major trading partners—the United States, the EC, Japan and Canada (known as the Quad)—and those of the developing countries are reviewed. The United States (and to a lesser degree Canada) argued strongly in favor of the liberalization of trade in services in general, while remaining blatantly protectionist in some services sectors, such as maritime transport and air transportation. The EC's goals largely reflected the experience gained thus far with the freedom to provide services under the Treaty of Rome (discussed in Part II. A 3 above). By contrast Japan's goals were less ambitious and were concentrated mainly in specific sectors such as transport, tourism and financial services.

[63] NAFTA *Article 1206:1* and Annex I.
[64] NAFTA *Article 1206:3* and Annex II; ¶ ABBOTT, *supra*, note 56, 80.
[65] NAFTA *Article 1206:2*.
[66] Eeckhout, *supra* note 37, at 213, ascribes this to the simple fact that when the founding Treaty of Rome was drafted trade in services had not yet been conceptualized, even to the extent that the concept of services *per se* did not exist and services occupied nowhere near as prominent a position in industrialized countries as they do today.

1. The QUAD Members (United States, EC, Japan and Canada)

(a) The United States. As discussed above, the U.S. Government had given priority to trade in services issues even before the launch of the Uruguay Round, encouraging its fellow GATT contracting parties to carry out research in the services sector. During the Reagan administration, under the guidance of United States Trade Representative ("USTR") William Brock, the U.S. Government established a Services Advisory Committee to support collaboration between government and industry in the field of services. The U.S. administration also supported the formation of an international services industries coalition in order to lend some weight to liberalization initiatives which could be offset against other sectors where strong protectionist interests prevailed, such as the agriculture and textiles and clothing sectors.

In April 1981 the Reagan Administration's Trade Policy Committee set in motion a services work program, using existing bilateral arrangements with other governments, in order to resolve trade problems that the private sector had identified. In this way the Administration hoped to develop a domestic and international consensus on services trade in preparation for future multilateral negotiations and to review domestic legislative provisions aimed at achieving reciprocity for U.S. services industries. The actual policy objectives on the eve of the 1982 GATT Ministerial Meeting which established the work program that led to the launch of the Uruguay Round four years later can best be summarized in the statement issued by USTR Brock, in which he identified trade expansion and the reduction of protectionist barriers to trade in services as the two most important goals of the future round.[67] These twin objectives were to be achieved through the development of a sound institutional environment for services and a negotiating process aimed at reducing, or eliminating, barriers to services trade.

More concretely, the USTR envisaged a framework, or umbrella, agreement on services that would cover substantive principles on non-discrimination, as embodied in the national treatment standard and market access provisions, as well as disciplines essential to control state-sanctioned monopolies of services providers, and procedural rules on transparency and dispute settlement.[68] It was envisaged that most-favoured-nation, or MFN, treatment would apply to all signatories of the framework agreement on services. National treatment would also be fundamental to any agreement and would have to be bound as a general obligation.

Trade in services would need to be defined as broadly as possible, including the area of services trade that involved significant aspects of investment, i.e. those services activities that required a commercial presence, or a right of establishment. These aspects were considered crucial by the United States if it were to achieve enhanced levels of market access. The U.S. administration further accepted the existence of national monopolies in services but it proposed that the sale of such services to foreign-based consumers should be on a non-discriminatory basis. The United States also wanted to see a number of specialized, self-contained agreements put in place that would be dedicated to specific service areas, which incorporated and extended the basic rules contained in the GATS

[67] *Senate Subcomm. on International Finance and Monetary Policy of the Senate Banking, Housing and Urban Affairs Committee*, 98th Cong. (1981) (statement by Ambassador Brock, U.S. Trade Representative); *see also* William E. Brock, *A Simple Plan for Negotiating Trade in Services*, 5 THE WORLD ECONOMY 229, 238–39 (1982).

[68] FEKETEKUTY, *supra* note 24, especially chapter 10 (*A General Agreement on Trade in Services*) at 214–228.

framework agreement and which would better fit the exigencies of their specific sectors, such as civil aviation, telecommunications and shipping.[69]

By the time the GATT Trade Negotiations Committee met at ministerial level in December 1988, during the Montreal Mid-Term Review,[70] the USTR had narrowed the basic principles governing trade in services to just four issues—national treatment, establishment, non-discrimination and transparency. At the same time it was becoming increasingly apparent that prior multilateral agreements on trade in services in certain sectors like civil aviation and maritime transport were going to raise difficulties. In the civil aviation sector this was due to the large number of bilateral air transport agreements that regulated specific air routes, landing rights and, in some cases tariffs, between states on a reciprocal and preferential basis. In the maritime transport sector this was due to the existence of the UNCTAD Liner Conferences that already provided for an extended network of specially negotiated tariffs, applied on a reciprocal and bilateral basis.

Also, the civil aviation and maritime transport sectors both recognized the concept of cabotage, i.e. the reservation to a State of air traffic rights[71] and navigation transit rights within its own territory. Neither the extended system of bilateral agreements nor the application of cabotage in the air and maritime transport sectors is compatible with basic MFN.

As a result of the intransigence of the U.S. Government, and some other GATT contracting parties, the final text of the GATS and its Annexes reflects the unwillingness that some countries felt towards bringing well-defined service sectors like air and maritime transport completely within the bounds of GATS rules. For example, the *Annex on Air Transport Services ("*GATS *Air Transport Annex")*,[72] which is appended to the GATS and forms part of the overall agreement (*See* Part IV of this chapter, commentary on GATS Article XXIX, and Part VI.D.3 of this chapter) currently only covers air transport with respect to "measures affecting: (a) aircraft repair and maintenance services; (b) the selling and marketing of air transport services; and (c) computer reservations system (CRS) services."[73] Traffic rights and ancillary services, i.e. those "services directly related to the exercise of air traffic rights," are completely excluded. Recently WTO Members have sought to redress this imbalance under the periodic review that the Annex itself mandates, further details of which are discussed in Part VI.D.3 of this chapter.

[69] *Annual Report of the President of the United States on the Trade Agreements Program*, 101st –102nd Cong. (1984–1985), (U.S.T.R. Appendix M: US Goals for Trade in Services). *See also* Fred Lazar, *Services and the GATT: U.S. Motives and a Blueprint for Negotiations*, 24 J. WORLD TRADE LAW 135–145 (1990), 136.

[70] General Agreement on Tariffs and Trade: *Decisions Adopted at the Mid-Term Review of the Uruguay Round*, 28 I.L.M. 1023 (1989).

[71] As a rule bilateral air services agreements and other international instruments recognize the so-called "five freedoms," as set out in the Interim Agreement on Civil Aviation of Dec. 7, 1944, ICAO document 7300/6, 6th ed. (1980). Convention on International Civil Aviation, signed at Chicago on Dec. 7, 1944, Doc. 7300/7 (7th ed.–1997); in force on April 4, 1947; 187 parties as at June 30, 2001 ("the Chicago Convention"). These five freedoms are: (1) the privilege to fly across a foreign State's territory without landing (transit); (2) the privilege to land for non-traffic purposes in a foreign State's territory (technical stops); (3) the privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses; (4) the privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; and (5) the privilege to take on passengers, mail and cargo destined for the territory of any other (Contracting) States and the privilege to put down passengers, mail and cargo coming from any such territory.

[72] GATS *Annex on Air Transport Services*, ("GATS *Air Transport Annex"*).

[73] GATS *Air Transport Annex*.

Similarly, the United States succeeded in keeping the regulation of maritime transport out of the GATS, at least temporarily, based on its reluctance to repeal certain provisions in the U.S. Merchant Marine Act,[74] which provided the Administration with the authority to take unilateral action against the practices of other countries that were considered to be harmful to U.S. maritime interests. A brief *Annex on Negotiations on Maritime Transport Services*,[75] adopted at the end of the Uruguay Round, simply reflects the standstill on liberalization of the supply of services in this sector. A Ministerial Decision taken at Marrakesh in April 1994 specified that maritime transport negotiations would continue until June 1996.[76]

The U.S. position on maritime transport services illustrates its somewhat ambiguous negotiating strategy on trade liberalization in services generally. On the one hand the U.S. Administration continued to argue strongly for liberalization of trade in services. On the other hand the United States sought to reserve to itself the right in the name of fair trade[77] to take unilateral measures against its trading partners under Section 301 of the 1974 Trade Act,[78] as amended by the Omnibus Trade and Competitiveness Act of 1988.[79] The U.S. Administration was of the view that such measures would extend to trade in services and intellectual property rights protection while negotiations were ongoing and even after the conclusion of the Uruguay Round.

(b) EC. The EC favored a broad agreement, both in terms of general scope and sectoral coverage, in order to maximize the potential for "effective" market access and to encourage participation as widely as possible among GATT contracting parties. As negotiations progressed, the European Communities expressed its preference for an agreement on trade in services with "soft" requirements rather than binding obligations, even including those related to national treatment. The United States, by contrast, sought a binding general obligation on national treatment and an emphasis on a sectoral approach, in what it termed "sectoral appropriateness." The corollary of this with respect to progressive liberalization was that market access should respect both policy objectives and the appropriateness of (domestic) regulation in each services sector.[80]

In a 1987 report to the European Commission, the European services industries stressed the degree of (domestic) regulation that then existed in many services sectors, and suggested that such regulation be kept at necessary levels, should be non-discriminatory as against foreign services and service suppliers, and should reflect the views of the private sector in addition to those of trade policy makers and negotiators.[81] In fact the private sector brought significant pressure to bear on the course of services negotiations, eventually leading to an EC proposal for a permanent "Regulations Committee," the task of which was to define the "appropriateness" of (domestic) regulations and to ensure that practical procedures were developed to deal with discriminatory aspects thereof.[82]

[74] *US Merchant Marine Act of 1970*, 46 U.S.C. § 1101 (1988).
[75] GATS *Annex on Negotiations on Maritime Transport Services ("GATS Maritime Transport Annex")*.
[76] *Decision on Negotiations on Maritime Transport Services*, Ministerial Decision adopted by the Trade Negotiations Committee on December 15, 1993, done at Marrakesh, April 15, 1994, *id*., 403.
[77] Lazar, *supra* note 69, 137.
[78] 19 U.S.C. § 2411(a).
[79] *US Omnibus Trade and Competitiveness Act of 1988*, Pub. L. No. 100-418, 102 Stat. 1107 (1988).
[80] Stanley Golt, *Trade Issues in the Mid-1980's*, British-North America Committee, November 1988, at 47.
[81] European Community Services Group, *The European Service Sector's View of the Liberalization of Trade in Services*, paper prepared for the European Commission 7 (April 14, 1987).
[82] Golt, *supra* note 80.

This particular position suited the European Communities because it disguised the lack of homogeneity that existed between various EC Member States, which held differing views on the regulation of services. It was further accentuated by the EC's preoccupation with its policy on completion of the internal market by 1992. As a result, the multilateral services negotiations were seen in the broader context of the overall EC aim of achieving a "services-friendly" policy in the internal market and of developing "an institutional, regulatory and fiscal environment in accordance with those needs."[83]

By the mid-1980's the EC had already attained a dominant position in world service exports and viewed its services sector as "investment-led."[84] This meant that the EC was keen to see adequate consideration given to both services and investment issues, especially where issues involving the right of establishment were concerned (this was to become the third mode of supply, involving commercial presence). This mirrored the EC's own approach to services that has been described more fully in Part II. A.3 above. Nowhere was this more apparent than in the field of financial services where Article 9 Section 4 of the Second Banking Directive[85] operated to restrict foreign bank entry, by limiting or suspending the authorization or acquisition of a new subsidiary in the EC, except in those cases where the same terms of entry were granted to EC banks on a reciprocal basis.

(c) Japan. During the course of the Uruguay Round Japan largely supported the United States on the issue of trade in services, despite the fact it was not perceived as a major services exporter. It supported the liberal U.S. stance because it felt that it had gains to make from services liberalization not only on a commercial level but also in political terms in order to deflect attention away from its trade surplus and closed markets.[86] The Japanese position was also influenced by the fact that it had large deficits in key sectors of interest to it—namely transport and tourism—while at the same time it enjoyed a comparative advantage in financial services, with respect to which Japan's domestic policy was highly protectionist.[87] Not surprisingly Japan came under pressure to open its own domestic services markets while realizing that it had a good deal to gain from the negotiations if it too could achieve similar access to foreign markets.

(d) Canada. Canada initially supported the United States on the issue of services, first in regard to the U.S. proposal for establishment of a working party on trade in services in 1984,[88] and later in the GATT Preparatory Committee over the question of inclusion of trade in services in the new round of multilateral negotiations.[89] It will be recalled that in 1982 a GATT Ministerial Declaration had recommended, on the basis of a U.S. initiative, that the GATT contracting parties should undertake an examination of their respective services sectors and that the results of those examinations should be exchanged among

[83] *Id*.
[84] Gibbs, *supra*, note 25, at 207.
[85] EC Council Directive, 98/646/EEC 1989, O.J. (L 386) 1.
[86] MARIO A. KAKABADSE, INTERNATIONAL TRADE IN SERVICES: PROSPECTS FOR LIBERALIZATION IN THE 1990'S 60 (Atlantic Paper No. 64, Atlantic Institute for International Affairs).
[87] See FEKETEKUTY, *supra* note 24, at 142, where he describes the barriers to entry in the Japanese insurance market.
[88] *Minutes of the Meeting of the GATT Council of Ministers*, GATT Doc. No. C/M/183 (December 10, 1984) 42.
[89] *Note on the Third Meeting of the Preparatory Committee*, GATT Doc. No. PREP.COM(86)3, (March 7, 1986), 49.

the parties in order to determine whether negotiations on trade in services were needed (*See* Part II. A.1 above) In response, only fourteen countries, including Canada, initially submitted their studies to the GATT.[90]

However, in the wake of the 1984 session of the GATT Ministerial Conference and before the launch of the Uruguay Round, Canada started to take a different position from the United States and the EC with respect to sectoral coverage. The United States and the EC had favored the "top down" approach, in which all services would be covered except those on a "negative list" that would be specifically excluded. Most of the developing countries supported a "bottom up" or "positive list" approach in which the only sectors covered would be those that were specifically *included*. The United States and the EC rejected the positive list approach, on the ground that it would give parties "veto power" over the application of the GATS, and proposed a "compromise," that would require parties to make concessions at the time of entry into force of the agreement, except with respect to the sectors listed on the "negative list." The compromise failed to gain general support, and although members of the OECD were reported to be "largely" in agreement with it, Canada (and New Zealand), both of which favored a "positive list" approach, opposed it.[91]

On the question of progressive liberalization, viewed by some as linked to coverage, Canada and the Nordic parties proposed[92] that appropriate flexibility should be provided for individual developing countries for opening fewer sectors, or liberalizing fewer types of transactions, and for progressively extending market access in line with their development.[93] The same proposal referred to the question of general exceptions, a matter that had long been a point of friction in the negotiations. The July 1990 text of the GATS[94] included an exception for the protection of "cultural values"—an issue historically of interest to Canada and the EC, among others. The Canadian and Nordic proposal[95] also sought to create an exception to "conserve exhaustible natural resources and to "protect human, animal or plant life, or health." In line with its call for an exception to protect cultural values, Canada, together with the EC, India and Egypt, also advocated a general exception, or special annex, for audio-visual services on the ground that this sector was important for the promotion of indigenous languages, national histories, and cultural heritages. The United States opposed the general exclusion for audio-visual services, arguing that cultural identity was not susceptible to definition, given the widespread use of multinational television and other media.[96]

Canada also opposed the U.S. position in two specific sectors, maritime services and telecommunications. Together with Japan, the EC, New Zealand, Switzerland, Hong Kong and Australia, Canada supported the elimination of all existing restrictive and trade-distorting measures in relation to all maritime services, as proposed by the Nordic

[90] United States, Canada, Japan, the EC, the UK, West Germany, Belgium, the Netherlands, Italy, Switzerland, Denmark, Sweden and Norway. *See International Economic Review* 4 (U.S. International Trade Commission (January 1985). As of July 1985, fourteen studies had been submitted. Eighteen national studies were eventually submitted.

[91] *GATT to Debate Services Agreement in Six Sectors Despite Negotiating Impasse*, 8 INSIDE US TRADE 4 (May 18, 1990).

[92] Reyna, *supra* note 16, at 2375, citing *General Agreement on Trade in Services*, a "Non-Paper" circulated by Canadian and Nordic Negotiators 2 (April 27, 1990) (the "*Canadian and Nordic proposal*").

[93] The EC supported immediate implementation of transparency and progressive implementation of other principles, including national treatment; the United States proposed that within three years from entry into force new negotiations should be undertaken to include excluded sectors, and reduce reservations or waivers.

[94] *Draft Multilateral Framework, for Trade in Services*, GATT Doc. No. MTN.GNS/35 (July 23, 1990).

[95] *Canadian and Nordic proposal, supra* note 92.

[96] Reyna, supra note 16, at 2390.

countries.[97] As noted above, the United States was reluctant to see the imposition of multilateral disciplines in this sector. On the other hand, the United States favored liberalization in basic telecommunications, a position reportedly opposed by the EC, Canada and Japan.[98]

2. The Goals of Developing Countries

The initial response of the developing countries towards negotiations on services was one of resistance.[99] The North/South divide on the issue comprised a broad range of concerns that mostly had to do with the desirability, scope and content of certain services in any negotiated agreement. Some developing countries even expressed the view that services should be excluded altogether from the negotiating process.[100]

In many respects the wording of the negotiating mandate on services, contained in the 1986 Ministerial Declaration of Punta del Este,[101] represents a compromise between developed and developing GATT contracting parties in order to take the negotiating process forward. The developing countries adopted a highly pragmatic approach towards services negotiations by allowing them to proceed but pushing for them to proceed along a separate track, outside the main legal framework of the GATT and separate from the régime for trade in goods.[102] In this way, developing countries managed to eliminate the obvious potential for cross-linkages between negotiations on existing GATT issues and negotiations on upcoming services issues.

From the outset, developing countries also insisted on the inclusion of economic development and growth in the objectives of any agreement on trade in services, a position that is now reflected in a general way in the Preamble to the GATS:

> Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as means of promoting the economic growth of all trading partners and the development of developing countries.

More specifically, the preamble states with respect to WTO developing and least-developed country members:

> Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness.
>
> Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs.

Some developing countries, led by Argentina, Brazil and India, still remained skeptical about the whole process, and this skepticism was reflected in particular in the submissions made by Argentina and India. They maintained that economic development and growth could best be met through market-sharing agreements in order to secure a greater share of world services trade for developing countries rather than through a process of negotiation leading to a multilateral framework agreement on trade in services.[103] A few developing

[97] *Id.* at 2409.
[98] *Id*. at 2422.
[99] Gibbs, *supra*, note 25, at 201.
[100] Bernard Hoekman, *Developing Countries and the Uruguay Round: Negotiating on Services* in WORLD BANK POLICY RESEARCH WORKING PAPER NO. 1220, at 4 (1993).
[101] *See supra*, text accompanying note 22.
[102] P.S. Randhawa, *Punta del Este and After: Negotiations on Trade in Services and the Uruguay Round*, 21 J. WORLD TRADE LAW 163, 164 (1987).
[103] Hoekman, *supra*, note 100, at 4.

countries also considered that any liberalization of the domestic service sector would be tantamount to surrendering a degree of autonomy and flexibility in macro-economic and development policies. Other developing countries were in favor of retaining export promotion schemes and/or infant industry protection clauses in any multilateral agreement on trade in services. In particular, for those developing countries where infant industry policies continued to play an important role, market access was seen as a valuable instrument for achieving the necessary transfer of certain skills. It was anticipated that this would lead to the creation of particular service markets, for example in the *business services* sector, in particular the sub-sector of *computer and related services*.

There was also serious anxiety among developing countries about the lack of statistical data on services that could assist them in determining how their future services trade could be affected by any multilateral agreement. This was an issue that had originally been used in order to justify excluding services transactions involving foreign service suppliers, because of the close nexus with issues of foreign direct investment. Not surprisingly, throughout the course of negotiations on services liberalization developing countries were keen to emphasize the need for negotiators to address the control of inward foreign direct investment, support for infant industries in the services sector, and restrictive business practices. This emphasis stemmed from a major preoccupation by developing countries with the preponderant role that transnational corporations were known to play in the services sector of many of their economies.[104]

The corollary of this approach was that developing countries remained fairly inflexible when it came to negotiating a national treatment obligation of general applicability in the context of a multilateral agreement on trade in services.[105] They were supported by the EC, which also lobbied hard not to have either a national treatment or market access obligation of general applicability. However, the United States was successful in securing a binding obligation of general applicability for MFN, with opt-outs in the form of MFN exemptions, thereby introducing the notion of conditional MFN into the GATS (for details *see* Part IV of this chapter, commentary on GATS Article II.2, below). The United States had fought hard for this result, and its success meant that it could continue to maintain its MFN exemption position as a lever in encouraging other GATT contracting parties to undertake significant liberalization. The United States felt that without this ability to take an MFN exemption in key services sectors, such as financial services and telecommunications, many countries would be unwilling to make significant market access concessions because they could obtain a "free ride" on concessions made by the United States to other countries.

B. Course of the Negotiations

The negotiations on trade in services ran neither fast nor smoothly. By the time of the Dunkel Draft in 1991,[106] a good deal of work remained to be done in the field of negotiations before it was possible to speak of a framework agreement, sectoral and other annexes, or completed schedules of initial service commitments, which lay at the heart of the liberalization process.[107] At the January 1992 meeting of the Trade Negotiations

[104] Randhawa, *supra* note 102, at 169.
[105] Hoekman, *supra* note 100, at 5.
[106] *General Agreement on Trade in Services, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991).
[107] Jimmie V. Reyna, *Services* in IV THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1992–1994) 777 (Terence P. Stewart ed. 1993).

Committee ("TNC")[108] a four-track approach was adopted in order to expedite the negotiating process, both on the text for a framework agreement and with respect to the scheduling of initial commitments in services.

The GATS negotiations came to a virtual halt in 1992–93 as a result of difficulties in other areas of negotiation, most notably market access and agricultural subsidies. There was also the unresolved issue of how to deal with the proposed MFN exemption in the GATS, which meant that GATT contracting parties were reluctant to table initial commitments.[109] However, mid-way through 1993 a mini-summit in Tokyo led to a breakthrough and negotiations on services resumed. The Group of Negotiations on Services ("GNS") adopted a new timetable for these negotiations in July 1993, which eventually led to a resumption of full negotiations later that year. In order to assist with the preparation of offers, requests and the scheduling of commitments by GATT contracting parties, the Secretariat issued a report clarifying the sectors and sub-sectors to be used, based on the *Services Sectoral Classification List* W/120,[110] which included "modes of supply" based on the origin of the service, the service supplier or the consumer, and the degree and type of presence that the service supplier had at the point of delivery. Contracting Parties were also instructed to record two different types of commitments, namely (i) horizontal commitments, i.e. applicable to trade in service either in a number of service sectors, or to all sectors, and (ii) sector specific commitments, i.e. applicable to trade in services of a particular sector, across the different modes of supply, with listing of limitations, if any.[111]

Towards the latter part of 1993 negotiations began to draw to a close, with the resolution of textual issues (particularly relating to whether various measures fell within the scope of GATS), the scheduling of commitments, and the submission of lists of MFN exemptions. The GATT Secretariat released a report at the end of November 1993 analyzing the results achieved thus far in the Uruguay Round negotiations generally, and more particularly with respect to developing countries. In the context of trade in services, the report noted the importance of services for developing economies, the status of initial services commitments, and the content of the framework agreement.[112]

In the following month the GATT Trade Negotiating Committee formally adopted the Final Act of the Uruguay Round Multilateral Trade Negotiations.[113] This included the results of the negotiations and text of Ministerial Decisions and Declarations but did not contain the respective commitments taken by GATT contracting parties resulting from the services negotiations that would eventually be inscribed in the Schedules of WTO Members, at Marrakesh in April 1994. Instead a special process of verification and corrections of the final schedules took place between mid-January and the end of March, to ensure that the schedules embodied the results of the negotiations.[114]

A significant amount of work on services remained to be completed, particularly in certain areas like basic telecommunications and maritime transport, while in others such

[108] Trade Negotiations Committee Meeting of January 13, 1992, GATT Doc. MTN.TNC/W/99 (January 15, 1992).

[109] Reyna, *supra* note 107, at 793.

[110] *Services Sectoral Classification List*, GATT Doc. MTN.GNS/W/120 (July 10, 1991) ("*Services Sectoral Classification List"* or "W/120"). *See* Appendix A to this Chapter.

[111] Reyna, *supra* note 107, at 795–796.

[112] *An Analysis of the Proposed Uruguay Round Agreement, with Particular Emphasis on Aspects of Interest to the Developing Economies*, GATT Secretariat, GATT Doc. MTN.TNC/2/122; MTN.GNG/W/30 at 7 (November 29, 1993).

[113] Trade Negotiations Committee, Thirty-Sixth Meeting, December 15, 1993, GATT Doc. MTN.TNS/40 (December 21, 1993), at 5.

[114] Reyna, *supra* note 107, at 812.

as financial services the results were disappointing. The TNC decided in its December 1993 meeting to prepare a number of Ministerial Decisions and Declarations that would allow the Members of the WTO, about to come into being, to continue negotiations in certain service sectors after the Round completed in order to arrive at satisfactory levels of commitments, or to improve on those already made.[115]

C. Overview of the Results

The Uruguay Round GATS negotiations, despite its ups and downs, resulted in some 97 Schedules of services commitments being submitted, involving 106 Members, with initial commitments across the board in virtually all sectors and sub-sectors. As noted above, however, a large number of these merely bound existing levels of market access rather than increasing them. A significant number of GATS Article II (or MFN) exemptions were also filed, totaling 350 entries altogether.[116]

The process "broke new ground in broadening the scope of world trade rules to cover an area of trade never before subject to multilateral disciplines."[117] The Uruguay Round MTN produced a framework agreement (with negotiations continuing in some sectors beyond the end of the round in order to achieve further liberalization), which falls under the WTO "umbrella" and is appended as a separate Annex to the WTO's founding instrument. It is important to note that the GATS, which forms Annex 1B to the WTO Agreement, is legally distinct from the GATT (which is included in Annex 1A), while remaining under the general institutional framework of the multilateral trading system created by the WTO.

IV. The Agreement

The successful negotiation of the GATS represents a milestone in multilateral rulemaking.[118] With the post-Uruguay Round structure of disciplines on goods, services (including investment), and intellectual property, all of which are subject to an integrated and improved dispute settlement mechanism, the scope of the multilateral trading system has never been greater or more encompassing.[119] When assessing the Agreement, however, it is important to keep in mind that, in spite of its achievements, the GATS is only a first, imperfect, step toward effective liberalization of trade and investment in services.

Under the GATS, WTO Members are encouraged to progressively negotiate market access and national treatment commitments in relation to a broad range of services and service suppliers,[120] to bind the results of such negotiations in national schedules[121] and to implement those commitments as far as possible on an MFN-basis.[122] In addition,

[115] *Id*. at 823.

[116] Reported in Christopher Arup, The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property 95, 106–107 (2000). Arup relies on an appraisal of the Uruguay Round results by L. Altinger and A. Endes, *The Scope and Depth of GATS Commitments*, 19 The World Economy 307 (1996).

[117] Pierre Sauvé and Robert M. Stern, *New Directions in Services Trade Liberalization: An Overview* in Sauvé and Stern, *supra* note 5, at 1.

[118] Pierre Sauvé, *Assessing the General Agreement on Trade in Services: Half-Full or Half-Empty?*, 29(4) Journal of World Trade 125, 126 (1995).

[119] *Id*.

[120] GATS, *Article XIX* (Negotiation of Specific Commitments).

[121] GATS, *Article XX* (Schedules of Specific Commitments).

[122] GATS, *Article II* (Most-Favoured-Nation Treatment).

like the GATT regime, governing trade in goods, the GATS also sets out a framework of basic rules and disciplines to be applied by all WTO Members in order to protect the value of the commitments that they have bound in their individual services schedules.

Although the GATT and the GATS have the same objective, the process of liberalization of services under the GATS differs significantly from that in relation to goods under the GATT. Whereas the GATT process entails the negotiation of binding tariff rates in relation to specified goods, and, in the case of agricultural goods, the conversion of non-tariff barriers into tariffs in order to facilitate reduction, the nature of trade in services renders the negotiation of liberalization a much more complex process. The GATS reflects this by requiring a hybrid of the "bottom up" or "positive list" and the "top-down" or "negative list" approaches to negotiating and scheduling liberalization commitments. Under the GATS, Members may voluntarily define the service sectors or sub-sectors in which they choose to permit market access, as well as the permitted modes of delivery of the services in those sectors. A Member undertakes no commitment to liberalize any sector unless it is listed in its Schedule (the 'positive list' approach). Once it has specified a sectoral classification in its Schedule, however, a Member is obliged to liberalize such sector fully, in each of four modes of delivery, unless it has itemized a limitation on market access or national treatment in the relevant column in the Schedule (the 'negative list' approach). Where no limitations on market access or national treatment are specified with respect to a particular mode of the sectoral classification, an inscription of "NONE" may be entered. Alternatively, the Member may indicate by an inscription of "UNBOUND" that it has made no commitment to grant market access or national treatment in this mode.

Further, the distinction between market access commitments and MFN obligations was unknown to the GATT. Under the GATS, the effect of a market access commitment is to require, at *minimum*, the treatment set out in the Schedule. The MFN obligation, on the other hand, is a general one, applying to the *actual* treatment extended by Members.

The concept of national treatment also differs from what we have been accustomed to in relation to goods liberalization. The application of national treatment to foreign services and service suppliers is not a general obligation but applies only once a commitment is made in relation to market access in a particular sector. Further, even when a specific market access commitment is made, the obligation to provide national treatment in the inscribed service sector may be limited by the Member by setting out conditions or qualifications in the Schedule. The flexibility of the GATS approach enables Members to retain significant control over the extent and rate of liberalization of services, a feature that was critical to securing the support of developing countries during the Uruguay Round Negotiations.[123]

The GATS is built around the framework Agreement, eight Annexes and individual country schedules of specific commitments, as follows:

Part I	Scope and Definition
Part II	General Obligations and Disciplines
Part III	Specific Commitments
Part IV	Progressive Liberalization
Part V	Institutional Provisions
Part VI	Final Provisions

[123] *See* Part III.A.2., of this chapter, *supra*.

Annex on Article II Exemptions
Annex on Movement of Natural Persons Supplying Services under the Agreement
Annex on Air Transport Services
Annex on Financial Services
Second Annex on Financial Services
Annex on Negotiations on Maritime Transport Services
Annex on Telecommunications
Annex on Basic Telecommunications
Country Schedules

In simple terms, the GATS has two main objectives: to provide a mutually agreeable framework of disciplines for the conduct of trade in services; and to foster binding national commitments for the progressive increase in liberalization of services markets. These objectives are manifest in the Agreement by the important division between Part II, which contains the "General Obligations and Disciplines", and Parts III and IV, which facilitate the making of specific commitments through a system of national Schedules, and oblige Member states to enter into rounds of negotiations with a view to achieving a progressively higher level of liberalization. The general obligations in Part II of the Agreement, which include the core principles of MFN and transparency, as well as other topics such as domestic regulation and mutual recognition, are binding on all WTO Members, subject only to specified exceptions. By contrast, specific commitments, which pertain primarily to market access and national treatment, are entered into voluntarily, as a result of a process of negotiation among Member states.

PART I. SCOPE AND DEFINITION

A. Scope and Definition (Article I)

1. Definition

Nowhere in the GATS is "services" expressly defined. "Trade in services" is defined only by reference to four modes of delivery, as discussed below. The GATS does, however, contain definitions of certain operative words and phrases that provide guidance as to the nature of services and trade in services.[124]

2. Scope

The GATS applies to all "measures by Members affecting trade in services,"[125] which include measures imposed by central, regional or local governments and authorities, or non-governmental bodies in the exercise of powers delegated by such governments or authorities.[126]

Measures *affecting* trade in services include those relating to:

- the purchase, payment or use of a service,[127]
- the access to and use of a service, in connection with supply, where such service is required by the Member to be offered to the public generally,[128] or

[124] These include: "measure," "supply of a service," "measures by Members affecting trade in services," "commercial presence," "sector," "service of another Member," "service supplier," "monopoly supplier of a service," "service consumer," "person," "natural person of another Member," "juridical person," "juridical person of another Member" and "direct taxes." *See* GATS *Article* XXVIII.
[125] GATS *Article I.1.*
[126] GATS *Article I.3(a)(i) and (ii).*
[127] GATS *Article XXVIII(c)(i).*
[128] GATS *Article XXVIII(c)(ii).*

- the presence, including commercial presence, of persons of one Member for the supply of a service in the territory of another Member.[129]

The GATS extends to measures affecting *services* trade in *any sector*[130], with the exception of services supplied in the exercise of governmental authority,[131] i.e. services-supplied neither on a commercial basis nor in competition with other service suppliers,"[132] such as central banking.

3. Modes of Supply

For the purposes of the GATS, "trade in services" is defined as the "supply of a service.[133] GATS *Article I:2* describes four possible means, or "modes" by which this supply may occur. An understanding of the four distinct modes is crucial in the process of negotiation, as specific commitments in regard to market access and national treatment are entered into on a mode-by-mode, as well as a sector-by-sector, basis. The four modes are:

- Mode 1: cross-border supply;
- Mode 2: consumption abroad;
- Mode 3: commercial presence; and
- Mode 4: presence of natural persons.

(a) Cross Border Supply. The first GATS mode of supply, commonly referred to as "*cross border supply"*, is defined as "the supply of a service from the territory of one Member into the territory of any other Member." It is reminiscent of the traditional idea of trade in goods, in that both the consumer and supplier remain in their respective territories when the product is delivered. For a service product, this situation arises when the service can be embodied in a transportable medium, such as written documentation or computer disc, or when it can be sent across borders through telecommunication channels. Mode 1 corresponds generally to the structure for balance of payments accounts set out in the *Manual* (and the old *BPM5*).[134]

[129] GATS *Article XXVIII(c)(iii).*

[130] GATS *Article I.3(b);* see however the Annex on Air Transport Services, which expressly excludes from the GATS measures affecting air traffic rights and services directly related to their exercise.

[131] GATS *Article I.3(b)* and GATS *Article XIII.1*. See further Markus Krajewski, *Public Services and Trade Liberalization—Mapping the Legal Framework*, 6(2) JOURNAL OF INTERNATIONAL ECONOMIC LAW 341 (2003).

[132] GATS *Article I.3.(c)*.

[133] GATS *Article I:2.*

[134] During the Uruguay Round negotiations, the relative importance of the different modes of supply was almost unknown, due to a lack of available quantitative information on trade in services. The GATS negotiations were conducted in the absence of a statistical assessment or comparison of sectoral commitments. The lack of statistical clarity was not considered crucial at the time since the objective of the GATS negotiations during the Uruguay Round was to establish a framework of enforceable rules and to bind current regimes, rather than to achieve significant trade liberalization. Quantitative information is already playing a far more important role in the Doha Round services negotiations, with regard to the establishment of negotiating priorities and exchange of concessions. The principal difficulty in the assessment of services trade is that the GATS legal framework diverges from the statistical framework for assessment of trade flows, namely balance of payments statistics. Until recently, the framework for balance of payments was defined by the fifth edition of the IMF's *Balance of Payments Manual* ("*BPM5", supra* note 2), which was based on the concept of residency and which records transactions between resident and nonresident transactors. The GATS concept of supply of services uses a broader framework that incorporates "residency" as well as other concepts such as "nationality," "territorial location" and "ownership" or "control." Moreover, the mode 3 supply of a service through a commercial presence was not considered "trade" at all in *BPM5* and was not therefore recorded in the balance of payments accounts. In order to provide international guidelines for the compilation of statistics related to international trade in services, the Interagency Task Force on Statistics of International Trade in Services, established by the Statistical Commission of the United Nations in 1994 ("*UN Interagency Task*

(b) Consumption Abroad. The second mode of supply, referred to as "*consumption abroad*" or "*movement of consumers*" is defined in the GATS as a supply "in the territory of one Member to the service consumer of any other Member." This mode occurs when the consumer moves to the territory of the supplier to take delivery of the service, for example the consumption of tourism services. Since the consumer remains a resident of his or her home country while abroad, the transaction arises between residents and non-residents; for balance-of-payments purposes, it is an "export" from the territory of the supplier and an "import" to the home territory of the consumer.

Mode 2 transactions under GATS correspond generally to those recorded under the *Manual* (and old *BPM5)* framework[135] as "travel." The use of "travel" as the sole statistical indicator of consumption abroad could however underestimate GATS mode 2, which also includes situations such as ship repair, in which it is only the property of the consumer that moves, or is situated, abroad. It could also result in an overstatement, particularly in relation to electronic transactions, where the line between mode 1 and 2 is somewhat unclear. While bank deposits and property insurance transactions, for example, should

Force," or "*Task Force*") has developed a *Manual on Statistics of International Trade in Services:* MANUAL ON STATISTICS OF INTERNATIONAL TRADE IN SERVICES, UN doc. ST/ESA/SER/M/86 *("Manual").* The Members of the Task Force are the Statistical Office of the European Communities, the IMF, the OECD, the United Nations Statistical Division, the United Nations Conference on Trade and Development, and the WTO, with OECD as chair and secretariat.

The initial major focus of the UN Interagency Task Force was the development of guidelines for definition, classification and coverage of statistics related to international trade in services. Since the publication of the *Manual* at the end of 2001, the Task Force has shifted its focus towards providing guidance and assistance to countries in the implementation of the recommendations contained in the *Manual*, with emphasis on the compilation of statistics on foreign affiliates trade in services. A final draft of the *Manual* was published on September 6, 2001 and is now available on-line at either: http://unstats.un.org/unsd/tradeserv/manual.asp or http://www.wto.org/english/res_e/statis_e/its_manual_e.htm.

The *Manual* was prepared by the Task Force to meet the needs of a variety of producers and users of statistics on international trade in services—statistical compilers, governments and international organizations, businesses and others that wish to assess developments in international services markets. A particular impetus for the preparation of a separate manual on services statistics was the need for statistics to guide the negotiations relating to the GATS and other trade agreements that encompass services as well as goods, and to support the implementation of such agreements.

The *Manual* expands the framework for provision of a range of statistics on international trade in services by building upon, rather than modifying, internationally agreed standards for statistical compilation. Its recommendations are summarized in Chapter 1 and elaborated in the remainder of the *Manual*. Chapter 2 proposes a conceptual framework and describes its links to existing international standards and frameworks, including the four GATS modes through which services may be traded internationally. Chapter 3 focuses on the compilation of statistics relating to conventional resident/non-resident trade in services, building on the balance of payments framework described in the fifth edition of the *Balance of Payments Manual (BPM5*, supra *note 2)*. The Extended Balance of Payments Services classification provides links to the Central Product Classification for clear definition. Chapter 4 recommends standards for compiling statistics on Foreign Affiliate Trade in Services ("*FATS*"), providing guidance on the measurement of services provided through foreign-owned firms. FATS draws to a considerable extent on the concepts and definitions of the *System of National Accounts 1993 ("1993 SNA")*.

The *Manual* proposes a phased approach to implementation so that developments can be implemented gradually and available information structured in line with the new international standard framework. While an implementation sequence is suggested, flexibility ensures that countries can meet the priorities of their own institutions. Full implementation, which is seen as a long-term goal, would represent a considerable increase in the detail of information available on trade in services.

The *Task Force* is now focusing on providing compilation guidance, particularly in the area of foreign affiliates' trade in services. In addition, it plans to undertake further development work, in particular in the areas of financial insurance, telecommunications, internet-related and environment-related services, as well as statistics relating to the movement of natural persons to take up employment on a non-permanent basis.

[135] *See supra*, note 134.

in principle be recorded in the relevant services category in the balance-of-payments account (Mode 1), some countries will allocate everything paid by credit card in foreign currency to "travel," resulting in an inflated perception of mode 2 services transactions. A separate annex to the *Manual* (Annex VII) discusses the relationship between the definitions and coverage of *travel* and *traveler* used in the *Manual* (and in *BPM5*) as well as the coverage of the *tourism satellite account*.[136]

(c) Commercial Presence. In addition to providing services in resident/non-resident transactions measured in balance of payments statistics, enterprises may supply services internationally through the activities of foreign affiliates abroad. The GATS defines this third mode of supply of a service as "the supply of a service by a service supplier of one Member through commercial presence in the territory of any other Member." The definition of "*commercial presence*" in the GATS is a broad one, encompassing "any type of business or professional establishment" within the territory of a Member for the purpose of supplying a service. In addition to the constitution, acquisition or maintenance of juridical persons, the creation or maintenance of a branch or a representative office may establish "presence."

The reference to commercial presence as a means of delivering international services is an innovation of the GATS, which recognizes that the delivery of services often requires proximity between supplier and consumer. Such supply by an entity resident in the consumer's territory, is, for balance of payments purposes, a transaction between residents and is not recorded as a trade transaction.

In order to provide a means by which to measure this important mode of supply, the UN Interagency Task Force has set up a framework for "Foreign Affiliates Trade in Services" ("FATS") statistics as set out in Chapter 4 of the *Manual*.[137] Included are recommendations on the selection of foreign affiliates to be covered,[138] the attribution of FATS statistics[139] and the variables to be compiled. Although this is a less well-developed statistical area than balance of payments, some FATS statistics in the compiling economy may be found in, or derived from, existing statistics on domestic production, including national accounts statistics based on the recommendations of the *1993 SNA*.

The basic FATS variables recommended in the *Manual* are:

- sales (turnover) and/or output;
- employment;
- value added;
- exports and imports of goods and services; and
- number of enterprises.

Other identified variables include assets, compensation of employees, net worth, net operating surplus, gross fixed capital formation, taxes on income, and research and development expenditures.[140]

[136] The Annex to the *Manual* is also available on-line at: http://www.unstats.un.org/unsd/tradeserv/manual.asp

[137] *See supra* note 134.

[138] Selection of foreign affiliates follows the definition of foreign-controlled enterprises used in the *1993 SNA*; *see supra* note 134.

[139] This includes a discussion on attribution by activity and by product.

[140] The definitions of these variables are drawn from the *1993 SNA*, *supra* note 134.

(d) Presence of Natural Persons. The fourth mode of supply under the GATS, or "*presence of natural persons*" is defined as a "supply by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." This mode of supply is also the subject of a separate Annex to the GATS that applies to "measures affecting natural persons of a Member who are service suppliers of a Member and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service." The *Annex on Movement of Natural Persons Supplying Services under the Agreement*[141] further indicates that the GATS does not apply to "measures affecting individuals seeking access to the employment market of a Member", or to "measures regarding citizenship, residence, or employment on a permanent basis".

The GATS and its relevant *Annex* appear to provide for two distinct categories of natural persons located in the territory of the consumer: self-employed service providers and natural persons employed by service providers. A foreign *self-employed* service provider will simply move to the territory of the consumer to provide his or her service. *Employees* will be foreign natural persons, employed in regard to provision of a service, and the employer/service provider may be located abroad or have a commercial presence in the territory of the consumer.

In terms of balance of payments statistics,[142] the *Manual* again moves beyond existing statistical frameworks where enterprises producing services in one country employ individuals who are residents of another country on a non-permanent basis. While some limited data are available from balance of payments statistics,[143] there is a need for further development of statistics related to employment and income of foreign nationals. This area is, however, still under discussion by the Task Force, so the *Manual* contains relatively little discussion on, or recommendation for, compiling relevant statistics.

PART II. GENERAL OBLIGATIONS

The core principles imposed by Part II of the GATS are MFN[144] and transparency.[145] Other general obligations and disciplines set out in Part II of the GATS include:

- increasing the participation of developing countries;[146]
- regional economic and labor market integration;[147]
- domestic regulation of services;[148]
- international recognition of service suppliers' credentials;[149]

[141] GATS *Annex on Movement of Natural Persons Supplying Services under the Agreement*, *("GATS Annex on Movement of Natural Persons").*

[142] *See supra* note 134.

[143] International transactions involving movement of labor (including service providers) are generally captured in balance of payments statistics under one of three different categories: "labor income," "workers remittances" and "migrants' transfers." In the IMF's *BPM5*, *supra* note 2, workers' remittances are shown under current transfers while migrants' transfers are placed under the capital and financial account; compensation to employees, i.e. "labor income", is listed as current income. *See further* BIMAL GHOSH, GAINS FROM GLOBAL LINKAGES: TRADE IN SERVICES AND MOVEMENTS OF PERSONS 29, 38 (1897).

[144] GATS *Article II.*

[145] GATS *Articles III and III bis.*

[146] GATS *Article IV.*

[147] GATS *Articles V and V bis.*

[148] GATS *Article VI.*

[149] GATS *Article VII.*

- regulation of monopolistic behavior;[150]
- regulation of restrictive business practices;[151]
- restrictions on international transfers and payments;[152] and
- the application of general and special exceptions.[153] In addition, Part II contains provisions relating to emergency safeguard measures (*Article X*), government procurement (*Article XIII*), and subsidies (*Article XV*). As it was not possible, during the Uruguay Round negotiations, to reach agreement on these issues, the provisions, for the most part, simply call for further negotiations.[154]

A. Most-Favored Nation (MFN) Treatment (Article II)

1. The Basic Rule

The MFN norm in relation to services, like MFN under the GATT, is one of the central and most important general obligations of the GATS, articulated in *Article II:1* as follows:

> With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

The MFN clause of the GATS applies to any measure by Members affecting trade in services in any sector transacted through any of the four modes of supply, with some exceptions, exemptions and limitations specified elsewhere in different GATS Articles. MFN requires that the most favourable treatment *actually accorded* to services and service suppliers must be extended to all other Members, whether or not the service sector has been the subject of a market access or national treatment commitment. MFN treatment is not *per se* a liberalizing condition, demonstrable by the fact that a Member that bans trade with all foreign suppliers does not violate MFN.[155] Rather, MFN is a principle of non-discrimination, which levels the playing field among the trading partners of one particular Member. By contrast, market access or national treatment commitments in a given sector oblige a Member to give to all other Members the stated *minimum* standard of treatment specified in its Schedule. An MFN exemption will permit deviations from the obligations of *Article II* but it does not relieve the Member from its binding market access and national treatment commitments.

The core MFN commitment found in *Article II* is supplemented by a number of other MFN or non-discrimination clauses found elsewhere in the GATS. Specific MFN clauses that apply in various fields include:

- recognition of professional standards shall not be accorded in a manner which would constitute a means of discrimination between countries (*Article VII*);
- each Member shall ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent with that Member's obligations under Article II and other specific commitments (*Article VIII*);

[150] GATS *Article VIII*.
[151] GATS *Article IX*.
[152] GATS *Article XI* (prohibiting restrictions on transfers and payments for current transactions relating to its specific commitments) and GATS *Article XII* (balance of payments exception).
[153] GATS *Article XIV* and GATS *Article XIV bis*.
[154] These provisions are discussed *infra* in Part VI.C of this chapter.
[155] Sauvé, *supra* note 118, at 128.

- rules for emergency safeguard measures are to be negotiated on the principle of non-discrimination (*Article X*);
- restrictions to safeguard the balance of payments shall not discriminate among Members (*Article XII*);
- measures constituting general exceptions should not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail (*Article XIV*);
- market access treatment shall be no less favourable than that provided for under the terms agreed and specified in national Schedules (*Article XVI*);
- compensatory adjustments for modification of Schedules shall be made on a MFN basis (*Article XXI*);
- access to and use of public telecommunications transport networks and services, shall be accorded to any service supplier of any other Member on reasonable and non-discriminatory terms and conditions (GATS *Annex on Telecommunications*, *Article 5(a)*);
- specific commitments resulting from negotiations undertaken in an alternative approach under the Understanding on Commitments in Financial Services shall apply on an MFN basis (*GATS Understanding on Commitments in Financial Services, Preamble*).

The rights and obligations of a Member under *Article II* are determined by the following key concepts and terms: "*immediately," "unconditionally," "treatment," "no less favourable than," "any other country," "like services and service suppliers*."

"Immediately" means that the service suppliers of WTO Members are entitled to claim and enjoy MFN treatment as soon as a Member extends favorable treatment to the services or suppliers of any other country. As the intention is to place the beneficiary state on an equal footing with other trading states, *Article II*, like other MFN clauses, probably entitles the beneficiary to the benefit of more favorable treatment enjoyed by a third country, even if such treatment was extended before the entry into force of the treaty containing the clause.[156]

"Unconditionally" means that MFN treatment is extended without the need for equivalent compensation. During the negotiations some developed countries argued that MFN should be conditional, but the majority agreed that this would be detrimental on the ground that Members would be prevented from benefiting from concessions of other Members unless they could provide reciprocal concessions up to a certain level of liberalization. However as discussed below, Members were permitted to take country-specific exceptions to the MFN obligations during the negotiations.

"Treatment" replaces the language used in GATT Article I, which enumerated explicitly "any advantage, favour, privilege, or immunity." Term such as "treatment" avoids any risk of incompleteness of enumeration, it may run the risk of ineffectiveness if, in its application, it is interpreted too broadly.[157]

"No less favourable than" has a dual meaning. It means that the treatment provided to services and suppliers from any other Member must be at least *equal* to that granted in relation to any other country; it also means that the Member is not prevented from providing Members with treatment *more* favorable than that it provides to suppliers

[156] For discussion on this point, *see* Yi Wang, *Most-Favoured-Nation Treatment under the General Agreement on Trade in Services—and its Application in Financial Services*, 30(1) JOURNAL OF WORLD TRADE 91, 96 (1996).
[157] *Id*, 97.

from any non-Member. In the event that the Member provides more favorable treatment, other Members are of course at once entitled to claim the same additional favors and advantages as a new standard of MFN treatment. Thus the use of "no less favourable" is fully compatible with the objective of progressive liberalization under the GATS and is more suitable than terms such as "equal," "identical" or "similar."

"Any other country," as under the GATT, includes both WTO Members and non-Members. Thus, advantages granted to the services or suppliers of a non-Member country must also be extended to those of all WTO Members. The GATS itself, like the GATT, imposes no obligation on WTO Members to extend the benefit of negotiated agreements to non-Members. Unlike the GATT, however, the GATS contains an express provision underscoring that a Member may deny GATS benefits to the supply of a service from or in the territory of a non-Member.[158] A Member will only be obliged to extend GATS benefits to a third country non-Member under the terms of a bilateral arrangement between them that includes an unconditional MFN provision, without exception for multilateral treaties.

"Like services and service suppliers" are even more difficult to identify and define than the notion of "like products" under the GATT. The rule, in essence, is that the beneficiary may claim MFN treatment only in relation to the same category of services or service supplier as those of the most-favored third country. The process is complicated by the fact that the same service may be supplied through different modes of delivery and even by different means, or different categories of service suppliers.

The classification of services for the purpose of market access and national treatment commitments is not reliable as a means of determining "likeness" of foreign and domestic services and service suppliers. The absence of a prescriptive structure for classification of service activities means that Members may diverge from the recommended system of classification as they see fit,[159] resulting in possible variations in the description of the services sectors and subsectors in which commitments are made. While the resulting ambiguity has the advantage of flexibility for purposes of adaptation to commercial developments, it offers little assistance for the determination of "like services *and* like service suppliers."[160]

2. MFN Exemption

Article II.2 of the GATS reads in Part:

> A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

When the GATS came into force, a number of countries were party to existing preferential services agreements with trading partners, either bilaterally or in small groups. The Members agreed on the necessity of temporarily maintaining these preferences, and permitted the continuation of the discriminatory treatment in certain service sectors by listing "MFN exemptions" alongside their first sets of commitments. In order to protect the general MFN principle, the exemptions could in general only be taken during the negotiations, in accordance with *Article II.2* and the *Annex on Article II Exemptions*.[161] The *Annex* specifies that a MFN exemption must be applied for and agreed prior to the entry into force of the WTO Agreement. In practice, this was achieved through the

[158] GATS *Article XXVII(a).*

[159] *See* Appendix A to this chapter with respect to classification of services.

[160] *See* also discussion of "likeness" in regard to national treatment, *infra* text accompanying notes 252 to 258.

[161] GATS *Annex on Article II Exemptions.*

submission of lists at the end of the Uruguay Round or during the negotiations in specified sectors, such as telecoms and financial services that continued after the WTO Agreement had entered into force. The exemption lists form an integral part of the GATS. Since the entry into force of the WTO Agreement (on January 1, 1995) no further exemptions can be added to the lists, other than where permitted under extended sectoral negotiations, or, in the case of acceding Members, in accordance with their Protocols of Accession.

In contrast to the Schedules of Commitments under Part III of the Agreement, MFN exemption lists are straightforward in structure and largely self-explanatory. Each exemption is defined by five pieces of information listed as follows:[162]

- description of the sector or sectors in which the exemption applies;
- description of the exemption, indicating why it is inconsistent with *Article II*;
- the country or countries to which the exemption applies;
- the intended duration of the exemption; and
- the conditions creating the need for the exemption.

The effect of an MFN exemption is to relieve the Member from its *Article II* (MFN) obligations, without permitting any deviation from *Article XVI* (market access) and *XVII* (national treatment) commitments. Where it has taken an MFN exemption, therefore, a Member may provide to some Members market access or national treatment that is more favorable than the minimum scheduled in a specific sector, as long as the minimum standard is maintained in relation to *all* other Members. A Member is never permitted (on grounds of reciprocity or lack thereof, for example)[163] to accord to certain Members treatment less favorable than that specified in its Part III Schedule. Where there are commitments, an MFN exemption permits only "upward" discrimination, allowing provision of more favorable treatment. Where, however, there are no scheduled commitments in a sector or mode, an MFN exemption provides full scope for discrimination, permitting the Member, at its discretion, to provide treatment to Members that is either more or less favorable than national treatment. The threat of wholesale invocation of an MFN exemption in any single sector has proved to be a powerful tool, which some WTO Members have used to press other Members to make further commitments in sensitive service sectors, such as financial services and telecoms.[164] Under Paragraph 3 of the Annex on Article III exemptions, every exemption granted for a period of more than five years was made subject to review by the Council for Trade in Services no later than five years from the entry into force of the WTO Agreement.[165] Exemptions were not to exceed a ten year duration "in principle",[166] but would terminate on the date provided in the exemption,[167] and are, "in any event," negotiable during subsequent rounds of negotiations.[168] The words "in principle" and "in any event" appear to allow for the extension of exemptions beyond ten years, but the practical implications of this possibility are still under discussion.

[162] It was not necessary to list measures providing for preferential liberalization of trade in services among Members of economic integration agreements, such as free trade areas, because such preferential treatment is permitted under GATS *Article V* and must meet the criteria laid down in that article. See *infra*, text accompanying notes 179 to 193. For a discussion of economic integration under the GATS.

[163] *Revision of Scheduling Guidelines*, Note by the Secretariat, S/CSC/W/19, March 5, 1999, at 11.

[164] *See* Arup, *supra* note 116, 110–112.

[165] At the time of writing (June 2003), the Council for Trade in Services was engaged in conducting this review, further details of which are provided in Part VI.D.1. *infra*.

[166] GATS *Annex on Article II Exemptions*, *supra* note 161, ¶ 2.

[167] *Id*, ¶ 5.

[168] *Id*, ¶ 6.

Only in exceptional circumstances will a new MFN exemption be granted. The GATS requires that the requesting Member apply for a waiver under the procedure provided for in Article IX.3 of the WTO Agreement.[169] The request must first be submitted to the Council for Trade in Services, which reports to the Ministerial Conference within ninety days, before a decision is taken by a 75 percent majority of the WTO membership.[170] In practice, the qualified majority requirement has been replaced by consensus, although the matter may be put to a vote should any Member so wish.[171]

3. Contiguous Frontier Zones

Article II.3 of the GATS provides:

> The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

The third paragraph of *Article II* carves out an exception to the MFN principle for local trade in services between the "contiguous frontier zones" of adjacent countries. Services must be produced and consumed "locally," so that the exception cannot be used to justify delivery of services to the foreign market beyond the frontier zone. Questions immediately arise as to definition of the extent of the frontier zone, the nature of "locality" in relation to production and consumption, and whether the application of the exception extends equally to all modes of delivery. While there is no indication that a commercial presence should be viewed any differently from a cross-border supply of services, two forms of supply may be distinguishable on the basis of the likelihood of each remaining a local phenomenon. The establishment of a commercial presence in the foreign contiguous zone seems more likely than a cross-border supply, which intrudes beyond the frontier and therefore falls outside the exception, because the foreign frontier zone becomes the location of the center of supply rather than the end point of supply emanating from the supplier's national base. In each case, the application of the exception will turn on the origin of the services and locality of consumption.

B. Transparency (Article III and Article III bis)

GATS *Article III* is the principal provision on transparency in trade in services. *Article III bis*, addresses disclosure of confidential information.

For trade in services to operate effectively, there must be an adequate exchange of information about market access and restrictions upon entry and operation of foreign suppliers in the territories of those countries participating in the Agreement. *Article III:1* requires the publication of all relevant measures of general application pertaining to or affecting trade in services, as well as relevant international agreements to which the Member is a signatory.[172]

Article III.3 contains a duty to notify and "at least annually inform" the Council for Trade in Services of the introduction of new, or any changes to existing, national laws, regulations or administrative guidelines, which "significantly affect trade in services

[169] *Id*., ¶ 2.
[170] *Id*., ¶ 2.
[171] See *Decision Making Procedures Under Article IX and XII of the WTO Agreement*, WTO General Council, November 15, 1995, WT/GC/M/8 (issued as WT/L/93 of November 24, 1995), 6.
[172] GATS *Article III:1*.

covered by its specific commitments" under Part III of the Agreement (market access and national treatment). Under *Article III:4* each Member must respond to requests by other Members for specific information on any of its published or notified measures and to establish an "enquiry point" for disseminating such information. *Article III.5* permits any Member to notify the Services Council of another Member's measure that it considers affects the operation of the GATS.[173]

Article III bis creates an exemption from the *Article III* transparency requirement, permitting Members to retain confidential information if its disclosure would:

- impede law enforcement;
- be contrary to public interest; or
- prejudice legitimate commercial interests of particular public or private enterprises.[174]

C. Increasing Participation of Developing Countries (Article IV)

Unlike the GATT, there is no major section of the GATS that contains provisions relating to special and differential treatment of developing countries, nor are there any provisions that confer on developing countries a set of special, preferential concessions. Instead, *Article IV* represents a deliberate attempt "to incorporate development considerations and the needs of countries at different stages of development as constituent elements of the agreement."[175] As noted above, the GATS preamble refers to "the development of developing countries" as one of the explicit objectives of the GATS. Given the asymmetries with respect to development of services regulations, the preamble also recognizes "the particular need of developing countries" to exercise the right "to regulate and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives."

Article IV builds upon one of the other main objectives in the preamble that refers to the desirability of facilitating "the increasing participation of developing country Members in trade in services and the expansion of their service exports." The means of achieving this are not through preferential arrangements but through the process of liberalization itself, i.e. the negotiation of specific commitments under Part III (Specific Commitments) and Part IV (Progressive Liberalization) of the Agreement, relating to the following specified matters:

- strengthening of domestic services capacity, efficiency and competitiveness through negotiated specific commitments on access to technology on a commercial basis;
- improvement of access to distribution channels and information networks; and
- liberalization of market access in sectors and modes of supply of export interest to them.[176]

In addition, Paragraph 2 of *Article IV* seeks to widen the scope of information available to developing country Members beyond increased transparency in relation to the regulatory aspects of the supply of services. It specifically calls upon developed country Members,

[173] GATS *Article III:5*.
[174] GATS *Article III bis*.
[175] *See* Ghosh, *supra* note 143, at 86.
[176] GATS *Article IV:1*.

"to facilitate the access of developing country Members' services suppliers to information . . . concerning" various issues. These include information about the "commercial and technical aspects of the supply of services," "registration, recognition and obtaining of professional qualifications" (a common barrier to labor mobility under Mode 4 supply) and "the availability of services technology."[177]

While negotiation in regard to sectors of interest to developing countries does not contravene MFN, the "special priority" requirement of *Article IV.3* in respect of least-developed country ("LDC") Members, regarding the implementation of the rest of the Article, almost certainly creates an exception. Particular account is to be taken of the serious difficulty of LDCs in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.[178]

D. Economic Integration (Article V)

1. The Exemption

Just as GATT Article XXIV carves out a significant exception from MFN for customs unions and free trade agreements, so *Article V* defines the circumstances in which integration agreements between particular WTO Members for intensive liberalization in trade in services constitute a permissible MFN exemption. It should be noted that the absence of a services equivalent to import duties means that in the GATS context there is no distinction comparable to that between customs unions and free trade areas.

Article V permits WTO Members to enter into agreements (loosely referred to as "integration agreements") to liberalize trade in services among themselves, provided that the agreement has substantial sectoral coverage[179] and does not increase the general level of barriers to trade vis-à-vis other Members not party to the agreement. To qualify for the *Article V* exception, an integration agreement must provide for the "absence or elimination of substantially all discrimination" between or among the parties, either by eliminating existing discriminatory measures and/or prohibiting new ones.[180]

Article V:6 recognizes that it is not only Member states but also private entities, where they are legally constituted and doing business within the integration area, that may benefit from the principle of non-discrimination under the terms of the agreement. Thus, a "service supplier of any other Member that is a juridical person constituted under the laws of a party" to an economic integration agreement "shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement."[181] This is an important innovation of the GATS because it takes account of private parties operating in the jurisdiction of individual WTO Members and is characteristic of the way in which services trade may impinge on local foreign investment requirements.

2. Substantial Coverage

While GATT Article XXIV requires that a free trade area or customs union provide for the elimination of duties and other restrictive regulations of commerce on "substantially all trade" between the constituent territories, the corresponding GATS provision

[177] GATS *Article IV:2 in extenso*.
[178] GATS *Article IV:3*.
[179] GATS *Article V:1(a)*.
[180] GATS *Article V ;1(b)*.
[181] GATS *Article V:6*.

(*Article V:1(b)*) requires that the economic integration agreement provide for "substantial sectoral coverage," understood in terms of numbers of sectors, volume of trade affected and modes of supply.[182] In meeting this condition, economic integration agreements should not provide for the *a priori* exclusion of any of the four modes of supply. These requirements are designed to prevent the conclusion of narrowly defined economic integration agreements covering only a few sectors or the provision of preferential treatment only in limited areas, such as foreign direct investment, that are linked to a particular mode of supply, such as commercial presence.

3. Elimination of Discriminatory Measures

In the covered sectors, *Article V:1(b)* requires the elimination of "substantially all discrimination," meaning all measures that discriminate in favor of services and service suppliers of domestic origin vis-à-vis those of other parties to the agreement. An exception is made for measures, permitted under certain provisions of the GATS on a contingent basis; these include the allowance for current account transfers (*Article XI*), and restrictions to safeguard balance of payments (*Article XII*), and general exceptions (*Article XIV*) and the security exception (*Article XIV bis*). In other words, parties to integration agreements must extend national treatment to each other's services and service suppliers across a substantial portion of their services economy without raising barriers in relation to trade in services with any Member outside the economic integration agreement.[183]

The language in the remainder of *Article V:1* makes it clear that the requirement to eliminate substantially all discrimination need not be met immediately, but might be achieved over a reasonable period of time, although this term is undefined.

Unlike its counterpart in GATT Article XXIV, *Article V:2* provides that an evaluation as to whether the elimination of substantially all discrimination has been achieved involves a consideration of "the relationship of the agreement to the wider process of economic integration or trade liberalization among the countries concerned" as a whole.

4. Notification and Examination

A WTO Member that is a party to an integration agreement must promptly notify the Council for Trade in Services[184] of the existence of the agreement and supply any relevant information that may be requested by the Council. As of December 5, 2003 some 27 economic integration agreements had been notified under *Article V.*[185]

Article V:7(a) provides that the Council for Trade in Services *may* establish a working party to examine an economic integration agreement, or the enlargement or modification thereof, in order to review its consistency with the provisions of *Article V*. Unlike the comparable procedure for notification and examination of customs areas and free trade agreements under GATT Article XXIV, the examination of integration agreements in the area of services trade remains an optional, rather than mandatory, requirement.[186]

[182] GATS *Article V:1 (a)*, footnote 1.

[183] GATS *Article V:4*.

[184] GATS *Article V:7(a).*

[185] *Interim Report (2003) of the Committee on Regional Arrangements to the General Council* ("*Interim Report (2003) CRTA"*), December 5, 2003, WT/REG/13 (July 7, 2003), para. 4.

[186] Compare the situation under GATT *Article XXIV*. A working party examination of a regional trade arrangement is required on the basis of section 7 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, adopted by the Members at Marrakesh, in Annex 1A Multilateral Agreements on Trade in Goods. The analogous provision in GATS *Article V:7(a)* only states that the Council "may" establish a working party to examine an agreement.

Nevertheless, practice thus far, although sparse, shows that the Council for Trade in Services usually does refer the economic integration agreement to the WTO Committee on Regional Trade Arrangements ("CRTA")[187] for an examination and report to the Council. So far, the Council for Trade in Services has referred all 27 economic integration agreements notified under *Article V* to the CRTA.[188] As of December 2003, however, the CRTA had not completed a single examination report for any form of regional arrangement, whether notified under GATT Article XXIV, GATS Article V or the Enabling Clause.

5. Developing Countries

Where developing countries are party to an economic integration agreement, the two conditions of "substantial sectoral coverage" and "absence or elimination of substantially all discrimination" are to be interpreted with flexibility "in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors."[189] In the event that *all* the parties to such agreement are developing countries, the GATS permits them to grant more favorable treatment to enterprises that are owned or controlled by natural persons of the parties to the agreement.[190]

6. Trade Creation

An important requirement regarding an economic integration agreement under *Article V* is that it should facilitate or *create* trade between parties to the agreement, while avoiding *diversion* of trade that would otherwise have been conducted with Members outside the agreement. To this end, parties to an economic integration agreement must ensure that the overall level of barriers to trade in the respective services sectors and sub-sectors is not raised beyond the level that applied before the agreement came into operation. This basic principle, set out in *Article V:4*, is similar to that contained in GATT Article XXIV.[191]

If, in conjunction with the "conclusion, enlargement or any significant modification" of an economic integration agreement a Member decides to withdraw or modify a specific commitment contrary to the terms and conditions of its Schedule of Specific Commitments, it must provide at least ninety days advance notice of its intention to do so.[192] In addition, under the procedure set out in paragraphs 2, 3 and 4 of *Article XXI*,[193] at the request of any "affected Member," the party seeking to withdraw or amend its commitment is required to enter negotiations, with a view to reaching agreement on any necessary compensatory adjustment.

E. Labor Markets Integration Agreements (Article V bis)

Article V bis is a special provision in the GATS that permits a specific form of economic integration agreement relating to the movement of persons. Essentially, it allows Members

[187] The Committee on Regional Trade Arrangements was established by Decision of the General Council of February 6, 1996, WT/L/127 (February 7, 1996). The CTRA's mandate is to carry out an examination of all types of regional trade arrangements, to consider how the reporting on the operation of agreements should be carried out and to make recommendations in this regard, to develop procedures to facilitate and improve the examination process and to provide a forum for the consideration of the systemic implications of regional trade arrangements and other regional initiatives for the multilateral trading system and the relationship between them, and to carry out any additional functions assigned to it by the General Council.

[188] *Interim Report 2003 CRTA, supra* note 185, ¶¶ 5 and 10.

[189] GATS *Article V:3(a).*

[190] GATS *Article V:3(b).*

[191] *See* JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 101–121. (2002)

[192] GATS *Article V:5.*

[193] *Id*.

to take part in agreements which establish "full integration of labour markets between or among the parties to such an agreement". A footnote to the provision makes clear that a typical labor markets integration agreement will provide citizens of the parties concerned a right of free entry to each other's employment markets. It will also typically include such matters as conditions of pay and other conditions of employment and social benefits.

Such labor market integration agreements are conditional upon two factors. First, such an agreement must "exempt citizens of parties to the agreement from requirements concerning residency and work permits"[194] and would normally only be relevant in those types of regional economic agreement where deeper integration has already taken place such as in the European Communities. Second, the labor market integration agreement must be notified to the Council for Trade in Services[195]; so far this has only been done in respect of a single agreement concerning a common Nordic labor market.[196]

F. Domestic Regulation (Article VI)

The GATS is also intended to provide a means of overcoming unnecessarily burdensome requirements that create barriers to trade in services. However, this is no mean task, given that barriers to trade in services are embedded in domestic regulation, unlike barriers to trade in goods that are usually imposed at the border.

In light of this, it is somewhat unfortunate that *Article VI* is one of the more difficult articles in the Agreement to understand fully, partly because the term "Domestic Regulation" is not clearly defined.[197] In literal terms, all regulations at the national level affecting trade in services are "domestic regulations." In the context of *Article VI*, however, most WTO Member governments agree that only certain types of measures are covered by the mandate in paragraph 4 of *Article VI* to develop any necessary disciplines on domestic regulation.

Specifically, as discussed below, nearly all WTO Members believe that the regulatory disciplines to be developed under paragraph 4 of *Article VI* apply only to non-discriminatory measures that are not already covered under *Article XVI (*market access) and *Article XVII* (national treatment), unlike the measures covered by paragraphs 1 to 3 and 6.

Before turning to a review of the specific developments that have taken place concerning paragraph 4 of *Article VI*, consideration should be given to the remaining paragraphs of that Article, which mandate both unconditional and conditional obligations.

1. Unconditional Obligations

With the apparent exception of *Article VI:4*, discussed below, *Article VI:2* is the only paragraph of *Article VI* that applies to all the services sectors covered by the GATS, regardless whether or not commitments have been entered into a Member's Schedule.

[194] GATS *Article V bis: (a)*.

[195] GATS *Article V bis: (b*.)

[196] Council for Trade in Services, *Notification Pursuant to Article V bis of the General Agreement on Trade in Services*, S/C/N/34 (Denmark notifying) (December 2, 1996), S/C/N/35 (Iceland notifying) (December 2, 1996), S/C/N/36 (Norway notifying) (December 2, 1996) and S/C/N/37 (Sweden notifying) (December 2, 1996) with respect to the *Agreement Concerning a Common Nordic Labour Market* and the protocol annexed to it, dated August 1, 1983.

[197] Generally speaking, the six paragraphs in GATS *Article VI* might be best understood as mandatory "good governance" provisions. Only *Article VI:3* actually mentions the term "regulation," referring to "domestic laws and regulations." Indeed, paragraphs 1 and 4 of *Article VI* refer to "measures," which are broadly defined under GATS *Article XXVII* (definitions) to include laws, regulations, rules, procedures, decision, administrative actions, etc.

Article VI:2(a) mandates the establishment of tribunals or procedures for the objective and impartial review of administrative decisions, to the extent they affect trade in services.[198] This is an extremely important GATS provision, as it helps to prevent arbitrary decision-making in any GATS sector, regardless of the level of liberalization inscribed in a particular Member's Schedule.

2. Conditional Obligations

Paragraphs 1, 3 and 6 of *Article VI* (paragraph 5 is discussed below) impose additional obligations on Members in the particular services sectors, or sub-sectors, where they have scheduled GATS commitments.

Article VI:1 calls for the "reasonable, objective and impartial" administration of all measures of general application. Again, this is primarily intended to prevent arbitrary administrative practices.[199]

Article VI:3, recognizing that authorization procedures, however benign in principle, potentially constitute a serious impediment to the provision of services, mandates that such authorizations be given within a "reasonable" period of time, and mandates the provision of information, upon request, concerning the status of the application for an authorization.[200]

Recognizing the high level of regulation in this area, *Article VI:6* contains the only reference in the Agreement to professional services, mandating the establishment of "adequate procedures" to verify the competency of professionals from any other WTO Member.[201] It must be emphasized, however, that while a Member is obligated to provide market access (and national treatment) in accordance with its GATS commitments, such market access is provided only to appropriately qualified service providers, as determined by the Member concerned.

Although it could be argued that *Article VI:6* is redundant, in light of the existing obligations imposed by *Articles XVI and XVII*, it can also be argued strongly that it serves, if nothing else, to remind Member governments that, if they decide to grant market access in professional services, they are required to facilitate the entry of qualified foreign professionals in a reasonable manner.

3. Mandated Development of Regulatory Disciplines

During the Uruguay Round, WTO Members recognized the potentially restrictive effects of domestic regulatory measures, and agreed to develop specific disciplines to ensure that government regulations are not unduly trade restrictive. The result was *Article VI:4*, which refers to three specific types of domestic regulation (licensing requirements, qualification requirements and procedures, and technical standards), and mandates WTO Members to develop "any necessary disciplines." Progress to date in implementing this mandate is examined in detail in Appendix A to this chapter.

[198] GATS *Article VI:2* (b) exempts a Member from this requirement if it would be "inconsistent with its constitutional structure or the nature of its legal system."

[199] To date, the terms "reasonable, objective, and impartial" have yet to be defined in the GATS or GATT context. See WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE (WTO Secretariat, Geneva, 2003) and GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, 6th edition (GATT Secretariat, Geneva, 1995).

[200] Paragraph 16 of the *Decision on Accountancy Disciplines*, as well as the current work of the Working Party on Domestic Regulation ("WPDR"), both of which are discussed in Appendix B to this chapter, attempts to give greater specificity to this requirement.

[201] To date, however, no discussion has yet taken place in the WTO services context regarding the meaning of the term "adequate procedures."

It should be remembered that the preamble to the GATS explicitly recognizes "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives."[202] Nonetheless, the GATS does set out specific rules, either in *Article VI* or elsewhere, to prevent regulations from unduly restricting trade. The objective, as Paragraph 4 states, is to help insure that measures "do not constitute *unnecessary* barriers to trade in services" (emphasis added), thereby recognizing the legitimacy of regulatory measures, even when they may be burdensome.

As already noted, Members generally agree that *Article VI:4* applies only to non-discriminatory measures that are not subject to scheduling under the GATS provisions regarding market access and national treatment. Considering that *Article VI:4* gives no direct indication of the types of measures covered, arriving at this conclusion involves a slightly complex process of deduction. An explanation is to be found in *Article XVIII*, which states, "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under *Articles XVI* or *XVII*, including those regarding qualifications, standards or licensing matters."

The strongest argument, however, in regard to the application of *Article VI:4* is that a legal distinction must be made between measures under *Article VI:4*, and those under *Articles XVI* and *XVII*, in order to protect the regulatory rights of governments. Specifically, applying *Article VI:4* to limitations entered under *Article XVI* and *Article XVII* would reduce the right of governments to schedule according to their domestic policy objectives. Equally important, if *Article VI:4* measures (for example regulations for ensuring consumer protection) were required to be scheduled, they would thereby become subject to negotiation and could not easily be modified or strengthened. This could directly contradict the regulatory rights recognized in the Preamble to the GATS.[203]

Although the text of *Article VI:4* does not state that any regulatory disciplines developed under its mandate should be applicable only where specific commitments have been made, most WTO Members are firmly of this view, with the possible exception of certain transparency provisions.[204]

4. Period Pending the Development of Regulatory Disciplines

Since it was anticipated that it would take time before regulatory disciplines could be developed in accordance with *Article VI:4*, provision was made for the intervening period. Thus, until the entry into force of any disciplines to be developed under *Article VI:4* the rather weak requirements of *Article VI:5* are in effect.[205]

Article VI:5 requires that, in sectors where specific commitments have been made, the Members concerned will not apply domestic regulations that nullify or impair those commitments, unless such domestic regulations could have reasonably been expected at the time the specific commitments were made. This weakness of *Article VI.5*, i.e. the

[202] Preamble to the GATS, fourth recital. In this respect, it should also be emphasized that the GATS does not presume to give Member governments the right to regulate; instead, it explicitly recognizes that right. *See also* the paper prepared by the WTO Secretariat, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to all Services*, S/C/W/96 (March 1, 1999) *("Article VI:4 Disciplines: Background Note")*, 2, ¶¶ 7–9.

[203] In this regard, *see id*, 3–4, ¶¶ 12–14.

[204] *See*, for example, Minutes of the WPDR meeting of October 22, 2002, S/WPDR/M/18 (December 3, 2002), at 3.

[205] Aaditya Mattoo, "*National Treatment in the GATS: Corner Stone or Pandora's Box?*" 31:1 JOURNAL OF WORLD TRADE LAW 118, 129 (1997).

nullification or impairment requirement, the "grandfathering" of existing measures, and the application only where specific commitments have been made, is probably due to the caution of Member governments with respect to the broad scope of *Article VI:4* resulting from the prevalence of domestic regulations in services.

One of the most interesting aspects of *Article VI:5* is the very weak provision on international standards. Section (b) of Paragraph 5 states that only those international standards being applied by a Member can be used to determine whether that Member is in conformity with the obligations under *Article VI:5.* Overall, the weakness of GATS provisions on international standards is in firm contrast to the TBT and SPS requirements for goods, which strongly encourage the use of international standards.[206]

5. Implementing the Domestic Regulation Mandate

Due to the potentially very wide-ranging effects of GATS *Article VI:4*, as well as to the fact that the GATS was a new and untested agreement, WTO Member governments have proceeded very slowly and cautiously in their efforts to implement the mandate to develop any necessary disciplines on domestic regulation. The results of these efforts, most notably the creation of the Accountancy Disciplines by the Working Party on Professional Services ("WPPS"), as well as the current work of the Working Party on Domestic Regulation ("WPDR"), are detailed in Appendix A.

G. Recognition (Article VII)

Corporations or natural persons supplying services generally have to obtain certificates, licenses or other authorizations that entitle them to do business in the jurisdiction of a particular WTO Member. Foreign suppliers often find it difficult to obtain such certificates, licenses or authorizations, because of the differing regulatory requirements that exist relating to education and vocational qualifications and work experience. *Article VII* forms the basis for introducing some discipline into the matter of "recognition," although the term itself is undefined.[207] An important point to note is that *Article VII* does not mandate recognition; instead it authorizes it.[208]

The actual scope of *Article VII* is broad in two respects. First, it covers virtually all domestic regulatory instruments that directly impact on the supply of a service. Second, it anticipates a range of possibilities that would include not only rules of harmonization but also rules of recognition, either on a mutual, plurilateral or autonomous basis. Just as it is unclear what recognition means in *Article VII*, there is no indication as to who is actually competent to negotiate and enter into legally enforceable mutual recognition commitments, despite the delegated authority implicit in the provision itself (one could speak of "imperfect delegation" in this respect), nor who is responsible for actual implementation of mutual recognition instruments.[209]

In order to overcome such difficulties, paragraphs 1 and 2 of *Article VII* urge Members to enter into bilateral and multilateral arrangements for the mutual recognition of the qualifications required for obtaining those necessary certificates, licenses or authorizations,

[206] *See Article VI:4 Disciplines: Background Note*, *supra* note 202, at 9–10, ¶¶ 35–42.

[207] Americo Beviglia Zampetti, *Market Access through Mutual Recognition: the Promise and Limits of GATS Article VII*, in Sauvé and Stern, *supra* note 5, at 294.

[208] Kalypso Nicolaïdes and Joel P. Trachtman, *From Policed Regulation to Managed Recognition in GATS*, in Sauvé and Stern, *supra* note 5, at 241, 261 and 264.

[209] Beviglia Zampetti, *supra* note 207, at 294.

or otherwise to accord such recognition on an autonomous basis.[210] *Article VII:2* further provides that such mutual recognition arrangements should be open for accession by other Members, if they can demonstrate that their domestic standards and requirements are comparable with those of the arrangements concerned. Similarly, if a Member accords recognition on an autonomous basis then any other Member must be afforded adequate opportunity to demonstrate that education, experience, licenses, or certifications obtained or requirements met, are worthy of recognition. *Article VII* thus provides an exception to *Article II* (MFN) but makes it conditional upon applying certain disciplines on recognition arrangements "designed to prevent them being used to dilute entirely the MFN obligation."[211]

Furthermore, there is a transparency requirement in Paragraph 4 of *Article VII*, in that Members wishing to enter into negotiations for a mutual recognition agreement are required to inform the Council for Trade in Services as to their intent so as "to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase."[212] So far 117 notifications have been received under *Article VII:4*, of which the majority are from Latin American countries (almost all related to educational and professional qualifications obtained abroad), from the United States (in the fields of accountancy, architectural services and engineering qualifications), from Switzerland and/or Liechtenstein (in the fields of educational and professional qualifications, transport services, mining, health, auditing qualifications, direct insurance services and patent agents), two from the European Communities (in the fields of direct insurance and banking including exemptions for the United States and Japan from German banking laws), from Australia (in the fields of accountancy, architectural services, engineering, surveyors professional qualifications), from Latvia (in the field of educational qualifications), from Norway (related to legal qualifications) and from Macao (in the fields of auditing qualifications and health services).[213]

Finally, there is a recommendation in Paragraph 5 of *Article VII* that Members should "(W)herever appropriate" base recognition on "multilaterally agreed criteria," and to that end should work in "co-operation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition." However, this provision allows considerable discretion to WTO Members as to whether to follow international standards by prefacing the relevant recommendation with the wording "(W)herever appropriate," in contrast to, for example, the Agreement on Technical Barriers to Trade, Article 2.4 or the Agreement on Sanitary and Phytosanitary Measures, Article 3.1.

[210] The only Member that has thus far indicated that it accords recognition on an autonomous basis is Singapore; *see Notification Pursuant to Article VII:4 of the General Agreement on Trade in Services*, S/C/N/30 (October 30, 1996), in which Singapore states that it "does not maintain recognition measures based on agreements" but "accords recognition autonomously".

[211] Nicolaides and Trachtman, *supra* note 208, at 265.

[212] Beviglia Zampetti, *supra* note 207, at 298–299.

[213] Aaditya Mattoo, *Developing Countries in the New Round of GATS Negotiations: From a Defensive to a Pro-Active Role*, unpublished paper for the WTO/World Bank Conference on Developing Countries in a Millennium Round, Geneva, September 20–21, 1999, at 24, n. 29. Since 1996, the following Members have notified Mutual Recognition Agreements (MRAs) to the Council for Trade in Services under GATS *Article VII:4*: Argentina, Australia, Brazil, Chile, Colombia, Costa Rica, Cuba, EC (and Germany, as EC Member), El Salvador, Guatemala, Latvia, Liechtenstein, Macao, Norway, Switzerland, U.S. and Venezuela. The Council for Trade in Services appears never to have issued a comprehensive list containing all notifications, despite requests to this effect from some of the Members.

H. Monopolies and Exclusive Service Supplies (Article VIII)

Market failure due to the exercise of monopoly or oligopoly powers in any given domestic market may create trade problems because incumbent service suppliers can impede access to the domestic market in the absence of appropriate regulation. It is not unusual to find a high degree of anti-competitive practices within a range of service industries. They are particularly common in infrastructure services like telecommunications, for example the exclusive provision of local service while engaging in competition on long-distance terrestrial and mobile telephone markets, or in some branches of the transport sector, where the presence of "cabotage" may also impede market access.

Anti-competitive behavior can also include the exclusivity of the service provider(s) in a particular market. An example of this could be the presence in the financial sector of certain so-called "club arrangements," which are primarily professional associations and groupings with specific objectives involving matters like payment systems, quotation, dealing and clearing and settlement systems in securities markets.

Even so, the relevant GATS provision, in *Article VIII*, is extremely limited in scope.[214] Paragraph 1 of *Article VIII* requires Members to ensure that monopoly service suppliers do not abuse their monopoly or, through the grant of an exclusive right, act in a manner which is "inconsistent" with their general or with their specific commitments as set out in their Schedule. A further conditional obligation is found in Paragraph 2 of *Article VII* which requires Members to prevent the "abuse" of a monopoly position by a domestic service supplier (either directly or through an affiliated company) where it is competing in the supply of a service over which it does not have monopoly rights but which is subject to that Member's specific commitments.

Furthermore, the Council for Trade in Services can, at the request of a Member affected by such anti-competitive behavior, initiate a request for information from the Member in whose territory the service supplier is established or which maintains or authorizes such supplier, concerning its operations.[215] Similarly, should a Member grant any monopoly or exclusive rights for the supply of a service which is covered by its specific commitments, after the date of entry into force of the WTO Agreement, then it is under a duty to notify the Council for Trade in Services in accordance with Paragraph 4 of *Article VIII. Article VIII:5* applies the provision to *de minimis* exclusive service suppliers where those suppliers substantially prevent competition among other suppliers in the territory.

I. Business Practices (Article IX)

GATS *Article IX* recognizes that service suppliers could adopt practices that "may restrain competition and thereby restrict trade in services", i.e. restrictive business practices pure and simple but potentially broader in scope than *Article VIII.* Whenever a problem of this type occurs, *Article IX* gives the affected Member the right to request the Member where the service supplier is located for mandatory consultations with a view to eliminating such practices.

J. Payments and Transfers (Article XI)

While there is no provision analogous to GATT Article XI, containing a general prohibition on quantitative restrictions, the GATS nevertheless has other provisions with a

[214] *Id*. at 22.
[215] GATS *Article VIII:3.*

similar application. One of these is GATS *Article XI*,[216] which contains a prohibition on the imposition by Member of international payments and transfer restrictions that are connected to market access commitments, which it has undertaken and bound in its respective Schedule of specific commitments.

GATS *Article XI:2* contains a double "savings clause." First, the GATS shall not affect the rights and obligations of Members, which are simultaneously IMF Members (or have entered into exchange agreements with the Fund). Second, this is conditional on a Member not seeking to impose restrictions on capital transactions that are inconsistent with its specific commitments unless covered by the balance of payments exception of GATS *Article XII* (see hereunder) or at the request of the Fund.[217]

K. Restrictions to Safeguard the Balance of Payments (Article XII)

GATS *Article XII* recognizes that the process of economic development or transition may put pressure on the balance of payments of some Members, necessitating the use of restrictions to maintain a level of financial reserves adequate for the implementation of its program of economic development. The provision therefore permits Members in the event of serious balance of payments or external financial difficulties, or the threat thereof, to adopt or maintain restrictions on trade in services on which it has undertaken specific commitments and any payments or transfers for transactions related to such commitments.

Some strict rules apply to the imposition of restrictions under *Article XII*. The restrictions:

- may not discriminate among Members;
- must be consistent with the Articles of the IMF;
- must avoid unnecessary damage to the interests of other Members;
- may not exceed those necessary to deal with the circumstances; and
- must be temporary, and progressively phased out.[218]

In applying restrictions, Members are permitted to give priority to those services essential to their economic or development programs, as long as they do not do so with the *purpose* of protecting a particular service sector.[219] Restrictions adopted, maintained or changed must be notified to the WTO General Council.[220] Members imposing restrictions must also consult promptly with the WTO Committee on Balance-of-Payments Restrictions in order to assess the BOP situation of the Member and the restrictions adopted or maintained.[221] A further provision makes it clear that these consultations must be conducted in accordance with the procedures established by the Ministerial Conference,[222] taking into account the following factors:

[216] A similar prohibition on the maintenance or adoption of restrictive measures, other than where specified in a Member's Schedule, can be found at GATS *Article XVI:2* (Market Access).
[217] GATS *Article XI:2*.
[218] GATS *Article XII:2*.
[219] GATS *Article XII:3*.
[220] GATS *Article XII:4*.
[221] GATS *Article XII:5(a)*.
[222] GATS *Article XII:5(b)* and footnote thereto, where it is stated that these procedures should be same procedures as those set out in the *Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*.

- the nature and extent of the balance-of-payments and external financial difficulties;
- the external economic and trading environment; and
- alternative corrective measures available.[223]

L. General Exceptions (Article XIV)

Like GATT Article XX, the general exceptions provision found in GATS *Article XIV* sets out the bases on which a Member may deviate from application of the basic GATS rules on certain public policy grounds, including the adoption of enforcement measures to protect public morals, to maintain public order, or to protect human, animal or plant life, or health. While these grounds are similar to those contained in GATT Article XX, *Article XIV* provides additional general exceptions relating to the prevention of deceptive practices, and the protection of privacy. It also contains specific exceptions to the *Article II* MFN requirement and the national treatment requirement of *Article XVII.*

While permitting adoption of such measures where exceptional circumstances prevail, the Agreement also imposes limitations on their use. The *chapeau* to GATS *Article XIV*, like that of GATT Article XX, requires that the measures not be applied in a manner that would constitute a means of "arbitrary" or "unjustifiable" discrimination between countries where like conditions prevail, or constitute "a disguised restriction on trade in services." In effect, as Arup points out: "(T)he GATS disciplines carry over tests of acceptability from the GATT which appear to represent a mixture of concerns . . . to ascertain the genuineness of the motives behind . . . the measures . . . (and) . . . to limit the effect of the genuine measures on trade."[224]

Subject to that requirement, Members may adopt or enforce measures that are inconsistent with the GATS that are:

a. necessary to protect public morals or to maintain public order (*Article XIV(a)*);
b. necessary to protect human, animal or plant life or health (*Article XIV(b)*);
c. necessary to secure compliance with laws or regulations that are not inconsistent with the GATS, including those relating to:
   - the prevention of deceptive and fraudulent practices to deal with the effects of a default on services contracts;
   - the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and
   - safety (*Article XIV (c)*).

Members may also adopt measures that are inconsistent with *Article XVII* (national treatment), if the difference in treatment is aimed at imposing and collecting direct taxes in regard to services or service suppliers of other Members (*Article XIV(d)*); and measures that are inconsistent with *Article II* (MFN), if the difference in treatment is the result of an agreement for the avoidance of double taxation (*Article XIV(e)*).

Although the general exceptions to the GATS parallel those found in GATT Article XX, they of course omit those measures that apply specifically to goods.[225] GATS

[223] GATS *Article XII:5(c)*.
[224] ARUP, *supra* note 116, at 130.
[225] GATS *Article XIV* makes no reference to the specific subjects areas contained in GATT *Article XX* under (*c*) imports and exports of gold and silver, (*e*) products of prison labour, (*f*) national treasures, (*g*) exhaustible

Article XIV does, however, include those provisions corresponding to XX(a), (b) and (d), as they apply equally to services industries. Paragraphs (a) and (b) of GATT Article XX and GATS *Article XIV* are almost identical, and GATS *Article XIV(c)* is similar to GATT Article XX(d) in that it permits measures "necessary to secure compliance with existing laws or regulations" not inconsistent with the provisions of the respective Agreement. While GATT examples of this include enforcement of customs laws and monopolies, intellectual property and prevention of deceptive practices, the non-exhaustive list set out in the GATS focuses on the prevention of deception, fraud and even default in relation to services contracts, as well as the protection of individual privacy and safety.

GATS *Article XIV(d)* permits measures that would otherwise contravene the *Article XVII* national treatment principle, provided that the differential treatment is "aimed at ensuring the equitable or effective imposition or collection of direct taxes." Thus, the issue as to how the GATS might deal with pre-existing tax measures was resolved by adopting a "common ground approach"[226] whereby tax measures affecting service suppliers required no justification under *Article XIV* unless they violated an obligation or commitment under the Agreement.[227] Additionally, a note to *Article XIV(d)* contains an understanding by the Members that direct taxation applies only to the collection of taxes that are imposed on the services themselves or on their suppliers. The fiscal "carve-out" even goes so far as to recognize the discretion of individual WTO Members, in that the relevant tax definitions and concepts under *Article XIV(d)* are determined in accordance with equivalent provisions in the domestic law of the Member taking the measure. The exception fails however to "acknowledge the broader role service suppliers such as professionals play in constructing tax avoidance schemes and the need to regulate services supply on this basis."[228]

GATS *Article XIV(e)* permits measures inconsistent with GATS *Article II* (MFN), provided that the differential treatment results from an international agreement for the avoidance of double taxation. This provision may, however, be of little utility. While double taxation agreements were, at one time, concluded in order to prevent the imposition of conflicting requirements on those operating in more than one country, globalization has led to their increasing obsolescence as firms increasingly operate in several jurisdictions, underscoring the need for greater international regulatory cooperation in the field of taxation rather than the bilateral approach.[229]

Although the GATS general exception provision remains untested in the WTO dispute settlement system, a panel or the Appellate Body might, if called upon, be expected to follow the same approach as that formulated in respect of the general exceptions under GATT. In accordance with WTO case law,[230] the application of the GATT test calls for a

natural resources, (*h*) governmental commodity agreements, (*i*) export restrictions on domestic materials and (*j*) acquisition or distribution of products in short supply.

[226] Reyna, *supra* note 107, at 800.

[227] *The Applicability of the GATS to Tax Measures*, Note by the Secretariat, MTN.GNS/W/210, (December 1, 1993), 1.

[228] ARUP, *supra* note 116, at 129.

[229] *Id*.

[230] WTO Panel Report and Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline ("US—Gasoline")*, WT/DS2/R (1996), and WT/DS2/AB/R (1996); WTO Panel Report and Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products ("US—Shrimp")*, WT/DS58/R (1998), and WT/DS58/AB/R (1998); WTO Panel Report and Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products ("EC—Asbestos")*, WT/DS/135 (2000) and WT/DS 135/AB/R (2000).

two-step analysis. First, the domestic measure must be provisionally characterized under one of the subparagraphs (a) to (j) of GATT Article XX (in a GATS situation, paragraphs (a) to (e) of GATS *Article XIV*). The second step requires an appraisal of the measures to ensure that they satisfy the criteria of the *chapeau*, which are almost identical to those contained in the *chapeau* to GATT Article XX.[231]

The sequence of these steps has proved to be important, at least in the WTO jurisprudential interpretation of GATT Article XX(d) (regarding measures necessary for securing compliance with existing laws or regulations), and may be equally so in the interpretation of GATS *Article XIV(c)*. In order to characterize a measure as one that falls within GATT XX(d), the Appellate Body has required demonstration of two elements: that the measure is designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT, and that it is "necessary" to secure such compliance.[232] Similarly, the burden of showing that this requirement has been met falls to the Member seeking to justify a measure by invoking the GATS *Article XIV(c)* exception.

The Appellate Body has already, in the context of GATT Article XX, provided an interpretation of the word "necessary." In *Korea—Beef* the Appellate Body considered that those "measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d)" but others "may fall within the ambit of this exception." The term "necessity" referred to a range of degrees of necessity that called for a weighing and balancing of a series of factors in each case.[233] In *EC—Asbestos*[234] the Appellate Body took the opportunity to elaborate upon *Korea—Beef* in finding that "necessity" could also be determined on the basis of the extent to which a WTO-consistent alternative measure contributes to the realization of the end pursued, as well as the more vital or important common interests of the value pursued.

This interpretation of the necessity requirement in GATT Article XX may be relevant with respect to paragraphs (a), (b) and (c) of *GATS Article XIV*. It appears to move away from a "least trade-restrictive" test, in which a measure is "necessary" only if it is the *least* restrictive alternative, toward a broader basis for justification (which could be called a "*less* trade-restrictive" approach), supplemented by a process similar to a proportionality test for "weighing and balancing a series of factors." Indeed, the development of such a proportionality test could occur in the services sector not only in relation to the general exceptions clause of GATS *Article XIV* but also (and more likely) in developing disciplines on domestic regulation under GATS Article VI:4 (*See* commentary on GATS Part II. F.3, 4 and 5 above).

M. Security Exceptions (Article XIV bis)

The GATS security exceptions are almost identical to those contained in GATT Article XXI. They include the disclosure of information that a Member considers contrary to its national security interests, as well as action that a Member considers necessary for the

[231] The only difference being that the *chapeau* in GATS *Article XIV* speaks of "where like conditions prevail," as compared to "where the same conditions prevail" in the preambular language of GATT *Article XX*.

[232] Report of the Appellate Body, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (2001), ¶ 157.

[233] *Id*, ¶ 161.

[234] *EC—Asbestos*, *supra* note 230, Appellate Body Report, ¶ 172.

protection of its essential security interest:

- relating to the supply of services for the provisioning of a military establishment;
- relating to fissionable or fusionable material; and
- taken in time of war or other emergency in international relations.[235]

Further, WTO Members shall not be prevented from undertaking "action in pursuance of . . . obligations under the United Nations Charter for the maintenance of international peace and security", i.e. in compliance with their obligations under Chapter VII of the Charter should the need arise.[236]

The GATS also contains a transparency provision that is absent from the GATT security exception. Under paragraph 2 of GATS *Article XIV bis*, the Services Council is not simply to be notified, but "shall be *informed to the fullest extent possible* . . ." of measures taken under paragraphs 1(b) and (c).[237] That language mirrors a Decision taken by the GATT Contracting Parties in 1982, which stated that "subject to the exception in Article XXI(a), Contracting Parties should be informed to the fullest extent possible of trade measures taken under Article XXI."[238]

PART III. SPECIFIC COMMITMENTS

Part III of the Agreement departs from the simplicity of the GATT-regime with respect to market access and national treatment. It encourages Members to make specific commitments in each of these two areas in order to liberalize their trade in services and to guarantee the type of treatment to be accorded in respect of all measures "affecting" the supply of services[239] in the sectors inscribed in their Schedules and subject to any conditions or qualifications set out therein. As barriers to trade in services arise largely from internal measures, rather than those applied at the "border," it can be expected that they will receive different treatment under the GATS. In essence, although no neat parallels can be drawn, such barriers can be divided roughly into two groups. The first comprises broadly quantitative restrictions under GATS *Article XVI*,[240] while the second includes discriminatory measures subject to national treatment disciplines under GATS *Article XVII*.

A. Market Access (Article XVI)

1. Overview

In accordance with Paragraph 1 of GATS *Article XVI*, Members, in respect of market access through the four modes of supply, are under an obligation to accord services and service suppliers of other Members treatment "no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." Although the Article contains no express definition of "market access," it in effect offers a description by providing an exhaustive list of the measures which are in principle prohibited by a market access commitment. Unless otherwise indicated by a reservation

[235] GATS *Article XIV bis:1(b)*.
[236] GATS *Article XIV bis:1(c)*.
[237] GATS *Article XIVbis:2*.
[238] See *Decision Concerning Article XXI of the General Agreement of November 30, 1982*, L/5426, BISD 29th Supp. 23–24 (1983), ¶ 1.
[239] The definitional clause in GATS *Article XXVIII* (definitions) is broadly framed so as to define "supply of a service" to include "production, distribution, marketing, sale and delivery of a service."
[240] With the exception of GATS *Article XVI:2(e)*.

in its Schedule, Article XVI:2 requires Members to refrain from maintaining or adopting measures falling into any of the following six categories of restrictions in the inscribed sectors:

(a) limitations on number of suppliers
(b) limitations on total value of service transactions (including any form of "economic needs test") or assets
(c) limitations on operations or total quantity of service output
(d) limitations on value of transaction
(e) measures which restrict the type of legal entity through which services may be supplied, and
(f) limitations on the participation of foreign capital or investment.

With the exception of *Article XVI:2(e)* (type of legal entity), the types of measures that are covered by *Article XVI* are approximately equivalent to quantitative restrictions in the GATT.

The following are important points with respect to *Article XVI.* First, not all potential barriers to services are, in principle, prohibited by Paragraph 2 of *Article XVI.* For example, there is no requirement that tax measures be scheduled as long as such measures are not discriminatory with respect to other Members' suppliers or domestic suppliers. Thus, a Member may maintain a high tax on services, potentially impairing market access, without contravening the GATS. Second, the "types" of restrictions prohibited by *Article XVI* (unless reserved by a specific limitation) encompass both discriminatory measures, applying only to foreign services or entities, and non-discriminatory measures, which would apply equally to foreign and domestic entities. Third, scheduled limitations on market access are to be read as guarantees of minimum treatment; there is nothing to prevent a Member from providing more favorable treatment if it so chooses. For example, if a Member states that it will limit entry to three service providers in the sector, there is no reason why it cannot permit entry to five providers if it chooses to do so.

2. The Relationship Between Market Access and National Treatment

GATS *Article XVI* raises a number of difficult issues, particularly in regard to its relationship with the national treatment obligation in *Article XVII*. Uncertainty about the meaning of specific commitments arises because the precise domains of market access and national treatment have not been clearly delineated; further ambiguities are created by the act of scheduling that makes "the degree of intended discrimination in a market access commitment unclear."[241] This is due to the fact that the restrictions that are in principle prohibited by *Article XVI* encompass both discriminatory and nondiscriminatory measures, which creates a potentially confusing overlap between the domains of market access and national treatment.

Thus, measures that are inconsistent with both *Article XVI* and *Article XVII* give rise to potential divergence between market access and national treatment commitments and ambiguity of interpretation of those commitments. What is the status of commitments in regard to a measure that falls in the domain of both market access and national treatment, where the Members' commitments with respect to the two are not the same? *Article*

[241] Patrick Low, *Comment* on Rudolf Adlung; *Services Trade Liberalization from Developed and Developing Country Perspectives* in Sauvé and Stern, *supra* note 5, at 136, 137. *See also* Patrick Low and Aaditya Mattoo, *Is There a Better Way? Alternative Approaches to Liberalization under GATS* in Sauvé and Stern, *id*, at 449, 450–451.

XX:2 partially answers this question by providing that if a measure that is inconsistent with both Articles XVI and XVII is inscribed as a limitation in the *Article XVI* (market access) column, it will be considered to provide a condition or qualification to national treatment, under *Article XVII*, as well.[242]

Article XX:2 does not, however, address the situation in which a Member enters a full commitment to provide national treatment, but makes no commitment to market access. An example of this is found in the Schedule of Commitments of Australia.[243] In regard to 'real estate services involving own or leased property (821)', Australia indicates in the market access column:

1) commercial presence required
2) commercial presence required
3) None
4) Unbound except as indicated in the horizontal section.

Under national treatment, the entries are as follows:

1) None
2) None
3) None
4) Unbound except as indicated in the horizontal section.

The entry 'commercial presence required' under market access modes 1 and 2 only reiterates that there are no limitations on mode 3 delivery of services, and indicates that Australia remains 'UNBOUND' as to access by cross-border supply and consumption abroad. Whereas no market access commitment is made in relation to those two modes, services under the same modes are guaranteed full national treatment ('NONE'). In such a situation, it is not clear whether the Member (in this case Australia) is free in future to introduce a discriminatory quantitative restriction that will affect entry by foreign suppliers.

One theory is that the Member is obliged to respect the national treatment obligation with regard to all measures covered by *Article XVII*, including those (discriminatory) measures that are also covered by *Article XVI*. Under this proposition, the scope of the national treatment obligation might be over-expansive and not reflect the true intention of the respective Member.

Another reading of Paragraph 2 of *Article XX:2* is that an entry of "UNBOUND" in relation to market access is in fact a limitation and applies to all measures inconsistent not only with *Article XVI* but also with those that contravene both *Articles XVI* and *XVII*.[244] By this interpretation, meaningful commitments in relation to all quantitative restrictions, including those that are discriminatory, can be made only under market access. In the absence of a market access commitment, a full national treatment commitment ("NONE") would guarantee non-discrimination only in relation to measures falling solely within the scope of Article XVII. It would thus preclude discriminatory quantitative restrictions that come under Article XVI. If this line of argument were accepted then the need to

[242] The *Scheduling Guidelines*, *infra* note 248, interpret this to mean that any *discriminatory* measure scheduled in the market access column is also to be regarded as scheduled under, and subject to the provisions of, GATS *Article XVII*. In other words, commitments on market access can be subordinated to national treatment. The *Scheduling Guidelines* further recommend that Members state in the market access column that the inscription 'also limits national treatment'.

[243] *See* sample Schedule set forth in the commentary on GATS Article XX, *infra*.

[244] *See* Mattoo, *supra* note 205.

define the boundary between the market access and national treatment obligations would largely disappear.

B. National Treatment (Article XVII)

1. Overview

GATS *Article XVII* requires that each Member accord foreign services and service suppliers treatment that is "no less favourable" than that accorded its own "like services" and "like service suppliers". This obligation applies with respect to any measures affecting the supply of services in the sectors inscribed in its Schedule, subject to any limitations expressly set out therein.

The national treatment obligation in the GATS is wider in scope but more limited in application than that in the GATT. While GATT is concerned with measures affecting products *per se*, the GATS addresses not only services, but also service suppliers. While the GATT applies to internal taxes and other charges and "all laws, regulations and requirements" affecting internal commercial transactions in relation to products, treatment of services applies simply "in respect of all measures affecting the supply of services." The GATS obligation applies, however, only selectively, to specified sectors and activities, as determined by each Member in its Schedule of specific commitments[245] whereas national treatment in the GATT applies to all imported goods, whether or not they are the subject of a scheduled tariff concession.

Article XVII:2 elaborates on the standard of treatment to be provided, expressly recognizing that "national" treatment does not require "identical" treatment of national and foreign services and suppliers. However, under Article XVII:3, formally identical or formally different treatment is considered to be "less favourable" if it modifies the conditions of competition in such a way that domestic services or suppliers are favored over like services or suppliers of any other Member. The treatment may be either formally identical or formally different, so long as the competitive conditions remain equally favorable to foreign and domestic services and their suppliers.

There are several problems in the interpretation of the GATS national treatment obligation that have an important effect on the operation of the Agreement. The first is the ambiguity as to the precise extent of *Article XVII*, particularly as it relates to *Article XVI* (market access). This was discussion at some length in the previous discussion of market access. The second issue is whether a national treatment commitment extends to all modes of supply, or whether Members retain the right to discriminate between identical services supplied in their territory through different modes. The third issue, which has also already been touched upon in relation to MFN treatment under GATS, is the definition of "likeness" of services and service suppliers.

2. National Treatment and Modes of Supply

Unlike *Article XVI*, which describes treatment "with respect to market access *through the modes of supply* . . ." there is nothing in the text of *Article XVII* to suggest that the national treatment obligation should be fragmented by reference to different modes of delivery. It says that national treatment is to be applied "in the *sectors* inscribed in its Schedule, and subject to any conditions and qualifications set out therein . . ." (emphasis supplied). *Article XX* requires that the specific commitments undertaken by each Member be set out in a Schedule and obliges Members to specify, "with respect to *sectors* where such

[245] *See* Sauvé, *supra* note 118, at 133.

commitments are undertaken" under paragraph (b), the "conditions and qualifications on national treatment"[246] (emphasis supplied).

These provisions raise two questions about the national treatment obligation. The first is whether a national treatment commitment (with qualifications and limitations) is modal, permitting discrimination between modes of delivery, or whether it extends equally to all modes of delivery in the services sector in which a market access commitment has been made. The second question is whether a national treatment commitment is autonomous from a market access commitment, or whether national treatment applies only once a market access commitment has been made.

As to the first, it must be accepted that national treatment commitments are mode specific. The scheduling of commitments by reference to modes of supply necessarily implies a fragmentation of the national treatment obligation in a way that was not anticipated in the text of the Agreement.[247] A Member may retain the right to discriminate between identical services supplied through different modes, by withholding its guarantee of national treatment in any particular mode. Both the structure of the schedules, and the scheduling conventions, contemplate that national treatment commitments must be considered on a modal, rather than sectoral basis. The *Scheduling Guidelines*[248] at paragraph 43[249] state:

> Regardless of what is inscribed in the market access column, a "no limitations" entry in the national treatment column (expressed as "NONE") would mean that national treatment is bound for the entire mode; it is not limited to what may be bound in a market access commitment with limitations. Thus, if a Member makes a commitment under Article XVI in a sector, where commercial presence is limited to partnerships, an entry "NONE" or any other entry in the national treatment column would refer to the whole mode of supply and not only to partnerships.

Whether the national treatment obligation is necessarily triggered by a market access commitment is more ambiguous. *Article XVII* requires national treatment "in the sectors inscribed in its schedule," rather than "in the sectors where market-access commitments are undertaken." Similarly, although the *Guidelines* state that a sector should not appear in the schedule if all modes of supply are "UNBOUND,"[250] they do not indicate whether "UNBOUND" refers to market access alone or also to national treatment commitments. Elsewhere, the *Guidelines* say that "depending on the extent to which a Member has limited market access and national treatment, for each commitment with respect to each

[246] Contrast this situation with the case of trade in goods: with regard to trade in goods, there is a relatively clear distinction between border measures and internal measures. In the GATT, apart from MFN, which applies equally to both types, border measures are subject primarily to GATT *Article II* (scheduling of tariffs) and GATT *Article XI* (elimination of quantitative restrictions), while internal measures are subject to the national treatment obligation under GATT *Article III*. At the time of the negotiation of the GATT, a debate arose as to whether national treatment should be limited solely to the items in the tariff schedules, in keeping with the alleged intention that GATT *Article III* was solely to protect the GATT *Article II* concessions. The majority view was that national treatment should extend to all imported products, whether or not they were the subject of a binding tariff concession, because the purpose of GATT *Article III* included the prevention of the use of internal taxes and regulations as a system of protection.

[247] Mattoo, *supra* note 205, at 121.

[248] *Guidelines for the Scheduling of Specific Commitments under the GATS*, S/L/92 (28 March 2001) ("*Scheduling Guidelines")*. The *Scheduling Guidelines* is the result of a revision of earlier *Guidelines* (MTN.GNS/W/164 and Explanatory Note MTN.GNS/W /164/Add.1) by the Committee on Specific Commitments (CSC).

[249] *Scheduling Guidelines*, *id*, ¶ 43.

[250] *Id*, ¶ 46.

mode of supply," four possible levels of commitment can be contemplated. Again, "each commitment" might equally refer to market access or to national treatment. *Article XIX:1*, entitled "Negotiation of Specific Commitments," on the other hand, indicates that negotiations for progressive liberalization are to be directed to the reduction or elimination of the adverse effects on trade in services of measures "as a means of providing effective market access."

In practical terms, while there may be no legal barrier to expressing a commitment to full national treatment in the absence of a market access commitment in any mode, there is little incentive for doing so. Schedules only occasionally inscribe sectors in which the entries show "UNBOUND" (market access) and "NONE" (national treatment), with the exception of "unbound except for horizontal commitments" (under both market access and national treatment) in one mode.[251] Mostly, a full national treatment commitment in all four modes arises where there is a market access commitment in regard to at least one mode. In the Australian real estate services example discussed in regard to market access, full national treatment was accompanied by a commitment to market access in regard to mode 3, commercial presence.

3. "Like Services and Service Suppliers"

The meaning and extent of the national treatment obligation depends on the definition of "like services and service suppliers" in the GATS. As pointed out in relation to most-favored nation treatment, the concept of likeness in relation to services is more difficult to define than the same notion in regard to goods. An initial comparison with the GATT shows that the national treatment obligation as expressed in GATS *Article XVII* (and GATT Article III:4) differs from that in GATT Article III:2[252] in that it refers only to "like services and service suppliers" and does not extend to "directly competitive or substitutable services."[253]

Physical characteristics, such as those used to determine likeness of goods, are not relevant for determining "likeness" in the GATS context. The *United Nations Provisional Central Product Classification* (or *UN CPC*)[254] of services, on which the *Services Sectoral Classification List* is based,[255] is not as well developed as the Harmonized System that is used for scheduling tariff concessions for goods, nor are Members bound to follow it absolutely. Further, the recommended services classification may distinguish between services products not on the basis of qualitative differences for consumption purposes but because they fall into different regulatory classes. Given, however, that the classification was developed and used for the negotiation of both market access and national treatment commitments, it could be argued that it represents mutually accepted product distinctions,

[251] As explained in Part IV.B.2. horizontal commitments are commitments made with respect to all sections, in contrast with the so-called "vertical," sector-specific commitments.

[252] *See also Ad Article III*, ¶ 2 to GATT Article III:2.

[253] It has been argued that the concept of "like" services in the GATS, if it is to equal in scope the concept of "like" products in GATT Article III:2, should be interpreted broadly, to include services that are "directly competitive or substitutable": Mattoo, *supra* note 205, at 127. This suggestion is, however, based on a reference to the second sentence of GATT Article III:2—which, as interpreted by *Ad Article* III, applies to "directly competitive or substitutable" products—a provision that is notably absent in the GATS.

[254] *United Nations Provisional Central Product Classification*, Statistical Papers Series M No. 77 (New York: United Nations, 1991). *("UN CPC").* The UN CPC has been updated on two occasions—CPC Ver. 1.0 (1997) and Ver. 1.1 (2002)—for a complete description of both versions, see: http://unstats.un.org/unsd/cr/registry/ (visited September 12, 2003).

[255] *See* Appendix A to this chapter *infra*, for an extensive discussion of classification of services and development of the *Services Sectoral Classification List* (or W/120), and *supra* note 110.

and that being allocated to different sub-sectors in the classification should be sufficient criteria for "unlikeness."

The answer to the reverse question: whether inclusion in the same narrowly defined sub-category of the classification can be considered to confer "likeness," is not as obvious. Given the high degree of aggregation of services under the system, the classification of services into even the finest of sub-categories will at best create a rebuttable presumption of likeness with one another.[256]

As is true of goods,[257] probably the most appropriate basis for comparing likeness in services is the "end use" of the product as appreciated by the consumer. End use also incorporates the commercially relevant concept of "directly competitive or substitutable," reflecting the way in which consumers treat services: whether they view them as substitutes for one another.

Whatever the criteria for determining an *a priori* concept of likeness, there is nothing to stop Members from imposing various regulatory distinctions, which, although they may be subject to challenge by other WTO Members, may be difficult to tackle in the GATS context. Aaditya Mattoo elaborates a good example of this in his article "*National Treatment in the GATS: Corner-Stone or Pandora's Box?*."[258] He describes a situation in which Member X, having made full market access and national treatment commitments in relation to transport services, imposes a regulation to the effect that drivers in X are required to train in its own schools and hold national drivers licenses. The restriction is not expressly discriminatory, as drivers from Member Y have access to the training facilities in X and the measure applies equally to X citizens, even if they have been trained abroad.

To determine that the measure is a *de facto* violation of *Article XVII*, on the grounds that it has a disproportionate impact on foreign drivers, requires a finding of likeness. The burden of determining likeness would fall on the complaining Member Y, who would simply argue that drivers from X and Y provide "like" services. X might assert that because drivers from Y have qualified under different training standards, their services are not "like" those of its national drivers. Since standards in any two countries are rarely going to be exactly the same, the question remains as to how much discrepancy is required to constitute "unlikeness". The situation could also put a WTO Panel in the awkward position of having to impose a decision on the local transport authorities of X. If it were to find that the services are "like", it would have to recommend that X give unconditional access to foreign drivers. Of course, if it were to find that they were "unlike," the national treatment rule would not apply, regardless of the extent of the difference in treatment applied by X.

As a third alternative, a Panel might recommend that X requires foreign drivers to take a competency test rather than compulsory local training as a less restrictive means of reaching the same objective. It is not, however, clear that GATS *Article XVII* can be read to contain a necessity test that would permit a Panel to assess the stringency of a measure, i.e. to ask whether the measure was necessary, or the least trade-restrictive means, to promote the objective, in this case of road safety. The general exception provision in *Article XIV* contains such a test, but it can only be invoked if inconsistency with *Article XVII* is demonstrated under paragraph (d) thereof, making it difficult for a panel to avoid the question of "likeness."

[256] Mattoo, *supra* note 205, at 128.

[257] With respect to goods, this approach was endorsed in *EC –Asbestos*, *supra* note 230, Appellate Body Report, ¶ 119.

[258] Mattoo, *supra* note 205, at 128.

C. Additional Commitments (Article XVIII)

GATS Article XVIII permits Members to make additional commitments, which are neither market access nor national treatment, in a particular sector. It facilitates the negotiation of commitments on "measures that reach beyond the purview of the GATS, relating, for example, to qualifications, standards or licensing matters."[259] While the conception of *Article XVIII* was linked to that of *Article VI*, which establishes a work program for the development of disciplines to ensure that qualifications, standards or licensing measures do not constitute unnecessary barriers to trade in services, the scope of *Article XVIII* is wider than that of Article *VI:4*, providing potential for negotiation of commitments on matters other than qualifications, standards or licensing.[260] While *Article XVIII* provided a legal framework for Members to address restrictive measures not falling within the scope of *Article XVI* or *XVII*, it was considered that a more long-term systemic solution would be desirable.[261]

As of July 2002, additional commitments had been undertaken by 72 Members in a number of services sectors, the majority of which were in telecommunications, maritime and financial services, with a few in professional and distribution services. In recording their additional commitments, Members have used different methods, sometimes simply describing the undertakings in individual text entries, or, more often, using a separate annex or note to the schedule, incorporated into the fourth column by reference.[262] In particular sectors, where mutually agreed model schedules were developed, a number of regulatory items were entered in the additional commitments column of the model.

In the draft telecommunications *Reference Paper*, for example, a "shopping list" of topics was included, most of which can be found in the *Reference Paper* in its current form.[263] Similarly, column four of all drafts of the "maritime model schedule" contained additional commitments regarding "access to/use of" port services and multimodal transport services. With the exception of the special case of the *Understanding on Commitments in Financial Services*,[264] some of the provisions of which, when incorporated in a schedule would constitute additional commitments, only a few WTO Members explicitly undertook additional commitments during the negotiations on financial services concluded in December 1997 by means of the Fifth Protocol to the GATS.[265]

The types of measures addressed in the additional commitments column also vary. In the telecommunications sector, for example, the most common inscriptions relate to competitive safeguards, provisions for independent regulators, interconnection, universal service obligations, allocation and use of scarce resources and licensing provisions. In other sectors, licensing conditions, requirements and/or procedures, services/product approval procedures, "access to and use of" infrastructural services, future undertakings

[259] Footer, *supra* note 5, 474.

[260] Report of the Committee on Specific Commitments, *Additional Commitments under Article XVIII of the GATS*, Note by the Secretariat, S/CSC/W/34 (July 16, 2002), (*"Additional Commitments under Article XVIII of the GATS"*), ¶ 4.

[261] *Id*, ¶ 5.

[262] *Id*, ¶ 6.

[263] The *Reference Paper* is appended to the results of the Negotiations on Basic Telecommunications that concluded with the adoption of the *Fourth Protocol to the General Agreement on Trade in Services ("Fourth Protocol to the GATS")*, S/L/20/ (April 30, 1996) *("Reference Paper on Basic Telecommunications"* or "*Reference Paper"*).

[264] *Understanding on Commitments in Financial Services*, discussed in detail in Chapter 20 of this book.

[265] *Fifth Protocol to the General Agreement on Trade in Services ("Fifth Protocol to the GATS")*, S/L/45 (December 3, 1997). See *Additional Commitments under Article XVIII of the GATS*, *supra* note 260, ¶ 40; the WTO Members were Brazil, the EC, Japan and the United States.

or elimination of measures (with or without dates), use of firm names and final-user price-setting mechanisms.[266] Less frequently, inscriptions in the fourth column of schedules provides for the future review of policies, best-endeavor clauses regarding licensing procedures, future undertakings conditional upon the passage of legislation, description of current policy, areas where foreign suppliers are or may be permitted, contractual arrangements between suppliers, and temporary movement of personnel of a firm.[267]

PART IV. PROGRESSIVE LIBERALIZATION

Part IV of the GATS, entitled "Progressive Liberalization," consists of *Articles XIX* (negotiation of specific commitments), *XX* (scheduling of commitments), and *XXI* (modification of schedules). Progressive liberalization is one of the key objectives of the GATS, "as a means of promoting the economic growth of all trading partners and the development of developing countries."[268]

It should be noted that the main obligation undertaken by Members in Part IV of the GATS is simply to enter into successive rounds of negotiations. It is not mandatory that specific commitments be made in regard to market access or national treatment. Where such commitments are made, however, certain obligations flow. *Article XX*, for example, requires that the commitments be set out in a national Schedule, which is annexed to, and forms an integral part of, the Agreement. Further, *Article XVI:2 and Article XVII:1*, both in Part III, oblige the Member having made the commitments to execute them by providing market access in accordance with the terms, conditions and limitations in its Schedule, and treating foreign services and services suppliers no less favorably than it would treat its own like services and service suppliers.

A. Negotiation of Specific Commitments (Article XIX)

GATS Article XIX requires WTO Members to enter into successive rounds of negotiations, commencing no later than five years from the effective date of the WTO Agreement, with a view to achieving a progressively higher level of liberalization of services markets. In accordance with this "built-in" agenda, services negotiations began in 2000 and were continued under the Doha Agenda, which was launched in November 2001.[269] In line with the timeframe for the rest of the negotiations undertaken in the Doha Round, the services negotiations were due to conclude by December 31, 2004, but were subsequently extended to the date of the next Ministerial Meeting in 2005.

B. Scheduling of Commitments (Article XX)

1. Overview

Article XX of the GATS requires each Member to set out in a national Schedule the specific commitments it undertakes. With respect to each section as to which commitments are made, the Schedule is to specify:

[266] *Additional Commitments under Article XVIII of the GATS*, *id*, ¶ 7.

[267] *Id*, ¶ 8. Examples of individual text entries can be found in Attachment 1 to *Additional Commitments under Article XVIII of the GATS*, *id*.

[268] *Preamble* to the GATS, second recital.

[269] *Ministerial Declaration*, adopted on November 14, 2001 at the Ministerial Conference, Fourth Session, Doha, November 9–14, 2001, WT/MIN(01)/DEC/1 (November 20, 2001) *("Doha Ministerial Declaration")*, ¶ 15, reproduced in the Appendix to this book.

(a) terms, limitations and conditions on market access;
(b) conditions and qualifications on national treatment;
(c) undertakings relating to additional commitments;
(d) where appropriate the time-frame for implementation of such commitments; and
(e) the date of entry into force of such commitments.

The Schedules are annexed to, and form an integral part of, the GATS.[270] By the end of the Uruguay Round, on April 15, 1994, the Members had agreed upon 95 schedules of services commitments (and 61 lists of MFN derogations). The Schedules are complex documents in which each Member identifies the service sectors to which it will apply the market access and national treatment obligations that of the GATS and any exceptions from those obligations that it wishes to maintain. In each case, the commitments and limitations are entered with respect to the four modes of supply by which "trade in services" is defined in GATS Article I. These are cross-border supply, consumption abroad, commercial presence and presence of natural persons.[271] The lists of MFN exemptions[272] are also integral to the GATS, and must be read in conjunction with the scheduled commitments.

Only by reference to a Member's Schedule, and (where relevant) its MFN exemption list, can one ascertain the services sectors and conditions to which the basic principles of the GATS will apply within the jurisdiction of that Member. A determination of the real level of market access represented by a Schedule requires an examination of the range of activities covered in each service sector and the limitations on market access and national treatment pertaining to the different modes of supply. It is also necessary to examine the list of MFN exemptions in order to assess the extent to which the Member is permitted to provide preferential treatment to, or discriminate against, one or more of its trading partners.

The WTO provides some assistance for understanding the scheduling process, and for obtaining and reading the Schedules of its Members. The Council for Trade in Services, through the Committee on Specific Commitments, has recently undertaken a major revision of the official guidelines on scheduling, resulting in the *Guidelines for the Scheduling of Specific Commitments under the GATS*, adopted March 23, 2001 ("*Scheduling Guidelines*").[273] Instead of binding rules in respect of scheduling, the revised *Scheduling Guidelines* take the form of an explanatory note. The intention was to improve the scheduling guidelines on the basis of practical experience since 1993, and to explain in concise terms how specific commitments should be set out in Members' individual Schedules. The adoption of a common format for scheduling as well as standardization of the terms used in services Schedules is intended to ensure that commitments made by Members are comparable and unambiguous. The *Scheduling Guidelines* also annex a list of documents relevant for scheduling purposes.[274]

The Trade in Services Division of the WTO also maintains a *Services Database*,[275] which contains downloadable Schedules of commitments and lists of GATS Article II (MFN) exemptions of those Members which were members of the WTO prior to

[270] GATS *Article XX:3*.
[271] GATS *Article I:2*.
[272] In accordance with GATS *Article II:2* and GATS *Annex on Article II Exemptions*, *supra* note 161.
[273] *Scheduling Guidelines*, *supra* note 248.
[274] See Annex 2 to the *Scheduling Guidelines, id*, which contains a list of eight such documents.
[275] Available at: http://tsdb.wto.org/wto/WTOHomepublic.htm.

December 31, 1999. The database does not include data on current negotiations or the schedules of WTO Members that have acceded since January 2000. Where further negotiations[276] resulted in schedules of commitments (GATS/SC/*/suppl.x) to supplement the original schedules of commitments (GATS/SC/*)[277], the Services Database provides one consolidated and up-to-date schedule for each country.

2. Horizontal Commitments

The national Schedules all conform to a standard format that is intended to facilitate comparative analysis.[278] In most Schedules, the commitments are divided into two sections. The first section contains horizontal commitments, the second section contains the secured vertical commitments made with regard to specific sections. Horizontal commitments stipulate limitations that apply to all of the sectors inscribed in that Member's Schedule, so it is important that any evaluation of sector-specific commitments take the horizontal entries into account. A Member might, for example, reserve the right to impose limitations on the supply of services in any sector in accordance with the terms of a pre-existing bilateral or regional investment treaty. Often horizontal commitments refer to limitations by mode of supply, such as commercial presence (mode 3) or movement of natural persons (mode 4); a common example of the latter is a limitation on access to executives and senior managers for a specified period of time.[279] Such limitations qualify the mode 3 and 4 entries made in every sector in which there is a commitment.

3. Sectoral Commitments

The second part of the Schedule contains the specific commitments that apply to trade in services in a particular sector or subsector based on negotiation. These sectoral commitments and any limitations on them are completely voluntary, but once a sector is scheduled, it is subject to the generally applicable obligations in the GATS, including any further norms that may be developed.[280] Some of the *general* obligations under the GATS, such as MFN and transparency, apply to the treatment actually provided by a Member, in any services sector, irrespective of its scheduled commitments. Others are applicable only in the context of specific commitments.[281]

(a) Hybrid Listing Approach. Part III of the GATS implicitly adopts an approach to the scheduling of services commitments that allows Members to gradually build up obligations through a process of "positive listings" of sectoral commitments. This "bottom up" approach is in contrast to the negative listing, or "top-down" approach adopted by the North American Free Trade Agreement ("NAFTA"), which operates on the premise that all service sectors are liberalized, unless they are circumscribed by specific restrictions.

[276] After the end of the Uruguay Round, negotiations took place in the WTO on the issue of movement of natural persons (1995) as well as sectorally, viz. basic telecommunications (1997) and financial services (1998). During these negotiations not all WTO members participated. Those Members that participated in the basic telecommunications and financial services negotiations made new commitments specifically in those sectors.

[277] * is a number which represents a specific country.

[278] See model schedule, attached as Annex I to the *Scheduling Guidelines*, *supra* note 248, and reproduced in text accompanying note 313, *infra* below.

[279] *See e.g., Australia—Schedule of Specific Commitments*, GATS/SC/6 (April 13, 1994) *("Australian Schedule")*.

[280] Arup, *supra* note 116, at 103.

[281] See for example *GATS Article XI*, which prohibits restrictions on international transfers and payments for current transactions relating to a Member's specific commitments.

Once a commitment has been made, however, the services sector is considered to be fully liberalized, unless limitations are itemized to the contrary in relation to individual modes of delivery; this combination of "positive" and "negative" listing requirements of the GATS may be referred to as a "hybrid" approach. The NAFTA approach may be less favorable, as it can lead countries to "carve out" broad reservations to keep their regulatory options open.[282] Still, there is potential for the same thing to happen under the GATS. A prudential carve-out has, for example, been included in the technical *Annex on Financial Services*, permitting national supervisory and regulatory authorities to take measures for prudential reasons.[283] The positive listing approach has the added disadvantage that a WTO Member may choose not to commit itself, by an inscription in its Schedule, to the degree of liberalization that it in fact provides in a particular services sector. It can therefore be difficult, or impossible, to get a clear picture of the regulatory barriers that exist in a particular service sector for a particular Member.

(b) Nature of Commitments. The Schedule of each Member, including its footnotes, headnotes and attachments, is a record of legally binding commitments.[284] The inscription of a service or sub-sector in a Schedule is a legal undertaking by a Member to provide market access and national treatment in relation to a service activity, on the terms and conditions specified in the Schedule. If a WTO Member does not wish to make a commitment in a particular mode or sector, it may enter "UNBOUND" in the specific commitments of its Schedule, indicating that, at least for the time being, it is maintaining its freedom to regulate the sector so as to restrict the entry of foreign suppliers.

By its commitment, a government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the service. This operates like a guarantee to foreign economic operators that the conditions of entry and operation in the market will not be changed to their disadvantage. Commitments can only be withdrawn or modified after the agreement of compensatory adjustments with affected countries and no withdrawals or modifications could be made until three years after entry into force of the Agreement.[285] Such modifications of commitments may not affect the application of most-favored-nation treatment. Commitments can however be added or improved at any time.

(c) Scheduling Sectoral Commitments.

(i) What Must be Scheduled The Schedule of sectoral commitments is a table comprising four columns.[286] The first column contains a description of the sector or subsector that is the subject of the commitment. In the second and third columns, the Member

[282] Others take the view that the NAFTA approach is preferable because it requires each country to list all of its restrictions. *See* Part II.A.3 of this chapter, *supra*, *Regional Approaches to the Regulation of Trade in Services: European Communities and NAFTA*, (b) *NAFTA*.

[283] See GATS *Annex on Financial Services* ("GATS *Financial Services Annex*"), ¶ 2 (Domestic Regulation) and *infra*, text accompanying note 630. *See also* Chapter 20 of this book.

[284] *Scheduling Guidelines*, *supra* note 248, ¶ 3.

[285] *See* GATS *Article XXI*, discussed below. However, under GATS *Article X:2* a Member could withdraw a commitment after one year from its entering into force provided that it notified the Council on Trade in Services and demonstrated that it could not wait until the end of the three-year period. An early report by the Secretariat on notifications in general, indicated that none had been made up to that point under GATS *Article X:2*; *see* Council for Trade in Services—*Notifications under the General Agreement on Trade in Services*—Note by the Secretariat, S/CSC/W/34 (July 14, 1997), 2.

[286] *See* the schematic version of a Schedule of vertical commitments, Annex 1 to the *Scheduling Guidelines*, *supra* note 248, included at the end of this section.

lists limitations on market access and limitations on national treatment, respectively. A sector-specific commitment applies to trade in services in a particular sector. If, in the context of such a commitment, a measure is maintained which is contrary to *Article XVI* (market access) or *Article XVII* (national treatment), then it must be entered as a limitation in the appropriate column. In each case this requires four entries, corresponding to the four modes of supply, for each sector or sub-sector inscribed. The entry should describe the measure concisely, indicating the elements that make it inconsistent with *Article XVI* or *Article XVII*, and may refer to the legal basis of the measure. In the fourth column, governments may enter any additional commitments that are not subject to scheduling under market access or national treatment.[287]

Also to be scheduled are the "time-frame for implementation of commitments,"[288] and the "date of entry into force of such commitments."[289] Attachments may be used, as long as it is made clear which part of the schedule they refer to.[290] If a commitment is not intended to cover the whole national territory, the entry should describe the geographical scope of the measures taken.[291] An example of this is Australia's national treatment limitations on mode 3 (commercial presence) delivery of legal services.[292] In New South Wales and Victoria at least one partner in a firm engaged in advising on foreign law matters must be a permanent resident; in Queensland at least one equity partner in a foreign law firm must be resident for a minimum period of 180 days per calendar year.

The following is a description of the information that must be inscribed in each column of the schedules. Terminology used in Schedules is standardized as much as possible although the descriptions of limitations entered in the market access and national treatment columns will vary according to the circumstances of the Member.

column 1: sector, subsector or services activity

The GATS articles on market access, national treatment and scheduling require, by implication, that commitments be undertaken on a sectoral basis. They each refer to "sectors where . . . commitments are undertaken"[293] or "in the sectors inscribed. . . ."[294] Subject to its negotiations with other participants, it is the Member that identifies the sectors, subsectors or activities that are listed in its Schedule, and it is to these alone that the commitments apply. A market access or national treatment commitment in a sector or sub-sectors inscribed in the Schedule does not imply that a service supplier in that sector is permitted to supply uncommitted services that are *inputs* to the committed service.[295]

The scope of the committed sectors varies greatly from, for example, "banking and other financial services" to "noise abatement services." Reflecting the recommended classification system,[296] the order in which the sectors are listed in most of the schedules corresponds to the twelve broad sectors listed in the *Services Sectoral Classification List (W/120)*, discussed in Appendix A to this chapter. In most cases, the sectoral entries are

[287] *See* commentary on GATS Article XVIII, *supra*.
[288] GATS *Article XX:1(d)*.
[289] GATS *Article XX:1(e)*.
[290] *Scheduling Guidelines*, *supra* note 248, ¶ 5.
[291] GATS *Article I:3(a)(i)* and *Scheduling Guidelines*, *id.*, ¶ 4.
[292] *Australian Schedule*, *supra* note 279, 7.
[293] GATS *Articles XVI:1* and *XX:1*.
[294] GATS *Article XVII:1*.
[295] *Scheduling Guidelines*, *supra* note 248, ¶ 25.
[296] *Scheduling Guidelines*, *id*, ¶ 23. See also ¶ 24, which contemplates an alternative in which a member uses its own sub-sectoral classification, giving a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment.

also accompanied by numerical references to the *UN CPC*, which gives a detailed explanation of the services activities covered by each listed sector or subsector and on which the W/120 is based.[297] Where this is not possible, listings are to provide a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment. A clear description of the subject sector, subsector or activity is essential to the efficacy of the commitment. Given the inadequacies of W/120 framework experienced by Members in regard to many commercial sectors, a work program in relation to sectoral classification and definition is continuing under the auspices of the Committee on Specific Commitments. This work in regard to classification is addressed in some detail in the Appendix to this chapter.

column 2: market access[298]

For each sectoral market access commitment, with respect to each mode of supply, four cases can be foreseen: full commitment, commitment with limitations, no commitment and no commitment technically feasible. In all cases, any relevant limitations listed in the horizontal commitments continue to apply.[299] If a Member makes a *full commitment* it grants full market access in a given sector and mode of supply, and does not seek to limit the market access in any way through measures inconsistent with *Article XVI.* In this circumstance, the Member will enter "NONE" in the market access column. "NONE" in the market access column (sectoral section) must, however, be read as subject to the conditions set out in the horizontal section, unless it is expressly indicated, either in the horizontal or the relevant sectoral section, that no horizontal restrictions apply in the sector in question. Where *no commitment* is made, the Member remains free with respect to a given sector and mode of supply to introduce and maintain measures inconsistent with market access. In this situation the Member must record "UNBOUND" in the appropriate column. This entry is only relevant if the Member has made a commitment in that sector with respect to at least one mode of supply. If all modes of supply are unbound and there are no additional commitments undertaken, then the sector need not appear on the Schedule at all.

Where a particular mode of supply is *technically unfeasible*, such as the delivery of dentistry services by cross-border supply, the Member should enter "UNBOUND*." The asterisk should refer to a footnote, which states "unbound due to lack of technical feasibility." If the entry that was thought to be unfeasible becomes applicable in the future, it simply means "UNBOUND."[300]

By a sectoral *commitment with limitations* a Member may bind either an existing situation ("standstill") or a more liberal situation in which the commitment involves the removal of certain existing restrictions on market access ("rollback"), but while still maintaining limitations that are inconsistent with *Article XVI*, which must be described them in the market access column.[301] As discussed above, those measures that must be specified as a limitation on market access fall into six categories.[302] The list is an exhaustive one, comprising four types of quantitative restriction—limitations on the number of service suppliers, the total value of service transactions or assets (including

[297] *UN CPC, supra* note 254.
[299] *Scheduling Guidelines*, *supra* note 248, ¶ 42.
[300] *Id.*, ¶ 47.
[301] For example, a Member which had not permitted foreign banks to operate at all might make a commitment to opening its market only to a limited degree, e.g. as to the number of foreign banks allowed or the type of legal entity permitted (branch or subsidiary).
[302] GATS *Article XVI:2*.

the requirement of an economic needs test), the total number of service operations on the total quantity of service output, and the total number of employees—limitations on the type of legal entity through which a supply may be delivered, and limitations on foreign equity participation.

Market access commitments should describe each measure concisely, indicating the elements that make it inconsistent with *Article XVI.*[303] It is not sufficient to enter terms such as "freeze" or "standstill." In some cases, Members have chosen to indicate a limited commitment by describing what they are offering rather than the limitations they are maintaining. Such an approach may be used to indicate market access opportunities for the entry of certain categories of foreign natural persons who supply services, and possibly to reflect current entry provisions contained in their foreign investment laws.

The four quantitative restrictions may be entered in a number of ways: numerically, as in the case of numerical ceilings which should be expressed in defined quantities in either absolute numbers or percentages; through other criteria specified in the relevant sub-paragraph (a) through (d); or through the description of an economic needs test.

Although reference to the "requirement of an economic needs test" is made four times in *Article XVI*, "economic needs test" is not defined anywhere in the GATS. The purpose of an economic needs test is to facilitate restrictions upon market access according to the economic need of the limiting Member, which raises issues that have been investigated by the WTO Council for Trade in Services as well as the UNCTAD and OECD Secretariats.[304] According to the *Scheduling Guidelines*, economic needs test entries should indicate with some precision the main criteria on which the test is based.

Approval procedures, licensing and qualification requirements should not be entered as market access limitations if they do not contain any of the elements specified in *Article XVI*. The *Guidelines* are helpful in providing descriptions of typical market access limitations drawn from the schedules of specific commitments.[305]

column 3: national treatment[306]

The national treatment obligation under *Article XVII* of the GATS is to accord to the services and service suppliers of any other Member treatment no less favorable than is accorded to domestic services and service suppliers. A Member wishing to reserve the right to impose any limitations on national treatment, i.e. any measures that result in less favorable treatment of foreign services or service suppliers, must indicate these limitations in the third column of its Schedule. There is no obligation in the GATS that requires a Member to impose the national treatment limitations that it has reserved to itself in the Schedule.

Neither is there any obligation on a Member to 'take measures' outside of its territorial jurisdiction,[307] where they might apply, for example, to a service supplier located in another Member. This should not be read to imply that the national treatment obligation has no application to modes 1 and 2. While in principle a national treatment commitment applies to all modes of delivery of service, it may not be practicable for a Member to implement restrictions extraterritorially. While this prospect may inhibit the Member from entering a full commitment, given that modes 1 and 2 consumers ultimately reside

[303] *Scheduling Guidelines*, *supra* note 248, ¶¶ 9 and 44.
[304] *See* in particular, Council for Trade in Services, Special Session, *Economic Needs Tests*, Note by the WTO Secretariat, S/CSS/W/118 (November 30, 2001).
[305] *Scheduling Guidelines*, *supra* note 248, ¶¶ 5 and 12.
[306] GATS *Article XVII:1* and ¶¶ 1(b) and 2 of *GATS Article XX*.
[307] *Scheduling Guidelines*, *supra* note 248, ¶ 15.

in the territory of the Member, and mode 1 services will be delivered there, it is possible to envisage certain national measures, such as restrictions on advertising, that Members might use to limit national treatment.

In regard to national treatment, like market access, any one of the four levels of commitment may be undertaken with respect to each sectoral commitment and mode of supply. "NONE" entered in the national treatment column means that a Member has made a *full commitment* to accord, in that sector and mode, conditions of competition no less favorable to services or service suppliers of other Members than those accorded to its own like services and service suppliers. It also means that the Member has made a binding commitment for the entire sector/mode, regardless of market access restrictions that may limit entry to only a portion of the service suppliers in that sector.[308] As in the case of market access, a full national treatment commitment must be read as subject to any relevant horizontal conditions.

Where *no commitment* is made, the Member remains free in a given sector and mode of supply to introduce and maintain measures inconsistent with the national treatment obligation. In this situation the Member must record "UNBOUND" in the national treatment column. This entry is *only* appropriate if the Member has made a commitment in a sector with respect to *at least one mode* of supply. If all modes of supply are unbound and there are no additional commitments undertaken, then the sector should not appear on the Schedule.

Where a particular mode of supply is *technically unfeasible*, the Member should enter "UNBOUND*." The asterisk should refer to a footnote, which states "unbound due to lack of technical feasibility." Notably, this entry cannot be made in the national treatment column for modes 1 (cross-border supply) and 2 (consumption abroad) when, for the same service, there is a market access commitment. Again, as in the case of market access, if the entry that was thought to be unfeasible becomes applicable in the future, it means "UNBOUND."

In relation to a *commitment with limitations* on national treatment, a few important factors should be kept in mind. First, measures that are in effect ("*de facto*") discriminatory constitute a limitation on national treatment that must be scheduled, even if the measure does not formally distinguish between services suppliers on the basis of national origin. This is because the national treatment obligation to provide "no less favourable treatment" does not require that Members provide "formally identical" treatment to domestic and foreign service suppliers; some formally different treatment results in effective equality of treatment, while some "identical" treatment results *de facto* in less favorable treatment to foreign services suppliers. An example of this is the scheduling of residency requirements in regard to professional services, as seen from the Australian Schedule of Specific Commitments. The fact that in some states at least one equity partner in accounting, auditing and book-keeping firms must be a permanent resident of Australia does not expressly discriminate in favour of Australian nationals, although it makes it much more likely that nationals will meet the criterion and obtain more favorable treatment than the foreign counterpart.[309]

Unlike *Article XVI* in regard to market access, *Article XVII* does not contain an exhaustive list of national treatment limitations that must be scheduled if such measures are to be maintained. This means that the necessity of scheduling a regulatory requirement, such as residency, must be assessed on a case-by-case basis to determine whether it is in

[308] *Id.*, ¶ 43.

[309] See *Australian Schedule*, *supra* note 279, at 9.

fact discriminatory. If, for example, all that is required is a mailing address in the country rather than a permanent residency, there may be no discriminatory effect and therefore no need to schedule. Similarly, approval procedures, licensing and qualification requirements should not be entered as national treatment limitations if they are to be applied equally to nationals and foreigners. Such non-discriminatory requirements would in any event be subject to separate disciplines on domestic regulation in accordance with *Article VI:5*.

Article XVII applies to *subsidies* in the same way that it applies to other measures, so that any subsidy that is discriminatory in nature would have to be scheduled as a limitation on national treatment. *Article XV* (Subsidies) requires only that Members enter into negotiations to counter the distortionary effects of subsidies (*See* commentary on GATS Part VI.C.3 below); it does not contain a definition of subsidy. Similarly, the *Scheduling Guidelines* indicate a consensus on the fact that restrictions on the purchase, lease or use of real estate connected with the supply of a service will be national treatment limitations that must be scheduled, if they alter the conditions of competition in favor of the service supplier of the Member, as compared to the like service suppliers of any other Member.

Where a Member wishes to maintain measures that are inconsistent with both *Article XVI* (market access) and *Article XVII* (national treatment), account must be taken of GATS Article XX:2. As noted above, that provision permits Members to inscribe such a limitation once, in the market access column, and confirms that "the inscription will be considered to provide a condition or qualification to Article XVII as well." The *Scheduling Guidelines* interpret this to mean that any discriminatory measure scheduled in the market access column is also to be regarded as scheduled under, and subject to the provisions of, *Article XVII* (national treatment). It also recommends that Members indicate that this is the case by stating in the market access column that the inscription "also limits national treatment."[310]

column 4: additional commitments

Members may negotiate commitments with respect to measures affecting trade in services that are not subject to scheduling under *Article XVI* or *Article XVII.* Such commitments are not mandatory. Entries would only be made in the Additional Commitments column if a specific commitment is being made in a given sector; it is not necessary to make a sub-entry for a mode of supply that remains unbound. Additional commitments are expressed in the form of positive undertakings, rather than the listing of limitations or restrictions,[311] and can include, but are not limited to, undertakings in relation to qualifications, technical standards and licensing requirements or procedures treatment of modes of supply.

The four modes of supply listed in the Schedules correspond to the scope of the GATS as set out in Article I:2. The modes are defined on the basis of the origin of the service supplier and consumer, and the degree and type of presence they have at the moment the service is delivered. For a more detailed description of the modes of supply of services, see commentary on GATS Part I. A.2 above.

The following table describes, in relation to the Member making a commitment, the four modes of supply, the location of the supplier and flow of services. Whatever the mode

[310] *Scheduling Guidelines*, *supra* note 248, ¶ 18.
[311] GATS *Article XVIII* and *GATS Article XX:2(c).*
[311] *Scheduling Guidelines*, *supra* note 248, ¶ 19.

of supply, obligations and commitments under the GATS relate directly to the treatment of services and service *suppliers*. They only relate to service *consumers* to the extent that services or service suppliers of other Members are affected. A Member may only be able to impose restrictive measures affecting its *own* consumers (especially under Mode 2), not those of other Members, on activities taking place outside its jurisdiction. Where a type of service requires, for practical purposes, the use of more than one mode of supply, the Member must make a commitment in each relevant mode of supply in order to ensure that coverage of the particular service transaction is complete.

Mode	Supplier Presence	Location of Service Delivery	Other Criteria
Cross-Border Supply	SUPPLIER NOT present in the territory of the Member	WITHIN the territory of the Member	Supply is FROM the territory of another Member
Consumption Abroad	SUPPLIER NOT present in the territory of the Member	OUTSIDE the territory of the Member, in the territory of another Member	Supply is TO a service consumer of the Member. • movement of consumer • property of consumer "moves" or is located abroad e.g. ship repairs • limitations re market access and/or NT should only relate to measures affecting the Member's own consumers.
Commercial Presence	SUPPLIER PRESENT in the territory of the Member	WITHIN the territory of the Member.	Supply through COMMERCIAL presence. Applies to expanded list of juridical persons: corporations, joint ventures, partnerships, representative offices and branches (see definitions, Article XXVIII).
Presence of Natural Persons	SUPPLIER PRESENT in the territory of the Member	WITHIN the territory of the Member.	Supplier present as a NATURAL person. Applies to natural persons who are themselves service suppliers, as well as natural persons who are employees of service suppliers.

(ii) What should not be scheduled The GATS does *not* require Members to schedule limitations such as customs duties or other administrative charges that may affect the cross-border movement of *goods* associated with the provision of a service.

Exceptions such as those falling under *Article XIV* (General Exceptions) are so-called "horizontal exceptions" and are "provisional" in their application. Horizontal exceptions, if found to be justified, can be set against all obligations and commitments under the GATS. They are provisional in the sense that certain conditions must be fulfilled in order

Schedule of Specific Commitments of Country X[313]

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
	(1)	(1)	
	(2)	(2)	
	(3)	(3)	
	(4)	(4)	
	(1)	(1)	
	(2)	(2)	
	(3)	(3)	
	(4)	(4)	

Key: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Note: The schedule shall also indicate the date of entry into force of the commitments and where appropriate the time-frame for their implementation. For all future commitments the relevant date of entry into force should be inscribed.

to warrant their application.[314] Due to their special character, such exceptions should *not* be scheduled.

Prudential measures taken in accordance with section 2(a) of the *Financial Services*, *Annex*[315] for example, constitute an exception to the Agreement and should *not* be scheduled. Likewise, measures falling under *Article XII* (Restrictions to Safeguard the Balance of Payments) are also exceptions because they are a form of emergency safeguard measure and therefore should *not* be scheduled; they are governed by separate disciplines, including notification and consultation.

Since the Schedules are a record of legal commitments, nothing should appear in them that is not intended to be legally binding. Extraneous information, even though it may seem to be useful for purposes of transparency, should be avoided, as it could reduce the clarity and specificity of the commitments and might lead to conflict as to their proper interpretation.

C. Classification of Services

GATS Article XX requires that each Member set out its Part III commitments in Schedules that are an integral part of the GATS, and identifies what is to be specified therein,[316] but imposes no requirements with respect to the description of services or sectors to be inscribed in the Schedule. "Sector" of a service, as defined in GATS *Article XXVIII*, is, with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule; otherwise, it is the whole sector, including all of its subsectors. The GATS provides no other guidance on the level of clarity or consistency

[313] Annex 1 to the *Scheduling Guidelines*, *supra* note 248.

[314] Additionally, in the actual application of the exception in practice the burden of proof rests upon the party, whether complainant or defendant, who asserts the affirmative of a particular claim or the defence thereof. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption (Report of the Appellate Body, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS/33/AB/R (1997)). Given the procedural aspects of the general exception, this also implies that (1) the complainant will be required to make a *prima facie* case of violation of the relevant provisions of the WTO Agreement and (2) this must be done on a case by case basis and cannot be pre-scheduled.

[315] *See* GATS *Financial Services Annex*, *supra* note 283, ¶ 2(a), and Chapter 20 of this book.

[316] GATS *Art. XX*, ¶¶ 1 and 3.

or standardization of nomenclature required in order to establish legal certainty in the scheduling of commitments.

During the Uruguay Round no agreement was reached as to a common classification structure for adoption by all Members. Although Members were free to use any classification system they deemed appropriate, it was recommended that they apply the *Services Sectoral Classification List*[317] (W/120), compiled by the Secretariat on the basis of the *United Nations* Central Product Classification (CPC) system with some comment by participants. Most Members adopted either the W/120 or the CPC, with certain clarifications and Member-specific deviations. The United States, for example, did not rely on the CPC in scheduling its commitments.

The W/120 comprises twelve sectors and 155 sub-sectors. The sectors are as follows: business services, communication services, construction and related engineering services, distribution services, educational services, environmental services, financial services, health related and social services, tourism and travel related services, recreational, cultural and sporting services, transport services, other services not included elsewhere. The W/120 is reproduced in Appendix A to this chapter. Appendix A also contains a discussion of each of the main sectors and the work of the Committee on Specific Commitments.

D. Modification of Schedules (Article XXI)

In accordance with the provisions of *Article XXI*, a Member may modify or withdraw any commitment in its Schedule, at any time after three years from the date on which the commitment entered into force. The required procedure is that the modifying Member is to notify its intention to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal. Any other Member that may be affected by the notified proposal may require the modifying Member to enter negotiations with a view to reaching an agreement on necessary compensatory adjustment.

In such negotiations and agreement, the Members are to endeavor to maintain a general level of mutually advantageous commitments no less favorable to trade than that provided for in Schedules of specific commitments prior to such negotiations. These compensatory adjustments shall be made on a most-favored nation basis.

In the event that negotiations in relation to compensatory adjustment are unsuccessful, the affected Member may refer the matter to arbitration. If no affected Member requests arbitration, then the modifying Member is free to implement the proposed modification or withdrawal. In the event of arbitration, the modifying Member must comply with the findings of the arbitration before modifying or withdrawing its commitment. If it does not do so, any affected Member that participated in the arbitration may take retaliatory measures in the form of modification or withdrawal of substantially equivalent benefits in conformity with the arbitration findings. Notwithstanding *Article II* (MFN), such retaliatory measures are applicable solely in relation to the modifying Member.

PART V. INSTITUTIONAL ARRANGEMENTS

The institutional arrangements for trade in services are taken up in Part V of the GATS. For the most part they are typical provisions related to the performance of treaty obligations under the GATS as well as institutional issues, essential to the operation of the WTO in the

[317] *Services Sectoral Classification List* (or W/120), *supra* note 110. There is some *ad hoc* classification in certain sectoral negotiations, for example telecommunications.

matter of services. They can be divided into three main areas. First, provisions relating to consultation (*Article XXII*) and dispute settlement and enforcement (*Article XXIII*) These are discussed in Part V.A below. Second, *Article XXIV* establishes the institutional body responsible for overseeing the operation of the GATS, i.e. the Council for Trade in Services (Part V.B. below). Third, two provisions deal with cooperation in the field of trade in services—one related to technical cooperation for developing countries (*Article XXV*) and the other regulating inter-institutional cooperation between the WTO and other intergovernmental organizations in the field of services (*Article XXVI*) (Part V.C. below).

A. Dispute Settlement Procedures (Article XXII and XXIII)

1. Trade in Services—General Application

The rules and procedures of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding or DSU")[318] apply to all disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to the DSU (the covered agreements), which include the General Agreement on Trade in Services (Annex 1B). The DSU rules and procedures also apply to consultations and disputes between Members under the WTO Agreement and under the DSU, taken in isolation or in combination with any other covered agreement.[319] However, Article I:2 of the DSU provides that the general rules are subject to any special or additional rules contained in the agreements, which include GATS *Articles XXII:3* and *XXIII:3*, as well as special rules under the GATS *Financial Services Annex*[320] and the GATS *Air Transport Annex*.[321] The special rules prevail in the event of a difference.

Where conflicts arise between special or additional rules in the respective covered agreements, and the matter cannot be resolved by agreement of the parties, the Chairman of the Dispute Settlement Body ("DSB") is to determine the rules and procedures to be followed within ten days after the request of either party Member.[322] In principle, the special and additional rules are to be used where possible and the rules and procedures set out in the DSU are to be used to the extent necessary to avoid conflict.[323]

Dispute settlement under the GATS is dealt with in Part V of the Agreement, in *Articles XXII and XXIII*.[324] These provisions refer to three stages in the dispute settlement process: consultations, adjudication and enforcement.

2. Consultations (Article XXII)

Paragraphs 1 and 2 of *GATS Article XXII* make provision for two distinct types of consultations under the Agreement. First, those carried out between individual Members (usually bilateral), of the sort contemplated under any of the other WTO agreements, with the opportunity to approach the Council for Trade in Services or the DSB for further assistance should bilateral discussions be unsuccessful. The basic provision in paragraph 1

[318] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, WTO Agreement, Annex 2, 33 INTERNATIONAL LEGAL MATERIALS 1125 (1986) (" *DSU*").
[319] DSU *Article 1:1*.
[320] GATS *Financial Services Annex, supra* note 283, ¶ 4.
[321] GATS *Air Transport Annex*, *supra* note 72, ¶ 4.
[322] DSU *Article 1:2*.
[323] *Id.*
[324] GATS, *Article XXII* and GATS *Article XXIII.*

requires that each Member be receptive to consultations with any other Member in respect of representations made with regard to any matter that might affect the operation of the GATS. The terms of the DSU apply to these consultations.[325] Under the DSU, the complaining party may request a panel sixty days after the request for consultations, or earlier, if the consulting parties jointly consider that the consultations have failed to resolve the dispute.[326]

Secondly, if a satisfactory solution cannot be found through consultations under paragraph 1, the provision for multilateral consultations contained in paragraph 2 of *Article XXII* may be invoked. At that point, the Member may (but is not obliged) to request the Council for Trade in Services or the DSB to consult with any Member or Members.[327] Since the DSU does not provide for this further consultation procedure, the point at which such "multilateral" consultations may be deemed to have failed and a request for the establishment of a panel can be made, is unclear; not surprisingly, this provision has thus far not been used.[328]

(a) Fiscal "Carve-out" and Arbitration. Besides the provisions for bilateral and multilateral consultations, paragraph 3 of *Article XXII* contains an additional provision not found in any other WTO Agreement. This provision excludes the possibility of challenging a measure in the field of services on the ground that it violates national treatment, where the measure at issue falls within the scope of a double-taxation agreement. Thus, the GATS creates a fiscal "carve-out" for certain categories of services disputes where there is a nexus with a double taxation issue.

In case of disagreement between Members as to whether such a measure falls within the scope of a double taxation agreement, either the complainant or the defendant may bring the matter before the Council for Trade in Services and the matter will be referred to binding arbitration.[329] In the case of double taxation agreements, which existed at the time of entry into force of the WTO Agreement (January 1, 1995), the Council will only be seized of the matter upon consent of both parties to the agreement.[330]

3. Dispute Settlement and Enforcement (Article XXIII)

(a) Violation Complaints. GATS *Article XXIII*, like its counterpart in the goods régime, namely GATT Article XXIII:1,[331] provides for both "violation" and "non-violation" complaints. Violation complaints are covered by paragraph 1 of GATS *Article XXIII*, which gives any Member recourse to the DSU where that Member considers that another Member has failed to carry out its obligations or specific commitments under the GATS.[332] The omission of any reference to nullification or impairment here has been explained[333] by reference to the fact that in GATT dispute settlement practice it was presumed that nullification and impairment of benefits under the agreement resulted wherever there was

[325] GATS *Article XXII:1*.
[326] DSU *Article 4.7*.
[327] GATS *Article XXII:2*.
[328] Werner Zdouc, *WTO Dispute Settlement Practice Relating to the GATS*, 2(2) JOURNAL OF INTERNATIONAL ECONOMIC LAW 295 (1999).
[329] GATS *Article XXII:3*.
[330] *See* the footnote to GATS *Article XXII:3*.
[331] *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 55 U.N.T.S. 194, *("GATT 1947")*, part of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1B, 33 INTERNATIONAL LEGAL MATERIALS (I.L.M.) 1125 (1986) ("*GATT 1994"*).
[332] GATS *Article XXIII:1*.
[333] Zdouc, *supra* note 328, at 298.

a violation of GATT rules.[334] This presumption has been incorporated into the DSU rules such that an infringement of obligations under a covered agreement is considered *prima facie* to constitute nullification and impairment, subject to rebuttal by the respondent Member.[335]

(b) "Non-Violation" Complaints. The basis of the non-violation remedy in the GATS is the nullification or impairment of benefits that might reasonably have been expected to accrue from specific commitments undertaken by each Member. In contrast to the nullification or impairment language of the GATT,[336] which refers to "benefits accruing . . . directly or indirectly under this Agreement to a Member," paragraph 3 of GATS *Article XXIII* refers to the nullification or impairment of "any benefit (a Member) could reasonably have expected to accrue to it."[337] Although it is open to argument as to whether "benefits reasonably expected to accrue under specific commitments" should be interpreted to include both indirect and direct benefits, the failure of paragraph 3 of *Article XXIII* to mention benefits accruing "indirectly" should be considered to have meaning in itself. The omission could be explained either as a reflection of the non-violation dispute settlement practice in the GATT, or as a deliberate attempt to contain the scope of the non-violation remedy under the GATS.

In view of the fact that services commitments are not as narrowly defined as tariff concessions on imported goods, but instead relate to national treatment or market access obligations with respect to broadly defined services sectors or sub-sectors and modes of delivery, the scope of government measures that might distort the relationship between domestic and like foreign services or service suppliers is potentially vast. Seen in this light the "narrow" language of paragraph 3 appears to be a deliberate act of containment on the part of the GATS drafters.

To date no non-violation cases have been brought under the GATS. In view of prior GATT and some recent WTO dispute settlement jurisprudence on non-violation cases, it appears that three conditions would have to be met in order to establish a non-violation claim under the GATS. The first is the existence of a governmental measure; the second is the absence of any reasonable anticipation of nullification or impairment at the time of the negotiation of the relevant specific commitment; and third, proof that the competitive relationship between foreign and like domestic products has been "upset."

4. Specific Service Sectors

Because of the specific nature of GATS obligations and the relevant commitments taken by Members in their Schedules of Services Commitments under the Agreement, and of trade in services, a separate Ministerial *Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services* (*Decision on GATS Procedures*) was adopted at the end of the Uruguay Round.[338] The *Decision on GATS Dispute Settlement Procedures* contains certain additional rules and procedures for dispute settlement under the GATS, including for example the requirement that panelists have

[334] Report of the GATT Panel, *United States—Taxes on Petroleum and Certain Imported Substances ("Superfund")*, BISD 34th Supp. 136, 158 (1987), ¶ 5.1.9.
[335] DSU *Article 3:8*.
[336] GATT *Article XXIII:1*.
[337] GATS *Article XXIII:3*.
[338] See the second recital to the *Decision on Certain Dispute Settlement Procedures of the General Agreement on Trade in Services ("Decision on GATS Dispute Settlement Procedures")*.

specific-sector expertise. In the case of a GATS dispute, panels should be composed of "well-qualified governmental and/or non-governmental individuals who have experience in issues related to the General Agreement on Trade in Services and/or trade in services, including associated regulatory matters."[339] Additionally, in panels regarding sectoral matters, the *Decision of Certain Dispute Settlement Procedures for the General Agreement on Trade in Services* states that they shall have "the necessary expertise relevant to the specific services sectors which the dispute concerns."[340]

In specific services sectors, additional dispute settlement requirements may prevail, based on the relevant sectoral annex. For example, the *Financial Services Annex* calls for panels involving disputes on prudential issues and other financial matters to have "the necessary expertise relevant to the specific financial service under dispute."[341] Another approach to dealing with disputes involving specific sectoral issues is to exclude the scope of those services, wholly or partly, from the dispute settlement provisions as is the case with air transportation.

On the one hand, the *Annex on Air Transport Services*[342] confirms that a Member's obligations under bilateral and multilateral agreements relating to all transport services in effect at the date of the entry into force of the WTO Agreement are not diminished or affected by any obligations or commitments assumed under the GATS.[343] The carve-out of trade in air transport services, whether scheduled or unscheduled, and ancillary services,[344] expressly denies application of the GATS, including its dispute settlement procedures, to measures affecting traffic rights, and services directly related to the exercise of traffic rights[345] since these are normally expressly reserved under bilateral air services agreements.

On the other hand the *Annex on Air Transport Services* expressly affirms the application of the GATS to aircraft repair and maintenance services, the selling and marketing of air transport services and computer reservation system ("CRS") services.[346] However, even in these secondary services, the dispute settlement provisions of the GATS may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.[347] The *Annex on Air Transport Services* leaves open the possibility of further application of the GATS in this sector, subject to periodic review by the Council for Trade in Services[348] (See Part VI.D.3 of this chapter below).

[339] *Id*., ¶ 3. Cf. the text of DSU *Article 8.1*, which states "... persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member."

[340] ¶ 4, *id*

[341] GATS *Financial Services Annex*, *supra* note 283, ¶ 4

[342] GATS *Air Transport Annex*, *supra* note 72, ¶¶ 1–4.

[343] *Id.*, ¶ 1.

[344] *Id*., ¶ 2.

[345] *Id.*, sub-para 6(d).

[346] *Id.*, sub-paras 6(a), (b), (c).

[347] *Id.*, ¶ 4. Regarding arbitration proceedings under the Chicago Convention, *supra* note 71, see R.I.R. Abeyratne, *The Settlement of International Aviation Disputes under the GATS and the ICAO Council—A Comparative Analysis*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, STUDIES IN TRANSNATIONAL ECONOMIC LAW 397 (Ernst-Ulrich Petersmann, ed. 1997).

[348] GATS *Air Transport Annex*, *supra* note 72, ¶¶ 1 and 5.

B. Council for Trade in Services (Article XXIV)

The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) specifically establishes a Council for Trade in Services in Paragraph 5 of WTO Agreement Article IV, which "... shall oversee the functioning of the General Agreement on Trade in Services." Article IV:6 of the WTO Agreement provides that the Council for Trade in Services "... shall establish subsidiary bodies as required" and that they shall adopt "their respective rules of procedure." This is reinforced by GATS *Article XXIV*.

The first and second paragraphs of *Article XXIV* make it clear that, in line with the competences of the WTO at large, the competences of the Council for Trade in Services are also functional in character. Specifically, those functions include all that is necessary to facilitate the operation of the GATS and to further its objectives, i.e. primarily to provide a regulatory framework for trade in services and to achieve higher levels of liberalization of trade in services.

Article XXIV:1 recognizes that the Council for Trade in Services can exercise its discretion in establishing subsidiary bodies to which it may further delegate such powers as are necessary in order to discharge those functions. The Ministerial *Decision on Institutional Arrangements for the General Agreement on Trade in Services* (*Decision on GATS Institutional Arrangements*), adopted at the end of the Uruguay Round,[349] provides additional rules for such subsidiary bodies, pursuant to *Article XXIV.*

Since the entry into force of the WTO on January 1, 1995, the following subsidiary bodies have existed, or been established, under the auspices of the Council for Trade in Services:

- the Committee on Trade in Financial Services (or Financial Services Committee);[350]
- the Committee on Specific Commitments or "CSC";[351]
- the Working Party on Professional Services or "WPPS"[352] (in 1999 it was transformed into the Working Party on Domestic Regulation or "WPDR";[353]
- the Working Party on GATS Rules or "WPGR".[354]

[349] *Decision on Institutional Arrangement for the General Agreement on Trade in Services ("Decision on GATS Institutional Arrangements")*.

[350] *Id.*, ¶ 3. The mandate of the Financial Services Committee is set out in ¶ 2 of the *Decision on GATS Institutional Arrangements*, and is confined to the responsibilities listed therein, which fall to be dealt with under individual sectoral annexes. They include such responsibilities as keeping the GATS *Financial Services Annex*, *supra* note 283, under continuous review, formulating proposals/recommendations for consideration by the Council (including proposals for amendments to the aforementioned *Annex*), providing a forum for technical discussions and providing technical assistance to developing countries and cooperating with other subsidiary bodies under the auspices of the Council for Trade in Services and/or international organizations in the financial sector.

[351] The Committee on Specific Commitments, or CSC, was established by the Council for Trade in Services in 1995; see *Decision Establishing the Committee on Specific Commitments*, adopted by the Council for Trade in Services, S/C/W/9 (October 4, 1995).

[352] The Working Party on Professional Services, or "WPPS", was established pursuant to the Uruguay Round *Ministerial Decision on Professional Services*, and the *Decision on Professional Services*, adopted by the Council for Trade in Services, March 1, 1995, S/L/3 (April 4, 1995).

[353] The WPDR is the successor to the WPPS, and was established by the Council for Trade in Service, S/L/70 (April 26, 1999), *supra* note 200.

[354] The Working Party on GATS Rules, or "WPGR", was established in March 1995 by the Council for Trade in Services to carry out the negotiating mandates contained in the GATS on emergency safeguard measures, government procurement in services and subsidies.

With the launch of special negotiations on trade in services in January 2000,[355] as mandated in the built-in agenda under GATS *Article XIX:1*, the Council for Trade in Services is currently holding a Special Session back to back with regular sessions of the Council.[356] However, once the negotiations on further liberalization in trade in services have come to an end, the Special Session of the Council for Trade in Services will cease to exist (*See* Part VI.A. of this chapter, below). The Special Session is *not* a subsidiary body of the Council for Trade in Services but is simply a meeting that forms part of the exceptional work-load of the Council for the duration of the negotiations.

In accordance with *Article XXIV:2*, both the Council for Trade in Services and, unless the Council decides otherwise, any subsidiary bodies, or committees, which it establishes, are committees of the whole, i.e. open to all WTO Members. The Members elect the Chairman of the Council for Trade in Services and the practice in the WTO is to renew the chairperson annually, along with all other Councils and Committee chairs.[357]

The rules of procedure for meetings of the Council for Trade in Services are set out in the WTO/OMC Compendium, *Rules of Procedures for Meetings of WTO Bodies*.[358] For meetings of the Council for Trade in Services, the decision has been taken to adopt the same rules of procedure that are used for meetings of the Ministerial Conference and of the General Council,[359] with some additional rules on the circulation of the agenda, the election and functions of a Vice-Chairperson.[360] Where not otherwise stated the Council for Trade in Services has also decided to apply the relevant provisions contained in the *Guidelines for Appointment of Officers to WTO Bodies*.[361]

When it comes to decision-making the Council for Trade in Services decides by consensus, in conformity with the general rule on decision-making to be found in WTO Agreement Article IX[362] together with Rule 33 (Chapter VII—Decision-Making) of the General Council.[363] The *Rules of Procedure for the Council for Trade in Services* contain a modification to Rule 33, as follows: "(W) here a decision cannot be arrived at by consensus, the matter shall be referred to the General Council for decision." This so-called "kick-up" provision is common to all WTO bodies and allows for a higher body to take a decision, where it has not been possible for a delegated body to do so.

[355] The meeting of the Council for Trade in Services of February 26, 2000 witnessed the official launch of these Special Negotiations Session of the Services Council, S/CSS/M/1 (April 12, 2000), ¶¶ 4–35. Reports of meetings and all other pertaining to these Council Special Sessions are designated "CSS."

[356] Minutes of the Special Session are publicly available on the WTO website (upon derestriction), at http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm, series S/CSS/M/1–13 and, subsequently, series TN/S/M/1–6.

[357] See the WTO web-site for a list of current chairpersons as at February 11, 2004, General Council, Press/371, available at http://www.wto.org/english/news_e/pres03_e/pr371_e.htm (visited on August 26, 2004).

[358] *Rules of Procedure for Meetings of WTO Bodies*, Geneva, 1997 is available from the WTO Secretariat, Geneva.

[359] This is not without significance since Annexes 2 and 3 of the procedures for meetings of the Ministerial Conference and of the General Council contain "Guidelines for Observer Status for Governments in the WTO" and "Observer Status for International Intergovernmental Organizations in the WTO" respectively. Since no amending provisions are provided for the Council for Trade in Services (Section XXIV), these Annexes apply *mutatis mutandi* to those meetings.

[360] *Rules of Procedure for Meetings of WTO Bodies*, *supra* note 358, Services Council (Section XXIV).

[361] Footnote 1 to the Services Council (Section XXIV), *id*, refers to the *Guidelines for the Appointment of Officers to WTO Bodies*, WT/l/31, February 7, 1995.

[362] WTO Agreement *Article IX:1*.

[363] *Rules of Procedure for Meetings of WTO Bodies*, *supra* note 358, section II, p. 8, which states "(T)he General Council shall take decisions in accordance with the decision-making provisions of the WTO Agreement, in particular *Article IX* thereof entitled 'Decision-Making.' "

Exceptionally a footnote at the beginning of the *Rule of Procedure for Meetings of WTO Bodies* records the fact that, of the four subsidiary bodies under the auspices of the Council for Trade in Services, only the CSC has decided to apply the same Rules of Procedure of the Council for Trade in Services; the other bodies apply its rules of procedure on a *de facto* basis.

C. Technical Cooperation (Article XXV)

Article XXV imposes a specific obligation on the group of developed country Members (and other Members to the extent possible) towards developing country Members, on the basis of *Article IV:2* (Increasing Participation of Developing Countries). In the interests of transparency, developed country Members must establish and maintain so-called "contact points" to make it easier for developing country Members' services suppliers to have access to information about trade in services that relate to their respective markets. Such information should include details of "commercial and technical aspects of the supply of services," information about "registration, recognition and (the means of) obtaining . . . professional qualifications" and details concerning the availability of supporting "services technology."[364]

Article XXV also calls for the provision of technical co-operation to developing country Members by the WTO Secretariat at the multilateral level. The Council for Trade in Services decides upon the provision of technical co-operation in the matter of services ensuring that it is budgeted for annually and included in the overall allocation of the WTO's technical assistance budget.

D. Relationship with Other International Organizations (Article XXVI)

GATS *Article XXVI* foresees the possibility of inter-institutional co-operation and co-ordination in the field of services. Interestingly, it is the Council for Trade in Services rather than the General Council which is charged with undertaking such inter-institutional co-operation, as a result of which it enjoys an exclusive external relations power.

The WTO and other specialized agencies of the United Nations may also undertake inter-institutional co-operation, which could for example, include "consultation and co-operation" with the United Nations Conference on Trade and Development ("UNCTAD"),[365] as well as with the International Trade Centre ("ITC").[366] It could also include consultation and co-operation by the WTO with other intergovernmental organizations,

[364] GATS *Article IV:2*.

[365] The United Nations Conference on Trade and Development ("UNCTAD") was established pursuant to G.A. Res. 1785, 17 U.N. GAOR, Supp. 17, at 14, U.N. Doc A/5217 (1963) and UNCTAD Final Act, U.N. Doc. E/Conf. 46/141, vols. 6–8 (1964). It became an official organ of the UN General Assembly by G.A. Res. 1995, 19 U.N. GAOR, Supp. 15, at 1, U.N. Doc. A/5815 (1965).

[366] The International Trade Centre ("ITC") is the technical cooperation agency of the United Nations Conference on Trade and Development ("UNCTAD") and the WTO for operational, enterprise-orientated aspects of trade development in support of developing and transition economy countries, in particular their business sectors. It was created by the GATT in 1964 and since 1968 has been operated jointly by the GATT (now WTO) and the UN, acting under the auspices of UNCTAD. ITC is also the executing agency for the United Nations Development Programme ("UNDP") and in that capacity is responsible for implementing UNDP-financed projects in developing countries and transition economies related to trade promotion. Most recently joint collaboration in the field of services has led to the publication of a *GATS Consultation Kit*, primarily aimed at developing and transition economy countries. The Global Services Network provides links to a range of organisation, including government, business and international, all of which are working in the services sector, it can be reached on-line at www.GlobalServicesNetwork.com.

such as the Organization for Economic Co-operation and Development ("OECD").[367] Whatever inter-institutional co-operation is sought, the only requirement is that it concerns services. An example of such co-operation is the publication in 2002 of a joint study by the World Health Organization and the WTO Secretariat on *WTO Agreements and Public Health*.[368]

The Council for Trade in Services has given a broad interpretation to its external relations power in Article XXVI, since it has not confined itself to inter-institutional co-operation and coordination but has worked with other inter-governmental entities such as the Commonwealth Secretariat, in collaboration with the ITC,[369] and non-governmental entities such as the European Services Forum.[370]

PART VI. FINAL PROVISIONS

A. Denial of Benefits (Article XXVII)

The content of this provision is standard treaty language. At first sight, it might appear to be superfluous but is nonetheless necessary since it relates primarily to issues involving non-Members and/or territorial application. The three separate matters that are covered by the provision are dealt with in succession.

First, the wording in paragraph (a) makes it clear that a Member may, at its discretion, decide not to extend the rights and benefits accruing under the GATS where it concerns the supply of a service because it can be established that the service is being supplied 'from or in the territory of a non-Member'. Hereby, third States, not parties to the WTO Agreement and not having become WTO Members, can be denied the benefits of membership. Similarly, the benefits of the GATS can be denied in the case where the supply of a service is from or in the territory of 'a Member to which the denying Member does not apply the WTO Agreement'. This might for example be an overseas, or mandated territory, for which a Member retains administrative control but does not include the extension of treaty rights and obligations on the basis of a territorial treaty clause which was appended to the Final Act of the Uruguay Round (as an original Member) or a Protocol of Accession (in the case of an acceding Member).

Second, paragraph (b) of GATS *Article XXVII* relates to the supply of maritime services and contains additional language that is specific to that sector. Basically, a Member can deny the benefits of the GATS either where a vessel has been registered under the laws of a non-Member (or a Member to which the denying Member does not apply the WTO

[367] The OECD is an economic grouping of 24 mostly industrialized countries. It was established as a reconstituted organisation (as successor to the Organization for European Economic Co-operation or OEEC of 1948) by treaty of December 14, 1960, 888 UNTS 179.

[368] WTO Agreements and Public Health—A Joint Study by the WHO and the WTO Secretariat (2002), also available in PDF format, at http://www.wto.org/english/news_e/pres02_e/pr310_e.htm (visited June 11, 2003).

[369] See BUSINESS GUIDE TO THE WORLD TRADING SYSTEM, published by the International Trade Centre (UNCTAD/WTO) and the Commonwealth Secretariat, Part Three, International Rules Governing Trade in Services (1999).

[370] The European Services Forum, or ESF, is on-line at www.esf.be. Other non-governmental organisations, sometimes simply representatives of the services sector at large or based in a particular Member country, include the U.S. Coalition of Services Industries, on-line at www.uscsi.org, the Hong Kong Coalition of Services Industries, on-line at www.hkcsi.org.hk, the Japanese Services Network (hosted by the Japanese Federation of Economic Organisations (Keidanren), on-line at www.keidanren.or.jp, the Irish Coalition of Service Industries, on-line at www.icsi.ie and the specialist financial services sector or International Financial Services, London, on-line at www.bi.org.uk.

Agreement) or where it concerns a person operating and/or using a vessel 'in whole or in part' which belongs to a non-Member (or a Member to which the denying Member does not apply the WTO Agreement).

Finally, the third paragraph (c) of GATS *Article XXVII* contains almost identical language to paragraphs (a) and (b) but in this instance there can be a denial of benefits under the GATS, on the same grounds as in the preceding two paragraphs if a service supplier is a juridical person and where it can be established that it is not a service supplier of another Member (or it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement).

B. Annexes (Article XXIX)

The Annexes to the GATS form an integral part of Annex IB. They cover a variety of different matters, relating to exemptions from or disciplines concerning basic GATS provisions to sectoral annexes and annexes that record the intention of Members to continue negotiating on certain sectoral issues. They include the following:

- Annex on Article II Exemptions;
- Annex on Movement of Natural Persons Supplying Services under the Agreement;
- Annex on Air Transport Services;
- Annex on Financial Services;
- Second Annex on Financial Services;
- Annex on Negotiations on Maritime Transport Services;
- Annex on Telecommunications; and
- Annex on Negotiations on Basic Telecommunications.

This book contains separate chapters relating to the Annexes on Financial Services and Telcommunications.[371]

V. Dispute Settlement Cases

The WTO dispute settlement mechanism has to date produced a limited body of analysis with regard to issues arising specifically under or pertaining to the General Agreement on Trade in Services. After a number of earlier cases involving GATS issues of a peripheral nature, the panel in *Mexico—Measures Affecting Telecommunications Services (Telmex)*,[372] was called upon to address matters arising primarily under the GATS—in particular the Telecoms Annex and the 'Telecoms Reference Paper'. The potential impact of the decision is reduced, however, by reason of its focus on issues specific to the telecommunications context, and because the parties were able to reach a mutual agreement on its implementation in order to avoid an appeal of the panel decision to the WTO Appellate Body.

In another recent case, *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*,[373] the panel agreed to suspend proceedings, prior to the issuance of a decision communicated confidentially to the parties, to facilitate their further

[371] *See* Chapters 20 and 21.

[372] Report of the WTO Panel (not appealed), *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004 (*"Telmex"*).

[373] US—*Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (*"US—Gambling and Betting"*).

negotiations. The complaint, by Antigua & Barbuda against the United States, is focused exclusively on cross-border delivery of gambling and betting services under the GATS, the primary issue being the construction of US commitments as set out in its Services Schedule. This goes to the heart of the uncertainty in the GATS system—one that, if the parties are unable to resolve the matter, will give the panel an opportunity to develop and clarify the rules on classification and scheduling. If it is determined that the United States has made a full commitment to liberalize gambling and betting services, then the GATS provisions on market access, national treatment and general exceptions will also come into play. At the time of writing, (August 2004), a resolution had not been notified by the parties.

Three prior cases: *Canada—Certain Measures Concerning Periodicals* (*Canada—Periodicals*),[374] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*[375] and *Canada—Certain Measures Affecting the Automotive Industry*[376] have addressed the scope of application of the GATS and its relationship to the GATT. A fourth, *Japan—Measures Affecting Consumer Photographic Film and Paper (Japan—Photographic Film and Paper* or *Kodak-Fuji)* case,[377] while making no express reference to the GATS, addresses claims under GATT Article III and GATT Article X in regard to "measures" and "countermeasures" affecting the distribution, offering for sale and internal sale of a product—in this case imported consumer photographic film and paper—in a manner that allegedly impaired the benefit to the United States of Japan's tariff concessions on the product. The case is of interest from a GATS perspective insofar as it deals with the effect of Japanese government action on national and foreign distributors and wholesalers, as well as manufacturers, of the product.

A. Canada—Periodicals

In *Canada—Periodicals*, GATS issues arose out of a Canadian defence to a U.S. challenge concerning "split-run" periodicals and the advertising contained therein, even though no GATS claims were ever specifically raised by the United States against the measures at issue. Instead, the United States argued that the Canadian ban on imports of split-run periodicals and the excise tax imposed on the locally printed issues of those foreign magazines violated Articles XI and III of the GATT.

The case involved a dispute between the United States and Canada over measures taken by the Canadian Government to protect the Canadian magazine industry as a medium of Canadian ideas and interests and a tool for the promotion of Canadian culture. It had been a long-standing policy of the Canadian Government to protect its magazine industry by boosting its advertisement revenues and distribution capacity, by, for example, making advertisements directed at the Canadian market eligible for income tax deductions, and adopting schemes that facilitated distribution of Canadian magazines at

[374] Report of the WTO Panel, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/R (1996), Report of the Appellate Body, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/AB/R (1996) (*"Canada—Periodicals"*).

[375] Report of the WTO Panel, *European Communities-Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/R (1995) Report of the Appellate Body, *European Communities-Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1996) (*"EC—Bananas III"*).

[376] Report of the Appellate Body, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS/139/AB/R and WT/DS142/AB/R (2000) (*"Canada—Automotive"*)

[377] Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (1998) ("*Japan—Photographic Film and Paper*" or the "*Kodak-Fuji case*").

reduced postal rates. In 1965, imported "split run" editions of foreign magazines (special editions largely identical to the issue distributed in the country of origin, with the exception of advertisements that were directed primarily at the Canadian market) were identified by Canada as undermining these policies and accordingly banned. The ban was not, however, applicable to split-run editions printed locally in Canada.

In 1995, in response to an anticipated publication of *Sports Illustrated Canada*, a Canadian-published "split run" of the original U.S. *Sports Illustrated* and in order to address the possible evasion of the ban on imports of split-runs, the Canadian Government imposed a new excise tax aimed at the advertisements contained in all domestically-published split-run magazines. Under Part V.I of the 1995 *Act to Amend the Excise Tax Act and the Income Tax Act* (the *Excise Tax Act*[378]) a tax of eighty percent of the value of the advertisements inserted in the split-run edition was levied on each issue of all split-runs distributed in Canada. Additional measures included programmes to provide Canadian publishers with reduced postal rates that were lower than the "commercial international" rates applied to imported magazines. The United States objected to the Canadian measures as being trade-restrictive and protectionist and initiated a WTO dispute settlement process that led to an unfavorable ruling for Canada.

The facts gave rise to the issues of the potential applicability of the GATS, its relationship to the GATT 1994 and the distinction between goods and services. In defense of Part V.I of the *Excise Tax Act*, Canada claimed that Article III of GATT 1994 did not apply, because the measure, being imposed on advertising revenues, was a tax on advertising services, and came under the purview of the GATS, with respect to which the United States had raised no claims. Canada argued that as it had not annexed a positive GATS commitment to liberalize advertising services, it was under no obligation to afford national treatment in this sector. It argued that the United States should not be allowed to "obtain benefits under a covered agreement" (GATT 1994) that have been expressly precluded under another covered agreement (GATS).[379]

Assuming that Canada's exclusion of advertising services from its GATS commitments, by not inscribing advertising services in its Schedule, was a positive act, the panel assessed whether Canada was thereby exonerated from examination of alleged violations of its obligations and commitments under GATT 1994. Canada argued that both the GATT and GATS should be interpreted in such a way as to avoid overlap that could lead to conflicts in their application. The United States replied that there was nothing in the Uruguay Round Agreements that suggested that a single measure may not be covered by both agreements except where an irreconcilable conflict arises from an attempt to comply with both. It also argued that in the absence of such a conflict Canada could not abandon its GATT obligation solely on the ground that the product in question had a service component.

The panel concluded that obligations under GATT 1994 and the GATS can coexist and that it was not intended to create a hierarchical order between them. Its decision was based on the ordinary meaning of the texts of GATT 1994, GATS and Article II:2 of the WTO Agreement read together, and the absence of any conflicts provision in GATT or GATS equivalent to that of Article XVI:3 of the WTO Agreement[380] or the General Interpretative

[378] *See* an *Act to Amend the Excise Tax Act and the Income Tax Act*, S.C. 1995, c. 46 ("*Excise Tax Act"*).

[379] *Canada- Periodicals*, *supra* note 372, Report of the WTO Panel, ¶ 3.35.

[380] WTO Agreement *Article XVI:3* provides that "(I)n the event of a conflict between any provision of this Agreement and a provision of any Multilateral Trade Agreements, the provisions of this Agreement will prevail to the extent of this conflict."

Note to Annex 1A,[381] the latter of which only relates to agreements in the goods régime. Drawing on the case law of the Appellate Body with respect to the interpretation of treaties, the panel affirmed that a corollary of the general rule of interpretation, as set out in the Vienna Convention on the Law of Treaties,[382] is that it must give meaning and effect to all the terms of a treaty. In the words of the panel: "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[383] The panel therefore found that both the GATS and the GATT could apply to the excise tax, and proceeded to address the claim of the United States under GATT Article III. The Appellate Body agreed with the panel, concluding that the entry into force of the GATS does not diminish the scope of application of the GATT 1994,[384] and found no necessity to rule on whether there could be a potential overlap between the GATT 1994 and the GATS.[385] As to Canada's characterization of the excise tax as a measure regulating advertising services, the panel pointed out that there was no comparable regulation on advertisements through other media and that the tax was imposed on the "periodical issue" rather than on the advertising.

On appeal, Canada had stepped back from its argument that the GATT could not possibly apply to the tax in question, with the result that the Appellate Body did not find it necessary to rule as to whether potentially conflict-producing overlaps might occur in the application of the GATT and the GATS. Canada did, however, appeal the decision that the tax was a measure affecting trade in goods. It argued that the panel had erred in law in applying the GATT to a measure affecting advertising services, which should properly be regulated by the GATS under which Canada had no national treatment commitment. Further, it alleged that the panel had misconceived the concept of indirect taxation in GATT Article III:2 and engaged in unwarranted generalization of the terms of GATT Article III:4, and had therefore erroneously concluded that the Excise Tax was a measure subject to Article III of the GATT 1994.

The Appellate Body affirmed the decision of the panel, finding that the measure was an excise tax on a product rather than on advertising services, and rejected Canada's claim that the excise tax, as a tax on services, could not "indirectly" affect imported products in accordance with Article III:2 GATT. In arriving at this conclusion, it considered several factors. First, it noted that the measure was an excise tax imposed on split-run editions of periodicals, and was entitled "tax on split-run periodicals" rather than "tax on advertising." The "Summary" of the Act[386] read "The *Excise Tax Act* is amended to impose an excise tax in respect of split-run editions of periodicals." Secondly, it found that the periodical was a good comprised of two components: editorial content and advertisement content, both of which could be viewed as having service attributes but

[381] The General Interpretative Note to Annex 1A of the WTO Agreement provides that "in the event of conflict between a provision of the General Agreement on Tariffs and Trade of 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization . . . the provision of the other agreement shall prevail to the extent of the conflict.

[382] *Vienna Convention on the Law of Treaties*, done at Vienna, May 23, 1969, 1155 UNTS 331, 8 I.L.M., *Article 31(1*) states that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[383] The panel made reference to *US—Gasoline*, *supra* note 230, Report of the Appellate Body, at 2; also cited in *Japan—Taxes on Alcoholic Beverages* ("*Japan—Alcoholic Beverages"*), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996), Report of the Appellate Body, at 12.

[384] *Canada-Periodicals*, Report of the Appellate Body, *supra* note 374, at 22.

[385] *Id*., at 23.

[386] *An Act to Amend the Excise Tax Act and the Income Tax Act*, S.C. 1995, c. 46.

concluded that they combine to form a physical product—the periodical.[387] The Appellate Body also considered that the *Excise Tax Act* was a companion to the *Tariff Code 9958*, which prohibited imports of special edition periodicals and was, in the admission of Canada, a measure affecting trade in goods,[388] notwithstanding that the Code banned split-runs primarily because of their advertising content. As a companion to the Code, the *Excise Tax Act* had the same object and purpose as *Tariff Code 9958* and should, in the determination of the Appellate Body, be analysed in the same manner.

Finally, the Appellate Body reasoned that the excise tax was applied to periodicals on a "per issue" basis, that by its very "structure and design" it was a tax on a periodical,[389] and that it was not the advertiser but the publisher, distributor or wholesaler who was liable to pay the tax.[390] The Appellate Body accordingly proceeded to address the Article III GATT issue of differential tax treatment of imported versus domestic products, despite the absence of a demonstration of adverse trade effects.[391]

On the basis of the *Canada—Periodicals* case, the determination as to whether a product or service is the object of the measure in issue could turn on whether the services attributes of a product or its components are subordinate to the product as a whole.[392] Given that the application of GATS and the GATT is not mutually exclusive, together with increasingly complex production processes and limitless consumption patterns and end uses, such determinations will be inevitable.[393] Indices for future analyses include the structure and design of the measure and the location of the burden of liability for the substantive effects of the measure.[394] It may also be relevant to ask whether the goods and service components, from a conceptual point of view, are physically or commercially separable, the extent to which they are integrated at various levels of production (manufacture, sale or consumption) and the conclusions that may be derived from market patterns of purchase and consumption and what consumers view as the "end product."

B. EC—Bananas III

EC—Bananas III was the first to deal with substantive issues, including the definition of "service suppliers" and claims of violation of GATS Article II (MFN) and Article XVII (national treatment). The case involved the compatibility of the EC regime for the importation, sale and distribution of bananas, and in particular the EC's preferential treatment of ACP (African, Caribbean and Pacific) countries, with the WTO rules. In July 1993, the EC imposed restrictions on banana imports from all countries except for approximately seventy former European colonies and protectorates, located in the Caribbean and West Africa, now forming part of the ACP group of developing countries. The measures favored the mostly family-owned ACP operations that were experiencing great difficulty in competing with the giant multinationals in Central America. While the United States does not export significant quantities of bananas from its own territory, the U.S. Government was nevertheless persuaded to initiate the challenge by interested American

[387] *Canada-Periodicals*, Report of the Appellate Body, *supra* note 374, at 20.
[388] *Id.*
[389] *Id*., at 21.
[390] *Id.*
[391] It had required such a test in a previous ruling; *see* Report of the Appellate Body, *Japan—Taxes on Alcoholic Beverages*, *supra* note 385, at 16.
[392] *Canada-Periodicals*, Report of the Appellate Body, *supra* note 374, at 20.
[393] Whether the reverse will arise, namely the question as to whether "goods attributes" may be subordinated to the service, is a matter for consideration.
[394] *Canada-Periodicals*, Report of the Appellate Body, *supra* note 374, at 21.

corporations such as Chiquita Brands International and Dole Foods Inc., which harvest bananas in Latin America and market them worldwide. At the heart of the case were the issues related to the EC import licensing system, which determined how economic rents generated by tariff-rate quotas were allocated between national importers and exporting countries.

The controversial measures at issue were set out in EC Regulation 404/93 and subsequent EC legislation, regulation and administrative measures which established the EC's banana import regime. The applicants: United States, Ecuador, Guatemala, Honduras and Mexico, argued that the regime was inconsistent with Articles I, II, III, X, XI and XIII of GATT 1994, Articles 1 and 3 of the Agreement on Import Licensing Procedures, the Agreement on Agriculture, Articles II and XVII of the GATS and Article 2 of the TRIMs Agreement. The position of the EC was essentially that the banana régime either did not fall within the scope of the invoked agreements or that any inconsistency with those agreements was covered by the Lomé waiver, which had been adopted by the GATT Contracting Parties in December 1994.[395]

The issues in *EC—Bananas III* also required the panel and Appellate Body to address the question of the relationship between the GATS and the GATT 1994 but from the opposite perspective to that required in *Canada—Periodicals* case. In *Canada—Periodicals* the issue was whether a measure directly or purportedly regulating services could actually or potentially affect imported goods adversely. In *EC—Bananas III* the issue was whether measures directly or purportedly regulating the importation of goods could actually or potentially adversely affect services or service suppliers of foreign origin.[396] In *Canada—Periodicals* Canada had argued that the measure related to *services* and that it had not made a specific commitment to liberalize in the relevant sector. In *EC—Bananas III* the EC, having made a full commitment in relation to wholesale trade services, argued that the measure related solely to *goods* and was therefore not subject to the GATS national treatment obligation. The GATS issues in *EC—Bananas III* include the scope of the material application of GATS, the definition of "service supplier" and substantive claims under GATS Articles II (MFN) and GATS XVII (national treatment).

1. Effective Date of GATS Obligations

The preliminary issue of the retroactivity of the GATS arose because some parts of impugned EC Regulation 404/93 were adopted and entered into force before the date of entry into force of the GATS (January 1, 1995).[397] The EC claimed that the application of GATS in this case would be contrary to Article 28 of the Vienna Convention on the Law of International Treaties,[398] which provides that international treaties are not applicable to situations that ceased to exist before their entry into force. Relying on 1992 data relating to the ownership and control of the companies, the panel characterized the provisions at issue as *continuing* measures, enacted before the entry into force of GATS but remaining in effect after that date. The scope of its ruling was accordingly limited to the effect of the measures after January 1995.

[395] The GATT waiver was required to allow the EC to take a general exception to its GATT obligations in order to continue to apply the Fourth ACP-Lomé Convention, and its system of preferential treatment for the ACP countries, which had been signed at Lomé on December 15, 1989; *see* text published in the Yellow Pages (1–186) of the Special Issue of *The Courier* No. 120 (March–April, 1990), OJ L 229/3 (1991), reprinted in 29 *I.L.M.* 783 (1990), as revised by the agreement signed in Mauritius on November 4, 1995, and published in the Yellow Pages (1–200) of *The Courier* No. 155 (January-February, 1996).

[396] Zdouc, *supra* note 328, 317.

[397] EC Regulation 404/93 was adopted on February 13, 1993 and was applicable from July 1, 1993.

[398] *Vienna Convention on the Law of Treaties*, *supra* note 384.

A further question arose as to the temporal relationship between the *de facto* discrimination arising from the EC licensing system and the GATS. At the panel stage it was determined that this discrimination existed in 1992, but whether it persisted after January 1995 remained unclear. Although the Appellate Body considered that the existence of *de facto* discrimination after January 1, 1995 was evident from the findings of the panel, the issue was technically outside the scope of jurisdiction of the Appellate Body and was not analyzed further.[399]

2. Application of the GATS

There were two issues to be addressed by the Appellate Body in the context of the application of the GATS to the EC import licensing procedures with regard to bananas. The first was whether the GATS applied to the EC import licensing procedures: i.e., whether they were "measures affecting trade in services." The second was whether the GATS overlaps with the GATT 1994, or whether the two agreements are mutually exclusive.

Having dealt with the question of non-discriminatory administration of quantitative restrictions under Article XIII GATT and having determined that the Lomé waiver justified preferential treatment provided by the EC only to the extent of the pre-1991 "best-ever" exports of the complainants, the panel held that allocation of advantages by the EC to any greater extent than the pre-1991 levels would contravene GATT Article XIII. Only then could the panel turn its attention to the import licensing procedures. It first determined that the EC banana licensing procedure fell within the scope of the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMs Agreement. In addition, and in spite of the EC argument to the contrary, the Appellate Body found that the import licensing regime also fell within the scope of the GATS.

The EC argued that the GATS did not apply to the banana licensing system in EC Regulation 404/93 because it did not comprise a measure "affecting trade in services" within the meaning of GATS Article I:1. It asserted that the rules dealt with bananas, albeit their importation, sale and distribution, and therefore the GATT rules alone applied. The complaining parties asserted that the GATS was sufficiently broad to encompass the EC regime because it comprised measures that affected the competitive relations between domestic and foreign services and service suppliers. This conclusion, they argued, was not affected by the fact that the same measures were also subject to scrutiny under the GATT 1994, as the two agreements are not mutually exclusive.

The Appellate Body gave a broad interpretation to the phrase "affecting trade in services" in the language of GATS Article I:1. It found that the use of the term "affecting" reflects the intent of the drafters to give a wide reach to the GATS. The Appellate Body referred to earlier panel decisions that determined that "affecting," in the context of Article III GATT is wider in scope than such terms as "regulating" or "governing."[400] It also noted that "services" includes any service in any sector, with the exception of services supplied in the exercise of governmental authority, and that "supply of a service" as defined in GATS Article XXVIII(b), includes the production, distribution, marketing, sale and delivery of that service. The Appellate Body found nothing in these provisions to suggest a limited scope of application for the GATS. It also agreed with the panel that

[399] DSU *Article 17.6* limits the appeal to issues of law covered in the panel report and legal interpretations developed by the panel.

[400] *EC—Bananas III*, *supra* note 375, Report of the Appellate Body, ¶ 220; Report of the Panel, ¶ 7.281; see also the earlier GATT panel decision, *Italian Agricultural Machinery* (adopted), *BISD* 7th Supp. 60, ¶ 12 (1958).

GATS Article XXVIII(c) does not narrow the meaning of the term "affecting" to "in respect of."[401] On these grounds, the Appellate Body found no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.

The second issue was whether the GATS and the GATT 1994 are mutually exclusive agreements. The Appellate Body found that the GATS and the GATT 1994 were not intended to cover the same subject matter and, given the respective scope of the application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue.

The Appellate Body identified three categories of measures. First, certain measures could fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Second, measures that affect the supply of services as services would fall exclusively within the scope of the GATS. A third category of measures could be found to fall within the scope of both the GATT 1994 and the GATS. These, it said, involved a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure could be scrutinized under both GATT 1994 and GATS, although the specific aspects of the measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis, as in *Canada Periodicals*.[402]

3. Service Suppliers

The EC, on appeal to the Appellate Body, raised two issues concerning the definition of "wholesale services suppliers" and its application. Both arose in response to the panel's finding that "operators" within the meaning of the Regulations at issue are service suppliers, whether they import bananas directly for marketing or conduct other functions in the marketing process within an "integrated company."

The first question was whether the operators under the Regulations were "service suppliers" in the sense of the GATS, as their function was to buy and import bananas. The EC argued that when buying and importing, a wholesale trade services supplier is a buyer or importer and not covered by the GATS at all, because it is not providing any reselling services.[403] The EC also challenged the panel's decision that "integrated companies" are service suppliers, as they may provide some of their services in-house in the production or distribution chain.

On the first point, the Appellate Body agreed with the panel that the operators as defined in the relevant regulations were indeed suppliers of "wholesale trade services," relying largely on the definition of "distributive trade services" in the Headnote to Section 6 of the CPC.[404] It noted that the EC had made a full commitment to wholesale trade services (CPC 622) in its Schedule of Specific Commitments under the GATS and that, although the operators were engaged in some activities not strictly with the definition of "distributive trade services," there was no question that they were also engaged in

[401] *EC—Bananas III*, *supra* note 375, Report of the Panel, ¶ 7.280.
[402] *Id.*, Report of the Appellate Body, ¶ 221.
[403] *Id.*, ¶ 224.
[404] *UN CPC, supra* note 254, 189.

other activities involving the wholesale distribution of bananas that came within that definition.[405] While the principal services rendered by wholesalers and retailers was considered to be reselling merchandise, the CPC definition also referred to a variety of related, subordinated services that may accompany the principal service of reselling. The Appellate Body noted that these related services would include buying and importing, as it would be difficult for a wholesaler/retailer to engage in reselling without obtaining the goods by some means.[406] Further, the Appellate Body took the view that even if a vertically integrated company performs other functions related to the production, importation, distribution and processing of a product, to the extent that it is also engaged in providing "wholesale trade services" and is affected by a measure of a Member in its supply of those services, it is a "service supplier" for the purposes of the application of the GATS.[407]

4. Scope of Article II: De Facto Discrimination

Before addressing the substantive claims of discrimination under GATS Article II and GATS Article XVII, the Appellate Body dealt with a further question relating to scope of application. This was the question whether GATS Article II:1 applies only to *de jure*, or formal, discrimination, or whether it also applies to *de facto* discrimination. The EC had appealed the Panel's finding that the MFN obligation contained in GATS Article II:1 to extend "treatment no less favourable" should be interpreted to require the provision of no less favourable conditions *of competition*. The panel had attributed to GATS Article II:1 (MFN) the same ordinary meaning as that of GATS Article XVII:1 (national treatment) and found that both derived from the national treatment standard in Article III of GATT 1994. The panel concluded that as the drafters of GATS had chosen to depart from the MFN language of "any advantage, favour, privilege or immunity" in Article 1 of GATT 1994 and had adopted (in both Articles II and XVII of the GATS) the operative language of "treatment no less favourable," it should be interpreted in accordance with the consistent interpretation of past panels which had found "treatment no less favourable" to be concerned with conditions of competition between like domestic and imported products in internal markets. The panel also found that to interpret the standard of "no less favourable treatment" narrowly to include only formally identical treatment, would frustrate the objective of GATS Article II to prevent discrimination between like services and service suppliers of other Members.

Although coming to the same conclusion, that GATS Article II should apply to both *de facto* and *de jure* discrimination, the Appellate Body found the panel's reasoning to be less than fully satisfactory. It objected to the analysis of GATS Article II (MFN) in light of the national treatment standard and found that references to national treatment provisions in the GATS and previous panel practice in relation to Article III of the GATT were not necessarily relevant to the interpretation of GATS Article II. Instead, the Appellate Body referred to past GATT practice in which Articles I and II GATT had been applied to measures involving *de facto* discrimination.

The Appellate Body also found that the "treatment no less favourable" language contained in Articles II and XVII of the GATS, while it was not necessary to interpret those provisions to arrive at the same meaning in each, did not imply that it had been the intention of the drafters that Article II should have a *de jure* or formal standard. Unlike GATS Article XVII:1, which is qualified by paragraphs 2 and 3, Article II:1 of the GATS

[405] *EC—Bananas III*, *supra* note 375, Report of the Appellate Body, ¶ 225.
[406] *Id*, ¶ 226.
[407] *Id*, ¶ 227.

is unqualified. The normal interpretation of that latter provision does not exclude *de facto* discrimination. Finally, the Appellate Body agreed with the panel that if it did not include *de facto* discrimination it would not be difficult—in fact it would be easier in the case of trade in services than in the case of trade in goods—to devise discriminatory measures aimed at circumventing the basic purpose of the Article.[408]

5. EC Licensing Procedures

The complainants challenged the consistency of various elements of the import licensing system with Article II and Article XVII of the GATS, namely the allocation of licenses on the basis of "operator category" rules, "activity function" rules, and "hurricane" rules. In each case the Appellate Body agreed with the panel that the rules violated both Article II and Article XVII of the GATS.

(a) Operator Category Rules. Under the banana import licensing scheme, the EC had divided operators into two categories, A and B, on the basis of whether they had supplied, during a previous three-year period, third-country and non-traditional bananas, or EC and traditional ACP bananas. Most of the suppliers originating in complainant countries fell into category A while suppliers of EC origin came under category B. Within each of these categories, treatment of suppliers from the EC was identical to that given suppliers originating in the complainant countries. There was no formal discrimination on the basis of origin of the supply of service, but the categories were treated differently. Certain operator category rules did not apply to category B suppliers, i.e. suppliers of EC and ACP bananas, which applied to the category A suppliers. By supplying wholesale trade services to the traditional ACP and EC market segment, operators could move into category B and avoid the additional burden of certain operator category rules. They would also be eligible for allocation of thirty percent of the in-quota licenses for third country and non-traditional imports that the EC had earmarked for category B suppliers.

The panel found the operator category rules to be contrary to both Article II and Article XVII of the GATS. On appeal, the EC argued that the EC licensing system for bananas is not discriminatory under Articles I and XVII of the GATS, because the various aspects of the system, including the operator category rules, the activity function rules and the special hurricane license rules, "pursue entirely legitimate policies" and are not inherently discriminatory "in design or effect." The Appellate Body disagreed, finding no specific authority in Article II or XVII of the GATS for the proposition that the "aims and effects" of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. It referred to the fact that the "aims and effects" test had originated in connection with the Article III:1 GATT principle that internal taxes, charges or other regulations "should not be applied to imported or domestic products so as to afford protection to domestic production." The Appellate Body noted that there is no comparable provision in the GATS, and that the Article III:1 GATT "aims and effects" test had been rejected by it in *Japan—Alcoholic Beverages*.[409]

This question aside, the Appellate Body affirmed the decision of the panel that the allocation of thirty percent of the third country and non-traditional import licenses to category B suppliers, in order to market third-country bananas, created less favourable conditions for the operators belonging to Category A (mostly suppliers originating in complainant parties), and thus violated both the MFN and the national treatment principles of the GATS.

[408] *Id*, ¶ 233.
[409] *Japan—Taxes on Alcoholic Beverages*, *supra* note 385.

(b) Activity Function Rules. Secondly, the EC had applied activity function rules that defined three categories of economic functions: primary importers, secondary importers (customs clearers) and ripeners. Tariff quota licenses for imports of bananas originating in traditional or non-ACP countries were allocated in fixed percentages according to these activities: 57 percent of the quotas were designated for primary importers and the rest to secondary suppliers (15 percent) and ripeners (28 percent), most of which were EC companies. On the facts, the service suppliers of complainant origin had little if any access to the performance of ripening activities, most of which was handled in EC-owned or -controlled ripening facilities.

The EC maintained that the aim of the activity function rules was to protect the banana ripeners against the concentration of economic bargaining power in the hands of the primary importers as a result of the tariff quota. It argued that the policy objective was to correct the position of all ripeners in relation to all suppliers of bananas, without distinction as to nationality, and that the effect of the activity function rules depended on the commercial choices made by the operators. Operators that previously supplied wholesale trade services to bananas brought under the tariff quota could avoid or reduce the extent to which they were subject to the activity function rules by extending their services to the EC market segment. They could also resort to licence pooling within independent ripeners, or retain ownership of the bananas they imported and have them ripened under contract.

In the view of the EC there were many options open to primary importers, and the activity function rules did not have the effect of providing less favourable conditions of competition. Nevertheless, the Appellate Body again rejected the "aims and effects" test, noting the panel's factual conclusions that even the EC statistics suggested that 74 to 80 percent of ripeners were EC-controlled. Given these findings, the Appellate Body affirmed the legal conclusion of the panel that the allocation to ripeners of a certain proportion of the Category A and B licenses, thereby allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates, created less favourable conditions of competition of like service suppliers of complainants' origin and was therefore inconsistent with the requirements of GATS Article XVII.

(c) Hurricane Licenses. The EC asserted that the purpose of the "hurricane licence rules" was to compensate those who suffer damage caused by tropical storms. Under those rules, however, it was only "operators who include or directly represent EC or ACP producers or producer organizations affected by a tropical storm" who were eligible for allocation of hurricane licenses. The panel concluded on the facts that the vast majority of operators who "include or directly represent EC or ACP producers" were service suppliers of EC or ACP origin. The Appellate Body accepted this factual finding and affirmed the decision of the panel that the hurricane licence system was also contrary to Article II and XVII of the GATS.[410]

C. Canada—Certain Measures Affecting the Automotive Industry

The *Canada—Automotive*[411] case involved complaints by Japan and the EC relating to Canadian measures affecting the automotive industry. The complainants challenged

[410] *EC—Bananas III*, *supra* note 375, Report of the Appellate Body, ¶ 248.
[411] *Canada—Automotive*, *supra* note 376.

Canadian legislation implementing an automotive products agreement (the so-called Auto Pact between the Canada and the United States, or Canada-United States Auto Pact), under which only a limited number of motor vehicle manufacturers were eligible to import vehicles into Canada duty-free and to distribute the motor vehicles in Canada at the wholesale and retail distribution levels. The legislation also made the duty-free treatment contingent on two criteria: a Canadian value-added ("CVA") content requirement that applied to both goods and services and a manufacturing and sales requirement. Japan and the EC alleged that these measures were in violation of several provisions of the GATT 1994, the TRIMs Agreement, Article 3 of the SCM Agreement and Articles II, V and XVII of the GATS.

The measure in issue was the *Motor Vehicles Tariff Order 1998 ("MVTO 1998")* which established duty-free treatment of certain automobiles and other motor vehicles pursuant to the Canada-United States Auto Pact of 1965. In conjunction with this there were *Special Remission Orders ("SROs")* which, in line with the terms of the Auto Pact, extended eligibility for the import duty exemption to additional manufacturers that had not met the conditions of the original MVTO 1965 and its successors. The import duty exemption was available to manufacturers of motor vehicles on imports "from any country entitled to the Most-Favoured-Nation Tariff," on condition that the manufacturer met the following three criteria:

a. the manufacturer was to have produced in Canada, during the designated "base year," motor vehicles of the class imported;
b. the ratio of the net sales value of the vehicles *produced in Canada* to the net sales value of all vehicles of that class *sold* for consumption *in Canada* was required to be, in the period of importation, "equal to or higher than" the ratio in the "base year," and the ratio was not in any case to be lower than 75:100 (the "ratio requirements"); and
c. the amount of Canadian value added in the manufacturer's local production of motor vehicles was required to be "equal to or greater than" the amount of Canadian value added in the local production of motor vehicles of that class during the "base year" (the "CVA requirements").[412]

Like *EC—Bananas III*, the *Canada Automotive* case raised a number of WTO issues in relation to both goods and services. At the panel level, the GATS issues were grouped around four main headings:

GATS Article I—measures affecting trade in services.

GATS Article II (MFN)—import duty exemption:

- whether the import duty exemption affected wholesale trade services;
- whether service suppliers were "like;"
- whether treatment no less favourable was accorded; and
- applicability of GATS Article V.

GATS Article XVII (national treatment)—import duty exemption:

- whether Canada had undertaken commitments on wholesale trade services of motor vehicles; and
- whether services were "like."

[412] *Id*., Report of the Appellate Body, ¶ 9 (citations omitted) (emphasis in original).

GATS Article XVII (national treatment)—the CVA Requirement:

- CVA requirements as affecting services related to the production of motor vehicles;
- whether services affected by the CVA requirements were covered by Canada's specific commitments in services;
- technical feasibility and inherent competitive disadvantage of modes 1 and 2 services;
- whether it was relevant that CVA requirements might be met on the basis of labour costs alone; and
- whether treatment no less favourable was accorded.

1. GATS Article I: Measures Affecting Trade in Services

The Appellate Body found that the panel should have asked, as a threshold question, whether the measure was within the scope of the GATS by examining whether the import duty exemption was a measure "affecting" trade in services within the meaning of GATS Article I, and that by failing to do so, the panel had erred in its interpretative approach.[413] The panel had referred to the *EC—Bananas III* case for the proposition that the term "affecting" in Article I of the GATS has a broad scope of application and accordingly found that no measures are *a priori* excluded from the scope of application of the GATS.[414]

The panel ultimately found that:

> "(t)he determination of whether a measure affects trade in services cannot be done in abstract terms in isolation from examining whether the effect of such a measure is consistent with the Member's obligations and commitments under the GATS. In this case, the determination of whether the MVTO 1998 and SROs are measures affecting trade in services within the meaning of Article I of the GATS should be done on the basis of the determination of whether these measures constitute less favourable treatment for the services and service suppliers of some Members as compared to those of others (GATS Article II) and/or GATS Article XVII)."[415]

The Appellate Body applied its reasoning in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, where it had held, in the context of GATT Article XX, that a panel may not ignore the "fundamental structure and logic" of a provision in deciding the proper sequence of steps in its analysis.[416] Based on this principle, it found that the fundamental structure and logic of GATS Article I:1, in relation to the rest of the Agreement, requires that determination of whether a measure is, in fact, covered by the GATS must be made *before* the consistency of that measure with any substantive obligation of the GATS can be assessed. It also found that the GATS Article II:1 reference to the fact that it applies to "any measure covered by this Agreement," confirms that a measure must be found to be covered by the GATS *before* any further examination of consistency with GATS Article II can logically be made.

The Appellate Body conducted its own threshold analysis of Article I of the GATS, referring to the pertinent parts of GATS Article I:1 and certain GATS Article XXVIII definitions. It found that at least two key legal issues must be examined to determine

[413] *Id*., ¶ 152.
[414] *Id*., Report of the WTO Panel, ¶ 10.231.
[415] *Id.*, ¶ 10.234.
[416] *US—Shrimp*, *supra* note 230, Report of the Appellate Body, ¶ 119. *See also US—Gasoline*, *supra* note 230, Report of the Appellate Body, at 22.

whether a measure is one "affecting trade in services." The first of these was whether there is "trade in services" in the sense of GATS Article I:2. Second, was whether the measure in issue "affects" such trade in services within the meaning of GATS Article I:1.

(a) Trade in Services. As to whether there was "trade in services," the Appellate Body looked at GATS Article I:2, where the definition of "trade in services" is the "supply of a service" in any one of four listed modes of supply. It then identified the supply of a service under the third mode, i.e. supply "by a service supplier" of one Member, through *commercial presence* in the territory of any other Member', as being at issue in the case. Next it looked at the definition of "commercial presence" in GATS Article XXVIII(d)[417] and, given the consensus of the parties, concluded that the category of services at issue was "wholesale trade services of motor vehicles supplied by service suppliers of certain Members through commercial presence in Canada."

(b) Affects Trade in Services. Having found "trade in services" it then considered whether the measure at issue "affects trade in services." Citing its own language in *EC—Bananas III*,[418] the Appellate Body affirmed the view that use of the term "affecting" in GATS Article I:1 reflects the intent of the drafters to give a broad reach to the GATS. It also affirmed the finding that, although the subject matter of the GATT 1994 and that of the GATS are different, particular measures "could be found to fall within the scope of both the GATT 1994 and the GATS," and that such measures include those "that involve a service relating to a particular good or a service supplied in conjunction with a particular good."[419] Furthermore, the Appellate Body reiterated that "whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis."[420] It concluded that:

> In cases where the same measure can be scrutinized under both the GATT 1994 and the GATS, however, the focus of the inquiry, and the specific aspects of the measure to be scrutinized, under each agreement, will be different because the subjects of the two agreements are different. Under the GATS, as we stated in European Communities—EC—Bananas III, "the focus is on how the measure affects the supply of the service or the service suppliers involved."[421]

The Appellate Body noted Canada's argument that the import duty exemption was not a measure "affecting trade in services" within the meaning of Article I of the GATS, because it was a tariff measure that affected the *goods* themselves and not the supply of distribution services. Canada maintained that the measure did not "affect" a service supplier in its *capacity as a service supplier* and in its *supply of a service*. It also relied on the *EC—Bananas III* decision to support its argument that the measure fell squarely within GATT 1994 and did *not* involve a service *relating to a particular good* or a service *supplied in conjunction with a particular good*.

Nevertheless, the panel had previously determined that the import duty exemption, granted only to manufacturer beneficiaries, bore upon conditions of competition in the supply of distribution services. Therefore, the import duty exemption fell into the third

[417] "(a)ny type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person . . . ."
[418] *EC—Bananas III*, *supra* note 375, Report of the Appellate Body, ¶ 220.
[419] *Id*, ¶ 221.
[420] *Id*; see also, *Canada-Periodicals*, *supra* note 374, Report of the Appellate Body, at 19.
[421] *Id*, ¶ 221.

category of measures identified by the Appellate Body in *EC—Bananas III*, as involving "a service relating to a particular good or a service supplied in conjunction with a particular good," which "could be scrutinized under both the GATT 1994 and the GATS."[422]

Referring to its analysis in *EC—Bananas III*, in determining that the activities of operators were indeed suppliers of "wholesale trade services," the Appellate Body pointed out that although the operators in that case were engaged in certain activities that were not strictly "distributive trade services," there was no question that they are also engaged in other activities involving the wholesale distribution of bananas within that definition.[423] It also noted the conclusions drawn in regard to vertically integrated corporate operators and said that "even if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, *to the extent that it is also engaged in providing 'wholesale trade services'* and is therefore *affected in that capacity* by a particular measure of a Member *in its supply of those 'wholesale trade services'*, that company *is a service supplier* within the scope of the GATS"[424] (emphasis added).

On that basis, the Appellate Body criticized the panel for failing to examine any evidence relating to the provision of wholesale trade services of motor vehicles within the Canadian market, its failure to make any factual findings as to the structure of the market for motor vehicles in Canada, or the companies that actually provide wholesale trade services of motor vehicles, and its consequent failure to examine whether or how the import duty exemption affects *wholesale trade service suppliers in their capacity as service suppliers*. The statement of the panel on the point had been as follows:

> Like the measures at issue in the EC—Bananas III case, the import duty exemption granted only to manufacturer beneficiaries bears upon conditions of competition in the supply of distribution services, regardless of whether it directly governs or indirectly affects the supply of such services.[425]

The Appellate Body found this to be an insufficient basis for a legal finding. A proper analysis as to whether the measure is one "affecting trade in services" under GATS Article I:1 would require the panel to show that the import duty exemption "affects" wholesale trade services of motor vehicles, *as services*, or wholesale trade service suppliers of motor vehicles, *in their capacity as service suppliers*. It found that the Panel had failed to analyse the evidence on the record relating to the provision of wholesale trade services of motor vehicles in the Canadian market. Moreover, it had also failed to articulate what it understood GATS Article I:1 to require by the use of the term "affecting." The panel, having interpreted GATS Article I:1, ought to have examined all the relevant facts, including *who* supplies wholesale trade services of motor vehicles through commercial presence in Canada, and *how* such services are supplied. The Appellate Body stated baldly: "(i)t is not enough to make assumptions." Finally, it said that "the Panel should have applied its interpretation of "affecting trade in services" to the facts it should have found."[426]

2. GATS Article II:1

In spite of finding that the panel had failed to examine whether the measure is one "affecting trade in services under GATS Article I, the Appellate Body

[422] *Canada—Automotive*, *supra* note 376, Report of the Panel, ¶ 10.239.
[423] *EC—Bananas III*, *supra* note 375, Report of the Appellate Body, ¶ 226.
[424] *Id.*, ¶ 227.
[425] *Canada—Automotive*, *supra* note 376, Panel Report, ¶ 10.239.
[426] *Id.*, Report of the Appellate Body, ¶ 165.

examined the analysis of the panel with respect to issues raised on appeal under GATS Article II:1.

Once again the Appellate Body, in laying the foundation as to the appropriate sequence of analysis, looked first at the text of GATS Article II:1 (MFN) and found that the wording of the provision suggested that analysis of the consistency of a measure with GATS Article II:1 should proceed in several steps. First, it reiterated that there must be a threshold determination under GATS Article I:1 finding that there is "trade in services" in one of four "modes of supply" and a measure which "affects" this trade. If the threshold determination is that the measure is covered by the GATS, then the next step is the appraisal of the consistency of the measure with the requirements of GATS Article II:1. This appraisal requires that treatment by one Member of "services and services suppliers" of any other Member should be compared with treatment of "like" services and service suppliers of "any other country." The process would normally require an interpretation of GATS Article II:1 and factual findings as to the treatment of services and service suppliers (in this case, the wholesale trade services and service suppliers of motor vehicles of different Members commercially present in Canada). Finally, the interpretation of GATS Article II must be applied to the facts as the panel finds them.

The Appellate Body found that the panel had taken none of these steps, but had based its conclusions on "pure speculation."[427] It said that the panel had confused the *application* of the import duty exemption to *manufacturers* with its *possible effect* on *wholesalers*.[428] It had also conducted a goods analysis of the measure, simply extrapolating its analysis of how the import duty exemption affects manufacturers to wholesale trade service suppliers of motor vehicles. Moreover, the panel had neither assessed the relevant facts, nor interpreted GATS Article II and applied the interpretation to the facts it found. On this basis the Appellate Body reversed the conclusion of the panel that import duty exemption, pursuant to the MVTO 1998 and the SROs, is inconsistent with Article II:1 of the GATS and its findings leading to that conclusion. In so doing, the Appellate Body expressly stated that it did not want to suggest that the import duty exemption does *not* affect wholesale trade services of motor vehicles in Canada.[429] Further, mindful of the importance of the GATS as a new multilateral trade agreement covered by the WTO Agreement and the complexity of the subject matter of trade in services, it decided that it was unable in the circumstances to provide any interpretation of GATS Article II.

3. GATS Article XVII: Import Duty Exemption and CVA Requirements

The parties did not challenge the decision of the panel with respect to GATS Article XVII on national treatment and the Appellate Body made no reference to this provision, or its analysis by the panel. It does, however, in its concluding paragraph, recommend that the DSB request Canada to bring the measure in question, "found in this Report and in the Panel Report as modified by this Report, to be inconsistent with Articles I and III of the GATT 1994, Article XVII of the GATS and Article 3.1 of the SCM Agreement, into conformity with its obligations in those agreements."

As to whether the import duty exemption contravened the national treatment obligation under GATS Article XVII, the panel found that Japan had failed to demonstrate that the import duty exemption, granted pursuant to the MVTO 1998 and the SROs constituted, "treatment less favourable" accorded to Japanese suppliers of wholesale trade services of

[427] *Id.*, Report of the Appellate Body, ¶ 174. *See also* ¶¶ 172 and 173.
[428] *Id.*, ¶ 181.
[429] *Id.*, ¶ 183.

motor vehicles than that accorded to like Canadian service suppliers within the meaning of Article XVII of the GATS.[430]

On the CVA requirements, the panel had found Canada, as a result of the application of the CVA requirements as one of the conditions determining eligibility for the import duty exemption on motor vehicles under the MVTO and SROs, to have acted inconsistently with Article XVII of the GATS by according treatment less favourable to services and service suppliers of other Members, supplied through modes 1 and 2, than it accorded to its own like services and services suppliers.[431]

The panel's reasoning on GATS Article XVII should, in light of the Appellate Body critique of its analysis and application of Articles I and II of the GATS, be viewed with caution. Although the conclusions of the panel still stand concerning application of GATS Article XVII (national treatment) to the CVA requirements, the Appellate Body's critique of the panel's approach to the Article I threshold determination applies equally to the CVA requirements as to the import duty exemption.

D. Japan—Photographic Film and Paper (Kodak-Fuji)

The *Kodak-Fuji*[432] dispute arose out of long-standing competition between the U.S. photographic film producer, Kodak, and its Japanese counterpart Fuji, and Kodak's battle for a share of the Japanese market. Originally Japan employed high tariffs and import licensing requirements to prevent the U.S. company from achieving a significant market presence, but eventually dismantled them, under pressure from the U.S. government and the OECD. After the formal restrictions were dismantled, the Japanese government then allegedly employed informal "*liberalization countermeasures*" to assist Fuji in blocking the expansion of Kodak in Japan. In particular, the government was said to have encouraged wholesale distributors to enter into exclusive supply contracts with Fuji that arguably enabled them and their affiliated distributors to dominate the Japanese market. According to the United States, the Japanese Ministry of International Trade and Industry: (1) encouraged the restructuring of the distribution agreements in consumer photographic materials so as to bring wholesalers and laboratories under the control of domestic manufacturers; (2) defended the Japanese industry against price-fixing charges by the Japanese Fair Trade Commission; and (3) tolerated systematic anti-competitive activities by the *domestic* industry, which the United States alleged to have the effect of restricting access of its industry into the Japanese market. Arguably it fostered a dependent and exclusionary relationship among Japan's major photographic materials manufacturers, the primary wholesalers, secondary wholesalers and retailers.

The United States launched a WTO proceeding claiming that a number of laws, regulations and requirements affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper, nullified or impaired benefits accruing to the United States under the WTO agreements. It argued that the measures breached GATT Article III[433] by affording protection to the domestic photographic film industry, breached GATT Article X[434] by reason of lack of transparency, and, within the meaning of GATT Article XXIII,[435] nullified the benefit of tariff commitments made by the Japanese government during the last several negotiating rounds.

[430] *Id.*, Panel Report ¶ 11.1(i).
[431] *Id.*, ¶ 11.1(j).
[432] *Kodak-Fuji case*, *supra* note 377.
[433] National Treatment.
[434] Transparency.
[435] Non-violation nullification and impairment within the meaning of GATT Article XXIII.

Surprisingly, the United States did not base its claim on the GATS. It could have argued that the U.S. supply of distribution, wholesale trade and retailing services was affected by "measures" taken by the Japanese government and that the treatment afforded the U.S. suppliers was less favourable than that accorded to the like Japanese services and service suppliers. Japan had entered both market access and national treatment commitments in its GATS Schedule in regard to distribution services, including wholesale trade services and retailing services, with the exception of mode 4 (movement of natural persons), which remained unbound except for certain categories of persons as described in the Horizontal Commitments.

The Panel decided against the United States on every point. It found that none of the 21 measures challenged by the United States had nullified U.S. tariff benefits or denied national treatment to U.S. exports; that the measures should have been anticipated by the United States in its tariff negotiations; that many of the measures, which were in the form of administrative guidance, did not compel behaviour; and that the purpose and effect of the Japanese action was to modernize, rather than to protect, its economy. The United States did not appeal the decision. Unfortunately the case fails to shed light on the application of the GATS, particularly GATS Article XVII,[436] but illustrates the difficulties at the intersection of public and private conduct, and of trade law and competition law.

E. Mexico—Telecommunications Services

In the *Telmex* case, the panel found that Mexican laws and regulations governing the international supply of telecommunication services violated its international commitments. It concluded that charges for interconnection were unacceptably high, the rules on negotiation of international rates and allocation of revenues fostered anti-competitive behaviour, and foreign suppliers were prevented from accessing public networks and services on reasonable terms. The United States initiated the claim following unsuccessful attempts to negotiate a reduction of rates for completion of long-distance calls in Mexico that were three times more expensive than U.S. calls terminating in Canada. Although limited in scope, the decision is a good example of the impact that WTO disciplines can have on competitive conditions in the international market, with concrete benefits to consumers and businesses. The decision should lead to lower telephone costs for Americans and Mexicans with family and friends across the border, and eliminate unnecessary costs for businesses and telecoms providers. The panel found against Mexico on three main issues.

1. Interconnection with a Major Supplier at Cost-Oriented Rates

The panel ruled that the rates charged by Mexico for interconnecting U.S. suppliers with a major Mexican supplier, through its international gateways, were not 'cost-oriented' as required by the Telecoms Reference Paper, which was incorporated into Mexico's GATS schedule (¶ 7.216). The interconnection requirement only applied to services for which Mexico had permitted access by way of scheduled GATS commitments. In relation to cross-border supply (which the basic telecoms services in issue are), Mexico had given full access to U.S. operators who owned their own facilities in the US. This was subject to the express requirement that calls be routed through Mexican enterprises holding a government concession for the operation of a public telecoms network, for the purposes of terminating calls in Mexico.

[436] National Treatment.

The panel largely accepted U.S. methodologies demonstrating that Telmex rates for international interconnection were not cost-oriented. Data regarding the same network elements used to interconnect US suppliers showed that they cost on average 75 percent less when used for domestic interconnection (¶¶ 7.189–203); a further methodology demonstrated that wholesale rates for termination of calls between various countries with competitive long-distance operators were much lower than the rates charged by Telmex (¶¶ 7.208–210).

2. Prevention of Anti-Competitive Practices

The panel found that not only had Mexico failed to take appropriate measures to prevent anti-competitive practices in the industry, but through its International Long Distance Rules it actually required Mexican telecoms suppliers to participate in them (¶¶ 7.260–261). Under the 'uniform settlement provisions', the dominant carrier, which is invariably Telmex, was required to negotiate the uniform interconnection rate for cross-border traffic to and from a given country, on behalf of all Mexican carriers. This elimination of competition within Mexico for international interconnection resulted in rates significantly above cost and significantly above the rates charged in countries with competitive telecoms markets.

The 'proportionate return' system was also in violation for requiring Mexican operators to distribute incoming traffic among themselves (or compensate one another) on the basis of the proportion of outgoing calls handled by each. The panel found that the allocation of market share, together with permission for financial compensation arrangements, had the effects of a market sharing arrangement between suppliers (¶¶ 7.263–264). It said that measures that legally require anti-competitive behaviour could not be 'appropriate' for preventing it (¶¶7.265-266). In the absence of a claim by Mexico, it did not examine the broader issue as to whether Mexico's competition laws were themselves 'appropriate measures' in terms of Section 1 of the Reference Paper.

3. Access to and Use of Public Networks and Services on Reasonable Terms and Conditions

The panel held that Mexico had failed to give U.S. service providers 'access to and use of public networks and services on reasonable terms and conditions', contrary to the GATS Telecoms Annex (¶¶ 7.328–335). Interconnection rates were 'unreasonable' on the ground that they far exceeded 'cost-oriented' rates. Mexican law also prevented U.S. commercial entities from establishing themselves in Mexico, contrary to a full market access commitment by Mexico in relation to mode 3 (commercial presence). Even if they were allowed in, Mexican law prevented them from leasing public networks or capacity in order to provide services by 'simple international resale' to other countries; they were, instead, required to use the facilities of a Mexican company with a government concession to operate public telecoms facilities.

In principle, the decision is helpful in furthering U.S. efforts to open up international telecommunications markets. Instead of having one interconnection rate negotiated by Telmex, US and other foreign carriers will be able to negotiate their own interconnection rates with Mexican telecoms firms, and increased competition should eventually result in reduced, reasonable and cost-oriented rates.

Restrictions on the scope of the Mexican commitments (the denial of interconnection to services supplied over leased networks or leased capacity), which limited the extent of the victory, have no real bearing on the importance of the case outside of the Mexican market. Although the amended Mexican rules on negotiation of settlement rates here

extend only to cross-border 'facilities-based' providers who own U.S. networks and route their calls through a Mexican entity, such limitations will not apply in every case.

Similarly, the mutual agreement of the parties—that Mexico will not implement the part of the panel decision requiring it to permit commercial agencies to conduct international simple resale of leased capacity—is a conclusion, peculiar to this case, that does not undermine the panel's interpretation of Mexico's commitment in relation to mode 3 delivery of services by commercial establishment.

Perhaps the most interesting aspect of the case, at least within the telecoms context, is the way in which the panel addresses the competition issues underlying the dispute. While the GATS itself does not make express provision for ensuring competition in the market, the Telecoms Reference Paper, which requires the prevention of anti-competitive practices, does require the panel to define the phrase, at least for the purpose of application to the measures in question. The panel refers to Mexico's national competition laws only tangentially, indicating that it is not required to address their effect in the absence of a claim by Mexico to do so. Nevertheless, the panel applied a broad interpretation of '*anti-competitive practices*', rejecting Mexico's claim that acts by a major telecommunications supplier cannot be considered anti-competitive simply because they are compelled by its national government. The panel accepted the U.S. argument that the nature of anti-competitive practices does not change as a result of the fact that they are required by law, pointing out that the pro-competitive obligations in the Reference Paper do not reserve any unilateral right of WTO members to maintain anti-competitive measures. While a critical assessment might suggest that this definition could raise issues relating to a broad spectrum of government-required conduct, it seems unlikely that it will result in any challenges that would not otherwise have been contemplated.

For telecoms services providers, the case is instructive in regard to specific definitions, such as the distinction between '*facilities-based*' and '*non-facilities based*' services, and for its application of the terms of the Reference Paper. It also addresses the meaning of two restrictions that Mexico inscribed in its Services Schedule: the cross-border routing restriction and the permit requirement related to establishment of commercial agencies. These restrictions, neither of which was found to be a market access 'limitation' in the true sense, may have parallels in disputes over other commitments. As an initial decision on trade in services, however, the panel report does not take us very far in the elaboration or clarification of specific GATS principles.

VI. The GATS Built-in Agenda: Completing the Framework

At the time the Uruguay Round was completed in 1994 the GATS was heralded as an important, if modest, attempt to create a framework for the liberalization of trade in services.[437] What is perhaps not so readily understood is that GATS is an "incomplete" Agreement. It contains not only a "built-in" requirement for WTO Members to enter into successive rounds of negotiations no later than five years after entry into force of the WTO Agreement and periodically thereafter,[438] but it also calls for completion of the GATS framework with specific disciplines on subsidies, emergency safeguards,

[437] JACKSON, *supra* note 5, 306; Feketekuty, *supra*, note 5, at 85–90; and Footer, *supra* note 5, at 481. The information contained in the following sections draws partly on Mary E. Footer, *The General Agreement on Trade in Services: Taking Stock and Moving Forward*, 29:1 LEGAL ISSUES OF ECONOMIC INTEGRATION 7 (2002).

[438] GATS *Article XIX:1*.

government procurement and domestic regulation. It also calls for negotiating more specific commitments on a sectoral basis, leading to the development of new Annexes,[439] and/or the review of existing ones.[440]

A. Special Negotiating Sessions

1. Overview

Pursuant to Article XIX:I of the GATS, special negotiations on trade in services were launched in January 2000[441] with the intention that these should consist of two phases. The "rule-making" phase would allow WTO Members to negotiate new rules for services on subsidies, safeguards and government procurement, while the "Request and Offer" phase would allow Members to negotiate further market access, commitments across-the-board (with no sector excluded *a priori*) in order to achieve progressively higher levels of liberalization of trade in services by reducing or eliminating restrictive measures. At its meeting of May 26, 2000, the Council for Trade in Services finally agreed on a work program for the first phase of the "negotiations" process[442] whereby Members would submit proposals for discussion at the Special Session of the Council for Trade in Services[443] by the end of December 2000.

Some WTO Members, such as the United States[444] and Hong Kong[445], put forward their own suggestions for a framework and scope and coverage of the negotiations. Additionally, two Members—the European Communities[446] and Australia[447]—called for negotiations to be conducted in so-called "clusters" of inter-related services in certain service sectors, as a means of assisting WTO Members in the traditional Request and Offer phase. It was thought that "clustering" would give weight to economic linkages by providing Members with a "checklist" outlining the economic inter-related sectors and/or subsectors, thereby contributing to the increased efficiency and coherence of services negotiations. In fact, the checklist approach appears to have won the day over clustering, both when dealing with classification in new sectors where economic interlinkages are very prominent and when negotiating on the progressive

[439] For example, a number of developing country Members have pushed for a new GATS *Annex on Tourism*, see *infra* note 550.

[440] Including the GATS *Annex on Article II Exemptions*, *supra* note 161, at 352; GATS *Annex on Movement of Natural Persons*, *supra* note 141; and the possibility of extending the scope of the GATS *Air Transport Annex*, *supra* note 71.

[441] Negotiations under GATS *Article XIX* were formally launched at the Special Session of the Council for Trade in Services of February 25, 2000, S/CSS/M/1 (April 12, 2000), ¶¶ 4–35.

[442] This work program, which some Members have termed a "road map", effectively establishes the main parameters for the overall negotiations, including the agreed modalities for the second phase of negotiations, for the treatment of autonomous liberalization, for means to facilitate the increasing participation of developing countries and proposals on issues arising from the work carried out in the Council and its subsidiary bodies.

[443] The Special Sessions of the Council for Trade in Services are held back-to-back with the regular meetings of the Council for Trade in Services for the duration of the negotiations, with the latter reporting on progress to the WTO General Council. The Special Sessions will cease once negotiations have ended.

[444] *Communication from the United States: Framework for Negotiations*, Council for Trade in Services, Special Session, S/CSS/W/4 (July 13, 2000).

[445] *Communication from Hong Kong, China: Scope and Coverage of the Services Negotiations and their Guidelines*, Council for Trade in Services, Special Session, S/CSS/W/6 (September 29, 2000).

[446] *Communication from the European Communities and their Member States: The Cluster Approach*, Council for Trade in Services, Special Session, S/CSS/W/3 (May 22, 2000).

[447] *Communication from Australia: Negotiating Proposal for Maritime Transport Services*, Council for Trade in Services, Special Session, S/CSS/W/111 (October 1, 2001), ¶ 7 on "clustering."

liberalization of specific service sectors. (For further details see also Appendix A, section 3, below.)

It was not until after the end of this first phase, in March 2001, that the Council for Trade in Services, adopted the *Guidelines and Procedures for the Negotiation on Trade in Services (Guidelines and Procedures for Negotiations)*, pursuant to the Preamble to the Agreement and GATS Article IV, and as mandated in GATS Article XIX GATS. The negotiations are aimed at achieving progressively higher levels of liberalization of trade in services through the elimination of regulatory barriers, and *inter alia* increasing "the participation of developing countries in trade in services."[448]

In accordance with the *Guidelines and Procedures for Negotiation* no service sector or mode of supply is excluded *a priori* from the negotiations, which means that such negotiations are across the board and include equally sectors where extensive liberalization has already taken place (e.g. telecommunications) and sectors where no, or virtually no, specific commitments have been taken to date (e.g. health-related and social services). Additionally, MFN exemptions previously taken by Members are the subject of negotiations in accordance with Paragraph 6 of the *Annex on Article II Exemptions*.[449]

The current (Uruguay Round)[450] schedules are the starting point for the negotiation of specific commitments,[451] and liberalization may take place through bilateral, plurilateral and multilateral negotiations, with the "Request-Offer" approach, already used in services negotiations and familiar from tariff negotiations, being the principal means of negotiating.[452] However, credit is also to be given in negotiations where individual Members have already undertaken autonomous liberalization following previous negotiations, although the *Guidelines and Procedures for Negotiation* do not say how this is to be achieved.[453] The uncertainty over this issue has finally been resolved only in 2003 with the adoption of a decision on autonomous liberalization, which is discussed below. Equally daunting is the fact that the Council for Trade in Services has decided to continue its work on assessing trade in services in the Special Session, and to keep it on its agenda as an "ongoing activity of the Council," with negotiations being adjusted accordingly in the light of the results of the assessment.[454]

Finally, the *Guidelines and Procedures for Negotiations* specifically mandate Members to continue negotiations on various outstanding issues,[455] related to rule making. These include the negotiations on emergency safeguard measures ("ESMs") under GATS Article X,[456] initially supposed to have been concluded and entered into force by January 1, 1998,[457] and the completion of negotiations on GATS Article VI:4 (domestic

[448] *Id.*, ¶ 2.
[449] *Id.*, ¶ 6.
[450] In the case of financial services and telecommunications, the most current schedules are those attached to the *Fourth Protocol to the GATS*, *supra* note 263 and the *Fifth Protocol to the GATS*, *supra* note 265, respectively. *See* Chapters 20 and 21 of this book.
[451] In accordance with GATS *Article XIX:3* the Council for Trade in Services, Special Session formally adopted *Guidelines and Procedures for the Negotiations on Trade in Services*, at its meeting of 28 March 2001, S/L/93 (29 March 2001) *("Guidelines and Procedures for Negotiations*"), ¶ 10.
[452] *Id.*, ¶ 11.
[453] *Id.*, ¶ 13.
[454] *Id.*, ¶ 14.
[455] *Id.*, ¶ 7.
[456] GATS *Article X:1*.
[457] This deadline has been extended several times already as follows: first extension: June 30, 1999 (*Decision on Negotiations on Emergency Safeguard Measures*, adopted by the Council for Trade in Services on November 26, 1997, S/L/43); second extension: December 15, 2000 (*Second Decision on Negotiations on Emergency Safeguard Measures*, adopted by the Council for Trade in Services on June 24, 1999, S/L/73); third

regulation)[458] and negotiations on GATS Article XIII (government procurement),[459] as well as on GATS Article XV (subsidies).[460]

2. Progressive Liberalization and Current Negotiations

Having commenced in 2000, outside of the Doha Round and on the basis of the negotiating mandate contained in the GATS built-in agenda of Article XIX, the negotiations on trade in services have been brought within the current Round, following the Doha Ministerial Meeting in November 2001, where Members noted the following:

> We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by Members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on March 28, 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by June 30, 2002 and initial offers by March 31, 2003.[461]

As already noted in Part IV.A.(2)(c), negotiations on trade in services are due to be completed by December 31, 2004, with the Ministerial Declaration calling upon WTO Members to submit initial requests for specific commitments by June 30, 2002 and initial offers by March 31, 2003.[462] It has been reported that at the bilateral (and confidential) request phase, almost all Members have received requests for further liberalization from some fifty-five Members, of which thirty-two are developing country Members.[463] The United States and the EC have requested market access commitments in almost all of the twelve services sectors (only the category of health and related social services appear not to have been mentioned).

Some requests have also addressed "horizontal issues," other than assessment of trade in services and autonomous liberalization, such as the removal of investment barriers (for example, economic needs tests or investment approval procedures) in Mode 3 (commercial presence), while several proposals mostly from developing country Members such as India call for increased access for temporary entry and stay of professional employees under Mode 4 (movement of natural persons). The Request-Offer stage of negotiations is to be followed by bilateral negotiations of market access and national treatment on an item-by-item basis, across all sectors. In accordance with the most recent decision of the

extension: March 15, 2002 (*Third Decision on Negotiations on Emergency Safeguard Measures*, adopted by the Council for Trade in Services on December 1, 2000, S/L/90); fourth extension: March 15, 2004 (*Fourth Decision on Negotiations on Emergency Safeguard Measures*, adopted by the Council for Trade in Services on March 15, 2002, S/L/102); fifth extension, no later than the date of entry into force of current service negotiations (*Fifth Session on Negotiations on Emergency Safeguard Measures*, adopted by the Council for Trade in Services on March 15, 2004, S/L/159.) *See further Negotiations on Emergency Safeguard Measures*, Report of the Chairperson of the Working Party on GATS Rules, S/WPGR/9 (March 14, 2003), 2, II. Background of the Negotiations and Main Activities.

[458] GATS *Article VI:4*.

[459] GATS *Article XIII*.

[460] GATS *Article XV*.

[461] *Doha Ministerial Declaration*, *supra* note 269, ¶ 15, reproduced in the Appendix to this book.

[462] *Id.*

[463] WTO Press Release, *Services Negotiations Offer Real Opportunities for all WTO Members and More so for Developing Countries*, Press/300 (June 28, 2002), 3.

General Council Concerning the Doha Work Programme, revised offers should be tabled by May 2005.[464]

3. Outstanding Issues

The remainder of this Part reviews some of the outstanding issues related to the current round of services negotiations, including horizontal issues such as assessment of trade in services and autonomous liberalization. This is followed by an analysis of those built-in agenda items that form part of the "rules-making" phase of the negotiations, such as domestic regulation, emergency safeguards, government procurement and subsidies as well as the status of review of certain sectoral and/or functional annexes and outstanding implementation issues.

(a) Assessment of Trade in Services. GATS Article XIX:3 requires the Council for Trade in Services to carry out an assessment of trade in services in overall terms and on a sectoral basis, with reference to the objectives of the Agreement, including those set out in GATS Article IV:1 (relating to the participation of developing countries). At the regular Council Meeting of February 25, 2000, it was decided to make this a standing item on the agenda of the Special Session, as part of an on-going process,[465] and this was confirmed in the *Guidelines and Procedures for Negotiations*.[466]

The assessment process has been complicated by the demands for further work on the statistical basis for services, especially sectoral services statistics from non balance-of-payment sources with reference to transition economy and developing country Members, as noted previously in Part IV. B.1 above, there is still a dearth of statistical data on services trade, which has made it difficult for a quantitative assessment of trade in services to be carried out. Some Members also believe that the objective of this assessment process should be to determine if and to what extent developing countries have benefited from "developed countries" liberalization of their services markets, in line with the objectives of Article IV of the GATS.[467]

Some Members, particularly from developing countries, have expressed concern that negotiations on further liberalization of services commitments could only take place once the "rules-making" phase has been sufficiently developed in order to create some certainty and clarity for Members on key disciplines, in particular emergency safeguard measures, when negotiating and scheduling specific and horizontal services commitments. Unfortunately, specialist working groups on domestic regulation and GATS disciplines, which were set up as subsidiary bodies by the Council for Trade in Services,[468] have made slow progress in this respect while the negotiating process for further liberalization has continued on track.

(b) Autonomous Liberalization. A further element that has a direct bearing on the course of services negotiations is the issue of autonomous liberalization. Basically, Article XIX:3

[464] *Decision of the General Council Concerning the Doha Work Programme*, adopted on July 31, 2002, WT/GC/W/535, ¶ 1e and Annex C.

[465] Council for Trade in Services, Special Session, *Report of the Meeting held on February 25, 2000*, Note by the Secretariat, S/CSS/M/1 (April 12, 2000), ¶¶ 36–38.

[466] *Guidelines and Procedures for Negotiations*, *supra* note 453, ¶ 14.

[467] *See Statement of the Chairman of the Council for Trade in Services to the General Council*, July 12, 2001, Council for Trade in Services, Special Session, S/CSS/7 (July 18, 2001), ¶ 4.

[468] GATS *Article XXIV:2*, second full sentence.

GATS[469] requires that the guidelines and procedures for the negotiations also "establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations. . . ."[470] However, there has been persistent doubt as to how to give credit and recognition for autonomous liberalization measures.[471]

Autonomous liberalization first became an issue during the Uruguay Round and was discussed quite extensively in the negotiating group on market access.[472] It was recognized that developing countries, which had autonomously liberalized tariffs or non-tariff measures since June 1, 1986, should be given appropriate recognition by other individual participants in the context of achieving the Uruguay Round trade liberalization objectives. Two issues arose and have remained at the heart of the ongoing debate as applied to negotiations for the liberalization of trade in services.

First, how can recognition be given for measures that Members have taken autonomously if there is no agreement as to what recognition is being given for? Second, should recognition be given to autonomous measures taken by Members outside the GATT/WTO context, particularly in the case of developing countries that have undertaken such liberalization in the context of policy reforms advocated by the IMF and other international financial institutions, such as the World Bank, under a structural adjustment program or under poverty reduction strategies policies?[473] The latter issue in particular affects developing country Members, many of which have not yet formalized these policy reforms through market access and national treatment commitments in the context of GATS.[474] This leads to the peculiar result that for many developing country Members their markets may be effectively open but their market access commitments under GATS remain limited; the resulting gap between the two puts them in a weaker bargaining position when negotiating further market openings.

Discussions between Members have continued for over three years in the Special Session of the Council for Trade in Services as to what criteria should be used in determining the grant of autonomous liberalization, for example the application of an economic needs test,[475] and the modalities to be employed. The latter include functional modalities *inter alia* as to whether credit could be given without necessarily binding the autonomous liberalization measures (and indeed whether binding an autonomous liberalization measures would have any impact on the measure granted), the question as to how to measure the value of the autonomous liberalization measure taken, the nature of the credit given and how disputes arising from the application of autonomous liberalization would be

[469] GATS *Article XIX:3*.

[470] *See also* the *Guidelines and Procedures for Negotiations*, *supra* note 451, ¶ 13.

[471] *See Report of the Meeting of the Council for Trade in Services, Special Session*, held on December 1, 2000 on the *Treatment of Autonomous Liberalization*: Note by the Secretariat, S/CSS/M/6 (January 22, 2001).

[472] A paper was distributed in December 1991 by the Chairman of the Negotiating Group on Market Access, MTN.GNG/MA/W/13, December 19, 1991. GATT contracting parties could not agree whether autonomous liberalization meant tariff bindings undertaken autonomously, or the application of tariffs below bound rates.

[473] Elisabeth Tuerk and Robert Speed, *Credit for Autonomous Liberalization: Benefits and Pitfalls for Developing Countries* (CIEL, January 22, 2003), unpublished paper, available from CIEL, Geneva, or at http://www.ciel.org.

[474] As a WTO representative, present at the aforementioned meeting on autonomous liberalization put it: "Can autonomous liberalization, for the purposes of GATS *Article XIX:3*, constitute trade liberalization undertaken and bound in an autonomous manner, i.e. outside the context of a negotiation, or trade liberalization undertaken autonomously but not bound?," *Report of the Meeting of the Council for Trade in Services, Special Session*, S/CSS/M/6 (January 22, 2001), *supra* note 473, ¶ 4.

[475] An example of this is the *Communication from MERCOSUR —Economic Needs Test*, Council for Trade in Services, Special Session, S/CSS/W/139 (March 20, 2002).

resolved.[476] Of key concern was whether both developed and developing country Members should be equally eligible for credit, with a group of mostly Latin American and Asian developing countries having rejected a proposal to this effect in 2001.[477]

Eventually in March 2003, after the initial Request and Offer stage had come to an end but before negotiations on trade in services had been completed, the Council for Trade in Services adopted a decision on *Modalities for the Treatment of Autonomous Liberalization (Autonomous Liberalization Modalities*).[478] Essentially an autonomous liberalization measure is any measure that is:

(a) subject to scheduling under Part III of GATS, and/or leading to the termination of an MFN exemption,
(b) compatible with the MFN principle,
(c) undertaken by the liberalizing measure unilaterally, since previous negotiations, in accordance with Article XIX of GATS, and
(d) applicable to any or all service sectors.[479]

A footnote to sub-section (c) makes it clear that measures undertaken as part of an economic reform program, including those undertaken under the auspices of the IMF or World Bank, should be considered as autonomous liberalization measures for the purpose of the *Autonomous Liberalization Modalities* provided they meet the criteria set out therein.

The actual criteria for autonomous liberalization are not defined as such in the decision on *Autonomous Liberalization Modalities* but instead are offered as "illustrative criteria."[480] They include some nine possible criteria including "sectoral coverage," the "liberalising nature of the measure concerned," "date of entry into force and duration of the measure," sector share in total trade of the trading partner, share of the latter in the total trade in the sector that has been autonomously liberalized by the liberalizing Member, "importance and impact of the autonomous liberalization measures on the liberalizing member's economy," "market potential in the liberalizing Member for the trading partner," expansion opportunities of foreign participation in the sector after introduction of the measures, and "whether the measure in question has already been scheduled and, if not, whether the liberalizing Member would be willing to do so." The latter issue was one of the major sticking points for developing country Members but was seen as vital in order to bring about the legal certainty and predictability that a bound measure has following the successful conclusion of negotiations.[481]

It was also agreed that Members could use any qualitative or quantitative approach in arriving at an assessment of the value of the autonomous liberalization measure.[482] The *Autonomous Liberalization Modalities* also explicitly states that Members should take into account the level and development of individual Members "both overall and in individual sectors" when applying both approaches and criteria.[483] Furthermore, the

[476] Tuerk and Speed, *supra* note 475, 2.
[477] *Communication from Brazil, Colombia, Cuba, Ecuador, Dominican Republic, Guatemala, Honduras, Indonesia, Malaysia, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Senegal, Uruguay and Venezuela on Autonomous Liberalization and Developing Countries*, Council for Trade in Services, Special Session, S/CSS/W/130 (November 30, 2001).
[478] *Modalities for the Treatment of Autonomous Liberalization* adopted by the Special Session of the Council for Trade in Services on March 6, 2003, TN/S/6 (March 10, 2003) *("Autonomous Liberalization Modalities")*.
[479] *Id.*, Part I, ¶ 3.
[480] *Id.*, Part II, ¶ 4.
[481] *Id.*, footnote 3 to ¶ 4(i).
[482] *Id.*, Part II, ¶ 5.
[483] *Id.*, ¶ 7.

Autonomous Liberalization Modalities is explicit when it says that the modalities "shall be used *inter alia* as a means of promoting the economic growth and development of developing countries and their increasing participation in trade in services."[484] Moreover, credit for autonomous liberalization shall be recognized and granted with Members taking "fully into account the flexibility provided for individual country members" and their individual level of development.[485]

B. Domestic Regulation

The *Guidelines and Procedures for Negotiations* established for services recognize that the work by the Working Party on Domestic Regulation ("WPDR") on regulatory disciplines is a significant part of the current overall WTO negotiations, stating "Members shall aim to complete negotiations under Articles VI:4 . . . prior to the conclusion of negotiations on specific commitments."[486] One of the initial stages of the current services negotiations was the circulation of negotiating proposals, over 140 of which were submitted, in nearly equal numbers by developed and developing country WTO Members. The proposals, publicly available on the WTO website,[487] are essentially expressions of negotiating interest, containing typically a brief description of the sector concerned, comments on the trade importance, including for developing countries, a general description of the main trade barriers encountered and, often, general suggestions for trade liberalization.

It is important to observe that nearly every negotiating proposal contains a reference to the significance of domestic regulatory issues for the sector concerned, with most urging that progress be made on the development of regulatory disciplines by the WPDR. With respect to transparency, Canada and the United States submitted specific proposals.[488] The Canadian proposal emphasizes the need to improve the transparency and predictability of the regulatory conditions under which international business is conducted, especially with regard to small- and medium-sized enterprises, while the U.S. proposal calls upon Members to consider a wide application of measures for transparency in domestic regulation, including prior comment processes.

Since the Request phase of WTO services negotiations is typically conducted bilaterally between Members, it does not involve notifications to the WTO Secretariat. Nonetheless, Member governments have been encouraged to report on the progress of bilateral negotiations, including the domestic regulation aspects, in the Special Session meetings of the Council for Trade in Services. Notably, a number of developing countries have stated that issues regarding domestic regulation might be better treated in the WPDR, i.e. a multilateral approach, rather than in the context of bilateral negotiations.[489]

[484] *Id.*, Part IV, ¶ 13.

[485] *Id.*, ¶ 14.

[486] *Guidelines and Procedures for Negotiations*, *supra* note 453, ¶ 7. *See* Appendix B of this chapter for progress to date in the development of regulatory disciplines.

[487] *See* http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm. A compilation of the regulatory issues raised in the negotiating proposals was submitted as an Informal Paper to the WPDR, Job (02)/50 (May 31, 2002). (Unpublished, informal paper, not in the public domain.)

[488] The proposals are *Communication from Canada*, Council for Trade in Services, Special Session, S/CSS/W/47 (March 14, 2001) and *Communication from the United States*, Council for Trade in Services, Special Session, S/CSS/W/102 (July 13, 2001), respectively.

[489] Council for Trade in Services, *Report of the Meeting Held on October 28, and November 1, 2002*—Note by the Secretariat, TN/S/M/4 (February 11, 2003), 27–28 and 33–34. *See also* Minutes *Additional Commitments* of the Meeting of the Working Party on Domestic Regulation, S/WPDR/M/18 (December 3, 2002), 5–6.

1. Legal Form of Regulatory Disciplines

Another important issue, closely related to the question of multilateral *versus* bilateral approaches, is whether work on regulatory issues in services should involve the development of disciplines under GATS Article VI:4, the scheduling of Additional Commitments in accordance with GATS Article XVIII, or a combination of the two.[490] While sharing a number of common elements, the two options have significantly different implications.

First, one of the most important distinctions between the two options is that the regulatory disciplines developed under GATS Article VI:4 are "rules about regulations," rather than the regulations themselves. If a Member inscribes an aspect of a regulation in the Additional Commitments column of its GATS Schedule (as may be requested in the context of bilateral negotiations), that aspect of the regulatory structure underlying the sector (or sectors) concerned becomes bound and cannot easily be modified or withdrawn.[491]

While adding an Annex on Domestic Regulation to the GATS is perhaps the most likely way of implementing any horizontal disciplines that may be created, another option is for individual Members to add a common Reference Paper to the Additional Commitments column of their GATS Schedule.[492] In either case the regulatory disciplines contained in the Annex or the Reference Paper would be binding upon the Members concerned while their domestic regulatory structures would remain unrestricted. The two options are not identical in their effect, however, as an annex would have universal coverage among WTO Members, and a Reference Paper would be binding only upon those individual Members that chose to add it to their GATS Schedules.

In terms of addressing specific regulatory concerns (as opposed to more general issues), persuading another Member to make a commitment under GATS Article XVIII may well be the easiest and most direct way of achieving the desired result. For example, if exports of services have been hampered by long delays in obtaining necessary authorizations, the Member concerned might be persuaded to add a promise under the Additional Commitments column of their Schedule to process such authorizations within a fixed time-period. Any commitment made would, of course, be available to all WTO Members on a MFN basis. The alternative is long and complicated negotiations in order to create horizontal (or even sectoral) disciplines that, in the end, may not achieve the desired specific result.

Obviously, however, the risk in the bilateral approach is that larger systemic issues, such as recognition procedures, may not be adequately addressed. For smaller WTO Members, there is also the risk that a bilateral approach might not provide sufficient negotiating leverage, compared to the albeit more complex and time-consuming multilateral approach.

2. Sectoral vs. Horizontal Disciplines

Finally, one of the most interesting questions regarding regulatory issues in the current (and future) services negotiations is whether the disciplines created are more likely to be horizontal or sectoral. Perhaps one of the more likely scenarios is the creation of a

[490] *See Additional Commitments under Article XVIII of the GATS*, *supra* note 260.

[491] Improvements to a GATS Schedule merely involve a notification procedure, while changes that reduce the level of liberalization require the payment of compensation under GATS *Article* XXI, unless covered under the GATS exception provisions.

[492] This latter option may also be the one Members decide upon with respect to implementing any regulatory disciplines created at the sectoral level, as was done previously with the *Reference Paper on Basic Telecommunications*, *supra* note 263.

core set of horizontal disciplines possibly along the lines of Japan's draft Annex (see Appendix B to this chapter), together with a number of sector-specific disciplines.

Members would almost surely decide to make any horizontal disciplines that are created applicable only where specific commitments have been made. These core disciplines would most likely cover such fundamental aspects as transparency and necessity, together with a limited number of other broadly applicable disciplines. An issue of fundamental importance for developing countries is the extent to which recognition problems and other Mode 4-related issues covered by domestic regulation can be addressed in a core set of horizontal disciplines. Otherwise, the alternative would be a primarily bilateral approach, as discussed above.

In the context of the current services negotiations, at least some sectoral disciplines on regulation are likely to be proposed and undoubtedly adopted. One of the important roles of the WPDR will be to ensure smooth coordination between any horizontal and sectoral disciplines that are created in order to minimize administrative difficulties and to prevent potential conflicts. Another possible role could be to analyse proposed sectoral disciplines to determine their horizontal applicability.

C. Emergency Safeguards, Government Procurement and Subsidies

Another aspect of the ongoing negotiations is the "rules-making" phase, which stems from the "built-in agenda" contained in various GATS provisions, and calls upon WTO Members to develop GATS disciplines on emergency safeguards,[493] government procurement,[494] and subsidies.[495] The idea was that Members should aim to complete the current work being undertaken on those disciplines in the Working Party on GATS Rules ("WPGR"), prior to the conclusion of the special negotiating sessions on services. However, matters have not progressed as fast or as smoothly as in the WPDR, especially in relation to ESMs.[496]

1. Emergency Safeguard Measures ("ESMs") (Article X)

GATS *Article X* simply says that there shall be "multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination."[497] Although there is no definition of an "emergency safeguard measure" or ESM anywhere in GATS, it is generally understood that an ESM is a temporary measure that can be taken if the implementation of a specific commitment has the unforeseen consequences of service imports occurring in such increased quantities that domestic suppliers of like services find themselves threatened with serious injury.

Multilateral negotiations on ESMs were due to have been completed by January 1, 1998[498] but the Council for Trade in Services has extended the negotiating mandate on no less than five separate occasions to a new deadline that is intended to ensure that the

[493] GATS *Article X:1*.

[494] GATS *Article XIII:2*.

[495] GATS *Article XV:1*.

[496] *See* the most recent report in this respect, *Negotiations on Emergency Safeguards*, Report by the Chairperson of the Working Party on GATS Rules, S/WPGR/9 (March 14, 2003) *in extenso* and the four decisions taken by the Council for Trade in Services to extend the deadline for the negotiations on ESMs, *supra* note 457. *See also*, Yong-Shik Lee, *Emergency Safeguard Measures under Article X in GATS*, 33(4) JOURNAL OF WORLD TRADE 47–59 (1999).

[497] GATS *Article X:1*.

[498] This is in accordance with the language of GATS *Article X:1*, which states that the results of the negotiations "shall enter into effect on a date no later than three years from the date of entry into force of the WTO Agreement."

results of negotiations on ESMS come into force no later than the date of entry into force of the results of ongoing services negotiations.[499] The reason for this is the widespread disagreement among WTO Members with respect to the desirability and feasibility of applying ESMs to trade in services. There are serious conceptual issues underlying the application of ESMs in the services sector and in 1997 the Chair of the WPGR, in an informal note, posed four questions:

(i) On whose behalf would emergency safeguard action be taken?
(ii) In what circumstances would emergency safeguard action be taken and what would be the purpose of such action?
(iii) What approach should be adopted in respect of injury/adverse effects, and the relevant causal link between injury/adverse effects and commitments under the GATS? and
(iv) What measures would be taken under the emergency safeguard mechanism? Are some measures deemed more suitable than others?[500]

At one point, the issue became so divisive that the Chair of the WPGR only managed to proceed on the basis of an illustrative list of themes. These included *inter alia* the following elements: (a) definition of "domestic industry;" (b) the issue of "acquired rights;" (c) the modal application of a safeguard mechanism; (d) the concept of "like service;" (e) the identification of indicators and criteria for determining injury and causality; (e) the possible forms of a safeguard measure; (f) the questions of compensation and special and differential treatment; and (g) relevant procedural matters.[501]

At the end of October 2000, Thailand, on behalf of the ASEAN Members, produced a "non-paper" containing an informal draft agreement on emergency safeguard measures for trade in services (known as the 'Asian Concept Paper', or 'ACP')[502] modeled on the Agreement on Safeguards, which is applied to trade in goods.[503] Broadly speaking the ACP favored the development of an ESM discipline as necessary in order to further market access negotiations in services. Even so, there was little substantive agreement among the Members as to how the concepts like "domestic industry," "serious injury or threat thereof," "causality" and "emergency" *versus* "unforeseen developments," all of which are common to the goods régime, would be applied in the field of services. A further difficulty in drawing up disciplines on ESMs in the services sector is that, due to the lack of statistical data on services, there is no reference base for calculating the amount of injury suffered, based on objective and quantifiable criteria, which is a necessary precondition to sanctioning compensatory adjustment in any ESM régime.

[499] Communication from the Chairperson of the Working Party on GATS Rules to the Council for Trade in Services, S/C/W/236 (March 15, 2004), with attached *draft Fifth Decision on Negotiations on Emergency Safeguard Measures* and, fifth extension until a date not later than the date of entry into force of the results of the current round of services negotiations, adopted by the Council for Trade in Services on March 15, 2004, SL/L/159, *supra* note 459.

[500] *Note from the Chairman of the Working Party on GATS Rules*, Job. No. 3102 (June 3, 1997).

[501] *Negotiations on Safeguards under Article X of the GATS*, Note from the Chairperson, Working Party on GATS Rules Job. No. 1979 (March 29, 2000) and Job. No. 1979/Rev.1 (October 6, 2000).

[502] *Communication from ASEAN—Concept Paper: Elements of a Possible Agreed Draft of Rules on Emergency Safeguard Measures for Trade in Services (GATS Article X)*, Working Party on GATS Rules, S/WPGR/W/30 (March 14, 2000).

[503] The paper was introduced at an informal meeting of the WPGR on November 1–2, 2000 and discussed later that month; *see Report of the Meeting of November 30, 2000*, Note by the Secretariat, Working Party on GATS Rules, S/WPGR/M/30 (December 22, 2000), ¶¶ 4–18. *See* for a comparison the WTO Agreement on Safeguards. *See* Chapter 18 of this book.

Most developed country Members and several Latin American developing country Members are skeptical about introducing ESMs. Japan and Mexico cannot see a clear case for such measures while the EC and the United States have continued to question the very feasibility and desirability of doing so. For example, the United States believes that a safeguard applied to Mode 3 (commercial presence), would be counter-productive because it could lead to forced disinvestment and foreign direct investment.[504] India is fearful that ESMs might be used against them particularly in the delivery of services through the Mode 4 (supply of services by natural persons),[505] where it has a particular comparative advantage in certain services sectors, e.g. computer and related services. There is further division among the Members as to whether any ESM rules that might be developed should be applied horizontally, i.e. across all sectors, or only on a sector-specific and mode-specific basis.

Following the presentation by a number of WTO Members of both formal and informal written contributions relating to the mandate under GATS Article X, in 2001 the Chair prepared a Synopsis, under his own responsibility, that attempted to present the Members' main proposals in a synthetic way.[506] Since then Australia has tabled one possible option aimed at a compromise position on an ESM discipline and that is to have a consensus-based mechanism on ESMs.[507] Another option that has been put forward by the EC is to apply safeguard measures on a modal basis, i.e. on the basis of mode of supply—an idea that found particular favour among some WTO Members.[508] However, the EC has belatedly joined a chorus of other Members in calling for a swift and positive conclusion on the question of ESMs for services by (1) trying to identify concrete examples of emergency situations in the services area that are not already addressed by GATS provisions such as basic exceptions, other safeguards, e.g. for balance of payments purposes, or through the withdrawal in whole or in part of commitments, on the basis of GATS *Article XXI* and (2) demonstrating that an ESM for services would be feasible and desirable in order to deal with identified situations.[509] The current status is one of stalemate as reported by the Chair in March 2003 with the additional observation that the current mode and pace of discussion are unlikely to lead to the early finalization of negotiations it is unlikely to happen unless there is a commitment and the political will on the part of the Members to bring about closure on the issue.[510]

2. Government Procurement in Services (Article XIII)

Negotiations on government procurement under GATS *Article XIII*[511] have recently begun to progress beyond the definitional phase and consideration of the possible development of multilateral disciplines. Members were encouraged to put forward submissions

[504] *Communication from the United States —Desirability of a Safeguard Mechanism for Services: Promoting Liberalization of Trade in Services*, Working Party on GATS Rules, S/WPGR/W/37, October 2, 2001, ¶ 2.
[505] Reported in *BRIDGES Weekly Trade News Digest*, Vol. 5, no. 40, November 28, 2001.
[506] *Synopsis—Note from the Chairperson*, Working Party on GATS Rules, JOB(01)122 (August 7, 2001) and JOB(01)/122/Add.1 (December 21, 2001).
[507] *Communication from Australia - Elements for a Possible "Core Mechanism" for Temporary Suspension or Modification of Commitments*, Working Party on GATS Rules, JOB(02)8 (February 13, 2002).
[508] *Communication from the EC (and their Member States)—Modal Application of an Emergency Safeguard Measure*, Working Party on GATS Rules, S/WPGR/W/38 (January 21, 2002).
[509] *Communication from the EC (and their Member States)—Scope for Emergency Safeguard Measures (ESM) in the GATS*, Working Party on GATS Rules, S/WPGR/W/41 (March 3, 2003).
[510] See *Report of the Chairperson of the Working Party on GATS Rules*, S/WPGR/9 (March 14, 2003), *supra* note 457.
[511] GATS *Article XIII*.

for negotiations on government procurement as early as possible before March 31, 2003. Currently the focus is on the desirability and feasibility of developing disciplines for government procurement in services and related issues. There appears to be a consensus among Members to concentrate on developing horizontal disciplines prior to considering sectoral rules and to apply the principle of transparency in government procurement to the criteria used to assess tenders.[512]

It should be noted that there is some parallel work going on in the Working Group on Transparency in Government Procurement ("WGTP") and the Committee on Government Procurement that overlaps with some of the issues undertaken by the WPGR with respect to government procurement in services. In this respect, several Members, among them Australia, the United States, Norway, Chile and the Republic of Korea favor greater coordination with the WGTP in order to avoid duplication of work.[513] Additionally the Plurilateral Agreement on Government Procurement (a former Tokyo Round agreement that was renegotiated outside the Uruguay Round) contains specific provisions on procurement of services.[514]

3. Subsidies (Article XV)

Subsidies are another area where Members are encouraged under GATS *Article XV* to "enter into negotiations with a view to developing the necessary multilateral disciplines to avoid . . . [a] trade-distortive effect".[515] In the application of subsidies to services trade, WTO Members have been considering their possible scope, based on five items contained in the Chairperson's Checklist.[516] These are as follows: (1) definition of a subsidy (including relevance of the definition in the WTO Agreement on Subsidies and Countervailing Measures); (2) examination of any evidence of trade distorting subsidies in services (including production, distribution, consumption and export subsidies); (3) the extent to which existing WTO rules, in particular the GATS national treatment and MFN provisions and the related technical issues of mode specificity and concept of "like service already apply;" (4) (a) the wider role of subsidies, including the pursuit of public policy objectives and (b) the role of subsidies in relation to development, and the needs of developing country Members for flexibility, including special and differential treatment; and (5) whether there is a need for additional GATS disciplines to avoid trade-distortive effects, including the appropriateness of countervailing measures.

Additionally, in 2000 the European Communities produced an informal note on state aid in the field of services[517] that sets outs some of the specific issues for trade in services compared to trade in goods. For example, the determination of the production capacity of services producers is much more complex than is the case for goods. The concept of general economic interest services also has to be respected, especially for those services such as energy and communication, which are recognized as fulfilling a public goal.

[512] *Report of the Meeting of February 25, 2003 of the Working Party on GATS Rules*, Note by the Secretariat, S/WPGR/M/41 (March 12, 2003), section B, ¶¶ 31–32.

[513] *Id*., ¶ 35–38.

[514] *See* Chapter 23 of this book.

[515] GATS *Article XV:1*.

[516] *The Chairman's Checklist*, Job No. 4519/Rev.1 (October 6, 2000) of five issues was introduced into the five separate meetings of the *Working Party on GATS Rules* that were held during the course of 2001, where docs. S/WPGR/M/30–34 refer).

[517] *The Community Regime for State Aid in the Services Area*, Job No. 4302 (July 6, 2000), referred to in *Report of the Meeting of the WPGR of July 7, 2000*, Note by the Secretariat, S/WPGR/M/28, August 4, 2000, ¶ 20.

Meanwhile transport services, which are frequently subject to general provisions on state aid, may fall under special rules.[518]

Even so, there is still widespread disagreement among WTO Members concerning two issues. One is the generic definition in the services context, including reference to the definition contained in the SCM Agreement and the other is the meaning of the concept of trade-distortive or "actionable subsidies."[519]

D. Sectoral and Other Annexes

Alongside these aforementioned developments, WTO Members have also been considering the development of new sectoral annexes or the revision of existing ones. This brief survey begins with a review of the *Annex on Article II Exemptions*, followed by the *Annex on Movement of Natural Persons*, before considering various issues related to further work that is being conducted on the *Annex on Air Transport Services* and the drafting of a possible new sectoral annex on tourism.

1. Annex on Article II Exemptions

The *Annex on Article II* [MFN] *Exemptions* has been undergoing its first five year review, pursuant to Paragraph 3 of the Annex.[520] Currently, it is estimated that over four hundred measures have been granted exemptions from MFN obligations under the Annex and almost all of them have no definite date for termination, even though the Annex stipulates that, in principle, the duration of an MFN exemption should not exceed ten years.

The first part of the MFN Review process was concluded in the summer of 2000 during which extensive discussions took place. The nature of the review and arrangements for its conduct were addressed at its first session, held on May 29–30, 2000.[521] At this stage the Council for Trade in Services decided that the review should be primarily of an educative nature, designed to provide more information on Members' MFN exemptions and, in particular, in accordance with paragraph 4 of the Annex,[522] on whether the conditions that had created the need for the exemption continued to prevail. Members wishing to submit written questions would address them to the Members concerned three weeks prior to each session and to the Secretariat for circulation to the rest of the Membership. Responding Members would be free to answer either in writing or orally at the meeting. The discussions would be conducted in the formal mode, unless otherwise determined, and discussions would be reported by the Secretariat in the form of the usual minutes.

The Review is being conducted by the Council for Trade in Services along sectoral lines, working from the Secretariat's compilation of all MFN exemptions by services sector,[523] a document that neither replaces the final Exemption Lists nor creates any inference about the legal status of the exemptions to which it refers.[524] It was agreed

[518] *Id*., ¶ 21.

[519] *Report of the Meeting of February 25, 2003 of the Working Party on GATS Rules*, Note by the Secretariat, S/WPGR/M/41 (March 12, 2003), section C, ¶¶ 41–58.

[520] GATS *Annex on Article II Exemptions*, *supra* note 161.

[521] *Council Review of MFN Exemptions Report of the Meeting held on May 29–30*, 2000: Note by the Secretariat, S/C/M/44 (June 21, 2000).

[522] GATS *Annex on Article II Exemptions*, *supra* note 161, ¶ 4.

[523] Note by the Secretariat, Job No. 1551 and Addendum 1 thereto (Job. No. 1551/Add. 1).

[524] *Council Review of MFN Exemptions*, Report of the Meeting of the Council for Trade in Services held on May 29, 2000: Note by the Secretariat, S/C/M/44 (June 21, 2000).

that the Chairman should take each sector in turn, opening the floor for delegations that had received questions on the exemptions listed in that particular sector to respond. Once all responding Members had taken the floor, the Chairman invited delegations wishing to ask additional questions to seek or clarifications to take the floor. In case of questions addressed to delegations who were not represented in Geneva, or who could not attend the meeting, the Secretariat was asked to forward such questions to the delegations concerned.

During the first two meetings of May 29, 2000 and July 5, 2000,[525] the Council for Trade in Services addressed the MFN exemptions listed in the entire compilation prepared by the Secretariat. Thereafter, the question arose as to the status of the review process, i.e. whether it would remain open for consideration and discussion of further issues in regard to MFN exemptions, or whether the Council was formally ending the exercise without fixing a date for further review. It was concluded that continuation of the full review exercise was necessary and that items on the agenda of subsequent meetings would not be restricted to the date of the next review.

At the meetings of October 5, 2000[526] and December 1, 2000[527] there was considerable support for the proposal that further review of MFN exemptions should take place no later than June 2004. A few delegations favored tabling the issue until the stocktaking exercise had taken place at the meeting of March 2001, while two delegations argued that the stocktaking was not an appropriate time to address the matter because MFN Review was separate to the negotiations. Finally, at the May 14, 2001 regular meeting of the Council for Trade in Services, it was determined that a further review of MFN exemptions should take place no later than June 2004.[528] On June 5, 2002, the Council for Trade in Services adopted Procedures for the Certification of Terminations, Reductions and Rectifications of Article II (MFN) Exemptions.[529] As of August 2004, there had been no further MFN review in the Council.

It was obvious from the first part of the MFN Review process that a substantial amount of work and greater effort was required on the part of Members in order to streamline the wide number and variety of derogations from the most fundamental principle of the multilateral trading system. It was even suggested that the WTO should take a recent OECD paper on MFN exemptions under the GATS as a starting point[530] and conduct an in-depth analysis of the issues surrounding their possible withdrawal.

Additionally, many Members consider the "principle of reciprocity" to form the basis for securing equal access to, or treatment in, foreign markets but to do this in the field of services, in respect of specific sectors, goes against the general practice in multilateral trade negotiations where participants seek to balance or trade-off concessions across

[525] *Council Review of MFN Exemptions Report of the Meeting of the Council for Trade in Services held on July 5, 2000*: Note by the Secretariat, S/C/M/45, (August 18, 2000).

[526] *Council Review of MFN Exemptions, Report of the Meeting of the Council for Trade in Services held on October 5, 2000*: Note by the Secretariat, S/C/M/47 (November 17, 2000) in particular ¶¶ 28–34.

[527] *Council Review of MFN Exemptions, Report of the Meeting of the Council for Trade in Services held on December 1, 2000*, S/C/M/51, ¶ 34.

[528] Council for Trade in Services, *Council Review of MFN Exemptions*, Report of the Meeting held on May 14, 2001, S/C/M/53 (June 14, 2001), ¶ 9.

[529] Council for Trade in Services, *Procedures for the Certification of Terminations, Reductions and Rectifications of Article II (MFN) Exemptions*, adopted on June 5, 2002, S/L/105 and S/L/106 (June 11, 2002).

[530] Martin Roy, *Trade in Services: A Roadmap to GATS MFN exemptions* Doc. TD/TC/WP(2001)25/FINAL (OECD 2001).

sectors. A further problem with application of the *Annex on Article II Exemptions* is that for Members to seek to maintain MFN exemptions, when equal access or treatment to a particular market has not been granted, does not constitute the usual "exceptional circumstances" upon which exemptions from the fundamental principles of international trade law are normally permitted in the multilateral trading system. For example, Korea[531] has suggested instead that the *Annex on Article II Exemptions* be strictly applied, i.e. that the ten-year duration for MFN exemptions be imposed irrespective (or because) of the fact that many WTO Members have chosen to list MFN exemptions for an unspecified duration, and where they are not removed during upcoming negotiations, then it is up to individual Members to seek a waiver on the basis of Paragraph 2 of the *Annex* together with WTO Agreement Article IX:3.[532] Obviously, the second part of the MFN Review process dedicated to the removal of MFN exemptions, subject to negotiation (for their elimination) in subsequent trade-liberalizing rounds,[533] will be decisive.[534]

2. Annex on Movement of Natural Persons

Throughout the Uruguay Round negotiations developing countries maintained as one of their key negotiating objectives, the liberalization of labor mobility,[535] known in GATS-parlance as the "movement of natural persons supplying services." Many developed countries, however, were opposed to such labor mobility through a trade agreement on the grounds that cross-border movement of personnel would require major changes in their visa and immigration policies. In many cases the immigration laws of developed countries provide for entry of highly skilled personnel and professionals for a limited duration of time but not for the entry of unskilled or low-skilled workers.

By 1992, and the appearance of the Dunkel Draft, a draft *Annex on Movement of Labor* primarily reflected the concerns of developed GATT Contracting Parties, involving mostly the cross-border movement of managerial, technical and supervisory staff. While being encouraged to negotiate bilaterally on commitments with respect to the movement of labor, the developing countries noted that the gains arising from Mode 4 (presence of natural persons) accrued mostly to developed countries as they applied to managers and executives (including intra-corporate transferees, corporate trainees and service sellers and/or individual service providers and specialists on specific services assignments).

Since the concerns of developing countries failed to generate improved offers in other areas of labor mobility of interest to them (primarily unskilled labor), a decision was taken to allow for a revision of the Schedules of Specific Commitments in order to achieve more progress on Mode 4; for this purpose such negotiations were to continue up to July 28, 1995.[536] As a result of the extended period for negotiations on movement of natural persons and completion of national schedules, the nature and extent of commitments

[531] *Communication from the Republic of Korea: A Thought on the Alternatives to MFN Exemptions in the Annex on Article II Exemptions*, Council for Trade in Services, Special Session, S/CSS/W/127 (November 30, 2001).

[532] WTO Agreement, *Article IX:3*.

[533] GATS *Annex on Article II Exemptions*, *supra* note 161, ¶ 6.

[534] The Council for Trade in Services specifically recognizes this phase in its *Guidelines and Procedures for Negotiations*, *supra* note 453, ¶ 6.

[535] Reyna, *supra* note 107, at 820.

[536] *Decision on Movement of Natural Persons*, adopted by the Council for Trade in Services on June 30, 1995, S/C/W/4 (July 4, 1995) and *Decision on Movement of Natural Persons Commitments*, adopted by the Council for Trade in Services on July 21, 1995, S/C/W/8 (July 21, 1995).

on liberalization can be summarized as falling into roughly four main categories: (1) commitments that limit the number of natural persons entering the territory of a Member in order to supply services; (2) bound commitments specifying the nature and extent of liberalization, e.g. entry and temporary stay of some categories of natural persons supplying services; (3) bound commitments specifying liberalization of entry and temporary stay of certain categories of natural persons as service providers but subject to economic needs tests or quantitative ceilings; and (4) some horizontal commitments in relation to national laws involving broad discretionary powers of immigration or labor ministries of some WTO Members.[537]

The WTO Secretariat has made an analysis of the current status of market access on Mode 4 and noted that commitments have been taken primarily with respect to executives, managers and specialists.[538] More recently some new proposals have been tabled with respect to the temporary movement of natural persons from the United States,[539] Canada,[540] Japan[541] and Colombia.[542] One idea that is gaining some currency, particularly among developed country Members, is to move ahead with a special GATS visa for entry and temporary stay of natural persons under Mode 4 although the actual scope and design of such a visa has not been extensively discussed.

3. Annex on Air Transport Services

The *Annex on Air Transport Services*,[543] one of the original annexes to the GATS, has been under review since 2000. The existence of a complex web of bilateral air services agreements, that many WTO Members wished to keep in place, has led to a unique sectoral exclusion. "Traffic rights" and "services directly related to the exercise of traffic rights" have been left outside the scope of the GATS; only aircraft repair and maintenance, the selling and marketing of air transport services and computer reservations systems, or CRS, are covered.[544]

There are interpretation problems with the *Annex on Air Transport Services*. On a practical level, some Members have taken commitments outside the three service subsectors specifically included under the Agreement. Moreover, the absence of a definition of what constitutes "services directly related to the exercise of air traffic rights" poses a question as to what the Annex really covers. The review is intended to clarify what Members understand by the present coverage of the Annex, bearing in mind that some commitments already go beyond the three specifically included services (aircraft repair and maintenance, the selling and marketing of air transport services and CRS). They must

[537] *See* Ghosh, *supra* note 143, at 82–115, 108–109.

[538] *Analysis of Market Access Commitments under Mode 4*, Note by the Secretariat, S/C/W/75.

[539] *Communication from the United States—Movement of Natural Persons*, Council for Trade in Services, Special Session, S/CSS/W/29 (December 18, 2000).

[540] *Communication from Canada—Initial Negotiating Proposal on Temporary Movement of Natural Persons Supplying Services under the GATS (Mode 4)*, Council for Trade in Services, Special Session, S/CSS/W/48 (March 14, 2001).

[541] *Communication from Japan—Movement of Natural Persons—Supplement*, Council for Trade in Services, Special Session, S/CSS/W/42/Suppl.2 (July 6, 2001).

[542] *Communication from Colombia—Proposal for the Negotiations on the Provision of Services through Natural Persons*, Council for Trade in Services, Special Session, S/CSS/W/97 (July 9, 2001).

[543] GATS *Annex on Air Transport Services*, *supra* note 72, ¶ 5 mandates a periodical review, at least every five years, of developments in the air transport sector and the operation of the Annex with a view to considering the possible further application of GATS in the air transport sector.

[544] *Id*., at ¶ 3; see *Air Transport Services, Background*, Note by the Secretariat, S/C/W/59, November 5, 1998.

also decide whether they wish to maintain the current exclusion of traffic rights and all services directly related to them.[545] The review is divided into two parts: examination of developments in the sector and operation of the Annex, as per the *Annex on Air Transport Services*.

4. Proposed Annex on Tourism

A new sectoral annex for the tourist sector has been under consideration in an informal working group. Tourism services[546] is a sector where many developing country Members have a comparative advantage and is also the service sector with the highest level of specific commitments to date. The Dominican Republic, supported by El Salvador and Honduras, first tabled the idea of an Annex on Tourism in 1999,[547] based on work undertaken in other international *fora* such as UNCTAD, the World Tourism Organization and World Travel and Tourism Council. Since then the proposal has also gained the backing of Bolivia, Ecuador, Nicaragua, Panama, Peru and Venezuela. Separately, the Dominican Republic, El Salvador, Honduras, Nicaragua and Panama have suggested a revised classification of tourism services, details of which can be found in Appendix A.

The original proposal for a draft Annex on Tourism has subsequently been revised with the latest draft dating from September 2001,[548] since when not much progress has been made. The main objective of the draft Annex on Tourism was to elaborate upon GATS provisions in order to ensure "equitable trading conditions for trade in tourism services, consistent with GATS *Article IV* and *Article XIX* and with the needs of sustainable development, including joint co-operation efforts and the prevention of anti-competitive practices in the tourism industries."[549]

Aside from its definitional clauses, the most striking feature of the draft Tourism Annex is the inclusion of provisions on anti-competitive practices (or so-called "competitive safeguards").[550] In the same way as a group of WTO Members participating in negotiations on telecommunications services in 1996 chose to agree a set of definitions and principles on the regulatory framework for basic telecommunications services, covering such matters as competition, interconnection guarantees, and transparency of licensing processes and the independence of regulatory authorities,[551] the draft Tourism Annex contains language to encourage Members to adopt competitive safeguards that are specific to the tourism sector. These should include measures to address discriminatory use of information networks, ancillary services to air transport, predatory pricing, abuse of dominant position through exclusivity clauses, refusal to deal, tied sales, quantitative restrictions, vertical integration and so forth.[552]

[545] *Report of the Second Session of the Review mandated under ¶ 5 of the Air Transport Annex held on December 4, 2000*, Note by the Secretariat, Council for Trade in Services, S/C/M/50, March 5, 2001, at ¶¶ 5 and 8.

[546] See *Tourism Services*, Background Note by the Secretariat, S/C/W/51, September 23, 1998.

[547] *Communication from the Dominican Republic, El Salvador and Honduras*, S/C/W/127 (October 14, 1999) and WT/GC/W/132 (October 14, 1999), *supra* note 450. The European Communities and its Member States submitted a response to the initial proposal, supporting full liberalization of the tourist sector, *supra* note 452.

[548] *Communication from Bolivia, Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama, Peru and Venezuela being a Draft Annex on Tourism ("Draft Annex on Tourism")* S/CSS/W/107 (September 6, 2001), *supra* note 448.

[549] *Id.*, ¶ 1, Section 4.

[550] *Id*., ¶ 3, sections 1 and 2.

[551] See the *Reference Paper on Basic Telecommunications*, *supra* note 263.

[552] *Draft Annex on Tourism*, *supra* note 549, ¶ 3, section 2.

E. Implementation Issues

Unlike the régime for trade in goods, there are few outstanding implementation issues in the field of services other than improving the means for facilitating the participation of developing countries in global services trade in accordance with GATS *Article IV* (*See* Part II.C. above). The *Guidelines and Procedures for Negotiations*[553] require the Council for Trade in Services to review the implementation of GATS *Article IV* and to "suggest ways and means of promoting the goals" of doing this. It is also recommended that in implementing GATS *Article IV* consideration be given to the needs of small service suppliers of developing countries.[554] An evaluation of the results attained in terms of the objectives of GATS *Article IV* is due to be undertaken "before the completion of negotiations."[555] Developing country Members have also urged the Council for Trade in Services to examine the actions taken by developed country Members to provide increased access for developing country service providers to technology, distribution channels and information networks and to evaluate the functioning of the contact points, which developed country Members are under a duty to establish, in accordance with paragraph 2 of GATS *Article IV*.[556]

VII. CONCLUSIONS AND FURTHER DEVELOPMENTS

The first nine years since the GATS entered into force have been momentous. In many respects, the Agreement is still very new and much needs to be done before the regime for trade in services can take its proper place alongside the older and more-established regime for trade in goods. To date, insufficient liberalization of services has occurred and there is a need for many more Members to take specific commitments across all sectors. In particular, Members have taken very few commitments in particular sectors such as health-related and social services or recreational, cultural and sporting services, as well as in such infrastructural sectors as transport services. This can be explained partly by the problems that exist with classification and scheduling across a range of service sectors combined with the relatively awkward way in which the Agreement is structured.

The Agreement also includes sectors that touch upon sensitive domestic policy issues and/or existing regulatory structures that have emerged over time and become embedded in domestic economies. Additionally, the "bottom-up" approach of listing sectoral commitments means that Members can gradually build up their commitments on services and can also choose not to commit themselves to the degree of liberalization that they otherwise already provide in their own domestic services sectors. Not surprisingly, it can be difficult, or even impossible, for a Member to get a clear picture of the regulatory barriers that exist in a particular service sector for a particular Member.

A further feature of the Agreement is that it is incomplete and remains a work in progress. Key disciplines relating to the development of rules on emergency safeguard measures (GATS *Article X*), subsidies (GATS *Article XV*) and government procurement (GATS *Article XIII*) have yet to be finalized, while there is still little practice among Members under some key provisions, for example on domestic regulation (GATS *Article VI:4*) or application of the principle of mutual recognition (GATS *Article VII*).

[553] *Guidelines and Procedures for Negotiations*, *supra* note 451, ¶¶ 14 and 15 (the latter in particular).
[554] *Id.*, ¶ 15.
[555] *Id*.
[556] GATS *Article IV:2*.

Members carry the burden of having to implement the current Agreement, to negotiate further on disciplines under the built-in agenda items on rules, and to undertake further liberalization across all service sectors.[557] For many Members there is the additional burden of adapting to regulatory change in their own domestic economies and meeting the challenge of interfacing with GATS disciplines.

Finally, there have been few disputes under the Agreement and no substantial jurisprudential developments in the field of services with respect to key principles, such as non-discrimination or transparency. Much of the case law has dealt with issues that are either tangential to services (*EC—Bananas III*) or not at all, even though distribution services were involved in the dispute *(Japan—Photographic Film and Paper (Kodak-Fuji))*. An additional result is that there has been very little or no guidance on key interpretative issues under the Agreement until the recent *Telmex* decision, and even there mostly in relation to scheduling of services commitments. If a decision is issued in the *U.S. Gambling and Betting* case (which had been suspended at the time of writing), it could help provide a better understanding of the relationship between actual scheduling and the key GATS provisions on market access, national treatment and relevant exceptions. For example, the relationship between the twin domains of market access and national treatment under the Agreement has still to be determined and the situation is not helped by the fact that when scheduling it is often unclear as to the degree of intended discrimination in a market access commitment.

[557] On this latter aspect, it will be recalled that under the GATT, it took a number of years and several rounds of tariff negotiations, prior to the Tokyo Round (1972–1979) to arrive at substantial reductions on tariff levels for manufactures.

APPENDIX A

CLASSIFICATION ISSUES

MTN.GNS/W/120
10 July 1991
Special Distribution

SERVICES SECTORAL CLASSIFICATION LIST[558]

SECTORS AND SUB-SECTORS	CORRESPONDING CPC[559]
1. BUSINESS SERVICES	Section B
A. Professional Services	
a. Legal Services	861
b. Accounting, auditing and bookkeeping services	862
c. Taxation Services	863
d. Architectural services	8671
e. Engineering services	8672
f. Integrated engineering services	8673
g. Urban planning and landscape architectural services	8674
h. Medical and dental services	9312
i. Veterinary services	932
j. Services provided by midwives, nurses, physiotherapists and para-medical personnel	93191
k. Other	
B. Computer and Related Services	
a. Consultancy services related to the installation of computer hardware	841
b. Software implementation services	842
c. Data processing services	843
d. Data base services	844
e. Other	845+849
C. Research and Development Services	
a. R&D services on natural sciences	851
b. R&D services on social sciences and humanities	852
c. Interdisciplinary R&D services	853
D. Real Estate Services	
a. Involving own or leased property	821
b. On a fee or contract basis	822

[558] *Services Sectoral Classification List* (or W/120), *supra* note 110. The GATT Secretariat indicated in its informal note containing the draft classification list (May 24, 1991) that it would prepare a revised version based on comments from participants. The attached list incorporates, to the extent possible, such comments. It could, of course, be subject to further modification in the light of developments in the services negotiations and ongoing work elsewhere.

[559] "CPC" refers to the United Nations provisional Central Product Classification. The (*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list. The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice-mail is only a component of CPC item 7523).

E. Rental/Leasing Services without Operators	
a. Relating to ships	83103
b. Relating to aircraft	83104
c. Relating to other transport equipment	83101+83102+83105
d. Relating to other machinery and equipment	83106-83109
e. Other	832
F. Other Business Services	
a. Advertising services	871
b. Market research and public opinion polling services	864
c. Management consulting service	865
d. Services related to man. Consulting	866
e. Technical testing and analysis services	8676
f. Services incidental to agriculture, hunting and forestry	881
g. Services incidental to fishing	882
h. Services incidental to mining	883+5115
i. Services incidental to manufacturing	884+885 (except for 88442)
j. Services incidental to energy distribution	887
k. Placement and supply services of Personnel	872
l. Investigation and security	873
m. Related scientific and technical consulting services	8675
n. Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	633+8861-8866
o. Building-cleaning services	874
p. Photographic services	875
q. Packaging services	876
r. Printing, publishing	88442
s. Convention services	87909*
t. Other	8790
2. COMMUNICATION SERVICES	
A. Postal services	7511
B. Courier services	7512
C. Telecommunication services	
a. Voice telephone services	7521
b. Packet-switched data transmission services	7523**
c. Circuit-switched data transmission services	7523**
d. Telex services	7523**
e. Telegraph services	7522
f. Facsimile services	7521**+7529**
g. Private leased circuit services	7522**+7523**
h. Electronic mail	7523**
i. Voice mail	7523**
j. On-line information and data base retrieval	7523**
k. electronic data interchange (EDI)	7523**
l. enhanced/value-added facsimile services, incl. store and forward, store and retrieve	7523**
m. code and protocol conversion	n.a.
n. on-line information and/or data processing (incl. transaction processing)	843**
o. other	

D. Audiovisual services	
a. Motion picture and video tape production and distribution services	9611
b. Motion picture projection service	9612
c. Radio and television services	9613
d. Radio and television transmission services	7524
e. Sound recording	n.a.
f. Other	
E. Other	
3. CONSTRUCTION AND RELATED ENGINEERING SERVICES	
A. General construction work for buildings	512
B. General construction work for civil engineering	513
C. Installation and assembly work	514+516
D. Building completion and finishing work	517
E. Other	511+515+518
4. DISTRIBUTION SERVICES	
A. Commission agents' services	621
B. Wholesale trade services	622
C. Retailing services	631+632 6111+6113+6121
D. Franchising	8929
E. Other	
5. EDUCATIONAL SERVICES	
A. Primary education services	921
B. Secondary education services	922
C. Higher education services	923
D. Adult education	924
E. Other education services	929
6. ENVIRONMENTAL SERVICES	
A. Sewage services	9401
B. Refuse disposal services	9402
C. Sanitation and similar services	9403
D. Other	
7. FINANCIAL SERVICES	
A. All insurance and insurance-related services	812**
a. Life, accident and health insurance services	8121
b. Non-life insurance services	8129
c. Reinsurance and retrocession	81299*
d. Services auxiliary to insurance (including broking and agency services)	8140
B. Banking and other financial services (excl. insurance)	
a. Acceptance of deposits and other repayable funds from the public	81115–81119
b. Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction	8113
c. Financial leasing	8112
d. All payment and money transmission services	81339**
e. Guarantees and commitments	81199**
f. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:	

—money market instruments (cheques, bills, certificate of deposits, etc.)	81339**
—foreign exchange	81333
—derivative products incl., but not to, futures and options	81339**
—exchange rate and interest rate instruments, inclu. products such as swaps, forward rate agreements, etc.	81339**
—transferable securities	81321*
—other negotiable instruments and financial assets, incl. bullion	81339**
g. Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues	8132
h. Money broking	81339**
i. Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services	8119+** 81323*
j. Settlement and clearing services for financial assets, incl. securities, derivative products, and other negotiable instruments	81339** or 81319**
k. Advisory and other auxiliary financial services on all the activities listed in Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy	8131 or 8133
l. Provision and transfer of financial, information and financial data processing and related software by providers of other financial services	8131
C. Other	
8. HEALTH RELATED AND SOCIAL SERVICES (other than those listed under 1.A.h-j.)	
A. Hospital services	9311
B. Other Human Health Services	9319 (other than 93191)
C. Social Services	933
D. Other	
9. TOURISM AND TRAVEL RELATED SERVICES	
A. Hotels and restaurants (incl. catering)	641–643
B. Travel agencies and tour operators services	7471
C. Tourist guides services	7472
D. Other	
10. RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)	
A. Entertainment services (including theatre, live bands and circus services)	9619
B. News agency services	962

C. Libraries, archives, museums and other cultural services	963
D. Sporting and other recreational services	964
E. Other	
11. TRANSPORT SERVICES	
A. Maritime Transport Services	
a. Passenger transportation	7211
b. Freight transportation	7212
c. Rental of vessels with crew	7213
d. Maintenance and repair of vessels	8868**
e. Pushing and towing services	7214
f. Supporting services for maritime transport	745**
B. Internal Waterways Transport	
a. Passenger transportation	7221
b. Freight transportation	7222
c. Rental of vessels with crew	7223
d. Maintenance and repair of vessels	8868**
e. Pushing and towing services	7224
f. Supporting services for internal waterway transport	745**
C. Air Transport Services	
a. Passenger transportation	731
b. Freight transportation	732
c. Rental of aircraft with crew	734
d. Maintenance and repair of aircraft	8868**
e. Supporting services for air transport	746
D. Space Transport	733
E. Rail Transport Services	
a. Passenger transportation	7111
b. Freight transportation	7112
c. Pushing and towing services	7113
d. Maintenance and repair of rail transport equipment	8868**
e. Supporting services for rail transport services	743
F. Road Transport Services	
a. Passenger transportation	7121+7122
b. Freight transportation 7123	
c. Rental of commercial vehicles with operator	7124
d. Maintenance and repair of road transport equipment	6112+8867
e. Supporting services for road transport services	744
G. Pipeline Transport	
a. Transportation of fuels	7131
b. Transportation of other goods	7139
H. Services auxiliary to all modes of transport	
a. Cargo-handling services	741
b. Storage and warehouse services	742
c. Freight transport agency services	748
d. Other	749
I. Other Transport Services	
12. OTHER SERVICES NOT INCLUDED ELSEWHERE	95+97+98+99

---

1. Overview

The difficulty with the W/120 list is that it provides an insufficient framework for country commitments of adequate specificity in all services sectors in all industries. In some instances, the classification entry is unclear because it is either too broad or too narrow for the scope of the service. In others instances, the W/120 provides no classification at all, either because the service did not exist at the time the classification list was drawn up, or because it has since evolved from a classified service into a "new" service.

W/120 does not, for example, provide a separate classification for energy services. Various sub-sectors throughout the W/120 are relevant to energy services, but they are either tangential to the core service sector, or are not well defined. Sectors, sectoral sub-headings and sub-sectors that are relevant to energy services businesses include a number of "other business services" under sector 1 Business Services: sub-heading F. Other Business Services; sub-sector h. Services incidental to mining (CPC 883 and 5115); sub-sector j. Services incidental to energy distribution (CPC 887); sub-sector m. Related scientific and technical and consulting services (CPC 8675). Also connected to energy services are certain sub-headings or sub-sectors under sector 11 Transport Services: sub-heading G. Pipeline Transport; sub-sector a. Transportation of fuels (i.e. "pipeline transport," CPC 7131) as well as under sector 1. Business Services: sub-heading A. Professional Services, sub-sector e. Engineering services (CPC 8672) and under sector 3 Construction and Related Engineering Services: sub-heading C. Installation and assembly work (CPC 514 and 516).

To take another example, there are classifications in sector 2. Communication Services under sub-heading A. Postal services (CPC 7511) and under sub-heading B. Courier services (CPC 7512) but not for "express delivery" services, which has developed only relatively recently and can be distinguished separately from each of the other two sub-headings. Members have tried several ways of amending the sectoral classification list to solve these problems: one is to disaggregate a sector into a more expansive list of sub-sectors, allowing Members to choose with more specificity sub-sectors to which they would make commitments. Another is to collapse two sectors, such as in the postal and courier example, into one single category which would henceforth be subdivided into a list of distinct services based on the types of items being handled.

An added difficulty is that since the Uruguay Round, services markets have developed exponentially, keeping pace with dramatic technological and commercial innovations. For many businesses, effective market access now requires access for a number of *interdependent* services as well as for those sectors that have not previously been defined. Many services are so closely interrelated commercially that restrictions on the supply of one can prevent or curtail the supply of others. This has been explored in relation to computer and related services, environmental services and energy services as well as telecommunications and audiovisual. Despite the close commercial links between a number of service sectors, the *Services Sectoral Classification List* constitutes a "vertical" structuring of services sectors on mutually exclusive lines. Few Members have undertaken specific commitments across most or all sectors that are closely related in commercial terms, with consequences for both predictability and security for the operations of services suppliers as well as the economic efficiency of the services supply chain overall. In relation to these problems, Members have explored the possibility of entering into defined "clusters" of commitments[560] or using a standard "checklist" of

[560] Julia Nielson, Carole Pellegrino, Rosemary Morris and Rachel Thompson, *Using "Cluster" Approaches to Specific Commitments for Interdependent Services*, in TRADE IN SERVICES: NEGOTIATING ISSUES AND APPROACHES 61 (OECD 2001), *and see* discussion below.

closely related services sub-sectors from which Members might pick and choose commitments. In light of ever-changing commercial realities, Members require a means of classification and definition that will provide not only commercial and legal certainty in regard to commitments but also sufficient flexibility for future evolution in each sector.

2. Guidelines for the Scheduling of Specific Commitments under GATS

Notwithstanding recognition of the problem, the approach to classification has been cautious and no major overhaul of the existing W/120 classification list has been attempted. As already noted, on March 28 2001, the Council for Trade in Services adopted new *Scheduling Guidelines*,[561] which state that the legal nature of a schedule and the need to evaluate commitments require the greatest possible clarity in the description of each sector and sub-sector scheduled. Accordingly, it recommends that Members continue to use the W/120 classification in which each sector and sub-sector is identified by reference to the corresponding CPC classification number and that further refinement of a sectoral classification, where necessary, be done on the basis of the CPC or other internationally recognized classification.[562] Further, the *Scheduling Guidelines* suggest that if a Member chooses to use its own classification system, it should provide concordance with the CPC in the manner illustrated in the *Scheduling Guidelines*. If this is not possible, it should give a sufficiently detailed definition to avoid ambiguity as to the scope of the commitment.[563]

3. Committee on Specific Commitments

Through its Committee on Specific Commitments ("CSC"), the Council for Trade in Services has proceeded to address classification issues and amend existing classifications on an *ad hoc* basis. The intended outcome of this exercise is, however, not entirely clear, as is apparent from the discussion that took place at the meeting of the CSC held on April 11 and 12, 2000:[564]

> *10. Regarding the substance of the work on classification the Chairman raised the issue of the overall aim of the exercise. He recalled that in the past meetings discussions had touched upon various possible outcomes for the work on classification including possible amendments to the existing sectoral classification (document MTN.GNS/W/120) and the development of "clusters" of sectors. He suggested that Members should begin asking themselves what they wanted to do with the existing sectoral classification and namely the "W/120." He pointed out that while it was the general view that this process should not result in an overhaul of the existing classification and that the structure of the "W/120" should be preserved, it was also evident, however, that adding new sectors or improving some existing sectoral entries would require an amendment of the existing classification list . . .*
>
> *20. The Chairman summing up the discussion said that according to most Members the work of the Committee should focus first on "core services" rather than on "clusters" and that the basis of this work should be the revision of the "W/120." He noted that many Members had stressed that any amendments to the "W/120" should only intervene where it was necessary and justified to ensure legal certainty and that some Members has raised the question of the role to assign to the CPC/Rev.1 in this process of revision. He said that while there was agreement on the mutually exclusive nature of the "W/120," the question of the mandatory or voluntary nature of the new classification was to be addressed at a later stage.*

[561] *Scheduling Guidelines*, *supra* note 248.
[562] *Id.*, ¶ 23; the example given is the GATS *Annex* on *Financial Services*.
[563] *Scheduling Guidelines*, *supra* note 248, ¶ 24.
[564] Committee on Specific Commitments, *Report of the Meeting held on April 11 and 12, 2000*, S/CSC/M/14, Note by the Secretariat (May 18, 2000).

The sectors in which the CSC has focused its efforts are, "without prejudice to the inclusion of any other sector whose classification Members may want to revise, and to the positions of Members as to the outcome of the exercise," in other words, environmental services, energy services, legal services, postal and courier services and construction services. Four of these five sectors are covered by an existing classification. "Energy services" is not itself defined under an existing classification, but comprises functions under several sub-sector classifications.

The work of the CSC in regard to classification raises certain questions. Is the technical work of the Committee too closely linked to political or diplomatic considerations related to future negotiations to serve the interests of commercial enterprise?[565] Does legal and commercial predictability require that the classification system be mandatory, and if so, that Members come to a consensus on this to avoid developing a scheme that can be sidestepped by Members' discretion to make or withhold commitments and to request specific commitments in "new" sectors?[566] Even if the amendment of the existing classification promises legal and commercial certainty can it be a lasting solution without the full commitment of each of the Members to adopt it? Are there creative solutions to the problem of classification, which do not require continual amendment of the definition of sectors in which existing commitments have been made?

4. Cluster and Checklist Approaches

Early in the work of the Committee on Specific Commitments, a number of Members expressed interest in a "cluster approach"[567] to the negotiation of specific commitments and presented several sector-specific proposals on the matter.[568] These proposals suggested that when Members seek to liberalize a particular sector they should, for the sake of commercial meaningfulness and legal clarity, choose to commit to a predefined "cluster" of narrowly defined sub-sectors, each related to the core services set out in the existing W/120 classification.

It was felt that the use of clusters might be appropriate in commercially interrelated sectors in which services companies are reliant on extended supply chain relationships. Where services are vital inputs to the supply of other services, access to interrelated services is an important factor in the efficiency and competitiveness of delivery of the

[565] Steve Orava, *The Commercial Reality (or Lack Thereof) in the Classification and Definition of Services in GATS Negotiations*, 1 INTERNATIONAL TRADE LAW REVIEW 5, 6 (2002): "... the linkage of the technical work on a scheduling framework with political and diplomatic issues seems misplaced and counterproductive."

[566] Heading 12 of the *Services Sectoral Classification List* (or W/120) is entitled "Services not Included Elsewhere."

[567] *See* discussion of the cluster approach in Nielson, Pellegrino, Morris and Thompson, *supra* note 562.

[568] The EC tabled a papers on clusters as a possible negotiating modality in the Council for Trade in Services, Special Session—*Communication from the European Communities (and their Member States) —The Cluster Approach*, Council for Trade in Services, Special Session, S/CSS/W/3 (May 22, 2000), followed by *Communication from Australia—Negotiating Proposal for Maritime Transport Services*, Council for Trade in Services, Special Session, S/CSS/W/111 (October 1, 2001) in relation to negotiations in the maritime sector. Other sector specific proposals include that of the EC in relation to classification of environmental services, *Communication from the European Communities (and their Member States)—Environmental Services*, Committee on Specific Commitments, S/CSC/W/25 (December 18, 2000) and Job No. 4348 (July 10, 2000) and a proposal tabled by the Dominican Republic, El Salvador and Honduras for a *Draft Annex on Tourism*, using a cluster approach, for details see *supra*, note 549. Electronic commerce is also often mentioned as a cross-cutting issue that relies on a definable cluster of key services inputs: Nielson, Pellegrino, Morris and Thompson, *supra* note 561, 62.

"other" services. The failure of a WTO Member to liberalize the sectors "related" or "connected" to, the "core service" could therefore have adverse consequences for the competitiveness of the foreign businesses trying to access and operate in its market. In this context, the definition of clusters was intended to cut across the "vertical" structure of the W/120, enabling businesses to obtain access to all input or support services relevant to their operations.

Strictly speaking, the cluster approach is not about classification, as it does not involve moving items from under their current listing in W/120; the rationale was that would permit appropriate recognition of the intersectoral links between sectors without requiring fundamental reorganisation of W/120, on which the existing WTO GATS Schedules are based. This is important for protecting the legal certainty of existing specific commitments and could result in greater overall liberalization of services trade.

In spite of its potential, the clustering approach had a few important drawbacks and had a mixed reception by the Members.[569] The main concern was that because a cluster grouping does not necessarily reflect existing regulatory regimes, it may increase the fragmentation of infrastructure services.[570] It might, for example, be difficult to implement commitments with regard to the construction of hotels, where hotel construction is not regulated separately from other types of construction. Neither is it necessarily desirable or appropriate, in terms of regulatory efficiency, to encourage the development of more specific regulatory regimes. Further, it is inevitable that the organisation of Members' regulatory frameworks and the extent of the regulation in any sector will vary. Moreover, in some cases the cluster approach could have the opposite effect of bringing together services that are classified separately but which correspond to a similar regulatory regime. Another argument against the cluster approach was that liberalization in groups of small sub-categories of broader infrastructure sectors could create barriers to trade by creating distortions in the domestic economy.

As a result, the most recent development is a shift in favour away from the cluster approach towards the use of a "checklist" of sub-sectors related to a core sector. The checklist is attractive because it is well placed to assist Members for the purpose of negotiations, while recognizing their entitlement to make selective commitments; in this way it may encourage consistency among Members without eliminating flexibility.[571]

5. The Twelve W/120 Services Sectors

The following is a brief description of each of the twelve services sectors as set out in the W/120 classification, the significance of the sector and highlights of the WTO work in relation to each sector, with particular emphasis on classification issues.[572]

[569] *See* Committee on Specific Commitments, *Report of the Meeting held on April 11 and 12, 2000*, S/CSC/M/14, Note by the Secretariat (May 18, 2000), *supra* note 370. At ¶ 20, the Chairman summing up the discussion said that according to most Members the work of the Committee should focus first on "core services rather than on 'clusters' and that the basis of this work should be the revision of the 'W/120' . . . ."

[570] Nielson, Pellegrino, Morris and Thompson, *supra* note 562.

[571] *See* for example, the EC in relation to tourism services, *Communication from the EC (and their Member States—Reaction to the Communication from Dominican Republic, El Salvador and Honduras on the Need for an Annex on Tourism*, Council for Trade in Services, Special Session, S/CSS/W/5 (September 28, 2000) ¶ 10.

[572] For a list of all negotiating proposals submitted up to April 2002, *see Statement of the Chairman of the Special Session of the Council for Trade in Services to the Trade Negotiations Committee of March 22, 2002*, TN/S/1, S/CSS/11 (April 11, 2002).

(a) Business Services. The sub-sectors covered by "business services" are: professional services, computer and related services, research and development services, real estate services, rental/leasing services without operators, and "other" business services. Each of these comprises a further set of between two and twenty sub-categories. Three general proposals have been made in regard to *Business Services* (other than professional services).[573] They highlight the need for transparency in domestic regulation, mutual recognition of qualifications-based business services and increased commitments in research and development services, real estate services, rental/leasing services and other business services. They also propose improved sectoral commitments, particularly the elimination of cross border supply limitations, limitations on commercial presence and restrictions on temporary movement of personnel.

Both professional services and computer and related services are growing rapidly and becoming knowledge-intensive sectors of the WTO member economies. *Professional Services* encompass a wide range of fields: legal services, accounting, auditing and bookkeeping services, taxation services, architectural services, engineering services, integrated engineering services, urban planning and landscape architectural services, medical and dental services, veterinary services and services provided by midwives, nurses, physiotherapists and para-medical personnel. The common characteristic of these services is that the practice of the respective profession is recognised by a competent national authority or regulatory body. The category of professional services has generated a number of proposals for negotiations (professional services,[574] accountancy,[575] architecture[576] and legal services).[577]

Legal Services is one of the five priority areas on which the CSC is currently focusing its work. The most recent Australian communication on classification proposes that the W/120 definition of legal services be expanded to reflect a number of sub-categories on the basis of a combination of an area of law and type of service, rather than by defining the service provider. It submits that, based on the Uruguay Round commitments and proposals tabled in the current negotiations, distinctions between home-country, host-country, third-country and international law are fundamental to achieving liberalization in legal services. The Australian proposal is as follows: home-country law (advisory

[573] *Communication from the EC and their Member States—GATS 2000: Business Services*, Council for Trade in Services, Special Session, S/CSS/W/34, (December 22, 2000); *Communication from Canada —Initial Negotiating Proposal on Business Services*, Council for Trade in Services, Special Session, S/CSS/W/55 (March 14, 2001); and *Communication from Australia Negotiating Proposal on Business Services*, S/CSS/W/135, Council for Trade in Services, Special Session, (March 7, 2002).

[574] *Communication from Colombia—Professional Services*, Council for Trade in Services, Special Session, S/CSS/W/98 (July 9, 2001), *Communication from Switzerland—GATS 2000: Professional Services*, Council for Trade in Services, Special Session, S/CSS/W/75 (April 4, 2001), *Communication from Canada—Initial Negotiating Proposal on Professional Services*, Council for Trade in Services, Special Session, Council for Trade in Services, Special Session, S/CSS/W/52 (March 13, 2001) and *Communication from the EC (and their Member States)—GATS 2000: Professional Services*, Council for Trade in Services, Special Session, S/CSS/W/33, (December 22, 2000).

[575] *Communication from Australia—Negotiating Proposal for Accountancy Services*, Council for Trade in Services, Special Session, S/CSS/W/62 (March 28, 2001) and *Communication from the United States—Accounting Services*, Council for Trade in Services, Special Session, S/CSS/W/20 (December 18, 2000).

[576] *Communication from Australia—Negotiating Proposal for Architectural Services*, Council for Trade in Services, Special Session, S/CSS/W/63 (March 28, 2001).

[577] *Communication from Australia—Negotiating Proposal for Legal Services*, Council for Trade in Services, Special Session, S/CSS/W/67, particularly supplement 2, S/CSC/W/32 (March 28, 2001, April 11, 2001, July 9, 2001, July 10, 2001 and March 11, 2002). *Communication from the United States—Legal Services*, Council for Trade in Services, Special Session, S/CSS/W28 (December 18, 2000).

services); home-country law (representation services); third-country law (advisory services); third-country law (representation services); host-country law (advisory services); host-country law (representation services); international law (advisory services); international law (representation services); international commercial arbitration services; other alternative dispute resolution services, preparation and certification of legal documents; and other legal advisory or consultancy services.[578]

At the CSC meeting of July 17, 2002[579] the EC representative expressed the view that the current classification was sufficiently flexible to achieve the goals of reflecting market reality and increasing the number and quality of commitments. The EC also felt that there was uncertainty as to whether the proposal by Australia was to amend the classification or to provide guidelines for scheduling terminology and that difficulties might arise if the terminology of "host-country" and "home-country" law, with which the EC has no problems were to be converted into a rigid classification.

The Minutes of the EC submission on this point read as follows:

> For example, if a Member were to take commitments only for "home country law," what would be the situation of a foreign lawyer that was qualified in host country law or of a foreign law firm employing lawyers qualified in the host country? Could they be prevented from providing legal advice in cases in which home and host country law were relevant at the same time? According to Australia's proposal, practice of "third country law" was subject to qualification in that third country. This might imply that "home country law" and "third country law" had the same meaning, and there would thus be no need for the latter category. Finally, further work on the definition of "international law" was necessary. Law could have an international content, but rely on domestic source and jurisdiction. Similarly, law could have an international source, combined with domestic jurisdiction. It was necessary to reflect further on those issues.[580]

Computer and related services is also of great interest, with six submissions having been made up to January 2003 by the EC,[581] Canada,[582] Taiwan,[583] MERCOSUR,[584] India[585] and Costa Rica.[586] The growing importance of the sector and the speed of technological development has prompted a proposal by the EC,[587] not to reclassify the CPC division 84 "computer and related services," but to develop an understanding as to its scope of coverage, particularly in relation to the "evolved" services. The suggestion was

[578] Committee on Specific Commitments, *Report of the Meeting held on March 11, 2002*, Note by the Secretariat, S/CSC/M/22 (May 21, 2002), ¶ 6.

[579] Committee on Specific Commitments, *Report of the Meeting held on July 17, 2002*, Note by the Secretariat, S/CSC/M/24 (September 23, 2002), ¶ 6.

[580] *Id*.

[581] *Communication from the EC (and their Member States)—Computer and Related Services*, to the Trade Negotiations Committee and Committee on Specific Commitments, TN/S/W/6 and S/CSC/W/35 (October 24, 2002) and S/CSC/W/34/Add.1 (July 15, 2002).

[582] *Communication from Canada —Initial Negotiating Proposal on Computer and Related Services*, Council for Trade in Services, Special Session, S/CSS/W/56 (March 14, 2001).

[583] *Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu—Computer and Related Services* to the Trade Negotiations Committee and Council for Trade in Services, Special Session, TN/S/W/10, S/CSS/W/37 (January 8, 2003).

[584] *Communication from MERCOSUR—Computer and Related Services*, Council for Trade in Services, Special Session, S/CSS/W/95 (July 9, 2001).

[585] *Communication from India—Initial Negotiating Proposal on Computer and Related Services*, Council for Trade in Services, Special Session, S/CSS/W/141 (March 22, 2002).

[586] *Communication from Cost Rica—Computer and Related Services*, Council for Trade in Services, Special Session, W/CSS/W/129 (November 30, 2001).

[587] *Communication from the EC (and their Member States)—Computer and Related Services* . . . TN/S/W/6 and S/CSC/W35, *supra* note 582.

that Members could inscribe "CPC 84"—Computer and related services in the "sector" column of the schedule, indicate there that they subscribe to the "Understanding on the Scope of Coverage of CPC 84," and annex the Understanding to the Schedule. In a subsequent meeting of the Committee for Specific Commitments,[588] Canada questioned whether the CPC description of computer and related services was so inadequate as to necessitate the annexing of a special Understanding to Members' schedules, and expressing a preference for clarifying the scope and application of CPC 84 through discussion in the CTS and CSC. It also contested the explicit inclusion of "packaged software" within the scope of CPC 84, while the EC representative affirmed that it was the view of his delegation that CPC 842 covered both packaged and customized software.

Chinese Taipei also introduced the concept of "value-chain" to the discussion regarding the scope of Computer and Related Services. Its suggestion was that the approach, which has been well accepted by the IT industries, would define the scope of the sector in four stages, namely, the pre-implementation stage, the implementation stage, the operations stage and the maintenance and support stage. Computer service providers would normally combine services from classifications in all four areas. In order to avoid overlap with other sectors, such as telecommunications or audiovisual services, Chinese Taipei recommends that issues under certain specified "convergence services" be dealt with in the other sectors. At the December 5, 2002 meeting of the Committee on Specific Commitments[589] Hong Kong, China sought clarification from the delegation of Chinese Taipei regarding the proposed exclusion, but the matter was postponed for discussion in Special Session.

(b) Communication Services. "Communication services" comprises postal, courier, telecommunications and "other" communication services. *Postal and courier services*, another of the five priority areas of the CSC, has received significant attention with respect to classification. Proposals have been submitted by the United States,[590] the EC,[591] Switzerland,[592] Bolivia and the MERCOSUR group of countries[593] and New Zealand.[594] The difficulty in this area is that the W/120 and the CPC classification systems were founded on the underlying assumption that postal services are carried out exclusively by national postal administrations[595] ("state monopolies,"[596] or "direct or indirect provision by the state itself, of services to society under a generalized monopoly regime")[597] while courier services, which generally consist of delivery of messages and

[588] *See* Committee on Specific Commitments, *Report of the Meeting held on December 5, 2002*, Note by the Secretariat, S/CSC/M/26 (February 7, 2003).
[589] *Id.*, ¶ 18.
[590] *Communication from the United States—Express Delivery Services*, Council for Trade in Services, Special Session, S/CSS/W/26 (December 18, 2000).
[591] *Communication from the EC (and their Member States)—GATS 2000: Postal/Courier Services*, Council for Trade in Services, Special Session, S/CSS/W/61 (March 23, 2001).
[592] *Communication from Switzerland—GATS 2000: Postal and Courier Services*, Council for Trade in Services, Special Session, S/CSS/W/73 (May 4, 2001).
[593] *Communication from Bolivia and MERCOSUR—Postal Services*, Council for Trade in Services, Special Session, S/CSS/W/108 (September 26, 2001).
[594] *Communication from New Zealand—Negotiating Proposal for Postal/Courier Services*, Council for Trade in Services, Special Session, S/CSS/W/115 (November 6, 2001).
[595] *Communication from the EC (and their Member States)—GATS 2000: Postal/Courier Services* S/CSS/W/61, *supra* note 593, ¶ 6.
[596] *Communication from Switzerland GATS 2000: Postal and Courier Services . . .* S/CSS/W/73, *supra* note 593, ¶ 3.
[597] *Communication from Bolivia and MERCOSUR . . . Postal Services . . .* S/CSS/W/108, *supra* note 595, ¶ 2.

packages by personal messengers, are performed by private companies. This distinction is becoming increasingly blurred and somewhat obsolete as postal monopolies have been eroded in various ways and "courier" enterprises compete on equal terms in the postal market for services that are not now considered exclusive to public operators. In addition, the recently evolved "express delivery services" goes beyond courier services in providing expedited collection, transport and delivery of documents parcels and goods, while tracking the location of and maintaining control over the items throughout the supply of the service.

The United States has proposed that a separate definition for express delivery be added to the *Services Sectoral Classification List*.[598] The EC submits that the postal and courier sectors be collapsed into one category and divided into a series of subcategories based on the type of items being handled, including addressed written communications, addressed parcels and packages, press products, registered or insured mail, express delivery services, non-addressed items, document exchange and other services not specified elsewhere.[599] The Swiss proposal supports that of the EC, suggesting that the sector be referred to as the "handling of postal items, whether for domestic or foreign destinations."[600] The MERCOSUR group of countries and Bolivia have proposed a simple merger of the two sectoral classifications into one category entitled "Postal Services,[601] while New Zealand has endorsed the EC, Swiss and MERCOSUR proposals but points out that the area of consulting services relating to postal/courier is nowhere addressed."[602]

(c) Telecommunication Services. Like financial services, telecommunications is a key infrastructure sector needed for overall development and required for all economic and trade activities. A competitive telecommunications market reduces communications costs for industry and individual users while new investments in the sector stimulate the development of electronic commerce that spur growth in almost all services sectors.

During the Uruguay Round negotiations Members concluded the *Annex on Telecommunications*,[603] which elaborated upon the provision of the GATS with respect to measures affecting access to and use of public telecommunications transport networks and services.[604] They extended liberalization in the sector to include telecommunications infrastructure-based services, as a result of which market access commitments were made to permit suppliers to own and operate their own networks. The GATS *Annex on Telecommunications* did not, however, extend to cable or broadcast distribution of radio or television programmes.[605]

[598] *Communication from the United States —-Express Delivery Services* . . . S/CSS/W/26, *supra* note 592, ¶ 10.

[599] *Communication from the EC (and their Member States)—GATS 2000: Postal/Courier Services* S/CSS/W/61, *supra* note 593, ¶ 9.

[600] *Communication from Switzerland GATS 2000: Postal and Courier Services* . . . S/CSS/W/73, *supra* note 594 ¶ 5.

[601] *Communication from Bolivia and MERCOSUR* . . . *Postal Services* . . . S/CSS/W/108, *supra* note 595, ¶ 18.

[602] *Communication from New Zealand—Negotiating Proposal for Postal/Courier* Services . . . S/CSS/W/115, *supra* note 596, ¶¶ 10 and 11.

[603] GATS *Annex on Telecommunications*.

[604] Members also determined, in the *Annex on Negotiations on Basic Telecommunications*, the criteria upon which GATS *Article II* and the GATS *Annex on Article II Exemptions supra* note 161, would enter into force for basic telecommunications.

[605] See Simon Norton, *Liberalization in The International Telecommunications Market: the General Agreement on Trade in Services*, 4(6) COMMUNICATIONS LAW 223 (1999).

The definition of telecommunications under *Communication Services* in the W/120 provides for 14 sub-sectors (a. through n.) and an "other" category (o), based on the W/120 classification. These 14 sub-sectors have been divided historically into "basic telecommunications" (a. through g) and "value added services" (h. through n). With regard to value added services, suppliers add value to the customer's information by form or content enhancement, or by providing for the storage and retrieval of that information. This category includes electronic data interchange, e-mail and on-line database storage. Negotiations and commitments on value added services were undertaken mainly during the Uruguay Round, while commitments on basic telecommunications were made during further negotiations that ended in February 1997.

Pursuant to the Uruguay Round Ministerial Decision on Negotiations on Basic Telecommunications,[606] the Negotiating Group on Basic Telecommunications ("NGBT") commenced negotiations on basic telecommunications in May 1994. In February 1997, the Group issued a Chairman's note[607] in which basic telecommunications services were defined as comprising:

(a) local, long-distance and international services for public and non-public use.
(b) services provided on a facilities basis or by resale;
(c) services provided through any means of technology, such as cable, wireless and satellites; and
(d) private leased circuit services through which service suppliers can sell or lease any type of network capacity for the supply of services listed in any other basic telecom service subsector. This would include capacity via cable, satellite and wireless networks.

As a result of the negotiations on basic telecommunications, the *Fourth Protocol* to the GATS entered into force on January 1, 1998.[608] Classification within the sector has not always been carried out based on the W/120 model. In addition to the distinctions drawn by the model schedule adopted for basic telecommunications, some countries have also introduced technological distinctions (satellite/non-satellite, mobile/fixed) and some definitions rely on internal legislation not yet adopted or non-explicit internal definitions. As a result of these factors a number of variations in Member's commitments have arisen and have led to a lack of clarity about those commitments.[609]

In addition to market access commitments, negotiations in basic telecommunications addressed domestic regulation and the inevitable range of technical standards that would be applicable across domestic regimes. Seeking in particular to ensure the effective competition of new entrants, the NGBT negotiated, and circulated at its December 15, 1995 meeting, a "non-paper" referred to as the *Reference Paper* which set out pro-competitive disciplines on horizontal issues such as competitive safeguards, interconnection guarantees (including transparency and availability of an arbitration procedure), neutrality of universal service requirements, transparency on licensing procedures, establishment of independent regulators, and guidelines for the allocation of scarce resources. The *Reference Paper* was included in the schedules as additional commitments by over sixty countries, with some alterations.[610]

[606] *Decision on Negotiations on Basic Telecommunications*.
[607] Group on Basic Telecommunications—*Note by the Chairman—Revision*, S/GBT/W/2/Rev.1 (January 16, 1997).
[608] *Fourth Protocol to the General Agreement on Trade in Services*, *supra* note 264.
[609] *Communication from EC (and their Member States)—GATS 2000: Telecommunications*, Council for Trade in Services, Special Session, S/CSS/W/35 (December 22, 2000).
[610] *Id*. For a more detailed discussion of this sector, *see* Chapter 21 of this book.

(d) Construction and Related Engineering Services. *Construction Services* is the third of five categories for specific attention by the CSC. The sector comprises general construction work for buildings, general construction work for civil engineering, installation and assembly work, building completion and finishing work, and "other." The classification question raised by New Zealand[611] was whether there should be an "integrated" construction services item in the classification in order to clarify the classification of turn-key or multistage construction projects. During discussion of the proposal at the CSC meeting of May 9, 2001[612] Venezuela took a contrary view to the "integrated" item which it interpreted to mean essentially a "cluster" of a number of services within a single category. It stated that greater aggregation would not enable a country that wanted to make a specific commitment for one particular activity, or intermediary activity within the chain of construction services to do so without having to make a general commitment for all the services. At the same time it found the aggregated cluster approach unnecessary on the grounds that the comprehensive commitment would leave no space for an activity in the construction sector to be carried out by other players within each project.

Mexico, backed by Venezuela, suggested that the general approach to possible changes to the W/120 and the specific breakdown of categories proposed by New Zealand, could be adopted by Members, if they chose, in their formulation of specific commitments, even in the absence of one aggregated "cluster" category. India's concern was that some of the classification proposals might have come out of negotiating position rather than being derived from pure classification-oriented needs. It has requested the indulgence of the Members in permitting it to take additional time in order to assess the proposal more fully.

(e) Distribution Services. The distribution services sector accounts for a large share of economic activity. According to the W/120 classification it comprises commission agents' services, wholesale trade services, retailing services, franchising, and "other." No proposals to reclassify this sector have been put forward. *Distribution services* constitute a principal link between the producer and consumer. In addition, the sector's performance contributes directly to the competitiveness of other sectors, such as in manufacturing, resources including mining, agriculture and services industries. For example, manufacturers and resource companies seeking to extend their activities overseas may add value to their products and differentiate them by using improved logistics, delivery, after-sales service and through encapsulating other services. The more efficient distribution services are, the better the allocation of resources and the matching of supply with demand.

From a consumer perspective, these benefits can be considerable, taking the form of reduced risk, lower costs and prices, better quality and wider choice.[613] Although the sector is still considered to be largely domestic,[614] Members anticipate that globalization and new technologies will transform business processes and supply chains. New

[611] *Communication from New Zealand Concerning Construction Services* to the Committee on Specific Commitments, Job 5479 (September 22, 1999).

[612] Committee on Specific Commitments, *Report of the Meeting Held on May 9, 2001*—Note by the Secretariat, S/CSC/M/20 (June 7, 2001), ¶¶ 26–30.

[613] *Communication from Australia—Negotiating Proposal: Distribution Services*, Council for Trade in Services, Special Session, S/CSS/W/136 (March 7, 2002).

[614] *Id*., Australia is of the view that national wholesalers and retailers undertake little significant international trade; Colombia is of the opinion that development of the sector is largely national: see *Communication from Colombia—Distribution Services*, Council for Trade in Services, Special Session, S/CSS/W/120 (November 27, 2001).

developments have already resulted in distribution services being part of an integrated "value chain," rather than simply elements of a sequential distribution function linking producers and consumers. The most important new technology for distribution services is likely to be Internet-delivered e-commerce. Trade in distribution services takes place mainly through commercial presence but with advances in e-commerce, it is anticipated that mode 1 (cross-border supply) will become significant.

(f) Educational Services. The W/120 for education services comprises primary education services, secondary education services, higher education services, adult education services and "other" education services. Notwithstanding that the education sector is important to all Members, given the critical role of education in economic and social development, and trade in education services is of increasing international significance, the sector remains one of the least committed under the GATS.[615] This has been attributed in part to the fact that the delivery of education services has largely been reserved to governments. WTO Members therefore see a need to strike a balance between the pursuit of domestic education priorities and exploring ways in which trade in education services can be further liberalized. The United States however notes that in spite of the limited number of commitments in this area, nearly all Members allow the provision of higher education, adult education and training services by private sector service providers.

All four negotiating proposals address the need for increased liberalization to permit further benefit from international trade in education. Japan sees the promotion of a certain level of liberalization, as a means to ensuring improvement in the *quality* of education and research. The U.S. proposal is limited to education and training beyond the primary and secondary level, i.e. higher (tertiary) education, adult education and training services that would supplement, rather than displace, public education systems. Accordingly the United States has addressed the classification of the sector and suggested that the W/120 definition be expanded and clarified in order to facilitate commitments in relation to higher and adult education.

The U.S. proposal is for classification to clearly indicate that "training services" and "educational testing services" are part of the concept of education. Training services, it says, are very similar to education services, but training courses are generally less theoretical and more job-related than academic courses, often requiring hands-on operation of tools, equipment and certain devices. Training services are related to the W/120 subsectors of higher education, adult education, and other education services. Educational testing services are described as a "fundamental and essential part of the learning process, used to evaluate the student as well as the course material. These services include designing and administering tests, as well as evaluating test results." Educational testing services generally are related to all types of education.

(g) Environmental Services. *Environmental services* is another of the sectors identified by the CSC as an area of interest and extensive discussions have taken place on the issue of "core" versus "cluster" environmental services. The existing W/120 sectoral classification includes sewage services, refuse disposal services, sanitation and similar services,

[615] *Communication from New Zealand—Negotiating Proposal for Education Services*, Council for Trade in Services, Special Session, S/CSS/W/93 (June 26, 2001), *Communication from Australia—Negotiating Proposal for Education Services*, Council for Trade in Services, Special Session, S/CSS/W/110 (October 1, 2001), *Communication from Japan—Negotiating Proposal for Education Services*, Council for Trade in Services, Special Session, S/CSS/W/137 (March 15, 2002) and *Communication from the United States—Higher (Tertiary) Education, Adult Education and Training*, Council for Trade in Services, Special Session, S/CSS/W/23 (December 18, 2000).

and "other" environmental services. The United States asserts that "increasingly" WTO Members are recognizing and addressing the importance of pollution clean-up and environmental protection. As a result, there has been a general movement by governments toward preventing, reducing, or correcting environmental degradation. Simultaneously, various industries are recognizing the benefits of pollution prevention and clean technologies for efficiency purposes, liability avoidance and in the interests of good corporate citizenship. All of these factors have contributed to an increased demand for environmental services.[616]

This sector is also important due to the global nature of many environmental issues. Given the trans-boundary effects of those elements, which contribute to environmental degradation, there should be genuine interest in ensuring that reliable and competent environmental services are as widely available as possible.[617] The removal of barriers in the environmental services sector can assist in increasing the availability of these services, while lowering their cost.

The current WTO classification for environmental services is generally considered to be obsolete, given its focus on end-of-line pollution control and failure to encompass modern engineering and design processes for pollution prevention. It has been suggested, therefore, that the classification of environmental services be expanded to include not only clean-up activities but also the integration of environmental concerns into production processes and new areas of activity that have emerged. In addition to such a reclassification, the United States is especially supportive of the cluster approach in this sector. It favors an initiative to construct a framework that would highlight the importance of liberalising in core services and related services that have not historically been classified as being environmentally-related.

The EC proposal[618] provides such a framework for reclassification and a cluster of related sectors for commitment. The EC has suggested that sector 6 *Environmental Services*, in W/120, be amended as follows:[619]

A. Water for human use & wastewater management;
B. Solid/hazardous waste management;
C. Protection of ambient air and climate;
D. Remediation and cleanup of soil & water;
E. Noise & vibration abatement;
F. Protection of biodiversity and landscape; and
G. Other environmental & ancillary services.

The proposal also contains an environmental services "cluster" or "checklist"[620] as follows:

- business services with an environmental component;
- R&D with an environmental component;
- consulting, contracting & engineering with an environmental component;

[616] *Communication from the United States—Higher (Tertiary) Education, Adult Education and Training supra* note 616, ¶ 2.
[617] *Id.*, ¶ 3.
[618] *Communication from the EC (and their Member States)—GATS 2000: Environmental Services*, Council for Trade in Services, Special Session, S/CSS/W/38 (December 22, 2000).
[619] All sectors and sub-sectors of the "proposed classification" are described in the *Communication from the EC (and their Member States) - Classification Issues in the Environmental Sector* to the Committee on Specific Commitments, S/CSC/W/25 (September 28, 1999), *supra* note 569 (in particular on classification issues) as modified by Job 7612 (November 28, 2000).
[620] *Id.*

- construction with an environmental component;
- distribution with an environmental component;
- transport with an environmental component; and
- others with an environmental component.

Australia[621] has supported the proposed EC approach, as has Colombia[622] in scheduling commitments according to a revised classification that preserves the mutually exclusive nature of W/120 while addressing most of its recognized problems. Switzerland[623] has suggested something similar but has proposed a slightly different breakdown of categories:

A. Waste water management;
B. Waste management;
C. Protection of ambient air and climate;
D. Remediation and clean-up of soil and water;
E. Noise and vibration abatement;
F. Protection of biodiversity and landscape; and
G. Other environmental and ancillary services.

It suggests that to accommodate the gradual integration of environmental services with other service activities, Members must be able to make specific commitments in the following fields of activity, which have expanded significantly in recent years:

- professional services relating to the environment;
- research and development relating to the environment;
- consultancy, sub-contracting and engineering relating to the environment; and
- construction relating to the environment

Canada's position[624] is that Members should seek greater liberalization for both the core list of environmental services as they are currently defined, as well as in other related sectors, such as technical testing and analysis services, scientific and technical consulting services, engineering services and construction services. It views the discussion of "core" versus "cluster" primarily as a classification issue and suggests that in regard to negotiations, clusters be used as a "checklist."

Cuba[625] has cautioned that the negotiations should take account of a Member's right to regulate according to the most appropriate environmental policies and to establish requirements guaranteeing the objectivity of environmental assessments and the real benefit to the national environment. It is of the opinion that trade liberalization in this field will only be able to strengthen domestic service suppliers if differential treatment

[621] *Communication from Australia —Negotiating Proposal for Environmental Services*, Council for Trade in Services, Special Session, S/CSS/W/112 (October 1, 2001).
[622] *Communication from Colombia—Environmental Services*, Council for Trade in Services, Special Session, S/CSS/W/121 (November 27, 2001). Colombia has suggested that certain additions be made to the sectors: the implementation and auditing of environmental management systems, the evaluation and mitigation of environmental impact and advice in the design and implementation of clean technologies.
[623] *Communication from Switzerland —GATS 2000: Environmental Services*, Council for Trade in Services, Special Session, S/CSS/W/76 (May 4, 2001).
[624] *Communication from Canada—Initial Negotiating Proposal on Environmental Services*, Council for Trade in Services, Special Session, S/CSS/W/51 (March 14, 2001).
[625] *Communication from Cuba —Negotiating Proposal on Environmental Services*, Council for Trade in Services, Special Session, S/CSS/W/142 (March 22, 2002).

is applied and the sustainable development needs of the developing countries are taken into consideration from the outset of the negotiations.

(h) Financial Services. *Financial services* is a key sector for sound economic development, and infrastructure in this area is needed to support the development and functioning of other sectors in order to make the economy work properly. The presence of foreign operators can contribute to financially sound institutions that provide, among other things, much needed capital, new products, transfer of expertise and labour training. Local savings can be channeled through competitive domestic capital markets, thereby improving economy-wide resource allocation and reducing reliance on foreign borrowing. Insurance allows for the necessary spread of risks. Cheaper and better financial services help to improve the performance of domestic companies.[626] Such liberalization would not preclude Members from taking the appropriate temporary measures, as required and in accordance with the relevant provisions of the GATS, to control capital movements.

The Uruguay Round negotiations resulted in a separate GATS *Annex on Financial Services* (the *Annex*).[627] The *Annex* states that governments have the right to take prudential measures, such as those for the protection of investors, depositors and insurance policy holders, and to ensure the integrity and stability of the financial system, (a so-called "prudential carve-out").[628] It also excludes from the scope of GATS certain services, such as those of a central bank or monetary authority that are provided when a government exercises its authority over the financial system.

During the Uruguay Round, a large majority of Members based their commitments on two classification systems—the one provided for in the *Annex* and the other based on the W/120 *Services Sectoral Classification List*. The *Annex* provides the only GATS definition of financial services, as follows: "financial service is any service of a financial nature offered by a financial service supplier of a Member."[629] It also sets out an extensive but non-exhaustive list of financial services, which includes all insurance and insurance-related services, as well as all banking and other financial services. The W/120 *Services Sectoral Classification List* is very similar, using the same major headings, i.e. all insurance and insurance-related services, banking and "other" financial services (excluding insurance). Despite their similarities, however, there are enough differences between the two as to render the matter unclear when making a cross-country comparison as to what commitments in financial services have been made.

Like telecommunications, financial services is an area in which further negotiations were convened, after the Round officially ended in July 1995 in order to improve on the initial Uruguay Round commitments.[630] As with basic telecommunications, a Uruguay Round Ministerial Decision on Financial Services[631] opened the way for further negotiations in order for Members to "improve, modify or withdraw all or part of their commitments" without offering compensation and to finalize their Article II Exemptions

[626] *Communication from the European Communities (and their Member States)—GATS 2000: Financial Services*, Council for Trade in Services, Special Session, S/CSS/W/39 (December 22, 2000).
[627] GATS *Financial Services Annex*, *supra* note 283.
[628] *Id.*, ¶ 2(a). However, where such measures are inconsistent with a Member's obligations, "they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement." *Id*.
[629] *Id.*, ¶ 5(a).
[630] GATS *Second Annex on Financial Services*.
[631] *Decision on Financial Services*.

with respect to this sector. The negotiations, which ended in December 1997[632] resulted in the *Fifth Protocol to the GATS*,[633] which provides for the annexation of new financial services schedules to the Uruguay Round schedules.

The Committee on Financial Services, which was established by the Council for Trade in Services,[634] has been responsible for reviewing the status of acceptance of the *Fifth Protocol to the GATS*, in particular whether the Members who participated in the financial services negotiations in 1997 have ratified their commitments. In connection therewith, the Committee has also been looking at the classification of financial services and at developments in financial services trade generally.

Since May 2000, when comprehensive negotiations on trade in services commenced under the "roadmap"[635] adopted by the Council for Trade in Services only nine proposals have been received with respect to expanding, strengthening and clarifying commitments in the financial sector. It has been suggested that Members use the classification provided in the *Annex* wherever possible.[636] They are also encouraged to utilize the *Understanding on Commitments in Financial Services*[637] agreed upon at the end of the Uruguay Round, which contains a pre-determined set of commitments, not described as a "cluster," from which exceptions would remain possible, as a means of achieving more coherent sets of commitments.

(i) Health-Related and Social Services. The W/120 classification for this sector comprises four categories: hospital services, other human health services, social services, and "other." The sector includes, in addition to hospital services, services delivered under the direction of medical doctors chiefly to in-patients aimed at curing, reactivating and/or maintaining the health status; other human health services, ambulance services, residential health facilities services other than hospital services; social services with or without accommodation. The definition of health-related and social services does not include medical and dental services, veterinary services and the services provided by nurses, midwives and so forth, which have been grouped separately under professional services. There have been no negotiating proposals submitted in relation to this sector.

(j) Tourism and Travel-Related Services. Tourism is an important industry for both developed and developing countries in terms of revenue generation and its contribution to employment. The W/120 classification defines tourism services under four main

[632] See Chapter 20 of this book.

[633] The *Fifth Protocol to the GATS*, supra note 265, was adopted in December 1997. It entered into force on March 1, 1999.

[634] The Committee on Financial Services was established pursuant to the *Decision on Institutional Arrangements for the General Agreement on Trade in Services*, adopted by the Council for Trade in Services on March 1, 1995, S/L/1 (April 4, 1995), ¶ 3.

[635] At a meeting of the Council for Trade in Services held in May 2000 some Members referred to the work program for the first phase of the negotiations" as a 'road map.' It included modalities for the second phase of negotiations, for the treatment of autonomous liberalization, for means to facilitate the increasing participation of developing countries and proposals on issues arising from the work carried out in the Council and its subsidiary bodies. *See* Council for Trade in Services, Special Session, *Report of the Meeting held on May 26, 2000*, Secretariat Note, S/CSS/M/3 (June 26, 2000), ¶ 24. The decision on *Autonomous Liberalization Modalities*, *supra* note 478, has since been adopted in March 2003.

[636] *Communication from the European Communities (and their Member States)—GATS 2000: Financial Services*, Council for Trade in Services, Special Session, S/CSS/W/39 (December 22, 2000), ¶ 6.

[637] *Understanding on Commitments in Financial Services*.

headings, namely hotels and restaurants (including catering), travel agencies and tour operators" services, tourist guides services, and "other."

Although the tourism sector attracted more commitments by Members than any other sector at the end of the Uruguay Round, significant restrictions still remain. Included among the most common restrictions appearing in Members' schedules are economic needs tests, size limitations for establishments, restrictive licensing practices and fixed equity limits. The classification and liberalization of this sector has been the subject of detailed discussions and proposals by both developing and developed Members. The "cluster approach" to commitments has been a primary feature of these discussions, initiated by the Dominican Republic, El Salvador, Honduras, Nicaragua and Panama in their proposal of October 14, 1999 in relation to the need for an Annex on Tourism.[638]

The Appendix to the proposed Annex on Tourism contained a defined "tourism industries cluster" comprising extensive sectoral coverage of "characteristic sectors" and "related sectors" for tourism. This coverage reflected a World Tourism Organization definition given to the Tourism Satellite Account ("TSA"), which was agreed upon at an international conference held in Nice in June 1999. Subsequently, in March 2000, the United Nations Statistical Commission, on the basis of a more global consensus, determined that the definition of the tourism satellite account would be comprised only of tourism *characteristic* products, excluding the set of tourism *related* products from the prior definition. "Tourism *characteristic* products" include those services that would cease to exist in meaningful quantity or those for which the level of consumption would be significantly reduced in the absence of visitors and for which statistical information seems possible to obtain.[639]

In addition, the proposal received a number of comments from other Members, in particular the EC.[640] Despite asserting that the scope of coverage in the draft Annex on Tourism was too broad, and in some cases inappropriate,[641] the EC suggested considering "tourism-related" services alongside "core" tourism services in a "checklist," in order to highlight any inconsistencies of approach and to facilitate liberalization in related sectors. It proposed that "such a checklist could greatly contribute to increasing the efficiency and coherence of tourism services negotiations." Moreover, the EC was of the view that a checklist of "tourism-related" services sectors could serve as an aide-memoire during the negotiations of sectors that are related to tourism (the result of which should be scheduled in the relevant GATS sectors other than tourism). A possible shorter checklist, which calls for reflection on the matter, was annexed as a basis for further discussion.

[638] *Communication from the Dominican Republic, El Salvador and Honduras* to the WTO General Council and Council for Trade in Services in preparation for the 1999 Ministerial Conference, S/C/W/127 (October 14, 1999) and WT/GC/W/132 (October 14, 1999).

[639] *Communication from the Dominican Republic, El Salvador, Honduras, Nicaragua and Panama: the Cluster of Tourism Industries*, Council for Trade in Services, Special Session, S/CSS/W/19 (December 5, 2000).

[640] The European Communities and its Member States submitted a response to the initial proposal: *Communication from the EC (and their Member States—Reaction to the Communication from Dominican Republic, El Salvador and Honduras on the Need for an Annex on Tourism* . . . S/CSS/W/5, *supra* note 573, in which they supported full liberalization of the tourist sector.

[641] *Id.*, Part of the EC response reads as follows: "For example, the inclusion of "services" provided under governmental authority such as "passport and visa issuing services" does not appear appropriate in the context of GATS *Article I*. A part of air transport services is currently excluded from GATS pending the result of the mandated review. Discussion on this is therefore ongoing in another framework and duplication of work should be avoided."

The proposed Annex on Tourism was accordingly amended by further communication from the Dominican Republic, El Salvador, Honduras, Nicaragua and Panama on December 5, 2000.[642] The respective delegates presented another detailed list of "tourism *characteristic* products," organized using the CPC codes and attributing such "tourism *characteristic* services" to the *Services Sectoral Classification List* (W/120). The stated objective was a comprehensive treatment for tourism by reference to a set of "tourism *characteristic* products" as the cluster of tourism industries, without prejudice to the use of the cluster as the scope for new disciplines or for requesting additional specific commitments.

Other Members have contributed to the debate, including Canada, which has encouraged other Members to focus negotiations on the W/120 classification of tourism and travel-related services, and to accommodate the cross-cutting, multi-industry nature of tourism services. Canada has suggested that Members create and utilize their own tailored checklists to assist in the negotiation of tourism related sectors that are of particular interest to them.[643] The United States, on the other hand, has had very little to say about the cluster proposals, but has focused on ways to generate investment for tourist and business destinations around the world.[644]

(k) Recreational, Cultural and Sporting Services (other than audiovisual services). Recreational, cultural and sporting services under the *Services Sectoral Classification List* (W/120) is subdivided into entertainment services (including theatre, live bands and circus services), news agency services, libraries, archives, museums and other cultural services, sporting and other recreational services and "other."

Sporting services (CPC 964) has received particular attention. New Zealand has submitted a proposal[645] to expand upon the four existing subcategories of CPC 964, and has suggested that discussion by Members of commitments on sporting services, and a more effective classification of the subsector, should focus on the following outline of core activities in the sector:

96411: "sports event promotion services: existing definition;"
96412: "sports event organization services: existing definition;"
96413: "sports facility operation services: existing definition to be expanded to include maintenance of sports facilities; also expansion of definitions of sports facilities to encompass facilities other than stadia or arenas;"
96419: "other sporting services."

It is proposed that this should be replaced by the following:

- Referee and umpiring services;
  Sports performance services;
- Coaching and training services;
  Other instruction of groups or individuals in the practice of a sport or health, leisure and fitness activity, such as that provided by sports clubs, gymnasiums and

[642] *Draft Annex on Tourism*, *supra* note 550. (It replaces earlier drafts contained in S/C/W/127 (October 14, 1999) and the appendices to S/CSS/W/19 (December 5, 2000)).
[643] *Communication from Canada—Initial Negotiating Proposal on Tourism and Travel-Related Services—Revision*, Council for Trade in Services, Special Session, S/CSS/W/54/Rev.1 (May 4, 2001).
[644] *Communication from the United States —Tourism and Hotels*, Council for Trade in Services, Special Session, S/CSS/W/31 (December 18, 2000).
[645] *Communication from New Zealand—Negotiating Proposal on Sporting Services*, Council for Trade in Services, Special Session, S/CSS/W/94 (June 26, 2001).

other sports facilities, institutes of sport, high performance sports clinics, health and fitness clubs and specialist fitness practitioners such as personal trainers or yoga instructors;
Instruction in coaching and training of sports or health, leisure and fitness activities;
Instruction in referee and umpiring services;
Administration and management of sports teams, clubs, institutes, gymnasiums and other sports facilities;
Sports agents services;
Sports drug testing services; and
Other sporting services not elsewhere classified.

New Zealand notes that its negotiating proposal on education raises the issue of the exclusion from the CPC provisional education classifications of "education services" primarily concerned with "recreational matters" and their relegation to subsector 9641 (sporting services) with no further elaboration. New Zealand believes that education services concerning the academic study and teaching of sport and recreational activities and related activities should be classified as education rather than sporting services. Such services are distinct from services related to the instruction of groups or individuals in the practice of sporting disciplines and health, leisure and fitness activities. The latter are sporting services, and should be included in an updated sporting services classification.[646] It also recommends that issues associated with the Mode 4 provision of sports performance services, i.e. the temporary movement of teams, individual athletes/players, coaches, trainers, referees, administrators and organizers, should be the subject of further discussion by Members.

(l) Transport Services. Transport services is a massive W/120 classification comprising maritime transport services, internal waterways transport, air transport services, space transport, rail transport services, road transport services, pipeline transport, services auxiliary to all modes of transport, and "other transport services."[647] *Maritime transport services* is the subject of a basic GATS Annex containing modalities for further negotiations in the sector, *Annex on Negotiations on Maritime Transport Services.*[648] The Secretariat has produced two comprehensive Background Notes[649] and several proposals for further regulation have been tabled. There is also a GATS *Annex on Air Transport Services*,[650] which is subject to review under the GATS, and for which three proposals to expand the scope of the *Annex* have been received to date. Finally, one proposal on services auxiliary to all modes of transport has been received from Switzerland.[651]

[646] *Id.*, ¶ 10.
[647] For general comments on the transport sector, including land transport, see the *Communication from the European Communities (and their Member States)—GATS 2000: Transport Services*, Council for Trade in Services, Special Session, S/CSS/W/41 (December 22, 2000).
[648] GATS *Maritime Transport Annex*, *supra* note 75.
[649] *See* the two Background Notes by the Secretariat, Council for Trade in Services—*Maritime Transport Services*, Background Note by the Secretariat S/C/W/62 (November 16, 1998) and Council for Trade in Services, Special Session, *Maritime Transport Services*, Background Note by the Secretariat, S/CSS/W/106 (October 4, 2001).
[650] GATS *Air Transport Annex, supra* note 71.
[651] *Communication from Switzerland—GATS 2000: Services Auxiliary to All Modes of Transport*, Council for Trade in Services, Special Session, S/CSS/W/78 (May 4, 2001).

(m) Maritime Transport Services. At the end of the Uruguay Round negotiators ran into difficulty when incorporating market access commitments into GATS by the key players in the maritime transport services sector. A multilateral negotiating process was set up under the Negotiations Group for Maritime Transport Services ("NGMTS") with a deadline for completion by June 30, 1996. In order to better facilitate negotiations in this sector, a model schedule was developed which, while not directly compatible with the W/120 classification, reflected what was found to be the best way to organise talks. The model schedule adopted a three-pillar approach, which included:

International Maritime Transport Services;
Maritime Auxiliary Services; and
Access to, and Use of Port Services.

The 3-pillar model schedule reflected Paragraph 4 of the 1996 *Decision on Maritime Transport Services* ("*Decision"*)[652] of the Council for Trade in Services, which affirmed that Article II of the GATS (MFN) and the Annex on Article II Exemptions would enter into force for the three pillar sub-sectors, at the same time as the conclusion of the negotiations. The *Decision* suspended negotiations on Maritime Transport Services, indicating that they were to resume with the commencement of further comprehensive negotiations on services, which didn't take place until 2000. The *Decision* contained a standstill clause, under which Members undertook not to apply "... any measures affecting the maritime transport services except in the response to measures applied by other countries, and with the view to maintaining or improving the freedom of provision of maritime transport services ...."[653]

In October of 2000, the EC, Hong Kong, China, Japan, Republic of Korea, Norway and Singapore, by means of a joint statement,[654] noted that new negotiations on trade in services had commenced under a "roadmap" adopted by the Council for Trade in Services in May 2000.[655] This roadmap called for the views of other Members on the resumption of negotiations with a view to liberalizing maritime transport services.

To date, few countries have scheduled substantial commitments on maritime transport services in their Schedules. MFN exemptions apply for many of those that have maintained specific commitments in the sector. International maritime transport services are nevertheless already quite liberal compared to land and air transport, and most other services, with few restrictions apart from those in mode 3 and 4, although national treatment remains an issue for some Members.

Negotiating proposals in this sector reflect a general support for the three-pillar model schedule[656] developed under the Uruguay Round *Decision*, with the possibility of including commitments in regard to a fourth pillar on multimodal transport. Australia has suggested that "multimodal transport" be defined as: "The carriage of goods by at least

[652] *Decision on Maritime Transport Services*, adopted by the Council for Trade in Services on 28 June 1996, S/L/24 (July 3, 1996).
[653] *Id.*, ¶ 7.
[654] *Joint Statement from the European Communities and their Member States; Hong Kong, China; Japan; Republic of Korea, Norway and Singapore on Maritime Transport Service*, Council for Trade in Services, Special Session, S/CSS/W/8 (October 6, 2000).
[655] For details of the road map, *see supra* notes 441 and 442.
[656] *Communication from Australia—Negotiating Proposal for Maritime Transport Services*, S/CSS/W/111, *supra* note 569, ¶ 5; *Communication from Colombia—Maritime Transport Services*, Council for Trade in Services, Special Session, S/CSS/W/123 (November 27, 2001), ¶ 5; *Communication from the European Communities (and their Member States)—GATS 2000: Transport Services*, S/CSS/W/41, *supra* note 648; *Communication from the Republic of Korea—Negotiating Proposal for Maritime Transport Services*, Council for Trade in Services, Special Session, S/CSS/W/87 (May 11, 2001), ¶ 5.

two different modes of transport, by the multimodal transport operator on the basis of a single 'through' multimodal transport contract, from a point of loading in one country to a point of delivery in another country."[657]

The EC contemplates an "ability to carry out multimodal operations, using land transport services where an international sea leg is involved."[658] It noted that the "fourth pillar" was not formally introduced in the previous negotiations, but emerged as a tool to facilitate multi-modal requests and offers. Although it suggests that proposals should be considered for activities such as feeder services related to international cargo, or repositioning of equipment and movement of empty containers, it also indicated that the right to conduct these activities should be limited and developed in the negotiations.[659]

A more recent joint communication of 29 states to the Council for Trade in Services in Special Session,[660] affirmed the importance of maritime transport services for foreign investment, employment opportunities and promotion of growth in other related service sectors. Noting that by the "multiplier effect" maritime transport services, extends to ship repair and maintenance, ship classification, distribution, professional services, communications, banking and insurance, they called for active participation of all members in the on-going negotiations, in order to secure broad coverage of the sector, consistent with sustainable development, security and safety.

(n) Air Transport Services. The supply of air transport services is covered by more than three thousand bilateral agreements worldwide and regulated by the International Civil Aviation Organization ("ICAO") on the basis of the 1944 Chicago Convention.[661] The importance of the sector for trade cannot be overestimated. Even so, the air transport sector is an anomaly under the GATS, as it is the only services sector that is subject to specific sectoral exclusions. The *Annex on Air Transport Services* confirms that "any specific commitment or obligation assumed under this Agreement will not reduce or affect a Member's obligations under bilateral or multilateral agreements that are in effect on the date of entry into force of the WTO Agreement."[662] The GATS, including the dispute settlement provisions, is expressly denied application to measures affecting traffic rights, or services related to the exercise of traffic rights.[663] It does, however, apply to measures affecting aircraft repair and maintenance services, the selling and marketing of air transport services and computer reservation system ("CRS") services.[664] These were the only three categories to form the basis of most of the limited commitments made by Members during the Uruguay Round[665] and their scope is further

[657] *Communication from Australia- Negotiating Proposal for Maritime Transport Services*, S/CSS/W/111, *supra* note 569, ¶ 7.

[658] *Communication from the European Communities and their Member States—GATS 2000: Transport Services*, S/CSS/W/41, *supra* note 648, ¶ 31.

[659] *Id.*, ¶ 32.

[660] *Communication from Australia, Canada, Chile, The People's Republic of China, Croatia, Cyprus, Czech Republic, Dominican Republic, Estonia, the European Communities and their Member States, Gambia, Georgia, Guatemala, Hong Kong, China, Iceland, India, Japan, the Republic of Korea, Kyrgyz Republic, Latvia, Lithuania, Malaysia, Malta, Mexico, New Zealand, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Peru, Poland, Romania, Singapore, Slovenia, Switzerland, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*: *on Maritime Services* to the Trade Negotiations Committee, TN/S/W/11 (March 3, 2003).

[661] For details of the 1944 Chicago Convention, *see supra* note 70.

[662] GATS *Air Transport Annex*, *supra* note 71.

[663] *Id.*, ¶ 2.

[664] *Id.*, ¶ 3.

[665] *Communication from New Zealand—Negotiating Proposal for Air Transport Services*, Council for Trade in Services, Special Session, S/CSS/W/92 (June 26, 2001).

limited by the narrow definitions maintained in respect of each of them in the *Annex* itself.[666]

Given the requirement that developments in the air transport sector and the operation of the *Annex* be reviewed periodically, and at least every five years, with a view to considering the possible further application of the GATS in this sector,[667] proposals have been made to explore ways in which Members can increase, within the existing scope of the GATS, the number and quality of commitments for air transport services during the course of the services negotiations. New Zealand is of the view that in terms of further commitments, aside from the specific exclusions covering a limited area of services that can only be supplied by the holders of traffic rights, all other air transport services and general aviation and supporting services must be considered to fall within the scope of the GATS.[668] In particular, it says that improvements could occur not only in the three areas explicitly referred to in the *Annex*, but also in such areas as auxiliary services (including cargo handling and storage and warehouse services), airport management services, air traffic control services, general aviation services, domestic air services and other supporting services for air transport.[669]

More than one Member has recognized that there is some sensitivity in this sector about the impact of improved commitments on the regulatory frameworks contained in the existing bilateral and multilateral air services agreements. New Zealand believes that "the GATS framework provides a flexible mechanism capable of accommodating the regulatory challenges across the full range of services sectors." Similarly, Colombia has expressed the view that liberalization, particularly for some ancillary services, is desirable if it can be accomplished without detriment to the regulatory and safety measures developed by the ICAO and competent national authorities. It has pointed out that these measures fall under GATS Article VI (Domestic Regulation).[670]

Most recently, Costa Rica has proposed that more substantial commitments be made, specifically in respect of aircraft maintenance repair and maintenance services, as defined in Paragraph 6(a) of the *Annex* as "such activities, when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance," or what the industry refers to as "maintenance, repair and overhaul.[671]

(o) Other Services Not Included Elsewhere. The presence of a category entitled "other" services leaves a creative option open for Members that wish to schedule commitments in relation to sectors not otherwise defined in the W/120. Energy services is one area in which the "other" classification might be utilized. In addition to legal, environmental, postal/courier and construction services, energy services has been of special and continuing interest to the CSC during its recent work.

[666] GATS *Air Transport Annex*, *supra* note 71, ¶ 6. This same paragraph also contains a definition of "traffic rights" which does not necessarily reflect the industry definition.
[667] *Id.*, ¶ 5.
[668] *Communication from New Zealand—Negotiating Proposal for Air Transport Services*, S/CSS/W/92, *supra* note 666, ¶ 3.
[669] *Id.*, ¶ 12.
[670] *Communication from Colombia—Air Transport Services*, Council for Trade in Services, Special Session, S/CSS/W/124 (November 27, 2001).
[671] Council for Trade in Services—*Air Transport Services*, Background Note by the Secretariat, S/C/W/59 (November 5, 1998); *Communication from Costa Rica—Aircraft Repair and Maintenance Services*, Council for Trade in Services, Special Session, S/CSS/W/138 (March 19, 2002), ¶ 4.

Energy Services is one of the most important industrial sectors of any economy and fundamental to the development of developing countries. Competitive provision of energy services helps ensure that energy consumers have access to efficiently produced, market-priced, reliable energy. The availability of a variety of energy sources at competitive prices, with access to cross-border supplies, contributes to a nation's ability to compete in the international market.

As noted above, there is currently no separate, comprehensive sectoral classification for energy services in W/120. A number of specifically energy-related subsectors are included in the W/120, but are spread throughout the classification system as follows: services incidental to energy distribution, and services incidental to mining (both subsets of "other business services") and pipeline transportation of fuel (in "transport services"). A number of other activities directly involved in the energy services chain are covered by other GATS sectoral classifications, including architectural and engineering services, construction work for civil engineering, wholesale and retail trade services with respect to fuels and energy equipment, transportation services and several specific financial services.

The absence of any comprehensive classification for energy services has been attributed to the fact that at the time of the Uruguay Round much of the energy industry was characterized by state-owned enterprises operating as vertically-integrated companies with monopoly positions and most services functions were performed in-house. Negotiators focused on sectors in which discrete services were readily identifiable and business interest in liberalization was strong. The energy market has changed drastically since then, through privatization and deregulation as well as technological advances and customer services. These changes and new activities in the energy sector have "unbundled" energy services and opened up opportunities for brokers and traders to buy and sell power or fuel on the open market for resale to an energy end-user.

New moves are now being made toward clarification of the scope of energy services, in parallel with the sectoral negotiations. With the exception of Canada,[672] the Members' proposals reflect positively on the need for a new and comprehensive classification[673] and several classification schemes have been proposed.[674] The United States proposes that the Energy Sector be divided into five main categories of activities related to the following:

1. development and redevelopment of the energy resource
   evaluation and exploration
   drilling
   completion and development

[672] In the more narrowly defined oil and gas sector, Canada's view is that all services can be found in the W/120: *Communication from Canada—Initial Negotiating Proposal on Oil and Gas Services*, Council for Trade in Services, Special Session, S/CSS/W/58 (March 14, 2001), ¶ 10.

[673] *See* the following proposals: *Communication from Japan—Negotiation Proposal on Energy Services—Supplement*, Council for Trade in Services, Special Session, S/CSS/W/42/suppl.3 (October 4, 2001), ¶ 1; *Communication from Cuba—Negotiating Proposal on Energy Services*, Council for Trade in Services, Special Session, S/CSS/W/144 (March 22, 2002), ¶ 10; *Communication from Venezuela—Negotiating Proposal on Energy Services*, Council for Trade in Services, Special Session, S/CSS/W/69 (March 29, 2001), ¶ 25; *Communication from the United States—Classification of Energy Services* to the Committee on Specific Commitment's, S/CSC/W/27 (May 18, 2000), ¶ 13; and *Communication from the EC (and their Member States)—GATS 2000: Energy Services*, Council for Trade in Services, Special Session, S/CSS/W/60 (March 23, 2001), ¶¶ 3 and 6.

[674] The United States and the EC have drafted comparably comprehensive schemes, while Venezuela has tabled a less detailed framework.

leasing or rental
offshore support
research and development

2. construction and operation of an energy facility
   design and construction of facilities necessary to produce and transform energy
   development activities for energy facilities
   installation, operation, management and maintenance of energy facilities and equipment on a fee or contract basis
   production-related activities
   decommissioning, waste management, environmental, recycling and disposal activities
   research and development
3. energy networks
   design and construction of energy networks
   operation activities of energy networks, including transportation, transmission and distribution
   maintenance and repair
   installation and upgrading
   research and development
4. wholesale markets in energy
   energy-related storage
   wholesale customer activities
   trading brokering and sales
   commodity and risk management
   energy efficiency activities
   advisory activities
   supply of energy activities
   activities related to the wholesaling and marketing of energy equipment
5. the retail supply of energy
   retail customer activities
   trading, brokering and sales activities
   commodity and risk management
   retail customer efficiency activities
   advisory activities
   activities related to the retail sale and marketing of energy equipment.[675]

It also proposes that the comprehensive description of energy services be structured to respect the existing scheduled commitments by reference to an "*Energy Sector Index*."[676] In the form of a table, the *Index*, when completed, would indicate where each of the commercial activities could be located in relation to the W/120 classification, i.e. whether the activity is clearly included in the W/120, likely to be included but requires clarification, is not included in W/120 but should be included in a new classification for Energy Services, or may possibly not come within the scope of the GATS at all. The intention is that the *Index* would help avoid overlaps between existing W/120 energy-related classifications and new energy services classifications. It would also cover the full

[675] For further detailed breakdown of these main headings, *see Communication from the United States—Classification of Energy Services*, **S**/CSC/W/27, *supra* note 674, Attachment A.
[676] *Id.*, Attachment B.

chain of energy service and serve as the basis of a model schedule of the energy services sector.

In addition, the United States proposes that the comprehensive classification could serve as a basis for developing a *Reference Paper on Energy Services*, similar to the *Reference Paper*[677] that was developed during negotiations in the telecommunications sector. It would address regulations and technical requirements creating significant impediments to market entry and competition within a market that is highly regulated and undergoing deregulation, and also subject to large incumbent suppliers.[678] Discussions, both within the CSC, and informally among delegates, have progressed during 2001 and 2002.[679]

[677] *See* in regard to telecoms, the *Reference Paper on Basic Telecommunications*, *supra* note 263.

[678] *Communication from the United States—Energy Services*, Council for Trade in Services, Special Session, S/CSS/W/24 (December 18, 2000), ¶¶ 14–16.

[679] *See* discussion between the United States, EC, Venezuela and Brazil in Committee on Specific Commitments, *Report of the Meeting Held on May 9, 2001*, *supra* note 418, ¶¶ 26–30 and further comment by Venezuela in Committee on Specific Commitments, *Report of the Meeting Held on June 3, 2002*, Note by the Secretariat, S/CSC/M/23 (June 24, 2002), ¶ 8.

APPENDIX B

IMPLEMENTING THE DOMESTIC REGULATION MANDATE

Due to the potentially very wide-ranging effects of GATS Article VI:4, as well as to the fact that the GATS was a new and untested agreement, Members have proceeded very slowly and cautiously in their efforts to implement the mandate to develop any necessary disciplines on domestic regulation. Indeed, the development of rules for the removal of unnecessary domestic regulatory barriers presents Members with a huge challenge, not least because they are also forced to deal with the attitudes and practices of their own national regulatory authorities towards regulatory reform. It is against this background that the developments which have occurred in implementing the domestic regulation mandate in Paragraph 4 of GATS Article IV must be viewed. We turn first to consider some of the early work in this field.

1. Working Party on Professional Services[681]

Recognizing that government regulation is especially pervasive in professional services, the first step taken by Members in implementing the mandate of GATS Article VI:4 was the Ministerial *Decision on Professional Services*[682] and the establishment of the Working Party on Professional Services ("WPPS").[683] After several years of discussions, the WPPS succeeded in creating the voluntary *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector* ("MRA Guidelines"), circulated in May 1997,[684] followed by the mandatory *Disciplines on Domestic Regulation in the Accountancy Sector* ("Accountancy Disciplines"), in December 1998.[685] It is important to note that both the *MRA Guidelines* and the *Accountancy Disciplines* are very general in scope and almost certainly could be applied, at least in part, across a wide range of other services. For this reason, both are deserving of extensive further attention.

2. MRA Guidelines

According to the introduction to the *MRA Guidelines*, "The most common way to achieve recognition has been through bilateral agreements."[686] The *MRA Guidelines* further state that "There are differences in education and examination standards, experience requirements, regulatory influence and various other matters, all of which make

[681] The discussion in this and the following sections, up to the section on the Working Party on Domestic Regulation, is based on Dale B. Honeck, *Developing Regulatory Disciplines in Professional Services: the Role of the World Trade Organization* in GLOBALIZATION OF SERVICES: SOME IMPLICATIONS FOR THEORY AND PRACTICE 52–72 (Yair Aharoni and Lilach Nachum eds., 2000).

[682] *Decision on Professional Services*, S/L/3 (April 4, 1995). The WTO negotiations on telecommunications, and to some degree those on financial services, also considered certain regulatory aspects related to GATS *Article VI:4*, as noted in the paper prepared by the WTO Secretariat, *International Regulatory Initiatives in Services*, S/C/W/97 (March 1, 1999), 2–4, ¶¶ 4–15.

[683] An overview of WPPS activities can be found in the reports to the WTO Council for Trade in Service, series S/WPPS/1–4, while detailed descriptions can be found in the Minutes of the meetings, series S/WPPS/M/1–25.

[684] *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector ("MRA Guidelines")*, S/L/38 (May 28, 1997).

[685] *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 (December 17, 1998).

[686] *MRA Guidelines*, *supra* note 684, second full para.

implementing recognition on a multilateral basis extremely difficult."[687] As required by Members, the *MRA Guidelines* are entirely voluntary in terms of application.

The core elements of the *MRA Guidelines*, in addition to a reminder of the notification requirements under GATS *Article VII*, are recommendations on the form and coverage of MRAs. The *MRA Guidelines* state that MRAs should clearly identify: the participants; purpose of the agreement; scope of the agreement; details of the mutual recognition provisions, including eligibility requirements for recognition as well as specification of the conditions under which any additional supplementary requirements may be applied; mechanisms for implementation; further licensing or related requirements; and terms for revision of the agreement.

3. Accountancy Disciplines

The WTO's Council for Trade in Services adopted the *Accountancy Disciplines* after agreement had been reached within the WPPS. The *Accountancy Disciplines* are very concise, comprising only twenty-six paragraphs in four pages (six pages with the appendix). They are divided into eight sections, i.e. I Objectives, II General Provisions, III Transparency (five measures), IV Licensing Requirements (six measures), V Licensing Procedures (five measures), VI Qualification Requirements (three measures), VII Qualification Procedures (three measures), and VIII Technical Standards (two measures).

The main achievements of the *Accountancy Disciplines*, relative to the current GATS Article VI:4 provisions are found in Paragraphs 1, 2, 5 and 6. Paragraph 1 (i.e. section I Objectives), for example, confirms that GATS Article VI disciplines are separate and distinct from measures under GATS Article XVI and GATS Article XVII. Paragraph 2, (section II General Provisions) is the most important element of the disciplines, as it mandates a "necessity test" for all applicable regulatory measures, i.e. the requirement that regulatory measures "shall not be more trade-restrictive than necessary to fulfil a specified legitimate objective."[688] Examples of such legitimate objectives mentioned in the disciplines are the protection of consumers (including all users of accounting services and the public generally), the quality of the service, professional competence and the integrity of the profession.[689]

In Paragraph 5 (under Section III, Transparency) of the *Accountancy Disciplines*, Members are required to explain upon request, the specific objectives intended by their accountancy regulations.[690] In Paragraph 6 (also under section III Transparency), Members are asked to provide an opportunity for trading partners to comment upon proposed accountancy regulations, and to give consideration to such comments.[691] Other important provisions of the *Accountancy Disciplines* include the requirement in section IV (Licensing Requirements) that WTO Members consider less trade restrictive alternatives to residency requirements,[692] the requirement in section V (Licensing Procedures) for reasonable documentation requirements[693] and the requirement in section VI (Qualification Requirements) that account be taken of qualifications earned abroad on the basis of equivalency.[694]

[687] *Id*.
[688] *Id.*, Section II, ¶ 2.
[689] *Id*.
[690] *Id.*, Section III, ¶ 5
[691] *Id.*, ¶ 6.
[692] *Id.*, Section IV, ¶ 9.
[693] *Id.*, Section V, ¶ 5.
[694] *Id.*, Section VI, ¶ 19.

The December 1998 *Decision* of the Council for Trade in Services adopting the *Accountancy Disciplines*[695] is composed of three elements. The first element is a statement to the effect that the Council has adopted the disciplines and that they are applicable to Members that have scheduled specific commitments on accountancy.[696]

The second element is the statement that Members will continue their work on domestic regulation, aiming to develop general disciplines for professional services while retaining the possibility to develop additional sectoral disciplines.[697] Before the end of the current round of services negotiations, which commenced in January 2000 (and were originally due for completion by January 1, 2005, but were subsequently extended) all the disciplines developed by the WPPS are to be integrated into the GATS and will then become legally binding. Consequently, the *Accountancy Disciplines* did not take immediate legal effect upon their adoption back in 1998. The third, and final, element is a "standstill provision," effective immediately, under which all WTO Members, including those without GATS commitments in the accountancy sector, have agreed, consistent with their existing legislation, not to take new measures which would be in violation of the *Accountancy Disciplines*.[698]

4. Working Party on Domestic Regulation

In April 1999, WTO Members initiated a major expansion of their efforts to develop regulatory disciplines under GATS Article VI:4, following adoption of the *Decision on Domestic Regulation* by the Council for Trade in Services.[699] That same *Decision* replaced the WPPS with a new Working Party on Domestic Regulation ("WPDR"), mandated to develop generally applicable disciplines, as well as disciplines for individual sectors or groups of sectors, including professional services, as appropriate.

The initial stage of work of the WPDR focused on the discussion of general concepts related to the creation of regulatory disciplines, especially the creation of horizontal disciplines potentially applicable to all the services sectors covered by the GATS.[700] As suggested by one of the background documents prepared by the WTO Secretariat,[701] the discussion centered upon four major topics, i.e. necessity, transparency, equivalency and international standards. To assist the discussions, the WPDR decided to create a *Checklist of Issues*,[702] as well as a *Summary of Discussions on the Checklist of Issues for WPDR* ("*Summary of Discussions*").[703]

[695] Council for Trade in Services, *Decision on Disciplines Relating to the Accountancy Sector* S/L/63 (December 15, 1998) *("Decision on Accountancy Disciplines")*.

[696] *Id.*, ¶ 1.

[697] *Id.*, ¶ 2.

[698] *Id.*, ¶ 3.

[699] Council for Trade in Services, *Decision on Domestic Regulation*, S/L/70 (April 26, 1999).

[700] An overview of WPDR activities can be found in the annual reports to the WTO Council for Trade in Services, series S/WPDR/1–4, while detailed descriptions can be found in the Minutes of the meetings, series S/WPDR/M/1–20.

[701] *Article VI:4 Disciplines: Background Note*, *supra* note 202, ¶ 16, states, "On the basis of the text of Article VI:4, of the accountancy disciplines and of other WTO Agreements on regulation in goods (TBT and SPS), it is possible to identify the following policy areas, where domestic regulation disciplines in services could be developed: necessity, transparency, equivalence and international standards."

[702] *Checklist of Issues*, the revised version of which was circulated as an Informal Paper to the WPDR, Job No 5067/Rev.1 (June 19, 2001). (Unpublished, informal paper, not in the public domain.) *("Checklist of Issues")*

[703] *Summary of Discussions on the Checklist of Issues for the WPDR*, includes both formal discussions (as recorded in the WPDR Minutes) and informal discussions, on a non-attributed basis. It was first attached to the minutes of the WPDR meetings, from S/WPDR/M/8 to M/13 (the latter dated November 21, 2001).

(a) General Issues. Among the most important of the general issues discussed by the WPDR is the coverage of GATS Article VI:4 vis-a-vis GATS Article XVI and GATS Article XVII.[704] As already noted, nearly all WTO Members believe that Paragraph 4 of GATS Article VI refers only to non-discriminatory measures that are not already covered under the GATS provisions regarding market access and national treatment. Nonetheless, the determination of where a specific measure should be categorized can be difficult, and sometimes must be done on a case-by-case basis. An observation made by the Secretariat was that licensing systems could be composed of both kinds of measures and that a distinction needed to be made in regard to categorization between the overall licensing system and its various components.[705]

(b) Necessity. The necessity test in section II, Paragraph 2, of the *Accountancy Disciplines* is one of the most important of all the provisions contained therein.[706] It has also been one of the most difficult and controversial issues for the WPDR to address. The concept of a legitimate objective was intensively discussed in the early stages of the WPDR work, but Members eventually decided it was not necessary to create an exhaustive listing of legitimate objectives, instead noting that the WTO Appellate Body had never questioned the legitimate objectives set by governments.[707] Another important aspect for discussion has been criteria for the necessity test, including the definition of such terms as "not more trade restrictive than necessary."[708]

(c) Transparency. This issue has received the greatest level of support in the WPDR, both from developed and developing country Members but remains somewhat controversial. While the benefits of transparency are widely acknowledged, concerns have been expressed over the administrative burden of any additional GATS transparency requirements, especially those related to allowing prior comments on proposed regulations. Related aspects that have been discussed include the adequacy of existing GATS notification requirements, as well as the objectives and orientation of further transparency requirements (i.e. toward suppliers, consumers, or governments).[709]

(d) Equivalence/International Standards. Until the second half of 2002, the issues of equivalence and international standards received only minimal attention in the WPDR. In regard to the latter, some of this is undoubtedly due to the relatively small number of international services standards created to date, and the hesitation of governments

It was subsequently circulated separately as an Informal Paper to the WPDR, the latest version of which is JOB(02)/3/Rev.7 (September 23, 2003). (Unpublished, informal paper, not in the public domain.)

[704] The report of the WPPS to the Council for Trade in Services on the development of the *Decision on Accountancy Disciplines* included an informal note by the Chairman entitled *Discussion of Matters Relating to Articles XVI and XVII of the GATS in connection with the Disciplines on Domestic Regulation in the Accountancy Sector.* The note states: "It was observed that the new disciplines developed under Article VI:4 must not overlap with other provisions already existing in the GATS, including Articles XVI and XVII, as this would create legal uncertainty." Minutes of the Meeting of the WPDR, S/WPPS/4 (December 10, 1998), at 9–10, ¶ 2.

[705] *Minutes of the Meeting of the WPDR*, S/WPDR/M/13 (November 21, 2001), 2, 9. See also *Minutes of the Meeting of the WPDR*, S/WPDR/M/12 (August 16, 2001), pp. 4–6.

[706] *Decision on Accountancy Disciplines*, *supra* note 695, Section II, ¶ 2.

[707] *Minutes of the Meeting of the WPDR*, S/WPDR/M/10 (May 10, 2001), 4–6. See also *Minutes of the Meeting of the WPDR*, S/WPDR/M/9 (March 12, 2001), 2–3. See S/WPDR/W/96, 4–6, ¶¶ 17–23 for information on the concept of necessity in other WTO Agreements.

[708] *Minutes of the Meeting of the WPDR*, S/WPDR/M/15 (April 10, 2002), 8–9.

[709] *Id.*, 9–11.

to create rules regarding something which largely does not yet exist. In addition, some WTO Members have expressed concern over the lack of involvement of many developing countries in the creation of international standards, typically due to a shortage of resources or technical expertise.[710]

The issue of equivalence, which is probably more accurately termed as the lack of recognition of qualifications, has received increasing attention, especially from developing country Members. In connection with the current services negotiations, India circulated a negotiation proposal in which recognition issues are a prominent feature.[711] This has been followed by comments from a growing number of Members in the WPDR, to the point where the issue occupies several pages of the *Summary of Discussion*.[712]

(e) Professional Services. The December 1998 *Decision* of the Council for Trade in Services, which adopted the *Accountancy Disciplines*, states that "the Working Party shall aim to develop general disciplines for professional services, while retaining the possibility to develop or revise sectoral disciplines."[713] At the time, Members discussed sending the *Accountancy Disciplines* and *MRA Guidelines* to other professions for discussion and consideration. Progress, however, was slow, as Members instead focused their attention on issues related to the development of horizontal disciplines for services as a whole.

To help advance the work on professional services, in 1999 the delegation of Hong, Kong, China submitted two informal papers.[714] Following discussions of the papers, the WPDR decided at its meeting in July 1999 that Members would consult on a voluntary basis with their domestic professional associations, concerning the potential applicability of the accountancy disciplines to their professions.[715] In the first of their two papers, Hong Kong, China suggested three questions for Member government to ask their domestic professional services associations regarding the potential applicability of elements of the *Accountancy Disciplines* to other professions. The questions were as follows:

(a) Are there any elements of the disciplines, which you feel need to be strengthened? If so, please set them out and why?
(b) Are there any points or areas which you consider are missing from the disciplines and which you feel should be included? If so, please indicate clearly what these are and why they should be included; and
(c) Are there any elements of the disciplines which you consider are not appropriate for your profession? If so, please set out which and why you consider they are inappropriate. Please also suggest what changes would make them appropriate.

[710] *Summary of Discussions, supra* note 320. On international standards for services, see also Minutes of the Meeting of the WPDR, S/WPDR/M/9 (March 12, 2001), 3, ¶¶ 13–15.
[711] *Communication from India: Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services (GATS)*, Council for Trade in Services, Special Session, S/CSS/W/12 (November 24, 2000).
[712] *Summary of Discussions, supra* note 320. See also Minutes of the Meeting of the WPDR, S/WPDR/M/18 (December 3, 2002), 7–8, ¶¶ 50–52 as well as Minutes of the Meeting of the WPDR, S/WPDR/M/20 (March 31, 2003), 6–7.
[713] *Decision on Accountancy Disciplines*, *supra*, note 695, ¶ 2.
[714] Informal Papers to the WPDR (*Communication from Hong Kong, China—Horizontal Work in Professional Services*, Job. No. 2784 (May 12, 1999) and Job No. 3547 (June 21, 1999). (Unpublished, informal papers, not in the public domain.)
[715] *Minutes of the Meeting of the WPDR*, S/WPDR/M/2 (September 2, 1999), 2, ¶¶ 8–9.

The WTO Secretariat subsequently compiled a synthesis of Members' responses, as notified to the WTO, circulated as an informal paper, under the heading: *Synthesis of Results to Date of the Domestic Consultations in Professional Services*. (*Synthesis of Results*). As of August 2004, responses had been received regarding seventeen professions, from fourteen WTO Members (counting the EU as one response), the vast majority of which indicated that the *Accountancy Disciplines* could be applied to other professional services, with perhaps some modifications to accommodate sectoral specificities.[716]

At the October 2002 meeting of the WPDR,[717] Members authorized the WTO Secretariat to begin consultations with a number of international professional services associations, which they had selected earlier, regarding the suitability of the *Accountancy Disciplines* for other professions. The Secretariat has reported on the progress on the consultations at subsequent WPDR meetings.[718]

(f) Regulatory Examples. The second phase of WPDR activities has been an attempt to move away from the discussion of abstract concepts to the analysis of concrete examples of the types of measures to which regulatory disciplines could be applied. This important shift in focus is recorded in the Minutes of the WPDR meeting of March 12, 2002, as follows:

> The Chairperson . . . observed that there would appear to be a general desire for the Working Party to adopt a more focused approach to its work, and that an important part of this would involve engaging more substantively in a review of the actual regulatory issues that related to Article VI:4.[719]

Members had earlier agreed to have the WTO Secretariat list examples of the kinds of measures that would be addressed by disciplines under GATS Article VI:4, based on contributions by Members and a review of the Working Party on Professional Services accountancy materials by the Secretariat. The Secretariat was instructed to list specific measures not already found in the *Accountancy Disciplines*, that were also not GATS Article XVI or GATS Article XVII measures. The WTO Secretariat then prepared an informal paper, *Examples of Measures to be Addressed by Disciplines under GATS Article VI:4* ("*Examples Paper*").[720]

In examining the measures listed in *Examples Paper*, Members agreed to ask the following four questions when looking at each measure individually, i.e.:

[716] The most recent version is circulated as an Informal Paper to the WPDR, JOB(02)/204/Rev.1 (February, 21 2003). (Unpublished, informal paper, not in the public domain.) Formal responses have been received from Canada, S/WPDR/W/13 (March 16, 2001) and W/22 (February 10, 2003); China W/20 (December 3, 2002); Chinese Taipei, W/21 (January 24, 2003); the European Communities, W/5 (May 19, 2000); Hong Kong, China, W/3 (April 28, 2000); Japan, W/6 (May 19, 2000); Korea, W/10 (October 2, 2000); Mexico, W/12 (March 9, 2001); Poland, W/7 (May 23, 2000); Switzerland, W/16 (September 4, 2001); and Thailand, W/18 (September 28, 2001).

[717] *Minutes of the Meeting of the Working Party on Domestic Regulation*, WPDR/M/18 (December 3, 2002), 7, 47.

[718] *Minutes of the Meeting of the WPDR*, February 24, 2003, S/WPDR/M/20 (March 31, 2003), 3, ¶ 18, and *Minutes of the Meeting of the WPDR*, May 15, 2003, S/WPDR/M/21/Rev.1 (June 25, 2003), 14, ¶ 81. The listing of international professional services associations selected by WTO Members for the Secretariat to consult is contained in the Informal Paper to the WPDR, *International Organizations in Professional Services*, JOB(01)/98 (June 2001). (Unpublished, informal paper, not in the public domain).

[719] *Minutes of the Meeting of the WPDR*, March 12, 2002, S/WPDR/M/15 (April 10, 2002), 1, ¶ 6.

[720] The latest version is an Informal Paper to the WPDR, JOB(02)/20/Rev. 7 (September 22, 2003). (Unpublished, informal paper, not in the public domain.)

(a) Is the measure already covered by Articles XVI and/or XVII?
(b) If not, is it addressed by any other provisions of the Agreement (e.g. Articles II, III, VIII, IX)?
(c) If not, does it fall clearly within the scope of Article VI, in particular VI:4 (licensing requirements, qualification requirements, technical standards, licensing procedures and qualification procedures)?; and
(d) If so, is the measure adequately addressed by the relevant provisions of the *Accountancy Disciplines*, or are modifications required?[721]

The later versions of the *Examples Paper* themselves contain a summary of the WPDR discussions on regulatory examples which, as of the fifth revision, had grown to seven pages. Among the types of examples most frequently discussed have been residency requirements, sub-federal measures and procedures for the recognition of qualifications.

(g) Draft Disciplines. At the WPDR meeting in February 2003, the delegation of Japan introduced an informal paper for discussion, entitled *Basic Outline of a Draft Annex on Domestic Regulation*.[722] The delegation stated that, following an extensive discussion of regulatory examples, it would be useful to start discussing disciplines on the basis of concrete provisions. Members could begin discussing possible disciplines on a text basis, and Japan hoped their paper would be useful to help stimulate further thinking in that regard.

Japan also stated that their draft Annex is based largely on the *Accountancy Disciplines* but that some elements were new, such as a paragraph regarding measures taken after granting a license or qualification, as well as a section on administrative guidance.[723] More importantly, however, Paragraph 2 of the *Accountancy Disciplines* has been modified to replace the reference to "legitimate objectives" with "national policy objectives," a politically more acceptable term found in the Preamble to the GATS.[724]

In July 2003, the EC circulated a *Proposal for Disciplines on Licensing Procedures*.[725] As indicated by the title, this formal paper concerns proposed disciplines only for licensing procedures. When introducing the paper at the formal meeting of the WPDR, the EC noted that licensing procedures are relevant to all services sectors where licences are required, and could be a particular burden in sectors dominated by small and medium-sized enterprises or individual service suppliers. The EC approach is not to address the substance of regulations, or the substantive requirements to be fulfilled to obtain a licence, but to focus on the procedures. Their approach is limited, but the EC also stated

[721] *Minutes of the WPDR meeting of February 24, 2003*, S/WPDR/M/19 (January 29, 2003), 2, ¶ 11.
[722] *Informal Paper to the WPDR*, *Basic Outline of a Draft Annex on Domestic Regulation* (*Communication from Japan*), JOB(03)/45 (March 3, 2003). (Unpublished, informal paper, not in the public domain.) Japan's introduction of the paper, and its initial responses to the comments received, can be found in the Minutes of the Meeting of the WPDR, February 24, 2003, S/WPDR/M/20, *supra* note 335, at 2–3, ¶¶ 7–10.
[723] *Id.*, ¶ 9. In a paragraph by paragraph comparison, Japan's draft Annex appears to have excluded ¶¶ 10–12 of the *Accountancy Disciplines*, *supra* note 695, regarding licensing requirements, ¶ 14 regarding licensing procedures, ¶¶ 19 and 21 regarding qualification requirements and ¶ 26 on technical standards. Perhaps the most significant of these omissions is the fact that the Japanese draft Annex makes no reference to ¶ 19 of the *Accountancy Disciplines*, requiring that competent authorities take account of qualifications acquired in the territory of another Member.
[724] In regard to use of the term "national policy objectives," see *Article VI:4 Disciplines: Background Note*, *supra* note 202, at 1, ¶ 2.
[725] *Communication from the European Community and its Member States, Proposal for Disciplines on Licensing Procedures*, S/WPDR/W/25 (July 10, 2003).

that they did not intend to exclude any other issues under the mandate of Article VI:4.[726] In addition to provisions from the *Accountancy Disciplines*, the paper relies upon measures from other WTO agreements, most notably the *Agreement on Import Licensing Procedures* and the *Reference Paper for Telecommunication Services*. Members have commented extensively on the EC paper at WPDR meetings.[727]

[726] *Minutes of the Meeting of the WPDR*, July 1, 2003, S/WPDR/M/22 (September 22, 2003).
[727] *See, e.g., Minutes of the Meeting of the WPDR*, November 27, 2003, S/WPDR/M/23 (November 27, 2003).

BIBLIOGRAPHY

Books and monographs

ABBOTT, FREDERICK M., LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM (The Hague, Dordrecht: Kluwer Law International, 1995)

ARUP, CHRISTOPHER, THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY (Cambridge: Cambridge University Press, 2000)

BUSINESS GUIDE TO THE WORLD TRADING SYSTEM, 2nd edition (Geneva, London: International Trade Centre UNCTAD/WTO and the Commonwealth Secretariat, 1999)

EECKHOUT, PIET, THE EUROPEAN INTERNAL MARKET AND INTERNATIONAL TRADE (Oxford: Clarendon Press, 1994)

FEKETEKUTY, GEZA, INTERNATIONAL TRADE IN SERVICES: AN OVERVIEW AND A BLUEPRINT FOR NEGOTIATIONS (Cambridge, MA: American Enterprise Institute/Ballinger,1988)

GHOSH, BIMAL, GAINS FROM GLOBAL LINKAGES: TRADE IN SERVICES AND MOVEMENTS OF PERSONS (London: Macmillan Press in conjunction with the International Organization for Migration, 1997)

HOEKMAN, BERNARD & MICHEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 2nd edition (Oxford: Oxford University Press, 2001)

JACKSON, JOHN H., THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS, 2nd edition (Cambridge, MA, and London: The MIT Press, 1997)

KAKABADSE, MARIO A., INTERNATIONAL TRADE IN SERVICES: PROSPECTS FOR LIBERALIZATION IN THE 1990's, Atlantic Paper No. 64 (New York: Croom Helm, for the Atlantic Institute for International Affairs)

KRAJEWSKI, MARKUS, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES (The Hague, London, New York: Kluwer Law International, 2003).

MATHIS, JAMES H., REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT (The Hague: TMC Asser Press, 2002)

NICOLAIDES, PHEDON, LIBERALIZING SERVICE TRADE: STRATEGIES FOR SUCCESS, (London: Chatham House Papers, 1989)

SAUVÉ, PIERRE AND ROBERT M. STERN (EDS.), GATS 2000, NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION (Washington, D.C.: The Brookings Institution, 2000)

MICHAEL J. TREBILCOCK AND ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE, 2nd edition, chapter 11 (London: Routledge, 1999)

Periodicals and contributions to edited works:

Abeyratne, R.I.R. *The Settlement of International Aviation Disputes under the GATS and the ICAO Council—A Comparative Analysis*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, STUDIES IN TRANSNATIONAL ECONOMIC LAW, 397 (Ernst-Ulrich Petersmann, ed. 1997)

Abu-Akeel, Aly K., *The MFN as it Applies to Service Trade: New Problems for an Old Concept*, 33(4) Journal Of World Trade 103 (1999)

Adolf, Huala, *Financial Services Agreement of the GATS: the developing countries' perspective 6(6)* INTERNATIONAL TRADE LAW & REGULATION 207 (2000)

Altinger, L. and A. Endes, *The Scope and Depth of GATS Commitments* vol. 19 THE WORLD ECONOMY 307 (1996)

Ascher, Bernard, *Multilateral Negotiations on Trade in Services: Concepts, Goals, Issues*, 19 GA. J. INT'L & COMP. L. 392, 395 (1989)

Bagheri, Mahmood and Chizu Nakajima, *Optimal Level of Financial Regulation Under the GATS: A Regulatory Competition and Cooperation Framework for Capital Adequacy and Disclosure of Information*, 5(2) JOURNAL OF INTERNATIONAL ECONOMIC LAW 507 (2002)

Beviglia Zampetti, Americo, *Market Access through Mutual Recognition: the Promise and Limits of GATS Article VII* in GATS 2000, NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 283–306 (Pierre Sauvé and Robert M. Stern eds. 2000)

Bhatnagar, Pradip, *Telecom Reforms in Developing Countries and the Outlook for Electronic Commerce*, 2(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW 695 (1999)

Brock, William E., *A Simple Plan for Negotiating Trade in Services*, 5 THE WORLD ECONOMY (1982), 229–240, 238–239

Bronckers, Marco C.E.J., *WTO—Appellate Body ruling: Canadian measures concerning periodicals*, 3(5) INTERNATIONAL TRADE LAW & REGULATION S87 (1997)

Choi, Byung-il, *Treatment of Autonomous Liberalization in the WTO New Service Round: to Give Credit is to Get More*, 35(2) JOURNAL OF WORLD TRADE 363 (2001)

Cooke, John, *Insurance in the WTO Services Negotiations: Proposal for a Model Schedule of GATS Commitments*, 8(2) INTERNATIONAL TRADE LAW & REGULATION 68 (2002)

Deselaers, Wolfgang and Michael Konig, *The WTO Millennium Round and the Audiovisual Sector*, 5(6) INTERNATIONAL TRADE LAW & REGULATION 147 (1999)

Eeckhout, Piet, *Constitutional Concepts for Free Trade in Services*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES (Gráinne de Búrca and Joanne Scott eds. 2001)

Farris, William and Mitchell Stocks, *The Future for Telecoms Companies in WTO China* 20(9) INTERNATIONAL FINANCIAL LAW REVIEW 56 (2001)

Feketekuty, Geza, *Assessing and Improving the Architecture of GATS* in GATS 2000, NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 85–111 (Pierre Sauvé and Robert M. Stern eds. 2000)

Footer, Mary E., *GATT and the Multilateral Regulation of Banking Services*, 27(2) THE INTERNATIONAL LAWYER 343 (1993)

Footer, Mary E., *Global and Regional Approaches to the Regulation of Trade in Services*, 43 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 661 (1994)

Footer, Mary E., *The International Regulation of Trade in Services Following Completion of the Uruguay Round*, 29(2) THE INTERNATIONAL LAWYER 453 (1995)

Footer, Mary E., *The General Agreement on Trade in Services: taking stock and moving forward*, 29(1) LEGAL ISSUES OF EUROPEAN INTEGRATION 7 (2002)

Gibbs, Murray, *Continuing the International Debate on Services* 19 JOURNAL OF WORLD TRADE LAW 199, 200 (1985)

Gonzalez Durantez, Miriam, *Telecommunications and GATS 2000* 5(6) INTERNATIONAL TRADE LAW & REGULATION 155 (1999)

Greer, Ben, *The Dangers of Doha*, 22 EUROPEAN LAWYER 10 (2002)

Guild, Elspeth and Philip Barth, *The Movement of Natural Persons and the GATS: a UK Perspective and European Dilemmas*, 4(3) EUROPEAN FOREIGN AFFAIRS REVIEW 395 (1999)

Guild, Elspeth and Claire Taylor, *Immigration and Trade in Services: the Tale of GATS*, LAWYERS' EUROPE 2 (1999/00)

Honeck, Dale B., *Developing Regulatory Disciplines in Professional Services: the Role of the World Trade Organization* in GLOBALIZATION OF SERVICES: SOME IMPLICATIONS FOR THEORY AND PRACTICE (Yair Aharoni and Lilach Nachum eds. 2000)

Hubner, Wolfgang & Pierre Sauvé, *Liberalization scenarios for international air transport*, 35(5) JOURNAL OF WORLD TRADE 973 (2001)

Karsenty, Guy *Assessing Trade in Services by Mode of Supply* in GATS 2000, NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 33–56 (Pierre Sauvé and Robert M. Stern eds. 2000)

Kennedy, Matthew, *Services join GATT: an analysis of the General Agreement on Trade in Services*, 1(1) INTERNATIONAL TRADE LAW & REGULATION 11 (1995)

Kleinfeld, George, *U.S. Federalism and Effective Market Access for Professional Services—Tempering Promises with Reality*, 6(6) INTERNATIONAL TRADE LAW & REGULATION 175 (2000)

Komuro, Norio, *Japan's Safeguard Law and Practice*, 35(5) JOURNAL OF WORLD TRADE 847 (2001)

Krajewski, Markus, *Public Services and Trade Liberalization—Mapping the Legal Framework*, 6(2) JOURNAL OF INTERNATIONAL ECONOMIC LAW 341(2003)

Lazar, Fred, *Services and the GATT: U.S. Motives and a Blueprint for Negotiations*, 24 JOURNAL OF WORLD TRADE LAW, 135 (1990)

Lee, Yong-Shik, *Emergency Safeguard Measures under Article X in GATS* 33:4 JOURNAL OF WORLD TRADE 47–59 (1999)

Leroux, Eric H., *Trade in Financial Services under the World Trade Organization*, 36(3) JOURNAL OF WORLD TRADE 413 (2002)

Low, Patrick, *Comment* on Rudolf Adlung, *Services Trade Liberalization from Developed and Developing Country Perspectives* in GATS 2000, NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 136–139 (Pierre Sauvé and Robert M. Stern eds. 2000)

Low, Patrick and Aaditya Mattoo, *Is There a Better Way? Alternative Approaches to Liberalization under GATS* in GATS 2000, NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 449–472 (Pierre Sauvé and Robert M. Stern eds. 2000)

Luff, David, *International Trade Law and Broadband Regulation: towards convergence? 3(2)* JOURNAL OF NETWORK INDUSTRIES 239 (2002)

Maberry, Stuart, *WTO Panel: Interim Ruling on the Banana Dispute*, 3(3) INTERNATIONAL TRADE LAW & REGULATION S46 (1997)

MacMillan, Fiona, *The World Trade Organisation and the Regulation of Trade in Environmental Services*, 7(5) INTERNATIONAL TRADE LAW & REGULATION 127 (2001)

Mattoo, Aaditya *National Treatment in the GATS—Corner-Stone or Pandora's Box?*, 31(1) JOURNAL OF WORLD TRADE 107 (1997)

Mitchell, Andrew D., *Towards Compatibility: the Future of Electronic Commerce Within the Global Trading System*, 4(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW 683 (2001)

Nicolaïdes, Kalypso and Joel P. Trachtman, *From Policed Regulation to Managed Recognition in GATS*, in GATS 2000, NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 241–282 (Pierre Sauvé and Robert M. Stern eds. 2000)

Norton, Simon, *Liberalisation in the International Telecommunications Market: the General Agreement on Trade in Services* 4(6) COMMUNICATIONS LAW 223 (1999)

Orava, Steve, *Commercial reality (or Lack Thereof) in the Classification and Definition of Services in the WTO GATS Negotiations*, 8(1) International Trade Law & Regulation 5 (2002)

Randhawa, P.S. *Punta del Este and After: Negotiations on Trade in Services and the Uruguay Round*, 21 JOURNAL OF WORLD TRADE LAW 163 (1987)

Ruth, D.A., *The United States-Canada Services Agreement: Review and Assessment* in THE CANADA-UNITED STATES FREE TRADE AGREEMENT: THE IMPACT ON SERVICE INDUSTRIES (Earl H. Fry and Lee H. Radebaugh, eds. 1988)

Reyna, Jimmie V., *Services*, in Terence P. Stewart, ed., THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992), VOL II: COMMENTARY, (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1993)

Sauvé, Pierre, *Assessing the General Agreement on Trade in Services—Half-Full or Half-Empty?* 29(4) JOURNAL OF WORLD TRADE 125 (1995)

Sauvé, Pierre, *Developing Countries and the GATS 2000 Round*, 34(2) Journal Of World Trade 85 (2000)

Sauvé, Pierre and Robert M. Stern, *New Directions in Services Trade Liberalization: An Overview* in GATS 2000, NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 1–30 (Pierre Sauvé and Robert M. Stern eds. 2000)

Sapir, André *The General Agreement on Trade in Services: from 1994 to the year 2000* 33(1) JOURNAL OF WORLD TRADE 51 (1999)

Sen, Rahul, *Liberalisation of International Trade in Financial Services in Southeast Asia*, 4(5) JOURNAL OF INTERNATIONAL FINANCIAL MARKETS 170 (2002)

Stephenson, Sherry M., *Regional Versus Multilateral Liberalization of Services*, 1(1) WORLD TRADE REVIEW 187 (2002)

Street, Paul, *Global Water Markets and the General Agreements on Trade in Services*, 13(4) Water Law 259 (2002)

Wang, Yi, *Most-Favoured-Nation Treatment under the General Agreement on Trade in Services—And Its Application in Financial Services*, 30(1) JOURNAL OF WORLD TRADE 91 (1996)

Zdouc, Werner, *WTO Dispute Settlement Practice Relating to the GATS* 2(2) JOURNAL OF INTERNATIONAL ECONOMIC LAW 295 (1999)

Reports, working papers, etc:

Elements of a Conceptual Framework for Trade in Services, OECD, Paris (1987)

Services and the Development Process, 42 U.N. Doc. TD/B/1008/Rev.1, UNCTAD Secretariat, Geneva (1985)

European Community Services Group (ECSG) *The European Service Sector's View of the Liberalization of Trade in Services*, paper prepared for the European Commission, April 14, 1987

Golt, Stanley, *Trade Issues in the Mid-1980's*, British-North America Committee, November 1988

Hoekman, Bernard, *Developing Countries and the Uruguay Round: Negotiating on Services*, WORLD BANK POLICY RESEARCH WORKING PAPER NO. 1220, 4 (1993)

Iida, Keiya and Julia Nielson, TRANSPARENCY IN DOMESTIC REGULATION: PRACTICES AND POSSIBILITIES, TD/TC/WP(2001)31/FINAL, OECD, Paris (2002)

Mario A. Kakabadse, INTERNATIONAL TRADE IN SERVICES: PROSPECTS FOR LIBERALIZATION IN THE 1990'S, Atlantic Paper No. 64 (New York: Croom Helm, for the Atlantic Institute for International Affairs), 60

Nielson, Julia, Carole Pellegrino, Rosemary Morris and Rachel Thompson, *Using "Cluster" Approaches to Specific Commitments for Interdependent Services*, in TRADE IN SERVICES: NEGOTIATING ISSUES AND APPROACHES, OECD, Paris (2001)

Roy, Martin, TRADE IN SERVICES: A ROADMAP TO GATS MFN EXEMPTIONS, TD/TC/WP(2001)21/FINAL, OECD, Paris (2001)

Tuerk, Elisabeth and Robert Speed, CREDIT FOR AUTONOMOUS LIBERALIZATION: BENEFITS AND PITFALLS FOR DEVELOPING COUNTRIES (CIEL, January 22, 2003), unpublished paper, available from CIEL, Geneva, or at http://www.ciel.org.

WTO Agreements and Public health—A JOINT STUDY BY THE WHO AND THE WTO SECRETARIAT, Geneva (2002)

CHAPTER 20

FINANCIAL SERVICES

Sydney J. Key*

TABLE OF CONTENTS

I. Introduction 956
II. Uruguay Round Negotiations 958
A. The "Free-Rider" Issue 959
B. The Interim Agreement on Financial Services 960
C. The 1997 Agreement 961
III. GATS Framework Agreement 962
A. Liberalization of Capital Movements 962
B. GATS Annex on Financial Services 964
1. The Prudential Carve-Out 964
2. Recognition of Prudential Measures 966
3. Specific Expertise in Dispute Settlement 968
4. Definition and Coverage of Financial Services 968
IV. Specific Commitments and MFN Exemptions 969
A. National Treatment and Market Access 971
1. Establishment of a Commercial Presence (Mode 3) 971
2. Cross-Border Services (Modes 1 and 2) 973
3. Temporary Presence of Natural Persons (Mode 4) 975
B. Additional Commitments 976
C. MFN Exemptions 977
V. The Doha Round and Beyond 978
A. National Treatment and Market Access 979
B. Nondiscriminatory Structural Barriers 980
1. Regulatory Transparency 981
2. "Effective Market Access" 982
C. Prudential Measures 983
VI. Conclusion 984

Appendix A. Understanding on Commitments in Financial Services 985
Appendix B. Definition of "Financial Services" in GATS Annex on Financial Services 987

* Sydney J. Key is on the staff of the Federal Reserve Board's Division of International Finance in Washington, D.C. The views expressed by the author in this chapter should not be interpreted as representing the views of the Board of Governors of the Federal Reserve System or anyone else on its staff. This chapter is adapted from two of the author's previous works: FINANCIAL SERVICES IN THE URUGUAY ROUND AND THE WTO (Occasional Paper 54, Group of Thirty, 1997); and THE DOHA ROUND AND FINANCIAL SERVICES NEGOTIATIONS (AEI Press, 2003) <www.aei.org/book456>.

I. Introduction

For the financial services sector, the World Trade Organization ("WTO") provides, for the first time, a high-level multilateral forum in which the primary goal is to reduce or eliminate trade barriers in order to promote competitive markets and thereby support economic growth and development. The new prominence of this goal at the multilateral level complements the intensive work on strengthening domestic financial systems that is taking place in a variety of other international fora, ranging from the International Monetary Fund ("IMF") to specialized bodies such as the Basel Committee on Banking Supervision.[1] This work includes promoting cooperation and coordination among financial supervisors and setting voluntary—but widely accepted—international minimum standards and codes of good practices.[2] It also includes IMF and World Bank "surveillance" of domestic financial systems, which, *inter alia*, involves monitoring and helping to build institutional capacity for implementation of the international standards and codes.[3]

Trade in financial services—in combination with reforms to strengthen domestic financial structures—can play an important role in helping countries build more competitive and efficient and therefore more stable domestic financial systems. A sound financial system is, of course, imperative for economic growth and development; it also increases an economy's resiliency to "external shocks" such as movements in exchange rates or a major increase in global interest rates. Financial services trade can improve the quality, availability, and pricing of financial services and enhance the efficiency of capital markets. Especially when a foreign financial firm establishes a commercial presence in the host country, such trade can also stimulate innovation through the dissemination of new technologies, know-how, and skills. Financial services trade can also promote the use of international good practices, for example, with regard to accounting, risk management, and disclosure of financial information.[4]

[1] The Basel Committee on Banking Supervision ("Basel Committee") , which was established in 1975 in the aftermath of the failure of Bankhaus Herstatt in what was then West Germany, includes central banks and non-central bank authorities responsible for banking supervision from the Group of 10 ("G-10") countries plus Luxembourg and Spain; its secretariat is provided by the Bank for International Settlements. The G-10 actually comprises eleven countries: Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States. Besides the IMF, the G-10, and the Basel Committee, other international fora involved in efforts to strengthen domestic financial systems include the Group of Seven (G-7), the Group of Twenty (G-20), the Financial Stability Forum, the International Organization of Securities Commissions and the International Association of Insurance Supervisors. *See* IMF, *A Brief Guide to Committees, Groups, and Clubs: A Factsheet* <www.imf.org/external/np/exr/facts/groups.htm> (accessed Apr. 2003). For additional information on the Basel Committee, *see* <www.bis.org/bcbs/index/htm> (accessed Apr. 2003).

[2] International minimum standards and codes of good practices have been established in three broad areas that are of critical importance for sound financial systems: (1) transparency of macroeconomic policy and data; (2) institutional and market infrastructure, which includes insolvency, corporate governance, accounting, auditing, market integrity and functioning, and payment and settlement systems; and (3) prudential regulation and supervision, which covers both financial firms and regulatory and supervisory systems. *See* Financial Stability Forum, *Compendium of Standards* <www.fsforum.org/compendium/about.html> (accessed Apr. 2003).

[3] *See* Sydney J. Key, The Doha Round and Financial Services Negotiations (AEI Press, 2003), for a brief overview of international efforts to strengthen domestic financial systems. *See also* Financial Stability Forum, *Compendium of Standards*, *supra* note 1; *Ongoing and Recent Work Relevant to Sound Financial Systems, Semiannual Status Report* (Apr. 2003) <www.fsforum.org/publications/Ongoin0304.pdf>; and IMF, *Standards and Codes* <www.imf.org/external/standards/index.htm> (accessed Apr. 2003).

[4] *See* Masamichi Kono, Patrick Low, Mukela Luanga, Aaditya Mattoo, Maika Oshikawa, and Ludger Schuknecht, Opening Markets in Financial Services and the Role of the GATS (WTO 1997); Wendy Dobson and Pierre Jacquet, Financial Services Liberalization in the WTO (1997); Stijn Claessens, Asli

The inclusion of financial services in a multilateral trade agreement such as the General Agreement on Trade in Services ("GATS") was a major milestone.[5] Because of the special characteristics and sensitivity of the financial sector—in particular, the role of banks in monetary and payment systems and the phenomenon of systemic risk—finance officials in the United States and other countries were concerned about allowing financial sector issues to fall within the domain of trade officials and the multilateral trading system.[6] Financial regulators made it clear that the inclusion of financial services in a multilateral trade agreement such as the GATS would be unacceptable without a specific carve-out from the obligations of the agreement for prudential measures. The regulators emphasized that such a carve-out was necessary to ensure that the agreement would not interfere with their ability to carry out their responsibilities for prudential regulation and supervision. Financial regulators also insisted that any dispute settlement panel dealing with financial services must have the appropriate expertise regarding the specific financial service at issue. Ultimately, provisions addressing both of these issues were included in the GATS Annex on Financial Services.

In the GATS, financial and other services are governed by the so-called framework agreement, which establishes overall rules and disciplines for trade in services and also includes various annexes; the Annex on Financial Services deals with rules specific to the financial services sector. Besides the framework agreement, the other major component of the GATS consists of schedules of specific commitments and lists of MFN exemptions; the Fifth Protocol to the GATS incorporates the results of the 1997 financial services negotiations into these schedules and lists. Although the expression "agreement on financial services" is widely used to refer to the results of the 1997 negotiations or, more broadly, to the GATS as it applies to financial services, from a legal point of view a separate multilateral agreement for financial services does not exist.

For financial services, however, there is a unique additional element, namely, the Understanding on Commitments in Financial Services, which was used by most of the OECD countries in scheduling commitments to supplement the provisions of the GATS framework agreement.[7] In legal terms, the Understanding is incorporated by reference

Dermirgüç-Kunt, and Harry Huizinga, *How Does Foreign Entry Affect the Domestic Banking Market?*, World Bank Policy Research Working Paper 1918 (1998); Stijn Claessens and Tom Glaessner, *Internationalization of Financial Services in East Asia*, paper presented at Conference on Investment Liberalization and Financial Reform in the Asia-Pacific Region, Sydney, Australia (Aug. 1997); Ross Levine, *Foreign Banks, Financial Development, and Economic Growth*, in HARMONIZATION VERSUS COMPETITION: INTERNATIONAL FINANCIAL MARKETS (Claude E. Barfield ed. 1996); World Trade Organization, *Financial Services: Communication from the United States*, S/CSS/W/27 (Dec.18, 2000).

[5] "Financial services" in the GATS include "all insurance and insurance-related services, and all banking and other financial services (excluding insurance)." GATS*, Annex on Financial Services,* ¶ 5(a). *See infra* Part III.B.4 and Appendix B.

[6] With the regard to the Uruguay Round negotiating process for financial services, arrangements were therefore worked out in a number of countries between trade and finance officials so that, although trade officials retained overall responsibility, finance officials played a major role as negotiators. For example, for the United States, although the Office of the United States Trade Representative had overall responsibility for the Uruguay Round negotiations and handled the insurance negotiations, the Department of the Treasury handled the negotiations for banking and other financial services excluding insurance. For the European Union ("EU") (see *infra* note 12 regarding use of the terms "European Union" and "European Community"), although the directorate general responsible for trade policy had overall responsibility for the Uruguay Round negotiations, the directorate general responsible for financial services (DG-Internal Market), handled the financial services negotiations.

[7] "OECD countries" refers to countries that are members of the Organisation for Economic Co-operation and Development ("OECD"). As of May 1, 2003, the OECD had thirty members: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy,

into the GATS through the schedules of commitments of the countries that use it. The Understanding is, in effect, a model schedule, albeit a particularly complicated one (see Appendix A to this chapter).

This chapter provides a history and analysis of financial services in the GATS. The following part discusses the Uruguay Round financial services negotiations, including the "free-rider" issue that prolonged the negotiations well beyond the official end of the round. Part III examines financial services in the GATS framework agreement, including the provisions dealing with liberalization of capital movements—which are of particular importance for financial services—as well as the prudential carve-out and other special provisions for financial services contained in the Annex on Financial Services.[8] Part IV examines financial services in the GATS schedules of commitments and lists of MFN exemptions, especially the December 1997 agreement on financial services commitments and MFN exemptions. Part V highlights issues for the Doha round and beyond,[9] and the final part presents the conclusions.

II. Uruguay Round Negotiations

In the mid-1980s, the U.S. government, partly in response to an initiative by the U.S. financial services industry, was the primary advocate for including financial and other services on the agenda for the Uruguay Round negotiations. The U.S. financial services industry hoped that a multilateral negotiation with simultaneous bargaining across a wide range of goods and services sectors would provide opportunities for tradeoffs that would lead to significant market opening for financial services by a number of emerging market economies. A hypothetical example used by the U.S. industry was that emerging market economies might be willing to make binding commitments to lift restrictions on the provision of services by foreign financial firms in return, implicitly or explicitly, for concessions by the major industrial countries in other sectors such as textiles. Such trade-offs, however, did not occur.[10]

Indeed, the Uruguay Round financial services negotiations—like those for other major service sectors such as basic telecommunications, maritime transport, and audiovisual services—proved to be very difficult. As the round drew to a close in December 1993, the hoped-for commitments to market opening had still not materialized. Although obtaining strong commitments to national treatment and market access for foreign direct investment in the financial sector had been a major focus of the negotiations, significant host-country limitations remained. One of the most important of these involved the refusal of some emerging market economies to allow foreign financial firms to hold majority-ownership positions in domestic firms or, where majority-ownership was allowed, to lift restrictions limiting the foreign ownership positions to less than 100 percent.[11]

Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

[8] The GATS provisions dealing with capital movements are contained in contained in Article XI (Payments and Transfers) and a footnote to Article XVI (Market Access). *See infra* Part III.A.

[9] In this chapter "Doha round" refers to the multilateral trade negotiations that are part of the "Doha Development Agenda."

[10] *See* Sydney J. Key, FINANCIAL SERVICES IN THE URUGUAY ROUND AND THE WTO (Occasional Paper 54, Group of Thirty, 1997), for a discussion of why cross-sectoral trade-offs involving financial services did not occur.

[11] In some cases, however, the issue involved a country's refusal to "bind" in the GATS liberalizing measures already in effect. *See infra* Part IV.A.1(a).

A. The "Free-Rider" Issue

In the Uruguay Round financial services negotiations, the United States and the European Union ("EU") shared the goal of obtaining strong commitments to market opening in financial services from emerging market economies; however, their approaches to achieving this goal differed markedly.[12] The EU's priority was to put in place a multilateral agreement that included binding commitments for financial services, even if some of the initial commitments were weak. By contrast, the United States gave priority to obtaining strong initial commitments and was unwilling to allow emerging market economies to become so-called free riders.[13]

The free-rider issue arises because the GATS—like the GATT—is based on the most-favored-nation ("MFN") principle, which precludes discrimination among foreign countries.[14] As a result, although a country may refuse to make strong commitments to market opening, its service suppliers have the opportunity to benefit from the openness provided by other WTO members with commitments to substantially full national treatment and market access. Such a country is referred to as a "free rider."

In the Uruguay Round negotiations, the U.S. government took the position that, unless improvements were made in the commitments that were being offered by a number of emerging market economies, it would make only a limited commitment for financial services in the GATS and take a broad MFN exemption.[15] Specifically, the United States said that for banking and other financial services excluding insurance, it would guarantee market access and national treatment only for existing operations of foreign financial firms. It would then take a broad MFN exemption that would leave open the possibility of discriminating among other WTO members with regard to new entry or operations. Therefore, without violating its GATS obligations, the United States would have been able to prohibit future entry into the U.S. market for firms whose home countries were not sufficiently

[12] For simplicity and in accordance with generally accepted nontechnical usage, "European Union" or "EU" is used in this chapter except when it is necessary to refer to the European Community ("EC") or the European Communities as specific legal entities. The EU was created by the Treaty on European Union ("TEU"), often referred to as the Maastricht Treaty, which entered into force on November 1, 1993. The EC, which was formerly the European Economic Community ("EEC"), and the European Atomic Energy Community ("Euratom") constitute the supranational "first pillar"of the EU. The EU's "second pillar" (common foreign and security policy) and "third pillar" (police and judicial cooperation in criminal matters) are both intergovernmental. From a legal point of view, the European Communities (not the EU itself) and their member states are members of the WTO. The reason is that the area of trade is governed by the two Community treaties (the EC Treaty and the Euratom Treaty), which the Maastricht Treaty amended but did not replace. (Prior to July 24, 2002, the European Coal and Steel Community ("ECSC"), which expired fifty years after its entry into force, was the third Community under the EU's "first pillar.")

[13] *See* Jeffrey Shafer and Jeffrey Lang, *In Defence of a Modest Outcome,* Fin. Times, Jul. 25, 1995; for an EU perspective, *see* Leon Brittan, *Why Apathy Must not Prevail*, Fin. Times, June 19, 1995.

[14] Under the MFN obligation of the GATS, a WTO member must accord to services and services suppliers of any other member treatment "no less favorable" than the treatment it provides to "like" services and service suppliers of the most favored foreign nation. GATS, Art. II:1. The reach of the MFN obligation is very broad because it applies to all measures affecting trade in services that are covered by the GATS, not just those for which a member has made specific commitments to liberalization. The GATS does, however, allow certain departures from the MFN obligation. First, subject to certain conditions, the GATS allows one-time exemptions from the MFN obligation to be taken upon entry into force of a country's initial schedule of commitments under the GATS (*see* GATS, Art. II and *Annex on Article II Exemptions*, and *infra* Part IV.C). Second, the GATS allows a WTO member to enter into an economic integration agreement without extending the benefits of the agreement to all WTO members, although it establishes stringent criteria for an agreement to qualify for this exception (*see* GATS, Art. V). Third, the MFN obligation does not apply to recognition of standards or licensing or certification requirements, or, in the case of financial services, recognition of prudential measures (*see* GATS, Art. VII and *Annex on Financial Services*, ¶ 3, and *infra* Part III.B.2).

[15] *See* U.S. Department of the Treasury, NATIONAL TREATMENT STUDY 1994 at 95–98 (1994).

open to U.S. financial firms; for firms already established in the U.S. market, the United States would have been able to prohibit expansion into new activities or new locations.

In December 1993, in the final hours of the Uruguay Round negotiations, the United States and the European Union reached an agreement that resulted in the extension of the financial services negotiations until June 30, 1995, six months beyond the entry into force of the Agreement Establishing the World Trade Organization ("WTO Agreement").[16] Although the United States took a broad MFN exemption for banking and other financial services excluding insurance at the close of the Uruguay Round, the compromise provided that the exemption would be suspended pending the results of the extended negotiations.[17] Financial services thus became one of several sectors for which negotiations were extended at the close of the Uruguay Round—the others being basic telecommunications, maritime transport, and movement of natural persons.

B. The Interim Agreement on Financial Services

In the first set of post-Uruguay Round financial services negotiations, which took place during the first half of 1995, a number of WTO members improved their financial services commitments and/or narrowed or withdrew MFN exemptions for financial services.[18] Just before the June 30 deadline, however, the United States announced that the market opening being offered by some WTO members was still inadequate. The United States therefore made binding commitments only for existing operations of foreign financial firms and took a broad MFN exemption with regard to new entry and operations for all financial services.[19] To avoid losing what had been accomplished up to that point, the EU then took the lead in trying to preserve the commitments that had already been offered in the 1995 negotiations by other WTO members. The result was the so-called interim agreement on financial services, under which other countries agreed to maintain their existing offers on an MFN basis through the end of 1997 despite the minimal commitments and broad MFN exemption that had been taken by the United States.[20]

[16] *See* GATS, *Second Annex on Financial Services*. *See also* Uruguay Round Trade Negotiations Committee, *Ministerial Decision on Financial Services* (Dec. 15, 1993).

[17] Specifically, the compromise provided that MFN exemptions that were "conditional upon the level of commitments undertaken by other participants or upon exemptions by other participants" would not be applied. *Ministerial Decision on Financial Services*, *supra* note 16, ¶ 1.

[18] *See* Roger Kampf, *A Step in the Right Direction: The Interim Deal on Financial Services in the GATS*, 1 INT'L TRADE L. & REG. 157, 159 (1995), and U.S. Department of the Treasury, NATIONAL TREATMENT STUDY 1998 at 113 (1998).

[19] In contrast, the MFN exemption taken by the United States at the end of the Uruguay Round negotiations in December 1993 covered only banking and other financial services excluding insurance (*see supra* Part II.A). Even though the initial schedules of commitments of countries participating in the Uruguay Round negotiations had entered into force on January 1, 1995, special rules for MFN exemptions adopted for the extended financial services negotiations permitted WTO members to submit revised schedules of commitments and lists of MFN exemptions during a three-month period that ended on July 28, 1995. *See* GATS, *Second Annex on Financial Services; Ministerial Decision on Financial Services, supra* note 16; and WTO Council for Trade in Services, *Decision on the Application of the Second Annex on Financial Services*, S/L/6 (Jul. 4, 1995).

[20] The results of the interim agreement on financial services are reflected in the *Second Protocol to the General Agreement on Trade in Services* S/L/11 (Jul. 24, 1995); *WTO Ministerial Decision adopting the Second Protocol to the General Agreement on Trade in Services,* S/L/13 (Jul. 24, 1995); WTO Council for Trade in Services, *Decision on Commitments in Financial Services,* S/L/8 (Jul. 24, 1995) and *Second Decision on Financial Services,* S/L/9 (Jul. 24, 1995). *See* Kampf, *supra* note 18, and Kenneth Freiberg, *Introductory Note—World Trade Organization: Second Protocol to the General Agreement on Trade in Services (GATS) and Related Decisions*, 35 INTERNATIONAL LEGAL MATERIALS 199 (1996).

C. The 1997 Agreement

Financial services negotiations resumed once again in Geneva in April 1997, with an agreed deadline of mid-December. The goal was to achieve a permanent agreement that included strengthened commitments from emerging market economies and a concomitant MFN-based commitment from the United States.[21] In July 1997, the United States submitted an MFN-based offer with strong commitments; the offer was, however, specifically conditioned on the strength of the commitments to be offered by other countries.

That month also marked the onset of the Asian financial crisis of 1997–1998, which slowed the pace of—but did not derail—the negotiations in the WTO. Indeed, the Asian crisis appears to have created even greater pressure on all parties to reach an acceptable compromise. A widespread concern was that failure to reach agreement could have a further adverse impact on market confidence. Moreover, making binding commitments in the GATS to allow foreign direct investment in the financial sector offered an additional opportunity for Asian governments to try to reassure markets that they were committed to longer-term policy reform.

In any event, a number of countries made improvements to their previous offers, and an MFN-based agreement on schedules of commitments for financial services was finally reached in December 1997.[22] Two "cliffhanger" issues held up an agreement until the last minute. One involved the insistence of the United States and other countries that Japan should "bind" in the GATS the liberalizing measures it had previously agreed to in bilateral financial services agreements with the United States.[23] In accordance with its MFN obligation in the GATS, Japan was already applying those measures to all WTO members. Nevertheless, its trading partners insisted that Japan incorporate the measures into its GATS schedule of commitments so that they would become formal multilateral commitments directly and fully subject to WTO dispute settlement. In the end, Japan agreed to do so.

The other "cliffhanger" issue involved Malaysia's adoption in 1996 of a new statute requiring foreign insurers to incorporate locally (as opposed to operating through branches) and generally limiting their ownership interests in domestic insurance firms to thirty percent. In addition, instead of "grandfathering" existing operations,[24] the statute required foreign insurance already in the market to divest existing ownership positions in excess of 49 percent of the shares of a domestic firm.[25] In the GATS negotiations, Malaysia finally

[21] Special rules for MFN exemptions were also adopted for the 1997 negotiations. Under the terms of the July 1995 Interim Agreement on Financial Services, WTO members were permitted to submit revised schedules of commitments and lists of MFN exemptions during a sixty-day period beginning November 1, 1997. *See Second Decision on Financial Services*, *supra* note 20.

[22] For a summary of improvements in the financial services offers, *see* World Trade Organization, *Non-attributable Summary of the Main Improvements in the New Financial Services Commitments*, Feb. 26, 1998 <www.wto.org/english/news_e/news98_e/finsum.htm>.

[23] *See Japan—United States Measures Regarding Financial Services* (Feb.13, 1995), 34 I.L.M.617; *Japan—United States Measures Regarding Insurance* (Oct., 11, 1994), 34 I.L.M. 661; *Japan—United States Supplementary Measures Regarding Insurance* (Dec. 24, 1996) <www.mac.doc.gov/japan/source/menu/insurance/supjpn.html>.

[24] *See infra* Part IV.A.1(a) regarding "grandfathering" (also referred to as guaranteeing the retention of "acquired rights").

[25] Foreign insurance firms that were operating in Malaysia through the branch form of organization were required to convert the branches to locally incorporated entities and then reduce their ownership interests to 49 percent. The finance minister was given discretionary authority to waive the local incorporation requirements and limitations on foreign ownership positions on the basis of the national interest.

agreed to raise this limit to 51 percent.[26] However, in response to Malaysia's continued refusal to provide grandfathering for existing operation of foreign insurance firms, the United States took a limited MFN exemption for insurance specifically targeted at any WTO member that pursues forced divestiture policies.[27]

III. GATS Framework Agreement

This part examines two elements of the GATS framework agreement: first, provisions dealing with liberalization of capital movements—contained in GATS Article XII (Payments and Transfers) and a footnote to Article XVI (Market Access)—which apply to all services sectors but are of particular importance for financial services; and second, special provisions that are specific to the financial services sector—including the prudential carve-out—that are contained in the GATS Annex on Financial Services.

A. Liberalization of Capital Movements

Liberalization of capital movements is distinct from—but closely related to—liberalization of trade in financial services.[28] Establishment of a commercial presence in a host country by a foreign service supplier involves both trade in services under the GATS and international capital transactions. For example, a GATS commitment to liberalize services trade by allowing foreign financial firms to establish wholly owned subsidiaries is essentially a commitment to allow foreign direct investment that involves the acquisition of one hundred percent of the shares of existing or *de novo* host-country firms.[29] In theory it is possible that, once established, a subsidiary of a foreign financial firm could conduct its ongoing activities without engaging in additional international capital transactions; however, its activities would need to be limited to transactions with host-country residents involving domestic financial assets.[30] Both establishment and

[26] However, firms in which foreign insurers held a majority ownership interest were subject to additional restrictions, including a prohibition on branching. Subsequently, the deadline for foreign insurance firms to comply with the 51 percent requirement was extended for five years. As of May 1, 2003, at least one foreign insurance firm was still permitted to operate through the branch form of organization.

[27] Although the U.S. MFN exemption provided a strong political statement opposing forced divestiture, the scope for applying the exemption appears to be limited. One reason is that the United States made strong commitments to market access and national treatment for insurance, and MFN exemptions may not be used to provide treatment that is less favorable than that provided by a country's "bound" commitments in the GATS (*see infra*, Part IV.C). Moreover, as a practical matter, Malaysian insurance companies appear unlikely to be in a position to enter the U.S. market in the foreseeable future.

[28] Capital movements comprise international capital transactions—that is, the creation, transfer of ownership, or liquidation of capital assets, including financial assets—and the payments and transfers associated with such transactions. Capital assets comprise intangible assets (which, in addition to financial assets, include intellectual property) and real estate. A capital transaction is considered "international" if it takes place between a resident and a nonresident. A broader definition of "international" includes transactions between residents of the same country that involve a foreign capital asset. *See* INTERNATIONAL MONETARY FUND, BALANCE-OF-PAYMENTS MANUAL (5th ed., 1993).

[29] Besides the creation or transfer of ownership of financial assets, international capital transactions associated with the establishment of a commercial presence by a foreign firm could also involve the purchase of real estate. *See* Key, *supra* note 3, ch. 2, regarding the definition of foreign direct investment and its coverage in the GATS.

[30] Under standard balance-of-payments accounting, however, even if the earnings of the subsidiary were reinvested, they would be regarded as additional foreign direct investment by the parent in the subsidiary. *See* International Monetary Fund, *supra* note 28, and U.S. Department of Commerce, THE BALANCE OF PAYMENTS OF THE UNITED STATES: CONCEPTS, DATA SOURCE, AND ESTIMATING PROCEDURES (1990).

operation of branches of foreign financial firms, which are not separately incorporated in the host country, almost always involve international capital transactions.[31]

For cross-border financial services, international capital transactions are typically either integral to, or closely associated with, the provision of the service. For example, international capital transactions are an integral part of accepting deposits from or making loans to nonresidents. In addition, international capital transactions are usually, although not necessarily, associated with financial services such as securities trading or asset management on behalf of a customer residing in another country.[32] By contrast, certain cross-border financial services, such as investment advisory services and financial information services, can be provided without an associated international capital transaction. The usefulness of investment advice might be limited, however, if the customer were prohibited from investing in foreign assets.

In general, it is difficult to realize fully the benefits of liberalization of trade in financial services without freedom of capital movements.[33] Financial services trade absolutely requires, however, the liberalization of only those capital movements that are necessary for the trade transaction to occur. GATS Article XI (Payments and Transfers) prohibits WTO members from imposing restrictions on capital transactions or associated payments and transfers that would be inconsistent with their specific commitments to liberalization of trade in services.[34] A footnote to Article XVI (Market Access) provides greater detail—namely, a country that has made a specific commitment to market access must allow (a) capital movements that are "essential" for the provision of a service in mode 1 (cross-border supply); and (b) inward capital movements that are "related" to a service supplied through establishment of a commercial presence.[35]

The bottom line is that if a country makes a commitment to liberalize trade with respect to a particular financial service in the GATS, it is also making a commitment to liberalize most capital movements associated with the trade liberalization commitment. The country is not, however, making an across-the-board commitment to freedom of capital movements. The GATS provisions dealing with capital movements, like GATS specific commitments to liberalize trade in services, are subject to a balance-of-payments safeguard.[36] Both the capital movements and balance-of-payments safeguard

[31] For example, both establishment and operation of branches of foreign banks almost always involve international capital transactions between the bank's head office and the branch. These transactions include both foreign direct investment and portfolio investment (*see* Key, *supra* note 3, ch. 3, for additional detail). For branches conducting a wholesale business—that is, conducting business with "sophisticated" customers such as such as corporations and institutions, other financial services firms, and wealthy individuals—ongoing activities would typically also involve international capital transactions with unaffiliated parties.

[32] The capital transaction in these examples—that is, the transfer of ownership of the underlying instrument—would be international if the new owner were a resident of a different country than the previous owner; the broader definition would include transactions where the owners were residents of the same county but the instrument had been originally issued in another country. *See supra* note 28.

[33] *See infra* Part V regarding capital controls.

[34] Exceptions are provided for restrictions imposed under Article XII (Restrictions to Safeguard the Balance of Payments) or at the request of the IMF. *See* GATS, Art. XI: 2. Article XI also requires WTO members not to impose restrictions on payments and transfers associated with current transactions. *See* GATS, Art. XI: 1.

[35] GATS, Art. XVI, n. 8. "Essential" effectively limits the first requirement to the financial services sector. By contrast, "related" would apply the second requirement to all services sectors; outward capital movements were not covered because of concern on the part of some members about "capital flight."

[36] The GATS balance-of-payments safeguard allows a WTO member to impose temporary restrictions that suspend its commitments in the event of "serious balance-of-payments and external financial difficulties or threat thereof." Besides being temporary, such restrictions must adhere to the MFN principle; be consistent with the IMF Articles of Agreement; not exceed those necessary to deal with the circumstances; and avoid

provisions of the GATS refer to and are consistent with the IMF's responsibilities in these areas.[37]

B. GATS Annex on Financial Services

The GATS Annex on Financial Services, as already mentioned, contains two provisions that financial regulators had insisted on—namely, the prudential carve-out and a requirement for specific expertise in dispute settlement. It also includes provisions dealing with recognition of prudential measures and the coverage and definition of financial services.[38]

1. The Prudential Carve-Out

The prudential carve-out for domestic regulation of financial services allows a country to take prudential measures "for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed" or "to ensure the integrity and stability of the financial system" regardless of any other provisions of the GATS. [39] Thus prudential measures could, in principle, be inconsistent with a country's national treatment or market access commitments or its MFN obligation. To guard against abuse of the prudential carve-out, the GATS provides that prudential measures may not be used "as a means of avoiding" a country's obligations or commitments under the agreement.[40]

unnecessary damage to the commercial, economic, and financial interests of other WTO members. Members invoking the balance-of-payments safeguard are required to consult with the WTO Committee on Balance-of-Payments Restrictions. *See* GATS, Art. XII (Restrictions to Safeguard the Balance of Payments).

[37] The IMF Articles of Agreement do not include liberalization of capital movements as an objective; moreover, if necessary, they allow the imposition of capital controls. Even under the existing articles, however, the Fund is heavily involved with capital movements as part of its responsibility for oversight of the international monetary system, in its routine surveillance of economic policies of its members (so-called Article IV surveillance), and in its stabilization programs, which, subject to conditions, provide financing for balance-of-payments purposes. As the Asian financial crisis of 1997–98 was developing, active consideration was being given to amending the IMF Articles of Agreement to extend its formal jurisdiction with respect to capital movements. The crisis made these discussions more difficult, and work on amending the articles was discontinued. *See* Stanley Fischer, Richard N. Cooper, Rudiger Dornbusch, Peter M. Garber, Carlos Massad, Jacques J. Polak, Dani Rodrik, and Savak S. Tarapore, *Should the IMF Pursue Capital-Account Convertibility?* (Princeton Essays Int'l Fin. 207, 1998); Francois Gianviti, *The International Monetary Fund and the Liberalization of Capital Movements*, in CURRENT DEV. MONETARY & FIN. L. (International Monetary Fund, 1999); Sean L. Hagan, *The Design of the International Monetary Fund's Jurisdiction over Capital Movements*, in CURRENT DEV. MONETARY AND FIN. L. (International Monetary Fund, 1999); William E. Holder, *Fund Jurisdiction over Capital Movements,* 5 ILSA J. INT'L & COMP. L. 407 (1999); Ross B. Leckow, *The Role of the International Monetary Fund in the Liberalization of Capital Movements*, 17 WIS. INT'L. L. J. 515 (2000).

[38] The provisions in the Annex on Financial Services and the Understanding on Commitments in Financial Services (*see infra* Appendix A) emerged from a text developed by an informal group of finance officials from Canada, the EU, Japan, Sweden, Switzerland, and the United States. The group had initially gathered to discuss how financial services should be handled in the GATS and was known as the "Fu Lung group" after the restaurant where its first meeting was held in September 1989. In 1990, the group was broadened to include selected Asian, Eastern European, and Latin American countries. Finance officials from the United States had initially envisaged the Fu Lung text as a financial services agreement that would be separate from the GATS framework agreement. However, the idea of a separate agreement for financial services was unacceptable to trade officials, both in the United States and other countries. It was also opposed by finance officials in some countries and by the U.S. financial services industry. *See* Key, *supra* note 10, at 18–19.

[39] GATS, *Annex on Financial Services,* ¶ 2.

[40] *Id.*

The prudential carve-out differs from other exceptions for domestic policy contained in the GATS in one very significant respect.[41] In contrast to health and safety, for example, where only "necessary" measures are excepted, *all* prudential measures are excepted.[42] As a result, a prudential measure may not be challenged on the ground that it is not "necessary" or "least trade restrictive." Moreover, the prudential carve-out overrides the requirements for domestic regulations in GATS Article VI (Domestic Regulation).

The absence of a necessity test does not, however, resolve the issue of whether a measure is prudential or is being used to avoid the obligations of the agreement. An allegedly prudential measure that violates a country's obligations or commitments under the GATS might be challenged on the grounds that its purpose is really trade restrictive rather than prudential and therefore it does not fall within the scope of the prudential carve-out. This question is subject to WTO dispute settlement procedures and potentially to a determination by a dispute settlement panel.

Financial regulators do not seem particularly concerned about this possibility. Three factors appear to account for this lack of concern. First, prudential issues are dealt with intensively in other international fora, so there is some basis for assuming that certain types of rules will always be considered prudential. Moreover, a WTO member that was concerned about whether a particular measure would be generally accepted as prudential had the option of listing that measure as a limitation when making initial commitments for national treatment and market access, thereby avoiding the need to rely on the prudential carve-out. Second, and extremely important, only governments, not private parties, may bring claims to dispute settlement in the WTO. Absent a truly egregious action, governments may prefer to respect each other's ability to determine which rules may be prudential. Third, if a prudential or other financial services issue did reach a WTO dispute settlement panel, the panel would be required to have the appropriate expertise.[43]

Some of the difficulties in dealing with barriers that may fall within the prudential carve-out are illustrated by the treatment of direct branches of foreign banks. The list of barriers to market access in GATS Article XVI (Market Access) includes restrictions on the type of legal entity through which services may be supplied. This is consistent with the consensus that an overall prohibition on branch entry is not a legitimate prudential measure.[44] However, even though a branch is an integral part of a foreign bank and not separately capitalized, some countries that permit branch entry impose branch capital-equivalency requirements. These can take the form of "dotation" or endowment capital requirements or asset pledge requirements.[45] Because such measures are widely regarded as prudential, most countries that impose these requirements have not listed them as limitations on market access or national treatment in their schedules of commitments.

[41] These exceptions are set forth in GATS, Art. XIV (General Exceptions). A separate exception for national security allows a member to take any action that the member considers necessary for the protection of its essential security interests. *See* GATS, Art. XIV bis (Security Exceptions).

[42] Some measures that fall within the scope of the prudential carve-out may also fall within the general domestic policy exceptions in GATS Article XIV (General Exceptions). For example, Article XIV provides an exception for adoption or enforcement of measures necessary to secure compliance with nondiscriminatory laws and regulations relating to the prevention of deceptive and fraudulent practices.

[43] *See infra* Part III.B.3.

[44] In the banking sector, when wholesale financial services are provided through the establishment of a commercial presence, direct branches of the foreign bank—if permitted by host-country regulation are usually a more efficient form of organization than subsidiaries.

[45] *See* Key, *supra* note 3, ch. 4, notes 33 and 34, for additional detail.

Some host countries, however, take an additional step that effectively negates the economic benefits associated with the branch form of organization—namely calculating lending and other operating limits based on branch capital-equivalency requirements. Such measures restrict branch operations by tying, say, the size of individual loans to the amount of capital attributable to the branch. Since domestic banks operate on the basis of their consolidated worldwide capital, national treatment would require allowing branches to operate on the basis of the foreign bank's consolidated worldwide capital. A U.S. government study concluded that, although restrictions might need to be applied to address specific prudential concerns in problem cases, general application of such restrictions would have the effect of denying a foreign bank the economic benefits of the branch form of organization.[46]

Some WTO members that impose lending and other operating limits based on branch capital-equivalency requirements—Korea and Turkey, for example—listed the measures as limitations in their schedules of commitments, which could be interpreted as an acknowledgement that the measures may not be generally accepted as prudential. By contrast, members that impose the measures but did not list them as limitations in their schedules—Chile, for example—clearly believe the measures are within the scope of the prudential carve-out. The EU simply noted that branches (as opposed to subsidiaries) of third-country financial firms are, in general, not subject to harmonized EU prudential measures and that each member state may therefore impose its own measures for prudential purposes.[47]

A measure that imposes lending and other operating limits based on branch capital-equivalency requirements on all host-country branches of foreign banks arguably does not meet a "necessity" or "least trade restrictive" test. Prudential measures, however, are not subject to such tests. The measure could nonetheless be challenged, at least in theory, under the antiabuse provision of the prudential carve-out on the grounds that it was being used to avoid a country's commitment to allow entry through the branch form of organization. In practice, however, as discussed above, it seems unlikely that national authorities would use the WTO dispute settlement mechanism, as opposed to a more informal forum, to challenge such a measure.

2. Recognition of Prudential Measures

The Annex on Financial Services permits a departure from the MFN obligation for unilateral or mutual recognition of prudential measures.[48] This provision allows a country to recognize prudential measures of selected other countries, either unilaterally or through a negotiated arrangement or agreement, without being subject to a challenge by an excluded WTO member that it is being denied MFN treatment. A country must, however, be willing to accord similar recognition to measures of other WTO members that meet the same standards. In effect, the recognition provision in the Annex elaborates on the application to the financial services sector of GATS Article VII (Recognition), which allows a country to recognize standards or licensing or certification requirements of selected countries without being subject to the MFN obligation of the GATS. However, in contrast to Article VII, the recognition provision in the Annex on Financial Services does not contain a requirement for prior notification to the Council on Trade in Services.

[46] *See* U.S. Dept. of the Treasury and Board of Governors of the Federal Reserve System, SUBSIDIARY REQUIREMENT STUDY (1992).

[47] This statement appears in a footnote to the so-called headnotes of the EU financial services schedule.

[48] GATS, *Annex on Financial Services*, ¶ 3.

Host-country recognition of the adequacy of home-country prudential measures could be used to provide relief from host-country regulatory requirements that are inconsistent with national treatment or market access. An example of such an arrangement is Germany's recognition of the adequacy of U.S. supervision to provide relief from the lending and other operational limits based on dotation capital requirements that Germany imposes on branches of non-EEA (European Economic Area) banks.[49] Recognition could also be used to deal with barriers created by differences in nondiscriminatory prudential measures. For example, host-country recognition of specific elements of home-country regulation and supervision could be used to determine whether an applicant has met a mandatory—but nondiscriminatory—host-country licensing or registration requirement or to provide a procedural "fast lane" for determining compliance with a host-country requirement.[50]

In general, a recognition arrangement needs to be predicated on some degree of harmonization of the rules of the home and host countries. Such harmonization may have already occurred *de facto* or could be achieved through negotiations. Acceptance of home-country rules and supervision, together with legislated harmonization of essential rules, is the basis of the EU single-market program for the financial sector.[51] Outside the EU, however, few recognition arrangements exist for financial services.[52]

[49] *See infra* note 51 regarding the European Economic Area and *supra* Part III.B.1 regarding dotation capital requirements. Under authority granted by the German Banking Act, Germany's finance ministry has "recognized" U.S. regulation and supervision, together with assurances of enhanced supervisory cooperation, as sufficient to exempt branches of U.S. banks from lending and other operational limits based on dotation capital requirements and impose instead limits based on the consolidated worldwide capital of the U.S. bank. *See* exchange of letters between the Board of Governors of the Federal Reserve System and the Comptroller of the Currency (Richard Spillenkothen, Director, Division of Banking Supervision and Regulation, and Susan F. Krause, Senior Deputy Comptroller for Bank Supervision) and the Bundesaufsichtsamt fħr das Kreditwesen (Jochen Sanio, Departmental President) (Feb. 17, 1994); and Federal Ministry of Finance [Germany], First Regulation on the exemption of enterprises domiciled outside the European Community from provisions of the German Banking Act (Apr. 21, 1994).

[50] For example, determination of a foreign bank's capital adequacy as part of a host-country licensing process could be speeded up by recognition of the home country's implementation of the risk-based capital standards developed by the Basel Committee (*see supra* note 1). Such recognition could allow the use of capital ratios calculated for home-country supervisory purposes, thereby avoiding the process of recalculating the ratios under host-country rules. The ratios would, however, still need to meet host-country capital standards, which might be higher than those of the home country.

[51] Under the EU approach of "mutual recognition" and "home-country control," a financial firm incorporated in any member state may provide services across borders or through the establishment of branches throughout the EU on the basis of a "single license" issued by the home country, subject to the harmonization of essential rules required by EU legislation. This approach extends to the entire European Economic Area ("EEA"), which, as of May 1, 2003, included, in addition to the EU member states, three members of the European Free Trade Association ("EFTA")—namely, Norway, Iceland, and Liechtenstein; as required by the EEA Agreement, these countries have adopted the *acquis communautaire* and agreed to conform to future EU legislation. (Switzerland, the fourth member of the EFTA, is not a party to the EEA Agreement.) The EEA Agreement entered into force on January 1, 1994. *See Agreement on the European Economic Area* (May 2, 1992). *See* Key, *supra* note 3, ch. 5, regarding the EU approach of mutual recognition and home-country control; s*ee also infra* Part V.B.

[52] In the insurance sector, two mutual recognition agreements to which Switzerland is a party are based on harmonization to EU standards. The 1989 insurance agreement between Switzerland and the European Community (which covers non-life insurance provided through branches) is based on Switzerland's conforming its prudential regulations, primarily with regard to solvency requirements, to the standards set forth in EU directives. *See Agreement between the European Economic Community and the Swiss Confederation Concerning Direct Insurance Other Than Life Assurance* (Oct. 10, 1989). The 1996 Switzerland-Liechtenstein insurance agreement, which, in effect, treats Switzerland as if it were a member of the EEA (*see supra* note 51), but only vis-à-vis Liechtenstein and only in the insurance sector, was facilitated by the previous Swiss harmonization

Recognition could be facilitated by a country's adherence to international minimum standards and codes of good practices for prudential regulation and supervision, but such adherence would not necessarily provide sufficient harmonization for recognition. For example, the host country may impose higher or additional standards on both domestic and foreign firms, or the home country may generally adhere to international minimum standards but introduce certain differences in its application of those standards. In addition, the host country might not be willing to recognize the home country's ongoing supervision as sufficiently effective. Indeed, one reason that recognition arrangements are relatively rare in the financial sector is the importance and difficulty of evaluating home-country supervisory practices.

Although the GATS is permissive regarding recognition arrangements for prudential measures, the WTO is not the appropriate forum for their negotiation. The German recognition arrangement with the United States, for example, involved negotiations between supervisory authorities and took the form of an exchange of letters and a subsequent regulation issued by the German finance ministry.[53] This is consistent with the approach used for supervisory cooperation and information-sharing agreements, which typically take the form of a memorandum of understanding, a statement of cooperation, or an exchange of letters among supervisors.

3. Specific Expertise in Dispute Settlement

The Annex on Financial Services requires that, in the event a financial services issue reaches a dispute settlement panel, the panel must have the expertise necessary to deal with "the *specific financial service* under dispute" [emphasis added].[54] This provision establishes a stricter criterion for expertise than that contained in the general provision applicable to GATS panels, which requires "the necessary expertise relevant to the *specific services sectors* which the dispute concerns" [emphasis added].[55]

4. Definition and Coverage of Financial Services

The Annex on Financial Services defines a financial service as "any service of a financial nature offered by a financial service supplier of a [WTO] Member," including "all insurance and insurance-related services, and all banking and other financial services (excluding insurance)."[56] The Annex provides a non-exclusive list of activities included in this definition that is a slightly modified version of the WTO Services Sectoral Classification List that was used during the Uruguay Round negotiations (known as the "W120 list").[57] A firm or individual "wishing to supply or supplying financial services" falls within the GATS definition of a financial service supplier and can benefit from the GATS

of prudential rules to EU standards and by the fact that Liechtenstein, to become a member of the EEA, had been required to adopt the *acquis communautaire* and agree to conform to future EU legislation. *See Accord sur l'assurance directe entre la Confédération suisse et la Principauté de Liechtenstein* (Dec. 19, 1996).

[53] *See supra* note 49. Finance ministry officials also participated in the negotiations.

[54] GATS, *Annex on Financial Services*, ¶ 4. As of May 1, 2003, there had been no dispute settlement proceeding and no request for consultation on a financial services issue.

[55] Uruguay Round Trade Negotiations Committee, *Ministerial Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services*, ¶ 4.

[56] GATS, *Annex on Financial Services,* ¶ 5 (for the text, *see infra* Appendix B).

[57] *See* GATS, *Annex on Financial Services*, ¶ 5. *See also* United Nations Conference on Trade and Development and World Bank, LIBERALIZING INTERNATIONAL TRANSACTIONS IN SERVICES: A HANDBOOK (1994), Obie G. Whichard, *Measurement and Classification of Services Sector Activity: Data Needs for GATS 2000*, in Robert M. Stern, ed. SERVICES IN THE INTERNATIONAL ECONOMY (2001), and World Trade Organization, *Financial Services: Background Note by the Secretariat* (1998).

regime for financial services.[58] The Annex on Financial Services also clarifies that the exclusion from GATS coverage for services supplied in the exercise of governmental authority applies to activities of central banks or monetary authorities in pursuit of monetary or exchange rate policies.[59]

IV. Specific Commitments and MFN Exemptions

The results of the 1997 financial services negotiations—that is, schedules of commitments and lists of MFN exemptions—were incorporated into the GATS by the Fifth Protocol to the GATS, which entered into force on March 1, 1999.[60] Seventy-one WTO members made improved—or, in a few cases, first-time—financial services commitments, although the strength and scope of these commitments vary considerably.[61] Most of the WTO members participating in the 1997 agreement "bound" the levels of liberalization for establishment of a commercial presence that existed as the negotiations entered their final phase in late 1997. For a number of emerging market economies and other developing countries, such liberalization represented a substantial improvement over the liberalization that existed a few years earlier. Moreover, capturing existing levels of liberalization in binding commitments subject to WTO dispute settlement is important in its own right. In contrast to the commitments for establishment of a commercial presence, the 1997 commitments for cross-border services in mode 1 (cross-border supply) were, even for OECD countries, relatively limited and did not always reflect existing liberalization.

[58] GATS, *Annex on Financial Services*, ¶ 5.

[59] GATS, *Annex on Financial Services*, ¶ 1.

[60] The Fifth Protocol to the GATS provides for the annexation of the financial services commitments agreed upon in December 1997 to the Uruguay Round services schedules of commitments and for any revised lists of MFN exemptions to replace the previous list of MFN exemptions for financial services (s*ee supra* note 21 regarding special rules governing MFN exemptions in the 1997 negotiations). For WTO members that participated in the 1997 negotiations but accepted the Fifth Protocol after March 1, 1999, commitments entered into force upon acceptance. The protocol initially remained open for acceptance until July 15, 1999; it was reopened for acceptance by Costa Rica and Nicaragua in late 1999; by Ghana, Kenya, and Nigeria in 2000, and by Bolivia in 2002. As of May 1, 2003, commitments made by six of the countries participating in the 1997 negotiations—Brazil, the Dominican Republic, Jamaica, the Philippines, Poland, and Uruguay—had not entered into force because they had not yet accepted the Fifth Protocol. *See* World Trade Organization, *Fifth Protocol to the General Agreement on Trade in Services,* S/L/45 (Dec. 3, 1997); Committee on Trade in Financial Services, *Decision Adopting the Fifth Protocol to the General Agreement on Trade in Services,* S/L/44 (Dec. 3, 1997); *Communication from Members which have accepted the Fifth Protocol to the General Agreement on Trade in Services*, S/L/67 (Feb. 15, 1999); and Council on Trade in Services, *Decision on Acceptance of the Fifth Protocol to the General Agreement on Trade in Services,* S/L/68 (Feb. 15, 1999). *See also* World Trade Organization, Council on Trade in Services*, Decision on the Acceptance of the Fifth Protocol* , S/L/76 (Oct. 21, 1999), *Second Decision on the Acceptance of the Fifth Protocol,* S/L/87 (June 8, 2000), *Third Decision on the Acceptance of the Fifth Protocol* , S/L/89 (Dec. 17, 2000), *Fourth Decision on the Acceptance of the Fifth Protocol,* S/L/108 (Nov. 11, 2002); and World Trade Organization, *Status of Acceptances of the Fifth Protocol to the General Agreement on Trade in Services* <www.wto.org/english/tratop_e/serv_e/finance_e/finance_status_5prot_e.htm> (accessed April 2003).

[61] The European Communities and each member state were counted separately in these statistics (as sixteen WTO members). Strictly speaking, only seventy members made *improved* or first time commitments. The exception was Ecuador, which acceded to the WTO in 1996 and used the special rules governing the extended financial services negotiations to weaken its schedule by imposing a temporary freeze on new licenses for both domestic and foreign banks. (Bulgaria, which also acceded in 1996, further strengthened its schedule in 1997.) *See* BRITISH INVISIBLES, OPENING MARKETS FOR FINANCIAL SERVICES: THE BI GUIDE TO THE FINANCIAL SERVICES AGREEMENT IN THE WORLD TRADE ORGANIZATION (1998), Roger Kampf, *Financial Services in the WTO: Third Time Lucky*, 4 INT'L TRADE L. & REG. 111 (1998), Aaditya Mattoo, *Financial Services and the WTO: Liberalization Commitments of Developing and Transition Economies*, 23 THE WORLD ECONOMY 351, (2000) regarding commitments made by individual countries. *See* U.S. Department of the Treasury, *supra* note 18, and World Trade Organization, *supra* note 22, regarding improvements made in the 1997 schedules.

Including financial services commitments made by additional WTO members that were not parties to the 1997 agreement, 117 members of the WTO—80 percent of its membership of 146—had made commitments in financial services as of May 1, 2003.[62] This figure includes sixteen countries that became members of the WTO under standard accession procedures since its establishment in 1995 and did not participate in the 1997 negotiations.[63] These acceding countries have, in general, made strong financial services commitments, including new liberalization, for foreign direct investment, and, in many cases, cross-border services in both modes 1 and 2. This figure also includes twenty-nine other WTO members—mainly small developing countries—that did not participate in the 1997 negotiations and maintained their pre-existing financial services schedules, which, in general, include only minimal commitments.[64] One additional member made a first-time commitment in financial services in 1998.[65]

This part highlights some of the important aspects of the financial services commitments to national treatment and market access for each mode of supply,[66] discusses the

[62] The European Communities and each member state were counted separately in these statistics. The total number of members with financial services commitments includes the six countries that had not accepted the Fifth Protocol as of May 1, 2003 (*see supra* note 60), because these countries had previous commitments in force. *See* BRITISH INVISIBLES, *supra* note 61, Kampf, *supra* note 61, and Mattoo, *supra* note 61, regarding commitments made by individual countries.

[63] As of May 1, 2003, eighteen members had acceded to the WTO through full accession negotiations under Article XII of the Marrakesh Agreement Establishing the World Trade Organization (as opposed to special GATT/WTO transitional arrangements): Bulgaria and Ecuador (1996), both of which participated in the 1997 negotiations and are therefore included with the Fifth Protocol countries; Mongolia and Panama (1997); Kyrgyz Republic (1998); Estonia and Latvia (1999); Albania, Croatia, Georgia, Jordan, and Oman (2000); Lithuania, Moldova, and China (2001); Chinese Taipei (2002); and Armenia and Macedonia (2003).

[64] A notable exception is Argentina, which made generally strong commitments in 1993 and did not modify its schedule in 1997. Most of the countries in this group have commitments that have remained unchanged either since December 1993 (the end of the Uruguay Round negotiations) or July 1995 (the "interim agreement" on financial services). This group also includes several smaller developing countries with minimal financial services commitments that acceded to the WTO in 1995 and 1996 under special GATT/WTO transitional arrangements. In the GATS, even if a country's schedule of commitments includes a particular sector such as financial services, the commitments may nonetheless be very limited—for example, commitments could cover only a few narrowly defined subsectors or activities and, within a listed subsector or activity, exclude one or more modes of supply or list other limitations on national treatment and market access.

[65] Côte d'Ivoire made a first-time commitment in financial services in 1998.

[66] In the GATS, national treatment and market access are "specific commitments" as opposed to general obligations. As a result, national treatment and market access do not apply across-the-board to all services sectors; instead, they apply *only* to sectors, subsectors, or activities that a WTO member specifically lists in its schedule of commitments. If a member is making only a partial commitment to national treatment or market access *within* a listed sector, subsector, or activity, any limitations must be listed in its schedule. The use of specific commitments for national treatment and market access instead of obligations applicable to all services sectors is in some respects a structural weakness of the GATS. (*See* Patrick Low and Aaditya Mattoo, *Is There a Better Way? Alternative Approaches to Liberalization under the GATS,* in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION (Pierre Sauvé and Robert M. Stern, eds., 2000), Bernard Hoekman, *Assessing the General Agreement on Trade in Services*, in THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES (Will Martin and L. Alan Winters, eds., 1996), and Bernard Hoekman and Pierre Sauvé, *Liberalizing Trade in Service*, Discussion Paper 343, World Bank (1994).) Under a more ambitious approach, such as that used in the NAFTA's services and investment provisions, national treatment and market access would apply in each sector unless an exception was specifically listed in a country's schedule of commitments or one of the public policy exceptions, such as the national security exception, applied. This approach is referred to as a "top down" or "negative list" approach to scheduling commitments. In its most stringent form, a negative list would mean that only nonconforming measures could be listed as exceptions to national treatment or market access; "negative list" is widely used, however, to refer to an approach that would also allow a country to take exceptions for particular sectors, subsectors, or activities (*see* Low and Mattoo, *supra*). The GATS approach to scheduling commitments is referred to as a "hybrid list"

use of the "additional commitments" column of the GATS schedules to go beyond market access and national treatment, and provides an overview of the one-time MFN exemptions that have been taken in financial services. Appendix A to this chapter examines the Understanding on Commitments in Financial Services, which, as noted in Part I above, was used by most of the OECD countries in scheduling commitments to supplement the provisions of the GATS framework agreement.[67]

A. National Treatment and Market Access

1. Establishment of a Commercial Presence (Mode 3)

Ideally, WTO members would make broad commitments covering all types of financial services for the establishment and expansion of a commercial presence in whatever legal form the investor chooses. Indeed, most OECD counties used the Understanding on Commitments in Financial Services to make such commitments. A number of additional WTO members, including most acceding countries, made similar commitments. Other members, however, have significant gaps in their financial services commitments for establishment of a commercial presence. Some of these gaps—such as the binding of foreign ownership positions at less than levels currently permitted—represent "binding gaps," which are created by failure to bind in the GATS liberalizing measures already in effect or scheduled to go into effect.[68] However, many of the gaps in the GATS financial services commitments for establishment of a commercial presence represent barriers that WTO members continue to impose. Commitments also vary by type of financial service. For example, a number of countries, particularly emerging market economies and other developing countries, have made stronger and broader commitments for banking services than for securities-related services or for insurance. Furthermore, many countries did not make commitments for asset management or financial information services.

(a) Binding Existing Liberalization. In the 1997 agreement, some emerging market economies scheduled commitments that were more restrictive than measures already in force. For example, suppose that a country that allowed foreign financial firms to have majority-ownership interests in domestic financial firms guaranteed a level of foreign ownership of only 49 percent in the GATS. It has therefore left open the possibility of restricting foreign ownership interests to 49 percent in the future without violating its obligations under the GATS. Unless the country had made a commitment, as some WTO members did for financial services, to "grandfather" existing operations and activities, the new limitation could also be applied to foreign firms already in the market—that is, they could be required to divest any ownership interest in excess of 49 percent. Although grandfathering (also referred to as guaranteeing the retention of "acquired rights") is an important principle that is often used as a basis for national policies dealing with foreign direct investment in the financial sector, it can create inequities between firms already in the market and new entrants. It is therefore not a substitute for a ban on new measures

because it involves a so-called "positive list" of sectors, subsectors, and activities for which commitments are undertaken and, within each listed sector, subsector, or activity, a negative list of limitations on national treatment or market access. (*See* Key, *supra* note 10, at 14–16 for a comparison of negative lists and GATS hybrid lists.) *See infra* Appendix A regarding the use of a negative list approach in the Understanding on Commitments in Financial Services for mode 3 (establishment of a commercial presence) and, for banking and other financial services excluding insurance, mode 2 (consumption abroad).

[67] *See supra* note 7 for a list of countries that are members of the OECD.

[68] *See* Key, *supra* note 3, ch. 4.

that are inconsistent with market access and national treatment (often referred to as a "standstill").[69]

Since the 1997 agreement, further market opening for financial services has taken place in a number of emerging market economies, either through unilateral action or as part of the conditionality in IMF stabilization programs. Without concomitant changes in GATS commitments, new binding gaps are created.[70] Unlike the financial services chapter of the NAFTA, the GATS does not contain a "ratchet" that would automatically lock in or bind new liberalizing measures that reduce or eliminate barriers to national treatment or market access.[71] Moreover, countries that have adopted liberalizing measures are concerned about receiving "credit" for such measures in the Doha round.[72] This concern highlights a major "disconnect" between trade negotiations and economic theory—namely, trade negotiations involve exchanging so-called concessions of liberalization that, in economic terms, are in a country's best interest in the first place.[73]

(b) Remaining Barriers. Despite significant improvements during the course of the Uruguay Round, some WTO members still impose major barriers to establishment of a commercial presence by foreign financial firms. Restrictions on foreign ownership positions in a number of emerging market economies and other developing countries prevent foreign financial firms from holding majority-ownership positions in host-country firms, or, where majority ownership is allowed, limit the ownership position to less than 100 percent. Another major barrier involves restricting the type of legal entity through which financial services may be provided by prohibiting entry through the branch form of organization—that is, through direct branches of a foreign financial firm.

Other important discriminatory barriers relate to the operation of foreign financial firms once they have established a commercial presence in the host country. For banking services, these barriers include limitations on the number of branches that a subsidiary of a foreign bank may open, the number of ATM machines it may install, and the types of banking services it may offer to domestic residents. Discriminatory barriers to host-country operations faced by firms engaging in securities activities often include restrictions on their participation in underwriting and distributing securities and their

[69] In the GATS, countries scheduling commitments in accordance with the Understanding on Commitments in Financial Services committed to a "standstill" under which they may take exceptions to their commitments to market access and national treatment only for existing nonconforming measures. *See infra* Appendix A.

[70] *See* Key, *supra* note 3, ch. 4. As a technical matter, binding existing liberalization in the GATS could involve removing specific limitations listed in a country's schedule of commitments, binding a mode of supply for which a country had previously entered "unbound," or listing subsectors or activities that a country had omitted from its schedule.

[71] Specifically, the ratchet in the NAFTA financial services chapter automatically locks in or binds new liberalization with regard to any measure for which a country has taken an exception to an obligation under that chapter. Suppose, for example, a country has taken an exception for an existing nonconforming measure and subsequently amends that measure to provide market access or national treatment. The ratchet locks in the liberalizing amendment, that is, a country is prohibited from reverting to the original nonconforming measure. *See North American Free Trade Agreement*, Art. 1409: 1(c).

[72] Negotiating guidelines on services adopted in March 2001 by the Council for Trade in Services? Special Session state that "[b]ased on multilaterally agreed criteria, account shall be taken and credit shall be given in the negotiations for autonomous liberalization undertaken by Members since previous negotiations." WTO Council for Trade in Services—Special Session, *Guidelines and Procedures for the Negotiations on Trade in Services*, S/L/93 (March 28, 2001), ¶ 13. *See also* WTO Council for Trade in Services—Special Session, *Modalities for the Treatment of Autonomous Liberalization*, TN/S/6 (March 1, 2003).

[73] *See supra* Part I regarding benefits of trade in financial services for a host country. *See also infra* Part V regarding liberalization of capital movements.

ability to trade securities in secondary markets.[74] Foreign financial firms may also face discriminatory barriers arising from limitations on the temporary entry of home-country personnel for employment by their subsidiaries or branches.[75]

2. Cross-Border Services (Modes 1 and 2)

In this chapter, the term "cross-border services" is used broadly without attempting to assign a geographic location to the customer—that is without attempting to determine whether a transaction "takes place" in the country of the service provider or in the country of the customer. For example, a cross-border financial services transaction could be carried out in a number of different ways: (a) a representative of, say, a foreign bank might visit the country of the customer to arrange a loan; (b) the customer might travel abroad to visit the office of the foreign bank; or (c) the transaction might take place via telephone, fax, or increasingly, the internet, which in this context, is simply another technological means of delivering the service.[76]

The GATS, however, distinguishes between services provided to nonresidents "from" the country of the service supplier (mode 1 or cross-border supply) and services provided "in" the country of the service supplier (mode 2 or consumption abroad). Usually, but as currently defined by the GATS, not necessarily—mode 2 involved physical movement of the consumer, such as the movement that occurs in tourism.[77] For financial services, however, the line dividing these two modes of supply is not always clear, especially in the case of transactions carried out through telephone, fax, or the internet.

Indeed, assigning a geographic site to the provision of financial services across borders is difficult and often arbitrary and will become more so as the importance of electronic finance increases. From a regulatory perspective, a major issue is whether, and to what extent, the rules of the host country—that is, the country of the customer—are applied to the cross-border transaction.[78] Besides regulatory jurisdiction, another important

[74] The issuance of securities by a corporation is itself *not* a "financial service;" however, the financial services covered by the GATS include many services that are related to the issuance of securities, such as underwriting and distribution.

[75] *See infra* Part IV.A.3.

[76] As a legal matter, in terms of scheduling commitments in the GATS, providing services via the Internet need not be treated differently than providing services via telephone or fax. Some commentators have emphasized the importance of explicitly confirming this principle of "technological neutrality" in the GATS to ensure that members would not make policy distinctions among services based on the technological means of delivery. *See* Aaditya Mattoo and Ludger Schuknecht, *Trade Policies for Electronic Commerce*, Policy Research Working Paper 2380, World Bank (2002).

[77] The issue of clarifying the distinction between mode 1 and mode 2 in the GATS may be raised during the Doha round services negotiations. One approach would be to define mode 2 to require the physical presence of the consumer in the country of the service supplier; another approach (which appears to have little, if any, support among WTO members) would be to combine the two modes. *See id*.

[78] *See generally* Sydney J. Key and Hal S. Scott , International Trade in Banking Services: A Conceptual Framework (Occasional Paper 35, Group of Thirty, 1991). *See also* Financial Services Authority [UK], *The FSA's Approach to the Regulation of E-Commerce,* Discussion Paper 6 (2001). Suppose, for example, that employees of a foreign bank visit the host country to arrange cross-border loans. Even when the host country does not have a regulatory framework in place for cross-border banking services, host-country bank regulators sometimes look at factors such as the frequency and duration of visits and the permanence of the host-country infrastructure for the visiting employees to determine whether, for regulatory purposes, the cross-border activity rises to the level of a host-country office. (In this example, the question would be whether the activity rises to the level of a representative office. In economic terms, a foreign bank's representative office—which is normally not legally permitted to sign loan or deposit contracts—is basically a marketing mechanism used to facilitate the cross-border provision of financial services. In the GATS, however, the definition of "commercial presence" includes representative offices.) Or, suppose that a foreign

jurisdictional issue arises in the event of a dispute; here the question is which country's courts have jurisdiction to try the case and which country's laws apply.[79]

The GATS commitments for cross-border financial services differ substantially between banking and other financial services excluding insurance on the one hand, and insurance and insurance-related services, on the other, as well as among countries. For cross-border banking and other financial services excluding insurance, commitments also differ substantially between mode 1 (cross-border supply) and mode 2 (consumption abroad).

(a) Banking and other Financial Services Excluding Insurance. Most OECD countries used the Understanding on Commitments in Financial Services to make commitments in mode 2 (consumption abroad) for all banking and other financial services (excluding insurance) listed in the Annex on Financial Services.[80] However, for mode 1 (cross-border supply), they used the Understanding to make commitments that were relatively limited and did not always reflect existing liberalization. Specifically, most OECD countries made commitments in mode 1 for only two categories (excluding insurance): (a) financial information and data processing services; and (b) advisory services.[81] Many acceding countries have made substantial commitments in both mode 1 and mode 2. Most developing countries, however, made no commitments or extremely limited commitments for cross-border banking and other financial services excluding insurance.

broker-dealer solicits host-country customers to purchase securities. Securities regulators often use solicitation—in addition to the actual conduct of business with domestic residents—as a criterion for determining whether the foreign firm is subject to host-country broker-dealer registration requirements. In response to the increasing use of the Internet by the securities industry, a number of regulators also examine factors such as whether a web site is being used to target host-country customers. *See* International Organization of Securities Commissions, Technical Committee, Internet Task Force, *Report on Securities Activities on the Internet* (1998) and *Report on Securities Activities on the Internet II* (2001); U.S. Securities and Exchange Commission, *Regulation of Exchanges*, Concept Release, Release 34-38672, International Series Release IS-1125 (Jul. 16, 1997) and *Statement of the Commission regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore*, Interpretation, International Series Release IS-1125 (Mar. 23, 1998); Financial Services Authority [UK], *Treatment of Material on Overseas Internet Wold Wide Web Sites Accessible in the UK but Not Intended for Investors in the UK*, Guidance 2/92 (1998), and *The FSA's Approach to the Regulation of E-Commerce, supra*; Michael E. Mann and Eva Marie Carney, *Jurisdiction in Cyberspace: International Implications of Electronic Markets*, in John F. Olson and Carmen J. Lawrence, eds. SECURITIES IN THE ELECTRONIC AGE: A PRACTICAL GUIDE TO THE LAW AND REGULATION (2002).

[79] See Financial Services Authority [UK], *The FSA's Approach to the Regulation of E-Commerce, supra* note 78.

[80] *See infra* Appendix A regarding the Understanding on Commitments in Financial Services. In view of the difficulties in distinguishing between the two modes, however, some of the members who made mode 2 commitments for a broad range of financial services also included statements in the so-called headnotes to their financial services schedules emphasizing that these commitments did not require them to allow solicitation by foreign service suppliers. *See* World Trade Organization, *Technical Issues Concerning Financial Services Schedules*, Note by the Secretariat, S/FIN/W/9 (1996).

[81] One OECD country—Switzerland—went further and made comprehensive financial services commitments for banking and other financial services (excluding insurance) in mode 1 as well as mode 2. A few OECD countries, however, severely limited even their commitments for financial information and data processing services and/or advisory services, or made no commitments at all in mode 1. The Annex on Financial Services refers to "advisory, intermediation and other auxiliary financial services" undertaken in connection with any financial service listed in the Annex; examples listed included credit reference and analysis, investment and portfolio research and advice, and advice on acquisitions and corporate restructuring and strategy. GATS, *Annex on Financial Services*, ¶ 5. With respect to mode 1, however, the Understanding covers advisory and other auxiliary financial services but excludes intermediation services. *See Understanding on Commitments in Financial Services*, ¶ B.3 (c).

For a number of the OECD countries, the lack of broad cross-border commitments in mode 1 (cross-border supply) for banking and other financial services excluding insurance represents a binding gap. In other words, these countries have been unwilling to bind additional categories of services even when their existing rules are consistent with market access and national treatment under the GATS. Some OECD countries, however, restrict or prohibit the cross-border provision of financial services, particularly securities services—for example, by requiring establishment of a commercial presence to provide securities services to retail customers. In some cases, host countries may regard these barriers as prudential.

For some emerging market economies and other developing countries the lack of broad cross-border commitments for banking and other financial services excluding insurance also represents a binding gap. Many developing countries, however, continue to impose barriers that significantly restrict or prohibit the provision of cross-border financial services to their residents. From the perspective of developing countries, cross-border services may not appear to offer the same benefits as establishment of a commercial presence, particularly with regard to the transfer of technology, know-how, and skills. A further complication is that capital flows are either an integral part of, or typically associated with, most types of cross-border financial services.[82] In addition to their concern about the overall volatility of international capital flows, some developing countries may also be concerned about "capital flight" on the part of individual residents.[83] Restrictions on residents opening bank accounts abroad, for example, constitute both capital controls and barriers to trade in financial services.

(b) Insurance and Insurance-Related Services. With the exception of the reinsurance business, the provision of insurance services has traditionally been much less internationalized than banking and other non-insurance financial services. At present, the cross-border provision of insurance services consists almost entirely of reinsurance and commercial insurance, primarily marine, aviation, and transport insurance (referred to as "MAT insurance").[84] In the GATS, most of the OECD countries used the Understanding to make commitments in both mode 1 (cross-border supply) and mode 2 (consumption abroad) only for MAT insurance; reinsurance and "retrocession," that is, reinsurance by reinsurers; and services auxiliary to insurance, such as actuarial, risk assessment and claim settlement services.[85] Many acceding countries made similar commitments. Most developing countries made no commitments or extremely limited commitments for cross-border insurance services.

3. Temporary Presence of Natural Persons (Mode 4)

This mode of supply includes both the temporary presence of nonlocal staff of a host-country branch or subsidiary of a foreign financial firm and agents of the firm visiting the

[82] *See supra* Part III.A

[83] The GATS requirement that a member allow capital movements that are an essential part of the cross-border supply of a service (*see supra* note 35) mentions only mode 1 (cross-border supply) and not mode 2 (consumption abroad). As a practical matter, however, countries would presumably not have scheduled commitments in either mode 1 or mode 2 unless they were prepared to liberalize any capital transaction that is either an integral part of or closely associated with the provision of the service.

[84] *See* HAROLD D. SKIPPER, JR., INSURANCE IN THE GENERAL AGREEMENT ON TRADE IN SERVICES. (2001).

[85] *See Understanding on Commitments in Financial Services*, ¶¶ B.3 (a)–(b); Skipper, *supra* note 84; and *infra* Appendix A.

host country to facilitate the provision of cross-border serivces. Although the presence of natural persons is listed as a mode of supply in the GATS and members can negotiate sector-specific commitments, countries usually make commitments for the temporary presence of natural persons as "horizontal commitments" that apply to all services sectors. For the financial services sector, however, most OECD countries used the Understanding on Commitments in Financial Services to make commitments allowing the temporary entry of senior managerial personnel and certain types of specialists in association with the establishment of a commercial presence.[86]

B. Additional Commitments

Barriers to international trade in financial and other services can also be created by non-quantitative and nondiscriminatory structural barriers. Such barriers are associated with national measures that do not discriminate between domestic and foreign services and service suppliers.[87] These barriers could arise because a national measure is primarily anticompetitive or fosters anticompetitive behavior by private parties. In some cases, the barrier could be associated with the inadequacy or absence of domestic regulation—for example, the lack of an adequate domestic legal framework for insolvency.[88] Nondiscriminatory structural barriers could also arise because of differences in national rules, including prudential rules, that make it difficult to conduct operations on a global basis. A country's administrative procedures—in particular, a lack of regulatory transparency and procedural "fairness"—could also create nondiscriminatory structural barriers.[89]

Some nondiscriminatory structural barriers are addressed in the GATS framework agreement;[90] others have been dealt with in schedules of commitments for individual sectors, where the most far-reaching example is in basic telecommunications.[91] In the

[86] *See infra* Appendix A regarding the Understanding on Commitments in Financial Services.

[87] GATS Article XVI (Market Access) covers various quantitative limitations imposed by host-country that may not, on their face, be overtly discriminatory—for example, limiting the number of service suppliers in a particular market by restricting the number of new licenses that may be issued or by relying on an economic needs test, which involves an assessment of "needs" in the market by host-country authorities. Such barriers are, however, similar to the more overly discriminatory barriers covered by GATS Article XVII (National Treatment) because they block foreign entry based on criteria that are beyond the control of the affected foreign service supplier to meet. *See infra* note 121.

[88] Nondiscriminatory structural barriers to trade in financial services are not limited to financial sector regulation. Barriers in other areas that are particularly important for the effective functioning of the financial services sector, such as lack of adequate frameworks for corporate governance or insolvency, are part of the international work on strengthening domestic financial systems (*see supra* Part I).

[89] *See infra* Part V.B.

[90] GATS Article III (Transparency) imposes a general transparency obligation on WTO members to publish all measures "of general application" that are relevant to trade in services. GATS Article VI (Domestic Regulation) addresses, in fairly general terms, barriers created by domestic regulations. It requires countries to apply such regulations in a "reasonable, objective and impartial manner" to avoid undermining commitments to market access and national treatment. Moreover, countries must have appropriate legal procedures to review administrative decisions affecting trade in services. Article VI also mandates further work to develop disciplines to ensure that licensing requirements or technical standards do not constitute unnecessary barriers to trade in services. Pending the completion of this work, countries must refrain from adopting licensing rules or technical standards that are so burdensome, restrictive of trade, or lacking in transparency that they undermine the benefits that could reasonably be expected from their commitments to national treatment and market access.

[91] In the basic telecommunications sector, a substantial majority of the countries that have made commitments to national treatment and market access in that sector have incorporated into their schedules—using the additional commitments column—a reference paper setting forth "procompetitive" regulatory principles. Designed for a sector where dominant suppliers often control essential host-country facilities, these principles

financial services sector, most OECD countries used the Understanding on Commitments in Financial Services to make a general "best efforts" commitment to remove or eliminate any significant adverse effects of such barriers.[92] In addition, the United States and the European Union used the "additional commitments" column of their schedules to make "best efforts" commitments to remove specified nondiscriminatory barriers.[93] Japan, under great pressure from its trading partners, went further and made binding commitments regarding removal of certain nondiscriminatory structural barriers—including restrictions on asset-management services and lack of regulatory transparency and limitations on lines of business in insurance—that were covered in its bilateral financial services agreements with the United States.[94]

C. MFN Exemptions

An MFN exemption allows a country to apply more favorable treatment than that guaranteed by its GATS commitments on a non-MFN basis, but it does not permit less favorable treatment. As a result, an MFN exemption, combined with the absence of commitments to substantially full national treatment and market access, provides leeway for a country to pursue a unilateral reciprocity policy. Such policies constitute a significant departure from the fundamental principle of nondiscrimination among countries on which the GATS and other multilateral trade agreements are based.[95] The GATS nonetheless allows one-time MFN exemptions to be taken upon entry into force of a country's initial schedule of commitments under the GATS. In principle such MFN exemptions should not exceed a period of ten years; they must be reviewed after five years and, in any event, are subject to negotiation in subsequent trade-liberalizing rounds.[96]

In financial services, about twenty-five WTO members have taken one-time MFN exemptions under GATS Article II.[97] Many of these exemptions are relatively narrow,

seek to ensure that a country's national treatment and market access commitments will not be undermined. Countries committing to the principles undertake, among other things, to maintain measures to ensure network interconnection on nondiscriminatory terms and to prevent certain anticompetitive practices. *See* Bernard M. Hoekman, *Competition Policy and the Global Trading System,* 20 THE WORLD ECONOMY 383 (1997) and Bernard M. Hoekman, Patrick Low, and Petros C. Mavroidis, *Regulation, Competition Policy and Market Access Negotiations*: *Lessons from the Telecommunications Sector* in COMPETITION POLICY FOR AN INTEGRATED GLOBAL ECONOMY (Einar Hope, ed., 1996).

[92] *See infra* Appendix A.

[93] For example, the U.S. administration committed to try to work with the Congress to remove Glass-Steagall Act restrictions, a goal that was subsequently accomplished, while the European Union pledged that its member states would try to process applications for licenses for banking and insurance subsidiaries within specified periods of time.

[94] *See supra* Part II.C and *infra* Part V.B. For asset management services, Japan's additional commitments included eliminating restrictions that prohibited a single entity from managing both pension and mutual funds and that imposed extremely strict asset-allocation rules—for example, requiring most assets to be invested in bonds and other fixed-income instruments as opposed to equities. *See Japan—United States Measures Regarding Financial Services, supra* note 23, and *Japan—United States Measures Regarding Insurance*, *supra* note 23. In addition, one insurance commitment was actually aimed at maintaining for a certain period of time a restriction on new entrants into a niche market, the so-called third sector of accident, medical and nursing care insurance. The purpose was to protect the interests of foreign firms in this market until they could enter and compete with domestic firms in other market segments. *See Japan—United States Supplementary Measures Regarding Insurance*, *supra* note 23.

[95] *See supra* note 14 and accompanying text.

[96] *See* GATS, Art. II and *Annex on Article II Exemptions*. *See also supra* notes 19 and 21.

[97] Some WTO members—including some of those that submitted MFN exemptions specifically targeted at financial services—took MFN exemptions for measures applicable to all services sectors that would also be relevant to the financial services sector, including, for example, measures dealing with the temporary presence of natural persons, regulatory frameworks for investment, or real estate ownership.

that is, they apply only to a specific activity or to treatment accorded particular countries. The United States, for example, has taken an MFN exemption for granting primary dealer status to foreign financial firms operating in the U.S. government securities market. Some members, including a number of developing countries, have taken MFN exemptions for measures applicable to neighboring countries because of special relationships that do not qualify as economic integration agreements.[98]

Of the members with MFN exemptions in financial services, about half have taken broad exemptions covering establishment of subsidiaries and/or branches of foreign financial firms—that is, they enable the country to condition establishment on whether the firm's home country has opened its market to host-country financial firms. These broad MFN exemptions—and concomitant absence of commitments or only minimal commitments to market access and national treatment—have been taken either to accommodate reciprocity policies currently in force or to preserve the option of applying such policies in the future. In the latter case, the MFN exemption is analogous to a "binding gap."

V. The Doha Round and Beyond

The inclusion of financial services in the GATS and the negotiation of the 1997 agreement on financial services commitments constitute an important step in the larger process of achieving "international contestability of markets" for financial services and strengthening domestic financial systems. "International contestability of markets" refers to the creation of markets that are competitive and efficient on a global basis—a goal that can be achieved by removing all types of barriers to foreign participation in host-country markets.[99] International contestability is, in effect, based on three pillars of liberalization: (1) national treatment and market access; (2) the removal of nondiscriminatory structural barriers, that is, domestic structural reform; and (3) freedom of capital movements.[100]

Third-pillar liberalization, that is, liberalization of capital movements, is dealt with by the GATS only insofar as it affects members' specific commitments to liberalize trade in services.[101] In general, liberalization of capital movements is a matter of concern for the IMF.[102] Although the free movement of capital plays a critical role in allowing efficient allocation of resources on a global basis, the Asian financial crisis of 1997–98 revived a long-standing debate over the appropriateness and effectiveness of capital controls, particularly on short-term flows.[103] Nevertheless, all parties to the debate agree

[98] An example of this type of MFN exemption taken by an OECD country, in this case for cross-border services in mode 1, involves Switzerland's requirement that Swiss franc-denominated issues be lead-managed by a bank or securities dealer with a commercial presence in Switzerland. Switzerland listed this requirement as a limitation on market access in its schedule of commitments. Because of its monetary union with Liechtenstein, however, Switzerland has taken an MFN exemption to allow persons established in Liechtenstein to lead-manage such issues without establishing a commercial presence in Switzerland.

[99] *See* Beviglia Zampetti, Americo, and Pierre Sauvé, *Onwards to Singapore: The International Contestability of Markets and the New Trade Agenda*, 7 THE WORLD ECONOMY 133 (1996), Graham, Edward M., and Robert Z. Lawrence, "*Measuring the International Contestability of Markets: A Conceptual Approach.*" 30 J. WORLD TRADE 5 (1996), Lawrence, Robert Z., *Toward Globally Contestable Markets*, in Organisation for Economic Co-operation and Development, MARKET ACCESS AFTER THE URUGUAY ROUND: INVESTMENT, COMPETITION, AND TECHNOLOGY PERSPECTIVES (1996).

[100] *See* Key, *supra* note 3, ch. 3, for a more detailed discussion of the three pillars of liberalization.

[101] *See supra* Part III.A.

[102] *See* Gianviti, *supra* note 37, Holder, *supra* note 37, and Leckow, *supra* note 37, regarding the role of the IMF in liberalization of capital movements.

[103] *See* Barry Eichengreen and Michael Mussa with Giovanni Dell'Ariccia, Enrica Detragiache, Gian Maria Milesi-Ferretti, and Andrew Tweedie, *Capital Account Liberalization: Theoretical and Practical Aspects*, Occasional Paper 172, International Monetary Fund (1998); Alan Greenspan, *International Economic and*

that capital controls can never be a substitute for sound macroeconomic policies and fundamental reforms of domestic financial and legal structures. Indeed, the Asian crisis itself emphasized that weaknesses in domestic financial systems can create significant vulnerabilities as capital movements are liberalized. At present, conventional wisdom holds that, although imposition of new capital controls should, in general, be avoided, the imposition of limited, temporary capital controls to deal with massive temporary inflows or outflows of short-term debt might be useful in some cases.[104] Moreover, it is now widely recognized that removal of existing controls must be carried out with great care. Of particular importance are the pace and appropriate "sequencing" of liberalization of different types of capital flows and of liberalization of capital movements vis-à-vis structural reforms to strengthen domestic financial systems.[105]

A. National Treatment and Market Access

To date, the financial services negotiations in the GATS have dealt primarily with first-pillar liberalization, aimed at ensuring national treatment and market access.[106] Despite significant improvements during the course of the Uruguay and post-Uruguay round negotiations, however, significant gaps remain in the GATS commitments to national treatment and market access for financial services. These include both binding gaps—that is, gaps created by the failure to bind in the GATS liberalizing measures already in effect or scheduled to go into effect—and gaps resulting from barriers that WTO members continue to impose on foreign financial services and service suppliers. It is therefore important for financial services negotiations in the Doha round to focus on (a) capturing as formal GATS commitments existing or ongoing liberalization that has not yet been bound; and (b) removing remaining barriers to national treatment and market access, and binding the resulting liberalization.[107] As already noted, for establishment of a commercial presence, important barriers that need to be addressed include restrictions on foreign ownership positions in host-country financial firms and restrictions on entry through the branch form of organization.[108]

Financial Systems, Testimony before the Committee on Banking and Financial Services, U.S. House of Representatives (Sept. 16, 1998); Paul Krugman, *Saving Asia: It's Time to Get Radical,* Fortune (Sept. 7, 1998); Jeffrey Sachs, *Global Capitalism: Making It Work*, THE ECONOMIST (Sept. 12, 1998); Lawrence H. Summers, *Go with the Flow*, FINANCIAL TIMES (Mar. 11., 1998) and *Repairing and Rebuilding Emerging Market Financial Systems*, Remarks at Federal Deposit Insurance Corporation International Conference on Deposit Insurance, Washington, D.C. (Sept. 9, 1998), Joseph E. Stiglitz,, *Boats, Planes, and Capital Flows*, FINANCIAL TIMES (Mar. 25, 1998).

[104] *See* Kenneth S. Rogoff, *Rethinking Capital Controls: When Should we Keep an Open Mind?* 39 FINANCE AND DEVELOPMENT 55 (2002).

[105] *See* Shogo Ishii and Karl Habermeier with Jorge Iván Canales-Kriljenko, Bernard Laurens, John Leimone, and Judit Vadasz, *Capital Account Liberalization and Financial Sector Stability*, Occasional Paper 211, International Monetary Fund (2002), and Eichengreen and Mussa with Giovanni Dell'Ariccia et al., *supra* note 103.

[106] Japan's additional commitments were an exception (*see supra* Part IV.B and *infra* Part V.B.2).

[107] The bound liberalization could involve "phased commitments," that is, commitments that are guaranteed to be implemented by a specified future date that marks the end of a transition period. A government could guarantee that it will lift a restriction by a certain date if it is able to do so by regulation, if it already has any necessary legislative mandate, or if it will be given the authority to do so as part of the approval process for the results of the Doha round negotiations or an accession agreement. Phased commitments were not used to any significant extent in the 1997 financial services agreement. China, however, in its WTO accession agreement, made a series of phased commitments to market-opening for financial services. *See* Key, *supra* note 10, ch. IV, regarding phased commitments.

[108] *See supra* Part IV.A.1(b).

For cross-border services, it may be necessary to use an incremental approach that combines strengthening GATS commitments and achieving greater liberalization in practice.[109] Such an approach could focus on broadening the group of countries with mode 1 and mode 2 commitments that are at least as strong as those made by most OECD countries; exploring whether there are any specific categories of financial services, beyond those now covered by the Understanding on Commitments in Financial Services, that OECD countries might be willing to bind in mode 1 (cross-border supply);[110] and persuading emerging market and other developing countries that do not currently offer substantially full market access and national treatment for a broad range of cross-border activities in mode 1 to liberalize their rules.[111]

Another area for negotiation that is closely related to national treatment and market access commitments involves the narrowing or withdrawal of the broad exemptions that some WTO members have taken from the most-favored-nation (MFN) obligation of the GATS. [112]

B. Nondiscriminatory Structural Barriers

A difficult issue for the Doha round and subsequent financial services negotiations is how far GATS financial services commitments should extend into the realm of second-pillar liberalization, namely, nonquantitative and nondiscriminatory structural barriers. Removing second-pillar barriers goes far beyond achieving national treatment and market access. Those principles ensure that foreign services and service suppliers can enter a host-country market *as currently structured* and enjoy equality of competitive opportunities vis-à-vis their domestic counterparts. By contrast, second-pillar liberalization represents an effort to create maximum potential competitive opportunities in a host-country market. Achieving this could require major domestic structural reform. This would necessarily involve some degree of convergence of national regulatory systems, either de facto or through negotiated harmonization.

The European Union's single-market program represents the most far-reaching effort to date to remove nondiscriminatory structural barriers among a group of nations.[113] That program has, however, been undertaken within the unique supranational legislative, judicial, and administrative structure of the European Community, to which member states have transferred a significant degree of sovereignty.[114] In addition, within that supranational framework, the legislated harmonization of essential rules covers a broad range of areas. Even within the European Union, however, important second-pillar barriers to trade in financial services among the member states are still in place.

[109] *See* Key, *supra* note 3, ch. 4, for a more detailed discussion.

[110] In view of concerns about ensuring consumer protection for retail financial services provided in cyberspace, such an effort could focus on services that are likely to present fewer risks for host-country retail consumers and also on the possibility of distinguishing between wholesale and retail customers.

[111] Binding such liberalization in the GATS would be a goal for future negotiations, since it would not be productive to pressure these countries to make commitments for activities that OECD countries are unwilling to bind.

[112] *See supra* Part IV.C.

[113] The EU single-market program is, in effect, an effort to achieve "EU contestability of markets" by dealing with all three pillars of liberalization: national treatment and market access; removal of nondiscriminatory structural barriers; and freedom of capital movements. Moreover, the EU single-market legislation includes most of the areas covered by the international work on strengthening domestic financial systems. See *supra* Part III.B.2 and Key, *supra* note 3, ch. 5, regarding the intra-EU approach of mutual recognition and home-country control.

[114] *See supra* note 12 regarding the distinction between the European Community and the European Union.

In considering whether, or to what extent, it is realistic or appropriate to negotiate and bind in the GATS financial services liberalization that goes beyond national treatment and market access, it seems reasonable to proceed selectively. In this regard, two areas seem particularly important: (a) developing stronger GATS disciplines on regulatory transparency; and (b) removing barriers that cannot be justified on prudential grounds and serve primarily to deny "effective market access" to foreign financial services and service suppliers, and then binding the resulting liberalization.

1. Regulatory Transparency

Regulatory transparency is qualitatively different from other types of second-pillar liberalization because it involves rules about developing and applying rules, that is, procedural as opposed to substantive barriers. Procedural reform can, however, engender substantive change. Increased transparency in developing and applying regulations, together with procedural fairness in applying regulations, can lead to higher quality regulations. Such regulations are likely to be clearer; more effective and less burdensome in achieving their goals; and applied more reasonably, objectively, and predictably. Regulatory transparency and procedural fairness help to achieve these goals because they promote accountability—that is, they create an environment in which regulatory authorities must explain and accept responsibility for their actions with regard to the development and application of rules.

Stronger GATS disciplines on regulatory transparency could be designed specifically for financial services or could be applied more generally to all services sectors.[115] GATS rules on transparency in developing[116] and applying regulations[117]—together with the

[115] In 2001, both the United States and Canada submitted proposals on regulatory transparency for the GATS negotiations in the Doha round. See World Trade Organization, *Transparency in Domestic Regulation,* Communication from the United States, S/CSS/W/102 (July 13, 2001), and *Initial Negotiating Proposal on Regulatory Transparency and Predictability*, Communication from Canada. S/CSS/W/47. (Mar. 14, 2003). The United States had previously submitted, as an attachment to its initial sectoral proposal for financial services, "some initial views" on transparency and other principles for regulation of financial services. *See* World Trade Organization, *Financial Services,* Communication from the United States, S/CSS/W/27 (Dec. 18, 2000).

[116] Transparency in *developing* financial services regulations includes establishing a meaningful procedure for interested parties to comment on a proposed regulation prior to its adoption in final form. (*See* Rachel Thompson and Keiya Iida, *Strengthening Regulatory Transparency: Insights for the GATS from the Regulatory Reform Country Reviews*, in TRADE IN SERVICES: NEGOTIATING ISSUES AND APPROACHES (Julia Nelson and Pierre Sauvé, eds., 2001.) Specific approaches will vary among countries—and over time within countries—depending on the legal system, the institutional arrangements for financial regulation and supervision, and the size and stage of development of financial markets. In the United States, for example, the Administrative Procedure Act generally requires "notice and comment" rulemaking, whereby regulatory authorities must give public notice of proposed rules, provide a reasonable amount of time for interested parties to submit comments, give consideration to comments received, and publish final regulations with an explanation that addresses major concerns raised in the comments and gives the basis for the agency's decision.*See* 5 U.S.C. §553 (2000). *See* Key, *supra* note 3, ch. 5, for a more extensive discussion of regulatory transparency and procedural fairness.

[117] With regard to transparency in *applying* regulations, Article III of the GATS (Transparency) already requires countries to publish all measures "of general application" relating to trade in services (*see supra* note 90). Other important elements of transparency in applying regulations include establishing and making publicly available objective criteria for obtaining authorization to provide a service; providing information on the amount of time normally required to act upon an application; responding to an applicant's request for information on the status of the application; and, except when special circumstances make it impracticable to do so, providing reasonable advance notice before requiring compliance with new regulations. GATS Article VI (Domestic Regulation) already includes a requirement for providing information about the status of an application but only for services for which a specific commitment to national treatment and market access has been made (*see* GATS, Art VI: 5).

closely related principle of procedural "fairness" in applying regulations[118]—would not only help eliminate barriers created by opaque and unfair regulatory procedures but also help ensure that a country does not use its regulatory process to undermine its commitments to national treatment and market access. Moreover, GATS rules on transparency in financial services regulation could both complement and build upon the work on transparency that is part of the ongoing international effort to strengthen domestic financial systems.[119]

2. "Effective Market Access"

A second issue involves anticompetitive domestic regulatory measures that cannot be justified on prudential grounds and serve primarily to keep foreign financial firms from competing in host-country markets by making entry impractical or too costly—thereby denying them "effective market access."[120] Such measures are distinct from the barriers to market access covered by GATS Article XVI (Market Access). The latter constitute quantitative barriers based on criteria such as numerical quotas and economic needs tests that are beyond the control of the affected foreign service supplier to meet. [121] By contrast, measures denying effective market access would, as a legal matter, allow a foreign firm the possibility of complying with the rules—that is, the firm would be permitted to enter the market and operate under the same rules that apply to domestic firms. Even if the rules provided de facto national treatment, however, their practical impact on foreign firms would be to create a major barrier to entry. [122]

Identifying barriers to effective market access in financial services that could usefully be negotiated in the GATS requires a country's trading partners to determine (a) whether, in practice, its measures keep foreign firms from competing in a host-country market or market segment and (b) whether a "critical mass" of regulators believes that the measures

[118] Although increased transparency per se should contribute to both substantive and procedural fairness in financial services regulation, principles specifically designed to enhance *procedural fairness in applying regulations* are usually linked with proposals for greater regulatory transparency. GATS Article VI (Domestic Regulation) already addresses some basic elements of procedural fairness in applying regulations (*see supra* note 90). Several of these, however, cover only those services for which specific commitments to national treatment or market access have been made—for example, requirements that regulations must be applied in a "reasonable, objective and impartial manner," and that regulatory authorities must act on applications in a timely fashion (GATS, Art. VI: 1,3). A provision of Article VI that applies more generally requires a country to maintain a mechanism for appeal of an adverse regulatory ruling affecting trade in services (*see* GATS, Art. VI: 2).

[119] Most of the work on transparency that is part of the ongoing international effort to strengthen domestic financial systems focuses on establishing international minimum standards and codes of good practices with regard to types of transparency other than regulatory transparency—namely, transparency on the part of governments with regard to macroeconomic policy and data; and on the part of the private sector with regard to disclosure of financial information, risk exposures, and risk management practices. *See* Key, *supra* note 3, ch. 5.

[120] "Effective market access" is an undefined term that has been used in many different ways in the context of international trade in financial services. For example, it has been used broadly to encompass all second-pillar barriers and also, much more narrowly, to refer to de facto national treatment *See* Sydney J. Key , *Is National Treatment Still Viable? US Policy in Theory and Practice*, 5 Journal of International Banking Law 365 (1990).

[121] *See* World Trade Organization, Council for Trade in Services, *Economic Needs Tests,* Note by the Secretariat, S/CSS/W/118 (Nov. 30, 2001), for a comprehensive discussion of the distinction between quantitative measures, particularly economic needs tests, listed in GATS Article XVI (Market Access) and domestic regulatory measures.

[122] *See* Robert G. Pozen, *WTO Objectives of Asset Manage*rs, (presentation at conference on "Further Liberalization of Global Financial Services Markets?" Institute of International Economics, Washington, D.C. (June 2002).

are inappropriate for prudential purposes. Even if the prevalent regulatory view is that the measures cannot be justified on prudential grounds, however, host-country regulators must be persuaded to accept it.[123] Some guidance on the areas that are appropriately subject to prudential regulation and the types of measures that are generally accepted as prudential is provided by the international work on minimum standards and codes of good practices. That work does not, however, directly address the appropriateness of specific national measures.

The additional commitments made by Japan in the 1997 agreement on financial services commitments provide a model for the types of measures that could be negotiated in the Doha round.[124] For example, with regard to asset management services, a number of countries still maintain restrictions that create major barriers to entry by foreign firms. Such restrictions include prohibiting pension and mutual funds from investing in foreign securities or limiting such investments to a small portion of their assets, and subjecting the funds to extremely strict asset-allocation requirements, such as requiring a certain percentage of assets to be invested in domestic government bonds.[125] For both pension and mutual funds, however, the prevalent regulatory view appears to be that prudential portfolio regulation should be based on broader principles that allow fund assets to be managed in an effective and efficient manner and, at the same time, ensure adequate protection of investors and policyholders.[126]

C. Prudential Measures

Barriers to trade in financial services can also be created by legitimate prudential rules, that is, measures to promote the integrity and stability of the financial system or to protect consumers of financial services. The prudential carve-out ensures that a WTO member may take such measures even if they are inconsistent with its obligations and commitments in the GATS. The international work on minimum standards and codes of good practices for prudential regulation and supervision provides general guidance on the areas in which prudential regulation is appropriate and on the types of rules that are widely accepted as legitimate prudential measures. Against this background, pressure from a country's trading partners—and, for particularly egregious measures, use of the WTO dispute settlement mechanism—will need to be relied upon to prevent abuse of the prudential carve-out.

Although prudential measures sometimes impose additional requirements on foreign firms, they may also create barriers simply because they differ among countries—that

[123] In the GATS, additional commitments are scheduled as so-called positive lists of liberalizing measures that reduce or remove existing barriers. A country would, of course, be unwilling to make a commitment to liberalize with respect to a measure that it regards as prudential. A country might need to rely on the prudential carve-out, however, if circumstances were to change such that it decided to reintroduce for prudential reasons a measure that was inconsistent with its additional commitments. See Key, *supra* note 3, ch. 5, for further discussion of the "effective market access" approach.

[124] *See supra* Part IV.B.

[125] *See* Investment Company Institute, *Asset Management*, presentation at financial services seminar, World Trade Organization, Council for Trade in Services (Oct. 11, 2001).

[126] Under such principles, mutual funds must maintain portfolios that comply with their stated investment objectives, disclose portfolio holdings periodically, maintain sufficient portfolio liquidity to meet redemptions, and keep fund assets safeguarded. Pension funds must act solely in the interests of the pension plan and its participants, make investments in accordance with principles of diversification and prudence, and safeguard plan assets. *See, for example,* International Organization of Securities Commissions, Technical Committee, *Report on Investment Management—Principles for the Regulation of Collective Investment Schemes and Explanatory Memorandum* (1994), regarding collective investment schemes.

is, financial firms operating on a global basis may often find it burdensome to comply with a multitude of different national rules. Two approaches can be used to deal with barriers created by legitimate prudential measures. One would have home-country regulatory authorities convince host-country authorities that their prudential concerns can be addressed with less sweeping requirements. These efforts could take place bilaterally or in various international fora, including the financial services negotiations under the auspices of the WTO, where finance ministries play a major role.[127]

A second approach would have home- and host-country authorities negotiate a recognition arrangement. Such arrangements can be used to deal with nondiscriminatory structural barriers that arise from differences in prudential rules among countries, as well as to provide relief from prudential rules that are inconsistent with national treatment and market access.[128] Although the GATS Annex on Financial Services facilitates unilateral or mutual recognition of prudential measures by permitting a departure from the MFN obligation of the GATS for such arrangements, their negotiation is beyond its purview.[129]

VI. Conclusion

Financial services liberalization under the GATS is one part of the larger process of achieving international contestability of markets and strengthening domestic financial systems, including prudential regulation and supervision. As the GATS explicitly recognizes, liberalization of trade in financial and other services is an ongoing process. In the financial services sector, this process is being driven not only by market forces and new technologies but also by the growing recognition among policymakers, particularly in emerging market economies, that market opening can both benefit host-country consumers of financial services and contribute to the resiliency of domestic financial systems. The development of international minimum standards and codes of good practices for sound financial systems and their implementation by individual countries provide a strong foundation for moving ahead with further liberalization of trade in financial services. Financial services negotiations in the Doha round and beyond can play an important role helping to accelerate the process of liberalization as well as solidifying its results in the form of binding commitments subject to the WTO dispute settlement mechanism.

[127] *See supra* note 6.
[128] *See, for example, supra* notes 49 and 52 and accompanying text.
[129] *See supra* Part III.B.2.

APPENDIX A

UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

The Understanding on Commitments in Financial Services ("Understanding") provides an alternative approach to scheduling commitments that was used by most of the OECD countries to supplement the requirements of the GATS framework agreement. In effect, the Understanding is a model schedule, albeit a particularly complicated one. In legal terms, the Understanding is incorporated by reference into the GATS through the schedules of commitments of the countries that use it. Commitments scheduled under the Understanding are extended to all members of the WTO regardless of whether the members scheduled commitments under the framework or the Understanding.

For establishment of a commercial presence (mode 3), the Understanding supplements the list of measures inconsistent with market access contained in GATS Article XVI (Market Access) by setting forth a broad commitment to the right of establishment or expansion of a commercial presence. WTO members using the Understanding undertake to provide national treatment and market access for *all* financial services in this mode—under the GATS framework agreement as supplemented by the Understanding[130]—except for nonconforming measures listed in their schedules or measures that fall within the scope of the prudential carve-out or the other public policy exceptions in the GATS. This is a so-called "negative list" or "top down" approach to scheduling commitments, in contrast to the "hybrid-list" approach used for national treatment and market access in the GATS.[131] The Understanding also contains a "standstill" provision that allows a member to take exceptions only for *existing* nonconforming measures.[132]

For banking and other financial services excluding insurance, the Understanding sets forth a comprehensive commitment for cross-border services provided through mode 2 (consumption abroad)—that is, a negative list approach is used for all banking and other financial services excluding insurance. However, for banking and other financial services excluding insurance provided through mode 1 and for insurance services in both modes 1 and 2, the Understanding is designed to facilitate more limited commitments.[133] With regard to the temporary presence of natural persons (mode 4), the Understanding sets

[130] The Understanding relies on the definition of national treatment in the framework agreement, but clarifies its application in the financial services sector with regard to both payment and clearing systems and self-regulatory bodies. Specifically, it clarifies that access by host-country offices of foreign financial firms to payment and clearing systems operated by public entities must be granted on a national treatment basis; it also makes clear that when membership in a private self-regulatory body is required by a host country in order for foreign financial firms to compete on an equal basis with domestic firms, the host country must ensure that the self-regulatory body offers national treatment. *See Understanding on Commitments in Financial Services*, ¶¶ C1.–C2.

[131] The GATS approach to scheduling commitments is referred to as a "hybrid list" because it involves a so-called "positive list" of sectors, subsectors, and activities for which commitments are undertaken and, within each listed sector, subsector, or activity, a "negative list" of limitations on national treatment or market access. (*See supra* note 66 and Key, *supra* note 10, at 14–16 for a comparison of "negative lists" and GATS "hybrid lists.")

[132] *See Understanding*, ¶ A.

[133] *See supra* Part IV.A.1.

forth commitments to allow the entry of managerial and certain technical personnel in association with establishment of a commercial presence.[134]

The Understanding contains various other provisions that supplement the framework agreement. These include: a "best efforts" undertaking to remove or limit any significant adverse effect of nonquantitative and nondiscriminatory structural barriers,[135] a requirement that existing monopoly rights be listed in schedules of commitments and a "best efforts" commitment to reduce or eliminate such rights;[136] an obligation to provide both MFN and national treatment for government procurement of financial services;[137] a requirement to allow a host-country office of a foreign financial firm to offer new financial services;[138] and a commitment not to prevent transfers and processing of information that are necessary in the ordinary course of business.[139]

[134] *See Understanding*, ¶ B.9 and *supra* Part IV.A.3.

[135] *See Understanding*, ¶ B.10. With regard to nondiscriminatory measures, the Understanding also contains a best efforts commitment not to limit or restrict existing opportunities. *See* Understanding, ¶ B.11. However, the Understanding also states that neither of these undertakings should result in "unfair" reverse discrimination against domestic service suppliers. *Understanding*, ¶¶ B.10–11.

[136] *See Understanding*, ¶ B.1.

[137] *See Understanding*, ¶ B.2.

[138] *See Understanding,* ¶ B.7. (A "new financial service" is defined as a service already being supplied in another country but not in the host country. *See Understanding*, ¶ D.3.) The purpose of this provision, which was strongly supported by the U.S. financial services industry, is to allow innovative products introduced by financial institutions in their home countries—and approved by the relevant home-country authorities—also to be introduced by their offices in other countries. However, the scope of the provision appears to be relatively narrow. A host country could, for example, invoke its prudential rules to refuse to allow a particular service or a particular type of entity to provide that service. In addition, a note regarding new financial services in the EU schedule of commitments contains a very broad reaffirmation of the need for consistency with host-country regulatory frameworks, a statement that appears to reflect a general understanding among negotiators.

[139] The provision makes clear, however, that it does not restrict the right of countries to protect personal data and privacy provided that right is not used to circumvent the GATS. *See Understanding,* ¶ B.8.

APPENDIX B

DEFINITION OF "FINANCIAL SERVICES" IN GATS ANNEX ON FINANCIAL SERVICES[140]

For the purposes of this Annex:

(a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

Insurance and insurance-related services

(i) Direct insurance (including co-insurance):
  (A) life
  (B) non-life
(ii) Reinsurance and retrocession;
(iii) Insurance intermediation, such as brokerage and agency;
(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

Banking and other financial services (excluding insurance)

(v) Acceptance of deposits and other repayable funds from the public;
(vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
(vii) Financial leasing;
(viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
(ix) Guarantees and commitments;
(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
  (A) money market instruments (including cheques, bills, certificates of deposits);
  (B) foreign exchange;
  (C) derivative products including, but not limited to, futures and options;
  (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  (E) transferable securities;
  (F) other negotiable instruments and financial assets, including bullion.
(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
(xii) Money broking;

[140] GATS, *Annex on Financial Services*, ¶ 5.

(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

(b) A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term "financial service supplier" does not include a public entity.

(c) "Public entity" means:

(i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or

(ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.

CHAPTER 21

TELECOMMUNICATIONS SERVICES

Marco Bronckers* and Pierre Larouche**

TABLE OF CONTENTS

I. Introduction : The Inclusion of Telecommunications Services in the WTO 991
II. A Brief Overview of the WTO Telecommunications Negotiations 992
A. From 1986 to the Conclusion of the GATS in 1994 992
B. The 1996 Breakdown 993
C. The 1997 End Game 993
III. The Commitments Relating to Telecommunications Services in the WTO .. 994
A. The Specific Commitments Concerning Telecommunications Under the GATS 994
1. The Distinction Between Basic and Value-Added Telecommunications 994
2. Commitments Contained in the GATS at the Time of Signature of the WTO Agreement (1994) 995
(a) GATS Schedules 995
(b) The Annex on Telecommunications 996
3. Commitments in the Fourth Protocol 998
(a) Market Access and National Treatment Commitments 998
(b) Additional Commitments on Regulatory Principles: The Reference Paper 999
(i) Legal nature 1000
(ii) Scope 1001
(iii) The regulation of "major suppliers" 1001
(iv) Competitive safeguards 1003
(v) Interconnection 1006
(vi) Universal service 1008
(vii) Licensing 1009
(viii) Independence of the regulatory authority 1010
(ix) Allocation and use of scarce resources 1010
(x) Overall assessment 1010
(c) Residual Importance of the Annex on Telecommunications after the Fourth Protocol 1013
B. The General GATS Obligations that Apply to the Telecommunications Sector 1014
1. The Most-Favored-Nation ("MFN") Obligation 1014

* Professor of WTO and EC External Trade Relations Law, University of Leiden; Partner, Wilmer Cutler Pickering Hale and Dorr, LLP, Brussels.
** Professor of Competition Law, Tilburg University.

2. Domestic Regulation 1015
3. Government Procurement 1017
C. Remedies and Dispute Settlement 1017
1. Remedies for Injury to the Domestic Market 1017
2. Remedies for Difficulties on Foreign Markets 1020
3. The WTO Dispute Settlement System 1020
IV. Implementation of WTO Commitments 1021
A. The EU, its Member States and their WTO Commitments 1021
B. The United States and its WTO Commitments 1025
1. Abandoning Reciprocity 1025
2. Accounting Rates 1028
V. The WTO Telecommunications Commitments in a Broader Context 1031
A. Institutional Setting: The WTO and the ITU 1031
B. Beyond Telecommunications: Convergence with Media, Electronic Commerce 1032
VI. Milestone or Stepping Stone? A Concluding Assessment 1034

Appendix A. Example of a Schedule of Specific Commitments on Telecommunications Services (Country X) 1036
Appendix B. Reference Paper 1038

I. Introduction : The Inclusion of Telecommunications Services in the WTO

In 1986, at the start of the Uruguay Round, there were few precedents and little discussion of liberalization in telecommunications. By way of illustration,[1] the United States was in the aftermath of the AT&T break-up, and the EC had not taken any internal liberalization measures yet, and national telecommunications operators ("TOs") were still firmly entrenched throughout the EU (with the exception of the UK). The European Commission did not publish its first policy paper on the telecommunications sector until 1987, with proposals for a partial liberalization.[2] There is reason to ask then why telecommunications was included in the trade policy framework.

First, the WTO provided a *suitable forum* for negotiations. In 1986, a number of developed countries felt that the traditional forum for international telecommunications negotiations, the International Telecommunications Union ("ITU"), was not an appropriate place in which to discuss liberalization initiatives. The vested interests in the ITU, *i.e.*, governments, most of which control the national TO, were used to discussing technical issues, such as radio frequency allocation, in a spirit of cooperation. Some felt that the introduction of competition, and the advent of many private suppliers of telecommunications services, did not fit into this tradition.[3]

Developed countries also perceived that developing countries had too much influence in the ITU.[4] In view of the ITU's role in discussions on the North-South dialogue and the "New International Economic Order" in the 1970s, developed countries did not expect that deregulation and liberalization could become a high priority for the ITU.

Second, it was felt by developed countries that the *negotiating techniques* of the GATT were appropriate for the objectives they pursued**:** the global framework would give them more opportunity to achieve results, since cross-sectoral deals might be struck.[5]

Having unsuccessfully resisted the inclusion of services in the Uruguay Round, the developing countries did manage to put services on a separate track in an attempt to prevent cross-linkages between traditional GATT issues and services.[6] In fact, there were not many trade-offs amongst different service sectors. These circumstances undoubtedly led to more protracted negotiations on telecommunications. As explained below, no agreement on basic telecommunications could be reached by 1994 for signature as part of the WTO Agreement. This issue was accordingly entrusted to an *ad hoc* negotiating group. While an agreement was ultimately signed, no benefits could therefore be derived from including telecommunications in a global trade round.

[1] *See* JILL HILLS, DEREGULATING TELECOMS—COMPETITION AND CONTROL IN THE UNITED STATES, JAPAN AND BRITAIN (1986).

[2] *See* European Commission, *Green Paper on the Development of the Common Market for Telecommunication Services and Equipment*, COM(87)290 final (Brussels, June 30, 1987).

[3] *See* ANDREAS TEGGE, DIE INTERNATIONALE TELEKOMMUNIKATIONS-UNION: ORGANISATION UND FUNKTION EINER WELTORGANISATION IM WANDEL 63–70 (1994) and Peter Holmes, Jeremy Kempton and Francis McGowan, *International Competition Policy and Telecommunications—Lessons from the EU and prospects for the WTO*, 20 TELECOMMUNICATIONS POLICY 755, 757–8 (1996).

[4] *See* TEGGE, supra note 3, at 54–59.

[5] Dissatisfaction with traditional UN fora for international negotiations was not limited to the telecommunications sector. For similar reasons, the developed countries also insisted that intellectual property be included in the Uruguay Round. They were unhappy about the agenda pursued by developing countries in the World Intellectual Property Organisation (WIPO), and thought they could achieve more by linking different issues to trade. *See* Marco C.E.J. Bronckers, *The Impact of TRIPS: Intellectual Property Protection in Developing Countries*, 31 CMLREV 1245, 1246–1251 (1994). *See also* Chapter 22 of this book.

[6] *See* BERNARD M. HOEKMAN AND MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 249 (2d ed., 2001).

Third, the original GATT appeared to provide a *tested framework* for negotiations on the liberalization of telecommunications services. The GATT framework for goods contained some fundamental liberalization principles (MFN, national treatment, tariff bindings, etc.). These tested principles might provide a road map to the telecommunications negotiators and could reinforce the commitments ultimately agreed.

Fourth, the proponents of including telecommunications in the Uruguay Round were attracted by the dispute settlement procedures available in the GATT. While these procedures could be criticized, they were at least used and thus helped to further trade liberalization. In contrast, the dispute settlement provisions of the ITU have not been used once since 1947.[7]

II. A Brief Overview of the WTO Telecommunications Negotiations

The WTO telecommunications negotiations lasted from 1986 to 1997.[8] In the first few years, discussions centered on the outlines of a general agreement on services.

A. From 1986 to the Conclusion of the GATS in 1994

Sectoral discussions on telecommunications began in 1989. Since the United States was the most advanced country in terms of telecommunications liberalization at the time, it will come as no surprise that their perspective and their agenda initially dominated the talks. For instance, as will be discussed further below, at the insistence of the United States a distinction between basic and value-added services was introduced to structure the discussions.[9] Negotiations on value-added or enhanced services went relatively easily.

However, difficulties arose with respect to basic telecommunications services. On the one hand, many U.S. operators were eager to be able to enter foreign markets and invest abroad, since they felt comparatively more advanced than their foreign competitors.[10] On the other hand, the United States was reluctant to open its market, the largest in the world, as long as other markets were dominated by legal monopolists which could thwart the efforts of U.S. firms abroad and also potentially engage in anti-competitive practices affecting the U.S. market (at least the market for international communications). The United States argued that it was not going to open its market as long as its telephone operators (AT&T, etc.) were not granted reciprocal access to markets of similar size to the United States. This became known as the issue of *critical mass*: without a sufficiently large number of market access commitments from its trading partners, the United States was unwilling to make a move.[11]

[7] *See* TEGGE, *supra* note 3 at 148–9.

[8] *See* generally BEN PETRAZINNI, GLOBAL TELECOMS TALKS: A TRILLION DOLLAR DEAL (1996) and on the history and outcome of the negotiations, Jonathan D. Aronson, *Telecom Agreement Tops Expectations*, in UNFINISHED BUSINESS: TELECOMMUNICATIONS AFTER THE URUGUAY ROUND 15 (Gary C. Hufbauer and Erika Wada eds. 1997).

[9] *See infra* notes 17–24 and the accompanying text for a discussion of the relevance of this distinction.

[10] This eagerness subsided somewhat as a result of the major changes brought to the U.S. market by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which modified in depth the Communications Act of 1934, 47 U.S.C. § 151 and ff. Since the second half of the 1990s, U.S. operators have refocused part of their energies on the domestic market again.

[11] *See* Holmes *et al*., *supra* note 3, at 764.

In the end, the Uruguay Round produced a framework agreement on trade in services.[12] WTO Members gave specific market access commitments in a variety of sectors.[13] With respect to telecommunications services, a number of countries made commitments, but they were mostly limited to so-called value-added services only (see Part III A1 below). No agreement was reached on basic telecommunications. A Decision on Negotiations on Basic Telecommunications was taken at the end of the Uruguay Round, whereby a Negotiating Group on Basic Telecommunications was created ("NGBT") with a mandate to conclude an agreement by April 30, 1996. WTO Members agreed to a standstill during the upcoming round of telecommunications negotiations; they would not seek to improve their negotiating position or leverage by the introduction of new measures.[14] An Annex on Negotiations on Basic Telecommunications was also attached to the GATS in order to extend the time limit for filing exemptions to Article II of the GATS (most-favored nation treatment) in the telecommunications sector until the end of the telecommunications negotiations.

B. The 1996 Breakdown

Negotiators were fairly relaxed about this seemingly generous extension of the deadline. They realized that rapid technological developments were helping to undermine national restrictions. By simply waiting, they felt they were still making progress towards liberalization.

Nevertheless, telecommunications negotiations broke down in the spring of 1996, when the United States bowed out. The United States explained its refusal to conclude an agreement by claiming that a critical mass of market access commitments, notably from developing countries, had not been reached.[15]

Members of the NGBT agreed however to extend the deadline in order to try to salvage the negotiations. The effect of both the Decision on Negotiations on Basic Telecommunications and the Annex on Negotiations on Basic Telecommunications were extended in substance to February 15, 1997 by the Decision on Commitments in Basic Telecommunications of April 30, 1996.[16] The NGBT was turned into the Group on Basic Telecommunications ("GBT"). In contrast to the NGBT, where some countries were participants and others observers, the GBT was open to all WTO Members as participants.

C. The 1997 End Game

Between April 1996 and the new deadline of February 15, 1997, a lot of effort was spent on improving existing offers and obtaining new offers. The United States and the EU

[12] For a general discussion of the GATS, *see* Chapter 19 of this book. For a practical introduction, available in English, French and Spanish, *see* European Commission, GUIDE TO THE GATS (1995).

[13] The commitments of high-income countries covered about half of their service sectors; those of developing countries as a group (including Eastern European countries in transition) only eleven percent. *See* Bernard M. Hoekman, *Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services*, in THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES (Will Martin and L. Alan Winters eds. 1996).

[14] *Decision on Negotiations on Basic Telecommunications,* ¶ 7.

[15] According to U.S. calculations, over forty percent of world telecom revenues and over 34 percent of global international traffic were not covered by acceptable offers. The United States was particularly disappointed about the offers from ASEAN countries and India, about continuing foreign ownership restrictions in some EU countries and Canada, and the lack of improvement in Latin-American offers. *See* Statement of Ambassador Charlene Barshefsky on Basic Telecom Negotiations (USTR, April 30, 1996).

[16] *Decision on Commitments in Basic Telecommunications*, WTO/S/L/19 (April 30, 1996).

were particularly looking for concessions in the Asia-Pacific region. As a result of this pressure, but also because of their own perception that deregulation would be in their own interest, several countries in the region presented revised or new liberalisation offers. In November 1996, the United States and the EU also improved their offers, as further enticement to the others.

At the end, 32 of the 34 offers that had been tabled in April 1996 were revised, and 21 new offers were submitted, bringing the total number of schedules of commitments to 55, accounting for 69 countries (the fifteen countries of the EU being included in a single schedule). On February 15, 1997, an agreement was reached between the participants on these commitments. The 55 schedules were attached to a brief document which became the Fourth Protocol to the GATS. The Fourth Protocol entered into force on February 5, 1998.

III. The Commitments Relating to Telecommunications Services in the WTO

The results of the telecommunications negotiations must be seen against the background of the GATS, as described in other Chapters, in particular the scheduling techniques peculiar to the GATS ("horizontal" and "vertical" commitments, modes of supply, listing of restrictions in schedules, etc.).

A. The Specific Commitments Concerning Telecommunications Under the GATS

This section reviews the commitments already contained in the GATS at the time the WTO Agreement was signed (1994), followed by the commitments of the Fourth Protocol of February 15, 1997. First, however, it is important to explain the distinction that has been drawn between "basic" and "value-added" telecommunications.

1. The Distinction Between Basic and Value-Added Telecommunications

As a preliminary matter, a distinction between "basic" and "value-added" telecommunications has unfortunately been introduced in the GATS framework. "Basic" and "value-added/enhanced" telecommunications are essentially U.S. regulatory categories introduced for the purposes of delineating FCC jurisdiction in the course of the *Computer* inquiries.[17] In the United States, basic services are defined as "the . . . offering of transmission capacity for the movement of information",[18] while enhanced services are "any offering over the telecommunications network which is more than a basic transmission service".[19] The FCC exerts jurisdiction under Title II of the Communications Act over the former but not the latter. The distinction is thus a technical one, whereby basic services are those where the service provider offers little more than a clear communications path to the customer. It does not reflect any inherent difference between the two groups of services.[20] The distinction is rather a way to draw a line between what the FCC perceived as a competitive sector and one that still required regulation.

[17] These inquiries aimed at ascertaining the scope of FCC jurisdiction as regards then emerging telecommunications services which also relied on data processing (*e.g.*, electronic mail). *See Second Computer Inquiry*, Docket 20828, Final Decision, FCC 80–189, 77 FCC 2d 384 (April 7, 1980) and subsequent modifications, *Third Computer Inquiry*, CC Docket 85–229, Report and Order, FCC 86–252, 104 FCC 2d 958 (May 15, 1986) and subsequent modifications.

[18] *Second Computer Inquiry*, *supra* note 17, at ¶ 93.

[19] *Second Computer Inquiry*, *supra* note 17, at ¶ 97.

[20] The difficulties related to the application of the basic/enhanced services distinction led the FCC to examine alternative means of delineating its jurisdiction in the *Third Computer Inquiry*, *supra* note 17.

The distinction between basic and value-added services is not present to the same extent in all telecommunications regulatory frameworks. In the EC, this distinction is no longer made.[21]

In the original outline for services schedules, telecommunications services were divided into fifteen sub-headings. These are still reflected in the schedules, as can be seen in the model schedule in the Annex. Later, the distinction between basic and value-added services was made by separating the sub-headings into two groups for the purposes of negotiation, the latter being treated in the original GATS, the former being left for further negotiations within the NGBT (and later the GBT).[22] The Decision on Negotiations on Basic Telecommunications defines "basic telecommunications" as "telecommunications transport networks and services", a definition which comes closer to the U.S. approach.[23] NGBT and GBT participants were, however, unable to agree on a more precise definition of basic services, and in fact did not incorporate a definition of basic services in their respective schedules. Whilst the United States uses the sub-headings as an exhaustive list of what is covered under "telecommunications services", the EC and its Member States see these sub-categories as illustrations of a broader definition, which is included at the beginning of its commitments.

Now that commitments have been made for both basic and value-added telecommunications, a full set of commitments is present and there is no need to distinguish further between the two services if no substantive consequences are attached to the distinction. Nevertheless, the basic/value-added distinction appears in the Reference Paper agreed by the GBT. This distinction stems from the idiosyncrasies of U.S. telecommunications regulation, may cause complications, and may have outlived its usefulness given that no substantive consequences are attached to the distinction. It could be eliminated from the GATS framework.[24]

2. Commitments Contained in the GATS at the Time of Signature of the WTO Agreement (1994)

The GATS, as concluded in 1994, already contained a number of commitments relating to telecommunications.

(a) GATS Schedules. Fifty-six of the original GATS schedules included specific commitments on telecommunications on behalf of 67 WTO Members, among which were the United States as well as the EU and its Member States (twelve at the time submitting a single schedule). Forty-four of these schedules (accounting for 55 Members) were limited to value-added or enhanced telecommunications services,[25]

[21] The historical evolution of the regulatory categories in the run-up to liberalization in the EC is described in PIERRE LAROUCHE, COMPETITION LAW AND REGULATION IN EUROPEAN TELECOMMUNICATIONS 1–30 (2000).

[22] The sub-heading "Other" (2.C.o)) was used by some countries in their original GATS schedule, by others in their schedule to the Fourth Protocol, in order to cover services which they felt were not adequately addressed by other sub-headings. For instance, many countries have included "Mobile Services" under "Other" in their schedule to the Fourth Protocol, although mobile services are theoretically covered by commitments made under the other sub-headings under 2.C. Chairman's Note for Scheduling Basic Telecom Services Commitments, S/GBT/W/2/Rev.1 (January 16, 1997), at ¶ 3.

[23] *Decision on Negotiations on Basic Telecommunications Services*, ¶ 1.

[24] The United States appears to be insisting on the distinction between basic and value-added services in its proposals for the next round of negotiations: Communication from the United States—*Market Access in Telecommunications and Complementary Services*, S/CSS/W/30 (December 18, 2000).

[25] *i.e.*, sub-headings 2.C.h to 2.C.n, as shown in the model schedule in Annex A to this chapter.

including the schedules of the most important countries in the international telecommunications market. The major countries in the international telecommunications market did not make any notable limitations to their commitments on value-added services.

(b) The Annex on Telecommunications. An Annex on Telecommunications ("AT"), attached to the GATS, concerns "access to and use of public telecommunications transport networks and services".[26] The AT is based on the recognition that telecommunications are an essential tool for other economic activities, such as banking.[27] It therefore set forth certain principles to make sure that concessions on other services would not be frustrated by a lack of progress on telecommunications negotiations. In other words, the AT can be seen as a general insurance policy for suppliers of other services that they would have access to the requisite telecommunications networks and services in WTO countries.

The AT does not contain or lead to any market access or national treatment obligation. It is not to be interpreted to require WTO Members to allow the provision of telecommunications services beyond the commitments they have already made in their respective schedules.[28] The AT is only applied once a WTO Member has offered specific commitments in a given service sector.[29] It is therefore comparable to the general GATS obligations which apply in addition to the specific commitments made in schedules.[30]

The central provision of the AT binds each Member to "ensure that any service supplier of any other Member is accorded access and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions".[31] This obligation is further specified as follows:

- Access to and use of leased lines is guaranteed, with the right to attach equipment to the network, to connect leased lines to the public network or the leased lines of a third party, and to choose the protocol to be used in the supply of a given service[32]
- Public networks and services must be available for the transport of information[33]
- Restrictions on access and use must be necessary to ensure public availability of the network or service, network or service integrity or the enforcement of the commitments made in the GATS schedule.[34]

[26] AT, ¶ 2.(a). *See* on the AT in general Lee Tuthill, *Users' Rights?: The Multilateral Rules on Access to Telecommunications*, 20 TELECOMMUNICATIONS POLICY 88 (1996).

[27] AT, ¶ 1.

[28] AT, ¶ 2.(c). This was confirmed in the Report of the WTO Panel, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (2004), ¶ 7.291, 7.293 (hereinafter cited as *Telmex* Report).

[29] AT, ¶ 5(a), applies only to "the supply of a service included in [a Member's] Schedule."

[30] Tuthill, *supra* note 26, at 94.

[31] AT, ¶ 5.(a). The structure of ¶ 5 is complex, but it is construed quite ably in the *Telmex* Report, ¶ 7.299–7.309. ¶ 5(a) itself was interpreted at length in ¶ 7.310–7.343. The panel finds that the termination rates for international traffic into Mexico were not "reasonable" within the meaning of ¶ 5(a), even though "reasonable" may imply some departure from cost-orientation (¶ 7.344, with the panel contrasting "reasonable" under the AT with "cost-orientation" for interconnection rates under the RP).

[32] AT, ¶ 5.(b). In the *Telmex* Report, Mexico was found to have breached its obligations under that provision as well: ¶ 7.347–7.389.

[33] AT, ¶ 5.(c).

[34] AT, ¶ 5.(e). Examples of possible restrictions are listed at ¶ 5(f).

The AT imposes some obligations regarding the transparency of tariffs and other terms and conditions relating to public telecommunications transport networks and services.[35] It is also of interest to note that developing countries can claim an exception to the AT in order to strengthen their domestic telecommunications infrastructure or their participation in international negotiations on telecommunications.[36]

To ascertain whether a service supplier from "WTO Member B" can rely on the AT in "WTO Member A", regard must be had to the GATS schedule of Member A. The AT is attached as a "bonus" to the specific commitment in a given sector. For an insurance provider from Member B, therefore, the mere fact that Member A has given a commitment in the insurance sector entitles that provider to the benefits of the AT, irrespective of the commitments of Member A in the telecommunications sector.

For instance, when Member A enters into specific commitments in the insurance sector while not making any specific commitments on telecommunications services, the AT generally gives insurers from Member B the right to access and use whatever public telecommunications transport networks and services are offered in Member A. In the rare case where the TO of Member A chooses not to offer leased lines, the insurer from Member B would not obtain much (more or less only the right to access and use the public telecommunications network). In most countries, however, leased lines will be offered by the TO. The insurer from Member B could then rely on the AT to obtain leased lines on non-discriminatory terms and to connect them to the public network in Member A.

In most cases, the AT will enable foreign suppliers of services for which a WTO Member has undertaken specific commitments to use their own telecommunications equipment, in combination with those leased lines, in order to self-provide their telecommunications needs. Indeed, WTO Members are bound to allow the basic operations required to put together a private telecommunications network[37] and to permit cross-border information movements for "intra-corporate communications" purposes.[38] The definition of "intra-corporate communications" is fairly narrow[39] expressly excluding any services offered to unrelated companies or customers.

There are some gaps in the coverage of the AT, which made it unsuitable as a regulatory basis for the liberalization of "basic" telecommunications.[40] The Reference Paper used in the NGBT and GBT contains heavier commitments as regards "major suppliers", notably on interconnection (points of interconnection, timeliness, cost-oriented rates, unbundling); at the same time, the AT's scope is not limited to "major suppliers" and its obligations are also couched in more general terms ("access to and use of" networks and services).[40a]

[35] AT, ¶ 4.
[36] AT, ¶ 5.(g).
[37] AT, par. 5.(b).
[38] AT, par. 5.(c).
[39] Especially when compared to the "closed user group" notion used in the EC to delineate private and public voice telephony ahead of full liberalization: *see* the definition of "voice telephony" in Directive 90/388 of June 28, 1990 [1990] OJ L 192/10, as amended. This definition and the correlated notion of "closed user group" are explained in detail in European Commission, Communication on the status and implementation of Directive 90/388 on competition in the markets for telecommunications services [1995] OJ C 275/2 at 4–8. The definition of "intra-corporate communications" at paragraph 3.(d) of the AT in fact closely corresponds to the concept of "corporate networks" once defended by Germany as a correct implementation of Directive 90/388 and found by the Commission in this Communication at 7–8, 16 to be too narrow and unduly limitative of the scope of liberalized services.
[40] *See* the testimony of Jeffrey M. Lang, the head of the U.S. delegation to the NGBT and GBT, before the U.S. Congress (May 9, 1996).
[40a] *Telmex* Report, ¶ 7.331–7.332.

3. Commitments in the Fourth Protocol

The NGBT and GBT negotiations were aimed at specific commitments in the field of basic telecommunications. The Annex depicts a "model schedule" after the entry into force of the Fourth Protocol.

(a) Market Access and National Treatment Commitments.[41] Fifty-five schedules of specific commitments were attached to the Fourth Protocol, accounting for 69 countries, with the EC and its Member States presenting a single schedule. From these 55 schedules:[42]

— Forty-seven schedules (for 61 countries) contained commitments to liberalize at least partially the provision of voice telephony. Two countries only committed to liberalize voice services to closed user groups. International voice services were liberalized in 42 schedules (56 countries), national long-distance services in 37 schedules (41 countries), and local services in 41 schedules (55 countries). A large number of commitments (for 25 countries), were phased in after the entry into force of the Fourth Protocol: for instance Spain (December 1998), Ireland, Portugal, Argentina and Singapore (2000), and Greece (2003);
— Forty-nine schedules (63 countries) included commitments on data transmission services, 41 schedules (55 countries) on leased lines, 46 schedules (60 countries) on cellular/mobile telephony services, 45 schedules (59 countries) on other types of mobile services (mobile data, paging), 37 schedules (51 countries) on mobile satellite services or transport capacity and 36 schedules (50 countries) on fixed satellite services or transport capacity.

OECD Members, with the exception of Switzerland and Turkey, liberalized all of the services mentioned above.

One of the key objectives of the United States in this round of discussions was to obtain commitments from WTO Members on foreign investment in local telecommunications services providers. Of the 55 schedules annexed to the Fourth Protocol, 42 (covering 56 countries) contained a commitment to permit foreign ownership or control of all telecommunications services and facilities. According to the U.S. Trade Representative, these 56 countries account for 97 percent of the total basic telecommunications services revenue of WTO Members.[43]

Nonetheless, certain significant WTO Members retained a foreign investment limit, notably India, South Africa, Turkey and many of the "Asian tigers" (Indonesia, Malaysia, the Philippines and Thailand). Others left foreign investment limits on certain services, including important players such as Brazil, Canada, France, Israel, Mexico and Portugal. Moreover, certain countries retained limits on foreign participation in the local incumbent TO, including Australia, Japan and New Zealand.

A number of issues arose with respect to the scheduling of commitments. First, there was discussion on whether to differentiate according to whether competition would take place only at the services level (or resale) or also at the infrastructure level

[41] *See also* the analysis made by William J. Drake and Eli Noam, *Assessing the WTO Agreement on Basic Telecommunications*, in UNFINISHED BUSINESS: TELECOMMUNICATIONS AFTER THE URUGUAY ROUND 27, at 41–4 (Gary C. Hufbauer and Erika Wada eds. 1997). A few representative individual schedules are analysed by Isabelle Gavannon, *International Telecommunications Trade: A Progressive Liberalization* INT'L BUS. L.J. 711 (1997).

[42] The numbers given below are taken from an unofficial compilation prepared by the WTO Secretariat.

[43] *Annex to the Statement of Ambassador Charlene Barshefsky on Basic Telecom Negotiations* (February 15, 1997), available at <http://www.ustr.gov>.

("facilities-based competition"). The key issue is whether, and if so how much, control should be retained over the construction of infrastructure. Many countries—especially developed ones—have a well-established telecommunications infrastructure. Since it is not necessary to construct a parallel infrastructure everywhere, competition could have been limited to resale only (although creating resale opportunities always require extensive regulation). On the other hand, certain countries—mostly developing ones—wanted to promote the expansion of their telecommunications infrastructure and were only inclined to allow facilities-based competition. Ultimately, it was agreed in the GBT that market access commitments would extend both to facilities-based and resale competition.[43a]

Second, many countries participating in the telecommunications negotiations conditioned their market access offers on the availability of frequencies. This could be seen as a factual statement reflecting the scarcity of a natural resource, or a broad reservation that allowed national or political preferences and thereby undermined market access commitments. To avoid any misunderstanding, it was indicated that frequency availability ought not be mentioned in the market access commitments, since it is covered by the general GATS framework for domestic regulation.[44]

Finally, the privatization of State-owned enterprises is a matter that falls outside the purview of the GATS.[45] Accordingly, neither the GATS nor the Fourth Protocol contained any provision on the privatization of State-owned TOs. Hence, even if many States made commitments to open their markets to foreign investment, a local TO may remain beyond the reach of a foreign investor as long as the State does not decide to privatize it. A State remains free not to privatize a State-owned local TO fully, so in practice foreign participation in the local TO can be limited.

Since the conclusion of the Fourth Protocol and up to the date of writing, five signatories (Guatemala, Morocco, Pakistan, Switzerland and Venezuela) have improved their commitments. Six WTO Members (Barbados, Cyprus, Egypt, Kenya, Suriname and Uganda) made commitments on basic telecommunications for the first time. Furthermore, fifteen new WTO members (Albania, Armenia, China, Croatia, Estonia, Georgia, Jordan, the Kyrgyz Republic, Latvia, Lithuania, Macedonia Moldova, Nepal, Oman and Taiwan) have made commitments on basic telecommunications in the course of their initial schedule of specific commitments.

(b) Additional Commitments on Regulatory Principles: The Reference Paper. The most remarkable feature of the Fourth Protocol is undoubtedly that almost all participating countries (but for Ecuador and Tunisia) agreed to enter into additional commitments concerning regulatory principles to be applied in the telecommunications sector. These principles are derived from a brief Reference Paper ("RP"),[46] which was prepared by a group of countries in the run-up to the April 1996 deadline. Some countries (Bolivia, India, Malaysia, Morocco, Pakistan, the Philippines, Turkey and Venezuela) did not

[43a] As noted in the *Telmex* Report, ¶ 7.55–7.68, a member must expressly indicate in its schedule if its commitments are limited to facilities-based or non-facilities based (resale) supply only.

[44] Art. VI GATS. *See Chairman's Note on Market Access Limitations on Spectrum Availability*, S/GBT/W/3 (February 3, 1997).

[45] Rachel Frid, *The Telecommunications Pact Under the GATS—Another Step Towards the Rule of Law,* 24(2) LEGAL ISSUES OF ECONOMIC INTEGRATION 67, 80 (1997).

[46] The Reference Paper was circulated by the WTO together with the results of the GBT. Like many other documents discussed here, it can be found at http://www.wto.org. It is reproduced in Appendix B to this chapter.

adopt the whole of the Reference Paper, while others (Bangladesh, Brazil, Mauritius and Thailand) have agreed to follow it at a later point in time.

The purpose of the RP is twofold: to provide the requisite safeguards in domestic law for market access and foreign investment commitments to be truly effective, and to anchor these safeguards in the WTO system and hence make failure to implement them challengeable under the WTO Dispute Settlement Understanding.

As noted in the introduction, until recently the telecommunications sector in most countries operated under a legal monopoly regime whereby one or a few operators held the exclusive right to provide telecommunications services. Whenever liberalization occurs, the former monopoly operator is by definition almost always the dominant player on the market. It is in many ways advantaged, if only because its network is already in place and it has a strong customer base. Usually, it also wields more political clout than any entrant, although this often means that it will be burdened with certain obligations that it would not otherwise have incurred based on free market principles (whether they are called universal service obligations or otherwise). The RP contains a core of principles designed to ensure that the advantages of the former monopoly operator are not used to the detriment of new entrants on the telecommunications markets.

The RP has quite recently been interpreted for the first time in the *Telmex* Report, issued in April 2004. The US alleged that Mexican international telecommunications policy infringed WTO law in three respects:

(i) Mexico failed to ensure that the tariffs of Telmex, the incumbent operator, for terminating international communications in Mexico were cost-oriented, thereby breaching its commitment under the RP to ensure "cost-oriented rates" for interconnection;[46a]
(ii) Mexico forced Telmex to negotiate such termination tariffs for all other operators and imposed a "proportionate return" system on incoming traffic, thereby failing to prevent anti-competitive practices, in contravention of the RP;[46b] and
(iii) Mexico failed to ensure access and use of its public networks and services on reasonable and non-discriminatory terms and conditions, contrary to the AT.[46c]

The analysis below will refer to salient findings in this report.

(i) Legal nature The RP could be characterized as a policy document, a common framework during the negotiations leading up to the 1997 agreement guiding the parties' individual commitments. As such, parties were free to deviate from the RP, to select particular issues from it and to rephrase certain obligations in their individual Schedules.[47] While most WTO Members participating in the Telecommunications Agreement ultimately agreed to follow the RP, a number of them did make slight or more important modifications when formulating their additional commitments.[48] Accordingly, the starting point of a legal analysis of a WTO Member's additional commitments is the language

[46a] RP, ¶ 2.2.b).
[46b] RP, ¶ 1. "Proportionate return" is discussed in greater detail *infra*, notes 217–218 and accompanying text.
[46c] AT, ¶ 5.
[47] *See* Lee Tuthill, *The GATS and New Rules for Regulators,* 21 TELECOMMUNICATIONS POLICY 783, 786 (1997).
[48] For a fascinating overview of how a number of Asian countries, some without any developed system of competition law, have implemented the Reference Paper in varying ways, *see* Ted Ringrose, *The Impact on Asian Telecommunications Markets*, in TRADE AND TELECOMS 103, 106–108 (Mark Clough ed. 2001).

each country has used when incorporating the RP in its own GATS Schedule. For ease of reference, and given that many WTO Member States did incorporate the RP more or less verbatim in their schedules of commitments, the following analysis discusses the RP rather than individual country schedules.

(ii) Scope As indicated in the heading "Scope", the RP applies to basic telecommunications services. This is probably a consequence of the mandate of the NGBT and GBT. As already noted, the distinction between basic and enhanced or value-added services does not serve much purpose in the GATS context. On its face, the RP could apply just as well to all telecommunications services, however characterized. It makes almost no practical difference that the *obligations arising* under the RP are only imposed on suppliers of basic services, since the markets for value-added or enhanced services are usually competitive. On the other hand, there is no reason why providers of all types of telecommunications services should not benefit from the *rights* that will be granted to suppliers when WTO Members implement the RP.

The RP is divided into six headings. The first two (competitive safeguards and interconnection) apply to the regulation of "major suppliers", while the last four (universal service, licensing, independence of the regulator and allocation of resources) deal with general regulatory issues.

(iii) The regulation of "major suppliers" The first two headings of the RP concern "major suppliers" of telecommunications services within a given country. The RP defines a "major supplier" as one: (1) with a power "materially [to] affect the terms of participation (having regard to price and supply)"; (2) flowing from one of two alternative situations, namely control over essential facilities *or* the position on the market; and (3) in the relevant market for basic telecommunications services. Each of these elements is examined in turn.

(1) The precise nature of the power to affect the terms of participation in the market is not clear. On its face, it would appear to mean quite a radical influence on the market, namely the power to exclude or control the participation of market actors. The RP is therefore concerned with suppliers that have a particularly strong position on the market. This may or may not correspond with the definition of dominance or monopoly power in the domestic competition laws of individual signatories of the RP.[49]

(2) In order for a supplier to qualify as a major supplier, the power mentioned above must come from control over essential facilities *or* a position on the market. The introduction of "essential facilities" as an alternative criterion is noteworthy. Elsewhere, the so-called "doctrine of essential facilities" has generally been presented as a special case of a dominant or monopoly position, an approach that is not without its share of problems.[50] In this respect, the RP

[49] The ECJ, for instance, in its judgment of 9 November 1983, Case 322/81, *Michelin* v. *Commission* [1983] ECR 3461 defined a dominant position as the possibility "to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers." In the *Telmex* Report, ¶ 7.153–7.155, the issue is left open, since in view of the fact that Telmex was legally required to negotiate the terms of termination of international calls into Mexico on behalf of all terminating carriers in Mexico, it "patently" had the ability to materially affect the terms of participation in the market.

[50] For a discussion of the doctrine in the main jurisdictions where it has been used, *see* Sally Van Siclen, *Background Note* in OECD, THE ESSENTIAL FACILITIES CONCEPT, COMPETITION POLICY ROUNDTABLES NO. 5,

acknowledges that control over facilities must be seen as a problem analytically separate from that of large market positions (since they can be evidenced by a high share of a relevant market).

The RP defines essential facilities as the parts of a public telecommunications transport network or service (a) that are exclusively or predominantly provided by one or a few suppliers, *and* (b) for which there is no economically or technically feasible substitute. Condition (a) is worded somewhat loosely in that a facility could be deemed essential even if it were provided on a competitive basis by a few suppliers. Condition (b) seems to echo the widespread view that an especially high level of non-substitutability must be shown to establish that a facility is essential.[51] Nevertheless, it is open to question whether the "essential facilities doctrine" as formulated in the RP, has the same meaning as in competition law.[52] Indeed, while under a normal competition law approach the burden of proving "essentiality" is quite high, the RP is part of the GATS commitments, which are meant to enable market access. It could be that a lower threshold (*i.e.*, a facility economically and technically necessary for a newcomer from another country to access the market) would suffice to conclude that a firm controls an essential facility for the purposes of the RP.

(3) The use of "relevant market" must be taken as a reference to competition law where this concept is well known.[53a] The wording of the RP does not require that the major supplier itself be active on the relevant market; it can very well exert the power in question from an upstream, downstream or neighboring market.[53] It may seem in theory that a major supplier would have no incentive to use such a disciplinary power were it not itself active on the relevant market or intent on being so, and that accordingly there should be no competition or regulatory concern if the major supplier is not active on the relevant market. In practice, given the difficulties that have surrounded market definition in the telecommunications sector, at least in Europe,[54] it is more convenient not to burden the inquiry further by requiring that the major supplier also be present on the relevant market.

While the definition of a "major supplier" in the RP is framed in relatively indeterminate terms, the WTO panel in the *Telmex* case had no trouble finding that the incumbent telecoms company Telmex was a "major supplier".[54a]

OCDE/GD(96)113, at 7–10. *See also* John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 FORDHAM INT'L L.J. 437 (1994) and LAROUCHE, *supra* note 21, at 165–217.

[51] *See* Van Siclen, supra note 50, at 12. For the EC, *see* ECJ, 26 November 1998, Case C-7/97, *Oscar Bronner GmbH & Co KG* v. *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791.

[52] *See* Marco C.E.J. Bronckers, *The WTO Reference Paper on Telecommunications: A Model for WTO Competition Law?*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 371, 385–386 (Bronckers and Quick eds. 2000).

[53a] Indeed this is how the RP is construed in the *Telmex* Report, ¶ 7.152. The panel defined the relevant market as "termination of telecommunications services—voice, switched data and fax—in Mexico".

[53] Giving rise to the same type of situation as was considered by the ECJ, November 14, 1996, Case C-333/94, *Tetra Pak* v. *Commission*, [1996] ECR I-5951.

[54] *See* Pierre Larouche, *Relevant Market Definition in Network Industries*, 1 JOURNAL OF NETWORK INDUSTRIES 407 (2000).

[54a] *Telmex* Report, ¶ 7.146–7.159. Later on, the panel also found that Telmex and all the other Mexican gateway operators *together* constituted a "major supplier": ¶ 7.228.

(iv) Competitive safeguards As a general principle, the RP contains a commitment to enact appropriate measures to prevent anti-competitive practices by major suppliers.[55] In the specific case of service providers holding a monopoly or exclusive/special rights, the obligations of the RP complement those of the GATS.[56] To the extent that anti-competitive practices are not defined but for the specific examples given in the RP, it would appear that WTO Members could meet their commitment to enact appropriate measures either through the application of general competition law, or in the absence thereof, through a specific regulatory provision for the telecommunications sector whereby a set of defined practices is forbidden.[56a]

The RP lists three examples of anti-competitive practices: (1) cross-subsidization, (2) use of information obtained from competitors, and (3) withholding technical and commercial information.[57]

(1) Cross-subsidization is not defined, but for the qualification "anti-competitive". Generally, cross-subsidization consists in the use of profits derived from one area of operations in order to finance another (presumably loss-making) area. It is a common business practice. It can become anti-competitive when the operations in the profit-making area are conducted pursuant to exclusive or special rights or when the major supplier in question holds a dominant position in the profit-making area. As experience in the EU shows, it can be quite difficult to translate a complaint about unfair or "cross-subsidized" prices into violations of general competition law.[58] If cross-subsidization is to be prevented, an appropriate regulatory framework must be developed. In order to be able to monitor whether any cross-subsidization occurs, one of the first regulatory elements required is that the major supplier in question implement an appropriate accounting system, with regular reporting and disclosure requirements.[59] Given the size and service portfolios of large telecommunications companies, it is otherwise almost impossible to prove that cross-subsidization

[55a] RP, par. 1.1.

[56a] GATS, Article VIII.

[56a] Note that the panel in the *Telmex* Report left open whether a country's competition laws could qualify as "appropriate measures" within the meaning of the RP. The panel did not consider it necessary to examine this issue, as Mexico had not claimed that its general competition laws were applicable to Telmex' disputed conduct: see ¶ 7.266. Yet the panel did have occasion to highlight an instance where a country's competition laws might not be considered an "appropriate measure". This would be the case where a country's competition laws would tolerate the "anticompetitive practices of a "major supplier" on the grounds that the contested behaviour of this supplier was mandated by governmental regulation. See, *infra* notes 60e–60g and accompanying text on Mexico's appeal to the "sovereign compulsion defense".

[57] RP, par. 1.2.

[58] *See* from an EC law and economics perspective, *e.g.*, Phedon Nicolaides, *Effective Competition in Network Industries: An Assessment of Commission Decision 2001/354 imposing a fine on Deutsche Post for abusing its dominant position in parcel delivery,* 22 EUR. COMP. L.REV. 390 (2001); Mats A. Bergman, *A prohibition against losses? The Commission's Deutsche Post decision,* 22 EUR. COMP. L.REV. 351 (2001); LAROUCHE, *supra* note 21 at 235–9; Leigh Hancher and José Buendia Sierra, *Cross-subsidization in EC Law*, 35 CMLREV. 901 (1998).

[59] *See* the requirements imposed in Directive 97/33 (ONP-Interconnection) of June 30, 1997 [1997] OJ L 199/32, Art. 7(5) and Annex V (now replaced by Directive 2002/19 (Access Directive) of 7 March 2002 [2002] OJ L 108/7, Art. 13(3) and (4)). In a further step, in case of persistent problems, accounting or even structural (legal) separation might be required, as was done in the EC, under certain circumstances, for firms holding both telecommunications and cable TV networks in Directive 1999/64 of June 23, 1999 [1999] OJ L 175/39, amending Directive 90/388, *supra* note 39 (now Directive 2002/77 of September 16, 2002 [2002] OJ L 249/21, Art. 8). *See also* Frid, *supra* note 45, at 84–5.

has occurred. Furthermore, some cost-allocation key must be found, a very thorny issue as mentioned below in relation to interconnection. The RP is silent on these regulatory issues, which leads one to doubt the effectiveness of the general commitment to prevent cross-subsidization.

(2) TOs typically operate at many levels in the telecommunications sector. They will, for instance, both supply leased lines to data communications providers in order to enable them to complete their network, and at the same time offer data communications in competition with those providers. In such a case, in the course of supplying leased lines to its competitor, a TO is likely to obtain information from the competitor which is often precise enough to identify the customers of the competitor or to guess the intentions of a competitor. If that information is relayed to the retail division of the TO, it can be used for anti-competitive purposes (although the RP does not specify what "anti-competitive purposes" means).[60] Here as well, structural measures, such as the legal separation of business divisions operating in different markets may be necessary, although the RP does not mention this point.

(3) Since the RP defines anti-competitive practices in absolute terms (by giving examples) and not in terms of non-discrimination, it would appear from the text of the RP that a major supplier could be forced to disclose technical and commercial information to third parties that want to provide a certain service, even if neither the major supplier nor any other party is already providing that service. Such far-reaching consequences, if they were intended, can only be explained by the high degree of market power of the "major suppliers" within the meaning of the RP.

While appreciating the many questions raised by the competitive safeguards included in the RP, one should not underestimate the capacity of WTO panels and the Appellate Body to provide answers. For instance, in the *Telmex* Report, the WTO panel found that the three practices listed in the RP are merely examples, and that term "anti-competitive practices" also includes other practices, in particular horizontal practices related to price-fixing and market-sharing agreements.[60a] The panel reached this conclusion in the light of the ordinary meaning of the term anti-competitive practices as found in dictionaries, the use of this term in the competition legislation of WTO Members, related provisions of international instruments concerning competition policy, as well as the object and purpose of the RP.[60b]

[60] The risks for competition associated with the movement of confidential information amongst divisions and subsidiaries was a major concern of the U.S. Department of Justice in *U.S.v. MCI*, Civil Action 94.1317, Consent Decree filed on June 15, 1994, and *U.S.v. Sprint Corporation*, Civil Action 95.1304, Consent Decree filed on July 13, 1995. In these two cases, stringent requirements were imposed in this respect.

[60a] *Telmex* Report, ¶ 7.232.

[60b] See *Telmex* Report, ¶ 7.230, 7.235–7.237. Here as well, much as it did for the definition of "major supplier", the panel turns to competition law to construe the terms of the RP that appear to originate from it. In the absence of any WTO or other international agreement on competition law, the panel looks into domestic laws (especially those of the US and the EU) and non-binding international instruments (such as those of the OECD). Yet the reference to the Havana Charter (predecessor to the GATT and the WTO) at ¶ 7.236 appears politically somewhat insensitive. After all, the Havana Charter was never ratified, following US opposition in the early 1950s. The Charter's competition law chapter reportedly went too far for American business. Now the Charter is used to lend support to a US complaint about anticompetitive practices in another country. See *infra* note 97 and accompanying text.

We believe that the panel conclusions are persuasive. Price-fixing and market-sharing arrangements are considered hard-core violations of competition laws around the world; leaving them outside of the scope of "anti-competitive practices" would have curtailed the RP's impact considerably.[60c] It would have transformed the RP's examples of anti-competitive practices into three isolated instances.

The panel found that the two elements of Mexican telecommunications policy at issue did constitute anti-competitive practices. The requirement that Telmex negotiate termination rates for international traffic on behalf of all its competitors on that market amounted to price-fixing, while the "proportionate return" policy amounted to market-sharing.[60d]

The panel then endorsed the US complaint that Mexico maintained measures that *require* Mexican telecommunications operators to participate in these anti-competitive practices. In so doing, the panel adroitly countered a clever Mexican appeal to the so-called "sovereign compulsion defense" in many competition laws. Pursuant to this defense, a firm can defend itself by showing that its allegedly anti-competitive conduct was in fact mandated by legislation.[60e] Mexico argued that since its laws required Telmex and its competitors to engage in otherwise anti-competitive practices, these practices fell outside the scope of the RP. [60f] The panel answered that the GATS obligations, including the RP, were designed to limit the regulatory powers of the WTO Members. A WTO Member cannot hide behind its domestic law in order to erode unilaterally its international commitment to prevent major suppliers from continuing anticompetitive practices.[60g]

However sensible and convincing, the panel's reasoning is geared to fit an unusual set of facts. One might recall at the outset that the RP provisions at stake are concerned with "major suppliers"; in competition law terms, their scope extends to "dominance" issues. The anti-competitive practices in question (price-fixing and market-sharing), however, pertain more to the "cartel" or "collusion" side of competition law. As regards dominance, the pricing of a dominant firm should become an issue only if it is excessive or predatory; similarly, any measures designed to enforce a certain market share should be problematic only if exclusionary. Yet the panel did not find that the high level of Telmex's termination rates as such constituted an anti-competitive practice from a dominant firm (or "major supplier").[60h] Elsewhere in the report, the panel faulted the high rates on the basis of a regulatory concept specific to the RP, holding that these rates were not

[60c] In criticizing the panel report, Marsden makes much of the fact that the RP's drafters did not mention cartels in the RP as an anti-competitive practice. From this omission, and the WTO membership's general reluctance to include binding competition law commitments in the WTO, he deduces that the panel should have left cartels outside the scope of the RP: see Marsden, *WTO Decides its First Competition Case, With Disappointing Results*, 16 Competition Law Insight 3, 8 (No. 16, May 2004). We find Marsden's *a contrario* reasoning unconvincing. In addition, the text of Mexico's RP indicates that the three examples listed of anticompetitive practices are not exhaustive.

[60d] See *Telmex* Report, ¶ 7.257–7.264.

[60e] *Id*., ¶ 7.244.

[60f] Interestingly enough, the EC supported this Mexican argument: *ibid*., ¶ 7.241.

[60g] *Id*., ¶ 7.244.

[60h] The panel did find, without much explanation, that Telmex and its competitors together formed a "major supplier": ibid. ¶ 7.228. However, there is no indication in the report of a "collective dominant position" or anything similar, based on a study of the characteristics of the market. See for instance, CFI, 6 June 2002, Case T-342/99, *Airtours* v. *Commission* [2002] ECR II-2585 for an illustration of the intricacies involved in showing that a number of firms collectively hold a dominant position.

"cost-oriented".[60i] But in finding that Telmex had engaged in "anti-competitive practices", the panel focused on the collusive or cartel-like nature of Telmex behaviour, i.e. price-fixing and market-sharing, which was required by Mexican legislation. The panel recognized that the Mexican measures are "exceptional"[60j] and cannot justify a "sovereign compulsion defence". Indeed the panel's findings do not reveal much about how a future WTO panel might deal with rather more typical "dominance" issues involving "major suppliers". Furthermore, whether State regulation making a certain tariff compulsory—as opposed to explicitly ordering one firm to fix prices for the whole market—would also fall foul of the RP is still debatable.

(v) Interconnection The provisions on interconnection constitute another key part of the RP. In large part, they also seek to prevent anti-competitive behavior by a major supplier, and they are accordingly closely linked to the provisions discussed above. Interconnection is defined as the "linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier".[61]

This definition closely resembles the standard U.S. and EC definitions. In the United States, interconnection is defined as the "physical linking of two networks for the mutual exchange of traffic",[62] while in the EC, it is the "physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same of another undertaking, or to access services provided by another undertaking".[63] In contrast to customer access, interconnection is granted between telecommunication service providers. It occurs not at network termination points, but rather at more central points of the network,[64] and it offers a quite different and more extensive range of possibilities (such as calls between users of both networks).

In the *Telmex* Report, the panel elaborated at some length on the meaning of interconnection in the RP, as Mexico had argued that this term did not cover the cross-border supply of telecommunications services. The panel rejected this argument and found that international interconnection was included in the substantive scope of the RP.[64a]

The RP enumerates the parameters of the obligation to ensure interconnection, namely:[65]

- Interconnection must be made at any technically feasible point.
- The terms, conditions and rates must be "non-discriminatory", and the quality of interconnection, "no less favorable" than that provided to subsidiaries, affiliates or third parties.[66]

[60i] See *infra*, note 70a–70b and accompanying text.
[60j] *Id*., ¶ 7.267.
[61j] RP, ¶ 2.1.
[62] Interpretation given by the FCC to the interconnection obligation of the local exchange carriers (LEC) pursuant to the new Telecommunications Act of 1996, *supra* note 10, 47 U.S.C. § 251(c)(2), in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96–98, First Report and Order, FCC 96–325, 61 Fed. Reg. 45476 (August 8, 1996) at ¶ 47.
[63] Directive 2002/19, *supra* note 59, Article 2(b). The *Telmex* panel relied on the EC definition to construe the RP: *Telmex* Report, ¶ 7.111
[64] For instance directly to a local switch.
[64a] *Telmex* Report, ¶ 7.96–7.143.
[65] RP, ¶ 2.2.
[66] *See* MARK NAFTEL AND LAWRENCE J. SPIVAK, THE TELECOMS TRADE WAR 111 (2000). It is interesting to note (*See also* Miriam Gonzalez Durantes, *The European Perspective*, in TRADE AND TELECOMS 51, 66

- Interconnection must be provided in a timely fashion.
- The rates must be cost-oriented (and not necessarily cost-based). Both at the national and international level, cost-orientation has proven to be a most difficult issue. While as a principle it looks very reasonable on paper, its application is rife with practical difficulties.[67] Since telecommunications firms are typically multi-service firms with a high level of common costs, cost allocation plays a central role.[68] There is a wide choice of theoretically acceptable formulae, including fully-distributed costs ("FDC"), long-run incremental costs (historic or forward-looking, the famous "FL-LRIC" standard) or stand-alone costs ("SAC"). In the case of interconnection between fixed networks, FL-LRIC has tended to prevail in national laws,[69] but even so at a practical level its implementation is rarely ever uncontroversial. The RP does not indicate anything beyond the general cost-orientation principle.[70] In *Telmex*, the panel found, on the basis of a survey of ITU Recommendations and domestic laws and regulations, that "cost-oriented" under the RP should be assessed on a long-run incremental cost (LRIC) basis, allowing for a reasonable rate of return.[70a] Since Mexico did not provide any cost data on Telmex itself, the panel relied on the four different methods put forward by the United States to show that Telmex could not be charging cost-oriented rates, and found that Mexico was in breach of its commitments under the RP.[70b]
- The terms, conditions and rates must be transparent and reasonable, having regard to economic feasibility;
- There must be "sufficient" unbundling, so that there is no need to "pay for network components or facilities" that are not required. Similar provisions are found in the U.S. Telecommunications Act of 1996[71] and EC Directive 2002/19.[72] Such

(Mark Clough ed. 2001)) that the EC introduced a footnote to the Reference Paper in its commitments on this point, stating that "different terms, conditions and rates may be set in the Community for operators in different market segments, on the basis of non-discriminatory and transparent national licensing provisions, where such differences can be objectively justified because these services are not considered 'like services"'. Another footnote just before goes in the same direction. These reservations echo the substance of Directive 97/33, *supra* note 59, Art. 7(3) (now superseded by Directive 2002/19, without any equivalent provision). For an analysis of the practical consequences of this apparently uncontroversial statement, *See* LAROUCHE, *supra* note 21, at 76–85.

[67] *See* the overview of costing issues in telecommunications in LAROUCHE, supra note 66, at 239–46.

[68] Unless one decides to ignore or avoid common cost allocation difficulties and allow pricing at marginal cost or according to the Efficient Component Pricing Rule ("ECPR"). *Id*.

[69] *Id*. at 244. In other contexts, *e.g*., cross-subsidization within a firm, other standards, such as FDC, might appear more appropriate, potentially leading to contradictions: for instance, interconnection could be priced according to FDC internally in order to avoid cross-subsidization, but at FL-LRIC towards third parties in order to encourage entry on the market. In that case, there is a contradiction if the party giving interconnection is otherwise under a non-discrimination obligation as between its own subsidiary and third-party competitors of that subsidiary.

[70] *See* James Ibbetson, *World Trade Organization and Basic Telecommunications Services*, in TRADE AND TELECOMS 31, 48 (Mark Clough ed. 2001).

[70a] *Telmex* Report, ¶ 7.166–7.185. Whereas elsewhere the panel referred to domestic competition laws to construe terms with a clear competition law lineage, here the panel turned to the ITU, as well as domestic telecommunications regulation, for the interpretation of terms which pertain more to the regulatory than the competition law arena.

[70b] Ibid., ¶ 7.186–7.216. These involved comparisons with: domestic Mexican rates for comparable services,"grey market" prices between the US and Mexico, rates on other international routes and rates used between Mexican operators under the "proportionate return" system.

[71] *Telecommunications Act of 1996*, *supra* note 10, 47 U.S.C. §251(c)(3).

[72] Directive 2002/19, *supra*,note 59, at Art. 9(2), formerly in Directive 97/33, *supra* note 63, at Art. 7(4).

provisions are difficult to apply unless the regulatory authority intervenes to provide a classification of network components in order to make the obligation more concrete.[73] The RP does not contain any provisions on this subject. A related question is whether the provisions of the RP imply an obligation to unbundle the local loop.[74] If the experience of the EC can be taken as a guide, access to an unbundled local loop does not truly qualify as interconnection (given that the local loop does not as such constitute a network, but rather a single component thereof). A more specific legal instrument is needed to cover such a case.[75]

- Interconnection must also be provided upon request at points other than those provided to the majority of users, subject to charges for additional facilities.

Unless otherwise noted above, the parameters contained in the RP broadly follow the regulatory framework in place in the United States and the EC, although the RP does not contain much detail.

The RP contains provisions on transparency.[76] Even though the RP imposes a general duty of non-discrimination and the public availability of interconnection agreements or standard offers,[77] some negotiation would still be needed for newcomers to obtain interconnection agreements (with prolonged discussions as to what terms and conditions are non-discriminatory). The RP does not go as far as the U.S. Telecommunications Act of 1996, which forces local exchange carriers to offer to other telecommunications carriers the same terms and conditions as those offered under existing interconnection agreements.[78] The RP also requires the creation of dispute settlement mechanisms in case of disagreement with a major supplier on the terms, conditions and rates for interconnection.[79]

(vi) Universal service The RP does not provide any definition or parameters for universal service, expressly leaving this question to each WTO Member. Parties to the Fourth Protocol do, however, agree that their rules on universal service will be transparent, non-discriminatory, competitively neutral and not unduly burdensome.

The application of universal service schemes has also given rise to some friction at the international level. In the EC, Member States must include a specific set of services in the universal service obligations that they impose on one or more service providers.[80]

[73] In the United States, this was done by the FCC in the Local Competition Order, *supra* note 62, at ¶ 97–409. However, in *AT&T Corp*. v. *Iowa Utilities Board* 525 U.S. 366 (1999), the Supreme Court found that the FCC was mistaken on that issue and had put the incumbents under too heavy an unbundling obligation. Later on, in a Third Report and Order in the Local Competition proceeding, FCC 99–238 (November 5, 1999), the FCC went back on its first order. Subsequently, the courts quashed that order again (*United States Telecom Ass'n* v. FCC, 290 F.3d 415 (D.C. Cir. 2002). A third attempt by the FCC (Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003)) was also quashed (*United States Telecom Ass'n* v. *FCC*, 359 F.3d 554 (D.C. Cir. 2004)) and the matter is now pending before the FCC once more.

[74] *See* NAFTEL AND SPIVAK, *supra* note 66, at 112.

[75] Regulation 2887/2000 of December 18, 2000 [2000] OJ L 336/4.

[76] RP, ¶¶ 2.3 and 2.4.

[77] RP, ¶ 2.2 and 2.4 respectively.

[78] *Telecommunications Act of 1996*, *supra* note 10, 45 U.S.C. § 252(i).

[79] RP, ¶ 2.5 RP.

[80] Directive 2002/22 of March 7, 2002 [2002] OJ L 108/51, Art. 3–7, replacing Directive 98/10 of February 26, 1998 [1998] OJ L 101/24, Art. 5–8. These are access to the PSTN, directory services, public payphones and specific measures for disabled users.

Member States may then set up a cost recovery mechanism for the extra costs associated with universal service, in the form of an industry fund.[81] These costs are to be recovered from the other providers of public networks and services in the country in question (therefore excluding international operators merely delivering traffic for termination).[82] The U.S. approach to universal service, in contrast, provides for a larger class of services that can be funded via a universal service mechanism. Moreover, that mechanism consists of a supplementary charge on access to local networks.[83] This charge is due irrespective of where the other end of the call is, *i.e.*, international operators must also pay it when they access local networks to terminate international calls. In other words, foreign telecommunications operators (and their customers) are contributing to universal service in the United States. The EC has voiced its dissatisfaction with this aspect of U.S. telecommunications law.[84]

(vii) Licensing The RP contains commitments on the public availability of licensing criteria, time periods required to decide on a license application and terms and conditions of individual licenses.[85] Reasons are to be given when licenses are denied. The provisions in the RP concerning licensing are limited, and some major issues are not addressed:

- The RP does not attempt to define the situations in which a license can be required, nor does it outline the terms and conditions that should or should not be found in a license. Licensing can become a substantial barrier to cross-border trade, since a service provider can be subject to fairly different (and sometimes incompatible) licensing conditions from one country to the other, even if each country applies an even-handed licensing process. Moreover, when the scope of activities for which a license is required is defined broadly and the time period for issue of a license is relatively long, new market entrants are penalized by having to wait while the incumbent catches up. The RP does not address these issues. The GATS general proportionality rule could, however, perhaps be used to keep disproportionate licensing requirements in check.[86] Conceivably, the provisions of the AT dealing with permissible conditions on access and use, though not dealing with licensing conditions, could be used to supplement the proportionality principle in this respect.[87]
- There is no provision for the mutual recognition of licenses in the RP. The GATS merely encourages the mutual recognition of licenses, while it does contain a non-discrimination obligation.[88] In the telecommunications sector in particular, it is very important to be able to operate globally, *i.e.*, at both the international

[81] Directive 2002/22, *id,* Art. 13.
[82] Directive 2002/22, *id*., Art. 13(4).
[83] *See* FCC, Federal-State Joint Board on Universal Service, CC Docket 96–45, Report and Order, FCC 97–157 (May 8, 1997). This order provides that the universal service program shall support, *inter alia*, schools and libraries as well as health care providers in addition to the traditional universal service target group (rural and low-income users).
[84] *See* EC, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 52 (2001), available at <http://europa.eu.int/comm/trade/bilateral/usa/usa.htm>. *See* NAFTEL AND SPIWAK, *supra* note 66, at 363–9.
[85] RP, ¶ 4.
[86] GATS, Art. VI, discussed *infra*, notes 118–34 and accompanying text.
[87] AT, ¶ 5.(e) and (f).
[88] GATS, Art. VII.

and domestic levels. A regional operator wanting to serve the Mercosur area, for instance, would likely have to obtain licenses from each and every country. It is however understandable that the RP does not touch upon this issue, since even within the EU, agreement on the mutual recognition of telecommunications licenses has proven elusive. At the same time, the EC has now put in place a mutual recognition regime for electronic commerce services, which shows that mistrust amongst countries in this area is not insurmountable.[89]

- The RP only contains an obligation to provide reasons when a license is denied, but not in cases when a license is granted with conditions that the applicant may not desire.

(viii) Independence of the regulatory authority Pursuant to the RP, signatories to the Fourth Protocol are bound to guarantee the separation of the regulatory authority from any supplier of basic telecommunications services, as well as the regulatory authority's impartiality.[90] There is however no provision in the RP analogous to the requirement in EC law that, when the TO is state-owned or state-controlled, the regulatory authority should also be structurally separated from the government department that exercises ownership and control functions over the TO.[91] Indeed, when the local TO is State-owned but autonomous, two sometimes distinct sets of interests may conflict with the regulatory authority: the interests of the TO itself as a business, and the interests of the government as the owner of the TO. Even if the regulatory authority is independent from the TO as a business, it can still conflict with the interests of the government as owner, for instance when privatization is taking place.

The RP is silent on some important issues as well, such as the circumstances in which recourse to an independent authority must exist (except in the case of interconnection disputes), or the standing requirements for foreign entities before the independent authority.

(ix) Allocation and use of scarce resources The RP includes commitments to allocate and use frequencies, numbers, rights of way and other scarce resources in an objective, timely, transparent and non-discriminatory manner, with a reservation for national security interests applicable to the secrecy of certain frequency allocations.

(x) Overall assessment Some observers believe that the most important achievement of the Fourth Protocol lies in the RP.[92] While we believe that the immediate impact of the RP should not be overstated, this document does provide a breakthrough at the international level. The RP reflects recognition that monopolized sectors cannot be liberalized with the stroke of a pen. Additional commitments are needed, in terms of both regulatory supervision as well as competition law principles. It is admirable that the negotiators of the RP recognized this point. One also has to appreciate how difficult it was for the negotiators to achieve something meaningful in this regard, as they were forced to explore areas that had long been politically fenced off.

[89] Directive 2000/31 of 8 June 2000 on Electronic Commerce [2000] OJ L 178/1.
[90] RP, ¶ 5. *See* Frid, *supra* note 45, at 81–3.
[91] Directive 2002/21 of March 7, 2002 [2002] OJ L 108/33, Art. 3(2), replacing Directive 90/387 (ONP—Framework Directive) of June 28, 1990 [1990] OJ L 192/1 (as amended), Art. 5(a)(2), second dash.
[92] *See* Drake and Noam, *supra* note 41, at 44–5, as well as NAFTEL AND SPIVAK, *supra* note 66, at 106–7.

As already noted, some of the RP's commitments concern licensing and other rules addressed to WTO governments, concerning for instance the way they allocate scarce resources like frequencies and telephone numbers. Since they are addressed to governments, these are commitments one would expect in a typical WTO Agreement. The RP also contains rules that effectively impose obligations on certain private entities, notably to open some of their production facilities (their public networks) to competitors from abroad. Reference is made to the so-called interconnection obligations. Moreover, WTO governments are supposed to take "appropriate measures" to prevent powerful suppliers of telecommunications services from engaging in "anti-competitive practices." The RP also gives examples of such practices.

It is highly unusual to find rules in the WTO that seek to govern private activities.[93] Indeed, the rules of the RP stand in marked contrast to the few provisions scattered throughout the WTO agreements where competition law is mentioned. Some of these provisions give WTO governments the authority to intervene if they believe that private entities are engaged in competition law violations.[94] Other provisions, notably in the GATS agreement, envisage that Members will consult each other about anti-competitive practices. However, none of these provisions forces governments to intervene or take action against private anti-competitive behavior.[95] The governments have discretion to do so. In contrast, the Reference Paper does envisage obligations for governments to prevent anti-competitive practices, which would in turn impose obligations for private parties (*i.e.*, the major suppliers of telecommunications services) as well. This is a significant innovation in the WTO package of agreements.

Indeed, the competition law principles found in the RP are the first competition laws ever introduced in the WTO.[96] This is the undoing of an old taboo. In the early 1950s, competition law was one of the factors that sank the genuine predecessor of the WTO, the International Trade Organization ("ITO"). It was the intention of the negotiators that the ITO would succeed the GATT and become the third international economic organization beside the IMF and the World Bank in the post-war UN-system. However, the Havana Charter was never even presented to the U.S. Congress for ratification because of the strong opposition there. The chapter on competition law in the ITO-Treaty was one of the major stumbling blocks, since—however modest—this chapter went too far for American business.[97] History repeats itself—in recent years the United States resisted

[93] Rare examples would be the Agreement on Government Procurement, and the Agreement on Pre-shipment Inspection, which cover both government and privately owned entities. *See* Chapter 23 of this book.

[94] *See* TRIPS, Art. 8, 31(c) and 40(2). These provisions are discussed in DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (2d ed., 2003). *See also* Chapter 22 of this book.

[95] GATS, Art. IX. Pursuant to Art. VIII of the GATS, WTO Members must guard against abuses by monopoly service providers, yet the scope of this obligation would seem to be limited. It ties the prohibited behaviour of the private entity to the GATS prohibitions addressed to governments. This provision, therefore, prevents a government from shirking its GATS obligations through a transfer of responsibility for essentially governmental action to a private entity, which it controls by means of a governmental monopoly.

[96] Of interest as well is the fact that WTO Members have agreed to review before January 1, 2000 whether the limited WTO agreement relating to investment ought to be complemented by provisions on competition policy, as part of a general review of this Agreement: *SeeAgreement on Trade-Related Investment Measures,* Art. 9. This review was not completed by the agreed deadline, nor were there any relevant developments to report by the fall of 2002.

[97] *See* Bernard M. Hoekman and Petros C. Mavroidis*, Competition, Competition Policy and the GATT,* 17 WORLD ECONOMY 121, 137–139 (1994).

European proposals to negotiate a general agreement on competition law in the WTO. In November 2001, at the Ministerial Meeting in Doha, a decision was taken in principle to start negotiations on some form of competition law agreement in the WTO after the next ministerial meeting in Cancun.[98] However, the Cancun Ministerial Meeting ended in failure. The EU agreed to drop competition law from the relaunched negotiations in the summer of 2004. Nevertheless, at some point the Reference Paper, and its interpretations in WTO dispute settlement, may help to break the ice by opening this controversial subject to multilateral negotiations.

Meanwhile, there is a need for much clarification. Many of the RP's principles are formulated vaguely and/or are incomplete. There is no definition of basic terms such as "anti-competitive cross-subsidization", "anti-competitive results" and "non-discrimination". Nor is there a benchmark against which these terms are to be interpreted: is the goal to increase market access for foreign suppliers, or to improve effective conditions of competition in the host country? This can make quite a difference. WTO panels already have had occasion to distinguish between competition and trade law approaches.[99] It is also notable that the RP, while stipulating that an independent agency is supposed to hear private complaints about interconnection, remains silent on whether this agency should also be competent to hear private complaints about anticompetitive practices of the "major suppliers" of telecommunications services. While government-to-government complaints always remain a possibility in this area of WTO law, experience shows that private enforcement of competition law principles is indispensable to their effectiveness.[100]

Key regulatory concepts have also not been well developed in the RP.[101] In general, the RP avoids the "heavier" regulatory issues that are no less essential to ensure a level playing field: transformation of TOs into private law companies (including privatization), accounting standards for TOs, the definition of the network and service components to be unbundled, universal service, services for which individual licenses may be required or not, terms and conditions attached to licenses or the recognition of foreign licenses.

The fact that the commitments in the Reference Paper are open-ended and allow many different interpretations has been hailed as the "real value" of the RP,[102] on the theory that no WTO Member could claim that only one interpretation is the valid one. Ultimately, it would be up to WTO panels and the Appellate Body to decide the specific interpretations of those commitments.[103] We could not disagree more. If the commitments undertaken on the basis of the Reference Paper are supposed to be legally binding, then they must be intelligible to all interested parties, their interpretation must be predictable, and their

[98] *See* ¶¶ 23–25 of the Doha Ministerial Declaration, available at www.wto.org., and reproduced in the Appendix into this book.

[99] Thus, panels have defined markets more broadly in trade than in competition law. In their view, trade law addresses the "potentiality to compete", whereas competition law is designed to protect "the actual mechanisms of competition". Report of the WTO Panel, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R (1998), at ¶ 10.81 (confirmed on appeal). *See also* Report of the WTO Panel, *Chile—Taxes on Alcoholic Beverages*, WT/DS/87/R, WT/DS/110/R (1999), at ¶ 7.87 (confirmed, and modified on other grounds, on appeal).

[100] These points have been developed in Bronckers, *supra* note 52.

[101] *See also* M. Fredebeul-Klein and A. Freytag, *Telecommunications and WTO Discipline*, 21 TELECOMMUNICATIONS POLICY 477, at 480–3, 489–60 (1997).

[102] *See* Gonzalez Durantes, *supra* note 66, at 71–75 who presents this as the "European perspective" on the Fourth Protocol.

[103] *Id*. at 72.

enforcement should not be seen either to "add to or diminish" the rights and obligations of WTO Members.[104] In the words of the *Telmex* panel:[105]

> WTO negotiators sometimes praise the political wisdom of resorting to "constructive ambiguity" as a diplomatic means of enabling consensus on WTO rules. [105a] The limited legal task of dispute settlement findings is very different. It is to decide on the legal claims, in a particular dispute, based on the "ordinary meaning" of the WTO provisions concerned in their context and in light of the "object and purpose" of the agreement.

In other words, the primary responsibility to clarify and improve the RP rests with the WTO membership, at the negotiating table. The same is true for the elaboration of competition law principles. If the WTO membership fails to assume this responsibility, dispute settlement on the basis of the RP remains a second-best solution to make the necessary progress.[105b] The overall admirable work of the panel in the *Telmex* Report has given a boost to the credibility of the RP. This report has also underlined the useful role that competition law principles can play in opening markets that were hitherto closed.

(c) Residual Importance of the Annex on Telecommunications after the Fourth Protocol. As a result of the successful conclusion of the GBT negotiations (especially the agreement on the RP), the AT has lost much of its significance. Yet the more salient obligations under the RP are in some respects more limited than those of the AT, as noted in the *Telmex* Report,[105c] where the panel made concurrent findings under both the AT and the RP. The AT therefore remains relevant:

- When a given WTO Member has not made any commitments under the Fourth Protocol;
- When a given WTO Member has made commitments under the Fourth Protocol but has not or not fully committed to the principles contained in the RP. In this case, the AT could provide some protection to suppliers of basic telecommunications services;
- When a WTO Member has made commitments under the Fourth Protocol, including the RP in full, for issues falling outside of the scope of the RP, because no "major supplier" is involved or because the problems do not concern "interconnection" but another form of "access to and use of" public networks and services;
- When a WTO Member has given commitments in a service sector other than telecommunications, for foreign service suppliers in that sector in their dealings with the incumbent TO; and
- When a WTO Member has given commitments on value-added telecommunications services, for suppliers of these services, since as mentioned above, the RP only applies to basic telecommunications services.

[104] *See* DSU, Art. 3.2. *See* Marco C.E.J. Bronckers, *Better Rules for a New Millennium: A Warning against Undemocratic Developments in the WTO,* 2 J. INT'L ECON. L. 547 (1999); Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARVARD INT'L L.J. 333 (1999).

[105] *Telmex* Report, ¶ 7.4.

[105a] Cf. former WTO Director-General Mike Moore, "*A World without Walls—Freedom, Development, Free Trade and Governance*", Cambridge, Cambridge University Press, 2003, P. 111 [footnote in original].

[105b] Obviously, it remains the prerogative of the WTO membership to exclude certain questions from being solved through WTO dispute settlement. For an example see TRIPS, Art. 6 (regarding the question of parallel imports).

[105c] See *Telmex* Report, ¶ 7.331–7.332.

B. The General GATS Obligations that Apply to the Telecommunications Sector

With the Fourth Protocol, the GATS now contains a complete set of specific commitments on telecommunications. In addition, as mentioned above, certain general obligations of the GATS come into play only when specific commitments are made for a given sector, relating essentially to domestic regulation.[106] The application of these general obligations to the telecommunications sector, in light of specific commitments, is reviewed below.[107] For the sake of convenience, the MFN obligation,[108] which can apply independently of any specific commitment, is also reviewed.

1. The Most-Favored-Nation ("MFN") Obligation

In general, the MFN obligation applies to every measure concerning trade in services,[109] and it would accordingly apply to measures concerning telecommunications services as well.[110] Essentially, it binds WTO Members to treat services and service suppliers from other WTO Members no less favorably than like services and service suppliers from any other country. However, the GATS Annex on Negotiations on Basic Telecommunications provided that the MFN obligation would only enter into force for basic telecommunications after the market access negotiations were completed or appeared to remain unsuccessful.[111] With the Fourth Protocol, the MFN obligation now applies to basic telecommunications as well.

WTO Members are allowed to apply measures in derogation of the MFN obligation, provided that they were identified during the negotiations and listed in an annex to the GATS. These derogations are then subject to periodical review and must in principle be terminated at the latest ten years after the entry into force of the WTO Agreement, *i.e.*, on January 1, 2005.[112] The Annex on Negotiations on Basic Telecommunications has similarly extended the deadline for so-called "Article II Exemptions" on basic telecommunications until the conclusion of the negotiations. Indeed, Article II Exemptions were also negotiated within the NGBT and GBT at the same time as specific commitments. Nine countries submitted Article II Exemptions (mentioned below when relevant).

The effects of the MFN obligation were felt mostly in countries where telecommunications are operated by the State or by a legal monopoly. It must indeed be emphasized that the MFN obligation, like virtually all WTO obligations,[113] rests only on States and their agencies. For instance, to the extent a government still negotiates accounting rates to settle international telephone calls, a sending country would be entitled to claim the most favorable rate a terminating country has offered to any other country—regardless of whether that other country is a WTO Member. Accordingly, five countries (Bangladesh, India, Pakistan, Sri Lanka and Turkey) submitted MFN exemptions for differential accounting rates concluded in separate bilateral agreements with other countries.[114]

[106] GATS, Art. VI. The obligations relating to freedom of payments and transfers (Art. XI and XII GATS) are of less immediate relevance and will not be discussed here.

[107] *See also* Drake and Noam, *supra* note 41, at 45–6.

[108] GATS, Art. II. On transparency, *See* Frid, *supra* note 45, at 83–4.

[109] *See* GATS, Art. II:1.

[110] Although the precise significance of MFN for telecommunications is not yet well established: Holmes *et al*., *supra* note 3, at 762. *See also* Tuthill , *supra* note 47, at 788–9.

[111] *See Annex on Negotiations on Basic Telecommunications*, ¶ 1.

[112] *See* GATS, Art. II:2, in conjunction with Annex on Article II Exemptions, ¶¶ 3 and 6. *See* HOEKMAN AND KOSTECKI, *supra* note 6, at 252.

[113] *See supra* notes 93–5 and accompanying text.

[114] *See* the discussion *infra* notes 213–25 and accompanying text.

To the extent private or privatized TOs handle international relations (including the negotiation of accounting rates), they are not directly bound to observe the MFN obligation. Two exceptions may exist. First, since most TOs will qualify as major suppliers for the purposes of the RP, the commitments on anti-competitive practices may well apply to differential treatment in international relations (*e.g.*, discriminatory accounting rates). Domestic law restrictions on discrimination then become relevant, to the extent they do not already apply independently of the RP commitments.[115] Second, if a TO enjoys legal monopoly rights or exclusive or special rights, a government may be forced to intervene under the GATS if the TO acts in a manner inconsistent with MFN by charging discriminatory prices on the basis of nationality (*e.g.*, differing accounting rates despite comparable distances or traffic volumes).[116]

Once a complete set of specific commitments relating to telecommunications is in place, the general MFN obligation of the GATS also creates a so-called *free rider* problem. Indeed, even if only 69 of the 130 WTO Members made specific commitments on telecommunications at the time of the Fourth Protocol, the benefit of these commitments must be extended to all WTO Members pursuant to the MFN obligation. Even among the 69 countries that participated in the NGBT and GBT, the commitments are by no means symmetrical. If Canada, for example, limited foreign ownership of facilities-based service providers to 46.7 percent (direct and indirect), a country such as the Netherlands, which fully removed all restrictions must allow Canadian investors to buy a majority in a facilities-based telecommunications provider. These free rider effects explain why a critical mass of acceptable offers was considered to be so important. If the free rider effect was thought by a Member to be too substantial, an Article II Exemption could still be used, but only on a temporary basis. The United States, for one, "retaliated" against the perceived shortcoming of the Canadian commitment mentioned above by filing an Article II Exemption on foreign ownership of U.S.-based companies active in certain satellite services.[117]

2. Domestic Regulation

While the GATS recognizes the right of WTO Members to regulate,[118] it also imposes certain obligations relating to domestic regulation.[119] For instance, for telecommunications services these obligations apply to licensing schemes,[120] universal service obligations, frequency allocation,[121] numbering, and access/interconnection regulations.

The GATS obligations regarding domestic regulation distinguish between "committed services" (i.e. services for which specific commitments have been made) and other services. All measures affecting services generally must be published.[122] Moreover, for

[115] *See e.g.,* Art. 82(c) EC, prohibiting a dominant supplier from charging discriminatory prices to its customers, which cause competitive harm.

[116] Pursuant to GATS, Art. VIII.

[117] Direct-to-home ("DTH"), direct broadcasting ("DBS") and digital audio services. A potentially more damaging consequence of this Article II Exemption could be that the commercial subsidiaries of international satellite organizations ("ISOs") are prevented from offering DTH and DBS in the United States. Even though the United States explicitly undertook not to apply this Article II Exemption against operators from the EU, the EC and its Member States protested. *See* the press release of the Council meeting of February 14, 1997, PRES/97/39.

[118] *See* the fourth recital of the GATS' preamble.

[119] GATS, Art. VI. *See also* Tuthill, supra note 47, at 789–92, and Chapter 19 of this book.

[120] Provided that the total number of suppliers is not limited, in which case the licensing requirement is subject to Art. XVI GATS and must be listed as a limitation on market access in the schedule of specific commitments.

[121] *See supra* note 44 and the accompanying text.

[122] GATS, Art. III.I.

committed services, any new law or regulation, or amendment of existing rules, which significantly affects the trade of services in that sector must be notified to the WTO, though prior consultation is not required.[123] Furthermore, in commited sectors, the WTO Member concerned must administer all regulations of general application in a reasonable, objective and impartial manner.[124]

Furthermore, WTO Members are also bound to institute objective and impartial review procedures with respect to administrative decisions affecting trade in services.[125] A service supplier who files an application to operate in a WTO Member in a "committed sector" is entitled to a decision within a "reasonable period of time". At "any time" when so requested the WTO Member shall "without undue delay" inform the applicant of the status of his application.[126] These general obligations correspond to or complete the specific commitments found in the RP.[127]

Moreover, in the absence of anything on this point in the RP, the general obligations of the GATS are the only provisions applicable to the substance of the terms and conditions of telecommunications licenses, although some guidance can already be derived from the provisions of the AT dealing with conditions on access and use, where a core of permissible restrictions and requirements is outlined.[128] In essence, licensing requirements should not restrict trade unnecessarily. Whenever a WTO Member has given commitments on telecommunications services, its licensing requirements are subject to a form of proportionality test (objective and transparent criteria, not more burdensome than necessary to ensure quality of service, not in themselves a restriction on supply). No WTO Member can undermine these commitments through the imposition of unnecessarily cumbersome licensing requirements, at least when such requirements would be new or unexpected.[129]

The WTO Council for Trade in Services is supposed to elaborate disciplines to concretize these principles—whether they are subject to commitments or not.[130] A reading of the GATS that would, for example, expressly tolerate the capricious, subjective and biased regulation of "uncommitted" telecommunications services would seem out of place.[131]

Nevertheless, the negotiation of principles of good administration regarding services regulation is proving to be difficult. It is generally recognized that the present disciplines of Art. VI need to be clarified and sensibly strengthened.[132] A key question has become how to determine in the WTO whether services regulations, such as telecommunications licensing requirements, are "necessary" or "proportionate".[133] In reaching

[123] GATS, Art. III.3. Note that, as with notification obligations generally in the WTO, there is no immediate sanction foreseen in the event notification has been omitted. This is to be contrasted, for instance, with the rigorous case law of the European Court of Justice pursuant to which Member States having failed to notify technical regulations to the Commission, pursuant to Directive 94/34 of June 22, 1998 [1998] OJ L 204/37, are barred from enforcing those rules against individuals. *See* ECJ, 30 April 1996, Case C-194/94, *CIA Security International* v. *Securitel* [1996] ECR I-2201.

[124] GATS, Art. VI.1.

[125] GATS, Art. VI.2.

[126] GATS, Art. VI.3.

[127] *See* RP, ¶¶ 2.5 and 5 on recourses for interconnection disputes and the independence of the regulatory authority.

[128] AT, ¶ 5(e) and (f).

[129] *See* GATS, Art. VI.5.

[130] *See* GATS, Art. VI.4.

[131] *See contra* GATS, Art. VI.1.

[132] *See e.g.,* Geza Feketekuty, *Regulatory Reform and Trade Liberalization in Services*, in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 225, 237–238 (Pierre Sauvé and Robert M. Stern eds. 2000).

[133] *See* GATS, Art. VI.4, opening paragraph and subclause (b). The EU and its Member States recently presented their views on this issue to the WTO Membership, with reference to their own experiences and

this determination the basic tension between market integration and national regulatory autonomy has to be resolved. This difficulty is not particular to the services sector. In the goods areas as well, assessing the proportionality of non-discriminatory domestic regulation has been one of the most intractable questions for the WTO membership.[134]

3. Government Procurement

The scope of GATS is limited in an important respect. The general MFN principle, as well as specific commitments relating to market access and national treatment, do not apply to government procurement of services. Negotiations on this subject started in 1995, though no timetable was set for their completion.[135] It is currently envisaged by the Members that the negotiations on government procurement will be completed at the same time as the overall negotiations on services liberalization which restarted in 2000.[136]

For foreign suppliers of telecommunications services this gap can have considerable impact. Governments are probably the largest single customer for telecom services in any country. The political expediency to purchase locally is supplemented by an economic interest, as long as governments retain an important stake or share in the local TO.

C. Remedies and Dispute Settlement

The substantive GATS provisions applicable to telecommunications have been examined above. It must now be assessed whether these provisions can be effectively enforced. The following section is concerned with applicable remedies and dispute settlement. Two cases are distinguished for the purposes of remedies, namely injury to telecommunications service providers in their home market as a result of practices from foreign suppliers, and difficulties on a foreign market.

1. Remedies for Injury to the Domestic Market

The GATS does not contain a set of self-help remedies, unlike the GATT, where Members can take unilateral action against dumped or subsidized imports from other Members, or even impose safeguard measures against imports that cause serious injury.[137] Even though WTO Members recognized that subsidies may distort competition in services as well,[138] the GATS contains no disciplines regarding government subsidies.[139] If a Member finds that subsidies granted by another country create distortions on its market, the GATS does not envisage countervailing action. A Member with sufficiently serious grievances about foreign subsidies on services is only entitled to "sympathetic consideration" if it

case law. *See European Communities—Domestic Regulation: Necessity and Transparency*, S/WPDR/W/14 (May 1, 2001).

[134] *See generally*, Axel Desmedt, *Proportionality in WTO Law*, 4 J. INT'L ECON. L. 441 (2001).

[135] *See* GATS, Art. XIII. On the issues to be addressed in these negotiations see Patrick Low, Aaditya Mattoo and Arvind Subramanian, *Government Procurement in Services*, in LAW AND POLICY IN PUBLIC PURCHASING—THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT 225 (Bernard M. Hoekman and Petros C. Mavroidis, eds. 1997).

[136] According to the "built-in agenda" of GATS, Art. XIX.1, a new round of negotiations on services started in the year 2000: *See* the Guidelines and Procedures for the Negotiations on Trade in Services, S/L/93 (March 29, 2001). These "built-in" negotiations have gained additional momentum following the Doha Ministerial Meeting in November 2001, which launched a new global round of trade negotiations in the WTO.

[137] *See* GATT, Art. VI and the WTO Anti-dumping and Subsidies Agreements, as well as GATT Art. XIX and the WTO Safeguard Agreement. *See* Chapters 11 and 18 of this book.

[138] *See* GATS, Art. XV.1.

[139] To the extent a Member has not scheduled limitations on national treatment regarding subsidies, it may be forced to give subsidies to local and foreign telecommunications suppliers indiscriminately.

requests consultations with the subsidizing country.[140] WTO Members have undertaken to address these issues in further negotiations,[141] and currently aim to complete these prior to the conclusion of the new overall negotiations on services liberalization, started in the year 2000.[142]

The GATS envisages no remedy either against injury caused by private anti-competitive behavior of foreign suppliers. The GATS, in other words, does not contain an anti-dumping remedy. This is remarkable, as the GATS itself offers no alternative. The GATS principles on restrictive business practices[143] or the RP do not really help here, as they are principally concerned with helping foreign suppliers to gain market access in the face of a powerful incumbent.

In some sense, it may be laudable that the GATS drafters did not simply copy the anti-dumping regime for trade in goods, given that this remedy is open to fundamental criticism. Beyond protecting against abuses by powerful exporters enjoying protection in their home market, anti-dumping measures have also been used to strike at competitive practices that are perfectly legitimate under national competition law and should create no concern internationally either.[144]

Perhaps the GATS drafters were not overly concerned about the lack of remedies against anti-competitive practices, as most of the specific commitments on market access aim to allow foreign service suppliers to establish a commercial presence in the host country.[145] Such a commercial presence may have been thought sufficient for the host country to exercise jurisdiction and curb any anti-competitive practices from the foreign supplier pursuant to domestic competition law. This assumption may not readily hold for telecommunications, and in particular international telecommunications, however. International telecommunications are often traded across borders, without a commercial presence of the supplier in the country where the service is consumed.[146] Furthermore, a local affiliate in the host country may not reflect the full competitive potential of the foreign supplier and therefore escape competition law disciplines imposed on major suppliers.[147] Accordingly, countries such as the United States have resisted the opening of their markets as long as no effective remedies against unfair competition from abroad were in place.

Such resistance may well have been compounded by the absence of an effective safeguard mechanism. Trade agreements traditionally incorporate an escape clause, a "fail-safe" mechanism, in order to provide assurance to countries which open their markets that they could unilaterally suspend trade concessions if these would cause unexpected problems for their domestic industry. An escape clause allows restrictions on imports, even if trade is considered fair; what matters is the injury suffered by the domestic industry.[148]

[140] GATS, Art. XV.1.

[141] *See* GATS, Art. XV.2.

[142] *See supra* note 136.

[143] *See* GATS, Art. VIII and IX.

[144] *See* Marco C.E.J. Bronckers, *Rehabilitating Antidumping and other Trade Remedies through Cost-Benefit Analyses*, 30 JOURNAL OF WORLD TRADE 5–37 (1996). *See also* Chapter 11 of this book.

[145] This is the third mode of international service delivery recognized in GATS, Art. I.2.

[146] This is the first mode of international service delivery recognized in GATS, Art. I.2.

[147] In EC competition law terms, for instance, the European subsidiary of a foreign supplier might escape the pricing disciplines which a dominant supplier must observe by virtue of Art. 82 EC.

[148] Paradoxically, by allowing a country to suspend its concessions when it finds itself in difficult circumstances, even if the foreign competition is fair, an escape clause is seen as an encouragement to trade liberalization.

Expressed differently, an escape clause can operate as an alternative or a complement to the remedies against anti-competitive practices or unfair trade (such as anti-dumping or countervailing duties). The GATT contains an escape clause, which after much difficulty was elaborated in a separate WTO agreement in the course of the Uruguay Round.[149]

The GATS, however, does not incorporate a safeguard mechanism yet. The agreement only provides that negotiations on such a mechanism were to be concluded before January 1, 1998,[150] but this deadline has been extended indefinitely.[151] In the meantime, the GATS allows WTO Members to permanently withdraw or modify concessions in accordance with a more cumbersome process.[152] The safeguard concept does not fit easily into the context of services.[153] Suppose, for instance, that a local TO runs into serious difficulties as a result of the surge in competition following the abolition of its monopoly over voice telephony. It would not seem feasible to simply "suspend" the concession, and reinstate the monopoly for some period.[154] A better alternative might be to impose a temporary surcharge on the sales of foreign telecom suppliers, to ease momentarily the competitive pressures on the local TO.

Perhaps the GATS negotiating parties felt that they were better protected against unexpected developments than in the goods sector, as GATS offers market access piecemeal through specific commitments. This is different from the original GATT approach, where quantitative restrictions had to be abolished as a matter of principle, tariffs reduced and national treatment immediately given. Whether sudden leaps in competitive advantage will happen in services remains to be seen. In the telecommunications sector at least, this seems a safe bet in view of continuing and rapid technological developments.

However, while for the time being the GATS does not explicitly envisage self-help remedies, it does not prohibit them altogether. The GATS acknowledges that WTO Members have latitude in developing their own public policies. Thus, the GATS would seem to allow a Member to impose licensing conditions in order to protect fair and undistorted competition in its own market.[155] Yet in order to be GATS-consistent, there would have to be evidence of anticompetitive behavior in the host country (or an unjustifiable failure of the foreign supplier to cooperate with a competition-related investigation by the host country) before a telecom license could be withdrawn. Expressed differently, telecom licenses cannot be denied *ex ante*, based on the presumption that a powerful foreign supplier *might* engage in anticompetitive behavior.[156]

[149] *See* GATT, Art. XIX and the WTO Safeguards Agreement. *See* Chapter 1.8 of this book.

[150] *See* GATS, Art. X.1.

[151] *See Fifth Decision on Negotiations on Emergency Safeguard Measures*, S/L/159 (March 17, 2004).

[152] *See* GATS, Art. X.2. Although not explicitly stated, the reference to Art. XXI suggests that a WTO Member wishing to avail itself of this provision may have to pay compensation to other disaffected WTO Members. This constraint is not in line with current thinking on the effective operation of an escape clause. *See WTO Safeguards Agreement*, Art. 8(3).

[153] *See* Gilles Gauthier, Erin O'Brien and Susan Spencer, *Déjà Vu, or New Beginning for Safeguards and Subsidies Rules in Services Trade*, in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 165, 166–176 (Pierre Sauvé and Robert M. Stern eds. 2001). *See* Chapter 19 of this book.

[154] This could amount to expropriation of, or at least far-reaching interference with an established business of foreign service providers. Note that similar, conceptual concerns were deemed insurmountable in the context of intellectual property, and have been put forward to explain the absence of an escape clause in the TRIPS agreement. *See* Bronckers, *supra* note 5, at 1260.

[155] *See* GATS, Art. VI.

[156] *See* Gonzalez Durantez, *supra* note 66, at 64–65.

2. Remedies for Difficulties on Foreign Markets

Various reasons may explain why a given telecommunications service provider (the "entrant") has difficulties in accessing a foreign market (the "host country"). It may be that the entrant has been correctly treated by the authorities of the host country, for example as far as licensing is concerned, but is facing anti-competitive practices from a major supplier in that host country. By way of example, the entrant may be deterred from offering services in the host country if the prices charged by the local TO are perceived to be artificially low. In that case, a faithful implementation of the principles of the RP should provide the entrant with a remedy before an independent regulatory authority, with the additional possibility of recourse against the decision of that authority, pursuant to the GATS.[157]

It may be however that the RP and the GATS have not been implemented in the host country, or that the entrant is hampered by the host country itself breaching one of the GATS commitments applicable in the telecommunications sector as described above, be it market access, foreign investment, MFN, transparency, etc. The entrant may then have difficulties obtaining redress, which reflect the problems private parties have with the enforcement of the WTO agreements in general.

First, there is no direct right of access to the WTO dispute settlement mechanism for private parties. Second, it is open to question whether the WTO agreement can be invoked by a new entrant before a national court in the host country. This depends on whether the host country is "dualist" or "monist", and in "monist" systems whether courts are willing to grant direct or indirect effect to WTO agreements.[158] The country of origin of the new entrant could of course initiate government-to-government litigation in the WTO, yet such litigation is normally an act of sovereign discretion. However, some WTO Members have introduced in their domestic law mechanisms whereby private parties can petition them to act before the WTO.[159] Pursuant to these mechanisms a telecom supplier from country A might formally request its government to initiate WTO dispute settlement action against country B which has frustrated this telecom company's access to country's B market (*e.g.*, by not curbing the anti-competitive practices of its domestic incumbent).

3. The WTO Dispute Settlement System

The WTO Agreement brought about a considerable improvement in dispute settlement procedures over the former GATT.[160] In sum, the WTO has created a unique system, which has compulsory jurisdiction to resolve disputes between Member countries rather quickly and effectively. Yet despite the innovative nature and wide-ranging scope of the Fourth Protocol, combined with the general obligations of the GATS, there have been relatively few disputes between WTO Members concerning telecommunications. Some of them are discussed below.

The only telecommunications dispute that has led to a WTO panel ruling, in April 2004, is the *Telmex* case, involving a complaint by the United States against Mexico.

[157] GATS, Art. VI.2.

[158] For a European Community law perspective, *see* Naboth van den Broek, *Legal Persuasion, Political Realism and Legitimacy: The European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order*, 4 J. INT'L ECON. L. 411 (2001).

[159] *See e.g.*, in the EC, Regulation 3286/94 of December 22, 1994 [1994] OJ L 349/71, discussed in Marco C.E.J. Bronckers and Natalie McNelis, *The EU Trade Barriers Regulation Comes of Age*, 35 J. WORLD TRADE 427–482 (No.4, 2001). *See also* Chapter 33 of this book.

[160] *See* Chapters 25 *et seq* of this book for a more detailed treatment of dispute settlement.

This case is commented on at some length in this Chapter and elsewhere in this book.[161]

Japan found itself in the crossfire of the United States and the EC, among others as regards persistently high interconnection fees with the incumbent NTT.[162] The case has not progressed to the dispute settlement stage.

A dispute between the United States and the EU/Germany was avoided in 1999.[163] In the course of setting out the details of the interconnection regime, the German regulator tried to find a way to distinguish between "true" telecommunications operators and "mere resellers" (who would get a less favorable interconnection rate to the incumbent). At some point, the envisaged solution would have placed international operators (whose network in Germany is often limited to a point of presence for the delivery of traffic to the incumbent) in the same basket as resellers. However, the solution finally retained was satisfactory to U.S. interests.

Finally, the United States has put in place a special monitoring process for telecommunications, whereby every year a number of countries are reviewed for compliance with their GATS commitments.[164] The review generally notes a number of points for each country, but it appears that most of these points are subsequently settled.

IV. Implementation of WTO Commitments

This section deals with how the two major trading blocks—the EU and the United States—implemented their WTO commitments in the telecommunications sector. It would be equally interesting to conduct such a study of the other WTO Members that have entered into commitments in the telecommunications sector,[165] but it would make this contribution much too large. In any event, the extensive experience of the EU and the United States with respect to regulation and competition law should be indicative of the difficulties arising in other WTO Members.

A. The EU, its Member States and their WTO Commitments

Before looking at how the EU and its Member States implemented their WTO commitments, it should be underlined that developments in the EU had a substantial influence on the content of the Fourth Protocol and indeed on the very fact that it was concluded. First of all, the Protocol was to enter into force on January 1, 1998,[166] which is also the date on which the full liberalization of the EU telecommunications sector was set to take

[161] *See* in this Chapter, pp. 998, 999, 1001–1009, 1015, 1032–1033, 1036; *see* also in Chapter 19 of this book.
[162] *See* U.S. Trade Representative*, Annual Review of Telecommunications Trade Agreements Highlights High Interconnection Rates in Japan*, Press release 00–22 (March 30, 2000), available at <http://www.ustr.gov>.
[163] *See* David Molony, U.S. *Poised to Take German Interconnect Row to WTO*, COMMUNICATIONS WEEK INTERNATIONAL (March 15, 1999).
[164] Pursuant to the Omnibus Trade and Competitiveness Act of 1988, section 1377, 19 U.S.C. § 3107, The reports can be found at <http://www.ustr.gov>.
[165] *See e.g.,* Ringrose, *supra* note 48. The situation in the APEC countries is also surveyed in Shin Cho and Myeongho Lee, *Competition and Deregulation: An APEC Perspective* and Erika Wada and Tomohiko Asano, *Telecommunications Services in the Asia Pacific Countries*, both in UNFINISHED BUSINESS: TELECOMMUNICATIONS AFTER THE URUGUAY ROUND 155 and 181 respectively (Gary C. Hufbauer and Erika Wada, eds. 1997). *See also* Toshiaki Tarigawa, *The Impact of the WTO Telecommunications Agreement on U.S. and Japanese Telecommunications Regulations* 32 J. WORLD TRADE 33 (1998).
[166] It eventually entered into force on February 5, 1998.

place under EC law.[167] This is no coincidence. As mentioned earlier, the United States always insisted on a "critical mass" of offers, and only when the offers coming from the EC and its Member States became satisfactory to the United States did it become possible to attain such a critical mass. Political agreement within the EC on the full liberalization of the telecommunications sector was only finalized at the very end of 1994,[168] when work was being pursued under the NGBT. The EC offers in the NGBT then began to reflect that agreement. Since full liberalization in the EU was one of the most significant commitments made, it made sense to align the date of entry into force of the Fourth Protocol with the internal deadline for liberalization in the EU.[169]

As for market access and national treatment, the EC schedule contains very few permanent limitations of any significance. Leaving aside limitations scheduled by Portugal and Greece,[170] the most significant limitation on the EC schedule is the twenty percent limit on direct non-EC ownership of public telecommunications providers operating radio-based infrastructure in France.[171] This limit is widely seen as an answer to a similar limitation found in the U.S. schedule.

It has been said that the Reference Paper was based in large part on the regulatory framework that was being discussed at the EC level in 1996–1997.[172] Accordingly, the substance of the Reference Paper was already present in that regulatory framework, and there was no need to modify or complement it to bring it into line with the Reference Paper.[173]

For the EC and its Member States, the key operation required to implement the specific WTO commitments on telecommunications consisted of extending the benefits of internal measures to providers from non-EC WTO Members. In line with the respective constitutional orders of the EC and its Member States, this was done through various

[167] *See* Directive 90/388, *supra* note 39, Art. 2(2), as amended by Directive 96/19 of March 13, 1996 [1996] OJ L 74/13.

[168] *See* LAROUCHE, *supra* note 21, at 19–23. The date of January 1, 1998 already appeared much earlier, in a Council Resolution of July 22, 1993 [1993] OJ C 213/1, as the date for completing the liberalization of all telecommunications services (with the liberalization of voice telephony). Agreement on the date of January 1, 1998 for the opening up of infrastructure, however, was only reached 18 months later, as evidenced by Council Resolution of December 22, 1994 [1994] OJ C 379/4.

[169] Within the EC, the deadline for full liberalization had been extended for some Member States (Spain, Greece, Ireland, Portugal and Luxembourg), pursuant to Directive 96/2 of January 16, 1996 [1996] OJ L 20/59, Art. 4 and Directive 96/19, *supra* note 167, Art. 1(2), replacing Directive 90/388, *supra* note 39, Art. 2. *See* Decision 97/114 of November 27, 1996 (Ireland) [1997] OJ L 41/8, Decision 97/310 of February 12, 1997 (Portugal) [1997] OJ L 133/19, Decision 97/568 of May 14, 1997 (Luxembourg) [1997] OJ L 234/7, Decision 97/603 of June 10, 1997 (Spain) [1997] OJ L 243/48 and Decision 97/607 of June 18, 1997 (Greece) [1997] OJ L 245/6. To the extent applicable, the extensions granted in those decisions were reflected in the EC schedule to the Fourth Protocol. They now have all lapsed.

[170] Portugal scheduled a requirement that cross-border supply of basic services be limited to companies established in Portugal, and that the direct or indirect participation of non-EC entities in firm supplying basic services be limited to 25 percent. Greece limited market access to corporations engaged exclusively in the provision of telecommunications services.

[171] As currently found in the French Code des postes et télécommunications, Art. 33–1.III. Art. 33–1.III. sets out the twenty percent limit for both direct and indirect ownership, however it is subject to international agreements, so that the limitation on indirect ownership is rendered inoperative towards firms from WTO Members through the commitments made in the Fourth Protocol.

[172] *See* NAFTEL AND SPIVAK, *supra* note 66, who also note, however, that U.S. negotiators thought that the U.S. Telecommunications Act of 1996, *supra* note 10, provided the "gold standard" for the WTO.

[173] For an explanation of how the EC regulatory framework in place for 1998 implements the commitments made in the WTO, see EC, Implementation of Telecommunication Legislation in the European Community, S/C/W/110/Add.5 (June 21, 1999), available at http://www.wto.org. *See also* Gonzalez Durantez, *supra* note 66, at 51–70.

legislative enactments ratifying the Fourth Protocol,[174] so that for all intents and purposes firms from other WTO Members were put on the same footing as EC firms. Accordingly, the implementation of the Fourth Protocol by the EC and its Member States did not give rise to any significant problems.

In this context, mention should be made of the tensions that arose between the EC and its main trading partners, first and foremost the United States, concerning Directive 95/46 of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[175] This Directive requires the Member States to put in place a regulatory framework to ensure the protection of personal data.[176] In order to avoid circumvention through "data havens" outside the EC, Article 25 of the "Data Protection Directive" obliges Member States to ensure that transfers of personal data to a non-EC country only takes place if that country offers an "adequate level of protection" for such data, as found by Commission decision.[177] To assure adequate protection, the situation in the country in question is examined, and if needed negotiations can be held to conclude an agreement with the EC on data protection. Conversely, if the Commission finds that a given non-EC country does not offer an adequate level of protection for personal data, Member States are required to block data transfers to that country. As could be expected, non-EC countries protested at what they saw as an attempt to "export" EC data protection norms. The United States, in particular, disagreed with the EC both on substance—the Data Protection Directive being too protective on a number of points, in their view—and on the regulatory vehicle—the United States preferring to leave data protection to self-regulatory mechanisms instead of legislation. Nevertheless, the United States and the EC entered into discussions on the issue. As the deadline for implementation of the Data Protection Directive (October 24, 1998), loomed without any agreement, the United States indicated that they might take the matter to the WTO as a breach of the EC's commitments regarding market access and national treatment, among others in the telecommunications sector. The EC, on the other hand, thought that the Data Protection Directive fell under the ambit of Article XIV(c)(ii) GATS.[178] The matter was ultimately resolved, without prejudice, by the creation of a "safe harbor" system in the United States, which the EC found satisfied its requirements.[179]

More significant difficulties may be in store for the EC and its Member States as they renew their internal telecommunications regulations. Many of the Directives of

[174] *See e.g.*, for the EC itself, Decision 97/838 of November 28, 1997 [1997] OJ L 347/45; for France, Act 97-1098 of November 28, 1997, JO, November 29, 1997, 17284; for Germany, the Act of November 20, 1997, BGBl.II.1990.

[175] Directive 95/46 of October 24, 1995 [1995] OJ L 281/31.

[176] In short, the Data Protection Directive regulates the processing of personal data according to the purpose of such processing (Art. 7–9). It gives persons the right to be informed of the collection and processing of personal data (Art. 10–11), the right to access and correct such data (Art. 12) and under certain circumstances the right to object to data collection and processing (Art. 14–15). Furthermore, Member States must provide for remedies to vindicate those rights, including liability (Art. 22–24).

[177] In addition to the United States, discussed here, the Commission concluded that there was an adequate level of protection in Switzerland (Decision 2000/518 of July 26, 2000 [2000] OJ L 215/1), Hungary (Decision 2000/519 of July 26, 2000 [2000] OJ L 215/4) and Canada (Decision 2002/2 of December 20, 2001 [2002] OJ L 2/13).

[178] *See* the First Annual Report of the EC Working Party on the Protection of Individuals with regard to the Processing of Personal Data, available at <http://europa.eu.int/comm/internal_market/en/dataprot/index.htm> at 17 (covering 1996), and the Second Annual Report (covering 1997), available on the same site, at 30.

[179] *See* Decision 2000/520 of July 26, 2000 [2000] OJ L 215/7.

the 1998 liberalization package[180] provided that the Commission had to undertake a review of the EC regulatory framework before the end of 1999.[181] This review led to EC legislation concerning what is now called "electronic communications".[182] While the regulatory package adopted in 1996–1998 did not specifically refer to the GATS and the Fourth Protocol, the new regulatory framework contains explicit references to the EC's obligations.[183] As discussed below, this does not necessarily mean that the EC's regulatory framework is entirely in line with the requirements set forth in the GATS and the Fourth Protocol. Furthermore, the inclusion of telecommunications, together with a significant part of broadcasting and other activities, under the overall concept of "electronic communications" might create difficulties for the EC in the upcoming rounds of negotiations. This issue is discussed below in relation to convergence.

The new EC regulatory framework rests on a number of assumptions[184] that are not necessarily consistent with the thrust of the Reference Paper. The new framework is very much oriented towards competition law in at least two major respects. First, it is widely assumed that in the long-run sector-specific regulation will shrink to leave economic regulation mostly to competition law.[185] Second, it is generally agreed that while sector-specific regulation remains in force, its substance should be aligned with that of competition law, by relying on competition law concepts and doctrines in the formulation of regulations.[186] Such an approach might prove incompatible with the EC's WTO commitments since the regulatory principles contained in the Reference Paper are not and cannot be aligned with an international competition law framework that presently does not exist.

To take a concrete example, there is no guarantee that the new definition of Significant Market Power ("SMP"), *i.e.*, "a position equivalent to dominance, that is to say a position of economic strength affording [a firm] the power to behave to an appreciable extent independently of competitors",[187] will cover the same firms as the definition of "major supplier" in the Reference Paper.[188] It could be that a firm that would be considered as a "major supplier" within the meaning of the Reference Paper would not be found to have SMP under that new EC definition, thereby escaping obligations (especially as regards

[180] Directive 90/387, supra note 91, Art. 8; Directive 97/33, *supra* note 59, Art. 22(2); Directive 98/10, *supra* note 80, Art. 31; Directive 97/13 of April 10, 1997 [1997] OJ L 117/15, Art. 23.

[181] Towards a new framework for electronic communications infrastructure and associated services—The 1999 Communications Review, COM(1999)539 (November 10, 1999).

[182] The main elements are Directive 2002/19, *supra* note 59; Directive 2002/20 of March 7, 2002 ("Authorization Directive") [2002] OJ L 108/21; Directive 2002/21, *supra* note 91; Directive 2002/22, *supra* note 80; Directive 2002/58, *supra* note 175 and Directive 2002/77 of September 16, 2002 [2002] OJ L 249/21.

[183] *See* Directive 2002/21, *id*., Rec. 29, Directive 2002/19 , *id.*, Rec. 13 and Art. 8(3) and Directive 2002/22, *id.*, Rec. 3.

[184] For more information concerning the new framework, *see* Pierre Larouche, *A Closer Look at Some Assumptions Underlying EC Regulation of Electronic Communications* 3 JOURNAL OF NETWORK INDUSTRIES 129 (2002), and CEPS, EUROPEAN COMMUNICATIONS AT THE CROSSROADS, REPORT OF A CEPS WORKING PARTY (Martin Cave and Pierre Larouche, rapporteurs, 2001).

[185] That proposition has been widely aired in the course of the legislative process: *See* the 1999 Communications Review, *supra* note 181, at 49 and the EP Resolution of June 13, 2000 [2001] OJ C 67/53. It has been taken over in a weakened form in the final texts: *see e.g., Framework Directive*, *supra* note 183, Rec. 27 and *Access Directive*, *supra* note 183, Rec. 12. For a similar argument at the international level, *See* Petros C. Mavroidis and Damien Neven, *The WTO Agreement on Telecommunications: It's Never Too Late*, in THE LIBERALIZATION OF STATE MONOPOLIES IN THE EUROPEAN UNION AND BEYOND 307 (Damien Geradin, ed. 2000), with a reply by Pierre Larouche at 319.

[186] *See e.g., Framework Directive*, *supra* note 183, Rec. 25 and *Access Directive, supra* note 183, Rec. 12.

[187] *Framework Directive,* Art. 13(2).

[188] As discussed *supra* notes 49–54 and accompanying text. *See contra* Ibbetson, *supra* note 70, at 46.

interconnection) that the parties to the Fourth Protocol have undertaken to impose on their "major suppliers".[189] In view of that possibility, the Access Directive makes room for SMP-type obligations to be imposed on firms without SMP in order to "comply with international commitments".[190] Similarly, while the RP prescribes cost-orientation for the interconnection tariffs of major suppliers, the new EC framework leaves more discretion to the national regulatory authorities as to the remedies to be applied.[191] Beyond that, it remains to be seen whether the new EC regulatory framework will remain as easily "exportable" on the international scene as the previous framework, in the absence of a consensus on the development of an international competition law instrument.

B. The United States and its WTO Commitments

Much like the EC and its Member States, the United States went through a major internal telecommunications law reform in parallel with the negotiations of the Fourth Protocol.[192] Nevertheless, the U.S. telecommunications sector was by and large already liberalized, as reflected in the U.S. schedule of specific commitments, which contains no significant limitations other than a twenty percent limit on direct foreign ownership of telecommunications carriers.

The implementation of WTO commitments in telecommunications has proved far more eventful in the United States than in the EC, for a number of reasons.[193] First of all, it was difficult for U.S. authorities to abandon the wide-ranging reciprocity principle that governed U.S. telecommunications policy before the Fourth Protocol. Second, U.S. policy on accounting rates provoked considerable friction with other WTO Members.

1. Abandoning Reciprocity

Of all the parties in the NGBT and the GBT, the United States probably had the most developed international telecommunications policy. It had liberalized its domestic market for long-distance and international telecommunications early on, with the breakup of AT&T in 1984. The United States was ostensibly worried that, in an environment where international communications were still essentially conducted on a bilateral, correspondent basis, U.S. operators competing to handle the origination or termination of international calls in the United States would be vulnerable to foreign operators—generally monopolists—handling the other end of those calls.

The main problems relate to (i) *cross-subsidization*, whereby a foreign operator would use supra-competitive profits in its home market to undercut the prices of U.S. carriers in the United States or in other markets, and (ii) *bypass*, whereby a U.S. subsidiary or affiliate

[189] That risk may be limited, however, given that the degree of market power which appears to be envisioned under the definition of "major supplier" in the Reference Paper is at least as strong as dominance as it is understood under EC law. Then again, given that the policy direction underlying the RP (market access or market foreclosure?) has not been articulated by the RP's negotiators, this remains a point of speculation.

[190] *Access Directive*, *supra* note 183, Art. 8(3).

[191] See Art. 2.2(b) RP. Firstly, Directive 2002/19, *supra* note 59, does not provide for the automatic imposition of pricing obligations on SMP operators as regards interconnection. Secondly, even if the national authority would impose a pricing obligation in such a case, it does not need to be cost-orientation: Directive 2002/19, Art. 13.

[192] It resulted in the enactment of the Telecommunications Act of 1996, *supra* note 10.

[193] On the U.S. implementation of its WTO telecommunications commitments, *See also* Kelly Cameron, *The WTO Basic Telecommunications Agreement—Effect on the U.S. Market,* in TRADE AND TELECOMS 77 (Mark Clough ed. 2001).

of a foreign monopoly or dominant operator would carry international traffic from that foreign country to the United States outside of the correspondent regime and thereby further distort the imbalance in settlement payments. In addition, the discrimination problem, discussed below in the context of accounting rates also arose from asymmetric liberalization.

As concerns *bypass* and *cross-subsidization*, the FCC introduced a new policy at the end of 1995.[194] Pursuant to the U.S. Communications Act, FCC approval must in practice be obtained for foreign operators to enter the U.S. market.[195] According to the relevant provisions of the Act, when examining requests the FCC is to have regard to "public convenience and necessity" or the "public interest". The FCC interpreted its legislative mandate so as to make its approval subject to the so-called "Equivalent Competitive Opportunities" ("ECO") test, whereby it must be shown that the country of origin of the foreign operator offers to U.S.-based operators equivalent competitive opportunities. Based on this provision, the FCC assessed whether the foreign market has been sufficiently liberalized, although it was willing to discount a perceived lack of liberalization in foreign markets against the pro-competitive effects on the U.S. market from allowing the entry of the foreign supplier.[196]

The U.S. policy was heavily discussed within the NGBT and GBT. It was argued by participants that it could not be maintained within the framework of GATS, since it breached the MFN obligation by differentiating between countries based on their perceived level of liberalization. Indeed the whole thrust of the Fourth Protocol, especially the additional commitments to the principles contained in the RP, was to address U.S. concerns by ensuring that all signatories create "effective competitive opportunities" and take it upon themselves to prevent anti-competitive behavior by their own operators, so that all markets could be opened at once without reservation, in conformity with the MFN principle. Accordingly, it was argued that the prior approval requirements of the Communications Act (and certainly the ECO test) should be abandoned as concerns WTO Members.

Although the U.S. Administration appeared to agree with the above reasoning, it indicated that it would not introduce legislation to implement the Fourth Protocol, but instead leave it to the FCC to amend its rules. That put the FCC between a rock and a hard place: on the one hand, it has a statutory mandate to look after the public interest, which it cannot readily abdicate; on the other hand, it was being asked to implement an international agreement pursuant to which the MFN principle must be respected, and barriers to market access and national treatment must be removed.

The FCC sought to live up to the U.S. commitments with its 1997 Foreign Participation Order.[197] In short, the FCC abandoned the ECO test for firms coming from other WTO Members, and replaced it with the following framework:

[194] *Market Entry and Regulation of Foreign-affiliated Entities,* IB Docket 95–22, Report and Order, FCC 95–475 (November 28, 1995). The U.S. policy prior to the Fourth Protocol is discussed critically in NAFTEL AND SPIVAK, *supra* note 66, at 123–46.

[195] This is the combined effect of 47 U.S.C. §§ 214 (authorization required for any carrier to operate infrastructure) and 310(b)(4) (authorization required for a foreign entity to own more than 25 percent of a U.S. carrier holding a radio license). In addition, under the Submarine Cable Landing License Act, 47 U.S.C §§ 34–39, a license must also be obtained to land and operate a submarine cable in the United States.

[196] *See Sprint Corporation*, ISP 95–002, Declaratory Ruling and Order, FCC 95–498 (December 15, 1995).

[197] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97–142, Report and Order, FCC 97-398 (November 26, 1997). *See* for a critical appraisal NAFTEL AND SPIVAK, *supra* note 66, at 156–64.

- Firms from other WTO Members may openly enter the U.S. market (*i.e.*, the FCC will presume that entry is in the public interest).[198] However, the FCC reserved the right to "attach additional conditions" to authorizations if it finds that existing safeguards might not be sufficient to prevent "anti-competitive harm" and even, "in the exceptional case in which an application poses a very high risk to competition, [the right] to deny an application."[199] Furthermore, national security, law enforcement, foreign policy and trade policy concerns will continue to be considered by the FCC in its decisions, although it is expected that they will rarely be brought to bear.[200]
- At the same time, the FCC revised but ultimately kept in place a number of "competitive safeguards" designed to prevent the exercise of "foreign market power" on U.S. markets.[201] For instance, U.S. carriers are prevented from accepting any "special concessions"[202] from foreign carriers who have been found to be dominant on their end of the market with respect to international telecommunications services with the United States.[203] Furthermore, U.S. carriers that are "affiliated" with (*i.e.*, more than 25 percent owned by) dominant foreign carriers are to be treated as dominant on the route to the country of that foreign carrier.[204] They are thus subject to specific prior disclosure, structural separation and reporting obligations.[205]

A similar approach has been put forward by the FCC for satellite communications.[206]

These new rules were criticized by many trading partners, including the EU.[207] In short, they are considered to violate the MFN principle, which is central to the GATS. As far as market access is concerned, the treatment of foreign firms may differ depending on the perceived level of competition in their respective home countries**.** It could even be said that the "competitive safeguards", which do not restrict entry as such, are difficult to reconcile with the MFN principle. Even though the "competitive safeguards" apply to firms operating in the United States, they indirectly affect foreign carriers (which see their freedom to deal with U.S.-based carriers impinged) in a manner that varies depending on their respective home countries. Furthermore, despite FCC statements to the contrary,[208] the thrust of the Reference Paper—in line with the MFN principle—is that each Member is meant to police its domestic market, so that the other Members can open their own markets "safely".

The relative fragility of the U.S. implementation of its WTO telecommunications commitments was made plain when Deutsche Telekom ("DT"), the German incumbent,

[198] *Id*. at ¶ 50.
[199] *Id*. at ¶ 51–4.
[200] *Id*. at ¶ 61–6.
[201] *Id*. at ¶¶ 144–6.
[202] Defined as special terms concerning operating agreements for basic services, interconnection agreements, disclosure of information or the joint handling of traffic. *Id*. at ¶ 164.
[203] Dominance being presumptively defined as a share of more than fifty percent of the relevant market. *Id*. at ¶¶ 157–161.
[204] *Id*. at ¶¶ 221–3, 225.
[205] *Id*. at ¶¶ 240 ff.
[206] *See Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States (DISCO II),* IB Docket 96–111, Report and Order, FCC 97–399 (November 26, 1997). *See also* Cameron, *supra* note 193 at 94–8.
[207] *See* Stefan M. Meisner, *Global Telecommunications Competition a Reality: United States Complies with WTO Pact* 13 AM. U. INT'L L. REV. 1345 (1998).
[208] *Foreign Participation Order*, *supra* note 197, at ¶ 237.

sought FCC approval for its purchase of U.S. mobile operators VoiceStream and Powertel.[209] Before the FCC, a number of parties intervened to ask the FCC to deny DT the necessary authorizations to carry out the transaction, on the ground that (i) state ownership of DT and/or (ii) DT's dominant position on many German markets created a risk of harm to competition in the United States, within the meaning set out in the *Foreign Participation Order* outlined above. The FCC firmly rejected these claims, finding among other points that state ownership of DT might put it at a competitive disadvantage,[210] and that DT could not rely on its dominant position in Germany to engage in predatory pricing in the United States, given the competitiveness of U.S. markets.[211] Despite this encouraging result from the WTO perspective, the procedure was lengthy (seven months) and costly (given the number of interested parties), and overlapped in part with the merger control activities of the Department of Justice.

In parallel with the FCC examination, some U.S. lawmakers (led by Senator Hollings), tried to place a bill on the agenda of Congress that would have prevented the FCC from granting the authorizations requested by DT. This was motivated by a concern that competition in the United States would be distorted by the entry of firms in which a foreign government has a significant stake.[212] This bill provoked a fierce reaction from within the U.S. administration and also from the EU, which threatened to bring the matter before the WTO if the bill in question was passed.[213] Ultimately, the bill was abandoned.

2. Accounting Rates

There is a long-standing U.S. complaint about the functioning of international communications accounting rates. For a better understanding of the problem, it is necessary to explain briefly the traditional way in which international communications were operated, namely the "correspondent system" set out in ITU Regulations. Under that system, the TO of the originating country cooperates with the TO of the terminating country to complete telephone calls or other services. The TO of the originating country alone collects a fee from the caller ("collection rate"). As between the two TOs, an "accounting rate" is agreed. For each minute of international traffic, the TO of the originating country owes a fraction of the accounting rate (usually half, called the "settlement rate") to the TO of the terminating country, in order to compensate the latter for the completion of the international call. The correspondent system works in both directions, so that a given pair of TOs will periodically offset the amounts due to one another. As a consequence, the TO from the country that originated the most traffic will make a payment to the TO of the other country. The correspondent system was developed earlier in the 20th century, at a time when almost all countries were served by monopoly TOs, often State-owned.

[209] *See* FCC, *VoiceStream/Powertel/DT*, IB Docket 00–187, Memorandum Opinion and Order, FCC 01–142 (April 27, 2001).

[210] *Id*. at ¶¶ 62–5.

[211] *Id*. at ¶¶ 89–92. The opposing parties even went as far as to suggest that the fact that both DT and VoiceStream used the GSM standard (and planned to use the same 3G standard, namely WCDMA) would give them an unfair competitive advantage.

[212] In the words of Senator Hollings, "you cannot compete with government": *See* T. Foley, *Congress Accused of Telecoms Protectionism,* COMMUNICATIONS WEEK INTERNATIONAL (August 14, 2000).

[213] *See* the European Commission's yearly REPORT ON U.S. BARRIERS TO TRADE AND INVESTMENT, available at <http://europa.eu.int/comm/trade/bilateral/usa/usa.htm> at 60 (2000) and at 50 (2001).

On its face, the correspondent system could work effectively when some or all countries have liberalized telecommunications services.[214] However, a central weakness of the traditional system is that accounting rates are not required to, and in practice do not bear any relationship to either customer prices (collection rate) or underlying costs. As technological evolution reduced operating costs, the gap increased. This resulted in two undesirable consequences for traffic between countries that have liberalized the provision of international services and countries that have not done so. First, in a liberalized country, competition among local service providers often brings down prices for international telecommunications, usually markedly below the prices in a non-liberalized country for the same call in the other direction. As a consequence, callers from a non-liberalized country will often try to originate their calls in the liberalized country to benefit from the lower collection rate.[215] The balance of traffic between the liberalized and the non-liberalized country is then upset—more traffic originates in the liberalized country, and as a consequence the operators in the liberalized country must make large settlement payments to the TO of the non-liberalized country.[216] Second, operators from the liberalized country are prevented from reducing prices as much as they could because settlement rates are above costs. A large part of the settlement payments made to a TO from a non-liberalized country can arguably be viewed as a subsidy.

The United States was dissatisfied with the artificially high level of accounting rates in comparison to underlying costs, which they claimed led to payment outflows of up to five billion U.S. dollars, three-quarters of which were allegedly a subsidy to foreign TOs. The FCC, in particular, has led a campaign against the correspondent system as a whole (including above-cost accounting rates), which it perceives as a barrier to competition. More specifically, the FCC fears discrimination by the foreign operators towards the competing U.S. carriers, be it through preferential treatment of one carrier in the allocation of return traffic from the foreign operator to the United States, or through whipsawing (pitting competing U.S. carriers against one another in order to obtain discriminatory accounting rate concessions).

In order to alleviate those concerns, the FCC introduced an International Settlements Policy ("ISP") whereby competing U.S. carriers must be treated without discrimination and must receive a proportion of return traffic to the United States equal to their proportion of outgoing traffic (so-called "proportionate return").[217] The ISP can be counterproductive when applied to traffic between the United States and another liberalized country, since competition in both countries provides a safeguard against discrimination and the ISP prevents the emergence of innovative alternative arrangements for international

[214] *See I Want My Pound of Flesh* . . . , PUBLIC NETWORK EUROPE 33 (September 1996) and *At this Rate, You're Going Nowhere* . . . PUBLIC NETWORK EUROPE 31 (October 1996).

[215] Services such as call-back or country direct help callers to "reverse" the direction of their calls.

[216] In *International Settlement Rates*, IB Docket 96–261, NPRM, FCC 96–484 (December 19, 1996), the FCC mentions as an example the balance of traffic between the United States and Hong Kong, which in the 18 months to October 1996 went from 1:1 to 7:1 in favour of traffic originating from the United States, as the use of call-back services became more widespread.

[217] *Policy Statement on International Accounting Rate Reform,* FCC 96–37 (January 31, 1996), at ¶ 8. *See also* the long-standing FCC proceeding on the *Regulation of International Accounting Rates*, CC Docket 90–337: *Phase I Report and Order*, FCC 91–157, 6 FCCR 3552 (May 9, 1991), *Phase II First Report and Order*, FCC 91–401, 7 FCCR 559 (December 12, 1991), *Phase II Second Report and Order,* FCC 92–496, 7 FCCR 8040 (November 5, 1992), *Phase II Third Report and Order*, FCC 96–160 (April 9, 1996), *Phase II Fourth Report and Order*, FCC 96–459 (November 26, 1996).

traffic between the two countries.[217a] The FCC has accordingly decided to relax the application of the ISP in appropriate cases for traffic to and from countries that satisfy the ECO test.[218]

Developing countries challenged the ISP, arguing that the high accounting rates, and the ensuing capital flows from developed to developing countries, are necessary to foster the development of the telecommunications infrastructure in developing countries. Furthermore, in a context where telecommunications are increasingly used for much more than simple voice telephony, an argument can be made that the accounting rate system amounts to a form of universal service financing mechanism at the international level, given that connecting developing countries also create value and benefits in developed countries (through network effects). From this perspective, it would make sense not to require developing countries alone to bear the cost of improving their telecommunications infrastructure and to transfer funds to them for that purpose. Yet the accounting rate system lacks a number of safeguards that are essential for a good universal service financing system, especially as regards reporting.

The United States tried to place the issue of accounting rates on the table of both the NGBT and GBT, without much success.[219] It appears that the United States already envisaged tying the award of licenses to foreign providers to the level of accounting rates between the United States and the foreign country in question. This would not have been compatible with the principle of MFN treatment, and it seems that other participants in the NGBT and GBT were uneasy with this U.S. approach. Ultimately, it was agreed in the Fourth Protocol that the issue of accounting rates would not be raised in WTO disputes until the beginning of the new round of services negotiations in 2000.[220] That understanding was interpreted narrowly in *Telmex*.[221]

The United States had already changed its course by December 1996. In connection with a downward revision of its benchmarks for accounting rates, the FCC proposed in its *International Settlement Rates* proceedings to impose, as a licensing condition on foreign carriers seeking to enter the U.S. market, a requirement that accounting rates move towards the benchmark rate. If this does not occur, the FCC envisaged various enforcement measures, including ordering U.S. carriers to settle at the benchmark rate with the foreign carrier in question.[222]

That decision was challenged before U.S. courts by around one hundred governments, regulators and telecommunications firms, principally on the ground that the FCC had exceeded its jurisdiction by seeking to regulate the activities of foreign firms indirectly by pressuring U.S. firms to disregard agreed accounting rates. The U.S. Court of Appeals for the D.C. Circuit dismissed the suit.[223]

Since then, the ITU has undertaken to reform the accounting rate system, and has come up with innovative proposals, including recognition that accounting rates should

[217a] While it may have appeared ironic to see the United States in *Telmex* attack the very type of "proportionate return" policy which it earlier pioneered, there was indeed no obvious purpose to be served by Mexico maintaining such a policy, given that both the United States and Mexico had liberalized the international telecommunications traffic between them.

[218] *Regulation of International Accounting Rates*, Phase II Fourth Report and Order, *id*.

[219] *See* Frid, *supra* note 45, at 87–83.

[220] *Report of the Group on Basic Telecommunications*, S/GBT/4 (February 15, 1997) at para. 7.

[221] *Telmex* Report, ¶ 7.124–7.138.

[222] *See International Settlement Rates*, *supra* note 215, at ¶ 76, 82, 88–89. For a critical appraisal, *See* NAFTEL AND SPIVAK, *supra* note 66, at 147–56.

[223] *Cable & Wireless* v. *FCC*, 166 F. 3d 1224 (D.C. Cir. 1999). That decision is reviewed and strongly criticized by NAFTEL AND SPIVAK, *supra* note 66, at 173–96.

be cost-oriented, the creation of its own benchmarks (somewhat higher than the FCC's) and an acknowledgement that international telecommunications can be handled through means other than the traditional correspondent system.[224] The status of the accounting rate system under the WTO remains uncertain, since on the one hand, the system itself—to the extent it can be presented as a State measure—would seem to be at odds with the MFN principle,[225] and on the other hand, the FCC settlement rate policy is also questionable, if not on WTO grounds (MFN principle), then on other grounds related to international law (comity and jurisdiction). In any event, as between developed countries at least, the accounting rate system is being replaced by other arrangements more suitable to a competitive environment, such as self-correspondence (when a firm is present at both ends of the international communication), interconnection (with termination and origination charges) or peering/routing arrangements (in the Internet sector).[226] Indeed the *Telmex Report* deals with the international traffic between Mexico and the United States first and foremost as an interconnection issue, not much different from domestic interconnection. The accounting rate system is seen as but one method to arrange international traffic.[226a] The difficulties caused by the accounting rate system are now likely to take much more of a North-South dimension.

V. The WTO Telecommunications Commitments in a Broader Context

The WTO commitments on telecommunications, culminating with the Fourth Protocol, are in many ways groundbreaking. So far, this contribution has examined the specific provisions of the Fourth Protocol, and looked at them in the light of domestic telecommunications regulation. The following paragraphs look at broader issues.

A. Institutional Setting: The WTO and the ITU

The launch of telecommunications negotiations in the course of the Uruguay Round amounted to a rebuke of the ITU by developed countries. The question was whether the WTO would take over the leading role in international telecommunications policy from the ITU,[227] since the WTO's structure and operation appeared inherently better suited to a liberalized, competitive and global telecommunications environment. Indeed, the ITU reflected the old world order of telecommunications, with government representatives speaking for each Member's telecommunications sector, on all issues ranging from operations to regulation. Like the "correspondent system" (with accounting rates), that grew out of its discussions, the ITU seemed somewhat outdated and was rapidly losing significance.

[224] *See* the latest version of ITU-T Recommendation D.140 on accounting rate principles for the international telephone service (October 2000) and Accounting Rate Reform undertaken by ITU-T Study Group 3 (2000), available at http://www.itu.int. The FCC and ITU approaches are compared by Kenneth B. Stanley, *Toward International Settlement Rate Reform: FCC Benchmarks Versus ITU Rates* 24 TELECOMMUNICATIONS POLICY 843 (2000). In the *Telmex* Report, these reforms were acknowledged and used as evidence by the panel: ¶ 7.170–7.175.

[225] Within the realm of State measures (leaving aside purely private arrangements), a uniform termination charge applicable to all foreign carriers that deliver traffic for termination in a given country would be optimal as regards MFN.

[226] *See* Pekka Tarjanne (former ITU Secretary-General), *Preparing for the Next Revolution in Telecommunications: Implementing the WTO Agreement* 23 TELECOMMUNICATIONS POLICY 51 at 54–5, 58–60 (1999), and Peter A. Stern and Tim Kelly, *Liberalization and Reform of International Telecommunication Settlement Arrangements*, available at http://www.itu.int for a thorough review of reform options for, as well as alternatives to, the accounting rate system.

[226a] *Telmex* Report, ¶ 7.96–7.117.

[227] *See* Drake and Noam, *supra* note 41, at 50–1.

To its credit, the ITU has sought to respond to the challenge by adapting to the new environment.[228] For instance, it recognized that private actors (who can become industry Members of the ITU and participate in its activities) played the leading role in operations and that governments should concentrate more on regulatory issues.[229] It tried to produce meaningful reform of the accounting rate system, but the pace of reform may not be quick enough and the whole system might disappear, at least for communications between developed countries. The ITU took measures to speed up its standardization process to respond to market realities,[230] and it has become a credible actor for standardization in areas such as ASDL, Voice over IP and 3G. It has also taken up the task of helping to set up and train regulators in developing countries, and to transfer regulatory expertise from developed countries to developing countries.[231]

At the same time, the above analysis of the Fourth Protocol should make it clear that if the WTO wants to pursue its work in the telecommunications area, it must go deeper into regulatory issues. In particular, as markets become more competitive, with a greater number of actors, matters such as frequency allocation, interoperability, compatibility and standardization will become increasingly significant.[232] On these matters, the WTO has little experience, while the ITU has expertise and is keen to maintain its pre-eminent role.

Accordingly, the WTO and the ITU have concluded a co-operation agreement to formalize their relationship and ensure the co-ordination of their respective activities.[233] It is likely that the two organizations will become partners in the management of international telecommunications regulation, with the WTO perhaps focusing on general issues of economic regulation, as well as enforcement, and the ITU taking care of more technical issues, including frequency allocation and standardization.

B. Beyond Telecommunications: Convergence with Media, Electronic Commerce

Given the convergence with neighboring sectors and the rise of electronic commerce, the telecommunications sector is becoming a part of a broader whole. This will affect the negotiations of future WTO commitments.

The first contributions from the EC and the United States to the services negotiations that commenced in the year 2000 already show some differences in approach. The EC would essentially like to improve the commitments made so far by ensuring that every Member removes scheduled restrictions, commits to the entire Reference Paper and eliminates MFN exemptions.[234] The United States would like to go further

[228] *See* Pekka Tarjanne (at the time ITU Secretary-General), *Trade in Telecommunications Services: The WTO Agreement and the Role of the ITU*, available at http://www.itu.int and Tarjanne, *supra* note 226, at 60–2.

[229] *See* the FINAL ACTS OF THE ITU PLENIPOTENTIARY CONFERENCE (Minneapolis, 1998), available at http://www.itu.int, especially Resolutions 71 and 79.

[230] *See e.g.,* the new Alternative Approval Process (ITU-T Recommendation A.8), approved in Resolution 37 of the World Telecommunications Standards Assembly (Montreal, 2000), available at http://www.itu.int.

[231] *See Global Symposium for Regulators an Unqualified Success: ITU to Develop Guidelines and Benchmarks for Effective Regulation*, ITU Press Release 2001–30 (December 7, 2001).

[232] Witness the debates surrounding the choice of standards for third-generation mobile networks (3G): *See* LAROUCHE, *supra* note 21, at 388–93. *See also* Paul A. David and W. Edward Steinmueller, *Standards, Trade and Competition in the Emerging Global Information Infrastructure Environment,* 20 TELECOMMUNICATIONS POLICY 817 (1996), and Tuthill, *supra* note 47, at 784.

[233] S/C/9/Rev.1 (June 15, 2000) at http://www.wto.org.

[234] *See* Communication from the EC and their Member States—*GATS 2000: Telecommunications*, S/CSS/W/35 (December 22, 2000).

and, beyond the improvement of commitments, would promote privatization and enhance telecommunications commitments by opening up (or opening further) a number of related areas.[235]

Significant debate is also likely to arise in the WTO framework concerning convergence, *i.e.*, acknowledging that telecommunications are now becoming part of a larger sector together with media and information technology.[236] In the Uruguay Round, the EC was very reluctant to enter into any commitment concerning the audiovisual sector. The EC was concerned that liberalizing the telecommunications sector might undermine its cultural reservations in the audiovisual sector. That issue was solved by the EC making an explicit reservation in its schedule of commitments that telecommunications does not extend to broadcasting, namely "the uninterrupted chain of transmission required for the distribution of TV and radio program signals to the general public".[237] Furthermore, the EC expressly noted in its schedule that its commitments do not cover "content provision which require[s] telecommunications services for its transport".[238] This reservation was apparently accepted by other signatories to the Fourth Protocol, although it leaves certain services, for instance, the distribution of audio or video files via the Internet, in a grey zone. Now that the EC has decided to introduce a single internal regulatory framework for telecommunications and broadcasting networks and services, it will be increasingly difficult to defend treating telecommunications and broadcasting separately at the international level.

Against that background, the United States has already indicated that it would like to include the audiovisual sector in the next round of negotiations.[239] The controversy over content regulation in the audiovisual sector is therefore likely to flare up again. This time around, it seems difficult to envisage an agreement to disagree. Convergence will force a re-thinking of the rationale underpinning content regulation (is it the content itself or rather its means of distribution?), with the answer likely to depend on the aim of content regulation (*e.g.*, diversity, protection of minors or consumer protection).

In addition to a repeat of the "audiovisual" controversy, foreseeable difficulties in dealing with convergence at the WTO level include:

- *Scheduling:* The current structure of GATS schedules embodies pre-convergence thinking. Already, there is no consensus on the definition of telecommunications services. In addition, telecommunications services are listed separately from audiovisual services, and no room is made for hybrid services that might fall between these two categories (for instance, video-on-demand or music download services). Even if modifications to the structure of the schedules represent major negotiating processes, they might be necessary in order to take convergence fully into account.
- *Treatment of regulatory constraints:* The same scheduling difficulties that beset the NBGT and GBT will surface once more. For instance, how is a must-carry

[235] *See* Communication from the United States—*Market Access in Telecommunications and Complementary Services*, *supra* note 24.

[236] *See* D. Geradin and D. Luff, ed., The WTO and Global Convergence in Telecommunications and Audio-Visual Services (2004), in particular P. Larouche, *Dealing with Convergence at the International Level* at 390.

[237] See the third supplement to the EC Schedule of Specific Commitments, GATS/SC/31/Suppl.3 (14 April 1997).

[238] *Id.*

[239] *See* Communication from the United States—*Audiovisual and Related Services*, S/CSS/W/21 (December 18, 2000).

rule—whereby network operators are bound to transmit certain content, *e.g.*, a public broadcasting channel—to be considered? Is it a restriction on market access or national treatment that must be listed in a schedule, is it part of a regulatory framework conducive to entry (like the Reference Paper), or is it none of these, and thus left to be dealt with under the rules concerning domestic regulation?[240]

- *Technological neutrality:* The mantra of "good regulation" in the convergence era can mean many things. It could imply a preference for competition law over sector-specific regulation, because competition law would be framed in technologically neutral terms.[241] It could also mean that decisions on standardization or frequency allocation would become relevant from the point of view of trade law, should they imply a preference for one technology over others.

Finally, the WTO has also taken up discussions on electronic commerce.[242] So far, there has been a lot of soul-searching over whether electronic commerce should be considered under the GATT or the GATS framework. Once that preliminary issue is settled, there will be a renewed impulse to move forward in the telecommunications negotiations in order to remove impediments to electronic commerce.

VI. Milestone or Stepping Stone? A Concluding Assessment

From a telecommunications perspective, the Fourth Protocol marked the beginning of a new era, though its immediate impact should not be overestimated. For a number of significant players, like the EU and the United States, the Protocol essentially consolidated at the international level the liberalization movement to which they were already committed nationally. Other, notably developing, countries claimed long transitional periods or significant exceptions for their liberalization commitments. Furthermore, while the RP represents a useful recognition that the liberalization of monopoly sectors has to be accompanied by additional regulatory and competition law commitments, much unfinished business remains.

In sum, the agreement reached in 1997 can be said to constitute a beginning, and a useful one at that. It will nevertheless take a sustained effort to further develop a suitable legal framework that will deliver the full benefits of the ongoing telecommunications revolution. Furthermore, new issues like convergence and electronic commerce will also force the current arrangements to be reconsidered and improved.

The obligations outlined in the Reference Paper will have to be strengthened as well, although the *Telmex* Report of April 2004 demonstrates that these obligations can already bite. Preferably, the RP obligations should also become part of a WTO agreement, rather than remain a patchwork of individual commitments, so as to ensure a modicum of uniformity, and predictability in their interpretation and enforcement. Even if the WTO membership were to negotiate a comprehensive competition law agreement, this would not eliminate the need for an agreed Reference Paper.

In part this is because general competition law is unlikely any time soon to replace the regulatory principles necessary to open up and further ensure effective competition in

[240] GATS, Art. VI.

[241] However, it must be possible to formulate sector-specific regulation in functional/economic terms without reference to a particular technology.

[242] *See* the *Work Program on Electronic Commerce* adopted by the General Council, WT/L/274 (September 30, 1998). *See also* Chapter 56 of this book.

heretofore heavily regulated industries like telecommunications.[243] Accordingly, while a WTO competition law agreement may adopt and reinforce parts of the Reference Paper, a need for sector-specific regulation in the telecommunications industry is likely to remain. In this respect the Reference Paper can serve as a checklist. It demonstrates to the WTO membership the additional commitments that are necessary to effectively liberalize other regulated service industries such as the post, energy and air transport.

[243] *See* LAROUCHE, *supra* note 21, at 322–403. For a different perspective, *see* Mavroidis and Neven, *supra* note 185.

APPENDIX A

EXAMPLE OF A SCHEDULE OF SPECIFIC COMMITMENTS ON TELECOMMUNICATIONS SERVICES (COUNTRY X)

In the original schedule to the GATS

Modes of Supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
Horizontal commitments (*i.e.*, across all sectors)		(3) Unbound for subsidies.	
	(4) Unbound except for intra-corporate transferees of senior managers	(4) Unbound except for categories listed in the market access column	
Sectoral commitments:			
2. COMMUNICATIONS SERVICES			
C. *Telecommunications Services*	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	
h) Electronic mail i) Voice mail j) On-line information and database retrieval k) Electronic Data Interchange ("EDI") l) Enhanced/Value-added facsimile services m) Code and protocol conversion n) On-line information and/or data processing			

In the schedule to the Fourth Protocol to the GATS

Modes of Supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
2. COMMUNICATIONS SERVICES C. *Telecommunications services* a) Voice telephony b) Packet-switched data transmission services c) Circuit-switched data transmission services d) Telex services e) Telegraph services f) Facsimile services g) Private leased circuit services o) Other	1) None, except for voice telephony services, to be liberalized as of 1.1.2000. 2) None. 3) None, except for: Voice telephony services, to be liberalized as of 1.1.2000; Foreign direct or indirect investment in facilities-based telecommunications service suppliers is permitted up to 33 percent of voting shares only. 4) Unbound except as indicated in the horizontal section.	1) None. 2) None. 3) None. 4) Unbound except as indicated in the horizontal section.	Country X undertakes the obligations contained in the reference paper attached hereto.

APPENDIX B

REFERENCE PAPER

Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

Definitions

Users mean service consumers and service suppliers.

Essential facilities mean facilities of a public telecommunications transport network or service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and
(b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or
(b) use of its position in the market.

1. Competitive Safeguards

1.1. Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2. Safeguards

The anti-competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;
(b) using information obtained from competitors with anti-competitive results; and
(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate

with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.

2.2. Interconnection to be Ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favorable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and
(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

2.3. Public Availability of the Procedures for Interconnection Negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4. Transparency of Interconnection Arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

2.5. Interconnection: Dispute Settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:

(a) at any time or
(b) after a reasonable period of time which has been made publicly known to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

3. Universal Service

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

4. Public Availability of Licensing Criteria

Where a license is required, the following will be made publicly available:

(a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license and
(b) the terms and conditions of individual licenses.

The reasons for the denial of a license will be made known to the applicant upon request.

5. Independent Regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

6. Allocation and Use of Scarce Resources

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

CHAPTER 22

THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Thomas Cottier*

TABLE OF CONTENTS

I. Introduction 1043
II. The Foundations and Origins of the Agreement 1046
A. The Functions of Intellectual Property 1046
B. Intellectual Property as an International System 1047
C. Efforts at Improvement of Intellectual Property Protection and the Trade Link Prior to the TRIPs Agreement 1050
D. From Tariffs to Intellectual Property 1052
E. Uruguay Round Negotiations 1055
F. The Impact of the TRIPs Agreement 1056
III. Description and Legal Analysis of the Trips Agreement 1057
A. Scope and Subject-Matter of the Agreement 1057
1. Survey of Protected Rights 1057
2. Subject Matter and Inter-temporal Application 1058
B. The Nature and Interpretation of TRIPs Rights and Obligations 1059
1. Private Rights and the Potentials of Direct Effect 1059
2. Minimum and Maximum Standards 1061
3. Incorporation by Reference of other Agreements 1063
4. Interpretation of the TRIPs Agreement 1064
5. The Relationship of the TRIPs Agreement to GATT and GATS 1066
C. General Provisions and Basic Principles (Part I) 1067
1. National Treatment 1067
2. Most-Favored-Nation Treatment 1068
3. Exhaustion of Rights and the Regulation of Parallel Trade 1069
4. Development and Social Policy Goals in the TRIPs Agreement 1077
5. Transparency and Good Governance 1080
6. Security Exceptions 1080

* Professor of European and International Economic Law, Managing Director, Department of Economic Law and World Trade Institute, University of Berne, formerly Deputy Director General of the Swiss Intellectual Property Office (now Institute of Intellectual Property) and legal adviser, Department of Foreign Economic Relations (now the State Secretariat of Economic Affairs); chief negotiator in TRIPs, dispute settlement and subsidies during the Uruguay Round. Chairman and member of several GATT and WTO panels. The author is indebted to Christophe Germann, Attorney-at-Law in Geneva and Zurich (DEA), research fellow at the Department of Economic Law, University of Berne, for his assistance in preparing this text, and to Matthias Studer, research fellow, for assistance in completing notes and checking the text. He is particularly grateful to the editors and Alice Zalik (formerly with the US Patent Office) for extensive and stimulating comments on a former draft. The structure and emphasis of this chapter, all views expressed, possible errors and omissions remain the sole responsibility of the author.

D. Standards Concerning the Availability, Scope and Use of Intellectual Property Rights (Part II) 1081
1. Copyright and Related Rights 1081
2. Trademarks 1087
3. Geographical Indications ("GIs") 1088
4. Industrial Designs 1091
5. Patents 1091
6. Layout-Designs (Topographies) of Integrated Circuits 1098
7. Protection of Undisclosed Information 1099
8. Control of Anti-Competitive Practices in Contractual Licenses 1101
E. Enforcement of Intellectual Property Rights (Part III) 1102
1. General Obligations 1104
2. Civil and Administrative Procedures and Remedies 1104
3. Provisional Measures 1106
4. Special Requirements Related to Border Measures 1107
5. Criminal Procedures 1109
F. Acquisition and Maintenance of Intellectual Property Rights and Related Inter Partes Procedures (Part IV) 1109
G. Dispute Prevention and Settlement (Part V) 1110
1. Recourse to Dispute Settlement 1110
2. Non-Violation Complaints 1112
H. Transitional Arrangements (Part VI) 1113
I. Institutional Arrangements and Final Provisions (Part VII) 1113
1. The TRIPs Council 1114
2. Amendments 1114
3. Reservations 1115
IV. Conclusions and Further Developments 1115

I. Introduction

The World Trade Organization ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs")[1] builds upon a long tradition of intellectual property rights protection ("IP" protection) in the national and international laws of Western market economies. Well before the advent of the TRIPs Agreement, a wide range of international IP treaties existed.[2] Deficiencies in the international IP system, particularly concerning the level of protection, implementation and enforcement, resulted in the decision of the GATT CONTRACTING PARTIES to vest regulatory leadership in the WTO with respect to trade-related aspects of intellectual property protection. What initially was conceived as a minor agreement, mainly relating to border enforcement against counterfeiting and piracy, emerged in the Uruguay Round as the third pillar of the multilateral trading system. It added a new dimension to traditional precepts of international trade regulation as they were known under the General Agreement on Tariffs and Trade ("GATT 1947"). A new generation of WTO rules emerged.

The TRIPs Agreement contains five distinctive features. *First*, the Agreement positively prescribes regulatory standards which Members must provide (positive integration). *Second*, the concept of progressive liberalization to be achieved in multilateral rounds of trade negotiations does not apply in this field. Flexibility is limited to transitional periods and sometimes broadly textured obligations which, however, remain subject to treaty interpretation by panels and the Appellate Body. Unlike the General Agreement on Tariffs and Trade and its side instruments ("GATT 1994") and the General Agreement on Trade in Services ("GATS"), but comparable to Human Rights treaties, the TRIPs Agreement *ab initio* sets relatively high standards of protection and requirements. This is true both for substantive rights as well as for procedural rights and obligations which emerged in an effort to combine civil and common law traditions. *Third*, the Agreement reflects the highly abstract nature of intellectual property rights ("IPRs"). Intellectual property exists not only with respect to particular traded products in commerce, but is inherent to creative ideas and information, or expression thereof, embodied in all such products. *Fourth*, the Agreement, for the first time in WTO law, explicitly addresses private rights of economic operators, whereas the GATT and other agreements only address traders' rights indirectly as they formally give rights only to States—a distinction which remains to be analyzed. *Fifth*, the Agreement fully incorporates substantive rules enshrined in other international agreements. The formal and constitutive integration into the TRIPs Agreement of major preexisting international agreements on intellectual property rights is unique in the law of international organizations. Substantively, it goes beyond traditional references to other treaties (such as the Vienna Convention on the Law of Treaties) and interlocks the WTO on the one hand and WIPO, and thus the UN system, on the other hand. It binds the international intellectual property ("IP") system to the WTO with respect to both substance and registration.

[1] *Agreement on Trade-Related Aspects of Intellectual Property Rights* (Annex 1C to the Agreement establishing the World Trade Organization of April 15, 1994); *see* GATT-SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS 365 ff (1994), www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement (visited November 25, 2003).

[2] For a comprehensive survey and sources *see* Thomas Cottier and Christophe Germann, *Bedeutung und Wirkung der Staatsverträge im Immaterialgüterrecht*, in SCHWEIZERISCHES IMMATERIALGÜTER- UND WETTBEWERBSRECHT I/2 GRUNDLAGEN 35–122 (R.von Büren and Lucas David eds., 2002).

The TRIPs Agreement significantly reinforces the international intellectual property system. It has become its core and center for the setting and enforcement of substantive and procedural standards. For the first time, intellectual property rights are subject to effective international litigation (other than commercial arbitration), with the possibility of cross-retaliation with respect to goods and services through the WTO dispute settlement system.

Changes in domestic law brought about by the TRIPs Agreement and its five features vary in degree. For industrialized and a number of advanced developing countries, the TRIPs Agreement largely reflects accepted domestic standards. For some, it added new forms of protection, such as the protection of geographical indications or the protection of undisclosed information as a defined intellectual property right. For others, adjustments were necessary mainly in the field of rules relating to civil and administrative enforcement. Yet it is fair to say that the TRIPs Agreement did not compel most industrialized countries to make politically difficult adjustments. The Agreement assures implementation and provides important refinements, but did not require most of them to make profound changes in their intellectual property legislation.

The situation is significantly different for a majority of developing countries and transitional economies who had not been exposed prior to the TRIPs Agreement to bilateral agreements, in particular with the United States, seeking higher levels of IP protection. Levels of protection were supposed to be raised within a few years, but implementation of the new standards has often caused political problems. The IP system, in particular patent protection, is costly and capacity needs to be built. In many countries, society is not familiar with Roman Law concepts of property, and communitarian use of resources has a long tradition. With the advent of the TRIPs Agreement, many saw their innovative capacity, and their capacity to imitate and build upon foreign technology reduced. Crucially, the economic costs and benefits of the TRIPs Agreement remain highly controversial, mainly in relation to extended patent protection (see Chapter 54 of this book). Evidence has remained anecdotal and economic research on the impact of the Agreement is still in its infancy.

Contemporary economic research on IPRs was only stimulated by the adoption of the Agreement. The first results indicate that developing countries, prior to the TRIPs Agreement, tended to reduce the levels of protection established under colonial rule in order to benefit from reproductive potential and talent (counterfeiting and piracy from the point of view of technology exporters). They would autonomously raise their standards only in accordance with the need for protection as their own creative industries emerged. The TRIPs Agreement cut short this process. For many countries, it is perceived as retarding development since reproductive potential is reduced, both domestically and internationally. On the other hand, evidence supports the view that that WTO disciplines are beneficial in the long term as they improve the rule of law, good governance, the framework for technology transfer and domestic and foreign direct investment.[3]

A majority of the WTO membership thus conceives the Agreement to be predominantly, if not exclusively, for the benefit of industrialized countries. Indeed, high-technology industries—ultimately defining economic leadership—all depend on

[3] For the leading analysis, *see* KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (2000); *see also* JAYASHREE WATAL, INTELLECTUAL PROPERTY IN THE WTO AND DEVELOPING COUNTRIES (2000), COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY (2002): www.iprcommission.org (visited November 25, 2003).

intellectual property rights, as well as other essential framework conditions, such as the rule of law, sound currency, sound financial institutions and democratic governance. To these industries, the Agreement is of vital importance as it regulates essential conditions of competition between them in third country markets, including those of developing countries. But the TRIPs Agreement is currently seen as increasing the gaps between industrial and developing countries, rather than closing them. Academic analysis of intellectual property by leading economists and lawyers has been critical of the current balance of private property rights and assets in the public domain.[4] For the time being, hopes for enhanced transfer of technology and foreign direct investment in developing countries due to increased IP protection have not yet materialized and there is no evidence of significantly increased levels of transfer of technology and foreign direct investment since the adoption of the TRIPs Agreement in 1995.

Given the sharp and increasing differences in perception and the policy changes required on the part of many Members of the WTO, it is not surprising that the world is sharply divided on the issue of legitimacy and acceptance of the Agreement. Many representing developing country governments, non-governmental organizations and academia believe that introducing TRIPs into the WTO was conceptually wrong and goes against the grain of trade liberalization, enhanced market access and competition generally furthered by WTO law and policy.

These objections and problems as well as the benefits of the TRIPs Agreement will be addressed throughout this chapter. At this introductory stage, attention simply needs to be drawn to the fact that more than in any other WTO Agreement, the ideological, legal and economic debate and overall state of affairs continues to be characterized by a persisting North-South divide, different perceptions of the role of private property and individual rights and, finally, the rule of law in governance. Attention is drawn to these tensions in order to emphasize that the revolutionary changes introduced by the TRIPs Agreement mean that acceptance of the Agreement in many parts of the world will be a long-term process. While standards were set at a relatively high level at the outset, the realities of implementation in developing countries will perhaps in reality be closer to the concept of *progressive* regulation and implementation as it is conceptually known in the fields of goods and, in particular, in services. This tradition, and the fact that international pressure on implementation only takes place where strong economic interests exist, may render the Agreement more acceptable in coming years. Greater acceptance should come with changing attitudes, capacity building, but above all, the realization of real benefits. New interests will emerge as countries develop their creative industries. The TRIPs Agreement has significantly increased awareness of IP issues, including developing country efforts to seek additional benefits from IP protection in support of agricultural exports, in particular in the field of geographical indications and possibly the eventual protection of traditional knowledge.

All this takes time. We should not forget that progressive liberalization of goods has taken decades, and not years. The same will be true of GATS, where the process is only in its infancy. It will also be true for the implementation and the further development of the milestone TRIPs Agreement. It is too early to assess the legitimacy of the Agreement from the point of view of developing countries. Time will tell as they develop viable market economies.

[4] *See generally* the collection of conference papers, INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Keith Maskus and Jerome H. Reichman eds., forthcoming).

II. The Foundations and Origins of the Agreement

A. The Functions of Intellectual Property

Market-based economic activities depend on the allocation of property rights, both real and intellectual. Contracts and transactions with respect to goods and services presuppose respect, protection and enforcement of such rights. Investment, creativity and commercial innovation by individuals and corporations largely depend on the protection of intellectual property rights. Legally, IP rights grant exclusive rights to right holders, normally for a limited period of time, in order to control the marketing of protected products and to prevent third parties from unfairly profiting from efforts by others in bringing about innovation or creating goodwill. They enable the right holder to prevent free-riding on what it has achieved. Economically, intellectual property rights are formalizations of investment protection, encouraging innovation and product improvements by assuring a period of exclusive returns or strong protection of goodwill achieved on the market.

Together with rules on anti-trust, unfair competition, subsidies and government procurement, intellectual property forms an essential ingredient of competition policy broadly defined. All IPR rights are important ingredients of legal security and justice and define, along with other legal factors, conditions of competition. This is true both domestically and for international transactions. International transactions depend on legal security and fair conditions of competition abroad, and thus depend on international disciplines and monitoring of IPRs. This has been true for a long time, but in the age of globalization and enhanced interdependence, it is today more important than ever before. It suffices to recall a number of key areas of the economy and their dependence on IPR protection. Developments in chemical, genetic and mechanical engineering have been stimulated by the allocation of patent rights. Developments in information technology, which now define one of the frontiers of global economic leadership and are a major source of growth in industrialized economies, have been stimulated and protected by copyright law. The ability to trade in goods and services depends on the reputation of a particular product or service provider—trademarks and geographical indications play an important role in the protection of reputation and allow consumer to make appropriate decisions in the market place.

Property rights are not absolute. As a whole, they must contribute to foster public goods, and individual rights need to be balanced with access to what is or should be in the public domain and thus at the disposition of society at large.[5] All legal systems need

[5] It would seem that intellectual property operates within the triangle of public goods, public domain and appropriation. "Public goods" are understood to be values and assets that are characterized by non-rivalry in consumption and non-excludability, such as prosperity, welfare, biodiversity, national defense, clean air. They cannot or should not be appropriated. Public goods exist in nature (such as air, water) or can be produced by men and norms, such as a legal system, human rights, justice and legal security. Public goods are generally perceived to be protected and created by public policy, but private rights—being part of the legal system—also contribute to the creation of public goods at large, to the extent that they have welfare creating effects. Public goods therefore are often values created on the basis of public law, but also private law as a whole. For example, property rights, contracts, and torts as legal concepts are equally important contributions to the public goods of equity and legal security. "Public domain" stands for the proposition that values and assets are or should be available to the public at large, to the exclusion of private property entitlements and exclusive rights. From the perspective of public goods, public domain is a tool, as much as exclusive legal rights, and both need to be balanced with a view to optimizing public goods. These relations are not clearly defined, and the literature tends to relate public goods to public policy, limiting or even excluding private rights, *cf.* Peter Drahos, *The Regulation of Public Goods*, IN INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME, *supra* note 4.

to find a proper balance between the allocation of private property and what is in the public domain in order to bring about optimal welfare effects. Lawyers and economists are engaged in this debate which is fuelled by ever-changing societal, economic and technological norms.[6] Arguments about IP rights relate to both efficiency and equity. They address the scope and duration of IP rights, the problem of inherent exceptions (fair use), exhaustion and parallel trade, and new forms of property rights. These issues will be discussed in this chapter. Many of the domestic controversies on intellectual property in different countries relate to the proper balance, rather than to the very idea of the existence of a proper system of property rights. For example, witness the current search for a balance in protecting new technologies, in particular information technology (data protection) and genetic engineering and modern biotechnology (patenting life forms). For well-established blue chip technologies, the matter was settled over time in a process of trial and error. The same will occur in legislation and adjudication over time with respect to the new fields of technology.

We see a parallel, but more intense, debate on the international level with respect to the proper balance between property rights and what should be in the public domain in developing and transitional economies. Again, it is less a matter of principle, and more a matter of defining and shaping the proper relationship between the scope of property rights and what should be in the public domain, than phasing in intellectual property laws based on economic and social needs. The main challenge here is to find appropriate standards that are equally suitable for economies at different stages of development. The first generation rules of the TRIPs Agreement are not the final word on this point, and the international community needs to build upon experience.

B. Intellectual Property as an International System

Intellectual property protection essentially depends on national law and legal systems. International transactions do not take place on the basis of international law, but upon rules and principles of domestic law assigned to such transactions by law or agreement.[7] The international legal system still depends on the principle of territoriality and nation states. This is also true for intellectual property. Yet, perhaps more than in any other field, commercial transactions involving IPRs depend on the proper interface of national laws and the regulations of different countries and markets. Compare this with real property transactions, which are barely regulated under international law except for investment protection.[8] Unlike real property, intellectual property protection depends on a certain level of transnational uniformity in order to achieve appropriate interfaces and comparable protection in different jurisdictions. It depends on mechanisms that facilitate registration of rights in pertinent markets around the world. The need for an interface between national systems accounts for the fact that intellectual property protection today

[6] *See supra* note 4 for further references.

[7] *See generally* FREDERICK M. ABBOTT, THOMAS COTTIER, FRANCIS GURRY, THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM (1999), and WIPO PUBLICATION NO. 476(E), INTELLECTUAL PROPERTY READING MATERIAL: http://www.wipo.org/news/en/ (under "Documents" and "Intellectual Property Reading Material"), visited November 25, 2003.

[8] *See, e.g.,* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (RICHARD B. LILLICH ED., 1983); ROSALYN HIGGINS, THE TAKING OF PROPERTY BY THE STATE: RECENT DEVELOPMENTS IN INTERNATIONAL LAW, 176(III) RECUEIL DES COURS 259 (1982); GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1997).

is promoted through an international system. For example, the principle of priority in relation to patents and trademarks, which allows registration in one country without losing potential eligibility for protection in other countries, is a prime and early example of such an interface. These interfaces were at the heart of efforts in international law, mainly by treaty-making since the late Nineteenth Century.

The battles fought over the new field of intellectual property rights during the industrial revolution reinforced attempts to bring about level playing fields among nations in the late Nineteenth Century. The 1883 Paris Convention on Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works resulted from this process. The many agreements and unions, in particular those that fall within the purview of the specialized UN World Intellectual Property Organization ("WIPO") provide ample evidence of this tradition of stabilizing and promoting internationally the protection of intellectual property. Apart from work on substantive standards of protection in different fields, these agreements mainly focus on international registration of national titles in the field of patents, trademarks and industrial designs.[9] WIPO today is one of the few

[9] *See* http://clea.wipo.int/clea/lpext.dll?f=templates&fn=main-h.html (visited November 29, 2003), (status as of June 1, 2003), *inter alia*:

Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979;

Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979;

Madrid Agreement concerning the International Registration of Marks of April 14, 1891, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Nice on June 15, 1957, and at Stockholm on July 14, 1967, and as amended on September 28, 1979;

Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks Adopted at Madrid on June 27, 1989;

Common Regulations under the Madrid Agreement concerning the International Registration of Marks and the Protocol relating to that Agreement of 27 June 1989;

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of June 15, 1957, as revised at Stockholm on July 14, 1967, and at Geneva on May 13, 1977, and amended on September 28, 1979;

Patent Cooperation Treaty ("PCT"), done at Washington on June 19, 1970, amended on September 28, 1979, and modified on February 3, 1984;

Regulations under the PCT (as in force from March 1, 2001);

The Hague Agreement Concerning the International Deposit of Industrial Designs London Act of June 2, 1934;

The Hague Agreement Concerning the International Deposit of Industrial Designs, The Hague Act of November 28, 1960;

The Hague Agreement Concerning the International Deposit of Industrial Designs Additional Act of Monaco of November 18, 1961;

The Hague Agreement Concerning the International Deposit of Industrial Designs Complementary Act of Stockholm of July 14, 1967;

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of October 29, 1971;

Convention Relating to the Distribution of Programme–Carrying Signals Transmitted by Satellite, done at Brussels on May 21, 1974;

Strasbourg Agreement Concerning the International Patent Classification of March 24, 1971, as amended on September 28, 1979;

Trademark Law Treaty, done at Geneva on October 27, 1994;

Regulations under the Trademark Law Treaty of 27 October 1994;

global institutions administering private rights. It is partly financed by fees obtained from international registrations.

The WIPO model was eventually adopted in regional fora. The European Patent Convention established a system of Europe-wide examination and registration of national patents.[10] The European Communities developed EC-wide registration systems of trademark protection,[11] geographical indications[12] and in the related field of eco-labeling.[13] The future may see a uniform Community patent, perhaps in combination with the European Patent Convention.[14] In the area of copyright, the Communities engaged in extensive harmonization of national laws.[15]

Convention Establishing the World Intellectual Property Organization Signed at Stockholm on July 14, 1967 and as amended on September 28, 1979;

Agreement Between the World Intellectual Property Organization and the World Trade Organization (1995) 22 December 1995;

Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks Done at Vienna on June 12, 1973 as amended on October 1, 1985;

Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, of April 14, 1891, Act revised at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958;

WIPO Copyright Treaty ("WCT") adopted in Geneva on December 20, 1996;

WIPO Performances and Phonograms Treaty ("WPPT") adopted in Geneva on December 20, 1996;

Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement (as in force on April 1, 2002);

Regulations Under the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (as in force on April 1, 2002);

Regulations Under the Hague Agreement Concerning the International Deposit of Industrial Designs (as in force on January 1, 2002);

Administrative Instructions for the Application of the Hague Agreement Concerning the International Deposit of Industrial Designs (as in force on January 1, 2002);

International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991;

The Hague Agreement Concerning the International Registration of Industrial Designs Geneva Act of July 2, 1999;

Patent Law Treaty (adopted at Geneva on June 1, 2000);

Regulations Under the Patent Law Treaty (adopted at Geneva on June 1, 2000);

Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure Done at Budapest on April 28, 1977, and amended on September 26, 1980;

Regulations under the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure of April 28, 1977;

[10] *See* http://www.european-patent-office.org/index.htm (visited November 25, 2003).

[11] *Regulations on the Community Trade Mark* http://oami.eu.int/en/mark/aspects/reg.htm: Council Regulation (EC) No 40/94 of December 20, 1993 on the Community trade mark; Commission Regulation (EC) No 2868/95 of December 13, 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark; Commission Regulation (EC) No 2869/95 of December 13, 1995 on the fees payable to the Office for Harmonization in the Internal Market (Trademarks and Designs); Commission Regulation (EC) No 216/96 of February 5, 1996 laying down the rules of procedure of the Boards of Appeal of the Office for Harmonization in the Internal Market (Trademarks and Designs).

[12] Council Regulation (EC) No 692/2003 of April 8, 2003 amending Regulation (EEC) No 2081/92 on the protection of geographical indications and designation of origin for agricultural products and foodstuffs, O.J. L 99 (April 17, 2003).

[13] *See, e.g., Commission Decision of April* 14, 2003 establishing the ecological criteria for the award of the Community eco-label to tourist accommodation services (2003/287/EC) L 102/82.

[14] See proposal for a Council Regulation on the Community patent, revised text of April 16, 2003, 8539/03, Interinstitutional File: 2000/0177 (CNS). TERENCE PRIME, EUROPEAN INTELLECTUAL PROPERTY LAW 173–176 (2000).

[15] Directive 2001/84/EC of the European Parliament and of the Council of September 27, 2001 on the resale right for the benefit of the author of an original work of art; Directive 2001/29/EC of the European

Intellectual property protection was the first sphere of international economic law to be harmonized multilaterally, long before multilateral disciplines were developed in the field of international trade regulation. Linking the protection of IPRs to the tradition of GATT, which only emerged after World War II but developed an increasingly effective dispute settlement system, adds a new quality and changes the traditions of harmonization under the Paris and Berne Conventions. With the advent of the TRIPs Agreement in WTO law, intellectual property protection spearheads the development of a global law of integration. It heralds a new era, and the many problems it raises are partly due to its pioneering role in global law. Perhaps more than in any field of international law, domestic IP rules and standards are primarily shaped and defined at the international level. In many respects national IP legislation implements what has been internationally agreed. Problems related to the legitimacy and democratic accountability of the multilateral trading system, now including IPRs, need to be discussed in this context.

C. Efforts at Improvement of Intellectual Property Protection and the Trade Link Prior to the TRIPs Agreement

Despite efforts beginning in the late Nineteenth Century to harmonize intellectual property protection, the emerging international system of IP protection remained highly fragmented and incomplete. Indeed, due to significantly different perceptions of the role of intellectual property in the process of economic development, as well as diverging traditions among industrialized countries, substantive global standards with respect to intellectual property have remained of a largely open and permissive nature. Throughout the 1970s and 1980s attempts to introduce more specific norms largely failed due to these differences. The unsuccessful effort to revise the Paris Convention in this period of time is a case in point. Moreover, WIPO lacks an effective, swift and simple system of dispute settlement, even for procedural matters relating to the registration of rights. It does not comprise standards on effective enforcement of intellectual property rights. No case has ever been brought before the International Court of Justice relating to intellectual property protection. The thrust of world-wide cooperation therefore has mainly focused on achieving national treatment for foreign nationals and, with the exception of international copyright law, on the important field of acquisition and administration of rights, i.e., by simplifying international registration of national trademarks, designs and patents.

Efforts made within other international organizations were also unsuccessful. The OECD, the World Bank and the United Nations produced a considerable record of work

Parliament and of the Council of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 96/9/EC of the European Parliament and of the Council of March 11, 1996 on the legal protection of databases; Council Directive 93/98/EEC of October 29, 1993 harmonizing the term of protection of copyright and certain related rights; Council Directive 93/83/EEC of September 27, 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; Council Directive 92/100/EEC of November 19, 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Council Directive 91/250/EEC of May 14, 1991 on the legal protection of computer programs; Council Directive 87/54/EEC of December 16, 1986 on the legal protection of topographies of semiconductor products. With respect to further forms of intellectual and industrial property protection in the EU, *see* http://europa.eu.int/comm/internal_market/en/intprop/index_all.htm (status as of June 1, 2003), (visited November 25, 2003).

and recommendations with respect to the relationship between intellectual property rights and the transfer of technology or competition.[16] Yet they failed to reach the level of binding obligations. The negotiations on the Law of the Sea Convention in the 1970s ("UNCLOS III") provide a classic example of extensive, but failed, IP-related negotiations on technology transfer, particularly in the field of deep seabed mining.[17] UNCTAD has dealt extensively with the issue of IPR protection from the point of view of developing countries and for a long time argued in favor of restraint, if not resistance to strengthening international rules on intellectual property.[18] Efforts within the movement towards a New International Economic Order focused on improving transfer of technology on a concessionary basis, yet without reinforcing IPRs.[19]

Difficulties in achieving progress in the traditional international fora led to increased links between IPRs and trade policies. These linkages began in the context of regional integration. The European Court of Justice was required to define the relationship between competition rules, free movement of goods and nationally defined intellectual property rights. A substantial body of trade-related case law emerged and eventually led to a considerable amount of secondary legislation addressing the relationship of exclusive rights, market segmentation and the goals of free movement of goods and competition, up to the point of creating the EC-wide systems of protection, described above.[20] Other regional fora, in particular Nafta, Mercosur and the Andean Pact, followed suit. They took ideas from the TRIPs drafts to harmonize fields of IP protection such as the protection of undisclosed data.[21]

At the national level, linkages between IPRs and trade were first established unilaterally by Section 301–06 of the 1974 U.S. Trade Act, which was reinforced in 1988 with controversial provisions and procedures allowing for retaliation against the import of goods and services from countries having, according to the United States,

[16] *See* UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development, TRIPs and Development: Resource Book, Part Three: *Intellectual Property Rights and Competition* (2003); Kamal Saggi, Trade, Foreign Direct Investment, and International Technology Transfer: A Survey (2000). For further references, *see* Commission on Intellectual Property Rights, *supra note* 3 24–26.

[17] For discussion of the history, economics and complex legal problems related to deep seabed mining *see inter alia* Samuel L. Bleicher, *The Law Governing Exploitation of Polymetallic Sulfide Deposits from the Seabed, in* Contemporary Issues in International Law, Essays in Honor of L.B. Sohn (T. Buergenthal ed., 1984); Jean-Pierre Beurier and Patrick Cadenat, *Le contenu économique des normes juridiques dans le droit de la mer contemporain, 78* Revue Générale de Droit International Public 575–622 (1974); Boleslav A. Boczek, *The Transfer of Marine Technology to Developing Nations in International Law*, The Law of the Sea Institute, Occasional Paper 32 (1982); E.D. Brown, *Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict*, 20 San Diego Law Review 521 (1983). For a comprehensive discussion of the consequences of the abandonment of technology transfer requirements under the LOS Convention by the Reagan Administration, *see* results of a 1984 workshop *Consensus and Confrontation: The United States and the Law of the Sea Convention* (J. Van Dyke ed., 1984). For a European perspective, *see* Kenneth R. Simmonds, *The Community's Declaration upon Signature of the UN Convention on the Law of the Sea*, 23 Common Market Law Review 521–544 (1986); Alfred H.A. Soon, The Position of the EEC towards the LOS Convention, American Society of International Law, Proceedings of the 84th Annual Meeting 278–283 (1990).

[18] UNCTAD, The TRIPs Agreement and Developing Countries 3 *et seq.* (1996).

[19] *See* Legal Aspects of the New International Economic Order (Kamal Hossein ed., 1980).

[20] Prime, supra note 14. Guy Tritton, Intellectual Property in Europe (2002); Philip Leith, Harmonisation of intellectual property in Europe: a case study of patent procedure (1998). See also Steven D. Anderman, EC Competition Law and Intellectual Property Rights (1998).

[21] Ingo Meitinger, Der Schutz von Geschäftsgeheimnissen im globalen und regionalen Wirtschaftsrecht. Stand und mögliche Entwicklungen der Rechtsharmonisierung 28 (2000).

unfair and distorting IP regimes, whether or not in conflict with current international obligations.[22] The IPR-trade linkage in domestic U.S. law, as well as U.S. bilateral and regional efforts, such as the Caribbean Basin Initiative, undoubtedly inspired GATT Contracting Parties, through a U.S. initiative to incorporate IPRs into the 1986 Punta del Este Declaration which began the Uruguay Round.

The Punta del Este mandate was able to build upon previous, but failed efforts, after the Tokyo Round to bring about disciplines against counterfeiting and piracy. It went beyond these leftovers and was strongly contested by developing countries. But fears of the use of unilaterally defined IPR trade policies by the United States largely accounted for the reluctant acceptance of international negotiations with a view to enhancing the predictability and accountability of major trading partners with respect to their export-driven foreign intellectual property policies.

D. From Tariffs to Intellectual Property

It is important to describe at the outset the inherent linkages between trade regulation and intellectual property protection and to understand the sequencing and the reasons therefor. The lack of appropriate protection of IPRs results in trade restrictions. This should be addressed in the proper context of what I call third generation trade barriers.

Trade policy in the early post-World War II era focused on the gradual reduction of tariffs and the elimination of preferential systems. Tariffs, the first generation of barriers, were high, stemming from the protectionist policies of the great depression of the 1930s.[23] In addition, preferential tariffs existed within the colonial systems. After the failure to establish the International Trade Organization, based upon the Havana Charter, the 1947 General Agreement on Tariffs and Trade ("GATT")[24] provided, in essence, a framework for a gradual and, as it turned out, successful process of tariff reductions. In seven rounds of multilateral negotiations, tariffs on manufactured goods, which averaged forty percent in 1947, were reduced by the conclusion of the Tokyo Round in 1979 to an average of 4.7 percent in the main industrialized nations. Further cuts were achieved in the Uruguay Round, the eighth round of multilateral trade negotiations, and the Round resulted in the decision of developing countries to bind many tariffs. Importantly, all quantitative restrictions were tariffied under the new Agreement on Agriculture. The average tariff reduction achieved by the 117 participants during the Uruguay Round negotiations amounted to forty percent.[25]

[22] JOHN H. JACKSON, WILLIAM DAVEY AND ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES AND MATERIALS 815 *et seq*. (1995). For the EC's retaliation instrument, *see* Marco Bronkers and Nathalie McNelis, *The EU Trade Barriers Regulation comes of Age*, in EUROPEAN INTEGRATION AND INTERNATIONAL COORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN (Armin von Bogdandy *et al*. eds. 2002).

[23] The following is based on Thomas Cottier, *Intellectual Property in International Trade Law and Policy: The GATT Connection*, 47 AUSSENWIRTSCHAFT 79–105 (1992).

[24] For the relevant WTO provisions *see supra* note 1.

[25] HEINZ HAUSER AND KAI-UWE SCHANZ, DAS NEUE GATT 42 (1995). For the negotiations on agriculture, see John M. Breen, *Agriculture*, in THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986-1992), VOLUME I: COMMENTARY, 131–247 (Terence P. Stewart ed., 1993); Harmon Thomas, *Agriculture in the Uruguay Round: Interests and Issues*, in URUGUAY ROUND PAPERS ON SELECTED ISSUES 221-260 (UNCTAD 1989).

The provisions of the GATT were designed to accompany tariff reductions and to prevent circumvention of tariff bindings by other means, in particular quantitative import restrictions, subsidies or discriminatory taxes on imports. Indeed, the gradual reduction (and even the elimination of tariffs within customs unions and free trade arrangements) increasingly shifted the emphasis in the negotiations to non-tariff measures, which began to replace tariffs as the main instrument of governmental trade policy in order to protect domestic industries and products. Quantitative restrictions, export subsidies, anti-dumping measures, technical norms and standards, balance of payment measures, labeling requirements, import licensing, rules on government procurement, "voluntary" import obligations or export restrictions ("grey area" measures such as voluntary export restraints or "VERs", and orderly marketing arrangements or "OMAs") and other imaginative tools became widely-used instruments for economic and political ends, both in developing and industrialized countries. They form a second generation of barriers. Such non-tariff measures became, in addition to the classical process of tariff reductions, the main subject of trade negotiations in the Tokyo Round. The Tokyo Round agreements on non-tariff measures were further developed in the Uruguay Round, and new ones, in particular on safeguards (including a prohibition of grey area measures) and textiles were added.

As a result of the substantial tariff reductions and increasing legal disciplines in the field of non-tariff measures, a third generation of non-tariff barriers emerged during the 1980s. These barriers encompassed a number of issues, ranging from domestic farm support, to the restrictive regulation of service industries and investments, and finally, the protection of intellectual property. What do these subjects share in common? They stem from different fields of law, public and private, but the common trait is that they all are foremost part of *domestic* legal systems. They are not directly geared to border measures and classical international trade relations, but they have been affecting such relations more and more in terms of limiting market access while other barriers were gradually dismantled or at least legally disciplined. The great political difficulty in reaching final agreement on important issues in the Uruguay Round, such as the reduction of agricultural support, but also the failure to achieve substantial streamlining of conditions for investment, or to bring about significant liberalization of trade in services beyond binding existing levels of market access (a first and important step to establish a framework for liberalization), all stemmed from this development—turning more and more to areas of domestic law, beyond simple regulation of imports and exports.

The main difficulties to be settled in the area of intellectual property had similar roots. The patentability of pharmaceuticals, foodstuffs or living matter, i.e., how far exceptions to patentability should be allowed to go, or, in copyright, how the relationships of authors, producers, performers and users should be arranged, are primarily matters of domestic law and policy. At the same time, they are perhaps the most prominent examples of how far international negotiations and regulations have penetrated socially, ethically or culturally sensitive contemporary issues concerning the domestic political process.

International trade law has come a long way. It has left the area of mere transboundary action. More than ever before, international trade regulation now seeks to assure fair competition in a globalizing market economy. Foreign and domestic economic affairs can no longer be separated; and the increasing importance and attention paid to foreign policy in general is a natural effect of such developments. Today, efforts under the Doha Development Agenda aim, inter alia, at developing disciplines on anti-trust rules, on

investment and enhanced transparency in government procurement.[26] These new areas continue the move towards the development of global rules on domestic conditions of competition beyond border measures, which essentially began in the Uruguay Round with the intellectual property and services negotiations.

The Uruguay Round mandate to negotiate on intellectual property resulted in what amounts to the most comprehensive instrument ever adopted in the field. Many consider it to be one of the main, if not the main, achievement of the Round. Others in hindesight, for reasons already discussed, identify a fundamental and fatal error in placing IPRs under the umbrella of the WTO; it is argued that trade rules in favor of freer trade and market access are fundamentally at odds with the allocation of exclusive rights and monopolies under the very same instrument. Many economists fear that the balance tipped too much towards exclusive or monopoly rights, profoundly at odds with freer trade. For them, as mentioned before, the negotiating history suggests that many countries were forced into a strange agreement under the single undertaking approach of the Uruguay Round in return for other benefits expected, but without an inherent linkage to trade liberalization. The TRIPs Agreement is thus seen by some as an alien and misplaced body of law in the WTO.

Two counter-arguments should be made and stressed. First, the negative point of view ignores the fact that intellectual property is not the only field encompassing what was described above as a new generation of trade regulation. Other areas are in principle, equally structured and follow the patterns of positive or prescriptive integration. Rules relating to safeguards, dumping, subsidies, and agriculture are equally harmonizing, albeit setting maximum, and not minimum standards. To the extent that Members make use of such policy instruments, they are obliged to respect a set of well-defined disciplines aimed at excluding excessive recourse and use. Second, the contradiction between trade liberalization and exclusive rights is a formal one. In substance, there is no difference in principle between exclusive rights and freer trade. Intellectual property rights are an inherent part of the international trading system. The evolution of intellectual property disciplines in the European Communities both under free movement of goods and competition rules, despite the rule that property rights per se remain within the competence of the Member States, proves the point on an international level. Every rule-based trading system depends on intellectual property protection, to the extent that it presupposes property rights over traded goods and services. Whether or not the effects are beneficial or detrimental to national and global welfare depends on the balance achieved. Lack of, or insufficient protection amounts to *de facto* restrictions on market access, as exported products will be replaced by both generic and copied products that free-ride on research and development, investment in creative activities and in quality control and product differentiation undertaken elsewhere. On the other hand, lack of appropriate limitations on rights may unduly hamper the flow of goods and services. The real issue is one of balancing different policy goals. This is the core of the matter, upon which fruitful discussions between proponents and critics of intellectual property protection should focus. The proper debate is one of degrees and levels of protection, rather than protection *per se* or the existence of the TRIPs Agreement in the WTO.

[26] *Ministerial Declaration*, adopted on November 14, 2001 at the Ministerial Conference, Fourth Session, Doha, November 9–14, 2001, WT/MIN(01)/DEC/1, November 20, 2001, ¶¶ 20–26, reproduced in the Appendix to this book. The so-called Singapore issues also contain a future mandate on trade facilitation; *see* THE SINGAPORE ISSUES AND THE WORLD TRADING SYSTEM: THE ROAD TO CANCUN (Swiss State Secretariat of Economic Affairs and S. Evenett eds., 2003).

E. Uruguay Round Negotiations

The complexity and comprehensiveness of the TRIPs Agreement cannot be fully understood without recalling the negotiating process through which it was concluded. It may be described as one of the most successful operations in building coalitions, partnerships and, above all, creating a mutual learning process.[27]

At the end of the Tokyo Round, the United States and the European Community launched negotiations on a draft Anti-Counterfeit Code. That effort ceased when intellectual property was included in the 1986 negotiating mandate for the Uruguay Round, which as a political compromise was limited to its "trade-related aspects".[28] The initiative was eventually supported by U.S. estimates that its industries suffered losses of some 24 billion dollars in 1986 as a result of inadequate protection of intellectual property and related investments.[29] At that time, no estimates were available for other countries, in particular for European industries. In the beginning, the European Community was reluctant to commit itself on the issue, but in the course of the negotiations, it gradually became one of the major *demandeurs*.

The seven-year negotiations went through three phases.[30] A long process of fact-finding, which also worked as a tool for mutual education, led to comprehensive proposals by various contracting parties. In the second phase, intensive negotiations took place after the Montreal mid-term review (December 1989) and the April 1990 Ministerial Decision. The work was successfully concluded in December 1991, when the draft TRIPs Agreement was included in the "Dunkel text".[31] During the last phase, efforts were aimed at preserving the results achieved and avoiding jeopardizing the results by counterproductive new IP proposals, as well as avoiding a deadlock in the negotiations on other IP issues, relating to agriculture or audiovisual services. Unlike the first two phases, the last phase was marked by conflicting interests between the United States and the EC on copyright issues (cultural aspects, levies on blank tapes, and national treatment of collecting societies).

The results were made possible by various factors, many of which are interesting for the purposes of a general assessment of the importance of intellectual property. To a great extent the results exceeded the initial expectations.

The educational process in the first phase led to a change in the attitude of a majority of developing countries toward the traditional UNCTAD approach of regarding higher protection of intellectual property as detrimental to the development of those countries. Negotiations were frank, and conducted by well-informed delegations. Complaints that many developing countries could not fully grasp the scope of obligations entailed by an

[27] On this subject, *see* Julie Chasen Ross and Jessica A. Wasserman, *Trade-Related Aspects of Intellectual Property*, in THE GATT URUGUAY ROUND. A NEGOTIATING HISTORY (1986-1992), VOLUME II: COMMENTARY, 2264–2315 (Terence P. Stewart ed., 1993); Amy S. Dwyer, *Trade-Related Aspects of Intellectual Property Rights*, in THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1994); VOLUME IV: THE END GAME (Part I) 463–773 (Terence P. Stewart ed., 1999); DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS, 3–28 (1998); *See* THOMAS COTTIER, *The Prospect For Intellectual Property in GATT*, 28 COMMON MARKET LAW REVIEW 383 (1991), also published in ABBOTT, COTTIER, GURRY, *supra* note 7, at 985.

[28] *See* Amy S. Dwyer, *supra* note 27, at 467–469.

[29] Frederic M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT*, 22 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 689 (1989).

[30] For an excellent account of the stages of the Round see Pierre-Louis Girard, *De Punta del Este à Marrakesh: le processus de négotiation* 1986–1993, in GATT URUGUAY ROUND: NINE PAPERS 1 (Thomas Cottier ed., 1995).

[31] *See* Amy S. Dwyer, *supra* note, 27 at 471–495; GERVAIS, *supra* note 27, at 3–25.

IP agreement are not well founded, perhaps with the exception of complaints from some African States that were not prepared or able to make the necessary resources available during the negotiations. But there was a strong group of countries, including Brazil and India, which resolutely defended their interests, as well as those of small and often absent delegations. The efforts of these countries were reflected in key provisions, such as those relating to the recognition of social and developmental goals, compulsory licensing, and restrictive business practices.

The developing countries eventually recognized the importance of intellectual property protection as a prerequisite, albeit not the only one, for foreign direct investment and transfer of technology. In that respect, the decisive position in favor of IPRs maintained by the newly industrialized Asian economies, the political and economic transformation of Central and Eastern European countries, as well as the growing competition between those countries in order to make their markets more attractive, undoubtedly played an important role, within the context of a globalizing world economy, in reaching an agreement. Developing countries subsequently discovered the virtue of the multilateral system as a bulwark against unilateral pressure, in particular that of the United States (through the Super 301 procedure of the Trade Act). They also saw the TRIPs Agreement as a means to reinforce their position with respect to trade in goods: the potential of reprisals through the withdrawal of concessions in the field of intellectual property enhanced their negotiating power on market access to Europe and the United States. Last, there was a clear linkage, albeit not openly and formally stated as such, between the TRIPs negotiations and those in the fields of agriculture and textiles. No breakthrough on TRIPs would have been possible without middle and long-term prospects of better market access conditions for developing countries in those two areas.

F. The Impact of the TRIPs Agreement

Unlike the agreement concluded in the field of agriculture, the TRIPs Agreement only required minor changes in the national legislation of the European Community and EFTA countries, and in North America. Within the EC, it has resulted in the further harmonization of laws, in particular in the field of procedures—despite the fact that the EC does not have internal jurisdiction in the field. Except for border measures, it is therefore essentially a mixed agreement in Community law, entailing the shared jurisdiction of the EC and the Member States.[32]

Major structural changes were, and still are, to be undertaken in developing countries, the newly industrialized countries, and Eastern European countries, subject to transition periods. Unlike measures which produce immediate results (e.g., tariff reductions), most effects of the TRIPs Agreement will only become apparent on a medium- and long-term basis for reasons already discussed. While national treatment and the most-favored-nation rule had to be accorded immediately, the other requirements were to be implemented by developed countries one year after the entry into force of the Agreement, i.e., on January 1, 1996, according to Article 65, or upon accession to the WTO in accordance with the respective protocol of accession. Developing countries benefit from further transitional periods, discussed in Part III(H) below.

In many countries, deficiencies in intellectual property protection result not only from inadequate substantive standards, but also from the lack of effective enforcement of

[32] *See Opinion 1/94 on the Competence of the Community to conclude International Agreements concerning Services and the Protection of Intellectual Property*, ECR I-5267 (1994) ¶¶ 54 *et seq.,* and 99 *et seq.*

intellectual property rights (due to corruption or lack of resources). In the final analysis, in many countries it is also a question of diverging cultural traditions, in other words, of general perceptions of law, property, and what is in the public domain, that need to change in light of the commitments made under the Agreement. At the 2001 Ministerial Meeting in Doha, implementation of the TRIPs Agreement was one of the main concerns of developing countries.[33] The wide gap that currently exists between the requirements of the WTO Agreements and current practices in many developing countries induced Members to pledge substantial efforts in capacity building, implicitly including capacity building related to IPRs.

It is clear that the implementation of the TRIPs Agreement amounts to a major challenge in many parts of the world. Implementation is not merely a matter of adjusting laws and regulations (monitored by the TRIPs Council as one of its main activities in the first five years). More profoundly, it is a matter of changing attitudes towards concepts of private and intellectual property, still largely absent in the social fabric of society in many countries. There are no easy and rapid solutions and this is bound to be a long-term process.

III. Description and Legal Analysis of the Trips Agreement

A. Scope and Subject-Matter of the Agreement

1. Survey of Protected Rights

The TRIPs Agreement is contained in Annex 1C of the WTO Agreement. The TRIPs Agreement lays down the essential elements of the level of protection that countries must accord to intellectual achievements. TRIPs Article 1:2 defines the nature and scope of obligations and the pertinent notion of "intellectual property" under the Agreement. Part II of the Agreement covers all pertinent fields and forms of intellectual property: copyright (including computer programs and data bases), trademarks and service marks, geographical indications, industrial designs, patents for invention, topographies of integrated circuits, and trade secrets (undisclosed information). Additional obligations stem from the incorporation of pre-existing agreements (as defined in Article I footnote 2 of the Agreement): Article 2 of the TRIPs Agreement obliges Members to comply with the substantive provisions of the widely adopted Stockholm Act of 1967 of the 1883 Paris Convention which covers aspects of patents, trademarks, trade names and protection against unfair competition. Article 9 incorporates the substantive provisions of the 1971 Paris Act of the Berne Convention covering copyright, and Article 35 incorporates the Washington Treaty on the Protection of Integrated Circuits, which has never come into force. These provisions form an integral part of the Agreement's obligations with respect to intellectual property.[34] The 1961 Rome Convention, addressing the rights of performers, producers and broadcasters (neighboring rights) is referred to in various Articles, but is not formally incorporated into the Agreement. The relationship of these various agreements is discussed in Part III(B)(3) of this chapter.

In addition, the Member States undertake in Part III to provide prescribed procedures and remedies at the national level in order for intellectual property rights to be effectively enforced, and in Part IV in relation to registration and maintenance of rights. The

[33] *See Ministerial Declaration* adopted on November 14, 2001, supra note 26, in particular ¶¶ 38–40, 41, reproduced in the Appendix to this book.

[34] *See* Report of the Appellate Body, *United States—Section 211 Omnibus Appropriation Act of* 1998, WT/DS176/AB/R (2002) regarding the incorporation and protection of trade names.

substantive and procedural standards are described in more detail in Parts III(D) and III(E) and (F) of this chapter.

Article 1:3 addresses the right holders under the TRIPs Agreement. These are deemed to include all nationals of other Members. For the purpose of enforcement, right holders also include "federations and associations having legal standing to assert such rights" in accordance with their purpose.[35] As a practical matter, the rights also extend to the nationals of a Member since rights and obligations are generally implemented in a non-discriminatory manner. Whether or not the Agreement can be invoked domestically, however, remains a matter to be defined by national law.

The rights and obligations relating to the specific forms of intellectual property are not defined uniformly, but vary from form to form. In general terms, they are defined as negative rights as they entitle a right holder to prevent others not having the owner's consent from acts such as making, using, offering for sale, selling and importing protected products. More specific activities covered will be discussed below in Part III(D).

2. Subject Matter and Inter-temporal Application

The subject matter of the Agreement is defined by the scope of protected rights and the objects of intellectual property, more specifically information, i.e. expression of ideas, creative forms, inventions, reputation, goodwill and products (goods and services) containing these factual elements. Intellectual property rights appropriate this information that would otherwise be in the public domain, and the relationship between the two needs (the scope of protected rights and the object of the intellectual property protection) to be defined in inter-temporal terms. With the advent of the TRIPs Agreement, the relationship of the new rights and existing subject matter under protection, no longer under protection and not yet under protection needs to be defined. The principles of intertemporal law are set out in Article 70 of the Agreement.

In accordance with general principles of law, the Agreement does not apply retroactively to acts that took place prior to the entry into force of the TRIPs Agreement. Article 70:1 therefore excludes from coverage *completed* creative or infringing activities such as inventing, acting and performing, registration of works on phonograms, but also counterfeiting or piracy which took place prior to the entry into force of the agreement. Ongoing acts, however, which become infringing under the Agreement, are subject to Article 70:4. The treaty allows Members to provide for a limitation on the remedies available for such acts, including past acts which entailed important (and ongoing) investment. At any rate, Members are obliged to provide for financial compensation in such cases.

It is important to distinguish acts from subject matter which was created through such acts and continues to exist, such as inventions, existing phonograms, trademarks, etc. Subject matter capable of protection through intellectual property rights falls under the Agreement to the extent that the subject matter existed at the day of entry into force for a Member. Under Article 70:2, the Agreement applies to subject matter which has been protected at the day of entry into force, or *subsequently meets the criteria for protection* under the Agreement. Existing subject matter, created by acts prior to the entry into force, therefore qualifies for protection under the Agreement. Of course, subject matter coming into existence after the entry into force, is fully covered. Pursuant to Article 70:7, subject matter for which an application for registration is pending when the TRIPs Agreement entered into force, is entitled to protection under the standards of the Agreement.

[35] Article 42 note 11.

Difficult areas of overlap exist with respect to pre-existing subject matter which qualifies for protection under the new rules. As a general rule, there is, according to Article 70:3, no obligation to restore protection of subject-matter which, at the day of entry into force, had been in the public domain. Subject matter which did not, or no longer, enjoys protection under pre-existing rules, will not be protected pursuant to the categories of extended protection under the Agreement. There are, however, qualifications of this principle in the fields of copyright and patents which will be discussed when these particular rights are addressed.[36]

B. The Nature and Interpretation of TRIPs Rights and Obligations

1. Private Rights and the Potentials of Direct Effect

As stated at the outset of this chapter, the TRIPs Agreement introduced a new dimension of rights and obligations into the multilateral trading system.[37] While intellectual property protection was referred to as a legitimate basis for exceptions in GATT Article XX(d), and thus used to justify trade restrictions on infringing imports, the TRIPs Agreement establishes standards for private rights and obligations, thus pertaining to right holders rather than States. The preamble explicitly recognizes that intellectual property rights are private rights. Members are obliged to implement these standards and thus grant protection to individual right holders, the very subject of the Agreement.

Such explicit recourse to private rights and right holders marks a particular feature of the Agreement. Yet, the practical difference between private and public law—the latter being the traditional basis of trade regulation—should not be overstated. The nature of private rights does not change the primary nature of obligations of Members under international law which require implementation through domestic law.

First, Article 1:1 of the TRIPs Agreement obliges Members to give effect to the provisions of the Agreement. As to methods of implementation, they remain free to define the appropriate method in accordance with their own legal system. The Agreement therefore does not prescribe the status of the norms of the TRIPs Agreement in domestic law. Members are free to limit the impact of these rules to the process of domestic legislation in the dualist tradition of international law which clearly separates the spheres of national and international law. Countries operating under monist doctrines, which integrate international law into domestic law, may grant more extensive, immediate effect to the norms of the Agreement. Yet, the nature and definition of private rights in the TRIPs Agreement has not altered the freedom of Members to chose their own methods of implementation.

Second, dispute settlement remains reserved to Members. Private operators cannot invoke the obligations of Members under WTO law before the WTO under the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") by arguing that in the field of IPRs these rights are also private rights.

The impact of defining private rights and directly addressing right holders is more important in domestic law and legal protection. The protection of intellectual property

[36] *See* Parts III(A)2; III(D)(1)(c), III(D)(5)(c) and III(E)(1) of this chapter.

[37] *See, e.g.,* ABBOTT, COTTIER, GURRY, *supra* note 7 at 1, 326; ALESCH STAEHELIN, DAS TRIPS-ABKOMMEN: IMMATERIALGÜTERRECHT IM LICHT DER GLOBALISIERTEN HANDELSPOLITIK 45 (1999); D. GERVAIS, SUPRA NOTE 27, AT 39–70; MICHAEL BLAKENEY, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPS AGREEMENT 39–43 (1997); A. Otten and H. Wager, *Compliance with TRIPs: The Emerging World View*, 29 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 391 (1996); WIPO, IMPLICATIONS OF THE TRIPS AGREEMENT ON TREATIES ADMINISTERED BY WIPO (1996).

rights has been a core function of domestic courts, and clearly belongs in the judicial province. Domestic courts are called upon to work with the provisions of the TRIPs Agreement in the process of implementing, completing and applying domestic intellectual property law. In this context, we need to distinguish the doctrine or principle of "consistent interpretation" and the doctrine of "direct effect".

The principle of consistent interpretation is of paramount importance, has been generally accepted, and is also suitable for application in dualist countries. According to this principle, courts of Members are obliged to interpret national law to the extent possible in a manner that is compatible with international law and thus the TRIPs Agreement.[38] The high level of detailed prescription contained in the TRIPs Agreement is a prominent feature. It allows the Agreement to provide guidance in interpreting domestic law which, in many countries, provides much less detail. The TRIPs Agreement is therefore an important reference to fill lacunae and render broad domestic provisions more specific in accordance with international legal obligations.

In addition, many provisions of the TRIPs Agreement, given their origin in the tradition of national law, are suitable to be applied with direct effect in domestic law. While consistent interpretation operates within the bounds of domestic law and assists in its interpretation, the doctrine of direct effect goes much further, addressing inconsistencies between domestic and international law obligations. Direct effect requires a monist tradition of international law. Granting direct effect implies that international law prevails over domestic law. In the United States—despite its monist tradition—direct effect is generally excluded by Congress in trade-related implementing legislation for reasons of separation of powers and the preservation of Congressional prerogatives.[39] The European Union, in particular the European Court of Justice, has so far generally excluded direct effect for trade policy reasons associated with the lack of reciprocal judicial protection by major trading partners.[40] Importantly, the Court did not exclude direct effect by EU Member States in areas of exclusive or mixed competence, to which intellectual property rights and civil and administrative enforcement belongs. Similarly, countries like Switzerland have not ruled out the general direct effect of the WTO Agreements and remain open to apply the doctrine, in particular in the field of intellectual property.[41]

The doctrine of direct effect is controversial and its application to WTO law has mainly been influenced by difficult cases outside the realm of the TRIPs Agreement. The modern theory of direct effect avoids generalizations with respect to its general applicability in WTO law. It seeks to analyze the nature and justiciability of the particular norm in question, taking into account the proper role and suitability of courts to make appropriate determinations in the case at hand. In other words, the doctrine of direct effect should apply to areas that belong to the traditional provinces of the courts in the light of separation of powers and checks and balances applied under the respective constitutional system.[42]

[38] Thomas Cottier and Krista Nadakavukaren Schefer, *The Relationship of World Trade Organization Law, National and Regional Law*, 1 Journal of International Economic Law 83 (1998).

[39] *See* Thomas Cottier and Matthias Oesch, *The Paradox of Judicial Review, in: The Role of the Judge in International Trade Regulation*, 4 World Trade Forum (Thomas Cottier and Petros Mavroidis eds., 2003); David W. Leebron, *Implementation of the Uruguay Round results in the United States*, in Implementing the Uruguay Round, 187 (John H. Jackson and Alan Sykes eds., 1997).

[40] *See* ECJ Case C-53/96, *Hermès v FHT* (1998) ECR I-3603, Joined Cases C-300/98 *Parfums Christian Dior SA v Tuk Consultancy BV and Case C-392/98 Assco Gerüste GmbH, Rob van Dijk v Wilhelm Layher GmbH & Co. KG, Layher BV* (2000) ECR I-11307.

[41] *See* Staehelin, *supra* note 37, at 225, with further references.

[42] *See* Thomas Cottier, *A Theory of Direct Effect in Global Law, in: European Integration and International Coordination*, in Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann,

Thus, direct effect depends on whether the subject matter concerned falls within the province of a court, or whether a decision should instead be left to political, legislative bodies. While trade policy generally speaking is characterized by strong prerogatives of the executive and legislative branches, accompanied by judicial restraint, no such tradition exists in the field of intellectual property protection.[43] Importantly, applying direct effect in the field of intellectual property does not prejudice the question of direct effect for other areas of trade regulation. It offers the potential for nuanced and differentiated approaches to direct effect.

2. Minimum and Maximum Standards

A second quality of TRIPs norms is that they are conceived as minimum standards, and not formal norms of international harmonization that set limits to domestic protection of intellectual property. The prevailing view is that the TRIPs Agreement merely sets out minimal substantive standards and does not amount to harmonization. It thus allows Members to introduce stronger protection than the minimums set forth in the Agreement.

Article 1:1 of the Agreement expressly allows Member States to adopt "more extensive protection", provided such protection does not contravene the provisions of the Agreement. Article 71:2 reiterates the basic concept, providing for facilitated adoption of enhanced standards contained in subsequent IPR agreements adopted by all Members. Article X:6 of the WTO Agreement allows for adoption "by the ministerial conference without further formal acceptance process" of such amendments to the TRIPs Agreement.

In terms of substantive standards relating to the different forms of intellectual property, it is difficult to see explicit barriers to enhanced protection in the provisions of the Agreement. The situation is different with respect to the provisions on enforcement, which partly limit Members from taking certain procedural steps. Experience had shown that border controls may be abused to impede international trade, and the rules partly reflect this experience. The preamble of the TRIPs Agreement recognizes this point requires an appropriate balance in the field of enforcement rules:

> Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

The question arises as to whether such limitations should also exist with regard to substantive standards, as trade barriers may equally stem from excessive standards. Assume that a Member adopts patent protection for fifty, instead of twenty years. This is unlikely for a number of policy reasons relating to competition, but is not excluded by the wording of Article 1:1 of the Agreement. Would the trade-impeding and pricing effects of such an extensive monopoly, if exercised to its full extent, amount to an abuse of rights and thus be contrary to a general principle of law? Or, could it give rise to a non-violation complaint under GATT or GATS as such a rule—compatible with the TRIPs Agreement—could excessively impair *de facto* market access and nullify and impair market access rights? At this stage, the agreement does not provide an answer to such issues. It may be argued that patents, whatever their duration, stimulate competition and a fifty-year period would not be exploited frequently as technology develops fast, is rapidly outdated, and patents will

99–123 (Armin von Bogdandy; Petros C. Mavroidis and Yves Mény eds., 2002). *See also* THOMAS COTTIER, ALBERTO ACHERMANN, DANIEL WUEGER, AND VALENTIN ZELLWEGER, DER STAATSVERTRAG IM SCHWEIZERISCHEN VERFASSUNGSRECHT 9, 95–253 (2001).

[43] *See* Thomas Cottier and Matthias Oesch, *supra* note 39.

therefore not be maintained. Similar questions may be asked in respect of an extensive duration of copyrights and neighboring rights as applied to software, the internet, phonograms and films, respectively. More importantly in practical terms, there is clear risk of excessive protection of contents of databases in domestic law[44] and of geographical indications.[45] Finally, it will be seen that the Agreement allows for extensive restrictions on parallel trade which may be questioned from a trade policy perspective.[46]

The problem of merely setting minimum standards in the TRIPs Agreement illustrates that in the long run the nature and scope of rights cannot be defined without reference to other disciplines of WTO law, in particular future competition policy and rules. This is a complex issue. Protection of intellectual property rights is recognized as a necessary condition of competition, allowing companies to find their identity and place on the market and motivating them to undertake investment in technological developments. At the same time, intellectual property protection is not a sufficient condition of competition. Consisting of exclusive rights, there is always the risk it will become a barrier to trade, leading to market segmentation and higher prices. A proper balance must be maintained.

Today, this balance is partly maintained in the Agreement by defining appropriate, non-excessive levels of protection. Partly, it is kept within the Agreement by allowing Members to consider other policy goals and introduce restrictions. Partly, it is kept by reference to competition policy against restrictive business practices which Members are allowed to apply fully under Article 40 of the Agreement. The Agreement however fails to effectively address excessive protection in domestic law. Future coordination in the WTO between the TRIPs Agreement and international standards on competition law and policy[47] may reveal that the TRIPs Agreement should not only prescribe minimum, but also maximum standards that Members must not exceed in order to maintain a proper balance between IPR protection, competition and market access rights. Such coordination would reveal the true harmonizing nature of TRIPs as a body of global law.

The problem posed by minimum versus maximum standards also arises from the practice of Members to ask for additional commitments from newly acceding countries which go beyond the level of protection required by the TRIPs Agreement. For example, the Protocol of Accession of the People's Republic of China sets forth additional substantive and procedural obligations.[48] While additional procedural requirements can be justified

[44] While efforts to bring about extensive protection for databases failed in the United States and in WIPO, the EC introduced a higher standard of protection based on traditional copyright (Articles 5–7 of Directive 96/9/EC of the European Parliament and of the Council of the EU of March 11, 1996 on the Legal Protection of Databases, O.J. L 077, March 27, 1996) as well as new sui generis approaches (Articles 7–11, Id) that are aimed at stimulating investment in databases; see Pamela Samuelson, *The Digital Agenda at WIPO*, 37 Virginia Journal of International Law 369 (1997), reprinted in Abbott, Cottier, Gurry, *supra* note 7 at 908; Matthias U. Studer, *The Quest for Legal Protection of Databases in the Digital Age*, Vol. 4 (5) Journal of World Intellectual Property 670, 690 (2001).

[45] *See infra* Part III(D)(3).

[46] *See infra* Part III(C)(3).

[47] Whether or not such disciplines will emerge is difficult to assess. *See generally, Julian L. Clarke and Simon J. Evenett, A Multilateral Framework for Competition Policy*? in The Singapore Issues and the World Trading System: The Road to Cancun 77–168 (Swiss State Secretariat of Economic Affairs and S. Evenett eds., 2003). The author of this chapter has argued from an IPR perspective that particular emphasis should be given to mutual assistance in law enforcement and the regulation of export cartels, *see* Thomas Cottier and Ingo Meitinger, The TRIPs Agreement without a Competition Agreement?, Nota di Lavoro (Working Paper) 56.00, Fondazione Eni Enrico Mattei Venice (1999): www.feem.it/NR/rdonlyres/364E97CC-2C8D-42E2-BE36-D87542C3A67C/299/6599.pdf visited November 25, 2003).

[48] *See* Protocol of WTO Accession of China, WT/MIN(01)/3 (November 10, 2001) http://www.wto.org/english/thewto_e/acc_e/protocols_acc_membership _e.htm (visited November 25, 2003).

to provide necessary assurances for enforcement in the light of existing problems and deficiencies of the legal system of the new Member,[49] additional substantive standards are problematic both from the point of view of equality of WTO Members and the equal conditions of competition that were set (unlike for GATT 1947) for all original Members of the WTO. Levels of commitments may and do vary in specific Member schedules under GATT and GATS, but should all remain within the legal framework of the WTO Agreements.

3. Incorporation by Reference of other Agreements

TRIPs Articles 2 and 9:1 settle the interrelationship between the norms of the TRIPs Agreement and the Berne and Paris Conventions, and require non-members of these Conventions to comply with their provisions.

The technique of full incorporation of the substantive provisions of these Agreements is a novel feature in international treaty law. It goes beyond preexisting treaty references as these agreements are positively incorporated and thus establish genuine rights and obligations that assist in the interpretation of the TRIPs Agreement and its exceptions. It establishes a Member's right to WTO dispute settlement over matters involving these conventions, including over disputes involving a WTO Member that is not a party to one or more of these agreements. Moreover, the TRIPs Agreement establishes jurisdiction to prescribe and enforce matters within the province of WIPO.

The "incorporation" of certain IP conventions into the WTO Agreement should be distinguished from other references to international agreements in the WTO Agreement. WTO law sometimes refers to other agreements that are not formally part of WTO law. These related agreements may be taken into account as a preliminary issue (e.g., in interpreting GATT Article XXIV relating to regional trade arrangements), or in interpreting provisions (e.g., GATT Article XX). Such relationships may also emerge in the field of intellectual property. Panels and the Appellate Body may be called upon to examine the relevance of existing agreements pursuant to Article 31 of the Vienna Convention on the Law of Treaties (in particular paragraph 3:c), such as the Patent Corporation Treaty, or agreements dealing with the international registration of rights. Other instruments, such as legal opinions submitted by WIPO, may be taken into account as factual evidence.[50]

Problems arose as to the relationship of the incorporated agreements with the TRIPs Agreement. In *United States—Omnibus Appropriation Act* the parties disputed whether trade names, protected under Article 8 of the Paris Convention, but not referred to in the TRIPs Agreement, enjoy protection under WTO law. While the Panel found against protection on the grounds that trade names are not specifically mentioned in the TRIPs Agreement, the Appellate Body rightly rejected such a formal view and affirmed incorporation and full protection of such names under the TRIPs Agreement.[51] This clarification, however, does not dispose of all potential problems. There may be tensions between rights and obligations of the TRIPs Agreement and an incorporated agreement. Formally, they are of equal standing, and the later-in-time rule of Article 30:3, or *the lex specialis* rule of Article 59:1 of the Vienna Convention on the Law of Treaties cannot formally apply. For example, Articles 5:2 and 5:4 of the Paris Convention allow, under certain

[49] Thomas Cottier, *Emerging Doctrines of Good Governance: The Impact of the WTO and China's Accession*, in CHINA IN THE WORLD TRADING SYSTEM, DEFINING THE PRINCIPLES OF ENGAGEMENT 119 (Frederick M. Abbott ed., 1998).

[50] *See United States—Omnibus Appropriation Act, supra* note 34, at 106.

[51] *See United States—Omnibus Appropriation Act, supra* note 34, at 333–339.

conditions, for mandatory working of patents. This is excluded under Article 27 of the TRIPs Agreement which generally requires non-discriminatory treatment of patents, i.e. "whether products are imported or locally produced". The potential tension will need to be resolved by interpreting these norms as a single undertaking, taking into account the underlying prohibition of abuse of rights in Article 5:2 of the Paris Convention and Article 31 of the TRIPs Agreement on compulsory licensing.

4. Interpretation of the TRIPs Agreement

(a) Textual Interpretation and Good Faith. The TRIPs Agreement does not contain particular provisions relating to its interpretation. The rules enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties apply in accordance with the standard practice of panels and the Appellate Body, based on the reference to "customary rules of interpretation of public international law" in Article 3:2 of the Dispute Settlement Understanding.[52] The process of interpretation is characterized by strong reliance on the wording and textual meaning (including standard dictionary definitions) in order to define the intent of the parties. The object and purpose of a rule is—unlike in EC and domestic law—less prominent, although it does appear in the form of a contextual analysis. Recourse to the third element in Article 31 of the Vienna Convention—protection of good faith[53]—however is not yet well developed in WTO law. While a Panel has used the "doctrine of legitimate expectations of Members regarding conditions of competition,[54] this approach was rejected by the Appellate Body in the field of IPRs, which found that the Panel had misapplied Article 31 of the Vienna Convention. According to the Appellate Body, the Panel had misunderstood the concept of legitimate expectations in the context of the customary rule of interpretation of public international law. It stated that the legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties, in accordance with the principles set forth in Article 31 of the Vienna Convention.[55]

It can be argued that the Appellate Body has failed to recognize that Article 31 of the Vienna Convention requires interpretation to be conducted in the light of good faith, thus taking into account what Members and right holders could legitimately expect from compliance with a particular obligation. The Appellate Body ruled that this would amount to the application of subjective standards. Protection of good faith, however, always makes recourse to what a reasonable person would and could believe under the circumstances. It makes recourse, in other words, to an objective assessment of what the claimant could reasonably expect in the process of applying and implementing an obligation. This must be distinguished from non-violation complaints, and the respective

[52] See Chapters 25 *et seq.* of this book.

[53] "A treaty is to be interpreted in good faith. Apart from the necessity for this as a matter of general principle, it follows from Article 26 of the [Vienna] Convention which imposes upon parties to a treaty the obligation to perform in good faith", I OPPENHEIM'S INTERNATIONAL LAW 1272 (9th ed., Robert Jennings and Arthur Watts eds., 1996) A footnote adds that "[t]his strongly implies an element of reasonableness". *Id.*

[54] Report of the Panel, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (1997), ¶¶ 7.20-7.21.

[55] Report of the Appellate Body, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS501/AB/R, ¶ 45. *See also* W.J. Davey, *Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 79 (2001); P. Cattaneo, *The Interpretation of the TRIPs Agreement: Considerations for the WTO Panels and Appellate Body*, 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY 626 (2000).

doctrine of protecting legitimate interests. Interpretation purely based on wording often falls short of identifying the true meaning of a provision.[56] While the scope of expansive interpretation is limited in international law and cannot be applied in the same manner as by a well-established domestic or regional court, the Vienna Convention nevertheless allows and even requires legitimate expectations to be reasonably taken into account in interpreting a rule.

(b) Questions of Law and Fact. The interpretation of TRIPs rules often entails the review of relevant national or regional intellectual property rules. The task regularly amounts to the examination of whether a certain rule is consistent with the standards set out in the TRIPs Agreement. Review and interpretation of domestic or regional law is a question of fact.[57] Panels and the Appellate Body do not have jurisdiction to interpret and apply national or regional laws, properly speaking. How should they treat them? How much deference should be granted? Panels and the Appellate Body examine the matter by asking whether the defendant is in a position to demonstrate as a matter of evidence that its interpretation is supported in national law. Defendants, of course, always argue that the rule is compatible, and examination therefore cannot rest here. Panels and the Appellate Body cannot simply rely on the interpretation provided by the defendant. It must be corroborated by precedents or scholarly writings. No benefit of the doubt is given to defendants in interpreting their own law. The test to be met is evidence as to the existence of a sound legal basis. As the Appellate Body held in the *India—Patents* case, municipal law may serve as evidence of facts and may provide evidence of state practice. In addition, under public international law, municipal law may also constitute evidence of compliance or non-compliance with international obligations. The Appellate Body quoted the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia*:[58]

> It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[59]

In *India—Patents*, the Appellate Body confirmed that the Panel proceeded in accordance with the above decision as it was not interpreting Indian law "as such", but was examining Indian law solely for the purpose of determining whether India had met its obligations under the TRIPs Agreement.[60] In *Canada—Patent Protection of Pharmaceutical Products*, the Panel noted that the "context" within the meaning of Article 31:2

[56] For further discussion, *see* Thomas Cottier and Krista Nadkavukaren Schefer, *Non-violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT 145 (Ernst Ulrich Petersmann ed., 1997).

[57] MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION—A CONTRIBUTION TO THE DEBATE ON THE BALANCE OF POWERS BETWEEN THE JUDICIARY OF THE WTO AND ITS MEMBERS (2003).

[58] *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, supra* note 55, ¶¶ 65–67.

[59] PCIJ Rep., Series A, No. 7, p.19 (1926).

[60] *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, supra* note 55, ¶¶ 65–67.

of the Vienna Convention includes the provisions of the international instruments on intellectual property protection incorporated into the TRIPs Agreement, as well as any agreement between the parties relating to these agreements. Furthermore, with respect to the negotiating history pursuant to Article 32 of the Vienna Convention, the Panel considered that it may go beyond the negotiating history of the TRIPs Agreement itself and also inquire into the negotiating history of other international IP instruments. In *Canada—Patent Protection of Pharmaceutical Products*, the Panel referred to the negotiating history of the Berne Convention.[61] In *Canada—Term of Patent Protection*, the Panel confirmed that the term "subsequent practice" according to Article 31:3(b) of the Vienna Convention means, according to the Appellate Body Report in *Japan—Taxes on Alcoholic Beverages*, a "'concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation."[62] The United States submitted evidence demonstrating that six developed country Members, other than Canada, had amended their laws to comply with the patent term obligation under TRIPs Article 33. In its interim report, the Panel considered this evidence insufficient to rise to the level of a "subsequent practice".[63]

5. The Relationship of the TRIPs Agreement to GATT and GATS

The TRIPs Agreement forms part of WTO law and thus cannot be read in isolation from other pertinent WTO Agreements. The Appellate Body has adopted a policy of "effective interpretation" with respect to the relationship between GATT and GATS,[64] but also in the relationship between the GATT and its related specialized Agreements under Annex 1A of the WTO Agreement.[65] This policy reflects an effort to bring about maximum application and implementation of the rules.

It is well established that both GATT and GATS may apply to the same measure.[66] There is a marked reluctance by panels and the Appellate Body to accept a conflict rule that would give priority to specific provisions of one instrument over the other in accordance with Article XVI:3 of the WTO Agreement, the General Interpretative Note to Annex 1A, the Vienna Convention on the Law of Treaties, or customary rules of

[61] Report of the WTO Panel, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (2000), ¶¶ 7.13–15; affirmed WT/DS114/AB/R (2000).

[62] *Id.,* ¶ 4.41, at 80.

[63] An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant; *see* Report of the WTO Panel, *Canada—Term of Patent Protection*, WT/DS170/R (2000), ¶¶ 5.3–5.5 and note 48.

[64] Report of the Appellate Body, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R (1997), Chapter IV; Report of the Panel (not appealed), *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT DS59/R, and WT/DS 64/R (1998), ¶ 14.56 (" We consider rather that the obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspect of a legislative act can be subject to various provisions of the WTO Agreement"); Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997), ¶¶ 217–222; Report of the Appellate Body, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (1997).

[65] *See* Report of the WTO Panel, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA, WT/DS48/R/CAN (1997) ¶¶ 8.27–8.31; On appeal, the Appellate Body upheld this finding of the Panel, *see* Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R (1998), ¶¶ 126–128; *see also* Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products,* WT/DS135/AB/R (2001), ¶¶ 75–76.

[66] *See* Reports of Panels and Appellate Body, *supra* note 64.

lex specialis which, by definition gives priority to the provisions of one instrument over another, based on the specificity with which one instrument addresses the particular issue in question in relation to a more general provision in another instrument. This policy also applies to the TRIPs Agreement, the more so because explicit conflict rules relating to the relationship of GATT 1994, GATS and the TRIPs Agreement do not exist. It is therefore conceivable that provision of the TRIPs Agreement, as well as those of GATT and GATS, or any of the specialized agreements, will apply to a particular case. While no case law exists as of today on this point, it is safe to say that the TRIPs Agreement can apply in combination with the GATT 1994 and its related agreements under Annex 1A, and the GATS. Potential areas of overlap can be found where the exercise of intellectual property rights affects the importation, exportation and the marketing of products, in particular restrictions of parallel trade of genuine products. The point is discussed in Part III(C)(3) below.

C. General Provisions and Basic Principles (Part I)

1. National Treatment

Article 3 of the TRIPs Agreement requires Member States "to accord to the nationals of other Member States treatment no less favorable than that it accords to its own nationals with regard to the protection of Intellectual Property". The obligation extends to all parts of the Agreement, including the availability, acquisition, scope, maintenance and enforcement of IPRs as well as those matters affecting the use of intellectual property rights specifically addressed in the Agreement. Importantly, it extends national treatment to copyright law, still absent under the Berne Convention. The wording of the provision deviates from Article 2 of the Paris Convention which requires equal treatment ("the same protection"), although for practical purposes, differences between the two provisions are limited.[67] While treatment no less favorable, in theory and practice, allows for reverse discrimination (*discrimination à rebours*) in favor of non-nationals, intellectual property laws normally provide, as abstract rules, for equal protection of all right holders alike and neither privilege nor disadvantage nationals, although exceptions to this finding exist.[68] Moreover, Article 3 of the Paris Convention provides for equal protection also of resident nationals of non-members, thus extending protection beyond the TRIPs Agreement. Finally, national treatment obligations under Article III of the GATT also apply in regard to procedures affecting the importation of products protected by intellectual property rights. A GATT Panel held that a dual system of legal protection that makes it more difficult to defend cases alleging infringement by imported products than infringement by domestic products, violates Article III GATT.[69]

However, a number of IPRs in the field of copyright remain subject to the requirement of reciprocity. Here, national treatment of rights is only granted if applied mutually by

[67] *See* GEORG BODENHAUSEN AND CHRISTIAAN HENDRIK, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY AS REVISED IN STOCKHOLM IN 1967 (1968).

[68] For example, the United States requires its own nationals to register their copyrights before bringing suit, but not foreign nationals (*cf.* 17 U.S.C. §411(a), *Murray Hill Publications, Inc. v. ABC Communications, Inc.,* 264 F.3d 622, 630 (6th Cir. 2001)), and requires nationals to use their trademarks in commerce in the United States before registration is possible, but imposes no use requirement on foreign nationals (*c.f.* 15 U.S.C. §1051) (communication by Alice Zalik).

[69] *See* Report of the GATT Panel, *United States—Sec 337 of the Tariff Act of* 1930, BISD 36S/345 (1989) (adopted). For renewed consultations on the matter, *see* DS 186/1-3, requested by the EC, Japan and Canada in 2000.

both Parties. Such exceptions are referred to in TRIPs Article 3:1 and corresponding rules are contained in Articles 6:1 and 20 of the Berne Convention and Article 13:d and 16:1 of the Rome Convention. They essentially relate to the predominantly European system of collecting societies by which authors and performers obtain remuneration on the basis of membership and overall income from royalties, rather than on the basis of individual contracts. The extension of national treatment to collecting societies was a major goal of the United States since much of the revenue of these societies is generated from works of U.S. authors and artists, but do not reach these persons if they are not members of the societies. The United States did not prevail on this point, partly due to its lack of corresponding societies and a system based on individual contracts, and partly due to European resistance to sharing income which was used in Nordic countries to support general cultural activities.

Article 3:2 of the TRIPs Agreement qualifies those exceptions referred to in Article 3:1 that relate to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent for foreign right holders (which does not exist for domiciled persons), thus facilitating intercourse with the authorities. Exceptions are only permitted where necessary to secure compliance with laws and regulations that are not inconsistent with the Agreement, and they must not be applied in a way that constitutes a disguised restriction on trade. The wording of these exceptions is very narrow. Obligations to appoint an agent for service are common in all fields of registered IPRs, such as trademarks or patents, and it is difficult to see why they should be limited to the exceptions set out in paragraph 1 of the provision. The text does not reflect the purpose of the provision and should be read in its overall context to encompass all rights that are subject to registration.

2. Most-Favored-Nation Treatment

Unlike all other intellectual property conventions, Article 4 of the Agreement includes an obligation of most-favored nation treatment. This obligation reflects the influence of GATT Article I and obliges all Parties to extend privileges accorded to one Member immediately and unconditionally to all other WTO Members. Importantly, the provision is not limited to TRIPs obligations, but extends to all protection granted to intellectual property, with the exception of rights of performers, producers of phonograms and broadcasting organizations not provided under the TRIPs Agreement.[70] The MFN provision strengthens, in particular, the position of smaller countries vis-à-vis the large trading powers in third markets. As a result of the TRIPs Agreement and its MFN clause, unilateral practices, or a bilateral agreement concluded between two Members, granting and providing greater protection ("TRIPs-plus"), or the improvement of registration procedures, needs to be extended to all Members so as to avoid any incompatibility with TRIPs obligations.

Article 4 provides for a number of enumerated exceptions to MFN, which relate to privileged, non-IPR specific judicial assistance or law enforcement. Again, the provision refers to relevant privileges contained in the Berne Convention and the Rome Convention providing for reciprocity and which, logically, not only excludes national treatment, but also MFN. Finally, privileges existing prior to the entry into force of the TRIPs Agreement in all areas of intellectual property (e.g., trademark law) are grandfathered to the extent that respective agreements were formally notified to the TRIPs Council and, in addition, do not amount to "arbitrary and unjustifiable discrimination" against

[70] TRIPs Agreement, Article 4(c).

nationals of other Members. The interpretation of this proviso will be influenced by the jurisprudence relating to the chapeau of GATT Article XX which uses similar language. Special arrangements and practices therefore will only be lawful if they are based upon relevant factual differences between Members.[71]

The TRIPs Agreement does not contain an exception corresponding to Article XXIV of the GATT and Article V of the GATS allowing for privileges in the context of free trade agreements, customs unions and regional economic integration. Negotiators agreed that preferential treatment in terms of intellectual property protection was not advisable nor necessary. Article 1 of the Agreement defines "nationals" to encompass persons domiciled or having a real and effective industrial or commercial establishment in a customs territory, a term that encompasses customs unions.[72] The EC (and other customs unions) are thus dealt with as a single unit for the purpose of the Agreement. Importantly, this does not apply to FTAs such as NAFTA. The point is of particular importance in relation to exhaustion of rights and parallel trade and its application in the context of regional integration.

3. Exhaustion of Rights and the Regulation of Parallel Trade

(a) The Doctrine of Exhaustion of Rights. Intellectual property rights are of an "ubiquitous" nature. They exist independently of the specific material good in which they might be incorporated. Intellectual property rights conceptually follow the product downstream, and potentially control the use of the product. Logically, they could expand endlessly over time, interfering in downstream markets indefinitely. It therefore is necessary to put an end, at some point, to the effect of intellectual property rights on individual products on the market. This concept is called "exhaustion of rights" or *épuisement*. This doctrine is a necessary ingredient in balancing the significance of exclusive rights against the needs of the markets. In a national context, IP rights with respect to specific products are exhausted as soon as the product is put on the market and sold by the right holder or with its consent, e.g., by way of a license agreement. At this point, the right holder can no longer influence a further transfer of the product on the market by legal means. His or her rights have been "exhausted". Exhaustion only relates to one specific aspect of intellectual property rights: that is, the right of sale after first sale or, to be more precise, the right to control the resale of the protected product after first sale by means of intellectual property rights. It does not affect the existence and exercise of rights in respect to all action taken without the consent of the right holder, for example counterfeiting, piracy, the use of a patented invention or the confusing use of a trademark. Exhaustion does not affect, in other words, the core and essence of an intellectual property right.

Three types of exhaustion exist: national, international and regional exhaustion.[73] They are of practical importance mainly in relation to the regulation of parallel trade,

[71] *See* Report of the Appellate Body, *United States—Import Restrictions of Certain Shrimps and Shrimp Products*, WT/DS58/AB/R (1998), ¶¶ 111–114.

[72] Footnote 1 of the Agreement states:

> When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

[73] *See generally* CHRISTOPHER HEATH, ERSCHÖPFUNG UND PARALLELEINFUHR, in: RECHTSFRAGEN DES INTERNATIONALEN SCHUTZES DES GEISTIGEN EIGENTUMS 27 (D. Ehlers, H.M. Wolffgang and H. Pünders eds., 2002). For further references *see infra* notes 74, 75; Marco M. Slotbooom, *The Exhaustion of Intellectual Property Rights: Different Approaches in EC and WTO Law*, 6 JOURNAL OF WORLD INTELLECTUAL PROPERTY 421 (2003).

i.e., the importation and marketing of genuine products outside contractual channels of distribution—perhaps the most prominent trade-related subject of intellectual property rights protection.

National exhaustion means that the sale of a protected product in one country has no impact on intellectual property rights in another country. The sale on the national market itself leads to the exhaustion of the rights to control the resale of the product in that market only. The doctrine of national exhaustion allows for market segmentation as the exercise of intellectual property rights remains completely independent in different countries and parallel imports therefore can be prevented or challenged.

International exhaustion means that it makes no difference whether a protected product was first sold on the national market or abroad. Regardless of where the first sale took place, the right holder cannot prevent parallel imports by asserting its intellectual property rights. Thus, whoever has acquired a product in a foreign country and which was put on the market with the consent of the right holder, can import it to another country that provides for international exhaustion. The official importer cannot prevent such a parallel trade flow. This typically increases competition within the country of destination of the good, and is likely to lower consumer prices.[74]

Regional exhaustion falls between national and international exhaustion. It does not apply globally, but only exists based on treaty law. Its territorial scope is limited to the respective signatory states, among which international exhaustion applies, while sales to third countries are typically subject to the doctrine of national exhaustion. In effect, it extends national to international exhaustion for two or more countries, fully allowing for parallel trade while limiting its effects to these countries.

The TRIPs Agreement addresses issues relating to parallel trade on two levels. The first one, of course, relates to the problem of exhaustion of rights. The second one relates to the notion and scope of individual intellectual property rights, in particular trademarks and patents.

(b) Scope of Article 6. The issue of exhaustion of rights is addressed in Article 6 of the Agreement which essentially constitutes an "agreement to disagree"[75] In the final stages of the Uruguay Round, the GATT Contracting Parties were unable to address in great detail the complex issue of exhaustion of rights and to agree on a common standard. The scope and content of Article 6 appears to be simple and void of much substance. It provides: "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4, nothing in this Agreement shall be used to address the issue of exhaustion of intellectual property rights". Nevertheless, Article 6 is not devoid of normative content and poses a number of puzzling problems.

First, exhaustion rules are subject to the provisions of non-discrimination, i.e., national treatment and most-favored-nation treatment. While Members remain free to adopt whichever doctrine of exhaustion they wish (national, regional or international), this has to be done on a consistent basis. The practical relevance of national treatment is limited in this context. For example, Members would be precluded from providing rules less favorable to foreign right holders than for nationals on the enforcement of contracts

[74] *See* Frederick M. Abbott, *First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importation*, 1(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW 607 (1998).

[75] *See also* M.C.E.J. Bronckers, *The Exhaustion of Patent Rights under WTO Law*, 32 JOURNAL OF WORLD TRADE 137, 142 (1998).

establishing marketing territories. The implications of MFN treatment are more important as Members are basically not allowed to treat other WTO Members differently in terms of exhaustion of rights of products originating from these countries. To what extent does MFN treatment affect and restrict the use of regional exhaustion?

First, as noted above, customs territories and thus customs unions are deemed to be a single territorial entity for the purposes of the TRIPs Agreement. The use of regional exhaustion within such an entity therefore does not amount to a violation of MFN. Second—and this is of importance to Free Trade Agreements—differential treatment of parallel trade based upon exhaustion or other rules is dealt with primarily as a matter of trade in goods and thus falls under the GATT, as will be discussed below.[76] The country of exportation, rather than the nationality of the right holder, is decisive in determining the exhaustion of rights in relation to the product at stake. For example, a product exported from Switzerland to the EC will be subject to the doctrine of exhaustion applied by the EC to third countries (or on the basis of specific bilateral treaty provisions) even if the right holder is a national of a Member State of the European Union. MFN treatment as to the nationality of the right holder therefore does not exclude differential and preferential treatment of parallel imports based upon categories other than IPRs, in particular provisions relating to free movement of goods in trade agreements.

Finally, provisions other than national treatment and MFN are arguably exempted from invocation, in the context of Article 6, for purposes of WTO dispute settlement between Members. However, Article 6 does not preclude recourse to such other provisions of the Agreement in domestic dispute settlement for the purpose of construing national or regional law relating to exhaustion and parallel trade in accordance with WTO rules.[77]

In conclusion, Article 6 of the TRIPs Agreement, while seemingly clear, does not exhaust the issue of parallel trade in WTO law. Moreover, additional provisions are relevant for the topic.

(c) Related Trademark Provisions. It is important to note that parallel trade is not exclusively defined in Article 6 of the TRIPs Agreement by the doctrine of exhaustion and its different forms—national, regional and international. The issue of parallel trade may also be resolved independently of exhaustion, i.e., *before* the question of exhaustion is reached.

This is so in the case of trademarks. As a minimum standard, TRIPs Article 16:1 grants rights only to the extent that the use of "identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion." The provision primarily applies to counterfeit goods, but is also relevant in the case of parallel trade for the following reason. Article 16:1 creates a presumption of such likelihood of confusion in the case of identical marks used on identical goods or services. The presumption can be rebutted by demonstrating the absence of confusion. This is crucial in parallel trade. The importer of parallel-traded goods originating from different production lines in different countries, but controlled by the same firm and right holder, will generally be able to show that such likeliness of confusion does not exist. Whether or not imported

[76] See *infra* Part III(C)(3)(e).

[77] *Cf. also* Karen D. Lee and Silke von Lewinski, *The Settlement of International Disputes in the Field of Intellectual Property*, in FROM GATT TO TRIPS 317 (Beier and Schricker eds., 1996).

products can be prevented from being put on the market depends on the test of consumer deception and confusion. To the extent that products are identical and of equal quality,[78] the concept of trademark protection in the TRIPs Agreement does not allow the ban of parallel imports. Conceptually, the question of exhaustion does not even arise, and the qualifications of TRIPs Article 6 (and the footnote to TRIPs Article 28:1) are irrelevant with respect to assessing parallel trade in the field of trademarks. As a result, the minimum standard is equivalent to a regime of international exhaustion.[79] It is interesting to note that the Swiss Supreme Court essentially relied upon this test of consumer deception in approaching parallel trade and based its decision, inter alia, on Article 16 of the TRIPs Agreement.[80]

The impact of Article 16, however, is not mandatory and applies in jurisdictions only where national or regional law does not grant protection beyond the minimum standard required by Article 1:1 of the Agreement.[81] Members are free to adopt levels of protection that go beyond the test of consumer deception and to exclude external parallel trade as a matter of principle. This is the case in EC law which applies the doctrine of regional exhaustion independently from consumer deception and thus generally allows the prevention of parallel imports from third countries (and thus protection from competition) also in the field of trademarks.[82]

From the point of view of properly balancing market access, competition and exclusive rights, the rules contained in Article 16 should, in this author's view and considered from a WTO law perspective, be made mandatory and a ceiling to protection. This is an example demonstrating why the TRIPs Agreement should impose both minimum and maximum standards. Discussions held at the International Law Association and recommendations adopted based on a revised version of a report by Professor Frederick Abbott, suggest that there is an emerging consensus in academia as to the application of international exhaustion to the field of trademarks.[83]

(d) Related Patent Provisions. In the field of patents, Article 28:1 of the TRIPs Agreement defines the rights of patent holders as follows (emphasis added):

> (a) where the subject matter of a patent is a product, to prevent third parties *not having the owner's consent* from the acts of: making, using, offering for sale, selling or *importing* for these purposes that product.
> (b) where the subject matter of a patent is a process, to prevent third parties *not having the owner's consent* from the act of using the process and from the acts of: offering for sale, selling, or *importing* for these purposes at least the product obtained directly by that process.

[78] The question arises as to what extent differences between countries with respect to conditions of sale, service plans or warranties can lead to substantial product differentiation and, accordingly, to consumer deception. However, as differences in pricing—the essence of parallel trade—do not create deception, conditions of sale and marketing attached to a particular product should not amount to consumer deception if properly communicated to the customer.

[79] *See also* CHRISTIANE FREYTAG, PARALLELIMPORTE NACH EG- UND WTO-RECHT: PATENTE UND MARKEN VERSUS HANDELSFREIHEIT 225–226 (2001).

[80] *Chanel SA,. Geneva and Chanel SA, Glarus v. EPA SA*, BGE 122 II 469 (Judgment of the Swiss Supreme Court of October 23, 1996). For a translation, *see* ABBOTT, COTTIER, GURRY, *supra* note 7, at 1374.

[81] *See* CHRISTIANE FREYTAG, *supra* note 79.

[82] The compatibility of this approach with the GATT is examined below, *see* text accompanying note 89.

[83] SECOND REPORT (PRELIMINARY) TO THE COMMITTEE ON INTERNATIONAL TRADE LAW OF THE INTERNATIONAL LAW ASSOCIATION ON THE SUBJECT OF THE EXHAUSTION OF INTELLECTUAL PROPERTY RIGHTS AND PARALLEL IMPORTATION, June 25, 1999, ILA Reports, *see also supra* note 74.

The notion of importing in (a)—but not in (b)—is qualified by a footnote: "This right, like any other rights conferred under this Agreement in respect of use, sale, importation or other distribution of goods, is subject to the provisions of Article 6". As Article 6 precludes the use of dispute settlement regarding exhaustion and thereby leaves the concept of exhaustion open to individual Members, the right to prevent imports and sales of parallel trade in patented goods—unlike trademarked goods—is not subject to a uniform minimum standard under the TRIPs Agreement. Clearly, there is no obligation to apply national treatment in patent law as a WTO minimum standard.[84] Members may adopt and entertain different concepts of exhaustion under this provision in patent law.[85] The question therefore arises, as to whether these concepts are subject to potential additional disciplines contained in the GATT and GATS Agreement, the two other main pillars of the WTO legal framework.

(e) The Application of GATT 1994 and GATS. It is still controversial whether or not the TRIPs Agreement *exclusively* addresses parallel trade, and to what extent the provisions of GATT and GATS may and should also be applied to this situation. For reasons stated above and in the light of case law defining the relationship of GATT and GATS,[86] the TRIPs Agreement cannot be read in isolation. The incorporation of intellectual property rights into the multilateral trading system and its goal of insuring fair conditions of competition and enhanced market access cannot be ignored. A number of arguments have been made in support of the exclusive application of the TRIPs Agreement in determining the law of parallel trade.[87] The argument that TRIPs rights are private rights, however, is not compelling. Like all other WTO agreements, the TRIPs Agreement primarily creates rights for Members. First, the fact that those rights are based on obligations to provide certain private rights to the nationals of other WTO Members in defined circumstances, and to make enforcement measures available to them, is irrelevant. As discussed above, the distinction is of relatively minor importance.[88] Second, it is recalled again that the law on parallel trade is based more upon the origin of a product than the nationality of the right holder. The issue should therefore be considered to fall under all pertinent rules of the WTO, including GATT 1994 and GATS.[89] This is true both for the application of current rules and with a view to future negotiations.

[84] *But see* Joseph Straus, *Implications of the TRIPs Agreement in the Field of Patent Law, in From GATT to TRIPs—The Agreement on Trade Related Aspects of Intellectual Property Rights* in 18 STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW, FROM GATT TO TRIPS—THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, 191–195 (Friedrich-Karl Beier and Gerhard Schricker eds., 1996). The author argues that a Member not recognizing international exhaustion would be entitled to take retaliatory measures upon violation of the right to control imports. The view is difficult to reconcile for product patents with footnote 6 of Article 28. *See also* Harvey Bale, *The Conflicts between Parallel Trade and Product Access and Innovation: The Case of Pharmaceuticals*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 638 (1998).

[85] *See, e.g.,* the Swiss Supreme Court in its recent decision: *Kodak SA v. Jumbo-Markt AG*, Swiss Federal Reporter (BGE) 126 III 129 (Judgment of December 7, 1999), where national exhaustion was applied in the context of patents. Interestingly, the Supreme Court had previously ruled in favor of international exhaustion in the field of trademarks (*Chanel v. EPA, supra* note 80) and copyright (*Nintendo Co. Ltd. v. Wahl Eximpo AG*, BGE 124 III 321). *Per contra*: Joseph Straus, *supra* note 84.

[86] *See supra* note 65.

[87] Bronckers, *supra* note 75, at 143–151.

[88] *See* text *supra*, Part II(D).

[89] Thomas Cottier and Marc Stucki, *Parallelimporte im Patent- Urheber- und Muster- und Modellrecht aus europarechtlicher und völkerrechtlicher Sicht*, in CONFLIT ENTRE IMPORTATIONS PARALLÈLES ET PROPRIÉTÉ INTELLECTUELLE? 30–59 (B. Dutoit ed., 1996).

Addressing parallel trade under GATT 1994 raises interesting implications for compensation when a Member joins a customs union. Finally, dealing with parallel trade under GATT and GATS offers the possibility of a new approach to parallel trade which allows for sectoral and more specific regulations on the following grounds.

From the perspective of GATT 1994, the regulation of parallel imports falls under the prohibition of quantitative restrictions and other measures in Article XI.[90] A ban on parallel importation clearly amounts to a restriction of imports in the form of a measure other than tariffs or quotas, to the extent that it is administrated as a border measure, in violation of GATT Article XI. If the goods are seized domestically, and not at the border, the problem would rather be dealt with under the principles of national treatment under Article III GATT, in particular paragraphs 1 and 4.[91] Removal of parallel imports from the shelves of retail outlets, often based upon preliminary injunctions, establishes treatment less favorable to goods of foreign origin, as such remedies are not available for goods which were placed upon the market by or with the consent of the right holder in the country and which are subsequently sold outside the realm of exclusive marketing agreements by parallel traders. Under both Articles III and XI therefore, a ban of parallel imports can only be justified if one of the exceptions to the basic principles of the GATT applies. Article XX:d of GATT 1994 provides a general exception to GATT obligations where a measure is necessary to secure compliance with laws related to the protection of patents, copyrights and trademarks and that are not GATT-inconsistent.[92] First, this clearly encompasses restrictions necessary to combat trademark counterfeiting. Border measures and domestic measures aimed at the prevention of importation, distribution

[90] GATT Article XI:1 states:

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

[91] GATT Article III:1 and III:4 state:

> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
> . . .
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

[92] The chapeau to Article XX and paragraph (d) provide:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary of unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> . . .
> d) necessary to *secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement*, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of *patents, trademarks and copyrights*, and the prevention of deceptive practices. (emphasis added).

and sale of such products come under this provision.[93] Second, Member States operating under the doctrine of national or regional exhaustion may bar the importation of products, as the conditions of Article XX:d are met. For countries operating under international exhaustion, however, this would not be the case and a ban cannot be justified under Article XX:d, as intellectual property rights are exhausted in this case and can no longer be invoked.

Whether an argument against a ban based upon national or regional exhaustion could be developed under the chapeau of GATT Article XX strongly depends on the particular factual aspects of the case. The chapeau addresses arbitrary and unjustifiable discrimination between countries where the same conditions prevail. The chapeau essentially bars Members from abusing regulatory exceptions to market access of foreign products.[94] Regional exhaustion *per se* does not amount to abuse; differential treatment of imports from countries having comparable rights under bilateral trade agreements, however, could amount to unjustifiable discrimination under GATT law if products from countries where the same conditions exist are treated differently.

Tension may equally emerge under GATT Article XXIV and GATS Article V dealing with customs unions and regional integration, respectively. These provisions allow for deviations from MFN in the case of regional trade arrangements, subject to certain conditions. Tariffs and quantitative measures must be abolished with respect to substantiality all trade, and barriers to trade with third countries must "on the whole" not be increased.[95] Such increases occur if a Member operating under the doctrine of international exhaustion joins a customs union which requires its Members to operate under regional exhaustion. This is the case in European integration.

While a number of Member States of the European Communities applied the doctrine of international exhaustion in the field of trademarks (Germany, Austria, and the Nordic countries) under former national law, community legislation provides for exclusive and mandatory regional exhaustion in all fields of intellectual property rights. In the Silhouette case, the European Court of Justice ruled that the doctrine of regional exhaustion is a mandatory standard implemented in different regulations and directives and that member countries are not allowed to apply international exhaustion in third country relations.[96] (The EFTA Court decided the opposite. In light of the fact that the European Economic Area Agreement ("EEA") does not form a Customs Union, the Court stated that jurisdiction over commercial policy towards third countries remains with the parties to the EEA Agreement, and so, therefore, does the choice of international or regional exhaustion.[97])

[93] *Cf. also* Verma, *Exhaustion of Intellectual Property Rights and Free Trade—Article 6 of the TRIPs Agreement*, 29 International Journal of Law and Information Technology 534, 554 (1998).

[94] "The chapeau of Article XX [GATT 1994] is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states". *See United States—Import Prohibition of Certain Shrimp and Shrimp Products, supra* note 71, ¶ 158.

[95] Article XXIV:5(a) provides:

> With respect to a customs union, . . . the . . . other regulations of commerce imposed at the institution of any such union . . . in respect of trade with contracting parties not parties such union shall not on the whole be higher or more restrictive than the general incidence of the . . . regulations of commerce applicable in the constituent territories prior to the formation of such union . . .

[96] *See* ECJ, *Silhouette International Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*, Case C-355/96, [1998] ECR I-4799.

[97] *See* EFTA-Court, *Mag Instrument Inc. v. California Trading Company Norway*, Case E-2/97 (Judgment of December 3, 1997).

In effect, genuine goods protected by intellectual property rights and put on the market outside the European Union no longer can be imported without the consent of the right holder. Under GATT Article XXIV:5(a), these restrictions call for rebalancing and may give rise to compensation to third countries for market access losses incurred. So far, the cost of regional exhaustion has not been addressed in negotiations and no compensation has been claimed or offered upon accession to a customs union.

(f) A New Approach. From a trade policy perspective, IPRs were introduced into the WTO system mainly for the purpose of improving conditions of foreign direct investment and market access abroad. As stated above, the absence of adequate protection amounts to a non-tariff barrier, as much as the excessive protection of exclusive rights. As discussed at the outset, it is important to find an appropriate balance between the two. This is particularly true for the issue of exhaustion of rights and of parallel imports. The problem no longer can be looked at exclusively from the perspective of maximizing intellectual property rights. It has to be dealt with from the perspective of creating level playing fields and avoiding market access distortions, while at the same time providing adequate investment protection. This is an important consequence of placing IPR protection within the WTO.

A combined regulation of exhaustion of rights in the TRIPs Agreement and of parallel trade in GATT, and possibly GATS, would allow the balance to be improved in future negotiations. Existing specific problems caused by parallel importation should be addressed in specific terms, as is already the case with trademarks. In other areas, in particular patents, the issue should be approached as a problem of quantitative restrictions, with the possibility of specific and well-reasoned limitations in specific market areas, depending on market structures and regulation.

GATT Article XX:d allows for trade restrictions, provided they also comply with the requirements of the chapeau, to the extent that they are necessary *to secure compliance with law or regulations which themselves are not inconsistent with GATT* 1994. To the extent that it can be demonstrated that the free flow of imports impairs a particular market regulation designed to serve the public interest (for example accessible health care) and which is not inconsistent with GATT 1994, import restrictions on parallel traded goods could be justified under this provision in order to accompany the domestic regulation and to prevent it from being undermined by imports. Therefore, it is a matter of looking at the domestic and external effects of market regulations, and of seeking optimal coordination of the two. Pharmaceuticals are a likely candidate for such a regime. Given the diverging levels of government intervention in health care and in the procurement of medication, and given the very different systems of financing health care in different countries, it would seem natural that importation be addressed by legislators when internal market regulations are designed.

Market access restrictions based upon Article XX:d GATT are specific to particular products in regulated markets. They are tailor-made and do not stem from the doctrine of national or regional exhaustion which must be applied uniformly for all products, irrespective of whether such restrictions conflict with the public interest, for example to foster price competition. From the perspective of GATT, all doctrines of exhaustion, other than international exhaustion, are too broad. Considering the possibilities of tailor-made and sector-specific restrictions under Article XX:d GATT, WTO law could allow a general doctrine of international exhaustion to operate in a future revision of the TRIPs Agreement. It is important to address the issue by considering the combined impact of both Agreements.

The same is likely true for GATS. The relationship of progressive liberalization of services and parallel trade of services protected by intellectual property rights has not been explored and deserves research. Neither the general provisions of GATS, nor the concept of market access and national treatment in Members' schedules of commitment, address the issue of licensing IP-protected services. Article XVI GATS—unlike Article XX:d GATT—does not contain special exceptions for the protection of intellectual property rights. What are the implications of different doctrines of exhaustion on commitments made? Ways should be developed to combine the goals of GATS and TRIPs, as was suggested for the GATT, both with respect to general rules, and with respect to limitations and conditions set forth in the schedules of Members.

4. Development and Social Policy Goals in the TRIPs Agreement

(a) The Goals and Principles. The TRIPs Agreement reflects the importance of effective protection of intellectual property rights for social and economic development. This is an important ingredient of the rule of law and good governance.[98] At the same time, the Agreement emphasizes that the goals of social and economic development need to be considered in shaping intellectual property regimes. The preamble of the Agreement explicitly recognizes "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives". It equally recognizes "the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base".

In addition to the right to exceed the mandatory standards discussed above, the TRIPs Agreement allows Members to limit protection for certain specific reasons which are enumerated in Articles 7 and 8.[99] Each provision of the TRIPs Agreement is to be read in light of the object and purpose of the Agreement as expressed in the preamble and, in particular vested in these two provisions.

Article 7, addressing the "objectives" of the TRIPs Agreement, states that:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8:1, addressing "principles", states that:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

[98] *See supra* note 3.

[99] *See, e.g.,* C.M. Correa, Intellectual Property and International Trade: The TRIPs Agreement 11 (1998); C. M. Correa, *TRIPs Rulings and the Developing Countries*, 4 Journal of World Intellectual Property 252 (2001); D. Williams, *The First Six Years and Beyond*, 4 Journal of World Intellectual Property 177, 190 (2001); T. Kongolo, *The WTO Dispute Settlement Mechanism: TRIPs Rulings and the Developing Countries*, 4 Journal of World Intellectual Property 257 (2001); R. P. Rozek, The WTO Dispute Settlement Mechanism: TRIPs Rulings and the Developing Countries—Prospects after Seattle, 4 Journal of World Intellectual Property 271 (2001); N.A. Odman, *Using TRIPs to Make the Innovation Process Work*, 3 Journal of World Intellectual Property 343 (2000).

Article 8 acknowledges in paragraph 2 that:

> Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

The wording of these provisions seeks to strike a careful balance between these objectives and principles and the rights protected in the Agreement. Recourse to the requirement that measures need to be consistent with the provisions of the Agreement, however, appears tautological and circular to some extent as this stipulates a predominance of the other provisions of the Agreement. It may support the view that the provisions of Article 7 and 8 merely express that necessary public policy measures do not amount to non-violation nullification and impairment of benefits to the extent that such policies may affect market access and protection of investment. However, subsequent developments in state practice relating to access to essential drugs suggest that that the objectives and principles of Articles 7 and 8 are given a preferred position as they define important public policy goals which must not be prevented by over-extensive protection of intellectual property rights:

In the Doha Ministerial Declaration the Members stressed that the TRIPs Agreement must be implemented and interpreted in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines.[100] In a separate Doha Ministerial Declaration on TRIPs and Public Health, the Members agreed that the TRIPs Agreement does not and should not prevent Members from taking measures to protect public health.[101] This document is of considerable importance in defining the balance between exclusive rights and the needs associated with public health care. It recognizes the importance of protecting intellectual property rights for research-based industries while making it clear that these rights are subject to public health policies. While not officially an "interpretation" in accordance with Article IX:2 of the WTO Agreement, the Declaration will nevertheless influence the interpretation of the TRIPs Agreement beyond the waiver adopted in 2003 in the field of compulsory licenses for essential drugs.[102]

The objectives and principles set forth in Articles 7 and 8 of the Agreement not only apply with respect to the protection of technological subject matter but extend to all intellectual property elements that are related to the socio-economic development of the Members. They are not limited to developing countries. States therefore are entitled to shape domestic intellectual property standards by taking into account, for example, the need to protect and preserve cultural diversity.[103] The long-term impact of these provisions remains to be explored more deeply. So far, the provisions have not yet been fully

[100] *Ministerial Declaration* adopted on November 14, 2001, *supra* note 26, ¶ 17, reproduced in the Appendix to this book.

[101] *Declaration on the TRIPs Agreement and Public Health* adopted on November 14, 2001, WTO Ministerial Conference, fourth session, Doha, November 9–14, 2001, WT/MIN(01)/DEC/2, November 20, 2001, reproduced in the Appendix to this book; on the relationship between trade rules and public health, *see also* the joint study by the *World Health Organization and the World Trade Organization Secretariat* WTO/WHO, WTO AGREEMENTS & PUBLIC HEALTH (2002).

[102] The implications of the Declaration with respect to the interpretation of Article 31 on compulsory licensing of essential drugs is discussed *infra, see* text accompanying note 172.

[103] For the audiovisual sector, *see* Christophe Germann, *Content Industries and Cultural Diversity: The Case of Motion Pictures*, CULTURELINK, June 2003.

explored in jurisprudence. In *United States—Section 110(5) of the U.S. Copyright Act*[104] the Panel had to deal with two U.S. copyright provisions exempting certain transmissions from copyright infringement. The Panel focused mainly on Article 13 of the TRIPs Agreement in order to decide whether these exemptions were permissible. In interpreting Article 13 of the Agreement it failed to make any explicit reference to the objectives and purposes of the Agreement as embodied in Articles 7 and 8.[105] In *Canada—Patent Protection of Pharmaceutical Products*,[106] despite a general reference to Articles 7 and 8, the Panel did not specifically address these provisions in the process of interpreting Article 30. Commentators have identified in these two cases a trend in TRIPs interpretation that does not sufficiently take into account the balance of rights and obligations embodied in Articles 7 and 8.[107] The argument was made that the Panel mainly interprets Article 30 from the perspective of IPR holders, thereby "largely dismissing competing social interests, and reducing considerably the range of regulatory diversity permitted under TRIPs".[108] This concern for appropriate balance is valid. It also applies to industrialized countries and reflects the wording of Article 7 that the protection of intellectual property rights should contribute, *inter alia*, to the transfer of technology for the *mutual* advantage of producers and users. Both need to be taken into account in shaping and fine-tuning WTO obligations in the process of treaty interpretation.

(b) Technical Cooperation and Transfer of Technology. Article 67 requires industrial countries to provide, upon request, technical and financial cooperation in building the IP system. The task not only implies preparation of legislation, but also training and institution building. It does not extend to the transfer of knowledge and technology on the part of the private sector. Substantial efforts to build and reinforce IPR systems in developing countries have been made by Members, and in cooperation with WIPO, over the last decade based on these provisions.

The goals of transfer of technology set forth in Article 7 are understood to be achieved over time as developing countries implement IPR legislation and improve conditions for foreign direct investment. Explicit provisions only exist in relation to least developed countries.

Under Article 66:2 developed countries are obliged to provide incentives to enterprises and institutions at home for the purpose of promoting and encouraging technology transfer to least developed countries. The provision has remained largely without effect. No significant efforts have been made to discuss and introduce governmental measures supporting transfer of technology, such as tax breaks for investing firms, or any other benefits. It remains one of the problems of the TRIPs Agreement that this obligation has not yet been taken seriously, which to some extent undermines the legitimacy of the TRIPs Agreement. Bringing about a more effective transfer of knowledge, information and technology may require more proactive policies. Leaving the matter to the private sector and the market may not be sufficient to achieve the goals of Article 7 of the TRIPs Agreement. Appropriate incentives in the domestic law of industrialized Members should

[104] *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (2000); for a further analysis of this case, *see infra* text accompanying note 118.

[105] *Id.* ¶¶ 6.71–6.101.

[106] *Canada—Patent Protection of Pharmaceutical Products, supra* note 61, ¶¶ 7.24–7.26.

[107] *See* R. Howse, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY 493, 497 (2000); D. Williams, *The First Six Years and Beyond*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 177, 204 (2001).

[108] R. Howse, *supra* note 107, at 494.

be created to this effect. It is hoped that upon the entry into force of all the provisions of the TRIPs Agreement upon the expiry of transitional periods these efforts will be increased.

5. Transparency and Good Governance

Transparency is one of the core principles of WTO law. Building upon the tradition of Article X GATT, Article 63 of the TRIPs Agreement contains important obligations in this regard. Members are obliged to publish not only laws and regulations, but also final judicial decisions and administrative rulings of general application, subject to the protection of undisclosed information affecting trade and commercial secrets of companies involved. Moreover, WTO notification requirements assist in ensuring that new legislation complies with TRIPs obligations. Members are obliged to notify the Council for TRIPs of their laws and regulations for the purpose of facilitating the Council's review of the operation of the TRIPs Agreement. In practice, some of these tasks are already fulfilled through WIPO's Collection of Laws for Electronic Access,[109] a database on the intellectual property-related legislation of most countries in English translation. In addition, under Article 63:3, each Member must be prepared to supply information on its relevant national rules and case law in response to a request from another Member. Article 63 aims at implementing transparency as a prerequisite for dispute prevention and settlement, and as a tool to assess the effectiveness of the TRIPs agreement.

A major portion of the work of the TRIPs Council in its first years consisted in exercising its review function and asserting a certain amount of peer pressure with a view to bringing about compliance. Further support for this effort is provided by regular trade policy reviews of Members under the Trade Policy Review Mechanism ("TPRM").[110] The TPRM reports reflect complaints of Members and responses to those complaints. They contain additional information on the state of play and problems relating to intellectual property protection in the concerned Members.

Perhaps more than any other agreement, the TRIPs Agreement promotes the doctrine of good governance through its rules on procedural standards in Part III of the Agreement.[111] These standards are discussed in Part III(E) of this Chapter. It is important to note that the many provisions in the Agreement on civil, administrative and penal procedures applicable to intellectual property protection not only benefit foreign right holders, but also domestic right holders as the benefit of these rules would normally be made available to them as well. Finally, we note that improvements in these procedures will not be limited to intellectual property, but will carry over to other areas of civil and administrative law enforcement. *De facto*, the TRIPs Agreement makes a general contribution to good governance in the field of judicial administration.

6. Security Exceptions

The TRIPs Agreement does not contain certain of the general exceptions contained in Article XX of the GATT 1994 or Article XVI of the GATS, because the various forms of intellectual property provide significantly different rights, making these general exceptions inappropriate. Instead, exceptions to the obligations are contained in the sections

[109] *See supra* note 9.

[110] *See* Chapter 4 of this book.

[111] *See* Thomas Cottier, *Emerging Doctrines of Good Governance: The Impact of the WTO and China's Accession*, in CHINA IN THE WORLD TRADING SYSTEM—DEFINING THE PRINCIPLES OF ENGAGEMENT 119 (Frederick M. Abbott ed., 1998).

dealing with each form of intellectual property. The Agreement does however provide a general security exception, as do Article XXI of the GATT and Article XIVbis of the GATS. Article 73 imports the criteria already contained in Article XXI of the GATT, essentially allowing Members to exclude fissionable materials, traffic in arms, ammunition and implements of war and related products from protection. In addition, the Agreement allows Members to withhold information the disclosure of which it considers contrary to its security interests. For example, Members may withhold patent information relating to inventions vital to national security. Significantly, protection of intellectual property may be withdrawn through measures taken in case of war or other emergencies in international relations and measures adopted under Chapter VII of the United Nations Charter. The exemption is broadly written, and Members and the international community traditionally have enjoyed substantial discretion in applying these exceptions under GATT 1947.[112] The same standard applies to the TRIPs Agreement. In particular, economic sanctions adopted by the Security Council of the United Nations may substantially impair the operation of existing intellectual property rights, albeit the need to include IPRs in sanctions is less apparent than restrictions applicable to trade in goods and services as detrimental effects of such measures may last beyond the implementation of the sanction and are difficult to remedy in due course.

D. Standards Concerning the Availability, Scope and Use of Intellectual Property Rights (Part II)

The TRIPs Agreement is one of the most complex and detailed of the WTO Agreements. It is not possible to analyze all its provisions and those of the related conventions in great detail in this Chapter. The following discussion seeks to provide the genesis and a survey of the most important characteristics and features of the TRIPs Agreements with respect to particular forms of intellectual property rights.

1. Copyright and Related Rights

The provisions on copyright relating to creators of literary and artistic works are based upon the Berne Convention, the substantive provisions of which are incorporated into the TRIPs Agreement.[113] The Agreement supplements these provisions, in particular by introducing disciplines relating to the protection of records, software and electronic data, and of related or neighboring rights for performers and broadcasters. The Agreement clearly reflects the overall expansion of copyright law into the field of the industrial activities of the information age.[114]

(a) The Negotiating Process. The task of reconciling common law concepts of copyright, in particular U.S. law and practice, with the continental system which includes neighboring rights, i.e., the rights of performers and broadcasters, was extremely difficult to achieve.[115] Even though there was general consensus on the application of the provisions

[112] GATT Analytical Index: Guide to GATT Law and Practice 601 (1995).

[113] *See supra* Part III(B)(3).

[114] For overviews, *see inter alia*: Staehelin, *supra* note 37, at 311; Gervais, *supra* note 27; Blakeney, *supra* note 37; Abbott, Cottier, Gurry, *supra* note 37, at 984; Otten and Wager, *supra* note 37, at 397; Somesh K. Mathur, *Trade-Related Aspects of Intellectual Property Rights and Copyright Provisions—Some Issues with Special Reference to Developing Countries*, 6 Journal of World Intellectual Property 65 (2003).

[115] *See* Thomas Cottier, *The Prospect For Intellectual Property in GATT*, 28 Common Market Law Review 383 (1991), also published in Abbott, Cottier, Gurry, *supra* note 7, at 985.

of the Berne Convention (1971), the United States took the position that entitlement based on moral rights protecting the artistic integrity of works should not be included, because these were considered not to be trade-related economic rights. Subjecting moral rights to the GATT, it argued, could upset the existing balance of negotiating power within the entertainment industry and stir up domestic debate on this contentious subject between authors, film directors and producers.[116] Article 9 thus explicitly excludes the application of Article 6bis of the Berne Convention. Referring to Berne, but making such exclusions, hardly seemed consistent, quite apart from the fact that moral rights indeed raise trade issues as they also affect market access abroad. Paradoxically, the exclusion may particularly affect U.S. films as it leaves possibly extensive bans on altered films (cutting or re-coloring) based upon domestic moral rights without a remedy under WTO law. On the other hand, it also appears doubtful whether inclusion or exclusion would make a strong practical difference, since jurisdiction to challenge the use of moral rights for protectionist purposes already exists under Article XX:d of the GATT, which is not limited to the rights protected under the TRIPs Agreement.

The Agreement completed the development of the protection of computer programs and electronic data compilation by means of copyright. The question of duration of protection, however, was for a long time pending in the drafts, depending on whether or not compilations and programs would be defined as literary works. Some developing countries favored the inclusion of alternative systems of protection and shorter periods of protection. Progress was made with respect to rental rights in the field of computer programs, cinematographic works, as well as phonograms. A compromise established an obligation to introduce rental rights only to the extent that exclusive rights are substantially impaired and nullified. This case-by-case approach eventually produced the "impairment test" which was introduced in the context of the rental of cinematographic works in Article 11, and is a typical product of reconciling the nullification and impairment doctrine of GATT Article XXIII with IPRs. It also borrows from the concept of material injury applied in GATT antidumping, subsidy and safeguard regulations. It is an interesting and perhaps unique example of using graduation and economic thresholds in IPR protection.[117] In the field of neighboring rights, little progress was achieved beyond the protection of phonogram producers who enjoy not only potential rental rights but also a fifty-year term of protection. The lack of progress concerning other neighboring rights was due to conceptual differences between the United States and Europe as well as Japan. While the rights of performers and broadcasters were specifically addressed in former drafts, their current rights do not go beyond those allocated to phonogram producers. They are limited to what is necessary to keep the rights of performers and broadcasters in line with the strongly improved position of phonogram producers thus maintaining a balance in contractual relations.

(b) The Agreement. The provisions related to copyright are set out in Articles 9 to 14 of the TRIPs Agreement. Besides obligating all WTO Members (including prior non-signatories) to comply with the substantive provisions of the Berne Convention, the TRIPs Agreement adds new provisions and clarifies those guaranteed by the Berne Convention. The rights of authors of literary and artistic works are addressed in Articles 9 to 12, the rights of performers, phonogram producers, and broadcasting organizations mainly

[116] Moral rights essentially are personal rights which allow authors and directors to prevent acts such as editing, coloring films and interrupting the performance with extensive commercial spots.

[117] *See also* the Conclusions in Part IV of this chapter.

in Article 14. The protection of performers' rights, which was traditionally limited to European civil law countries, is for the first time dealt with in a multilateral treaty of wider geographical coverage. The TRIPs copyright provisions against counterfeiting and piracy are of particular significance to producers of computer programs and phonograms.

Article 9:1 establishes the relationship between the TRIPs Agreement and the Berne Convention. It obliges the Member States to comply with Articles 1 through 21 of the Convention. As discussed above, moral rights, however, are explicitly exempted from protection in Article 9, referring to Article 6bis of the Berne Convention. In *United States—Section 110(5) of the US Copyright Act*, brought by the EC, the Panel addressed, *inter alia*, the relationship between the TRIPs Agreement and the Berne Convention.[118] In the course of its opinion the Panel clarified the status of the relationship between the TRIPs and Berne provisions. It not only stated that the rules of the Berne Convention "have to be read as applying to WTO Members", but also that the Berne acquis[119] has been incorporated into TRIPs. It held that "the Berne Convention and the TRIPs Agreement form part of the overall framework for multilateral protection"[120] and that, if the incorporation was not intended to cover the Berne *acquis*, the TRIPs Agreement would have explicitly so provided".[121] Generally, "one should avoid interpreting the TRIPs Agreement to mean something different than the Berne Convention except where this is explicitly provided for".[122]

Article 9:2 awards copyright protection only to expressions and not to ideas, procedures, methods of operation, or mathematical concepts as such. The excluded elements are not defined by TRIPs, thus leaving it, subject to treaty interpretation, to Member states and domestic courts to decide what exactly constitutes, for example, a non-protected "procedure" or "method of operation" in software as opposed to protected expression.[123]

Article 10 expands the traditional subject matter of copyright to include computer programs and compilations of data by creating an obligation to protect them as literary works. Like Article 2:5 of the Berne Convention, *Article 10:2* of the TRIPs Agreement requires originality in the selection and arrangement of the contents of a compilation. Merely creating a list of works or extracts without engaging in any creative activity is

[118] *See United States—Section 110(5) of the U.S. Copyright Act, supra* note 104. For a more detailed analysis, *see, e.g.* D. Williams, *The First Six Years and Beyond*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 177, 192 ff (2001); L. R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPs and Economic Analysis of the Fairnes in Music Licensing Act*, 80 BOSTON UNIVERSITY LAW REVIEW 93 (2000); J. C. GINSBURG, TOWARD SUPRANATIONAL COPYRIGHT LAW? THE WTO PANEL DECISION AND THE "THREE-STEP TEST" FOR COPYRIGHT EXCEPTIONS, WORKING PAPER NO. 181, THE CENTER FOR LAW AND ECONOMIC STUDIES, COLUMBIA LAW SCHOOL; GRAEME B. DINWOODIE, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 469 (2000); D. Gervais, *The TRIPs Agreement after Seattle: Implementation and Dispute Settlement Issues*, 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY 509 (2000).

[119] In this specific context, the Panel analyzed the "minor exceptions" doctrine developed in the context of Articles 11bis and 11 Berne Convention (for further details, *see* ¶ 6.42–6.59 of the Panel report, *supra* note 104). As another noteworthy aspect of this decision, the Panel uses "state practice as reflected in the national copyright laws of Berne Union Members" as an additional source of treaty interpretation in order to confirm its conclusion. *Id.* ¶ 6.55.

[120] *United States—Section 110(5) of the US Copyright Act, supra* note 104, ¶ 6.66.

[121] *Id*. ¶ 6.62. To support this reasoning, the Panel mentions, *inter alia*, the treatment of moral rights, which have been explicitly excluded by TRIPs Article 9.1.

[122] *Id*. ¶ 6.66

[123] Whether or not the use of a menu command hierarchy (i.e. the means by which user control and operate) a computer program is expression or "method of operation" was extensively discussed and denied for the United States in *Lotus Development Corp. v. Borland International*, 49 F.3d 807 (1st Cir., 1995), *affirmed* 116 U.S. 804 (1996).

not sufficient to merit copyright protection. If the database is protectable, the copyright protection only extends to the creative elements (e.g., the selection and arrangement of the data) and does not "extend to the material or data itself".[124]

Article 11 provides the exclusive right to authors and their successors to authorize or prohibit the commercial rental of their computer programs and, subject to a so-called impairment test,[125] to their cinematographic works.

Following Article 7:1 of the Berne Convention, *Article 12* of the TRIPs Agreement sets the term of protection of most works that are calculated on a basis other than the life of the author to a minimum duration of fifty years from the end of the calendar year of authorized publication, making, or phonogram fixation/performance.[126] Under *Article 14:5* a term of twenty years is to apply to the rights of broadcasters, respectively, supplementing the twenty-five year term of protection for photographic works which is provided for in Article 7:4 of the Berne Convention.

Article 13 requires Members to confine limitations or exceptions to exclusive rights to (i) "certain special cases" which (ii) do not conflict with normal exploitation of the work, and (iii) do not unreasonably prejudice the legitimate interests of the right holder. The Panel first applied this test in the *U.S. Copyright* case.[127] Since the wording of Article 13 has its roots in Article 9:2 of the Berne Convention, the Panel emphasized that the "preparatory works of Article 9(2) . . . and its application in practice may be of contextual relevance in interpreting Article 13 of the TRIPs Agreement".[128] By applying the above three-prong test to the provisions of the U.S. statute at issue, it held that the exemption in U.S. copyright law from copyright liability for business establishments not exceeding a specified size to transmit or retransmit television or radio broadcasts of non-dramatic musical works failed the first criterion, since too many retail establishments were covered by the exemption to constitute only "certain special cases".[129] However, the Panel found that the home-style exemption, which provided a similar exemption for certain small restaurants and retail outlets using "a single receiving apparatus of a kind commonly used

[124] STAEHELIN, *supra* note 37, at 68. The difficult task of striking a balance between the conflicting interests of right holders (which try to impose maximum control on their databases in order to protect investment) and the interest of the public in free access to information becomes increasingly important in the light of recent revolutionary advances like digital technology and the Internet. Database producers would like to extend the protection to the non-creative elements of the database, the *data* itself (which, as a matter of fact, usually is the most valuable part of the compilation). Many databases (*e.g.*, phone books) are arranged and structured in a way that does not fulfill the "originality" requirement, as held in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991). The U.S. Supreme Court ruled that the extraction of mere data does not infringe the owner's copyright. In the light of these developments, and in order to boost the domestic database market, the European Union introduced a "*sui generis*" law in Directive 96/9/EC of the European Parliament and of the Council of the EU of March 11, 1996 on the Legal Protection of Databases, O.J. L 077, March 27, 1996, at 0020-0028, granting exclusive rights irrespective of the database's eligibility for copyright protection if there had been a "substantial investment" in creating such a database. Similar legislation has been prevented, due to heavy opposition, in the United States up to now. Recently introduced draft bills in Congress rely more heavily on an unfair competition approach. For more detailed information on this issue, *see* Studer, *supra* note 44, at 653.

[125] This is the case when the rental of the copies has led to such widespread copying that the exclusive rights of reproduction are materially impaired. However, this formulation leaves many ambiguities, and many commentators consider it difficult to assess when such a case occurs, *see, e.g.*, Alberto Bercovitz, *Copyright and Related Rights*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 153 (Carlos M. Correa and Abdulqawi A. Yusuf eds., 1998).

[126] For unpublished works, the period of fifty years is counted from the end of the year of making.

[127] *United States—Section 110(5) of the US Copyright Act, supra* note 104, ¶ 6.97 et seq.

[128] *Id*. ¶ 6.72

[129] *Id*. ¶ 6.133.

in private homes," satisfied all three conditions of Article 13. The Panel stressed that, in addition to the actual effect on the market, the potential effect of an exemption should be taken into consideration as well when assessing the permissibility of the exemptions. In doing so, the Panel referred to similar concepts and interpretation standards developed in past GATT/WTO dispute settlement practice. It deemed it appropriate to develop an interpretation of the legal protection of IP right holders that is compatible with the treatment of products under GATT and services/service suppliers under GATS.[130]

In the field of neighboring rights, *Article 14* grants improved protection of rights of performers, phonogram producers, and broadcasting organizations. With respect to performers, *Article 14:1* sets out the protection to be granted (i.e., preventing unauthorized phonogram fixation, reproduction of such fixations, broadcasting by wireless means and communication to the public). Phonogram producers enjoy exclusive rights over the reproduction of their phonograms in *Article 14:2* and exclusive rental rights under *Article 14:4*. Finally, *Article 14:3* requires that broadcasting organizations be given the right to prohibit the fixation, reproduction of fixations, wireless re-broadcasting, and communication to the public of television broadcasts. According to *Article 14:6*, Members may provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention,[131] principally those provided for by Articles 12, 15 and 16 of the Convention.

(c) The Relationship Between TRIPs and the New WIPO Treaty on Copyright. In the *U.S. Copyright* case, discussed above, the Panel also addressed the question of the role of the WIPO Copyright Treaty ("WCT")[132] in the interpretation of the TRIPs Agreement.[133] The Panel held that the subsequent WCT was designed to be compatible with the TRIPs and the Berne Convention framework and should seen as a part of the overall framework of multilateral copyright protection. Therefore, "it is relevant to seek contextual guidance also in the WCT when developing interpretations that avoid conflicts within this overall framework, except where these treaties explicitly contain different obligations".[134] This approach could become of major importance for future disputes involving treaties adopted subsequent to the adoption of the TRIPs Agreement.[135]

(d) Inter-Temporal Application. In relation to copyright obligations with respect to existing works and obligations with respect to the rights of producers and performers in existing phonograms, the principles of transitional application discussed above are governed by special rules. TRIPs Article 70:2 states that such existing rights shall be solely determined under Article 18 of the Berne Convention. TRIPs Article 14:6 extends these rules *mutatis mutandis* to neighboring rights. Since this reference is clear and specific, there is no doubt that the TRIPs Agreement does not directly answer the question of application for existing copyrights and for neighboring rights, but leaves the answer to the special provisions of the Berne Convention (1971).

[130] *Id*. ¶ 6.185.

[131] *Rome Convention, supra* note 9

[132] *WIPO Copyright Treaty, supra* note 9. For the relationship between the Berne Convention and the WCT, *see* Kurt Kemper, *Die Berner übereinkunft und der WIPO-Urheberrechtsvertrag von 1996*, in RECHTSFRAGEN DES INTERNATIONALEN SCHUTZES GEISTIGEN EIGENTUMS 123 (Dirk Ehlers, Hans-Michael Wolffgang and Hermann Pünder eds., 2002).

[133] *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R, *supra* note 104, ¶¶ 6.67–6.70.

[134] *Id*. ¶ 6.70

[135] *See, e.g., Dara Williams, The First Six Years and Beyond*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 177, 203 (2001).

The first two paragraphs of Article 18 of the Berne Convention provide the substantive legal principle and its exceptions:

> (1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.
> (2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

The third paragraph contains important procedural provisions governing implementation of the substantive rules. It follows from this language that the rules set out above are not self-executing, but depend on implementation either by international agreement and/or by national legislation:

> (3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of applications of this principle.

The provisions relating to the protection of existing works have been, for a long time of limited practical interest to Members of the Berne Convention, since the minimum term of protection for copyright was harmonized in 1948. They again became of interest when the Berne Convention entered into force for the United States and other countries, in particular in Central and Eastern Europe. With the extension of these rules to neighboring rights under Article 70:2 *in fine* of the TRIPs Agreement, they are now of general practical interest for phonograms and videograms.

In a legal opinion dated October 10, 1995, the Director-General of WIPO expressed his views on the interpretation of Article 18 of the Berne Convention (the "WIPO Opinion").[136] According to the WIPO Opinion, Article 18 is to be construed to protect all work for which the term of protection has not yet expired in the country of origin when the Convention enters into force.[137] The opinion correctly clarifies that this:

> . . . means "retroactivity" only in the sense that the Convention does not only apply to works that are created or published after the entry into force of the Convention, but also to works already existing, and not in the sense that acts carried out in respect of such works before the entry into force would be relevant".[138]

With the incorporation of the provisions of the Berne Convention into the TRIPs Agreement, the relevant date of entry into force of the Convention is generally January 1, 1996 (and successive dates for new Members). With an agreed duration of protection of fifty years for phonograms (twenty years for broadcasting) in TRIPs Article 14:5, the relevant duration of protection in WTO Member States is fifty and twenty years respectively, provided that the respective provisions have been implemented by the date of entry into force and provided that a Member did not adopt longer terms than those prescribed by the WTO. Therefore, all phonograms protected on January 1, 1996 for fifty years are entitled to protection under the TRIPs Agreement. This basically includes all sound recordings dating from January 1, 1946. The application of this principle, however, is left to Members in accordance with Article 18:3 of the Berne

[136] On file with the author.
[137] *WIPO Opinion, supra* note 136, at 4.
[138] *Id*.

Convention. They remain free to take into account legitimate interests and acquired rights. They also remain free to adopt transitional arrangements in their national legislation that take into account the legitimate interests of those who were formerly in a position to lawfully use sound recordings and had made investments accordingly. A dispute between the United States and Japan concerning this matter was settled to this effect by consultation.[139]

Finally, Article 70:5 stipulates that the provisions on rentals of computer programs, cinematographic works and phonograms do not apply to originals and copies purchased before the entry into force of the Agreement.

2. Trademarks

(a) Negotiating History. Trademark negotiations in the Uruguay Round and its substantial achievements were not really controversial, with the exception of those relating to the "use" requirement. The United States and Canada are the only two countries whose domestic laws require actual use, or the intention to use, for the registration of a trademark. The EC and Japan were opposed to this requirement.[140] As a result of obligations under Article 6 *quinquies* of the Paris Convention, the United States and Canada did not require use in the United States for foreign marks. The United States and Canada only sought recognition of their requirement for use under domestic law for domestic marks, so that parties could not use the TRIPs Agreement to claim that a requirement of use was generally inconsistent with international law.

(b) The Agreement. The Agreement significantly improves trademark protection of goods and services in countries other than Western Europe and North America.[141] For the first time in an international agreement, *Article 15* offers a uniform minimum definition of trademarks (for goods and services), including protection of combinations of colors, but leaving aside other features such as sound or scent marks which are protected by domestic law in some countries, such as the United States. Article 15:3 allows the Members to make registration depend on intended use, but an application may not be refused solely on the ground that intended use has not taken place within three years of the application. *Article 16* specifies the owner's exclusive rights to prevent third parties from using similar marks for goods or services when such use would produce a "likelihood of confusion"—a provision discussed above in the context of parallel trade.[142] The protection of well-known trademarks is extended to services in Article 16:2 and internationally well-known (or famous) trademarks are subject to the minimum standard of protection. According to *Article 16:3,* it is no longer possible to use famous marks in relation to products other than the famous product (e.g., Nike for a sports drink) if such use suggests a linkage with the right holder that is likely to damage his or her reputation. The term of protection under *Article 18* is a minimum term of no less than seven years with an indefinite possibility of renewal. According to *Article 19*, the registration of a trademark can be cancelled only after a period of non-use of three years. *Article 20* and *Article 21* prohibit encumbering the use of trademarks with special requirements (e.g.,

[139] *Japan—Measures Concerning Sound Recordings*, WT/DS28. Consultation were requested on February 9, 1996 and a settlement was announced on January 24, 1997.

[140] Julie Chasen Ross and Jessica A. Wasserman, *supra* note 27, at 2301.

[141] *See also* ABBOTT, C*ottier*, G*urry*, *supra* note 7, at 1247 *et seq*.; STAEHELIN, *supra* note 37, at 86–107; GERVAIS, *supra* note 27, at 102–118; BLAKENEY, *supra* note 37, at 53–67; Otten and Wager, *supra* note 37, at 399.

[142] *See supra* note 78 and accompanying text on the role of Article 16(1) in the context of parallel trade.

requirement for use only in combination with another trademark). Importantly, Article 21 excludes all compulsory licensing in the field of trademarks. The practice of combining, under a compulsory license, a local trademark with a foreign mark in order to launch and promote a product is no longer possible under the TRIPs Agreement.

3. Geographical Indications ("GIs")

(a) Negotiating History. Special trademark protection for goods, the quality and reputation of which is attributable to their particular geographic origin, was one of the most contentious areas of negotiations, and unfinished business was left behind.[143] The protection of sources of origin and appellations of origin has been a long-standing interest and concern mainly to Europeans. A number of international agreements address this issue, but have failed to achieve global reach.[144] The EC and Switzerland insisted that the TRIPs agreement contain protection for "appellations of origin". The differences in the EC and the U.S. approaches were reflected in the different draft proposals addressing the grounds for disallowing an appellation of origin. The EC sought high standards of protection based on "unfair competition" considerations, whereas the United States tried to limit protection to non-generic appellations of origin for wine in cases where the use "would mislead the public".[145] To a large extent the EC position eventually prevailed, taking into account the concerns of the New World and other users of geographical names not consistent with the locus of production. The groundwork for further work on wines and spirits following the Uruguay Round, and possibly more specific protection in future trade rounds, was laid.

(b) The Agreement. Article 22 of the TRIPs Agreement provides a succinct definition of geographical indications "which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." This definition renders eligibility narrower than for trademarks or collective marks but is still broader than the concept of appellation of origin as defined in the 1958 Lisbon Agreement for the Protection of Appellations of Origin. This agreement requires, in addition to GIs, that specific qualities or characteristics need to be expressed in the product itself and that the names directly relate to a particular geographical name of a country, region or locality.[146] The use of symbols, permissible under GIs, are not sufficient to met the requirements of an appellation of origin.

Despite the concise definition, no significant substantive improvement for geographical indications concerning foodstuffs and industrial products was achieved, since the level of protection provided by the TRIPs Agreement remains limited in Article 22:2(b) to

[143] STAEHELIN, *supra* note 37, at 108, GERVAIS, *supra* note 27, at 119–138, BLAKENEY, *supra* note 37, at 68–74; Otten and Wager, *supra* note 37, at 400.

[144] *See* Bernard O'Connor, *Geographical Indications in National and International Law*, 6 MONOGRAPHS IN TRADE LAW 41 (O'Connor Company ed., 2003). Felix Addor and Alexandra Grazioli, *Geographical Indications beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPs Agreement*, 5 JOURNAL OF WORLD INTELLECTUAL Property 886 (2002).

[145] Julie Chasen Ross and Jessica A. Wasserman, SUPRA note 27, at 2303 ff.

[146] Art. 2:1 Lisbon Agreement, *supra* note 9, states:

> In this Agreement, "appellations of origin" means the geographical name of a country, region or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to geographical environment, including natural and human factors.

unfair competition as defined in Article 10*bis*:3 of the Paris Convention. Thus, the use of an indication referring to the true origin of the product is not deemed to be an act of unfair competition and does not imply consumer deception even though the denomination of the product refers to a different geographical area. The proper labeling of products as to their true geographical origin (for example: Parma ham made in the United States) therefore allows for extensive use of geographical attributes in the denomination of a product.

The burden of proof to demonstrate consumer deception rests with the claimant and thus renders protection rather difficult. A higher, absolute level of protection of goodwill and reputation is introduced in *Article 23:1* for wines and spirits, with respect to which even where there is no doubt about the true origin of a product, no linkage may be made directly or indirectly to other geographical names. Protection thus is much stronger. The Agreement, however, balances these rights with existing usages of geographical indications and contains a number of exceptions, as do the sections on other forms of intellectual property. *Article 23:4* protects homonymous indications (i.e., use of identical names simultaneously used in different regions of the world, such as Rioja in Spain and Argentina). *Article 24:4* and *24:7* exclude rollback, i.e., retroactive protection of geographical indication at the expense of established trade marks where they were used in good faith or for a duration of at least ten years, and claims in relation to a trademark must be made within five years after adverse use of the indication has become generally known. *Article 24:5* protects existing trademarks registered in good faith, or for which an application for registration has been filed in good faith prior to the entry into force of the Agreement or to the protection of geographical indications in its country of origin. *Articles 24:6, 24:8, and 24:9* exempt generic use of indications, person's names, and indications that are no longer in use or are no longer protected in their country of origin.

(c) Additional Negotiations. *Article 23:4* of the Agreement obliges Members to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits. *Article 24:1* obliges Members to enter into negotiations aimed at increasing the protection of individual geographical indications. Efforts undertaken to this effect within the TRIPs Council between 1995 and 2000 did not materialize. The obligation in Article 23:4 was affirmed (as extended to spirits by the Singapore Ministerial Declaration) in paragraph 18 of the Doha Ministerial Declaration:

> With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPs) on the implementation of Article 23:4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPs pursuant to paragraph 12 of this Declaration.[147]

Since the Uruguay Round, geographical indications have also become of increasing interest for developing countries. While trade liberalization mainly benefits large producers, benefits may accrue to smaller producers by promoting and protecting niche markets for special products that have a given quality, reputation, or other characteristic that is essentially attributable to their geographic origin. The protection of geographical indications is a potentially useful tool in this regard.[148] It is one of the areas in intellectual

[147] *Ministerial Declaration* adopted on November 14, 2001, *supra* note 26.

[148] *See* P. Vandoren, *The TRIPs Agreement: A Rising Star*? 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 307, 316 (2001).

property protection where benefits may directly accrue to developing countries, many of which still strongly rely upon agriculture. The following statement underscores the point:

> The subject of geographical indications is of particular interest to developing countries because of the importance to those countries of the remunerative marketing of their agricultural production. The expansion of the full scope of the TRIPs geographical indications regime to those products is an effective demonstration of the relevance of the Agreement to their economic circumstances. Resistance to this extension may communicate an unfortunate message to those countries about the political realpolitik of the international intellectual property regime.[149]

The Doha Declaration also requires the TRIPs Council "to examine, *inter alia*, the relationship between the TRIPs Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments . . .".[150] In the context of this mandate, geographical indications may be one of the forms of protection suitable to enhance development in accordance with these objectives, and proposals to extend GIs to all products were tabled by Switzerland on behalf of 20 developed, developing and transitional countries.[151] The protection and promotion of niche products based upon traditional knowledge and a broad range of genetic resources may assist both in bringing about additional income to farming communities in developing countries and may support the ecological goal of preserving biodiversity through commercial use of these resources.[152]

Efforts to extend protection of geographical indications continue to be met with skepticism for a number of reasons. First, it is feared that extension will enhance protectionism, perhaps replacing tariffs and subsidies as barriers to trade. Moreover, it is feared that the system will be expensive. It is submitted that both arguments can be addressed. First, geographical indications do not exclude similar or like products on the market. They are limited in their effect to products that free-ride on reputation, much like trademarks. If there are problems of exclusion of competing products, they primarily arise domestically when eligibility of producers to use a geographical indication is defined. Provided that adequate transitional arrangements are reached, that there is no rollback, and the protection of homonymous products is assured, restrictions on international trade remain limited. Enhanced protection is likely to stimulate new and innovative products. It may not be a coincidence that new wines originating in countries like Chile and Australia have successfully conquered traditional markets after the Uruguay Round. Second, the international system of registration will be financed internationally and does not particularly burden national budgets. To the extent that a new regulation does not contain rollbacks (which is unlikely) there will be particular marketing costs due to re-branding of products. As Article 23:1 and the Doha Declaration do not specify the legal nature of the future system, it remains open at this stage whether registration will be legally constitutive of rights (the European view) or merely an instrument of information

[149] Michael Blakeney, *Proposals for the International Regulation of Geographical Indications*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 629, 652 (2001); Felix Addor and Alexandra Grazioli, *supra* note 144.

[150] *Ministerial Declaration* adopted on November 14, 2001, *supra* note 26. *See also* GERVAIS, *TRIPs, Doha and Traditional Knowledge*, 6 JOURNAL OF WORLD INTELLECTUAL PROPERTY 403 (2003). *See also infra* note 161.

[151] TRIPs Council, *The Extension of Additional Protection for Geographical Indications to Products other than Wines and Spirits*, IP/C/W/353 (June 24, 2002).

[152] On this point *see* the Conclusions in Part IV of this chapter.

(the U.S. view).[153] The matter will need to be addressed by taking into account the possible extension to products other than wines and spirits, and a uniform approach should be designed. From the perspective of legal security and efficiency, constitutive effects may be combined with limitations on excessive protection (and thus maximum standards) with a view to finding an appropriate balance between the protection of niche products and market access and efficiency.[154]

4. Industrial Designs

(a) Negotiating History. Negotiations on industrial designs were difficult. There was controversy as to whether the standards of protection to be granted for industrial design should be based on the protection available in Europe or in the United States.[155] The EC wanted the United States to expand coverage of its domestic design patent law. The initial U.S. proposal excluded "functional" designs from protection and was limited to designs that are "new, original, ornamental and non-obvious." One of the main practical interests at stake was trade in automobile spare parts. The automotive industry sought to obtain protection from cheaper parts produced by foreign competitors. Extension of protection was, therefore, opposed by developing countries and the car insurance industry. The interests of the textile industry, which sought enhanced protection for fashion designs, were another driving force in the negotiations and resulted in modest improvements. Overall, the minimum standard of protection that was agreed maintains a reasonable level of creativity, but allows Members to grant more extensive protection if they so wish.

(b) The Agreement. Members are obliged by *Article 25* to provide for the protection of independently created industrial designs that are new or original. Protection can be withheld from "designs dictated essentially by technical or functional considerations". Members must ensure that the requirements for obtaining protection for textile designs do not unreasonably impair the opportunity to obtain such protection. *Article 25:2* was included in recognition of the short lifecycle of such design creations due to changes in fashion and amounts to a novel instrument in design protection. Together with Article 62, discussed in Part III(F) below, *Article 25:2* creates an obligation to, and pressures for, facilitating filing procedures in countries notoriously slow in registering designs which depend on fashion cycles. Moreover, in many countries copyright protection can also be used as a possible way for protecting designs without any registration requirements.

5. Patents

(a) Negotiating History. From the beginning, patents were among the most contentious subjects of the Round, and the differences were not limited to North-South issues, as Members may have thought when the subject was placed on the negotiating agenda of

[153] In the context of a Multilateral Register of Geographical Indications for Wines and Spirits, *see* proposal of the US (IP/C/W/133/Rev. 1 (July 26, 1999)) and proposal of the EU (IP/C/W/107/Rev.1 (June 22, 2000)).

[154] Current standards of protection in European Community Law should be rebalanced. Two recent judgments of the European Court of Justice to require Parma ham to be sliced and packaged, as well as Grana Padano cheese to be grated and packaged, in the respective region of production in Italy, are difficult to understand from a trade policy point of view and efficient servicing of international of markets—see ECJ, *Consorzio del Prosciutto di Parma and Salumificio S. Rita v. Asda Stores Ltd*., Case C-108/01, [2003], and ECJ, RAVIL SARL V. BELLON IMPORT SARL, Case C-469/00 [2003].

[155] *See* STAEHELIN, *supra* note 37, at 125; GERVAIS, *supra* note 27, at 138-143; BLAKENEY, *supra* note 37, at 75–80; Otten and Wager, *supra* note 37, at 391, 400.

the Uruguay Round.[156] The negotiations addressed a number of key political issues: patentability, exclusions, non-discrimination, patent term, burden of proof, rights conferred, compulsory licenses, and the problem of government use.[157]

Negotiations on patent protection were key to the success or failure of the Uruguay Round. It was clear that without major commitments in this area, no package deal would be possible. Negotiations were strongly supported and monitored by industry, in particular the research-based pharmaceutical industry, and took place under considerable industry pressure. Although at the outset, the developing countries strongly opposed the introduction of product patents for certain fields of technology as well as a minimum patent duration, the negotiations succeeded in establishing a comprehensive set of rules, for reasons already discussed above.[158] Once the principle of equal protection for all sectors of technology was agreed upon, negotiations focused on possible exemptions from patentability, which remained contentious until the conclusion of the negotiations. Except for India, at the end of the day most parties were increasingly prepared to accept the inclusion of foodstuffs, pharmaceuticals and agricultural chemical products, the latter two subject to extensive transitional provisions. The debate shifted instead to complex issues involving biotechnological and genetically engineered products, as patenting of pharmaceuticals and agrochemical products increasingly depend on patenting of biotechnology and genetic engineering. Extensive patentability of such inventions in Australia, the United States, and Japan created comparative advantages, which partly explain the increasing exodus of research and know-how from Europe where legal foundations of patenting life forms and related regulations are more restrictive. The provisions on patentability reflect the compromise achieved, but also indicate that this will not be the final word on the matter.

The second issue of fundamental controversy related to compulsory licensing of patents, the conditions of which are of great importance. While compulsory licenses are granted only rarely, the rules and conditions on compulsory licensing set the stage for voluntary, contractual licensing and influence the playing field for the negotiation of commercial contracts. Developing countries and Canada argued in favor of an obligation to work the patent domestically (i.e., excluding importation even on normal commercial terms). Exporting countries argued that importation should fully satisfy the requirement of exploitation or working as economies of scale would not permit local "working" in the territory of every WTO Member. Negotiations resulted in Article 31 of the Agreement. This provision, for the first time in international law, contains a detailed list of substantive and procedural conditions for compulsory licensing, yet leaves the motives for compulsory licensing to Members. A balance was sought between the legitimate use of compulsory licensing and the conditions to be met. Again, post-Uruguay Round discussions show that the issue has remained highly controversial. Patent law will remain a key issue for years to come.

(b) The Agreement. According to *Article 27:1*, patents shall "be available for any inventions, whether products or processes, in all fields of technology", as long as these

[156] For a historical account, *see also* THOMAS COTTIER, *The Prospect For Intellectual Property in GATT*, 28 COMMON MARKET LAW REVIEW 383 (1991), also published in ABBOTT, COTTIER, GURRY, *supra* note 7, at 985.
[157] *See* STAEHELIN, *supra* note 37, at 142; GERVAIS, *supra* note 27, at 144–172; BLAKENEY, *supra* note 37, at 81–95; ABBOTT, COTTIER, AND GURRY, *supra* note 7, at 685 ff.; Otten and Wager, *supra* note 37, at 391, 400 *et seq*.
[158] *See supra* Part III(C)(4).

inventions are new, involve an inventive step and are capable of industrial application. Even though these requirements can be found in many national patent laws, the negotiating parties considered it necessary to place these provisions in the TRIPs Agreement. The main normative content of the provision consists in the all-encompassing coverage of both process and product patents in all fields of technology, thus the coverage of pharmaceuticals and agro-chemical products, subject to exceptions in *Article 27:2* and *3. Article 27:1,* also deals with the principle of non-discrimination as to the place of invention, the fields of technology and the country of production. In this context, the underlying difference between the U.S. "first-to-file" system and the more usual "first-to-invent" system is not addressed directly, but member countries are required not to discriminate in the availability of patent protection according to the place of invention. The conceptual issue leading to this affirmation of non-discrimination was that, except in very limited circumstances, the United States did not allow evidence of inventive activity that took place outside the United States, with the result that if two inventors applied for a patent on the same invention, the inventor who made his or her invention in the United States would be favored by the law.

Important exceptions from patentability are embodied in *Article 27:2 and 27:3*. Article 27:2 contains the basic general exceptions. It allows the exclusion from patentability of inventions "the commercial exploitation of which is necessary to protect *ordre publique* or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to the environment". Unlike the European Patent Convention, this provision accepts that the mere publication of inventions can infringe public order.[159] *Article 27:3(a)* permits Members to exclude from patentability diagnostic, therapeutic, and surgical methods for treatment of humans and animal, but not products associated with those methods. *Article 27:3(b)*—embodying a transitional compromise—permits Members to exclude plants and animals from patentability and essentially biological processes for the production of plants and animals. Micro-organisms and non-biological and microbiological process must however be protected. The provision also obliges Members to provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. While plant varieties are patentable at present in only a few countries (e.g., the United States, where such patents have a twenty-year term measured from the date on which the patent application was filed), the UPOV Convention (Union Pour la Protection des Obtentions Végétales) is the prime example of "sui generis" protection. The provision, however, allows equally for alternative *sui generis* systems. A number of countries have combined such protection with rights under the Convention on Biodiversity for access and benefit sharing.[160]

On January 1, 1999, *Article 27:3(b)* became subject to review. Beyond stocktaking, substantive negotiations did not take place and the matter will need to be addressed under the Doha Development Agenda. Success will depend on the integration of the newly emerging topic of protecting traditional knowledge in order to rebalance the system in the age of biotechnology. Efforts to introduce obligations for prior informed consent as a requirement to grant a patent, and thus to allow for objections on the basis of prior

[159] STAEHELIN, *supra* note 37, at 147.

[160] *See* P. Cullet, *Revision of the TRIPs Agreement Concerning Protection of Plant Varieties: Lessons from India concerning the Development of a Sui Generis System*, 2 JOURNAL OF WORLD INTELLECTUAL PROPERTY 617 (1999); *see also* the Conclusions in Part IV.

art, are being made in order to improve the potential for benefit sharing and adjust and prepare international patent law for the era of biotechnology.[161]

Article 28:1(a) confers on the owner of a product patent the exclusive right to prevent third parties that do not have their consent from making, using, offering for sale, selling, or importing that product. With respect to process patents, under *Article 28:1(b),* the patent owner must have the exclusive right to prevent third parties from using the process and from using, offering for sale, selling, or importing for these purposes the product obtained directly by that process. As discussed above, this provision also touches the issue of parallel imports. Footnote 6 clarifies that the right to prevent third parties from importing patented products is subject to TRIPs Article 6, which allows Member to apply the principle of national, international or regional exhaustion in their domestic IP regimes.[162] At any rate, the patent owner must have the possibility of preventing imports if the product infringes the patent or was manufactured in a third country based on compulsory licenses.

Article 29 clarifies the conditions for the grant of a patent, requiring disclosure of the invention in the patent application in a manner that enables a person skilled in the art to carry out the invention. Members are permitted to require, in addition, disclosure of the best mode known to the inventor at the filing or priority date.

Article 30 allows Members to grant limited exceptions to the rights conferred with a view to balancing the need for protection against the advantages of leaving the matter partly in the public domain. Such exemptions may be motivated by practical reasons, excluding rights in constellations of minor economic importance and difficult to enforce, or by public interest policies to render the subject matter of the patent more readily available to competitors and the public at large. The exception must be limited, not unreasonably conflict with normal exploitation of the patent, and, finally, not "unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties".

These tests of reasonableness and legitimate expectations were the main focus of a case brought by the EC, *Canada—Patent Protection of Pharmaceutical Products*.[163]

At issue was the TRIPs consistency of Sections 55:2(1) and 55:2(2) of Canada's Patent Act, which create exceptions to the exclusive rights of patent owners. Canada's regulatory review exception (Section 55:2(1)) allows potential competitors of the owner of a patented product to use the patent during its term of protection in order to obtain government marketing approval where necessary to sell the product after expiry of the patent. This provision was of particular relevance to the pharmaceutical industry.[164] The stockpiling exception (Section 55:2(2)) allows competitors to manufacture and stockpile patented goods for a period of time before the patent expires in order to be in a position to begin marketing as soon as the patent expires.[165]

[161] *See* COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 3, at 111–122. A submission to amend the TRIPs Agreement ensuring prior informed consent and fair and equitable sharing of benefits in the field of bioprospecting was tabled by a group of developing countries including Brazil, China, Cuba, the Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe (*see* TRIPs Council—*The Relationship between the TRIPS Agreement and the CBD and the Protection of Traditional Knowledge,* IP/C/W/356 (June 26, 2002); *see* also the Conclusions in Part IV of this chapter.

[162] *See supra* note 80.

[163] *Canada—Patent Protection of Pharmaceutical Products, supra* note 61.

[164] *Id*. ¶ 7.2.

[165] *Id*. ¶ 7.7.

The EC argued that Canada had violated Article 28:1 of the TRIPs Agreement by allowing manufacturing and stockpiling before the patent term expires. Additionally, Canada allegedly treated patent holders in the field of pharmaceutical inventions differently than all other patent holders by allowing activities such as the Section 55:2(1) marketing approval process. In order to justify its measures, Canada claimed that the regulatory review and stockpiling provisions fell under Article 30. It also argued that none of the provisions reduced *de facto* the term of protection to less than twenty years. In its report, the Panel applied the three criteria test of Article 30. Like TRIPs Article 13,[166] the language of this provision was inspired by Article 9:2 of the Berne Convention:[167] The Panel found the regulatory review exception to be consistent with Article 30 of the TRIPs Agreement and not inconsistent with Article 28:1.[168] The stockpiling exception, however, was considered to be a substantial curtailment of the exclusionary rights required to be granted to patent owners under Article 28:1 of the TRIPs Agreement and therefore inconsistent with this provision.[169]

Article 31 deals with three major issues: government use, compulsory licensing and dependent patents. Government non-commercial use of a protected invention (or such use by a private contractor on behalf of the government), as stated in *Article 31:b,* obliges government officials to promptly inform the right holder, thereby allowing the patentee to claim remuneration and the other rights granted under *Article 31.*

Article 31 allows compulsory licensing for patents. In doing so, it does not address legitimate motives and leaves their determination to Members. They are free to invoke compulsory licensing for whatever purpose they choose. However, the Agreement strictly regulates the conditions to be met for compliance, i.e., consideration of each case on its individual merits, prior effort and failure to achieve authorization from the right holder on commercial terms (except in cases of national emergency, extreme urgency and public, non-commercial use), limitation of the compulsory license to the purpose for which it was initially authorized, proper compensation to the patent holder, and judicial or other independent review. Additionally, the license must be non-exclusive, non-assignable, authorized predominantly for the supply of the domestic market under *Article 31:f,* and only be allowed while the circumstances giving rise to the license still prevail. Countries may bypass some of the above conditions in the case of anti-competitive conduct by right holders as determined on the basis of national law by courts or administrative bodies under *Article 31:h*. The provisions need to be read in conjunction with additional criteria for compulsory licensing of Article 5:2 of the Paris Convention. Potential tensions were already addressed above.[170]

The provisions on compulsory licensing have, so far, remained untested in WTO dispute settlement. However, they were at the heart of the political discussions and negotiations relating to the issue of access to essential drugs, mainly AIDS/HIV drugs, but also drugs for other epidemics (malaria, tuberculosis, etc.). The invocation of the TRIPs Agreement by governments, at the urging of the pharmaceutical industry, to prevent the

[166] *See supra* note 127 and accompanying text.

[167] *Canada—Patent Protection of Pharmaceutical Products, supra* note 61, ¶ 7.29.

[168] *Id*. ¶ 7.39.

[169] *Id*. ¶ 7.36. The panel first considered whether this specific exception to the patent owners right (to exclude "making" and "using") could be considered as being "limited". It observed that nothing in Section 55.2(2) limited the quantity of production, so that the stockpiling exception would therefore entirely remove the protection during the last six month. *Id*. ¶ 7.34.

[170] *See supra* Part II(B)(3).

use of compulsory licensing and parallel importation of less expensive drugs gave raise to political initiatives, which greatly put at risk the reputation of intellectual property, the TRIPs Agreement and the WTO. The declaration produced by the Doha Ministerial Conference on the TRIPs Agreement and Public Health was born out of the necessity to respond to the political challenge.[171] It recognized that many least developed countries do not have the capacity to produce pharmaceuticals and depend on cost efficient imports. Of concern was the availability of low priced imported products after 2005, when all developing countries must have in place product patent protection for pharmaceutical products and could no longer freely export generic products still under patent protection, since Article 31:f does not allow to grant compulsory licensing predominantly for the purpose of exportation. The Declaration mandated Members to negotiate a solution to this problem.

Efforts were made to bring about an instrument by which obligations to exclude the granting of compulsory licensing for exportation would be waived. By the end of the year 2002 all Members seemed to have agreed upon a solution except the United States which for the time being, echoing the concerns of research-based industries, refused to agree to inclusion of all medicines beyond those relating to epidemics.[172] The argument for inclusion of all medicines is that HIV/AIDS triggers the need for inexpensive access to a great number of drugs as the deficiencies of the immune system cause different diseases.[173] The argument against broad coverage is that it would essentially undermine the general obligation to introduce effective patent protection for pharmaceuticals by the end of 2005. Prior to the Ministerial Meeting at Cancun, a solution could be found. A waiver was adopted which is based upon broad product coverage, but emphasizes additional criteria in support of good faith recourse to exemptions granted for compulsory licensing for the purpose of exports.[174] These criteria will allow to avoid and counter the abuse of compulsory licensing.

In the long run, questions concerning compulsory licensing could be addressed based on existing rights and obligations under the TRIPs Agreement. A company's refusal to grant a reasonably priced compulsory license for the export of an essential drug to a country in need that is unable to produce the drug itself is arguably an abuse of rights and could be considered under the national law of the exporting country as anti-competitive conduct.[175] The problem remains, however, that most countries do not have the necessary funding to buy the drugs or to compensate companies for the imposition of compulsory licenses. Nor do they have effective competition laws. What is primarily needed are

[171] *See supra* note 26. The problem stirred an intensive debate, *see, e.g.*, D. Nash, *South Africa's Medicines and Related Substances Control Amendment Act of 1997*, 15 Berkeley Tech. Law Journal 485 (2000); S.M. Ford, *Compulsory Licensing Provision Under the TRIPs Agreement*: Balancing Pills and Patents, 15 American University International Law Review 941 (2000); A. Subramanian, *The Aids Crisis, Differential Pricing of Drugs and the TRIPs Agreement: Two Proposals*, 4 Journal of World Intellectual Property 322 (2001).

[172] *Cf.* Ismail Faizal, *The Doha Declaration on TRIPs and Public Health and the Negotiations in the WTO on Paragraph 6—Why Pharma Needs to Join the Consensus*, 6 Journal Of World Intellectual Property 393 (2003); Tshimango Kongola, *TRIPs, the Doha Declaration and Public Health*, 6 Journal Of World Intellectual Property 373 (2003); Eric Noehrenberg, *TRIPs, the Doha Declaration and Public Health*, 6 Journal Of World Intellectual Property 379 (2003).

[173] *Cf.* Frederick M. Abbott, The *TRIPs Agreement, Access to Medicines, and the WTO Doha Ministerial Conference*, in 5 Journal of World Intellectual Property 15 (2002).

[174] *Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health,* Decision of the General Council of August 30, 2003, WT/L/540. For the draft see IP/C/W405 (August 28, 2003) and Note by the Chairman of the TRIPs Council JOB(03)177 (August 27, 2003).

[175] Thomas Cottier, *TRIPs, the Doha Declaration and Public Health*, 6 Journal of World Intellectual Property 385 (2003).

solutions outside the TRIPs Agreement, such as the creation of a fully functioning global fund. The case of access to medicines is a classical example of blaming WTO and the TRIPs Agreement for problems which are mainly caused by factors outside the trading system and therefore primarily need to be addressed by the appropriate institutions.

The issue of dependent patents is addressed in *Article 31:l* of the TRIPs Agreement. In some cases, a patent is based on some prior, protected invention. It is therefore dependent since it cannot be exploited without recourse to the older patent, and thus requires a license to work. *Article 31:1* requires compulsory licensing in case use of the patent cannot be agreed. Three additional conditions need to be met: (i) the second patent involves an "important technical advance of considerable economic significance," (ii) the owner of the first patent is allowed to receive a cross-license on reasonable terms on the second patent, and (iii) the first patent may not be assigned except with the assignment of the second patent.

The minimum term of protection under *Article 33* is twenty years from the filing of the patent application. Transitional issues arose upon entry into force of the Agreement. In *Canada—Term of Patent Protection*, provisions of the Canadian Patent Act giving patents filed before October 1, 1989 a protection term of seventeen years from the day the patent was issued were challenged by the United States.[176] *Article 33* of the Agreement requires a patent protection term of at least twenty years from the filing date for all patents in existence as of January 1, 1996. Canada considered its law to be in compliance arguing, *inter alia*, that the Agreement does not have retroactive application and that a term of seventeen years from grant provides, *de facto*, a longer protection period than twenty years from application. The Panel concluded that Canada's Patent Act failed to comply with Article 33, since some patents[177] did not enjoy the minimum patent term. Additionally, the Panel found that the wording of Article 70:2 of the TRIPs Agreement (dealing with protection of existing subject matter—see Part III(A)(2) and III(D)(1)(d) of this chapter) includes inventions protected by patents that were in effect on January 1, 1996.[178] The Appellate Body upheld the findings of the Panel.[179]

Article 34 includes a reversal of the burden of proof in the case of process patents. It generally is very difficult for the patent owner to demonstrate that another product has been produced using the same patented process, as it has no lawful access to the premises and undisclosed information of the competitor. *Article 34* therefore requires the defendant to demonstrate that a different process has been used to obtain an identical product if the product obtained by the patented process is new or if there is a substantial likelihood that the process was used and the patent owner, through reasonable efforts, has been unable to determine the process actually used.

(c) Inter-Temporal Application. As transitional periods up to ten years were granted to developing countries for the introduction of extended product patent protection under Article 65 (see Part III(H) of this chapter), it became necessary to design special

[176] *Canada—Term of Patent Protection, supra* note 63. For further details, *see, e.g.*, S. A. Mota, *TRIPs: Five Years of Disputes at the WTO*, 17 Arizona Journal of International & Comparative Law 533, 546 (2000).

[177] *Canada—Term of Patent Protection, supra* note 63, ¶ 6.6. The Panel observed that this dispute only involves "patents for which applications were filed before October 1989, which were granted less than three years after filing, which were in effect on January 1, 1996 and are still in effect". *See* Mota, *supra* note 176, at 533, 547.

[178] *Canada—Term of Patent Protection, supra* note 63, ¶ 7.1.

[179] *Canada—Term of Patent Protection*, Report of the Appellate Body, WT/DS170/AB/R (2000), ¶¶ 61–66.

intertemporal rules. Short of such rules, patent applications would only be possible as of January 1, 2006, and effective protection would result only after the additional period required for the examination and the grant of the patent. The issue is addressed in *Article 70:8 and 9* of the TRIPs Agreement which lay the foundations for the so-called "pipe line protection" and "mail-box" provisions. These provisions serve the purpose of making patent protection available from the entry into force of the product patent requirement, and of protecting a Member's priority rights in an invention.

Under these provisions, developing countries are obligated to make available, from the entry into force of the Agreement, "a means by which applications for patents can be filed" in the field of pharmaceuticals and agricultural chemical products before regular patent applications will be made available (January 1, 2006). However, the criteria for patentability under this Agreement and of priority rights shall apply as from the date of the application of the Agreement (generally January 1, 1995). Effective patent protection is to be granted only upon the expiry of the ten year transititional period, but will be counted from the date of filing through the remainder of the period. For example, if a patent is filed under the mail-box provision on April 1, 1998 in a country entitled to the ten-year implementation period, patent protection takes effect on January 1, 2006 for the period up to April 1, 2018. In addition, *Article 70:9* requires a Member to grant exclusive marketing rights for products for which an application has been filed under Article 70:8 and, in addition, a patent has already been granted abroad and marketing approval was obtained. This obligation extends to five years or until the patent is granted, which ever period is shorter.

The implementation of this provision triggered a number of disputes. Some were settled by consultation, others led to panel and Appellate Body recommendations. *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, discussed above, was the first case ever to address the TRIPs Agreement.[180] Separate complaints by the United States and the European Communities took issue with the legal quality of administrative measures put in place by India and the lack of regulations granting exclusive marketing rights. Both resulted in findings that the measures did not meet the requirements of the Agreement since (i) they failed to assure effective priority rights, and thus the future validity of patents applied for, and (ii) failed to provide for exclusive marketing rights.

6. Layout-Designs (Topographies) of Integrated Circuits

(a) Negotiating History. The creation of special rights for the lay-out designs of integrated circuits responded to the needs of an industry that was rapidly growing in the 1980s. Instead of protecting these products by means of existing forms, such as patent, copyright or industrial designs, the view prevailed that a separate instrument be created. On the level of international law, this strategy was consolidated by the Treaty on Intellectual Property in Respect of Integrated Circuits ("IPIC" or the "Washington Treaty", adopted May 26, 1989. Although the Treaty never entered into force, it was eventually incorporated into the TRIPs Agreement. This strategy allowed contentious issues which could not be resolved in IPIC negotiations to be addressed in the Uruguay Round: the duration of protection and the protection of the *bona fide* acquisition of products containing counterfeit circuits.

(b) The Agreement. The provisions of Articles 35 to 38 implement and reinforce the "Washington Treaty". They are of particular importance not only to the protection of

[180] *supra* notes 54 and 55.

topographies as such, but also for all products that include topographies.[181] The provisions significantly strengthen the legal position of the right holders as they are linked with the enforcement provisions. In order to avoid distortions caused by potential abuse of border enforcement procedures, it is necessary to equally protect the interest of importers and bring about an appropriate balance of interests.

Article 35 requires Member countries to protect the layout-designs of integrated circuits in accordance with the provisions of the Washington Treaty. In addition, the the TRIPs Agreements clarifies several points. In *Article 38* the term of protection is extended from eight to ten years from the date of filing or from the first commercial exploitation wherever it occurs. *Article 36* defines the rights and their broad applicability to products containing infringing integrated circuits. The provision bans the import, sale, or distribution of unlawfully produced designs or circuits, and applies to the many products incorporating such designs or circuits. The breadth of product coverage made it imperative to limit the application to willful and negligent infringement. *Article 37* excludes the *bona fide* buyer of counterfeited goods. Acts of incorporating a counterfeited layout design into an integrated circuit, or incorporating the latter into any product, are not deemed unlawful if the person performing the act did not know or had no reasonable ground to know when acquiring the product that it contained an unlawfully produced layout-design. Given the number of integrated circuits contained in many products, this provision essentially limits the reach of the article to producers and traders, to the exclusion of consumers, since consumers are usually not in a position to know, and cannot be expected to know, the origin of layout-designs incorporated in a product which they buy on the market.

7. Protection of Undisclosed Information

(a) Negotiating History. The legal regimes for the protection of undisclosed data vary greatly among countries. There were many definitions of trade secrets, sometimes substantially different, on the national level, and many jurisdictions did not even provide a legal definition of trade secrets.[182] The protection of undisclosed data also varied considerably within national jurisdictions, such as the United States, where protection is provided on the federal and state levels, but mainly through the federal Uniform Trade Secrets Act.[183] In the United States protection resulted mainly from the development of case law in the fields of contract, unfair competition, and criminal law. In contrast to countries having a long tradition of such case law, those jurisdictions that more recently provided for the protection of undisclosed data did so by codification, often as a result of pressure from industry.[184] In many countries, no adequate protection was available.

The disparities in approaches and standards of protection, and the occasional lack of protection, required a more harmonized way of addressing this issue. The question of trade secrets was raised in an early phase of the Uruguay Round negotiations as one of the pressing issues. There were essentially two needs. First, the extension of liability to companies receiving unlawfully disclosed information. Second, improved protection of information submitted to authorities for purposes of product approval, so as to prevent its

[181] *See* STAEHELIN, *supra* note 37, at 163, 173–180; BLAKENEY, *supra* note 37, at 96–101; Otten and Wager, *supra* note 37, at 391, 401.

[182] MEITINGER, *supra* note 21, at 42.

[183] *Uniform Trade Secrets Act* (14 U.L.A. 433–67 (Supp. 1998)).

[184] For an extensive review of EC regulations pertaining to protection of undisclosed information *see* COTTIER AND MEITINGER, *supra* note 47.

leak or impermissible disclosure to competitors. Many delegations, however, argued that trade secrets and test data protection are not part of the traditional body of intellectual property rights and, therefore, should not be dealt with in the TRIPs Agreement.[185] It was only by tying the protection of trade secrets to Article 10*bis* of the Paris Convention, which was to be incorporated by reference into the TRIPs Agreement, that the concept was finally accepted. Likewise, Article 1:2 of the TRIPs Agreement, by reference to Section 7 of Part II of the Agreement, formally includes the protection of undisclosed information into the rights protected under the TRIPs Agreement. This is an interesting example of transmutation from unfair competition to intellectual property protection, building upon unfair competition principles and the standards of honest business practices. This treatment still leaves the legal nature of the protection of undisclosed information somewhat unsettled in WTO law. While international law now considers trade secrets as a novel category of IP rights,[186] national regulations still tend to limit the protection of trade secrets to the prevention of unfair competition, and thus to weaker protection.

(b) The Agreement. Article 39 of the TRIPs Agreement essentially consists of two parts.[187] The first part deals with the concept and definition of undisclosed information. The second part, contained in Article 39:3, addresses specific problems in handling research-based data that must be submitted to governments to obtain marketing approval for pharmaceutical and agricultural chemical products.

Article 39:2 addresses the first concern and defines undisclosed information as information that is secret, has commercial value because it is secret, and has been subject to reasonable steps by the person lawfully in control of the information to keep it secret. Secrecy is defined in terms of the absence of knowledge and of accessibility to "persons within the circles that normally deal with the kind of information in question"; the standard therefore is relatively demanding. It builds upon the professional environment of a business sector and not on accessibility of the information to the public at large. By providing harmonization and a detailed definition, the TRIPs Agreement contributes to greater legal certainty. The provision builds upon Article 10*bis* of the Paris Convention which obligates Members to assure protection against unfair competition. Paragraph 2 of this provision defines an act of unfair competition more concretely as "any act of competition contrary to honest practices in industrial or commercial matters", and paragraph 3 provides an illustrative list of practices that must be prohibited (creating confusion, discrediting a competitor and misleading the public), but does not address the issue of undisclosed information. Moreover, this general obligation does not determine the way in which the protection must be implemented and, therefore, leaves broad leeway to national legislators. *Article 39:2* of the TRIPs Agreement significantly improves protection and in effect creates a specific intellectual property right by providing that "natural and legal persons shall have the possibility of preventing undisclosed information (meeting the above requirements) lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices". Footnote 10 may be the most important and innovative provision in this section of the Agreement. It defines " a manner contrary to honest commercial practices" in

[185] COTTIER AND MEITINGER, *supra* note 47, at 26–29, 52.

[186] The various drafts of *Article 39* of the TRIPs Agreement also inspired Chapter 17 of the NAFTA Agreement and Decision 486 of the Andean Pact. COTTIER AND MEITINGER, *supra* note 47, at 51.

[187] *Id*. at 32–33, STAEHELIN, *supra* note 47, at 181–187; BLAKENEY, *supra* note 37, at 102–107; Otten and Wager, *supra* note 37, at 391, 402.

terms of a minimal standard. Besides conduct relating to contract law (breach, inducement to breach, breach of confidence), it provides that the owner of a trade secret has a claim against a recipient of the data who knew, or was grossly negligent in failing to know, that the acquisition of the data was unlawful. Often, the person who breached a contractual duty of secrecy is a natural person and, compared to the acquirer of the secret (often a company), not wealthy. This provision gives the owner of a trade secret a claim against the recipient company. Members are therefore obliged to create the tort liability of companies with respect to such acts.

Article 39:3 of the TRIPs Agreement addresses the second concern, the protection of information required by Members to be submitted to governmental authorities to obtain marketing approval for pharmaceutical and agricultural chemical products.[188] This provision obligates Members to secure fair competition among competitors, by providing for the protection of test data so as to prevent unfair commercial use by third parties. Therefore, the government institutions in question are not obliged as a matter of law to keep the information secret under all circumstances, provided that the data is protected against unfair commercial use. The solution was criticized as it does not provide full protection for trade secrets.[189] It reflects the hybrid nature of current levels of protection and its origins in unfair competition rules. Additional rules on protecting undisclosed information can be found in Article 40:3 and relate to anti-trust procedures.

8. Control of Anti-Competitive Practices in Contractual Licenses

(a) Negotiating History. Intellectual property rights are an important basis of contractual arrangements. This is perhaps the most important function of IP rights as it allows cooperation with business partners domestically and internationally. Since such contracts may infringe national competition rules, and no such disciplines were available in the GATT, the Members decided to include a carve-out provision in the Agreement and to assure minimum levels of cooperation in addressing anti-competitive practices.[190] This was a particular concern of developing countries, and the provision is closely linked to the principles and goals set forth in Articles 7 and 8 of the TRIPs Agreement. The difficulty consisted of striking an appropriate balance between the protection of exclusive rights and the potential of them being abused in contractual relations, while avoiding at the same time that domestic competition law would erode what was achieved under the TRIPs Agreement. In respect of cooperation, negotiations on Article 40 were able to build upon existing comity in the field as developed by the OECD.

(b) The Agreement. Article 40 of the Agreement recognizes that some licensing practices or conditions pertaining to intellectual property which restrain competition may have adverse effects on trade and can impede the transfer and dissemination of technology. The two portions of this provision should be read separately, as licensing agreements may adversely affect the importation of final products or investment and the transfer of technology. Member countries may, in accordance with *Article 40:2,* adopt appropriate

[188] For a detailed analysis of this provision *see* Thomas Cottier and Ingo Meitinger, *The Protection of Test Data Submitted to Governmental Authorities: The Impact of the TRIPs Agreement on EC Law*, in: MARKETING AUTHORIZATION FOR PHARMACEUTICAL PRODUCTS AND THE PROTECTION OF SUBMITTED DATA, Schriften des Europa-Instituts der Universität Saarland 27, 53–72 (W. Meng and Torsten Stein eds., 2000).

[189] RICHARD E. NEFF AND FRAN SMALLSON, NAFTA: PROTECTING AND ENFORCING INTELLECTUAL PROPERTY RIGHTS IN NORTH AMERICA 100 (1994).

[190] *Cf. also* STAEHELIN, *supra* note 37, at 171–177; GERVAIS, *supra* note 27, at 188–192; BLAKENEY, *supra* note 37, at 108–118; Otten and Wager, *supra* note 37, at 391, 402.

measures to prevent or control licensing practices or conditions "that may in particular cases constitute an abuse of intellectual property rights having an adverse affect on competition in the relevant market". This provision requires such measures to be consistent with other provisions of the Agreement. The existence of intellectual property rights per se therefore cannot be considered anti-competitive; while the exercise of licensing practices governing IP rights may be anti-competitive if it amounts to an abuse of the IP right. The provision gives a number of examples, such as exclusive grant-back conditions, coercive package licensing or restrictions against challenges to the validity of a contract, but leaves further determinations to national law. Limitations on such restrictions are difficult to define in the abstract. The provision is based upon the doctrine of abuse of rights, and extensive restrictions of the ordinary exercise and use of intellectual property rights amounts to a violation of the TRIPs Agreement. Future negotiations on trade and competition may assist in clarifying the relationship between competition and intellectual property rights with a view to enhancing legal security in this field.

Article 40:3 provides a mechanism whereby a Member can enter into consultations with other Members and exchange publicly-available information in order to facilitate action against anti-competitive practices. Members are obliged to enter into consultations with the requesting Member. There is however no obligation to impose restrictions. Since export cartels are generally excluded from the jurisdiction of competition authorities, the potential for effective cooperation to combat abusive practices having effects abroad are limited. Moreover, Members are obliged to protect undisclosed information pertaining to private parties affected. Overall, the obligation remains a procedural one. Future negotiations on trade and competition will need to address the problem with a view to bringing about more effective procedures, and obligations of mutual assistance in anti-trust procedures.[191]

Article 40:4 provides similar consultation rights for a Member whose companies are involved in competition proceedings in the jurisdiction of another Member. This is a form of diplomatic protection. For the reasons discussed with respect to Article 40:3, the instrument is weak and requires further development.

E. Enforcement of Intellectual Property Rights (Part III)

Effective legal protection depends both on substantive norms and the efficient and fair administration of justice. This is equally true for intellectual property rights protection. In many countries, implementation of and respect for rights fails due to lack of adequate and effective legal protection before administrative and judicial authorities. This is particularly true for intellectual property since it is a complex area of law often unfamiliar to regular courts and often alien to the legal tradition of developing countries. Efforts in the GATT prior to the Uruguay Round focused on combating counterfeiting and piracy which essentially entailed efforts to improve domestic and border enforcement. It was clear from the outset that comprehensive negotiations on trade-related aspects of intellectual property protection in the GATT, and subsequently the WTO, could not be limited to the definition of minimum substantive standards, but would need to extend to standards on judicial, administrative and even penal protection of IPRs. These efforts amounted to one of the most interesting and challenging tasks of the negotiation. None of the conventions

[191] *See* Benoit Merkt, Harmonisation internationale et entraide administrative internationale en droit de la concurrence (2000); Thomas Cottier and Ingo Meitinger, *supra* note 47.

administrated by WIPO addresses the issue of effective enforcement. A common and new ground between different legal traditions and systems had to be found. Developing countries resisted these efforts for a long time on the ground that the issue of enforcement goes far beyond aspects of international trade. Moreover, improving enforcement would not come without additional financial burdens which were not considered a priority in the process of development.[192] Negotiations were based upon comprehensive drafts submitted by the United States, the European Communities and Switzerland. They can be characterized as a process of mutual approximation or *approchement* between common law traditions which entail party-driven instruments such as pretrial discovery, and the European-based approach leaving procedures and investigation much more in the hand of the courts. The result amounts to a first and quite substantial harmonization of civil and administrative law procedures in international law, while leaving room for alternative solutions reflecting different legal traditions. Many of the provisions are expressed in non-mandatory terms, allowing Members, but not obliging them, to authorize judicial and administrative authorities to take certain measures. These formulations demonstrate, on the one hand, the remaining divergences between judicial systems. On the other hand, they also prescribe and confirm that such measures as authorized, but not mandated, by the Agreement do not amount to excessive procedural requirements and, consequently, cannot give rise to violation and non-violation complaints.

As the implementation of these rules in national legislation inherently reaches beyond the realm of intellectual property protection, the provisions of Part III of the TRIPs Agreement may be described as a body of common procedural standards in international law. The norms resulting from the negotiations reflect a considerable level of detail. They are particularly apt to be referred to in the process of interpretation and application of domestic law under the doctrine of consistent interpretation. They are equally suitable for direct effect where such effect is constitutionally permitted.[193] These points are of particular importance for the European Community. By means of the provisions on enforcement, a common regional standard in EC law was achieved for which no internal jurisdiction or competence existed in internal, domestic EC law. It is no coincidence that the provisions on enforcement resulted in a considerable expansion of the jurisdiction of the European Court of Justice in matters relating to civil procedure, and the doctrines of consistent interpretation and direct effect were first probed by the court in the field of WTO law.[194]

While compliance with Part III only required few, but sometimes important changes in the legislation of industrialized countries, major implementing legislation was often required in developing and transitional countries, assisting the process of reinforcing the rule of law and good governance. The Agreement, however, does not oblige Members to provide additional and special resources for the protection of intellectual property rights distinct from the resources provided for the enforcement of laws in general. Article 41:5 provides a significant limitation, stating that "[n]othing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general." Developing country efforts to reinforce the judicial system for the purposes of intellectual property right protection, however,

[192] Julie Chasen Ross and Jessica A. Wasserman, *supra* note 27, at 2308.

[193] *See* Part III(B)4 of this chapter.

[194] With respect to the interpretation of Article 50 of the TRIPs Agreement in the context of European law, see ECJ Case C-53/96 *Hermès International v. FHT Marketing Choice BV* (1998) ECR I-3603; Case C-300/98 *Parfums Christian Dior SA v. Tuk Consultancy BV* and Case C-392/98 *Assco Gerüste GmbH and Rob van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV* (2000) ECR I-11307.

have to be supported by developed country Members through technical cooperation under Article 67 of the Agreement.

1. General Obligations

Article 41 of the Agreement stipulates a number of fundamental principles which apply in general and to all the subsequent, more specialized provisions of Part III. It requires Members to ensure that enforcement procedures are available under their law that permit effective action against any act of infringement of intellectual property rights covered by the TRIPs Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. The relevant test in assessing enforcement procedures is trade-related, examining whether they create barriers to legitimate trade and whether they provide safeguards against their abuse. *Article 41:2* requires the procedures to be fair and equitable. Standards of fairness and equity are incorporated in the provisions throughout this Part. In addition, they need to be defined by reference to general principles of law. Procedures must not be unnecessarily complicated or costly, and must not entail unreasonable time-limits or unwarranted delays. *Article 41:3* entails the fundamental principle that a decision on the merits of a case is to be reasoned, preferably in writing. Oral decisions therefore are not prohibited, and may be applied primarily in the field of rapid, provisional measures. Decisions on the merits must be based solely upon evidence in respect of which the parties were offered an opportunity to be heard.

These important provisions apply to all judicial systems alike and embody the fundamental right to be heard and the right to reasoned decision-making. They also apply, in accordance with Article 62:4, to administrative revocation and inter-partes procedures, such as opposition, revocation and cancellation of rights. *Article 41:4* builds upon the tradition of Article X:3(b) of the GATT and prescribes the obligation to provide for appeal mechanisms. Members are required to provide for review of final administrative decisions by independent judicial authorities. As to judicial decisions in civil matters, the agreement is limited to a minimal standard. Members are free to define the jurisdictional threshold for appeal commensurate with the importance of the case (e.g., in terms of monetary thresholds). Within this range, they need to provide at least for review of legal issues on the merits. There is no obligation to provide for a second level of appeal. As to penal cases, judicial review is required for convictions, but not for acquittals.

Implementation of Part III is supported by obligations of Members to cooperate in international law enforcement in accordance with Article 69 of the Agreement. Members are obliged to establish and notify contacts point in their administrations and be ready to exchange information on infringing goods. Particular emphasis is laid on cooperation and exchange of information between customs authorities "with regard to trade in counterfeit trademark goods and pirated copyright goods".

2. Civil and Administrative Procedures and Remedies

The provisions of Section 2 of Part III of the TRIPs Agreement further specify the concept of fair and equitable procedural principles commensurate with well-established general rules of civil procedure. According to *Article 49*, they also apply to administrative procedures to the extent that "any civil remedy can be ordered as a result of administrative procedures on the merits of the case." The following requirements deserve particular emphasis:

Footnote 11 to *Article 42* defines right holders entitled to civil procedures to include federations and associations having legal standing in accordance with domestic law.

Parties shall be entitled to substantiate their claims. To this effect, the provision requires Members to allow representation by legal counsel. The requirement of personal appearance of right holders and defendants shall not be "overly burdensome"; an item of particular importance in transnational litigation. Defendants need to be served with sufficiently detailed and timely written notice. Subject to the constitutional law of Members, the confidential information of parties to the dispute needs to be protected, for example by making available a summary of factual evidence to the other party.

Article 43 contains important rules on evidence. *Article 43:1* obliges Members to require parties to a dispute, based upon sufficiently substantiated claims, to produce evidence in administrative and judicial proceedings, subject to the protection of undisclosed information. If a party fails to produce such evidence, *Article 43:2* empowers administrative and judicial authorities to make determinations based on the available evidence.

Article 44 addresses injunctions which are of particular importance in intellectual property litigation, especially in cases relating to counterfeiting or unlawful parallel trade. It requires domestic laws to grant power to local judicial authorities to prevent imminent infringements of intellectual property rights. This provision, applicable to proceedings on the merits and to be distinguished from independent provisional measures addressed in Article 50, sets forth minimum standards for injunctions requiring a party not to commit an infringement or to cease infringement. In particular, local judicial authorities should be empowered, immediately after customs clearance of such goods, to prevent the entry into the channels of commerce of imported goods that infringe an intellectual property right and to seize the respective goods. Members are not required to extend such mechanisms to situations where the importer did not know, or did not have reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right. In such cases, the right holder would need to await the judgment on the merits.

Article 45 requires that the damages awarded must constitute adequate compensation for the injury, including payment of the expenses of the right holder which, depending on the judicial system, may also (but need not) include appropriate attorney's fees. This minimum obligation is limited to willful or careless infringement. In addition, authorities may have the power to recover profits and/or the payment of pre-established damages. This possibility is available also in cases where the infringers did not knowingly, or with reasonable grounds to know, engage in infringing activity.

In addition, local authorities shall have the mandatory authority under *Article 46* to seize infringing goods and to prevent the further delivery of infringing services (e.g., film screenings). Instruments ("implements") that predominantly serve to create infringing goods ("*instrumenta sceleris*"), such as production facilities and machinery, computers, etc., are also to be subject to seizure. For many countries, this amounts to an important additional obligation, reinforcing the fight against counterfeiting at its source. Judicial authorities shall have the authority to remove infringing goods and implements from the channels of commerce without compensation. Subject to the constitutional requirements of Members and the principle of proportionality, this may also involve destruction. Counterfeit goods or unlawfully imported goods in parallel trade may be used and consumed outside the channel of commerce, for example by making them available to food and support programs. Authorities are obliged to engage in a process of balancing the interests involved with a view to preventing further violations. As a result, goods may stay in the channel of commerce, even though the treaty specifies that mere removal of trademarks is generally not sufficient to comply with the TRIPs Agreement.

Article 47 provides an arguably very effective tool for detecting the sources of infringements. Provided that the measure appears to be proportionate to the infringement, the judicial authorities shall have the authority to require the infringing person to disclose (i) the identity of third persons involved in the production and distribution of the infringing goods or services, and (ii) their channels of distribution. While these obligations strongly reinforce the position of right holders, *Article 48* protects defendants against abusive claims and measures. The provision is designed to deal with cases of so-called procedural harassment where measures imposing unjustified restrictions were granted. Appropriate remedies to compensate for damage must be made available. Accordingly, the judicial authorities must have authority to order the applicants to pay the defendant's expenses, which may include appropriate attorneys' fees. Members may exempt both public authorities and officials from appropriate remedial measures where unjustified actions are taken in good faith in the course of enforcing intellectual property laws.

3. Provisional Measures

Provisional measures applied for and granted beyond the ordinary civil or administrative remedies discussed above, amount to one of the most effective and important tools in enforcing intellectual property rights. Most cases against infringement or, as the case may be, unlawful importation and distribution by way of parallel trade, are settled by means of such procedures and do not reach the stage of ordinary and costly proceedings on the merits. The powers granted in *Article 50* are of particular importance for trademark and copyright enforcement in the field of software protection as evidence of infringement can be easily destroyed upon notice of impending measures. A number of countries were obliged, following consultations under the DSU, to alter their legislation accordingly.[195]

Article 50 is therefore a core provision of the TRIPs Agreement.[196] Applying both to civil and administrative proceedings (*Article 50:8*), *Article 50:1* obliges Members to make available prompt and effective provisional measures in order to (i) prevent an infringement from occurring, "in particular to prevent the entry into the channels of commerce in their jurisdiction or goods, including imported goods immediately after customs clearance", and (ii) "to preserve relevant evidence in regard of the alleged infringement". The Agreement sets detailed mandatory standards to this effect. In particular, according to *Article 50:2* the judicial authorities shall have the authority to adopt such measures without having heard the defendant prior to taking action ("*inaudita altera parte*"). Such measures are subject to certain conditions set forth in Article 50:3 and 50:5: (i) the rights of the claimant must be reasonably established, (ii) any delay is likely to cause irreparable harm or where there is a risk of evidence being destroyed, and (iii) the goods concerned must be clearly identified and the applicant may therefore may be required to supply additional information necessary for the identification of the goods. Upon taking measures *inaudita altera parte, Article 50:4* requires that the defendant must be notified without delay of the measure and granted access to judicial review within a reasonable period to decide upon maintenance, revocation or modification of the measures. *Article 50:6* of the Agreement requires that the provisional measures are revoked or otherwise cease to

[195] *See* consultations held between the US and the EU: *Portugal—Patent Protection under the Industrial Property Act*, WT/DS37/2/Corr.1; *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86/2; *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83/1.

[196] *See generally*, Hannes Schloemann, *Rechtschutz nach Massgabe des Article 50 TRIPs*, in RECHTSFRAGEN DES INTERNATIONALEN SCHUTZES GEISTIGEN EIGENTUMS 189 (Dirk Ehlers, Hans-Michael Wolffgang and Hermann Pünder eds., 2002).

have effect upon request of the defendant, if the claimant does not initiate proceedings on the merit within a reasonable period of time. Such period is to be determined by the judicial authority ordering the provisional measure. Failing such determination, it shall not exceed 20 working days or 31 calendar days, whichever is shorter. This requirement and safeguard of linking provisional measures to proceedings on the merit amounts to a defining element of provisional measures compatible with WTO law. Article 50 gave rise to interpretation by the European Court of Justice and was applied in accordance with the doctrine of consistent interpretation with respect to both national law and the European trademark regulation.[197] Furthermore, Article 50 is particularly suitable for direct effect when its safeguard provisions do not exist in domestic law. Under *Article 50:7*, courts may order the applicant to pay appropriate damages to the defendant, if the measure turns out to be unjustified.

4. Special Requirements Related to Border Measures

Border measures operated by customs authorities provide the second central mainstay for enforcing intellectual property rights.[198] Counterfeit goods are best intercepted at the point of importation. Once they have reached the channels of distribution, law enforcement is more difficult and burdensome as complaints may need to be filed in different jurisdictions.

The provisions of Section 4 of Part III of the TRIPs Agreement deal, with measures ordered by custom administrations with respect to the importation of counterfeit trademarked or pirated copyrighted goods. "Counterfeit trademark goods" (not including geographical indications) and "pirated copyright goods" (including goods protected by neighboring rights) are defined in a footnote to *Article 51*.[199] There is no obligation to apply this Section to patented products, industrial designs, layout-designs, or geographical indications. However, if border measures are extended to other forms, there must be compliance with the procedures set forth in the Agreement. Furthermore, Members can also provide the same measures against infringing goods destined for export from their territories.

Article 52 requires the applicant to provide *prima facie* evidence of an impending infringement, and conditions are defined to this effect. Upon acceptance of the application, the authority informs the applicant as to the duration of the measure taken and, in accordance with *Article 54*, both the applicant and the importer are promptly notified of the suspension of the release of the goods at stake.

[197] See *supra* note 40

[198] STAEHELIN, *supra* note 37, at 185; Hannes Schloemann, *supra* note 196; Reginhard Henke, *Produktpiraterie und Zoll*, in RECHTSFRAGEN DES INTERNATIONALEN SCHUTZES GEISTIGEN EIGENTUMS 211 (Dirk Ehlers, Hans-Michael Wolffgang and Hermann Pünder eds., 2002).

[199] Footnote 14 reads:

> For the purposes of this Agreement:
>
> (a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
>
> (b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

Article 53 allows authorities to require a reasonable, non-deterrent security or an equivalent assurance sufficient to protect the interests of the defendant and the authority in case wrongful actions is taken and compensation is due in accordance with *Article 56*. In cases other than trademark counterfeiting and copyright piracy as defined above (industrial designs, patents, layout designs and undisclosed information) the importer or consignee of such goods is entitled to their release on the posting of a sufficient security. This reflects the fact that assessing violations of IPRs in these areas is more difficult than in the field of trademarks and copyright protection.

Article 55 defines the duration of suspension of release and the relationship to proceedings on the merits. Given the powerful impact of this instrument, customs authorities are obliged to release the goods if they are not informed within ten working days that proceedings on the merits have been initiated by the applicant or that the competent judicial authority has taken provisional measures prolonging the suspension of the goods in accordance with Article 50. If proceedings on the merits have been initiated, the defendant is entitled to initiate review of the measure and to be heard. Measures may be subsequently modified, revoked or confirmed within a reasonable period of time.

Article 56 addresses the indemnification of the importer and owner of the goods for injury due to wrongful detention of goods or through detention of goods released pursuant to Article 55. The provision obligates Members to grant authorities the authority to require the applicant to pay the owner of the goods or the consignee appropriate compensation for injury caused. The Agreement does not set forth any standards and criteria to this effect and Members may base such compensation on their tort law. Also, the provision is silent on the responsibility of customs authorities. Article 53 implies that the responsibility remains exclusively with the applicant vis-à-vis the defendant. Additional remedies for *ex officio* action are required by Article 58.

Under *Article 57* Members are obliged to grant the local authorities power to allow the right holder to inspect the goods in order to substantiate its claim, and the importer must also be granted the right of inspection. The Members are to authorize their authorities to inform the right holder of the names and addresses of the consignor, the importer and the consignee, and of the quantity of the goods in question if a positive determination has been made on the merits of a case.

Customs authorities are not limited to acting upon motion by the applicant. According to *Article 58*, Members may, but are not obligated, to empower competent authorities to order *ex officio* enforcement measures relating to the protection of intellectual property on the basis of *prima facie* evidence. Where such powers exist, a number of safeguards must be respected: (i) authorities are entitled to request additional information from the right holder at any time, (ii) the importer and right holder need to be promptly informed about the suspension of customs clearance (*Article 58(b)* implies that appeal procedures shaped *mutatis mutandis* in accordance with Article 55 must be available to the importer); (iii) liability of public authorities and officials for unlawful suspension must be made available and can only be excluded for acts taken or intended in good faith. The standard provides minimum protection against willful or negligent infringement.

Article 59 renders the principles and rules of Article 46 on disposal or destruction of infringing goods applicable to ex *officio* measures. Other than in exceptional circumstances, counterfeit trademark goods may not be released into a third country in an unaltered state, thus somewhat limiting the flexibility available under Article 46. Under *Article 60* Members may exclude *de minimis* imports from the application of the provisions in Section 4.

5. Criminal Procedures

The TRIPs Agreement contains in *Article 61* the first generation of penal provisions in the WTO system. It nevertheless leaves Members considerable flexibility in implementing the provision. Members are obligated to prosecute, at a minimum, willful trademark counterfeiting and copyright piracy (as defined in Article 51) on a commercial scale.[200] Penalties must include imprisonment and/or monetary fines. Members are obliged to set standards of punishment consistently with penalties provided for crimes of comparable gravity. In other words, they need to show consistency in their criminal policies. Penalties for other infringements, including negligent trademark or copyright violations, are permitted, but not required. Penal law must allow for the seizure, forfeiture and destruction of infringing goods and implements (defined in Article 46) in appropriate cases. The provision does allow Members to adopt extensive criminal sanctions without running the risk of facing challenges under violation or non-violation complaints, even though the threat of such sanctions may have considerable trade-restricting effects, for example in the field of internet communication.

F. Acquisition and Maintenance of Intellectual Property Rights and Related Inter Partes Procedures (Part IV)

Experience in a number of countries has shown that registration procedures for the acquisition and maintenance of IPRs may lead to disguised forms of willful or negligent denial of protection and even encouragement of use of information contained in pending applications, for example in the field of patents or industrial designs (fashion).[201] The time required to examine and grant protection is often excessive and cannot be justified in procedural terms. Other forms of disguised restrictions of protection include excessively high fees for registration or maintenance. As a result, the TRIPs Agreement contains requirements applicable to IP registration and maintenance procedures. Negotiations on the subject were difficult as Members were not prepared to specifically address the administrative and cost structure of domestic intellectual property offices. For example, no provision addresses the problem of excessive registration or maintenance fees, except for a general reference in Article 41:3, also applicable to registrations, and for the registration of textile designs in Article 25:2. The general reluctance is expressed in the first sentence of Article 61:1, which merely stipulates that Members may require compliance with reasonable procedures and formalities. This formulation, which should be mandatory, is somewhat at odds with the mandatory formulations in Articles 61:2–5.

According to the second sentence of *Article 62:1,,* formalities must be consistent with the TRIPs provisions. For example, a country cannot require a registration procedure for the acquisition of copyright because Article 5:2 of the Berne Convention, incorporated into the TRIPs Agreement, precludes formalities with respect to the enjoyment and exercise of copyright. As noted above, Article 25:2 stipulates procedural requirements as to cost, examination and publication of textile designs—much of this provision would have been better placed in this Part of the Agreement. *Article 62:2* requires Members to grant titles within a reasonable period of time, yet without specifying particular ranges.

[200] Even through Article 61 is framed as an alternative (by stating that criminal procedures and penalties be applied at least to trademark counterfeiting *or* copyright piracy), measures clearly need to be put in place for both trademarks *and* copyright.

[201] See *also* STAEHELIN, *supra* note 37, at 190-193; GERVAIS, *supra* note 27, at 237-240; BLAKENEY, *supra* note 37, at 140-148; Otten and Wager, *supra* note 37, at 391, 403.

Article 62:3 requires priority rights in Article 4 of the Paris Convention to be extended to service marks, newly protected under this Agreement.

Article 62:4 is a key provision as it applies the basic principles of procedural fairness, specified in Article 41:2 and 41:3, to all procedures of acquisition, maintenance, administrative revocation and *inter partes* agreement, such as opposition, revocation and cancellation of rights. *Article 62:5* subjects such procedures to judicial or quasi-judicial review, to the extent that the matter is not open to invalidation procedures before courts of law. Review of determinations by an independent administrative commission therefore meets the requirement of this provision.

As discussed above, registration procedures are partly determined by other international agreements, such as the Patent Cooperation Treaty or the Madrid and Lisbon Agreements for trademarks and designs, respectively.[202] These agreements primarily address international registrations, but also bear upon national registration procedures. They may contain important benchmarks which should be referred to in interpreting the requirements of reasonable procedures under the TRIPs Agreement. Panels and the Appellate Body are likely to take such benchmarks into account.

G. Dispute Prevention and Settlement (Part V)

With the advent of the TRIPs Agreement, the international intellectual property system has, for the first time, been provided with tools and instruments to interpret and enforce the international standards of protection for intellectual property between States. Up to this point, the existing channel to the International Court of Justice[203] has never been invoked, and efforts to bring dispute settlement into the ambit of the WIPO have failed even for matters limited to registration of patent, trademark and design rights under the respective international cooperation agreements.

The title of this section indicates that the idea of dispute prevention was equally important to negotiators. Basic principles and obligations as to transparency, good governance and reporting, discussed above, are thought to contribute effectively to the prevention of disputes.[204]

1. Recourse to Dispute Settlement

In accordance with *Article 64:1*, the WTO Dispute Settlement Understanding[205] fully applies to the TRIPs Agreement, subject to initial restrictions on non-violation complaints, set out in Article 64:2 and discussed below. A substantial body of case law has been produced in the first years after the entry into force of the Agreement. As of August 2003, out of 299 complaints, twenty-four (16.5 percent) were related to the TRIPs Agreement. Eight cases were decided, nine cases had settled and seven were pending. Most of the cases involved North-North issues as the substantive obligations of developing countries applied only after January 1, 2000, and litigation with developing countries prior to that time had to do with transitional obligations such as that under Article 70:8 and 70:9. The United States was the principal complainant (sixteen cases), followed by the EC (six), Brazil (one) and Canada (one). Six of the seven cases that resulted in panel or Appellate

[202] For references *see supra* note 9.

[203] Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, in 20 HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW 661 (1997); also published in ABBOTT, COTTIER, GURRY, *supra* note 7, at 358.

[204] See Part III(C)(5) of this chapter.

[205] See Chapters 25 *et seq.* of this work.

Body decisions on the merits were initiated by the EC. The EC was also the principal defendant (nine cases), followed by the United States (four), Canada (two) and Japan (two). In addition, seven developing countries were respondents.

Compared to other new agreements, in particular the GATS, adjudication has contributed significantly to the clarification of rights and obligations created by the Agreement. As to implementation, consultations often led to domestic legislative reform based on the relatively clear spelling out of rights and obligations in the TRIPs Agreement.[206] Another factor contributing to the successful recourse to dispute settlement is that intellectual property protection has long been the subject of domestic litigation and international agreements, while the GATS Agreement addresses an area relatively new to international trade regulation and most commitments inscribed have not gone beyond the current state of domestic legislation.

As to enforcement and implementation, intellectual property can be the subject of cross-retaliation under Article 22:3 of the DSU. In *EC-Bananas*, Ecuador was authorized to suspend its obligations regarding intellectual property rights in order to compensate for nullification and impairment determined to amount to US 201.6 million per year.[207] The arbitrators authorized Ecuador to request authorization by the DSB to suspend concessions or other obligations, not only under GATT 1994 and under GATS, but also, to the extent that the suspension requested under GATT 1994 and GATS was insufficient, under the TRIPs Agreement in the sectors of copyright and related rights, protection of performers, producers of phonograms and broadcasting organizations, geographical indications and industrial designs. The arbitrators also noted that, pursuant to Article 22:3 of the DSU, Ecuador should first seek to suspend concessions or other obligations in the field of GATT and GATS, i.e., the sectors in which its rights had been impaired. On May 18, 2000, the DSB authorized Ecuador to suspend concessions to the European Communities as requested.[208]

Effective use of suspension of intellectual property rights largely depends, as for goods and services, on the size of the market. Small and middle-sized economies have a built-in disadvantage in using dispute settlement enforcement as long as the system does not make available the multilateralization of retaliatory measures. The effectiveness further depends on carefully choosing the targets of suspension of rights. General suspension of patent or trademark protection for goods and services originating in a particular Member affects imported and locally produced products alike and is likely to harm domestic producers and distributors operating under licensing agreements. Suspension, if at all, therefore needs to target specific products exclusively imported from the Member infringing its WTO obligation.[209] Even if contained and limited in time, long-lasting detrimental effects may be incurred as the measure may impair and destroy distribution systems which may not recover upon lifting of the measure. Suspension of protection or enforcement of intellectual property rights are likely to have potentially negative effects

[206] *See e.g.,* consultations between the United States and EU, *supra* note 195.

[207] *European Communities—Regime of the Importation, Sale and Distribution of Bananas, Recourse to Arbitration* under Article 22.6 of the DSU, WT/DS27/ARB/ECU (2000), ¶ 126.

[208] Text adapted from WTO, *Update of Dispute Settlement Cases*, WT/DS/OV/1 (October 18, 2001).

[209] *Cf*. in this context the structure of the retaliatory measure in the United States excluding judicial enforcement of registered trademarks and trade names having a relationship with business activities in Cuba in Section 211 of the Omnibus Appropriation Act of 1998. The measure effectively targeted a single product. *See* the Appellate Body report *United States—Section 211 Omnibus Appropriation Act of 1998, supra* note 34

beyond the period of suspension and should therefore be referred to only as a measure of last resort.

Finally, we note that intellectual property gave rise to the first case of financial compensation within the WTO system. In an arbitration conducted between the EC and the United States relating to remuneration for copyright violation, the Arbitrators determined that the level of EC benefits were being nullified or impaired as a result of the operation of Section 110(5)(B) amounted to $\in$ 1, 219, 900 per year.[210]

2. Non-Violation Complaints

Under *Article 64.2* of the TRIPs Agreement, complaints may be field not only with rspect to violations of the Agreement but also, after a period of five years from the entry into force of the Agreement, with respect to measures that do not violate specific rights or obligations of the Agreement, but which frustrate legitimate expectations under the so-called non-violation rule of Article XXIII:1(b) and (c) GATT.[211] Law and Policy in International Business 1055 (2000). Application of non-violation to the TRIPs Agreement was conceptually controversial at the end of the Uruguay Round. This author argued in favour of its application.[212] The criterion of non-foreseeability of a measure, in particular, prevents invocation of non-violation in most cases, and limits cases essentially to violations of the general principles of good faith and, in my view, of legitimate expectations. Such cases may also arise in relation to intellectual property protection, and there is no justification why intellectual property should be excluded from such supplementary protection available in WTO law. Others felt that non-violation complaints are inherently linked to tariff concessions and could not apply to the field of intellectual property cases.[213] Politically, developing countries opposed this cause of action because they feared that they would be confronted with claims going beyond the negotiated text of the TRIPs Agreement. As a compromise, a moratorium was agreed in Article 64:2 which would elapse after five years. Under *Article 64:3*, the five-year period of non-availability of non-violation complaints could only be extended by a consensus of the Ministerial Conference. Since no explicit decision was taken extending the suspension, non-violation complaints appeared to be available as of the year 2001. However, this view has been strongly contested as fears of too broad a reading of the doctrine of non-violation, of extensive claims and political pressures based upon non-violation, persist among developing countries. In the Decision on Implementation-related Issues and Concerns, adopted at the Doha Ministerial Conference in 2002, Members agreed

[210] *United States—Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1 (2001), ¶ 5.1.

[211] G. E. Evans, *A Preliminary Excursion into TRIPs and Non-Violation Complaints*, 3 Journal of World Intellectual Property 868 (2000); F. M. Abbott, *TRIPs in Seattle: The Not-So-Surprising Failure and the Future of the TRIPs Agenda*, 18 Berkeley Journal of International Law 172 (2000); T.N. Samahon, *TRIPs Copyright Dispute Settlement after the Transition and Moratorium: Non violation and Situation Complaints Against Developing Countries*, 31

[212] *See* Thomas Cottier, *The Prospect For Intellectual Property in GATT*, 28 Common Market Law Review 383 (1991), also published in Abbott, Cottier, Gurry, *supra* note 7, at 985, Thomas Cottier, Krista Nadkavukaren Schefer, *supra* note 56, at 1349–177; Thomas Cottier, Krista Nadakavukaren Schefer, *Good Faith and the Protection of Legitimate Expectations in the WTO*, in New Directions in International Economic Law: Essays in Honour of John H. Jackson 47–68 (Marco Bronckers and Reinhard Quick eds., 2000).

[213] See Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in International Trade Law and the GATT/WTO Dispute Settlement System 123 (E-U. Petersmann ed., 1997).

not to initiate non-violation complaints for a further period of two years, while instructing the TRIPs Council to continue its examination of the scope and modalities of such complaints.[214] The future status of such cases therefore remains controversial.

From a legal point of view, objections to the application of non-violation complaints do not appear to be justified. First, Article 8 of the Agreement provides an important shield in defense of goals of social and economic development and counters extensive claims in law. Second, the comprehensive nature of the TRIPs Agreement renders application of the non-violation doctrine exceptional[215] and the conditions and criteria for non-violation complaints, as developed in the case law, are sufficiently stringent to counter such pressures.[216]

H. Transitional Arrangements (Part VI)

Members were granted a one year general period to implement the Agreement in *Article 65:1.* Developing countries and, under certain conditions economies in transition, were given five years from the date of entry into force of the WTO Agreement before being required to meet the obligations of the TRIPs Agreement, i.e., until January 1, 2000.[217] Developing countries could delay for a further five years application of the obligation to make product patents available for those areas of technology not protectable by product patents in its territory on the date of general application of the TRIPs Agreement.[218] Countries exercising this right were required to install "mail-box" and pipe-line protection under Article 70:8 and 9, discussed above[219] This provision is of particular importance with respect to pharmaceuticals and chemical products.

For least developed countries, *Article 66* only renders the basic principles of non-discrimination applicable in these countries as of the entry into force of the Agreement. The general deadline for implementation of the TRIPs Agreement originally was scheduled for January 1, 2006. However, it was extended for pharmaceuticals by the Doha Ministerial Declaration for the group of least developed countries until the year 2016[220] and implementation may be further delayed.

I. Institutional Arrangements and Final Provisions (Part VII)

Part VII addresses miscellaneous issues.[221] Protection of existing subject-matter (Article 70) and international cooperation in enforcement (Article 69) are addressed above.[222]

[214] International Centre for Trade and Sustainable Development ("ICTSD") and International Institute for Sustainable Development ("IISD"), Doha Round Briefing Series—Developments Since the Fourth WTO Ministerial Conference, Vol. 1 No. 5 of 13 February 2003, at 3.

[215] This is even true for challenging excessive procedural requirements, such as extensive registration or maintenance fees which may amount to nullification and impairment of benefits. While not extensively addressed in the Agreement, Articles 25:2, 41.2, and 62.4 clearly render such matters suitable for violation complaints.

[216] *See* Thomas Cottier, Krista Nadkavukaren Schefer, *supra* note 56.

[217] Article 65:2 and 65:3.

[218] Article 65:4.

[219] Part III(D)(5)(c)

[220] *Declaration on the TRIPs Agreement and Public Health, supra* note 101), at ¶ 7: "... We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPs Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66:1 of the TRIPs Agreement ...".

[221] For a discussion *see* STAEHELIN, *supra* note 37, at 261–274.

[222] *See* Parts III(A)2; III(D)(1)(c), III(D)(5)(c) and III(E)(1).

1. The TRIPs Council

Article 68 of the TRIPs Agreement establishes the Council for Trade-Related Aspects of Intellectual Property Rights—in parallel to the Councils on Goods and Services. It consists of delegates of Members, generally on the level of diplomatic counselors and specialists from capital, and is chaired by one of the ambassadors accredited to the WTO. The Council monitors the operation of the Agreement. According to *Article 71*, the Council is mandated to review the implementation of this Agreement at regular two years' intervals after January 1, 2001, upon the elapse of the transitional periods of Article 65. This mandate defines much of the standard work of the Council. The Council has produced a series of reports based upon Member questions concerning the implementation of the Agreement by other Members.[223] In addition, *Article 27:3(b)* requires review of the provision on patenting life forms after January 1st 1999. This task did not include a mandate to negotiate. It was limited to an extensive review of national legislation on the subject-matter and generated extensive debate on this controversial issue.[224] The Council was also directed to provide any assistance requested by Members in the context of dispute settlement—a role which has not materialized, and is not likely to materialize given the increasing separation of powers between the legislative and judicial branches of the WTO. The Council as a political organ is not suitable for this task. Pursuant to Article 68, "In carrying out its functions, the Council may consult and seek information from any source it deems appropriate". The main partner of the Council in this respect is WIPO. In accordance with Article 68, a cooperation Agreement with WIPO was concluded on December 22, 1995[225] WIPO also participates in meetings of the Council as an observer.

2. Amendments

Beyond its administrative tasks, the Council plays an important role in negotiations taking place in the WTO on intellectual property. A number of provisions of the TRIPs Agreement mandate that the Council explicitly address what may be called the leftovers and unfinished business of the Uruguay Round. *Article 23:4*, discussed above, mandates the Council to undertake negotiations on the establishment of a multilateral system of notification and registration of geographical indications for wines; a mandate eventually extended to spirits. *Article 24* requires negotiations aimed at increasing the protection of GIs and sets forth a number of parameters for such negotiations. *Article 71:1* implies powers to negotiate in the light of new developments "which might warrant modification or amendment of this Agreement." To the extent that such modifications consist of merely adjusting to the higher levels of protection achieved in other multilateral agreements in force and accepted by all Members, *Article 71:2* of the TRIPs Agreement allows for facilitated adoption in accordance with Article X:6 of the WTO Agreement based upon a consensus proposal by the TRIPs Council.

None of the powers to amend the agreement have been utilized so far. Experience shows that it is virtually impossible to bring about consensus on single and specific issues without being able to offer mutual tradeoffs. The situation will only change if

[223] *See* reports on http://www.wto.org/english/tratop_e/trips_e/intel6_e.htm and http://www.wto.org/english/tratop_e/trips_e/intel8_e.htm (visited November 25, 2003).

[224] *See* references on http://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm (visited November 25, 2003).

[225] *See* F. M. Abbott, *Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance*, 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 63 (2000).

WTO Members replace consensus requirements with weighted voting on issues arising between multilateral trade rounds.[226]

During multilateral trade rounds, the negotiating mandate in the field of intellectual property rights is defined by the respective Ministerial Declarations. The Doha Agenda mandates the TRIPs Council to supervise negotiations rather than to create a special negotiating group. Neither the WTO Agreement nor the TRIPs Agreement provide guidance as to the adoption of future amendments resulting from a multilateral trade round. These are likely to form part of a Final Act, comprising mandatory changes to the various agreements and possibly containing new instruments. It is possible, but not likely, that additional provisions on intellectual property protection will be framed in the form of a plurilateral agreement and thus not become part of a mandatory package binding all Members.

3. Reservations

Finally, *Article 72* provides that the TRIPs Agreement cannot be accompanied by unilateral reservations unless agreed to by the other Members. No such reservations have been granted as of the time of writing (August 2004). This is probably because the TRIPs Agreement forms an integral part of the WTO in accordance to Article II:2 of the WTO Agreement and cannot be dealt with in isolation.

IV. Conclusions and Further Developments

During the first ten years after the adoption of the Agreement, intellectual property protection has emerged as one of the mainstays of the multilateral trading system. It proved to be an important interface between industrialized countries, and has strongly reinforced the potential for protection and enforcement of defined rights. It has worked well and reinforced the global system of intellectual property protection Issues relating to cultural products, and the problem of potentially excessive copyright protection in the age of the internet are likely to dominate the agenda between industrialized countries.

The TRIPs Agreement remains a major stumbling block for many developing countries. Despite the fact that most developing countries had fairly well-developed copyright and trademark laws and clear patent laws prior to the adoption of the TRIPs Agreement and are supported by means of technical cooperation; implementation and enforcement of intellectual property rights remains a major problem for such countries. It is an arduous and a long-term process. It implies the reception and internalization of legal concepts with which many societies around the world are neither sufficiently familiar nor convinced that they serve their long-term interests. Most of the rights, in particular patent rights, are primarily of interest to industrialized countries. The invocation of the Agreement as a means of preventing parallel trade in generic pharmaceuticals by industry and a number of governments has seriously, but wrongly, furthered the view in international public opinion that the Agreement is essentially imbalanced and does not offer much to developing countries. A proper application of all its provisions, including those relating to social and developmental goals, could serve the long-term interest of developing countries in fostering intellectual property protection. Future negotiations should seek to identify those areas that are of particular interest for developing countries, commensurate

[226] For proposals to this effect *see* Thomas Cottier and Satoko Takenoshita, *The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response*, in 58 HEFT II AUSSENWIRTSCHAFT 171 (2003).

with a level of development which, in many countries, strongly depends on agriculture. To the extent that the TRIPs Agreement, in combination with other trading rules, also adequately responds to the needs and expectations of rural populations predominant in the developing world, the Agreement will develop enhanced legitimacy and acceptance. The quest for enhanced protection of geographical indications for the promotion of niche products as much as the quest for enhanced protection of traditional knowledge in an era of biotechnology should therefore be supported. The use of traditional knowledge related to plant genetic resources in developing countries for the purposes of modern biotechnology should be compensated for through contractual arrangements under the Convention on Biodiversity. Ways need to be sought on the international level to bring about adequate control by, and remuneration of, rural communities based on a new generation of intellectual property rights that protect traditional knowledge relating to geographically assignable plant genetic resources and folklore. Such rights, together with appropriate policy instruments, can make an important contribution to the validation of traditional ways of production, enhance the use and conservation of biodiverse plant genetic resources, and further distributive justice and intergenerational equity.[227] In recent years there has been an increased interest in these new subjects and the challenges they pose for the intellectual property system. Moreover, linkages with competition policy are necessary and fair conditions in developing countries should be supported by the creation of disciplines on export cartels in order to combat potential abuses of IPRs in markets largely unprotected against cartels and the abuse of dominant positions. A new generation of the TRIPs Agreement should not be limited to minimal standards, but should also reflect the need to limit protection in line with competition policies and therefore as well adopt maximum substantive standards. Such ceilings should also limit unilateral, bilateral and multilateral policies of imposing TRIPs-plus standards on Members and acceding countries. Efforts to improve the international regime of intellectual property should be undertaken within the multilateral system. Discussions on parallel importation, taking into account the implication of GATT and GATS, need to continue. New approaches, leaving overly broad concepts of national and regional exhaustion behind, are available within the multilateral system and can be further developed.

Quite apart from its internal balance, the long-term legitimacy of the TRIPs Agreement will depend on improved market access in agriculture and textiles for developing countries. It will equally depend on visible improvements in transfer of technology and investment—arguments strongly relied upon by industrialized countries and the private sector and which, so far, have not borne fruit, since many developing countries were not obligated to implement the Agreement until 2000 and developed countries are not under strict obligations to foster transfer of technology by their industries through governmental policies. But it is principally the private sector which has to assume the responsibility of handling and using intellectual property rights in a manner supportive of the needs of developing countries. Long-term legitimacy depends on that, more than on measures of governmental support. The TRIPs Agreements, the expectations it raises, and its potential, can be used as an asset in promoting global stability and peace.

[227] *See* Bernard O'Connor, *Protecting Traditional Knowledge—An Overview of a Developing Area of Intellectual Property Law*, 5 JOURNAL OF WORLD INTELLECTUAL PROPERTY 677 (2003); Thomas Cottier, *The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law*, 1 JOURNAL OF INTERNATIONAL ECONOMIC LAW 555 (1998); for further references *see supra* notes 160 and 161 and text accompanying note 152.

Finally, a new philosophy needs to be developed in future negotiations on implementation and graduation of rights and obligations. While in its first and initial form and content, the TRIPs Agreement was inspired by the traditions of international intellectual property protection, a new generation of rules will need to build upon the traditions of *progressive* liberalization in GATT and the multilateral trading system. In light of the economic analysis of short-term disadvantages and long-term benefits of IPRs for developing and transitional countries, rules should be framed in a way that the current level of development in a Member and particular industrial sectors can be taken into account based on economic factors to be defined. As these countries progress, as sectors of the domestic industry develop competitiveness, intellectual property rules should gradually apply to these sectors, based upon economic factors and variables. Members and industries would therefore be able to assess when they will be subject to full application of specific obligations. Both traditional perceptions of special and differential treatment and temporal exceptions and phase-ins do not sufficiently reflect the short-term and long-term needs of developing countries. The international intellectual property community may learn from other areas of the WTO system and adopt a philosophy of progressive regulation, based upon the basic concept of nullification and impairment. The incorporation of intellectual property in the system of the World Trade Organization will not leave the future evolution of intellectual property protection untouched. Linking it to progressive trade liberalization, effective dispute settlement and tools of enforcement, has brought about new dynamics, challenges and responsibilities. They need to be met with legal innovation and creativity which is at the very heart of the idea of intellectual property and the TRIPs Agreement.

BIBLIOGRAPHY

The following list only gives a selection of material concerning the TRIPs Agreement. A detailed bibliography can be found, e.g., in the book by Alesch Staehelin listed below.

Regular contributions concerning TRIPs appear in the JOURNAL OF WORLD INTELLECTUAL PROPERTY, WERNER PUBLISHING, GENEVA. SEE ALSO 1(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW (1998) AND 29 VANDERBILT JOURNAL OF TRANSNATIONAL LAW (1996), BOTH SPECIAL ISSUES ON THE TRIPS AGREEMENT.

F. M. ABBOTT, *Distributed Governance at the WTO-WIPO: An evolving Model for Open-Architecture Integrated Governance*, 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 63 (2000).

F. M. ABBOTT, *TRIPs in Seattle: The Not-So-Surprising Failure and the Future of the TRIPs Agenda*, 18 BERKELEY JOURNAL INTERNATIONAL LAW 165 (2000).

F. M. ABBOTT, T. COTTIER, F. GURRY, THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM 2, VOLS. (1999).

FREDERICK M ABBOTT, *First Report (Final) to the Committee on International Trade La of the International Law Association on the Subject of Parallel Importation*, JOURNAL OF INTERNATIONAL ECONOMIC LAW 607 (1998).

F. M. ABBOTT AND D.W. FEER VEERKADE, *The Silhouette of a Trojan Horse: Reflections on Advocate General Jacobs' Opinion in Silhouette v. Hartlauer"*, DRAFT OF MARCH 2, 1998, ON FILE WITH AUTHOR.

F. M. ABBOTT, *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, IN INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, 387 (E.-U. PETERSMANN ED. 1997).

F. M. ABBOTT, *The International intellectual Property order enters the 21st Century*, 29 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 471 (1996).

J. AUDIER, TRIPS AGREEMENT: GEOGRAPHICAL INDICATIONS (2000).

F.-K. BEIER, G. SCHRICKER (EDS.,) FROM GATT TO TRIPS (1996).

M. BLAKENEY, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPS AGREEMENT (1997).

M.C.E.J. BRONCKERS, D.W.F. VERKADE, N.M. MCNELIS, TRIPS AGREEMENT: ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (2000).

M.C.E.J. BRONCKERS, *The Exhaustion of Patent Rights under World Trade Organization Law*, 35 JOURNAL OF WORLD TRADE 137 (1998).

M.C.E.J BRONCKERS, *The Impact of TRIPs: Intellectual Property Protection in Developing Countries*, 31 COMMON MARKET LAW REVIEW 1245 (1994).

C. BAUDENBACHER, *Erschöpfung der Immaterialgüterrecht in der EFTA und die Rechtslage in der EU*, GRUR INT. 7/2000 571.

P. CATTANEO, *The Interpretation of the TRIPs Agreement: Considerations for the WTO Panels and Appellate Body*. 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY 626 (2000).

COMMISSION ON INTELLECTUAL PROPERTY RIGHTS (CIPR), INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY (2002): "HTTP://WWW.IPRCOMMISSION.ORG".

BERNARD O'CONNOR, *Protecting Traditional Knowledge—An Overview of a Developing Area of Intellectual Property Law*, 5 JOURNAL OF WORLD INTELLECTUAL PROPERTY 677 (2003)

C. M. CORREA, *TRIPs Rulings and the Developing Countries*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 255 (2001).

C. M. CORREA, *Review of the TRIPs Agreement: Fostering the Transfer of Technology to Developing Countries*, 2 JOURNAL OF WORLD INTELLECTUAL PROPERTY 941 (2001).

C.M. CORREA, INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT (1998).

C. M. CORREA, *The GATT Agreement on Trade-related Aspects of Intellectual Property Rights: New Standards for Patent Protection*, 8 EUROPEAN INTELLECTUAL PROPERTY REVIEW (EIPR) 327 (1994).

T. COTTIER, I. MEITINGER, *The Protection of Test Data Submitted to Governmental Authorities: The Impact of the TRIPs Agreement on EC Law*, ON FILE WITH THE AUTHOR (2000).

T. COTTIER, I. MEITINGER, *The TRIPs Agreement Without a Competition Agreement?*, KNOW—KNOWLEDGE, TECHNOLOGY, HUMAN CAPITAL—SPECIAL ISSUE ON TRADE AND COMPETITION, NOTA DI LAVORO 65.99 (FONDAZIONE ENI ENRICO MATTEI ED. 1999).

T. COTTIER, *The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law*, 1 JOURNAL OF INTERNATIONAL ECONOMIC LAW 4, 555 (1998).

T. COTTIER, THE *Impact of the TRIPs Agreement on Private Practice and Litigation*, IN: DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION, 111 (J. CAMERON AND K. CAMPBELL EDS., 1998)

T. COTTIER, TH.-L TRAN THI., *Le GATT et l'Uruguay Round: l'importance du projet d'accord TRIPs et son impact sur le droit de la propriété intellectuelle en Suisse*, AKTUELLE JURISTISCHE PRAXIS, AJP/PJA 5/93, 632 (1993).

T. COTTIER, *The Prospects in International Trade Law and Policy: The GATT Connection*, 47 AUSSENWIRTSCHAFT 79 (1992).

T. COTTIER, *The Prospects of Intellectual Property in GATT*, 28 COMMON MARKET LAW REVIEW 384 (1991).

P. CULLET, *Revision of the TRIPs Agreement concerning Protection of Plant Varieties: Lessons from India concerning the Development of a Sui Generis System*, 2 JOURNAL OF WORLD INTELLECTUAL PROPERTY 617 (1999).

A. D'AMATO, D.E. LONG, INTERNATIONAL INTELLECTUAL PROPERTY LAW (1997)

W. J. DAVEY, *Has the WTO Dispute Settlement System Exceeded its authority? A consideration of Deference shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 79 (2001).

GRAEME B. DINWOODIE, *A new Copyright Order: Why National Courts should create Global Norms*, 149 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 469 (2000).

R. C. DREYFUSS, A. LOWENFELD, *Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together*, 37 VIRGINIA JOURNAL OF INTERNATIONAL LAW 275 (1997).

S. DÖRMER, *Dispute Settlement and new Developments Within the Framework of TRIPs: An Interim Review*, 31 INTERNATIONAL REVIEW OF INDUSTRIAL PROPERTY AND COPYRIGHT LAW (IIC) 1 (2000)

J. DREXL, *Nach, GATT und WIPO": Das TRIPs-Abkommen und seine Anwendung in der Europäischen Gemeinschaft*, GRUR INT. HEFT 10 (1994).

G. E. EVANS, *A Preliminary Excursion into TRIPs and Non-Violation Complaints*, 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY 868 (2000).

G.E. EVANS, *TRIPs and the Sufficiency of Free Trade Principles*, 2 JOURNAL OF WORLD INTELLECTUAL PROPERTY 707 (1999).

M. E. FOOTER, *Developing Country Practice in the Matter of WTO Dispute Settlement*, 35 JOURNAL OF WORLD TRADE 55 (2001).

S.M. FORD, *Compulsory Licensing Provision Under the TRIPs Agreement:* BALANCING PILLS AND PATENTS, 15 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 941 (2000)

P. E. GELLER, *Intellectual Property in the Global Marketplace: Impact of TRIPs Dispute Settlement?*, THE INTERNATIONAL LAWYER (1995).

D. GERVAIS, *The TRIPs Agreement after Seattle: Implementation and Dispute Settlement Issues*, 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY 509 (2000)

D. GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (1998).

J. C. GINSBURG, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for copyright Execptions*, WORKING PAPER NO. 181, THE CENTER FOR LAW AND ECONOMIC STUDIES, COLUMBIA LAW SCHOOL.

L. R. HELFER, *World Music on a U.S. Stage: A Berne/TRIPs and Economic Analysis of the Fairnes in Music Licensing Act*, 80 BOSTON UNIVERSITY LAW REVIEW 93 (2000).

A. HOLEWEG, EUROPÄISCHER UND INTERNATIONALER GEWERBLICHER RECHTSSCHUTZ UND.URHEBERRECHT: TABLLEARISCHER ÜBERBLICK UND AKTUELLE ENTWICKLUNGEN, GRUR INT. 141 (2001).

R. HOWSE, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY, 493 (2000)

INTERNATIONAL LAW ASSOCIATION (ILA), *Resolution No. 2/2000 on TRIPs*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 295 (2001).

J.H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS (2000)

T. KONGOLO, *The WTO Dispute Settlement Mechanism: TRIPs Rulings and the Developing Countries*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 257 (2001).

P.L. KOLKER, TRIPS AGREEMENT: PATENT PROTECTION (2000)

A. KUR, *Trademark Provisions of the TRIPs Agreement*, IN FROM GATT TO TRIPS, 98 (F-K BEIER AND G. SCHRICKER EDS., 1996).

KAREN D. LEE AND SILKE VON LEWINSKI, *The Settlement of International Disputes in the Field of Intellectual Property*, IN: FROM GATT TO TRIPS, 317 (BEIER AND SCHRICKER EDS., 1996).

S. A. MOTA, *TRIPs: Five Years of Disputes at the WTO*, 17 ARIZONA JOURNAL INTERNATIONAL & COMPARATIVE LAW 533 (2000).

KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY, WASHINGTON 2000.

A. MUKERJI, *Developing Countries and the WTO: Issues of Implementation*, 34 JOURNAL OF WORLD TRADE 33 (2000)

D. NASH, *South Africa's Medicines and Related Substances Control Amendment Act of 1997*, 15 BERKELEY TECHNICAL LAW JOURNAL 485 (2000).

N.A. ODMAN, *Using TRIPs to Make the Innovation Process Work*, 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY 343 (2000).

A. OTTEN AND H. WAGER, *Compliance with TRIPs: The Emerging World View*, 29 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 391 (1996)

A. OTTEN, *Improving the Playing Fields for Exports: The Agreements on Intellectual Property, Investment Measures and Government Procurement*, IN: URUGUAY ROUND—NINE PAPERS (T. COTTIER ED. 1995).

A. OTTEN, *Trade-related Intellectual Property Rights: What Will Change*. INTERNATIONAL CONFERENCE ON INTELLECTUAL & INDUSTRIAL PROPERTY, OBJECTIVES & STRATEGIES, 11-12-13 APRIL '94, EUROPEAN COMMISSION—DIRECTORATE GENERAL XV, 23-30.

D. QIAO, *Revision of the Chinese Patent Law conforms to the Trend of Development of the International Patent System*, CHINA PATENTS AND TRADEMARKS 1993, NO. 1 28

J.H. REICHMAN, *Enforcing the Enforcement Procedures of the TRIPs Agreement*, 37 VIRGINIA JOURNAL OF INTERNATIONAL LAW 335 (1997).

J.H. REICHMAN, *Compliance with the TRIPs Agreement: Introduction to a Scholarly Debate*, 29 VANDERBILT JOURNAL TRANSNATIONAL LAW 363 (1996)

R. P. ROZEK, *The WTO Dispute Settlement Mechanism: TRIPs Rulings and the Developing Countries—Prospects after Seattle*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 271 (2001).

T.N. SAMAHON, TRIPs *Copyright Dispute Settlement after the Transition and Moratorium: Non violation and Situation Complaints Against Developing Countries*, 31 LAW AND POLICY IN INTERNATIONAL BUSINESS 1055 (2000)

R. SENTI, WTO: SYSTEM UND FUNKTIONSWEISE DER WELTHANDELSORDNUNG (2000)

A. STAEHELIN, DAS TRIPS-ABKOMMEN: IMMATERIALGÜTERRECHT IM LICHT DER GLOBALISIERTEN HANDELSPOLITIK (1999).

J.A.L. STERLING, TRIPS AGREEMENT—COPYRIGHT AND RELATED RIGHTS (2000) A. SUBRAMANIAN, *The Aids crisis, Differential Pricing of Drugs and the TRIPs Agreement: Two Proposals*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 322 (2001).

P. VANDOREN, *The TRIPs Agreement: A Rising Star?*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 307 (2001).

P. VANDOREN, *The Implementation of the TRIPs Agreement*, 2 JOURNAL OF WORLD INTELLECTUAL PROPERTY 25 (1999).

J. WATAL, *TRIPs and the 1999 WTO Millennium -Round: Some Reflections on Future Issues related to IPRS in the WTO and the Way Forward for Developing Countries*, 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY 3 (2000).

J. WATAL, INTELLECTUAL PROPERTY IN THE WTO AND DEVELOPING COUNTRIES, THE HAGUE (2000).

D. WILLIAMS, *The First Six Years and Beyond*, 4 JOURNAL OF WORLD INTELLECTUAL PROPERTY 177 (2001).

WORLD TRADE ORGANIZATION, *Overview: The TRIPs Agreement*, WTO HOMEPAGE, HTTP://WWW.WTO.ORG/ENGLISH/TRATOP_E/TRIPS_E/INTEL2_E.HTM (VIEWED NOVEMBER 25, 2003

J. WORTY, *Intellectual Property Protection after GATT*, 5 EUROPEAN INTELLECTUAL PROPERTY REVIEW 195 (1994).

C. The Plurilateral Agreements

CHAPTER 23

THE AGREEMENT ON GOVERNMENT PROCUREMENT

Peter Trepte*

TABLE OF CONTENTS

I. History of the GPA 1125
A. The ITO Discussions 1125
B. The Work of the OECD 1126
C. The GATT Negotiations and the Tokyo Round 1129
1. The Original Code 1129
2. Continuing Issues Arising from the Code 1130
3. Procedural Rules 1131
4. Dispute Resolution 1132
D. Improvements Following the Tokyo Round Code 1133
II. The Uruguay Round and the GPA 1994 1134
III. The Government Procurement Agreement 1994 1137
A. Scope and Coverage 1137
1. Entity Coverage 1138
2. Scope 1139
3. Threshold Values 1140
4. Exclusions 1140
B. The Basic Principles 1141
C. The Contract Award Procedures 1141
1. Tendering Procedures 1142
2. Tender Documentation 1146
3. Qualification 1146
4. Receipt of Tenders 1147
5. Award of Contracts 1148
6. Advertising, Transparency and Information Requirements 1149
7. Technical Specifications 1154
D. Bid Challenge Procedures and Dispute Resolution 1154
1. Private Bid Challenge 1155
2. Dispute Settlement 1157
E. Special and Differential Treatment for Developing Countries 1158
IV. The Way Forward 1160
A. Ongoing Review of the GPA 1161
B. The Working Group on Transparency 1161
C. The GATS Negotiations 1162

* Peter Trepte is a barrister practicing at Littleton Chambers in London. He was a member of the WTO panel in the *Korean Government Procurement* case, *infra*, note 74.

The stated objective of the 1994 Agreement on Government Procurement ("GPA" or "GPA 1994") is to provide an effective and transparent multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade.[1] After years of debate and disagreement, the negotiations conducted within various *fora*, including the ITO negotiations, the OECD and the GATT, have resulted in the most comprehensive multilateral set of enforceable provisions applying to government purchases, opening up potentially hundreds of billions of dollars worth of public procurement to foreign competition.[2] The GPA does so by extending the GATT principles of non-discrimination (MFN and national treatment) and transparency to the tendering procedures adopted by government bodies at both central and regional levels as well as to those of other specified entities.

This extension of the GATT principles is not absolute, however. In the first place, the GPA signed in Marrakesh on April 15, 1994 is one of the so-called plurilateral agreements under the WTO umbrella, signifying that only those States which have signed up to the agreement are bound by it. Currently, the signatories to the GPA include Canada, the fifteen European Union Member States, Hong Kong China, Iceland, Israel, Japan, Liechtenstein, Netherlands with respect to Aruba, Norway, Korea, Singapore, Switzerland and the United States. A number of countries are currently negotiating accession[3] and, in addition to those, a number of countries have observer status.[4]

Second, the non-discrimination obligations do not apply to all government procurement of the signatories. Rather, they apply in a qualified manner to specified entities, goods and services which have been the subject of extensive bilateral negotiations between the signatories. The results of these negotiations are contained in a series of Annexes to the GPA which are critical to an understanding of the scope of application of the GPA.

The GPA entered into force on January 1, 1996, one year after the multilateral Uruguay Round Agreements went into effect, and replaced the previous GPA of 1979, amended in 1987.[5]

[1] For an analysis of the economic motivation for liberalising government procurement at the international level, *see* Aaditya Mattoo, *Economic Theory and the Procurement Agreement,* in LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT (Bernard Hoekman and Petros Mavroidis eds. 1997).

[2] It has been estimated that the GPA 1994 covers trade worth $350 billion per year. BHALA AND KENNEDY, WORLD TRADE LAW 1315 (1998), citing INTERNATIONAL CHAMBER OF COMMERCE, THE GATT NEGOTIATIONS: A BUSINESS GUIDE TO THE RESULTS OF THE URUGUAY ROUND 71 (1994). Statistics available after the signing of the original 1979 GPA estimated that it covered around $35 billion per year: Annet Blank and Gabrielle Marceau, *The History of the Government Procurement Negotiations Since 1945,* 5 PUBLIC PROCUREMENT LAW REVIEW 77, 102 (1996), although the actual figures appear to have been even less: ARIE REICH, INTERNATIONAL PUBLIC PROCUREMENT LAW: THE EVOLUTION OF INTERNATIONAL REGIMES ON PUBLIC PURCHASING 133 (1998). The huge expansion of coverage of the 1994 Agreement resulted from the inclusion of services as well as goods, and the extension of the Agreement to subcentral government entities.

[3] These are Albania, Bulgaria, Estonia, Georgia, Jordan, Kyrgyz Republic, Latvia, Lithuania , Moldova, Oman, Panama, Slovenia and Chinese Taipei.

[4] These are Argentina, Australia, Cameroon, China, Czech Republic, Chile, Colombia, Croatia, Hungary, Malta, Mongolia, Poland, Slovak Republic, Turkey. Three intergovernmental organisations also have observer status: the International Monetary Fund, the United Nations Conference on Trade and Development ("UNCTAD"). The International Trade Centre, a joint agency of the WTO and UNCTAD, also attends the meetings.

[5] For a comprehensive and detailed history of the negotiations leading to the GPA, *see* Annet Blank and Gabrielle Marceau, *supra* note 2. *See also,* Morton Pomeranz, *Towards a New International Order in Government Procurement,* 11 LAW AND POLICY IN INTERNATIONAL BUSINESS 1263 (1980).

I. History of the GPA

A. The ITO Discussions

The idea that government procurement would be subject to international trade rules arose in the context of the ITO discussions in 1946, in which the United States proposed that government purchases and contracts should be treated as any other measures relating to trade in goods and be subject to general principles of non-discrimination.[6] Ultimately, this position was rejected, doubtless because the negotiating parties were reluctant to eliminate the numerous "buy national" provisions which many imposed and which required procuring entities to give preference to domestic products in their public purchases. These early negotiations did, however, identify a number of issues which have become key elements in all subsequent negotiations, not least of which is the issue of coverage. No consensus was reached, for example, on the meaning of the word "government" in this context, i.e. whether it referred to central government only or included regional and local governments as well. Disagreement over this issue and the inability of the negotiating parties over the years to agree on a precise definition has given the GPA its hallmark convoluted entity-coverage provisions.

There was further confusion over what was meant by the term "procurement." The discussions centred on three types of transaction: state trading, government purchases and the award of contracts. In state trading, the government is a trading partner like any other and buys, sells or resells products. In government purchasing, the government is acting as a consumer, procuring for its own consumption and not for resale. The award of government contracts was understood to apply not to the purchase of goods but to contracts for the supply of both goods and services (for example, works contracts which included both the supply of materials and the provision of construction services) and implying the use of tendering procedures. The result of this confusion was twofold. First, the fear that inclusion of works contracts would lead to coverage of services within the negotiations led to a decision to apply any provisions only to goods. This exclusion of services was a constant feature in the subsequent negotiations and, when an agreement was finally reached with the GPA (1979), services contracts were excluded from its scope of application. This exclusion was also carried over to the GATS (1995).[7] Second, the negotiators appear to have become preoccupied with the issue of state trading. Indeed, the only provision relating to government procurement to emerge from the negotiations at all was a provision in the Article dealing with state trading requiring "fair and equitable treatment" in respect of government procurement.[8]

The negotiations that led to the GATT were held in parallel to the ITO discussions and, in finalising the text of the GATT, consideration was given to those provisions of the draft ITO Charter that would be incorporated into the GATT. In the context of government

[6] Articles 8 and 9 (relating to MFN and national treatment, respectively) of the U.S. draft for an International Trade Organisation Charter.

[7] Article XIII, although the article also provides that multilateral negotiations will be held within two years of the entry into force of the WTO Agreement aimed at including government procurement in services under GATS, thereby opening up the possibility of expanding the procurement obligations to a wider membership than the current GPA signatories. *See further,* Part IV:C, below.

[8] Article XVII:2 GATT (1947 and 1994): "The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment."

procurement, the final version of the GATT reflected the impasse reached in those discussions. The result was that Article I, on MFN, made no reference at all to government procurement with the largely accepted consequence that the MFN obligation does not apply to government procurement.[9] Article III, on national treatment, specifically excluded government procurement.[10] The only explicit obligation in respect of government procurement was the "soft" obligation of fair and equitable treatment in the provisions relating to state trading.

B. The Work of the OECD

The issue of government procurement next emerged in the context of the Organization for Economic Cooperation and Development ("OECD"), notably as the result of complaints by Belgium and the United Kingdom against increased preferences in U.S. defence procurement.[11] This led to a more general objective of examining the general issue of government preferences in government procurement and of compiling information on the procurement procedures of governments. Not surprisingly, it was soon appreciated that government procurement was conducted in any number of ways and using different methods. Administratively, procurement could be subject to highly detailed regulation and open to challenge by disappointed tenderers but, in many countries, was still governed by more discretionary means through the use of administrative guidelines or internal practice which gave little or no room for external challenge. In practical terms, it was clear that there were also a wide variety of tendering procedures used under different systems, some based on formal open tendering, others based on more discretionary forms of purchasing. It also emerged that most of the countries examined maintained some form of domestic preference providing protection against foreign competition. The results of this study were published in 1966[12] and formed the basis for the further discussions which took place in a working group under the auspices of the OECD Trade Committee with a view to ensuring the "fairest possible government procurement procedures, seeking to limit discrimination against foreign suppliers."

This early work of the OECD was critical in the sense that it changed the way in which government procurement was approached by the negotiators. Unlike the initial ITO/GATT discussions which started from the premise that government procurement could be approached in the same way as general trade in goods and services and could thus be made subject to the general application of the GATT non-discrimination principles, the OECD showed that it would not be possible to impose such obligations without at the same time addressing the rules for the conduct of procurement which differed widely in form throughout the potential membership. It recognised that procedural conformity or compatibility was a necessary step to the achievement of non-discriminatory access to procurement markets. This was a vital change of course and it is this imposition of detailed procedural steps and safeguards which characterised each of the subsequent agreements.

[9] *See, contra,* Arie Reich, *The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity,* 31 J. WORLD TRADE 125 (1997).

[10] Article III:8(a): "The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial use."

[11] OECD Doc. TFD/TD/499, November 15, 1968.

[12] *Government Purchasing in Europe, North America and Japan—Regulations and Procedures* (OECD 1966).

During the ITO discussions, it had become apparent that there was no consensus on what "government" meant in the context of government procurement. This was not the consequence of any linguistic difficulty but the result of the constitutional arrangements of the different States. Clearly, the constitutional powers of central government would differ between federal and unitary systems, but the degree of control over regional, local or municipal governments would also differ between similar systems. However, the central debate did not concern the level of control exercised by central government over local government[13] and the ability of central government to impose and enforce procurement procedures at the various levels. Nor was it necessarily a question of identifying the source of public funds which, at least in the domestic context, provides legitimacy for the notion that the expenditure of public money should be regulated and controlled and which also plays a part in identifying publicly funded enterprises which may be subject to procurement regulation. Rather, these discussions took place in an attempt to reach international agreement on the opening up of and access to procurement markets. What was of concern to the negotiators, therefore, was to ensure that any agreement would bring trade advantages to all the signatories and that these advantages would be of equivalent value. The key was the achievement of reciprocal trade advantages.[14]

In this context, it was feared that the likely trade advantages to be offered by federal states, who could offer access to the purchases of government only at the federal level, would be disproportionately lower than the advantages that could be offered by unitary states who would be in a position to offer access to different levels of government purchasing.[15] This issue was brought to a head particularly in the context of discussions over the extent to which public utilities could be covered by any agreement. The United States had proposed that the work should focus on heavy electrical equipment[16] because of "its considerable trade importance, its susceptibility to statistical study . . . and its relevance to OECD members as producers or consumers." Notwithstanding the ease by which trade advantages could be quantified (or maybe precisely because those advantages were readily shown to be disproportionate), it proved impossible to reach a conclusion on this sector because of the different degrees of government ownership in the sector in the different countries. This was and remains an issue in respect of public utilities (in the energy, transport and telecommunications sectors, for example) where the operators are, in some countries, entirely government-owned and, in others, privately owned to a greater or lesser degree.

[13] Although this was an issue in the context of the GPA, for example, in relation to the ability of the U.S. federal government to impose the procurement rules required by the GPA on the individual States. Indeed, a WTO dispute panel was established in 1997 to consider a law enacted by the State of Massachusetts which essentially sought to prohibit State public authorities, covered by the GPA, from procuring goods or services from any companies, whether from the United States or elsewhere, that engaged in business with Burma (Myanmar) and that were listed in the law (*United States—Massachusetts State Law Prohibiting Contracts with Firms Doing Business with or in Myanmar*, WT/DS88/1-5, WT/DS95/1-5 and WT/DSB/M/49). The Law also imposed a ten percent price penalty on bids submitted by listed companies. The work of the Panel was suspended following a U.S. court ruling preventing the implementation of the law.

[14] This bargaining for equivalent trade advantages became particularly marked during the Uruguay Round negotiations, notably between the EC and the United States which together employed an independent accounting firm to assess the value of the parties' offers. *See* Gerard de Graaf and Mathew King, *Towards a More Global Government Procurement Market: the Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round,* 29 INTERNATIONAL LAW 552 (1995).

[15] *See* Pomeranz, *supra* note 5, at 1273.

[16] OECD Archives, *Government Purchasing—Note from the United States Delegation*, September 9, 1968, cited in Blank and Marceau, *supra* note *2*, at 89.

It was clear that it would not be possible simply to identify a sector and await the expected trade advantages by imposing reciprocal access to the "government" procurement markets of the putative signatories without, at the same time, finding a way of ensuring that those advantages could flow both ways, ie. that they were indeed reciprocal. This led to the conclusion that the approach could not be based on a limited number of sectors and that, in order to assess and ensure reciprocal advantages, some type of list of entities would need to be prepared based on the size and nature of the market in question. The idea was to devise a system under which, whatever the entity or market concerned, each member could offer the other members equivalent access to its government procurement in proportion to its size and the size of the economy as a whole.[17] The solution was to turn to the system of offers and requests used widely in the multilateral negotiations of the GATT whereby coverage would be limited to an agreed list of (governmental) entities that each party would offer, subject to the approval of the other parties. They, in turn, could reject the offer and request those entities in the offering country that they would like to see included in the list. This is the system that was eventually adopted in the Tokyo Round and Uruguay Round GPAs.

It should be added that, at the same time that the OECD discussions were taking place, the EEC had also started work on liberalising government procurement among its member states and there is little doubt that there was extensive cross-fertilisation between the two *fora*.[18] Two of the basic principles of the EEC Treaty, the freedom of establishment and the freedom to provide services, were to be achieved through the implementation of two General Programmes[19] which were adopted in 1961.[20] Both programmes recognised the importance of public procurement markets for both supplies and works but it was clear that the economic importance and sensitive nature of these markets meant that any abrupt and comprehensive liberalisation was out of the question.[21]

The approach taken was to work towards the adoption of two types of directives: "liberalising" directives to remove the most flagrant discriminatory measures applied in the member states, and "co-ordinating" directives aimed at harmonizing the laws of the member states in respect of public procurement. In the meantime and until the end of the transitional period, safeguards were put in place in the form of a quota system under which a certain percentage of relevant contracts could be reserved for nationals. As in the case of the OECD discussions, the value of contracts concluded by nationals of the different member states was also taken into account under this quota system, thereby establishing a certain degree of reciprocity.[22] Once the quota was exhausted, a member state was able to suspend allocation of the contracts to nationals of other member states. A series of liberalising directives were adopted during the 1960s[23] although it was not until the 1970s that the first co-ordinating directives emerged.[24] These have since been significantly amended.

[17] *See* Reich, *supra* note *2*, at 107.

[18] Blank and Marceau, *supra* note *2*, at 77.

[19] Articles 54(1) and 63(1) of the EEC Treaty, respectively.

[20] Official Journal 32 and 36 of 1962, respectively.

[21] Friedl Weiss, Public Procurement in European Community Law 30 (1993).

[22] *Id*. at 30, n. 86.

[23] Commission Directive of December 17, 1960, which applied the non-discrimination principles to goods including their supply for building works irrespective of whether these works were "public" works; Directive 62/427, OJ 1863/64; Directive 64/429, OJ 1880/64; Commission Directive of November 7, 1966; Directive 70/32, OJ 1970 L13/1; Directive 71/304, OJ 1971 L185/1.

[24] Directive 71/305, 1971 OJ L185/5 and Directive 77/62, OJ 1977 L13/1 on works and supplies, respectively.

These co-ordinating directives took essentially the same approach as that discussed in the context of the OECD. They regulated coverage of the directives by reference to broad descriptions[25] of the entities covered, together with (non-exhaustive) lists of the entities, and imposed a common set of procedures to be applied to procurement in the member states. These two key elements were pursued in the OECD discussions and, by the time these discussions were transferred in 1976 from Paris, home of the OECD, to Geneva where the Tokyo Round of GATT negotiations was underway, had become firmly established as the basis of any future agreement on government procurement.

C. The GATT Negotiations and the Tokyo Round

1. The Original Code

Under the Tokyo Round negotiations, begun in 1973, a special negotiating group had been established in the GATT to consider non-tariff barriers, quantitative restrictions and technical barriers to trade. A sub-group on government procurement was set up in 1976, to which the OECD sent a report setting out the current state of play of the OECD negotiations on government procurement and, soon thereafter, its "Draft Instrument on Government Purchasing Policies, Procedures and Practices." Work progressed rapidly within this sub-group and, by the end of 1977, the sub-group circulated a "Draft Integrated Text for Negotiations on Government Procurement."[26] Extensive bilateral and plurilateral negotiations and consultations between the parties followed. Given the difficulties of obtaining the required majorities for amending the GATT itself, the approach adopted was to establish a supplementary Code on procurement applicable only to those contracting parties that originally signed the Code, and open to signature to others wishing to participate. The first Government Procurement Agreement was signed on April 12, 1979 and entered into force on January 1, 1981.

The GPA 1979 ("the Code") was clearly based on the work of the OECD and many of the solutions worked out in the OECD discussions were evident in the final text. The two broad elements of entity coverage by entity list and the introduction of detailed procedural requirements were maintained and formed the basis of the Code and, later, of the GPA 1994. On the basis of the system of offers and requests, the lists of entities included in Annex I were those whose inclusion in the list had been negotiated between the parties. For the most part, these entities were agencies of the central or federal government and entities under the direct and substantial control of the government. Local, provincial and municipal entities were not covered nor were state-owned enterprises or corporations of a commercial character which excluded many of the state utility companies, notably in the fields of energy and telecommunications. Defence entities were also largely excluded, with only non-military products purchased by them being covered. Entity coverage was, therefore, limited, with only a token gesture aimed at possible enlargement in future: governments were required to inform regional and local governments and authorities of

[25] They referred to the state, its territorial sub-divisions (such as provinces, Länder, communes etc.) as well as to a more broadly defined category of bodies governed by public law (see, for example, Article 1(1) and (2) of the Commission Directive of December 17, 1960). Until the 1990s, the directives excluded entities in the utility sectors of water, energy, transport and telecommunications, mainly because the degree of State ownership over these entities varied so widely between the member states.

[26] GATT Doc. MTN/NTM/W/133 of December 15, 1977, amended by Doc. MTN/NTM/W/133/rev. 1 of March 30, 1978.

the objectives, principles and rules of the Agreement and to draw their attention to the overall benefits of liberalisation in government procurement.[27]

2. Continuing Issues Arising from the Code

The lack of a general definition of those entities which are covered by the term government procurement, though apparently resolved by adopting a system of lists, has given rise to a number of isolated disputes and the continuing elusiveness of a workable definition plagued the ongoing negotiations.[28] In particular, use of the phrase, entities "under the direct or substantial control"[29] of the government in Article I:1(c) of the Code, gave rise to the possibility that entities other than those listed in the appropriate Annex could be covered.[30] The issue was considered by a dispute panel in 1992,[31] in the context of a U.S. Sonar Mapping System.[32] There, the United States had agreed with a private company that the company would procure a sonar mapping system but that the system would be for the benefit of the government, would be paid for by government money and that the final decision over the award of the contract would also be made by the government. In the event, the panel held that those characteristics (payment by government, government ownership and possession by the government and government control over the award process) were sufficient to bring the procurement within the terms of Article I:1(a) of the Code.[33]

Linked to the issue of entity coverage was the question of thresholds, i.e. the minimum value of a contract above which the Code would apply. This issue had been discussed in the OECD but became a serious point of disagreement under the Tokyo Round negotiations. This was partly due to the question of the value of procurement offered by the different parties. The lower the threshold, the more contracts and entities would be covered. The higher the threshold, the fewer there would be,[34] and this could well affect the net value of the "contribution" of the different parties. At a more practical level, however, it was also recognised that a low threshold would cause a significant administrative burden on governments as a result of the large number of small value contracts undertaken by them on a daily basis. On the other hand, too high a threshold would limit, if not frustrate, the objectives of the Agreement since fewer contracts would be covered. Developing countries also favoured lower thresholds since this would enhance their prospects of gaining access to the procurement markets of developed countries by enabling them to compete for the lower value and less sophisticated contracts. In the end, a threshold value

[27] GPA 1979, Article I:2.

[28] For a detailed analysis of the issue and the unreported disputes, see Pablo Olivera, *Defining the Scope of Covered Entities under the WTO Agreement,* 6 PUBLIC PROCUREMENT LAW REVIEW 1, 8 (1997).

[29] This phrase has been omitted from the GPA 1994, although that has not removed the residual doubts, particularly since many of the Annexes rely on broader categories of entities than would be expected in Annexes supposedly limited to naming specific entities. See Pablo Olivera, *ibid*., at p. 16.

[30] As mentioned above, under the EEC directives, the Community's procurement rules would apply to any "body governed by public law" whether or not they were also explicitly included in the lists appended to the directives.

[31] *See* Part C.4, below in respect of the 1979 GPA dispute resolution system.

[32] Document GPR.DS1/R, April 23, 1992, and reported in *Re Procurement of a Sonar Mapping System: European Community v. United States of America* [1992] 3 CMLR 573. For a commentary, *see* Mary Footer, *GATT: Developments in Public Procurement Procedures and Practices,* 2 PUBLIC PROCUREMENT LAW REVIEW 193 (1993). *See also*, a more recent case under the GPA 1994, *Korea—Measures Affecting Government Procurement,* discussed below at Part III:A(1).

[33] Adoption of the Panel report was blocked by the United States.

[34] The United States, for example, had recognised that foreign procurement contracts tended to be much lower in value than those in the United States. *See* Reich, *op. cit*. (*footnote 2*), at p.109.

of SDR 150,000[35] was agreed. The Code also provides that contracts may not be divided with a view to removing them from the scope of the Code obligations.[36]

In line with the earlier negotiations, the scope of the Code extended only to contracts for the procurement of products. The procurement of general services was largely excluded, although services incidental to the supply of products were included under the agreement if the value of those incidental services did not exceed that of the products themselves.[37] Together with the provision, in the same article, excluding "services contracts *per se*," this suggests that, in the context of a mixed contract, one which includes the supply of both goods and services, the contract would be categorised as one or the other depending on the value of the respective components. This was not, however, the interpretation given by the panel in the *Sonar Mapping System* case, referred to above, which did not consider that the fact that the supply of products took place within the framework of a services contract of higher value was sufficient to exclude the procurement of those products from the Code. The panel concluded, therefore, that the U.S. procurement of the sonar mapping system was subject to the provisions of the Code even though it was procured in the context of a much larger contract for the supply of services.

3. Procedural Rules

The second main element of the Code was the imposition of transparent and common tendering procedures to govern the parties' procurement under the Code. The core provision is contained in Article II which incorporated into the Code the GATT obligations of MFN and national treatment. This required the parties immediately and unconditionally to provide to the products and suppliers of other parties treatment no less favorable than (a) that accorded to domestic products and suppliers and (b) that accorded to products and suppliers from any other Party. As is evident from the wording, this provision was limited to suppliers from Parties offering products originating from those countries. It was, therefore, important to determine the origin of those products which are entitled to the benefits of the Code. No agreement was reached to regulate origin questions in a single international standard,[38] and it was finally agreed that each Party would apply the same origin rules that it otherwise applies "in the normal course of trade" with specific reference to those applied to imported products.[39]

The negotiating parties had, as mentioned above, concluded that the non-discrimination obligations were not sufficient alone to open up procurement markets, and that the solution lay in the adoption of detailed and specific rules for the conduct of the procurement process. This was to be done by setting out specific tendering procedures inspired by the results of the OECD findings in relation to the parties' existing procedures.[40] Although there were many forms of tendering procedure, it was possible to identify three broad categories: "public" or "open" tenders under which the invitation to tender was given the widest possible publicity and where an unlimited number of suppliers were given the opportunity to bid; "selective" or "restricted" tenders under which participation is limited to a certain number of selected suppliers, the invitation to tender normally taking the form of invitations sent directly to those suppliers; and

[35] This refers to the full cost of the product to the entity, including any VAT or customs duties payable: *Report of the Panel on Value Added Tax and Threshold*, BISD 32nd Supp., 247.

[36] Article I:1(b).

[37] Article I:1(a).

[38] See Chapter 15 of this book.

[39] Article II:4.

[40] *See* the OECD Report of 1966, *supra* note 12.

"private contract" or "single tender" procedures under which the contracting entity contacts suppliers directly or contacts a single supplier directly, though generally only in the case of specific circumstances justifying a lack of competition (such as urgency). Article V of the Code reflects these findings and requires the use of open or selective tendering procedures unless the conditions specified for the use of single tender are met.[41]

An important principle applied to these tendering procedures was transparency. Little would be gained from the Code unless the participating countries' procedures were transparent and available to all potential and eligible bidders. Thus, the Code contained publicity requirements for announcing tenders and for notifying the award of contracts; minimum time limits providing sufficient opportunity for all eligible bidders to respond and submit bids; transparent and objective bidder selection and contract award criteria to be made known to all bidders in advance; and requirements regarding the use and development of objective technical specifications. These provisions remain largely unaltered in the GPA 1994 and will be discussed in detail below.

4. Dispute Resolution

Few agreements, let alone international agreements, are likely to be applied effectively unless there is a means of enforcing their provisions. Given the political nature of the GATT negotiations, political solutions to disputes, based on conciliation and negotiation, are to be expected and any form of adjudication is likely to be a measure of last resort. That is, indeed, the solution adopted by the Code. Nevertheless, unlike the GATT which concerns essentially public economic measures of governments affecting general trade between countries, the Code provided for specific tendering procedures, the breach of which was apt to lead to discrimination against specific foreign tenderers in the context of specific contracts and contract award procedures. Tenderers are, therefore, best placed to discover breaches of the provisions and are likely to have the keenest interest in seeking remedial action, thus avoiding costly and bureaucratic centralised supervision of the procurement process.[42] The introduction of private bid challenge rights had to await the GPA 1994, although Article VI:6 of the Code did require parties to maintain "procedures for the hearing and reviewing of complaints arising in connexion with any phase of the procurement process, so as to ensure that, to the greatest extent possible, disputes under this Agreement will be equitably and expeditiously resolved between the suppliers and the entities covered." This, however, was understood (by the parties) to mean that complaints would be heard by the procuring entity itself without, at the same time, requiring reliance on or the establishment of independent judicial or quasi-judicial bodies.[43]

The dispute resolution procedures of Article VII of the Code were threefold. First, a solution had to be sought through the use of bilateral consultations between the "government" parties under which each party was required to afford sympathetic consideration to any request for such consultations with a view to reaching a mutually satisfactory resolution of the matter. Second, in the absence of a mutually satisfactory resolution, the matter was to be referred to the Committee on Government Procurement, established

[41] These procedures, which remain largely unaltered in the GPA 1994, will be discussed at more length below.

[42] *See further*, on this issue and on the theory of procurement regulation, PETER TREPTE, REGULATING PROCUREMENT: UNDERSTANDING THE ENDS AND MEANS OF PUBLIC PROCUREMENT REGULATION (2003).

[43] Arie Reich, *supra* note 2, at 128.

during the Tokyo Round to oversee the procedures for consultation and dispute resolution, which was to investigate the matter with a view to facilitating, again, a mutually satisfactory solution. Third, if these attempts failed, the Committee was to establish a Dispute Panel to examine the matter and make such findings as would assist the Committee in making recommendations or giving rulings on the matter.[44] The findings and recommendations were not binding on the parties and parties could block their adoption by the Committee.[45]

The weakness of political compromise and of inter-governmental procedures as a means of resolving disputes, particularly where specific breaches of the Code as well as measurable damage to individual tenderers could be identified, is amply demonstrated by the Trondheim Panel.[46] In that case, although a contract had been awarded to a Norwegian supplier in clear violation of the Code,[47] the panel did not consider it necessary or appropriate to order remedial action by way of contract annulment or the recommencement of the tender procedures, since that had not been the customary practice under GATT.[48] It did not either deem it appropriate to order any form of compensation for the benefit of the U.S. supplier which was discriminated against or to order the withdrawal of the benefits of the Code from Norway. Despite breaching the Code, therefore, no action was taken against Norway or the Norwegian government entity responsible for the breach of the Code. As one commentator notes,[49] given the fact that this was apparently Norway's second violation of the Code with regard to the same type of product (the first having been with respect to Oslo) and given the well-known lack of effective remedies under the Code, it is tempting to accept the U.S. view (set forth at paragraph 3.34 of the Report) that the Norwegian Government had known that its actions would violate the Code and had made a calculated decision that this was an acceptable cost of supporting domestic industry. Whether this was the true motivation or not, the lack of adequate remedies at the disposal of aggrieved tenderers was clearly a serious weakness of the Code and one that has now been remedied in the GPA 1994.

D. Improvements Following the Tokyo Round Code

The Code contained in Article IX:6 an undertaking by the parties to begin negotiations within three years with a view to broadening and improving the Agreement and expanding its coverage to include services. These negotiations were commenced in 1982 and culminated in a Protocol of Amendments in 1986. Despite the ambitious intentions

[44] This procedure is similar to but not identical to the GATT procedure. See D.V. Anthony and C.K. Hegarty, *Cautious Optimism as a Guide to Foreign Government Procurement* 11 LAW & POL. IN INT'L. BUS. 1301, 1330 (1979).

[45] This was a weakness of the GATT system generally, and was rectified by the WTO Dispute Settlement understanding adopted at the end of the Uruguay Round. Appellate Body reports and unappealed panel reports are now adopted unless a consensus opposes adoption which as a practical matter is never likely to happen. *See* Chapters 26 and 27 of this book.

[46] GATT Doc. GPR.DS2/R of April 28, 1992 ("*Trondheim Panel Report*") and reported in *Norwegian—Procurement of Toll Collection Equipment for the City of Trondheim,* BISD 39th Supp. 400 (adopted). For a commentary, see Mary Footer, *supra* note 32, at CS200.

[47] The Norwegian government had adopted a single tendering procedure ostensibly because the contract was one for research and development, although the Panel found that it was, in fact, a contract for the supply of equipment since the result of the procurement was the purchase of operational toll equipment for a fully functioning toll ring system.

[48] *Trondheim Panel Report*, ¶ 4.17

[49] Reich, *supra* note 2 at 132.

of broadening the Code to include greater entity coverage and expanding its scope to include services contracts, very little was achieved in this respect during the negotiations following its entry into force.[50] Work concentrated on improving the text of the Code and seeking to strengthen its provisions in order to ensure proper and reciprocal implementation of the Code. In the event, the majority of the amendments concerned improvements to the text of the Code and to the tendering procedures themselves.[51] These consisted essentially in amending the publicity requirements and the minimum time limits for submitting tenders; amending the qualification criteria; introducing provisions relating to urgency; imposing restrictions on the use of offsets and improving publication of post-award information. In addition, a new and important paragraph[52] was added to the provisions relating to technical specifications in order to prevent the seeking or acceptance of advice on technical specifications which might have the effect of precluding competition.

A few more modest amendments were also made. First, the term "purchase of products" was replaced by the term "procurement of products" and was enlarged to cover not only purchase but also the lease, rental or hire-purchase of products, with or without an option to buy. Second, the threshold value was reduced from SDR 150,000 to SDR 130,000 and provisions included for the valuation of recurring contracts, lease, rental or hire purchase contracts as well as option clauses. Third, in order to prevent further discrimination, a clause was introduced[53] to ensure that parties would not discriminate against locally-established suppliers on the basis of degree of foreign affiliation or ownership. Further, parties would not discriminate against locally-established suppliers on the basis of the country of production of the good being supplied, provided that the country of production was a party to the Code.

II. The Uruguay Round and the GPA 1994

While one of the stated aims of the Uruguay Round was to "improve, clarify or expand, as appropriate, agreements and arrangements negotiated in the Tokyo Round of Multilateral Trade Negotiations," little of substance in relation to the Code was negotiated by the MTN Agreements and Arrangements group established to discuss a number of the Tokyo Round Codes, including the GPA. Negotiations on the Code continued, therefore, under the Committee on Government Procurement, established under Article IX:6 of the Code. This choice of negotiating forum is significant. Negotiations with respect to the remaining Tokyo Round MTN Agreements[54] were open to all GATT members. These agreements, as revised in the Uruguay Round, eventually ceased to be "voluntary" agreements and became part of the WTO single undertaking and, therefore, applicable to all WTO members. The GPA negotiations, by contrast, were conducted by the existing members of the Committee. The result was the plurilateral, as opposed to multilateral, GPA, signifying that it is limited to a number of WTO Members rather than all Members. While it remains part of the GATT/WTO family by virtue of its inclusion in the WTO

[50] It is perhaps no coincidence that 1986 was the year in which the Uruguay Round of multilateral trade negotiations was launched and it is possible that some of the negotiating parties were prepared to wait for those negotiations to push forward with greater expansion of the Code.

[51] These will be discussed in detail below.

[52] Article IV:4.

[53] Article II:2.

[54] The Subsidies Code, the Anti-Dumping Code, the Customs Valuation Code, the Standards Code and the Import Licensing Code.

annexes and is served by the WTO Secretariat and the Dispute Settlement Body, the GPA, together with one other plurilateral sectoral agreement,[55] remains binding on and confers benefits only to those Members who have signed up to it.

The "terms of accession" to the members-only club of the GPA reflect the long negotiating history.[56] The bargaining for entity coverage which had been the hallmark of previous negotiations reached a fever pitch during the Uruguay Round, most notably between the EU and the United States which disputed the real value of each other's offers.[57] The dispute led to the threat of retaliation by the United States against the EU's perceived discrimination[58] against foreign suppliers in the hotly contested utilities sectors of water, energy, transport and telecommunications. The dispute was only resolved after both countries agreed to sign an interim agreement (the Memorandum of Understanding ("MOU")) in which they made certain reciprocal commitments to open their respective procurement markets as a "down payment" towards an expanded Code in the areas of central government entities and electrical utilities.[59] No agreement was reached, however, on another contentious sector, telecommunications. The MOU[60] also contained a side letter calling for the appointment of an independent consultant to seek to quantify the value of the respective offers. This solution prompted other parties to improve their offers in an attempt not to be left outside an exclusive transatlantic procurement agreement.[61] These negotiations were largely bilateral with each party negotiating with the others resulting in a kaleidoscope of reciprocal arrangements between the parties. The annexes to the GPA contain not only lists of entities and contracts covered; they also contain a variety of derogations and reciprocity clauses which apply differently between the various parties.[62]

Notwithstanding the complications in implementation introduced by these various derogations, the parties succeeded in broadening entity coverage significantly. The GPA now includes not only (i) an expanded list of central government entities (Group A) already covered by the Tokyo Round Code but also, not covered by the Code, (ii) subcentral government entities (Group B) such as provinces and state authorities in federal systems and local and regional governments in centralised systems, and (iii) "other" entities (Group C) whose procurement policies are substantially controlled by, dependent

[55] The Agreement on Trade in Civil Aircraft. Two other plurilateral agreements concluded during the Uruguay Round, the International Dairy Agreement and the International Bovine Meat Agreement, are no longer in effect.

[56] During the negotiations, the parties adopted a Ministerial Decision on Accession to the GPA, partly in order to allay fears of developing countries as to the closed nature of the negotiations and the GPA. Under this Decision, coverage offers of countries seeking accession will be examined by a working party established by the Committee which will consider the coverage offer of the applicant, taking into account the export opportunities for existing parties in the procurement markets of the applicant country and the potential export capabilities of the applicant member to the procurement markets of the existing parties. *See The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts,* 407(WTO 1999).

[57] For an account of the negotiations, see Gerard De Graaf and Mathew King, *Towards a More Global Government Procurement Market: the Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round*, 29 INT'L LAWYER 435 (1995).

[58] Contained in Article 29 of Directive 90/531 (OJ 1990 L297/1) which became Article 36 of Directive 93/38 (OJ 1993 L199/84).

[59] *See also* Andrew Halford, *An Overview of EC-US Relations in the Area of Public Procurement* 4 PUBLIC PROCUREMENT LAW REVIEW 35 (1995), and Peter Trepte, *The EC-US Trade Dispute: Negotiation of a Partial Solution* 2 PUBLIC PROCUREMENT LAW REVIEW CS82 (1993).

[60] OJ 1993 L125.

[61] de Graaf and King, *supra* note 14, at 445.

[62] The prevalence of these derogations led to Hong Kong, an active participant in the negotiations, declining to join the GPA. *See* Blank and Marceau, *supra* note 2, at 119.

on, or influenced by[63] central, regional or local government such as public utilities. No agreement[64] was reached on a fourth category of entities (Group D), which consisted of entities not substantially controlled by, dependent on, or influenced by central, regional or local government such as the private utilities operating on the basis of special or exclusive rights. Such entities are, by contrast, covered by the EU's procurement directives.[65]

The second significant advance made during the Uruguay Round was the expansion of coverage of the GPA to services. As we saw above, the Tokyo Round Code was restricted to the procurement of goods. The GPA, by contrast, covers the procurement of both goods and services. The provisions of the GPA are framed in a way which does not distinguish between the procurement of goods and services, although there is a significant distinction in practice which is evidenced in the annexes. As with entity coverage, the approach taken was to provide a list of contracts covered. In the case of goods, this is a *negative* list, signifying that all goods are covered save for those specifically excluded. In the case of services, the lists are *positive*.[66] This means that the only services covered by the GPA are those which have been explicitly included in the lists. There is a further distinction to be made. Construction services have been treated separately and are listed in Annex 5. All other services are listed in Annex 4. Whilst there was general agreement on the definition of construction services and no reservations made by any of the parties in respect of their offers for construction services, no such agreement was reached for the Annex 4 services. The offers of the parties differ considerably[67] with some (notably the United States) offering a comprehensive list of services and others, such as Japan, offering very few. Inevitably, some services are included in the lists of some parties and not in others, making it extremely difficult to identify with precision those services contracts open to bidders from other signatory countries. The issue is further complicated by the myriad restrictions included in the different parties' offers which apply reciprocity conditions, *viz.* access will not be given to service providers of parties which have not themselves included the same category of services contracts in their own offer.

Finally, perhaps the most important institutional change made by the GPA 1994 consists in the requirement for parties to provide independent bid challenge procedures. In addition to the possibility of resorting to the WTO's Dispute Settlement Body at an inter-governmental level, the parties must ensure the existence of non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the GPA arising in the context of procurements in which they have or have had an interest.[68] This gives aggrieved bidders access to judicial or otherwise impartial bodies in each of the parties' jurisdictions and opens up the possibility of quick and effective remedial action, including the award of compensation. From a procurement perspective this is a remarkable achievement, given the traditional inter-governmental approach of the GATT to dispute resolution which has proved so ineffective in the context of procurement, as was seen in the *Trondheim* case, above.

[63] The means of control or influence could include, *inter alia*, governmental ownership or part ownership, government financial assistance such as subsidies, statutory relationship between the entity and the government, special privileges such as legal monopolies, budget review by government, appointment of management personnel by government, political pressure etc. *See* Blank and Marceau, *supra* note 2, at 113.

[64] Indeed, it was decided that no negotiations should take place concerning Group D.

[65] Article 2 of Directive 93/38 (OJ 1993 L199/84). The EU's Annex 3 to the GPA ensures that, of these, only the publicly owned utilities are subject to the GPA.

[66] Except for the United States which adopted a *negative* list approach.

[67] In some instances, they also differ on threshold values.

[68] Article XX:2.

In addition to these three major improvements to the GPA (greater entity and contract coverage; introduction of bid challenge procedures), the Uruguay Round also made a number of amendments and improvements to the text of the GPA and to the tendering procedures to be applied, including the introduction of a certain degree of flexibility for the Group B and C entities, the introduction of a competitive negotiation procedure, strengthening of the prohibition on offsets and changes to the provisions on technical specifications. These will be discussed below.

III. The Government Procurement Agreement 1994

The GPA consists of the main text and four appendices. These appendices consist of lists of the agencies each government has committed to complying with the agreement, lists of services and constructions services subject to the agreement, and lists of publications the governments use to publish tender notices, qualification lists and the procurement rules and procedures they apply. Given the importance of these appendices to the understanding and implementation of the GPA, it is as well to have a clear idea of their content at the outset.

Appendix I defines the coverage of the parties' obligations under the GPA in terms of procuring entities and services, including construction services. Each party, based on the system of offers and requests discussed above, provides its own appendix[69] which comprises five annexes:

- Annex 1 contains a list of the covered central government entities;
- Annex 2 contains a list of the covered sub-central government entities;
- Annex 3 contains a list of all other covered entities that procure in accordance with the agreement;
- Annex 4 specifies those services, whether listed positively or negatively, covered by the agreement;
- Annex 5 specifies covered construction services.

In addition, there are General Notes to each party's Appendix 1 which qualify the commitments referred to in the annexes.

Appendix II sets out the publications utilised by the parties for the publication of notices of intended procurements (Article IX:1) and post-award notices (Article XVIII:1).

Appendix III sets out the publications utilised by the parties for the annual publication of information on permanent lists of qualified suppliers in the case of selective tendering procedures (Article IX:9).

Appendix IV sets out the publications utilised by the parties for the publication of laws, regulations, judicial decisions, administrative rulings of general application and any procedure regarding government procurement covered by the agreement (Article XIX:1).

A. Scope and Coverage

The GPA applies to any law, regulation, procedure or practice regarding any procurement by entities covered by the agreement. It does not seek to replace national procurement systems but sets out a requirement of consistency between the applicable national

[69] These are all available on the WTO website, www.wto.org.

systems and the GPA.[70] As a result, the national procurement systems of the parties have been modified to a greater or lesser extent in order to bring them into line with the GPA.[71] Without defining what is meant by government procurement, the GPA applies to specifically-listed government entities when they purchase goods, services and construction services, also specifically listed, where the value of the contract exceeds a specified threshold value. These elements will be considered separately.

1. Entity Coverage

Only procurement carried out by the entities listed for each party in Appendix I, Annexes 1, 2 or 3 of the GPA is covered by the Agreement. As discussed above, these now include central government entities; sub-central government entities such as states, provinces, Länder, prefectures and municipalities; and other entities which the parties have agreed to subject to the agreement, such as public undertakings and public authorities, notably in the utilities sector, or federal enterprises. These are generally undertakings operating in the sectors of the generation and supply of gas and electricity, water, operation of urban transport networks (trams, underground systems etc.), and the provision of port and airport facilities. Coverage is not equal between the parties, however. Whilst all these sectors are subject to the GPA for the member states of the EU, Korea and Japan, for example, have not provided general coverage for airports[72] and urban transport (nor electricity, in the case of Japan). Some countries have included a variety of other entities under this annex, such as, in the case of Japan, the Japan National Tourist Organization. As discussed above, Annex 3 does not cover any purely private undertakings.

The issue of the coverage of airports gave rise to the first dispute under the GPA 1994.[73] In *Korea—Measures Affecting Government Procurement,*[74] the only dispute panel finding to date under the GPA 1994, the question arose whether the Korean entities responsible for the construction of the new Inchon International Airport (the Korean Airports Authority and its successors ("KAA")) were required to comply with the provisions of the GPA.[75] The KAA was not listed in any of the relevant Annexes and it was not therefore a listed entity, although it was common ground that the Ministry of Construction and Transportation was listed. A note to Korea's annex provided that government entities included "their subordinate linear organisations, special local administrative organs and attached organs as prescribed in the [Korean] Government Organization Act." Though framed in ambiguous terms, the panel concluded that this was not sufficient to cover the

[70] *See, for example*, Articles VII:1 and XXIV:5.

[71] There are a number of commentaries on implementation in different states. See, for example: Joseph Francois, Douglas Nelson and David Palmeter, *Public Procurement in the United States: a Post-Uruguay Round Perspective*; Pierre Didier, *The Uruguay Round Covernment procurement Agreement: Implementation in the European Union*; Norio Komuro, *Implementation of the GPA in Japan*; Michael Hart and Pierre Sauvé, *Does Size Matter? Canadian Perspectives on the Development of Government Procurement Disciplines in North America*, all to be found in Hoekman and Mavroidis, *supra* note 1.

[72] Precisely the question at issue in *Korea—Measures Affecting Government Procurement,* discussed immediately below.

[73] *See also* the *Sonar Mapping* case discussed in Part IC(2) above, which raised similar, if not identical issues.

[74] WT/DS163/R ("*Korean Government Procurement*"). *See also*, for a commentary, Arwel Davies, *Korea—Measures Affecting Government Procurement: Some Critical Observations*, 10 PUBLIC PROCUREMENT LAW REVIEW 229 (2001). See also Hans-Joachim Prieß and Christian Pitschas, *Recent Developments within the WTO: Korea—Measures Affecting Government Procurement* 9 PUBLIC PROCUREMENT LAW REVIEW NA91 (2000).

[75] The exclusion of certain U.S. construction companies from the bidding process had prompted a complaint from the United States.

KAA on the facts of the case. The United States had argued for the application of a control test and the panel went on to consider whether GPA coverage can result from the control relationship between two entities regardless of the Schedules and the way in which the parties seek to define them. While the panel was not prepared to read such a control test into the GPA, based as it is on the system of lists of entities, it did consider that control by one entity over another could be a relevant criterion for determining coverage,[76] especially where an entity is not specifically excluded by the Annexes.[77] It looked, in particular, at whether the government entity concerned (the Ministry of Construction and Transportation) and the KAA were, in some way, legally unified, or whether, in the alternative, it could be said that KAA was acting as the agent of the government entity such that the airport project was, in reality, the legal responsibility of the government. On the facts of the case, neither situation was found to exist. Nevertheless, the possibility that unlisted entities may be covered by the GPA in appropriate circumstances, where they are, in reality, acting for and on behalf of the government, is, as this panel finding makes clear, a real one which serves to avoid situations of circumvention. This has implications for negotiating parties in that much care needs to be taken in negotiating the Annexes. In this case, it was also evident that the United States had to some extent brought the problem on itself during the negotiations in failing to act upon qualifications Korea had made in its answers in relation to an explicit request by the United States regarding the Inchon airport construction. Other negotiating parties had understood that Korea's offer did not include the airport and had acted upon that understanding by including a derogation in their offers with respect to Korea's airport coverage.[78]

2. Scope

The provisions of the GPA apply only to the procurement[79] of goods (other than defence-related goods and a number of goods specifically excluded by the parties), construction services listed in Annex 5 and other services (defined by reference to the Central Product Classification ("CPC")) listed in Annex 4. Unlike the case for other services, the parties managed to reach a mutual agreement on the construction services to be covered and a common definition appears in each party's Annex 5. It defines a construction service contract as "a contract which has as its objective the realisation by whatever means of civil or building works, in the sense of Division 51 of the CPC." This division includes all types of services in connection with construction, from the pre-erection work at the construction site (of buildings, roads or other infrastructure) to the building and completion itself.

No such agreement was reached on the definition of other services covered by the agreement and this is where most annexes differ considerably from one another. Nevertheless, there are some services that are covered by all parties: most types of computer services, architectural services, urban planning, engineering services, sewage, refuse disposal and most other environmental services. Most parties also include, for example, accounting, auditing and bookkeeping (except for Israel and Japan); management

[76] *Korean Government Procurement,* ¶ 7.57.

[77] *Id.,* ¶ 7.72. Given the negotiated inclusion of entities in the lists, to bring within the coverage of the GPA entities which have explicitly been negotiated out, would undermine the very basis of the negotiations. *See, contra,* Davies, *supra* note 81, at 231.

[78] *Korean Government Procurement,* ¶ 7.116.

[79] By Article I:2, the agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

consulting (except Japan and only partially covered by Canada); market research (except Canada); advertising (except Canada and only partially covered by Korea); printing and publishing (except Israel and Canada, the United States at sub-central level and only partially covered by Korea). Some services are covered only by a limited number of parties, for example, financial services (EU and United States) and legal services in respect of advice on foreign and international law only (Canada).

In terms of the applicable rules of origin, the GPA[80] has simply reiterated the relevant provision in the Tokyo Round Code, but adding services, to the effect that parties shall apply those rules of origin that are applied in the normal course of trade. In terms of services, there may be a problem in that most countries do not have any clear rules of origin for services which they apply in the normal course of trade.[81] Reich suggests[82] that, in this event, Article XXVIII of GATS would apply. That article distinguishes between a service supplied from or in the territory of another member and a service supplied through commercial presence or through the presence of a natural person. In the first case, the service is considered to be of the country from or in whose territory the service was supplied (regardless of the service provider's nationality). In the second case, the origin is determined in principle by reference to the nationality of the service provider.

3. Threshold Values

The GPA applies to contracts whose value exceeds the threshold values set out in Appendix 1. Though largely the same for most countries, some of these thresholds have been set at different levels. The threshold for the supply of both goods and services to Annex 1 entities is SDR 130,000, with some minor exceptions. For the sub-central government entities in Annex 2, the threshold is generally SDR 200,000. For Annex 3 entities, most parties apply a threshold of SDR 400,000. In the case of construction services procured by entities in all three annexes, most countries apply a threshold value of SDR 5 million, although, in the case of Japan and Korea, the threshold is as high as SDR 15 million.

In order to prevent manipulation of contract valuation that would take particular contracts outside the scope of the GPA, Article II:2 provides that no selection of the valuation method may be used nor any procurement requirement divided with the intention of avoiding the application of the GPA. Article II also provides for methods of contract valuation to take account of recurring contracts, contracts for the lease, rental or hire purchase of products or services or where contracts do not specify a total price and option clauses. Remuneration will include, as well as price, any premiums, fees, commission and interest receivable.

4. Exclusions

Military products are explicitly excluded by each State (either by a negative or positive list contained in each country's Annex 1). In addition, Article XXIII of the GPA contains exceptions similar to the general and security exceptions contained in Articles XX and XXI of the GATT. Thus, the GPA does not prevent any party taking action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials or to procurement indispensable to national security or for national defence purposes. Provided they are not a means of arbitrary or unjustifiable discrimination or a disguised

[80] *See* GPA Article IV.
[81] *See* Reich, *supra* note 2, at 290.
[82] *Id.* at 291.

restriction on international trade, the GPA does not prevent a party from imposing or enforcing measures necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property;[83] or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.

B. The Basic Principles

The central premise of the GPA is non-discrimination in government procurement between the signatories, and the two non-discrimination pillars of the GATT, national treatment and the most favoured nation (MFN) obligation, are incorporated in Article III. These principles are guaranteed by Article III:1 of the GPA which requires each party, "immediately and unconditionally," to provide to the *products*, *services* and *suppliers* (including service providers) of the other parties, treatment no less favourable than (a) that accorded to domestic products, services and suppliers (national treatment) and (b) that accorded to products, services and suppliers of any other party (MFN). It would appear that, in this context, "domestic suppliers" means locally-established suppliers, since the position of domestic firms with a degree of foreign affiliation or ownership is dealt with by another provision.[84] Article III:2(b) complements these provisions by ensuring that there will be no discrimination against locally-established suppliers on the basis of the *country of production* of the good or service (i.e. the origin of the product or service as opposed to the nationality of the supplier), provided that the country of production is a signatory to the GPA, so that a locally-established supplier will not be discriminated against when not offering domestic supplies, provided they are supplies originating in a GPA signatory State.

In addition, Article XVI provides emphatically (whereas, in the Tokyo Round Code, there was only a plea for limitation) that, in the qualification and selection of suppliers, products or services or in the evaluation of tenders and award of contracts, entities shall not impose, seek or consider offsets. Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, countertrade or similar requirements. Thus, there can be no discrimination in favour of domestic suppliers through the use of offsets. Nevertheless, an exception is made (in Article XVI:2) in the case of developing countries. At the time of accession, a developing country may negotiate objective, clearly defined and non-discriminatory conditions for the use of offsets (such as requirements for the incorporation of domestic content) which will be set out in their Appendix 1. The offset conditions may only be used for purposes of qualification and not as criteria for the award of contracts, *i.e.* only tenderers meeting the offset requirement will be eligible to tender; offsets will not be used as a means of granting preferences between those tenderers meeting the offset requirement and those who do not.

C. The Contract Award Procedures

Implementation of the basic obligations of non-discrimination is ensured by setting out a number of detailed operational rules for tendering to be followed by procuring entities.

[83] Where products or services are protected by intellectual property rights *and* can be supplied by only one supplier, then a limited tendering procedure may be used.

[84] Article III:2(a). *See* Blank and Marceau, *supra* note 2, at 106.

This is done by prescribing three methods of tendering (open, selective and limited) and one additional mechanism which may be applied to each of those methods (competitive negotiation), supplemented by provisions relating to the preparation of tender documentation, the qualification of suppliers, selection procedures, receipt and opening of tenders and the award of contracts. In addition, the rules also provide transparency requirements relating both to tender notices and their publication, time limits for tendering and delivery and information on the award of contracts. The GPA also contains specific rules with regard to technical specifications.

1. Tendering Procedures

Article VII:3 sets out the three main procedures. Competitive negotiation is not a tendering procedure as such but an approach which may be relied upon by parties when using the other procedures, provided the appropriate conditions are met.

(a) The Open Procedure. Open tendering procedures are those procedures under which all interested suppliers may submit a tender. This is the most competitive of procedures and the remaining procedures involve decreasing levels of competition. The operational requirements of the GPA apply to the open procedures in full. They apply more restrictively in the case of selective and limited procedures.

(b) The Selective Procedure. Selective tendering procedures are those procedures under which only those suppliers invited to do so by the procuring entity may submit a tender. Many procurement systems incorporate a selective or restricted procedure for a number of reasons. In some systems, it is recognised that there are circumstances in which the advantages to be gained by open bidding are outweighed by the cost and time implications of conducting the procedure. Thus, where there are a limited number of suppliers (such as in the case of suppliers of power-generating equipment), little would be gained by relying on an open bidding procedure. Those invited to submit tenders are, therefore, specifically identified as individual tenderers. These systems will, therefore, also impose conditions for its use. The UNCITRAL Model Law,[85] for example, permits the use of a selective procedure when (a) the goods, construction or services, by reason of their highly complex or specialized nature, are available only from a limited number of suppliers or contractors, or (b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, construction or services to be procured.[86]

Unlike UNCITRAL, however, the GPA does not set out any conditions for the use of the selective procedure and, in this, it takes a similar approach to the current equivalent EU directives on procurement.[87] The main reason for this is that the EU and GPA provide for the use of the selective procedure in cases where there are too many potential tenderers so that, if all were to be fully evaluated, the process would be excessively time-consuming and expensive. It is to be used, therefore, in a rather different situation to that envisaged in

[85] This is not a system itself but a model used to design procurement systems.

[86] Article 20 UNCITRAL Model Law. *See also* the *World Bank Guidelines on Limited International Bidding* (Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/4817).

[87] One of the incarnations of the EU's Supplies Directive did, however, require a justification resulting from, *inter alia*, a need to maintain a balance between contract value and procedural costs and the specific nature of the products to be procured: *see*, Article 6 of Directive 77/62 (OJ 1977 L13/1) as amended by Directive 88/295 (OJ 1988 L127/1).

the UNCITRAL Model[88] and allows contracting entities to limit the number of tenderers. Thus, the UNCITRAL type selective procedure recognises that there is a limited number of qualified tenderers, allowing invitations to be sent directly to selected (identified) bidders, whilst the EU/GPA selective procedure allows the number to be limited by way of selection where there are too many potential tenderers. That selection is made by a form of pre-qualification, i.e. only those who are qualified based on the selection criteria are invited to submit full tenders for evaluation. As with the EU directives, a notice of an intended procurement to be conducted by way of selective procedure must also be published.

While the EU directives require that invitations be sent to a minimum of five suppliers,[89] the GPA imposes no numerical minimum. However, in order to ensure optimum effective international competition under selective tendering procedures, Article X requires entities to invite tenders from the maximum number of domestic suppliers and suppliers of other parties consistent with the efficient operation of the procurement system. They must select the suppliers to participate in the procedure in a fair and non-discriminatory manner. No method is indicated as to how a selection will be made between a large number of suppliers, although this is an issue which has plagued many procurement systems which allow the use of selective tendering without providing the means (nor the motivation) for making the selection.[90] If, as in the case of the GPA, there is no set number of tenderers to be invited, it is arguable that the selection will take place on the basis of a pass/fail test, i.e. all those tenderers who meet (pass) the minimum selection criteria will be invited to submit tenders.[91] Nevertheless, the requirement to ensure a fair representation in the selection between national suppliers and suppliers of other parties, suggests that other selection criteria are to be used. No guidance is offered in the GPA.

The GPA allows entities to maintain permanent lists of qualified suppliers[92] and, in selective procedures, they are also permitted to select suppliers to be invited to tender from among those listed, allowing equitable opportunities for suppliers on the lists.[93] Given that the selective procedure is to be advertised, this does not prevent expressions of interest from other suppliers and, under Article X:3, other suppliers requesting to participate (by telex, telegram or fax) shall also be considered where they are not yet qualified (i.e. do not appear on a permanent list of qualified suppliers), provided there is sufficient time to complete the qualification procedure. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.

(c) The Limited Procedure. The limited procedure is the least competitive procedure and, in common with all other systems which allow it, may only be used when certain conditions are met. Under this procedure (previously called "single tendering"), a procuring entity may contact a supplier or suppliers directly and individually and negotiate the terms of a contract directly with that supplier or suppliers. Article IX:1 specifies that

[88] In some respects, this is a confusion brought about the use of non-standard terminology in international procurement.

[89] Article 19(2) of Directive 93/36 (OJ 1993 L199/1).

[90] On similar difficulties with the EU system, *see* SUE ARROWSMITH, THE LAW OF PUBLIC AND UTILITIES PROCUREMENT 217 (1996).

[91] This is the method preferred and adopted in the procurement rules of international organisations such as the World Bank, and the Asian Development Bank.

[92] *See* Part III C3 *infra*.

[93] Article X:2.

no invitation to tender need be published and Article XV:1 provides that the provisions of Articles VII to XIV governing open and selective tendering procedures do not apply. Provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other parties or protection to domestic producers or suppliers, Article XV permits the use of limited tendering in the following circumstances:

- in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been collusive,[94] or not in conformity with the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;
- when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
- in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;
- for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services;[95]
- when an entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of products or services shall be subject to Articles VII through XIV;[96]
- when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services

[94] Collusion among bidders is one of the constant threats to an effective procurement system. However, collusion and other anti-trust matters are generally outside the scope of procurement rules since they address supply-side actors whilst procurement rules impose obligations on buyers. Collusion is also notoriously difficult to prove and it is unclear, in this provision, what authority is to make the finding of collusion. Certainly, procuring entities are ill-equipped to undertake such a task, whatever their suspicions. On competition matters and procurement generally, *see* Diane Wood, *The WTO Agreement on Government Procurement: An Antitrust Perspective* in Hoekman and Mavroidis, *supra* note 1, at 261; Peter Trepte, *Public Procurement and the Community Competition Rules*, 2 PUBLIC PROCUREMENT LAW REVIEW 93 (1993).

[95] Footnote 5 of the GPA. It is understood that "existing equipment" includes software to the extent that the initial procurement of the software was covered by the Agreement.

[96] Footnote 6 of the GPA. Original development of a first product or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards. It does not extend to quantity production or supply to establish commercial viability or to recover research and development costs. *See* also the *Trondheim* panel decision, discussed above.

from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction services may not exceed fifty per cent of the amount of the main contract;

- for new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded in accordance with Articles VII through XIV and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for such new construction services;
- for products purchased on a commodity market;
- for purchases made under exceptionally advantageous conditions which only arise in the very short term. This provision is intended to cover unusual disposals by firms which are not normally suppliers, or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers;
- in the case of contracts awarded to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Agreement, notably as regards the publication, in the sense of Article IX, of an invitation to suitably qualified suppliers, to participate in such a contest which shall be judged by an independent jury with a view to design contracts being awarded to the winners.

(d) Competitive Negotiation. Negotiations are generally not permitted in the case of tendering procedures since this would, *prima facie,* open up the possibility of unequal treatment and discrimination.[97] However, the possibility of negotiation was introduced into Article XIV of the GPA during the Uruguay Round negotiations. As mentioned above, it is not a procedure in itself, but may be used during the open or selective procedures under the stated conditions. Effectively, provided the intention to do so was indicated in the invitation to participate, negotiations may be conducted with the bidders. Even in the absence of such an indication, recourse may also be had to negotiations where it appears from the evaluation that no one tender is obviously more advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation.

The purpose of the negotiations is primarily to identify the strengths and weaknesses in the tenders and the negotiations must be kept confidential so that no information shall be provided that is intended to assist particular participants to bring their tenders up to the level of other participants. The process must be non-discriminatory and the entities must, in particular, ensure that (a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation; (b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations; (c) all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and (d) when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.

[97] Although a number of countries would appear to permit such negotiations. *See Procurement: Competitive Negotiations: Note by the Secretariat,* in UNCITRAL Yearbook Volume XXIII, at 243 (1992).

2. Tender Documentation

In order to provide fairness and equality of treatment, Article XII requires that the tender documentation contain all information necessary to permit tenderers to submit responsive tenders, including the information published in the notice of intended procurement. To further guarantee fairness, Article VII:2 prohibits entities from supplying to any supplier information with regard to a specific procurement which would have the effect of precluding competition. In addition, Article XII:3(c), dealing with requests for information regarding the tender documentation, prevents the entity from disclosing information that would give the supplier making the request information which would give the supplier an unfair competitive advantage over its competitors.

In addition to the above-mentioned information, as well as providing information with respect to the address to which tenders and requests for supplementary information should be sent, information regarding bid opening and the language or languages in which tenders should be submitted, the tender documentation must also contain the technical specifications, the qualification criteria (in terms of economic and technical requirements), financial guarantees and information or documents required from suppliers, terms and condition of contract, including payment terms and the criteria for awarding the contract. The award criteria will include any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of products or services of other Parties, customs duties and other import charges, taxes and currency of payment. This is critical since an award may only be based on the criteria set out in the tender documentation.[98]

Article XII also requires procuring entities to forward the tender documentation to any tenderer who requests them and to respond promptly to any reasonable requests for explanations.

3. Qualification

In many procurement systems, the qualification of tenderers is based on an enumeration of exhaustive selection criteria. Whilst Article VIII does refer to such criteria, the emphasis of the GPA is much more in ensuring a non-discriminatory application of the selection/qualification criteria. Thus, the main obligation is that entities shall not discriminate among suppliers of other parties or between domestic suppliers and suppliers of other parties. The qualification criteria must be published in sufficient time to allow interested suppliers the opportunity of completing the qualification procedures. The minimum time limits, discussed below, would normally be adequate to ensure this completion, although the GPA does also permit the use of permanent lists of suppliers. Where such lists exist, the suppliers appearing on them are, in a sense, pre-qualified and do not need to be qualified a second time. The concern relates to those suppliers that do not appear on these lists. They are, as is made clear in Article VIII(c), entitled to participate in the same way as suppliers appearing on the list but will only be considered provided there is sufficient time to complete the qualification procedure. On the other hand, the same Article does require entities not to use the process of and time required for qualifying suppliers as a means of keeping suppliers off the lists or from being considered for an intended procurement.

With a view to ensuring objectivity in the qualification criteria, any conditions for participation in tendering procedures must be limited to those which are essential to ensure

[98] Article XIII:4(c).

the firm's capability to fulfil the contract in question. Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, must be no less favourable to suppliers of other Parties than to domestic suppliers and must not discriminate among suppliers of other Parties. The financial, commercial and technical capacity of a supplier will be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations. None of these provisions preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of the Agreement.

The permanent lists of suppliers are not closed lists and must be open to suppliers at all times. Applications for qualification must be dealt with promptly and decisions on qualification, as well as removal from the lists, must be communicated to the applicants. Where entities maintain permanent lists of qualified suppliers for the purpose of selective tendering, Article IX:9 requires an annual publication of an appropriate notice in one of the publications listed in Appendix III. The notice must contain the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists; the conditions to be fulfilled by suppliers with a view to their inscription on those lists and the methods according to which each of those conditions will be verified by the entity concerned; and the period of validity of the lists, and the formalities for their renewal. However, when the duration of the qualification system is three years or less and if the duration of the system and the fact that no further notices will be published is made clear in the notice it will be sufficient to publish the notice once only, when the system is set up.

When a notice on the existence of a qualification system is used as an invitation to participate,[99] the notice must, in addition, include the information on the nature of the products or services concerned and a statement that the notice constitutes an invitation to participate.

4. Receipt of Tenders

Notwithstanding the desire expressed in Article XXIV:8[100] to ensure that the GPA does not constitute an unnecessary obstacle to technical progress, the terms of the GPA are rather static and, for the most part, require the submission of tenders in writing. In particular, Article XIII:1(a) provides that "tenders shall normally be submitted in writing directly or by mail." This will include, where "permitted" by the purchasers, tenders submitted by telex, telegram or facsimile, although these must then be confirmed by letter or a signed copy of the original. Tenders by telephone are not permitted. It is arguable that, given the largely permissive language used in the GPA, even under the current text, electronic submission would be permitted at the behest of the purchaser.

The tenders must, of course, be submitted by the deadline, although the provisions of the GPA do not extend to requiring the return of tenders unopened if they arrive after the deadline. Article XIII:1(b) does, however, provide that a supplier shall not be penalized if a tender is received in the office designated in the tender documentation after the time

[99] *See* Part III.C.6 below.

[100] This Article simply provides for regular consultations by the Committee regarding the use of information technology with a view, where necessary, to negotiating modifications to the Agreement.

specified because of delay due solely to mishandling on the part of the procuring entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide. There are no specific provisions relating to public bid openings nor to the procedures of such openings. That is a procedural question for national law which must, however, guarantee the regularity of bid openings and be consistent with the non-discriminations obligations of the agreement. However, public bid openings are not excluded for those states which choose to employ them and Article XII:1(e) requires, for example, the tender documentation to identify the persons authorised to be present at the opening of tenders and the time, date and place of the opening.

The submitted tenders must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender.[101] Tenderers may be given the opportunity to correct unintentional errors of form between the opening of tenders and the award of the contract but only if they do not give rise to any discriminatory practice.[102] In practical terms, this means that only errors of form will be permitted and no errors of substance. This is likely to include mathematical errors, for instance, but would not permit any reworking of the calculations in order to arrive at different prices.

5. Award of Contracts

There is always tension with regard to the most appropriate award criteria to be applied. Some countries, notably the United States, rely solely on price-based evaluation and award, although many others, notably the EU member states, rely on a combination of price and other objective criteria which could include delivery dates, commitments to spare parts and after-sales service, technical quality, and even aesthetic merit. The World Bank guidelines and the UNCITRAL Model also permit the use of various criteria in awarding contracts although, in contrast to the EU system, they (notably the World Bank) require a certain degree of quantifiability in the additional criteria imposed. Thus, the criteria are expressed, so far as possible, in monetary terms and the price offered by the tenderers are evaluated against these quantified criteria, leading to a "lowest evaluated price."[103]

Given the objective of the GPA of laying down minimum standards to be applied, it has opted for flexibility and, in addition to allowing awards on price, also allows other criteria to be taken into account, provided they have been set out in the tender documentation. Article XIII:4(b) provides that, unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract[104] and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender

[101] Article XIII:1(a).

[102] Article XIII:1(b).

[103] It might be suggested that this is necessary in order to prevent arbitrary discrimination between tenderers. Otherwise higher weight might easily be assigned to suppliers favoured by procuring entities, whatever the reasons for that favouritism. The EU has now included such a requirement in its new directive coordinating the procedures for the award of public supplies, works and services contracts: *Directive 2004/18/EC* (OJ 2004 L134/114). Article 53(2) requires procuring entities, where additional criteria other than price are to be applied, to specify in advance the weighting given to each of those criteria.

[104] Only those tenders which, at the time of bid opening, conform to the essential requirements of the notices or tender documentation and from a supplier which complies with the conditions for participation will be considered for award.

or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.

The difficulty with this provision is that it does not indicate what criteria may be taken into account nor what weight should be given to those criteria in the evaluation and award process. Article 34 of the UNCITRAL Model Law identifies as possible criteria, for example, the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion and construction or provision of services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services. World Bank guidelines suggest, in addition, inland transport and insurance costs to the site, efficiency and compatibility of equipment, availability of service and spare parts and related training, safety and environmental benefits. The EU directives would add cost effectiveness, technical merit, quality, aesthetic characteristics and security of supplies. These types of criteria are typical of the considerations buyers would take into account in the award of contracts and are likely to be permissible under the GPA; there would appear to be no limit to the possible criteria. Whilst no weighting is required, the general non-discrimination obligations of the GPA also apply and would, were it possible to prove discrimination, serve to prevent arbitrariness on the part of the procuring entity in this respect.

There is a further provision contained in Article XIII:4(a) to the effect that where a procuring entity has received a tender *abnormally lower* than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract. There may be many reasons why tenderers may be able to offer abnormally low prices (currency fluctuations, stockpiles protected against inflation, assets bought on liquidations, etc) and there is no reason why a procuring entity is not also entitled to benefit from particularly competitive prices.[105] Thus, where there is such a tender, the entity may take the benefit provided it is satisfied that the low price is not due to a particular failure or likely failure of the tenderer to meet the qualification criteria or to deliver on the contract.

6. Advertising, Transparency and Information Requirements

As well as requiring entities to adopt the tender procedures outlined above and in order to make them effective, the GPA contains provisions relating to publicity of tender notices and to minimum time limits following publication which seek to ensure that all potential bidders have sufficient and equal time to prepare and submit their bids. The GPA also requires information to be published following the award of a contract. In addition, the GPA imposes certain other transparency and information requirements, both for statistical purposes and for the purpose of ensuring non-discrimination.

(a) Tender Notices. Except for procurements fulfilling the conditions of the limited procedure, the GPA requires the contract award procedures to be initiated by way of an invitation to participate in an intended procurement which will take the form of a notice. Each notice of intended procurement ("NIP") must contain specific information and must make clear that the procurement is covered by the GPA.[106] They must contain: the nature and quantity, including any options for further procurement and, if possible, an estimate

[105] There is an unfortunate tendency in transition economies to require all offers lower than an estimated price by a certain percentage to be rejected. Apart from a misconceived reliance on estimated prices, this also deprives the procuring entities of particularly favourable and competitive prices.

[106] Article IX:11.

of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products or services to be procured; whether the procedure is open or selective or will involve negotiation; any date for starting delivery or completion of delivery of goods or services; the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted; the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents; any economic and technical requirements, financial guarantees and information required from suppliers; the amount and terms of payment of any sum payable for the tender documentation; and whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.[107]

If, after publication of an invitation to participate in any case of intended procurement, but before the time set for opening or receipt of tenders as specified in the notices or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice must be given the same circulation as the original documents upon which the amendment is based. The non-discrimination obligations are ensured by requiring that any significant information given to one supplier with respect to a particular intended procurement is given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.

In addition to the NIPs, Article IX provides two other options. The GPA has introduced an element of flexibility for sub-central (Annex 2) and other (Annex 3) entities, similar to the provisions contained in the EU directives.[108] In the first place, these entities may use a notice of planned procurement ("NPP") which will need to contain only so much of the information required in an NIP as is available. It must at least contain a statement that interested suppliers should express their interest in the procurement to the entity; a contact point with the entity from which further information may be obtained; the subject matter of the contract; the time-limits set for the submission of tenders or an application to be invited to tender; and the addresses from which documents relating to the contracts may be requested. There is no further requirement to publicise the planned procurement, although entities which use a notice of planned procurement as an invitation to participate must subsequently invite all suppliers who expressed an interest to confirm their interest on the basis of information which must include at least the information required in an NIP.

The second element of flexibility concerns a notice regarding qualification. The contents of this notice are described above, in Part III.C.3. As with the NPP, above, there is no requirement for further publicity after the initial notice. However, entities which use a notice regarding a qualification system as an invitation to participate must provide in a timely manner, information which allows all those who have expressed an interest to have a meaningful opportunity to assess their interest in participating in the procurement. This information will include the information required by the NIP as well as the subject matter of the contract, the time-limits set for the submission of tenders or an application to be invited to tender, and the addresses from which documents relating to the contracts may be requested, *to the extent such information is available*. Information provided to one interested supplier must also be provided in a non-discriminatory manner to the other interested suppliers.

[107] Article IX:6.

[108] Notably, the Utilities Directive 2004/17 (OJ 2004 L134/1): Articles 41 and 42.

NIPs and NPPs must be published in the appropriate publication listed in Appendix II to the GPA. Notices regarding permanent lists of qualified suppliers will be published in an Appendix III publication.

(b) Time Limits. There is little benefit in publishing tender notices, in terms of non-discrimination and equality of treatment, if tenderers are, at the same time, not given the same and sufficient time to prepare and submit their bids. Article XI:1(a), therefore, prescribes a time-limit that must be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. The time limits are minimum time limits and not targets since in many cases, notably large construction projects, it is necessary to give tenderers considerable time to prepare their bids. In determining any such time-limit, entities will, therefore, and consistently with their own reasonable needs, take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points.

Taking into account the likely publication delays, the general minimum time limits are the following:

- in ***open procedures***, the period for the receipt of tenders shall not be less than *40* days from the date of publication of the NIP;
- in ***selective procedures*** not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall not be less than *25* days from the date of publication of the NIP; the period for receipt of tenders shall in no case be less than *40* days from the date of issuance of the invitation to tender;
- in ***selective procedures*** involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall not be less than *40* days from the date of the initial issuance of invitations to tender, whether or not the date of initial issuance of invitations to tender coincides with the date of the publication of the NIP. There is again some added flexibility introduced in this procedure for Annex 2 and Annex 3 entities. This time limit may be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than ten days.

The GPA permits a large degree of flexibility and all of these time limits may be further reduced in specific circumstances. Apart from the facility referred to above in respect of Annex 2 and Annex 3 entities, Article XI:3 allows the time limits to be shortened in three situations (two of which are very similar to comparable provisions in the EU directives):[109]

- in cases where a notice has already been published not less than forty days and not more than twelve months in advance (a "prior information notice" in EU parlance) provided that the original notice contains, at least:
- as much of the information required in the NIP as is available;
- the subject matter of the contract, the time-limits set for the submission of tenders or an application to be invited to tender, and the addresses from which documents relating to the contracts may be requested;

[109] *See*, for example, Article 38(4) and 38(8) of Directive 2004/18 in 2004 OJ 134/114.

- a statement that interested suppliers should express their interest in the procurement to the entity; and
- a contact point with the entity from which further information my be obtained.

Where these conditions are met, the time limit may be reduced to a period sufficiently long to enable responsive tendering which, as a general rule, should not be less than 24 days but, in no case less than 10 days.

- Where the general time periods are rendered impracticable by a state of urgency[110] which is duly substantiated by the procuring entity, when the time limit may be reduced to not less than 10 days (the "accelerated procedure" in EU parlance.)
- In the case of the second or subsequent notice in respect of a recurring contract, then the time limits for these latter notices may be reduced to not less than 24 days.

(c) Information on the Award of Contracts. Within 72 days of the award of any contract awarded under any of the procedures foreseen in the agreement, the entities must publish, in the publication listed in Appendix II, a notice containing the nature and quantity of products or services; the name and address of the awarding entity; the date of the award; the name and address of the successful tenderer; the value of the successful award *or* the highest and lowest offer taken into account in the award; where appropriate, the means of identifying the NIP or the justification for using limited tendering; and, the type of procedure used.[111]

As well as publishing the required notices, the entities are under an obligation promptly to provide information to suppliers from a party upon request.[112] This information requirement extends to an explanation of its procurement practices and procedures; pertinent information concerning the reasons why a supplier's application to qualify was rejected, why its qualification was brought to an end or why it was not selected; and, in respect of unsuccessful tenderers, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected together with the name of the successful tenderer. Certain information may, however, be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private, or might prejudice fair competition between suppliers.

There are, in addition, a number of other reporting requirements scattered about the agreement. For example, where entities have adopted the limited tendering procedure, the entities must prepare a report containing the name of the procuring entity, the value and kind of the goods or services procurement, their country of origin and a statement that the conditions applying to this procedure were fulfilled. The report is to be maintained by the entity and put at the disposal of the responsible government entity in the event of a challenge.[113] A similar report for the same purposes is to be kept regarding the opening of tenders.[114]

[110] This is not the same as the urgency condition which enables recourse to be had to the limited tendering procedure (see above), which is a far stricter conditionality.
[111] Article XVIII:1.
[112] Article XVIII:2.
[113] Article XV:2.
[114] Article XIII:3.

(d) Statistical and Other Information. Article XIX of the agreement also imposes a series of information obligations on the parties themselves, not only the procuring entities. The primary obligation is for them promptly to publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by the agreement, in the appropriate publications listed in Appendix IV and in such a manner as to enable other Parties and suppliers to become acquainted with them. Each party must also be prepared, upon request, to explain to any other Party its government procurement procedures.

Available information concerning procurement by covered entities and their individual contract awards must be provided, upon request, to any other Party.[115] This becomes an even stronger obligation where the party represents an unsuccessful bidder. In those circumstances, the government of that unsuccessful bidder may seek such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.

In terms of statistical information, Article XIX:5 requires each Party to collect and provide to the Committee on an annual basis statistics on its procurements covered by the Agreement. These reports will contain the following information with respect to contracts awarded by all procurement entities covered under this Agreement:

- for entities in Annex 1, statistics on the estimated value of contracts awarded, both above and below the threshold value, on a global basis and broken down by entities; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value on a global basis and broken down by categories of entities;
- for entities in Annex 1, statistics on the number and total value of contracts awarded above the threshold value, broken down by entities and categories of products and services according to uniform classification systems; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value broken down by categories of entities and categories of products and services;
- for entities in Annex 1, statistics, broken down by entity and by categories of products and services, on the number and total value of contracts awarded under limited tendering; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded above the threshold value under limited tendering; and
- for entities in Annex 1, statistics, broken down by entities, on the number and total value of contracts awarded under derogations to the Agreement contained in the

[115] Article XX:4, concerning the challenge procedures, discussed below, also requires the parties to ensure that documentation relating to all aspects of the process concerning procurements covered by the Agreement shall be retained for three years.

relevant Annexes; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes.

To the extent that such information is available, each Party must also provide statistics on the country of origin of products and services purchased by its entities. With a view to ensuring that such statistics are comparable, the Committee will provide guidance on the methods to be used. With a view to ensuring effective monitoring of procurement covered by this Agreement, the Committee may decide unanimously to modify the requirements of the above as regards the nature and the extent of statistical information to be provided and the breakdowns and classifications to be used.

7. Technical Specifications

The objectives of the GPA could be defeated if it were possible to define technical specifications and standards in such a way that only a particular (national) supplier were able to satisfy the contract criteria based on such specifications and standards. For this reason, Article VI seeks to ensure non-discrimination in the formulation of such technical specifications. It provides that technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. Rather than seeking to define them in terms of their design or descriptive characteristics, they should be defined in functional or performance terms and, an innovation brought about since the Tokyo Round Code, they should be based, where possible, on international standards or, where none such exist, on national technical regulations,[116] recognized national standards[117] or building codes. In particular, there should be no reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.

Finally, as mentioned above, entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

D. Bid Challenge Procedures and Dispute Resolution

Perhaps the most innovative and far-reaching mechanism introduced by the GPA is the possibility of private bid challenge in the hands of aggrieved tenderers. This places the

[116] Footnote 3 to the GPA defines a technical regulation as a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.

[117] Footnote 4 to the GPA defines a standard as a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or services or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.

direct supervision of compliance with the GPA in the hands of entities best placed to identify any apprehended breaches of the GPA and most likely to suffer harm as a result of those breaches. This approach is entirely consistent with most developed national procurement systems which also provide for remedial action at the suit of tenderers. In addition, the intergovernmental dispute resolution methods have also been strengthened due to the improvements made to the WTO dispute settlement mechanism.[118]

1. Private Bid Challenge

In common with other systems,[119] in the event of a complaint by a supplier that there has been a breach of the Agreement in the context of a procurement, each Party is to encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. Given that the majority of perceived breaches of procurement rules are based on misunderstandings and/or easily remedied, this provision serves to prevent the pursuit of unwarranted actions. For the same reasons, before initiating the review procedure described below, the challenger must notify the procuring entity of the challenge.[120] Where such a complaint is made, the procuring entity must accord impartial and timely consideration to the complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

Where that complaint is unsuccessful in resolving the perceived breach, the GPA requires that the parties must provide non-discriminatory, timely, transparent[121] and effective procedures enabling private bid challenge. To this end, it provides for a complaint to be brought before an independent review body.

(a) Independent Review Bodies. Challenges are to be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. It is not sufficient, therefore, for a party to use or establish an administrative review organ which is attached in any way to the government procuring entity. Where the chosen review body is not a court, then its decision must either be subject to judicial review or the review body must be endowed with certain procedures which give it a quasi-judicial authority. It must thus have procedures which provide that participants can be heard before an opinion is given or a decision is reached; participants can be represented and accompanied; participants shall have access to all proceedings; proceedings can take place in public; opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions; witnesses can be presented; documents are disclosed to the review body. Provided these conditions are met, this would permit review to be conducted by autonomous administrative agencies within the government such as the proliferating State procurement agencies or offices established in transition economies to oversee the correct implementation of new procurement legislation.

(b) Challenge. Challenges are available against alleged breaches of the Agreement arising in the context of procurements at the suit of suppliers who have, or have had, an interest in that procurement. This would exclude, for example, actions brought by trade

[118] *See* Chapters 25 *et seq*. of this book.
[119] *See also,* the UNCITRAL Model Law.
[120] Article XX:5.
[121] Article XX:3 states that each Party shall provide its challenge procedures in writing and make them generally available.

associations and the like since the challenger must have an interest in the procurement but is likely to include all those with a direct interest such as the bidders, their joint venture partners as well as sub-contractors. Time is of the essence in the context of procurement where, following the award process, the procuring entity is keen to proceed with the successful tenderer. In order to avoid excessive delay, the GPA allows parties to require of interested suppliers that they initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than ten days.

(c) Available Remedies. In order to avoid delay in the procurement process and to protect the commercial interests involved, the GPA requires the challenge procedure "normally" to be completed in a timely fashion. Of course, and depending on the stage of the procedure reached, even fairly short time limits for the conduct of review procedures may be insufficient to protect the interests of a challenger. Once a contract has been signed, for example, it is very difficult both legally and in practical terms to provide any meaningful remedy that will satisfy the challenger who is likely to be more interested in securing the contract than any monetary compensation. Breaches will often, though clearly not exclusively, only become apparent once the award has been made and even the most rapid review mechanism may be too brief to bridge the gap between award and signature of the contract.[122] The main mechanism to prevent such an event is to provide for the suspension of the procurement process pending a (rapid) decision on the merits of a challenge. The GPA, therefore, provides for the possibility of rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such measures may result in suspension of the procurement process. At the same time, however, such procedures may also provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In those circumstances, just cause for not acting must be provided in writing.

In addition to providing for what is effectively a declaration on the merits of the case,[123] the GPA provides for correction of the breach of the Agreement or compensation for the loss or damages suffered. Corrections could, for example, take the form of amending certain documents which include breaches in the use of qualification criteria or technical specifications where such corrections could be made without adversely affecting the conduct of the procedure underway or perhaps overruling decisions incorrectly excluding tenderers and reinstating their tenders. Compensation payments present certain difficulties due largely to the nature of the claim. In most systems of law, breaches of pre-contractual procurement rules are generally categorised as delictual or tortious offences. Without seeking to refer to any specific system of law, the issue may best be described in the following way. Where a tenderer has been excluded in breach of the law, the availability of compensation will normally depend on the degree of harm suffered. If, absent the breach, that tenderer would have won the contract, then the harm suffered is the loss of the contract and, consequently, the loss of profits which would have been made. On the other hand, if the tenderer, notwithstanding the breach, would not have

[122] This is a critical issue which has recently come to the fore in the EU. *See* case C-81/98 *Alcatel Austria AG v Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-7671.

[123] The precise terms of Article XX:7(b) provide for an "assessment and a possibility for a decision on the justification of the challenge."

been the successful tenderer, it will have suffered no harm as a result of the exclusion. If there is no harm, there can, in theory, be no compensation. Where there are a number of tenders subject to evaluation on the basis of a number of award criteria, it can be extremely difficult to determine whether the complainant would have won the contract in the absence of a breach. An alternative level of compensation which seeks to avoid such a difficult assessment is to award compensation which is limited to the costs incurred by the tenderer in preparing his bid. This has the virtue at least of limiting compensation to an identifiable harm. Whether a tenderer would have won a contract or not, unfair exclusion would result in the wasted costs of bid preparation.

The GPA leaves the choice of compensation open. Whilst parties may provide for compensation for loss of profits, parties may also provide that compensation is limited to costs for tender preparation or protest. The terms are not entirely clear. For example, do they mean that parties are entitled, from the outset, to limit compensation to wasted costs or do they allow the review bodies to decide to award only compensation for wasted costs in appropriate circumstances? The latter interpretation is to be preferred and is entirely consistent with other recognised procurement systems such as that of the EU. Similarly, does the phrase "or protest" mean that compensation could be limited only to the costs of the challenge or that this is another decision to be made at the discretion of the review body? Again, it is argued that the latter solution is to be preferred since the alternative would surely be inconsistent with the obligation to provide an effective remedy.

2. Dispute Settlement

The WTO dispute settlement mechanism was significantly strengthened during the Uruguay Round[124] and, subject to specific modifications to take account of the procurement context, is also available in the case of breaches of the GPA. Thus, if any Party considers that any benefit accruing to it, directly or indirectly, under the Agreement is being nullified or impaired, or that the attainment of any objective of the Agreement is being impeded as the result of the failure of another Party or Parties to carry out its obligations under the Agreement, or the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of the Agreement,[125] it may with a view to reaching a mutually satisfactory resolution of the matter, make written representations or proposals to the other Party or Parties which it considers to be concerned. Such action must be promptly notified to the Dispute Settlement Body established under the Dispute Settlement Understanding (the "DSB"). Any Party thus approached must give sympathetic consideration to the representations or proposals made to it.

The DSB has the authority to establish panels, adopt panel and Appellate Body reports, make recommendations or give rulings on the matter, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the GPA or, and in this it differs from the general DSU provisions, consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible,[126] provided that only Members of the

[124] See Chapters 25 *et seq.* of this book.

[125] It should be noted that this phrase introduces a cause of action based on "non-violation" of the agreement, based on Article XXIII:1 of the GATT 1947. This issue was considered in the first panel decision under the new GPA: *Korea—Measures Affecting Government Procurement,* discussed above. *See further* Chapter 29 of this book.

[126] Article XXII:3. This provision would appear to avoid the *fait accompli* which could not be remedied in the *Trondheim* case, discussed above.

WTO that are party to the GPA participate in decisions or actions taken by the DSB with respect to disputes under the Agreement.

Panels established by the DSB to examine disputes under the GPA must specifically include persons qualified in the area of government procurement. Given the need for speed in the context of procurement, every effort is to be made to accelerate the proceedings to the greatest extent possible. The general DSU time limits have been reduced by two months, and the panel must attempt to provide its final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date on which the composition and terms of reference of the panel are agreed.

One of the most important differences between the general DSU procedure and the special rules under the GPA is the exclusion of cross-retaliation in respect of the GPA.[127] Thus, no dispute arising under any other WTO agreement may result in the suspension of concessions or other obligations under the GPA, and no dispute arising under the GPA may result in the suspension of concessions or other obligations under any other WTO agreement.

E. Special and Differential Treatment for Developing Countries

Developing countries had been active participants in the early discussions relating to government procurement (notably in the discussions leading to the Tokyo Round Code), and had made many suggestions and comments with regard to the substance of the agreement. Indeed, the discussions took place in the context of the "New International Economic Order" when pressure from the Group of 77 for effective differential and preferential treatment in favour of developing countries were high on the international agenda.[128] Certainly, as mentioned above, they were active in discussions over the threshold values, preferring lower thresholds which would bring open tendering obligations to the lower value contracts for which their companies could more easily compete. Despite the special treatment offered to developing countries seeking membership, very few did join and these were largely growing export-driven economies such as Hong Kong.[129] Those that did join[130] did so on the basis of rather limited lists of entities covered in line with the provisions on special and differential treatment for developing countries. Some developing countries which expressed their intention to join the GPA during the 1980s, failed to accede.[131]

A number of countries are currently seeking accession to the GPA but many of these are doing so in the context of and as a condition of their accession to the WTO itself.[132] This apparent lack of interest on the part of developing countries is, in part, the motivation for the work being conducted by the Committee with a view to reaching an agreement on "Transparency" (*see* Part IV B below).

The GPA maintains provisions which seek to establish special and differential treatment for developing countries. The objective of these provisions, contained in Article V, is to encourage the existing parties, in the implementation and administration of the agreement, to take into account the development, financial and trade needs of developing

[127] Article XXII:7.

[128] Blank and Marceau, *supra* note 2, at 99.

[129] Hong Kong was a party to the Tokyo Round Code but did not immediately accede to the GPA. It joined subsequently.

[130] Hong Kong, Singapore, Korea and Israel.

[131] India, Philippines, Chile.

[132] China, Croatia, Georgia, Lithuania, Moldova, Mongolia and Oman.

countries, in particular least-developed countries. These needs relate, in particular, to the necessity for these countries to safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development; to promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas and economic development of other sectors of the economy; to support industrial units so long as they are wholly or substantially dependent on government procurement; and to encourage their economic development through regional or global arrangements among developing countries.

The first, soft, obligation is for the parties to the GPA, in the preparation and application of laws, regulations and procedures affecting government procurement, to facilitate increased imports from developing countries, bearing in mind the special problems of least-developed countries and of those countries at low stages of economic development. Taking this further, Article V:8–11 also provide for technical assistance to be given to developing countries. Each developed country Party is required, upon request, to provide all technical assistance which it may deem appropriate to developing country Parties in resolving their problems in the field of government procurement. This assistance, which is to be provided on the basis of non-discrimination among developing country Parties, will relate, *inter alia,* to the solution of particular technical problems relating to the award of a specific contract as well as to any other problem which the Party making the request and another Party agree to deal with in the context of this assistance. This technical assistance is to include translation of qualification documentation and tenders made by suppliers of developing country Parties into an official language of the WTO designated by the entity, unless developed country Parties deem translation to be burdensome, and in that case an explanation must be given to developing country Parties upon their request addressed either to the developed country Parties or to their entities.

In addition developed country Parties are required to establish, individually or jointly, information centres to respond to reasonable requests from developing country Parties for information relating to, *inter alia,* laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders. The Committee may also set up an information centre.

More concretely, Article V provides for the considerations enumerated above to be taken into account in the course of negotiations with respect to the procurement of developing countries to be covered by the provisions of this Agreement with a view to ensuring that developing countries are able to adhere to the GPA. Thus, developed countries, in the preparation of their coverage lists under the provisions of this Agreement, must endeavour to include entities procuring products and services of export interest to developing countries. In addition, Article V foresees a number of permitted exclusions during accession negotiations. A developing country may negotiate with other participants in negotiations mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In those negotiations, account will again be taken of the needs identified above. A developing country participating in regional or global arrangements among developing countries may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking

into account, *inter alia,* the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.

After entry into force of the Agreement, a developing country Party may also modify its coverage lists in accordance with the GPA's provisions for modification of such lists,[133] having regard to its development, financial and trade needs, or may request the to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists. A developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries. Each request to the Committee by a developing country Party relating to modification of a list must be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter. These provisions apply *mutatis mutandis* to developing countries acceding to this Agreement after its entry into force.

Article V:12 also contains provisions which grants special treatment for the least-developed countries based on paragraph 6 of the Decision of the CONTRACTING PARTIES to GATT 1947 of November 18, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.[134] Under this provision, special treatment is to be granted to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties. A Party may also grant the benefits of the Agreement to suppliers in least-developed countries which are not Parties, with respect to products or services originating in those countries. Each developed country Party shall also, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

IV. The Way Forward

Work on government procurement did not come to an end with the adoption of the GPA. Article XXIV:7(b) and (c) calls on the Parties, not later than the end of the third year from the date of its entry into force, to undertake further negotiations, with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions relating to developing countries and eliminating any remaining discriminatory measures and practices which distort open competition. Whilst this Article implied that further work would commence by the end of 1998, work actually began as early as February 1997.[135] One of the stated aims of this review was the expansion of the membership of the Agreement by making it more accessible to non-Parties. Indeed, this is one of the major themes of the post-GPA discussions, given the relative failure of the GPA to attract signatories other than from the developed world. This lack of a fully representative

[133] Article XXIV:6.

[134] BISD 26S/203-205 (1979).

[135] *See* 1996 Report to the General Council (WTO Document GPA/8) in which the Committee agreed to undertake an early review.

membership has clearly been of concern to the Parties and has driven further attempts to make the GPA more attractive to developing countries. Simultaneously with the review under Article XXIV and based on support from both the United States and the European Union for an "interim agreement" on government procurement,[136] work also began on developing a "Transparency Agreement" which would offer to developing countries a less rigorous discipline than the GPA.

Together with these two activities, work also continues on another issue which has previously been raised in the GPA negotiations, namely the relationship between the GPA and the government procurement of services within the framework of the GATS. Government procurement of services is currently excluded from the scope of the main GATS commitments but that agreement[137] foresees negotiations designed to extend the provisions of the agreement to such services. To this end, a working party has been established to provide a forum for negotiations on this issue. These three developments are discussed below.

A. Ongoing Review of the GPA

The process of review which began in 1997 has taken the form of a series of discussions and consultations between the Parties over the last six years. This review has covered a number of elements, in particular, the simplification and improvement of the GPA, including adaptation, where appropriate, to advances in the area of information technology; expansion of the coverage of the GPA, and elimination of discriminatory measures and practices which distort open procurement. The objective of simplification and improvement was thought to be a key element in attracting wider membership and thus improve the multilateral aspect of the Agreement.[138] This, however, needs to be set against the risk of weakening the Agreement by diluting its core principles. Whilst, therefore, it is likely that the review will ultimately lead to a more streamlined text, it is equally likely that it will not compromise on the essential objectives and requirements of the current GPA. Part of the simplification and improvement process has dwelt on the issue of bid challenge. Suggestions have been made, for example,[139] for the creation of independent enforcement agencies which, in comparison with the existing bid challenge mechanism, might offer the possibility of more rapid methods for the resolution of disputes by avoiding the cumbersome formality of court proceedings.

In addition to the ongoing discussions about policy improvements which might be made to the GPA, the Parties have been conducting an article by article review of the GPA and the results have been incorporated into successive versions of an informal note reflecting the discussions on the draft texts of the modifications to the Articles proposed by the various Parties, known as the "Suggested Drafting Changes to the Text of the Agreement." Modalities for further discussions (including the hitherto—avoided market access issues) were agreed in June 2004, although a final text is not expected before 2006.

B. The Working Group on Transparency

Following the suggestions of the United States and the European Union, the WTO Ministerial Conference in Singapore chose to "establish a working group to conduct a study

[136] *See* Sue Arrowsmith, "*Developing Multilateral Rules on Government Procurement,*" (1996) 6 PPLR, CS154; Martin Dischendorfer, *"The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO,"* (2000) 9 PPLR 1 at 29 *et seq.*

[137] Article XIII GATS.

[138] *See* Dischendorfer, *supra* note 136 at 32.

[139] WTO Document GPA/60.

on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement."[140] The hope was that, by concentrating on the core principle of transparency, the Parties would be able to draft a less rigid and burdensome agreement which would encourage broader membership from developing countries. By avoiding the increased bureaucracy and financial burden which naturally flows from adherence to the provisions of the GPA, it was hoped that an agreement which requires only a limited number of basic procedural guarantees would encourage membership and, thus, an acceptance of the basic disciplines of an open and competitive public procurement system.

As is clear from the mandate given in Singapore, the working group's activities are to be considered in two phases: first, a study on transparency; second, development of an agreement on transparency. To date, efforts have concentrated mainly on the study of national and international systems as they relate to transparency and the working group has been collecting information from a number of sources, including national systems, international organisations such as the World Bank and UNCITRAL, OECD, UNDP, EBRD, and from other comparable studies such as the APEC survey and conclusions.[141] Despite the submission of draft agreements at the disrupted Seattle meeting by both the United States[142] and the European Union,[143] no agreed text of any Transparency Agreement emerged. Whilst there appeared little disagreement on the importance of transparency as a fundamental principle, there was less agreement on how transparency might be achieved.[144]

No agreement was forthcoming at the Doha Ministerial meeting either although the Ministerial Declaration of November 14, 2001 stated that negotiations on this agreement will take place after the Fifth Session of the Ministerial Conference (Cancún). The initiative appears, however, to have been abandoned following the General Council's decision on the Doha Agenda work programme of August 1, 2004 (reproduced in the Appendix to this book).

C. The GATS Negotiations

A further working party has been established to act as a forum for negotiations leading to the inclusion of the government procurement of services within the main GATS commitment. This is likely to be the most difficult of the areas subject to ongoing development within the context of the GPA and, more broadly, government procurement within the context of the WTO. The government procurement of services is currently outside the scope of the GATS and it has to be said that, even in the context of the GPA, those services which are covered vary considerably between the Parties and are, in each case, the subject of strict reciprocity provisions. Not only, therefore, will it be difficult to secure harmony between the existing Parties as to the services to be covered by the GPA, it will also be extremely difficult to persuade non-GPA Parties to open up their government procurement markets for services to foreign service providers on equal terms with their national service providers.

[140] WTO Document WT/MIN(96)/DEC/W of December 13, 1996.
[141] See www.apecsec.org.sg/govtproc/gphome.html.
[142] WTO Document WT/WGTGP/W/27.
[143] WTO Document WT/WGTGP/W/26
[144] WTO Documents WT/WGTGP/W/10 and 11. *See also,* Hans-Joachim Prieβ and Christian Pitschas, *The Proposed WTO Agreement on Transparency in Government Procurement—Doha and Beyond* 11 PUBLIC PROCUREMENT LAW REVIEW 13, 14 (2002).

Despite the enormous inroads made by the GPA, its membership remains relatively limited, reflecting perhaps the reluctance of the wider WTO membership to abandon the safe haven of preferential government procurement. Whilst this reluctance is being eradicated within the ongoing review of the GPA and is likely to be the subject of much coaxing in the context of the proposed Transparency Agreement, the GATS negotiations are likely to bring these issues to a head once again and to set the free-traders against those with more protectionist inclinations.

CHAPTER 24

THE AGREEMENT ON TRADE IN CIVIL AIRCRAFT AND OTHER ISSUES RELATING TO CIVIL AIRCRAFT IN THE GATT/WTO SYSTEM

Richard O. Cunningham and Peter Lichtenbaum*

TABLE OF CONTENTS

I. Introduction 1167
II. The Tokyo Round: the Civil Aircraft Agreement and the Subsidies Code . 1167
A. Aircraft Code 1168
1. Application and Institutions 1168
2. Government Assistance 1168
3. Other Provisions 1169
B. Subsidies Code 1169
III. GATT Dispute Settlement 1170
A. German Exchange Rate Case 1170
B. 1991 Case 1171
IV. U.S.-EU Bilateral Agreement (1992) 1172
A. Background 1172
B. Main Elements of Bilateral Agreement 1172
V. The WTO 1174
A. SCM Agreement 1174
1. Relevance to Civil Aircraft Trade 1174
2. Ambiguities and Problems in the SCM Agreement 1176
B. Rectification of the Aircraft Code 1176
C. Other Relevant WTO Agreements 1178
1. TBT Agreement 1178
2. The General Agreement on Trade in Services 1180
VI. WTO Dispute Settlement 1184
A. Canada—Aircraft: A Blow Against Royalty-Based Financing and "Matching" 1184
1. Royalty-Based Financing 1184
2. "Matching" 1185
B. Brazil—Aircraft: Impact on Export Credit Programs 1187
1. Material Advantage 1187
2. OECD Safe Harbor 1189

* Mr. Cunningham and Mr. Lichtenbaum were partners in the Washington, D.C. law firm of Steptoe & Johnson LLP and advised The Boeing Company and Bombardier Inc. on certain international trade issues. Mr. Lichtenbaum has since left the firm to become Assistant Secretary of Commerce for Export Administration. The views set forth herein are the authors' own and are not to be taken as a statement of the views of any of their clients or of the United States Department of Commerce. The authors wish to thank Yves Botteman for his assistance.

C. France—Flight Management System Subsidy 1190
VII. The Future 1190
A. Tensions over Government Assistance 1191
1. Airbus "A380 Super Jumbo" Project 1191
2. Restructuring of Airbus 1192
3. Indirect Supports for Boeing 1192
4. Brazil-Canada Dispute 1193
B. Inducements 1194
VIII. Conclusion 1194

I. Introduction

When considering how the GATT/WTO system has addressed issues relating to the civil aircraft industry, a central issue is how the system has responded to the role of governments in promoting their domestic industries. Given the enormous development costs in the aircraft industry, as well as national prestige, export potential, employment and the important overlap with defense production, governments have historically had a significant role in providing direct or indirect assistance to the civil aircraft industry. Therefore, the GATT/WTO subsidy disciplines as they relate to the civil aircraft sector necessarily have had to strike a balance between two competing considerations. On the one hand, the rules need to constrain governments from distorting trade. On the other hand, the rules inevitably reflect the view of many governments that they have an important role to play in the initial development of this capital-intensive industry, particularly given its potential significance for national security. Because of the centrality of this issue to understanding the role of the international trading system vis-a-vis civil aircraft, we devote significant attention in this chapter to the evolution of GATT/WTO subsidy disciplines in this area.

There are, of course, other ways that the GATT/WTO system may affect government involvement in or regulation of the civil aircraft sector. These include, for instance: tariff commitments; government inducements (other than subsidies) to purchasers to encourage the purchase of the domestic manufacturer's aircraft; government technical regulations that may burden trade; and the incremental effort to negotiate rules regarding aviation services. These topics are also covered in this chapter.

Part II of this chapter discusses the initial steps undertaken under the GATT—notably the Subsidies and Aircraft Codes adopted upon completion of the Tokyo Round negotiations in 1979—to discipline the provision of governments' assistance to their domestic aircraft industries. Next, Part III discusses aircraft-related disputes under the GATT dispute settlement system, primarily through a review of two disputes brought by the United States in the late 1980s and early 1990s against the European Community in an attempt to contain European subsidies to Airbus Industrie. These GATT disputes led to the negotiation and adoption of the 1992 bilateral agreement on the implementation of the GATT Aircraft Code, discussed in Part IV. Part V analyzes the impact of the 1994 WTO Agreements on the civil aircraft industry, particularly the WTO Subsidies Code and the General Agreement on Trade in Services (GATS). Part VI assesses WTO dispute settlement in this sector, specifically the *Brazil—Aircraft* and *Canada—Aircraft* disputes regarding export subsidies. Part VII describes continuing controversies relating to government assistance to domestic aircraft manufacturers. Part VIII provides a brief conclusion.

II. The Tokyo Round: the Civil Aircraft Agreement and the Subsidies Code

In the Tokyo Round of trade negotiations concluded in 1979, two agreements were concluded that had particular significance for the civil aircraft industry: (1) the Agreement on Trade in Civil Aircraft (the "Aircraft Code"), and (2) the Agreement on Subsidies and Countervailing Measures (the "Subsidies Code"). Like the other agreements negotiated in the Tokyo Round, both agreements were plurilateral, *i.e.,* were binding only on their signatories, and not on all GATT members.

A. Aircraft Code

1. Application and Institutions

In an effort to address issues peculiar to trade in civil aircraft, the United States, Europe and certain other GATT members negotiated the Aircraft Code.[1] The Aircraft Code applies to "all civil aircraft," "all civil aircraft engines and their parts and components," "all other parts, components, and sub-assemblies of civil aircraft," and "all ground flight simulators and their parts and components."[2]

A Committee on Trade in Civil Aircraft was established to meet at least once a year to consult on issues affecting the operation of the Aircraft Code.[3] In addition, if a signatory considered that its trade interests in civil aircraft had been "adversely affected" by any action by another signatory, this Committee was to review the matter and "issue such rulings or recommendations as may be appropriate."[4]

In certain situations, GATT dispute settlement was available for disputes arising under the Aircraft Code. If the dispute was "related to a matter covered by [the Aircraft Code]," and was not covered by a multilateral GATT Agreement, then the dispute could be taken to GATT dispute settlement. However, if the dispute was also covered by a multilateral GATT agreement, then the dispute arising under the Aircraft Code could not be taken to GATT dispute settlement unless both parties agreed (which was unlikely to occur).[5] Of course, the signatories to the Aircraft Code retained their pre-existing rights to bring issues to GATT dispute settlement if they arose under the GATT or other multilateral agreements negotiated under the GATT that affected trade in civil aircraft. Thus, a signatory to the Aircraft Code could bring a dispute to the Committee on Trade in Civil Aircraft, "without prejudice" to the signatory's right to initiate GATT proceedings arising out of a GATT violation.[6]

2. Government Assistance

With respect to subsidies, the Aircraft Code provided no improvement on the Subsidies Code (discussed below). In granting government support, the signatories noted that the provisions of the Subsidies Code applied, and they agreed to seek to avoid adverse

[1] The thirty current Aircraft Code members are: Bulgaria, Canada, Chinese Taipei, the European Communities, Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Egypt, Estonia, Georgia, Japan, Latvia, Lithuania, Macau, Malta, Norway, Romania, Switzerland and the United States. *See Report (2001) of the Committee on Trade in Civil Aircraft,* WT/L/34 (26 Nov. 2001), ¶ 2; *Report of Working Party on Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu,* WT/MIN(01)/4 (11 Nov. 2001), ¶¶ 222–23. Albania and Croatia have indicated that they will become parties upon accession to the WTO and Oman within three years of accession. *See Statement of Steven J. Falken, Office of the United States Trade Representative, Before the Subcommittee on Aviation of the Committee on Transportation and Infrastructure, U.S. House of Representatives,* July 26, 2001 (hereafter "*Falken Statement"*) at 3, downloaded from www.ustr.gov/sectors/industry/aircraft.shtml. Russia confirmed bilaterally in 1996 that it will become a party when it accedes to the WTO, but its current position is that it will not do so. *See Joint Memorandum of Understanding* (30 January 1996), downloaded from http://www.ita.doc.gov/td/aerospace/aerospacedocuments.htm; *Official Position of Russia at the WTO Accession Negotiations is not to join the Agreement on Trade in Civil Aircraft,* downloaded from www.wto.ru/en/news on 27 Nov. 2002. China is not a signatory to the Aircraft Code, although it made substantial tariff and regulatory commitments in this area as part of its WTO accession. *See,* e.g., U.S. Department of Commerce, *Civil Aircraft,* downloaded from www.mac.doc.gov/China/Docs/industryfactsheets/civair.htm.

[2] *Aircraft Code,* Art. 1.1.

[3] *Id.,* Art. 8.1.

[4] *Id.,* Art. 8.7.

[5] *Id.,* Art. 8.8.

[6] *Id.,* Art. 8.7.

effects.[7] However, the European Community insisted on an additional sentence stating that participants "shall take into account the special factors which apply in the aircraft sector, in particular the widespread governmental support in this area, their international economic interests, and the desire of producers of all Signatories to participate in the expansion of the world civil aircraft market."[8] This provision was relevant only to disputes arising under the Aircraft Code, and could not be invoked, for example, in a case arising under GATT provisions (or now, in the WTO).

In response, the United States insisted on a provision that in its view means that issues concerning aircraft subsidies could be taken to dispute resolution under the Subsidies Code.[9] That is, such issues would not have to be raised under the Aircraft Code dispute procedures. This ability to rely on the Subsidies Code made the European insistence on the "special factors" provision in the aircraft sector tolerable for the United States.

3. Other Provisions

The Aircraft Code contained other provisions not relating to government assistance, the principal ones which are identified below:

- Elimination of all tariffs and of all GATT-inconsistent quantitative or import licensing restrictions.[10]
- Aircraft certification requirements to be governed by the Agreement on Technical Barriers to Trade.[11]
- No government-imposed restrictions or pressures that would prevent airlines from buying "on the basis of commercial and technological factors."[12] Governments will not require purchases from a particular source.
- Governments to avoid political or economic "inducements" to purchasers "which would create discrimination against suppliers from any Signatory."[13]
- Government procurement to "be made only on a competitive price, quality and delivery basis."[14]
- Certification requirements and specifications on operating and maintenance procedures must be non-discriminatory, as provided in the separate Agreement on Technical Barriers to Trade.[15]
- Pricing of civil aircraft "should be based on a reasonable expectation of recoupment of all costs."[16]

B. Subsidies Code

As noted above, the Tokyo Round Subsidies Code was also a plurilateral agreement, negotiated among many of the same countries who were parties to the Aircraft Code.

[7] *Id.,* Art. 6.1. This admonition was consistent with the somewhat equivocal treatment of domestic subsidies in the GATT Subsidies Code. *See* text accompanying notes 17 and 18, *infra.*

[8] *Id.,* Art. 6.1.

[9] *Id.,* Art. 6.1 (noting that the provisions of the Subsidies Code apply to trade in civil aircraft). The Subsidies Code contained formal dispute settlement procedures for panel rulings, similar to those existing under the GATT. *See Subsidies Code*, Art. 18.

[10] *Id.*, Arts. 2, 5.

[11] *Id.*, Art. 3.

[12] *Id.*, Art. 4.2.

[13] *Id.*, Art. 4.4.

[14] *Id.*, Art. 4.3.

[15] *Id.*, Art. 3.

[16] *Id.*, Art. 6.2.

The Subsidies Code also provided a less than fully effective discipline on aircraft sector subsidization. This was true for two reasons. First, the substantive discipline on subsidies was equivocal. While export subsidies on manufactured goods were prohibited, and an "illustrative list" of such subsidies was developed, the Subsidies Code was notably "soft" on domestic subsidies. There was no definition of what constituted a "subsidy." Moreover, the Code's discussion of domestic subsidies began with the assertion that such subsidies had a legitimate role in public policy.[17] The Code asked only that GATT Members "shall seek to avoid causing" adverse effects on the trade interests of other Members when using such subsidies.[18]

Second, and even more serious, were the shortcomings of the GATT dispute resolution mechanism. The GATT mechanism for resolving disputes did not guarantee a conclusive, binding final decision even in a case where a GATT panel had concluded that a subsidy violated the Subsidies Code. Any Member country—including even the country providing the illegal subsidy—could block adoption of the panel's report, thus preventing any GATT-authorized action against the subsidy.

III. GATT Dispute Settlement

Eventually, despite the frailty of the Subsidies Code's disciplines and dispute resolution mechanism, the United States turned to the GATT in an effort to achieve discipline over Airbus subsidies.

A. German Exchange Rate Case

The first case challenged a German program that insulated Deutsche Airbus ("DA"), a subsidiary of Messerschmitt-Boelkow-Blohm ("MBB"), the German member of the Airbus consortium, against adverse exchange rate fluctuations on aircraft fuselage deliveries made by DA to Airbus Industrie's assembly plant in Toulouse, France. Transfer prices between DA and Airbus Industrie were set in U.S. dollars while DA's cost structure was established in Deutsche Marks. In 1988, due to concerns about the cost of the Airbus program, the German government decided to sell MBB to Daimler-Benz. As part of the terms, the German government provided a guarantee to DA against losses on export sales of aircraft fuselages, resulting from unfavorable exchange rate fluctuations. The government agreed to compensate DA if the dollar dropped below a specified level against the Deutsche Mark, resulting in losses on the sales of DA's fuselages.[19]

The GATT panel declared the subsidy to be inconsistent with the EC's GATT obligations.[20] Specifically, the panel held that the subsidy constituted "the provision by governments . . . of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes,"

[17] *See* the Preamble, Articles 8.1 and 11.1 of the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT* (the so-called Tokyo Round Agreement on Subsidies and Countervailing Duties), 26th Supp BISD 56 (1980). The Preamble of this agreement reads "{r}ecognizing that subsidies are used by governments to promote important objectives of national policy." Similarly, Article 8.1 reads "signatories recognize that subsidies are used by governments to promote important objectives of social and economic policy."

[18] *Id.*, Article 11.2.

[19] In other words, if the dollar dropped, the dollars that DA would receive for its fuselages would be worth less in DM.

[20] *See German Exchange Rate Scheme For Deutsche Airbus*, Report by the GATT Panel, SCM/142 (1992). *See also German Exchange Rate Scheme Found to be Export Subsidy for Airbus Parts*, INSIDE U.S. TRADE, January 24, 1992, at 1.

under item (j) of the Illustrative List of Export Subsidies annexed to the Subsidies Code.

An interesting question addressed by the panel was whether these subsidies were export subsidies, and therefore prohibited under the Subsidies Code. The panel found that the subsidies applied to payments for transfers of inputs by Deutsche Airbus only to Airbus Industrie, in France. That is, Deutsche Airbus only benefited from the German payments if it exported inputs (fuselages) to France. Thus, the panel found the German scheme was contingent on export, despite the absence of any guidance on this issue in the Subsidies Code. The panel's ruling anticipates the subsequent clarification in the WTO Subsidies Agreement that subsidies may be *de facto* export contingent even if they are not *de jure* contingent.[21] The panel noted, however, that the German program did not constitute an export subsidy relating to the ultimate sales of aircraft by Airbus, as the payments were provided without regard to the ultimate purchaser of the aircraft.[22] This interpretation did not affect that panel's recommendation, which was that Germany conform its exchange rate scheme to the Subsidies Code (in effect, that Germany terminate the subsidy).[23] However, the interpretation demonstrates that the Subsidies Code panel was unwilling to rely on the "export orientation" of the relevant industry in determining whether a subsidy was *de facto* tied to exporting. In making this finding, the panel declined to consider evidence regarding the high proportion of Airbus aircraft that were exported.

The case had been brought by the United States out of concern that the German subsidy enhanced the competitiveness of Airbus aircraft. From this commercial perspective, the GATT ruling achieved U.S. objectives, even though the export subsidy was found on the intermediate transfer rather than the ultimate sale of the plane. Although the EU blocked adoption of the GATT panel report, the EC simultaneously announced that the German Government was terminating the program with respect to claims arising after January 15, 1992.[24]

B. 1991 Case

The United States subsequently prepared a much broader Subsidies Code case, challenging the overall subsidization of Airbus Industrie's consortium. Airbus Industrie was originally registered under French law as a Groupement d'Interet Economique ("GIE").[25] The GIE is a vehicle for co-operation among several companies whose industrial activities are closely related. Its sole purpose is to facilitate or develop the economic activities of its members. The purpose of the GIE is, therefore, not to make profits for itself and, indeed, no income tax is imposed on the GIE's income. Airbus Industrie's consortium partners were Aerospatiale, Deutsche Airbus, British Aerospace and Construciones Aeronauticas.

In its new case, the United States sought to challenge the full range of subsidies to Airbus Industrie, including the financing provided for the creation of the GIE as well as launch aid for the development of the various Airbus aircraft programs. Rather than proceeding with GATT dispute resolution after the United States requested Subsidies Code consultations, the European side requested the negotiation of a bilateral arrangement,

[21] *Agreement on Subsidies and Countervailing Measures*, Art. 3.1(a).

[22] SCM/142, ¶ 5.12.

[23] *Id.*, ¶ 6.2. However, if the panel had found that subsidies provided to Airbus Industrie were contingent upon exportation due to the company's export orientation, this would have had significant implications for the full range of European government supports to Airbus Industrie.

[24] *See EC Rejects Panel on Airbus Exchange Rates, Germany Suspends Subsidy*, INSIDE U.S. TRADE, May 1, 1992, at 1.

[25] As discussed in Part VII.A.2 below, Airbus Industrie was reorganized into a single corporate entity in 2001.

discussed below. Upon negotiation of the 1992 Bilateral Agreement, the United States suspended the GATT dispute resolution proceeding without requesting a panel, but did not withdraw or terminate the proceeding. Ultimately, after adoption of the Uruguay Round Agreements and creation of the WTO, the proceeding was terminated as part of a general arrangement for the discontinuation of all unresolved GATT dispute resolution cases.

IV. U.S.-EU Bilateral Agreement (1992)

On July 17, 1992, the United States and the EU signed a bilateral "Agreement Concerning the Application of the GATT Agreement on Civil Aircraft" ("Bilateral Agreement").[26] This agreement, as its name suggests, involved an interpretation of particular provisions of the GATT Aircraft Code.

A. Background

Initially, the goal of the negotiations was to reach an agreed understanding as to what constitutes impermissible subsidization in the civil aircraft sector. Soon, however, the European side declared that it was not prepared to agree on subsidy disciplines. Instead, the Europeans proposed to negotiate limits on the amount of government funding (which they referred to as "direct supports,"[27] as opposed to "subsidies," so as to avoid the issue of which types of support would be considered "subsidies") that could be provided. The Europeans proposed to focus primarily on funding for the development of new models of large civil aircraft (referred to as "program development supports" or "launch aid").[28] The U.S. side agreed to negotiate limits on the amount of development supports (as opposed to elimination), provided that all other direct supports would be eliminated.[29] The United States also agreed to address the issue of "indirect" supports, e.g., government defense or space contracts that also benefit civil aircraft production.

B. Main Elements of Bilateral Agreement

Ultimately, agreement was reached on the conceptual basis proposed by the European side. The main elements of the Bilateral Agreement are:

- The parties stated in the Preamble that their negotiations were premised on the expectation that there would be a progressive reduction in future levels of government support.

[26] *Agreement Between the United States and the European Economic Community Concerning the Application of the GATT Agreement on Trade in Civil Aircraft*, April 12, 1979, TIAS 9620, 31 UST 619.

[27] *Id.*, Annex II ("'direct government support' means any financial support provided by a government or by a public body within the territory of a Party which is provided: 1) for specific large civil aircraft programmes or derivatives or 2) for specific companies to the extent that large civil aircraft programmes or derivatives directly benefit.")

[28] While this was the principal focus of the European side, the Bilateral Agreement is not limited to funding for new models of large civil aircraft. With the exception of engines, which are specifically excluded under Annex II, the Bilateral Agreement adopts as its scope the GATT Civil Aircraft Agreement definition of "aircraft," which includes components as well as finished aircraft. *See Bilateral Agreement,* Annex II, ¶ 1; GATT Aircraft Code, Article 1.

[29] *See* General Accounting Office, *Long-term Viability of U.S.—European Union Aircraft Agreement Uncertain,* December 1994, GAO/GGD-95-45, at 15–16. The GAO report acknowledges that EU officials and Airbus officials have portrayed the agreement as a "trade-off between constraints on direct and indirect support." *Id.* at 16.

- Development supports could be provided for a new large civil aircraft program only upon the basis of a "critical project appraisal," made on the basis of conservative assumptions as to costs and as to forecast sales revenues, that projects the full recovery of all costs (including repayment of the government support money) over a period not longer than seventeen years.[30] The "critical project appraisal" provision echoes the similar requirement in Article 6.2 of the Aircraft Code.
- Government support for a given program may not exceed 33 per cent of the forecast costs of program development.[31] Certain strictures are also placed on interest rates and repayment timetables for such aid.
- All future "direct government support . . . for the production of large civil aircraft," other than "support for the development of a new large civil aircraft programme" or "official export credit financing consistent with the [OECD] Large Aircraft Sector Understanding" ("LASU") is prohibited.[32] Since "production" is defined in Annex II as "all manufacturing, marketing and sales activities" other than new aircraft program development, this provision represents an agreement to provide no support for these activities other than that for new aircraft program development or LASU-consistent export financing.
- Equity infusions are not covered by the Bilateral Agreement, except that "Equity infusions will not, however, be provided in such a manner as to undermine the disciplines in this Agreement."[33]
- No limits are placed on the provision of supports to defense or space projects. The Bilateral Agreement merely directs each party to "take such action as is necessary to ensure that indirect government support neither confers unfair advantage upon manufacturers of large civil aircraft . . . nor leads to distortions" in aircraft trade.[34] "Identifiable benefits to the development or production" of civil aircraft arising from defense or space projects are limited, not in terms of percentages of the cost of specific aircraft programs, but rather in terms of percentages of overall annual civil aircraft turnover.[35] Those percentages are set at levels unlikely to come into play, especially since (a) the amount of indirect support is net of recoupments (*e.g.*, where government shares in revenue generated by a project) (b) "identifiable benefits" exist only "when there is an identifiable reduction in costs of large civil aircraft resulting from government-funded research and development in the aeronautical area,"[36] (c) only indirect supports for projects "performed after the entry into force of this Agreement" are relevant,[37] and (d) research and development benefits are not counted where the results of the government-funded research are made available on a non-discriminatory basis to large civil aircraft manufacturers.[38]

[30] *Bilateral Agreement*, Art. 4.1.
[31] *Id.*, Art. 4.2.
[32] *Id.* Art. 3.
[33] *Id.*, Art. 7.
[34] *Id.*, Art. 5.1. Indirect support is defined in Annex II of the Agreement to mean "financial support provided by a government or by any public body within the territory of a Party for aeronautical applications, including research and development, demonstration projects and development of military aircraft, which provide an identifiable benefit to the development or production of one or more specific large civil aircraft programmes."
[35] *Id.*, Art. 5.2.
[36] *Id.*, Art. 5.3.
[37] *Id.*
[38] *Id.*

The Bilateral Agreement is not self-enforcing, *i.e.,* it does not contain effective dispute resolution procedures. (Article 11 merely provides for consultations and bilateral efforts to resolve disputes.) The remedy of one party for the other's violation is to terminate the agreement.[39] An automatic right to terminate arises if either party commences an import relief proceeding under its domestic law.[40] However, no such right of termination arises from either party taking subsidy (or other) issues to GATT or WTO dispute resolution.

The Bilateral Agreement remains in effect as of August 2004.

V. The WTO

The WTO Subsidies and Countervailing Measures Agreement ("SCM Agreement") is the WTO agreement with greatest impact on trade in civil aircraft. However, other WTO agreements, such as the Agreement on Technical Barriers to Trade ("TBT Agreement") may also become relevant and are briefly discussed below. While there were attempts in the Uruguay Round to renegotiate the Aircraft Code on a multilateral basis, those attempts were unsuccessful. As a result, the Aircraft Code has been integrated without change in the WTO legal system as one of the four Plurilateral Agreements, i.e., agreements for which membership is optional.[41] This means that WTO dispute settlement is not available for alleged violations of the Aircraft Code.[42]

A. SCM Agreement

1. Relevance to Civil Aircraft Trade

The WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") represented a very substantial step forward in the level of international agreement to discipline government subsidies.[43] In contrast to the Tokyo Round Subsidies Code, the SCM Agreement contains a definition of the term "subsidy": a "financial contribution" by a government that confers a "benefit." The SCM Agreement categorizes subsidies as actionable (yellow light) or prohibited (red light).[44] To be actionable under the SCM Agreement, a domestic subsidy must be "specific" to certain enterprises and must cause "adverse effects", defined as either "material injury" to the domestic industry of the importing country member, or "serious prejudice" to the interests of the complaining member, i.e., harm to its industry occurring in any market, or "nullification or impairment" of benefits accruing from the GATT 1994.[45] Regarding subsidies contingent on exportation or "red light" subsidies, the existence of adverse effects and specificity does

[39] *Id.*, Art. 9.4.

[40] *Id.*, Art. 10.3.

[41] The other three plurilateral agreements were the *Agreement on Government Procurement,* discussed in Chapter 23 of this book, the *International Dairy Agreement*, and the *International Bovine Meat Agreement.* The last two are no longer in effect.

[42] Appendix 1 to the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* provides that plurilateral agreements such as the Aircraft Code are subject to the Understanding only if the parties to the relevant agreement adopt a decision to that effect. The signatories to the Aircraft Code had not adopted such a decision as of December 2002.

[43] The Agreement is discussed in detail in Chapter 16 of this book.

[44] Under Article 8 of the SCM Agreement, a last category of subsidies included "green light" or non-actionable subsidies. Pursuant to Article 31, Article 8 was applied provisionally for a period of five years upon entry into force of the WTO Agreements and could only be extended by agreement. No such agreement was reached, and Article 8 therefore has lapsed.

[45] *SCM Agreement,* Arts. 2 and 5.

not have to be demonstrated by the complaining country member. This reflects the SCM Agreement's hard line toward programs linked to export performance. In addition, and of critical importance, the SCM Agreement is enforceable under the WTO's Dispute Settlement Understanding ("DSU"). As a result, rulings under the SCM Agreement will be adopted by the WTO unless there is a consensus (unanimity) against the panel report. The SCM Agreement also permits members to impose countervailing duties against subsidies, if the subsidized imports are found to cause or threaten material injury to a domestic industry.[46]

Many types of government assistance provided to the civil aircraft industry are likely to come within the SCM Agreement definition of subsidies.[47] For instance, a key means of support by certain governments has been development supports furnished at below-market interest rates or on a royalty repayment basis, under which the loan is repaid with royalties on aircraft or avionics sales. Royalty-based loans may be a subsidy *per se*, if it is demonstrated that the firm could not "actually obtain" royalty-based loans on the commercial market, or where the effective interest rate based on reasonable sales forecasts is below market.[48] Debt forgiveness, exchange rate guarantees, and equity infusions are also considered as subsidies when provided on terms more favorable than those obtainable from commercial sources. *See* SCM Agreement, Articles 1 and 14.

The definition of export subsidies may apply to such government programs. Aircraft companies may benefit from programs specifically designed to promote exports, and programs contingent on meeting sales targets might be found export contingent if virtually all sales are for export.[49] Similarly, the Article 6.3 provisions relating to "serious prejudice" will likely apply, *e.g.,* where an aircraft manufacturer can demonstrate that it has lost market share in its home market or a third country market due to the effects of a subsidy provided to its competitor.[50]

[46] *SCM Agreement,* Arts. 10–23. Note that only one form of relief—either WTO action or a domestic countervailing duty action—can be pursued regarding the effects of a subsidy on the domestic market of the importing member. *Id.*, n. 35.

[47] European officials have occasionally suggested that the SCM Agreement either may not apply to assistance to civil aircraft, or may be subordinate to the terms of the 1992 Bilateral (described above). For instance, when asked whether the European governments would ensure that future assistance is on commercial terms in accordance with the SCM Agreement, EU Trade Commissioner Pascal Lamy stated his position that the SCM Agreement does not "contradict" the 1992 Agreement. While ambiguously stated, this position might be taken to suggest that compliance with the Bilateral Arrangement could be argued as a defense to a challenge under the SCM Agreement, *i.e.,* that the Bilateral Agreement is *lex specialis* regarding aircraft subsidies, such that it represents the parties' understanding of how the GATT Subsidies Code (and now the SCM Agreement) would apply to the aircraft sector. In response to such a position it could be argued that it would not have been necessary to exclude civil aircraft from the operation of certain provisions of the SCM Agreement (discussed in note 50 *infra*) if civil aircraft had not been subject to the SCM Agreement generally.

[48] *SCM Agreement,* Art. 14(b).

[49] *See SCM Agreement,* Art. 3; *see also* the discussion of the *Canada—Aircraft* case, infra note 99 and accompanying text, and the WTO panel decision in *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather,* WT/DS126/R (1999) (not appealed), ¶ 9.56 (observing that it is appropriate to consider the export orientation of the recipient in assessing the issue of *de facto* export contingency).

[50] Beyond these general provisions, there are specific provisions relating to civil aircraft. However, like the "green-light" provision, these provisions were in effect for an initial five-year period and were not extended, so have now lapsed due to the operation of *SCM Agreement* Art. 31. They are unlikely to be revived in the next round, and therefore are of little current significance. Footnote 15 stated that the civil aircraft sector is not subject to the five percent *ad valorem* threshold for subsidies, over which serious prejudice is presumed under Article 6.1(a). Footnote 16 provides that "where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice" for purpose of the Article 6.1(d) presumption of serious prejudice in

2. Ambiguities and Problems in the SCM Agreement

As a result of the sharp divisions existing between the negotiating governments on the proper role of subsidies in the economy, the SCM Agreement contains terms that are sometimes imprecise, or have an unclear inter-relationship. For instance, the SCM Agreement contains guidelines that apply to determinations of when various government actions confer a "benefit," but these guidelines are fairly general (*e.g.,* requiring a determination of whether a government loan is on terms better than a "comparable commercial loan which the firm could actually obtain in the market.") In the aircraft industry, this issue is particularly relevant to the question of whether and when government loans that are based on royalty repayment confer a benefit, including whether they inherently confer a benefit. Moreover, the SCM Agreement imported without change the "Illustrative List of Export Subsidies" contained in the 1979 Tokyo Round Subsidies Code, without clarifying the relationship of this Illustrative List to the SCM Agreement's definition of a "subsidy" or its prohibition of subsidies that are contingent on exportation.[51] This ambiguity has had to be resolved in the course of dispute settlement proceedings, as discussed in Part VI below.

A further problem is that in order to prevail in an SCM Agreement proceeding based upon a domestic subsidy, it is likely to be necessary to reveal confidential information about market share, pricing, etc. This is particularly true given the lapse of the Article 6.1 "dark amber" provisions under which serious prejudice could be presumed.[52] Due to insufficient procedures in WTO dispute settlement for the protection of business confidential information,[53] this concern creates a major issue for companies seeking to proceed under the SCM Agreement. The concern is magnified in the civil aircraft sector, where the number of competitors is at present very small.

B. Rectification of the Aircraft Code

As discussed at the beginning of Part V, the GATT Aircraft Code was not included in the series of multilateral agreements that are part of the "Single Undertaking" of the

cases of direct forgiveness of debt. Note that footnote 16 did not say that royalty repayment funding was not a subsidy, but rather that a shortfall in repayment did not result in a presumption of serious prejudice. Also, "serious prejudice" can be demonstrated by other evidence, under Article 6.3, and royalty-based financing for civil aircraft could cause the other two forms of "adverse effects"—injury to a domestic industry and nullification or impairment of benefits. Footnote 24 stated that the "green light" provision for research and development assistance, Article 8, does not apply to civil aircraft.

[51] *See SCM Agreement*, Annex I.

[52] Under the now-lapsed Article 6.1, four types of subsidies were presumed to cause "serious prejudice." These subsidies were known as "dark amber" in the traffic-light parlance of subsidy categories (discussed above), because they placed the burden of proof on the responding country Member to show that the subsidy program did not cause serious prejudice. Because Article 6.1 lapsed by operation of Article 31 of the SCM Agreement, a complaining Member now always has the burden of proving the existence of serious prejudice.

[53] The DSU states that: "Confidential information which is provided [by a Member] shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information." DSU, Art. 13(1). However, from a practical standpoint, companies may desire stronger protection against the possibility of a disclosure of highly confidential information, *e.g.* a specific protective order. For instance, in the case involving aerospace subsidies brought by Brazil against Canada, the Panel adopted a protective order. This order provided for business confidential information ("BCI") to be available for review only at the WTO offices in Geneva and at the Geneva mission of the other party, although government officials were allowed to take detailed (non-verbatim) notes on the BCI. The order required that the BCI be stored in a safe in a locked room at the Geneva mission, with restrictions imposed on access to the locked room and safe, and provided for either party to visit the other party's Geneva mission and review the proposed location of the safe, and propose any changes. *See Canada—Measures Affecting the Export of Civilian Aircraft,* Report of the WTO Panel, WT/DS70/R (1999), ¶ 9.105.

Uruguay Round. Instead, it constituted one of the four plurilateral agreements, binding only on those Members of the WTO who signed it.[54] The failure to include it in the Single Undertaking resulted from a continuing dispute between the United States and the European Union over how subsidies to civil aircraft manufacturing will be treated in this agreement and in the WTO Agreement on Subsidies and Countervailing Measures. The United States has been concerned that subsidies are treated more leniently in the Aircraft Code than in the SCM Agreement, and therefore was concerned that including the Aircraft Code in the Single Undertaking would strengthen a possible European position that the Aircraft Code (and the Bilateral Agreement) should be controlling in any disputes over aircraft subsidies. (See discussion in Part V.A.2 above) As a result, there have been continuing discussions in the WTO over whether and how to "rectify" the Aircraft Code, *i.e.,* to bring the Aircraft Code into the system of WTO agreements. The benefits, and potential risks, of rectification may be summarized as follows.

One potential benefit of rectification would be that all disputes among WTO members involving civil aircraft issues covered by the Code would be handled by the WTO Dispute Settlement Body ("DSB"). The Aircraft Code Committee may review disputes among signatories related to matters covered by the Code. Indeed, when disputes arise between signatories as to issues covered by the Aircraft Code, but not covered by the WTO, the Committee is the only forum for dispute settlement.

A second potential benefit of rectification would be the imposition of the disciplines contained in the Aircraft Code on all WTO members. Thus, rectification would mean that the Aircraft Code obligations would apply with respect to the much broader group of countries who are WTO Members, but who are not currently signatories to the plurilateral agreement. If accepted by other WTO members, rectification of the Aircraft Code would obligate all members to comply with certain provisions not otherwise required by WTO commitments. These include, for instance, the elimination of tariffs on imports of products for use in the manufacture and repair of civil aircraft;[55] a requirement that purchases of civil aircraft be made only on a competitive basis;[56] the prohibition against attaching inducements to the sale or purchase of civil aircraft;[57] and the commitment that pricing of civil aircraft should be based on a reasonable expectation of recoupment of all costs.[58] However, it is unclear how significant these commitments currently are in the context of global civil aircraft trade. For instance, most countries have eliminated or reduced to low levels their tariffs affecting civil aircraft production and repair.

Rectification would not have a major immediate effect on the obligations of the countries producing large civil aircraft, since the EU and the United States are already bound by the Aircraft Code. Russia could become bound by the provisions of the Code if rectification occurs by the time it has become a member of the WTO.[59] China, in contrast, refused to accept the Aircraft Code, although it agreed to similar obligations in its WTO accession package, including reduced or zero duties on aircraft products.[60] Moreover, the broader

[54] As noted above, the only other plurilateral agreement currently in force is the *Agreement on Government Procurement. See* Chapter 23 of this book.
[55] *Aircraft Code*, Art. 2.
[56] *Id.*, Art. 4.3.
[57] *Id.*, Art. 4.4.
[58] *Id.*, Art. 6.2.
[59] In 1996, Russia bilaterally agreed with the United States to eventually become a signatory to the Aircraft Code and in the interim to allow reasonable access to its domestic market for foreign civil aircraft by waiving import duties. *Falken Testimony, supra* note 1, at 3.
[60] Id.

applicability of the Aircraft Code could still be of significant benefit to some members of the civil aircraft industry. In particular, the disciplines of the Aircraft Code would apply for the first time to WTO member countries such as Brazil, which produces regional jets.

A potential concern with rectification has been whether it would affect the ability of WTO Members to initiate and effectively pursue WTO dispute settlement proceedings based on the SCM Agreement. The Vienna Convention on the Law of Treaties, which is applied when interpreting WTO obligations,[61] could be construed to create uncertainties as to the interplay between the SCM Agreement and the Aircraft Code. First, the Vienna Convention arguably establishes that "later in time" agreements prevail in the event of conflict with earlier agreements.[62] The United States has been concerned that any rectification of the Aircraft Code would be argued to make it an agreement subsequent to the SCM Agreement and, therefore, that the provisions of the Aircraft Code should take precedence over, or should be considered in interpreting, the disciplines of the SCM Agreement as they relate to trade in civil aircraft. This U.S. concern could potentially be addressed in the drafting of the rectification documents, although several drafting efforts by both the European Commission and the Office of the U.S. Trade Representative have proved unsuccessful.

Second, the rules of interpretation of public international law establish that the more specific agreement/provision prevails over the less specific in the event of a conflict.[63] Again, it could be argued that the Aircraft Code is more specific to the civil aircraft industry and that its terms should prevail over those of the SCM Agreement in the event of inconsistency between the two agreements (*e.g.,* arising out of the Aircraft Code's recognition of the "widespread governmental support in this area."). Currently, this argument would be difficult to make successfully in an SCM Agreement dispute between signatories to the Code, because the Code is not part of the Single Undertaking and therefore would not appear to provide relevant "context" for interpreting provisions of the SCM Agreement. Alternatively, one could argue that the Aircraft Code should be considered in interpreting the disciplines of the SCM Agreement as to civil aircraft trade. Again, however, attentive drafting should serve to avoid this problem.

A March 2001 proposal from the Aircraft Committee sought to address this concern. The proposal was a limited one, which would only incorporate the tariff commitments of Article 2 of the Aircraft Code into the WTO system. The proposal would clarify that this rectification would not affect the signatories' rights and obligations under any of the WTO agreements, except with respect to the tariff commitments affected by Article 2.

C. Other Relevant WTO Agreements

1. TBT Agreement

The WTO Agreement on Technical Barriers to Trade ("TBT Agreement") contains three central substantive provisions that are relevant to the civil aircraft industry. First, it requires national treatment, *i.e.*, that technical regulations apply to imported products in a

[61] *See* DSU, Article 3.2. *See also, Japan—Taxes on Alcoholic Beverages,* Report of the Appellate Body, WT/DS8/AB/R (1996), at p.3.

[62] *Vienna Convention on the Law of Treaties,* 8 INTERNATIONAL LEGAL MATERIALS 679 (1969), Art. 30(3).

[63] For a discussion of the *'lex specialis derogat legi generali'* principle and the presumption against conflict in international law *see, e.g., Indonesia—Certain Measures Affecting the Automobile Industry,* Report of the Panel, WT/DS54/R (1998) (not appealed) at ¶ 14.28; *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products,* Report of the Panel, WT/DS90/R (1999) at ¶ 4.20.

manner no less favorable than that accorded to like products of national origin.[64] Second, it requires "most favored nation" treatment, *i.e.,* that technical regulations apply to imported products in a manner no less favorable than that accorded to like products originating in any other country.[65] Third, the TBT Agreement requires Members to "ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."[66] The TBT also requires transparency in the development and promulgation of technical regulations.[67]

There are some indications that such "technical barriers" could be of significant concern to the civil aircraft industry. As an example, in the mid-1990s, Boeing experienced a delay over the certification by the Joint Aviation Authorities ("JAA") in Europe with regard to its next generation 737 aircraft. Boeing sought to have the 737–700 certified as safe for 149 passengers, and for the 737–800 to be certified as safe for 189 passengers. These limits had been approved by the U.S. Federal Aviation Authority ("FAA"). However, the JAA ruled in early 1996 that it would certify the 737–700 only with 145 seats and the 737–800 for 180 seats.[68] Given the importance of these additional seats to airline revenues, this regulatory ruling presented a major concern for Boeing. Boeing had contracted to provide 189-seat capacity on the 737–800—nine more seats than on the rival Airbus A320.[69]

While in the end an acceptable compromise with the JAA was reached and thus it was not necessary for the United States to consider WTO action, the events show the potential for regulatory issues to become a significant commercial concern and therefore for the TBT Agreement to come into play. Indeed, as of this writing in December 2002, despite JAA approval, the French government still has not certified the Boeing plane for the limit of passenger capacity requested by Boeing.

Moreover, U.S. government officials have claimed that draft legislation proposed by the European Commission to create a European Aviation Safety Authority contains provisions that would allow the Commission to overturn a Member State's certification of U.S.-produced aircraft if the Commission were to consider that the approval would give an unfair advantage to the United States. [70] The draft legislation authorizes the Commission to require a Member State to "modify" aircraft certificates it plans to issue on the basis of approvals issued by third countries, where the third country has not concluded a mutual recognition agreement with the EU, if the Commission considers that "such certificates would give an unfair advantage to a third country."[71] While the United States has concluded agreements on certification with EU Member States, it has not yet negotiated an agreement with the EU itself.[72]

[64] *TBT Agreement,* Art. 2.1.
[65] *Id.*
[66] *Id.*, Art. 2.2.
[67] *Id.*, Arts. 2.9, 2.10, 10.
[68] See, e.g., *737 Seat Limit is Setback in Europe*, AIRCRAFT VALUE NEWS, April 15, 1996.
[69] *Boeing Seating Proposal for New 737 Satisfies JAA*, FLIGHT INTERNATIONAL, July 9, 1997.
[70] Testimony of Grant D. Aldonas, Under Secretary of Commerce for International Trade, U.S. House of Representatives Committee on Transportation on Infrastructure, Subcommittee on Aviation, July 26, 2001 (hereafter "*Aldonas Testimony*"), downloaded from http://www.ita.doc.gov/media/Speeches/aviation%20testimony72601.html, at 3–4.
[71] *Commission Proposal for a Regulation of the European Parliament and of the Council on Establishing Common Rules in the Field of Civil Aviation and Creating a European Aviation Safety Agency*, COM(2000) 595 Final, September 27, 2000, p. 29, Article 9.2.
[72] *See* FAA, *Listing of Country Specific Bilateral Agreements,* downloaded from www.faa-gov/certification/aircraft/bilateral-agreements.stm.

Finally, the well-publicized "hush-kit" dispute between the United States. and the EU raised issues relating to the TBT Agreement. In 1999, the EU adopted a regulation, (EC)925/1999, to cut noise pollution around congested European airports, which was to take effect in May 2002.

The regulation would ban the use of "hush-kitted" aircraft, *i.e.,* aircrafts fitted with noise mufflers. The United States complained that the ban would discriminate against U.S. carriers, and that the ban improperly was based on a design standard rather than a performance standard. The United States did not file a WTO complaint, however, but instead filed a case asking the International Civil Aviation Organization (ICAO) to resolve the dispute.[73] Ultimately, the dispute was resolved through EU revisions to the regulatory approach.[74]

2. The General Agreement on Trade in Services

The civil aircraft industry is also affected by the GATT/WTO rules relating to civil aviation generally. National markets for civil aviation services are some of the least liberalized sectors in the WTO system. Civil aircraft manufacturers would stand to benefit from the expansion of civil aviation services that can be expected to result from any greater WTO disciplines on national measures in this area. Therefore, although a full discussion of civil aviation services in the WTO is beyond the scope of the current paper, we briefly discuss below the limited nature of the current WTO rules for aviation-related services, and the prospects for strengthening those rules in a new trade round.

Aviation-related services, like any services, are subject to WTO disciplines to the extent they are covered by the General Agreement on Trade in Services ("GATS") and national commitments thereunder. All countries who are members of the WTO have necessarily accepted GATS, which is one of the multilateral agreements that form part of the Single Undertaking. GATS commitments include Most-Favored-Nation treatment (unless an express exception is taken) and national treatment to the extent specified in a country's GATS schedule. GATS violations are subject to binding dispute settlement under the WTO's Dispute Settlement Understanding.

Aviation-related services are specifically addressed in the GATS Air Transport Services Annex, which describes the extent of GATS coverage of air transport services.[75] Air traffic rights are not covered by GATS.[76] In 1995 most countries were not prepared to

[73] *See* U.S. Department of State, *U.S.—EU Hushkit Dispute: U.S. Files Article 84* [*sic*], March 14, 2000, downloaded from http://secretary.state.gov/www/briefings/statements/2000.

[74] *See* European Commission, *EU Commission Proposes New Aircraft Noise Legislation Removing Cause for Hushkit Dispute,* November 28, 2001, downloaded from wttp://www.eurunion.org/news/press/2001/2001090.htm.

[75] A very useful review of the status of air transport services in the GATS as of November 1998 is contained in a Background Note by the WTO Secretariat, *Air Transport Services,* WTO Document S/C/W/59 (November 5, 1998). Other relevant sources include: U.S. International Trade Commission, *Air Transport Services: International Regulation and Future Prospects for Liberalization,* December 1999, USITC Publication 3271; and *Aviation Issues in GATS 2000 and Other Fora,* Office of International Aviation, U.S. Department of Transportation, July 1999 (on file with the authors).

[76] Paragraph 6(d) of the *Annex on Air Transport Services* defines air traffic rights as "the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership and control."

abandon the current system of bilateral reciprocity agreements and the multilateral system for air navigation, safety and security under the International Civil Aircraft Organization ("ICAO"). Essentially, WTO members believed that the existing international air transport regime would best promote liberalization of the air transport sector (e.g., because the WTO's most-favored nation requirement would dissuade members from offering concessions due to the "free-rider" problem).[77] Services "directly related to the exercise of traffic rights" services are also excluded, with specified exceptions. Excluded "related" services include activities on the ground such as check-in space and baggage handling.

Certain air transport services are, however, subject to GATS, namely: aircraft repair and maintenance services; selling and marketing of air transport services; and computer reservation system ("CRS") services. These services were generally not covered in bilateral or multilateral air transport services agreements, unlike "traffic rights," so that there was no reason to exclude them from GATS. In addition, some aviation services are not "directly related to the exercise of traffic rights" and are therefore not covered by the GATS exclusion. The category of services "directly related to the exercise of traffic rights" is not defined in the GATS Annex, and therefore it is unclear what is excluded from this category. Some WTO Members have GATS commitments on other aviation services. Such aviation services may include air catering services, refueling services, air traffic control services, etc. In assessing the scope of national commitments in any of these covered areas, one must also consider which of the GATS "modes" of delivering services are covered by the national commitments.

GATS talks on air transport services began in February 2000. The Annex committed the Council for Trade in Services (consisting of all WTO Members) to review not later than 2000 the possible application of the GATS to additional aspects of the air transport sector. As of June 2002, there is no deadline for completion of these talks. These talks involve a review of the operation of existing commitments and their sufficiency, as distinct from actual negotiations on air transport services. The Council for Trade in Services has met to review these issues and summaries of the discussions are available.[78]

What are the positions of the major players in air transport services? As one might expect, there is a diversity of views among Members. The *United States* has been skeptical of any efforts to include air traffic rights in the GATS.[79] It has stated that "no changes should be made to the status quo solely in an effort to create an impression of positive change or to resolve what is perceived as anomalous in the GATS context."[80] There is

[77] Under the MFN principle, a WTO Member are obligated to extend to all other WTO Members treatment that is no less favorable than the Member accords to services imported from any country. *See* GATS, Art. II(1). Therefore, if two Members are willing to liberalize air traffic services bilaterally, they would have to extend that liberalization to all other Members (or take a broad MFN exception under the GATS Annex on Article II Exemptions). Having received the benefit of such liberalization (*e.g.,* the right to provide air traffic services to the U.S. market), the other Members would have a reduced incentive to liberalize their own air traffic services markets: they could "free-ride" on the bilateral liberalization that had occurred.

[78] *See,* e.g., *Report of the Third Session of the Review Mandated Under Paragraph 5 of the Air Transport Annex Held on 9 October 2001*, S/C/M/57 (13 February 2002). Discussion has also occurred in a Special Session of the Council for Trade in Services in March 2002. *See Report of the Meeting Held on 19–22 March 2002,* TN/S/M/1 (5 June 2002), ¶¶ 183–206.

[79] In its *2000 Annual Report on the Trade Agreements Program*, the United States reported that "While a small number of countries have advocated changes to the current exclusion, to date the United States has taken the position that bilateral and plurilateral venues outside the WTO have proven to be effective in promoting U.S. interests in this sector." USTR, *2001 Trade Policy Agenda and 2000 Annual Report* (March 2001), at 70.

[80] Communication from the United States, *Review of the GATS Annex in Air Transport Services,* October 3, 2001, S/C/W/198 at ¶ 38.

little domestic support from U.S. carriers or labor groups for including air traffic rights in the GATS. As to GATS treatment of other air transport services, the United States in the past had indicated some interest in adding ground handling services to the list of covered services, but its October 2001 paper took a firm line that ground handling services are "directly related" to traffic rights and therefore excluded from GATS.[81] Instead of liberalization via GATS, the United States has been interested in pursuing its "beyond open skies" initiative. This could involve regional agreements such as an EU-U.S. Transatlantic Common Aviation Area (TCAA), or agreements under the Asia-Pacific Economic Cooperation (APEC) forum or within the Free Trade Area of the Americas (FTAA).[82] U.S. aviation officials have envisioned that these regional agreements could ultimately serve as the foundation for multilateral liberalization. As to air cargo services, the United States is working with the OECD to develop a prototype open-skies agreement.[83]

In September 2000, the EU supported extending GATS coverage to certain areas, including ancillary services such as airport management and ground handling,[84] as well as discussions on how GATS could promote leasing of aircraft and transit flights. The EU proposal to the GATS Council also recommended that the air transport review include greater liberalization of aircraft repair and maintenance, computer reservations, and the selling and marketing of air transport services, and whether it is possible to extend GATS coverage to air cargo services.[85] A subsequent proposal in December 2000 argued that the Council should try to ensure that the GATS covers supporting services that allow carriers to provide air traffic services, such as ground-handling services and airport management services.[86] While the EU has historically been unwilling to address the issue of traffic rights within the GATS framework, taking the position that traffic rights should be discussed in the context of regional, particularly transatlantic (EU-U.S.) negotiations, it has indicated that it would support limited discussions comparing the bilateral approach to a multilateral framework.[87] (This focus on EU-U.S. liberalization has bothered many other countries, including Australia and New Zealand.) There are some differences within the EU in the area of air transport services. The Netherlands told the "Beyond Open Skies" convention that it was exploring numerous global options for air traffic liberalization, including the WTO.[88]

Japan has called for the WTO Secretariat to review the compatibility of existing bilateral air traffic agreements with WTO equal treatment principles.[89] Japan argued that open sky agreements may not provide MFN and national treatment, which of course they do not; but they do not violate the WTO/GATS since air traffic rights are expressly excluded from the WTO/GATS.) Japan also suggested that the WTO Secretariat should

[81] *Id.*, ¶ 35.

[82] For instance, the U.S. October 2001 paper emphasizes the APEC Multilateral Agreement on the Liberalization of International Air Transport. *Id.*, ¶ 13.

[83] *Id.*, ¶ 20.

[84] *See Review of the GATS Annex on Air Transport Services:* Communication from the European Communities and Their Member States, WTO Document S/C/W/168 (Sept. 26, 2000), ¶¶ 20, 37, 41.

[85] *Id.*, ¶ 36.

[86] Communication from European Communities and their Member States, *The Review of the GATS Annex on Air Transport Services,* S/C/W/186 (Dec. 4, 2000).

[87] *Id.*, ¶ 44.

[88] *Useful Posturing: United States, Netherlands Comment on Air Trade*, 37 AIR TRANSPORT WORLD, No. 2, at 67 (Feb. 1, 2000).

[89] *Japan Urges WTO Review of Bilateral Pacts, Competition Policies for Air Transport Sector*, 17 BNA INTERNATIONAL TRADE REPORTER, No. 7, at 257 (Feb. 17, 2000). *See also*, *Work Programme on Review of Air Transport Services*: Communication from Japan, S/C/W/134 (Feb. 10, 2000), at ¶ 9.

study the rise of oligopolies or monopolies in the industry and whether the competition (antitrust) policies of Members should be better coordinated. Finally, Japan suggested that the Secretariat should study possible new measures to deter "destructively low fares" for air transport.

Among other countries, *Australia, New Zealand, Chile* and *Singapore* are the strongest supporters of incorporating air traffic rights into the WTO/GATS system. These countries also support coverage of air cargo services. However, even some of these supporters of liberalization have advocated a gradual approach—for example, *Australia* has recommended that the air transport review focus on dedicated freight services and nonscheduled services, rather than more controversial issues such as passenger services and scheduled flights.[90] According to press reporting, most of the WTO's 135 member countries are not receptive to adding air traffic rights or air cargo rights to GATS. For instance, *Brazil* has stated its strong commitment to the continued exclusion of "traffic rights and all the segments directly involving traffic rights," expressing a preference for reliance on ICAO as the primary jurisdiction for aviation rights.[91]

As for industry groups, the *International Air Transport Association* ("IATA") has said that air transport should be handled primarily by ICAO, although IATA has expressed greater willingness for the GATS to address air cargo services. Several industry groups have pressed for liberalization of air cargo rules, including the *International Chamber of Commerce* and the *Trans-Atlantic Business Dialogue*. Companies such as *UPS* had lobbied for air cargo services to be discussed within GATS. The *Airports Council International* ("ACI") has said that the WTO is not the right forum to deal with liberalization of aviation services, which should proceed through ICAO. ACI also has said, however, that liberalization of air cargo services is necessary.

Based on the foregoing review, while one should not expect too much, these talks may produce some additional liberalization of some air transport services, such as ground handling or air cargo services. There is not likely to be a consensus to include air traffic rights in the GATS. However, there is significant dissatisfaction with the current system and there may be important developments beyond the current system in the coming years.

Proposals to expand the GATS/WTO coverage of air transport services are sometimes criticized as counter-productive, in that it would be much more difficult to liberalize air transport services if any opening had to be extended to all WTO Members (under the unconditional MFN principle). However, this criticism may be exaggerated. As the existence of MFN exemptions for certain air transport services shows, it is possible in the GATS for Members to include a sector on a non-MFN, reciprocal basis. In addition, there is precedent under the GATS for reaching a "plurilateral" agreement, *i.e.,* an agreement that binds only certain countries. This was done in the "Reference Paper" negotiated in connection with the Basic Telecommunications Agreement. A potential advantage of covering air transport services under the GATS/WTO is that disputes could be settled under the highly effective WTO Dispute Settlement Understanding. The DSU provides a guaranteed forum, rapid dispute proceedings (often about a year from initiation of the proceeding to issuance of a panel report), and the right to countermeasures if the other

[90] *Trade Officials See Slow Progress in WTO Air Transport Services Talks*, BNA INTERNATIONAL TRADE REPORTER, Vol. 17, No. 39, p. 1511 (Oct. 5, 2000). *See also The Mandated Review of the GATS Annex on Air Transport Services*: Communication from Australia, S/C/W/167 (September 18, 2000).

[91] Communication from Brazil, *Review of the GATS Annex on Air Transport Services,* Oct. 4, 2001, S/C/W.201, ¶ 21. Brazil cited ICAO regulatory measures that "give special treatment to the evolution of air transport activities in developing countries." *Id.*, ¶ 24.

country does not comply. As such, the DSU system is significantly stronger than ICAO dispute procedures.

VI. WTO Dispute Settlement

In two companion cases, the WTO Appellate Body ("AB") took a first step forward in achieving clarity in the general subsidy rules that affect civil aircraft, including certain types of subsidies (royalty financing and export financing) that are common in the aircraft industry. These were: *Brazil—Export Financing Programme for Aircraft,*[92] ("*Brazil—Aircraft*") and *Canada—Measures Affecting the Export of Civilian Aircraft,*[93] ("*Canada—Aircraft*"). The *Brazil—Aircraft* case involved Canada's challenge to certain alleged export subsidies provided by the Brazilian government to its regional aircraft industry, i.e., the Brazilian manufacturer, Embraer. *Canada—Aircraft* was a companion case initiated by Brazil, challenging certain alleged export subsidies provided by the Canadian government to its own regional aircraft industry, *i.e.,* the Canadian manufacturer, Bombardier.

These decisions provided the first substantial guidance from the Appellate Body regarding the interpretation of the SCM Agreement. The decisions provide important rulings regarding the meaning of key terms in the SCM Agreement, including the meaning of a "benefit" under Article 1 of the SCM Agreement. The decisions also address issues such as when a subsidy is contingent on exports so as to be an illegal subsidy under Article 3 of the SCM Agreement, and whether a developing country has the burden of proof to show that it qualifies for the special rules in Article 27 of the SCM Agreement. The following is an analysis of the key aspects of these decisions, particularly as they may affect the global civil aircraft industry.[94]

A. Canada—Aircraft: A Blow Against Royalty-Based Financing and "Matching"

1. Royalty-Based Financing

Canada had appealed an original WTO Panel's ruling that the Technology Partnerships Canada ("TPC") program was a subsidy. The TPC program consisted primarily of royalty-based loans, *i.e.,* loans that were repayable out of royalties charged on sales of the product in question. These royalty-based loans were available to all companies helped by TPC, i.e., they were not limited to the regional aircraft industry. The Panel had held that TPC conferred a benefit and therefore was a subsidy, reasoning that Canada had not rebutted Brazil's evidence that the effective interest rate charged by the TPC program was below the comparable commercial rate, which the Panel had found to be in the 15 to 22 percent range.

Canada appealed on the ground that the existence of a "benefit" from these loans under Article 1 should be measured by reference to the government's cost of funds as well as with regard to a commercial benchmark. The European Union, as intervenor before the AB, also argued that there is no subsidy under the SCM Agreement if the measure in question did not result in a net cost to government, *i.e.,* if the costs incurred

[92] *Brazil—Export Financing Programme for Aircraft,* Report of the Appellate Body, WT/DS46/AB/R (1999).
[93] *Canada—Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R (1999).
[94] The significant impact of these decisions on subsidy methodology issues generally is discussed separately in Chapter 16 of this book. *See also* Oliver Stehmann, *Export Subsidies in the Regional Aircraft Sector: The Impact of Two WTO Panel Rulings Against Canada and Brazil,* 33(6) JWTL 97–120 (1999) (analysis of the panel rulings in each case).

by the government in providing the support did not exceed its own cost of funds. This position would have had the effect of raising the bar for actionable subsidies, as many subsidies are likely to cover the government's cost of funds even if they do not provide a commercial rate of return to the government.

The Appellate Body affirmed the Panel's conclusion that the question of whether a company received a "benefit" from a government financial contribution is determined by reference to a *commercial* baseline, and not by reference to whether the contribution resulted in a "cost to government." The Appellate Body observed:

> there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred,' because the trade- distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.[95]

The Appellate Body based its conclusion on the relevant context of SCM Article 14, which sets forth guidelines for calculating the amount of a subsidy in terms of "the benefit to the recipient." The Appellate Body rejected Canada's argument that SCM Annex IV—which refers to the "cost to government" for purposes of calculating the *ad valorem* subsidy rate in the serious prejudice context—was relevant to the interpretation of SCM Article 1. The Appellate Body found that Annex IV "has nothing to do with whether a 'benefit' has been conferred, nor with whether a measure constitutes a subsidy within the meaning of Article 1.1."[96]

This conclusion should foreclose any argument that government funding does not confer a "benefit" under the SCM Agreement because the terms are designed to recover the government's cost of funds.[97] In the particular context of civil aircraft, this ruling has significance because many governments provide financing on a royalty basis. That is, governments provide financing whose repayment is contingent on future sales, profitability, etc. An effective interest rate can be calculated based on the projections regarding the amount and timing of repayments. The *Canada—Aircraft* case makes clear that where the implicit interest rate in such schemes is below the market rate, the financing is a subsidy. However, it will not always be easy to determine the implicit interest rate in a royalty financing program, as this may require an assessment of whether the government's projected sales of the aircraft are commercially reasonable. (In the *Canada—Aircraft* case this issue did not arise, as even under the government's projected sales forecasts, the implicit interest rates were below commercial levels.)

2. "Matching"

In the original proceeding, the Panel had found that a Canadian export credit program, the "Canada Account," was an illegal export subsidy because the financing was below

[95] *Canada—Measures Affecting the Export of Civilian Aircraft*, supra note 93, at ¶ 157.

[96] *Id.* at ¶ 159.

[97] Parties may still argue, as the EU did in *Canada—Aircraft,* that government funding does not confer a "financial contribution" where the funding does not involve a cost to government. That is, parties might seek to distinguish *Canada—Aircraft* as relating solely to the interpretation of "benefit" in Article 1.1(b), thus leaving open whether "cost to government" might be relevant to the interpretation of "financial contribution" in Article 1.1(a)(1). Although a measure falling within any of the sub-categories of "financial contribution" will necessarily be a financial contribution, the issue of cost to government is likely to be raised in future disputes regarding the appropriate interpretation of these sub-categories. For instance, Members may seek to argue that a government has not foregone revenue under Article 1.1(a)(ii) if there is no cost to government.

market terms.[98] In an attempt to comply with the ruling, Canada then adopted a "Policy Guideline" to the effect that any future Canada Account financing would conform to the Organization for Economic Cooperation and Development ("OECD") Arrangement rules for export credits.

In a compliance proceeding brought under Article 21.5 of the Dispute Settlement Understanding, Brazil argued that by adopting the Policy Guideline, Canada had not revised its "Canada Account" program so as to conform to Article 3 of the SCM Agreement.[99] Brazil expressed concern that the Policy Guideline did not make clear precisely how Canada intended to interpret and apply the OECD rules. In its response, Canada argued, in part, that it was entitled to rely upon the "matching" provisions of the OECD Arrangement. These rules permit the participants in the Arrangement to "match" the export credit terms offered by other participants and by non-participants, subject to certain conditions, even where those terms themselves do not comply with credit terms approved by the OECD Arrangement.[100] Canada argued that "matching" was "in conformity with" the OECD Arrangement, and therefore was exempted from WTO challenge by item (k), paragraph 2 of Annex 1 to the SCM Agreement. This provision states that:

> Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

The Article 21.5 Panel decided that the matching of export credit terms which themselves did not conform with the Arrangement could not itself be considered as "in conformity with" the Arrangement.[101] The Panel considered that tolerating such "matched derogations" would undermine discipline on official financing support, as well as giving participants in the OECD Arrangement an unfair advantage over non-participants (since participants would have access to information about the terms other participants were providing).[102]

This ruling could be quite important to the export finance provided by governments to civil aircraft exports. Essentially, the ruling states that government matching of other countries' export credit terms is an illegal export subsidy, if the terms being matched are themselves inconsistent with the OECD terms (even though OECD tolerates such matching). This ruling, which was not appealed,[103] will probably eliminate the ability of countries to match other countries' offers that are inconsistent with OECD terms, without violating the SCM Agreement. While such offers could be challenged as inconsistent with the SCM Agreement, the delayed nature of the remedy means that the panel

[98] *Canada—Measures Affecting the Export of Civilian Aircraft,* Report of the Panel, WT/DS70/R, (1999), at ¶¶ 9.224 & 9.231. This finding was not challenged on appeal. Canada merely challenged the panel's interpretation of the term "benefit" by arguing that absent a cost to the government a benefit could not have been conferred on Bombardier. *See Canada—Aircraft, supra,* note 93, ¶ 7.

[99] *Canada—Measures Affecting the Export of Civilian Aircraft*, Report of the Article 21.5 Panel, WT/DS70/RW (2000).

[100] *OECD Arrangement,* Arts. 29 and 51, and Annex III, *Sector Understanding on Export Credits for Civil Aircraft*, Arts. 25, 29(d) and 31.

[101] *Canada—Aircraft,* Article 21.5 Panel, *supra* note 99, at ¶¶ 5.125 and 5.126.

[102] *Id.* at ¶¶ 5.120, 5.125, 5.134.

[103] The Article 21.5 Panel Report was appealed on other issues than "matching." *Canada—Measures Affecting the Export of Civilian Aircraft: Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW (2000).

ruling may create significant opportunities for governments to gain market share for their national exporters through aggressive use of export credits, knowing that more responsible governments will be unable to match these terms.[104]

B. Brazil—Aircraft: Impact on Export Credit Programs

The two issues decided in the *Brazil—Aircraft* case with greatest import for the civil aircraft industry are: (1) whether government export financing assistance can be defended on the ground that it does not confer a "material advantage"; and (2) the scope of the "safe harbor" created in the Illustrative List for export financing that conforms to the terms of the plurilateral rules agreed by the OECD.

1. Material Advantage

Brazil's PROEX program bought down the interest rate available in the commercial marketplace for financing obtained by purchasers of regional aircraft manufactured by the Brazilian company, Embraer. As originally challenged by Canada, PROEX bought down the interest rate from the rate negotiated by the aircraft manufacturer and purchaser by as much as 3.8 percentage points, resulting in a reduction of the aircraft purchase price of up to $3.5 million.[105]

In the original dispute, Brazil argued that while PROEX was an export subsidy within the meaning of Article 3 of the SCM Agreement, it was exempted from challenge because it did not provide a "material advantage." As background, item (k), paragraph 1 of the Illustrative List of Export Subsidies annexed to the SCM Agreement lists as an export subsidy:

> The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, *in so far as they are used to secure a material advantage in the field of export credits.*
>
> (Emphasis Supplied)

The Illustrative List of Export Subsidies also indicates, in particular provisions, that certain practices should not be considered as export subsidies.[106] Brazil made an *a*

[104] The *Canada—Aircraft* ruling on "matching" has recently been reaffirmed by the panel considering the "*PROEX III*" case brought by Canada, and discussed further below. *See Brazil—Export Financing Programme for Aircraft: Second Recourse by Canada to Article 21.5 of the DSU,* Report of the Article 21.5 Panel, WT/DS46/RW/2 (2001) ("*PROEX III Panel Report*"), ¶¶ 5.109–5.117. The panel reasoned that while this ruling may undercut the ability of parties to the OECD Arrangement to "match" terms that derogate from the OECD Arrangement, they can nonetheless achieve discipline over such terms by using the SCM Agreement to challenge those terms as illegal export subsidies. Of course, this raises the question whether the SCM Agreement can serve as a meaningful deterrent to such practices, given the length of time that elapses in WTO proceedings and their implementation.

¶ The ruling was endorsed by a third WTO panel, this one brought by Brazil against Canada. *See Canada—Export Credits and Loan Guarantees for Regional Aircraft*, Report of the Panel, WT/DS222/R (2002). At the DSB meeting to adopt this decision, the U.S. and EU delegations strongly criticized the result. *See U.S., EU Hit Out at WTO Panel Ruling on Matching Subsidies in Aircraft Dispute,* 19 (8) BNA INTERNATIONAL TRADE REPORTER 301 (February 21, 2002).

[105] *Brazil—Export Financing Programme for Aircraft,* Report of the Panel, WT/DS46/R (1999) at ¶¶ 4.41–4.43.

[106] The Illustrative List states that: "Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement."

contrario argument that because PROEX fell within the ambit of item (k) but did not meet the conditions set forth therein, PROEX therefore could not be considered as an export subsidy. Brazil argued that PROEX did not confer a "material advantage in the field of export credits," because the resulting rates did not give Embraer an overall edge, in light of the alleged significant Canadian government support for its own industry. The Panel rejected this argument, finding *inter alia* that PROEX did confer a material advantage relative to terms available in the marketplace, and therefore that PROEX was not excluded from being an export subsidy.

The Appellate Body affirmed the Panel's findings but disagreed with its reasoning. The Appellate Body first noted that the term "material advantage" must be interpreted as requiring more than a mere "advantage", as in order for government assistance to be a "subsidy" it would necessarily have to confer an "advantage" (due to the requirement that a subsidy must confer a "benefit"). The Appellate Body found that the Panel had interpreted the term "material advantage" in a manner that was effectively the same as the interpretation of the term "benefit" in Article 1 of the SCM Agreement, by finding that a government action provides a material advantage if it is on terms more favorable than are available in the marketplace. The Appellate Body reasoned that this approach would make this language in item (k) devoid of meaning, since a government action found to be a subsidy would necessarily provide a material advantage.[107]

The Appellate Body then sought to determine whether PROEX had been used to convey a "material advantage". The Appellate Body relied on the second paragraph of item (k) (quoted in Part A2 above)—providing that certain export credit practices conforming with the OECD Arrangement are not export subsidies—as relevant context for interpreting the first paragraph of item (k). The Appellate Body noted that the OECD Arrangement provides "one example" of a market benchmark, by establishing a Commercial Interest Reference Rate ("CIRR"), which represents the relevant government bond rate plus one hundred basis points. The Appellate Body concluded that an appropriate comparison for purposes of "material advantage" was to compare the effective interest rate in a PROEX transaction with the relevant CIRR. If the effective net interest rate was below the relevant CIRR, this is a "positive indication" that a material advantage exists.[108] Since Brazil had not demonstrated that the PROEX effective interest rates were above the relevant CIRR, it had not shown the absence of a "material advantage."

The Appellate Body also rejected Brazil's argument that the term "in the field of export credits" should be interpreted to mean that PROEX did not provide a material advantage if it merely "matched" the subsidies provided by Canada to its own regional aircraft industry.[109] The Appellate Body made clear that it was inappropriate to compare the challenged subsidy, in this case the PROEX interest rates, with the total amount of subsidies provided by another Member.

In an Article 21.5 compliance proceeding, Canada challenged the revised "PROEX II" program adopted by Brazil in an attempt to comply with the Appellate Body ruling. The PROEX II program revised the subsidy program so that it reduced the interest rate to twenty basis points above the U.S. Treasury rate. The Article 21.5 Panel found that Brazil's program still did not qualify for exemption based on the claimed "material advantage" exception, holding that (1) Item (k), paragraph 1 could not be used as an affirmative defense (rejecting Brazil's *a contrario* argument), (2) that PROEX payments

[107] *Brazil Aircraft, supra* note 92, at 182.
[108] *Id.* at ¶¶ 180–82.
[109] *Id* at ¶ 185.

were not "the payment by [governments] of all or part of the costs incurred by exporters or financial institutions in obtaining credits," and (3) that in any event PROEX payments did convey a "material advantage."[110]

On appeal by Brazil, the Appellate Body held that Brazil had not established that PROEX II did not provide a material advantage. The Appellate Body stated that Brazil had to show either that the PROEX II interest rates were at or above CIRR, or that the rates were at or above an "alternative market benchmark."[111] The Appellate Body noted that Brazil had not argued that the PROEX II interest rates were at or above CIRR. The Appellate Body then considered whether the PROEX II floor rate of twenty basis points above the U.S. Treasury rate was an appropriate market benchmark, in light of evidence submitted by Brazil regarding other aircraft transactions that allegedly existed in the marketplace at this rate, and found that Brazil had provided insufficient evidence to support this benchmark. The Appellate Body then declined to address the other two legal issues ruled on by the Panel, stating that these findings were "moot and, thus, of no legal effect."[112]

2. OECD Safe Harbor

Brazil then amended its program again. The new "PROEX III" program authorized the provision of a buy-down payment to reduce the rates paid by purchasers of Embraer aircraft to levels "compatible with those practised in the international market." PROEX III also stated that such buy-downs should be established on a case-by-case basis, "complying with the Commercial Interest Reference Rate (CIRR), published monthly by the OECD."[113]

In the Article 21.5 compliance proceeding with respect to PROEX III, Brazil argued that its revised PROEX program was exempt from challenge because it complied with the safe harbor of item (k), paragraph 2 of the Illustrative List (quoted earlier).[114] The Article 21.5 Panel found that because of the discretionary authority provided under PROEX III to set the rate levels, PROEX III did not—as such—violate the SCM Agreement because it did not necessarily confer a benefit when compared to the market.[115] The Panel further

[110] *Brazil—Export Financing Program for Aircraft: Recourse by Canada to Article 21.5 of the DSU*, Report of the Article 21.5 Panel, WT/DS46/RW (2000) at ¶¶ 6.21–6.107.

[111] Id. at ¶ 67.

[112] *Id.* at ¶¶ 78 and 81.

[113] *See* Central Bank of Brazil, *Resolution 2799,* Article 1.

[114] Brazil made other arguments as well; we focus here on the argument with greatest relevance to the civil aircraft industry.

[115] *See PROEX III Panel Report, supra* note 104, at ¶¶ 5.30–5.51. The Panel framed the issue as whether PROEX III conferred a benefit on producers of regional aircraft, as distinct from lenders involved in the purchase of regional aircraft. A benefit conferred on the lenders rather than the producers arguably would not have violated the SCM Agreement as it would be a subsidy to the financial service provider and therefore outside the scope of the SCM Agreement, which deals with subsidies for goods.] *Id.* at ¶ 5.27. The Panel then held that PROEX III did not mandate Brazil to confer a benefit on producers of regional aircraft, within the meaning of the traditional mandatory / discretionary doctrine, because Brazil retained discretion to provide PROEX III only on terms consistent with terms otherwise available to the borrower in the international market. *Id.* at ¶¶ 5.48–5.49. The Panel's ruling on this issue may be criticized, as the Panel itself acknowledged that the "very logic" of PROEX III would not be achieved if PROEX III were administered in a way that did not confer a benefit when compared to the terms that the purchaser could obtain on the international commercial market. *See* id. at ¶ 5.51 and n. 68 (describing this as an "unlikely scenario"). As a result, the Panel's holding seems premised on a somewhat technical and unrealistic assessment of PROEX III.

¶ At a deeper level, the issue is whether the mandatory measure doctrine in GATT/WTO jurisprudence should be interpreted as precluding the finding of a violation unless a measure legally requires a violation, even if the measure makes it a virtual certainty that a violation will occur as a practical matter. Another WTO

found that, assuming PROEX III did confer a benefit, Brazil had shown that it could administer the program so as to comply with the safe harbor of item (k), paragraph 2. That is, nothing in PROEX III required Brazil to administer the program in violation of the requirements of the safe harbor.

However, the Panel interpreted the scope of the safe harbor quite narrowly. The Panel held, in particular, that compliance with the safe harbor requires a Member to comply with certain provisions of the OECD Arrangement other than the CIRR interest rate. The safe harbor requires Members not to offer credit terms longer than the applicable period (ten years for regional aircraft, twelve years for large aircraft) and requires that the credit terms not to exceed the 85 percent loan-to-value ratio.[116] These restrictions on the use of the safe harbor should prevent item (k), paragraph 2 from undermining the disciplines of the OECD Arrangement as well as the SCM Agreement.

C. France—Flight Management System Subsidy

In May 1999, the United States requested WTO consultations with regard to an alleged French subsidy provided to Sextant Avionique to develop a Flight Management System (FMS) in direct competition with the FMS manufactured by a U.S. company, Honeywell.[117] The United States contended that the French government had agreed to grant, and the European Commission had approved, a loan, on preferential and non-commercial terms, in the amount of 140 million French francs, to be disbursed over three years, for a project in which Sextant would develop a FMS adapted to Airbus aircraft.

The United States stated that it considered the aid to cause adverse effects within the meaning of Article 5 of the SCM Agreement. Specifically, the United States believed that this aid caused serious prejudice within the meaning of Articles 5(c) and 6 of the SCM Agreement because the subsidy's effect was to displace or impede imports of FMS from the United States into France, to displace or impede exports of FMS from the United States to third country markets; and to cause significant price undercutting by the subsidized product as compared with the price of a like product of a U.S. producer in the same market or significant price suppression, price depression or lost sales in the same market. However, the United States ultimately did not request a panel regarding this alleged subsidy, for unrelated commercial reasons.

VII. The Future

What will be the most important issues regarding civil aircraft in the GATT/WTO system in the next decade? Controversy will undoubtedly continue over governments' assistance to their domestic industries. In addition, there may be increased disputes over the role of government "inducements" to purchase from their domestic industries.

panel recently endorsed the restrictive view of the mandatory measure doctrine. *See United States—Measures Treating Export Restraints as Subsidies,* Report of the Panel, WT/DS194/R (2001). Such rulings, however, contribute to the inefficacy of the WTO in resolving trade disputes within a commercially reasonable period, given the inability of the WTO to issue injunctive relief. Once the violation occurs, a manufacturer may forfeit a crucial sale, particularly in the civil aircraft industry where large single competitions are common.

[116] *See OECD Arrangement on Guidelines for Officially Supported Export Credits, Annex III: Sector Understanding on Export Credits for Civil Aircraft*, Articles 3, 4, 21.

[117] *European Communities—Measures Relating to the Development of a Flight Management System*, complaint by the United States (WT/DS172/1), dated May 21, 1999.

Finally, as discussed earlier, there may be continued incremental liberalization in the air transport services area, with attendant positive implications for civil aircraft producers.

A. Tensions over Government Assistance

Despite the fact that the new SCM Agreement now sets forth improved subsidy disciplines, backed up by an almost unblockable dispute resolution mechanism, government assistance to the civil aircraft industry continues at significant levels. As is apparent from the continuing saga of the Brazil—Canada subsidy dispute, the WTO dispute settlement system sometimes does not provide timely solutions in this area. This means that complaining parties may not be able to rely solely on WTO dispute settlement to resolve highly political issues of government assistance to domestic civil aircraft industries.

1. Airbus "A380 Super Jumbo" Project

Airbus has announced the launch of an A380 "super jumbo," an aircraft substantially larger than the largest version of the Boeing 747. This massive project and to a lesser extent the recent provision of program development assistance for the A340–500 and A340–600 programs have raised questions under the Bilateral Agreement.

As discussed earlier, the Bilateral Agreement can be viewed as a *modus vivendi,* in which the United States refrains from taking Airbus subsidy issues to the WTO in return for three basic European commitments:

- no supports will be provided to Airbus other than new aircraft program development supports,
- new program development supports will not exceed 33 percent of total program development costs and there will be a progressive reduction in support levels, and
- development support will not be furnished to a new aircraft program unless a valid critical project appraisal based on conservative assumptions demonstrates a reasonable expectation that all costs (including repayment of all support money) will be recovered in not longer than seventeen years.

The critical project appraisal requirement is a central issue posed by the A380. Obviously, the question of what are the proper "conservative assumptions" for an A380 critical project appraisal is a major question to be resolved if this project is to be funded within the disciplines of the Bilateral Agreement.

The European parties have adopted the position that they will not discuss the critical project appraisal, or reveal information on that appraisal to the U.S. Government, until *after* the Airbus member governments have committed the funds for subsidizing development costs. Moreover, the European Commission's position in response to U.S. inquiries concerning the critical project appraisal on the most recent program, the A340–500 and A340–600, is to define "commitment" in such a manner that the time for disclosing details of the critical project appraisal is too late to prevent disbursement of the subsidy monies.[118]

[118] *U.S. Attempts to Take Down Subsidies for Airbus Superjumbo,* INSIDE U.S. TRADE, Oct. 20, 2000 (stating that "none of the four [Member States] have provided the Critical Project Appraisal, and are not likely to do [so] until the project is officially launched.").

In April 2001, the EU notified the U.S. government that seven Member States had made commitments to provide development support for the A380. They provided information on the terms of that support. However, the U.S. government stated in July 2001 that it believes that additional information is required in order to undertake a "meaningful analysis," and had requested supplemental information.[119]

If the United States cannot be satisfied that the European governments will refrain from subsidizing uneconomic aircraft programs, then there will be little reason for the United States to rely on the Bilateral Agreement when it now has a far stronger and non-blockable WTO remedy available. If the issues of the validity of the critical project appraisal and the amount of government funding are not resolved at an early stage, then a bilateral confrontation over the A380 could occur.

2. Restructuring of Airbus

On July 11, 2001, Airbus Industrie and its member companies converted the consortium into a "single corporate entity," the Airbus Integrated Company ("AIC"). This involved the transfer by each of the member companies of their Airbus-related production facilities and operations to a new, private company organized under French law as a simplified joint stock company (Société par Actions Simplifiée). AIC has two shareholders, the European Aeronautic Defence and Space Company ("EADS") and BAE Systems (based in the UK) holding respectively eighty percent and twenty percent of the new stock. EADS was formally created in July 2000 and combined the activities of Aerospatiale Matra (France), DaimlerChrysler Aerospace AG (Germany) and Constructiones Aeronauticas SA (Spain). About thirty percent of EADS stock is publicly held pursuant to the initial public offering (IPO) in July 2000.

In principle, the new structure could help ease bilateral U.S.—EU tensions over Airbus operations. The new AIC is indirectly held by the public (through EADS) and therefore should be subject to significantly greater transparency obligations. In its former guise as a Groupement d'Interet Economique, the Airbus consortium was not required to report its financial results to the public because it was merely operating as a vehicle for cooperation among the four European partners. In addition, given the shareholding structure of EADS (including public shareholders), the new AIC should likely be subject to greater market discipline than the old Airbus when it comes to investing in major new commercial aircraft programs.[120]

3. Indirect Supports for Boeing

It is also possible that the EU will seek to use the SCM Agreement to address perceived assistance provided by the U.S. government through "indirect supports" arising out of U.S. government contracts. Such an initiative might occur as a response if the U.S. government initiates a WTO dispute settlement proceeding involving assistance to Airbus. (Indeed, the EU's WTO challenge to the U.S. Foreign Sales Corporation (FSC) tax legislation may

[119] *Falken Testimony, supra* note 1, at 4. The EU reportedly was "reviewing" these questions, as of July 2001. *Aldonas Testimony, supra* note 70, at 3.

[120] The United States might however raise questions such as whether the member companies had received adequate payment from AIC, so that AIC's acquisition of operations and production facilities occurred at market value; whether the burden of repaying past government financial support was passed entirely to AIC; and to what extent would the indirect support provisions of the 1992 Agreement apply to European government funding of military and space R&D projects. The United States might argue that if any of these conditions were not met, the European governments could be in violation of the Bilateral Agreement's prohibition of all aid other than new program development supports.

have been motivated, in part, by a desire to reduce the level of perceived U.S. government support for Boeing.[121])

The EU has alleged that indirect support arising out of Department of Defense ("DoD"), National Aeronautics and Space Administration ("NASA"), and Federal Aviation Administration ("FAA") spending results in indirect support to U.S. large civil aircraft manufacturers that is "well above the 33% limit set by the 1992 bilateral Agreement."[122] For instance, the EU cites the NASA programme for High Speed Civil Transport as resulting in benefits for the U.S. industry's civil aircraft production. The U.S. government has rejected these European claims, arguing that virtually no identifiable benefits have accrued to current U.S. commercial aircraft programs from currently funded NASA, FAA or DOD contracts.[123] For instance, the United States argues that over ninety percent of NASA and FAA R&D results are available on a non-discriminatory basis to EU aerospace companies, and are thus exempt from the indirect support rules, under Article 5.3 of the Bilateral Agreement. The United States also claims that benefits tend to flow from the commercial side of the industry to the military side, rather than vice-versa, and that any U.S. indirect supports are exceeded by European indirect supports.[124]

4. Brazil-Canada Dispute

The Brazil—Canada dispute over subsidies shows some signs of easing. In March 2001, Brazil requested a panel ruling regarding Canada's provision of assistance in a particular competition to supply regional aircraft to Air Wisconsin.[125] Canada argued that its assistance merely served to "match" the assistance that was offered by Brazil in support of Embraer.[126] Relying on the panel ruling in *Canada—Aircraft, Article 21.5,* the panel rejected Canada's argument on the ground that matching is not consistent with the SCM Agreement.[127] According to press reports, both governments expressed interest in reaching a *modus vivendi* on government support to regional aircraft industries with a view to softening their long-standing bilateral dispute.[128]

[121] For instance, the EU's *Report on United States Barriers to Trade and Investment* (Oct. 28, 1998) stated that the FSC system "grants a considerable competitive advantage to the US aircraft manufacturers to the detriment of their competitors," and alleged that improved earnings to improved earnings due to the FSC system translated "into advantages of US$ 1 to 2 billion for Boeing's market capitalization." Boeing was the only company identified as a recipient of FSC tax benefits. *Id.*, p. 41.

[122] *Id*, p. 34.

[123] *See, e.g., Aerospace Daily* (Dec. 13, 1996), Vol. 180, No. 50, p. 385.

[124] Other U.S. arguments include that financial contributions to military programs are exempt from review under the broad GATT Article XXI national security exception regardless of any benefit to large civil aircraft; that the United States received fair value in return for its financial contribution (as in many military procurement situations) and did not "overpay;" and that the acquisition of R&D is more akin to a "service", than a "good," and could, therefore, be considered outside the scope of the SCM Agreement (*see* SCM Agreement Art. 1.1(a)(1)(iii)).

[125] *Canada—Export Credits and Loan Guarantees for Regional Aircraft, Request for the Establishment of a Panel by Brazil,* WT/DS222/2 (March 1, 2001). Brazil also raised issues relating to the operation of Canada Account, the Export Development Corporation (EDC) and Investissement Quebec. *See Canada—Export Credits and Loan Guarantees for Regional Aircraft,* Report of the WTO Panel, WT/DS222/R, at ¶ 3.1 (2002).

[126] *Id.,* at ¶ 7.156; according to press reports, a similar competition that Bombardier won with Northwest may present the same issue. *See Embraer Official Says Brazil Should Seek Sanctions Against Canada In Aircraft Row,* BNA INTERNATIONAL TRADE REPORTER, Vol. 18. 29, July 19, 2001, p. 115.

[127] *See* discussion of *Canada—Aircraft, supra* Part VI.A.2.

[128] *Canada Seeking Negotiated Settlement With Brazil After Air Wisconsin Reverse,* BNA INTERNATIONAL TRADE REPORTER, Vol 19 no. 5, January 31, 2002, p. 201.

B. Inducements

Over the past decade, the issue of government "inducements" to purchase their domestic manufacturers' aircraft has arisen with increasing frequency, and is therefore worth a brief discussion. As discussed above, the Aircraft Code prohibits signatories from providing political or economic inducements as an incentive to the sale or lease of civil aircraft.

Both the United States and the EU have, in the past, accused one another of intervening to assist their manufacturers in competitions with foreign airlines, particularly where the airlines were state-owned. The United States focused particularly on French government activities in support of Airbus sales in India, Kuwait and South Korea.[129] In return, the EU also has expressed strong concern about U.S. government assistance with third country airlines, such as a major Boeing sale to Saudi Arabia.[130] The EU has also raised concerns about efforts by members of Congress to encourage Taiwan to buy Boeing aircraft.[131]

Quite recently, senior U.S. government officials have reiterated their concern about inducements provided by European governments for third country airlines to buy Airbus planes. The Undersecretary of Commerce for International Trade, Grant Aldonas, testified in 2001 that:

> The Airbus consortium's parent governments have intervened in sales competitions in an effort to win orders for Airbus. . . . In the past, some European governments have sought to influence these [purchasing] decisions by potentially offering increased airline landing rights for the purchasing airlines, granting preferential trading rights in unrelated sectors to benefit the country purchasing aircraft, and demonstrating willingness to advance the status of countries interested in joining the European Union.[132]

Indeed, according to press reports, European governments offered Russia the ability to use the European launching system, Arianespace, for its launch of Russian Soyuz spacecraft, if Russia would purchase Airbus planes.[133] However, Russia reportedly chose to purchase Chinese planes despite the European effort.

The continued concern about such inducements suggests that further attention will be given in the GATT/WTO context to achieving discipline on such inducements, given their particular prevalence in the civil aircraft sector.

VIII. Conclusion

In this article, we have sought to provide an overview of the practical application of the GATT/WTO to civil aircraft trade, dealing with the past, present and future. If there is a single conclusion that we can draw from this review, it is the difficulty of achieving legal discipline over governments' desire to promote a perceived national interest in a strong civil aircraft industry. Whatever the rules that are written, the ability of the GATT/WTO system to bend government decision-making depends to an extent on governments' commitment to compliance with WTO rulings, given that the system lacks enforcement jurisdiction, in the form of specific performance or damages. Ultimately, reforming the

[129] *See* Harvard Business School, *Collision Course in Commercial Aircraft: Boeing-Airbus-McDonnell Douglas*—1991 (A), Case Study 9–391-106, Rev. Oct. 27, 1993, at 10.

[130] *See EU 1998 Report on United States Barriers to Trade and Investment,* p. 34 (criticizing the U.S. Administration's "high-level political leverage with third countries' airlines (inducement).").

[131] *See U.S. Lawmakers Push Taiwan To Choose Boeing Over Airbus,* THE WALL STREET JOURNAL, Sept. 12, 2002, at A13.

[132] *Aldonas Testimony, supra* note 70, at 2.

[133] *See* WASHINGTON TRADE DAILY, July 27, 2001, at 3.

role of governments in the civil aircraft industry will depend on national governments' evaluation of their appropriate role in relation to industry. For instance, if Airbus is one day viewed as a mature company that needs assistance relatively less than other candidates (such as small farmers), European assistance may dry up. The same may be true elsewhere as well. This does not mean that one should abandon hope of using multilateral rules to discipline governmental actions in this area, but merely that a healthy dose of realism and patience is required.

BIBLIOGRAPHY

U.S. General Accounting Office, *Long-term Viability of U.S.-European Union Aircraft Agreement Uncertain* (December 1994) GAO/GGD-95–45

U.S. General Accounting Office, Report to Congressional Requestors, *European Aeronautics: Strong Government Presence in Industry Structure and Research and Development Support* (March 1994) GAO/NSIAD-94–71

Background Note by the WTO Secretariat, *Air Transport Services* WTO Document S/C/W/59 (November 5, 1998)

U.S. International Trade Commission, *Air Transport Services: International Regulation and Future Prospects for Liberalization* (December 1999) USITC Publication 3271

Office of International Aviation, U.S. Department of Transportation, *Aviation Issues in GATS 2000 and Other Fora*, (July 1999) (on file with the authors)

Oliver Stehmann, *Export Subsidies in the Regional Aircraft Sector: The Impact of Two WTO Panel Rulings Against Canada and Brazil*, Journal of World Trade Law 33(6): 97–120 (1999)

Harvard Business School, *Collision Course in Commercial Aircraft: Boeing-Airbus-McDonnell Douglas—1991 (A)*, Case Study 9-391–106, Rev. Oct. 27, 1993

U.S. Library of Congress, Congressional Research Service, *The Airbus Controversy: Revisited?,* by John W. Fischer, CRS Report 93-jgg425 E (April 19, 1993)

U.S. International Trade Commission, *Industry Trade and Technology Review* (December 1999) USITC Publication 3271

Southern Methodist University School of Law, Journal of Air Law and Commerce, *The Aircraft Subsidies Dispute in the GATT's Uruguay Round,* by Shane Spradlin (May 1995/June 1995), 60 J. Air L. & Com. 1191

Southern Methodist University School of Law, Journal of Air Law and Commerce, *Would Competition in Commercial Aviation Ever Fit Into The World Trade Organization?,* by Ruwantissa I.R. Abeyratne (May/June 1996), 61 J. Air L. & Com. 793

Vanderbilt University Law School, Vanderbilt Journal of Transnational Law, *865 *"Super Jumbo" Problem: Boeing, Airbus, and the Battle for the Geopolitical Future,* by Daniel I. Fisher (May 2002)

D. Dispute Settlement

CHAPTER 25

CONSULTATIONS

Christiane Schuchhardt*

TABLE OF CONTENTS

I. Introduction 1199
II. History and Development of the Consultations Process 1199
A. Consultations under the GATT 1947 1200
B. Negotiations During the Uruguay Round: Power-Oriented versus Rule-Oriented 1202
III. The Contribution of Consultations to the Settlement of GATT/WTO Disputes 1203
IV. Objectives and Nature of the Consultations Process 1203
A. Settlement of the Dispute by Way of Satisfactory Adjustment 1204
B. Information Gathering, Clarification and Shaping of the Substance ... 1205
V. The Right to Ask for Consultations and the Duty to Consult 1206
VI. Procedure 1207
A. Time Periods and Deadlines 1207
B. Cases of Urgency 1209
1. Cases where Urgency has been Invoked in Consultations 1209
2. Do Parties Actually Consult under the Reduced Time Frame? 1210
3. How to Get to the Request for Establishment of a Panel Within Twenty Days 1211
C. Parties to Consultations 1212
1. Plurilateral and Private Consultations 1212
2. Multiple Consultations under Article 4.11 DSU: Third Party Rights and Substantial Trade Interest versus the Respondent's Discretion to Accept a Joinder 1213
3. Direct Proceeding to a Panel for Joining Parties? 1214
VII. The Consultations Request 1215
A. Substantive Requirements and the Role of the Consultation Request 1215
B. Issues not Raised in the Consultations Request but Actually Discussed 1220
C. Is there a Duty to Consult in Compliance Review Proceedings? 1221
VIII. Adequacy of Consultations and the Requirement to Consult in Good Faith 1222

* Wilmer Cutler Pickering Hale and Dorr, LLP, Washington, D.C. The author thanks Gary N. Horlick and Peggy Clarke for their valuable comments and advice as well as for their patience during numerous discussions. Many thanks also go to Andrea G. Staebler for her help with researching and editing this chapter

A. Adequacy 1223
B. The Principle of Good Faith 1224
1. Litigation Strategies 1224
2. Further Elements of the Good Faith Principle 1225
IX. Confidentiality of the Proceeding, Article 4.6 DSU 1226
A. The Use of Facts and Evidence Obtained During Consultations Before the Panel 1226
B. Settlement Offers Made During Consultations 1227
C. Third Parties and Information Acquired During Consultations 1228
X. Preparation and Logistics of Consultations 1228
XI. Developing Countries, Article 4.10 DSU 1229
XII. Conclusion 1231

I. Introduction

From a purely legal perspective, the Dispute Settlement Understanding ("DSU") consultations process may not strike one as the most compelling phase of WTO dispute settlement. The panel and the appellate stages, discussed in Chapters 26 and 27 of this book, have naturally attracted more attention among academics and legal practitioners. There are, however, a surprising number of interesting procedural and practical issues related to consultations that have been dealt with by WTO panels and the Appellate Body, as well as by WTO Members.

A question exists concerning the justification for consultations, that is, how effective are consultations and how do the different procedural elements established by the DSU contribute to or hamper effectiveness? The first part of the question concerning the effectiveness of consultations cannot be answered fully in this chapter. To review the effectiveness of consultations would require more detailed information than is publicly available concerning settlement agreements reached during consultations and, more importantly, their implementation. Nevertheless, the statistical information concerning the rate of settlements achieved during consultations provides some measure of their effectiveness and some information is thus provided on this topic. Furthermore, this chapter discusses the usefulness of a number of procedural elements such as deadlines or objections to third party joinder in ensuring the effectiveness of the system.

A second question concerns the relationship between the consultations request and any subsequent panel proceeding. Does the consultations request limit the scope of the panel request and thereby the panel's terms of reference? And if not, to what extent do claims raised in the panel and consultation requests have to overlap? WTO panels addressing this question have given a liberal interpretation to the legal requirements for making a consultations request in Article 4.4 DSU. To date, however, the Appellate Body has not spoken definitively on the issue.

A third question relates to how WTO Members have approached the consultation process. Litigation strategies used by the large WTO Members, in particular the EU and the United States, may pose a systemic threat to the consultations process. It appears that large trading nations tend to make a serious effort to consult mainly when faced with a complaint by a WTO Member of their own size and importance. In those cases, the economic stakes are high and both sides have sufficient interest and clout to engage their opponent in meaningful consultations, and to make a serious effort to settle the dispute before it reaches a panel. By contrast, when faced with complaints involving smaller countries, large WTO Members frequently do not take the consultations process seriously, instead considering consultations as merely a required preliminary stage before litigation. From a legal and systemic perspective, such strategies are detrimental in a large number of cases because they make consultations meaningless, with the result that an entire stage of the dispute settlement process becomes useless. Equally, from a practical perspective it is important that all parties make a good faith effort to consult. Otherwise parties will forego the opportunity to reach a quick settlement and to avoid the substantial expenses involved in a panel proceeding and a possible appeal.

II. History and Development of the Consultations Process

Although this chapter includes some discussion of the evolution of the consultations process through different rounds of trade negotiations, it focuses on the consultations process and the decisions handed down under the DSU, rather than on issues arising under the GATT 1947.

A. Consultations under the GATT 1947

Consultations between GATT Contracting Parties were the first stage of dispute settlement in the GATT. The first GATT provision on the settlement of disputes through consultations was Article XXII of the GATT 1947.[1] In 1955, among other modifications to the Agreement, paragraph 2 was added to that provision, allowing a party to consultations to request the Contracting Parties ("CPs") to intervene on matters where a satisfactory solution could not be reached between the original parties to consultations.[2]

The GATT/WTO dispute settlement system as a whole has undergone a distinct evolution since its establishment in the form of the very basic provisions set forth in Articles XXII and XXIII of the GATT 1947. Two parts of the system, however, have been key elements since its inception: consultations at the beginning of the process, and the possibility of suspension of concessions or other obligations at the very end of the process. These two components mark the opposite ends of two extremes: consultations are the most conciliatory form of settling a dispute, and suspension of GATT concessions or other obligations is the ultimate means of retaliation and enforcement when a party fails to comply with its legal obligations under the Agreement. Over time the consultations process has changed less dramatically than the panel process which now contains an appellate stage. However, as with other stages of WTO dispute settlement system, consultations have become more legalized. Written rules agreed among the parties and in some instances codifying panel decisions have been introduced, and over the decades become increasingly detailed.[3] WTO panel and Appellate Body reports have added considerably to the body of decisions that provide guidance as to the legal requirements for consultations.

In 1958 procedures were introduced allowing the participation by third parties in Article XXII consultations.[4] The rules required (1) notification of the GATT Executive Secretary by the contracting party seeking consultations for the information of all contracting parties; (2) notification of the Executive Secretary by any other contracting party with a "substantial trade interest" informing the consulting parties of the desire to join consultations; (3) joinder of the third party in consultations if the party to which the request was made agrees that there is a substantial trade interest;[5] (4) referral of a

[1] The GATT 1947 was accepted and applied by most Contracting Parties based on the Protocol of Provisional Application, 55 U.N.T.S. 308 (1947). Article XXII provides:

> Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other contracting party with respect to the operation of customs regulations and formalities, anti-dumping and countervailing duties, quantitative and exchange regulations, subsidies, state-trading operations, sanitary laws and regulations for the protection of human, animal or plant life or health, and generally all matters affecting the operation of this Agreement.

[2] GATT, *Protocol Amending the Preamble and Parts II and III of the General Agreement in Final Act Adopted at the Ninth Session of the CONTRACTING PARTIES,* 278 U.N.T.S. 200 (1957).

[3] For a more detailed description of the development of dispute settlement rules *see* THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986–1992) Volume II, 2663 (Terence P. Stewart ed. 1994).

[4] *Procedures Under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties*, BISD, 7th Supp. 24 (1959) (adopted on Nov. 10, 1958) ("*1958 Procedures on Article XXII*"). The same substantive elements of the joinder into Article XXII consultations were later incorporated into Article 4.11 DSU on joint consultations.

[5] As to procedural requirements, Article 4.11 DSU stipulates that interested Members must notify the DSB of their interest to join consultations within ten days of the circulation of the request for consultations.

claim to the contracting parties by a third party whose request to join consultations was rejected; (5) informing the contracting parties of the outcome of consultations; and (6) the provision of assistance in consultations by the Executive Secretary if requested by the consulting parties.

Procedures introduced under Article XXIII in 1966 established specific provisions for the resolution of disputes between developed and less-developed country contracting parties.[6] If bilateral consultations under Article XXIII had failed, the less-developed country complainant could refer the matter to the Director-General for his good offices under the new provisions.

In 1979 the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance was adopted as a result of the Tokyo Round of Multilateral Trade Negotiations.[7] The 1979 Understanding codified for the first time a framework of procedural rules for the GATT dispute settlement process as a whole. The principal aim was to establish rules for the panel process and to improve its functioning, but more elaborate requirements for the consultations process were also included. The requirement to respond "promptly" to requests for consultations and to attempt to conclude consultations "expeditiously" with a view to reaching mutually satisfactory conclusions was introduced. Despite these more detailed provisions intended to prevent parties from procrastinating, no specific deadlines or guidance on the length of consultations were introduced. A further new element was that the request for consultations should include grounds for the request. No specific obligations were introduced with respect to developing countries other than the requirement that during consultations special attention should be given "to the particular problems and interests of less-developed contracting parties".[8] The provisions conclude with the requirement to undertake consultations under Article XXIII:1 first before referring the matter to the contracting parties, *i.e.,* before recourse to a panel.[9]

In 1990, four years after the official launch of the Uruguay Round, the contracting Parties adopted the Improvements to the GATT Dispute Settlement Rules and Procedures.[10] These rules applied until the end of the Uruguay Round when they were replaced by the more comprehensive DSU. For the first time, the Mid-term Agreement established a specific time frame for consultations. A party had to respond within ten days to a request to consult, and consultations had to be entered into within thirty days from the date of the request. In the case of a failure to respond, the party that requested consultations could then request the establishment of a panel.[11] If consultations failed, the complaining party could request the establishment of a panel within sixty days of the request for consultations. As under the 1979 Understanding, the consultations request had to be made in writing, and had to state grounds for the request. The GATT Council had to be notified of the request.[12] In addition, for the first time a specific provision with abbreviated deadlines in cases of urgency, including cases of "perishable goods en route", was introduced. In such cases parties had to enter into consultations within ten days of the consultations

[6] *Procedures Under Article XXIII*, Decision by the Contracting Parties of April 5, 1966, BISD, 14th Supp. 18 (1966) ("*1966 Procedures*").

[7] *Understanding Regarding Notification, Consultation Dispute Settlement and Surveillance,* BISD, 26th Supp. 210–211 (1980) (adopted on Nov. 28, 1979) ("*1979 Understanding*").

[8] *Id*. at 211. Very similar wording can be found today in Article 4.10 DSU.

[9] *Id.*

[10] BISD, 36th Supp. 61 (1990) ("*The Mid-term Agreement*").

[11] *Id.* at 62.

[12] *Id.*

request. In the case of failure of consultations the establishment of a panel could be requested within thirty days.[13]

As with the DSU, the Mid-term Agreement left key terms such as "urgency" undefined and open for interpretation by panels. This somewhat sketchy drafting style (applied throughout the DSU) has had positive as well as negative effects. On the one hand its flexibility allows panels to interpret legal terms in light of the applicable facts and on a case-by-case basis. On the other hand, the openness of this drafting style leaves broad gaps that may go beyond a panel's capacity, competence and even willingness to "legislate". As a result, it can create situations where the dispute settlement process is overburdened with a law-creating function that should have been assumed by the WTO Members.

B. Negotiations During the Uruguay Round: Power-Oriented versus Rule-Oriented

The GATT 1947 dispute settlement system has been viewed from the perspective of an international dispute resolution paradigm describing power-oriented diplomacy versus rule-oriented diplomacy.[14] A power-oriented system functions based on conciliation and negotiation and the outcome of a dispute is largely influenced by the relative power status of the parties. Such a system will therefore usually work to the advantage of the more influential and stronger parties. By contrast, in a rule-oriented system settlement of a dispute is achieved by reference to agreed rules.[15]

In the past some commentators considered the GATT 1947 as a "negotiating forum" designed to "preserve a balance of concessions and obligations"[16] and thus as a more power-oriented rather than rule-based system. The progressive legalization of the GATT 1947 and in particular the changes brought about by the establishment of the WTO and the DSU have tipped the balance strongly towards a rule-based system. It could, nevertheless, be argued that consultations under the DSU, being a negotiations-based phase of the dispute settlement process, are a remnant of the power-based oriented approach. Consultations are free from third party influence. Thus, there is no one to supervise or monitor the way in which parties conduct consultations under this system and a larger and more powerful country could still bring to bear its influence upon a smaller country through implicit or explicit threats of negative consequences. For example, a developed country challenged by a developing country could threaten the suspension of development aid if the developing country does not agree to a settlement during consultations, even if the settlement might not be the most advantageous and even if it would not have accepted the settlement under different circumstances.

The possibility of exerting political, economic or any other type of pressure during consultations is to some extent addressed by the fact that the party requesting consultations can proceed to the request for establishment of a panel after sixty days if it considers that consultations were unsuccessful. The right to a panel when consultations have failed brings the dispute into the ambit of the rule-based system through the application of law under third party control. It thus makes little sense to be overly critical of the consultations phase merely because it is a forum in which parties are capable of exerting political pressure against one another. Consultations are a necessary element of every dispute and will therefore occur, whether formalized as a phase of the dispute under the DSU or

[13] *Id.*

[14] John H. Jackson, The World Trading System 109–111 (1997).

[15] *Id.*

[16] Oliver Long, Law and its Limitations in the GATT Multilateral Trade System 73 (1987); Kenneth W. Dam, The GATT: Law and the International Economic Organization 356 (1970).

not. Even if a formal consultations phase had been omitted and parties had immediate access to the panel process, parties would still be likely to communicate and negotiate before one party requested a panel, just as parties often do in domestic litigation. Within these negotiations, there is always the possibility that parties will exert pressure upon other parties that are not in an equal negotiating position and have less leverage. It is a characteristic of the WTO that is manifest not only during consultations, but during any phases of negotiations, such as tariff negotiations.

III. The Contribution of Consultations to the Settlement of GATT/WTO Disputes

As of June 30, 2004, a total of 312 consultations had been notified to the WTO[17] out of which 124 cases have been definitively resolved. Out of those 124 cases, eighty proceedings ended in a panel or Appellate Body report and an additional sixteen cases were settled during the panel stage through mutually agreed solutions. In another 44 cases parties settled during consultations. The remaining cases were at least formally unresolved, with 109 pending consultations and 24 active panels.[18] Thus, a little under a quarter of all cases resolved have been settled without ever reaching the panel stage. This seems like a reasonable number of cases but by no means inspires enthusiasm about the performance of the consultations mechanism. Considering the DSU's explicit aim of settling disputes and the fact that consultations seem an appropriate arena for doing so early on, one would have hoped that a larger proportion of resolved cases would formally settle during consultations. It must be considered, however, that there is a relatively large gray area of inactive consultations cases among the cases currently recorded as pending consultations. Likely, quite a few of these proceedings in fact settled during consultations but settlement was never formally notified to the WTO Secretariat.[19] The number of cases that could be considerd as actually settled during consultations is therefore potentially higher. The overall performance of the consultations process must thus be considered more successful than would be indicated by the formal record. [20]

IV. Objectives and Nature of the Consultations Process

Consultations provide a relatively powerful tool for provoking a reaction from the challenged party since the party requesting consultations can fairly quickly (within ten or

[17] For a summary of the state of play of all WTO cases, *see* 30 June 2004 *Update of WTO Dispute Settlement Cases*, WT/DS/OV/21 (2004) ("*Dispute Update*"). A number of these cases are consultations requests that were consolidated at the panel stage, so that the total of the cases accounted for here will therefore not add up to 312.

[18] And in an additional 26 cases where panels are inactive, the contested measures have been terminated without formal notification of a mutually agreed solution at either the consultations or panel stage or the panel request was withdrawn.

[19] Calculated based on the information provided in WT/DS/OV/21, the average duration of the pending consultation cases has been a little over fifteen months.

[20] These figures only include cases where the settlement was reached by means of consultations and was formally notified to the DSB. Please note that other authors reach a higher number of settlements by including cases that have been resolved without resorting to the panel process, *i.e.* including cases where the panel request was withdrawn, *see* C. Christopher Parlin, *Part I: Review of the Dispute Settlement Understanding (DSU): Panel 1A: Stage I—Operation of Consultations, Deterrence and Mediation*, 31 LAW & POL'Y INT'L BUS. 565, 567 (2000). For more statistical information on WTO dispute settlement in general *see also* Young Duk Park and Barbara Eggers, *WTO Dispute Settlement 1995–99: A Statistical Analysis*, 3 JOURNAL OF INT'L ECON. LAW 193, 196 (2000).

thirty days) request a panel if the defending party does not respond to the request or refuses to consult. A request for consultations provides an opportunity to mount a relatively public threat since it will often attract the interest of other WTO Members, non-governmental organizations, companies, academics and other individuals. On the other hand, the consultations process itself is private in nature. The DSU procedures establish a process that is informal, party-controlled and settlement-oriented, rather than a formalized transition stage on the way to panel proceedings. This is demonstrated by the fact that the DSU does not provide for any involvement by the Dispute Settlement Body ("DSB") or other WTO bodies during consultations. The involvement of a third party in the form of good offices, conciliation or mediation can only occur with the agreement of the parties.[21] The fact that consultations are confidential and that no formal record exists further evidences that the drafters of the DSU did not envisage outside interference during the consultation stage of the dispute settlement process. Furthermore, panel decisions declining to consider the adequacy of consultations (discussed below) recognize that what happens during consultations is a matter of diplomacy, and is thus not subject to panel review.

A. Settlement of the Dispute by Way of Satisfactory Adjustment

With respect to the objectives of consultations, Article 4.5 demonstrates that the DSU favors settlement of a dispute by way of satisfactory adjustment and thus without reaching the panel stage. Dispute settlement in the WTO, at any stage of the process, is clearly aimed at settlement through agreement between the parties, rather than through the identification of treaty violations. This principle, among others, is also expressed in the general provisions of Article 3 of the DSU. Article 3.7 provides that "A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." Article 4.5 specifies with respect to consultations that:

> in the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

The Appellate Body thus held in *High Fructose Corn Syrup* ("*HFCS*") that:

> Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, *reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU*. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and limit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties as well as to third parties and to the dispute settlement system as a whole.[22] (emphasis added).

There are numerous reasons why it may be preferable for parties to settle during consultations. The most likely reason for settlement is that the parties simply achieved the result they had been looking for when they started consultations or have come to some other kind of agreement. For financial reasons, poorer countries in particular may try to avoid going through the lengthy and costly panel process. Frequently, panel decisions are appealed, which adds to the financial burden. Two other reasons why there may be a preference for settlement during consultations are that a party may prefer to avoid the publicity involved in a panel proceeding, or may prefer to settle a case that could set a

[21] DSU, Art. 5.1.

[22] Report of the Appellate Body, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, Recourse to Article 21.5 DSU, WT/DS132/AB/RW at 54 (2001) ("*HFCS*").

precedent and entail more proceedings by other WTO Members with similar complaints. Parties may also settle to avoid a panel or Appellate Body ruling on legal issues that they prefer to maintain as "uncharted territory".

B. Information Gathering, Clarification and Shaping of the Substance

Another purpose of consultations is to gather and clarify facts and to identify in a more detailed manner legal issues involved in a dispute. During consultations a party may present written questions concerning specific facts to the other side in order to obtain particular information. This may help in furthering that party's goal to reach settlement of the dispute during consultations. The panel in the *Korea Liquor Tax* case thus stated:

> Indeed, in our view, the very essence of consultations is to enable the parties gather correct and relevant information, for purposes of assisting them in arriving at a mutually agreed solution, or failing which, to assist them in presenting accurate information to the panel.[23]

As stated by that panel, in case consultations fail, information obtained will help in making a clear case before the panel. It has been noted, however, that some WTO Members treat consultations similarly to a pretrial discovery stage as it exists in U.S. procedural law.[24] In such instances, the main intent of the party requesting information is to gather a maximum of information for use in the subsequent panel proceeding. Opposing parties who, in earlier proceedings, candidly provided the information requested may have learned that such openness does not always work to their advantage.[25] As a result, there is a good chance that responding parties will not always be forthcoming and will not provide all information requested if they perceive that information is being aggressively gathered by the complaining party for use in subsequent proceedings. Allowing the information-gathering function of consultations priority over achievement of a settlement by mutually-agreed solution distorts the objectives of the DSU and leads to the use of consultations as a mere preliminary stage to the panel proceeding. When a party requested to provide detailed information refuses to do so, many facts will not be discussed during consultations and will only emerge during the panel proceedings. The Appellate Body in the *India-Patent Chemical Products* case recognized that panels need to engage in additional fact-finding when relevant information is not provided during consultations.[26]

[23] Report of the WTO Panel, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, ¶ 10.23 (1998) ("*Korea Alcohol Tax"*).

[24] Hyun Chong Kim, *The WTO Dispute Settlement Process: A Primer*, 2 JOURNAL OF INT'L ECON. LAW 457, 462 (1999).

[25] *Id.*

[26] The Appellate Body stated that "the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding." Report of the Appellate Body, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, ¶ 94 (1997) ("*Appellate India Chemical Products*"). The panel in the *Brazil—Aircraft* case found that "One purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel." Report of the WTO Panel, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/R, ¶ 7.9 (1999) ("*Brazil Aircraft Dispute*"). *See also* Report of the Appellate Body, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R ¶ 13 (1999) (*citing* the panel's finding concerning this point) ("*Appellate Brazil Aircraft Dispute*").

Consultations can also shape the substance of a case. With respect to this function, parties may decide, after uncovering more facts during consultations, to drop claims that they consider likely to be rejected by the panel. Parties may also have only put forward certain claims tentatively in their consultations request, or because they were concerned about the completeness of the request, and may therefore decide to drop those claims. In light of the more recent panel jurisprudence parties may also decide during or after consultations to add claims in the panel request.[27]

V. The Right to Ask for Consultations and the Duty to Consult

WTO law establishes broad consultation rights in Articles XXII and XXIII of the GATT 1994 which set out the general-purpose rules for consultations. Article 4 DSU provides more detailed rules governing consultation proceedings.[28] The "causes of action" for requesting consultations are, pursuant to Article 1.1 DSU, set out in the specific consultations provisions in the Agreements covered by the DSU.[29] Consultations are the first and a mandatory step in the WTO dispute settlement process. The obligation to consult results, first of all, from Article XXII:1 and Article XXIII:1 GATT 1947, but also from Article 4.2 DSU.[30] The only exception from the obligation to consult is Article 8.10 of the Agreement on Textiles and Clothing ("ATC"), under which a matter may be taken to the DSB without prior consultations if it remains unresolved after the Textiles Monitoring Body has issued a recommendation.

The right to request consultations and the duty to consult are two sides of the same coin. The importance of the duty to appear at consultations, which is placed on the party allegedly maintaining WTO inconsistent measures, should not be underestimated. That party will have to defend or explain its measures. If it is unwilling to do so it will, at a minimum, have to communicate its unwillingness to the party requesting consultations. This procedure will often be of some embarrassment to the Member maintaining the disputed measure. In *Desiccated Coconut,* Brazil refused to consult with the Philippines on the grounds that the disputed issue was outside the scope of the DSU. In the subsequent panel proceeding the panel did not issue a direct ruling on the issue since the Philippines had failed to raise the question of Brazil's refusal to consult in its panel request and raised

[27] This subject is discussed *infra* Part VII(A).

[28] Other provisions of the GATT 1994 calling for consultations include Articles II:5; VI:7; VII:1; VIII:2; IX:6; XII:4; XIII:4; XVI:4; XVIII:7; 12, 16, 21, 22; XIX:2; XXIII; XXIV:7; XXV:1; XXVII; XXVIII:1 and 4, and XXXVII:2.

[29] The consultation provisions in the covered agreements are: *Agreement on Agriculture*, Article 19; *Agreement on the Application of Sanitary and Phytosanitary Measures*, Article 11.1; *Agreement on Textiles and Clothing*, Article 8.4; *Agreement on Technical Barriers to Trade*, Article 14.1; *Agreement on Trade-Related Investment Measures*, Article 8; *Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping)*, Article 17.2; *Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation)*, Article 19.2; *Agreement on Preshipment Inspection*, Article 7; *Agreement on Rules of Origin*, Article 7; *Agreement on Import Licensing Procedures* Article 6; *Agreement on Subsidies and Countervailing Measures*, Article 30; *Agreement on Safeguards*, Article 14; *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

[30] GATT 1947, Article XXII:1 on multilateral consultations provides that "Each contracting party shall . . . afford adequate opportunity for consultation . . . "; GATT 1947, Article XXIII:1 on bilateral consultations stipulates that "the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it." DSU, Article 4.2 takes up this language and states: "Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement . . . ."

it only subsequently during the panel process. The panel nevertheless opined *in dicta*:

> The Philippine's request concerns a matter which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system. . . . In our view, these provisions [DSU, Article 4.6 and 4.2] make clear that *Members' duty to consult is absolute*, and is not susceptible to the prior imposition of any terms and conditions by a Member.[31] (emphasis added).

Consultations are thus an absolute duty of a Member and the failure to respond or to appear at consultations violates an absolute right of the party requesting consultations. This is true despite the fact that in *Desiccated Coconut,* the Panel ultimately agreed with Brazil that the issue *was* outside the scope of the DSU.[32]

It should be noted that both parties to a dispute have the right and the duty to consult. As a consequence of the non-responding party's violation of this duty, Article 4.3 DSU provides that the party requesting consultations can move directly to the panel request within ten days (if the opposing party does not respond to the request) or thirty days (if the party responds but does not agree to hold consultations in a timely manner). A non-responding party thus foregoes its right to consult and an opportunity to settle the case during consultations.

The fundamental role that the WTO Agreements and the DSU attribute to consultations as well as the emphasis that the panel in *Desiccated Coconut* put on the importance of the duty to consult raises the question whether the right to consult could be considered as something more than a procedural right.[33] On the one hand, consultations are the first means of providing relief to a party that considers that its rights under the WTO Agreements are infringed. The fact that a Member is deprived of the opportunity to settle a dispute during the consultation stage, and that it is left with no choice other than to request a panel, seems to bring the right to consultations somewhat closer to a substantive right. On the other hand, there is no protection or enforcement of the right to consult as such.[34] Although a party whose right to consultations was violated can request a panel under an accelerated time frame (*i.e.*, ten or thirty days), the result will only be that the panel declares that the party refusing to consult violated its duty to consult. There are no further legal consequences attached, such as suspension of concessions, as would be the case when a panel finds that a substantive provision is violated. This takes the right to consultations out of the ambit of a substantive right.

VI. Procedure

A. Time Periods and Deadlines

Unlike the panel process,[35] many of the deadlines that frame the consultations process are flexible and parties can mutually agree to extend the relevant deadlines provided in

[31] Report of the WTO Panel, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/R, ¶ 287 (1996) ("*Desiccated Coconut*").

[32] *Id*. ¶ 290.

[33] It should be noted in this context that the panel in *Guatemala—Cement* found that there is no reason to regard procedural rights differently from substantive rights, Report of the WTO Panel, *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, ¶ 8.111 (2000) ("*Guatemala Cement*").

[34] The concept of "enforcement" of law between states is of a much more limited applicability in public international law than in domestic law, and enforcement in the WTO is limited to the suspension of concessions.

[35] *See* DSU, *Working Procedures*, App. 3.

the DSU. There are several different ways to pass through the consultations process to the stage where the Member requesting consultations can request a panel, each involving a different time frame. All deadlines for the consultations process run from the date of receipt of the consultations request.[36]

First, if the Member requested to hold consultations fails to respond after ten days from the receipt of the request, the Member that wishes to consult can request the establishment of a panel.[37] Second, the party requesting consultations has the same right if the party requested to consult fails to enter into consultations within thirty days from the receipt of the request.[38] This means that twenty days after the responding party's initial reply to the request, the responding party must actually meet and talk to the party requesting consultations unless the latter does not insist on that deadline. For practical reasons of its own, the party requesting consultations may not insist on maintaining the deadlines suggested by the DSU. Third, if, within sixty days from the receipt of the consultations request the Member requesting consultations decides that consultations have failed, it can request a panel. Fourth, at any time during the sixty day period the consulting parties can mutually agree that consultations have failed and the party requesting consultations can request a panel.

In a model case where the party requesting consultations seeks to get through the consultation process as quickly as possible, and where the responding party responds within its allotted deadlines under the DSU, the entire process will only take about two months. In that case, one Member will request consultations, the responding Member will reply within ten days, the parties will meet within twenty days and have an additional thirty days to continue consultations. After that point in time a panel can be requested without the agreement of the responding party. The elapsed time would be sixty days. In practice, however, such a swift proceeding is the exception. Under the flexible time frame for consultations set forth in the DSU there is no obligation on the party that requested consultations to request a panel after sixty days. Rather, Article 4.7 allows the discretion to continue consultations.[39] Thus, parties have the right to consult for as long as they wish and they make extensive use of this right.[40]

The minimum requirement of sixty days for the consultation period provides for a fairly streamlined process. Some, however, have considered it unduly long. This may be true, in particular, where the responding party has no interest in participating constructively in the consultation process. In such cases, consultations are nothing more than a necessary formality before litigation begins and it seems unfair that the party bringing the case must wait until the lapse of the sixty-day deadline in the face of non-cooperation by the responding party. Nevertheless, such stonewalling should be considered a worst-case scenario. It is questionable whether shorter deadlines should be introduced and a new standard created when a party fails to make an effort to resolve differences during

[36] DSU, Arts. 4.3, 4.7, & 4.8. The deadline for joining consultations starts running from the time of circulation of the request, DSU, Article 4.11.

[37] DSU, Art. 4.3. The DSU does not require a written response to the consultations request.

[38] *Id.*

[39] *See* the wording of DSU, Article 4.7: "the complaining party may request the establishment of a panel" (emphasis added).

[40] Among the currently pending proceedings a few cases have been pending for up to nine years. A large number of cases has been pending between five and seven years. *Dispute Update*, *supra* note 17. As pointed out earlier, however, the category of pending consultations likely includes a number of cases where parties do not actively pursue consultations and that could therefore be considered inactive or settled and are thus not necessarily indicative of the duration of active consultations.

consultations. Shortening the time period for consultations in such instances risks minimizing the importance of consultations and reducing it to a mere way station on the way to panel litigation. This runs counter to the priority the DSU attributes to settlement over litigation. In addition, the fact that a relatively large number of cases are settled during consultations is evidence that stalling tactics are not the norm. Lastly, sixty days for consultations is not that long a period, considering that the panel process can last up to nine months. In light of this, it seems unlikely that there will be agreement to shorten the time period for consultations. However, if time were added to one part of the dispute settlement proceeding, i.e. the panel or the appellate process, without extending the overall nine-month limitation, this time would likely be subtracted from the sixty-day consultations period.

B. Cases of Urgency

Article 4.8 of the DSU provides for a shorter timeframe for consultations in cases of urgency. In such cases, Members must enter into consultations within no more than ten days of the receipt of the consultations request. The challenging party can request the establishment of a panel within twenty days from the receipt of the consultations request if consultations fail to settle the dispute. The time frame set out in Article 4.8 DSU is a maximum deadline. It is different from consultations under the standard timeframe in that it does not provide for mutually-agreed extensions of deadlines. This point is made in Article 4.9 DSU which states that parties (but also panels and the Appellate Body) are required to "accelerate the proceedings to the greatest extent possible."

Article 4.8 DSU raises several important questions, including how to define situations of urgency, how to hold consultations within ten days of the request and, finally, how a party can request the establishment of a panel after twenty days. These points are discussed in the following three sections.

1. Cases Where Urgency has been Invoked in Consultations

Thus far, no Panel or Appellate Body decision has dealt with the issue of urgency. Parties, nevertheless, have invoked urgency in consultations requests under Article 4.8 and 4.9 DSU. Several urgent consultations requests have been based on "perishable goods", the example provided in Article 4.8.[41] The urgency of these requests is more or less self-explanatory because of the nature of the products involved. In these cases, the parties simply state that they wish to use the accelerated proceeding under Article 4.8 and 4.9 DSU. In other, less obvious cases, parties describe in more detail why they consider the case to be urgent.

In two earlier cases involving wheat exports to the Slovak and the Czech Republics, Hungary justified its request for urgent consultations on the "clear inconsistency" of the measure involved with fundamental obligations and the severe economic and trade losses

[41] *Korea—Measures Concerning the Testing and Inspection of Agricultural Products*, Request for Consultations by the United States, WT/DS3/1 (1995) does not indicate the agricultural product involved (consultations pending at time of writing); *United States—Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico*, Request for Consultations by Mexico, WT/DS49/1 (1996) for fresh or chilled tomatoes (case apparently settled without panel request but settlement was not notified to the DSB). *Peru—Tax Treatment on Certain Imported Products*, Request for Consultations by Chile, WT/DS255/1 (2002) ("*Peru Tax Treatment*") for import tax treatment of fresh fruit, vegetables, fish, milk, tea and other natural products (a panel was requested in June 2002, WT/DS255/3).

in view of the planned duration of the measure.[42] In the more recent dispute *Romania—Wheat and Wheat Flour*, Hungary, after initially requesting consultations under the regular consultations procedures, modified its request and asked for urgent consideration. Hungary considered that the date Romania suggested for holding consultations was not timely and that the measure stopped all exports of wheat and wheat flour and thereby created critical circumstances.[43] In its panel request Hungary added the arguments that the product had a seasonal character and that exports of wheat represented a considerable part of total Hungarian exports to Romania.[44]

In *United States—Import Measures* the EC requested consultations with the United States regarding a U.S. decision to suspend liquidation on imports from the EC of products valued at over $500 million on an annual basis and to impose a contingent liability of one hundred percent duties on each individual importation of affected products. The EC held that this effectively imposed a one hundred percent duty, which stopped the products in questions from entering the United States. "Given the immediate and significant trade impact of this U.S. measure", the EC requested urgent consultations under Article 4.8 DSU.[45]

In its consultations request in *United States—Canada Softwood Lumber*, one of the most recent cases of urgency, Canada's justification for urgency under Article 4.8 DSU was that the preliminary CVD determination by the United States regarding exports of softwood lumber from Canada had an immediate and significant trade impact. Canada stated that the high trade volume involved represented a cost in potential countervailing duties of nearly one-half billion Canadian dollars, and that the cost to the Canadian lumber industry increased on a daily basis. Canada stated that lumber mills closures had already occurred, that more were imminent, and that significant layoffs of workers in mills still operating were taking place.[46] This case is discussed further in the following section.

2. Do Parties Actually Consult under the Reduced Time Frame?

Because of the confidential nature of consultations it is difficult to determine, for most of the above-mentioned cases, whether consultations were begun under the reduced time frame of Article 4.8. One of the more recent cases of urgency, *United States—Canada Softwood Lumber*, may serve as an example. The parties held consultations 27 days after the request for consultations was made, and not within the

[42] *Slovak Republic—Measures Affecting Import Duty on Wheat from Hungary*, Request for Consultations by Hungary, WT/DS143/1 (1998) (consultations pending at time of writing); *Czech Republic—Measures Affecting Import Duty on Wheat from Hungary, Request for Consultations by Hungary*, WT/DS148/1 (1998) (consultations pending at the time of writing).

[43] *See Romania—Import Prohibition on Wheat and Wheat Flour*, Request for Consultations by Hungary, WT/DS240/1 (2001) and the Addendum WT/DS240/2 where Hungary invoked urgency. Hungary initially requested consultations on October 18, 2001, to which Romania responded on October 26. Hungary added the urgency consultations request on October 30, twelve days after its initial consultations request.

[44] Hungary requested the establishment of a panel on November 27 (WT/DS240/2). *Id*. At its meeting on December 10 the DSB deferred the establishment of a panel. At the same day Hungary requested the DSB to hold a special meeting in order to establish a panel. Hungary withdrew its panel request on January 7, 2002 (WT/DS240/3) upon withdrawal by Romania of its legislation. *Id*.

[45] *United States—Import Measures on Certain Products from the European Communities*, Request for Consultations by the European Communities, WT/DS165/1 (1999) ("*U.S. Import Measures*"). In its subsequent request for a panel, the EC did not invoke the urgency provisions, *see id*., Request for Establishment of a Panel by the European Communities, WT/DS165/8 (1999).

[46] *United States—Preliminary Determinations With Respect to Certain Softwood Lumber from Canada*, Request for Consultations by Canada, WT/DS236/1 (2001) ("*Softwood Lumber*").

ten-day period requested by Canada. Evidently, the United States did not agree that this case required urgent consultations. In its panel request Canada did not invoke the urgency provisions.[47] Parties came somewhat closer to using the "urgency time frame" in *Peru—Tax Treatment for Imported Products*, where consultations were held after seventeen days. In addition, Chile's subsequent panel request referred to the urgency procedures.[48]

The fact that in past cases parties rarely (or possibly never) started consultations within the ten-day timeframe raises the question as to how to decide if there is a case of urgency. The party requesting consultations determines whether a matter is urgent. The decision as to whether consultations are held within ten days, however, can only be made by mutual agreement since the responding party can ultimately block the attempt to expedite matters. For example, it can respond to the request within ten days but not actually engage in consultations, then proceed by simply following the standard time frame for consultations. Where a responding party refuses to meet under the accelerated time frame there is little the party requesting consultations can do, since there is no neutral decision-maker to determine urgency (the DSB or a panel) at this early stage of the proceeding. There is no review of the refusal to consult under an accelerated time frame because the DSU generally does not provide for involvement by the DSB during consultations. Arguably, as a result, the provisions on urgency for the consultations process are practically useless.

It would be preferable to resolve disagreement over the invocation of the urgency provisions through a neutral decision-maker, such as a WTO panel. The panel could decide, as a matter of its jurisdiction and as a preliminary determination, whether the panel proceeding is urgent. In determining the urgency of its own proceeding, the panel would implicitly rule on the consultations, thus avoiding a direct determination regarding consultations. Panel decisions on urgency would help to define situations where the urgency provisions could legitimately be invoked. Such decisions, in accord with WTO panel and Appellate Body practice for many legal questions, could be made on a case-by-case basis rather than through a formula generally applicable to all cases. This process would establish precedent as to what should be considered a matter of urgency by consulting parties in future cases and should over time make the invocation of urgency at the consultation stage less problematic and contribute to a meaningful application of Article 4.8 and 4.9 DSU. It does not solve the problem, however, that a party requesting consultations under Article 4.8 DSU would not have immediate access to a panel determination at the time the request is made.

3. How to Get to the Request for Establishment of a Panel Within Twenty Days

There remains the question how to quickly select a panel. If the party requesting consultations requests a panel within twenty days, is the DSB automatically required to allow the panel request under the standard procedure of Article 6.1 DSU? The responding party will almost certainly object that the case was not urgent and that consultations should have been held under the sixty day standard time frame.

A fair solution would be to follow the reverse consensus rule under Article 6.1, allowing for the establishment of a panel unless there is consensus not do so. This should lead to the establishment of a panel within twenty days, since the party requesting the panel

[47] *See Softwood Lumber, supra* note 46, Request for Consultations by Canada, WT/DS236/2 (2001).
[48] *See supra* note 41.

will not vote against establishment.[49] The respondent could raise the question of urgency as a preliminary issue for the panel to rule upon if it felt inappropriately rushed during consultations or if consultations did not take place within the twenty day period before the panel request. The panel could either find that the complainant had inappropriately invoked urgency (and possibly send the parties back to the consultations phase to try again) or that the respondent had inappropriately refused to hold consultations because there was urgency and that the complainant therefore had the right to proceed to a panel under the reduced time frame.

It must be borne in mind that these ideas are speculative. The DSB has so far managed to steer around these controversies and it remains to be seen how it will deal with the legal and practical implications of future cases involving urgency.

C. Parties to Consultations

1. Plurilateral and Private Consultations

Under the basic GATT rules on consultations the party requesting consultations can choose between plurilateral consultations under Article XXII GATT 1994, and consultations held in private under Article XXIII:1 GATT 1994. It is thus the party requesting consultations that can determine whether only one specific party or multiple parties participate.[50] In GATT practice, the contracting parties started using Article XXII as the basis for plurilateral, working-party-like consultations. In 1958 the provision was used as the basis for plurilateral consultations in connection with questions arising out of the Treaty of Rome.[51] If, by contrast, a consultations request is made under Article XXIII:1, third parties are excluded from consultations and the two parties consult in private.[52] Such a request will be made when the requesting party considers that

[49] Another question is whether in matters where urgency is invoked the DSB should establish the panel at the first DSB meeting rather than deferring to the second request for a panel (if the responding party blocks the first request for establishment). As a matter of law, the DSB would have leeway to do so since Article 6.1 provides that "... a panel shall be established *at the latest* at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, ..." (emphasis added).

[50] Article XXII:1 outlines a broad requirement to "accord sympathetic consideration to" and to "afford adequate opportunity" for consultations. The purpose of Article XXIII:1 overlaps with this requirement although it is more specific. Its language provides for consultations in the case of a complaint (*i.e.*, nullification or impairment or the impediment of the attainment of any objective of the Agreement) and upon a written representation by one party against another party. The party against whom the complaint is directed shall "give sympathetic consideration to the representations." It has been observed that the procedure of Article XXII to some extent duplicates that of Article XXIII but that there is no necessary connection between the provisions and that each procedure has its independent application. *See* JOHN JACKSON, WORLD TRADE AND THE LAW OF GATT 178 (1969).

[51] *Treaty Establishing the European Economic Community*, BISD, 7th Supp. 69–71 (1959). In the 1979 Understanding it is the section on consultations that explicitly requires parties to attempt to find a satisfactory adjustment under Article XXIII. By contrast, no reference is made to Article XXII. *See 1979 Understanding, supra* note 7 at 210, 211. The Mid-term Agreement refers to both, Article XXII:1 and Article XXIII:1 as a legal basis for consultations, *see The Mid-term Agreement, supra* note 10. It was also in the 1950s that the CPs established the practice that consultations under Article XXII are sufficient to fulfill the consultation prerequisite and to proceed to a panel request under Article XXIII:2. *See* II ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 673 (1995).

[52] *See e.g.*, the consultation request in *Chile—Price Band System* and *Safeguard Measures Relating to Certain Agricultural Products WT/DS201/1 (2000); Korea—Laws, Regulations and Practices in the Telecommunications Procurement Sector*, Request for Consultations by the European Communities, WT/DS40/1 (1996); Turkey—Restrictions on Imports of Textiles and Clothing Producers, Request for Consultations by India, WT/DS34/1 (1996). *See also Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Request for Consultations from Poland, WT/DS122/1 (1998),

confidential consultations will be more successful.[53] In the majority of cases consultations requests are made under Article XXII (plurilateral consultations). In case a request for consultations does not state a legal basis for consultations, the decision whether other parties should be allowed to join under Article 4.11 DSU or whether consultations should be confidential should remain with the party requesting consultations.

2. Multiple Consultations under Article 4.11 DSU: Third Party Rights and Substantial Trade Interest versus the Respondent's Discretion to Accept a Joinder

In the case of a consultations request under Article XXII:1 of the GATT 1994 or pursuant to the corresponding provision in a covered agreement, a WTO Member may decide to join consultations whenever it considers that it has a "substantial trade interest". In practice, joint consultations mean that the joining party or parties have the right to be present when the original consulting parties meet. They have access to the facts, legal arguments, discussions and documents produced during consultations in the same manner as the original consulting parties.

As a practical matter, a Member may join consultations for various reasons. A Member may already have the same trade problem as the party requesting consultations. It may have a high volume of trade in the good or service at issue. Members may also wish to join for strategic reasons since they will have access to the facts, legal arguments and counterarguments, theories and strategies that the consulting parties forward. Joining parties may also seek to use such information in a different, not necessarily related, proceeding against the same or other countries. This can raise problems concerning the confidentiality of the process.[54]

As a formal procedural requirement, the request to join must be notified to the DSB within ten days after the circulation of the request for consultations.[55] The decision as to whether the claim of a "substantial trade interest" is well founded, and therefore whether another Member can join consultations, lies with the party responding to the request.[56] A refusal to allow a Member to join consultations raises a problem for the party wishing to join, since the term "substantial trade interest" is not defined in the DSU and has never been defined or interpreted by GATT or WTO panels. The failure to develop a definition through jurisprudence stems in part from the fact that there is no possibility of immediate review when a party requested to hold consultations rejects the request by a third party to join.[57]

In the *Bananas* decision the Appellate Body only touched on the issue in its discussion of whether the United States needed to have standing in the form of a "legal interest" to bring claims under the GATT 1994. [58] For this purpose, the Appellate Body examined,

based on Article 17.3 of the Antidumping Agreement which is the corresponding provision to Article XXIII:1 of the GATT 1994.

[53] William J. Davey and Amelia Porges, Comment, *Performance of the System I : Consultations & Deterrence,* 32 INT'L LAW 695, 701–702 (Fall 1998).

[54] *See* Part X *below*.

[55] DSU, Article 4.11, 1st sentence.

[56] DSU, Article 4.11, 2nd sentence.

[57] The only way for a rejected third party to obtain review of the rejection of its request and thereby of whether it has a substantial trade interest would be through the original party that requested consultations if the case goes to a panel. The original party that requested consultations could raise the issue of the rejection of the third party request before the panel. Arguably, the consulting parties would have needed to consult on the issue before it can be raised in the panel request.

[58] *See* Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, AB-1997-3, WT/DS27/AB/R, ¶ 132–136 (1997) ("*Appellate Banana Regime*").

inter alia, Article 4.11 DSU and stated that in order to join multiple consultations, a WTO Member must have a "substantial trade interest". With respect to the standing of the United States to bring claims under the GATT 1994, the Appellate Body found that the United States was justified in bringing claims:

> The United States is a producer of bananas and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas.[59]

This standard provides a fairly low threshold for an issue as important as bringing claims under a WTO agreement. Although the question of standing is a different legal issue from that of a "substantial trade interest", it can reasonably be argued that the "substantial trade interest" standard for joining consultations should be interpreted just as broadly. WTO Members requested to hold consultations under Article XXII, however, have refused participation by countries that seem to have met the requirement of a substantial trade interest.[60] In such cases, the party that was not permitted to join must request separate consultations with the Member refusing the request for participation.[61] Objective reasons for rejecting a request for joinder may exist where a party wishing to join does not provide any evidence of a substantial trade interest or where the nature of the interest is not directly pertinent to the subject of the consultations.[62]

3. Direct Proceeding to a Panel for Joining Parties?

It has been argued that a WTO Member that has joined consultations under Article 4.11 should be able to request a panel without requesting separate consultations itself.[63] This would mean that the party joining consultations can step into the shoes of the party that originally requested consultations and change its status from being a joint party to consultations to becoming a party to the panel proceeding.

If, for example, the party that originally requested consultations decides to settle, the joining party could request a panel without starting new consultations. This seems sensible since it would save time. If the original requesting Member decides to settle during consultations but the joint party wishes to proceed to a panel, efficiency considerations suggest accepting the panel request rather than requiring new consultations. First, it is not obvious why a party joining consultations should not have the same rights as the party

[59] *Id*. ¶ 136.

[60] *See, e.g. U.S. Import Measures, supra* note 45, Request for the Establishment of a Panel by the European Communities, WT/DS165/8 (1999), stating that the United States refused participation of all third parties in the consultations.

[61] The incorporation of the substantial trade interest standard from the 1958 Procedures for Article XXII into the DSU seems to make little sense other than to allow a party that has been requested to hold consultations the strategic decision as to whether to avoid a teaming-up of efforts by the parties requesting consultations and thus to split or divide issues and disputes. In addition, the fact that, when requesting separate consultations as provided in Article 4.11 of the DSU no trade interest needs to be shown, and that in order to participate in a panel as a third party only a "substantial interest" needs to be demonstrated, makes the "substantial trade interest" standard an unnecessary obstacle to an efficient use of consultations. On the other hand, denying joinder is the only way for the party requested to consult to control the number of parties with which it must simultaneously consult. It would thus be more useful to allow the party that has been requested to hold consultations to reject a request for multiple consultations and to establish a requirement to enter into separate consultations with that party. The "substantial interest" requirement for third party participation before a panel was introduced in the 1979 Understanding. *1979 Understanding, supra* note 7.

[62] *See* Davey and Porges, *supra* note 53, at 700.

[63] *Id*. at 697, 704.

that originally requested consultations. Joining multilateral consultations is permitted under Article XXII:1 GATT 1994. The party originally requesting consultations and the party requested to consult are thus aware that consulting members may not be limited to the original group. The Article 4.11 DSU joinder puts the defending party on notice that any panel request may not be limited to the original parties to the consultations. This should be sufficient to protect the due process rights of the responding party. Second, there is nothing in the DSU or in the GATT 1994 that distinguishes between the parties originally requesting consultations and the parties that later join consultations. Requiring joining parties to request new consultations before making a panel request would merely drag out the process without serving any additional purpose. In cases where a joining party requests a panel, the responding party is likely to pay close attention to the issues raised in the panel request to make sure that there is sufficient congruence between the original consultations request and any panel request made by the joining party. In order to protect the due process rights of the responding party in such circumstances, the party requesting the panel can only raise issues before the panel that were discussed during consultations where the joining party was present. The burden to show that issues have been discussed during consultations is on the joining party requesting the panel.

VII. The Consultations Request

The consultations request is made directly to the defending Member. It will usually be addressed to a high-ranking government official, such as the minister or secretary in charge of the area covered by the WTO Agreement in question, or to the head of the Member's Mission in Geneva. Under Article 4.4 of the DSU, the DSB and the relevant Councils and Committees must be notified of the request. The DSB will circulate the request to all WTO Members within a short period of time (a few days maximum).[64] The request must be in writing and state the reasons for the request. It must list the "measures at issue", that is the domestic laws, regulations, practices etc., complained against. The request must also indicate the legal basis for the complaint; it must enumerate the WTO Agreement provisions allegedly violated.

A. Substantive Requirements and the Role of the Consultation Request

The requirement in Article 4.4 DSU that "the reasons for the request" must include the "identification of the measure at issue" and "an identification of the legal basis of the complaint" has given rise to questions before more than one panel, as well as before the Appellate Body. For obvious practical and due process reasons, it is in the interest of the party responding to a panel request that the consultations cover, to as wide an extent as possible, the issues that will be the subject matter of the panel dispute. Knowledge of the issues discussed during consultations will help the respondent prepare its panel submissions. Thus, there should be a broad overlap between the claims, measures and facts raised in the consultations request and those identified in the panel request, forming the substance of the dispute. Despite the close connection that exists between the consultations and the panel request there are differences between the legal requirements of the consultations request under Article 4.4 DSU and the request for the establishment

[64] Consultations requests for bilateral consultations under Article XXIII:1 are also notified to the DSB and the relevant Councils and Committees and circulated to the WTO Members, but this is for information purposes only.

of a panel under Article 6.2 DSU. Both requests are relevant to identify the disputed issues but different standards apply as to their completeness.[65]

In one of its earlier reports, *India—Patent Chemical Products*, the Appellate Body gave its ruling on the standard to be applied to assess the completeness of consultations and panel requests, *i.e.*, claims stated and facts disclosed during consultations, a wording that could have resulted in Article 4.4 DSU being interpreted as narrowly as Article 6.2 DSU. The report was interpreted by some trade litigators to require parties to state their claims fully in the consultations request, and in the event that they failed to do so, would have resulted in the foreclosure of new claims in panel proceedings.

India's appeal against the panel's ruling in the *Chemical Products* case was in part based on an incomplete panel request by the United States with respect to claims arising under the TRIPS Agreement.[66] India did not raise completeness of the U.S. consultations request, but only the panel's alleged lack of jurisdiction over portions of the dispute involving Article 63 of the TRIPS Agreement.[67] Arguably there was, therefore, no reason for the Appellate Body to rule on issues concerning consultations. Nevertheless, the Appellate Body provided broad guidance with respect to consultations. On the basis of the due process argument established for completeness of the panel request in *Desiccated Coconut* and *EC—Bananas,* the Appellate Body stated that:

> All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must

[65] The Appellate Body has consistently interpreted Article 6.2 narrowly and has applied a high standard for completeness of the panel request. Laying out the foundations for its jurisprudence on the panel request in *Desiccated Coconut,* the Appellate Body interpreted the "matter" of a dispute to be the specific claims stated by the parties in the relevant documents specified in the terms of reference. Report of the Appellate Body, *Brazil—Measures Affecting Desiccated Coconut*, AB-1996-4, WT/DS22/AB/R at 21–22 (1997) ("*Appellate Desiccated Coconut*"). The "relevant documents" referred to will usually be the request for the establishment of a panel. The Appellate Body's argument is evidently based on the fundamental premise of fairness of the proceeding. Thus, the Appellate Body further states that "[T]erms of reference fulfill an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case." *Id*. In *EC—Bananas* the Appellate Body expanded on this argument, focusing on the panel request. "It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint." *Appellate Banana Regime, supra* note 58, ¶ 142. Completeness of a panel request was also discussed in the Report of the Appellate Body, *Australia—Measures Affecting Importation of Salmon*, AB-1998-5, WT/DS18/AB/R ¶ 110 (1998). It follows from the Appellate Body's jurisprudence that the panel request has at least two important functions, first, to determine the panel's terms of reference and thereby to frame the subject matter of the dispute and, second, the due process element of informing the defending party and third parties to the disputes of the substantive claims. In light of the role of the panel request, the Appellate Body's narrow interpretation of Article 6.2 is warranted. Different standards, however, should apply to the consultations request. For additional information on these and additional objectives of the panel request, *see* Gary N. Horlick and Glen R. Butterton, *A Problem of Process in WTO Jurisprudence: Identifying Disputed Issues in Panels and Consultations*, 31 LAW & POL'Y INT'L BUS. 573, 576–578 (2000).

[66] The U.S. panel request referred to inconsistencies in India's legal regime "with the obligations of the TRIPS Agreement, including but not necessarily limited to Article 27, 65 and 70." *See India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Request for the Establishment of a Panel, WT/DS50/4 (1996). The United States subsequently raised Article 63 of the TRIPS Agreement in its oral statement in the first substantive meeting of the parties with the panel and the panel decided to rule upon the alternative claim. Report of the WTO Panel, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (1997) ("*India Chemical Products*").

[67] *Appellate India Chemical Products, supra* note 26, ¶¶ 14 & 28.

> be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding. But this additional fact-finding cannot alter the claims that are before the panel—because it cannot alter the panel's terms of reference.[68]

The Appellate Body was extremely careful with its wording and did not directly state that a party's consultations request must include all claims that will later be raised in the panel request. The phrase that "claims must be stated clearly" does not mean that they must also be stated *completely*. The phrase that "claims made during consultations do much to shape the substance and the scope of subsequent panel proceedings" comes close to saying that the substance of the panel proceeding should not exceed the substance of the consultations and yet falls a little short of saying that it must be *all-inclusive*. The Appellate Body seems to request a high degree of disclosure from the consulting parties, but stops short of establishing a standard that requires panels to deal only with claims that were raised during consultations. Early disclosure of as many claims and facts surrounding these claims as possible would, of course, be ideal to protect, most importantly, the due process rights of the party requested to consult. It would also further adherence to the requirement to consult in good faith.[69] However, an overly narrow interpretation of Article 4.4. and the possible consequence of freezing the record for the subsequent panel request are not very practical nor necessary, and it is questionable if such an interpretation would be within the spirit and the wording of the DSU.

First, as a practical matter, parties may not be aware of all the facts and thus of all legal issues and claims when they draft the consultations request. This should not foreclose them from raising these claims in a panel request. Making the consultations request a mirror image of the panel request may result in parties being over-inclusive and thereby overburdening and frustrating the consultations. In addition, DSU consultations are designed as a party-controlled, settlement-oriented, and relatively informal process.[70] Formalizing this process and making it a mere preliminary stage before panel proceedings, with consultations requests being a mirror image of the claims before a panel would be detrimental to the idea of freely discussing ideas and exchanging information, as well as the idea of negotiating and compromising over issues. The purpose of consultations is to encourage parties to reach settlement in a less formalized environment before the dispute enters the more formal legal structure of the panel proceeding. However, given that parties sometimes employ litigation strategies during consultations, this idea of a free exchange of ideas and a good faith effort to a resolve a dispute during consultations might be considered just as idealistic as the Appellate Body's concept of complete disclosure of all claims and facts during consultations.

Since the discussion surrounding completeness of consultations in the *India—Patent Chemical Products* dispute, subsequent WTO panels dealing with completeness issues have been more liberal and pragmatic in their approach. Effectively, panels seem to have

[68] *Id*. ¶ 94.
[69] DSU, Art. 4.3.
[70] *See supra* Part IV.

"gained back some territory", finding that a panel's terms of reference are determined by the panel request and not by prior consultations. These panels have interpreted Article 4.4 broadly, both in terms of completeness of the *measure* complained against and the *claims* included in the panel request.

In the *Brazil—Aircraft* and *Canada—Aircraft* disputes, the parties alleged that the panel did not have jurisdiction over certain issues because they had not been included in the consultations request and had not been the subject of consultations. In the case against Brazil, the earlier of the two proceedings, Brazil argued on appeal that certain regulatory instruments of its PROEX program were not properly before the panel because they came into effect after consultations were held. The case thus dealt with the question of how completely the measures complained against and raised in the panel request must be covered during consultations.[71] The panel held that the consultations request and the request for establishment of the panel related to fundamentally the same "dispute", because they involved essentially the same practice, the payment of export subsidies under PROEX. The Appellate Body upheld this finding, based on the fact that the later regulatory instruments related to the administration of PROEX and "did not change the essence of that regime."[72] It further ruled that parties must hold consultations, but that Articles 4 and 6 of the DSU[73] do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[74] Therefore, even if one gives a narrow interpretation to the ruling in *India—Patent Chemical Products*, requiring more or less identity between the consultations and the panel request, the ruling in the *Brazil—Aircraft* case appears to allow additional leeway since other measures can be included in the panel request as long as they do not alter the "essence" of the measure. The Appellate Body did not define what exactly would be the "essence" of a measure, but it stated that "the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that was referred to the DSB for the establishment of a panel." [75] This general reference to subsidies under PROEX seems to leave the door relatively wide open for inclusion of additional measures, again, as long as the subject matter of the measure at issue is not modified. Some parties, however, have considered it safer to request additional consultations on certain issues that were not included, or not explicitly included, in the original consultations request. As an example, in *Mexico—Telecommunications Services* the United States requested a new round of consultations with respect to new regulations that Mexico had enacted after the original consultations.[76]

In *Canada—Aircraft*, Canada raised as a preliminary issue whether certain measures identified in Brazil's request for a panel under Article 4.4 SCM had been subject to

[71] *Brazil Aircraft Dispute, supra* note 26, ¶ 7.4. When Canada originally requested a panel in this case Brazil successfully disagreed with the legal claims Canada raised in its panel request. In its consultations request Canada listed violations of the SCM Agreement only. When requesting the establishment of a panel, it also alleged violations of the GATT 1994. Due to Brazil's objections in the DSB meeting, Canada had to resubmit a modified request, limiting its scope to the SCM Agreement.

[72] *Appellate Brazil Aircraft Dispute, supra* note 26, ¶ 130.

[73] Or Article 4, paragraphs 1 to 4 of the Agreement on Subsidies and Countervailing Measures.

[74] *Appellate Brazil Aircraft Dispute, supra* note 26, ¶ 132 (emphasis in original).

[75] *Id*.

[76] For the original request *see Mexico—Measures Affecting Telecommunications Services*, Request for Consultations by the United States, WT/DS204/1 (2000) and the additional request, Request for Establishment of a Panel by the United States, Addendum, WT/DS204/1/Add.1 (2000).

the consultations request and were in fact the subject of consultations. Canada claimed that because the term "financing" in the description of Canada's aircraft export subsidy program had been omitted from the consultations request but included in the panel request, the panel did not have jurisdiction over this issue.[77] Brazil responded that a request for establishment of a panel will often not be identical to a request for consultations because of the refinement of claims that will likely result from consultations. The panel rejected Canada's claim, stating that its jurisdiction was determined by its terms of reference as established in the panel request as set out in Article 7 DSU. Regarding the role of the consultations request, the panel stated that:

> a panel's terms of reference would only fail to be determinative of a panel's jurisdiction if, in light of Article 4.1–4.4 of the SCM Agreement applied together with Article 4.2–4.7 of the DSU, the complaining party's request for establishment were found to cover a "dispute" that had not been subject of a request for consultations.[78]

The panel continued by stating that "the 'matter' on which consultations are requested will not necessarily be identical to the 'matter' identified in the request for establishment of a panel."[79]

This ruling seems to indicate that there is some connection between the "dispute" and the "matter". It also seems to permit new issues, in the form of new measures and possibly even new legal claims, to be raised in the panel request. This is in accord with the findings in *Japan—Agricultural Products*, the latest panel addressing completeness. Japan argued that a claim raised for the first time in a panel request should be excluded from the panel's terms of reference since consultations were not held on it. The additional claim raised by the United States related to Article 7 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). In its preliminary ruling on the issue the panel rejected the argument, noting without further reference to earlier panel or Appellate Body reports that its terms of reference were based on the panel request and not on the issues covered in consultations.[80] In its consultations request the United

[77] Report of the WTO Panel, *Canada—Measures Affecting the Export of Civilian Aircraft from Brazil*, WT/DS70/R, ¶ 9.6 (1999) ("*Canada Aircraft*"). Brazil's consultations request referred to "EDC [Export Development Corporation] equity infusions into corporations specially established to facilitate the export of aircraft", and "EDC loan guarantees for exported aircraft." Brazil's request for establishment of a panel referred to "financing and loan guarantees provided by the [EDC], including equity infusions into corporations established to facilitate the export of civilian aircraft", thus including the additional term "financing" as opposed to just "loan guarantees". Canada claimed that "financing" is a distinct activity from either providing "equity infusions" or "loan guarantees" and that because of the omission of that term from the consultations request it could not have properly been included in the panel request. In Canada's view the panel could therefore not have jurisdiction over this issue. Pointing to the language in Article 4 SCM on remedies, Canada claimed that a "rational connection" must exist between "the subsidy in question" in Article 4.2 and the "matter" referred to the DSB. Canada argued that the SCM Agreement and due process would be violated if Canada were forced to respond to a "matter" in a panel dispute on which consultations had not been requested.

[78] *Id*. ¶ 9.12.

[79] *Id*.

[80] The panel stated: "We first examine Japan's request to exclude Article 7 of the SPS Agreement from our examination on the grounds that it was only mentioned for the first time in the U.S. panel request (document WT/DS76/2) and that no consultations were held on it. We note that our terms of reference (set out in document WT/DS76/3) direct us to examine the matter before us 'in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS76/2.' This document, the U.S. panel request, specifically cites Article 7 of the SPS Agreement. We thus consider that claims under that provision fall within our terms of reference." Report of the WTO Panel, *Japan—Measures Affecting Agricultural Products*, WT/DS76/R, ¶ 8.4 (1998).

States had identified claims both under the GATT 1994 and the SPS Agreement. It is possible the panel would have ruled differently if the new claim raised in the panel request had not been under the SPS Agreement but under an entirely different agreement, such as the Agreement on Technical Barriers to Trade. A claim raised under an agreement not identified in the consultations request adds a new area of substantive law that has not been subject to consultations, and might therefore be viewed by some of the parties as considerably changing the nature of the dispute, if not the entire dispute. Such a view would be in accord with the ruling in *Brazil—Aircraft*, where Brazil successfully contested the inclusion of new GATT 1994 claims when GATT claims had not been identified in Canada's consultations request.[81]

As to the practical question of how to draft a consultations request, the recent panel reports discussed above suggest that there is no absolute need to be all-inclusive. This applies for both the measures complained against and the claims identified, i.e., the legal provisions invoked. This advice, however, must be treated with care. The "dispute", as the panel in *Brazil—Aircraft* held, or the "matter" as stated by the panel in *Canada—Aircraft,* subject to consultations must be the same as that identified in the panel request. In order to be on the safe side when drafting the consultations request, it is advisable to cover the subject matter at issue as broadly as possible. All relevant measures, *i.e.*, domestic laws, regulations, practices etc., known to the complainant at the time the request is made should be included. Similarly, it seems advisable to identify and include in the consultations request all WTO Agreements that will be at issue in the dispute, if not all relevant provisions of these Agreements.

B. Issues not Raised in the Consultations Request but Actually Discussed

In *Canada—Aircraft* Brazil argued that the subject of Export Development Corporation ("EDC") "financing" had been discussed in consultations and that Canada's claim that the panel did not have jurisdiction over this claim was therefore unfounded. The parties disagreed over whether this discussion had occurred and the panel could not establish whether consultations had indeed been held on this issue.[82] The panel noted that if there had been consultations on the issue, this would normally dispose of the jurisdictional issues raised by Canada. The panel's decision was reasonable since the due process purpose of consultations, putting a party on notice of the issues that may be raised in the panel request and that may be raised before the panel, are fulfilled. The case also demonstrates the risk of not including issues in the request for consultations and expecting that discussion of issues in the consultation themselves will suffice to permit their inclusion in the panel request. The confidentiality of consultations and the fact that often there is no agreed record of the consultations makes it difficult to prove that consultations were held on a specific issue.[83] For issues not included in the request for consultations, jurisdiction of the panel will usually be limited to issues that the parties agree were the subject of consultations. As a result parties could also include an issue in the panel request that was not the subject of consultations, provided there are no objections from other parties.

[81] *See Brazil Aircraft Dispute, supra* note 71.

[82] *Canada Aircraft, supra* note 77, ¶ 9.11.

[83] *But see*, Report of the WTO Panel, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, ¶¶ 3.8 & 6.31 (2000), where India prepared verbatim reports of the consultations.

C. Is there a Duty to Consult in Compliance Review Proceedings?

In the first case involving an Article 21.5 compliance review by the original panel, the *High Fructose Corn Syrup* case, Mexico objected on appeal that the review panel had failed to examine the alleged lack of consultations. In Mexico's view, there should have been another round of consultations before the United States could request the reestablishment of the original panel for a compliance review. Mexico based its complaint before the panel on Articles 3.7 and 6.2 DSU (and did not raise Article 4).[84] Mexico argued, supported by the EU as a third participant, that consultations are an indispensable element in Article 21.5 proceedings since the phrase "these dispute settlement procedures" in Article 21.5 must be interpreted as a reference to all DSU procedures, including those involving Article 4.[85] In the U.S. view, the phrase referred to something less than all DSU procedures and the only condition established by Article 21.5 was that there is disagreement as to whether a Member has implemented the recommendations and rulings of the DSB.[86]

The Appellate Body found that Mexico had not properly brought the issue before the panel since it was not raised in an explicit or timely manner.[87] The Appellate Body further examined whether the panel still had the duty to examine the lack of consultations on its own motion. In its decision, not always using the clearest language, the Appellate Body avoided ruling on the issue of whether consultations were a necessary precondition for an Article 21.5 review. The Appellate Body stated that if Mexico were correct in its objection, then the panel would have needed to address the issue of consultations to ascertain its own jurisdiction and its authority to carry out a review under Article 21.5. If the panel's jurisdiction were in question because of the lack of consultations, the panel had the duty to examine this question *on its own motion*.[88] The Appellate Body *assumed* that the same procedures apply in Article 21.5 procedures as in original panel proceedings. Thus *assuming* that there is a requirement to consult, the Appellate Body examined whether the lack of consultations would be a defect serious enough to deprive the panel

[84] It was unclear from Mexico's appeal whether the issue raised was the lack of consultations or whether, in addition, the panel should have ruled on the failure of the U.S. panel request to indicate whether consultations had been held and the U.S.'s failure to exercise its judgment as to whether recourse to Article 21.5 would be "fruitful", *see* Report of the Appellate Body, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Recourse to Article 21.5 of the DSU by the United States, AB-2001-5, WT/DS132/AB/RW, ¶¶ 35 & 51 (2001). On the latter two issues, the Appellate Body ruled that the authority of the Panel was not invalidated by the absence in the Panel request of an indication whether consultations were held as required under Art. 6.2 DSU. It recognized that the requirement to indicate in a panel request whether consultations were held was certainly incumbent upon the complaining party, but since its purpose was "primarily informational" the failure to do so did not deprive the panel of jurisdiction. *Id*. ¶ 70. Finally, the AB determined that the Panel was not obliged to address the question of whether the United States satisfied its obligation under Art. 3.7 DSU to exercise its judgment as to whether dispute settlement would be "fruitful." Given the "largely self-regulating" nature of the requirement, it found that panels and the AB must presume that requests for establishment of a panel are made in good faith. The Panel was not required, nor authorized, "to look behind [a] Member's decision and to question its exercise of judgment," and therefore was not obliged to consider the issue on its own motion. *Id*. ¶ 74.

[85] *Id*. ¶ 52.

[86] *Id.*

[87] Mexico did not raise the lack of consultations during the DSB meeting at which the review panel was established. *Id.* ¶ 39. It also did not make any mention in its two written submissions to the panel, *id*. ¶ 40, but waited until the oral hearing to make a statement concerning "observations of a general nature" and the U.S. haste "in resorting to the Dispute Settlement Body", which in Mexico's view, "resulted in the presentation of a superficial and deficient case." *Id*. ¶ 41. The panel did not mention any of these issues in its report, and Mexico did not comment on this issue during the interim review stage. *Id*. ¶ 44.

[88] *Id*. ¶ 53.

of its jurisdiction to review the case.[89] The Appellate Body was "not persuaded that the undoubted practical importance of consultations to the WTO dispute settlement system is dispositive of the issue before us on appeal."[90] It argued that pursuant to Article 4.3 DSU the responding party could relinquish benefits from consultations by not responding to the request and that under Article 4.7 DSU it could forgo the potential benefits that continued consultations might bring, and that therefore the DSU explicitly allowed for circumstances where the absence of consultations would not deprive the panel of its jurisdiction:

> In our view, it follows that where the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consultations it may have had.[91]

In conclusion, the lack of consultations is not a defect that eliminates the jurisdiction of the panel in Article 21.5 proceedings—*even if* the general obligation of the DSU to consult were applicable to Article 21.5 proceedings. Thus, there is no obligation on the panel to consider the lack of consultations in an Article 21.5 proceeding on its own motion.[92]

As a result of the Appellate Body's decision to decline to rule on the question whether consultations are an indispensable element of proceedings under Article 21.5 DSU, the practice of WTO Members' regarding consultations in Article 21.5 proceedings differs. Some Members have formally requested consultations before requesting Article 21.5 review panels, whereas other Members have not, at least not formally.[93]

VIII. Adequacy of Consultations and the Requirement to Consult in Good Faith

Consultations will not always be carried out to the satisfaction of all parties involved in the process. Parties have thus claimed before panels that the consultations held were inadequate. A review of the adequacy of consultations by a panel would mean not only that there are substantive requirements as to how parties carry out consultations, but also that a panel would have jurisdiction over this subject matter. Furthermore, beyond the formal and procedural requirements of Article 4, the only substantive requirement that the DSU establishes for the conduct of consultations is that parties "consult in good faith" as required in Article 4.3. WTO panels and the Appellate Body have declined to

[89] *Id.*
[90] *Id.* ¶ 56.
[91] *Id.* ¶ 63.
[92] *Id.* ¶¶ 59–65.
[93] The European Communities in particular have consistently been of the view that consultations must be held under Article 21.5, s*ee e.g. United States—Tax Treatment for Foreign Sales Corporations*, Recourse by the European Communities to Article 21.5 of the DSU, Request for Consultations, WT/DS108/14 and Corr. 1 (2000). During the long-lasting battle surrounding EU compliance in the *Banana* case this provoked communications from the parties to the compliance proceedings, including a statement by Ecuador that, as a matter of principle, such consultations were not required under Article 21.5, *see European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Request to Reactivate Consultations of September 17, 1998 by Ecuador, WT/DS27/30 (1998) ("*Banana Regime*"), and Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States, WT/DS27/18 (1998). Deviating from their position in *HFCS* the United States requested consultations in *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse by the United States to Article 21.5 of the DSU, Request for Consultations, WT/DS103/15 (2001).

review the adequacy of consultations and therefore, by implication, whether parties were consulting in good faith.

A. Adequacy

In the *Bananas* case the EC argued that the consultations held with Ecuador, Guatemala, Honduras, Mexico and the United States did not fulfill their minimum function of affording a possibility for arriving at a mutually satisfactory solution, and that the different claims making up the dispute were not clearly set out. The complainants responded that Article 4.5 of the DSU only requires an "attempt" to resolve the matter.[94] The Panel held that the DSU requires that "parties should consult in good faith and attempt to reach such a [mutually agreed] solution."[95] The panel continued stating that:

> Consultations are, however, a matter reserved for the parties. The DSB is not involved; no panel is involved and the consultations are held in the absence of the Secretariat. In these circumstances, we are not in a position to evaluate the consultations process in order to determine if it functioned in a particular way. While a mutually agreed solution is to be preferred, in some cases it is not possible for the parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that consultations, if required, were in fact held or, at least, requested.[96]

The Panel also disagreed with the EU's position that consultations must lead to an adequate explanation of the case, recognizing that if this were the case, any respondent could defeat the establishment of a panel by claiming a lack of understanding of the case, thereby "undermin[ing] the automatic nature of panel establishment under the DSU."[97] Thus, although clarification of the facts and the substance of the case may be desirable and one of the objectives of the consultations process, there is nothing in the DSU providing that a complainant can only request a panel once he has adequately explained its case to the respondent. The only prerequisite, per DSU Art. 4.7, for a panel request is that consultations have failed to settle a dispute within sixty days of the request.[98]

Panel jurisprudence merely requires that consultations were formally held. Even if a party could prove that the other side did not attempt to consult in good faith and settle the case, a panel will not review this issue because it does not have jurisdiction to do so. In conclusion, and in accordance with the finding in *Desicccated Coconut*, a panel will only declare that a party violated its duty to consult if it does not respond to the consultations request within ten days or refuses to actually meet for consultations. The substance of the consultations itself and their conduct, beyond the mere formal requirements, remains a black box, entirely controlled by the parties, and without involvement by any WTO bodies. This view was confirmed by the panel in the *Liquor Taxes* case. Korea argued that complainants did not engage in good faith consultations to reach a mutually agreed solution as required by Art. 3.3, 3.7 and 4.5 DSU. The Panel found that there is no recognized concept of "adequacy" of consultations, that the DSU only requires that consultations are held, or at least requested, and that a period of sixty days elapses from the time of the consultation request to the panel request.[99] The Panel continued that while

[94] *See Banana Regime, supra* note 93. Complaint by the United States, WT/DS/27/R/USA, ¶ 7.18 (1997).
[95] *Id*. ¶ 7.19.
[96] *Id*.
[97] *Id*. ¶ 7.20.
[98] *Id*.
[99] *Korea Alcohol Tax, supra* note 23, ¶ 10.19.

consultations "are a critical and integral part of the DSU", it had "no mandate to investigate the adequacy of the consultation process that took place between the parties . . . ", and further stated that "[w]hat takes place in those consultations is not the concern of a panel." [100] In the *Turkey—Textiles* case the respondent Turkey argued that the principle of procedural economy as well as the spirit of the WTO dispute settlement mechanism require that panel procedures be considered as an *ultima ratio* means to solve conflicts between Members for which they are unable to find a mutually agreed solution.[101] Referencing the *Banana* and *Liquor Tax* decisions, the panel rejected Turkey's argument.

B. The Principle of Good Faith

Closely related to the question of adequacy of consultations is the principle of good faith set out in Article 4.3 DSU and requiring that the "Member to which the [consultations] request is made . . . shall enter into consultations in good faith." If a responding party does not engage in consultations in good faith, a meaningful discussion of the problems at issue will not occur and the party requesting consultations could therefore claim before a panel that consultations were (1) inadequate, and (2) in violation of the good faith principle itself. In the context of consultations, the good faith requirement in Article 4.3 DSU has, to date, not been interpreted by the Appellate Body or panels. The principle has, however, been applied in numerous cases by WTO panels and the Appellate Body, mostly as a principle of interpretation of international treaties[102] and as a performance obligation on WTO Members.[103] This case law can only be applied to a limited extent to interpret Article 4.3.

1. Litigation Strategies

In the procedural law context, DSU, Article 3.10 establishes a general good faith requirement for DSU proceedings by stipulating that " . . . if a dispute arises, all Members will engage in these procedures in *good faith* in an effort to resolve the dispute." In its report in the *Foreign Sales Corporations* ("*FSC*") case, the Appellate Body found that this obligation of Article 3.10 DSU is another specific manifestation of the good faith principle

[100] *Id.*

[101] Report of the WTO Panel, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, ¶ 9.19 (1999). Arguably, the panel in this case did not need to discuss the adequacy of consultations, since consultations did not take place because of Turkey's failure to appear. Turkey would not hold consultations without the participation of EU representatives, which India refused on the grounds that it had requested bilateral consultations pursuant to Article XXIII:1 GATT 1994 with Turkey. *Id*. ¶ 9.20. The panel could therefore have found that because of its failure to appear Turkey violated its duty to consult and forfeited its right to consult, with the result that an issue of adequacy never arose.

[102] *India Chemical Products, supra* note 66, ¶ 7.18; Report of the WTO Panel, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, ¶ 8.29 (2000); Report of the WTO Panel, *United States—Section 301–310 of the Trade Act of 1974*, WT/DS152/R, ¶ 7.64 (1999); Report of the WTO Panel, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, ¶ 8.25 (1998); Report of the WTO Panel, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, ¶ 7.20 (1996) ("*Underwear Imports*").

[103] Report of the WTO Panel, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, ¶ 7.94 (2000) regarding non-violation complaints; *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, ¶ 6.14 (1997); Report of the Appellate Body, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, AB-2001-9, WT/DS202/AB/R, ¶¶ 55 & 110 (2002).

as a general principle of law and a principle of general international law, applying to both parties to a dispute. The Appellate Body interpreted good faith in the context of parties' due process rights and found that:

> This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of the trade disputes.[104]

If this interpretation is applied specifically to consultations the responding party (but, beyond that, likely also the party requesting consultations) must thus be "fair, prompt and effective" in order to conduct consultations in good faith. The ruling is similar to that of the decision in the *India—Patent Chemical Products* case where the Appellate Body held that parties must be fully forthcoming with information.[105]

Certain litigation strategies occasionally applied by Members, such as "stonewalling", are clearly in conflict with the good faith principle of Article 4.3, since they prevent the effective discussion of disputed issues. Stonewalling consultations is a preferred practice of the larger WTO Members whose negotiators try to disclose as little information as possible in order not to reveal their legal theories and to get the full benefit of surprise once a panel is established and proceeding begun. Thus, in some instances, parties do not cooperate during consultations—they do not openly discuss facts and law and little substantive information is exchanged. As a result, consultations are reduced to a mere formality, a necessary stage before the panel proceedings begins. Parties are unwilling to engage in good faith consultations because they have no interest in settling and do not want to admit that they are wrong. This will normally be the case for a responding party that concludes that it is likely its measures violate a WTO agreement, as well as for a party bringing a "false" complaint knowing that it actually does not have a case.

2. Further Elements of the Good Faith Principle

In the Article 21.5 proceedings of the *Shrimp-Turtle* case the panel dealt with the enforcement of a unilateral import prohibition by the United States relating to the protection of sea turtles. The parties disputed whether, if in order to justify such a measure under the chapeau of Article XX of the GATT 1994, the United States had to make a good faith effort to *negotiate* an international agreement on turtle protection, or if it had to *conclude* such an agreement. The question raised by the complainant Malaysia and discussed by the panel related to the requirements of Article XX's chapeau, rather than to the conduct of the negotiations by the United States, and whether it had acted in good faith.[106] Nevertheless, the panel stated:

[104] Report of the Appellate Body, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R, ¶ 166 (2000).

[105] *Appellate India Chemical Products, supra* note 26.

[106] Report of the WTO Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/RW, ¶¶ 5.42–5.75 (2001).

> The notion of good faith, in relation to the issue under examination in this section, [*i.e.*, the extent of the U.S. obligation to negotiate and/or reach an international agreement on the protection of sea turtles] implies a continuity of efforts which, in our opinion, is the only way to address successfully the issue of conservation and protection of sea turtles through multilateral negotiations, as demonstrated by the circumstances of this case.[107]

The panel thus found that there must be an element of continuity in the negotiating effort in order to be a "good faith" effort.[108] It is questionable to what extent this element could be applied to the good faith requirement of DSU consultations. The performance requirement imposed on the United States by the interpretation given to good faith in the *Shrimp-Turtle* case is based on the specific factual circumstances of the case, and is thus not a universally applicable definition that could easily be transferred to the specific situation of DSU consultations. In particular, the continuous, long-term effort that the panel required from the United States is somewhat at odds with the limited time period of DSU consultations.

IX. Confidentiality of the Proceeding, Article 4.6 DSU

Article 4.6 DSU requires that consultations be confidential. This means that parties to either bilateral consultations under Article XXII of GATT 1994 or multilateral consultations under Article XXIII:1 of GATT 1994 must not disclose information on what is discussed during consultations to third parties. This must, as a matter of course, include not only the spoken word but also any documents created or viewed in the course of consultations. Confidentiality of consultations is important because it can be conducive to reaching settlement. When parties are able to discuss an issue in private, knowing that what is said as well as information provided will not reach the outside world, they are more likely to lower their guard and reach a compromise on an issue than when they are under the scrutiny of other WTO Members, and ultimately the public. The question arises, however, whether there are limitations to the confidentiality of consultations and if so, when such limitations arise.

A. The Use of Facts and Evidence Obtained During Consultations Before the Panel

A question exists with respect to possible limitations to confidentiality. Should parties be allowed to submit to a panel information obtained during consultations to the panel, and should a panel be allowed to base its findings on such information. The wording of Article 4.6 DSU provides that "consultations shall be confidential *and without prejudice to the rights of any Member in any further proceedings*" (emphasis added). Taken literally, this seems to imply that information gained during consultations should not be used to the detriment of a party in a panel proceeding, *i.e.,* in a finding against that party. This,

[107] *Id*. ¶ 5.60. *See also* ¶ 5.67. The panel's interpretation of good faith was not disputed on appeal. *See* Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, ¶¶ 115–124 (2001).

[108] On appeal, the Appellate Body found that under its application of the doctrine of *abus de droit*, the good faith principle required that the exercise of a right impinging on a field covered by a treaty obligation must be exercised *bona fide*, *i.e.,* reasonably. Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 158 (1998). *See also* Report of the WTO Panel, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R, ¶ 8.57 (2001), applying the same reasoning to Article 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").

however, would make little practical sense and would also conflict with the information-gathering function of the consultations process. WTO panels and the Appellate Body have thus admitted information that was acquired during consultations.

In the *Korean Liquor Taxes* case Korea claimed that references made by the complainant in its written submission to the panel to information supplied by Korea during consultations constituted a breach of Article 4.6 DSU. The panel rejected this argument, finding that "confidentiality extends only as far as requiring the parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations."[109] The panel relied on the fact that the panel proceeding between the parties remains confidential[110] and that by disclosing information acquired during consultations to the panel, parties do not breach confidentiality.[111] Pointing out that the essence of consultations is for parties to gather information, the panel further stated that "[i]t would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings."[112]

The panel in the *Bed Linen* case referenced the *Korean Liquor Taxes* decision. It found that "verbatim reports" of the consultations drafted by India did not have to be excluded from the panel proceeding because the panel's obligation under Article 11 DSU to make an objective assessment of the facts would be inhibited by an *a priori* limit on evidence.[113] The panel also referred to its broad right to seek evidence under DSU Art. 13.2.[114] It is important to note, however, that at the outset of its decision on this issue the panel in *Bed Linen* stated that there was nothing new or substantive in the verbatim reports of the substance of the consultations that was not otherwise before the panel.[115] This could indicate that the panel might have come to a different decision if India's verbatim transcripts had supplied important new information that was discussed during consultations but had not been raised before the panel. In light of the rule established in *Korea Liquor Taxes*, panels should not reject evidence based on reports made or notes taken by consulting parties during consultations, as long as the subject matter does not exceed what is covered by the panel request. It may be a different issue, however, if one party taped the consultations without the knowledge and consent of the other parties in order to introduce the transcript into the panel proceeding. None of the above panels made explicit reference to or interpreted the "without prejudice" clause in Article 4.6 DSU. The significance of the clause for parties to panel proceeding therefore remains somewhat unclear.

B. Settlement Offers Made During Consultations

In the *Underwear* case, one of the earlier WTO cases dealing with confidentiality of consultations, the complainant Costa Rica submitted to the panel information concerning settlement offers made by the United States during consultations. The offers related to levels of restrictions to be imposed under Article 6 of the Agreement on Textiles and

[109] *Korea Alcohol Tax, supra* note 23, ¶ 10.23.
[110] DSU, Art. 14.
[111] *Korea Alcohol Tax, supra* note 23, ¶ 10.23.
[112] *Id.*
[113] Report of the WTO Panel, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, ¶ 6.33 (2000).
[114] Id. ¶ 6.34.
[115] Id. ¶ 6.32.

Clothing ("ATC"). Referring to the "without prejudice" clause of Article 4.6 DSU the panel found that:

> In our view, the wording of Article 4.6 of the DSU makes it clear that offers made in the context of consultations are, in case a mutually agreed solution is not reached, of no legal consequence to the later stages of dispute settlement, as far as the rights of the parties to the dispute are concerned. Consequently, we will not base our findings on such information.[116]

The panel's ruling refers explicitly only to settlement offers, no other type of information is mentioned. This seems to imply that information other than settlement offers may be used in a subsequent panel proceeding. Furthermore, there are obvious reasons why information from settlement offers should be treated differently from any other type of information disclosed during consultations. Settlement offers are the core objective of the consultations process and are, if made sincerely, the essence of a party's good faith effort to reach settlement. If a settlement offer could be used to the detriment of a party in a subsequent panel proceeding, the priority that the DSU places on settlement would be nullified, since settlement offers would become far less likely. A party making a settlement offer must be protected from any use of the offer against it in later proceedings.

C. Third Parties and Information Acquired During Consultations

The panel's approach in the *Korean Liquor Tax* case also raises questions regarding information that can be obtained by third parties who join at the panel stage and who were not parties to the consultations. Third parties have the right to receive the first submission to the panel and if information disclosed during consultations is part of that submission, parties that were not in the consultations will effectively have access to it.[117] Since parties to the dispute have little or no control over who joins the panel as a third party this seems especially problematic were bilateral consultations held to guarantee maximum privacy.[118]

X. Preparation and Logistics of Consultations

The DSU does not establish requirements regarding how consultations are to be conducted. Parties are free to meet as often and wherever they wish, and to conduct consultations as they please. WTO bodies such as the DSB are not involved in the organization and logistics of consultations, nor is the WTO Secretariat. No official record is kept of what is said by the parties in the course of the meetings between parties. Parties usually meet in Geneva but they may also decide to meet at another location, most likely the capital of one of the disputing parties. The composition of a delegation will often vary depending on the size of a country. The delegation of a WTO Member with a large bureaucracy will typically include legal specialists on the specific WTO agreement at issue in addition to higher-ranking officials with more representative functions. A smaller country will often be unable to devote similar resources to a dispute and will therefore appear with a less specialized delegation. Countries are free to include private lawyers in

[116] *Underwear Imports, supra* note 102, ¶ 7.27.

[117] DSU, Art. 10.3.

[118] Unlike the "trade interest" requirement for a joinder to consultations in DSU, Art. 4.1, the well-foundedness of the "substantial trade interest" requirement in DSU, Article 10.2 is not subject to the consent of the parties to the dispute.

their delegation. Consultations may last one day, or even less.[119] Or a series of meetings may be held over a number of days or an even longer period.

The complaining party may present the defending party with questions in writing before the first meeting in order to allow more time for preparing a response. During the meetings the parties may discuss factual and legal questions. Parties are also free to ask for information in writing. The duration of consultations will likely depend on the complexity of the issues discussed and the willingness of the parties to come to an agreement.

XI. Developing Countries, Article 4.10 DSU

One of the goals that Members had for the newly established WTO dispute settlement process was the increased use of the system by developing countries. This goal has been achieved. Developing countries are filing complaints in the WTO more frequently than under GATT 1947.[120] Among the total of 312 complaints filed in the WTO to date, developing countries were in the role of complainants in 71 instances.[121] Thus, compared to the 44 complaints brought by developing countries between 1948 and 1990, the number of complaints filed under the DSU over a period of eight years is substantially higher than the number of complaints brought during almost the entire existence of the GATT 1947.[122]

It is unlikely that Article 4.10 of the DSU, the provision on consultations with developing countries, has contributed much to this increase. Article 4.10 provides that: "during consultations Members should give special attention to the particular problems and interests of developing country Members." The provision only requires that Members "should" give special attention; its language is not mandatory and therefore rather weak. There is therefore little chance that developing country Members will be able to invoke the provision in any legally meaningful way.

[119] The consultations in *United States—Softwood Lumber* reportedly lasted for less than thirty minutes.

[120] For developing country participation in dispute settlement under the GATT, *see* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW, THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM, 295–301 (1993). The author analyzes a total of 207 GATT complaints brought during the 42-year period between 1948 and 1990. Although this period does not cover the complete phase of GATT dispute settlement until 1994, it provides by far the most detailed and exhaustive statistical information and analysis on GATT 1947 dispute settlement. Among the 207 cases analyzed are several complaints involving multiple complainants and/or defendants which are counted on an individual-country basis. As a result there were 229 complainants and 223 defendants. *Id*. at 294. Out of 229 complaints, 44 were brought by developing countries, compared to 185 by developed countries. In its analysis, the author comes to the conclusion that developing countries withdrew their complaints twice as often (21 complaints) as developed countries. What is more, developing countries reached settlement in only 18 percent of their complaints (at total of eight complaints) as opposed to the 31 percent settlement rate (a total of 58 complaints) for developed countries. *Id*. at 316–317. Developing countries were defendants in 29 out of 223 cases. Further analysis shows that only 14 percent of complaints against developing countries are withdrawn (four complaints) by comparison to withdrawal of 27 percent of complaints against developed countries (53 complaints). By contrast, developing countries agreed to settle in 41 percent of the complaints brought against them (12 complaints) whereas developed countries only agreed to settlement in 27 percent of the complaints (52 complaints). *Id*. at 302–303. These data provide ample evidence that the relatively low participation of developing countries in GATT proceedings is a result of their weak negotiating position compared to developed countries. Please note that the term "settlement" used by Mr. Hudec is different from that of "formal settlement" as defined for DSU consultations in the context of this chapter. *See supra* note 20.

[121] *See Dispute Update supra* note 17. In case of multiple complainants each developing country was counted individually.

[122] *See supra* note 120.

Furthermore, WTO panels have consistently (and correctly) refused to review the substance of the consultations process. This makes the "special attention" clause of Article 4.10, like the DSU provisions on consultations in cases of urgency, more or less unenforceable and leaves a developing country Member with the mere hope that during consultations a developed country will have a "developed enough" sense of justice to give due consideration to the more difficult position of developing country Members.

Another core problem of the WTO dispute settlement process is that although the number of cases involving developing countries has increased, not all developing countries have realistic access to the dispute settlement system, including effective consultations. Thus, the group of developing countries participating in proceedings on the complaining side has been limited. The most frequent users are the newly industrialized countries such as Argentina, Brazil and Mexico. None of the least-developed country Members have brought a complaint. There are many reasons for this—an important one may be the desire not to offend the EU and the United States and risk losing aid and GSP benefits.

With respect to the outcome of consultations, developing countries are less likely to settle during consultations than developed countries, and frequently request the establishment of a panel when in the role of complainant. Among the formally settled cases, only two were brought by developing countries and one of the two cases involved another developing country as the defendant.[123] Despite the priority placed on settlement in the DSU it must be considered a positive development that developing countries do not settle easily when involved in disputes with developed countries. Due to their relative lack of bargaining power when opposing developed countries, developing countries are in a weaker position in a negotiation-type situation such as consultations. Neutral third-party adjudication is therefore more likely to achieve a fair outcome for developing countries than negotiations. The increasing number of panel requests made by developing countries also means that developing countries have become more assertive with respect to their rights and are not as easily bullied into obedience by larger trading nations as was the case under the GATT 1947. As a practical matter, the decreasing numbers of settlements and the increasing numbers of panel requests mean that developing country governments are willing to devote the resources required to go through a panel proceeding, and that they recognize that it is money well spent. An interesting strategy for a WTO dispute involving a developing country is to "team up" with a developed country and to benefit from its resources and expertise, as was the case in the *Bananas* dispute. In that case Ecuador, Guatemala, Honduras, Mexico and the United States consulted jointly and jointly went through a panel preceding.[124] The formation of such alliances could serve as a model for future cases. Another option for assistance for developing countries is the newly established Advisory Centre on WTO Law ("ACWL").[125]

[123] The parties were Brazil bringing a complaint against Argentina and India bringing a complaint against Poland. Ten out of 28 formally settled complaints involved developing countries as complainants or defendants.

[124] *See Banana Regime, supra* note 93, Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND; Complaint by Mexico, WT/DS27/R/MEX; Complaint by the United States, WT/DS27/R/USA; Complaint by Ecuador, WT/DS27/R/ECU (1997); and *Appellate Banana Regime, supra* note 58. WT/DS234/R (2002). The same applies to *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS/217/R (the "Byrd Amendment" panel), where Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand jointly complained against the United States.

[125] The Centre describes its services as follows: The Centre will provide legal counseling on WTO law matters to developing-country and economy-in-transition Members of the Centre and all least developed countries free of charge up to a maximum of hours to be determined by the Management Board. It will also provide legal support throughout dispute settlement proceedings in the WTO at discounted rates for

By contrast, a case is likely to settle during consultations when the case involves a developing country as a defendant.[126] This is in line with the general trend that countries are more likely to settle when they have to defend a domestic measure alleged to be WTO-inconsistent than when they are launching a dispute against another Member.[127] It is, however, also a situation where the developing country's lack of leverage and power to resist political pressure will have the strongest impact.

Improvements in the situation of developing countries under WTO dispute settlement in general, and during the consultations phase in particular, are unlikely to result from procedural changes such as extended deadlines or "special attention". What developing countries need is additional funding and legal training in order to build up the necessary technical capacity of their officials so that they can handle a WTO case on their own. This will, first of all, be very expensive and the question is, who is going to pay. Second, such a development is strategically of limited interest for developed countries, if not against their interests. Why should large trading parties provide financial support to developing or least-developed countries when as a result they will be subject to increased trade litigation? Few countries are willing to make this sacrifice. Nevertheless, the ACWL constitutes a first (small) step in the right direction.[128]

XII. Conclusion

Taking stock of the consultations phase, Member practice demonstrates that since the introduction of the DSU a significant number of parties have formally settled their disputes during consultations. The settlement rate vindicates the claim that consultations are not merely a mandatory step, but a useful and necessary phase of the WTO dispute settlement process. Whether consultations will remain a meaningful phase will depend mostly on whether parties are willing to make a good faith effort to solve their conflicts at this early stage. The priority that the DSU attributes to a mutually agreed solution suggests that parties should at least attempt to negotiate such an outcome during consultations. It is evident, however, that there will always be a number of cases where settlement will not be reached and for which panel proceedings are inevitable.

The fruitful use by WTO Members of the consultations process will to some extent also depend on procedural issues. WTO Members should reconsider procedural elements that encourage stalling techniques, such as the right of the party responding to the consultations request to refuse a request for third party joinder when there are no objective

its Members and least developed countries in accordance with the schedule of fees set out in Annex IV of the Agreement establishing the Centre. The Centre thus functions essentially as a law office specialized in WTO law. In addition, the Centre will offer training on WTO jurisprudence on a regular basis. Intern and trainee programs will be developed for government officials from developing country Members and least developed countries. Its mandate and modest size require the Centre to stay within its own niche, to avoid overlap and to complement the training and technical co-operation provided by the WTO Secretariat and other international institutions. *See* http://www.acwl.ch.

[126] Out of the 28 formally settled complaints, developing country defendants challenged by developed countries settled in eight cases.

[127] In a WTO dispute settlement case,as in every other lawsuit, there is always a degree of unpredictability whether a case may win or lose. Nevertheless, a party launching a WTO dispute will usually carefully examine the merits of its case, refrain from bringing a weak case and only start such a proceeding where it considers that the case will most likely be successful. This may give such a country a better negotiating position during consultations than that of the country defending an allegedly WTO inconsistent measure.

[128] The developed-country Members to the ACWL and, therefore, its donors to date are only Canada, Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Sweden and the United Kingdom.

reasons for such a refusal. (The same holds true for the unanswered question of whether compliance proceedings under Article 21.5 DSU require new consultations.) Issues of this type tend to make the proceeding more time consuming, cumbersome and frustrating than necessary. By the same token, certain "short cuts" that make the process speedier and smoother should be allowed, such as the possibility to proceed directly to panel requests for disputes involving joint parties rather than requesting new consultations with the joint parties before a panel can be requested.

Changes could be brought about by amending the DSU, but also by changing the practice of the parties. Is this because the parties can do what they want in the black box of consultations? Whether this will happen as a result of the ongoing DSU review is unknown.[129]

[129] The 1994 Marrakesh Ministerial Conference originally mandated a review of the DSU within four years of the entry into force of the WTO Agreement, thus by January 1, 1999. *See Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, LT/UR/D-1/6 (1994).

CHAPTER 26

THE PANEL PROCESS

Werner Zdouc*

TABLE OF CONTENTS

I. Introduction 1235
II. Types of Complaints 1236
A. Violation Complaints 1236
B. Non-Violation Complaints 1237
C. Situation Complaints 1238
III. Who May Participate in Panel Proceedings? 1238
A. Private Counsel 1239
B. Non-Governmental Organizations 1239
C. Need for Legal Interest? 1240
IV. Object of a Complaint 1241
V. Consultation Stage 1242
VI. Panel Establishment and Panel Terms of Reference 1244
VII. Multiple Panel Proceedings 1247
VIII. Panel Composition 1248
IX. Procedural Stages of Panel Proceedings 1252
A. Organizational Meeting 1252
B. Preliminary Issues and Procedural Objections 1253
C. Written Submissions and Oral Hearings 1254
D. Confidentiality of Proceedings 1255
X. Third Party Rights 1256
XI. Burden of Proof 1258
XII. Timing of Evidence 1259
XIII. Panel's Right to Seek Information 1259
A. Expert Review Group 1261
B. Duty to Respond 1263
XIV. Mandate of Panels 1264
A. Legal Issues 1264
B. Factual Issues 1265
XV. Interim Review Stage 1267
XVI. Contents of the Final Panel Report 1268
A. Basic Rationale Behind Panel Findings 1269
B. Due Exercise of Judicial Economy 1270

* Counsellor, WTO Appellate Body Secretariat (since 2001) and Legal Affairs Division (1995–2001). The views expressed in this article are personal to the author and should not be attributed to the Appellate Body Secretariat or the Appellate Body Members. The author would like to thank Valerie Hughes, Jim Bacchus, Tania Voon and Gabrielle Marceau for their comments on earlier drafts.

C. Not Adding to or Diminishing Rights and Obligations of Members 1271
D. Right to Suggest How to Implement 1271
XVII. Conclusion of Panel Proceedings 1271
XVIII. Appendix 1273

I. Introduction

This paper provides an introduction to the panel process within the framework of the World Trade Organization ("WTO") dispute settlement mechanism. After this brief introduction (I), it discusses (II) the types of complaints (that is, "violation" complaints, "non-violation" complaints and "situation" complaints); (III) who may participate in panel proceedings (including whether private counsel and non-governmental organizations may participate and whether there is a need for a "legal interest" in initiating proceedings); (IV) the object of a complaint; (V) the consultations stage; (VI) panel establishment and terms of reference; (VII) multiple panel proceedings; (VIII) panel composition; (IX) procedural stages of panel proceedings (including organizational meeting, preliminary issues and procedural objections, written submissions and oral hearings, confidentiality of proceedings); (X) third party rights; (XI) burden of proof (including timing of evidence); (XII) panel's right to seek information (including expert review groups and duty to respond); (XIII) mandate of panels in respect of legal issues and factual issues; (XIV) interim review stage; (XV) contents of the final panel report (including the obligation to set out the basic rationale behind panel findings, duly exercise judicial economy, not to add to or diminish rights and obligations of Members, and the right to suggest how to implement the panel findings); and (XVI) conclusion of panel proceedings.[1]

The WTO *Understanding on Rules and Procedures for the Settlement of Disputes* ("DSU") contains detailed provisions regulating the functioning of the quasi-judicial WTO dispute settlement mechanism. The system is aimed at providing security and predictability to the multilateral trading system, clarifying existing provisions, ensuring consistent application of WTO law by all Members, and maintaining a proper balance between the rights and obligations of Members.[2] The rules and procedures of the DSU apply *generally to all* disputes raised before the WTO dispute settlement mechanism. However, a number of agreements covered by the WTO provide for *special and additional* dispute settlement rules and procedures.[3] Where particular agreements covered by the

[1] The appellate review and the implementation stages are covered by Chapters 27 and 28 of this book.

[2] Articles 1 and 3 of the DSU. Article 3.2 provides:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

[3] Appendix 2 on "Special or Additional Rules and Procedures Contained in the Covered Agreements" to the DSU lists Article 11.2 of the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement"); Articles 2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9–6.11 and 8.1–8.12 of the Agreement on Textiles and Clothing ("ATC"); Articles 14.2–14.4 and Annex 2 to the Agreement on Technical Barrier to Trade ("TBT Agreement"); Articles 17.4–17.7 of the Agreement on Implementation of Article VI of the GATT 1994 ("Anti-Dumping Agreement"); Articles 19.3–19.5 and paragraphs 2(f), 3, 9 and 21 of Annex II to the Agreement on Implementation of Article VII of the GATT 1994 ("Customs Valuation Agreement"); Articles 4.2–4.12, 6.6, 7.2–7.10, 8.5 and footnote 35, and Articles 24.4 and 27.7 and Annex V to the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"); Articles XXII:3 and XXIII:3 of the General Agreement on Trade in Services ("GATS"); paragraph 4 of the Annex on "Financial Services", paragraph 4 of the Annex on "Air Transport Services", and paragraphs 1–5 of the Decision on Certain Dispute Settlement Procedures for the GATS. This list includes provisions where only a part of the provision may be relevant in this context. This list does not contain special and additional rules contained in Plurilateral Trade Agreement (that is the Agreements on Government Procurement and Trade in Civil Aircraft).

WTO provide for special and additional rules and procedures on dispute settlement, these rules or procedures *prevail* over the general DSU rules and procedures to the extent that there is a conflict or a difference between them.[4]

II. Types of Complaints

Article XXIII of the GATT 1994 and the DSU define the *jurisdiction* of WTO dispute settlement panels broadly. Whenever a WTO Member considers that any benefit accruing to it directly or indirectly under the covered agreements of the WTO (covered agreements) is being nullified or impaired, or that the attainment of any objective of those agreements is being nullified or impaired as the result of:

(a) the failure of another Member to carry out its obligations under [that] Agreement, or
(b) the application by another Member of any measure, whether or not it conflicts with the provisions of [that] Agreement, or
(c) the existence of any other situation,[5]

such Member may seek redress through recourse to the WTO dispute settlement mechanism.[6] In dispute settlement practice, these types of complaints are referred to as (a) "violation" complaints; (b) "non-violation" complaints; and (c) "situation" complaints.

A. Violation Complaints

Given that the WTO dispute settlement system aims to preserve the rights and obligations of Members under the covered agreements, it is obvious that complaints of violations of the provisions of the covered agreements may be raised before dispute settlement panels.[7] It is questionable whether parties could—by mutual consent—submit complaints on breaches of international law *other than* the covered agreements to WTO panels and whether those panels would be acting consistently with their obligations under the DSU if they adjudicated such complaints.[8] In an increasing number of WTO disputes, issues arise that involve not only WTO law as such, but also matters relating to "non-trade concerns", such as environmental protection, labor standards and human rights, investment, taxation, and competition. Whenever infringements of WTO law are alleged, panels or the Appellate Body would have no authority to dismiss such a complaint simply because

[4] Article 1.2 of the DSU. The Appellate Body noted that:

> . . . it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply. (Appellate Body Report, *Guatemala—Cement I*, ¶ 65. (*See* the Appendix to this chapter for full citations to the Panel and Appellate Body reports referred to in this chapter). *See also*, Appellate Body Report, *India—Quantitative Restrictions*, ¶¶ 84–86)

[5] Article XXIII:1 of the GATT 1994.

[6] Article 23.1 of the DSU.

[7] Article XXIII:1(a) of the GATT 1994 also requires that a Member's failure to carry out an obligation under the GATT 1994 results in the nullification or impairment of a benefit which another Member considers accrues to it under the GATT.

[8] Especially in light of Article 19 of the DSU.

it also involves "non-trade concerns".[9] Moreover, according to Article 3.2 of the DSU, WTO law must be interpreted in accordance with customary rules of interpretation of public international law. These rules of interpretation are codified in the Vienna Convention on the Law of Treaties ("Vienna Convention").[10] According to Article 31.1(c) of the Vienna Convention, these rules include "any relevant rules of international law applicable in the relations between the parties". One can argue that, consequently, provisions of WTO law may also be interpreted in light of relevant rules of other international treaty law or customary law applicable between the parties. For example, it has been argued that international law other than trade law is relevant in interpreting exceptions (including Article XX of the GATT 1994) authorizing Members to derogate from WTO free-trade and non-discrimination rules when pursuing legitimate non-economic objectives such as the protection of human, animal and plant life and health. The Appellate Body has stated that WTO law does not exist in "clinical isolation" from other areas of international law.[11] The covered agreements are not a "self-contained regime".

B. Non-Violation Complaints

There is a separate cause of action even if another Member's measure is *not in violation* of WTO law when the complaining Member considers that the measure otherwise nullifies or impairs benefits accruing to it directly or indirectly under the covered agreements.[12] The rationale underlying non-violation complaints is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated, not only by measures proscribed by the GATT, but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions, they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the GATT.[13] The GATS and the TRIPS Agreement contain specific rules with respect to the non-violation remedy.[14]

The Appellate Body and panels agree that the non-violation complaints should be approached with caution and should remain an exceptional remedy.[15] In order to establish

[9] Article 3.3 of the DSU and Article XXIII:1 of GATT: "If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded . . . ". (*See* Panel Reports, *EC—Bananas III*, and Appellate Body Report, *EC—Bananas III*, ¶¶ 132 *ff*)

[10] Done at Vienna, May 23, 1969, 1155 U.N.T.S. 331 (1969); 8 *International Legal Materials* 679 (1969).

[11] Appellate Body Report, *U.S.—Gasoline*, at 17.

[12] Article XXIII:1(b) of the GATT 1994 and Article 26 of the DSU. E.-U. Petersmann, *Violation Complaints and Non-Violation Complaints in Public International Trade Law*, 34 GERMAN YEARBOOK OF INTERNATIONAL LAW 175, 225 (1991), mentions as other legal bases for the non-violation concept the effectiveness of concessions, reciprocity and bona fide protection of reasonable expectations. Non-violation complaints are discussed in Chapter 29 of this book.

[13] GATT Panel Report, *EEC—Oilseeds I*, adopted 25 January 1990, BISD 37S/86, at 128–129, ¶¶ 144 and 148, *quoted in* Appellate Body Report, *EC—Asbestos*, ¶ 185. The panel in *Japan—Film* noted that "[a]lthough the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been 'on the books' for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims. This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement." (Panel Report, *Japan—Film*, ¶ 10.36)

[14] Article XXIII:3 of GATS and paragraphs 2 and 3 of Article 64 of the TRIPS Agreement.

[15] The Appellate Body agreed, at ¶ 186 in *EC—Asbestos*, with the panel in *Japan—Film*. That panel stated that "[t]he reason for this caution is straightforward. *Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.*" (Panel Report, *Japan—Film*, ¶ 10.36 (original emphasis))

a case of *non-violation* nullification or impairment of trade benefits in the absence of a breach of WTO law, a complainant must provide a "detailed justification"[16] in respect of essentially three conditions: (a) that a measure attributable to a Member's *government* exists; (b) that the measure "upsets the competitive relationship" between imported and like domestic products to the disadvantage of imported products; and (c) that the incidence of that measure could not have been reasonably anticipated at the time when the relevant tariff binding was negotiated.[17] When the complainant prevails with its non-violation case, the defendant need not withdraw the challenged measure as it is not in breach of WTO law. The defendant is instead required to offer a "mutually satisfactory adjustment", in other words, compensation by offering trade opportunities in alternative trade sectors.[18]

C. Situation Complaints

A third cause of action is "the existence of any other situation" that nullifies or impairs benefits which a Member considers to accrue to it directly or indirectly under the covered agreements.[19] It is unclear whether the so-called *situation* complaints could be stretched so far as to challenge "private conduct" allegedly nullifying or impairing trade benefits where such conduct is not attributable to a Member government and thus could not be challenged through violation or non-violation complaints.[20] Again, a detailed justification of a "situation complaint" is required.[21] Decisions by the Dispute Settlement Body (DSB) on the adoption of panel reports adjudicating "situation complaints" are exempt from the "negative consensus" rule. Accordingly, panel rulings on "situation complaints" would have to be adopted by the DSB and become binding upon the parties only if all Members including the "losing party" consent.[22]

III. Who May Participate in Panel Proceedings?

Only *governments* of WTO Members (that is, States or separate customs territories possessing full autonomy in the conduct of their external commercial relations) may initiate complaints and enjoy full party and third party status in panel proceedings.[23] The

[16] Article 26 of the DSU.
[17] Panel Report, *Japan—Film*, ¶¶ 10.41 *ff*.
[18] Paragraph 1(b) of Article 26 of the DSU.
[19] Article XXIII:1(c) of the GATT 1994.
[20] Article XXIII:1(c) has been invoked in only very few instances under GATT 1947. While the establishment of a panel or a working party under this article has been requested in a few cases, no panel has ever made a finding on such a situation complaint. WTO, II ANALYTICAL INDEX 668–670 (1995).
[21] Paragraph 2(a) of the Article 26 of the DSU.
[22] No "situation" complaint has ever led to the issuance of a panel report. "Situation" complaints are not foreseen under the GATS and the TRIPS Agreement.
[23] According to the Appellate Body:

> . . . access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. (Appellate Body Report, *U.S.—Shrimp*, ¶ 101)

WTO Secretariat is not entitled to prosecute suspected breaches of WTO law on its own initiative; nor are non-governmental organizations or business or industry associations entitled to do so.

A. Private Counsel

Member governments have the right to decide who should represent them in panel proceedings. A Member may choose to include in its delegation public civil servants only or also private counsel. The Appellate Body found nothing in the WTO Agreement, the DSU or its Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in appellate review proceedings.[24] Therefore, it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.[25] For the Appellate Body:

> representation by counsel of a government's own choice may well be a matter of particular significance—e specially for developing-country Members—to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings.[26]

Prior to that ruling, some panels insisted that delegations be composed of government officials only.[27] Since then, panels have changed course and followed the Appellate Body's ruling.[28] Delegations representing parties in panel proceedings often include private counsel and in an increasing number of cases—instead of diplomats—private attorneys present the pleadings.

B. Non-Governmental Organizations

Despite the essentially inter-governmental nature of the WTO dispute settlement mechanism, non-governmental organizations ("NGOs") or inter-governmental organizations are not totally excluded from any form of participation in panel proceedings. In more than a dozen panel proceedings, NGOs (for example, civil society groups or business and industry associations) have submitted so-called *amicus curiae* briefs to panels.[29]

It is undisputed that Member governments are entitled to attach briefs authored by NGOs to their submissions and to endorse the arguments contained therein as their own.[30] However, there is a deep difference of views between WTO Members on whether

[24] Appellate Body Report, *EC—Bananas III*, ¶ 10.
[25] *Id*.
[26] *Id.*, ¶ 12.
[27] Panel Reports, *EC—Bananas III*, ¶¶ 7.10–7.12.
[28] Panel Report, *Indonesia—Cars*, ¶¶ 14.1–14.2.
[29] Some of the panels that received *amicus curiae* briefs mention this in express terms in their report (*See, e.g.*, panels in *U.S.—Shrimp,* ¶ 3.129; *U.S.—Section 110(5) Copyright Act,* ¶¶ 6.3–6.8; *EC—Asbestos,* ¶¶ 6.1–6.4; *EC—Bed Linen,* ¶ 6.1). *Amicus Curiae* briefs are discussed in Chapter 32 of this book.
[30] The Appellate Body has accepted this practice in the context of appellate review proceedings in noting "the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission. . . . [A] participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments." (Appellate Body Report, *US—Shrimp*, ¶ 89)

panels are entitled to accept unsolicited *amicus curiae* briefs submitted by NGOs on their own initiative. In this respect, it should be recalled that a panel has the right to seek information and technical advice from any individual or body that it deems appropriate.[31] A panel may also seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter before it.[32] The reference to any relevant source and any individual or body includes the right to request information from non-governmental sources. In the view of the Appellate Body,

> [a] panel's authority includes the authority to decide *not to seek* such information or advice at all. [A] panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof.[33]

However, the Appellate Body believes that the term "seek" need not necessarily be read in a too literal or formalistic manner in the sense that a panel cannot choose to accept unsolicited information submitted by an individual or body.[34] Thus the "authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel."[35]

In most disputes where NGOs have submitted unsolicited *amicus curiae* briefs, the panels accepted such submissions but decided that relying on their content was not necessary for resolving the issues before them.[36] The Appellate Body has deemed admissible an *amicus curiae* brief submitted by a WTO Member government that did not enjoy party or third-party status in the proceeding at hand.[37] But this question has not yet arisen before a panel.

In summary, panels and the Appellate Body have decided that they are entitled—but not required—to receive and consider *amicus curiae* submissions even if they are unsolicited. They have also ruled that they are not obliged to rely in their rulings on such submissions. In the DSU review negotiations, Members have expressed widely divergent views on these questions. A few Members have suggested that the Appellate Body's interpretation be codified in the DSU, while the vast majority of Members demands that panels be expressly precluded by the DSU from accepting unsolicited briefs from non-governmental sources.

C. Need for Legal Interest?

In order to initiate panel proceedings, it is sufficient that a WTO Member *itself* considers that any benefits accruing to it directly or indirectly under a covered agreement are being

[31] Article 13.1 of the DSU. Article 14 and Annex 2 of the TBT Agreement and Article 11 of the SPS Agreement. Before seeking such information from any individual or body within the jurisdiction of a Member the panel shall inform the authorities of that Member. (Article 13.1 of the DSU)

[32] Article 13.2 of the DSU.

[33] Appellate Body Report, *U.S.—Shrimp*, ¶ 104.

[34] *Id.*, ¶ 107.

[35] *Id.*, ¶ 108.

[36] In the same vein, the Appellate Body stated in *EC—Sardines*:

> Accordingly, we believe that the objections of Peru with regard to the *amicus curiae* brief submitted by a private individual are unfounded. We find that we have the authority to accept the brief filed by a private individual, and to consider it. We also find that the brief submitted by a private individual does not assist us in this appeal. (Appellate Body Report, *EC—Sardines*, ¶ 160)

[37] *Id.*, ¶¶ 161–170.

impaired or nullified by a measure taken by another Member.[38] The Appellate Body noted that:

> . . . a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful".[39]

The complainant does not have to show *actual* adverse trade effects before initiating a panel proceeding. The impairment of potential trade opportunities and the legal interest in the compliance by other Members with WTO law is sufficient for a Member to raise a complaint. With the increased interdependence of the global economy, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.[40] The Appellate Body agreed with a panel that neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU or the WTO Agreement contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel.[41] Given the "largely self-regulating" nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgment as to whether recourse to that panel would be "fruitful". Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgment.[42]

IV. Object of a Complaint

A WTO Member may complain against any *measure* taken by or attributable to another Member's government. Such measures do not only encompass mandatory laws, regulations and other requirements enacted by a government, they may also include formally non-binding governmental actions such as "administrative guidance".[43] A Member government may also be challenged before the WTO for non-governmental measures adopted or maintained by public or private enterprises such as voluntary export restraints or orderly marketing arrangements when those measures are encouraged or supported by that government.[44] However, "not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government."[45]

[38] Article 3.3 of the DSU and Article XXIII:1 of GATT:

> If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded. . . .

Article 3.7 of the DSU provides in relevant part:

> Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.

[39] Appellate Body Report, *EC—Bananas III*, ¶ 135.
[40] *Id.*, ¶ 136.
[41] *Id.*, ¶ 132.
[42] Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 74.
[43] Panel Report, *Japan—Film*, ¶ 10.43.
[44] Article 11 of the *Agreement on Safeguards*.
[45] Panel Report, *Japan—Film*, ¶ 10.43.

Complainants may challenge the application of a law or regulation in a *specific* case against specific economic operators.[46] The Appellate Body has also noted with approval that a number of panels have dealt with dispute settlement claims brought against a Member on the basis of its legislation as such, independent of the application of that legislation in specific instances, stating that:

> In *examining* such claims, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations.[47]

Complaints are usually directed against measures requiring positive action. In certain cases, a Member's inaction or omission to act can be challenged when a particular provision of a covered agreement requires the Member to take certain action.[48]

In the following sections, the different stages of WTO dispute settlement proceedings are discussed.

V. Consultation Stage

Consultations between the parties must precede litigation before a panel. These consultations are aimed at finding a satisfactory settlement of the dispute between the parties through diplomatic means.[49] A request for consultations must be submitted in writing and must give the reasons for the request. It has to identify the measures at issue and the legal basis for the complaint.[50] Requests for consultations must be notified to the DSB.[51]

Each Member is to "accord sympathetic consideration" to such a request and "afford adequate opportunity" for consultations.[52] Consultations are confidential.[53] The WTO Secretariat, the DSB, and the panelists are not involved. Consultations are "without prejudice to the rights of any Member in any further proceedings".[54] This means that arguments raised, partial compromises reached, and concessions made during consultations cannot

[46] The Appellate Body noted that:

> Prior to the entry into force of the *WTO Agreement*, it was firmly established that Article XXIII:1(a) of the GATT 1947 allowed a Contracting Party to challenge legislation as such, independently from the application of that legislation in specific instances. While the text of Article XXIII does not expressly address the matter, panels consistently considered that, under Article XXIII, they had the *jurisdiction* to deal with claims against legislation as such. Appellate Body Report, *U.S.—1916 Act*, ¶ 60.

[47] Appellate Body Report, *U.S.—1916 Act*, ¶ 61.

[48] For example, a particular provision of the Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement) requires Members to ensure in its domestic legislation a certain level of protection in respect of a certain intellectual property right.

[49] Article 4.5 of the DSU. The consultation stage is discussed in detail in Chapter 25 of this book.

[50] Article 4.4 of the DSU.

[51] WTO document WT/DSB/6.

[52] Article 4.2 of the DSU. The Appellate Body noted in *India—Patents (U.S.)*:

> All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. (Appellate Body Report, ¶ 94)

[53] Article 4.6 of the DSU.

[54] *Id*.

be held against any party during subsequent panel proceedings. Even if consultations ultimately fail to resolve the dispute, they serve to define and delimit the scope of the matter actually in dispute between the parties.[55]

It is important that a request for consultations be detailed and comprehensive because a defendant could later raise procedural objections against a request for panel establishment that is allegedly broader than the request for consultations, on the grounds that a panel request must indicate whether the matter at issue was actually subject to consultations.[56] However, there is no requirement in the DSU as to the "precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[57] One purpose of consultations "is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel."[58]

When a Member other than the consulting Member considers that it has a "substantial trade interest" in consultations held pursuant to Article XXII:1 of the GATT 1994, or corresponding provisions in other covered agreements,[59] it may notify the consulting Member and the DSB of that interest within ten days of the date of circulation of the original request for consultations. The interested Member may join the consultations unless the Member to which the original request for consultations was addressed objects. When the Member initiating the consultations has made its request under Article XXIII:1 of the GATT 1994, such joining of consultations held between other Members is not permitted. In other words, by making its request under either Article XXII:1 or Article XXIII:1 of the GATT 1994, the Member initiating consultations determines whether it wants to offer the opportunity to other Members to join in—or to exclude them from—the consultations.

If the defending party fails to respond to the request for consultations within ten days, if it fails to enter into consultations within thirty days, or if the consultations fail to settle the dispute within sixty days, the complaining party may request the establishment of a panel by the DSB.[60] If parties mutually agree, or in cases of urgency, these deadlines are

[55] The Appellate Body noted in *Mexico—Corn Syrup (Article 21.5—US)*:

> Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. (Appellate Body Report, ¶ 54)

[56] However, the requirement in Article 6.2 of the DSU to indicate "*whether* consultations were held . . . may be satisfied by an express statement that *no consultations were held*. In other words, Article 6.2 also envisages the possibility that a panel may be validly established without being preceded by consultations." (Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 62)

[57] Appellate Body Report, *Brazil—Aircraft*, ¶ 132.

[58] *Id.*

[59] These include Article XXII:1 of GATS. See Article 4.11 of the DSU and the cross-references to other covered agreements in footnote 4 to Article 4.11.

[60] Articles 4.3 and 4.7 of the DSU. The Appellate Body stated in *Mexico—Corn Syrup (Article 21.5—US)*:

> When the responding party does not respond to a request for consultations, or declines to enter into consultations, the complaining party may dispense with consultations and proceed to request the establishment of a panel. In such a case, the responding party, by its own conduct, relinquishes the potential benefits that could be derived from those consultations. (Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 59)

even shorter.[61] Developing country Members enjoy special and differential treatment. If consultations involve a measure taken by a developing country Member, the parties may agree to extend these time periods. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and if so, for how long.[62]

In recent years, litigation before a panel has occurred after no more than approximately one-third of the requests for consultations. Given widespread lack of compliance with the obligation of parties to notify the DSB of all "mutually agreed solutions", it is difficult to ascertain which disputes were fully settled. Nonetheless, the number of disputes that are settled through diplomatic means, prior to entering the litigation stage before a dispute settlement panel, is often underestimated.

In the course of the negotiations on DSU review, it has been suggested that consultation meetings between the parties be intensified and that the overall period for consultations be shortened. It has also been proposed that settlements agreed between the parties during these consultations should be made enforceable through the same means as foreseen by the DSU for enforcing the implementation of panel and Appellate Body findings adopted by the DSB.

VI. Panel Establishment and Panel Terms of Reference

If the consultations are not fruitful within a sixty day period, the complainant may start the contentious phase of a WTO dispute settlement proceeding by requesting the establishment of a panel by the DSB. At the second DSB meeting discussing the panel request (at the latest), the DSB "quasi-automatically" establishes the panel by "negative consensus". Except in the unlikely situation that the complainant would join a consensus to reject its own request, the decision to establish the panel will always be taken at that second DSB meeting.[63] In the DSU review negotiations it has been proposed to "quasi-automatically" establish the panel by "negative consensus" at the first DSB meeting discussing the panel request.

A panel's mandate or, in other words, its terms of reference, are usually defined by the matter as set out in the complainant's request for the establishment of a panel—unless the parties agree otherwise.[64] The Appellate Body observed:

> A panel's terms of reference are important for two reasons. First, terms of reference fulfill an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[65]

[61] According to Article 4.8 of the DSU, Members shall enter into consultations within 10 days and if the consultations fail to settle the matter, the complaining party may request panel establishment within 20 days.

[62] Article 12.10 of the DSU.

[63] Article 6.1 of the DSU.

[64] According to Article 7.1 of the DSU, panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

> To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

[65] Appellate Body Report, *Brazil—Desiccated Coconut*, at 22, DSR 1997:I, 167, at 186.

Parties frequently disagree on the scope of the subject matter of a dispute. When the defendant raises procedural objections, a panel will have to examine at the outset of the proceedings whether the *request for the establishment of a panel* sets out the matter as *clearly and specifically* as required by Article 6.2 of the DSU.[66] According to the Appellate Body, the *matter* referred to the DSB consists of two major elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*).[67] More specifically:

> [w]hen parsed into its constituent parts, Article 6.2 may be seen to impose the following requirements. The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[68]

Article 6.2 obliges complaining parties to indicate "whether consultations were held" prior to requesting the establishment of a panel. This requirement may be satisfied by the inclusion, in the request for establishment of a panel, of a statement as to whether consultations occurred *or not*. In the Appellate Body's view, this is so because the DSU expressly contemplates that, in certain circumstances, a panel may deal with, and dispose of, the matter referred to it, even if no consultations took place.[69]

Article 6.2 requires, moreover, a "brief summary of the legal basis of the complaint sufficiently to present the problem clearly", or in other words, the sufficient identification of the *claims* raised. Regarding the obligation of the complainant to identify the claims in the panel request that may form part of a panel's terms of reference, the Appellate Body noted that:

> Article 6.2 demands only a summary—and it may be a brief one—of the legal basis of the complaint; but the summary must, in any event, be one that is "sufficient to present the problem clearly". It is not enough, in other words, that "the legal basis of the complaint" is summarily identified; the identification must "present the problem clearly".[70]

Therefore, if a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.[71] Moreover, the convenient phrase, "including but not necessarily limited to", is not adequate to meet the standard set out in Article 6.2 of the DSU and thus is not sufficient to bring a claim within the terms of reference of a panel.[72] However, the Appellate Body also noted that:

[66] Article 6.2 of the DSU states:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

[67] Appellate Body Report, *Guatemala—Cement I*, ¶¶ 72 and 76.

[68] Appellate Body Report, *Korea—Dairy*, ¶ 120.

[69] Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 70. Moreover, "neither Articles 4 and 6 of the DSU, nor paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel." (Appellate Body Report, *EC—Computer Equipment*, ¶ 132)

[70] Appellate Body Report, *Korea—Dairy*, ¶ 120.

[71] Appellate Body Report, *EC—Bananas III*, ¶ 143.

[72] Appellate Body Report, *India—Patents (US)*, ¶ 90.

> . . . there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[73]

Thus, the complainant is required to specify sufficiently the *claims*, but not the detailed *arguments*, in the request for panel establishment in order to allow the defendant and any third parties to know the legal basis of the complaint.[74]

However, a mere listing of articles of a covered agreement alleged to have been breached would not necessarily, in each and every case, be a sufficient standard of precision—observance of which would always constitute sufficient compliance with the requirements of Article 6.2.[75] In assessing this question, the Appellate Body took into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that a panel request simply listed the provisions claimed to have been violated.[76] Thus, the fundamental issue in assessing claims of prejudice is whether a defending party was made aware of the claims presented by the complaining party sufficiently to allow it to defend itself.[77] Moreover, if a defendant fails to request the panel, in a timely fashion, to make a preliminary ruling on the sufficiency of the panel request, this may be, in the circumstances of a given case, a strong indication that the defendant did not, in fact, suffer prejudice on account of any lack of clarity in the panel request.[78]

Another major element for defining the panel's terms of reference is the identification by the complainant of the "*specific measures at issue*" in the dispute. The specific measure can be a measure of general application provided that its application to certain products is of a mandatory character or the specific application of the general measure to particular countries, traders, or products.[79] In respect of certain WTO obligations, in order to identify the "specific measures at issue", it may be necessary to identify the products subject to the measures in dispute.[80] In disputes regarding trade remedies, such as the imposition of anti-dumping measures, further specification may be required.[81]

When the defending party modifies or amends the measure specifically identified in the panel request in the course of the panel proceedings, it could argue that the original measure identified in the panel request is no longer in force and that the modified measure was not properly identified in the panel request. Along these lines, the defending

[73] Appellate Body Report, *EC—Bananas III,* ¶ 141.

[74] *Id.*, ¶ 143. In other words, what the panel request needs to set out with sufficient clarity are the claims, not detailed arguments. (Appellate Body Report, *Korea—Dairy*, ¶ 123)

[75] Appellate Body Report, *Korea—Dairy*, ¶ 123.

[76] *Id.*, ¶ 127.

[77] Appellate Body Report, *Thailand—H-Beams*, ¶ 95.

[78] *Id.*

[79] The Appellate Body considered that "measures" within the meaning of Article 6.2 of the DSU are not only measures of general application, i.e., normative rules, but also can be the application of tariffs by customs authorities. (Appellate Body Report, *EC—Computer Equipment*, ¶ 65)

[80] *Id.*, ¶¶ 67 and 103.

[81] The Appellate Body noted that "in disputes under the *Anti-Dumping Agreement* relating to the initiation and conduct of anti-dumping investigations, a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the *Anti-Dumping Agreement* and Article 6.2 of the DSU." (Appellate Body Report, *Guatemala—Cement I*, ¶ 80)

party could demand that the panel refrain from ruling on the consistency with WTO law of either of those measures. According to the Appellate Body, whether the modified or amended measure falls, nonetheless, within the panel's terms of reference may depend on whether the amended measure is essentially the same as the original measure or whether the amendment has changed the measure in its essence.[82] The reason is that:

> a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'. If the terms of reference in a dispute are broad enough to include amendments to a measure . . . and if it is necessary to consider an amendment in order to secure a positive solution to the dispute . . . then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute.[83]

The Appellate Body did not wish "to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel" or by itself.[84]

VII. Multiple Panel Proceedings

Article 9 of the DSU deals with two different situations: first, panel proceedings involving multiple *complaints* and, second, multiple *panels* dealing with the same matter.

Regarding multiple complaints, where more than one Member requests the establishment of a panel relating to the same matter,[85] a single panel *may* be established to examine these complaints.[86] While a single panel should be established to examine such complaints whenever feasible, any one of the complainants or defendants has the right to insist on separate panels. This rule takes into account the rights of all Members concerned as well as the need to use resources efficiently. Where a single panel is established, its work has to be organized and its findings have to be presented so as to avoid the impairment of rights that parties would have enjoyed had separate panels examined the complaints. To that end, the submission of each complainant has to be made available to all other complainants and each has the right to receive the pleadings of any other complainant. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. However, this right is not unqualified.[87] A panel enjoys a certain margin of discretion on whether to accede to a request for a separate panel report in order

[82] Appellate Body Report, *Chile—Price Band System*, ¶ 139.

[83] *Id.*, ¶ 144.

[84] *Id.*

[85] It should be noted that Article 9 of the DSU uses the term "matter" somewhat loosely in the sense that it presupposes identity of the claims raised and the measure in dispute but obviously not in respect of the parties to the dispute.

[86] Article 9.1 of the DSU.

[87] The Appellate Body noted in *U.S.—Offset Act (Byrd Amendment)* that:

> Article 9.2 must not be read in isolation from other provisions of the DSU, and without taking into account the overall object and purpose of that Agreement. . . . Article 3.3 of [the DSU provides] that the 'prompt settlement' of disputes is 'essential to the effective functioning of the WTO.' If the right to a separate panel report under Article 9.2 were 'unqualified', this would mean that a panel would have the obligation to submit a separate panel report, pursuant to the request of a party to the dispute, at any time during the panel proceedings. . . . Such an interpretation would clearly undermine the overall object and purpose of the DSU to ensure the "prompt settlement" of disputes. (Appellate Body Report, ¶ 311)

to ensure that the rights of all parties are respected (not only the rights of the complaining party making the request).[88]

Where more than a single panel is established to examine complaints relating to the same matter, "to the largest extent possible" the same persons shall be chosen to serve on all those panels.[89] Again, this is a guideline, not an absolute requirement. Any party to those panel proceedings retains the right to reject a panelist for "compelling reasons" even if that person is to serve on another panel dealing with the same matter. However, such multiple panels dealing with the same matter are required to harmonize their timetable and work in other respects.[90]

There is no mention of multiple *defendants* in the DSU. In other words, a complainant may decide which Member to challenge before the WTO dispute settlement mechanism even if the challenged measure is imposed by several Members. For example, when an allegedly WTO-inconsistent measure is based upon a trade agreement between several Members, a complainant cannot be prevented from challenging that measure only with respect to one or some of the signatories which are bound by that trade agreement.[91]

VIII. Panel Composition

It is the prerogative of the DSB to take the decision to *establish* a panel. But the DSB does not determine which persons *compose* the panel. The decision as to which individuals serve on the panel is, in principle, taken by mutual agreement between the parties to the dispute. In other words, the WTO Director-General and Secretariat cannot, as a

[88] The Appellate Body stated in *U.S.—Offset Act (Byrd Amendment)* that:

> We do not believe that we should lightly disturb panels' decisions on their procedure, particularly in cases such as the one at hand, in which the Panel's decision appears to have been reasonable and in accordance with due process. We observe that, on appeal, the United States is not claiming that it suffered any prejudice from the denial of its request for a separate panel report. We also note that the first sentence of Article 9.2 refers to the rights of all the parties to the dispute. The Panel correctly based its decision on an assessment of the rights of all the parties, and not of one alone. (Appellate Body Report, ¶ 316)

[89] Article 9.3 of the DSU.

[90] The Appellate Body noted in *EC—Hormones* that it considered the panel's:

> decision to hold [in two parallel panel proceedings] a joint meeting with the scientific experts consistent with the letter and spirit of Article 9.3 of the DSU. . . .
>
> Clearly, it would be an uneconomical use of time and resources to force the Panel to hold two successive but separate meetings gathering the same group of experts twice, expressing their views twice regarding the same scientific and technical matters related to the same contested EC measures. . . . Having access to a common pool of information enables the panel and the parties to save time by avoiding duplication of the compilation and analysis of information already presented in the other proceeding. . . the Panel tried to avoid unnecessary delays, making an effort to comply with the letter and spirit of Article 9.3 of the DSU. (Appellate Body Report, ¶¶ 152–154)

[91] For example, in *Turkey—Textiles*, India chose to complain against Turkey only although the challenged measure was based on the agreement establishing a customs union between Turkey and the European Communities. Panel Report, *Turkey—Textiles* (WT/DS44/R), ¶ 9.4ff. Likewise, in *EC—Bananas III*, the complaining parties challenged the European Communities only, but not the African, Caribbean and Pacific ("ACP") States which were also signatories of the Lomé Convention between the ACP States and the European Union. Panel Report and Appellate Body Report, *EC—Bananas III* (WT/DS27/AB/R, WT/DS27/R). In both cases, the measures challenged before the WTO dispute settlement mechanism were based on treaties which the defending Member could not have changed without the consent of the other signatories to those treaties, that is, European Union and the ACP States, respectively.

rule, "impose" panelists on Members. However, if parties fail to agree on the panel's composition for a period of at least twenty days, either of the parties may request the Director-General to compose the panel by default.

A panel is usually composed of three individuals—unless the parties agree within ten days of the establishment of the panel that it be composed of five individuals.[92] Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as representatives of a Member or of a contracting party to GATT 1947 or as representatives to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.[93]

To assist in the selection of panelists, the GATT Secretariat kept a "roster" of individuals who could be selected to serve on panels established under the GATT of 1947.[94] Similarly, the WTO Secretariat maintains an "indicative list" of governmental and non-governmental individuals possessing the qualifications mentioned above.[95] Members may periodically suggest names for inclusion on that list. Relevant information on the expertise of proposed individuals in international trade and the sectors or subject matters of the covered agreements shall be added to the nomination.[96] The "indicative list" also indicates whether the nominated person has expertise under the GATT, the GATS and/or the TRIPS Agreement. Usually, Members nominate qualified individuals holding their citizenship, although the DSU would not exclude the nomination of non-citizens. The names are added to the "indicative list" when approved by the DSB. Although the decision to approve nominations needs to be taken by the DSB by "positive consensus", it has been extremely rare that a Member objected to the inclusion of another Member's national on the list.

The WTO Secretariat should propose and the parties should agree on panel members with a view to ensuring independence, a sufficiently diverse background and a wide spectrum of expertise among the panelists.[97] To that effect, the Secretariat holds meetings with the parties and proposes names of well-qualified governmental or non-governmental experts for consideration. The parties also have the right to suggest names on their own initiative. The Secretariat may suggest names of persons other than those included on the "indicative list". This often happens in disputes where specialized knowledge in specific service sectors or intellectual property rights is required, because many of the persons included on the "indicative list" are identified therein as experts in trade in goods only.

The parties to the dispute may not oppose the Secretariat's nominations except for compelling reasons.[98] The DSU does not define the term "compelling". In panel composition practice, a party may feel compelled to reject a nomination if that person lacks pertinent expertise to resolve the matter in dispute. A person that has made public statements or published articles on the issues in dispute should not be selected to avoid the resolution of the case being affected by preconceived views. However, what a party itself believes to be a compelling reason for rejecting a nomination would often not withstand

[92] Article 8.5 of the DSU.
[93] Article 8.1 of the DSU.
[94] Established on 30 November 1984 (BISD 31S/9).
[95] Article 8.4 of the DSU. The WTO "indicative list" includes the "roster" of qualified individuals established under the GATT 1947.
[96] Article 8.4 of the DSU.
[97] Article 8.2 of the DSU.
[98] Article 8.6 of the DSU.

objective scrutiny from a more neutral perspective. It is certainly not a compelling reason for rejecting a nomination that the person served on a previous panel which ruled against the Member that is party to the new dispute. Of course, it is unlikely that any party would openly express such a reason, but it is always difficult to discern the true motives for a party's rejection of an individual proposed by the Secretariat. Sometimes, delegates participating in panel composition meetings may not even be instructed by their government to give a reason for a rejection. In some of those instances, the WTO Secretariat has requested that a party submit compelling reasons in written form. Nevertheless, Article 8.6 of the DSU, as it stands, provides no remedy against parties rejecting nominations for gratuitous reasons or pretexts.

Parties may also reject proposed individuals not for reasons relating to a specific person's qualifications, but rather because they perceive the "package" of the three individuals of which a panel is to be composed as unbalanced with respect to geographic diversity, technical expertise, or professional experience. In practice, panels are often composed of at least a lawyer and an economist; citizens of both developing and developed countries; individuals originating in different continents; Geneva-based diplomats; experts working in public service back in capital; and, more recently, experts working in private practice or academia.

In current WTO panel composition practice, it has become more difficult to discern such traditional panel composition patterns. This may be due to the complexity of many current disputes and the need for very specialized expertise to be represented on a panel. Another reason is that nationals of Members whose governments are parties or third parties to the dispute cannot serve as panelists unless both parties agree.[99] This rule is arguably designed to foster the independence and impartiality of panels and to avoid conflicts of interests. But it cannot be assumed that all nationals of a party or third party are, as a rule, biased or partial, neither with respect to public civil servants nor with respect to persons employed in private business or academia. Moreover, this rule makes it particularly difficult to find qualified panelists in disputes involving multiple parties and third parties. WTO Members forming part of major trading blocks are often parties or third parties to panel proceedings. At the same time, many highly qualified trade experts hold the citizenship of those Members and thus cannot serve on panels involving their countries of origin unless both parties agree. Therefore, the higher the number of Members participating in a dispute, the smaller the "pool" of trade experts with pertinent expertise from which panelists can be selected. This explains why many panelists are citizens of Members that are not part of, or are not closely associated with, the major trading powers.

The exclusion, in principle, of nationals of parties and third parties also makes it more difficult to ensure a sufficiently diverse geographic background of panelists. However, where a dispute involves a developed country and a developing country, upon request by the latter, the panel must include at least one national from a developing country.[100] In dispute settlement practice, the WTO Secretariat usually proposes names of developing-country nationals as panelists in disputes involving developing countries even if no such request has been made.

It is important that persons requested to serve on a panel do not give any appearance of dependence, partiality, or conflicts of interests. Even if they are working in public service, panelists serve in their individual capacity and not as government representatives, nor as

[99] Article 8.3 of the DSU.
[100] Article 8.10 of the DSU.

representatives of any organization. WTO Members are expressly precluded from giving instructions or seeking to influence them as individuals with regard to the matter before the panel.[101] Moreover, Members are called upon to permit their government officials to serve as panelists.[102]

Members have adopted a *Code of Conduct* that sets detailed standards to ensure the impartiality and independence of panelists, the confidentiality of proceedings, and the avoidance of conflicts of interests in a particular dispute. It applies to all panelists irrespective of whether they are working in public service, in private business, or in academia. Experts heard by a panel, arbitrators, Appellate Body Members, members of the Textiles Monitoring Body and Secretariat staff assisting in dispute settlement proceedings, are also bound by the *Code of Conduct*.

The experience with the panel composition process shows a number of problems. Often the selection process takes much longer than the twenty days implied by Article 8.7 of the DSU. A party frequently rejects proposed candidates for reasons that are not disclosed and may not in fact be "compelling". The high percentage of panels composed by default by the Director-General is proof of that problem. Definitions and an "illustrative list" of reasons that are acceptable as "compelling" could alleviate this problem. There seems also to be a need for additional remedies against the abuse of a party's right to reject panel candidates for compelling reasons.

There are other ways in which the "pool" of persons with pertinent expertise and eligible to serve as panelists could be enlarged. Arguably, strict enforcement of the *Code of Conduct* would make superfluous, and could replace, the rigid rule that nationals of parties and of third parties cannot serve as panelists unless the parties agree. As a more revolutionary solution, the European Communities has proposed—in the context of negotiations to improve and clarify the DSU—the creation of a standing panel body ("SPB"). According to this proposal, the SPB would be composed of at least 16, or up to 25, individuals. SPB members would serve for a non-renewable term of, for example, six years.[103] They would be selected on the basis of criteria such as geographical diversity and pertinent expertise in trade sectors and specific covered agreements of the WTO. Three SPB members would be assigned to each case on the basis of rotation. Parties would no longer enjoy the right to reject proposed panelists for "compelling" reasons. Likewise, the rule that nationals of parties and of third parties to the dispute cannot serve on a panel would be abolished. Accordingly, more citizens of developing-country Members, and least developing-country Members, as well as citizens of the "frequent users" of the system (including Canada, Japan, the European Communities and its Member States, and the United States) could serve as panelists. However, the *Code of Conduct* would continue to apply. SPB members would be excused from cases in which there could be an appearance of a conflict of interest.

This panel composition system would speed up the selection process and solve many of the problems arising under the current system. It would facilitate the prompt adjudication of procedural issues raised at the outset of a dispute which under the current system cannot be resolved before the panel is composed. SPB members would build up more expertise in dispute settlement practice than panelists selected *ad hoc* for one or only a few disputes. SPB members would probably adjudicate procedural objections and substantive legal issues from a different perspective than one-time panelists interested only in settling

[101] Article 8.9 of the DSU.
[102] Article 8.8 of the DSU.
[103] WTO document TN/DS/W/1, dated March 13, 2002, at 3.

the dispute at hand. They could likely develop a better sense of the implications of their rulings on future disputes. The European Communities' proposal could promote predictability and coherence of panel decisions and lead to further "judicialization" of the panel process.

On the other hand, the creation of an SPB could also make it more difficult to ensure that panelists have case-specific expertise. Even if an SPB had several dozen members, it is very unlikely that those members would have pertinent expertise in all matters relating to all aspects of the covered agreements. More frequent recourse by panels to technical advice by experts could, to some extent, solve this problem. However, as panelists must not delegate their responsibility for factual rulings and legal findings to experts, seeking advice from any appropriate source cannot fully make up for panelists who themselves have case-specific expertise.

Furthermore, selecting three SPB members for a panel on the basis of rotation could aggravate this problem because, for example, an anti-dumping expert could be assigned to a copyright case. Although Appellate Body Divisions are composed on the basis of the same principle, the problem appears more serious for panels who have to rule on issues of fact –Appellate Body jurisdiction is limited to rulings on issues of law (and "mixed" issues of law and fact). Moreover, diplomats and other trade experts working in public service could not simultaneously be SPB members. This would limit the "pool" of qualified individuals who could be appointed as SPB members. An SPB would also reduce the participation of trade diplomats in the dispute settlement process, which could undermine the credibility and acceptability of panel decisions for Members and their representatives.

A compromise between the European Communities' proposal and the present system of *ad hoc* selection would be a system where only the chairpersons of panels are selected from a "standing panel chairperson body". These chairpersons would be available to deal promptly with preliminary issues and procedural requests and they could provide a longer-term perspective to panel dispute settlement practice. The two remaining panel members would be selected according to the current panel composition rules. This solution would ensure that individuals with case-specific expertise, as well as individuals with experience (ensuring continuity), are represented on the panel. It could be said, however, that a system combining permanent panel chairpersons with *ad-hoc* panelists appointed for a given case would create two "classes" of panelists. Such a system could risk giving more influence to quasi-permanent panel chairpersons than to panelists appointed on an *ad hoc* basis.

IX. Procedural Stages of Panel Proceedings

When the parties have agreed on the persons that should serve as panelists, or when the Director-General has appointed them upon request, the panel's composition is completed and the panelists can begin their work.

A. Organizational Meeting

First, the panel must draw up a calendar for its work and decide, in consultation with the parties, on its working procedures. This should be done as soon as practicable and whenever possible within one week after the panel composition.[104] Panel working

[104] Article 12.3 of the DSU.

procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.[105] Suggested time-periods for the calendar and tentative working procedures are set out in Article 12 and Appendix 3 to the DSU. Panels may deviate from the proposed time periods and adopt different working procedures after consulting with the parties.[106] In practice, panels tend to follow the working procedures suggested in Appendix 3 to the DSU but, where necessary, they adopt more detailed and additional procedures for the purposes of the specific proceedings at hand. Usually, panels hold a so-called organizational meeting to consult with the parties before deciding on the working schedule and procedures.

B. Preliminary Issues and Procedural Objections

Sometimes, parties raise preliminary issues and procedural objections at the organizational meeting if they have not done so by prior written communication or unless they decide to raise those objections in their first written submission to the panel. While the DSU contains no specific rules on how to deal with these issues, certain principles have been applied in panel and Appellate Body dispute settlement practice. When exercising its margin of discretion in dealing with procedural issues, a panel should be guided by the principles of due process and good faith.

Article 3.10 of the DSU commits Members to engage in dispute settlement procedures in good faith in an effort to resolve the dispute.[107] According to the Appellate Body,

> the principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.[108]

Therefore, when a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly. A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections.[109]

Moreover, a procedural objection raised by a party to a dispute should be sufficiently specific to enable the panel to address it.[110] The requirements of good faith, due process and orderly procedure dictate that objections, especially those of potential significance, should be explicitly raised. Only in this way will the panel, the other party to the dispute, and the third parties, understand that a specific objection has been raised, and have an adequate opportunity to address and respond to it.[111]

In the Appellate Body's view, "the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific

[105] Article 12.2 of the DSU.

[106] Article 12.1 of the DSU and ¶¶ 1 and 11 of Appendix 3.

[107] "This is another specific manifestation of the principle of good faith that, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith." (Appellate Body Report,*U.S.—FSC*, ¶ 166)

[108] Appellate Body Report, *U.S.—FSC*, ¶ 166.

[109] Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—U.S.)*, ¶ 50.

[110] Appellate Body Report, *EC—Hormones*, ¶ 152.

[111] Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—U.S.)*, ¶ 47.

situations that may arise in a particular case and that are not explicitly regulated".[112] An appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by the panel's legal ruling.[113] For example, observance of due process entails providing "parties adequate opportunity to respond to the evidence submitted."[114]

C. Written Submissions and Oral Hearings

Panels should set precise deadlines for written submissions and the parties should respect those deadlines.[115] The tentative calendar in Appendix 3 to the DSU expresses time periods in terms of the number of weeks for each step of the panel proceedings. Based on this proposed schedule, the panel adopts a "working schedule" setting out specific dates and deadlines for each stage of the specific panel proceeding. In determining the panel's working schedule, the panel shall provide sufficient time for the parties to prepare their submissions.[116] In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for that Member to prepare and present its arguments.[117]

Pursuant to the working schedule, parties transmit a first set of written submissions to the panel, to each other, and to the third parties.[118] In their first written submissions, the parties present the facts of the case and their legal arguments.[119] The complaining party submits its first submission in advance of the responding party unless the panel decides, after consulting with the parties, that submissions should be filed simultaneously.[120]

At its first substantive meeting with the parties, the panel asks the complaining party to present its case. Subsequently, the responding party is asked to present its point of view.[121] The panel may at any time put questions to the parties and ask them for explanations either in the course of the meeting with the parties, or in writing.[122] Parties may answer the questions posed by the panel or the other parties during the substantive meeting with the panel or reserve their right to respond in writing within a time limit set by the panel.

Rebuttal submissions are due approximately three weeks after the panel's first substantive meeting with the parties. The rebuttals, as well as any subsequent written submissions, are to be filed by the parties simultaneously.[123] The parties present oral rebuttals at the

[112] Appellate Body Report, *EC—Hormones*, footnote 138 to ¶ 152.
[113] Appellate Body Report, *EC—Hormones*, footnote 138 to ¶ 152.
[114] Appellate Body Report, *Australia—Salmon*, ¶ 272. And in ¶ 278:

> A fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it. In this case, we believe that the Panel *did* accord Australia a proper opportunity to respond by allowing Australia to submit a third written submission. We cannot see how the Panel failed to accord due process to Australia by granting the extra time it had requested.

[115] Article 12.5 of the DSU.
[116] Article 12.4 of the DSU.
[117] Article 12.10 of the DSU.
[118] Article 12.6 of the DSU envisages that the Secretariat receives and transmits the submissions to the panel and the other part(ies) to the dispute. In practice, the parties transmit submissions to the other part(ies) and third parties directly.
[119] ¶ 4 of Appendix 3 to the DSU.
[120] Article 12.6 of the DSU and ¶ 12(a) of Appendix 3 to the DSU.
[121] ¶ 5 of Appendix 3 to the DSU.
[122] ¶ 8 of Appendix 3 to the DSU.
[123] Article 12.6 of the DSU.

second substantive meeting of the panel. In making their oral statements, the responding party takes the floor first and is followed by the complaining party.[124]

To ensure transparency and to avoid any appearance of *ex parte* communications, each party's oral presentations, rebuttals, explanations and responses to questions shall be made in the presence of the other parties. Moreover, each party's written submissions, written responses to questions, written comments on the descriptive part and the interim report shall be made available to the other parties.[125]

As noted above, panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.[126] While the procedural rules set out in the DSU and its Appendix 3 give panels a certain margin of discretion in drawing up working schedules and procedures, this flexibility has limits. A panel's discretion does not extend to disregarding or modifying the substantive provisions of the DSU.[127]

D. Confidentiality of Proceedings

WTO dispute settlement proceedings are confidential.[128] The panel meets in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.[129] There may not be any *ex parte* communications between the parties and the panel concerning matters under consideration by the panel.[130] The internal deliberations of the panel are confidential.[131]

Written submissions to the panel shall be treated as confidential, but shall be made available to the parties to the dispute.[132] Parties are not precluded from disclosing statements of their own positions to the public during the proceedings. However, parties must treat as confidential information submitted to the panel by another party when that party has designated it as confidential. A party to the dispute shall also, upon request of another party, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.[133] However, the DSU does not set a deadline by which such a non-confidential summary is to be provided. In dispute settlement practice, parties often fail to provide such summaries prior to the conclusion of the proceedings. In the DSU review negotiations, it has been proposed to insert in Article 18 of the DSU a deadline by which such a summary has to be provided or to make the parties' entire submissions public documents.

The final panel reports are accessible to the public (for example, on the WTO website) immediately after they are circulated to all WTO Members and regardless of whether they are appealed. The arguments raised by the parties in their written and oral submissions to the panel are published, in full or in summary form, as part of the descriptive part of the panel report.

Upon suggestion by the parties in disputes involving a great deal of company-specific factual information, several panels have developed additional procedures to ensure the

[124] ¶ 7 of Appendix 3 to the DSU.
[125] ¶ 10 of Appendix 3 to the DSU.
[126] Article 12.2 of the DSU.
[127] Appellate Body Report, *India—Patents (US)*, ¶ 92.
[128] Articles 14 and 18 of the DSU.
[129] ¶ 2 of Appendix 3 to the DSU.
[130] Article 18.1 of the DSU.
[131] Article 14.1 of the DSU.
[132] Article 18.2 of the DSU; ¶ 3 of Appendix 3 to the DSU.
[133] Article 18.2 of the DSU.

protection of business confidential information from dissemination through governments to competitors of those companies.[134]

X. Third Party Rights

Members other than the parties to the dispute, having a substantial interest in the matter before a panel, have the opportunity to express their views to the panel.[135] Any such Member must notify its interest at the DSB meeting when the panel is established or within ten days after that date.[136]

The notion of "substantial interest" has been interpreted broadly in dispute settlement practice. It is not limited to current trade interests. Potential trade interest or "systemic" interest in the legal issues at hand may be sufficient to qualify for third party status. One reason why there seems in practice to be no need to establish the "substantial" nature of a Member's interest is that during the initial stage of the proceedings, when third party rights are being reserved, no panel has yet been composed to adjudicate that question. This would not exclude however that a panel could, at a later stage of the proceedings, decide upon request whether a Member's interest is substantial enough to warrant third party status. Nonetheless, for all practical purposes, when a Member considers itself substantially interested and reserves its third party rights, the parties to the dispute or the panel will usually not second-guess that decision.

A third party is entitled to make a written submission to the panel and to receive the first written submissions of the parties.[137] Third parties may present their views at a special session of the first substantive meeting of the panel. All third parties may be present during the entirety of this session.[138] A third party may ask questions of the parties and other third parties and respond to questions posed by the panel or the parties.

Third parties are not entitled to receive the rebuttal submissions of the parties or to respond in writing to those submissions. Nor does the DSU give third parties the right to attend the second substantive meeting of the panel with the parties. In cases with particularly substantial effects for certain third parties, panels have granted—on an exceptional and case-specific basis—*enhanced* participatory rights to third parties, such as allowing them to receive the rebuttal submissions and the opportunity to attend and speak at the second substantive meeting of the panel.[139] Although Article 12.1 and Appendix 3 of the DSU do not specifically require a panel to grant enhanced third party rights in special circumstances, according to the Appellate Body, a decision to grant such rights falls within the discretion and authority of a panel, particularly if the panel considers it necessary for ensuring to all parties due process of law.[140]

[134] The Appellate Body has not found it necessary to follow that approach and has deemed the general DSU disciplines protecting confidential information as sufficient for the appellate review process. Appellate Body Report, *Brazil—Aircraft*, ¶ 125; Appellate Body Report, *Canada—Aircraft*, ¶ 147.

[135] Article 10.2 of the DSU.

[136] Practice agreed by the DSB.

[137] Paragraphs 2 and 3 of Article 10 of the DSU.

[138] ¶ 6 of Appendix 3 to the DSU.

[139] Panel Reports in *EC—Bananas III,* ¶¶ 7.4ff; Panel Report, *EC—Hormones (US)*, ¶¶ 8.12ff.

[140] Appellate Body Report, *EC—Hormones*, ¶ 154. According to the Appellate Body, a "panel's decision whether to grant enhanced participatory rights to third parties is thus a matter that falls within the discretionary authority of that panel. Such discretionary authority is, of course, not unlimited and is circumscribed, for example, by the requirements of due process." Appellate Body Report, *U.S.—1916 Act*, ¶ 150. In that case, the Appellate Body held that it had not been shown that the panel exceeded the limits of its discretionary authority by granting enhanced third party rights.

The provisions of Article 10 apply *mutatis mutandis* in panel proceedings pursuant to Article 21.5 of the DSU when a panel is reconvened to review whether the measures taken to comply with rulings adopted by the DSB are consistent with WTO law. Usually, compliance panels hold a single oral hearing with the parties and third parties. Therefore, in compliance panel proceedings the rebuttal submissions are most often exchanged before that oral hearing. In these circumstances, the Appellate Body found that third parties should be entitled to have access not only to the first submissions of the parties but also to their rebuttal submissions provided to the compliance panel.[141]

Compared to procedural rules governing other international dispute settlement mechanisms and tribunals, the rights of third parties before WTO panels are somewhat limited. A third party may present its views on the claims raised and the measures challenged by the complainant, but it cannot add to the claims raised or complain against measures additional to those challenged by the complainant.[142] Even if a third party's interest in the matter is very substantial, a panel does not have the power to confer full party status to an intervening third party in a proceedings initiated by a different complainant.

In the DSU review negotiations, proposals for enhanced third party rights have been made. For example, it has been suggested that third parties also be given access to the parties' rebuttal submissions, the panels' second substantive meeting, all responses of parties to panel questions, the interim report, the parties' interim review comments and the interim oral hearing, if any.

While a third party is not entitled to appeal a panel's findings and conclusions in its own right, it may participate in the appellate review procedure as a third participant and express its views on the points in the appeal raised by the appellant or cross-appellant. However, at any time, a third party may initiate a dispute settlement proceeding as a complainant in its own right when it considers that a measure which is already the subject of a panel proceeding nullifies or impairs benefits accruing to it under the covered agreements.[143] Such a dispute shall wherever possible be referred to the individuals serving on the original panel.[144]

It should be emphasized that in many panel proceedings, the legal and factual arguments submitted by third parties regarding the claims raised by, and the measures disputed between, the "main" parties have been thoroughly taken into account by panels. This is

[141] The Appellate Body stated that:

> Article 10.1 directs panels "fully" to take into account the interests of Members other than the parties to the dispute, and Article 10.2 requires panels to grant to third parties "an opportunity to be heard". Article 10.3 ensures that, up to a defined stage in the panel proceedings, third parties can participate fully in the proceedings, on the basis of the same written submissions as the parties themselves. Article 10.3 thereby seeks to guarantee that the third parties can participate at a session of the first meeting with the panel in a full and meaningful fashion that would not be possible if the third parties were denied written submissions made to the panel before that meeting. Moreover, panels themselves will thereby benefit more from the contributions made by third parties and will, therefore, be better able "fully" to take into account the interests of Members, as directed by Article 10.1 of the DSU. Appellate Body Report, *U.S.—FSC (Article 21.5—EC)*, ¶ 249.

[142] As the Appellate Body noted, "[t]hird parties to a dispute cannot make claims. It was for Argentina, as the claimant, to make its claim; Argentina cannot rely on third parties to do so on its behalf. Moreover, we note that Argentina did not adopt these arguments of the third parties in subsequent proceedings." Appellate Body Report, *Chile—Price Band System*, ¶ 163.

[143] Article 10.4 of the DSU.

[144] Thus right to initiate a separate panel proceeding under Article 10.4 is subject to the provisions on "procedures for multiple complainants" in Article 9 of the DSU.

the case in particular when third parties propose legal interpretations of a more systemic nature that go beyond the situation arising in the specific dispute (which tends to be the focus of the parties).

XI. Burden of Proof

The Appellate Body addressed the question of who bears the burden of proof in panel proceedings as follows:

> [V]arious international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[145]

The Appellate Body specified that as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favor of its claim.[146] A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favor of the complaining party presenting the *prima facie* case.[147] However, "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."[148] If the complaining Member succeeds in establishing a *prima facie* case, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary.[149]

By contrast, the party invoking an exception or raising a defense bears the burden of demonstrating that the measure at issue meets all the conditions or requirements attached to that exception or defense.[150] For example,

[145] Appellate Body Report, *U.S.—Wool Shirts and Blouses*, at 16, DSR 1997:I, 323, at 335.

[146] Appellate Body Report, *Canada—Dairy (Article 21.5—New Zealand and U.S. II)*, ¶ 66.

[147] Appellate Body Report, *EC—Hormones*, ¶ 104; Appellate Body Report, *Canada—Aircraft*, ¶ 192.

[148] Appellate Body Report, *U.S.—Wool Shirts and Blouses*, at 14, DSR 1997:I, 323, at 335. Moreover, "[t]here is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case." (Appellate Body Report, *EC—Sardines*, ¶ 281)

[149] Appellate Body Report, *Canada—Dairy (Article 21.5—New Zealand and U.S. II)*, ¶ 66. For example, under the SPS Agreement, this means that:

> [t]he initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. (Appellate Body Report, *EC—Hormones*, ¶ 98)

[150] Appellate Body Report, *U.S.—Gasoline*, at 22–23, DSR 1996:I, 3, at 20–21.

> Articles XX and XI:(2)(c)(i) [of the GATT 1994] are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defenses. It is only reasonable that the burden of establishing such a defense should rest on the party asserting it.[151]

A panel is not "required to state *expressly* which party bears the burden of proof in respect of every claim made."[152] Nor is a panel "required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case."[153]

XII. Timing of Evidence

The DSU does not establish time limits for the submission of evidence to a panel. Neither Articles 11 and 12, nor Appendix 3 to the DSU establish precise deadlines for the presentation of evidence by a party to the dispute. The Working Procedures in Appendix 3 do not prohibit submission of additional evidence after the first substantive meeting of a panel with the parties. However, according to the Appellate Body,

> . . . these Working Procedures do contemplate two distinguishable stages in a proceeding before a panel: the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit "rebuttals" by each party of the arguments and evidence submitted by the other parties.[154]

Nonetheless, especially in cases involving trade remedies, where a panel reviews the determination of a competent national authority, "[t]he exercise of due diligence by a Member['s competent authority] cannot imply . . . the examination of evidence that did not exist and that, therefore, could not possibly have been taken into account when the Member made its determination."[155] A *panel* reviewing the due diligence exercised by a Member in making its determination has to put itself in the place of that Member at the time it makes its determination. Consequently, a panel must not consider evidence that did not exist *at that point in time*.[156]

XIII. Panel's Right to Seek Information

The DSU gives panels different means or instruments for complying with its mandate under Article 11 of the DSU.[157] Among these is the right to seek information and technical

[151] Appellate Body Report, *U.S.—Wool Shirts and Blouses*, at 15–16, DSR 1997:I, 323, at 337–338.
[152] Appellate Body Report, *India—Quantitative Restrictions*, ¶ 137.
[153] Appellate Body Report, *Thailand—H-Beams*, ¶ 134. And in Appellate Body Report, *Korea—Dairy*, ¶ 145:

> We find no provision in the DSU or in the *Agreement on Safeguards* that requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defense and evidence.

[154] Appellate Body Report, *Argentina—Textiles and Apparel*, ¶ 79.
[155] The demonstration by a Member that a particular product is being imported into its territory in such increased quantities as to cause serious damage (or actual threat thereof) to the domestic industry can be based only on facts and evidence that existed at the time the determination was made. The urgent nature of such an investigation may not permit the Member to delay its determination in order to take into account evidence that might be available only at a future date. Even a determination on the existence of threat of serious injury must be based on projections extrapolating from *existing* data.
[156] Appellate Body Report, *U.S.—Cotton Yarn*, ¶¶ 77–78.
[157] Appellate Body Report, *Argentina—Textiles and Apparel*, ¶ 82.

advice provided for in Article 13 of the DSU.[158] Paragraph 1 of that Article gives a panel the right to seek information and technical advice from any individual or body that it deems appropriate. Paragraph 2 entitles a panel to seek information from any relevant source and to consult experts to obtain their opinions on certain aspects of the matter in dispute.

According to the Appellate Body, Article 13 provides for discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision.[159] Panels enjoy discretion as to *whether or not* to seek information from external sources. Thus a "contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU."[160] Nor does a panel's duty to "actively review the pertinent facts" in order to comply with Article 17.6(i) of the *Anti-Dumping Agreement* imply that a panel *must* exercise its right to seek information under Article 13 of the DSU. There is nothing in the texts of Article 17.6(i) of the *Anti-Dumping Agreement* or Article 13 of the DSU to suggest that a reading of these provisions, in combination, would render *mandatory* the exercise of a panel's *discretionary* power under Article 13 of the DSU.[161] The mere fact that a panel does not consider it necessary to seek information does not, by itself, imply that the panel's exercise of its discretion was not "due". Where no specific provision of a covered agreement obliges panels to hear experts or seek information from a particular source, "panels enjoy a *discretion*, pursuant to Article 13 of the DSU, to seek information 'from any relevant source'"[162] and "Article 11 of the DSU imposes no *obligation* on panels to conduct their own fact-finding exercise, or to fill in gaps in the arguments made by parties."[163]

The authority of a panel to seek information and technical advice from any individual or body it may consider appropriate, or from any relevant source, includes the authority to decide *not to seek* such information or advice at all. In the Appellate Body's view,

> [a] panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for*

[158] Article 13 of the DSU reads:

> *Right to Seek Information*
>
> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
>
> 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

[159] Appellate Body Report, *Argentina—Textiles and Apparel*, ¶ 84.

[160] Appellate Body Report, *EC—Sardines*, ¶ 302.

[161] Appellate Body Report, *EC—Bed Linen (Article 21.5—India)*, ¶ 167.

[162] Appellate Body Report, *U.S.—Carbon Steel*, ¶ 153.

[163] For example, "given that the European Communities itself had submitted no evidence—other than the text of the provision—on this point, the Panel did not act inconsistently with Article 11 in refraining from seeking additional information on its own initiative". (Appellate Body Report, *U.S.—Carbon Steel*, ¶ 153)

> *information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.[164]

A panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defense on a *prima facie* basis.[165] However, some of the WTO agreements[166] suggest that panels seek experts' advice on scientific or other technical matters.

A. Expert Review Group

Panels may request opinions from individual experts in their personal capacity or request an advisory report from an Expert Review Group ("ERG").[167] An ERG works under the panel's authority. The panel decides on their mandate and working procedures.[168] Participation in an ERG is restricted to persons of professional standing and experience in the scientific field in question.[169] Citizens of the parties to the dispute shall not serve on an ERG unless both parties agree or when the panel considers in exceptional circumstances that the need for specialized scientific expertise cannot be fulfilled otherwise.[170] However, government officials of a party to the dispute shall not serve on the ERG. Members of an ERG serve in their individual capacity and not as representatives of a government or organization (which must not give them instructions concerning the matter at issue). An ERG may consult with and seek information and technical advice from any source it deems appropriate and Members shall respond promptly and fully to any such request.[171] Parties to the dispute shall have access to all relevant information provided to an ERG (unless it is of a confidential nature).[172] The ERG submits a draft report to the parties with a view to obtaining their comments, and taking them into account in their final report as appropriate. The final report of the ERG is issued to the panel and the parties simultaneously. The final report is of an advisory nature.[173] It is the sole prerogative of the panel to make, on the basis of the information contained in an ERG's final report, the factual determinations and legal findings required to resolve the dispute. In other words, the panel must not delegate its mandate to an ERG.

[164] Appellate Body Report, *U.S.—Shrimp*, ¶ 104. In doing so, a panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly. (Appellate Body Report, *EC—Hormones*, ¶ 138)

The Appellate Body concluded that "the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts." (Appellate Body Report, *U.S.—Shrimp*, ¶ 106)

[165] "A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defense." Appellate Body Report, *Canada—Aircraft*, ¶ 192.

[166] Article 14 and Annex 2 of the TBT Agreement and Article 11 of the SPS Agreement.

[167] Appendix 4 to the DSU.

[168] ¶ 1 of Appendix 4 to the DSU.

[169] ¶ 2 of Appendix 4 to the DSU.

[170] ¶ 3 of Appendix 4 to the DSU.

[171] ¶ 4 of Appendix 4 to the DSU.

[172] Confidential information shall not be released without the authorization from the government, organization or person providing it. Where no such authorization is given, a non-confidential summary shall be provided. Paragraph 5 of Appendix 4 to the DSU.

[173] ¶ 6 of Appendix 4 to the DSU.

In dispute settlement practice, panels have so far refrained from establishing ERGs. Panels seem to prefer hearing a broad spectrum of individual responses from selected experts, as well as responses to questions formulated, in consultation with the parties. One reason for this practice could be that advisory reports from ERGs would likely express compromise majority opinions (or rarely minority dissenting opinions) which may not fully reflect the entire spectrum of available scientific opinion. The Appellate Body has not found fault with the practice of panels to hear individual experts, instead of establishing ERGs, because in disputes involving scientific or technical issues, neither Article 11.2 of the SPS Agreement, nor Article 13 of the DSU prevents panels from consulting individual experts. Rather, both the SPS Agreement and the DSU leave to the discretion of a panel the determination of whether the establishment of an ERG is necessary or appropriate.[174]

However, the procedural rules set forth in Appendix 4 for ERGs have been used by panels, as appropriate, in selecting individual experts and in obtaining the parties' comments on individual expert opinions submitted to the panel. Once a panel has decided to request the opinion of individual scientific experts, there is no legal obstacle to the panel drawing up, in consultation with the parties to the dispute, *ad hoc* rules for those particular proceedings.[175]

It should be reiterated that individual—or groups of—experts operate under the panel's authority, and the legal assessment of the WTO-consistency of challenged measures in the light of scientific experts' opinions remains the sole responsibility of the panel.[176]

Where a request for information is addressed to an individual or body within the jurisdiction of a WTO Member, the authorities of that Member need to be informed.[177] In dispute settlement practice, panels are hesitant to "by-pass" governments by requesting information directly from individuals, companies, or institutions at national levels.

Nonetheless, panels are exceedingly active in asking questions of parties in oral and written form in order to clarify the facts of the case or to hear the parties' views on interpretations of legal provisions. In this respect, the Appellate Body rejected a respondent's argument that the complainant's claims were not sufficiently clear, and that the panel, therefore, overstepped the limits of its authority in asking questions of the parties. It stressed that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them."[178]

However, a panel may not use its discretionary right to seek information from any source in a way that interferes with the allocation of the burden of proof between the parties as addressed above. The Appellate Body held that, for example, that

[174] Appellate Body Report, *EC—Hormones*, ¶ 147.

[175] Appellate Body Report, *EC—Hormones*, ¶ 148.

[176] The question whether a panel has assessed, on its own responsibility, the WTO-consistency of a measure based on information received from another source is subject to appellate review. For example, the Appellate Body noted in a dispute that the panel "gave considerable weight to the views expressed by the IMF [International Monetary Fund] in its reply to these questions. However, nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions." (Appellate Body Report, *India—Quantitative Restrictions*, ¶ 149)

[177] Article 13.1 of the DSU.

[178] Appellate Body Report, *Thailand—H-Beams*, ¶ 135. The Appellate Body also dismissed the argument that a panel had no authority to ask a question relating to claims for which the complaining party had not first established a *prima facie* case, and stated that such an argument was "bereft of any textual or logical basis". Appellate Body Report, *Canada—Aircraft*, ¶ 185.

> Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favor of a complaining party that has not established a prima facie case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, . . . to help it to understand and evaluate the evidence submitted and the arguments made by the parties, *but not to make the case for a complaining party*."[179]

B. Duty to Respond

Whenever a panel makes a request for information that it considers necessary or appropriate the Member concerned *should* respond promptly and fully to such a request.[180] The Appellate Body has held that the word "should", in the third sentence of Article 13.1 and in the context of the whole of Article 13, is used in a normative, rather than a merely exhortative, sense. Members are, in other words, under a duty and an obligation to "respond promptly and fully" to requests made by panels for information under Article 13.1 of the DSU.[181]

The discretionary authority of a panel may be exercised to request and obtain information from *any Member*, including *a fortiori* a Member who is a party to a dispute before a panel. The "discretionary authority to seek and obtain information is *not* made conditional by [any] provision of the DSU upon the other party to the dispute having previously established, on a *prima facie* basis, such other party's claim or defense. Indeed, Article 13.1 imposes *no conditions* on the exercise of this discretionary authority."[182] A refusal to provide information requested on the basis that a *prima facie* case has not been made, would, in the Appellate Body's view, imply that the Member concerned believes that it is able to judge for itself whether the other party has made a *prima facie* case. "However, no Member is free to determine for itself whether a *prima facie* case or defense has been established by the other party. That competence is necessarily vested in the panel under the DSU, and not in the Members that are parties to the dispute."[183]

The Appellate Body noted that "[w]here a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn."[184] A panel clearly has the legal authority and the discretion to draw inferences from all the facts before it—including the fact that a Member has refused to provide information sought by the panel.[185] It would be inevitable to draw "*negative inferences*" from a Member's refusal to disclose information that is in its sole possession and essential for the other party to establish a *prima facie* case.[186] The

[179] Appellate Body Report, *Japan—Agricultural Products II*, ¶ 129 (emphasis added).
[180] Article 13.1 of the DSU. However, confidential information that is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
[181] Appellate Body Report, *Canada—Aircraft*, ¶ 187.
[182] *Id.*, ¶ 185.
[183] *Id.*, ¶ 192.
[184] Appellate Body Report, *U.S.—Wheat Gluten*, ¶ 174.
[185] Appellate Body Report, *Canada—Aircraft*, ¶ 203.
[186] *Id.*, ¶¶ 187 and 203–204. And in Appellate Body Report, *U.S.—Wheat Gluten*, ¶¶ 171–173:

> [T]he refusal by a Member to provide information requested of it undermines seriously the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU. Such a refusal also undermines the ability of other Members of the WTO to seek the "prompt" and "satisfactory" resolution of disputes under the procedures for which they bargained in concluding the DSU.

Appellate Body characterized the drawing of inferences as a "discretionary" task falling within a panel's duties under Article 11 of the DSU.[187]

XIV. Mandate of Panels

According to Article 7 of the DSU, the task of a panel is to make such findings and conclusions on the matter referred to it upon request by the complainant as will enable the DSB to give rulings consistent with the WTO agreement(s) invoked.[188] Article 11 of the DSU provides more specifically:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

The panel's task of making an "objective assessment of the matter" is twofold. It includes the objective assessment of the *facts* relating to the challenged measures and the objective examination of the *claims* before the panel. Whether panels fulfill this mandate has given rise to considerable litigation before the Appellate Body.

A. Legal Issues

Insofar as *legal* questions are concerned, that is, the consistency or inconsistency of a Member's measure with the provisions of the applicable agreement, panels are required by Article 11 of the DSU to make an objective assessment of the facts of the case and the *applicability of and conformity with the relevant covered agreements*.[189] For example, a panel would act inconsistently with Article 11 of the DSU if it made a ruling *ultra petita*, that is, on a claim that has not been made and thus does not form part of the matter before it.[190]

Municipal law is relevant for a panel's examination of the claims before it. In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations.[191] Accordingly, although it is not the role of panels to

[187] Appellate Body Report, *U.S.—Wheat Gluten*, ¶¶ 171–173.

[188] Article 7 of the DSU.

[189] Appellate Body Report, *EC—Hormones*, ¶ 118.

[190] The Appellate Body stated in *Chile—Price Band System* that:

> [b]ecause it made a finding on a provision that was not before it, the Panel, therefore, did not make an objective assessment*of the matter before it*, as required by Article 11. Rather, the Panel made a finding on a matter that was *not* before it. In doing so, the Panel acted *ultra petita* and inconsistently with Article 11 of the DSU. (Appellate Body Report, ¶ 173)

[191] "There was simply no way for the Panel to make [a determination on the claims raised] without engaging in an examination of [domestic] law. But . . . the Panel was not interpreting [domestic] law "as such"; rather, the Panel was examining [domestic] law solely for the purpose of determining whether India had met its obligations under the *TRIPS Agreement*." Appellate Body Report, *India—Patents (U.S.)*, ¶¶ 65–67.

interpret a Member's domestic legislation as such, it is permissible for a panel to conduct a detailed examination of that legislation in assessing its consistency with WTO law.[192]

B. Factual Issues

Under Article 11 of the DSU, panels are also charged with the mandate to determine the *facts* of the case and to arrive at *factual findings*. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.[193] Panels, therefore, are not required to accord to the parties' factual evidence the same meaning and weight as do the parties.[194] The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.[195] It is generally within the discretion of the panel to decide which evidence it chooses to utilize in making findings.[196] A panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly.[197]

In the Appellate Body's view, an allegation that a panel has failed to conduct the "objective assessment of the matter before it" is a very serious allegation which goes to the very core of the integrity of the WTO dispute settlement process itself.[198] In assessing the panel's appreciation of the evidence, the Appellate Body refused to base a finding of inconsistency under Article 11 of the DSU simply on the conclusion that it might have reached a factual finding different than the one the panel reached. Nor may every error in the appreciation of the evidence (although it may give rise to a question of law) be characterized as a failure to make an objective assessment of the facts.[199] Rather, the Appellate Body must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.[200] For example, it is not an error, let alone an egregious error, for the panel to fail to accord the weight to the evidence that one of the parties believes the panel should have accorded to it.[201] For the Appellate Body:

[192] Appellate Body Report, *U.S.—Hot-Rolled Steel*, ¶ 200. See also, Appellate Body Report, *U.S.—Section 211 Appropriations Act*, ¶¶ 105–106:

> Thus the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the *WTO Agreement*.

[193] Appellate Body Report, *U.S.—Wheat Gluten*, ¶ 150, citing from Appellate Body Report, *Korea—Dairy,* ¶ 137.
[194] Appellate Body Report, *Australia—Salmon*, ¶ 267.
[195] Appellate Body Report*, Korea—Dairy*, ¶ 137.
[196] Appellate Body Report, *EC—Hormones*, ¶ 135.
[197] *Id.*, ¶ 138.
[198] Appellate Body Report, *EC—Poultry*, ¶ 133.
[199] Appellate Body Report, *EC—Hormones*, ¶ 133. Appellate Body Report, *Japan—Agricultural Products II*, ¶ 141.
[200] Appellate Body Report, *U.S.—Wheat Gluten*, ¶ 151.
[201] Appellate Body Report, *Korea—Alcoholic Beverages*, ¶ 164.

> The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The willful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel.[202]

In essence, Article 11 requires panels to take account of the evidence put before them and forbids them to willfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record.[203] Provided that panels' actions remain within these parameters, however, it is generally within the discretion of the panel to decide which evidence it chooses to utilize in making findings and, on appeal, the Appellate Body "will not interfere lightly with a panel's exercise of its discretion".[204]

As far as the review by a panel of *fact-finding* determinations by competent national authorities is concerned:

> the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts". Many panels have in the past refused to undertake *de novo* review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, "total deference to the findings of the national authorities", it has been well said, "could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU".[205]

The Appellate Body Reports in disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard can be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgment for that of the competent authority.[206]

[202] "A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice." Appellate Body Report, *EC—Hormones*, ¶ 133.

[203] Appellate Body Report, *U.S.—Carbon Steel*, ¶ 142.

[204] *Id.*, The Appellate Body stressed that panels enjoy discretion as the trier of facts; they enjoy a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Appellate Body will not intervene in the panel's appreciation of the evidence solely because it might have reached a factual finding different than the one the panel reached; the Appellate Body will intervene only if it is "satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence". Appellate Body Report, *EC—Sardines*, ¶ 299.

[205] Appellate Body Report, *EC—Hormones*, ¶ 117.

[206] Appellate Body Report, *U.S.—Cotton Yarn*, ¶ 74. Article 17.6 of the *Anti-dumping Agreement* complements the standard of review set out in Article 11 of the DSU for disputes concerning anti-dumping measures. In the current negotiations reviewing the functioning of the *Anti-Dumping Agreement*, the United States has

Although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities.[207] In this respect, the phrase "*de novo* review" should not be used loosely. If a panel concludes that the competent authorities, in a particular case, have *not* provided a reasoned or adequate explanation for their determination, that panel has not, thereby, engaged in a *de novo* review. Nor has that panel substituted its own conclusions for those of the competent authorities.[208]

XV. Interim Review Stage

Following the consideration of rebuttal submissions and oral arguments (at the second substantive meeting of the panel with the parties), the panel issues the descriptive section (including the parties' factual and legal arguments) of the draft report to the parties to the dispute. Within a time-period set by the panel—usually between one and two weeks—parties submit their comments in writing.[209]

As the next procedural step, the panel issues an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. The interim report remains confidential, but parties often leak the findings and conclusions to the public. Third parties are not entitled to receive the interim report. Within a time-period set by the panel, a party may submit a written request for the panel to review "precise aspects of the interim report" prior to circulation of the final report to Members.[210] In the early years of WTO dispute settlement practice, parties often submitted comprehensive comments on the interim report. Some feared that this could transform the interim review stage into some form of a "mini-appeal" process. In more recent years, however, parties have tended to limit the comments on the panel's legal interpretations and findings during the interim review, and to save for the appellate review stage their arguments on the legal errors allegedly committed by the panel. In the light of this practical experience, some have suggested that the appellate review stage is sufficient and that the interim review stage should be abolished altogether. Others have proposed that an interim review stage should be added even to the appellate review stage.

It is important to realize, however, that the interim review stage is the last chance for the parties to correct factual errors committed by the panel and to comment on purely factual rulings. While the Appellate Body is inclined to review "mixed" issues of law and fact, it will have to do so on the basis of the factual determinations made by the panel and facts in the panel record which are undisputed between the parties.[211]

In the Appellate Body's view, the interim review stage is not an appropriate time to introduce *new* evidence. At the interim review stage, the panel process is essentially complete; it is only—in the words of Article 15—"precise aspects" of the report that must

demanded to clarify the specific standard of review set out in Article 17.6 of that Agreement so as to ensure that panels and the Appellate Body show more deference to determinations made by national anti-dumping authorities.

[207] Appellate Body Report, *U.S.—Lamb*, ¶ 106.

[208] *Id.*, ¶ 107.

[209] Article 15.1 of the DSU.

[210] Article 15.2 of the DSU.

[211] Article 17.6 of the DSU limits the appellate review to issues of law covered in the panel report and legal interpretations developed by the panel.

be verified during the interim review. And this cannot properly include an assessment of new and unanswered evidence. A panel would thus act properly in refusing to take into account new evidence during the interim review, and would not thereby act inconsistently with Article 11 of the DSU.[212]

At the request of either party, the panel must hold a further meeting with the parties on the issues identified in the written comments.[213] In recent WTO dispute settlement practice, it is rare for a party to request that an oral hearing be held to discuss the interim review comments. According to the working procedures adopted by most panels, if no such interim oral hearing is requested, the other party or parties are given the opportunity to respond in written form, within a brief time-period set by the panel, to the interim review comments received from the other party or parties. In the DSU review negotiations, it has been suggested that interim oral hearings be generally abolished and that the interim review stage be limited to written comments.

The findings in the final panel report must include a discussion of the arguments made at the interim review stage.[214] Usually, panel reports contain a separate chapter entitled "Interim Review". The interim review comments received from the parties are often addressed substantively in the panel report section containing the findings and conclusions on the relevant claim, but these comments are often not identified as having been made during the interim review stage. If no comments are received from any party during the interim review comment period, the interim report is to be considered the final panel report and circulated promptly to Members.[215]

XVI. Contents of the Final Panel Report

Unless the parties have found a mutually satisfactory solution to the dispute, the panel is to submit its findings, reasoning and conclusions in written form.[216] The reports of panels must be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.[217] Concurring and dissenting opinions by individual panelists are permitted—even though such opinions expressed by individual panelists are anonymous.[218] First, the final panel report is issued to the parties. When translations into all official languages of the WTO are completed, the final report is circulated to all Members and disclosed to the public at large (regardless of whether it will be appealed).

Where at least one developing country Member is party to the dispute, the panel report must explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favorable treatment that form part of the covered agreements which have been invoked by the developing country Member in the course of the panel proceedings.[219]

[212] Appellate Body Report, *EC—Sardines*, ¶ 301.
[213] Article 15.2 of the DSU.
[214] Article 15.3 of the DSU.
[215] Article 15.2 of the DSU.
[216] Where a settlement of the matter among the parties to the dispute has been found, the panel report shall be confined to a brief description of the case and to reporting that a solution has been reached. Article 12.7 of the DSU.
[217] Article 14.2 of the DSU.
[218] Article 14.3 of the DSU.
[219] Article 12.11 of the DSU.

A. Basic Rationale Behind Panel Findings

The panel report shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.[220] The obligation of a panel to set out the "basic rationale" behind its findings and conclusions has given rise to much argumentation in appellate review proceedings.

A panel complies with the obligation provided for in Article 12.7 of the DSU when it "set[s] out a detailed and thorough rationale for its findings and recommendations . . . [and goes to] some length to take account of competing considerations and to explain why, nonetheless, it made the findings and recommendations it did."[221] A panel has also set out a "basic rationale" for its finding and recommendation when it "identified the legal standard it applied, examined the relevant facts, and provided reasons for its conclusion . . . ".[222] Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. Panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.[223] For the Appellate Body this duty reflects and conforms with the principles of fundamental fairness and due process that underlie and inform the provisions of the DSU:

> In cases where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such finding as a matter of due process. In addition, the requirement to set out a "basic rationale" in the panel report assists such Member to understand the nature of its obligations and to make informed decisions about: (i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal. Article 12.7 also furthers the objectives, expressed in Article 3.2 of the DSU, of promoting security and predictability in the multilateral trading system and of clarifying the existing provisions of the covered agreements, because the requirement to provide "basic" reasons contributes to other WTO Members' understanding of the nature and scope of the rights and obligations in the covered agreements.[224]

Whether a panel has articulated adequately the "basic rationale" for its findings and recommendations must be determined on a case-by-case basis, taking into account the facts of the case, the specific legal provisions at issue, and the particular findings and recommendations made by the panel. Panels must identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts. In this way, panels will, in their reports, disclose the essential or fundamental justification for their findings and recommendations.[225]

An appeal based on Article 12.7 will be unsuccessful if it implies that a panel, in setting out the "basic rationale", had to expound at length on the reasons for its findings and recommendations. The Appellate Body could, "for example, envisage cases in which a panel's 'basic rationale' might be found in reasoning that is set out in other documents,

[220] Article 12.7 of the DSU.
[221] Appellate Body Report,*Korea—Alcoholic Beverages*, ¶ 168
[222] Appellate Body Report,*Chile—Alcoholic Beverages*, ¶ 78.
[223] Appellate Body Report,*Mexico—Corn Syrup (Article 21.5—US)*, ¶ 106.
[224] *Id.*, ¶ 107.
[225] *Id.*, ¶ 108.

such as in previous panel or Appellate Body reports—provided that such reasoning is quoted or, at a minimum, incorporated by reference."[226]

B. Due Exercise of Judicial Economy

Neither the obligation of panels to set out the "basic rationale" for their findings and recommendations, nor the obligation in Article 11 of the DSU to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements", nor previous GATT practice:

> . . . requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues.[227] . . . In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.[228] (original underlining)

Under the DSU, "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[229] However, there are limits to applying the principle of judicial economy in WTO dispute settlement practice:

> This principle has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members.[230]

For purposes of transparency and fairness to the parties, a panel should, in all cases, address expressly those claims which it declines to examine and rule upon for reasons of judicial economy. Silence does not suffice for this purpose.[231]

The Appellate Body also clarified that a panel comes under a duty to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. For example, the vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. For this reason, "panels cannot simply ignore issues which go to the root of their jurisdiction—that is, to their authority to deal with

[226] For example, "a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings."(Appellate Body Report*, Mexico—Corn Syrup (Article 21.5—US)*, ¶ 109)

[227] "Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated." Appellate Body Report, *U.S.—Wool Shirts and Blouses*, at 18.

[228] Appellate Body Report, *U.S.—Wool Shirts and Blouses*, at 18.

[229] *Id*., at 19. Moreover, "[j]ust as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim." (Appellate Body Report, *EC—Poultry*, ¶ 135)

[230] Appellate Body Report, *Australia—Salmon*, ¶ 223.

[231] Appellate Body Report, *Canada—Autos*, ¶ 116.

and dispose of matters. Rather, panels must deal with such issues—if necessary, on their own motion—in order to satisfy themselves that they have authority to proceed."[232]

C. Not Adding to or Diminishing Rights and Obligations of Members

Article 3.2 of the *DSU* is not meant to encourage panels to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute.[233] In making findings and conclusions, panels must keep in mind that only WTO Members have the authority to amend the DSU or to adopt authoritative interpretations pursuant to Article IX:2 of the *WTO Agreement*.[234] Determining what the rules and procedures of the DSU ought to be is not the responsibility of panels; it is the responsibility solely of the Members of the WTO.[235] However, the Appellate Body had "difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements."[236]

D. Right to Suggest How to Implement

Where the panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[237] bring the measure into conformity with that agreement.[238] Most panels make such a declaratory judgment and leave it to the Member concerned to select the means to implement the panel's recommendations and rulings. However, a panel also has the power, upon request or on its own motion, to suggest ways in which the Member concerned could implement the recommendations.[239] Panels tend to refrain from using that power for a number of reasons. For example, there might be several ways to bring a measure into conformity with WTO law, and panels are hesitant to interfere with the sovereign right of Members to choose among different options as long as they bring about full conformity with WTO law.

XVII. Conclusion of Panel Proceedings

Panel proceedings should be completed within nine months of establishment of the panel by the DSB or within six months of the appointment of panelists by mutual accord of the parties or by the Director-General of the WTO.[240] In cases of urgency, including those relating to perishable goods, a panel shall aim to issue its report to the parties within three months.[241] In dispute settlement practice, these indicative time-frames are often

[232] Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 36.
[233] A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute. Appellate Body Report, *U.S.—Wool Shirts and Blouses*, at 20.
[234] The Appellate Body noted that Article 3.2 of the DSU limits the tasks of panels "to preserv[ing] the rights and obligations of Members under the covered agreements, and to *clarify[ing] the existing provisions* of those agreements in accordance with customary rules of interpretation of public international law." (emphasis added)
[235] Appellate Body Report, *U.S.—Certain EC Products*, ¶ 92
[236] Appellate Body Report, *Chile—Alcoholic Beverages*, ¶ 79.
[237] The "Member concerned" is the party to the dispute to which the panel recommendations are directed.
[238] Article 19.1, first sentence, of the DSU.
[239] Article 19.1, second sentence, of the DSU.
[240] ¶ 9 of Article 12 of the DSU.
[241] Article 12.8 of the DSU.

not met, *inter alia*, because the panelist selection process takes a long time, parties ask for more time to prepare submissions, experts need time to give advisory opinions, or panelists have to deal with complex facts or novel legal issues under WTO agreements being interpreted for the first time. When the panel considers that it cannot issue its report within six months (or within three months in cases of urgency) it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report.[242]

The panel may suspend its work at any time at the request of the complaining party for a period not to exceed twelve months. In the event of such a suspension, the time-frames mentioned above shall be extended by the time period for which the work is suspended. If the work of the panel has been suspended for more than twelve months, the authority for the establishment of the panel lapses.[243]

The findings and conclusions contained in panel reports are to be adopted by the DSB by "reverse" or "negative" consensus to the extent that they have not been modified or reversed on appeal (if any). To provide sufficient time for the Members to consider panel reports, they are not be considered for adoption by the DSB until twenty days after having been circulated to Members.[244] Members having objections to a panel report can explain their objections in writing for circulation at least ten days prior to the DSB meeting at which the panel report will be considered.[245] Members do not make much use of this provision in DSB practice. The parties to a dispute have the right to participate fully in the consideration of the panel report by the DSB, and their views are fully recorded. Parties, third parties, and other Members frequently make extensive comments on panel reports during the DSB meeting at which a report is to be adopted, both on factual and legal determinations made by the panel, and on systemic implications of a panel's legal interpretations for future disputes. The minutes of DSB meetings fully reflect those comments. The DSB minutes are usually derestricted 45 days after the date of their circulation to WTO Members.[246]

A panel report shall be adopted at a DSB meeting (unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report) within sixty days after the date of its circulation to WTO Members.[247] In practice, this does not mean that a Member will always take the full sixty days to decide whether or not to appeal a panel report. A party may decide to file a notice of appeal on the very day that the panel report is circulated to Members in all official languages. If the party wants time to reflect on whether to appeal or to maximize the time to prepare its argumentation on appeal, it can benefit from the "grace period" of twenty days as of the report's circulation during which the DSB cannot consider the panel report for adoption. However, when this twenty day period has expired, another party to the dispute may put the report up for adoption by placing it on the agenda of the next regular DSB meeting or a special DSB meeting scheduled for that purpose (arguably subject to the ten day period for inscribing items on the DSB agenda). Once this has occurred, the only way for a potential appellant to avoid a panel report being quasi-automatically adopted

[242] Article 12.9 of the DSU.
[243] Article 12.12 of the DSU.
[244] Article 16.1 of the DSU.
[245] Article 16.2 of the DSU.
[246] DSB Decision of May 14, 2000 (WTO document WT/L/452).
[247] If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after the conclusion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report. (Article 16.4 of the DSU)

is to file a notice of appeal prior to that DSB meeting. In other words, any other party may effectively shorten the time-period for an appellant to prepare its argumentation on appeal to much less than the maximum period of sixty days.

XVIII. Appendix

Table of GATT and WTO Reports Cited in This Article

Short Title	Full Case Title and Citation
Argentina—Textiles and Apparel	Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
Australia—Salmon	Panel Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII, 3407
Australia—Salmon	Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil—Aircraft	Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Brazil—Desiccated Coconut	Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Canada—Aircraft	Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada—Autos	Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2995
Canada—Dairy (Article 21.5—New Zealand and US II)	Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
Chile—Alcoholic Beverages	Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
Chile—Price Band System	Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
EEC—Oilseeds I	GATT Panel Report, *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, adopted 25 January 1990, BISD 37S/86.
EC—Asbestos	Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC—Bananas III (Ecuador)	Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085

(*Continued*)

(*Continued*)

Short Title	Full Case Title and Citation
EC—Bananas III (Guatemala and Honduras)	Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 695
EC—Bananas III (Mexico)	Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 803
EC—Bananas III (US)	Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943
EC—Bananas III	Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC—Bed Linen	Panel Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R
EC—Bed Linen (Article 21.5—India)	Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India—Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC—Computer Equipment	Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
EC—Hormones (Canada)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)—Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235
EC—Hormones (US)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)—Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699
EC—Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC—Poultry	Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
EC—Sardines	Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
Guatemala—Cement I	Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
India—Patents (US)	Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9

(*Continued*)

Short Title	Full Case Title and Citation
India—Quantitative Restrictions	Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
Japan—Agricultural Products II	Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Japan—Film	Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
Korea—Alcoholic Beverages	Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Korea—Dairy	Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Korea—Various Measures on Beef	Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R
Mexico—Corn Syrup (Article 21.5—US)	Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States—Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
Thailand—H-Beams	Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
Turkey—Textiles	Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
Turkey—Textiles	Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345
US—1916 Act	Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
US—Carbon Steel	Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US—Certain EC Products	Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001
US—Cotton Yarn	Appellate Body Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US—FSC	Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619

(*Continued*)

(*Continued*)

Short Title	Full Case Title and Citation
US—FSC (Article 21.5—EC)	Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US—Gasoline	Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US—Hot-Rolled Steel	Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US—Lamb	Appellate Body Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US—Lead and Bismuth II	Panel Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, as upheld by the Appellate Body Report, WT/DS138/AB/R, DSR 2000:VI, 2631
US—Offset Act (Byrd Amendment)	Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US—Section 110(5) Copyright Act	Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000:VIII, 3769
US—Section 211 Appropriations Act	Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002
US—Shrimp	Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US—Wheat Gluten	Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US—Wool Shirts and Blouses	Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

CHAPTER 27

THE APPELLATE BODY: INSTITUTIONAL AND PROCEDURAL ASPECTS

Victoria Donaldson*

TABLE OF CONTENTS

I. Introduction 1279
II. Uruguay Round Negotiations 1279
III. Institutional Aspects of Appellate Review 1281
A. Governing Instruments 1281
1. Covered Agreements 1282
2. Working Procedures 1282
3. Rules of Conduct 1284
B. The Appellate Body Members 1284
1. Legal Framework and Appointment Procedures 1284
2. The Individual Members 1289
3. The Chairman 1290
4. The Appellate Body Secretariat 1290
IV. The Conduct of Appeals 1291
A. Overview of the Mechanics of the Appeal Process 1291
B. Specific Issues Arising in Relation to Appeals 1294
1. Right to Appeal 1294
2. Deadlines and Time-Limits in Appeals—Sixty-Day Deadline to Initiate the Appeal 1295
3. Deadlines and Time-Limits in Appeals—Calculating Dates 1295
4. Initiation of an Appeal 1296
5. Notice of Appeal 1296
6. Scope of Appellate Review 1300
7. Standard of Review on Appeal 1302
8. Divisions 1303
9. Presiding Member 1304
10. Appellants/Other Appellants/Appellees 1305
11. Participants and Parties 1306
12. Third Parties, Third Participants and Passive Observers 1306
13. Conflicts of Interest 1307
14. Ex Parte Communication 1308
15. Confidentiality 1309
16. Business Confidential Information 1310

* Counsellor, Appellate Body Secretariat. All views expressed in this chapter are my own and do not necessarily reflect those of the Appellate Body or the Appellate Body Secretariat. I thank former Appellate Body Member James Bacchus for his comments on this chapter.

17. Requests for a Preliminary Ruling 1310
18. Requests to Change the Deadline for a Written Submission 1313
19. Written Submissions 1314
20. Requests to Change the Date of the Oral Hearing 1315
21. The Oral Hearing 1316
22. Multiple Appeals, "Joinder" of Cases on Appeal, Joint Hearing 1316
23. Joint Submissions 1317
24. Objections 1318
25. Private Counsel 1318
26. Additional Written Memoranda 1319
27. Panel Record/Evidence on Appeal 1320
28. Experts 1320
29. *Amicus Curiae* Briefs 1321
30. Conditional Appeals 1325
31. Decision-Making—Opinions 1325
32. Decision-Making—Collegiality 1326
33. Interpretation of the Working Procedures 1326
34. Costs 1326
35. Failure to Appear or File a Timely Submission 1326
36. Withdrawal of an Appeal 1327
37. Deadlines and Time-Limits in Appeals—Ninety Day Limit for Completion 1328
38. Circulation of Report 1329
39. Precedential Value of AB Reports—"Stare decisis"? 1329
40. Precedential Value of AB Reports—"Res judicata"? 1330

V. Appraisal of the Appellate Body 1332

I. Introduction

This chapter examines the Appellate Body and appellate procedures in WTO dispute settlement. Part II sets out a brief review of how the concept of appellate review arose and evolved during the Uruguay Round of trade negotiations. Part III describes the principal institutional aspects of the Appellate Body: the applicable legal instruments, the Appellate Body as an institution, and the individuals that have served on it. Part IV of the chapter focuses on the appeal process and provides, first, an overview designed to familiarize the reader with the conduct of an appeal, and second, a survey of specific issues that have arisen, or might arise, during an appeal. Part V attempts to take stock of the current state of Appellate Body procedures. This is done through a brief examination of certain comments that have been made by WTO Members, of proposals made in the current negotiations on reform of the Dispute Settlement Understanding ("DSU"), and of comments that have been made by outside observers. Overall, the objectives of this chapter are to familiarize readers with the detailed mechanics of WTO appeals and to provide them with some of the data necessary to judge for themselves the extent to which current appellate procedures are consistent with the Appellate Body's own description of the objective of dispute settlement in the WTO:

> The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.[1]

II. Uruguay Round Negotiations

The GATT contracting parties recognized, at the time that they launched the Uruguay Round of trade negotiations, that enhanced dispute settlement procedures would be indispensable in order to buttress a more sophisticated multilateral trading system. In addition, the GATT system had always contained a dispute settlement mechanism, and as this mechanism evolved over time, the contracting parties had become increasingly dissatisfied with certain aspects of that mechanism. One particularly troublesome feature of the system was the ability of contracting parties to block the adoption of panel reports.

Contracting parties held different views on the reasons why panel reports had been blocked. For some, it was due to the poor quality of particular panel reports. Others blamed "losing" parties for "abusing" the consensus decision-making process by which reports were adopted. Similarly, in the early phases of the negotiations, a number of different views as to how to cure the problem were put forward. Suggestions included procedures to ensure the selection of better-qualified panelists, an expanded interim review stage at the panel level, a formal process by which parties to the dispute could lodge written objections to the contents of the panel report, and modification of the consensus decision-making rules for the adoption of panel reports.[2]

[1] Appellate Body Report, *United States—FSC*, ¶ 166 (Note: full citations to Appellate Body reports are provided in the table at the end of this chapter).

[2] The contracting parties discussed, for example, the idea of a "consensus-minus" form of decision-making, where panel reports would still require consensus for adoption, but either the parties to the dispute, or the parties and any third parties to the dispute, would not participate in the decision. At least one delegation also favoured the idea of using Article XXV of GATT to take adoption decisions on panel reports, while another delegation suggested that panel reports could be divided into legal rulings on the GATT-consistency of the measures at issue (to be adopted by consensus) and recommendations as to implementation (where a modified consensus rule could be applied). *See* the summary of proposals in MTN/GNG13/W/29/Rev. 1.

The idea of a discrete appellate review stage was floated for the first time at a relatively late stage of the negotiations. Appellate review did not feature in the December 1988 mid-term review, nor in the Contracting Parties' Decision of April 12, 1989 to implement certain procedural reforms of the dispute settlement system on a trial basis as from May 1, 1989.[3] The idea of a standing appeals body appears to have been raised for the first time around the time of a meeting of the negotiating group on dispute settlement on September 28, 1989, as part of the discussions on the procedures for adopting panel reports.[4]

In an effort to synthesize discussions on the issue, Mexico's proposal explained that:

> 12. The purpose of establishing an appellate body is to compensate for the virtually automatic adoption of panel reports, by allowing parties to a dispute the opportunity to have reports reviewed in their entirety by a body specialized in GATT matters: in other words, by a body whose membership and permanent nature ensure that the final conclusions and recommendations are free from any doubt or error of interpretation concerning GATT rules and disciplines.
>
> 13. The appellate body would be available to all contracting parties. However, this remedy should not be used as just another procedure in dispute settlement. Parties to a dispute which so request must present their case in writing, indicating their grounds for considering that the panel report being appealed is unsound and the specific points they wish to have reviewed by the appellate body. In addition, all appeal applications must be accompanied by a formal declaration reiterating that the applicant will accept the final outcome of the appeal.[5]

In their subsequent discussions on the issue, many contracting parties expressed concern that the creation of an appellate review stage would unduly increase the duration and complexity of dispute settlement proceedings, and insisted that any appellate review stage must be structured so as to ensure that appeals occurred only in extraordinary cases, rather than becoming simply one more stage in dispute settlement that would be utilized in virtually every dispute.[6] One delegation suggested, instead, a form of appellate/interim review in which draft panel reports would be submitted to some form of expert body, which could then propose changes to the draft. The idea of appellate review also provoked discussion as to the legal effects of appellate reports, specifically whether they would need to be adopted and, if so, what the appropriate decision-making rules for such adoption would be.[7]

In December 1991, Chairman Arthur Dunkel released the "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", Sections S and T of which addressed dispute settlement.[8] Draft Article 15 of Section S dealt specifically with appellate review, and its provisions resemble very closely the current text of Article 17 of the DSU. Perhaps due to the novelty of appellate review in GATT dispute settlement and, almost certainly as a result of the late stage of the negotiations when the concept was introduced, only the broad parameters of what appellate procedures would look like were set out in the text. Little was added to this text when it later became Article 17 of the DSU.

[3] *Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT Doc. No. L/6489, BISD 36S/61.

[4] MTN/GNG/NG13/16, ¶ 21.

[5] MTN/GNG/NG13/W/42, Proposal by Mexico dated July 12, 1990, ¶¶ 12 and 13.

[6] *See*, *e.g.*, the Secretariat notes recording the discussions of the negotiating group at its meetings between September 1989 and April 1990: MTN/GNG/NG13/16, MTN/GNG/NG13/17, MTN/GNG/NG13/18, and MTN/GNG/NG13/19.

[7] *See* the draft text prepared by the Secretariat on September 21, 1990, MTN/GNG/NG13/W/45.

[8] MTN/TNC/W/FA, December 20, 1991.

At the same time as the adoption of the DSU and the WTO Agreement, Ministers decided to establish a Preparatory Committee for the World Trade Organization.[9] Four sub-committees were established, including one on Institutional, Procedural and Legal Matters which was to address, *inter alia*, issues relating to the Appellate Body.[10] The discussions of this sub-committee revealed the extent to which WTO Members attached importance to the credibility and prestige of the Appellate Body, to its anticipated role as a cornerstone in the new WTO system, and to the equality of and collegiality among all seven members.[11] Discussions focused on the following issues: whether Appellate Body members should be appointed on a permanent or a part-time basis, where its members should be located, the remuneration they should receive and the type and number of support staff with which they should be provided.[12] The Sub-Committee concluded its work in a series of informal consultations, which yielded a set of recommendations on the establishment of the Appellate Body that were circulated on December 2, 1994.[13] A slightly revised version of the recommendations was circulated six days later.[14] These documents were approved by the General Council on January 31, 1995 through the adoption of the report of the Preparatory Committee as a whole, and forwarded to the Dispute Settlement Body ("DSB") for action.[15] The recommendations were then endorsed by the DSB at its meeting of February 10, 1995 and circulated on June 19, 1995 as document WT/DSB/1. The recommendations recognize that "the DSU does not answer all questions which must be settled before the Appellate Body can function effectively", but also that "not all issues connected with the Appellate Body require decisions or recommendations at this point" and that it "is not therefore necessary to tie up all loose ends at this stage."[16]

Overall, the legacy of the Uruguay Round was the creation of a new body to hear appeals from panel reports, along with the skeletal outlines of its procedures. The absence of detailed procedures was compensated for, in part, by the power given to the Appellate Body to adopt its own working procedures, in consultation with Members and the Chairman of the DSB.

III. Institutional Aspects of Appellate Review

A. Governing Instruments

The rules relating to the establishment, constitution, and operation of the Appellate Body are contained in three main legal instruments: (1) the DSU, in particular Articles 17 and

[9] Ministerial Decision of April 14, 1994 at Marrakesh, MTN.TNC/45(MIN), Annex IV.

[10] *See* minutes of the April 29, 1994 Meeting of the Preparatory Committee for the World Trade Organization, PC/M/1.

[11] The committee rejected an initial budget proposal from the Director-General that appeared to propose funding for three Appellate Body members to be hired on a permanent basis and four on a retainer basis. *See* the minutes of the 21 October 1994 meeting of the Sub-Committee on Institutional, Procedural and Legal Matters: PC/IPL/M/7, ¶¶ 84*ff*.

[12] *See*, in particular, the minutes of the October 21, 1994 and November 18, 1994 meetings of the Sub-Committee on Institutional, Procedural and Legal Matters: PC/IPL/M/7, ¶¶ 84–107; and PC/IPL/M/9, ¶¶ 59–61.

[13] PC/IPL/W/15.

[14] PC/IPL/13.

[15] WT/GC/M/1, p. 8. Certain matters referred by the Preparatory Committee to the WTO which concerned WTO bodies other than the General Council were, at the time that the Committee's Report was adopted, remitted to those bodies for further consideration and/or action as appropriate. Thus, "Establishment of the Appellate Body and Rules of Ethical Conduct" were referred to the Dispute Settlement Body.

[16] PC/IPL/13; PC/IPL/W/15; and WT/DSB/M/1, ¶¶ 1 and 2.

18; (2) the *Working Procedures for Appellate Review* (the "*Working Procedures*"); and (3) the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*Rules of Conduct*").[17] As indicated in Article 1.2 of the DSU, certain special or additional rules on dispute settlement in other covered agreements—listed in Appendix 2 to the DSU—also apply in disputes brought under those agreements, and prevail over the rules contained in the DSU in the event of a conflict.[18] For example, certain provisions of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") set forth special, shortened time limits that apply to all stages—including the appellate stage—of disputes that involve prohibited or actionable subsidies within the meaning of that Agreement.[19] Some procedures used in appeals have been established through decisions taken by the Dispute Settlement Body (the "DSB") or through the practice of WTO Members participating in appeals.[20] Lastly, certain of the Ministerial Declarations and Decisions adopted at the conclusion of the Uruguay Round may have implications for Appellate Body procedures.[21]

1. Covered Agreements

The provisions of the covered agreements pertaining to Appellate Body procedures (such as the DSU and the *SCM Agreement*) can be modified only by the Members of the WTO, in accordance with the procedures set forth in Article X of the *WTO Agreement*. The Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes provided for a "full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force" of the *WTO Agreement*, and invited the first Ministerial Conference after the completion of such review "to take a decision . . . whether to continue, modify or terminate such dispute settlement rules and procedures". Although Members engaged in extensive discussion between 1998 and 2000 pursuant to this "DSU Review" mechanism, ultimately no decision was taken and the DSU has continued to be applied without modification. The Doha Development Round of Trade Negotiations, launched in 2001, provides for negotiations on clarifications and improvements to the DSU, and these ongoing negotiations include discussion of possible amendments to certain aspects of appellate review.[22]

2. Working Procedures

The *Working Procedures* consist of detailed provisions regarding all aspects of appellate procedures, and they apply in all appeals. Article 17.9 of the DSU directs the Appellate Body to draw up its working procedures, "in consultation with the Chairman of the DSB

[17] WT/DSB/RC/1. The *Rules of Conduct* are also directly incorporated into the *Working Procedure*s as Annex II. *See* the communication dated January 20, 1997 from the Chairman of the Appellate Body to the Chairman of the DSB, WT/DSB/RC/2.

[18] *See Guatemala—Cement I*, ¶ 65.

[19] *See SCM Agreement*, Article 4, in particular paragraphs 8, 9, and 12 thereof, and Article 7, in particular paragraphs 6 and 7 thereof.

[20] *See*, *e.g., Rules of Procedure for Meetings of the Dispute Settlement Body* (WT/DSB/9); *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council* (WT/L/161); *Working Practices Concerning Dispute Settlement Procedures*, as agreed by the DSB (WT/DSB/6); and *Expiration of Time-Periods in the DSU—Proposal by the Chairman and Secretariat Note* (WT/DSB/W/10 and WT/DSB/W/10/Add. 1), adopted by the DSB at its meeting of September 27, 1995.

[21] For example, the *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*; the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*; and the *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*.

[22] *See* Part V below.

and the Director-General", and requires them to be "communicated to Members for their information."[23] Rule 32(2) of the *Working Procedures* makes explicit that amendments to those Procedures are to be carried out in accordance with the process set forth in Article 17.9 of the DSU, and Rule 32(3) directs the Appellate Body to consider whether amendment of the *Working Procedures* is necessary in the event that WTO Members amend the DSU or the special or additional rules and procedures of the covered agreements.

The DSU explicitly directs the Appellate Body to consult with the Chairman of the DSB on proposed working procedures. In addition, the Chairman of the DSB is required to consult with WTO members on certain issues. Thus, for example, the DSB Decision on Establishment of the Appellate Body specifies that "the DSB Chairman, at the appropriate time, should consult with Members in order to obtain their views on the working procedures prior to advising the Appellate Body".[24] Furthermore, in December 2002, the DSB adopted additional procedures for consultations between Members and the Chairperson of the DSB with respect to amendments to the *Working Procedures*.[25] The existing *Working Procedures* also contain a mechanism to deal with procedural questions not otherwise covered by the *Working Procedures.* Rule 16(1) allows a division hearing an appeal, "in the interests of fairness and orderly procedure" to adopt an *ad hoc* procedure, for purposes of that appeal only, and "provided that it is not inconsistent with the DSU, the other covered agreements and these Rules." When a division adopts a special procedure pursuant to this Rule, it must immediately notify the participants to the appeal as well as the other members of the Appellate Body.

The *Working Procedures* were first adopted by the Appellate Body on February 7, 1996, and came into force on February 15, 1996.[26] The Procedures were drafted by the seven original Appellate Body members, primarily during January 1996. In drafting their procedures, the Appellate Body consulted with the Director-General and the Chairman of the DSB. In addition, the Chairman of the DSB held informal meetings on January 2 and February 1, 1996 in order to discuss the *Working Procedures* with delegations. The *Working Procedures* have been amended three times since their adoption. In 1997

[23] During the Uruguay Round, an early draft text prepared by the Secretariat contained bracketed language that would explicitly have required working procedures drafted by the Appellate Body to be approved by the Council. (MTN/GNG/NG13/W/45, September 21, 1990, *Appellate Review*, Article 2(a)). This language had disappeared by the time that the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (the *Brussels Draft Final Act*) was circulated on November 26, 1990 (MTN.TNC/W/35). A former Appellate Body Member has noted that although, at first blush, an institutional structure that leaves the adoption of working rules to the Appellate Body itself seems "astounding", the "wisdom" of this arrangement in fact becomes "immediately apparent if one considers the alternatives". He asks, in this regard:

> Is it realistic to assume that the Appellate Body would have been able to start its work with any working procedures, if their approval had been entrusted to the DSB, acting under the traditional rule of consensus? At what point in time would such consensus have been brought about? Is it totally unrealistic to assume that even today, the Appellate Body would have to operate without detailed working procedures if the approval of these working procedures had to [have] been left to the DSB, acting according to the traditional consensus principle?

Claus-Dieter Ehlermann, *Six Years on the Bench of the 'World Trade Court'*, 36(4) JOURNAL OF WORLD TRADE 605 at 610–611 (2002).

[24] WT/DSB/1 ¶ 14.

[25] WT/DSB/31. In broad outline, this document provides that, when the Appellate Body requests consultations, pursuant to Article 17.9 of the *Working Procedures*, the Chairperson of the DSB is to inform WTO Members "at the earliest opportunity", and to "inform the Appellate Body that he will seek the views of Members on the proposed amendments and that he will convey any such views to the Appellate Body". In addition, the Chairperson is to allow Members an opportunity to comment on the proposed amendments, allow for such proposed amendments to be discussed in an appropriate DSB meeting, convey to the Appellate Body the views expressed by Members and request the Appellate Body to take them into account.

[26] *Working Procedures,* Rule 32(1).

the Appellate Body amended Rule 5(2) to allow the first Chairman of the Appellate Body to serve for a term of two years, rather than one year.[27] Rule 5(2) was amended a second time in 2001 to provide for the possibility for an Appellate Body member serving as Chairman of the Appellate Body to be appointed to a second one-year term. Thirdly, in September 2002 the Appellate Body provisionally amended the provisions of the *Working Procedures* governing the participation of third parties in appeals.[28] The final version of those amendments came into effect on May 1, 2003.[29] On October 7, 2004, the final version of the most recent amendments to the *Working Procedures* was circulated to WTO Members in document WT/AB/WP/W/9.[30] The amendments to the *Working Procedures* come into force on January 1, 2005, and will apply to all appeals initiated after that date.[31]

3. Rules of Conduct

The *Rules of Conduct* were adopted by a decision taken by the DSB and could, presumably, be modified in the same way, although the Rules do not themselves stipulate any specific amendment procedure.[32] In February 1996, the Appellate Body provisionally attached the draft *Rules of Conduct* as Annex II to the *Working Procedures*, pending the future adoption of the Rules by the DSB. The *Rules of Conduct* were not formally adopted by the DSB until its meeting on December 3, 1996.[33] Thereupon, the Appellate Body confirmed, in accordance with Rule 8(2) of its *Working Procedures*, that the *Rules of Conduct*, as adopted by the DSB, were directly incorporated into the *Working Procedures* and superseded the original Annex 2 thereto. The *Rules of Conduct* were reviewed, in accordance with Section IX:1, within two years of their adoption. No Member objected to the existing text, and the DSB therefore decided to continue to apply the *Rules of Conduct* as originally adopted and "to review them at a later stage, as necessary."[34] The *Rules of Conduct* apply to "covered persons", namely: Members of the Appellate Body, panelists, arbitrators, experts and the staff of the WTO and Appellate Body Secretariats.

B. The Appellate Body Members

1. Legal Framework and Appointment Procedures

Certain general principles governing the establishment and composition of the standing Appellate Body, as well as the requisite qualifications of Appellate Body members, are

[27] WT/AB/WP/3; discussed at DSB meeting on February 25, 1997, WT/DSB/M/29.

[28] *See Third Parties, Third Participants and Passive Observers*, *infra* Subpart IV.B.12.

[29] WT/AB/WP/6.

[30] This document also sets out a new numbering system for documents relating to the *Working Procedures*. Readers should ensure that they are using the most recent version of the *Working Procedures* which, at the time of writing (October 2004) was WT/AB/WP/7, but which will be WT/AB/WP/5 as from January 1, 2005.

[31] Significant changes have been introduced regarding, in particular: the required content of Notices of Appeal; a new requirement to file a Notice of Other Appeal; amendments to Notices of (Other) Appeal; and the deadlines for filing an appellant's submission and for requesting authorisation to correct clerical errors in written submissions.

[32] However, as explained further below, Rule IX.1 does contemplate that a review of the Rules of Conduct would be conducted within two years of their adoption, and that the DSB would decide whether to continue, modify or terminate them.

[33] WT/DSB/M/27.

[34] DSB meeting of January 25, 28 and 29 and February 1, 1999, WT/DSB/M54, p. 42. Rule IX.1 stipulates that a review of the Rules of Conduct was to be conducted within two years of their adoption, and that the DSB was to decide whether to continue, modify or terminate them. At the DSB meeting of November 25, 1998, the Chairman of the DSB referred to this provision, noted that he had not detected a desire among Members for a comprehensive review of the Rules, and suggested that it might be better to wait to gain further experience with the application of the Rules before undertaking such a comprehensive review. WT/DSB/M/51, p. 29.

set out in the first three paragraphs of Article 17 of the DSU. Article 17.1 of the DSU provides that the DSB is to establish a standing Appellate Body composed of seven persons, three of whom will serve on any one appeal. Many of the criteria identified in Article 17 were elaborated upon in the DSB's 1995 Decision on the "Establishment of the Appellate Body" (the "1995 Decision").[35] Members recognized, in that Decision, that in selecting individuals to serve on the Appellate Body, "[i]ssues arise as to its members' expertise, representative balance, impartiality, conditions of employment, and the selection procedures to be used."[36] These issues have periodically been the subject of discussion amongst Members, especially during the processes for appointment of Appellate Body members. Yet even in 1995, the DSB explicitly recognized that, in establishing and composing the Appellate Body:

> The success of the WTO will depend greatly on the proper composition of the Appellate Body, and persons of the highest calibre should serve on it.[37]

(a) Representativeness. Paragraph 3 of Article 17 stipulates that the membership of the Appellate Body as a whole "shall be broadly representative" of membership in the WTO. In 1995, the DSB recognized that the requirement of representative balance implies that "factors such as different geographical areas, levels of development, and legal systems shall be duly taken into account". In 1995 the Chairman of the DSB summarized the views of many WTO Members on this criteria as follows:

> Many delegations believed that the strength of [the] Appellate Body would lie in its diversity of representation reflecting: (i) regional, developed and developing country balance; (ii) adequate representation from regions and countries who were active participants in the trading system including smaller as well as larger countries; (iii) different legal systems, on grounds that the credibility and authority of the Appellate Body had [to] be acceptable to all.[38]

The DSU does not explicitly reserve seats for specific regions and the WTO Members have, on occasion, objected to any suggestion that such an allocation would be proper. During the DSB meeting at which the seven original Appellate Body members were appointed, the DSB Chairman cautioned that:

> The decision to be taken at the present meeting on the Committee's proposal did not mean that the composition of the Appellate Body would remain the same over time and no rights might be derived from the initial composition. The particular regional or national distribution of initial appointments to the Appellate Body therefore, in no way compromised the scope for different regional or national compositions on future occasions.[39]

(b) Qualifications. As regards the requisite qualifications of the individuals who serve as Appellate Body members, Article 17.3 of the DSU prescribes four types of criteria. First, they must be "persons of recognized authority, with demonstrated expertise in law,

[35] WT/DSB/1, ¶ 14.
[36] 1995 Decision, WT/DSB/1, ¶ 4.
[37] 1995 Decision, WT/DSB/1, ¶ 4.
[38] Minutes of the DSB Meetings of May 31, 1995, WT/DSB/M/5, p. 13.
[39] Minutes of the DSB meeting of November 1 and 29, 1995, WT/DSB/M/9, p. 2. At the same meeting, Mexico highlighted that "the present composition of the Appellate Body would not constitute a precedent" (p. 5), Egypt noted that "[t]he composition of the Appellate Body would not mean that any country represented therein would have an automatic right." (p. 5) and Canada emphasized that "no fixed national or regional composition should be established or implied from the present composition." (p. 7) During the second appointment process, in 2000, Japan objected to the nomination letter submitted by Egypt in 2000, which referred to "the seat reserved to Africa and the Middle East". Canada, the United States and Slovenia also indicated that they did not agree that seats on the Appellate Body are reserved for certain countries or regions. Minutes of the DSB meeting of January 27, 2000, WT/DSB/M/74, pp. 21–22.

international trade and the subject-matter of the covered agreements generally." Second, they must be "unaffiliated with any government". Third, they must be "available at all times and on short notice". Fourth, the individuals serving on the Appellate Body are directed to "stay abreast of dispute settlement activities and other relevant activities of the WTO." In addition, as discussed further below,[40] individual Appellate Body members are prohibited from participating in the consideration of any appeals that would create a direct or indirect conflict of interest.

With respect to the first of these criteria, the 1995 Decision of the DSB repeatedly refers to the "overriding concern" that candidates be of high quality. During the first selection process, WTO Members debated whether it was necessary for *each* candidate for appointment to the Appellate Body to possess expertise in *all* of the areas identified in Article 17.3 of the DSU (law, international trade, and the subject-matter of the covered agreements). The Chairman of the DSB noted that consultations between the Selection Committee and Members:

> . . . had indicated widespread views that all individual appointees, whether persons having principally legal or trade policy expertise (including GATT/WTO experience), had to have some demonstrated expertise in all three aspects of the agreed guidelines, namely law, international trade and the subject matters of the WTO Agreement. For appointees who were primarily legal practitioners, a combination of academic, public law and arbitration experience had been judged by most delegations to be the most useful. In this regard, many had also referred to the need for appointees to be able to write their own legal opinions.[41]

As regards the second criteria, the 1995 Decision stipulates that Appellate Body members "should not . . . have any attachment to a government that would compromise their independence of judgment", but adds that this "would not necessarily rule out persons who, although paid by a government, serve in a function rigorously and demonstrably independent from that government." None of the individuals appointed to the Appellate Body to date have been in the pay of any government at the time of their appointment to the Appellate Body, although several had previously worked as government employees or consultants to governments.

The requirement that Appellate Body members be "available at all times and on short notice" suggests, according to the DSB, "that members of the Appellate Body have a priority working relationship with the WTO" but that, at the same time, they "may have other activities".[42] In order to attract high caliber candidates while also affording them the flexibility to pursue other activities, the DSB determined that individuals appointed to the Appellate Body should be offered contracts based on a monthly retainer plus a fee for actual days worked. The DSB also pledged itself to keep under review the issue of whether a move to the full-time employment of Appellate Body members would be warranted.[43] In practice, the growing work load of the Appellate Body in recent years, combined with the requirement that members be "available at all times and on short notice", has at times made it difficult for members to continue to pursue other activities.

(c) Terms of Office. Pursuant to Article 17.2 of the DSU, Appellate Body members are appointed by the DSB for a term of four years. They may be reappointed once, also by decision of the DSB. The terms of the Appellate Body members are staggered in two

[40] *See Conflicts of Interest*, *infra*, Subpart IV. B. 13.
[41] *See* the minutes of the DSB Meetings of May 31, 1995, WT/DSB/M/5, p. 12.
[42] 1995 Decision, WT/DSB/1, ¶ 10.
[43] 1995 Decision, WT/DSB/1, ¶ 11.

groups such that every two years the terms of either three, or four, of the Appellate Body members expire.[44] In order to ensure such staggered terms, three of the original seven Appellate Body members were appointed for an initial term of two—rather than four—years. In one instance, two Appellate Body members who declined to be considered for appointment to a second term had their terms extended by approximately three and a half months.[45] This enabled the Appellate Body to continue its work during a busy period pending the appointment of two new Appellate Body members. When an Appellate Body member is unable to complete his or her term, the person appointed as a replacement is appointed for the remainder of the term, rather than for a full four-year term.[46]

(d) Appointment Processes. Five separate processes have been conducted to appoint Appellate Body members: (i) in 1995, to appoint the original seven Appellate Body members;[47] (ii) in 2000, to replace two of the original Appellate Body members who chose not to seek reappointment;[48] (iii) in 2000, following the unexpected death of original Appellate Body member Christopher Beeby, to appoint a replacement for the remainder of his term;[49] (iv) in 2001, to appoint three members to replace the three original members who had reached the end of their second and final term;[50] and (v) in 2003, to appoint a replacement for James Bacchus, the only original Appellate Body member to serve two full four-year terms.[51] The procedures followed in each case have been very similar, and in accordance with the procedures laid out by the DSB in its 1995 Decision. A six-person Selection Committee is formed, composed of the WTO Director-General and the chairpersons of the DSB, the General Council, and the Councils for Trade in Goods, Trade in Services and TRIPS.[52] Delegations are invited to submit the names and *curricula vitae* of candidates for appointment to the Appellate Body by a designated date. WTO Members may nominate their own nationals or nationals of other Members. The Selection Committee meets with and interviews each candidate. In addition, each candidate is asked to make him or herself available to meet with interested delegations. Following completion of all interviews, the Selection Committee also makes itself available for short meetings with interested delegations. At the end of this process, the Selection Committee recommends to the DSB the specific candidate(s) to be appointed. The DSB then takes a decision on appointment. To date, the DSB has always appointed the candidate(s) recommended by the Selection Committee.

With respect to reappointment of sitting Appellate Body members to a second term, the DSB has, to date, always reappointed members willing to serve a second term. In 1997, when lots were drawn to determine which of the original seven members would

[44] Although all seven original Appellate Body Members were appointed at the same time, pursuant to Article 17.2 of the DSU, the first terms of three of the original seven—determined by lot—expired after only two years. This allowed the present system of staggered terms to come into effect.

[45] The terms of office of Said El-Naggar and Mitsuo Matsushita were extended from their end-date of December 11, 1999 to March 31, 2000. WT/DSB/M/70 , pp. 32–35.

[46] Thus, when Christopher Beeby died while serving as an Appellate Body Member, his replacement, Yasuhei Taniguchi, was appointed for the remainder of Mr. Beeby's term, rather than for a full four years. WT/DSB/M/82, ¶¶ 2 and 3.

[47] The DSB appointed the original seven Appellate Body Members at its meeting of November 1 and 29, 1995. WT/DSB/M/9.

[48] Minutes of the DSB meeting of April 7, 2000, WT/DSB/M/78, pp. 16–22.

[49] Minutes of the DSB meeting of May 25, 2000, WT/DSB/M/82, pp. 2–4.

[50] Minutes of the DSB meeting of September 25, 2001, WT/DSB/M/110, pp. 6–9.

[51] Minutes of the DSB meeting of July 21 and 23, 2003, WT/DSB/M/153, ¶¶ 99–109.

[52] In accordance with the recommendations set forth in paragraph 13 of the 1995 Decision.

have first terms of only two years, the three members whose names were drawn were immediately reappointed for a second term.[53] When, in 1999, two members who had served a first term of four years indicated their willingness to be reappointed, the DSB Chair conducted consultations with delegations. Following this consultation period the DSB decided to reappoint the two individuals.[54] At that meeting, several WTO Members indicated that, in their view, the reappointment of Appellate Body members to a second term should not be "automatic".[55] In 2003, the Chairman of the DSB held consultations to assess whether Members wished to nominate candidates to replace three Appellate Body Members whose first terms were due to expire in late 2003 and early 2004.[56] The three sitting members had expressed their willingness to serve a second term. No WTO Member expressed any such wish.[57] On November 7, 2003, Georges Abi-Saab, A.V. Ganesan and Yasuhei Taniguchi were all appointed to a second term.[58]

(e) Conditions of Employment of Appellate Body Members. With respect to the conditions on which Appellate Body members are to be engaged, the DSU simply establishes the length of the terms, as well as the requirement that Appellate Body members are to be "available at all times and on short notice." Additional details on the conditions of employment were laid down in the DSB's 1995 Decision on the Establishment of the Appellate Body.[59] The DSB there noted that the conditions of employment "should reflect the overriding concern that candidates are of a high enough calibre to ensure the integrity and authority of decisions taken by the Appellate Body". The DSB considered that this concern could be met, while also allowing for the flexibility that would be necessary to allow Appellate Body members to engage in their other activities, by a contractual arrangement providing for compensation in the form of a monthly retainer plus a fee for actual days worked. The monthly retainer was fixed, in that decision, at 7,000 Swiss francs per month, and, as of the time of writing (October 2004) had not subsequently been modified. In addition, current Appellate Body members receive a *per diem* for each day that they are traveling to or working in Geneva (the amount of which is currently equal to the annually-established UN *per diem* rate for Geneva, plus a forty percent premium), a fee per day worked in Geneva or per eight hours worked outside Geneva, and a monthly administrative/communication fee.[60] Travel expenses for Appellate Body members are also covered. Appellate Body members are not considered "staff" of the WTO and do not participate in the WTO pension plan.

Pursuant to Articles 31 and 34 of the Headquarters Agreement between the WTO and the Swiss Confederation, Appellate Body members are entitled to "such privileges and immunities as are granted to diplomatic agents in accordance with the law of nations and

[53] Minutes of the DSB meeting of November 1 and 29, 1997, WT/DSB/M/35, pp. 6–7.

[54] Minutes of the DSB meeting of September 22 and 24, 1999, WT/DSB/M/68, pp. 25–26; and Minutes of the DSB meeting of October 27 and November 3, 1999, WT/DSB/M/70, pp. 32–35.

[55] *See*, *e.g.*, comments made by Australia, India and Mexico at the DSB meeting of October 27, and November 3, 1999, WT/DSB/M/70, pp. 32–35.

[56] Minutes of the DSB meeting of July 21 and 23, 2003, WT/DSB/M/153, ¶¶ 99–109. Yasuhei Taniguchi's first term as an Appellate Body Member expired on December 10, 2003; the first terms of Georges Abi-Saab and A.V. Ganesan expired on May 31, 2004.

[57] Minutes of the DSB meeting of August 18, 2003, WT/DSB/M/154, ¶¶ 42 and 43.

[58] WTO Press Release.

[59] WT/DSB/1, ¶¶ 10–12.

[60] The daily fee paid to Appellate Body Members is 600 Swiss francs, and the administrative/communication fee is 300 Swiss francs per month. As of October 1, 2003, the *per diem* was 451 Swiss francs. None of the current Appellate Body Members reside in Geneva.

international custom."[61] The specific privileges accorded to Appellate Body members include exemption from Swiss federal, cantonal and communal taxes on their compensation, as well from value-added tax on goods and services purchased for their personal use.[62]

The DSB's 1995 decision also provides for WTO Members to review the compensation package of Appellate Body members "to determine whether a move to full-time employment was warranted". Such a review was undertaken in 2001, during the selection process for three new Appellate Body members.[63] The review occurred following the busiest year (2000) that the Appellate Body had ever had, and the members debated, particularly in the light of information showing that, in the year 2000, four of seven Appellate Body members had actually worked more than one hundred per cent of an equivalent full-time position. Nevertheless, in their discussions on the issue, WTO Members could not reach consensus on whether action such as converting the positions into full-time positions, adding additional Appellate Body members, or other steps, was warranted in the light of the heavier than expected workload. The DSB accordingly left the terms of employment of the Appellate Body undisturbed, and agreed to consider reverting to the matter at a later date.

(f) Cost of Appellate Review. The Appellate Body is funded by contributions from WTO Members. Its budget is equivalent to about two percent of the overall WTO Secretariat budget.[64] Although there are no direct fees for initiating or participating in appeals, Members must bear the costs of their participation in appeals, namely, the costs of preparing written submissions on technical legal issues, copying and delivering documents, as well as the costs associated with the attendance of their representatives at Appellate Body hearings in Geneva.

2. The Individual Members

Appellate Body Member (nationality)	Term(s) of Office
Georges Michel Abi-Saab* (Egyptian)	June 1, 2000–May 31, 2004, June 1 2004 –May 31 2008
Luiz Olavo Baptista* (Brazilian)	December 11, 2001–December 11, 2005
Arumugamangalam Venkatachalam Ganesan* (Indian)	June 1, 2000–May 31, 2004, June 1 2004–May 31 2008
Merit E. Janow*(American)	December 11, 2003–December 10, 2007
John Lockhart* (Australian)	December 11, 2001–December 11, 2005
Giorgio Sacerdoti* (Italian)	December 11, 2001–December 11, 2005
Yasuhei Taniguchi* (Japanese)	May 25, 2000–December 10, 2003, December 11, 2003–December 10, 2007

(*Continued*)

[61] WT/GC/1.

[62] *Id.*, ¶ 2. The privileges and immunities granted to Appellate Body Members are equivalent to those granted to the Deputy Directors-General and senior staff of the WTO Secretariat.

[63] *See* the minutes of the DSB meetings held on March 12 and June 20, 2001, WT/DSB/M/101, pp. 25–26; and WT/DSB/M/106, pp. 12–15.

[64] The Appellate Body budget is separate from the WTO Secretariat budget. The 2003 budget for the Appellate Body and its Secretariat was 2,971,200 Swiss Francs. This figure includes fixed costs, such as Secretariat staff costs and the retainer for Appellate Body Members, but does not include variable costs, such as fees for court reporters and the travel and *per diem* costs of the Appellate Body Members, which vary with the number of appeals made in any given year. Such variable costs, which are covered by the Appellate Body Operating Fund, can reach two-thirds or more of the amount of fixed costs. *See Annual Report 2003* (World Trade Organization, Geneva) p. 158, Table IV.3.

Appellate Body Member (nationality)	Term(s) of Office
James Bacchus (American)	December 11, 1995–December 10, 1999, December 11, 1999–December 10, 2003
Christopher Beeby (New Zealand)	December 11, 1995–December 10, 1999, December 11, 1999–March 19, 2000†
Claus-Dieter Ehlermann (German)	December 11, 1995–December 10, 1997, December 11, 1997–December 10, 2001
Florentino Feliciano (Filipino)	December 11, 1995–December 10, 1997, December 11, 1997–December 10, 2001
Julio Lacarte-Muró (Uruguayan)	December 11, 1995–December 10, 1997, December 11, 1997–December 10, 2001
Mitsuo Matsushita (Japanese)	December 11, 1995–December 10, 1999, December 11, 1999–March 31, 2000‡
Said El-Naggar (Egyptian))	December 11, 1995–December 10, 1999, December 11, 1999–March 31, 2000‡

*Sitting Appellate Body member (as of August 31, 2004).
†Deceased March 19, 2000.
‡Term of office extended pending appointment by the DSB of new Appellate Body member.

3. The Chairman

Rule 5 of the *Working Procedures* provides for one of the Appellate Body members to serve as Chairman of the Appellate Body. Pursuant to this rule, the Appellate Body elects one of its members to serve as Chairman for a term of one year, which may be extended for a second consecutive year. When a new Chairman of the Appellate Body is elected, the outgoing Chairman informs the Chairman of the DSB in a communication that is circulated to WTO Members.[65] Rule 5 also identifies the circumstances in which a replacement Chairman will be elected for a full one-year term (permanent incapacity of the Chairman as a result of illness or death or by resignation or expiration of his/her term), and authorizes the nomination of a temporary Chairman in the event that the standing Chairman is temporarily absent or incapacitated. The Chairman is responsible for the overall direction of the Appellate Body business, including supervision of the internal functioning of the Appellate Body and such other duties as his colleagues may entrust to him. In practice, the Chairman represents and speaks on behalf of the Appellate Body in communications with the representatives of other WTO organs, most commonly with the Chairman of the DSB.

The following individuals have served as Chairman of the Appellate Body:

Julio Lacarte Muró	February 7, 1996–February 6, 1998
Christopher Beeby	February 7, 1998–February 6, 1999
Said El-Naggar	February 7, 1999–February 6, 2000
Florentino Feliciano	February 7, 2000–February 6, 2001
Claus-Dieter Ehlermann	February 7, 2001–December 10, 2001
James Bacchus	December 15, 2001–December 10, 2003
Georges Michel Abi-Saab	December 13, 2003–12 December 2004

4. The Appellate Body Secretariat

Article 17.7 of the DSU mandates that the Appellate Body be provided with "appropriate administrative and legal support as it requires." This support is provided through

[65] *See, e.g.*, WT/DSB/11, 5 December 1997; WT/DSB/15, 27 January 1999; WT/DSB/18, 31 January 2000; WT/DSB/22, 31 January 2001; WT/DSB/27, 17 December 2001; WT/DSB/30, 20 December 2002; WT/DSB/36, 17 December 2003.

the Appellate Body Secretariat. In 1995, the DSB approved the recommendations of the Preparatory Committee to the effect that the Appellate Body Secretariat should be "independent" and "administratively separate" from the WTO Secretariat.[66] The DSB also agreed that the size of the Appellate Body Secretariat should depend on the workload of the Appellate Body. At the time of establishment of the Appellate Body, this consisted of a Director, two legal professionals and two administrative support staff. In 2003, the staff of the Appellate Body Secretariat consisted of a Director, ten legal professionals and four administrative support staff.

IV. The Conduct of Appeals

A. Overview of the Mechanics of the Appeal Process

The appeal process within the WTO dispute settlement system consists of several stages: (i) written arguments, consisting primarily of the preparation and filing of the Notice(s) of Appeal and written submissions by the WTO Members participating in the appeal; (ii) oral arguments, presented at an oral hearing attended by the WTO Members participating in the appeal and division of three Appellate Body members assigned to the case; (iii) the Appellate Body's discussions, deliberations and drafting of the decision in the appeal. Strict deadlines govern the entire process. Appeals typically last ninety days, calculated beginning the day after a Notice of Appeal is filed and ending on the day that the Appellate Body report in the dispute is circulated to the Members of the WTO.

The WTO Members that participate in appeals are, by virtue of the *Working Procedures*, designated as "appellants", "other appellants", "appellees", or "third participants" according to their role in the appeal.[67] These labels differ from those given to these WTO Members while they participate in the proceedings before the panel in the dispute.[68] Essentially, an appellant initiates the appeal and makes certain allegations that the panel has erred in its legal analysis. An other appellant (sometimes referred to as a "cross-appellant") does not initiate the appeal, but also makes its own allegations of error on the part of the panel. Appellees (also referred to as "respondents") respond to the allegations of error made by the appellant(s) and other appellants. Third participants have no right to appeal the panel's findings, but have certain rights to participate in the appeal nonetheless.

The appeal process is commenced by an appellant formally notifying the DSB that an appeal is being made and filing a Notice of Appeal with the Appellate Body Secretariat. This must be done within sixty days of the circulation of the panel report and before the panel report is adopted by the DSB. In practice, appellants send one copy of the Notice of Appeal to the Chairman of the DSB and file a copy of the same Notice with the Appellate Body Secretariat.[69] The Secretariat reproduces the text of the Notice of Appeal in a WT/DS document which is then circulated to all Members, usually on the working day following the date on which the appeal is filed. Typically, a Notice of Appeal is a brief (one

[66] WT/DSB/1, ¶ 17. At present, the Appellate Body Secretariat is located in the same building as the WTO Secretariat, the Centre William Rappard in Geneva, and its employees engaged on the same terms as WTO Secretariat employees.

[67] *See Appellants/Other Appellants/Appellees*, *Participants and Parties,* and *Third Parties, Third Participants and Passive Observers* in Subparts IV.B.10, 11, and 12 respectively, below. An "other appeal" is sometimes referred to as a "cross-appeal".

[68] Appellants, other appellants and appellees are parties to the dispute that were a complainant or a respondent before the panel. Third participants were third parties before the panel.

[69] For details as to how this is done, see note 84 below.

to three page) document. Nevertheless, there are certain formal and substantive elements that must be contained in every Notice of Appeal, and Notices that do not comply with these requirements (set forth in Rule 20 of the *Working Procedures*) may be subject to challenge.[70]

On the day that the appeal is filed or the next working day, all of the parties and third parties to the dispute are notified by letter of the composition of the three-person division[71] that will hear the appeal, and of the working schedule for the appeal. The working schedule identifies the deadlines for the various written submissions to be made during the course of the appeal, as well as the date(s) for the oral hearing in the appeal. Careful attention should be paid to the working schedule and accompanying letter, which contain additional instructions to participants regarding their conduct of the appeal. For example, with respect to written submissions, parties are typically asked to file twelve hard copies and one electronic copy of their submission by 5:00 p.m. on the relevant due date. Participants are also requested to file, simultaneously with their submission, an executive summary of that submission. Participants are also requested to use font size 12 in their written submissions, and informed of the physical and e-mail addresses of the Appellate Body Secretariat for the purposes of filing documents. The accompanying letter also contains general instructions regarding the oral hearing in the appeal, specifying a date by which participants are asked to inform the Appellate Body Secretariat if they require official interpreters at the oral hearing, as well as another date by which participants are asked to supply the Appellate Body Secretariat with the names of the members of their delegation who will attend the oral hearing. Lastly, the letter accompanying the Working Schedule identifies the member(s) of the Appellate Body Secretariat staff who should be contacted in the event of questions relating to the appeal process.

Participants in an appeal typically elaborate their arguments most comprehensively in their written submissions. These are due between ten and twenty-five days after the date on which the Notice of Appeal is filed, depending on the participant concerned. The appellant's submission is due first, ten days after the filing of the Notice of Appeal. If another party to the dispute wishes to file its own appeal of the panel report, it does so through the filing of an "other appellant's submission", which sets out the grounds of the "other appeal" as well as all of the written arguments in support of that other appeal. The other appellant's submission, if any, is due fifteen days after the filing of the Notice of Appeal. The remaining submissions, namely appellees' submissions and third participants' submissions, are all due twenty-five days after the filing of the Notice of Appeal.

Although the *Working Procedures* do not formally contemplate such a procedural step, participants will occasionally request the division to make a preliminary ruling prior to the oral hearing. This may necessitate the submission of additional memoranda by the participants.[72] Usually, however, the phase of the appeal that follows the filing of the written submissions is the oral hearing, which is held 40–45 days after the filing of the Notice of Appeal.

In the week before the oral hearing the Secretariat sends, on behalf of the division, a letter to all parties concerning the oral hearing. Typically, this letter informs the party of the time at which the hearing will start (usually 9:30 or 10:00 am), the room in which it will held, and the expected duration of the hearing (most often one day, although occasionally

[70] *See Notice of Appeal* in Subpart IV.B.5 below.

[71] *See Divisions* in Subpart IV.B.8 below.

[72] *See Requests for a Preliminary Ruling, Requests to Change the Deadline for a Written Submission*, and *Requests to Change the Date of the Oral Hearing* in Subparts IV.B.17, 18 and 20, respectively, below.

two or even three days). The letter also informs the participants of the amount of time that they will be allocated to make an oral statement (typically twenty or thirty minutes for participants, ten or fifteen minutes for third participants), and the order in which they will be asked to present those oral statements. Generally speaking, the appellant will be asked to make its oral statement first, followed by the appellee and then the third participants. For participants intending to distribute a written copy of their oral statement, the letter specifies the numbers of copies of the statement that should be brought to the hearing. Finally, the letter reiterates that participants are to send a list of the members of their delegation to the Appellate Body Secretariat by a specified date and time prior to the oral hearing (usually by noon on the day before the hearing).

The room in which the oral hearing is held and the way in which it is laid out depends, to a certain extent, on the number of participants and third participants, and the size of their various delegations. As a general rule, the three members of the division hearing the appeal—with the Presiding Member in the middle—sit at one end of the room, flanked by staff of the Appellate Body Secretariat. The participants are seated in rows perpendicular to the table at which the division is seated. The appellant(s) and appellee(s) sit closest to the division, and the third participants further away. The precise space in which each delegation is to sit is indicated by means of a small notice-board with the name of the relevant WTO Member upon it.

The oral hearing begins with a brief statement from the Presiding Member, who describes how the hearing will proceed and then invites the participants to raise any preliminary matters. In practice, this rarely occurs. If no preliminary matters are raised, then the Presiding Member invites each participant to deliver its oral statement, beginning with the first appellant. Each participant is given a single opportunity to make its opening statement, regardless of whether there is an "other appeal"or not. In other words, an appellant that is also an appellee in the other appeal is expected to use the opportunity to make an opening statement to address *all* of the issues that it wishes to speak to whether those issues were raised in its own appeal, or in the appeal(s) brought by the other participant(s). Of course, no participant is obliged to speak to *all* of the issues, and it is a matter of strategy for each participant to decide how much time to devote to each issue, and when to rely on its written submissions alone regarding a particular issue. It is not uncommon for third participants to decline to make an oral statement during this first phase of the oral hearing.

Once the oral statements have been delivered, the next, and typically the longest stage of the hearing consists of the division asking questions of the participants. Some questions are asked of specific participants, others of all participants. Although control of the proceedings resides with the Presiding Member of the division, in general participants and third participants who wish to respond to a question or to comment on the responses of other participants will be afforded an opportunity to do so. Each delegation indicates its desire to speak by raising its notice-board or by turning the board so that it sits vertically in the holder. Participants are not permitted to pose direct questions to each other. Once the division has finished asking questions of the participants, the participants and third participants will be offered the opportunity to make brief concluding remarks, which typically do not exceed five or ten minutes.

Following the oral hearing, the participants and third participants do not usually have any further active role in the appeal. The Appellate Body holds, shortly after the oral hearing, an "Exchange of Views" in which the three members of the division hearing the appeal meet with the other four members of the Appellate Body to discuss the issues raised in the appeal and to hear the views of their colleagues. Then the division drafts its

report. If, as is usually the case, the report is not ready for circulation on the sixtieth day filing the Notice of Appeal, then the Chairman of the Appellate Body sends a letter to the Chairman of the DSB stating that the Appellate Body cannot provide its report within sixty days.[73] This letter is circulated as a WT/DS document. In the letter, the Chairman of the Appellate Body also indicates the estimated date on which the report will be circulated, which is usually on the ninetieth day following the filing of the Notice of Appeal. On the date of circulation of the report, the Chairman of the Appellate Body transmits the report to the Chairman of the DSB, along with a short cover letter. Both are circulated as WT/DS documents, and both are also distributed to all WTO Members, in their mailboxes at the WTO, late in the afternoon on the circulation date. As a courtesy, the participants in an appeal are usually invited to pick up a hard copy of the report a few hours in advance of circulation to all Members. The participants are asked to agree on a time, not before 12:00 noon, when they will pass by the Appellate Body Secretariat in order to pick up the report on the day of circulation, and to inform the Secretariat of the agreed time. General circulation typically occurs between four and five in the afternoon of the same day.

The Appellate Body is not involved in the process for adoption of the report, which is handled by the DSB and the Council Division of the WTO Secretariat, which services the DSB. By virtue of Article 17.14 of the DSU, an Appellate Body report must be adopted by the DSB and unconditionally accepted by the parties to the dispute within thirty days of their circulation unless the DSB decides by consensus not to adopt it. Every Appellate Body report that has been circulated has also been adopted by the DSB within this thirty-day period.

B. Specific Issues Arising in Relation to Appeals

This subpart discusses an illustrative list of discrete issues relating to Appellate Body procedures, many of which are explicitly dealt with under existing rules or which have arisen in specific disputes. For each issue, relevant rules and rulings by the Appellate Body are identified, and the cases, if any, in which the relevant issue arose are briefly discussed.

1. Right to Appeal

Only parties to the dispute that participated in the proceedings before the panel have the right to appeal the legal findings in a panel report. Third parties before the panel do not have such a right.[74] The right of the parties to appeal is unqualified. Either, both, or all parties may appeal. As long as the appeal is filed in the proper form within the applicable deadline, the right to appeal does not require leave from the Appellate Body, from the DSB, or from any other entity.[75]

[73] This communication is required by Article 17.5 of the DSU.

[74] Article 17.4 DSU. In *EC—Bed Linen* Egypt, a third participant, submitted its views on a number of issues that it considered "fundamental to a proper legal interpretation of the *Anti-Dumping Agreement*." The Appellate Body, however, observed that, "since none of these findings have been appealed, Egypt's comments do not directly bear upon this appeal." (¶ 35)

[75] During the Uruguay Round, contracting parties discussed whether, rather than being "automatic", a party's right to appeal should be contingent either upon the permission of the Council, or a decision by the Appellate Body itself, on "whether the case merited the appellate review". The European Communities suggested that "the body could reject cases where the appeal was groundless". (*See*, *e.g.*, the United States proposal dated April 6, 1990, MTN/GNG/NG13/W/40, Section I.B.3; Canada's proposal dated June 28, 1990, Section C; and the comments of the European Communities at the April 5, 1990 meeting of the Negotiating Group, MTN/GNG/NG13/16, ¶ 7).

2. Deadlines and Time-Limits in Appeals—Sixty-Day Deadline to Initiate the Appeal

By virtue of Article 16.4 of the DSU, any party to a dispute may appeal a panel report within sixty days of the date of circulation of the panel report, provided that the panel report has not been adopted by the DSB. There is no explicit minimum time-period following the date of circulation of the panel report that parties to a dispute must wait before appealing that report.[76] However, a potential appellant may not be able to wait the full sixty days before making its appeal. This is since, in practice, the "triggering event" for an appeal often occurs when one party to the dispute places the adoption of the panel report on the agenda of a DSB meeting within that sixty-day period. This compels any party desiring to appeal the panel report to do so *before* the DSB decides to adopt it.[77]

In one instance, affecting three separate disputes, the DSB agreed to extend the period within which the panel report had to be adopted or appealed. The sixty-day time-period set forth in Article 16.4 of the DSU was scheduled to expire, in those disputes, in the month of August, when there are normally no regularly-scheduled DSB meetings. Accordingly, at the July DSB meeting, the European Communities—the complainant in all three disputes—proposed "the postponement of consideration of these Panel Reports and the extension of the corresponding time-periods for appeal to a future meeting of the DSB at the beginning of September."[78] The three Members that had been respondents before the panel agreed to accept the proposal provided that all their rights were preserved. Two other Members indicated that they had no objection provided that the arrangement was viewed as an agreement among the parties to the disputes rather than a precedent.[79] Thus, these three panel reports were appealed more than sixty days after they had been circulated.

On one occasion, a panel report was appealed on the day that it was circulated. In *US—1916 Act*, the panel report in the complaint by Japan was scheduled to be circulated several weeks after the panel report addressing the complaint by the European Communities. In order to allow the two reports to be appealed simultaneously, the panel decided to circulate only the findings section of its report (not the descriptive part, which had not yet been translated).[80] Accordingly, this version of the panel report was circulated on May 29, 2000 and the United States appealed both panel reports on the same day.[81]

3. Deadlines and Time-Limits in Appeals—Calculating Dates

Rule 17 of the *Working Procedures* identifies the methods to be used for calculating relevant deadlines in appeals. In accordance with Rule 17(1), the date on which an action is taken that starts the clock running is *not* to be included in the calculation of a relevant time-period, but the last day of that period is to be included in the calculation. Thus, for

[76] In practice, parties tend to wait until the second half of the period within which appeal is possible before commencing their appeal. In the first 56 appeals made to the Appellate Body, the average time between circulation of the panel report and the filing of the Notice of Appeal was 42 days.

[77] However, by virtue of Article 16.1 of the DSU, Members have a minimum grace period of at least twenty days in order to consider the contents of the panel report. That provision prohibits the DSB from considering a panel report for adoption until at least twenty days have elapsed following circulation of that report.

[78] *See* the minutes of the DSB meeting held on July 26, 1999, WT/DSB/M/65, p. 19. The disputes affected were: *Chile—Alcoholic Beverages* (WT/DS87/R—WT/DS110/R); *Argentina—Footwear (EC)* (WT/DS121/R); and *Korea–Dairy* (WT/DS98/R).

[79] Minutes of the DSB meeting held on July 26, 1999, WT/DSB/M/65, p. 20.

[80] Mexico objected to this action and argued that early circulation of the Findings section of the panel report (without the descriptive part) in *US—1916 Act* (*Complaint by Japan)* was not consistent with the DSU. Communication from Mexico, WT/DS162/8, July 26, 2000.

[81] The panel report in *US—1916 Act (Complaint by the EC)* had been circulated on March 31, 2000.

example, the ninety-day appeal period begins to run on the first day *after* the filing of the Notice of Appeal (whether or not the day after filing is a working day). Neither the DSU nor the *Working Procedures* provide for any suspension of the running of the ninety-day period for any holiday or recess period, although the possibility of introducing such a system was floated by the Appellate Body in April 2004 in document WT/AB/WP/8. However, in accordance with Rule 17(2) of the *Working Procedures* and the decision of the DSB relating to the expiration of time periods in the DSU,[82] when the end of the ninety-day period falls on a non-working day (that is, on a weekend or a day that is an official WTO holiday[83]), then the deadline will be deemed to have been met when the Appellate Body Report is circulated on the first WTO working day following the day on which the deadline would otherwise fall.

4. Initiation of an Appeal

Article 16.4 of the DSU provides that panel reports are to be adopted by the DSB within sixty days of circulation unless, *inter alia*, "a party to the dispute formally notifies its decision to appeal" and Article 17.5 establishes that the time-period for the appeal begins as "from the date that a party to the dispute formally notifies its decision to appeal". The DSU does not, however, address the mechanics of this "formal" notification process. These are elaborated in Rule 20 of the *Working Procedures.* The first paragraph of Rule 20 stipulates that an appeal is to be commenced by simultaneously notifying the DSB in writing of the appeal and filing a Notice of Appeal with the Appellate Body Secretariat.[84] The second paragraph of Rule 20—dealt with under the next heading—prescribes the content of the Notice of Appeal.

5. Notice of Appeal

According to Rule 20(2) of the *Working Procedures*, a Notice of Appeal must satisfy four requirements. The first three requirements are formal in nature. The Notice must include (a) the title of the panel report under appeal; (b) the name of the party to the dispute filing the Notice of Appeal; and (c) the service address, telephone and facsimile numbers of that party. To date, there have been no allegations that a Notice of Appeal filed does not comply with these formal requirements. The fourth requirement, set forth in Rule 20(2)(d), is more substantive and requires the Notice to include:

> a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel.

In response to requests by participants in appeals, the Appellate Body has considered the scope of this requirement as well as the legal consequences that flow from

[82] WT/DSB/M/7, pp. 9–10, adopting the practice concerning the expiration of time-periods set forth in documents WT/DSB/W10 and WT/DSB/W/10/Add. 1. Although these documents do not explicitly list the deadline set forth in Article 17.5 of the DSU, the list of provisions contained in WT/DSB/W/10/Add. 1 is an illustrative one, and Rule 17 of the *Working Procedures* explicitly applies the DSB decision on the expiration of time periods to appeals.

[83] Rule 109.1 of the *WTO Staff Rules* identifies the following (which may be changed in any given year) as official WTO holidays: New Year's Day, Good Friday, Easter Monday, Ascension Day, Whit Monday, Jeûne genevois, the day after Jeûne genevois, Christmas Day and one other day to be designated by the WTO Director-General.

[84] The DSB has confirmed that the "working practice" to be followed in order to commence an appeal is to send the communication including the Notice of Appeal to the WTO Secretariat with a copy to the DSB Chairman (after having contacted the Council Division to "inform" them of the communication), and to also file the Notice of Appeal directly with the Appellate Body Secretariat. *See Working Practices Concerning Dispute Settlement Procedures*, WT/DSB/6, p. 2. For delivery to the Appellate Body, appellants typically have their Notice of Appeal hand-delivered to the office of the Administrative Assistant of the Director of the Appellate Body Secretariat, where it is date-stamped.

a defective Notice of Appeal. The Appellate Body has also adopted certain amendments to Rule 20(2)(d) which will come into effect on January 1, 2005, as explained document WT/AB/WP/W/9.

In *US—Shrimp*, the appellees asked that the appeal be dismissed on the grounds that the Notice of Appeal filed by the United States was "vague and cursory".[85] The appellees challenged, in particular, the fact that the Notice of Appeal did not identify the numbered paragraphs of the Panel Report containing the findings that were the subject of the appeal. In considering the scope of Rule 20(2)(d), the Appellate Body highlighted that the Notice is to contain a "*brief*" statement, and stressed that the Notice of Appeal is not expected to contain the reasons why the appellant considers the findings appealed to be erroneous, or to serve as a summary or outline of the arguments of the appellant in support of its appeal. These arguments are to be set out in the appellant's submission.[86] In that case, the Appellate Body held that the mere fact that the Notice of Appeal did not identify the numbered paragraphs of the Panel Report containing the findings that were the subject of the appeal was not fatal since "there [was] no mistaking which findings or interpretations of the Panel the Appellate Body [was] asked to review."[87]

In *US—Countervailing Measures on Certain EC Products*, the Appellate Body gave further details as to what it considers must be contained in the Notice of Appeal. In that case, the Notice of Appeal simply identified, without additional explanation, the specific paragraphs of the panel report in which the alleged errors were found.[88]

In examining the requirement in Rule 20(2)(d), the Appellate Body stressed:

> . . . the important balance that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right of defence effectively. . . . [The] requirements under Rule 20(2) serve to ensure that the appellee also receives notice, albeit brief, of the "nature of the appeal" and the "allegations of errors" by the panel.[89]

With respect to two of the three issues identified by the European Communities, the Appellate Body held, in that particular case, that the reference in the Notice of Appeal to certain paragraphs of the panel report was sufficient to meet the requirements of Rule 20(2)(d), although the Appellate Body emphasized that:

> . . . generally, a Notice of Appeal that refers simply to the paragraph numbers found in the "Conclusions and Recommendations" section of a panel report, or that quotes them in full, will be insufficient to provide adequate notice of the allegations of error on appeal, and, hence, will fall short of the requirements set out in Rule 20(2)(d) of the *Working Procedures*.[90]

The third issue raised by the European Communities related to whether the panel had complied with the requirements of Article 11 of the DSU (which requires panels to make "an objective assessment of the matter before it, including an objective assessment of

[85] Appellate Body Report, ¶ 96.
[86] Appellate Body Report, ¶ 95.
[87] *US—Shrimp*, ¶ 96.
[88] The relevant portion of the Notice of Appeal is reproduced at paragraph 51 of the Appellate Body Report;. A copy of the original document, found at WT/DS212/7, is also attached as Annex I to the Report.
[89] ¶ 62.
[90] ¶ 70. In examining whether the specific Notice of Appeal at issue satisfied the requirements of Rule 20(2)(d), the Appellate Body found it appropriate to consider, as well, a document submitted by the United States three days after its Notice of Appeal following an invitation by the Appellate Body to respond to the request for particulars from the European Communities. (¶ 64)

the facts of the case and the applicability of and conformity with the relevant covered agreements"), an issue that was not mentioned in the Notice of Appeal. The Appellate Body noted, in this regard, that since an alleged failure by a panel to comply with Article 11 can, by definition, *only* be raised in an appeal (and not before the panel), any appellant seeking to rely on Article 11 in its appeal "must refer to it in Notices of Appeal in a way that will enable appellees to discern it and know the case they have to meet."[91]

In *Chile—Price Band*, the Appellate Body considered Argentina's argument that a particular issue raised by Chile should not be considered because it was not identified in Chile's Notice of Appeal. The Appellate Body drew an analogy between, on the one hand, the distinction between claims and legal arguments for purposes of Article 6.2 of the DSU and, on the other hand, the distinction between "allegations of error" and legal arguments for purposes of Rule 20 of the *Working Procedures*. In the same way that Article 6.2 requires claims, but not supporting arguments, to be included in a request for establishment of a panel,[92] Rule 20 requires allegations of error, but not supporting legal arguments, to be included in a Notice of Appeal. The Appellate Body considered that the issue raised by Chile—that the Panel had erred in the *order* in which it addressed certain legal issues—was a legal argument in support of the issues identified in the Notice of Appeal. Accordingly, the Appellate Body found no need for the issue of the order of analysis chosen by the Panel to be identified in the Notice of Appeal.[93]

The distinction drawn by the Appellate Body in *Chile—Price Band,* was also considered in *Japan—Apples*, where the Appellate Body did not agree with Japan that an allegation that the Panel failed to comply with Article 11 of the DSU is simply a "legal argument" underlying the issues on appeal. The Appellate Body observed that "Article 11 claims are distinct from those raised under substantive provisions of a WTO agreement". A claim of error under Article 11 is a distinct "allegation of error" and, as such, must be included in the Notice of Appeal.[94]

With respect to the *consequences* that flow from a failure to comply with the requirement in Rule 20(d)(d), the Appellate Body has never, as requested by the appellees in *US—Shrimp,* dismissed an appeal in its entirety on the grounds of a defective Notice of Appeal. The Appellate Body has, however, excluded discrete legal issues from the scope of the appeal when those issues have not been sufficiently clearly presented in the Notice of Appeal.

In *EC—Bananas III*, the Appellate Body excluded a contested panel finding from the scope of the appeal on the grounds that Ecuador, the appellee, had no notice that the European Communities was appealing that finding. The finding was not identified in the Notice of Appeal, and was only referred to in the conclusions of the European Communities' appellant's submission.[95] In *Japan—Apples*, the Appellate Body declined to rule on a claim that the panel had acted inconsistently with Article 11 of the DSU on the grounds that this claim of error was not included in Notice of Appeal.[96]

In *US—Countervailing Measures on Certain EC Products ,* the European Communities asserted that the Notice of Appeal failed to comply with Rule 20(2)(d) and requested

[91] *Id.*, ¶ 74.
[92] *See* e.g. Appellate Body Report, *EC—Bananas III*, ¶¶ 141 and 143; and Appellate Body Report, *US—Carbon Steel*, ¶ 173.
[93] ¶¶ 182 and 183.
[94] ¶ 127.
[95] Appellate Body Report, ¶ 152.
[96] ¶¶ 126–127.

the Appellate Body to "order the United States, pursuant to Rule 16(1) of the *Working Procedures*, immediately to file further and better particulars to its Notice of Appeal identifying the precise legal findings and legal interpretations that it is challenging."[97] At the invitation of the Appellate Body, the United States filed an additional document three days after its Notice of Appeal.[98] In assessing the conformity of the Notice of Appeal with the requirements of Rule 20(2)(d), the Appellate Body found it appropriate, in the particular circumstances of that case, to take account of the document filed by the United States. Having done so, the Appellate Body determined that the issue of whether the panel had complied with Article 11 of the DSU was not properly raised, since neither the Notice of Appeal nor the additional document submitted by the United States explicitly or implicitly referred to Article 11 of the DSU.[99]

In *US—Offset Act (Byrd Amendment)*, Canada filed a request for a preliminary ruling asserting that four questions of fact and law were improperly raised in the United States' appellant's submission because those issues had not been included in the United States' Notice of Appeal.[100] With respect to two of the issues, the Appellate Body examined the Notice of Appeal and held that it did not "provide notice . . . that the United States intended to make claims that the Panel exceeded its terms of reference."[101] The Appellate Body observed that "if an appellee has not received sufficient notice in the Notice of Appeal that a particular claim will be advanced by the appellant, that claim normally will be excluded from the appeal".[102] In that case, however, the Appellate Body observed, the two issues—regarding the panel's terms of reference—were jurisdictional in nature. The Appellate Body considered that "the issue of a panel's jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal."[103] Thus, the Appellate Body ruled on the two issues notwithstanding that it had concluded that the issues were not included in the Notice of Appeal.[104]

In three cases, the Appellate Body did not need to make any ruling based on an alleged failure to comply with Rule 20(2)(d) of the *Working Procedures*. In *US—Lead and Bismuth II*, the European Communities' contended that the United States' Notice of Appeal failed to identify its "claim" on appeal with respect to certain findings made by the panel in that case. The Appellate Body did not, however, need to resolve this issue since, at the oral hearing in that appeal, the United States acknowledged that the relevant findings were findings of fact, and that it did not challenge those factual findings.[105] Similarly, in *EC—Sardines*, the issue of the sufficiency of the Notice of Appeal was raised but not ruled upon. In that case, two days after the European Communities had filed its Notice of Appeal, Peru filed a request for a preliminary ruling asking that four of the nine points raised in that Notice be excluded from the appeal on the grounds that

[97] Appellate Body Report, ¶ 52, referring in note 123 to the European Communities' Request for a Preliminary Ruling, ¶ 6.
[98] ¶ 55.
[99] ¶ 75.
[100] WT/DS217/AB/R, WT/DS234/AB/R, adopted January 27, 2003,
[101] ¶ 206.
[102] ¶ 206.
[103] ¶ 208.
[104] In *US—Offset Act (Byrd Amendment)*, the Appellate Body also opined that, in accordance with the general principle that objections to jurisdiction should be raised as early as possible, "it would be preferable, in the interests of due process, for the appellant to raise such issues in the Notice of Appeal, so that appellees will be aware that this claim will be advanced on appeal." (¶ 208)
[105] Appellate Body Report, ¶¶ 65 and 66.

they did not satisfy the requirements of Rule 20(2)(d) of the *Working Procedures*.[106] Subsequently, however, the European Communities withdrew that Notice of Appeal and filed a replacement Notice of Appeal, thus rendering moot the issue of the conformity of the original Notice with the requirements of Rule 20(2)(d).[107] Lastly, In *US—Offset Act (Byrd Amendment)*), Canada filed a request for a preliminary ruling asserting that four questions of fact and law were improperly raised in the United States' appellant's submission because those issues had not been included in the United States' Notice of Appeal.[108] With respect to two of the issues, the United States clarified that it was not, in its appeal, asking the Appellate Body to make rulings under Articles 11 and 12.7 of the DSU, and the Appellate Body did not, therefore, need to consider whether it could make such rulings notwithstanding that they were not expressly mentioned in the Notice of Appeal.

6. Scope of Appellate Review

In addition to the limitations imposed by the Notice of Appeal filed in each case, the scope of review in appeals is defined primarily by Articles 17.6 and 17.13 of the DSU. The Appellate Body has identified at least three types of limitations on the scope of appellate review that flow from these provisions: (i) review is limited to *legal* issues; (ii) issues subject to review on appeal must have a sufficient nexus to those covered in the panel report; (iii) certain statements made by a panel that do not amount to a "legal finding or a conclusion" may not be reviewed by the Appellate Body.

With respect to the first criteria, in *EC—Hormones*, the Appellate Body confirmed that, by virtue of Article 17.6 of the DSU, factual findings are, in principle, not subject to review by the Appellate Body.[109] Factual findings made by panels that have been found to be beyond the scope of appellate review include: findings regarding the nationality, ownership and control of certain companies, as well as their respective market shares;[110] findings that fair market value was paid for all productive assets in a privatization;[111] a finding that certain information had not been disclosed to interested parties during a domestic anti-dumping investigation;[112] findings regarding the difference in the costs of production of an exporter and domestic producers made by an investigating authority that were affirmed by the panel;[113] and a finding regarding whether an international standard was adopted by consensus.[114] Similarly, in *Korea—Alcoholic Beverages*, the Appellate Body declined to review the factual basis for the panel's finding that the Korean alcoholic beverage soju is directly competitive with or substitutable for products such as whiskey, gin and vodka. The panel's finding was based on the its examination and weighing of factual evidence in the form of market studies comparing, for example, marketing practices,

[106] ¶ 11. The original Notice of Appeal is found at WT/DS131/10. Since the subsequently filed Notice of Appeal (WT/DS131/12) contains more elaborated versions of points (d), (f), (g) and (h) of the Notice of Appeal, it appears that these were the points, in the original Notice, that Peru contended did not conform to the requirements of Rule 20(2)(d).

[107] ¶¶ 12, 13, and 136. Note that the Appellate Body has adopted a new Rule 23 *bis* to the *Working Procedures*, which will come into effect on January 1, 2005, and which will allow an appellant to apply for leave to amend its Notice of Appeal. *See* WT/AB/WP/W/9.

[108] WT/DS217/AB/R, WT/DS234/AB/R, adopted January 27, 2003,

[109] ¶ 132.

[110] Appellate Body Report, *EC—Bananas III*, ¶ 239.

[111] *US—Lead and Bismuth II*, ¶ 66.

[112] *EC—Tube or Pipe Fittings*, ¶ 141.

[113] *Id.*, ¶ 177.

[114] *EC—Sardines*, note 145 to ¶ 226.

methods of production, taste, colour, and places of consumption for all such alcoholic products.[115]

At the same time, the Appellate Body has ruled that the issue of the *consistency* of a given fact or set of facts with the requirements of a treaty provision is "a legal characterization issue" and, as such, a legal issue reviewable on appeal. For this reason, the Appellate Body held, in *Canada—Periodicals* that the panel's finding on "like products", for the purposes of Article III:2 of the GATT 1994, was reviewable.[116] In *US—Section 211 Appropriations Act*, the Appellate Body considered that, in order to address the issues raised in the appeal, it was compelled to examine the interpretation given by the panel to the relevant provision of U.S. legislation, observing that the "meaning given by the Panel to Section 211 is, thus, clearly within the scope of our review as set out in Article 17.6 of the DSU."[117] Furthermore, the Appellate Body has on several occasions employed the technique of "completing the analysis". This approach enables the Appellate Body, when it has reversed a legal finding in the panel report, to nevertheless seek to make a ruling so as to resolve the dispute between the parties and facilitate the prompt settlement of that dispute. As explained in *US—Section 211*, the Appellate Body has "completed the analysis where there were sufficient factual findings in the panel report or undisputed facts in the panel record to enable us to do so", has not where there were not, and, in one appeal, declined to complete the analysis with respect to a "novel" issue that had not been argued in sufficient detail before the panel.[118] The Appellate Body does not possess a "remand" power, that is, the ability to send a dispute back to the panel for a redetermination of the facts. This means that, in some appeals, when the Appellate Body has reversed the panel's legal findings and determined that the factual record was insufficient to allow for completion of the analysis, no ruling was made on those legal issues.[119]

Second, the Appellate Body has pointed out that the text of Article 17.6 contemplates a nexus between the issues appealed and the panel report—that any legal issues appealed will be legal issues that were covered in the panel report or developed by the panel. In *Canada—Aircraft*, the Appellate Body found that a new argument raised by Brazil was beyond the scope of review defined in Article 17.6, reasoning that although new arguments are not *per se* excluded from the scope of appellate review, Article 17.6 precluded the Appellate Body from ruling on a new argument that would require it to solicit, receive and review new facts that were not before the Panel, and were not considered by it.[120] Similar reasoning led the Appellate Body to decline to consider an argument in *US—FSC* because the panel "was simply not asked to address the issues raised by the United States' new argument."[121] In *EC—Asbestos* the Appellate Body declined to rule on Canada's claims under the *TBT Agreement* in part because the panel had not addressed these claims and, therefore "there are no 'issues of law' or 'legal

[115] *Korea—Alcoholic Beverages*, ¶ 161. In that appeal, the Appellate Body reviewed, and upheld, the panel's interpretation of the phrase "directly competitive or substitutable" in *Ad* Article III of the GATT 1994, but declined to "second guess" the panel's appreciation of the evidence that it used in applying its interpretation to the facts of that case.

[116] Appellate Body Report, p. 22.

[117] *US—Section 211 Appropriations Act,* ¶ 106.

[118] Appellate Body Report, *US—Section 211 Appropriations Act*, ¶ 243.

[119] *See e.g.* Appellate Body Report, *US—Corrosion-Resistant Steel Sunset Review* ¶¶ 138 and 190; Appellate Body Report, *US—Softwood Lumber IV,* ¶ 122; and Appellate Body Report, *US—Section 211 Appropriations Act*, ¶ 243 and notes thereto.

[120] Appellate Body Report, ¶ 211.

[121] Appellate Body Report, ¶ 103.

interpretations' regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU."[122]

Third, the Appellate Body has also found that not every statement made by a panel when it addresses a legal issue can necessarily be characterized as a "legal finding or conclusion" which the Appellate Body may, in accordance with Article 17.13 of the DSU, "uphold, modify or reverse". Accordingly, "purely a descriptive and gratuitous comment" by the panel was held to be beyond the scope of review in *United States—Wool Shirts and Blouses*,[123] as was a descriptive comment contained in a footnote to the panel report in *European Communities—Poultry.*[124]

Finally, on two occasions, WTO Members, in commenting on Appellate Body reports at the time of their adoption, have raised issues that arguably relate to the scope of appellate review. At the time of the adoption of the Appellate Body Report in *US—Cotton Yarn*, Pakistan underlined the contents of Article 17.12 of the DSU, which states that the Appellate Body "shall address each of the issues" raised in the appeal. In Pakistan's view, the Appellate Body, in that case, had not fulfilled its mandate under Article 17.12 because it had not addressed all of the issues submitted to it.[125] The United States, at the meeting to adopt the Appellate Body Report in *US—Hot-Rolled Steel*, asserted that the Appellate Body, in that case, had exceeded the bounds of its authority by addressing an issue that neither the United States nor Japan had appealed.[126]

7. Standard of Review on Appeal

The DSU does not provide express guidance as to the degree of scrutiny that the Appellate Body is to apply to issues raised on appeal. The Appellate Body has seldom addressed this question directly, although examination of its reports suggest certain factors that influence the standard of review that is applied. Broadly speaking, at least four types of considerations may be distinguished.

First, with respect to issues of interpretation of the covered agreements, the Appellate Body seems to review a panel's work with a view to determining whether the panel properly employed the customary rules of interpretation of public international law in order to arrive at a correct interpretation of the provisions at issue,[127] and a proper application of the relevant legal norms to the facts of the case.

Second, as regards a panel's treatment of facts, the Appellate Body has consistently stated that, in principle, factual findings made by a panel fall beyond the scope of appellate review.[128] At the same time, the Appellate Body has recognized that, when a panel's treatment of the facts exceeds the bounds of the discretionary authority afforded to panels

[122] Appellate Body Report, ¶ 82.
[123] Appellate Body Report, p.17.
[124] Appellate Body Report, ¶ 107.
[125] Minutes of the DSB meeting of November 5, 2001, WT/DSB/M/112, ¶ 24.
[126] Minutes of the DSB meeting of August 23, 2001, WT/DSB/M/108, ¶ 68.
[127] The Appellate Body has consistently employed the general rule of interpretation set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. In doing so, the Appellate Body focuses, first, on the text of the relevant provisions, seeking to ascribe meaning to all relevant provisions of the relevant agreement(s), and thereby to ascertain the common intentions of the WTO Members who drafted the treaty. *See*, e.g. Appellate Body Report, *US—Gasoline*, p. 17; Appellate Body Report, *Japan—Alcoholic Beverages II*, p. 11; Appellate Body Report, *India—Patents (US)*, ¶ 45; *EC—Computer Equipment*, ¶ 84; Appellate Body Report, *US—Carbon Steel*, ¶¶ 61–62; and Appellate Body Report, *US—Offset Act (Byrd Amendment)*, ¶ 271.
[128] "Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body." (*EC—Hormones*, ¶ 132)

by virtue of the provisions of Article 11 of the DSU, then the panel's factual findings may constitute an error of law and, as such, be scrutinized on appeal.[129] However, in approaching factual matters, "the role of the Appellate Body differs from the role of panels".[130] Thus, on appeal, the Appellate Body will not conduct a new review of the evidence and make its own findings. Rather, the Appellate Body examines whether the panel's treatment of the facts met the standard of "objective assessment" prescribed by Article 11 of the DSU. In so doing, the Appellate Body will not find an error of law if it determines that it might have reached a different factual finding than the panel, but only if it determines that the panel's treatment of the facts was not "objective", for example if the panel willfully disregarded or distorted evidence, or made affirmative findings that lacked an evidentiary basis.[131]

Third, Article 12.7 of the DSU imposes an obligation on panels with respect to the *form* of their reports and the *reasoning* that they use to support their findings.[132] The Appellate Body has made clear that, in examining a claim that the panel failed to comply with its obligations under Article 12.7, the nature of the review to be undertaken is formal—rather than substantive—in nature. In assessing compliance with Article 12.7, it is irrelevant whether the Appellate Body agrees with the factual or legal findings of the panel. Rather, the Appellate Body will consider whether the panel sufficiently identified the relevant facts and the applicable legal norms, and explained how the law applies to the facts. Panels need not provide extensive reasoning, nor produce a wholly self-contained report, as long as the report, read in context and taking account of references made to other sources, reveals that the panel has satisfied the minimum standard of disclosing the essential or fundamental justification for its findings and recommendations.[133]

Finally, with respect to *procedural* issues dealt with by panels, the Appellate Body will examine whether a panel ruling has abrogated any rights given to parties under the DSU or infringed upon due process. Provided that these minimum guarantees have been respected, the Appellate Body has tended to afford panels a degree of latitude in making procedural rulings. In *EC—Hormones*, the Appellate Body suggested that an appellant requesting the Appellate Body to reverse a panel's ruling on a procedural matter in a specific situation that is not explicitly regulated "must demonstrate the prejudice generated by such legal ruling."[134]

8. Divisions

Article 17.1 of the DSU provides that three of the seven Appellate Body members are to hear any given case, and that the three shall serve on the basis of rotation, as set forth in the *Working Procedures*. A "division" is defined in the *Working Procedures* as

[129] *EC—Hormones*, ¶ 132; *US—Wheat Gluten*, ¶ 151.

[130] *US—Wheat Gluten*, ¶¶ 150–151.

[131] *EC—Hormones*, ¶¶ 131–142; *EC—Poultry*, ¶¶ 131–136*; Australia*—Salmon, ¶¶ 262–267; *Korea—Alcoholic* Beverages, ¶¶ 159–165; *Japan—Agricultural Products II*, ¶¶ 140–142; *India—Quantitative Restrictions*, ¶¶ 149 and 151; *Korea—Dairy Safeguard*, ¶¶ 137 and 138; *US—Wheat Gluten*, ¶ 151; *US—Carbon Steel*, ¶ 142; *EC—Bed-Linen (Article 21.5—India)*, ¶¶ 159–182, *US—Steel Safeguards*, ¶ 497; and *Japan—Apples*, ¶¶ 221 and 222.

[132] Article 12.7, among other things, requires the report of every panel to "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes."

[133] Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—US)*, ¶¶ 106–109 and 124–126; *Argentina—Footwear (EC)*, ¶ 149; *Chile—Alcoholic Beverages*, ¶ 78; *Korea—Alcoholic Beverages*, ¶¶ 166, 168.

[134] *EC—Hormones*, note 138 to ¶ 152.

"the three Members who are selected to serve on any one appeal in accordance with paragraph 1 of Article 17 of the DSU and paragraph 2 of Rule 6". According to paragraph 2 of Rule 6, divisions are to be composed "on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all members to serve regardless of their national origin". Thus, unlike panelists[135], there is no bar on a member of the Appellate Body serving on a division assigned to hear an appeal involving the WTO Member of which he or she is a national.

Since its inception, the Appellate Body has employed a confidential process for determining the composition of divisions in accordance with these principles. The composition of a division is not known until the Notice of Appeal has been filed. A member assigned to a division may only be excused from that division for the reasons indicated in Rule 6(3) of the *Working Procedures*, namely: (i) a disclosed conflict of interest or a finding of a "material violation" within the meaning of the *Rules of Conduct*;[136] (ii) due to incapacity resulting from illness or "other serious reasons" which have been disclosed to and discussed with the Chairman of the Appellate Body and the Presiding Member of the division; or (iii) because that Appellate Body member has notified the Chairman of the Appellate Body in writing of his or her intention to resign. In such cases, Rule 13 provides that an alternate member will be selected, in accordance with the principles set forth in Rule 6(2) of the *Working Procedures*, for the division.[137] This has occurred three times. In *US—Lead and Bismuth II*, one member of the division hearing the appeal passed away shortly after the oral hearing in the appeal had been held, and a replacement was selected.[138] In *US—Offset Act* (*Byrd Amendment*), approximately one month after the filing of the Notice of the Appeal, but prior to the oral hearing, the participants were informed that, in accordance with Rule 13 of the *Working Procedures*, the Appellate Body had selected an Appellate Body member to replace the Presiding Member of the division hearing the appeal since the original Presiding Member "was prevented from continuing to serve on the division for serious personal reasons".[139] For the same reasons, a replacement was also selected for one member of the original *US—Softwood Lumber IV* division.[140]

As discussed in section 30 below, although decisions are made by divisions of the Appellate Body, under the "collegiality" rule the division is instructed to "exchange views" with all other members of the Body before issuing its decision.

9. Presiding Member

Pursuant to Rule 7 of the *Working Procedures*, one member of each division is elected as the Presiding Member of that division. The Presiding Member has responsibility for coordinating the overall proceedings in that appeal, chairing the oral hearing and meetings relating to that appeal, and coordinating the drafting of the Appellate Body Report. The Presiding Member is elected or agreed by the members of the division once the composition of that division is known. In electing a Presiding Member for the division, the practice of the Appellate Body to date has tended to reflect the principles of rotation and equal opportunity to serve as Presiding Member, rather than being based, for example, on seniority.

[135] Article 8.3 of the DSU precludes citizens of Members that are involved as a party or third party in a dispute from serving as a panellist in that dispute unless the parties to the dispute agree otherwise.

[136] *See Conflicts of Interest*, Subpart IV.B.13 below.

[137] Rule 13, referring to Rule 6(2) and (3) of the *Working Procedures*.

[138] ¶ 8.

[139] ¶ 8.

[140] ¶ 10.

10. Appellants/Other Appellants/Appellees

The DSU authorizes any WTO Member that was a party in panel proceedings to appeal the panel report. Third parties to the panel proceedings have no such right of appeal.[141] The *Working Procedures* define the party that files a Notice of Appeal and initiates the appeal process as the "appellant". For appellants, Rule 20 governs the filing of the Notice of Appeal and Rule 21 sets out the deadline (within ten days—to become seven days as of January 1, 2005—of the filing of the Notice of Appeal) and required content for the written submission to be made by the appellant.

Once an appellant has initiated an appeal by notifying the DSB and filing its Notice of Appeal, any other Member that was a party in the panel proceedings may also decide that it wishes, independently, to appeal issues of law and legal interpretation in the panel report. Such Members have, in principle, two options, which are laid out in Rules 23(1) and (4) of the *Working Procedures*. The first option, which is more commonly used, is for the Member to become what is called an "other appellant". "Other appellants" are also referred to as "cross-appellants".[142] An other appellant initiates its appeal, defines the scope of that appeal, and sets out the written arguments in support its appeal through the filing of a single document . This document is known as the "other appellant's submission". Rule 23(1) of the *Working Procedures* provides that other appellants' submissions—if any—must be submitted within fifteen days of the date of filing of the Notice of Appeal.[143] Although it may address some, all, or none of the issues appealed by the appellant, an other appellant's submission is not intended to be a direct response to the Notice of Appeal or appellant's submission. Rather, both appellants and other appellants are also "appellees", sometimes referred to as respondents. Appellees have the right to respond, through the filing of an appellee's submission (due 25 days after the filing of the Notice of Appeal) as well as in their oral arguments, to the issues appealed by another party.[144]

The second option for a Member that was a party in the panel proceedings to appeal the panel report is for that Member to file its own, separate Notice of Appeal, in accordance with Rule 23(4) of the *Working Procedures*. The panel report would then be the subject of two distinct appeals. In such circumstances, Rule 23(5) of the *Working Procedures* provides that "a single division shall hear the appeals". Although these rules appear to contemplate the possibility that multiple appeals of the same panel report could run on different time schedules if the different appealing parties do not file their respective Notices of Appeal on the same day, in practice this has never occurred. See the discussion under the heading *Multiple Appeals, "Joinder" of Cases on Appeal, Joint Hearing, Subpart IV.B.22* below.

In the first appeal to come before it, the Appellate Body made clear that an issue must be specifically appealed—by an appellant or other appellant—to be properly before the Appellate Body. Parties to the dispute that do not file a Notice of Appeal or an other appellant's submission cannot appeal issues in an appellee's submission. The appeal in *US—Gasoline*[145] was brought by the United States, which filed a Notice of Appeal and appellant's submission. In their appellees' submissions, Venezuela and Brazil made

[141] Article 17.4 DSU.

[142] Note that important changes affecting other appellants, including a new requirement to file a Notice of Other Appeal, will be introduced to Rule 23 of the *Working Procedures* as from January 1, 2005.

[143] Other appellant's submissions—often known as "cross-appeals"—are filed in roughly half of the appeals brought before the Appellate Body.

[144] Thus, the *Working Procedures* define an "appellee" as a party to the dispute that has filed a submission pursuant to Rule 22 or Rule 23(3) of the *Working Procedures*.

[145] Appellate Body Report, WT/DS2/AB/R, adopted May 20, 1996, DSR 1996:I, 3.

arguments on two issues that had not been appealed by the United States. Neither Venezuela nor Brazil had filed a Notice of Appeal pursuant to Rule 23(4) of the *Working Procedures* and Article 16.4 of the DSU, or an other appellant's submission pursuant to Rule 23(1) of the *Working Procedures*. The Appellate Body refused to rule on these two issues, reasoning, in part, that:

> Venezuela and Brazil could have appealed the Panel's finding and non-finding on the two matters by taking advantage of Rules 23(1) or 23(4) of the *Working Procedures* and thereby placing the Appellate Body in a position to dispose of those issues directly in one and the same appellate proceeding.[146]

11. Participants and Parties

The term "participant", which is defined in the *Working Procedures*, is used for WTO Members that participated as a party to the dispute in the proceedings before the panel and are also participating in the appeal. The term "party" is, by virtue of the *Working Procedures,* reserved for a Member that was a complaining or a defending party in the panel proceedings. A Member that was not a party before the panel cannot become a "participant" in the appeal in that dispute. A Member that was a complaining or defending party in the panel proceedings does not become a "participant" in the appeal until it takes the prescribed action—either the filing of the Notice of Appeal, the filing of an other appellant's submission, or the filing of an appellee's submission. Even if it does not take such action, however, a "party" enjoys essentially the same rights as "participants" under the *Working Procedures*, including to receive notification of various steps, and copies of all documents filed, in the appeal.[147] To date, no Member involved as a party in the panel proceedings has ever opted not to participate in the appeal in the dispute.

12. Third Parties, Third Participants and Passive Observers

These three terms all refer to WTO Members that are not parties to a dispute but which, at the time of establishment of the panel, notified the DSB, pursuant to Article 10.2 of the DSU, of their substantial interest in the matter. Such Members, known as "third parties" under the DSU, are also defined as "third participants" under the *Working Procedures* if they take one or more prescribed steps to participate in the appeal process.[148] By virtue of the definition of "third participant" and Rule 24 of the *Working Procedures*, a third party becomes a third participant in an appeal if, within 25 days of the filing of the Notice of Appeal, it files a written submission or notifies the Appellate Body Secretariat that it wishes to attend the oral hearing in the appeal. If more than 25 days have passed from the filing of the Notice of Appeal, a third party will still become a third participant if it notifies its intention to appear at the oral hearing, although in these circumstances the right of such third participant to make an oral statement and respond to questioning at the oral hearing will be subject to the discretion of the division hearing

[146] *Id.*

[147] The only provisions of the *Working Procedures* that, on their face, apply to participants without mentioning parties are Rules 10(1), (2) and (3) (filing of evidence of a material violation); 18(5) (correction of clerical errors in documents); 28(1) and (2) (additional written memoranda); and 29 (failure to appear).

[148] At a meeting to discuss changes to the definition of "third participant" in the *Working Procedures*, India noted that the DSU does not distinguish between "third parties" and "third participants" and expressed a desire for the Appellate Body to abolish the concept of "third participant" in any future comprehensive review of the *Working Procedures*. Minutes of the DSB meeting of January 27, 2003, WT/DSB/M/142, ¶ 76.

the appeal.[149] The text of the *Working Procedures* draws few distinctions between third parties and third participants.[150] It is not uncommon for WTO Members that were third parties in the proceedings before the panel to refrain from participating in the appellate proceedings.

Third participants enjoy many of the same rights as participants at the stage of appellate review. They are entitled to receive all documents in the case, to submit written briefs, and to appear at the oral hearing in the appeal and respond to questioning at the hearing. The principal difference between the rights of third participants and those of participants is that third participants have no right to appeal the panel report and, thus, no ability to influence the scope of the appeal. In addition, as a matter of practice, third participants are afforded less time than participants—typically half as much time—to make an oral statement at the oral hearing, and usually have fewer, or no questions directed specifically to them during the oral hearing.

In the light of recent amendments to the *Working Procedures*, the concept of "passive observers" is of historic interest only. The original *Working Procedures* did not contemplate participation in the oral hearing by third parties that had not filed a written submission within 25 days of the filing of the Notice of Appeal. Several Members expressed the view that the opportunity to attend the oral hearing and to be heard by the Appellate Body should not depend on the filing of a written submission. The Appellate Body thus adopted an *ad hoc* practice of allowing "passive participation" at oral hearings in certain appeals. Specifically, the Appellate Body allowed third parties that had not filed a third participant's submission to attend—but not to speak at—the oral hearing in the appeal.[151] This practice is no longer used since the Appellate Body amended the provisions of its *Working Procedures* (provisionally on September 27, 2002, and then definitively on May 1, 2003) governing third party participation in appeal proceedings.[152]

13. Conflicts of Interest

According to Article 17.3 of the DSU, Appellate Body members may not participate in the consideration of any dispute that would create a direct or indirect conflict of interest. This principle is buttressed by the more detailed rules and procedures set out in the *Rules of Conduct*, which require covered persons, including Appellate Body members, to "be

[149] Rule 27(3).

[150] Like third participants, third parties are entitled to be notified of various steps taken, and to receive documents filed in an appeal. Rule 28(4) appears to operate so as to limit the entitlement of third parties entitled to receive questions and requests for additional written memoranda, as well as the responses thereto, to circumstances in which such questions and requests are made *prior to* the oral hearing in the appeal whereas, under Rule 28(1) and (2), the right of third participants to receive such documents does not appear to be similarly limited.

[151] On this basis, Mexico attended the oral hearing in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R); Paraguay attended the oral hearing in *Argentina—Safeguard Measures on Imports of Footwear* (WT/DS121/AB/R, ¶ 7); Zimbabwe attended the oral hearing in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R, note 4, note 7); Canada and Japan attended the oral hearing in *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (WT/DS177/AB/R and WT/DS178/AB/R, note 2, ¶¶ 8–9); Ecuador attended the oral hearing in *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia* (WT/DS58/AB/RW, note 16 to ¶ 10)), Japan and Nicaragua attended the oral hearing in *Chile—Price Bands* (WT/DS207/AB/R, ¶ 6); and Colombia attended the oral hearing in *EC—Sardines* (WT/DS231/AB/R, ¶ 18). Japan was also authorized to attend the oral hearing on this basis in *India—Autos* but, in the event, the oral hearing was not held as a result of India's withdrawal of its appeal: WT/DS146/AB/R, WT/DS175/AB/R, ¶¶ 12 and 13.

[152] *See* WT/AB/WP/5; WT/AB/WP/6; and WT/AB/WP/7.

independent and impartial," and to "avoid direct or indirect conflicts of interest".[153] The *Rules of Conduct* set out two specific duties: (i) to disclose, and (ii) to avoid, actual or potential conflicts of interest.[154]

An Appellate Body member's duty to "disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality"[155] applies upon a member's appointment.[156] In addition, once a Notice of Appeal has been filed, each Appellate Body member must review the factual portion of the relevant panel report and complete the disclosure form attached as Annex 3 to the *Rules of Conduct*. He or she may consult with the other Appellate Body members before completing the disclosure form.[157] In addition, during a dispute an Appellate Body member is subject to a continuing duty to disclose any new relevant information at the earliest time he or she becomes aware of it.[158] The "Illustrative List of Information to be Disclosed" contained in Annex 2 to the *Rules of Conduct* provides guidance as to the types of disclosure to be made.[159]

If, at the outset of an appeal, an Appellate Body member discloses an actual or potential conflict, then the Appellate Body—excluding the disclosing member—will consider the circumstances and decide whether the member concerned should, if assigned to the division hearing the appeal, continue to be assigned to the division or be excused from it.[160] Neither a member who is excused from a division nor a member who, had he or she been on the division, would have been so excused, may participate in the exchange of views relating to that appeal.[161]

14. Ex Parte *Communication*

There may be no *ex parte* communication concerning matters related to appeals being considered by the Appellate Body.[162] Rule 19 of the *Working Procedures* prohibits the division hearing an appeal and each of its members from meeting with or contacting a participant or third participant in the absence of the other participants and third participants, and also forbids any discussion between a member of the division and a participant or third participant in the absence of the full division, as well as discussions between an Appellate Body member not serving on the division and any participant or third

[153] Article II of the *Rules of Conduct*. *See* also paragraph 8 of the 1995 Decision, WT/DSB/1. The *Rules of Conduct* also apply to the staff of the Appellate Body Secretariat, but not to lawyers or other individuals who represent or advise WTO Members participating in dispute settlement. The latter may be subject to ethics rules in the jurisdictions in which they are qualified, but they are not covered by the WTO *Rules of Conduct*.

[154] Article III of the *Rules of Conduct.*

[155] Article III of the *Rules of Conduct.*

[156] Article VI:2 of the *Rules of Conduct*.

[157] Rule 9(1) of the *Working Procedures* and Article VI.4(b)(i) of the *Rules of Conduct*.

[158] Article VI:5 of the *Rules of Conduct*.

[159] These include such things as financial, professional, employment or family interests, as well as active participation in public interest groups with a declared position relevant to the dispute or published statements of personal opinion on issues relevant to the dispute. However, according to Article VI.3 of the *Rules of Conduct*, an Appellate Body Member's duty of disclosure does not extend to "the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant", and should not infringe upon "the personal privacy" of Appellate Body Members nor "be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve on . . . the Standing Appellate Body. . . .".

[160] Rule 9(3) and (4) of the *Working Procedures*.

[161] Rule 11(2) and (3) of the *Working Procedures*. *See* also Rule 4(3).

[162] Article 18.1 DSU.

participant in the appeal. The prohibition on *ex parte* communication extends as well to communications involving the staff of the Appellate Body Secretariat.[163]

15. Confidentiality

Article 17.10 of the DSU requires that appellate proceedings be confidential, and Article 18.2 provides that written submissions to the Appellate Body shall be treated as confidential. These obligations apply to all Members of the WTO. Each WTO Member is also responsible for ensuring respect for these duties by its officials, as well as by any person that the Member selects as its representative, counsel or consultant.[164]

For Appellate Body members and the staff of the Appellate Body Secretariat, these broad confidentiality requirements are further elaborated in the *Rules of Conduct*. Pursuant to those Rules, "covered persons", defined to include, *inter alia*, members of the Appellate Body and Appellate Body Secretariat staff must, "at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential".[165] These obligations are also supplemented by a personal commitment, made by each member of the Appellate Body when he or she signs a Solemn Declaration on taking office.[166] In addition, at the beginning of each new appeal, all members of the Appellate Body sign the Disclosure Form annexed to the *Rules of Conduct*. In so doing, they acknowledge their "continuing duty . . . to respect [their] obligations regarding the confidentiality of dispute settlement proceedings."

These obligations of confidentiality extend to all aspects of appellate proceedings. As the Appellate Body explained in the *Canada—Aircraft* and *Brazil—Aircraft* cases:

> . . . we take "proceedings" to include, in an appellate proceeding, any written submissions, legal memoranda, written responses to questions, and oral statements by the participants and the third participants; the conduct of the oral hearing before the Appellate Body, including any transcripts or tapes of that hearing; and the deliberations, the exchange of views and internal workings of the Appellate Body. [167]

An allegation that a participant breached its obligations of confidentiality in an appeal has arisen in only one appeal to date. In *Thailand—H Beams*, Thailand alleged that an *amicus curiae* brief submitted by a private association revealed that this association had had access to Thailand's appellant's submission in the appeal. Thailand insisted that the only way for the association to have obtained such access was for the other participant (Poland) or a third participant in the appeal to have breached its obligation to maintain the confidentiality of Thailand's appellant's submission. Thailand underlined, in this regard, that the private law firm hired by Poland as an advisor in the dispute also acted as counsel to the association in question. Thailand requested the Appellate Body to make inquiries of the other participant and the third participants in the appeal in order to determine the source of the breach of confidentiality, and to then take such action as the Appellate

[163] Section VII:2 of the *Rules of Conduct*. *See* also Article 18.1 of the DSU.

[164] Appellate Body Report, *Canada—Aircraft*, ¶ 145; Appellate Body Report, *Thailand—H-Beams*, ¶ 74.

[165] *See also* paragraph 9 of the 1995 Decision, WT/DSB/1.

[166] This Declaration, which parallels the language found in Article 17.10 of the DSU, requires the signatory to "respect the confidentiality of proceedings of the Appellate Body". Appellate Body Secretariat staff sign both a confidentiality undertaking and the Declaration required of all WTO Secretariat staff when commencing employment in the Appellate Body Secretariat.

[167] *Canada—Aircraft*, ¶ 143; *Brazil—Aircraft*, ¶ 121.

Body might deem appropriate.[168] Poland and the third participants in the dispute all insisted that they, and their officials and consultants, had respected the confidentiality of the proceedings. Nevertheless, the Appellate Body observed that there was "*prima facie* evidence that [the private association] received, or had access to, Thailand's appellant's submission in this appeal".[169] The Appellate Body declined to accept the written brief submitted by the private association on the grounds that it was not relevant.[170] The Appellate Body did not conduct any further inquiry as to how, or from whom, the private association had obtained access to Thailand's submission, and made no specific finding that any participant or third participant had breached its duties of confidentiality.

16. Business Confidential Information

In the *Canada—Aircraft* and *Brazil—Aircraft* cases, Canada and Brazil jointly requested that the Appellate Body adopt special, *additional* procedures, pursuant to Rule 16(1) of the *Working Procedures*, in order to ensure the protection of business confidential information, on the grounds that "Article 18.2 of the DSU does not provide adequate procedural protection for confidential proprietary business information of the type that is before the Appellate Body in this case."[171]

The Appellate Body declined this request. The Appellate Body reasoned that such additional procedures were not necessary given that the confidentiality obligations set forth in Articles 17.1 and 18.2 of the DSU apply to *all* WTO Members, their officials, representatives and consultants, to the Appellate Body and its Secretariat staff, and that those provisions cover *all* aspects of appellate proceedings.[172]

17. Requests for a Preliminary Ruling

In a number of appeals, parties have requested the Appellate Body to make preliminary rulings on issues such as: the attendance of private legal counsel at the oral hearing; changes to the Working Schedule for the appeal; the sufficiency of the Notice of Appeal and the proper scope of the appeal; the treatment of confidential information; the participation of private counsel and of third parties at the oral hearing; *amicus curiae* briefs, and the withdrawal and re-filing of a Notice of Appeal. At present, neither the DSU nor the *Working Procedures* set forth specific procedures or rules concerning the making by the Appellate Body of rulings prior to the circulation of the report in the appeal.[173]

[168] Thailand made a number of suggestions as to actions that might be appropriate, including:

> the disqualification from further participation in this appeal of any attorney or law firm which had disclosed the contents of Thailand's submission; the undertaking by such attorneys or law firm that they had destroyed or returned to the Appellate Body all copies of Thailand's written submission, or all written materials that were based on or referred to this submission; the undertaking by CITAC that it had destroyed or returned to the Appellate Body all copies of Thailand's appellant's submission or any written materials that were based on or referred to the submission; and the requirement that the attorneys for Poland or the third parties submit to the Appellate Body a written report setting out in detail all disclosures made by such attorneys to any party not involved in this appeal, including any memoranda they had prepared for, or discussions they had with, clients or potential clients in any way referring to the contents of Thailand's appellant's submission.

Appellate Body Report, *Thailand—H-Beams*, ¶ 67.

[169] Appellate Body Report, *Thailand H—Beams*, ¶ 74.

[170] *Id.*, ¶¶ 74 and 78.

[171] Appellate Body Report, *Canada—Aircraft*, ¶ 127; Appellate Body Report, *Brazil—Aircraft*, ¶ 105.

[172] Appellate Body Report, *Canada—Aircraft*, ¶¶ 141–147; Appellate Body Report, *Brazil—Aircraft*, ¶ 119–125.

[173] Indeed, in *US—Offset Act (Byrd Amendment)*, the United States argued that neither the DSU nor the *Working Procedures* permit the Appellate Body to make preliminary rulings. (¶ 186)

However, in the specific case of requests to modify deadlines in the Working Schedule while an appeal is ongoing, Rule 16(2) of the *Working Procedures* clearly contemplates the making and notification of decisions while the appeal is in progress. For that reason, requests to change the Working Schedule are not considered under this heading, but rather under *Requests to Change the Date for the Filing of Written Submissions* and *Requests to Change the Date of the Oral Hearing* in Subparts IV.B.18 and IV.B.20, respectively, below.

Generally, the Appellate Body has dealt with other types of requests for a preliminary ruling on a case-by-case basis, without commenting upon the legal framework or procedures that apply to such requests and rulings. The Appellate Body usually affords the other parties and third parties an opportunity to comment on the request before ruling on it. In one instance, the Appellate Body held a preliminary hearing on the request.[174] In most instances, the Appellate Body has ruled on the request shortly after it was made, although in certain cases the Appellate Body has refrained from ruling or declined to rule on requests at a preliminary stage of the appeal, and instead dealt with the issues only in its final report.[175] The time at which the Appellate Body deals with a request appears in some cases to be determined by the type of issue raised, since certain issues by their nature require some decision or ruling from the Appellate Body before the date of circulation of the report or before the oral hearing. Typically, even when it rules on a request at a preliminary stage, the Appellate Body also elaborates further, in its final report, the reasons that led it to grant or refuse a particular request.

In *EC—Bananas III*, Saint Lucia filed, on the same day as its joint third participants' submission, a request to allow two of its private legal advisors to participate in the oral hearing. Five days later two third parties filed letters supporting Saint Lucia's request, while the original complaining parties filed letters opposing the request. The next day—six days before the oral hearing was due to begin—the division hearing the appeal granted the request, providing brief reasons that were supplemented in the report in that appeal.[176]

On the 24th day of the appeals in *Canada—Aircraft* and *Brazil—Aircraft*, Canada and Brazil filed a joint request for the Appellate Body to adopt certain business confidential procedures. Four days later, the divisions hearing the two appeals invited Canada and Brazil to submit legal memoranda in support of their request, and offered each of them, as well as the third participants, an opportunity to comment on those memoranda. The divisions then held a joint preliminary hearing on the issue and, the next day, issued a preliminary ruling denying the requests. The four-paragraph ruling was later supplemented by additional reasons in the Appellate Body Reports issued in the two appeals.[177]

In *Thailand—H-Beams*, the Appellate Body received an *amicus curiae* brief submitted by a private industry coalition. Five days later, Thailand submitted a request for a preliminary ruling to the Appellate Body, observing that the *amicus curiae* brief revealed that its authors appeared to have been given access to Thailand's appellant's submission, in violation of the confidentiality obligations in Articles 17.10 and 18.2 of the DSU (*see* Subpart IV.B.15 above). Accordingly, Thailand requested that the Appellate Body reject the brief, but also that it inquire of the participants and third participants in the appeal whether they had disclosed the contents of Thailand's submission to anyone other than a participant or third participant in the appeal. Thailand also requested that, if it were

[174] A single hearing to address joint requests by Canada and Brazil for the Appellate Body to adopt procedures governing business confidential information was held in the simultaneous appeals in *Canada—Aircraft* and *Brazil—Aircraft*. WT/DS70, ¶ 126. WT/DS46, ¶ 104.

[175] *See*, *e.g., US—Offset Act (Byrd Amendment)*, ¶ 186.

[176] ¶¶ 9–12.

[177] ¶¶ 103–125.

determined that any participant or third participant had breached its obligations under Articles 17.10 and 18.2 of the DSU, the Appellate Body take such further action as it deemed appropriate.[178] The Appellate Body sought further information from Poland and from the third participants, all of whom stated that neither they nor their officials, representatives, counsel or consultants had disclosed Thailand's submission. However, Poland also stated that, although it had no reason to suspect wrongdoing, it had accepted the resignation of the private law firm that it had engaged for the appeal. The Appellate Body then issued a ruling in which it stated its belief that "there is *prima facie* evidence that [the private industry coalition] received, or had access to, Thailand's appellant's submission in this appeal" and stated that it had returned the *amicus curaie* brief to the coalition. Thailand then submitted another letter, requesting further action from the Appellate Body, in particular that it inquire directly of the industry association how it came to be in possession of Thailand's submission, that it seek further information from Poland regarding the withdrawal of its private legal counsel, and that the Appellate Body provide additional reasons for its rejection of the *amicus curiae* brief and fully reflect the issue in its report. The Appellate Body did not take any other preliminary measures in response to this request, although the issue was discussed at the oral hearing in the appeal, and additional reasons and explanations were provided in the final report.[179]

In *EC—Sardines*, two days after the European Communities had filed its Notice of Appeal, Peru filed a request for a preliminary ruling asking that four of the nine points raised in that Notice be excluded from the appeal on the grounds that they did not satisfy the requirements of Rule 20(2)(d) of the *Working Procedures*.[180] The Appellate Body sought the views of the participants as to this request, but ultimately did not rule on the sufficiency of the Notice of Appeal since the European Communities withdrew the original Notice of Appeal and filed a replacement Notice of Appeal, at which point Peru dropped its arguments concerning the insufficiency of the original Notice.[181]

In *US—Offset Act* (*Byrd Amendment*), Canada filed a request for a preliminary ruling asserting that certain questions of fact and law were improperly raised in the United States' appellant's submission either because they had not been included in the Notice of Appeal or because they amounted to new factual evidence. Canada sought a ruling that the relevant legal issues be struck from the appeal, and that both those issues and the alleged new factual evidence be declared beyond the scope of appellate review. The division hearing the appeal declined to issue a preliminary ruling, although it did address the substance of the objections raised by Canada both at the oral hearing in the appeal and in the eventual Appellate Body Report in that appeal.[182] The Appellate Body recorded the view of the United States that neither the DSU nor the *Working Procedures* permit the Appellate Body to issue preliminary rulings, but did not explicitly opine on whether it has the authority to do so.[183]

Lastly, prior to the recent changes to the *Working Procedures,* a number of requests to attend the oral hearing were made by third parties that had not filed a third participant's submission. In each case, the Appellate Body solicited the views of the other participants

[178] Appellate Body Report, *Thailand—H-Beams*, ¶ 67.
[179] Appellate Body Report, *Thailand—H-Beams*, ¶¶ 62–78.
[180] ¶ 11.
[181] ¶¶ 12, 13, and 136. Although Peru did not pursue its challenge to the original Notice of Appeal, it did challenge the right of the European Communities to withdraw its appeal conditionally upon the right to file a new Notice of Appeal. *See Withdrawal of an Appeal* in Subpart IV.B.36 below.
[182] ¶¶ 9, 185 and 186*ff*.
[183] ¶ 186.

and third participants in the appeal and granted the requesting third party the right to attend the oral hearing as a "passive observer".[184]

18. Requests to Change the Deadline for a Written Submission

Rule 16(2) of the *Working Procedures* allows a participant or third party to request modification of a date for the filing of a document in "exceptional circumstances, where strict adherence to a time-period set out in [the *Working Procedures*] would result in manifest unfairness." To date, such requests have been made in eight cases. The initial requests were granted in seven of these cases, although subsequent requests made by other participants in two of those seven appeals were denied. The reports in those appeals contain no, or only very brief explanations of the reasons for granting or denying such requests in the reports, although a few reports give some indication as to the types of considerations that a division has found to be persuasive.[185]

Broadly speaking, the division will assess each request in the light of all the surrounding circumstances. In *US—Wool Shirts and Blouses*, the division extended the time for the United States to file its appellee's submission from a Friday to the following Monday, but did not provide reasons for such extension.[186] A two-day extension of the deadline for filing appellee's and third participant's submissions was also granted, without reasons, in *EC—Bananas III*.[187] In *Guatemala—Cement*, Guatemala and Mexico filed, respectively, an appellant's submission and an appellee's submission in Spanish. Taking account of the associated delay for the United States to obtain an English version of the appellant's submission, the division granted the United States an additional two weeks to file its third participant's submission. The division denied, however, Mexico's request that its appellee's submission, filed on the original due date for the United States' submission, be withheld from Guatemala and the United States until the United States had filed its submission.[188] In *EC—Bed-Linen,* the division decided, in the light of the "exceptional circumstances" of the appeal, to extend the time-period for filing the appellee's and third participant's submissions from January 2, 2001 to January 8, 2001.[189] Although the division did not explicitly identify the "exceptional circumstances", it seems likely to have been influenced by the fact that, in the absence of such an extension, these submissions would have been due on the first business day following the Christmas and New Year's holidays. At the time of the Article 21.5 proceedings in the *US—FSC* case, the anthrax scare had resulted in the temporary closure of certain buildings of the United States Congress, including those housing officials with jurisdiction over the issues raised in the appeal. The division specifically determined that these circumstances constituted "exceptional circumstances" within the meaning of Article 16(2) of the *Working Procedures*, and that maintaining the deadline for filing of the appellant's submission in such circumstances would result in "manifest unfairness to the United States". Accordingly, the division

[184] *See* the discussion under the heading *Third Parties, Third Participants and Passive Observers* in Subpart IV.B.12 above.

[185] In *US—Wool Shirts and Blouses* the division granted, without reasons, the request of the United States to extend the deadline for submission of its appellee's submission from Friday 21 March 1997 to Monday 24 March 1997: p. 2. Similarly, in *EC—Bananas III*, the division granted, without reasons, the request of the Complaining Parties to extend by two days the deadline for submission of the appellees' and third participants' submissions: ¶ 3.

[186] P. 2.

[187] ¶ 3.

[188] Appellate Body Report, *Guatemala—Cement I*, ¶ 4.

[189] Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC—Bed Linen*"), WT/DS141/AB/R, adopted March 12, 2001, note 12 to ¶ 6.

granted the United States' request to extend the deadline for submission by seven days, and also extended the deadlines for all other written submissions by seven days.[190]

In *US—Softwood Lumber IV* the Appellate Body denied the request of the European Communities to extend the deadline for the filing of its third participant's submission on the grounds that such an extension would "significantly reduce the time available for the Division to consider carefully the arguments raised therein as well as the time available to the participants to respond to those arguments".[191] The division in that case did not accept the argument of the European Communities that the relevant deadline was "contrary to Rule 24(1) of the *Working Procedures*" because the due date was less than 25 days after the filing of the Notice of Appeal. The Appellate Body underlined that, in the particular circumstances of that case, the European Communities had known of the contents of the Notice of Appeal for more than 25 days, and had enjoyed the usual 15-day period following receipt of the appellant's submission in which to prepare its own submission.[192]

19. Written Submissions

(i) **Working Procedures** The *Working Procedures* provide certain explicit rules regarding written submissions, particularly:

Deadlines: the time periods within which the various submissions must be filed are indicated in the *Working Procedures.* The actual due date can be calculated once the Notice of Appeal has been filed, in accordance the relevant provisions of the *Working Procedures* as well as the DSB *Decision on Expiration of Time-Periods in the DSU.*[193] The specific dates are also indicated to the participants and third participants in the Working Schedule communicated to them at the outset of the appeal, which also specifies that the documents should be submitted by 5:00 p.m. on the date on which they are due. A document that is not filed within the prescribed time-period is not considered filed with the Appellate Body.[194]

Service on other parties to the dispute: Under Rule 18(2), every document filed by a party or third party to the dispute must be served on all of the other parties, participants, third parties and third participants in the appeal. The *Working Procedures* define the "service address" as the address of any party to the dispute, participant, third party or third participant as generally used in WTO dispute settlement proceedings, unless the party to the dispute, participant, third party or third participant has clearly indicated another address. Typically service is effected by delivery to a Member's Geneva Mission, although delivery to a Member's WTO mailbox is sometimes used instead.

Proof of service: Rule 18(3) requires each document filed with the Appellate Body Secretariat to be accompanied by proof that it has been served on all of the other parties, participants, third parties and third participants. "Proof of service" is defined in the *Working Procedures* as a letter or other written acknowledgement that a document has

[190] In so doing, the division did not accede to the European Communities' request that, should the Appellate Body extend the deadline for the filing of the appellant's submission by seven days, then it in turn extend the deadline for the filing of the European Communities' appellee's submission by fourteen days (that is, by the extra seven days afforded the United States *plus* an additional seven days). Appellate Body Report, *US—FSC (Article 21.5—EC)*, ¶ 8.

[191] ¶ 7.

[192] *Id.* In that case, the United States had withdrawn its original Notice of Appeal and re-filed the identical document nineteen days later, along with its appellant's submission. *See Withdrawal of an Appeal* in Subpart IV.B.36 below.

[193] WT/DSB/M/7. Rule 17 of the *Working Procedures* deals with the calculation of deadlines for appellate proceedings, and its paragraph 2 specifically applies this DSB decision to appeals.

[194] *Working Procedures*, Rule 18(1). A failure to file a submission in a timely manner may lead to an "appropriate" order by the division hearing the appeal pursuant to Rule 29 of the *Working Procedures*. *See* Subpart IV.B.35 below.

been delivered, as required, to the relevant Member(s). At present, the Appellate Body usually considers the attachment to a filed document of a list of all of the addressees to whom the document has been sent to constitute sufficient proof of service.

Correction of Clerical Errors: Paragraph 5 of Rule 18 allows Members to "correct" their written submissions, subject to three qualifications. First, correction may only occur "upon authorization by the division"; second, the types of errors that may be corrected are "clerical errors"; and, third, the correction "shall be made within three days of the filing of the original submission" (as of January 1, 2005, this will become within thirty days of the filing of the Notice of Appeal). In practice, Members have rarely had recourse to this rule.
(ii) **Current Practice** In any given appeal, the Appellate Body may also make certain requests regarding written submissions, usually in the letter sent to participants at the outset of the appeal along with the Working Schedule for the appeal. The requests below have commonly been made in recent appeals, but are examples only:

Number: At present, the Appellate Body requests that participants and third participants file twelve hard copies and one electronic copy of each written submission. The electronic version may be submitted on a diskette, delivered along with the hard copies, or by e-mail to the e-mail address indicated in the letter sent to all parties and third parties at the outset of an appeal.

Format: In recent appeals, the Appellate Body has expressed a preference for participants to use 12-point font size in their written submissions. The Appellate Body does not at present normally make other requests regarding the form of written submissions, such as page limits, type of binding, required cover pages, etc.

Executive Summaries: In recent appeals, the Appellate Body has asked participants and third participants making written submissions to submit executive summaries of their written submissions simultaneously with those submissions. The summaries provided by the participants themselves are intended to assist the Appellate Body in its preparation of the "front", or "descriptive" part of the report.

Place for Filing: All correspondence and written submissions filed in appeals must be filed with the Appellate Body Secretariat, *not* the WTO Secretariat. At the time of writing (late 2003) the Appellate Body Secretariat was located on the second floor of the North Wing of the William Rappard Building, and hand-delivered documents were to be brought to office number 2010 or 2011.

Language: Written submissions may be made in any of the three official languages of the World Trade Organization: English, French or Spanish. The Appellate Body typically requests that participants and third participants notify the Appellate Body Secretariat prior to submission of documents in French and Spanish in order that any necessary arrangements for translation can be made.

20. Requests to Change the Date of the Oral Hearing

Rule 16(2) of the *Working Procedures* allows a participant or third party to request modification of a date for the oral hearing in "exceptional circumstances, where strict adherence to a time-period set out in [the *Working Procedures*] would result in manifest unfairness." To date, the divisions involved have given no, or only very brief explanations of their reasons for granting or denying such requests in the reports. Hence, it is difficult to identify the types of circumstances that will in fact be deemed to "result in manifest unfairness" to the party concerned. The Appellate Body will, before deciding on such requests, inquire as to whether the other participants and third participants in the appeal join in, accede to, or oppose the request.

On July 10, 1997, pursuant to Rule 16(2) of the *Working Procedures*, the Government of Jamaica, a third participant in the *Bananas* appeal, asked the Appellate Body to postpone

the dates of the oral hearing from July 21–22, 1997 to August 4–5, 1997. This request was not granted as the Appellate Body was not persuaded that there were exceptional circumstances resulting in manifest unfairness to any participant or third participant that justified the postponement of the oral hearing in this appeal.[195] The division also refused a request by the United States to change the date of the oral hearing in *US—Shrimp (21.5)*.[196]

21. The Oral Hearing

Rule 27 of the *Working Procedures* contemplates that an oral hearing will be held, "as a general rule", thirty days after the filing of the Notice of Appeal. In practice, the oral hearing more typically occurs 40–45 days after the filing of the Notice of Appeal and Rule 27 has been amended, with effect from January 1, 2005, to reflect that practice. The parties and third parties to the dispute are notified of the date of the oral hearing in the Working Schedule for the appeal, which is communicated by the Appellate Body to them shortly after the filing of the Notice of Appeal. In the majority of cases the oral hearing lasts for one day, although in particularly complex cases the hearing may last for two, or even three, days. Participants and third participants are entitled to make their oral submissions in any of the three official languages of the WTO, but are requested to inform the Appellate Body Secretariat in advance if they intend to make their oral submissions in French or Spanish, or if they require interpretation from English into French or Spanish, so as to allow arrangements to be made for interpretation.[197] Due to the obligations of confidentiality that govern appellate proceedings, oral hearings are not open to the public nor to WTO Members not participating in the appeal.[198] However, WTO Members participating in the appeal have the right to include whoever they wish in their delegation.[199] The practice of WTO Members in this regard is quite varied. Delegations typically include government officials from capitals and from Geneva missions, but have at times also included privately-engaged lawyers or consultants, technical experts, and lawyers from the Advisory Centre on WTO Law. The size of delegations also varies considerably, from as few as one to as many as fifteen or more.

22. Multiple Appeals, "Joinder" of Cases on Appeal, Joint Hearing

The DSU does not contain an explicit provision, analogous to Article 9 of the DSU for panels, identifying how the Appellate Body is to deal with multiple appeals relating to the same subject-matter. Rule 23(5) of the *Working Procedures* provides that when there is more than one appeal of a panel report (as opposed to an "other" or "cross-" appeal), those multiple appeals will be heard by a single division. Rule 23(5) does not address the issue of whether a single or multiple reports will be issued in the event of multiple appeals.

In practice, in all appeals relating to the same measure and involving multiple parties, a single division has heard the appeal or appeals and a single report has been issued.[200] In

[195] *EC—Bananas III*, ¶ 4.

[196] *US—Shrimp*, ¶ 11.

[197] In two cases, a WTO Member participating in an appeal requested, and received, permission to bring its own interpreters to the oral hearing so as to have the benefit of interpretation into the language of that WTO Member, which was not an official WTO language.

[198] Thus, oral hearings are attended only by the delegations of Members, the division assigned to the appeal and Appellate Body Secretariat staff. Professional court reporters, who are subject to confidentiality requirements, also attend in order to prepare a transcript of the proceedings for internal Appellate Body records.

[199] In *EC—Bananas III* the Appellate Body ruled, at paragraph 10 of its Report, "that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body". *See Private Counsel* in Subpart IV.B.25 below.

[200] No participant in an appeal has requested separate Appellate Body reports in an appeal involving multiple parties.

cases where multiple complaints were joined before the panel and a single panel report was issued, the cases have remained joined at the appellate stage.[201] A single Appellate Body report was also issued in *EC—Bananas III*, even though the panel established to hear the multiple complaints in that case had issued four separate panel reports. In that dispute, the European Communities filed a single Notice of Appeal in respect of all four panel reports.[202]

In two cases, *EC—Hormones* and *US—1916 Act*, the Appellate Body effectively "joined" cases that were treated, at the panel stage, by separate panels composed of the same persons. The two sets of proceedings before the panel were, in each case, conducted on somewhat different time schedules, and separate panel reports were issued. In each of these cases, the appellant filed two separate Notices of Appeal on the same day. The subsequent documents filed by the appellant, as well as the eventual Appellate Body Report, dealt with all issues together.[203] In *US—1916 Act*, the Appellate Body explained that, although the two Panel Reports were not identical, they were "alike in all major respects".[204] In view of the "close similarity" of the issues raised in the two appeals, "it was decided, after consultation with the parties, that a single division would hear and decide both appeals".[205]

The *Canada—Aircraft* and *Brazil—Aircraft* disputes related to different measures in different countries, and were decided by two different panels composed of different individuals. Nevertheless, these disputes both involved the same WTO Members as parties and third parties in both cases, and raised similar legal issues. The appeals in the two disputes, one by Canada and the other by Brazil, were filed on the same day. A preliminary issue, common to both cases, related to the issue of whether special procedures to protect business confidential information were necessary. In those circumstances, a preliminary hearing to address the issue was held, with the divisions on the two appeals sitting jointly, and the participants and third participants being given the opportunity to make oral statements and respond to questions posed by those divisions.[206]

23. Joint Submissions

Neither the DSU nor the *Working Procedures* address the possibility of participants making joint oral or written submissions during an appeal. In practice, both have occurred. In *EC—Bananas III*, the original complaining parties filed a joint appellant's submission and a joint appellee's submission, and two separate groups of third parties each filed a third participants' submission.[207] In *US—1916 Act*, the European Communities and Japan filed a joint other appellants' submission in respect of both appeals, but each filed its own, separate appellee's and third participant's submissions.[208] In *US—Offset Act* (*Byrd Amendment*), the European Communities, India, Indonesia and Thailand filed a joint appellees' submission, as did Japan and Chile.[209] In *US—Steel Safeguards*, Brazil,

[201] *See*, for example, *US—Gasoline; US—Shrimp; Canada—Dairy;* and *US—Lamb*.
[202] WT/DS27/9.
[203] *See* Appellate Body Report, *EC—Hormones,* ¶ 7 and Appellate Body Report, *US—1916 Act*, ¶ 7.
[204] *US—1916 Act,* ¶ 1.
[205] *Id.,* ¶ 7.
[206] *Brazil—Aircraft*, ¶ 9; *Canada—Aircraft*, ¶ 6. As one Appellate Body member was on both divisions, five Appellate Body members participated in the preliminary hearing.
[207] Appellate Body Report, *EC—Bananas III*, ¶ 3.
[208] ¶ 7.
[209] ¶ 7.

Japan and Korea filed a joint other appellants' submission.[210] In a few cases, where there have been multiple participants sharing the same positions on issues, those participants have divided the issues amongst themselves for purposes of the oral hearing, presumably so as to avoid repetition and allow for the most efficient use of their combined total time for oral argument.

24. Objections

The Appellate Body has identified certain standards that are to be observed by parties to a dispute when they raise objections—for example of a procedural or jurisdictional nature—during the course of dispute settlement proceedings. First, the objection must be "sufficiently specific."[211] In *Mexico—Corn Syrup (Article 21.5—US),* the Appellate Body invoked the "requirements of good faith, due process and orderly procedure" in finding that parties must "explicitly" raise their objections so that the panel, the parties to the dispute, and the third parties, understand that a specific objection has been raised, and have an adequate opportunity to address and respond to it.[212] Second, the Appellate Body has ruled that a party to a dispute must raise its objections "promptly".[213] Otherwise, the Appellate Body has warned:

> A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections.[214]

In the specific context of appeals, the Appellate Body has established that "it would be preferable, in the interests of due process, for the appellant to raise [objections to jurisdiction] in the Notice of Appeal".[215] At the same time, the Appellate Body has held that certain issues going to jurisdiction are so fundamental that they are to be considered even if they are not raised at the earliest opportunity.[216]

25. Private Counsel

Both the DSU and the *Working Procedures* are silent on the issue of who may represent a participant or third participant in the oral hearing. In *EC—Bananas III*, Saint Lucia filed, on the same day as its joint third participants' submission, a request to allow two private legal advisors—not full-time employees of the Government of Saint Lucia—to participate in the oral hearing.[217] The request was opposed by the original complaining parties for a number of reasons, including that the rules of public international law regarding

[210] ¶ 8.

[211] *EC—Hormones*, ¶ 152.

[212] *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 47. In that case, the Appellate Body found, at paragraph 46 of its report, that Mexico had never clearly identified a specific objection, and neither requested the panel to examine, nor to make a ruling on, any such objection.

[213] *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 50. *See also* Appellate Body Report, *United States—FSC*, ¶ 166. Appellate Body Report, *Korea—Dairy Safeguard*, ¶¶ 127–131; and Appellate Body Report, *United States—1916 Act*, ¶ 54. At the same time, the Appellate Body has also held that certain issues going the root of the jurisdiction of panels are so fundamental that, even if parties fail properly to raise objections, panels may nevertheless be obliged to satisfy themselves that they have the requisite authority to proceed. *See* Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 26; Appellate Body Report, *United States—1916 Act*, ¶ 54.

[214] *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 50.

[215] Appellate Body Report, *US—Offset Act (Byrd Amendment)*, ¶ 208.

[216] *US—Offset Act (Byrd Amendment)*, ¶ 208. *See* also *US—1916 Act*, ¶ 54; and *Mexico—Corn Syrup (Article 21.5—United States),* ¶ 36.

[217] ¶¶ 9–12.

diplomatic relations do not afford governments *carte blanche* in naming individuals to represent them in international bodies; that the participation of outside counsel in other international tribunals is authorized only pursuant to specific rules agreed between states—which do not exist in WTO dispute settlement—and that allowing the request of Saint Lucia would constitute a departure from longstanding GATT practice and be inconsistent with the inter-governmental nature of WTO dispute settlement. The Appellate Body, however, decided to grant the request made by Saint Lucia, explaining that:

> . . . there are no provisions in the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), in the DSU or in the *Working Procedures* that specify who can represent a government in making its representations in an oral hearing of the Appellate Body. With respect to GATT practice, we can find no previous panel report which speaks specifically to this issue in the context of panel meetings with the parties. We also note that representation by counsel of a government's own choice may well be a matter of particular significance—especially for developing-country Members—to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings.[218]

In practice, it is not uncommon for delegations to include private lawyers in their delegations at the oral hearing.[219] Even when such individuals do not attend the oral hearing, private counsel often assist Members throughout the various stages of dispute settlement, as the Appellate Body itself observed in the *Bananas* case.[220]

26. Additional Written Memoranda

Rule 28(1) of the *Working Procedures* authorizes a division, at "any time during the appellate proceeding" to address written questions to or to request additional written memoranda from the participants and third participants in the dispute. During the oral hearing in the first appeal brought before it, the Appellate Body requested the participants and third participants to submit the responses to certain questions, in writing, after the hearing, along with a final written statement of their positions.[221] Post-hearing responses to questions and written memoranda were also submitted in *Japan—Alcoholic Beverages*,[222] but in the third appeal brought before the Appellate Body the participants and third participants declined an invitation to submit post-hearing memoranda.[223] Since then, the Appellate Body has on occasion had recourse to this rule in order to request additional written submissions. During the first few years of its existence, the Appellate Body tended

[218] ¶ 12.

[219] The frequency of this practice may increase with the formation of the Advisory Centre on WTO Law, which offers legal services to developing country Members of the WTO, and whose legal staff have already been called upon to make presentations and respond to questioning at oral hearings on behalf of the WTO Member whose interests they represent. *See* www.acwl.ch.

[220] The Appellate Body stated, at ¶ 11 of *EC—Bananas III*, that:

> . . . it is well-known that in WTO dispute settlement proceedings, many governments seek and obtain extensive assistance from private counsel, who are not employees of the governments concerned, in advising on legal issues; preparing written submissions to panels as well as to the Appellate Body; preparing written responses to questions from panels and from other parties as well as from the Appellate Body; and other preparatory work relating to panel and Appellate Body proceedings.

[221] *US—Gasoline*, p. 3.

[222] *Japan—Alcoholic Beverages,* p. 3.

[223] *United States—Underwear*, p. 5. Nevertheless, the United States did submit a written clarification of one of its oral responses to a question, and Costa Rica responded in writing to that clarification.

to request such memoranda, if at all, *after* the oral hearing in an appeal.[224] In recent years, however, the Appellate Body has from time to time received and/or requested written submissions on discrete issues *before* the oral hearing, particularly in appeals presenting procedural issues or in which requests for preliminary rulings are made.[225]

27. Panel Record/Evidence on Appeal

Article 17.10 of the DSU provides, in part, that reports of the Appellate Body are to "be drafted . . . in the light of the information provided and the statements made." The information made available to the Appellate Body includes not only the contents of the panel report and the submissions made by the participants and third participants in the appellate proceedings, but also the record of the panel proceedings. Rule 25(1) of the *Working Procedures* stipulates that the "complete record of the panel proceedings" is to be transmitted to the Appellate Body upon the filing of a Notice of Appeal. Paragraph 2 of Rule 25 sets forth an illustrative list of the types of documents that comprise the panel record.

The limited nature of appellate review under Article 17.6 of the DSU excludes, in principle, the consideration of new evidence by the Appellate Body. The Appellate Body refused, in *US—Offset Act (Byrd Amendment),* to consider two documents referred to by the United States in its appellant's submission. The Appellate Body noted that the documents were not part of the panel record in the case, that Article 17.6 of the DSU limits the jurisdiction of the Appellate Body to issues of law covered in the panel report and legal interpretations developed by the panel, and that the other participants had not had any opportunity to comment on the documents and might not be able to so without themselves introducing new evidence. Accordingly, notwithstanding the United States' assertion that the documents were "available on the public record", the Appellate Body found that the documents constituted new evidence that could not be taken into account in the appeal.[226] The Appellate Body also invoked Article 17.6 in refusing to consider factual information of a scientific and economic nature contained in an *amicus curiae* brief submitted by Morocco in *EC—Sardines.*[227]

28. Experts

Article 17 of the DSU contains no express equivalent of Article 13, which permits panels to seek the assistance of outside experts, although such a power was once proposed during the Uruguay Round negotiations.[228] This may reflect the limited scope of appellate review and the fact that the Appellate Body is not normally called upon to examine factual issues. In practice, the Appellate Body has never sought the assistance of outside experts in an appeal.

[224] *EC—Poultry*, ¶ 6. In *US—FSC (Article 21.5—EC)*, the division requested the United State to reduce certain of its responses to questions to writing, and afforded the European Communities an opportunity to respond to that additional written submission. (¶ 11)

[225] *See EC—Bananas,* ¶¶ 5–7; *US—Shrimp*, ¶ 8; *Canada—Patent Term*, ¶ 8; *EC—Asbestos,* ¶ 50; *Thailand—H-Beams,* ¶¶ 68–70; *US—Section 211 Appropriations Act,* ¶ 13; *EC—Sardines*, ¶ 12; *US—Countervailing Measures on Certain EC Products*, ¶ 7; *US—Offset Act (Byrd Amendment*), ¶ 9.

[226] *US—Offset Act (Byrd Amendment)*, ¶ 222.

[227] ¶ 169.

[228] Shortly after the idea of appellate review had first been raised, Mexico suggested that the Appellate Body "may call on the advisory services of experts outside GATT when it considers this to be necessary. The Chairman of the Panel whose report has been appealed may participate on invitation to clarify to the appellate body the conclusions and recommendations of the Panel report in question". (MTN/GNG/NG13/W/42, Proposal by Mexico dated July 12, 1990, ¶ 15.)

29. Amicus Curiae Briefs

The issue of whether the Appellate Body may accept and consider written submissions from states, entities, and individuals other than the WTO Members that participated in the dispute while it was before the panel has received much attention and generated much controversy in recent years. Both the DSU and the *Working Procedures* are silent on this issue.

The Appellate Body explained the legal basis for its treatment of such submissions in *US—Lead and Bismuth II*, where two briefs were received from industry associations. The appellee and the third participants considered the briefs "inadmissable" and argued that the Appellate Body does not have the authority to accept or consider *amicus curiae* briefs. The United States, the appellant, took the opposite position. In its ruling, the Appellate Body noted that nothing in the DSU nor in the *Working Procedures* either specifically allows or prohibits the acceptance and consideration of *amicus curiae* briefs. The Appellate Body, however, opined that Article 17.9 of the DSU, which allows the Appellate Body to draw up its own working procedures, reflects a "broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements."[229] The Appellate Body also referred to Rule 16(1) of the *Working Procedures*, which allows a division hearing an appeal to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the *Working Procedures*. The Appellate Body concluded:

> . . . that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.[230]

To date, the Appellate Body has never considered fully the contents of an "*amicus curiae*" brief, although it has stated on a number of occasions that it has the authority to do so. The case law does not positively identify the circumstances in which such briefs would be accepted and considered, but the Appellate Body has indicated that it will be inclined to exercise its discretion to refuse to consider such briefs: (i) where the brief is not pertinent or useful; (ii) where the brief contains primarily or exclusively factual information that is beyond the scope of appellate review; and (iii) where the brief is submitted late in the appellate proceedings, such that accepting the brief would interfere with the "fair, prompt and effective resolution of trade disputes" and could impose an undue burden on other participants in the appeal.[231] The four types of situations in which the issue of *"amicus curiae"* briefs has arisen are dealt with, in turn, below.

(i) Briefs attached to parties' submissions: The issue of "*amicus curiae"* briefs in appellate proceedings arose for the first time in *US—Shrimp*.[232] In that case, the United States appended to its appellant's submission three exhibits containing *amicus curiae*

[229] Appellate Body Report, *US—Lead and Bismuth II*, ¶ 39.

[230] *Id*. In paragraph 41 of that report, the Appellate Body emphasized that it has no legal duty to accept or consider *amicus curiae* briefs from individuals or organizations which are not Members of the WTO. It has a legal duty to accept and consider only submissions from WTO Members that are parties or third parties in a particular dispute.

[231] *Ec—Sardines*, ¶ 167.

[232] The concept of *amicus curiae*, or "friend of the court", exists, albeit in different ways, in certain national legal systems. Although the precise definition of an *amicus curiae* varies among different legal jurisdictions, and is unknown in many, it is generally understood to mean an entity or individual, not formally party to legal proceedings, who nevertheless seeks some form of participation in those proceedings, whether to afford the tribunal the benefit of the amicus' particular expertise or possibly in order to focus the tribunal's attention on interests that the parties themselves may not wish to highlight.

briefs from environmental non-governmental organizations. The appellees objected to these briefs and requested that the Appellate Body not consider them. The United States made clear that it agreed with the legal arguments contained in the appended *amicus curiae* briefs "to the extent those arguments concur with the U.S. arguments set out in [its] main submission".[233] The Appellate Body considered that the attachment of a brief or other material to the submission of an appellant or appellee "renders that material at least *prima facie* an integral part of that participant's submission."[234] Taking account of the limited nature of the United States' endorsement of the content of the *amicus curiae* brief, the Appellate Body admitted the briefs as part of the United States' appellant's submission, but added that:

> . . . considering that the United States has itself accepted the briefs in a tentative and qualified manner only, we focus in the succeeding sections below on the legal arguments in the main U.S. appellant's submission.[235]

In the appeal in the Article 21.5 proceeding in the *Shrimp* case, the United States again attached a submission by a non-governmental organization to its submission, and again qualified its endorsement of the arguments contained therein.[236] The Appellate Body decided to "focus [its] attention on the legal arguments in the appellee's submission of the United States."[237]

(ii) Briefs submitted directly to the Appellate Body by non-WTO Members: This is the most common means by which the issue of "*amicus curiae*" briefs has arisen in appeals. In *US—Lead and Bismuth II*, the Appellate Body received two briefs submitted by American steel industry associations. After deciding that it has the legal authority to accept information that it considers pertinent and useful, the Appellate Body declined to take the two briefs into account.[238] In *Thailand—H-Beams*, the Appellate Body received a written brief from a coalition of United States' companies and trade associations. Thailand, the appellee, requested the division to reject the brief. In a preliminary ruling issued on December 14, 2000, the division stated that it saw "no reason to accept the written brief" and that it had thus returned the brief to the coalition.[239]

In *US—Shrimp (Article 21.5—Malaysia)*, the Appellate Body received an *amicus curiae* brief from an individual acting "on his own behalf". The Appellate Body did not find it necessary to take the brief into account.[240] The same individual submitted a brief in the *EC—Sardines* case. There, the Appellate Body referred to the approach it had followed regarding *amicus* briefs in previous cases, confirmed that it has the authority to accept and consider briefs from private individuals and organizations which are not Members of the WTO, but found that the brief submitted by the private individual was

[233] *Letter from the United States*, dated August 13, 1998, quoted in relevant part in paragraph 86 of the Appellate Body Report.
[234] Appellate Body Report, *US—Shrimp*, ¶ 89.
[235] *Id.*, ¶ 91.
[236] In response to questioning at the oral hearing, the United States indicated that "'[t]hose are the independent views of that organization. We adopt them to the extent they are the same as ours but otherwise they are their independent views. We submit them for your consideration but not like our arguments where, for example, the panel is expected to address each one.'" Appellate Body Report, *US—Shrimp (Article 21.5—Malaysia)*, ¶ 77.
[237] *US—Shrimp (Article 21.5—Malaysia)*, ¶ 77.
[238] *Id.,* ¶ 42.
[239] Appellate Body Report, ¶ 74. The brief also raised an issue of breach of the confidentiality obligation, which is discussed under the heading *Confidentiality* in Subpart IV.B.15 above, as well as in Subpart IV.B.17.
[240] Appellate Body Report, *US—Shrimp (Article 21.5—Malaysia)*, ¶ 78.

not of assistance in that appeal.[241] The American Iron and Steel Institute submitted an *amicus curiae* brief in the appeal in *US—Countervailing Measures on Certain EC Products*. The Appellate Body did not find the brief to be of assistance and did not take it into account.[242] The Appellate Body reached similar conclusions with respect to a brief submitted by the American Institute for International Steel in *US—Steel Safeguards*.[243] The Appellate Body "did not find it necessary to take" the two *amicus curiae* briefs submitted in *US—Softwood Lumber IV* "into account in rendering its decision" in that case.[244]

(iii) Submission of an "*amicus curiae*" brief by a WTO Member: In the *EC—Sardines* case, a submission described as an "*amicus curiae*" brief was filed by a WTO Member (Morocco) that had not exercised its third party rights during the proceedings before the panel. The Appellate Body considered whether the specific rights of third-party participation contemplated in the DSU affect how the Appellate Body is to treat an *amicus curiae* briefs received from a WTO Member that did not exercise those rights. The Appellate Body found that it had the same authority to accept and consider *amicus curiae* briefs received from WTO Members as to accept and consider *amicus curiae* briefs received from non-WTO Members.[245]

With respect to the specific submission filed by Morocco, the Appellate Body indicated its willingness to exercise its discretion to *consider* some—though not all—parts of the *amicus curiae* brief. The Appellate Body explained that Morocco's brief set forth largely factual information of a scientific and economic nature and that, due to the limits in Article 17.6 of the DSU such information did not fall within the scope of appellate review and was not pertinent. The Appellate Body also declined to consider an unsupported legal allegation made by Morocco. However, with respect to certain other arguments of a legal nature made by Morocco, the Appellate Body indicated that it would consider whether Morocco's arguments were of assistance when it opined on the legal issues in respect of which Morocco's arguments were made. Ultimately, however, the Appellate Body did not reach those issues as they formed part of a conditional appeal made by Peru, and the condition on which the appeal of those issues was made was not satisfied.[246]

(iv) The Appellate Body's use of a "leave" procedure: In *EC—Asbestos*, the division acted pursuant to Rule 16(1) of the *Working Procedures* to adopt a "request for leave to file an *amicus curiae* brief" procedure in order to deal in a "fair and orderly manner" with anticipated submissions.[247]

At the outset of the appeal, the division invited the parties and the third parties to submit their comments on a number of questions relating to the potential adoption by the division of an "application for leave" procedure.[248] Having received these responses, and after

[241] ¶¶ 156–160.
[242] *US—Countervailing Measures on Certain EC Products*, ¶ 76.
[243] ¶¶ 9, 10 and 253.
[244] ¶ 9.
[245] ¶ 166.
[246] ¶ 314.
[247] Rule 16(1) allows a division to adopt an additional procedure for the purpose of a particular appeal. In that case, a large number of *amicus curiae* briefs had been submitted during the proceedings before the panel, which led the Appellate Body to believe that the same would be true during the appeal phase.
[248] Canada, the European Communities and Brazil considered that issues pertaining to any such procedure should be dealt with by WTO Members themselves. The United States welcomed adoption of a "request for leave" procedure, and Zimbabwe indicated that it had no specific reasons to oppose adoption of a "request for leave" procedure. Without prejudice to their positions, Canada, the European Communities and the United States each made a number of suggestions regarding any such procedure that might be adopted.

consultations among all seven members of the Appellate Body, the division adopted an "Additional Procedure" to deal with written submissions received from persons other than the parties and third parties to this dispute. The Additional Procedure was communicated to the parties and third parties, circulated, in the form of a letter from the Chairman of the Appellate Body to the Chairman of the DSB, as a dispute settlement document to the Members of the WTO,[249] and posted on the WTO website on November 8, 2000.

The Additional Procedure required "[a]ny person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body" to submit an application for leave to file such a brief. The Additional Procedure specified a number of criteria to be met by each application,[250] and set a deadline of November 16, 2000 (the due date for the appellant's submission) for the filing of such applications. The Additional Procedure further explained that the Appellate Body would review and consider each application for leave to file a written brief and render a decision thereon. In the event that leave to file a written brief were granted, the Additional Procedure also set forth a deadline and a number of criteria that were required to be respected in such submissions.[251]

The Appellate Body received seventeen applications pursuant to the Additional Procedure requesting leave to file a written brief.[252] Six of these seventeen applications were received after the deadline specified in paragraph 2 of the Additional Procedure and, for this reason, leave to file a written brief was denied.[253] Eleven applications requesting leave to file were received by the Appellate Body within the November 16, 2000 deadline. Shortly thereafter, the Appellate Body decided to deny leave to file a written brief to the eleven entities that had submitted timely applications, in each case on the grounds of failure to comply sufficiently with all the requirements set forth in the Additional Procedure. Each applicant was sent a copy of the decision affecting its application.[254]

In the wake of these events, a special meeting of the General Council was held on November 22, 2000, where WTO Members expressed extreme dissatisfaction with the adoption by the Appellate Body of the Additional Procedure.[255]

The issue of *amicus curiae* briefs is also discussed in Chapter 32 of this book.

[249] WT/DS135/9, November 8, 2000.

[250] For example, applicants were required to limit their request to three pages, to identify themselves and the nature of their interest in the appeal, to identify the specific issues of law which the applicant wished to address in its written submission, explain why its submission would contribute to resolution of the dispute, and disclose any relationship with any of the parties or third parties in the case.

[251] For example, the submissions were not to exceed twenty pages, and were to include "a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief."

[252] The Appellate Body also received thirteen written submissions from non-governmental organizations that were not submitted in accordance with the Additional Procedure. Each of these thirteen submissions was returned to its sender, along with a letter informing the sender of the procedure adopted by the division, together with a copy of the Additional Procedure. Only one of these non-governmental organizations subsequently submitted a request for leave in accordance with the Additional Procedure. (¶ 54)

[253] ¶ 55.

[254] ¶ 56. Three weeks after the oral hearing, the division received a written brief from a number of environmental organizations. As the division had already denied, in accordance with the Additional Procedure, an application from these organizations for leave to file a written brief in this appeal, the division did not accept this brief. (¶ 57)

[255] *See infra* Part V.

30. Conditional Appeals

On occasion, a party to a dispute brings a "conditional appeal" against a legal finding or interpretation by the panel. This involves a request that the Appellate Body review a particular legal finding or interpretation *only if* a specified condition—usually the reversal by the Appellate Body of another panel finding or interpretation—is satisfied. Rulings by the Appellate Body with respect to conditional appeals have indicated at least three criteria that must be met for the Appellate Body to rule on a conditional appeal. First, the conditional appeal must be properly brought.[256] Second, the condition on which the appeal is made must be satisfied.[257] Third, if ruling on the conditional appeal requires the application of relevant legal provisions to facts, then there must be sufficient factual findings or undisputed facts on the record for the Appellate Body to be able to "complete the analysis".[258]

The Appellate Body has declined to rule on conditional appeals in two additional circumstances. In *US—FSC*, the European Communities appealed one issue and asked the Appellate Body to rule on it *if* the Appellate Body considered that the United States could implement the recommendations and rulings of the DSB *without* repealing a particular statutory provision. The Appellate Body declined to address the issue, indicating that "we do not consider that it is appropriate for us to speculate on the ways in which the United States might choose to implement the rulings and recommendations of the DSB."[259] In other words, the Appellate Body found it inappropriate to consider whether the condition on which the European Communities' was made was satisfied. In *US—Steel Safeguards*, the conditions on which several appeals were made were satisfied, at least in part. Nevertheless, the Appellate Body declined to rule on the conditional appeals under Article 5.1 of the *Agreement on Safeguards* because the Appellate Body had already found the measures at issue to be inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, and 4.2 of the *Agreement on Safeguards.* Hence, the Appellate Body deemed it "not necessary, for the purposes of resolving this dispute" to rule on the claims under Article 5.1 of the *Agreement on Safeguards*.[260]

31. Decision-Making—Opinions

The DSU does not identify a specific decision-making process for the division hearing an appeal, although Article 17.11 does require that any individual opinion expressed be anonymous. The *Working Procedures* elaborate the decision-making process. Rule 3(1) states that decisions relating to an appeal will be taken solely by the division hearing

[256] In the first case brought before the Appellate Body, Brazil and Venezuela requested the Appellate Body to make a ruling under the *TBT Agreement* in the event that the Appellate Body reversed the panel's findings on Article XX(g) of the GATT 1994. However, this request was made in Brazil and Venezuela's *appellee's* submission. Brazil and Venezuela did not file an other appellant's submission nor bring a separate appeal. Accordingly, the Appellate Body stated that, even if the condition on which the appeal was made had been satisfied, it would have been "most reluctant" to rule on the issues because "the route they chose for addressing the two issues in question is not contemplated by the *Working Procedures*, *and therefore, these issues are not properly the subject of this appeal*". (p. 12)

[257] Cases where the Appellate Body found that the condition on which an appeal was made was not satisfied and, in consequence, did not reach the conditional appeal include: *Brazil—Aircraft*, ¶ 196; *US—Lamb,* ¶ 196; *US—Hot-Rolled Steel*, ¶¶ 237 and 238; *US—FSC (21.5)*, ¶¶ 253–255; *EC—Sardines*, ¶¶ 312 and 313; and *US—Steel Safeguards*, ¶¶ 508–511.

[258] In *US—Hot-Rolled Steel*, the condition on which one of Japan's conditional appeals was made was satisfied. Nevertheless, the Appellate Body was unable to rule on the conditional appeal as there was an insufficient factual record to allow it to complete the analysis. (¶ 239)

[259] ¶ 175.

[260] ¶ 512.

the appeal, and Rule 3(2) directs the Appellate Body and divisions to "make every effort to take their decisions by consensus." Rule 3(2) further provides that, where consensus is not possible, "the matter at issue shall be decided by a majority vote." To date, all but one of the Appellate Body reports have been consensus opinions. In *EC—Asbestos*, one member of the division hearing the appeal wrote a separate but concurring opinion.[261]

32. Decision-Making—Collegiality

Rule 4 of the *Working Procedures* provides that, without prejudice to its authority to decide the appeal, a division hearing an appeal should, in the interests of collegiality, involve other Appellate Body members in the process. To this end, paragraph one sets out the objectives of ensuring "consistency and coherence in decision-making" and drawing "on the individual and collective expertise of the Members". More specifically, paragraph 3 of Rule 4 instructs the division hearing an appeal, before it finalizes its report, to "exchange views" with the other Appellate Body members who are not assigned to the division. To this end, all seven Appellate Body members receive the documents in all appeals. Following the oral hearing in each appeal the seven meet in Geneva in order for the three-member division hearing the appeal to discuss all of the issues raised in the appeal with their other four colleagues. Any Appellate Body member with a conflict of interest that did result or would have resulted in his or her being excused from the division does not participate in the exchange of views.

33. Interpretation of the Working Procedures

In *EC—Sardines*, the Appellate Body emphasized that the *Working Procedures* "must not be interpreted in a way that could undermine the effectiveness of the dispute settlement system". The Appellate Body referred, in this regard, to the "obligation to interpret the *Working Procedures* in a way that promotes the effective resolution of disputes", and observed that this obligation "is complemented by the obligation of Members, set out in Article 3.10 of the DSU, to 'engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute.'"[262] Although the comment was not aimed specifically at the *Working Procedures*, the Appellate Body has also observed that the "procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[263]

34. Costs

At present, no provision of the DSU or the *Working Procedures* refers to the issue of costs. No participant in an appeal has ever requested—or been awarded—costs.

35. Failure to Appear or File a Timely Submission

Rule 29 of the *Working Procedures* authorizes the division hearing an appeal to "issue such order, including dismissal of the appeal, as it deems appropriate" in the event that a participant fails to file a submission within a required time-limit or fails to appear at the oral hearing. To date, the Appellate Body has not had recourse to this provision.

[261] ¶¶ 149–154.

[262] ¶¶ 139 and 140.

[263] Appellate Body Report, *US—FSC*, ¶ 166; also referred to in Appellate Body Report, *EC—Sardines*, ¶¶167 and footnote 71 thereto.

36. Withdrawal of an Appeal

The DSU does not address the issue of suspension or withdrawal of an appeal.[264] Rule 30(1) of the *Working Procedures* authorizes an appellant to withdraw its appeal at "any time during an appeal . . . by notifying the Appellate Body, which shall forthwith notify the DSB." The *Working Procedures* do not, however, elaborate the legal consequences that flow from such withdrawal.

In *EC—Sardines* the Appellate Body expressed certain views on Rule 30(1) and a party's right "conditionally" to withdraw an appeal and subsequently file it again. In that case, Peru challenged the sufficiency of the Notice of Appeal submitted by the European Communities. In response, the European Communities withdrew its Notice of Appeal "conditionally on the right of the European Communities to file [a] new Notice of Appeal" that was attached to the letter of withdrawal.[265] When Peru challenged the conditional withdrawal of the appeal, as well as the right of the European Communities to file a second appeal, the Appellate Body considered the proper scope of Rule 30(1) of the *Working Procedures*, and found that:

> Rule 30(1) permits conditional withdrawals, unless the condition imposed undermines the "fair, prompt and effective resolution of trade disputes", or unless the Member attaching the condition is not "engag[ing] in [dispute settlement] procedures in good faith in an effort to resolve the dispute." Therefore, it is necessary to examine any such conditions attached to withdrawals on a case-by-case basis to determine whether, in fact, the particular condition in a particular case in any way obstructs the dispute settlement process, or in some way diminishes the rights of the appellee or other participants in the appeal.[266]

The Appellate Body found "that the withdrawal of the original Notice on condition of filing a replacement Notice was appropriate and had the effect of conditionally withdrawing the original Notice" because the European Communities' conditional withdrawal and filing of a new Notice of Appeal was intended to remedy a deficiency perceived by Peru, and had been done in a timely manner.[267] The Appellate Body cautioned, however, that it would reach a different conclusion in circumstances where the withdrawal and filing of a replacement Notice of Appeal is "abusive and disruptive".[268]

Appellants have withdrawn their appeals four other times: in *US—FSC*, *US—Line Pipe, India—Autos* and *US—Softwood Lumber* IV.[269] In *United States—FSC; United States—Line Pipe,* and *US—Softwood Lumber IV*, the United States filed its Notice of Appeal quite soon after circulation of the relevant panel report.[270] For scheduling reasons, in each case, the United States withdrew its appeal on the condition that it could later be re-filed, and each time the appeal was re-filed at a later stage in the sixty-day appeal period for

[264] This compares with Article 12.12 of the DSU, which explicitly authorizes a panel to suspend its work for a period of up to one year at the request of the complaining party, and indicates that the panel's authority will lapse after that one year period.

[265] WT/DS231/11.

[266] *EC—Sardines*, ¶ 141.

[267] *Id.*, ¶ 145.

[268] *Id.*, ¶ 146. The Appellate Body gave, as an example of such an "abusive" practice, the withdrawal and re-filing of an appeal in order to "circumvent" the requirement in Article 16.4 of the DSU that a panel report be adopted or appealed within sixty days of its circulation.

[269] *See* WT/DS108/6; WTDS/202/8 ; WT/DS/146/9, WT/DS175/9; WT/DS257/7.

[270] In *US—FSC* the panel report was circulated on October 8, 1999 and appealed, for the first time, on October 28, 1999. In *US—Line Pipe* the panel report was circulated on October 29, 2001 and appealed, for the first time, on November 6, 2001. In *US—Softwood Lumber IV* the panel report was circulated on August 29, 2003 and appealed, for the first time, on October 2, 2003.

adoption or appeal of a circulated panel report.[271] In those cases the division hearing the appeal, as well as the appellees, had prior knowledge of, and accepted, the U.S. action.[272] However, at the first DSB meeting held following the U.S. withdrawal and re-filing of the appeal in *US—FSC*, India expressed concern that "no reasons [had] been given to justify the withdrawal". India also underlined that under Rule 30 of the *Working Procedures*, no reference is made to the effect that a withdrawn appeal may be launched again.[273]

In *India—Autos*, India withdrew its appeal on the day before the date scheduled for the oral hearing in the appeal. This withdrawal, which was made after the sixty-day period for the adoption or appeal of panel reports, was not conditional. The Appellate Body issued a short report detailing the procedural history of the case, and concluded that "[i]n view of India's withdrawal of the appeal by its letter of 14 March 2002, the Appellate Body hereby completes its work in this appeal."[274] The DSB then adopted the panel report and the Appellate Body report together at its meeting of April 5, 2002.[275]

37. Deadlines and Time-Limits in Appeals—Ninety Day Limit for Completion

Article 17.5 of the DSU states that, as a general rule, appellate proceedings shall not exceed sixty days from the date of the filing of the appeal to the date on which the Report is circulated and that, in "no case shall the proceedings exceed 90 days". In its early years, when its workload was lighter, the Appellate Body often circulated its reports before the ninety-day deadline. Since 1997, however, in the vast majority of cases, Appellate Body Reports have been circulated ninety days after the filing of the Notice of Appeal. This time-limit has been exceeded only four times, in *EC—Hormones*, *US—Lead and Bismuth II*, *EC—Asbestos* and *Thailand—H-Beams*. In three of these cases, the time-limit was extended due to a heavy workload, combined with the fact that the appeals ran over the Christmas/New Year holiday period.[276] In *US—Lead and Bismuth II* one of the members of the division hearing the appeal died suddenly during the course of the appeal. Another Appellate Body member was appointed to the division, and the newly-constituted division decided to hold a second oral hearing. In these extraordinary circumstances, the participants explicitly agreed in writing to a two-week extension of the ninety-day appeal period.[277]

[271] In *US—FSC* the United States withdrew its appeal on November 2, 1999 and re-filed the appeal on November 26, 1999. In *US—Line Pipe* the United States withdrew its appeal on November 13, 2001 and re-filed the appeal on November 19, 2001. In the latter case, the United States' filed its appellant's submission one day after its (re-filed) Notice of Appeal, and the other appellant's submission was filed five days after that. In *US—Softwood Lumber IV* the United States withdrew its appeal on October 3, 2003 and re-filed the appeal on October 24, 2003. The United States simultaneously filed its appellant's submission on that day.

[272] *See EC—Sardines*, note 31 to ¶ 138. In *US—Softwood Lumber IV*, the European Communities, a third participant, objected to the Working Schedule proposed by the division in the wake of the withdrawal and re-filing of the appeal, in particular to the deadline for its third participant's submission, which was set at fifteen days after the submission of the Notice of Appeal and appellant's submission. The division, however, refused the European Communities' request to modify this deadline: *see* ¶ 7 of the Appellate Body Report in that case.

[273] Minutes of the DSB meeting of at the DSB December 9, 1999, WT/DSB/M/72, p. 3.

[274] *India—Autos*, ¶ 18.

[275] WT/DS146/11, WT/DS175/11.

[276] In the case of *EC—Hormones*, *see* the Communication to the Chairman of the DSB from the Chairman of the Appellate Body dated December 10, 1997, referring to "the exceptional nature of this case" and "the time needed for translation and the intervention of the Christmas holiday period". (WT/DS48/9 and WT/DS26/11) *See* also Appellate Body Report, *EC—Asbestos*, ¶¶ 6 and 8; and Appellate Body Report, *Thailand—H-Beams*, ¶ 7.

[277] Appellate Body Report, *US—Lead and Bismuth II* ¶ 8.

By virtue of Article 4.9 of the *SCM Agreement*, when an appeal is made in the course of a dispute concerning a prohibited subsidy, the Appellate Body is to issue its report no more than sixty days after the filing of the Notice of Appeal. However, footnote 6 to Article 4 allows this deadline to be extended by mutual agreement of the parties. In practice, in disputes involving prohibited subsidies, parties have always agreed that the Appellate Body should deal with the appeal in its standard ninety-day period.[278]

38. Circulation of Report

Circulation of the report to the WTO Members is the last step in the appellate process that is within the control of the Appellate Body. Neither the DSU nor the *Working Procedures* prescribe a particular method of circulation. Typically, on the official date of circulation, Appellate Body Reports are distributed by placing hard copies of the report, in the three working languages of the WTO, in the mailboxes of the WTO Members.[279] At the same time, the three language versions of the report are placed on the WTO website. This usually occurs between 4 and 5 p.m. on the date of circulation. As a matter of practice, the Appellate Body will generally agree to allow the participants in an appeal—as long as the participants all agree—to pick up a hard copy of the final report a few hours in advance of the distribution to the mailboxes. In case of such early distribution, the Appellate Body reminds participants and third participants that the report is to remain confidential until such time as it is circulated to the membership as a whole.

Late in 2002, a work-to-rule action by the staff of the WTO secretariat threatened the usual practice of the Appellate Body with respect to circulation in two appeals that were ongoing at the time of the staff action. Accordingly, in his letter transmitting the report in *US—Carbon Steel* to the Chairman of the DSB, the Chairman of the Appellate Body warned that it might not be possible to circulate the report in all three languages, and that, if not, "then the Report will be circulated in its original language (English), with Spanish and French versions to be distributed once available."[280] Ultimately, it was possible for the report to be simultaneously circulated in the three languages. Shortly thereafter, the Chairman's letter to the DSB Chairman in the *US—Countervailing Duties on Certain EC Products* appeal cautioned that, due to the same work action, paper copies of the report would not be available in the three official WTO languages of the WTO on the planned circulation date but that, in order to ensure compliance with the ninety-day deadline prescribed by Article 17.5 of the DSU, an electronic version of the report in its original language (English) would be posted on the WTO website at 4 p.m. on that date.[281]

39. Precedential Value of AB Reports—"Stare decisis"?

There is no explicit doctrine of precedent in WTO dispute settlement that would require panels and/or the Appellate Body to follow previous Appellate Body decisions. In *Japan—Alcoholic Beverages*, the Appellate Body explained that, prior to the entry into force of the WTO Agreement, the generally-held view of the legal status of adopted GATT panel reports was that "subsequent panels did not feel legally bound by the details

[278] *See Canada—Aircraft,* ¶ 4.

[279] The covered agreements were concluded in English, French and Spanish, and each language version is authentic. In addition, Rule 30 of Chapter VIII of the rules of procedure for meetings of the General Council provides that "English, French and Spanish shall be the working languages." (WT/L/61)

[280] WT/DS213/8, December 2, 2002.

[281] WT/DS212/10, December 12, 2002. At an informal DSB meeting held shortly thereafter, several WTO Members expressed dissatisfaction with circulation in this manner.

and reasoning of a previous panel report." This, explained the Appellate Body, resulted from the fact that the decision by the CONTRACTING PARTIES to adopt a panel report did not "constitute agreement . . . on the legal reasoning in that panel report", nor express an intent "that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947."

The Appellate Body went on to explain that, today, the nature of adopted panel reports "continues to differ from interpretations of the GATT 1994 and the other Multilateral Trade Agreements under the *WTO Agreement* by the WTO Ministerial Conference or the General Council." Rather:

> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding.[282]

In *United States—Shrimp (21.5)*, the Appellate Body referred to this passage and added that "[t]his reasoning applies to adopted Appellate Body Reports as well." In that case, Malaysia argued, on appeal, that the panel erred by virtue of the extensive references it made to the reasoning of the Appellate Body in its report in the original proceedings. The Appellate Body, however, rejected this ground of appeal, observing that, given the direct relevance of the Appellate Body's reasoning to the issues before the panel, the panel "was correct in using our findings as a tool for its own reasoning", and that:

> [t]he Panel had, necessarily, to consider our views on this subject, as we . . . had provided interpretative guidance for future panels, such as the Panel in this case.[283]

40. Precedential Value of AB Reports—"Res judicata"?

Article 17.14 of the DSU makes explicit that Appellate Body reports are binding on the parties to the dispute.[284] This provision does not, however, directly define whether, and to what extent the binding nature of adopted Appellate Body reports serves as a bar to future dispute settlement proceedings raising the same issues—whether, in other words, WTO dispute settlement recognizes a principle analogous to the concept of *res judicata*.[285] Nevertheless, certain comments made by the Appellate Body in the context of proceedings under Article 21.5 of the DSU shed some light on this issue. In particular, in *US—Shrimp (21.5)*, the Article 21.5 panel reasoned that "as long as the implementing measure before us is identical to the measure examined [in the original proceedings] by the Appellate Body in relation to paragraph (g) [of Article XX of the GATT 1994], we should not reach a different conclusion from the Appellate Body".[286] Using this logic, and having concluded that the measure at issue remained the same, the Article 21.5 panel went on to find that "since Section 609 as such has not been modified, the findings of the Appellate Body regarding paragraph (g) remain valid and the consistency of Section 609 as such

[282] Appellate Body Report, *US—Gasoline*, p. 14.

[283] Appellate Body Report, *US—Shrimp (Article 21.5—Malaysia)*, ¶¶ 107–109.

[284] It provides, in relevant part, that an adopted Appellate Body report shall be "unconditionally accepted by the parties to the dispute".

[285] In common law jurisdictions, the concept of *res judicata* means "a specific doctrine that precludes relitigation of claims and issues arising from the same cause of action between the same parties and their privies after a final judgment on the merits by a competent tribunal or after some other final determination having the same effect." MERRIAM WEBSTER'S DICTIONARY OF LAW 430 (Linda Picard Wood, ed. 1996).

[286] Panel Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/RW, adopted 21 November 2001, as upheld by the Appellate Body Report, WT/DS58/AB/RW, ¶ 5.39.

with the requirements of paragraph (g) also remains valid".[287] On appeal, Malaysia challenged this approach, arguing that the panel had acted inconsistently with Article 21.5 of the DSU because it had failed to examine the consistency with the covered agreements of the measure taken to comply with the rulings and recommendations of the DSB in the original *United States—Shrimp* proceedings. The Appellate Body dismissed Malaysia's appeal on this issue, ruling that:

> the Panel properly examined Section 609 as part of its examination of the totality of the new measure, correctly found that Section 609 had not been changed since the original proceedings, and rightly concluded that our ruling in *United States—Shrimp* with respect to the consistency of Section 609, therefore, still stands.[288]

The Appellate Body has also ruled that, when findings in the original panel report are adopted without being appealed, then they cannot be revisited by the Appellate Body in subsequent proceedings under Article 21.5 of the DSU. In *Mexico—Corn Syrup (Article 21.5—US)*, the Appellate Body invoked three factors in refusing to re-examine findings in the original panel report: (i) the original proceedings and the Article 21.5 proceedings did not deal with the same measure; (ii) Mexico did not appeal the original panel's report; and (iii) "Articles 3.2 and 3.3 of the DSU reflect the importance to the multilateral trading system of security, predictability and the prompt settlement of disputes."[289] In *EC—Bed Linen (Article 21.5—India)* the Appellate Body elaborated its reasoning as follows:

> . . . a reading of Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1 [of the DSU], taken together, makes it abundantly clear that a panel finding which is not appealed, and which is included in a panel report *adopted* by the DSB, must be accepted by the parties as a *final* resolution to the dispute between them, in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB—with respect to the particular claim and the specific component of the measure that is the subject of the claim.[290]

Thus an adopted panel ruling on a particular claim made with respect to specific aspects of a measure constitutes final resolution of the matter between the parties. This was so whether the original panel had ruled that the measure was *consistent* (as in the *Shrimp* case) or that the complainant had failed to establish a *prima facie* case (as in *Bed Linen*).[291]

The above rulings of the Appellate Body suggest that where, in Article 21.5 proceedings, there is identity of parties, claims and of the measure at issue, then a concept akin in some respects to *res judicata* prevents the panel and the Appellate Body from revisiting matters already decided in the original proceedings. It is not yet clear, however, the extent to which the principle would have application beyond the particular circumstances of these cases—for example in ordinary proceedings, rather than those conducted pursuant

[287] Panel Report, *US—Shrimp (Article 21.5—Malaysia)*, 5.41

[288] *United States—Shrimp(Article 21.5—Malaysia)*, ¶ 96.

[289] *Mexico—Corn Syrup (Article 21.5—US)*, ¶ 79.

[290] *EC—Bed Linen (21.5)*, ¶ 93.

[291] However, in note 115 to paragraph 96 of its Report in *EC—Bed Linen (21.5),* the Appellate Body noted that a similar bar would not apply in circumstances where the original panel declined to rule on a specific claim because it exercised "false judicial economy" and only partially resolved the matter before it. In such circumstances, the Appellate Body stated:

> . . . a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding.

to Article 21.5 of the DSU; nor the extent of "identity" of parties, claims and measures that is necessary to bar further consideration of a matter.[292]

V. Appraisal of the Appellate Body

Over the first eight years of its existence, the Appellate Body has established a significant body of procedural rules and practices. These are considerably more detailed and sophisticated than the procedures employed by GATT panels, and more comprehensive than the procedures still used by WTO panels.[293] The adoption of the *Working Procedures* and the experience accumulated over eight years of confronting procedural issues in appeals have added flesh to the skeletal outlines of appellate procedures contained in the DSU. Procedural rules are informed by, and essential to ensuring respect for, the principles of due process, fairness, and good faith. Never has a procedural issue prevented the Appellate Body from complying with its responsibilities to decide an appeal. The Appellate Body has also been vigilant to prevent its procedural rules from being employed by Members as a tool for "abusive litigation techniques".[294]

It is significant that the vast majority of procedural rules adopted and procedural rulings made by the Appellate Body have attracted no comment from Members or outside commentators. The relatively smooth operation of these procedures demonstrates that, for the most part, the procedural aspects of appellate review are functioning well.

Experience has, inevitably, exposed a few gaps in the rules set out in the DSU and *Working Procedures*, as well as pockets of dissatisfaction amongst WTO Members. Chief among these is the highly contentious issue of *amicus curiae* briefs. Although some Members expressed negative views concerning the Appellate Body's treatment of *amicus* briefs in *US—Shrimp*[295] and *US—Lead and Bismuth II,*[296] the procedural action taken by the Appellate Body that generated the single greatest reaction from WTO Members was its decision to adopt, in the *EC—Asbestos* case, an additional procedure to deal with the anticipated submission of "*amicus curiae*" briefs. The General Council held a Special Meeting on November 22, 2000 to discuss the Appellate Body's approach to the *amicus curiae* brief issue in the *EC—Asbestos* case. Many WTO Members expressed strong

[292] In *Canada—Periodicals*, for example, the Appellate Body stated, in footnote 28 to p. 19, that:

> . . . a Panel finding that has not been specifically appealed in a particular case should not be considered to have been endorsed by the Appellate Body. Such a finding may be examined by the Appellate Body when the issue is raised properly in a subsequent appeal.

[293] Panels adopt *ad hoc* procedures that are typically more comprehensive than those set forth in Appendix 3 to the DSU. Although they seem to be moving in this direction, panels have not yet, notwithstanding Appellate Body exhortations to do so, adopted detailed, standard working procedures. *See* Appellate Body Reports, *European Communities –Bananas III*, ¶ 144; *India—Patents*, ¶ 95; and *Argentina—Footwear*, note 68 to ¶ 79.

[294] Appellate Body Report, *EC—Sardines*, ¶ 151.

[295] Minutes of the DSB meeting of November 6, 1998, WT/DSB/M/50.

[296] *US—Lead and Bismuth II* was the first appeal in which the Appellate Body was asked to accept the direct submission of *amicus briefs,* and the first time that it opined that it had the authority to do so. Several Members criticized this holding at the DSB meeting when the report was adopted, and asked the Chairman of the DSB whether he or the Director General had been consulted by the Appellate Body prior to taking the decision in that appeal. The Chairman made a statement at a subsequent DSB meeting explaining that neither he nor the Director-General had been consulted, but that such consultations were not necessary because the Appellate Body had not been adopting a new Working Procedure, but rather ruling on a specific procedural objection raised by one of the parties to the dispute. Minutes of the DSB Meeting of June 19, 2000, WT/DSB/M/84, p. 20. *See also* WT/DSB/W/137, June 21, 2000, and the minutes of the DSB meeting of June 7, 2000, WT/DSB/M/83.

opposition to the Appellate Body's approach.[297] A proposal was put forth to "order" the Appellate Body to revoke its procedure, although this was not agreed.[298] According to press reports, some Members even privately called for the resignation of the Appellate Body Chairman over the issue.[299] The Chairman of the General Council undertook to convey the sentiments expressed by Members to the Appellate Body and to instruct the Appellate Body to proceed with "extreme caution" when dealing with *amicus curiae* briefs in future, and to initiate discussions with Members on establishing procedures for such briefs.[300]

The criticism that has been directed at the Appellate Body on *amicus curiae* briefs reflects ongoing and lively debate amongst WTO Members, who have so far been unable themselves to reach consensus on this issue. Yet the controversy concerning Appellate Body rulings on *amicus curiae* briefs has also exposed two more fundamental issues. First, some Members appear to accept that the Appellate Body has significant discretion to adopt procedural rules, but not substantive rules. These Members argue that the issue of *amicus curiae* briefs is not procedural but substantive and, thus, an issue to be regulated by WTO Members alone. Accordingly, the *amicus* debate raises the question of how properly to distinguish between procedural and substantive issues. Second, some Members consider that, irrespective of whether the *amicus* issue is properly classified as procedural or substantive in nature, the problem to be resolved is who (WTO Members or the Appellate Body) should engage in "gap-filling" if existing rules make no explicit provision for dealing with particular issues? Chile has expressed its view as follows:

> [the Appellate Body's ruling regarding *amicus curiae* in *EC—Sardines* was] to a large extent based on the premise that, where an act or a procedural right was not specifically prohibited by the DSU or the Working Procedures, it existed and was allowed . . . . In other words, anything that was not prohibited was permitted. Since these Agreements had been negotiated among several parties, this premise could not be applied. The Agreements were the result of compromises and represented a balance of rights and obligations which the parties had specifically laid down in the text. This was why it was not possible to read between the lines and necessarily impose new rights and obligations. They provided the system with certainty and predictability. In the final analysis, what should prevail was the principle that only what was allowed in the Agreements would be permitted.[301]

A related question concerning Appellate Body control of its proceedings arose in connection with the Appellate Body's most recent amendments to its *Working Procedures.*[302]

[297] With regard to the general question of acceptance of *amicus curiae* briefs, the United States took the view that this is permitted under the Appellate Body's general powers under the DSU, and New Zealand and Switzerland also supported the action taken by the Appellate Body in the case. Japan and the European Communities took the position that in certain circumstances this might be appropriate. However, the vast majority of Members that expressed views during the meeting, including Egypt, India, Malaysia and Pakistan were opposed to the acceptance of *amicus curiae* briefs by panels and the Appellate Body.

[298] *WTO Members Warn Appellate Body on Amicus Procedures,* INSIDE US TRADE, December 1, 2000.

[299] *WTO General Council Slaps Appellate Body on Amicus Briefs*, BRIDGES WEEKLY TRADE NEWS DIGEST, Vol. 4, Number 45, November 28, 2000.

[300] *Id.* Criticism of the Appellate Body's handling of *amicus curiae* briefs has continued in DSB meetings where subsequent reports dealing with the issue have been adopted, s*ee* for example, minutes of the DSB meeting of 23 October 2002, where the report in *EC—Sardines* was adopted, WT/DSB/M/134.

[301] WT/DSB/M/134, ¶ 42. Mexico expressed a similar sentiment at the same meeting (¶ 48).

[302] Some Members objected to temporary amendments published by the Appellate Body on September 27, 2002, on the grounds that they had not been adequately consulted by the Chairman of the DSB. As a consequence, the DSB held an informal DSB meeting to air Members' views on the amendments. The relevant issues were discussed again at a subsequent DSB meeting, and the Chairman requested to convey the views of Members to the Appellate Body. *See* WT/DSB/M/134 and WT/AB/W/5.

After certain Members expressed concern that they had not been adequately consulted on the amendments, the DSB adopted agreed procedures for consultations between Members and the Chairperson of the DSB with respect to amendments to the *Working Procedures*.[303] These developments may signal that Members desire to be more involved in the process of developing the more detailed, technical rules relating to Appellate Body procedures in the future. In April 2004, the Appellate Body circulated possible amendments to the *Working Procedures*. Members made extensive comments thereon, and the Appellate Body expressly took account of these comments in adopting the final version of the amendments.[304]

Moreover, although WTO Members have discussed amendments to the DSU at length, first during the DSU review conducted in 1998–1999, and more recently during the Doha Development Round, relatively few of the proposals made by Members have related to appellate procedures.[305] To date, these proposals have generated comparatively little discussion relative to many other issues. While it is difficult to predict the outcome of the negotiations at this stage, the proposals that seem to have garnered widespread support among Members are ones that would result in only modest changes to appellate procedures.

Two proposed amendments illustrate the types of issues under discussion by Members. One idea that could alter the architecture of the overall dispute settlement system is the proposal to create a remand power. This would allow the Appellate Body to send cases back to the original panel in circumstances where appellate rulings mean that there are insufficient factual findings or uncontested facts on the record for the Appellate Body to resolve the dispute.[306] Some WTO Members have proposed adding a footnote to Article 17.6 of the DSU that would set forth certain requirements for the Notice of Appeal, including that the Notice identify issues sufficiently clearly so as to allow the parties and third parties to understand the issues that are appealed.[307]

[303] WT/DSB/M214.

[304] *See* WT/AB/WP/W/8, WT/DSB/M/169 and WT/AB/WP/W/9. The amendments to the *Working Procedures* will come into force on January 1, 2005.

[305] Members have proposed increasing the number of Appellate Body members, or providing that either the DSB or General Council may take a decision to increase their number. Others have proposed increasing the term that Appellate Body members are appointed to serve but making that term non-renewable. Increased third party rights before the Appellate Body have been proposed, including the possibility of WTO Members who did not reserve their third party rights before the panel being allowed to participate in the appeal. A number of other proposals have also been made that would affect different stages of the dispute settlement process, including appellate review. These include suggestions to increase the transparency of proceedings by, for example, making submissions, or at least non-confidential versions thereof, publicly available and opening panel and Appellate Body hearings to the public; adopting clear rules on *amicus curiae* briefs (proposals have been made both to allow and to prohibit consideration of such submissions); requiring each member of a panel or of an Appellate Body division to write a separate opinion in the report; and adding stronger rules on special and differential treatment for developing countries, including allowing for the award of litigation costs to developing country parties that prevail in dispute settlement proceedings. A more fundamental change to Appellate Body procedures was suggested by the United States and Chile. They jointly proposed that the maximum time-period for hearing appeals be extended from 90 to 120 days, and that the extra time be used to accommodate the insertion of a new "interim review" stage at the appellate level. In the same proposal, the United States and Chile suggested that appeals could be suspended upon agreement of the parties and applicable deadlines extended accordingly, and that the decision-making process by which the DSB adopts Appellate Body Reports could be amended to allow for the "partial adoption" of reports. This proposal would allow the DSB to decide, by consensus, not to adopt specific findings, or the basic rationale behind a specific finding in a report.

[306] *See* the proposals made by the European Communities and Jordan, TN/DS/W/38 and TN/DS/W/43.

[307] *See* the proposal by India *et al*, TN/DS/W/47. The suggestion to add such a footnote seems to respond directly to procedural rulings that have been made by the Appellate Body on the issue of the sufficiency of the Notice of Appeal. *See* Subpart IV.B.5 above.

The Chairman's text circulated to Members on June 6, 2003 included several proposed amendments to the DSU that would have a modest but important effect on appellate review within the WTO system. These include the enhancement of third party rights, the introduction of an interim review stage and a remand procedure, and the introduction into the DSU of the concept of the Notice of Appeal and certain requirements as to its content.[308] However, several parts of these proposals remain in bracketed text (indicating doubt on the part of the Chairman as to whether they can be agreed). In addition, it is not clear that this text will serve as the basis for continued negotiations in 2004.

There has been only limited commentary from outside observers on the procedures used by the Appellate Body. In addition to more extensive commentary on the high-profile *amicus curiae* issue, there have a few articles published on discrete issues such as the possibility of a remand authority,[309] the precedential value of Appellate Body Reports,[310] and the scope of appellate review.[311] More broadly, the increased use of procedural rules that has accompanied the creation of the Appellate Body and its pronouncements in the more than fifty reports that it has issued in eight years, are for many a sign of the increased "judicialization" of WTO dispute settlement.[312] Amongst commentators who have considered this theme, those who support such a trend tend to also support transparent, comprehensive procedures. Those who favor preserving a less formal, less legalistic form of dispute settlement are somewhat more skeptical of the need for detailed procedural rules.

In sum, the Appellate Body has been able, through application of the rules set out mainly in the DSU and the *Working Procedures*, as well as *ad hoc* rulings, to deal with all issues of procedure that have arisen in the appeals brought before it. This accomplishment is an important one, and one that is recognized in the fact that WTO Members have so far debated tinkering with, but not radically revising, the rules that structure and govern appellate procedures. The successful formulation and application of procedural rules is an essential foundation of WTO appellate review. Proper procedures serve the objectives of ensuring due process and fairness, help to guarantee the security and predictability of the dispute settlement process itself, and allow the parties and the Appellate Body to focus their energies on issues of substance. And this, in turn, enhances the efficacy and vigor of WTO dispute settlement as a whole.

[308] TN/DS/9.

[309] David Palmeter, *The WTO Appellate Body Needs Remand Authority*, 32 JOURNAL OF WORLD TRADE 41 (1998).

[310] Raj Bhala, *The Myth about* Stare Decisis *and International Trade Law,* 14 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 845 (1999); Raj Bhala, *The Precedent Setters:* De Facto Stare Decisis *in WTO Adjudication*, 1 FLORIDA STATE UNIVERSITY JOURNAL OF TRANSNATIONAL LAW AND POLICY (1999); A. Chua, *The Precedential Effect of WTO Panel and Appellate Body Reports*, 11(1) LEIDEN JOURNAL OF INTERNATIONAL LAW 45–61 (1985).

[311] M. Lugard, *Scope of Appellate Review: Objective Assessment of the Facts and Issues of Law,* 1(2) JOURNAL OF INTERNATIONAL ECONOMIC LAW 323–327 (1998).

[312] J. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement* (2000), case-study of an Appellate Body Proceeding for UNCTAD Workshop on Dispute Settlement in International Trade, Investment and Intellectual Property : Case Studies, Simulation Exercises and Moot Court; R. Howse, *The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power. The Role of the Judge: Lesson for the WTO,* World Trade Forum 2000 Conference, Bern, World Trade Institute; W.J. Davey, *WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding 'Over-Legalization*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, M. (M. Bronckers and R. Quick eds. 2000), at 291–307; D. McCrae, *Has WTO Dispute Settlement Been Too Successful?*, Notes for an address to the Third Annual WTO Conference, *Dispute Resolution—At the Crossroads*, London, May 14, 2003.

Table of Appellate Body reports

Short title	Full case title and citation
Argentina—Footwear (EC)	Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted January 12, 2000,DSR 2000:I, 515
Argentina—Textiles and Apparel	Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*,WT/DS56/AB/R and Corr.1, adopted April 22, 1998, DSR 1998:III, 1003
Australia—Salmon	Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted November 6, 1998, DSR 1998:VIII, 3327
Brazil—Aircraft	Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*,WT/DS46/AB/R, adopted August 20, 1999, DSR 1999:III, 1161
Brazil—Aircraft (Article 21.5—Canada)	Appellate Body Report, *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted August 4, 2000, DSR 2000:VIII, 4067
Brazil—Desiccated Coconut	Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted March 20, 1997, DSR 1997:I, 167
Canada—Aircraft	Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted August 20, 1999, DSR 1999:III, 1377
Canada—Aircraft (Article 21.5—Brazil)	Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft—Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted August 4, 2000, DSR 2000:IX, 4299
Canada—Autos	Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R,WT/DS142/AB/R, adopted June 19, 2000, DSR 2000:VI, 2995
Canada—Dairy	Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted October 27, 1999, DSR 1999:V, 2057
Canada—Dairy (Article 21.5—New Zealand and US)	Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Recourse to Article 21.5 of the DSU by New Zealand and the United States*,WT/DS103/AB/RW, WT/DS113/AB/RW, adopted December 18, 2001
Canada—Dairy (Article 21.5—New Zealand and US II)	Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products—Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted January 17, 2003
Canada—Patent Term	Appellate Body Report, *Canada—Term of Patent Protection*, WT/DS170/AB/R, adopted October 12, 2000, DSR 2000:X, 5093
Canada—Periodicals	Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted July 30, 1997, DSR 1997:I, 449
Chile—Alcoholic Beverages	Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted January 12, 2000, DSR 2000:I, 281

(*Continued*)

Short title	Full case title and citation
Chile—Price Band System	Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted October 23, 2002
EC—Asbestos	Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted April 5, 2001
EC—Bananas III	Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted September 25, 1997, DSR 1997:II, 591
EC—Bed Linen	Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted March 12, 2001, DSR 2001:V, 2291
EC—Bed Linen (Article 21.5—India)	Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India—Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted April 24, 2003
EC—Computer Equipment	Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted June 22, 1998, DSR 1998:V, 1851
EC—Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted February 13, 1998, DSR 1998:I, 135
EC—Poultry	Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted July 23, 1998, DSR 1998:V, 2031
EC—Sardines	Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R, adopted October 23, 2002
EC—Tube or Pipe Fittings	Appellate Body Report, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted August 18, 2003
Guatemala—Cement I	Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted November 25, 1998, DSR 1998:IX, 3767
India—Autos	Appellate Body Report, *India—Measures Affecting the Automotive Sector*, WT/DS146/AB/R, WT/DS175/AB/R, adopted April 5, 2002
India—Patents (US)	Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted January 16, 1998, DSR 1998:I, 9
India—Quantitative Restrictions	Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted September 22, 1999, DSR 1999:IV, 1763
Japan—Agricultural Products II	Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted March 19, 1999, DSR 1999:I, 277

(*Continued*)

(*Continued*)

Short title	Full case title and citation
Japan—Alcoholic Beverages II	Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted November 1, 1996, DSR 1996:I, 97
Japan—Apples	Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted December 10, 2003
Korea—Alcoholic Beverages	Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted February 17, 1999, DSR 1999:I, 3
Korea—Dairy	Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted January 12, 2000, DSR 2000:I, 3
Korea—Various Measureson Beef	Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted January 10, 2001, DSR 2001:I, 5
Mexico—Corn Syrup (Article 21.5—US)	Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States—Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted November 21, 2001
Thailand—H-Beams	Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted April 5, 2001
Turkey—Textiles	Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted November 19, 1999, DSR 1999:VI, 2345
US—1916 Act	Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted September 26, 2000, DSR 2000:X, 4793
US—Carbon Steel	Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted December 19, 2002
US—Certain EC Products	Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted January 10, 2001, DSR 2001:I, 373
US—Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted January 9, 2004
US—Cotton Yarn	Appellate Body Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted November 5, 2001
US—Countervailing Measures on Certain EC Products	Appellate Body Report, *United States—Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted January 8, 2003
US—FSC	Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted March 20, 2000, DSR 2000:III, 1619
US—FSC (Article 21.5—EC)	Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted January 29, 2002

(*Continued*)

Short title	Full case title and citation
US—Gasoline	Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996, DSR 1996:I, 3
US—Hot-Rolled Steel	Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted August 23, 2001
US—Lamb	Appellate Body Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted May 16, 2001
US—Lead and Bismuth II	Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted June 7, 2000, DSR 2000:V, 2601
US—Line Pipe	Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted March 8, 2002
US—Offset Act (Byrd Amendment)	Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted January 27, 2003
US—Section 211 Appropriations Act	Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted February 1, 2002
US—Shrimp	Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted November 6, 1998, DSR 1998:VII, 2755
US—Shrimp (Article 21.5—Malaysia)	Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted November 21, 2001
US—Softwood Lumber IV	Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R. (to be circulated January 2004)
US—Steel Safeguards	Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248AB/R, WT/DS249AB/R, WT/DS251AB/R, WT/DS252AB/R, WT/DS253AB/R, WT/DS254AB/R, WT/DS258AB/R, WT/DS259AB/R, adopted December 10, 2003
US—Underwear	Appellate Body Report, *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted February 25, 1997, DSR 1997:I, 11
US—Wheat Gluten	Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted January 19, 2001, DSR 2001:II, 717
US—Wool Shirts and Blouses	Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted May 23, 1997, DSR 1997:I, 323

CHAPTER 28

IMPLEMENTATION AND ENFORCEMENT OF DISPUTE SETTLEMENT DECISIONS

Andrew W. Shoyer*, Eric M. Solovy** and Alexander W. Koff***

TABLE OF CONTENTS

I. Introduction 1342
II. Bargaining in the Shadow of the WTO 1344
III. Theories of Implementation in International Law 1346
IV. Overview of Implementation and Enforcement Provisions 1350
A. Basic Structure of the Dispute Settlement Understanding 1350
1. Recommendations with Respect to Panel and Appellate Body Reports 1350
2. Surveillance of Implementation 1351
3. Compensation and Suspension of Concessions 1352
B. Limitations of the DSU 1353
1. Ambiguity in Process: Articles 21.5 and 22 of the DSU 1353
2. The "Reasonable Period of Time" for Implementation 1355
3. Incentives for Unilateral Sanctions 1361
4. Disproportionate Effect of Retaliation 1362
V. Suggested Improvements to Enforcement Devices 1364
A. Enforceable Settlement Agreements 1364
B. Interim Relief 1364
C. Emphasizing Compensation Over Retaliation 1365
D. Retroactive Remedies 1367
E. The Model of the European Community 1367
VI. Conclusion 1369

* Andrew W. Shoyer is a partner with Sidley Austin Brown & Wood LLP in Washington, D.C. From August 1993 through October 1997, Mr. Shoyer served as Legal Advisor in the U.S. Mission to the World Trade Organization. All three authors thank Alexander S. Williams for his significant contributions to this Chapter.
** Eric M. Solovy is an associate at Sidley Austin Brown & Wood LLP in Washington, D.C., specializing in global trade policy, dispute settlement, and intellectual property law.
*** Alexander W. Koff is a senior associate at Paul Hastings Janofsky & Walker LLP in Washington, D.C., practicing in the area of international dispute resolution.

I. Introduction

The implementation and enforcement mechanisms of the World Trade Organization Agreements are unprecedented in the realm of multilateral treaty regimes with a large membership. With the exception of the judicial system of the European Union, which has the benefit of a far smaller and less diverse membership, the Dispute Settlement Understanding ("DSU")[1] of the WTO provides the most detailed and rules-based system ever seen in international treaty law. From the WTO headquarters in Geneva, Switzerland, panelists and the Appellate Body are rendering judicial decisions in areas such as intellectual property protection, services, the environment, and health and safety, that extend far beyond the traditional role of its predecessor, the General Agreement on Tariffs and Trade ("GATT") 1947.[2] For the most part, Members have complied with the rulings of panels and the Appellate Body.[3]

The WTO attempts to establish a delicate middle ground between a dispute settlement mechanism that would "criminalize" the behavior of foreign governments and one that would allow Members to violate the Agreements with impunity. As one commentator has aptly stated:

> When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas. . . Compliance with the WTO, as interpreted through dispute settlement panels, remains elective.[4]

But a Member does not violate the WTO Agreements without consequences. In an international legal system where the observance of the law depends heavily on extra-legal pressures, such as reputation in the trading and investment community, stability of the WTO system, and other foreign relations concerns, it is difficult for a Member to excuse its noncompliance with a ruling adopted and published by the WTO.

Moreover, as discussed in detail below, after a Member has been found to violate the WTO and has failed to bring its laws into compliance within a "reasonable" period of time, the Dispute Settlement Body ("DSB"), made up of one representative from each Member, can authorize retaliatory trade measures against the violating Member—assuming that the parties to the dispute have not been able to agree upon compensation. This provides a continuing incentive to change the offending measure and clearly brands the Member as a violator of the WTO. Viewing the WTO as a part of the larger realm of

[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2, Marrakesh Agreement Establishing the World Trade Organization (1994).

[2] For a complete account of GATT 1947 dispute settlement practice, *see* THE ANALYTICAL INDEX (GUIDE TO GATT LAW AND PRACTICE), (1994).

[3] The Secretariat of the WTO periodically publishes a summary of all cases at www.wto.org. For example, *see Update of WTO Dispute Settlement Cases*, WT/DS/OV/21 (June 30, 2004). Of the 312 complaints notified to the WTO as of June 16, 2004: (1) 44 have resulted in mutually agreed solutions; (2) 26 were inactive or were settled based on withdrawal of a panel request or termination of a contested measure; (3) 80 resulted in adopted panel or Appellate Body reports; and (4) 24 were currently being reviewed in active panels. *Id* at p. ii. These numbers do not add up to 312 because a number of the complaints were consolidated at the panel stage. As of June 16, 2004, only eight cases had reached the stage where it was necessary to determine a level of retaliation through arbitration pursuant to Article 22.6 of the DSU, and Four of these cases consisted of two pairs of related cases. *Id.* During this time, there was also one case in which the level of nullification and impairment was determined pursuant to arbitration under Article 25 of the DSU. *See US—Section 110(5) of the US Copyright Act*, WT/DS160/ARB25/1 (2001).

[4] Judith H. Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 417 (1996).

international law, Professor Jackson points out that an "adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO Agreements and its annexes."[5]

The extent to which the WTO dispute settlement system has established an enforcement mechanism with "teeth," as that term is used in the jargon of international legal scholars, is subject to debate. What is clear, though, is that in the context of international treaty regimes, the WTO is unique in its ability to make a violation transparent, and then to authorize retaliation against the violator.

Because of the limitations on the enforcement "powers" of the WTO, the ultimate conclusion of any dispute requires negotiation by the Members concerned. Although retaliation and concerns for reputation motivate a Member to bring its measures into compliance, the WTO dispute resolution mechanism has no remedy beyond the authorization of retaliation to force a government to change its domestic laws. Ultimately, the offending measure will be changed only if the violating Member agrees to change it.

Indeed, in a dispute resolution mechanism applied by and to sovereign governments, negotiation is an indispensable element of the process. Adjudication on the merits—by panels, by the Appellate Body, and by arbitrators—merely changes the terms of the negotiation, but cannot replace the need for it.

Just as with any other system of dispute resolution, the WTO does not generally benefit when Members push the dispute settlement mechanism to its limits. While the meaning of the WTO Agreements may become more transparent as a result of published panel, Appellate Body, and arbitration decisions, the prompt settlement of individual disputes is the ultimate goal of the DSU. Article 3.3 of the DSU makes this clear:

> The *prompt settlement* of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member *is essential to the effective functioning of the WTO* and the maintenance of a proper balance between the rights and obligations of Members. (emphasis added).

Disputes such as *EC—Regime for the Importation, Sale and Distribution of Bananas* ("*EC-Bananas*") and *EC—Measures Concerning Meat and Meat Products* ("*EC-Hormones*"), discussed below, that take years to conclude and result in the authorization of trade retaliation, have tested the stability and reputation of the WTO. Furthermore, the WTO Secretariat has limited resources to deal with such cases.

Thus, one of the central focuses of modifying WTO dispute settlement in the future must be on enhancing incentives and opportunities for settlement. Despite the already common occurrence of settlement in WTO disputes, both at the beginning and at the end of the dispute resolution process, WTO Members could do more to utilize the available mechanisms already established in the DSU to foster settlement.

This chapter explores the implementation and enforcement mechanisms of the WTO, both from a theoretical and practical perspective. In order to provide a proper context, it is necessary to analyze theories of negotiation and general theories of implementation in international law, as they apply to the WTO, before proceeding to a detailed discussion of the WTO in operation. This preliminary analysis is performed in Parts II and III. Part IV provides an overview of the WTO Dispute Settlement Understanding as it relates to implementation, and a discussion of some of the major issues that have arisen in its performance. Finally, Part V explores potential modifications to the dispute

[5] John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations*, 91 Am. J. Int'l L. 60 (1997).

settlement mechanism that could, if agreed to by WTO Members, substantially increase the likelihood of timely implementation.

II. Bargaining in the Shadow of the WTO

Settlement by negotiation is an option at any point during a dispute between WTO Members, whether before consultations have taken place or after retaliation has been authorized by the DSB. But the negotiating and bargaining does not occur in a vacuum. Two sides in a dispute bargain "in the shadow of the law,"[6] or, in the case of WTO Members, "in the shadow of the WTO." In other words, each party to the dispute has an endowment, or bargaining chip, based on the outcome that the law will impose if no agreement is reached.[7] For Members engaged in WTO consultations, the key bargaining chip is the binding nature of the dispute resolution mechanism.[8]

If the outcome of a dispute is clear to all parties involved, this clarity will encourage settlement and, if necessary, implementation. Unfortunately, multilateral treaties are not generally known for their clarity, and the text of the various WTO Agreements is no exception. During negotiation of such treaties, often the only way to reach consensus is to draft ambiguous language that can be interpreted in different ways, allowing each negotiator to claim success before his or her domestic constituency. Greater levels of ambiguity in the language, however, decrease the ability of Members to predict how a panel or the Appellate Body would rule in a dispute. In turn, this reduces the possibility of settlement.

Thus, by interpreting the language of the WTO Agreements, the adopted decisions of the panels and Appellate Body of the WTO serve to clarify "the shadow of the law" and encourage future settlement and implementation. The introduction of an Appellate Body, with a membership that does not change with each case, and a policy of collegiality whereby all Appellate Body members are consulted on each case,[9] is one of the greatest advances of the WTO over the GATT and other international dispute settlement mechanisms.[10] Members involved in a dispute about portions of the WTO Agreements that have been previously interpreted by panels and the Appellate Body should be more likely to settle than to proceed to a predictable outcome at great expense.

To reach a mutually beneficial settlement, all parties involved in the dispute—the governments and the underlying parties at interest—must conclude that the expected net benefit of a settlement exceeds the expected net benefit of continuing the dispute. And these expected net benefits are evaluated not only based upon the expected legal decisions, but also upon the expected costs and benefits during the interim period while the parties await a final decision. Although legal fees and other transaction costs are expected costs for both parties, and increase the desirability of early settlement, the generally forward-looking retaliation mechanism of the WTO discourages settlement and implementation by the violating party. The WTO does not generally allow for retroactive remedies for

[6] Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Robert Cooter, et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

[7] *Id.*

[8] *See* Gary N. Horlick, *The Consultations Phase of WTO Dispute Resolution: A Private Practitioner's View*, 32 INT'L LAW. 685, 687 (1998).

[9] *See* WTO Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/4, ¶ 4(3) (Jan. 24, 2002).

[10] The GATT dispute settlement process relied solely on *ad hoc* panels, with no appellate review.

violations of the Agreements.[11] Thus, if a Member benefits from its failure to obey a WTO obligation, the lack of retroactive remedies increases the incentive to both delay and extend the dispute settlement process as much as possible.[12]

The perverse incentives created by the lack of retroactive remedies is confirmed by Butler and Hauser's economic analysis of the WTO dispute settlement process.[13] They conclude as follows:

> Even if the probability of winning a case is slim, countries have an incentive to introduce trade restrictions, as rents continue to accrue during the litigation process, and sanctions or compensations for past damages do not exist.[14]

Consequently, Members defending their regulations have a strong tendency to appeal panel decisions even if their chances of overturning the decision are low, in order to delay implementation and retaliation measures.[15]

Another major deterrent to settlement in the WTO is the failure of Members to include enforcement mechanisms in settlement agreements. This factor, combined with the lack of retroactive remedies, allows a Member to breach a settlement agreement with impunity (unless the breach is itself inconsistent with WTO rules), while benefiting by delaying adjudication and maintaining the violation for a longer period of time. Given these perverse incentives, it is apparent that extra-legal concerns must weigh heavily in a Member's decision to comply with the terms of a settlement agreement. The lack of enforcement mechanisms in settlement agreements, however, may serve to diminish the number of settlements or delay the stage of the process when settlement occurs. Part V of this chapter proposes methods to allow for enforcement of settlement agreements.

Even with these problems, WTO Members have reached settlement agreements often, particularly during the early years of the WTO.[16] A study of combined statistics of GATT and WTO disputes revealed that in roughly 55 percent of disputes no panel was ever established, and that an additional eight percent of cases settled prior to the issuance of a panel report.[17] The study found that these statistics have not changed much over time, including under the WTO.[18] A 1997 report by the Office of the United States Trade Representative ("USTR") emphasized the success of the United States in reaching favorable settlements during the first years of the WTO.[19]

> The new dispute settlement rules often make it possible for us to enforce WTO Agreements without ever having to reach a panel decision. The fact that the WTO can and will authorize us to retaliate pays off in earlier settlements opening markets for more of our exports.[20]

[11] *But see* Art. 4.7 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") (a Member must "withdraw" a prohibited subsidy) and the interpretation of the panel in Recourse to Art. 21.5 of the DSU by the United States, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather* WT/DS126/RW (2000), ¶¶ 6.48–6.49 ("repayment is necessary in order to 'withdraw' the prohibited subsidies").

[12] *See* Gary N. Horlick, *Dispute Resolution Mechanism: Will the United States Play by the Rules*, 722 PLI/COMM 685, 695 (1995).

[13] Butler and Hauser, *The WTO Dispute Settlement System: A First Assessment From an Economic Perspective*, 16 J. L. ECON. & ORG. 503 (2000).

[14] *Id.* at 527.

[15] *Id.*

[16] *See generally* Marc L. Busch and Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L. J. 158, 167–68 (2000).

[17] *Id.* at 161–62.

[18] *Id.*

[19] Office of U.S. Trade Representative, *Report on Trade Expansion Priorities Pursuant to Executive Order 12901 (Super 301)*, 62 Fed. Reg. 52604, 52611 (October 8, 1997) ("*USTR Report*").

[20] *Id.*

The report listed a number of cases that settled prior to a panel ruling. For example, in the case of *Korea—Measures Concerning the Shelf-life of Products* (WT/DS5), consultations regarding requirements that restricted imports of U.S. goods led to a commitment by Korea to phase out those restrictions.[21] The timing of this settlement is notable. The request for consultations was dated May 3, 1995 and the parties notified the settlement on July 31, 1995—less than three months later.[22] In *Japan—Measures Concerning Sound Recordings* (WT/DS28), the first request involving the TRIPS Agreement, the United States and Japan reached a settlement agreement in which Japan agreed to amend its law within a year of the request for consultations.[23] Other instances where settlement agreements were reached with the United States without panel adjudication include: (1) *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS36) (settlement within ten months of consultation request); (2) *Portugal—Patent Protection under the Industrial Property Act* (WT/DS37) (settlement within six months of request for consultations); (3) *Turkey—Taxation of Foreign Film Revenue* (WT/DS43) (settlement within thirteen months of request for consultations); and (4) *Hungary—Export Subsidies in Respect of Agricultural Products* (WT/DS35) (settlement within sixteen months of request for consultations).[24]

In one instance, *EC—Trade Descriptions of Scallops* (WT/DS7, WT/DS12, WT/DS14), the parties settled after the panel had already concluded its deliberations and issued an interim panel report, but before the final report was circulated to the public. The prospect of an adjudicated result that fell short of all parties' expectations led to a corresponding change in the motivation to reach settlement. It is, however, a settlement that went counter to the understanding that there is an "overwhelming incentive to appeal" rulings.[25] In the *EC-Scallops* case, the desire to keep a report "confidential" (and thereby avoid an unfavorable ruling) appears to have outweighed the incentive to appeal it.

III. Theories of Implementation in International Law

Countries, just as individuals, choose to obey or violate laws for various reasons.[26] In both cases, extra-legal sanctions, such as reputation-based concerns, prestige, credit, relationships, and other interests play an important role. Indeed, lacking a central international government with the authority to parse out and enforce sanctions, international law relies much more upon extra-legal sanctions for compliance than does domestic law. Despite a general absence of coercive sanctions in public international law (with the rare exception of military action authorized by the UN Security Council) and international treaty regimes, Henkin declares: "It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*"[27] Yet, as the obligations become more technical and politically intrusive, such as those required by the WTO agreements, the pressures against compliance increase significantly.

[21] *Id.*
[22] *Update of WTO Dispute Settlement Cases*, WT/DS/OV/8 (Aug. 9, 2002).
[23] *Id.*; *USTR Report*, *supra* note 19.
[24] *Update of WTO Dispute Settlement Cases*, *supra* note 22; *USTR Report*, *supra* note 19.
[25] Butler and Hauser, *supra* note 13, at 521.
[26] *See* Louis Henkin, How Nations Behave 92–95, 97–98(1979).
[27] *Id.* at 47 (emphasis added).

Bello identifies four factors that motivate Members to comply with WTO rules and dispute settlement rulings.[28] First, Members comply because it benefits them when other Members do likewise.[29] In fact, this explains the basic motivation behind countries crafting and joining the WTO, and the GATT before it. It follows, then, that it is in the self-interest of Members to respect a system that they expect others to respect.

Second, Members lose "international credibility and clout through scofflaw conduct."[30] Credibility is critical in international relations, and countries must carefully consider whether maintaining a trade restriction is worth the harm to a country's credibility in successive trade negotiations.

Third, Bello states that a WTO Member complies in order to avoid "damage to [their] economic interests through compensation or retaliation."[31] She refers here to the legal penalties imposed under the WTO DSU, but properly places them in the context of the other motivating factors for implementation. Fourth, according to Bello, if Members do not comply with WTO rules and rulings, then international cooperation on other issues may be jeopardized.[32] These issues include national security, illicit drug trafficking, illegal immigration, arms control, environmental protection, and promotion of human rights. A trade dispute can be a thorn in the side of a relationship that makes it difficult to come to agreement on other issues that, in many cases, are far more important to a country's self-interest.[33]

Chayes and Chayes ("Chayes") provide an important commentary on the relationship between sovereignty, on the one hand, and participation in the international community, on the other, that is especially relevant here:

> In today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system. Isolation from the pervasive and rich international context means that the state's potential for economic growth and political influence will not be realized. Connection to the rest of the world and the political ability to be an actor within it are more important than any tangible benefits in explaining compliance with international regulatory agreements.[34]

These concerns seem far greater than the individual issues at stake in specific WTO trade disputes.

Leaders operate within the confines of their own domestic legal and political systems, and often need to balance competing interest groups. An adverse ruling by a WTO panel or the Appellate Body may allow legislators to shift blame away from themselves when modification of a law upsets important interest groups. In response to outcries about a modified law or regulation, a legislator can argue that it was necessary to comply with its international obligations under the WTO.[35] In such instances, however, early settlement

[28] Bello, *supra* note 4, at 417.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *See*, *e.g.*, Peter Morton, *Bombardier Dogfight Could Buffet Canada-Brazil Talks*, THE FINANCIAL POST (Dec. 6, 1997) at 11; *Brazil's Reaction to Lost Aircraft Sale Puzzles Canada*, ASSOCIATED PRESS (Dec. 23, 1997); *Loss of Plane Deal Upsets Brazilian Trade; Trade Action Threatened Against Canada*, TORONTO STAR (Dec. 24, 1997) at A18; *Brazil Puts Temporary Block on Canadian Association With Mercosur*, BBC SUMMARY OF WORLD BROADCASTS: JAN. 21, 1998, 0930 GMT RADIO CANADA INT'L IN MONTREAL (Jan. 27, 1998); Edward Alden, *Canada Signs Investment Deal With Mercosur*, FINANCIAL TIMES (June 18, 1998) at 5.
[34] ABRAM CHAYES AND ANTONIA H. CHAYES, THE NEW SOVEREIGNTY 27 (1995).
[35] *See*, *e.g.*, *U.S. Will Comply With WTO Gas Panels But Does Not Say How*, INSIDE U.S. TRADE (June 21, 1996).

may not be an option because of the need for a published opinion declaring a law or regulation to be in violation of international rules.

In contrast to the realist's perspective that noncompliance is the result of conscious cost-benefit analysis, Chayes identifies three sources of noncompliance that may be outside the direct control of a particular country.[36]

First, ambiguity and indeterminacy of treaty language can lead to inadvertent violations and disputes.[37] In fact, the WTO panel and Appellate Body reports that interpret the WTO Agreements help to alleviate this concern. Although there is room for improvement, including the need to create a mechanism whereby the Appellate Body could remand cases back to the panel for further interpretation when it is unable to complete the reasoning of the panel,[38] the DSU provides a mechanism that can reduce the ambiguity of the WTO Agreements.

Second, the "limitations on capacity" of a country to comply with a treaty obligation constitute a clear obstacle to implementation.[39] Developing countries have long asserted lack of capacity in relation to compliance with trade agreements and sought special treatment in the DSU to address this difficult issue. For example, Article 24.1 of the DSU states as follows:

> At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member.

Another capacity-related problem may arise from the constitutional structure of a country. If, for example, a state, province, or municipality issues a law or regulation that is not subject to the control of the national government, the country will still be liable for the treaty violation but will not have direct control over implementation.[40] Even if a country has the capacity to change its regulations, it may require a change that cannot be passed by an elected legislature.

Similar to capacity, the third barrier to compliance with international obligations identified by Chayes is "the temporal dimension."[41] This is the simple idea that "[s]ignificant changes in social or economic systems mandated by regulatory treaties take time."[42] Thus, Article 21.3 of the DSU provides Member governments a "reasonable period of time" (generally fifteen months) to comply with Panel and Appellate Body decisions.

Chayes proposes thoughtful solutions to deal with these three sources of non-willful noncompliance.[43] Because of the unintentional nature of these problems, coercive enforcement will not improve the situation because it will not solve the underlying

[36] CHAYES AND CHAYES, *supra* note 34 at 9–17.

[37] *Id.* at 10–13.

[38] *See* Andrew W. Shoyer and Eric M. Solovy, *The Process and Procedure of Litigating At the World Trade Organization: A Review of the Work of the Appellate Body*, 31 LAW & POL'Y INT'L BUS. 677, 689–692 (Spring 2000).

[39] CHAYES AND CHAYES, *supra* note 34, at 13–15.

[40] *See*, *e.g.*, GATT 1994 Article XXIV:12: "Each [Member] shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."

[41] CHAYES AND CHAYES, *supra* note 34, at 15–17.

[42] *Id.* at 15.

[43] *Id.* at 23–28.

problems. Instead, Chayes proposes solutions that the drafters of the WTO also seem to have had in mind.

First, a more transparent treaty regime contributes to compliance by facilitating coordination of treaty norms, providing reassurance to other countries that they are not being taken advantage of, and deterring countries from noncompliance.[44] Although the publication of panel and Appellate Body reports, minutes of the DSB, other committee reports, and other surveillance mechanisms of the DSU contribute to the transparency of the WTO, more can be done. For example, hearings and transcripts of hearings could be made accessible to the public, and the DSU could require publication of submissions to the panel and Appellate Body. Currently, the decision of whether to open these aspects of dispute settlement to the public is voluntary and, in large part, resisted by most Members.

Second, Chayes recommends dispute settlement as a method of decreasing the ambiguity of treaty language,[45] referring to the WTO mechanism as an example of a compulsory form of dispute settlement.[46]

Third, Chayes urges treaty organizations to assist with capacity building in the form of technical and financial assistance to achieve compliance. The WTO Secretariat[47] and WTO Members[48] understand the need for such capacity building exercises, but more must be done.

Finally, Chayes acknowledges that "persuasion" can be used to induce compliance.[49] By "persuasion," they do not refer to coercive sanctions, but rather to "an iterative process of discourse among the parties, the treaty organization, and the wider public."[50] The WTO dispute settlement system, and its implementation and retaliation procedures, create a type of "persuasion," although in a stronger form than Chayes envisioned.

Chayes argues that "coercive economic—let alone military—measures to sanction violations cannot be utilized for the routine enforcement of treaties in today's international system, or in any that is likely to emerge in the foreseeable future" and that the effort to devise and incorporate sanctions in these treaties "is largely a waste of time."[51] As a result, Chayes focuses on a "managerial" cooperative, problem-solving approach to treaty implementation rather than a coercive one.

Chayes makes two important points about economic sanctions. First, the cost of such sanctions is high for all parties involved:

> The costs of economic sanctions are also high, not only for the state against which they are directed, where the sanctions fall mainly on the weakest and most vulnerable, but also for the sanctioning state.[52]

[44] *Id.* at 23.
[45] *Id.* at 24.
[46] *Id.*
[47] The WTO regularly conducts workshops on technical assistance and capacity building. *See*, *e.g.*, *WTO Workshop on Technical Assistance and Capacity Building in Trade Facilitation at* http://www.wto.org/english/tratop_e/tradfa_e/tradfac_workshop_may01_e.htm (accessed 7/25/01).
[48] For example, on May 9, 2001, the Government of Spain announced a contribution of 100,000 euros to the WTO to help finance technical assistance activities for Latin American countries. *Spain Donates 100,000 Euros to the WTO for Developing Country Technical Assistance at* http://www.wto.org/english/news_e/pres01_e/pr225_e.htm (accessed 7/25/01).
[49] CHAYES AND CHAYES, *supra* note 34, at 25–26.
[50] *Id.* at 25.
[51] *Id* at 2.
[52] *Id.* at 2.

In the context of the WTO, this has been demonstrated several times. For example, Ecuador, in *EC-Bananas*, and Canada, in *Brazil—Export Financing Program for Aircraft* ("*Brazil—Aircraft*"), were both authorized to retaliate in the form of increased trade barriers, but neither country took advantage of this authority because, evidently, it was not in their economic self-interest to retaliate. Nevertheless, reputation-based and other extra-legal concerns are highlighted when a country is subject to authorized retaliation, even when it has not been imposed.

Second, Chayes criticizes the "intermittent and ad hoc" nature of sanctions.[53] The WTO dispute settlement mechanism attempts to satisfy this concern by placing sanctions within the overall structure of the DSU.

In light of these critiques, it is important to recall that the sanctions authorized by the WTO are limited. Article 22.4 of the DSU states that "the level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment." Whether the purpose of countermeasures is to induce compliance or to "maintain the balance of reciprocal trade concessions negotiated in the WTO Agreements,"[54] it seems fair to observe that WTO rules on sanctions are not optimally designed to "force" a violating Member to bring its measures into compliance. Members could have been granted the authority to impose sanctions disproportionately greater than the impact of the offending measure. But the effect of the sanction is to provide at least some incentive for a violating Member to bring its measures into compliance. The incentive will vary based on the economic base of the country and the size and nature of the suspension.

IV. Overview of Implementation and Enforcement Provisions

A. Basic Structure of the Dispute Settlement Understanding[55]

Before evaluating the relative success of the WTO dispute settlement mechanism in bringing about compliance after the adoption of a panel or Appellate Body report, it is necessary to first briefly review the process and relevant provisions of the DSU.

1. Recommendations with Respect to Panel and Appellate Body Reports

When the adjudication process has ended and the panel report, as modified by the Appellate Body report, if any, is adopted by the DSB, a Member is asked to make changes to comply with the relevant WTO Agreements that the report concluded were violated. The DSU states that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."[56]

Article 19.1 of the DSU provides that "the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations." In practice,

[53] *Id.* at 2–3.

[54] David Palmeter and Stanimir Alexandrov, *Inducing Compliance in WTO Dispute Settlement*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE: ESSAYS IN HONOR OF ROBERT E. HUDEC (Kennedy and Southwick eds. 2002).

[55] The material in this subsection has been substantially reproduced from Jeffrey P. Kushan, Andrew W. Shoyer and Eric M. Solovy, *The Role of Private Parties in WTO Dispute Settlement under the TRIPS Agreement*, 15TH ANNUAL ABA-IPL SPRING CLE PROGRAM (April 2000). *See* David Palmeter and Petros C. Mavroidis, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE (1999); THE WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS (1999).

[56] DSU, Art. 21.1.

however, panel and Appellate Body reports do not generally recommend or suggest specific ways in which a WTO Member must bring its measures into compliance. In some cases, the remedy may be obvious, such as the elimination of a discriminatory tax or the lowering of a tariff. In other more complex cases, however, the remedy is far more ambiguous. If there is disagreement regarding the consistency of the measures taken by the infringing Member to comply with the relevant agreement, then the dispute is returned to the dispute settlement procedures, including the original panel, if possible.[57] Another potential problem arises when a Member, in complying with one ruling, adopts a measure that violates the relevant agreement in a different way, or that violates a different covered agreement. The Appellate Body has confirmed that these questions may be resolved as part of the expedited compliance review. Article 21.5 of the DSU provides that in the event that Members disagree as to whether measures taken to comply with panel rulings are themselves WTO-consistent, that disagreement should be settled by resort to DSU procedures. If possible, the matter is referred to the original panel, which then has ninety days to resolve the matter. Article 22.6 of the DSU addresses similarly expedited arbitration procedures should Members disagree as to the level of proposed retaliation.

2. Surveillance of Implementation

The party must state its intentions to implement the recommendations of the ruling at a DSB meeting held within thirty days after adoption of the report.[58] Pursuant to Article 21.3 of the DSU, in any dispute[59] the reasonable period of time in which the ruling must be implemented may be decided by (a) the Member concerned, subject to the approval of the DSB[60]; (b) agreement of the parties within 45 days of adoption of the report[61]; or (c) binding arbitration within ninety days after the adoption of the report by the DSB.[62] In practice, roughly half of the determinations of the reasonable period of

[57] DSU, Art. 21.5.

[58] DSU, Art. 21.3.

[59] Special and additional procedures apply in disputes involving the SCM Agreement.

[60] DSU, Art. 21.3(a). S*ee, e.g.,* WT/DS160/9 (*United States—Section 110(5) of the US Copyright Act*).

[61] DSU, Art. 21.3(b). S*ee, e.g.,* WT/DS34/10 (*Turkey—Restrictions on Imports of Textile and Clothing Products*), WT/DS69/9 (*European Communities—Measures Affecting the Importation of Certain Poultry Products*), WT/DS76/9 (*Japan—Measures Affecting Agricultural Products*), WT/DS90/15 (*India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*), WT/DS98/11 (*Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*), WT/DS103/13, WT/DS113/13 (*Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*), WT/DS122/8 (*Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*), WT/DS132/5 (*Mexico—Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*), WT/DS141/10 (*European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*), WT/DS161/12, WT/DS169/12 (*Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*), WT/DS166/12 (*United States—Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*), WT/DS177/13, WT/DS178/14 (*United States—Safeguard Measures on Import of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*), WT/DS179/5 (*United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*) and WT/DS189/7 (*Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*).

[62] DSU, Art. 21.3(c). S*ee, e.g.,* WT/DS8/15, WT/DS10/15, WT/DS11/13 (*Japan—Taxes on Alcoholic Beverages*), WT/DS18/9 (*Australia—Measures Affecting Importation of Salmon*), WT/DS26/15, WT/DS48/13 (*European Communities—Concerning Meat and Meat Products (Hormones)*), WT/DS27/15 (*European Communities—Regime for the Importation, Sale and Distribution of Bananas*), WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (*Indonesia—Certain Measures Affecting the Automobile Industry*), WT/DS75/16, WT/DS84/14 (*Korea—Taxes on Alcoholic Beverages*), WT/DS87/15, WT/DS110/14 (*Chile—Taxes on Alcoholic Beverages*), WT/DS114/13 (*Canada—Patent Protection of Pharmaceutical Products*), WT/DS136/11, WT/DS162/14 (*United States—Anti-Dumping Act of 1916*), WT/DS139/12,

time have occurred through agreement of the parties, and roughly half through binding arbitration, but the method of decision by the Member concerned is rarely used. In the event that the reasonable period of time is determined by arbitration, the "guideline" is that the time period shall not exceed fifteen months from the date of adoption of the panel or Appellate Body report, although, as discussed below, arbitrators have become increasingly less dependent on this "guideline."

The DSB monitors the implementation of the adopted rulings, and any Member may raise the issue of improper implementation at any time before the DSB.[63] Beginning six months after establishment of the reasonable period of time, the infringing Member must submit a regular status report to the DSB.[64] The DSU directs the DSB to give special consideration to developing countries, both as infringing countries and injured countries.[65]

3. Compensation and Suspension of Concessions

If an infringing Member fails to bring a measure into compliance, the party or parties that invoked the dispute settlement procedures have several alternatives. First, in the time before the expiration of the "reasonable period of time," they may initiate negotiations with the infringing party in order to agree on mutually acceptable compensation for the delay in implementation.[66]

If the level of compensation is not agreed to within twenty days after expiration of the "reasonable period of time," then the parties that brought the case may take more drastic measures. They may request authorization from the DSB to suspend concessions or other obligations under the WTO Agreements granted to the infringing Member.[67] The DSU sets out guidelines to ensure that the level of retaliation is appropriate to the level of harm resulting from the infringing Member's violations.[68] The general principle is that the complaining party should first seek to suspend concessions or other obligations relating to the same sectors that the infringing Member had been found to violate.[69]

If the infringing Member believes that the proposed retaliation is excessive, the issue is referred to arbitration pursuant to Article 22.6 of the DSU.[70] The arbitration will be conducted within sixty days after the expiration of the "reasonable period of time" by the original panel, if available, or by an arbitrator appointed by the Director-General.[71] The concessions shall not be suspended during the course of the arbitration.[72] The arbitrator or panel decides whether or not the level of the suspension is equivalent to the level of nullification or impairment caused by the violation of the infringing Member, and this

WT/DS142/12 (*Canada—Certain Measures Affecting the Automotive Industry*), WT/DS155/10 (*Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*), WT/DS160/12 (*United States—Section 110(5) of the US Copyright Act*), WT/DS170/10 (*Canada—Term of Patent Protection*) and WT/DS184/9 (*United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan)*.

[63] DSU, Art. 21.6.

[64] *Id.*

[65] DSU, Arts. 21.7, 21.8.

[66] DSU, Art. 22.2.

[67] DSU, Arts. 22.3–22.8.

[68] *Id.*

[69] DSU, Art. 22.3(a).

[70] DSU, Arts. 22.6–22.7.

[71] DSU, Art. 22.6.

[72] *Id.*

ruling is not subject to appeal.[73] The DSB shall follow the ruling made at arbitration, unless by consensus the DSB disagrees with the ruling.[74] Then, the suspension of concessions may remain in effect until the infringing Member complies with the rulings, or until a mutually satisfactory solution is reached.[75] The DSB keeps the matter under surveillance until successful implementation.[76]

B. Limitations of the DSU

Although the WTO dispute resolution mechanism functions well in the majority of cases, certain especially problematic and high-profile cases have tested the limitations of the DSU. The discussion below examines some of the key concerns with the DSU and the overall structure of the WTO dispute settlement mechanism.

1. Ambiguity in Process: Articles 21.5 and 22 of the DSU

Even after years of WTO jurisprudence, the relationship between the Article 21.5 compliance review procedure and the Article 22.6 arbitration procedure, applied to judge whether retaliation levels are excessive, remains unclear.[77] Unless a Member concedes that it has failed to bring its measures into compliance, thereby eliminating the need for an Article 21.5 compliance review,[78] this issue arises in every case that reaches the implementation stage. At issue is the "sequence" of the two procedures and, in particular, whether it is possible or desirable for arbitrators to determine the level of appropriate retaliation pursuant to Article 22.6 of the DSU before a panel, or the Appellate Body, has determined whether a WTO Member has complied with the recommendations and rulings of the DSB pursuant to Article 21.5 of the DSU. The DSU does not prescribe a sequence for the two procedures. Yet, many Members have expressed concern at the prospect that a complaining Member would skip the Article 21.5 procedures, including a panel and possible Appellate Body ruling, and instead move directly to a retaliation evaluation under an Article 22.6 arbitration decision without recourse to appeal. In reaction to this uncertainty, Members have generally reached voluntary agreements regarding the sequence of the two procedures.

In *EC-Bananas*, the United States and EC battled over the relationship between Article 21.5 and Article 22.6. The EC argued that the failure to first utilize the Article 21.5 process before moving to retaliation constituted a unilateral determination by the United States of non-compliance and, therefore, a violation of the DSU.[79] The United States argued that not only was it appropriate to go directly to Article 22.6 retaliation, but that the language of Article 22.6 effectively (and perhaps inadvertently) required a party to request authorization to retaliate within twenty days after expiration of the reasonable period of time.[80] As the United States explained, based upon a plain reading of the text,

[73] DSU, Art. 22.7.
[74] *Id.*
[75] DSU, Art. 22.8.
[76] *Id.*
[77] For an extensive discussion of this issue, *see* Carolyn B. Gleason and Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW AND POL'Y IN INT'L BUS. 709, 721–728 (2000).
[78] *See* Report of the Appellate Body, *European Communities—Measures Concerning Meat and Meat Products* (*EC—Hormones*), WT/DS26/AB/R, WT/DS48/AB/R (1998).
[79] *See* Gleason and Walther, *supra* note 77, at 725.
[80] DSU, Art. 22.2; *See* Gleason and Walther, *supra* note 77, at 725.

Article 22.6 provides authorization for retaliation by the DSB upon negative consensus *only* if the decision is taken by the DSB within thirty days after the expiration of the reasonable period of time. Although the DSB could make a decision after that date to authorize retaliation, the normal decision rule (positive consensus) would apply—meaning that the losing party could block the decision. Although this could hardly have been the intent of the negotiators of the DSB, the United States appears to have been sufficiently concerned that the EC could block a decision to authorize retaliation if the DSB were to consider the request after the thirty-day period had expired. Consequently, both procedures took place simultaneously and the conflict was temporarily settled by virtue of the fact that the members of the Article 21.5 panel (established based on Ecuador's request) and the Article 22.6 Arbitrators were the same people, and essentially combined the two rulings into one.[81]

In *Brazil-Aircraft* and *Canada-Aircraft*, the Appellate Body heard the first appeals of Article 21.5 panel reports.[82] *Brazil-Aircraft* presented an unusual situation in which the ruling on authorization for retaliation (under Article 22.6) was scheduled for decision *before* the Appellate Body decision on the Article 21.5 panel report. The *ad hoc* solution was that the Article 22.6 Arbitrators issued an interim decision pending the Appellate Body decision. The Appellate Body subsequently upheld the Panel's ultimate findings,[83] and the Arbitrators concluded that the Article 21.5 Appellate Body report did not require changes in the final arbitration decision.[84] If the result of the Article 21.5 Appellate Body report had been different, this arrangement would have resulted in substantial inefficiency.

Although it was later dismissed by the Appellate Body as outside the panel's scope of review, a panel reviewing the EC's complaint regarding the unilateral actions taken by the United States in reaction to the *EC-Bananas* case attempted to define the relationship between Articles 21.5 and 22.6 of the DSU. In *U.S.—Import Measures on Certain Products from the European Communities* ("*U.S.—Import Measures*"), the Panel rejected the EC's claim that the United States had violated Article 21.5 by requesting an Article 22.6 arbitration before requesting a ruling under Article 21.5.[85] Instead, the Panel concluded, based on the terms of the DSU and "simple legal logic," that an Article 22.6 arbitration could conduct the Article 21.5 implementation analysis along with its determination of the appropriate level of retaliation:

> We consider . . . that if, at the time when the Article 22.6 arbitration is requested, no WTO determination of the compatibility of the implementing measure has yet taken place, those acting in arbitration are obliged to assess first whether the implementing measure nullifies or impairs the WTO rights of the Member requesting DSB permission to retaliate. This is a matter of simple legal logic: it is legally impossible to assess the level of suspension based on the level of nullification before assessing whether the implementing measure nullifies or impairs WTO rights. Only after having assessed the WTO compatibility of the implementing measure can a WTO adjudicating body assess the impact of any such WTO incompatibility,

[81] Report of the Panel (Recourse to Article 21.5 DSU by Ecuador), *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/RW/ECU (1999); Arbitration under Article 22.6 of DSU, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB (1999).

[82] Report of the Appellate Body (Recourse to Article 21.5 DSU), *Brazil—Export Financing Program for Aircraft*, WT/DS46/AB/RW (2000)**;** Report of the Appellate Body (Recourse to Article 21.5 DSU), *Canada—Measures Affecting the Export of Civilian Aircraft* ,WT/DS70/AB/RW (2000).

[83] Report of the Appellate Body (Recourse to Article 21.5 DSU), *Brazil—Export Financing Program for Aircraft*, WT/DS46/AB/RW (2000).

[84] Arbitration Under Article 22.6, *Brazil—Export Financing Program for Aircraft*, WT/DS46/ARB (2000).

[85] Report of the WTO Panel, *United States-Import Measures on Certain Products from the European Communities*, WT/DS165/R (2000), ¶¶ 6.116–6.130.

> which will indicate the "equivalent level of suspension of concessions and other obligations." Since the Article 22.6 arbitration process was given the authority to determine "a level of suspension equivalent to the level of nullification," it has the authority to assess both variables of the equation, including whether the implementing measure nullifies any benefit and the level of such nullified benefits.[86]

If this Panel decision had been followed, however, it seems likely that a complaining party would generally try to speed up the implementation process by going directly to an Article 22.6 arbitration. As a result of the finality of Article 22.6 arbitration decisions, this would bypass not only an Article 21.5 determination by a panel, but also any appeals.

The Appellate Body, however, concluded that the Panel in *U.S.–Import Measures* had erred in its decision regarding the relationship between Article 21.5 and 22.6, because the matter was "outside its terms of reference."[87] The Appellate Body acknowledged the "important systemic issue of the relationship between Articles 21.5 and 22 of the DSU," but concluded that "[d]etermining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of the panels; it is clearly the responsibility solely of the Members of the WTO."[88] Thus, it will take a decision of the DSB and ultimately an amendment to the DSU before the issue will be resolved. Until then, absent voluntary agreements, this ambiguity remains an important flaw in the implementation mechanism of the DSU. It appears, though, that the Appellate Body ruling has provided at least some motivation for WTO Members, including Japan and Canada, to renew the push to clarify the DSU.[89]

2. The "Reasonable Period of Time" for Implementation

As discussed above, once the panel or Appellate Body report is adopted, assuming the defending party loses, the party must notify the DSB of its intentions to implement the adopted recommendations. If it is impracticable to comply immediately, generally the Member is given a reasonable period of time to bring its measures into conformity.[90] Arbitrators consider a number of factors when determining the appropriate time period for implementation, including the definition of "prompt compliance," the "particular circumstances" of implementing legislation, and the status of a WTO Member as a developing country. This process, discussed in detail below, has generally worked well over the years, but there remains the potential for abuse; Members could use the reasonable period as merely a delay tactic to maintain an inconsistent provision without facing retaliation.

(a) Prompt Compliance. The term "reasonable period of time" in Article 21.3(c) of the DSU must be interpreted in accordance with the customary principles of treaty

[86] *Id.* ¶ 6.122.

[87] Report of the Appellate Body, *United States-Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (2000), ¶¶ 88–90. For further discussion of this case, *see infra* Part IV(B)(3).

[88] *Id.* ¶¶ 91–92.

[89] *See WTO Appellate Decision Prompts Renewed Push for Change to DSU*, INSIDE U.S. TRADE, January 12, 2001, at 11.

[90] In the special rules and procedures for dispute settlement in the SCM Agreement, the DSU's reference to the "reasonable period of time" is replaced by more specific language. For example, when a measure has been found to be a prohibited subsidy in violation of Article 3 of the SCM Agreement (i.e., an export subsidy or an import substitution subsidy), the defending party is required under Article 4.7 of the Agreement to withdraw the subsidy "without delay". When a measure has been found to be an actionable subsidy in violation of Article 5 of the SCM Agreement, the defending party must, under Article 7.9 of the Agreement, "remove the adverse effects of the subsidy or withdraw the subsidy *within six months* from the date" of adoption of the panel or Appellate Body report. (emphasis added).

interpretation as set out in the Vienna Convention on the Law of Treaties[91] ("*Vienna Convention*"). Pursuant to Article 31.1 of the Vienna Convention, the meaning of a treaty term is to be determined in accordance with the ordinary meaning to be given to the term in its context and in the light of the object and purpose of the treaty.[92] In determining the ordinary meaning of a term, a treaty interpreter must begin with an examination of the words of the treaty itself.[93]

The text of the DSU is clear. Regarding implementation, the basic premise is that "prompt compliance" with the DSB recommendations and rulings is "essential" for the "effective resolution of disputes to the benefit of all Members."[94] The DSU recognizes, however, that requiring all Members "to comply immediately" with DSB recommendations and rulings may, in some situations, be "impracticable."[95] In such situations, the Member concerned is afforded "a reasonable period of time" to comply.[96] The question, therefore, is what constitutes a reasonable period.

If the dispute is submitted to binding arbitration, a guideline for the arbitrator is that the reasonable period should not exceed fifteen months, calculated from the date of adoption of a panel or Appellate Body report.[97] Although the first three arbitration decisions on the reasonable period followed the fifteen month guideline,[98] the trend has been toward shorter time periods.[99] For example, arbitrators issuing rulings in 2000 and 2001 decided on periods of time averaging approximately ten months, one-third less than the fifteen-month guideline.[100]

[91] U.N. Doc. A/CONF. 39/27 (1969). Article 3.2 of the DSU requires the WTO Agreements to be interpreted "in accordance with customary rules of interpretation of public international law."

[92] *See, e.g.,* Report of the WTO Panel, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R (1999), ¶ 4.496.

[93] Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998), ¶ 114 ("A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted."). *See also* Report of the Appellate Body, *India—Patent Protection for Pharmaceutical and Agriculture Chemical Products*, WT/DS50/AB/R (1997), ¶ 45 (principles set out in the Vienna Convention neither require nor condone the imputation into a treaty of words that are not there, nor the importation into a treaty of concepts that are not intended.)

[94] DSU, Art. 21.1.

[95] DSU, Art. 21.3.

[96] *See, e.g.*, Arbitration Under Article 21.3(c) of the DSU, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14 (2000), ¶ 37.

[97] DSU, Art. 21.3(c). The period may be shorter or longer, if "particular circumstances" so justify.

[98] Arbitration Under Article 21.3(c) of the DSU, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/15, WT/DS10/15, WT/DS11/13 (1997) ¶ 27 (fifteen months); Arbitration Under Article 21.3(c) of the DSU, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13 (1998) ¶ 48 (fifteen months); Arbitration Under Article 21.3(c) of the DSU, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/15 (1998), ¶ 20 (fifteen months and one week). In *Bananas*, had the period ended exactly at fifteen months, however, the date would have been December 25, 1998 (Christmas Day). As a result, the Arbitrators extended the reasonable period of time an additional week to account for the holiday in Europe.

[99] *See* Gleason and Walther, *supra* note 77, at 715–718; *see, e.g.*, Arbitration Under Article 21.3(c) of the DSU, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (1998), ¶ 25 (period of twelve months); Arbitration Under Article 21.3(c) of the DSU, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/16, WT/DS84/14 (1999), ¶ 48 (period of eleven months); Arbitration Under Article 21.3(c) of the DSU, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/9 (1999), ¶ 39 (period of eight months).

[100] Arbitration Under Article 21.3(c) of the DSU, *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/10 (2001) (twelve months, twelve days); Arbitration Under Article 21.3(c) of the DSU, *United States—Anti-Dumping Act of 1916,* WT/DS136/11, WT/DS162/14 (2001) (ten months); Arbitration Under Article 21.3(c) of the DSU, *Canada—Term of Patent Protection*, WT/DS170/10 (2001) (ten months); Arbitration Under Article 21.3(c) of the DSU, *United*

The covered agreements themselves offer the arbitrators very little guidance on what is a reasonable period of time for compliance. Indeed, no source of guidance is as important in an arbitration to determine the reasonable period of time as the reported decisions of prior arbitrators.[101] Although prior decisions do not have *stare decisis* effect, the WTO system has produced a set of precedents that arbitrators refer to but are not legally required to follow.[102]

One Arbitrator noted that the burden of proof is on the party seeking to prove that the "particular circumstances" warrant justifying a shorter or longer time.[103] Others, however, believe that the implementing Member bears the burden of proof in showing that the duration of *any* proposed period of implementation, including its supposed component steps, constitutes a "reasonable period of time."[104] If an arbitrator perceives that an implementing Member has not adequately begun implementation after adoption so as to effect "prompt compliance," the arbitrator might take this into account when determining the "reasonable period of time."[105]

The most important factor in establishing the length of the reasonable period of time is the interpretation of the phrase "prompt compliance."[106] One Arbitrator consulted a dictionary, which defines "prompt" as meaning "a. acting with alacrity; ready. b. made, done, etc. readily or at once."[107] In context, as interpreted by many arbitrators, this means "the shortest possible period within the legal system of the Member to implement the recommendations and rulings of the DSB."[108]

But the "shortest period possible within the legal system of the Member" refers to "normal legislative procedures"; it does not require a Member to utilize "an *extraordinary*

States—Section 110(5) of the US Copyright Act, WT/DS160/12 (2001) (twelve months); Arbitration Under Article 21.3(c) of the DSU, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/12; WT/DS142/12 (2000) (eight months); Arbitration Under Article 21.3(c) of the DSU, *Canada—Patent Protection of Pharmaceutical Products,* WT/DS114/13 (2000) (six months); Arbitration Under Article 21.3(c) of the DSU, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14 (2000) (fourteen months, nine days).

[101] Palmeter and Mavroidis, *supra* note 55, at § 3.03.

[102] The International Court of Justice follows a similar system of precedent. *See*, *e.g.*, *Statute of the International Court of Justice*, Arts. 38(1)(d), 59, www.un.org/overview/statute/contents.html.

[103] Arbitration Under Article 21.3(c) of the DSU, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13 (1998), ¶ 27.

[104] Arbitration Under Article 21.3(c) of the DSU, *United States—Anti-Dumping Act of 1916,* WT/DS136/11, WT/DS162/14 (2001), ¶ 32, *quoting* Arbitration Under Article 21.3(c) of the DSU, *Canada—Patent Protection of Pharmaceutical Products,* WT/DS114/13 (2000), ¶ 47.

[105] Arbitration Under Article 21.3(c) of the DSU, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/12 (2001), ¶ 46.

[106] Arbitration Under Article 21.3(c) of the DSU, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/16, WT/DS84/14 (1999), ¶ 37.

[107] Arbitration Under Article 21.3(c) of the DSU, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13 (1998), ¶ 26 *quoting* D. Thomson (ed.), *The Concise Oxford Dictionary of Current English*, 1096 (9th ed. 1995).

[108] Arbitration Under Article 21.3(c) of the DSU, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13 (1998), ¶ 26. *See also* Arbitration Under Article 21.3(c) of the DSU, *United States—Anti-Dumping Act of 1916,* WT/DS136/11, WT/DS162/14 (2001), ¶ 32; Arbitration Under Article 21.3(c) of the DSU, *Canada—Patent Protection of Pharmaceutical Products,* WT/DS114/13 (2000), ¶ 47; Arbitration Under Article 21.3(c) of the DSU, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14 (2000), ¶ 23; Arbitration Under Article 21.3(c) of the DSU, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/16, WT/DS84/14 (1999), ¶ 37; Arbitration Under Article 21.3(c) of the DSU, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/9 (1999), ¶ 38; Arbitration Under Article 21.3(c) of the DSU, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (1998), ¶ 22.

legislative procedure."[109] In other words, the ability to take extraordinary action to implement a DSB recommendation is irrelevant to the determination of the reasonable period for implementation.

As noted above, however, there is one situation in which the "reasonable period of time" standard does not apply.[110] The SCM Agreement requires a recommendation to "withdraw"[111] a prohibited subsidy "without delay."[112] Recommendations enacted pursuant to the prohibited subsidy provision, therefore, are not relevant for determining what may constitute a reasonable period of time for implementation of other recommendations.[113]

Recalling that all bargaining between Members takes place in the "shadow of" WTO precedent, it is not surprising that the mutually agreed reasonable periods of time pursuant to Article 21.3(b) of the DSU have also continued to decrease. For example, several agreements in 2001 were as short as eight months,[114] seven months,[115] and five months and two days.[116] Such agreements are promising developments.

(b) Particular Circumstances. Arbitrators are cognizant of the steps a Member must take to implement a recommendation to comply, and they are instructed by the DSU to consider "the particular circumstances"[117] of each case when determining the reasonable period of time. But, as the Arbitrators held in the *EC-Hormones* arbitration, the term "particular circumstances" does not go so far as to include "time to conduct studies or to consult experts to demonstrate the *consistency* of a measure already judged to be *inconsistent*."[118]

One of the common examples of "particular circumstances" examined by arbitrators is whether implementation must be enacted by legislation or administrative action. Typically, when implementation can be effected through an administrative as opposed to a legislative process, the reasonable period of time will be shorter.[119] Arbitrators have reasoned that absent evidence to the contrary, a legislative change is likely to be more time-consuming than an administrative change.[120] For example, in *Canada—Pharmaceutical Patents*, Canada, as the implementing party, argued for an implementation period of eleven months.[121] Surprisingly, the EC, the complaining party, asked for a

[109] Arbitration Under Article 21.3(c) of the DSU, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/12 (2001), ¶ 32 *quoting* Arbitration Under Article 21.3(c) of the DSU, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/16, WT/DS84/14 (1999), ¶ 42.

[110] *See supra* note 90.

[111] SCM Agreement, Art. 4.7.

[112] *Id.*

[113] Article 21.3(c) of the DSU, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/12; WT/DS142/12 (2000), ¶ 53.

[114] Agreement Under Article 21.3(b) of the DSU, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/12, WT/DS169/12 (2001).

[115] Agreement Under Article 21.3(b) of the DSU, *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/5 (2001).

[116] Agreement Under Article 21.3(b) of the DSU, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/10 (2001).

[117] DSU, Art. 21.3(c).

[118] Arbitration Under Article 21.3(c) of the DSU, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13 (1998), ¶ 39.

[119] Arbitration Under Article 21.3(c) of the DSU, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/9 (1999), ¶ 38.

[120] Arbitration Under Article 21.3(c) of the DSU, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/12 (2001), ¶ 34, *quoting* Arbitration Under Article 21.3(c) of the DSU, *Canada—Patent Protection of Pharmaceutical Products,* WT/DS114/13 (2000), ¶ 49.

[121] Arbitration Under Article 21.3(c) of the DSU, *Canada—Patent Protection of Pharmaceutical Products,* WT/DS114/13 (2000), ¶ 5.

longer period of twelve months, arguing that implementation required legislative—not regulatory—action.[122] This brought two issues before the Arbitrator: whether Canada's proposed regulatory action was sufficient for implementation, and how long Canada should be afforded to implement that change.[123]

The proper concern of an arbitrator under Article 21.3(c) of the DSU is with *when*, not *what*.[124] *What* a Member must do to comply with a recommendation is addressed elsewhere in the DSU. An arbitrator determines only the "reasonable period of time" it should take for a Member to make the change that it proposes. With this mandate, the Arbitrator in *Canada—Pharmaceutical Patents* examined closely the process for implementing a *regulatory* change proposed by Canada, as opposed to the legislative change proposed by the EC. The Arbitrator stated that his mandate allowed only for an examination of the time period of Canada's implementation efforts and not the method, which was reserved for an Article 21.5 panel.[125]

The procedural time periods required by a Member's law or regulation are taken into account when determining the "reasonable period of time."[126] For other estimates not fixed by law or regulation, the implementing Member bears a greater burden of proof in demonstrating their accuracy and legitimacy.[127] The complexity of the proposed legislative change may be relevant to the determination of the appropriate time required to implement a decision.[128]

In *Canada—Pharmaceutical Patents*, after weighing the arguments of both parties and considering the substantive part of Canada's proposed regulatory change, the Arbitrator determined that *six months* was a reasonable period to implement the recommendation of the DSB.[129] The Arbitrator considered Canada's proposed regulatory change, which read in its entirety: "The *Manufacturing and Storage of Patented Medicines Regulations* are repealed."[130] Obviously, the short time period for implementation in this case took into account the simplicity of the proposed change. As the Arbitrator noted, "After all, how many other ways could this one sentence be written?"[131] What is clear is that the "particular circumstances" of each case influence the determination of what is a "reasonable period of time" for implementation.[132] The term "particular circumstances" includes whether implementation is by *administrative* rather than *legislative* means, the *complexity* of the proposed implementation, and the *legally binding* as opposed to the discretionary nature of the component steps leading to implementation.[133]

[122] *Id.* ¶ 24.
[123] *Id.* ¶¶ 36 *et. seq*.
[124] *Id.* ¶ 41.
[125] *Id.* ¶ 44.
[126] *Id.* ¶ 54.
[127] *Id.* ¶ 55.
[128] Arbitration Under Article 21.3(c) of the DSU, *United States—Anti-Dumping Act of 1916,* WT/DS136/11, WT/DS162/14 (2001), ¶ 36.
[129] Arbitration Under Article 21.3(c) of the DSU, *Canada—Patent Protection of Pharmaceutical Products,* WT/DS114/13 (2000), ¶ 64.
[130] *Id.* ¶ 58.
[131] *Id.*
[132] *Id.* ¶ 48; Arbitration Under Article 21.3(c) of the DSU, *Canada—Term of Patent Protection*, WT/DS170/10 (2001), ¶ 36 n. 27 *quoting* Arbitration Under Article 21.3(c) of the DSU, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14 (2000), ¶ 29, 41–45; Article 21.3(c) of the DSU, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/12; WT/DS142/12 (2000), ¶ 39.
[133] Arbitration under Article 21.3(c) of the DSU, *Canada—Patent Protection of Pharmaceutical Products,* WT/DS114/13 (2000), ¶¶ 48–52.

(c) Developing Countries. Developing countries have negotiated hard in the international trading system for special and differential treatment.[134] The WTO is no exception. Pursuant to Article 21.2 of the DSU, when determining the reasonable period of time to implement a decision, arbitrators are required to pay "particular attention" to dispute settlement matters affecting the interests of developing country Members.

In *Chile—Alcoholic Beverages*, although the Arbitrator noted Chile's reference to Article 21.2 of the DSU, he implied that the criteria for the determination of a reasonable period of time should not be qualitatively different for developed and developing country Members.[135] By contrast, in *Indonesia—Automobile Industry*, after considering the "dire economic and financial situation" in Indonesia and its status as a developing country, the Arbitrator awarded "an additional" period of six months over and above the six month period determined to be the shortest period for implementation.[136] Thus, Indonesia was given a total of twelve months—six months as the shortest period possible to complete its domestic rulemaking process and an additional six months as a transition to allow affected industries to make structural adjustments—to implement the recommendations of the DSB.

Article 21.2 of the DSU is cast in general terms and is not specific or concrete about how it should be applied to determine the length of the reasonable period.[137] Yet despite this, it is not simply to be disregarded.[138] Arbitrators must abide by the "fundamental principle of *effet utile* . . . that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility."[139] Rather an arbitrator must "be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB."[140] What impact Article 21.2 will have on the determination of the reasonable period of time necessarily depends, therefore, on the facts of each particular case.

(d) Potential for Abuse of "Reasonable Period of Time". Perhaps even more important than the length of the "reasonable period of time" is the behavior that occurs during this time. According to the terms of Article 21.3 of the DSU, a Member is given this time period "if it is impracticable to comply immediately with the recommendations and rulings." But, other than the mandate that implementation measures should be taken by the end of the period, the DSU does not include guidance as to what must take place

[134] For two comprehensive studies by the United Nations Conference on Trade and Development (UNCTAD), *see* GUIDEBOOK FOR THE GSTP: THE GLOBAL SYSTEM OF TRADE PREFERENCES AMONG DEVELOPING COUNTRIES—ORIGIN, DIMENSIONS, NEGOTIATIONS AND PROSPECTS, GSTP/NC/TP/2 (1987) (UNCTAD Pub. No. GE.87-51064); REVIEW OF THE PREFERENTIAL ARRANGEMENTS UNDER THE GATT PROTOCOL RELATING TO TRADE NEGOTIATIONS AMONG DEVELOPING COUNTRIES, UN Doc. TD/B/C.7/49 (1981); *see also* Committee on Trade Development, *A Description of the Provisions Relating to Developing Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions*.

[135] Arbitration Under Article 21.3(c) of the DSU, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14 (2000), ¶¶ 44–45. The Arbitrator set a deadline for implementation fourteen months and nine days from the DSB's adoption of the Appellate Body and Panel Reports.

[136] Arbitration Under Article 21.3(c) of the DSU, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (1998), ¶¶ 22, 24.

[137] Arbitration Under Article 21.3(c) of the DSU, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14 (2000), ¶¶ 44, 45.

[138] *Id.* ¶ 45.

[139] *See, e.g.,* Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R (1999), ¶ 133.

[140] Arbitration Under Article 21.3(c) of the DSU, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/15, WT/DS110/14 (2000), ¶ 45.

during the course of this reasonable period of time.[141] There are no requirements to file an implementation plan, or opportunities for consultation regarding claims of bad faith for misusing the reasonable period as a delay tactic.[142] While Members sometimes voluntarily elect to cooperate closely on implementation during the period,[143] nothing prevents abuse of the period. For example, in *EC-Hormones*, the Arbitrator determined that the EC would be granted a fifteen-month period, after the EC had requested three to four years.[144] Despite the Arbitrator's ruling that the reasonable period of time should not include "time to conduct studies or to consult experts to demonstrate the consistency of a measure already judged to be inconsistent,"[145] the EC used its fifteen months to do exactly that and conducted scientific studies.[146] At the end of the reasonable period, the EC concluded that it would not modify its laws.[147] No remedy was available to the United States with regard to what it considered to be an abusive use of the reasonable period of time allotted as a means to delay the impending retaliation.

3. Incentives for Unilateral Sanctions

As detailed above, because of the lack of retroactive remedies for WTO violations, a WTO Member defending a complaint has an extra incentive to delay the authorization of retaliation. Many aspects of the DSU are conducive to such delay, and this upsets the complaining Members. Consequently, Members have considered taking unilateral retaliatory actions outside the framework of the DSU. Such action violates Article 23.1 of the DSU, which requires Members seeking redress for WTO violations to "have recourse to, and abide by, the rules and procedures of this Understanding." In *U.S.—Import Measures*, the Panel held, and the Appellate Body confirmed, that the issuance of increased bonding requirements by the United States (on March 3, 1999) as a response to its dissatisfaction with the *EC-Bananas* case, prior to DSB authorization of retaliation (on April 19, 1999) in that case, constituted unilateral action that violated the DSU.[148] The United States did not appeal the panel's findings that it had violated Articles 22.6, 23.1 and 23.2(c) of the DSU as a result of these unilateral actions, although it appealed other aspects of the decision. The Appellate Body concluded that the United States "has accepted the conclusion of the panel that, by adopting the 3 March Measure, the United States acted inconsistently . . . with the obligation in Article 23 of the DSU not to take unilateral action in redressing perceived breaches of WTO obligations by other WTO Members."[149]

[141] *See* Gleason and Walther, *supra* note 77, at 719–721.

[142] *Id.*

[143] *Id.* Gleason and Walther mention *U.S.—Reformulated Gasoline* and *U.S.—Restrictions on Imports of Cotton and Man-Made Fiber Underwear* as examples where a Member, the United States, had voluntarily traveled to the capitals of the complaining Members to provide assurances regarding implementation. *Id*. at 719–720. In both those cases, however, the United States faced enormous controversy about its implementation schedule, and thus, might have felt particular need to make extraordinary efforts to cooperate on its implementation plans.

[144] Arbitration Under Article 21.3(c) of the DSU, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13 (1998).

[145] *Id.* ¶ 39.

[146] Gleason and Walther, *supra* note 77, at 720–721.

[147] *Id.*; Status Report by the European Communities, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/17/Add.4, WT/DS48/15/Add.4 (1999).

[148] Report of the WTO Panel, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/R (2000); Report of the Appellate Body, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (2000).

[149] Report of the Appellate Body, *United States-Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (2000), ¶ 58.

Ironically, the lack of retroactive remedies worked in favor of the United States in this case. Because retaliation was ultimately authorized in *EC-Bananas*, and the United States consequently cancelled its unilateral measures prior to the panel decision in *US-Import Measures*, the panel in *US-Imports* found that the unilateral action by the United States no longer constituted a continuing violation. As a result, the United States was not subject to retaliation for its unilateral measures. Specifically, the Panel concluded that "the 3 March Measure is no longer in existence," but nevertheless recommended that the DSB request the United States to bring its measures into conformity.[150] The Appellate Body concluded that this latter recommendation was in error because the measure no longer existed at the time of the panel ruling.[151]The result is a situation whereby a WTO Member has the ability to take unilateral actions outside the scope of the DSU with no fear of retaliation. The United States was, in practice, able to begin its retaliation against the EC in the time and manner that it chose. In such situations, either retaliation will ultimately be authorized in the underlying case and a unilateral measure will no longer be necessary, or a Member could remove its unilateral measure anytime before retaliation is authorized in response to that unilateral measure. Thus, the lack of retroactive remedies becomes a double-edged sword for both parties in a WTO dispute.

4. Disproportionate Effect of Retaliation

WTO Members constitute a diverse group of countries with widely disparate economies. While the DSU recognizes some of these differences, such as the provisions in Article 24 for least-developed country Members, it generally does not distinguish between countries based on economic differences. As a result, a country like the United States will be treated no differently when it comes to measuring what constitutes appropriate retaliation than a country with a much smaller economy. Yet, retaliation may have a disproportionate effect on a smaller economy, both as the target of retaliation and as the Member authorized to retaliate.

In those situations where two Members face the same level of retaliation for a violation, a country with a small economy is at a significant disadvantage to a country with a large economy. For example, while $100 million per year in trade retaliation would have little overall impact on the U.S. economy, it would have a large impact on Ecuador's overall economy. As a result, the coercive effect of retaliation measures in influencing implementation of the DSB rulings and recommendations could be much greater for a country with a small economy. With economies as large and diverse as that of the European Union and the United States, it would take extremely high levels of retaliation before the overall economies will be noticeably impacted. The impact of retaliation should not be judged purely on the volume of trade affected, however. The same $100 million targeted at a few highly sensitive U.S. products could have a much greater effect on the willingness of the United States to comply with DSB recommendations than measures spread widely across $100 million of Ecuadorian products.

Moreover, as complaining Members, countries with smaller economies may be less likely to take advantage of authorization to retaliate than countries with large economies because of the potential costs associated with taking such retaliation. Increased trade

[150] Report of the WTO Panel, *United States-Import Measures on Certain Products from the European Communities*, WT/DS165/R (2000), ¶¶ 7.1, 7.3.

[151] Report of the Appellate Body, *United States-Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (2000), ¶ 81. The 3 March measure had expired on its own term, having been replaced by retaliatory duties.

barriers do not generally help the overall economy of the country that is retaliating. For example, on August 28, 2000, the Article 22.6 Arbitrators in *Brazil-Aircraft*, determined that Canada could retaliate with over $233 million per year (C$344 million) in trade sanctions.[152] Nevertheless, Canada never acted on this authorization. Because there is little trade between Canada and Brazil in the product at issue in the dispute (regional aircraft), increased trade barriers on imports of aircraft from Brazil to Canada would have had little, if any, impact. Thus, the alternative was for Canada to raise tariffs on unrelated products, such as coffee, sugar, and cocoa.[153] While this would have hurt Brazilian producers if these products were easily substitutable with products from other countries, it would also have hurt Canadian consumers and producers who use these Brazilian products for consumption or for industrial inputs, as a result of increased prices and decreased competition.

Similarly, in *EC-Bananas,* even though Ecuador was granted authorization to retaliate with up to $201.6 million in trade barriers against the EC,[154] it never took retaliatory measures. Moreover, because of the small value of imports from the EC into Ecuador, even if Ecuador had hoped to raise tariffs by $201 million, this would not have been possible. The Arbitrators acknowledged this problem and authorized Ecuador to seek retaliation in the areas of services and of intellectual property rights by, for example, allowing infringement of copyrights, industrial designs and geographical indications. The result in *EC-Bananas* (Ecuador) is ironic when one considers the great resistance of developing countries toward the TRIPS Agreement during the Uruguay Round. If Ecuador had not taken on TRIPS commitments, it would not have been possible to suspend those as part of the authorized retaliation! The EC and Ecuador settled the *EC-Bananas* controversy more than one year after Ecuador was authorized to retaliate. Ecuador had never taken advantage of its authorization to retaliate, presumably because Ecuador did not find retaliation to be in its economic interest.

Authorization to retaliate does not occur within a vacuum. As discussed above, WTO Members are part of the larger international community, and this provides additional extra-legal pressures to implement WTO obligations. Such extra-legal pressures are not felt equally by all countries. Pauwelyn illustrates this point:

> [N]egotiations [where a small economy is faced with noncompliance by a large economy] highlight and effectively uphold the inevitable economic and political inequality between WTO members (as equal as they may be in the eye of the law). Would it not be difficult in practice indeed, even counter-productive—for say, Burkina Faso or Estonia to take countermeasures against, for example, the United States or the European Community? Difficult because retaliation may, in turn, provoke counterretaliation in non-WTO-related fields such as development aid, and counterproductive because fencing off Burkina Faso's or Estonia's market from much needed U.S. or EC imports would mostly harm the former, not induce compliance by the latter.[155]

International law does not prevent countries from taking such "counter-retaliation" measures in areas of international relations in which there is no specific customary or treaty

[152] Recourse to Arbitration by Brazil Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, *Brazil—Export Financing Program for Aircraft*, WT/DS46/ARB (2000).

[153] Recourse by Canada to Article 4.10 of the SCM Agreement and Article 22.2 of the DSU, *Brazil—Export Financing Program for Aircraft*, WT/DS46/16 (2000).

[154] Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/ARB/ECU (2000).

[155] Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335 (2000).

law. Important areas like development aid, military support, loan guarantees, and support for creating new treaties are all elements in the war chest of a powerful country that do not fall under the provisions of the WTO Agreement.

V. Suggested Improvements to Enforcement Devices

The WTO dispute settlement process has performed quite well during its early years, but it is by no means perfect. The framers of the DSU attempted to create a middle ground that goes beyond reliance on extra-legal sanctions to motivate implementation, but that does not go so far as to create the highly coercive economic sanctions that are the subject of Chayes' critique. The WTO dispute settlement mechanism must continue to hold this middle ground, but the system can be modified to improve its effectiveness.

A. Enforceable Settlement Agreements

Given the central importance of settlement at every stage of the WTO dispute settlement process, it is critical that the DSU improve the incentives for settlement. As detailed in Part II, bargaining for settlement agreements takes place "in the shadow of the WTO." As the DSU is currently framed, a party can breach a settlement agreement with no fear of direct legal consequences, requiring the complaining party to restart the dispute settlement process from the beginning. In the meantime, the alleged violator may continue to violate the WTO Agreements without penalty, until retaliation is authorized at the end of a potentially very long process.

The DSU should facilitate implementation of settlement agreements at least as well as it facilitates the implementation of the rulings and recommendations of the DSB.[156] Although WTO Members appear to have the option of providing for arbitration of their agreements pursuant to Article 25 of the DSU, this has not been their practice. If Members did agree to such an arbitration, Article 25.4 would appear to bring this settlement agreement within the scope of surveillance under Article 21, as well as within the provisions of Article 22 on compensation and suspension of concessions.

To ensure that settlement agreements are subject to coverage by the DSU, the DSU could be modified in a way that transforms commitments made in settlements into WTO commitments. This could be done through a modification of Article 1 of the DSU to explicitly include within the scope of "covered agreements" mutually agreed solutions notified to the DSB and the relevant councils and committees pursuant to Article 3.6 of the DSU. These settlement agreements would then fall within the scope of the WTO dispute settlement process in the event that they were breached. Such a change would make settlement agreements in the WTO system more like settlement agreements under national law, where a breach of a settlement agreement is treated as a breach of contract subject to damages to be determined by a court or through arbitration.

B. Interim Relief

WTO Panels are not authorized by the DSU to grant interim relief—for example, to enjoin a Member from imposing a measure until after its WTO consistency has been adjudicated. The lack of interim relief is consistent with the basic assumptions underlying the DSU.

[156] *See* Andrew W. Shoyer, *The Future of Dispute Settlement*, American Society of International Law, Proceedings of the 92nd Annual Meeting, (April 1–4, 1998), at 75–76.

Sovereign governments are assumed to be applying the terms of the WTO Agreement in good faith[157]—they are presumed innocent until proven guilty.

Yet, the possibility of interim relief could greatly encourage settlement, and could be justified without shifting the presumption of good faith implementation. For example, panels could be granted the authority to recommend that Members withdraw a measure pending the adjudication of its WTO consistency in circumstances similar to those in which courts grant preliminary injunctions—to avoid irreparable harm to the trading interests of the complaining Member.[158] Panels could reach the issue as a preliminary matter upon the request of the complaining Member.

Interim relief would address one of the criticisms of the WTO dispute settlement system identified by private interests—that the period of time before Members are required to repeal or modify offending measures is too long. Although interim relief would not completely address this concern, it would safeguard the underlying commercial interests of the complaining Member while respecting the sovereignty of the defending Member. The enforcement of interim relief could, however, be difficult, and success would rely largely on voluntary compliance with the interim measures.

C. Emphasizing Compensation Over Retaliation

Although the DSU ultimately prefers compliance with WTO obligations over compensation and retaliation, compensation is the lesser of the two evils and is clearly preferred over retaliation.[159]

Article 22.2 of the DSU clarifies that retaliation should be an option only when Members are unable to agree to compensation. While retaliation results in the raising of trade barriers, compensation may have the opposite effect and, thereby, more closely follows the spirit of the WTO. Thus, the WTO dispute settlement mechanism would benefit by encouraging compensation, in the form of reduced trade barriers, over retaliation. Unfortunately, compensation is extremely difficult for a Member to offer, and retaliation dominates as the remedy of choice. Indeed, as of October 2002, there has only been one known example, *Japan—Taxes on Alcoholic Beverages*, in which the parties have agreed to compensation pending implementation.

The specifics of what constitutes compensation are not clear from the DSU, but it has generally been interpreted by Members to involve the lowering of trade barriers that are not directly at issue in the underlying dispute. In *Japan—Taxes on Alcoholic Beverages*, the United States and EC accepted Japan's offer of compensation, in the form of lower import tariffs on alcoholic beverages, in exchange for its failure to reduce taxes on foreign

[157] *See Vienna Convention*, *supra* note 91, Art. 26 ("*Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.")

[158] The U.S. Supreme Court has summarized the standard as follows: "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931 (1975).

[159] Article 3.7 of the DSU provides, in relevant part, as follows:

> The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Members, subject to authorization by the DSB of such measures.

whiskey within the fifteen-month implementation period established by arbitration.[160] In *EC-Hormones,* the EC offered to compensate the United States by increasing the quota for imports of a product (beef raised without hormones) different than the one at issue in the underlying case (beef raised with hormones).[161] The United States rejected this offer, reportedly because it would not have received sufficient benefit from this change.[162] Compensation was also discussed as a possibility early on in the *U.S.-FSC* dispute.[163] It has been used successfully in *US—Section 110(5)*; the small amount of trade affected (roughly $1 million per year) made the circumstances unusually easy for the United States to offer compensation.[164]

One of the deterrents to compensation appears to be the requirement that it be "consistent with the covered agreements."[165] Thus, the basic principles of most favored nation (MFN), national treatment, and others must be followed. For example, if the EC lowers its tariffs on widgets in order to compensate for a trade barrier that affected the United States, all widget-exporting Members must benefit as a result of the EC's MFN obligations. Thus, WTO Members not involved in the dispute become "free riders" even if they are not affected by the trade barrier in the underlying dispute.

At the domestic policy-making level, the difficulties inherent in trade compensation go even deeper. Generally, a complaining Member pursues another Member's trade measure in WTO dispute settlements at the behest of an exporting (or otherwise interested) industry. In turn, the defending Member defends that measure, at least in part, to serve the interest of a competing domestic industry. To offer trade compensation as an alternative to compliance with an unfavorable ruling, the defending Member must select an area of its economy to be subject to increased competition from abroad. In *Japan—Taxes on Alcoholic Beverages*, Japan was able to "self-compensate"—that is, to offer compensation in the same sector that was the subject of the underlying dispute. This is rarely a viable option for the defending Member, which generally will need to select another industry or industries to pay for the maintenance of protection. As a political matter, the selection of a willing, innocent "victim" is extremely difficult. This is particularly true for a Member, such as the United States, that would need specific legislative authority to provide such compensation. For those reasons, it is generally easier for a defending Member to suffer retaliation than to offer compensation, because the blame can be shifted away from domestic politicians to the WTO.

If compensation places the complaining Member, as a whole, in the same position as it would have been in had there been no WTO violation, the complaining party is in a much better position than if it retaliates. As demonstrated above, retaliation generally hurts the economy of the Member that retaliates, with a disproportionate effect on smaller economies. Therefore, compensation, when politically feasible, would be a temporary solution that satisfies this concern.

Thus, WTO Members should establish incentives that encourage compensation as a viable alternative to retaliation, perhaps by temporarily allowing a country to breach its MFN obligations for the limited purpose of encouraging compensation over retaliation.

[160] *See* WT/DS8/19 (1998).
[161] *See US Rejects EU Proposal to Compensate U.S. in Hormone Dispute*, INSIDE U.S. TRADE, March 19, 1999, at 1.
[162] *Id.*
[163] *See From Boom to Boon: An End to Trade Wars?*, THE ECONOMIST, September 30, 2000, at 77.
[164] *United States—Section 110(5) of the US Copyright Act*, WT/DS160/ARB25/1, November 9, 2001 (Award of the Arbitrator).
[165] DSU, Art. 22.1.

Nevertheless, compensation should never be so attractive that it is viewed as an alternative to bringing measures that are at issue in an underlying dispute into compliance with the WTO Agreement.

D. Retroactive Remedies

The introduction of retroactive remedies would strengthen the motivation of Members to comply with DSB recommendations. There should, however, not be a shift from a total absence of retroactive remedies to drastic punitive retroactive remedies. A regime where penalties begin to accrue at the beginning of a violation would most likely not be acceptable to WTO Members, as such a policy would create an element of coercion and punishment that, as Chayes has explained, could be more harmful than helpful to implementation and the overall stability of the WTO.

Nevertheless, WTO Members might be able to craft a middle ground for using retroactive remedies that could moderately increase the motivation to come to an early settlement and implement WTO obligations. For example, to reduce the incentives of Members to appeal a panel decision when they have no hope of overturning it,[166] perhaps the arbitrators could be granted the power to impose a temporary higher penalty to account for the lost time. This partial retroactive remedy would increase a Member's motivation to bring its measures into compliance more quickly when the likelihood of prevailing on appeal is low.

Alternatively, to ensure that a Member is making use of the implementation period to modify its regulations, the DSU could be amended such that a country that fails to implement during the allotted time is forced to bear substantially higher levels of retaliation than would otherwise be authorized.[167] While such a modification may be seen as a coercive economic sanction, it may be an appropriate response to the abuse of the WTO dispute settlement process. The additional retaliation would not be framed as a penalty for the breach of the WTO Agreements *per se*, but instead as a punitive remedy for abusing the very dispute settlement process that is central to the stability of the system. Such an amendment to the DSU would not be possible, however, until WTO Members have enough experience and confidence in the overall dispute settlement mechanism such that they are willing to give up this extra degree of control.

E. The Model of the European Community

The experience of the EC has demonstrated that one of the most effective ways to enforce international treaty obligations is to ensure that these obligations have the force and effect of law in the domestic legal systems.[168] Through "direct effect" in the EC, private actors can bring claims against national governments in domestic courts based on the failure to obey EC legislation. Then, if the domestic court finds in favor of the private actor, the government is penalized through an assessment of damages or another remedy designated by the court. Petersmann has called EC law "the most advanced, albeit imperfect example for . . . a foreign policy constitution based on complementary national and international guarantees of fundamental rights, separation of powers,

[166] *See supra* note 15 and accompanying text.

[167] *See* Gleason and Walther, *supra* note 77, at 734.

[168] Ronald A. Brand, *Direct Effect of International Economic Law in the United States and The European Union,* 17 NW. J. INT'L L. & BUS. 556 (1996–1997).

judicial review, respect for international law, and active participation in international organizations."[169]

Although individual countries have the option to establish the direct effect of the WTO Agreements, very few have done so. This is largely dependent on how countries treat international treaties, in general, in their domestic legal systems. For example, a number of Latin American countries, including Argentina,[170] Chile,[171] and Brazil,[172] appear to incorporate treaties, including the WTO Agreements, into their domestic law. In the case of the United States, however, the U.S. Congress specifically provided in its implementing legislation that private parties shall not "have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement."[173] Petersmann recommends direct effect, but does not believe that the United States is prepared to change its policy:

> In the United States . . . it seems doubtful that the U.S. Congress and the U.S. President will ever agree to a further constitutionalization of their power-oriented foreign policies. This constitutionalization would include accepting stricter judicial protection by domestic courts of reciprocal international guarantees of freedom and nondiscrimination in the transatlantic EC-U.S. relations.[174]

Similarly, although the EC Member States adopt direct effect for EC law, the European Council Directive implementing the Uruguay Round states that the WTO Agreements are "not susceptible to being directly invoked in Community or Member State courts."[175] Canada also follows the same philosophy.[176]

Even if WTO Members were prepared to create direct effect in their own legal systems, the WTO Agreements are not properly designed to adapt to such a development. In a situation where domestic courts around the world would attempt to interpret the language of treaties, there must be a way to create relatively uniform interpretations. In the EC, domestic courts can certify questions of EC law to the European Court of Justice in order to ensure uniform interpretation.[177] No such certification procedure currently exists in the WTO. This procedure could be established if, for example, the DSU were amended to permit the DSB (or the Appellate Body directly) to address questions referred by courts of Member governments. It would, however, require considerable resources, including a possible expansion of the Appellate Body.

[169] Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy For the Benefit of Civil Society?*, 20 MICH. J. INT'L L. 1, 28–29 (1998).

[170] *See* Argentine Constitution of 1994, Art. 75.22.

[171] *See* Chilean Constitution of 1980, Art. 5.

[172] *See* Paulo Borba Casella, *The Results of the Uruguay Round in Brazil: Legal and Constitutional Aspects of Implementation,* in IMPLEMENTING THE URUGUAY ROUND 441, 448 (John H. Jackson et al. eds., 1997).

[173] *Uruguay Round Agreements Act of 1994*, Pub. L. No. 103–465 § 102, 108 Stat. 4815 (1994).

[174] Ernst-Ulrich Petersmann, *Prevention and Settlement of International Trade Disputes Between the European Union and the United States*, 8 TUL. J. INT'L & COMP. L. 233, 251–252 (2000).

[175] Brand, *supra* note 168, at 604; Council Decision 94/800/EC, 1994 O.J. (L336) 1, 2. *See* Case C-300/98, *Parfums Christian Dior SA* v *Tuk Consultancy BV*, OJ C 118, 21/04/2001, p. 7 (". . . Community law neither requires nor forbids that the legal order of a Member State shall accord to individuals the right to rely directly on the rule laid down by Article 50(6) of the TRIPS Agreement or that it should oblige the courts to apply that rule of their own motion.")

[176] Brand, *supra* note 168, at 604; *World Trade Organization Agreement Implementation Act* of Dec. 15, 1994, chapter 47 section 6, 1994 S.C. 3 (Can.).

[177] *Treaty Establishing the European Community*, Feb. 7, 1992, art. 173, O.J. (C224) 1 (1992), 1 C.M.L.R. 573 (1992); *Consolidated Version of the Treaty on European Union and the Treaty Establishing the European Economic Community*, Art. 230 (1997).

The world is far away from agreeing to any multilateral commercial treaty that requires direct effect in domestic courts. Professor Jackson points out three main impediments to such direct effect.[178] First, the limited democratic participation of citizens of the various nations involved in treaty negotiations makes it less acceptable to countries that expect representative governance. Second, treaty rules are difficult to amend in response to the needs of citizens. Finally, countries simply are less likely to enter into treaties with strong teeth than those with less coercive enforcement mechanisms. As Amelia Porges has stated, "if all national systems 'constitutionalized' trade via direct effect the most likely result would be that any further progress internationally would become suddenly much more difficult, and international decision-making would become much stickier and more politicized."[179]

Yet, although it has a far smaller and much less diverse membership than the WTO, the experience of the EC demonstrates that direct effect of multilateral treaty regimes is not an impossible dream in the long term. As with other dramatic steps that countries made when they agreed to the WTO dispute settlement system, if countries determine that it is in their self-interest to create a treaty regime with direct effect, they will do so.

VI. Conclusion

The dispute settlement mechanism of the WTO does not rely on highly coercive economic sanctions to force Members into compliance. Nor does it depend solely on the extra-legal pressures of the typical international treaty regime for implementation. Instead, as demonstrated in this Chapter, the DSU combines both legal sanctions and extra-legal pressures to motivate Members to comply.

For the most part, early settlement is quite common, and countries comply with the WTO agreements, as interpreted by panel and Appellate Body decisions. The DSU, however, is far from perfect and certain WTO Members have demonstrated a proclivity to test the limits of these imperfections. The potential for multiple rounds of implementation challenges, procedural battles over the required sequence for determining implementation and retaliation, prolonged periods of litigation with appeals at every stage, and the abusive use of the "reasonable period of time," all in a system without retroactive remedies or remand authority, creates cause for concern and impetus for reform.

In spite of the unique framework established by the DSU, achieving a settlement between disputing countries remains the key force in successful implementation. Thus, it is imperative that the WTO harness the DSU in ways that increase the likelihood of early settlement. The possibilities of enforceable settlement agreements, partial retroactive remedies, and interim relief all would serve this purpose. Nevertheless, one must be careful to avoid the dangers of establishing truly coercive economic sanctions that punish Members. The delicate balance established by Members through the DSU must be maintained in order to ensure the stability and continued viability of the WTO, but the DSU should be modified in ways that make the most of the basic framework that has already been established.

[178] Brand, *supra* note 168, at 605, citing Jackson, *Status of Legal Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992).
[179] *See id.* at 606.

CHAPTER 29

A RE-APPRAISAL OF NON-VIOLATION COMPLAINTS UNDER THE WTO DISPUTE SETTLEMENT PROCEDURES

Frieder Roessler* and Petina Gappah**

TABLE OF CONTENTS

I. Introduction 1372
II. The Origin of Non-Violation Complaints 1373
III. Practical Experience with Non-Violation Complaints Under the GATT and the WTO 1374
A. Experience Under the GATT 1947 1375
B. Experience under the WTO Agreement 1377
1. Korea—Government Procurement 1377
2. European Communities—Asbestos 1379
IV. Reflections on the Non-Violation Remedy 1382
V. The Non-Violation Remedy and the Trips Agreement 1384
VI. Conclusion 1387

* Executive Director, Advisory Centre on WTO Law.
** Counsel, Advisory Centre on WTO Law. The views expressed in this article are the personal views of the authors, and are not to be attributed to the Advisory Centre on WTO Law.

I. Introduction

Dispute settlement procedures under international treaties are designed to resolve differences arising from the interpretation or application of the provisions of the treaty in question. The legal system of the World Trade Organization (WTO) goes further by allowing its Members recourse to its dispute settlement in order to resolve disputes arising from measures that violate the provisions of the WTO agreements as well as disputes relating to measures that do not violate the provisions of those agreements, but nonetheless nullify or impair benefits accruing under certain of the WTO agreements.

Prior to the establishment of the WTO in 1995, disputes under the General Agreement on Tariffs and Trade (GATT) were settled in accordance with the provisions of Articles XXII and XXIII of the GATT 1947. Article XXII established the framework for consultations and required contracting parties to accord sympathetic consideration to requests for consultations. Article XXIII set out the types of complaints or "causes of action" in respect of which requests for consultations could be made under the GATT. Article XXIII states, in relevant part:

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement . . .
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.

Articles XXII and XXIII, together with other articles of the original GATT, were incorporated into the Marrakesh Agreement Establishing the WTO as the GATT 1994. By incorporating Articles XXII and XXIII of the GATT 1947 into the GATT 1994, WTO Members demonstrated their commitment to the continuity of the principles underlying the GATT dispute settlement system. This is expressed in Article 3.1 of the DSU, where the WTO Members:

> . . . affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.[1]

This expression of continuity is found in the GATT 1994, in the DSU, as well as in the other WTO agreements which call for disputes to be settled in accordance with the DSU. Most of the other WTO agreements contain a provision that defines the types of complaints or "causes of action" necessary to invoke the DSU. This is done by reference to Article XXIII[2] or using terms similar to those in Article XXIII.[3] Article XXIII:1(a) refers to the failure to carry out obligations, thus addressing omissions as well direct conduct that violates the provisions of the WTO agreements. In addition, Article XXIII:1(b) of the

[1] *See also DSU*, Article 1.1.

[2] *See e.g.* Article 14.1 of the *Agreement on Technical Barriers to Trade*, and Article 19 of the *Agreement on Agriculture*.

[3] *See e.g.* Article 17.3 of the *Agreement on the Implementation of Article VI of the GATT 1994* (Anti-Dumping Agreement).

GATT 1994 permits any WTO Member to bring a complaint whenever it considers that "any benefit accruing to it directly or indirectly under this Agreement is nullified or impaired . . . as a result of the application by another [WTO Member] of *any measure, whether or not it conflicts with the provisions of this* Agreement . . . " (emphasis added) Disputes arising under Article XXIII:1(b) are referred to as "non-violation complaints".

As will be discussed in further detail below, an exception applies in the case of disputes relating to the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement"). At the time of the negotiation of the TRIPS Agreement, it was decided to exclude non-violation complaints during a five-year transitional period which has now expired.[4] Article 64.3 of the TRIPS Agreement mandated the Council for TRIPS, during this period, to "examine the scope and modalities" for non-violation complaints and to submit recommendations to the Ministerial Conference for approval. The Decision on Implementation-Related Issues and Concerns adopted in Doha by the Fourth Session of the WTO Ministerial Conference on November 14, 2001, further directs the Council for Trade-Related Aspects of Intellectual Property Rights to examine this matter and make a recommendation to the Fifth Session of the Ministerial Conference. Further, the Decision states that "it is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement".[5]

With the exception of disputes arising under the TRIPS Agreement, it is possible, by means of a "non-violation complaint", for a WTO Member to initiate dispute settlement proceedings against another Member even where such Member has not failed to carry out an obligation under a covered agreement. The elements of a successful non-violation claim are that there is a measure that nullifies or impairs benefits accruing directly or indirectly pursuant to a concession made to another WTO Member.

II. The Origin of Non-Violation Complaints[6]

The concept of non-violation nullification and impairment has its origins in the trade agreements that were concluded by the United States in the 1930s and 1940s. These agreements all contained a standard clause providing for the sympathetic consideration of any representation that a measure, whether or not it conflicted with the agreement, had the effect of nullifying or impairing an object of the agreement.[7] If the complaint did not bear fruit, the complaining party's only option was to withdraw from the agreement, an option that was readily available as the agreements could be terminated on short notice. In those circumstances, consultation on the interpretation or application of such

[4] Article 64.2 of the TRIPS Agreement states:

> Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement

[5] *Decision on Implementation-Related Issues and Concerns*, (WT/MIN(01)17), ¶ 11.1 (November 14, 2001), reproduced in the Appendix to this book.

[6] *See also* Ernst-Ulrich Petersmann, *Violation-Complaints and Non-Violation Complaints in Public International Trade Law*, 34 GERMAN YEARBOOK OF INTERNATIONAL LAW 175 (1991); Pieter-Jan Kuyper, *The Law of GATT as a Special Field of International Law*, XXV NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 227–257 (1994); and Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 123–142 (Ernst-Ulrich Petersmann ed. 1997).

[7] *See e.g.* Article XIV of the Reciprocal Trade Agreement Between the United States of America and Mexico, December 23, 1942.

agreement was, at the same time, negotiation on its continued application. Consequently, the question whether a measure affected the object of the agreement was more important than the question whether such measure was consistent with the agreement. In the original GATT, one organ—the CONTRACTING PARTIES acting jointly—handled all such complaints. Against this background, it was natural for the drafters of Article XXIII to submit questions concerning all possible forms of impairment to the same decision-making procedures.

The possibility of bringing complaints relating to perfectly legal measures was introduced into the GATT because its founders realized that the intended effect of a tariff negotiation could be easily frustrated by measures that the GATT did not regulate, such as domestic subsidies. As the GATT did not contain any substantive commitments on such internal measures, a procedure for the adjustment of tariff concessions following the introduction of such measures was required. The purpose of Article XXIII:1(b) was to provide such a procedure.[8]

A finding that a measure, though consistent with a WTO agreement, nevertheless impairs benefits accruing under that agreement, has serious consequences for the Member concerned. A refusal to cease the impairment or to accord compensation is subject to the same sanction as a refusal to implement obligations, namely the suspension of equivalent obligations by the adversely affected Member that has brought the complaint.[9] Neither the original GATT nor the dispute settlement provisions of the WTO contain any definition as to the nature of these additional benefits that Members must accord lest they be exposed to the threat of retaliation. Many of the drafters of the GATT doubted whether Article XXIII should provide for the possibility of imposing sanctions when undefined, and hence un-negotiated, benefits were being impaired. As one of the drafters remarked:

> Of all the vague and woolly punitive provisions that one could make, this seems to me to hold the prize place. It appears to me that what it says is this: In this wide world of sin there are certain sins which we have not yet discovered and which after long examination we cannot define; but there being such sins, we will provide some sort of punishment for them *if* we find out what they are and if we find anybody committing them.[10]

III. Practical Experience with Non-Violation Complaints Under the GATT and the WTO

Non-violation complaints have been extremely rare both under the GATT and the WTO. Only eight cases were considered by working parties and panels under the GATT 1947.[11]

[8] *See* ROBERT HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 44–46 (1990).

[9] DSU, Article 26.1. *See* Chapter 28 of this book.

[10] U.N. Document E/PC/T 186, 53.

[11] Report of the Working Party, *Australian Subsidy on Ammonium Sulphate ("Australia—Ammonium Sulphate"),* CP.4/39, BISD II/188, adopted on April 3, 1950; Report of the GATT Panel, *Treatment by Germany of Imports of Sardines ("Germany—Sardines"),* G/26, BISD 1S/53, adopted on October 31, 1952; Report of the GATT Panel, *Uruguayan Recourse to Article XXIII ("Uruguayan Recourse"),* L/1923, BISD 11S/95, adopted on November 16, 1962; Report of the GATT Panel, *EC—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region ("EC—Citrus Products")*, L/5776, dated February 7, 1985 (unadopted); Report of the GATT Panel, *EEC—Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes ("EEC—Canned Fruit")*, L/5778, dated 20 February 1985 (unadopted); *Japan—Trade in Semi-conductors, ("Japan—Semi-conductors")*, L/6309, BISD 35S/116, adopted on May 4, 1988; Report of the GATT Panel, *EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins ("EEC—Oilseeds")*, L/ 6627, BISD 37S/86, 130, 150–151, adopted on January 25, 1990; Report of the GATT Panel, *United States—Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the 1955*

In two of these cases, the panels found that the non-violation complaints were justified, but the panel reports were not adopted.[12] In three cases, the non-violation claims failed.[13] Thus only in three cases have non-violation complaints succeeded.[14]

Four panels have examined non-violation complaints since the establishment of the WTO.[15] In the *Japan—Film* dispute, the non-violation complaint failed. In the *EC—Computer Equipment* dispute, the non-violation issue was raised as a subsidiary issue and the panel did not have to address it because that panel found the measure at issue to be inconsistent with the concession claimed to have been impaired. The panels in *Korea—Government Procurement* and *EC—Asbestos* rejected the non-violation complaints. We start our survey of these cases with the three GATT cases in which non-violation complaints were sustained.

A. Experience Under the GATT 1947

In 1950, a working party established at the request of Chile examined a decision taken by Australia to remove a purchase subsidy on sodium nitrate, which was mainly imported, while maintaining it on ammonium sulfate, which was mainly of domestic origin. The working party concluded that the two fertilizers were not like products within the meaning of the national treatment provisions of Article III, so that the differentiation between them was not a failure to observe Australia's national treatment obligations. Instead, it found that the differentiation impaired a benefit accruing to Chile. The working party reached this conclusion after having agreed on the following test for determining the existence of an impairment within the meaning of Article XXIII:1(b):

> It was agreed that such impairment would exist if the action of the Australian Government which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulfate could not reasonably have been anticipated by the Chilean Government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding on sodium nitrate.[16]

In 1952, in a case involving the tariff treatment of sardines by Germany, a panel established at the request of Norway declined to rule that two commercially equivalent types of sardines, one mainly exported by Portugal, the other mainly by Norway, were like products within the meaning of the most-favored nation provisions of Article I of

Waiver and Under the Headnote to the Schedule of Tariff Concessions ("United States—1955 Waiver"), L/6631, BISD 37S/228, adopted on November 7, 1990.

[12] *EEC—Citrus Products, supra* note 11; and *EEC—Canned Fruit*, supra note 11.

[13] *Uruguayan Recourse, supra* note 11; *Japan—Semi-conductors, supra* note 11; *"United States—1955 Waiver", supra* note 11.

[14] *Australia—Ammonium Sulphate*", *supra* note 11; *Germany—Sardines; supra* note 11; and Report of the Members of the Original Oilseeds Panel, *Follow-up on the Panel Report "EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins"*, DS28/R, BISD 39S/91, March 31, 1992.

[15] Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper ("Japan—Film")*, WT/DS44/R (1998); Report of the Panel, *European Communities—Customs Classification of Certain Computer Equipment,* WT/DS62/R, WT/DS67/R and WT/DS68/R, ¶¶ 8.69–8.72 (1998); Report of the Panel, *Korea—Measures Affecting Government Procurement,* WT/DS163/R, ¶ 7.126 (2000), and Report of the WTO Panel, *European Communities—Measures Affecting Asbestos and Asbestos—Containing Products ("EC—Asbestos Panel")* , WT/DS135/R (2001).

[16] *Australian—Ammonium Sulphate, supra* note 11, ¶¶ 193–194.

the GATT and that the tariff differentiation was therefore inconsistent with Germany's obligations under that provision.[17] The panel stated that:

> . . . although the Norwegian complaint rested to a large extent on the concept of 'like products' . . . the Panel was satisfied that it would be sufficient to consider whether in the conduct of the negotiations at Torquay the two parties agreed expressly or tacitly to treat these preparations as if they were 'like products' for the purposes of the General Agreement.

Based on an analysis of the course of the negotiations, it concluded that the differentiation between the two products impaired a benefit accruing to Norway under the tariff concession it had negotiated with Germany.[18]

The third successful case was the 1989 complaint by the United States against the subsidies paid by the EC to producers of oilseeds.[19] This panel ruled that these subsidies, which varied with the level of import prices, impaired benefits accruing to the United States under a zero tariff subsidy the EC had negotiated with the United States in 1962 because they systematically offset the economic effect of the negotiated tariff reduction. The Panel based its ruling on a decision adopted by consensus by the CONTRACTING PARTIES in 1955, according to which:

> . . . it was agreed that a contracting party which has negotiated a tariff concession under Article II may be assumed, for the purposes of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the introduction or increase of a domestic subsidy on the product concerned.[20]

The Appellate Body has confirmed that fiscal discrimination between directly competing products for the purpose of protecting a domestic industry, similar to that engaged in by the Australian Government in 1949, violates Article III:2 of the GATT.[21] The Appellate Body also ruled that the most-favored-nation provisions of the GATT apply to *de facto* discrimination of the kind Germany introduced against sardine imports in 1952.[22] Moreover, as Article 11 of the DSU requires panels to "make an objective assessment of the matter before it . . . including an assessment . . . of the applicability of and conformity with the relevant covered agreements", a WTO panel, unlike a GATT panel in 1952, cannot refuse to consider a violation complaint and examine it instead as a non-violation complaint. If the *Australian—Ammonium Sulphate* and the *German—Sardines* cases were to arise today, they would probably be resolved as violation complaints. Perhaps these early GATT cases were handled under the non-violation provisions to spare Australia and Norway the opprobrium of illegality and thereby promote a negotiated solution to the problem.

If the *Oilseeds* case were to arise today, a panel would most likely examine it, not under Article XXIII:1(b) of the GATT, but under Article 7 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"). Non-violation complaints against subsidies unexpectedly granted subsequent to an exchange of tariff concessions

[17] *Germany—Sardines, supra* note 11; ¶¶ 53–59.
[18] *Germany—Sardines, supra* note *11, ¶ 57.*
[19] *Follow-up on the Panel Report "EEC—Oilseeds", supra* note 14, ¶¶ 91–127.
[20] Working Party Report, *Other Barriers to Trade*, BISD 3S/222,224, adopted 3 March 1955. See *Follow-up on the Panel Report "EEC—Oilseeds", supra* note 14, ¶¶ 77–78.
[21] *See* Report of the Appellate Body, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, 28, 29 (1996).
[22] *See* the references to this principle in *European Communities—Regime for the Importation, Sale and Distribution of Bananas,* Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB, ¶ 5.38 (1999).

are now subject to specific provisions that codify the decisions of the CONTRACTING PARTIES.[23]

This permits the following conclusions. If all the successful complaints under Article XXIII:1(b) were resubmitted to the WTO dispute settlement procedures, they would be resolved either as violation complaints under Article XXIII:1(a) of the GATT or under the special non-violation provisions of Article 7 of the SCM Agreement. The existence of Article XXIII:1(b) would not make a difference. This seriously calls into question the practical utility of non-violation complaints. In fact, because impairing subsidies of the type considered in the *EEC—Oilseeds* case are now covered by the SCM Agreement, it may be questioned whether this unusual legal institution is needed at all. We discuss this point in more detail below.

B. Experience under the WTO Agreement

The contracting parties to the GATT consistently called upon panels to exercise caution with respect to Article XXIII:1(b). Thus, in *EEC—Oilseeds*, the United States stated that it "concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept has been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept".[24] The EEC stated in that case that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty".[25]

These attitudes appear to have carried over into the WTO legal regime, and are reflected in the findings of the *Japan—Film* panel. That panel stated:

> Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been "on the books" for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims. This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. . . . The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.[26]

As already noted, non-violation complaints have been raised in WTO dispute settlement proceedings in four disputes. Of these, two cases, namely *Korea—Government Procurement* and *EC—Asbestos* warrant particular attention, the former because of the approach taken by the panel, the latter because of the approaches taken by both the panel and the Appellate Body.

1. Korea—Government Procurement

The panel report in *Korea—Government Procurement* seemed to abandon the "cautious approach" followed under the GATT and enunciated in *Japan—Film*, and instead developed its own interpretation of the non-violation remedy. This dispute concerned the interpretation of Korea's obligations under the plurilateral Agreement on Government

[23] Footnote 12 of the Subsidies Agreement makes clear that the existence of nullification or impairment resulting from a subsidy "shall be established in accordance with the practice of application of these provisions".

[24] *EEC—Oilseeds, supra* note 11, ¶ 118.

[25] *Id.*

[26] *Japan—Film, supra* note 15, ¶ 10.36.

Procurement (the "GPA"). The Panel was asked to consider certain claims made by the United States concerning procurement for the Inchon International Airport. The United States argued that all of the entities responsible for this project were covered under Korea's Appendix I of the GPA, so that Korea was obliged to abide by the provisions of the GPA in respect to this airport project. The United States also argued that, regardless of its obligation, Korea's measures nullified or impaired benefits accruing to the United States under the GPA.

In addressing this issue, the Panel drew a distinction between what it termed a traditional non-violation claim, and the non-violation claim in that case. The Panel noted that in the typical non-violation case, benefits accrue as the result of a concession, while in that particular case, benefits accrued as the result of a negotiation. The Panel stated:

> One of the issues that arises in this dispute is whether the concept of non-violation can arise in contexts other than the traditional approach represented by *pacta sunt servanda.* Can, for instance the question of error in treaty negotiation be addressed under Article 26 of the DSU and Article XXII:2 of the GPA?[27]

To this question, the Panel responded: "[w]e see no reason why it cannot",[28] and reasoned that:

> Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith. It is clear to us (as discussed . . . below) that it is necessary that negotiations in the Agreement before us (the GPA) be conducted on a particularly open and forthcoming basis.[29]

The Panel was of the view that the U.S. non-violation claim concerning promises made in the course of negotiations did not "fit well with the traditional theory".[30] Having said this, it might have been expected that the Panel would stop there, and find that the United States had failed to make its claim. However, despite the lack of arguments from the parties on this point, the Panel decided to examine the U.S. claim from the perspective of customary international law concepts of "error in respect of a treaty".[31] The Panel thus expanded the concept of nullification and impairment and further, confused the "non-violation remedy" with the "error in treaty concept".[32]

The Panel's ruling appears to contradict the text of the treaty, which clearly refers to nullification of a benefit accruing under the treaty, and not benefits accruing during negotiations. Thus the Panel's ruling flies in the face, not only of GATT jurisprudence on the interpretation of Article XXIII:(b), but also of the text of the treaty itself. Moreover, the linkage established by the Panel between the concept of error in treaty law and the non-violation remedy is unfortunate. The non-violation remedy was intended to prevent the frustration of the objectives of tariff concessions. Extending this concept to reasonable expectations in negotiations impermissibly broadens the scope of the

[27] *Korea—Government Procurement, supra* note 15, ¶ 7.100.
[28] *Id.*
[29] *Id.*
[30] *Korea—Government Procurement, supra* note 15, ¶ 7.120.
[31] *Id.,* ¶¶ 7.100–7.102.
[32] Under public international law, and as expressed in Article 48 of the *Vienna Convention on the Law of Treaties,* the apparent consent of a state to a treaty may be vitiated in circumstances where the state acted on the basis of a fundamental error. As stated in Article 48, an error in a treaty may be invoked as invalidating consent "if the error relates to a fact or situation which was assumed . . . to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty." See, generally OPPENHEIM'S INTERNATIONAL LAW, Ninth Ed. 1288–1289 (Robert Jennings and Arthur Watts eds. 1992).

non-violation remedy and upsets the balance of rights and responsibilities agreed by the negotiators. Further, in stating that had Korea made a concession regarding the Inchon Airport project, the dispute would have involved a violation claim, with the result that a traditional non-violation case could not have been sustained, the Panel clearly misunderstood the non-violation remedy. The Panel implies that a measure which conflicts with a provision of, for example, the GATT 1994, would not be subject to a non-violation complaint. While it may be better, from a strategic perspective to pursue a claim of violation, according to the wording of Article XXIII:1(b), a complaining party would be well within its rights to assert both violation and non-violation claims.[33]

2. European Communities—Asbestos

The most recent consideration of the non-violation remedy was in the *EC—Asbestos* dispute. This dispute involved a complaint by Canada with respect to a measure taken by the European Communities that banned the manufacture, processing, importation, sale, marketing, etc. of all varieties of asbestos fibers and products containing such fibers, with certain limited exceptions. Canada argued that this measure violated certain of the EC obligations under the GATT 1994 and the Agreement on Technical Barriers to Trade. Canada also claimed that the measure nullified or impaired benefits accruing to it under Article XXIII:1 (b) of the GATT 1994.[34]

The European Communities argued before the panel that the rules on non-violation, nullification or impairment in Article XXIII:1 (b) of the GATT 1994 apply only if the measure in question does not fall under other provisions of the GATT 1994. The European Communities also argued that, while there may be "legitimate expectations" in connection with a purely commercial measure, there can be no such expectations with respect to a measure necessary to protect human health and which can therefore be justified under Article XX:(b) of the GATT. The European Communities submitted that the purpose of Article XXIII:1(b) is to prevent abuse of the provisions of the GATT, and argued further that the Appellate Body had pointed out in the *United States—Shrimp* dispute that the conditions laid down in the chapeau of Article XX(b) are meant precisely to address situations in which a Member applies in bad faith, and in an abusive manner, the exceptions laid down in Article XX. Thus, the European Communities argued that there cannot be two sets of provisions that address the same problem twice.[35]

In response to this, Canada argued that the distinction between measures of a purely commercial nature and measures which have health-protection related aspects has no basis either in the texts of the WTO Agreement or in case law. A legitimate expectation does not in any way concern a particular measure adopted by a Member, but rather the opportunities for competition agreed during multilateral trade negotiations on a given product.[36]

The Panel recognized that:

> . . . the GATT 1947 and WTO panels have never discussed the situation with respect to a measure designed to protect public health. All previous cases have concerned situations in which a measure of a purely commercial nature was adopted pursuant to the negotiation of a concession.[37]

[33] This panel report was not appealed. As the DSB meeting at which the report was adopted, several WTO Members sharply criticised the Panel's approach.

[34] *EC—Asbestos Panel, supra* note 15, ¶ 3.2.

[35] *Id.,* ¶ 3.531.

[36] *Id.,* ¶ 3.530.

[37] *Id.,* ¶ 8.225.

However, the Panel did not consider this relevant because:

> . . . neither the text of Article XXIII:1(b) of the GATT 1994 nor that of Article 26:1 of the Understanding expressly incorporates the separation suggested by the EC between measures of a purely commercial nature and measures designed to protect human health. Although these articles require the existence of a *measure*—which neither of the Parties disputes—they do not distinguish between different *types* of measures.[38]

The Panel therefore concluded that "Article XXIII:1(b) applies to a measure whether it is consistent with the GATT because the GATT does not apply to it or is justified by Article XX."[39] As a result of this finding, the Panel did not examine whether it was *legitimate* for Canada to expect to be able to export a carcinogenic product—given the explicitly recognized right to restrict trade in such products accorded by Article XX(b)—but whether Canada could *as a matter of fact anticipate* the adoption of a measure restricting the use of asbestos. The Panel's conclusion that the asbestos ban does not impair the relevant tariff concessions was therefore exclusively based on the finding that the hazardous nature of chrysotile was already known when the relevant tariff concession was negotiated and that restrictions on the use of asbestos could therefore have been foreseen.[40]

The Panel's approach implies that Article XXIII:1(b) offers redress when the regulatory framework applicable to a product is adapted in response to new scientific knowledge concerning health risks. The European Communities considered that this right of redress is not among the benefits accruing under the GATT within the meaning of Article XXIII:1(b) and therefore appealed the panel's finding.

In dealing with the issue raised by the European Communities, the Appellate Body stated the obvious:

> The European Communities also contends that the Panel erred in finding that Article XXIII:1(b) applies to measures which pursue health, rather than commercial, objectives and which can, therefore, be justified under Article XX(b) of the GATT 1994. Once again, we look to the text of Article XXIII:1(b), which provides that "the application by another Member of *any measure*" may give rise to a cause of action under that provision. The use of the word "any" suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure. Clearly, therefore, the text of Article XXIII:1(b) contradicts the European Communities' argument that certain types of measure, namely, those with health objectives, are excluded from the scope of application of Article XXIII:1(b).[41]

The EC argument was however not directed against the Panel's interpretation of the term "measure" in Article XXIII:1(b) but of the terms "benefit accruing . . . under this Agreement". The essence of the EC argument was to question whether there was a benefit accruing to Canada. In other words, was it a reasonable expectation of Canada to expect to export a carcinogenic product to the EC market? Was it a reasonable expectation to expect that the European Communities would not take measures to protect health?

However, the Appellate Body did not address the issue of whether Members can reasonably expect other Members not to take measures covered by the health provisions of Article XX(b). Instead, the Appellate Body stated:

[38] *Id.* ¶ 8.226.
[39] Id., . ¶ 8.264
[40] *EC—Asbestos Panel, supra* note 15, ¶ 8.295.
[41] Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-containing Products,* WT/DS135/AB/R, ¶ 188 (2001).

> An important aspect of the European Communities' argument is that a Member cannot have reasonable expectations of continued market access for products which are shown to pose a serious risk to human life or health. However, the paragraphs of the Panel Report appealed by the European Communities involve *exclusively* the Panel's findings on the threshold issues of the scope of application of Article XXIII:1(b). This particular argument of the European Communities, important as it is, simply does not relate to those threshold issues. Rather, the European Communities' argument relates to the substance of a claim that has been determined to fall within the scope of application of Article XXIII:1(b) and, in particular, concerns the issue whether a "benefit" has been "nullified or impaired" by a measure restricting market access for products posing a health risk. Here, we emphasize that the European Communities does *not* appeal the Panel's findings relating to the "nullification or impairment" of a "benefit" through the frustration of reasonable expectations by application of the measure at issue. We do not, therefore, find it necessary to examine the European Communities' argument relating to reasonable expectations.[42]

By declining to address this argument, the Appellate Body missed an opportunity to clarify an important element of the non-violation claim. In the jurisprudence on Article XXIII:1(b) there are frequent references to the fact that an expectation, to be protected by Article XXIII:1(b) must be "legitimate" or "reasonable". Some panels have used these terms as if they were interchangeable; in fact however they designate entirely different aspects of the expectations that Article XXIII:1(b) protects. An expectation arising from a tariff concession can be described as *legitimate* if it has merit and therefore deserves to be protected by Article XXIII:1(b). To say that an expectation is legitimate is therefore equivalent to saying that its protection is "a benefit accruing under the GATT". To answer the question whether an expectation is legitimate, a panel must conduct a normative inquiry into the object and purpose of the WTO Agreement and the balance of rights and obligations established under it.

Under WTO law, tariff concessions are accorded subject to explicit conditions (such as the right to take safeguard actions under Article XIX or adopt public policy measures under Article XX). Members, when assessing the value of their trading partners' concessions and deciding on the commitments they "paid" for those concessions, take this into account. There is therefore no legitimacy in the expectation that a WTO Member will refrain from adopting a measure that is specifically foreseen in the WTO Agreement itself. The protection of this expectation under Article XXIII:1(b) would have the consequence that the Member could seek compensation for the loss of trading opportunities they did not "pay" for and should therefore not be regarded as a benefit accruing under the GATT.

Numerous provisions in the WTO Agreement expressly safeguard the right of WTO Members to adopt origin-neutral policy measures that do not create unnecessary obstacles to trade. Also this factor enters into the assessment of the value of tariff concessions by the negotiators. An expectation that Members that have granted a tariff concession will refrain from adopting measures that are part and parcel of the day-to-day conduct of the policies implemented by all responsible governments is not legitimate and its protection consequently not part of the benefits accruing under the GATT.

An expectation arising from a tariff concession can be described as *reasonable* if it was logical and based on sound judgment. This requires a factual inquiry into the circumstances prevailing at the time of the negotiation of the tariff concession. If the panel determines that the expectation that the measure at issue would not be taken after the grant of the tariff concession is "reasonable", it has found that an informed person

[42] *Id.* ¶ 190.

applying logic and sound judgment could have taken the possibility of such a measure into account in assessing the value of the concession. The measure at issue can then not cancel or weaken the value that the negotiators could realistically attach to the tariff concession. A determination that a measure had to be reasonably expected is therefore essentially a determination that it does not "nullify or impair" the value of the tariff concession within the meaning of Article XXIII:1(b).

In the *EC—Asbestos* case, the Appellate Body appeared to endorse the "cautious approach", and quoted with approval, the statement of the panel in the *Japan—Film* case.[43] However, the Appellate Body failed to clarify an important element of the non-violation remedy. The Appellate Body failed to address the essence of the EC argument, which was that a measure justified under Article XX, whose exceptions are known to WTO Members, can be anticipated, and thus, no legitimate expectations can flow in respect of such a measure. Addressing this issue would have had the benefit of significantly reducing the scope of the non-violation remedy to measures that could not be anticipated. As the scope of measures falling under the WTO Agreement is now vast, there is some need for clarification on this issue.

IV. Reflections on the Non-Violation Remedy

Pierre Pescatore has observed that the notion of nullification and impairment of benefits through measures that are legal is "a legal fantasy" which has turned into a "useless and dangerous construction" that should never have been included in the DSU.[44] The above survey of GATT and WTO rulings shows the correctness of this view. Outside the area of subsidies, which is now covered by the Agreement on Subsidies and Countervailing Duties, the concept of non-violation has proven useless over half a century. This raises the question whether Article XXIII:1(b) complaints should not be abolished altogether so as to ensure that the human and budgetary resources allocated to WTO dispute settlement proceedings are used more efficiently.

In addressing this fundamental question, it should be borne in mind that Article XXIII:1(b) was considered necessary because the provisions of the GATT do not realize the objectives of the GATT completely. The GATT 1947 served as a legal framework into which the results of tariff negotiations could be incorporated. The main purpose of this framework was to ensure that the value of tariff concessions was not impaired by non-tariff measures. However, the provisions of the GATT 1947 provided this assurance only in respect of border measures such as those covered by Article XI of the GATT, or discriminatory internal measures covered by Article III. In respect of non-discriminatory internal measures, such as subsidies accorded to certain producers or indirect taxes imposed on selected products, the GATT did not impose any obligations even though such measures might have had similar protective effects. The right of redress under Article XXIII:1(b) was granted as a counterpart to the freedom the contracting parties had retained with respect to their domestic economic policies.

The basic function of Article XXIII:1(b) is to protect the expectations that served as the basis for tariff concessions negotiated by WTO Members. It is to ensure that a WTO Member obtains compensation, or a right to the compensatory withdrawal of concessions,

[43] The Appellate Body stated that: "We consider that the remedy in Article XXVIII:1(B) should be approached with caution and should remain an exceptional remedy". *Id.* ¶ 186.

[44] Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects,* 9 JOURNAL OF INTERNATIONAL ARBITRATION 41 (1993).

if a measure introduced subsequent to the negotiation of a concession frustrates one of those expectations. The phrase "benefits accruing under the GATT" in Article XXIII:1(b) must, therefore, be interpreted with the protection of expectations arising from a tariff concession in mind. As we have said above, the possibility of bringing complaints relating to perfectly legal measures was introduced into the GATT because its founders realized that the intended effect of a tariff negotiation could be easily frustrated by measures that the GATT did not regulate, such as domestic subsidies. As the GATT did not contain any substantive commitments on such internal measures, procedures for the adjustment of tariff concessions following the introduction of such measures were required.

The situation under the WTO Agreement is different to that pertaining under the GATT. The WTO Agreement addresses non-tariff measures such as subsidies which may have been particularly suited to non-violation complaints. The evolution of the multilateral trading system, and the expansion in the coverage of WTO Agreements to include non-tariff measures, appear to have removed the justification for non-violation complaints. It is therefore unclear which "benefits" could be deemed to be accruing to a Member under the WTO agreements governing non-tariff measures and the TRIPS Agreement, other than the right to the faithful observance of these agreements. A panel or the Appellate Body required to rule on this issue would be facing a normative void.

Moreover, it is difficult to reconcile the non-violation remedy with the binding nature of the WTO dispute settlement system. In assessing the value of the non-violation remedy, its origins as part of a non-binding dispute settlement mechanism should also be borne in mind. It has been observed that:

> The negotiators of the GATT . . . regarded the concept of non-violation nullification or impairment as a benchmark guiding consultations, negotiations and multilateral decision-making. They did not envisage the application of the concept in a binding third-party adjudication procedure. The Contracting Parties to the GATT 1947 applied the concept in the context of procedures under which each contracting party had the possibility to block the adoption of a finding of nullification or impairment. The open-ended nature of the concept of nullification and impairment therefore did not entail a threat to the sovereignty of the contracting parties.
>
> Under the WTO Agreement, however, the decisions determining the benefits that might accrue under a provision in addition to the benefit of its observation would be determined by the Appellate Body, whose decisions must be unconditionally accepted. What has thus happened, more by accident than by design, is that the power of an independent tribunal to hand out licenses to retaliate is defined by a legal concept that originally served to define the scope of the obligation to consult under bilateral trade agreements.[45]

There are few persuasive arguments for the continued existence of the non-violation remedy in the WTO. However, as long as the concept of non-violation is part of WTO law, WTO panels and the Appellate Body should use their unusual power to grant the right to retaliate against the denial of "un-negotiated benefits" only in those rare instances in which the membership of the WTO, through consensus decisions or consistent practice, has provided them with normative guidance. Such guidance exists so far only in respect to production subsidies impairing benefits accruing under tariff concessions. Panels and the Appellate Body should refuse to invent new, "un-negotiated benefits", on the ground that this would be inconsistent with the basic principle of law expressed in Article 3.2

[45] Frieder Roessler, *Should Principles of Competition Policy be Incorporated into WTO Law through Non-violation Complaints?* 2 Journal of International Economic Law 413, 418 (1999).

of the DSU, which stipulates that the recommendations and rulings of a panel and the Appellate Body cannot add to or diminish the rights and obligations set out in the WTO agreement.

V. The Non-Violation Remedy and the Trips Agreement

The concerns addressed above should inform any consideration of the application of the non-violation remedy in the context of the TRIPS Agreement. Article 64 of the TRIPS Agreement makes Articles XXII and XXIII of the GATT 1994 and the DSU fully applicable to disputes under that Agreement. It suspended the application of the non-violation provisions of Article XXIII until January 1, 2000. Why did the drafters of the TRIPS Agreement decide to include a reference to Article XXIII:1(b) and to suspend the application of this provision until January 1, 2000?

This solution was a compromise between two opposing views expressed mainly in informal meetings in the final stages of the Uruguay Round. Some negotiators, principally from developing countries, argued that there were no benefits accruing to WTO Members under the TRIPS Agreement beyond those arising from the observation of its provisions, and that there was consequently no place for complaints based on measures that are legal. Other negotiators, mainly from developed countries, argued that the complaints predicated on measures that are legal must be available to ensure that the obligations under the TRIPS Agreement are not be circumvented through measures not specifically covered by the TRIPS Agreement, such as high fees for patent registration, or through informal administrative guidance.

The concept of nullification and impairment as developed under the GATT cannot be transposed to the TRIPS Agreement. The basic legal conception of the TRIPS Agreement is fundamentally different from that of the GATT. As pointed out above, the obligation of WTO Members to accord redress if their domestic policies adversely affect their tariff concessions is a counterpart to the autonomy they enjoy with respect to those policies. However, the TRIPS Agreement is not intended to leave WTO Members with policy autonomy requiring redress and compensation under Article XXIII:1(b). The purpose of the TRIPS Agreement, unlike that of the GATT, can be achieved through the good faith performance of its obligations. WTO Members did not expect to obtain more from this Agreement than the good faith performance of its obligations. If additional advantages were accorded to Members under Article XXIII:1(b) in response to measures perfectly consistent with that Agreement, Members would be getting more than they "paid" for.

There was no common understanding among the negotiators that this Agreement creates a legitimate expectation of benefits that go beyond the effective protection of intellectual property rights. In particular, there was no common understanding that the Agreement is also intended to protect the *commercial exploitation* of intellectual property rights. Thus, authors who are nationals of a WTO Member can legitimately expect that their books will not be illicitly copied within the jurisdictions of any other WTO Member; the TRIPS Agreement, however, gives them no assurance that they can actually sell their books in those jurisdictions. In the legal system of the WTO, market access benefits accrue under the GATT, under the other multilateral agreements on trade in goods and the GATS, but not under the TRIPS Agreement. While the TRIPS Agreement certainly facilitates market access of goods and services, it is not a market access agreement as such.[46]

[46] The United States appears to support the unqualified application of the non-violation remedy in the TRIPS Agreement. The United States takes the view that the TRIPS Agreement is a market access agreement because

The TRIPS Agreement is a *sui generis* agreement that provides minimum standards in respect of the acquisition, exploitation, scope, and enforcement of intellectual property rights. If a WTO Member considers that an unexpected change in intellectual property rights protection impairs a negotiated market access concession, the complaint would therefore have to be brought under the GATT or the GATS, and not under the TRIPS Agreement.

A finding of nullification or impairment under the TRIPS Agreement would have legal consequences substantially different from such a finding under the GATT. Article XXIII:1(b) of the GATT operates as a legal device that can be applied to oblige WTO Members to renegotiate tariff concessions under Article XXVIII of the GATT when an unexpected or unanticipated measure affects what served as the basis of their exchange of scheduled concessions. However, the obligations under the TRIPS Agreement may not be unilaterally modified or withdrawn. If a WTO Member is found to be impairing a benefit accruing under a provision of the TRIPS Agreement, it could not unilaterally decide to maintain such a measure and renegotiate the impaired obligation. If the impairing measure is not withdrawn, the WTO Member whose benefits were found to have been impaired would, by refusing to accept compensation, expose the Member promulgating the measure to the threat of retaliation equivalent to that available in the case of a violation of the TRIPS Agreement.

Under the TRIPS Agreement the remedy of nullification and impairment could operate to create *completely unknown* new benefits and corresponding responsibilities. Members failing to accord such new benefits would be subject to retaliation equivalent to that applicable in the case of a violation.

The reasons which the proponents of Article XXIII:1(b) complaints under the TRIPS Agreement advance to justify their position are based on misconceptions. According to Article 3.2 of the DSU, one of the purposes of the dispute settlement system is to clarify the existing provisions of the agreements covered by the DSU "in accordance with the customary rules of interpretation of international law." Pursuant to these rules, treaties must be performed in good faith and, in interpreting their terms, their object and purpose must be taken into account. According to Articles 26 and 31 of the Vienna Convention all treaties must be interpreted and performed in good faith. The Appellate Body has confirmed the importance of the concept of good faith in interpreting obligations under the WTO Agreement. The Appellate Body has described the concept of good faith as a "pervasive principle" of general international law that guides the way in which Members should interpret their rights and obligations.[47] The Appellate Body has also explained that this principle affects the exercise of rights by WTO Members:

> [The principle of good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say,

it helps reduce market distortions that existed prior to its negotiations by establishing adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights, and by ensuring that effective and appropriate means for enforcement of these rights are available. *See Scope and Modalities of Non-violation Complaints Under the TRIPS Agreement,* Communication to the TRIPS Council from the United States, IP/C/W/194, July 17, 2000.

[47] Report of the Appellate Body, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R, ¶ 166 (2000).

> reasonably.[48] An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.[49]

Even if a measure, such as an excessive fee for patents, is not specifically regulated in the TRIPS Agreement, it may nonetheless constitute a violation of that Agreement if it is taken in bad faith or if it defeats the purpose of one of the provisions of the Agreement.[50]

The above considerations lead to the conclusion that the concept of nullification and impairment developed in the GATT for tariff concessions cannot be transposed into the field of intellectual property rights.[51] A new rationale for non-violation complaints specific to the TRIPS Agreement would need to be found to justify application of the concept. It is difficult to see what that rationale might be. The functions that some of the negotiators of the TRIPS Agreement wish to assign to the concept of non-violation in the TRIPS context are functions normally assigned to the process of constructive treaty interpretation in furtherance of the objectives of a particular agreement. We fear that the availability of Article XXIII:1(b) complaints will guide panels and the Appellate Body *away* from a constructive interpretation of the obligations under the TRIPS Agreement and therefore have effects contrary to what the proponents of non-violation complaints under the TRIPS Agreement seek.

There is no consensus among the WTO Members as to whether the concept of nullification and impairment developed under the GATT should be transposed into the TRIPS Agreement.[52] At the Fourth Session of the Ministerial Conference in Doha, the WTO Members issued a Decision on Implementation-related Issues and Concerns. Paragraph 11.1 of that Decision states:

> The TRIPS Council is directed to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, members will not initiate such complaints under the TRIPS Agreement.[53]

Whether this Decision is *legally* binding or not, it is clear that its effect is to extend the moratorium on the non-consideration of non-violation complaints under the TRIPS Agreement.

[48] *See* Chapter 4, in particular p.125, of B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953).

[49] Report of the Appellate Body, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, ¶ 158 (1998).

[50] *See e.g. Japan—Semi-conductors, supra* note 11, ¶¶ 153–155.

[51] *See also* Matthew Stilwell and Elisabeth Tuerk, *Non-violation Complaints and the TRIPS Agreement: Some Considerations for WTO Members,* Centre for International Environmental Law (May 2001).

[52] *See e.g. Scope and Modalities of Non-violation Complaints Under the TRIPS Agreement,*Communication from the United States of America, IP/C/W/194, July 17, 2000; *Non-violation, Nullification or Impairment Under the Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), Proposal from Cuba, the Dominican Republic, Egypt, Indonesia, Malaysia and Pakistan, IP/C/W/141, April 29, 1999;*Non-violation Complaints Under the TRIPS Agreement—Suggested Issues for Examination of Scope and Modalities Under Article 64.3 of the TRIPS Agreement,* Communication from Canada, the Czech Republic, the European Communities and their Member States, Hungary and Turkey, IP/C/W/191, June 22, 2000.

[53] *Decision on Implementation-related Isuues and Concerns, supra* note 5.

VI. Conclusion

Although the non-violation remedy has a long history in the GATT, it has been resorted to infrequently by both GATT contracting parties and WTO Members. Panels have circumscribed its use, some with more success than others, and it may now be time to question whether this remedy has any value in the WTO system. The multilateral trading system emerging from the Uruguay Round addresses the trade-distorting nature of a large number of non-tariff measures, and accordingly establishes rigid disciplines for their use. In view of this, it is necessary to ask whether the non-violation remedy is still relevant in the dispute settlement system. No decision has yet been taken on whether to transpose this remedy to the TRIPS Agreement, and the same considerations discussed above suggest that its application may not be necessary.

CHAPTER 30

SOME THOUGHTS ON THE APPELLATE BODY

Mitsuo Matsushita*

TABLE OF CONTENTS

I. Introduction 1390
II. Jurisdiction of the Appellate Body 1391
A. Question of Facts and Question of Law 1391
B. The Scope of Appellate Review 1392
C. Remand Power 1394
III. Oral Hearings and Exchange of Views 1395
A. Oral Hearings 1395
B. Exchange of Views 1396
IV. Interpretation of the WTO Agreements—Article 31 and Article 32 of the Vienna Convention 1397
V. Transparency and Access Issues 1398
A. Transparency 1398
B. The Amicus Curiae Issue 1398
VI. Dissenting Opinions 1401
VII. Reform of the Appellate Process? 1401

* Professor of Law, Seikei University; former member of the WTO Appellate Body.

I. Introduction

This article is not intended to provide an overview of the appellate process at the WTO but to discuss a few specific issues of the appellate process which the writer thinks are interesting in light of his experience as a member of the Appellate Body from 1995 to 2000. A general account of the appellate process is covered by another chapter in this book (Chapter 27) by Victoria Donaldson of the Appellate Body Secretariat.

The appellate procedure is still in the process of formation. The WTO's dispute settlement process is said to have been judicialized as compared with that of the old GATT system. However, the WTO's dispute settlement process seems to fall somewhere between the judicial process and the political process that characterized the GATT dispute settlement system. It is judicial in the sense that panels and the Appellate Body rule on issues by interpreting and applying WTO agreements rather than by negotiation. They do not, in principle, decide cases on political considerations even if implications of their decisions may have political ramifications. It is also judicial because there is a guarantee that rulings of the Appellate Body will be adopted by the Dispute Settlement Body ("DSB") through the rule of automaticity, and because a *de facto* independent decision-making process like that of a judiciary is established.

However, it is not quite a full-fledged judiciary in the sense that as a formal matter panels and the Appellate Body do not make decisions, but simply recommend that the DSB adopt their reports and request the Member in violation to rectify the wrong. In this respect, the power of panels and the Appellate Body is different from the power of, say, the International Court of Justice ("ICJ") and the European Court of Justice ("ECJ"), as well as domestic courts, which are bodies vested with independent decision-making powers. Of course, under the rule of automaticity as mentioned above, it is certain (or almost certain) that rulings of panels and the Appellate Body will be adopted. But the above features of panels and the Appellate Body show that institutionally they are auxiliary to the DSB which is a political body.

Unlike judges in domestic courts and international courts such as the ICJ and the ECJ, panelists are appointed on an *ad hoc* basis to serve only in particular cases. They do not have full-time positions with the WTO. Members of the Appellate Body are appointed for a four-year period (and their terms are renewable only once). Their positions are also not full-time and their term as judges is much shorter than those of judges on domestic and international tribunals.

The structure of WTO panels and the Appellate Body was the result of a compromise. On the one hand, it was clear that the GATT dispute settlement procedure suffered from a number of defects. For example, panel reports could only be adopted by consensus, meaning that the losing party could block the adoption of the report. The dispute settlement process based on the consensus principle was thus inherently unstable. Furthermore, the timeframe for the process was not clearly established, which caused undue delay in the proceedings.[1] The Uruguay Round negotiating parties sought to establish a more stable dispute system in which the likelihood of the acceptance and, if necessary, rapid enforcement of rulings of the decision-making body was increased. The need for this change was related in part to the fact that the WTO would be a more complex body of treaties covering not only trade in goods, but also trade in services, as well as intellectual property.

[1] Despite these institutional defects, the GATT dispute settlement process performed its functions quite well and many disputes were successfully resolved through this process. Nevertheless, there were defects and there were important cases in which the adoption of panel reports was blocked. *See, e.g.,* Report of the Panel (unadopted), *United States-Taxes on Automobiles* (CAFE case), DS31/R (1994).

On the other hand, the prevailing sense of the negotiating parties was that the newly created WTO should be a member-driven organization. It should be the Members that make decisions, political or otherwise, and no WTO bodies independent of the Members should make important decisions. This shows that the international trading system is not mature enough yet to entertain the idea of an independent judiciary for the resolution of disputes among trading nations. WTO agreements indeed are based on a fine and delicate balance of interests among Members, and any pressure to tilt this balance one way or another would jeopardize the smooth functioning of the WTO.

II. Jurisdiction of the Appellate Body

A. Question of Facts and Question of Law

Article 17.6 of the Dispute Settlement Understanding ("DSU") states that "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." The ordinary meaning of this provision is that the jurisdiction of the Appellate Body is limited to "issues of law" rather than "issues of facts". However, this provision needs some elaboration. Article 17.6 says that parties to a dispute cannot appeal issues of fact, but does not necessarily say that the Appellate Body cannot deal with any factual issue. This raises a question: "Can the Appellate Body deal with facts not dealt with by the Panel?"

This was an issue in the *Canada-Periodicals* case,[2] in which the United States claimed that the Canadian imposition of a heavy tax on advertisements contained in "split-run" U.S. magazines was contrary to Article III of the GATT. The Panel held that the Canadian imposition was contrary to Article III because the split-run U.S. magazines and Canadian magazines were "like products" and there was discrimination against the split-run U.S. magazines in the form of an advertisement tax. Therefore, the Panel applied Article III:2(1) of GATT 1994 and stated that the Canadian measure discriminated against foreign magazines.

The Appellate Body reversed the portion of the report in which the Panel ruled that split-run U.S. magazines and Canadian domestic magazines were "like products". The Appellate Body then proceeded to apply Article III:2(2) of GATT 1994, which states that a Member cannot discriminate through taxation against a foreign product in favor of a domestic product if the foreign and domestic products are "directly competitive products" and if the discrimination is imposed "so as to afford protection to a domestic industry". The Appellate Body held that the Canadian measure violated this provision. In finding that the split-run U.S. magazines and Canadian domestic magazines were directly competitive products, the Appellate Body relied on reports and other pieces of evidence mentioned in the panel report, but not relied upon by the panel when it made its ruling, i.e. a Canadian Task Force Report and statements by Canadian Government officials.

Although the Panel had not based its ruling on GATT Article III:2(2), the Appellate Body decided that it had jurisdiction to apply Article III:2(2) to this dispute. The disputing parties had no knowledge that the case would be disposed of under Article III:2(2). If the parties had known that Article III:2(2) would be applied, they (especially the Canadian Government) would have made arguments with regard to the reports and other items of evidence relied upon by the Appellate Body. For due process purposes, it seems that the

[2] *Canada-Certain Measures Concerning Periodicals* ("*Canada-Periodicals*"), Report of the Panel, WT/DS31/R; Report of the Appellate Body, WT/DS31AB/R (1997).

parties should be given a chance to comment on facts used by the Appellate Body if it decides a dispute by applying a provision that had not been invoked and relied upon at the panel level. Under the current system, it is impossible to do so since after the oral hearing there is no chance for disputing parties to comment on either legal or factual issues present in a case. This may be one of the aspects that the DSB should consider when it next reviews the DSU in order to increase due process.

The distinction between a legal question and a factual question appears in Article 11 of the DSU which states that ". . . a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. . . . " An objective assessment relates to: (a) the facts of the case, and (b) the applicability of and conformity with the relevant covered agreement. The latter is clearly a legal question.

What about the former? When the Appellate Body deals with the question of whether a panel infringed Article 11 by not making an objective assessment of the facts, it examines facts found by the Panel and the relationship between those facts and the application of a provision of a WTO agreement to this set of facts. In doing so, the Appellate Body deals with the characterization of facts, which may be regarded as a question of law.

However, the borderline between factual questions and legal questions is often blurred. Let us look at the *E.C.-Hormones* case.[3] One of the major issues in this case was whether or not the growth hormones that the EC banned were carcinogenic. The Panel received several submissions from experts regarding this issue. All except for one stated that there was no sign of carcinogenic risk if used under the "maximum residue level" established by the Codex Committee. One expert indicated that there was a risk of incurring cancer in one out of a million persons. The Panel relied on the majority view of experts and decided that the EC's ban was not based on a proper risk assessment.

The EC appealed against this ruling arguing that the Panel violated Article 11 of the DSU by ignoring and distorting some pieces of evidence. The Appellate Body had to examine whether or not the Panel violated Article 11. In order to do this, the Appellate Body reviewed all of the submissions made by these experts, together with other factual material submitted to the Panel, to ascertain whether the Panel had paid attention to each submission and made an appropriate assessment before reaching its conclusion. The Appellate Body concluded that the Panel had examined and evaluated each submission, but did not agree with the assertion of the EC that the hormones in question were carcinogenic. This was a review of how the Panel handled pieces of factual evidence and applied WTO agreements to them. In this operation, the Appellate Body handled a question of "mixed facts and law". Many Article 11 issues are of this nature.

B. The Scope of Appellate Review

Can the Appellate Body review legal issues not dealt with by a Panel? This issue has appeared in several cases. One of them is the *Canada-Periodicals* case, discussed above.[4] In this case, the Appellate Body relied upon Article III:2(2) of GATT 1994 which the Panel had not considered and which neither Canada nor the United States had invoked in the appellate proceeding. The issue of evidence with regard to this case has already been

[3] *EC—Measures Concerning Meat and Meat Products* ("*EC-Hormones*"), Report of the Panel, WT/DS26/R/USA, WT/DS48/R/Can; Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R (1998).

[4] *See supra* footnote 2.

discussed. Setting aside the evidentiary issue, there is nothing in the DSU that prevents the Appellate Body from dealing with a provision in the WTO Agreement that a Panel has not cited or which neither party to the dispute has invoked. As long as a particular provision of a covered agreement is applicable to the subject matter of the dispute, the Appellate Body is authorized to apply it to resolve the dispute. It should be part of the discretion of the Appellate Body to decide which provision of the WTO Agreement applies to the subject matter of the dispute before it.

In *U.S.-Gasoline*,[5] the Panel had ruled that a U.S. trade measure applied to imported gasoline was discriminatory and did not fall under Article XX(g) of the GATT 1994 (the exception for the conservation of natural resources). On appeal, the Appellate Body reversed this ruling and held that the U.S. measure did fall under Article XX(g). However, Article XX of GATT 1994 requires that a measure which falls under any of the enumerated exceptions meet the requirements of the first paragraph of the Article ("the Chapeau") in order for that measure to be exonerated. The Chapeau states that a measure which falls under any of the exceptions provided for in Article XX must not constitute "a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade". The Appellate Body considered whether the U.S. measure satisfied these requirements, ruling that the U.S. measure was discriminatory and did not satisfy the requirements of the Chapeau. In this case, the Appellate Body took up and based its judgment on an issue that the Panel had not considered, i.e., the applicability of the Chapeau to Article XX. It was inevitable that the Appellate Body would consider and apply the Chapeau since, as long as the Appellate Body reversed the ruling of the Panel and held that Article XX(g) applied to the U.S. measure in question, the legal analysis would have been incomplete had the Appellate Body not considered this issue.

Another issue raised in the *U.S.-Gasoline* case was procedural. At the Panel level, the parties raised the question of the applicability of Article XX and the Panel examined this issue. Although the U.S. appeal was limited to the applicability of Article XX(b) and (g), Venezuela and Brazil argued in their appellees' submissions that provisions of the TBT Agreement (the Agreement on Technical Barriers to Trade) should be applied. The Appellate Body declined to consider the TBT issue because Brazil and Venezuela could have cross-appealed this issue but had chosen not to do so. To bring up this issue in their appellees' submissions was procedurally inappropriate. In any event, there was only a week or so between the appellees' submission and the oral hearing, and the time was too short for the United States to prepare a rebuttal. The refusal to hear the TBT issue was thus not grounded on lack of jurisdiction over the subject matter, but on due process because the way the issue was presented was procedurally wrong and the appellant should be given sufficient time for rebuttal.

In the *U.S.-Shrimp* case,[6] one of the issues was the applicability of Article XX(g) of the GATT 1994 to the unilateral prohibition exercised by the United States on imports of shrimp from countries in which "turtle exclusion devices" ("TEDS") were not required by governments.[7] The argument of the United States, the respondent, was that this prohibition was justified as it fell under the Article XX(g) exception. The Panel omitted the process of examining whether the U.S. measure fell under the Article XX(g) exception,

[5] *United States-Standards for Reformulated and Conventional Gasoline* ("*U.S.-Gasoline*"), Report of the Panel, WT/DS2/R; Report of the Appellate Body, WT/DS2/AB/R (1996).

[6] *United States-Import Prohibition of Certain Shrimp and Shrimp Products* ("*U.S.-Shrimp*"), Report of the Panel, WT/DS58/R; Report of the Appellate Body, WT/DS58AB/R (1998).

[7] TEDs are utilized on fishing boats to prevent sea turtles from being caught in shrimp nets.

went directly to the Chapeau, and decided that the U.S. measure was discriminatory and therefore contrary to the provisions of the Chapeau. The Panel reasoned that it was not necessary to examine whether the measure fell under Article XX(g) because, as long as the measure in question amounted to discrimination prohibited by the Chapeau, it made no difference to the result whether or not the measure in question fell under Article XX(g). The Appellate Body reversed this ruling and held that the Panel should have first determined whether the U.S. measure fell under Article XX(g) and, if so, that it then should have considered whether the measure satisfied the requirements of the Chapeau.

After reversing the Panel's method of analysis, the Appellate Body then proceeded to interpret Article XX(g). In doing so, the Appellate Body recognized that protection of the environment should be justified as part of GATT 1994. Although the Appellate Body considered this as a question of legal interpretation, it seems reasonable to assume that there was a policy consideration behind this ruling, i.e., that environmental protection be given legitimacy within the framework of the WTO.

C. Remand Power

Article 17:13 of the DSU states: "The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel". The word "remand" is lacking. It is not clear whether or not this omission was intended. It is conceivable that the Appellate Body will face a situation in which the findings of a panel may be based on insufficient facts but could be justified given sufficient facts. In this situation in a domestic jurisdiction, an appellate court normally remands the case to the original court and instructs it to engage in further fact finding to ascertain whether the conclusion is justifiable.

What would the Appellate Body do in such a situation? One could argue that the Appellate Body has an inherent power to remand a case even if there is no clear textual authorization. However, without any clear wording in the DSU, the Appellate Body would be extremely reluctant to remand a case. There are many instances in which the Appellate Body has reversed a ruling but declined to go any further than merely to state that the Appellate Body could not rule on the subject due to a lack of sufficient facts. In the *Asbestos* case,[8] for example, the Appellate Body reversed the ruling of the Panel that a French ordinance which prohibited the manufacture, use or importation of asbestos and products which contain asbestos was not covered by the TBT Agreement. However, the Appellate Body did not go any further than to state that it could do no more because the panel had not made sufficient factual findings to judge whether the French measure was contrary to provisions of the TBT Agreement. This was unfortunate because, if the Appellate Body had remand power, it could have remanded the case to the original panel and the panel could have determined whether the French measure in question violated the TBT Agreement. This was the first time that the TBT Agreement was considered in a WTO dispute settlement proceeding, and it would have constituted an important decision regarding the applicability of the TBT Agreement on product safety issues.

However, the lack of remand power seems to have caused little problem so far. Perhaps serious problems just did not occur, or perhaps the present system is satisfactory. For the sake of completeness, however, it would probably be useful to provide the Appellate Body with remand power. There is, however, a means by which the Appellate Body could

[8] *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products* ("*EC-Asbestos*"), Report of the Panel, WT/DS135/R, Report of the Appellate Body, WT/DSD135/AB/R (2001).

effectively exercise remand power. If an issue of remand comes up in a case in which the Panel's fact-finding was not sufficient, the Appellate Body could reverse the ruling of the Panel based on insufficient fact-finding and send its report to the DSB with a comment that the reversal is due to the lack of sufficient fact-finding rather than a deficiency in legal reasoning. The DSB could then decide to reconvene the original panel and commission it to engage in further fact-finding.[9]

III. Oral Hearings and Exchange of Views

A. Oral Hearings

Oral hearings are held usually one month after the initiation of an appeal. Oral hearings are held *in camera* and only members of the division, disputing parties, third parties, staff lawyers from the WTO Secretariat, translators and record-keepers are present. In oral hearings, parties are questioned with regard to issues argued in their submissions and related issues. Oral hearings are held so that members of the division understand the positions of each party and can thereby come to a fair judgment.

If the assertions of a party in oral hearings are different from those contained in its written submission, which should the Appellate Body base its judgment upon? This does not happen often since parties generally prepare their submissions carefully and argue their cases based on the reasoning contained in their submissions. However, it may happen, and it has happened in the past. In *U.S.-Lead Bars*,[10] one of the issues was whether the purchaser of the enterprise which had owned the steel production facility subsidized by the British government paid market value when it purchased the enterprise. The panel found that the purchase was made at fair market value. The United States, the appellant, appealed this finding on the grounds that it was wrong for the panel to have engaged in such a *de novo* investigation and to find that the purchase was made at fair market value. In the view of the United States, such a probe was an intrusion into the investigative power reserved to national governments and exceeded the panel's authority. In the oral hearing, however, the United States admitted that the panel's findings in this respect were factual findings, and chose not to challenge these factual findings. The Appellate Body interpreted this statement to mean that the United States had changed its position and withdrawn its allegation regarding this point. Thereupon, the Appellate Body decided that this issue had become moot.

A situation may, however, arise in which a party is faced with rigorous questioning and makes a response that contradicts a statement in its written submission. The question is whether the Appellate Body should base its judgment on this new statement. This writer believes that the answer depends on the circumstances in which such a statement is made. The purpose of oral hearings is not to put a party on the spot but to find out what it really wants to say. If a party is cornered at the oral hearing and admits something that contradicts its statement in its written submission, there should be an evaluation by the Appellate Body of the circumstances in which such a statement was made. The party might have spent many hours preparing its submission and its contradictory statement in the oral

[9] Although there is nothing to prevent the DSB from reconvening the original panel for further fact-finding, there is no guarantee that the original panelists would agree to serve again. A panel could be created composed of different panelists from those who serve on the original panel.

[10] *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*U.S.-Lead Bars*"), Report of the Panel, WT/DS138/R; Report of the Appellate Body, WT/DS138/AB/R (2000).

hearing may be an inadvertent mistake made in a tense moment of rigorous questioning. It does not seem fair to take up this mistake in the spirit of faultfinding and dispose of the case on this basis. Nevertheless, it is highly recommended that parties prepare their submissions and their oral statements in such a way that there is no contradiction or inconsistency between them since otherwise this may adversely affect the credibility of submissions and statements.

B. Exchange of Views

Article 17.9 of the DSU authorizes the Appellate Body to draw up working procedures in consultation with the Chairman of the DSB and the Director-General of the WTO. Under the authority of this provision, the Appellate Body drafted its Working Procedures for Appellate Review ("Working Procedures") in early 1996 which, with a minor amendment, are currently applied. The Working Procedures set out details of the process by which an appeal is examined and treated.

Rule 4(3) of the Working Procedures states that the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report. This process is called the "exchange of views". Rule 4(4) of the Working Procedures adds: "Nothing in these Rules shall be interpreted as interfering with a division's full authority and freedom to hear and decide an appeal assigned to it. . . ." Therefore, the decision of a division is not made *en banc* by the whole Appellate Body but by a division. However, an exchange of views is required before a division comes to its final conclusion in respect of a case.

Rule 4(3) of the Working Procedures is included in the section providing for "collegiality". Collegiality is necessary in order for divisions to make consistent judgments on various issues. The provision requiring an exchange of views is incorporated to maintain coherence between judgments among different divisions deciding the same or similar issues. In an exchange of views, members of the Appellate Body who are not members of the division provide input to the division and the division takes into account their views in reaching its conclusion. Rule 4(4) provides that the division is not bound by comments made by other members when deciding a case. The views of the other Appellate Body members constitute formal input which the division may or may not choose to accept.

However, if comments made by other Appellate Body members at a meeting of the members do not necessarily have any impact on the final judgment of the division, what is the point in conducting an exchange of views in every case? The views expressed by other members can serve a useful purpose for the division. These views are considered by the members of the division and may be incorporated in the judgment.

Because an exchange of views may have a substantial impact on a decision, the disputing parties may feel uneasy not having an opportunity to be heard by the full Appellate Body. The other members, of course, review the written submissions of the parties to a dispute. However, important statements may be made during the oral hearing, and those Appellate Body members not present might have formed different impressions had they attended the hearing.

This issue may be of some importance to the fairness of the appellate process, and the Appellate Body and the DSB may need to give some consideration to this point. As precedents accumulate and doctrines for interpreting provisions of WTO agreements become more firmly established, the need to emphasize collegiality and the exchange of views may not be as great as it is today. In the future, Article 17.1 of the DSU, which currently requires that three members of the Appellate Body serve on one case, may be changed to allow important cases to be heard in an "*en banc*" session (such as when

modification of precedents are discussed) and a "*petit*" session in which routine cases are discussed and resolved.

IV. Interpretation of the WTO Agreements—Article 31 and Article 32 of the Vienna Convention

Article 3:2 of the DSU directs that the bodies in charge of dispute settlements should: "... clarify the existing provisions of those agreements [covered agreements] in accordance with customary rules of interpretation of public international law." Customary rules of interpretation of public international law are incorporated in provisions in the Vienna Convention, in particular, Article 31 and Article 32 thereof. Article 31(1) provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 provides that a treaty interpreter can consider preparatory documents of a treaty only when the "interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

Rules incorporated in the Vienna Convention regarding rules of treaty interpretation are similar to rules developed in civil law jurisdictions. In civil law countries, the task of jurists is to interpret provisions of the Civil Code and to apply them to particular situations. As a result, there are rules in civil law countries requiring that the ordinary meaning of words and their context be respected, as well as their object and purpose. Courts in civil law countries resort to the legislative history of a provision of the law far less than courts in some common law countries. In light of the above, there is something common to both treaty interpretation under Article 31 and Article 32 of the Vienna Convention and the interpretation of the Civil Code by domestic courts in civil law countries.

However, panels and the Appellate Body have put much more emphasis on the "wording" and "context" of a provision of a WTO agreement than domestic courts in civil law jurisdictions. Almost every panel and/or appellate report refers to the *Oxford* and *Webster* dictionaries. The Appellate Body must nevertheless sometimes interpret a word differently from what it literally says. This was the case in *Canada-Aircraft,*[11] in which the Appellate Body interpreted the word "should" in Article 13 of the DSU to mean "shall". This is, however, rare, and panels and the Appellate Body are generally faithful to the wording and context of a provision and do not easily deviate from them. In domestic jurisdictions, courts often interpret provisions of law more liberally if it is necessary to accomplish fairness and justice.

To give an example, Article 709 of the Civil Code of Japan (providing for tort claims) states that: "any person who infringes a right of another person by intention or negligence is liable to compensate damages caused by that act." The Supreme Court of Japan held in 1925 that the word "right" means "interests which deserve to be protected by law", as opposed to just a right provided in a law (such as "copyright").[12] However, panels and the Appellate Body would be hesitant to interpret the word "right" to mean "interests".

The strict adherence by panels and the Appellate Body to the words and the context of a provision in a WTO agreement is probably due to the unstable basis on which the WTO's dispute settlement system stands. The WTO agreements are the result of intensive

[11] *Canada-Measures Affecting the Export of Civilian Aircraft* ("*Canada-Aircraft*"), Report of the Panel, WT/DS70/R; Report of the Appellate Body, WT/DS70/AB/R (1999).

[12] Decision of the Supreme Court of Japan, 4 Minshu (Supreme Court Civil Cases Reporter) 670, (November 28, 1925).

negotiations between negotiators and reflect a fine balance of carefully negotiated interests. Any attempt to upset this balance will result in a loss of trust in the WTO system. In domestic jurisdictions, there is usually a solid community behind the legal system and there is frequently more respect and trust in domestic court systems than in the WTO's dispute settlement system. Compared with domestic judicial systems, the WTO system is more fragile and susceptible to collapse if the balance of interests reflected in the WTO agreements is upset. In the Uruguay Round, Members decided to part with a portion of their sovereignty to avoid trade wars (which may be likened to "the state of nature" in Thomas Hobbs' *Leviathan*). However, Members of the WTO are keenly conscious that they did not give up anything except that which is contained in the WTO agreements. With respect to the rest, they are jealous of protecting their sovereign prerogatives. The carefully negotiated balance of interests is reflected in the wording of the WTO agreements and the meaning of words in the WTO agreements is therefore vitally important.

This general sentiment among Members is reflected in several provisions of the Marrakesh Agreements. Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization states: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Article 3:2 of the DSU states: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Again Article 19:2 of the DSU provides: "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements." This last provision is an admonition to panels and the Appellate Body to take the utmost care not to overstep the boundaries set by the WTO agreements.

V. Transparency and Access Issues

A. Transparency

How to promote transparency in the WTO process is an important policy consideration for the WTO. The breadth of transparency issues is wide and goes well beyond the appellate process. With regard to transparency of the appellate process, only one issue needs to be mentioned. Article 17:10 of the DSU requires the confidentiality of the appellate process by stating: "The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute. . . ." It is obvious from this provision, as well as from the nature of the appellate proceeding, that the process of deliberations by divisions and the whole Appellate Body must be kept confidential. However, there seems to be little reason why attendance in oral hearings should be limited to the disputing parties, third parties, members of the division hearing the claims of the parties and staff lawyers. Allowing the general public to attend oral hearings would promote the transparency of the appellate process and increase the acceptance of the process by civil society by providing them with a glimpse of the process.

B. The Amicus Curiae Issue

The relationship between the WTO and civil society has recently become an important issue. This is partly due to the growing importance of NGOs as actors in WTO matters.

The WTO cannot ignore these actors. While the WTO is still an organization composed of governments and only governments can participate in WTO activities, it is not certain how long the WTO can cling to this traditional idea. In the long run, the WTO cannot exist unless it is accepted not only by governments, but also by civil society, including various groups such as NGOs, business associations, labor unions, professional groups and the general public.

The issue of whether the Appellate Body can (and should) accept *amicus curiae* briefs from persons outside the WTO should be considered from this broad perspective. This is a controversial issue, and many developing countries are opposed to allowing panels and the Appellate Body to accept and consider *amicus curiae* briefs.[13] This issue was first raised in connection with proceedings at the panel level. In *U.S.-Shrimp*,[14] the Panel decided that it did not have authority to accept and consider *amicus curiae* briefs. The Appellate Body reversed this ruling and held that panels were authorized to accept and consider *amicus* briefs. The Appellate Body reasoned that Article 13:1 of the DSU authorizes panels "to seek information and technical advice from any individual or body it deems appropriate" and that "the right to seek" should include the right to accept and consider information and advice including *amicus* briefs. Although there was much objection to this ruling among Members (especially among developing country Members), this appellate report was adopted and became an important precedent.

The issue of whether the Appellate Body can accept and consider *amicus* briefs was raised in *U.S.-Lead Bars*[15] in which two private U.S. groups filed *amicus* briefs with the Appellate Body. In its preliminary determination, the Appellate Body ruled that it could accept and consider *amicus* briefs. In holding that there was such authority, the Appellate Body cited Article 17:9 of the DSU which authorized the Appellate Body to draw up its own working procedures and compared this with the power of panels to establish working procedures. The Working Procedures for panels are provided in Appendix 3 of the DSU and panels are generally requested to follow these procedures, although a panel can choose to establish its own working procedures. The Appellate Body reasoned, comparing those two situations, that the Appellate Body is given greater authority to control its procedures as compared to that granted to panels. If panels are authorized to accept and consider *amicus curiae* briefs, why not the Appellate Body?

This writer agrees with the conclusion of the Appellate Body with respect to the power to accept and consider *amicus curiae* briefs. However, he would justify the power in the following way. *Amicus curiae* briefs are pieces of information of one kind or another which may be useful. The Appellate Body is required to examine submissions of the parties to a dispute. But it is also authorized to, and does consider academic writings, past panel precedents, decisions of ICJ and those of other international tribunals. They are pieces of information which may be useful. If the Appellate Body can consider academic writings, panel precedents, decisions of ICJ and so on, why should it not review *amicus* briefs? Is there any qualitative difference between them?

It is true that Article 13 of the DSU authorizes panels to seek information and advice from any person, but does not explicitly authorize the Appellate Body to do so. However, too much reliance on words may lead to absurdity. Article 11 states: "... a panel should

[13] On the issue of *amicus curiae* brief at the Appellate Body, see Arthur E. Appleton, *Amicus Curiae Submission in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 691 (2000); *Issues of Amicus Curiae Submissions: Note by the Editors*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 701 (2000). *See also* Chapter 32 of this book.

[14] *See supra* footnote 6.

[15] *See supra* footnote 10.

make an objective assessment of the matter before it, including an objective assessment of . . . the applicability of and conformity with the relevant covered agreements. . . . " There is no equivalent language in the DSU for the Appellate Body. No one would argue, however, that the Appellate Body is not authorized to "make an objective assessment of the matter before it, including an objective assessment of the applicability of and conformity with the relevant covered agreements." Whether written or unwritten, Article 11 expresses the due process requirements which both panels and the Appellate Body must observe.

The Appellate Body is required to review an appeal and render its judgment objectively and judiciously. In order for the Appellate Body to carry out this task, it is important to collect as much relevant, necessary and useful information available from whatever sources. *Amicus* briefs may contain valuable information and insights which the Appellate Body can utilize to arrive at a balanced judgment. To deny the Appellate Body the opportunity to review *amicus* submissions would do a disservice to the appellate process. In light of this, it is submitted that the Appellate Body should be regarded as having inherent power to accept and consider *amicus* briefs. Even if this power is not written in the DSU, it is implicit in the process and part of the due process of law.

It should be emphasized, however, that panels and the Appellate Body are not obligated to accept and review *amicus* briefs. It should be left to the discretion of panels and the Appellate Body to decide whether or not to accept an *amicus* brief. It is equally important to emphasize that panels and the Appellate Body can (and should) control the process of accepting and reviewing such documents. There may be a risk that too many documents are filed and that this causes a delay in the proceedings. In *EC-Asbestos*,[16] the Appellate Body adopted a procedure which it applied to that case only and in which it required, *inter alia*, that a person wishing to file an *amicus* brief should request leave from the Appellate Body to file such a brief in an application no longer than three typed pages which sets forth why the applicant would make a contribution to the resolution of the dispute that is not likely to be repetitive of what has already been submitted. The Appellate Body further provided that if granted leave to file, an *amicus* submission could not exceed 20 typed pages and must set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal interpretation.[17] This should establish an important precedent. The General Council of the WTO subsequently warned the Appellate Body that it should act with "extreme prudence" on the issue of accepting briefs from non-governmental organizations in dispute settlement proceedings.[18] A number of developing countries were concerned about this practice, since they feared that they would be "outgunned" in dispute settlement proceedings by amicus briefs filed by multinational companies, as well as by developed country NGOs.

Some have argued that, by allowing persons outside the WTO to file *amicus* briefs, the Appellate Body is giving more rights to persons outside the WTO than it does to Members that are not parties to a dispute. On this, two points should be made clear. First, the Appellate Body cannot give a "right" to persons outside the WTO to file *amicus curiae* briefs. It belongs to the discretion of the Appellate Body to decide whether to accept and consider such briefs if they are filed. Persons who file *amicus* briefs have no means to compel the Appellate Body to accept and review them. Secondly, there is nothing which prevents any Member of the WTO that is not a party to a dispute from

[16] *See supra*, note 8.
[17] Communication from the Appellate Body, WT/DS135/9 (November 8, 2000).
[18] INSIDE U.S. TRADE, December 1, 2000.

filing an *amicus curiae* brief. If it wishes to do so, it can certainly do so. However, such a brief would be handled in the same fashion as any other *amicus* brief.

VI. Dissenting Opinions

Article 17:11 of the DSU states that opinions expressed in an Appellate Body report by individuals serving on the Appellate Body shall be anonymous. The Appellate Body is required to refrain from identifying the name of a division member who expressed a certain opinion in regard to an appeal. However, the DSU is silent about whether the Appellate Body can publish a dissenting opinion on an anonymous basis. The Working Procedures state: "The Appellate Body and its divisions shall make every effort to take their decisions by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by a majority vote." Under this rule, a division dealing with an appeal should make every effort to take its decision by consensus. This rule nevertheless anticipates that a consensus decision may not always be possible. If it is not possible, then the majority rule must be applied. This means that a decision would be arrived at by a vote of two to one. Here again, the Working Procedures remain silent about the publication of a dissenting opinion.

There is nothing in Article 17:11 of the DSU nor in the Working Procedures which prohibits the Appellate Body from publishing a dissenting opinion on an anonymous basis. However, a dissenting opinion has never been published by the Appellate Body. On one occasion, a "concurring opinion" was published (*EC-Asbestos*)[19]. Whether or not the Appellate Body should publish a dissenting opinion is a policy matter that the Appellate Body can decide. There are pros and cons to the publication of dissenting opinions. On one hand, if a dissenting opinion is published, this shows that there was not a unanimity of views within the division regarding the disposition of the appeal. This could have a negative consequence when the losing party seeks to change the domestic measure in question to conform to WTO rules. The fact that there is a dissenting opinion could be used by domestic opponents to delay or block the adoption of a new law or regulation.

On the other hand, if a dissenting opinion is not published, this would mean that the dissenting opinion was simply ignored or that a compromise was reached between the majority and the dissenting member. This could make the reasoning of the judgment somewhat unclear and ambiguous. This would lessen its value as a precedent.

This writer sides with the latter view. The publication of a dissenting opinion would promote the transparency of the appellate process. With regard to the concern that the publication of a dissenting opinion may weaken the effect of an Appellate Body judgment, this writer observes that in many domestic courts dissenting opinions are published without appearing to create problems. Appellate reports are the most authoritative source of precedents in the dispute settlement system of the WTO. The importance of promoting clarity and sharpness of reasoning in appellate reports far outweighs any other consideration.

VII. Reform of the Appellate Process?

Since the inauguration of the WTO, the performance of its dispute settlement system has been an outstanding success. In less than ten years, more than three hundred cases have been brought before the DSB. This figure is remarkable when compared to the

[19] *Supra*, note 8.

approximately three hundred cases that were brought under the GATT dispute settlement system during the nearly fifty years of its existence. The Appellate Body has played a key role in the successful operation of the dispute settlement system of the WTO. However, no institution is perfect and it is time to think about whether there is any room for improvement.

One of the striking features of the WTO's dispute settlement system is the rule of automaticity. Automaticity guarantees that reports of panels and the Appellate Body are adopted by the DSB by negative consensus. A *quid pro quo* of automaticity in the adoption of panel reports was the creation of an appellate process in which the Appellate Body reviews rulings of panels, and upholds, modifies or reverses them. However, reports of the Appellate Body are adopted by automaticity. There is no higher tribunal which reviews appellate reports and this means that the Appellate Body's decision is effectively the final voice deciding a dispute among Members. Some issues involved in disputes touch on the vital interests of the Members. Matters of vital interest to a Member are in the hands of the seven members of the Appellate Body. Therefore, the Appellate Body's responsibility is enormous.

In many domestic jurisdictions, the principle of checks and balances operates. Although supreme courts (and lower courts) are independent from other branches of the government, any mistake that a supreme court may make can be corrected by a legislative act overturning the decision of the supreme court. With regard to the Appellate Body, there is no realistic chance for such a correction. In theory a provision of an agreement could be renegotiated in a Ministerial Conference with a view to amending or abolishing it, but this is an extremely cumbersome procedure[20] and as a practical matter would be virtually impossible to achieve.

It must be asked whether a system of checks and balances is necessary for the Appellate Body. The lack of checks and balances may have strained the Appellate Body. Some of the cases handled by panels and the Appellate Body may be beyond the capacity of the dispute settlement system of the WTO. The *Hormones* case,[21] for example, tested the capacity of the dispute settlement system. The enormous burden on the Appellate Body in this case may have caused it to put too much emphasis on tests present in the WTO agreements and to formulate conservative interpretations.

It seems that, in any human institution, some form of checks and balances is necessary. If an institution lacks a mechanism of checks and balances, there is no chance of correction if its members have made a mistake. Since no human institution is infallible and the Appellate Body is no exception to this law, it seems sound to introduce some form of checks and balances into the system. However, the question remains, what type of mechanism should be created?

One approach may be to activate the exclusive authority of the Ministerial Conference and the General Council to adopt interpretations of WTO agreements. Article IX:2 of the Marrakesh Agreement states: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." This article provides that the adoption of such interpretations be made by a three-fourths majority. This may be too stringent a requirement and could be eased to a two-thirds majority or a simple majority. Admittedly the General Council is a political body as opposed to a judicial or quasi-judicial body. If an interpretation made by the Appellate Body is overturned by the adoption of an interpretation of

[20] See Article X of the Marrakesh Agreement Establishing the World Trade Organization.
[21] *Supra*, note 3.

the General Council under Article IX:2 of the Marrakesh Agreement, this would mean that a decision of a judicial (or quasi-judicial) body has been overturned by a political decision and this may be contrary to the policy to judicialize the dispute settlement system. Considering, however, that the current dispute settlement system is not a one hundred percent judicial process, the above may be a possible compromise.

Another approach would be to create a body within the WTO specifically designed to review Appellate Body rulings. This body would not have the power to overturn rulings of the Appellate Body. Instead, this body would review rulings of the Appellate Body and evaluate and criticize them if there are any problems. Publication of such evaluations and criticisms could be instructive to the Appellate Body. It could learn something from and use them as one source to improve subsequent decisions.

CHAPTER 31

THE APPLICATION OF NON-WTO RULES OF INTERNATIONAL LAW IN WTO DISPUTE SETTLEMENT

Joost Pauwelyn*

TABLE OF CONTENTS

I. Introduction 1406
II. WTO Law *is* Public International Law 1406
III. WTO Law *Interacts* with Other Rules of International Law 1406
A. General International Law 1407
B. Other, Non-WTO Treaties 1408
C. A Word of Caution 1409
IV. The Jurisdiction of WTO Panels 1409
A. Substantive Jurisdiction 1409
B. Implied or Incidental Jurisdiction 1410
V. Relevant Law Before a WTO Panel 1410
A. International Law Referred to in the Process of "Interpreting" WTO Terms 1411
B. International Law Referred to Outside the Process of Treaty Interpretation 1412
1. General International Law 1413
2. Other, Non-WTO Treaties 1414
3. A Second Word of Caution 1417
VI. The Outcome of the WTO/Public International Law Interaction Before a WTO Panel: Complement or Conflict? 1417
A. WTO Law "Contracting Out" of General International Law 1418
B. Non-WTO Treaties Contradicting the WTO Agreement 1418
C. The Definition of "Conflict" and General International Law Rules on the Inter-Play of Norms 1420
D. Does the Obligation on Panels Not to "add to or diminish the rights and obligations provided in the covered agreements" Constitute a General Conflict Clause in Favor of WTO Rules? 1421
VII. Conclusions 1423

* Associate Professor of Law, Duke University School of Law, formerly with the Appellate Body Secretariat and the Legal Affairs Division of the WTO Secretariat (1996–2002).

I. Introduction

Can WTO panels apply general rules on state responsibility? Can they apply provisions of the Vienna Convention on the Law of Treaties other than those on treaty interpretation? Are WTO panels mandated to apply non-WTO treaties, such as multilateral environmental agreements, or bilateral agreements concluded only as between the disputing parties? If so, what is the relationship between these non-WTO rules of international law and the WTO Agreement? Which prevails in the event of conflict? Those are some of the practical questions examined in this Chapter. Part I examines the nature of WTO law. Part II looks at how WTO law interacts in the abstract with other rules of international law. Then the jurisdictional scope of WTO panels is set forth (Part III) and the law that panels may apply and refer to in examining WTO claims (Part IV). The outcome of the interaction between WTO and other international law in practice before a WTO panel, is addressed in Part V. Part VI provides a summary of the chapter and offers some guidelines to WTO negotiators and other treaty-makers.

II. WTO Law *is* Public International Law

The WTO Agreement is part of public international law. It is a "treaty" in the sense of Article 2 of the Vienna Convention on the Law of Treaties ("VCLT"). The WTO treaty is not a "self-contained regime" in the strict sense of being a treaty that was somehow concluded *outside* the system of international law all together. Just as no U.S. statute can be enacted outside the framework of U.S. law, no treaty can be concluded outside the framework of international law.

III. WTO Law *Interacts* with Other Rules of International Law

Although any WTO agreement, as an agreement between states, had to be concluded as part of the system of international law, the WTO drafters could in theory have framed their agreement so as to seclude it completely from other rules of international law (other than those of *jus cogens*[1]). However, they did not do so. On the contrary, Article 3.2 of the Dispute Settlement Understanding ("DSU") explicitly confirms that WTO agreements must be interpreted "in accordance with customary rules of interpretation of public international law". These rules of interpretation—in practice, Articles 31–33 of the VCLT—direct, in turn, that in interpreting the WTO treaty, account must be taken not only of the treaty itself, but also of "any relevant rules of international law applicable in the relations between the parties".[2] As the Appellate Body acknowledged in its very first report,

> [t]hat direction [in DSU Article 3.2] reflects a measure of recognition that the *General Agreement* [GATT] is not to be read in clinical isolation from public international law.[3]

Hence, (1) WTO law is international law *and* (2) WTO law interacts with other norms of international law, albeit to a degree still to be determined.

[1] *Jus cogens* consists of rules of international law, such as the prohibition on genocide or slavery, that are binding on all states and from which no deviation is permitted (*see* Article 53 of the VCLT).

[2] Article 31.3(c) of the VCLT.

[3] Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 17 (1996) ("*U.S.—Gasoline*").

At this juncture, it is useful to distinguish between "general international law"—that is, international law that is, in principle, binding on *all* states and consists mainly of general customary international law[4] and general principles of law[5]—and other, non-WTO treaties—that is, rules of international law binding *only* on some states, namely state parties to a particular treaty. We deal with them in turn.

A. General International Law

Rules on treaty interpretation—*explicitly* confirmed in Article 3.2 of the DSU—are but one set of international law rules that apply to, or interact with, the WTO Agreement. Indeed, it is generally understood that unless a new treaty overrules or deviates from existing international law, hereafter referred to as "contracting out", the existing law continues to interact with and, as the case may be, apply to, the new treaty. It is for the new treaty to *exclude* the rules of international law that the parties do *not* want to apply to the new treaty; not the reverse, i.e., the treaty does not have to positively list all such rules that are to apply to the new treaty. Just as private contracts are automatically born into a system of domestic law, so treaties are automatically born into the system of international law. Much the way private contracts do not need to list all relevant legislative and administrative provisions of domestic law for them to be applicable to the contract, so treaties need not explicitly set out pre-existing rules of international law for them to be applicable to, or interact with, the new treaty.

In that sense, there was no need for DSU Article 3.2 to explicitly confirm the application of international law rules on treaty interpretation. Absent "contracting out" in the WTO Agreement, these rules on interpretation—being rules of *general* international law binding on all WTO Members—would have applied automatically.[6] More generally, any explicit confirmation of rules of *general* international law in the WTO Agreement must be seen as made *ex abundante cautela*.[7] Absent "contracting out" in the WTO Agreement, these rules (be they general customary international law or general principles of law) would have applied. Hence, explicitly confirming some rules of general international law in the WTO Agreement does not amount to excluding all other rules.

The fact that general international law continues to apply to a new treaty unless that treaty overrules it or deviates from it (that is, "contracts out" of it), has been confirmed consistently in a series of international decisions, including decisions by the ICJ, and scholarly writings.[8] This approach was adopted also by a WTO panel (not appealed),

[4] Defined in Article 38(b) of the ICJ Statute as "international custom, as evidence of a general practice accepted as law".

[5] Defined in Article 38(c) of the ICJ Statute as "general principles of law recognized by civilized nations".

[6] For a plausible reason why the drafters considered it necessary to explicitly confirm international law rules on interpretation, *see* the panel report in *Korea—Measures Affecting Government Procurement*, WT/DS163/R, ¶ 7.96, n.753 (2000) ("*Korea—Government Procurement*"):

> The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law.

[7] That is, just to make absolutely sure that the rules in question would apply.

[8] For an elaboration on those cases and the relevant scholarly writings, *see* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 535, at 541–542 (2001), referring, *inter alia*, to: *Georges Pinson (Fr.) v. United Mexican States*, 5 R.I.A.A. 327, 422 (Perm. Ct. Arb. 1928*); Chorzów Factory (Ger. v. Pol.), Merits*, 1928 PCIJ (ser. A) No. 17, at 29 (Sept. 13); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

which found:

> We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. *Customary international law applies generally to the economic relations between the WTO Members.* Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that *the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.*[9]

On these grounds, the panel applied "general rules of customary international law on good faith and error in treaty negotiations",[10] in particular Article 48 of the VCLT.[11] The panel correctly rejected the argument to the contrary that the reference in DSU Article 3.2 only to rules of treaty interpretation, meant that all other international law is excluded.[12]

This approach has, more recently, been adopted also by the Appellate Body in the *Cotton Yarn* decision, this time with respect to the general international law principle of proportionality of countermeasures.[13] The Appellate Body first noted "the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered", and DSU Article 22.4 which has a similar effect.[14] It then stated that it would be absurd not to have the same principle of proportionality applied to safeguard actions under the Agreement on Textiles and Clothing, such action being "a remedy to WTO-consistent 'fair trade' activity".[15] In what is a crucial passage, the Appellate Body found that:

> . . . such an exorbitant derogation from the principle of proportionality in respect of the attribution of serious damage could be justified only if the drafters of the [Agreement on Textiles and Clothing] had expressly provided for it, which is not the case.[16]

Therefore, at least in this particular case, the Appellate Body concurs with the view that as long as general international law—here, the principle of proportionality—has not been excluded or "contracted out" from in the WTO Agreement, it continues to apply to that agreement.

B. Other, Non-WTO Treaties

Having examined the interaction between the WTO treaty and general international law, how does the WTO treaty interact with other non-WTO treaties? It is argued here that for this type of interaction between treaties a similar approach should be taken as that set

Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16, 47, ¶ 96 (June 21); *Elettronica Sicula S.p.A (ELSI) (U.S. v. Italy)*, 1989 ICJ Rep. 15, 42, ¶ 50 (July 20); and *Amoco Int'l Finance Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, ¶ 112 (1987).

[9] *Korea—Government Procurement*, *supra* note 6, ¶ 7.96 (emphasis supplied, footnote omitted).

[10] *Id.* ¶ 7.101.

[11] *Id.* ¶¶ 7.123–7.126.

[12] *Id.* ¶ 7.96, n.753.

[13] Report of the Appellate Body, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("*U.S.—Cotton Yarn*"), WT/DS192/AB/R (2001).

[14] *Id.* ¶ 120.

[15] *Id.*

[16] *Id.*

out above in respect to the relationship between the WTO Agreement and general international law, namely: unless the WTO Agreement somehow overruled, deviated from, replaced or terminated norms in pre-existing non-WTO treaties (be it the Tokyo Round Codes on Subsidies and Dumping or the Montreal Protocol on Substances Depleting the Ozone Layer), those pre-existing treaty norms continue to be relevant as between WTO Members bound by them. Similarly, any new treaties created as between certain or all WTO Members, subsequent to the conclusion of the WTO Agreement (say, the Cartagena Biosafety Protocol or any more recent UN, WIPO or WHO conventions) necessarily interact with, and may have an impact on, the rights and obligations of WTO Members bound by the new treaty. Just as there are no sealed compartments between general international law and WTO law, no such compartments separate the WTO treaty from other treaties. The WTO was not created in a vacuum, nor does its legal existence continue in a vacuum. As much as the WTO Agreement altered the landscape of international law in April 1994, so post-1994 rules can change the universe of law relevant to the WTO.

C. A Word of Caution

The fact that WTO law thus interacts with other rules of international law, be they general international law or other non-WTO treaties, is one thing. It means that the WTO is not a "self-contained regime" either (1) in the strict sense of being a treaty somehow concluded outside of the system of international law all together (as discussed above), or (2) in the broader sense of being a sub-system of international law hermetically sealed off from other branches of international law. The way in which this interaction between WTO law and other international law plays out in WTO dispute settlement and the question of which of these branches prevails in the event of conflict is another matter, discussed in the remaining parts. We first examine the limited jurisdiction of WTO panels (Part III), then the broader universe of relevant law that WTO panels may refer to or apply (Part IV), before, finally, setting out what may happen in the event of a conflict between WTO and non-WTO rules of international law (Part V).

IV. The Jurisdiction of WTO Panels

A. Substantive Jurisdiction

The potential impact of non-WTO rules of international law in WTO dispute settlement is limited, first and foremost, by the limited jurisdiction of WTO panels. By jurisdiction I mean the type of legal claims that a WTO Member can bring under the compulsory DSU system. Under Article 1.1, the DSU applies only to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to the [DSU]", i.e., the so-called WTO-covered agreements. Hence, WTO panels have jurisdiction to examine only claims made under certain WTO agreements (not claims, for example, under the WTO's Trade Policy Review Agreement). The jurisdiction of an international adjudicator, like a WTO panel, depends on the consent of the disputing parties. Hence, unless disputing WTO Members were to agree to expand the jurisdictional scope of a particular panel (and even here there must be limits, such as the overall mandate of the WTO),[17] WTO Members cannot bring complaints to the WTO under

[17] They could do so, for example, under DSU Article 7.1 allowing parties to expand the standard terms of reference of WTO panels or DSU Article 25 providing for alternative arbitration procedures, but even in those cases it would seem that only claims that can be said to fall under the WTO umbrella, broadly defined (such as, arguably, mutually agreed solutions that ended a formal WTO dispute), can be covered.

rules of international law other than WTO-covered agreements. They cannot complain, for example, about non-compliance with certain multilateral environmental agreements ("MEAs"), nor about the non-implementation of rules of general international law (say, the prohibition of genocide), even if part of *jus cogens*.

B. Implied or Incidental Jurisdiction

Although the substantive jurisdiction of WTO panels is limited to claims under WTO-covered agreements, in the examination of those claims WTO panels may be required to decide on claims incidental to the exercise of their substantive jurisdiction. The power to determine whether one has substantive jurisdiction in the first place (the issue of *compétence de la compétence*) is one element of the implied jurisdiction of panels. The Appellate Body explicitly confirmed that WTO panels have such jurisdiction.[18]

Other claims incidental to the enforcement of WTO-covered agreements arise as a result of certain rules on the judicial settlement of disputes, such as rules on burden of proof[19] or due process, as well as rules on the implementation of state responsibility, such as rules on standing[20] and remedies, even if such rules are not explicitly incorporated into the WTO treaty.[21] A WTO panel does not exceed the bounds of its jurisdiction by making findings on these matters. Making such findings is inherent in the exercise of its judicial function. It flows directly from the fact, explored in previous parts, that both WTO law and WTO panels do not operate in a vacuum but in the context of the wider *corpus* of international law.

V. Relevant Law Before a WTO Panel

Given that the jurisdiction of WTO panels is limited to claims under WTO-covered agreements, most of the law applied by panels will, obviously, be WTO law. Nonetheless, a distinction must be made between the substantive jurisdiction of panels—WTO claims only—and the law that they may refer to or apply to decide the validity of claims.

The DSU limits the jurisdiction of WTO panels. For reasons explained below, it does not in my view limit the potentially applicable law. The fact that the substantive jurisdiction of WTO panels is limited to claims under WTO-covered agreements should not necessarily mean that the law potentially applicable to decide those claims must equally be limited to that found in WTO-covered agreements. The *Lockerbie* cases before the ICJ illustrate this point. There, the ICJ had jurisdiction to consider Libyan claims only under the Montreal Convention. However, this did not stop the Court from also examining other international law, in particular UN Security Council Resolution 748 invoked in defense by the United Kingdom and the United States, as part of its applicable law.

[18] Report of the Appellate Body, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, ¶ 54 n.30 (2000). *See also* International Tribunal for the Former Yugoslavia, *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. ITB94B1BAR72, ¶¶ 18, 15 (Oct. 2, 1995).

[19] Report of the Appellate Body,*United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India* WT/DS33/AB/R, at p. 14 (1997) ("*U.S.—Shirts and Blouses*").

[20] Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, ¶ 133 (1997) ("*EC—Bananas*").

[21] It is generally accepted that when states confer jurisdiction on a tribunal to decide a particular claim, such jurisdiction includes the jurisdiction to grant the available remedies to redress the violation in case the claim is found to be valid. *See Chorzów Factory (Ger. v. Pol.), Merits*, 1928 PCIJ (ser. A) No. 17, at 29.

Importantly, the ICJ did so notwithstanding the fact that it was not conferred jurisdiction to entertain claims of violation under these UN resolutions.[22]

The instruction for panels in DSU Article 7 to examine the matter referred to them "in the light of the relevant provisions" of the covered agreement(s) cited by the parties to the dispute and to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute", imposes an obligation on panels to address and possibly apply certain WTO rules. However, the way I see it, nothing in the DSU or any other WTO rule precludes panels from addressing and, as the case may be, applying other rules of international law so as to decide the WTO claims before them. That is not to say, of course, that all international law applies to each WTO dispute. This will depend on the facts of the case, the parties involved and the claims and defenses that they make.

Nonetheless, a commonly held (but, in my opinion, mistaken) view remains that WTO panels must limit themselves to the law set out in WTO-covered agreements and that any rules of international law not explicitly included, or referred to,[23] in the WTO treaty cannot play a role in WTO dispute settlement. Both theory and practice show that this view—limiting the law relevant to WTO panels to the "four corners" of WTO-covered agreements—is mistaken. Panels and the Appellate Body alike have referred to non-WTO rules of international law in the interpretation of WTO treaty terms and have applied such non-WTO norms directly, that is, independently of the process of treaty interpretation. We examine these two situations in turn.

A. International Law Referred to in the Process of "Interpreting" WTO Terms

As pointed out earlier, DSU Article 3.2 explicitly confirms that WTO-covered agreements must be interpreted in the light of "any relevant rules of international law applicable in the relations between the parties".[24] Hence, for purposes of giving meaning to the terms in WTO provisions, an important bridge exists between WTO law and other rules of international law "applicable in the relations between the parties". In principle, to give meaning to WTO terms, only non-WTO norms that reflect the "common intentions" of all WTO Members can be considered. As the Appellate Body put it in *EC—Computer Equipment*:

> The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty.[25]

[22] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Provisional Measures*, 1992 ICJ REP. 114, ¶ 42 (April 14). There is, of course, a difference between DSU Article 7 (making explicit reference to WTO-covered agreements only) and Article 38 of the ICJ Statute which explicitly refers to four sources of international law that the ICJ may apply. Nonetheless, practice has shown that these four sources explicitly mentioned in Article 38 do not exhaust the potentially applicable law before the ICJ. They do not include, for example, unilateral acts of states and acts of international organizations. Hence, DSU Article 7 and Article 38 of the ICJ Statute are not that different: neither of them sets out an exhaustive list of potentially applicable law.

[23] Such as the intellectual property conventions referred to in the TRIPS Agreement, certain international standards in the SPS and TBT Agreements or OECD interest-rate conventions in the SCM Agreement.

[24] Article 31.3(c) VCLT.

[25] Report of the Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment,* WT/DS62/AB/R, ¶ 84 (1998) ("*EC—Computer Equipment*").

Hence, for non-WTO rules to be referred to pursuant to Article 31.3(c) VCLT, they must normally reflect the "common intentions" of all WTO Members.[26] For present purposes, it suffices to say that because of Article 31.3(c) of the VCLT, WTO-covered agreements cannot be read exclusively within the "four corners" of the WTO, but must be construed in the light of certain other, non-WTO rules of international law.

This is also what panels and the Appellate Body have done. In the interpretation of WTO terms, they have referred, for example, to the principle of good faith[27] and "the fundamental rule of due process".[28] The Appellate Body explicitly confirmed that the principle of good faith "informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements".[29] In another report, it referred to "the 'pervasive' general principle of *good faith* that underlies all treaties".[30] Nowhere in the WTO Agreement is the principle of good faith mentioned. Still, it has been consistently relied upon in WTO dispute settlement. In other instances, the Appellate Body has referred to other non-WTO treaties to interpret WTO terms. In U.S.—*Shrimp/Turtle*, it interpreted the WTO term "exhaustible natural resources" in GATT Article XX(g) with reference to, *inter alia*, the UN Law of the Sea Convention, the Convention on Biological Diversity and the Convention on International Trade in Endangered Species ("CITES").[31] Once again, if WTO dispute settlement were restricted to WTO-covered agreements, this reference to non-WTO treaties would not have been possible.

B. International Law Referred to Outside the Process of Treaty Interpretation

That WTO panels can refer to non-WTO rules of international law in the process of interpreting WTO treaty terms is now commonly accepted (although it was largely unheard of in the old GATT days). The process of direct application of non-WTO rules in the examination of a WTO complaint, independent of the interpretation of specific WTO terms, remains a vastly more controversial topic.[32] As pointed out earlier in the sub-section on implied or incidental jurisdiction, WTO claims cannot be enforced in a legal vacuum. In order to fulfill their judicial function, WTO panels must rely on certain general international law rules such as those on the judicial settlement of disputes and state responsibility. This is not a matter of choice, but one of necessity. How else would they discharge their mandate? Or should the absence in the WTO treaty of, for

[26] For an elaboration and an assessment of the question of whether this means that all WTO Members must be legally bound by a non-WTO rule before that rule can be referred to in the interpretation of a WTO treaty term, *see* Joost Pauwelyn, *How Far Can We Go?*, *supra* note 8.

[27] Report of the Appellate Body, *United States—Import Prohibition of Shrimp and Certain Shrimp Products,* WT/DS58/AB/R (1998)("*U.S.—Shrimp/Turtle")*, ¶ 158. In ¶ 166, n.157, of this report, the first and so far the only explicit reference to Article 31(3)(c) is made. *See also,* Report of the Appellate Body, *United States—Tax Treatment for "Foreign Sales Corporations",* WT/DS108/AB/R (2000), ¶ 166 (*referring* to the principle of good faith as "at once a general principle of law and a principle of general international law").

[28] *EC—Computer Equipment*, *supra,* note 25, ¶ 70 (in interpreting DSU Article 6.2).*See also* Report of the Appellate Body , *European Communities—Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R (1998) ("*EC—Hormones*"), ¶ 133 & n.138 (referring to "fundamental fairness", "due process" and "natural justice" in the context of DSU Article 11).

[29] Report of the Appellate Body, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (2001), ¶ 101.

[30] Report of the Appellate Body, *United States—Transitional Safeguard Measures on Combed Cotton Yarn From Pakistan*, WT/DS192/AB/R (2001), ¶ 81.

[31] *U.S.—Shrimp/Turtle*, *supra* note 27, ¶¶ 128–32.

[32] By "interpretation" I mean here the process of giving meaning to a particular term or word set out in a treaty.

example, explicit rules on burden of proof mean that in WTO dispute settlement the question of burden of proof does not apply? If so, how could WTO panels, when faced with contradictory evidence, decide a case?

Although these rules of international law are not referred to in the WTO Agreement, they remain relevant for WTO panels. Moreover, when referring to those rules, WTO panels are not doing so in the process of interpreting WTO treaty terms. It would strain the notion of treaty interpretation to say that when panels apply general international law norms on, for example, burden of proof, standing or representation before panels (be it as private counsel or *amicus curiae*), they are "interpreting" specific WTO terms.[33] The fact of the matter is that the WTO Agreement does not have an explicit provision on burden of proof, standing or representation before panels. There is, therefore, no WTO provision on those matters to be "interpreted" in light of general international law norms. Rather, given the silence of the WTO Agreement on the issue, general international law norms must be presumed to continue to apply to the issue as it arises before a WTO panel.[34] Hence, we are faced here with general international law "filling gaps" left open by the WTO Agreement; not with general international law that is used as a reference to interpret, that is, to give meaning to, specific WTO terms. Here again, if WTO dispute settlement were to operate only under WTO law, no such "gap filling" could occur.

The question remains, however, what type of international law rules can thus be applied by WTO panels? And whether panels can only apply such rules in case the WTO Agreement is silent on the matter, i.e., to "fill gaps" in the WTO treaty, or whether such non-WTO rules may also overrule a WTO provision? The first question is addressed in the following sub-section, distinguishing, once again, between general international law and other, non-WTO treaties. In Part V below, we examine the second question.

1. General International Law

For WTO panels and the Appellate Body, as international adjudicators, to apply general international law in the examination of WTO claims to issues on which the WTO Agreement itself remains silent (say, rules on burden of proof) should not come as a surprise, nor be very controversial. As noted earlier, the distinguishing feature of general international law is that it is binding on all states, hence, all WTO Members. Thus, to apply it in WTO dispute settlement in the examination of WTO claims—to the extent that the WTO Agreement has not "contracted out" of it and as long as it does not constitute a distinct substantive claim (for which WTO panels do not have

[33] *See supra* note 32.

[34] When first examining the question of burden of proof, the Appellate Body clearly was not interpreting a particular WTO provision, but applying general international law rules (more particularly, "general principles of law" it would seem) on burden of proof to the WTO treaty. It stated:

> In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption. (*U.S.—Wool Shirts and Blouses, Supra* note 19, at p. 14.)

jurisdiction)—would only amount to applying law that is already legally binding on all WTO Members.

What is more, applying general international law rules in WTO dispute settlement may well be inevitable. Without those general rules—composed largely of (1) rules on the law of treaties, such as the principle of non-retroactivity of treaties and the good faith implementation of treaties; (2) state responsibility, such as standing and the principle of proportionality of countermeasures; and (3) the judicial settlement of disputes, such as burden of proof and due process—it would be practically impossible to enforce WTO rights and obligations. What would be the basis of the legally binding nature of the WTO treaty, how would the judicial function be circumscribed and how would claims of breach be entertained, if not against the backdrop of such general rules on the law of treaties, state responsibility and the judicial settlement of disputes? Finally, given that such general rules cannot themselves constitute the legal basis for a distinct claim (what case could be brought purely with reference, for example, to rules on burden of proof?), there is no risk that application of those rules would be made independent of WTO provisions. As a result, the general rules thus applied by WTO panels have sometimes been referred to as mere "adjuvants" or subsidiary tools required for the creation and enforcement of WTO rights and obligations.[35] The theory is that these general rules—call them "adjuvants" or "secondary" rules—can only be applied to the extent that they relate to the "life-cycle"—that is, creation, application, interpretation and enforcement—of WTO provisions themselves. Hence, the question of panels exceeding their jurisdiction does not really arise since a link with WTO provisions themselves—the "primary" rules—can always be found.

However, once it is accepted that such general rules or "adjuvants" can be applied in WTO dispute settlement (and a consensus is building in that direction), this practice should apply with respect to all such "adjuvants", e.g., all general international law rules on state responsibility and the law of treaties, not "contracted out" from in the WTO Agreement. For example, do Articles 21 and 22 of the DSU "contract out" of the general international law rule that reparation must be made for breach (including reparation for past damage)? There may be room for doubt. If so, to the extent that no such "contracting out" occurred, the general rule on reparations should also apply in the WTO. The same applies with respect to the general rule that treaty norms are subject to change by subsequent treaties, a rule set out in Articles 30 and 41 of the VCLT.[36] If, but only if, and to the extent that it were found that these rules of general international law were left intact by the WTO Agreement, they should continue to apply to the WTO Agreement.

2. Other, Non-WTO Treaties

Once it is accepted that certain general rules or "adjuvants" can be applied in WTO dispute settlement, a major problem arises as to where to draw the line between non-WTO rules that can, and those that cannot be applied by WTO panels. Should the line be drawn based on the distinction between general international law and other international law not binding on all states? Perhaps, but general international law is not only composed of

[35] The term "adjuvants" was coined by Pieter-Jan Kuijper, former Director of the Legal Affairs Division of the WTO Secretariat.

[36] Article 30 provides essentially that in the event of conflict a later treaty prevails over an earlier treaty. Article 41 sets out the conditions under which a limited number of state parties to a treaty may modify that treaty as between themselves only, the main condition being that in doing so they may not violate the rights of third parties.

the "adjuvants" or "secondary" rules we have referred to above; it also includes "primary" rules of law, directly imposing rights and obligations on all states, such as customary law and general principles of law on the use of force, genocide and human rights. Hence, to say that WTO panels may apply all rules of general international law in their examination of WTO claims would definitely go a step further than what has been done in case law to date.

What then if one were to draw the line between non-WTO rules that can and cannot be applied by WTO panels based on the concept of "adjuvants"? WTO panels would then only be mandated to apply non-WTO rules that regulate the "life-cycle" of WTO provisions themselves, from their creation to their enforcement (in particular rules on the law of treaties and state responsibility, e.g., rules on the conclusion, validity, interpretation and application of treaties, and rules on how to enforce international legal obligations). Two problems arise under this approach. First, it may not always be easy to distinguish "adjuvants" or "secondary" rules, from "primary" rules (for example would the precautionary principle, assuming it were a rule of general international law, be a primary or a secondary rule?). Second, and more importantly, the application of "adjuvants" to the WTO Agreement may, in turn, activate certain other rules which are *not* "adjuvants". This is particularly so in respect of rules on the law of treaties. For example, VCLT rules on the validity of treaties refer to "primary" rules of *jus cogens*. Article 53 of the VCLT states that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". Hence, if a WTO provision were in conflict with *jus cogens*, the application of a mere "adjuvant" to the WTO Agreement (*in casu*, Article 53 of the VCLT) would, in turn, necessitate the application of non-WTO rules of international law that are *not* "adjuvants" (say, the prohibition on slave trading). Consequently, by opening the door to "adjuvants", one necessarily also allows in primary or more substantive rules of international law such as, in our hypothetical, the prohibition on slave trading or genocide. As a result, the distinction between "adjuvants" and other rules of international law—according to which the former could be applied by WTO panels, the latter not—loses its practical sense. Articles 30 and 41 of the VCLT are other examples which demonstrate that permitting the application of "adjuvants" in WTO dispute settlement will necessarily lead to applying other rules of international law.

Articles 30 and 41 relate to how a treaty can be changed. Article 30 provides that to the extent of conflict, a later treaty prevails over an earlier one. Article 41 essentially permits modifications to multilateral treaties as long as this is not explicitly prohibited in the treaty itself and does not affect third party rights. Applying these VCLT provisions, which are undoubtedly "adjuvants" regulating the "life-cycle" of WTO norms, to WTO treaty norms means that these WTO norms can be changed by later treaties, albeit only as between the parties to such later treaties. To define such change, WTO panels cannot limit themselves to the "adjuvant" set out in Articles 31 and 41. They will have to take account also of the non-WTO rules to which Articles 30 and 41 will direct them, for example, a post-1994 MEA that allegedly altered a WTO treaty provision (say, GATT Article XI in combination with GATT Article XX), albeit only as between the parties to the MEA. As a result, applying mere "adjuvants" to the WTO Agreement will often mean that WTO claims cannot be examined in isolation from subsequent treaties.

Thus applying other, non-WTO treaties, to which not all WTO Members are a party, would go another step further, beyond what has happened in case law and beyond the application only of rules of general international law that can be termed "adjuvants". Here as well, no case law is available either in support or against applying non-WTO

treaties, although one WTO panel did imply that IMF rules could potentially change WTO rules and in so doing referred also to rules set out in the Final Act that are not part of the WTO-covered agreements (in this case the Declaration on the Relationship of the WTO with the IMF).[37]

The difficulty of drawing a line between rules of international law that panels can and cannot apply indicates that perhaps no such line is needed. This is the position suggested here: all rules of international law may be relevant in coming to a decision on the validity of a WTO claim. The only limitations are the facts of the case, the parties involved and the defenses they decide to make. Within that framework, however, if a defending WTO Member can point to another non-WTO treaty to which the complainant is a party, this other treaty must be considered by a WTO panel as a potential defense. As long as both disputing parties are bound by such a non-WTO treaty, say, a subsequent MEA that grants an explicit right to restrict trade as between the parties to the MEA, a panel must, in my view, regard this MEA as part of the applicable law.

A recent case that surely goes in the direction of WTO panels having to take account of other, non-WTO treaties, even if they are not binding on all WTO Members, is the Article 21.5 *Shrimp/Turtle* dispute. There, the Appellate Body found that:

> to avoid "arbitrary or unjustifiable discrimination" [under the *chapeau* of GATT Article XX], the United States had to provide all exporting countries "similar opportunities to negotiate" an international agreement. Given . . . the decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles . . . , the United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other.[38]

In other words, to conform to WTO rules, the United States had to negotiate or, even better, conclude treaties with other WTO Members on protecting sea turtles. Hence, it can be safely assumed that if a bilateral agreement between, say, the United States and Malaysia, were concluded, such an agreement would absolve the inconsistency that was found earlier in favor of Malaysia under the *chapeau* of GATT Article XX. If that is so, how could one possibly argue that WTO panels cannot take account of other, non-WTO treaties even if they are concluded only as between the disputing parties? If Malaysia were to sue the United States, subsequent to the conclusion of its bilateral agreement with the United States, would the United States then not be allowed to invoke that bilateral agreement as a defense?[39] In my view, the United States should be permitted to do so (even if the agreement allows the United States to impose import restrictions not justified under GATT Article XX) and any Malaysian argument that the bilateral agreement is not part of the applicable law before a WTO panel should be rejected. To say that in such a

[37] Report of the Appellate Body, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items,* WTO Doc. WT/DS56/AB/R, ¶¶ 65–74 (1998).

[38] Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 DSU by Malaysia*, WT/DS58/AB/RW (2001)("*United States—Article 21.5 Shrimp-Turtle*"), ¶ 122.

[39] In the Article 21.5 *Shrimp/Turtle* dispute, *supra* note 38, the Appellate Body explicitly referred to a non-WTO treaty (the Inter-American Convention for the Protection and Conservation of Sea Turtles), albeit only as "a factual reference" (*Id.* ¶ 130), as "evidence that an alternative course of action based on cooperation and consensus was reasonably open to the United States" (*Id*. ¶ 128). There, it could not possibly have relied on this Convention as a U.S. defense since Malaysia, the complainant, was not bound by this Convention.

case it would be the WTO panel that somehow changed WTO provisions as they apply between the United States and Malaysia would be disingenuous. Obviously, it was the United States and Malaysia themselves who made this change by concluding the bilateral agreement.

Crucially, even though WTO panels should, therefore, "apply" certain non-WTO treaties (in particular as law in defense against claims of WTO violations), this does not mean that these treaties can form the legal basis of claims of violation. As pointed out, the jurisdiction of WTO panels is limited to claims under WTO-covered agreements. In our example, the United States could, therefore, invoke its bilateral turtle protection agreement with Malaysia in defense of a subsequent WTO claim brought by Malaysia. The United States could, however, not possibly bring a complaint for violation of this bilateral turtle protection agreement to a WTO panel.

In sum, it is suggested here that WTO panels may take account, not only of the provisions in WTO-covered agreements, but also of other rules of international law (1) in the process of treaty interpretation; or (2) in their further examination of the validity of WTO claims as between the disputing parties including, without doubt, certain rules of general international law, also referred to as "adjuvants", as well as, we suggest, all other rules of international law binding as between the disputing parties, including other non-WTO treaties.

3. A Second Word of Caution

At the end of Part II, I warned that the interaction between WTO law and other international law in the abstract is one thing, the way this interaction plays out in WTO dispute settlement, quite another. In this part, it is concluded that WTO panels may apply non-WTO law in the examination of WTO claims in a variety of ways. The effect of that non-WTO law and its impact on the validity of the WTO claims examined by the panel is another matter.

VI. The Outcome of the WTO/Public International Law Interaction Before a WTO Panel: Complement or Conflict?

As noted earlier, to apply non-WTO rules of general international law in respect of issues on which the WTO Agreement remains silent (say, rules on burden of proof or representation before panels) should not be particularly controversial. In that event, the non-WTO rule simply complements relevant WTO provisions. More generally, it can indeed be safely said that most non-WTO rules of international law add to, confirm or complement the WTO Agreement. Both WTO and non-WTO norms are made by the same state actors. Hence, it can be assumed that in most instances these actors will not want to contradict what they have agreed upon earlier, although they can, of course, do so when they decide to "change their mind". Some non-WTO rules are completely unrelated to the WTO Agreement, either in terms of subject matter or in terms of parties bound by them. Others may deal with the same subject matter, but may simply complement, rather than contradict WTO rules (say, regional trade agreements in conformity with GATT Article XXIV).

But what happens when a WTO panel, in its examination of a WTO claim, is directed to another, non-WTO rule that contradicts the WTO treaty? Two situations must be distinguished: WTO norms "contracting out" of general international law and non-WTO treaties contradicting WTO norms.

A. WTO Law "Contracting Out" of General International Law

There are cases where the WTO Agreement "contracts out" of general international law (for example, Article X of the Marrakesh Agreement on amendments, which "contracts out" of VCLT rules on treaty amendments; or DSU provisions "contracting out" of general international law rules on the judicial settlement of disputes or state responsibility).[40] Here, there can be no doubt that the WTO provision prevails and is the one to be applied by a WTO panel. This is so because the WTO provision is both the latest and the most specific expression of state intent, as compared to the rule of general international law. That treaty provisions can thus "contract out" of general international law is confirmed also in the VCLT[41] and the Draft Articles on State Responsibility of the International Law Commission.[42]

In this type of conflict, the general international law rule would only prevail in case it is either (1) part of *jus cogens* (making the WTO provision invalid pursuant to VCLT Article 53, quoted above), or (2) established subsequent to the WTO Agreement and the WTO Agreement does not continue to apply as the most specific law.

B. Non-WTO Treaties Contradicting the WTO Agreement

There may also be instances where the relevant non-WTO rule is a rule of particular international law (say, a treaty norm), which is in conflict with a provision in the WTO Agreement. In that case (and to the extent, of course, that the non-WTO rule is relevant and can be referred to in the examination of a particular WTO claim), should a WTO panel automatically give preference to the WTO provision, over and above the non-WTO treaty rule? Not so, in my view, for the following reasons.

First of all, there is no inherent hierarchy between WTO and non-WTO rules. With the exception of *jus cogens* and obligations under the UN Charter,[43] no rule of international law is inherently "more important" than another. Since all international law, in one way or another, derives from the same source, that is, state consent, it is alien to a hierarchy of sources.[44] Hence, in terms of the hierarchy of norms, it does not matter whether, for example, the United States binds itself in the WTO, the UN or at the IMF. The rules created in all three fora are equally binding and of the same legal value (that is, of course, only for those states that agree to be bound by them).

[40] For example, DSU Article 22 which explicitly provides that countermeasures can only be taken after DSB authorization. In contrast, in general international law, countermeasures do not need multilateral approval.

[41] Article 5 VCLT states that the Convention is "without prejudice to any relevant rules" of international organizations.

[42] Article 55 of the Draft Articles adopted in August 2001 (ILC, 53rd Session, report posted at http://www.un.org/law/ilc/reports/2001/english/chp4.pdf) provides: "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".

[43] Article 103 of the UN Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligation under any other international agreement, their obligations under the present Charter shall prevail". The *lex posterior* rule in Article 30 of the VCLT is explicitly deactivated to give effect to Article 103 even as it applies to future treaties.

[44] *See, e.g.,* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (1998); NGUYEN QUOC DINH, PATRICK DAILLIER, & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 114 (1999) (*stating* "pour les sources, il n'existe pas de hiérarchie en droit international" (emphasis omitted)); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES, ¶ 85 (2d rev. ed. 1997) (noting that "an *a priori* hierarchy of sources is an alien concept" to the structure of the international legal order); Michael Akehurst, *The Hierarchy of the Sources of International Law*, 1974–75 BRIT. Y.B. INT'L L. 273, 274.

Second, although there is no inherent hierarchy between WTO and non-WTO rules, WTO Members, when enacting WTO rules, may have given preference to WTO rules in case they conflict with other rules. WTO Members could have done so, for example, in a general "conflict clause" such as Article 103 of the UN Charter.[45] Have WTO Members expressed such a general preference? With the potential exception of DSU Arts. 3.2 and 19.2 (discussed below), they have not done so.

The WTO Agreement does not explicitly state that it prevails in general over preexisting law, or that it does not derogate from preexisting law.[46] It simply contains a number of specific conflict clauses, e.g., with respect to UN Charter obligations for the maintenance of international peace and security,[47] the WIPO conventions incorporated into the TRIPS Agreement,[48] certain dispute settlement provisions,[49] and regional trade arrangements.[50] As for IMF rules, the Declaration on the Relationship of the WTO with the IMF provides, in essence, that GATT 1994 rules prevail over IMF rules unless otherwise provided for in the GATT itself. The Declaration on Trade and Environment covers preexisting environmental conventions. However, rather than setting out conflict rules, this declaration establishes the WTO Committee on Trade and Environment, one of whose major tasks is to examine the relationship between the WTO treaty and multilateral environmental agreements. So far, this mandate has not resulted in any clear conflict rules.[51] In paragraph 31(1) of the Doha Declaration of November 2001, WTO Members agreed to negotiations on "the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements".

WTO Members could also express preference for WTO rules when enacting the non-WTO rule in question. This was done, for example, in Article 4 of the European Energy Charter Treaty.[52] In contrast, other conflict clauses in non-WTO treaties (such as Article 103 of the UN Charter) may give preference to non-WTO rules.

In sum, no general conflict clause in favor of WTO rules can be found. The WTO Agreement contains only scattered and specific conflict clauses. When both the WTO Agreement and the non-WTO treaty are silent or inconclusive with respect to a particular conflict, general international law rules on the inter-play between norms, such as Articles 30 and 41 of the VCLT or the *lex specialis* principle, must be used to resolve the conflict.

Hence, a conflict will sometimes be resolved in favor of WTO rules (e.g., where the WTO rule is the later in time), while at other times WTO rules may have to give way

[45] *See supra* note 43.

[46] Note, in contrast, the very elaborate Article 311 of the UNLOS Convention, *Relation to Other Conventions and International Agreements*, which regulates both the relationship of the Convention to pre-existing treaties and subsequent treaties.

[47] GATT Article XXI(c), a limited mirror image of Article 103 of the UN Charter.

[48] Article 2.2 of the TRIPS Agreement provides that "[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Bern Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits".

[49] *See* Article 11.3 of the SPS Agreement.

[50] GATT Article XXIV and GATS Article V.

[51] The Committee, however, did endorse multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature, and said it preferred that trade disputes arising in connection with a multilateral environmental agreement be resolved through the mechanisms established by that agreement. WTO Doc. WT/CTE/1, ¶ 171 (1996).

[52] *European Energy Charter Treaty*, *opened for signature* Feb. 1, 1995, 34 ILM 360 (1995), as subsequently amended.

to the non-WTO rule in question (e.g., when the non-WTO rule, say an MEA, is more specific to the issue at hand and/or later in time). Crucially, if WTO rules must give way to non-WTO rules before a WTO panel, this can result only in the dismissal of the particular WTO claim. The non-WTO rule, for example, an MEA binding on the disputing parties, may excuse an otherwise WTO inconsistent measure (the MEA may, for example, lead to the dismissal of a claim of violation of GATT Article XI and this even if the conditions of GATT Article XX would not be met). However, WTO panels would not have jurisdiction to examine claims of violation under that treaty (a WTO panel would not have jurisdiction to enforce, for example, emission standards agreed upon in the MEA).

C. The Definition of "Conflict" and General International Law Rules on the Inter-Play of Norms

I do not intend to elaborate on either (1) the definition of a conflict, that is, when (and to what extent) does a WTO rule "contract out" of general international law or when is a WTO provision in conflict with a non-WTO treaty; or (2) the general international law rules on inter-play of norms. Both discussions are, however, crucial in any determination by a panel on the inter-play between WTO and other international law.[53]

In terms of defining "conflict", serious thought should be given to considering as a conflict the situation where one treaty grants an explicit right to do something that is prohibited by another treaty (for example an environmental convention granting the explicit right to impose a trade restriction on specific products that would otherwise be prohibited by GATT Article III and not be justified by GATT Article XX).[54]

In terms of general international law rules on the inter-play of norms, it may be useful to distinguish between (1) what one could call an "inherent normative conflict" where one of the two norms is, in and of itself, invalidated or terminated by the other norm or where one norm is illegal under the other norm (e.g., pursuant to VCLT Articles 41, 53, 59 or 64; this would be the case, for example, if a treaty norm conflicts with *jus cogens* as a result of which the treaty norm would simply disappear); and (2) a conflict in the applicable law, where both norms remain untouched and continue to apply but where one norm, in the particular circumstances of the case, is to be applied over and above the other norm (pursuant to explicit conflict clauses, Article 30 of the VCLT, or the *lex specialis* principle). Particularly in the latter situation, the definition of a "conflict" should be broad so as to include an explicit right contradicting an obligation (say, an explicit right to *restrict* trade under an MEA or a human rights convention as against a WTO obligation *not* to restrict trade in the same circumstances); not only mutually exclusive obligations.

The next section discusses in more detail the debate as to whether DSU Articles 3.2 and 19.2 constitute a general conflict clause in favor of WTO rules.

[53] For a discussion, *see* Joost Pauwelyn, *supra* note 8 and the same author's book CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW, HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003).

[54] In support: Panel Report on *EC—Bananas*, *supra* note 20, ¶ 7.159 (including within the definition of conflict "the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits"). *Contra*: Report of the Appellate Body, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, ¶ 65 (1998), defining conflict very narrowly as "a situation where adherence to the one provision will lead to a violation of the other provision", thereby seemingly recognizing as a "conflict" only a situation where "mutually exclusive obligations" arise.

D. Does the Obligation on Panels Not to "add to or diminish the rights and obligations provided in the covered agreements" Constitute a General Conflict Clause in Favor of WTO Rules?

It has been submitted that DSU Article 3.2, as confirmed in DSU Article 19.2, is a general conflict clause addressing the relationship between WTO law and other norms of international law.[55] The last sentence of Article 3.2 provides:

> Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[56]

Should this provision be interpreted to mean that WTO panels cannot ever add to or diminish any of the rights and obligations explicitly set out in WTO-covered agreements, that is, that no other law, be it pre- or post-1994, can ever influence WTO-covered agreements? Should it, moreover, be interpreted to mean that, in the event of conflict between WTO-covered agreements and another rule of international law, the WTO rule must always prevail?

In my view, the answer must be no. If the answer to the first question were yes (that is, no source of law, other than WTO-covered agreements, can influence a panel), the entire preceding discussion, as well as a long series of Appellate Body reports where general international law *was* referred to, would be legally incorrect. There would even be no scope for WTO panels to apply general international law to "fill gaps" left open by the WTO Agreement (say, in respect of burden of proof, good faith or due process) nor, arguably, for panels to refer to previous Appellate Body case law (a source of law *not* explicitly referred to in the DSU).[57] Doing either of these would then unjustifiably "add to" the WTO-covered agreements.

The second question (is DSU Article 3.2 an automatic conflict clause in favor of WTO rules?) must also be answered in the negative. DSU Articles 3.2 and 19.2 do not address the jurisdiction of panels nor the applicable law before them. Nor do they proclaim that WTO-covered agreements must necessarily and always prevail over all past and future law. They deal rather with the inherent limits of a WTO panel as a judicial organ in interpreting WTO-covered agreements. In the exercise of this judicial function of interpretation, WTO panels may clarify and interpret what WTO-covered agreements mean, but they may not "add to or diminish the rights and obligations provided in the covered agreements". The immediate context of this passage in Article 3.2 confirms this reading. The sentence directly follows the instruction for panels to clarify WTO-covered agreements "in accordance with customary rules of interpretation of public international law". This is also an indication that the last sentence of Article 3.2 deals with the interpretative function of panels, not with the applicable law before a panel, nor with a conflict of norms.

[55] *See* Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings,* 35 JOURNAL OF WORLD TRADE 499 (2001).

[56] Article 19.2 provides that in their findings and recommendations, "the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".

[57] In contrast to, for example, Article 38, ¶ 1(d) of the ICJ Statute which explicitly refers to "judicial decisions . . . as subsidiary means for the determination of rules of law". Panels, nonetheless, refer constantly to previous Appellate Body holdings. In a recent case, the Appellate Body even obliged panels to take account of its earlier findings. Appellate Body report on *United States—Article 21.5 Shrimp Turtle*, *supra,* note 38, ¶ 107 ("The Panel had, *necessarily,* to consider our views on this subject, as we . . . had provided interpretative guidance for future panels", emphasis supplied).

To put it differently, the way I read Articles 3.2 and 19.2 is that as judicial organs WTO panels may not create new rights and obligations, they must apply those agreed upon by WTO Members. This limitation on the interpretative function of WTO panels was made *ex abundante cautela*.[58] Even without this limitation, this rule would have applied to WTO panels. As the ICJ noted in the *Interpretation of Peace Treaties* Advisory Opinion: "to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty".[59] The Appellate Body, in turn, confirmed that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"[60] (pursuant to the principle of effectiveness). At the other end of the spectrum, the Appellate Body also stated that the "principles of interpretation [in the Vienna Convention] neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[61]

Hence, within the process of treaty interpretation, non-WTO rules cannot add meaning to WTO rules that goes either beyond or against the "clear meaning of the terms" of WTO-covered agreements. Therefore, in the process of interpretation, WTO rules "prevail" over other rules. This is, in my view, what Articles 3.2 and 19.2 confirm: a most obvious limitation on the process of treaty interpretation, nothing more.

However, when international law is applied outside the process of treaty interpretation, as explained above, this restriction (confirmed in DSU Articles 3.2 and 19.2) does not apply. There is a major difference between stating what the judiciary can do with the law when interpreting the law (as done in DSU Articles 3.2 and 19.2) and stating what the legislature (i.e., WTO Members) have done, or can do, with the law. DSU Article 3.2 directs that the WTO judiciary, like any other judiciary, cannot "change" the WTO treaty when asked to apply that treaty. A conflict clause, in contrast, would (1) tell us that WTO Members, when negotiating the treaty, did not want any other existing rules of international law to prevail over the WTO Agreement, as well as (2) direct WTO Members that in their future dealings they cannot change or overrule the rights and obligations set out in the WTO Agreement (except pursuant to the amendment and other relevant provisions in the WTO treaty itself).

To read DSU Articles 3.2 and 19.2 as being such a conflict clause, thus imposing serious restrictions on the law WTO Members can create in the future, would severely restrict the sovereign will of WTO Members. The alternative reading suggested here—Articles 3.2 and 19.2 are about treaty *interpretation*, nothing more—would avoid this restriction. The reading proposed here also corresponds to political reality: if the WTO treaty would, in any event, always prevail over other treaties why do certain WTO Members go to such lengths to negotiate clauses in post-1994 treaties—in particular the Cartagena Biosafety Protocol, but also in the run up to the final statement made at the Johannesburg Summit on Sustainable Development—which would posit that these new treaties will not affect the WTO treaty?[62] If Articles 3.2 and 19.2 of the DSU were conflict clauses that always

[58] *See supra* note 7.

[59] ICJ Reports 1950, 229.

[60] *U.S.—Gasoline, supra* note 3, at 23, *confirmed in,* inter alia, Report of the Appellate Body, *Japan—Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996) at 12.

[61] Report of the Appellate Body, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* , WT/DS50/AB/R (1998), ¶ 46.

[62] After long discussions, the preamble to the Cartagena Biosafety Protocol now provides: "this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements". Nonetheless, it is followed by an "[u]nderstanding that the above recital is not

favor WTO rules, why would WTO Members bother? Moreover, if non-WTO rules could never prevail over the WTO treaty, why would WTO negotiators themselves have decided in Doha to negotiate on "the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements"? If WTO panels were not permitted to apply non-WTO treaties what would there be to negotiate? Moreover, if WTO rules, that is DSU Articles 3.2 and 19.2, already resulted in the WTO treaty always prevailing, why would this inter-relationship issue be raised as a "new" topic for negotiation?

If, as advocated here, WTO panels were to apply non-WTO rules, binding as between the parties, in their examination of the validity of a WTO claim, all they would do is to give effect to the law made and agreed upon by the disputing parties themselves. Panels would not be "adding to" or "diminishing" the covered agreements. All panels would be doing is giving effect to what the WTO Members themselves had done before them (and they would do so without exceeding their substantive jurisdiction, limited to WTO claims).

Moreover, when it comes to future, post-1994 treaties in conflict with the WTO Agreement, reading DSU Articles 3.2 and 19.2 as a conflict clause would have little effect. Article 30 of the VCLT sanctions only one conflict clause claiming priority over future treaties, namely Article 103 of the UN Charter.[63] For all other conflict clauses of the same type, the *lex posterior* principle continues to applies. The contractual freedom of WTO Members thus allows them to deviate from the WTO Agreement, including the alleged conflict clause. WTO Members could do so collectively, or as between a limited number of WTO Members as long as the conditions in Articles 41 and 58 of the VCLT are fulfilled, that is, in particular, as long as the modification is not explicitly prohibited by the WTO treaty itself (say, a regional arrangement not meeting the conditions of GATT Article XXIV) and as long as WTO Members by agreeing on modifications to the WTO treaty do not affect the rights of other WTO Members not a party to the modification. Hence, even if DSU Articles 3.2 and 19.2 were to constitute a conflict clause giving automatic preference to WTO rules over other rules—which, according to the view proposed here, is not the case—this purported conflict clause would have little or no effect with respect to post-1994 treaty norms as between WTO Members bound by these norms.

VII. Conclusions

This chapter addresses the relationship between public international law and WTO law. It offers the following conclusions. First, WTO law is public international law. Second,

intended to subordinate this Protocol to other international agreements". Although countries such as the United States and Australia strongly pushed for a statement to the effect that the JohannesburgDeclaration on Sustainable Development would be subject to existing WTO rules, the final declaration does not include such a statement due to a last minute intervention by a number of small developing countries (*see* http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.htm; based on an interview with Matthew Stilwell who attended the summit on behalf of the Center for International Environmental Law).

[63] Article 30, ¶ 1 states: "Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs". Article 30 then goes on to provide for the "treaty later in time prevails" rule. This rule is only deactivated in Article 30, paragraph 1 for Article 103 of the UN Charter and in Article 30, paragraph 2, for treaties explicitly providing that "it is subject to, or that it is not to be considered as incompatible with, an earlier treaty or later treaty". No exception is made for conflict clauses claiming priority over future treaties other than Article 103 of the UN Charter.

both general international law and other, non-WTO treaties, interact with the WTO Agreement in the abstract. Third, the substantive jurisdiction of WTO panels is limited to claims under WTO-covered agreements. However, panels also have certain implied or incidental jurisdictional powers.

Fourth, although the jurisdiction of WTO panels is limited to WTO claims, in the examination of those claims, panels may have to refer to or apply other, non-WTO rules of international law. Based on explicit case law to date, it is by now beyond doubt that panels may do so in the interpretation of terms set out in WTO provisions (although the scope of non-WTO rules that can thus be referred to for interpretative purposes is rather limited). It is, moreover, standard practice for WTO panels and the Appellate Body also to apply certain rules of general international law to matters on which the WTO Agreement itself is silent (such as burden of proof, due process, representation before panels or error in treaty formation). It must be recognized that this application of non-WTO rules occurs outside the rather limited process of "treaty interpretation", that is, the process of giving meaning to words in the WTO treaty. In this context, especially the application of what has been called "adjuvants" or "secondary" rules of general international law binding on all WTO Members and from which the WTO treaty did not "contract out" (e.g., certain rules on the law of treaties, state responsibility and the judicial settlement of disputes), is no longer as controversial as it once was. However, once it is accepted that WTO panels can directly apply certain non-WTO rules of international law—something that is, essentially, the unavoidable consequence of WTO law being just a branch of public international law—it becomes very difficult to draw a line between non-WTO rules that panels can apply, and those that they cannot apply, in order to resolve a WTO claim. If one limits WTO panels only to rules of general international law (that is, rules binding on all WTO Members), it must be realized that such rules also include more substantive rules such as human rights, rules on the use of force and *jus cogens*, all of which are rules that cannot be said to be mere "adjuvants". If one were to limit WTO panels to non-WTO rules that are simply "adjuvants' in the process of defining and enforcing WTO provisions, it could be difficult in practice to decide which rules this includes and, more importantly, certain of these "adjuvants", such as VCLT provisions on how treaties can be changed or declared invalid based on *other* rules of international law, will unavoidably direct WTO panels to non-WTO rules that are of a more substantive nature (such as a subsequent MEA that may have altered pre-existing rights and obligations as between WTO Members party to that MEA).

The solution proposed in this chapter is the following: instead of trying to draw a strict line, all rules of international law should be recognized as potentially relevant law for the resolution of WTO claims. The only limits are the facts of the case, the rules applicable to the disputing parties and the claims and defenses they decide to invoke. Within those boundaries all rules of international law binding as between the disputing parties can be relied on by WTO panels. Obviously, applying non-WTO treaties, in particular as a defense against claims of violation of WTO law, is one thing; WTO panels examining claims of violation under these non-WTO treaties (say, claims of violation of certain emission standards under an MEA), is another. The latter is something for which WTO panels do not have jurisdiction.

Fifth, once it is accepted that WTO law and other rules of international law do interact also as a matter of practice, before WTO panels, it must be acknowledged that this interaction can take two forms. Either the norms in question complement each other or there is a contradiction or conflict between them. In the former case, the non-WTO rule simply "fills gaps" left open by the WTO treaty. In the latter case, that is, in the event

of conflict, the WTO Agreement does not provide a general conflict clause, either in favor or to the detriment of WTO rules. DSU Articles 3.2 and 19.2—prohibiting panels to "add to or diminish" WTO-covered agreements—restrict, under the reading advanced here, the interpretative process of panels. They do not restrict WTO Members from changing WTO provisions as between themselves. Some specific conflict rules are found in the WTO Agreement as well as other non-WTO treaties. However, in the absence of explicit conflict clauses, general international law rules on the inter-play between norms, in particular the *lex posterior* and *lex specialis* principles, must apply. In some cases, this will mean that the WTO rule prevails. In other cases, those general conflict rules may lead to a non-WTO rule overruling certain WTO provisions, only, of course, as between the WTO Members bound by this non-WTO rule (for example, a later MEA overruling GATT Article XI read in combination with GATT Article XX). In practice, this may lead to the dismissal of a WTO claim (e.g., the conclusion that a violation of GATT is justified on the basis of an MEA). Once again, panels do not have jurisdiction to entertain claims under non-WTO rules.

What are the lessons to be drawn from this Chapter by WTO negotiators and treaty-makers in other fora? First, since WTO panels can potentially apply all rules of international law, it does make sense for treaty-makers to specify the relationship between WTO rules and newly negotiated treaties, be it the Cartageno Biosafety Protocol or a new WHO treaty on tobacco. If no such conflict clauses are provided for by the negotiators themselves, the adjudicator, in particular WTO panels and the Appellate Body, will have to apply *general* international law rules on how to solve conflict between norms. Such general rules (e.g., the *lex posterior* and *lex specialis* rules) are not well developed and may not always offer predictable outcomes. This should be a strong incentive for treaty-makers to decide themselves which rules ought to prevail. For the same reason, paragraph 31(1) of the Doha Declaration—where WTO Members agreed to negotiations on "the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements"—is of crucial importance. If negotiators refrain from making a decision in this respect, WTO panels and the Appellate Body will one day be forced to do so. Second, if it were, indeed, accepted that WTO panels can potentially apply all rules of international law, part of the debate on whether the WTO should take on other responsibilities in non-trade related fields, or at least be more sensitive to those other fields, is resolved. Following the approach suggested here, the WTO could just continue regulating international trade while other organizations regulate the environment, human rights or labor issues. WTO panels would also continue to examine only claims under WTO-covered agreements. However, in case any of those other, non-WTO treaties were to offer a defense against a particular WTO claim, WTO panels would have to examine the validity of that defense. The WTO would thereby defer to other organizations when it comes to making non-trade rules while at the same time take full cognizance of those other rules in the enforcement of WTO claims as between WTO Members bound by both sets of rules. In this sense, both the unity of international law and the freedom of each individual state to decide where and what to make international law would be preserved.

CHAPTER 32

THE INTERVENTION OF PRIVATE ENTITIES AND STATES AS "FRIENDS OF THE COURT" IN WTO DISPUTE SETTLEMENT PROCEEDINGS

Brigitte Stern*

TABLE OF CONTENTS

I. Introduction 1429
II. The Position of the WTO's Dispute Settlement Mechanism on *Amicus Curiae* Briefs 1429
A. The Systemic Approach 1429
B. The Evolution of the GATT/WTO Approach to the Admissibility of *Amicus Curiae* Briefs in Panel Proceedings 1430
1. The Origins 1430
2. The *Shrimp-Turtle* Case, a Turning Point 1431
C. *Amicus Curiae* Briefs in Appellate Body Proceedings 1433
1. A Door Left Ajar in the *Shrimp-Turtle* Case 1433
2. A Door Left Firmly Open in the *United States-Carbon Steel* Case 1436
3. A "Trompe l'œil" Door Deliberately Left Open in the *Asbestos* Case 1437
4. Another Door Breached in the *Sardines* Case 1438
D. The Content of *Amicus Curiae* Briefs: Factual and/or Legal Aspects? 1441
III. The Types of Private Party and the Consequences of Admitting *Amicus Curiae* Briefs 1442
A. The Private Parties 1442
1. The *Shrimp-Turtle* Case 1442
2. The *Australia-Salmon* Case 1442
3. The *United States-Carbon Steel* Case 1443
4. The *United States-Copyright* Case 1443
5. The *European Communities-Cotton Linen* Case 1444
6. The *European Communities-Asbestos* Case 1444
7. The *Thailand-Antidumping Duties* Case 1446
8. The *Sardines* Case 1447
B. What is the Position of Governments? 1447

* Professor at the University of Paris 1, Panthéon-Sorbonne and the Graduate Institute of International Studies, Geneva. I would like to thank Gabrielle Marceau of the WTO and Arthur E. Appleton, attorney in Geneva, for having kindly read through and commented on this contribution, as well as for the always very stimulating discussions I have had with them. I also would like to thank Zašova Svetlana for editing work on this chapter.

C. The Problems Raised 1451
1. The Legal Issues 1451
2. The Political Implications 1454
3. The Practical Problems 1456
IV. Concluding Remarks 1457

I. Introduction

In these days, the global legitimacy of the WTO is frequently being called into question by "civil society", and particularly by the NGOs. One of the chief criticisms is that the WTO's decisions, and especially those taken within the dispute settlement context, are arrived at "behind closed doors" and take into account only the trade-offs between State interests, with no consideration for the rights and interests of private individuals. To make up for these shortcomings, the NGOs and various private bodies, including those that represent the multinationals, are demanding, among other things, the right to join the proceedings as "friends of the court" and, in that capacity, to submit *amicus curiae* briefs.

This idea[1] has met with bitter opposition from within the WTO. Before proceeding to examine the nature of the protagonists and the interests at stake in this debate (in Part II of this chapter), I shall first outline the current position of the WTO's adjudicative bodies on this question of the participation of friends of the court—first private entities, but then also States other than the parties or third parties—in dispute settlement proceedings, at both the panel and Appellate Body stages (Part I).

II. The Position of the WTO's Dispute Settlement Mechanism on *Amicus Curiae* Briefs

A. The Systemic Approach

In order properly to appreciate the place that should be reserved for private party submissions, it is necessary to bear in mind the general architecture of the WTO's dispute settlement mechanism, which is essentially an *intergovernmental system*. The Appellate Body has made this very clear:

> It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. . . . Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel.[2]

However, although the system is intergovernmental, it is *not entirely indifferent to the interests of individuals*. As a panel has pointed out:

> Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.

[1] For a general approach to the question of the role of the NGOs and *amicus curiae*, *see* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Proceedings*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 611–619 (1994); Raymond Ranjeva, *Les organisations non-gouvernementales et la mise en œuvre du droit international*, 270 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9–106 (1997); Hervé Ascensio, *L'*amicus curiae *devant les juridictions internationales*, 4 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 897–929 (2001); Philippe Sands, *Le droit international, le praticien et les acteurs non étatiques,* in L'ÉMERGENCE DE LA SOCIÉTÉ CIVILE INTERNATIONALE—VERS LA PRIVATISATION DU DROIT INTERNATIONAL, (Pedone 2003).

[2] Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998),¶ 101 (emphasis in original).

> However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.[3]

Likewise, it should not be forgotten that, as stated by the Appellate Body in *Shrimp-Turtle*,[4] sustainable development is one of the WTO's objectives, and that, in general, this is inseparably bound up with consideration for the interests of the individuals for whose benefit this sustainable development has to be achieved. This close relationship is noted in Chapters 23 and 27 of Agenda 21.[5] Thus, according to Chapter 23, public participation is indispensable:

> One of the fundamental prerequisites for the achievement of sustainable development is *broad public participation in decision-making*. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work.[6]

Similarly, Chapter 27 stresses the partnership role of the NGOs in the pursuit of the objective of sustainable development:

> Society, Governments and international bodies should develop *mechanisms to allow non-governmental organizations to play their partnership role responsibly and effectively* in the process of environmentally sound and sustainable development.
>
> With a view to strengthening the role of non-governmental organizations as social partners, the United Nations system and Governments should initiate a process, in consultation with non-governmental organizations, to review formal *procedures and mechanisms for the involvement of these organizations at all levels* from policy-making and decision-making to implementation.[7]

No one could deny that consideration for the views of civil society has now become an inescapable issue in the area of international economic relations.

B. The Evolution of the GATT/WTO Approach to the Admissibility of **Amicus Curiae** *Briefs in Panel Proceedings*

1. The Origins

This question of *amicus curiae* briefs has evolved over time. During the GATT period, some documents of this type were in fact submitted to the Secretariat, but they were never

[3] Report of the WTO Panel, *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (1999),¶¶ 7.72 and 7.73.

[4] *United States—Shrimp, supra* note 2, ¶ 129.

[5] Agenda 21 is an environmental protection program adopted at the United Nations Conference On Environment And Development ("UNCED"). The Conference was held in Rio de Janeiro, Brazil from June 3 to 14, 1992. The Conference is also called the Earth Summit and the Rio Summit. The Rio Declaration on Environment and Development is Annex 1 to the Report of the United Nations Conference on Environment and Development ("*Rio Declaration*"), A/CONF.151/26 (Vol. I), August 12, 1992. The Rio Declaration is available on the internet at www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

[6] *Rio Declaration, supra* note 5 (emphasis added).

[7] *Id*. (emphasis added).

taken into consideration by panel members, who stuck to the principle that the GATT dispute settlement system was for governments only.

The same solution was adopted when the WTO dispute settlement mechanism began to operate: thus, in the *Gasoline* and *Hormones* cases, in which *amicus curiae* briefs were submitted to the panels, they were disregarded, in accordance with previous practice from the GATT period. However, international society has evolved to such an extent[8] that this policy of abstention is no longer viable.

2. The Shrimp-Turtle *Case, a Turning Point*

The turning point came with the *Shrimp-Turtle* case. Having received *amicus curiae* briefs from environmental NGOs, the panel, on the basis of a literal reading of Article 13,[9] refused to take them into consideration as directly-submitted briefs, while allowing them to be attached to the parties' submissions. It considered that, in accordance with the text of Article 13 of the *DSU*, *amicus curiae* briefs could only be submitted at the panel's own request[10] and declared that "accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied".[11]

The Appellate Body rejected this analysis:

> . . . authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged.[12]

However, inasmuch as the panel had allowed the United States to attach the NGOs' briefs to its own submission, the Appellate Body considered that this was a means that a panel could use to obtain certain information from NGOs. It also pointed out that the panel

[8] With regard to the diversification of the actors in international relations, *see* Brigitte Stern, *Etats et souveraineté: la souveraineté de l'Etat face à la mondialisation*, in UNIVERSITE DE TOUS LES SAVOIRS: QU'EST-CE QUE LA SOCIETE? 828–839 (Odile Jacob ed., 2000).

[9] Article 13 (Right to Seek Information) provides:

> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it seams appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body or authorities of the Member providing the information.
> 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects on the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.

[10] "We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel", Report of the Panel in *United States—Shrimp, WT/DS58/R (1998)*, ¶ 7.8.

[11] *Id.*

[12] Report of the Appellate Body, *United States—Shrimp, supra* note 2, ¶ 108.

had given the other countries two additional weeks to respond, which meant that the way in which the NGOs' submissions were taken into account had not infringed due process.

Thus, the conclusion is clear:

> We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions.[13]

Accordingly, the Appellate Body considered that, for a panel, the right "to seek information from any individual or body which it deems appropriate" includes:

— choosing the source of the information;
— deciding whether or not to request information;
— deciding whether to accept or reject a requested document;
— deciding whether to accept or reject a non-requested document;
— the authority to dispose of a requested document as it thinks fit;
— the authority to dispose of a non-requested document as it thinks fit.

The panel needed such extensive freedom of action in order to function properly. This wide discretion meant that panels would henceforth be free to deal with *amicus curiae* briefs as they thought fit:

> We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.[14]

Thus, panels are required to make a series of decisions:

— to accept or reject;
— if they accept, to make a qualitative appraisal; and moreover
— if they accept, to make a quantitative appraisal, by deciding what weight to ascribe to the information and advice received in the form of *amicus curiae* briefs.

Clearly, it is a less felicitous consequence of this procedure that, to make these successive decisions, panels will have to read the documents submitted. This should be borne in mind later on, when solutions are being proposed.

It would appear, that following this decision, it will be necessary to make a distinction according to whether or not the *amicus curiae* briefs are attached to the Members' documents. It may be assumed that panels have an *obligation* to take attached briefs into account, whereas consideration of others is merely *optional*.

For some, the situation is less straightforward. Thus, the Appellate Body accepted the panel's position on briefs attached to Member submissions in these terms:

[13] *Id.* ¶ 110.
[14] *Id.* ¶ 104 (emphasis in original).

> The Panel was, accordingly, entitled to treat and take into consideration the section of the brief that the United States appended to its second submission to the Panel, just like any other part of the United States pleading.[15]

According to Arthur Appleton,[16] the fact that the Appellate Body used the term "entitled" rather than "obligated" means that even with respect to attached briefs panels retain a degree of discretion as regards the way in which they are to be taken into account. Arthur Appleton's reading finds some support in the Appellate Body's position on *amicus curiae* briefs appended to contracting parties' submissions to the Appellate Body itself, as indicated below, since it began by taking them into consideration only to the extent that they did not contradict the arguments of the parties.

Personally, I read this passage rather differently, viewing it as meaning merely that the decision to authorize the parties to attach an NGO brief lies within the powers of the panel but that, once the briefs had been attached, they have to be taken into consideration in exactly the same way as any other Member submission.

Since this decision, many *amicus curiae* briefs have been submitted to panels: the principle of the freedom of the panel has not again been called into question. And that freedom has been used to accept *amicus curiae* briefs, to reject them while giving reasons for their rejection—late submission or unnecessary duplication—and, finally, to reject them without the least word of explanation.

C. **Amicus Curiae** *Briefs in Appellate Body Proceedings*

The willingness of the Appellate Body to consider *amicus curiae* briefs addressed directly to it has developed more gradually and insidiously.

1. A Door Left Ajar in the Shrimp-Turtle *Case*

The question first arose in *Shrimp-Turtle* when the United States attached to its submission to the Appellate Body three "independent" NGO briefs, to which all the appellees objected. In addition to the arguments already put forward in connection with the submission of such documents to the panel, a further claim was made, namely, that taking them into consideration would be incompatible with the very essence of the appeal procedure: according to Article 17.6 of the DSU, an appeal should be limited "to issues of law covered in the panel report". However, the NGO documents contained a great deal of factual information which, according to the appellees, made them inadmissible on appeal. Moreover, after its brief had been presented as an attachment to the United States submission, one of the organizations had produced a revised version which it had forwarded directly to the Appellate Body.

In a preliminary procedural ruling, the Appellate Body decided to accept for consideration the information provided by the NGOs, without distinguishing between the different ways of submitting the briefs:

> On 11 August 1998, we issued a ruling on this preliminary procedural matter addressed to the participants and third participants, as follows:
>
> > We have decided to accept for consideration, insofar as they may be pertinent, the legal arguments made by the various non-governmental organizations in the three briefs attached as exhibits to the appellant's submission of the United States, as well as the

[15] Report of the Appellate Body, *United States—Shrimp, supra* note 2, ¶ 109.

[16] Arthur E. Appleton, *Shrimp/Turtle: Untangling the Nets*, 2 JOURNAL OF INTERNATIONAL ECONOMIC LAW 477, 485 (1999).

> revised version of the brief by the Center for International Environmental Law et al., which was submitted to us on 3 August 1998. The reasons for our ruling will be given in the Appellate Body Report.[17]

Thus the Appellate Body accepted the direct submission of an *amicus curiae* brief. In the report adopted, the Appellate Body gave only a partial explanation of how this information should be taken into account.

In actual fact, the Appellate Body had questioned the United States about the precise connection between its own submission and those of the NGOs. The United States had replied as follows:

> the three submissions prepared by non-governmental organizations reflect the independent views of those organizations . . . The United States agrees with the legal arguments in the submissions of the non-governmental organizations to the extent those arguments concur with the U.S. arguments set out in our main submission.[18]

On that basis, the Appellate Body accepted NGO briefs to the extent that the Member adopts them, that is to say, where, on the one hand, they form an integral part of the appellant's submission and, on the other, concur with the main submission:

> We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission.[19]

Thus, without being able to cite any specific authorization in the provisions of the DSU—which in the case of panels, even though generously interpreted, existed in embryonic form—in a preliminary ruling the Appellate Body accepted on the one hand, the possibility of attaching *amicus curiae* briefs to the submissions of the parties and, on the other, the direct submission of an *amicus curiae* brief, referring to the legal arguments in support of this twin decision which, ultimately, in the Appellate Body report were provided only in connection with the first point, the second being passed over in silence.

The Appellate Body seemed to acknowledge the right of governments to attach *amicus curiae* briefs to their submissions but without expressly doing so. Thus, having asked the United States whether it agreed with the legal arguments of the NGOs set out in the attached briefs and having received a partly negative and partly affirmative reply, the Appellate Body decided to focus on the main U.S. submission.

As for direct submission, there is no mention of it in the final report, which has led some authors to suggest that the Appellate Body made a prudent retreat, after the appellees objected to the acceptance of an *amicus curiae* brief addressed to it directly. Thus, Arthur Appleton writes: "The Appellate Body's decision not to explain its legal basis, if any, for accepting the CIEL submission brings into doubt its authority to accept *amicus curiae* briefs directly from non-members".[20]

To sum up what the Appellate Body decided in this case, nothing explicit was said, at this stage, about the direct admissibility of *amicus curiae* briefs whereas, at first glance, it appears that briefs appended to government submissions were taken into consideration

[17] Report of the Appellate Body, *United States—Shrimp, supra* note 2, ¶ 83.
[18] *Id.* ¶ 86.
[19] *Id.* ¶ 89.
[20] *See* Appleton, *supra* note 16, at 487.

only insofar as the government itself agreed with them: thus, the government screen or barrier seems to have been formally maintained.[21]

The relationship between a government submission and an NGO brief could be described as a combination of integration and subordination: integration of the latter in the former and subordination of the latter to the former, whenever there are discrepancies between them.

In reality, things are not quite so simple. As other authors have pointed out,[22] a careful examination of what the Appellate Body actually did reveals that it tacitly accepted a revised version of an NGO brief, initially appended to the U.S. submission, which had been communicated to it directly, without passing through the U.S. Government. Thus, a breach seems to have been made in the "governments-only fence" around Appellate Body proceedings. Although the intergovernmental nature of the proceedings at the appellate level seems to have been formally maintained, some have argued that, since that time, the WTO has been giving *de facto* consideration to submissions by NGOs and, in view of the importance of WTO issues for civil society, have suggested that this taking into consideration of *amicus curiae* briefs should also be provided for *de jure* when the procedures under the dispute settlement mechanism are revised.[23]

Even if the Appellate Body did not say in so many words that it could accept directly submitted *amicus curiae* briefs, it did implicitly accept such a document; however, it should also be borne in mind that, although the final version of the document was in fact directly submitted to the Appellate Body, the first version had nevertheless been appended to the U.S. submission. Thus, it was not possible to predict with any certainty what the Appellate Body's position would be with regard to an *amicus curiae* brief that was filed directly with it in the first instance.

Even by adopting a flexible interpretation, as it did in connection with the independent briefs submitted at panel level, the Appellate Body certainly had greater difficulty in finding a legal basis for accepting non-requested *amicus curiae* briefs. At the panel level, Article 13 refers to the possibility of seeking information "from any individual or body which it deems appropriate." There is no equivalent article for the Appellate Body and under Rule 28(1) of the *Working Procedures for Appellate Review* the Appellate Body may only request additional submissions "from any participant or third participant".

Thus, the situation still remained relatively fluid and as one author's analysis suggests: "The Appellate Body . . . appears to have opened the door for the limited admissibility of non-member submissions and *amicus curiae* briefs."[24]

Subsequent developments show that the Appellate Body has chosen to move resolutely towards a policy of opening up to the NGOs, despite the fusillade of criticism from the government side which followed its decision in the *Shrimp-Turtle* case.

[21] As Hélène Ruiz Fabri has pointed out, "the Appellate Body's final position amounts to neutralizing the problem . . . As with the composition of delegations (in the *Bananas* case), the government barrier may be regarded as having been maintained", in *Chronique du règlement des différends. 1996–1998*, 2 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 497 (1999).

[22] Gregory Schaffer, *United States—Import Prohibition of Certain Shrimp Products*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 510 (1999).

[23] JAMES CAMERON AND KAREN CAMPBELL, DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION 227 (1998).

[24] *See* Appleton, *supra* note 16, at 494.

2. A Door Left Firmly Open in the United States-Carbon Steel *Case*

In *United States-Carbon Steel*, the Appellate Body explicitly considered that it had discretionary authority to accept directly-submitted *amicus curiae* briefs. In this case, certain submissions by industry associations, which had been rejected by the panel for being late, were resubmitted to the Appellate Body: these *amicus curiae* briefs came from the American Iron and Steel Institute and the Specialty Steel Industry of North America.

Having failed to do so in the *Shrimp-Turtle* case, in this report the Appellate Body finally explained the legal basis for accepting a directly-submitted *amicus curiae* brief:

> In considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs. However, Article 17.9 of the DSU provides: "Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information." This provision makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.[25]

Thus, the Appellate Body recognizes two types of limitations on its authority to adopt procedural rules: a formal limit, *i.e.*, the requirement to consult certain individuals, and a material limit, *i.e.*, consistency with the provisions of the DSU and the covered agreements. In an attempt to forestall predictable criticism, the Appellate Body made it very clear that the position it had taken did not confer any right to submit an *amicus curiae* brief on entities other than Members of the WTO:

> Individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal *duty* to accept and consider *only* submissions from WTO Members which are parties or third parties in a particular dispute.[26]

Nevertheless, it concludes:

> We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision.[27]

Accordingly, it is on the basis of Article 17.9 of the DSU and, though mentioned only in a footnote,[28] Rule 16(1) of the *Working Procedures for Appellate Review* (both articles being quoted for the first time in connection with *amicus curiae* submissions) that the Appellate Body will, at its discretion, agree to accept *amicus curiae* briefs.

[25] Report of the Appellate Body, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Carbon Carbon Steel Products Originating in the United Kingdom*, ("*United States—Lead and Bismuth II* ") WT/DS138/AB/R (2000), ¶ 39.

[26] *Id*. ¶ 41.

[27] *Id*. ¶ 42.

[28] Text of the note: "In addition, Rule 16(1) of the *Working Procedures* allows a division hearing an appeal to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the *Working Procedures*".

Thus, the Appellate Body appears to have granted itself unlimited freedom of action and the only criterion it proposes to use for guiding its policy in this field and determining whether a brief is admissible or not is summed up in the phrase "if we find it pertinent and useful to do so."[29] This decision gives rise to certain questions of a legal nature to which I shall return later.

3. A "Trompe l'œil" Door Deliberately Left Open in the Asbestos *Case*

In the *Asbestos* case,[30] urged on by numerous NGOs, the Appellate Body, despite or perhaps because of the discussions in progress, decided to establish "operating instructions" for *amicus curiae* briefs, by adopting procedural and substantive rules for their admission, but restricted these rules exclusively to the case in progress, as indicated in a letter from the Presiding Member of the Appellate Body to the Chairman of the DSB:

> I am writing to inform you that the Division hearing the above appeal has decided, in the interests of fairness and orderly procedure in the conduct of this appeal, to adopt an additional procedure to deal with any written briefs received by the Appellate Body from persons other than a party or a third party to this dispute. This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and is *not* a new working procedure drawn up by the Appellate Body pursuant to paragraph 9 of Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.[31]

It seems rather as if the Appellate Body wanted to reach a point of no return, by obliging governments to take a position on its reasonable attitude, now that the precondition of the admission of *amicus curiae* briefs, which it no doubt hoped would not again be called into question by Members, had been accepted.

In fact, it had very soon realized that the discretionary authority it had granted itself in the *United States-Carbon Steel* case needed to be consolidated. Thus, in *Asbestos*, the Appellate Body laid down rules enabling it to deal in a transparent fashion with requests for authorization to file *amicus curiae* briefs. It considered that "the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only"[32] and accordingly proceeded to adopt such procedures.

In a document adopted on November 7, 2000, following, it should be noted, consultations among all seven members of the Appellate Body, the latter established an additional procedure, which included a number of requirements[33] to be met:

> An application for leave to file such a written brief shall:
>
> (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
> (b) be in no case longer than three typed pages;
> (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;

[29] Report of the Appellate Body, *U.S.—Carbon Steel*, *supra* note 25, ¶ 42.

[30] On this case *see*, in particular, Geert A. Zonnenkeyn, *The Appellate Body's Communication on Amicus Curiae Briefs in the Asbestos Case*, 35 JOURNAL OF WORLD TRADE 553 (2001).

[31] WT/DS135/9, November 8, 2001.

[32] Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* ("*EC-Asbestos*") WT/DS135/AB/R (2001), ¶ 50.

[33] Requirements undoubtedly closely modeled on those suggested by Gabrielle Marceau and Matthew Stilwell in their article entitled *Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 155 (2001).

(d) specify the nature of the interest the applicant has in this appeal;
(e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;
(f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and
(g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.[34]

The additional procedure provided for in the *Asbestos* case did more than merely regulate the application for authorization to file an *amicus curiae* brief. It also laid down rules for the authorized brief itself, to save the Appellate Body from being deluged with submissions to read and study:

A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:

(a) be dated and signed by the person filing the brief;
(b) be concise and in no case longer than 20 typed pages, including any appendices; and
(c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.[35]

After this additional procedure was adopted by the Appellate Body, it was widely circulated by the Secretariat, which published it on the WTO's web site and e-mailed it to all the NGOs on the WTO's distribution list the very day it was adopted. There were many Members of the WTO who felt that this amounted to an outright invitation to NGOs to file *amicus curiae* briefs, a further step taken by the Appellate Body which showed that it was not only willing to receive NGO submissions but was encouraging them and giving them its blessing.

Despite this apparent encouragement given by the Appellate Body to the submission of *amicus curiae* briefs as a result of its adoption of a specific procedure and despite the more diversified origin of the briefs submitted in the *Asbestos* case, both geographically and in terms of the institutions concerned—professors and university centers, environmental NGOs, associations of asbestos multinationals—, as will be seen later, the end result seemed particularly disappointing, since not a single application to submit an amicus *curiae* brief was granted.

4. Another Door Breached in the Sardines *Case*

Two *amicus curiae* briefs were submitted in the *Sardines* case, but the real innovation lies in the fact that one of the briefs was filed by Morocco, a Member of the WTO that did not exercise its third party rights in the panel stage of the proceedings and, moreover,

[34] WT/DS135/9, November 8, 2001.
[35] *Id.*

a member of the developing country group which up to then had been particularly hostile to the idea of accepting *amicus curiae* briefs. As the Appellate Body pointed out, "this is the first time that a WTO Member has submitted such a brief in any WTO dispute settlement proceeding".[36]

The novelty of the situation led to a discussion of the admissibility of Morocco's *amicus curiae* brief. All interested parties had their say, including the parties to the dispute—the European Communities at the hearing, and Peru in the written submission stage, as well as most of the third participants—Canada, Chile, Ecuador and the United States.

It was the European Communities that proved readiest to recommend acceptance of Morocco's *amicus curiae* brief, maintaining that, in principle, the Appellate Body had the discretionary power to accept it and that, in practice, it contained elements pertinent to the settlement of the dispute. The EC had the support of the United States as far the question of principle was concerned, although the Americans considered that the contents of the brief would be of no use to the Appellate Body.

Canada, while asserting that the brief did not contain any pertinent information, nevertheless seemed uncomfortable, noting the lack of clear agreement among WTO Members as to the role of *amicus curiae* briefs and contending that, according to the texts, "WTO Members have a legal right to participate in dispute settlement proceedings only if they reserve their third party rights at the outset of the dispute settlement process".[37] It was this aspect of the situation that Peru, in particular, chose to stress in expressing its firm opposition to the acceptance of the Moroccan brief:

> Peru further objects to the acceptance and consideration of the amicus curiae briefs submitted in this appeal. It states that, while it welcomes non-Member submissions where they are attached to the submission of a WTO Member engaged in dispute settlement proceedings, the DSU makes clear that only WTO Members can make independent submissions to panels and to the Appellate Body. Peru argues further that the DSU already provides conditions under which WTO Members can participate as third parties in dispute settlement proceedings. According to Peru, accepting amicus curiae briefs from WTO Members that did not notify their third party interest to the DSB would be allowing a WTO Member impermissibly to circumvent the DSU.[38]

Chile took a similar position, arguing that accepting Morocco's brief "would mean that those Members would be accorded more favorable treatment than those accorded passive observer status in an appeal",[39] a view shared by Ecuador.

In its report, the Appellate Body reaffirmed the policy it had already laid down, namely that of opening the doors in favor of all friends of the court, whoever they might be, declaring without any qualification: "We have the authority to accept *amicus curiae* briefs".[40] This power would now seem to be unlimited.

How did the Appellate Body come to extend to States the possibility of filing an *amicus curiae* brief, hitherto reserved for individuals and organizations that are not Members of the WTO? In arriving at this result, the Appellate Body referred to and expanded on some of its previous decisions. More particularly, it referred to *United States—Lead and Bismuth II*, in which it decided it could accept briefs from sources other than the

[36] Report of the Appellate Body, *European Communities —Trade Description of Sardines* ("*EC-Sardines*"), WT/DS231/AB/R (2002), ¶ 161.
[37] *Id.* ¶ 155.
[38] *Id*. ¶ 65.
[39] *Id*. ¶ 111.
[40] *Id*. ¶ 157.

participants and third participants in an appeal.[41] On this basis, the Appellate Body pursued its argument as follows:

> In so ruling, we did *not* distinguish between, on the one hand, submissions from WTO Members that are not participants or third participants in a particular appeal, and, on the other hand, submissions from *non*-WTO Members.[42]

In other words, from the moment that the possibility of filing *amicus curiae* briefs became available to individuals and organizations that were not Members of the WTO, it also became available to States that are not WTO Members, which are clearly "organizations" in the broader sense of the term. Thus, the Appellate Body did not believe that WTO Members should be treated differently from non-Members where the exercise of its powers to accept *amicus curiae* briefs was concerned. In this connection, the Appellate Body notes that both parties to the dispute were in favor of according the same treatment to Members and non-Members alike—without pointing out that whereas the European Communities wanted both to be allowed to submit *amicus curiae* briefs, Peru wanted both to be denied that right.

In reply to the objection that accepting *amicus curiae* briefs would be contrary to the specific procedures laid down in the DSU with regard to the participation of WTO Members as third parties in a dispute, the Appellate Body declared that it was nothing of the sort: if a Member notified a panel that it had a substantial interest in a case, the DSU gave that Member a right to participate, or more precisely *the right* to make written and, if necessary, oral submissions both to the panel and to the Appellate Body and, even if it did not file a written submission, the right to attend the hearing as a passive observer. No such right of this sort is accorded to Members that have not indicated a substantial interest in the case; they are only given the *possibility* of filing an *amicus curiae* brief which may or may not be accepted, at the discretion of the Appellate Body. As the Appellate Body pointed out:

> . . . WTO Members that are third participants in an appeal have the *right* to make written and oral submissions. The corollary is that we have a *duty*, by virtue of the DSU, to accept and consider these submissions from WTO Members. By contrast, participation as *amici* in WTO appellate proceedings is not a legal *right*, and we have no duty to accept any *amicus curiae* brief. We may do so, however, based on our legal authority to regulate our own procedures as stipulated in Article 17.9 of the DSU. The fact that Morocco, as a sovereign State, has chosen not to exercise its *right* to participate in this dispute by availing itself of its third-party rights at the panel stage does not, in our opinion, undermine our *legal authority* under the DSU and our *Working Procedures* to accept and consider the *amicus curiae* brief submitted by Morocco.[43]

However, noting the potential for confusion thus introduced into the well-ordered procedures of the DSU, the Appellate Body took care to add a serious *caveat*:

> We wish to emphasize, however, that, in accepting the brief filed by Morocco in this appeal, we are not suggesting that each time a Member files such a brief we are required to accept and consider it.[44]

Only the future will tell whether this new door for friends of the court will remain viable.

[41] *Id.* ¶ 162, *citing United States—Lead and Bismuth II supra* note 25, ¶ 39 n.58.
[42] *EC—Sardines*, *supra* note 36, ¶ 162 (emphasis in original).
[43] *Id.* ¶ 166. (emphasis in original).
[44] *Id.* ¶ 167.

D. The Content of Amicus Curiae *Briefs: Factual and/or Legal Aspects?*

There is a final point that deserves to be mentioned, namely, the question of the permissible coverage of *amicus curiae* briefs, at both panel and Appellate Body stages. It would appear that the content of *amicus curiae* briefs can go well beyond anything that textual interpretation might suggest. According to the Appellate Body:

> The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU.[45]

There can be no doubt that under Article 11 of the DSU, a panel has a general duty to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". This does not automatically mean, as the Appellate Body suggests in the passage cited, that it must be able to have recourse to *amicus curiae* briefs for all these tasks.

In particular, both the appellees in *Shrimp-Turtle* and the European Communities in *United States-Carbon Steel*, made it clear that, in their opinion, Article 13 could not be used as a basis for the admission of legal arguments or interpretations, inasmuch as the text refers only to "information and technical advice":

> The European Communities notes that Article 13 of the DSU does not apply to the Appellate Body and that, in any case, that provision is limited to *factual information and technical advice*, and would not include *legal arguments or legal interpretations* received from non-Members.[46]

Though an interpretation based on the ordinary meaning of the words would appear to lean more towards the analysis proposed by the European Communities, the Appellate Body's constructive reading is also plausible: in fact, it does not seem absolutely necessary to restrict the intervention of *amicus curiae* to the factual aspects as the generality of the language used in Article 13 would certainly allow technical points of law to be addressed.

Whereas there can be no doubt that, at the panel stage, *amicus curiae* briefs may address questions of fact—and possibly questions of law—it is equally certain that, at the Appellate Body level, they can only address questions of law. From this standpoint, it seems surprising that such briefs should have been admitted, inasmuch as Article 17.3 of the DSU stipulates that the Appellate Body must comprise "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally", and should therefore have no need to resort to NGOs in order to determine the law applicable and its interpretation.

[45] Report of the Appellate Body, *United States—Shrimp*, *supra* note 2, ¶ 106 (emphasis in original).

[46] Report of the Appellate Body, *United States—Lead and Bismuth II*, *supra* note 25, ¶ 36. *Cf.* the position of the European Communities in another case cited below, namely, *United States—Section 110(5) of U.S. Copyright Act*—Report of the Panel, WT/DS160/R (2000), ¶ 6.5 (emphasis in original).

III. The Types of Private Party and the Consequences of Admitting *Amicus Curiae* Briefs

To assess the legitimacy, if not the legality, of the Appellate Body's interpretation, it might be useful to make an inventory of the types of organizations that have submitted *amicus curiae* briefs.

A. The Private Parties

1. The Shrimp-Turtle *Case*

In *Shrimp-Turtle*, two environmental NGOs[47] made submissions at the panel stage. A little later, the panel received another submission from a third environmental NGO.[48] As explained earlier, the panel refused to accept these submissions as directly filed, but did allow them to be attached to the parties' briefs.

More environmental NGOs wanted to participate at the Appellate Body stage: the United States appended to its appellant's submission[49] three "independent briefs" submitted by three groups of NGOs.[50] Later, as previously mentioned, one of these groups, the Center for International Environmental Law *et al*., submitted a lightly revised version of its submission directly to the Appellate Body, without passing through the United States government.

In this case, therefore, the submissions came mainly from *environmental NGOs*.

2. The Australia-Salmon *Case*

In *Australia-Salmon*, the *amicus curiae* issue came up at the implementation stage, *i.e.*, in connection with the Article 21.5 proceeding. The implementation panel received a letter from a group of concerned Southern Australian fishermen and fish processors. This letter related to Australia's treatment of, on the one hand, certain imports of pilchards for use as bait or fish feed and, on the other, salmon imports. Thus, it was a question of a submission not by an NGO in pursuit of some objective of general interest but by private economic operators ultimately concerned by the specific decision to be taken within the context of the WTO's dispute settlement mechanism.

In the preliminary stage, the panel considered that the information contained in this letter was relevant to its work and agreed to treat it as part of the file. It took this decision by virtue of the powers conferred upon it under Article 13.1 of the DSU.

[47] The Center for Marine Conservation and the Center for International Environmental Law.

[48] The World Wildlife Fund.

[49] In respect of these exhibits, the United States stated the following: "Encouraging the use of TEDs in order to promote sea turtle conservation is a matter of great importance to a number of nongovernmental environmental organizations. Three groups of these organizations—each with specialized expertise in conservation of sea turtles and other endangered species—have prepared submissions reflecting their respective independent views with respect to the use of TEDs and other issues. The United States is submitting these materials to the Appellate Body for its information attached hereto as U.S. Appellant Exhibits 1-3." United States Appellant's Submission, ¶ 2, n.1.

[50] The first was from the Earth Island Institute; Humane Society of the United States; and Sierra Club; the second was from the Center for International Environmental Law; Centre for Marine Conservation; Environmental Foundation Ltd; Mangrove Action Project; Philippine Ecological Network; Red Nacional de Accion Ecologica; and Sobrevivencia; and the third was from the Worldwide Fund for Nature and Foundation for International Environmental Law and Development.

In its final report, the panel confirmed its preliminary decision:

> We confirm this ruling recalling, in particular, that the information submitted in the letter has a direct bearing on a claim that was already raised by Canada, namely inconsistency in the sense of Article 5.5 of the SPS Agreement in the treatment by Australia of pilchard *versus* salmon imports.[51]

It is worth noting that this decision extends recognition of the panel's discretionary authority to admit *amicus curiae* briefs to a panel convened under Article 21.5 of the DSU.

3. The United States-Carbon Steel *Case*

In a third case, *United States-Carbon Steel,* the problem of accepting *amicus curiae* briefs was again raised before the panel. This time, too, it was a question not of environmental NGOs but of associations representing the manufacturers concerned, since the briefs came from the bodies representing the interests at stake in the dispute before the WTO.[52]

The panel recalled that it had broad discretionary authority with respect to the *amicus curiae* briefs and, exercising that authority, decided to reject them for having been submitted too late.[53]

The two associations also submitted non-requested briefs to the Appellate Body, which accepted them in principle, while deciding not to take them into consideration.

4. The United States-Copyright *Case*

In *United States-Section 110 (5) of the U.S. Copyright Act*, the bone of contention was the copying to the panel of a letter from a law firm representing the American Society of Composers, Authors and Publishers (ASCAP) to the U.S. Trade Representative.

It is important to make clear the position of the parties in relation to this letter. The United States, while favoring *amicus curiae* briefs in principle, did not think that, in this particular case, the letter should be accepted:

> . . . the United States, *inter alia*, distanced itself from positions expressed in the letter by that law firm and emphasized that in its view the letter was of little probative value for the Panel because it provided essentially no factual data not already provided by either party. But the United States supported in general the right of private parties to make their views known to WTO dispute settlement panels.[54]

As for the European Communities, they tried to define more precisely the extent of a panel's authority to take *amicus curiae* briefs into consideration:

> In referring to the Appellate Body's interpretation of Article 13 of the DSU in its report in the dispute *United States—Import Prohibition of Certain Shrimp and Shrimp Products*,[55] the European Communities also remarked that in its view, the authority of panels is limited

[51] Report of the WTO Panel, *Australia—Measures Affecting Importation of Salmon—Recourse to Article 21.5 by Canada,* WT/DS18/RW (2000), ¶ 7.9.

[52] The American Iron and Steel Institute and the Specialty Steel Industry of North America.

[53] *See* Report of the WTO Panel, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* WT/DS138/R (1999), ¶ 6.3.

[54] Report of the WTO Panel, *United States—Section 110 (5) of the U.S. Copyright Act*, WT/DS160/R (2000), ¶ 6.5.

[55] Footnote omitted.

> to the consideration of factual information and technical advice by individuals or bodies alien to the dispute and thus did not include the possibility for a panel to accept any legal argument or legal interpretation from such individuals or bodies.[56]

The panel accepted the letter, but made no use of it, mainly because it contained nothing new and was therefore superfluous:

> In this dispute, we do not reject outright the information contained in the letter from the law firm representing ASCAP to the USTR that was copied to the Panel. We recall that the Appellate Body has recognized the authority of panels to accept non-requested information. However, we share the view expressed by the parties that this letter essentially duplicates information already submitted by the parties. We also emphasize that the letter was not addressed to the Panel but only copied to it. Therefore, while not having refused the copy of the letter, we have not relied on it for our reasoning or our findings.[57]

5. The European Communities-Cotton Linen *Case*

In this case, an *amicus curiae* brief was submitted by the "Foreign Trade Association",[58] in support of the Indian position. Though accepted by the panel, the brief was not taken into consideration. The ruling, contained in a footnote, is particularly succinct:

> The day before our first meeting with the parties, the Panel received an unsolicited *amicus curiae* brief in support of the complaint by India in this dispute, submitted on behalf of the Foreign Trade Association . . . We made copies available to the parties for comment. No party made any substantive comments regarding that submission. We did not find it necessary to take the submission into account in reaching our decision in this dispute.[59]

6. The European Communities-Asbestos *Case*

In *European Communities-Asbestos*, five *amicus curiae* briefs were submitted to the panel at different stages of the proceedings. Among the NGOs, there was a trade union, a Mexican trade association, and an Indian NGO ("ONE"),[60] reflecting geographical and structural diversification among the private interests involved.

The European Communities incorporated two *amicus curiae* briefs[61] in its own submissions and requested the panel to reject the others which, in its eyes, were of no relevance, whereas Canada argued for the rejection of all the briefs. In actual fact, the panel took into consideration the two briefs incorporated in the Communities' submissions "as they had been included by the EC in their own submissions on an equal footing",[62] and rejected the other two, with no explanation, as well as the last brief, for being submitted

[56] *Id.* ¶ 6.6.

[57] *Id.* ¶ 6.8.

[58] The only information about this entity is given in note 10 of the Panel Report where it is stated that "[o]n Tuesday, 9 May 2000, the day before our first meeting with the parties, the Panel received an unsolicited *amicus curiae* brief in support of the complaint by India in this dispute, submitted on behalf of the Foreign Trade Association by Dr. Konrad Neundörfer".

[59] Report of the WTO Panel, *European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/R (2000), ¶ 6.1 and n.10.

[60] There was one from Collegium Ramazinni (before the first meeting of the panel); three others from: from Ban Asbestos Network, Instituto Mexicano de Fibro-Industrias AC, and the American Federation of Labor and Congress of Industrial Organizations (between the panel's first and second meetings); and the last, from Only Nature Endures, after the adoption of the interim report.

[61] Those from the Collegium Ramazinni and the American Federation of Labor and Congress of Industrial Organizations.

[62] Report of the Panel, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (2000), ¶ 8.12.

too late. However, of the three independent briefs rejected, the last, rejected for late submission, was communicated to the parties for information, while the other two were not. No explanation was offered for this differential treatment.

The Appellate Body initially received thirteen independent briefs.[63] Then, once the additional procedure had been adopted, these thirteen briefs were returned to their authors for resubmission under this procedure. However, the only association to submit a request for authorization under the additional procedure was the Korea Asbestos Association. Finally, seventeen requests, including sixteen new ones, were received under this procedure, which suggests that the existence of a clear framework of rules tends to encourage *amicus curiae* briefs. Out of this total, six were received after the deadlines had expired.[64]

The eleven requests submitted within the deadlines came from a very wide range of natural and legal persons.[65] The Appellate Body did not accept any of the briefs, offering the following explanation—if explanation it is—of its position:

> We carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief. Each applicant was sent a copy of our decision denying its application for leave for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.[66]

Nothing more. This reticence on the part of the Appellate Body may be attributable to the very harsh warnings it had been given by WTO Members at the extraordinary meeting of the General Council on November 22, 2000, which had been convened precisely to discuss the concerns aroused among Members by the adoption of the additional procedure.[67]

[63] From the following bodies: Asbestos Information Association (United States); HVL Asbestos (Swaziland) Limited (Bolenbu mine); South African Asbestos Producers Advisory Committee (South Africa); J & S Bridle Associates (United Kingdom); Associação das Indústrias de Produtos de Amianio Crisótilo (Portugal); Asbestos Cement Industries Limited (Sri Lanka); The Federation of Thai Industries, Roofing and Accessories Club (Thailand); Korea Asbestos Association (Korea); Senac (Senegal); Syndicat des Métallos (Canada); Duralita de Centroamerica, S.A. de C.V. (El Salvador); Asociación Colombiana de Fibras (Colombia); and Japan Asbestos Association (Japan).

[64] The six requests that arrived too late came from Association of Personal Injury Lawyers (United Kingdom); All India A.C. Pressure Pipe Manufacturers' Association (India); Confédération internationale des syndicats libres/Confédération européenne des syndicats (Belgium); Maharashtra Asbestos Cement Pipe Manufacturers' Association (India); Roofit Industries Ltd. (India); and Society for Occupational and Environmental Health (United States).

[65] As evidenced by the following list: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment et American Chemistry Council (United States); Conseil européen de l'industrie chimique (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint request from the following: Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (Netherlands), Fonds mondial pour la nature, international (Switzerland) and Fédération luthérienne mondiale (Switzerland).

[66] *EC—Asbestos*, *supra* note 32, ¶ 56.

[67] *See infra* Subpart B.

7. The Thailand-Antidumping Duties *Case*

In this case,[68] the Appellate Body received a written brief from the Consuming Industries Trade Action Coalition ("CITAC"), a grouping of United States companies and trade associations. There was a sharp dispute between the Parties with regard to the ethics of the "friends of the court". The problem was that this *amicus curiae* brief included references to Section III of Thailand's submission, which indicated that the organization had been aware of the contents of the latter. Thailand protested vigorously, insisting that there had been a breach of the obligation to ensure confidentiality under Articles 17.10 and 18.2 of the DSU and calling on the Appellate Body to make a thorough investigation of the matter. In particular, Thailand suggested that the law firm that was defending Poland in this case before the WTO was also CITAC's counsel, and demanded meaningful action by the Appellate Body, as the latter indicated in its report:

> Thailand also requested that we take such action as we deemed appropriate, if we established that a participant or a third participant in these proceedings had breached its obligations under Articles 17.10 and 18.2 of the DSU. Thailand suggested that such action could include the rejection of the written brief submitted by CITAC; the disqualification from further participation in this appeal of any attorney or law firm which had disclosed the contents of Thailand's submission; the undertaking by such attorneys or law firm that they had destroyed or returned to the Appellate Body all copies of Thailand's written submission, or all written materials that were based on or referred to this submission; the undertaking by CITAC that it had destroyed or returned to the Appellate Body all copies of Thailand's appellant's submission or any written materials that were based on or referred to the submission; and the requirement that the attorneys for Poland or the third parties submit to the Appellate Body a written report setting out in detail all disclosures made by such attorneys to any party not involved in this appeal, including any memoranda they had prepared for, or discussions they had with, clients or potential clients in any way referring to the contents of Thailand's appellant's submission.[69]

To the questions put by the Appellate Body Poland gave an embarrassed reply. It acknowledged that a member of the law firm defending its interests had worked as a lawyer for CITAC, adding that "although it considered that there had been no proof of wrongdoing on the part of Hogan & Hartson L.L.P., Poland had decided to accept that law firm's proposal to withdraw as its legal counsel in this appeal."[70]

The Appellate Body appears to have been extremely timid in its handling of this matter, since it did no more than acknowledge that CITAC had had access to the Thai submission and refuse to accept the brief. At the same time, it failed to single out a "guilty party" and, above all, did not explicitly establish a link between its rejection of the brief and the events surrounding its preparation, as follows from its preliminary ruling of December 14, 2000 on this point:

> We believe that there is *prima facie* evidence that CITAC received, or had access to, Thailand's appellant's submission in this appeal. We see no reason to accept the written brief submitted by CITAC in this appeal. Accordingly, we have returned this brief to CITAC.[71]

Thailand, however, was not satisfied with this cryptic pronouncement and insisted on the Appellate Body stating its reasons for having rejected CITAC's brief. Its efforts were in vain since the Appellate Body merely replied as follows:

[68] Report of the Appellate Body, *Thailand—Anti-Dumping Duties on—Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (2001).

[69] *Id.* ¶ 67.

[70] *Id.* ¶ 72.

[71] *Id.* ¶ 74.

> We believe that we have done all that is possible within our mandate under the DSU to address Thailand's concerns. With respect to Thailand's suggestion that we seek an explanation from CITAC, we note that we have rejected the written brief filed by this organization. Under these circumstances, it would not be appropriate for the Appellate Body to communicate with this organization. With respect to a clarification of the reasons for rejecting the brief from CITAC, we would only add that we did not find the brief filed by CITAC to be relevant to our task.[72]

This case revealed the possibility of collusion between a party and the NGOs that backed its cause.[73] An important lesson to be learned from this case is that a friend of the court should not be a false friend and should therefore be independent of the parties, a principle which one author has expressed in the following terms: "the aim is to avoid confusion between the interests of the friends of the court and the interests of the parties or third parties, otherwise the manipulation of the one group by the other would render the institution meaningless."[74]

8. The Sardines *Case*

The *Sardines* case in which, as previously noted, two briefs were submitted, one by a private individual, or more precisely by a law professor at the University of Michigan, the other by a WTO Member, is doubly important. On the one hand, it appears to signal a turning point in the attitude of the developing countries toward *amicus curiae* briefs, since it was a developing country that decided to use the disinterested submission procedure. On the other hand, however, and above all, it marks the appearance of a new type of friend of the court, namely a WTO Member that is neither a principal party nor a third party to the dispute.

B. What is the Position of Governments?

Clearly, the rulings concerning NGO briefs raise a number of questions. Even at the meeting at which the DSB adopted the Appellate Body's ruling in *Shrimp-Turtle*, despite the ambiguity of that ruling, many voices were raised in criticism of what some governments regarded as an abuse of authority by the Appellate Body.[75] It is worth reproducing a few passages from the minutes in full.

According to Thailand:

> [w]ith regard to the procedural issues, it was apparent that the Appellate Body had used this case to extend its authority beyond that granted to it under the WTO Agreement. . . . His delegation believed that *Members, not the Appellate Body, should decide the extent to which NGOs might be involved in a dispute settlement process*. Thailand's long-standing

[72] *Id.* ¶¶ 76 and 78.

[73] To that should be added the possibility, if not of collusion, at least of a conflict of interest between an NGO and a member of a panel or the Appellate Body. It is worth recalling the withdrawal of an English law lord from the Pinochet case, because of his links with Amnesty International which had been authorized to submit an *amicus curiae* brief. This led to a second hearing before the House of Lords. *House of Lords, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division); Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division)*, Judgment of March 24, 1999, 38 ILM 581–663 (1999).

[74] *See* Ascensio, *supra* note 1, at 918–919.

[75] Meeting of November 6, 1998, WT/DSB/M/50, December 14, 1998.

> position was that the WTO Agreement did not give NGOs the right to submit *amicus* briefs, nor did it allow Members to attach *amicus* briefs to their submissions that did not reflect their point of view. The Appellate Body's conclusion . . . had defied the rights and obligations of Members and the basic intention under the DSU. . . . The DSU did not grant the Appellate Body the right "to seek" information. . . . Thailand was also concerned that the "evolutionary" interpretative approach newly adopted by the Appellate Body was a formula for adding to or diminishing the rights and obligations of Members. . . . As demonstrated by the results in this case, this had diminished business confidence and had affected the interpretation of rights and obligations of Members in ways which were not contemplated under the WTO Agreement.[76]

According to Pakistan:

> the DSU did not give NGOs the right to submit *amicus* briefs or to give Members permission to attach briefs to their submissions that did not reflect their views. The DSU did not give NGOs greater rights to make submissions than those enjoyed by Members. The Appellate Body had disregarded the jurisdictional limits agreed by Members . . . *Those Members who had negotiated the DSU were aware that it had never been intended to permit NGOs to submit amicus briefs to panels and to the Appellate Body*. Pakistan strongly believed that Members, not the Appellate Body, should determine the extent to which NGOs might participate in the dispute settlement process.[77]

According to India:

> [t]he Panel had interpreted the word 'seek' in Article 13 of the DSU fully in accordance with the general rule of interpretation of the Vienna Convention on the Law of Treaties: i.e., that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms contained therein. The word 'seek' , in its ordinary meaning, implied a pro-active search on the part of the subject, which in this case was the Panel. Therefore, the right for the Panel to seek information which was different from NGOs having the unimpeded right to submit information to panels. The Appellate Body had alleged that the Panels' reading of the word 'seek' was too formal and technical. His delegation considered it unusual that the Appellate Body had stated this, because the discipline of law was both formal and technical, and the WTO constituted a forum in which legally binding commitments had been undertaken by Members . . . India, therefore, believed that *the Appellate Body might have interpreted one of the important provisions of DSU loosely and wrongly*, which could upset the balance of rights and obligations of Members . . . It appeared that by this approach the Appellate Body had transcended the strict boundaries of law and had entered into the political domain strictly preserved for Members. With regard to *amicus* briefs, the Appellate Body had appeared to have let itself to be overawed by the campaign of NGOs of major trading entities.[78]

Mexico also expressed concern about the systemic consequences of the Appellate Body' ruling:

> The Appellate Body's findings, in particular . . . had paved the way for diverse groups not related to the WTO to become active participants in proceedings, *with the result that cases would be discussed at a political level at the expense of argumentation of a legal nature*.[79]

According to Hong Kong, China, although it:

> reluctantly agreed that panels should in general have the discretion to accept or reject non-requested information, it was concerned that the ruling might open up *the floodgate*

[76] *Id.* at 2, 3 and 4 (emphasis added).
[77] *Id.* at 5 (emphasis added).
[78] *Id.* at 7 and 8 (emphasis added).
[79] *Id.* at 14 (emphasis added).

> *of non-requested submissions which would in turn have serious implications on the work of future panels in terms of workload and efficiency*. His delegation considered that the issue should be thoroughly and carefully considered by the DSB in the future. In doing so, Members should be mindful of rendering NGOs any treatment which was more favorable than that of Members and the rule-based and inter-governmental nature of the WTO.[80]

Japan also took a critical view of the Appellate Body's ruling:

> Allowing non-requested information from non-governmental sources to be directly submitted could pave the way for parties and subsequently the panel to deal with such information within a short period of time and placed an additional burden for both the parties and the panel . . . Japan supported the treatment of information from non-governmental sources by the Panel as approved by the Appellate Body, namely that if any party in this dispute had wished to put forward any documents or information it considered relevant to support its arguments as part of its submission to the Panel would be free to do so . . . One of the logical consequences of the Appellate Body's findings might be that *even those Members who were not third parties to the dispute would be allowed to submit their views to a panel at their own convenient time.*[81]

At the time of the DSB's adoption of the Appellate Body report in *United States-Carbon Steel*, governments also expressed contrasting points of view.[82] In particular, the European Communities considered that " . . . the way the Appellate Body had dealt with the issue of *amicus curiae* briefs was not entirely satisfactory . . . the Appellate Body had concluded that it had the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which it found it pertinent to do so. However, the Appellate Body did not provide any guidance under what circumstances it might find it pertinent to consider *amicus curiae* briefs nor how this would be reflected in its Working Procedures."[83]

Argentina also gave vent to its concerns:

> The dispute settlement system established intergovernmental procedures and the authority to accept and consider unsolicited briefs submitted by individuals or organizations, not Members of the WTO, could distort the character of dispute settlement procedures. Access to the WTO dispute settlement procedure was restricted to WTO Members and panels, and the Appellate Body only had a duty to consider submissions from parties or third parties in a given dispute . . . Furthermore, recognition of the authority to accept *amicus curiae* briefs raised a number of doubts over the rights of Members that were neither parties nor third parties in a dispute. The question was whether those Members had the right to make voluntary submissions that might be accepted and considered by panels or the Appellate Body. If not, this would entail that they would have less rights than individuals or organizations that were not Members of the WTO.[84]

In addition, the representative of Hong Kong, China put forward an important argument when he pointed out that the authority which the Appellate Body had arrogated to itself was not one of the procedural powers conferred upon it by Article 17.9 of the DSU: "To justify its claim, the Appellate Body had relied upon its interpretation of Article 17.9 of the DSU. However, that Article concerned only procedures for Appellate Review and allowed the Appellate Body to draw up its working procedures under certain constraints. Therefore, the issues to be considered in this context had to be procedural. However, the acceptance by the Appellate Body of *amicus curiae* briefs *was not a procedural but a*

[80] *Id*. at 16 (emphasis added).
[81] *Id*. at 16–17 (emphasis added).
[82] DSB meeting held on June 7, 2000, WT/DSB/M/83, June 7, 2000.
[83] *Id*. ¶ 5 (emphasis added).
[84] *Id.* ¶ 14.

substantive matter. It affected the intergovernmental character of the WTO as well as Members' rights and the obligations.[85]

The Philippines considered that it was not the right time to take a decision on the subject of *amicus curiae* briefs since Members were still discussing the problem.[86] Similar concerns were expressed by Canada at the DSB's meeting on November 17, 2000,[87] during which it was decided to hold a special meeting of the General Council precisely to discuss the implications of the Appellate Body's rulings in the *Asbestos* case: "In Canada's view, it was for Members as a whole, not the Appellate Body, to decide how the issue of *amicus* participation should be dealt with in the future. Members had to ensure that the government-to-government nature of the dispute settlement process was not weakened or compromised by the procedural initiatives of panels or the Appellate Body. Thus, Canada was concerned that the Appellate Body division had chosen to adopt these new procedures at this time."[88]

This special meeting of the General Council, convened at the request of Egypt on behalf of the informal group of developing countries, met on November 22, 2001.[89] The meeting opened with a statement by the Chairman of the General Council, in which he endorsed a previous statement by the Chairman of the DSB who had said he was convinced that no Member in discussing the question of *amicus* briefs wanted to harm the reputation of the Organization. His preliminary statement was accompanied by a Note from the Secretariat[90] retracing the Appellate Body's various rulings on this issue.

In reality, rather than the content of the additional procedure, what governments most strongly objected to was the procedure for disseminating that additional procedure, which had been published on the WTO's web site and e-mailed to all the NGOs on the very day on which it was adopted. Many Members, such as India, regarded this as an outright invitation to submit *amicus* briefs. Thus, in the statement it made in the course of the meeting, India denounced the Appellate Body's approach in the following terms:

> . . . it was not unfair to conclude that the Appellate Body knew, or at least should have known, that putting the additional procedure on the WTO web site, which was said to have been designed to discipline the process and was supposed to have been adopted for the particular appeal only, would virtually amount to an invitation to hundreds of NGOs to file *amicus curiae* briefs.[91]

Reading these numerous statements, it could seem that there is unanimity against the broad acceptance of *amicus curiae* briefs. As a matter of fact, one State has a radically different position. It is symptomatic that in the course of this extraordinary meeting of November 22, 2000, out of the representatives of 24 countries and six groups of countries[92] that took the floor, only one, the United States, approved of the Appellate Body's decision to adopt an additional procedure.

[85] *Id.* ¶ 15 (emphasis added). In addition, "Brazil noted that the question of who could be heard by panels and the Appellate Body was not a 'procedural rule', but rather a very substantive component of the DSU rules, which affected the way the system operated and significantly altered the rights and obligations Members negotiated under the Uruguay Round", WT/GC/M/60 ¶ 43.

[86] *Id.* ¶ 20 (emphasis added).

[87] WT/DSB/M/92, January 15, 2001.

[88] *Id.* ¶ 128.

[89] *See Report of the Meeting*, WT/GC/M/60, January 23, 2002.

[90] *Factual Background Note Relating to the Issue Raised by Certain Members*, Circulated in Job(00)/7343 and reference in *Report of the Meeting*, WT/GC/M/60, January 23, 2002.

[91] WT/GC/M/60 ¶ 35.

[92] Egypt on behalf of the informal group of developing countries, Colombia on behalf of the Andean countries, Singapore on behalf of ASEAN, Hungary on behalf of seven Central European countries, and the European Communities.

Earlier the United States had already expressed quite some enthusiasm for the positions taken by the Appellate Body concerning its authority to accept *amicus curiae* briefs at the appeal stage. While declaring itself to be disappointed with the ruling on the merits in *United States-Carbon Steel*, it approved of the procedural findings: "However, there was one positive aspect of the Appellate Body Report, namely, its finding that the Appellate Body had the authority to take into account submissions by interested private parties, so-called *amicus curiae* briefs."[93] During the meeting of November 22, 2000, the United States set forth its analysis of the reasons why the solution adopted is a good solution as far as *amicus curiae* briefs are concerned: "the Appellate Body has adopted procedures to manage this issue in a fair, legal and orderly manner, taking into account the interests of the members of civil society in having their views considered, the interests of the parties and third parties in being able to review and respond to any *amicus* submissions, and the interest of all in resolving the dispute."[94]

C. The Problems Raised

1. The Legal Issues

The interpretations that led the Appellate Body to acknowledge the possibility of a panel, and indeed the Appellate Body itself, accepting non-requested *amicus curiae* briefs inevitably pose some difficult legal problems.

(a) The Legal Basis for a Panel's Authority. First of all, with regard to the authority granted to panels under Article 13 of the DSU, there can be no denying that it relies upon an extremely flexible interpretation of the act of "seeking". To convince oneself of this it is sufficient to compare the wording of Article 13 with, for example, that of Article 61.3 of the Rules of the European Court of Human Rights. Article 61.3 provides:

> The President of the Chamber may, in the interests of the proper administration of justice, *invite or grant leave* to any Contracting State which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing. Requests for leave for this purpose must be duly reasoned. . . .[95]

This article, contrary to DSU Article 13, uses two terms that refer respectively to the act of "asking" and the act of "accepting" something that has not been requested. It is therefore debatable whether the single verb "to seek" can be interpreted by turning what might be described as a "passive seeking" into an "active seeking", as the Appellate Body does, without assigning oneself a judicial law-forming role, which explains why there was no shortage of government criticism, as indicated above.

(b) The Legal Basis for the Authority of the Appellate Body. Next, with regard to the authority assumed by the Appellate Body on the basis of Article 17 of the DSU, and perhaps secondarily on Article 16.1 of the *Working Procedures for Appellate Review*, its legal interpretation is far from watertight.

The recourse to Article 17.9 of the DSU in *United States-Carbon Steel* merely indicates that the Appellate Body has wide discretion to adopt procedural rules, but the use of Article 17.9 depends on the observance of a consultation and notification procedure, which quite clearly was not followed in this particular case. Nor does it seem that

[93] *Id*. ¶ 8.
[94] *Report of the Meeting*, WT/GC/M/60, January 23, 2002, ¶ 74.
[95] Http://www.echr.int/Fr/fdoc/rulesofcourt.htlm (emphasis added).

Article 16.1 of the *Working Procedures for Appellate Review*, if it had been formally invoked, would have been able to provide a firm foundation for a new general procedural rule such as the Appellate Body claimed to have laid down in *United States-Carbon Steel*. In fact, this article is a sort of safeguard clause that enables the Appellate Body to give a ruling in unprecedented procedural situations; however, it is explicitly intended for use in specific and exceptional circumstances and not for laying down general procedural rules, since it stipulates that "a division may adopt an appropriate procedure for the purposes of that appeal only". Indeed, the Appellate Body acknowledged this in the *Asbestos* case, by establishing procedural rules for the admission of *amicus curiae* briefs applicable to that case only.

There can be no denying that any jurisdictional body has implicit powers that enable it to organize the proceedings taking place before it in the best possible way. But it is one thing to say that such *procedural* powers exist and quite another completely to upset the balance of a dispute settlement system by introducing a procedural innovation with far reaching consequences, which, it seems to me, is what happened in this case.

(c) Respect for the Procedural Guarantees Offered to Members and for their Rights. Furthermore, a number of procedural guarantees offered to Members in the two stages of the dispute settlement procedure appear to have been ignored. Firstly, the procedure for the acceptance of non-requested briefs by a panel undoubtedly deprives Members of the *right to be informed* of any request for information addressed to one of their nationals, conferred upon them by Article 10.2 of the DSU.

Secondly, the right to *transparency*, established in paragraph 10 of the *Working Procedures*, which provides for all presentations to panels to be made "in the presence of the parties", also seems to be infringed by allowing "friends of the court" to submit briefs directly to the panel.

It is also clear that the risk of breaches of *confidentiality* is particularly acute, as shown by the problems that arose in the *Thailand-Antidumping Duties* case. Indeed, governments have been guaranteed the confidentiality not only of panel and Appellate Body proceedings but also of communications between the parties, as follows from Article 18.2 of the DSU:

> Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public.

Although a party is free to disclose statements of its own positions to the public, this freedom clearly does not extend to the statements of the other party.

Finally, procedural rulings adopted by the WTO's adjudicative bodies *cannot add to or diminish the rights of Members*, as stipulated in Articles 3.2 and 19.2 of the DSU. It is far from certain that the solutions adopted by the Appellate Body concerning the treatment of *amicus curiae* briefs—both as regards their being taken into consideration by a panel and their being taken into consideration by the Appellate Body itself—fully respect the provisions of these articles. In fact, the ability of Members to intervene in a case is subjected to strict limits, by Article 10.2 of the DSU for panels[96] and by Article 17.4 for the

[96] "Any Member having a substantial interest in a matter before the panel and having notified its interest to the DSB (referred to in this Understanding as a "Third Party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."

Appellate Body[97], limits which the rulings adopted in connection with *amicus curiae* briefs make it possible to ignore. Thus, either this additional procedure is open to Members—as legal persons—or it is not. If it is not, "a severe harm and a grave imbalance would be done to the rights of Members *vis-à-vis* external parties or individuals who were not even contractually committed to the obligations of the system."[98] If it is open to Members, then the new procedural opportunities made available to them mean that the position taken by the Appellate Body is actually changing the rights conferred on Members by the WTO Agreement, by adding to them. As Arthur Appleton pertinently remarks:

> Members that have not become third parties and notified the Appellate Body of a substantial interest might be able to circumvent the prohibition on filing written submissions simply by labeling their submissions as *amicus curiae* briefs and filing them with the Appellate Body.[99]

We know that since the *Sardines* case, it is the second alternative that has prevailed.

Moreover, as noted by the representative of Hong-Kong, China, the procedure is fundamentally *unfair*, since it was "prejudicial to those who did not have effective electronic access to the WTO web site or were not subscribers to the Secretariat's NGO bulletin."[100]

Lastly, there are serious problems with respect to the *law of evidence*. Thus, in their briefs the NGOs do not have to prove their assertions. If the facts they report or the provisions to which they refer are prejudicial to one of the parties, it will be for that party to rebut them: there can be no doubt that this represents a distortion of the rules concerning the burden of proof.[101]

Insofar as *amicus curiae* briefs have been widely admitted, the most pressing question is that of the control of the process by the contracting parties, and in particular the question of the evidential value of *amicus curiae* briefs.

Admittedly, the Appellate Body seems to be aware of the problem. Even though it has not addressed the actual question itself, it has addressed the parallel issue of the evidential value of the advice offered by experts consulted by a panel:

> Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favor of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.[102]

[97] "Only parties to the dispute, not third parties, may appeal to a panel report. Third parties which have notified the DSB of a substantial interest of the matter pursuant of paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body."

[98] Comment by Egypt on behalf of the informal group of developing countries at the meeting of the General Council on November 22, 2000, WT/GC/M/60,¶ 18.

[99] *See* Appleton, *supra* note 16, at 487–488; and *EC—Sardines*, *supra* note 36, ¶¶ 153–170, where the Appellate Body received an *amicus* submission from the Kingdom of Morocco.

[100] WT/GC/M/60 ¶ 27.

[101] As noted, for example, by Asif Qureshi, *Extraterritorial Shrimps, NGO's and the WTO Appellate Body*,48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 205 (January 1999): "... The NGOs do not need to prove the veracity of their statements. The onus of rebuttal falls on the parties in question. Indeed, conceivably, NGO submissions could have the effect of shifting, or at any rate partly distorting, the onus of proof as set out in the Understanding."

[102] Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R (1999), ¶ 129.

Applying these tests of the sound administration of justice to the case before it, the Appellate Body criticized the panel, which had placed too much reliance on this advice in arriving at its conclusions:

> In the present case, the Panel was correct to seek information and advice from experts to help it to understand and evaluate the evidence submitted and the arguments made by the United States and Japan with regard to the alleged violation of Article 5.6. The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a *prima facie* case of inconsistency with Article 5.6 based on claims relating to the "determination of sorption levels". The United States did not even *argue* that the "determination of sorption levels" is an alternative measure which meets the three elements under Article 5.6.[103]

Despite these precautions, it can hardly be denied that if pertinent arguments against a party to the proceedings are advanced in an *amicus curiae* brief, there is a risk of that party being obliged to rebut them, which introduces unenvisaged imbalances into the dispute settlement mechanism, as one author has already pointed out:

> . . . at least one party must respond to arguments stemming from a private person or entity which does not have the rights and obligations of a WTO Member . . . In other words, the acceptance of a submission from a non-state actor affects the balance between the parties to the dispute settlement and becomes a question of due process.[104]

2. The Political Implications

The first problem is that this broad acceptance of *amicus curiae* briefs is opening up access to the WTO dispute settlement system, which was intended to be intergovernmental, to private actors. As Hervé Ascencio has said, "the *amicus curiae* is the procedural breach in the dike through which individuals, companies and associations can pour when party status is reserved for states."[105]

It is the entire philosophy of international trade dispute settlement that is at stake. A comparative analysis[106] shows that *amicus curiae* briefs are not admitted in purely intergovernmental proceedings, whereas they are accepted in cases in which private persons are exclusively or partially involved.

If the opening of the WTO dispute settlement mechanism initiated by the rulings of the Appellate Body is not challenged, that "*retournement du monde*",[107] about which there is so much talk, will be confirmed. A new balance is emerging between the governmental and non-governmental actors, certainly.

But over and above that, tension between very different types of potential participants is beginning to develop. With regard to the interests represented, there is undeniably tension between the NGOs proper which are fighting, at least officially, in the *general interest* and the associations representing *commercial interests* and even—and why not—*governments* which failed to express in good time their desire to become third parties and which see in this development a means of catching up that enables them

[103] *Id*. ¶ 130.

[104] Georg C. Umbricht, *An "Amicus Curiae Brief" on Amicus Curiae Briefs at the WTO*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 779 (2001).

[105] Ascensio, *supra* note 1, at 900.

[106] *See e.g.,* Gabrielle Marceau and Matthew Stilwell, *Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 164–175 (2001).

[107] *See e.g.,* BERTRAND BADIE ET MARIE-CLAUDE SMOUTS, LE RETOURNEMENT DU MONDE: SOCIOLOGIE DE LA SCENE INTERNATIONALE (1995).

to participate in the debate and assert their rights. Moreover, associations representing *State interests*, the notorious GONGOs ("Governmental Non-governmental Organizations"), may also participate, although this is not the only method of State intervention now that States that fail to declare their intention of becoming third parties in good time have also been given the right to submit *amicus curiae* briefs directly. Finally, no one should underestimate the disadvantages that could result from giving access—a doubtless unintended but scarcely avoidable development once the doors have been thrown open—to entities openly opposed to the WTO and the multilateral trading system or whose objectives are incompatible with those of the WTO and the multilateral trading system.

Apart from these possible abuses of procedure, another burgeoning question is whether this new deal is not insidiously creating other imbalances between different categories of governmental actors.

In particular, there is reason for concern about imbalances between Members, especially between developed and developing country Members, depending on which were better able to "elicit" "spontaneous" information from NGOs, as this might distort a panel's view of the facts. This is one of the arguments against admitting *amicus curiae* briefs advanced by Georg Umbricht:

> Critics of the admission of *amicus curiae* briefs at either level of WTO quasi-jurisdiction argue that if NGO's are allowed to have a voice within dispute settlement, the developed countries will gain even more power within the system, and, more specifically, within the dispute settlement process. It is their contention that most of the NGO's are from developed countries, and the few NGO's from developing countries are financed by their developed countries counterparts.[108]

The developing countries are constantly stressing this point. Thus, Egypt, intervening on behalf of the informal group of developing countries, has criticized the adoption of the additional procedure, pointing out that:

> the likely beneficiaries of such a decision were those individuals and NGOs who had the capacity in terms of resources and time. Those were entities which had more access to WTO work and documents, and were operating mainly in the developed world with few in developing countries. Electronic means did not help the disadvantaged in remote areas, who were increasing in number with the further widening of the digital divide.[109]

Even among the countries of the North, the unlimited acceptance of *amicus curiae* briefs would probably favor, in particular, the larger international NGOs, most of which would appear to be of American origin, as well as the extremely well organized and powerful U.S. lobbies. Subject to a more detailed analysis of the sociology of organizations, it seems very likely that if there were unlimited access for *amicus curiae* briefs the big winner, in terms of relative influence, would be the United States: in these circumstances it is hardly surprising that the United States should be the most enthusiastic—and indeed the only—advocate of such an opening, as it made clear at the time of adoption of the report in *United States-Carbon Steel*:

[108] Umbricht, *supra* note 104, at 785–786.

[109] WT/GC/M/60 ¶ 21. *Cf.* the similar comments of Pakistan: "[w]ith regard to the manner in which this communication had been sent, *i.e.*, to NGOs on the WTO e-mailing list, there was clearly an inherent discrimination since the largest number of NGOs from developing countries did not have access to the internet and were not on the WTO e-mailing list". *Id.* ¶ 66.

> By allowing affected private parties to present their views in WTO appeals, the Appellate Body had taken a positive step towards making the WTO more open and enhancing public confidence in the dispute settlement process . . . the United States was confident that the Appellate Body was fully able to adopt procedures for *amicus curiae* submissions so as to benefit from them without unduly burdening the system or the parties.[110]

Nor is it surprising that the developing countries should be fundamentally opposed to such a procedure, as illustrated by the passages from the minutes of WTO meetings quoted above, a hostility which has its roots in systemic problems as well as practical considerations.

3. The Practical Problems

The systemic aspects apart, the procedure could well become extraordinarily cumbersome if panels or the Appellate Body were to make too free use of the authority conferred on them, owing to: panels and the Appellate Body inundated with unsolicited information, the need to respond to every argument contained in these NGO briefs should a panel or the Appellate Body refer to them, and the difficulty of ensuring due process. To give some idea of the scale of the problem, even with the limitations introduced by the additional procedure, if only twenty *amicus curiae* briefs were submitted in connection with a case, that would represent up to four hundred pages of legal arguments, to which the parties would have to respond in a matter of days.

Admittedly, the additional procedure was supposed to have been adopted precisely for the purpose of screening requests and preventing them from becoming too numerous, and therefore requires a certain amount of information. Although, on the surface, this may seem like a reasonable approach, its actual implementation is more problematic. Thus, among other things, applicants are asked to show how their briefs would make a contribution that would avoid duplicating arguments already advanced by a party or a third party. It is hard to see how someone requesting authorization to file an *amicus curiae* brief could satisfy that requirement without having access to the submissions of the parties and third parties . . . Furthermore, for some the deadlines are totally unrealistic, as Jamaica made clear when it noted that:

> very few non-Members from developing countries would have become aware of this additional procedure, communicated on 8 November, and with a deadline of 16 November for leave to apply to file a written brief.[111]

This difficulty in managing the dispute settlement process, if the valves controlling the admission of independent briefs are opened too wide, has been highlighted by Hervé Ascensio, according to whom: "... it is sometimes friends who cause trouble, either by disturbing comfortable certainties with their inopportune remarks or, if they are too numerous, by creating noise and disorder."[112]

Finally, apart from the internal imbalances introduced by the proliferation of voices from the North, the purely material aspects must also be taken into account, that is to say, the imbalance in the resources available for following proceedings before the WTO's dispute settlement bodies, which could only be aggravated by a further flood of *amicus curiae* briefs. Some authors have already drawn attention to this aspect of the situation:

[110] DSB meeting of June 7, 2000, WT/DSB/M/83, July 7, 2000 ¶ 8.
[111] WT/GC/M/60 ¶ 91.
[112] Ascensio, *supra* note 1, at 898.

> Developing countries have noted that this may increase the burden on countries that have only limited resources to apply to WTO dispute settlement . . . Developing countries are particularly concerned that they may be deluged by submissions from northern NGO's with significant resources to devote to influencing the outcome of WTO disputes, including industry associations and firms.[113]

Of course, on the other side of the balance sheet, for civil society there is the increased transparency and the feeling of participation in the discussion of important social issues resulting from the Appellate Body's rulings, which can only encourage what might be called the democratization of international relations. However, transparency—which is admittedly desirable—should not be confused with the active participation of NGOs in a quasi-judicial process for settling disputes between states.

IV. Concluding Remarks

Whatever its advantages and disadvantages, it would seem difficult for the WTO to go into reverse on this question of the admission of *amicus curiae* briefs, particularly as it is obvious that the position taken by the Appellate Body is tending to spill over into other international disputes.[114]

In my opinion, the Appellate Body would certainly have done better to adopt a less evolutionary interpretation of the basic texts. However, there now exists a legal situation that takes into account the Appellate Body's very innovative reading of its authority and that of panels. Whatever the *legal criticisms* that might be leveled against the Appellate Body's decision, and that have indeed been voiced by different States, the decisions taken by the Appellate Body have been adopted by Members within the context of the DSB, because of the existence of the reverse consensus rule. According to Arthur Appleton, the ruling in *Shrimp-Turtle* shows "the Appellate Body's determination to maintain a degree of public support for the WTO among what is frequently termed 'civil society'."[115]

The same author has drawn attention to the "perverse" effect of reverse consensus, which results in any ruling of the Appellate Body being necessarily endorsed by Members, even if there is a large majority which considers that ruling to be legally unsound. Thus:

> The *Carbon Steel* decision . . . illustrates that automaticity is a double-edged sword. Although automaticity prevents losing parties from blocking the adoption of appellate reports, it also severely restricts the possibility that Members can limit the effects of the Appellate Body rule making. Because of automaticity, *amicus* submissions are now here to stay.[116]

In reality, even though it may be true that governments could adopt clear rules prohibiting the admission of non-requested *amicus curiae* briefs when the dispute settlement mechanism is reviewed from a *political point of view*, considering the strength of international feeling and the WTO's desire to establish its credibility in the eyes of civil society, it would seem difficult directly to oppose the movement initiated by the Appellate Body.

[113] Gabrielle Marceau and Matthew Stilwell, supra note 106, at 164.

[114] *See*, in particular, the NAFTA arbitration in an international investment case involving a government and an investor, *Methanex Corporation v. United States, Decision on Petitions from Third Persons to Intervene as "Amici Curiae"*, January 15, 2001, http://www.naftalaw.org or http://www.international-economic-law.org. *See also* another NAFTA arbitration along the same lines, *United Parcel Service of America Inc. v. Canada*, October 17, 2001. On this question, see Brigitte Stern, *L'entrée de la societe civile dans l'arbitrage entre Etat et investisseur*, 2 REVUE DE L'ARBITRAGE 329 (2002).

[115] Appleton, *supra* note 16, at 494.

[116] Arthur E. Appleton, *Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?,* 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 691, 699 (2000).

The author I have just quoted has also drawn attention to the "political" relevance of the Appellate Body's decision, not so much from the standpoint of the Members of the WTO, many of whom, to say the least, have reservations about it, but from the standpoint of the WTO itself, as an institution with ambitions to be at the center of the international trading and, indeed, economic system:

> From a political perspective this decision satisfies a public relations objective—reducing the distrust of the WTO which exists in the environmental community. This task is accomplished without seriously compromising the trade rights guaranteed under the WTO Agreement.[117]

There can be no denying that if in the future, by a decision of the Members of the WTO, NGOs were to be refused access to the dispute settlement system via *amicus curiae* briefs—which would mean a setback for civil society relative to the present situation—the credibility of the system would be seriously impaired; on the other hand, continuing to accept such briefs would reinforce, within that civil society, the feeling that economic justice was being done. This was the line taken by Ian Brownlie with regard to the general acceptance of *amicus curiae* briefs, long before the question was raised in the WTO:

> Even if the individual is not given procedural capacity a tribunal interested in doing justice effectively must have proper access to the views of individuals whose interests are directly affected whether or not they are parties as a matter of procedure.[118]

It remains for this movement to be properly channeled to make it an efficient means of improving economic justice. The additional procedure adopted by the Appellate Body in one specific case[119] could provide a template for new general procedural rules designed to control the flow of contributions by "friends of the court" to a better system of international economic justice.[120]

It must be acknowledged that the latest developments in international economic dispute settlement—whether it be in trade disputes between states or in investment cases between a state and a private investor—have led to a breakthrough for civil society, without it yet being possible to measure all the consequences, positive and/or negative.

[117] Appleton, *supra* note 16, at 477. One commentator has written that "Amicus briefs from nongovernmental organizations could further enhance the legitimacy, and acceptance, of the WTO dispute settlement process". *See* Thomas Cottier, *The WTO and Environmental Law: Three Points for Discussion*, in TRADE AND ENVIRONMENT: BRIDGING THE GAP 59 (James Cameron and Agata Fijalkowski eds. 1998).

[118] Ian Brownlie, *The Individual Before Tribunals Exercising International Jurisdiction,* 11 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 719 (1962). *See also*, Shabtaï Rosenne, *Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 250 (Philippe Sanders eds. 1967).

[119] *See EC—Asbestos, supra* note 32.

[120] These could be adopted either by the Contracting Parties or by the Appellate Body.

CHAPTER 33

THE WTO AGREEMENT IN EUROPEAN COMMUNITY LAW: STATUS, EFFECT AND ENFORCEMENT

Philippe Ruttley and Marc Weisberger*

TABLE OF CONTENTS

I. Introduction 1461
II. Community Competence to Conclude the WTO Agreement 1461
A. Status of the Community Under GATT 1947 1461
1. Introductory Remarks 1461
2. International Law 1462
3. Community Law 1462
B. Status of the Community Under the WTO Agreement 1463
C. The Community's Relationship with the WTO: Determining the Existence of Community Competence 1464
1. Express Competence: The Common Commercial Policy 1464
2. Implied Competence 1464
D. Nature of the Competence 1465
1. Exclusive Competence 1465
2. Shared Competence 1468
E. Opinion 1/94—The Nature of the Competence Attaching to the WTO Agreement 1469
1. Multilateral Agreements on Trade in Goods 1470
2. Article 133 and GATS 1471
3. Article 133 and TRIPS 1472
4. Implied Competence—Generally 1474
5. Implied Competence and GATS 1474
6. Implied Competence and TRIPS 1475
F. Opinion 1/94, International Law and Responsibility 1476
1. Law and Competence 1476
2. Competence and Responsibility 1478
G. Conclusions 1480
III. The Effects of the WTO Agreement in the Community Legal Order 1481
A. Introduction 1481
1. The Issue of the Potential "Direct Effect" of the WTO Agreement ... 1481
2. The Doctrine of "Direct Effect": A Brief Summary 1482
3. Application of the Doctrine of "Direct Effect" to the WTO Agreement 1483

* EC and WTO Group, Clyde & Co, London. The authors wish to acknowledge the assinstance of Miss Ann Marie Hynes and Mr. Gus Macfarlane (also of Clyde & Co) in the preparation of this chapter.

4. Procedural Routes for Invoking the WTO Agreement in the EC Legal System 1484
5. The Status of GATT 1947 in the Community Legal Order—An Overview 1485
6. Is the WTO Agreement Capable of Direct Effect? 1487
B. The Duty of WTO Consistent Interpretation of EC Legislation and Measures 1498
C. Is the EC Under a Duty to Legislate in Conformity with WTO Obligations? 1499
1. General Discussion of the ECJ's Case Law 1499
2. Practical Application 1504
IV. Private EC Complaints Procedures for the Enforcement of WTO Obligations 1507
A. Introduction 1507
B. The Community's "Market Access Strategy" 1508
C. The Trade Barriers Regulation: Council Regulation 3286/94 1508
1. Scope of the TBR 1509
2. Permitted Subject—Matter of TBR Complaints 1509
3. Post Complaints Procedure 1513
4. The Outcome of the TBR Procedure: Termination, Suspension or WTO Dispute Settlement 1514
5. Initiation of WTO Proceedings 1514
D. The Article 133 Committee[1] 1519
V. Conclusions 1520

[1] For a recent survey, *see* JOHNSON, EUROPEAN COMMUNITY TRADE POLICY AND THE ARTICLE 113 COMMITTEE (1998).

I. Introduction

The purpose of this chapter is to describe and analyze the status and effect of the WTO Agreement in European Community law. These issues are of great constitutional and commercial significance to traders operating within the boundaries of one of the two largest trading blocks within the WTO's membership,[2] as well as to the Community's own trading partners within the WTO itself.

This chapter cannot hope to be exhaustive given the complexity of the issues raised and the length allowed, but sufficient references to the extensive literature on the subject will be made throughout the chapter.

The first part of this chapter describes the constitutional issues raised by the question of the Community's competence to conclude the WTO Agreement. The second part discusses whether the WTO Agreement can be used as a means to challenge the legality of Community measures, i.e. (to use EC legal terminology) whether it has "direct effect" in the Community legal order. Finally, the third part will analyze the means by which aggrieved private parties can challenge perceived third country breaches of the WTO Agreement by non-EC countries through the institutions of the Community.

II. Community Competence to Conclude the WTO Agreement

A. Status of the Community Under GATT 1947

1. Introductory Remarks

The European Community is the creation of the Treaty establishing the European Community, originally the Treaty of Rome of 1957 as subsequently amended by later Treaties. It is currently[3] composed of fifteen Member States[4] *and is* due[5] *to expand to 25 Member States on 1 May 2004*.[6] Being the creature of an international treaty, the Community's scope and powers are attributable to the terms and provisions of its constitutive instruments by a process of attributed powers; consequently, there will be areas where the EC Treaty has no application and where competence to act is divided, or rather shared, between the EC and its Member States. This situation is particularly relevant to accession to the WTO Agreement by the EC and its Member States as described below.

The EC must be distinguished from the European Union ("EU") which is the creation of the 1997 Treaty on European Union of Amsterdam. The Treaty on European Union is designed to promote the further integrated development of the EC's Member States by establishing a "European Union" embracing a wide range of additional areas of cooperation alongside the European Community itself (such as foreign policy, security and judicial and political cooperation). This chapter is therefore concerned with the European Community's external trade relations and reference throughout will be to the EC, rather than to the EU, unless the context otherwise requires.

[2] *U.S.-EU: The Biggest Trading Elephants in the Jungle—But Will they Behave?,* speech by Pascal Lamy to The Economic Strategy Institute, Washington D.C., June 7, 2001.

[3] This chapter was finalized in July 2003.

[4] Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

[5] Subject to successful acceptance of membership under the constitutional procedures of each applicant state concerned.

[6] The new EC Member States would be: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

The Treaty of Amsterdam renumbered the EC Treaty extensively. Except where the context requires, we have used the new numbering throughout, amending quotations from pre-Amsterdam cases using the old numbering.

2. International Law

As GATT 1947 was only open to participation by governments,[7] the Community could never formally become a contracting party to GATT 1947. Accordingly, the Member States remained contracting parties and were individually responsible for the fulfillment of their GATT 1947 obligations.

Although the compatibility of the EEC Treaty with GATT 1947 was never conclusively determined,[8] the Community was given the *de facto* right to participate fully in sessions of the contracting parties, working groups and committees for matters within EEC competence. The Commission acted for the Community in most areas of GATT business, although the Member States retained competence over budgetary matters.

3. Community Law

In *International Fruit*,[9] the ECJ had to consider whether the Community could, as a matter of internal Community law, be regarded as a party to GATT 1947. This question arose in the context of a referral to the ECJ by the Dutch courts, which questioned whether Community legislation could be invalid as being contrary to GATT 1947.

The Court began its analysis by stating that before a Community measure can be impugned on the grounds of incompatibility with a provision of international law, the Community must first be bound by that provision.[10] The Court concluded that, in so far as under the EEC Treaty the Community had assumed the powers previously exercised by the Member States in the area governed by GATT 1947, the provisions of that agreement had the effect of binding the Community.[11] The Court's conclusion was based on:

(a) The fact that the Member States were bound by GATT 1947 at the time they concluded the EEC Treaty and that by concluding the Treaty they could not withdraw from their obligations to third parties;[12]
(b) The provisions of the EEC Treaty (in particular Articles 110[13] and 234[14]), which made clear the Member States' desire to observe the undertakings in GATT 1947;[15]
(c) The Community's assumption of the functions inherent in its tariff and trade policy, which showed the Member States' wish to bind the Community by GATT 1947 obligations;[16] and
(d) The fact that the Community, acting through its own institutions, had appeared as a partner in tariff negotiations and as a party to the agreements concluded within the framework of GATT 1947.[17]

[7] GATT 1947, Art. XXXII:1 and Art. XXIV.
[8] *See* KEES JAN KUILWIJK, THE EUROPEAN COURT OF JUSTICE AND THE GATT DILEMMA: PUBLIC INTEREST VERSUS INDIVIDUAL RIGHTS 63–7 (1996).
[9] Cases 21–24/72 *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.
[10] *Id.* ¶ 7.
[11] *Id.* ¶ 18.
[12] *Id.* ¶¶ 10–11.
[13] Now, after amendment, Art. 131.
[14] Now, after amendment, Art. 307.
[15] *International Fruit*, *supra* note, ¶¶ 12–13.
[16] *Id.* ¶¶ 14–15.
[17] *Id.* ¶ 16–17.

However, although the Community was bound by GATT 1947 as a matter of Community law, the rights of individuals, Member States or Community institutions to challenge Community measures on the grounds that they were inconsistent with GATT 1947 were severely curtailed. The issues concerning such rights under both GATT 1947 and the WTO Agreement are considered below.[18]

B. Status of the Community Under the WTO Agreement

The WTO Agreement is open to acceptance by the "European Communities" and the Member States by virtue of their original membership of the WTO.[19] The Final Act embodying the results of the Uruguay Round was signed by the Member States and by the Presidency and the Commission on behalf of the Communities in Marrakech on April 15, 1994. The WTO Agreement was signed (subject to conclusion) on the same day. On December 22, 1994, the Council adopted a Decision concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–94).[20]

As a member of the WTO, the Community has the right to vote and speak at the Ministerial Conference and the General Council. When the Community exercises its right to vote, the combined vote of the Community and the Member States equals the number of Member States that are members of the WTO.[21]

However, the provisions of the WTO Agreement belie a hidden conflict between the Commission and the Member States as to the nature of the Community's power or "competence" to conclude the WTO Agreement. The Commission maintained that the Community had "exclusive" competence to conclude all of the WTO Agreement. That is to say, the Commission claimed that the right of Member States to conclude the WTO Agreement and to speak and vote at its meetings should be *wholly* assumed by the Community. On the other hand, the Member States maintained that specific areas of the WTO Agreement, in particular GATS and TRIPS, were subject to "shared" competence between the EC and its Member States. That is to say, the Community and the Member States would conclude the relevant provisions as separate WTO Members, each able to act individually in votes and meetings. The ECJ ruled on these issues in *Opinion 1/94,*[22] pursuant to Article 300(6) EC, which gives the ECJ power to give interpretative rulings as to the compatibility of an agreement with EC law.

However, in order to analyze the reasoning in *Opinion 1/94* fully, it is first necessary to set out the relevant "competence" rules of Community external relations law. The reader should note that this brief survey is not exhaustive and deals only with those aspects of general Community external relations law which have a bearing on the case.[23]

[18] *See* PART B: THE EFFECTS OF THE WTO AGREEMENT IN THE COMMUNITY LEGAL ORDER, *infra.*

[19] *WTO Agreement*, Arts. XI and XIV.

[20] *Council Decision 94/800/EC*, OJ 1994 L 336, at 1. Some of the legal effects of this Decision are discussed in footnote 179 *infra*.

[21] *WTO Agreement*, Art. IX:1 and note 2 thereto.

[22] *See E. Opinion 1/94—The Nature of the Competence Attaching to the WTO Agreement, infra* note 23 and accompanying text.

[23] More detailed treatment of the subject will be found in, *inter alia* McGoldrick, International Relations Law of the European Union (1997); Macleod, Hendry and Hyett, The External Relations of the European Communities (1996); The General Law of EC External Relations (Dashwood and Hillion eds., 2000);

C. The Community's Relationship with the WTO: Determining the Existence of Community Competence

The Community only has those powers which have been attributed to it by the Member States. This principle of attribution of powers finds its expression in Article 5 EC, which provides that "[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." The principle was confirmed by the ECJ, when it stated in *Opinion 2/94* that the Community "has only those powers which have been conferred upon it."[24]

The Community's competence to conclude international agreements can arise expressly or implicitly from the Articles of the EC Treaty or from measures adopted by the Community institutions. Each source of competence will be considered in turn.

1. Express Competence: The Common Commercial Policy

In the context of the WTO Agreement, the most relevant provisions of the EC Treaty that give the Community competence to conclude international agreements are those governing the "common commercial policy".

Article 3(b) EC provides that one of the activities of the Community shall be a "common commercial policy". The provisions governing the common commercial policy are set out in Title IX, Articles 131–134 EC. Of these Articles, the following are germane:

Article 131 states that by creating a customs union, the Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers. Further, it also provides that the common commercial policy shall take into account the favorable effect which the abolition of customs duties between Member States may have on the increase in the competitive strength of undertakings in those States.

Article 133 provides that the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

It also provides that where agreements with one or more States or international organizations need to be negotiated in the context of the common commercial policy, the Commission is to make recommendations to the Council, which can authorize the Commission to open the necessary negotiations. The Commission must conduct the negotiations in consultation with a committee appointed by the Council, which is commonly known as the Article 133 Committee. The Commission must also negotiate within the framework of such directives as the Council may issue to it. The internal procedure for the signing, conclusion and incorporation into EC law of any such agreements is then laid down in Article 300 EC.

2. Implied Competence

Implied external relations competence is an uncertain area of EC law.[25] However, for present purposes, it is arguable that competence can be implied in the following situations:

[24] [1996] ECR I-1759, ¶ 23.

[25] *See* MACLEOD, HENDRY AND HYETT, *supra* note 24, at 47–53.

(a) Where the Community has adopted internal measures in a specific area, the Community also has competence to conclude international agreements in that area;[26]
(b) Where the Community's objectives under the EC Treaty cannot be achieved by internal measures alone because third countries also have to participate in the relevant legislative scheme;[27] and
(c) More controversially, where the participation of the Community in an international agreement is necessary for the attainment of the objectives of EC Treaty.[28]

D. Nature of the Competence

It should be noted that the existence of the Community's competence to conclude the WTO Agreement has not been formally tested before the ECJ. Rather, arguments between the Commission and the Member States have focussed on the *nature* of that competence. As noted above,[29] there are two types of competence: exclusive and shared. Each will be considered in turn.

1. Exclusive Competence

In certain cases, the Community's competence in a given area leads to the exclusion of any Member State competence in the same area. It is therefore crucial to determine the circumstances when this "exclusive" competence can arise, and the implications of such a competence for Member States.

(a) Determining When Competence is Exclusive. In *Opinion 2/91*, the ECJ laid down a concise summary of the sources of exclusive competence:

> The exclusive or non-exclusive nature of the Community's competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis.[30]

Therefore, it may be said that exclusive competence arises from the following sources.

(b) Express Provisions of the Treaty. As regards Article 133 EC and the common commercial policy, the ECJ has held[31] that the common commercial policy was conceived in the context of the operation of the common market, for the defense of the common interests of the Community within which the particular interests of the Member States must endeavor to adapt to each other. The ECJ held that this common interest prevented the

[26] Case 22/70 *Commission v. Council* [1970] ECR 263; *Opinion 1/94* [1994] ECR I-5267; *Opinion 2/91* [1993] ECR I-1061; Joined Cases 3,4 and 6/76 *Cornelis Kramer* [196] ECR 1279.
[27] *Opinion 1/76* [1977] ECR 741; *Opinion 1/94*, *supra* note 25; *Opinion 2/92* ECR [1995] I-521.
[28] *Opinion 1/76*, *supra* note; *Opinion 2/91*, *supra* note 25. Although this interpretation is now doubtful after the delimitation of the scope of dicta in *Opinion 1/76* by *Opinion 1/94*, *supra* note 26. For comment prior to *Opinion 1/94 see, e.g.*, Pescatore, *External Relations in the Case Law of the ECJ*, 16 COMMON MARKET LAW REVIEW 615 (1979); Hardy, *Opinion 1/76 of the Court of Justice,* 14 COMMON MARKET LAW REVIEW 561, 588 (1977).
[29] *See The Community's Relationship with the WTO*, *supra* Part II C.
[30] *Opinion 2/91, supra* note 25, ¶ 9.
[31] *Opinion 1/75* [1975] ECR 1355, 1364.

Member States from acting concurrently (or independently) to secure their own interests. The provisions of Articles 133 EC,[32] on the conclusion of international agreements within the context of the common commercial policy, clearly showed that exercise of concurrent powers by the Member States and the Community was impossible. Thus the ECJ ruled that Community competence as regards the common commercial policy is exclusive.

The exclusive nature of Community competence under the common commercial policy was particularly relevant in *Opinion 1/94*, where the Commission argued that all of the WTO Agreement fell within its scope.[33]

(c) Internal Measures Adopted By the Community Institutions. The ECJ has stated in *ERTA* that:

> [E]ach time the Community, with a view to implementing a common policy envisaged in the Treaty, adopts provisions laying down the common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations which affect those rules. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.[34]

The jurisprudential base of the "*ERTA* principle" is said to be the rule that Community law is supreme over national law. That is to say, in the case of an actual or potential conflict between the Community legal order and the laws of Member States, the former must prevail. As the uniform legal environment of the Community common market could be undermined by the conclusion of independent agreements by individual Member States, the rule of supremacy forbids this scenario from arising. From an economic perspective, the *ERTA* principle also prevents Member States from creating trade diversions within the Community via independent agreements with third countries. External competition for foreign investment and trade is therefore eliminated to complement restrictions on intra-Community competition.[35]

Although the *ERTA* principle is easily stated, its precise scope is still uncertain, for there can be varying types of "common rules" within the Community legal order, each type having a differing scope and substantive content from the other. Nevertheless, the following statements of principle can arguably be deduced from the case law following *ERTA*.

First, if internal Community rules *completely or exhaustively* regulate a particular sphere, the Community also acquires exclusive external competence in respect of that sphere. If the Member States were to conclude agreements in that area, such agreements would affect the applicable Community rules by affecting their existing scope, and would accordingly be impermissible under the *ERTA* principle.[36]

The *ERTA* principle also applies where Community legislation is *not complete or exhaustive*. In *Opinion 2/91*, the ECJ determined that Part III of the ILO Convention was concerned with the area of social policy:

[32] And Art. 114 of the EC Treaty (now repealed).
[33] *See* E. Opinion 1/94—The Nature of the Competence Attaching to the WTO Agreement, *infra* Part II E.
[34] *Commission v. Council*, *supra* note 25, ¶ 17.
[35] *See, e.g.*, O'Keefe, *Exclusive, Concurrent and Shared Competence*, in Dashwood and Hillion, *supra* note 22, 179, 182.
[36] *See* Temple Lang, *The ERTA Judgment and the Court's Case Law on Competence and Conflict*, 6 REL 183 (1986).

> [W]hich is already covered to a large extent by Community rules progressively adopted since 1967 with a view to achieving an even greater degree of harmonization and designed, on the one hand to remove barriers to trade resulting from differences in legislation from one Member State to another and, on the other hand, to provide, at the same time, protection for human health and the environment.[37]

Despite the less than total coverage of Community rules in the area, the ECJ nevertheless held that the Community had exclusive competence within it, as Part III of the ILO Convention would "affect" those Community rules. Thus, according to some commentators, when determining whether exclusive competence arises from non-comprehensive Community rules:

> The question in any given case would be whether the internal Community rules are intended to fix standards or establish common rules and, if so, whether the extent of the Community's legislative activity is such that independent action by the Member States would inevitably have the effect of undermining or affecting these rules or altering their scope. Clearly, the greater the amount of Community legislation on a matter, or the more extensively a matter is regulated at Community level, the less room there would be for the Member States to act unilaterally; the more likely, therefore, that the Community's competence will be exclusive.[38]

The extent and coverage of Community legislation in the areas of services and intellectual property became particularly relevant in *Opinion 1/94*, when the ECJ had to determine the nature of the Community competence attaching to the GATS and TRIPS agreements.[39]

(d) Express Power in an Internal Measure. Community measures often give the Community authority to enter into agreements with third countries. In *Opinion 1/94*, the Court stated that "whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries are expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts."[40] Although this quotation is in broad terms, it should not be interpreted as meaning that every express external power in an internal measure creates exclusive Community competence. Each measure should be construed on its own terms in order to discover whether this is the case.

(e) External Powers Complement Internal Powers. The Community may also have exclusive external competence even if no internal rules have been adopted. However, this will only be the case where "the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules."[41] This principle is illustrated by *Opinion 1/76*.[42] The subject of the case was a draft Agreement establishing a European laying-up fund for inland waterway vessels. The proposed scheme was designed to eliminate disturbances arising from surplus carrying capacity for goods by inland waterway in the Rhine and Moselle basins. It would not have been possible fully to attain that objective through internal Community rules, because of participation on the inland trade by external Swiss vessels. Thus,

[37] *Opinion 2/91*, *supra* note 25, ¶ 25.
[38] MACLEOD, HENDRY AND HYETT, *supra* note 22, at 59.
[39] *See E. Opinion 1/94—The Nature of the Competence Attaching to the WTO Agreement, infra* Part II E.
[40] *Opinion 1/94*, *supra* note 25, ¶ 95.
[41] *Opinion 2/92*, *supra* note 26, ¶ 32.
[42] *Opinion 1/76, supra* note 26.

the Community had exclusive competence to conclude an international agreement with Switzerland, which is not an EC Member State, without any internal rules having been adopted.[43]

The interpretation of *Opinion 1/76* in *Opinion 1/94* is considered below.[44]

(f) Consequences of the Existence of Exclusive Community Competence. When it is established that the Community has exclusive competence in a given area, the Member States may no longer act in that area.[45] In legal theory, the powers of the Member States have been transferred completely to the Community, and the Member States cannot exercise concurrent powers. The rationale behind this position is that Member States should not be entitled to conclude international agreements which might affect or alter the scope of Community measures.[46]

The Member States may not adopt positions which differ from those which the Community intends to adopt in relation to third countries, nor take other action which would obstruct the Community in international relations in the relevant field.[47] Nor may they adopt internal legislation which undermines, or contradicts, measures adopted, externally or internally, by the Community.

A further result is that a Member State must not fetter the Community in exercising its external powers.[48] In addition, the Member States must employ all means at their disposal in order to ensure the participation of the Community in such agreements.[49]

Unilateral action by a Member State in an area within the Community's exclusive competence would be a violation of the Member State's obligations under the EC Treaty. The Commission, or other Member States, can then bring the alleged violation before the ECJ.[50]

However, in particular cases, the Member States may act in areas where the Community has exclusive competence. An example of this principle can be found in the conduct of the Member States in the context of GATT 1947. Member States then had to represent the interests of the Community when voting because of the Community's inability to become a Contracting Party. In such cases, the Member States act to protect the interests of the Community.[51]

2. Shared Competence

Community competence is not always exclusive. It may be truly "shared" between the Community and the Member States in a given sphere. That is to say, the Community and the Member States may both have the power to conclude a given agreement as independent contracting parties. Alternatively, within the confines of a particular agreement, some

[43] For other examples of this type of agreement include those relating to the conservation of fisheries; *see Opinion 1/94, supra* note 25.

[44] *See E. Opinion 1/94—The Nature of the Competence Attaching to the WTO Agreement, Infra* Part II E.

[45] *Opinion 1/75*, *supra* note 30, at 1364; *Commission v. Council*, *supra* note 25, ¶ 17; Case 804/79 *Commission v. UK* [1981] ECR 1045, ¶¶ 17, 18 and 20).

[46] *Commission v. Council*, *supra* note 25, ¶ 22.

[47] *Opinion 1/75*, *supra* note 30, at 1364.

[48] *Ruling 1/78* [1978] ECR 2151, ¶ 32.

[49] *Kramer*, *supra* note 25.

[50] Under Arts. 226 and 227 EC respectively.

[51] *See Opinion 2/91*, *supra* note 25, ¶ 5. Another example of Member States acting in the Community's interest despite exclusive Community competence in a given area was the enactment of the Member States of limited measures, in the absence of Community legislation, to conserve fishing stocks. *See Kramer*, *supra* note 25; *Commission v. Ireland* [1978] ECR 417; Joined Cases 185–204/78 *Van Dam et al.* [1979] ECR 2345; Case 804/79 *Commission v. UK* [1981] ECR 1045.

provisions may theoretically be within the competence of the Community, while others remain within the competence of the Member States. Such agreements are commonly known as "mixed" agreements. Consequently, in some cases, it may be hypothetically possible to split the provisions of a mixed agreement into two groups: the first to be ratified by the Community, the second by the Member States. Thus, it may be strictly inaccurate to say that mixed agreements involve "shared" competence, as the respective competencies are in fact exclusive. However, we would suggest there is still an overall competence for such agreements, which is shared between the Community and the Member States.

Shared competence has not been consistently accepted by third countries, which have concerns as to whether the Member States or the Community is the legally relevant counter-party. Nevertheless, the ECJ has consistently recognized the validity of the principle as a matter of Community law.

(a) When Shared Competence Arises. There is some authority for the proposition that shared competence is to be presumed, unless exclusive competence has been established. Nevertheless, there are at least five situations in which shared competence has been found to exist:

- Where that consequence flows from the Treaty Article conferring power on the Community;
- Where the Community has potential competence which it has not exercised;
- Where an agreement includes provisions within Community competence and provisions within Member State competence;
- Where the Community's competence arises from the existence of internal "minimum rules";
- And in certain areas, such as intellectual property, where Community and Member State competence can co-exist without either displacing the other.[52]

(b) Member State Responsibility When Competence Is Shared. In the situation of shared competence, Member States do not have total freedom to act in their own interests. The ECJ has ruled that there should be a "close association" between the institutions of the Community and the Member States in the processes of negotiating, concluding and implementing an agreement.[53] Accordingly, Community co-ordination committees are established within the context of each agreement to ensure that a close association is achieved. It is in these committees that the day to day attribution of responsibility between Member States and the Community is discussed before third countries are engaged.

E. Opinion 1/94—The Nature of the Competence Attaching to the WTO Agreement

During the Uruguay Round, the Commission acted as sole negotiator on behalf of the Community and the Member States. However, that state of affairs was without prejudice to the question of competence and the WTO Agreement. On April 6, 1994, shortly before the WTO Agreement was due to be signed in Marrakech, the Commission sought the Opinion of the ECJ on the following questions.[54]

[52] MACLEOD, HENDRY AND HYETT, *supra* note 22, at 63–67.

[53] *Opinion 2/91*, *supra* note 25, ¶ 36; *Ruling 1/78*, *supra* note 47, ¶¶ 34–36.

[54] Under Art. 300(6) EC, the Council, the Commission or a Member State may obtain the opinion of the ECJ as to whether an agreement envisaged is compatible with the EC Treaty.

As regards the results of the Uruguay Round GATT trade talks contained in the Final Act of December 15, 1993:

(1) Does the European Community have the competence to conclude all parts of the Agreement establishing the WTO concerning trade in Services (GATS) and the trade-related aspects of intellectual property including trade in counterfeit goods (TRIPS) on the basis of the EC Treaty, more particularly on the basis of Article 113 EC alone, or in combination with Article 100a EC and/or Article 235 EC?
(2) Does the European Community have the competence to conclude alone also those parts of the WTO Agreement which concern products and/or services falling exclusively within the scope of application of the ECSC and the EAEC Treaties?
(3) If the answer to the above questions is in the affirmative, does this affect the ability of Member States to conclude the WTO Agreement, in the light of the agreement already reached that they will be original Members of the WTO?[55]

However, by the time that the ECJ came to deliver *Opinion 1/94*,[56] both the Community and the Member States had signed the Final Act and the WTO Agreement. An argument was put forward by Spain that the request for an Opinion was inadmissible. Spain claimed that the ECJ's jurisdiction to give Opinions on the conclusion of international agreements by the Community only existed where the Community had not yet entered into any international obligations. As the Community had signed the Final Act and WTO Agreement, it was under an international obligation to forward the text to the Community institutions for approval.[57]

The ECJ rejected this argument on the grounds that unless the Community had fully expressed its consent to be bound by an agreement, its jurisdiction to give Opinions remained valid.[58]

1. Multilateral Agreements on Trade in Goods

The Commission and the Member States were agreed that the majority of the Multilateral Agreements on Trade in Goods were within the scope of the common commercial policy

[55] *Opinion 1/94*, *supra* note 25, ¶ 6.

[56] *See, e.g.*, Pescatore, *Opinion 1/94 on Conclusion of the WTO Agreement: Is There an Escape from a Programmed Disaster?*, 36(2) COMMON MARKET LAW REVIEW 387 (1999); Ni Chatain, *The European Community and the Member States in the Dispute Settlement Understanding of the WTO: United or Divided?* 5(4) ELJ 461 (1999); Heliskoski, *Joint Competence of the European Community and its Member States and the Dispute Settlement Practice of the World Trade Organization,* 2 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 61 (1999); Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34(4) COMMON MARKET LAW REVIEW 11 (1997); Rivoal, *Opinion of the European Court of Justice on the WTO Agreement (November 15, 1994)*, 21(1) A&SL 25 (1996); Vedder and Folz, *Opinion 1/94*, 7(1) EUROPEAN JOURNAL OF INTERNATIONAL LAW 131 (1996); Appella, *Constitutional Aspects of Opinion 1/94 of the ECJ Concerning the WTO Agreement*, 45(2) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 440 (1996); Emiliou, *The Death of Exclusive Competence?*, 21(4) EL REV. 294 (1996); Footer, *Opinion 1/94 on Community and Member States' Competences under the WTO: Implications for Public Procurement*, 2 PPLR CS14 (1995); Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession*, 32(3) COMMON MARKET LAW REVIEW 763 (1995); Hilf, *The ECJ's Opinion 1/94 on the WTO—No Surprise, But Wise?*, 6(2) EUROPEAN JOURNAL OF INTERNATIONAL LAW 245 (1995); *The Aftermath of Opinion 1/94 or How to Ensure Unity of Representation for Joint Competences*, 32(2) COMMON MARKET LAW REVIEW 385 (1995); Maunu, *The Implied External Competence of the European Community after the ECJ Opinion 1/94—Towards Coherence or Diversity?*, 2 LEGAL ISSUES OF EUROPEAN INTEGRATION 115 (1995); Zijlmans, *The (Exclusive) External Competence of the European Community*, 2(4) MJ 405 (1995).

[57] *Id.* ¶ 10.

[58] *Id.* ¶¶ 11–12. See the converse situation in *Opinion 3/94* [1995] ECR I-4577, where Germany's request for an Opinion on the Banana Framework Agreement was declared inadmissible as the Community was already bound by its terms.

and thus exclusive Community competence. However, the ECJ clarified the following minor issues:

(a) Agreements concluded pursuant to Article 113 EC could cover trade in Euratom and European Coal and Steel Community products;[59]
(b) The Agreement on Agriculture, the SPS Agreement and the TBT Agreement all fell within the common commercial policy.[60]

2. Article 133 and GATS

The Commission's main submission was that GATS fell within the scope of Article 133 EC and thus within exclusive Community competence.[61] More specifically, it drew a distinction between services other than transport and services comprised in transport. All of the former were said to be within the scope of Article 133 EC. Of the latter, "international agreements of a commercial nature in relation to transport (as opposed to those relating to safety rules)" were claimed to be within the coverage of the common commercial policy.[62]

(a) Services Other Than Transport. The ECJ drew attention to the "open nature" of the common commercial policy, which had been recognized in *Opinion 1/75*[63] and *Opinion 1/78*,[64] and held that "trade in services cannot immediately, and as a matter of principle, be excluded from the scope of Article [133]."[65]

However, the Court then proceeded to analyze the "definition of trade in services" given in the GATS:

> Under Article I(2) of the GATS, trade in services is defined, for the purposes of that agreement, as comprising four modes of supply of services: (1) cross-frontier supplies not involving the movement of persons; (2) consumption abroad, which entails the movement of the consumer into the territory of the WTO member country in which the supplier is established; (3) commercial presence, i.e. the presence of a subsidiary or branch in the territory of the WTO member country in which the service is to be rendered; (4) the presence of natural persons from a WTO member country, enabling a supplier from one member country to supply services within the territory of any other member country.[66]

As regards mode 1, cross-frontier supplies, the ECJ declared that the situation was "not unlike trade in goods",[67] as neither the supplier nor the consumer moved from their respective countries. As trade in goods was within the scope of the common commercial policy, the ECJ held that "there is no particular reason" why cross-frontier supplies should not also fall within the scope of Article 133 EC.[68]

However, the ECJ held that none of modes 2, 3 or 4, that is consumption abroad, commercial presence or the presence of natural persons, came within the common commercial policy. Its reasoning was as follows:

[59] *Id.* ¶¶ 24–27.
[60] *Id.* ¶¶ 28–34.
[61] *Id.* ¶ 35.
[62] *Id.* ¶ 36.
[63] *Opinion 1/75, supra* note 30.
[64] *Opinion 1/78, supra* note 47.
[65] *Opinion 1/94*, *supra* note 25, ¶ 41.
[66] *Id.* ¶ 43.
[67] *Id.* ¶ 44.
[68] *Id.*

The ECJ noted the listing of the common commercial policy on the one hand, and "measures concerning the entry and movement of persons"[69] on the other, as separate activities of the Community in Article 3 EC. It also drew attention to the specific chapters in the EC Treaty on the free movement of natural and legal persons.[70] Accordingly, it held that "the treatment of nationals of non-member countries on crossing the external frontiers of Member States cannot be regarded as falling within the common commercial policy."[71] Thus, the crucial distinction between cross-frontier supply and the other modes, the movement of persons into the Community, took the remaining modes outside of the scope of Article 133 EC.

(b) Transport Services. The ECJ also approached transport services from a structural analysis of the EC Treaty. It held that transport services were subject to Title IV of the EC Treaty, as opposed to Title VII on the common commercial policy. As it had been decided in *ERTA* that only implied competence arose from measures adopted under Title IV, it followed that transport matters were not covered by Article 133 EC.[72] Further, the ECJ found that no distinction had been made in either *ERTA* or *Opinion 1/76* between agreements on transport safety rules and commercial agreements; both were outside the scope of the common commercial policy.[73]

The Commission had relied upon a series of embargoes based on Article 133 EC which had involved the suspension of transport services. However, these were dismissed as non-conclusive. The transport services embargoes were necessary adjuncts to the primary embargoes on goods. In any event, the ECJ stated, the embargo practice of the Council did not create a binding precedent for the Court.[74]

Thus, the ECJ concluded that "only cross-frontier supplies are covered by Article [133] of the Treaty and that international agreements in the field of transport are excluded from it."[75]

3. Article 133 and TRIPS

The Commission argued that TRIPS fell within the common commercial policy because TRIPS rules are closely connected to trade in the products and services to which they apply.[76]

The ECJ identified a similarity between Section 4 of Part III of TRIPS, which contains specific rules as to measures to be applied at border crossing points, and Council Regulation (EEC) No 3842/86 of December 1, 1986 laying down measures to prohibit the release, for free circulation, of counterfeit goods.[77] Confirming that the Regulation was correctly based on Article 133 EC, as it related to measures taken by customs authorities at the frontier of the Community, the ECJ reasoned that the equivalent anti-counterfeit "border" provisions of TRIPS were also within Article 133 EC.[78]

[69] Art. 3.1(d) EC.
[70] *Opinion 1/94*, *supra* note 25, at 46.
[71] *Id.* ¶ 47.
[72] *Id.* ¶ 48.
[73] *Id.* ¶¶ 49–50.
[74] *Id.* ¶¶ 51–52.
[75] *Id.* ¶ 53.
[76] *Id.* ¶ 54.
[77] OJ 1986 L 357, at 1.
[78] *Opinion 1/94*, *supra* note 25, ¶ 55.

The ECJ then ruled that the remainder of TRIPS was not within Article 133 EC for the following reasons:

First, it agreed that the exercise of intellectual property rights "has effects" on trade in goods, and that such rights are "specifically designed" to produce such effects. However, that was not enough to bring them within the common commercial policy, as intellectual property rights "do not relate specifically to international trade; they affect internal trade just as much as, if not more than, international trade".[79]

Secondly, as TRIPS laid down harmonized rules in areas where there were no internal Community harmonization measures,[80] its conclusion under Article 133 EC would enable the Community to achieve harmonization by the "back door". Such "back door" harmonization would circumvent the harmonization, voting and procedural rules expressly laid down in the EC Treaty.[81]

Thirdly, the Commission relied on the "New Commercial Policy Instrument",[82] the forerunner to the Trade Barriers Regulation, which had been adopted under Article 133 EC. Various Decisions taken under the New Commercial Policy Instrument were said to have been taken "to defend the Community's intellectual property interests".[83] However, the ECJ stated that such Decisions were unrelated to harmonization, which was the "primary objective" of TRIPS. They were concerned with matters which fell within the common commercial policy.[84] Similarly, the suspension of tariff preferences against Korea for its discrimination in relation to intellectual property rights[85] was not persuasive. As the grant of preferences was within Article 133 EC, so too was their suspension.[86]

Fourthly, the fact that the Community had concluded international agreements containing intellectual property provisions and based them on Article 133 EC[87] did not bring TRIPS within the Article as well. Their scope was limited to consultation procedures and hortatory clauses encouraging non-Community counter-parties to bring the level of their intellectual property protection up to that of the Community.[88]

Finally, exclusive Community agreements with Austria[89] and Australia,[90] which contained provisions relating to the reciprocal protection of descriptions of wines, were

[79] *Id.* ¶ 57.

[80] The Community is empowered to harmonize national intellectual property laws under Arts. 94, 95 and 308 EC.

[81] *Opinion 1/94, supra* note 25, ¶ 60.

[82] Council Regulation (EC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices (OJ 1984 L 252, at 1).

[83] *Opinion 1/94*, *supra* note 25, ¶ 62. E.g., Commission Decision 87/251/EEC of March 12, 1987 on the initiation of an international consultation and disputes settlement procedure concerning a United States measure excluding imports of certain aramid fibers into the United States of America (OJ 1987 L 117, at 18).

[84] *Id.* ¶ 63.

[85] Within the framework of Council Regulation (EC) No 4257/88 of December 19, 1988 applying generalized tariff preferences for 1989 in respect of certain industrial products originating in developing countries (OJ 1988 L 375, at 1).

[86] *Opinion 1/94*, *supra* note 25, ¶ 65.

[87] *E.g.*, the Agreement between the European Economic Community and the People's Republic of China on trade and trade in textile products, initialed on 9 December 1998 (OJ 1988 L 380, at 2) and the Agreement with Hungary of December 16, 1991 (OJ 1992 L 116, at 2).

[88] *Opinion 1/94*, *supra* note, ¶¶ 67–68.

[89] Agreement with the Republic of Austria of December 23, 1988, on the control and reciprocal protection of quality wines and "retsina" wine (OJ 1989 L 56, at 2).

[90] Agreement with Australia of January 26 and 31, 1994, on trade in wine (OJ 1994 L 86, at 3).

considered. However, the ECJ found that these agreements were directly linked with the common agricultural policy and Community rules on wine, not with the common commercial policy.[91] Further, these agreements had no bearing on competence to conclude the provisions of TRIPS which dealt with patents and designs, the protection of undisclosed technical information, trade marks or copyright.[92] In this context, it may be asked why on this analysis, the Agreement on Agriculture was held to fall squarely within the common commercial policy and not within the common agricultural policy.[93]

4. Implied Competence—Generally

As an alternative argument to achieve exclusive competence in relation to both GATS and TRIPS, the Commission maintained that such competence arose implicitly from the provisions of the EC Treaty establishing internal Community competence, from internal Community measures, or from the need to enter into international commitments with a view to achieving an internal Community objective. Finally, it claimed that exclusive competence existed by virtue of Articles 95 and 308 of the EC Treaty.[94]

5. Implied Competence and GATS

(a) Treaty Provisions Establishing Internal Community Competence. The Commission cited the internal Community powers on the right of establishment, freedom to provide services and transport as a basis for the exclusive external competence to conclude the whole of GATS.[95]

However, this argument was rejected. As regards transport, the ECJ affirmed its judgment in *ERTA* that competence only becomes exclusive when "common rules" which could be affected by Member State commitments come into existence. As not all transport matters were covered by such common rules, exclusive competence could not attach to them.[96]

As regards the right of establishment and freedom to provide services, it was found that the relevant Treaty Articles "contain no provisions on the problem of the first establishment of national of non-member countries and the rules governing their access to self-employed activities."[97] Consequently, exclusive competence could not be inferred from those provisions, save for access to service markets which were the subject of cross-border supplies. The latter were within the scope of Article 133 and thus the exclusive competence of the Community.[98]

(b) Achieving Internal Community Objectives. The Commission maintained, on the basis of *Opinion 1/76*,[99] that internal measures were not necessary to create exclusive competence. It could arise where international agreement was necessary for the attainment

[91] *See* Council Decision 94/184/EC of January 24, 1994, concerning the conclusion of an Agreement between the European Community and Australia on trade in wine (OJ 1994 L 86, at 1).
[92] *Opinion 1/94*, *supra* note 25, ¶ 70.
[93] *See, e.g.*, Bourgeois, *supra* note 55, at 776.
[94] *Opinion 1/94*, *supra* note 25, ¶ 72.
[95] *Id.* ¶ 73.
[96] *Id.* ¶ 77.
[97] *Id.* ¶ 81.
[98] *Id.*
[99] *Opinion 1/76, supra* note 26.

of an internal Community objective identified in the Treaty. Thus, the Commission identified the cohesion of the internal market and the participation of the Community in international relations as relevant objectives in this context.[100]

The Court rejected this interpretation of *Opinion 1/76*. The scope of the case, it decided, was limited to a situation where the achievement of an internal Community objective (short-term over-capacity elimination on the Rhine and Moselle basins) could only be achieved through the participation of a non-member country (Switzerland, due to the participation of Swiss vessels in the trade). The ECJ found another example of this scenario in the international restriction of fishing on the high seas. If this was the Community's objective, it could only be effected through the participation of non-member countries. Only in this case would exclusive competence arise without the adoption of internal measures.[101]

However, attainment of the internal freedom of establishment and freedom to provide services was not "inextricably linked" to the treatment to be afforded to national of non-member countries in the Community or to Member State nationals in non-member countries.[102] Thus, the provisions of the Treaty governing these internal freedoms could not create exclusive competence in relation to the GATS.

As regards Articles 95 and 308 EC, the ECJ repeated its ruling that external competence cannot be conferred if an internal power has not been exercised,[103] and found that there was not complete harmonization in all service sectors; thus, exclusive competence in relation to all those sectors could not arise.[104]

6. Implied Competence and TRIPS

(a) Internal Measures Which Could Be Affected by Member State Participation. The ECJ summarily rejected the Commission's TRIPS arguments based on *Opinion 1/76*[105] and Articles 95 and 308 EC for the reasons stated above. In relation to the former, the ECJ held that "unification or harmonization of intellectual property rights in the Community context does not necessarily have to be accompanied by agreements with non-member countries in order to be effective."[106]

Thus, all that remained was the Commission's final argument that internal Community measures would be affected within the meaning of the *ERTA* principle if Member States were to conclude TRIPS. This argument was also rejected, as harmonization within the Community was not co-extensive with the areas covered by TRIPS. Thus, the essential requirement of exclusive competence, the exercise of Community internal powers, had not been fulfilled.[107]

(b) Summary of Competencies and Future Developments. In summary, therefore, the result of *Opinion 1/94* was that competence was shared in relation to GATS (save for cross-frontier services) and TRIPS (save for anti-counterfeit "border" measures). Conversely, Community competence was exclusive in relation to the Multilateral Agreements on Trade in Goods.

[100] *Opinion 1/94*, *supra* note 25, ¶¶ 82–83.
[101] *Id.* ¶ 85.
[102] *Id.* ¶ 86.
[103] *Id.* ¶¶ 87–97.
[104] *Id.* ¶ 97.
[105] *Opinion 1/76, supra* note 26.
[106] *Opinion 1/94*, *supra* note 25, ¶ 100.
[107] *Id.* ¶¶ 102–103.

It should be noted that Article 133 will be amended by the Treaty of Nice, which is yet to enter into force.[108] The Nice text provides that agreements in the fields of trade in services and the commercial aspects of intellectual property will come within the scope of the common commercial policy, thereby avoiding such agreements being subject to mixed competencies in the future. However, it is also provided that agreements relating to areas where the Community has no internal competence, such as internal harmonization in the areas of education, human health and culture, shall not be concluded by the Community alone. These agreements must still be concluded jointly by the Community and the Member States. In addition, agreements in the field of transport are still expressly excluded from Article 133, being governed by Title V of the EC Treaty.

F. Opinion 1/94, International Law and Responsibility

Commentators have reacted critically to *Opinion 1/94*, chiefly from the perspective of Community law.[109] However, in this chapter, we wish to develop an analysis of the issue which is based on international law. Further, we will consider how the issue of competence affects the respective responsibilities of the Community and the Member States under the WTO Agreement.

1. Law and Competence

In our view, international law and the provisions of the WTO Agreement (which were not considered in any detail by the ECJ) provide the answer to the vexed question of competence. In summary, we suggest that the concept of "trade" in international law leads one to conclude that the whole of the WTO Agreement falls within the exclusive competence of the Community.

As noted, the Community and the Member States signed the WTO Agreement before *Opinion 1/94* was delivered. Under the general law of treaties, therefore, the Community and each of the Member States had authenticated the text of the WTO Agreement and undertook an obligation of good faith to refrain from acts calculated to frustrate its objects prior to ratification.[110] As such, the ECJ was faced with a non-binding, but authenticated "mixed" agreement before it had even commenced its analysis. It is therefore unsurprising that *Opinion 1/94* resulted in the finding that the WTO Agreement was subject to shared competencies. The ECJ was, we suggest, conscious of the factual and political reality of the Community's conclusion of the WTO Agreement and shaped its judgment accordingly.

However, there are grounds for holding that, despite the joint signing of the WTO Agreement by the Community and the Member States, exclusive competence for the whole of the WTO Agreement should lie with the Community.

First, we would suggest that the true scope of Article 133 is far wider than that suggested by the ECJ. If one bears in mind the development of international trade law, culminating in the signing of the WTO Agreement, it is clear that the Community legal concepts of "commerce" and "trade" should not be limited to trade in goods. The Uruguay Round and the transition from GATT 1947 to the WTO Agreement were clear, wide-spread State

[108] *Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, Art. 2(8) (OJ 2001 C 80, at 1).

[109] *See supra* note 25.

[110] *See Vienna Convention on the Law of Treaties*, Art. 18; BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 611 (5th ed., 1998).

practice evidencing the fact that international law now defines the concept of "trade" widely, so as to encompass both trade in services and trade-related intellectual property rights.[111] We would submit that the ECJ erred in appreciating the full significance of this development. Further, it would have been advantageous for the ECJ to have considered the overall scope of the WTO Agreement, which is stated in Article II as follows:

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.
2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members . . .

These provisions show that the Uruguay Round negotiators intended the various Annexes to the WTO Agreement to be viewed a cohesive unit of obligations relating to general "trade relations" between the WTO Members. Consequently, Community law should also have classified the whole of the WTO Agreement as relating to "commerce" and "trade" under Article 133 EC. As Bourgeois states, can one seriously sustain the view that the negotiating with a third country of an agreement on the establishment of subsidiaries of financial institutions, on the exchange of air traffic rights, or on the mutual protection of intellectual property rights, is not part and parcel of a State's commercial policy?[112]

Indeed, confirmation of this view can be found in the Treaty of Nice amendments discussed above.[113] The Member States themselves have now ultimately conceded that the Community should, as a general rule, have exclusive competence for all matters of trade.

A finding that the Community had exclusive competence for the whole of the WTO Agreement would not have been inconsistent with the fact that the Member States and the Community were all to become WTO Members. Article IX of the WTO Agreement states that "where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are members of the WTO." Consequently, it was necessary for the Member States to participate alongside the Community as original WTO Members in order to enable the Community to participate effectively in WTO proceedings—without their Membership, the numerical voting strength of the Community would have been diminished. Consequently, the WTO Membership of the Member States could be seen as an exercise of the Community's competence through the Member States.[114]

However, it must be recognized that the legal reality of the WTO is now that the Community shares competence with the Member States in respect of TRIPS and GATS. This internal division of power requires a day to day co-ordination of policy between the Community (in the form of the Commission) and the Member States. However, the real question is whether the division of competencies has any legal effect on the

[111] Paradoxically, the ECJ noted a trend for basic industry to be concentrated in developing countries, while services and goods with high value-added content were primarily exported from developed nations. This trend was "borne out by the WTO Agreement and its annexes, which were the subject of a single process of negotiation covering both goods and services"; *Opinion 1/94*, *supra* note 25, ¶ 40. One must therefore ask why the ECJ did not consider this relevant in defining the scope of the commercial policy in the remainder of the Opinion.

[112] BOURGEOIS, *supra* note 55, at 779–780.

[113] *See supra* at Section V.F.2

[114] *See Opinion 2/91*, *supra* note 25, ¶ 5; MACLEOD, HENDRY AND HYETT, *supra* note 22, ¶ 143.

international responsibility of the Community and the Member States under the WTO Agreement.

2. Competence and Responsibility[114]

The WTO Agreement, and in particular the DSU, are silent on the respective liabilities of the Community and the Member States. According to the law of treaties, the Community and the Member States are separately responsible for the performance of the WTO Agreement.[115] However, in *Parliament v Council*,[116] AG Jacobs expressed the view, in his advisory opinion to the ECJ,[117] that "under a mixed agreement, the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion."[118] However, as the following paragraphs demonstrate, we would suggest that in the context of the WTO Agreement, the Community and the Member States cannot be accurately described as joint parties for the purposes of the DSU, and that the nexus between the potential liability of a Member State and of the Community is a matter of internal Community law alone.

(a) Areas within Member State Competence. Take the following example; a Member State's national measures infringe a provision of the GATS within Member State competence. Must the complaining WTO Member proceed by making a joint claim against both the Member State and the Community, or against the Member State alone, or may it ultimately go against the Member State and the Community separately? Conversely, if the complaining WTO Member goes against the Member State alone, does the Community have the right to be joined as a party to the dispute?

We suggest that the complaining WTO Member is under no international obligation to make a joint claim against both the Member State and the Community. Nor must it make two separate claims against the Member State and the Community on the same subject matter.[119] Instead, it is entitled to engage the sole responsibility of the State which promulgated the offending measure. Indeed, the practice of the United States indicates that it considers itself to have such a right.[120]

Conversely, if the complaining WTO Member pursues the Member State alone, the Community can only become party to consultations under the procedure laid down in

[114] For detailed reviews of this issue *see* Heliskoski and Ni Chathain, *supra* note 55.

[115] *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, Article 26.

[116] *Parliament v. Council,* Case C-316/91 [1994] ECR I-625, ¶ 69.

[117] In the EC system, the Judges of the ECJ are assisted by eight Advocates-General whose function is to give advisory opinions on the case and who recommend a particular conclusion to the ECJ: *see* Article 222 EC. This advisory function closely resembles that of the Commissaire du Gouvernement of the French Conseil d'Etat. The opinions of the AGs are not binding on the ECJ, but are influential in shaping the Court's final judgments. The lower court of the EC system, the Court of First Instance, has powers to appoint one of the CFI judges to act as an AG, but this is seldom used.

[118] *Id.,* ¶ 69.

[119] Of course, it may pursue these options if they are politically and legally advantageous, e.g., assuring itself that at least one of the two will accept retaliation under DSU Article 22 should the need arise.

[120] *See, e.g., Ireland—Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS82; *Belgium—Measures Affecting Commercial Telephone Directory Services*, WT/DS80; *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83; *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television*, WT/DS125; *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86; *Portugal—Patent Protection under the Industrial Property Act*, WT/DS37. It should be noted that the Community became a party to the consultations in WT/DS83 and WT/DS86. Parallel proceedings against the Community were launched with WT/DS82 (*see* WT/DS115) and WT/DS125 (*see* WT/DS124).

Article 4.11 of the DSU, i.e. it must claim to have a "substantial trade interest" in the matter. From the perspective of Community law, it is certainly arguable that under the duty of co-operation, the Member State must agree that the Community's claim of substantial interest is "well-founded" so as to facilitate the latter's participation in the case. However, there does not seem to be any formal record of the Community expressly using the Article 4.11 procedure in cases where the United States has pursued individual Member States. There appears to have been an acquiescence on the part of the United States, allowing the Community to bypass the formal requirements of the Article.

Equally, if the establishment of a panel is requested by the complaining WTO Member, the establishment of the panel cannot be blocked by the Community or the Member State on the grounds that the Community should be a party to the dispute. The Community must use the Article 10 procedure to become a third party to the dispute. Again, the Member State would arguably be under a Community law obligation not to oppose the Community's application.

If the case were to proceed all the way to the approval of retaliation against the Member State, the question would be whether the complaining WTO Member could also retaliate against the Community. For example, if the Member State were to breach its GATS obligations, could the complaining WTO Member suspend concessions against services from the Community (i.e. from other Member States) or cross-retaliate against goods or intellectual property rights of the same origin? We suggest that it could not do so. The wording of Article 22.2 speaks of retaliation against only "the Member concerned", i.e. the party to the dispute to which the panel or Appellate Body recommendations are directed.[121] If the Community (or any other Member State) is not party to the dispute, it cannot be the target of retaliation in any form. Accordingly, we respectfully question the assertion made by some commentators that cross-retaliation would be "likely to spill over to the other Member States and may affect them and the EC at large".[122]

(b) Areas within Community Competence. We would also suggest that WTO Members are entitled to pursue an individual Member State if its measures breach an area of the WTO Agreement which is within Community competence.[123] However, the key issue, as demonstrated by the *LAN* case,[124] is establishing whether the Community or the Member State is responsible for the offending measure.

In the *LAN* case, the United States alleged that the tariff reclassification by the European Communities, Ireland and the United Kingdom of certain Local Area Network (LAN) adapter equipment and personal computers with multimedia capability violated Article II of GATT 1994. The issue of the responsible counter-party was argued in the proceedings. The reports give no final answer to the question. However, and although its language is ambiguous in parts, the panel emphasized that the substance of the dispute was concerned

[121] DSU, Article 19, note 9.

[122] *See* Ni Chathain, *supra* note 55, at 463.

[123] *See* the United States practice in *Belgium —Administration of Measures Establishing Customs Duties for Rice*, WT/DS210; *France—Measures Relating to the Development of a Flight Management System*, WT/DS173; *France—Certain Income Tax Measures Constituting Subsidies*, WT/DS131; *Ireland—Certain Income Tax Measures Constituting Subsidies*, WT/DS130; *Greece—Certain Income Tax Measures Constituting Subsidies*, WT/DS129; *Netherlands—Certain Income Tax Measures Constituting Subsidies*, WT/DS128; *Belgium—Certain Income Tax Measures Constituting Subsidies*, WT/DS127.

[124] *European Communities, United Kingdom and Ireland—Certain Classification of Certain Computer Equipment*, WT/DS62, 67, and 68 (1998).

with tariff treatment of the relevant goods by authorities in the Community and not in any of the Member States individually.[125] Similarly, the Appellate Body stated that the relevant export market was the Community, constituting a customs union, and not the Member States.[126] Consequently, we suggest that the panel and Appellate Body correctly identified the Community as being responsible for the common customs tariff. Indeed, the Community, rather than the individual Member States had entered a tariff schedule to GATT 1994. The United States claims against the United Kingdom and Ireland were therefore misplaced, as these countries were the agents of the Community in the implementation and administration of the tariff.

As regards the Community joining consultations or panel proceedings against single Member States in areas of exclusive Community competence, our comments above on areas of mixed competence also apply. Again, it appears that the United States has unilaterally waived the formal procedural requirements for the Community's participation in the relevant cases.[127]

Concerning retaliation, a complaining WTO Member would strictly have no right to retaliate against the Community if the Member State were to be the sole "Member concerned".[128] However, the complaining WTO Member could take advantage of the internal division of competence at this point. The Community, having exclusive competence for the relevant area, could not validly disown any responsibility for the Member State's legislation without undermining its legal powers in Community law. Moreover, from a practical perspective, the Member State's conduct in the dispute will have been closely coordinated with the Community position. Thus, the Community would have shared in the responsibility for failure to implement the DSB reports and retaliation against trade from other Member States is a real possibility in this scenario.

G. Conclusions

In conclusion, we suggest that the division of competence in relation to the WTO could have been avoided by a fuller consideration of the negotiating history and express wording of the WTO Agreement, rather than a somewhat myopic analysis of the structure of the EC Treaty and Community practice.

Further, we also believe that the Member States and the Community are not jointly responsible for their WTO obligations; from the perspective of international law, they are separately responsible for their own measures. Consequently, from a strict perspective, retaliation against a responsible Member State cannot be extended to the Community and the other Member States. However, from a practical viewpoint, the Community and the other Member States cannot object to an extension of retaliation against them when the offending Member State measure is concerned with an area within Community competence.

[125] Report of the WTO Panel, *European Communities, United Kingdom and Ireland—Certain Classification of Certain Computer Equipment*, *supra* note 124, ¶¶ 8.18 and 8.28.

[126] Report of the Appellate Body, *European Communities, United Kingdom and Ireland—Certain Classification of Certain Computer Equipment*, *supra* note 124, ¶ 96.

[127] E.g., the request for consultations and for the establishment of a panel in *Belgium—Administration of Measures Establishing Customs Duties for Rice*, *supra* note 23, was addressed solely to Belgium. However, it was the Community and the United States which requested the panel to suspend its work pursuant to DSU, Article 12.2 (*see* WT/DS210/4). There is no formal record of a request to join consultations or become a party by the Community.

[128] *See Areas Within Member State Competence*, *supra*, Part II.F.L.(a).

III. The Effects of the WTO Agreement in the Community Legal Order

A. Introduction

This part of the chapter will now deal with the effect of the WTO Agreement within the Community's legal system. This issue is many-faceted, since it involves consideration of the various ways in which individuals may invoke the WTO Agreement before EC Courts or before the courts or tribunals of EC Member States. One aspect of this issue is whether the WTO Agreement is capable of "direct effect", the EC term for a self-executing treaty provision. Another aspect of this issue is the extent to which individuals may avail themselves of the various procedural avenues that are available for bringing suspected violations of WTO law to the attention of the Commission or of the Member States. The next part of this chapter will therefore deal with the various "WTO complaints mechanisms" that exist, such as the Trade Barriers Regulation. Finally, the final part of this chapter will also describe the Commission's initiatives in raising awareness of WTO issues in the EC business community.

1. The Issue of the Potential "Direct Effect" of the WTO Agreement

An enduringly controversial issue in EC law is whether the WTO Agreement can be given "direct effect" in the Community legal order or otherwise be invoked by private parties in European Community courts or in the courts of EC Member States. In this context, "direct effect" means that individuals, Member States and the Community institutions can rely on the provisions of the WTO Agreement before national and/or Community courts as giving them enforceable rights. This question has generated a very considerable body of legal literature[129] and the pages which follow will attempt to summarize the current state of the law on this issue.[130] In order to answer this difficult question, the law relating to the status of GATT 1947 in Community law will be briefly surveyed. Attention will then be given to the leading case on the WTO Agreement, *Portugal v Council*,[131] and its subsequent application in the case law of the Community courts.

[129] Among the many commentaries, the following may be of interest to those seeking to research the matter further: K.J. KUILWIJK ,THE EUROPEAN COURT OF JUSTICE AND THE GATT DILEMMA: PUBLIC INTEREST VERSUS INDIVIDUAL RIGHTS (1996); N. Neuwahl, *Individuals and the GATT*, and F.E. Jacobs, *Judicial Review of Commercial Policy Measures after the Uruguay Round,* in THE EUROPEAN UNION AND WORLD TRADE LAW AFTER THE URUGUAY ROUND 313, 329 (N. EMILIOU AND D. O'KEEFE eds. 1995); Nicholas J. Forwood, *Issues of Justiciability in EC Trade Law*, in 6 THE EUROPEAN ADVOCATE (Winter 1995); Piet Eeckhout, *The Domestic Legal Status of the WTO Agreements: Interconnecting Legal Systems*, 34 COMMON MARKET LAW REVIEW" 11 (1997); Mark Miller, *The Trips Agreement and Direct Effect in European Community Law: You Can Look . . . But Can You Touch?,* 74 NOTRE DAME LAW REVIEW 59 (1999); Stefan Griller, *Judicial Enforcability of WTO Law in the European Union*, 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 441 (2000); G.A. Zonneyken, *The Status of WTO Law in the EC Legal Order—The Final Curtain?, 34* JOURNAL OF WORLD TRADE 111 (2000); P Ruttley, *WTO Dispute Settlement and Private Sector Interests: A Slow But Gradual Improvement?*, in DUE PROCESS IN WTO DISPUTE SETTLEMENT (P. Ruttley, I. Macvay and M. Weisberger eds. 2001); Nicholas J. Forwood, *The Status of WTO Law in the Community Legal Order* (Paper presented at the 4th Annual Conference of the World Trade Law Association, London, November 10, 2000), at 10; Naboth van den Broeck, *Legal Persuasion, Political Realism, And Legitimacy: The European Court's Recent Treatment Of The Effect Of WTO Agreements In The EC Legal Order*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 411 (2001); Steve Peers, *WTO Dispute Settlement And Community Law*, 26 EUROPEAN LAW REVIEW 605(2001); Marc O Weisberger, *The Application Of Portugal v. Council: The Banana Cases*, 12 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 153 (2002); Xin Zhang, Direct *Effect Of The WTO Agreements: National Survey* 9(2) INTERNATIONAL TRADE LAW & REGULATION 35, 36 (2003); Francis Snyder, *The Gatekeepers: The European Courts And WTO Law*, 40 COMMON MARKET LAW REVIEW 313 (2003).

[130] This chapter was finalized in July 2003.

[131] Case C-149/96 *Portugal v. Council* [1999] ECR I-8395.

2. The Doctrine of "Direct Effect": A Brief Summary

The doctrine of "direct effect" has played a key role in ensuring the compliance of EC Member States to Community law. In essence, it permits individual citizens to enforce the legal rights conferred on them by EC law (be it in the form of an EC Treaty Article, a Community Directive or other provision of EC legislation). EC law describes as "vertical direct effect" as the enforcement of a provision of EC law by a citizen against a Member State, the emanation of a Member State (such as a local authority or governmental agency) or a Community Institution. "Horizontal direct effect" describes the situation where a Community law provision is enforced by one EC citizen against another.

Since Community law derives from a treaty between sovereign states,[132] the possibility of "direct effect" raises the issue whether such law can generate rights capable of being enforced in national courts (or Community courts) without:

(a) this procedural right being expressly granted, or
(b) the Community law provision being transposed into national law.

The original case on "direct effect"[133] dates from 1962 and concerned a Dutch transport operator who sought to challenge a Dutch border tax on imports from Germany on the grounds that such a tax was contrary to the Customs Union created by the EEC Treaty, following the expiry of the relevant transitional period.[134] The crucial question referred to the ECJ by the Dutch national court for an interpretative ruling was whether, in the absence of any right under Dutch law, such a right could derive simply by virtue of the EEC Treaty. This issue raised fundamental constitutional questions and, in their submissions to the ECJ, the Netherlands government argued that the EC Treaty was no different from traditional international treaties and that the concept of "direct effect" would contradict the intentions of the Treaty negotiators. It even raised the prospect of Member States refusing to cooperate with the ECJ if they granted individuals the right to invoke the EC Treaty in national courts.

The ECJ, in a landmark ruling, dismissed these arguments:

> To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.
>
> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee. . .
>
> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law

[132] *See, i.e.*, the European Community Treaty of Rome of 1957 as amended and amplified by subsequent Treaties.

[133] Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

[134] The relevant provision of the EC Treaty, Article 12, reads as follows: "Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect and, from increasing those which they already apply in their trade with each other."

> therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[135]

The *Van Gend en Loos* judgment established that certain Articles of the EC Treaty could have "direct effect". Over the years, the jurisprudence of the ECJ has established a number of tests for the creation of "direct effect"; to have such legal consequence, the EC provision:

(a) must be clear and unambiguous
(b) must be unconditional
(c) its operation must not be dependent on further action being taken by Community or Member State authorities to give it legal force (i.e. enactment in national law or some other measure of transposition).

Cases following the *Van Gend on Loos* ruling expanded the scope of the doctrine of "direct effect" to other types of provisions of EC law, such as Directives or EC Decisions. Thus, certain provisions in Directives (which set an objective to be achieved by Member States by a given deadline, while leaving them the discretion to decide how to do this under their national laws)[136] can be directly effective after the deadline has expired in the event a Member State has failed to comply.[137]

3. Application of the Doctrine of "Direct Effect" to the WTO Agreement

For the present purposes, therefore, the essential question is whether the 1947 GATT or the WTO Agreements are capable of "direct effect". It will be seen that the question appears to have been answered in the negative by recent judgments of the ECJ. However, it is settled EC law that an agreement's potential "direct effect" is gauged by an analysis of the provisions own terms, in the light of its aim and content.[138] As regards external trade agreements to which the EC is a party, the ECJ has granted direct effect to several provisions of bilateral agreements which were clearly designed to grant individual rights.[139] As regards the WTO Agreements, the jurisprudence of the ECJ now appears to

[135] ¶¶ 19, 20 and 24 of the Judgment.
[136] *See* Article 249 EC.
[137] *See*, *e.g.*,Case 148/78 *Pubblico Ministero v. Ratti* [1979] ECR 1629.
[138] *Van Gend en Loos* at ¶ 19.
[139] Examples of provisions which were found to have *no* direct effect are: Art. XI GATT (Joined Cases 21–24/72, *International Fruit Company NV. Produktschap voor Groenten en Fruit* (1972) ECR 1219); Art. II GATT (Case 9/73 *Schlüter v. Hauptzollamt Lörrach* [1973] ECR 1135); the GATT generally (Case C-280/93 *Germany v. Council* [1994] ECR 1–4973); Art. 12 EEC—Turkey Association Agreement and Art. 36 of the Additional Protocol thereto (Case 12/86, *Demirel v. Stadt Schwäbisch Gmûnd* (1987) EUR/3719 above); Lomé Convention provisions on right of establishment (Case 65/77 *Razanatsimba* [1997] ECR 2229); Art. v. GATT (Case 266/81 *SIOT v. Ministero delle Finanze* [1983] ECR 731); GATT Tariff Protocols (Joined Cases 267–269/81 *Amministrazione delle Finanze dello Stato v. SPI and SAMI* [1983] ECR 801). Provisions which *were* found to have direct effect include: Art. 2(1) Yaoundé Convention 1963 (Case 87/75 *Conceria Daniele Bresciani v. Amministrazione delle Finanze dello Stato* [1976] ECR 129); Art. 21(1) EEC—Portugal Free Trade Agreement (Case 104/81, *Hauptzollamt Mainz v. Kupferberg*); (1982) ECR 3641; Art. 6 EEC—Sweden Agreement (Case C-163/90 *Administration des Douanes et Droits Indirects v. Legros* [1992] ECR I-4625); Art. 18(1) EEC-Austria Free Trade Agreement (Case C-312/91 *Metalsa Srl v. Italy* [1993] ECR 3751); Art. 41(1) EEC-Morocco Cooperation Agreement (Case C-18/90 *Office National de l'Emploi v. Kziber* [1991] ECR I-199 and Case C-58/93 *Yousfi v. Belgium* [1994] ECR I-1353 and Case C-126/95 *Hallouzi-Choho v. Bestuur Van de Sociale Verzekeringsbank* [1996] ECR I-4807; Art. 39(1) EEC—Algeria Cooperation

preclude the possibility of direct effect, although in certain very specific circumstances, as will be discussed below, the matter is not yet settled.

It will be readily understood that whether or not a provision of an international agreement which binds the Community is capable of "direct effect" is a question of the highest constitutional and practical importance. By ruling on the question whether individuals can enforce the international agreements entered into on their behalf by their governments, the ECJ is determining the boundaries of Community law, international law and the limits of the powers of national governments or the Community to conduct their external relations.

4. Procedural Routes for Invoking the WTO Agreement in the EC Legal System

However, in order to place the discussion in its correct legal context, it is first necessary to explain the relevant remedial actions under Community law that feature in the jurisprudence.[140] First, a Member State may request the ECJ to review the legality of an act of any of the Community institutions.[141] The consequence of the ECJ finding the measure to be unlawful is that the measure is annulled. Secondly, private individuals may, where they can establish that the act is of "direct and individual concern" to them, seek the annulment of a Community measure by a direct action before the EC Court of First Instance under Article 230, which confers judicial review powers to the EC Courts on the grounds of "lack of competence, infringement of an essential procedural requirement, infringement of [the EC] Treaty or any rule of law relating to its application, or misuse of powers". Alternatively, under Article 232 EC, an action for failure to act can be brought by individuals where they must establish that the Community Institution they are challenging "has failed to address to that person any act other than a recommendation or opinion". In addition, under Article 288(2)EC an individual may sue the Community for non-contractual damages if an unlawful act of one of the Community Institutions has caused them loss.

An alternative route to direct action before the Community courts is to challenge the application of the EC obligation by the national authorities of Member States in domestic courts, raising constitutional EC issues relating to the lawfulness of the contested measure under EC law and the relevant international treaty provision. Under the EC system, such constitutional issues must be "referred" by the national court to the ECJ for an interpretative ruling: such rulings are binding on the referring national court and are the main source of challenges testing the "direct effectiveness" of Community acts as implemented by EC Member States.[142]

Agreement (Case C-103/94 *Krid*, (1995) ECR I-719) the EEC-Yugoslavia co-operation agreement of 1980: Case C-162/96 *Racke v. Hauptzollamt Mainz* (1998) ECR I-3655. The direct effectiveness of the Ankara Agreement between the EC and Turkey has been considered in Case 12/86 *Demirel* [1987] ER 3719; Case C-129/89 *Sevince* [1990] ECR I-3461 Case C-237/91 *Kus v. Landeshaupstadt Wiesbaden* [1993] 2 COMMON MARKET LAW REVIEW 887; Case C-355/93 *Eroglu v. Land Baden-Württemberg,* unreported [1994] ECR I-5113; Case C-434/93; *Boz Kurt v. Staatssecretaris Van Justitie* [1995] ECR I-1475; Case C-285/95 *Kol v. Land Berlin* [1997] 3 COMMON MARKET LAW REVIEW 1175; Case C-351/95 *Kadiman v. Freitstaat Bayern*, [1997] ECR I-2133; Case C-386/95 *Eker v. Land Baden-Württemberg,* [1997] ECR I-2697; Case C-36/96 *Günaydin v. Freistaat Bayern* [1998] I COMMON MARKET LAW REVIEW 871, Case C-37/98 *The Queen v. Secretary of State for the Home Department ex parte Savas* (2000) ECR I-2927. The direct effectiveness of the European Economic Area Agreement was considered in Case T-115/95 *Opel Austria v. Council* [1997] I COMMON MARKET LAW REVIEW 733.

[140] *See* BREALEY AND HOSKINS, REMEDIES IN EC LAW: LAW AND PRACTICE IN THE ENGLISH AND EC COURTS (1998).

[141] Art. 230 EC.

[142] *See* Article 234 EC.

5. The Status of GATT 1947 in the Community Legal Order—An Overview

The ECJ consistently refused to give direct effect to GATT 1947 or its supplementary Codes, except in two very limited circumstances.

The basic rule was laid down in *International Fruit*,[143] where the ECJ was asked to determine whether Community measures concerning the import of apples were invalid because of their inconsistency with Article XI of GATT 1947. The ECJ held that there was "great flexibility of provisions" in GATT 1947.[144] The ECJ particularly focused on negotiation and consultation in dispute settlement and the right of contracting parties to act unilaterally in cases of disagreement or economic difficulty. This lack of formalism and prevalence of political application in GATT 1947 led the ECJ to hold that the agreement was not intended to confer rights on individuals.[145] The operative parts of the ECJ's judgement are worth quoting in full since they were built on and expanded in later cases:

> It is also necessary to examine whether the provisions of the general agreement confer rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure.
>
> For this purpose, the spirit, the general scheme and the terms of the general agreement must be considered.
>
> This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements" is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.
>
> Consequently, according to the first paragraph of Article XXII, "each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other contracting party with respect to . . . all matters affecting the operation of this agreement".
>
> According to the second paragraph of the same Article, "the contracting parties"—this name designating "the contracting parties acting jointly" as stated in the first paragraph of Article XXV—"may consult with one or more contracting parties on any question to which a satisfactory solution cannot be found through the consultations provided under paragraph (1).
>
> If any contracting party should consider "that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as a result of", inter alia, "the failure of another contracting party to carry out its obligations under this agreement", Article XXIII lays down in detail the measures which the parties concerned, or the contracting parties acting jointly, may or must take in regard to such a situation.
>
> Those measures include, for the settlement of conflicts, written recommendations or proposals which are to be "given sympathetic consideration", investigations possibly followed by recommendations, consultations between or Decisions of the contracting parties, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under the general agreement and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement.
>
> Finally, where by reason of an obligation assumed under the general agreement or of a concession relating to a benefit, some producers suffer or are threatened with serious damage, Article XIX gives a contracting party power unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties

[143] *Joined Cases 21–24/72 International Fruit Company NV. Produktschaap voor Groenten en Fruit (1972) ECR 1219.*

[144] *Id.* ¶ 21.

[145] *Id.* at ¶¶ 19–27.

> jointly and failing agreement between the contracting parties concerned, or even, if the matter is urgent and on a temporary basis, without prior consultation.
>
> Those factors are sufficient to show that, when examined in such a context, Article XI of the General Agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts.[146]

The *International Fruit* judgment closed the door to individuals invoking the direct effect of the 1947 GATT in actions before EC courts or the national courts of Member States. However, while direct effect was thus denied to the 1947 GATT, this did not mean that it had no force in the judicial examination of Community law or measures. There were two aspects to this.

First, the ECJ ruled that the lack of GATT direct effect "in no way affects the Community's obligation to ensure that the provisions of the GATT are observed in its relations with non-Member States which are parties to the GATT."[147]

The second exception to this rule applied where the Community intended to implement a particular obligation assumed in the context of GATT 1947, or where the Community measure referred expressly to the precise provisions of GATT 1947.[148] In *FEDIOL*,[149] the applicants challenged a Commission decision to reject their complaint against Argentina under Regulation 2641/84, the so-called "New Commercial Policy Instrument"[150] (the precursor to the Trade Barriers Regulation discussed below). This Regulation allowed the Commission to scrutinize third country trade practices which were "incompatible with international law or with the generally accepted rules". Since the Regulation envisaged individuals relying on GATT 1947 to challenge those trade practices, the ECJ held that the applicants could request it to review the Commission's decision by reference to GATT 1947. In *Nakajima*,[151] the ECJ held that the applicants were entitled to invoke the GATT 1947 Anti-Dumping Code when challenging the Community's anti-dumping regulation. This was because the regulation expressly stated its intention to implement Article VI of the Code.

Subsequently, it delivered a similar ruling as regards actions by Member States challenging Community measures on the grounds of alleged incompatibility with the 1947 GATT. In *Germany v. Council,*[152] the ECJ was faced with a challenge brought by a Member State based on the 1947 GATT where Germany, attacking the Community's banana import regime had argued that compliance with GATT rules was a condition of the lawfulness of Community acts, regardless of whether the GATT was capable of direct effect. This argument was considerably strengthened by the fact that a GATT Panel had advised that the Community's banana import regime was inconsistent with the 1947 GATT. Germany's argument in the *Bananas* case has a certain compelling logic. Article 230 provides that the ECJ may review the lawfulness of Community acts, since these constitute "acts of the institutions of the Community" and are therefore subject to the

[146] Case C-280/93 *Germany v. Council* [1993] ECR I-4973 where Germany, attacking the Community's banana import regime had argued that compliance with GATT rules was a condition of the lawfulness of Community acts, regardless of whether the GATT was capable of direct effect. This argument was considerably strengthened by the fact that a GATT Panel had advised that the Community's banana import regime was inconsistent with the 1947 GATT: *see EEC—Import Regime for Bananas*, Report of the Panel (DS27/R, May 22, 1997).

[147] Case 266/81 *SIOT v. Ministero delle Finanze* [1983] ECR 731 ¶ 28.

[148] *Id.* ¶ 11.

[149] Case C 70/87 *Fédération de la Huilerie de la CEE ("FEDIOL") v. Commission* [1989] ECR 1781.

[150] Regulation 2641/84 (OJ 1984 L252/1).

[151] Case C-69/89 *Nakajima All Precision Co Ltd v. Council* [1991] ECR I-2069.

[152] *See* note 146.

jurisdiction of the ECJ under Article 234 EC.[153] Article 230 also confers on the ECJ power to review such "acts" on the grounds of infringements of the Treaty, "or of any rule of law relating to its application". Since the ECJ had consistently stressed the obligation on the Community to fulfil its international obligations, including the GATT,[154] it would not be stretching EC constitutional interpretation too far to treat the GATT and any other international agreement which is binding on the Community as a "rule of law relating to [the Treaty's] application", since all acts of the Community Institutions are based on powers granted by the Treaty.

The Commission countered the arguments submitted by Germany by questioning whether, in the light of the GATT's general scheme, spirit and terms, the GATT could be subject to "direct effect". It stressed that the GATT was enforced through diplomatic negotiations rather than legal procedures, without at its basis, a set of legal rights and obligations. Accordingly, it would be inappropriate for the ECJ to find direct effect in a GATT provision: first, in principle, the GATT was not susceptible to direct effect and, second, any finding by the ECJ of direct effect in the GATT would undermine the negotiating freedom which Member States or the Commission needed in the conduct of GATT-related external relations.

The ECJ dealt with the case by merely restating its ruling in *International Fruit*. Since the 1947 GATT was not capable of "direct effect", it followed that this precluded an action under Article 230 by a Member State for the same reason.[155] However, it will be noted that the Commission's more political view of the need to avoid direct effect for the GATT, on the grounds that to do so would curtail the Community's negotiating position, adumbrated the ECJ's later reasoning denying "direct effect" to the WTO Agreements as well.[156]

6. Is the WTO Agreement Capable of Direct Effect?

(a) The Opinions of the Advocates-General[157]. In several cases brought after the conclusion of the WTO Agreement, the question of direct effect was discussed by the Advocate-Generals advising in the cases. However, the ECJ effectively discarded their reasoning in the body of its judgments.

In *Affish v Rijksdienst*,[158] the ECJ was referred questions by a Dutch national court testing the validity of a Commission fish conservation measure in the light of the SPS Agreement. AG Cosmas applied the rule in *International Fruit* to the WTO Agreement and in particular the SPS Agreement. He stated that the flexibility of the provisions in the WTO Agreement and the lack of clear, unconditional rules in the SPS Agreement

[153] An interpretation of Article 234 which has rightly been described as "an apparently literal reading" of the text of that Article, *see* I. Cheyne, *Haegeman, Demirel and their Progeny*, in THE GENERAL LAW OF EC EXTERNAL RELATIONS 29 (A. Dashwood and C. Hillion eds., 2000).

[154] *See, e.g.*, Case 104/81 *Kupferberg* [1982] ECR 3641, ¶ 11; Case 266/81 *SIOT* [1983] ECR 731, ¶ 28; Case 142/88 *Hoesch AG v. Bergrohr GmbH* [1989] ECR 3413, ¶ 30; and Case 312/91 *Metalsa* [1994] LCMLR 121.

[155] ¶ 109 of the Judgment.

[156] *See infra* section F2.

[157] The Advocate Generals of the ECJ resemble the "commissaire du gouvernement" in the French Conseil d'Etat and have no equivalent in Anglo-Saxon judicial systems. They assist the Judges of the Court by presenting reasoned opinions on the issues of law and fact before them. Their opinions review the facts and legal issues in the case, presenting an influential but personal view. *See* Article 222 (former Article 166) of the EC Treaty and Chapter 4 of L.N. BROWN AND T. KENNEDY, BROWN & JACOBS: THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (5th ed., 2000).

[158] Case C-183/95 *Affish v. Rijksdienst voor de Keuring van Vee en Vlees* [1997] ECR I-4315.

prohibited their direct effect.[159] The ECJ, however, noted that the national court which had made the Article 234 Reference to it had not asked the ECJ to consider the contested measures in the light of the SPS Agreements. Consequently, the ECJ declared that there was no need for it to rule on the issue.[160]

In *T Port v Hauptzollant*,[161] the ECJ was referred questions by a German national court testing issues relating to the timing of the application of WTO rules. AG Elmer was of the view that the ECJ should continue to apply its GATT 1947 reasoning to the WTO Agreement, but he gave no detailed reasons for this conclusion.[162] However the ECJ was able once again to avoid ruling on this issue since it held that the nature of the issues in the case[163] did not make it possible for GATT 1947 or GATT 1994 to be invoked.

Finally, in *Hermes International*,[164] the ECJ was referred questions by a Dutch court concerning the adequacy of the Netherlands' implementation of the procedural rules of Article 50 of TRIPS concerning provisional protective measures. AG Tesauro indicated that there was nothing in principle to prevent the direct effect of the WTO Agreement, given that other agreements with flexible dispute settlement regimes had been given direct effect.[165] However, AG Tesauro sounded a note of caution by recognizing that the WTO Agreement had not been given reciprocal effect by the Community's major trading partners.[166] In the Advocate General's view, it would be more correct to "line recognition of direct effect with the principle of reciprocity in the implementation of the agreement", rather than to "repeat formulas that were perfectly acceptable in the context of GATT 1947 but are no longer relevant in the context of the WTO Agreement, and would merely lend weight to the already wide spread view that this is a political not a legal solution."[167]

In its judgment, the ECJ stressed that, although EC legislation must be interpreted consistently with the TRIPS agreement,[168] it was not being required to rule on direct effect by the reference from the national court. Rather, it was being asked to assist the national referring court in the interpretation of TRIPS procedural rules and expressly declined to address the issue of direct effect from the outset.[169] However, as will be seen

[159] *Id.* ¶¶ 119–126.
[160] *Id.* ¶ 28.
[161] Cases 364–365/95 [1998] ECR I-1023 *T Port GmbH v. Hauptzollamt Hamburg-Jonas* [1998] ECR I-1023.
[162] *Id.* at ¶¶ 27–29.
[163] The central issue in the case concerned the status of Ecuador as regards whom Germany allegedly owed international legal obligations. However Ecuador had not been a Contracting Party to the 1947 GATT and did not become a WTO Member until after the date of the contested EC measure.
[164] Case C-53/96 [1998] ECR I-3603 *Hermes International v. FHT Marketing Choice BVT* [1998] ECR I-3603.
[165] *Id.* ¶¶ 27–30.
[166] It would appear that Japanese law precludes the judicial enforceability of the WTO Agreements: *see* Y. Iwasawa, *Constitutional Problems Involved in Implementing the Uruguay Round in Japan*, in IMPLEMENTING THE URUGUAY ROUND 136 (Jackson and Sykes, eds.,1997). In the United States, their direct applicability is expressly precluded by the U.S. Uruguay Round Agreements Act, Section 102(a) and (b)(2). For a recent survey of the situation in the U.S., *see* Simon N. Lester, *WTO Panel and the Appellate Body Interpretations of the WTO Agreements in U.S. Law*, 35(3) JOURNAL OF WORLD TRADE 521 (2001). In Canada, the judicial enforceability of the WTO Agreements would also appear to be excluded by that country's dualist approach to international law: *see* D.P. Steger, 'Canadian Implementation of the Agreement Establishing the World Trade Organization', in JACKSON AND SYKES, *supra* at 242 and especially at 261–2. For a useful broad survey WTO's members' treatment of justiciability in their domestic laws (covering the US, EC as well as Asia, African, Latin-American WTO Members) *see*: Xin Zhang, *supra* note 129.
[167] *Id.* at ¶ 35.
[168] *Id.* ¶ 28.
[169] *Id.* ¶ 35.

below, the issue of reciprocity was later adopted by the ECJ as the touchstone of direct effect in *Portugal v Council*. It is to that case that discussion will now turn.

(b) Portugal v Council

(i) The Case *Portugal v Council* concerned an application by Portugal for the annulment of Council Decision 96/386/EC of February 26, 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products.[170] The application was brought under Article 230 EC, which permits Member States to request the ECJ to review the legality of acts of the Council.

Following the closure of the Uruguay Round negotiations, the Commission pursued negotiations on market access for textile and clothing products with, amongst other countries, India and Pakistan. These negotiations continued following the signing of the WTO Agreement by the Community. On October 15, and December 31, 1994 the Commission, and India and Pakistan respectively, signed two Memoranda of Understanding between the Community and India and Pakistan on arrangements in the area of market access for textile products. On a proposal from the Commission of 7 December 1995, the Council adopted on February 26, 1996 the contested Decision which was approved by a qualified majority. Spain, Greece and Portugal voted against it. The Memoranda of Understanding with India and Pakistan were signed on March 8 and 27, 1996 respectively.

Portugal claimed that the contested Decision constituted a breach of GATT 1994, the Agreement on Textiles and Clothing and the Agreement on Import Licensing Procedures. Portugal therefore had to establish that it was entitled to rely on those rules and fundamental principles before the ECJ. Thus, the issue was whether the WTO Agreement created rights capable of being enforced by Member States against Community institutions.[171]

(ii) The Judgment of the ECJ First, the ECJ construed the WTO Agreement to determine whether it laid down the legal effect it was to have in national legal systems.

In doing so, the ECJ found that the WTO Agreement differs significantly from the provisions of GATT 1947, in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes. However, it nevertheless maintained that the WTO system still "accords considerable importance to negotiation between the parties."[172] This conclusion was based on an analysis of the DSU as follows:

> Although the main purpose of the mechanism for resolving disputes is in principle, according to Article 3 (7) of the Understanding on Rules & Procedures Governing Settlement of Disputes (Annex 2 to the WTO), to secure the withdrawal of the measures in question if

[170] OJ 1996 L 153/47. *See, e.g.*, G.A. Desmedt, *European Court of Justice on the Effect of WTO Agreements in the EC Legal Order*, 27(1) LEGAL ISSUES OF EUROPEAN INTEGRATION 93 (2000); Stefan Griller, *Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, Portugal v. Council* 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 441 (3–2000); Allan Rosas, *Case C-149/96, Portugal v. Council. Judgment of the Full Court of 23 November 1999*, 37(3) COMMON MARKET LAW REVIEW 797 (2000); G.A. Zonnekeyn, *The Status of WTO Law in the Community Legal Order: Some Comments in the Light of the Portuguese Textiles Case*, 25(3) EUROPEAN LAW REVIEW 293 (2000).

[171] It should be noted that A.G. Saggio concluded in *Portugal v. Council* that the WTO Agreement did have direct effect in the Community legal order, but that the Council had not breached its provisions on the facts of the case (opinion of February 25, 1999).

[172] *Portugal v. Council, supra* note 131, ¶ 36.

> they are found to be inconsistent for the WTO rules, that understanding provides that where the immediate withdrawal of the measures is impracticable compensation may be granted on an interim basis pending the withdrawal of the inconsistent measure.
>
> According to Article 22(1) of that Understanding, compensation is a temporary measure available in the event that the recommendations and rulings of the dispute settlement body provided for in Article 2(1) of that Understanding are not implemented within a reasonable period of time, and Article 22(1) shows a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question.
>
> However, Article 22(2) provides that if the member concerned fails to fulfil its obligation to implement the said recommendations and rulings within a reasonable period of time, it is, if so requested, and on the expiry of a reasonable period at the latest, to enter into negotiations with any party having invoked the dispute settlement procedures, with a view to finding mutually acceptable compensation.[173]

Consequently, the ECJ held that the WTO Agreement did not specify the legal effect it should have in national legal systems. This, the ECJ surmised, was because direct effect and its remedy of disapplication of WTO-inconsistent measures would have the consequence of depriving WTO Members' political institutions of the opportunity of entering into negotiating arrangements under Article 22 of the DSU either for compensation or in relation to retaliatory suspension of concessions.[174] Thus, the ECJ was free to determine whether the WTO Agreement should have direct effect in the Community legal system.

As regards this question, the ECJ stressed that the WTO Agreement, according to its preamble, is still founded (like GATT 1947) on the principle of negotiations with a view to entering into "reciprocal and mutually advantageous arrangements".[175] This emphasis on reciprocity and mutuality was in contrast to "agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community" which had previously been given direct effect.[176]

Finally, the ECJ considered the issue of reciprocity. As some of the Community's major trading partners (i.e., the United States, Japan and Canada) had denied direct effect to the WTO Agreement in their legal systems,[177] the granting of direct effect by the Community could lead to the non-uniform application of WTO rules.[178] The ECJ's underlying policy is apparent as it was also particularly conscious that the lack of judicial control in the legal systems of those trading partners gave their representatives "scope for maneuver" in WTO negotiations. The effect of judicial control in the Community could deny its institutions an equivalent scope for maneuver, and they would thus be disadvantaged in implementation discussions.[179]

The Court therefore concluded:

> It follows from all of these considerations that, having regard to their nature and structure, the WTO Agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.

[173] *Id.* ¶¶ 37–39.
[174] *Id.* ¶ 40.
[175] *Id.* ¶ 42.
[176] *Id.* ¶ 42. An example of an "asymmetric" agreement was held to be the EEC—Portugal Free Trade Agreement, given direct effect in Case 104/81 *Hauptzollamt Mainz v. C A Kupferberg & Cie KG aA* [1982] ECR 1331.
[177] *See supra* note 166, and the literature cited therein.
[178] *Id.* ¶ 45.
[179] *Id.* ¶ 46.

> That interpretation corresponds, moreover, to what is stated in the final recital in the Preamble to Decision 94/800,[180] according to which by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State Courts.[181] (Recital II)

The ECJ then transposed the two exceptions to the non-justiciability of GATT 1947 commitments, that is the rules in *FEDIOL* and *Nakajima*, without significant analysis into the context of the WTO. Accordingly, the ECJ considered whether through Decision 96/386/EC the Community intended to implement a particular obligation assumed in the context of the WTO, or whether the Decision referred expressly to the precise provisions of the WTO Agreement.[182]

The ECJ concluded that the impugned Decision was not within those exceptions given that its purpose was merely to approve the Memoranda of Understanding negotiated by the Community with Pakistan and India.[183]

(c) The Consequences of Portugal v Council—Denial of Direct Effect for Private Parties but "Indirect" Remedies Continue to be Available

(i) Introduction Although the ECJ's ruling in *Portugal v Council* (and the cases which followed it) closed the door to the possibility of direct effect for the WTO Agreements, attempts to invoke the WTO Agreement "indirectly" were tried in two ways:

(a) suits for damages against Community Institutions;
(b) invoking the doctrine of WTO consistent interpretation of Community law.

[180] The effect of the Council's Decision of December 22, 1994 "concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations" (Decision 94/800/EC in OJ 1994 L 336/1) has generated considerable controversy: *see* P. Ruttley "The Effect of the WTO Agreements in EC Law" in THE WTO AND INTERNATIONAL TRADE REGULATION 144 (Ruttley, MacVay and George eds., 1998). That Council decision purported unilaterally to exclude the justiciability of the WTO Agreements within the Community with the following declaration: "*. . . by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State Courts"* (Recital 11). In its Explanatory Notes to the draft Council Decision, the Commission stated that the rationale for this declaration was as follows: "it is important for the WTO Agreement and its annexes not to have direct effect, that is whereby private individuals who are natural or legal persons could invoke it under national law. It is already known that the United States and many other of our trading partners will explicitly rule out any such direct effect. Without express stipulation of such exclusion in the Community instrument of adoption, a major imbalance would arise in the actual management of the obligations of the Community and other countries" (Doc Com (94) 143 final). However, it should be noted that if the Community had wished to declare its views on the legal effect of an external agreement, it would be normal practice for it to do so at the time of the conclusion of the negotiations of the relevant agreement; the Community failed to do this and had been criticised for this omission (*see* P.J. Kuijper "The Conclusion and Implementation of the Uruguay Round Results by the European Community" 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 222, 236 (1995). The Council's declaration remains, it is submitted, a unilateral act and one which cannot *ex post facto* alter the legal character of its actions, such as concluding the Marrakech agreements, since only the ECJ is competent to decide the nature of such effects: *see* Case 104/81 *Hauptzollamt Mainz v. Kupferberg* (1982) ECR 3641. However, it should be noted that the Council's declaration was particularly influential in persuading national courts to deny direct effect to the TRIPS in two early UK court cases both decided before the *Portugal v. Council* judgment: see *R v. the Controller of Patents, Designs and Trademarks* ex parte *Lenzing AG* (Jacob J.) (1997) Reports of Patents Cases 245, and *Azrak-Hamway International Inc's Licence of Right (Design Right and Copyright) Application* (1997) RPC 134 (Dennehey J.).

[181] *Id.* ¶ 47.

[182] *Portugal v. Council, supra* note, ¶ 49.

[183] *Id.* ¶ 50.

These two routes will now be considered in turn. At the time of finalizing the text of this chapter[184], new possibilities of allowing limited means of bringing actions for damages against Community Institutions for alleged failure to implement WTO law have been opened up by the Advocate General's opinion in the *Biret* case. While it is considered unlikely that the European Court of Justice will follow AG Alber's reasoning, the opinion is dealt with separately below.

(iii) The Possibility of Community Financial Liability for WTO Breaches Although the ECJ's judgment in *Portugal v Council* reveals an understanding of the political and legal reality of DSU implementation, the ECJ did not consider the impact of its ruling on private industry. Despite the ECJ's emphasis on preserving the Community's ability to offer compensation for infringements under Article 22 of the DSU, dispute settlement practice within the WTO shows that no WTO Member has ever had an offer of compensation accepted in implementation proceedings. Instead, the inevitable consequence of the European Community's, failure to implement recommendations and rulings of Panels or of the Appellate Body to the satisfaction of its opponents has been retaliation by the complaining WTO Member.[185] Thus, although the Community is advantaged on a "macro" level by the maintenance of its infringing measures, private industries have paid for this advantage "on the ground" by suffering severe increases in their export costs or having their minimum rights under the WTO Agreement suspended.

Consequently, private industries that have been caught in the crossfire of disputes between the Community and other WTO members have sought to hold the Community responsible for their consequential loss and damage. Article 288 EC provides the basis for Community "non-contractual" or tortious liability:

> In the case of a non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The ECJ has jurisdiction to deal with such disputes under Article 235. The exercise of this right has, in practice, been restrictively interpreted by the ECJ,[186] but is available to repair economic harm resulting from unlawful Community acts.

The question in this area, therefore, is whether private parties can rely on the provisions of the WTO Agreement in actions for non-contractual damages against the Community and its institutions, pursuant to Article 288(2) EC. The European Court of First Instance (CFI) has recently considered this issue in three cases: *Cordis v Commission*,[187] *Bocchi Food Trade International v Commission*[188] and *T. Port v Commission*.[189] The judgments contain duplicate wording on the issue of direct effect. In all three cases, the applicants

[184] July 2003.

[185] The Community has faced retaliation in, for example, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27 and *European Communities—Measures Affecting Meat and Meat Products (Hormones)*,WT/DS26 and WT/DS48.

[186] *See* T.C. HARTLEY THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 447 (4th ed., 1998); and H.G. SCHERMERS AND D.F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 328 (6th ed., 2001).

[187] Case T-18/99 *Cordis Obst und Gemüse Großhandel GmbH v. Commission of the European Communities* [2001] ECR II-913 (hereinafter "*Cordis*").

[188] Case T-30/99 *Bocchi Food Trade International GmbH v. Commission of the European Communities* [2001 ECR II-943 (hereinafter "*Bocchi*").

[189] Case T-52/99 *T Port GmbH & Co KG v. Commission of the European Communities* [2001] ECR II-981 (hereinafter "*T Port*").

were wholesale fruit traders who claimed that they had suffered loss as a result of the adoption by the Commission of Regulation (EC) No 2362/98 of October 28, 1998 which laid down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community.[190] Regulation No 2362/98 had been adopted following the condemnation of the Community import arrangements for bananas in European Communities—Regime for the Importation, Sale and Distribution of Bananas[191] (*EC—Bananas*). Put succinctly, the detailed rules of Regulation No 2362/98 had the effect of reducing the applicants' provisional quotas for the import of bananas into the Community. The applicants therefore attempted to recover the monetary value of that trading loss from the Commission in actions for damages.

A further nine cases were subsequently lodged by undertakings claiming to have suffered economic loss as a result of U.S. retaliation against the EC, each suing the Commission, Council and European Parliaments (depending on the nature of the EC legal instrument being challenged) with claims for monetary compensation under Article 288(2) EC (formerly Article 215(2) EC). These cases are *Fiam*;[192] *Le Laboratoire du Bain*;[193] *Biret*;[194] *Cartonbruck*;[195] *de Solène*;[196] *Fremaux*;[197] *Beamglow*;[198] and *Fedon*.[199]

Of these only the two *Biret* cases have so far come to judgment before the Court of First Instance, which dismissed the application on grounds of lack of direct effect of WTO law following *Portugal v. Council*.[200] The CFI's rulings are currently under appeal before the European Court of Justice.[201] The Advocate General in these joined cases has very recently issued an advisory opinion which, to the extent it proposes a basis for permitting actions for damages against Community Institutions following alleged failures to implement WTO obligations is dealt with separately below.

In these complex cases, the applicants attempted to establish their *locus standi* to invoke WTO law in a variety of unsuccessful but instructive ways:

(A) a straightforward claim for damages under Article 288(c) for alleged breaches of WTO law;
(B) a restatement of (a) above but on the grounds that the breach of WTO law was, in reality, a breach of EC law, the WTO obligation having been transposed into EC law; and
(C) a claim that the ECJ had jurisdiction to rule whether the EC could regulate in a manner allegedly contrary to WTO obligations.

[190] OJ 1998 L 293, at 32.

[191] *See European Communities—Regime for the Importation, Sale and Distribution of Bananas* (Panel Report of May 22, 1997, WT/DS27 and Report of the Appellate Body of September 9, 1997, WT/DS27/AB/R), finding that the EC's licensing procedures were inconsistent with Articles I, III:4 and X of the 1994 GATT.

[192] Case T-69/00 *Fiam SPA and others v. Council and Commission* (pending).

[193] Case T-151/00 *Le Laboratoire du Bain v. Council and Commission* (pending).

[194] Case T-174/00 *Société Biret International v. Council* (2002) ECR II-17 and Case 210/00 *Etablissements Biret et Cie v. Council* (2000) ECR II-47, now on appeal to the European Court of Justice in Case C-93/02 P *Biret International SA v. Council* (pending, AG opinion of May 15, 2003).

[195] Case T-320/00 *CD Cartonbruck Gmbh v. Council and Commission* (pending).

[196] Case T-297/00 *Claude-Anne de Solène v. Council and Commission* (action subsequently withdrawn).

[197] Case T-301/00 *Groupe Fremeaux and Palais-Royal v. Commission* (pending).

[198] Case T-383/00 *Beamglow Ltd v. Council, European Parliament and Commission* (pending).

[199] Case T-135/01 *Giorgio Fedon & Figli and others v. Council and Commission* (pending).

[200] Case T-174/00 at ¶¶ 61–72, Case T-210/00, ¶¶ 71 *et seq*.

[201] Case C-93/02 P and C-94/02 P*Biret International SA and Etablissements Biret et Cie v. Council*.

Each of these three arguments will now be examined in turn.

(A) The straightforward claim for damages for breach of WTO law

The applicants all alleged that despite the Community's response to *EC—Bananas*, Regulation No 2362/98 was still in conflict with GATT 1994, GATS and the Agreement on Import Licensing Procedures. However, after pleadings had closed, the ECJ delivered its judgment in *Portugal v Council*, where it held that:

> [H]aving regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.[202]

Portugal v Council was therefore clear authority for the proposition that Member States could not rely on the provisions of the WTO Agreement to challenge the legality of Community measures. It is submitted that it must have followed, *a fortiori*, that the WTO Agreement could have no direct effect for individuals either.[203] Indeed, the applicants all conceded in additional observations to the CFI that WTO provisions did not have "general direct effect" within the Community legal system.[204]

(B) The Restatement of the Damages Claim as an Action for Breach of EC Law

However, the applicants then attempted to re-frame their arguments as complaints that the Community institutions, by adopting Regulation No 2362/98, were guilty of "misuse of powers" as a matter of Community law. More specifically, the applicants argued that because the Community arrangements for banana imports had been declared incompatible with WTO rules in the adopted panel and Appellate Body reports,[205] and that the Community had undertaken to rectify the infringements concerned, the Community was then precluded as a matter of Community law from adopting further provisions in breach of those rules. The Commission, they claimed, had deliberately infringed WTO rules in order to achieve the organization of the banana market and had therefore misused its powers.[206]

The practical consequences of this argument were obvious. The issue of direct effect would become irrelevant if it could be shown that the adoption of a measure infringing WTO rules was a "misuse of power". The focus of judicial attention would no longer be on whether WTO rules were precise and unconditional enough to be given direct effect: instead, they would be directed towards the content of the contested "act" and "subjective" intentions of the Community, when adopting this "act", in the light of its international obligations.

The CFI, no doubt conscious of the fact that the "misuse of power" argument thus had the effect of undermining the ECJ's ruling in *Portugal v Council*, denied the applicant any relief based on the WTO Agreement.

First, the CFI (noting the applicants' concessions) applied *Portugal v Council* and held that WTO rules are not in principle intended to confer rights on individuals, and that

[202] *Portugal v. Council, supra* note 131, ¶ 47.

[203] *See* Nicholas J. Forwood, *The Status of WTO Law in the Community Legal Order* (Paper presented at the 4th Annual Conference of the World Trade Law Association, London, November 10, 2000) at 10.

[204] *Cordis supra* note 187, ¶ 33; *Bocchi supra* note, ¶ 38; *T Port supra* note 189, ¶ 33.

[205] *See supra* note 28.

[206] *Cordis supra* note 187, ¶¶ 31–37; *Bocchi supra* note 188, ¶¶ 36–42; *T Port supra* note 189, ¶¶ 31–37.

consequently the Community cannot incur non-contractual liability under Article 288(2) as a result of their infringement.[207]

In relation to the alternative "misuse of power" submissions, the CFI determined that an act of a Community institution is vitiated by misuse of powers only if it was adopted "with the exclusive or main purpose of achieving an end other than that stated".[208] Further, it held that a finding of misuse of powers may only be made on the basis of "objective, relevant and consistent evidence".[209] The applicants' submission that the Commission had adopted Regulation No 2362/98 "to achieve its ends, namely the organization of the market in bananas",[210] was thus fatal to their claims. Without identifying or proving an ulterior aim behind the legitimate objective stated in the Regulation, i.e. the detailed implementation of Regulation No 404/93 as amended, their claim of misuse of powers could not be substantiated.[211]

In addition, the CFI stressed that the applicants' reliance on misuse of powers to challenge the substance of Regulation 2362/98 for breach of WTO rules was ill-conceived. Misuse of powers, according to the CFI, involves the Community Courts reviewing the "purpose of a measure and not its content".[212] This would seem to have closed the door for further applications for damages pursuant to Article 288 EC.

The Biret *case: a Coda*

However, a series of actions were brought before the Court of First Instance in 2000 by EC undertakings which allegedly suffered economic loss as a result of U.S. retaliatory measures against the EC in the Banana dispute. Most of them are still pending but one, *Biret,*[213] has now reached the European Court of Justice (on appeal) where Advocate-General Alber's advisory opinion of May 15, 2003 has reopened the controversy.

It is not possible to predict whether the Judges of the European Court of Justice will follow AG Alber's reasoning: ECJ Judges often follow an Advocate-General's opinion but in a controversial case such as this, with its wide systemic implications, it is submitted that the probability of this happening is low. However, AG Alber's reasoning is novel and presents a new approach to the issue of monetary compensation for breaches of WTO law by Community Institutions. Moreover, his approach would also have similar implications for the liability of EC Member States.

Biret, a French food trading company (particularly in meat), alleged that it had suffered damage as a result of the EC's continuing ban on the import into the EC of beef treated with certain hormones. However, the relevant EC measures effecting the ban was declared WTO inconsistent in February 1998,[214] and the "reasonable period" for implementation of the ruling expired on May 13, 1999. The Commission presented a draft Directive

[207] *Cordis supra* note 187, ¶ 51; *Bocchi supra* note 188, ¶ 56; *T Port supra* note 189, ¶ 51.
[208] Case C-285/94 *Italian Republic v. Commission of the European Communities* [1997] ECR I-3519.
[209] Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos SA and Transacciones Maritimas SA and Recursos Marinos SA and Makuspesca SA v. Commission of the European Communities* [1996] ECR II-247. *See Cordis supra* note 187, ¶ 53; *Bocchi supra* note 188, ¶ 58; *T Port supra* note 189, ¶ 53.
[210] *Cordis supra* note 187, ¶ 36; *Bocchi supra* note 188, ¶ 41; *T Port supra* note 189, ¶ 36.
[211] *Cordis supra* note 187, ¶ 54; *Bocchi supra* note 188, ¶ 59; *T Port supra* note 189, ¶ 54.
[212] *Cordis supra* note 187, ¶ 56; *Bocchi supra* note 188, ¶ 61; *T Port supra* note 189, ¶ 56.
[213] Case C-93/02 P and Case 94/02 *P. Biret International SA and Etablissements Biret et Cie v. Council.*
[214] *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/11, Appellate Body Report adopted by the DSB on 13 February 1998.

adoption to the EC Council on May 24, 2000, but no further action was taken by the EC. *Biret* brought two actions for damages the Council under Article 288(2) EC (formerly 215(2) EC) before the EC Court of First Instance,[215] but these were dismissed by the CFI applying the case-law of the ECJ since *Portugal v. Council*. The CFI also ruled that the applications did not fall under the Nakajima or FEDIOL exceptions which allow judicial review of Community acts and legislative measures purporting to implement WTO obligations.[216]

Biret appealed to the European Court of Justice.[217] In his Advisory opinion of May 15, 2003, AG Alber advised the ECJ to allow the claim for damages. First, this was not a situation where it was essential to preserve the negotiating maneuver of Community negotiators in the WTO: the EC's obligations following the DSB's adoption of the Appellate Body's report and the expiry of the "reasonable period" for implementation became absolute. No further negotiations of the primary obligation can occur and the DSB's decision must be unconditionally implemented only the *manner* of implementation remains within the EC's discretion. It follows that the failure on the part of the Council to act amounts to a failure to implement Community law (since international treaties to which the EC has adhered become provisions to which the Community Institutions must adhere). The recognition of a right to obtain damages in appropriate circumstances for failure to fulfil obligations having been established in a long line of cases,[218] and the liability of the Council was similarly established in the present case. Moreover, AG Alber suggested that EC law recognized a fundamental right to freedom of economic activity: it was therefore unfair to deny a citizen damages where the Community legislature, through its inaction, had restricted the enjoyment of this right for a period of four years from the expiry of the "reasonable period".

AG Alber concluded that WTO law is directly applicable where the incompatibility of a Community measure with WTO law has been found in DSB recommendations or decisions and the Community has failed to implement the recommendations or decisions within the "reasonable period" of time allowed. In addition, he examined whether the purpose of the WTO rules was to protect the individual. He emphasized that, in States organized on market economy principles, trade is primarily conducted by private individuals and, consequently, restrictions of trade have an effect on the scope of their freedom of economic activity. It was therefore clear from EC case-law that the fact that a legal rule is for the protection of general interests (in the instant case, the liberalization of world trade) did not rule out the possibility that it is also for the protection of individuals. The Council had therefore infringed a rule of Community law, on which an individual could rely.

AG Alber's advisory opinion raises the prospects of a new strand of exceptions to the rule against direct applicability of WTO law. It is submitted that it is consistent both with the underlying principles of the ECJ's ruling in *Portugal v. Council* (in that it would preserve the room for maneuver of Community WTO negotiators) and also consistent with EC precedents establishing a right to monetary compensation where legislative inaction by the Community Institutions or EC Member States have caused damage.

[215] Case T-174/00 and Case T-210/00 cited *Supra* in note 201.

[216] *See* Part III B below for a detailed discussion.

[217] Joined Cases C-93/02 P and 94/02 P *Biret International SA and Etablissements Biret et Cie v. Counci*.

[218] See for example Case C-6/90 *Francovich and Bonifaci v. Italy* (1991) ECR I-5357.

(C) The Alleged Inability of the EC to Legislate in a Manner Arguably Contrary to WTO Obligations

The CFI also rejected the argument that the Community was precluded from adopting a regulation which infringed (or continued to infringe) WTO rules, when the Community had previously undertaken to comply with those rules.[219] It ruled that, in effect, the applicants were attempting to bring the adopted WTO Panel and Appellate Body reports within the *Nakajima*[220] and *FEDIOL*[221] exceptions to the non-justifiability of the GATT/WTO which had been identified in *Portugal v Council*. That is to say, the ECJ and CFI can review the legality of Community measures in the light of WTO rules only where:[222]

(a) The Community intends to implement a *particular obligation* assumed in the context of the WTO; or
(b) The Community measure refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement.

The CFI refused to apply the exceptions to the adopted reports, as they did not include any "special obligations" which the Commission intended to implement within the meaning of *Nakajima*. Nor did they come within *FEDIOL*, as they did not "make express reference either to any specific obligations arising out of the reports of WTO bodies, or to specific provisions of the agreements contained in the annexes to the WTO Agreement."[223]

Consequently, the CFI ruled in each case that:

> The applicant cannot therefore base its action on an alleged infringement of certain agreements contained in Annex 1 to the WTO Agreement in this case or on an alleged misuse of powers.[224]

(b) Further Application of Portugal v Council: Denial of Direct Effect to the TRIPS, GATT 1994 and TBT Agreements. The reasoning in *Portugal v Council* has also been applied by the ECJ to deny direct effect to the TRIPS agreement in *Dior and Others*,[225] to the GATT 1994 in *OGT*[226] and (per Advocate-General Alber) to the TBT.[227] In *OGT*, the ECJ also confirmed the limited scope of the *Nakajima* and *FEDIOL* exceptions, where it held that, even though the contested Community measure had been condemned by an Article 21.5 DSU panel in *EC-Bananas,* expressly stating that "the Community's international commitments under the World Trade Organisation (WTO) . . . should be met", such a ruling did not grant direct effect to the applicable GATT provision and a challenge could

[219] *Cordis supra* note 187, ¶ 57; *Bocchi supra* note 188, ¶ 62; *T Port supra* note 189, ¶ 57.
[220] Case C-69/89 *Nakajima All Precision Co Ltd v. The Council of the European Communities* [1991] ECR I-2069.
[221] Case 70/87 *Fédération de l'Industrie de l'Huilerie de la CEE (FEDIOL) v. Commission of the European Communities* [1989] ECR 1781.
[222] *Cordis supra* note 187, ¶ 58; *Bocchi supra* note 188, ¶ 63; *T Port supra* note 189, ¶ at 58.
[223] *Cordis supra* note 187, ¶ 59; *Bocchi supra* note 188, ¶ 64; *T Port supra* note 189, ¶ 59.
[224] *Cordis supra* note 187, ¶ 60; *Bocchi supra* note 188, ¶ 65; *T Port supra* note 189, ¶ 60.
[225] Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v. Tuk Consultancy BV (C-300/98); (1) Assco Geruste GmbH (2) R Van Dijk T/A Assco Holland Steigers Plettac Nederland v. (1) Wilhelm Layher GmbH & Co KG (2) Layher BV (C-392/98)* (2000) ECR I-11307. *See also* Case C-89/99 *Schieving-Nijstad v. Groeneveld*, (2000) ECRI-5851.
[226] Case C-307/99 *OGT Fruchthandelsgesellschaft GmbH v. Hauptzollamt Hamburg-St Annen* [2001] ECR I-3159 (hereinafter "*OGT*").
[227] *See* Cases C-27/00 and C-122/00 *R v. Secretary of State for the Environment, Transport and the Regions* ex parte *Omega Air Ltd* and *Omega Air Ltd, Aero Engines Ireland Ltd, Omega Aviation Services Ltd v. Irish Aviation Authority*, opinion of September 20, 2001, at ¶¶ 93–96, (2002) ECR I-2569.

not be brought against the WTO-inconsistent Community measure[228] under the *FEDIOL* or *Nakajima* exceptions. The ECJ ruled that it was not designed to ensure implementation in the Community legal order of a particular obligation assumed in the context of GATT 1994, nor did it refer expressly to specific provisions of GATT 1994.[229]

Further, in *OGT* it was argued that the first paragraph of Article 307 EC applied to GATT 1994. The first paragraph of Article 307 EC reads:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

In this context, the ECJ was prepared to assume[230] that GATT 1994 was an agreement within the paragraph. However, it correctly stated that GATT 1994 is legally distinct from GATT 1947 under Article II:4 of the WTO Agreement and that it differs significantly from GATT 1947 as part of the overall WTO regime. Moreover, GATT 1994 was concluded by the Community and not by the Member States.[231]

Even under this assumption, the ECJ referred to its previous case law in *Buroga*,[232] where it held that agreements to which Article 307 EC applies do not become part of Community law, and no new rights are created under them for individuals or economic operators. If a national of a Member State could not claim rights under the agreement before the EC Treaty entered into force for the Member State, he cannot derive any such rights by virtue of Article 307 EC.[233] The ECJ did not expressly apply *Buroga* in detail to the case, being content simply to repeat its essential findings. Nevertheless, one can interpret the ECJ's implicit reasoning to be that since GATT 1994 was not directly effective, Article 307 EC could not alter its legal effect.[234]

B. The Duty of WTO Consistent Interpretation of EC Legislation and Measures

The denial of direct effect to the WTO Agreements and the closure of any prospect to recover damages for alleged breaches of WTO law came as a disappointment to many, particularly those concerned with the transparency and accessibility of the new WTO system.

[228] Council Regulation (EC) No. 1637/98 of July 20, 1998 amending Regulation (EEC) No. 404/93 on the common organization of the market in bananas (OJ 1998 L 210 at 28), preamble, ¶ 2.

[229] *OGT supra* note 226, at ¶ 28.

[230] *Id.* at ¶ 29.

[231] *See Opinion 1/94 supra* note 25. In this context, it is also difficult to see how *OGT* could successfully argue that GATT 1947 could be given direct effect without undermining the ECJ's existing case-law, which consistently denied individuals and Member States the general right to rely on its provisions. *See . The Status of GATT 1947 in the Community Legal Order—An* Overview, *supra* section IX(E).

[232] Case 812/79 *Attorney General v. Buroga* [1980] ECR 2787.

[233] MACLEOD, HENDRY AND HYETT, THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES 229 (1996).

[234] The analysis of Article 307 EC in *OGT* has been taken further in Case T-52/99 *T Port GmbH & Co KG v. Council of the European Communities* (2001) ECR I-2093 (hereinafter *T Port II*) and Case T-3/99 *Bananatrading GmbH v. Council of the European Communities* (2001) ECR II-2123 (hereinafter *Bananatrading*). In both these cases, the CFI found that GATT 1994 was legally distinct from GATT 1947 and was therefore not within the scope of Article 307 EC (*see T Port II*, ¶¶ 79–81; *Bananatrading*, ¶¶ 73–77). Second, the obligations arising from GATT 1994 fell on the Community and not the Member States (*T Port II*, ¶ 82; *Bananatrading*, ¶ 76). Third, Article 307 was not intended to confer rights on individuals and therefore its alleged breach could not be a separate ground for claiming damages (*T Port II*, ¶¶ 83–84; *Bananatrading* ¶¶ 78–79). Finally, any argument that Article 307 (ex 234) gave GATT 1994 direct effect was inconsistent with existing case-law on the issue (*T Port II*, ¶ 85; *Bananatrading*, ¶ 80).

Nevertheless, the WTO Agreements are *not* devoid of legal effects in the Community legal order. Apart from the various avenues open to private individuals to present complaints of WTO violations to their national governments or the EC Commission (discussed in the final section of this chapter), the ECJ has developed the doctrine of WTO consistent interpretation of EC legislation or measures which provides an effective method of invoking WTO law before EC or national courts.

Thus the ECJ has ruled that in fields to which TRIPS applies and in respect of which the Community has already legislated, the national courts are required to apply national provisional measures in the light and purpose of TRIPS.[235] As Advocate General Jacobs noted in his recent Opinion in *Schieving-Nijstad and others*:

> That principle reflects the Court's earlier approach[236] to the effect of GATT 1947, where it stated for example that "it is important that the provisions of GATT should, like the provisions of all other agreements binding the Community, receive uniform application throughout the Community.[237]

However, in its recent judgment in *Schieving-Nijstad*,[238] the ECJ ruled that the procedural rules of Article 50 of the TRIPS "are not such as to create rights upon which individuals may rely directly before the Community courts and the courts of the Member States.[239] Nevertheless, the ECJ was prepared to analyze the contested Dutch legislation implementing Article 50 of the TRIPS to give some guidance on issues of drafting and interpretation.[240]

It remains to be seen how far this principle of consistent interpretation will be taken. Professor Griller suggests that WTO-consistent interpretation "could result in the most effective means of judicially enforcing, in the absence of specific measures of transformation, WTO law within the Community legal order."[241] We believe that the obligation of consistent interpretation should not be overstated, especially if issues of construction are referred to the ECJ by the national courts. The ECJ will naturally be astute to ensure that its ruling in *Portugal v Council* is not undermined and any interpretations will, we suspect, not result in disapplication "by the back door".

C. Is the EC Under a Duty to Legislate in Conformity with WTO Obligations?

1. General Discussion of the ECJ's Case Law

If a Community measure is found to breach the WTO Agreement, is the Community under any international obligation to bring that measure back into conformity with WTO rules? Secondly, if such an obligation exists, there is the further question of whether such an obligation can create directly effective rights in the Community legal order.

It is submitted that the answer to these questions is given implicitly by *Portugal v Council*. In deciding whether the WTO Agreement specified a mandatory form for its implementation, the ECJ noted in *Portugal v Council* that the main purpose of the DSU was

[235] *Dior and Others*, *supra* note 225, ¶ 49; and Case C-89/99 *V.O.F. Schieving-Nijstad Nof and Others v. Groeneveld*, (2001) ECRI-5851 ¶¶ 35 and 55.

[236] Joined Cases 267/81 to 269/81 *SPI and SAMI* [1983] ECR 801, ¶ 14 of the judgment.

[237] Case C-89/99 *V.O.F. Schieving-Nijstad and Others v. Robert Groeneveld* ¶ 42. (2001) ECR I-5851.

[238] *Id.*

[239] ¶ 55 of the Judgment.

[240] The issues raised concerned the necessity of a defendant's request to determine the continuance of interim relief under Art. 50(6) of the TRIPS, and the duration of provisional measures and the exercise of a Member State's discretion under TRIPS 50(6).

[241] Griller *supra* note 170, at 468.

"to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules".[242] In addition, it stated that DSU Article 22.1 on compensation and retaliation "shows a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question".[243] Thus, the ECJ expressly recognized that, in the words of Jackson, "an adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes."[244]

However, it is submitted that the determination of the existence of an obligation is a separate question from the determination of its *precise content*. The content of the "obligation of conformity" referred to by Jackson can be discerned from the wording of DSU Article 3.7, which speaks of compensation being "resorted to" only if the immediate withdrawal of the offending measure is impracticable, and of retaliation as "the last resort". In addition, Article 22.1 states that:

> [N]either compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. (emphasis added)

The implication of these provisions must therefore be that the DSU, in Jackson's words, "clearly establishes a preference for an obligation to perform the recommendation".[245] Indeed, the above quotation from *Portugal v Council* indicates the identical conclusion of the ECJ. However, it is suggested that the use of the word "preferred" in Article 22.1 and the overall structure of the DSU indicates that the obligation of conformity is "soft". That is to say, under the obligation of conformity, a WTO Member must at least *attempt* to bring its measures into line with WTO rules. Nevertheless, that WTO Member's failure to achieve conformity within a reasonable period of time[246] does not mean that it is in breach of its international obligations. For in this situation, the WTO Member is expressly permitted by the WTO Agreement to enter into Article 22 DSU arrangements in lieu of full implementation. It is suggested, therefore, that the obligation of conformity will only be breached where the WTO Member makes it clear that it has no intention of implementing an adopted report for whatever reason.[247]

[242] *Portugal v. Council, supra* note 131, ¶ 37.

[243] *Id.* ¶ 38.

[244] Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings of the Nature of Legal Obligation* in DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION, 69, 70 (Cameron & Campbell eds., 1998). *Contrast* Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 416 (1996), and T.M. Reif and M. Florestal, *Revenge of the Push-Me Pull-You: The Implementation Process under the WTO Dispute Settlement Understanding*, 32 INTERNATIONAL LAWYER 755 (1998), and P. Ruttley, *WTO Dispute Settlement and Private Sector Interests: A Slow but Gradual Improvement?* in DUE PROCESS IN WTO DISPUTE SETTLEMENT 171 (P. Ruttley, I. MacVay and M. Weisberger eds. 2001).

[245] Jackson, *supra* note 244, 74.

[246] Determined pursuant to DSU Art. 21.3.

[247] *See* Desmedt, *supra* note 170, at 100; Griller, *supra* note 170, at 450–454; Rosas, *supra* note 170, at 809; Zonnekeyn, *supra* note 170, at 300–302. This interpretation is confirmed by the most recent practice of the Community. Regulation No 1515/2001 was introduced to allow the Community to adapt its anti-dumping and anti-subsidy legislation in the light of unfavorable dispute settlement reports. However, the Regulation speaks of the Community bringing its laws into conformity with a report's recommendations "where it considers this appropriate"; Council Regulation (EC) No 1515/2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy measures (OJ L 2001, p. 10, preamble ¶¶ 4 and 5 and Articles 1(1)(4), 2(1)(4)). Indeed, the explanatory memorandum to the Commission proposal for the Regulation states expressly that: "WTO rules do not oblige the Community to implement a report adopted by the DSB" (*see* COM/2001/0379 final).

The ECJ implicitly recognized this limitation on the content of the obligation of conformity when setting out the decisive justification for its decision in *Portugal v Council*, which appears at two separate points of the judgment:

> Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of [the DSU] of entering into negotiated arrangements even on a temporary basis . . . (paragraph 40).
>
> To accept that the role of ensuring that [WTO] rules comply with Community law devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for maneuver enjoyed by the counterparts in the Community's trading partners. (paragraph 46).

In other words, the ECJ was concerned to ensure that the Community was on a "level playing field" with other WTO Members who had not given the WTO Agreement direct effect. The remedial consequences of direct effect in the Community legal order (i.e., disapplication of the impugned Community measure) could unilaterally restrict the Community's ability to maintain infringing measures through temporary compensation arrangements. In contrast, those political institutions of other WTO Members whose actions were not subject to such judicial scrutiny would have the full ability to enter into compensation arrangements (or accept retaliation), while simultaneously maintaining their own WTO-inconsistent measures.[248] It is therefore submitted that the ECJ's concern not to undermine the Community's right to enter into compensation arrangements was based on an appreciation of the fact that the Community was not bound to achieve full implementation by the obligation of conformity. It still had the right to enter into DSU Article 22.1 arrangements, albeit in tandem with a soft obligation to attempt to comply with the DSB ruling.

Moreover, the ECJ's reasoning in *Portugal v Council* appears to have assumed the existence of an adopted dispute settlement report.[249] For its focus on compensation presupposes the adoption of "the panel or Appellate Body report" which activates the implementation procedures under DSU Article 21. At this juncture it must be admitted that the ECJ did not consider the impact of the still unsettled "sequencing" issue, which was the subject of intense debate in the DSB during the implementation of *EC—Bananas*.[250] In essence, the sequencing issue is whether a DSU Article 21.5 panel report finding that a WTO Member has not correctly implemented an "original" dispute settlement report must be obtained before Article 22 procedures can be activated.[251] Nevertheless, the resolution of the sequencing issue would, it is submitted, have no effect on the outcome of *Portugal v Council* or the subsequent jurisprudence. The sequencing issue is concerned with when Article 22 DSU procedures can be validly commenced. However, after the adoption of either the original report(s) or the Article 21.5 report(s), the *possibility* of Article 22 arrangements still exists. As has been seen above, this possibility is enough

[248] *See* Griller, *supra* note 170, at 455; Zonnekeyn, *supra* note 168, at 299.

[249] *See* Rosas, *supra* note 170, at 811.

[250] *See* in particular WT/DSB/M/54.

[251] The United States has maintained that a WTO Member has the right to suspend concessions under Art. 22 without having first obtained a favorable Art. 21.5 report. However, as can be seen from WT/DSB/M/54, this view is not shared by the majority of WTO Members. The sequencing issue awaits determination in the DSU review, which it is hoped will be reactivated after the 2001 Ministerial Conference in Doha, Qatar. In this context, *see European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Art. 22.2 of the DSU by the United States—Communication from Japan, WT/DSB/W/91.

to limit the content of the obligation of conformity, so that the Community is only under a "soft" obligation to attempt full implementation after the adoption of any dispute settlement report.

Therefore, in conclusion, it is submitted that the Community Courts have correctly ruled in *Portugal v Council* and the subsequent case law that if a Community measure breaches the WTO Agreement, it is only under a soft obligation to attempt to bring its law back into conformity with the WTO Agreement. If it fails to achieve this target, it is not in breach of its international obligations, as it has the express right to participate in Article 22 DSU arrangements while maintaining the offending measure.

As such, were the Community Courts correct to rule that the obligation of conformity cannot have direct effect in Community law? It is suggested that they were for the following reasons.

First, despite its analysis in *Portugal v Council*, the ECJ has often held that to determine whether a rule in an international agreement has direct effect, it is necessary first to ascertain whether the content of that rule is clear, precise and unconditional, and then to evaluate the content in the light of the aims and context of the agreement.[252] It is suggested that the obligation of consistency cannot be classified as clear, precise or unconditional.

As to clarity and precision, Jackson states that the language of the DSU does not solidly "nail down" the question of the legal effect of a DSU report. Indeed, Jackson's correct conclusion as to the existence of the obligation of consistency is drawn from the cumulative effect of at least eleven DSU provisions.[253] It is simply not possible to identify a stand-alone provision in the DSU which gives a clear and precise legal basis for the obligation of consistency. Further, as to unconditionality, it has been seen that the activation of Article 22 DSU procedures does not simultaneously mean that a WTO Member has breached the obligation of consistency. The ability of WTO Members to engage freely in Article 22 arrangements, despite the existence of an original or Article 21.5 report, means that the obligation of consistency is conditional and, therefore, does not satisfy the first limb of the test of direct effect.

What of the second limb of the test? It is submitted that the ECJ in *Portugal v Council* did not accurately assess the legal force of the WTO Agreement when it characterized it, like GATT 1947, as being founded on negotiations with a view to "reciprocal and mutually advantageous arrangements."[254] The 1947 GATT dispute resolution system was more than a mere "soft" law forum for the settlement of disputes by diplomatic means: indeed, the record of compliance with 1947 GATT Panel Reports was much better than normally appreciated.[255] The new WTO dispute settlement system is, it is submitted, far more effective as witnessed by the impressive record of compliance of WTO Members to DSB rulings. The ECJ was also incorrect in considering that the structure of the DSU and the wording of Article 22 means that the aims and context of the WTO Agreement

[252] Case 87/75 *Bresciani* [1976] ECR 129, ¶ 16; Case 270/80 *Polydor Ltd v. Harlequin Record Shops Ltd* [1982] ECR 329, ¶ 14 *et seq* Case 17/81 *Pabst & Richarz AG v. Hauptzollamt Oldenburg* [1982] ECR 1331, ¶¶ 26 and 27; Case 104/81 *Hauptzollamt Mainz v. C A Kupferberg & Cie KG aA* [1982] ECR 3641, ¶¶ 11 to 14 and 23; Case 12/86 *Demirel (Meryem) v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, ¶ 14; Case 192/89 *Sevince* v. *Staatssecreatris van Justitie* [1990] ECR I-3461, ¶ 15; Case C-18/90 *Office National de l'Emploi v. Bahia Kziber* [1991] ECR I-199, ¶ 15; Case C-432/92 *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S P Anastasiou (Pissouri) Ltd and others* [1994] ECR I-3087.

[253] DSU Arts. 3.4, 3.5, 3.7, 11, 19.1, 21.1, 21.6, 22.1, 22.2, 22.8, 26.1(b).

[254] *Portugal v. Council, supra* note 131, ¶ 42.

[255] *See* W.J. Davey, *An Overview of the General Agreement on Tariffs and Trade*, in HANDBOOK OF GATT DISPUTE SETTLEMENT 78–79 (Pescatore, Davey and Lowenfeld eds., 1992), and the literature cited therein; and E-U. Petersmann, *Constitutional Principles Governing the EEC's Commercial Policy* in THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION 21 (M. Maresceau ed., 1993).

require the ECJ to refrain from scrutinizing Community legislation in the light of WTO rules.

As to the "soft" nature of the WTO, Advocate General Saggio correctly states in his Opinion in *Portugal v Council* that:

> It must be recognised that many provisions of the agreements attached to the Agreement establishing the WTO give rise to obligations and prohibitions that are unconditional and include specific undertakings for commitments by the contracting parties in the context of their reciprocal relations …
>
> [A]nd it has rightly been held that the present system gives little latitude to States who believe they are victims of illegal conduct on the part of another contracting party.[256]

Thus, the ECJ's analysis of the WTO Agreement as based on reciprocal and mutually advantageous arrangements is, to say the least, questionable, particularly in the light of its compulsory dispute settlement procedures.[257] Further, this characterization led the ECJ to draw an uncomfortable distinction between the WTO Agreement and "agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community", the latter having been given direct effect.[258] As Professor Griller notes, the ECJ drew no clear borderline between "asymmetric" and "reciprocal and mutually advantageous" agreements.[259] In addition, it is even more difficult to apply these rather simplistic labels to complex international trade agreements in which commitments may appear to be evenly balanced, but in fact are asymmetric when implemented in the relevant markets. For example, economic opportunities for the vast majority of WTO Members in the Community market are much bigger than could be offered to the Community in return.[260]

However, as regards the appropriateness of the ECJ's interpretative role, the ECJ was right to conclude that judicial scrutiny and potential disapplication of measures which the Community is entitled to maintain temporarily under Article 22 would both frustrate the Community's *express rights* under the WTO Agreement and unilaterally disadvantage the Community vis-à-vis foreign governments who are not under equivalent restraints. It is therefore not the general nature of the WTO Agreement which means that the obligation of consistency fails the second limb of the direct effect test. Rather, this failure is the result of the express wording of Article 22 and the structure of the DSU as a whole. Direct effect of WTO rules would run counter to the "aims and context" of the WTO dispute settlement system.[261]

Finally, the lack of certainty, precision and unconditionality in the obligation of legislative consistency also leads one to conclude that it cannot be brought within the *Nakajima* exception to *Portugal v Council*. Although the scope of the *Nakajima* exception has yet to be fully clarified,[262] *Nakajima* itself was concerned with the situation where the

[256] *Portugal v. Council*, Opinion of Advocate General Saggio, *supra* note 131, ¶ 21.

[257] *See* Desmedt, *supra* note 170, at 98; Griller, *supra* note 170, at 457; Rosas, *supra* note 170, at 808; Zonnekeyn, *supra* note 170, at 300. The European Court of Justice's analysis of the WTO agreements should be contrasted to its approach to the Rio Convention on Biological Diversity. The latter convention was characterised by the ECJ as "not strictly based on reciprocal and mutually advantageous arrangements": while the ECJ declined to rule on whether the Rio Convention had created directly effective rights in the narrow sense, it confirmed the Convention's broader "invocability" which allowed the Court to review the Community's compliance with the obligations contained in the Convention: Case C-377/98 *Netherlands v. European Parliament and Council* (2001) ECRI-7079, ¶¶ 52–54.

[258] *Portugal v. Council, supra* note 131, ¶ 42. *See supra* Section IX(F), *(ii) The Judgment of the ECJ.*

[259] See Griller, *supra* note 170, at 459; Rosas, *supra* note 168, at 813.

[260] *See* Griller, *supra* note 170, at 458.

[261] Rosas, *supra* note 170, at 811.

[262] *See* Griller, *supra* note 170, at 463–467; Rosas, *supra* note 170, at 815.

Community stated its intention to implement a precise GATT 1947 Anti Dumping Code provision, i.e. Article VI of the Code.[263] Advocate General Saggio recognized in *Portugal v Council* that *Nakajima* was "more consistent with the general case-law on international agreements and is based on different criteria from those used to evaluate the effects of the GATT with regard to Community legislation".[264] That is to say, Article VI of the Code was implicitly considered clear, precise and unconditional. It is therefore suggested that the *Nakajima* exception ultimately requires an application of the first limb of the direct effect test referred to above. As can be seen from *OGT*, it is not enough for the Community legislation to identify the Community's general obligation to conform to WTO rules. The legal compulsion for the relevant Community measure must be a clear, precise and unconditional provision in the WTO Agreement. Consequently, the lack of precision and conditional nature of the obligation of consistency means that the Community Courts were correct to hold that it is not a "particular obligation"[265] of the WTO Agreement, as that term is understood in Community law.

2. Practical Application

In practice, the doctrine of legislative WTO-consistency operates in a fairly narrow range of situations, often referred to as the "*Nakajima*" and "*FEDIOL"* exceptions. These two situations will now be discussed in some detail.

(a) Assessment of WTO Consistency in Legislative Enactments: the Nakajima Doctrine. An application of the doctrine of legislative WTO-consistency is the so-called "Nakajima" exception, which derives its name from the eponymous case brought by Japanese exporters challenging definitive anti-dumping duties imposed on them by the EC Council in breach of the GATT Anti-Dumping Code.[266] Article 241 EC provides a mechanism whereby a party affected by an EC Regulation may challenge the applicability of such measure even if the normal two months deadline for bringing a direct challenge set by Article 230 EC has expired. This provides a necessary "safety valve" in cases where a party is affected by a Regulation several years subsequent to its adoption by the Community. Without the so-called "plea of illegality" provided by Article 241 the party contesting the lawfulness of the Regulation would be "time-barred". The ECJ ruled that the Japanese exporters could challenge the Council Regulation imposing definitive duties,[267] not as a consequence of any "direct effect" of the GATT Anti-Dumping Code pursuant to Article 230 EC, but rather "*in an incidental manner under Article* [241] *EC*".[268]

The ECJ stressed that the EC Council's Anti-Dumping Regulation[269] stated that it was adopted in accordance with existing Community obligations, in particular those arising from the GATT and the Anti-Dumping Code:

> In those circumstances, it is necessary to examine whether the Council went beyond the legal framework thus laid down, as Nakajima claims, and whether by adopting the disputed provision, it acted in breach of Article 2(4) and (6) of the Anti-Dumping Code.[270]

[263] *Nakajima supra* note 170, ¶ 30. See the Opinion of Advocate General Gulmann in *Germany v. Council*, *supra* note 146, ¶¶ 145–151.
[264] *Portugal v. Council*, Opinion of Advocate General Saggio, *supra* note 131, at note 21.
[265] *OGT*, *supra* note 226, ¶ 27.
[266] Case C-69/89 *Nakajima v. Council* (1991) ECRI-2069.
[267] Council Regulation 3651/88 in OJ 1998 L317/33.
[268] ¶ 28 of the judgment.
[269] Council Regulation 2943/88 in OJ 1988 L264/56.
[270] ¶ 32 of the judgment.

Although the ECJ concluded by rejecting Nakajima's plea on its substance, it had opened an important avenue for obtaining "WTO compliance reviews" of EC measures, particularly in areas such as anti-dumping where, of necessity, EC legislation will be forced to reflect (and then transpose) precise WTO obligations into Community law.[271]

(b) The Scope of the Nakajima Exception. Too much must not be made of the *Nakajima* and *FEDIOL* exceptions as they have been narrowly interpreted by the Courts. As the ECJ held in *Germany v Council*[272]:

> it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules[273].

This statement was repeated almost verbatim in *Portugal v Council* in the case of the WTO Agreements[274].

This statement of the ECJ requires careful scrutiny since it raises the following questions: (1) is WTO-compliance review only permitted where the contested EC measure is "intended" to implement a particular WTO obligation? (2) Must this intention be express (such as in the basic Anti-Dumping Regulation,[275] or (3) can it be inferred from the context and content of the Regulation in question? (4) If the latter, it is clear that providing specific reference would provide an easy means of excluding judicial review under the *Nakajima* doctrine.

A great number of the EC legislative measures adopted to implement WTO obligations contain express references to the WTO Agreement that inspired them: consequently a *Nakajima*-style "compliance review" should be possible, at least in principle. A wide range of EC instruments[276] make express reference to the WTO obligations that they are

[271] *See* M.C.E Bronckers, *WTO Implementation in the European Community: Anti-dumping, Safeguards and Intellectual Property*, 29(5) JOURNAL OF WORLD TRADE 73 (1995); and P. Didier, *The WTO Anti-Dumping Code and EC Practice: Issue for Review in Trade Negotiations*, 35(1) JOURNAL OF WORLD TRADE 33 (2001). *See* Case C-76/00 P *Petrotub and Republica v. Council* (judgment of January 9, 2003, not yet reported) where the ECJ ruled that the requirement to state reasons in Article 2.4.2 of the WTO Agreement on the implementation of Article VI of the GATT 1994 had been subsumed under the general requirement in Article 190 of the EC Treaty for EC institutions to state reasons for their acts.

[272] Case C-280/93 *Germany v. Council* (1994) ECRI-4973.

[273] ¶ 111 of the judgment.

[274] Case C-149/96 *Portugal v. Council* (1999) ECR, ¶ 49, *supra* note 131.

[275] Council Regulation 384/96 (OJ 1996 L56/1) expressly states that it is implementing the WTO Agreement on the implementation of Article VI of the 1994 GATT: *see* Recitals 3, 4 and 5 in particular. For an analysis of how successfully the EC has achieved this, *see* M.C.E. Bronckers, *supra*, note 271, and P. Didier, *supra*, note 271.

[276] *See* the package of Regulations adopted by the Council to implement the WTO agreements which became binding on the Community from the date of its membership, published in the December 31, 1994 issue of the EC Official Journal (OJ L 349). These measures are: Council Regulation 3283/94 on protection against dumped imports form countries not members of the European Community (OJ 1994 L 349/1) implementing the GATT Anti-Dumping Code; Council Regulation 3284/94 on protection against subsidized imports from countries not members of the European Communities, (OJ 1994 L 349/22) implementing the GATT Subsidies Code; Council Regulation 3285/94 on the common rules for imports (OJ 1994 L 349/53) implementing the GATT and the Agreement on Safeguards; Council Regulation 3286/94, the Trade Barriers' Regulation discussed below; Council Regulation 3287/94 on pre-shipment inspections for exports from the Community (OJ 1994 L349/79) implementing the Agreement on pre-shipment inspection; Council Regulation 3288/94 (OJ 1994 L 349/83) amending the Community trade mark for the implementation of the TRIPS; Council Regulation 3289/94 (OJ 1994 L 349/85) implementing the Agreement on Textiles and Clothing; Council Regulation 3290/94 (OJ 1994 L 349/105) implementing the Community's obligations in the agriculture sector

purporting to implement and should, on the Nakajima principle, be susceptible to judicial review to ascertain whether they have been successful in transposing the relevant WTO obligation. However, the availability of such a procedure will vary from case to case, making the application of the *Nakajima* doctrine difficult to determine with any degree of certainty.

One example will suffice. The Agreement on Government Procurement ("GPA") led to the adoption of a number of Community Directives on government procurement after the GPA entered into force,[277] which make several references to the GPA in their Recitals. The Community has exclusive competence as regards procurement in goods, and the relevant Recitals of the Directives are therefore the expression of the Community draftsman's intention both to implement the EC's obligations as a signatory to the GPA and to oblige the EC's Member States to apply the Directives to goods procured from other GPA signatories. On the *Nakajima* principle, these Directives should be subject to judicial review in the light of the GPA. However, the position as regards procurement in services is different, since this is an area of mixed competence; consequently, the susceptibility of the Directives to judicial review of the *Nakajima* type will not be possible in the case of procurement in services, (where the relevant passages of the Directives, insofar as they address procurement in services, will have to be interpreted as a prohibition on discrimination of Community suppliers).[278]

The experience of the ECJ's interpretation of the Memoranda of Understanding with India and Pakistan[279] in the *Portugal v Council* case should serve as a warning to those arguing for too sweeping an application of the *Nakajima* principle. In that case, Portugal had argued that the Memoranda and the Council Decision that approved them[280] had the express purpose of applying the relevant WTO rules in the GATT 1994 and the Agreement on Textiles. The two Memoranda in question were intended to reduce quota restrictions and customs duties for Indian and Pakistani exports to the EC, both of which could only be done in the context of the WTO membership of the EC, India and Pakistan. The second Recital to the Council Decision adopting the Memoranda recorded that they were negotiated "in the framework of the GATT market access negotiations" between the Commission and these two countries as regards textile products[281]. Consequently, Portugal submitted that the Council Decision that it was challenging was judicially reviewable based on the *Nakajima* principle. The ECJ did not accept that argument:

> The contested decision is not designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of the WTO, nor does it make express reference to any specific provisions of the WTO agreements. Its purpose is merely to approve the Memoranda of Understanding negotiated by the Community with Pakistan and India.[282]

following the Agreement on Agriculture; and Council Decision 94/824/EC on the extension of the legal protection of topographies of semiconductor products to persons from a Member of the WTO, implementing TRIPS obligations. It should be noted that some of these instruments have subsequently been amended.

[277] *See* Council and European Parliament Directive 97/52 (OJ 1997 L328/1) and Council and European Parliament Directive 98/4 (OJ 1998 L 101/1).

[278] For a fuller discussion of this issue, *see* Griller, *supra* note 170, at 463–4.

[279] Memorandum of Understanding between the European Community and the Islamic Republic of Pakistan on arrangements in the area of market access for textile products, OJ 1996 L-153/48; Memorandum of Understanding between the European Community and the Republic of India on arrangements in the area of market access for textile products, OJ 1996 L 153/53.

[280] Council Decision 96/386/EC of 26 February 1996 (OJ 1996 L 153/47).

[281] Council Decision 96/386, Recital 2.

[282] *Portugal v. Council, supra* note 131, ¶ 51 of the judgment.

The ECJ was correct to state that contested Council Decision did not expressly refer to a precise obligation contained in GATT 1994 or in the Agreement on Textiles in the body of its text. However, it is clear that the Council draftsman was writing with the intention of creating a legal instrument that would be consistent with the EC's obligations under the aforementioned WTO provisions. The conclusion to be drawn is that the mere intention to act in accordance with WTO obligations does not automatically render a provision of EC legislation susceptible to judicial review under the *Nakajima* principle. The narrow test applied by the ECJ appears to require the contested Community measure to be "designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of the WTO" or that it should "make express reference to [a] specific provisions of the WTO agreements". That considerably restricts the scope of a *Nakajima*-style compliance review.

(c) Assessment of WTO-consistency of EC-incorporated Remedies and Obligations: The FEDIOL Doctrine. Another variant of "WTO consistency review" occurs where an international obligation is incorporated into Community law, for example where Community legislation is aimed expressly at dealing with practices which are illicit under an international agreement (such as the rules of non-discrimination in GATT Article III) to which the EC is a party. The legality of any Community measure taken to deal with the allegedly illicit third country practice is, by virtue of the EC legislation, dependent on the GATT-consistency of the third country practices being challenged. In such circumstances, therefore, the ECJ has concluded that it has jurisdiction and competence to assess that conformity and can perform its own analysis of the GATT obligations at issue.

In *FEDIOL*,[283] the applicant trade association presented a complaint against alleged Argentinean breaches of Articles III, XI and XXIII of the 1947 GATT agreement. This complaint was brought under Regulation 2641/84, then the applicable complaints mechanism for alleged third country violations of GATT obligations. The case turned on whether the Commission correctly exercised its discretion under Regulation 2641/84 in rejecting FEDIOL's complaint.

The ECJ ruled that even though GATT was not capable of direct effect, that did not prevent individuals from requesting the Court to examine the Commission's assessment of whether the Argentinean measures constituted a violation of the GATT agreement. In effect, the ECJ was being asked to review the legality of the Commission's decision applying the provisions of Regulation 2641/84.[284]

One could imagine the same reasoning being applied in other situations, such as a challenge under Article XX of the Agreement on Government Procurement, alleging a breach of that plurilateral agreement's rules in the award of a Community tender. An analysis of such a claim would be likely to lead the Community Court seized with the matter to examine the terms of the GPA and the remedies it provides.

IV. Private EC Complaints Procedures for the Enforcement of WTO Obligations

A. Introduction

Even if the doors to private enforcement of the WTO Agreement have largely been closed by the ECJ's judgment in *Portugal v Council* and the cases that followed it,

[283] Case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (FEDIOL) v. Commission* (1989) ECR 1781.
[284] ¶ 22 of the judgment.

the EC provides several other means for private interests to submit complaints of perceived violations of the WTO Agreements by non-EC countries. There are three main avenues:

(a) informal complaints to the Commission via its Market Access Strategy Program;
(b) formal complaints under the Trade Barriers Regulation; and
(c) complaints via an EC Member State in the Article 133 Committee.

The final part of this chapter will describe each of these avenues in turn.

B. The Community's "Market Access Strategy"

Very soon after the WTO Agreement came into force, the European Commission's Directorate-General for Trade (DG Trade) launched an important political initiative: the "Market Access Strategy".[285] This was a large-scale exercise composed of several elements. First, information was gathered from Community traders by creating a database listing trade barriers experienced by Community industry in third countries. DG Trade's website[286] contains an interactive dialog box where the WTO Members' commitments in their national schedules can be compared with actual experiences, questions can be e-mailed to the Commission and specific complaints submitted. Any trade barrier identified through this process is then investigated by DG Trade. First, the suspected trade barrier is reported to the Commission's Market Access Unit and sufficient information collected to enable the discussions to be started with the authorities of the WTO Member concerned. If a trade barrier, contrary to WTO obligations, is proved to exist, the Member States and the Commission, meeting in the so-called "Article 133 Committee",[287] decide on an appropriate course of action, such as bilateral consultations between the EC and the third country concerned, activating the WTO dispute settlement procedure, or even, where appropriate, the inclusion of a commitment to the removal of the trade barrier in WTO accession negotiations. The Article 133 Committee produces annual reports of its activities.

C. The Trade Barriers Regulation: Council Regulation 3286/94[288]

The Trade Barriers Regulation (TBR) has been the subject of extensive commentary[289] and constitutes a major procedural innovation, providing a clear and transparent

[285] *See* Commission Communication, *The Global Challenge for International Trade: A Market Access Strategy for the European Union*, COM (96) 53 final. The Commission has held several symposia on market access: *see* Symposium on Market Access—Summary of Proceedings, Brussels, November 4, 1997 and December 2000. An informative and detailed account of the Market Access Strategy can be found in MacLean and Zarpellon, *Tackling Barriers to Trade Through the European Community's Market Access Strategy*, 5 INTERNATIONAL TRADE LAW & REGULATION 109 (1999).

[286] The Market Access Database can be found at: http://mkaccdb.eu.int.

[287] *See* D. The Article 133 Committee *infra* Part IV D.

[288] Council Regulation (EC) No. 3286/94 (OJ 1994 L 349 at 71) as amended by Council Regulation (EC) No. 356/95 (OJ 1995 L 41 at 3) laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization.

[289] *See* in particular: Marco Bronckers, *Enforcing WTO Law through the EC Trade Barriers Regulation*, 3 INTERNATIONAL TRADE LAW AND REGULATION 76 (1997); MACLEAN AND VOLPI, EU TRADE BARRIER REGULATION (2000); M. Bronckers and N. McNelis, *The EU Trade Barriers Regulation Comes of Age* 35 JOURNAL OF WORLD TRADE 427 (2001).

complaints procedure for EC industry against violations of the WTO Agreement.[290] The length of this chapter does not allow a very detailed description of the TBR and reference should be made to the literature cited above.[291] In essence, the TBR provides a means by which Member States or Community industrial interests can submit complaints to DG Trade. If the complaint is substantiated, the Commission's services investigate the obstacle to trade and, where consultations fail to achieve an acceptable result, the EC Council may exercise its discretion to activate the WTO dispute settlement mechanism.

1. Scope of the TBR

The TBR is designed to deal with two types of obstacles to trade, as defined in Article 2(1) of the Regulation: "any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action". The statement of the TBR's aims in Article 1 of the Regulation makes it clear that this covers "primarily" the WTO Agreement, but also other trade agreements to which the EC is a party, such as the various Association Agreements it has concluded with a number of non-WTO States:[292]

> This Regulation establishes Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation which, subject to compliance with existing international obligations and procedures, are aimed at:
>
> (a) responding to obstacles to trade that have an effect on the market of the Community, with a view to removing the injury resulting therefrom;
> (b) responding to obstacles to trade that have an effect on the market of a third country, with a view to removing the adverse trade effects resulting therefrom.

2. Permitted Subject—Matter of TBR Complaints

(a) Governmental Measures. The TBR is aimed at governmental measures which are alleged to breach the WTO Agreement, rather than the acts of private parties. Article 2(1) of the TBR defines "obstacles to trade" as "any trade practice adopted or maintained by a third country". Clearly, both violation and non-violation complaints are covered.[293] However, general systematic obstacles to trade which are not specifically referable to a definite provision of the WTO or other trade agreements appear to be excluded.[294] Accordingly, a complaint of anti-competitive conduct or infringements of intellectual property rights by third country enterprises would fall outside the scope of the TBR.

[290] As well as the rights and obligations contained in other bilateral EC-third country trade agreements or multilateral and plurilateral agreements to which the EC is a party. Bronckers (2001), *supra* note 271, at 433, suggests that "it cannot be excluded that a TBR complaint could be based on customary international law", a situation that might arise in cases of expropriation without adequate compensation.

[291] *See supra* note 289.

[292] A full list is available on the Commission's website at <http://europa.eu.int/comm/trade/pdf/ecrtagr.pdf>.

[293] *Compare* Article 2(1) of the TBR with Article XXIII (1) of the 1994 GATT.

[294] As Bronckers, *supra* note 271 points out,"It is difficult to see how the Indonesian sound recording case could have been admitted under the TBR", referring to *IFPI v. Indonesia* (1987), where the European sound recording industry complained about piracy of its sound recordings in Indonesia, claiming that these activities were essentially tolerated by Indonesia: OJ 1988 L 213, at 51. It should be noted that the EC attacked Indonesia for the acts of individual citizens in its territory according to standards of intellectual property protection contained in treaties to which it was not a party.

A more difficult question is whether the TBR could cover government inaction or discriminatory reluctance to enforce its domestic laws against anti-competitive conduct by its own nationals. The evidential burden that would need to be met to lodge a TBR complaint based on the points at issue in *Fuji-Kodak*[295] or *Indonesian Sound Recording*[296] would be a considerable challenge. This point should not be stressed unduly: after all, a non-violation complaint under Article XXIII(1) of the GATT will often be directed at "sins of omission" on the part of a government rather than at national measures containing outright breaches of WTO obligations.[297]

(b) Economic Activities Covered by the TBR. The TBR covers the international trade rules "established under the auspices of the WTO".[298] It therefore covers any alleged breach of the WTO Agreement, the multilateral agreements annexed to it such as the TRIPS or the GATS,[299] as well as the plurilateral agreements such as the GPA.

(c) Issues of Mixed Competence and the TBR. As has been seen, the ECJ has ruled that the EC shares competence with the Member States as regards most services and intellectual property issues.[300] Arguably this permits greater Member State involvement in TBR procedures relating to those areas, something that may be to the advantage of complainant EC industries with good relations with their governments. Although the Nice Treaty of 2001 has changed the situation, by providing that the EC has competence to negotiate and conclude agreements in services and the commercial aspects of intellectual property,[301] this Treaty is not (at the time of writing) yet in force, and indeed may not be if opposition to it in Ireland (and other Member States) continues.

In practice, however, the Commission has taken action in several cases relating to intellectual property without apparent Member State objection, no doubt on the grounds that the TBR offers an effective way of dealing with individual country WTO violations and a recognition that the Community has the necessary expertise and resources to defend EC industry.[302]

A precondition of a TBR complaint is the definition of the relevant product by reference to its characteristics, including its use or purposes or the degree of its substitutability with other products. In the *Brazilian Proex* case,[303] which concerned a TBR complaint against subsidies given by the Brazilian government to its aircraft manufacturers to encourage exports, the Commission required the complainant to justify its narrow definition of the

[295] In *Japan—Measures Affecting Consumer Photographic Film and Paper* (WT/DS44), adopted Panel Report of April 22, 1998, the United States attacked alleged governmental tolerance of anti-competitive conduct in the film distribution market—in the event unsuccessfully.

[296] In *Indonesia—Sound Recordings* (OJ 1987 C136/3) privacy of sound recordings allegedly tolerated by the Indonesian government led to a procedure being initiated under the predecessor to the TBR, the so-called "New Commercial Policy Instrument", Council Regulation 2641/84 in OJ 1984 L252/1. This led to an amicable settlement and the Indonesian government agreed to adopt measures to strengthen intellectual property rights protection. *See* OJ 1988 L 123/51.

[297] *See*, in particular, the list of "non-violations" in Article XXIII(1) of the GATT which, after covering failure to carry out WTO obligations and the "application" of measures, then covers "the existence of any other situation".

[298] TBR, Art.2(2).

[299] *See* TBR Articles 2(5) and 2(6).

[300] *See supra* Part II, for a discussion of the allocation of Community and Member State competence as regards WTO law resulting from Opinion 1/94 (1994) ECR I-5267.

[301] Article 133(5), Treaty of Nice.

[302] *See* Bronckers and McNelis, *supra* at note 289.

[303] *See* OJ 1999 C108, at 33, re: *Brazil Proex Export Financing*.

relevant market as being confined to "regional aircraft" rather than all types of aircraft, using definitions used in the recent Boeing/MCD merger decision.[304]

(d) Locus Standi for the Submission of Complaints. Complaints can be submitted by Member States[305] or Community industry,[306] or by any Community enterprises or any association (regardless of whether or not they have legal personality), acting on behalf of one or more Community enterprises.[307]

There are three types of complaints allowed by the TBR. The "first track" covers complaints by Member States against adverse effects resulting from obstacles to trade. The "second track" covers complaints by Community industry against "injury" caused by "obstacles to trade that have an effect on the market of the Community". Thus only a Community industry (rather than individual companies) may use the TBR to complain of effects felt *within* the Community markets of foreign trade practices. By contrast, both trade associations and individual companies are given the right to complain against obstacles to trade affecting a third country market (the "third track").

Each "track" has its own procedure and individual evidentiary requirements and will analyzed in turn below.

(i) Member State Complaints A Member State has an automatic right to submit a TBR complaint,[308] provided it is able to supply "sufficient evidence" to the Commission to support the request for action "as regards obstacles to trade" and the effects resulting therefrom.[309] The evidence submitted to the Commission must follow the illustrative list in Article 10 of the Regulation where the complaint deals with injury or adverse trade effects.[310] Upon receipt, the Commission notifies the other Member States of the complaint[311] and must take a decision whether or not to act on the complaint "as soon as possible" and normally within 45 days of the referral.[312] The procedure can be suspended to permit further fact finding.[313]

It is significant that no Member State has activated the procedure to date, probably reflecting political sensitivity of being too obviously seen to attack a third country. By contrast, sixteen complaints have been accepted by the Commission following the initiation of procedures under Article 8(1)(a) of the TBR.

(ii) Complaints by a Community Industry against Effects within the Community from Foreign Trade Practices Article 3(1) of the Regulation provides that "any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry" may lodge a written complaint when it "considers that it has suffered injury as a result of obstacles to trade that have an effect on the market of the Community".

Article 2(5) of the Regulation defines a Community industry as "all Community producers or providers" of either:

[304] Commission Decision of July 30, 1997, OJ 1997 C 136, at 3.
[305] TBR, Art. 6.
[306] TBR, Art. 3(1).
[307] TBR, Art. 4(1).
[308] TBR, Art. 6(1).
[309] TBR, Art. 6(2).
[310] TBR, Art. 6(2).
[311] TBR, Art. 6(3).
[312] TBR, Art. 6(5).
[313] TBR, Art. 6(5).

(a) products or services identical or similar to the product or service which is the subject of an obstacle to trade; or
(b) products or services competing directly with that product or service; or
(c) who are consumers of processors of the product or consumers or users of the service which is the subject of an obstacle to trade.

The complaint must contain sufficient evidence of the existence of the obstacles to trade and of the injury resulting therefrom. Evidence of "injury" must be given on the basis of the illustrative list in Article 10 of the TBR, namely:

(i) the volume of Community imports or exports concerned, notably where there has been a significant increase or decrease, either in absolute terms or relative to production or consumption on the market in question;
(ii) the prices of the Community industry's competitors, in particular in order to determine whether there has been, either in the Community or on third country markets, significant undercutting of the prices of the Community industry;
(iii) the consequent impact on the Community industry and as indicated by trends in certain economic factors such as: production, utilization of capacity, stocks, sales, market share, prices (that is depression of prices or prevention of price increases which would normally have occurred), profits, return on capital, investment, and employment.[314] (An example of a Community industry complaints of this type was (in part) the complaint by COTANCE, the Confederation of National Association of Tanners and Dressers of the EU against Argentinean measures relating to the export of raw and semi-tanned hides and the import of finished leather.[315] COTANCE argued that the restrictions on exports of hide had a negative effect on the internal EC market.)

(iii) Complaints by Individual Community Enterprises The third (and most common) type of complaint covers complaints brought by individual companies or trade associations against adverse trade effects as a result of obstacles to trade that have an effect on the market of a *third* country[316] (rather than "injury as a result of obstacles to trade that have an effect on the market of the Community", which is dealt with under the Community industry procedure described above). Again, the evidence supplied to the Commission must be on the basis of the illustrative list in Article 10 of the TBR cited above.

Alternatively, a complaint can be presented by a grouping of producers or service providers "whose combined output constitutes a major proportion of total Community production of the products or services in question".[317] For these purposes, to prevent the blocking of a complaint by related Community users or importers of the product alleged to be the subject of the trade obstacle, manufacturers within the Community who are related to the producers of the products under investigation may be excluded.[318] There are also special rules for regional Community industries; where the complainants' collective output constitutes "the major proportion of the output" of the relevant product originating from one or a set of Member States, and "provided that the effect of the obstacle to trade is concentrated" in that Member State or set of Member States, then

[314] TBR Art. 10 (a)–(c).
[315] OJ 1997 C59/6.
[316] TBR, Art. 4(1).
[317] TBR, Art. 2(5).
[318] TBR, Art. 2(5)(a).

a TBR complaint on behalf of Community industry may be submitted.[319] An example of this procedure occurred in the complaint against Chilean restrictions on shipping of swordfish presented by a Spanish trade association located in Galicia which was found to represent a major proportion of the Community's frozen swordfish industry.[320]

This category of complainants is limited to complaints against violations or nullification of the WTO Agreement,[321] and does not cover bilateral agreements between the EC and third countries.[322]

(iv) Threatened Injury Where the complaint addresses threatened injury, the evidence presented to the Commission must be sufficient for it to assess whether it is clearly it is clearly foreseeable that a particular situation is likely to develop into actual injury. In this regard, Article 10(2) of the TBR allows account to be taken of factors such as:

(a) the rate of increase of exports to the market where the competition with Community products is taking place;
(b) export capacity in the country of origin or export, which is already in existence or will be operational in the foreseeable future, and the likelihood that the exports resulting from that capacity will be on the market referred to in point (a) above.

3. Post Complaints Procedure

Once the complaint is received, the Commission's services examine the evidence. If a *prima facie* case is made out, the Commission formally initiates a procedure[323] by a notice in the Official Journal of the EC, which indicates the product or service and countries concerned, gives a summary of the information received, and requests that all relevant information be communicated to the Commission. The Commission states the period within which interested parties may apply to be heard orally by the Commission.[324]

The Commission notifies the authorities of the third country complained against and may offer consultations.[325]

During the investigation phase, the Commission will consult importers, traders, producers and other parties concerned and may conduct on-site visits (where permitted by the third country complained against).[326] Third parties who can demonstrate that they are "primarily concerned by the result of the procedure" may apply to be granted a

[319] TBR, Art. 2(5)(b).

[320] *See* Commission Report on this TBR Complaint, OJ 1998 C 215/2 and press release of January 25, 2001 announcing the amicable settlement of the dispute.

[321] *See* TBR, Art. 4(1), second sentence: "Such complaint, however, shall only be admissible if the obstacle to trade alleged therein is the subject of a right of action established under international trade rules laid down in a multilateral or plurilateral trade agreement". Thus the WTO Agreements and the two remaining plurilateral agreements in Annex 4 to the WTO Agreement (on trade in civil aircraft and government procurement) are covered, but not, it would seem, the bilateral agreement of the EC with third countries.

[322] This limitation on "third track" complaints appears to have been the result of a political compromise within the EC Council reflecting a concern that sensitive bilateral relations between the EC and Central and Eastern European countries should not be undermined by EC industry complaints. *See* Marco Bronckers: *Enforcing WTO Law through the EC Trade Barriers Regulation*, 3 INTERNATIONAL TRADE LAW AND REGULATION 76, 80 (1997). However, EC bilateral trade agreements generally have their own dispute resolution procedures which may offer an avenue for private industry complaints.

[323] TBR, Art. 8 (1) (a).

[324] This is pursuant to TBR, Art. 5.

[325] TBR Art. 8 (1) (b).

[326] TBR Art. 8 (2) (a) and (b).

hearing.[327] Subject to the consent of the parties, the Commission may also organize a meeting of the different sides to the dispute "so that opposing views may be presented and any rebuttal argument put forward".[328] This examination procedure takes between five and seven months from the date of initiation of the procedure.[329]

After the Commission has concluded its investigations, it then reports to the TBR Committee, composed of EC Member State representatives,[330] with the Commission representative as chairman of the TBR procedure, usually within five months of the announcement of the initiation, although that period can be extended to seven months.[331]

4. The Outcome of the TBR Procedure: Termination, Suspension or WTO Dispute Settlement

Once the Commission has concluded its investigations and after consultation with Member States, there are three possible outcomes.

The first is that the investigation has led to the conclusion that no action by the Community is required (either because it is not in the interests of the Community to take action or because the third country has rectified the situation by the adoption of new measures or new legislation): in that eventuality, the TBR procedure may be terminated.[332]

Alternatively, the TBR procedure may be suspended.[333] In that eventuality, the Commission monitors the situation at regular intervals which allows the third country complained against to alter its laws or measures and for the Commission to examine whether, over a set period of time, the change of practice has remedied the situation. A recent example of this procedure was the suspension of the complaint by the European Federation of Pharmaceutical Industries and Associations against alleged Korean restrictions on local manufacturing.[334]

An additional option is for the obstacle to trade to be dealt with by means of a bilateral agreement.[335]

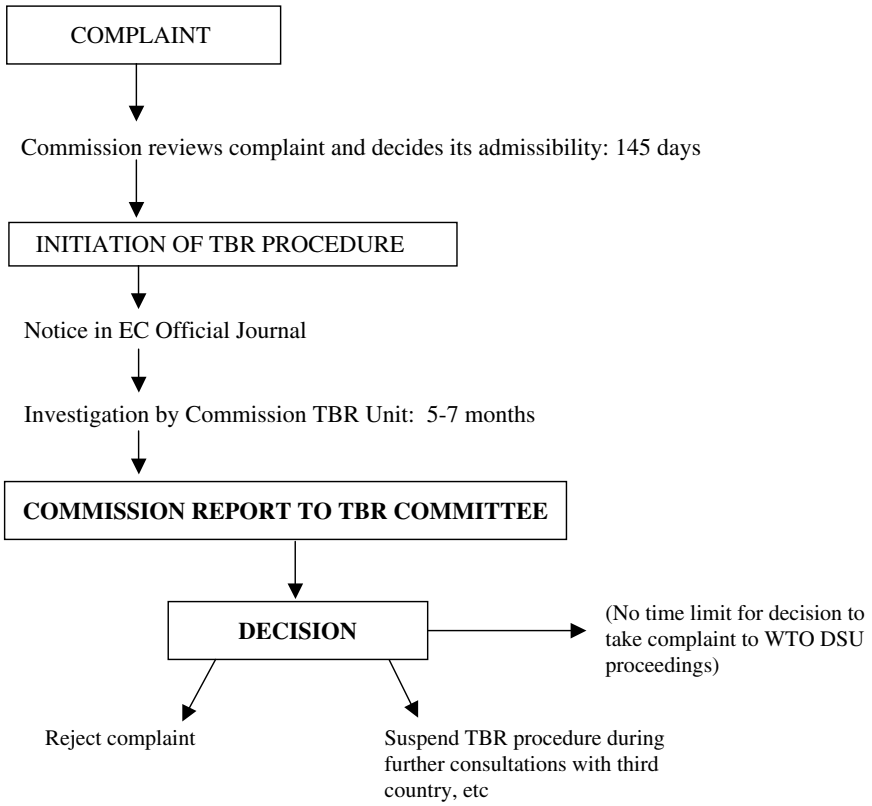
However, where no satisfactory solution can be found, and if it is in the interests of the Community to do so, the European Communities may activate WTO dispute settlement procedures.

5. Initiation of WTO Proceedings

If the complaint is justified, the Council may exercise the option to initiate proceedings before the WTO DSB. However, it is not obliged to do so since Article 12 of the TBR confers very wide discretion in deciding whether or not to proceed in the WTO DSB; as Article 12(1) provides, the Council must decide that it is "in the interests of the Community" to take action.

No time limit is set by the TBR for the Council's decision whether or not to take the complaint to WTO dispute settlement proceedings. For obvious practical reasons, the

[327] TBR Art. 8(5).
[328] TBR Art. 8(6).
[329] TBR, Article 8(8).
[330] TBR Art. 7.
[331] TBR Art. 8(8).
[332] TBR Art. 11(1).
[333] TBR Art. 11(2).
[334] Notice of initiation in OJ 1999 C 218/3, notice of suspension in OJ 2000 L281/18.
[335] TBR Art. 11 (3).



Diagrammatic description of TBR procedure and time limits.

Council has an almost complete discretion in the matter, although one might envisage an admissible legal challenge against deliberate and manifest "foot dragging".[336] Recent cases have witnessed very considerable delays in initiating WTO procedures.[337]

Before the TBR procedure can be initiated, the Commission must conclude that "there is sufficient evidence to justify initiating an examination procedure and that it is necessary in the interests of the Community" to do so.[338]

TBR cases raise complex issues of international economic law, diplomacy and external relations policy. It is obvious that the decision whether to initiate WTO dispute procedures will only be taken after very careful consideration of the effect of such a step on relations with the third country concerned. This is particularly the case where there is a possibility that the WTO procedure will lead to retaliatory suspension of concessions pursuant to Article 22 DSU. In deciding whether to proceed to WTO dispute settlement, the Commission will have to balance other conflicting commercial interests i.e., those of Community exporters compared to those of consumers. Sometimes, for example, certain

[336] *See, e.g.*, the action brought by a Member of the European Parliament to challenge the Council's failure to start on the common aviation policy: Case 246/81 *Lord Bethell v. Commission* [1982] ECR 2277.

[337] Fourteen months from the initiation of the TBR procedure to activation of the DSU in United States — *Antidumping Act of 1916* (OJ 1997 C58/14: initiation), OJ 1998 L126/36, request for consultations on June 9, 1998); thirteen months in *Japan—Imports of Leather* OJ 1997 C110/2 (initiation), request for consultations on October 8, 1998 (though announced in May 1998: OJ 1998 L159/65); and twenty months in *Argentina—Leather Exports and Imports* (OJ 1997 C59/6) (initiation), decision to proceed to WTO consultations in October 1998 (OJ 1998 L295/46) and official request on December 23, 1998.

[338] TBR Art. 8 (1).

Community interests will have managed to find an "accommodation" with the country whose actions gave rise to the TBR complaint. They may be less enthusiastic about the prospect of WTO proceedings compared to the complainants. It is noteworthy that, unlike the current EC Anti-Dumping Regulation,[339] the TBR gives no guidance on how this balancing of competing interests should be achieved.

Another noteworthy aspect of the TBR procedure is the requirement that complainants establish that the alleged violation of WTO law has created adverse trade effects. By contrast, under WTO law, a complainant Member does not have to establish the existence of adverse trade effects, but merely that the contested provision is in breach of WTO obligations.[340] This additional requirement on TBR complainants is, of course, designed to give the Council a greater margin of discretion in deciding whether or not to take up the complaint and to start WTO dispute settlement proceedings.

An unreasoned or unjustifiable refusal to initiate a TBR procedure is an act of the Commission[341] capable of judicial review by the ECJ[342] since it alters the legal position of the complainant. However, the circumstances in which the Community courts will exercise their review powers are limited to verifying whether the relevant procedural rules or applicable laws have been observed, whether the Commission has properly addressed the facts before it, or whether there has been a misuse of powers.[343]

The Council's wide discretion makes it unlikely that a successful judicial review action could be brought by an aggrieved party whose complaint has been rejected (for instance under the procedure for challenging a Community institution's failure to act under Article 232 EC).[344] In the predecessor Regulation to the TBR,[345] an attempt to challenge the Commission's rejection of a complaint was unsuccessful as the European Court of Justice effectively declined to substitute its interpretation of the legal situation for that of the Commission.[346] The results of the TBR have been mixed, with industry often complaining about the TBR's cumbersome procedure and the heavy evidential burden that must be met to ensure that the Commission's discretion is exercised in its favor.

To date, there have been twenty two TBR cases (two of which were "continuations" of previous complaints under the TBR's predecessor Regulation).[347] A full list of these cases, with references to the relevant notices of initiation, suspension and termination

[339] *See* Article 21(1) of Regulation 384/96, OJ 1996 L 56/1.

[340] *See United States—Taxes on Petroleum and Certain Imported Substances*: adopted Panel Report June 17, 1987, BISD 34S/136, 158 (concerning GATT III:2, first sentence).

[341] *See* the definition of a Community "act" in Case 60/81 *IBM v. Commission* (1981) ECR 2639: "any measure the legal effects of which are binding on, and capable of affecting the legal interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article [230] for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article. "In this case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitely laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision". (¶¶ 9–10) of the judgment.

[342] This is pursuant to Article 230 EC—*ex* 173).

[343] These are the grounds for judicial review set out in Article 230 EC (*ex* 173); see Case C-174/87 *Ricoh v. Council* (1992) ECR I—1335, at ¶ 68.

[344] Formerly Art. 175 of the EC Treaty.

[345] Regulation 2641/84 (OJ 1984 L 252/1).

[346] *FEDIOL v. Commission*, supra note 149.

[347] *The New Commercial Policy Instrument*, Regulation 2641/84, OJ 1984 L 252/1.

in the EC Official Journal, is available on the website of the Directorate-General for Trade.[348]

The following table provides a survey of the complaints submitted under the TBR up to July 2003.

Trade Barriers Regulation: Recent Case Law

Complainant	Respondent	WTO provision	Procedural aspects
International Federation of Phonographic Industry	Thailand	TRIPS	Commission Decision suspending TBR procedure OJ 1996 L11/7
International Rayon and Synthetic Fibres Committee	Turkey	GATT 1994	Commission Decision terminating proceedings, OJ 1996 L326/71
Federtessile (Italian Textile Association)	USA	Agreement on Textiles and Clothing Agreement on Rules of Origin Article III GATT 1994 Agreement on Technical Barriers to Trade.	Commission Decision terminating the examination procedure, OJ 2000 L278/35
Eurofer (European Confederation of Iron and Steel Industries)	USA	Article VI GATT 1994 Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the WTO Antidumping rules)	Commission Decision to pursue complaint before WTO, OJ 1998 L126/36
COTANCE (Confederation of EC Tanners and Dressers	Japan	Agreement on Subsidies and Countervailing Measures.	Commission Decision to pursue WTO complaint, OJ 1998 L159/65
COTANCE (Confederation of EC tanners and dressers)	Argentina	Article XI GATT 1994 Article X:3 (a) GATT 1994 Article III:2 GATT 1994	Commission Decision to pursue complaint under WTO DSU, OJ 1998 L295/46
BNIC (Bureau National Interprofessionnel du Cognac)	Brazil	TRIPS	Commission Decision terminating examination procedure, OJ 2001 L035/53
Irish Music Rights Organization (IMRO)	USA	TRIPS	Commission Decision to pursue complaint under WTO DSU, OJ 1998 L346/63
EUROFER (European Federation of Iron and Steel Industries)	Brazil	Articles XI, III:4 and X GATT 1994 Agreement on Import Licensing Procedures	Commission Decision terminating proceedings, OJ 1999 L014/32

(*Continued*)

[348] *See* http://europa.eu.int/comm/trade/issues/respectrules/tbr/cases/index_eu.htm (visited July 1, 2003).

(*Continued*)

Complainant	Respondent	WTO provision	Procedural aspects
Febeltex (Belgium Textile Federation)	Brazil	GATT 1994 Agreement on Import Licensing Procedures.	Commission Decision to request WTO consultations OJ 1999 L86/22 Commission Decision suspending examination procedures, OJ 2001 L153/30
Cerestar (EU producer of Sorbitol)	Brazil	GATT 1994 Agreement on Import Licensing Procedures Agreement on Agriculture Agreement on Sanitary and Phytosanitary Measures.	Commission Decision suspending examination procedure, OJ 2001 L153/30
ANAPI (the Spanish national association of owners of deep-sea longliners)	Chile	Article V GATT 1994 (freedom of transit) SPS Agreement.	Commission Decision to pursue complaint under WTO DSU, OJ 2000 L96/67
COLIPA (European Cosmetic, Toiletry and Perfumery Association)	Korea	Agreement on Technical Barriers to Trade Article III: 4 GATT 1994.	Commission Decision to suspend examination procedure, OJ 2000 L4/29
Dornier Luftfahrt GmbH (the German regional aircraft manufacturer)	Brazil	Export subsidies to purchasers of the Brazilian 30-seater regional jet Embraer ERJ-135.	Notice of initiation, OJ 1999 C 108/33
Consorzio del Prosciutto di Parma (an association of 201 Prosciutto di Parma producers)	Canada	TRIPS	Notice of initiation of examination procedures, OJ 1999 C 76/6
EFPIA (European Federation of Pharmaceutical Industries Association)	Korea	Article III:4 GATT 1994	Commission Decision suspending examination procedure, OJ 2000 L281/18
EURATEX (European Apparel and Textile Organisation)	Argentina	Article VII GATT 1994 Article VIII.1(c) GATT 1994 Agreement on Pre-Shipment Inspection Agreement on Textiles and Clothing Agreement on Technical Barriers to Trade.	Notice of initiation of examination procedure, OJ 1999 C340/70

(*Continued*)

Complainant	Respondent	WTO provision	Procedural aspects
Volkswagen AG	Colombia	GATT 1994	Notice of initiation of examination procedure, OJ 2000 C236/4
CESA (Committee of European Shipbuilders Associations)	Korea	Subsidies to Korean shipbuilding companies by the Korean Government (OJ 2000 C 345/5).	Notice of initiation of examination procedure, OJ 2000 C 345/5; supplementary investigation reports of 2001 and updating investigation reports (2002). Initiation of DSB proceedings, 21 October 2002 (OJ 2002 L281/15)
FIFC (Fédération des Industries condimentaires de France)	USA	WTO Agreement DSU	Notice of TBR initiation OJ 2001 C215/2
CIVB (Conseil Interprofessionel du Vin de Botdeanx	Canada	TRIPS (Geographical indications)	Notice of TBR procedure initiation OJ 2002 C 124/6
EOA (European Oilseed Alliance)	USA	SCM	Notice of TBR initiation OJ 2003 C58

D. The Article 133 Committee[349]

An alternative to the formal complaints mechanism of the TBR is presenting a complaint to a Member State, whose representatives meet with their Community counterparts in the Committee established under Article 133 EC.[350] This Article establishes:

> [A] special Committee appointed by the Council to assist the Commission in the establishment of the Common Commercial Policy.

The Committee is composed of a representative of each EC Member State (known as "Titulaires") with the Commission representative holding the Chair. It is an organ of the EC Council.[351]

The 133 Committee is a key forum where authoritative officials meet to deal with the increasingly technical issues of international trade relations. Functionally, it is subdivided into the "Titulaires" Committee, which is attended by the most senior Commission officials, meets monthly, and is responsible for overall policy. The Titulaires' work is

[349] For a recent survey, *see* JOHNSON, EUROPEAN COMMUNITY TRADE POLICY AND THE ARTICLE 113 COMMITTEE (1998).

[350] Formerly Art. 113 of the EC Treaty.

[351] JOHNSON, *supra* note 349, at 17.

assisted by a weekly meeting of the Deputies Committee. The Deputies Committee deals with technically detailed issues and prepares the work of the Titulaires.

In addition, and within the framework of the 133 Committee, there is a weekly meeting of the Member States and Commission representatives in Geneva to discuss WTO matters. It is chaired by the representative of the EC Member State currently holding the Presidency of the Council[352]. To reflect the increased specialization of trade issues, subgroups focused on specific matters have been established (e.g., the Article 133 Textiles Committee and the Article 133 Services Committee).[353]

Although it has only a limited consultative role under Article 133, the Committee advises the Council of Ministers on all matters concerning the implementation of the Common Commercial Policy and participates in the formulation of trade policy. To the extent required by the applications of the doctrine of Community Competence, the Commission proposes new measures to the Council and acts as the spokesman of the Community in the WTO, other multilateral *for a*, and in bilateral meetings with trading partners on policy matters.

While the Article 133 Committee does not itself vote, issues opinions on Commission proposals or on the handling of particular trade disputes. These opinions are not formal documents issued in its own name, but serve to express the consensus of Member States' views.

The Article 133 Committee provides an effective mode for private industry interests of raising WTO compliance issues, without the need to face the considerable administrative and evidential burdens imposed by the Trade Barriers Regulation.[354] It is the more popular vehicle for the presentation of private party complaints against WTO inconsistent measures than the Trade Barriers Regulation and, indeed, several such complaints which have led to successful EC actions in the WTO dispute settlement system originated from Committee 133 complaints rather than Trade Barriers Regulation complaints.[355]

V. Conclusions

The relationship between Community and WTO law has not been easy. The issue of competence within the WTO demonstrates the tension between a multilateral, unified concept of international trade and the fragmented spheres of competence within the structure of the EC Treaty. Moreover, the issue of direct effect reveals the difficulties that are created when a regional organization, designed to improve and unify the legal rights of the individual, participates in a system which, by its very nature, is inter-governmental. However, as we have suggested above, the Community Courts have correctly recognized that the inter-State rights created by the WTO system do not necessarily create rights within the Community system. Finally, the TBR and Article 133 Committees, the gateways through which private parties can access inter-governmental dispute settlement procedures, encapsulate the difficult question of what procedural and substantive hurdles should be overcome by private parties in order to make their voice heard. In summary, these three areas lead one to conclude that, whilst the Community can rightly be classified as a political giant of world trade, the legal structure supporting this position does not bear such a confident assessment.

[352] *Id.* at 36.
[353] *Id*. at 7.
[354] *Id.* at 46.
[355] *See, e.g.*, the EC's WTO complaints against Japan (WT/DS8), Korea (WT/DS75) and Chile (WT/DS87) concerning trade barriers in the spirits industry were all started by Art. 133 complaints rather than the TBR.

E. Other Issues

CHAPTER 34

SPECIAL AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES

Kevin Kennedy[1]

TABLE OF CONTENTS

I. Developing Countries in the GATT-WTO System 1525
A. Defining the Term "Developing Country" 1525
B. Developing Countries' Two-Track Approach to Trade 1528
II. The GATT Rules on Special and Differential Treatment of Developing Countries 1530
A. GATT Article XVIII 1531
1. Background and Overview 1531
2. Article XVIII, Preamble 1532
3. Article XVIII, Section A 1533
4. Article XVIII, Section B 1533
5. Article XVIII, Section C 1534
6. Article XVIII, Section D 1535
B. GATT Part IV 1535
1. Background and Overview 1535
2. Article XXXVI 1536
3. Article XXXVII 1537
4. Article XXXVIII 1537
III. The Generalized System of Preferences 1538
A. Background 1538
B. The Origins of GSP 1539
C. The Ten-Year Waiver 1539
D. The Problem of Discriminatory Preferences 1540
E. The Tokyo Round Enabling Clause 1541
1. Background 1541
2. The Terms of the Enabling Clause 1542
3. The Problem of Graduation 1544
IV. The Uruguay Round Decisions and Agreements Affecting Developing Countries 1546
A. Background 1546
B. Decisions in Favor of Least-Developed Countries 1546
1. Decision on Measures in Favor of Least-Developed Countries 1546
2. Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries 1547

[1] Professor of International Trade Law at Michigan State University College of Law.

C. MTAs Providing Special and Differential Treatment of Developing Countries 1548
1. Agreement on Agriculture 1549
2. Agreement on Implementation of Article VI of the GATT 1994 (Antidumping) 1550
3. Agreement on Subsidies and Countervailing Measures 1551
4. Agreement on Safeguards 1552
5. Agreement on Sanitary and Phytosanitary Measures 1552
6. Agreement on Technical Barriers to Trade 1553
7. Agreement on Trade-Related Investment Measures 1553
8. Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation) 1554
9. Agreement on Textiles and Clothing 1554
10. Agreement on Import Licensing Procedures 1555
11. Other Uruguay Round MTAs 1555
12. Agreement on Government Procurement 1556
V. WTO Assistance to Developing and Least-Developed Countries 1556
A. The Singapore Ministerial Conference 1557
B. Plan of Action for Least-Developed Countries 1557
1. High-Level Meeting on Least-Developed Countries 1559
2. Integrated Framework for Trade-Related Technical Assistance 1559
C. The Committee on Trade and Development 1561
D. The Doha Ministerial Conference and the Development Round 1562
VI. Summary and Appraisal 1566

BIBLIOGRAPHY 1570

I. Developing Countries in the GATT-WTO System

The intellectual keystone of the GATT-WTO multilateral trade system is that economic development is best achieved through non-discriminatory trade patterns, the progressive reduction of tariffs, and the elimination of nontariff barriers that block trade flows. Still, non-discrimination is not a shibboleth in the GATT-WTO system. To cite just one example, the scores of regional trade arrangements that have proliferated over the past decade honor the MFN obligation in the breach. And so it is with developing countries under GATT 1994 and the WTO MTAs. During the initial GATT-ITO negotiations in 1947 the view was accepted that the principle of equality of treatment among countries is inappropriate when countries are not economic equals. Within the GATT-WTO system, the concept of preferential treatment of developing countries (or special and differential treatment in GATT parlance) made its way into the permanent legal structure of GATT 1947 and its many subsidiary agreements. In a nutshell, the rules requiring MFN treatment of imported goods regardless of origin were altered in the case of imports from developing countries.[1]

A. Defining the Term "Developing Country"

Many labels have been applied over the years to the group of countries that are the focus of this Chapter. Developing countries have been referred to as less developed countries. The poorest of the developing countries have been referred to as least-developed developing countries or "LDDCs." A subset of the group of countries comprising developing countries has been called the newly industrialized countries or "NICs," such as the four Asian "tigers" or "dragons" of Korea, Hong Kong, Taiwan, and Singapore. As a group developing countries are not all at the same stage of economic development. Rather, they can be placed on a continuum that runs from the extremes of abject poverty (e.g., the 50 least developed countries), to comparative wealth in the case of Taiwan with per capita GDP of $13,200 in 2000, to actual wealth in the case of Singapore with per capita GDP of $26,360 in 2000. While all developing countries may avail themselves of the WTO provisions on special and differential treatment, under national programs to benefit developing-country trade preferential tariff treatment ends for those developing countries which attain a certain level of wealth. For example, under the U.S. Generalized System of Preferences ("GSP") program, graduation from the GSP program is mandatory once a beneficiary developing country becomes a "high income" country under World Bank criteria (*i.e.*, per capita annual GNP of $8,600 in 1994 dollars).[2] The most noteworthy exercise of the President's authority to graduate beneficiary developing countries

[1] For analyses of the role of developing countries in the GATT-WTO system, *see* WTO, HIGH LEVEL SYMPOSIUM ON TRADE AND DEVELOPMENT, BACKGROUND DOCUMENT (1999); ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (1987); DIANA TUSSIE, THE LESS DEVELOPED COUNTRIES AND THE WORLD TRADING SYSTEM: A CHALLENGE TO THE GATT (1987); ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW (1982); F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW (1990); WORLD BANK, THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES (Will Martin and L. Alan Winters eds. 1995); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT § 25.1–25.7 (1969); KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 376–85 (1970); Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U.L. REV. 347 (1994); Note, *Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development*, 108 HARV. L. REV. 1715 (1995); Robert E. Hudec, *GATT and the Developing Countries*, 1 COLUM. BUS. L. REV. 67 (1992).

[2] 19 U.S.C. § 2462(e).

occurred in 1988 when President Reagan graduated the four Asian "tigers" of Hong Kong, Korea, Singapore, and Taiwan.[3] In 1996, President Clinton withdrew Malaysia's GSP designation, effective January 1, 1997, because it had made sufficient progress in economic development and international competitiveness.[4] Five countries were notified in 1996 that they were being graduated from GSP as "high income" countries, effective January 1, 1998: Aruba, Cyprus, Greenland, Macao, and the Netherlands Antilles.[5] If a country loses its beneficiary designation, it thereafter receives the prevailing MFN duty rate on its exports to the United States.

Although no formal definition of the term "developing country" has ever been adopted by the GATT Contracting Parties or the WTO Members, GATT Article XVIII:1 contains a rough definition of a developing country as one whose economy "can only support low standards of living and [is] in the early stages of development." The WTO divides its membership into three groups: developed countries, developing countries, and least developed countries. The difference between a developed country and a developing country traditionally has been a matter of self-selection.

A country typically joins the WTO as a developing-country Member through self-selection, that is, it declares itself to be a developing country, and that declaration generally goes unchallenged. Because of the many WTO rules extending special and differential treatment to developing countries, this self-selection process is more than a matter of form. However, a challenge to such self-selection arose in the WTO accession negotiations with China, which insisted on accession as a developing country in the services and agricultural sectors. Some WTO Members, especially the United States and the EU, resisted China's accession on such terms.[6] In the end, China acceded to the WTO as a hybrid, with treatment in some contexts the same as a developed-country Member, in other instances on terms the same as a developing-country Member, and still in other cases on terms worse than either a developed- or developing-country Member.[7] For example, in connection with safeguards relief, during a twelve-year period starting from the date of accession there will be a special Transitional Safeguard Mechanism in cases where imports of products of Chinese origin cause or threaten to cause "market disruption" to the domestic producers of other WTO Members. The "market disruption" test is an easier one for an importing country to satisfy than is the standard "serious injury" test contained in Article 2 of the Safeguards Agreement. In the agricultural sector, China agreed to limit its subsidies for agricultural production to 8.5 percent of the value of farm output (the comparable figures for developed and developing countries are 5 percent and 10 percent, respectively).

Regarding the least-developed countries, Article XI:2 of the Marrakesh Agreement Establishing the World Trade Organization accepts the United Nations' designation of a country as least-developed for purposes of the WTO agreements. Fifty

[3] H.R. Doc. No. 162, 100th Cong., 2d Sess. (1988). *See* Jay S. Newman, *Korea and the American Generalized System of Preferences: Was Graduation a Proper Response?*, 11 U. Pa. J. Int'l Bus. L.687 (1990).

[4] 61 Fed. Reg. 54,719 (1996). *See GSP: Malaysia Graduated from Program, Some Pakistan Products Suspended,* 13 Int'l Trade Rep. (BNA) 1629 (1996).

[5] *See* 61 Fed. Reg. 54,719 (1996).

[6] *See China Clings to Tough WTO Demand for Developing Country Status on Joining,* 18 Int'l Trade Rep. (BNA) 782 (2001). For a comprehensive overview of the WTO accession process in practice, *see* WTO document WT/ACC/7/Rev.1 (1999).

[7] *See* WTO, *WTO Successfully Concludes Negotiations on China's Entry*, WTO/Press/243 (Sept. 17, 2001).

countries are currently designated by the United Nations as "least developed countries" ("LDCs"). As of 2004, the United Nations recognized the following 50 countries as least-developed:

Afghanistan	Madagascar
Angola	Malawi
Bangladesh	Maldives
Benin	Mali
Bhutan	Mauritania
Burkina Faso	Mozambique
Burma	Nepal
Burundi	Niger
Cambodia	Rwanda
Cape Verde	Samoa
Central African Rep.	Sao Tome & Principe
Chad	Senegal
Comores	Sierra Leone
Djibouti	Solomon Islands
Equatorial Guinea	Somalia
Eritrea	Sudan
Ethiopia	Tanzania
Gambia	Timor Leste
Guinea	Togo
Guinea Bissau	Tuvalu
Haiti	Uganda
Kiribati	Vanuatu
Laos	Yemen
Lesotho	Zaire
Liberia	Zambia

The list is reviewed every three years by the United Nations Economic and Social Council ("ECOSOC"). The criteria underlying the current list of LDCs are:

- a low income, as measured by per capita gross domestic product ("GDP") (the current maximum is $900);
- weak human resources, as measured by a composite index called the Augmented Physical Quality of Life Index that is based on indicators of life expectancy at birth, per capita calorie intake, combined primary and secondary school enrolment, and adult literacy; and
- a low level of economic diversification, as measured by a composite index called the Economic Diversification Index that is based on the share of manufacturing in GDP, the share of the labor force in industry, annual per capita commercial energy consumption, and UNCTAD's merchandise export concentration index.

Different thresholds are used for inclusion in, and graduation from, the LDC list. A country qualifies to be added to the list of LDCs if it meets inclusion thresholds on all three criteria. A country qualifies for graduation from the list if it meets graduation thresholds on two of the three criteria. For the low-income criterion, the threshold on

which inclusion in the current list is based is a GDP per capita of $900, and the threshold for graduation is a GDP per capita of $1035.[8]

Of the 50 LDCs, 31 are WTO Members. Eleven of the 50 (Bhutan, Cambodia, Cape Verde, Equatorial Guinea, Ethiopia, Laos, Nepal, Samoa, Sudan, Vanuatu, and Yemen) are in the process of accession to the WTO. The remaining LDCs—Afghanistan, Comoros, Eritrea, Kiribati, Liberia, Somalia, Timor Leste, and Tuvalu—are not currently in the process of acceding to the WTO.[9]

In addition to this list of 50 LDCs, the former Soviet bloc countries in Central and Eastern Europe are referred to in GATT-WTO parlance as "economies in transition" or "transition economies" and are usually excluded from the list of developing countries. With the exception of Romania, the transition economies of other East and Central European countries have not and will not accede to the WTO with developing-country status.

B. Developing Countries' Two-Track Approach to Trade

Developing countries showed little enthusiasm for participating in GATT-sponsored MTN rounds based on a perception of GATT as an economic club of rich countries dominated by what was eventually to become known as the "Quad Members" of Canada, the EU, Japan, and the United States. The Quad Members were not forthcoming in meeting the demands of developing countries to lower tariffs and other trade barriers to goods of export interest to developing countries, such as textiles and clothing, steel products, and tropical agricultural products. "Free trade" was a hollow promise for developing countries. A major failure of the MTN negotiations prior to the Uruguay Round from a developing-country perspective was a lack of progress in liberalizing trade in two key sectors, textiles and agriculture.[10]

In reaction to the intransigence of the developed countries, developing countries pursued a two-track approach at the international level, one within GATT and the other within the United Nations Conference on Trade and Development ("UNCTAD"). Within GATT, developing countries pressed for special and differential treatment in connection with tariffs, subsidies, and import quotas. As described below, they have achieved some success in securing such special and differential treatment. The track pursued by developing countries outside GATT was initiated in the 1960s under the auspices of UNCTAD.[11] UNCTAD was established in 1964 in the hope that, at least for developing countries, it

[8] *See Least Developed Countries (LDCs),* at www.un.org. In its July 2000 review, in the light of recommendations by the WTO Committee for Development Policy, ECOSOC declared the eligibility of Senegal for designation as an LDC (subject to Senegalese Government so desiring), and decided to postpone until 2001 its consideration of Maldives' graduation. The criteria for determining the list of LDCs are under review. The Committee for Development Policy has recommended that the Economic Diversification Index be replaced by an Economic Vulnerability Index reflecting the main external shocks to which many low-income countries are subject, and incorporating the main structural elements of the countries' exposure to the shocks, including their smallness and lack of diversification.

[9] For a list of LDCs that are WTO members and of those that are in the process of acceding or that have observer status, *see* WTO, Understanding the WTO: The Organization, Least-Developed Countries, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.

[10] *See* Chapters 6, 9, and 53 of this book.

[11] For a background discussion of UNCTAD in the context of GATT, *see* DAM, *supra* note 1, at 376–85. *See also* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE HISTORY OF UNCTAD 1964–1984 (1985); BRANISLAV GOSOVIC, UNCTAD: CONFLICT AND COMPROMISE (1972). UNCTAD is composed of all UN members, plus Monaco, Switzerland, and Vatican City.

would act as a counterweight to GATT. To that end UNCTAD rejected the MFN principle as an inappropriate basis for conducting trade among countries of disparate economic power.[12] Deeply influenced by its dynamic first Secretary-General, Raul Prebisch, and his 1964 book, *Towards a New Trade Policy for Development*, UNCTAD called for a complete reorganization of the world trading system to realign the tilted playing field on which developing countries had been invited to compete. For example, UNCTAD supported commodity price stabilization schemes,[13] import substitution policies, and increased market access in developed countries for developing-country goods. At its second session in 1968 ("UNCTAD II"), UNCTAD called for the establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences, a call that was embodied in the Generalized System of Preferences three years later.[14]

The zenith (or nadir, depending on one's perspective) of UNCTAD's efforts came in 1974 with its demand for a New International Economic Order, coupled with the UN General Assembly's manifesto, the Charter of Economic Rights and Duties of States.[15] Not only did the Charter sanction commodity cartels, but it also approved expropriation of property without compensation. The Charter found few supporters among the developed countries, with Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom, and the United States voting against adoption of the Charter, and Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain abstaining.

Today, UNCTAD continues to be a voice for developing countries, but its influence in the field of international trade has been eclipsed by the WTO.[16] UNCTAD provides a forum for advancing the economic development of LDCs, having held three decennial conferences that focus on this subject. In May 2001, UNCTAD held its Third United Nations Conference on the Least Developed Countries in Belgium. Under the program of action, participants commit to good governance, to building human and institutional capacities, to enhancing the role of trade in development, and to mobilizing financial resources.[17] UNCTAD convenes at the ministerial level every four years, and oversees the Generalized System of Preferences, discussed below. It also monitors the operation of a number of international commodity agreements between producing and consuming countries designed to stabilize markets for a range of primary products of importance to developing countries. Those agreements include the International Cocoa Agreement, the International Coffee Agreement, the International Sugar Agreement, the International

[12] *See* OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 90 (1985).

[13] *See generally* KABIR-UR-UAHMAN KAHN, THE LAW AND ORGANISATION OF INTERNATIONAL COMMODITY AGREEMENTS (1982).

[14] *See* REPORT OF THE SECRETARY-GENERAL OF THE OECD, THE GENERALIZED SYSTEM OF PREFERENCES: THE REVIEW OF THE FIRST DECADE 9–12 (1983).

[15] G.A. Res. 3281, UN GAOR, 29th Sess., Supp. No. 31, at 50, UN Doc. A/9631 (1974). *See* Charles N. Brower & John B. Tepe, Jr., *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 295 (1975); Branislav Gosovic & John G. Ruggie, *On the Creation of a New International Economic Order: Issue Linkage in the Seventh Special Session of the UN General Assembly*, 30 INT'L ORG. 309 (1976).

[16] *See* Judith Matloff, *UN Trade Body Strains To Prove It's Needed*, CHRISTIAN SCI. MONITOR, May 2, 1996, at 8. The author notes that "UNCTAD is most lauded for its ability to train officials to carry out more efficient trade and its wealth of knowledge about issues such as customs and clearing." *Id.*

[17] *See* UNCTAD, *Draft Program of Action for the Least-Developed Countries for the Decade 2001–2010,* A/CONF.191/L.18 (2001)

Wheat Agreement, the International Tropical Timber Agreement, the International Jute Agreement, and the International Rubber Agreement.[18]

Whatever the merits of the economic arguments for and against special and differential treatment of developing countries in the GATT-WTO system, the fact is that they do receive such treatment. The principle that developing countries should receive preferential treatment is reflected in two amendments to GATT 1994 (Article XVIII, as substantially amended in 1955, and Part IV, added in 1965); the 1971 GATT waiver for GSP, codified in the Tokyo Round Enabling Clause; a handful of formal Decisions reached during the Uruguay Round; and several articles in the WTO multilateral trade agreements ("MTAs"). In addition, the MTAs in a number of instances accord special treatment that is reserved exclusively for LDCs. The following pages survey the joint efforts made by developed and developing countries to improve the economic status of developing countries within the GATT-WTO system.

II. The GATT Rules on Special and Differential Treatment of Developing Countries

Voting in the WTO is based on the United Nations' rule of one-nation, one-vote,[19] and is not weighted by economic power, as is the case in the International Monetary Fund. Nevertheless, influence in the WTO is measured by economic power, not on the sovereign equality of states. Consequently, although developing countries comprise more than 75 percent of the WTO's membership, their influence in the WTO is not in proportion to their numbers. Nevertheless, the WTO endeavors to work by consensus,[20] and has demonstrated a keen awareness of the economic plight of developing countries. The proposition that developing countries should receive special and differential ("S&D") treatment has found concrete expression in several GATT articles and in many of the WTO MTAs. Developing countries received S&D treatment in the WTO MTAs in the form of extended transition periods for bringing their national laws into compliance with the substantive provisions of the MTAs. With the exceptions of the Agriculture, Safeguards, and Subsidies Agreements, developing countries are in general required ultimately to observe all of the substantive provisions of the WTO Agreements on the same terms as developed countries.

In the negotiations leading up to the Havana Charter (the organic document of the still-born International Trade Organization), the United States proposed that developing countries join the ITO on terms equal to those of all other countries, regardless of their stage of economic development.[21] The principle of equality of treatment was totally unacceptable to the developing countries. Consequently, Articles 8 through 15 of the Havana Charter on economic development and reconstruction were drafted to take into account the concerns of developing countries. These Articles covered access to capital and other financing arrangements, international investment, preferential arrangements among developing countries, and commodity agreements. In a parallel development, Article XVIII was also included in GATT 1947. Article XVIII, the principal provision in the General Agreement

[18] For a brief overview of these agreements, *see* U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1993: OPERATION OF THE TRADE AGREEMENTS PROGRAM 75–78 (USITC Pub. 2769, 1994); U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1994: OPERATION OF THE TRADE AGREEMENTS PROGRAM 63–66 (USITC Pub. 2894, 1995).

[19] *See WTO Agreement,* Art. IX:1. The EC holds a block of twenty-five votes, one for each member country.

[20] *See WTO Agreement,* Arts. IX:1, IX:3, X.

[21] *See* DAM, *supra* note 1, at 225; JACKSON, *supra* note 1, at 628–40.

dealing with developing countries, allows governmental assistance for economic development, including the now-discredited domestic economic policy of import substitution. With the stillbirth of the ITO and the Havana Charter, it fell to GATT Article XVIII to accommodate the demands of developing countries for S&D treatment within the GATT legal and institutional framework.

It was becoming increasingly clear in the late 1950s that the economic condition of developing countries was not improving despite the highly touted benefits of an increasingly liberalized world trade regime. The 1958 GATT Report, *Trends in International Trade* (the so-called Haberler Report), concluded that the trade policies of the developed countries restricted market access of developing-country exports and prevented developing countries from realizing the full benefits of liberal trade.[22] The GATT Contracting Parties responded by establishing a Programme for Trade Expansion[23] that same year which, through its Committee III, was charged with the task of identifying developed countries' barriers to developing countries' export trade. The Committee found that high tariffs and quantitative restrictions in developed countries on primary products, in particular agricultural commodities, were chiefly responsible for frustrating the economic development efforts of developing countries.[24] This GATT initiative was followed by the 1961 Declaration on Promotion of the Trade of Developing Countries,[25] and by a seven-point Action Programme in 1963.[26] The Declaration and Action Programme called for preferential tariff treatment of developing-country exports to developed countries. The upshot of these developments was the 1965 amendment of GATT that added Part IV, entitled *Trade and Development.*[27]

A. GATT Article XVIII

1. Background and Overview

In a prelude to the 1958 Haberler Report and the addition of Part IV to GATT 1947, the Contracting Parties took steps in 1955 to assist developing countries in integrating into the world trading system by substantially redrafting Article XVIII, *Governmental Assistance to Economic Development*. The current text of Article XVIII, which took effect in 1957, is derived from two 1955 GATT Working Party reports, the Report of the Review Working Party on Quantitative Restrictions,[28] and the Report of the Review Working Party on Schedules and Customs Administration.[29]

The Report of the Review Working Party on Quantitative Restrictions summarized the new direction of the redrafted Article XVIII in the following words:

> The general concept of the new Article is that economic development is consistent with the objectives of the General Agreement and that the raising of the general standard of living of the underdeveloped countries which should be the result of economic development will facilitate the attainment of the objectives of the Agreement. In that sense, the new text

[22] *See* DAM, *supra* note 1, at 228–29; JACKSON, *supra* note 1, at 642–43.

[23] BISD, 7th Supp. 27 (1958).

[24] For the view that the developing countries were at least partially responsible for their plight, *see* Brian Hindley, *Different and More Favorable Treatment—And Graduation, in* WORLD BANK, THE URUGUAY ROUND HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS 71 (J. Michael Finger and Andrzej Olechowski eds. 1987).

[25] BISD, 10th Supp. 33 (1961).

[26] BISD, 12th Supp. 36 (1963).

[27] BISD, 13th Supp. 1 (1965).

[28] Report of the Review Working Party, *Quantitative Restrictions*, BISD, 3rd Supp. 170 (1955).

[29] Report of the Review Working Party, *Schedules and Customs Administration,* BISD, 3rd Supp. 205 (1955).

> represents a new and more positive approach to the problem of economic development with the obligations undertaken under the General Agreement regarding the conduct of commercial policy.[30]

The principle that economic development is within GATT's competence (as it would have been for the ITO under Articles 8–15 of the Havana Charter) finds expression in Article XVIII's preamble and its four sections.[31] Without attempting to provide a bright-line, quantitative definition of "developing country," Section A authorizes countries whose economies can only support a low standard of living and are in the early stages of development to modify or withdraw tariff concessions in order to promote the establishment of an industry. Section B authorizes such countries to impose import quotas for balance-of-payment purposes. Section C authorizes resort to certain GATT-inconsistent measures as necessary to promote the establishment of a particular industry. Section D permits countries whose economies are in the process of development but which do not have a "low standard of living" to nevertheless derogate from GATT for the purpose of establishing a particular industry, provided it receives the approval of the other GATT Contracting Parties.

2. Article XVIII, Preamble

The preamble of Article XVIII begins:

> The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.[32]

To that end, Article XVIII:2–4 gives developing countries that meet the criteria of having a low standard of living and of being in the early stages of development *carte blanche* to adopt trade protectionist measures in the name of economic development. For example, such developing countries are given broad authorization to maintain flexibility in their tariff structures so as to enable them to grant tariff protection to "a particular industry." A "particular industry" is defined as applying not only to a new or "infant" industry, but also to a new branch of an existing industry, to the substantial transformation of an existing industry, and to the substantial expansion of an existing industry supplying a relatively small proportion of domestic demand.[33] Developing countries also may impose quantitative restrictions for balance-of-payments purposes. If neither of these measures are efficacious, then developing countries may derogate from other GATT provisions and adopt additional trade protectionist measures, as provided in Section C of Article XVIII.

[30] *Working Party Report on Quantitative Restrictions, supra* note 28, at 179, ¶ 35.

[31] *See generally* WORLD TRADE ORGANIZATION, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, vol. 1, at 488–511 (1995).

[32] GATT Art. XVIII:1. GATT 1994 does not provide a quantitative definition of eligibility as a "developing country," such as, for example, by using per capita GDP benchmarks. Regarding the phrase "can only support low standards of living," Interpretative Note *Ad* Article XVIII:1 provides that the determination whether a country can only support low standards of living is not to be based on a temporary situation where exceptionally favorable conditions exist for the export products of a developing country. Regarding the phrase "in the early stages of development," Interpretative Note *Ad* Article XVIII:2 states that it is not limited to countries that have just started their economic development, but also covers countries that are industrializing in order to reduce their dependency on exports of primary products.

In Report of the GATT Panel (adopted), *Ceylon—Article XVIII Applications*, BISD, 6th Supp. 112 (1957), the panel used the criteria of per capita GNP ($128) and the percentage of manufacturing, mining, and construction in GNP (10 percent) to conclude that Ceylon (the present Sri Lanka) was eligible to invoke Article XVIII. *See id*. at 113, ¶ 4.

[33] *See* GATT Art. XVIII, Interpretative Note *Ad* Article XVIII, ¶ 2.

3. Article XVIII, Section A

According to the GATT working party:

> Section A of Article XVIII was drafted to permit a qualifying developing country to enter into negotiations for the modification of a concession, in order to promote the establishment of an industry, with the country with which it was initially negotiated and with other substantially interested countries. . . . [T]he applicant may modify or withdraw concessions in cases where it is unable, for good reasons, to provide adequate compensation.[34]

In pre-Uruguay Round practice, Section A played an insignificant role in the economic development of most developing countries because developing countries as a group had few bound tariffs on imported goods prior to the Uruguay Round.[35] Accordingly, they remained free to raise their tariffs for any reason at any time without being obligated to compensate other GATT contracting parties. Section A had been invoked only nine times by five countries: Suriname in 1958; Greece in 1956 and 1965; Korea in 1958; and Sri Lanka in 1955 (twice), 1956, and 1957.[36]

4. Article XVIII, Section B

Article XVIII, Section B authorizes the imposition of import quotas taken for balance-of-payment ("BOP") purposes under criteria slightly less stringent than the normal BOP criteria set out in GATT Article XII. The Working Party Report on Quantitative Restrictions noted that "countries coming under Section B of Article XVIII face special additional problems which the provisions have been adjusted to meet."[37] Article XII:2(a) permits the implementation of BOP measures to forestall an "imminent" threat of a serious decline in a country's monetary reserves and to correct a situation of "very low monetary reserves." Article XVIII:9(b), on the other hand, which parallels the language of Article XII:2 for the most part, omits the term "imminent" and instead refers to a situation of "inadequate reserves." In addition, under Article XII:12 a country imposing BOP restrictions is required to consult with other Members every year. In contrast, consultations under Article XVIII:4 are required only every two years.

Supplementing the special BOP provisions of Article XVIII is the Tokyo Round Declaration on Trade Measures Taken for Balance-of-Payments Purposes.[38] In that Declaration the Contracting Parties agreed to the following: (1) BOP measures taken under either Articles XII or XVIII should be ones that have the least disruptive effect on trade; (2) the simultaneous application of more than one type of trade measure (e.g., a tariff increase on specific goods coupled with a quota on imports of those same goods) should be avoided; and (3) a time schedule for removing the measure should be announced.[39]

[34] *Working Party Report on Schedules and Customs Administration, supra* note 29, at 215, ¶¶ 22–23.

[35] Developing countries had agreed to tariff bindings on only 13 percent of imported industrial products in the pre-Uruguay Round period. The percentage of imported industrial products subject to bound duty rates shot up to 61 percent as a result of Uruguay Round concessions. *See* Richard Blackhurst, Alice Enders and Joseph F. Francois, *The Uruguay Round and Market Access: Opportunities and Challenges for Developing Countries, in* THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES, *supra* note 1, at 97, 99.

[36] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 31, vol. 1, at 501.

[37] *Working Party Report on Quantitative Restrictions*, *supra* note 28, at 183, ¶ 44.

[38] *Declaration on Trade Measures Taken for Balance-of-Payments Purposes*, BISD, 26th Supp. 205 (1979).

[39] *Id*. ¶ 1. Footnote 1 of the Declaration adds a cryptic statement that "the less-developed contracting parties must take into account their individual development, financial and trade situation when selecting the particular measure to be applied." Because it is hard to imagine that they would do otherwise, this admonition may amount to little more than a call to exercise self-restraint.

Paragraph 2 of that Declaration further provides that if a developed country imposes import quotas for BOP purposes, "it shall . . . take into account the export interests of the less-developed contracting parties and may exempt from its measures products of export interests to those contracting parties."[40] Finally, paragraph 8 of the 1979 Declaration and the Uruguay Round Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 introduce a simplified consultation procedure that permits a documentary presentation (as opposed to a formal meeting) by the developing country imposing the BOP measures. The Committee on Balance-of-Payments Restrictions is responsible for consulting with and reporting on Members which impose BOP restrictions under Article XVIII:B.[41]

The question of whether an invocation of Article XVIII:B is justified was examined in 1989 in three parallel GATT panel reports.[42] Korea had maintained import quotas on beef, ostensibly on BOP grounds, for more than twenty years, notwithstanding the earlier conclusion of the Committee on Balance-of-Payments Restrictions in 1987 that Korea's import restrictions no longer could be justified under Article XVIII:B. The panel found that in light of Korea's much improved BOP situation (it held monetary reserves of $12 billion, equal to three months' worth of imports), Korea should establish a timetable for phasing out its BOP restrictions on beef.[43]

The Appellate Body in *India—Quantitative Restrictions*, ruled that under Article XVIII:11 a Member imposing BOP restrictions need not change its development policies as a condition precedent to imposing such measures.[44] However, the Appellate Body agreed with the panel that India's BOP restrictions were inconsistent with Articles XI:1 and XVIII:11 of GATT 1994.[45]

5. Article XVIII, Section C

Section C of Article XVIII:13 provides:

> If a [developing country] finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

Section C may be invoked in situations where tariff withdrawals under Section A or the imposition of import quotas for BOP purposes under Section B fail to improve a country's economic development. Section C permits developing countries whose "economy can only support low standards of living" (suggesting a reference to least developed countries) to derogate from other GATT provisions in order to promote the establishment of a particular industry.

[40] *See id.* at 207.

[41] *See* Report (2001) of the Committee on Balance-of-Payments Restrictions, WT/BOP/R/59 (2001); Report (2000) of the Committee on Balance-of-Payments Restrictions, WT/BOP/R/55 (2000); Report (1999) of the Committee on Balance-of-Payments Restrictions, WT/BOP/R/47 (1999); Report (1998) of the Committee on Balance-of-Payments Restrictions, WT/BOP/R/44 (1998); Report (1997) of the Committee on Balance-of-Payments Restrictions, WT/BOP/R/37 (1997).

[42] Reports of the GATT Panel (adopted), *Republic of Korea—Restrictions on Imports of Beef*, BISD, 36th Supp. 202, 234, 268 (1989).

[43] *See id*. at 98–101, 120–23, 114–17.

[44] *See* Report of the Appellate Body, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, ¶¶ 126, 134 (1999).

[45] *See id*. ¶ 154.

Section C contemplates that prior consultations will be held before a Member implements Section C measures.[46] In contrast, Section A or B measures require only *post hoc* consultations. Once consultations are completed, and an agreement is reached or attempts to reach an agreement are exhausted, then "[t]he contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement [with the exceptions of Articles I on MFN treatment, II on tariff bindings, and XIII on the nondiscriminatory administration of quantitative restrictions[47]] to the extent necessary to permit it to apply the measure."[48] Given the severe limitations on the kinds of GATT-inconsistent measures that may be taken when invoking Section C, Section C's chief value appears to be in permitting derogations from the Article III national treatment obligation and the Article XI prohibition on quantitative restrictions.

Section C is a provision most often honored in the breach. A handful of countries have been granted releases under Section C,[49] and a handful more have ever bothered notifying other contracting parties of measures taken under Section C.[50] It was blandly reported in 1986 that "countries invoking . . . Article XVIII:C had not followed the prescribed procedures."[51]

6. Article XVIII, Section D

Finally, Section D of Article XVIII focuses on middle-income developing countries, that is, countries that do not fall into the category of a country whose economy can only support low standards of living. Section D permits such middle-income developing countries to invoke Article XVIII:A–C. However, no measures may be implemented without the concurrence of the other WTO Members.[52] Section D has never been invoked.

B. GATT Part IV

1. Background and Overview

In 1957, the GATT Contracting Parties appointed a panel of experts to report on trends in international trade, "in particular the failure of the trade of less developed countries to develop as rapidly as that of industrialized countries, excessive short-term fluctuations in prices of primary products, and widespread resort to agricultural protection."[53] The Report, *Trends in International Trade* (also known as the "Haberler Report" after Gottfried Haberler, the panel's chairman), galvanized the Contracting Parties to examine ways in which developing countries could achieve greater access for their exports in world markets.[54] The end product of the 1958 Haberler Report was Part IV of GATT, *Trade and*

[46] *See* GATT Art. XVIII:14–18.

[47] *See* GATT Art. XVIII:20.

[48] *Id.* Art. XVIII:18.

[49] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 31, vol. 1, at 508 (Cuba, Haiti, India, and Sri Lanka granted Section C releases).

[50] These countries are Greece, Indonesia, and Malaysia. *See id.*

[51] Report of the GATT Group, *Quantitative Restrictions and Other Non-Tariff Measures,* BISD, 33rd Supp. 160, 169, ¶ 35 (1986). *See also* Report of the GATT Panel (adopted), *Ceylon—Notifications under Article XVIII:C,* BISD, 6th Supp. 75, 78, ¶ 8 (1958)("[I]f the need for similar temporary measures [under Section C] should arise in the future, the Ceylon Government would inform the CONTRACTING PARTIES before putting such measures into force."). For additional analysis of the origins of Article XVIII, Section C, *see* Committee on Trade and Development, *Application of Article XVIII, Section C, of GATT 1994,* Background Note, WT/COMTD/39/Add.1 (Sept. 11, 2002).

[52] *See Working Party Report on Quantitative Restrictions, supra* note 28, at 189, ¶ 64.

[53] BISD, 6th Supp. 18 (1957).

[54] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 31, vol. 2, at 1040–41.

Development, which was added to GATT 1947 by the Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development,[55] effective in 1966.[56]

Part IV is comprised of three Articles, Articles XXXVI through XXXVIII. Although Part IV is an integral part of a binding legal instrument, *i.e.*, GATT 1994, it is drafted in language that is hortatory, not mandatory. In other words, developed countries apparently made few, if any, binding legal commitments to developing countries in Part IV. In brief, Article XXXVI is a statement of principles and objectives whose thrust is greater market access for the products of developing countries. Article XXXVII states the commitments the Members agree to make to ensure developing countries do in fact attain increased access to world markets. Article XXXVIII provides for joint action by the WTO Members.

2. Article XXXVI

The first article of Part IV, Article XXXVI, according to Kenneth Dam, "follows the elegant but indefinite style which has tended to characterize the work of those international organizations where the appearance of action has too often been substituted for action itself."[57] For example, Article XXXVI:2 provides, "There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties." Article XXXVI:3 states, "There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development." Article XXXVI proclaims, "The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly." It is hard to disagree with Professor Dam's sobering characterization of Article XXXVI.

Despite the criticism that Article XXXVI is long on exhortation and short on a compulsory plan of action, a GATT panel concluded that the EC had failed to live up to its Article XXXVI commitments. In the 1980 *Report on Refunds of Sugar*,[58] in response to a complaint by Brazil that EC subsidization of sugar exports was inconsistent with Part IV commitments, the panel concluded that "increased Community exports of sugar through the use of subsidies . . . [amounted to a failure to] collaborate[] jointly with other contracting parties to further the principles and objectives set forth in Article XXXVI . . ."[59] In the 1989 *Report on Restrictions on Imports of Dessert Apples*,[60] another GATT panel addressed Chile's complaint that in restricting Chilean imports of apples, the EC had not considered the special needs of Chile as a developing country as the EC was obliged to do under Part IV. The panel stated that it "could not find that the EC had made appropriate efforts to avoid taking protective measures on apples originating in Chile."[61] Nevertheless, because the panel concluded that the EC's import restrictions

[55] *Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development*, done at Geneva, Feb. 8, 1965, 572 U.N.T.S. 320.

[56] *See* DAM, *supra* note 1, at 236–37.

[57] DAM, *supra* note 1, at 238.

[58] Report of the GATT Panel (adopted), *EC—Refunds on Exports of Sugar*, BISD, 27th Supp. 69 (1980).

[59] *See id*. at 97–98, ¶ (h).

[60] Report of the GATT Panel (adopted), *EEC—Restrictions on Imports of Dessert Apples*, BISD, 36th Supp. 93 (1989).

[61] *Id*. at 134, ¶ 12.32.

were in violation of other articles of the General Agreement, the panel did not consider it necessary to reach any conclusions on the claims based on Part IV.[62]

Article XXXVI contains the most important provision of Part IV. This provision marks the first substantive reform of one of the basic (albeit implicit) GATT commitments, that is, non-reciprocity of concessions. Developing countries are relieved of any obligation to reciprocate in tariff negotiations. Article XXXVI:8, which codifies a practice adopted during the Kennedy Round,[63] plainly states that "developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." Interpretative Note *Ad* Article XXXVI to paragraph 8 further states:

> It is understood that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

The Tokyo Round Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation by Developing Countries (the "Enabling Clause"), discussed below, reaffirms that developing countries are not expected to make reciprocal tariff concessions in MTN rounds.

3. Article XXXVII

Article XXXVII, *Commitments*, is a standstill provision that obligates developed countries "to the fullest extent possible—that is, except when compelling reasons, which may include legal reasons, make it impossible,"[64] (1) to give high priority to the reduction and elimination of tariff and nontariff barriers to trade in products of particular export interest to developing countries, (2) to refrain from introducing or increasing such barriers to trade, and (3) to refrain from imposing new fiscal measures that would discourage consumption of primary products produced in developing countries.[65] Article XXXVII:2 directs developed countries to consult with developing countries on the implementation of these admittedly soft commitments. Article XXXVII:3 further instructs developed countries to "make every effort" and "give active consideration" to adopting other unspecified measures for the promotion of imports from developing countries. According to a 1976 GATT Secretariat Note on the application of Part IV, such other measures include refraining from the use of safeguards actions affecting developing-country imports, and excluding developing-country imports from the assessment of antidumping and countervailing duties.[66]

4. Article XXXVIII

As a complement to Article XXXVI:8's modest substantive changes to GATT 1994, Article XXXVIII, *Joint Action*, makes an important procedural change by creating the

[62] *See id*.

[63] *See* LONG, *supra* note 12, at 99; DAM, *supra* note 1, at 238.

[64] The text interpreting the phrase "to the fullest extent possible" was added at the insistence of developing countries. They feared that without this interpretative gloss, developed countries would be the exclusive judge of the applicability of the provisions of Article XXXVII:1. *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 31, vol. 2, at 1061.

[65] *See* GATT Art. XXXVII:1(a)–(c).

[66] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 31, vol. 2, at 1065.

Committee on Trade and Development under authority of Article XXXVIII:2(f).[67] The Trade and Development Committee's original terms of reference included keeping under continuous review the application of Part IV, formulating proposals for consideration by the Contracting Parties in connection with any matter relating to Part IV, and determining the eligibility of a country as a "developing country" for purposes of Part IV.[68] New terms of reference for the Committee were agreed to in 1995 by the WTO General Council at its first meeting, which include the following: (1) to serve as a liaison between the WTO and other multilateral agencies concerned with development, (2) to review the participation of developing countries in the WTO, and (3) to review and consider any questions that may arise in connection with the application of the special provisions in the Uruguay Round Agreements and Decisions in favor of developing countries.[69] Recent activities of the Committee on Trade and Development are discussed in Part V. C below.

Finally, Article XXXVIII directs the Contracting Parties not only to work collaboratively *inter se*,[70] but also with other international organizations, including UNCTAD.[71]

III. The Generalized System of Preferences

A. Background

The 1955 amendment to Article XVIII and the addition of Part IV to GATT in 1965 do not alter the fact that GATT still requires nondiscriminatory MFN treatment in trade between and among contracting parties. In the absence of some agreement to the contrary, any S&D treatment that a developed country gives to a developing country has to be generalized and accorded to all other WTO Members. With the exception of validating historical preferences in existence at the time GATT 1947 entered into effect or when a country acceded to GATT,[72] there is no authorization for S&D treatment of developing countries by developed countries.[73] To be sure, in exceptional circumstances, a Member may be granted a waiver of its GATT obligations pursuant to GATT Article XXV:5. But such waivers may be granted only in "exceptional circumstances," and must be approved by a three-fourths absolute majority of WTO Members. What constitutes "exceptional circumstances" warranting an Article XXV:5 waiver has been the subject of some

[67] BISD, 13th Supp. 75 (1964). Article XXXVIII:2(f) provides that the Contracting Parties shall "establish such institutional arrangements as may be necessary . . . to give effect to the provisions of this Part." For a discussion of the work of the Committee on Trade and Development under GATT 1947, *see* DAM, *supra* note 1, at 242–44. The problems and positions of developing-country Members of the WTO are heard by the Committee on Trade and Development, and its Subcommittee on Trade of Least-Developed Countries. The Committee reports to the WTO's General Council. *See, e.g., Report (2001) of the Committee on Trade and Development and the Sub-Committee on Least-Developed Countries*, WT/COMTD/33 (2001).

[68] BISD, 13th Supp. 75–76 (1964).

[69] WT/L/46 (1995).

[70] *See* GATT Art. XXXVIII:2(a), (c), & (e).

[71] *See* GATT Art. XXXVIII:2(b).

[72] The protocols of accession to the General Agreement of a number of countries which were not original GATT contracting parties include preferences between the acceding country and other countries listed in the protocol of accession. For example, when Argentina joined GATT, it included preferences in existence at the time of its accession with several border countries in South America. For a list of such protocols of accession, *see* GUIDE TO GATT LAW AND PRACTICE, *supra* note 31, vol. 1, at 48–49.

[73] *See* GATT Art. I:2; Annexes A–F.

controversy within GATT.[74] There is no generally accepted definition or standard criteria to identify what circumstances are deemed "exceptional."

The amendments to Article XVIII, the addition of Part IV to GATT, and the work of UNCTAD on behalf of developing countries created momentum for more changes within the GATT system to assist developing countries in their economic development. The notion of expanding import preferences for developing countries was gaining popularity.

Developing countries argued that Part IV was itself authorization to developed countries to grant tariff preferences to developing-country imports that would otherwise derogate from the MFN clause. Developed countries disagreed.[75] What was needed was some legal device by which Members could give preferential tariff treatment to developing countries without simultaneously violating the MFN commitment.

B. The Origins of GSP

The concept of a Generalized System of Preferences ("GSP") was introduced by UNCTAD at its first conference held in 1964.[76] Developing countries argued that preferential tariffs in developed-country markets on developing-country imports would have several salutary benefits for developing countries. First, of course, developing countries would increase their exports. Second, they would diversify into industries that produce and export higher value-added goods, making them less reliant on primary products as their main source of exports. Third, GSP would reduce their dependence on foreign aid.

At UNCTAD's second conference held in 1968, with the support of the United States and other developed countries, the GSP concept was formally adopted. The GSP system as originally conceived had three features: (1) developed countries would grant temporary and unilateral tariff preferences to developing countries; (2) tariff preferences would be on goods of export interest to developing countries in which they were not competitive internationally; and (3) tariff preferences would not be extended to goods produced by an industry in the importing country if that industry was vulnerable to import competition.[77]

C. The Ten-Year Waiver

In 1970, the GATT Contracting Parties adopted the GSP, under which the major developed countries give tariff preferences to the imported products of developing countries. The tariff preferences generally are in the form of lower tariffs on or duty-free treatment of imports originating from designated beneficiary developing countries.To bring the GSP system into legal effect within the GATT framework, the Contracting Parties considered three options: (1) amend GATT, (2) grant an Article XXV:5 waiver, or (3) adopt a

[74] *See, e.g.*, Report of the GATT Working Party, *United States—Caribbean Basin Economic Recovery Act, BISD*, 31st Supp. 180 (1980). In that Report, the Working Party recognized that there are a number of different approaches within the GATT framework to the establishment of preferential schemes and that each case must be analyzed on the basis of all the circumstances peculiar to it. "Having considered these alternative approaches," the Working Party noted, "a number of the members of the Working Party concluded that the waiver procedure under paragraph 5 of Article XXV was the most appropriate alternative with respect to the CBERA." *Id*. at 198, ¶ 62. For an analysis of the Article XXV:5 waiver procedure, *see* GUIDE TO GATT LAW AND PRACTICE, *supra* note 31, vol. 2, at 882–88.

[75] *See* EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION § 9.222 (1996).

[76] *See* PROCEEDINGS OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, General Principle Eight & Annex A.III.5, vol. 1, at 10–11, 39 (1964); DAM, *supra* note 1, at 249.

[77] *See* STAFF OF HOUSE COMM. ON WAYS & MEANS, 104TH CONG., 1st SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 13 (Comm. Print 1995).

declaration by the Contracting Parties authorizing new preferences on a temporary basis, notwithstanding the Article I MFN commitment.[78] The Contracting Parties settled on the second option, a temporary ten-year waiver under Article XXV:5, adopted on May 25, 1971.

The waiver was criticized on the ground that it did violence to the language of Article XXV:5, which calls for waivers of GATT obligations only "in exceptional circumstances." However, the first option, an amendment to GATT, was considered excessively time-consuming. Regarding the third option, the necessary political will for issuing a declaration, which would have given permanent legal status to the GSP system within GATT, could not be mustered at the time.

The Decision on a Generalized System of Preferences of June 25, 1971,[79] temporarily waived the provisions of Article I for ten years with respect to GSP tariff preferences. Even though the GSP Decision did not refer to Article XXV:5, the intent was to grant a waiver under that Article based on communications from the prospective donor countries that had applied for an Article XXV:5 waiver. The waiver made possible the implementation of a system of generalized, non-reciprocal, nondiscriminatory preferences as agreed to at the 1968 UNCTAD conference. In other words, all developing countries, but no developed country, were potential beneficiaries of any GSP program established by a developed country, and beneficiary countries would receive preferential tariff treatment on a non-reciprocal basis. The waiver did not identify beneficiary countries by name. Rather, the waiver provided that beneficiary countries would self-identify.

The only GATT Article affected by the GSP waiver is the MFN obligation of Article I. The 1971 waiver makes GSP legally possible, but it in no way obligates developed countries to offer tariff preferences to developing countries. Any donor country is free to withdraw or modify its GSP program at any time.

In 1971, the original six members of the EEC implemented the world's first GSP program. The benefits were generally available to the so-called "Group of 77" developing countries. By the 1970s, twenty OECD countries—Australia, Canada, Hungary, Japan, New Zealand, Norway, Switzerland, the United States, and the EC (on behalf of its then 12-member countries)[80]—had notified GATT of GSP programs they had established. The GSP is monitored by UNCTAD's Special Committee on Preferences.

D. The Problem of Discriminatory Preferences

Developed countries were expected to extend GSP benefits on a nondiscriminatory basis among all beneficiary developing countries. No one beneficiary, or group of beneficiaries, was to be singled out among developing countries for preferential treatment. However, discriminatory trade preference programs created by developed countries in favor of selected developing countries appeared almost immediately after the GSP was approved by the Contracting Parties. For example, under the first Lomé Convention in 1976, the EU extended GSP benefits to a large but under-inclusive group of nearly seventy developing countries in Africa, the Caribbean, and the Pacific ("ACP"). Most of these ACP countries were former colonies of EU-member countries.[81] The United States at first protested

[78] *See* LONG, *supra* note 12, at 100.

[79] *Decision on a Generalized System of Preferences of June 25, 1971*, BISD, 18th Supp. 24 (1971).

[80] *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 31, vol. 1, at 50.

[81] *See* ELLEN FREY-WOUTERS, THE EUROPEAN COMMUNITY AND THE THIRD WORLD: THE LOMÉ CONVENTION AND ITS IMPACT (1980); Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade,* 22 CAL. W. INT'L L.J. 1 (1991); Kele Onyejekwe, *GATT, Agriculture, and Developing Countries,* 17 HAMLINE

the EU's discriminatory trade preferences that offered preferential tariff treatment to a broader range of goods than was offered to other GSP beneficiary countries. The U.S. complaint became moot in 1983 when it too followed the EU's lead with the enactment of the Caribbean Basin Economic Recovery Act ("CBERA").[82] CBERA provides discriminatory tariff treatment in favor of two dozen countries in the Caribbean and Central America by offering CBERA beneficiary countries preferential duty treatment on approximately 1,700 more items than is the case under the U.S. GSP program.[83] Other discriminatory trade programs for select developing countries include the Andean Trade Preference Act[84] (in favor of Ecuador, Columbia, Peru, and Bolivia) and the African Growth and Opportunity Act.

In a parallel development, the developing countries undertook to provide preferential treatment to one another's imports under GATT auspices. In the Decision on Trade Negotiations among Developing Countries of November 26, 1971,[85] the obligations of Article I:1 were waived to permit a developing country participating in the arrangement to accord preferential treatment with respect to products originating in other developing countries which are signatories to a protocol implementing the Decision. That protocol is open for accession to all developing countries, but has been ratified by only fifteen developing countries.[86]

E. The Tokyo Round Enabling Clause

1. Background

Developing countries were generally disappointed with the results of the 1967 Kennedy Round. Tariff cuts made by developed countries did not significantly improve market access for developing countries because those cuts tended to be on goods that were not part of the export trade of developing countries.

Developing countries hoped for better results in the Tokyo Round. The expectations of developing countries were raised by the Ministerial Declaration that launched the

L. Rev. 77 (1993). The Lomé Convention was overhauled in 2000 in the form of a 20-year agreement that focuses on regional free-trade agreements among the 71 ACP beneficiary countries. *See EU and 71 Developing Nations Agree to Overhaul of Lomé Convention*, 17 Int'l Trade Rep. (BNA) 240 (2000); *EU Requests WTO Waiver on New Pact Giving ACP Countries Preferential Access*, 17 Int'l Trade Rep. (BNA) 596 (2000). The EU received an Article I MFN waiver at the Doha Ministerial Conference for its successor agreement to the *Lomé* Convention, the ACP-EC Partnership Agreement. The waiver expires on December 31, 2007. *See Decision of 14 November 2001 of the Ministerial Conference, ACP-EC Partnership Agreement*, WT/MIN(01)/15 (2001).

[82] *See* 19 U.S.C. §§ 2701–33.

[83] Because CBERA extends discriminatory tariff treatment to a limited number of developing countries, it does not qualify for the blanket MFN waiver available under the GSP. In September 1995, pursuant to Article IX of the WTO Agreement, the United States requested the WTO to renew the waiver previously granted CBERA for an additional ten years. The U.S. request was granted on November 15, 1995. *See* Decision of the WTO General Council of Nov. 15, 1995, WT/L/104 (1995).

[84] Pub. L. No. 102–182, tit. II, 105 Stat. 1236 (1991), *codified at* 19 U.S.C. §§ 3201–3206. The Andean Trade Preference Act ("ATPA"), commonly referred to as the Andean Initiative or Andean Trade Pact, was enacted on December 4, 1991, to authorize preferential trade benefits for the Andean nations of Bolivia, Ecuador, Colombia, and Peru. ATPA benefits are similar to, but not identical with, the benefits accorded beneficiary countries under CBERA.

[85] *Decision on Trade Negotiations among Developing Countries of November 26, 1971*, BISD, 18th Supp. 26 (1971).

[86] Bangladesh, Brazil, Chile, Egypt, India, Mexico, Pakistan, Peru, Korea, Romania, Tunisia, Turkey, Uruguay, and Yugoslavia have ratified the protocol relating to trade negotiations among developing countries. India withdrew on March 29, 1993. *See* Guide to GATT Law and Practice, *supra* note 31, vol. 1, at 51.

Tokyo Round. The Declaration provided that one of the Round's goals was "to secure additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, the acceleration of the rate of growth of their trade, . . . [and] a substantial improvement in the conditions of access for the products of interest to the developing countries . . ."[87]

With the ten-year waiver granted under the 1971 GSP Decision set to expire, affirmative action was required by the Contracting Parties to keep GSP alive. Whereas the political will did not exist in 1971 to make GSP and S&D treatment of developing countries a permanent GATT fixture, by 1979 opinion had shifted, as reflected in four agreements adopted by the Contracting Parties in November 1979 relating to the legal framework for the conduct of international trade:

- the Declaration on Trade Measures for Balance-of-Payments Purposes[88]
- the Decision on Safeguard Action for Development Purposes[89]
- the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance[90]
- the Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries.[91]

The 1971 waiver granted in the GSP Decision was not renewed in light of the Tokyo Round Decision of November 18, 1979 on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries,[92] commonly referred to as the "Enabling Clause."[93] The Enabling Clause gives GSP permanent legal status under GATT.[94]

2. The Terms of the Enabling Clause

The Enabling Clause, as its title suggests, *enables*, but does not *obligate*, developed countries to accord preferential tariff treatment to developing countries.[95] Paragraph 1 provides that "[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties." Paragraph 2 identifies four areas in which such preferential treatment may be accorded, but the list is not exhaustive:

[87] BISD, 20th Supp. 19, 20 (1974).

[88] *Declaration on Trade Measures for Balance-of-Payments Purposes*, BISD, 26th Supp. 205 (1979).

[89] *Decision on Safeguard Action for Development Purposes*, BISD, 26th Supp. 219 (1979).

[90] *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, BISD, 26th Supp. 210 (1979).

[91] *Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, BISD, 26th Supp. 203 (1979).

[92] *Decision of November 18, 1979 on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, BISD, 26th Supp. 203 (1979).

[93] *See* Abdulqawi A. Yusuf, *"Differential and More Favourable Treatment": The GATT Enabling Clause,* 14 J. WORLD TRADE L. 488 (1980).

[94] *See* LONG, *supra* note 12, at 101.

[95] In Report of the GATT Panel (adopted), *United States—Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear form Brazil*, BISD, 39th Supp. 128 (1992), the panel concluded that the Enabling Clause permits only preferential tariff treatment of products from developing countries without obligating the importing developed country to accord that treatment to imports of other countries, but does not permit such preferential treatment in connection with other rules and regulations (in this case, the use of an injury test in countervailing duty actions). *Id*. at 152–53, ¶¶ 6.14–6.17.

(a) preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the [1971 Decision on a] Generalized System of Preferences;
(b) differential and more favorable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT [referring to the Tokyo Round Codes, many of which contained provisions on special treatment of developing countries];
(c) regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and . . . of non-tariff measures, on products imported from one another;
(d) special treatment of the least developed among the developing countries in the context of any general or specific measures in favor of developing countries.

Acknowledging the risk that preferential tariff treatment of developing countries might harm trade liberalization efforts among developed countries, paragraph 3 of the Enabling Clause states that preferential tariff treatment is "to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties." Paragraph 3 further cautions that preferential tariff treatment must not retard the pace of reduction or elimination of tariffs and other restrictions to trade on an MFN basis. Paragraph 4 is a procedural provision obligating any developed country that introduces a GSP program to notify and consult with GATT.

The Enabling Clause does not impose any reciprocity obligation in trade concessions upon developing countries. In fact, paragraph 5 of the Clause reiterates the principle of Article XXXVI:8 by specifically relieving them of any commitment to make reciprocal tariff concessions in exchange for preferential treatment.

The United States, the EU, and Japan are the largest GSP donors measured in terms of tariff benefits to beneficiary countries.[96] Developing countries, including Argentina,

[96] A nagging issue under the Enabling Clause is whether donor countries can discriminate among beneficiary countries by conditioning eligibility for GSP, for example, on the basis of enforcement of worker rights. The U.S. GSP program denies GSP treatment to countries that take or fail to take certain specified actions. A country may lose or be denied GSP beneficiary status if it (1) has nationalized or expropriated, *de facto* or *de jure*, property owned by U.S. citizens or businesses which are at least fifty per cent beneficially owned by U.S. citizens, unless the President determines either that prompt, adequate, and effective compensation has been paid; that good faith negotiations on compensation are in progress; or that the dispute has been submitted to binding international arbitration; (2) fails to recognize or enforce arbitral awards in favor of U.S. citizens or businesses which are at least fifty per cent beneficially owned by U.S. citizens; (3) aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism; and (4) has not taken or is not taking steps to afford internationally recognized worker rights to its workers. A beneficiary developing country may also forfeit GSP beneficiary status if it has failed to take the necessary steps to provide market access to U.S. exports, to protect intellectual property rights, and to reduce barriers to investment and trade in services. *See* 19 U.S.C. §§ 2462(c), 2463(d). For example, in 1995, Maldives was suspended as a GSP beneficiary following a determination that it had not taken and was not taking steps to afford its workers internationally recognized workers' rights. In 1996, President Clinton suspended certain GSP benefits from Pakistan for its failure to make sufficient progress in protecting worker rights. *See* RAJ BHALA AND KEVIN KENNEDY, WORLD TRADE LAW 464–68 (1998). Such conditionality and the consequent discrimination have been challenged as violative of the Enabling Clause. *See, e.g.,* Committee on Trade and Development, Special Session, *Application of the Special and Differential Treatment Provisions Contained in the Agreements and Decisions of the WTO*, Communication from Paraguay, TN/CTD/W/5 (2002).

Chile, Egypt, Indonesia, Morocco, Mauritius, Thailand, and Turkey, have also established their own tariff preference programs for LDCs.[97] In addition, some of the leading regional trade arrangements among developing countries *inter se* have been notified under the Enabling Clause, including the Andean Pact, MERCOSUR, ALADI, and the ASEAN Free Trade Area.[98]

3. The Problem of Graduation

Paragraph 7 of the Enabling Clause for the first time formalizes the concept of graduation from GSP into a legal principle. Although not referring to graduation *in haec verba*, paragraph 7 alludes to graduation from GSP with the statement that as the economic condition of developing countries improves, "they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement." The former Director-General of GATT, Olivier Long, was more candid on the subject of graduation:

> The contention that equality of treatment creates a condition of inequality between developed and developing countries was the main justification and motive for the introduction of preferential treatment. A logical consequence of this precept is that, as the economic situation of developing countries improves, equality should become progressively the rule . . . . [C]ertain developing countries are already competitive in particular sectors. In fact, some of them have lost the benefit of preferences for certain of their exports within the framework of the GSP.
>
> ******
>
> Differential treatment should not be looked upon as immutable. If it were, the results of the efforts made through national and international policies to promote development would amount to little.[99]

Olivier Long's observation raises a question that has yet to be answered satisfactorily: When should a developing country graduate from the GSP?

The principle of graduation from GSP became increasingly popular among donor developed countries during the pre-Uruguay Round years.[100] While developed countries have tried to push developing countries down the road to fuller participation in the GATT-WTO system, developing countries have resisted.[101] In fact, no developing country has

At least a partial resolution of the issue of conditionality was provided by the Appellate Body in 2004 in *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (2004). The Appellate Body concluded that the Enabling Clause "does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries . . . [provided that] identical treatment is available to all similarly-situated GSP beneficiaries . . . ." *Id.* ¶¶ 173–174.

[97] *See* World Trade Organization, Sub-Committee on Least-Developed Countries, *Market Access Conditions for Least Developed Countries*, WT/LDC/SWG/IF/14/Rev.1 (2001).

[98] As of December 2003, nineteen regional trade agreements among developing countries *inter se* have been notified to the Committee on Trade and Development under the Enabling Clause. *See Report (2003) of the Committee on Regional Trade Agreements to the General Council*, WT/REG/13, ¶ 4 (2003).

[99] LONG, *supra* note 12, at 103–04.

[100] *See* Hindley, *supra* note 24, at 71–74; Gregory O. Lunt, *Graduation and the GATT: The Problem of the NICs*, 31 COLUM. J. TRANSNAT'L L. 611 (1994).

[101] *See, e.g.*, Hindley, *supra* note 24, at 72, where the author notes that in 1979 the Group of 77, a bloc of developing countries, rejected the concept of graduation being introduced by developed countries. In the 1982 Report of UNCTAD's Secretary-General, ASSESSMENT OF THE RESULTS OF THE MULTILATERAL TRADE NEGOTIATIONS, the graduation principle in paragraph 7 of the Enabling Clause was criticized to the extent

ever volunteered to be graduated. Donor developed countries have reminded beneficiary developing countries that preferential tariff treatment is neither an end in itself nor is it meant to last in perpetuity.[102]

The theory of graduation was put into practice in the years leading up to the Uruguay Round. Under the U.S. GSP program, for example, the process of graduation can be gradual. GSP benefits are removed on a product-by-product basis once a beneficiary country's exports of a particular product reach a specified value (around $100 million) or capture fifty percent of total U.S. imports of the product.[103] Graduation can also be total. For example, as noted, in 1989 Korea, Hong Kong, Taiwan, and Singapore—which collectively accounted for 57 percent of U.S. GSP imports in 1985—were removed from the list of beneficiary countries under the U.S. GSP program because of the high level of economic development and international trade competitiveness achieved by all four.[104] Obviously, the economies of these countries did not collapse following the loss of their U.S. GSP beneficiary status.[105] More recently, Malaysia (in 1997), and Aruba, the Cayman Islands, Cyprus, Greenland, Macao, and the Netherlands Antilles (in 1998) also were graduated from the U.S. GSP program.[106]

Pre-Uruguay Round assessments of the GSP program were mixed. In a 1983 OECD report on the first ten years of the GSP, the GSP was seen as playing an important role in opening developed countries' markets and expanding developing countries' trade.[107] Other assessments were less upbeat, concluding that GSP benefits had not been distributed evenly among the beneficiary developing countries.[108] A 1986 study estimated that 44 percent of total GSP benefits went to three countries: Hong Kong, Taiwan, and Korea. Each received three times the benefits of the next largest beneficiary, Brazil.[109] What is more, the benefits of GSP have been eroded as a result of the progressive reduction in tariff rates in each MTN round. The margin of tariff preference has shrunk, and in some cases it has disappeared altogether.[110]

it would permit developed countries to discriminate among developing countries in their trade relations. *See* REPORT OF THE SECRETARY-GENERAL OF UNCTAD, ASSESSMENT OF THE RESULTS OF THE MULTILATERAL TRADE NEGOTIATIONS 29, ¶ 179, UNCTAD Doc. T/B/778/Rev. 1 (1982).

[102] Within the Committee on Trade and Development, the view was expressed that the Enabling Clause and GSP contemplated differentiation among developing countries, given that they were at different stages of economic development. *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 31, vol. 1, at 58.

[103] *See* 19 U.S.C. § 2463(c)(2)(A)(i)-(ii).

[104] *See Reagan Decides Asia's 'Four Tigers' can Fend for Themselves*, CHRISTIAN SCI. MONITOR, Feb. 1, 1988, at 7; Jay S. Newman, *Korea and the American Generalized System of Preferences: Was Graduation A Proper Response?*, 11 U. PA. J. INT'L BUS. L. 687 (1990). The EU took similar action in 1995. *See* Simon Lester, *The Asian Newly Industrialized Countries to Graduate from Europe's GSP Tariffs*, 36 HARV. INT'L L.J. 220 (1995).

[105] *See* TOH MUN HENG & LINDA LOW, INSTITUTE OF SOUTHEAST ASIAN STUDIES, ECONOMIC IMPACT OF THE WITHDRAWAL OF THE GSP ON SINGAPORE 36 (1991).

[106] *See* U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1996: OPERATION OF THE TRADE AGREEMENTS PROGRAM 143 (USITC Pub. 3024 1997).

[107] *See* REPORT BY THE SECRETARY-GENERAL OF THE OECD, THE GENERALIZED SYSTEM OF PREFERENCES: REVIEW OF THE FIRST DECADE 90–91 (1983).

[108] *See* OECD, THE GENERALIZED SYSTEM OF PREFERENCES: REVIEW OF THE FIRST DECADE (1983); Ndiva Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, 18 CAL. W. INT'L L.J. 291 (1987–88); Nina J. Lahoud, *The "Non-Discriminatory" United States Generalized System of Preferences: De Facto Discrimination Against the Least Developing Countries*, 23 HARV. INT'L L.J. 1 (1982).

[109] *See* HINDLEY, *supra* note 24, at 69.

[110] *See generally* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, RENEWAL OF THE GENERALIZED SYSTEM OF PREFERENCES (1984).

The entire program of differential and more favorable treatment of developing countries received a thorough reexamination in the Uruguay Round. Although the GSP program was not abandoned outright, increased pressure was brought to bear on many newly industrialized developing countries to join the GATT-WTO family as full-fledged equals.

IV. The Uruguay Round Decisions and Agreements Affecting Developing Countries

A. Background

On the eve of the Uruguay Round, many developing countries were at best ambivalent about participating in the Round.[111] Brazil and India openly opposed launching the Uruguay Round based on a lack of evidence that OECD countries were committed to trade liberalization in the areas of textiles and steel.[112] In the Punta del Este Ministerial Declaration that launched the Uruguay Round, developing countries were assured they would not be expected to make "concessions that are inconsistent with [their] development, financial and trade needs."[113] That assurance was probably a hollow one. As described in the next sections, although developing countries were in many instances given extended transition periods within which to implement Uruguay Round commitments relative to developed countries, they were not exempted from most of the substantive Uruguay Round obligations. In the Uruguay Round Decisions and MTAs, developing countries as a whole are formally divided into two groups: developing countries and least-developed countries. The least developed among the developing countries are given special treatment in two Uruguay Round Decisions and in several of the Uruguay Round MTAs. Such treatment takes the form of (1) extended transition periods before various substantive commitments become binding, and (2) complete exemptions from some commitments. With few exceptions developing countries are not relieved of the obligation to comply with the substantive trade liberalization commitments in the MTAs. They also receive shorter transition periods than least-developed countries to bring those commitments into binding effect. Thus, for the first time in GATT's history, developing countries agreed to trade liberalization commitments as near-equals with developed countries.

B. Decisions in Favor of Least-Developed Countries

As part of the Final Act Embodying the Results of the Uruguay Round (Final Act), two Decisions were reached affecting least-developed countries.

1. Decision on Measures in Favor of Least-Developed Countries

The first Decision was intended to implement Article XI:2 of the Agreement Establishing the World Trade Organization ("WTO Agreement"). That Article provides that

[111] For an assessment of developing countries' attitudes toward the GATT system at the start of the Uruguay Round, *see* THE URUGUAY ROUND AND BEYOND: THE FINAL REPORT FROM THE FORD FOUNDATION SUPPORTED PROJECT ON DEVELOPING COUNTRIES AND THE GLOBAL TRADING SYSTEM (John Whalley ed. 1989).

[112] For a discussion of developing countries' role in the Uruguay Round, *see generally* JOHN CROOME, RESHAPING THE WORLD TRADE SYSTEM: A HISTORY OF THE URUGUAY ROUND (1995); GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, TRADING FOR GROWTH: THE NEXT ROUND OF TRADE NEGOTIATIONS 33 (1985); Michael Rom, *Some Early Reflections on the Uruguay Round as Seen from the Viewpoint of a Developing Country*, 28 J. WORLD TRADE 5 (1994); Raymond F. Hopkins, *Developing Countries in the Uruguay Round: Bargaining Under Uncertainty and Inequality, in* WORLD AGRICULTURE AND THE GATT 143 (William P. Avery ed. 1993).

[113] Ministerial Declaration on the Uruguay Round, Part I:B(v), *reprinted in* GATT Focus (Oct. 8. 1986).

"[t]he least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities." Supplementing this principle is the Decision on Measures in Favor of Least-Developed Countries, included in the Uruguay Round Final Act. The Decision acknowledges the economic predicament of least-developed countries and reaffirms the commitment made in paragraph 2(d) of the Enabling Clause to provide "special treatment of the least developed among the developing countries in the context of any general or specific measures in favor of developing countries." To that end, the Decision extended for one year (until April 1995) the time within which the least-developed countries were required to submit schedules of tariff concessions with the WTO. The Decision also gives least-developed countries assurances in the following five areas:

(i) Expeditious implementation of all special and different measures taken in favor of least-developed countries . . . .
(ii) To the extent possible, MFN concessions on tariff and non-tariff measures agreed in the Uruguay Round on products of export interest to the least-developed countries may be implemented autonomously, in advance and without staging. Consideration shall be given to further improve GSP and other schemes for products of particular interest to least-developed countries.
(iii) The rules set out in the various agreements and instruments and the transitional provisions in the Uruguay Round should be applied in a flexible and supportive manner for the least-developed countries . . . .
(iv) In the application of import relief measures and other measures referred to in paragraph 3(c) of Article XXXVII [in particular, safeguards actions] . . . , special consideration shall be given to the export interests of least-developed countries.
(v) Least-developed countries shall be accorded substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services, as well as in trade promotion, to enable them to maximize the benefits from liberalized access to markets.

The fourth assurance may prove knotty. What does "special consideration" mean? Does it refer to restraint in the frequency with which such actions brought? Does "special consideration" mean exercising restraint in the type and duration of any relief granted against least-developed country goods? Does it refer to an application of domestic administrative procedures that are more favorable to least developed countries? Whatever the term "special consideration" means, plainly it does bar developed countries from bringing import relief actions against least-developed countries.

2. Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries

The second Uruguay Round Decision whose focus is on least-developed countries is the Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries. There was some concern that the strengthened legal disciplines governing agricultural trade under the Agreement on Agriculture could result in a reduction of food aid to least-developed countries. The availability of food supplies on reasonable terms and conditions might be threatened by the Agreement on Agriculture's provisions limiting export subsidies

on agricultural shipments. Accordingly, the Decision provides that implementation of the Agreement on Agriculture should not threaten the availability of food aid at a level that is sufficient to meet the food needs of the least-developed and net food-importing developing countries.[114] The Decision further provides that the level of food aid is to be reviewed periodically by the Committee on Food Aid under the 1986 Food Aid Convention, and to provide food aid to least-developed and net food-importing developing countries in grant form consistent with the Food Aid Convention.[115]

C. MTAs Providing Special and Differential Treatment of Developing Countries

Most of the WTO MTAs contain clauses providing S&D treatment of developing countries. In total, there are 97 S&D provisions in the WTO agreements. The S&D provisions can be divided into six categories: (1) provisions aimed at increasing trade opportunities, (2) provisions that require WTO Members to safeguard the interests of developing-country Members, (3) flexibility of commitments, (4) transitional time periods, (5) technical assistance, and (6) provisions relating to measures to assist least-developed country Members.[116]

The MTAs covering trade in goods that have S&D clauses include (1) the Agreement on Agriculture, (2) the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement), (3) the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), (4) the Agreement on Safeguards (Safeguards Agreement), (5) the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), (6) the Agreement on Technical Barriers to trade (the TBT Agreement), (7) the Agreement on Trade-Related Investment Measures (the TRIMs Agreement), (8) the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (the Valuation Agreement), (9) and the Agreement on Textiles and Clothing (the ATC).[117]

In addition to the WTO MTAs covering trade in goods, three other WTO MTAs—the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related

[114] The WTO list of developing countries eligible as beneficiaries under the Decision include (1) the fifty least-developed countries recognized by the Economic and Social Council of the United Nations, and (2) Barbados, Botswana, Cote d'Ivoire, Dominica, Dominican Republic, Egypt, Honduras, Jamaica, Jordan, Kenya, Mauritius, Morocco, Pakistan, Peru, Saint Lucia, Senegal, Sri Lanka, Trinidad and Tobago, Tunisia, and Venezuela. *See* Committee on Agriculture, *WTO List of Net Food-Importing Developing Countries for the Purposes of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*, G/AG/5/Rev.5 (2002). *See also Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries, Actions Taken Within the Framework of the Decision as Notified by Members*, Background Paper by the Secretariat, G/AG/NG/S/4 (2000).

[115] *See Annual Monitoring Exercise in Respect of the Follow-Up to the Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries*, G/AG/GEN/46 (2000).

[116] *See* Committee on Trade and Development, *Concerns Regarding Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Note by the Secretariat, WT/COMTD/W/66, ¶ 4 (2000). *See also Committee on Trade and Development Implementation of WTO Provisions in Favour of Developing Country Members*, Note by the Secretariat, WT/COMTD/W/35 (1998).

[117] One other Uruguay Round MTA, the Agreement on Preshipment Inspection, does not contain any special treatment of developing countries *per se*. Rather, it is an agreement to establish an international framework of rights and obligations of both user Members (*i.e.*, developing countries) and exporter Members (*i.e.*, developed countries). The practice of preshipment inspection, while not reserved for developing countries, is most often used by them to verify the quality, quantity, and price of imported goods. Preshipment inspections operate as a non-tariff barrier to trade in many developing countries. *See* Chapter 13 of this book.

Aspects of Intellectual Property Rights (the TRIPS Agreement), and the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU)—contain special provisions for the benefit of developing and least-developed countries.

A survey of the relevant clauses in these Uruguay Round Agreements follows.

1. Agreement on Agriculture

The Agreement on Agriculture accords developing countries S&D treatment in several respects. First, the preamble—which, of course, is precatory only—states that developed-country Members are to take fully into account the needs of developing-country Members by providing greater market access for agricultural products of export interest to developing-country Members.

Second, WTO Members agree to a process called "tariffication" whereby all non-tariff barriers to agricultural trade are converted into ordinary customs duties, and then bound in the individual Member's Schedule of Concessions. Tariffs on agricultural products in developed countries are to be reduced 36 percent over six years. For developing countries, the commitment is a 24 percent reduction over ten years. For least-developed countries, the commitment is to enter into tariff bindings only, with no commitment on tariff reductions.[118]

Third, under Article 4.2, WTO Members agree not to maintain, resort to, or revert to any measures "of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5." A footnote to this Article provides an illustrative list of prohibited measures that includes quantitative restrictions on imports or exports. Annex 5, Section B excepts from this obligation "a primary agricultural product that is the predominant staple in the traditional diet of a developing country Member." This exception is subject to minimum access opportunities that initially are set at one percent of base domestic consumption of the product (as listed by the developing country), and that gradually increase over a ten-year period to four percent of base domestic consumption. After the tenth year, the level of minimum access opportunities resulting from the application of this minimum-access opportunity formula must be maintained in the Schedule of the developing country, subject to negotiation of the continued special treatment beyond the tenth year.[119] Because it is limited to staple diet products, this exception will affect only a few developing countries and a handful of agricultural products.

Fourth, while developed-country Members are committed generally to reducing their domestic subsidies in the agriculture sector by twenty percent,[120] developing-country Members are committed to a 13.3-percent reduction. Least-developed country Members made no commitment.[121] In addition, developing-country Members are exempted under Article 6.2 from reducing domestic agricultural subsidies in three areas: (1) investment subsidies that are generally available to agriculture, (2) agricultural input subsidies that are generally available to low-income or resource-poor producers, and (3) domestic support to producers to encourage diversification from growing illicit narcotic crops.

Fifth, the *de minimis* provision of five percent for developed countries in their grant of agricultural subsidies is increased to ten percent for developing countries.[122]

[118] *See* Agreement on Agriculture, Art. 4 and Schedules. *See also* U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1993: THE OPERATION OF THE TRADE AGREEMENTS PROGRAM 7 (USITC Pub. 2769 1994).

[119] *Agreement on Agriculture,* Annex 5, Section B, ¶¶ 8–10.

[120] *See id.* Art. 6.1; THE YEAR IN TRADE 1993, *supra* note 18, at 7.

[121] *See* THE YEAR IN TRADE 1993, *supra* note 18, at 7.

[122] *See Agreement on Agriculture,* Art. 6.4.

Sixth, under Article 8 and the Schedules, WTO Members agree generally not to provide export subsidies otherwise than in conformity with the Agreement and with the commitments in their Schedules. The Schedules include annual reduction commitments during a five-year implementation period totaling 36 percent in terms of budgetary outlay, and 21 percent in terms of the volume of exports benefiting from export subsidies.[123] Developing countries commit to reducing their export subsidies by only 23 and 14 percent, respectively, over a ten-year period.[124] Least-developed countries are exempted from these reductions.[125]

Seventh, during the implementation period, developing countries are not required to undertake commitments to reduce two types of export subsidies: (1) subsidies that lower the costs of marketing exports of agricultural products, such as international transportation and freight costs; and (2) preferential domestic transportation and freight charges on export shipments.[126] This exemption is subject to a proviso that the exempted subsidies "are not applied in a manner that would circumvent reduction commitments."[127]

Eighth, WTO Members that institute any new export prohibitions or restrictions on foodstuffs in accordance with the short-supply provision of GATT Article XI:2(a) are required to follow procedural rules on advance notification of the restriction and its projected duration.[128] Developing countries are exempted from this requirement, unless they are net-food exporters of the particular foodstuff.[129]

Ninth, Article 15, entitled *Special and Differential Treatment*, provides that "[d]eveloping country Members shall have the flexibility to implement [subsidy] reduction commitments over a period of up to ten years. Least-developed country Members shall not be required to undertake [subsidy] reduction commitments."[130] The normal implementation period for reducing subsidies is six years.[131]

Tenth, Article 16 directs developed countries to take the action that is provided for in the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.[132]

Finally, Annex 2 provides that developing country Members are to receive S&D treatment with regard to public stockholding for food security purposes and domestic food aid.[133]

2. Agreement on Implementation of Article VI of the GATT 1994 (Antidumping)

The Antidumping Agreement contains only one provision according developing countries special treatment. Article 15, *Developing Country Members*, provides:

> Special regard must be given by developed country Members to the special situation of developing countries Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement

[123] *See* THE YEAR IN TRADE 1993, *supra* note 18, at 8.
[124] *See Agreement on Agriculture*, Art. 15.2 and Schedules.
[125] *See* THE YEAR IN TRADE 1993, *supra* note 18, at 8.
[126] *See Agreement on Agriculture,* Art. 9.4.
[127] *See id.*
[128] *See id.* Art. 12.1.
[129] *See id*. Art. 12.2.
[130] *See id*. Art. 15.2.
[131] See *id.* Art. 1(f). Under the due restraint clause of Article 13 of the Agriculture Agreement, support measures that are consistent with the Agriculture Agreement may not be challenged in the WTO for a period of nine years, although domestic countervailing duty actions are not foreclosed.
[132] *See id.* Art. 16.
[133] *See id.* Annex 2, ¶ 3 n.5, ¶ 4 n.6.

> shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

In *EC—Bed Linens*, a WTO panel considered India's argument that the EU had failed to consider "constructive remedies" as called for under Article 15.[134] The panel concluded:

> We cannot come to any conclusions as to what might be encompassed by the phrase "constructive remedies provided for under this Agreement"—that is, means of counteracting the effects of injurious dumping—except by reference to the Agreement itself. The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute "constructive remedies" within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute "constructive remedies" under Article 15, as none have been proposed to us.[135]

Thus, as an alternative to the imposition of antidumping duties, Article 15 contemplates that price undertakings should receive careful consideration in cases where exporters are from a developing country. There is nothing in the language of Article 15 to preclude the possibility that developed countries establish higher *de minimis* dumping margins and/or higher negligible import volumes for developing countries, but such alternative measures are not mandatory.

3. Agreement on Subsidies and Countervailing Measures

Article 27 of the SCM Agreement, *Special and Differential Treatment of Developing Country Members*, contains special *de minimis* rules for subsidized imports from developing countries. First, countervailing duty investigations of imports from developing-country Members must be terminated once it is determined either that the *ad valorem* subsidy is less than two percent[136] (the normal *de minimis* margin is one percent under Article 11.9), or that the volume of imports from a developing country is less than four percent of total imports of the product under investigation, unless cumulated imports from all developing countries with import shares of less than four percent is greater than nine percent of total imports.[137] This exemption might have the unintended consequence of creating a perverse incentive to file an antidumping petition against more developing countries in order to clear the nine-percent threshold.

Second, least-developed and low-income developing countries are exempted from the Agreement's prohibition on export subsidies unless they achieve "export competitiveness" in a product, in which case the export subsidies on that product must be phased out over eight years.[138] Other developing countries receive an eight-year exemption, with a

[134] Report of the WTO Panel, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,* WT/DS141/R (2000). Although the panel report was appealed, the Article 15 issue was not one of the issues before the Appellate Body.

[135] *Id.*, ¶ 6.229.

[136] The *de minimis* subsidy amount is increased to three percent until 2003 for developing countries that have eliminated export subsidies, or which are listed in Annex VII of the Agreement, being the 50 least-developed countries as designated by the United Nations, plus twenty countries with per capita annual income of less than $1,000 (Bolivia, Cameroon, Congo, Cote d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka, and Zimbabwe). *See* SCM Agreement Art. 27.11, Annex VII.

[137] *See SCM Agreement,* Art. 27.10.

[138] *See id*. Art. 27.2(a).

commitment to phase out export subsidies during that period.[139] The eight-year period is reduced to two years for any product receiving export subsidies in which the developing country has achieved "export competitiveness" in that product.[140]

Third, the general prohibition on domestic subsidies contingent upon the use of goods of local-origin is waived for an eight-year period for least-developed and low-income developing countries. It is waived for five years for other developing countries.[141]

Fourth, Articles 27.8 and 27.9 provide special rules for developing countries regarding when developing-country subsidies are actionable and when serious prejudice has resulted to another WTO Member as a result of developing-country subsidized imports.

Fifth, certain subsidies, such as debt forgiveness and social welfare payments that are directly linked to a privatization program instituted by a developing country are not actionable under the SCM Agreement.[142]

Finally, although excluded from the developing-country category, centrally-planned economies which are in the process of transforming into a market economy are accorded special treatment, including a seven-year subsidy phase-out period for prohibited subsidies.[143]

4. Agreement on Safeguards

The Safeguards Agreement prohibits safeguard actions taken against products originating in a developing country as long as its share of the imported product does not exceed three percent of total imports, unless cumulated imports from all developing countries with imports of less than three percent exceed nine percent of total imports.[144] Article 9.2 further provides that developing countries may extend their own safeguard measures for two years beyond the normal maximum period of eight years that is available to developed countries. Finally, although safeguard measures applied against an imported product may not be applied again "for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years,"[145] the hiatus period is cut in half for developing countries.[146]

5. Agreement on Sanitary and Phytosanitary Measures

The SPS Agreement provides that S&D treatment is to be accorded to developing-country imports in the application of SPS measures "[w]here the appropriate level of

[139] *See id*. Art. 27.4. The Committee on Subsidies and Countervailing Measures has established procedures for extending the transition period under Article 27.4 for certain developing-country Members. *See* Committee on Subsidies and Countervailing Measures, Procedures for Extensions Under Article 27.4 for Certain Developing Country Members, G/SCM/39 (2001). Programs eligible for extension pursuant to these procedures, and for which Members will grant extensions for calendar year 2003, are export subsidy programs (i) in the form of full or partial exemptions from import duties and internal taxes, (ii) which were in existence not later than 1 September 2001, and (iii) which are provided by developing country Members (iv) whose share of world merchandise export trade was not greater than 0.10 per cent, (v) whose total Gross National Income for the year 2000 as published by the World Bank was at or below US $20 billion, and (vi) who are otherwise eligible to request an extension pursuant to Article 27.4.

[140] *See* SCM Agreement Art. 27.5. Article 27.6 defines "export competitiveness" as the point at which a developing country accounts for a 3.25-percent share in world trade of that product for two consecutive calendar years.

[141] *See id*. Art. 27.3.

[142] *See id*. Art. 27.13.

[143] *See id*. Art. 29.2.

[144] *See Agreement on Safeguards,* Art. 9.1.

[145] *Id*. Art. 7.5. For example, if the period of safeguard measures was three years, a three-year hiatus must exist before such measures may again be imposed on that product.

[146] *See id*. Art. 9.2.

sanitary or phytosanitary protection allows scope for the phased introduction of new [SPS] measures."[147] Developed-country Members are to provide technical assistance to developing countries in the preparation and implementation of SPS measures.[148]

Developed countries are to take into account the special needs of developing-country and LDC Members in the preparation and application of SPS measures. One way of achieving this commitment, for example, would be to have longer time periods apply to developing countries within which to comply with new SPS measures.[149] Developed-country Members are also directed to encourage and facilitate the participation of developing countries in international standards-setting organizations such as the Codex Alimentarius Commission.[150]

Article 14 gave developing and least-developed countries extended transition periods of two years and five years, respectively, within which to bring their domestic SPS measures into compliance with the Agreement. The two-year transition period only applied, however, if compliance with the Agreement was impaired due to lack of technical expertise, technical infrastructure, or resources.[151]

6. Agreement on Technical Barriers to Trade

The TBT Agreement directs WTO Members to give developing-country Members a reasonable opportunity to adapt their products or methods of production to new standards.[152] Members are to provide technical assistance to developing countries in the preparation of technical regulations and the establishment of national standardizing and regulatory bodies.[153]

Article 12 of the TBT Agreement, *Special and Differential Treatment of Developing Country Members*, is a loose collection of exhortations to developed countries to be sensitive to the special needs of developing countries. For example, developed countries are instructed to be circumspect in the preparation and application of technical regulations, standards, and conformity assessment procedures that might fall disproportionately hard on developing countries.

7. Agreement on Trade-Related Investment Measures

The TRIMs Agreement provides for special treatment of developing countries in two respects. First, Article 4 permits developing countries to deviate temporarily from the Agreement for balance-of-payments purposes. Second, developing countries were given five years to eliminate all prohibited TRIMs; least-developed countries were given seven years.[154] The transitional period for developed countries was two years.

[147] *SPS Agreement,* Art. 10. *See also id.* preamble.

[148] *See id.* Art. 9. *See, e.g.,* Committee on Sanitary and Phytosanitary Measures, *Technical Assistance to Developing Countries*, Statement by the European Communities at the Meeting of 14–15 March 2001, G/SPS/GEN/244 (2001).

[149] *See id.* Arts. 10.1, 10.2.

[150] *See id.* Art. 10.4. A fund has been proposed to be administered by the Food and Agriculture Organization to enhance the participation of LDCs in standards setting in the Codex Alimentarius Commission, as well as to improve infrastructure to produce safe and high quality food products in LDCs. *See* Sub-Committee on Least Developed Countries, *Enhancing Least Developed Countries' Participation in International Trade: Food Safety and Quality, Standards and Technical Regulations*, WT/LDC/SWG/IF/10 (2001).

[151] *See SPS Agreement,* Art. 14. The SPS Committee is also authorized to grant specific exemptions to developing-country Members, in whole or in part, from the obligations of the SPS Agreement. *See id.* Art. 10.3.

[152] *See TBT Agreement,* Arts. 2.12, 5.9.

[153] *See id.* Art. 11.1–11.6.

[154] *See TRIMs Agreement*, Art. 5.2

In 2000 eight developing countries (Argentina, Chile, Colombia, Malaysia, Mexico, Pakistan, the Philippines, and Romania) sought an extension of the five-year period within which to eliminate all prohibited TRIMs.[155] In 2001, they were granted a waiver of the obligation to comply with the TRIMs Agreement's transition period and were given until December 31, 2003 to comply with the Agreement.[156]

8. Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation)

The Customs Valuation Agreement provides that developing countries may postpone application of the Agreement for five years. The five-year period may be extended for good cause shown pursuant to Annex III:1 of the Agreement. Eight developing countries sought and were granted such an extension.[157] The Valuation Agreement also authorizes the deferral of the provision on the computed value method of valuation for as long as eight years, provided the developing country seeking this extension was not a party to the Tokyo Round Valuation Code, the predecessor agreement to the Valuation Agreement.[158]

Second, Annex III of the Agreement permits developing countries to enter three reservations to the Agreement: (1) a reservation that permits developing countries for a limited time to value goods on the basis of officially established minimum values (fourteen countries entered such a reservation, with only six still maintaining it as of October 2002 (Colombia, Gabon, Guatemala, Honduras, Nicaragua, and Jamaica)); (2) a reservation to use deductive value before computed value, reversing the normal rank order of these alternative valuation methods (29 countries have entered such a reservation); and (3) a reservation to use deductive value based on the price after processing, whether or not the importer so requests, despite the normal rule in Article 5.2 requires an importer request before this valuation method is employed (29 countries have entered such a reservation).[159]

Third, developed countries are required to provide technical assistance to developing countries upon request.[160]

9. Agreement on Textiles and Clothing

Under the Agreement on Textiles and Clothing, Members agree to provide "meaningful improvements in access" for small suppliers, new entrants, and in general through accelerated increases in quota growth rates.[161]

If transitional safeguard measures are put in place, Members whose export volumes are comparatively small are to be accorded S&D treatment in the setting of

[155] *See Philippines Urges U.S. to Refrain from Panel Request in TRIMS Dispute,* 17 INT'L TRADE REP. (BNA) 942 (June 15, 2000); *WTO Clinches Deal on Addressing Implementation by Developing Nations*, 17 INT'L TRADE REP. (BNA) 741 (May 11, 2000).

[156] *See, e.g.,* WTO, *Extension of the Transition Period for the Elimination of Trade-Related Investment Measures Notified under Article 5.1 of the Agreement on Trade-Related Investment Measures, Argentina,* G/L/460 (Aug.7, 2001). *See also* Ravi Kanth, *WTO Approves Extending Deadline for TRIMS Compliance for Eight Members*, 18 INT'L TRADE REP. (BNA) 1255 (Aug. 9, 2001).

[157] For a list of the eighteen Members which have requested and been granted an extension, *see* Committee on Customs Valuation, *Invocation of Special Provisions Available to Developing Country Members*, Note by the Secretariat, G/VAL/2/Rev.10 (2000).

[158] *See Valuation Agreement,* Art. 20.1–20.2.

[159] *See* Committee on Customs Valuation, *Invocation of Special Provisions Available to Developing Country Members, Note by the Secretariat*, G/VAL/2/Rev.10 (2000).

[160] *See Valuation Agreement* Art. 20.3.

[161] *See Agreement on Textiles and Clothing,* Arts. 1.2, 2.18. Article 1.4 further provides that the particular interests of cotton-producing exporting Members should be reflected in the Agreement's implementation.

quotas.[162] Article 6 further provided that in cases where a safeguards measure is to be imposed by an importing Member during the Agreement's transition period, "least-developed country Members shall be accorded treatment significantly more favorable than that provided to the other groups of Members. . . ."[163] However, no details regarding the nature of such treatment are provided.

10. Agreement on Import Licensing Procedures

Administrative procedures used to implement licensing schemes are to take into account the development, financial, and trade needs of developing-country Members.[164] Developing countries not parties to the Tokyo Round Import Licensing Agreement were given a two-year transition period on implementing the rules for the issuance of automatic licenses.[165] Developing countries "would not be expected" to incur an additional administrative burden in order to provide import statistics for products subject to non-automatic licensing.[166] Finally, special consideration is to be given to developing countries in allocating non-automatic licenses.[167]

11. Other Uruguay Round MTAs

Outside of the Uruguay Round MTAs dealing with trade in goods, three other MTAs have rules on special treatment of developing countries.

(a) General Agreement on Trade in Services. Article IV of the GATS, entitled *Increasing Participation of Developing Countries*, contains special provisions for increased participation by developing countries in trade in services through measures designed to (1) strengthen their domestic services capacity and efficiency, (2) improve their access to distribution and information networks, and (3) liberalize market access. GATS Article IV:3 further charges developed countries not to expect specific commitments from least-developed countries in trade in services. The GATS also contains flexible and special rules for developing countries that are members of a regional trade arrangement that includes liberalized trade in services as part of the arrangement.[168] Article XIX:2 of GATS gives developing countries the flexibility to open fewer sectors, to liberalize fewer types of transactions, and to attach conditions when providing market access.

(b) The Agreement on Trade-Related Aspects of Intellectual Property Rights. The transition provisions of the TRIPS Agreement permit developing countries to delay the application of the Agreement for five years, and up to ten years in the case of certain patent protection.[169] (The implementation period for developed-country Members was one year from the effective date of the TRIPS Agreement, *i.e.*, January 1, 1996.) Least-developed countries were entitled to delay application of the Agreement for eleven years,

[162] *See id.* Art. 6.6(b). Similar consideration is to be given to wool-exporting Members. *See id.* Art. 6.6(c). Developing country exports of cottage industry handlooms, hand-made products, and traditional handicraft products are exempt from any transitional safeguard measure. *See id.* Annex, ¶ 3.

[163] *Agreement on Textiles and Clothing,* Art. 6.6(a).

[164] *See Agreement on Import Licensing,* Art. 1.2.

[165] *See id.* Art. 2.2 n.5.

[166] *Id.* Art. 3.5(a)(iv).

[167] *See id.* Art. 3.5(j).

[168] *See General Agreement on Trade in Services,* Art. V.

[169] *See TRIPS Agreement,* Arts. 65.2–65.3. This transition period coincides with the ten-year phase-out of textile and clothing quotas. The two transition periods are contingent upon each other: if one does not happen, neither will the other.

until January 1, 2006.[170] In June 2002 WTO Members approved a proposal that extends the deadline for LDCs to provide patent protection for pharmaceutical products until January 1, 2016, a ten-year extension.[171]

Developed countries are obligated to provide technical assistance to developing and least-developed countries, and to offer incentives to domestic firms to transfer technology to least-developed countries.[172] Such assistance includes help in the preparation of laws and regulations for intellectual property protection and enforcement.[173]

(c) The Dispute Settlement Understanding. While not a special treatment provision for developing countries *per se*, the DSU contains several special provisions relating to developing countries. Generally, the DSU has introduced to the GATT-WTO system a much stronger rules-based versus power-based approach to dispute settlement. In their dealings with economically more powerful developed countries, economically weaker developing countries would prefer a rules-based versus power-based approach to dispute settlement. Specifically, the DSU provides that developing countries that are parties to a dispute are entitled to have a panelist from a developing country appointed.[174] Due restraint is to be exercised in bringing dispute settlement proceedings against an LDC, as well as in seeking compensation or suspending concessions in a proceeding brought against an LDC.[175] If consultations are unsuccessful in a case involving an LDC, the LDC may ask the Director-General of the WTO or the Chairman of the Dispute Settlement Body to exercise good offices in order to try to settle the dispute.[176]

In October 2001, the Advisory Centre on WTO Law was established in Geneva, independent from the WTO. Its mission is to conduct seminars on WTO law and provide legal advice and representation to LDCs and developing countries involved in a WTO dispute settlement proceeding.

12. Agreement on Government Procurement

The plurilateral Agreement on Government Procurement provides that developing countries, and in particular least-developed countries, are to be given special treatment in procurement under the national treatment clause.[177] Developed countries are also to establish information centers for the benefit of developing countries.[178]

V. WTO Assistance to Developing and Least-Developed Countries

Since the conclusion of the Uruguay Round, the WTO has been actively studying and suggesting ways in which to integrate developing and least-developed countries more fully into the GATT-WTO system. This work is being conducted at all levels of the WTO—Ministerial, Council, Committee, and Sub-Committee.

[170] *See id*. Art. 66.1.
[171] *See* Decision of the Council for TRIPS of 27 June 2002, *Extension of the Transition Period Under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*, IP/C/25 (2002).
[172] *See id*. Art. 66.2.
[173] *See id*. Art. 67.
[174] *See* DSU, Art. 8.10.
[175] *See id.* Art. 24.1.
[176] See *id.* Art. 24.2.
[177] *See Agreement on Government Procurement,* Art. V.
[178] *See id.* Art. VI.

A. The Singapore Ministerial Conference

At the conclusion of the Singapore Ministerial Conference in 1996, the trade ministers of the WTO Members issued a Declaration covering more than twenty subjects, including the integration of developing and least-developed countries into the GATT-WTO system.

The Singapore Ministerial Declaration acknowledges that developing country Members have undertaken significant new substantive and procedural commitments.[179] The Ministerial Conference Declaration further acknowledges the range and complexity of the efforts developing countries are making to comply with these commitments. In order to assist them in these efforts, the Ministerial Conference Declaration states that the WTO "will improve the availability of technical assistance under agreed guidelines."[180] To that end, Guidelines for the WTO's Technical Cooperation were adopted by the Committee on Trade and Development in October 1996. Those Guidelines are discussed below.

The Singapore Ministerial Conference also expressed concern over the economic problems of least-developed countries. They therefore agreed to (1) a Plan of Action aimed at improving least-developed countries' overall capacity to respond to the opportunities offered by the GATT-WTO system, and (2) hold an international conference, co-sponsored by UNCTAD and the International Trade Center, to develop an integrated approach to assisting least-developed countries in enhancing their trading opportunities.[181]

B. Plan of Action for Least-Developed Countries

In order to implement the Uruguay Round Decision on Measures in Favour of Least-Developed Countries and other WTO MTA provisions in favor of least-developed countries, the Singapore Ministerial Conference adopted a *Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries*.[182] The WTO Plan of Action covers the fifty least-developed countries designated as such by the United Nations which are also WTO Members, and has four elements: (1) implementation of the Decision on Measures in Favour of Least-Developed Countries, (2) human and institutional capacity-building, (3) market access, and (4) other initiatives, including the promotion of foreign direct investment in least-developed countries.

First, with regard to the implementation of the Decision on Measures in Favour of Least-Developed Countries, the Plan of Action calls upon WTO Members to increase their efforts to improve the capacity of least-developed countries to meet their notification obligations under the WTO MTAs and to assist them in implementing their WTO commitments.[183] The Committee on Trade and Development also is charged with the responsibility of conducting a biennial review (to coincide with the Ministerial Conference) on the progress of the implementation of measures in favor of least-developed countries.[184]

Second, with regard to human and institutional capacity-building, least-developed countries are to be given priority when technical assistance is provided pursuant to the Guidelines for WTO Technical Cooperation (discussed below).[185] In the area of

[179] *See Singapore Ministerial Declaration,* adopted on 13 December 1996, ¶ 13, WT/MIN(96)/DEC (1996).
[180] *Id.*
[181] *Id.* ¶ 14.
[182] *Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries*, adopted on 13 December 1996, WT/MIN(96)/14 (1996).
[183] *See id.* ¶ 5(a), (c).
[184] *See id.* ¶ 5(b).
[185] *See id.* ¶ 6.

institutional capacity-building to facilitate trade and investment, the WTO has developed a comprehensive approach and division of labor with relevant international organizations, including UNCTAD, the International Trade Center, the World Bank, the IMF, and the United Nations Development Program.[186]

Third, with regard to market access, the Plan of Action proposes several options WTO Members should consider to improve market access for least-developed country exports. Among them are: (a) expanded duty-free access for items of export interest to least-developed countries that are not currently receiving preferential duty treatment under the GSP,[187] (b) improved access for least-developed country exports under the Agreement on Textiles and Clothing, and (c) unilateral extension and early implementation of benefits to least-developed countries provided for in WTO MTAs.[188] In an April 2001 report by the Sub-Committee on Least-Developed Countries on market access conditions for LDCs,[189] the data indicate that tariff peaks and tariff escalation continue to exist for products of interest to LDCs. The LDC Sub-Committee also found that non-tariff barriers (e.g., product standards, SPS measures, and rule of origin requirements) pose serious impediments to the trading opportunities for LDCs.[190] The LDC Sub-Committee also found that there have been progressive improvements by LDC trading partners to secure more open and predictable trading conditions for LDCs since the Singapore Ministerial Conference in 1996, including measures to provide duty and quota-free access to all or essentially all products exported by LDCs.[191] Such preferential tariff treatment of LDCs—to the exclusion of other developing countries—became possible pursuant to a 1999 WTO waiver.[192]

Fourth, other initiatives that WTO Members are directed to undertake include working with multilateral and regional institutions to encourage investment in least-developed countries, and adopting binding preferential tariff rates applicable to least-developed countries on an exclusive basis.[193] In this connection, in 2001 the EU announced its

[186] *See id.* ¶ 7.

[187] *See id.* ¶ 11.

[188] *See WTO Plan of Action*, *supra* note 182, ¶ 11. An integrated framework pilot scheme will be adopted initially by Cambodia, Madagascar, and Mauritania in 2001 to mainstream trade into poverty reduction strategies. *See WTO Starts Pilot Program for Poor Nations to Integrate Trade in Poverty Reductions Plans*, 18 Int'l Trade Rep. (BNA) 739 (2001).

[189] WTO, Sub-Committee on Least-Developed Countries*, Market Access Conditions for Least Developed Countries*, WT/LDC/SWG/IF/14/Rev.1 (2001).

[190] *See id.* ¶¶ 15–16.

[191] *See id.* ¶ 26.

[192] *See Waiver on Preferential Tariff Treatment for LDCs*, WT/L/304 (1999). The WTO Members to have notified their market access improvements for LDCs to the WTO pursuant to the 1999 waiver are Canada, Egypt, the EC, Japan, Korea, Mauritius, New Zealand, Norway, Singapore, Switzerland, Turkey, and the United States. *See* Report of the LDC Sub-Committee, *supra* note 189, ¶ 27. As of late 2002, 28 WTO Members have on an autonomous basis announced steps they have taken to enhance market access for imports from LDCs. Those Members are Argentina, Australia, Bulgaria, Canada, Chile, Czech Republic, Egypt, the EU, Hong Kong, Hungary, Iceland, India, Indonesia, Japan, Korea, Malaysia, Mauritius, Morocco, New Zealand, Norway, Poland, Singapore, Slovak Republic, Slovenia, Switzerland, Thailand, Turkey, and the United States. *See* Sub-Committee on Least-Developed Countries, The High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development, WT/COMTD/LDC/W/22, ¶ 4 & n.4 (2001).

[193] *See WTO Plan of Action, supra* note 182, ¶¶ 13–14. The WTO also began accepting contributions from non-governmental, nonprofit organizations in May, 2001, to help finance projects aimed at helping LDCs meet their WTO obligations. *See Voluntary Contributions, Gifts or Donations From Non-Governmental Donors*, Guidelines approved by the General Council on 15 December 2000, WT/L/386 (2001; *WTO Ready to Accept Private Sector Contributions to Aid Poorer Members*, 18 Int'l Trade Rep. (BNA) 739 (2001).

"Everything But Arms" initiative that grants duty-free access to almost all exports from LDCs. In May 2001, the EU also announced its decision to unilaterally refrain from imposing antidumping duties on imports from LDCs.[194]

1. High-Level Meeting on Least-Developed Countries

Pursuant to the Singapore Ministerial Declaration, a high-level, inter-organizational meeting on least-developed countries was held in Geneva at the end of October 1997 under the joint auspices of the WTO, UNCTAD, and the International Trade Center.[195] The High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development (the High-Level Meeting) was aimed to boost efforts to further the integration of the least-developed countries into the multilateral trading system. All least-developed countries, regardless of their membership in the WTO (nineteen of them are not Members), were invited to participate and to prepare a comprehensive assessment of their needs for trade-related technical cooperation.

The meeting focused on three subjects: (1) launching initiatives to improve market access for least-developed country exports, (2) building the capacity to trade in least-developed countries, and (3) encouraging investment in least-developed countries. Because least-developed countries as a group account for only 0.4 per cent of world trade, removing barriers to their trade thus would pose no serious threat to any WTO Member. One of the chief aims of the High-Level Meeting, therefore, was to encourage increased market access for the products originating in the least-developed countries. At the High-Level Meeting, WTO Members were invited to announce steps they had taken, or would be taking, on an autonomous basis to enhance market access for imports from least-developed countries. A number of developed and developing Members made such announcements. Some developing-country Members were concerned about the existence of a legal basis under which they could grant preferences to products originating in least-developing countries. Following consultations, a draft "umbrella" waiver from GATT Article I was adopted by the General Council on June 15, 1999.[196]

Improved market access alone, however, is only a small part of the overall development picture. Least-developed country delegations have repeatedly stressed the serious constraints they face on supply capacity and, therefore, the need for assurance in capacity building. To that end, the High-Level Meeting endorsed the Integrated Framework for Technical Assistance to assist least-developed countries in their trade and trade-related activities.

2. Integrated Framework for Trade-Related Technical Assistance

The 1997 High-Level Meeting endorsed the Integrated Framework for Trade-Related Technical Assistance to support LDCs in their trade activities ("Integrated Framework"

[194] *See* Joe Kirwin, *U.S., EU, Japan, Canada to Expand, Speed Up Concessions for Poor Countries*, 18 INT'L TRADE REP. (BNA) 847 (May 31, 2001).

[195] *See Report of the High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development,* WT/LDC/HL/23 (1997). Notes on the proceedings of the High-Level Meeting are contained in documents WT/LDC/HL/M/1 and Add.1 (1997). Details on the preparations for the meeting can be found in two WTO documents, WT/COMTD/W/28 and WT/COMTD/W/28/Add.1 (1997). The WTO Sub-Committee on Least-Developed Countries took the lead in making preparations for the meeting. *See* WT/COMTD/LLDC/M/7 and Corr.1 (1997). For other work of the Sub-Committee on Least-Developed Countries, *see Measures to Assist and Facilitate the Expansion of Trade and Investment Opportunities of Least-Developed Countries,* WT/COMTD/LLDC/W/1 (1996).

[196] *See supra* note 192.

or "IF").[197] The six core international agencies working together with LDCs to coordinate their trade assistance programs through the Integrated Framework are the International Monetary Fund, the International Trade Center, UNCTAD, the United Nations Development Program, the World Bank, and the WTO. The Integrated Framework "seeks to increase the benefits that least-developed countries derive from the trade-related technical assistance available to them from the six Agencies involved in designing this Framework, as well as from other multilateral, regional and bilateral sources, with a view to assisting them to enhance their trade opportunities, to respond to market demands and to integrate into the multilateral trading system."[198]

Although the IF is structured on the basis of eight steps,[199] in practice it focuses on five main steps: (1) country-needs assessments prepared by individual LDCs, (2) integrated responses by the six core agencies, (3) preparation of a multi-year country program and the holding of a round table meeting, (4) implementation and monitoring of trade-related technical assistance activities, and (5) regular evaluation by the staff of the six core agencies and officials of the least-developed countries.

Criticism has been raised that the process has been slow and bureaucratic. Coordination is often difficult because the Integrated Framework aims at coordinating 50 LDCs, the six core agencies, other multilateral partners, and the donor community. Coordination has proven to be a particular challenge within the least-developed countries where a large number of ministries and other government agencies, private-sector groups, and local non-governmental organizations are frequently involved.[200]

Least-developed countries have criticized the Integrated Framework for not living up to their expectation that, in its implementation, it should address supply-side constraints and infrastructure requirements, as well as trade-related capacity and institution building.[201]

As of late 2001 the IF was bogged down in bureaucratic squabbles and an inadequate governance structure. In 2001 an IF Steering Committee was created that is independent of the WTO. Its task is to address the concern of other IF agencies that mandates are being established that involve them but without sufficient consultation and without their participation in decision making.[202] On a more positive note, a pilot scheme was launched in 2001 to improve the operation of the IF. As a first element of IF reform, the WTO decided to proceed with a pilot scheme that will assist countries that have demonstrated a clear choice and commitment to mainstream a "trade integration chapter" as part of

[197] *Integrated Framework for Trade-Related Technical Assistance, Including for Human and Institutional Capacity-Building, to support Least-Developed Countries in Their Trade and Trade-Related Activities,* WT/LDC/HL/1/Rev.1 (1997).

[198] *Id.*

[199] The eight steps are (1) needs assessment by individual LDCs, (2) integrated responses by the six core agencies, (3) country-specific round table meetings, (4) coordination among the six agencies involved, (5) financing, (6) implementation and monitoring, (7) review and evaluation of country programs, and (8) maintenance and publication of a core inventory. *See id.* ¶ 5.

[200] *See Report of the Director-General on Follow-up to the High-Level Meeting*, WT/MIN(99)/7, ¶ 17 (1999).

[201] *See id.* ¶ 18; WTO, *High Level Symposium on Trade and Development, Background Document* (1999); Sub-Committee on Least-Developed Countries*, Focal Points Under the Integrated Framework as Reported to the Administrative Unit*, WT/COMTD/LDC/W/14 (1999); Sub-Committee on Least-Developed Countries, *Third Progress Report on the Follow-Up to the High-Level Meeting*, WT/COMTD/LDC/W/13 (1999). *See also Developing Countries Fault Quad Package; Say It Falls Short of Expectations on Access*, 17 INT'L TRADE REP. (BNA) 599 (April 13, 2000); *Poorer Countries Want to be Directly Involved in WTO Talks Before Agreeing to New Round*, 17 INT'L TRADE REP. (BNA) 742 (May 11, 2000).

[202] *See* Sub-Committee on Least-Developed Countries, *The High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development*, WT/COMTD/LDC/W/22, ¶ 9 (2001).

their country development strategies.[203] Eleven LDCs have been chosen to participate in the pilot scheme: Burundi, Djibouti, Ethiopia, Eritrea, Guinea, Lesotho, Malawi, Mali, Nepal, Senegal, and Yemen.[204]

C. The Committee on Trade and Development

The Committee on Trade and Development continues the work of its GATT predecessor to facilitate the integration of developing countries into the GATT-WTO system. The Committee's work program has three priority tasks: (1) review the implementation of provisions in the WTO Agreements and instruments in favor of developing-country Members,[205] (2) work towards increasing the participation of developing countries in the GATT-WTO system,[206] and (3) recommend positive measures aimed at ensuring that least-developed country Members achieve their development objectives.[207]

A fourth priority task of the Committee was completed in 1997: the preparation of guidelines for the WTO's technical cooperation activities. The Guidelines for WTO Technical Cooperation were adopted by the Committee on Trade and Development on October 15, 1996.[208] The Guidelines are administered by the WTO Secretariat and divided into two parts: objectives and principles, and operational directives. Among the objectives and principles are (1) to assist in the full integration of developing and least-developed countries into the GATT-WTO system; (2) to keep a geographical balance, while giving priority to least-developed countries, in particular African countries; and (3) to coordinate closely with other multilateral and bilateral institutions that provide technical assistance in order to avoid overlap and duplication of effort.[209]

The operational directives cover (1) modes of delivery (*e.g.*, training courses and materials), (2) long-term engagement (*e.g.*, training local trainers, using local technical expertise, and establishing links with academic and research institutions), (3) international coordination (*e.g.*, close dialogue with UNCTAD and the International Trade Center to define and execute joint projects and avoid duplication), and (4) management of the technical cooperation program (*e.g.*, annual reporting by the Secretariat on program implementation, funding and cost-sharing, and monitoring by the Committee on Trade and Development).[210]

[203] *See* Sub-Committee on Least-Developed Countries, *Integrated Framework—Proposal for a Pilot Scheme*, WT/LDC/SWG/IF/13 (2001).

[204] *See* Integrated Framework Steering Committee, *The Extension of the Integrated Framework Pilot Phase: Selection of Pilot Countries and the Calendar*, WT/IFSC/W/9 (2001).

[205] *See* Committee on Trade and Development, *Implementation of Uruguay Round Provisions in Favour of Developing Countries,* WT/COMTD/W/16, WT/COMTD/W/16/Add.1, WT/COMTD/W/16/Add.2 (1996).

[206] The Committee completed a study in 1996 that addressed the domestic and external factors impeding developing countries' integration into the GATT-WTO system. *See* Committee on Trade and Development, *Participation of Developing Countries in World Trade: Overview of Major Trends and Underlying Factors,* WT/COMTD/W/15 (1996).

[207] *See Report (1996) of the Committee on Trade and Development to the General Council*, WT/COMTD/9, at 1, ¶ 3 (1996).

[208] WT/COMTD/8.

[209] Committee on Trade and Development, *Guidelines for WTO Technical Cooperation*, adopted 15 October 1996, WT/COMTD/9, at 1 (1996).

[210] *See id.* at 2–5. In July 1999, the WTO established the Global Trust Fund for Technical Assistance as an adjunct to the Guidelines on Technical Assistance. The objectives of the Trust Fund are based on the Guidelines and are designed (1) to improving the management and implementation of WTO technical cooperation, (2) to supporting and complementing the WTO regular budget, (3) to enhancing technical assistance, and (4) to enabling the Secretariat to deliver technical cooperation in a flexible, timely, and

D. The Doha Ministerial Conference and the Development Round

Following the debacle in 1999 at the third Ministerial Conference in Seattle, developing countries, especially the LDCs, were determined not be marginalized at the next biennial meeting of the Ministerial Conference. Two important meetings occurred in 2001 that helped put the spotlight at the Doha Ministerial Conference on the economic plight of LDCs. The first meeting was the Third United Nations Conference on the Least Developed Countries held in Belgium in May 2001. Out of the Conference came a document entitled *Draft Programme of Action for the Least Developed Countries for the Decade 2001–2010*, calling for coherent action by the United Nations, the WTO, the World Bank, and the IMF to integrate LDCs into the global economy.[211]

The second meeting was the LDC trade ministers' meeting held in Zanzibar, Tanzania in July 2001. In the Zanzibar Declaration the LDCs agreed to take steps to reverse the process of their exclusion and marginalization in world trade.[212] The trade ministers identified no fewer than nine items that they requested the Doha Ministerial Conference to agree to, including full implementation of the commitments undertaken at the Third United Nations Conference on the Least Developed Countries and full implementation of the Integrated Framework.[213] Attached to the Zanzibar Declaration was an annex entitled *LDCs Development Agenda at the Fourth Ministerial Conference, Negotiating Objectives and Proposals of the Least Developed Countries*.[214] The LDCs' agenda listed no fewer than 21agenda items for Doha, including implementation issues in the areas of agriculture, services trade, subsidies, SPS and TBT technical assistance, textiles and clothing, TRIMs, TRIPS, customs valuation, antidumping and countervailing duties, and safeguards.[215]

Speaking on behalf of a broader range of developing countries, the Group of 77, together with China, issued a separate declaration in October 2001 calling on the Ministerial Conference to, *inter alia*, make the S&D provisions of the WTO MTAs "legally binding . . . operationalized . . . and enforceable so that these do not remain merely 'best endeavour clauses.'"[216] The Declaration also called for increased technical assistance in order to bring their national laws into compliance with WTO obligations.[217]

The WTO has not been indifferent to the complaints from developing countries and LDCs about marginalization and lack of technical and institutional capacity. In the years since the Singapore Ministerial Conference the WTO has held countless training seminars and workshops, undertaken technical assistance activities, and conducted capacity building exercises to assist LDCs and other developing countries become fully integrated into the international trading system.[218] Yet, despite these efforts, more clearly needs to be done.

pertinent manner. All WTO Members may participate in the Trust Fund, which was open to receive voluntary financial contributions on July 1, 1999. *See* General Council, Minutes of Meeting held on 15 July 1999, WT/GC/M/45, at 25 (1999).

[211] *See* Third United Nations Conference on the Least Developed Countries*, Draft Programme of Action for the Least Developed Countries for the Decade 2001–2010*, A/CONF.191/L.18, ¶ 65 (2001).

[212] *See Zanzibar Declaration, Meeting of the Ministers Responsible for Trade of the Least Developed Countries*, WT/L/409 (2001).

[213] *See id.*

[214] *See id.*

[215] *See id.*

[216] *Declaration of the Group of 77 and China on the Fourth WTO Ministerial Conference at Doha, Qatar,* WT/L/424*,* ¶ 7 (2001).

[217] *See id*. ¶ 18.

[218] *See, e.g.*, WTO, *The WTO, Capacity Building and Development, A Proposal* (2001); General Council, Special Session on Implementation, *Actions to Increase the Participation of Developing Country Members*

Around 100 implementation issues were raised prior to the Doha Ministerial Conference either in the LDC Zanzibar Declaration, in the Draft Programme issued at the Third U.N. Conference on LDCs, or in the Group of 77 Declaration. At the fourth Ministerial Conference held in Doha, Qatar, in November 2001, the trade ministers launched a "work program" that includes on its agenda many of these implementation-related issues and concerns. Although the trade ministers carefully avoided the use of the politically-charged phrase, "multilateral trade negotiation round"—perhaps out of a concern that it would conjure up the seemingly interminable eight-year Uruguay Round—the "work program" has been informally called the "Development Round." The Ministerial Declaration issued at the conclusion of the Doha session provides:

> We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them . . . . [W]e further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, . . .[219]

With regard to the specific concerns of LDCs, the Ministerial Declaration acknowledged the concerns expressed by LDCs in the Zanzibar Declaration. The Declaration also endorsed the Integrated Framework and reaffirmed that the S&D treatment provisions are an integral part of the WTO Agreements. The Declaration states that "all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns."[220]

The Decision on Implementation-Related Issues and Concerns referred to in paragraph 12 of the Ministerial Declaration identifies more than 40 implementation issues and proposed action by the WTO Members.[221] Most of the 40-plus items were settled at or before the Doha Conference. The majority of the remaining items are the subject of negotiations. The following is a list of the highlights of the Implementation Decision as they relate to LDCs and other developing countries:

1. *GATT 1994*—Article XVIII on balance of payments is a special and differential treatment provision for developing countries and recourse to it should be less onerous than to Article XII of GATT 1994.
2. *Agreement on Agriculture*—Members are to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and to address food security concerns.

in the Work of Relevant Sanitary and Phytosanitary International Standards-Setting Organizations, Second Report by the Director-General, WT/GC/45 (2001); Committee on Subsidies and Countervailing Measures, *Chairman's Report on the Implementation-Related Issues Referred to the Committee at the Request of the Chairman of the General Council on 2 August and 15 October 2001 and in the 15 December 2000 Decision of the General Council*, G/SCM/38 (2001).

[219] WTO Ministerial Conference, Fourth Session, 9–14 November 2001, *Ministerial Declaration Adopted on 14 November 2001*, WT/MIN(01)/DEC/W/1, ¶ 12 (2001). The Declaration adds that where a specific negotiating mandate is established in the Declaration, the relevant implementation issues are to be addressed under that mandate. Otherwise, the other outstanding implementation issues are to be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee by the end of 2002 for appropriate action.

[220] *See id*. ¶ 44.

[221] *See* Ministerial Conference, Fourth Session, *Decision on Implementation-Related Issues and Concerns*, WT/MIN(01)/W/10 (2001).

3. *SPS Agreement*—Members are to provide, to the extent possible, the financial and technical assistance necessary to enable LDCs to respond adequately to the introduction of any new SPS measures that may have significant negative effects on their trade. Members are to ensure that technical assistance is provided to LDCs with a view to responding to the special problems faced by them in implementing the SPS Agreement.
4. *Agreement on Textiles and Clothing*—the Council for Trade in Goods is to examine the following proposals: (a) that when calculating the quota levels for small suppliers for the remaining years of the Agreement, Members will apply the most favorable methodology available in respect of those Members under the growth-on-growth provisions from the beginning of the implementation period; extend the same treatment to least-developed countries; and, where possible, eliminate quota restrictions on imports of such Members; and (b) that Members will calculate the quota levels for the remaining years of the Agreement with respect to other restrained Members as if implementation of the growth-on-growth provision for stage 3 had been advanced to January 1, 2000.
5. *TBT Agreement*—Members are to provide, to the extent possible, the financial and technical assistance necessary to enable LDCs to respond adequately to the introduction of any new TBT measures that may have significant negative effects on their trade. Members are to ensure that technical assistance is provided to LDCs with a view to responding to the special problems faced by them in implementing the TBT Agreement.
6. *TRIMs Agreement*—the Council for Trade in Goods is to consider positively requests that may be made by LDCs under Article 5.3 of the TRIMs Agreement or Article IX.3 of the WTO Agreement for extending the transition period, as well as to take into consideration the particular circumstances of LDCs when setting the terms and conditions including time-frames.
7. *Antidumping Agreement*—while Article 15 of the Antidumping Agreement on special treatment of exports from developing countries is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision.
8. *Customs Valuation Agreement*—the Council for Trade in Goods to give positive consideration to requests that may be made by LDC Members under paragraphs 1 and 2 of Annex III of the Customs Valuation Agreement regarding extensions of time for implementation of the Agreement and the use of minimum values, as well as to take into consideration the particular circumstances of LDCs when setting the terms and conditions including time-frames.
9. *SCM Agreement*—subject to the provisions of Articles 27.5 and 27.6, it is reaffirmed that LDC Members are exempt from the prohibition on export subsidies set forth in Article 3.1(a) of the SCM Agreement, and thus have flexibility to finance their exporters consistent with their development needs. It is understood that the eight-year period in Article 27.5 within which an LDC Member must phase out its export subsidies in respect of a product in which it is export-competitive begins from the date export competitiveness exists within the meaning of Article 27.6. Having regard to the particular situation of certain developing-country Members, the Committee on Subsidies and Countervailing Measures is to extend the transition period under Article 27.4

of the SCM Agreement for certain export subsidies provided by such Members.[222]

10. *TRIPS Agreement*—under the provisions of Article 66.2 of the TRIPS Agreement making technology transfer mandatory, the TRIPS Council will put in place a mechanism for ensuring the monitoring and full implementation of this obligation. To this end, developed-country Members are to submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions are to be subject to a review in the TRIPS Council and information is to be updated by Members annually.[223]
11. *Cross-Cutting Issues*—the Committee on Trade and Development is to undertake a review of S&D treatment and (a) identify those S&D treatment provisions that are already mandatory in nature and those that are non-binding in character, (b) consider the legal and practical implications for developed and developing Members of converting S&D treatment measures into mandatory provisions, (c) identify those that Members consider should be made mandatory, (d) examine additional ways in which S&D treatment provisions can be made more effective, (e) consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of S&D treatment provisions, and (f) consider how S&D treatment may be incorporated into the architecture of WTO rules.

Negotiations in the Development Round were to be concluded not later than January 1, 2005, with a stocktaking of the progress of the negotiations to take place at the fifth Ministerial Conference in 2003.[224] With the collapse of the Cancun Ministerial Conference, that deadline will be missed. The negotiations were put back on track in August 2004, with the decision by the General Council on the framework for future negotiations.[225] As was the case with the Uruguay Round agreements, all agreements reached during the Development Round are to be treated as a single undertaking, that is, a package deal with no opt-outs.

Independent of the Development Round negotiations, the WTO Secretariat continues to provide and coordinate technical assistance to developing countries. In its Coordinated Technical Assistance Plan for 2002, the WTO Secretariat has identified training programs and workshops for LDCs and developing countries agriculture, competition policy, customs valuation, dispute settlement, government procurement, investment, market access,

[222] On September 19, 2002, the Quad Members agreed to approve requests from nineteen developing-country Members for a one-year deadline extension—through 2003—allowing them to maintain investment and export promotion subsidies that are otherwise illegal under the SCM Agreement. Extension requests are renewable through 2007. *See* Daniel Pruzin, *Quad Group Gives Approval to Extensions for Developing Countries' Export Subsidies*, 19 INT'L TRADE REP. (BNA) 1630 (Sept. 26, 2002).

[223] In a separate declaration involving the TRIPS Agreement and the AIDS epidemic, the Ministerial Conference issued a declaration acknowledging that every WTO Member has the right to grant compulsory licenses and to determine what constitutes a national emergency. *See* Ministerial Conference, Fourth Session, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/W/2 (2001). At the end of 2003, the General Council reached an agreement on implementing the Doha TPIPS Declaration. *See Implementation of Paragraph 6 of the Doha Declaration on the TPIPS Agreement and Public Health, Decision of 30 August 2003*, WT/L/540 (2003).

[224] *See* Doha Ministerial Declaration, *supra* note 221, ¶ 45.

[225] *See Doha Work Programme Decision Adopted by the General Council on 1 August 2004*, WT/L/579 (2004).

services, and intellectual property.[226] Among these efforts are special sessions for LDCs with no permanent mission in Geneva that are designed to enhance their participation in the Development Round negotiations.[227]

VI. Summary and Appraisal

Explanations abound for why many developing countries, especially LDCs, have performed poorly in the world trading system. Examples of the exogenous factors conspiring against developing countries include political fallout from the New International Economic Order, barriers to trade in developed-country markets, restrictive business practices of multinational enterprises headquartered in developed countries, the debt crisis of the 1970s and 1980s, and the reduced flow of foreign direct investment into these countries.[228] Examples of the endogenous factors include macroeconomic policies, infrastructure problems, foreign exchange mismanagement, policies based on import substitution rather than export-led growth, and rampant corruption. In the view of some WTO Members, the main conclusion to be drawn about the different rates of growth of developing countries is that while market access is important to determine the export performance of countries, little can be achieved if the appropriate domestic policies (e.g., a stable economic environment and a liberal trade regime) are not in place.[229] In the view of other WTO Members, domestic policies, while important, do not constitute the main reason for the divergent performance of developing countries. On the contrary, this latter group believes that trade barriers play a more significant role than domestic policies.[230]

Precisely how developing countries should respond has been widely debated. Broad agreement does exist that a strong link exists between open trade, open investment, and development.[231] The post-World War II experience of the four Asian "tigers" or "dragons" demonstrates that trade can be an engine of growth.[232] Accordingly, the notion of developing countries needing and, therefore, being permitted to impose high levels of protection against import trade has fallen into disfavor among economists.[233] Indeed, many economists argue that developing countries would experience improved terms of trade and economic growth if their high levels of trade protection were removed.[234] The infant-industry argument and its associated policy of import substitution—legitimized

[226] *See* Committee on Trade and Development, *Coordinated WTO Secretariat Annual Technical Assistance Plan 2002*, Note by the Secretariat (2001).

[227] *See Fifth Geneva Week concentrates on Doha Development Agenda negotiations*, WTO, Press Release 321, Nov. 8, 2002.

[228] In 1996, the WTO Committee on Trade and Development conducted a study on the factors preventing developing countries from participating fully in the GATT-WTO system. *See* WTO Committee on Trade and Development, *Participation of Developing Countries in World Trade: Overview of Major Trends and Underlying Factors,* WT/COMTD/W/15 (1996). *See generally* THE URUGUAY ROUND AND BEYOND: THE FINAL REPORT FROM THE FORD FOUNDATION SUPPORTED PROJECT ON DEVELOPING COUNTRIES AND THE GLOBAL TRADING SYSTEM 31–34 (John Whalley ed. 1989).

[229] *See Report (1996) of the Committee on Trade and Development to the General Council*, WT/COMTD/9, at 4, ¶ 15 (1996).

[230] *See id.*

[231] *See* UNCTAD, WORLD INVESTMENT REPORT 1996: INVESTMENT, TRADE AND INTERNATIONAL POLICY ARRANGEMENTS (1996); WTO SECRETARIAT, TRADE AND FOREIGN DIRECT INVESTMENT (1996).

[232] *See* U.S. INT'L TRADE COMM'N, EAST ASIA: REGIONAL ECONOMIC INTEGRATION AND IMPLICATIONS FOR THE UNITED STATES (USITC Pub. 2621 1993).

[233] *See* Hindley, *supra* note 24, at 67; Jagdish Bhagwati, *The Poor's Best Hope*, THE ECONOMIST, June 22, 2002, at 24 (arguing that poor countries must remove their own trade barriers in order to prosper).

[234] *See* Hindley, *supra* note 24, at 70.

and enshrined in GATT Article XVIII—have been used as a justification for resort to trade protection measures by developing countries. This policy may have worked at cross-purposes with developing countries' ultimate goal of achieving lasting economic prosperity. During the 1960s and 1970s, the concept of preferential treatment of developing countries in lieu of market-based principles received an indirect boost from the developed countries as they began to use "managed" trade to restrict imports, adversely affecting an increasing number of sectors within their domestic economies.

Today, developing countries receive special and differential treatment not only in GATT-WTO rules, but also in special trade programs established for them by developed countries. In the long run, however, such special tariff treatment is of limited value to developing countries in achieving the goal of a stable, healthy economy. Tariff reductions associated with preferential treatment regimes are inherently uncertain because they depend entirely on the trade policies of the donor countries. In addition, as MFN tariff rates are progressively lowered in developed countries following successive MTN rounds, the benefit to beneficiary developing countries of preferential tariff treatment is marginalized.

The notion that tariff preferences are the means for offsetting trade restrictions imposed by importing countries has been an attractive distraction. Nontariff barriers to trade in products in which developing countries enjoy a comparative advantage, e.g., textiles and clothing, as well as persistently high tariffs on those products are probably more to blame for impeding developing countries' full integration into the world trading system.

Full integration of the developing countries into the world trading system must proceed on several tracks. The first track should be greater and assured access to export markets for all product groups, not just primary and unprocessed goods. Market access is of greater help to developing countries in the long term than tariff preferences on commodities and semi-manufactured goods. Steps in this direction were taken in the Uruguay Round. For example, the Uruguay Round Agreement on Textiles and Clothing progressively eliminates quotas imposed by importing developed countries on textiles and clothing in which developing countries enjoy a competitive strength because of the labor-intensive nature of the manufacturing process. Still, because quota and tariff reduction commitments are backloaded, developing countries will not enjoy the full benefit of trade liberalization in the textile and clothing sector until 2005.

A second track should pursue integrating developing countries through the vehicle of regional trade arrangements as a step toward full integration in the GATT-WTO system. Several of the existing regional trade arrangements, such as MERCOSUR and ASEAN, have a membership comprised exclusively of developing countries. By integrating their economies on a regional basis, developing countries can pool their economic strength in order to pry trade concessions from developed countries. Pursuing this course to the exclusion of others poses risks, however: integrating their economies on a regional basis will not serve as a hedge when one or more of the major developed countries experience an economic downdraft.

A third track that developing countries should pursue is cultivating a hospitable environment for foreign direct investment ("FDI"). Much of the recent literature confirms that the effects of investment for investor country and host country alike are beneficial. For example, the OECD noted the beneficial effects of FDI in a 1998 communication to the WTO:

> Direct investment by MNEs [multinational enterprises] has the potential rapidly to restructure industries at a regional or global level and to transform host economies into prodigious exporters of manufactured goods or services to the world market. In so doing, FDI can

> serve to integrate national markets into the world economy far more effectively than could have been achieved by traditional trade flows alone. As with private sector investment more generally, the benefits from FDI are enhanced in an environment characterized by an open trade and investment regime, an active competition policy, macroeconomic stability and privatization and deregulation. In this environment, FDI can play a key role in improving the capacity of the host country to respond to the opportunities offered by global economic integration, a goal increasingly recognized as one of the key aims of any development strategy.[235]

National laws and regulations that discriminate against foreign direct investment distort international trade in much the same way as do tariffs, quotas, and other NTBs. By favoring domestic investors or discriminating against foreign investors, the most efficient producers may not be able to penetrate a market due to government interference in the market. Since the 1980s, the worldwide trend in national legislation regulating FDI has been to adopt laws that attract foreign investors by creating a favorable investment climate.[236] UNCTAD reported that in 1997, 151 changes in FDI regulatory regimes were made by 76 countries, 89 percent of which in the direction of creating a more favorable environment for FDI.[237] UNCTAD has also reported that the network of bilateral investment treaties (BITs) is expanding as well, quintupling during the 1990s, reaching 2,099 by the end of 2001, compared to some 400 at the beginning of 1990.[238] One BIT was concluded on average every 2-1/2 days in 1997. The number of double taxation treaties also increased, numbering 1,794 at the end of 1997. "The common thread that runs through the proliferation of both types of treaties," UNCTAD concludes, "is that they reflect the growing role of FDI in the world economy and the desire of countries to facilitate it."[239]

The effects of these liberalization measures are reflected in the growth of foreign direct investment. Worldwide FDI grew 25 percent in 1999 to a record $827 billion, up from $660 billion in 1998.[240] Developing countries received nearly $200 billion of that total, an increase of 15 percent.[241] The FDI total reached an all time high in 2000 of nearly $1.3 trillion, with $240 billion going to developing countries.[242] Many developing countries still restrict FDI, however, by restricting foreign ownership in local companies to a minority stake. While many developing countries defend these investment restrictions on the ground of sovereignty and complain about the restrictive businesses practices of large multinational firms in their countries that harm local firms, another perspective is that multinational enterprises (MNEs) bring with them not only fresh capital, but

[235] WTO, Working Group on the Relationship between Trade and Investment, *Communication from the OECD, Foreign Direct Investment and Economic Development*, WT/WGTI/W/26, at 4–5 (1998). The WTO Secretariat has echoed the OECD's conclusions and offered some of its own insights on the importance of FDI. *See* Report by the WTO Secretariat, *Trade and Foreign Direct Investment* 19 (1996). *See also* UNCTAD, WORLD INVESTMENT REPORT 1997: TRANSNATIONAL CORPORATIONS, MARKET STRUCTURE AND COMPETITION POLICY, at xv (1997).

[236] For a list of the 143 countries that have enacted special FDI legal regimes, *see* UNCTAD, WORLD INVESTMENT REPORT 1998: TRENDS AND DETERMINANTS, Table III.1, at 56.

[237] *See* UNCTAD, WORLD INVESTMENT REPORT 1998,at xix (1998).

[238] *See* UNCTAD, WORLD INVESTMENT REPORT 2002, at 4 (2002).

[239] *See* UNCTAD, WORLD INVESTMENT REPORT 1998, at xix (1998).

[240] *Id.*

[241] The tremendous FDI spurt was fueled by cross-border mergers and acquisitions ($797 billion), rather than greenfield investment in new plants and factories. *See* Daniel Pruzin, *UN Agency Says FDI Jumped by 25 Percent in '99 to $827 Billion*, 17 INT'L TRADE REP. (BNA) 234 Feb. 10, 2000); THE ECONOMIST, Feb. 12, 2000, at 3, 105; THE ECONOMIST, Feb. 5, 2000, at 5.

[242] *See* UNCTAD, WORLD INVESTMENT REPORT 2001, at xiii (2001).

they also introduce modern managerial and organizational practices that local firms in developing countries can emulate. They often bring with them the latest technologies and train indigenous populations in their use. Because of their high visibility, some evidence exists that MNEs are often better corporate citizens that pay better, do less environmental damage, and adhere closer to industrial codes of good conduct.[243] In sum, developing countries must view MNEs not as instruments of neo-colonialism, but rather as integral players in their economic development strategies.

Conversely, MNEs may be pivotal to resolving immigration pressures on developed countries. UNCTAD considers FDI an important source of job creation within developing countries, reducing the attraction of migration to rich, developed countries for the poor living in developing countries who are struggling to eke out an existence. If developed countries are sincere in wanting to stem the flow of migration from poor countries to rich countries, then they must remove barriers to trade in goods produced in developing countries. Even if developing countries liberalize their rules on FDI, FDI in developing countries will still not be attractive if MNEs are prevented from exporting the goods that they make there to developed-country markets.[244]

While it is argued—mostly by developing countries—that MNEs are able to engage in restrictive business practices in host countries that result in monopoly profits, lower efficiency, and barriers to entry by potential competitors, the WTO Secretariat has made the alternative argument that the entry of an MNE "might have the effect of breaking up a comfortable domestic oligopolistic market structure and stimulating competition and efficiency. . . . The empirical evidence, however, points strongly to pro-competitive effects."[245] The WTO Working Group on the Interaction between Trade and Competition Policy has also noted that open policies toward FDI and properly functioning competition polices are mutually supportive. Liberal investment rules make markets contestable, thereby challenging domestic oligopolies and reducing the likelihood of cartels and monopolies.[246] At the same time, effective competition polices can ensure against possible abuses of market power by foreign investors. Thus, for example, with open investment rules in place, an exporter who finds itself unable to penetrate a foreign market because incumbent wholesalers and retailers, owned or controlled by local producers of competing goods, will not handle its goods could establish a new distribution channel or purchase an existing one, thereby eliminating the local distribution bottleneck. A liberal investment policy, in short, can simultaneously promote competition and trade in the host-country market, and perhaps in the global market as well.

One final reflection: Calls for dismantling the WTO at the Seattle Ministerial Conference in 1999 were incredibly shortsighted. Such demands evidence no appreciation for the tremendous contribution that GATT 1994 and the WTO have made to increasing world wealth and improving the daily life of millions of persons throughout the world. To cite just one example, without a legal instrument like GATT 1994 to promote liberal

[243] *See Foreign-Owned Firms Employ 5 Million Americans,* CHRISTIAN SCI. MONITOR, Nov. 27, 1996, at 8.

[244] *See Why the Poor Don't Catch Up*, THE ECONOMIST, April 25, 1992, at 48.

[245] *Trade and Foreign Direct Investment*, *supra* note 231, at 16 (citing in support RICHARD E. CAVES, MULTINATIONAL ENTERPRISES AND ECONOMIC ANALYSIS (1982), and EDWARD M. GRAHAM, GLOBAL CORPORATIONS AND NATIONAL GOVERNMENTS (1996)).

[246] *See* WTO, Working Group on the Interaction between Trade and Competition Policy, *Report (1999) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WT/WGTCP/3, at 24, ¶ 72 (1999); WTO, Working Group on the Interaction between Trade and Competition Policy, Communication from the United States*, Relationship Between Investment and Competition Policy*, WT/WGTCP/W/102, at 4 (1998).

trade, and the legal and political commitment of WTO Members to support liberal trade, developing countries would find markets in developed countries largely closed to their exports of textiles, clothing, and other goods that are the product of labor-intensive industries. The critics would presumably prefer seeing the developing world locked into a state of perpetual economic stagnation and poverty, with the people of those countries working behind a water buffalo plowing a malarial-infested field. As Jeffrey Schott has noted, "[A]s the weaker partners in the trading system, developing countries benefit the most when the major trading powers play by a common set of rules."[247] A liberal trade policy is a policy of increased competition and opportunity. Such a policy holds great promise for the world's developing countries.

BIBLIOGRAPHY

American Enterprise Institute for Public Policy Research, Renewal of the Generalized System of Preferences (1984)

Ellen Frey-Wouters, The European Community and the Third World: The Lome Convention and Its Impact (1980)

F.V. Garcia-Amador, The Emerging International Law of Development: A New Dimension of International Economic Law (1990)

Branislav Gosovic, UNCTAD: Conflict and Compromise (1972)

Robert E. Hudec, Developing Countries in the GATT Legal System (1987)

OECD, The Generalized System of Preferences: Review of the First Decade (1983)

Office of the U.S. Trade Representative, A Guide to the U.S. Generalized System of Preferences (1996)

Diana Tussie, The Less Developed Countries and the World Trading System: A Challenge to the GATT (1987)

United Nations Conference on Trade and Development, The History of UNCTAD 1964–1984 (1985)

The Uruguay Round and Beyond: The Final Report from the Ford Foundation Supported Project on Developing Countries and the Global Trading System (John Whalley ed. 1989)

World Bank, The Uruguay Round and the Developing Economies (Will Martin & L. Alan Winters eds. 1995)

Abdulqawi Yusuf, Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law (1982)

Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. Ill. U.L. Rev. 347 (1994)

Robert E. Hudec, *GATT and the Developing Countries*, 1 Colum. Bus. L. Rev. 67 (1992)

Ndiva Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, 18 Cal. W. Int'l L.J. 291 (1987–88)

Nina J. Lahoud, *The "Non-Discriminatory" United States Generalized System of Preferences: De Facto Discrimination Against the Least Developing Countries*, 23 Harv. Int'l L.J. 1 (1982)

Gregory O. Lunt, *Graduation and the GATT: The Problem of the NICs*, 31 Colum. J. Transnat'l L. 611 (1994)

Douglas E. Matthews, *Lome IV and ACP/EEC Relations: Surviving the Lost Decade,* 22 Cal. W. Int'l L.J. 1 (1991)

Kele Onyejekwe, *GATT, Agriculture, and Developing Countries,* 17 Hamline L. Rev. 77 (1993)

Kele Onyejekwe, *International Law of Trade Preferences: Emanations from the European Union and the United States*, 26 St. Mary's L.J. 425 (1995)

Abdulqawi A. Yusuf, *"Differential and More Favourable Treatment": The GATT Enabling Clause,* 14 J. World Trade L. 488 (1980)

[247] Jeffrey Schott, *After Seattle*, The Economist, Aug. 26, 2000, at 66.

CHAPTER 35

THE NATIONAL SECURITY PROVISION—GATT ARTICLE XXI

Alan S. Alexandroff and Rajeev Sharma*

TABLE OF CONTENTS

I. Introduction 1572
II. Historical Overview of GATT Article XXI 1572
III. The Text of GATT Article XXI 1573
IV. GATT/WTO Jurisprudence on Article XXI 1573
A. GATT Decisions 1574
1. Czechoslovakia v. United States 1574
2. Swedish Import Restrictions on Certain Shoes 1574
3. Argentina 1575
4. Nicaragua I 1575
5. Nicaragua II 1576
B. The WTO Era 1577
V. Conclusions 1578

* Alan S. Alexandroff, Research Director Program on Conflict Management and Negotiation, Munk Centre for International Studies, University of Toronto, and C.D. Howe Institute Fellow-in-Residence in International Policy. Rajeev Sharma, Barrister & Solicitor, specializes in international trade and anti-trust law at Heenan Blaikie LLP, Toronto, Canada.

I. Introduction

The Contracting Parties to the General Agreement on Tariffs and Trade ("GATT") understood that they might need to take independent security and defense policy measures that would be exempted from the general legal obligations contained in the GATT. This exception to the GATT rules is contained in Article XXI titled "Security Exceptions" ("Article XXI").[1]

On its face Article XXI is a most powerful exception to the general obligations undertaken by WTO members. The element of Article XXI with the greatest potential for abuse is subsection (b)(iii), which allows any WTO member to ignore its general WTO obligations in situations "which it considers essential to its security interests . . . in time of war or other emergency in international relations". American legal scholar Raj Bhala, who has written extensively on the national security exception, has described the potential for protectionist mischief sanctioned by Article XXI as "cowboy behavior".[2] Yet the infrequent invocation of Article XXI suggests that it is not much more than a potential threat. Article XXI has yet to be relied upon to justify a significant impediment to the openness of the global trading system. In practice, GATT/WTO members have not undermined the liberalizing objectives and obligations in the GATT/WTO through extensive recourse to the Article XXI exception. However, the question remains: Despite the absence of 'cowboy behavior' historically, and infrequent recourse to the exception, can we be confident that member countries will be equally restrained in the future, especially in a post-September 11th world where terrorism and national security have become such large concerns? Trade policymakers need to assess the continuing potential for "mischief" created by Article XXI and its potential impact on the global trading system.

II. Historical Overview of GATT Article XXI

The drafters of Article XXI understood the extremely broad scope of the exception they were creating. The debates on the ITO Charter reveal concern about the critical balance required between national security and national sovereignty on the one hand, and the need to promote commerce and to protect an open trading system on the other. One of the drafters of the original ITO Charter described the care that the Contracting Parties took in fashioning this critical exception:

> We gave a good deal of thought to the question of the security exception, which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any member of measures relating to a Member's security interests," because that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance . . . [T]here must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight,

[1] Article XIVbis of the *General Agreement on Trade in Services* and Article 73 of the *Agreement on Trade Related Aspects of Intellectual Property Rights* contain almost identically worded exceptions. No disputes have arisen involving these exceptions. Similar exceptions can be found in regional agreements such as the *North American Free Trade Agreement* at Article 2102.

[2] Raj Bhala, *National Security and International Trade Law: What the GATT says, and What the United States Does*, 19(2) U. PA. J. INT'L ECON. L. 263, 273(1998). *See also* RAJ BHALA AND KEVIN KENNEDY, WORLD TRADE LAW 154–57(1998) and in particular 1999 SUPPLEMENT at 220–231("BHALA AND KENNEDY").

> because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures, which really have a commercial purpose.[3]

As discussed in this chapter, a number of serious issues have been raised over the national security exception. Although Article XXI has been the subject of several dispute settlement proceedings, as well as discussions in the GATT Council, most of these issues remain unresolved. Given the broad scope of the exception and the protection of national sovereignty that all Members agree is fundamental to the modern global trading system, how is it that the exception has not been more prone to abuse since it came into effect as part of the GATT 1947? Before attempting to answer this question, it is necessary to examine the legal text of Article XXI and how member countries have treated elements of the exception in the few disputes that have arisen regarding its use.

III. The Text of GATT Article XXI

GATT Article XXI ("Article XXI") reads as follows:

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

Few Panels have examined the precise meaning and scope of the Article XXI exception. The key issue, as yet unresolved, is the jurisdictional argument – relied upon more than once by the United States—that the phrase "which *it* considers necessary" (emphasis supplied) in the chapeau of paragraph (b) means that a country's decision to take action on national security grounds under Article XXI:1(b) cannot be challenged in the dispute resolution system.

IV. GATT/WTO Jurisprudence on Article XXI

One of the most influential GATT experts, Professor John Jackson, has argued that Article XXI is "so broad, self-judging, and ambiguous that it obviously can be abused. It has even been claimed that maintenance of shoe production facilities qualifies for the exception because an army must have shoes!"[4] Despite dire warnings such as this, contracting

[3] Quoted in GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, 6TH EDITION (1994), 554 ("GATT LAW AND PRACTICE, 1994").

[4] JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 230(1997). *See* discussion of the Swedish footwear case below.

parties have rarely relied on the exception to justify restrictions on trade in goods. Few decisions have therefore considered the national security exception in any detail.

A. GATT Decisions

1. Czechoslovakia v. United States

In the *Czechoslovakia v. United States* dispute,[5] the United States invoked Article XXI to justify its ban on imports of various goods from Czechoslovakia. Czechoslovakia countered that "the United States Government had used and interpreted the expression 'war material' so extensively that no one knew what it really covered."[6] However, the United States pointed out that only two hundred of the three thousand items on Czechoslovakia's tariff classification list were actually affected by the ban. The Contracting Parties voted overwhelmingly in favor of the United States.[7]

While there was virtually no analysis or reasons provided for the decision, the materials available indicate that the discussion focused very generally on the policy reasons underlying the national security exception. It is likely that the decision was motivated by political concerns at the very beginning of the Cold War, when countries were reluctant to offend the most powerful member of the nascent GATT, only two years old at the time.

2. Swedish Import Restrictions on Certain Shoes

A clearer and more restrained voice was expressed by some contracting parties in the GATT Council's consideration of an import quota imposed in 1975 by Sweden on certain footwear. The concern was the need to distinguish "commercial purpose" from *bona fide* national security action. The GATT Council paid particular attention to the term "essential security interests" in the Chapeau of Article XXI. Sweden argued that its import ban conformed to at least the spirit of Article XXI and stated:

> [D]ecrease in domestic production had become a critical threat to the emergency planning of Sweden's economic defence . . . The policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.[8]

During the GATT Council debates many of the contracting parties expressed their reservations as to whether Sweden's import quota measure could be justified under Article XXI. While Sweden revoked its measure on July 1, 1977, without prompting from the GATT, the argument that Sweden's measure was likely more for a commercial purpose rather than for national security seems to have been compelling. To identify a link between a commercial interest and national security puts the country invoking the exception on a slippery slope toward protectionism. A country invoking the national security exception should be obliged to justify its measure in order to weed out trade policies that are for commercial rather than national security interests. Otherwise, as Professor Bhala suggests[9], the potential exists for protection of far too many non-critical industries and sectors. As Professor Bhala reminds us, other remedies, such as Article XIX (known as

[5] Summary Record of the Twenty-Second Meeting, June 8, 1949, CP.3/SR22—II/28.
[6] *Id.* at 2.
[7] 17–1, with 3 abstentions and 2 absent. *See* BISD (Volume II) at 28 (1949).
[8] *Sweden—Import Restrictions on Certain Footwear,* L/4250 (November 17, 1975) at 3, quoted in GATT LAW AND PRACTICE, 1994 at p. 557.
[9] Bhala, *supra,* note 2, at 273.

the "Safeguards Clause"), are available to provide temporary relief for dealing with non-military threats posed by fair competition from imports.[10] The Swedish case represents the "edge" of the slippery slope in the history of the Article XXI debate that countries have for the most part wisely avoided to date.

3. Argentina

In 1982, soon after the temporary forced annexation of the Falkland Islands by Argentina, several Western countries (the European Economic Community, Australia and Canada) imposed trade restrictions on Argentina. Argentina complained that the two-month ban on Argentinean goods violated GATT Articles I (MFN), II (bound tariffs), and XI (quantitative restrictions). While no formal dispute panel was ever convened, on November 30, 1982, the Contracting Parties adopted a "Decision Concerning Article XXI of the General Agreement" setting out interpretative guidelines regarding the acceptable use of Article XXI. The Contracting Parties articulated the limits of Article XXI in the following manner:

1. Subject to the exception in Article XXI:a (right to withhold sensitive information), contracting parties should be informed to the fullest extent possible of the trade measures taken under Article XXI; and
2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.[11]

4. Nicaragua I

The dispute in the *Nicaraguan Sugar Case (Nicaragua I)*[12] arose out of the Reagan Administration's drastic reduction of sugar imports from Nicaragua as a part of its larger Central American foreign policy. Nicaragua argued that the U.S. sugar restrictions violated Articles XI (general elimination of quantitative restrictions), II (national treatment), XIII (non-discriminatory administration of quantitative restrictions) and Part IV of the GATT (trade and development). In that case, the United States did not explicitly invoke the Article XXI exception. However the United States did claim that its measure was beyond the scope of the GATT Panel and not a trade issue. Specifically, the United States argued:

> [T]he reduction of Nicaragua's sugar imports was not solely motivated by trade considerations, nor did this action secure any economic or trade benefit for the United States or for the sugar producers or any other industry of the United States...the United States did not believe that the review and resolution of that broader dispute was within the ambit of the GATT.[13]

The Panel noted that the United States had not invoked any of the exceptions available to it under the GATT, and therefore would not comment or issue a ruling on whether the US measure could be justified under an exception. In the end, the Panel found the U.S. measure to be inconsistent with GATT Article XIII (2) obligation and suggested that the Contracting Parties recommend the United States "promptly allocate to Nicaragua

[10] *Id.*

[11] GATT Doc. L/5426 (1982), BISD (29th Supp.) at p. 23 (1982), quoted in GATT LAW AND PRACTICE, 1994 at p. 559.

[12] Report of the GATT Panel (adopted), *United States—Imports of Sugar From Nicaragua,* BISD 31S/67 (1984).

[13] *Id.,* ¶¶ 3.10–3.11.

a sugar import quota consistent with the criteria set out in Article XIII (2)."[14] As noted below, the United States changed its legal strategy in *Nicaragua II*, where it did invoke the Article XXI national security exception.

5. Nicaragua II[15]

Trade relations between the United States and Nicaragua were the subject of a second GATT dispute settlement proceeding a few years later, after President Reagan issued an Executive Order on May 1, 1985 prohibiting all trade and transactions relating to air and sea transportation between Nicaragua and the United States. The United States initially objected to a Panel being struck to hear the dispute but later agreed to the creation of a Panel on the condition that it not examine or judge the validity of, or motivation for, the United States invoking Article XXI (b)(iii). Therefore, while the dispute proceeded, the Panel's terms of reference were framed extremely narrowly.

Nicaragua argued that the United States could not properly invoke Article XXI because the US embargo was not consistent with an "essential security interest," and the measure was not taken during a time of "war or other emergency in international relations". To support its claim, Nicaragua relied on a decision of the International Court of Justice and two UN Resolutions that condemned the US embargo as being a violation of international law.[16] The United States replied that the text of Article XXI left the validity of the security justification to the exclusive judgment of the Contracting Party invoking the exception. The United States also pointed to the narrow terms of reference given to the Panel and argued that it was not required to debate the merits of the Article XXI exception any further.

The Panel declined to rule on the dispute. It took the position that the narrow terms of reference precluded it from determining whether the United States had violated any of its GATT obligations within the meaning of Article XXIII:1(a). Although it concluded that the terms of reference did not prevent it from considering whether Nicaragua's GATT benefits had been nullified or impaired within the meaning of Article XXIII:1 (b) (non-violation), it held that there was no point in doing so unless a practical solution was available. Since the United States had indicated that it would not lift the embargo without a solution to the underlying political problem, a recommendation by the Contracting Parties that the embargo be withdrawn would have no effect. The alternative solution, providing Nicaragua authority to retaliate against the United States, would be equally ineffective since the U.S. embargo applied to exports from the United States to Nicaragua as well as to imports from Nicaragua.

Nevertheless, clearly frustrated by the narrow terms of reference, the Panel did ask the question whether "[i]f it were accepted that the interpretation of Article XXI was reserved entirely to the Contracting Party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision?"[17] While acknowledging that the GATT was not intended to require contracting parties to forego their essential security interests, the Panel observed that the GATT could not achieve its basic aims of fostering non-discriminatory and open trade policies unless

[14] *Id.* ¶ 4.7.
[15] *United States—Trade Measures Affecting Nicaragua*, Report of the Panel (unadopted) (L/6053), 13 October 1986.
[16] *Id.* ¶ 4.5.
[17] *Id.* ¶ 5.17.

each contracting party, whenever it invoked Article XXI, carefully weighed its national security needs against the need to maintain stable trade relations. In its frustration and anger over the Panel failing to make recommendations, Nicaragua blocked adoption of the report

B. The WTO Era

The first and so far only dispute in the WTO involving GATT Article XXI was a challenge by the EU of the U.S. Helms-Burton Act of 1996 ("Helms-Burton").[18] Helms-Burton, signed into law by President Clinton on March 12, 1996, was designed to tighten the 1962 embargo on communist-controlled Cuba. Title III of the legislation permitted U.S. nationals to bring legal action in the United States against foreign companies that were dealing or trafficking in U.S. property confiscated by Cuba after Fidel Castro came to power in 1959,[19] while Title IV authorised the U.S. State Department to deny visas to officials and to shareholders of such companies that benefit from such trafficking.[20]

The EU's complaint against Helms-Burton argued that the legislation violated GATT Articles I (MFN), III (National Treatment), V (Freedom of Transit), XI (Quantitative Restrictions), as well as several obligations under the General Agreement on Trade in Services ("GATS"), including Articles I (MFN), III (Transparency), VI (Domestic Regulation), XVI (Market Access) and XVII (National Treatment) as well the Annex on the movement of natural persons.[21]

As in *Nicaragua II*, the United States took the position that the legislation fell under the Article XXI exception, and that a dispute settlement panel was not competent to examine the justification or the motivation of the United States.[22] Indeed, U.S. officials made it clear that the United States would not even appear before the panel. According to one unnamed U.S. official: "We would not show up [to the panel proceedings]. This is a matter that touches on the foreign policy and national security of the United States, as to which no panel in the WTO is competent."[23]

This was potentially one of the most explosive cases to have reached the dispute settlement stage. Had the Panel and/or the Appellate Body ruled in favour of the

[18] *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, Pub. L. No. 104–114, 110 Stat. 785.

[19] However, the President was authorized to waive application of Title III for six-month periods. On July 16, 1996, President Clinton suspended the right of U.S. citizens to file suit under Title III, and the waiver has been renewed at six-month intervals ever since.

[20] Executives of three companies and their families were banned from entering the United States pursuant to Title IV: Grupos Domos, a Mexican telecommunications company, Sherritt International, a Canadian mining company, and BM Group, an Israeli citrus company. Grupos Domos disinvested in the Cuban property at issue in 1997 and the ban was lifted. Visa exclusion for officials from an Italian telecommunications company, STET, was averted when STET agreed to pay US-based ITT Corporation $25 million for the use of ITT-claimed property in Cuba for a ten-year period. In addition, the U.S. State Department has investigated the Spanish hotel Sol Melia that apparently had invested in Cuban property that was confiscated from U.S. citizens in 1961, though there is no confirmation that the US State Department has denied visas to officials of that company. *See State Department. Official Promises Strict Enforcement of Helms-Burton*, INSIDE US TRADE, (April 13, 2001) and *Overview and Compilation of US Trade Statutes, 2001 Edition*, COMMITTEE ON WAYS AND MEANS, US HOUSE OF REPRESENTATIVES 219(June 2001).

[21] *See* EU Request for Consultations, *United States—The Cuban Liberty and Democratic Solidarity Act,* WT/DS38/1(May 13, 1996). Canada and Mexico joined the case as third parties.

[22] However, European officials suggested that the case could be distinguished from *Nicaragua II* on the basis that that case involved a primary boycott, whereas Helms-Burton created a secondary boycott. *See, e.g., Paeman Raises Possible WTO Challenge to National Security Measures*, INSIDE US TRADE (March 29, 1996).

[23] *US Says it will not Participate in WTO Panel on Helms-Burton*, INSIDE US TRADE, (February 21, 1997).

United States, the way would have been open for any Member to justify any trade restriction on national security grounds without fear of challenge. Moreover, a victory for the United States when it had failed even to appear in the proceedings would have seriously undermined the legitimacy of the new organization. On the other hand, had the ruling gone against the United States the U.S. Congress, already uneasy about the perceived loss of sovereignty entailed by the new WTO dispute settlement process,[24] would have reacted extremely negatively.

Fortunately, however, wiser heads prevailed. After a panel had been struck, the EU and the United States signed a Memorandum of Understanding ("MOU") on April 11, 1997.[25] In the MOU, the parties agreed, among other things, to develop agreed disciplines and principles for the strengthening of investment protection governing expropriation and nationalization. The United States indicated that it would continue to suspend operation of Title III provided that the EU and other allies stepped up their efforts to promote democracy in Cuba. The United States agreed to consult with Congress with a view to obtaining a Presidential waiver for Title IV once bilateral consultations had been completed and the EU had adhered to the agreed disciplines and principles.[26] Finally, the EU agreed to suspend the WTO proceedings.[27]

Thus, the question whether the invocation of Article XXI to justify actions that would otherwise violate provisions of the WTO agreements can be challenged in the WTO dispute settlement system is still open.[28]

V. Conclusions

As discussed in this chapter, countries have for the most part exercised a good deal of self-restraint with respect to the use of Article XXI to justify trade restrictions, and no GATT or WTO dispute resolution panel has had to rule on the precise meaning of its provisions. However, with the shift towards a more proactive U.S. foreign and defense policy since September 11, 2001, and growing international attention to national security, it may only be a matter of time before a substantive ruling on the parameters of Article XXI will be sought. National security imperatives in the wake of international terrorism could well weaken the historical constraint on "cowboy behavior" described in this Chapter. The use of Article XXI in the face of the real problems posed by the threat of international terrorism may well prove not to be too troublesome. However, if WTO governments take the opportunity to invoke sanctions where terrorism and national security threats are not readily apparent, but the protection of domestic interests are, or where foreign policy

[24] Under the GATT dispute settlement system the losing party could block adoption of a panel report, a right quite frequently invoked by the United States. Under the WTO system, panel and Appellate Body reports are automatically adopted unless blocked by a consensus of the members. The only sop to the proponents of undiminished sovereignty was that the WTO could not force a losing party to comply with the panel or Appellate Body recommendations; the losing party could instead offer compensation or face retaliation.

[25] *European Union-United States: Memorandum of Understanding Concerning the US Helms-Burton Act and the US Iran and Libya Sanctions Act*, 36 INTERNATIONAL LEGAL MATERIALS 529 (1997).

[26] No amendment to Title IV as contemplated by the MOU has ever been passed by Congress [Conversation with Angela Ellard, Majority Staff, Committee on Ways and Means, US House of Representatives, December 1, 2003].

[27] The proceedings lapsed in 1998, since cases cannot be suspended for more than one year. *See Dispute Settlement Understanding,* Article 12:12.

[28] Kees Jan Kuilwijk has argued that claims to a national security exception are subject to both procedural and substantive review. *See* Kees Jan Kuilwijk, *Castro's Cuba and the U.S. Helms-Burton Act: An Interpretation of the GATT Security Exemption,* 31(3) JOURNAL OF WORLD TRADE 49(1997).

concerns that do not appear to have direct national security implications are dominant, as in the *Helms-Burton* case, difficult questions could be presented to the WTO.[29]

Whether or not a panel or the Appellate Body would actually delve into the merits of an Article XXI defence is an open question. Activist adjudicators might be willing to consider the meaning of such terms as "war or other emergency in international relations", "necessary", and "essential security interests". But "Realpolitik", according to some experts, would be more likely to incline the WTO to accept that Article XXI was intended to give members a great deal of sovereign freedom to act in ways that they believe to be in their national security interests, without being subject to second-guessing in the dispute settlement system.[30] In such case, only continued self-restraint by Members will prevent abuse of the national security exception.

[29] For example, at the time of China's accession to the WTO, the U.S. Congress created the United States-China Economic and Security Review Commission (*see* 22 U.S.C. § 7002) to assess and to report annually to Congress on the national security implications and impact on U.S. interests of the bilateral trade and economic relationship between the United States and China. The legislation specifically requires:

> Each report under paragraph (1) shall also include recommendations for action by Congress or the President, or both, including specific recommendations for the United States to invoke Article XXI (relating to security exceptions) of the General Agreement on Tariffs and Trade 1994 with respect to the People's Republic of China, as a result of any adverse impact on the national security interests of the United States. 22 U.S.C. § 7002(c)(3).

The first Commission report issued in July 2002 includes the following recommendation:

> Recommendation 11: Congress mandated the Commission to evaluate and make recommendations on invoking Article XXI of the General Agreement on Tariffs and Trade (GATT), relating to security exceptions from GATT obligations. The Commission believes that the steel industry is a positive candidate for using Article XXI. If the Administration's current safeguard measures prove ineffective, the Commission recommends that Congress consider using Article XXI to ensure the survival of the U.S. steel industry. *Report to Congress of the U.S.-China Security Review Commission—The National Security Implications of the Economic Relationship Between the United States and China Executive Summary* <http://www.uscc.gov/execsum02.htm>

[30] Bhala and Kennedy, *supra*, note 1 at 222 et seq.

CHAPTER 36

TARIFF CLASSIFICATION

Ian S. Forrester, Q.C.* and Tashi Kaul**

TABLE OF CONTENTS

I. Introduction 1582
II. The Nature and Purpose of Classification 1582
A. The Harmonized System 1582
B. Origins of the HS 1583
C. The WCO and the WTO: Distinction in Competence 1584
D. The Purposes of Classification 1586
1. Classification as the First Step in Customs Valuation 1586
2. Classification in the Context of Other "Like Product" Issues 1586
3. Classification as a Method for Determining Origin 1586
4. Classification as Disguised Discrimination: a Means of Refusing MFN Treatment 1587
E. Classification as a Criterion for Determining "Like Products" 1587
F. Conversion of GATT Tariff Schedules to HS Nomenclature 1589
G. Legal Effect 1590
III. WTO Rules on Classification 1590
IV. WTO/GATT Case Law Relating to Classification 1591
A. Violation Claims 1592
1. Article I:1: Reclassifications That Deny MFN Treatment to "Like Products" 1592
2. Reclassification Decisions that Violate GATT Article II:1. 1594
B. Article XXIII 1:(b): Non-Violation Nullification or Impairment of Benefit 1597
V. Conclusion 1598

* Ian Forester, Q.C., is a partner with the Brussels office of the law firm White & Case.
** Tashi Kaul is Director of WTO Affairs with the Washington, D.C., office of White & Case.

I. Introduction

States which agree with other states the levels of duties which they each will levy on specific goods require a means of identifying exactly which goods will be subject to which duty rates. Customs classification rules assist in effecting this identification. The rules should specify which goods are eligible for particular treatment, which other goods should receive the same treatment on the ground that they are "like" the specified goods, and which characteristics are to be regarded as conclusive when in doubt. The rules should also be non-discriminatory and should not lend themselves to national favouritism. This may be illustrated by some hypothetical examples. Is orange juice made from blood oranges to be regarded as if it were orange juice made from ordinary oranges? Should butter with a lower incidence of certain fat solids (so-called spreadable butter) be treated in the same fashion as normal butter? Is a large photocopier producing ninety copies per minute "like" a smaller copier making fifty copies per minute, so that imports of the former may be subjected to anti-dumping duties designed to protect domestic producers of the latter?

Most countries base their customs classification systems on the Harmonized System of Classification ("HS"). The HS is administered not by the WTO but by the World Customs Organization ("WCO"), based in Brussels. However, classification issues can be significant in matters that fall within the competence of the WTO, and several GATT and WTO disputes have involved questions relating to classification. Because customs classification as such is not governed by the WTO, this chapter does not attempt to provide a comprehensive discussion of the subject.[1] Instead, it discusses customs classification as it has arisen in the context of the GATT and the WTO. It first outlines the nature and purposes of customs classification (Part II). Next, it examines current WTO rules directly and indirectly related to classification (Part III). Finally, it analyses WTO/GATT case law relating to classification (Part IV).

II. The Nature and Purpose of Classification

A. The Harmonized System

Article 1 of the International Convention on the Harmonized System provides:

> "the Harmonised System means the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, the Chapter and Subheading Notes and the General Rules for the interpretation of the Harmonised System, set out in the Annex to this Convention."

The HS classifies over 5000 separate groups of goods in a logical structure comprising over 1200 headings broken down into 96 chapters organized in 21 sections, starting with cruder products. Subdivisions run to up to six digits. Each heading is identified by a four-digit code whose first two digits indicate the chapter where the heading appears, while the second two indicate the chapter heading. Fifth and sixth digits respectively identify one and two-dash subheadings. A zero indicates that there is no sub-heading[2].

[1] The WCO has published a classification course on a CD-ROM entitled "HARMONIZER: computer-based Training in the HS" developed by the Swedish Customs Administration. Details are available on the WCO website, www.wcoomd.org.

[2] For example, consider HS category 0902.10, corresponding to "Flavored Green tea (not fermented) in immediate packings of a content not exceeding 3 kg". The first two digits of the code 0902.10 indicate that the product belongs to chapter 9 entitled "Coffee, Tea, Maté And Spices". The third and fourth digits indicate

The HS includes six General Rules of Interpretation,[3] as well as headnotes to sections, chapters, headings and subheadings which provide additional guides to interpretation for particular categories of product.[4]

B. Origins of the HS

After World War II, a European Customs Union Study Group was established in Brussels to respond to the need for a standardized, internationally accepted classification system by developing a classification system known as the Brussels Tariff Nomenclature ("BTN") of the Customs Cooperation Council ("CCC"). It was considered that harmonised classification would facilitate international trade flows and tariff negotiations and make international trade statistics more reliable and useful. By 1967 all leading GATT members except the United States and Canada had adopted the BTN as their tariff classification. The United States finally joined the CCC in 1970, but did not adopt the BTN which it considered inadequate. The CCC, including the United States, developed the HS, which entered into force on January 1, 1987 and was adopted by the United States with effect from January 1, 1989, and by Canada with effect from January 1, 1988. The HS, which is based in part on the Standard International Trade Classification("SITC"), used by the United Nations statistical commission to report trade statistics, has now been adopted for customs tariffs and trade statistical purposes by countries representing ninety percent of all world trade.

The CCC evolved into the World Customs Organisation ("WCO") in 1994. The WCO, based in Brussels, is responsible for maintaining the HS. The WCO takes measures to secure uniform interpretation of the HS and amends it to take account of technological developments. A country can be a member of the WCO and also be party to the HS Convention: there are 159 members of the WCO and 104 signatories to the Convention. A number of countries that have not formally adopted the Convention nonetheless apply the HS in practice. All WCO members may become party to the HSC; non-WCO members may be invited by the WCO Council to become parties to the HSC (only Chad currently falls into this category).

The HS is amended every five years. The HS Committee, which acts by consensus, may draw up amendments after consulting Members. The Committee meets regularly to consider specific classification problems, review the operation of the HS and update it and the explanatory notes as necessary. Private companies or trade associations should raise classification concerns or suggestions for amending the HS with their national customs authorities, which may then ask the WCO Secretariat to raise the issue with the HS Committee.

The WTO Appellate Body and GATT and WTO panels have often referred to the HS during WTO dispute settlement procedures for comparisons or to obtain more information

that the product falls under Heading 2 which corresponds to "Tea, whether or not flavored". The fifth and sixth digits indicate that the product is further classified as subheading 1, corresponding to "Green tea (not fermented) in immediate packings of a content not exceeding 3 kg".

[3] For example, GRI 2(a) provides: "Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled".

[4] For example, Subheading Note 1 to Chapter 85 provides: "For the purposes of subheading 8542.10, the term "smart cards" means cards which have embedded in them an electronic integrated circuit (microprocessor) of any type in the form of a chip and which may or may not have a magnetic stripe."

on the reasoning behind a certain classification. A key fact in *Japan-SPF Lumber*,[5] for instance, was that there was no comparable independent tariff line for dimension lumber under the HS. In the *EC-Computer Classification* dispute[6], the Appellate Body held that the HS and its explanatory notes constituted a supplementary means for interpretation of classification decisions. These disputes are discussed in greater detail in Part IV of this chapter.

Close cooperation exists between the WTO and the WCO on questions related to the Harmonized System. The WTO participates as an observer at the sessions of the Harmonized System and usually a representative of the WCO's Nomenclature and Classification Division participates as an observer in the meetings of the WTO Market Access Committee. The two organizations however, differ in their areas of competence.

C. The WCO and the WTO: Distinction in Competence

The WTO and WCO exist as two separate entities with different areas of competence that do not overlap. The instruments of both organizations are distinct and complementary—although this is not always clear—once they have been implemented (and integrated) at the national level. The WCO is charged with "promoting an honest, transparent and largely predictable customs environment"[7]. It is the only inter-governmental worldwide organization competent in customs matters aiming to enhance the effectiveness and efficacy of customs administrations. The WTO on the other hand, deals with the rules of trade between nations. The target groups therefore are also different, with the WCO dealing solely with national customs administrations. Given the different types of "clients" or members, it has not been considered logical to merge both organisations, although some parts of their instruments are closely linked to each other. The WTO, for example, has little to do with cigarette smuggling, an issue which falls within the WCO's domain on the basis that diversions of trade due to differences in price and excise duty give rise to technical problems of enforcement.

The WCO is the only global international organization having competence in the classification of commodities in the Harmonized System. The WTO has no such competence. Classification at the national level rarely takes place simply for the sake of classification. It is usually designed to carry out specific government policies. The protection of domestic industries through tariffs is one such policy,[8] and one that the WTO concerns itself with. A standard classification system, applicable at the international level uniformly all over the world, however, must be designed purely from a classification point of view. The WCO in administering the HS Nomenclature aims to do exactly this and in doing so, differs in its objectives from the WTO.

Products under the HS are classified on the basis of likeness rather than on that of tariff applicability as in WTO Members' tariff schedules; Article 9 of the HS Convention states "Contracting Parties do not assume by this Convention any obligation in relation to rates of Customs duty". WTO Members' tariff schedules on the other hand, are not

[5] Report of the GATT Panel (adopted), *Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber,* L/6470, 36th Supp. BISD 167 (1990).

[6] *European Communities—Customs Classification of Certain Computer Equipment,* WT/DS62, WT/DS67, and WT/DS68 (1998) ("*EC—Customs Classification*").

[7] *The Institution of Customs*, WCO Brochure, *About Us* (http://www.wcoomd.org)

[8] Another policy, the raising of revenue, is far less important in developed countries than it was historically. But duties still constitute a major proportion of government revenue in much of the developing world, particularly least-developed countries.

required to follow any particular classification system as long as like products receive identical tariff treatment; the motivation here quite clearly is tariff application. WTO Members often refer to the WCO's classification instrument in the context of Customs tariff negotiations and other Customs tariff-related issues. Again, the application of duty rates at the national level is a result of the classification of the commodity at issue in the Customs tariff nomenclature (which for most countries is based on the HS).

Disputes over the application of the HS Convention and its Nomenclature (and, therefore, over the classification of commodities in the HS) fall within the competence of the WCO and should be brought before the appropriate WCO body (i.e., the Harmonized System Committee). The Committee has power to issue opinions that are advisory only, not binding. It should be noted that although disputes in the HS Committee are settled from a purely classification point of view, those responsible for this classification should take classification decisions within the context of trade policies. Correctness of decisions must be verified with regard to such policies. For example, if the context of the question is whether a specific category of products may be included within a broader category of products made subject to anti-dumping measures, those deciding the controversy will doubtless endeavour to find a conclusion which acknowledges, even if it does not reconcile, the sentiments of the countries involved, one of which seeks to afford wide protection against unwelcome imports coming from the other country. To date, the HS Committee has solved many disputes, thus contributing to achieving uniform classification and ensuring transparency with regard to HS classification. The Committee is the single international body which can provide authoritative advice with regard to tariff classification.

Although the WTO does not have competence in the classification of commodities in the HS, WTO members sometimes discuss the HS classification of certain goods within the context of an informal WTO forum. WTO panels and appellate bodies continue to make judgments on "like products". This raises the question whether disputes over classification issues can be taken to the WTO or to the WCO or to both? The *EC-Customs Classification* case[9] is an instance of a dispute discussed both at the WTO level and at the WCO. It is noteworthy however, that in *EC-Customs Classification* the question before the WTO concerned the application of the correct duty rates and not the correct classification of LAN equipment. As explained above, the correct application of the negotiated duty rates depends on (i) the integration at the national level of these duty rates into the Customs tariff nomenclature, and (ii) the correct classification of the commodity at issue in that nomenclature. Consider the following excerpt from the report of the Appellate Body in the *EC-Customs Classification* case, demonstrating that classification issues may still be relevant to a dispute that is not directly about product classification:

> "We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions and that, even if they were to become final as they stood, they would not affect the outcome of the present dispute for two reasons: first, because these decisions could not confirm that LAN equipment was classified as ADP machines in 1993 and 1994; and, second, because this dispute "was about duty treatment and not about product classification". We note that the United States agrees with the European Communities that this dispute is not a dispute on the *correct* classification of LAN equipment, but a dispute

[9] *Supra,* note 6.

on whether the tariff treatment accorded to LAN equipment was less favourable than that provided for in Schedule LXXX. However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant; and, therefore, they should have been examined by the Panel."[10]

D. The Purposes of Classification

1. Classification as the First Step in Customs Valuation

The need to classify products in tariff schedules stems from the fact that tariff rates for products differ. Classifying products in separate categories and sub-categories facilitates determination by customs authorities of the appropriate level of duty to be applied to individual products. Before deciding what *ad valorem* or other duty is applicable to an imported product, customs officials must first establish the exact category in the national tariff schedule under which that product is classified. If they cannot find an exact denomination for the commodity, they must charge the level of duty applicable to a "like product". Thus, a decision that one product is "like" another may form the basis for determining the valuation of, and duty on, that product. Is Corian, a building material used for bathroom and kitchen surfaces and made from crushed mineral and polymethylmethacrylate, to be regarded as "artificial stone" (at say a six percent duty), or as a "plastic" (at say an eleven percent duty)?[11]

2. Classification in the Context of Other "Like Product" Issues

The significance of the HS classification in helping to determine likeness is not restricted to identifying the appropriate tariff to be levied on a product. The concept of "like products" runs like a leitmotif in WTO disciplines, ranging beyond the National Treatment obligations to trade remedy and other rules. Likeness debates therefore arise not only in the context of tariff treatment of an imported product, but extend more generally to the realm of non-tariff barriers. For example, the issue in the *EC—Asbestos* case[12] was whether an imported asbestos product was "like" another domestically produced product in the context of a claim of violation of the National Treatment obligation of GATT Article III. As another example, GATT Article VI:1 establishes as the normal benchmark for anti-dumping comparisons the price of the "like product" in the domestic market of the exporting country. Standard product classification lists like the HS, as guides to decisions regarding the "likeness" of goods, may thus acquire a broader usage beyond the context of tariff treatment.

3. Classification as a Method for Determining Origin

A change in the level of a product's tariff heading is often considered sufficient to confer product origin on the country where that change took place, since it is deemed to reflect "substantial transformation" of the product—a criteria frequently used in rules of origin.[13] This is important in a number of contexts. So-called "preferential" rules of origin determine when a product is considered to have been produced in a country

[10] Report of the Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment,* WT/DS62/AB/R, WT/DS67/AB/R, and WT/DS68/AB/R (1998), ¶ 90 (footnotes omitted, emphasis in original).

[11] This question was addressed in *E.I. Du Pont de Nemours Inc. v. Commissioners of Customs & Excise*, Case 234/81, 1982 ECR 3515.

[12] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135 ("*EC—Asbestos*").

[13] Rules of origin are discussed in Chapter 15 of this book.

entitled to preferential treatment, for example a fellow member of a free trade agreement. Non-preferential rules of origin are necessary for purposes such as country-of-origin marking and coverage of trade-restrictive measures such as quotas and anti-dumping duties. However, using the change-in-tariff method to determine origin may not always be reliable, as even in the HS products are not always categorized in a uniform manner.[14]

4. Classification as Disguised Discrimination: a Means of Refusing MFN Treatment

The flexibility of the WTO rules on constructing classification lists gives Members the possibility of using them to evade the MFN obligation. For instance, Member A could subdivide its automobile classification into "green" and "non-green" cars in order to grant a preferential tariff rate for a particular "environmentally-friendly" model from country B. If B is the only country which exports "green" cars to A, even on an MFN basis A would be able to grant preferential tariff treatment exclusively to country B, without having to establish a formal MFN exemption. Legally speaking, this would not amount to a violation of MFN, provided that all "green" cars imported into A received the same tariff treatment and no other WTO Member claimed that "green" and "non-green" cars were like products. The best-known "real-life" example of such evasion is provided by a 1904 Swiss-German Treaty which reduced German tariffs on imports of: ". . . large dapple mountain cattle or brown cattle reared at a spot at least 300 meters above sea level and having at least a month's grazing each year at a spot at least 800 meters above sea level".[15] Few if any other European countries raise cattle at the same heights above sea level as Switzerland, and this provision would have been vulnerable to a claim by another country with MFN rights that cattle raised closer to sea level were "like" the Swiss cattle and therefore should not be subject to higher German tariffs.

In this sense, therefore, classification may be viewed as a technique for giving effect to reciprocal tariff commitments in as narrow as possible a fashion.

E. Classification as a Criterion for Determining "Like Products"

Can standard product classifications such as the HS be used to demonstrate or determine "like-ness"? If so, can WTO Members' schedules of tariff concessions ("tariff classification") be put to the same use? The criteria considered as relevant for establishing likeness have been determined on a case-by-case basis. No exhaustive list of such criteria has so far been established. However, in *Japan—SPF Lumber*, discussed in detail in Part III below, a GATT panel rejected Canada's argument that Japan's application of an eight percent duty to imports of SPF dimension lumber, as compared with a zero tariff on dimension lumber of other species, was inconsistent with Article 1. Canada had argued that "dimension lumber" was a term recognized by the Canadian industry and to some extent the U.S. and Japanese industries as well, and that all lumber falling within the term should be treated as "like products", no matter what the species. The Panel said that this fact alone did not mean that dimension lumber could be considered a tariff classification category, and placed great significance on the fact that it did not belong to any internationally accepted classification.[16]

[14] For example, preserved fruit are classified in a different chapter of the HS than fresh fruit, while frozen fruit appear in the same chapter. It is not immediately obvious why preserving fruit would be enough to constitute "substantial transformation", while freezing would not, yet this would be the result if a change of chapter were the test. See HS 0803 *et seq*., HS 0811, and HS 2008.

[15] JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 151 (2000).

[16] *Japan—SPF Lumber*, *supra,* note 5, ¶ 5.14.

More recently, in *European Communities-Measures Affecting Asbestos and Asbestos Containing Products*,[17] the Appellate Body endorsed an approach using four general criteria for establishing "likeness":

(i) the properties, nature and quality of the products
(ii) the end uses of the products
(iii) consumers' tastes and habits
(iv) the *international* tariff classification of the products[18]

By classifying like products under a single heading, the HS links the analysis of likeness to the question of classification. A decision on classification thus automatically establishes the like nature of products, while analysis of the likeness of products will be based on the way in which they have been classified. Neither the General Agreement nor WTO rulings provides a precise definition of the term "like product", which appears in many places in the GATT 1994 and the other Uruguay Round agreements on trade in goods.[19] The Appellate Body has held that the term acquires different meanings in different contexts of the agreements.[20] Analysis of the likeness of products under the HS is therefore inextricably linked with their classification. However, the WTO rules do not explicitly require members' tariff classification lists to follow any particular classification system or adhere to the principle of likeness. Article I of GATT 1994 stipulates that the same level of duty be levied on like products, but does not require that they be classified under the same heading. As New Zealand pointed out in *Japan-SPF Dimension Lumber*, WTO rules create an obligation for Members to extend identical tariff treatment to like products but not to harmonize their classification.[21]

It is therefore possible to argue that a standard product classification system such as the HS may be a more reliable criterion than tariff classification for determining the likeness of products. This can be explained by the varying aims of classification systems: the HS system seeks to classify products according to their likeness, while the aim of tariff classification is to classify products according to the applicable duty treatment. For instance, a decision as to whether regular butter and spreadable butter should be classified under the same heading of the HS would be based on considerations of their likeness. For country X's tariff schedule, however, the decision could be based on whether the two types of butter would be subject to the same tariff. Country X might consider that its domestic spreadable butter industry needed protection, while its regular butter industry required more competition from imports, and therefore decide to impose a high tariff on imported spreadable butter and a zero tariff on regular butter. X's tariff classification

[17] Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001), ("*EC—Asbestos*"), ¶ 101.

[18] The first three criteria were listed by the Working Party Report, *Border Tax Adjustments,* L/3464, BISD 18th Supp. 97 (1970). The last, international tariff classification, was not mentioned by the Working Party, but was included by subsequent panels (see for instance, Report of the GATT Panel (adopted), *EEC Measures On Animal Feed Proteins*, L/4599—25S/49 (1978), footnote 58, ¶ 5.6; Report of the WTO Panel, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11//R, footnote 58, at 113 (1996).

[19] The Appellate Body has noted that the term appears in Articles I:1, II:2, III:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4 and XIX:1 of the GATT 1994. *EC—Asbestos, supra* note 12, para. 88.

[20] "The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply." Report of the Appellate Body, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 21 (1996).

[21] *Japan—SPF Lumber, supra* note 5, ¶ 4.14.

would therefore classify the two types of butter under two distinct headings or "tariff lines" under the heading prescribed by the HS for butter.[22] As a result, it would be unwise to use tariff schedules as the sole basis for determining whether or not regular and spreadable butter are like products.

Questions regarding the likeness of products may arise in the context of the tariff or non-tariff treatment of imports in the territory of another Member. When the objective is to determine the tariff applicable to an imported product, the WTO rules (Article II of GATT 1994) provide no means of interpretation other than the Member's tariff schedule. In some cases, however, it may not be easy to determine the appropriate level of duty because the tariff schedule does not list the product in question clearly. It is in these ambiguous cases, where the need to identify the most closely alike product arises, that the case law indicates a potential role for standard classifications like the HS. The United States argued in *EC-Customs Classification* that the HS and its Explanatory Notes could be considered to form part of the "circumstances of the conclusion" of the WTO Agreement in the sense of Article 32 of the Vienna Convention and could therefore be used as a "supplementary means' for interpreting classification decisions.[23] The WTO Appellate Body supported the relevance of the HS in interpreting the tariff concessions within the EC's tariff schedule[24]. Product classification lists such as the HS can, therefore, help countries to ascertain whether their products are receiving the appropriate treatment for like products, so that they can "monitor and protect the value of tariff concessions".[25]

F. Conversion of GATT Tariff Schedules to HS Nomenclature

As noted above, neither the GATT nor the WTO has required members to adopt the HS. However, the 1983 Decision on "GATT Concessions under the Harmonised Commodity Description and Coding System" recommended adoption of the HS to achieve "greater uniformity among countries in customs classification and thus a greater ability for countries to monitor and protect the value of tariff concessions."[26] This Decision outlined the basic principles and guidelines for facilitating what it described as the "considerable" changes related to the introduction of the HS. It instructed Members not to change existing tariff bindings on adopting the HS unless retaining them would make national tariffs unduly complex. In any event, adoption should not involve a significant or arbitrary increase in customs duties collected on a particular product and Members should not modify or renegotiate bindings for reasons unrelated to the adoption of the

[22] The separate classification and duty treatment could of course be challenged under GATT Article 1 on the basis that the two types of butter were "like products". An exporter of spreadable butter subject to the high tariff could complain that imports of regular butter—the "like product"—were being imported from a different country at a zero tariff, and that this violated the Article I MFN obligation. See *Spain—Tariff Treatment of Unroasted Coffee*, Report of the GATT Panel (adopted), L/5135—28S/102 (1981) ("*Spain—Unroasted Coffee*"), discussed below.

[23] *Supra*, note 10, ¶ 38 (footnotes omitted).

[24] In *EC-Customs Classification*, *supra* note 10, the Appellate Body also ruled that the classification practice *in the European Communities* during the Uruguay Round was part of the "circumstances of [the] conclusion" of the WTO Agreement and could therefore be used as a supplementary means of interpretation under Article 32 of the Vienna Convention. *Id.*, ¶ 92. The Appellate Body, however, made this finding in the context of considering to what extent the United States was entitled to derive legitimate expectations from the classification practices of the EC.

[25] *Decision on GATT Concessions under the Harmonised Commodity Description and Coding System*, 12 July 1983, L/5470/rev.1, 30th Supp. BISD 17, ¶ . 1.2.

[26] *Id.*

HS. GATT contracting parties could request explanations of changes in tariff schedules. The Decision considered that bindings would have to be renegotiated, as adoption of the HS would lead to the combination of previously separate bound and unbound tariff lines or tariff lines with different bound rates under one heading. It laid down negotiating procedures based on the provisions of GATT Article XXVIII.

G. Legal Effect

Can signatories to the HS modify HS divisions and subdivisions at their own discretion? Article 3 of the HS Convention stipulates that contracting parties (with certain exceptions for developing countries) must use all the HS headings and subheadings and their related numerical codes, without addition or modification. It also requires signatories to apply the general rules for the interpretation of the HS, as well as all the section, chapter and subheading notes, and prohibits them from modifying the scope of sections, chapters, headings or subheadings.

Under Article 3.3 of the Convention:

> "Nothing in this Article shall prevent a Contracting Party from establishing in its Customs tariff or statistical nomenclatures, subdivisions classifying goods beyond the level of the Harmonised System, provided that any such subdivision is added and coded at a level beyond that of the six-digit numerical code set out in the Annex to this Convention."

Signatories are therefore bound to adopt the six-digit HS as a minimum, and WTO Members which are also signatories of the Convention must observe this rule to remain in compliance with their obligations under the Convention. In contrast, the WTO does not explicitly prevent its Members from amending classification rules, provided they do so transparently. As a result, most WTO Members adopt the HS in its entirety, i.e. up to the six-digit level with discretion to introduce additional subdivisions beyond that level. However, other WTO rules may indirectly limit a Member's freedom to classify as it wishes, as discussed in Part III below.

III. WTO Rules on Classification

As mentioned above, GATT 1994 does not require WTO Members to follow any particular system for classifying goods, leaving them free to introduce new headings or subheadings in their customs tariffs as they see fit. The only specific rules on customs classification in the GATT 1994 impose a requirement on members to publish regulations and provide for fair and judicial-type procedures (Article X:1) and to provide for negotiation and "compensatory adjustment" (Article II:5) in the event that classification rulings undermine the value of a concession.

Article X:1 stipulates that the:

> "laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to . . . , shall be published promptly in such a manner as to enable governments and traders to become acquainted with them."

GATT and WTO panels and the Appellate Body have interpreted Article X:1 to imply that the stipulated measure does not have to be published before their entry into force, as no time limit or delay between publication and entry into force of the

measure is specified therein.[27] The use of back-dated measures, however, is prohibited under Article X:1.[28]

Article II:5 provides for negotiations "with a view to a compensatory adjustment" in the event that classification rulings undermine a negotiated concession. This language implies that in principle Members are allowed to modify their tariff classification, but if another Member challenges that modification as undermining the value of the corresponding negotiated concession, negotiations must take place with a view to achieving a compensatory adjustment. Article XXVIII of the GATT specifies the consultative procedures to be followed pursuant to modification of tariff schedules. The Appellate Body in *EC-Customs Classification*[29] clarified that while Article II:5 recognizes the possibility that the treatment *contemplated* with respect to a concession may differ from the treatment *accorded* and thereby provides a compensatory balancing mechanism, nothing in the provision suggests that *only* the expectations of the *exporting* Member can serve as the basis for interpreting a Member's schedule to determine whether it has acted consistently with GATT Article II. The Appellate Body explained that the purpose of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties is "to ascertain the *common* intentions of the parties".[30] Noting that a tariff concession schedule is made an integral part of the GATT treaty by GATT Article II:7, it concluded that the concessions provided for in that schedule are part of the terms of the treaty. The interpretation of a tariff concession schedule must therefore be based on the rules of interpretation set out in the Vienna Convention on the Law of Treaties.

Reclassification which extends differential treatment to like products could also be challenged as violating MFN obligations under Article I:1. In Part IV of this chapter, immediately following, we will draw upon WTO and GATT jurisprudence, to illustrate how discriminatory tariff classification could be challenged under the following GATT 1994 Articles:

1. Article I:1: nullification or impairment of benefit by violating MFN treatment of "like products".
2. Article II:1, which requires "no less favourable" treatment than that specified in the tariff schedule.
3. Article XXIII 1:(b): nullification or impairment of benefit through non-violation.

The case law on classification issues throws light on how these provisions are to be applied.

IV. WTO/GATT Case Law Relating to Classification

Tariff reclassifications violate Article I:1 of the GATT 1994 if they result in different tariff rates being applied to like products imported from different countries, or Article II:1 if they result in a higher tariff rate than that specified in the country schedule being applied

[27] *See, e.g.,* Report of the GATT Panel (adopted), *European Economic Community—Restrictions on Imports of Dessert Apples—complaint by Chile*, L/6491, 36th Supp. BISD 93, ¶ 12.29 (1989) ("*EEC—Dessert Apples*").

[28] *EEC—Dessert Apples, supra* note 27. *See also*, Gabrielle Marceau and Peter N. Pedersen, *Is the WTO Transparent? A Discussion of the Relationship of the WTO with Non-governmental Organizations and Civil Society's Claim for more Transparency and Public Participation*, 33 (1) JOURNAL OF WORLD TRADE 5 (1999).

[29] *Supra,* note 10.

[30] *Id.*, ¶ 84 (emphasis in original).

to a particular product. Both situations can be the subject of a "violation" complaint under Article XXIII:1(a). *Spain—Roasted Coffee*[31] and *Japan—SPF*[32] both involved claims of Article I:1 violations, and *EC—Customs Classification*[33] involved an alleged violation of Article II:1. However, even if there is no violation of Article I:1(a) or any other WTO rule, a reclassification can give rise to a "non-violation" claim of nullification or impairment of benefits under Article XXIII:1(b).[34] The *Germany—Sardines*[35] case involved a non-violation claim.

A. Violation Claims

1. Article I:1: Reclassifications That Deny MFN Treatment to "Like Products"

"*Whatever the tariff classification adopted, Article I:1 required that the same tariff treatment be applied to like products"*[36]

A tariff reclassification may violate Article I:1 of the GATT by infringing the obligation to accord MFN treatment to like products originating in the territories of all contracting parties. Cases have involved complaints that modifications to classification schedules have led to refusal to grant MFN treatment to the complainant's products, or that following reclassification, the treatment accorded to their products was different from that accorded to essentially similar products from other countries. Such claims depend for their success on establishing the likeness of the products in question, so that product classification for tariff purposes is linked to the determination of "like product".

(a) Spain—Tariff Treatment of Unroasted Coffee[37]. In the 1981 *Spain—Unroasted Coffee* case, Brazil claimed that Spain had modified its sub-tariff classification of unroasted coffee so that imports into Spain of "mild" coffee received more favourable tariff treatment than imports of unroasted non-decaffeinated "unwashed Arabica" and Robusta coffees. Prior to 1 March 1980, Spain had classified all imports of unroasted coffee under a single tariff heading, so they were subject to identical tariff treatment. Spain had not bound its customs duties on unroasted coffee. After that date Spain split the tariff heading into five tariff lines to which different rates of duty applied.[38] Brazil alleged that Spain had violated Article I:1 of the GATT by fixing a seven percent tariff rate for imports of certain types of unroasted, non-decaffeinated coffee, while granting duty-free treatment to other types of coffee. The basis of Brazil's claim was that the categories of coffee receiving different treatment were like products.

The Panel dismissed Spain's argument that the MFN requirement only applied to bound tariff items, pointing out that Article I of GATT applied to both bound and unbound tariff items. Changes to tariff classification resulting in different tariff treatment for like products would violate the MFN obligation irrespective of whether the tariffs in question

[31] *Spain—Unroasted Coffee, supra,* note 22.
[32] *Supra,* note 5.
[33] *Supra,* note 6.
[34] *See* Chapter 29 of this book.
[35] Report of the GATT Panel (adopted), *Treatment by Germany of Imports of Sardines*, 1st Supp. BISD 53(1952), ("*Germany—Sardines*").
[36] *Spain—Unroasted Coffee*, supra note 22, ¶ 4.4.
[37] *Supra,* note 22.
[38] This change occurred as a result of the Spanish Government's concern over the impact on prices of its decision to abolish the state monopoly over imports of coffee and return the product to the private sector. Coffee accounted for more than two per cent in the Spanish consumer price index. Panel Report at ¶ 3.14.

were bound or unbound. In reply to Spain's claim that the Brussels nomenclature allowed contracting parties to add subdivisions to their tariff headings, the Panel clarified that the GATT allowed such modification only when it did not create a new classification which led to different tariff treatment of like products, as this would violate Article I:1.

Spain argued that qualitative differences between the types of unroasted coffee in question, such as different chemical composition, different aromas and richness in soluble solids and different taste, led to different quotations for each type on international trade and commodity markets, and to distinct markets for each type of coffee. This was particularly true in the Spanish market where the use of blends was prohibited until March 1980. There was an obligation to market coffee under the designations of "superior", "regular" and "popular", which corresponded to "mild", "unwashed Arabica" and "Robusta" coffee respectively. Consumer preferences for each type of coffee were well established. Spain acknowledged the increasing market share of blends outside Spain but argued that the existence of blends proved that the various types of coffee were not like products.

The Panel, however, found that the differences between the various types of coffee, particularly in aroma and taste, resulted from geographical factors, cultivation methods, the processing of the beans and genetic factors, and did not consider them significant enough to justify different treatment for the products in question. The Panel concluded that all unroasted, non-decaffeinated coffee beans should be considered as "like products" within the meaning of Article I:1, *inter alia* because:

> "[u]nroasted coffee was mainly, if not exclusively, sold in the form of blends, combining various types of coffee, and that coffee in its end-use, was universally regarded as a well-defined and single product intended for drinking. . . . No other contracting party applied its tariff regime in respect of unroasted, non-decaffeinated coffee in such a way that different types of coffee were subject to different tariff rates."[39]

Was the Panel justified in basing its analysis of the likeness of the products in question on universal perception? Should not the analysis have been specific to local tastes and perceptions in Spain as opposed to the rest of the world? For instance, the use of blends was not common in Spain—yet the Panel took into consideration only the "universal" usage of blends despite Spain's intervention that a distinctive market existed for each of these products within Spain. Products that are deemed "like" from a legal perspective could be viewed differently in the market. Consumer tastes and preferences, reflected in prices, could force a distinction in the market between products that would otherwise be considered "like". Consumer tastes and preferences (and hence, price differences) may often be influenced by factors external to the intrinsic qualities of the products in question. Such factors as advertising, promotional campaigns and packaging could be unrelated to the physical properties and the real value of the product in question. Arguably, although mentioned in the Working Party Report on *Border Tax Adjustments*,[40] consumer habits and preferences are not the most reliable indicators of the likeness of products. The weight accorded to this criterion should be lower than that to the other more objective criteria mentioned in the report.

(b) Japan—Tariff on Import of Spruce Pine-Fir (SPF) Dimension Lumber[41]. This dispute, initiated by Canada, concerned Japan's discrimination between types of lumber on the basis of species. Japan imposed a ten percent duty (temporarily eight percent) on

[39] *Id.,* ¶¶ 4.7, 4.8.
[40] *Supra,* note 18.
[41] *Supra,* note 5.

spruce, pine, fir ("SPF") and larch, while granting duty-free treatment to cedar, hemlock, Douglas fir and other coniferous species. Canada argued that "dimension lumber" (lumber of standard sizes used in construction) made from SPF and dimension lumber made from other species were like products within the meaning of GATT Article I:1. Canada therefore asserted that the eight percent duty applied by Japan to imports of SPF dimension lumber, as opposed to duty-free treatment for dimension lumber of other species, violated Article I:1.

Japan made two main arguments in response to the Canadian complaint. First, Japan claimed that dimension lumber was not a separate "finished" product irrespective of its species. Japan argued that dimension lumber was not a universal, clearly defined product, and that no country had established it as a separate tariff line in its tariff classification, pointing out that no independent tariff line existed for dimension lumber under the HS. Japan also asserted that classification according to species was justified because different lumber species were marketed separately from each other and not in mixtures.

Second, Japan claimed that the lumber quality of SPF was lower than that of other species. Pine lumber usually had large knots and did not have a straight grain; fir and spruce had insufficient decay resistance. Owing to its lower quality, the profitability of SPF lumber was low and it therefore required protection. On the other hand, the higher quality of the other species led to higher profitability and a higher demand, which in turn meant that they had to be imported.

The Panel concluded that Japan's tariff treatment of dimension lumber imports from Canada was not inconsistent with its obligations under Article I:1 of the GATT. This ruling was based on the fact that dimension lumber did not belong to any *internationally accepted customs classification*. The fact that it was a standard applied by the Canadian industry and, to some extent also in the United States and Japan, was not sufficient reason for considering it as a separate category for tariff classification purposes.

The *Japan-SPF Panel*, like the *Spain-Coffee Panel*, therefore examined the issues from the viewpoint of "any internationally accepted customs classification". Unlike the *Coffee Panel*, however, the *Japan-SPF Panel* did not determine the likeness of the products in question by analysing their physical properties or end use, but based its findings solely on the consideration that "dimension lumber" was basically a standard applied by the Canadian industry which "did not belong to any internationally accepted customs classification". The Panel did not take into account Canada's specific arguments on classification of the products. It could have undertaken a more thorough analysis of likeness, including factors going beyond tariff classification, but instead reached a narrowly-based conclusion which is less persuasive than the comparable deliberations on coffee.

2. Reclassification Decisions that Violate GATT Article II:1.

The landmark case of *European Communities-Customs Classification of LAN Equipment*[42] concerned a complaint by the United States against the customs classification in the EC of certain computer equipment associated with local area networks (LAN). According to the United States, the EC, Ireland and the UK charged higher duties than they had undertaken in their schedules of concession on LAN equipment and certain personal computers with multimedia capability by granting them less favourable treatment than that provided for in Schedule LXXX of the EC. The countries in question were therefore acting contrary to their obligation under GATT Article II:1. The United States claimed that the EC had formerly imposed on LAN equipment the tariff applicable under heading 84.71 for "automated data processing" ("ADP") machines. Since 1995 some EC

[42] *Supra,* note 6.

Member States had charged imports of LAN equipment the higher rate of duty applicable under heading 85.17 to telecommunications equipment. Additionally, the United States argued that the EC had increased tariffs on certain PCs with multimedia capability by reclassifying them from heading 84.71 to other categories bearing higher duties.

The Panel examined whether LAN equipment fell under tariff headings 84.71 or 85.17, noting *inter alia* that EC Tariff Schedule LXXX did not refer explicitly to "LAN equipment". The Panel found itself unable to determine for the purposes of Article II:1 whether LAN equipment should be regarded as ADP machines purely on the basis of the ordinary meaning of the terms used in Schedule LXXX, taken in isolation. It posited that the meaning of the term "ADP machines" in this context could be determined on the basis of evidence of the "legitimate expectations" of an exporting Member[43], given that the protection of such expectations was one of "the most important functions" of Article II of the GATT. The Panel noted that such expectations

> "are normally based, at a minimum, on the assumption that the actual tariff treatment accorded to a particular product at the time of the negotiation will be continued unless such treatment is manifestly anomalous or there is information readily available to the exporting member that clearly indicates the contrary."

After examining evidence from the United States of tariff treatment of LAN equipment as ADP machines before and during the Uruguay Round, the Panel ruled that such a prevailing practice formed a basis for the legitimacy of U.S. expectations that it would continue to receive the same treatment, and concluded:

> "... the European Communities, by failing to accord imports of LAN equipment from the United States treatment no less favourable than that provided for under heading 84.71 or heading 84.73, as the case may be, in Part I of Schedule LXXX, acted inconsistently with the requirements of Article II:1 of GATT 1994."[44]

The EC appealed various legal findings and interpretations made by the Panel, including its finding of inconsistency with Article II: 1, and argued that the Panel had erred in interpreting the EC's tariff schedule in both its consideration of a "legitimate expectations" standard and its use of GATT Article II: 5 as confirmation of this standard.

The Appellate Body overturned the Panel's analysis and conclusion under GATT Article II. Firstly, the Appellate Body rejected the Panel finding that the EC's tariff schedule could be interpreted in terms of the exporting Member's *legitimate expectations*. The Appellate Body ruled that in a violation complaint such as this, the Panel's reference to the concept of reasonable expectations (which the Panel referred to as "legitimate expectations") was legally irrelevant, as the concept applies only to non-violation complaints.

Additionally, the Appellate Body disagreed with the Panel's invocation of GATT Article II:5 which the latter relied upon to confirm its consideration of a "legitimate expectations interpretation". Article II:5 provides a *compensatory balancing mechanism* in instances where the treatment contemplated with respect to a concession may differ from the treatment accorded. The Appellate Body argued furthermore that nothing in the provision suggested that *only* the expectations of the *exporting* Member could serve as the basis for interpreting a Member's schedule to determine whether it has acted consistently with GATT Article II.

The Appellate Body did not consider this "legitimate expectations" standard to be consistent with Article 31 of the Vienna Convention on the Law of Treaties (VCLT) on good faith interpretation. In the *India—Patents* case, it had overturned a similar use of

[43] *Id.*, ¶ 8.31.

[44] *Id.*, ¶ 9.1. However, the Panel rejected the U.S. claim with respect to multimedia PCs.

legitimate expectations in the name of a good faith interpretation. The Appellate Body explained that the purpose of treaty interpretation under VCLT Article 31 is "to ascertain the *common* intentions of the parties".[45] Given the GATT Article II:7 stipulation that the concessions provided for in Members' schedules are part of the terms of the GATT treaty, the only rules, which may be applied in interpreting the meaning of a concession, are the general rules of treaty interpretation set out in the VCLT. The Appellate Body listed the series of rules contained in VCLT Article 31 and explained that these rules "will usually allow a treaty interpreter to establish the meaning of a term". Pursuant to Article 31(1) of the *Vienna Convention*, the meaning of a term of a treaty is to be determined in accordance with the ordinary meaning to be given to this term in its context and in the light of the object and purpose of the treaty.

The Appellate Body explained that if application of Article 31 does not help establish the meaning of the term, Article 32 allows a treaty interpreter to have recourse to:

> "... supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."

According to the Appellate Body, the "circumstances of [the] conclusion" may be interpreted, in appropriate cases, as allowing the examination of the historical background against which the treaty was negotiated.

The Appellate Body concluded that the Panel had not followed the principles of treaty interpretation, given that it had not undertaken a textual analysis of Schedule LXXX in accordance with Articles 31 and 32 of the Vienna Convention. Noting that the Panel did examine the EC's classification practice during the Uruguay Round, the Appellate Body explained that such evidence constituted "supplementary means of interpretation" under VCLT Article 32, a provision not specifically invoked by the Panel in this context. Moreover, it asserted that the value of this evidence as a supplementary means of interpretation is subject to certain qualifications. For example, the Panel should have also considered relevant the U.S. practice with regard to the classification of this equipment, emphasising that the purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the *common* intentions of the parties. If this method fails, Article 32 allows reference to additional texts, including *travaux préparatoires*. The Appellate Body found that the EC did not follow a consistent classification practice during the Uruguay Round, and criticised the Panel for failing to consider additional means of interpretation within the meaning of Article 32 of the Vienna Convention, such as:

- The HS and its explanatory notes as *travaux préparatoires* or in the context of the conclusion of the GATT 1994 under Article 32 of the Vienna Convention. The Appellate Body found that the Panel should have examined the Harmonized System and its Explanatory notes as context in its interpretation of the terms of the Schedule, given that it was undisputed that the Uruguay Round negotiations were held on the basis of the HS nomenclature.
- The 1997 decision[46] by the World Customs Organisation on the proper classification of LAN equipment, as the Appellate Body declared that a proper

[45] *Id.*, ¶ 84.

[46] The WCO HS Committee at its eighteenth session in November 1986, ruling in favor of the United States, concluded that a PC with television and audio capabilities was properly classified as an automatic data processing machine in HS Chapter 84 at sub-heading 8471.49. *Classification Opinion* 8471.49, Amendments to the Compendium of classification opinions, 22nd Session (NN. 1998).

interpretation "would have included an examination of the existence and relevance of subsequent practice."[47]

- EC customs classification legislation. The Appellate Body considered that the Panel should have examined how the EC had bound LAN equipment during the Tokyo Round, given that the U.S. position relied on its alleged expectations of a continuation of the *status quo*.

The Appellate Body therefore reversed the Panel's findings on the grounds that the latter had not interpreted the EC's Schedule in light of the documentary evidence in accordance with the relevant provisions the Vienna Convention. It is noteworthy however that the Appellate Body did not itself examine any of this evidence. After defining the correct method of interpretation, it stopped short of applying the method to determine the legality of the measure in question, i.e. whether there was a "violation" in the sense of Article XXIII:1(a) of GATT 1994.[48]

B. Article XXIII 1:(b): Non-Violation Nullification or Impairment of Benefit

One early GATT case, *Germany—Sardines*,[49] recognised that a *legitimate tariff reclassification could nullify or impair the reasonable anticipation of a party*, thereby giving rise to a claim for compensation under GATT Article XXIII:1. Thus, a complainant could argue that a modification to the classification was inconsistent with its "reasonable expectations" of tariff treatment deriving from classification agreed at earlier negotiations, so that an expected benefit did not materialise or was impaired, even though there was no violation of WTO rules.

In 1951 Norway complained that West Germany had imposed on preparations of *culpea pilchardus* a different rate of import duty from those imposed on preparations of *culpea sprattus* and *culpea harengus*. The products were also subject to different treatment with regard to internal taxes and quantitative restrictions. Canned *culpea pilchardus* products had previously received the same customs treatment in Germany as canned *culpea sprattus* and *culpea harengus* products, in accordance with notes exchanged between the two governments guaranteeing equality of treatment. Whether the products were like products in the sense of GATT Articles I and XIII was central to the dispute. The Panel's conclusion, however, was based solely on the negotiating history, and not on whether the difference in treatment violated GATT Articles I and XIII[50].

[47] *EC—Customs Classification, supra* note 10, ¶ 90. *See also*, Joel P. Trachtman, *European Communities-Customs Classification of Certain Computer Equipment*, 9(3) European Journal of International Law 551 (1998).

[48] Although the Appellate Body has in general applauded the exercise of judicial economy by panels, there have been several cases in which it has disagreed with the panel's interpretation of a core issue and in order to complete the case has found it necessary to analyse other provisions or facts themselves. In the *Australia—Salmon* case (Report of the Appellate Body, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R (1998), ¶ 279), for instance, the Body found that the panel wrongly exercised judicial economy, leaving a key issue unresolved. These issues form part of the current debate over "creative interpretation" by the Appellate Body. Although the Body is confined by DSU Article 17 to "law not facts", it has been quite expansive in deciding what are issues of law.

[49] *Supra*, note 35, ¶ 39.

[50] Article XIII:1 provides: "No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product of all third countries is similarly prohibited or restricted."

> "The Panel did not feel that it was called upon to give a definition of "like products" or that it was necessary for the consideration of the Norwegian complaint to decide whether the preparations of *culpea pilchardus, culpea sprattus* and *culpea harengus* had to be generally treated as "like products". Although the Norwegian complaint rested to a large extent on the concept of "like products" as set out in the Agreement and the German reply addressed itself also to that concept, the Panel was satisfied that it would be sufficient to consider whether in the conduct of the negotiation at Torquay the two parties agreed expressly or tacitly to treat these preparations as if they were "like products" for the purposes of the General Agreement."[51]

The Panel ruled in favour of Norway, arguing that given the history of the negotiations, its expectations were reasonable. In other words, Norway could reasonably assume on the basis of its prior agreement with Germany that the products in question would continue to receive equal treatment. The Panel therefore found that Norway was justified in claiming that a benefit accruing to it under GATT Article XXIII had been impaired.

> "It would seem therefore that the Norwegian Government, in order to secure the extension of advantages or privileges granted to preparation of *culpea pilchardus* to preparations of *culpea sprattus* and *culpea harengus*, relied on assurances which it considered it has obtained in the course of the negotiations rather than on the automatic operation of the most-favoured-nation clause.[52]"

The Panel declined to rule on whether the products were "like" within the meaning of Articles I:1 and XIII, and instead concluded that the different treatment of the products impaired a benefit accruing to Norway under the tariff concession it had negotiated with Germany. The Panel's finding of nullification and impairment of benefits can be understood within the meaning of GATT Article XXIII:1(b), although the Panel did not specify whether its ruling was based on Article XXIII:1(a) (violation) or on Article XXIII:1(b) (non-violation). However, it can be inferred from the fact that the Panel refrained from determining if there was a violation of Article I:1 or Article XIII that it viewed this as an Article XXIII(b) case. Clear evidence of non-violation does not rule out the possibility of violation: ideally the Panel should have begun by deciding whether or not there had been a violation before reaching a judgment on non-violation. The ruling exemplifies an instance where "the question of whether a measure affects the negotiated balance of interests tends to be more important than its legal status."[53] It is possible that the Panel failed to examine the legality of the measure because at the time no clear distinction had been established between the consequences of a measure that was found to nullify and impair through violation, and a measure that did so through non-violation.

V. Conclusion

> "The WTO/GATT left wide discretion to the contracting parties in relation to the structure of national tariffs and the classification of goods in the framework of that structure. The HS, . . . had brought about a large measure of harmonization in the field of customs classification of goods, but this system did not entail any obligation as to the ultimate detail in the respective tariff classifications. Indeed, this nomenclature has been on purpose structured in such a way that it leaves room for further specifications."[54]

[51] *Supra,* note 35, ¶ 12.
[52] *Id.,* ¶ 13.
[53] Frieder Roessler, The Legal Structure, Functions and Limits of the World Trade Order, 70(2000).
[54] *Japan—SPF Lumber, supra,* note 5, ¶ 5.8.

There is no obligation under the GATT/WTO rules to follow any particular system for classifying goods, and a Member has the right to introduce in its customs tariff new positions or sub-positions as appropriate. Flexibility was built into WTO rules and the harmonized system precisely to enable Members to adapt their classification system to their trade policy interests, including their protection needs as well as their requirements for the purposes of tariff and trade negotiations. This flexibility is better appreciated if one considers that it allows Members to target their protection precisely on the product that requires protection, rather than penalizing products that may be similar but are not "like". It may appear curious that WTO Members are on the one hand, given the freedom to classify their products as finely as they wish precisely so as to allow tariff differentiation; on the other, limits are imposed on tariff differentiation. The key to understanding this balancing act is to recognize that WTO rules allow tariff imposition in order to protect domestic industry; they do not, however, allow that protection be accorded differently across products that are "like". As the Panel found in the *Japan-SPF* case,

> "Tariff differentiation being basically a legitimate means of trade policy, a contracting party which claims to be prejudiced by such practice bears the burden of establishing that such tariff arrangement has been diverted from its normal purpose so as to become a means of discrimination in international trade. Such complaints have to be examined considering simultaneously the internal protection interest involved in a given tariff specification, as well as its actual or potential influence in the pattern of imports from different extraneous sources[55]."

Canada further clarified this principle in the context of the same dispute, positing that it:

> "did not deny that a contracting party has the right to structure its tariff as it wishes (subject, however, to its international obligations), and to create as many sub-divisions as it wishes, whether it be for statistical or other valid reasons, but the "like product" obligation was paramount and superseded any classification structure. Similarly, contracting parties were free to protect domestic industries as they saw fit, but only in ways compatible with their GATT obligations, and tariff discrimination among like products was not consistent with the obligation of Article I."[56]

Thus, no WTO rules exist that impose an obligation on Members to adopt a particular method of tariff classification, which enables *precise* tariff differentiation in Members' schedules. In having the flexibility to classify as finely as possible, a Member can grant tariff protection where it wishes to and lower such protection where it does not. On the other hand, WTO rules that do impose, albeit indirectly, obligations on Members with regard to classification, ensure that the tariff differentiation undertaken by a Member does not nullify or impair the benefits accruing to other Members under the GATT, either through violation of GATT Articles I:1 or II:1 or through frustration of that other Member's reasonable expectations as to the tariff treatment agreed to be accorded to a particular product. The treatment of classification in the WTO/GATT system therefore illustrates well the adage that what is not written in the legal texts is no less significant than that which is.

[55] *Id.,* ¶ 5.10.
[56] *Id.,* ¶ 3.28.

Author Biographies

Alan Alexandroff is currently the Research Director for the Program on Conflict Management and Negotiation Munk Centre for International Studies at the University of Toronto. He has been for a number of years on the Chapter 19 NAFTA Binational Panel Roster for Canada presiding or participating on a number of AD and CVD cases. He has acted, also, as Counsel to Appleton & Associates on a number of Chapter 11 NAFTA investor-state cases. In the last few years, Dr. Alexandroff has been involved in a major project on China's Accession to the WTO and has published with co-authors Sylvia Ostry and Rafael Gomez, CHINA AND THE LONG MARCH TO GLOBAL TRADE: THE ACCESSION OF CHINA TO THE WORLD TRADE ORGANIZATION (2002). In addition Dr. Alexandroff has been fellow-in-residence in international policy for the C.D. Howe Institute. With Don Guy he recently published, "What Canadians Have to Say About Relations with the United States," C.D. Howe Institute Backgrounder No. 73 (July 2003). He is completing an edited book for the C.D. Howe Institute on investment in North America and the global trading system.

Arthur E. Appleton is a Counsel at White & Case LLP. His practice consists of WTO work and international arbitration (both as counsel and arbitrator). He has appeared as lead counsel before the WTO's Appellate Body, and has published and lectured throughout the world on many different aspects of the WTO Agreement. His practice frequently brings him to developing countries. Dr. Appleton is a Faculty Member of the World Trade Institute (Berne), an Adjunct Faculty Member of the International Law Institute, and a visiting lecturer at the University of Amsterdam School of Law and the International Development Law Organization. He is based in Geneva. Dr. Appleton is a Co-editor of this book.

Nigel Balchin is Vice-President, SGS Société Générale de Surveillance S.A., Trade Assurance Services, Geneva. Originally a Research Chemist, Mr. Balchin joined the SGS Group in 1976 and held various positions in UK, Nigeria, Indonesia and Switzerland in government assistance programs and quality management. He is currently the Geneva Representative of the International Federation of Inspection Agencies.

Marco C. E. J. Bronckers received his law degrees from the University of Amsterdam (J.D., Ph.D.) and the University of Michigan (LL.M.). He has been practicing EU law and international trade law since 1980. He is a partner in the Brussels office of Wilmer, Cutler Pickering Hale and Dorr LLP. In 1997 he was appointed Professor of Law at the University of Leiden, where he holds the chair of WTO and EU External Trade Relations Law. In addition, he is a faculty member of the World Trade Institute, University of Bern. From 1999 to 2004 he served a term as member of the WTO's five person Permanent Group of Experts on Subsidies. In December 2000 he was included in the roster of WTO panelists. He is an associate editor of the JOURNAL OF INTERNATIONAL ECONOMIC LAW.

Peggy Clarke is a partner at the firm Wilmer Cutler Pickering Hale and Dorr LLP in the International Trade and Market Access Group. Ms. Clarke spent five years at the U.S. Department of Commerce, Import Administration, where she administered the U.S. antidumping and countervailing duty laws and advised on GATT subsidy and antidumping issues. Ms. Clarke received her J.D. from Georgetown University and holds a master's degree in international relations from the Johns Hopkins School of Advanced International Studies. Ms. Clarke has authored several articles on U.S. antidumping and countervailing duty laws, the WTO Agreements on antidumping and subsidies, and NAFTA treatment of antidumping.

Thomas Cottier is a full professor of European and International Economic Law at the University of Berne and managing director of the World Trade Institute, Berne, Switzerland. He was educated at the University of Berne, the University of Michigan Law School, and was a visiting fellow at Cambridge University, UK. He taught at the Universities of St. Gallen, Neuchâtel and the Geneva Graduate Institute in Geneva. During the Uruguay Round, he served as a Swiss negotiator with responsibilities including intellectual property. He served a member and chairman of several GATT and WTO panels. He is a member of the ILA Trade Law Committee, chairman of the ILA Committee on Biotechnology and a Member of the Swiss National Research Council until 2004. He has published widely in the field of international trade regulation and intellectual property. He was a member of the Swiss Council for Scientific Research untill 2004.

Richard O. Cunningham is senior international trade partner in the Washington, D.C.-based law firm of Steptoe & Johnson LLP. He currently co-chairs the American Bar Association Task Force on the Relationship of Trade and Competition Policy and is a member of the Advisory Committee to the Canada-United States Law Institute. Mr. Cunningham has chaired numerous international trade-related committees in the ABA Sections of International Law & Practice, Administrative Law, Litigation and Public Contract Law, and has served frequently as advisor on trade negotiations and trade legislation to Congressional Committees and U.S. Government Agencies. His international trade practice involves representation of both U.S. and foreign clients in import relief cases, in WTO litigation and in trade policy matters. Mr. Cunningham received his Juris Doctor from The George Washington University Law School in 1968.

William J. Davey is the Edwin M. Adams Professor of Law at the University of Illinois College of Law, where he has taught courses in international trade law, European Community law and corporate/securities law since 1984. From 1995 to 1999, he was the Director of the Legal Affairs Division of the World Trade Organization. Professor Davey is the author of LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (fourth edition 2002, with Jackson & Sykes), EUROPEAN COMMUNITY LAW (second edition 2002, with Bermann, Goebel & Fox), PINE & SWINE: CANADA-UNITED STATES TRADE DISPUTE SETTLEMENT (1996), and the HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT (1991–2000, with Pescatore & Lowenfeld), as well as many articles on various international trade law issues. After his graduation from the University of Michigan Law School in 1974, he served as a law clerk to Judge J. Edward Lumbard (U.S. Court of Appeals-New York) and Justice Potter Stewart (U.S. Supreme Court) and worked in Brussels and New York for the law firm of Cleary, Gottlieb, Steen & Hamilton. He is a member of the American Law Institute.

Victoria Donaldson is a Counsellor in the Appellate Body Secretariat, where she has worked since 1999. Prior to joining the Appellate Body Secretariat, she worked for three years as an associate at the Brussels office of Cleary, Gottlieb, Steen & Hamilton, and for one year as a law clerk to Justice Peter deC. Cory at the Supreme Court of Canada.

Mary Footer is Deputy Director of the Amsterdam Center for International Law and a Member of the Faculty of Law at the Universiteit van Amsterdam. She is also a dozent (visiting) at the Europa-Institut (Sektion Rechtswissenschaft), Universität des Saarlandes in Saarbrücken, Germany, Faculty Member (visiting) at the World Trade Institute, Bern. She has previously taught at University College London, Erasmus University Rotterdam, University of Kent at Canterbury and University of Warwick. She is currently a listed consultant on trade and development for the WTO and consultant on investment for UNCTAD.

Ms. Footer is Of Counsel to the firm of Hunton & Williams, London, Washington, D.C. and Brussels on matters of international trade law. She is a Member of the Committee on International Trade Law of the International Law Association, a Member, of the Advisory Board, Law, Social Justice and Global Development and a Member, of the Consultative Committee, NAFTA: Law and Business Review of the Americas. She writes and speaks frequently on WTO matters and is completing a book on *Rule Making in the World Trade Organisation: An Institutional and Normative Analysis*, which is due for publication in 2005.

Ian Forrester practices European law in Brussels with White & Case. He also practices as an advocate in Scotland and as a barrister before the English courts. He has participated in many cases before the European Courts, and the European Commission. He represented the Government of Gibraltar before the European Court of Justice in litigation about Gibraltar airport; he represented the European Commission before the European Courts in the Magill case about refusals to license by dominant companies; and represented UEFA in the Bosman case about professional football. He specializes in the fields of competition, customs, trade, sport, telecommunications, broadcasting, software and pharmaceutical regulation. He has lectured on EC legal and policy topics to academic and private bodies in many countries, and has published extensively on these themes, having been co-author since 1981 of the annual review of EC competition law and policy in the Oxford Yearbook of European Law. He was appointed Queen's Counsel in 1988 and Visiting Professor in European Law at Glasgow University in 1991.

Petina Gappah obtained a Dr.iur. degree from the Karl-Franz University in Graz, Austria, where she wrote a doctoral thesis on the regulation of investment and competition in the World Trade Organization. She holds a Master of Laws degree from Cambridge University, and a Bachelor of Laws Honors degree from the University of Zimbabwe. From 1999–2002, Petina Gappah worked as a legal affairs officer in the Appellate Body Secretariat of the World Trade Organization. She is currently a lawyer with the Advisory Centre on WTO Law.

Carol George coordinates the global WTO Practice Group of Baker & McKenzie, from the Firm's London office. She holds an LLM in Public International Law from the London School of Economics (1995), and an LLB (1984) and B.Sc. (1981), both from the University of British Columbia in Vancouver, Canada. Having practiced commercial law in Canada, she lectured in International Economic Law at the University of London from 1996 to 2000 and requalified as a UK solicitor in 1998, before joining Baker & McKenzie in 2001. She provides technical assistance to Governments in relation to the implementation of WTO agreements and dispute settlement matters, and acts for private clients in the preparation of WTO-consistent business strategies and the pursuit of competitive market conditions through WTO negotiations. She has written or co-authored several trade-related publications.

Dale B. Honeck is a Counselor in the Trade in Services Division of the World Trade Organization, and is Secretary of the WTO Working Party on Domestic Regulation (WPDR). Other major responsibilities include servicing the professional services and tourism aspects of the current WTO negotiations, and technical cooperation lectures on services and the General Agreement on Trade in Services. From June 1997 until the creation of the WPDR in April 1999, he served as Secretary of the former WTO Working Party on Professional Services. His first five years in the GATT/WTO, from 1992 to 1997, were spent in the Trade Policies Review Division as a Trade Policy Analyst, researching

and writing Trade Policy Review studies on Japan, Korea, Malaysia, the Philippines, and Thailand. In addition to WTO/GATT publications and documents, he has written numerous articles on regulatory issues and services trade.

Gary N. Horlick is a partner in the law firm of Wilmer Cutler Pickering Hale & Dorr, LLP. He taught international trade law at Yale and Georgetown. He was a member of the World Trade Organization's Permanent Group of Experts dealing with subsidies (serving as the first Chairman). He was responsible for U.S. investigations of antidumping and countervailing duty complaints as Deputy Assistant Secretary of Commerce for Import Administration. He served as International Trade Counsel for the Senate Finance Committee. He is a graduate of Dartmouth College, Cambridge University, and Yale Law School.

Hiroshi Imagawa was Senior Technical Officer responsible for the Origin Sub-Directorate of the World Customs Organization ("WCO"). From 1994 to 2003 he was involved in the Secretariat work on the negotiations for harmonizing non-preferential rules of origin, particularly in the drafting of technical documents related to the architectural issues and the product-specific rules for the machinery sector. Prior to joining the WCO, he worked from 1985 to 1990 with the UNCTAD/UNDP Technical Assistance Projects on GSP and Other Trade Laws, for Asia and the Pacific based in Jakarta and Kuala Lumpur and at the interregional level based in Geneva. He is now back in the Japan's Customs and Tariff Bureau of the Ministry of Finance as Deputy Director, Office of International Trade Organizations, dealing mostly with origin issues related to FTAs and WTO. He has a background in Law and in International Relations.

Rolf Jeker. Executive Vice President at SGS (SGS Sociéte Générale de Surveillance S.A.) responsible for Government contracts in the field of pre-shipment inspection, customs modernization, trade facilitation as well as forestry and aid monitoring. Currently also President of the Swiss Chambers of Commerce overseas (SwissCham); Chairman of the Board of Swiss Export Promotion Office (OSEC); Member of Foreign Economic Relations Committee of Economiesuisse; Member of Swiss Consultation Committee on Foreign Economic Relations of Swiss Government. He was formerly Ambassador and Delegate of the Swiss Government for International Agreements (in Trade, Foreign Assistance and Investment), Chairman of Swiss Export and Investment Guarantee Risk Board; Executive Director of African Development Bank.

Tashi Kaul is Director of WTO Affairs at the Washington DC office of White & Case LLP. She specializes in trade policy analysis, with a focus on regulatory issues and commercial opportunities arising from commitments under WTO Agreements. She helped establish in 2001, WCI Consulting PTE Ltd., the WTO consulting unit of White & Case in Geneva. She served as Director at WCI Consulting for two years and Trade Policy Analyst at White & Case, Brussels, before moving to Washington DC. Ms. Kaul worked as Economic Consultant at the WTO secretariat from August 1997 to October 1999, initially at the Trade in Services Division and later at the Development Division. She holds an M.Phil. in Development Economics from the University of Cambridge and a B.A. (Honors) in Economics from Smith College (*magna cum laude, phi beta kappa*).

Kevin Kennedy. Prior to joining the faculty of Michigan State University College of Law in 1987, Kevin Kennedy was a trial attorney at the U.S. Department of Justice where he was responsible for defending Commerce Department antidumping and countervailing determinations and International Trade Commission injury determinations before the

U.S. Court of International Trade and the Court of Appeals for the Federal Circuit. Before joining the Justice Department, Kennedy was a law clerk at the U.S. Court of International Trade. He currently serves as a NAFTA Chapter 19 binational dispute settlement panelist. Kennedy teaches courses in International Trade Regulation, International Litigation, and International Arbitration. He is the co-author, with Professor Raj Bhala, of the treatise, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL TRADE ARRANGEMENTS, AND U.S. LAW. His monograph, Competition Law and the World Trade Organization: The Limits of Multilateralism, was published in 2001 by Sweet & Maxwell.

Sydney J. Key, who received her A.B., A.M., and Ph.D. in economics from Harvard University, is on the staff of the Federal Reserve Board's Division of International Finance in Washington, D.C. In the 103rd U.S. Congress (1993–94), she was staff director of the Subcommittee on International Development, Finance, Trade and Monetary Policy of the House Banking Committee. In 1990–91, she served as a national expert in the European Commission's Internal Market Directorate-General. Dr. Key has been a lecturer on law at Harvard Law School (2001), an adjunct professor at the Stern School of Business at New York University (1999–2000), and a lecturer at the Morin Center for Banking and Financial Law at Boston University School of Law (1988–2000). She has also been an academic visitor in the Department of Accounting and Finance at the London School of Economics (1990–91). She has written extensively on international trade in financial services, international aspects of financial regulation, and the EU single market for financial services. Her book THE DOHA ROUND AND FINANCIAL SERVICES NEGOTIATIONS was published in 2003.

Alexander Koff is an attorney in the Washington, D.C. office of Paul, Hastings, Janofsky & Walker. His practice concentrates on trade policy and dispute settlement, international business and regulatory law, and international trade litigation. Representative matters at the WTO include the first case decided by the dispute settlement system, the first trade dispute between the U.S. and Japan, and the first prohibited subsidies case before the Appellate Body. He also helped draft the unanimously adopted Resolution and Recommendation advocating the right to private counsel in WTO dispute settlement for the American Bar Association. His work for clients in matters involving international arbitration and commercial litigation includes representing the claimant in the first NAFTA chapter 11 case to permit amicus curiae submissions and to open its proceedings to the public. He also advised U.S. and Vietnamese policy-markers on issues raised by the U.S.-Vietnam bilateral trade agreement, such as how to reform Vietnam's market-planned economy, how to increase predictability and transparency to attract investment, and how to reduce trade barriers for goods and services to assist commercial actors. In addition to his experience in private practice, Mr. Koff served as an intern in the legal office of the Office of the U.S. Trade Representative (in Geneva), the U.S. National Security Council, the U.S. Agency for International Development, and the United Nations (in New York). Prior to law school, he served as an intern in the Office of Politico-Military Affairs of the U.S. Department of State. He has published articles in various journals, including the Journal of Commerce, the Berkeley Journal of International Law, and the Michigan Journal of International Law. In addition, he has served as a guest-lecturer on international economic issues. His graduates degrees are from the University of Michigan Law School and the University of Cambridge.

Martha Lara de Sterlini is a Counselor in the Trade and Finance Division of the WTO Secretariat. She is responsible for the Committee on Trade-Related Investment Measures and is also involved in other activities of the WTO Secretariat relating to the interaction

between trade and investment, including technical assistance in this area. Prior to joining the WTO Secretariat, she worked for 15 years as a trade official and negotiator with the Mexican Ministry of Trade and Industrial Development, where she held several positions including Deputy Director General for Multilateral Trade Affairs and Counselor at the Permanent Mission of Mexico to the WTO in Geneva. She was a member of Mexico's negotiating team for the NAFTA and for other bilateral and regional trade agreements. She holds a master degree in International Law from the Graduate Institute of International Studies in Geneva.

Pierre Larouche is Professor of Competition Law at Tilburg University and Vice-Director of the Tilburg Law and Economics Center (TILEC). He is a member of the Quebec Bar (1991). He graduated from the Faculty of Law of McGill University (Montreal) in 1990. He clerked at the Supreme Court of Canada in 1991–1992. In 1993, he obtained a masters degree from the Rheinische Friedrich-Wilhelms Universität Bonn. Thereafter he practiced law for three years within the European Community law unit of Stibbe Simont Monahan Duhot in Brussels. From 1996 to 2002, he was at the Universiteit Maastricht for the Ius Commune Casebooks Project (*Casebook on Tort* (2000)). He obtained his doctorate in 2000 on the balance between competition law and sector-specific regulation in the telecommunications sector. His teaching and research interests include competition law, telecommunications law, media law, basic Community law and the common European law of torts.

Yong-Shik Lee (Y.S. Lee) is Associate Professor at Hamline University School of Law (St. Paul, Minnesota). Prior to joining the Hamline Law faculty, he served as a Legal Counsel for the Ministry of Foreign Affairs and Trade of South Korea and also taught at law schools and business schools in USA and South Korea. Professor Lee has published extensively in the area of international trade law and has also written on the issues of business law and arbitration. He is a qualified legal practitioner in USA and UK and a current member of the Korean Commercial Arbitration Board. He is considered the foremost authority on safeguard measures in world trade: he handled the first WTO panel case on safeguards, appearing at the WTO panel and the Appellate Body hearings, and wrote the first comprehensive treatise on safeguards titled, *Safeguard Measures in World Trade* (Kluwer Law International, 2003; 2nd ed. forthcoming 2005) as well as numerous other articles on this issue. He has also participated in various multilateral and bilateral negotiations relating to international trade and investment, including the negotiations at the United Nations Commission on International Trade Law (UNCITRAL) and the bilateral investment treaty (BIT) negotiations with Japan. He is currently conducting research on the impact of international trade law on economic development. This research has been sponsored by Hamline University School of Law and the University of Tokyo Institute of Social Science and has been scheduled for publication in a book titled, *Reclaiming Development in the World Trading System* (Cambridge University Press, forthcoming 2005). Professor Lee received his undergraduate degree in economics from the University of California at Berkeley and another Bachelor's degree (law) from the University of Cambridge. The University of Cambridge recently awarded him a Ph.D. under Special Regulations based on his scholarly publications. He is currently an Associate Editor of the Journal of World Trade and International Business Law Review.

Simon Lester is the President and co-founder of WorldTradeLaw.net LLC, which runs an on-line subscription service on WTO disputes (http://www.worldtradelaw.net). Mr. Lester previously worked as a Legal Affairs Officer in the WTO's Appellate Body Secretariat, where he assisted the Appellate Body Members with the conduct of individual appeals.

Prior to working at the WTO, he spent several years in private practice at Willkie Farr & Gallagher, where he worked on WTO disputes as well as trade cases before U.S. courts and agencies. He is a graduate of Harvard Law School.

Peter Lichtenbaum is the Assistant Secretary for Export Administration at the United States Department of Commerce. Mr. Lichtenbaum is responsible for developing the policies of the Commerce Department's Bureau of Industry and Security's (BIS) regarding controls on the export of dual-use items for national security, foreign policy, nonproliferation, and short supply reasons. He chairs the inter-agency Advisory Committee on Export Policy, and manages BIS's participation in multilateral export control regimes. Mr. Lichtenbaum joined the Commerce Department from the Washington, D.C.-based law firm of Steptoe & Johnson LLP, where he was a partner in the firm's international practice group. He principally handled matters involving international trade, including U.S. export controls and economic sanctions programs, and the application of the WTO Agreements. He is a graduate of Harvard Law School and the Kennedy School of Government.

Patrick Macrory practiced for three years as a barrister in London before moving to the United States. He was a senior partner with Arnold & Porter and subsequently with Akin, Gump, Strauss Hauer & Feld. He is now the Director of the International Trade Law Center at the International Law Institute, Washington, D.C. He has taught trade law at universities in London, Tokyo, and Washington, D.C., and has written and lectured extensively on the subject. He is Editor-in-Chief of this book.

Mitsuo Matsushita is a professor emeritus of Tokyo University and a counsel to Nagashima, Ohno & Tsunematsu, a leading international law firm in Tokyo. He served as one of the founding members of the Appellate Body of the World Trade Organization from 1995 to 2000. He has been attached to the Ministry of Finance, the Ministry of Economics, Trade and Industry and the Ministry of Telecommunications and Posts of the Japanese government as a member of various councils dealing with telecommunications, customs and tariffs, export and import transactions, and industrial property. Currently he is a member of the Industrial Structure Council attached to the Ministry of Economics, Trade and Industry and a member of the Office of Trade and Investment Ombudsman which is part of the Japanese government dealing with market access issues. He is also a member of the advisory board attached to the Academy of the World Intellectual Property Organization. He holds a Ph.D. degree from Tulane University (1962) and a D.Jur. degree from Tokyo University (1968). He has held professorships in Japan at Sophia University, Tokyo University and Seikei University. He has been a visiting professor at Harvard Law School, Michigan Law School, Columbia Law School, the Monash University in Australia and at the College of Europe in Bruges, Belgium. He has written many books and articles on various aspects of international trade and competition and investment law. Mitsuo Matsushita is admitted to Tokyo Bar (Daiichi Tokyo Bengoshi Kai).

Joseph McMahon is Professor of Commercial Law at University College Dublin, where he teaches International Trade Law on the graduate program in International Commercial Law. After his undergraduate studies in the Queen's University of Belfast, he undertook doctoral research at the University of Edinburgh. His doctoral thesis on *European Trade Policy in Agricultural Products* was published by Martinus Nijhoff. He writes extensively on international agricultural issues, for example, *Agricultural Trade, Protectionism and the Problems of Development: A Legal Perspective* (1992) and *Trade and Agriculture: Negotiating a New Agreement* (2001) (editor and contributor), the European Community's

Common Agricultural Policy (for example, *The Law of the Common Agricultural Policy* (2000)) and its Development Co-operation Policy (for example, *The Development Co-operation Policy of the European Community* (1998)). He has also contributed to various edited collections and published articles in major legal journals on each of these issues and their interconnection. He has previously been a member of staff at the Queen's University of Belfast, the University of Leicester and Victoria University of Wellington, New Zealand.

Mike Moore was the Director-General of the WTO 1999–2002 and the Prime Minister of New Zealand in 1990. He held numerous portfolios including Foreign Affairs and Trade, Tourism and Sports and Recreation. He has been honored and recognized by over a dozen Governments and Universities. He was awarded New Zealand's highest honor the Order of New Zealand and is also a member of the Privy Council. He is the author of nine books. He is a member of several Company Boards including SGS, and is a Councilor to New Zealand's largest company Fonterra. An adjunct Professor at a number of Universities including La Trobe and Adelaide Universities, Mr. Moore is also a regular columnist to papers such as *The Australian Financial Review* and the *South China Morning Post*, as well as being an advisor to several Governments.

Omar E. Odarda is an Argentine attorney, currently working as an associate of White & Case, LLP, based in Geneva. He worked for the Argentine government in the MERCOSUR agriculture negotiations between 1997 and 2000. In 2001, he joined White & Case, L.L.P. where he practiced International Trade Law in the Brussels and Washington, D.C. offices. He has extensive expertise in a wide range of trade-related matters, with a focus on regulatory issues and commercial opportunities arising from commitments under WTO Agreements. He has published on MERCOSUR, dispute settlement and trade in services. Mr. Odarda holds a law degree from the National University of Cordoba, Argentina, an L.L.M. in International Trade Law from the George Washington University, Washington, D.C., and a D.E.A in European Community Law from the University of Toulouse, France.

Joost Pauwelyn is Associate Professor at Duke University, School of Law. Prior to joining the Duke Law faculty, he served as a Legal Affairs Officer for the World Trade Organization in Geneva (1996–2002), first, in the Legal Affairs Division, then in the Appellate Body Secretariat. His areas of concentration are international economic law, in particular, the law of the World Trade Organization and public international law, with a focus on international law and development. Professor Pauwelyn received his Bachelor's degree in law (*Cand. Jur.*) from the University of Namur, Belgium; his Master's degree in law (*Lic. Jur.*) from the Catholic University of Leuven, Belgium; his *Magister Juris* from the University of Oxford, Corpus Christi College, UK; and Ph.D. in law, from the University of Neuchâtel, Switzerland. He is the author of *Conflict of Norms in Public International Law, How WTO Law Relates to Other Norms of International Law*, published in 2003 by Cambridge University Press.

Denise Prévost is a research associate at Maastricht University (the Netherlands), where she teaches a course on the external relations of the European Union. She is currently conducting research towards a Ph.D on the WTO's Agreement on Sanitary and Phytosanitary Measures, from a developing country perspective. She is also a consultant for UNCTAD, for which she has written a training module on the SPS Agreement and lectures in capacity-building workshops for developing country delegates. Before her arrival in Maastricht in 1997, she worked as a researcher at the University of South Africa (1995–1996). She obtained her BLC (1992) and LL.B (1994) degrees cum laude

from the University of Pretoria and has an LL.M in International Economic Law from UNISA (2000) and an LL.M in European Law summa cum laude from the University of Maastricht (1998).

Frieder Roessler has worked for the World Bank, the GATT and the World Trade Organization. In 1989 he was appointed Director of Legal Affairs of the GATT, a post which he held until 1995. Mr. Roessler's main task was to advise dispute settlement panels and to prepare drafts of their reports or supervise their preparation by his staff. He was also closely involved in the legal aspects of the Uruguay Round negotiations and participated in the legal drafting process at the end of the Round. After leaving the WTO, Mr. Roessler remained actively involved in WTO legal matters, and advised WTO Members involved in WTO dispute settlement proceedings and worked as a consultant on WTO-related matters for governments, professional organizations and law firms. Mr. Roessler was an adjunct professor at the Jean Moulin University of Lyon and at Paris I. He also taught at the universities of St. Gallen in Switzerland and of Minnesota and at Georgetown University in the United States. He has published extensively, mainly in the field of international trade law. A collection of his essays was published in 2000 by Cameron May under the title "The Legal Structure, Limits and Functions of the World Trade Order". Since July 2001, Mr Roessler has been the Executive Director of the Advisory Centre on WTO Law.

Philippe Ruttley is a Partner in the EC and WTO Group of the London office of the international law firm, Clyde & Co. He was educated at Oriel College, Oxford, and was called to the English Bar in 1980, subsequently being admitted as a Solicitor in 1991. His career has included practice as an EC lawyer in Brussels, international development projects with the UN in Rome and a period on the EC staff of H.M. Treasury Solicitor's Department. He has been in private practice since 1989, specializing in EC and international trade law, making frequent appearances in hearings before the EC Commission and EC Courts in Luxembourg. Since 1997, he has served as Secretary of the World Trade Law Association and has coauthored and edited several books and articles on international trade.

Christiane Schuchhardt has been a foreign lawyer at Wilmer Cutler Pickering Hale and Dorr LLP in Washington D.C. since December 2002. Previously she worked with the International Trade Group at O'Melveny & Myers in Washington, D.C. Before joining the private sector in 1999 she was a visiting fellow at Georgetown University Law Center and worked with the WTO Appellate Body Secretariat for a period of time. She did her legal studies and trained as a lawyer in Germany and holds a Master's degree from the University of London.

Rajeev Sharma is a Barrister and Solicitor with the law firm of Heenan Blaikie LLP in Toronto, Canada. Mr. Sharma specializes in all aspects of international trade, international arbitration and anti-trust/competition law. He regularly advises clients on anti-dumping, countervail, NAFTA, customs, WTO Agreements and law, government procurement and contracting, investor-state arbitration under NAFTA Chapter 11, and bilateral investment treaties worldwide. Mr. Sharma is an adjunct professor of Law & Economics at Glendon College, York University in Toronto and has previously held teaching positions at the Faculties of Law at Queen's University (Kingston, Ontario) and the University of Western Ontario where he has taught international business transactions and NAFTA law. He holds degrees from the London School of Economics, Osgoode Hall Law School and York University (Toronto).

Andrew W. Shoyer is a partner in the Washington, D.C. office of Sidley Austin Brown & Wood LLP. His practice focuses on the implementation and enforcement of international trade and investment agreements. Mr. Shoyer spent seven years in the Office of the United States Trade Representative, serving most recently as Legal Advisor in the U.S. Mission to the World Trade Organization in Geneva. He was the principal negotiator for the United States of the rules implementing the WTO Dispute Settlement Understanding, and has briefed and argued numerous WTO cases before dispute settlement panels and the WTO Appellate Body. Previously, Mr. Shoyer was Assistant General Counsel at USTR in Washington, D.C., where he served as principal legal counsel in the negotiation of the market access rules of the North American Free Trade Agreement. He is an adjunct professor of international trade policy at the Georgetown University School of Foreign Service, and an author of numerous articles on WTO and NAFTA jurisprudence and practice.

Eric M. Solovy is an associate at Sidley Austin Brown & Wood LLP. He counsels companies, trade associations and governments on international trade dispute settlement and a variety of intellectual property matters. He has represented a WTO Member in proceedings before the Appellate Body of the World Trade Organization, and has participated in ICSID arbitrations. He has provided advice regarding patent law policy to major biotechnology and e-commerce companies, and has represented clients as amicus curiae in cases before the Federal Circuit and the U.S. Supreme Court. Mr. Solovy also counsels clients on issues of international trademark protection, and border enforcement of intellectual property rights. In addition to his experience in private practice, Mr. Solovy was a law clerk to the Honorable Pauline Newman of the U.S. Court of Appeals for the Federal Circuit. He also served in the Office of Legal Adviser of the U.S. Department of State, and in the Office of Foreign Commercial Services at the U.S. Embassy in Madrid, Spain. Mr. Solovy is a graduate of Harvard Law School (*cum laude*) and Duke University (*summa cum laude*).

Brigitte Stern is Professor of International Law at the University of Paris I, Panthéon-Sorbonne, as well as Associate Professor at the Graduate Institute of International Studies in Geneva, and Director of the CEDIN-Paris I, Centre of Research in International Law. She has been a visiting Professor in many universities and schools including the Diplomatic School in Daar-es-Salam, the Institute of Foreign Languages at Shanghai, the Global Law School Program at New York University, Tokyo and Sao Paulo Universities. She serves as an Expert for International Organizations and Governments—for example she is a member of the legal team of the Bosnian Government in the Genocide Case against Yugoslavia before the International Court of Justice. She has also served as counsel in several arbitrations, and as an ICSID Arbitrator. She is a Vice-president of the United Nations Administrative Tribunal (UNAT), and was a Member of the Asian Development Bank Administrative Tribunal. She is also the President of the French Commission for the Elimination of Landmines.

Peter Denis Sutherland is Chairman of BP p.l.c. (1997–current). He is also Chairman of Goldman Sachs International (1995–current). Of Irish nationality, he was born on 25 April 1946 and was educated at Gonzaga College, University College Dublin and the King's Inns. Mr. Sutherland graduated in Civil Law. He was also admitted to practice before the Supreme Court of the United States of America. Mr. Sutherland currently serves on board of The Royal Bank of Scotland Group plc and is associated with, amongst others, the following organizations: Trilateral Commission (Europe) Chairman, World

Economic Forum, Foundation Board Member. Previously he served as, Attorney General of Ireland (1981–1984), EC Commissioner responsible for Competition Policy (1985–1989), Chairman of Allied Irish Banks (1989–1993), and Director-General of GATT and then The World Trade Organization on its inception. He has received fourteen honorary doctorates from universities in Europe and America. He was awarded an honorary fellowship of the London Business School in recognition of his contribution to business and trade (1997).

Peter Trepte is a UK barrister at Littleton Chambers specializing in European and international trade law with particular reference to government procurement, competition and the utilities. In the case of international regulated procurement, he advises and represents before administrative and judicial tribunals public bodies and commercial undertakings in matters relating to the application and enforcement of the UK, EU and WTO/GPA procurement rules. He was one of the panel members in DS 163, *Korea—Measures Affecting Government Procurement*. He also acts as a consultant to the World Bank, the Asian Development Bank, OECD, the EU and a number of national aid agencies and as an adviser to foreign governments on the introduction and development of procurement regulations and dispute resolution mechanisms, mainly in Central and Eastern Europe, the Balkans, the Caucusus and the Far East. He is a Fellow of the Chartered Institute of Arbitrators and the author of Public Procurement in the EC (CCH, 1993) and Regulating Procurement (OUP, 2004).

Peter L.H. Van den Bossche, Lic. jur., LL.M., Ph.D., is Professor of International Economic Law at Maastricht University. From February 1997 to August 2001, he was first Counselor, and then Acting Director, of the Appellate Body Secretariat of the World Trade Organization in Geneva. Born in 1959, he studied law at the University of Antwerp (Lic. jur., 1982), the University of Michigan, Ann Arbor (LL.M., 1986) and the European University Institute, Florence (Ph.D., 1990). Peter Van den Bossche has lectured and published on institutional and substantive issues of European Union law and WTO law. He is the author of numerous publications in the trade field, and is a member of the Editorial Board of the *Journal of International Economic Law* and a consultant to UNCTAD on international economic dispute settlement matters.

Edwin Vermulst is a founding partner of Vermulst Waer & Verhaeghe Advocaten in Brussels. After having studied at the Universities of Utrecht and Ann Arbor, Michigan, law schools, he has practiced international trade law in Washington D.C. and Brussels. He has been a panelist in a WTO dispute settlement proceeding and has been a member of delegations pleading their case before WTO panels. Mr. Vermulst has coauthored five books and numerous articles on various aspects of international trade law.

Marc Weisberger is an associate in the EC & WTO Group at Clyde & Co, London. He holds an MA (Law) from Queens' College, Cambridge University and an LLM from the London School of Economics and Political Science. He specializes in international trade law, with an emphasis on EC external relations. He is the author of several trade-related articles.

Gilbert R. Winham is Professor Emeritus of Government and Political Science at Dalhousie University, Halifax, Canada. He teaches and conducts research on international political economy, and specializes in international trade policy and negotiation. Dr. Winham is a Fellow of the Royal Society of Canada, and a past Woodrow Wilson Fellow (2001/02). He has served frequently on NAFTA dispute settlement panels dealing

with antidumping and countervailing duty actions. In 1996 he worked on changes to the Special Imports Measures Act (SIMA) for a Sub-committee of the Parliament of Canada. He has over twenty years of experience in training government officials from developing countries in trade policy and negotiation at the GATT/WTO in Geneva, and has conducted training sessions in numerous countries. He has served as on-site consultant for countries applying for accession to the WTO, e.g., Jordan and the Kyrgyz Republic. He is the author of numerous books and articles.

Werner Zdouc, Ph.D. is an attorney in the Appellate Body Secretariat of the World Trade Organization. He worked from 1995–2001 as an attorney in the Legal Affairs Division of the World Trade Organization. Dr Zdouc studied law at the University of St. Gallen, the University of Michigan and the University of Graz. He writes and speaks frequently on WTO issues.

INDEX

A380 Super Jumbo project, I:1191
AB. *See* Appellate Body
abandoning reciprocity (under Telecommunications Services commitments), I:1025–8
  bypass subsidization problem, I:1025–6
  cross-subsidization problem, I:1025–6
accession. *See also* World Trade Organization Membership
  Accession Protocol, WTO, I:75
  of least-developed countries, I:78
  of New Members in WTO, I:74
  to GATT/WTO
    China, I:76–7, III:61–4
    Egypt, III:93
    Japan, III:172
    Mexico, III:217–27
    Mongolia, III:250–54
    Russia, III:289–91, 321–331
    Singapore, III:336–7, 341
  WTO decision making and, I:70
accountancy disciplines, I:943
ADA. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement)
advertising, tender notices. *See* tender notices publicity under GPA
AFL-CIO, II:593, 594
African Growth and Opportunity Act (AGOA), II:578
AFTA. *See* ASEAN Free Trade Area
Agenda 2000 reforms of CAP, I:203
aggregate measurement of support (AMS), I:207–8; II:115
AGOA. *See* African Growth and Opportunity Act
AGP. *See* Agreement on Government Procurement
Agreement on Agriculture, II:97, 98, 723–6
  Article 4.1, I:205
  Article 4.2, I:203
  Article 5, I:205–6
  Article 5.1(b), I:206–7
  Article 5.4, I:205
  Article 5.5, I:205
  Article 5.6, I:206
  Article 6 [exemptions]
    Article 6.2 [Developing Country Exemptions], I:208
    Article 6.4 [De Minimis Exemptions], I:208
    Article 6.5 [Blue Box Exemptions], I:208–9
    Green Box Exemptions, I:209
  Article 20, I:217
  CAP and, I:201–3
  Cancun and
    cotton reference, I:227
    domestic support provisions, I:226
    export subsidies provisions, I:226
    market access provisions, I:225
  contracting parties
    EC, I:201–2
    US, I:202
  developing countries, provisions for
    Net Food-Importing Developing Countries Decision, I:215–17
    special and differential treatment, I:215, 1549
  Doha and, I:217
    Article 5, I:218
    Article 20(c), I:223–4
    domestic support provisions, I:220
    EC proposal, I:218
    export subsidies provisions, I:221
    Framework for Establishing Modalities in Agriculture (August 2004), I:224; text III:517–23
    market access provisions, I:218–19
    non-trade concerns provisions, I:223
    S&D provisions, I:222
    US proposal, I:218
  domestic support provisions
    AMS, I:207–8
    Annex 2(1), I:209
    Annex 3, I:207
    Article 1(a), I:207
    Article 6 [exemptions], I:208
    dispute settlement, I:209–10
    market price support, I:207
    non-exempt measures, I:207–8
    total AMS, I:208
  export subsidies provisions
    anti-circumvention provisions, I:211
    Article 3.3, I:210, 213
    Article 8, I:210
    Article 9.1, I:210
    Article 9.1(a), I:212
    Article 9.1(b), I:212
    Article 9.1(c), I:212, 213
    Article 9.1(d), I:213
    Article 9.2, I:211
    Article 10, I:211
    Article 10.1, I:213
    Article 11, I:211
    dispute settlement, I:211
    reduction commitments, I:210
  GATT
    Article XI:2(c), I:206
    Article XX, I:206
  LDC development and, I:1563
  market access provisions, I:202
    dispute settlement, I:206
    general exceptions, I:206
    special safeguard measures, I:205
    tariff reductions, I:205
    traffication, I:203, 204
  Modalities Agreement, I:203
    Annex 2, I:203
    Annex 3, I:203
    Annex 3B, I:204
    Annex 5, I:204
    Annex 5B, I:204
  negotiations
    Blair House agreement, I:202
    Marrakesh Declaration, I:202
    Tokyo Round, I:201
    Uruguay Round, I:200, 202, 205
  Peace Clause

Agreement on Agriculture (*cont*.)
Article 13, I:214
domestic and export subsidies, I:214–15
SCM measures and, II:97–8
SPS Agreement relationship with, I:254
trade and environment, II:516
URAA, II:110, 112–15, 119, 124, 125, 126, 127
Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement). *See also* *Australia-Salmon* case; *EC-Hormones* case; SPS measures
agriculture issues in, II:122
application related issues
Article 13 of (Applicability to Bodies Other than Central Government Bodies), I:248
GATT violation proofs, nonrequirement of, I:248–9
temporal application scope, I:249–50
Article 1.1, I:244–7
Article 2 [Basic Rights and Obligations]
Article 2.1 [Right to Take SPS Measures], I:254–5
Article 2.2, I:255–64
Article 2.3, I:264–6
Article 2.4, I:251
Precautionary Principle for Article 2.2, I:261
relationship with Articles 5.1 and 5.2, I:263–4
Article 3 [Harmonization], I:266–7
Article 3.1, I:268–9, 272–3, 275
Article 3.2, I:268, 275–6
Article 3.3, I:268, 275–8
Article 3.4, I:269
Article 3.5, I:269
Article 4 [Equivalence], I:324–5
ad-hoc recognition of equivalence, I:324–5, 328–9
Article 4.1 [Acceptance of Equivalence], I:326
Article 4.2 [Agreements on Recognition of Equivalence], I:326–7
conditions, I:326
Equivalence Decision, I:331–3
examples, I:329
implementation problems, I:330
international guidelines on equivalence, I:331
notification, I:328–9
procedure, I:327–8
Article 5.1, I:263–4, 279, 281, 288, 294–7
Article 5.2, I:263–4, 279, 292–3
Article 5.3, I:279, 292, 294
Article 5.4, I:309
Article 5.5, I:265, 266, 309–18
relationship with Article 2.3, I:319
Article 5.6, I:319
challenged under
no alternative measure achieves appropriate level of protection, I:321–3
no alternative measure significantly less restrictive to trade, I:323–4
no alternative measure that is reasonably available, I:320–21
Article 5.7, I:257, 262–3
available pertinent information and, I:304
insufficiency of relevant scientific evidence and, I:302–3
necessary information and, I:305–6
relationship with Article 2.2, I:308
relationship with Precautionary Principle, I:297–9, 301
review within reasonable period and, I:306–7
Article 5.8, I:336, 339
Article 6 [Adaptation to Regional Conditions], I:333
Article 6.1, I:334
Article 6.2, I:334–5
Article 6.3, I:335
regionalization work and, I:335–6
Article 7, I:336
Article 8, I:340–41
Article 9 [Technical Assistance]
Article 9.1, I:356
Article 9.2, I:356
Article 10 [Special and Differential Treatment]
Article 10.1, I:358
Article 10.2, I:358
Article 10.3, I:358
Article 10.4, I:358
Article 11 [Dispute Settlement]
Article 11.1, I:345
Article 11.2, I:349–51
Article 11.3, I:345
Article 12
Article 12.1, I:342
Article 12.2–12.6, I:343
Article 12.7, I:343
Article 14 [Transitional Periods], I:359
Article XX exception and, I:159–60
clarifications or amendments possible in, I:365–6
control, inspection and approval procedures
Annex C, I:340–41
Article 8, I:340–41
developing countries and, I:355
Doha Decision on implementation, I:360–61
implementation problems, I:360
reasonable adaptation period (Annex B, paragraph 2), I:359
S&D treatment (Article 10), I:358
special provisions on notification (Annex B, paragraphs 8 and 9), I:359
technical assistance (Article 9), I:356
transitional periods (Article 14), I:359
dispute settlement, I:345
burden of proof, I:346–9
consultation with experts (Article 11.2), I:349–51
overview, I:354–5
review standard, I:351–3
environmental issues, II:150, 151
evaluation, I:362–4
features, I:242
procedural rules, I:244
scientific disciplines, I:243
future key issues, I:366–70
GATT 1994
Article XI, I:253
Article XX(b), I:251–3
gender analysis of trade agreement and, II:732–3
human rights and, II:654–5
international trade, effect on, I:247
LDC development and, I:1564
least trade restrictive measure requirement, I:319
risk assessment
Annex A, paragraph 4, I:280

Article 5.1–5.3, I:279–85, 294–7
Article 5.1, I:288–90
specificity elements, I:286–7
Article 5.2, I:292–3
Article 5.3, I:292, 294
"based on" requirement, I:294–7
borrowed risk assessments, I:290
risk management aspects, I:291–2
risk management
Annex A, paragraph 5, I:308
Article 5.3–5.6, I:308
Article 5.4, I:309
Article 5.5, I:309–19
Article 5.6, I:319–20
SPS Committee
composition, I:342
consultations forum, I:342
functions, I:342
harmonization monitoring and encouraging (Article 12.2–12.6), I:343
overview of work (1995–2002), I:344–5
periodic review of SPS Agreement operation and implementation (Article 12.7), I:343
SPS Measure definition (Annex A, paragraph 1), I:245–7
technical assistance in Uruguay Round Agreements, II:464
trade and environment, II:515
transparency provisions
Annex B.1, I:337
Annex B.5, I:337–8
Annex B.6, I:338
Annex B.10, I:340
Article 5.8, I:336, 339
Article 7, I:336
infrastructure for transparency, I:340
notification procedure, I:338–9
scope of notification obligation, I:336
Uruguay Round Negotiations, I:239
Cairns Group proposal, I:241
developing countries, role of, I:242
EC proposal, I:241
trading nations position, I:240
US proposal, I:241
WTO Agreements, relationship with, I:250
Agreement on Agriculture, I:254
GATT 1994, I:251–3
TBT Agreement, I:251
Agreement on Customs Valuation. *See* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
Agreement on Government Procurement (GPA)
Appendix I (Annex 1–5), I:1137
Appendix II–IV, I:1137
bid challenge procedures and dispute resolution, I:1154
dispute settlement, I:1157–8
private bid challenge, I:1155–7
contract award procedures, I:1141
advertising, transparency and information requirements, I:1149–54
contract awarding (Article XIII:4), I:1148–9
qualification (Articles VII and Article IX), I:1146–7
technical specifications, I:1154
tender documentation (Articles VII and XII), I:1146
tender receipt (Article XIII:1), I:1147–8
tendering procedures (Article VII:3), I:1142–5
gender analysis of trade agreement, II:729
history of, I:1125
ITO discussions, I:1125
GATT negotiations and Tokyo Round, I:1129
OECD, I:1126–9
investment-related provisions in, II:315
principles (Articles III and XVI), I:1141
scope and coverage, I:1137
entity coverage, I:1138
exclusions (Article XXIII), I:1140
scope, I:1139
threshold values (Article II), I:1140
special and differential treatment for developing countries, I:1156, 1158–60
Tokyo Round Code, I:1129
improvements following (Article IX:6), I:1133–4
issues arising from (Article I:1), I:1130–31
Tokyo Round negotiations and
dispute resolution (Articles VI:6 and VII), I:1132–3
procedural rules (Articles II and V), I:1131–2
Uruguay Round and, I:1134–7
way forward, I:1160
GATS negotiations, I:1162
GPA ongoing review, I:1161
Working Group on transparency, I:1161
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement or ADA) I:487; II:764
Article 1 [Principles], I:500
Article 2 [Determination of Dumping]
Article 2.1, I:501, 503, 507
Article 2.2 [cost determinations], I:501, 503
Article 2.2.1 [sales below cost], I:502
Article 2.2.1.1, I:504
Article 2.2.2 [SG&A expenses, determination of], I:504
Article 2.3 [constructed export price], I:505
Article 2.4 [fair comparison], I:505
Article 2.4.1 [currency conversion], I:506
Article 2.4.2 [price averaging], I:507
Article 2.5 [transshipment], I:508
Article 2.6 [like product], I:508
Article 2.7 [non-market economies], I:508
Article 3 [Determination of Material Injury], I:508
Article 3.1, I:737
Article 3.2, I:739
Article 3.3, I:740
Article 3.4, I:742
Article 3.5, I:743
Article 3.6, I:745
Article 3.8, I:747
Article 3.7, I:746
Article 4 [Definition of Domestic Industry], I:508
Article 4.1, I:509
Article 4.2, I:509
Article 5 [Initiation and Subsequent Investigation]
Article 5.4 [support for application], I:510
Article 5.5 [publicizing of petition], I:511
evidence required for initiation
Article 5.2, I:510
Article 5.3, I:511

Agreement on Implementation of Article VI (*cont.*)
time limits for investigation and immediate termination
Article 5.8, I:512
Article 5.10, I:512
Article 6 [Evidence], I:512
Article 6.5 [confidential information], I:514
Article 6.8 [facts available], I:515–16
Article 6.9 [informing parties of essential facts], I:516
Article 6.10 [individual margins], I:516–17
Article 6.12 [consumers and industrial users], I:517
Article 6.13 [small companies], I:517
submission of evidence and time limits
Article 6.1.1, I:513
Article 6.1.2, I:513
Article 6.1.3, I:513
verification
Article 6.6, I:514
Article 6.7, I:514
Article 7 [Provisional Measures], I:517
Article 7.1, I:518
Article 7.3, I:518
Article 7.4, I:518
Article 8 [Price Undertakings]
Article 8.2, I:518
Article 8.3, I:518
Article 8.4, I:518
Article 8.5, I:518
Article 8.6, I:519
Article 9 [Imposition and Collection of Anti-Dumping Duties]
Article 9.1, I:519
Article 9.2, I:519
Article 9.3, I:519
Article 9.4, I:520
Article 9.5, I:520
Article 10 [Retroactivity], I:520
Article 10.3, I:521
Article 10.7, I:521
Article 11 [Duration and Review of Anti-Dumping Duties and Price Undertakings], I:521
Article 11.1, I:522
Article 11.2, I:522
Article 11.3, I:522–3
Article 11.4, I:523
sunset reviews, I:522–3
Article 12 [Public Notice and Explanation of Determinations]
Article 12.1, I:523
Article 12.2, I:524
Article 12.2.1, I:524
Article 12.2.2, I:524
Article 13 [Judicial Review], I:524
Article 14 [Anti-Dumping Action on Behalf of a Third Country]
Article 14.1, I:524
Article 14.4, I:524
Article 15 [Developing Countries], I:525
Article 16 [Committee on Anti-Dumping Practices], I:525
Article 17 [Consultation and Dispute Settlement]
Article 17.4, I:525–6
Article 17.5, I:526
Article 17.6, I:526–7
Article 18 [Final Provisions]
Article 18.1, I:527
Doha Development Agenda, I:528–9
LDC development and, I:1564
S&D treatment of developing countries (Article VI of GATT 1994), I:1550
transparency provisions in, I:139
Uruguay Round Negotiations and, I:498–500
Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement or CVA), I:534
administration and dispute settlement, I:540–41
Article VII of GATT 1994, I:537
implementation of, I:538
relationship with, I:541–2
confidential information (Article 10), I:565–6
currency conversion, I:563
customs authorities powers, I:564
general introductory commentary, I:539
history of
from GATT 1947 to Tokyo Round, I:534–5
from Tokyo Round to WTO, I:536
implementation related issues, I:568
developing countries' systemic and structural problems, I:571
Doha implementation-related issues, I:569–70
importers' rights, I:564–5
LDC development and, I:1564
Method 1 (transaction value of goods), I:543
price paid or payable adjustments (additions), I:547
assist value, I:548–9
packing costs, I:548
proceeds of any subsequent resale, disposal, and use of merchandise, I:550
royalties or license fee (Article 8.1), I:549
selling commission and brokerage, I:547
price paid or payable adjustments (deductions)
cost of international transportation and related charges (Article 8.2), I:552
costs accruing after importation, I:550–51
interest charges treatment under financing arrangement, I:551
storage costs, I:552–3
TV definition (CVA Article 1.1), I:544–6
Method 2 (TV of identical goods), I:556, 557
Method 3 (TV of similar goods), I:556, 557
Method 4 (deductive value), I:558
DV calculation, basis for, I:558–9
unit price, adjustments to, I:559
Method 5 (computed value), I:559
access to necessary information, I:561
CV calculation, I:560–61
Method 6 (fallback method of valuation), I:561
prohibited methods, I:562
requirements for applying, I:562
Preamble, I:539
principles
fairness, I:539
neutrality, I:539
uniformity, I:539
scope of Agreement, I:540
special and differential treatment, I:567
of developing countries (Article VII of GATT 1994), I:1554

reservations regarding DV and CV methods, I:568
technical assistance, I:568
transitional periods, I:567
substantive provisions (Annex I), I:540
technical assistance in Uruguay Round Agreements, II:465
transparency (Article 12), I:566
TV, departure from
absence of sale or price for export, I:553
data unavailable to make appropriate adjustments under Article 8, I:556
goods disposal or use restrictions, I:553
proceeds of subsequent resale accrue to seller, Article, I:1 (c), I:555
related parties, I:555
sale or price subject to conditions cannot be determined (Article 1.1), I:554
Agreement on Import Licensing Procedures (AILP), I:592–3
Article 1 [General Principles]
Article 1.1, I:595
Article 1.2, I:595
Article 1.3, I:595
Article 1.5, I:596
Article 1.6, I:596
Article 1.7, I:596
Article 1.8, I:596
Article 1.9, I:596
Article 2 [Automatic Import Licensing]
Article 2.1, I:597
Article 2.2, I:597
Article 3 [Non-Automatic Import Licensing]
Article 3.4, I:597
Article 3.5, I:597–8
Article 4, I:598
Article 5, I:599
Article 6, I:599
Article 7, I:599
recommendations for change, I:599
S&D treatment of developing countries, I:1555
Tokyo Round Code, I:594
Uruguay Round Negotiations on, I:594
Agreement on Preshipment Inspection (API), I:574. *See also* Preshipment Inspection
Article 1 [Definitions]
Article 1.1, I:575
Article 1.2, I:575
Article 1.3, I:576
Article 1.4, I:576
Article 2 [Obligations of User Members]
Article 2.1 [Non-Discrimination], I:576
Article 2.2 [Governmental Requirements], I:577
Article 2.3 [Site of Inspection], I:577
Article 2.4 [Standards], I:577
Article 2.5–2.8 [Transparency], I:578
Article 2.9–2.13 [Protection of Confidential Business Information], I:579–80
Article 2.14 [Conflicts of Interest], I:580
Article 2.15 [Time for Inspection], I:580
Article 2.16 [Issuance of Report], I:580–81
Article 2.17 [Preliminary Price Verification], I:581
Article 2.18, I:581n.
Article 2.20 [Price Verification], I:582–3
Article 2.21 [Appeals Procedures], I:583
Article 2.22 [Derogation], I:583
Article 3 [Obligations of Exporter Members], I:584
Article 4 [Independent Review Procedures], I:584
Article 5 [Notification], I:585
Article 6 [Review], I:585
Article 7 and 8 [Consultation and Dispute Settlement], I:585
assessment of, I:587
Preamble, I:575
technical assistance in Uruguay Round Agreements, II:465
Agreement on Rules of Origin (ARO), I:603. *See also* Committee on Rules of Origin; harmonized non-preferential rules of origin architecture; Technical Committee on Rules of Origin
Article 1.1, I:610
Article 1.2, I:610
Article 2, I:610
Article 3, I:610
Article 4.1, I:611
Article 4.2, I:611
Article 5, I:611
Article 6, I:611
Article 6.3, I:640
Article 7, I:611
Article 8, I:611
Article 9, I:611
dispute settlement
Article 2 interpretation, I:612–14
Chile-Taxes on Alcoholic Beverages case, I:612
United States-Rules of Origin for Textiles and Apparel Products case, I:612
Harmonization Work Programme, I:614, 615
HRO implementation, implications of, I:657, 658
Article 1.2, I:658–660
CRO Chairman, report by, I:660–61
Agreement on Safeguards, I:764. *See also* safeguard measures
Article 1 [General Provision], I:765
Article 2 [Conditions], I:765
Article 2.1
imports increase, I:765
like or directly competitive products, I:767
Article 2.2 [MFN application of safeguards], I:768
other provisions in Article 2, I:769
unforeseen developments, I:768
Article 3 [Investigations]
Article 3.1, I:769
Article 3.2 [confidential information], I:770
inclusion of reasoning in reports, I:769
selective analysis of domestic industry, I:770
Article 4 [Serious Injury]
Article 4.1 [determination of serious injury], I:771
Article 4.2(a) [factors to be considered], I:771; II:50
Article 4.2(b) [causation], I:772
threat of injury, I:772
Article 5 [Application of Safeguard Measures], I:774
Article 5.1
adjustment plans, I:776
extent of measures, I:774
form of measures, I:775
Article 5.2 [quota allocation], I:776; II:49
Article 6 [Provisional Safeguard Measures], I:776
Article 7 [Duration and Review of Safeguard Measures]
Article 7.1, I:776; II:50
Article 7.2, I:776

Agreement on Safeguards (*cont.*)
Article 7.3, I:777; II:50
Article 7.4, I:777; II:50
Article 7.5, I:777
Article 7.6, I:777
Article 8 [Compensation or Retaliation]
Article 8.1, I:777
Article 8.2, I:778
Article 8.3, I:778
Article 9 [Developing Countries]
Article 9.1, I:779; II:49
Article 9.2, I:779
Article 10 [Termination of Pre-Existing Safeguard Measures], I:779
Article 11 [Elimination of Gray-Area Measures], I:780; II:48
Article 11.1, I:780
Article 11.3, I:780
Article 12 [Notification and Consultation], I:781; II:50
Article 12.1 [consultations], I:782
Article 12.2 [contents of notifications], I:782
Article 12.3 [timing of notifications], I:781
Article 13 [Surveillance], I:783
GATT
Article XIX, II:44t., 45–8
Article XXIV (RTA regulation aspects), II:238
issues in application of, I:784
burden of proof, I:788
GATT Article XIX, relationship between, I:784
prohibition of "gray-area measures", I:792
standard of review, I:789
US Steel Safeguard case, I:793
Japan, III:175
S&D treatment, I:1552
trade and culture, II:765
Uruguay Round reforms affecting safeguards, II:48–51
Agreement on Subsidies and Countervailing Measures (ASCM), I:681, 686, 1174
Civil Aircraft Agreement and
ambiguities and problems in, I:1176
relevance to Civil Aircraft Trade, I:1174–5
environmental issues, II:152
GATT Subsidies Code (1979) and, I:682, 683
GATT Subsidy Discipline (1947) and, I:681
injury determinations under
Article 15.1, I:737
Article 15.2, I:739
Article 15.3, I:740
Article 15.4, I:742
Article 15.5, I:743
Article 15.6, I:745
Article 15.7, I:746
Article 15.8, I:747
gender analysis of trade agreement, II:720–22
investment-related provisions in, II:316
LDC development and, I:1564
Part I (General Provisions), I:687
Article 1 [Definition of a Subsidy], I:688
Article 1.1(a) [Financial Contribution], I:689
Article 1.1(b) [A Benefit is Conferred Thereby], I:692
Article 2 [Specificity], I:694
Article 2.1 [Subsidies Limited to Certain Enterprises], I:694
Article 2.2 [Regional Subsidies], I:695
Article 2.3 [Export and Import Substitution Subsidies], I:696
Article 2.4, I:696
Part II (Prohibited Subsidies), I:696
Article 3 [Prohibition], I:696
Article 4 [Remedies for Prohibited Subsidies], I:699
Part III (Actionable Subsidies)
Article 5 [Adverse Effects], I:701
Article 6 [Serious Prejudice], I:701
Article 7 [Remedies], I:703
Part IV (Non-Actionable Subsidies)
Article 8 [Identification of Non-Actionable Subsidies], I:704
Article 9 [Consultations and Authorized Remedies], I:706
Part V (Countervailing Measures), I:707
Article 10 [Application of Article VI of GATT 1994], I:707
Article 11 [Initiation and Subsequent Investigation], I:708
Article 11.1 and 2 [Application for Imposition of Countervailing Measures], I:708
Article 11.3 [Obligation to Review Evidence Prior to Initiation], I:709
Article 11.4 [Standing], I:710
Article 11.5–11.11 [Initiation and Subsequent Investigation], I:711
Article 12 [Evidence], I:712
Article 13 [Consultations], I:715
Article 14 [Calculation of Amount of a Subsidy], I:716
Article 15 [Determination of Injury], I:717
Article 16 [Definition of Domestic Industry]
Article 16.1, I:717
Article 16.2, I:718
Article 16.3, I:718
Article 16.4, I:718
Article 17 [Provisional Measures], I:718
Article 17.3, I:719
Article 17.4, I:719
Article 18 [Undertakings], I:719
Article 19 [Imposition and Collection of Countervailing Duties], I:720
Article 20 [Retroactivity], I:721
Article 21 [Duration and Review of Countervailing Duties and Undertakings], I:722
Article 21.2, I:722, 723
Article 21.4, I:724
Article 22 [Public Notice and Explanation of Determinations], I:724
Article 23 [Judicial Review], I:725
Part VI (Institutions), I:725
Article 24 [Committee on Subsidies and Countervailing Measures and Subsidiary Bodies], I:725
Part VII (Notification and Surveillance), I:726
Article 25 [Notifications], I:726
Article 26 [Surveillance], I:727
Part VIII (Developing Country Members), I:727
Article 27 [Special and Differential Treatment of Developing Country Members], I:727
Part IX (Transitional Arrangements), I:729
Article 28 [Existing Programmes], I:729
Article 29 [Transformation into a Market Economy], I:730

Part X (Dispute Settlement), I:730
Article 30 [Dispute Settlement], I:730
Part XI (Final Provisions), I:731
Article 31 [Provisional Application], I:731
Article 32 [Other Final Provisions]
Article 32.1, I:731, 732
Article 32.3, I:686
S&D treatment of developing countries, I:1551
subsidization and, I:148
trade and culture, II:760
TRIMs Agreement, dispute settlement relationship with, I:469
Uruguay Round Negotiations, I:684, 685
Agreement on Technical Barriers to Trade (TBT Agreement), I:107, 125. *See also EC-Asbestos* case; *EC-Sardines* case
applicability at governmental and non-governmental levels, I:385
Article 1.3, I:381
Article 1.4, I:381
Article 1.5, I:381
Article 2, I:385
Article 2.2, I:390–92, 394, 399
Article 2.3, I:394
Article 2.4, I:384–5, 396, 398
Article 2.5, I:396, 399
Article 2.9, I:138
Article 3, I:385–6
Article 3.1, I:386
Article 4 [Code of Good Practice], I:386
Article 5 [Central Government Bodies], I:387
Article 5.1.2, I:391
Article 5.2.7, I:394
Article 6 [Central Government Bodies], I:387
Article 7 [Local Government Bodies], I:387
Article 8 [non Government Bodies], I:387
Article 9 [International and Regional Application], I:388
Article 11 [Technical Assistance], I:402–3
Article 12 [Special and Differential Treatment], I:403–5
Article 12.10, I:407–8
Article 13, I:407
Article 14 [Consultations And Dispute Settlement], I:405
Article 14.1, I:405
Article 14.2, I:405
Article 14.4, I:405
Article 15.3, I:407
Article 15.4, I:407
Article XX exception and, I:159, 160
Civil Aircraft Agreement and, I:1178–80
conformity assessment procedure (Annex 1 Paragraph 3), I:380
conformity assessment procedures (Articles 5–9), I:386
central government bodies (Articles 5 and 6), I:387
international and regional application (Article 9), I:388
local government bodies (Article 7), I:387
non government bodies (Article 8), I:387
consultations and dispute settlement provision (Article 14), I:405
EC-Asbestos, I:406
EC-Sardines, I:406
environmental issues, II:150, 151
GATT 1947 overview and, I:374
gender analysis of trade agreement and, II:732–3
import prohibitions applicability (Annex 1), I:383
institutional considerations
built-in reviews of Agreement, I:407
Doha Program work, I:408
TBT Committee work, I:407
Web resources, I:408
LDC development and, I:1564
Preamble, I:373, 374
principles applicable under
equivalence and mutual recognition, I:400–401
harmonization, I:395–400
non-discrimination principle, I:388
prevention of unnecessary obstacles to international trade, I:390–94
transparency, I:401–2
transparency, derogations from, I:402
relationship with SPS Agreement, I:251
retroactive application of, I:384
special and differential treatment (Article 12), I:403–5, 1553
standard (Annex 1 Paragraph 2), I:379
standards (Article 4), I:386
structure and scope of, I:380
inapplicability to NPR-PPM (Annex 1), I:382
not applicable to trade in services (Annex 1A), I:381
TBT vs. GPA, I:381
TBT vs. SPS, under Annex A(1), I:381
technical assistance
in Uruguay Round Agreements, II:465
provisions (Article 11), I:402–3
technical regulation
Annex 1 Paragraph 1, I:376–8
Articles 2 and 3, I:385
Tokyo Round Standards Code overview and, I:375
trade and environment, II:514
Agreement on Textiles and Clothing (ATC), I:412, 418
accelerated implementation related issues, I:433, 434
Article 1.1, I:418
Article 1.7, I:427
Article 2
Article 2.1, I:419
Article 2.4, I:419
Article 2.6, I:420
Article 2.8, I:420
Article 2.9, I:421
Article 2.13, I:420
Article 2.14, I:420
Article 3.1, I:419
Article 3.2, I:420
Article 5, I:427
Article 6 [Special Safeguard Mechanism]
Article 6.1, I:421
Article 6.3, I:424
Article 6.4, I:426
Article 6.7, I:421
Article 6.10, I:423, 427
Article 8, I:427
Article 8.1, I:426
Article 8.5, I:426
Article 8.9, I:426
backloading integration issues, I:430, 431
circumvention, I:427
GATT 1947 Textiles Trade regulation, I:412
Long-Term Arrangement (LTA), I:413

Agreement on Textiles and Clothing (*cont*.)
Multi-Fiber Arrangement (MFA), I:414
Short-Term Arrangement (STA), I:413
GATT 1994 provisions and, I:419
gender analysis of trade agreement, II:719
integration of products into GATT 1994, I:420
jurisprudence, I:427–9
LDC development and, I:1564
MFA restrictions, I:419, 420
Preamble, I:418
product coverage, I:427
S&D treatment of developing countries, I:1554
Special Safeguard Mechanism, I:421, 422
procedural steps, I:423
substantive requirements, I:424
textiles and developing countries aspects of
analysis of integration program, II:412
disputed balance of rights and obligations, II:408–10
implementation of, II:410
inherent weaknesses of, II:411
liberalization and integration process, II:405–7
Punta del Este Preparations, II:401–3
Textiles Monitoring Body, II:410
transitional safeguard mechanism, II:407
Uruguay Round Negotiations, II:403
Textiles Monitoring Body, I:418, 426
trade liberalization and UR-1 Scenario, II:26
US rules of origin requirements issues, I:432, 433
Uruguay Round Negotiations and, I:415
linkage to other GATT Rules, I:418
monitoring body, role of, I:417, 418
quota growth rates, I:416
scope of products to be integrated, I:417
special safeguard mechanism development, I:417
speed of integration, I:416
Agreement on Trade in Civil Aircraft, I:1167
Aircraft Code
application and institutions, I:1168
government assistance, I:1168
other provisions, I:1169
rectification, I:1176–8
Bilateral Agreement (US-EU 1992), I:1172
background, I:1172
elements of, I:1172–4
dispute settlement (GATT), I:1170
1991 Case, I:1171
German Exchange Rate Case, I:1170
dispute settlement (WTO), I:1184
Brazil-Aircraft: Impact on Export Credit Programs, I:1187
material advantage, I:1187–9
OECD Safe Harbor, I:1189–90
Canada-Aircraft case, I:1184
"matching", I:1185–7
royalty-based financing, I:1184–5
France-Flight Management System Subsidy case, I:1190
future scope, I:1190
government assistance tensions, I:1191
Airbus "A380 Super Jumbo" Project, I:1191
Airbus restructuring, I:1192
Brazil-Canada dispute, I:1193
indirect supports for Boeing, I:1192
inducements, I:1194
Tokyo Round, I:1167
Aircraft Code, I:1168
Subsidies Code, I:1169–70
WTO and, I:1174
Aircraft Code rectification, I:1176–8
GATS, I:1180–84
SCM Agreement, I:1174
ambiguities and problems in, I:1176
relevance to Civil Aircraft Trade, I:1174–5
TBT Agreement, I:1178–80
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), I:1043
Agreement interpretation and disputes, II:427
agreement object and purpose of, II:431–4
contemporaneity, II:435–6
deference to national states, II:435
interpreting domestic law, II:434
mandatory vs. discretionary provisions, II:437
principles of interpretation, II:429–31
relationship with GATT, II:428
competion policy and, II:507
contentious issues, II:437
compulsory licenses, II:442–6
GATT Jurisprudence exceptions, II:438–40
parallel imports, II:446–52
TRIPS Agreement exceptions, II:440–42
developing countries and. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights and developing countries
Doha Declaration on Public Health, I:1078, 1096, 1113; II:452–5, 647
text, III:492–502
EC Law and
Article 133 EC, I:1472–4
implied competence under, I:1475–6
electronic commerce issues, II:481
taxation, II:484
trade and development, II:483
environmental issues, II:151
EU and, III:122
foundations and origins of
from tariffs to intellectual property, I:1054–7
functions of IP, I:1046
impact of, I:1056
IP as international system, I:1047–50
IP protection and trade link prior to TRIPS Agreement, I:1050–1
Uruguay Round negotiations, I:1055
gender analysis of trade agreement, II:729–32
human rights and trade, II:656, 675–8, 691
interpretation
questions of law and fact, I:1065
textual interpretation and good faith, I:1064
investment-related provisions in, II:315
LDC development and, I:1565
Mexico and, III:231
Mongolia and, III:264
Part I [General Provisions and Basic Principles], I:1067
development and social policy goals, I:1077–80
Article 7 [objectives], I:1077, 1078–79
Article 8, I:1078, 1079
Article 8.1 [principles], I:1077
Article 67 [technical cooperation], I:1079

technology transfer (Articles 7 and 66.2), I:1079
exhaustion of rights (Article 6), I:1069–71
parallel trade regulation (Articles 16 and 28.1), I:1071–7
most-favored-nation treatment (Article 4), I:1068
national treatment (Article 3), I:1067
security exceptions, I:1080
transparency and good governance (Article 63), I:1080
Part II [Standards Concerning Availability, Scope and Use of IPR], I:1081
anti-competitive practices in contractual licenses controlling (Article 40), I:1101
copyright and related rights, I:1081–7
geographical indications (Article 22–24), I:1088–91
industrial designs (Article 25), I:1091
layout-designs (topographies) of IC (Articles 35–38), I:1098
patents (Articles 27–31, 33–34, and 70), I:1091–8
trademarks (Articles 15–16 and 18–21), I:1087
undisclosed information protection (Article 39), I:1099–1101
Part III [Enforcement of Intellectual Property Rights], I:1102
civil and administrative procedures and remedies, I:1104
Article 42, I:1104
Article 43, I:1105
Article 44, I:1105
Article 45, I:1105
Article 46, I:1105
Article 47, I:1106
Article 48, I:1106
Article 50, I:1105
criminal procedures (Article 61), I:1109
general obligations (Article 41), I:1104
provisional measures (Article 50), I:1106
border measures, I:1107–08
Article 51, I:1108
Article 52, I:1108
Article 53, I:1109
Article 54, I:1108
Article 55, I:1109
Article 56, I:1109
Article 57, I:1109
Article 58, I:1109
Article 59, I:1109
Article 60, I:1109
Part IV [Acquisition and Maintenance of Intellectual Property Rights and Related Inter Partes Procedures]
Article 62.1, I:1109
Article 62.2, I:1109
Article 62.3, I:1110
Article 62.4, I:1110
Article 62.5, I:1110
Part V [Dispute Prevention and Settlement]
non-violation complaints (Article 64.2), I:1112
recourse to dispute settlement (Article 64.1), I:1110–12
Part VI [Transitional Arrangements]
Article 65.1, I:1113
Article 66, I:1113
Part VII [Institutional Arrangements and Final Provisions], I:1113
Amendments (Article 71), I:1114
reservations (Article 72), I:1115
TRIPS Council (Articles 68 and 71), I:1114
public health and, I:1078, 1096, 1113; II:452–5, 647
text of Doha Declaration on, III:492–502
rights and obligations, I:1059
incorporation by other Agreements reference, I:1063
interpretation of, I:1064
minimum and maximum standards, I:1061–3
private rights and direct effect, I:1059–61
relationship to GATT and GATS, I:1066
S&D treatment of developing countries, I:1555
scope and subject-matter of
subject matter and inter-temporal application (Article 70), I:1058
survey of protected rights, I:1057
Singapore and, III:342t
strade and environment, II:517
technical assistance in Uruguay Round Agreements, II:465
text of Doha Declaration, III:492–502
TRIPS disputes, II:424
Canada-Patent Protection for Pharmaceutical Products, II:425
Canada-Term of Patent Protection, II:425
Mailbox Cases, II:425
US-Section 110(5) of US Copyright Act, II:426
US-Section 211 Omnibus Appropriations Act of 1998, II:426
WTO Practice on Access to Medicines, II:647–8
Agreement on Trade-Related Investment Measures (TRIMs Agreement), I:123, 125
Article 1 [Coverage], I:449
Article 2 [Basic Obligations]
Article 2.1, I:449
Article 2.2, I:449
Article 3 [Exceptions], I:450
Article 4 [Developing Countries], I:451
Article 5 [Notification and Transitional Arrangements]
Article 5.1, I:451
Article 5.2, I:451
Article 5.3, I:451, 455
Article 5.4, I:452
Article 5.5, I:452
Article 6 [Transparency]
Article 6.1, I:138, 452
Article 6.2, I:452
Article 6.3, I:452
Article 7 [Committee on Trade-Related Investment Measures], I:452
Article 8 [Consultation and Dispute Settlemen], I:453
Article 9 [Review by Council for Trade in Goods], I:453
Article 9 [Review], I:472–3
Colombia, III:82
competition policy and, II:500
current debate and prospects, I:472
dispute settlement cases involving, I:458–9
Canada-Auto Pact dispute, I:462–3
EC-Bananas III dispute, I:460

Agreement on Trade-Related Investment (*cont.*)
India-Measures Affecting Automotive Sector, I:464–5
Indonesia-Autos dispute, I:461–2
dispute settlement relationship with GATT 1994
Article III:4, I:466–9
Article XI:1, I:468–9
dispute settlement relationship with SCM Agreement, I:469
economic rationale of, I:440
EU and, III:122
FIRA Panel Case, I:444
gender analysis of trade agreement, II:723
general features, I:448
human rights dispute over, II:656
illustrative list, I:449
Paragraph 1(a), I:450
Paragraph 1(b), I:450
Paragraph 2(a), I:450
Paragraph 2(b), I:450
Paragraph 2(c), I:450
implementation issues, I:473–5
investment-related provisions in, II:315
LDC development and, I:1564
Mexico, III:231, 235
notification obligations
Article 5, I:454
Article 5.1, I:454
Article 5.2, I:454
Article 5.5, I:454
performance requirements of, I:440
developing countries, I:441
export performance, I:441, 442
multinational enterprises, I:441, 442
Preamble, I:449
prospects of, I:478–80
S&D treatment, I:476, 1553
trade and culture, II:774
Transition Periods, Extension of, I:456, 458
"2 + 2 formula", I:457
Article 5.3, I:455–7
Uruguay Round negotiations on, I:445–7
Working Group on relationship between trade and investment, I:476–7
agriculture. *See also* Agreement on Agriculture; agriculture under GATT; tariff-rate quotas
agricultural subsidies, II:97
Argentina, agricultural protectionism in
costs of agricultural protectionism, other, III:21
proposal for, III:21
protectionism and financial costs, III:19–21
China's Accession to WTO, agriculture challenges after, III:61
Colombian concerns, III:81, 82, 85
decline, Uruguay Round Negotiation launching and, I:10, 11
developing country
interests, II:110–12
options for, II:127–9
Egypt negotiations on, III:102
EU and, III:118–20, 125
Framework for Establishing Modalities in Agriculture (August 2004) (Text), III:518–523
global free trade and, III:442–5
issues ('new' trade), II:121
agriculture's so-called multifunctionality, II:124–7
technical standards, including SPS and food safety measures, II:122–4
issues (traditional)
agricultural reform process, II:118–20
agriculture needs and WTO Round, II:120–21
potential gains from further trade policy reform, II:116–18
URAA, II:112–15
Japanese concerns, III:174
Korean concerns, III:204
liberalization, II:32, 33, 121, 127
Mexican concerns, III:228
New Zealand concerns, III:280–82
OECD
MFN tariff rates, II:111
Russian WTO accession impact on, III:322
SCM measures and, II:105–6
trade and environment issues, II:552–4
under HWP, I:654
agriculture under GATT. *See also* Agreement on Agriculture
Contracting Parties
EC, I:191–2
US, I:190–91
exceptions under GATT 1994, I:129–30
Haberler Report, I:192–3
Havana Charter and, I:189–90
multilateral trade negotiations
Kennedy Round, I:193–5
Tokyo Round, I:195–6
trade disputes under GATT
Article XI(2) [Import Restrictions], I:196–7
Article XVI [Export Subsidies], I:197–8
AILP. *See* Agreement on Import Licensing Procedures
Air Transport Services (under GATS), Annex on, I:909–10, 937, 938
Airbus "A380 Super Jumbo" Project, I:1191
Aircraft Code. *See under* Agreement on Trade in Civil Aircraft
ALADI. *See* Asociación Latinoamerican de Integración
American Selling Price (ASP), I:535
amicus curiae briefs and dispute settlement, I:1429. *See also under* Appellate Body
AB proceedings, I:1433
Door Breached in (*Sardines* case), I:1438
Door Deliberately Left Open (*EC-Asbestos* case), I:1437
Door Left Ajar (*Shrimp-Turtle* case), I:1433–5
Door Left Firmly Open (*US-Carbon Steel* case), I:1436
consequences of admitting *amicus curiae* briefs, I:1442
governments' position, I:1447–51
legal issues
AB authority, I:1451
Panel's authority, I:1451
procedural guarantees offered to Members, I:1452–4
political implications, I:1454–6
practical problems, I:1456
private parties (involved cases), I:1442
factual and/or legal aspects, I:1441

GATT/WTO approach to *amicus curiae* briefs
admissibility in panel proceedings, I:1430–33
origins, I:1430
Shrimp-Turtle case, I:1431
human rights concerns, II:643–5
EC-Asbestos, II:644, 645
US-British Steel, II:644
US-Shrimp, II:643
private parties', admissibility consequences for
Australia-Salmon case, I:1442
EC-Asbestos case, I:1437, 1444
EC-Cotton Linen case, I:1444
Sardines case, I:1438, 1447
Shrimp-Turtle case, I:1431, 1433–5, 1442
Thailand-Antidumping Duties case, I:1446
US-Carbon Steel case, I:1436, 1443
US-Copyright case, I:1443
AMS. *See* aggregate measurement of support
Andean Community, Colombia, III:88
Andean Trade Preference Act (US) (ATPA), II:577
Andean Trade Promotion and Drug Eradication Act (US) (ATPDEA), II:577
anti-competitive practices in contractual licenses (Article 40 of TRIPS), I:1101
Article 40:2, I:1101
Article 40:3, I:1102
Article 40:4, I:1102
anti-dumping. *See also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Anti-Dumping Code (Tokyo Round), II:70, 71
Article VI of GATT [Antidumping and Countervailing Duties], I:140, 141, 142; II:69–72, 74, 78
Article VI:1, I:141
Article VI:2, I:141
Article VI:3, I:141
Doha Ministerial Declaration, II:78, 79
GATT litigation and, I:497–8
global free trade and, III:447
history of
Article VI of GATT, I:494
enforcement origins, I:493
Kennedy Round International Anti-Dumping Code, I:494–6
Tokyo Round Anti-Dumping Code, I:496
in WTO
brief history of, II:69–72
problems of, II:68–9
international trade and competition law, II:72–7
Japanese concerns on, III:175
Korean concerns on, III:205
laws, I:490–91
principal targets of, I:488
principal users of, I:488
sectors affected by, I:489
Mexican concerns on, III:229
proposals for reform, II:77–80
rules of origin and, II:274–6, 277
safeguard measures and, II:51, 52
United States-Anti-Dumping Act of 1916, I:141, 493
Uruguay Round, II:71
Anti-Dumping Act of 1916, I:141, 493
Anti-Dumping Agreement. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
antitrust law and competition policy, II:489
APEC. *See* Asia Pacific Economic Cooperation
API. *See* Agreement on Preshipment Inspection
Appellate Body (AB), I:1279, 1390. *See also* dispute settlement
appeal process mechanics, I:1291–4
appellate process, reform of, I:1401
dissenting opinions, I:1401
exchange of views, I:1396
institutional aspects, I:1281
Appellate Body members, I:1284–91
governing instruments, I:1281
covered agreements, I:1282
Rules of Conduct, I:1284
Working Procedures, I:1282–4
jurisdiction, I:1391
appellate review, scope of, I:1392
question of facts and question of law, I:1391
remand power, I:1394
Members
Appellate Body Secretariat, I:1290
Chairman, I:1290
individual members, I:1289
legal framework and appointment procedures (Article 17 of DSU), I:1284–9
Appellate Review cost, I:1289
appointment processes, I:1287–8
conditions of employment of members, I:1288–9
qualifications (Article 17.3 of DSU), I:1285–6
representativeness, I:1285
terms of offices (Article 17.2 of DSU), I:1286–7
oral hearings, I:1315–16, 1395
related issues
AB reports precedential value
"Res judicata", I:1330
"Stare decisis", I:1329
additional written memoranda, I:1319
amicus curiae briefs, I:1321–4
appeal initiation, I:1296
appeal standard of review, I:1302
appellants/other appellants/appellees, I:1305
Appellate Body appraisal, I:1332
appellate review scope, I:1300–02
business confidential information, I:1310
circulation of report, I:1329
conditional appeals, I:1325
confidentiality, I:1309
conflicts of interest, I:1307
costs, I:1326
deadlines and time-limits in appeals
calculating dates, I:1295
ninety day limit for completion, I:1328
sixty-day deadline to initiate appeal, I:1295
decision-making
opinions, I:1325
collegiality, I:1326
divisions, I:1303
ex parte communication, I:1308
experts, I:1320
failure to appear or file a timely submission, I:1326
joint submissions, I:1317
multiple appeals, "joinder" of cases on appeal, joint hearing, I:1316
notice of appeal, I:1296
objections, I:1318

Appellate Body (AB) (*cont.*)
oral hearing, I:1315–16
panel record/evidence on appeal, I:1320
participants and parties, I:1306
presiding member, I:1304
private counsel, I:1318
requests for preliminary ruling, I:1310–13
right to appeal, I:1294
submission
failure to appear or file timely, I:1326
joint submissions, I:1317
written submission, I:1313–14
third parties, third participants and passive observers, I:1306
withdrawal of appeal, I:1327
working procedures interpretation, I:1326
written submission, I:1313–14
RTAs and, II:234–40
transparency and access issues
amicus curiae issue, I:1398–1401
transparency, I:1398
Uruguay Round negotiations, I:1279–81
Vienna Convention on the Law of Treaties
Article 31 of, I:1397
Article 32 of, I:1397
Working Procedures, I:1282–4, I:1326
Rule 3(1), I:1325
Rule 4, I:1326
Rule 4(3), I:1396
Rule 5, I:1290
Rule 5(2), I:1284
Rule 6(3), I:1304
Rule 7, I:1304
Rule 13, I:1304
Rule 16(1), I:1283, 1310, 1321, 1323
Rule 16(2), I:1313, 1315
Rule 17, I:1295
Rule 17(1), I:1295
Rule 17(2), I:1296
Rule 18(2), I:1314
Rule 18(3), I:1314
Rule 19, I:1308
Rule 20, I:1296, 1298
Rule 20(2), I:1296
Rule 20(2)(d), I:1296–1300, 1312
Rule 23(1), I:1305, 1306
Rule 23(4), I:1305, 1306
Rule 23(5), I:1305, 1316
Rule 24, I:1306
Rule 24(1), I:1314
Rule 27, I:1316
Rule 28(1), I:1319
Rule 29, I:1326
Rule 30, I:1328
Rule 30(1), I:1327
Rule 32(2), I:1283
Argentina
agricultural protectionism
other costs of agricultural protectionism, III:21
proposal for, III:21
protectionism and financial costs, III:19–21
Multilateral Trade Round prospects, III:25–6
patents for pharmaceutical drugs case
concessions value estimation in patents
impact on FDI and trade, III:11
transfer of rents, III:9–11
pharmaceutical drug companies, rent-seeking by, III:7–9
regional trade negotiations between MERCOSUR and EU
background, III:22
differing negotiating goals and strategies, III:22
EU proposal, III:23–4
role in International Trade and in GATT, III:5
services
concessions value estimation in services, III:13
privatization of Argentina's service industries, III:12
services-related inflows of FDI, III:15–16
trade in services, III:14
trade in goods
agriculture, III:18
manufacturing, III:17
Uruguay Round Negotiations, III:6
intellectual property rights (patents for pharmaceutical drugs), III:7–12
services, III:12–16
trade in goods, III:17–18
Argentina-Footwear case
Agreement on Safeguards, I:766, 772, 773, 786
RTA regulation aspects (GATT Article XXIV), II:238–9
ARO. *See* Agreement on Rules of Origin
ASCM. *See* Agreement on Subsidies and Countervailing Measures
ASEAN. *See* Association of South East Asian Nations
ASEAN Free Trade Area (AFTA), II:253
Indonesian concerns and, III:163
RTA impact evaluation, II:306
rules of origin and, II:284
Singaporean concerns and, III:345
Asia Pacific Economic Cooperation (APEC), II:210, 256
Canada, III:38
Mexico and, III:238
New Zealand, III:275–7
trade and gender, II:705
Asociación Latinoamericana de Integración (ALADI), III:88, 227
ASP. *See* American Selling Price
Association of South East Asian Nations (ASEAN), II:210
double density measures of trade intensity, II:20t
Indonesia, III:162, 163
RTA impact evaluation, II:305
rules of origin, II:284
Singapore, III:345, 346
transition economies and, II:253, 255, 256
Uruguay Round and regionalism, II:303
ATC. *See* Agreement on Textiles and Clothing
ATPA. *See* Andean Trade Preference Act
ATPDEA. *See* Andean Trade Promotion and Drug Eradication Act
Australia-Salmon case, I:246, 253, 263
amicus curiae briefs admissibility consequences in, I:1442
SPS Agreement
Article 2.3, I:264–266
Article 3, I:271

Article 4, I:328
Article 5.1, I:288–290, 297
risk assessment concept, I:281–287
risk management concept, I:309
Article 5.5, I:312–317
Article 5.6, I:320–324
trade and environment, II:525–6
automatic licensing system. *See also* non-automatic import licensing
defined, I:592
import licensing, I:597
GATT Article XIII and, I:593
under AILP (Article 2), I:597
automotive, challenges after China's Accession to WTO, III:62
autonomous liberalization under GATS, I:897–900
Award of contracts under GPA. *See also* Agreement on Government Procurement; United Nations Commission on International Trade Law
Article XIII:4(a), I:1149
Article XIII:4(b), I:1148

backloading integration issues (textiles & clothing), I:430, 431. *See also* Agreement on Textiles and Clothing
Bagwell-Staiger analysis. *See under* environmental issues
balance-of-payments
Committee, I:65
exception, I:131
Korea and BOP consultations, III:189
Mexico and BOP exceptions, III:230
Balance of Payments Manual (5th ed) (IMF) (BPM5), III:14
Bank of International Settlement (BIS), III:145
banking, Russian WTO accession impact on, III:299, 327
banking services (excluding insurance), national treatment and market access commitments, I:974, 987
Basic Telecommunications Agreement, electronic commerce and, II:470. *See also* Telecommunications Services
BDV. *See* Brussels Definition of Value
Beecham Group v. *International Products Ltd*, II:450
Beef Hormone case. *See EC-Hormones* case
bid challenge procedures (under GPA), I:1154. *See also* tendering procedures
available remedies, I:1156–7
challenges, I:1155
independent review bodies, I:1155
private bid challenge, I:1155
bilateral investment treaties (BIT), II:318–20, 516
biosafety, II:550–52. *See also* environment issues
BIS. *See* Bank of International Settlement
Blair House agreement, I:8, 202; III:415. *See also* Peace Clause
Blue Box Exemptions (under Agreement on Agriculture), I:208, 209. *See also* Green Box Exemptions
Blue Box policies, I:220
BOP. *See* balance-of-payments
Border Tax Adjustments report, I:118
BPM5, *see* Balance of Payments Manual (5th ed)
Brazil, argument on trade and culture and, II:752
Brazil-Aircraft case. *See also Canada-Aircraft* case
Appellate Body and, I:1309–11, 1317
Article 21.5, I:1354
Article 22.6, I:1354
consultations and, I:1218, 1220
DSU
decision implementation and enforcement, I:1350
disproportionate effect of retaliation, I:1363
under Civil Aircraft Agreement, I:1187, 1193
material advantage, I:1187–9
OECD Safe Harbor, I:1189–90
Brussels Definition of Value (BDV), I:534–6
Brussels Draft, US, 412
burden of proof
dispute settlement under SPS Agreement, I:346–9
under Agreement on Safeguards, I:788
under ATC Jurisprudence, I:428
business services
computer and related services, I:913 923, 924
legal services, I:922
professional services, I:913
R&D services, I:913
bypass subsidization, I:1025–6

CAC. *See* Codex Alimentarius Commission
CAEC. *See* Central Asian Economic Community
Cairns Group proposal (agriculture)
domestic support provisions, I:219–20
export subsidies provisions, I:221
special and differential treatment provisions, I:222
SPS Agreement and, I:241
Canada, III:30–37
argument on trade and culture, II:752
as QUAD member, I:815–817
choices and opportunities for, III:37–40
trade policy making in, III:40–46
formal consultative mechanisms, III:43
informal consultative mechanisms, III:44–6
Canada-Aircraft case, I:692, 697, 1309–11, 1317. *See also Brazil-Aircraft* case
consultations and, I:1218, 1220
DSU
Article 21.5, I:1354
Article 22.6, I:1354
under ASCM, I:692, 697
under Civil Aircraft Agreement
impact on export credit programs, I:1184–7
"matching" concept, I:1185–7
royalty-based financing, I:1184–5
Canada-Automotive case
RTA regulation aspects (GATT Article XXIV), II:237, 238
TRIMs Agreement
dispute settlement under, I:462–3
TRIMs and GATT 1994 relationship, I:467
under ASCM, I:690, 697
under GATS, I:884–890
Article I [Measures Affecting Trade in Services], I:886
affects trade in services, I:887–8
trade in services, I:887
Article II:1, I:888–9
Article XVII [Import Duty Exemption and CVA Requirements], I:889–90

Canada-Patent Protection of Pharmaceutical Products, I:1079, 1094, 1097, 1358
DSU decision implementation and enforcement, I:1359
under TRIPS Agreement, I:1065–6; II:425, 445
contemporaneity, II:436
deference to national states, II:435
exception, II:442
object and purpose of, II:431, 432
principles of interpretation, II:430, 431
relationship with GATT, II:428
Canada-Periodicals case, I:121, 122
AB jurisdiction, I:1301, 1391
trade and culture concerns
ASCM, II:763, 766
GATT, II:756
under GATS, I:875–8
Canada-United States Free Trade Agreement, I:809–10. *See also* North American Free Trade Agreement
Canadian-US Mutual Legal Assistance Treaty (MLAT), II:498
Cancun Ministerial Conference, III:432–4
and Agreement on Agriculture, I:224
Ministerial Statement (text), III:512–19
CAP. *See* Common Agricultural Policy
capacity building. *See also* trade related technical cooperation and capacity building
LDCs in multilateral trading system, II:372
trade related, II:460
Carribean Community (CARICOM), II:303
cashmere. *See under* Mongolia
Cassis de Dijon case, I:808
CEDAW. *See* Convention on the Elimination of All Forms of Discrimination Against Women
Central Asian Economic Community (CAEC), II:255
Central European Free Trade Area (CETA), II:251, 252
central government bodies, TBT Agreement and, I:387
Central Unitaria de Trabajo (CUT), II:593
centrally planned economies and GATT, II:248. *See also* transition economies
CER. *See* Closer Economic Relations
CG-18. *See* Consultative Group of Eighteen
CGE simulation model. *See* computable general equilibrium simulation model
Change in Tariff Heading (CTH), I:607–8; II:268. *See also* percentage criterion test; technical test
child labor, II:183–5. *See also* labor standards
China
accession protocol, I:76–7
accession to WTO, challenges after
agriculture, III:61
automotive, III:62
financial services, III:64
petrochemicals, III:63
pharmaceuticals, III:62
telecommunications, III:63
economic challenges and opportunities, III:56
Japan's example, III:57
opportunities arising from WTO Membership, III:57–61
legal system
reforms during its bid for Membership, III:55–6
WTO Membership effect on, III:64–6
participation in GATT and WTO, III:49–51
reforms (economic) during its bid for WTO Membership
equal treatment of foreign and domestically-owned enterprises, III:53
import barriers reduction, III:52
increased market access, III:54
new laws, III:54
particular problem areas, III:51
price reforms, III:54
reforms (legal) during its bid for membership
initial attempts at reform, III:55
post-1992 reforms, III:56
strategies after joining "Club", III:66
additional research and training on WTO, III:68
economic restructuring, III:67
globalization encouragement for Chinese enterprises, III:67
position in next MTN Round
electronic commerce, III:68
trade and competition, III:69
trade and environment, III:69
trade and labor standards, III:69
taking advantage of S&D treatment for developing countries, III:67
WTO Membership, opportunities arising from
access to WTO Dispute Settlement System, III:60
discriminatory treatment elimination, III:59
domestic enterprises benefits, III:61
FDI inflow improvement and improved investment environment, III:58
multilateral economic policymaking participation and international trade rules development, III:60
optimal resource reallocation achievement and market economy promotion, III:57
CIRR. *See* Commercial Interest Reference Rate
CIS. *See* Commonwealth of Independent States
CITES. *See* Convention on International Trade in Endangered Species
Civil Aircraft Agreement. *See* Agreement on Trade in Civil Aircraft
Clean Report of Findings (CRF), I:580, 581
Closer Economic Relations (Australia and New Zealand) (CER)
RTA and, II:297
RTA impact evaluation, II:306
CLP. *See* Competition Law and Policy Committee
CMEA. *See* Council for Mutual Economic Assistance
Code of Good Practice. *See under* Agreement on Technical Barriers to Trade
Codex Alimentarius Commission (CAC), I:269
Codex Standard 94 (under Agreement on Technical Barriers to Trade)
as EC regulation basis, I:397, 398
characterization as relevant international standard, I:396
COECE. *See* Coordinadora de Organismos Empresariales de Comercio Exterior
collateralism problem, trade and human rights and, II:683
Colombia
Doha Ministerial Declaration, III:85–8
agriculture, III:85
decision on implementation, III:85
domestic support, III:85
export subsidies, III:85
intellectual property, III:86

market access, III:85–6
services, III:86
trade and environment, III:86
WTO norms, III:86
GATT/WTO participation
economic effects, III:82–3
agriculture, III:82
dispute settlement, III:83
services, III:82
subsidies, III:82
TRIMs Agreement, III:82
historical background, III:74
legal effects, III:83
observer status, III:74
post Tokyo Round period, III:76–7
social effects, III:83
Tokyo Round, III:74–6
UNCTAD III, III:74
RTA participation
Agreements Under ALADI, III:88
Andean Community, III:88
FTA of Americas, III:89
Group of Three, III:89
trade policy development, III:89
Uruguay Round participation
negotiations objectives, III:79
negotiations results
agriculture, III:81
textile and clothing, III:81
tropical products, III:80
Punta del Este Declaration, preliminary negotiations for, III:79
services, III:78
WTO
attitude of citizens, businessmen, and political leaders towards, III:84
Colombian perspective on strengths and weaknesses of, III:84–5
COMECON. *See* Council for Mutual Economic Cooperation
COMESA. *See* Common Market for Eastern and Southern Africa
Commission on Status of Women (CSW), II:704
Commercial Interest Reference Rate (CIRR), I:1189
Committee on Customs Valuation, I:540
Committee on Regional Trade Agreements (CRTA), I:835; II:226, 229, 230, 232, 234, 241–4
GATT Article XXIV Rules Governing, II:226
Committee on Rules of Origin (CRO), I:611, 616. *See also* Technical Committee on Rules of Origin
CRO (after June 1999), I:618–19
wholly-obtained goods definition, I:651–3
Uruguay Round Agreement on Rules of Origin, II:269, 270
Committee on Trade and Development (CTD), I:367
Committee on Trade and Environment (CTE), II:529–30
Common Agricultural Policy (CAP), I:191–2, 201, 203; III:113, 119, 120, 124. *See also* agriculture
Common Market for Eastern and Southern Africa (COMESA), III:104, 108
Commonwealth of Independent States (CIS), II:254
communication services, I:914, 924–5
compensation, safeguard measures and
compensation and retaliation, II:49
compensation versus no-compensation, II:62–64
competence. *See under* EC Law and WTO Agreement
Competition Law and Policy Committee (CLP), II:497
competition law, international trade and (anti-dumping action), II:72–7
competition policy, II:488
antitrust laws and, II:489
Competition Law and Policy (CLP) Committee, II:497
Doha Ministerial Declaration, II:501–2
final observations, II:508–10
GATT deliberations and rule coverage, II:494–7
Japan-Trade in Semiconductors case, II:495
Kodak-Fuji dispute, II:495
global competition forum, need for, II:505–6
Indonesia, III:157, 158
International Competition Network, II:507
International Competition Policy Advisory Committee (US), II:505–6
internationalization issues concerned with, II:490, 491
key issues for WTO, II:506–8
Korea, III:206
MLAT, II:498
multilateral trade negotiations, II:501
EU, II:502
other views, II:504–5
US Government, II:503
private restraints and competition issues under ITO, II:493
bilateral cooperation arrangements and experiences, II:497
GATT deliberations and rule coverage, II:494–7
ITO and other early efforts, II:493
OECD, II:497
regional arrangements, II:499
UNCTAD, II:497
relevance to trade policy, II:489–93
trade and competition policies
China, III:69
Egypt, III:104
global free trade and, III:450
Korea, III:206
Uruguay Round Agreements and WTO
basic nondiscrimination principles, II:499
GATS, II:500
Singapore Ministerial Meeting (1996), II:501
Telecommunications Services Agreement, II:500
TRIMs Agreement, II:500
complaint types
non-violation, I:1237
situation, I:1238
violation, I:1236
compulsory licenses (TRIPS Agreement), II:442–6
computable general equilibrium simulation model, II:24
computational analysis and trade liberalization
implications, II:40
Michigan CGE Model, II:24–5
of Doha Development Round, II:34t
aggregate results, II:33
data, II:32
sectoral results, II:38t., II:40
of Uruguay Round Liberalization, II:25, 27t
aggregate results, II:31
computational results, II:26
sectoral results, II:29t., II:31

computed value (Method 5), I:559. *See also* Agreement on Implementation of Article VII of the General Agreement on tariff and Trade 1994
  access to necessary information, I:561
  CV calculation, I:560–61
consensus and voting aspects in WTO decision making, I:67–8
consensus rule making, WTO and, I:43–5
conservation, natural resources, I:162
construction services, I:915, 927
consultations. *See also* Panel process
  adequacy of consultations, I:1222–4
  confidentiality of proceeding (Article 4.6 DSU), I:1226
    settlement offers made during consultations, I:1227
    third parties and information acquired during consultations, I:1228
    use of facts and evidence obtained during consultations before Panel, I:1226
  consultations request (DSU Article 4.4), I:1215
    duty to consult in Compliance Review Proceedings (DSU Article 21.5), I:1221
    issues not raised in consultations request but actually discussed, I:1220
    substantive requirements and consultation request role, I:1215–20
  developing countries, Article 4.10 DSU, I:1229
  GATT 1947 and, I:1200–02
  GATT/WTO disputes settlement, I:1203
  objectives and nature of, I:1203
    dispute settlement by way of satisfactory adjustment, I:1204
    information gathering, clarification and shaping of substance, I:1205
  parties to consultations (under DSU Article 4.11)
    direct proceeding to panel for joining parties, I:1214
    multiple consultations, I:1213
    plurilateral and private consultations, I:1212
  preparation and logistics, I:1228
  principle of good faith
    DSU Article 4.3, I:1224
    further elements of (DSU Article 21.5), I:1225
    litigation strategies, I:1224
  right to consultations and duty to consult, I:1206
  time periods and deadlines, I:1207–9
  urgency cases
    reduced time frame consultations aspects (DSU Articles 4.8 and 4.9), I:1210
    urgency invoked in consultations (DSU Articles 4.8 and 4.9), I:1209
    within 20 days Panel establishment request (DSU Article 6.1), I:1211
  Uruguay Round negotiations and, I:1202
Consultative Group of Eighteen (CGE) (GATT), I:804
consumer interests, trade policy development and, I:32
contract award procedures. *See under* Agreement on Government Procurement 1994
contractual licenses, anti-competitive practices in (Article 40 of TRIPS Agreement), I:1101
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), II:701, 704, 736
Convention on International Trade in Endangered Species (CITES), I:164; II:146
Coordinadora de Organismos Empresariales de Comercio Exterior (COECE), III:239, 240
copyright and related rights under TRIPS Agreement, I:1081–1087
  Article 9.1, I:1083
  Article 9.2, I:1083
  Article 10, I:1083
  Article 11, I:1084
  Article 12, I:1084
  Article 13, I:1084
  Article 14, I:1085
  Inter-Temporal Application
    Article 70.2, I:1085, 1086
    Article 70.5, I:1087
  negotiating process, I:1081
  TRIPS Agreement and WIPO, relationship between, I:1085
Council for Mutual Economic Assistance (CMEA), II:250, 251
Council for Mutual Economic Cooperation (COMECON), III:251, 252, 253
Council for Trade in Goods (CTG), II:229–30
countervailing duties, II:103–5. *See also* Agreement on Subsidies and Countervailing Duties
country of origin, I:626
countries of origin, multiple, I:627–8
CRF. *See* Clean Report of Findings
CRO. *See* Committee on Rules of Origin
cross-subsidization, I:1003, 1025–6
CRTA. *See* Committee on Regional Trade Agreements
CSW. *See* Commission on Status of Women
CTD. *See* Committee on Trade and Development
CTE. *See* Committee on Trade and the Environment
CTG. *See* Committee on Trade in Goods
CTH. *See* change in tariff heading
CU. *See* customs unions
Cuban Democracy Act of 1992, I:167
culture. *See* trade and culture
CUSFTA. *See* Canada-United States Free Trade Agreement
customs duties
  assessing of, I:533
  principle functions of, I:534
customs unions, II:9. *See also* free trade areas, regional trade arrangements
  GATT Article XXIV, II:223, 224
    criteria for establishing RTA, I:172
    Uruguay Round Understanding on, I:176
  RTA and developing countries, II:329, 330
  RTA types, I:175
  rules of origin and, II:274–6
Customs Valuation Agreement. *See* Agreement on Implementation of Article VII of the General Agreement on Tariff and Trade 1994
Customs Valuation Code (Tokyo Round), I:537
  actual value, I:537–8
  Article VII:2(a), I:537
  Article VII:2(b), I:538
  Article VII:2(c), I:538
  Article VII:5 [transparency], I:538
  implementation and CVA, I:538
CUT. *See* Central Unitaria de Trabajo
CVA. *See* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement)

Danish Bottles case, human rights and trade, II:686, 687
de facto
discrimination under GATS, I:882
specificity, I:695
de jure specificity, I:695
Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries (Uruguay Round), I:1547
Decision on Measures in Favor of Least-Developed Countries (Uruguay Round), I:1546
deductive value (DV). *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DV calculation, basis for, I:558, 559
unit price, adjustments to, I:559
deregulation, Uruguay Round Negotiation and, I:17
developed countries. *See also* least-developed countries
SPS measures and international trade rules for, I:234
Uruguay Round negotiation launching and, I:12, 13
developing countries. *See also* special and differential treatment of developing countries
Agreement on Agriculture
Net Food-Importing Developing Countries Decision, I:215–17
S&D treatment provisions, I:215
agricultural interests of, II:110, 111
Agreement on Safeguards and, I:764, 779
ASCM and, I:727
CVA implementation related issues, I:571
definition, I:1525
EU and, III:123
FDI in, I:1567–9
GATS and, I:817–18, 832–3
GATT-WTO System, I:1525
human rights and trade with, II:679–82
MNE in, I:1569
RTA and
member countries, II:326–34
non-member countries, II:334–7
special provisions under GATT, I:180
SPS Agreement and, I:242, 355
Doha Decision on implementation, I:360, 361
implementation problems, I:360
reasonable adaptation period (Annex B, paragraph 2), I:359
S&D (Article 10), I:358
special provisions on notification (Annex B, paragraphs 8 and 9), I:359
SPS measures and international trade rules for, I:235, 236
technical assistance (Article 9), I:356
transitional periods (Article 14), I:359
textiles and. *See* textiles and developing countries
TRIPS Agreement and. *See* Agreement on Trade-related Aspects of Intellectual Property Rights and developing countries
TRTCCB for, II:459
"two-track approach to trade" (UNCTAD), I:1528–30
DFA. *See* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations
Dillon Round, Japan participation in, III:172
direct effect, I:1062
direct effect and EC Community legal order
Advocates-General opinions, I:1487, 1488
direct effect doctrine, I:1482, 1483
Portugal v *Council*, I:1489
denial of direct effect for private parties, I:1491, 1493, 1494, 1496, 1497
ECJ judgement, I:1489, 1490
possibility of community financial liability for WTO breaches, I:1493
potential issues of, I:1481
disassembly of goods into parts/components
negative rule for disassembly, I:641
origin of disassembled (used) parts/components, I:641, 642
dispute resolution participation
Mexico, III:232–4
South Africa, III:370
dispute settlement. *See also* Appellate Body; Dispute Settlement Understanding; World Trade Organization law
amicus curiae briefs and
AB proceedings, I:1433
Door Breached in (*Sardines* case), I:1438
Door Deliberately Left Open (*EC-Asbestos* case), I:1437
Door Left Ajar (*Shrimp-Turtle* case), I:1433–5
Door Left Firmly Open (*US-Carbon Steel* case), I:1436
consequences of admitting *amicus curiae* briefs, I:1442
governments' position, I:1447–51
private parties (involved cases), I:1442
problems raised, I:1451–7
factual and/or legal aspects, I:1441
GATT/WTO approach to *amicus curiae* briefs admissibility in panel proceedings, I:1430–33
systemic approach, I:1429
ADA (Article 17), I:525
Agreement on Agriculture, I:206
API (Article 7 and 8), I:585
ARO
Article 2 interpretation, I:612–14
Chile-Taxes on Alcoholic Beverages, I:612
US-Rules of Origin for Textiles and Apparel Products, I:612
China, III:60
Colombia, III:83
consultations contribution to
GATT/WTO disputes, I:1203
settlement by way of satisfactory adjustment, I:1204
CVA, I:540
Egypt, III:99
EU, III:128–31
GATT
Article XXII [Consultation], I:169
Article XXIII [Nullification or Impairment], I:169
gender analysis of trade and, II:739
global free trade and, III:453–55
GPA, I:1157–1158
human rights
GATT Article III, II:653–4
GATT Article XX, II:651–3
Hormone Beef dispute, II:648–50
under SPS Agreement, II:654–5

dispute settlement (*cont.*)
implementation and enforcement. *See* dispute settlement decisions, implementation and enforcement of
Japan, III:177
Korea
as complainant, III:201, 202t
as defendant, III:202, 203t
nonviolation complaints re-appraisal, I:1372, 1374–82
under GPA, I:1378
non-WTO rules application in, I:1406–1409
International Law referred to in the process of "interpreting" WTO terms, I:1411
International Law referred to outside the process of Treaty interpretation, I:1412–17
WTO/Public International Law interaction, I:1417–23
RTA regulation (WTO based), II:213
evaluation of, II:240
expedited recourse to dispute settlement procedures, II:244
WTO Panel and AB rulings involving RTAs, II:234–40
Telecommunication Services and
remedies for injury to domestic market, I:1017–9
remedies for difficulties on foreign markets, I:1020
WTO Dispute Settlement System and, I:1020
TBT Agreement (Article 14), I:405, 406
TRIMs Agreement, I:458, 459
Article 8, I:453
Canada-Auto Pact dispute, I:462, 463
EC-Bananas III dispute, I:460
India-Measures Affecting Automotive Sector dispute, I:464, 465
Indonesia-Autos dispute, I:461, 462
under ASCM Agreement (Article 30), I:730
under Civil Aircraft Agreement
1991 Case, I:1171
Brazil-Aircraft case, I:1187–90
Canada-Aircraft case, I:1184–7
France-Flight Management System Subsidy case, I:1190
GATT dispute settlement, I:1170–71
German Exchange Rate case, I:1170
WTO dispute settlement, I:1184–90
under GATS
Article XXIII
non-violation complaints, I:868
violation complaints, I:867
Canada-Certain Measures Affecting Automotive Industry case, I:884
Canada-Periodicals case, I:875–8
EC-Bananas III case, I:878
Japan-Photographic Film and Paper (Kodak-Fuji) case, I:890
Mexico-Telecommunications Services case, I:891
under TRIPS
non-violation complaints (Article 64.2), I:1114
recourse to dispute settlement (Article 64.1), I:1112–14
Dispute Settlement Body (DSB), I:64, II:54
dispute settlement decisions, implementation and enforcement of, I:1342
DSU limitations, I:1353
ambiguity in process (DSU Articles 21.5 and 22), I:1353–5
disproportionate effect of retaliation, I:1362–1364
incentives for unilateral sanctions (DSU Article 23.1), I:1361
"reasonable period of time" for implementation, I:1355–61
developing countries (DSU Article 21.2), I:1360
particular circumstances, I:1358–9
potential abuse of (DSU Article 21.3), I:1361
prompt compliance (DSU Article 21.3), I:1355–8
DSU structure
compensation and suspension of concessions (DSU Article 22.6), I:1352
implementation surveillance (DSU Article 21.3), I:1351
panel and Appellate Body recommendations, I:1350
enforcement devices, improvements suggested to, I:1364
emphasizing compensation over retaliation (DSU Article 22.2), I:1365
enforceable settlement agreements, I:1364
interim relief, I:1364
retroactive remedies, I:1367
European Community model, I:1367–9
implementation and enforcement provisions, I:1350
implementation in International Law, I:1346–50
WTO and, I:1344–6
Dispute Settlement Understanding (DSU)
Article 1.1, I:1206, 1409
Article 3:2, I:1397
Article 3.2, I:168, 1271, 1411, 1421–3
international law rules, I:1407–8
prompt settlement, I:1343
Article 3.6, I:1364
Article 3.7, I:1204
Article 3.10, I:1224
Article 4, I:1206
Article 4.3, I:1207, 1222, 1224
Article 4.4, I:1215–16
Article 4.5, I:1204, 1223
Article 4.6, I:1226–8
Article 4.8, I:1209–10
Article 4.9, I:1209
Article 4.10, I:1229–31
Article 4.11, I:1213
Article 6.1, I:1211
Article 6.2, I:1216, 1245
Article 7, I:1411
Article 7.1, I:1409
Article 9, I:1247
Article 11, I:428, 1264–6, 1441
Article 12.1, I:1256
Article 12.7, I:1269, 1303
Article 13, I:349, 1260, 1441, 1451
Article 13.1, I:1263, 1442
Article 16.4, I:1296
Article 17, I:1320
Article 17.1, I:1303
Article 17.2, I:1286
Article 17.3, I:1285–6, 1307, 1441
Article 17.6, I:1300, 1320, 1391
Article 17.9, I:1451, 1396
Article 17.10, I:1309–11, 1398, 1446
Article 17:11, I:1401
Article 17:13, I:1302, 1394
Article 18, I:1255
Article 18.2, I:1311, 1446

Article 19.1, I:1350
Article 19.2, I:1421–3
Article 21, I:1364, 1414
Article 21.2, I:1360
Article 21.3, I:1348, 1351, 1360
Article 21.3(b), I:1358
Article 21.3(c), I:1355, 1359
Article 21.5, I:212, 1221, 1257, 1351, 1353, 1354
Article 22, I:1364, 1414
Article 22.2, I:1365
Article 22.4, I:1350
Article 22.6, I:1351–4
Article 23.1, I:1361
Article 24.1, I:1348
Article 25, I:1364
Article 25.4, I:1364
Article 26.1, I:172
implementation and enforcement of dispute settlement decisions and
DSU limitations, I:1353–64
DSU structure, I:1350–53
S&D treatment of developing countries, I:1555
technical assistance in Uruguay Round Agreements, II:466–7
trade and environment, II:518
distribution services, I:915, 927
Doha Declaration on the TRIPS Agreement and Public Health, I:1080, 1098, 1115; II:452–5; III:510–12
Doha Development Agenda, III:234
Anti-Dumping Agreement, I:528, 529
Colombia, III:85–8
computational analysis of trade liberalization II:34t
aggregate results, II:33
agricultural liberalization, II:32, 33
data, II:32
sectoral results, II:38t., II:40
Doha launch and US, III:426–32
Doha Ministerial Declaration (text), III:492–502
Doha Work Programme (August 2004) (text) III:523–4
Egypt issues, III:101–7
electronic commerce and, II:472
EU and, III:134–5
global free trade and, III:455–6
Implementation Issues and Concerns (text), III:503–9
Japan, III:178
agriculture, III:178
developing countries, III:179
issues, III:179
Mexico
Built-in Agenda, III:235
other issues, III:236
Singapore issues, III:235
UR Agreements implementation, III:235
New Zealand's multilateral liberalization concerns
agriculture, III:280–82
non-agricultural products, III:282
rules, III:283–5
services, III:283
sustainable development, III:285–6
postal and express delivery services in GATS, II:199
Services Recommendation of the Special Session for Trade in August 2004 (text), III:527
South Africa, III:371
TBT Agreement and, I:408
Doha Ministerial Declaration, I:62
antidumping action and, II:78, 79
competion policy and, II:501, 502
CVA implementation-related issues, I:569, 570
Financial Services and, I:978
national treatment and market access, I:979
nondiscriminatory structural barriers, I:980–84
new Agreement on Agriculture, I:217
domestic support provisions, I:220
EC proposal, I:218
export subsidies provisions, I:221
market access provisions, I:218, 219
US proposal, I:218
on geographical indications, I:1091, 1092
on SPS Agreement implementation, I:360, 361
text, III:492–502
domestic agricultural subsidies, Peace Clause and, I:214
domestic industrial tariffs issues, Egypt, III:107
domestic labor protection, II:584–7
domestic regulation, gender analysis of trade and, II:732–3
domestic support provisions. *See also* Agreement on Agriculture
Colombia, III:85
under Doha Development Agenda, I:226
EC proposal, I:220
US proposal, I:220
Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (DFA), I:7; III:412
DSB. *See* Dispute Settlement Body
DSU. *See* Dispute Settlement Understanding
Dunkel Draft. *See* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations
DV method. *See* deductive value

EC. *See* European Community
EC-Asbestos case
amicus curiae briefs, I:1400, 1437, 1444; II:644–5
human rights concerns, II:644–5, 688
nonviolation complaints experience under WTO Agreements, I:1379–82
TBT Agreement, I:377–8, 389, 393
applicability of, I:406
import prohibitions applicability aspects of, I:383
trade and environment, II:527–9, 539
WTO Dispute Settlement Practice Relating to Protection of Health and Environment, II:652
EC-Bananas III case, I:133; III:129
AILP and, I:595
Appellate Body and, I:1298, 1311, 1313, 1317
consultations and, I:1216, 1223
dispute settlement under TRIMs Agreement, I:460
DSU
Article 21.5, I:1353
Article 22.6, I:1353
Article 23.1 (incentives for unilateral sanctions), I:1362
decision implementation and enforcement, I:1350
disproportionate effect of retaliation, I:1363
relationship between TRIMs and GATT 1994, I:466

EC-Bananas III case (under GATS), I:878–84
Article II (*de facto* discrimination), scope of, I:882
EC licensing procedures
activity function rules, I:884
hurricane licenses, I:884
operator category rules, I:883
effective date of GATS obligations, I:879
GATS application, I:880–81
service suppliers, I:881–2
EC-Bed Linen case
ADA, I:507
Article 5.3, I:511
Appellate Body and, I:1313
textiles and developing countries, II:415
EC-Cotton Linen case
amicus curiae briefs admissibility consequences in, I:1444
EC-Hormones case, I:244, 1358; II:163; III:129
AB jurisdiction, I:1300, 1303, 1317, 1392
DSU
Article 21.3 (Reasonable Period of Time), I:1361
Article 22.2 (Emphasizing Compensation Over Retaliation), I:1366
environmental issues, II:151
GATT Jurisprudence exception, II:439
human rights concerns, II:648, 649
SPS Agreement and
Article 2, I:256, 260, 262
Article 3, I:267, 268, 270
Article 3.2, I:276
Article 3.3, I:276, 277
Article 5.7, I:298–301
dispute settlement aspects
Article 11.2, I:349
burden of proof, I:346, 348
standard of review, I:351–3
risk assessment concept, I:280, 282–4, 286–7
Article 5.1, I:288, 291, 294–6
Article 5.2, I:292
risk management concept, I:309
Article 5.4, I:310
Article 5.5, I:310–11, 313–15, 318–19
trade and environment, II:523
EC-Import Restrictions on Meat and Meat Products. See *EC-Hormones* case
EC Law and WTO Agreement
Article 133 EC, I:1464
Article 133 Committee, I:1519–20
GATS and, I:1471–2
TRIPS and, I:1472–4
Article 230 EC, I:1489
Article 232 EC, I:1484
common commercial policy, I:1464
competence and Community, I:1465
exclusive competence, I:1465–8
consequences of exclusive Community competence existence, I:1468
determining of (Opinion 2/91), I:1465
express power in internal measure (Opinion 1/94), I:1467
express Treaty provisions (Article 133 EC), I:1465
external powers complement internal powers (Opinion 1/76), I:1467
internal measures adopted by Community (ERTA principle), I:1466
express competence (common commercial policy), I:1464
Article 3(b) EC, I:1464
Article 131 EC, I:1464
Article 133 EC, I:1464
implied competence, I:1464, 1474–6
shared competence, I:1468
GATT 1947, community status under, I:1461
Community Law, I:1462
International Law, I:1462
Opinion 1/94 and WTO Agreement, I:1469
Article 133 and GATS, I:1471
Article 133 and TRIPS Agreement, I:1472–4
GATS and, I:1474
multilateral agreements on trade in goods, I:1470
TRIPS and, I:1475–6
Opinion 1/94, International Law and Responsibility, I:1476
areas within Community competence, I:1478–9
areas within Member state competence, I:1479–80
law and competence, I:1476–8
Opinion 2/91 (exclusive competence), I:1465
shared competence, I:1468–70
WTO Agreement, community status under
GATS, I:1463
TRIPS Agreement, I:1463
WTO and legal order of Community
"direct effect" and Community legal order, I:1481–4, 1487–98
FEDIOL Doctrine, I:1507
GATT 1947 and, I:1485–7
Nakajima Doctrine, I:1504–7
WTO consistent interpretation of EC legislation and measures, I:1498
WTO in EC legal system, procedural routes for invoking, I:1484
WTO obligations, EC conformity with, I:1499–1504
WTO obligations and EC complaints procedures for obligations enforcement, I:1507
Article 133 Committee, I:1519–20
"Market Access Strategy", I:1508
TBR (Council Regulation 3286/94), I:1508
permitted subject matter of TBR complaints, I:1509–13
post complaints procedure, I:1513
procedure outcome (termination, suspension or WTO dispute settlement), I:1514
scope of, I:1509
WTO proceedings initiation, I:1514
EC-Sardines case, I:396, 399–400
AB, I:1299, 1312, 1322, 1326
amicus curiae briefs admissibility consequences in, I:1438, 1447
TBT Agreement, I:377, 378
applicability of, I:406
retroactive application of, I:384
Economic Cooperation Organization (ECO), II:255
economic integration, under GATS, I:833–5
economic principles of international trade. *See* international trade, economic principles of
economic reform
deregulation, I:17
liberalization, I:16, 17
economies in transition. *See* transition economies
educational services, I:915, 928

EFTA. *See* European Free Trade Association
Egypt
  GATT accession aspects, III:93
  GATT/WTO Membership and Uruguay Round Agreements on, III:96
    economic effects, III:96–7
    legal effects, III:98
    political effects, III:97
    social effects, III:98
  issues in forthcoming negotiations (Doha), III:101
    agriculture negotiations, III:102
    domestic industrial tariffs, III:107
    electronic commerce, III:106
    labor standards, III:107
    services negotiations, III:103
    Singapore issues, III:104
    trade and competition policies, III:104
    trade and environment, III:106
    trade and investment, III:104
    trade facilitation, III:105
    transparency, III:106
    Uruguay Round Agreements implementation, III:101
    view toward a new round of negotiations, III:101
  RTAs effect on, III:108
  strategy for objectives accomplishment, III:108
  trade policy development, III:109
  Uruguay Round participation, III:93
    WTO establishment, work after, III:94
    WTO Ministerial Conferences participation, III:95
  WTO
    accession aspects, III:93
    attitude towards, III:98
    Membership effects on Egypt, III:96–8
    participation in WTO Dispute Settlement Process, III:99
    strengths and weaknesses, Egyptian perspective on, III:98–9
electronic commerce. *See also* Telecommunications Services
  Chinese issues, III:68
  classification issues (goods vs. services), II:472
    basic trade principles, II:475
    practical considerations, II:476
    theoretical principles, II:474
  Egyptian issues, III:106
  GATS issues, II:478
    classification issues, II:480
    e-commerce end-user services, II:479
    e-commerce infrastructure services, II:478
    new commitments, II:481
  GATT issues, II:476
    Customs Duty Moratorium, II:477
    Information Technology Agreement, II:477
  Geneva Declaration on (Text), III:491
  global free trade issues, III:453
  TRIPS issues, II:481
    taxation, II:484
    trade and development, II:483
  WTO history, II:470
    Basic Telecommunications Agreement, II:470
    Doha Round, II:472
    Seattle Ministerial, II:472
    Work Programme on Electronic Commerce, II:471
Endangered Species Act (US), Section 609 of, I:163
energy services, I:939–41
environmental issues, II:138. *See also* trade and environment
  background, II:139–149
  Bagwell-Staiger analysis, II:159, 160
  economic theory and empirical evidence, II:152
    economic growth and environment, II:154
    environmental externalities and economic policy, II:153
    trade agreements and environment, II:158
    trade and environment, II:155–8
  GATT and WTO, II:141
    multilateral environmental agreements conflicts, II:148
    national environmental protection restraints, II:145–8
  gender analysis of trade and, II:737
  GEO (Global Environmental Organization), II:167
  internalization versus polluter pays, II:164
  process and production methods, II:162–4
  "trade and environment" concept, II:142
    avenues for further research, II:158
    environmental policies as international competitiveness determinant, II:144–8
    green cover for protectionism, II:149
    trade as threat to environmental quality, II:143
    trade sanctions and eco-imperialism, II:148–9
    trade's impact with local pollutants, II:155–7
    trade's impact with transboundary pollutants, II:157
    WTO as self-enforcing agreement, II:160–61
    WTO rules to accommodate environmental safeguards, II:158–60
  UNEP (United Nations Environmental Programme), II:167
  Uruguay Round Agreements, II:149
    intellectual property, II:151
    services (GATS and GATT 1947), II:152
    standards (TBT and SPS), II:150
    subsidies (SCM), II:151
  WEO (World Environmental Organization), II:167
environmental services, I:915, 928–30
Equivalence and Mutual Recognition principle (under TBT Agreement), I:400–401
Equivalence Decision, I:331–3. *See also* Agreement on Application of Sanitary and Phytosanitary Measures
ERA. *See* Export Restraint Agreement
ERG. *See* Expert Review Group
ERTA principle, I:1466
European Community (EC)
  agriculture trade and, I:201, 202
  agriculture under GATT and
    Article XXIV of GATT, I:191
    CAP, I:191, 192
  export subsidy system, I:198, 199
  NAFTA and, I:807
    Cassis de Dijon case, I:808
    EC Treaty Article 43, I:808
    EC Treaty Article 49, I:808
    EC Treaty Article 50, I:808
    EC Treaty Article 52, I:809; II:317
    EC Treaty Article 58, I:809
    EC Treaty Article 73(b), II:317
    Säger case, I:808
  QUAD member, I:814–15
European Free Trade Association (EFTA), II:208

European Union (EU), III:112. *See also* Russia; United States
CAP, III:113, 119, 120, 124
competition policy negotiations, II:502
double density measures of trade intensity, II:18t
EU and MERCOSUR, regional trade negotiations between
background, III:22
differing negotiating goals and strategies, III:22
EU proposal, III:23–4
expansion and rules of origin, II:286
GATT
Article XIX, III:121
Article XXIV:6, III:112, 113
trade policy decision-making, III:113–15
Uruguay Round
European "overall approach", III:116–18
European results in, III:123–5
lessons from, III:127
origin of, III:115
Uruguay Round, decisive European factors in
agriculture pre-eminence, III:125
bilateralization of negotiations, III:125
time importance, III:126
Uruguay Round European issues
agriculture, III:118–20
developing countries, III:123
market access for goods, III:120
multilateral disciplines strengthening, III:118
services, III:121
TRIPS, TRIMs and restrictive business practices, III:122
WTO and
Doha, III:134–5
EU associations and enlargements in WTO, 131
one more Round, III:132–4
WTO Dispute Settlement, III:128–31
Excise Tax Act, *See Canada-Periodicals* case
exclusive competence. *See under* EC Law and WTO Agreement
Exhaustible Natural Resources conservation, I:162
exhaustion of rights under TRIPS Agreement, I:1069–77
Article 6 scope, I:1070–1
doctrine, I:1069
international exhaustion, I:1070
national exhaustion, I:1070
regional exhaustion, I:1070
Expert Review Group (ERG), I:1261–3
express competence. *See under* EC Law and WTO Agreement
export licensing, Mongolian sector, III:257
Export Restraint Agreement (ERA), II:47. *See also* Orderly Marketing Agreement; Voluntary Export Restraint
export subsidies, II:90, 91. *See also* Agreement on Subsidies and Countervailing Measures; import subsidies
Colombia, III:85
red light, II:99
export subsidies provisions (Agreement on Agriculture)
anti-circumvention provisions
Article 10, I:211
Article 11, I:211
developing countries provisions, I:215
dispute settlement, I:211
Article 3.3, I:213
Article 9.1(a), I:212
Article 9.1(b), I:212
Article 9.1(c), I:212–13
Article 9.1(d), I:213
Article 10.1, I:213
Doha Development Agenda
Cairns Group proposal, I:221
EC proposal, I:221
Peace Clause and, I:215
reduction commitments
Article 3.3, I:210
Article 8, I:210
Article 9.1, I:210
Article 9.2, I:211
express delivery services. *See* postal and express delivery services in GATS

FAIR (Federal Agricultural Improvement and Reform) Act of 1996 (US), II:118
fallback method of valuation (Method 6), I:561. *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
prohibited methods, I:562
requirements for applying, I:562
farm export subsidies, II:118
FATS. *See* Foreign Affiliates Trade in Services
FDI. *See* foreign direct investment
FEDIOL Doctrine, I:1507. *See also* Nakajima Doctrine
Financial Services, I:915, 931, 956
Annex on Financial Services, GATS
dispute settlement expertise, I:968
financial services definition and coverage, I:968
prudential carve-out, I:964–6
prudential measures recognition, I:966–8
banking services, I:974
commitments, I:969, 985
additional, I:976–977
national treatment and market access, I:971–5
Doha Round and beyond, I:978
national treatment and market access, I:979
nondiscriminatory structural barriers, I:980
"effective market access", I:982
prudential measures, I:983
regulatory transparency, I:981
GATS Framework Agreement, I:962
Annex on Financial Services, I:964–9, 987
liberalization of capital movements, I:962–4
insurance services, I:975
MFN exemptions, I:977–8
national treatment and market access (Doha Round), I:979
national treatment and market access commitments, I:971
commercial presence establishment (Mode 3), I:971
cross-border services (Modes 1 and 2), I:973
temporary presence of natural persons (Mode 4), I:975
Uruguay Round Negotiations, I:958
"Free-Rider" issue, I:959–60

Interim Agreement on, I:960
1997 Agreement, I:961
WTO accession impact on
China, III:64
Russia, III:299, 327, 328
FIRA. *See* Foreign Investment Review Act
FMS (flight management system), I:1190
FOGS Group and WTO institutional issues, I:55
Foreign Affiliates Trade in Services (FATS), I:825
foreign direct investment (FDI), I:18, 20, 439. *See also* global finance transactions; investment-related provisions
Argentina
concessions value in patents, impact on FDI and trade, III:11
services-related inflows of FDI and, III:15–16
in developing countries, I:1567–9
postal and express delivery services in GATS, II:198
RTA and developing countries, II:330–31
services liberalization and, II:190
stages
1950s, I:21
1985–1990 boom, I:21
early 1970s, I:21
mid-1980s, I:21
foreign exchange trading, I:19
Foreign Investment Review Act (FIRA)
GATT panel case, I:123
GATT Article III:4, I:444
GATT Article XI:1, I:444
GATT Article XVII:1(c), I:445
foreign labor protection
potential legal bases in GATT/WTO Law, II:587
US-Reformulated Gasoline case implications, II:587–9
Fourth Protocol commitments under GATS. *See also* Telecommunication Services
market access and national treatment commitments, I:998
Reference Paper on regulatory principles commitments, I:999
allocation and use of scarce resources, I:1010
assessment, I:1010–13
competitive safeguards, I:1003–1006
interconnection, I:1006–1008
legal nature, I:1000
licensing, I:1009
"major suppliers" regulation, I:1001
regulatory authority independence, I:1010
scope, I:1001
universal service, I:1008
residual importance of Annex on Telecommunications and, I:1013
Framework for Establishing Modalities in Agriculture (August 2004) (Text), III:518–23
Framework for Establishing Modalities in Market Access for non-agricultural products (August 2004) (Text), III:524–6
"Free-Rider" issue, Financial Services and, I:959–60
free trade areas (FTAs), I:172, 173, 175; II:9. *See also* customs unions; regional trade arrangements
Canada, III:43
Colombia, III:89
GATT Article XXIV, II:223, 224
Korea, III:208, 209, 210
Mexico, III:237
New Zealand, III:277
rules of origin, II:274–6, 280, 282
Singapore, III:347
Singapore-New Zealand, II:285
RTA and developing countries, II:329, 330
Free Trade Area of the Americas (FTAA), II:209; III:238
Argentina and, III:22
Canada, III:38
rules of origin and, II:285
Uruguay Round and Regionalism, II:303
"friends of the court" in WTO's dispute settlement mechanism, I:1429. *See also amicus curiae* briefs and dispute settlement

GAFTA. *See* Greater Arab Free Trade Agreement
GATS. *See* General Agreement on Trade in Services
GATT. *See* General Agreement on Tariffs and Trade
GATT 1947. *See* General Agreement on Tariffs and Trade 1947
GATT 1994. *See* General Agreement on Tariffs and Trade
gender analysis. *See* trade and gender
General Agreement on Tariffs and Trade (GATT)
accession aspects
Egypt, III:93
Japan, III:172
Korea, III:185
Mexico, III:217–27
Russian, III:289–91, 321–331
Singapore, III:336–7, 341
anti-dumping action under, II:69–72, 74, 78
Argentina role in international trade and, III:5–6
Article I [Unconditional Most-Favored-Nation Obligation], I:99, 100
Article I:1, I:102
conditional vs. unconditional MFN treatment, I:101–2
"like products" definition, I:103–5
MFN antecedents, I:101
MFN commitments (additional), I:105
overview of, I:102
Article II [Tariff Bindings]
Article II:1(a), I:107
Article II:3 [valuation of imports], I:111
Article II:4 [import monopolies], I:112
Marrakesh Protocol, I:112–14
other duties or charges
Article II:1(b), I:111
Article II:2 [other duties or charges], I:111
tariff classification
Article II:1, I:112
Article II:5, I:112
tariff modification and withdrawal, I:109–10
tariff negotiations, I:108–9
Article III [National Treatment Obligation], I:114, 375
additional commitments, I:124–5
Article III:1, I:115, 116, 120
Article III:2, I:116
first sentence, I:117
internal taxes and other charges, I:116
second sentence, I:120–22

General Agreement on Tariffs and Trade (*cont.*)
Article III:4, I:374
internal regulations affecting imports, I:122–4
"like product" determination, I:118–19
internal regulations affecting imports
Article III:4, I:122–5
Article III:5, I:125
national treatment exceptions, I:125–7
Article III:8(a), I:125
Article III:8(b), I:126
Article III:10, I:127
Article IV [Cinematograph Films], I:753–54
Article V [Freedom of Transit]
Article V:2, I:140
Article V:5, I:140
Article V:6, I:106, 140
Article VI [Antidumping and Countervailing Duties], I:140, 142, 1550
Article VI:1, I:141
Article VI:2, I:141
Article VI:3, I:141
Article VII [Customs Valuation], I:172, 1554
actual value, definition, I:537–8
Article VII:2(a), I:142, 537
Article VII:2(b), I:142, 538
Article VII:2(c), I:538
Article VII:3, I:538
Article VII:5 [transparency], I:538
implementation and CVA, I:538
relationship with CVA, I:541–2
Article VIII [Fees and Formalities Connected with Importation]
Article VIII:1(a), I:143
Article VIII:1(c), I:143
Article VIII:3, I:143
Article IX [Marks of Origin]
Article IX:1, I:106, 144
Article IX:2, I:144, 145
Article IX:3, I:144
Article IX:4, I:144
Article IX:5, I:145
Article IX:6, I:145
Article X [Publication and Administration of Trade Regulations], I:134
Article X:1, I:136
Article X:2, I:135
Article X:3, I:136
Article XI [Elimination of Quotas], I:127
allocation of quotas, I:132
balance-of-payments exception, I:131
exception for agricultural products
Article XI:1, I:128–30
Article XI:2, I:129
Article XI:2(b), I:129
Article XI:2(c), I:129–31
Article XII [Balance-of-Payments Exception], I:131–2
Article XIII [Administration of Quantitative Restrictions]
Articles XIII:1, I:106
Article XIII:2, I:132–3
Article XIII:3, I:134
Article XIII:4, I:134
Article XIV [Exchange Controls and Exchange Arrangements], I:146
Article XIV:1, I:147
Article XIV:2, I:147
Article XV [Exchange Controls and Exchange Arrangements], I:146
Article XV:4, I:147
Article XV:5, I:147
Article XVI [Subsidies], I:148
Article XVII [State Trading Enterprises], I:148
Articles XVII:1, I:106
Article XVII:1(a), I:149
Article XVII:1(b), I:149
Article XVII:1(c), I:149
Article XVII:2, I:150
Article XVIII, I:106
balance-of-payments restrictions (Article XVII1:B), I:65, 84, 131
governmental assistance to economic development, I:180
Article XIX [Emergency Action on Imports of Particular Products] of GATT 1994, I:151–3
Article XX [General Exceptions], I:106
Article XX(b) [Measures Necessary to Protect Human, Animal or Plant Life or Health], I:154, 157–9, 236, 237, 251, 252, 253, 375
Article XX(d) [Measures Against Deceptive Practices and to Protect Intellectual Property], I:160–62
Article XX(g) [Measures to Conserve Exhaustible Natural Resources], I:162–5, 375
chapeau (Preamble), I:155–6
other exceptions, I:165
public morals exception, I:157
Article XXI [Security Exceptions], I:1572–8
Article XXI(b)(iii), I:166, 167
Article XXI(c), I:168
Article XXII [Consultation], I:169, 1200–1202
Article XXIII [Nullification or Impairment]
Article XXIII.1, I:169
Article XXIII:1(a) [violation complaints], I:127, 170
Article XXIII:1(b) [nonviolation complaints], I:126, 170–71, 1379–82
Article XXIII:1(c) [situation complaints], I:172
Article XXIII.2, I:170
Article XXIV
Article XXIV:4, I:176
Article XXIV:6, I:177–8
Article XXIV:8, I:172
Article XXIV:12, I:126
RTA establishing criteria, I:172–4
Uruguay Round understanding on, I:176–8
Article XXVIII
Article XXVIII:1, I:111
Article XXVIII:2(a) *bis*, I:109
Article XXVIII:4, I:110
Article XXIX, I:91, 92n.
Article XXX:2, I:70
Article XXXV, I:78, 79, 179
Articles XXXVI–XXXVIII [Trade and Development], I:181
balance-of-payments
Article XII, I:131–2
Article XVII1:B, I:65, 84, 131
Canada, III:30–35
centrally planned economies and, II:248
Colombia participation in
economic effects of, III:82–3

post Tokyo Round period, III:76–7
Tokyo Round, III:74–6
UNCTAD III, III:74
competition policy and, II:494–7
customs unions and FTAs, I:172
Article XXIV, I:172, 176
RTA types, I:175
Customs Valuation and Agreement, I:534
dispute settlement, I:168
Article XXII [Consultation], I:169
Article XXIII [Nullification or Impairment], I:169
EC Law
Community legal order under GATT, I:1485–7
Community status under GATT, I:1461–2
electronic commerce issues, II:476
Customs Duty Moratorium, II:477
Information Technology Agreement, II:477
environmental issues, II:141
Article III, II:160
Article XX, II:146, 149, 150
conflicts with multilateral environmental agreements, II:148
restraints on national environmental protection, II:145–8
exceptions
See Article XX [General Exceptions]
See Article XXI [Security Exceptions]
future aspects of, I:182–184
GATT 1947, Textile trade regulations under
Long-Term Arrangement (LTA), I:413
Multi-Fiber Arrangement (MFA), I:414
Short-Term Arrangement (STA), I:413
transition to GATT 1994, I:96
gender analysis of, II:717–19
Article XVIII, II:718
Article XX, II:719
human rights and trade
Article III, II:653–4
Article XX, II:651–3, 677, 680, 681
Indonesia and, III:146, 152
institutional inadequacies and
ICITO, I:54
ITO, I:53
pragmatic adaptation and its limitations, I:54
institutional provisions under, I:178–180
integration of products (under ATC) into, I:420
jurisprudence exceptions and TRIPS Agreement, II:438–40
Korea and, III:187
Beef Panel, III:191
BOP consultations, III:189
Multifiber Arrangement, III:187
Tokyo Round, III:188
labor in GATT practice, II:576
adjudication without law, II:584
Article XIII, II:185, 186
Article XVI, II:185
Article XX, II:185
contracting parties proposals, II:581
domestic labor protection, II:584–7
foreign labor protection, II:587
Marrakesh Protocol to, I:112–114
MFN commitments (additional)
Article III:7, I:106
Article IV(b), I:106
Article V:5, I:106
Article V:6, I:106
Article IX:1, I:106
Article XIII:1, I:106
Article XVII:1, I:106
Article XX, I:106
MTN rounds, I:92, 93
Tokyo Rounds, I:94
Uruguay Round, I:95
multilateralism, I:94
non-violation complaints experience under, I:1374–82
non-violation nullification or impairment of benefit and tariff classification, Article XXIII:1:(b), I:1597
plurilateralism, I:94
RTA regulation aspects (Article XXIV), II:222–8, 303
Agreement on Safeguards, II:238
Argentina-Footwear case, II:238–9
Canada-Certain Measures Affecting Automotive Industry case, II:237–8
Turkey-Textiles case, II:235–7, 240
rules of origin in, II:264–73
safeguard measures (Article XIX), I:755
compensation and retaliation, I:760
increased imports, I:757
most-favored nation treatment, I:758
preferential arrangements, I:758
procedural requirements, I:759
unforeseen developments and tariff concessions effect, I:757
SCM and, II:95
agricultural subsidies (Article XVI), II:97
Article II:2(b), II:93
Article III:8(b), II:93
Article XVI, II:93, 94
S&D treatment of developing countries
Article XVIII, I:1531
Preamble, I:1532
Section A, I:1533
Section B, I:1533
Section C, I:1534
Section D, I:1535
Part IV of GATT
Article XXXVI, I:1536
Article XXXVII, I:1537
Article XXXVIII, I:1537
services liberalization and economic development, II:191–6
special provisions for developing countries (Article XVIII), I:180
SPS measures
Article III, I:236
Article XI, I:236, 237
Article XX(b), I:236, 237
inefficiency of GATT 1947 rules, I:238
Subsidies Code (1979), I:682–3
Subsidy Discipline (1947), I:681
summary and appraisal aspects of, I:182
textiles and developing countries
MFA comparison with GATT, II:398
MFA objectives and impact, II:399–401
Short-Term and Long-Term Arrangements, II:391–5

General Agreement on Tariffs and Trade (*cont.*)
trade and culture concerns under
Article I.1-Most Favored Nation, II:756
Article III-National Treatment, II:756–60
Article IV-Cinematographic Films, II:753–5
Article XI-Quotas, II:760
Article XX(f)-Exception for National Treasures, II:755–6
trade and environment, II:514
US and
leadership in GATT formation, III:382–3
Tokyo Round (1947–1979), III:389, 392–6
violation claims and tariff classification
Article I:1, I:1592–4
Article II:1, I:1594
Customs Valuation Agreement and, I:534
General Agreement on Trade in Services (GATS), I:802. *See also* services; services in RTAs
Annex on Financial Services, I:964–9, 987
Annex on Telecommunications, I:996, 1013
background, I:803
Built-in Agenda, I:893
Article X [Emergency Safeguard Measures], I:902–4
Article XIII [Government Procurement in Services], I:904
Article XV [Subsidies], I:905
domestic regulation, I:900
regulatory disciplines legal form, I:901
sectoral vs. horizontal disciplines, I:901
emergency safeguards, government procurement and subsidies, I:902
implementation issues, I:911
outstanding issues, I:897
autonomous liberalization, I:897–900
Trade in Services assessment, I:897
sectoral and other annexes, I:906
Annex on Air Transport Services, I:909–10
Annex on Article II Exemptions, I:906–8
Annex on Movement of Natural Persons, I:908–9
Annex on Tourism, I:910
special negotiating sessions, I:894
outstanding issues, I:897
overview, I:894
progressive liberalization and current negotiations, I:896
China and, III:65
classification issues, I:913
cluster and checklist approaches, I:920–21
Committee on Specific Commitments (CSC), I:919
overview, I:918
specific commitments scheduling guidelines, I:919
W/120 classification, I:921–41
competition policy and, II:500
dispute settlement cases, I:874
Canada-Certain Measures Affecting Automotive Industry case, I:884–90
Canada-Periodicals case, I:875–8
EC-Bananas III case, I:878–84
Japan-Photographic Film and Paper (Kodak-Fuji) case, I:890–91
Mexico-Telecommunications Services case, I:891–3
domestic regulation mandate implementation
accountancy disciplines, I:943–4
MRA Guidelines, I:942
Working Party on Domestic Regulation, I:944
Working Party on Professional Services, I:942
EC Law and
Article 133 EC, I:1471
implied competence under, I:1474
electronic commerce issues, II:478
classification issues, II:480
e-commerce end-user services, II:479
e-commerce infrastructure services, II:478
new commitments, II:481
environmental issues, II:152
Framework Agreement (Annex on Financial Services), I:962, 964–9
dispute settlement expertise, I:968
Financial Services definition and coverage, I:968
prudential carve-out, I:964–6
prudential measures recognition, I:966–8
GATT and, I:821
gender analysis of, II:726–9
history and development of, I:803
GATT, I:803
international and national fora, I:805
ICC, I:806
UNCTAD, I:806
regional approaches to regulation
EC, I:807
NAFTA, I:809
investment-related provisions in, II:314
liberalization under, I:820–21. *See also* Part IV. Progressive Liberalization *infra*
Mexico, III:231
Part I. Scope and Definition (Article I), I:822
definition, I:822
scope, I:822
modes of supply
commercial presence, I:825
consumption abroad, I:824
cross border, I:823
presence of natural persons, I:826
Part II. General Obligations, I:826
Article II [Most-Favored Nation (MFN) Treatment], I:827
Article II:1 [basic rule], I:827–9
Article II:2 [MFN exemption], I:829–31
Article II:3 [contiguous frontier zones], I:831–2
Article III [Transparency], I:831
Article III:1, I:831
Article III:3, I:831
Article III:4, I:832
Article III:5, I:832
Article III *bis*, I:832
Article IV [Increasing Participation of Developing Countries], I:832–3, 1555
Article V [Economic Integration], I:833
developing countries, I:835
elimination of discriminatory measures (Article V:1 and V:2), I:834
exemption (Article V:6), I:833
notification and examination (Article V:7), I:834
substantial coverage (Article V:1), I:833
trade creation (Article V:4), I:835
Article V *bis* [Labor Markets Integration Agreements], I:835

Article VI [Domestic Regulation], I:836
conditional obligations (Article VI:1, VI:3 and VI:6), I:837
domestic regulation mandate implementation (Article VI:4), I:839
mandated development of regulatory disciplines (Article VI:4), I:837–8
period pending regulatory disciplines development (Article VI:4 and VI:5), I:838–9
unconditional obligations (Article VI:2 and VI:4), I:836
Article VII [Recognition], I:839–40
Article VIII [Monopolies and Exclusive Service Supplies], I:841
Article IX [Business Practices], I:841
Article XI [Payments and Transfers], I:841
Article XII [Restrictions to Safeguard Balance of Payments], I:842
Article XIV [General Exceptions], I:843–5
Article XIV *bis* [Security Exceptions], I:845–6
Part III. Specific Commitments
Article XVI [Market Access] 846
Article XVI:2, I:847
market access and national treatment, relationship between, I:847–9
overview, I:846
Article XVII [National Treatment], I:849
"like services and service suppliers", I:851–2
national treatment and modes of supply, I:849–51
overview, I:849
Article XVIII [Additional Commitments], I:853
Part IV. Progressive Liberalization
Article XIX [Negotiation of Specific Commitments], I:854
Article XX [Scheduling of Commitments], I:854–64
horizontal commitments, I:856
overview, I:854–6
sectoral commitments, I:856
Article XXI [Modification of Schedules], I:865
Services Classification, I:864
Part V. Institutional Arrangements, I:865
Dispute Settlement Procedures (Article XXII and XXIII), I:866
Article XXII [Consultations], I:866
Article XXIII [Dispute Settlement and Enforcement], I:867–8
GATS, I:866
Specific Service Sectors, I:868–9
Article XXIV [Council for Trade in Services], I:870
Article XXIV:1, I:870
Article XXIV:2, I:871
Article XXV [Technical Cooperation], I:872
Article XXVI [Relationship with Other International Organizations] 872
Part VI. Final Provisions, I:873
Article XXVII [Denial of Benefits], I:873
Article XXIX [Annexes], I:874
postal and express delivery services in, II:196–200
RTAs and
Article V, II:302, 303
ceiling binding commitment, II:299
challenges in, II:300, 301
impact evaluation, II:305
liberalizing principles, II:296
rules of origin and, II:286–7
Russia and, III:298
SCM measures and, II:98
S&D treatment of developing countries (Article IV), I:1555
technical assistance in Uruguay Round Agreements, II:465
trade and culture, II:767, 775–7
trade and environment, II:517
Uruguay Round
goals, I:811
developing countries, I:817
QUAD Members, I:812
negotiations course, I:818–20
results overview, I:820
General Council (WTO governance structure), I:63, 64
Generalized System of Preferences (GSP), I:1538. *See also* special and differential treatment of developing countries
discriminatory preferences problem, I:1540
human rights and trade under, II:680
origin of, I:1539
rules of origin and, II:266
ten-year waiver, I:1539
Tokyo Round Enabling Clause
background, I:1541
problem of graduation, I:1544–6
terms of, I:1542
genetically modified organisms (GMO), II:122, 123, 151, 550
Geneva Ministerial Conference (1998), I:61
Global Electronic Commerce Declaration on (Text), III:491
Ministerial Declaration (Text), III:488–90
Geneva three-pronged approach and TRTCCB, II:462–4
ITC, II:463
UNCTAD, II:463
WTO, II:462
GEO. *See* Global Environmental Organization
geographical indications (under TRIPS), I:1088–91
Article 22, I:1088
Article 22.2, I:145
Article 22.3, I:145
Article 23
Article 23.1, I:146
Article 23.2, I:146
Article 23:4, I:1089
Article 24
Article 24:1, I:1089
Article 24:4, I:1089
Article 24:7, I:1089
Doha Declaration, I:1089, 1090
negotiating history, I:1088
Germany v. Council, EC Law and WTO Agreement, I:1486
GILS. *See* grossly inadequate labor standards
GIR 2(a), I:643, 644. *See also* Harmonization Work Programme
global economic policymaking functions of WTO, I:59
Global Environmental Organization (GEO), II:167
global financial transactions, I:18–20. *See also* foreign direct investment

global free trade
Doha Development Agenda, III:455–6
institutional issues (dispute settlement), III:453–55
market access
agriculture, III:442–5
services, III:445–7
tariffs, III:440–42
rules
anti-dumping and subsidies/countervailing measures, III:447–9
electronic commerce, III:453
non-discrimination, III:451–3
trade and competition, III:450
trade and environment, III:451
trade and investment, III:449
services in RTA and
compatibility, II:309
incentives, II:307
overlapping fora, II:308
Global System of Trade Preferences (GSTP), III:109
Global Trade Analysis Project (GTAP), II:114, 116
globalization. *See also* liberalization
1990s, III:469–72
Chinese enterprises encouragement for, III:67
corporation role, III:461–3
impact on trade and labor, II:575
impact on trade policy, I:22, 33–4
NGOs and WTO, III:463–9
trade and culture issues, II:750, 751
Uruguay Round negotiation and, I:23–4; III:458–61
FDI, I:20, 21, 22
global financial transactions, I:18–20
GMO. *See* genetically modified organisms
government bodies (under TBT Agreement)
central government bodies (Articles 5 and 6), I:387
local government bodies (Article 7), I:387
non government bodies (Article 8), I:387
Government Procurement. *See* Agreement on Government Procurement
GPA. *See* Agreement on Government Procurement
gravity model estimations, II:17, 22t
gray-area measures, I:763. *See also* safeguard measures
elimination of, I:780
prohibition of, I:792
Greater Arab Free Trade Agreement (GAFTA), II:211; III:108
Green Box Exemptions (under Agreement on Agriculture), I:209, 220, 221. *See also* Blue Box Exemptions
green light subsidies (ASCM), I:704–6; II:97, 101. *See also* red light subsidies; yellow light subsidies
grossly inadequate labor standards (GILS)
and international competitive position, II:179–81
efficiency in world production, II:177
promote unfair trade, II:177
Group of Three, Colombia, III:89
GSP. *See* Generalized System of Preferences
GSTP. *See* Global System of Trade Preferences
GTAP. *See* Global Trade Analysis Project
Guidelines for Mutual Recognition Agreements or Arrangements in the Accounting Sector (GATS), I:942

Haberler Report, I:192, 193. *See also* agriculture under GATT
harmonization of non-preferential rules of origin, II:270–3
harmonization principle (under TBT Agreement), I:395
Codex Standard 94, I:396–8
ineffective or inappropriate means, I:398–9
rebuttable presumption favoring, I:399–400
Harmonization Work Programme (HWP) (Rules of Origin), I:614
CRO (after June 1999), I:618, 619
product-specific rules of origin (Appendix 2)
agricultural products (HS Chapters 1 to 24), I:654–5
machinery, transport equipment and photocopying apparatus (HS Chapters 84 to 90), I:656–7
textiles and textile articles (HS Chapters 50 to 63), I:655
Technical Committee on Rules of Origin (TCRO) (July 1995—May 1999), I:615, 616
second examination, I:618
working method, I:616–18
wholly-obtained goods (Appendix 1)
CRO definition, I:651
goods obtained outside country, definition of, I:652–3
preparatory discussion, I:648
TCRO definition, I:649–51
harmonized non-preferential rules of origin architecture
Appendix 1 (wholly-obtained goods), I:622
CRO definition, I:651
goods obtained outside country, definition of, I:652–3
preparatory discussion, I:648
TCRO definition, I:649–51
Appendix 2 rules, I:636
product-specific rules of origin, I:654–6
Rule 4 [intermediate materials], I:637
Rule 6 (putting up in sets [or kits]), I:646–7
Rule 7 [de minimis], I:638
residual rules, I:628–30
Appendix 3 (minimal operations or processes), I:622
background, I:619
basic framework, I:625
country of origin, I:626
disassembly of goods into parts/components
negative rule for disassembly, I:641
origin of disassembled (used) parts/components, I:641–2
General Rules, I:621, 622
General Rule 2, I:639
General Rule 2(a)
assembly of collection of parts, I:644
collection of parts, I:643–4
items presented unassembled or disassembled, I:643
simple assembly issue, I:643
General Rule 3 [Determination of Origin], I:636
General Rule 4 [Neutral Elements], I:636
General Rule 5 [Packing and packaging materials and containers], I:644–5
General Rule 6 [Accessories and spare parts and tools], I:645
issues related to
Article 6.3 of ARO, I:640
harmonized system related issues, I:639
Meech Lake recommendations, I:624
minimal operations or processes
CRO negotiations (after June 1999), I:635

discussions at TCRO's first and second sessions, I:634
origin-conferring rules, relationship with, I:635
placement of, I:634
mixture rules, I:647
multiple country of origin, I:627, 628
Ottawa language, I:623–4
primary rules, I:625–6, 628, 631
residual rules, I:621, 625–6
essential character criterion, I:629–30
Rule 2 (May 1999), Appendix 2, I:630–31
Rule 2 (as of June 2002), I:632
Rule 3 (as of June 2002), I:632–3
Rule 5, I:633
substantial transformation and, I:633
rules for mixtures, I:647
tracing-back approach, I:626–7
harmonized system classification
conversion of GATT tariff schedules to, I:1589–90
nature and purpose of, I:1582–3
harmonized system, Mongolian, III:257
Havana Charter, I:91, 92, 189, 190; II:600
Havana Conference, III:217
health related and social services, I:916, 932
Helms-Burton Act (US), I:167, 1577–8
High Level Meeting
LDCs in multilateral trading system, II:348
hub and spoke systems and rules of preference ("Spaghetti Bowl" Problem), II:283
human rights and trade, II:625, 664
balancing of human rights, II:637, 667
balancing principles relevance for WTO Rules interpretation, II:637–8
legal consequences of human rights approach to international trade, II:638–41
necessity principles, II:637
non-discrimination, II:637
rule of law, II:637
challenge, II:664
institutional identity, II:666
navigating among rival political philosophies, II:665
cosmopolitan democracy and, II:682
adjustment between trade and non-trade interests, II:689–91
balance approaching between trade and non-trade interests, II:685–9
collateralism problem, II:683
cosmopolitan democracy, political impartiality, and WTO, II:691–4
factoring in trading interests, II:691
impartial order for trade relations, II:684
EU Treaty Article 6, II:635
GATS, II:678
GATT, II:677, 678, 681
Article III, II:653–4
Article XX(b), II:688
Article XX, II:638, 639, 651–3, 680
gender analysis, II:736–7
human right to health, II:641
human right to health and access to medicines, II:645
trade-related aspects of right to health (General Comment No. 14), II:645–7
WTO practice on access to medicines, II:647–8
human rights as constitutional restraints on WTO bodies power, II:642
due process of WTO (*Amicus Curiae* Briefs), II:643–5
judicial deference vis-a-vis democratic legislation (*Hormone Beef* dispute), II:648–50
substantive restraints (human right to health and access to medicines), II:645–8
human rights functions of WTO Rules, II:650
WTO guarantees of freedom, non-discriminatory conditions of competition, necessity and proportionality, II:650–55
WTO guarantees of property rights (disputes over TRIMs and TRIPS), II:656–7
WTO legal restraints on discrimination and trade sanctions for political ends, II:657–9
human rights obligations of WTO members, II:628
constitutional primacy of human rights in International Law, II:633
diversity of national and international human rights implementation, II:632
human rights as institutional and constitutional guarantees, II:641–2
indivisibility and incomplete enumeration of specific human rights, II:634–6
limited WTO jurisdiction and customary International Law Rules for WTO Law interpretation, II:629–32
obligations by governments and intergovernmental organizations to respect, protect and promote human rights, II:636
principles for mutual balancing of human rights, II:637–41
ICCPR, II:666, 685
ICESCR, II:628, 666, 670, 675, 676, 691
Article 2, II:646
Article 4, II:637
selecting and balancing basic rights, II:667
Stockholm Declaration, II:626
TRIPS Agreement, II:675, 676, 678
Article 27, II:691
UDHR, II:626, 637
under GSP, II:680
Vienna Declaration on Human Rights, II:628
WTO Constitution future (explicit recognition of human rights so as to better protect social welfare and democratic governance in WTO)
explicit recognition to promote social welfare and democratic governance in trade policy area, II:660–61
formal and substantive "multi-level constitutionalism" in WTO Law, II:659–60
WTO guarantees of freedom, non-discriminatory conditions of competition, necessity and proportionality, II:650
balancing of economic and non-economic values in WTO dispute settlement practice relating to GATT Article III, II:653–4
dispute settlement practice relating to health and environment protection (GATT Article XX), II:651–3
dispute settlement practice relating to SPS Agreement, II:654–5
WTO Law interpretation
Article II:1, II:629

human rights and trade (*cont*.)
Article III:1, II:629
Article III:2, II:629
Article V:1, II:629
WTO practice on access to medicines
SPS Agreement, II:649
TRIPS Agreement, II:647, 648
WTO's objectives linking to human rights, II:668
embedded and imported rights, II:669–70
human rights and trade with developing countries, II:679–82
market integration types, II:674
negative integration aspects, II:676–9
positive integration aspects, II:674–6
techniques of interpretation (functional versus civic inclusion), II:672–4
techniques of interpretation (institutional purpose and founders' intentions), II:671
HWP. *See* Harmonization Work Programme

IAA. *See* International Agreement on Anti-dumping
ICCPR. *See* International Covenant on Civil and Property Rights
ICESCR. *See* International Covenant on Economic, Social and Cultural Rights
ICFTU. *See* International Confederation of Free Trade Unions
ICITO. *See* Interim Commission for International Trade Organization
ICN. *See* International Competition Network
ICPAC. *See* International Competition Policy Advisory Committee
ICT. *See* information and communication technologies
identical goods. *See also* Agreement on Implementation of Article VII of the General Agreement on tariff and Trade 1994; similar goods
definition, I:556
requirements for qualifying as, I:557
IF. *See* Integrated Framework for LDCs
IFIA. *See* International Federation of Inspection Agencies
IGO. *See* intergovernmental organizations
ILO. *See* International Labor Organization
IMF. *See* International Monetary Fund
implied competence. *See under* EC Law and WTO Agreement
import licensing
automatic licensing, I:592, 597
Mexico, III:230
Mongolia, III:257
non-automatic licensing, I:592, 597
Import Licensing Procedures Agreement. *See* Agreement on Import Licensing Procedures
import prohibitions applicability, TBT Agreement (Annex 1), I:383. *See also under* General Agreement on Tariffs and Trade
import risk analyses (IRA), I:297
import subsidies, II:92, 93. *See also* export subsidies
import substitution industrialization (ISI), I:16
importers' rights (under CVA), I:564
right to appeal (Article 11), I:565
right to have goods released (Article 13), I:565
right to request written explanations (Article 16), I:565
imports
internal regulations affecting, I:122
valuation of, I:111
India-Autos case
dispute settlement under TRIMs Agreement, I:464, 465
relationship between TRIMs and GATT 1994, I:468
India-Patent Protection for Pharmaceutical and Agricultural Chemical Products
consultation and dispute settlement, I:1205, 1217, 1218, 1225
under TRIPS Agreement, I:1065
relationship with GATT, II:428
TRIPS interpretation, II:429, 430, 434
Indonesia, III:139
ASEAN and, III:162
changing trade pattern and structure, III:142, 143t, III:144t, III:147t
commodity power (oil and primary commodities), III:142
diversified export base, III:146
post-oil boom, III:143–6
future prospects
nurturing system in 21st century, III:168
proactive participation in multilateral system, III:164
systemic issues (multilateral system integrity), III:165
GATT
Article XI, III:141
Article XVIII, III:152
Article XIX, III:152
Article XX, III:141
GATT/WTO interface and decision-making mechanism, III:146
issues (Multilateral Round), III:154
competition policy, III:157
existing obligations (implementation issues), III:156
investment, III:157
linkage between trade, investment and competition policy, III:158
NGOs emergence, III:155
non-economic issues, III:159
S&D treatment, revisiting of, III:161
technical and trade facilitation rules, III:159
issues (Uruguay Round)
institutional issues, III:153
intellectual property rights, III:151
market access in goods, III:149
S&D treatment, III:153
services, III:150
strengthening GATT rules, III:152
multilateral trading system and (historical perspective), III:140–42
multilateralism versus regionalism, III:162–4
Indonesia-Autos case
human rights and trade, II:657
investment measures, I:470, 471
trade and culture concerns, II:763
TRIMs
dispute settlement under, I:461, 462
measure, I:470
relationship with GATT 1994, I:466
relationship with SCM Agreement, I:469
industrial designs, I:1091
Article 25 of TRIPS Agreement, I:1091
negotiating history, I:1091
industrial goods, Mexico, III:228
industry, Russian WTO accession impact on, III:323–5

information and communication technologies, (ICT) II:356
Information Technology Agreement (ITA), II:477
  text, III:483–7
injury
  under ADA and ASCM
    causation
      Article 3.5 ADA, I:743
      Article 15.5 ASCM, I:743
    cumulation
      Article 3.3 ADA, I:740
      Article 15.3 ASCM, I:740
    domestic industry
      Article 3.6 ADA, I:745
      Article 15.6 ASCM, I:745
    evaluation of economic factors
      Article 3.4 ADA, I:742
      Article 15.4 ASCM, I:742
    in regional markets, I:748
    objective examination of positive evidence
      Article 3.1 ADA, I:737
      Article 15.1 ASCM, I:737
    special care in threat cases
      Article 3.8 ADA, I:747
      Article 15.8 ASCM, I:747
    threat of injury
      Article 3.7 ADA, I:746
      Article 15.7 ASCM, I:746
  under Agreement on Safeguards (Article 4)
    causation, I:772
    determination of serious injury, I:771
    factors to be considered, I:771
    threat of injury, I:772
  volume and effect of imports
    Article 3.2 ADA, I:739
    Article 15.2 ASCM, I:739
institutional framework. *See* World trade organization institutional framework
instrumental values, II:610. *See also* values in trade and labor
insurance, Russian WTO accession impact on, III:299, 328
insurance services, national treatment and market access commitments, I:975, 987
Integrated Framework (IF) for Least Developed Countries, II:365
  clarify policy objectives, II:366
  coordination issues, II:366
  funding of, II:366
  strengthening governance and administration, II:366
Integrated Negotiation Text (INT), I:619
integration. *See also* globalization
  backloading textile integration issues, I:430, 431
  trade and human rights
    negative integration aspects, II:676–9
    positive integration aspects, II:674–6
intellectual property (IP). *See also under* Agreement on Trade-Related Aspects of Intellectual Property Rights
  as international system, I:1047–50
  from tariffs to, I:1052–5
  functions, I:1046
  gender analysis of trade and, II:729–32
  IPR issues
    Argentina (patents for pharmaceutical drugs), III:7–12
    Colombia, III:86
    Egypt, III:97
    Indonesia, III:151
    Japan, III:175
    Mexico, III:235
    Mongolia, III:258
    Russia, III:307
  protection and trade link prior to TRIPS Agreement, I:1050–1
  trade and environment issues, II:555–8
intellectual property rights. *See* Agreement on Trade-Related Aspects of Intellectual Property
intergovernmental organizations (IGO), relations with WTO, I:72
Interim Commission for International Trade Organization (ICITO), I:54. *See also* International Trade Organization
International Agreement on Anti-dumping (IAA), I:494–6
International Competition Network (ICN), II:506
International Competition Policy Advisory Committee (ICPAC), II:505
International Confederation of Free Trade Unions (ICFTU), II:593, 594
International Covenant on Civil and Property Rights (ICCPR), II:666, 685
International Covenant on Economic, Social and Cultural Rights (ICESR), II:628, 666, 670, 675, 676, 691
International Federation of Inspection Agencies (IFIA)
  appeal procedures provisions
    appeals (Section 2.21.2), I:589–90
    complaints (Section 2.21.1), I:589
  confidential business information protection provisions
    office security (Section 2.10.2), I:589
    specific assurances (Section 2.10.3), I:589
    Staff Non-Disclosure Agreement (Section 2.10.1), I:589
International Fruit case
  EC, I:1486
  EC Law and WTO, I:1485
International Labor Organization (ILO), II:173, 576. *See also* labor and trade; labor standards
  gender analysis of, II:734, 735
international law and WTO. *See under* WTO law
International law, constitutional primacy of human rights in, II:633
International Monetary Fund (IMF), I:53
GATT and, I:146
International Office of Epizootics (IOE), I:269, 271, 335
International Plant Protection Convention (IPPC), I:269, 272, 335
International Telecommunications Union (ITU), WTO and, I:1031
international trade and competition law (anti-dumping action), II:72–7
international trade, economic principles of, II:4. *See also* human rights and trade; labor and trade; trade and culture; trade and environment; trade and gender
  empirical examples, II:14
    "double-density" measures of trade intensities, II:15
    econometric gravity approach example, II:17, 22t
    trade-share analysis example, II:15, 18t, 20t, 21t
  modern international trade theory
    alternative theories, II:6–9
    integrated approaches, II:9
    neoclassical trade theory: factor proportions model, II:4–6

international trade, economic principles of (*cont.*)
preferential trading agreements thoery, II:9
dynamic effects, II:11–13
new theories (natural economic bloc), II:13–14, 15
static effects of, II:10–11
International Trade Centre (ITC), II:463. *See also* Geneva three-pronged approach and TRTCCB
International Trade Organization (ITO), I:53, 91, 189, 190
competition policy and, II:493
GATT and, I:53
GPA and, I:1125
trade and labor, II:587–89, 580
investment, I:439
Egypt concerns, III:104
gender analysis of trade and, II:729
global free trade concerns and, III:449
Indonesia, III:157, 158
Korea, III:206
multilateral framework for, I:477–78
RTA and developing countries, II:330–31
trade and culture, II:774–5
Trade & Investment, Working Group on Relationship between, I:476–480
Investment Canada Act, II:775
investment-related provisions
in RTAs, II:316
rules building on treatment and protection principles of BIT, II:318–20
rules distinguishing between local and third-party investors, II:320
rules on regional enterprises, II:321
rules on right of establishment and free movement of capital, II:316–18
in WTO
ASCM, II:316
GATS, II:314
GPA, II:315
TRIMs Agreement, II:315
TRIPS Agreement, II:315
IP. *See* intellectual property
IPPC. *See* International Plant Protection Convention
IPR. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights
IRA. *See* import risk analyses
ISI. *See* import substitution industrialization
Israel, Mexico and, III:237
ITA. *See* Information Technology Agreement
ITC. *See* International Trade Centre
ITO. *See* International Trade Organization
ITU. *See* International Telecommunications Union

Japan
accession to GATT, III:172
as QUAD member, I:815
dispute settlement procedure, III:177
Doha Development Agenda, III:178
agriculture, III:178
developing countries, III:179
issues, III:179
GATT/WTO Membership effects on
economic and political aspects, III:175
GATT accession, III:172
social aspects, III:176
Japan's example taken up by China to counter economic challenges, III:57
participation in
Dillon Round, III:172
Kennedy Round, III:172
Tokyo Round, III:172
RTAs, III:179
trade policy formulation, III:180
Uruguay Round
agriculture, III:174
contingent protection (anti-dumping and safeguards), III:175
intellectual property, III:175
market access, III:174
overall objective, III:173
rules, III:174
services, III:175
WTO
attitude towards, III:176
strengths and weaknesses, III:177
Japan-Agricultural Products case, I:257, 261, 262
consultations and, I:1219
dispute settlement aspects
burden of proof, I:346
SPS Agreement and
Article 3.3, I:278
Article 5.6 (risk management concept), I:320, 321, 323
Article 5.7, I:302, 304–6, 308
Article 11.2, I:350
transparency provisions, I:337
Japan-Alcoholic Beverages case, I:105, 116, 118, 121, 122
DSU Article 22.2 (emphasizing compensation over retaliation), I:1365–6
GATT Article III, I:116, 118, 121, 122
like product analysis, I:105
Japan-Apples case, I:257
Appellate Body and, I:1298
dispute settlement aspects (SPS Agreement)
Article 11.2, I:351
burden of proof, I:347
Standard of Review, I:353
SPS Agreement and
Article 5.7, I:304
Article 5.1, I:289, 290
Article 5.8, I:339, 340
risk assessment concept, I:285, 287–90
transparency provisions, I:338–40
July 2004 Framework (Doha Development Agenda)
Agriculture, I:224
cotton reference in Framework, I:227
domestic support provisions, I:226
export subsidies provisions, I:226
Text market access provisions, I:225

Kennedy Round. *See also* Doha Development Agenda; Tokyo Round; Uruguay Round
agriculture under GATT and, I:193–5
International Agreement on Anti-dumping (IAA), I:494–6
Japan participation in, III:172
US and, III:390–92
knowledge-based economy, II:356–8, 371
Korea
accession to GATT, III:185
Beef Panel, III:191

Doha Development Agenda
agriculture, III:204
anti-dumping, III:205
market access for industrial goods, III:205
RTAs, III:205
services, III:204
trade and competition policy, III:206
trade and environment, III:207
trade and investment, III:206
trade facilitation, III:207
GATT and, III:187
BOP consultations, III:189
Multifiber Arrangement, III:187
Tokyo Round, III:188
RTAs and, III:205, 208
trade policy making, III:210–12
Uruguay Round
background, III:192
impact on Korea, III:197
implementation, III:197
negotiations, III:194
objectives, III:194
participation in, III:194
results, III:195
WTO dispute Settlement System
Korea as complainant, III:201, 202t
Korea as defendant, III:202, 203t
Korea-Beef case, III:191
human rights approach to international trade and, II:638
TBT Agreement and, I:393
Korea-Dairy Products case
Agreement on Safeguards, I:769–70, 774, 776, 782, 784–6, 788–91
trade and culture concerns, II:766
Korea-Government Procurement case
nonviolation complaints experience under
GATT 1994, I:1377–9
GPA, I:1378
Kyoto Convention, rules of origin and, II:266–9

labeling issues (trade and environment), II:540–43
labor and trade. *See also* labor standards
foreign labor protection, II:587
potential legal bases in GATT/WTO Law, II:587
US-Reformulated Gasoline case implications, II:587–89
from Marrakesh to Singapore, II:574
GATT Panel Practice
adjudication without law, II:584
domestic labor protection, II:584–7
First Tuna Panel, II:585
foreign labor protection (Article XX), II:587
Second Tuna Panel, II:586
Havana Charter for ITO, II:600
historical antecedents, II:579
from linkage to social policy conditionality, II:579
ITO connection, II:580
in broader context, II:598
apartheid of labor and trade, II:599–601
unfulfilled promise of liberalized trade, II:601–4
institutional implications of a cohesive framework
beyond coherence to accountability, II:618–20
coherence among national policies in trade and elsewhere, II:615–16
mandates coordination among international organizations, II:617
international v. fair labor standards, II:573
labor in GATT practice, II:581
contracting parties proposals, II:581
GATT Councils deliberation, II:583
US request for Working Party, II:582
labor unions, I:31
links between trade and labor rights, II:575
from integrated to segregated standards, II:575
globalization impact, II:575
ILO, GATT and Unilateral State Practice, II:576–8
multilateral and bilateral agreements as WTO action model, II:592
Russian WTO accession impact on, III:330
separate concerns integration, II:578
shared values
as instrumental tools, II:606, 610
as normative principles, II:609–10
as over-arching objectives, II:607–8
standard setting
merits and demerits of standards incorporation, II:590
standards selection for social clause, II:590
supervision of compliance, II:591
themes and issues, II:572
values framework normative implications
internationalization of values, II:611
ordering priorities, II:612–14
values in markets and workplace, II:604–6
WTO Ministerial Meetings, II:592
labor standards, II:172
GATT/WTO and, II:185
gender analysis of trade and, II:734–6
GILS, II:177, 179–81
Group 1 Standards, II:175
Group 2 standards, II:177
ILO, II:173
inclusion arguments, II:177
accelerate growth in poor countries, II:178
efficiency in world production, II:177
GILS promote unfair trade, II:177
humanitarian concerns, II:178
regulatory race to bottom, II:178
issues
Egyptian, III:107
evolution of, II:173–7
NAALC, II:174, 175
NAFTA, II:174, 175
theory and evidence
GILS and international competitive position, II:179–81
practical considerations, II:185–6
regulatory race, II:181–3
WTO and child labor, II:183–5
TRIPS and, II:186
US policy, II:174
WTO/GATT, II:176
layout-designs of integrated circuits
Articles 35–38 of TRIPS Agreement, I:1098, 1099
negotiating history, I:1098
least-developed countries (LDCs), I:1527, 1528, 1556
accession of, I:78
background, II:343
CVA issues, I:568

least-developed countries (LDC) (*cont.*)
Doha Ministerial Conference and Development Agenda, I:1562
Agreement on Agriculture, I:1563
Agreement on Textiles and Clothing, I:1564
Antidumping Agreement, I:1564
cross-cutting issues, I:1565
Customs Valuation Agreement, I:1564
GATT 1994, I:1563
SCM Agreement, I:1564
SPS Agreement, I:1564
TBT Agreement, I:1564
TRIMs Agreement, I:1564
TRIPS Agreement, I:1565
historical perspective, II:344
First WTO Ministerial Conference, II:347
High Level Meeting, II:348
post-war period, II:345
Second Ministerial Conference, II:348
Uruguay Round, II:346
international community efforts, II:359
integrated framework, II:365–7
market access, II:360–3
special and differential treatment, II:363–4
international conferences achievements
Fourth WTO Ministerial Conference (Doha), II:369–71
Third United Nations Conference on LDCs, II:367–9
must do for, II:371
capacity building, II:372
credible alliances building, II:377
export profile diversification, II:373
human resources development, II:372
improving communications between government and non-government sector, II:376
knowledge-based economy, II:371
losers, compensation for, II:375
macro-economic reforms, II:374
mainstreaming trade with development strategies and processes, II:371
promoting accountable governance, II:374
safeguards use, II:376
weaknesses, II:349
competitive ability, II:349
exclusion from "knowledge-based economy", II:356–8
high export concentration ratio, II:350
implementation problems, II:351
lack of capacity, II:352–3
supply-side constraints, II:350
tortuous accession process, II:354
weaknesses, other, II:358
WTO Assistance to
Committee on Trade and Development, I:1561
Doha Ministerial Conference and Development Round, I:1562–6
High-Level Meeting on Least-Developed Countries, I:1559
Integrated Framework for Trade-Related Technical Assistance, I:1559–61
Plan of Action for Least-Developed Countries, I:1557
Singapore Ministerial Conference, I:1557
liberalization, II:601–4. *See also* computational analysis and trade liberalization; globalization; progressive liberalization under GATS
agricultural, II:32, 33, 121, 127
gender and trade liberalization, II:703–8
integration process and, II:405
Mexico and trade liberalization, III:224
MFA, II:26
New Zealand, III:274
bilateral liberalization (FTAs), III:277
competitive liberalization, III:278–80
multilateral liberalization (Doha Round), III:280–86
regional liberalization (APEC), III:275–7
rules of origin and trade liberalization, II:264
safeguard measures, II:53
services in RTAs and
liberalizing approaches, II:297–8
liberalizing principles, II:296
services liberalization, II:191–6
and economic development, II:191–6
postal and express delivery services in GATS, II:196–200
textiles and developing countries, II:405–7
trade and culture and investment liberalization through GATS, II:775
under GATS, I:820–21
autonomous liberalization, I:897–900
liberalization of capital movements, I:962–4
Uruguay Round Negotiation and, I:16–17
LIBERTAD Act (1996), I:167
licensing system. *See also* Agreement on Import Licensing Procedures
automatic, I:592
Mongolia
export licensing, III:257
import licensing, III:257
non-automatic, I:592
Like-Minded Group (LMG), III:95
like product
Agreement on Safeguards and, I:767
classification in context of, I:1586–7, 1592
definition, I:103–5
under ADA, I:508
under GATT (Article III), I:118
under TBT Agreement, I:389
"like services and service suppliers" under GATS, I:851–2
limited tendering procedures, I:1143–5
LMG. *See* Like-Minded Group
lobbies in trade policy development, I:28
local government bodies
TBT Agreement and, I:387
Long-Term Arrangement (LTA) (textiles and clothing), I:413; II:391–5. *See also* Multi-Fiber Arrangement; Short-Term Arrangement (STA)

Mailbox Cases (TRIPS disputes), II:425, 433
market access
Agreement on Agriculture, I:202
Cancun, I:225
Doha
developing countries proposal, I:219
EC proposal, I:219
dispute settlement, I:206
general exceptions, I:206
special safeguard measures, I:205
tariff reductions, I:205
tariffication, I:203–4
Framework for Establishing Modalities in Agriculture (August 2004) (text), III:518–23
Colombia concerns, III:85, 86

EU and, III:120
Financial Services and, I:971–5, 982
global free trade and, III:440–47
Indonesian issues, III:149
Japanese concerns, III:174
Korean concerns, III:205
Mexico
non-tariff barriers, III:229–30
tariffs, III:228–29
Non-Agricultural Products, Framework for Establishing Modalities for (August, 2004) (text), III:524–6
Singapore commitments, III:339
Telecommunication Services and, I:998
trade and environment issues, II:547
under GATS, I:846
Article XVI:2, I:847
market access and national treatment, relationship between, I:847–9
overview, I:846
WTO obligations and EC Law ("Market Access Strategy"), I:1508
Marrakesh Agreement and WTO establishment
miscellaneous aspects
conflicts resolution between WTO Agreements, I:80
continuation of GATT practices, I:80
reservations, I:81
WTO Agreement Preamble, I:79
organizational issues, I:71
trade and environment, II:513
WTO
decision making, I:67
functions, I:57–60
governance structure, I:60, 63–7
membership, I:73
scope, I:56–7
Marrakesh Declaration on Agriculture Trade, I:202
Marrakesh Ministerial Conference on Trade And Labor, II:574
Marrakesh Protocol to GATT 1994, I:112–14
MEA. *See* Multilateral Environmental Agreements
media, trade policy development and, I:30
Meech Lake recommendations. *See under* harmonized non-preferential rules of origin architecture
membership, WTO. *See* World Trade Organization Membership
MERCOSUR (Southern Common Market), I:175
double density measures of trade intensity, II:21t
RTAs and, II:239
trade and gender, II:705
Uruguay Round and Regionalism, II:303
MERCOSUR and EU, regional trade negotiations between
background, III:22
differing negotiating goals and strategies, III:22
EU proposal, III:23–4
Mexico
accession to GATT
1970s postponement of Mexico's accession to GATT, III:218–23
1980s unilateral trade liberalization and (finally) accession, III:224–7
Havana Conference, III:217
dispute resolution process in GATT/WTO, III:232–4
Doha Development Agenda, III:234
Built-in Agenda, III:235
electronic commerce issues, III:236
industrial goods issues, III:236
labor and environmental issues, III:236
Singapore issues, III:235
UR Agreements implementation, III:235
RTAs
APEC, III:238
current negotiations, III:238
Europe, III:237
FTAs with Latin American countries, III:237
Israel, III:237
NAFTA, III:236
trade policy-making, III:238–41
Uruguay Round, III:227
dispute settlement, III:232
government procurement, III:232
market access (non-tariff barriers)
antidumping and countervailing duties, III:229
BOP exceptions, III:230
import licenses, III:230
rules of origin, III:230
safeguards, III:229
sanitary and phytosanitary measures, III:230
subsidies, III:230
technical barriers to trade, III:230
market access (tariffs), III:228
agriculture, III:228
industrial goods, III:228
textiles and apparel, III:229
RTAs, III:232
state-trading enterprises, III:230
trade in services, III:231
trade-related intellectual property rights, III:231
trade-related investment measures, III:231
WTO, public attitudes towards
business groups opinions, III:241
SMEs and NGOs, III:242–3
Mexico-Telecommunications Services case
consultations and, I:1218
under GATS, I:891–3
anti-competitive practices prevention, I:892
interconnection with major supplier at cost-oriented rates, I:891
public networks and services on reasonable terms and conditions, access to and use of, I:892
MFA. *See* Multi-Fiber Arrangement
MFN. *See* most-favored nation
Michigan CGE Model, II:24–5. *See also* computational analysis and trade liberalization
Ministerial Conferences, WTO
Cancun-September 2003, I:63
Ministerial Statement (text), III:512–19
Doha-November 2001, I:62
Declaration on the TRIPS Agreement and Public Health (text), III:510–11
Implementation Issues and Concerns (text), III:503–9
Ministerial Declaration (text), III:492–502
Geneva-May 1998, I:61
Declaration on Global Electronic Commerce (text), III:491
Ministerial Declaration (text), III:488–90
Seattle-November 1999, I:61–2
Singapore-December 1996, I:60–61
Ministerial Declaration (text), III:475–82
Ministerial Declaration on Trade in Information Technology Products (text), III:483–7

mixtures rules, I:647. *See also* harmonized non-preferential rules of origin architecture
MLAT. *See* Canadian-US Mutual Legal Assistance Treaty
MNE. *See* multinational enterprises
Modalities Agreement (Agreement on Agriculture), I:203–4
  Annex 2, I:203
  Annex 3, I:203
  Annex 3B, I:204
  Annex 5, I:204
  Annex 5B, I:204
Modalities for Negotiations on Trade Facilitation (August 2004) (text), III:528–9
Mongolia, III:250
  accession to WTO, III:250
    accession negotiations initiation, III:251
    old strategy and mentality versus new realities, III:251–2
    time pressure and imagined "deadline", III:253
    unclear objectives, III:253
  should Mongolia remain in WTO?, III:265–7
  WTO commitments implementation, III:255
    cashmere, ban on exports of raw, III:258
    customs valuation, III:256
    evolution from accession-orientation to implementation-orientation, III:258
    harmonized system, III:257
    import and export licensing, III:257
    intellectual property rights, III:258
    internal taxation, III:257
    membership aspects (cashmere and scrap metal examples), III:259–62
    tariff system, III:256
    transparency, III:258
  WTO in operation, III:262
    cashmere and WTO-IMF-World Bank coherence test, III:262
    customs valuation (law v. practice), III:263
    Mongolian Court's TRIPS rights enforcement, III:264
most-favored nation, (MFN), I:105–6
  application of safeguards, I:768
  Financial Services and, I:977–8
  RTA regulation and, II:219–21
  safeguard measures and
    MFN versus discrimination, II:62
    MFN versus specificity, II:48
  tariff classification as disguised discrimination and, I:1587
  Telecommunication Services and, I:1014
  TRIPS Agreement and (Article 4), I:1068
  unconditional MFN obligation, (Article I of GATT 1994), I:99, 100
    Article I:1, I:102
    conditional vs. unconditional MFN treatment, I:101–2
    "like products" definition, I:103–5
    MFN antecedents, I:101
    overview of, I:102
  under GATS (Article II)
    Article II:1 [basic rule], I:827–9
    Article II:2 [MFN exemption], I:829–31
    Article II:3 [contiguous frontier zones], I:831–2
  under GATT
    Article I [Unconditional MFN Obligation], I:99–106
    Article III:7, I:106
    Article IV(b), I:106
    Article V:5, I:106
    Article V:6, I:106
    Article IX:1, I:106
    Article XIII:1, I:106
    Article XVII:1, I:106
    Article XVIII, I:106
    Article XX, I:106
  under GPA, I:1141
MRA Guidelines. *See* Guidelines for Mutual Recognition Agreements or Arrangements in the Accounting Sector
Multi-Fiber Arrangement (textile and clothing)
  Article 1.2 of, I:414
  Korea and, III:187
  rules of origin and, II:266
  textiles and developing countries
    MFA comparison with GATT, II:398
    MFA objectives and impact, II:399–401
  Textiles Surveillance Body (TSB), I:414, 417
  trade liberalization and UR-1 Scenario, II:26
Multilateral Environmental Agreements (MEAs), II:148, 558–60. *See also* environmental issues
multilateral trading system, I:41
  consensus decision-making principle, I:41
  Indonesia, III:140–42, 162–4
    multilateralism versus regionalism, III:162–4
    proactive participation in multilateral system, III:164
    systemic issues (multilateral system integrity), III:165
  Russian WTO accession impact on, III:331
  WTO and, I:40
multinational enterprises (MNE), I:1568, 1569
multinational firms, TRIMs and, I:441–2
multiple countries of origin, I:627–8

NAALC. *See* North American Agreement on Labor Cooperation
NAFTA. *See* North American Free Trade Area
Nakajima Doctrine, I:1504–7. *See also* FEDIOL Doctrine
national security provision (GATT Article XXI), I:166–8
  GATT/WTO Jurisprudence on Article XXI, I:1573–6
    WTO era, I:1577–8
  historical overview of, I:1572
  text of GATT Article XXI, I:1573
national treatment commitments
  Financial Services and, I:971, 979
  Telecommunication Services and, I:998
  TRIPs Agreement and (Article 3), I:1067
  under GATS, I:849
    "like services and service suppliers", I:851–2
    national treatment and modes of supply, I:849–51
    overview, I:849
national treatment obligation (Article III of GATT 1994), I:114
  additional commitments, I:124–5
  Article III:1, I:115, 116, 120
  Article III:2, I:116
    first sentence, I:117
    internal taxes and other charges, I:116
    second sentence, I:120–22
  Article III:4
    internal regulations affecting imports, I:122–4
    "like product" determination, I:118–19

internal regulations affecting imports
Article III:4, I:122–5
Article III:5, I:125
national treatment exceptions, I:125–7
Article III:8(a), I:125
Article III:8(b), I:126
Article III:10, I:127
NATO. *See* North Atlantic Treaty Organization
natural economic bloc (NEB), II:13–14, 15. *See also* preferential trading arrangements
natural resources conservation, I:162
Negotiating Group on Basic Telecommunications (NGBT), I:926
Net Food-Importing Developing Countries, I:215–7
New Partnership for Africa's Development (NEPAD), III:363
New Zealand, III:270
multilateral liberalization (Doha Round), III:280
agriculture, III:280–82
non-agricultural products, III:282
rules, III:283–5
services, III:283
sustainable development, III:285–6
trade liberalization, III:274
bilateral liberalization (FTAs), III:277
competitive liberalization, III:278–80
regional liberalization (APEC), III:275–7
trade policy, III:271
Uruguay Round participation, III:272–4
NFIDC Decision. *See* Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries
NGBT. *See* Negotiating Group on Basic Telecommunications
NGO. *See* non-governmental organizations
NIP. *See* Notice of Intended Procurement
non-automatic import licensing. *See also* Agreement on Import Licensing Procedures; automatic licensing system
defined, I:592
under AILP (Article 3), I:597
non-discrimination
global free trade and, III:451–3
principle under TBT Agreement, I:388
under API (Article 2.1), I:576
WTO and, I:40–41
non government bodies, under TBT Agreement (Article 8), I:387
non-governmental organizations (NGOs)
external transparency issues, I:86
global integration and, III:463–9
Indonesia and, III:155
Mexico, III:242–3
panel process participation of, I:1239
relations with WTO, I:72
role in WTO, I:86–7
trade policy development and, I:31
WTO democratic roots and, I:47
non-market economies, I:77
under ADA, I:508
non-preferential rules of origin, I:604; II:270–3. *See also* harmonized non-preferential rules of origin architecture; preferential rules of origin
non-product-related processes and production methods (NPR-PPM), I:238
TBT Agreement and, I:392
TBT Agreement inapplicability to, I:382
non-tariff barriers to trade (NTB), I:93. *See also* Agreement on Technical Barriers to Trade
in MTN rounds, I:93
in Tokyo Round, I:94
under GATT
Article V [Freedom of Transit], I:140
Article VI [Antidumping and Countervailing Duties], I:140
Article VII [Valuation for Customs Purposes], I:142
Article VIII [Fees and Formalities Connected with Importation], I:143
Article IX [Marks of Origin], I:144
Article XV [Exchange Controls and Exchange Arrangements], I:146
Article XVI [Subsidies], I:148
Article XVII [State Trading Enterprises], I:148
Article XIX [Emergency Action on Imports of Particular Products], I:151
non-violation complaints, I:1237. *See also* situation complaints; violation complaints
under GATT, I:170–71
re-appraisal, I:1372
complaints origins, I:1373
EC-Asbestos case, I:1379–82
GATT 1947, complaints experience under, I:1374–7
Korea-Government Procurement case, I:1377–9
non-violation remedy and TRIPs Agreement, I:1384–7
reflections on non-violation remedy, I:1382–4
WTO Agreement (GATT 1994 and GPA), complaints experience under, I:1377
under GATS (Article XXIII), I:868
under TRIPs Agreement, I:1112
non-WTO rules application. *See under* dispute settlement
non-WTO treaties. *See under* World Trade Organization law
normative principles, II:609–10. *See also* values in trade and labor
North American Agreement on Labor Cooperation (NAALC), II:174, 175, 593
gender analysis of, II:735
North American Free Trade Area (NAFTA), I:175; II:10, 281. *See also* free trade areas
Canada, III:40
CUSFTA and, I:809, 810
dispute settlement procedures innovations, II:213
double density measures of trade intensity, II:20t
EC and, I:807
gender analysis of, II:735
labor standards and, II:174, 175
Mexico and, III:236
RTAs and, II:297
compatibility issues, II:309
investment provisions and, II:318, 319
rules of origin, II:279, 282
trade facilitation and harmonization of domestic regulations, II:214
Uruguay Round and regionalism, II:303
North Atlantic Treaty Organization (NATO), II:251
Notice of Intended Procurement (NIP), I:1149–50
Notice Of Planned Procurement (NPP), I:1150

NPR-PPM. *See* non-product-related processes and production methods
NTB. *See* non-tariff barriers to trade

ODA. *See* Official Development Assistance
OECD. *See* Organization for Economic Cooperation and Development
OECD Safe Harbor (*Brazil—Aircraft* case), I:1189–90
Official Development Assistance (ODA), II:368
OIE. *See* International Office of Epizootics
Oil. *See under* Indonesia
OMA. *See* Orderly Marketing Agreement
Omnibus Trade Act of 1988 (US), II:426, 430; III:400–402
open tendering procedures, I:1142. *See also* tendering procedures under GPA
  time limit concerns, I:1151
Opinion 1/94. *See under* EC Law and WTO Agreement
Orderly Marketing Agreement (OMA), II:47. *See also* Export Restraint Agreement; Voluntary Export Restraint
Organization for Economic Cooperation and Development (OECD), I:66, 1126–9; II:251. *See also* developing countries
  agriculture
    aspects, II:128–9
    interests of, II:110–11
    MFN tariff rates, II:111
    TRQ, II:115t
  agriculture issues, II:116–18, 121
    agriculture's so-called multifunctionality, II:124–7
    technical standards, including SPS and food safety measures, II:122–4
  competition policy and, II:497
  gender definition by, II:699–700
organizational issues and WTO establishment
  WTO relations with IGOs and NGOs, I:72
  WTO Secretariat, I:71
  WTO status, I:71
Origin Project (rules of origin), I:615. *See also* Harmonization Work Programme
Ottawa language, I:622. *See also* harmonized non-preferential rules of origin architecture
  evolution of, I:623
  type rules, I:624

Panel process, I:1235. *See also* consultations; dispute settlement
  burden of proof, I:1258
  complaint object, I:1241
  complaint types
    non-violation, I:1237
    situation, I:1238
    violation, I:1236
  consultation stage, I:1242
  final panel report content, I:1268
    judicial economy, due exercise of, I:1270
    panel findings, basic rationale behind, I:1269
    right to suggest how to implement, I:1271
    rights and obligations of members, not adding to or diminishing, I:1271
  interim review stage, I:1267
  mandate of panels (Article 11 of DSU)
    factual issues, I:1265
    legal issues, I:1264
  multiple panel proceedings, I:1247
  panel establishment and panel terms of reference, I:1244
  panel composition, I:1248
  panel proceedings' participants, I:1238
    legal interest need, I:1240
    NGOs, I:1239
    private counsel, I:1239
  panel proceedings procedural stages
    confidentiality of proceedings, I:1255
    organizational meeting, I:1252
    preliminary issues and procedural objections, I:1253
    written submissions and oral hearings, I:1254
  panel's right to seek information, I:1259
    duty to respond, I:1263
    Expert Review Group, I:1261–3
  third party rights, I:1256
  timing of evidence, I:1259
parallel trade under TRIPS Agreement
  GATS and
    Article V, I:1075
    Article XVI, I:1077
  GATT and
    Article III, I:1074
    Article XI, I:1074
    Article XX, I:1074–7
    Article XXIV, I:1075–6
  GATT 1994 and GATS application, I:1073–5
  parallel imports issues, II:446–52
  related trademark provisions (TRIPS Agreement)
    Article 16, I:1071–2
    Article 28.1, I:1072
patents
  for pharmaceutical drugs (Argentina)
    concessions value estimation in patents
      impact on FDI and trade, III:11
      transfer of rents, III:9–11
    pharmaceutical drug companies, rent-seeking by, III:7–9
  under TRIPS Agreement, I:1091–8
    Article 27:1, I:1092–3
    Article 27:2, I:1093
    Article 27:3, I:1093
    Article 28, I:1094
    Article 29, I:1094
    Article 30, I:1094–5
    Article 31, I:1095–7
    Article 33, I:1097
    Article 34, I:1097
    inter-temporal application, I:1097, 1098
    negotiating history, I:1091–2
Peace Clause (Agreement on Agriculture)
  domestic subsidies, I:214
  export subsidies, I:214–15
percentage criterion test. *See also* change in tariff heading; technical test
  cost of materials, I:605–6
  general overhead expenses, I:606–7
  manufacturing overhead, I:606
petrochemicals, challenges after China's Accession to WTO, III:63
pharmaceuticals
  Argentina and
    rent-seeking by, III:7–9
    transfer of rents, III:9–11
  challenges after China's Accession to WTO, III:62

policy reform, Uruguay Round Negotiation and, I:15, 16
pollutants, trade and, II:157. *See also* environmental issues
Portugal v *Council*, I:1501–2
  consequences
    denial of direct effect for private parties but availability of, I:1491–7
    denial of direct effect to TRIPS, GATT 1994 and TBT Agreements, I:1497
  WTO direct effect and EC Community legal order, I:1489–90
postal and express delivery services in GATS, II:196. *See also* services liberalization
  current classifications, II:197–8
  Doha Trade Agenda, II:199
  existing positions regarding liberalization, II:199–200
  FDI and, II:198
  general problem, II:197
  USO, II:198
PPM. *See* processes and production methods
Precautionary Principle of SPS Agreement
  Article 2.2, I:261
  Article 5.7 relationship with, I:297
preferential rules of origin, I:604. *See also* non-preferential rules of origin
preferential trading arrangements, II:282. *See also* customs unions; free trade areas; regional trade arrangements
  Article XXIV of GATT, II:275, 276
  dynamic effects
    economic development, II:12–13
    economies of scale, II:11
    investment effects, II:12
    x-efficiency, II:12
  new theories (NEB), II:13
  rules of origin and, II:279
    EU expansion and rules of origin, II:286
    FTAA and rules of origin, II:285
    hub and spoke systems and rules of preference ("Spaghetti Bowl" Problem), II:283
    new Asian regionalism and rules of origin, II:284
  static effects of, II:10–11
  trade diversion and rules of origin, II:280
Preshipment Inspection, I:574. *See also* Agreement on Preshipment Inspection
  Uruguay Round negotiations on, I:575
  WTO Working Party Recommendations on, I:585
    December 1997 Report, I:585
    March 1999 Report, I:586
  Zaire program, I:574
price undertakings under Anti-dumping Agreement (Article 8), I:518, 521
principle of good faith and consultations and (DSU Article 4)
  further elements of, I:1225
  litigation strategies, I:1224
privatization of Argentina's service industries, III:12
processes and production methods (PPM), I:247, 382; II:538–40
product-specific rules of origin (Appendix 2), II:282. *See also* Harmonization Work Programme
  agricultural products (HS Chapters 1 to 24), I:654–5
  machinery, transport equipment and photocopying apparatus (HS Chapters 84 to 90), I:656–7
  textiles and textile articles (HS Chapters 50 to 63), I:655
PROEX program, I:1187, 1188. *See also Brazil-Aircraft* case
  PROEX II, I:1189
  PROEX III, I:1189, 1190
professional services, I:913
progressive liberalization under GATS
  Article XIX [Negotiation of Specific Commitments], I:854
  Article XX [Scheduling of Commitments], I:854–64
    overview, I:854–6
    horizontal commitments, I:856
    sectoral commitments, I:856
  Article XXI [Modification of Schedules], I:865
protection of undisclosed information (under TRIPS Agreement), I:1099
  Article 39
    Article 39.2, I:1100
    Article 39.3, I:1101
  negotiating history, I:1099
protective subsidies, II:89, 90
PSI. *See* Preshipment Inspection
public health. *See* Doha Declaration on the TRIPS Agreement and Public Health
publicity of tender notices under GPA, I:1149
  information on award of contracts, I:1152
  NIP, I:1149, 1150
  NPP, I:1150
  statistical and other information (Article XIX), I:1153–4
  time limit concerns (Article XI:1)
    open procedures, I:1151
    selective procedures, I:1151
Punta del Este Declaration
  Colombia, III:79
  textiles and developing countries, II:401–3

QUAD members. *See also* General Agreement on Trade in Services
  Canada, I:815–17
  EC, I:814–15
  Japan, I:815
  United States, I:812–14

red light subsidies (ASCM), I:734; II:96, 99. *See also* green light subsidies; yellow light subsidies
regional trade arrangements (RTAs), I:172–4; II:205. *See also* customs unions; free trade areas; preferential trading arrangements
  APEC, II:210
  arguments made about
    arguments made against, II:218–19
    arguments made in favor, II:215–17
  ASEAN, II:210
  Colombia participation
    Agreements Under ALADI, III:88
    Andean Community, III:88
    FTA of Americas, III:89
    Group of Three, III:89
  CRTA, II:226, 229, 230
  developing countries and (Member countries)
    domestic policies, II:332–3
    industrial location and growth, II:331
    investment, II:330
    politics, II:334

regional trade arrangements (*cont*.)
RTAs parameters, II:327–30
trade effects, II:326
developing countries and (non-member countries), II:334
depth and breadth in integration, II:337
excluded countries, II:335
stepping stones, dominoes and open regionalism, II:335
trade negotiations, II:336
Egypt, RTAs effects on, III:108
examinations under WTO
examination report, II:231
notification provision, II:230
oral and written examinations, II:231
overview, II:229
report obligations, II:231
examinations under WTO, evaluation of
examination report, II:233
notification and submission of information, II:231
oral and written examinations, II:232
FTAA, II:209, 210
GAFTA, II:211
GATT System (Article XXIV), II:222–8
1994 understanding on interpretation of, II:225, 226
Agreement on Safeguards and, II:238
Canada-Certain Measures Affecting Automotive Industry, II:237–8
disciplines on customs unions and FTAs, II:223, 224
evaluation of WTO legal disciplines governing RTAs, II:227
procedural rules governing CRTA, II:226
Turkey-Textiles case, II:235–7, 240
innovations in, II:212
area of trade facilitation and harmonization of domestic regulations, II:214
dispute settlement procedures, II:213
expansion of scope of RTAs coverage, II:212
investment-related provisions in, II:316
rules building on treatment and protection principles of BIT, II:318–20
rules distinguishing between local and third-party investors, II:320
rules on regional enterprises, II:321
rules on right of establishment and free movement of capital, II:316–18
Japan and, III:179
Korea, III:205, 208
MERCOSUR countries, II:239
Mexico, III:232
APEC, III:238
current negotiations, III:238
Europe, III:237
FTAs with Latin American countries, III:237
Israel, III:237
NAFTA, III:236
MFN Principle, II:219, 220
disillusionment with discriminatory trading blocs for multilateral trading systems, II:220
underlying principles of GATT MFN Rule, II:221
proliferation of, II:206
Africa, II:211
East Asia and Pacific region, II:210
European region, II:208
Mediterranean, II:211
phenomenon size, II:206
Western Hemisphere region, II:208–10
regulation in WTO system interest, II:241
expedited recourse to dispute settlement procedures, II:244
independent committee of neutral experts, II:242
phase-in periods for RTAs under examination, II:243
systematic investigation of hidden discrimination within RTA provisions, II:243
Russia and, III:313
services in, II:294
commitments depth, II:298
coverage dimension, II:295
global free trade issues, II:307–10
liberalizing approaches, II:297–8
liberalizing principles, II:296
opportunities and challenges in, II:300–302
regional agreements impact evaluation, II:305–6
Uruguay Round and regionalism, II:302–4
Singapore and, III:345–8
South Africa, RTAs effects on, III:374
types
ASEAN, I:175
EU-Member States, I:175
MERCOSUR, I:175
NAFTA, I:175
WTO dispute settlement based regulations of, II:234
evaluation of, II:240
WTO Panel and AB rulings involving RTAs, II:234–40
WTO institutional framework for regulation of, II:228
evaluation of WTO, II:231–4
RTAs under GATT System, II:228
RTAs under WTO System, II:229–31
WTO legal framework for regulation of
evaluation of, II:227
GATT Article XXIV, II:222–8
MFN Principle, II:219–21
regionalism
Asian rules of origin and, II:284
RTAs
and developing countries, II:335
services in RTAs (Uruguay Round), II:302–4
transition economies and, II:249t., II:251–6
vs. multilateralism, III:162–4
rents (Argentine pharmaceutical drug companies)
rent-seeking, III:7–9
transfer of rents, III:9–11
residual rules. *See under* harmonized non-preferential rules of origin architecture, I:628
Revenue Act of 1916 (US), I:493
risk assessment/management. *See under* Agreement on Application of Sanitary and Phytosanitary Measures
Romania-Wheat and Wheat Flour case, I:1210
royalty-based financing. *See under Canada—Aircraft* case
RTA. *See* regional trade arrangements
rules of origin, I:603; II:264, 267t. *See also* Agreement on Rules of Origin
CTH test, I:607–8; II:268
economic theory and rules of origin, II:273
antidumping and voluntary restraints, II:277
customs unions and free trade agreements, II:274–6

local content protection (value-added tariff), II:278–9
problem in economically integrated world, II:277
empirical analyses of impact of
cost to firms of compliance with rules of origin, II:280
product-specific rules of origin and investment distortion, II:282
trade diversion and economic costs of protective rules of origin, II:280–81
Mexico, III:230
non-preferential, I:604
origin determination by contracting members of GATT, II:265
harmonization of non-preferential rules of origin, II:270–3
Kyoto Convention, II:266–9
Uruguay Round, II:269
Percentage Criterion Test, I:605–7
preferential, I:604
preferential trading arrangements proliferation, II:282
EU Expansion and rules of origin, II:286
FTAA and rules of origin, II:285
hub and spoke systems and rules of preference ("Spaghetti Bowl" Problem), II:283
new Asian regionalism and rules of origin, II:284
requirements, US, I:432
rules of origin and services (GATS), II:286–7
technical test, I:608
WTO Agreement need for, I:609
Russia. *See also* EU; United States
agriculture concerns
accession impact on agriculture, III:322
beef, pork, poultry, sugar, and butter, III:297
domestic support level, III:295–7
wine, spirits, cigars and cigarettes, III:297
energy and gas, domestic price control over, III:301
government involvement in trade, III:308
recognition as market economy, III:309–12
RTAs with CIS countries, III:313
laws conformity with WTO Rules, III:304–7
Russia and WTO members, current situation in negotiations between, III:291
trade in goods concerns, III:292
apparel and footwear issues, III:294
Civil Aircraft (Plurilateral Agreement) issues, III:294
industrial goods negotiations, III:292–4
IT products issues, III:294
trade in services concerns, III:298
banking, III:299
insurance, III:299
telecommunications, III:300
transport, III:301
WTO accession, III:289–91
advantages of, III:314–17
customs issues, III:305
disadvantages of, III:317
IPR protection issues, III:307
quotas and restrictive licensing issues, III:305
Russian business community perception of, III:318–21
TBT and SPS issues, III:306
WTO accession impact on, III:321
agriculture, III:322
financial services
banking, III:327
insurance, III:328
industry, III:323–5
labor market, III:330
multilateral trading system, III:331
other service areas, III:329
services sector, III:325
telecommunications, III:326
transport services, III:328

SAARC. *See* South Asian Association for Regional Cooperation
SACA. *See* Special Agreement on Commodity Arrangements
SACU. *See* South African Customs Union
SADC. *See* Southern African Development Community
safeguard measures. *See also* Agreement on Safeguards; Agreement on Subsidies and Countervailing Measures
antidumping measures, II:51, 52
compensation and retaliation, I:760, 763
compensation versus no-compensation, II:62–4
definition of, I:751; II:44
DSB and, II:54
economic effects, II:52
empirical research on, II:58
frequency and use of safeguards relative to other trade policy instruments, II:57, 60t
import-competing industries assistance, II:5
political-economy motives, II:57
senescent industries, II:56
technological catch-up, II:55
insurance against negative terms of trade shocks, II:54–55
liberalization, II:53
financial crisis and, I:753
justification for, I:752
Mexico, III:229
MFN
MFN treatment under GATT, I:758
MFN vs. discrimination, II:62
MFN vs. specificity, II:48
objections to, I:752
origin of, I:751
reforms to other WTO Agreements, II:64
trade promotion and, I:754
transparency, additional, II:64
under Agreement on Agriculture
price-based safeguard, I:205
volume-based safeguard, I:205
under ATC (Special Safeguard Mechanism)
Article 6, I:421–2
attribution, I:425
causation, I:425
overview, I:421–2
procedural steps, I:423
serious damage, I:424
under GATT Article XIX, I:755
compensation and retaliation, I:760
increased imports, I:757
most-favored nation treatment, I:758
preferential arrangements, I:758
procedural requirements, I:759
unforeseen developments and tariff concessions effect, I:757

safeguard measures (*cont*.)
Uruguay Round Negotiations, I:760; II:48–51
available policy instruments, II:48, 49
compensation and retaliation, I:763
gray-area measures, I:763
MFN versus specificity, II:48
procedural issues, I:764; II:49
selectivity, I:762
special rules for developing countries, I:764
structural adjustment, I:763
Säger case, I:808
sales below cost concept (anti-dumping), I:502. *See also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
sanitary and phytosanitary measures. *See* Agreement on Application of Sanitary and Phytosanitary Measures
Schieving-Nijstad case
EC Law and WTO, I:1499
SCM. *See* subsidies and countervailing measures
SDT. *See* special and differential treatment of developing countries
Seattle Ministerial Conference, I:61; II:472
Section 301 of US Trade Act, II:490
Section 337 of US Tariff Act of 1930, I:160–62
Section 609 of US Endangered Species Act, I:163–5
security exceptions under
GATS (Article XIV *bis*), I:845–6
GATT 1994 (Article XXI), I:154
TRIPs Agreement and, I:1080
S&D treatment. *See* special and differential treatment of developing countries
selective tendering procedures
GPA type, I:1142–3
time limit concerns, I:1151
UNCITRAL type, I:1142–3
selling commission, I:547. *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
services. *See also* General Agreement on Trade in Services
Argentina
concessions value estimation in services, III:13
privatization of Argentina's service industries, III:12
services-related inflows of FDI, III:15–16
trade in services, III:14
Colombia, III:78, 82, 86
Egypt negotiations, III:103
EU and, III:121
global free trade and, III:445–7
Indonesian issues, III:150
Japanese concerns, III:175
Korean concerns, III:204
Mexican, III:235
New Zealand concerns, III:283
Russian WTO accession impact on, III:325
services liberalization
and economic development, II:191–96
postal and express delivery services in GATS, II:196–200
services in RTAs, II:294. *See also* regional trade arrangements
commitments depth, II:298
"freeze" or "standstill" on existing non-conforming measures, II:299
ceiling binding, II:299
list or lose, II:299
ratcheting, II:299
transparency, II:299
coverage dimension, II:295
global free trade issues
compatibility, II:309
incentives, II:307
overlapping fora, II:308
issues, II:304
global free trade, II:307–10
regional agreements impact evaluation, II:305–6
liberalizing approaches, II:297–8
Closer Economic Relations (Australia-New Zealand), II:297
NAFTA, II:297
liberalizing principles
MFN, II:296
national treatment, II:296
no local presence required, II:296
no quantitative non-discriminatory restrictions, II:296
opportunities and challenges in, II:300–302
policy conclusions, II:310
Uruguay Round and regionalism, II:302–4
GATS Article V, II:302
GATT Article XXIV, II:302
shared competence. *See under* EC Law and WTO Agreement
Short-Term Arrangements (textiles and clothing), I:413; II:391–5. *See also* Long-Term Arrangements; Multi-Fiber Arrangements
Shrimp-Turtle case. *See US-Shrimp* case
SGRAD. *See* Strengthened GATT Rules And Disciplines
Significant Market Power (SMP), I:1024
similar goods. *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; identical goods
definition, I:556
requirements for qualifying as, I:557
Singapore
accession to GATT, III:336–7
GATT/WTO Membership and Uruguay Round impact on
economic effects, III:341
legal effects, III:342
political effects, III:341
social effects, III:341
TRIPS Compliance Legislation, III:342t
next Round
principal issues to be taken up in, III:344
strategies to accomplish Singapore's objectives in, III:345
RTAs, III:345–8
trade policy development, III:348–9
Uruguay Round participation, III:338
market access commitments, III:339
market access outcomes, III:339
policy goals, III:338, 340
WTO
attitude of citizens, businessmen, and political leaders towards, III:342
dispute resolution process, III:343
Membership impact, III:341
strengths and weaknesses of, III:343

Singapore Ministerial Conference, I:60
competition policy and, II:501
LDC and, II:347
Ministerial Declaration (text), III:475–82
Ministerial Declaration on Trade in Information Technology Products (text), III:483–7
trade and labor, II:574
single tendering. *See* limited tendering procedures
situation complaints, I:172, 1238. *See also* non-violation complaints; violation complaints
social services, I:932
SOEs. *See* state-owned enterprises
South Africa
Dispute Resolution participation, III:370
Doha Round, III:371
general background, III:352–4
political, constitutional and institutional transition, III:354–6
RTAs effects, III:374
trade policy development, III:376
Uruguay Round participation
objective, III:358
outcomes, III:359
policy, III:356–7
WTO
attitudes towards, III:368
strengths and weaknesses of, III:368–70
WTO Membership effects
international economic legal framework, III:365
legal framework, III:363–5
political and social effects, III:362
trade policy and economic reform, III:360–62
South African Customs Union (SACU), III:376, 377
South Asian Association for Regional Cooperation (SAARC), II:255
Southern African Development Community (SADC), III:104, 109, 359, 376
Southern Common Market. *See* MERCOSUR
Spaghetti Bowl Problem, II:283
Spain-Unroasted Coffee case
tariff classification (GATT Article I:1), I:1592–3
Special Agreement on Commodity Arrangements (SACA), I:190
special and differential treatment of developing countries, I:1530
Agreement on Agriculture
Doha Development Agenda, I:222
domestic support, I:215
export restrictions, I:215
export subsidies, I:215
market access, I:215
CVA, I:567
reservations regarding DV and CV methods, I:568
technical assistance, I:568
transitional periods, I:567
GATT (Article XVIII)
Article XVIII, Preamble, I:1532
Article XVIII, Section A, I:1533
Article XVIII, Section B, I:1533
Article XVIII, Section C, I:1534
Article XVIII, Section D, I:1535
background and overview, I:1531
GATT (Part IV), I:1535
Article XXXVI, I:1536
Article XXXVII, I:1537
Article XXXVIII, I:1537
background and overview, I:1535
Generalized System of Preferences (GATT Article XXV:5), I:1538
background, I:1538
discriminatory preferences problem, I:1540
origin of, I:1539
ten-year waiver, I:1539
Tokyo Round Enabling Clause, I:1541–6
Indonesian issues, III:153, 161
TRIMs Agreement, I:476
Uruguay Round decisions and agreements affecting, I:1546
ADA, I:1550
Agreement on Agriculture, I:1549
CVA, I:1554
Agreement on Safeguards, I:1552
AILP, I:1555
ASCM, I:1551
ATC, I:1554
background, I:1546
Decision on Measures Concerning Possible Negative Effects of Reform Program on Least-Developed and Net Food-Importing Developing Countries, I:1547
Decision on Measures in Favor of Least-Developed Countries, I:1546
DSU, I:1555
GATS (Article IV), I:1555
GPA, I:1556
SPS Agreement, I:358, 1552
TBT Agreement, I:1553
TRIMs Agreement, I:476, 1553
TRIPS Agreement, I:1555
WTO Assistance to
Committee on Trade and Development, I:1561
Doha Ministerial Conference and Development Round, I:1562–6
Plan of Action for Least-Developed Countries, I:1557–61
Singapore Ministerial Conference, I:1557
under GPA, I:1158–60
specificity
ASCM (Article 2), I:694
de facto, I:695
de jure, I:695
MFN versus specificity and safeguard measures, II:48
Sports Illustrated dispute, II:757
SPS Agreement. *See* Agreement on Application of Sanitary & Phytosanitary Measures
SPS measures *see also* Agreement on Application of Sanitary and Phytosanitary Measures
"based on" requirement (Article 3.1), I:272–3
international standards (Annex A, paragraph 3), I:269
nature of obligation under Article 3.1, I:275
conforming to international standards (Article 3.2)
"conform to" requirement, I:275
consistency presumption, I:276
definition (Annex A, paragraph 1), I:245
GATT 1947 rules
Article III, I:236
Article XI, I:236–7
Article XX(b), I:236–7
inefficiency of, I:238

SPS measures (*cont.*)
international trade and
rules for developed countries, I:234–5
rules for developing countries, I:235–6
uneasy relationship, I:233
Mexico, III:230
resulting in high level of protection (Article 3.3), I:276–8
Russian, III:306
Standards Codes, I:236, 238
state-owned enterprises (SOEs), III:51, 53
state trading enterprises (STEs), I:148; III:230
Stockholm Declaration, II:626
Strengthened GATT Rules And Disciplines (SGRAD), II:403, 409
subsidies and countervailing measures (SCM). *See also* Agreement on Subsidies and Countervailing Measures; export subsidies provisions
agricultural, II:97
Colombia, III:82
defined, II:85, 87
economic background, II:84
good and bad subsidies, II:88–92
subsidies effect on producers, II:87–8
subsidy, defined, II:85–7
economic perspective on WTO rules
agriculture sector, II:105–6
bargain protection under GATT and GATS, II:98
countervailing duties, II:103–5
domestic subsidies and definition of subsidy in WTO Law, II:100
red light subsidy (export and domestic content subsidies), II:99
yellow light, green light approach, II:101–3
export subsidies, II:90, 91, 99
global free trade and, III:447
good and bad subsidies, II:88
for export promotion, II:90–92
protective subsidies, II:89–90
green light subsidies, II:97, 101
import subsidies, II:92, 93
in GATT System Prior to Uruguay Round, II:93–5
legal background, II:93–8
Mexico, III:230
red light subsidies, II:96, 99
subsidized imports from importing country's perspective, II:92–3
trade and environment, II:516, 548–50
under GATS (Article XV), I:905
under GATT (Article XVI), I:148
Uruguay Round Agreements
Agriculture Agreement, II:97–8
SCM, II:95–7
yellow light subsidies, II:96, 101, 102
Subsidies Code (Tokyo Round), I:682–4
Civil Aircraft Agreement and, I:1169–70
GATT and, I:682–3
subsidization, I:148
bypass, I:1025–6
countervailing duties and, II:103
cross-, I:1003, 1025–6
GATT and, II:93
subsidy discipline (1947), GATT, I:681
sugar export subsidies, I:198
Sunset Clause, II:71
Sunset Reviews under ADA (Article 11), I:522
sustainable development, New Zealand concerns, III:285–6
Switzerland argument on trade and culture, II:752

Tariff Act of 1930 (US), Section 337 of, I:160
tariff bindings (Article II of GATT 1994)
Article II:1(a), I:107
Article II:3 [valuation of imports], I:111
Article II:4 [import monopolies], I:112
Marrakesh Protocol, I:112–14
other duties or charges
Article II:1(b), I:111
Article II:2 [other duties or charges], I:111
tariff classification
Article II:1, I:112
Article II:5, I:112
tariff modification and withdrawal, I:109–10
tariff negotiations, I:108–9
tariff classification, I:112, 1582
classification purpose, I:1586
customs valuation, I:1586
disguised discrimination, I:1587
"like product" issues context, I:1586–7
origin determining method, I:1586
legal effect, I:1590
nature and purpose of, I:1582
harmonized system (HS), I:1582
origins of HS, I:1583
WCO and WTO, distinction in competence, I:1584
under GATT
Article II of, I:112
Article XXIII:1:(b) [non-violation nullification or impairment of benefit], I:1597
tariff schedules conversion to HS nomenclature, I:1589
violation claims, I:1592
GATT Article I:1 [reclassifications denying MFN treatment to "like products"], I:1592–4
GATT Article II:1 violating reclassification decisions, I:1594
Japan-SPF case, I:1593–4
Spain-Unroasted Coffee case, I:1592–3
WTO rules on, I:1590
WTO/GATT case law relating to, I:1591–7
tariff concessions, I:113. *See also* General Agreement on Tariffs and Trade
tariff-rate quotas (TRQs), I:592, 596, 598, 599; II:130–32, 115t
agricultural aspects and, II:114, 119, 120
tariffication provisions of Agreement on Agriculture
Article 4.2, I:203
current access commitments, I:204
minimum access opportunities, I:204
Modalities Agreement, I:203–4
TBT Agreement. *See* Agreement on Technical Barriers to Trade
TCCV. *See* Technical Committee on Customs Valuation
TCRO, I:609, 611. *See also* Harmonization Work Programme
July 1995–May 1999, I:615–616
Uruguay Round Agreement on Rules of Origin, II:269, 270
wholly-obtained goods definition, I:649–651

technical assistance. *See also* trade related technical cooperation and capacity building
in Uruguay Round Agreements
API, II:465
CVA, II:465, 568
DSU, II:466–7
GATS, II:465
SPS Agreement, I:356; II:464
TBT Agreement, I:402–3; II:465
TRIPS Agreement, II:465
technical barriers to trade. *See* Agreement on Technical Barriers to Trade
Technical Committee on Customs Valuation (TCCV), I:540, 541, 546
Technical Committee on Rules of Origin (TCRO), I:609, 611
July 1995–May 1999, I:615–616
Uruguay Round Agreement on Rules of Origin, II:269, 270
wholly-obtained goods definition, I:649–651
technical cooperation. *See also* trade related technical cooperation and capacity building
under GATS (Article XXV), I:872
under TRIPS Agreement (Article 67), I:1079
technical regulation (under TBT Agreement), I:376–8
Article 2, I:385
Article 3, I:385
technical test. *See also* CTH test; percentage criterion test
advantages, I:608
negative technical test, I:608, 609
technology transfer under TRIPS (Articles 7 and 66.2), I:1079
Telecommunications Services, I:914, 925, 993
Annex on Telecommunications (GATS), I:996
assessment, I:1034–5
bypass subsidization, I:1025–6
commitments in WTO
convergence with media, electronic commerce and, I:1032
GATS obligations, I:1014–17
implementation. *See* WTO commitments implementation *infra*
institutional setting (WTO and ITU) and, I:1031
remedies and dispute settlement, I:1017–20
specific commitments
distinction between basic and value-added telecommunications 994
Fourth Protocol commitments, I:998–1013
GATS commitments at WTO Agreement signature time (1994), I:995–7
competition policy and, II:500
competitive safeguards, I:1003–6
cross-subsidization, I:1003, 1025–6
dispute settlement, I:1017
remedies for difficulties on foreign markets, I:1020
remedies for injury to domestic market, I:1017–19
WTO Dispute Settlement System, I:1020
GATS obligations, I:1014–17
domestic regulation, I:1015–17
government procurement, I:1017
MFN obligation, I:1014
GATS Schedules, I:995
MFN obligation, I:1014
trade and culture, II:771
WTO accession impact on
Chinese, III:63
Russian, III:300, 326
WTO commitments implementation, I:1021
EU, I:1021–5
United States
abandoning reciprocity, I:1025–8
accounting rates, I:1028–31
WTO inclusion of, I:991
WTO Telecommunications Negotiations overview, I:994
1986 to GATS 1994 conclusion, I:994
1996 breakdown, I:993
1997 end game, I:993–4
tender under GPA. *See also* tendering procedures under GPA
documentation
Article VII:2, I:1146
Article XII:3(c), I:1146
receipt, I:1148
Article XIII:1(a), I:1147
Article XIII:1(b), I:1147
tender notices publicity under GPA
information on award of contracts, I:1152
NIP, I:1149–50
NPP, I:1150
statistical and other information (Article XIX), I:1153–4
time limit concerns (Article XI:1)
open procedures, I:1151
selective procedures, I:1151
tendering procedures (under GPA). *See also* bid challenge procedures
competitive negotiation (Article XIV), I:1145
limited tendering procedures, I:1143–5
open tendering procedures, I:1142
selective tendering procedures, I:1142–3
Textiles and Clothing Agreement. *See* Agreement on Textiles and Clothing
textiles and apparel, Mexico, III:229
textiles and developing countries, II:385
ATC
analysis of integration program, II:412
disputed balance of rights and obligations, II:408–10
implementation of, II:410
inherent weaknesses of, II:411
liberalization and integration process, II:405–7
Punta del Este Preparations, II:401–3
Textiles Monitoring Body, II:410
transitional safeguard mechanism, II:407
Uruguay Round Negotiations, II:403
dispute settlement, II:413–16
era of restrictions, II:386
MFA
comparison with GATT, II:398
objectives and impact of, II:399–401
textiles and clothing as exception to GATT system, II:390
GATT and MFA, comparison between, II:398–401
Multi-Fiber Arrangement, II:395–401
Short-Term and Long-Term Arrangements, II:391–5
textiles importance in international trade, II:385
Uruguay Round and beyond, II:387–90

Textiles Monitoring Body (TMB), I:418, 426
ATC Jurisprudence
Turkey-Textiles case, I:429
US-Shirts and Blouses case, I:429
textiles and developing countries, II:410
Textiles Surveillance Body (TSB), I:414
Thai Cigarettes case
GATT Jurisprudence exception, II:439
human rights and trade, II:687, 688
TBT Agreement and, I:393
WTO Dispute Settlement Practice Relating to Protection of Health and Environment, II:652
Thailand-Antidumping Duties case
amicus curiae briefs admissibility consequences in, I:1446
TMB. *See* Textiles Monitoring Body
Tokyo Round. *See also* Doha Development Agenda; Kennedy Round; Uruguay Round
Agreement on Import Licensing Procedures, I:594
agriculture under GATT and, I:195–6, 201
Aircraft Code, I:1168
Anti-Dumping Code, I:496
Customs Valuation Code, I:534, 536
Enabling GSP Clause, I:1541–6
background, I:1541
problem of graduation, I:1544
terms of Enabling Clause, I:1542
Government Procurement
dispute resolution, I:1132–3
procedural rules, I:1131–2
Tokyo Round Code, I:1129–34
NTB Agreements, I:94
participation
Colombia, III:74–6
Japan participation in, III:172
Korea and, III:188
United States, III:389, 392–6
plurilateralism aspects, I:94
Standards Code, I:375–6
inefficiency of, I:238
SPS measures and, I:236–7
Subsidies Code, II:97
total AMS. *See under* aggregate measurement of support
tourism (under GATS), Annex on, I:910
tourism and travel related services, I:916, 932, 933
TPA. *See* Trade Promotion Authority
TPRB. *See* Trade Policy Review Body
TPRM. *See* Trade Policy Review Mechanism
trade and culture
Brazil argument on, II:752
Canada argument on, II:752
cultural goods and services in WTO, II:753
ADA, II:764
Agreement on Safeguards, II:765
ASCM, II:760
Basic Telecommunications, II:771
GATS, II:767, 775–7
GATT 1994, II:753–60
intellectual property rights, II:777
investment, II:774
TRIMs Agreement, II:774
Cultural Exception Approach
Cultural Exceptions, II:785
Cultural Exemptions, II:786
Cultural Reservations, II:786
Cultural Waiver, II:787
GATT 1994
Article I.1-Most Favored Nation, II:756
Article III-National Treatment, II:756–60
Article IV-Cinematographic Films, II:753–5
Article XI-Quotas, II:760
Article XX(f)-Exception for National Treasures, II:755–6
globalization aspects, II:750–51
Sports Illustrated dispute, II:757
Switzerland argument on, II:752
US argument on, II:752
trade and environment, II:513. *See also* environment issues
China, III:69
Colombia issues, III:86
Committee on Trade and Environment (CTE), II:529–30
Egyptian issues, III:106
global free trade and, III:451
Korean issues, III:207
legal and policy issues, II:536
agriculture, II:552–4
biosafety, II:550–52
intellectual property, II:555–8
labeling, II:540–43
market access, II:547
MEAs, II:558–60
process and production methods, II:538–40
scientific uncertainty and precaution, II:544–7
services, II:554
subsidies, II:548–50
looking forward, II:568–9
material linkages (economic, social and environmental)
direct and indirect linkages, II:536
nature of material linkages, II:535
positive and negative linkages, II:535
MEAs, II:558–60
organizational issues
assessment, II:561
compliance, enforcement and dispute settlement, II:566–8
information exchange and observer status, II:565
transparency and public participation, II:562–5
trade and environment debate, II:532–5
WTO disputes, II:519
Australia-Salmon, II:525–6
EC-Asbestos, II:527–9
EC-Hormones, II:523
Japan-Varietals, II:526–7
US-Gasoline, II:519–21
US–Shrimp, II:521–2
US-Shrimp 21.5 (implementation decision), II:523
WTO, environment and sustainable development, II:513
Agreement on Agriculture, II:516
DSU, II:518
GATS, II:517
GATT, II:514
Marrakesh Agreement establishing "WTO Agreement", II:513
SCM Agreement, II:516
SPS Agreement, II:515
TBT Agreement, II:514
TRIPS Agreement, II:517
WTO's Fourth Ministerial Mandate on Trade and Environment, II:531

trade and gender
APEC, II:705
CEDAW, II:701, 704, 736
GATT Article XX(a), II:737
gender relevance to international trade and investment, II:699
gender and trade liberalization, II:703–8
gender concepts and terms, II:699–702
gender differences and trends in global economic activity, II:702–3
gender equality, II:700
gender, trade and investment
legal analysis of, II:711–16
socioeconomic approaches to, II:708–11
Informal Working Group on Gender and Trade (IWGGT), II:706–7
International Gender and Trade Network (IGTN), II:706–8
MERCOSUR, II:705
OECD gender definition, II:699–700
TPRB, II:740
trade agreements, gender analysis of, II:716
GPA, II:729
Agreement on Agriculture, II:723–6
ASCM, II:720–22
ATC, II:719
GATS, II:726–9
GATT 1994, II:717–19
SPS Agreement, II:732–3
TBT Agreement, II:732–3
TRIMs Agreement, II:723
trade-related areas, gender analysis of, II:729
domestic regulation, II:732–3
environment, II:737
human rights, II:736–7
intellectual property, II:729–32
investment, II:729
labor standards, II:734–6
UNCTAD efforts, II:704–5
UNIFEM, II:706
WTO processes, gender analysis of, II:738
dispute settlement, II:739
TPRM, II:740
trade negotiations, II:738
trade-related capacity building, II:741–2
trade and human rights. *See* human rights and trade
trade and labor. *See* labor and trade
trade barriers regulation and EC Law (Council Regulation 3286/94), I:1508. *See also* Agreement on Technical Barriers to Trade
permitted subject matter of TBR complaints, I:1509–13
Community industry complaints against foreign trade practices effects, I:1511
governmental measures, I:1509
individual Community enterprises complaints, I:1512
Member State complaints, I:1511
mixed competence issues and TBR, I:1510
threatened injury, I:1513
post complaints procedure, I:1513
procedure outcome (termination, suspension or WTO dispute settlement), I:1514
scope of, I:1509
WTO proceedings initiation, I:1514
Trade Facilitation, Modalities for Negotiations on (August 2004) (text), III:528–9
trade in goods, III:292
Argentina concerns
agriculture, III:18
manufacturing, III:17
Egypt concerns, III:96
Russian concerns
apparel and footwear issues, III:294
Civil Aircraft (Plurilateral Agreement) issues, III:294
industrial goods negotiations, III:292–4
IT products issues, III:294
trade liberalization. *See* computational analysis and trade liberalization
trade policy development, I:28
business sector and, I:29
Canada, III:40–46
formal consultative mechanisms, III:43
informal consultative mechanisms, III:44–6
Colombia, III:89
consumer interests and, I:32
Egypt, III:109
EU, III:113–15
globalization aspects, I:22, 33–4
Japan, III:180
Korea, III:210–12
labor unions, I:31
legislative level, I:30
lobbies proliferation in, I:28
media and, I:30
Mexico, III:238–41
national interests, I:33
New Zealand, III:271
NGOs and, I:31
Singapore, III:348–9
South Africa, III:376
trade stakeholders interests and, I:32
United States
debate over multilateralism, III:387
President and Congress (constitutional tensions over trade), III:384
trade negotiating authority and "fast-track", III:385–7
USTR, III:388
WTO role in
efficiency increasing mechanisms, I:36–7
Members/delegation, I:35
multilateral perspective, I:37
operations, I:34
Secretariat, I:35–6
Trade Policy Review Body (TPRB), I:59, 64; II:740
Trade Policy review functions of WTO
TPRB, I:59
TPRM, I:58–9
Trade Policy Review Mechanism (TPRM), I:58–9, 136–7; II:740; III:153
Trade Promotion Authority (US), II:175, 577
Trade-Related Aspects of Intellectual Property Rights. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights
trade-related capacity building, gender analysis of trade and, II:741–2
trade-related technical cooperation and capacity building (TRTCCB)
definitions, II:458–60
Geneva three-pronged approach, II:462–4
ITC, II:463
UNCTAD, II:463
WTO, II:462

Trade-Related Aspects (*cont*.)
technical assistance in Uruguay Round Agreements
API, II:465
CVA, II:465
DSU, II:466–7
GATS, II:465
SPS Agreement, II:464
TBT Agreement, II:465
TRIPS Agreement, II:465
trade-related capacity building, II:460–62
trademarks. *See also* Agreement on Trade-Related Aspects of Intellectual Property Rights
Articles 15–16 and 18–21 of TRIPS Agreement, I:1087
negotiating history, I:1087
transaction value definition under CVA
actually paid or payable price, I:545
agreed price, I:544
agreed price, changes in, I:545
identification of targeted transaction, I:546
no time requirement, I:546
price actually paid or payable, I:544
price for goods, I:544
price in this transaction, I:545
transition economies
regionalism and, II:249t
AFTA, II:253
APEC, II:256
ASEAN, II:253, 255–6
CAEC, II:255
CEFTA, II:251–2
CIS, II:254–6
CMEA, II:251, 256
ECO, II:255–6
EU, II:256
NATO, II:251
SAARC, II:255
WTO and, II:256–9, 257t
transparency
AB and, I:1398
API (Articles 2.5–2.8), I:578
commitment in MTAs, I:138, 139
CVA (Article 12), I:566
issues
external transparency, I:86
internal transparency, I:85
Egyptian issues, III:106
GATS (Article III)
Article III:1, I:831
Article III:3, I:831
Article III:4, I:832
Article III:5, I:832
Article III*bis*, I:832
Mongolian issues, III:258
safeguard measures and, II:64
SPS Agreement
Annex B, I:336
Annex B.1, I:337
Annex B.5, I:337–8
Annex B.6, I:338
Annex B.10, I:340
Article 5.8, I:336, 339
Article 7, I:336
infrastructure for transparency, I:340
notification procedure, I:338–9
scope of notification obligation, I:336
TBT Agreement
allowance of time for comments obligation, I:401
creation of inquiry points obligation, I:402
notification obligation, I:401
pre-enactment publication obligation, I:401
provision of copies obligation, I:401
publication of measures obligation, I:402
TRIMs Agreement (Article 6), I:452
TRIPS Agreement and (Article 63), I:1081
transport services, I:917, 935–7, 1472; III:301, 328
transshipment concerns under Anti-Dumping Agreement, I:508
travel and tourism-related services, I:932–3
TRIMs Agreement. *See* Agreement on Trade-Related Investment Measures
TRIPS Agreement. *See* Agreement on Trade-related Aspects of Intellectual Property Rights
TRQ. *See* tariff-rate quotas
TRTCCB. *See* trade related technical cooperation and capacity building
TSB. *See* Textiles Surveillance Body
Turkey-Textiles case (ATC Jurisprudence)
consultations and, I:1224
GATT Article XXIV (RTA regulation aspects), II:240
RTA regulation aspects, II:235–7
TMB role, I:429

UDHR. *See* Universal Declaration of Human Rights
UNCTAD. *See* United Nations Conference on Trade and Development
UNCITRAL. *See* United Nations Commission on International Trade Law
unconditional most-favored-nation obligation. *See under* most-favored nation
undisclosed information protection under TRIPS Agreement, I:1101
UNIFEM, II:706
unilateral trade liberalization, III:224
United Nations Commission on International Trade Law (UNCITRAL). *See also* Agreement on Government Procurement
award contracts by, I:1148
type selective procedure, I:1142–3
United Nations Conference on Trade and Development (UNCTAD), I:1528–30
Colombia, III:74
competition policy and, II:497
conference on LDC, II:361
Geneva three-pronged approach and TRTCCB, II:463
Indonesia, III:148
trade and gender, II:704–5
United Nations Environmental Programme (UNEP), II:167–8
United Nations Fund for Women (UNIFEM), II:706
United States, III:381. *See also* European Union; Russia
1980s (congressional unrest, bilateralism and a globalizing economy)
Congress' restlessness, III:398–9
early 1980s (trade deficits, trade restrictions, breakdown in Geneva), III:396–8
globalizing economy, III:402
Omnibus Trade Act of 1988, III:400–402
agriculture trade and, I:202

agriculture under GATT and, I:191
Agricultural Adjustment Act of 1933, I:190
Article XI:2(c) provisions, I:190
Article XXV:5, waivers under, I:190
argument on trade and culture, II:752
Cancun, III:432–34
Doha launch, III:426–32
in GATT, Tokyo Round (1947–1979)
early years, III:389
Kennedy Round, III:390–92
Tokyo Round, III:392–6
government competition policy and negotiations, II:503
leadership in GATT formation
postwar revival of trading system, III:382
US settles for GATT, III:383
QUAD member, I:812–14
Telecommunications Services commitments implementation and
abandoning reciprocity, I:1025–8
accounting rates, I:1028–31
Trade Act of 2002, III:426, 428
trade policy decision-making in
debate over multilateralism, III:387
President and Congress (constitutional tensions over trade), III:384
trade negotiating authority and "fast-track", III:385–7
USTR, III:388
Uruguay Round
1986–89 (three key pillars building), III:404–8
1993 finishing of Round, III:417–19
Blair House and beyond, III:415–17
from Brussels to Dunkel Draft, III:412–15
importance to U.S. Policy, III:403
mid-term review in Montreal and on to Brussels, III:408–12
Uruguay Round Agreements Act, III:419–22
WTO first seven years (negotiations and implementation)
built-in agenda, III:423
foundations laying, III:422
new initiatives, III:424
WTO in 2005 (challenges ahead), III:434–5
Universal Declaration of Human Rights (UDHR), II:626
Universal Services Obligations (USO), II:197, 198
URAA. *See* Uruguay Round Agreements Act
Uruguay Round. *See also* Doha Development Agenda; Kennedy Round; Tokyo Round
ADA, I:498–500
Agreement on Agriculture, I:200, 202, 205
Agreement on Safeguards, I:760
AILP, I:594
anti-dumping action, II:71, 78, 79
Appellate Body and, I:1279–1281
Argentina
intellectual property rights (patents for pharmaceutical drugs), III:7–12
services, III:12–16
trade in goods, III:17–18
ARO
Article 9.2 of, II:269
CRO, II:269–70
HS nomenclature, II:269
TCRO, II:269–70
ASCM, I:684, 685
ATC, I:415; II:403
linkage to other GATT Rules, I:418
monitoring body, role of, I:417–18
quota growth rates, I:416
scope of products to be integrated, I:417
special safeguard mechanism development, I:417
speed of integration, I:416
chronology
December 1988 to December 1990, I:7
December 1990 to December 1991, I:7
December 1991 to June 1993, I:7
June to December 1993, I:8
pre-negotiation (1981–86), I:6
September 1986 to December 1988, I:7
Colombia participation in
negotiations objectives, III:79
negotiations results, III:80
agriculture, III:81
textile and clothing, III:81
tropical products, III:80
Punta del Este Declaration, preliminary negotiations for, III:79
services, III:78
competition policy and
GATS, II:500
Singapore Ministerial Meeting (1996), II:501
Telecommunications Services Agreement, II:500
TRIMs Agreement, II:500
computational analysis of trade liberalization (UR-1, UR-2, and UR–3 Scenario), II:25, 27t
aggregate results, II:31
computational results, II:26
MFA, II:26
sectoral results, II:29t., II:31
consultation process and, I:1202
developing countries, decisions and agreements affecting, I:1546
Decision on Measures Concerning Possible Negative Effects of Reform Program on Least-Developed and Net Food-Importing Developing Countries, I:1547
Decision on Measures in Favor of Least-Developed Countries, I:1546
developing countries, MTAs providing S&D treatment of, I:1548
ADA, I:1550
Agreement on Agriculture, I:1549
Agreement on Safeguards, I:1552
AILP, I:1555
ASCM, I:1551
ATC, I:1554
CVA, I:1554
DSU, I:1555
GATS (Article IV), I:1555
GPA, I:1556
SPS Agreement, I:1552
TBT Agreement, I:1553
TRIMs Agreement, I:1553
TRIPS Agreement, I:1555
Egypt participation, III:93, 101
environmental issues and, II:149
intellectual property, II:151
services (GATS and GATT 1947), II:152
standards (TBT and SPS Agreements), II:150
subsidies (SCM Agreement), II:151

Uruguay Round (*cont.*)
EU and. *See under* European Union
Financial Services and, I:958–60
GATS and, I:811
goals, I:812–17
negotiations course, I:818
results overview, I:820
GATT 1994
Marrakesh Agreement, I:95
MFN obligation, I:95
MTAs, decisions, and understandings, I:98
transition from GATT 1947 to GATT 1994, I:96–8
GATT Article XXIV, understanding on, I:176–8
globalization impact on, I:23, 24; III:458–61
GPA, I:1134–7
Indonesian issues
institutional issues, III:153
intellectual property rights, III:151
market access in goods, III:149
S&D treatment, III:153
services, III:150
strengthening GATT rules, III:152
Japan participation in, III:172–5
Korea, III:192
economic and political impact, III:197–9
implementation, III:197
negotiations, III:194
objectives, III:194
participation in Uruguay Round, III:194
results, III:195
LDCs in multilateral trading system, II:346, 369–71
Mexico, III:227
dispute settlement, III:232
GATS, III:231
government procurement, III:232
market access (non-tariff barriers), III:229–30
antidumping and countervailing duties, III:229
BOP exceptions, III:230
import licenses, III:230
rules of origin, III:230
safeguards, III:229
sanitary and phytosanitary measures, III:230
subsidies, III:230
technical barriers to trade, III:230
market access (tariffs), III:228–9
agriculture, III:228
industrial goods, III:228
textiles and apparel, III:229
RTAs, III:232
state-trading enterprises, III:230
TRIMs Agreement, III:231
TRIPS Agreement, III:231
New Zealand participation in, III:272–4
overview of, I:4, 5
PSI, I:575
regionalism and, II:302–4
ASEAN, II:303
CARICOM, II:303
FTAA, II:303
GATS (Article V), II:302
GATT (Article XXIV), II:302
MERCOSUR, II:303
NAFTA, II:303
rules of origin and, II:269
safeguard measures and, II:48–51
available policy instruments, II:48
compensation and retaliation, II:49
MFN versus specificity, II:48
procedural reforms, II:49
SCM measures and
Agriculture Agreement, II:97–8
SCM, II:95–7
Singapore
market access commitments, III:339
market access outcomes, III:339
policy goals, III:338, 340
South Africa participation in
objective, III:358
outcomes, III:359
policy, III:356–7
SPS Agreement, I:239
Cairns Group proposal, I:241
developing countries, role of, I:242
EC proposal, I:241
trading nations position in, I:240
US proposal, I:241
technical assistance in
API, II:465
CVA, II:465
DSU, II:466–7
GATS, II:465
SPS Agreement, II:464
TBT Agreement, II:465
TRIPS Agreement, II:465
textiles and developing countries, II:387–90
TRIMs Agreement and, I:445
negotiating positions, I:446–7
outcome, I:447
TRIPs Agreement and, I:1055
United States
1986–89 (three key pillars building), III:404–8
1993 finishing of Round, III:417–19
Blair House and beyond, III:415–17
from Brussels to Dunkel Draft, III:412–15
importance to U.S. Policy, III:403
mid-term review in Montreal and on to Brussels, III:408–12
Uruguay Round Agreements Act (US) (URAA), II:110, 119, 124–8, III:419–22. *See also* Agreement on Agriculture
green box measures, II:127
US-Copyright case
amicus curiae briefs admissibility consequences in, I:1443
US-Gasoline case
AB jurisdiction, I:1393
GATT jurisprudence execption, II:438
trade and environment, II:519–21
trade and labor, II:587–89
US-Restrictions on Imports of Cotton and Man-Made Fibre Underwear case, I:135
ATC Jurisprudence
evidentiary scope of review, I:428
standard of review, I:428
textiles and developing countries, II:415
US-Rules of Origin case
rules for textiles and apparel products, I:612
US-Section 110(5) of U.S. Copyright Act (under TRIPS), I:1089
contemporaneity, II:436

disputes, II:426
exception, II:442
principles of interpretation, II:431
relationship with GATT, II:428
US-Shirts and Blouses case
ATC, I:424, 425, 427
ATC Jurisprudence
burden of proof, I:428
evidentiary scope of review, I:429
TMB role, I:429
textiles and developing countries, II:414
US-Shrimp case, II:163
AB and, I:1297, 1298, 1316, 1322, 1330, 1393
amicus curiae briefs, I:1399
amicus curiae briefs admissibility consequences, I:1431, 1433–5, 1442; II:643
balancing principles of human rights, II:637
consultations and (DSU Article 21.5), I:1225
environmental issues, II:147, 151, 165, 166
human rights concerns, II:643
TBT Agreement and, I:383
trade and environment, II:521–2, 540
trade and labor, II:587
US-Shrimp 21.5 (implementation decision), II:523, 540, 653
US Trade Act of 2002, III:426, 428
US Trade Promotion Authority Act 2002, II:577
US Trade Representatives (USTR), III:388, 389
USO. *See* Universal Services Obligations

values in trade and labor
in markets and workplace, II:604–6
shared values
as instrumental tools, II:606, 610
as normative principles, II:609–10
as over-arching objectives, II:607–8
values framework normative implications
internationalization of values, II:611
ordering priorities, II:612–14
VER. *See* Voluntary Export Restraint
Vienna Convention on the Law of Treaties (VCLT)
Article 2, I:1406
Article 30, I:1415
Article 31, I:1397, 1595–6; II:643
Article 31.1, I:1356
Article 31.3, II:630
Article 31:3(c), II:638
Article 32, I:1397
Article 41, I:1415
Article 53, I:1415
Vienna Declaration on Human Rights, II:628
violation complaints. *See also* non-violation complaints; situation complaints
under GATS (Article XXIII), I:867
under GATT, I:170
volume-based safeguard, I:205. *See also* safeguard measures
Voluntary Export Restraint (VER), I:152; II:47, 49, 390. *See also* Export Restraint Agreement; Orderly Marketing Agreement, Voluntary Restraint Agreement
Voluntary Restraint Agreement (VRA), I:151; II:277

W/120 classification, I:921
air transport services, I:937–8
business services, I:922
computer and related services, I:923–4
legal services, I:922
communication services, I:924–5
construction and related engineering services, I:927
distribution services, I:927
educational services, I:928
energy services, I:939–41
environmental services, I:928–30
financial services, I:931
health-related and social services, I:932
recreational, cultural and sporting services, I:934
telecommunication services, I:925
tourism and travel-related services, I:932–3
transport services, I:935–7
waivers
granted under GATT 1947, I:179
granted under GATT 1994, I:179
WTO decision making and, I:69
WCO. *See* World Customs Organization
WCT. *See* WIPO Copyright Treaty
WEO. *See* World Environmental Organization
WGTI. *See* Working Group on Trade and Investment
wholly-obtained goods (ARO Appendix 1)
CRO definition, I:651
goods obtained outside country, definition of, I:652, 653
preparatory discussion, I:648
TCRO definition, I:649–51
WIPO. *See* World Intellectual Property Organization
WIPO Copyright Treaty (WCT), I:1085
Work Programme on Electronic Commerce, II:471
Working Group on Trade and Investment, I:467, 477
Working Party on Domestic Regulation, I:944
draft disciplines, I:948
equivalence/international standards, I:945
general issues, I:945
necessity, I:945
professional services, I:839, 870, 942, 946
regulatory examples, I:947
transparency, I:945
Working Party on Professional Services, I:942
World Customs Organization (WCO), I:1584; II:269
WCO Origin Project, I:615
World Environmental Organization (WEO), II:167
World Intellectual Property Organization (WIPO), I:72, 1048
World Trade Organization (WTO), I:5. *See also under* Indonesia; Mongolia; Singapore; United States
competition policy and
key issues for, II:506–8
Uruguay Round Agreements and WTO, II:499–501
cultural goods and services in
ADA, II:764
Agreement on Safeguards, II:765
ASCM, II:760
Basic Telecommunications, II:771
GATS, II:767, 775–7
GATT 1994, II:753–60
intellectual property rights, II:777
investment, II:774
TRIMs Agreement, II:774
democratic roots of, I:40–46
consensus rule making, I:43–5
dispute settlement, I:43
MFN obligation, I:40n.

World Trade Organization (*cont.*)
multilateral trading system, I:40, 41
national treatment obligation, I:41n.
negotiating rounds, I:42
NGO involvement, I:47
non-discrimination principle, I:40, 41
environmental issues and, II:141
conflicts with multilateral environmental agreements, II:148
restraints on national environmental protection, II:145–8
WTO as a self-enforcing agreement, II:160–61
WTO Rules to accommodate environmental safeguards, II:158–60
EU and
Doha, III:134–5
EU associations and enlargements in WTO, 131
one more Round, III:132–4
WTO Dispute Settlement, III:128–31
functions under Marrakesh Agreement
dispute settlement, I:58
global economic policymaking, I:59–60
negotiations, I:57–8
Trade Policy review, I:58–9
TPRB, I:59
TPRM, I:58
global integration and, III:463–9
governance structure. *See* World Trade Organization governance structure
human rights and. *See under* human rights and trade
institutional framework. *See* World Trade Organization institutional framework
investment-related provisions in, II:314
Agreement on Government Procurement, II:315
ASCM, II:316
GATS, II:314
TRIMs Agreement, II:315
TRIPS Agreement, II:315
Japan
attitude towards WTO, III:176
WTO strengths and weaknesses, III:177
labor standards and, II:177
LDCs in multilateral trading system, II:347, 348
Membership. *See* World Trade Organization Membership
Mexican public attitudes towards
business groups opinions, III:241
SMEs and NGOs, III:242–3
RTAs under, II:229–31
RTAs regulation
legal framework for, II:219–27
institutional framework for, II:228–34
WTO dispute settlement based, II:234–40
regulation in WTO system interest, II:241–44
rules of origin in, II:264–73
services liberalization and economic development, II:191–6
South Africa
attitudes towards WTO, III:368
strengths and weaknesses of WTO, III:368–70
WTO Membership effects on, III:360–65
tariff classification rules, I:1590
non-violation nullification or impairment of benefit [GATT Article XXIII:1:(b)], I:1597
violation claims (GATT Articles I:1 and II:1), I:1592–7
trade and environment (Fourth Ministerial Mandate), II:531
trade and labor, II:592
trade policy development and
efficiency increasing mechanisms, I:36–7
multilateral perspective, I:37
WTO Members/delegation role, I:35
WTO operations, I:34
WTO Secretariat role, I:35–6
transition economies, II:256–9, 257t
TRTCCB (Geneva three-pronged approach), II:462
WTO Agreement, Preamble, I:79
World Trade Organization governance structure, I:60–67
committees, I:64
Committee on Balance-of-Payments Restrictions, I:65
Committee on Budget, Finance and Administration, I:66
Committee on Regional Trade Agreements, I:66, 67
Committee on Trade and Development, I:65
Committee on Trade and Environment, I:66
General Council, I:63, 64
Meetings, I:67
Ministerial Conference
Cancun (2003), I:63
Doha (2001), I:62
Geneva (1998), I:61
Seattle (1999), I:61
Singapore (1996), I:60
organization of negotiations, I:67
Sectoral Councils and Subsidiary Bodies, I:64
World Trade Organization institutional framework
decision-making
accessions, I:70
amendments, I:70
consensus and voting, I:67–8
interpretations, I:68
waivers, I:69
decision-making difficulties, I:81–4
amendment procedures, I:85
legislative institutions relationship to DSB, I:83
routine decisions, I:81
ICITO, I:54
institutional issues, Uruguay Round Negotiations on
FOGS Group, I:55
new organization creation proposal, I:56
ITO, I:53
Marrakesh Agreement and
conflicts resolution between WTO Agreements, I:80
continuation of GATT practices (Article XVI:1), I:80
decision making in WTO, I:67–70
national laws conformation to WTO rules, requirements to, I:80
organizational issues, I:71–2
reservations, I:81
WTO functions, I:57–60
WTO governance structure, I:60–67
WTO Preamble, I:79
WTO scope, I:56–7
Membership, I:73–9
organizational issues
relations with IGO and NGO, I:72
WTO membership, I:73
WTO Secretariat, I:71
WTO status, I:71
pragmatic adaptation and its limitations

World Trade Organization institutional framework (*cont.*)
decision making process inadequacies, I:55
structural inadequacies, I:54, 55
transparency issues
external transparency, I:86
internal transparency, I:85
World Trade Organization law. *See also* dispute settlement
interaction with international law rules, I:1406, 1417
cautionary concerns, I:1409
"conflict" definition, I:1420
general international law, I:1407
General International Law rules on inter-play of norms, I:1420
non-WTO treaties, I:1408
panels obligation and General Conflict Clause constitution in favor of WTO rules, I:1421–3
WTO Agreement contradicting non-WTO Treaties, I:1418–20
WTO Law "contracting out" of General International Law, I:1418
international law referred to in the process of "interpreting" WTO terms, I:1411
international law referred to outside the process of treaty interpretation, I:1412
cautionary concerns, I:1417
general international law, I:1413
non-WTO treaties, I:1414–17
World Trade Organization Membership
accession of new members
accession approval, I:78
accession protocol and working party report, I:75–7
bilateral negotiations, I:75
Foreign Trade Regime Memorandum, I:74–5
China
challenges after accession to WTO, III:61–64
economic reforms during its bid for, III:51–55
legal reforms during its bid for, III:55–6
legal system, effect on, III:64–6
opportunities arising from, III:57–61
strategies after joining "Club", III:66–9
Egypt
attitude towards WTO, III:98
economic effects, III:96–7
legal effects, III:98
participation in WTO Dispute Settlement Process, III:99
political effects, III:97
social effects, III:98
strengths and weaknesses, Egyptian perspective on, III:98–9
non-application among Members (Article XIII), I:78
original members, I:73
withdrawal, I:79
World Trade Organization Secretariat
organizational issues, I:71
trade policy development and, I:35, 36
world trade regime, Uruguay Round Negotiation launching and, I:14

yellow light subsidies (ASCM), II:96, 101, 102. *See also* green light subsidies; red light subsidies

The World Trade Organization: Legal, Economic and Political Analysis

Volume II

The Editors

PATRICK F. J. MACRORY, Director, International Trade Law Center, International Law Institute, Washington, D.C.

ARTHUR E. APPLETON, Counsel, White & Case (Geneva)

MICHAEL G. PLUMMER, Professor of International Economics, Johns Hopkins University, SAIS-Bologna

Editorial Advisory Board

RICHARD BERNAL, Director General of the Caribbean Regional Negotiating Machinery

RAJ BHALA, University of Kansas Law School

MARICE CREMONA, Queen Mary's and Westfield College, University of London

ESPERANZA DURAN, Agency for International Trade Information and Cooperation, Geneva

ROBERT HERZSTEIN, Miller & Chevalier, Washington, D.C.

GARY HORLICK, Wilmer, Cutler, Pickering, Hale & Dorr, Washington, D.C.

ROBERT LITAN, The Brookings Institution, Washington, D.C.

MITSUO MATSUSHITA, Seikei University, Tokyo

ERNST-ULRICH PETERSMANN, European University Institute, Florence

ALAN SYKES, University of Chicago Law School

The World Trade Organization: Legal, Economic and Political Analysis

Volume II

Editors

Patrick F. J. Macrory
Director, International Trade Law Center, International Law Institute, Washington, D.C.

Arthur E. Appleton
Counsel, White & Case (Geneva)

Michael G. Plummer
Professor of International Economics, Johns Hopkins University, SAIS-Bologna

Springer

INTERNATIONAL LAW INSTITUTE ILI

Library of Congress Cataloging-in-Publication Data

The World Trade Organization : legal, economic and political analysis / editors Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer.
p. cm.
Includes bibliographical references and index.
ISBN 0-387-22685-0 (alk. paper)
1. World Trade Organization. 2. Foreign trade regulation. 3. Labor laws and legislation, International. 4. International trade. I. Macrory, Patrick F. J. II. Appleton, Arthur Edmond. III. Plummer, Michael G., 1959–

HF1385.C654 2005
382′.92—dc22
2004052576

© 2005 Springer Science+Business Media, Inc.
All rights reserved. This work may not be translated or copied in whole or in part without the written permission of the publisher (Springer Science+Business Media, Inc., 233 Spring Street, New York, NY 10013, USA), except for brief excerpts in connection with reviews or scholarly analysis. Use in connection with any form of information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now know or hereafter developed is forbidden.
The use in this publication of trade names, trademarks, service marks and similar terms, even if the are not identified as such, is not to be taken as an expression of opinion as to whether or not they are subject to proprietary rights.

Printed in the United States of America.

9 8 7 6 5 4 3 2 1 SPIN 11055563

springeronline.com

CONTENTS

Table of Cases vii

III. ECONOMIC, POLITICAL, AND REGIONAL ISSUES

A: Economic Perspectives

37. Economic Principles of International Trade 3
Mordechai E. Kreinin and Michael G. Plummer

38. Computational Analysis of Multilateral Trade Liberalization in the Uruguay Round and Doha Development Round 23
Drusilla K. Brown, Alan V. Deardorff, and Robert M. Stern

39. Safeguards 43
Chad P. Bown and Meredith A. Crowley

40. Anti-dumping and Competition Law 67
P. J. Lloyd

41. Subsidies and Countervailing Measures 83
Alan O. Sykes

42. Agriculture 109
Kym Anderson

43. Environmental Issues 137
Chad P. Bown and Rachel McCulloch

44. Labor Standards 171
Charles Pearson

45. Services: The Case of Postal versus Express Delivery Services 189
Michael G. Plummer

B: Regional Issues

46. Regulating Regional Trade Agreements—a Legal Analysis 203
Robert E. Herzstein and Joseph P. Whitlock

47. The Economies in Transition, the WTO and Regionalism 247
Richard Pomfret

48. Rules of Origin and Rules of Preference and the World Trade Organization: The Challenge to Global Trade Liberalization 263
William E. James

49. Services in Regional Trading Arrangements 293
Christopher Findlay, Sherry Stephenson, and Francisco Javier Prieto

50. Rules for Foreign Direct Investment at the WTO: Building on Regional Trade Agreements 313
Michael Gestrin and Alan Rugman

51. Regional Trading Arrangements and Developing Countries 325
Maurice W. Schiff and L. Alan Winters

C: Developing Country Perspectives

52. LDCs in the Multilateral Trading System 341
Ratnakar Adhikari

53. Textiles and Developing Countries 383
Magda Shahin

54. The Trips Agreement and Developing Countries 419
Carlos M. Correa

55. Trade-Related Technical Cooperation and Capacity Building 457
Esperanza Durán

D: New Issues

56. Trade and Electronic Commerce 469
Stewart Baker and Maury Shenk

57. Trade and Competition Policy 487
Merit E. Janow

58. Trade and the Environment 511
Matthew Stilwell and Jan Bohanes

59. Trade and Labor I 571
Friedl Weiss

60. Trade and Labor II 597
Janelle M. Diller

61. Trade and Human Rights I 623
Ernst-Ulrich Petersmann

62. Trade and Human Rights II 663
Sheldon Leader

63. Trade and Gender 697
Eugenia McGill

64. Trade and Culture 747
Ivan Bernier

Author Biographies 795

Index 807

TABLE OF CASES

WTO Decisions

Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil:
Report of the Panel, WT/DS241/R (2003): I:507, I:511, I:512, I:513, I:517, I:523

Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy:
Report of the WTO Panel (not appealed), WT/DS189/R (2001): I:506, I:513, I:514, I:515, I:516, I:517, I:1351

Argentina—Definitive Safeguard Measure on Imports of Preserved Peaches:
Report of the WTO Panel (not appealed), WT/DS238/R (2003): I:755, I:766, I:768, I:772, I:786

Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items:
Report of the WTO Panel, WT/DS56/R (1997): I:143, I:1224
Report of the Appellate Body, WT/DS56/AB/R (1998): I:109, I:111, I:1259, I:1260, I:1273, I:1336, I:1416

Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather:
Arbitration Under Article 21.3(c), WT/DS155/10 (2001): I:1352, I:1356

Argentina—Safeguard Measure on the Imports of Footwear:
Report of the WTO Panel, WT/DS121/R (1999): I:737, I:739, I:740, I:744, I:745, I:755, I:766, I:772, I:773, I:786, I:789, I:795, II:238, II:239, II:240
Report of the Appellate Body, WT/DS121/AB/R (1999): I:147, I:153, I:740, I:745, I:755, I:765, I:768, I:772, I:773, I:786, I:795, I:796, I:1303, I:1307, I:1332, I:1336, II:235, II:238, II:240, II:429

Australia—Measures Affecting the Importation of Salmon:
Report of the WTO Panel, WT/DS18/R (1998): I:246, I:253, I:263, I:266, I:271, I:281, I:284, I:287, I:288, I:289, I:290, I:296, I:307, I:309, I:313, I:314, I:316, I:317, I:320, I:321, I:323, I:324, I:354, I:1273
Report of the Appellate Body, WT/DS18/AB/R (1998): I:264, I:266, I:280, I:281, I:282, I:283, I:284, I:289, I:290, I:309, I:311, I:312, I:314, I:316, I:317, I:318, I:320, I:321, I:322, I:324, I:328, I:353, I:354, I:1216, I:1254, I:1265, I:1270, I:1273, I:1303, I:1336, I:1597, II:523, II:525, II:526, II:545
Arbitration Under Article 21.3(c), WT/DS18/9 (1999): I:1351, I:1356, I:1357, I:1358
Recourse to Article 21.5 by Canada, WT/DS18/RW (2000) I:248, I:265, I:282, I:285, I:297, I:321, I:323, I:324, I:1442, I:1443

Australia—Subsidies Provided to Producers and Exporters of Automotive Leather:
Report of the WTO Panel (not appealed), WT/DS126/R (1999): I:697, I:698, I:699, I:700, I:1175
Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW (2000): I:1345

Brazil—Export Financing Programme for Aircraft:
Report of the WTO Panel, WT/DS46/R (1999): I:1167, I:1187, I:1205, I:1218, I:1220
Report of the Appellate Body, WT/DS46/AB/R (1999): I:699, I:1184, I:1188, I:1205, I:1218, I:1243, I:1256, I:1273, I:1309, I:1310, I:1311, I:1317, I:1325, I:1336
Arbitration under Article 22.6 of DSU, WT/DS46/ARB (2000): I:1354, I:1363
Recourse by Canada to Article 21.5 of the DSU, WT/DS46/RW (2000), I:1189
Recourse by Canada to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS46/AB/RW (2000): I:1336, I:1350, I:1354
Second Recourse to Article 21.5 by Canada, WT/DS46/RW/2 (2001): I:698, I:1187, I:1189, I:1190, III:201
Recourse to Article 22.2 of the DSU, WT/DS46/16 (2000): I:1363

Brazil—Measures Affecting Desiccated Coconut:
Report of the WTO Panel, WT/DS22/R (1996): I:1206, I:1207
Report of the Appellate Body, WT/DS22/AB/R (1997): I:686, I:1066, I:1216, I:1244, I:1273, I:1336, II:548

Canada—Certain Measures Affecting the Automotive Industry:
Report of the WTO Panel, WT/DS139/R, WT/DS142/R (2000): I:458, I:462, I:463, I:467, I:468, I:469, I:483, I:886, I:888, I:890, II:234, II:237, II:238, II:657
Report of the Appellate Body, WT/DS/139/AB/R, WT/DS/142/AB/R (2000): I:463, I:483, I:690, I:697, I:699, I:875, I:884, I:885, I:886, I:888, I:889, I:1270, I:1273, I:1336, III:33, III:201
Arbitration Under Article 21.3(c), WT/DS139/12, WT/DS142/12 (2000): I:1352, I:1357, I:1358, I:1359

Canada—Certain Measures Concerning Periodicals:
Report of the WTO Panel, WT/DS/31/R (1997): I:103, I:875, I:876, I:879, I:881, I:1391, II:538, II:756, II:757, II:759, II:760, II:782
Report of the Appellate Body, WT/DS31/AB/R (1997): I:103, I:119, I:121, I:122, I:875, I:877, I:878, I:879, I:881, I:887, I:1066, I:1301, I:1332, I:1336, I:1391, II:474, II:475, II:539, II:756, II:757, II:758, II:759, II:763, II:764, II:766

Canada—Export Credits and Loan Guarantees for Regional Aircraft:
Report of the WTO Panel (not appealed), WT/DS222/R (2002): I:698, I:701, I:1187, I:1193

Canada—Measures Affecting the Export of Civilian Aircraft:
Report of the WTO Panel, WT/DS70/R (1999): I:1167, I:1175, I:1176, I:1186, I:1218, I:1219, I:1220, I:1397
Report of the Appellate Body, WT/DS70/AB/R (1999): I:689, I:692, I:697, I:699, I:717, I:1184, I:1185, I:1186, I:1256, I:1258, I:1261, I:1262, I:1263, I:1273, I:1301, I:1309, I:1310, I:1311, I:1317, I:1329, I:1336, I:1397
Recourse to Article 21.5 of the DSU, WT/DS70/RW (2000): I:1186, I:1193
Recourse to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS70/AB/RW (2000): I:1186, I:1336, I:1354, II:548

Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products:
Report of the WTO Panel, WT/DS103/R, WT/DS113/R (1999): I:212, I:595, I:1356, III:274

Report of the Appellate Body, WT/DS103/AB/R, WT/DS113/AB/R (1999): I:212, I:699, I:1317, I:1336, I:1351, I:1360, III:274
Recourse to Article 21.5 of the DSU, Report of the Panel, WT/DS103/RW, WT/DS113/RW (2001): I:212, I:213
Recourse to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS103/AB/RW, WT/DS113/AB/RW (2001): I:1336
Second Recourse to Article 21.5, Report of the Appellate Body, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (2003): I:1258, I:1273, I:1336

Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain:
Report of the WTO Panel, WT/DS276/R (2004): I:149, I:150, I:458, I:459

Canada—Patent Protection for Pharmaceutical Products:
Report of the WTO Panel, (not appealed) WT/DS114/R (2000): I:1065, I:1066, I:1079, I:1094, I:1095, II:424, II:425, II:428, II:430, II:431, II:432, II:435, II:436, II:442, II:445, II:446, II:648
Arbitration Under Article 21.3(c), WT/DS114/13 (2000): I:1066, I:1351, I:1356, I:1357, I:1358, I:1359

Canada—Term of Patent Protection:
Report of the WTO Panel, WT/DS170/R (2000): I:1066, I:1097
Report of the Appellate Body, WT/DS170/AB/R (2000): I:1097, I:1320, I:1336, II:424, II:425
Arbitration Under Article 21.3(c), WT/DS170/10 (2001): I:1352, I:1359

Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products:
Report of the WTO Panel, WT/DS207/R (2002): I:203, I:206, I:755, I:766, I:775
Report of the Appellate Body, WT/DS207/AB/R (2002): I:1247, I:1257, I:1264, I:1273, I:1298, I:1307, I:1337

Chile—Taxes on Alcoholic Beverages:
Report of the WTO Panel, WT/DS87/R, WT/DS110/R (2000): I:103, I:1012
Report of the Appellate Body, WT/DS87/AB/R, WT/DS110/AB/R (2000): I:104, I:121, I:612, I:1269, I:1271, I:1273, I:1303, I:1336,
Arbitration Under Article 21.3(c), WT/DS87/15, WT/DS110/14 (2000): I:1351, I:1356, I:1357, I:1359, I:1360

Egypt—Definitive Anti-Dumping Measures on Steel Rebar From Turkey:
Report of the WTO Panel (not appealed), WT/DS211/R (2002): I:513, I:514, I:516, III:100

European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India:
Report of the WTO Panel, WT/DS141/R (2000): I:505, I:511, I:525, I:709, I:743, I:1220, I:1227, I:1239, I:1274, I:1444, I:1551, II:415, III:100
Report of the Appellate Body, WT/DS141/AB/R (2001): I:434, I:505, I:523, I:1260, I:1274, I:1294, I:1313, I:1337, I:1351, II:413, II:415, III:100
Recourse to Article 21.5, WT/DS/141/RW (2002): III:201
Recourse to Article 21.5, Report of the Appellate Body, WT/DS141/AB/RW (2003): I:1274, I:1303, I:1331, I:1337
Agreement under Art. 21.3 (b) of the DSU, WT/DS141/10 (2001): I:1358

European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings From Brazil:
Report of the Appellate Body, WT/DS219/AB/R (1998): I:504, I:1300, I:1337

European Communities—Conditions for the Granting of Tariff Preferences to developing Countries:
Report of the Appellate Body, WT/DS246/AB/R (2004): I:1544

European Communities—Customs Classification of Certain Computer Equipment:
Report of the WTO Panel, WT/DS62, WT/DS67, WT/DS68 (1998): I:1224, I:1375, I:1479, I:1480, I:1584, I:1595
Report of the Appellate Body, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (1998): I:112, I:1245, I:1246, I:1274, I:300, I:301, I:1302, I:1337, I:1411, I:1412, I:1480, I:1584, I:1585, I:1586, I:1589, I:1591, I:1592, I:1594, I:1595, I:1596, I:1597, II:478, III:130, III:201

European Communities—Measures Affecting Asbestos and Asbestos-Containing Products:
Report of the WTO Panel, WT/DS135/R (2000): I:406, I:844, I:1224, , I:1239, I:1375, I:1377, I:1379, I:1380, I:1394, II:653
Communication from the Appellate Body (Additional Procedures), WT/DS135/9 (November 8, 2000): I:1400, I:1444, II:564, II:644, II:645
Report of the Appellate Body, WT/DS135/AB/R (2001): I:83, I:119, I:120, I:171, I:245, I:256, I:377, I:378, I:383, I:389, I:390, I:393, I:395, I:405, I:406, I:409, I:844, I:845, I:1066, I:1237, I:1273, I:1301, I:1302, I:1307, I:1320, I:1323, I:1324, I:1326, I:1328, I:1332, I:1337, I:1380, I:1381, I:1382, I:1394, I:1400, I:1401, I:1437, I:1438, I:1445, I:1450, I:1452, I:1458, I:1586, I:1588, II:440, II:527, II:528, II:539, II:589, II:613, II:614, II:615, II:631, II:644, II:652, II:654, II:687, II:688, III:130

European Communities—Measures Affecting the Importation of Certain Poultry Products:
Report of the WTO Panel, WT/DS69/R (1998): I:134, I:206, I:207, I:592, I:595, I:596, I:597, I:598
Report of the Appellate Body, WT/DS69/AB/R (1998): I:136, I:206, I:207, I:592, I:596, I:598, I:1265, I:1270, I:1274, I:1302, I:1303, I:1320, I:1337, I:1351

European Communities—Measures Concerning Meat and Meat Products:
Report of the WTO Panel, WT/DS26/R, WT/DS48/R (1998): I:244, I:245, I:246, I:248, I:249, I:250, I:252, I:253, I:256, I:263, I:270, I:271, I:272, I:273, I:274, I:278, I:280, I:281, I:286, I:291, I:292, I:293, I:294, I:295, I:296, I:310, I:311, I:312, I:313, I:314, I:318, I:348, I:354, I:1066, I:1256, I:1274, I:1392, I:1402, I:1492, II:150, II:151, II:163, II:655, II:733, III:130
Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R (1998): I:160, I:250, I:256, I:257, I:260, I:261, I:262, I:264, I:265, I:266, I:267, I:268, I:272, I:273, I:274, I:276, I:277, I:278, I:280, I:281, I:282, I:283, I:284, I:286, I:287, I:288, I:290, I:291, I:292, I:293, I:294, I:295, I:296, I:298, I:299, I:301, I:304, I:305, I:307, I:308, I:309, I:310, I:311, I:314, I:315, I:316, I:318, I:319, I:346, I:349, I:351, I:352, I:353, I:354, I:384, I:394, I:399, I:788, I:1066, I:1248, I:1253, I:1254, I:1256, I:1258, I:1261, I:1262, I:1264, I:1265, I:1266, I:1274, I:1300, I:1302, I:1303, I:1317, I:1318, I:1328, I:1337, I:1343, I:1353, I:1392, I:1402, I:1412, I:1492, I:1495, II:142, II:150, II:151, II:163, II:439, II:440, II:523, II:524, II:525, II:529, II:544, II:545, II:546, II:648, II:649, II:655, II:733, III:129, III:130

Arbitration Under Article 21.3(c), WT/DS26/15, WT/DS48/13 (1998): I:1351, I:1356, I:1357, I:1358, I:1361, I:1366
Arbitration Under Article 22.6, WT/DS26/ARB, WT/DS48/ARB (1999): III:130

European Communities—Regime for the Importation, Sale and Distribution of Bananas:
Report of the WTO Panel, WT/DS27/R (1997): I:68, I:69, I:105, I:133, I:204, I:406, I:458, I:460, I:466, I:467, I:468, I:469, I:482, I:875, I:878, I:879, I:880, I:881, I:885, I:886, I:1230, I:1237, I:1239, I:1248, I:1256, I:1273, I:1274, I:1420, I:1486, I:1492, I:1493, I:1494, II:657, III:129, III:132
Report of the Appellate Body, WT/DS27/AB/R (1997): I:133, I:136, I:204, I:460, I:467, I:482, I:592, I:595, I:596, I:875, I:878, I:879, I:880, I:881, I:882, I:883, I:884, I:885, I:886, I:887, I:888, I:1066, I:1213, I:1214, I:1216, I:1230, I:1237, I:1239, I:1241, I:1245, I:1246, I:1248, I:1273, I:1274, I:1298, I:1300, I:1311, I:1313, I:1315, I:1316, I:1317, I:1318, I:1319, I:1320, I:1332, I:1337, I:1343, I:1350, I:1410, I:1492, I:1493, II:424, II:475, II:782, III:65, III:129, III:132
Arbitration Under Article 21.3(c) of the DSU, WT/DS27/15 (1998) I:1351, I:1356
Arbitration under Article 22.6 of the DSU, WT/DS27/ARB (2000): I:134, I:1111, I:1353, I:1354, I:1362, I:1363, I:1376, II:51 (has listed as 1999), II:424, III:129
Recourse to Article 21.5, Report of the Panel, WT/DS27/RW/ECU (2001), I:133, I:1353, I:1354, I:1497, I:1501

European Communities—Trade Description of Sardines:
Report of the Panel, WT/DS231/R (2002): I:377, I:398, I:399, I:406, I:407
Report of the Appellate Body, WT/DS231/AB/R (2002): I:377, I:378, I:384, I:385, I:396, I:397, I:398, I:399, I:400, I:405, I:1240, I:1260, I:1266, I:1268, I:1274, I:1299, I:1300, I:1307, I:1312, I:1320, I:1321, I:1322, I:1323, I:1325, I:1326, I:1327, I:1328, I:1332, I:1333, I:1337, I:1438, I:1439, I:1440, I:1447, I:1453

Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico:
Report of the WTO Panel, WT/DS60/R (1998): I:512
Report of the Appellate Body, WT/DS60/AB/R (1998): I:300, I:430, I:512, I526, I:1236, I:1245, I:1246, I:1274, I:1282, I:1313, I:1337, I:1420

Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico:
Report of the WTO Panel (not appealed), WT/DS156/R (2000): I:511, I:513, I:514, I:515, I:516, I:523, I:524, I:709, I:710, I:712, I:713, I:724, I:1207

India—Measures Affecting the Automotive Sector:
Report of the WTO Panel, WT/DS146/R, WT/DS175/R (2002): I:123, I:128 I:458, I:464, I:465, I:468, I:469, I:483, II:657
Report of the Appellate Body, WT/DS146/AB/R, WT/DS175/AB/R (2002): I:123, I:128, I466, I:483, I:1307, I:1327, I:1328, I:1337, III:201

India—Patent Protection for Pharmaceutical and Agricultural Chemical Products:
Report of the WTO Panel, WT/DS50/R (1997): I:1064, I:1216, I:1224, II:424, II:428, II:429, II:430, II:433, II:434, II:441
Report of the Appellate Body, WT/DS50/AB/R (1997): I:1064, I:1065, I:1205, I:1216, I:1217, I:1218, I:1225, I:1242, I:1245, I:1255, I:1264, I:1274, I:1302, I:1332, I:1337, I:1356, I:1422, II:424, II:433, II:434, II:441

India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products:
Report of the WTO Panel, WT/DS90/R (1999): I:65, I:84, I:595, I:1178
Report of the Appellate Body, WT/DS90/AB/R (1999): I:65, I:1236, I:1259, I:1262, I:1275, I:1303, I:1337, I:1351, I:1534

Indonesia—Certain Measures Affecting the Automobile Industry:
Report of the WTO Panel (not appealed), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (1998): I:103, I:126, I:300, I:440, I:458, I:459, I:461, I:462, I:466, I:467, I:469, I:470, I:471, I:472, I:482, I:702, I:703, I:734, I:1066, I:1178, I:1239, II:424, II:539, II:657, II:763, II:782, III:201
Arbitration Under Article 21.3(c), WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (1998): I:1351, I:1356, I:1357, I:1360

Japan—Measures Affecting Agricultural Products:
Report of the WTO Panel, WT/DS76/R (1998): I:246, I:302, I:306, I:321, I:323, I:324, I:346, I:350, I:351, I:354, I:1219
Report of the Appellate Body, WT/DS76/AB/R (1999): I:257, I:258, I:260, I:261, I:262, I:263, I:264, I:278, I:280, I:282, I:302, I:304, I:305, I:306, I:307, I:308, I:320, I:337, I:339, I:340, I:346, I:347, I:350, I:353, I:354, I:1263, I:1265, I:1275, I:1303, I:1337, I:1351, I:1453, I:1454, II:523, II:526, II:527, II:545, II:546

Japan—Measures Affecting Consumer Photographic Film and Paper:
Report of the WTO Panel (not appealed), W/DS44/R (1998), I:123, I:136, I:171, I:172, I:781, I:875, I:890, I:891, I:1237, I:1238, I:1241, I:1275, I:1375, I:1377, I:1382, I:1510, II:99, II:492, II:495, II:496, II:563

Japan—Measures Affecting the Importation of Apples:
Report of the WTO Panel, WT/DS245/AB/R (2003): I:246, I:257, I:258, I:259, I:285, I:286, I:287, I:289, I:290, I:302, I:303, I:338, I:347
Report of the Appellate Body, WT/DS245/AB/R (2003): I:262, I:280, I:285, I:287, I:303, I:304, I:348, I:351, I:353, I:354, I:1298, I:1303, I:1338,

Japan—Taxes on Alcoholic Beverages:
Report of the WTO Panel, WT/DS8R, WT/DS10/R, WT/DS11/R (1996): I:103, I:121, I:736, I:1588, II:758, II:763
Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996): I:80, I:103, I:105, I:116, I:117, I:118, I:120, I:121, I:122, I:300, I:301, I:315, I:389, I:390, I:877, I:878, I:883, I:1066, I:1178, I:1302, I:1319, I:1329, I:1338, I:1376, I:1422, I:1588, II:240, II:429, II:484, II:757, II:758, II:763
Arbitration Under Article 21.3(c), WT/DS8/15, WT/DS10/15, WT/DS11/13 (1997): I:1351, I:1356, I:1365, I:1366

Korea—Definitive Safeguard Measure on the Imports of Certain Dairy Products:
Report of the WTO Panel, WT/DS98/R (1999): I:755, I:767, I:769, I:770, I:771, I:772, I:774, I:775, I:776, I:781, I:782, I:783, I:784, I:785, I:788, I:789, I:790, I:791, I:795
Report of the Appellate Body, WT/DS98/AB/R (1999): I:153, I:206, I:542, I:755, I:758, I:768, I:774, I:782, I:786, I:787, I:790, I:1245, I:1246, I:1259, I:1265, I:1275, I:1303, I:1318, I:1338, I:1351, II:766, III:203

Korea—Measures Affecting Government Procurement:
Report of the WTO Panel (not appealed), WT/DS163/R (2000): I:1123, I:1130, I:1138, I:1139, I:1157, I:1224, I:1375, I:1377, I:1378, I:1407, I:1408, III:203

Korea—Measures Affecting Imported of Fresh, Chilled and Frozen Beef:
Report of the WTO Panel, WT/DS161/R, WT/DS169/R (2000): I:206, I:209, I:595, I:1275
Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R (2000): I:124, I:206, I:209, I:210, I:256, I:393, I:845, I:1275, I:1338, I:1351, II:528, II:638, II:652, III:203
Agreement under Art. 21.3(b), WT/DS161/12, WT/DS169/12 (2001): I:1358

Korea—Taxes on Alcoholic Beverages:
Report of the WTO Panel, W/DS75/R, W/DS84/R (1998): I:103, I:1012, I:1205, I:1223, I:1224, I:1227, I:1228, II:500
Report of the Appellate Body, W/DS75/AB/R, W/DS84/AB/R (1999): I:103, I:121, I:1265, I:1269, I:1275, I:1300, I:1301, I:1303, I:1338, III:203, II:500
Arbitration Under Article 21.3(c), WT/DS75/16, WT/DS84/14 (1999): I:1351, I:1356, I:1357, I:1358

Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States:
Report of the WTO Panel (not appealed), WT/DS132/R (2000): I:511, I:521, I524, I:709, I:711, I:719, I:724, I:746, I:747, I:1351,
Recourse to Article 21.5, Report of the Appellate Body, WT/DS132/AB/RW (2001): I:1204, I:1221, I:1222, I:1241, I:1243, I:1245, I:1253, I:1269, I:1270, I:1271, I:1275, I:1303, I:1318, I:1331, I:1338,

Mexico—Measures Affecting Telecommunications Services:
Report of the Panel (not appealed), WT/DS204/R (2004): I:874, I:891, I:892, I:893, I:997, I:999, I:1001, I:1002, I:1003, I:1004, I:1005, I:1006, I:1007, I:1013, I:1020, I:1032, I:1033, I:1036, I:1218

Thailand—Antidumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland:
Report of the WTO Panel, WT/DS122/R (2001): I:504, I:505, I:511, I:526, I:527, I:709, I:738, I:739, I:743
Report of the Appellate Body, WT/DS122/AB/R (2001): I:737, I:740, I:743, I:1246, I:1259, I:1262, I:1275, I:1309, I:1310, I:1311, I:1312, I:1320, I:1322, I:1328, I:1338, I:1351, I:1446, I:1447, I:1452

Turkey—Restrictions on Imports of Textile and Clothing Products:
Report of the WTO Panel, WT/DS34/R (1999): I:419, I:429, I:430, I:1224, I:1248, I:1275, II:227, II:235
Report of the Appellate Body, WT/DS34/AB/R (1999): I:1275, I:1338, I:1351, II:227, II:235, II:236, II:240

United States—Anti-Dumping Act of 1916:
Report of the Appellate Body, WT/DS136/AB/R, WT/DS162/AB/R (2000): I:141, I:500, I:510, I:512, I:1242, I:1256, I:1275, I:1317, I:1318, I:1338, I:1410
Arbitration Under Article 21.3(c), WT/DS136/11, WT/DS162/14 (2001): I:1351, I:1356, I:1357, I:1359

United States—Anti-Dumping and Countervailing Duty Measures on Steel Plate from India:
Report of the WTO Panel (not appealed), WT/DS206 (2002): I:516, I:525

United States—Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea:
Report of the WTO Panel (not appealed), WT/DS99/R (1999): I:512, I:522, I:723, I:742, III:202

United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan:
Report of the WTO Panel, WT/DS184/R (2001): I:521, I:526, I:714, I:715, I:745
Report of the Appellate Body, WT/DS184/AB/R (2001), I:501, I:513, I:516, I:520, I:527, I:714, I:737, I:738, I:739, I:745, I:746, I:1265, I:1276, I:1302, I:1325, I:1339, I:1412, III:201
Arbitration under Article 21.3(c) of the DSU, WT/DS184/9 (2001): I:1352

United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel and Strip from Korea:
Report of the WTO Panel (not appealed), WT/DS/179/R (2001): I:506, I:507, I:508, I:1351, III:202
Agreement under Art. 21.3 (b) of the DSU, WT/DS179/5 (2001): I:1358

United States—Continued Dumping and Subsidy Offset Act of 2000:
Report of the WTO Panel, WT/DS/ 217/R, WT/DS/234/R (2003): I:510, I:712, I:732, I:1230, III:202
Report of the Appellate Body, WT/DS217/AB/R, WT/DS/234/AB/R (2003): I:510, I:527, I:528, I:712, I:732, I:1247, I:1248, I:1276, I:1299, I:1300, I:1302, I:1304, I:1310, I:1311, I:1312, I:1317, I:1318, I:1320, I:1339, II:63, III:201, III:202

United States—Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products From Germany:
Report of the WTO Panel, WT/DS213/R (2002): I:742
Report of the Appellate Body, WT/DS213/AB/R (2002): I:512, I:742, I:1260, I:1266, I:1275, I:1298, I:1302, I:1303, I:1329, I:1338

United States—Countervailing Measures Concerning Certain Products from the European Communities:
Report of the WTO Panel, WT/DS212/R (2002): I:693, I:694
AB report: I:693, I:694, I:722, I:723, I:1297, I:1298, I:1299, I:1320, I:1323, I:1329, I:1338

United States—Definitive Safeguard Measures on Imports of Certain Steel Products:
Report of the WTO Panel, WT/DS248∼DS259/R (2003): I:755, I:766, I:767, I:768, I:769, I:770, I:773, I:786, I:787, I:791, I:794, III:202, III:274
Report of the Appellate Body, WT/DS248∼DS259/AB/R (2003): I:153, I:755, I:766, I:769, I:791, I:792, I:794, I:1303, I:1317, I:1318, I:1323, I:1325, I:1339, III:202

United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea:
Report of the WTO Panel, WT/DS/202/R (2001): I:755, I:766, I:768, III:202
Report of the Appellate Body, WT/DS/202/AB/R (2002): I:736, I:755, I:774, I:775, I:783, I:789, I:795, I:1224, I:1327, I:1328, I:1339, II:234, II:235, II:238, III:202

United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities:

Report of the WTO Panel, WT/DS166/R (2000): I:737, I:744, I:745, I:755, I:766, I:768, I:769, I:770, I:772, I:773, I:774, I:781, I:783, I:789, I:791, I:794

Report of the Appellate Body, WT/DS166/AB/R (2000): I:206, I:755, I:772, I:774, I:783, I:791, I:794, I:1263, I:1264, I:1265, I:1276, I:1303, I:1339, I:1351, II:234, II:235, II:238

United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*:*

Report of the Appellate Body, WT/DS257/AB/R (2004): I:690, I:694, I:716, I:1301, I:1304, I:1314, I:1323, I:1327, I:1328, I:1339

United States—Final Dumping Determination on Softwood Lumber from Canada:

Report of the Appellate Body, WT/DS264/AB/R (2004): I:504 I:507

United States—Import Measures on Certain Products from the European Communities:

Report of the WTO Panel, WT/DS165/R (2000): I:565, I:1354, I:1355, I:1361, I:1362

Report of the Appellate Body, WT/DS165/AB/R (2000): I:1271, I:1275, I:1338, I:1355 I:1361, I:1362

United States—Import Prohibition of Certain Shrimp and Shrimp Products:

Report of the WTO Panel, WT/DS58/R (1998): I:844, I:1239, I:1393, I:1399, I:1431, II:147, II:149, II:150, II:151, II:163, II:165, II:166, II:637

Report of the Appellate Body, WT/DS58/AB/R (1998): I:80, I:83, I:154, I:163, I:164, I:165, I:300, I:374, I:383, I:844, I:886, I:1069, I:1075, I:1226, I:1238, I:1239, I:1240, I:1261, I:1276, I:1297, I:1298, I:1307, I:1316, I:1317, I:1320, I:1321, I:1322, I:1332, I:1339, I:1356, I:1379, I:1386, I:1393, I:1399, I:1412, I:1429, I:1430, I:1431, I:1432, I:1433, I:1434, I:1435, I:1436, I:1441, I:1442, I:1443, I:1447, I:1457, II:147, II:149, II:150, II:151, II:163, II:165, II:166, II:414, II:436, II:514, II:521, II:522, II:537, II:540, II:560, II:564, II:587, II:588, II:589, II:610, II:611, II:613, II:614, II:616, II:637, II:643, II:652, II:653, II:678, II:691

Recourse to Article 21.5, WT/DS58/RW (2001): I:165, I:1225, I:1226, I:1330, I:1331, I:1416, I:1421, II:560

Recourse to Article 21.5 of the DSU, Appellate Body Report, WT/DS58/AB/RW (2001): I:165, I:383, I:392, I:1226, I:1307, I:1322, I:1330, I:1331, I:1339, II:523, II:540, II:587, II:615, II:637, II:653, II:678, II:680, II:691

United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom:

Report of the WTO Panel, WT/DS138/R (2000): I:693, I:1276, I:1395, I:1443

Report of the Appellate Body, WT/DS138/AB/R (2001): I:83, I:352, I:692, I:693, I:717, I:722, I:723, I:731, I:737, I:738, I:1276, I:1299, I:1300, I:1304, I:1321, I:1328, I:1332, I:1339, I:1395, I:1399, I:1436, I:1437, I:1439, I1440, I:1441, I:1449, I:1451, I:1452, I:1455, I:1457, II:101, II:564, II:644

United States—Investigation of the International Trade Commission in Softwood Lumber from Canada:

Report of the WTO Panel, WT/DS277/R (2004): I:741, I:746, I:747, I:748

United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services

Report of the WTO Panel, WT/DS285/R (2004): I:874

United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India:
Report of the WTO Panel, WT/DS33/R (1997): I:422, I:424, I:425, I:427, I:428, I:429, II:408, II:413, II:414
Report of the Appellate Body, WT/DS33/AB/R (1997): I:346, I:348, I:422, I:428, I:467, I:864, I:1258, I:1259, I:1270, I:1271, I:1276, I:1302, I:1313, I:1339, I:1410, I:1413, II:408, II:413, II:414

United States—Measures Treating Export Restraints as Subsidies:
Report of the WTO Panel (not appealed), WT/DS194/R (2001): I:688, I:691, I:1190

United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada:
Report of the WTO Panel (not appealed), WT/DS236/R (2002): I:690, I:694, I:719, I:721, I:722

United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear:
Report of the WTO Panel, WT/DS24/R (1996): I:422, I:424, I:425, I:426, I:427, I:428, I:429, I:1224, I:1228, II:408, II:413, II:415
Report of the Appellate Body, WT/DS24/AB/R (1997): I:135, I:422, I:423, I:1319, I:1339, I:1361, II:408, II:413, II:415

United States—Rules of Origin for Textiles and Apparel Products:
Report of the WTO Panel (not appealed), WT/DS243/R (2003): I:433, I:603, I:612, I:613, I:614

United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia:
Report of the WTO Panel, WT/DS177/R, WT/DS178/R (2000): I:755, I:767, I:768, I:771, I:772, I:774, I:786, I:789, III:274
Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R (2001): I:153, I:206, I:428, I:738, I:740, I:743, I:745, I:746, I:755, I:771, I:772, I:774, I:789, I:790, I:791, I:1267, I:1276, I:1307, I:1317, I:1325, I:1339, I:1351, III:274

United States—Section 110(5) of U.S. Copyright Act:
Report of the WTO Panel (not appealed), WT/DS160/R (2000): I:1079, I:1083, I:1084, I:1085, I:1239, I:1276, I:1351, I:1441, I:1443, I:1444, II:425, II:426, II:428, II:430, II:431, II:436, II:442, II:656
Recourse to Arbitration under Article 25 of the DSU,WT/DS160/ARB25/1 (2001): I:1112, I:1342, I:1366, II:214, II:656
Arbitration Under Article 21.3(c), WT/DS160/12 (2001): I:1352, I:1357, I:1358

United States—Section 211 Omnibus Appropriations Act of 1998:
Report of the WTO Panel, WT/DS176/R (2001): I:1063, I:1226, II:430
Report of the Appellate Body, WT/DS176/AB/R (2002): I:1057, I:1063, I:1111, I:1265, I:1276, I:1301, I:1320, I:1339, II:425, II:426, II:431

United States—Section 301–310 of the Trade Act of 1974:
Report of the WTO Panel (not appealed), WT/DS152/R (1999): I:81, I:1224, I:1430, II:422, II:437, II:626, III:201

United States—Standards for Reformulated and Conventional Gasoline:
Report of the WTO Panel, WT/DS2/R (1996): I:103, I:118, I:256, I:394, I:409, I:844, I:1391, II:438, II:587, II:588
Report of the Appellate Body, WT/DS2/AB/R (1996): I:103, I:154, I:155, I:156, I:157, I:162, I:163, I:300, I:315, I:844, I:877, I:886, I:1258, I:1276, I:1302, I:1305, I:1319, I:1330, I:1339, I:1361, I:1393, I:1406, I:1422, II:438, II:439, II:514, II:519, II:520, II:538, II:540, II:563, II:588, II:589, II:613, II:652

United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan
Report of the Appellate Body, WT/DA244/AB/R (2004): I:522, I:1301, I:1338

United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina:
Report of the WTO Panel, WT/DS268/R (2004): I:523

United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan:
Report of the WTO Panel, WT/DS192/R (2001): I:422, I:424, I:425, I:426, I:429
Report of the Appellate Body, WT/DS192/AB/R (2001): I:422, I:426, I:429, I:1259, I:1266, I:1275, I:1302, I:1338, I:1408, I:1412, II:413, II:416

United States—Tax Treatment for Foreign Sales Corporations:
Report of the Appellate Body, WT/DS108/AB/R (2000): I:213, I:689, I:690, I:698, I:699, I:1225, I:1253, I:1275, I:1301, I:1318, I:1325, I:1326, I:1327, I:1328, I:1338, I:1385, I:1412, II:95, III:129, III:130
Arbitration under Article 22.6, WT/DS108/ARB (2002): I:1366, III:129, III:131
Recourse to Article 21.5, Report of the Panel, WT/DS108/RW (2001): III:131
Recourse to Article 21.5, Report of the Appellate Body, WT/DS108/AB/RW (2002): I:698, I:1257, I:1276, I:1279, I:1313, I:1314, I:1320, I:1325, I:1338, III:131

GATT Panel and Working Party Reports

Australian Subsidy on Ammonium Sulphate, BISD, 2nd Supp. 188 (Adopted April 3, 1950): I:103, I:104, I:171, I:1374, I:1375, I:1376

Border Tax Adjustments, Report of the Working Party, BISD, 18th Supp. 97 (Adopted December 2, 1970): I:103, I:104, I:118

Brazil—Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, BISD, 41st Supp. 467 (Adopted by the SCM Committee, April 28, 1994): I:739

Brazilian Internal Taxes, Report of the Working Party, BISD, 2nd Supp. 181 (1949): I:103

Canada—Administration of the Foreign Investment Review Act, BISD, 30th Supp. 140 (Adopted February 7, 1984): I:123, I:154, I:444, I:445, I:464, I:482, II:657

Canada—Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies, BISD, 35th Supp. 37 (Adopted March 22, 1988): I:112, I:150

Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, BISD, 39th Supp. 27 (Adopted February 18, 1992): I:117, I:135, I:149

Canada—Import Restrictions on Ice Cream and Yoghurt, BISD, 36th Supp. 68 (Adopted December 5, 1989): I:129, I:130

Canada—Import Quotas on Eggs, BISD 23rd Supp. 91 (Adopted February 17, 1976): I:197

Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, BISD, 35th Supp. 98 (Adopted March 22, 1988): I:129, I:155, I:162, I:163, I:375, II:586

Canada—Measures Affecting the Sale of Gold Coins, L/5863 (September 17, 1985) (unadopted): I:103, I:126

Canada—Withdrawal of Tariff Concessions, BISD, 25th Supp. 42 (Adopted May 17, 1978): I:109, I:110

Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber, 36th Supp. BISD 167 (Adopted July 19,1989): I:103, I:105, I:1584, I:1587, I:1588, I:1592, I:1593, I:1594, I:1598, I:1599

Canadian Countervailing Duties on Grain Corn from the United States, SCM/140 (Adopted by the SCM Committee, March 26, 1992): I:739, I:740, I:744, I:745

Ceylon—Article XVIII Applications, BISD, 6th Supp. 112 (1957): I:1532

Ceylon—Notifications Under Article XVIII:C, BISD, 6th Supp. 75 (1958): I:1535

DISC—United States Tax Legislation, Report of the Working Party, BISD 23rd Supp. 98 (presented to the Council of Representatives on November 12, 1976): II:95

European Communities—Refunds on Exports of Sugar, complaint by Australia, BISD 26th Supp. 290 (Adopted November 6, 1979): I:198

European Communities—Refunds on Exports of Sugar, complaint by Brazil, BISD 27th Supp. 69 (Adopted November 10, 1980): I:198, I:1536

European Community—Anti-Dumping Duties on Audio Tapes in Cassettes Originating from Japan ADP/136(April 28, 1995) (unadopted): I:498, I:507

European Community—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, BISD 42nd Supp. 17 (Adopted by the ADP Committee, October 30, 1995): I:498, I:525

European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, L/5776 (February 7, 1985) (unadopted): I:171, I:1374, I:1375

European Economic Community—Follow-Up on the Panel Report "Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins", BISD 39th Supp. 91 (March 31, 1992) (unadopted): I:202, I:1375, I:1376, III:416

European Economic Community—Measures On Animal Feed Proteins, L/4599—25S/49 (Adopted March 14, 1978): I:103, I:104, I:122, I:1588

European Economic Community—Member States' Import Regimes for Bananas (Bananas I), DS/32/R (June 3, 1993) (unadopted): III:129

European Economic Community—Member States' Import Regimes for Bananas (Bananas II), DS38/R (February 11,1994) (unadopted): I:460, III:129

European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, BISD, 37th Supp. 86 (Adopted January 25, 1990): I:126, I:128, I:171, I:201, I:206, I:686, I:1237, I:1273, I:1374, I:1377, II:95

European Economic Community—Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, L/5778 (February 20, 1985) (unadopted): I:171, I:1374, I:1375

European Economic Community—Programme on Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables, BISD, 25th Supp. 68 (Adopted October 18, 1978): I:128, I:197, I:593

European Economic Community—Quantitative Restrictions Against Imports of Certain Products from Hong Kong, BISD, 30th Supp. 129, (Adopted July 12, 1983): II:585

European Economic Community—Regulation on Imports of Parts and Components, BISD, 37th Supp. 132, (Adopted May 16, 1990): I:116, I:497, I:499

European Economic Community—Restrictions on Apples from Chile, BISD, 27th Supp. 98 (adopted November 10, 1980): I:197

European Economic Community—Restrictions on Imports of Dessert Apples, complaints by Chile, BISD 36th Supp. 93 (Adopted June 22, 1989): I:130, I:134, I:136, I:197, I:593, I:1536, I:1537, I:1591

European Economic Community—Restrictions on Imports of Apples, complaints by the United States, BISD, 36th Supp. 135 (Adopted June 22, 1989): I:133, I:593

European Economic Community—Subsidies on Exports of Pasta Products, SCM/43 (May 19, 1983) (unadopted): I:199

European Economic Community, Subsidies on Export of Wheat Flour, SCM/42 (March, 21, 1983) (unadopted): I:198, I:199

Exports of Potatoes to Canada, BISD, 11th Supp., at 88 (Adopted November 16, 1962): I:540

France—Assistance to Exports of Wheat and Wheat Flour, Complaint by Australia, BISD, 7th Supp. 46 (Adopted November 21, 1958): I:197

Greece—Special Import Taxes, BISD, 1st Supp. 48 (Adopted November 3, 1952): I:117

Italian Discrimination Against Imported Agricultural Machinery, BISD, 7th Supp. 60 (Adopted October 23, 1958): I:123, I:126, I:880, II:500, II:585

Italian Restrictions Affecting Imports from Israel, BISD, 10 Supp. 130 (Adopted December 9, 1961): II:584

Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD, 34th Supp. 83 (Adopted November 10/11, 1987): I:103, I:117, I:118, I:120, I:145

Japan—Measures on Imports of Leather, BISD, 31st Supp. 94, (Adopted May 15/16, 1984): I:170, I:593, II:585

Japan—Restrictions on Imports of Certain Agricultural Products, BISD, 35th Supp. 163 (Adopted February 2, 1988): I:130, I:135, I:161, I:196, I:197

Japan-Trade in Semi-conductors, BISD, 35th Supp. 116 (Adopted May 4, 1988): I:128, I:171, I:761, I:1374, I:1375, I:1386, II:495

Korea—Antidumping Duties on Imports of Polyacetal Resins from the United States, BISD, 40th Supp. 205 (Adopted by the ADP Committee, April 27, 1993): I:497, I:736, I:746, III:201

New Zealand—Imports of Electrical Transformers from Finland, BISD, 32nd Supp. 55 (Adopted July 18, 1985): I:497

Norway—Restrictions on Imports of Certain Textile Products, BISD, 27th Supp. 119 (Adopted June 18, 1980): I:132, I:758

Norway—Restrictions on Imports of Apples and Pears, BISD, 36th Supp. 306 (Adopted June 21/22, 1989): I:54

Republic of Korea—Restrictions on Imports of Beef, BISD, 36th Supp. 268 (Adopted November 7, 1989): I:150, I:162, I:1534, III:191, III:201

Spain—Measures Concerning Domestic Sale of Soyabean Oil, L/5142 (June 17, 1981) (unadopted): I:103

Spain—Tariff Treatment of Unroasted Coffee, L/5135—28S/102 (Adopted June 11, 1981): I:103, I:103, I:105, I:1589, I:1592, I:1593, I:1594

Swedish Antidumping Duties, BISD, 3rd Supp. 81 (Adopted February 26, 1955): I:141, I:497

Thailand—Restrictions on Importation of and National Taxes on Cigarettes, BISD, 37th Supp. 200 (Adopted November 7, 1990): I:149, I:155, I:158, I:159, I:256, I:391, I:393, I:595, II:439, II:528, II:540, II:615, II:652, II:687, II:688

Treatment by Germany of Imports of Sardines, BISD, 1st Supp. 53 (Adopted October 31, 1952): I:103, I:171, I:1374, I:1375, I:1376, I:1592, I:1597, I:1598

United States—Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico, ADP/82, (September 7, 1992) (unadopted): I:497, I:509, I:510, I:711, I:718, III:233

United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, BISD, 38th Supp. 45 (Adopted July 11, 1991): I:142, I:686, II:95

United States—Customs User Fee, BISD, 35th Supp. 245 (Adopted February 2, 1988): I:102, I:111, I:143

United States—Definition of Industry Concerning Wine and Grape Products, BISD, 39th Supp. 436 (Adopted by the SCM Committee, 28 April 1992): I:103

United States—Denial of Most-favoured-nation Treatment as to Non-Rubber Footwear from Brazil, BISD, 39th Supp. 128 (Adopted June 19, 1992): I:95, I:102, I:103, I:103, I:124, I:683, I:1542

United States—Imports of Certain Automotive Spring Assemblies, BISD, 30th Supp. 107 (Adopted May 26, 1983): I:156

United States—Imports of Sugar from Nicaragua, BISD, 31st Supp. 67 (Adopted March 13, 1984): I:133, I:1575, I:1576

United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, BISD 41st Supp. 229 (Adopted by the ADP Committee, April 28, 1994): I:498, I:507, I:510

United States—Imposition of Anti-dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, ADP/47 (August 20, 1990) (unadopted): I:497, I:510, I:710, I:711

United States—Imposition of Countervailing Duty on Imports of Fresh and Chilled Atlantic Salmon from Norway, BISD, 41st Supp. 2 (Adopted by the SCM Committee, April 27, 1994): I:497, I:711, I:739

United States—Manufacturing Clause, BISD, 31st Supp. 75 (Adopted May 15/16, 1984): I:54

United States—Measures Affecting Alcoholic and Malt Beverages, BISD, 39th Supp. 206 (Adopted June 19, 1992): I:103, I:117, I:121, I:126, II:538, II:759

United States—Measures Affecting Imports of Softwood Lumber From Canada, BISD, 40th Supp. 358 (Adopted October 27, 1993): I:214, I:709, I:710

United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco, DS44/R, 41S/131 (Adopted October 4, 1994): I:117, I:125

United States—Prohibition of Imports of Tuna and Tuna Products from Canada, BISD, 29th Supp. 91 (Adopted February 22, 1982): I:130, I:155, I:156, I:157, I:162, I:163, I:196,

United States—Restrictions on Imports of Tuna, BISD, 39th Supp. 155 ((September 3, 1991) (unadopted): I:144, 1:155, I:162, I:391, II:139, II:147, II:149, II:150, II:151, II:162, II:163, II:166, II:533, II:538, II:585, II:586, II:652, II:653, III:233, III:419

United States—Restrictions on Imports of Tuna, DS 29/R, (June 10, 1994) (unadopted): II:615

United States—Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, BISD, 37th Supp. 228 (adopted on November 7, 1990): I:171, I:1374, I:1375

United States—Section 337 of the Tariff Act of 1930, BISD, 36th Supp. 345 (Adopted November 7, 1989): I:117, I:124, I:154, I:155, I:156, I:158, I:160, I:161, I:1067, II:439, II:445

United States—Taxes on Automobiles, DS31/R (October 11, 1994) (unadopted): I:103, I:391, I:1390, II:538

United States—Taxes on Petroleum and Certain Imported Substances, BISD, 34th Supp.136 (Adopted June 17, 1987): I:103, I:117, I:170, I:868, I:1516, III:233

United States—Trade Measures Affecting Nicaragua, Report of the Panel (unadopted), L/6053, (October 13, 1986): I:1576, I:1577

Uruguayan Recourse to Article XXIII, BISD, 11th Supp. 95 (Adopted November 16, 1962): I:171, I:1374, I:1375

Part III Economic, Political, and Regional Issues

A. Economic Perspectives

CHAPTER 37

ECONOMIC PRINCIPLES OF INTERNATIONAL TRADE

Mordechai E. Kreinin* and Michael G. Plummer**

TABLE OF CONTENTS

I. Introduction 4
II. Modern International Trade Theory 4
A. Neoclassical Trade Theory: The Factor Proportions Model 4
B. Alternative Theories 6
C. Integrated Approaches 9
III. The Theory of Preferential Trading Agreements 9
A. Static Effects of Preferential Trading Groups 10
B. Dynamic Effects of Preferential Trading Groups 11
C. New Theories 13
IV. Some Empirical Examples 14
A. Trade-Share Analysis 15
B. "Double-Density" Measures of Trade Intensities 15
C. Econometric Gravity Approach 17
V. Conclusions 22
Tables
Table 1 Merchandise trade of selected regional integration arrangements, 2000 16
Table 2a EU—Double Density Measures of Trade intensity 18
Table 2b NAFTA—Double Density Measures of Trade Intensity 20
Table 2c ASEAN—Double Density Measures of Trade intensity 20
Table 2d MERCOSUR—Double Density Measures of Trade intensity . 21
Table 3 Gravity Model Estimations of Regional Trade Blocs 22

* Michigan State University.
** Johns Hopkins University SAIS-Bologna.

I. Introduction

International trade theory has come a long way since the days of the classical economists. However, the intuition that can be gained from the great theorists such as Adam Smith and David Ricardo still dominates the thinking of modern economists. In particular, Ricardo demonstrated that free trade was a "first-best" policy solution.[1] This holds true today, even though the formal analysis of international trade theory has changed substantially. In fact, many of the opponents of international trade today (from the "anti-globalists" on the left of the political spectrum to the economic nationalists on its right) present arguments that Ricardo himself was able to dismiss over a hundred years ago. While the names and the subjects have changed, the basic principles have not.

This chapter, written for a general audience, serves as a primer to the basic theory of international trade. Its goal is to endow the reader with a sufficient background to understand the underlying framework of the subsequent economics chapters in this book, including basic definitions, conceptual approaches, and analytical results of empirical applications. We start with a review of the modern theory of international trade, beginning with the factor-proportions—or "neoclassical"—theory, which continues to serve as the basic building bloc of most other models, both theoretical and empirical. We also review extensions of the model and alternative approaches, such as the sector-specific model, the "human skills" paradigm, the product life-cycle hypothesis, and models that include different specifications of market structure, such as monopolistic competition. Next, given the importance of regionalism in the international marketplace, and its key role in many of the chapters of this volume, we offer an overview of the theory of preferential trading arrangements, focusing on the economic effects of regionalism. Finally, we use a series of empirical approaches to shed light on which existing and proposed regional trade blocs meet important economic criteria. This empirical exercise also gives the reader an idea of the most common approaches to empirical modelling in international trade, something that will be developed much further in the subsequent economics chapters.

II. Modern International Trade Theory

International trade is often cited as a key engine of growth in the international economy. Indeed, in the post-war period, international trade has grown considerably more rapidly than global output, leading to a significant internationalization of the global economy. In the United States, for example, the share of trade in GDP has doubled over the past two decades. This section considers several theoretical approaches to what underlies international trade flows and their direction.

A. Neoclassical Trade Theory: The Factor Proportions Model[2]

Attempts to explain the reason for, and the direction of, international trade, dates back to the "father of modern economics," Adam Smith. In his book *The Wealth of Nations* he shows that each of two countries would export to the other country the commodity

[1] Economists frequently distinguish between "first-best policies," which unambiguously lead to greater efficiency, and "second-best policies," which may or may not, as they inevitably involve some sort of trade-off.

[2] This section borrows from Mordechai E Kreinin, INTERNATIONAL ECONOMICS: A POLICY APPROACH (2002).

that is more efficiently produced in it. That became known as the principle of "absolute advantage." Years later, David Ricardo considered a more general case: what if one country is more efficient (produces at lower cost) than the other in the production of both goods? Mutually beneficial trade can still exist as long as the *degree of advantage* is not the same in both industries. Thus, if Country I has a 3 to 1 advantage over Country II in producing commodity A, and only a 2 to 1 advantage in producing commodity B, Country I would export A to B and Country II would export B to A. The case where one country has a cost advantage over another in producing many commodities is common. What matters is the *degree* of advantage, otherwise known as *comparative* advantage. Each country exports the commodity in which it possesses a comparative advantage (highest degree of advantage) and imports the commodity in which it has a comparative disadvantage (lowest degree of advantage). Through this process, the world could be made better off through a more efficient division of labor.

But what is it that confers upon Country I a comparative advantage in good A, and Country II a comparative advantage in good B? The theory that reigned supreme for many years in answering this question is called "The Factor Proportion Theory." It marries the factor *intensity* of commodities with the factor *endowments* of countries. For the purpose of explanation we assume two countries, the United States and the United Kingdom, producing two commodities, wheat and textiles, with the use of two productive factors, capital and labor.

Each producer of a commodity has a range of available production methods from which one is selected. The basic economic feature that distinguishes various production techniques is the labor/capital ratio. The producer adjusts the factor use ratio to the ratio of factor prices (wages for labor; rent for capital) in the marketplace. The more expensive is labor relative to capital, the less labor and the more capital the producer would use. Each commodity is assumed to be produced under identical production conditions in the two countries, in the sense that *if faced with the same factor prices, producers in both countries would use the two factors in the same ratio.*

On the other hand, the production processes required differ from one commodity to the other within each country in a definite, unique, and consistent manner: For any given pair of factor prices, the production of wheat utilizes a higher capital/labor ratio than the production of textiles. This is expressed by saying that wheat is capital-intensive relative to textiles or, equivalently, that textiles are labor-intensive relative to wheat. The extension of this relationship to a world of more than two commodities involves the *ranking* of all goods by their capital/labor ratio.

How are countries distinguished from one another? They differ in their resource endowment: If the United States possesses a higher capital-to-labor ratio than the United Kingdom, we say that the United States is the relatively capital-abundant country, while the United Kingdom is the relatively labor-abundant country.

If we assume that demand conditions are similar in the two nations, then relative factor prices are determined by their supply as reflected in the resource endowment. Thus, capital becomes relatively cheaper (rent is relatively lower) in the United States and labor relatively cheaper (wages are relatively lower) in the United Kingdom. More precisely, the wage-rental ratio is higher in the United States than in the United Kingdom. Combine this result with the earlier postulates concerning manufacturing in the two countries and the following conclusions emerge: The United States specializes in the production of wheat, the commodity that uses much of its relatively cheap factor (capital)—it exports wheat and imports textiles; the United Kingdom specializes in textiles, the commodity that uses much of its relatively cheap factor (labor)—it exports textiles and imports wheat. Wheat

is relatively cheaper in the United States because it is capital intensive, while textiles are relatively cheaper in the United Kingdom because they are labor intensive.

In sum, each country exports the commodities that are relatively intensive in the factor with which it is relatively well endowed. That is how it acquires a comparative advantage in these commodities.

Although extremely simple, this model has considerable explanatory power. One of its implications is that each country exports the "factor services" of its abundant factor, as embodied in the bundle of its export goods, and imports the "factor services" of its abundant factor, as embodied in the bundle of its import goods. (Commodity trade and factor movements, therefore, are substitutes, as a country can either export its factor services or its factors.[3]) Thus, trade raises the demand for, and the price of the abundant factor, and lowers the demand for, and the price of, the scarce factor. The effect of trade on the country's income distribution is at the heart of the controversy over free trade versus protectionism in many countries: The scarce factor lobbies for protectionism, to minimize its losses. Likewise, factors employed in the export industries gain from trade, and those employed in import-competing industries lose. Even though the gains exceed the losses, so that the country as a whole gains from trade, demands for protectionism are often heeded, as is evident, for example, from the 2002 steel case in the United States. It has also important implications for income distribution: through free trade, labor would gain in labor-abundant countries (improving income distribution and lowering poverty rates) and lose in capital-abundant countries (exacerbating income distribution).

B. Alternative Theories

Despite its considerable explanatory power, the factor proportions theory cannot explain all of international trade. In particular this theory cannot adequately explain the vast expansion of trade among the industrial countries whose factor endowment ratios are rather similar. Much of this exchange is intra-industry trade, namely, trade in similar products that are differentiated (or distinguished) from each other by some feature(s); for example, the exchange between the United States and Europe of Boeing for Airbus aircraft. Consequently several alternative explanations emerged in the 1970s and 1980s. A few of them are reviewed below.

First, the sector-specific model is a widely used variant of the factor proportion theory.[4] It assumes a two-sector economy, with agriculture using land and labor, and manufacturing employing capital and labor. Only labor is mobile between the two sectors. Suppose a country is land-abundant so that it has a comparative advantage in agriculture. When free trade is introduced to an otherwise isolated economy, the domestic price of farm products rises. Labor is drawn from manufacturing to agriculture, so that more labor is combined with (specific factor) land, while less labor is combined with capital. The value of the marginal product of land rises and that of capital declines: Owners of land gain and capital-owners lose, whereas the effect on the mobile factor (labor) is ambiguous. These redistributional effects of trade are highlighted by this model. In

[3] This result has critical real-world policy implications. For example, during the NAFTA debate in the United States, groups concerned with immigration issues were supportive of NAFTA, as they (in this model, correctly) concluded that either Mexico would send its labor to the United States, leading to potential social problems, or the services of this labor embodied in exports.

[4] *See, e.g.,* R.W. Jones, *A Three-Factor Model in Theory, Trade, and History,* in TRADE, BALANCE OF PAYMENTS, AND GROWTH, ESSAYS IN HONOR OF C. KINDLEBERGER (J. Bhagwati et all eds. 1971).

fact, much of the debate over trade policy is an argument between the losers and the gainers.

Second, there is the "human skills" model. In industrial economies, the training and sophistication of the labor force is the most important characteristic distinguishing one country from another. Therefore, countries that are relatively well endowed with professional personnel and highly-trained labor will specialize in and export skill-intensive goods. Conversely, relative abundance of unskilled labor promotes the export of commodities embodying mostly untrained labor. An extension of this hypothesis can be used to explain comparative advantage in high-technology products. Because they are produced by knowledge-intensive industries, these products are developed in countries endowed with a high proportion of research scientists and engineers in the labor force, and spend considerable amounts (relative to their GDP) on research and development.

Third, the "product life-cycle" hypothesis stresses the standardization process of products.[5] Early manufacture of a new good involves experimentation with both the feature of the product and the manufacturing process. Therefore, in its beginning stages, the good is non-standardized. As markets grow and the various techniques become common knowledge, both the product and the process become standardized and perhaps even subject to international standards and specifications. At that time, production can begin in less-sophisticated nations. According to this hypothesis, highly sophisticated economies are expected to export non-standardized goods, while less sophisticated countries specialize in more standardized goods.

Finally, there are theories that depart from the assumption of perfectly competitive markets. Monopolistic competition is a market structure in which there are many firms, and entry into the industry is easy and unrestricted, ensuring that economic profits will be competed away to zero in the long run.[6] In these aspects the market structure is similar to perfect competition. But unlike perfect competition, consumers do not view the good produced by the various firms as perfect substitutes. Rather, the good produced by each firm is differentiated in some way—such as the service associated with it, packaging, or even brand name—from those produced by other firms in the industry. Such firms can operate under increasing returns to scale: If the firm increases all inputs by a given proportion, its output rises by a *greater* proportion. Put differently, the firm's unit production cost declines as output expands.

Expansion of the market has two beneficial effects for consumers: It results in a larger number of firms producing more varieties of the (differentiated) product; and because each firm *produces a larger output, at lower average cost*, each variety would be available at a lower price.

Perhaps a theoretical example would help illustrate this model. Assume that Switzerland is a relatively capital abundant country while France is relatively labor abundant, and that the watch industry is relatively capital intensive while the pen industry is relatively labor intensive. If watches were a homogeneous product (a perfectly competitive industry) then, when trade opens up, Switzerland would export watches to France and import pens.

[5] *See, e.g.,* R. Vernon, *International Investment and Trade in the Product Cycle*, 80 QUARTERLY JOURNAL OF ECONOMICS 190 (May 1966); and L. Wells, *A Product Cycle for International Trade?,* JOURNAL OF MARKETING (July 1968). Note that rapid technological diffusion shortens the product cycle.

[6] The notion of economic profits includes the opportunity cost of capital to mere accounting profits. If they are zero, this means that the firm was able to make the same return on its capital in terms of profits as the going rate in the entire economy.

But the watch industry is monopolistically competitive, with each firm manufacturing a different *variety* of watches. Because of economies of scale in producing each variety, neither of the two countries would produce all the varieties. Switzerland will become a net exporter of watches. But there will be consumers in Switzerland who prefer varieties produced by French firms, and those watches will be imported. So there will be an exchange of watches between the two countries, or *intra-industry trade.*

The overall trade pattern that would emerge in these circumstances would have both inter-industry (between industries) and intra-industry components.[7]

(a) Inter-industry trade would reflect comparative advantage. Switzerland would export watches to France and import pens.
(b) In addition there would develop intra-industry trade that has nothing to do with comparative advantage. Because economies of scale in watch-making prevent one country from producing all the varieties, Switzerland and France would export to each other different varieties of watches. The pattern of intra-industry trade is unpredictable.

Switzerland would export only watches (and no pens) under both types of trade, thus becoming a net exporter of watches. France would export pens under inter-industry trade and watches under intra-industry trade. It would be a net exporter of pens and a net importer of watches. The more similar the countries are in their technologies and factor endowments, the less would be their inter-industry and the greater would be their intra-industry trade. Indeed much of the trade among the industrial countries is of the intra-industry variety, while most North-South trade tends to be of the inter-industry variety.

However, intra-industry examples can be found in North-South trade as well. For instance, General Electric has realized that because American consumers prefer refrigerators with two doors, it is not profitable to manufacture single-door refrigerators within the United States. In contrast, the Mexican preference is for single-door refrigerators. Therefore, G.E. supplies the low-volume, double-door segment of the Mexican market from its U.S. plants, and the low-volume, single-door segment of the U.S. market out of Mexico.[8]

Intra-industry trade introduces an additional gain from international trade. Because trade creates a larger market, a country can reduce the number of varieties it produces, thereby lowering production costs of each variety (economies of scale effect), and at the same time increase the number of varieties available to consumers (via imports). There is a gain from lower prices and a gain from a wider choice. This benefit accrues to all, and no redistributional effects occur. It calls for very little economic adjustment to trade. Indeed European economic integration proceeded with minimal internal disruption in the participating countries because it generated mainly intra-industry trade from which all benefit. Likewise the U.S.—Canada Auto Agreement (1965), which set up free trade in automobiles and parts between the two countries, enabled Canada to reduce the number

[7] For discussion, *see* S. Linder, AN ESSAY ON TRADE AND TRANSFORMATION (1962); E. Helpman, *International Trade in the Presence of Product Differentiation, Economies of Scale, and Monopolistic Competition*, 11 JOURNAL OF INTERNATIONAL ECONOMICS 305 (August 1981); and P. Krugman, *New Theories of Trade among Industrial Countries*, 73 AMERICAN ECONOMIC REVIEW 343 (May 1983).

[8] *See* J. Gannon, *NAFTA Creates Jobs for Joe and José*, WALL STREET JOURNAL, editorial page (March 29, 1993).

of models (varieties) it produces and lower per-unit production costs. At the same time, it increased the number of models available to Canadian consumers.

C. Integrated Approaches

The contemporary view treats separately two components of international trade:

(a) Inter-industry trade is the exchange between countries of totally different commodities, such as trading textiles and shoes for aircraft and computers; or the exchange of primary materials for finished manufactures. Much of this trade is between nations of vastly different factor endowments, such as the developing countries and the industrial countries, and can be explained by the factor endowment model, or its extension into skills and technology.

(b) Intra-industry trade refers to a two-way trade in a similar commodity such as the exchange of automotive products between the United States and Canada or among some of the European countries, and the exchange of commercial aircraft between the United States. and Europe. A growing proportion of international trade falls in this category. Much of it is conducted among the industrial countries, whose factor endowments are very similar.

Two features of the producing firms involved in intra-industry trade are important: (a) they tend to be oligopolies[9] or monopolistically competitive, mainly with differentiated products; and (b) economies of scale in production and distribution play an important role in their behavior.

Under these circumstances, factor endowments determine whether a country will be a net exporter or a net importer within broad commodity classes, but the advantages of long production runs lead each country to produce only a limited range of products within each class. The result is that countries with similar capital-labor endowment ratios and skill levels will still have an incentive to specialize in producing different goods within each industry and to engage in trade—hence the emergence of vast intra-industry trade.

The benefits from such trade are not confined to reallocation of resources. They include the rationalization of industries to take advantage of economies of scale, greater competition among large firms (across national boundaries), and a larger product variety available to consumers. The effects on income distribution and on returns to factors, so prominent in comparative advantage models, are vastly outweighed by these benefits. All productive factors gain from trade.

One reason the United States and Europe find it difficult to adjust to increased imports from developing countries, even when accompanied by increased exports to them, is that these imports represent inter-industry rather than intra-industry trade. Resources within the importing country must shift from one industry to another rather than within segments of the same industry. Such adjustment will take place at a higher cost, particularly in the short run.

III. The Theory of Preferential Trading Agreements

There are two common types of preferential trade agreement: Customs Unions ("CU") and Free Trade Areas ("FTAs"). A CU is a group of countries that abolish trade restrictions among themselves and set up common and uniform restrictions against imports from non-members. The European Community, established in 1957 with the Treaty of Rome,

[9] A few large firms make up each industry.

and now encompassing fifteen countries (soon to rise to 25), is a prime example. In an FTA, internal trade restrictions are also eliminated, but each country retains its own restrictions against imports from non-members. There is no common external tariff. The North American Free Trade Agreement ("NAFTA") is a case in point. Both CUs and FTAs discriminate against outside countries, and as such they violate the rule of non-discrimination, embodied in Article I of the GATT/WTO and known as the Most Favored Nation ("MFN") rule. But the GATT provides for these two exceptions to the MFN principle in Article XXIV. Indeed, as will be discussed below, preferential agreements have proliferated in recent years, and dozens of them exist on the five continents.

A. Static Effects of Preferential Trading Groups

It is a standard result of international trade theory that free trade in commodities maximizes global efficiency in a distortion-free world. Through trade, countries are able to specialize in the production of commodities in which they have comparative advantage. As noted above, they export these products, and import those in which the country is relatively non-competitive. Hence, trade allows for a more efficient division of labor. Free trade is the "first-best" policy from a global efficiency perspective.

Prior to the seminal 1950 work by Jacob Viner, *The Customs Union Issue*,[10] it was believed that, if a preferential trade grouping ("PTG') did not raise tariff and non-tariff barriers against non-member countries, it would constitute a movement toward free trade because it would involve a net reduction in (intra-regional) barriers. By reducing trade distortions a PTG would increase the gains from trade.

Viner was the first to demonstrate the shortcomings of this reasoning. He argued that if a PTG were to represent a step in the direction of free trade, then by definition it must be the case that post-PTG commodity purchases should be supplied from lower cost sources than was the pre-union case. Such an effect would occur if and when inefficient domestic (say, Mexican) production, previously protected by tariffs, contracts as a result of a more efficient partner country (say, U.S.) production. In Viner's terminology, this is "trade creation" and represents a movement toward free trade. However, some protected commodities that were previously imported from a non-partner country (say, Japan)– the lowest-cost producer–will now be imported from the partner country (the United States), a higher-cost producer, because of the tariff discrimination against non-members. This is "trade diversion", and represents a movement away from free trade since it diverts imports away from the lowest cost source. Hence, we cannot determine*a priori* the efficiency effect of a PTG; it will represent a movement toward free trade only if trade creation exceeds trade diversion.[11]

This economic approach to the effects of a PTG conflicts with popular thinking. To an economist, trade creation is beneficial to a country because it leads to the contraction of inefficient industries, whose resources can be used more effectively elsewhere in the economy. On the other hand, trade diversion leads to greater inefficiency by spurring production in the partner country in areas in which it has *intra-regional* comparative advantage but comparative disadvantage at the *global* level.[12] Yet, to many non-economists, contraction of domestic production (trade creation) is considered welfare-reducing, for

[10] Jacob Viner, The Customs Union Issue (1950).

[11] By introducing the distinction between trade creation and trade diversion, Viner established the foundations upon which the General Theory of Second Best would be built, a widely-used concept in microeconomics.

[12] Of course, it is possible for the partner country to have intra-regional and global comparative advantage in a certain product. But if this is the case, the home country would have been importing the product from that country before the union as well, meaning that there would be no trade diversion.

it means a loss of jobs. Trade diversion is viewed positively, as it suggests a gain to the union at the expense of non-partners. These sentiments were expressed forcefully during the NAFTA debate in the United States, in which the emphasis was on job loss to Mexico and on trying to keep the Japanese and the Europeans out of the North American market.

How can these views be reconciled? To the extent that they can be, reconciliation has to relate to basic assumptions. The Viner model and subsequent elaborations of it implicitly or explicitly assume that (*inter alia*): (1) markets are competitive; (2) there is full employment of economic resources at all times; (3) tariff revenues are redistributed to consumers; and (4) there are no externalities in production or consumption. If we lift these assumptions, we could obtain different results. For example, if there exists unemployed labor, then the contraction of domestic industry through the trade creation effect would lead to more unemployment and, hence, reduce welfare; trade diversion may be beneficial by putting resources back to work.

B. Dynamic Effects of Preferential Trading Groups

There have been a number of critiques of and extensions on the Viner paradigm,[13] but the essential intuition behind trade creation and trade diversion resulting from changes in relative prices remains intact. However, these static economic effects of PTGs generally refer to one-time changes in the allocation of resources (allocative efficiency). On the other hand, the "dynamic effects" of PTGs are long-term effects that can conceivably be more important than the static effects. We define (liberally) four possible areas as "dynamic" in nature: economies of scale, X-efficiency improvements, changes in investment flows, and the potential for industrial expansion in a developing-country context.

Economies of Scale. The advantages derived from access to an expanded market have always been an attraction for countries to form PTGs. A main benefit is the possibility of reaping economies of scale in production. The argument is straightforward: In industries where production technology is characterized by decreasing costs, the domestic market alone may be too small to permit production at an optimal level. If there are high tariff walls on these goods in foreign countries, international trade might be of little or no help in allowing these firms to expand output toward the optimum. With the formation of a PTG and the subsequent intra-union free trade, the expanded market could present the domestic decreasing- cost firms with adequate demand to produce at the optimum, a point which is particularly relevant for developing countries where local markets are small.[14] Economies of scale are thus a possible argument in favor of PTGs.[15]

[13] See, for example: James Meade, THE THEORY OF CUSTOMS UNIONS (1955); F. Gehrels, *Customs Unions from a Single Country Viewpoint*, 24 REVIEW OF ECONOMIC STUDIES 61 (1956–57); R. Lipsey, *The Theory of Customs Unions: A General Survey*, 70 THE ECONOMIC JOURNAL 496 (1960); M. Michaely, *On Customs Unions and the Gains from Trade*, 74 ECONOMIC JOURNAL 577 (Sept. 1965); R. Cooper and Massell, *A New Look at Customs Union Theory*, 75 ECONOMIC JOURNAL742 (December 1965); Wonnacott and Wonnacott, *Is Unilateral Tariff Reduction Preferable to a Customs Union?*, 71 AMERICAN ECONOMIC REVIEW 704 (Sept. 1981); Kemp and Wan, *An Elementary Proposition Concerning the Formation of Customs Unions*, 6(1) JOURNAL OF INTERNATIONAL ECONOMICS 95 (February 1976).

[14] For a more detailed discussion of the microeconomic foundations of the economies-of-scale argument, see F.M. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, Ch. 4 (1980).

[15] See W. Cordon, *Economies of Scale and Customs Union Theory,* 73 JOURNAL OF POLITICAL ECONOMY, 465–475 (June 1972) for a theoretical exposition of the effects of regional economic integration on economies of scale.

X-Efficiency. The term X-efficiency relates to the optimal organization of the productive process, e.g., work methods, incentive programs, plant layout, management, and psychological environment at the workplace. These can be separated into three categories: (1) intra-plant motivational efficiency, (2) external motivational efficiency, and (3) non-market input efficiency. Leibenstein[16] shows empirically that the counterpart to X-efficiency, X-inefficiency, is a far more significant cause of failure to achieve the social optimum in production than is allocative inefficiency (e.g., due to monopolistic practices).

It is therefore important for our purposes to include the X-efficiency factor in searching for the economic viability of PTGs. If inefficient practices in the workplace of a protected industry are replaced by efficient methods due to competition from the partner country, a PTG will improve productivity. This is called "forced efficiency"[17] and represents an improvement in welfare. In addition, there may be other benefits, such as improved technology and method sharing, new ideas to stimulate the psychological atmosphere at the workplace, and increased standardization of quality and specification requirements allowing for longer production runs. When a PTG is formed of economic partners at diverse levels of economic development, the less-developed members would stand to gain more from benefits inherent in X-efficiency spillovers.

Investment Effects. A PTG may have several effects on the direction of investment flows. First, after a PTG is formed, domestic capital previously invested in partner countries in order to circumvent tariffs can now flow to where the return to capital is highest. This results in a more efficient allocation of investment funds. In addition, the formation of a PTG reduces the risk and uncertainty of investing in partner countries, as there is no longer risk of changes in foreign commercial policy, and the PTG itself may have investment provisions.

However, there may also be an efficiency reduction associated with investment changes induced by PTG formation. Investment funds that would be more efficiently invested in non-partner countries may be diverted to partner countries in the PTG. This investment diversion is caused by the "non-economic" attraction of investment funds to the FTA in order to evade its discriminatory tariff wall.[18] For example, suppose Kia Motors wished to build an automobile assembly plant off-shore for export to the U.S. market. Further, assume that it deems Indonesia to be the most efficient location. With the creation of NAFTA, Kia could decide to build the plant in Mexico instead.[19] Thus, while this *investment-diversion* effect reduces global efficiency, it constitutes an increased investment flow to North America.[20]

PTGs and Economic Development. In addition to the dynamic factors mentioned above, PTGs can be used as part of an economic development strategy. In developing

[16] H. Leibenstein, *Allocative Efficiency vs. X-Efficiency*, 56 AMERICAN ECONOMIC REVIEW 392 (1966)

[17] This term is from R. Lipsey, *The Theory of Customs Unions: A General Survey*, in INTERNATIONAL TRADE: SELECTED READINGS 281 (J. Bhagwati ed. 1981).

[18] Mordechai Kreinin, *On the Dynamic Effects of a Customs Union*, 72 JOURNAL OF POLITICAL ECONOMY 193 (1964)

[19] In making this decision, Kia would have to take into account the extremely-high domestic content requirements of NAFTA, which in automobiles comes to 62.5 percent of value added. Hence, NAFTA creates an additional incentive for Kia to move its operations to Mexico in lieu of Indonesia, thereby increasing the *investment diversion* effect.

[20] In considering investment diversion at the firm level, we need to point out the underlying assumptions that: (1) financing constraints exist; and (2) the investing company only requires one plant. Otherwise, there would be no investment diversion, only investment creation. In the example above, Kia motors would build plants both in Mexico *and* Indonesia.

countries, the nurturing of the industrial base is often considered of paramount importance for a number of reasons, such as self-sufficiency aspirations, work-force and social externalities, and political clout of industrialists. In other words, industrial production "appears as a collective consumption good yielding a flow of satisfaction to the electorate independent of the satisfaction they derive directly from the consumption of industrial products"[21]. Therefore, if the country wishes to protect and expand its domestic industrial production, and forming a PTG is the least expensive way of achieving this goal (because a large market is needed to attain lower-cost production), it follows that PTGs are indeed economically rational.

With the formation of a customs union, the developing country in question experiences a growth in market size for its industrial products. If it specializes in the industry in which it has intra-union comparative advantage and the other country does likewise, then the same level of industrial production can be sustained at a lower marginal cost. Or, alternatively, for the same cost of production, the level of industrial production can be greater.

C. New Theories

Many of the new approaches that have emerged in the international trade literature center around locational advantages and the "natural" development of intra-regional trade before an agreement is reached. Empirically, PTGs in the global economy are mostly geographically based, that is, they all tend to include countries comprising the same geographical area. Also, it would appear that, *ceteris paribus*, the closer are countries to each other, the larger the percentage of trade that takes place between them. Hence, two-thirds of EU trade is intra-regional; Canada and the United States are each other's most important trading partners; and Mexico is heavily reliant on trade with the United States. The larger the volume of trade between countries within a regional bloc, the greater the potential for trade creation and the smaller the potential for trade diversion, making the agreement more likely to be efficiency-enhancing rather than efficiency reducing. The exception might be between geographically-close developing countries whose trade tends to be inter-industry rather than intra-industry.

Thus, according to Krugman and others, "natural" economic integration takes place between geographically-close countries due to lower transportation (and related) costs; hence forming a PTG between such countries would be consistent with the market and, therefore, would increase efficiency.[22] As a rule of thumb, it is suggested that a PTG in which intra-regional trade is greater than, or equal to, 50 percent of trade would increase efficiency.

Moreover, Frankel stresses that it is not enough merely to consider values of intra-regional trade.[23] His "natural" economic bloc would be one in which the "bias" for trade within the region has been growing over time. Using the possible formation of a market-determined "natural" economic bloc in Asia, he suggests that the growth of intra-regional trade in Asia in the 1980s reflects mainly an economic growth effect rather than a "natural" increase in trade between countries of the region. Estimating a gravity

[21] H. Johnson, *An Economic Theory of Protectionism, Tariff Bargaining, and the Formation of Customs Unions*, JOURNAL OF POLITICAL ECONOMY 73, 256, 258 (April 1965)

[22] Paul Krugman, *Is Bilateralism Bad?*, in INTERNATIONAL TRADE AND POLICY (Helpman and Krugman eds. 1991)

[23] Jeffrey A. Frankel, *Is Japan Creating a Yen Block in East Asia and the Pacific?,* NBER WORKING PAPER NO. 4050, (April 1992)

model of the region's trade, he shows that the bias in favor of intra-East Asian trade, though positive, has actually been *falling* over the 1980s if one corrects for the growth bias.

However, these approaches to the "natural" determinants of a trade bloc have several shortcomings. First, few economic blocs meet the 50 percent criterion. While intra-regional trade in the EU exceeds that mark *today*, this occurs only after 36 years of a wide-reaching PTG. At the formation of the EC, the percentage of intra-regional trade was closer to one-third. Also, as will be noted in the next section, intra-regional flows as a percentage of total trade in NAFTA prior to the agreement itself fell short of 50 percent. It is about one-fourth in the case of ASEAN. Does this mean that all these blocs should be considered *a priori* "un-natural"? Moreover, such an approach says nothing about the degree of distortion involved in the other 50 percent of trade. If discrimination against the extra-regional 50 percent is high, can the group still be considered "natural"? If a PTG has only one-third intra-regional trade but its extra-regional trade is such that there would be little diverted trade, is this necessarily an "un-natural" bloc?

Kreinin and Plummer suggest that a "natural" economic bloc might be alternatively defined as a bloc which preserves a country's structure of trade, that is, its rankings of industries according to comparative advantage.[24] For example, if one assumes that the existing global trade of a country is a good proxy for what its free trade pattern of comparative advantage would be, a high correlation between the ranking of industries by a country's comparative advantage within a proposed regional bloc and that of its global trade would indicate a "natural" economic bloc. They undertake this exercise for possible trading arrangements in the Asia-Pacific region and conclude that, while ASEAN's intra-regional trade is not highly correlated with constituent countries' global trading patterns, a more general East Asian Economic Bloc and APEC would be.

More of these themes are taken up in Chapter 51 of this book. Suffice it to conclude that the implications of the theory of PTGs (as is the case with all second-best policies) is that it is difficult to know *a priori* if a given grouping will be economically efficient. In fact, it may just be that PTGs are driven by political rather than economic considerations. Moreover, perhaps the most important economic question is whether a PTG is a "building bloc" or a "stumbling bloc" towards global free trade. Chapter 51 offers some interesting insights into this debate in the case of developing countries in Latin America.

IV. Some Empirical Examples

There is an extensive empirical literature that estimates the economic effects of PTGs in the real world. It varies from simple techniques based on direction of trade flows to complicated economy-wide Computational General Equilibrium (CGE) models, such as the one used in Chapter 38 (by Deardorf, Stern and Brown). These models have been surveyed elsewhere.[25] However, it is useful to consider how economically "rational" existing and emerging PTGs seem to be. We do this by expanding upon the theoretical models developed in the "natural economic bloc" ("NEB") literature.

There are a number of ways in which one might define a NEB, as well as determine whether or not one exists. In this section, we employ three oft-used methodologies to

[24] Mordechai E. Kreinin and Michael G. Plummer, *Natural Economic Blocs: An Alternative Formulation*, 8(2) THE INTERNATIONAL TRADE JOURNAL 193 (Summer 1994)

[25] For an extensive survey of these models, see Mordechai E. Krenin and Michael G. Plummer, ECONOMIC INTEGRATION AND DEVELOPMENT: HAS REGIONALISM DELIVERED FOR DEVELOPING COUNTRIES? (2002).

assess the degree to which various grouping meet the NEB criteria. These empirical approaches include: trade share analysis, double-density calculations, and an econometric gravity model.

It might be useful to note that this type of analysis has not only been used to ascertain whether or not an NEB exists on the real side of the economy (i.e., with respect to trade), but also to what degree monetary union makes sense for a group of countries. Many empirical studies focusing on the economics of monetary union in Europe, dollarization in Latin America and Asia, and so on, use various indicators of economic integration as one means of determining the potential benefits from monetary integration. The basic intuition is that the more integrated the economies are on the real side, the more they have to gain through price stability brought about by monetary union and the less they have to lose by giving up an independent monetary policy. Hence, what is good for real integration is also good for monetary integration. In fact, this has led the European Commission to conclude that, even though it is not clear that the criteria for an "optimal" currency area are met in Europe, the process of integration that will be set in motion through a common currency will ensure that these criteria will eventually be satisfied.

A. Trade-Share Analysis

The simplest approach to evaluating whether or not NEB conditions exist involves measuring shares of trade with partner countries as a percentage of total trade. A 50 percent trade share will be used as a rule of thumb for meeting the criteria by any trade grouping (as discussed above).

Table 1 shows intra- and extra regional trade shares (imports and exports) for several important groupings (APEC, EU-15, NAFTA, ASEAN, the Central European Free Trade Area, MERCOSUR, and the ANDEAN Pact) for three years: 1990, 1995, and 2000. Several important conclusions emerge: First, both APEC and the EU-15 meet the 50 percent rule, with intra-regional trade shares accounting for about three-fourths and two-thirds of total trade, respectively. Second, intra-NAFTA exports as a percentage of the total have risen from 43 percent in 1990 (i.e., prior to the formal free trade area, though the Canada-US Free Trade Area had just begun) to 56 percent of total trade in 2000. Third, intra-ASEAN trade has increased from about one-fifth of total trade in 1990 (i.e., prior to the ASEAN Free trade Area) to about one-fourth of total trade in 2000. Finally, intra-regional trade in the other regional groupings formed in emerging and developing markets constitute but a small percentage of total trade.

Thus, according to the NEB rule-of-thumb, out of these groupings only APEC, the EU-15 and possibly NAFTA would be considered NEBs. Of course, it is important to underscore that the 21 countries forming APEC account for a large percent of global GDP and total world trade. And the EU-15 is not only a large group of developed countries, but intra-regional trade shares reflect over four decades of discrimination against outsiders. Clearly, size matters in trade-share analysis and may confuse the definition of what is "natural". This is why normalization according to size might be justified in identifying NEBs; this is done by the double-density technique.

B. "Double-Density" Measures of Trade Intensities

As noted by Petri, increases in intra-regional trade signify an increase in inter-dependence but do not offer a strong indication of the "bias" toward regionalization, as it may reflect levels and changes in other variables, such as economic size (as noted above) and trends

Table 1: Merchandise trade of selected regional integration arrangements, 2000
(Billion dollars and percentage)

		Value	Share in total exports/imports			Annual percentage change		
		2000	1990	1995	2000	1990–00	1999	2000
APEC (21)								
Total exports		2931	100.0	100.0	100.0	8	7	18
	Intra exports	2127	67.5	73.1	72.6	9	9	20
Total imports[a]		3171	100.0	100.0	100.0	8	10	21
	Intra-imports	2159	65.4	71.7	68.1	9	11	15
EU (15)								
Total exports		2251	100.0	100.0	100.0	4	0	2
	Intra exports	1392	64.9	63.1	61.8	4	1	0
Total imports[b]		2362	100.0	100.0	100.0	4	2	5
	Intra-imports	1396	63.0	63.8	59.1	4	1	0
NAFTA (3)								
Total exports		1224	100.0	100.0	100.0	8	6	14
	Intra exports	686	42.6	46.1	56.0	11	12	18
Total imports		1672	100.0	100.0	100.0	10	11	18
	Intra-imports	674	34.4	37.7	40.3	11	12	18
ASEAN (10)								
Total exports		427	100.0	100.0	100.0	11	9	19
	Intra exports	101	20.1	25.5	23.7	13	10	28
Total imports		367	100.0	100.0	100.0	8	8	23
	Intra-imports	90	16.2	18.9	24.5	13	9	31
CEFTA (6)								
Total exports		117	—	100.0	100.0	—	1	12
	Intra exports	13	—	14.6	11.5	—	−7	9
Total imports		149	—	100.0	100.0	—	−2	12
	Intra-imports	14	—	11.3	9.5	—	−4	12
MERCOSUR (4)								
Total exports		85	100.0	100.0	100.0	6	−9	14
	Intra exports	18	8.9	20.5	20.9	16	−26	17
Total imports		89	100.0	100.0	100.0	12	−16	8
	Intra-imports	18	14.5	18.1	20.1	16	−25	14
ANDEAN (5)								
Total exports		58	100.0	100.0	100.0	6	11	33
	Intra exports	5	4.3	12.2	8.8	14	−28	32
Total imports[c]		40	100.0	100.0	100.0	8	−20	11
	Intra-imports	6	7.7	12.9	13.9	15	−20	32

[a]Imports of Canada, Mexico, Peru and Australia are valued f.o.b.
[b]Imports of Canada and Mexico are valued at f.o.b.
[c]Imports of Peru and Venezuela are valued at f.o.b.
Note: The figures are not fully adjusted for differences in the way members of the arrangements in this table record their merchandise trade.
Source: WTO, International Trade Statistics 2001, B30 Table 1.9.

in income growth.[26] For example, the increase in intra-APEC exports from 68 percent of total trade in 1990 to 73 percent in 2000 may be just a reflection of faster economic growth

[26] Peter A. Petri, *East Asian Trade Integration: An Analytical History,* in REGIONALISM AND RIVALRY: JAPAN AND THE UNITED STATES IN PACIFIC ASIA, CHAPTER ONE (1993).

in APEC than in the rest of the world. Thus the increase in trade shares was induced by income-growth rather than a "natural" tendency to trade. To control for this effect, a "double-density" measure can be used, which normalizes bilateral or intra-regional trade shares by the importance of the country or region in total trade. An example might best illustrate the approach. The share of ASEAN in Singapore's total exports in 2000 came to 30 percent. However, ASEAN imports as a percentage of total world imports was only 5.5 percent in 2000. Hence, normalizing the share of ASEAN in Singapore's exports (0.3) by the importance of ASEAN as a recipient of global imports (0.055) gives us a "double-density" value of 5.5; in other words, Singapore exports 5.5 times as much to ASEAN as one would expect if ASEAN were a random group of countries. Therefore, an alternative definition of a NEB is one in which the double-density measure is greater than 1.

Table 2a-d presents double-density coefficients for four existing trade groups included in Table 1: The EU-15, NAFTA, ASEAN, and MERCUSOR. The results are quite different from those in Table 1. The EU-15 countries do, indeed, have double-density ratios greater than 1 in all cases; however, they are infrequently greater than 2 and, then, only for a few small countries (in particular, Portugal, Belgium, the Netherlands, and Spain). On the other hand, ASEAN and MERCUSOR have much higher ratios than the EU-15. In ASEAN, the double-density ratios ranged from 2.6 (the Philippines) to 5.5 (Singapore) in 2000; moreover, the ratios increased everywhere over the past decade except in Malaysia and Singapore where they were already very high. The double-density ratios are even higher for MERCUSOR, amounting to 11 and 24 for Brazil and Argentina, respectively, and 33 and 49 for the smaller countries of Uruguay and Paraguay, respectively. All have been increasing with the exception of Uruguay. For NAFTA, the double-density ratios are also high, higher than those for ASEAN or the EU countries, with the exception of Canada-Mexico trade, where the double-density measures are less than one. Hence, within NAFTA, an NEB exists (according to this criterion) for Mexico and Canada each *vis-a-vis* the United States, as well as between United States and these two trading partners. NAFTA could have just as well been two bilateral agreements between the United States and Canada and between the U.S. and Mexico, because free trade between Canada and Mexico doesn't make much sense according to this definition.

C. Econometric Gravity Approach

Our final empirical exercise is the estimation of an econometric model of bilateral trade flows that attempts to capture a trade-bias coefficient. In particular, gravity models have been popular in the empirical international trade literature, as they generate strong and robust results and are able to address a number of important questions. However, they have been criticized for having a questionable theoretical basis, although it is possible to generate a gravity-model specification from a standard factor-proportions model.[27]

In short, gravity models attempt to explain bilateral import demand (X_{ij}) by a variety of explanatory variables, such as, income of the importing country (Y_i), income of the exporting country (Y_i), population of the importing and exporting countries (N_i and N_j, respectively), and a variable that accounts for the distance between the importing and exporting countries (D_{ij}). Expressed in logarithmic form, a typical gravity model of

[27] Jeffrey Frankel, REGIONAL TRADE GROUPINGS (1998).

Table 2a: EU—Double density measures of trade intensity*
(Billion dollars and percentage)

		Total exports	Exports to EU	EU exports/ Tot. country exports (1)	EU tot. imports/World imports (2)	Double density measure EU (1/2)
Austria	1990	41,265	28,018	67.9	44.0	1.5
	1995	57,533	37,929	65.9	39.0	1.7
	1998	62,584	38,754	61.9	39.0	1.6
	1999	64,292	41,625	64.7	38.2	1.7
	2000	63,903	39,428	61.7	35.4	1.7
Belgium-	1990	117,703	92,284	78.4	44.0	1.8
Luxembourg	1995	171,001	120,809	70.6	39.0	1.8
	1998	178,811	142,985	80.0	39.0	2.1
	1999	179,320	138,806	77.4	38.2	2.0
	2000	186,148	138,229	74.3	35.4	2.1
Denmark	1990	36,870	23,317	63.2	44.0	1.4
	1995	50,594	30,773	60.8	39.0	1.6
	1998	48,173	31,715	65.8	39.0	1.7
	1999	49,705	32,520	65.4	38.2	1.7
	2000	49,631	32,647	65.8	35.4	1.9
Finland	1990	26,571	16,611	62.5	44.0	1.4
	1995	40,310	22,247	55.2	39.0	1.4
	1998	43,145	22,310	51.7	39.0	1.3
	1999	41,867	24,111	57.6	38.2	1.5
	2000	45,635	25,464	55.8	35.4	1.6
France	1990	216,588	137,039	63.3	44.0	1.4
	1995	286,795	180,067	62.8	39.0	1.6
	1998	306,052	189,468	61.9	39.0	1.6
	1999	302,443	196,833	65.1	38.2	1.7
	2000	298,127	186,329	62.5	35.4	1.8
Germany	1990	421,100	256,132	60.8	44.0	1.4
	1995	523,007	290,323	55.5	39.0	1.4
	1998	542,812	304,792	56.2	39.0	1.4
	1999	544,076	304,881	56.0	38.2	1.5
	2000	551,505	309,878	56.2	35.4	1.6
Greece	1990	8,105	5,493	67.8	44.0	1.5
	1995	10,945	6,698	61.2	39.0	1.6
	1998	10,868	5,729	52.7	39.0	1.4
	1999	10,150	4,806	47.3	38.2	1.2
	2000	10,229	5,115	50.0	35.4	1.4
Ireland	1990	23,743	18,539	78.1	44.0	1.8
	1995	44,610	31,514	70.6	39.0	1.8
	1998	64,284	43,938	68.3	39.0	1.8
	1999	71,258	45,208	63.4	38.2	1.7
	2000	79,868	49,279	61.7	35.4	1.7
Italy	1990	170,304	107,154	62.9	44.0	1.4
	1995	234,003	134,280	101.9	39.0	2.6
	1998	245,469	130,262	53.1	39.0	1.4
	1999	235,806	131,986	56.0	38.2	1.5
	2000	237,750	130,525	54.9	35.4	1.6

(*Continued*)

Table 2a: (*Continued*)

		Total exports	Exports to EU	EU exports/ Tot. country exports (1)	EU tot. imports/World imports (2)	Double density measure EU (1/2)
Netherlands	1990	131,775	105,557	80.1	44.0	1.8
	1995	196,902	137,362	69.8	39.0	1.8
	1998	200,769	129,073	64.3	39.0	1.6
	1999	201,197	169,251	84.1	38.2	2.2
	2000	212,507	164,329	77.3	35.4	2.2
Portugal	1990	16,417	13,246	80.7	44.0	1.8
	1995	22,596	18,728	82.9	39.0	2.1
	1998	24,770	19,709	79.6	39.0	2.0
	1999	24,564	19,176	78.1	38.2	2.0
	2000	23,323	18,537	79.5	35.4	2.2
Spain	1990	55,642	39,789	71.5	44.0	1.6
	1995	91,613	66,216	72.3	39.0	1.9
	1998	109,037	76,050	69.7	39.0	1.8
	1999	110,246	74,571	67.6	38.2	1.8
	2000	113,747	80,305	70.6	35.4	2.0
Sweden	1990	57,540	35,495	61.7	44.0	1.4
	1995	79,584	45,273	56.9	39.0	1.5
	1998	84,944	46,799	55.1	39.0	1.4
	1999	84,842	47,650	56.2	38.2	1.5
	2000	86,933	46,596	53.6	35.4	1.5
UK	1990	185,172	106,455	57.5	44.0	1.3
	1995	242,008	129,095	53.3	39.0	1.4
	1998	272,879	142,012	52.0	39.0	1.3
	1999	269,139	140,402	52.2	38.2	1.4
	2000	284,090	162,499	57.2	35.4	1.6

Note: The trade intensity measure (Iij) is defined for country i's exports to country j as the share of i' exports going to j (Xij/Xi) relative to the share of j's imports (Mj) in world imports (Mw). That is (Iij) = (Xij/Xi)/(Mj/Mw).
Source: Computed from WTO statistics, *WTO International Trade Statistics 2000*, IMF *Direction of Trade Statistics Yearbook 1995 and 2000,*
The Economist Intelligence Unit *Country Profiles 2001*, Statistics Finland.

bilateral trade takes on the form of:

$$\ln X_{ij} = A + \delta_1 Y_i + \delta_2 \ln Y_j + \delta_3 \ln N_i + \delta_4 \ln N_j + \delta_5 \ln D_{ij} + \ln e_{ij}$$

where i = importing country; j = exporting country; A = intercept; δ_i = coefficients of the explanatory variables; and log e_{ij} = lognormal error term.[28]

Gravity models can be used in several ways and are flexible with respect to model specification. For example, modern gravity equations tend to exclude population variables and include the product of *per capita* income of the trading countries, on the theoretical

[28] Standard trade theory would suggest that the coefficients of the explanatory variables would have the following signs: $\hat{\delta}1 > 0$, $\hat{\delta}2 < 0$, $\delta 3 > 0$, $\hat{\delta}4 < 0$, $\hat{\delta}5 < 0$.

Table 2b: NAFTA—Double density measures of trade intensity*

		Double density measure NAFTA	Double density measure US	Double density measure Canada	Double density measure Mexico
United States	1990	1.5	—	6.1	5.8
	1995	1.5	—	6.7	5.4
	1998	1.5	—	6.2	5.0
	1999	1.5	—	6.3	4.9
	2000	1.4	—	6.1	5.1
Canada	1990	3.9	5.1	—	0.3
	1995	4.1	5.4	—	0.3
	1998	3.8	5.1	—	0.2
	1999	3.6	4.8	—	0.2
	2000	3.4	4.5	—	0.2
Mexico	1990	4.1	5.4	0.1	—
	1995	4.4	5.7	0.8	—
	1998	3.9	5.2	0.4	—
	1999	3.7	4.9	0.5	—
	2000	3.5	4.6	0.5	—

Note: The trade intensity measure (I_{ij}) is defined for country i's exports to country j as the share of i' exports going to j (Xij/Xi) relative to the share of j's imports (Mj) in world imports (Mw). That is (Iij) = (Xij/Xi)/(Mj/Mw).
Source: Computed from WTO statistics, *WTO International Trade Statistics 2001*

Table 2c: ASEAN—Double density measures of trade intensity*
(Billion dollars and percentage)

		Total exports	Exports to ASEAN	ASEAN exports/ Tot. country exports (1)	ASEAN tot. imports/ World imports (2)	Double density measure (1/2)
Indonesia	1990	25.68	2.57	10.0	4.6	2.2
	1995	45.42	6.50	14.3	6.8	2.1
	1999	48.67	8.28	17.0	5.1	3.4
	2000	62.12	10.89	17.5	5.5	3.2
Malaysia	1990	29.42	8.62	29.3	4.6	6.4
	1995	73.91	20.41	27.6	6.8	4.1
	1999	84.46	20.13	23.8	5.1	4.7
	2000	98.24	26.07	26.5	5.5	4.8
Philippines	1990	8.07	0.59	7.3	4.6	1.6
	1995	17.50	2.36	13.5	6.8	2.0
	1999	36.50	4.99	13.7	5.1	2.7
	2000	39.78	5.63	14.2	5.5	2.6
Singapore[a]	1990	52.75	13.57	25.7	4.6	5.6
	1995	118.27	38.24	32.3	6.8	4.8
	1999	114.69	32.15	28.0	5.1	5.5
	2000	137.88	41.50	30.1	5.5	5.5
Thailand	1990	23.07	2.75	11.9	4.6	2.6
	1995	56.44	12.33	21.8	6.8	3.2
	1999	58.44	10.86	18.6	5.1	3.7
	2000	69.06	13.42	19.4	5.5	3.5

[a]includes significant re-exports
Note: The trade intensity measure (I_{ij}) is defined for country i's exports to country j as the share of i' exports going to j (X_{ij}/ X_i) relative to the share of j's imports (Mj) in world imports (Mw). That is (Iij) = (Xij/Xi)/(Mj/Mw).
Source: Computed from WTO statistics, *WTO International Trade Statistics 2001*

Table 2d: MERCOSUR—Double density measures of trade intensity*
(Billion dollars and percentage)

		Total exports	Exports to MERCOSUR	Mercosur exports/ Tot. country exports (1)	Mercosur tot. imports/ World imports (2)	Double density measure (1/2)
Argentina	1990	12353	1833	14.8	0.8	17.9
	1995	20967	6780	32.3	1.5	21.1
	1999	23333	7071	30.3	1.4	21.7
	2000	26298	8352	31.8	1.3	23.7
Brazil	1990	31414	1320	4.2	0.8	5.1
	1995	46506	6154	13.2	1.5	8.6
	1999	48011	6778	14.1	1.4	10.1
	2000	55086	7762	14.1	1.3	10.5
Paraguay	1990	959	379	39.5	0.8	47.8
	1995	919	528	57.5	1.5	37.5
	1999	741	307	41.4	1.4	29.6
	2000	852	553	64.9	1.3	48.5
Uruguay	1990	1693	595	35.1	0.8	42.5
	1995	2106	995	47.2	1.5	30.8
	1999	2237	1007	45.0	1.4	32.2
	2000	2295	1023	44.6	1.3	33.3

Note: The trade intensity measure (I_{ij}) is defined for country i's exports to country j as the share of i' exports going to j (X_{ij}/X_i) relative to the share of j's imports (Mj) in world imports (Mw). That is (Iij) = (Xij/Xi)/(Mj/Mw).
Source: Computed from WTO statistics, *WTO International Trade Statistics 2001*

ground that wealthy countries tend to trade more with each other because they have common tastes.

A regional binary variable(s) is then added to estimate whether or not formal economic integration has a statistically-significant effect.[29] The larger the coefficient, the greater the tendency to trade within (or with) that region. We do this for two proposed PTGs, APEC and the FTAA, as well as the EU-15. The motivation is to examine regional integration in a "three-bloc" world, which has been postulated as a logical conclusion to the regionalism trend.

Our sample contains 5404 bilateral trade flows each year over the 1980 to 1999 period and we estimated a gravity model for each such flow. In the overwhelming majority of cases, the estimates are robust (with the exception of the *per capita* income variable), and the regression fits are good. The adjusted R^2 (which tells us how much of the variance of the dependent variable—in this case, bilateral trade—is explained by the explanatory variables) is over 0.40 in the past decade, generally on par with other gravity models.

The estimated coefficients on the APEC and EU-15 binary variables are always statistically significant and high, with the APEC variable rising since 1980 (from 1.70 that year to 2.41 in 1999) and approaching the level of the EU-15. On the other hand, the FTAA is not an NEB using this econometric approach: the estimated coefficient on the FTAA variable is never statistically different from zero, suggesting that it does not add anything to the explanation power of the regressions.

[29] Frankel, note 27 *supra.*

Table 3: Gravity model estimations of regional trade blocs
(Dependent variable: Trade between country pairs)

	C	GDP Host	GDP Partner	Distance	Adjacency	APEC	FTAA	EU	Adj. R Squared
1980	11.76**	0.81**	0.47*	−1.87**	0.23*	1.70**	0.05	2.52**	0.35
1981	11.25**	0.82**	0.49*	−1.80**	0.24*	1.65*	−0.04	2.36**	0.36
1982	11.07**	0.84**	0.48*	−1.80**	0.38*	1.68**	−0.19	2.52**	0.37
1983	11.20**	0.82**	0.47*	−1.80*	0.29*	1.68**	−0.36	2.52**	0.37
1984	11.15**	0.84**	0.50*	−1.82**	0.25*	1.55**	−0.25	2.57**	0.37
1985	10.72**	0.85**	0.47*	−1.77**	0.30*	1.61**	−0.21	2.61**	0.37
1986	10.68**	0.87**	0.46*	−1.78**	0.22*	1.77**	−0.08	2.68**	0.38
1987	10.46**	0.89**	0.46*	−1.77**	0.30*	1.90**	0.04	2.72**	0.39
1988	10.78**	0.89**	0.46*	−1.79**	0.22*	2.06*	−0.13	2.70**	0.41
1989	11.06**	0.89**	0.45*	−1.81**	0.41*	2.19**	0.00	2.71**	0.43
1990	10.82**	0.90**	0.46*	−1.79**	0.53*	2.21**	−0.02	2.74**	0.43
1991	11.40**	0.90**	0.48*	−1.86**	0.34*	2.09**	−0.05	2.61**	0.43
1992	11.23**	0.91**	0.46*	−1.82**	0.31*	2.10**	0.02	2.58**	0.43
1993	11.15**	0.90**	0.45*	−1.82**	0.28*	2.21**	0.04	2.56**	0.42
1994	11.92**	0.84**	0.42*	−1.88**	0.16	2.38**	0.18	2.61**	0.42
1995	12.26**	0.82**	0.43*	−1.89**	0.10	2.29**	0.04	2.48**	0.42
1996	12.88**	0.95**	0.47*	−2.07**	0.05	2.53**	0.13	2.62**	0.43
1997	12.03**	1.01**	0.59**	−2.04**	0.16	2.37**	0.11	2.45**	0.44
1998	11.60**	0.98**	0.56**	−1.96**	0.12	2.27**	0.33	2.63**	0.43
1999	10.78**	0.94**	0.59**	−1.84**	0.29*	2.41**	0.10	2.68**	0.45

Statistic significance at 95% and 99% denoted by * and **, respectively
All variables are in logarithmic form, save the binary variables
A joint Per Capita Income variable was also esitmated but in no case was it statistically significant and hence is not included in the tables
Sources: Direction of Trade Yearbooks, IMF, and authors' calculations.

V. Conclusions

This chapter has reviewed the principles of international trade theory and some aspects of empirical modeling. International trade has been an active research field and, hence, it was possible to review only a few of the most important theories. In particular, special attention centered on the factor-proportion theory and its extensions. It is hoped that the theoretical review will endow the reader with sufficient background to understand the basic principles of international trade needed to follow the other economics chapters in this book.

Next, the theory of international trade was applied to models dealing with regionalism. Following a review of the theory of regional integration and its relevant empirical approaches an important conclusion emerges: there are no "magic numbers" to suggest whether a preferential trading arrangement is economically beneficial or not. Rather, one is limited to *relative* conclusions, i.e., whether or not a grouping makes sense relative to another grouping, or has a grouping met the efficiency criteria after integration even if it failed to do so prior to formal integration.

CHAPTER 38

COMPUTATIONAL ANALYSIS OF MULTILATERAL TRADE LIBERALIZATION IN THE URUGUAY ROUND AND DOHA DEVELOPMENT ROUND

Drusilla K. Brown*, Alan V. Deardorff**, and Robert M. Stern***

TABLE OF CONTENTS

I. Introduction 24
II. Overview of the Michigan CGE Model 24
III. Computational Scenarios of Uruguay Round Liberalization 25
A. Computational Results 26
B. Aggregate Results 31
C. Sectoral Results 31
IV. Computational Analysis of the Doha Development Round 32
A. Data 32
B. Aggregate Results 33
C. Sectoral Results 40
V. Conclusions and Implications 40
Tables
Table 1 Summary Results of the Uruguay Round 27
Table 2 Sectoral Results of the Uruguay Round—United States 29
Table 3 Sectoral Results of the Uruguay Round—India 29
Table 4 Summary Results of a Doha Round 34
Table 5 Sectoral Results of the Doha Development Round—United States 38
Table 6 Sectoral Results of the Doha Development Round—India 38
Bibliography 41

* Tufts University
** University of Michigan
*** University of Michigan

I. Introduction

In this chapter, we first use the Michigan Model of World Production and Trade to simulate the economic effects of the Uruguay Round of multilateral trade negotiations completed in 1993–94 on the major industrialized and developing countries/regions. We estimate that the Uruguay Round negotiations increased global economic welfare by $73.0 billion. The developed countries overall have an estimated welfare gain of $53.8 billion, and the developing countries an estimated welfare increase of $19.2 billion.

We have also simulated the effects of assumed 33 percent reductions in trade barriers in the ongoing Doha Development Round. There is an estimated increase in global welfare of $574.0 billion. There is a global welfare decline of $3.1 billion from agricultural liberalization due primarily to the assumed reductions in export subsidies. There are global welfare gains of $163.4 billion from reductions in tariffs on manufactures and $413.7 billion from reductions in services barriers. All of the countries/regions covered in the Michigan Model show overall welfare increases, with the largest absolute gains going to the developed countries.

We present an overview of the Michigan Model in Part II of this chapter, and the detailed computational results of the analysis of the trade negotiations in the Uruguay Round and the detailed Doha Development Round in Parts III and IV. Conclusions and implications are discussed in Part V.

II. Overview of the Michigan CGE Model

The Michigan Model is a computable general equilibrium ("CGE") simulation model designed to assess the potential economic effects of trade liberalization. The distinguishing feature of the Michigan Model is that it incorporates some aspects of the New Trade Theory, including increasing returns to scale, monopolistic competition, and product heterogeneity. A complete description of the formal structure and equations of the model can be found on line at www.spp.umich.edu/rsie/model/.

The version of the model that we will use consists of twenty countries/regions (plus rest-of-world) and eighteen production sectors. The country/region and sectoral coverage are indicated in the tables noted below. Agriculture is modeled as perfectly competitive and all other sectors as monopolistically competitive with free entry and exit of firms. The model is implemented using GEMPACK software, as described by Harrison and Pearson[1].

Needless to say, the data needs of the Michigan model are immense. The main data source is "The GTAP-4 Database" of the Purdue University Center for Global Trade Analysis Project.[2] The reference year for this database is 1995. We have extracted the following data, aggregated to our sectors and regions, from this source:

1. Bilateral trade flows among twenty countries/regions, decomposed into eighteen sectors. Trade with the rest-of-world ("ROW") is included to close the model;
2. Input-output tables for the twenty countries/regions, excluding ROW;
3. Components of final demand along with sectoral contributions for the twenty countries/regions, excluding ROW;

[1] W.J. Harrison and Ken Pearson, *Computing Solutions for Large General Equilibrium Models Using GEMPACK,* 9 COMPUTATIONAL ECONOMICS 83 (1996)

[2] Robert McDougall, et al., GLOBAL TRADE: ASSISTANCE AND PROTECTION: GTAP-4 DATABASE (1998).

4. Gross value of output and value added at the sectoral level for the twenty countries/regions, excluding ROW;
5. Bilateral import tariffs by sector among the twenty countries/regions;
6. Elasticity of substitution between varieties in demand;
7. Bilateral export-tariff equivalents among the twenty countries/regions decomposed into 18 sectors.

The monopolistically competitive market structure in the nonagricultural sectors of the model imposes an additional data requirement of the number of firms at the sectoral level. These data have been drawn from the United Nations, *International Yearbook of Industrial Statistics, 1998*.[3] We also need estimates of sectoral employment for the countries/regions of the model. These data come from: UNIDO, 1995, *International Yearbook of Industrial Statistics*, and the World Bank, 1997, *World Development Report*. The employment data have been aggregated according to our sectoral/regional aggregation to obtain sectoral estimates of workers employed in manufactures. The *World Development Report* was used to obtain data for the other sectors.

We have projected the GTAP-4 1995 database to the year 2005 by extrapolating the labor availability in different countries/regions by an average weighted growth rate of 1.2 per cent per annum. This figure was computed from the growth-rate forecasts for the period 1997–2010 provided for various countries in Table 2.3 of the World Bank's 1999 *World Development Indicators*. All other major variables have been projected, using an average weighted growth rate of GDP of 2.5 per cent per annum, for all of the countries/regions of our model during the period 1990–1997, as per Table 11 of the 1989/99 *World Development Report*.[4]

III. Computational Scenarios of Uruguay Round Liberalization

The projected database provides us with an approximate picture of what the world could be expected to look like in 2005 if the Uruguay Round ("UR") negotiations had not occurred. The UR reductions in trade barriers were implemented beginning in 1995 and will be completed by 2005. Accordingly, we have analyzed the impact of the UR-induced changes that are expected to occur over the course of the ten-year implementation period as a consequence of the negotiated reductions in tariffs and NTBs.[5] The scaled-up database for 2005 is then readjusted to mimic the world as it might look in the post-UR implementation. In Part IV of this chapter, we will report on some liberalization scenarios for the ongoing WTO (Doha) negotiating round, involving possible reductions in tariffs on agricultural products and manufactures and reductions of barriers to services trade.

[3] It should be noted that the above source does not provide number-of-firms data for all countries. We have used the number-of-firms data for similar countries in these cases.

[4] *See* Thomas W. Hertel and Will Martin, *Would Developing Countries Gain from Inclusion of Manufactures in the WTO Negotiations?,* paper presented at the CONFERENCE ON THE WTO AND THE MILLENNIUM ROUND (September 1999) and Thomas W. Hertel, *Potential Gains from Reducing Trade Barriers in Manufacturing, Services and Agriculture*, 82 FEDERAL RESERVE BANK OF ST. LOUIS REVIEW 77 (2000) for a more elaborate and detailed procedure for calculating year 2005 projections. *See also* our discussion below on the 2005 projections.

[5] It should be noted that we are not considering the effects of the Agreement on Trade Related Intellectual Property Rights ("TRIPS") and the other agreements on rules and procedures that were encompassed in the Uruguay Round negotiations.

In this section, we report on the following three scenarios:[6]

UR-1 *The Agreement on Textiles and Clothing ("ATC") is analyzed by simulating the effects of the phase-out of the Multifiber Agreement ("MFA") under the Uruguay-Round Agreement. This is done by assuming complete elimination of the MFA export-tax equivalents on textiles and wearing apparel for the developing countries/regions subject to the MFA and other quotas imposed on their exports to the industrialized countries.*
UR-2 *All the countries/regions in the model reduce their bilateral import tariffs as per the UR Agreement on manufactures.*[7]
UR-3 *This combines* ***UR-1*** *and* ***UR-2.***

A. Computational Results[8]

Table 1 provides aggregate, or economy-wide, results from the scenarios listed above for the countries/regions that have been modeled. Disaggregated sectoral results for the **UR-3** scenario for the United States and for India are reported for illustrative purposes in Tables 2–3.

To help the reader interpret the results, it is useful first to review the features of the model that serve to identify the various economic effects that are being captured in the different scenarios. Although the model includes the aforementioned features of the New Trade Theory, it remains the case that markets respond to trade liberalization in much the same way that they would with perfect competition. That is, when tariffs or other trade barriers are reduced in a sector, domestic buyers (both final and intermediate) substitute toward imports and the domestic competing industry contracts production while foreign exporters expand. With multilateral liberalization reducing tariffs and other trade barriers simultaneously in most sectors and countries, each country's industries share in both of these effects, expanding or contracting depending primarily on whether their protection is reduced more or less than in other sectors and countries. At the same time, countries with larger average tariff reductions than their trading partners tend to experience a real

[6] Agricultural liberalization in the Uruguay Round negotiations was supposed to be as follows: agricultural import tariffs were to be reduced by twenty percent for the industrialized countries and by thirteen percent for the developing countries; agricultural export subsidies were to be reduced by 36 percent for the industrialized countries and by 24 percent for the developing countries; and agricultural production subsidies were to be reduced by twenty percent for the industrialized countries and by fourteen percent for the developing countries. However, as noted in JOSEPH FRANCOIS, The next WTO Round: North-south stakes in new market access negotiations 11 (2001): "Basically, in agriculture, we are in a world that allows scope for great policy discretion and uncertainty as a result of the loose commitments made." What this means is that many countries introduced quantitative restrictions on imports in the form of tariff-rate quotas. There is also evidence of considerable leeway in the choice of the reference period from which to measure reductions in export subsidies. Furthermore, the disciplines on domestic subsidies were weakened by changes in the definition of the Aggregate Measure of Support. As a consequence, relatively little agricultural liberalization was accomplished in the Uruguay Round negotiations. In the absence of detailed information on the various agricultural policy changes that have been made, we have chosen therefore not to include agricultural liberalization in the Uruguay Round computational scenarios.

[7] See Joseph Francois and Anna Strutt, *Post-Uruguay Round Tariff Vectors for GTAP Version 4,* FACULTY OF ECONOMICS, ERASMUS UNIVERSITY, ROTTERDAM, THE NETHERLANDS (1999) for details on the post-UR tariff rates.

[8] There have been a substantial number of CGE modeling studies of the Uruguay Round that are summarized and critiqued in Joseph F. Francois, Bradley McDonald, and Hakan Nordstrom, *A User's Guide to Uruguay Round Assessments*, CENTER FOR ECONOMIC POLICY RESEARCH (CEPR) DISCUSSION PAPER SERIES, NO. 1410 (June 1996) and Joseph Francois, *General Equilibrium Studies of Multilateral Trade Negotiations*, in THE POLITICAL ECONOMY OF POLICY REFORM (Douglas Nelson ed. 2001b).

Table 1: Summary results of the Uruguay Round change in imports, exports, terms of trade, welfare and the real return to capital and labor

Country	Imports (Millions)	Exports (Millions)	Terms of Trade (Percent)	Welfare (Percent)	Welfare (Millions)	Real Wage (Percent)	Return to Capital (Percent)
Scenario UR-1: Removal of the Multifiber Arrangement							
Developed Countries							
Australia & New Zealand	144.7	114.0	0.030	0.018	94.5	0.012	0.028
Canada	782.3	719.4	0.065	0.094	683.8	0.066	0.133
European Union and EFTA	2517.7	2275.1	0.055	0.058	6320.8	0.051	0.071
Japan	−121.4	191.0	−0.050	0.004	257.1	−0.002	0.012
United States	6497.4	4482.0	0.148	0.095	8608.2	0.084	0.114
Developing Countries							
Asia							
India	1517.9	1992.1	−0.954	0.231	972.2	0.224	0.238
Sri Lanka	98.7	159.1	−1.101	0.143	23.8	0.032	0.251
Rest of South Asia	449.1	652.8	−1.088	0.263	307.4	0.207	0.319
China	1849.7	2760.4	−0.366	−0.161	−1458.5	−0.120	−0.194
Hong Kong	1544.3	1364.5	0.187	−0.473	−609.2	0.121	−0.988
South Korea	405.0	428.0	−0.015	0.025	142.7	0.045	0.006
Singapore	−510.4	−591.4	0.054	−0.001	−0.8	−0.025	0.020
Indonesia	147.5	207.8	−0.089	−0.005	−13.8	0.030	−0.032
Malaysia	223.0	354.0	−0.121	0.275	328.7	0.735	0.025
Philippines	2080.9	2513.8	−1.316	0.900	794.3	2.057	0.045
Thailand	140.3	259.0	−0.143	0.029	59.4	0.161	−0.019
Other							
Mexico	−45.3	24.8	−0.030	−0.010	−36.6	−0.010	−0.010
Turkey	−157.3	−120.0	−0.094	−0.015	−31.6	−0.031	−0.006
Central Europe	−20.3	−0.6	−0.026	0.037	138.3	0.026	0.054
Central & South America	−162.9	−106.2	−0.050	−0.004	−73.9	−0.002	−0.006
Total	**17380.9**	**17679.5**			**16506.8**		
Scenario UR-2: Tariff Reductions in Manufactures							
Developed Countries							
Australia & New Zealand	2848.0	2527.6	0.347	0.327	1674.8	0.345	0.300
Canada	1071.9	1354.5	−0.086	0.127	926.3	0.137	0.114
European Union and EFTA	16826.6	15358.5	0.145	0.159	17405.6	0.157	0.163
Japan	8680.6	8331.3	0.062	0.102	6608.4	0.092	0.115
United States	12426.0	13459.3	−0.133	0.123	11187.1	0.124	0.122
Developing Countries							
Asia							
India	2585.3	3628.9	−2.099	0.446	1875.4	0.316	0.577
Sri Lanka	98.8	106.3	−0.193	0.558	93.0	0.507	0.608
Rest of South Asia	3454.8	4820.1	−7.541	2.025	2366.5	2.224	1.828
China	3112.6	1917.7	0.456	0.305	2762.2	0.347	0.271
Hong Kong	763.5	480.1	0.254	0.360	464.1	0.346	0.373
South Korea	2858.6	2733.2	0.068	0.422	2403.3	0.409	0.435
Singapore	3539.8	3647.5	−0.078	2.111	1570.3	1.943	2.258
Indonesia	936.5	894.5	0.068	0.247	626.0	0.291	0.215
Malaysia	2790.9	3411.4	−0.563	1.919	2293.9	1.816	1.974
Philippines	2452.6	3102.1	−1.989	1.917	1691.7	1.853	1.964
Thailand	1264.7	1002.3	0.291	0.366	753.9	0.597	0.283
Other							
Mexico	−64.9	1.4	−0.026	0.019	66.3	0.038	0.010
Turkey	319.3	253.9	0.143	0.123	259.1	0.122	0.124
Central Europe	1871.7	1846.1	0.020	0.294	1091.2	0.311	0.270
Central & South America	3778.8	2999.5	0.423	0.022	377.1	0.043	0.004
Total	**71616.2**	**71876.4**			**56496.0**		

(*Continued*)

Table 1: (*Continued*)

Country	Imports (Millions)	Exports (Millions)	Terms of trade (Percent)	Welfare (Percent)	Welfare (Millions)	Real wage (Percent)	Return to capital (Percent)
Scenario UR-3: Uruguay Round Combined Liberalization							
Developed Countries							
Australia & New Zealand	2992.8	2641.6	0.377	0.345	1769.3	0.357	0.328
Canada	1854.2	2073.9	−0.021	0.221	1610.1	0.202	0.247
European Union and EFTA	19344.2	17633.6	0.200	0.216	23726.4	0.208	0.234
Japan	8559.2	8522.3	0.011	0.106	6865.5	0.090	0.127
United States	18923.4	17941.3	0.014	0.218	19795.3	0.208	0.236
Developing Countries							
Asia							
India	4103.2	5620.9	−3.053	0.677	2847.5	0.540	0.815
Sri Lanka	197.5	265.4	−1.293	0.701	116.8	0.539	0.859
Rest of South Asia	3903.9	5473.0	−8.629	2.288	2673.9	2.430	2.147
China	4962.4	4678.2	0.089	0.144	1303.8	0.227	0.077
Hong Kong	2307.9	1844.7	0.442	−0.113	−145.1	0.467	−0.615
South Korea	3263.6	3161.2	0.053	0.447	2546.1	0.454	0.441
Singapore	3029.4	3056.1	−0.024	2.110	1569.4	1.917	2.278
Indonesia	1084.0	1102.4	−0.021	0.242	612.2	0.321	0.183
Malaysia	3013.9	3765.4	−0.684	2.194	2622.6	2.552	1.999
Philippines	4533.4	5615.9	−3.305	2.817	2486.0	3.910	2.009
Thailand	1405.0	1261.3	0.148	0.395	813.3	0.758	0.264
Other							
Mexico	−110.2	26.1	−0.056	0.008	29.6	0.027	0.000
Turkey	162.0	133.9	0.049	0.108	227.6	0.091	0.117
Central Europe	1851.4	1845.5	−0.006	0.331	1229.4	0.336	0.324
Central & South America	3615.9	2893.3	0.373	0.017	303.2	0.041	−0.002
Total	**88997.2**	**89555.9**			**73002.8**		

depreciation of their currencies in order to maintain a constant trade balance, so that all countries therefore experience mixtures of both expanding and contracting sectors.

Worldwide, these changes tend to cause increased international demand for all sectors, with world prices rising most for those sectors where trade barriers fall the most. This in turn causes changes in countries' terms of trade that can be positive or negative. Those countries that are net exporters of goods with the greatest degree of import-tariff liberalization will experience increases in their terms of trade as the world prices of their exports rise relative to their imports. The reverse occurs for net exporters in industries where liberalization is slight—perhaps because it already happened in previous trade rounds.

The effects on the economic welfare of countries arise from a mixture of these terms-of-trade effects, together with the standard efficiency gains from trade and also from additional effects due to elements of the New Trade Theory, the latter of which are mostly, but not all, beneficial.[9] Thus, we expect on average that the world will gain from multilateral liberalization, as resources are reallocated to those sectors in each country where there is a comparative advantage. In the absence of terms-of-trade effects, these efficiency gains should raise national welfare measured by the equivalent variation for every country, although some factor owners within a country may lose, as will be noted below. However, it is possible for a particular country whose net imports are concentrated

[9] *See* discussion below.

Table 2: Sectoral results of the Uruguay Round: percent change in exports, imports, output, scale and employment for the United States

Product	Exports (Percent)	Imports (Percent)	Supply (Percent)	Scale (Percent)	Employment (Percent)	Employment (000's)
Agriculture	1.24	−0.89	0.37	0.00	0.37	14967.1
Mining	2.53	−0.93	0.77	0.33	0.44	3103.9
Food, Beverages & Tobacco	8.40	12.27	0.24	0.22	0.04	1236.0
Textiles	−0.08	8.38	−2.59	0.01	−2.59	−32076.8
Wearing Apparel	−1.83	26.37	−7.94	0.57	−8.39	−97094.5
Leather Products & Footwear	2.86	0.33	0.20	0.21	0.04	27.0
Wood & Wood Products	2.04	0.18	0.28	0.16	0.17	7512.7
Chemicals	2.13	1.57	0.21	0.22	0.03	931.1
Non-metallic Min. Products	1.74	2.61	0.07	0.16	−0.04	−283.1
Metal Products	2.15	0.39	0.42	0.25	0.21	5823.1
Transportation Equipment	2.12	−0.49	0.65	0.27	0.40	10645.1
Machinery & Equipment	1.61	2.02	0.23	0.21	0.11	2366.5
Other Manufactures	2.24	0.28	0.60	0.21	0.46	8227.8
Elec., Gas & Water	0.25	−0.04	0.16	0.17	0.03	1341.3
Construction	1.54	−1.00	0.15	0.17	0.01	1918.4
Trade and Transport	1.27	−2.63	0.25	0.18	0.11	34642.6
Other Private Services	1.49	−1.39	0.25	0.21	0.08	30102.6
Government Services	1.05	−0.97	0.05	0.06	0.02	6609.4
Average	**1.95**	**1.74**	**0.15**		**0.00**	**0.00**

Table 3: Sectoral results of the Uruguay Round: percent change in exports, imports, output, scale and employment for India

Product	Exports (Percent)	Imports (Percent)	Supply (Percent)	Scale (Percent)	Employment (Percent)	Employment (000's)
Agriculture	0.70	−2.04	−0.09	0.00	−0.05	−143922.3
Mining	3.73	−2.07	1.79	0.67	1.41	46546.0
Food, Beverages & Tobacco	5.18	10.66	0.06	0.35	−0.07	−7841.8
Textiles	18.86	7.43	4.34	1.25	3.34	388153.9
Wearing Apparel	54.34	−9.57	29.23	1.33	28.26	231337.8
Leather Products & Footwear	7.97	34.60	4.61	1.21	3.70	42892.0
Wood & Wood Products	4.81	31.29	−2.68	0.60	−3.09	−226363.1
Chemicals	4.44	12.54	−1.02	0.70	−1.46	−21998.1
Non-metallic Min. Products	6.55	22.26	−0.45	0.66	−0.94	−32502.0
Metal Products	4.37	7.23	−2.34	0.65	−2.76	−96777.2
Transportation Equipment	7.09	25.24	−1.62	0.79	−2.23	−30912.3
Machinery & Equipment	2.65	16.36	−5.65	1.10	−6.56	−156588.3
Other Manufactures	2.60	19.31	−1.55	0.76	−1.98	−106883.9
Elec., Gas & Water	4.37	−2.27	1.21	1.11	0.36	6171.9
Construction	2.86	−2.68	−0.27	−0.03	−0.08	−11520.2
Trade and Transport	2.49	−2.99	0.33	0.28	0.26	124360.2
Other Private Services	2.05	−2.39	−0.24	−0.06	−0.03	−962.6
Government Services	1.57	−2.12	−0.18	−0.03	−0.01	−3189.9
Average	**11.31**	**8.22**	**0.43**		**0.00**	**0.0**

in sectors with the greatest liberalization to lose overall, if the worsening of its terms of trade swamps these efficiency gains.

On the other hand, although the New Trade Theory is perhaps best known for introducing new reasons why countries may lose from trade, in fact its greatest contribution is to expand the list of reasons for gains from trade. It is these that are the dominant contribution of the New Trade Theory in our model. That is, trade liberalization permits all countries to expand their export sectors at the same time that all sectors compete more closely with a larger number of competing varieties from abroad. As a result, countries as a whole tend to gain from lower costs due to increasing returns to scale, lower monopoly distortions due to greater competition, and reduced costs and/or increased utility due to greater product variety. All of these effects make it more likely that countries will gain from liberalization in ways that are shared across the entire population.

In perfectly competitive trade models such as the Heckscher-Ohlin Model, one expects countries as a whole to gain from trade, but the owners of one factor—the "scarce factor"—to lose through the mechanism first explored by Stolper and Samuelson[10]. The additional sources of gain from trade due to increasing returns to scale, competition, and product variety, however, are shared across factors, and we routinely find in our CGE modeling that both labor and capital may gain from liberalization. That is often the case here.

One additional point about our model should be mentioned, related to the modeling and role of nontariff barriers ("NTBs"), such as those applying to textiles and apparel. These are quantitative restrictions, captured in the model by endogenous tariff equivalents that rise and fall with changing supplies and demands for trade. The tariff equivalents generate quota rents that accrue to whatever group is granted the rights to trade under the restriction, which in the case of the MFA are the developing countries that export textiles and wearing apparel. Liberalization of these NTBs reduces or eliminates these quota rents, and this can be costly to those who possessed them disproportionately beforehand. Therefore, it is not the case that exporting countries necessarily benefit from relaxation of these trade barriers, since their loss of quota rents can more than outweigh their gains from increased exports. Indeed, their exports can actually decline, along with their national welfare, if increased exports from other countries displace them in world markets.

In the real world, all of these effects encompassed by the Michigan Model occur over time, some of them more quickly than others. Our model is however static, based upon a single set of equilibrium conditions rather than relationships that vary over time. Our results therefore refer to a time horizon that is somewhat uncertain, depending on the assumptions that have been made about which variables do and do not adjust to changing market conditions, and on the short- or long-run nature of these adjustments. Because our elasticities of supply and demand reflect relatively long-run adjustments, and because we assume that markets for both labor and capital clear within countries, our results are appropriate for a relatively long time horizon of several years—perhaps two or three at a minimum.

On the other hand, our model does not allow for the very long-run adjustments that could occur through capital accumulation, population growth, and technological change. Our results should therefore be thought of as being superimposed upon longer-run growth paths of the economies involved. To the extent that these growth paths themselves may be influenced by trade liberalization, therefore, our model does not capture that.

[10] Wolfgang Stolper and Paul A. Samuelson, *Protection and Real Wages*, 9 REVIEW OF ECONOMIC STUDIES, 58–73 (1941)

B. Aggregate Results

In Table 1, we report various economy-wide changes for each of the countries/regions of the model. These include changes in exports and imports in millions of dollars, the changes in terms of trade, real wage rate and real return to capital in percentages, and changes in economic welfare measured by equivalent variation, both in millions of dollars and as percent of country GDP. The terms of trade is the world price of a country's exports relative to its imports. The equivalent variation is the amount of money that, if given to the country's consumers at initial prices, would be equivalent in terms of their level of welfare to the effects of the assumed liberalization. In general, as discussed above, a worsening (fall) in a country's terms of trade has an adverse effect on its consumers' welfare. But this can be outweighed by the other gains from trade due to economic efficiency and the other benefits modeled by the New Trade Theory.

UR-1: Elimination of the MFA Quota Constraints—The results for the Uruguay Round elimination of the MFA quota and other bilateral constraints on developing country exports of textiles and apparel, shown in Scenario **UR-1** of table 1, indicate an increase in global welfare of $16.5 billion. In interpreting the results, it should be noted that, with increased exports of these goods to world markets, their prices will fall and the terms of trade of the MFA exporting countries and their economic welfare may deteriorate. This decline in terms of trade is experienced as a loss of quota rents from the MFA and can be seen in column (3) in table 1 for most of the developing countries/regions. Several of those countries/regions also experience reductions in welfare. The developed countries all gain from MFA elimination. Changes in returns to labor and capital are mostly small.

UR-2: Liberalization of Manufactures—Scenario **UR-2** in table 1 covers the reductions in import tariffs on manufactures that were negotiated in the Uruguay Round. Global economic welfare increases by $56.5 billion and the gains are positive for all countries/regions. The largest welfare increases noted are for EU/EFTA ($17.4 billion), the United States ($11.2 billion), and Japan ($6.6 billion). The effects on returns to labor and capital are uniformly positive.

UR-3: Combined Liberalization Effects (UR-1 + UR-2)—The combined effects of the Uruguay Round (UR) liberalization are indicated in Scenario UR-3 of table 1. As noted, this table is the linear combination of **UR-1** and **UR-2**. Global welfare is increased by $73.0 billion. It is noteworthy that the developed countries all gain, with an increase in welfare of $23.7 billion for the EU/EFTA, $19.8 billion for the United States, and $6.9 billion for Japan. The developing countries in the aggregate show an estimated welfare increase of $19.2 billion from the combined UR liberalization. All the individual developing countries/regions noted, except Hong Kong, show an increase in welfare. Changes in the real wage and the return to capital are positive but relatively small for the developed countries, and relatively sizable in several of the Asian developing countries.

C. Sectoral Results

A major contribution of our CGE modeling is to identify those sectors that will expand and those that will contract as a result of various patterns of trade liberalization, as well as the sizes of these changes. Given our assumption that expenditure adjusts within each country to maintain a constant level of total employment, it is necessarily the case that each country experiences a mixture of expansions and contractions at the industry level. This must be true of employment, and it is likely to be true as well for industry output. To report these sectoral results in any detail is tedious, since there are eighteen sectors

in each country/region. We therefore report, in Tables 2–3, the sectoral results only for the combined UR liberalization for the United States and India, for illustrative purposes. The sectoral results for the other scenarios and countries/regions are available from the authors on request.

For the United States, there are increases in employment in all sectors, except for textiles (−32,077) and wearing apparel (−97,094), reflecting especially the effects of elimination of the MFA quota constraints. For India, the largest employment increases are in textiles (388,154), wearing apparel (231,338), trade and transport (124,360), leather products & footwear (42,892), and mining (46,546). India's largest employment declines are in agriculture (−143,922), wood & wood products (−226,363), and the combined sectors including industrial products and machinery. The percentage changes in employment are relatively small for the United States, except in textiles and wearing apparel. The employment changes for India are relatively sizable in several sectors. In interpreting the employment changes, it should be noted that these changes would be mitigated given that the UR liberalization has been phased in over a ten-year period. We may also note, from the changes reported for scale (output per firm), that there is evidence of positive scale effects for most of the sectors.

IV. Computational Analysis of the Doha Development Round

In this part, using the Michigan Model, we report some of the economic effects that may result from the ongoing Doha Development Round of multilateral trade negotiations. The Doha Round was launched officially at the beginning of 2002 and is scheduled for conclusion by the end of 2004.[11] The Doha Round scenarios here assume 33 percent reductions in post-Uruguay Round tariffs and services barriers, as follows:

DR-1 *Agricultural liberalization is modeled as a 33 percent reduction in post-Uruguay Round agricultural import tariffs, export subsidies, and domestic production subsidies.*
DR-2 *Liberalization of manufactures is modeled as a 33 percent reduction in post-Uruguay Round tariffs on manufactures.*
DR-3 *Services liberalization is modeled as a 33 percent reduction in estimated post-Uruguay Round services barriers.*
DR-4 *This combines* ***DR-1***, ***DR-2***, ***and DR-3***.

A. Data

As noted in Part II, our basic data source is the GTAP-4 Database, supplemented with employment data, and projected to 2005, which is when the Uruguay Round will have been fully implemented. The projected database has in turn been readjusted to include the results of the Uruguay Round implementation as analyzed above.

The main accomplishment of the Uruguay Round in the area of services was the creation of the General Agreement on Trade in Services ("GATS"), which is an umbrella agreement setting out the rules governing the four modes of providing services transactions. These modes include: (1) cross-border services (e.g., telecommunications); (2) services provided to consumers visiting from abroad (e.g., tourism); (3) services

[11] As was the case in our analysis of the Uruguay Round negotiations, we do not consider the effects of the negotiations on the various rules and procedures to be covered in the Doha Round.

requiring a domestic presence in the form of foreign direct investment ("FDI"); and (4) movement of natural persons. In an earlier study, Brown and Stern developed a new version of the Michigan Model for the purpose of analyzing the behavior of multinational firms, which are major providers of services, both intra-firm as well as in the production and sales of foreign affiliates located in host countries.[12] To approximate existing services barriers, Brown and Stern used estimates of barriers to FDI provided by Hoekman[13], based on the gross operating margins of services firms listed on national stock exchanges for the period, 1994–96.[14] We use these estimates here as *ad valorem* equivalent tariffs for the services sectors included in the current version of the Michigan Model. Our simulation **DR-3** assumes then that the services barriers are to be reduced by 33 percent in the Doha Round.

B. Aggregate Results[15]

The aggregate results of the assumed Doha Round scenarios are presented in Table 4, and the sectoral results of the combined scenarios (**DR-4**) for the United States and India are presented in Tables 5 and 6.

DR-1: Agricultural Liberalization—The results for assumed 33 percent reductions in post-Uruguay Round agricultural import tariffs, export subsidies, and production subsidies (taken here as a proxy for the Aggregate Measure of Support) are shown in Table 4. The more detailed results are available from the authors on request. In the model, the reductions in agricultural import tariffs will have the effects of tariff reductions already described. In the case of export subsidies, their effects will be to reduce world prices and raise domestic prices. When export subsidies are reduced, world prices would then rise and domestic prices in the subsidizing countries would fall, with the possible consequences that economic welfare may rise in the countries reducing their export subsidies and fall in net-importing countries now facing higher world prices. Similarly, production

[12] Because of computer-capacity constraints, Dusilla K. Brown and Robert M. Stern, *Measurement and Modeling of the Economic Effects of Trade and Investment Barriers in Services,* 9 REVIEW OF INTERNATIONAL ECONOMICS 262 (2001) used a three-sector aggregation consisting of agriculture, manufactures, and services and a twenty-country/region breakdown. They also made allowance for international flows of FDI and increases in capital stocks in response to the multilateral trade liberalization that they analyzed.

[13] Bernard Hoekman, *The Next Round of Services Negotiations: Identifying Priorities and Options,* 82 FEDERAL RESERVE BANK OF ST. LOUIS REVIEW 31 (2000)

[14] The gross operating margins were calculated as the differences between total revenues and total operating costs for construction, trade and transport, other private services, and government services. Some of the differences between total revenues and costs are presumably attributable to fixed cost. Given that the gross operating margins vary across countries, a portion of the margins can also be attributed to barriers to FDI. For this purpose, we have selected as a benchmark for each sector the country with the smallest gross operating margin, on the assumption that operations in this country can be considered to be freely open to foreign firms. The excess in any other country above the lowest benchmark is then taken to be due to barriers to establishment by foreign firms. That is, the barrier is modeled as the cost increase attributable to an increase in fixed cost borne by multinational corporations attempting to establish an enterprise locally in a host country. We further assume for purposes of our analysis here that we can interpret this cost increase as an ad valorem equivalent tariff on international services transactions generally. Further details are available from the authors on request.

[15] The potential gains from the Doha Round are also analyzed in Hertel, *supra* note 4 and Thomas W. Hertel, Bernard M. Hoekman, and Will Martin, *Developing Countries and a New Round of WTO Negotiations,* 17 THE WORLD BANK RESEARCH OBSERVER 113 (2002). These studies are based on the GTAP CGE model, which is a widely used modeling structure. Perfect competition is assumed in all sectors. National product differentiation (i.e., the Armington assumption) is also assumed, which may tend to exaggerate terms-of-trade effects.

Table 4: Summary results of the Doha Development Round: change in imports, exports, terms of trade, welfare and the real return to capital and labor

Country	Imports (Millions)	Exports (Millions)	Terms of trade (Percent)	Welfare (Percent)	Welfare (Millions)	Real wage (Percent)	Return to capital (Percent)
Scenario DR-1: 33 Percent Reduction in Agricultural Protection							
Developed Countries							
Australia & New Zealand	566.2	−168.1	0.798	−0.063	−320.7	−0.182	−0.224
Canada	−248.6	−768.3	0.168	−0.051	−368.4	−0.218	−0.209
European Union and EFTA	157.1	416.2	−0.041	0.258	28328.0	−0.045	0.023
Japan	564.3	3199.9	−0.470	−0.044	−2826.4	−0.039	−0.003
United States	2690.9	928.3	0.219	−0.122	−11081.1	−0.190	−0.193
Developing Countries							
Asia							
India	324.2	285.3	0.066	0.384	1617.4	−0.109	−0.030
Sri Lanka	−93.9	−67.5	−0.240	−2.734	−455.7	−0.307	−0.480
Rest of South Asia	106.6	157.2	−0.118	0.310	362.1	−0.078	−0.119
China	−522.8	−652.7	−0.013	−0.434	−3932.0	−0.163	−0.320
Hong Kong	−380.7	−256.9	−0.026	−0.294	−379.0	−0.186	−0.180
South Korea	285.4	912.9	−0.333	−0.230	−1311.4	0.132	0.134
Singapore	−153.9	−39.5	−0.067	−0.244	−181.4	−0.038	−0.068
Indonesia	−436.5	−466.7	−0.006	−1.259	−3185.5	−0.113	−0.462
Malaysia	−10.8	49.0	−0.076	−0.264	−315.8	0.189	0.104
Philippines	−344.8	−241.8	−0.199	−1.336	−1179.1	−0.062	−0.076
Thailand	−621.2	−1119.3	0.613	0.045	92.4	−0.703	0.054
Other							
Mexico	−200.7	−193.6	−0.089	−0.121	−425.6	−0.354	−0.185
Turkey	−189.1	−119.0	−0.087	−0.414	−871.4	−0.327	−0.347
Central Europe	−432.7	−428.6	0.025	−0.457	−1695.6	−0.363	−0.391
Central & South America	1500.6	870.3	0.377	−0.285	−4988.0	−0.252	−0.358
Total	**2559.5**	**2297.3**			**−3117.2**		
Scenario DR-1a: 33 Percent Reduction in Agricultural Export Subsidies							
Developed Countries							
Australia & New Zealand	−314.2	−449.3	0.153	−0.020	−102.3	0.047	0.059
Canada	−259.4	−274.2	−0.005	−0.065	−472.1	−0.018	−0.017
European Union and EFTA	−3081.5	−3917.3	0.071	0.011	1193.9	0.035	0.040
Japan	−1251.3	−1008.3	−0.056	−0.067	−4371.6	−0.019	−0.026
United States	−1338.0	−1030.7	−0.018	−0.052	−4697.2	−0.021	−0.020
Developing Countries							
Asia							
India	−91.0	−76.7	−0.028	−0.260	−1094.6	−0.020	−0.070
Sri Lanka	−123.4	−88.0	−0.439	−2.801	−466.8	−0.344	−0.366
Rest of South Asia	−91.4	−58.0	−0.084	−0.360	−420.6	−0.041	−0.052
China	−751.1	−737.1	−0.045	−0.199	−1798.8	−0.060	−0.070
Hong Kong	−346.2	−245.7	−0.035	−0.235	−303.2	−0.173	−0.160
South Korea	−423.3	−367.8	−0.025	−0.275	−1563.4	−0.081	−0.088
Singapore	−247.0	−171.7	−0.043	−0.238	−176.7	−0.207	−0.230
Indonesia	−589.8	−488.6	−0.190	−1.033	−2613.8	−0.108	−0.210
Malaysia	−362.3	−355.6	−0.026	−0.387	−462.9	−0.100	−0.137
Philippines	−494.2	−420.9	−0.140	−1.416	−1249.5	−0.223	−0.191
Thailand	−979.3	−1311.7	0.413	0.229	472.4	−1.420	0.414
Other							
Mexico	−330.7	−270.0	−0.093	−0.339	−1195.1	−0.027	−0.061
Turkey	−497.0	−407.5	−0.151	−0.696	−1463.2	−0.064	−0.262
Central European Assoc.	−681.1	−618.3	−0.035	−0.327	−1214.7	−0.072	−0.074
Central & South American Assoc.	−113.6	−83.9	−0.006	−0.070	−1228.7	−0.013	−0.015
Total	**−12365.5**	**−12381.1**			**−23229.0**		

Table 4: (*Continued*)

Country	Imports (Millions)	Exports (Millions)	Terms of trade (Percent)	Welfare (Percent)	Welfare (Millions)	Real wage (Percent)	Return to capital (Percent)
Scenario DR-1b: 33 Percent Reduction in Agricultural Import Tariffs							
Developed Countries							
Australia & New Zealand	686.9	359.8	0.345	−0.069	−352.3	−0.167	−0.213
Canada	100.7	−86.5	0.066	−0.020	−144.3	−0.055	−0.060
European Union and EFTA	1254.5	1513.4	−0.023	0.024	2590.4	0.022	0.025
Japan	2885.3	4331.8	−0.230	0.079	5157.4	0.127	0.162
United States	4388.7	2930.0	0.149	−0.048	−4340.3	−0.060	−0.068
Developing Countries							
Asia							
India	229.4	243.9	−0.025	0.367	1544.0	0.016	0.036
Sri Lanka	37.2	30.4	0.107	0.397	66.1	0.082	0.040
Rest of South Asia	191.0	210.7	−0.102	0.687	802.7	0.112	0.124
China	572.8	619.4	0.000	0.155	1407.0	0.041	0.040
Hong Kong	166.5	109.8	0.026	0.077	98.5	0.083	0.078
South Korea	1208.9	1728.4	−0.288	0.274	1557.7	0.349	0.378
Singapore	311.4	354.0	−0.030	0.118	88.1	0.253	0.244
Indonesia	141.7	120.7	0.037	0.047	118.3	0.022	−0.009
Malaysia	522.4	671.8	−0.126	0.329	392.9	0.283	0.342
Philippines	291.7	333.8	−0.093	0.422	372.2	0.193	0.240
Thailand	342.8	275.2	0.063	0.030	62.7	0.318	−0.100
Other							
Mexico	−10.4	−49.2	0.024	0.008	26.8	−0.001	−0.035
Turkey	241.1	264.5	−0.056	0.188	395.1	0.037	0.044
Central European Assoc.	262.7	194.1	0.054	−0.019	−72.2	−0.033	−0.069
Central & South American Assoc.	464.6	295.5	0.092	−0.018	−308.4	−0.048	−0.072
Total	**14289.9**	**14451.3**			**9462.5**		
Scenario DR-1c: 33 Percent Reduction in Agricultural Production Subsidies							
Developed Countries							
Australia & New Zealand	193.4	−78.6	0.300	0.026	133.8	−0.062	−0.070
Canada	−89.9	−407.5	0.107	0.034	248.0	−0.146	−0.131
European Union and EFTA	1984.1	2820.1	−0.089	0.224	24543.7	−0.102	−0.042
Japan	−1069.7	−123.6	−0.184	−0.056	−3612.2	−0.147	−0.139
United States	−359.8	−970.9	0.088	−0.023	−2043.6	−0.109	−0.105
Developing Countries							
Asia							
India	185.7	118.1	0.120	0.278	1168.0	−0.105	0.004
Sri Lanka	−7.8	−9.9	0.092	−0.330	−54.9	−0.045	−0.154
Rest of South Asia	7.1	4.6	0.067	−0.017	−20.0	−0.148	−0.191
China	−344.5	−535.0	0.032	−0.391	−3540.2	−0.144	−0.290
Hong Kong	−201.0	−121.0	−0.017	−0.135	−174.3	−0.096	−0.097
South Korea	−500.2	−447.7	−0.021	−0.229	−1305.7	−0.135	−0.155
Singapore	−218.4	−221.8	0.006	−0.125	−92.8	−0.084	−0.082
Indonesia	11.6	−98.9	0.146	−0.273	−690.0	−0.027	−0.243
Malaysia	−170.9	−267.2	0.075	−0.206	−245.7	0.006	−0.100
Philippines	−142.3	−154.6	0.034	−0.342	−301.8	−0.033	−0.125
Thailand	15.4	−82.8	0.137	−0.215	−442.7	0.399	−0.261
Other							
Mexico	140.4	125.6	−0.019	0.211	742.7	−0.327	−0.089
Turkey	66.7	24.0	0.119	0.093	196.7	−0.300	−0.129
Central European Assoc.	−14.3	−4.4	0.006	−0.110	−408.8	−0.257	−0.249
Central & South American Assoc.	1149.6	658.7	0.291	−0.197	−3451.0	−0.191	−0.272
Total	**635.1**	**227.1**			**10649.3**		

(*Continued*)

Table 4: (*Continued*)

Country	Imports (Millions)	Exports (Millions)	Terms of trade (Percent)	Welfare (Percent)	Welfare (Millions)	Real wage (Percent)	Return to capital (Percent)
Scenario DR-2: 33 Percent Reduction in Manufactures Tariffs							
Developed Countries							
Australia & New Zealand	3720.7	3457.2	0.267	0.545	2790.6	0.508	0.515
Canada	1996.0	2097.3	−0.013	0.347	2526.2	0.216	0.251
European Union and EFTA	23184.8	22840.3	0.050	0.358	39273.0	0.190	0.199
Japan	19071.4	15817.0	0.548	0.696	45190.9	0.234	0.304
United States	20454.2	18337.3	0.167	0.260	23634.2	0.198	0.224
Developing Countries							
Asia							
India	3280.4	4054.2	−1.384	0.733	3084.4	0.439	0.592
Sri Lanka	536.8	592.1	−1.025	3.207	534.5	1.565	2.010
Rest of South Asia	1892.0	2018.4	−0.604	1.895	2214.7	0.889	1.025
China	16080.3	19416.3	−1.221	1.199	10859.3	1.470	1.323
Hong Kong	3182.8	1840.3	1.246	1.444	1859.1	0.947	0.647
South Korea	8023.4	8440.7	−0.233	1.515	8622.9	1.158	1.003
Singapore	4382.9	4161.8	0.131	2.276	1692.5	2.481	2.611
Indonesia	2362.7	2336.0	0.053	0.835	2113.3	0.645	0.447
Malaysia	4242.8	4805.2	−0.488	2.555	3055.1	2.896	2.812
Philippines	3984.0	4535.1	−1.192	5.478	4834.4	3.310	2.461
Thailand	3406.1	3970.1	−0.675	0.873	1798.6	1.664	0.972
Other							
Mexico	916.3	1132.6	−0.166	0.364	1283.1	0.195	0.204
Turkey	1421.0	1558.6	−0.335	0.827	1740.3	0.349	0.272
Central Europe	3866.3	4366.4	−0.428	0.734	2724.2	0.816	0.722
Central & South America	5038.9	6103.2	−0.612	0.206	3610.0	0.159	0.108
Total	**131043.7**	**131880.0**			**163441.4**		
Scenario DR-3: 33 Percent Reduction in Services Barriers							
Developed Countries							
Australia & New Zealand	2354.4	1962.3	0.385	1.050	5379.6	0.694	0.657
Canada	2244.0	2136.3	0.083	0.811	5910.4	0.317	0.316
European Union and EFTA	35478.1	35336.8	0.032	1.295	142003.2	0.553	0.546
Japan	14797.7	15501.6	−0.067	0.891	57875.1	0.247	0.277
United States	32467.7	32231.5	−0.033	1.448	131426.8	0.524	0.534
Developing Countries							
Asia							
India	919.2	803.9	0.212	0.552	2321.6	0.170	0.204
Sri Lanka	121.7	99.1	0.335	1.202	200.4	0.881	0.507
Rest of South Asia	374.3	286.7	0.286	0.689	804.9	0.293	0.453
China	5660.3	6210.9	−0.128	1.320	11959.1	0.840	0.603
Hong Kong	7587.2	8058.4	−0.611	4.382	5643.1	5.638	5.927
South Korea	4842.2	5002.5	−0.102	1.339	7619.5	0.913	0.956
Singapore	3325.1	3776.2	−0.297	3.322	2470.8	4.821	3.972
Indonesia	1401.3	1469.4	−0.072	1.256	3177.0	0.327	0.307
Malaysia	1487.6	1466.8	0.049	1.267	1514.5	1.026	0.928
Philippines	1986.7	2195.0	−0.462	2.342	2067.1	1.739	1.622
Thailand	3324.2	3625.3	−0.413	1.401	2886.4	1.088	0.904
Other							
Mexico	863.1	809.1	0.110	0.878	3099.3	0.204	0.195
Turkey	1733.3	1462.9	0.589	1.781	3745.9	0.695	0.884
Central Europe	3841.7	3744.5	0.061	1.409	5227.2	1.067	0.996
Central & South America	4199.9	4442.8	−0.179	1.050	18363.5	0.256	0.272
Total	**129009.6**	**130621.8**			**413695.4**		

Table 4: (*Continued*)

Country	Imports (Millions)	Exports (Millions)	Terms of trade (Percent)	Welfare (Percent)	Welfare (Millions)	Real wage (Percent)	Return to capital (Percent)
Scenario UR-4: 33 Percent Reduction in all Trade Barriers							
Developed Countries							
Australia & New Zealand	6641.2	5251.4	1.449	1.532	7849.3	1.020	0.947
Canada	3991.3	3465.3	0.238	1.107	8068.2	0.315	0.359
European Union and EFTA	58819.3	58592.5	0.041	1.911	209609.8	0.697	0.768
Japan	34433.4	34518.5	0.012	1.544	100239.5	0.442	0.579
United States	55612.4	51496.8	0.353	1.586	143980.5	0.533	0.565
Developing Countries							
Asia							
India	4523.7	5143.3	−1.106	1.669	7023.4	0.500	0.766
Sri Lanka	564.6	623.7	−0.930	1.675	279.2	2.139	2.037
Rest of South Asia	2372.9	2462.3	−0.436	2.894	3381.8	1.104	1.360
China	21217.8	24974.6	−1.361	2.085	18886.9	2.148	1.606
Hong Kong	10389.2	9641.7	0.609	5.532	7123.1	6.399	6.394
South Korea	13151.0	14356.1	−0.668	2.624	14930.8	2.203	2.094
Singapore	7554.0	7898.6	−0.233	5.354	3982.0	7.264	6.516
Indonesia	3327.5	3338.6	−0.025	0.832	2104.8	0.858	0.292
Malaysia	5719.6	6321.0	−0.515	3.558	4253.8	4.111	3.845
Philippines	5625.9	6488.3	−1.854	6.485	5722.5	4.987	4.007
Thailand	6109.1	6476.1	−0.475	2.319	4777.4	2.050	1.930
Other							
Mexico	1578.6	1748.0	−0.145	1.122	3957.0	0.045	0.214
Turkey	2965.1	2902.4	0.167	2.194	4614.5	0.718	0.809
Central Europe	7275.2	7682.1	−0.342	1.686	6255.3	1.521	1.327
Central & South America	10739.4	11416.1	−0.414	0.971	16985.8	0.163	0.021
Total	**262611.2**	**264797.6**			**574025.4**		

subsidies will have the effect of reducing prices both domestically and abroad. When production subsidies are reduced, the cost of agricultural products will rise with consequent terms-of-trade effects similar to those just discussed. In addition, depending on the input-output structure, a rise in the cost of agricultural inputs will push up marginal cost relative to average total cost in some sectors. In order to return to the optimal markup of price relative to marginal cost, firm output in these sectors has to fall, and economic welfare may then decline due to reduced scale economies.

In the underlying results, the reductions in agricultural import tariffs alone increase global economic welfare by $9.5 billion. Welfare increases in the EU/EFTA, Japan, the Asian developing countries, Mexico, and Turkey as resources are shifted away from agriculture. Correspondingly, welfare declines in Australia/New Zealand, Canada, and the United States as resources are shifted to agriculture and away from nonagricultural industries. As noted above, when export subsidies are reduced, world prices would rise and domestic prices would fall. This is borne out in the underlying results insofar as welfare increases in the EU/EFTA and declines in all of the countries/regions in the model, except Thailand. Global welfare falls by an estimated $23.2 billion. When production subsidies are reduced, domestic and foreign prices rise, and depending on input-output structures, the increased cost of agricultural inputs may cause firm output in some sectors to decline for the reasons discussed above. In the underlying results, it turns out that the EU/EFTA region benefits the most when its agricultural production subsidies are reduced, whereas welfare declines for most developing countries/regions. Global welfare rises by $10.6 billion. Agricultural liberalization thus involves a complex of differential changes because both tariffs and subsidies are being reduced. The net effect indicated in Table 4

Table 5: Sectoral results of the Doha Development Round: percent change in exports, imports, output, scale and employment for the United States

Product	Exports (Percent)	Imports (Percent)	Supply (Percent)	Scale (Percent)	Employment (Percent)	Employment (000's)
Agriculture	13.90	4.06	1.86	0.00	1.87	75688.4
Mining	1.26	0.52	0.61	0.65	−0.02	−131.6
Food, Beverages & Tobacco	7.63	−2.83	0.27	−0.44	0.73	23186.0
Textiles	2.18	5.96	−1.29	0.28	−1.53	−18399.5
Wearing Apparel	6.15	11.31	−4.30	0.76	−4.89	−52044.9
Leather Products & Footwear	3.44	6.18	−4.56	0.94	−5.31	−3642.3
Wood & Wood Products	2.23	−0.10	0.50	0.29	0.29	12853.9
Chemicals	3.36	1.94	0.67	0.61	0.12	3424.3
Non-metallic Min. Products	3.06	3.89	0.25	0.48	−0.07	−571.0
Metal Products	2.11	1.87	0.44	0.60	−0.08	−2239.2
Transportation Equipment	1.63	2.33	0.39	0.66	−0.23	−6108.3
Machinery & Equipment	1.88	1.97	0.48	0.48	0.18	4030.0
Other Manufactures	2.50	1.89	0.49	0.53	0.13	2336.8
Elec., Gas & Water	0.70	−0.18	0.42	0.47	0.03	1284.8
Construction	10.25	11.80	0.42	0.47	0.01	1737.6
Trade and Transport	9.79	16.71	0.44	0.64	−0.08	−23770.4
Other Private Services	13.44	22.60	0.59	0.79	−0.09	−32536.9
Government Services	12.47	17.68	0.25	0.32	0.06	14902.1
Average	**5.49**	**4.98**	**0.42**		**0.00**	**0.00**

Table 6: Sectoral results of the Doha Development Round: percent change in exports, imports, output, scale and employment for India

Product	Exports (Percent)	Imports (Percent)	Supply (Percent)	Scale (Percent)	Employment (Percent)	Employment (000's)
Agriculture	11.50	0.71	−0.19	0.00	−0.15	−449827.9
Mining	5.43	−1.84	2.68	1.03	2.07	69399.1
Food, Beverages & Tobacco	7.75	17.83	0.40	0.06	0.52	60679.6
Textiles	8.69	21.56	1.82	0.78	1.23	148188.9
Wearing Apparel	14.06	24.77	9.30	0.86	8.75	95004.0
Leather Products & Footwear	9.30	9.13	6.63	1.10	5.82	69966.9
Wood & Wood Products	5.40	5.53	0.03	0.46	−0.27	−18859.3
Chemicals	5.75	10.53	−0.65	0.92	−1.29	−19167.5
Non-metallic Min. Products	7.61	15.32	0.55	0.92	−0.20	−6811.1
Metal Products	5.23	11.70	−2.15	1.13	−3.01	−102891.1
Transportation Equipment	7.33	12.93	−0.03	1.23	−1.05	−14198.4
Machinery & Equipment	4.53	10.83	−3.04	1.58	−4.44	−99199.1
Other Manufactures	4.93	15.52	−0.51	1.21	−1.32	−70109.0
Elec., Gas & Water	6.33	−4.53	0.71	0.75	0.17	2982.9
Construction	15.90	2.99	0.63	0.72	0.14	20273.2
Trade and Transport	15.06	14.66	0.26	0.64	−0.07	−35549.3
Other Private Services	16.86	10.16	0.58	0.58	0.35	10009.5
Government Services	15.45	−2.91	1.22	0.86	0.81	340108.6
Average	**9.22**	**8.30**	**0.50**		**0.00**	**0.0**

is a reduction in global welfare of $3.1 billion, as the negative welfare effects of lower export subsidies offset the positive welfare gains from reductions in import tariffs and domestic production subsidies.

DR-2: Liberalization of Manufactures—The assumed 33 percent reduction of post-Uruguay Round manufactures tariffs results in an increase in global welfare of $163.4 billion, which is considerably greater than the $56.5 billion welfare gain from the Uruguay Round manufactures liberalization. As was the case in the Uruguay Round results, the assumed liberalization of manufactures in the Doha Round would increase welfare in all of the countries/regions listed and would have positive effects as well on real wages and the return to capital. The largest welfare gains are for Japan ($45.2 billion), the EU/EFTA ($39.3 billion), and the United States ($23.6 billion). While the welfare gains for the developing countries/regions are much smaller in absolute terms, the percentage gains are mostly larger, ranging from 0.2 percent for Central & South America to 5.5 percent for the Philippines.[16] There are also sizable percentage increases in the real factor returns in the Asian developing economies.

DR-3: Services Liberalization —As noted above, the Uruguay Round negotiations on services resulted in creation of the GATS, but no significant liberalization of services barriers occurred. Following the conclusion of the Uruguay Round, there have been successful multilateral negotiations to liberalize telecommunications and financial services. While it would be desirable to assess the economic effects of these sectoral agreements, we cannot do so because of lack of data. What we have done then is to use the estimates of services barriers based on the calculations of gross operating margins for services firms in the countries/regions in our model, as already described. These estimates of services barriers are intended to be indirect approximations of what the actual barriers may in fact be. Assuming that the ad valorem equivalents of these barriers are reduced by 33 percent, it can be seen in table 4 that global economic welfare rises by $413.7 billion, which exceeds the $163.4 billion welfare increase for manufactures liberalization. All of the countries/regions listed experience positive welfare gains as well as increases in real wages and returns to capital. The EU/EFTA region has the largest welfare gain of $142.0 billion for the group of industrialized countries, compared to $131.4 billion for the United States, and $57.9 billion for Japan. For the smaller industrialized and developing countries, the percentage increases in welfare and factor returns are especially noteworthy. It should be borne in mind that these results of services liberalization depend on the size of the services barriers that have been calculated indirectly from financial data and may possibly be overstated. It seems fair to say nonetheless that the welfare effects of reductions in services barriers would tend to be considerably greater than the welfare effects of reduced tariffs on manufactures.

DR-4: Combined Liberalization Effects (DR-1 + DR-2 + DR-3)—The results for **DR4** are a linear combination of the other three scenarios. Overall, in table 4, global welfare rises by $574.0 billion. Among the industrialized countries, the EU/EFTA region has a welfare gain of $209.6 billion, the United States a gain of $144.0 billion, and Japan a gain of $100.2 billion. The percentage welfare gains and increases in returns to factors are sizable in most of the smaller industrialized countries and in the developing countries.

[16] Our results differ from those obtained by Hertel, Hoekman, and Martin, *supra* note 15, p. 121, who conclude that: "... the bulk of the gains go to developing countries, which are estimated to receive three quarters of the total gains from liberalizing manufacturing trade." The differences in our results compared to Hertel et al. most likely stem from the assumptions made in projecting the database for the model to 2005. That is, Hertel et al. project significantly greater expansions of the output and trade of the developing countries than in our simpler extrapolations noted above.

C. Sectoral Results

The sectoral results for **DR-4** in the United States and India are presented for illustrative purposes in tables 5 and 6. The sectoral results for other scenarios and countries/regions are available from the authors on request. The largest employment increases for the United States are in agriculture (75,688), food, beverages, and tobacco (23,186), wood & wood products (12,854), and government services (14,902). There are employment declines in textiles (−18,400), wearing apparel (−52,045), leather products & footwear (−3,642), trade and transport (−23,770), and other private services (−32,537). For India, there are employment increases in mining (69,399), food, beverages, and tobacco (60,680), textiles (148,189), wearing apparel (95,004), leather products & footwear (69,967), construction (20,273), and government services (340,109). The employment declines are in agriculture (−449,828), the combined sectors of industrial products and durable manufactures, and trade and transport (−35,549). As was the case with the sectoral results for the Uruguay Round trade liberalization noted in Tables 2 and 3, it can expected that the Doha Round trade liberalization will be phased in over a period of several years so that possible sectoral employment dislocations would be mitigated.

V. Conclusions and Implications

The following conclusions can be drawn from our computational analysis of the Uruguay Round trade negotiations:

- The elimination of the MFA quota constraints resulting from the Uruguay Round agreement is beneficial to economic welfare in the developed countries but detrimental to some of the developing countries/regions. The detrimental effects occur because of the decline in world prices and deterioration of the exporting countries' terms of trade, including the loss of quota rents.
- Because there is considerable evidence of backsliding from the formal Uruguay Round commitments to reduce agricultural import tariffs, export subsidies, and production subsidies, we assumed that no significant agricultural liberalization resulted from the Uruguay Round.
- The liberalization of trade in manufactures was beneficial to all the developed and developing countries/regions covered in the model.
- The combined effects of the Uruguay Round trade liberalization were welfare increasing for the developed and developing countries/regions, except for Hong Kong. The largest absolute gains were for the developed countries.
- The sectoral effects of the Uruguay Round trade liberalization varied, depending on the patterns of liberalization for individual countries. Employment dislocations appeared relatively small, considering that the trade liberalization was to be phased in over a ten- year period.

The computational results of assumed 33 percent reductions of trade barriers in the Doha Development Round negotiations can be summarized as follows:

- The assumed reductions in agricultural import tariffs, export subsidies, and production subsidies suggested that the EU/EFTA would be the prime beneficiaries. The net effect on global welfare would be negative, with the overall welfare decline from the reduction in export subsidies offsetting the overall gains from reductions in import tariffs and production subsidies.

- The effects of manufactures liberalization would be uniformly positive for all developed and developing countries/regions. The industrialized countries show the largest absolute welfare increases, while several developing countries/regions show sizable gains as a percentage of their GDP.
- All of the developed and developing countries/regions would have significant increases in welfare due to the assumed liberalization of services barriers. These welfare increases would be substantially greater than the increases due to manufactures liberalization, although that result especially depends, of course, on the estimated sizes of the trade barriers in services and the extent to which they will be reduced.
- The combined effects of the assumed Doha Development Round liberalization would be sizable in both absolute and percentage terms for the developed and developing countries/regions. The largest absolute gains would be for the developed countries.
- Sectoral employment dislocations would be mitigated insofar as the Doha Round liberalization would be phased in over several years time.

Our computational results thus suggest that there are substantial benefits to be realized from the Doha Development Round negotiations, especially for manufactures and services and for both developed and developing countries. This is in contrast to the effects of the Uruguay Round trade liberalization, which may have been tilted against developing countries.[17]

We should note, as discussed above, that our computational model is based on a comparative static approach, meaning that we move from an initial position to a new equilibrium in which all of the liberalization occurs at one time. That is, we abstract from a variety of dynamic and related effects that may occur through time, especially the international mobility of real capital, increases in real investment via capital accumulation, and technological improvements. The economic benefits that we have calculated, especially for the Doha Development Round, may therefore be interpreted as a lower bound for the benefits that may be realized from the multilateral trade negotiations.[18]

BIBLIOGRAPHY

Brown, Drusilla K. and Robert M. Stern. *Measurement and Modeling of the Economic Effects of Trade and Investment Barriers in Services*, 9 REVIEW OF INTERNATIONAL ECONOMICS 262 (2001).

Finger, J. Michael and Julio J. Nogues. *The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations*, 25 THE WORLD ECONOMY 321 (2002).

Francois, Joseph F., Bradley McDonald, and Hakan Nordstrom. *A User's Guide to Uruguay Round Assessments*, Centre for Economic Policy Research Discussion Paper Series, No. 1410 (June 1996).

[17] See J. Michael Finger and Julio J. Nogues, *The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations,*25 THE WORLD ECONOMY 321 (2002) for arguments of how and why many of the aspects of the Uruguay Round negotiations resulted in an outcome that was unbalanced against the developing countries and the implications from the Uruguay Round experience that may be applicable in a new trade round.

[18] See Francois, *supra* note 8, esp. pp. 31–34 for an elaboration of how the usefulness of CGE modeling studies can be improved in applications to the Doha Round negotiations.

Francois, Joseph and Anna Strutt. *Post-Uruguay Round Tariff Vectors for GTAP Version 4, processed*, Faculty of Economics, Erasmus University, Rotterdam, The Netherlands (1999).

Francois, Joseph. *General Equilibrium Studies of Multilateral Trade Negotiations,* in THE POLITICAL ECONOMY OF POLICY REFORM (Douglas Nelson ed.), in preparation.

Francois, Joseph. *The Next WTO Round: North-South Stakes in New Market Access Negotiations*, Centre for International Economic Studies, Adelaide, and Tinbergen Institute, Amsterdam and Rotterdam (2001).

Harrison, W.J. and Ken Pearson. *Computing solutions for large general equilibrium models using GEMPACK*, 9 COMPUTATIONAL ECONOMICS 83 (1996).

Hertel, Thomas W. and Will Martin. *Would Developing Countries Gain from Inclusion of Manufactures in the WTO Negotiations?*, presented at the Conference on the "WTO and the Millennium Round," Geneva, September 20–21, 1999.

Hertel, Thomas W. *Potential Gains from Reducing Trade Barriers in Manufacturing, Services and Agriculture*, 82 FEDERAL RESERVE BANK OF ST. LOUIS REVIEW 77 (2000).

Hertel, Thomas W., Bernard M. Hoekman, and Will Martin. *Developing Countries and a New Round of WTO Negotiations*, 17 THE WORLD BANK RESEARCH OBSERVER 113 (2002).

Hoekman, Bernard. 2000. *The Next Round of Services Negotiations: Identifying Priorities and Options*, 82 FEDERAL RESERVE BANK OF ST. LOUIS REVIEW 31 (2000).

McDougall, Robert et al. 1998. *Global Trade: Assistance and Protection: GTAP-4 Database*, Purdue University, W. Lafayette, IN (1998).

Stolper, Wolfgang and Paul A. Samuelson. 1941. *Protection and Real Wages, 9* REVIEW OF ECONOMIC STUDIES 58–73 (1941).

CHAPTER 39

SAFEGUARDS

Chad P. Bown* and Meredith A. Crowley**

TABLE OF CONTENTS

I. Introduction 44
II. Background 45
III. Uruguay Round Reforms Affecting Safeguards 48
A. Reforms in the Agreement on Safeguards 48
1. Available Policy Instruments 48
2. MFN versus Specificity 48
3. Compensation and Retaliation 49
4. Procedural Reforms 49
B. Reforms Captured in Other UR Agreements that Affect the Use of Safeguards 51
IV. Economic Effects 52
A. Does the Inclusion of Safeguards Result in More or Less Liberalization Overall? 53
B. Safeguards as Insurance against Negative Terms of Trade Shocks 54
C. Safeguards Assist Import-Competing Industries 55
1. Technological Catch-Up 55
2. Senescent Industries 56
3. Political-Economy Motives 57
D. Frequency and Use of Safeguards Relative to Other Trade Policy Instruments 57
E. Further Empirical Research on Safeguards 58
V. Unfinished Business 61
A. MFN Versus Discrimination 62
B. Compensation Versus No-Compensation 62
C. Additional Transparency 64
D. Reforms to other WTO Agreements 64
VI. Conclusion 64
Tables
Table 1 Country use of Article XIX and the Agreement on Safeguards, 1950–2001 44
Table 2 The Relative Frequency of Safeguards Use, 1950–2000 60
Bibliography 65

* Department of Economics and International Business School, Brandeis University
** Department of Economic Research, Federal Reserve Bank of Chicago. The opinions expressed in this paper are those of the authors and do not necessarily reflect those of the Federal Reserve Bank of Chicago or the Federal Reserve System.

I. Introduction

What do Argentine shoes, Indian tire rubber, Korean garlic and American wheat gluten have in common? Although some are final consumer goods while others are intermediate inputs and they differ in terms of their market structures, production technologies, cost structures, and capital intensities, they share a common situation in the WTO trading system. All were temporarily shielded from foreign competitors by measures under the WTO's Agreement on Safeguards. Table 1 describes the countries that have most frequently implemented safeguard measures under the GATT and WTO regimes.

Because safeguard measures have been used only rarely in the past, many policymakers and industry representatives are unfamiliar with them. In the world of temporary trade protection, antidumping duties have stolen the stage, though safeguards could become more prominent in the future. If the WTO's antidumping code is reformed, safeguards are the next logical choice for a country that needs a temporary shield against imports. Moreover, the rules regarding the use of safeguard measures in the GATT are biased towards favoring the same industries that currently seek protection under antidumping laws.

What is a safeguard measure? A safeguard measure is a temporary restriction on trade—either a tariff or a quota—that is used to protect a domestic industry from fair foreign competition. In contrast and as discussed at length in other chapters of this volume, antidumping duties offset what is deemed to be unfair pricing by foreign exporters, while countervailing duties "level the playing field" between a foreign government-subsidized exporter and a domestic producer. In general, a safeguard measure can be used to restrict imports of a particular good as long as imports of that good have increased and the higher

Table 1: Country use of Article XIX and the Agreement on Safeguards, 1950–2001

Country	Number of *Article XIX* cases resulting in protection 1947–1994	Number of *Agreement on Safeguards* cases resulting in protection 1995–2001
Australia	38	0
EEC	26	0
US	25	5
Canada	22	0
Austria	8	0
South Africa	4	0
Chile	3	2
Finland	2	0
New Zealand	1	0
Norway	1	0
Czech Republic	1	2
India	0	6
Egypt	0	3
Korea	0	2
Latvia	0	1
Argentina	0	2
Brazil	0	1
Other	19	6
Total	**150**	**30**

Source: WTO

level of imports has caused or threatens to cause serious harm to the domestic industry. For example, if several firms in the American shoe industry were about to go bankrupt because Americans started to substitute their purchases toward imported shoes from a new, highly-efficient Argentine shoe company, the American industry would be eligible for a safeguard measure under the WTO rules.

The fact that Article XIX of the General Agreement on Tariffs and Trade, together with the WTO Agreement on Safeguards ("AS"), allows countries to arbitrarily restrict trade may seem surprising. After all, the preamble to the Uruguay Round ("UR") Agreements identifies the WTO's primary objective as "expanding the production of and trade in goods and services" by forming an agreement "directed to the substantial reduction of tariffs and other barriers to trade".[1] Why, therefore, does the WTO allow the use of safeguard measures?

From an economist's point-of-view, there are two ways to approach this question. First, an economist could argue that, somehow, despite our understanding that countries gain from trade and that trade restrictions are costly, temporary trade restrictions can make all countries that belong to the WTO better off. At first glance, this seems to contradict the teachings of every undergraduate course on international trade: freer trade is supposed to improve upon the welfare of all countries that embrace it. However, in the real world, countries interact repeatedly, comparative advantages change as workers acquire skills, and international prices fluctuate unexpectedly in response to everything from scientific discoveries to changes in the weather. When such realities are taken into consideration, it may actually be possible for all countries to benefit from temporary trade restrictions, relative to a scenario in which temporary trade restrictions were explicitly prohibited.

On the other hand, an economist might explain the presence of safeguard measures on a combination of both economic and political-economic grounds. The use of safeguards certainly will have consequences for income distribution, making some countries, industries, and factors of production better off even though they cause harm to others. In this case, safeguards may be permitted under the WTO to provide governments with a means to address their redistributive motives,[2] or to demonstrate favor to politically preferred interest groups if those groups have more power than those that are harmed by the potential use of safeguards.

In this chapter, we will consider both economic and political-economic reasons for policymakers to use safeguard measures. In Part II we start from the evolution of safeguards from the 1947 GATT, before turning in Part III to the Uruguay Round reforms leading to the Agreement on Safeguards. In Part IV we consider the economic effects of safeguards, before turning in Parts V and VI to a discussion of some possible reforms to the Agreement on Safeguards and also suggestions on areas in which further research is needed.

II. Background

Historically, safeguard measures permitted under Article XIX and the Agreement on Safeguards have been distinguished from other GATT-sanctioned trade protection—antidumping duties, countervailing duties and balance of payments

[1] *Uruguay Round Agreement Establishing the World Trade Organization*.

[2] This also requires that governments fail to have access to other policy instruments to redistribute income that would be more efficient than trade restrictions, a point that we will return to below.

exceptions—by the trade problems they were used to remedy.[3] Safeguard measures trace their roots to the United States-Mexico trade agreement of 1942. Fearing that the lowering of a tariff on some particular good could result in a larger-than-expected import surge that would hurt domestic firms, the U.S. government insisted that the agreement include a provision permitting it to re-institute tariffs in the face of large import surges.

Foreseeing that the same problem could arise in the multilateral trading system, the framers of the GATT incorporated the use of temporary trade restrictions into the agreement in the form of Article XIX. Article XIX provides that safeguard measures can be used when an increase in imports *resulting from a tariff cut* harms domestic firms producing the same or a similar product. Over time, the GATT stopped enforcing the requirement that the use of safeguards be tied to tariff cuts. Today, under the Uruguay Round's Agreement on Safeguards, safeguard measures can be used whenever a government determines that a domestic industry is suffering serious harm under the burden of increased imports that arise due to "unforeseen developments." They can be applied for an initial four-year period with the possibility for a maximum additional four-year extension.

In keeping with the GATT's guiding principle of nondiscriminatory treatment for all its members, safeguard measures were intended to be applied to all members equally. When an importing country imposes a safeguard tariff, it raises the tariff on imports from all source countries, even those with only a very small presence in the importing country's market. Moreover, while the GATT has traditionally had a strong preference that countries use tariff measures when imports must be restricted, prior to 1994, countries often used quotas and tariff-rate-quotas to protect themselves temporarily from imports. Such quantitative restrictions are undesirable for a variety of reasons,[4] including the fact that though governments may try to allocate quota rights fairly, quantitative restrictions are fundamentally discriminatory and, thus, at odds with the GATT's guiding principle of equal treatment for all countries.

To the GATT framers, a safeguard was the reinstatement of a tariff that had been removed or lowered during a trade negotiation. Thus, the GATT 1947 required countries that imposed safeguards to offer compensation to the exporting countries that lost some of their export market. With the GATT focus on trade liberalization, the preferred form of compensation was that affected exporting countries would be afforded tariff reductions on some other product. However, if countries could not agree on compensation, the GATT could authorize an exporting country to retaliate against the safeguard measure with its own tariff increase as a last resort.

Under the GATT 1947, retaliation against a safeguard measure was explicitly authorized under Article XIX:3(a). While affected countries may not have frequently resorted

[3] There are other places under the GATT aside from Article XIX where countries can implement safeguard-type measures such as Article XXVIII for permanent protection, Articles XII or XVIII:b for balance of payments problems, Article XXI or XX for national security or other general exceptions, and Article XXV for the granting of waivers. While we will focus on Article XIX, for a discussion of these other areas see John H. Jackson, *Safeguards and Adjustment Policies*, in THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE (R.M. Stern ed. 1993) and J. Michael Finger, *GATT Experience with Safeguards: Making Economic and Political Sense out of the Possibilities that the GATT Allows to Restrict Imports* [*sic*] POLICY RESEARCH WORKING PAPER 2000, DEVELOPMENT RESEARCH GROUP, WORLD BANK, (1998).

[4] With limited exceptions, quantitative restrictions were generally prohibited under GATT Article XI.

to retaliation,[5] perhaps more importantly, many economists believe that the threat of retaliatory tariffs probably led countries to avoid using formal safeguard measures when the conditions otherwise may have been appropriate to do so.

Although compensation for safeguard measures was often negotiated in the 1960s and 1970s, as tariff rates fell and more products came to be freely traded, as a practical matter, it became difficult for countries to agree on compensation packages. This undoubtedly contributed to the rise of voluntary export restraints ("VERs"), export restraint agreements ("ERAs"), and orderly marketing agreements ("OMAs") in the 1980s. The GATT did not explicitly prohibit these measures, but it did not specifically allow their use either. Consequently, they came to be called "grey-area measures."

Under a grey-area measure like a VER, an importing country asks exporting countries to voluntarily accept a quantitative restriction on exports. The restriction causes the price of the good in the importing country to rise. The difference between the price the good would sell at under free trade and the higher price it sells at under the quota is known as the "quota rent." Under a standard quota system that is administered by the importing country, the importing country's government can receive the equivalent monetary value of the quota rents by arranging for a competitive auction for the licenses that give agents the right to import. Under a simple tariff system, the quota rents are equivalent to the tariff revenue received by the import-restricting country's government.

The basic difference between a VER arrangement and a quota or tariff is that in the former case the exporting countries' firms get the quota rents. Because VERs both restrict imports and compensate foreign firms, both domestic firms and foreign firms often prefer such an arrangement to a similar trade-restricting quota or tariff policy. However, VERs distort world-wide trade flows and, consequently, can harm the well-being of other countries. Moreover, consumers in importing countries are forced to pay higher prices on the products in question. One of the most famous examples of a VER was the United States-Japan automobile VER of 1981. This VER raised the price of Japanese cars in the United States 14 percent each year in 1983 and 1984[6].

Procedurally, Article XIX permitted the use of safeguards if there were (1) an increase in imports and (2) serious injury to the domestic firm or industry *caused* by the increase in imports. As a practical problem, under Article XIX there was a high degree of variation across countries as to how they enforced these injury rules. Jackson quotes an unidentified European trade official as saying "we can always find 'injury' whenever we need to for political purposes"[7]. At the other extreme, Baldwin describes how the narrow definition of injury in the US Trade Act of 1962 made it virtually impossible for U.S. domestic producers to receive safeguard protection[8].

Going into the UR, a number of problems with Article XIX were evident. (1) Countries were using quotas and tariff-rate quotas instead of tariffs when they implemented safeguards; (2) discriminatory, non-MFN application of safeguards was distorting world-wide trade flows; (3) compensation and retaliation provisions were leading countries to

[5] Of the 150 formal GATT applications of safeguards provisions between 1947–1994, there were eleven instances in which an affected country either cited Article XIX:3 or made a formal appeal for retaliation. WTO, *Analytical Index: Guide to GATT Law and Practice*, Vol II (1995), at 539–559.

[6] Pinelopi Goldberg, *Product Differentiation and Oligopoly in International Markets: The Case of the U.S. Automobile Industry*, in 63 ECONOMETRICA 929 (1995)

[7] John H. Jackson, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 9 (1997)

[8] Robert E. Baldwin, THE POLITICAL ECONOMY OF U.S. IMPORT POLICY 85–86 (1985)

use grey-area measures that automatically provided compensation to exporting firms; (4) policymakers feared that "temporary" safeguards might be applied "permanently;" and (5) the injury criteria were vague.

Furthermore, concurrent with the rise of VERs, countries were using unfair trade laws to restrict trade far more frequently than the vast majority of economists thought reasonable. During the 1980s and 1990s it became apparent that importing country governments were using unfair trade remedies not as protection against the anti-competitive practices of foreign firms, but as safeguard measures. Unfair trade remedies were a desirable form of protection because they did not require compensation and they could be targeted against specific foreign exporters and thus were even more discriminatory than the application of a safeguard measure. Given the relationship between safeguard measures and these other forms of protection, reforms of other areas and rules of the GATT outside Article XIX could also have a profound effect on the way countries use safeguards under the WTO.

With these numerous problems in mind, the UR negotiators undertook the important task of reforming the use of safeguards.

III. Uruguay Round Reforms Affecting Safeguards

The Uruguay Round reforms amplified the GATT Article XIX escape clause provisions into the WTO Agreement on Safeguards, and Jackson notes that they were "a substantial achievement, and indeed a heroic statement of principle."[9] In this part we focus on the UR reforms affecting the economic incentives facing countries that consider the implementation of a safeguard measure. To do so, we first address areas of reform of the AS itself. At the end of this part, we turn to other UR reforms and rules that affect a government's incentives to use a safeguard measure.

A. Reforms in the Agreement on Safeguards

1. Available Policy Instruments

The first area of reform is the decision of which policy instruments that countries implementing safeguard measures shall have at their disposal. As suggested in Part II, under the GATT, countries often implemented safeguard measures through use of tariffs, quotas, tariff-rate quotas, and the popular VERs. Under the AS, countries can implement protection through either tariffs, quotas or tariff-rate quotas. Although the lack of reform that might eliminate the use of quantitative restrictions is disappointing, one substantial reform changes the way the WTO treats VERs, OMAs, and ERAs, as they are now expressly prohibited under Article 11:1(b). This decision to permit quotas, tariff rate quotas and similar quantitative restrictions does have an important economic impact that we will further describe in Part IV below.

2. MFN versus Specificity

A second reform of the escape clause involved the question of whether use of safeguard protection can be country-specific, or whether a safeguard-imposing country must follow the non-discrimination rules of the most-favoured-nation ("MFN") clause. The agreement requires safeguard measures to be imposed on an MFN basis, as stated in Article 2:2, "[s]afeguard measures shall be applied to a product being imported irrespective of its

[9] Jackson, *supra* note 7, at 210.

source," and in the case of a quantitative restriction, Article 5:2(a) states that the quota shares should be allocated based on the share of the market that exporters had in a prior representative period.

However, there are two situations in which the MFN rule apparently does not have to be followed. First, Article 5:2(b) allows countries to depart from the principle if "clear demonstration is provided to the Committee [on Safeguards] that . . . imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period." Second, the Agreement does not allow restriction of imports from developing countries that have less than three percent of total imports, unless the aggregate share of all such countries is more than nine percent (AS, Article 9:1).

3. Compensation and Retaliation

A major reform of the Uruguay Round was the provision that countries facing absolute import surges would not be required to offer compensation for the first three years during which safeguard measures are imposed, as provided in Article 8:3. Although the general rule of the WTO under Article 8:2 is that compensation must be offered to affected countries after a safeguard measure has been implemented, this important exception means that in practical terms, it rarely is.

As we suggested in Part II, compensation for implemented safeguard measures can take the form of additional liberalization by the protection-implementing country. If no agreement on compensation between the safeguard-implementing and the exporting country is reached, Article 8:2 sanctions the withdrawal of "substantially equivalent concessions," or an increase in a foreign tariff based on the rule of reciprocity, as was the case under GATT Article XIX.

One intent of the reform which limits compensation was arguably to make use of safeguards relatively more attractive in "legitimate circumstances," relative to the alternative popular policy instruments whose use had far out-paced the escape clause—such as anti-dumping duties, protection for balance of payment purposes, VERs or other "grey-area" measures. On the other hand, the removal of compensation makes it more likely that a country who might not have imposed safeguard measures at all may be induced into doing so, because now the costs of doing so are less than would otherwise be the case.

As suggested in the last part, a second and popular means of compensation under the escape clause, or the implicit compensation of "quota rents" embodied in the policy of a VER, was also outlawed by the AS. At the least, this serves to eliminate a useful, and arguably efficient compensation mechanism for instances in which a country that implements a safeguard measure does not face an "absolute surge in imports" and thus must compensate affected trading partners in some manner.

4. Procedural Reforms

The last set of reforms accomplished by the UR negotiations were primarily procedural in nature. These included formally defining the injury requirement, establishing a surveillance monitoring body, and specifying the maximum length that a safeguard measure can be in place.

An important procedural improvement over Article XIX was the establishment of a more precise definition of "injury." Under the WTO it is now defined as a "significant overall impairment in the position of the domestic industry." (AS, Article 4:1(a)). The

AS also included a more explicit determination of the data to be used to measure injury: "the rate and the amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment" (AS, Article 4:2(a)).

Second, the new AS also provides for surveillance with the establishment of a Safeguards Committee whose charge it is to monitor and oversee use of the AS provisions by WTO members. For example, Article 12 of the AS states that members must notify or consult with the Committee on Safeguards if they initiate a safeguard investigation and then make any decision on imposing or extending safeguard protection. Under Article 13, the Committee is also charged with overseeing use of the agreement and compliance with its procedural elements.

Finally, Article 7 established the maximum duration that a safeguard measure can remain in place and the conditions necessary for the initial period of the safeguard application to be extended. First, Article 7:1 limits the continued application of a safeguard measure to the length of time necessary to prevent serious injury and facilitate adjustment, and at a maximum, the "period of initial application and any extension thereof, shall not exceed eight years." (AS, Article 7:3) In order to extend a safeguard measure beyond its initial four-year maximum, the WTO member imposing the safeguard must also show evidence that the industry being protected by the measure is adjusting, and in cases in which safeguards have been applied for longer than one year, the Member "shall progressively liberalize [the measure] at regular intervals during the period of application." (AS, Article 7:4).

These procedural reforms could have an economic impact on various stages of a country's safeguard process; for example, both at the petition initiating stage and at the domestic government's accept/reject stage. First, if the safeguard process is bureaucratic (or apolitical) in nature, a clearer definition of what constitutes "injury" would be expected to affect the pattern of petitions that industries initiate. With a well-defined criterion of what would make a "successful" petition, an industry may tend to alter the pattern of initiated petitions to those that fit that criterion. The effect could work in either direction—industries that think they are injured but that do not satisfy the better-defined criteria may be less likely to petition, and industries that did not understand the earlier criteria now with the clarification may be more likely to initiate and put pressure on the domestic government.

Second, at the domestic safeguard authority's decision-making stage, the pattern of accepted versus rejected petitions may change, relative to the pre-UR case. But again the reduced uncertainty could have an economic impact that would go in either direction—leading to either more or fewer acceptances. For example, domestic governments may have been likely to accept a weak safeguard petition under the GATT, but would no longer feel comfortable accepting the same petition given the clearer definition of injury established by the UR reforms. This increased transparency also reduces some of the discretion it may have enjoyed earlier. For the case of the United States, the government may no longer be able to hide behind the argument that a petition does not satisfy the injury requirement (when that requirement was ill-defined), and therefore if it chooses not to protect it will have to come up with other reasons why. Politically, this may be more difficult. On the other hand the United States may now be able to erect credible arguments that other petitions fail to satisfy the injury requirement so that they can now more credibly rely on the WTO for commitment power to not implement protection in other situations.

B. Reforms Captured in Other UR Agreements that Affect the Use of Safeguards

Given that countries can implement trade policy restrictions by substituting between policy instruments, reforms of other areas of the GATT also have an impact—whether intended or unintended—on use of the AS.

One example of an important reform was captured in the WTO's new Dispute Settlement Understanding ("DSU") and relates to the compensation available to affected trading partners should countries fail to bring their policies into conformity with their WTO obligations. In trade disputes where countries are unable to negotiate mutually agreeable compensation, the DSU has established a level of permissible retaliation in recent trade dispute cases (e.g. *EC—Bananas* and *EC—Beef Hormones* [10]) that is similar to the level of retaliation authorized by the AS.

To consider the impact that this has on a country's potential use of the AS, take the extreme case in which a country wishes to offer protection to a domestic industry that was injured by imports, but there was no "absolute surge in imports." Thus, the country will have to offer compensation under the AS. Moreover, suppose there is no evidence of dumping. The country must choose between implementing a safeguard and offering compensation or implementing an illegal antidumping duty ("ADD") and facing possible DSU-authorized retaliation. If the retaliation that can be authorized under both the AS and the DSU is identical, there is little economic incentive for the country to use the legal safeguard provisions. Even if the country were to impose an ADD and the affected trading partner filed a dispute, in the worst-case scenario that the ADD-imposing country lost the dispute, it would only have to yield the same compensation as it would have faced under the safeguard provisions. In this case, if there is even a tiny chance that the ADD-imposing country could win the dispute, then the country is clearly better off "cheating" and using the antidumping ("AD") measure rather than the safeguard provisions, even when there is no evidence of dumping or injury.

Furthermore, we also expect that the procedural reforms that have served to essentially define the minimum length of the dispute settlement process to have an effect on the duration of application of a particular safeguard measure.[11] Under the GATT regime, due to the fact that individual countries (including the defending country) had the power to veto the process at any stage, the length and even conclusion of a trade dispute was uncertain and even indeterminate. However, under reforms to the DSU, maximum time limits for different phases of the process have been adopted—initial consultations will last no more than sixty days, the period from the establishment of a panel to the circulation of its report will take no longer than nine months, etc. Petersmann suggests that the DSU "will be the quickest worldwide system for the settlement of disputes among states."[12]

Recall that the change in compensation requirements under the AS gives a government the right to impose safeguard measures as a response to an "absolute increase in imports" without having to provide compensation for three years. We argued that the likely impact of this reform is that governments will typically design safeguard measures that respond to an "absolute increase" to tend to be no longer than three years in length in order to

[10] Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB (1999), and Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/ARB (1999) and WT/DS48/ARB (1999).

[11] *See Uruguay Round Understanding on the Rules and Procedures Governing the Settlement of Disputes* for the time limits for each phase of the WTO's dispute settlement process.

[12] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement 183 (1997)

avoid the compensation requirement.[13] In a similar manner, once the minimum length of the full dispute settlement process is established, this can also affect the way in which a domestic policymaker designs or chooses to implement a dubious safeguard measure that knowingly does not satisfy the criteria set out in the AS. Given that retaliation (compensation) cannot be applied retroactively and must end once a WTO-illegal policy has been removed, policymakers can implement an illegal safeguard measure for the anticipated length of the dispute settlement process.[14]

A second important reform introduced by the UR Agreements that may be having an impact on the way countries use the AS relates to the issue of VERs. Under the WTO Agreement on Antidumping, price undertakings are explicitly allowed and arguably are even encouraged as a means for countries to resolve an AD case. Price undertakings refer to an explicit agreement between the investigating AD authority and the foreign exporting firm that is the subject of the AD investigation where the foreign firm agrees to raise its price to a level that eliminates the "dumping margin" established by the domestic AD authority. However, such a price increase will typically decrease imports, thus the foreign firm's "voluntary" price increase leads to an outcome (in terms of welfare) quite similar to that generated by a VER.

The economic impact of this reform for the AS, is that if a country seeks to protect a domestic industry by "managing trade", this is explicitly encouraged under the Agreement on Antidumping and explicitly prohibited under the AS. All else equal, this flexibility may lead to more antidumping activity and less safeguard activity.

There are separate safeguards provisions for many of the "new" areas of trade brought into GATT discipline with the establishment of the WTO: agriculture, apparel, textiles and clothing and services. Each of these areas of trade has a distinct UR Agreement which has its own safeguard provision therein, for example, see Article 6 of the Agreement on Textiles and Clothing, and Article 5 of the Agreement on Agriculture. Furthermore, Article X of the General Agreement on Trade in Services calls for negotiations on services safeguards and provided a one-time three year window for modification or withdrawal of commitments.

The final point that we should make is that there was virtually no reform to another Agreement on Safeguards alternative, Article XXVIII. While in practice Article XXVIII has been rarely used, for countries that seek to protect an industry permanently, they are still able to do so just as they were under the GATT regime.

IV. Economic Effects

Because safeguard measures have been rarely used, does this imply that their economic effect is small? Here we argue that such a conclusion is faulty, as in order to accurately

[13] The US steel safeguard applied in March 2002 was imposed for three years and one day.

[14] Note, however, that if a government implements a safeguard measure that does not satisfy the "absolute surge in imports" requirement, provided the WTO Council for Trade in Goods does not disapprove, the government may not need to wait until the completion of the panel process of a formal DSU dispute to obtain compensation in the form of authorized retaliation. For an example, see the EU's response to the U.S. steel safeguard measures implemented in March 2002, *Immediate Notification Under Article 12.5 Of The Agreement On Safeguards To The Council For Trade In Goods Of Proposed Suspension Of Concessions And Other Obligations Referred To In Paragraph 2 Of Article 8 Of The Agreement On Safeguards European Communities*. G/SG/43, May 15, 2002, and G/SG/43/Suppl.1, June 20, 2002. Furthermore, there are also DSU "urgency" exceptions that countries may resort to, perhaps in order to help prevent trading partners from drawing out the length of the dispute settlement process in order to keep a temporary protective measure in place.

assess the role of safeguards in the world trading system, we need to compare the economic outcome of a world in which safeguards are permitted to the economic outcome in a world in which they are not allowed. To simply assess them by measuring the costs and benefits on the few occasions in which they have been used captures only a small part of the picture. In this part, we will review two broad categories of economic research, the theoretical research that analyzes the difference between a world with safeguards and a world without safeguards, and the empirical research that measures the costs and benefits of safeguard measures that have been used in the past.

From the perspective of policymakers who must determine the details of how policies are designed and implemented, some of the most important economic research will be focused on the specifics of safeguard measures. Are tariffs better than quotas? For whom? Should protection last three years or eight? If a country faces higher imports of bicycles from China, but not from Mexico, should a safeguard tariff be imposed against China, or both China and Mexico? If French cheesemakers suffer a significant loss when the United States institutes a safeguard measure against cheese, should the United States be made to compensate France? If so, how?

An increasing number of economic researchers have examined safeguard measures from a variety of angles. The theoretical research papers typically address the common question: why does the WTO allow the use of safeguards?

Essentially, there are two categories of answers in the economics literature. The first argument is that safeguard measures can create a net benefit for the world as a whole. The safeguard may make some countries better off and others worse off, but if we add up the gains and losses to everyone in the world, the sum total is positive. In other words, the gains of temporary trade protection outweigh the losses. We pursue this argument in the next two sections. In the third section, we turn to another argument justifying safeguard measures—that its presence is motivated by the interests of importing countries, and in particular, import-competing industries in those countries. In Section D we explore some of the economic arguments that seek to explain why safeguards are used or not-used relative to other policy instruments that have similar features to the safeguard provisions. Finally, in Section E we turn to other related (and future) empirical work on safeguards.

A. Does the Inclusion of Safeguards Result in More or Less Liberalization Overall?

Perhaps the most widely cited argument for safeguards is that they can facilitate greater tariff liberalization by governments during trade negotiations. Because a government has an escape valve if a tariff reduction causes pain to its own producers, it has more freedom to make larger and potentially more risky tariff reductions. Because there are large gains from permanent tariff reductions and relatively small costs from imposing temporary safeguards in a few sectors, the world gains by having safeguards in a trade agreement, even when they are not actually used. Jackson provides an intuitive discussion of this.[15]

Ethier asks: how does the interaction between unilateralism and multilateralism affect the pace of trade liberalization?[16] His central concern is to analyze a trading system like the GATT/WTO which is characterized by the general practice of negotiating tariff reductions to benefit all members and the occasional use of temporary unilateral tariff

[15] Jackson, *supra* note 7

[16] Wilfred J. Ethier, *Unilateralism in a Multilateral World*, 112 Economic Journal 266 (2002).

increases through safeguards or antidumping duties. He develops a multi-country model in which countries grow at different rates. He shows, first, that the pace of trade liberalization is constrained by the slowest-growing countries in the world. He then illustrates how allowing these countries to temporarily raise their tariffs can accelerate the pace of worldwide trade liberalization. The key insight is that when countries negotiate tariff reductions, they do not know if their growth will be fast or slow. In a trade agreement that does not allow temporary tariff increases, countries fear that their growth will be slow and will negotiate only small tariff reductions. When safeguards are added to the trade agreement, countries negotiate larger tariff reductions because they know that if they turn out to have slow growth, they can temporarily increase their tariffs.

Klimenko, Ramey, and Watson arrive at a similar result by examining the question of why the WTO's Dispute Settlement Body ("DSB") exists.[17] In their paper, they show that when countries regularly renegotiate their tariffs, as in the GATT/WTO trade rounds, a DSB is necessary for the trade agreement to survive. A DSB makes it possible for countries to punish each other for violations. Because countries want to avoid punishment, they are less likely to violate a trade agreement that includes a DSB. As an extension to their paper, they also show that if the DSB allows countries to temporarily raise their tariffs (as is the case with safeguard measures) in response to some unexpected change in the economic environment, they will negotiate larger tariff reductions initially.

Although some of the theoretical arguments suggest that safeguards help to facilitate trade liberalization, other economists arrive at the opposite conclusion. Staiger and Tabellini show that allowing for safeguard measures could reduce the credibility of a trade agreement.[18] If governments are not fully committed to liberal trade, the productive factors in their economies may not efficiently reallocate because changing sectors is costly, and they *expect* their government to step in and utilize the safeguard provisions at their disposal. From this perspective, the inclusion of a safeguard measure can weaken the overall agreement.

B. Safeguards as Insurance against Negative Terms of Trade Shocks

Another economic argument in favor of the inclusion of a safeguard clause is that it acts as a form of insurance against changing international prices, or, in economics jargon, fluctuations in the terms of trade. Consider a country that imports a good whose price fluctuates substantially. For example, the price of steel imported by the United States rises with the price of its main inputs—iron and energy—and falls as new factories with low-cost technologies come online. When prices change, the economic environment can become so different that countries want to pull out of a trade agreement that constrains them to set low tariffs.

Bagwell and Staiger explore how price fluctuations affect large players in a trade agreement—countries like the United States, the EU and Japan which have markets that are so large that their safeguard measures can significantly alter world prices.[19] They argue that due to the self-enforcing nature of the trade agreement, in periods of large import volumes, a safeguard measure acts as a pressure valve to enable countries to

[17] Mikhail Klimenko, Garey Ramey, and Joel Watson, *Recurrent Trade Agreements and the Value of External Enforcement*, UC SAN DIEGO MIMEO (2002)

[18] Robert Staiger and Guido Tabellini, *Discretionary Trade Policy and Excessive Protection*, 77 AMERICAN ECONOMIC REVIEW 823 (1987)

[19] Kyle Bagwell and Robert W. Staiger, *A Theory of Managed Trade*, 80 AMERICAN ECONOMIC REVIEW 779 (1990)

sustain cooperation by temporarily raising tariffs. In the absence of a safeguard clause, countries would not be able to sustain cooperation, and the result would be a costly trade war of high levels of tariff retaliation. Fischer and Prusa show that even small countries, which cannnot affect world prices by imposing a safeguard, can use safeguards to insure themselves against international price shocks.[20]

To date, empirical research in economics has not been able to prove or disprove the ideas put forth in the papers mentioned above. In some ways this is an impossible task—how can we prove that countries negotiate lower tariffs when a safeguard is part of a trade agreement when all the trade agreements in existence include safeguards?[21]

C. Safeguards Assist Import-Competing Industries

The starting point for another important area of research is the belief that the WTO allows the use of safeguards because of concerns for the interests of importing countries, and in particular importing countries with firms and industries that compete with foreign firms. This may arise because the agent that benefits from the potential safeguard is politically powerful, and the result is that these papers then investigate how the politically powerful agent gains from the safeguard. If one country pursues a policy that benefits itself but harms other countries, economists want to understand how and why the policy creates a benefit so that they can develop alternative policies that create a similar benefit but reduce or eliminate the harm to others. Here we pursue three potential arguments explaining why governments may seek to assist import-competing industries: to help them catch-up to their foreign competitors, to facilitate their exit from the industry, or to reap the gains from a politically-preferred sector.

1. Technological Catch-Up

Several theoretical papers[22] explore how safeguards benefit import-competing firms that are technologically behind their foreign competitors. These papers examine the consequences of using a temporary safeguard to induce domestic firms to adopt newer, more efficient production technologies. Economists have long understood that a government subsidy is better than a tariff for helping a firm adopt a new technology.[23] A direct subsidy can achieve the same result as a safeguard, but because it does not also increase the

[20] Ronald D. Fischer and Thomas J. Prusa, *Contingent Protection as Better Insurance*, NBER WORKING PAPER 6933 (1999)

[21] A related paper is the recent empirical contribution by Robert Staiger and Guido Tabellini, *Do GATT Rules Help Governments Make Domestic Commitments?*, 11 ECONOMICS AND POLITICS 109 (1999), who compare two different policy environments (U.S. escape clause petitions and U.S. Tokyo Round sectoral exclusions) to investigate the question of whether GATT rules help governments make trade policy commitments to its private sector. The fact that they find evidence to support the claim that GATT rules do give governments commitment power also provides support for the theory that the inclusion of an escape clause can have damaging effects that erode a government's ability to commit to liberalization.

[22] Kiminori Matsuyama, *Perfect Equilibria in a Trade Liberalization Game*, 80 AMERICAN ECONOMIC REVIEW 480 (1990); Kaz Miyagiwa and Yuka Ohno, *Closing the Technology Gap Under Protection*, 85 AMERICAN ECONOMIC REVIEW 755 (1995); Kaz Miyagiwa and Yuka Ohno, *Credibility of Protection and Incentives to Innovate*, 40 INTERNATIONAL ECONOMIC REVIEW 143 (1999); Meredith Crowley, *Do Safeguard Tariffs and Antidumping Duties Open or Close Technology Gaps?*, FEDERAL RESERVE BANK OF CHICAGO Working Paper 2002–13 (2002).

[23] Avinash K. Dixit and Victor Norman, THEORY OF INTERNATIONAL TRADE (1980); Richard E. Caves, Jeffrey A. Frankel and Ronald W. Jones, WORLD TRADE AND PAYMENTS: AN INTRODUCTION (2002); and Paul R. Krugman and Maurice Obstfeld, INTERNATIONAL ECONOMICS: THEORY AND POLICY (2000), are a few standard textbooks that make this point.

price facing consumers, it is less costly to society as a whole.[24] Thus, using a safeguard to facilitate technological improvement is a "second-best" policy at best. However, if a government wants to use a trade policy to induce technological improvement, what specific features should this safeguard measure have? How long should it last? Should it be applied against imports from all countries or just a few?

Matsuyama, and Miyagiwa and Ohno, provide theoretical support for the requirement of a strict termination date for safeguard protection and allowing exporting countries to retaliate against safeguard measures that extend beyond the three year "grace period" where an absolute increase in imports is involved.[25] Miyagiwa and Ohno find that safeguards provide an incentive for protected firms to innovate quickly only if the cost of the new technology is falling over time and the termination date for safeguard protection is credibly enforced by foreign retaliation. One implication of their paper is that the exact length of time that a safeguard must be in place in order to induce a domestic firm to acquire a new technology will depend critically on how quickly the cost of the new technology is falling. Thus, the WTO's three-year time limit will provide too much protection in some cases and not enough in others. The cases in which it provides too little protection are particularly troubling. The safeguard will force consumers to pay higher prices but will not yield any benefit to the economy. Crowley finds that a nondiscriminatory safeguard tariff can accelerate technology adoption by a domestic import-competing firm, but will slow down technology adoption by foreign exporting firms.[26] Because an MFN safeguard tariff can delay a foreign firm's adoption of new technology, its worldwide welfare costs may exceed its benefits.

Unfortunately, the little empirical evidence on the effect of safeguards on technology adoption is not very encouraging. A 1982 study by the US government's administrative body that reviews safeguard petitions, the US International Trade Commission ("USITC"), found that most safeguards failed to promote positive adjustment to import competition. Rather than assisting companies in upgrading their facilities, in most cases safeguards merely slowed an industry's inevitable decline. A review of U.S. safeguard cases since 1974 shows that some industries seek and receive protection repeatedly—for example, stainless alloy tool steel was granted safeguard protection in 1976 and again in 1983.

2. Senescent Industries

Another group of theoretical papers shows how firms in declining industries can utilize political support to maintain protection. Hillman, Brainard and Verdier, and Magee all examine the use of tariff protection to allow a dying industry to collapse slowly, rather than quickly.[27] Because these papers all assume that there are high costs to quickly scaling back production, they find that a temporary tariff that can slow an industry's decline

[24] More generally, economists have shown that an import tariff has an equivalent economic impact as the simultaneous imposition of a production subsidy and consumption tax. The direct subsidy would thus be more efficient than a safeguard tariff as it would not have the second welfare distortion of the tax effect that raises the price facing consumers.

[25] Matsuyama, *supra* note 22; Miyagiwa and Ohno, *supra* note 22.

[26] Crowley, *supra* note 22.

[27] Arye Hillman, *Declining Industries and Political-Support Protectionist Motives*, 72 AMERICAN ECONOMIC REVIEW 1180 (1982); S. Lael Brainard and Thierry Verdier, *Lobbying and Adjustment in Declining Industries*, 38 EUROPEAN ECONOMIC REVIEW 586 (1994); S. Lael Brainard and Thierry Verdier, *The Political Economy of Declining Industries: Senescent Industry Collapse Revisited*, 42 JOURNAL OF INTERNATIONAL ECONOMICS 221 (1997); Christopher Magee, *Declining Industries and Persistent Protection*, 10(4) REVIEW OF INTERNATIONAL ECONOMICS 749 (2002)

can improve an importing country's welfare. However, this type of policy also slows the reallocation of capital and labor into other industrial sectors in which they would be more productive. This loss of productivity is an indirect welfare cost on the country imposing the safeguard measure.

3. Political-Economy Motives

Both the economist Robert Baldwin and the political scientist Wendy Hansen have found that political factors are important in determining whether or not an American petition for safeguard protection is successful.[28] Evidence that safeguards are politically tainted in a country like the United States that has transparent and well-defined administrative procedures underscores the necessity for the WTO to thoroughly review how safeguard policy is being carried out by its many members.

D. Frequency and Use of Safeguards Relative to Other Trade Policy Instruments

There is some empirical research that addresses the question: why have safeguards been used so rarely? Hansen and Prusa argue that the existence of another policy tool, the antidumping duty, explains the rare use of safeguard measures.[29] Indeed, during the 1987–1994 period, while there were only eighteen safeguard measures implemented worldwide, Miranda *et al.*[30] report that over seven hundred antidumping measures were used, after 1586 antidumping investigations.[31] In the case of the United States, Baldwin argues that the strict injury criteria of the U.S. law, especially prior to 1974, has led the US ITC to reject many safeguard petitions.[32]

While there is undoubtedly some truth to these ideas, there are other potentially important explanations. For example, economists believe that provisions for compensation and the threat of retaliation may have dissuaded countries from imposing safeguards in numerous instances. However, it is impossible to document all of the potential occasions in which a country chose not to pursue a safeguard, although it may have considered doing so.

Nevertheless, Bown has proposed a theory to explain why countries that have committed to implementing protection will choose to use safeguard measures, as opposed to using GATT/WTO-illegal alternatives that may result in a trade dispute.[33] The explanation is that countries will use safeguards when the trading partners that are affected by the increase in import protection have a substantial capacity to retaliate. By considering

[28] Baldwin, *supra* note 8; Wendy L. Hansen, *The International Trade Commission and the Politics of Protection*, 84 AMERICAN POLITICAL SCIENCE REVIEW 21(1990).

[29] Wendy L. Hansen and Thomas J. Prusa, *The Road Most Taken: the Rise of Title VII Protection*, 18 THE WORLD ECONOMY 295 (1995)

[30] Jorge Miranda, Raul A. Torres and Mario Ruiz, *The International Use of Antidumping: 1987–1997*, 32 JOURNAL OF WORLD TRADE 5 (1998)

[31] A simple comparison of the number of safeguard and antidumping measures that are implemented does not tell the entire story, however, given that AD measures are country-specific and each safeguard measure can affect multiple exporting countries. Suppose we were to compare the number of countries affected instead of measures imposed. If we assumed that that an average of twenty countries were affected by each safeguard measure (e.g., the average number of countries affected in the twenty-one safeguard measures investigated by Chad P. Bown and Rachel McCulloch in *Nondiscrimination and the WTO Agreement on Safeguards*, 2(3) World Trade Review 327 (2003), the relevant comparison would be 360 versus 700 affected countries. This would still indicate a significant bias toward the use of antidumping measures.

[32] Baldwin, *supra* note 8.

[33] Chad P. Bown, *The Economics of Trade Disputes, the GATT's Article XXIII and the WTO's Dispute Settlement Understanding*, 14(3) ECONOMICS AND POLITICS 283 (2002)

the GATT rules of retaliation that take place under safeguards and dispute settlement negotiations, the safeguard provisions can be interpreted as providing cover to countries that must implement protection but who wish to mitigate the retaliatory response and limit the compensation due to affected trading partners. Given that the affected trading partners are large, policymakers find the safeguard measures attractive if retaliation threats under dispute settlement provisions are either unpoliced or excessive, which may have been the case under the GATT regime.

Bown[34] pursues the empirical question of whether the concern for retaliation affects a government's policy decision of how to implement protection: under the GATT's safeguard provisions or through some 'GATT-illegal' provision that results in a viable trade dispute. Using data on 1973–1994 Article XIX safeguard measures[35] and trade disputes that were filed under Article XXIII, the results suggest that countries use the safeguard measures as opposed to GATT-illegal policies when there is a substantial concern for retaliation.

While the threat of retaliation may be important to a government's determination of how to implement protection, this does not address the question of whether the threat of retaliation affects the decision of whether a government will offer safeguard protection, relative to no protection at all. Recent empirical research by Blonigen and Bown[36], however, does find that the threat of retaliation is an important deterrent for firms and governments that are considering trade protection in the form of antidumping duties, a related policy instrument. Using data on U.S. antidumping measures between 1980–1998, they find that the threat of foreign firms retaliating through antidumping duties on U.S. exports affects the decision of which foreign firms are named in a petition, while the threat of a GATT/WTO trade dispute and potential retaliation through that channel affects the U.S. government in its antidumping duty determination decision. Thus, while the Bown result suggests that retaliation threats affect how countries implement protection, the Blonigen and Bown result suggests that retaliation threats also affect the decision of whether a government should implement protection at all. Given that safeguard measures and antidumping duties are potentially substitutable policy instruments, these related empirical results on retaliation threats may also have implications for both how firms (in addition to countries) choose between policy instruments when they seek import protection, and also whether to seek protection through safeguard measures at all.

E. Further Empirical Research on Safeguards

Hansen and Prusa have produced an important paper that explored the available data on U.S. safeguard measures.[37] They examine the trade-restricting effects of five U.S. safeguard measures imposed between 1980 to 1988. They find that trade volumes fell by an average of 34 percent after the government imposed the safeguard measure. On the other hand, over the same time period, they find that trade volumes fall by an average of only eleven percent when the government imposes an antidumping duty. Even though

[34] Chad P. Bown, *Trade Disputes and the Implementation of Protection under the GATT: An Empirical Assessment*, 62(2) JOURNAL OF INTERNATIONAL ECONOMICS 263 (2004).

[35] The paper also uses data on countries invoking protection through the GATT's Article XXVIII, which is similar to Article XIX (in terms of how compensation is handled), although it provides for permanent protection

[36] Bruce A. Blonigen and Chad P. Bown, *Antidumping and Retaliation Threats*, 60(2) JOURNAL OF INTERNATIONAL ECONOMICS 249 (2003).

[37] Hansen and Prusa, *supra* note 29

safeguard measures are more effective at restricting imports, U.S. industries file more antidumping than safeguard petitions and the success rate for antidumping (63 percent) is higher than for safeguard (26 percent) petitions. Hansen and Prusa thus conclude that while it may have a less effective impact on overall trade, antidumping protection is most likely more popular because it is easier to obtain. As one of the few empirical papers on safeguards, this is a useful starting point for future research.

The empirical research on safeguards applies almost entirely to the pre-UR regime. One exception is recent work by Bown and McCulloch who use data on WTO safeguard measures implemented under the 1995–2000 period to investigate the differential impact that the form of the safeguard (tariff, tariff rate quota, quota) has on exporting country market shares.[38] They find that exporters' market shares after the application of the safeguard are more closely tied to historical market shares for quantitative measures than tariffs, supporting the idea that quotas have the potential to discriminate in favor of historical suppliers and be biased against new entrants.

Other questions that economic researchers might consider include the following: what has changed since the creation of the WTO? Furthermore, we previously identified five concerns that existed before the UR and discussed the UR reforms intended to address them. Thus, regarding the use of compensation and retaliation, how has the prohibition on retaliation during the first three years of a safeguard measure directed against an absolute increase in imports affected its use?

There is evidence that some countries are increasing their usage of safeguards. From 1980 to 1994, the United States imposed only seven safeguard measures, or fewer than one every two years. In contrast, between 1994 and 1999, the United States imposed five safeguard measures or one per year. On a worldwide basis, it seems that safeguard use has increased. Table 2 documents the number of safeguards reported to the GATT/WTO per year divided by both the number of GATT/WTO members and by the total trade volume of the members. Safeguard use fell fairly steadily from about 1960 to 1994. Interestingly, after the UR reforms were implemented around the world, their use began to grow. It is too early to determine if this is the beginning of a long-term trend or just a temporary increase, but it seems that safeguards have become a little more popular.[39]

Anecdotally, two interesting phenomena can be observed. First, many countries imposing safeguards have chosen to apply them for three years rather than four—presumably to avoid compensation or retaliation. Second, threats of retaliation have become concrete. In the wake of the U.S. safeguard measure on steel, several countries have published lists of U.S. products that would be hit with tariffs if the safeguard remains in place for more than three years or if the measure is otherwise found by the DSU to violate the United States's WTO obligations and the United States refuses to bring it into conformity.[40] For example, the EU claimed that for many of the products there had only been a relative increase in imports so that they did not have to wait three years for compensation.

[38] Chad P. Bown and Rachel McCulloch, *Nondiscrimination and the WTO Agreement on Safeguards*, 2(3) WORLD TRADE REVIEW 327 (2003).

[39] There was a substantial increase in the use of safeguards in 2002 after the March U.S. steel safeguard decision resulted in higher U.S. tariffs. Many trading partners responded by also implementing safeguard protection against the likely deflection of exports of steel from the United States.

[40] As of February 2003, nine WTO members (EU, Japan, Korea, China, Switzerland, Norway, New Zealand, Brazil, and Taiwan) had initiated formal cases against the United States under the DSU regarding the March 2002 safeguard measure on steel imports. For the list of the goods the EU had threatened to retaliate over, *see Immediate Notification Under Article 12.5 Of The Agreement On Safeguards To The Council For Trade In Goods Of Proposed Suspension Of Concessions And Other Obligations Referred To In Paragraph 2 Of Article 8 Of The Agreement On Safeguards European Communities*. G/SG/43, May 15, 2002.

Table 2: The relative frequency of Safeguards Use, 1950–2000

Year	Number of members	Value of trade*	Safeguard measures imposed	Safeguards per member	Safeguards per value of trade
1950	28	208.39	1	0.036	0.048
1951	32	289.60	0	0.000	0.000
1952	32	288.78	2	0.063	0.069
1953	33	299.64	0	0.000	0.000
1954	33	313.22	1	0.030	0.032
1955	34	338.80	2	0.059	0.059
1956	34	357.98	2	0.059	0.056
1957	36	376.08	3	0.083	0.080
1958	36	355.80	5	0.139	0.141
1959	36	384.27	3	0.083	0.078
1960	37	431.22	2	0.054	0.046
1961	39	445.47	2	0.051	0.045
1962	43	468.48	7	0.163	0.149
1963	59	496.61	2	0.034	0.040
1964	63	553.03	5	0.079	0.090
1965	64	593.95	2	0.031	0.034
1966	68	637.60	3	0.044	0.047
1967	73	659.83	5	0.068	0.076
1968	74	708.47	5	0.068	0.071
1969	75	783.76	2	0.027	0.026
1970	77	860.29	3	0.039	0.035
1971	79	929.45	3	0.038	0.032
1972	80	1066.46	1	0.013	0.009
1973	82	1410.13	2	0.024	0.014
1974	82	1871.04	3	0.037	0.016
1975	82	1778.71	5	0.061	0.028
1976	82	1892.69	12	0.146	0.063
1977	82	2004.17	7	0.085	0.035
1978	83	2150.96	7	0.084	0.033
1979	84	2473.04	4	0.048	0.016
1980	84	2739.51	7	0.083	0.026
1981	85	2450.58	2	0.024	0.008
1982	87	2143.20	5	0.057	0.023
1983	89	2025.41	5	0.056	0.025
1984	89	2095.21	4	0.045	0.019
1985	89	2055.43	4	0.045	0.019
1986	91	2233.55	4	0.044	0.018
1987	94	2578.34	4	0.043	0.016
1988	95	2867.28	1	0.011	0.003
1989	95	3015.29	1	0.011	0.003
1990	99	3321.87	1	0.010	0.003
1991	102	3296.72	5	0.049	0.015
1992	104	3468.51	3	0.029	0.009
1993	114	3365.46	3	0.026	0.009
1994	128	3755.71	0	0.000	0.000
1995	128	4428.90	0	0.000	0.000
1996	128	4568.03	3	0.023	0.007
1997	130	4667.64	3	0.023	0.006
1998	133	4570.74	5	0.038	0.011
1999	135	4717.20	10	0.074	0.021
2000	140	5241.68	15**	0.107	0.029

*Value of WTO trade in billions of 1996 U.S. dollars.

**15 measures including provisional safeguards of up to 200 days. 10 measures not including provisional measures.

Source: author's calculation based on WTO, International Trade Statistics (2001). Nominal data deflated using the U.S. GDP deflator.

Regarding the type of policy measure, since 1994 countries have imposed both tariffs and quotas. Thus, despite rule changes introduced in the UR, safeguards are still not subject to the basic GATT/WTO principle of equal treatment for all countries. This is compounded by evidence that even when countries are imposing safeguard tariffs, they are regularly applying safeguards in a discriminatory way.[41]

As for the injury criteria, it is difficult to assess their stringency without detailed data on safeguard investigations around the world. However, it is encouraging to observe that countries are turning down some safeguard petitions. Of the 35 safeguard investigations conducted around the world between 1995 and 1999, only 21 resulted in import-restricting measures.[42]

It is also too early to tell at this stage if countries will try to make temporary safeguard protection permanent by extending protection beyond the eight year maximum limit that the AS allows, perhaps through either Article XXVIII or through other WTO provisions, such as the Agreement on Antidumping. The fact that exporting countries have threatened retaliation if measures are not removed after three years suggests that most countries will choose to comply with the AS time limits.

Finally, as the data compiled by Miranda et al. indicate[43], the use of antidumping duties has exploded over this time period, and it is certainly the case that they are being used when a safeguard would be the more appropriate trade policy. In the next section we discuss the interplay between antidumping policy and safeguard policy, and the need for joint reform of both safeguards and antidumping.

In summary, economics research on safeguards points to their many potential benefits—most importantly, the role they play in sustaining trade agreements. Sadly, in practice it appears that safeguards may not be used when they can create benefits for society and may be used when they cannot.

V. Unfinished Business

In this part we provide a discussion of where to go from here. The caveat we note from the outset is that it is difficult to make any policy reform that will target a deficiency in the current system without introducing another problem somewhere else. Thus our goal is to discuss potential reforms and to illustrate as clearly as possible their benefits and costs. Ultimately it is then the role of researchers and policy-reformers to try to estimate the magnitude of the costs and benefits of policy changes, in order to determine which should be pursued. While we propose what are ultimately a set of empirical questions, these questions may admittedly be difficult to answer conclusively because of the rather infrequent resort to safeguard measures and thus limited data availability. Nevertheless, we start from the perspective that safeguards in their current form under the WTO are not being utilized as researchers and policymakers envision, especially given their unpopularity relative to the explosion of implementation and use of national antidumping statutes.

[41] Bown and McCulloch, *supra* note 38

[42] Furthermore, the application of many of these safeguards have been determined under the DSU to be inconsistent with WTO obligations. Douglas A. Irwin, *Causing Problems? The WTO Review of Causation and Injury Attribution in U.S. Section 201 Cases*, 2(3) WORLD TRADE REVIEW 297 (2003), investigates the problems of recent U.S. safeguard actions that have been brought before the DSU and that resulted in rulings that USITC decisions had failed to ensure that injury to the domestic industry was not caused by non-import factors (e.g., domestic shocks) and was not mis-attributed to imports.

[43] Miranda et al., *supra* note 30.

The first issue that must be addressed is the question of the frequency of protectionist measures being implemented under the WTO system. Given the substitutability between policy instruments, it may be useful to take a step back and recognize the inevitability and indeed, potential welfare-enhancing feature of GATT/WTO provisions that give domestic governments the ability to temporarily protect domestic industries. From this perspective, perhaps the most important questions to consider when discussing reforms to the WTO that would affect safeguards are: should the measures be applied on an MFN basis? Should the measures be accompanied with compensation? Should the use of safeguards be made more attractive or at least more transparent?

A. MFN Versus Discrimination

An empirical question that reformers need to take into consideration is whether the economic "benefits" from requiring the MFN application of safeguards outweigh the "costs" of an MFN policy. The benefit of a temporary MFN measure is that there is no trade diverted into the protection-implementing country's market from less efficient sources, as could have been the case had the country been permitted to implement a discriminatory policy. Furthermore, if countries are given the ability to discriminate, governments may take advantage of that by allowing their trade policy to be tailored so as to avoid potential retaliation by "large" countries, thus implicitly targeting smaller trading partners that do not have the capacity to retaliate.[44]

On the other hand, there are other practical benefits to not forcing countries to implement safeguard measures on an MFN basis. First, a discriminatory policy may be preferred if the safeguard scheme requires compensation based on the fact that with fewer trading partners affected by the measure, less compensation is required. In a system with a *de facto* inflexible compensation mechanism such as that faced by the WTO currently, this has its benefits as there is the potential for fewer secondary inefficiencies to be generated through retaliation-as-compensation. If safeguards were applicable on a non-MFN basis, this would arguably also improve their attractiveness relative to antidumping measures which are discriminatory by their very nature.

Another open question is what are the full, international trade-diversionary effects of a non-MFN as opposed to an MFN safeguard policy? While a non-MFN policy can generate trade diversion into the protected market, because fewer countries are targeted, there is perhaps less trade that is deflected, from export to the protecting market to export to other international destinations. With a safeguard measure that is applied on an MFN basis, an unanswered empirical question is what is happening to overall world trade? Is it simply being dampened or suppressed, or is more trade being deflected to other international destinations? In the second case, this could lead to surges of imports to other importing countries and hence calls to resort to protection there as well. The implications of this are currently not well understood but should be considered.

B. Compensation Versus No-Compensation

A second empirical question to consider is whether the economic "benefits" from requiring compensation with the application of a safeguard measure outweigh the "costs"

[44] *See* the evidence for the case of antidumping duties in the United States, a discriminatory policy, presented by Bruce A. Blonigen and Chad P. Bown, *Antidumping and Retaliation Threats*, 60(20) JOURNAL OF INTERNATIONAL ECONOMICS 249(2003).

of requiring compensation. The costs to requiring compensation in the current system are larger than the monetary costs might indicate—due to the inflexible nature of the *de facto* current system which more and more frequently requires countries to rely on the threat of retaliation and the difficulties inherent in compensation negotiations. Furthermore, requiring compensation makes more attractive the inappropriate use of alternative policy instruments, such as antidumping duties, that are just as easy (or arguably easier) to obtain but which require no compensation.

Given that retaliation imposes costs (through the inefficiencies generated) that are larger than the benefits to the retaliating country (which receives the compensation), one legitimate question is why require compensation at all? Are there explicit benefits to a compensation requirement? Recall that the imposition of a tariff measure by any large country generates a "negative externality"—it imposes a cost on the foreign exporting country. Specifically, the protection drives down the price received by the trading partner's exporters, generating potential welfare gains for itself at the expense of these foreign agents. Because the country does not face all of the costs of its protection, it engages in an excessive level of protection, relative to that which it would invoke if it were to face all the costs of its actions. A compensation requirement, on the other hand, forces the protection-implementing country to internalize more of the externality, imposing fewer costs of the protection onto its trading partners. Because of the internalization, it faces costs closer to the "true" costs of implementing the protection, thus it will tend to implement such protection less frequently, only when the (political, economic) gains are larger than those "true" costs.

What reforms to the compensation requirements might be considered? Recall that while the UR reforms did much to change the *size* of the compensation required (e.g., there is no compensation required for the first three years in AS cases with an absolute surge in imports) the effect on increasing the relative attractiveness of the safeguard provisions appears to have been minimal. Governments still prefer to use antidumping measures, even though in many instances if they were to implement the protection as a safeguard measure, they would also not have to offer compensation. Nevertheless, an important negative effect on the compensation mechanism induced by the UR reforms was actually a restriction to the *means* by which countries were able to compensate each other through resort to safeguards, with the general prohibition of VERs. One reform is thus to try to introduce an additional *explicit* means of compensation that has the efficiency properties of a VER, so that the costs of compensation are not increased simply because of the means through which the compensation is exchanged (retaliation).

Bown, for example, has suggested that compensation might take the form of the protection-implementing country refunding the tariff revenue collected to the foreign government, whose firms have been adversely affected by the domestic government's protection.[45] The benefit to such a mechanism is that the effect on economic welfare across countries in this case can work in a manner similar to a VER, as the exchange of tariff revenue could be equivalent to the exchange of the "quota rents" under a VER. In addition, this would not necessarily have the same discriminatory or anti-competitive

[45] Chad P. Bown, *Why are Safeguards under the WTO so Unpopular?*, 1 (1) WORLD TRADE REVIEW 47 (2002). To clarify, this should not be confused with the recent controversial Byrd Amendment which changed U.S. trade law to automatically allocate tariff revenue collected in U.S. antidumping and countervailing duty cases to the *U.S.* industries that supported the petition. The Byrd Amendment has been found by the WTO Appellate Body to violate the WTO Agreements on Antidumping and Subsidies and Countervailing Measures, see Report of the Appellate Body, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R (2003).

(collusive) side-effects or "costs" of the VERs of the past, as the safeguard tariff could still be applied on an MFN basis and there would be no need for negotiation between foreign and domestic firms or the domestic and foreign governments, and thus no scope for arm-twisting or discriminating on the basis of "power" relationships.[46] Furthermore, the compensation of tariff revenue could be handed directly to the foreign firms which would help overcome the problem of how to effectively compensate the "losers" of a safeguard measure, which is hard to do when the only response available is retaliation.[47]

C. Additional Transparency

Additional useful reforms to the safeguard provisions would include further refinements of the Agreement in order to differentiate between alternative categories of safeguard measures, perhaps along the lines of the different economic reasons that policymakers use to justify their use. If countries also provided a reason why they are resorting to that form of protection, this would add transparency to the system.

Furthermore, a more refined safeguards agreement could potentially have different rules on the applicability of MFN and compensation, based on the (legitimate) justifications behind why countries are resorting to the measures. Much as the AS already does not require compensation during the first three years for an "absolute increase" in imports, compensation might also be eliminated in the instances in which a government implements safeguards in order to facilitate an orderly exit of the declining, domestic industry. On the other hand, more compensation might be required if safeguards were being used for reasons of technological catch-up or because of pure political considerations.

Nevertheless, any increased transparency requirements in the safeguard provisions that were not also included in antidumping provisions, would also be costly as they would act to make the alternatives relatively more attractive.

D. Reforms to other WTO Agreements

As experience after the UR has shown, any reforms that might be designed to make safeguards more attractive will have limited effectiveness if they are not combined with reforms to the Antidumping Agreement and perhaps penalties and compensation under the DSU that makes the use of antidumping measures less attractive.

VI. Conclusion

Safeguards play an important, multi-faceted role in trade regimes such as the GATT and now the WTO. How and when they are used—both relative to the alternative of free trade and also the alternative of policy instruments such as antidumping measures—are affected by a variety of influences in the underlying rules of the system.

[46] Bown, *supra* note 45, has also suggested that this is an additional reason why antidumping measures are attractive to protection-implementing countries relative to safeguard measures. As noted above, under the Agreement on Antidumping, managed trade arrangements are encouraged through the resort to "price undertakings," which economists like Michael O. Moore, *VERs and Price Undertakings under the WTO*, GEORGE WASHINGTON UNIVERSITY mimeo (2001), have argued can be equivalent (or even worse) than a VER on welfare grounds.

[47] This would require, however, an additional mechanism to ensure that foreign exporters did not anticipate the refund and further reduce prices in the domestic market, thus eliminating the effectiveness of the safeguard protection from the perspective of the domestic industry, which was benefiting from the higher prices.

In this chapter we have documented the historical and continuing role of safeguard provisions in the GATT and WTO agreements. We have provided a review of the primary economic explanations for the benefits of including safeguard provisions into trade agreements such as the GATT/WTO as well as the costs of doing so. We have also identified some of the important pitfalls that arise and which can lead to misuse of the provisions, once they have been included. We have discussed the relationship of safeguards with other, substitute policy instruments in the system, in particular antidumping duties. Throughout our discussion, we have attempted to highlight the most relevant rules and procedures of the WTO system that affect safeguards in order to illustrate how these rules generate incentives that affect the ways that countries use safeguards. Finally, we have documented some ideas for potential reforms to the safeguards and related agreements and provided a discussion of their costs and benefits, in the attempt that future researchers and reformers play special attention to the full interaction of the safeguards provisions with the overall WTO agreement.

BIBLIOGRAPHY

Bagwell, Kyle and Staiger, Robert W. "A Theory of Managed Trade." 80 *American Economic Review* 779–795 (1990).

Baldwin, Robert E. *The Political Economy of U.S. Import Policy*. (1985) Cambridge: The MIT Press.

Blonigen, Bruce A. and Bown, Chad P. forthcoming. "Antidumping and Retaliation Threats." 60(2) *Journal of International Economics*: 249–273 (2003).

Bown, Chad P. "Trade Disputes and the Implementation of Protection under the GATT: An Empirical Assessment." 62(2) *Journal of International Economics* 263–294 (2004).

Bown, Chad P. "The Economics of Trade Disputes, the GATT's Article XXIII and the WTO's Dispute Settlement Understanding." 14(3) *Economics and Politics* 283–323 (2002).

Bown, Chad P. "Why are Safeguards under the WTO so Unpopular?" 1 *World Trade Review* 47–62 (2002).

Bown, Chad P. and Rachel McCulloch. "Nondiscrimination and the WTO Agreement on Safeguards." 2(3) *World Trade Review* 327–348 (2003).

Brainard, S. Lael and Verdier, Thierry. "Lobbying and Adjustment in Declining Industries." 38 *European Economic Review* 586–595 1994.

Brainard, S. Lael and Verdier, Thierry. "The Political Economy of Declining Industries: Senescent Industry Collapse Revisited." 42 *Journal of International Economics* 221–237 (1997).

Caves, Richard E., Frankel, Jeffrey A. and Ronald W. Jones. *World Trade and Payments: an Introduction* (2002). (Ninth edition). Boston: Addison-Wesley.

Crowley, Meredith. "Do Safeguard Tariffs and Antidumping Duties Open or Close Technology Gaps?" Federal Reserve Bank of Chicago & Working Paper 2002–13 (2002).

Dixit, Avinash K. and Norman, Victor. *Theory of International Trade* (1980).

Ethier, Wilfred J. "Unilateralism in a Multilateral World." 112 *Economic Journal* 266–292 (2002).

Finger, J. Michael. "GATT Experience with Safeguards: Making Economic and Political Sense out of the Possibilities that the GATT Allows to Restrict Imports." Policy Research Working Paper 2000, Development Research Group, World Bank, Washington, DC (1998).

Fischer, Ronald D. and Prusa, Thomas J. "Contingent Protection as Better Insurance." NBER Working Paper #6933 (1999).

Goldberg, Pinelopi. "Product Differentiation and Oligopoly in International Markets: The Case of the U.S. Automobile Industry." 63 *Econometrica* 891–951 (1995).

Hansen, Wendy L. "The International Trade Commission and the Politics of Protection." 84 *American Political Science Review* 21–46 (1990).

Hansen, Wendy L. and Prusa, Thomas J. "The Road Most Taken: the Rise of Title VII Protection." 18 *The World Economy* 295–313 (1995).

Hillman, Arye. "Declining Industries and Political-Support Protectionist Motives." 72 *American Economic Review*, 1180–1187 (1982).

Irwin, Douglas A. "Causing Problems? The WTO Review of Causation and Injury Attribution in U.S. Section 201 Cases." 2(3) *World Trade Review* 297–325 (2003).

Jackson, John H. "Safeguards and Adjustment Policies." in R.M. Stern, (ed.), *The Multilateral Trading System: Analysis and Options for Change*. (1993) Ann Arbor, MI: The University of Michigan Press.

Jackson, John H. *The World Trading System: Law and Policy of International Economic Relations*, (1997) Second Edition. Cambridge: The MIT Press.

Klimenko, Mikhail; Ramey, Garey; and Watson, Joel. "Recurrent Trade Agreements and the Value of External Enforcement." UC San Diego mimeo (2002).

Krugman, Paul R.; and Obstfeld, Maurice. *International Economics: Theory and Policy* 2000 (Fifth edition). Reading, MA: Addison-Wesley.

Magee, Christopher. "Declining Industries and Persistent Protection," 10(4) *Review of International Economics* 749–762 (2002).

Matsuyama, Kiminori. "Perfect Equilibria in a Trade Liberalization Game." 80 *American Economic Review* 480–492 (1990).

Miranda, Jorge.; Torres, Raul A.; and Ruiz, Mario. "The International Use of Antidumping: 1987–1997." 32 *Journal of World Trade* 5–71 (1998).

Miyagiwa, Kaz and Ohno, Yuka. "Closing the Technology Gap Under Protection." 85 *American Economic Review* 755–770 (1995).

Miyagiwa, Kaz and Ohno, Yuka. "Credibility of Protection and Incentives to Innovate." 40 *International Economic Review* 143–163 (1999).

Moore, Michael O. "VERs and Price Undertakings under the WTO." George Washington University mimeo (2001).

Petersmann, Ernst-Ulrich. *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997) London: Kluwer Law International.

Staiger, Robert and Tabellini, Guido. "Discretionary Trade Policy and Excessive Protection." 77 *American Economic Review* 823–837 (1987).

Staiger, Robert and Tabellini, Guido. "Do GATT Rules Help Governments Make Domestic Commitments?" 11 *Economics and Politics* 109–144 (1999).

United States International Trade Commission. "The Effectiveness of Escape Clause Relief in Promoting Adjustment to Import Competition." USITC Publication # 1229, Investigation # 332–115 (March 1982).

WTO. *Analytical Index: Guide to GATT Law and Practice*. Vol II (1995).

WTO. *Uruguay Round Agreement Establishing the World Trade Organization*. (1995) Geneva: WTO.

WTO. *Report (2000) of the Committee on Safeguards*, G/L/409 (2000).

WTO. *Report (2001) of the Committee on Safeguards to the Council for Trade in Goods*, G/L/494 (2001).

WTO. *International Trade Statistics* (2001). Geneva: WTO.

WTO. *Immediate Notification Under Article 12.5 Of The Agreement On Safeguards To The Council For Trade In Goods Of Proposed Suspension Of Concessions And Other Obligations Referred To In Paragraph 2 Of Article 8 Of The Agreement On Safeguards European Communities*. G/SG/43, May 15, 2002, and G/SG/43/Suppl.1, June 20, 2002.

WTO. *Immediate Notification Under Article 12.5 Of The Agreement On Safeguards To The Council For Trade In Goods Of Proposed Suspension Of Concessions And Other Obligations Referred To In Paragraph 2 Of Article 8 Of The Agreement On Safeguards European Communities*. G/SG/43/Suppl.1, June 20, 2002.

CHAPTER 40

ANTI-DUMPING AND COMPETITION LAW

P. J. Lloyd*

"Unfair competition is selling cheaper than someone else"

Ralph Harris
Everyman's Guide to Contemporary Economic Jargon,
in GROWTH, ADVERTISING AND THE CONSUMER (1964)

TABLE OF CONTENTS

I. The Problems of Anti-Dumping Action in the WTO 68
II. A Brief History of Anti-Dumping Action in the GATT/WTO 69
III. International Trade or Competition Law? 72
IV. Proposals for the Reform of Anti-Dumping Actions 77
V. Conclusion 80
Bibliography 80

* The University of Melbourne. I would like to acknowledge the helpful suggestions made by Mary Amiti, Donald MacLaren, Keith Maskus, Michael Plummer and Jose Tavares on an earlier draft.

I. The Problems of Anti-Dumping Action in the WTO

It has often been observed that anti-dumping actions have risen rapidly in number since the conclusion of the Uruguay Round negotiations. The WTO (and before it the GATT) Committee on Antidumping produces semi-annual reports which give data on the number of anti-dumping investigations and measures adopted by members of the organisation. Until the mid-1980s only the United States, Australia, New Zealand and countries that are now members of the EU took anti-dumping action regularly. In 1990 only nine members were reported as taking anti-dumping action during the year. The WTO reported that 27 members had taken anti-dumping actions in the six-month period January 1-June 30, 2002.[1] The main new users have been Mexico, Brazil, South Africa, India and Korea.

More countries are introducing legislation providing for anti-dumping duties, though there is no obligation for them to do so under WTO rules. These include developing and transition economies such as China.[2] As of October 5, 2002, 75 countries had reported to the WTO that they had legislation providing for anti-dumping action.[3] Thus anti-dumping action is becoming a standard tool of international trade policy.

As important as the frequency of action is the magnitude of the implicit tariffs resulting from the action. There is no systematic data on this aspect. Messerlin and Reed calculated that the protective dumping margins in the United States and EU are on average two to three times higher than the rates of regular tariffs.[4] Blonigen and Prusa report that the average dumping margin in the United States over the past decade has been sixty per cent.[5] Calculations of dumping duty rates in Australia provide similar results; for a sample of goods subject to antidumping duties in 1994 the unweighted average antidumping duty was 35 per cent whereas the unweighted average tariff on the same goods was only seven per cent.[6]

Action may take the form of a price undertaking as well as the imposition of a duty. This has an effect on the consumer/buyer that is the same as that resulting from an antidumping duty, but unlike an antidumping duty, a price undertaking also raises the landed price. Exporters or importers may raise the price before a dumping examination. I know of no empirical study in any country of the magnitude of price increases due to price undertakings. Prusa[7] estimates that about 25 per cent of the cases investigated in the United States by the Department of Commerce are withdrawn, often after an agreement to restrict the quantities exported, that is, they induce voluntary export restraints. Because of these "voluntary" price and quantity responses, the statistics of antidumping actions substantially understate the impact of laws.

But the problem is not merely that anti-dumping actions are becoming a major restraint on trade. There is concern with other characteristics of anti-dumping actions. First, the only conditions that must be satisfied relate to proof of dumping and injury and, therefore,

[1] World Trade Organization, REPORT (2003) OF THE COMMITTEE ON ANTI-DUMPING PRACTICES, G/L/653 (October 28, 2003), ("*2003 Report")*¶10. The EU is counted as only one member in this statistic.

[2] For a discussion of the development of anti-dumping actions in the Americas, *see* J. Tavares, C. Macario and K. Steinfatt, *Antidumping in the Americas*, 35 JOURNAL OF WORLD TRADE 555–574 (August 2001)

[3] *2003 Report, supra* note 1, ¶6.

[4] P.A. Messerlin and G. Reed, *The US and EC Antidumping Policies*, 105 THE ECONOMIC JOURNAL 1565, Table 2 (November 1995)

[5] B.A. Blonigen and T.J. Prusa, *Antidumping*, IN HANDBOOK FOR INTERNATIONAL ECONOMICS (Basil Blackwell ed. 2003)

[6] K.M. Vautier and P.J. Lloyd, INTERNATIONAL TRADE AND COMPETITION POLICY: CER, APEC AND THE WTO, Appendix 1 (1997)

[7] T.J. Prusa, *Why are So Many Antidumping Petitions Withdrawn?*, 33 JOURNAL OF INTERNATIONAL ECONOMICS, 1–20 (August 1992)

actions can be taken unilaterally even when the substantive rates of duty are bound at a zero rate. Consequently, they breach the reciprocity involved in past tariff negotiations. Second, again because of the nature of the proof of dumping and injury required under the rules, anti-dumping action discriminates among countries of origin of imports of the goods concerned.[8] In particular, anti-dumping action is taken predominantly by the industrialized countries and the imports that bear the duties are predominantly sourced from developing countries. Hence, it has become another of the issues that divide the developed and the developing countries in the WTO. Third, though this characteristic is not evident from the trade statistics alone, conduct that is actionable when the seller is outside a country is not actionable when the same conduct occurs but the seller is a domestic supplier. This is discriminatory in another way and obviously leads to economic inefficiencies. Fourth, anti-dumping actions have become a major source of conflict among the members of the WTO. The imprecision of the present rules has led to an increasing number of complaints under the Dispute Settlement Procedures in recent years.[9] Altogether, these features mean that anti-dumping action has become a major problem for the organisation.

There are some recent surveys of aspects of anti-dumping actions. The data is surveyed comprehensively by Miranda, Torres and Ruiz[10]. James calculates the national intensities of use (that is, the country share of definitive measures relative to the country share of imports) and the asymmetries of actions taken against and by individual member countries.[11] The former provides a normalized measure of the frequency of use and the latter shows how a country is affected both as a user and as a subject of other countries' actions. Blonigen and Prusa survey the literature on anti-dumping, separating the pre-investigation, investigation and post-investigation phases of the process.[12]

This paper reexamines dumping from the point of view of a form of business conduct that might be subject to competition law. This point of view is relatively new but it is causing a fundamental rethinking of the economics of anti-dumping actions. Part II briefly reviews the history of GATT and WTO law on dumping. Part III considers the central question of whether dumping should be addressed by "fair trading" laws or by competition law. Part IV considers reform proposals that are based on the competition law view of dumping. The conclusions are summarized in Part V.

II. A Brief History of Anti-Dumping Action in the GATT/WTO

Dumping entered the set of international trade policies subject to GATT regulation from the outset in 1947. Article VI differs from other Articles in GATT in that it is concerned with "unfair trade" whereas the other articles are concerned with trade restrictions as an aspect of the objective of efficiency in the world economy. Dumping (and subsidization

[8] Article 9 of the 1994 Agreement states that any duty must be imposed on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except on imports from sources from which price undertakings have been accepted. Non-discrimination on that portion of the imports of the product liable for anti-dumping action, however, implies discrimination between the dumped and the non-dumped imports of the product in the ordinary sense of trade discrimination.

[9] E. Vermulst and N. Komuro, *Anti-dumping Disputes in the GATT/WTO: Navigating Dire Straits*, 35(1) JOURNAL OF WORLD TRADE LAW 5 (1997). As of October 2003, Seventeen panel and Appellate Body reports involving anti-dumping issues had been adopted by the Dispute Settlement Body.

[10] J.R. Miranda, A. Torres, and M. Ruiz, *The International Use of Anti-dumping*, 32(5) JOURNAL OF WORLD TRADE LAW 5 (1998)

[11] W.E. James, *The Rise of Anti-dumping: Does Regionalism Promote Administered Protection?*, 14 ASIAN-PACIFIC ECONOMIC LITERATURE 14 (November 2000)

[12] Blonigen and Prusa, *supra* note 5.

which is also covered by the Article) was perceived as being "unfair" to domestic competitors and therefore a practice which tends to undermine respect for the rules of the international trading system and the willingness of countries to liberalize international trade.[13]

Article VI of GATT (1947) defined dumping as a situation in which ". . . the price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". If there is no such domestic price, a constructed price can be calculated based on the highest comparable price for the like product in a third country or the cost of production. The difference between the "normal value" and the "export price" is called the "margin of dumping". The duty cannot exceed the dumping margin.

The Article allows members to apply anti-dumping duties on imports of a product so long as two conditions are met. The goods must be dumped, and the dumping must cause or threaten material injury to an established domestic industry or materially retard the establishment of a domestic industry. The GATT/WTO law does not seek to regulate dumping—the action of private parties—but instead regulates the use of anti-dumping measures.

From the time the GATT rules were introduced, there have been numerous complaints from the exporting countries subject to anti-dumping actions that the discretion available to the importing countries enables them to overstate the dumping margins and the injury, and most particularly, the existence of dumping in the first place. Exporting countries claim that dumping duties are often applied when they should not be under the letter of the GATT law, and that anti-dumping actions are used to harass and discourage cheap imports.

An attempt was made to tighten the GATT rules in the Anti-dumping Code that was agreed to in 1967 as a part of the Kennedy Round and later revised in the Tokyo Round. The Code gave greater precision to the definitions of Article VI relating to like products, dumping, injury and domestic industry. The Code laid down for the first time procedures and rules of administration; time limits for the period of investigation and retro-activity of anti-dumping duties, the rights of interested parties to be heard, rules of evidence and other administrative rules.

The Code allowed a determination of dumping if the export price is less than the cost of production of the good exported only if there were no sales of the like product in the exporting country or no proper comparison can be made between the export and the domestic price. This was a tighter definition. However, the United States, Canada, Australia and New Zealand agreed in 1978 that pricing below average cost was "not in the ordinary course of trade" and therefore could be determined to be dumping on the basis of a constructed normal value calculated from the cost of production plus a reasonable amount for administrative, selling and any other costs and for profits.

The Code also introduced two new measures. First, it provided a definition of a price undertaking as a "satisfactory voluntary undertaking from any exporter to revise its prices or to cease exports to the area at dumped prices so that authorities are satisfied that the injurious effect of the dumping is eliminated."[14] The Code explicitly permitted a price undertaking that raised prices no more than the margin of dumping, but only allowed it to be entered into after preliminary findings of dumping and injury. This measure resulted from British and Canadian complaints during the Kennedy Round that the U.S. Treasury (which at that time was responsible for dumping investigations) had been slow in its

[13] John H. Jackson, The World Trading System, Chapter 10 (1989)

[14] Article 7 of the code.

dumping investigations and had encouraged producers to give price undertakings even though the Tariff Commission enquiry might not have resulted in a finding of injury and the imposition of a duty. Second, the Code introduced a provision for preliminary duties. Both became widely used.

The Uruguay Round Agreement on the Implementation of Article VI made a stronger attempt to tighten the regulation of governments' anti-dumping actions. The Agreement sets out yet more detailed rules concerning the determination of dumping and of injury and the establishment of a causal link between them. It also set out more detailed procedures to be followed in initiating and conducting anti-dumping investigations and clarified the role of dispute settlement panels in disputes concerning anti-dumping actions taken by Members. It introduced a "sunset clause", requiring an anti-dumping duty to terminate within five years unless a fresh review determines that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. But the Agreement retained all of the central features of the system.

A new feature of the Agreement, compared to the earlier Article and Code, is that it allowed consideration of the combined effect of dumped imports from several supplying countries. This was called "cumulation". With the experience of six years of application of the Uruguay Round amendments, the change relating to cumulation across countries can now be seen as a change for the worse. Before the Uruguay Round Agreement, the practice was used on a limited scale and it was doubtful that it conformed to the GATT law. The Uruguay Round Agreement made the practice WTO-legal. This has increased the coverage of complaints and their likelihood of success in countries that use this provision.

In the United States, in the ten years following the introduction of the mandatory cumulation amendment, Prusa[15] finds that 75 per cent of anti-dumping cases have involved cumulation. Hansen and Prusa[16] and Prusa[17] verify that cumulation has had an effect on the affirmative finding of injury which is "super-additive", that is, greater than the effect predicted on the basis of the summation of the countries import shares. In the EU, cumulation has made it easier for the Commission to prove injury and has thereby increased the frequency of anti-dumping actions. Tharakan, Greenaway and Tharakan[18] find that 66.3 per cent of all injury determinations over the period 1980–97 were determined on the basis of the cumulation of imported market shares. Following the line of analysis of U.S. anti-dumping actions by Hansen and Prusa[19], they also find a super-additive effect.

Under GATT and WTO rules anti-dumping actions relate solely to trade in goods. No provision for anti-dumping in services was introduced into GATS. Hoekman and Leidy examined the possibility of introducing provision for anti-dumping action in services trade.[20] They concluded that such action would make very little sense because of the different nature of services trade; services often have to be delivered in the country in

[15] T.J. Prusa, *Cumulation and Anti-dumping: A Challenge to Competition*, 21 THE WORLD ECONOMY 1021 (November 1998).

[16] W.L. Hansen and T.J. Prusa, *Cumulation and ITC Decision-making: The Sum of the Parts is Greater than the Whole*, 34 ECONOMIC INQUIRY 746 (1996).

[17] Prusa, *supra* note 15.

[18] J. Tharakan, D. Greenaway and J. Tharakan, *Cumulation and Injury Determination of the European Community in Antidumping Cases*, WELTWIRTSCHAFTLICHES ARCHIV 320–39 (1998).

[19] Hansen and Prusa, *supra* note 16.

[20] B. Hoekman and M.P. Leidy, *Antidumping for Services?*, in POLICY IMPLICATIONS OF ANTIDUMPING MEASURES (P.K.M. Tharakan ed. 1991).

which the consumers reside, and the intangibility and the bundling of services make it difficult to establish unit prices.

These rules have maintained the basic features of anti-dumping actions for more than fifty years. In some respects the changes negotiated in agreements in GATT rounds have made the rules less permissive but they have also broadened the measures to include pricing below average cost, price undertakings and preliminary measures and they have become more permissive in terms of cumulation across countries. On balance, these changes to the GATT/WTO rules may have weakened rather than strengthened the discipline on countries taking anti-dumping actions.

III. International Trade or Competition Law?

International trade economists have traditionally taken a very different view of dumping from international trade officials. From the time of the classic study of dumping by Viner[21], international trade economists have regarded dumping as a form of price discrimination. There has been a proliferation of models of dumping which offer new explanations of this behavior; for example, demand uncertainty or strategic dumping to discourage firms in the dumped markets from reaching a scale of output that would make them competitive in the exporting country.[22] Only the cases of predatory and strategic dumping are regarded by economists as harmful to the competition process and to the welfare of the country in which the goods are "dumped".

During the 1990s a number of new models of dumping behavior were developed. Many of these treat dumping as a strategic response to the possibility of anti-dumping action. Anti-dumping law creates incentives for firms in both the importing and exporting countries to act strategically in order to influence the determination of dumping and of injury. These models cover both dumping determinations based on price differences and those based on cost of production in the exporting country. They relate to situations of duopoly and oligopoly and use multi-stage game theory with cooperative and non-cooperative outcomes. Blonigen and Prusa[23] survey these models.

International trade economists have long regarded most anti-dumping action in practice as a form of contingent protection.[24] As voluntary export restraints and other non-tariff barriers have been curtailed by the GATT and WTO, anti-dumping action is being used as a substitute form of non-tariff barrier which is still permissible under the WTO rules. The marked cyclical pattern of new anti-dumping actions and the heavy concentration in certain industries, especially steel and chemical products, support the view that anti-dumping action in practice is contingent protection rather than action against "unfair trade".[25]

[21] J. Viner, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1926).

[22] *See* the entry by W.J. Ethier, *Dumping*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (J. Eatwell, M. Milgate and P. Newman eds. 1987) for the literature until the mid-Eighties.

[23] Blonigen and Prusa, *supra* note 5, Section 3.2.

[24] *See*, for example, P.J. Lloyd, ANTI-DUMPING ACTIONS AND THE GATT SYSTEM (1977) and J.M. Finger, ANTI-DUMPING: HOW IT WORKS AND WHO GETS HURT (1993)

[25] Miranda, Torres, and Ruiz, supra note 10, and Tavares, supra, note 2, have argued that new developing country users of anti-dumping action have used this instrument as a form of safeguard action when trade liberalisation lowered tariffs and non-tariff barriers. (See also J.M. Finger, F. Ng and S. Wangchuk, *Antidumping as Safeguard Policy*, manuscript (2000).) Safeguards are applied in a particular set of contingencies associated with an import surge.

Anti-dumping action may be preferred as a safeguard instrument because the standards of injury are lower, no compensation is required as with safeguard action, and it may be applied for a period up to five years. The

As James put it, "Anti-dumping actions are the current weapon of choice of protectionists."[26] As an alternative instrument of protection, anti-dumping has a number of advantages over other instruments. It does not, unlike safeguard action under Article XIX, require compensation. It is subject to weak discipline. In fact, in some countries it essentially provides protection on demand. Over the ten years 1987–1997, the proportion of all completed anti-dumping investigations which resulted in the imposition of definitive measures was 51 per cent for countries reporting to the GATT/WTO. It was 64 per cent for the United States and 62 per cent for the EU.[27] In the United States over the past decade the Department of Commerce has issued only three negative determinations of dumping out of almost four hundred determinations.[28] Anti-dumping action can be used when prices are at the bottom of their distribution and therefore the benefit to local producers who are threatened with insolvency or are downside risk-averse is greatest. It can provide protection against the cheapest source of imports under the guise of "unfair competition" (as noted in the quotation at the head of the article).

Indeed, several economists have argued that national legislators introducing legislation providing for anti-dumping actions and the architects of GATT understood that the action was essentially protectionist but described it as designed to combat "unfair" trade in order to disguise the intent. As Finger graphically put it:

> "Antidumping is the fox put in charge of the henhouse: trade restrictions certified by GATT. The fox is clever enough not only to eat the hens, but also to convince the farmer that it is the ways things ought to be. Antidumping is ordinary protection with a grand public relations program".[29]

If anti-dumping action is to improve the national welfare, it should take account of the interests of buyers. But anti-dumping provisions in the WTO and in the legislation of most nations that take anti-dumping actions ignore these interests. Unless the terms of trade effect is sufficiently large, an anti-dumping duty will harm the importing country. This is the standard analysis of an *ad valorem* tariff, based on equal weighting of the welfare losses and gains to buyers and sellers respectively. This conclusion holds *a fortiori* for a price undertaking as the higher price is received by the foreign supplier rather than the home government or alternatively demand is diverted to higher-cost alternative import sources, both cases resulting in a negative terms of trade effect. For this reason, international trade economists have been widely opposed to government anti-dumping action.

In many cases, buyers are other firms that are buying intermediate goods rather than final consumers. That is, the producer interest of the law is further biased towards the interests of incumbent producers of the competitive goods.

history of safeguard actions under the GATT/WTO is, however, not encouraging. Safeguard actions have been subject to abuse too and procedures were tightened in the Uruguay Round.

[26] W.E. James*, The Rise of Anti-dumping: Does Regionalism Promote Administered Protection?, 14* ASIAN-PACIFIC ECONOMIC LITERATURE 14 (2000).

[27] Miranda, Torres and Ruiz, *supra* note 10, Table 24.

[28] Blonigen and Prusa, *supra* note 5, at 23

[29] J.M. Finger, *The Meaning of "Unfair" in US Import Policy*, WORKING PAPER WPS 745, COUNTRY ECONOMICS DEPARTMENT, WORLD BANK,42 (1991). *See also* J.W. Suomela, FREE TRADE VERSUS FAIR TRADE: THE MAKING OF AMERICAN TRADE POLICY IN A POLITICAL ENVIRONMENT, Chapter 3.1.3 (1993); J.M. Finger, *The Origins and Evolution of Antidumping Regulation*, in ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT, *supra* note 24; and A.O. Sykes, *Antidumping and Antitrust: What Problems Does Each Address?*, in BROOKINGS TRADE FORUM 1998 (R.Z. Lawrence ed. 1998)

As dumping is a matter of international trade law, it should also take account of the interests of the exporting country. Dumping duties harm the exporting nation. Price undertakings also harm the exporting nation because they raise the price and reduce the quantity below the outcome in a market without intervention. However, the cost to the exporting nation is less with a price undertaking than with an equivalent duty as the exporter receives the higher price. GATT/WTO law ignores the interests of the exporters as it ignores the interests of the buyers in the importing country.

Anti-dumping action derives from a completely outdated view of dumping. Article VI of GATT 1947 states categorically that "The contracting parties recognize that dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." There is no economic theory or model accepted today that finds that this conduct is always harmful. There is nothing "fair" about these provisions as they ignore the interests of buyers and of the foreign sellers.

Since there is no justification for anti-dumping action in economic theory other than to combat harmful predatory or strategic pricing, it is necessary to view dumping explicitly from a competition perspective. Pricing behavior is appropriately examined under the methods of competition analysis and the principles and procedures of competition law.

From a competition perspective, dumping as defined in the GATT/WTO is an act of price discrimination between markets or perhaps, with a liberal interpretation of the provision relating to no comparable price, selling below cost. The theory of price discrimination indicates when price discrimination may occur. Price discrimination between buyers in two different markets requires some restraint on trade that segments the markets as well as some monopoly power in the global markets. This segmentation provides an assurance that the product sold in the market with the lower price cannot be resold back to the first market. When the markets are in different countries and the higher price is charged in the exporter's home market, the discrimination is called dumping. High price differences can occur only if there are high tariffs or non-tariff measures or natural protection due to transport costs.

For international price discrimination, the substantial lowering of both government protection measures under the GATT and of transport margins in the 1980s and 1990s must have reduced the scope for international price discrimination. Industrial tariffs averaging around five per cent in the OECD countries, which are the main users of ant-dumping actions, and transport margins of less than ten per cent suggest that much measured "dumping" is spurious. In an age of differentiated products, many "like products" are in fact differentiated and the price differences might reflect product differentiation rather than dumping. The use of constructed values for the determination of the dumping margin allows a finding of dumping when there is no price discrimination.

Under national competition laws price discrimination might or might not be judged to be conduct that is anti-competitive. National laws vary considerably in their treatment of price discrimination. For example, in the United States the Robinson-Patman Act prohibits sellers from discriminating in the prices, terms of sale or advertising where competitive injury may result to seller's competitors or to unfavored purchasers. In the EU Article 82 covers price discrimination when this is used by a dominant firm to restrict competition. Some other countries with comprehensive competition laws do not prohibit price discrimination; for example, Australia which is another frequent user of anti-dumping actions, removed from the Trade Practices Act in 1995 a separate provision relating to price discrimination, though price discrimination might still be caught under

the more general provision relating to the abuse of dominant power. Several countries prohibit predatory pricing *per se*. For example, in the United States Section 2 of the Sherman Act prohibits predatory pricing and other predatory conduct (however, predation has been difficult to prove in most jurisdictions.) Competition law typically does not prohibit selling below cost *per se* although prohibitions on the abuse of a dominant position might catch some below-cost pricing.

This variation in the prohibition of price discrimination reflects the analysis of competition economists. Standard models of price discrimination show that price discrimination may have a pro-competitive or an anti-competitive effect.[30]

The view that the GATT rules are producer-oriented and protectionist is confirmed by the observation that the rules do not cover the situation in which the price charged by a discriminating monopolist is higher in the importing nation than the exporting nation, the case which truly harms the importing nation.

The opposition of international trade economists to the use of anti-dumping action to counter cross-border price discrimination has been supported by the empirical findings on the pattern of dumping actions. A review by Messerlin and Reed[31] of anti-dumping cases handled by the U.S. and EU authorities revealed that at most ten per cent and more likely only five per cent of cases involve predatory dumping, and that the only country that was in a position to practice strategic dumping was Japan. (cf. the views of the OECD CLP Committee which has found that claims of predatory pricing are often unfounded and recommended that governments apply a market structure test to find if the conduct should be challenged).[32]

Starting around 1990, economists began to observe that some anti-dumping actions are themselves anti-competitive in effect. The EU is one of the countries or blocs of countries with anti-dumping law in which there is evidence that anti-dumping action has itself had anti-competitive effects in some instances by, for example, reinforcing the position of a domestic cartel.[33] Similarly, in Australia and Brazil, it has been found that anti-dumping action has sometimes had anti-competitive effects.[34] Domestic producers sometimes use anti-dumping complaints as a means of restricting foreign competition and thereby reinforcing price-fixing agreements in the domestic markets.

More recently, economists have used a number of the models to see if dumping has a pro-competitive or an anti-competitive effect in markets with imperfect competition. There is a family of models of imperfect competition in which government intervention may change the competitive behavior in the market equilibrium.[35] In several of these models anti-dumping action may induce collusion in a market that was non-collusive before the intervention. These models tend to support the finding that some anti-dumping actions are anti-competitive.

[30] *See*, for example, L. PHILIPS, THE ECONOMICS OF PRICE DISCRIMINATION (1983).

[31] Messerlin and Reed, *supra* note 4.

[32] World Trade Organization, ANNUAL REPORT 1997, Volume 1 (1997), Note 171.

[33] EUROPEAN COMPETITION POLICY 79–81 (P. Montagnon ed. 1990); P. Messerlin, *Antidumping Regulation or Procartel Law? The EC Chemical Case,* 13 THE WORLD ECONOMY 465 (1990); Messerlin and Reed, *supra* note 4; R. Veufelers and H. Vandenbussche, *European Anti-dumping Policy and the Profitability of National International Collusion*, 43 EUROPEAN ECONOMIC REVIEW 28 (1999)

[34] *See* the Industry Commission of Australia, ANNUAL REPORT 1995–96, Appendix E (1995); and C.A. Primo Braga and S.D. Silber, *Brazilian Frozen Concentrated Orange Juice: The Folly of Unfair Trade* Cases, in ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT, *supra* note 23, respectively

[35] *See* Blonigen and Prusa, *supra* note 5 and references therein.

In the model of Hartigan[36], the intervention could have the reverse effect of inducing competition in a market that was collusive before the intervention by lowering the costs of renegotiation of collusion. This model relates to a duopoly situation with a single domestic seller and a single foreign seller who is a monopolist in its home market. This is an uncommon occurrence in dumping cases, if indeed it occurs at all. Typically several domestic producers file a complaint jointly, and increasingly, as noted above, the investigation cumulates production across several exporting countries. In any case, if this situation should occur, the preferred intervention is the application of competition law to prohibit collusion outright.

An issue that has not received attention is whether anti-dumping duties or price undertakings will be effective in restoring competition even if it is true that there is predatory or strategic dumping. In general, the answer is no. Anti-dumping action does not bear directly on the firm's or firms' competitive behavior. It only raises the price of the dumped good for the duration of the action. The appropriate action would be a prohibition of the practice with appropriate penalties if the offense continues.

These models indicate that anti-dumping action under international trade law is not the instrument or, to use the language of competition law, the remedy to correct business conduct in the form of harmful price discrimination or selling below average cost. If dumping has no effect on competition or has a pro-competitive effect, no anti-dumping action or other action should be taken. If, on the other hand, price discrimination or selling below average cost does restrict competition, the conduct should be prohibited. And it should be prohibited for sellers operating solely in the national market as well as for sellers selling across national borders. Similarly, non-price forms of predation and entry deterrence by dominant producers should be prohibited along with price predation.

Competition law is the correct means to combat anti-competitive effects across national borders when they occur. The competition law of each country has national economic goals as its objective or objectives. These vary among countries but they are converging to the objective of preserving competition in markets or of protecting consumer interests, which are more suitable than the anti-dumping objective of protecting incumbent producers. Given that dumping may have either a pro-competitive or an anti-competitive effect, the Rule of Reason should apply.

Some studies have shown that many of the anti-dumping actions that are now taken would not be taken if the current definition of dumping were retained but standards of national competition law were substituted for those of international trade law. In the United States, for both price discrimination and predatory pricing, Lipstein compares the standards in relation to the definition of a market and proof of injury.[37] For both forms of pricing and in all respects, the standards under U.S. competition laws are much stricter than those of its anti-dumping law. Tharakan, Vermulst and Tharakan[38] consider as a case study the EU determination in the 'Personal Fax Machines' case. They ask if the pricing of the goods and the injury would have violated competition law standards in the exporting countries and in the EU. They conclude that the outcome might have been very different and less trade-restrictive if competition standards had been applied.

[36] J.C. Hartigan, *An Antidumping Law can be Procompetitive*, 5 PACIFIC ECONOMIC REVIEW 5 (February 2000)

[37] R. Lipstein, *Using Antitrust Principles to Reform Antidumping Law*, in GLOBAL COMPETITION POLICY (E. Graham and J.D. Richardson eds. 1997)

[38] M. Tharakan, E. Vermulst and J. Tharakan, *Interface between Anti-dumping Policy and Competition Policy*, 21 THE WORLD ECONOMY 1035 (November 1998)

There is also the question of the definition of dumping compared to the definition of predatory pricing. The definition of predatory pricing is contentious. Sometimes average total cost is used but marginal cost and average variable cost and non-cost rules have been proposed.[39] Some of these are more permissive than average total cost and are likely therefore to allow conduct which could be deemed dumping under international trade law.

Thus, at least in the case of two of the biggest users of anti-dumping actions, the substitution of competition law standards for international trade law standards would lead to a substantial tightening in the regulation of anti-dumping actions. The same outcome is likely to hold in other countries that take anti-dumping actions.

IV. Proposals for the Reform of Anti-Dumping Actions

There are many possible reforms that would reduce the harm done to the welfare of residents of the importing nations that impose the duties and to the exporting nations.

To start with, as anti-dumping duties are discretionary, the individual member nations of the WTO that currently take anti-dumping actions could reform their national laws or administration unilaterally to make them less trade-restrictive. This is unlikely to happen in most countries, however, as the political support for protectionism by means of anti-dumping actions seems to be in the ascendancy, and the appeal of anti-dumping action as a form of protectionism increases as more discipline is applied to the traditional instruments of protection. We need greater discipline on anti-dumping actions in the multilateral system.

The analysis of the previous section indicates clearly that the optimal solution is the most radical one. Logically, it would be best to eliminate anti-dumping regulation altogether. Another attempt to tighten the law with a view to reducing the discretion and arbitrariness under the present system would not address the real problems. As Hoekman and Kostecki concluded after the Uruguay Round

> "AD [anti-dumping] is fundamentally flawed from an economic perspective and cannot be fixed by tinkering with the methodological arcana of investigations. For all practical purposes, there is nothing wrong with dumping, as it is normal business practice. The problem is anti-dumping."[40]

To economists, dumping is not an international trade problem. International pricing may be a competition problem and as such it should, in principle, be addressed exclusively as a part of national competition laws. Lipstein[41], and Lloyd and Vautier,[42] and probably others, have recommended the abolition of anti-dumping provisions in the WTO.

Four regional trading agreements have taken this view for intra-area dumping. They are the EU, the European Economic Area, the CER Agreement between Australia and New Zealand and the Canada-Chile Agreement. All have abolished the possibility of anti-dumping actions against members of the areas.[43] In the first three cases, this step

[39] The definitions are discussed in W.K. Viscusi, J.M. Vernon and J.E. Harrington, ECONOMICS OF REGULATION AND ANTITRUST 283–289 (2000).

[40] B. Hoekman and M. Kostecki, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 1174 (1995)

[41] R. Lipstein, *It's Time to Dump the Dumping Law*, INTERNATIONAL ECONOMIC INSIGHTS, (November/December 1993)

[42] P.J. Lloyd and K.M. Vautier, PROMOTING COMPETITION IN GLOBAL MARKETS, 168 (1999)

[43] For background on this aspect, see Lloyd and Vautier, *supra* note 42, Chapters 4, 5 and 6; G. Niels and A. ten Kate, *Trusting Antitrust to Dump Antidumping, Abolishing Antidumping in Free Trade Agreements without Replacing it with Competition* Law, 31 JOURNAL OF WORLD TRADE 29 (December 1997); and Tavares *et al., supra* note 2

was taken only after a high degree of integration of the members' economies and the availability of area-wide competition remedies in the event of anti-competitive behavior. A single market would prevent market segmentation and make price discrimination impossible. The Canada-Chile Agreement set a precedent in agreeing to abolish ant-dumping actions within the area without any substitute measures, though the Agreement still permits safeguard actions against imports from member countries.

In fact, in the United States and some other countries, dumping arose as a part of anti-trust legislation. It is only in recent decades that it has again come to be regarded more and more as an international trade rather than a competition problem and standards in the two fields have diverged.

One possible objection to the substitution of action under national competition law for action under international law is that some of the countries that have anti-dumping laws do not have competition laws that cover predatory pricing or price discrimination or other pricing behavior that might produce dumping as measured under international laws. Indeed, few of the new countries that take anti-dumping action have effective national competition laws. However, this absence of competition law can be taken as a lack of concern in these countries over such conduct.

This solution is not going to be adopted in the negotiations under the next Round. The Doha Ministerial Declaration states that:

> . . . we agree to negotiations aimed at clarifying and improving the disciplines under the Agreements on Implementation of Article VI of GATT 1994 and on Subsidies and Countervailing measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants.[44]

Preserving the basic concepts and principles of the existing WTO law retains the dual tests of dumping and injury. Yet, this still leaves a number of options for reform. Some countries have put forward proposed reforms in the traditional areas of stricter standards and improved administration as well as new issues such as anti-circumvention rules, special and differential treatment for developing countries. Other reforms are also possible. These will be considered in the form of an agenda for reform of WTO law on dumping and anti-dumping actions in the forthcoming Round.

One simple reform would be to require all countries to report to the WTO all dumping margins and the *ad valorem* equivalent of the duties imposed and of the price undertakings. This would make the extent of the protection more transparent.

The negotiations should reconsider the aspect of the definition of dumping dealing with sales below the average cost of production. The rules set out in the Uruguay Round Agreement to determine when the exporter's cost of production may be used in place of the actual home market price and to govern the calculation of the constructed price have proven quite inadequate and allowed a substantial extension of the application of anti-dumping actions.

Similarly, the rules introduced in the Uruguay Round Agreement relating to cumulation across countries need to be tightened considerably. This rule has made it much easier to prove injury to the domestic industry.

Another substantial reform within the present definition of anti-dumping would be the amendment of Article VI to supplement the (producer) injury test by a national economic

[44] World Trade Organisation, MINISTERIAL DECLARATION (2001), ¶28, reproduced in the Appendix to this book.

welfare test. As noted above, the interests of consumers are ignored in Article VI and the Uruguay Round Agreement on the Implementation of Article VI and the definition of domestic industry for the purposes of assessing injury is in terms of domestic producers of like products, which does not include the downstream industry users of the products. This additional test would obligate countries investigating alleged dumping to offset gains from dumping to downstream producers and/or consumers against incumbent producer losses. Such a reform could go a long way to reducing the use of anti-dumping action as a form of contingent protection. (An international welfare test would be even less likely to result in anti-dumping action as it would take account of the benefit of dumping to the exporter.)

More radically, a competition law standard could supplement the existing trade law standards in the assessment of harm to the economy in which goods are dumped. About a decade ago, economists began to ask whether competition objectives and standards could be used within the WTO to guide the applications of anti-dumping actions.[45] Canadian anti-dumping law already allows competition considerations to be taken into account in the determination of both the dumping margin and injury.

Several proposals have been put forward. Hoekman and Kostecki suggested that allegations of dumping be investigated by the competition authority of the exporter's home country, assuming it had one, and a finding of anti-competitive behaviour be required before anti-dumping duties are imposed by the importing country.[46] In effect, this would add a competition test to the existing dumping and injury tests. This would make an anti-dumping action consistent with the competition law of the exporting country. Alternatively, the alleged dumping could be investigated by the competition authority of the importing country, assuming it had one. Messerlin and Tharakan suggest a "two-tier" approach in order to weed out complaints that did not involve predation[47]. In the first tier, the investigation would confirm that the seller accused of dumping has sufficient market power to be able to recoup losses.

Under both of these proposals anti-dumping action would vary with the competition standards applied by the competition authority in the exporting country, assuming that one existed. As consistency of standards across importing countries is desirable, there would have to be WTO negotiations to adopt a common competition standard for all members.

Any amendment of the test of injury or the addition of a third test might be considered to breach the undertaking in the Doha Ministerial Declaration that the negotiations preserve the concepts and principles of the Uruguay Round Agreement on the Implementation of Article VI. For example, if it were required that any allegation pass a third test relating to national interest or competition standards, it would mean in some cases that anti-dumping action could not be taken, even though the case satisfied the requirements relating to the proof of dumping and the proof of injury. On the other hand, the Doha Ministerial Declaration also agreed that negotiations will take place on the interaction between trade and competition policy. While this does not provide a mandate for the introduction of a competition standard in anti-dumping actions taken under Article VI, it explicitly "recognizes the case for a multilateral framework to enhance the contribution of competition policy to international trade and development". There is a tension in the

[45] For example, *see* Hoekman and Kostecki, *supra* note 40, at 258; B. Hoekman and P.C. Mavroidis, *Dumping, Antidumping and* Antitrust, 30 JOURNAL OF WORLD TRADE LAW (February 1996); and the AMERICAN BAR ASSOCIATION, REPORT OF THE TASK FORCE OF THE ABA SECTION OF ANTITRUST LAW ON THE COMPETITION DIMENSION OF NAFTA, Chapter 6 (1994).

[46] Hoekman and Kostecki, *supra* note 40, at 258.

[47] P.A. Messerlin and P.K.M. Tharakan, *The Question of Contingent Protection*, 22 THE WORLD ECONOMY (December 1999).

Declaration between the desire to improve the discipline on anti-dumping action on the one hand and the intention of preserving the principles and concepts of the existing agreements on the other that will have to be resolved.

V. Conclusion

Anti-dumping action as a remedy for cross-border price discrimination and selling below average cost is a fundamentally mistaken policy. Dumping is not usually harmful to the importing country. Moreover, anti-dumping action itself is normally harmful to both the importing and the exporting country. The rules have led to the use of anti-dumping action as a form of back-door protection that is discriminatory and has become a major source of bilateral and systemic frictions in the world trading system.

The adoption of a competition approach to dumping focuses on the true costs and benefits of this form of business conduct and it suggests possible reforms that will align government interventions more closely to the true costs of harmful predation or price discrimination. The point of view that dumping should be regarded as a competition problem has not yet penetrated the consciousness of the national or WTO negotiators.

Major reform of the WTO rules relating to anti-dumping is limited by the words chosen in the Doha Ministerial Declaration. There is unlikely to be much support among developed countries for changing anti-dumping provisions from the WTO in a substantial way. The U.S. Government in particular remains adamantly opposed to any tightening of the WTO rules relating to anti-dumping action.[48] On the other hand, the Declaration itself recognises the need to improve the discipline on ant-dumping actions. This conflict is the challenge of the next Round.

Some suggestions for an agenda of reform of the discipline on anti-dumping actions have been listed above. Reform is likely to be a difficult process, as it has been in the past, but the much greater importance of anti-dumping action as a form of border trade intervention and restriction today make it imperative that major reforms be achieved.

BIBLIOGRAPHY

American Bar Association *Report of the Task Force of the ABA Section of Antitrust Law on The Competition Dimension of NAFTA*, Chicago: American Bar Association (1994).

Blonigen, B. A. and T. J. Prusa 'Antidumping' , NBER Working Paper No. W8398(July 2001), available at http://papers.nber.org/papers.

Ethier, W.J. 'Dumping' in J. Eatwell, M. Milgate and P. Newman (eds*), The New Palgrave Dictionary of Economics*, London: Macmillan (1987).

Finger, J. M. 'The Meaning of "Unfair" in U.S. Import Policy', Working paper WPS 745, Country Economics Department, World Bank (1991).

Finger, J. M. *Antidumping: How it Works and Who Gets Hurt*, The University of Michigan Press, Ann Arbor (1993).

Finger, J. M. 'The Origins and Evolution of Antidumping Regulations' in J. M. Finger (ed.), *Antidumping: How it Works and Who Gets Hurt*, The University of Michigan Press, Ann Arbor (1993).

Finger, J. M., F. Ng and S.Wangchuk 'Antidumping as Safeguard Policy', manuscript (2000).

[48] Lindsey and Ikeson argue that this attitude should and may change as a result of the increasing number of anti-dumping actions being taken against U.S. exporters. B. Lindsey and D. Ikeson, *Coming Home to Roost Proliferating Antidumping Laws and the Growing Threat to U. S. Exports*, Cato Institute (2001).

Hansen, W.L. and T.J. Prusa 'Cumulation and ITC Decision-making: The Sum of the Parts is Greater than the Whole', 34 *Economic Inquiry* 746–769 (1996).

Harris, R. "Everyman's Guide to Contemporary Economic Jargon" in Growth, Advertising and the Consumer (1964).

Hartigan, J. C. 'An Antidumping Law can be Procompetitive', *5 Pacific Economic Review*, 5, February, 5–14 (2000).

Hoekman, B. and M. Kostecki *The Political Economy of the World Trading System: From GATT to WTO*, Oxford: Oxford University Press (1995).

Hoekman, B. and M. P. Leidy 'Antidumping for Services?', in P. K. M. Tharakan (ed.), *Policy Implications of Antidumping Measures*, Amsterdam: North-Holland (1991).

Hoekman, B. and P.C. Mavroidis 'Dumping, Antidumping and 30 Antitrust', 30 *Journal of World Trade Law*, February (1996).

Industry Commission *Annual Report 1995–96,* Canberra: Australian Government Publishing Service.

Jackson, J.H. *The World Trading System*, Cambridge, Mass.: MIT Press (1989).

James, W. E. 'The Rise of Anti-dumping: Does Regionalism Promote Administered Protection?', 14 *Asian-Pacific Economic Literature*, 14–26 (November 2000).

Lindsey, B and D. Ikeson 'Coming Home to Roost Proliferating Antidumping Laws and the Growing Threat to U. S. Exports', Cato Institute (2001).

Lipstein, R. 'It's Time to Dump the Dumping Law', *International Economic Insights*, November/December (1993).

Lipstein, R. 'Using Antitrust Principles to Reform Antidumping Law', in E. Graham and J. D. Richardson (eds.), *Global Competition Policy*, Institute for International Economics, Washington, D. C. (1997).

Lloyd, P.J. *Anti-dumping Actions and the GATT System*, London: Trade Policy Research Centre (1977).

Lloyd, P. J. and K. M. Vautier *Promoting Competition in Global Markets*, Edward Elgar, Cheltenham (1999).

Messerlin, P. "Antidumping Regulation or Procartel Law? The EC Chemical Case", 13 *The World Economy*, 465–92 (1990).

Messerlin, P.A. and G. Reed 'The US and EC Antidumping Policies', 103 *The Economic Journal*, 1565–1575 (November 1995).

Messerlin, P.A. and P.K.M. Tharakan, *The Question of Contingent Protection*, *The World Economy* 22 (December 1999).

Miranda, J. R., A. Torres and M. Ruiz 'The International Use of Anti-dumping', 32 (5) *Journal of World Trade Law*, 5–71 (1998).

Montagnon, P. (ed) *European Competition Policy*, London: Royal Institute of International Affairs (1990).

Niels, G and A. ten Kate 'Trusting Antitrust to Dump Antidumping, Abolishing Antidumping in Free Trade Agreements without Replacing it with Competition Law', 31 *Journal of World Trade*, 29–43 (December 1997).

Phlips, L. *The Economics of Price Discrimination*, Cambridge Ujiversity Press, Cambridge (1983).

Primo Braga, C. A. and S. D. Silber 'Brazilian Frozen Concentrated Orange Juice: The Folly of Unfair Trade Cases', in J. M. Finger (ed.), *Antidumping: How it Works and Who Gets Hurt*, The University of Michigan Press, Ann Arbor (1993).

Prusa. T. J. 'Why are So Many Antidumping Petitions Withdrawn?', 33 *Journal of International Economics*, 1–20 (August 1992).

Prusa, T. J. 'Cumulation and Anti-dumping: A Challenge to Competition', 21 *The World Economy*, 1021–1034 (November 1998).

Suomela, J. W. *Free Trade versus Fair Trade: The Making of American Trade Policy in a Political Environment*, Institute of European Studies Publications 7/93 (1993).

Sykes, A. O. 'Antidumping and Antitrust: What Problems Does Each Address?', in R. Z. Lawrence (ed.), *Brookings Trade Forum 1998*, Brookings Institution Press, Washington, D. C (1998).

Tavares, J., C. Macatio and K. Steinfatt 'Antidumping in the Americas', 35(4) *Journal of World Trade*, 555–574, (August 2001).

Tharakan, M., D. Greenaway and J. Tharakan, 'Cumulation and Injury Determination of the European Community in Antidumping Cases', *Weltwirtschaftliches Archiv*, (1998) 320–39.

Tharakan, M., E. Vermulst and J. Tharakan, 'Interface between Anti-dumping Policy and Competition Policy', *The World Economy*, 21, (November 1998), 1035–1060.

Vautier, K.M. and P.J. Lloyd, *International Trade and Competition Policy: CER, APEC and the WTO*, Wellington: Institute of Policy Studies (1997).

Veugelers, R. and H. Vandenbussche, 'European Anti-dumping Policy and the Profitability of National International Collusion', *European Economic Review*, 43, 11–28 (1999).

Vermulst, E. and N. Komuro, 'Anti-dumping Disputes in the GATT/WTO: Navigating Dire Straits', *Journal of World Trade Law*, 31 (1), 5–43 (1997).

Viner, J., *Dumping: A Problem in International Trade*, League of Nations: Geneva (1926).

Viscusi, W. K., J. M. Vernon and J. E. Harrington, *Economics of Regulation and Antitrust*, The MIT Press, Cambridge, Mass (2000).

World Trade Organization (WTO), *Annual Report 1997*, Volume 1, World Trade Organisation, Geneva (1997).

World Trade Organisation, *Annual Report 2001*, World Trade Organisation, Geneva (2001a).

World Trade Organisation, *Ministerial Declaration*, World Trade Organisation, Geneva (2001b).

CHAPTER 41

SUBSIDIES AND COUNTERVAILING MEASURES

Alan O. Sykes*

TABLE OF CONTENTS

I. Introduction 84
II. Economic Background 84
A. What Is a "Subsidy?" 85
B. The Effects of Subsidies on Producers 87
C. Distinguishing Good Subsidies from Bad Subsidies 88
1. Protective Subsidies 89
2. Subsidies for Export Promotion 90
D. Subsidized Imports from the Importing Country's Perspective 92
III. Legal Background 93
A. Subsidies and Countervailing Measures in the GATT System Prior to the Uruguay Round 93
B. The Uruguay Round Agreements 95
1. Subsidies and Countervailing Measures 95
2. Agriculture 97
IV. An Economic Perspective on the WTO Rules 98
A. Protecting the Bargain under GATT and GATS 98
B. The Red Light: Export and Domestic Content Subsidies 99
C. Domestic Subsidies and the Definition of Subsidy in WTO Law 100
D. The Yellow Light, Green Light Approach 101
E. Countervailing Duties 103
F. Agriculture 105
V. Conclusion 106
Bibliography 106

* Frank & Bernice Greenberg Professor of Law, University of Chicago. I am grateful to participants in the Law and Economics Workshop at Northwestern University for their thoughtful comments. I thank Jessica Romero for able research assistance.

I. Introduction

Subsidies present thorny problems for the international trading system. The legitimate activities of governments inevitably affect the economic position of firms within their jurisdictions, yet the perception sometimes arises that government programs confer an unacceptable advantage on those firms. The controversial task of determining which sorts of government activities create unacceptable advantages, and what to do about them, has occupied an important place on the agenda of the WTO/GATT system since its inception.

The Uruguay Round of GATT negotiations produced an important new WTO Agreement on Subsidies and Countervailing Measures ("SCM"). It also established separate rules for agricultural subsidies in the WTO Agreement on Agriculture, and took some minimal steps toward addressing subsidies issues in services industries within the General Agreement on Trade in Services ("GATS"). Because the rules on subsidies within GATS are so undeveloped,[1] I will concentrate here on trade in goods, with primary emphasis on the SCM agreement and only a few words to say about agriculture.

In brief, I suggest that *some* of the WTO disciplines on subsidies are useful and sensible from an economic perspective, particularly (a) the nonviolation nullification and impairment doctrine that protects the market access expectations associated with particular trade commitments from frustration due to the introduction of unexpected subsidy programs; and (b) the general prohibition on export subsidies (outside of agriculture). *The treatment of domestic subsidies under WTO law is far more problematic*, in substantial measure because of the conceptual and practical difficulties in determining what constitutes an undesirable "subsidy." Further, *the opportunity for importing nations to employ countervailing duties in the WTO system is likely a source of more harm than good.* From the standpoint of welfare economics, a strong argument can be made that the WTO system should give up on its efforts to discipline domestic subsidies through general rules, and concentrate on the few sectors (such as agriculture) where a consensus arises that pressures for competitive subsidization are a source of economic waste. Likewise, global welfare would likely increase if general authority for the use of countervailing duties were eliminated.

Part II of this chapter provides an introduction to the economic issues that bear on the regulation of subsidies and countervailing measures. Part III then provides some legal background, beginning with the treatment of subsidies and countervailing measures in the GATT system prior to the Uruguay Round, and proceeding to consider the important developments in the law of the WTO. Part IV is an economic discussion of what has been accomplished within the WTO/GATT system and what has not, while Part V provides a brief conclusion.

II. Economic Background

Subsidies are of concern to the members of the WTO/GATT system for three reasons. First, subsidies can undermine market access commitments by importing nations. Promises to reduce or eliminate the use of traditional instruments of protection like tariffs and quotas can prove worthless if other instruments of import protection are substituted for them, and new subsidy programs are one such instrument.

[1] For a discussion of how subsidies issues might eventually be addressed within GATS, s*ee* Gilles Gauthier, Erin O'Brien and Susan Spencer, D*eja Vu, or New Beginning for Safeguards and Subsidies Rules in Services Trade?,* in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 165 (Pierre Sauve and Robert Stern eds. 2000).

Second, and related, subsidies can divert customers from one exporting nation to another. The benefits to exporters of market access commitments secured through international negotiations are threatened just as much by subsidies to competing exporters in third countries as by subsidies to import-competing industries in the nations that make commitments.

Finally, and somewhat more amorphously, subsidies are said by many observers to "tilt the playing field" in a way that is unfair or otherwise objectionable, quite independently of whether they frustrate the market access expectations associated with WTO/GATT commitments on particular products or services. It is well known among economists, for example, that subsidies can distort resource allocation by diverting resources from higher-valued to lower-valued uses. Put slightly differently, they can distort comparative advantage and produce a less efficient global division of labor, leading to lower economic welfare. In the view of some observers, additional disciplines are required to thwart the use of subsidies that result in unfair or economically inefficient distortions of international trade.

Elements of all three concerns are reflected in the WTO/GATT legal system. Before discussing the law, however, it is useful to set forth some economic background.

A. What Is a "Subsidy?"

Although the term "subsidy" is quite familiar in economics, it is rarely defined precisely. Often it is used synonymously with a government transfer of money to an entity in the private sector. On other occasions, the term "subsidy" may refer to the provision of a good or service at a price below what a private entity would otherwise have to pay for it. On still other occasions, it may refer to various government policies that may favorably affect the competitive position of private entities, such as procurement policies or programs to educate workers. Yet, it is by no means clear that all such measures are "subsidies" in any meaningful sense.[2] Governments engage in a wide range of tax and expenditure policies that impose costs and confer benefits on private entities. The suggestion that a "subsidy" arises anytime a government program benefits private actors ignores the other side of the ledger—the numerous government programs that impose costs on those same actors.

To an economist, perhaps a natural benchmark for identifying subsidization is a hypothetical market equilibrium without the presence of government. The classic economic models of general competitive equilibrium, for example, are entirely decentralized and embody no government sector.[3] When the government enters the picture through tax and expenditure policies, it will alter equilibrium prices and output. Activities for which the net returns are reduced will be discouraged to some degree, and those activities can be said to be "taxed." Activities for which the net returns are enhanced will be encouraged to a degree, and they may be said to be "subsidized."

The difficulty with this concept of subsidization is that it is exceedingly difficult to apply as a practical matter. The hypothetical market equilibrium without government cannot be observed, and indeed it is not clear that the concept is coherent. Implicit in the classic general equilibrium models is a capacity for actors to engage in transactions, yet it is difficult to see how such a capacity can arise in a large economy without a government to create property rights. Further, the deviations from any benchmark equilibrium that

[2] This set of issues is addressed thoughtfully in Richard Snape, *International Regulation of Subsidies*, 14 THE WORLD ECONOMY 139 (1991).

[3] *See*, *e.g.*, GERARD DEBREU, THE THEORY OF VALUE (1959).

result from government activity are exceedingly complex. Governments engage in a wide variety of taxation practices—income taxes, payroll taxes, capital taxes, value-added taxes, sales and excise taxes, and others. Not only are the number of tax instruments large in number (and often administered by several levels of government), but the incidence of the various taxes (the relative burden of the tax on the demand side versus the supply side of the market that is taxed) is often quite uncertain. Governments also engage in innumerable regulatory programs that impose costs on private entities of various sorts: occupational health and safety programs, environmental quality programs, programs to transfer resources to certain disadvantaged groups, and untold others. Finally, government expenditure programs provide vast benefits to private sector entities in direct and indirect ways, including public education, highways, research and development funding, low cost insurance, fire and security services, a legal system, and on and on. Even national defense services no doubt benefit private firms by reducing risk and lowering the cost of capital.

Against this backdrop, it is surely impossible in practice to ascertain the "net" impact of government on any entity according to the sort of benchmark put forth above. Of necessity, therefore, one must search for other benchmarks to determine when a "subsidy" exists.

The simplest alternative is to look at each government program in isolation, and to ignore the question of whether any benefits that it confers may be offset by costs elsewhere. If a particular program confers benefits on a private entity, a "subsidy" may be declared to exist without further inquiry. Thus, for example, if a firm receives a loan from the government at a below-market rate, one might say that a "subsidy" arises without any regard to the various tax and regulatory burdens imposed on the firm.

A second possible alternative is to assume that *generally applicable* tax, expenditure and regulatory policies affect most enterprises about equally and thus do not confer any net "subsidy." Equivalently, one might assume that any subsidy conferred by generally applicable programs is uniform across industries, and will be counteracted by an offsetting movement in exchange rates. Programs of narrow applicability that target benefits at particular industries, by contrast, might be assumed to confer benefits that encourage production in that industry. To illustrate, a government might make an investment tax credit available to all industries that use durable goods. On the premise that all industries benefit about equally and that any affects on international competitiveness wash out through exchange rates, such a program might be ignored for purposes of identifying "subsidies." By contrast, if the automobile industry is the beneficiary of a special tax credit program for investment in automobile manufacturing, a "subsidy" might be found as to that industry.

A third possible alternative is to focus on the impact of government on private activities *relative to the impact of other governments on similarly situated entities elsewhere.* In the international context, one might look for programs that seem to confer particularly large benefits on particular entities relative to the benefits that governments confer on similar entities in other countries. The presumption would be that most governments tax and regulate in roughly similar fashion, resulting in similar background effects on the competitive position of most private entities—only when a program for a particular group of private entities stands out as especially generous relative to such programs elsewhere would a "subsidy" be present. Thus, for example, if most governments provide a certain range of benefits to their farmers, those programs might be presumed to cancel each other out in international trade more or less, and no "subsidy" would be found. But if a particular country provides industrial assistance to the semiconductor industry in a context where no such aid is provided by other governments, a "subsidy" might be said to exist.

Each of these alternatives has obvious deficiencies. The first has the virtue of simplicity, but its essential failing was noted above—by ignoring the offsetting costs imposed by government on private actors it raises a great danger that "subsidization" will be found where a private entity has not been meaningfully advantaged by government programs. Indeed, because so many government programs are funded out of general revenues, a narrow focus on particular government expenditure programs without any offset for most forms of taxation would lead to the conclusion that there is rampant "subsidization" in virtually any economy.

The second alternative is little more than *deus ex machina*. The insuperable complexities of calculating the net impact of national governments on domestic industries are avoided by assuming that generally applicable programs have a neutral impact while targeted programs do not. But there is no reason to believe that this assumption is correct. Many broadly applicable programs have widely disparate effects on different industries. Consider a simple example like public education—it will lower the cost of labor to industries that use educated workers, but it may *increase* the cost of labor to industries that use lower-skilled workers by lowering the supply of such workers. Many similar examples might be given with respect to tax and regulatory programs. And, of course, the question of what is to be considered "generally applicable" or "targeted" is hardly straightforward.

The third alternative changes the inquiry fundamentally, and treats "subsidization" as an alteration in the competitive position of private entities relative to similar entities elsewhere. This shift in emphasis perhaps captures the notion that subsidization involves "tilting the playing field," and might be defended on that basis. But it too raises difficult practical problems. The presumption that most governments tax and regulate similarly with respect to background factors that affect the competitive position of private entities is highly suspect, and the mere fact that a particular type of program exists in one country and not another, or is more generous in one country than in another, is at best a weak marker for a program that shifts the competitive balance overall.

In sum, it is far easier to conceptualize a "subsidy" in simple economic models than it is to identify a subsidy in practice. Even when a government program viewed myopically might seem to afford uneconomic assistance to an industry, such assistance may in fact offset other tax and regulatory burdens that disadvantage the industry. Any administrable rule for deciding whether a particular government program is a subsidy or not will no doubt result in serious errors of overinclusion and underinclusion for this reason alone. Other complexities will be considered below.

B. The Effects of Subsidies on Producers

For now, let us put to the side the problem of identifying subsidies, and simply assume that they exist. What are their effects?

Subsidies to the producers of goods and services lower the producers' costs of production, other things being equal. This reduction in their costs of production can lead to an expansion of their output in two ways, depending on the nature of the subsidy. First, some subsidies depend directly on output—the subsidy program may provide a producer with $1 for each widget that it produces, for example (or $1 for each widget that it exports, the classic "export subsidy" discussed below). Subsidies that increase with output in this fashion are economically equivalent to a reduction in the short-run marginal costs of production for the producer that receives them. In general, producers will respond to a reduction in short-run marginal costs by lowering price. Of course, when price falls, the quantity demanded by buyers will rise and output will expand to meet the increased demand.

Second, even where the amount of the subsidy is not contingent on output and does not affect short-run marginal costs of production, subsidies can affect long-run marginal costs in a way that causes additional productive capacity to come on line or to remain on line. For example, imagine an unprofitable company that is unable to cover its variable costs of production at any level of output, and would thus shut down its operations under ordinary circumstances. A subsidy to that company that is contingent on it remaining in business can avert a shut-down in operations—it must simply be enough to allow the company to cover its variable costs at some level of output. Likewise, a subsidy can induce a company to build new capacity to enter a market when the expected returns to entry absent the subsidy would not be high enough to induce entry.

It is also possible, to be sure, that a "subsidy" will have no impact on the output of recipients. Imagine, for example, that a government simply sends a company an unexpected check for $1 million. The money is in no way contingent on the company's output, or on it remaining in business. The owners of the company will be pleased to receive this subsidy, of course, but there is no reason for them to change their operations in any way—whatever level of output was most profitable without the subsidy will also be most profitable with the subsidy.

These observations suggest another important issue that must be confronted in conceptualizing subsidies. For a government program to confer a "subsidy," must it encourage an increase in output by the recipient? If it does not, then it cannot "tilt the playing field" in a way that causes detriment to competing producers. But if this question is answered affirmatively, it becomes necessary to inquire whether the government program in question affects marginal costs in the short run, or has an effect on long-run marginal cost that is sufficient to cause capacity to remain in production when it would exit otherwise, or to enter when it would not otherwise. Such issues are not always easily resolved.[4]

C. Distinguishing Good Subsidies from Bad Subsidies

Economic theory offers no general objection to the use of subsidies. As suggested above, a "subsidy" need not have any effect on the behavior of a private actor to the extent that it is offset by other costs that the government imposes on that actor. And even where a "subsidy" program can be deemed to confer a net benefit, any effect that it has on the economic activity of its recipients may well be socially desirable.

Students of microeconomics will be familiar with the proposition that subsidies may be used constructively by governments to remedy "market failures." For example, it may be difficult for individuals who invent socially valuable things to recoup their costs of research and development—depending on the nature of the innovation and the efficacy of any intellectual property protection, inventions may be copied by competing sellers and sold at a price that will not allow inventors an adequate return to their efforts. An appropriately calibrated government subsidy for research and development may then be economically desirable.

Even when obvious market failures are absent, some government programs may confer benefits on private sector entities that are collateral to their central purpose and that are

[4] Some commentators have proposed that countermeasures under international law should be limited to cases where the subsidy in question has a "cross-border" effect via an effect on the output of the recipients. *See* Charles Goetz, Lloyd Granet and Warren Schwartz, *The Meaning of "Subsidy" and Injury" in Countervailing Duty Law*, 6 INT'L REV. L. & ECON. 17 (1986). A symposium on this proposal, with a principal paper by Richard Diamond, may be found in 21 L. & POL. INT'L BUS. 503 (1990).

not usually seen as harmful. Public education programs may lower the cost of labor for many firms, as noted, but even if such programs might be deemed "subsidies" to private enterprise in a sense, few observers would regard them as objectionable. The best explanation is perhaps that most observers regard public education as contributing to a reasonable *distribution* of opportunities among citizens. Indeed, in some quarters, education is now viewed as a basic human right.

But it is also well-known that subsidies can distort resource allocation. Many subsidies simply transfer resources to well-organized interest groups without remediating any demonstrable market failure. From the standpoint of an economist, this last group of subsidies can be an appropriate target of legal discipline, while the first two groups are not. It is thus useful to consider in somewhat greater detail some particular types of subsidies that economists tend to deem undesirable.

1. Protective Subsidies

As noted above, depending on the nature of the subsidy program, subsidies may lead recipients to reduce prices and expand output. Such behavior by a subsidized firm will attract customers away from unsubsidized firms. It follows immediately that subsidies can be used to protect domestic firms from foreign competition. A subsidy to domestic firms that compete with imported goods or services can induce them to expand their share of the market relative to the share of imports, in much the same way as a tariff or a quota.

Subsidies for the purpose of protecting domestic firms from import competition, and subsidies that have such an effect without remediating some market failure or promoting some accepted distributional goal, will be termed "protective subsidies." So defined, protective subsidies are economically undesirable for two reasons.

First, as indicated earlier, protective subsidies may upset the expectations associated with particular market access commitments in the WTO/GATT system. If nation A receives a promise from nation B to eliminate the tariff on widgets in return for a reciprocal commitment on gadgets by nation A, and nation B then replaces the tariff on widgets with a subsidy that has the same effect as the tariff, nation A's ability to sell widgets to customers in nation B has not improved and its benefits from the bargain are lost. When bargains are undermined in this fashion, nations will become reluctant to enter them in the first instance. For this reason, protective subsidies can interfere with the negotiation of reciprocal agreements to reduce trade barriers, agreements that generally desirable from an economic standpoint.

Second, even if a protective subsidy does not upset expectations under a trade agreement, it still distorts resource allocation by affording protection. When domestic firms expand output at the expense of imports because of a subsidy, productive resources are diverted into domestic production and away from foreign production (wasteful diversion may occur from unsubsidized domestic firms to subsidized domestic firms as well). Resource allocation is distorted because goods and services are no longer produced at the lowest possible cost—domestic firms produce more and foreign firms produce less only because of the artificial reduction in the costs of domestic firms attributable to subsidization. In addition, subsidy programs must be financed somehow, and virtually all forms of taxation to raise the money necessary for subsidies will cause additional economic distortions.

It is important to note, however, that protective subsidies may be no worse than other devices for protecting domestic firms against foreign competition. Comparing a subsidy to a tariff that achieves the same level of protection (as measured by the market shares of

domestic and imported producers), for example, both have the same effect in diverting production from lower cost foreign firms to higher cost domestic firms. The tariff creates a further distortion by increasing prices to consumers, and pricing some consumers out of the market who are willing to pay the marginal cost of production to obtain the good or service in question but are not willing to pay the elevated price after the tariff is put in place.[5] The subsidy avoids the increase in price to consumers and the associated distortion. But the taxation necessary to finance the subsidy likely creates some other distortions, and it is impossible to say in general whether the subsidy is on balance better or worse from an economic standpoint.[6] Thus, in an environment in which some protection is tolerated for political reasons, it is by no means clear that subsidies are a bad way to provide it, as long as they do not upset the market access expectations associated with trade agreements.

The wisdom of subsidies can become even more difficult to assess if one adds a political dimension to the analysis. Imagine a society in which the electorate has a taste for rural, agrarian life and wishes to see it preserved. The electorate enthusiastically supports government programs to preserve family farms. Is a protective subsidy present? Or should one instead view the resulting political equilibrium as an efficient transfer to family farmers based on the electorate's willingness to pay to see them remain in operation? Does the answer turn on the issue of whether the farm program results from preferences of the electorate at large, or from deficiencies in the political process that allow well-organized interest groups (farmers) to exact transfers from poorly organized interest groups (taxpayers)?[7]

2. Subsidies for Export Promotion

Just as subsidies can protect firms in an importing nation from foreign competition, so too can they enhance the position of subsidized exporters relative to unsubsidized exporters in third-country markets. For example, suppose that nations A and B both export to country C. Nation A then introduces a subsidy that lowers the cost of its exports to country C, and its exporters lower their prices on exports to country C as a result. Nation B will then see its share of exports to country C diminish while nation A will see its share expand.

This diversion of exports from one nation to another can result from any subsidy that causes firms engaged in exporting to expand their output. Thus, it may or may not be intended by the government that grants the subsidy, and may or may not result from a subsidy that responds sensibly to market failure.

A particular set of subsidy practices, however, seems clearly aimed at inducing an expansion of exports—namely, subsidies that are contingent in one way or another on the volume of exports. Such "export subsidies" may take the simple form of a fixed payment for every unit of a good or service that is exported, or may take more subtle

[5] For an accessible treatment of the basic welfare economics of tariffs, *See*, e.g., Peter B. Kenen, THE INTERNATIONAL ECONOMY 17–19, 175–77 (1985), excerpted in John H. Jackson, William J. Davey and Alan O. Sykes, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 40–44 (2002).

[6] For a discussion of the relative costs and benefits of different policy instruments that afford protection, *See* Alan O. Sykes, "*Efficient Protection" Through WTO Rulemaking*, in EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 114 (Roger Porter, Pierre Sauve, Arvind Subramanian and Americo Zambetti eds. 2001)

[7] These sorts of issues are considered in detail in Warren F. Schwartz and Eugene Harper, Jr., *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831 (1972).

forms such as below-market export financing or insurance, tax benefits for exportation, and many other measures.

From an economic standpoint, export subsidies are generally undesirable. First, export subsidies diminish market access opportunities for competing exporters, and can upset their expectations pursuant to negotiated trade agreements. Trade agreements then become less valuable to them, other things being equal, and fewer such agreements may be entered. Alternatively, or perhaps in addition, competing exporters may prevail on their governments to establish subsidy programs of their own to restore competitive balance. The resulting battle of competing subsidy programs then dissipates resources on a broader scale for no useful economic purpose.

The other distortions associated with export subsidies are entirely familiar. By inducing the expansion of higher cost exporters at the expense of lower cost exporters, exported goods and services are no longer produced at the lowest possible cost. And the taxes used to finance the subsidy programs create further distortions that depend on the method of taxation.

Against these distortions associated with export subsidies, it is almost impossible to devise any scenario in which they might be economically justified. Although it is possible to imagine several settings in which a nation's exports may be "too low" from an economic standpoint, an export subsidy is most unlikely to be the optimal remedy.

First, exports may be uneconomically low because export subsidies by other nations have diverted business toward their exporters. But the appropriate response to that problem is an agreement among nations to eschew export subsidies, not a policy of competing subsidies that can exacerbate waste while doing nothing to eliminate the distortions of subsidization. Second, exports may be low because of protectionist policies in export markets. Such barriers are a subject of direct negotiation under trade agreements, however, and can be dismantled directly through those negotiations. To the extent that protection must remain in the system for political reasons, attempts by exporting nations to overcome it through export subsidies will likely just result in more protection to counteract them. Third, exports might be said to be low because of some distortion in foreign exchange markets that causes an exporting nations' currency to be overvalued. Even assuming that "overvaluation" can occur by some sensible criterion, however, the proper response to it is currency market intervention or a change in the macroeconomic policies that cause overvaluation, not industry-by-industry export subsidies. Fourth, exports might be too low because of some market imperfection in an industry that causes its output to be too low—perhaps the returns to innovation are hard to capture, for example, so that an industry does too little research and development and loses its share in world markets as a result. But the appropriate subsidy response here is not an export subsidy, but an R&D subsidy. The general point is that while various market imperfections might affect exports and a subsidy may be a proper policy response to some of those imperfections, the proper subsidy will be conditioned not on exports *per se* but on the activity that is undersupplied due to market failure (research in our example). Finally, exports in an industry might be too low because that industry is "overtaxed" by its own government in some sense, raising its costs and reducing its competitiveness uneconomically. But again the optimal remedy is not an export subsidy but a general reduction in the industry's tax burden.

This list of scenarios in which exports are in some sense "too low" may be incomplete, and perhaps the reader can imagine others. Yet, I think it exceedingly unlikely that an important class of cases exists in which export subsidies are the best response to any market imperfection—some other policy instrument, such as a different type of subsidy

operating directly on the distorted behavioral margin, or a multilateral agreement to eschew export promotion policies, will almost certainly dominate the export subsidy.

D. Subsidized Imports from the Importing Country's Perspective

The fact that subsidies may distort resource allocation hardly means that everyone will be harmed by them. The direct recipients of subsidies can only benefit from them even if the economy of the subsidizing nation as a whole suffers. Likewise, the consumers of subsidized goods and services will enjoy the lower prices that result from subsidies, even if taxpayers at large and unsubsidized producers suffer. The fact that some groups gain from subsidies and some groups lose, even when the subsidies are economically undesirable considering gains and losses in the aggregate, creates constituencies for subsidization that may prevail politically regardless of economic logic.

Of particular relevance to the WTO/GATT legal system is the perspective of importing nations regarding subsidized imports. In general, nations benefit from a reduction in the prices of goods that they import. It is straightforward to demonstrate in the standard case of a competitive industry that the economic losses to import-competing domestic firms are outweighed by the gains to domestic consumers from the opportunity to purchase goods or services more cheaply. The intuition for this result draws on the fact that domestic firms hurt by lower prices can economize on their losses by shifting productive resources to activities with higher returns, while domestic consumers gain from not only the price reduction on all units purchased at the previously higher price, but reap additional gains from the opportunity to purchase more units at a lower price.[8] The net gain to an importing nation from lower priced imports does not depend in any way on the reason why price declines—a price decline due to foreign subsidies has the same economic consequences in the standard case as an equivalent price decline due to other factors. This observation lies behind a well-known economists' quip to the effect that the proper response of an importing nation to subsidies that lower the price of imports is to "send a thank-you note to the embassy."

To be sure, it is possible to devise scenarios in which subsidies granted by foreign governments to their exporting firms can be harmful to an importing nation. One possibility is that the subsidy may drive out all competitors of the subsidized firm(s) under circumstances where it is difficult for competitors to re-enter the market later, leaving the subsidized firm(s) with monopoly power that results in higher (rather than lower) prices.[9] Related possibilities are explored in the literature on "strategic trade policy," which develops economic models in which subsidies are employed to expand the market share of firms in industries that yield better than competitive returns due to the presence of monopoly profits or positive externalities—it is theoretically possible in such models that subsidies will produce a net loss to nations that import the subsidized goods or services.[10] A thorough examination of this literature would take us far afield, and it is

[8] *See* the diagrammatic exposition in Kenen, *supra* note 4.

[9] *See* Janusz Ordover, Alan Sykes and Robert Willig, *Unfair International Trade Practices*, 15 N.Y.U. J. INT'L L. & POLITICS 323 (1983).

[10] *See*, e.g., James Brander and Barbara Spencer, *Export Subsidies and International Market Share Rivalry*, 18 J. INT'L ECON. 83 (1985); Avinash Dixit and Alan Kyle, *The Use of Protection and Subsidies for Entry Promotion and Deterrence*, 75 AM. ECON. REV. 139 (1982); Jonathan Eaton and Gene Grossman, *Optimal Trade and Industrial Policy Under Oligopoly*, 101 Q. J. ECON. 386 (1986); Paul Krugman, *Industrial Organization and International Trade*, in HANDBOOK OF INDUSTRIAL ORGANIZATION, VOL. II, 1179–1223 (Richard Schmalansee and Robert Willig eds. 1989).

enough to note here that these scenarios represent special cases. For the bulk of industries that operate under competitive conditions, subsidies to exporting firms will confer net benefits on nations that import their production.[11]

The proposition that importing nations usually benefit from the opportunity to buy subsidized goods or services from abroad is plainly at odds with the popular notion that subsidized imports are "unfairly traded." Economists have relatively little to say about what is fair or unfair, and I take no position on the question whether a principled fairness argument offers an objection to subsidized imports. I note only that the same political constituency that benefits from any form of trade protection—namely, import-competing domestic firms—will benefit from countermeasures against subsidized imports as well. Many countries have national laws that authorize countermeasures against subsidized imports under specified conditions. These laws are termed "countervailing duty laws," and will be discussed in more detail below.

III. Legal Background

The original drafters of GATT in 1947 paid little heed to the trade issues associated with subsidies. GATT's lack of attention to the matter was quickly perceived to be unsatisfactory; however, the subsequent history of the WTO/GATT system reflects steadily increasing discipline on the use of subsidies by member nations.

A. Subsidies and Countervailing Measures in the GATT System Prior to the Uruguay Round

The original GATT contained limited provisions with respect to subsidies and countervailing measures, which were embodied in Articles XVI, II, VI and III. Like all of the GATT, these provisions applied to trade in goods but not to trade in services.

GATT Article XVI originally consisted of a single paragraph containing a loose reporting requirement with respect to subsidies that operated to reduce imports or increase exports. Article II:2(b) of GATT authorized the use of countervailing duties (and antidumping duties), even if they resulted in tariff rates that exceeded negotiated tariff commitments, as long as they were imposed in accordance with Article VI. Article VI in turn imposed three significant requirements on the use of countervailing duties. First, any such duty could not exceed the estimated amount of the "bounty or subsidy" granted on a product, although no definition of those terms was included. Second, duties could not be imposed unless "the effect of the . . . subsidization . . . is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry." Finally, to the extent that subsidies might result in lower prices for exportation that could be treated as dumping, no product could be subjected to both antidumping and countervailing duties "to compensate for the same situation."[12] A final provision bearing on the use of subsidies was Article III:8(b). The "national treatment" requirements of Article III broadly required member nations to treat domestic and imported products alike for purposes of domestic tax and regulatory

[11] A detailed exploration of the impact of subsidies on the welfare of importing nations, including a discussion of the strategic trade literature, may be found in Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989).

[12] GATT Art. VI: 3,5 and 6.

policies. Paragraph 8(b) created an exception, stating that Article III did not "prevent the payment of subsidies exclusively to domestic producers."

Thus, the original GATT was quite tolerant of subsidies. It did acknowledge the permissibility of countervailing duties when import-competing industries were injured by subsidies, and it undertook to limit those duties to an amount that would offset the subsidy.

These rules were soon perceived to be inadequate. The first development came with respect to subsidy policies that upset market access expectations under tariff commitments. As early as 1950, a working party found that an unexpected change in subsidy policy that disadvantaged imported goods relative to domestic competitors could be found to deny the benefits associated with a tariff concession, and thus to constitute what is termed a "nonviolation nullification or impairment" of GATT benefits that gives rise to a right of redress under the dispute settlement provisions of Article XXIII.[13]

Article XVI was later amended during a 1954–55 review session to add some commitments to reduce the use of export subsidies. With respect to subsidies on "primary products,"[14] the obligation was to avoid the application of subsidies that resulted in a nation obtaining a "more than equitable share of world export trade." For products other than primary products, the obligation was to avoid subsidies that resulted in a price for exportation of a product that was below the price charged for the like product in the domestic market.[15] Of course, "export subsidies" as defined above will indeed tend to lead to export prices that are below home market prices, and thus the amended Article XVI amounted to something close to a prohibition on the use of export subsidies on other than primary products (although a complaining member nation would likely have had to show a price differential to prevail in the event of a complaint). These amendments, however, were not accepted by all GATT signatories.[16]

In 1960, a GATT working party devised an "illustrative list" of practices that would likely result in the two-tier pricing structure that would violate the obligations of Article XVI with respect to other than primary products. The working party report was "adopted" by the GATT membership and thus became an authoritative basis for determining whether a violation of those obligations was present.[17]

The next stage in the evolution of GATT Subsidies law was an agreement popularly known as the "Subsidies Code," negotiated during the Tokyo Round of the late 1970s. Its principal achievements were three: it tightened the restrictions on the use of export subsidies; it elaborated the procedures that must be followed in investigations that may lead to the use of countervailing duties; and it identified some criteria to be examined in determining whether subsidized imports were a cause or threat of material injury. The illustrative list of export subsidies was included in the Code as an annex. Like the amendments to Article XVI, however, the Code was accepted by only a limited number of GATT signatories.

[13] *See* Report of the Working Party, *Australian Subsidy on Ammonium Sulphate*, II BISD 188 (adopted April 3, 1950).

[14] These were defined as any product of farm, forest or fishery, or a mineral, in its natural form or else processed to the point customarily required for it to be marketed in substantial quantities in international trade. *See* GATT Ad Art. XVI.

[15] GATT Art. XVI:3–4.

[16] For a discussion of their legal status within the GATT system, see JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 371–76 (1969).

[17] See GATT, BISD 9th Supp. 185 (1961).

In sum, the legal environment prior to the Uruguay Round had the following essential characteristics:

— subsidies were generally permissible for domestic producers, although a number of GATT signatories had accepted obligations to reduce the use of export subsidies, especially on other than primary products.
— countervailing duties were permissible if calibrated to the amount of subsidization and based on a finding of injury; a number of signatories had also agreed in the Subsidies Code to follow certain procedures in investigating subsidy allegations.
— new subsidy programs that frustrated market access expectations associated with tariff concessions were understood to give rise to a right of action under GATT.

GATT disputes through the years were clustered around these basic principles. Thus, a few cases challenged subsidy practices as impermissible export subsidies.[18] Occasionally, a dispute would arise over whether a countervailing duty had been imposed in excess of the amount of the subsidy bestowed on the product in question.[19] And new subsidy programs might be challenged as upsetting the expectations associated with tariff concessions.[20]

As for the use of countervailing duties in the GATT system, their use was relatively uncommon. The United States employed them far more often than any other nation. Between 1980 and 1991, only 128 definitive countervailing duties were reported to the GATT Secretariat by all members combined. Of that total, 110 were imposed by the United States.[21]

B. The Uruguay Round Agreements

Two new WTO agreements (in addition to the old GATT which survives in the WTO) bear importantly on the issue of subsidies—the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and the Agreement on Agriculture. (The General Agreement on Trade in Services essentially defers subsidies issues to future negotiations.). The agreements are extremely detailed, and I will not attempt to survey all of their legal provisions, which are discussed in detail in Chapter 16 of this book. Instead, this section lays out the features that raise the most interesting and important economic issues.

1. Subsidies and Countervailing Measures

The SCM Agreement adds a great deal to the law that existed before it. It applies only to trade in goods, however, and its restrictions on the use of subsidies do not apply to

[18] *See*, e.g., Report of the GATT Panel, *DISC—United States Tax Legislation*, BISD 23rd Supp. 98 (presented to the Council of Representatives on November 12, 1976). This report was not adopted until a compromise arrangement in 1981 produced a declaration that affirmed the principles in footnote 59 of the Tokyo Round Subsidies Code. The United States then replaced DISCs with Foreign Sales Corporations (FSCs), a meaure that has been successfully challenged before the WTO. Report on Appellate Body, *United States-Tax Treatment for Foreign Sales Corporations*, WT/DS/04 AB/R (2001)

[19] *See* Report of the GATT Panel*, United States—Countervailing Duties on Imports of Fresh, Chilled and Frozen Pork from Canada*, BISD 38th Supp. 30 (adopted July 11, 1991).

[20] *See* Report of the GATT Panel, *EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, BISD 37th Supp. 86 (adopted January 25, 1990).

[21] *See* JOHN H. JACKSON, WILLIAM J. DAVEY AND ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 768 (1995).

agricultural subsidies that conform to the requirements of the Agreement on Agriculture during the "implementation period" of that Agreement.

The GATT and even the Tokyo Round Subsidies Code contained no definition of the term "subsidy." However, Part I of the SCM agreement defines "subsidy" in some detail. It entails a "financial contribution by a government," in the form of (i) a direct transfer of funds, (ii) a decision to forego revenue that is "otherwise due," (iii) the provision of goods and services, or (iv) an income or price support scheme, *if* the financial contribution confers a "benefit."[22] The requirement that a benefit be conferred makes clear that not all government programs are subsidies—if a government provides goods and services at market prices, for example, no benefit arises and thus no subsidy exists.

The fact that a program is a "subsidy" by this definition is not enough to subject it to WTO constraints. Rather, only subsidies that are "specific" are subject to possible condemnation under WTO law, or to countervailing duties by WTO members. The concept of specificity originated in U.S. law, and relates to the degree of targeting in the government program at issue. Subsidies that are expressly limited to "certain enterprises" are specific, that term left undefined. By contrast, when the program does not "favour certain enterprises over others," but is available on the basis of "objective criteria or conditions" to enterprises at large, it is not specific—an example given of such a criterion would be the number of employees in an enterprise. Subsidies that appear on their face to be non-specific, however, can become specific as applied. Further, subsidies that are limited to a particular geographic region within the jurisdiction of the administering authority are defined to be specific.[23]

A major innovation in the Agreement was the creation of a "red light, yellow light, green light" system to govern subsidies. Two types of "red light" subsidies are completely prohibited—export subsidies, including all subsidies listed in the illustrative list now attached as Annex I, and subsidies contingent on the use of domestic over imported goods. All such subsidies are defined to be "specific" regardless of their details.[24]

The "yellow light" subsidies are termed "actionable" subsidies—they are not prohibited altogether, but may be challenged under certain conditions. A subsidy is actionable if it is specific and if it causes one of three types of hatus to another member: (a) injury to a domestic industry; (b) impairment of the benefits of a tariff concession; or (c) "serious prejudice to the interests of another Member."[25] The first two concepts are familiar from earlier GATT law—injury was required in connection with the use of countervailing duties, and new subsidies were understood to have the potential to impair the benefits of tariff concessions. Previously, however, only the second type of subsidy gave rise to action under GATT law. Subsidies that merely caused injury to an industry in an importing nation were permitted but could be countervailed.

The new conception of harm that did not exist in prior GATT law is "serious prejudice." The types of harm that can justify a finding of serious prejudice include a loss of exports by the complaining member to the home market of the subsidizing member, and a loss of exports by the complaining member to exporters from the subsidizing member in a third country market. Thus, the notion of serious prejudice makes subsidies potentially actionable any time they cause injury to the export industries of other members. Prior law is thereby extended in two ways: an action may be brought when a subsidy displaces

[22] SCM Agreement Art. 1.1.
[23] *Id.* Art. 2 & n. 2.
[24] *Id.* Arts. 3 & 2.3.
[25] *Id*. Art. 5.

exports from the complaining member to a third country market, and an action may be brought when a subsidy displaces exports from the complaining member to the market of the subsidizing country, even if the subsidy would not be deemed to impair market access expectations associated with a tariff commitment (as in a case where there was no tariff binding, or where the subsidy already existed at the time of the tariff negotiations). The burden of proof to show serious prejudice is on the complaining member in general, although under a provision which lapsed in 2000 the subsidizing member had the burden of proving the absence of serious prejudice when the subsidies were of a particular magnitude or type (such as *ad valorem* subsidization of a product in excess of five percent of its value, or subsidies to cover operating losses).[26]

The "green light" subsidies were introduced on an experimental basis for a five-year period, which expired in the year 2000. At present, the experiment has not been renewed. While the "green light" provisions were in effect, certain types of subsidies were "non-actionable" even if they were specific and caused one of the harms enumerated above. The three categories of subsidies temporarily insulated from challenge were: (i) certain R&D subsidies; (ii) certain regional development subsidies; and (iii) certain subsidies for environmental compliance costs.[27] Nations that complied with the restrictions in each category could grant the subsidies without fear of challenge or countervailing measures—the green light rules thus created "safe harbors" for the enumerated government programs.

Much of the SCM Agreement pertains to the imposition of countervailing duties, and sets forth a variety of substantive and procedural restrictions on their use. In large part these were also found in the Tokyo Round Subsidies Code. Substantively, the agreement makes clear that market benchmarks should be used in valuing subsidies,[28] and requires that "all relevant factors" be considered in determining whether injury is present.[29]

2. Agriculture

Agricultural subsidies remain widespread in the global economy, and the Agreement on Agriculture undertakes to limit them. It falls far short of the disciplines contained in the SCM Agreement, however, and was envisioned simply as a first step toward addressing a situation that had become quite unsatisfactory under GATT.

In particular, GATT Article XVI contained a "loophole" for subsidies on primary products, which include all basic agricultural commodities. While amended Article XVI generally prohibited export subsidies on other than primary products, the rule for primary products was simply that export subsidies should not result in the subsidizing nation obtaining a "more than equitable share" of world export trade in the subsidized product. After some wrangling, this test was ultimately found to be too vague to be enforceable, with the result that agricultural export subsidies were completely undisciplined. As noted, GATT had little to say about domestic subsidies either, and so agricultural subsidies became rampant (and still are).

During the Uruguay Round, efforts were made to negotiate limits on agricultural subsidies, but it was clear that major players such as the European Union, the United States and Japan were unwilling to accept dramatic reductions in their farm programs. A decision was made to devise an agreement that could facilitate a gradual reduction in such subsidies over time, by treating them in much the same way as the GATT treats tariffs

[26] *Id*. Art. 6.
[27] *Id*. Art. 8.2.
[28] *Id*. Art. 14.
[29] *Id*. Arts. 15–16.

on goods. Both export subsidies and domestic subsidies became the subject of specific commitments, and nations agreed to limit certain types of domestic and export support programs in accordance with negotiated ceilings. The permissible level of subsidies is scheduled to decline over time, and it is anticipated that future negotiations will produce further reductions.

Annex 2 of the Agreement exempts certain types of domestic support programs from the negotiated commitments. Generally speaking, the types of programs that are exempt are those which have relatively less impact on output—programs that cushion the incomes of farmers, for example, without encouraging them to increase their production. Article 13 of the Agreement also creates some safe harbor provisions for subsidies that conform to the Agreement, exempting them from countervailing duties and the like under GATT.

The arrangements in the Agriculture Agreement are complex and could readily serve as the basis for an entirely separate academic treatment. I will devote relatively little further attention to them here, and will simply note that aside from the introduction of negotiated ceilings and the exemption for domestic subsidies that have less of a distortive effect on output than others, there is little economically novel about the approach of the Agriculture Agreement to subsidies discipline.

IV. An Economic Perspective on the WTO Rules

There are many subtle economic issues relating to the treatment of subsidies under WTO law. I cannot hope to touch on all of them here, and will simply emphasize the most general and important ones.

A. Protecting the Bargain under GATT and GATS

As noted in Part I of this chapter, part of the concern about subsidies in the WTO system relates to the possibility that they will undermine the market access expectations associated with the commitments that members have made to each other. Not all subsidies do so, of course: only subsidies that are unexpected and that alter the competitive balance between exporters and their domestic competitors in a manner that trade negotiators did not anticipate.

Both GATT and GATS respond sensibly to this issue with the "nonviolation nullification or impairment" doctrine. Any change in policy by member governments, including the introduction of new subsidies, may be shown to deny benefits that members reasonably expected to obtain as a result of negotiated concessions. Once this showing has been made, the complaining member is entitled to redress in the form of a withdrawal of the offending measure, or other trade compensation. This policy protects the value of the bargain for all members and thereby encourages more bargains to be struck.

A nice feature of the nonviolation doctrine is the fact that it does not require subsidies to be carefully defined or measured. A complaining member need simply demonstrate that an unanticipated government program has improved the competitive position of domestic firms at the expense of their foreign competition. The administration of the doctrine is thus reasonably straightforward, and the fighting issue is likely to be whether the government policy in question was foreseen by trade negotiators. On that issue, WTO law has also moved sensibly in the direction of a rebuttable presumption that measures introduced subsequent to a tariff negotiation are unanticipated. For measures extant at

the time of the negotiation in question, a rebuttable presumption arises that their effects on the market in question could be anticipated.[30]

The nonviolation doctrine is of no help, however, in addressing the other reasons for concern about subsidies. In particular, it has no bite when a third country introduces new subsidies that result in a shift in business toward its exporters. And it does nothing to address the problem of subsidies that create other economic distortions. These problems bring us to the much more complex (and problematic) rules found in the Agreement on SCM.

B. The Red Light: Export and Domestic Content Subsidies

The GATT system has long viewed export subsidies as particularly problematic, culminating with the prohibited subsidy category in the WTO SCM agreement, which makes it illegal to employ export subsidies in goods markets (save for the agricultural sector). The prohibited category also encompasses, as noted, subsidies that are conditioned on the use by the recipient of domestic over imported goods.

The prohibition on export subsidies has two convincing economic justifications. First, as noted earlier, market access expectations can be upset not only when an importing nation introduces a new subsidy to domestic firms, but also when third countries introduce subsidies that result in a diversion of business to their exporters. A relatively inexpensive way for third countries to divert trade toward their exporters is through the use of export subsidies, and history teaches that nations will employ them in the absence of legal constraint. The prohibition on export subsidies thus eliminates an important policy instrument for export promotion that can erode the benefits of the bargain and thus discourage trade bargains in the first instance. It also ensures that nations will not go down the road of competing with each other to subsidize their exporters.

Second, even if an export subsidy would do nothing to frustrate the market access expectations of other trading nations (as where it is longstanding and fully anticipated), it is almost certainly a source of economic distortion. As noted earlier, economic theory suggests that subsidies can at times serve as a device for remedying market failure. In general, a subsidy to correct a market failure should be made contingent on the activity that is undersupplied because of the market failure.[31] For the reasons given previously, it is exceedingly difficult to imagine a market failure that is best addressed with an export subsidy.

The other "red light" subsidy category, subsidies contingent on the use of domestic over imported goods, presents somewhat more of a puzzle. GATT Article III, a provision now incorporated into WTO law, permits the granting of subsidies exclusively to domestic producers of goods (subject to the possibility that they may be countervailed, and now that they may be "actionable" under certain conditions). Such subsidies, of course, can encourage the production of more domestic goods at lower prices, and result in the purchase of domestic rather than imported goods by buyers. A subsidy to buyers that encourages them to buy domestic rather than imported goods has the same effect. Indeed, a per unit subsidy to all domestic buyers of a good can be completely equivalent in its effects to an equal per unit subsidy to all domestic sellers—net output of domestic producers, net imports, and net price to buyers will be exactly the same under competitive conditions.

[30] *See* Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper,* WT/DS44/R (1998).

[31] *See*, e.g, HARRY JOHNSON, ASPECTS OF THE THEORY OF TARIFFS, 117–51 (1971).

One is led to wonder, therefore, why the domestic producer subsidy is widely tolerated while the subsidy to domestic purchasers conditioned on the purchase of domestic goods is prohibited. By the same token, the prohibition may have little economic bite—a nation that cannot use a subsidy to domestic purchasers can substitute one to domestic sellers, and probably achieve much the same result.

C. Domestic Subsidies and the Definition of Subsidy in WTO Law

As noted, WTO law identifies domestic "subsidies" as financial contributions that confer a "benefit," and makes them actionable or subject to countermeasures only if they are "specific." As such, WTO rules are seriously deficient in relation to a number of the problems with the identification of undesirable subsidies discussed in Part I of this chapter.

First, the existence of a "financial contribution" that confers a "benefit" cannot be analyzed in isolation if the goal is to ascertain the net impact of government on the competitive position of an industry. Often, such benefits will offset by other tax or regulatory burdens, and nothing in WTO law permits such issues to be considered systematically. Although an effort to sort out these net effects would be extraordinarily complicated and fraught with error, to ignore the problem is to render the system unable to detect true subsidization of an industry except by chance.

One argument that might be advanced to rescue the WTO approach in the face of this objection has already been addressed. It is simply baseless to assume that generally applicable tax, expenditure and regulatory programs collectively have a neutral impact on all industries, and that only targeted or "specific" programs can be a source of net benefits. The folly of such an assumption is well-illustrated by considering the sector that most observers would regard as the most subsidized in the world—agriculture. Under the specificity test as it has evolved, a program aimed at growers of particular agricultural product, such as wheat, would be specific. But a program that gave assistance to all farmers regardless of what they grow would not be specific.[32] Thus, the degree to which agricultural subsidies are "specific" will depend in large measure on form rather than substance—governments that bundle farm subsidies together into generally applicable farm programs may escape a finding of specificity, while those with multiple pieces of legislation that each focus on one or a few farm products may not. Although agricultural subsidies are to a considerable degree exempted from discipline under the SCM agreement during the implementation period for the Agriculture Agreement, the broader point remains.

It has also been suggested that targeted programs are more likely than untargeted programs to be motivated by protectionist considerations—the narrower the group of beneficiaries, the argument runs, the more likely that the program in question is a "special interest deal" rather than a program geared to some high-minded purpose. There may be some merit to this argument, but it seems highly speculative. Agriculture once again provides a good example, where the most powerful special interest lobbies in the subsidies sphere often secure government largesse that is deemed non-specific as a legal matter.

In addition, even when an industry is a net beneficiary of government largesse, those benefits may be socially justifiable. Some industries may be a source of positive external economies (most likely in the high technology area), while others may receive assistance because of the desire of the polity to preserve them (cultural industries, family farms?).

[32] This rule is formally embodied in the countervailing duty regulations of the U.S. Department of Commerce. *See* 19 C.F.R. §351.502(d).

Aside from the now expired "green light" subsidy rules, to be discussed below, WTO law does nothing to address the question whether the ostensible "subsidy" addresses some legitimate problem. The specificity test, in particular, bears essentially no relation to this question. Indeed, where a principled justification for a subsidy exists, it will likely arise narrowly and case-by-case, so that the policy response will often appear "specific."

Finally, WTO law to a considerable degree ignores the question whether subsidies have an effect on the output of the beneficiary, and thus the attendant question whether foreign competitors can be harmed by it (and to what extent). There is no requirement that the "benefit" from the subsidy have any effect on production, for example. Likewise, WTO members are arguably permitted to use countervailing duties against measures that confer "specific" "benefits" even if the subsidy program in question has no effect on short run marginal costs or industry capacity.[33] The requirement of injury to a domestic industry prior to the use of countervailing duties might seem to preclude them when no effect of the subsidy on output is present, but that constraint has not materialized in practice given the way that the injury test has been operationalized.[34]

Of course, the requirement that a "benefit" exist imposes some restrictions. A subsidy bestowed long in the past, for example, followed by an arm's-length sale of assets to another party, may have no "benefit" to the owner of those assets presently.[35] Further, in any action predicated on "serious prejudice" under the SCM agreement, the respondent country may be able to rebut the existence of an serious prejudice by showing that the subsidy program in question did not increase output. But on the whole, WTO law does not in general require proof that the subsidy in question has resulted in an expansion of output that has injured the complaining party.

The failure of WTO law to require measurement of the net impact of domestic programs on an allegedly subsidized industries, to assess whether any net benefit to them is justifiable, or to assess the effect of subsidies on output is perhaps unsurprising given the enormous administrative challenges that such inquiries would entail and the difficulties that would attend any effort to achieve consensus on how to undertake them. As a result, however, WTO rules for the identification of problematic domestic subsidy programs are deeply and profoundly flawed from an economic standpoint.

D. The Yellow Light, Green Light Approach

As noted, the SCM agreement goes beyond prior law in making certain domestic subsidies "actionable" (that is, they can be challenged as violations of WTO law and not simply

[33] *See* the discussion of the U.S.-Canadian lumber dispute in JACKSON, DAVEY and SYKES, *supra* note 18, pp. 845–51. The suggestion that only output-increasing subsidies should be subject to countervailing duties is discussed in the sources cited in note 3 *supra*.

[34] Agencies that administer the injury test often look at factors such as the correlation between the volume of subsidized imports and the indicia of injury to domestic firms, for example, which does not establish harm due to the subsidy itself. Indeed, there is a long-running controversy over whether WTO law requires injury to be linked to the subsidy, or simply to the presence of the subsidized imports in the importing nation. *See* the discussion of the material injury test in JACKSON, DAVEY and SYKES, *supra* note 18, pp. 737–46.

[35] *See* Report of the Appellate Body, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products originating in the United Kingdom*, WT/DS138/AB/R, (2000), ¶¶52–68. The proposition that a sale of assets at fair market value cleanses those assets of any "subsidy" previously received may, however, be contested in some instances. If the prior subsidy program resulted in the construction of uneconomical capacity, for example, the fact that it is sold at arm's-length and remains in operation thereafter would not change the fact that the subsidy had caused an expansion of output.

countervailed if they injure an import-competing industry) even if they do not impair market access expectations associated with tariff concessions. The basis for such an action can arise whenever a specific subsidy causes injury to an import-competing industry, displaces exports to the subsidizing country, or displaces exports to a third country market. Subsidies with the potential to cause such effects are colloquially termed the "yellow light" subsidies.

On one level, the opportunity to challenge such subsidies as violations of WTO law is an important step forward for two reasons First, under prior law, domestic subsidies that harmed import-competing industries abroad could merely be countervailed by the importing nation, which is an inferior option for reasons that will be addressed below in the discussion of countervailing duties. As a brief preview of the discussion, countervailing duties do not necessarily discourage undesirable subsidization, and may simply divert subsidized goods to other markets. The waste caused by the subsidy then remains and global economic welfare may worsen rather than improve.

Second, prior law afforded no remedy to exporters when a *domestic* subsidy to competitors caused them to lose exports to third country markets. That is, if country A gave a domestic subsidy to some exporting industry, and that industry expanded its exports to country B at the expense of exporters in country C, the exporters in country C had no legal options for redress. A countervailing duty in their home market is of no help when the harm is suffered in a foreign market. The nonviolation nullification or impairment doctrine is of no use (even if the subsidizing country had bound its tariff on the subsidized good) because the loss of market access occurs in a third country market, not the market of the subsidizing nation. The extension of the concept of "serious prejudice" to cover this scenario thus creates a potentially important new remedy.

Yet, the notion that the "yellow light" category adds valuable new remedies to address harmful domestic subsidies must ultimately rest on the ability of WTO law to identify problematic domestic subsidies in the first instance. That proposition, in turn, brings us full circle to the issues discussed above. If WTO law does a poor job at identifying the net impact of government on industries, a poor job of assessing whether government assistance to industry is justified, and a poor job of determining whether it has a significant impact on foreign competitors, it is not clear that adding new remedial options does anything worthwhile.

As for the now expired category of "green light" subsidies relating to research and development, development assistance to disadvantaged regions, and environmental compliance costs, there are two possible views. The more cynical perspective proceeds from the suspicion that the WTO can never do a good job of identifying undesirable domestic subsidies, and hence that such subsidies should generally be ignored by WTO law unless they upset the market access expectations associated with specific concessions. Then, any set of safe harbor provisions appears a step forward.

But one can also argue that the particular safe harbor provisions created by the green light experiment (with the possible exception of the R&D category) are questionable. A general objection to these provisions relates to the fungibility of money, and the attendant possibility that the safe harbor rules will be subject to abuse. If government provides resources to a firm with environmental compliance costs, for example, what is to ensure that the marginal effect on behavior lies in environmental compliance? Quite plausibly instead, the subsidy may be used to expand productive facilities and increase output with no impact on the environment relative to the counterfactual world without the subsidy (where the firm would still have had to meet its environmental obligations). Likewise, when a subsidy is nominally given for research and development, how can

trading partners be assured it in fact results in more R&D at the margin rather than some other output expanding behavior?[36] In short, the premise that subsidies can be dedicated to particular purposes and shown to be used in that fashion is shaky.

More particular objections may be addressed to each of the three safe harbor categories. The R&D category presents the best case for a safe harbor, in that research and development affords a paradigm example of an activity that *may* generate positive externalities and that *may* be undersupplied by a private market. Yet, nothing in the WTO rules on the subject required any showing that the particular research in question plausibly required subsidization. The opportunity to subsidize was present to the same degree for all industries regardless of their technological progressivity or the difficulty that private actors have in appropriating the returns to innovation. Perhaps administrative considerations dictate a blanket approach, however, and if so then perhaps a safe harbor for R&D has some logic (subject to the caveat above about the fungibility of money).

The category covering assistance to disadvantaged regions is more problematic. All sizable nations likely contain regions with lower than average per capita income, and there is no economic basis to suppose that subsidies for industrial development in such regions will address any market failure. To the contrary, they may induce businesses to locate inefficiently to take advantage of the subsidy, and simply provide an opportunity for the interest groups in pursuit of wasteful subsidies to obtain them more easily.

Subsidies to cover environmental compliance costs are also questionable on economic grounds. To be sure, pollution is the classic economist's example of a (negative) externality. But the usual economic prescription for negative externalities is to require the party that creates the externality to "internalize" it—in the environmental area, the corollary is the well-known "polluter pays" principle. Thus, standard economic models of optimal environmental policy call for polluting activities to be taxed, not subsidized. A subsidy for environmental compliance costs can abate pollution to be sure, but only at the cost of encouraging a larger than desirable scale of polluting activity. It is by no means clear why the WTO should create a safe harbor for the inferior policy instrument of subsidization.

E. Countervailing Duties

For the reasons given in Part I of this chapter, countervailing duties usually strike economists as peculiar. Subsidies may be wasteful, but even when they are the economic loss is generally borne by the taxpayers in the nation that bestows the subsidy. Nations that import the lower-priced, subsidized merchandise are net economic beneficiaries for the same reasons that any reduction in the price of things they buy from abroad is a benefit. When nations respond to subsidies with countervailing duties, therefore, they tend to reduce their economic well-being, other things being equal. The suspicion thus arises that countervailing duties result when well-organized protectionist interest groups use the fortuity of "subsidization" to secure protection from import competition that they might not secure otherwise.[37] The mere threat to use countervailing duties may also be harmful, as it may become the basis for government-to-government "settlement" negotiations that raise prices and achieve effects similar to a cartel.

[36] Other commentators have made similar points. *See*. e.g., William Wilcox, *GATT-Based Protectionism and the Definition of a Subsidy*, 16 B.U. INT'L L.J. 129 (1999).

[37] Studies of the use of countervailing duties in practice suggest that they tend to appear in industries where the forces of protection are active and are pursuing multiple avenues to obtain it. *See* Howard Marvel and Edward Ray, *Countervailing Duties*, 105 ECON. J. 1576 (1995).

Exceptional cases may arise, of course, as suggested by the literature on strategic trade policy and related work. If a foreign government employs a subsidy to shift rents to its firms in an industry that earns better than competitive returns, a countervailing duty of sorts may at times be a rational response (as may other policies, such as competing subsidies).[38] But without dwelling on that rich and complex literature, suffice it to say that the industries which fit the strategic trade framework are limited in number. Moreover, studies of the use of countervailing duties in practice suggest that they are used primarily in established and often declining industries, where technological progress is limited and returns are, if anything, below the competitive level. Such industries do not fit the strategic trade framework.[39] Indeed, nothing in national or WTO law respecting countervailing duties is in any way sensitive to the conditions that strategic trade theory might suggest are relevant to the use of duties for strategic purposes.

Outside of the strategic trade area, the only plausible defense of countervailing duties is the suggestion that they enhance global welfare by discouraging wasteful subsidy practices. Thus, the argument runs, even if the importing nation typically harms itself if one takes a narrow view of countervailing duties, under a broader view all nations are discouraged from wasteful subsidies; global economic welfare increases and all nations on average benefit.[40]

This argument is an empirical claim that cannot be verified or falsified as a practical matter. Nevertheless, there are reasons to doubt that countervailing duties within the WTO system do much to discourage subsidies. As noted earlier, they have been used infrequently and predominantly by only a few nations (most notably the United States). Uncoordinated, unilateral countervailing duties may simply divert subsidized goods to markets that do not employ them rather than discourage wasteful subsidies. The existence of the injury test as a predicate to countervailing duties is a further obstacle to their efficacy in discouraging waste, as it ensures that only a limited number of countries can employ them in response to a wasteful subsidy practice. Of course, nations without an import-competing industry claiming injury and clamoring for protection might have no incentive to employ countervailing duties even if they could use them legally, but this observation simply underscores the reasons why countervailing duties will be used sporadically and in an uncoordinated fashion that greatly reduces their deterrent value. In addition, countervailing duties will never be employed unless the subsidy program becomes known to trading partners, and only then after a lag during which the beneficiaries of the subsidy may derive considerable benefit.[41]

For these reasons, it seems preferable for wasteful subsidy practices to be treated as violations of WTO law, and to be challenged and condemned as such, rather than for importing nations to employ countervailing duties. A successful WTO challenge to a subsidy practice, assuming that the losing nation complies with the ruling, will indeed eliminate the subsidy and the associated economic waste. One could therefore make a strong argument that the provisions of the SCM agreement that authorize and regulate the use of countervailing duties are counterproductive, and that the exclusive remedy for nations adversely affected by a foreign subsidy should be a WTO challenge to the subsidy.

[38] *See* sources cited *supra* note 9.

[39] *See* Marvel and Ray, *supra* note 34; Howard Marvel and Edward Ray, *Countervailing Duties*, in NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS, VOL. I, 538–41 (Peter Newman ed. 1998).

[40] *See* John H. Jackson, THE WORLD TRADING SYSTEM 282 (1997).

[41] Some of these issues are discussed further in James Hartigan, *Perverse Consequences of the GATT: Export Subsidies and Switching Costs*, 63 ECONOMICA 153 (1996); Larry Qiu, *What Can't Countervailing Duties Deter Export Subsidization?*, 39 J. INT'L ECON. 249 (1995).

Before embracing this position, however, one must be careful to recollect the inherent weaknesses of WTO law regarding the identification and measurement of harmful subsidies. To the degree that WTO law is incapable of determining which domestic subsidy programs are truly harmful, the notion that WTO dispute panels should get seriously involved in telling governments how they can spend their money is highly problematic. On this rather pessimistic view, therefore, the role of countervailing duties may be primarily to defuse political pressures for action against "unfair" practices while doing little violence to the ability of sovereign governments to act as they wish.

F. Agriculture

Conventional wisdom has it that the agricultural sector is heavily subsidized in most developed nations. Whatever difficulties may arise in determining the net impact of government on industries in general, most observers seem to agree that agriculture is a net beneficiary of government largesse.

It is ironic that the one sector considered to be the most subsidized is subject to the least degree of discipline on subsidies (among goods markets). As noted, both export and domestic subsidies are generally permissible under the WTO Agreement on Agriculture, though subject to negotiated ceilings and some reduction over time.

The absence of tight discipline on export subsidies is unfortunate for the reasons discussed at length earlier. Export subsidies are almost certainly a source of economic distortion, and indeed the agricultural sector affords a case study of how pressures for competitive subsidization have led trading nations down the road of mutually wasteful expenditures.

The resistance to the elimination of domestic farm programs is likely a source of economic waste as well, for much the same reason that any form of protectionism is a source of waste. But as indicated in the discussion of protective subsidies, it is hardly clear that protection through subsidization is any worse from an economic standpoint than other forms of protection. Thus, if the political equilibrium is such that agriculture must be protected, domestic farm programs may be no more troublesome than border measures.

One objection that might be tabled to the continued coexistence of domestic farm programs and protective border measures for the same commodities (assuming that protection is inevitable) is that multiple protective measures complicate trade negotiations. If country A wishes to bargain for access to the agricultural markets of country B, it is harder to evaluate the benefits of a tariff concession from country B in the face of a subsidy program that also protects farmers in country B. The added transaction costs of negotiation in the face of multiple instruments of protection can be avoided by channeling all protection into a single, transparent policy instrument—this is the essential rationale for efforts in the WTO/GATT system toward "tariffication" of all trade barriers.

Yet, the prevalence of domestic farm programs suggests that border measures alone are inadequate to the task of achieving the anticompetitive purposes compelled by current politics. One need only look at the United States, which is a net exporter of many agricultural commodities, to realize that import restrictions may do little to ensure politically acceptable prices or rates of return to the producers of certain commodities.

Thus, perhaps the best that can be done is to schedule all the protective policies, both subsidies and tariffs, and bargain over both simultaneously to achieve limits on their magnitude. This is the approach of the Agriculture Agreement, and one might reasonably hope that sequential rounds of negotiations over these protective instruments in the

agricultural area will produce gradual liberalization, much as the sequence of negotiating rounds under GATT brought great reductions in the tariffs applicable elsewhere.

There is also something to be said for the effort in Annex 2 of the Agriculture Agreement to favor subsidies that do not encourage output. To the degree that subsidies are being granted for reasons that do not relate to the correction of an externality, programs that confer financial benefits on the intended recipients without inducing an expansion of their output may create fewer distortions. The caveat, of course, relates to the fundamental problem of identifying subsidies in the first instance—an output-expanding subsidy might counteract some distortion associated with other tax and regulatory policies. But in the agriculture sector, where most observers believe that net subsidies are present at the outset, efforts to channel farm aid into programs that do not stimulate agricultural production may make good sense.

V. Conclusion

The WTO legal system does a good job in ensuring that unanticipated subsidy programs do not frustrate the reasonable expectations associated with negotiated trade commitments. It also embodies a sensible prohibition on export subsidies in goods markets outside of agriculture, a prohibition that might usefully be extended to agriculture and services sectors in the years to come.

The system is far less successful in addressing domestic subsidies. Its criteria for determining which government programs are actionable or countervailable are highly imperfect from an economic standpoint, and the challenges associated with efforts to do a better job are vast. It is by no means clear that general principles to sort unacceptable from acceptable domestic subsidy programs can be devised and administered successfully. A better strategy in the end may be to embrace the approach of the Agriculture Agreement, which treats domestic subsidies as a topic of negotiation and allows nations to agree to reduce them product-by-product.

Similarly, it is unlikely that countervailing duties serve an economically useful purpose. They are simply one more arrow in the quiver of import-competing industries that seek protection, and likely have no systematic value in discouraging wasteful subsidy practices. Whatever the rules that determine which domestic subsidies are permissible or impermissible, an argument can be made for eliminating countervailing duties as a remedial measure and substituting an action against the subsidy within the WTO.

BIBLIOGRAPHY

Barcelo, John J., *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 L & Pol. Int'l Bus. 779 (1977).

Brander, James and Barbara Spencer, *Export Subsidies and International Market Share Rivalry*, 18 J. Int'l Econ. 83 (1985).

Diamond, Richard, *Economic Foundations of Countervailing Duty Law*, 29 Va. J. Int'l L. 767 (1989).

Cass, Ronald, *Trade Subsidy Law: Can a Foolish Inconsistency Be Good Enough for Government Work?*, 21 L. & Pol. Int'l Bus. 609 (1990).

Diamond, Richard, *A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law*, 21 L. & Pol. Int'l Bus. 507 (1990).

Dixit, Avinash and Alan Kyle, *The Use of Protection and Subsidies for Entry Promotion and Deterrence*, 75 Am. Econ. Rev. 139 (1982).

Eaton, Jonathan and Gene Grossman, *Optimal Trade and Industrial Policy Under Oligopoly*, 101 Q. J. Econ. 386 (1986).

Gauthier, Gilles, Erin O'Brien and Susan Spencer, Deja Vu, or *New Beginning for Safeguards and Subsidies Rules in Services Trade?, in GATS 2000: New Directions in Services Trade Liberalization* (Pierre Sauve and Robert Stern eds. 2000), pp. 165–83.

Goetz, Charles. Lloyd Granet and Warren Schwartz, *The Meaning of "Subsidy" and "Injury" in Countervailing Duty Law*, 6 Int'l Rev. L. & Econ. 17 (1986).

Hartigan, James *Perverse Consequences of the GATT: Export Subsidies and Switching Costs*, 63 Economica 153 (1996).

Jackson, John H., *The World Trading System* (2d ed. 1997).

Johnson, Harry, *Aspects of the Theory of Tariffs* 117–51 (1971).

Krugman, Paul, *Industrial Organization and International Trade, in Handbook of Industrial Organization, Vol. II* (Richard Schmalansee and Robert Willig eds. 1989), pp. 1179–1223.

Marvel, Howard, and Edward Ray, *Countervailing Duties*, 105 Econ. J. 1576 (1995).

Ordover, Janusz, Alan Sykes and Robert Willig, *Unfair International Trade Practices*, 15 N.Y.U. J. Int'l L. & Politics 323 (1983).

Qiu, Larry, *What Can't Countervailing Duties Deter Export Subsidization?*< 39 J. Int'l Econ. 249 (1995).

Schwartz, Warren F. and Eugene Harper, Jr., *The Regulation of Subsidies Affecting International Trade*, 70 Mich. L. Rev. 831 (1972).

Snape, Richard, *International Regulation of Subsidies*, 14 The World Economy 139 (1991).

Sykes, Alan O., *Countervailing Duty Law: An Economic Perspective*, 89 Colum. L. Rev. 199 (1989).

Sykes, Alan O., *Second-Best Countervailing Duty Policy: A Critique of the Entitlement Approach*, 21 L. & Pol. Int'l Bus. 699 (1990).

Sykes, Alan O., "Efficient Protection" Through WTO Rulemaking, in Roger Porter, Pierre Sauve, Arvind Subramanian and Americo Zampetti eds., *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Washington: Brookings Institution 2001), pp. 114–41.

Wilcox, William, *GATT-Based Protectionism and the Definition of a Subsidy*, 16 B.U. Int'l L. J. 129 (1999).

CHAPTER 42

AGRICULTURE

Kym Anderson*

TABLE OF CONTENTS

I. Introduction 110
II. Defining Developing Country Interests 110
III. The Traditional Issues 112
A. The Legacy of the Uruguay Round Agreement on Agriculture 112
B. The Potential Gains from Further Trade Policy Reform 116
C. What Should be Done to Further the Agricultural Reform Process? 118
D. Why Agriculture Needs Other Sectors in the Next WTO Round 120
IV. Agriculture and 'New' Trade Issues 121
A. Technical Standards, Including SPS and Food Safety Measures 122
B. Agriculture's So-Called Multifunctionality 124
V. Conclusions and Options for Developing Countries 127
APPENDIX Effects of Imposing a Tariff-Rate Quota Regime on the Domestic Price, Trade and Welfare of a Food-Importing Economy 130
Tables and Figure
Table 1 Depth of Uruguay Round Tariff Cuts and Post-UR Bound and Applied Tariffs on Imports, by Sector and Region 113
Table 2 In-Quota and Out-of-Quota Tariff Rates and Estimated Maximum TRQ Quota Rents, Selected Agricultural Products and OECD Countries, 1996 115
Table 3 Sectoral and Regional Contributions to the Economic Welfare Gains from Completely Removing Trade Barriers Globally, Post-Uruguay Round, 2005 117
Figure 1 Domestic Price, Trade and Welfare Effects of an Agricultural Tariff Rate Quota Regime on a Small Economy 130
Bibliography 133

* Professor of Economics and Associate Dean (Research) in the School of Economics and Executive Director of the Centre for International Economic Studies, University of Adelaide (on leave at the Development Research Group of the World Bank since June 2004).

I. Introduction

One of the great achievements of the Uruguay Round of trade negotiations was the bringing of agricultural policies under much greater multilateral discipline through the new World Trade Organization. The Uruguay Round Agreement on Agriculture ("URAA") led to the conversion of non-tariff barriers to agricultural imports into bound tariffs, and those bound tariffs were scheduled for phased reductions, as were farm production and export subsidies, between 1995 and 2000 (or 2004 in the case of developing countries).

This chapter makes several claims. One is that traditional agricultural market access issues remain the main priority for the next round, because agricultural protection rates in OECD countries were still huge at the turn of the century. But 'dirty' tariffication and the introduction of tariff-rate quotas in the URAA mean that large commitments in terms of bound tariff cuts and/or quota expansions will be needed if agricultural protection is to be reduced significantly. Whether that is done in the same way as in the UR (percentage cuts to bound tariffs, export subsidies and domestic support and growth in the share of consumption imported), or whether a more radical approach is needed, is a point for discussion.

Second, for several reasons reforms in other sectors also are important for developing country agriculture, not least because having them on the negotiating agenda can bring to the table groups that can counter farm protectionist lobbies. Adding new issues to the agenda can contribute in a similar way, albeit at the risk of diverting attention away from traditional market access issues.

Third, among the other issues that will be raised in the next WTO round are two of concern to some high-income, food-importing countries. These issues relate to the assertions by these countries that stricter technical barriers to farm trade are necessary for food safety reasons, and that agriculture's so-called 'multifunctional' nature requires that the sector be treated differently from other sectors. If handled badly in the Doha round, both could lead to outcomes detrimental to developing country agriculture.

The chapter begins by making the obvious point that, given the diversity within the group, there is more than one set of developing country interests in agricultural trade issues. Since those interests are not always well understood, an attempt is made to clarify them and identify the extent to which the different sub-groups would benefit from agricultural reform. The chapter then examines the traditional issues as they affect developing country agriculture, before turning to the newer issues including food safety and agriculture's so-called multifunctionality. It concludes by reviewing some of the options facing developing country negotiators.

II. Defining Developing Country Interests

Almost all developing countries have an interest in the agricultural parts of the next round of multilateral trade negotiations, either directly or indirectly. Consider four groups of such countries. First, the exporters of tropical farm products face relatively low tariffs on most of their primary exports, but there are important exceptions such as bananas. Also, they face much higher effective tariffs on many of the processed versions of tropical products, which hinders their capacity to export the processing value-added component.

Second, developing country exporters of farm products grown also in temperate areas (e.g., grains, livestock products, sugar and oilseeds) typically face high import tariffs and restrictive tariff rate quotas when trying to sell into OECD countries' markets. They

have a clear interest in seeing those barriers lowered. It is true that among this group is a subset of developing countries whose exports of farm products enjoy preferential access into OECD countries' markets. In the short term at least, they may lose sales revenue on those items if the OECD countries' MFN tariff rates are lowered. Even so, they may gain enough sales of other farm products whose tariffs have been lowered to more than offset the cut in their margin of preference, and/or they may be able to negotiate compensation.

Third, there are the net food-importing developing countries that fear that agricultural subsidy cuts by OECD countries will lead to higher international food prices for their imports (and perhaps fewer concessional imports via food aid or subsidized sales). Yet even those developing countries need not lose from farm support cuts abroad. If, for example, they are close to self-sufficient in food (as so many net food importers are), and reform abroad raises the international price of food, they may switch to become sufficiently export-oriented that their net national economic welfare rises. A second possibility is that the country's own policies are sufficiently biased against food production that the country is a net importer despite having a comparative advantage in food. In that case, it has been shown that the international price rise can improve national economic welfare even if the price change is not sufficient to turn that distorted economy into a net food exporter.[1] That comes about because the higher price of food attracts mobile resources away from more-distorted sectors, thereby improving the efficiency of national resource allocation. Because of these two possibilities, the number of poor countries for whom a rise in international food prices might cause some hardship is much smaller than the number that are currently not net exporters of agricultural products.

Within developing countries, the vast majority of the poor are in farm households that would benefit directly from a food price rise. Most of the rest of the poor would benefit indirectly from farm trade liberalization via a rise in the wage for unskilled labour, which may be sufficient to more than offset the rise in food prices. Since the more affluent people in cities would find it relatively easy to pay a little extra for food, the vulnerable group of under-employed poor would be quite small and could be compensated with food aid programs at low cost.

Fourth, for those developing countries which are rapidly accumulating capital, developing their infrastructure, and industrializing, their comparative advantage is gradually moving from primary products to (initially unskilled) labour-intensive manufactures. While that lowers their direct interest in agricultural trade reform abroad, it heightens their interest in reducing barriers to their exports of textiles and clothing. That interest of theirs in textile trade is shared by agricultural-exporting developing countries, for if newly industrializing countries ("NICs") could export more manufactures, they would tend to become larger net importers of farm products.[2] Conversely, lowered industrial-country barriers to farm trade would reduce the need for the more land-abundant developing countries to move into manufactures in competition with the newly industrialized ones. This suggests scope for the two groups to band together and negotiate as a single voice calling for barriers to both farm and textile trade to be lowered.

[1] K. Anderson and R. Tyers, *More on Welfare Gains to Developing Countries from Liberalising World Food Trade*, 44 (2) JOURNAL OF AGRICULTURAL ECONOMICS 189 (May 1993).

[2] That is more so the more their government is constrained by WTO commitments from following the earlier EU, Japanese and Korean examples in raising food import barriers increasingly as industrialization proceeds (K. Anderson and Y. Hayami, THE POLITICAL ECONOMY OF AGRICULTURAL PROTECTION, (1986)). Manufacturing exporters in newly industrializing countries have a direct interest in such constraints to agricultural protection growth at home, because farm supports raise the price and reduce the quantity of mobile resources (especially low-skilled labour) available for factory work.

Even if a country's national economic welfare were to decline following the change in its terms of trade resulting from the next multilateral trade negotiations, that does not mean the economy would be better off not participating in the round. On the contrary, that economy's welfare would fall even more if it did not participate, because it would forego the economic efficiency gains from reforming its own policies.[3] There is also the likelihood in the Doha round—already dubbed a "development round' by the EU and others—that participating poor economies that lose from multilateral liberalization could secure more compensation than in previous rounds, in the form of technical and economic assistance commitments.

It is thus in the national economic interest of such countries to be pressured from abroad to commit to such reform, painful though that may be politically for its government. The political pain tends to be less, and the prospect for a net economic gain greater, the more sectors the country involves in the reform. The economic gain is prospectively greater the more sectors it involves because a wider net reduces the possibility that reform is confined to a sub-set of sectors that are not the most distorted. In the latter case, resources might move from the reformed sector to even more inefficient uses, thereby reducing rather than improving the efficiency of national resource use.

Of course net national economic welfare is not the only criterion that drives governments to act as they do. Indeed until recently, it may not have been even a major one. However it is steadily becoming more dominant, for at least two reasons. One is the rapid globalization of the world that technological and economic policy changes have stimulated over the past decade or so, a major effect of which is that economies will be penalized ever-more rapidly and severely through capital flight for bad economic governance. The other reason is the broader mandate of the WTO, which makes it easier now than before the Uruguay Round for developing countries to engage profitably in cross-sectoral exchange of market access commitments. Both developments add a new liberalizing dimension to the domestic political market for protection policies.[4]

With these points in mind, we turn first to examine developing country interests (a) in the traditional market access issues associated with the next WTO round, and then (b) in some of the newer issues.

III. The Traditional Issues

A. The Legacy of the Uruguay Round Agreement on Agriculture

For most farm products and OECD countries, actual tariffs are providing no less protection now than did the non-tariff import barriers of the late 1980s/early 1990s, according to Ingco[5] and the WTO[6]. This is because in most cases tariffs were bound well above the

[3] For empirical support for this proposition, see for example M.D. Ingco, *Has Agricultural Trade Liberalization Improved Welfare in the Least-Developed Countries? Yes*, POLICY RESEARCH WORKING PAPER 1748 (1997) with respect to least-developed countries and K. Anderson and A. Strutt, *Impact of East Asia's Growth Interruption and Policy Responses: The Case of Indonesia*, 13(2) ASIAN ECONOMIC JOURNAL 205–18 (June 1999) with respect to Indonesia. The point is made strongly also in THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES (W. Martin and A.L.Winters eds. 1996).

[4] G.M. Grossman and E. Helpman, *Trade Wars and Trade Talks*, 103(4) JOURNAL OF POLITICAL ECONOMY 675 (August 1995); A.L. Hillman and P. Moser, *Trade Liberalization as Politically Optimal Exchange of Market Access*, in THE NEW TRANSATLANTIC ECONOMY (M. Canzoneri et al., eds. 1995)

[5] M.D. Ingco, *Tariffication in the Uruguay Round: How Much Liberlization?*, 19(4) THE WORLD ECONOMY 425 (July 1996)

[6] WTO, OVERVIEW OF DEVELOPMENTS IN THE INTERNATIONAL TRADING ENVIRONMENT: ANNUAL REPORT OF THE DIRECTOR-GENERAL (15 November 2002), Chart 3.

Table 1: Depth of Uruguay Round tariff cuts and post-UR bound and applied tariffs on imports, by sector and region

	Depth of UR cut in bound tariff rate t (as % of 1 + t)	Post-UR bound tariff rate (%)	Post-UR applied tariff rate (%)	Depth of cut needed in bound tariff rate t (as % of 1 + t) to bring it down to sector's post-UR applied rate	Proportional cut needed in bound tariff rate t (as % of t) to bring it down to region's post-UR average applied rate
AGRICULTURE					
OECD countries	1.5	15	14	0.9	83
Developing economies	4.7	60	18	26.3	78
All WTO members	2.6	24	14	8.1	82
TEXTILES & CLOTHING					
OECD countries	1.4	11	8	2.7	76
Developing economies	4.1	24	21	2.4	45
All WTO members	1.6	12	10	1.8	53
OTHER MANUFACTURES					
OECD countries	1.0	4	3	1.0	35
Developing economies	2.7	20	13	5.8	34
All WTO members	1.3	6	4	1.9	35

Source: Finger and Schuknecht (1999).

applied rates (or the tariff equivalents of the quantitative restrictions) in place at the end of the Uruguay Round. That is true in other sectors also, but to a much lesser extent. Table 1 suggests that a bound tariff cut just forty per cent greater than in the Uruguay Round would bring the average bound rate down to applied rate average for manufactures, whereas for agriculture the depth of cut would need to be three times greater than in the Uruguay Round to close the gap (compare column 1 and 4). The final column of Table 1 (found at the end of the chapter) shows that a one-third cut in the bound tariffs on 'other manufactures' would bring its average down to each region's applied rate average for all goods, whereas for textiles and clothing a cut of about one-half would be needed and for agriculture (including processed food) the cut would have to be about four-fifths.

Binding agricultural tariffs well above applied rates has also allowed countries to vary applied tariffs below the binding so as to stabilize the domestic market in much the same way as the EU has done in the past with its system of variable import levies and export subsidies. This means there will be little of the reduction in fluctuations in international food markets this decade that tariffication was expected to deliver.[7]

Even getting agricultural (and textile) bound tariffs down to currently applied rates on those products would require big cuts. Yet applied rates for textiles and clothing are 2.5 times, and for agriculture 3.5 times, those for other manufactures. Clearly, action

[7] Francois and Martin demonstrate, however, that since many agricultural tariffs are specific and farm prices fluctuate from year to year for seasonal reasons, binding those tariffs does lower both the mean and variance of their *ad valorem* equivalents over time, even when the bindings are well above the applied rates. J.F Francois and W. Martin, *Commercial Policy Variability, Bindings, and Market Access*, EUROPEAN ECONOMIC REVIEW 48(4): 665–79, June 2004.

is needed on two tariff fronts: getting bound rates down to applied rates, and lowering applied rates on these two outlying industry groups—both of which are of vital interest to developing countries.

As if that were not enough, a third front requires attention. Agricultural-importing countries agreed also to provide minimum market access opportunities, such that the share of imports in domestic consumption for products subject to import restrictions rises to at least five per cent by the year 2000 under a tariff rate quota (less in the case of developing countries). Even though within-quota imports attract a much lower tariff than out-of-quota imports, such tariff rate quotas ("TRQs") have several undesirable features: they legitimize a role for state trading agencies, they generate quota rents, they introduce scope for discriminating between countries, and they can reduce national welfare by much more than similarly protective import tariffs.

More specifically the Appendix to this chapter shows, among other things, that:

- in the presence of TRQs the national welfare cost of agricultural protection can be considerably greater than under a similarly protective tariff-only regime, and that cost tends to rise more when there is (as in the latter 1990s) a fall in international food prices;
- with a TRQ regime, a cut in the out-of-quota bound tariff may have only a fraction of the effect on prices and quantities traded (and possibly none at all) of a cut of the same size under a tariff-only regime, not only when the bound rate exceeds the applied rate but also when the applied rate is above the prohibitive tariff in the presence of a TRQ;
- the effect of a tariff cut on national welfare, by contrast, may be much greater when a TRQ rather than a tariff-only regime is in place, depending on how the quota is being administered before and after that reform; and
- an expansion of the market access (quota) commitment need not expand trade and welfare, for it is always possible for the quota administrator to allocate the quotas so as to ensure under-fill such that no more or even less imports in total flow in.

Models such as GTAP (a global economy-wide model) are in principle capable of handling these complications though careful additional programming, but to generate reliable numbers requires also assimilating a much greater volume of policy data than is required when a simple tariff-only regime exists. Until all those data are collected and added appropriately to the model databases, model results of the effects of a cut in the bound tariff will necessarily over-estimate price and quantity effects but may under-estimate the welfare effects of reform.

A number of these undesirable features of TRQs in food-importing countries—1,366 of which have been notified to the WTO—are illustrated in Elbehri et al.[8]. Table 2 summarizes some of the data from that study. The low in-quota and very high out-of-quota tariffs mean potentially huge benefits are going to those allocated quota licenses. In numerous cases quotas are far from being filled, however, one possible reason being that quotas are allocated (inadvertently or deliberately) to imports from high-cost suppliers incapable of making full use of them. And the fact that the quota often represents a high proportion and sometimes one hundred per cent of actual imports suggests that some out-of-quota tariffs are virtually prohibitive.

[8] A. Elbehri, M. Ingco, T. Hertel and K. Pearson, *Agricultural Liberalization in the New Millennium*, WTO/WORLD BANK CONFERENCE ON AGRICULTURE AND THE NEW TRADE AGENDA FROM A DEVELOPMENT PERSPECTIVE (October 1999)

Table 2: In-quota and out-of-quota tariff rates and estimated maximum TRQ quota rents, selected agricultural products and OECD countries, 1996

	In-quota ad valorem Tariff, %	Out-of-quota ad valorem Tariff, %	Maximum quota rents ($US billion)	Quota fill ratio, %	Quota As a % of total imports
European Union					
Wheat	0	87	0.0	21	2
Grains	35	162	0.4	74	26
Sugar	0	147	2.4	100	87
Dairy	24	91	1.1	99	80
Meats	19	128	2.3	100	73
Fruits & vegetables	11	51	0.0	78	20
United States					
Sugar	2	129	1.0	97	76
Dairy	11	70	0.6	77	95
Meats	5	26	0.0	67	102
Canada					
Wheat	1	49	0.0	27	218
Grains	1	58	0.0	5	2400
Dairy	7	262	0.3	100	75
Meats	2	27	0.0	124	72
Japan					
Wheat	0	234	3.4	109	95
Grains	0	491	10.8	109	84
Dairy	29	344	2.8	93	91
Korea					
Rice	5	89	0.0	100	53
Grain	3	326	1.9	148	61
Oilseeds	8	545	0.0	157	62
Dairy	21	106	0.0	85	106
Meats	40	42	0.4	97	77
Fruits & vegetables	47	305	0.0	99	83

Source: Elbehri, Ingco, Hertel and Pearson (1999).

The aggregate level of domestic support ("AMS") for industrial-country farmers was to be reduced to four-fifths of its 1986–88 level by the turn of the century. That too would require only modest reform in most industrial countries, partly because much of the decline in the AMS had already occurred by the mid-1990s. This has been possible because there are many forms of support that need not be included in the calculation of the AMS, the most important being direct payments under production-limiting programs of the sort adopted by the United States and EU. A risk that needs to be curtailed is that the use of such "blue box" instruments, as with exempt "green box" instruments such as quarantine and environmental provisions, may spread to other countries and other commodities as the use of farm income support via trade and direct domestic price support measures is gradually curtailed through the WTO.

Thus, without underrating the Uruguay Round's achievement of establishing rules for agricultural trade and securing some reform, it has to be recognized that very limited progress has been made over the past five years in reducing agricultural protection and market insulation, and a great deal of reform remains to be undertaken relative even to textiles and clothing let alone other manufactures.

B. The Potential Gains from Further Trade Policy Reform

When the implementation of the Uruguay Round is complete in 2005, what will be the potential for further gains from reforming agricultural markets of OECD countries compared with the gains from protection cuts in other sectors; and how large are those potential gains from OECD liberalization compared with gains from developing country reforms? According to a recent paper using Version 3 of GTAP [9], the gains from removing remaining tariffs and subsidies would be huge.[10] That empirical work is in the process of being updated using Version 4 of GTAP.

The economic significance of the projected distortions in the different sectors by 2005 depends not only on the size of the price wedges but also on the size of each sector's production and the importance of its products in consumption. Table 3 suggests that if all merchandise trade distortions were removed globally, almost half (48 per cent) of the estimated global economic welfare gains (ignoring environmental effects) would come from agricultural and processed food policy reform in OECD countries—even though such products in those countries contribute only four per cent of global GDP and less than one-tenth of world trade. Another one-sixth would come from reform of farm and food policies of developing countries (defined here as in the WTO to include newly industrialized countries such as Korea). Textiles and clothing reforms appear pale by comparison with agricultural reform: their potential global welfare contribution is barely one-tenth that of agriculture's (7 per cent compared with 65 per cent). This big difference reflects two facts: one is that projected distortions to prices for agriculture are more than twice those for textiles and clothing in 2005; the other is that textiles and clothing contributes only 1.5 per cent to the value of world production and five per cent to the value of world trade, half or less the shares for farm products.[11]

However, two assumptions are crucial in generating the results reported in Table 3. One is that China and Taiwan are assumed to join the WTO (as they did at December 2001 and January 2002, respectively) and enjoy the same accelerated access to OECD markets under the UR Agreement on Textiles and Clothing ("ATC") as other developing countries that already are WTO members. The other crucial assumption is that OECD countries fully implement the ATC. The latter is far from certain to happen though, particularly if China were to phase out its 'voluntary' export restraints ("VERs") on textiles and clothing by 2005. Dropping either of those assumptions reduces very substantially the estimated gains from Uruguay Round implementation[12], and therefore would raise the potential gains from textile and clothing reform in the next and subsequent WTO rounds.

Even so, agricultural protection would remain far more costly to the world economy than barriers to textiles and clothing trade—and more than twice as costly as protection to other manufactures, despite the latter having much bigger shares in the value of world production and trade than farm and processed food products.

[9] K. Anderson, B. Hoekman and A. Strutt, *Agriculture and the WTO: Next Steps*, 9 (2) REVIEW OF INTERNATIONAL ECONOMICS 192 (May 2001)

[10] Because that computational exercise involved removing all trade distortions, many of the difficulties raised in the Appendix that relate to measuring the effects of partial reform of a tariff rate quota regime, are absent.

[11] Anderson, *supra* note 9

[12] K. Anderson, B. Dimaranan, T. Hertel and W. Martin, *Economic Growth and Policy Reforms in the APEC Region: Trade and Welfare Implications by 2005*, 3(1) ASIA-PACIFIC ECONOMIC REVIEW 1 (April 1997).

Table 3: Sectoral and regional contributions to the economic welfare gains[a] from completely removing trade barriers globally, post-Uruguay Round, 2005

(a) in 1995 US$ billions

Liberalizing region	Benefitting region	Agriculture and food	Other primary	Textiles & clothing	Other manufactures	Total
High Income						
	High Income	110.5	−0.0	−5.7	−8.1	96.6
	Low Income	11.6	0.1	9.0	22.3	43.1
	Total	**122.1**	**0.0**	**3.3**	**14.2**	**139.7**
Low Income						
	High Income	11.2	0.2	10.5	27.7	49.6
	Low Income	31.4	2.5	3.6	27.6	65.1
	Total	**42.6**	**2.7**	**14.1**	**55.3**	**114.7**
All Countries						
	High Income	121.7	0.1	4.8	19.6	146.2
	Low Income	43.0	2.7	12.6	49.9	108.1
	Total	**164.7**	**2.8**	**17.4**	**69.5**	**254.3**

(b) in per cent of total global gains

Liberalizing region	Benefitting region	Agriculture and food	Other primary	Textiles & clothing	Other manufactures	Total
High Income						
	High Income	43.4	0.0	−2.3	−3.2	38.0
	Low Income	4.6	0.1	3.5	8.8	16.9
	Total	**48.0**	**0.0**	**1.3**	**5.6**	**54.9**
Low Income						
	High Income	4.4	0.1	4.1	10.9	19.5
	Low Income	12.3	1.0	1.4	10.9	25.6
	Total	**16.7**	**1.1**	**5.5**	**21.7**	**45.1**
All Countries						
	High Income	47.9	0.1	1.9	7.7	57.5
	Low Income	16.9	1.0	4.9	19.6	42.5
	Total	**64.8**	**1.1**	**6.8**	**27.3**	**100.0**

[a]No account is taken in these calculations of the welfare effects of environmental changes associated with trade liberalization, which could be positive or negative depending in part on how environmental policies are adjusted following trade reforms.

Source: Anderson, K., J. Francois, T. Hertel, B. Hoekman, and W. Martin, "The Cost of Rich (and Poor) Country Protection to Developing Countries," JOURNAL OF AFRICAN ECONOMIES 10(3): 227–257, September 2001.

Moreover, if OECD governments did renege on the spirit of the ATC, for example by using safeguards and anti-dumping measures to limit their textile imports after 'voluntary' export restraints are abolished at the end of 2004, the industrialization of developing countries as a group would slow down and hence their need to depend on farm products to trade their way out of poverty would be greater.

The distribution of the gains across regions that would result from full trade liberalization is clear from Table 3. As always, most of the gains accrue to the liberalizing region. For example, all but one-tenth (12/122) of the gains from high-income countries removing distortions to their trade in farm and food products accrues to those countries.

Even so, that farm trade reform contributes more than one-quarter of the total welfare gains to developing countries from developed countries liberalizing their merchandise trade (12/43). As for developing countries liberalizing their own farm and food policies, three-quarters of the benefits therefrom stay with the developing countries themselves (31/43), and those policies contribute almost half of the gains from those countries' overall merchandise trade reform (31/65).

WTO members were right, therefore, to insist that agricultural reform must continue into the new century without a pause. In particular, developing countries as a group have a major stake in the process of farm policy reform continuing: according to the model results in Table 3, farm and food policies globally contribute forty per cent (17/43) of the cost to developing economies of global goods trade distortions. Textile and clothing policies also harm them greatly, but nowhere near as much as farm policies.[13]

For reasons explained in the previous section, even many food-importing developing economies would benefit from farm policy reforms of high-income countries. For the subset that would suffer a deterioration in their terms of trade, however, the extent of the rise in their food import prices would be very small. The earlier Anderson, Hoekman and Strutt study found that full liberalization of OECD farm policies would boost global agricultural trade by more than fifty per cent, but would cause real international food prices to rise by only five per cent on average, such is the extent of global farm supply response to liberalization.

C. What Should be Done to Further the Agricultural Reform Process?

In terms of farm export subsidies, nothing less than a ban is needed to bring agriculture into line with non-farm products under the GATT. They are, after all, almost exclusively a Western European phenomenon apart from sporadic U.S. involvement: five-sixths of all export subsidies in the mid-1990s were granted by the EU, and all but two per cent of the rest were accounted for by the United States, Norway and Switzerland.[14]

With respect to domestic subsidies, it was hoped that gradual reform of policies of the United States and the EU, in particular the further de-coupling of farm income support measures from production as with America's FAIR Act of 1996, might allow removal of the 'blue box' in the next round of talks (which was an anomaly introduced into the UR negotiations in 1992 simply to satisfy just two members so the negotiations could proceed). Policy developments during 2001–02 in both Brussels and Washington, however, suggest their domestic supports are not likely to be reduced soon. Efforts to tighten the 'green box' criteria, so as to reduce the loopholes they provide for continuing output-increasing subsidies and to further reduce the Aggregate Measure of Support, also may not be able to bear immediate fruit.

But the most important area requiring attention has to do with import market access. Tariffication appeared to be a great step forward. However, the combination of dirty tariffication by developed economies (setting bound rates well above applied rates) and the adoption of very high ceiling bindings by developing economies allows many countries

[13] It should be recognised that these results ignore the effect of tariff preference erosion. In so far as a developing country receives such preferences at present in OECD markets, the above results slightly overstate the potential gains from their reforms.

[14] S. Tangermann and T. Josling, *The Interests of Developing Countries in the Next Round of WTO Agricultural Negotiations*, paper presented at THE UNCTAD WORKSHOP ON DEVELOPING A PROACTIVE AND COHERENT AGENDA FOR AFRICAN COUNTRIES IN SUPPORT OF THEIR PARTICIPATION IN INTERNATIONAL TRADE NEGOTIATIONS 16 (1999).

still to vary their protection as they wish in response to changes in domestic or international food markets. Reducing bound tariffs from 50–150+ per cent to the 0–15 per cent range of tariff rates for manufactures is one of the major challenges ahead. If the steady rates of reduction of the past are used, it will be several decades before that gap is closed—and some time even before many of those bound tariffs reach current applied rates.

At least three options for reducing bound tariffs present themselves. One is a large across-the-board tariff cut. Even if as much as a fifty per cent cut were to be agreed, however, many very high bound tariffs would still remain. A second option is the "Swiss formula" used for manufactures in the Tokyo Round, whereby the rate of reduction for each item is higher the greater the item's tariff level. This has the additional economic advantage of reducing the dispersion in rates that was introduced or exacerbated during the Uruguay Round. In particular, it would reduce many of the tariff peaks and the extent of tariff escalation that bothers developing countries. And a third option is the one used successfully in the information technology negotiations, namely, the "zero-for-zero" approach whereby, for selected products, tariffs are eliminated altogether. In contrast to the second option, this third option would increase the dispersion of tariffs across products, increasing the risk that resources will be wastefully diverted from low-cost to higher-cost activities. While that might appeal as a way of allowing attention to then focus on the politically difficult items such as dairy and sugar, the manufacturing sector experience with long-delayed reductions in protection of textiles and cars makes it difficult to view this third option optimistically as a quick solution.

The just-mentioned tariff reductions refer to above-quota imports. There is also a pressing need to focus on in-quota imports, that is, those that meet the minimum access requirements in the UR Agreement on Agriculture (generally five per cent of domestic sales by 2000 for developed economies). Those quotas were introduced ostensibly to guarantee traditional exporters a minimum level of market access, equal at least to what was available before tariffication, given that tariffs have been bound at rates greatly above applied rates. As many as 36 WTO member countries listed TRQs in their Uruguay Round schedules, of which at least half actively use them. But as the Appendix makes clear, this system of tariff rate quotas ensures that agricultural trade policies continue to be very complex. In particular, their existence reduces the extent to which future tariff cuts will lead to actual import growth in the medium term, and it is worrying that quotas have on average been barely two-thirds filled according to the count of notifications to the WTO Committee on Agriculture during 1995 and 1996.[15]

Agricultural-exporting countries are understandably reluctant to suggest that TRQs be removed, because TRQs provide at least some market access at low or zero tariffs. Nor would allowing TRQs to be auctioned be seen by all as a solution, because that would be like imposing the out-of-quota tariff on quota-restricted trade that the TRQ was designed to avoid. If banning TRQs is not yet possible, the next-best alternative is to expand them, so as to simultaneously reduce their importance, increase competition, and lessen the impact of high above-quota tariffs.

One can imagine an outcome from TRQ expansion that is either optimistic or pessimistic from a reformer's viewpoint. On the one hand, optimists may say: if the TRQs were to be increased by, say, the equivalent of one per cent of domestic consumption per year, it would not be very long in most cases before the quota became non-binding. Expanding the TRQ could thereby be potentially much more liberalizing in the medium

[15] Tangermann and Josling, *supra* note 14

term than reducing the very high above-quota tariffs. Such an approach may require binding within-quota tariffs at a reasonable level (such as that for manufactures).

On the other hand, negotiators familiar with the tortuous efforts to reform the quota arrangements for textiles and clothing trade see the agricultural TRQs as a way of recycling the acronym "MFA" before it disappears in 2004 when the last of the textile quotas are scheduled to be removed. In this case it would stand for a 'multilateral food arrangement'.[16] Since the first inception of textile quotas was around 1960, it looks as if it will take fifty years or so before they are finally abolished. Is that the expected lifetime of agricultural TRQs?

Those with this more pessimistic view may wish to put the case for a more radical approach to the next round of agricultural negotiations, namely to bring agriculture much more into line with the treatment of non-agricultural goods in the WTO. For example, they might call for the total elimination of agricultural TRQs (along with export subsidies and export credits) and a major reduction in bound (out-of-quota) tariffs. To soften the blow of that request, their quid pro quo could be to suggest WTO put less emphasis on trying to discipline farm domestic measures other than direct output-increasing subsidies. The almost infinite scope for re-instrumentation of domestic price-support measures makes disciplining them very difficult anyway. And, as Snape[17] has pointed out, tightening constraints on border measures would ensure an increasing proportion of the cost of support programs would be exposed via the budget and thereby subjected to regular domestic political scrutiny.

D. Why Agriculture Needs Other Sectors in the Next WTO Round

Agricultural negotiations and supportive analytical efforts to date have focused primarily on the traditional instruments of agricultural intervention, namely border measures and producer subsidies. Yet much of the distortion to incentives facing internationally competitive farmers stems from their own countries' non-agricultural policies.[18] Since the WTO negotiations focus on reciprocal exchange of market access concessions, export-oriented farmers have a negotiating interest not only in better access to food markets abroad but also in more competition from abroad in their own economies' markets for non-farm products. That applies not only to industrial goods but also to services.

There are at least three reasons why the WTO's non-agricultural negotiations are relevant to agriculture. One is that the government of a WTO member that imports farm products and exports non-farm goods and services will be more interested in lowering its impediments to agricultural imports if agricultural-exporting members lower their impediments to non-farm imports. This is because its loss in political support from farmers will be compensated by political support from non-food exporters.[19] The second reason has to do with the fact that many non-farm goods and services are needed by farmers as intermediate inputs or to get farm products to the final consumer. If because of trade

[16] J.F. Francois, *Approaches to Agricultural Policy Model Construction*, paper presented at the UNCTAD workshop on Agricultural Policy Modeling, Geneva, 24–25 March (1999)

[17] R.H. Snape, *The Importance of Frontier Barriers*, in PROTECTION AND COMPETITION IN INTERNATIONAL TRADE (H. Kierzkowski ed. 1987)

[18] M. SCHIFF AND A. VALDES, THE POLITICAL ECONOMY OF AGRICULTURAL PRICING POLICY: VOL. 4, A SYNTHESIS OF THE ECONOMICS IN DEVELOPING COUNTRIES (1992)

[19] G.M. Grossman and E. Helpman, *Trade Wars and Trade Talks*, 103 (4) JOURNAL OF POLITICAL ECONOMY 675 (August 1995); A.L. Hillman and P. Moser, *Trade Liberalization as Politically Optimal Exchange of Market Access*, in THE NEW TRANSATLANTIC ECONOMY (M. Canzoneri *et al.*, eds. 1995)

impediments those non-farm products are more expensive than they need be, costs are raised so net farm incomes are reduced.[20] The third reason is that farmers compete with non-farm sectors for mobile factors of production, most notably investment funds and labour. To the extent that a country's non-farm sectors are supported by trade impediments, so its farmers can be disadvantaged by having to pay higher prices for those factors.

There is yet another reason why it is important to have other sectors on the negotiating table at the same time as agriculture. It is that many developing country WTO members are unable to engage in market access exchange just with agricultural goods, as they have relatively little intra-sectoral trade in farm products.

For all these reasons, the probability of the next WTO round delivering further agricultural reforms will be significantly greater if negotiations also seek to achieve protection cuts for other sectors, including services.

Fortunately, services are already scheduled to be on the agenda for the next Round. Further liberalization of manufacturing industries is also required, especially in developing countries where industrial tariff rates are still high. Additional textile and clothing reform, which would give a major boost to developing economies as a group, would encourage labour-intensive industrial production in newly industrializing countries. That would be at the expense of agricultural production in those countries in so far as farm household labour is attracted to factories. Hence it would have the flow-on effect of providing new market opportunities for agricultural exporters in other countries. This shows up even in model simulations involving an across-the-board liberalization in all manufacturing globally[21]. Hertel and Martin's unreported simulation results show that when manufacturing tariffs are cut globally by forty per cent, agricultural exports of developing countries *as a group* would hardly change, but the net food imports of the developing East Asia sub-group would rise by $2.8 billion per year (in 1995 U.S. dollars) while Latin America's and Sub-Saharan Africa's net agricultural exports would rise by $2.5 billion per year.

IV. Agriculture and 'New' Trade Issues

Inclusion of new trade agenda issues in the next round is considered by some developing country negotiators as undesirable because it would distract attention from the market access issues that are deemed to be of greater importance to them. However, their inclusion could have the advantage that more OECD non-agricultural groups would take part in the round which, depending on the issue, could counter-balance forces favouring agricultural (and other sectoral) protection. As well, better rules on some of those new issues would reduce the risk of farm trade measures being replaced or made ineffective by domestic agricultural measures and technical barriers to trade that may be almost as trade-distorting—a risk that has grown considerably in the past year or so.

[20] The importance of post-farm gate activities to farm income increases rapidly with urbanization. It is not uncommon for the costs (including normal profits) of getting a farm product from the farm gate to the retail consumer to be several times the farmer's cost of production of the unprocessed product. Also important to exporters of bulky farm products are maritime shipping costs. Shipping lines not only tend to be owned by OECD firms, but also tend to be cartelized. A recent study by J.F. Francois and I. Wooton, *Trade and Competition in Shipping Services and the GATS*, 9(2) REVIEW OF INTERNATIONAL ECONOMICS (2001) estimated that, depending on the degree of collusion, shippers could absorb, in the form of higher markups, up to half the gains from trade liberalization.

[21] *See, e.g.,* T.W. Hertel and W. Martin, *Developing Country Interests in Liberalizing Manufactures Trade*, paper presented at the WTO/WORLD BANK'S CONFERENCE ON DEVELOPING COUNTRIES IN A MILLENNIUM ROUND (September 1999)

Such issues as competition policy and investment policy are as relevant for developing country agriculture as for other groups. However, since they may not be included in the Doha round, and their implications for agriculture are in any case discussed well elsewhere,[22] attention in the rest of this section is focused on the interests of developing countries in two emerging issues that very directly affect agriculture. They are the issues surrounding (a) technical standards, including SPS and food safety in the wake of the new biotechnologies, and (b) agriculture's so-called multifunctionality.

A. Technical Standards, Including SPS and Food Safety Measures

The inability of the Standards Code that came out of the Tokyo Round to adequately address sanitary and phytosanitary ("SPS") issues, plus the desire to reduce the risk of re-instrumentation of agricultural support to SPS measures in response to the reforms committed to under the URAA, gave birth to the SPS Agreement during the UR. That agreement defined new criteria that had to be met if a country chose to impose regulations more onerous than those agreed in international standards-setting bodies. It, together with the UR's strengthening of the dispute settlement procedures at the WTO, was bound to raise the profile of SPS matters. That profile has been raised even more dramatically, especially in Europe, with the emergence of several food safety issues: 'mad-cow' disease, beef hormones, and transgenic food products or genetically modified organisms ("GMOs").

Developing countries have a complex set of interests in these developments. One is that the SPS Agreement requires a WTO member to provide scientific justification for any measure that is more trade-restricting than the appropriate international standard would be, and to assess formally the risks involved. At least some technical assistance to help developing countries meet these requirements has been provided, but more may be needed.

A second interest is in maintaining and increasing access to other members' markets that are protected by SPS measures. Again some technical assistance in meeting those importers' standards is helpful. However, numerous countries use very blunt quarantine instruments that excessively restrict imports well beyond what is necessary for protecting the health of their plants and animals, or their citizens in the case of food safety concerns. For example, there are outright bans on imports of many products, including into agricultural-exporting countries seeking to preserve a disease-free image. The levels of protection involved are in some cases equivalent to tariffs of more than one hundred per cent. Without some form of notification requirement on WTO members that forces members to disclose the degree to which trade is restricted by such measures, reform in this area is likely to be confined to the very small proportion of those cases that are brought before the WTO's dispute settlement body ("DSB"). The resource requirements of such legal proceedings ensures that the pace of reform by that means alone would be glacial, and would be skewed towards concerns of those richer WTO members able to afford to bring such cases to the DSB.

Who gains and who loses from an SPS measure varies from case to case, depending on how widespread are the externalities affecting production and/or consumption. In the straightforward situation where the import restriction is aimed simply to prevent the rise in the cost of disease control for domestic farmers, the latter group gains at the expense of domestic consumers and overseas producers. James and Anderson[23] provide

[22] e.g., Tangermann and Josling, *supra* note 14

[23] S. James and K. Anderson, *On the Need for More Economic Assessment of Quarantine Policies*, 41 (4) AUSTRALIAN JOURNAL OF AGRICULTURAL AND RESOURCE ECONOMICS 525 (December 1998)

an example where the cost to consumers is likely to have outweighed any possible benefit to producers, resulting in a net national loss (not to mention the loss to potential overseas suppliers) from apparently excessive protection in that case where broader externalities appeared to be absent.

Those domestic consumers are unlikely to be a source of pressure for liberalization of quarantine barriers, however, and not just for the usual reasons (poor information, high costs of collective action because of free riding, etc.). As well, citizens are often concerned about possible risks to the natural environment from importing exotic diseases and/or about the safety of imported food. And their demands for higher quality, safer food and for environmental protection are going to continue to rise with their per capita incomes.

However, perceptions about the safety of different foods and food production and processing methods, and conformity assessment procedures, differ greatly—even among countries with similar income levels. The WTO Dispute Settlement case, brought by the United States and Canada against the EU over its ban on imports of beef that had been produced with the help of growth hormones, shows that standards differences across countries are difficult to resolve even with a great deal of scientific advice. So too does the controversy over the banning of intra-EU beef trade over the 'mad-cow' disease scare. How much more, then, are trade disputes likely to arise over issues in which the scientific evidence is far less complete? Thus not having consumers' concerns represented in the SPS Agreement has been a two-edged sword: on the one hand it has meant the absence of a voice arguing that domestic consumers should have better access to lower-priced imported food currently excluded by excessive quarantine regulations; but on the other hand it has kept out of the SPS debate such issues as the consumers' 'right to know' via, for example, labeling. That latter concern is not going to disappear though. On the contrary, it is likely to show up in dispute settlement cases under the WTO's Agreement on Technical Barriers to Trade ("TBT").[24]

Whether or not wealthy consumers are irrational and hyper-risk averse when it comes to food safety issues is not really the point. Providing them with more scientific information, and improving the reputation of national, regional and international standards-setting bodies, may be valuable initiatives but they may do little to alter consumer opinions in the medium term, and in any case such information is scarce on new issues.[25]

In the case of policy dialogues surrounding GMOs, far more heat than light has been generated so far. Attempts to promote science-based assessment of the risks involved have met with extreme versions of the precautionary principle, manifest in the form of compete bans on their production, importation and/or sale in numerous markets. Proposed solutions such as segregating GMO products and identifying them via labels on affected food items have been rejected by many consumer groups; they have also been resisted by the major producing countries in North and Latin America, who claim that 'like' products are involved and so no costly GMO labeling is warranted. The fact that the production of some GMO products is less damaging to the environment than is the production of traditional farm products has done little to dissuade civil society groups of their opposition to GMOs.

[24] Indeed one paper has already been posted on the Internet advocating activists to argue under the TBT Agreement for the right of WTO member governments to require compulsory labeling of products containing GMOs sold in their markets (M. Stillwell and B. Van Dyke, *An Activist's Handbook on Genetically Modified Organisms and the WTO*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (1999)).

[25] L.P. Mahe and F. Ortalo-Magne, *International Co-operation in the Regulation of Food Quality and Safety Attributes*, in PROCEEDINGS OF THE OECD WORKSHOP ON EMERGING TRADE ISSUES IN AGRICULTURE (October 1998); S. Henson, *Regulating the Trade Effects of National Food Safety Standards*, OECD WORKSHOP ON EMERGING TRADE ISSUES IN AGRICULTURE (October 1998)

How are developing countries affected by this issue? Two ways in particular are worth noting: one is via the impact of the new technology in so far as it is lowering costs of food production; the other is via any food trade barriers that may be erected in response to consumer concerns in (mostly OECD) countries. The former would benefit those food-exporting developing countries able to attract the new technology, which places a premium on them having in place sound intellectual property law and enforcement (because seed companies would otherwise be wary of selling into or producing in such countries). If they cannot make productive use of the new biotechnologies, however, their competitiveness on international markets may be eroded as international food prices come down. Net food importing developing countries could benefit from that price fall (subject to the provisos discussed in the first section of this chapter), and perhaps even more so if OECD countries ban imports of GMO products. The likely impact is clouded, however, by the fact that a premium might be attached to GMO-free products in international trade. This is clearly an area requiring more empirical economic research, ideally taking into account the impact of the new biotechnology on the competitiveness of the often-multinational input-supplying firms (to examine the extent to which such firms, rather than farmers or consumers, may capture the gains from the new technology).

While such agricultural issues will arise increasingly under the Uruguay Round's SPS and TBT agreements, they will also arise in other, non-agricultural-related contexts. As with state-trading, subsidies, and competition policies, there is a strong case for developing common disciplines for all types of products, whether agricultural or not. In the case of TBT, there is nothing special about food as compared with, say, dangerous chemicals or heavy metals involved in the production or disposal of manufactured goods. A key advantage of having a common set of rules for risk analysis and risk management is that inconsistencies in current arrangements, and the problems that will keep causing for dispute settlement, would be reduced.

B. Agriculture's So-Called Multifunctionality

Considerable attention has been given in some OECD countries to the term 'non-trade concerns', which appears in Article 20© of the URAA. WTO members agreed that, in negotiating the continuation of the agricultural policy reform process after 1999, 'non-trade concerns' would be taken into account. While not spelt out in any detail, the preamble to the URAA defines those concerns to include security of food supplies and protection of the environment. A third concern is the viability of rural areas. The governments discussing these three items are characterizing them as positive externalities and in some cases public goods that are jointly produced along with food and fibre. Hence their use of the word 'multifunctionality' to describe these features of agricultural production.

Does agriculture deserve more price support and import protection than other sectors because of the non-marketed externalities/public goods it produces jointly in the process of producing marketable food and fibre? That is, do these unrewarded positive externalities exceed the negative externalities from farming by more than the net positive externalities produced by other sectors? If so, to what extent if any are those farmer-produced externalities under-supplied? And where there is under-provision, what are the most efficient ways to boost their production to the socially optimal levels?

So-called 'non-trade' concerns are becoming an issue in the WTO in numerous areas, not just with respect to agriculture. They are a direct consequence of the lowering or outlawing of trade barriers: with less natural and governmental protection from import competition, domestic policies are becoming relatively more important as determinants of

the international competitiveness of certain industries. Despite their 'non-trade' adjective, these concerns need to be dealt with in the WTO because they certainly can affect trade. Ideally they should be handled in the same way for all sectors (for example, under an expanded Agreement on Subsidies and Countervailing Measures), but until that is done they cannot be ignored in the up-coming agricultural negotiations.

These concerns are not really new, but they are being packaged a little differently than in the past. A key question at stake is: do they require exceptional treatment, or are WTO provisions sufficient to cater for them, for example via the URAA's 'green box'? The short answer appears to be that WTO provisions are adequate for dealing with the main cases raised.

Both economic theory and policy practice have taught us at least five lessons of relevance to this issue. First, where there are several policy objectives, an equal number of policy instruments typically is required to deal efficiently with them. Second, the most efficient/lowest cost policy instrument or measure for achieving a particular objective (such as overcoming a market failure) will be that which addresses the concern most directly. Third, trade measures in particular are rarely the most efficient instruments for addressing 'non-trade' concerns. Fourth, trade reform will be welfare-improving so long as optimal domestic interventions are in place to deal with those 'non-trade' concerns. And fifth, whenever governments intervene in a market, even if it is to overcome a market failure, there is the risk of government failure—and that could be more welfare-reducing than the market failure the intervention is trying to offset. The government failure could result simply from there being insufficient information and analysis available to design an appropriate intervention (bureaucratic failure); or it could result from deliberate action at the political level aimed at rewarding particular groups covertly for their political support, even though that intervention may be costly to the community at large.

Every productive sector generates both marketed and non-marketed products. Some of those non-marketed products are considered more desirable than others, and some are considered undesirable. Since tastes and preferences change over time and differ between countries, so too will society's valuation of those non-marketed products. And as technologies, institutions, policy experiences and market sizes change in the process of development, so will the scope for being able to market some of those previously unmarketable products that were jointly produced with each sector's main products.

For a case to be made that farming should receive more assistance from government than other sectors, it needs to be demonstrated that agricultural production not only is a *net* contributor in terms of externalities and public goods, but also is *more* of a net contributor than other sectors and especially the sectors that would expand if agricultural supports were to shrink. Demonstrating that is an almost impossible task, given the difficulties in obtaining estimates of society's ever-changing (a) evaluation of the myriad externalities and public goods generated by the economy's various sectors and (b) marginal costs of their provision. Hence the practice of intervening only in the most obvious situations requiring a correction.

Even if a clear case could be made for an intervention, the appropriate measure is unlikely to be import restrictions or output price supports for a broad range of marketed farm commodities. Rather, it will be a finely tuned measure to encourage the optimal extra amount of just the public-good or external aspect that has been under-supplied (or would be under laissez faire).

The policy task thus involves several steps: to get a sense of *society's willingness to pay* for the non-marketable by-product; to determine the *most efficient policy instrument* for encouraging farmers or others to supply that by-product for society; and then to

determine the *optimal level of encouragement* so as to equate the marginal social benefit with the marginal social cost of that intervention, bearing in mind the risks associated with one or both forms of government failure identified above.

Some of the more-specific conclusions from a recent review of these issues[26] are worth stressing. First, several policy instruments will be necessary to address efficiently (which means directly and precisely) the numerous policy objectives encompassed in the 'non-trade' concerns. General agricultural price support programs are not among the efficient measures. This is true even of direct domestic supports, let alone indirect supports via import barriers or export subsidies (which also distort consumer prices), because—to use the surgical analogy—those instruments are far too blunt to efficiently achieve the specific objectives involved.

With respect to food security, the most efficient policy instrument for boosting it above that provided under free markets is probably subsidies to stockholding of staple foods. That is already allowed for in Annex 2 of the URAA. Import restrictions to boost self sufficiency, far from helping, may even diminish food security for vulnerable groups struggling to pay the high price of protected domestic food. And once bound tariffs are lowered to applied rates, greater stability in international food markets will prevail which will boost food security in all parts of the world.

Environmental protection has many facets and so requires a range of policy instruments. Reducing farm output price supports, as under the URAA, probably provides the single biggest potential contribution to the rural environment in agricultural-protectionist OECD countries, through lowering the level and intensity of farm production. While those supports are still in the process of being phased down, there should be additional taxes, charges or other regulations on pollution from farm inputs to offset the extra damage caused by them via output price supports. Such input taxes are of course permitted under WTO rules. In so far as agriculture provides positive externalities or public goods, appropriate policies are de-coupled payments for their specific provision to the optimal level in each location (assuming that optimal level is above the level that would otherwise prevail, bearing in mind the marginal social cost of further provision). Since most of those goods can be provided independently of farming per se, de-coupling is not only possible but also desirable, because non-farmers may be able to provide some of those goods or services at lower cost than farmers. Some provision for such payments is made both in the URAA and in the WTO Agreement on Subsidies and Countervailing Measures.

Ensuring the viability of rural areas also is a laudable goal, but again the blunt instrument of general farm product price supports is far from optimal, particularly since agriculture is not even the dominant source of income in many (particularly near-urban) rural areas. Far more appropriate are WTO-consistent targeted adjustment assistance (including re-training) packages and perhaps subsidies to essential services that would otherwise be withdrawn from strategic left-behind remote areas.

In short, WTO rules and URAA reform commitments are not at all incompatible with the adoption of efficient measures for addressing the so-called 'non-trade' concerns discussed above. There is plenty of synergy and no need for trade-offs between domestic policy objectives and agricultural protection reform objectives as embodied in WTO

[26] K. Anderson, *Domestic Agricultural Policy Objectives and Trade Liberalization: Synergies and Trade-offs*, in PROCEEDINGS OF THE OECD WORKSHOP ON EMERGING TRADE ISSUES IN AGRICULTURE (October 1998) and published in revised form as *Agriculture's Multifunctionality and the* WTO, 44 (3) AUSTRALIAN JOURNAL OF AGRICULTURAL AND RESOURCE ECONOMICS 475 (September 2000)

rules. However, it needs to be recognised that some re-instrumentation of farm support measures is inevitable and is already evident as traditional measures (tariffs, export subsidies and domestic price supports) are phased down. Getting a particular measure included on the list of 'green box' measures, in order for it to be excluded when calculating the Aggregate Measure of Support, will be a much sought-after prize by agricultural protectionist forces during the next round of WTO negotiations. Careful scrutiny of the grounds for such inclusions is likely to be a high payoff activity for developing country trade negotiators in the period ahead.

Both exporting and import-competing countries should welcome the call for closer scrutiny of instruments used for addressing 'non-trade' concerns. This is partly because once those superior instruments are identified and adopted at closer to optimal levels, greater food security and environmental protection will result. But perhaps equally importantly, the current blunt instruments of support to farm product prices could then be dismantled more rapidly, as there would be even less reason to maintain them. Consumers, taxpayers and exporters of non-farm products in the countries protecting farmers, together with the world's more-efficient farmers, could then join with those anxious to conserve global resources in celebrating this improvement in the management of our economy and environment.

V. Conclusions and Options for Developing Countries

The next WTO round has already been dubbed a 'development' round by several prominent EU spokespersons. This is partly a response to the disappointment expressed by developing countries in the extent to which they perceive they gained from the Uruguay Round, and partly a reflection of the fact that their weight in the WTO has grown considerably. Developing countries now comprise almost five-sixths of the WTO membership, and that share is to continue rising as the thirty or so developing and transition economies currently in the midst of accession negotiations gradually complete that process, many before the end of the next round.

The Doha round thus offers probably the best prospects ever for developing countries in general—and their rural communities in particular—to secure growth-enhancing reforms. In the mercantilist tradition of multilateral trade negotiations this will necessarily take the form of requests and offers, but it should be recognized that the so-called concessions that are offered are in fact beneficial to the economies making those reform offers: a win-win game in terms of nations' economic welfare.

Traditional agricultural market access liberalization should be the key priority issue in the next WTO round of multilateral trade negotiations, given the enormous potential for global and developing country welfare gains from reducing agricultural protection. Assurances are also needed that the EU and the United States will honour fully the spirit of their commitment to gradually expand market access for textiles and clothing, and not simply replace the remaining quantitative restraints on trade in those products with 'safeguard' measures by the end of the phase-out in 2005. Substantial progress in freeing up more trade in both these sectors is essential if the next round is to be a genuine development round.

Such reform could boost enormously the earnings of the world's poor, the vast majority of whom are in rural households of developing countries. Rural households would benefit even in newly industrializing economies that take advantage of expanding opportunities to export textile products, for example through some of their household members moving to new jobs in nearby clothing factories.

From an agricultural development perspective, attention should focus also on reducing protection granted to other manufacturing and services industries. Protection in those sectors still bestows a significant anti-agricultural bias in many developing countries, making it more difficult for them to benefit from the agricultural and textile trade reforms of OECD countries. Those reforms can be done unilaterally, but the next WTO round offers an opportunity to obtain a quid pro quo, and can be a useful instrument through which to lock in such reforms domestically.

This next round will, however, be conducted in an environment in which globalization forces (including ever-faster development and international transfers of information, ideas, capital, skills and new technologies) will, by having ever-stronger impacts on domestic markets, simultaneously trigger insulationist policy reactions. For example, further reductions in traditional measures of farm protection will meet significant resistance in numerous OECD countries, as farm groups join with food safety and environmental groups to argue for new forms of agricultural protection.

In these circumstances the mercantilist nature of trade negotiations may require that the agenda of the next WTO round include not only other sectors but also some "new trade agenda" items such as investment and competition policies, so as to provide the potential for beneficial issue linkages and tradeoffs. Such new items may cause political and administrative difficulties in some developing countries, but they also create additional opportunities to secure domestic reforms that would boost their economies. Limited analytical and negotiating resources in developing countries make a number of them hesitant about having lots of new issues in the next round, to say the least. But developing countries may need to agree to discuss at least some of the new trade issues if they want to ensure agricultural (and textile) market access remains high on the WTO's agenda.

Given the apparent good will towards making this next WTO round a development round, and given that many developing countries have embraced major reforms unilaterally during the past decade or so,[27] perhaps developing countries should adopt a quite different approach from the past this time. Consideration might be given, for example, to exchanging more MFN market access with OECD countries rather than seeking special and differential treatment ("S&DT") and tariff preferences. S&DT simply allows developing country governments to continue to keep shooting their economies in the foot by delaying beneficial reforms; and tariff preferences tend to divide developing countries into sub-groups, thereby weakening their individual and collective bargaining strength.

A striking example of the latter has been exposed in the prolonged and extremely costly dispute over access to the EU market for bananas. The EU policy regime involves layers of preferences that have divided developing countries into 'we' and 'they' groups and thereby weakened their chances of securing a better deal for all.

Another illustration of how preferential treatment has reduced the resolve of developing countries to push for OECD farm policy reform has to do with their food imports from the protectionist countries. Food export subsidies, export credits and non-emergency food aid all are by-products of OECD farm support programs. Without those programs most developing countries would be better off through expanded trade opportunities, and those that would not could be compensated with expanded access to OECD markets for tropical products and/or direct financial aid (which would be a far more efficient way of transferring resources to developing countries than doing it in kind as a way of disposing of surpluses).

[27] C. Michaelopoulos, *The Integration of Developing Countries into the Multilateral Trading System*, MIMEO, WORLD BANK AND WTO SECRETARIAT (1999).

With these examples in mind, would developing countries' interests be served by the new EU proposal for OECD countries to provide preferential access to exports of least-developed countries? If the things that matter (such as agricultural and textile products) were to be effectively excluded from such a deal, little of substance would be gained by the least-developed countries, and yet those countries would then feel less able to join other developing countries in seeking lower MFN tariffs on products of export interest to all developing countries. Meanwhile, OECD countries could use this initiative as an excuse for not reforming as much in the key areas.

All this suggests a potentially high payoff for developing countries acting collectively to push hard for greater market access for farm and textile products, and for technical and economic assistance to aid their reform processes, in return for providing more access to developing country markets for goods and services. The political price of the latter offer is, after all, now much lower than it used to be: the forces of globalization are such that economies are now rewarded more, via inflows of foreign capital, for good domestic economic governance, but they are also penalized more if poor policy choices are not corrected. Two such corrections that would at the same time help the cause of reducing agricultural protection abroad would be for developing countries to commit to not using taxes or other restraints on agricultural exports, and to reduce their (often very high) ceiling bindings on their own import tariffs on farm products.

More specific requests that developing countries might put on their wish-list include the following:

- remove tariffs on tropical (including processed) agricultural products,
- replace specific with ad valorem tariffs on imports of interest to developing country exporters, since the former (which apply to 42 per cent of U.S. and EU agricultural tariffs) discriminate against products of lower quality and ones whose international price is declining through time,
- use the Swiss formula approach in making market access commitments, since that will reduce tariff peaks and escalation most,
- seek a firm phase-out date for agricultural TRQs, as was obtained for textiles and clothing in the Uruguay Round, but with limits on the extent to which safeguards can replace the quantitative restrictions at the end of the phase-out period,
- seek firm commitments, preferably written into OECD countries' schedules, on the extent of economic and technical assistance to cope with adjustment to reforms, especially for least-developed and net food-importing developing countries, and
- support the liberalization of trade in maritime services, given the potential for the cartelized OECD firms that own most of the liners to extract, via higher markups, much of the exporters' gain from goods trade liberalization.

Finally, what else should developing countries do to help their own reform processes complement those abroad? One obvious thing is to direct new economic and technical assistance funds towards reducing the under-investments in rural infrastructure (human as well as physical), agricultural research and development, and agricultural technology transfer. Liberalizing foreign investment rules and improving intellectual property law enforcement would enhance the prospects for both transfers of new biotechnologies and their further development locally. And removing domestic disincentives to farmers in the form of agricultural export taxes, manufacturing protection, and over-valued exchange rates remain essential.

APPENDIX

EFFECTS OF IMPOSING A TARIFF-RATE QUOTA REGIME ON THE DOMESTIC PRICE, TRADE AND WELFARE OF A FOOD-IMPORTING ECONOMY

Consider an economy that imports an agricultural product imposes a tariff-rate quota ("TRQ") regime under the rules of the Uruguay Round Agreement on Agriculture. That involves setting a bound tariff (typically more than the tariff actually applied) on out-of-quota sales and a lower in-quota tariff for a specified volume of imports. As is clear from Table 1, the extent of the difference between those two tariff rates for various products and OECD countries is considerable.

The initial impact of imposing such a TRQ regime is depicted in Figure 1 where this economy's import demand curve for the product is line D. For simplicity, the economy is assumed to be a sufficiently small player in the global market for this product that its imports do not affect the international price, and its in-quota tariff is assumed to be zero, in which case the quota volume, Q, is imported at the international price P*.

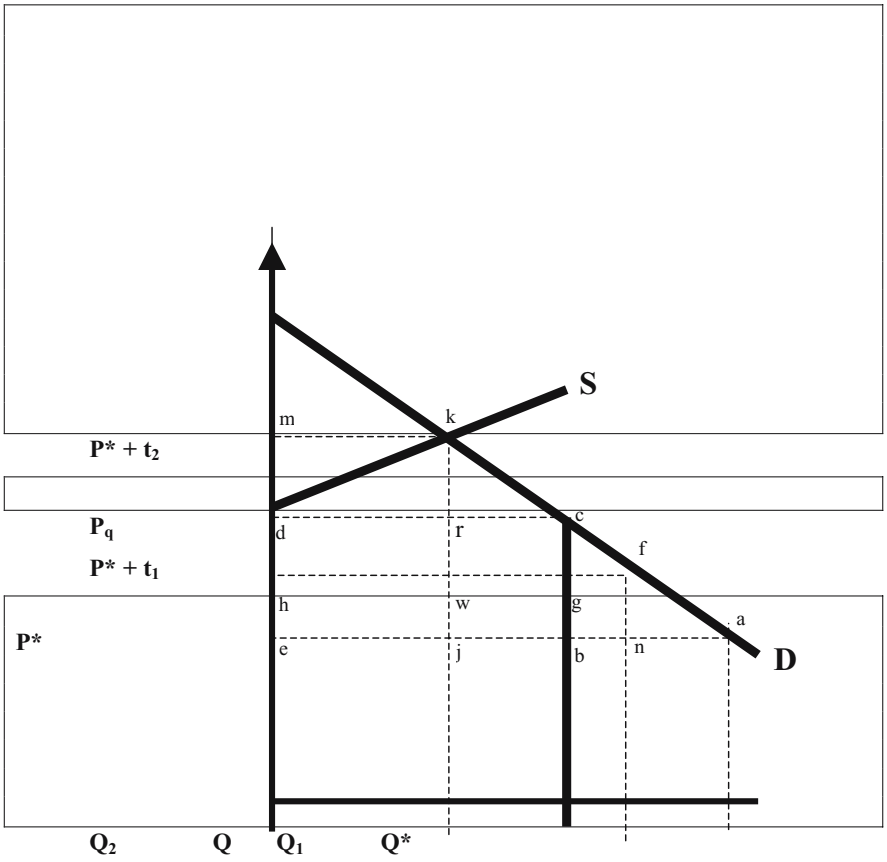


Figure 1: Domestic price, trade and welfare effects of an agricultural tariff rate quota regime on a small economy

If this was an import quota regime (now illegal under WTO), the domestic price would be P_q and the national economic welfare loss from restricting imports to Q, instead of allowing the free-trade volume Q*, would be area *abc* plus a percentage of the potential quota rent which is area *bcde.* What that latter percentage is depends on how the import licenses are administered: it is zero only if all licenses go to domestic firms and those firms are allowed to import from the lowest-cost suppliers abroad. (By contrast, if say only Q_2 of the Q units were allocated to domestic firms, the national welfare loss would be greater by area *bcrj*.)

It is possible to achieve the same outcome under a TRQ regime as under a traditional import quota. In terms of Figure 1, all that is required is to set the out-of-quota applied tariff (and therefore the bound rate) at $P_q - P^*$ per unit or more.

Only if the out-of-quota applied tariff is set at a value of less than $P_q - P^*$ per unit would there be any out-of-quota imports under a TRQ regime. If the applied rate was set at the specific rate of t_1 per unit, for example, the domestic price would be $P^* + t_1$ and an additional $Q_1 - Q$ units would be imported. Compared with a prohibitive out-of-quota tariff, this would generate less potential quota rent (lower by area *cdhg*) but would cause domestic consumer surplus net of domestic producer surplus to be higher by area *cdhf*, and tariff revenue of area *fgbn* would be collected by the government. Hence net economic welfare would be greater by area *fcbn* as compared with no out-of-quota imports, again assuming all licenses go to domestic firms and those firms are free to source imports from the lowest-cost suppliers abroad.

If some licenses are made valid only for imports from high-cost foreign suppliers (as applies for some products under the European Union's Lome Convention, for example), this importing economy's welfare would be further reduced. It could be reduced by even more than the maximum quota rent for volume Q (area *bcde*). Suppose, for example, the licenses are restricted to imports from a set of countries whose export supply curve measured at cif prices is line S. Even if the out-of-quota applied tariff was more than t_2, those foreign suppliers could afford to export only Q_2 units to this economy, causing the domestic price to be $P^* + t_2$ rather than P_q because of the quota being underfilled by $Q - Q_2$ units. In this case there would be no quota rents, and the net economic welfare cost of imposing such a TRQ regime would be much larger than described in the previous two paragraphs. Specifically, compared with free trade, the welfare cost of this regime would be area *aemk*, regardless of whether the licenses are allocated to domestic or foreign firms, whereas the cost of the regimes described in paragraphs one and two are potentially just areas *abc* and *anf*, respectively. To that needs to be added the cost to government of administering the license allocation system and the lobbying costs of firms seeking a share of those licenses.

Effect of an International Price Fall

If the international price of this product were to fall—as it has during the implementation of the Uruguay Round—the nominal rate of protection (the percentage by which the domestic producer price exceeds the border price) would remain constant under an ad valorem tariff regime but would rise under a specific tariff regime. However, it would rise even more under a TRQ regime if the out-of-quota tariff had been prohibitive (i.e., above $P_q - P^*$ per unit). Indeed if $P^* + t_2$ was above P_q by more than the fall in the international price, the import volume and domestic price would remain unchanged despite that price fall. It is thus possible that even though agricultural producer supports were supposed to decline during the implementation of the Uruguay Round though cuts in bound tariffs (as

well as producer and export subsidies) plus growth in TRQ volumes, protection levels may have increased in some cases because of a more-than-offsetting fall in international food prices since 1995.

Effects of a New Commitment to Lower the Bound Tariff

Suppose at the end of the URAA implementation period this economy commits itself to lower its bound tariff on this product. If a tariff-only regime was in place, the impacts of that reform would be somewhere between zero and 100 per cent of the impacts of an equally large cut in the applied tariff, depending on the extent to which the bound rate exceeds that applied rate. (The proportion starts to rise above zero only after the bound rate reaches the applied rate.) In the presence of a TRQ regime, however, the impacts are even smaller if the out-of-quota tariff is still prohibitive. Indeed even if licenses were held by domestic firms and imports were sourced from the most efficient suppliers, there would be no impact at all from that reform commitment if the cut in the bound rate was insufficient to bring the applied tariff down to less than $P_q - P^*$ in Figure 1. The maximum impacts are possible only if the out-of-quota applied tariff is not prohibitive, *and* the bound rate is not above the applied rate.

If there were (a) restrictions on sourcing from lowest-cost suppliers, and/or (b) only some of the quota (say Q_2) was allocated to domestic firms, the welfare gains from bringing the applied tariff down to a non-prohibitive level would be substantially greater than without those features of quota administration. For example, if the tariff was reduced from more than t_2 to t_1, there would be an additional gain of (a) area *bemkc* if the requirement on domestic firms to source from high-cost imports along curve S was removed, and (b) area *gcru* if only Q_2 of the quota licenses were in the hands of domestic firms.

Effects of a New Commitment to Expand the Quota

Even more than a commitment to lower the bound tariff, a commitment to expand the quota could have anything between zero and more than 100 per cent of the standard impact described in textbooks. If the quota had not been administered frictionlessly in the past and had not been fully allocated to domestic firms, and there were changes in favour of domestic importers as part of the new commitment, the economy's actual welfare gain could exceed the maximum gain normally estimated for a quota increase.

Conclusions

The following conclusions can be drawn from the above:

- TRQs add considerable complexity to modeling empirically even the domestic impacts of agricultural trade policies and their reform;
- in the presence of TRQs the national welfare cost of agricultural protection can be considerably greater than what a given domestic-to-borderprice wedge would imply if a tariff-only regime prevailed;
- a fall in the border price of the product causes that cost of protection to rise if a TRQ regime with a prohibitive out-of-quota tariff is in place, and by more than if a specific tariff alone is used;

- modeling an x per cent cut in the bound tariff as if it is a cut of that size in the applied rate can overstate the price and quantity effects of reform not only because the bound rate exceeds the applied rate but also because the applied rate is above the prohibitive tariff in the presence of the quota, such that the actual effects could range (in a non-linear, double-kinked fashion) from anything between zero to 100 per cent of the modeled effects;
- the modeled effects of a tariff cut on national welfare, by contrast, could understate or overstate the gains from further reform, depending on how the quota is being administered before and after the next reform;
- an expansion of the market access (quota) commitment need not ease this measurement problem, for it is always possible for the quota administrator to allocate those quotas so as to ensure under-fill such that no more or even less imports in total flow in; and
- modeling the effects of the TRQ regime, and changes to it, on bilateral trade flows and thereby on the welfare of this economy's trading partners also is more complex than modeling their effects under a tariff-only regime, with in-quota and out-of-quota tariff preferences for some trading partners adding further complications for modelers.

Models such as GTAP are in principle capable of handling these complications though careful additional programming, but to generate reliable numbers requires also assimilating a much greater volume of policy data than is required when a simple tariff-only regime exists. Until all those data are collected and added appropriately to the model's database, modeling the effects of an x per cent cut in the bound tariff will necessarily generate upper-bound estimates of price and quantity effects, the true impacts being somewhere between those from the model and zero. But it is possible that modelers may *under-estimate* rather than over-estimate the *welfare* effects of reform, depending on the way the quotas are administered before and after the next round of commitments.

BIBLIOGRAPHY

Anderson, K., *Domestic Agricultural Policy Objectives and Trade Liberalization: Synergies and Trade-offs*, in Proceedings of the OECD Workshop on Emerging Trade Issues in Agriculture (Paris, 25–26 October 1998), and published in revised form as *Agriculture's Multifunctionality and the WTO*, 44(3) AUSTRALIAN JOURNAL OF AGRICULTURAL AND RESOURCE ECONOMICS 475–94 (September 2000).

Anderson, K., 'Agriculture, Developing Countries, and the WTO Millennium Round', Ch. 6 in *Agriculture and the New Trade Agenda*, edited by M.D. Ingco and L.A. Winters, Cambridge University Press, 2004.

Anderson, K., B. Dimaranan, T. Hertel and W. Martin, *Economic Growth and Policy Reforms in the APEC Region: Trade and Welfare Implications by 2005*, 3(1) Asia-Pacific Economic Review 1 (April 1997).

Anderson, K., J. Francois, T. Hertel, B. Hoekman, and W. Martin, "The Cost of Rich (and Poor) Country Protection to Developing Countries." JOURNAL OF AFRICAN ECONOMIES 10(3): 227–257, September 2001.

ANDERSON, K. AND Y. HAYAM, THE POLITICAL ECONOMY OF AGRICULTURAL PROTECTION (1986)

Anderson, K., B. Hoekman and A. Strutt , *Agriculture and the WTO: Next Steps*, 9(2) REVIEW OF INTERNATIONAL ECONOMICS 192, (May 2001).

Anderson, K. and A. Strutt, Impact of East Asia's Growth Interruption and Policy Responses: The Case of Indonesia, 13(2) ASIAN ECONOMIC JOURNAL 205, (June 1999).

Anderson, K. and R. Tyers, *More on Welfare Gains to Developing Countries from Liberalising World Food Trade*, 44(2) JOURNAL OF AGRICULTURAL ECONOMICS 189 (May 1993).

Cottier, T. and P.C. Mavroidis (eds.), STATE TRADING IN THE TWENTY-FIRST CENTURY (1998).

Elbehri, A., M. Ingco, T. Hertel and K. Pearson, *Agricultural Liberalization in the New Millennium,* paper presented at the WTO/World Bank conference on Agriculture and the New Trade Agenda from a Development Perspective, Geneva, 1–2 October 1999.

Finger, J.M. and L. Schuknecht, *Market Access Advances and Retreats: The Uruguay Round and Beyond,* paper presented at the Annual World Bank Conference on Development Economics, Washington, D.C., April, 1999.

Francois, J.F., *Approaches to Agricultural Policy Model Construction*, paper presented at the UNCTAD workshop on Agricultural Policy Modeling, Geneva, 24–25 March, 1999.

Francois, J.F., *Market Access Liberalization in the WTO 2000 Negotiations*, paper presented at the WTO/World Bank conference on Agriculture and the New Trade Agenda from a Development Perspective, Geneva, 1–2 October, 1999.

Francois, J.F. and W. Martin, *Commercial Policy Uncertainty, Bindings, and Market Access,* EUROPEAN ECONOMIC REVIEW, 48(3): 665–79, (June 2004).

Francois, J.F. and I. Wooten, *Trade in International Transport Services: The Role of Competition*, 9(2) REVIEW OF INTERNATIONAL ECONOMICS 249 (2001)

Grossman, G.M. and E. Helpman *Trade Wars and Trade Talks*, 103(4) JOURNAL OF POLITICAL ECONOMY 675 (August 1995).

Henson, S., *Regulating the Trade Effects of National Food Safety Standards*, OECD Workshop on Emerging Trade Issues in Agriculture, Paris, 25–26 October, 1998, available at http://www.oecd.org/agr/trade/.

Hertel, T.W. (ed.), Global Trade Analysis: Modeling and Applications (1997).

Hertel, T.W., and W. Martin, *Developing Country Interests in Liberalizing Manufactures Trade*, paper presented at the WTO/World Bank's Conference on Developing Countries in a Millennium Round, Geneva, 19–20 September, 1999.

Hillman, A.L. and P. Moser, *Trade Liberalization as Politically Optimal Exchange of Market Access*, in THE NEW TRANSATLANTIC ECONOMY (Canzoneri *et al*. eds. 1995).

Hudec, R.E., *Does the Agreement on Agriculture Work? Agricultural Disputes After the Uruguay Round*, IATRC Working Paper #98-2, Department of Applied Economics, University of Minnesota, April, 1998.

Ingco, M.D., Tariffication in the Uruguay Round: How Much Liberalization?, 19(4) THE WORLD ECONOMY 425, (July 1996).

Ingco, M.D., *Has Agricultural Trade Liberalization Improved Welfare in the Least-Developed Countries? Yes*, Policy Research Working Paper 1748, World Bank, Washington, D.C., April, 1997.

Ingco, M.D. and F. Ng, Distortionary Effects of State Trading in Agriculture: Issues for the Next Round of Multilateral Trade Negotiations, World Bank Policy Research Working Paper 1915 (1998).

James, S. and K. Anderson, *On the Need for More Economic Assessment of Quarantine Policies*, 41(4) AUSTRALIAN JOURNAL OF AGRICULTURAL AND RESOURCE ECONOMICS 525 (December, 1998).

Josling, T., S. Tangermann and T.K. Warley (1996), *Agriculture in the GATT*, London: Macmillan and New York: St Martin's Press.

Mahe, L.P. and F. Ortalo-Magne, *International Co-operation in the Regulation of Food Quality and Safety Attributes,* in Proceedings of the OECD Workshop on Emerging Trade Issues in Agriculture, Paris, 25–26 October, 1998, available at http://www.oecd.org/agr/trade.

Michaelopoulos, C., The Integration of Developing Countries into the Multilateral Trading System, mimeo, World Bank and WTO Secretariat (1999).

Roberts, D., Implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures: The First Two Years, Working Paper #98-4, Department of Applied Economics, University of Minnesota, May 1998.

Roberts, D. and K. DeRemer, *Overview of Foreign Technical Barriers to U.S. Agricultural Exports*, ERS Staff Paper No. 9705, Washington, D.C.: U.S. Department of Agriculture, March, 1997.

Schiff, M. and A. Valdes, The Political Economy of Agricultural Pricing Policy: Vol. 4, A Synthesis of the Economics in Developing Countries (1992).

Skully, D., T*he Economics of TRQ Administration,* IATRC Working Paper #99-6, St Paul: University of Minnesota, May 1999.

Snape, R.H., *The Importance of Frontier Barriers*, in PROTECTION AND COMPETITION IN INTERNATIONAL TRADE (H. Kierzkowski ed. 1987).

Stillwell, M. and B. Van Dyke, *An Activist's Handbook on Genetically Modified Organisms and the WTO* (Center for International Environmental Law, March, 1999), available at (uwww.consumerscouncil/org/ccc/policyhandbk399.htm).

Tangermann, S. and T. Josling, *The Interests of Developing Countries in the Next Round of WTO Agricultural Negotiations*, paper presented at the UNCTAD workshop on Developing a Proactive and Coherent Agenda for African Countries in Support of their Participation in International Trade Negotiations, Pretoria, 29 June to 2 July, 1999.

Tyers, R. and K. Anderson, Disarray in World Food Markets: A Quantitative Assessment (1992).

WTO, OVERVIEW OF DEVELOPMENTS IN THE INTERNATIONAL TRADING ENVIRONMENT: ANNUAL REPORT OF THE DIRECTOR-GENERAL (2002).

CHAPTER 43

ENVIRONMENTAL ISSUES

Chad P. Bown and Rachel McCulloch*

TABLE OF CONTENTS

I. Introduction 138
II. Background 139
A. Environmental Issues in the GATT and the WTO 141
B. The Content of "Trade and Environment" 142
1. Trade as a Threat to Environmental Quality 143
2. Environmental Policies as a Determinant of International Competitiveness 144
3. GATT/WTO Restraints on National Environmental Protection 145
4. GATT/WTO Conflicts with Multilateral Environmental Agreements 148
5. Trade Sanctions and Eco-Imperialism 148
6. Environmental Concerns as Green Cover for Protectionism 149
III. The Uruguay Round Agreements 149
A. Standards 150
B. Intellectual Property 151
C. Subsidies 151
D. Services 152
IV. Economic Theory and Empirical Evidence 152
A. Environmental Externalities and Economic Policy 153
B. Economic Growth and the Environment 154
C. Trade and the Environment 155
1. Trade's Impact with Local Pollutants 155
2. Trade's Impact with Transboundary Pollutants 157
3. Avenues for Further Research 158
D. Trade Agreements and the Environment 158
1. Adequacy of WTO Rules to Accommodate Environmental Safeguards 158
2. The WTO as a Self-Enforcing Agreement 160
3. Avenues for Further Research 161
V. Unfinished Business 162
A. Process and Production Methods 162
B. Internalization Versus Polluter Pays 164
VI. Conclusions and Future Directions 165
Bibliography 169

* Department of Economics and International Business School, Brandeis University. Financial support from the Schulhof Foundation is gratefully acknowledged.

I. Introduction

What role does the World Trade Organization play in efforts to safeguard the environment? What role *should* it play? Environmental groups and green-leaning governments have come to view the WTO, with its large membership and its relative success in achieving a rules-based international regime, as the prime candidate for international arbiter on environmental issues. However, many proponents of expanded global trade, and especially policy makers in developing countries, are skeptical about an expanded role for the WTO in maintaining environmental standards. They fear that WTO-approved trade sanctions may be used to enforce adherence to environmental norms not necessarily shared by or appropriate for all nations, and that environmental protection may in practice translate into a fresh justification for old-fashioned protectionism.

Although the word "environment" itself appears nowhere in the original articles of the General Agreement on Tariffs on Trade, Article XX allows broad exceptions for environmental policies that would otherwise constitute violations of GATT principles:

> [N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health . . . [or] . . . relating to the conservation of exhaustible natural resources. . . .

But Article XX also specifies that application of such measures must not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. . . ."[1] Much of the recent controversy over the WTO's appropriate role in achieving environmental objectives centers on application of Article XX, and thus at least implicitly on the weight that should be given to efficiency gains from expanding international trade relative to health and welfare benefits from raising environmental quality. This trade-off lies at the very heart of the controversy. Seen from the perspective of the WTO's intended role as champion of open international markets, Article XX offers potential green cover for protectionist-inspired national policies.[2] Yet environmentalists regard the scope of Article XX as unduly narrow, preserving only very limited and circumscribed national sovereignty with respect to environmental initiatives.

This chapter begins by laying out the set of linkages and policy issues now collectively termed "trade and environment," and then examines the role of the GATT and WTO in these areas (Part II). Part III focuses on relevant innovations made in the Uruguay Round. Part IV reviews recent economic analysis and empirical findings on the trade-environment nexus. The remainder of the chapter discusses the most important "unfinished business" in this area (Part V) as well as some policy conclusions (Part VI).

[1] As detailed in Part III of this chapter, the Uruguay Round negotiations supplemented Article XX by providing similar exemptions for policies affecting trade in services and in new agreements on agriculture, product standards, intellectual property rights, and subsidies.

[2] Writing from the perspective of international economics, we use *protection* (protectionist/protectionism) in reference to policy measures intended to shield domestic producers from foreign competition. Such policies create benefits for the shielded sector but usually inflict a net loss on the country as a whole. Thus, international economists almost always favor less protection, and this is also the main goal of the GATT/WTO system. But environmentalists want *more* protection—of the environment. As has been observed, this difference in the use of language can itself be a source of confusion in the trade-environment area: "the word 'protection' warms the hearts of environmentalists but sends chills down the spines of free traders." DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 36 (1994).

II. Background

In the 1990s, heightened public interest in environmental issues led to a rapid "greening" of regional and multilateral negotiations on trade. Although environmental and conservation lobbies in the United States and most other advanced countries had begun to mobilize at least two decades earlier, their agenda until the 1990s was largely domestic. For the United States, the shift in focus toward trade issues started with the North American Free Trade Agreement ("NAFTA") and the *Tuna-Dolphin* case[3] in the GATT, discussed below.[4]

International economic theory has traditionally been constructed around a single policy objective: maximization of national welfare. In practice, this almost always means maximization of national income as conventionally measured, i.e., without any attempt to include the estimated cost of environmental damage or benefit of environmental cleanup. Trade is accordingly viewed as beneficial largely to the extent that it raises national income. Environmental issues, along with such other politically salient considerations as income distribution and national defense, are seen as only tangentially related to trade. Until the mid-1990s, few texts on international economics even raised the possibility that trade might have significant environment effects or that trade policies might be used to achieve environmental objectives.[5] In his influential treatment of the "scientific" tariff, Harry Johnson refers collectively to these other considerations as *non-economic* objectives of protection, i.e., objectives apart from maximization of national income.[6] Bhagwati and Srinivasan demonstrate that trade policy is rarely if ever the most efficient way—the one entailing least sacrifice of national income—to achieve such goals. Trade policy is thus regarded as a "second-best" means to achieve environmental objectives.[7] A study prepared for the 1999 Seattle WTO ministerial reiterates this conclusion: "Trade barriers are poor environmental policies."[8] In practice, however, it has become increasingly difficult to justify exclusion of environmental issues from negotiations on trade.[9]

For the United States, the environmental side-agreement appended to the North American Free Trade Agreement in 1992 set the precedent for linking environmental safeguards to trade liberalization. At the international level, given the absence of a

[3] Report of the GATT Panel (unadopted), *United States—Restrictions on Imports of Tuna*, BISD 39 S/155 (1991).

[4] I.M. Destler and Peter J. Balint, THE NEW POLITICS OF AMERICAN TRADE: TRADE, LABOR, AND THE ENVIRONMENT, Chapter 3 (1999).

[5] More recently, however, authors have been making up for lost time. The first edition of Charles Kindleberger's classic textbook (Charles P. Kindleberger, INTERNATIONAL ECONOMICS (1953)) omits any mention of environmental concerns; a recent update (Thomas A. Pugel and Peter H. Lindert, INTERNATIONAL ECONOMICS (2000)) includes an entire chapter on the subject.

[6] Harry G. Johnson, *The Cost of Protection and the Scientific Tariff,* 68(4) JOURNAL OF POLITICAL ECONOMY 327 (1960).

[7] Jagdish N. Bhagwati and T. N. Srinivasan, *Domestic Distortions, Tariffs, and the Theory of the Optimum Subsidy,* 71(1) JOURNAL OF POLITICAL ECONOMY 44 (1963).

[8] Håkan Nordström and Scott Vaughan, TRADE AND ENVIRONMENT 3 (1999).

[9] Labor and environmental concerns often appear in tandem as twin threats posed by globalization. Although the International Labor Organization could in principle be the lead forum for labor issues, no comparable general-purpose organization exists in the area of environment. Individual environmental issues ranging from the ozone layer to wildlife have given rise to over two hundred free-standing multilateral environmental agreements, with signatories ranging from a handful to one hundred or more in number.

parallel organization dedicated to environmental protection,[10] the WTO, with its inclusive membership and built-in mechanism for dispute resolution on trade matters, has emerged as an obvious candidate for resolving disputes on environmental issues as well.

Potential conflict between trade expansion and environmental protection became the stuff of headlines in November 1999, when environmental activists and other opponents of globalization combined forces to disrupt the WTO ministerial meeting in Seattle. Subsequent lobbying efforts, together with some rulings perceived as anti-environment emanating from WTO panels, helped to keep the trade-environment issue constantly before the public. Environmental issues have thus gained some legitimacy as an element of global trade diplomacy. Indeed, it has become almost essential from the standpoint of political viability for any new trade agreement to include environmental safeguards. Likewise, environmental non-governmental organizations ("NGOs") have gained official standing in the WTO and other international forums.[11]

Yet many economists and trade officials remain unconvinced of the benefits from systematic linkage of environmental and trade issues or from opening trade negotiations to NGO participation. So far there is no international consensus on environmental goals or on the value to be placed on achieving any specific goal. Some analysts even reject the whole notion of a trade-off, arguing that, especially in the longer run, the goals of trade expansion and environmental protection are largely complementary; the higher per-capita incomes brought about by expanded trade raise both the ability and the willingness to make environmental investments.[12] The free-trade-oriented *Economist* makes this case in an editorial, "Why Greens Should Love Trade" (October 9, 1999), timed to appear a few weeks before the Seattle WTO ministerial. Yet most participants in the debate acknowledge that pollution abatement and similar policies do typically entail a trade-off, the terms of which will necessarily vary across countries because of diversity in ecological conditions, per-capital income, and even social conditions.[13]

Thus, differences in income, climate, population density, preferences, and other relevant conditions are an obvious source of tension in any effort to protect global commons (oceans, ozone layer, biodiversity). However, even in the cases where economic activity has little or no effect outside a single country's borders, nations seeking to maintain the highest environmental standards have strong motives to induce or even require other

[10] Some important environmental issues involve global commons and cannot be treated adequately without broad international cooperation. See Esty, *supra* note 2, and Daniel C. Esty, *Greening World Trade,* in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD (Jeffrey J. Schott ed. 1996) on the case for a Global Environmental Organization and John Whalley and Ben Zissimos, *An Internalisation-based World Environmental Organisation,* 25(5) THE WORLD ECONOMY 619 (2002) on an internalization-based World Environmental Organization. In Part VI of this chapter we consider obstacles a global environmental organization would face.

[11] Sylvia Ostry, *The WTO After Seattle,* paper prepared for presentation at the AMERICAN ECONOMIC ASSOCIATION ANNUAL MEETING (January 2001).

[12] A few economists, notably Michael Porter, adhere to the even more optimistic position that stringent environmental policies can actually promote economic growth and international competitiveness by stimulating innovation (Michael E. Porter and Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship,* 9(4) JOURNAL OF ECONOMIC PERSPECTIVES 97 (1995)). Other empirical researchers remain unconvinced, however. Brian Copeland and M. Scott Taylor, in *Trade, Growth and the Environment*, 42(1) JOURNAL OF ECONOMIC LITERATURE (2004), speculate that the occasional positive relationship between trade competitiveness and pollution abatement expenditures merely reflects that both variables are endogenous.

[13] Moreover, ex-post remediation of the kind that has been carried out in most of the industrialized countries is likely to be far costlier than preventive action. Thus, global efficiency could well be served by measures to encourage early environmental cleanup in developing countries, an issue to which we return in Part V.

nations to do likewise. U.S. measures to protect dolphins in extraterritorial waters are sometimes justified in terms of "psychological spillovers," conveying the idea that U.S. residents can indeed be harmed by events occurring entirely outside their borders. Esty defends trade policy in aid of extraterritorial environmental goals on the ground that "trade, like any realm of human endeavor, cannot exist without baseline rules, defined by community standards and values."[14] As precedent he cites nineteenth-century British qualms about trade with slave-holding American states. Another justification for international action concerns environmental damage in countries without representative democracy. In such cases, there is less basis for assuming that national standards reflect the preferences of domestic residents.

A final obstacle to international consensus on measures to protect the environment is the lack of a well-developed understanding of many key issues at the trade-environment interface. The underlying environmental science itself remains incomplete in some highly contentious areas, notably global warming.[15] Likewise, economic theory and empirical evidence concerning the trade-environment link can so far offer only limited guidance for policy making.[16] Meanwhile, the trade-environment agenda continues to be broadened to include complex new concerns such as bioengineering, where scientific investigation is only in its infancy.

A. Environmental Issues in the GATT and the WTO

Notwithstanding the extraordinary publicity surrounding the Seattle demonstrations, the proposition that environmental concerns should be addressed internationally along with trade policies was far from new in 1999. "Trade and environment" issues first came to prominence almost three decades earlier. In 1971 the GATT established a Group on Environmental Measures and International Trade, intended as "a standby machinery which would be ready to act, at the request of a contracting party, when the need arose."[17] The United Nations Conference on the Human Environment, held in Stockholm in 1972, highlighted the possibility that strong environmental policies could undermine the international competitiveness of a country's industries. While the danger that competitiveness concerns might promote a "race to the bottom" or at least discourage adoption of stronger environmental protection—"regulatory chill"—remains a core issue today, the trade and environment agenda has broadened over the years. In addition to the traditional and still pressing concerns of air and water pollution, negotiations may now include such topics

[14] Daniel C. Esty, *Bridging the Trade-Environment Divide,* 15(3) JOURNAL OF ECONOMIC PERSPECTIVES 123 (2001).

[15] Article 5:7 of the Uruguay Round Agreement on Sanitary and Phytosanitary Measures requires a scientific basis for national product standards but also recognizes a "precautionary principle" where relevant scientific research evidence is considered insufficient. However, there is disagreement among members as to the legal status of the precautionary principle. While some, notably the European Union, would like to see the principle strengthened, others are concerned that precaution might be over-used in order to implement otherwise unjustifiable protection.

[16] Copeland and Taylor, *supra* note 12.

[17] Nordström and Vaughan, *supra* note 8. The first activation came nearly twenty years later, just prior to the Uruguay Round, at the request of the countries from the European Free Trade Area. The main environmental issue raised in the intervening years related to trade of domestically prohibited goods. Such goods included pharmaceuticals and pesticides whose sale in the exporting country's domestic market was no longer permitted due to health or environmental concerns, as well as radioactive or other hazardous waste materials.

as depletion of natural resources, use of hormones to promote cattle growth,[18] reduction of biodiversity, and genetic modification of plants and animals. Moreover, these newer aspects of the trade-environment interface have become increasingly contentious, despite—or perhaps because of—the lack of a firm scientific basis for collective action.

Environmental issues had moved into the mainstream of the GATT by April 1994, when ministers from more than one hundred countries met in Marrakesh to conclude the Uruguay Round of multilateral trade negotiations. Negotiators agreed to establish a Committee on Trade and Environment within the new WTO. Moreover, the preamble to the agreement establishing the WTO describes its mandate as "expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development . . . in a manner consistent with respective needs and concerns at different levels of economic development."

B. The Content of "Trade and Environment"

Recent conflicts between free traders and environmentalists[19] reflect several types of linkages and associated issues at the interface between trade and environment policies. From the environmentalist perspective, there are at least four distinct concerns. The first is that expansion of trade may produce environmental damage, either directly, if new export opportunities encourage polluting industries to expand their operations and/or increase pollution associated with transport of goods, or indirectly, as conventional gains from trade raise national incomes and consumption. A related second concern is that some countries will use weaker environmental protection as a way of increasing their international competitiveness. A third issue is that individual countries seeking to maintain high environmental standards may be restrained by GATT/WTO rules from using trade policy for this purpose. Finally, GATT/WTO rules may inhibit international cooperation to reduce environmental threats by restricting the use of trade sanctions to enforce multilateral environmental agreements.

For their part, free traders fear that a coalition of environmentalists and protectionists could reverse decades of progress toward open international markets. Such a coalition could block poor nations from pursuing economic development via export expansion. From the perspective of those who wish to promote trade, there are at least two distinct concerns. First, WTO-sanctioned trade barriers designed to achieve environmental goals may become instruments of "eco-imperialism," permitting richer and greener countries to force their own preferred norms on countries with lower incomes and different priorities. Second, allowing trade restrictions in aid of environmental goals provides yet another loophole for garden-variety protectionism. The active participation of U.S. labor unions in anti-WTO protests on environmental grounds adds weight to this concern.

Of these diverse issues, the first (possible environmental damage resulting from expansion of trade) relates directly to the WTO's central objective of achieving and maintaining open global trade, and thus poses a key question in the trade-environment debate: Could trade expansion cause enough environmental damage to offset completely the resulting

[18] European Union restrictions on imports of beef raised using hormones have already given rise to a WTO trade dispute. *See* Report of the Appellate Body, *European Communities—Measures Concerning Meat and Meat Products (Hormones))*, WT/DS26/AB/R and WT/DS48/AB/R (1998).

[19] Following Esty, *supra* note 2, at 3, we simplify the exposition by using these terms to describe the two sides in the ongoing debate. We thus largely ignore differences in goals within each camp and also that many participants in each camp agree at least in principle on the need to balance environmental and narrowly economic objectives.

gains in national incomes? The other issues are linked to current or potential WTO rules specifying environmental exceptions to basic WTO principles. Below we discuss each area in turn. In Part III of this chapter, we highlight relevant changes in GATT/WTO rules negotiated in the Uruguay Round, while in Part IV we look more closely at recent contributions to economic theory and supporting empirical evidence.

1. Trade as a Threat to Environmental Quality

Many environmentalists view expanded trade (globalization) as a threat to environmental quality. The threat is perceived to arise through one or both of two channels. The first and more direct channel is the effect of trade expansion on the composition of output in each country.[20] Specifically, freer trade may increase the ability of dirty industries to expand where environmental regulation—or enforcement of environmental standards—is relatively weak. This relocation of dirty production to less-regulated sites is presumed to increase pollution[21] in exporting countries and worldwide.[22] As discussed in Part IV of this chapter, the relevance of this channel depends on the assumption that environmental regulation is an important component of total production cost, i.e., that countries with the lowest environmental standards are therefore likely to have comparative advantage in dirty industries. To the extent that increased trade means that goods travel longer distances to markets, pollution associated with transport may also rise.

A second and less direct channel through which globalization itself may affect the environment arises through the usually favorable net impact of expanded trade on economic growth and per-capita income. If environmental externalities such as pollution are roughly proportional to output, higher output necessarily translates into higher total pollution.[23] However, other effects work in the opposite direction. First, the social demand for clean air and water tends to rise with per-capita income. In economic terminology, environmental quality has a high income-elasticity; it is a "superior" good. As nations grow more prosperous, their leaders tend to adopt stronger environmental policies.[24] Moreover, globalization improves nations' access to advanced technologies to implement these policies. Both of these changes are expected to have a favorable impact on technique, i.e., to reduce environmental damage per unit of output. Finally, growth

[20] As further discussed in Part IV of this chapter, the environmental impact of growth or trade can be partitioned conceptually into three distinct components: effects on the *composition* of output (relatively less or more production by dirty industries), on the *technique* of production (relatively less or more environmental damage per unit of output produced), and on the overall *scale* of production (a proportional increase in associated damage).

[21] For expository concreteness, environmental damage is discussed here and in much of what follows as pollution that results from production. Part V of this chapter briefly discusses other types of environmental damage.

[22] The effect of expanded trade on the environment depends critically on the particular form of pollution controls as well as whether a particular location has high or low standards. When pollution is regulated entirely by quantity restrictions such as emissions permits, and this quantity limit remains unchanged, expansion of dirty industries will result in an increased value of permits, and thus in cost to producers per unit of emissions; total environmental damage will not rise (Copeland and Taylor, *supra* note 12).

[23] Use of power and associated emissions are considered to be roughly proportional to output. On the other hand, poverty can itself contribute to some types of environmental deterioration, such as deforestation and water pollution.

[24] The process is far from automatic, however, and clearly depends on the form of the political system. Steve Charnovitz, *World Trade and the Environment: A Review of the New WTO Report* (2000), available at <http://www.gets.org/pages/steve.charnovitz.cfm> (accessed 29 July 2002), argues that the link is stronger in democratic societies. The environmental record in Eastern Europe and the Soviet Union in the decades prior to transition offers indirect evidence.

usually changes the composition as well as the scale of economic activity. Because the proportion of income spent on services tends to rise with per-capita income, the resulting change in the composition of output would be expected to reduce environmental damage per unit of aggregate output even if each individual good and service continued to be produced with unchanged technique. The observed net effect of all these changes,[25] termed the environmental Kuznets curve ("EKC"), often shows total pollution (of a specific type) rising with income at low per-capita income levels but then falling as income rises further. Theoretical and empirical analysis of the relationship between growth and environmental quality is reviewed below in Part IV.

2. Environmental Policies as a Determinant of International Competitiveness

National environmental policies typically affect production costs. Although the size of the effect is subject to debate, differences in national environmental policies or in the vigor of enforcement efforts at least potentially constitute one determinant of comparative advantage. Absent differences in technology or relative factor abundance, low-standard countries would have comparative advantage in dirty industries. Environmentalists accordingly fear that lower-income countries will become "pollution havens" due to their willingness to put economic growth ahead of environmental safeguards. A separate but related concern is that nations will compete for global markets and foreign direct investment by reducing environmental standards (race to the bottom) or will be reluctant to raise standards unilaterally due to competitiveness concerns (regulatory chill).

Although both situations reflect the potential role of environmental standards as a source of comparative advantage, the two differ in their implications for efficiency and welfare. Trade based on differences in preferred standards, i.e., the existence of pollution havens, does not necessarily imply economic inefficiency.[26] In contrast, competition for markets through strategic lowering of standards may result in a "prisoners' dilemma" situation. In such a case, although every country might prefer a high-standard regime to a low-standard regime, without international cooperation each country expects to gain from choosing a low standard (in the language of game theory, choosing a low standard represents a dominant strategy for each player in a non-cooperative game). The result without cooperation is a global low standard rather than the high standard all nations would prefer. In this case—but not where differences in standards reflect differences in national preferences—international coordination of standards could raise global efficiency.

Available data, mainly for the United States, show that the *average* cost associated with meeting environmental regulations constitutes a small fraction of total production cost, suggesting that concerns about the role of low environmental standards as a determinant of production location may be overstated.[27] Yet average costs do not tell the whole story. Because compliance costs are much higher for certain "dirty" industries, the possibility remains that differences in environmental policies could have a significant effect on trade and FDI in at least a few sectors where abatement costs are especially high.

Many environmentalists, along with their protectionist anti-globalization allies, favor a policy remedy for competing imports that appear to be driven by significant differences

[25] These are respectively the *scale*, *technique*, and *composition* effects of growth on environmental damage as defined in footnote 20, *supra*.

[26] Copeland and Taylor, *supra* note 12. Even in the absence of trade, a country might prefer a low standard. In this case, the concern is clearly not international competitiveness but, rather, that the cost of compliance with a higher standard is perceived to exceed the benefit.

[27] Nordström and Vaughan, *supra*, note 8, at 36–38.

in environmental standards—what they term *environmental dumping* or *eco-dumping*. In the context of the WTO, the remedy could take the form of required harmonization of environmental standards across countries,[28] possibly encouraged or reinforced by allowing high-standard nations to apply anti-dumping and/or countervailing duties to imports whose low cost is due in part to weak environmental protection.[29] Free traders, familiar with the widespread abuse of conventional anti-dumping duties, strongly oppose introducing a major new device that is likely to be captured by protectionist forces.

3. GATT/WTO Restraints on National Environmental Protection

While some countries may opt for lower standards for reasons of income, tastes, or geography, others may reduce, or fail to raise, environmental safeguards in order to enhance trade competitiveness. In either case, any effect on trade is due to a *difference* in standards across countries; if two countries were to simultaneously impose equivalent increases or decreases, the effect on comparative advantage would be minimal.[30] However, if one country desires a higher standard while a second does not, required upward harmonization in effect forces the second country to bear part of the cost of achieving the first country's target. Thus, one element in the debate on harmonization of environmental standards is essentially about who should bear the economic cost of achieving higher national standards.[31] Developing countries with lower per-capita incomes are understandably suspicious that rich countries favoring high environmental standards may seek to shift part of the cost onto their lower-standard trading partners. The "polluter pays" principle, integral to domestic market-based solutions to environmental spillovers, is likely to be problematic among sovereign nations with very different levels of per-capita income, i.e., with significant differences in willingness and *ability* to pay. A central problem for the international community is to find efficient means of improving global environmental performance without inflicting unacceptable costs on poorer nations in the process.[32] We return to this issue in Part V of this chapter.

A closely linked issue is the WTO position on national policies to achieve environmental goals. As noted above, the use of trade policy to achieve environmental objectives is, in economic terminology, almost always second-best. At least in theory, there is a more direct policy that can achieve the same objective at lower cost in terms of foregone national income. For example, suppose that logging in a particular area causes destruction of species habitat (a *negative externality*, in economic terminology). To reduce environmental damage to the socially optimal level, the government could levy a tax on

[28] Jagdish N. Bhagwati and T.N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?* in FAIR TRADE AND HARMONIZATION—VOLUME 1: ECONOMIC ANALYSIS 161 (Jagdish N. Bhagwati and Robert Hudec eds. 1996), argue that such harmonization is seldom optimal from the perspective of global welfare.

[29] Environmental groups such as the Sierra Club intervened in the most recent battle between the United States and Canada in the longstanding conflict over Canada's alleged low stumpage fees for loggers operating on government-owned land. However, environmental concerns were not at the heart of the legal case. Indeed, these concerns were not even discussed in the U.S. Commerce Department's final decision in 2002, which resulted in the imposition of a substantial countervailing duty. For details, see *Certain Softwood Lumber Products From Canada,* 67 FR 15545 (April 2, 2002). Canada subsequently appealed the U.S. decision to the WTO and to a NAFTA panel.

[30] Even with identical standards and enforcement, industries in the two countries could experience differences in compliance costs for a variety of reasons, such as differences in geography, technology, or cost of capital.

[31] Here we are concerned with purely local environmental issues. In this case the only "spillover" across borders is in costs associated with compliance. As discussed in Part IV, the situation is more complex with transboundary effects.

[32] Bhagwati and Srinivasan, *supra* note 28, at 199.

logs (from a specific source) equal to the dollar value of the negative external effect, i.e., equal to the *additional* cost to the rest of society that logging companies would otherwise disregard in their business decisions. The tax "internalizes the externality," causing loggers to choose on the basis of social rather than private cost of logging. Alternatively, the government could impose quantitative limits on logging in the relevant area (e.g., using transferable logging permits that in equilibrium would increase loggers' cost per log by the same dollar amount as the tax). These policies are both first-best in that they address the problem at its source. In principle they are equivalent, although in practice one is likely to be preferable in terms of cost of implementation and enforcement or political acceptability.

Trade policy offers another way to reduce the damage from logging. Assuming that the country is a log exporter, an export tax or equivalent export quota would lower the net price received by domestic loggers and thus reduce domestic logging, just as with the logging tax or permit requirement. However, an export tax would also lower the price paid by domestic purchasers, thus encouraging inefficiently *high* domestic use of logs in construction or manufacturing.[33] For this reason, the trade approach is considered a second-best means of reducing environmental damage from logging. Like the optimal policy, the second-best policy reduces the negative externality from domestic logging. But at the same time it introduces a new inefficiency from excessive domestic use. Only precise measurement can show whether the net effect on social welfare is positive rather than negative—overall welfare may fall even when the reduced logging and associated reduction in environmental damage is taken into account. The same effects, and the same ambiguity regarding the overall effect on welfare, would occur if trade were restricted by importers rather than exporters.

A special case arises when the relevant activity occurs in an exporting country that is unwilling and/or unable to implement the first-best policy.[34] In this case, other countries may act to reduce the damage (e.g., destruction of fragile rain forest and associated loss of biodiversity) by limiting their own imports of the logs and products made from them, or by requiring eco-labeling to allow consumers to choose goods whose production is less environmentally damaging. In 2001, Brazil banned virtually all mahogany exports after finding that the most of the wood was being harvested illegally on public and Indian land.[35] Brazil claimed that trade restrictions were necessary to reduce profits from illegal logging and thus preserve the Amazon rainforest.

An example of second-best policy carried out by importing countries is the collective action taken since the 1960s by members of the Conference on International Trade in Endangered Species ("CITES").[36] Here the first-best policy would be to restrict killing and/or sale of endangered species. However, this policy can only be applied in the exporting countries, which have largely been unable to enforce such restrictions. CITES members have therefore adopted the second-best approach of prohibiting imports of endangered species.

Article XX of the GATT clearly allows second-best policies to achieve environmental objectives even though they restrict trade, but two high-profile cases have underscored

[33] In the longer run, second-best export restrictions on wood and wood products also create an incentive for conversion of forested lands to more profitable uses, usually agriculture (Esty, *supra* note 2, at 189).

[34] Charnovitz, *supra* note 24.

[35] Jonathan Karp and Miriam Jordan, *U.S. Ports Hold On to Brazilian Mahogany,* THE WALL STREET JOURNAL (March 29, 2002).

[36] For details on membership and structure of CITES, see <http://www.cites.org/index.html> (accessed 15 July 2002).

important GATT/WTO limits on their application. The *Tuna-Dolphin* case arose over the incidental drowning of dolphins—large marine mammals—in fishing for tuna with purse-seine nets. Beginning in 1972, the United States applied a number of non-trade-policy measures, including dolphin-safe net requirements for U.S. ships and all ships in U.S. waters, voluntary labeling of dolphin-safe tuna, and government pressure on major U.S. canners to eschew purchases of dolphin-unsafe tuna. Although these measures had already reduced estimated mortality from about 130,000 dolphins in 1986 to just 25,000 by 1991,[37] the United States nonetheless imposed a ban on tuna imports from Mexico and four other countries. Mexico's immediate protest to the GATT was ultimately upheld, mainly over the principle that imports cannot be restricted solely on the basis of exporters' process and production methods ("PPMs").[38]

Ignoring its exact legal basis, environmentalists cite the decision as evidence that GATT/WTO rules and their application are inherently anti-environment.[39] Still, the logic of the *Tuna-Dolphin* decision implies limits on the ability of one country to restrict trade as a means to influence the environmental standards of other countries.[40] To those who see trade mainly as a potential lever for achieving environmental or other types of non-economic objectives rather than as a means to raise allocative efficiency and national incomes, the outcome was surely a disappointment. Activists subsequently began to target the PPM issue, arguing that exclusion of goods based on PPMs is not inconsistent with GATT principles, as is usually claimed.

The *Shrimp-Turtle* case[41] presents issues similar to those in *Tuna-Dolphin*, but with one critical difference: the sea turtles trapped by shrimp fishers are an endangered species. A U.S. prohibition on shrimp imports from countries without adequate (in the eyes of U.S. authorities) sea turtle safeguards was successfully contested in the WTO by four Asian countries. The WTO's Appellate Body ("AB") upheld the initial ruling in 1998 but on much narrower grounds.[42] While the panel decision held that import bans of this type could not be justified, the AB found fault only with U.S. administrative procedures rather than with the import restriction itself. In particular, the four countries that initiated the case were subject to far harsher treatment than certain other countries. The United States won a final appeal in 2001 after changing the way the law was implemented. Changes included U.S. efforts to open international negotiations on protection of the endangered sea turtles, financial assistance for developing countries involved in the negotiations, and technical assistance and training in the installation and use turtle-safe nets for interested governments.[43] The rulings in this case thus confirmed that conservation measures can

[37] Pugel and Lindert, *supra* note 5, at 250.

[38] C. Ford Runge, FREER TRADE, PROTECTED ENVIRONMENT, 72–73 (1994). Dolphins are not an endangered species, distinguishing this case from the *Shrimp-Turtle* case, discussed below. Subsequent agreements among the interested parties reduced dolphin mortality to about 2000 per year after 1998, but controversy continues about the effects of stress experienced by dolphin in tuna-fishing areas. A 2001 report from the U.S. National Oceanic and Atmospheric Administration ("NOAA") describes ongoing research on dolphin populations <http://www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/chase-recapture.html> (accessed July 15, 2002).

[39] Michael M. Weinstein and Steve Charnovitz, *The Greening of the WTO,* 80(6) FOREIGN AFFAIRS 148 (2001) conjecture that although the environmental movement has achieved most of its initial goals regarding the WTO, "the need to keep their supporters energized makes some groups loath to say so."

[40] To be more precise, an importing nation cannot do this without compensating affected exporters.

[41] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (1998).

[42] Weinstein and Charnovitz, *supra* note 39, at 152.

[43] United States Trade Representative, *USTR on WTO Decision Supporting U.S. on Shrimp-Turtle Law*, October 22, 2001, <http://usinfo.state.gov/wto/01102201.htm> (accessed 1 January 2002).

be consistent with WTO agreements but must be administered fairly, i.e., in a way that does not constitute disguised protection for favored producers. The final resolution of the dispute also set an interesting precedent for international burden-sharing: the United States assumed much of the cost of implementing its preferred environmental standard through cash transfers and technical assistance to the developing country producers.

4. GATT/WTO Conflicts with Multilateral Environmental Agreements

Although environmental regulation is largely implemented at the national and subnational level, economies and ecosystems are highly interdependent. Some major environmental goals, ranging from maintaining biodiversity to protecting the ozone layer, are appropriately viewed as global commons. For these goals, actions taken by any one country, and particularly by smaller countries, create diffuse global benefits enjoyed mainly by those *outside* the country. As a result, nations choosing individually on the basis of benefits to their own citizens tend to do too little; environmental protection is undersupplied from the global perspective.[44] An effective approach to regional (e.g., Rhine water quality) or global (biodiversity, ozone layer, global warming) commons issues thus requires international cooperation.

A kind of intellectual benchmark for such cooperation is the action that would be undertaken by a hypothetical inclusive and effective organization, variously termed a "Global Environmental Organization" or "World Environmental Organization." Such an organization would be capable of formulating and enforcing appropriate policies that internalize all environmental externalities, i.e., capable of ensuring that all economic decisions in every country reflect *global* social costs and benefits. However, no such organization is even on the horizon. Instead, the most salient environmental issues have been tackled by narrowly defined agreements and treaties.

Of more than two hundred such multilateral environmental agreements ("MEAs"), almost all are extremely specific in their objectives, far from inclusive in membership, and reliant on voluntary compliance alone. Only six have more than fifty parties.[45] The WTO has identified about twenty MEAs with trade provisions or implications.[46] So far no trade dispute has arisen from conflict between MEA operations and WTO principles. However, environmentalists seek blanket WTO authorization to use trade sanctions as a means of enforcing compliance by members of an MEA and/or in preventing nonmembers from undermining an agreement's effectiveness. To what extent is such use sanctioned under Article XX? Without further advance clarification, this scope will be delineated over time as enforcement actions give rise to trade disputes and their resolution within the WTO. But multilateral agreements typically require years to reach operational status, and ambiguity concerning the relationship between MEAs and the WTO increases the difficulty of achieving the international agreements required to tackle global environmental problems. Nonetheless, free traders in the WTO are unlikely to give environmentalists *carte blanche* with regard to the use of trade sanctions as a means of enforcing MEAs.

5. Trade Sanctions and Eco-Imperialism

Achieving higher environmental standards at the local or national level typically entails higher production costs and thus some sacrifice of national income as conventionally

[44] Economists view the situation as an example of the prisoners' dilemma as described above. Only if all affected nations commit credibly in advance can the socially preferable outcome be achieved.

[45] William Krist, *Multilateral Environmental Agreements and the World Trade Organization,* WOODROW WILSON CENTER (March 2001) <http://wwics.si.edu/tef/stoconfpap.htm> (accessed 9 August 2001).

[46] <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey4_e.htm> (accessed 29 July 2002).

measured. For a country that trades with the rest of the world, higher production costs can also mean a loss of international competitiveness in affected industries to countries that have not matched the higher standards implemented at home. Any resulting increase in imports allows a high-standard country to consume goods whose production is environmentally damaging while incurring only part or sometimes even none of the associated damage. The domestic import–competing industry will typically suffer lower output and profits, however. Competition from less-controlled producers abroad may thus be regarded as "unfair." Injured parties may seek—and may succeed in obtaining—restrictions on imports whose lower cost is due partly to the lower environmental standards of the exporting nation.

Because of differences across countries in incomes, tastes, and environmental conditions, individual nations are unlikely to adopt identical standards with regard to environmental protection. Developing countries in particular are concerned that richer trading partners may seek to impose their preferred standards on all exporters. Like conventional dumping, eco-dumping typically benefits the importing country as a whole but creates losses for importing-competing producers. The *Tuna-Dolphin* and *Shrimp-Turtle* cases discussed above are both instances in which the United States sought, with some success, to impose its own environmental priorities on producers in developing nations.

6. Environmental Concerns as Green Cover for Protectionism

Even when free traders share the same concerns as environmentalists, they remain suspicious—often with some reason—that highlighted environmental objectives simply provide a convenient excuse for old-fashioned protectionism. U.S. fishing fleets as well as would-be dolphin protectors favored the U.S. ban on imports of dolphin-unsafe tuna. In the protests that disrupted the 1999 WTO ministerial meeting in Seattle, environmental NGOs worked in tandem with the same U.S. labor unions that have perennially favored import restrictions. But international economists have been slow to recognize that, for better or for worse, environmental issues are likely to remain a WTO concern. While international economists rightly point out that trade policy is almost never a first-best way to achieve environmental goals, the same is true for virtually *all* uses of trade policy. Moreover, safeguarding the environment may well be a worthier non-economic objective from a social perspective than delaying the demise of an uncompetitive senescent industry.

Free traders also emphasize that economic growth depends on trade and investment. If environmentalists succeed in slowing down or reversing the process of globalization, there is a price to be paid in terms of lower growth and less-efficient use of resources. Many free traders point to the generally favorable association between higher incomes and increased attention to environmental concerns. However, it is important to remember that this process is far from automatic. Although poverty demonstrably contributes to certain types of environmental degradation, increased wealth by itself cannot ensure reductions in harmful practices.

III. The Uruguay Round Agreements

A significant advance in the Uruguay Round was to initiate negotiations on specific areas of concern in the trade-environment nexus. Until the Uruguay Round negotiations, Article XX of GATT (1947) had provided the sole basis for exceptions to trade policy obligations on grounds concerning environmental objectives. Although panel rulings in formal trade disputes such as *Tuna-Dolphin* had established bounds for permissible environmental exceptions to a country's trade policy obligations within the GATT framework,

Article XX itself was the only element of the pre-Uruguay Round GATT treatment of environmental issues that had actually emerged from international negotiations.

The Uruguay Round Agreements ("URAs") did *not* include an explicit "Agreement on Trade and the Environment" to centralize all linkages between international trade and issues relating to the environment. Negotiators took a much more diffuse approach, introducing references to the environment and environmental exceptions to trade policy obligations into many of the newly codified areas. The resulting agreements on technical barriers to trade, sanitary and phytosanitary measures, trade-related intellectual property rights, subsidies and countervailing measures, agriculture, and services all contain specific language that underscores the interaction between trade and environmental objectives. And, while the URAs do not include an agreement on trade and the environment, a WTO directive established a Committee on Trade and Environment to identify, monitor, and assess issues relating to trade and the environment as they arise.

Even with the development of the new areas under the URAs, Article XX of GATT 1947 remains the key underlying component linking trade and the environment within the WTO system. However, the URAs are important because they add new possibilities for countries seeking to defend trade-restricting actions on environmental grounds.[47] Below we examine the newly codified areas in the URAs as they relate to the environment and identify the economic incentives created by the terms of the new agreements.

A. Standards

The Agreements on Technical Barriers to Trade ("TBTs") and Sanitary and Phytosanitary ("SPS") Measures are complementary codes focusing on product standards and food safety. The TBT Agreement is a modified version of a stand-alone Standards Code negotiated during the 1973–79 Tokyo Round; the SPS agreement introduces standards for food safety as well as regulations to promote human, animal, and plant health and safety. These agreements allow countries to adopt explicit product standards that are consistent with underlying WTO principles. In particular, standards must not be designed so as to discriminate between domestic products and imports (a violation of the national-treatment clause of Article III) or between imports from different sources (a violation of the MFN clause of Article I). For example, Article 5:1 of the SPS agreement may allow trade restrictions for environmental purposes in some circumstances. Such restrictions must be based on an appropriate assessment of "risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations." Restrictions must also be transparent and non-discriminatory in their application.

The initial obscurity of the TBT and SPS agreements evaporated with several high-profile disputes over product standards. While the agreements have been interpreted as allowing for the establishment of standards based on a product's *end-use* or *quality* or *content*, an important unresolved question is whether the WTO also permits standards based on *production method*. This issue is one common thread linking recent cases such as *Tuna-Dolphin, Shrimp-Turtle*, and *Beef Hormones*; in each case production method served as the justification for a ban on imports.

[47] Matthew Stilwell argues, in the context of GMO labeling, that the implied criteria for exceptions in the various agreements may differ in subtle ways. *See Center for Environmental Law, Protecting GMO Labeling from a WTO Challenge,* (2001), available at <http://www.cid.harvard.edu/cidtrade/issues/biotechnologypaper.html> (accessed 19 April 2003).

A central question in each of these standards disputes is whether a country may impose its own national production standard on goods that it consumes but that are produced elsewhere. In the *Tuna-Dolphin* case, the justification for the standard was a concern for the humane treatment of marine mammals; in the *Shrimp-Turtle* case, the standard was intended to bolster conservation efforts on behalf of an endangered species; in the *Beef Hormone* case, the basis was the "precautionary principle" and the lack of persuasive evidence that non-hormone-treated beef and hormone-treated beef have the same end-use effect on humans. The permissibility of such standards within the WTO framework is also likely to become a pivotal issue in the new and highly contentious area of genetically modified organisms ("GMOs").

The first economic concern regarding any product standard relates to the reason that a trade-restricting measure is being imposed. As WTO rules rest on the underlying principle of liberal and non-discriminatory trade, an initial consideration is whether the standard constitutes a genuine response to a perceived threat to health or safety, rather than a disguised effort to protect domestic producers from competing imports or to discriminate between foreign producers. The TBT and SPS agreements specify the use of internationally accepted standards,[48] and thus rely on information provided by international standard-setting bodies. Since the WTO defers to these standard-setting bodies as "experts" in the relevant areas, their transparency and organization becomes an important factor in determining the outcome of actual cases.

A further concern is the effect of standards on production efficiency and the gains from trade. International harmonization of product standards may reduce costs of compliance for a firm serving more than one national market. Agreement on a common standard can lead to efficiency gains via network externalities. However, mandatory harmonization of *production* standards across countries could significantly reduce one of the primary sources of gains from trade, i.e., the gains arising from differences in production conditions across countries and resulting specialization based on comparative advantage.

B. Intellectual Property

Another substantive Uruguay Round agreement that includes an explicit environmental exception is the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). This agreement seeks to strengthen the rules protecting patents, trademarks, copyrights, and trade secrets. One link between intellectual property and the environment is contained in Article 27 of TRIPS, which permits governments to refuse to issue patents "that threaten human, animal or plant life or health, or risk serious damage to the environment."

C. Subsidies

One goal in the Uruguay Round was to limit the use of subsidies in many areas of international trade, thus shifting countries away from government-supported production and towards market-based reforms. While the effort to control subsidies and countervailing

[48] For example, the Preamble of the SPS agreement states that its aim is to "further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards and guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention. . . ."

duties was not new to the GATT/WTO system,[49] the URAs clarified the rules on permissible and impermissible subsidies.[50] Notably, the Agreement on Subsidies and Countervailing Measures ("SCM") and the Agreement on Agriculture ("AoA") include explicit exceptions for subsidies with environmental objectives. The SCM temporarily allowed for subsidies that helped firms adapt to new environmental laws, as long as those subsidies were less than twenty per cent of the firms' actual compliance costs.[51] Similarly, the AoA specifically exempts environmental programs from mandated cuts in subsidies.[52]

Perhaps as important as the introduction of these exceptions for subsidies with environmental objectives is the increased discipline the WTO system imposes on non-environmental subsidies. Environmental problems are often caused or aggravated by government subsidies, especially subsidies to natural-resource-based industries such as agriculture, fishing, and logging. Farm subsidies and price supports, combined with restrictions on land under cultivation, create incentives for overuse of chemicals to increase crop yields. Likewise, government support of excess capacity in fishing fleets has exacerbated the conservation problems of the world's fisheries. WTO limits on subsidies thus have the potential to reduce environmental damage along with inefficient high-cost production.

D. Services

Article XIV of the General Agreement on Trade in Services ("GATS") contains exceptions analogous to those in Article XX(b) of GATT (1947) covering trade in goods.

IV. Economic Theory and Empirical Evidence

As the liberalization of world trade has become an important concern for the environmental movement, more economists have turned their attention to modeling and estimating the effects of trade and trade policy on the environment. An early examination of many trade-environment issues from an economic perspective[53] arose from a 1991 workshop organized for the GATT Secretariat. Surveys of more recent literature include Nordström and Vaughan[54] and Copeland and Taylor.[55] Here we summarize briefly some important theoretical results concerning the trade-environment nexus, as well as relevant empirical findings. Our review focuses on two fundamental questions: How does international trade affect the environment? What is the appropriate role for a trade agreement such as the WTO with respect to environmental concerns?

[49] Articles VI and XVI of GATT (1947) deal respectively with countervailing duties and export subsidies. The stand-alone Subsidies Code negotiated in the Tokyo Round also addresses these issues.

[50] See Chapters 16 and 41 in this book.

[51] Article 8.2 (c) of the Agreement on Subsidies and Countervailing Measures specifies the conditions under which environmental subsidies are "non-actionable." However, the initial exemption was for a five-year period subject to renewal (SCM Article 31). It has not been renewed so that the exemption no longer applies.

[52] Annex 2: 12(a) of the Agreement on Agriculture indicates which types of subsidies are exempted from the reduction commitment.

[53] Kym Anderson and Richard Blackhurst, THE GREENING OF WORLD TRADE ISSUES (1992).

[54] Nordström and Vaughan, *supra* note 8.

[55] Copeland and Taylor, *supra* note 12.

A. Environmental Externalities and Economic Policy

From the economic perspective, most environmental issues arise from *externalities*, i.e., effects of consumption or production that fall on others. Activities creating air or water pollution thus entail *negative* externalities, while environmental cleanup generates *positive* externalities. The key consideration is the extent to which a consumer or producer's actions and decisions affect others not directly involved. This criterion may be interpreted narrowly, i.e., whether physical effects extend beyond the agent's private property, or more broadly, to include even psychological externalities. In the international context, a further distinction is made between external effects that occur entirely within a single country's borders and "transboundary" effects that spill over to other countries.

Existence of a negative externality implies that the *private* cost of an activity (the cost borne by the consumer or producer who causes the externality) is below its *social* cost. In the absence of corrective government action, market-determined consumption and production of polluting goods will usually be too high from the social point of view because decisions are based on private rather than social costs.[56] Likewise, the level of any activity with a positive externality will tend to be too low. Such situations are called *market failures* because the "invisible hand" is unlikely to achieve a socially desirable resource allocation.[57]

From the economic viewpoint, the socially optimal level of pollution or other environmental damage is not zero unless the damage can be eliminated at no cost. In general, the socially optimal level depends on the social cost in terms of foregone economic output of a further reduction, i.e., the *opportunity cost* of abatement. The level of pollution (or pollution abatement) is socially optimal when the social cost in foregone output of a further reduction just balances the social benefits resulting from that reduction. The use of cost-benefit analysis in designing environmental policies is intended to achieve this kind of balance. However, this approach is far from straightforward in practice, as its implementation requires decision makers to place a dollar value on such intangible benefits as cleaner air or greater biodiversity. Moreover, effects usually extend far into the future and must therefore be discounted accordingly.

Policies to improve environmental outcomes are of two basic types: market-based instruments and direct controls. Appropriately designed taxes attempt to *internalize the externality* and thus ensure that decision makers choose actions based on their full social cost, not the private cost alone. But because of the difficulties entailed in measuring costs and benefits, such policies are unlikely to achieve this goal exactly. Rather than trying to fine-tune the market response, policy makers may opt instead for an approach that limits quantity directly, as with emissions permits,[58] or requires the use of a particular abatement technology. But regardless of which approach is chosen, policy makers are

[56] When property rights are fully defined and enforced, and costs of transactions among interested parties sufficiently low, private action alone may be sufficient to assure an efficient outcome (Ronald Coase, *The Problem of Social Costs*, 3 JOURNAL OF LAW AND ECONOMICS 1 (1960)). In such an outcome, the polluter may agree to compensate those affected, but it is also possible that those affected will pay the polluter to abate the pollution.

[57] Policies to address environmental spillovers are used when voluntary action, including Coasian private contracts between the parties responsible for the externality and all those affected by it, is considered insufficient to achieve a satisfactory outcome.

[58] If such permits may be bought or sold freely, their market value will approximate the tax rate required to achieve the same reduction in emissions. However, the fiscal implications will differ unless permits are distributed via competitive auction.

likely to give less consideration to costs or benefits experienced beyond the boundaries of the relevant jurisdiction, while globally efficient outcomes require such transboundary effects to be given equal weight. A reasonable assumption is that internalization via policy is incomplete: policy measures do not fully internalize environmental externalities (social cost remains above private cost), and that the remaining gap is larger in the case of transboundary effects.

Given this starting point, how do trade and economic growth (which may result from trade or other causes) affect environmental conditions and environmental policies? To better explore the complex relationships, recent analysis has relied on a conceptual partition of the environmental impacts of trade or economic growth into three distinct components: effects on the *composition* of output (relatively less or more production by dirty industries), on the *technique* of production (relatively less or more environmental damage per unit of output produced), and on the overall *scale* of production (a proportional increase in associated damage).

B. Economic Growth and the Environment

Conceptually, economic growth is likely to increase environmental damage via the scale effect, but this negative impact of growth may be more than offset by favorable composition and technique effects. Grossman and Krueger[59] were among the first to demonstrate empirically that economic growth does not necessarily imply accompanying deterioration of the environment. Using cross-country data, they estimate the reduced-form relationship between GDP and various measures of national pollutants, such as urban air pollution, oxygen levels in river basins, fecal contamination of river basins, and heavy metal contamination of river basins. Decomposing the overall impact of national income into the scale, technique, and composition effects, they conclude that while higher GDP is related to higher pollution in the very poorest countries, beyond a certain GDP threshold (around $8000 in 1985 U.S. dollars), further increases in GDP are typically associated with an improvement in environmental quality. This is the U-shaped relationship between national income and pollution subsequently labeled the environmental Kuznets curve.[60]

A substantial literature has explored the robustness of the empirical evidence for a U-shaped income-pollution relationship. An important recent contribution is Harbaugh, Levinson, and Wilson.[61] With access to a richer data set and through the use of alternative econometric techniques and additional covariates in the estimation, the authors call into question the finding of a robust U-shaped relationship between a group of important air pollutants and national income. They also conclude that the available empirical evidence does not support broad claims either for an unequivocally positive or an unequivocally negative effect of economic growth on the environment.

[59] Gene M. Grossman and Alan B. Krueger, *Environmental Impacts of a North American Free Trade Agreement,* in THE U.S.-MEXICO FREE TRADE AGREEMENT (Peter Garber ed. 1993); Gene M. Grossman and Alan B. Krueger, *Economic Growth and the Environment,* 110(2) QUARTERLY JOURNAL OF ECONOMICS 353 (1995).

[60] The name is based on its similarity to the U-shaped pattern for the relationship between economic growth and income inequality hypothesized by Simon Kuznets.

[61] William T. Harbaugh, Arik Levinson, and David Molloy Wilson, *Reexamining the Empirical Evidence of the Environmental Kuznets Curve,* 84(3) REVIEW OF ECONOMICS AND STATISTICS 541 (2002). *See* James Andreoni and Arik Levinson, *The Simple Analytics of the Environmental Kuznets Curve,* 80(2) JOURNAL OF PUBLIC ECONOMICS 269, footnote 1 (2002) for a comprehensive list of papers in this literature.

Related theoretical work by Andreoni and Levinson[62] shows that an EKC can be derived from optimizing behavior even in a model with a single consumer and thus no externalities and no possibility of market failure. The result depends on increasing returns in abatement of the pollution generated during production of the consumption good: proportional increases in both pollution and clean-up effort are associated with a more than proportional increase in pollution abatement. This assumption is plausible whenever abatement entails significant fixed costs.

With many consumers optimizing individually, the usual environmental externality is incorporated into the model. The U-shaped relationship now remains, but each individual consumes too much and abates too little, relative to the social optimum. Given the environmental externality and resulting market failure, public policy can raise social welfare by internalizing the externality. As Andreoni and Levinson emphasize, their results do not imply that economic growth alone will solve pollution problems, nor do they offer theoretical support for a laissez-faire approach to environmental problems. On the contrary, they show that although the pollution-income path may have an inverse-U shape even in the absence of environmental regulations, pollution will be inefficiently high at every income level.

C. Trade and the Environment

To assess how international trade affects the environment, it is useful to proceed in two steps. First we examine the impact of international trade on the environment when the environmental concern is local pollutants, i.e., where the source and the effect are in the same political jurisdiction. We then turn to the impact of trade on the environment in the presence of transboundary pollutants.

1. Trade's Impact with Local Pollutants

Copeland and Taylor[63] use a simple model of North-South trade that illustrates each of the possible channels through which trade can affect local pollution. They analyze the impact of trade on pollution when countries differ only in per-capita income (relative endowment of human capital); environmental standards are assumed to rise with income. North therefore applies higher environmental standards. Trade allows South to become a pollution haven, exporting pollution-intensive products to North. In this model, trade does raise pollution for South and for the world as a whole, but trade is nonetheless welfare-improving for both countries. Because environmental impacts are local and standards are adjusted endogenously to maximize national welfare, there is no market failure in this model, either with trade or without.

In terms of the standard decomposition, the *scale* effect implies that pollution will rise in both countries. However, the *technique* effect, here captured by the assumption that environmental standards rise with income, will lead to the adoption of cleaner production methods in both countries, thus reducing pollution per unit of output in each industry. The *composition* effect depends on the comparative advantage of the country. The composition effect reduces the average pollution intensity of production if the marginal industry that leaves the country due to specialization is dirtier than the average industry in the country. If the marginal industry is cleaner than the average national industry, then average pollution

[62] Andreoni and Levinson, *supra* note 61.

[63] Brian Copeland and M. Scott Taylor, *North-South Trade and the Environment,* 109(3) QUARTERLY JOURNAL OF ECONOMICS 755(1994).

intensity will rise. Under the assumptions of the model, the composition effect must dominate as industries relocate in order to take advantage of differences in environmental standards. A larger initial North-South gap in per-capita income results in a larger increase in pollution worldwide due to trade.

Differences in environmental protection are the only source of comparative advantage in Copeland and Taylor,[64] so that South necessarily has a comparative advantage in dirty industries. In reality, however, many polluting industries are relatively capital intensive. Without significant differences in environmental standards, such industries would be expected to locate in capital-abundant, i.e., more developed, countries. To capture this second determinant of industry location, Antweiler, Copeland, and Taylor [65] include factor endowments as an additional source of comparative advantage. This theoretical framework introduces the possibility that capital-intensive industries may prefer to locate in the capital-abundant North, where capital is cheaper, even though environmental taxes there are higher due to higher incomes. The authors use this framework to disentangle two competing hypotheses: the pollution-haven hypothesis, i.e., that trade will allow dirty industries to relocate to low-income countries with relatively weak environmental standards, and the factor-endowments hypothesis, i.e., that trade will allow dirty capital-intensive industries to relocate to relatively capital-abundant higher-income countries despite higher environmental standards.

In the empirical part of the analysis, Antweiler *et al.* examine the impact of liberalized trade in manufactured goods on the environment, where "the environment" is measured by sulfur-dioxide (SO_2) emissions. Estimating the sizes of the scale, technique, and composition effects, the authors find that the composition effect is small, so that the factor-endowment motive for trade dominates the pollution-haven hypothesis. The net impact of the trade-induced scale and technique effects is a reduction in pollution from these sources. Overall, liberalized trade is found to be good for the environment: a one per cent increase in GDP created by trade liberalization is associated with a fall of nearly one per cent in pollution concentrations. These empirical results suggest that, at least for sulfur-dioxide emissions, the favorable technique effect associated with higher incomes due to expanded trade is much larger than the composition effect (international relocation of production) and the scale effect (higher production levels). However, there is no basis for concluding that the relative magnitudes of the three effects will be similar for other types of industrial pollution or that expanded trade will necessarily be associated with a net decrease in every type of pollution.

One important implication of these models is that trade *does* affect the environment, even when policy makers set optimal domestic environmental policies and adjust these policies as per-capita income rises. When the net impact is a *cleaner* environment, as found by Antweiler, *et al.*,[66] this outcome arises almost entirely through the technique effect: income gains induced by trade cause governments to respond with more-stringent environmental policies, which in turn create incentives for industry to adopt cleaner production techniques. A favorable net outcome therefore rests critically on the ability and willingness of policy makers to adjust environmental standards optimally as per-capita incomes rise.

[64] *Id.*

[65] Werner Antweiler, Brian R. Copeland, and M. Scott Taylor, *Is Free Trade Good for the Environment?* 91 (4) AMERICAN ECONOMIC REVIEW 877(2001).

[66] *Id.*

In addition to trade-induced increases in income that encourage adoption of stronger environmental policies, another potential benefit from trade arises through the spatial separation of "environmentally incompatible" industries such as "dirty" manufacturing and an environmentally sensitive sector such as agriculture or fishing.[67] By allowing incompatible industries to move farther away from each other, trade can reduce or eliminate some negative externalities that depress productivity in the other industry, thereby raising productivity overall.

2. Trade's Impact with Transboundary Pollutants

Although industrial pollution is often a national or local problem, some of the most controversial environmental issues involve transboundary pollutants. Without international coordination, policies designed to maximize *national* welfare are likely to under-correct for this type of externality. Trade may thus reduce efficiency and welfare once environmental consequences are taken into account. Where the number of countries affected is small, regional agreements may suffice to achieve the required coordination. Examples of such cases include acid rain along a shared border and pollution of a river that runs through two or more countries. But for the limiting case in which one country's actions affect all countries equally, global environmental quality can be considered a pure public good, subject to the usual incentive problems associated with the optimal provision of public goods. Without international coordination, each country will "spend" too little, from the global perspective, to reduce emissions that threaten the ozone layer or contribute to global warming. The case of *global* pollution differs importantly from the framework described above because the relocation of dirty industries to lower-income pollution havens can reduce environmental quality everywhere, not just in the new location. This transboundary effect can undercut the standard gains from trade.

Unteroberdoerster[68] revisits the spatial separation of environmentally incompatible industries via trade in the case of pollution with transboundary effects. In this setting, specialization due to trade has repercussions for pollution in a partner country. The relative size of the transboundary component of pollution is key. Under some conditions, free trade may increase pollution and, over time, reduce environmental quality in both countries. In fact, trade can cause the world production possibility frontier to shift inward as transboundary pollution shrinks productivity in the partner country. However, this unfavorable outcome requires both that the emitting industry in one country is more polluting than its counterpart in the other country and that the ratio of transboundary to national pollution is sufficiently high.

Copeland and Taylor analyze the effects of trade among many countries when global environmental quality is a pure public good.[69] As in earlier work,[70] they focus on the role of environmental policy as a determinant of trade by assuming that differences in per-capita income (human capital endowments) and thus in environmental standards are the only source of comparative advantage. Each of many countries in the higher-income North and lower-income South maximizes national welfare with respect to a limit on its

[67] Brian Copeland and M. Scott Taylor, *Trade, Spatial Separation, and the Environment,* 47(1) JOURNAL OF INTERNATIONAL ECONOMICS 137 (1999).

[68] Olaf Unteroberdoerster, *Trade and Transboundary Pollution: Spacial Separation Reconsidered,* 41(2) JOURNAL OF ENVIRONMENTAL ECONOMICS AND MANAGEMENT 269 (2001).

[69] Brian Copeland and M. Scott Taylor, *Trade and Transboundary Pollution,* 85(4) AMERICAN ECONOMIC REVIEW 755 (1995).

[70] Copeland and Taylor, *supra* note 63.

own total emissions; these limits are implemented through the sale of pollution permits. Even in this extreme case of transboundary pollution, poorer countries choose higher limits; in autarky, permits are thus cheaper in these countries.

Trade can then be interpreted as the indirect exchange of two factors of production: human capital and pollution permits. The effects of trade depend on the extent of differences in endowments of human capital between North and South. If differences are not too large, so that trade in goods equalizes factor prices, trade has no net impact on the environment. Although the autarky equilibrium is sub-optimal from a global perspective (too much consumption and too much pollution), trade does not exacerbate that inefficiency. However, if income differences are large and trade in goods alone does not equalize factor prices, the price of pollution permits will remain relatively lower in poorer countries. Trade then allows these countries to become pollution havens, and free trade has a negative impact on the global environment. However, both of these effects are moderated if pollution permits as well as goods can be traded internationally. And, not surprisingly, reductions in pollution by a coalition of countries or through North-South income transfers tied to pollution reduction can achieve Pareto improvements. These results reflect the underlying inefficiency from setting environmental policy at the national level when benefits are global.

3. Avenues for Further Research

Even given the substantial increase over the last decade in formal economic analysis of the impact of international trade on the environment, empirical results concerning the size (and perhaps even the sign) of the impact of trade on the environment should still be regarded as preliminary, and many more pollutants in addition to sulfur dioxide remain to be investigated. Although the initial results appear promising for proponents of liberal trade, they are not yet conclusive. Moreover, there has been little empirical work assessing the effects of trade on transboundary pollution. Finally, despite the attention to these issues in recent trade negotiations, there has been little theoretical or empirical work specifically assessing the environmental impact of liberalized agricultural trade and the reduction of state-sponsored subsidies on the environment, and in particular the effects on runoff, groundwater, and pollutants associated with chemical-intensive farming.[71]

D. Trade Agreements and the Environment

The literature reviewed in the previous sections addresses the environmental impact of increased trade, usually with a focus on the interaction between income levels and endogenous national environmental standards. A related line of research investigates implications of sensitive environmental issues for the role and design of *international trade agreements.* A key issue here is the extent to which current WTO rules curtail the ability of signatories to apply desired environmental safeguards at the national level.

1. Adequacy of WTO Rules to Accommodate Environmental Safeguards

Economists view trade agreements as a means for countries to achieve mutual gains either by coordinating behavior directly or by establishing rules of behavior that are likely to

[71] Agricultural support programs often create incentives for adoption of chemical-intensive techniques that increase yield per acre. Thus, a potential benefit of reducing import restrictions, export incentives, and price supports is the reduction of some types of environmental damage.

increase global efficiency.[72] An example of direct coordination is a trade agreement that enables relatively large countries—which have less incentive to remove trade barriers unilaterally because of associated terms-of-trade losses—to benefit from liberalization. Such a trade agreement helps large countries out of the prisoners' dilemma resulting from terms-of-trade effects. By compelling each country to give up sovereignty with respect to its trade policy, the trade agreement can make all trading partners' better off.

Alternatively, a trade agreement may serve as a way for governments that lack commitment power with respect to the actions of their private sector to commit credibly to trade liberalization.[73] Given this frame of reference and that trade agreements generally require governments to give up sovereignty over their trade policies, must countries in a similar fashion cede control over their domestic policies in order to move toward global efficiency with regard to environmental concerns? Bagwell and Staiger address this question for the case of local pollutants and large countries—ones whose unchecked trade and domestic policy choices could generate negative terms-of-trade externalities for trading partners.[74] Perhaps surprisingly, they conclude that it is *not* necessary for countries to cede control over domestic environmental policy in order to achieve global efficiency.

In the case of local pollutants, the international transmission of environmental problems occurs only through the government's desire to manipulate its environmental policy to improve its trade prices and thus generate welfare gains for itself (with corresponding terms-of-trade losses for its trading partners). While one way to deal with this problem would be to negotiate directly over national environmental policies by bringing them into the WTO, this drastic measure is not required; current WTO rules are already adequate to handle most of the problem. With a minor reform that would actually give governments *more* sovereignty, the existing WTO framework could produce a globally efficient outcome.

The Bagwell-Staiger analysis has two elements, both of which focus on WTO rules regarding market-access commitments. First, consider the case in which a domestic industry with competitiveness concerns seeks import relief from its government. Because the country's tariff rates are bound under the WTO, the government cannot respond unilaterally by manipulating its trade policy. It has an incentive to relax its environmental standards as an alternative means to improve the competitiveness of the domestic industry, thereby imposing some costs on its trading partners through the induced change in the terms of trade. However, the WTO already has rules and procedures that address this problem. An affected exporting country can intercede with a *non-violation*[75] complaint

[72] Kyle Bagwell and Robert W. Staiger, 89(1) *An Economic Theory of GATT,* AMERICAN ECONOMIC REVIEW 215 (1999).

[73] Robert W. Staiger and Guido Tabellini, *Discretionary Trade Policy and Excessive Protection, 77(5)* AMERICAN ECONOMIC REVIEW 823(1987).

[74] Kyle Bagwell and Robert W. Staiger, *Domestic Policies, National Sovereignty, and International Economic Institutions,* 116(2) QUARTERLY JOURNAL OF ECONOMICS 519 (2001); Kyle Bagwell and Robert W. Staiger, *The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues,* 15(3) JOURNAL OF ECONOMIC PERSPECTIVES 69 (2001).

[75] A violation complaint alleges a trading partner's violation of one or more specific WTO rules. In contrast, a non-violation complaint may be brought to the WTO when a member undertakes an activity (here, lowering environmental standards) that violates no explicit WTO rule yet nullifies or impairs the market-access benefits expected by its trading partner. *See* Chapter 29 of this book; and Ernst-Ulrich Petersmann, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT, CHAPTER 4 (1997). In practice, very few non-violation complaints have been brought, and not all of these have been successful.

and initiate a trade dispute. The non-violation complaint would make the WTO-valid argument that, although the domestic policy action reducing the country's environmental standards did not violate any WTO rules, the action did affect the market-access commitments expected by the exporting country. Thus, enforcement of current WTO rules appears to be sufficient to deal with race-to-the-bottom concerns.

The second element of the Bagwell-Staiger analysis relates to the adequacy of current WTO rules to deal with concerns of regulatory chill—governments' hesitation to tighten domestic environmental policies if some of the benefits of those policies accrue to trading partners in the form of expanded market access. Bagwell and Staiger[76] suggest two possible means of addressing this issue, one of which involves giving governments more sovereignty than the WTO rules currently allow. One way for an international trade agreement like the WTO to address the regulatory-chill problem is to grant a government the right to raise its tariffs when it imposes a more-stringent domestic pollution policy, thus neutralizing the net market-access impact of the policy change. Although this approach conforms to the spirit of WTO practice, current rules prohibit members from raising their bound tariffs even if there is no net impact on their market-access commitments. Increasing a bound tariff could give rise to a *violation* complaint, even though the *net* effect of the two changes would be to leave the exporting country's market access unchanged.

Alternatively, the government raising its environmental standards could offer domestic producers a subsidy to offset the financial burden on environmentally regulated industries. Some subsidies of this type were explicitly authorized as non-actionable under the Uruguay Round Subsidies Agreement, although as noted above the exemption is no longer applicable.[77] However, for countries that would find it difficult to generate the tax revenue needed to implement subsidy policies, the tariff-increase approach may be more feasible. Because current WTO rules prohibit uncompensated tariff adjustments, this would require a minor reform of the rules.

2. The WTO as a Self-Enforcing Agreement

Given that the organization has no real enforcement power of its own, the WTO relies primarily on the retaliation threats of its members to sustain cooperative outcomes such as low tariffs and liberalized trade. The threat of retaliation—and of the possible breakdown of the agreement—restrains countries from cheating. But success in achieving and maintaining lower tariff barriers has led countries to use domestic policies as alternative means of achieving the same policy objectives, so that recent negotiations have increasingly focused on the trade impact of domestic policies, including environmental policies.[78] Article III of the GATT stipulates that no domestic policy should be applied in such a way as to "afford protection to domestic production." Because explicit protection in the form of tariffs (up to the bound level) is allowed under the GATT rules, Article III embodies a preference for the use of tariffs rather than domestic policies.

Given that the WTO lacks a centralized means of enforcement and globally efficient outcomes are thus not attainable, an important question is how best to allocate the scarce

[76] Bagwell and Staiger, *supra* note 74.

[77] For a discussion, *see* Michael J. Trebilcock and Robert Howse, THE REGULATION OF INTERNATIONAL TRADE 196 (1999).

[78] Josh Ederington and Jenny Minier, *Is Environmental Policy a Secondary Trade Barrier? An Empirical Analysis, 36(1)* CANADIAN JOURNAL OF ECONOMICS 137 (2003), in an empirical analysis, find results consistent with U.S. use of environmental policy as a secondary means to protect import-competing industries. By modeling environmental policy as endogenous, Ederington and Minier also obtain larger estimated effects on trade than those reported by earlier researchers.

enforcement power arising from the self-interest of its members. Should it be used to achieve maximum cooperation on trade policies, maximum cooperation on domestic policies (including environmental measures), or some mix of the two? Ederington's theoretical analysis of international coordination of trade and domestic policies concludes that when enforcement power is limited, countries should cooperate fully over domestic policies, allowing each country to use these optimally to counter domestic distortions such as environmental externalities.[79] Trade policies should then be set so as to maintain the agreement's viability. In particular, this rules out the idea of an environmental "escape clause" allowing members to relax their environmental polices when faced with external shocks. Rather, adjustments necessary to sustain the agreement and to prevent countries from defecting should come through adjustments in trade policies only, as permitted under the WTO's Agreement on Safeguards.[80]

Ederington's result is an application of the theory of economic distortions to trade policy.[81] Here the assumed source of the inefficiency is trade. Specifically, sufficiently large surges in import volumes create a terms-of-trade motive for one country to defect from the agreement (the country's private benefit from defecting exceeds the social benefit, which is negative). Therefore, the efficient means of addressing the distortion is through a trade policy. Use of an environmental policy would be at most second best.

3. Avenues for Further Research

The theoretical literature on the role of trade agreements has so far addressed mainly issues relevant to localized pollution rather than global-commons concerns. One important open question is whether the WTO should be used to negotiate and/or enforce international environmental agreements. Bagwell and Staiger,[82] in assessing the WTO's role as a mechanism for securing market-access property rights, see no basis for expecting that the success of the GATT/WTO in facilitating trade liberalization would carry over to negotiations on global-commons issues. However, their stance on the issue of enforcement is neutral: "At this early stage in the research literature, it is impossible to advance with confidence an answer to whether using WTO trade sanctions as an enforcement mechanism for global labor and environmental standards would end up benefiting either free trade, labor, or the environment." Threats of retaliation via trade policy might lead, *ceteris paribus*, to more international cooperation on environment—and, likewise, threats of retaliation via environmental policy might lead to more international cooperation on trade. However, it is also possible that issue linkage would result in more cooperation in one area and less in the other than if each were dealt with separately.

[79] Josh Ederington, *International Coordination of Trade and Domestic Policies,* 91(5) AMERICAN ECONOMIC REVIEW 1581 (2001).

[80] Kyle Bagwell and Robert W. Staiger, *A Theory of Managed Trade,* 80(4) AMERICAN ECONOMIC REVIEW 779 (1990), establish such a motive for including a safeguards clause in an international trade agreement. By allowing countries to increase protection temporarily when facing import surges (and thus strong terms-of-trade incentives to deviate from the cooperative agreement), a safeguards clause helps to maintain viability of the agreement.

[81] Distortions are situations where private costs and/or benefits diverge from social costs and/or benefits. As noted above, these are cases where market failure is likely. A central conclusion from the literature on policy in the presence of distortions is that the best policy is one that addresses the distortion at its source. A "second-best" policy is the best choice available when the optimal policy is ruled out for political or budgetary reasons.

[82] Kyle Bagwell and Robert W. Staiger, *The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues,* 15(3) JOURNAL OF ECONOMIC PERSPECTIVES 69, 85 (2001).

V. Unfinished Business

Some new trade-environment disputes have already emerged during the short history of the WTO, while a number of others brought to the GATT prior to 1995 remain unresolved. This section examines several issues where WTO consideration is currently in progress or likely to begin soon. Perhaps it is not surprising that the most contentious of the current issues (beef hormones, genetically modified organisms, biodiversity) are newer concerns only loosely related to ongoing efforts with regard to air and water pollution. For the latter, decades of experience with policy making at the national level and efforts to establish international cooperative regimes have already borne some fruit: an improved scientific basis for policy formation as well as better performance. While the newer issues are analytically similar to traditional pollution concerns in that they also entail negative production or consumption externalities, policy making is hampered by lack of an adequate scientific base. This is partly because the issues are newer, but also because they usually involve the possibility that today's actions will have negative consequences far in the future. Design of an appropriate policy response, whether at the national or international level, hinges critically both on the accuracy with which future changes can be predicted and the choice of the discount rate used to compare costs and benefits accruing over time.[83]

A. Process and Production Methods

One key issue sure to be raised under the WTO's Dispute Settlement Understanding is the WTO position on rules that distinguish among traded goods on the basis of process and production methods. Specifically, members seek to establish when it is permissible to limit imports from a trading partner based solely on that partner's PPM. In GATT/WTO terminology, to what extent can goods produced by different methods nonetheless be considered "like products"?

Restraint of trade on the basis of PPM was rejected by a GATT panel in the *Tuna-Dolphin* case, discussed above. The panel concluded that the primary goal of the U.S. ban on imports of dolphin-unsafe tuna was to pressure other countries to adopt U.S.-style regulations concerning protection of dolphins.[84] The panel also found that the United States had not exhausted means other than restriction of imports in its efforts to protect dolphins. In fact, subsequent to the panel ruling, nine countries including Mexico and the United States signed a multilateral agreement on protection of dolphins.[85]

A U.S. restriction on imports of shrimp on the basis of PPM was likewise rejected by a WTO panel, as also discussed above. A subsequent ruling by the WTO Appellate Body following an appeal did not reverse the panel decision against the United States. However, the 1998 report of the Appellate Body affirmed the right of members to take actions necessary to protect the environment and also that measures to protect sea turtles

[83] All environmental issues have an intertemporal dimension, but it is notable that the greatest progress has been made in reducing emissions such as sulphur dioxide, whose negative effects can be seen or smelled today. Also, merely documenting longer-term effects, say of GMOs, necessarily requires a longer period of observation and analysis.

[84] This kind of forced harmonization offers two types of potential benefits for the United States. First, it reduces the number of dolphins killed outside U.S. waters by ensuring that all those wishing to serve the U.S. market adopt dolphin-safe methods in tuna fishing. In addition, it restores the initial competitiveness position of U.S. tuna fishers, and thus shifts part of the cost of the U.S. policy onto U.S. trading partners. Of course, any type of import restriction also imposes higher prices on domestic consumers.

[85] Trebilcock and Howse, *supra* note 77, at 406–410.

would be permitted under Article XX. The problem with the U.S. policy was in its implementation, which was found to discriminate among exporting countries—exporters in the western hemisphere received financial and technical assistance and were allowed more time to comply with the policy. Even though the Appellate Body did not rule in favor of the United States, the report can been seen as strengthening the use of Article XX as a basis for the unilateral application of trade measures in some circumstances. Specifically, trade measures to achieve environmental objectives could be used if efforts to achieve a multilateral solution have failed and the measures themselves are not discriminatory in their application.[86] Following improvements in implementation to eliminate discrimination among exporters, the U.S. policy prevailed in a WTO challenge with respect to implementation of the decision in 2001.

The disputes in the *Tuna-Dolphin* and *Shrimp-Turtle* cases both acknowledged environmental concerns. In each case the issue is not the stated goal of the policy but, rather, the trade-restricting method used to achieve it. However, some environmental goals are more controversial. In the *Beef Hormones* case, the European Union banned imports of U.S. beef from cattle treated with hormones, even though decades of scientific research indicate that such beef poses no risk to human health.[87] A WTO panel and the Appellate Body both concluded that the EU ban violated WTO provisions.[88] After the European Union failed to change its policy, the United States exercised its right under the WTO to impose retaliatory restrictions on imports from the European Union.[89]

PPMs would also be a substantial issue in any case concerning trade restrictions of genetically modified organisms brought under the DSU. In recent decades, genetic engineering has produced new varieties of wheat, corn, and other crops, with higher yields and less vulnerability to common pests. By 2001, one hundred million acres worldwide had been planted with these new varieties, with the United States accounting for the lion's share.[90] As in the case of beef hormones, the weight of scientific evidence suggests that GMOs provide no significant risk to human health. Yet many consumers in Europe are reluctant to eat foods containing GMOs, and environmentalists have raised the concern that GM crops might crossbreed with wild plants to produce "super-weeds." EU regulatory authorities have thus placed a *de facto* moratorium on approval needed to market new products in the European Union. A number of countries have passed or are considering mandatory labeling of foods containing GMOs.[91] While U.S. trade and agriculture officials have lodged protests in various forums, some North American farmers are already switching back to traditional varieties to ensure access to important

[86] The report gave further support to environmental groups in stating that WTO panels may accept "amicus briefs" (friends of the court submissions) from NGOs or other interested parties <http://www.wto.org/wto/english/tratop_e/envir_e/edis08_e.htm> (accessed 14 August 2001).

[87] Given that the WTO defers to the Codex Alimentarius Commission on matters of food safety, support from the Codex standard played a key element in the ruling against the European Union. While Trebilcock and Howse, *supra* note 77, at 152 point out that the Codex standard on hormones was adopted by a vote of 33 to 29 with seven abstentions, they also note that the Codex has been criticized for a "closed-door policy" and procedures that do not ensure an outcome based on the weight of scientific evidence.

[88] A further complication is evidence that some European farmers use hormones obtained illegally via a black market <http://www.sciencenews.org/20020105/bob13.asp> (accessed 29 July 2002).

[89] The EU offered additional concessions on non-hormone-treated beef as a settlement. However, the U.S. took an inflexible stance in the bargaining, either to underscore a principle or because it did not have sufficient amounts of non-hormone treated beef to benefit from accepting the EU offer.

[90] U.S. General Accounting Office*, International Trade: Concerns Over Biotechnology Challenge U.S. Agricultural Exports* 3, Report to the Ranking Minority Member, Committee on Finance, U.S. Senate (GAO-01-727, June 2001).

[91] *Id.* at 6.

export markets. Ironically, concerns about the possible long-term risk of GMOs may mean increases in environmental damage from the additional chemicals normally required for commercial success with older varieties. Furthermore, the uncertainty regarding market access for GM crops is likely to affect planting decisions of developing countries in Africa that rely on the EU markets for their agricultural exports.

Because the issues at stake—such as when scientific evidence is adequate for use in determining policy and when the precautionary principle justifies restriction of imports—have become so controversial, it may be risky for the future of the WTO system to allow the parameters of acceptable trade restriction on the basis of PPM to be determined entirely by case law. Reliance on DSU case law may be politically palatable when the issues involved are benign and limited to trade. However, when the issues involved in the international debate include politically sensitive questions over the environment, science, trust of regulatory authorities, and even ethics, direct international negotiations over the issues will carry more weight politically than would third-party adjudication by a body like the DSU that is already viewed with substantial distrust and skepticism.

Another important concern raised by the PPM experience is the flexibility of the WTO, in its current form, to respond to the dynamic nature of environmental concerns, given that the scientific information required to make informed policy decisions is evolving as well. Many environmental issues that need to be addressed (global warming, deforestation, coral reefs, biodiversity, etc.) have uncertain future costs if left untreated. Yet addressing these environmental issues today entails certain costs in terms of foregone national income as resources are moved out of current production and into prevention of environmental degradation. These costs and benefits have a significantly larger intertemporal dimension than the costs and benefits of market access that the GATT/WTO system has successfully negotiated over its history. Progress in negotiating over the environment will require flexibility, long-term cooperation, and a consensus on both the underlying scientific base and the appropriate discount rate to be used when current costs weighed against future benefits.

There are at least two different concerns over the current structure of the WTO in handling these needs. Because the WTO itself does not have ongoing legislative powers, it is not amenable to flexible, ongoing discussions of the sort needed to respond to environmental concerns. Occasional negotiating rounds may not be adequate to address such potentially serious concerns. Furthermore, the WTO as currently structured has shown little ability to credibly match intertemporal gains and losses. As shown by its experiences with TRIPs, the Agreement on Textiles and Clothing, and other agreements with relatively long phase-in periods, intertemporal trading is difficult to sustain politically.

B. Internalization Versus Polluter Pays

As discussed in Part IV of this chapter, internalization of externalities is central to the market-based approach to achieving environmental goals. The goal of this internalization approach is to ensure that the optimizing decisions of individuals and firms reflect the full social cost or benefit from their actions. To the extent that the internalization is achieved via a system of taxes and subsidies or an equivalent system of marketable permits—polluters also bear, at least proximately,[92] the cost of the choices they make: the polluter pays an extra amount equal to the value of the negative external effect, and the

[92] As with any tax, ultimate incidence (the actual change in net price received or paid) depends on elasticities of producer supply and consumer demand.

abater likewise enjoys a cost reduction equal to the value of the positive external effect. However, even at the regional or national level, such policies may be modified to soften income-distribution effects deemed undesirable and/or politically unacceptable. In the United States, small businesses, though often among the worst polluters, are nonetheless exempted from most policies intended to protect the environment. Older autos, typically owned by those in lower income groups, are usually exempt from environmental regulations that apply to newer vehicles, although some communities have instead adopted incentives to remove these high-emissions vehicles from the road.

It is notable that burden-shifting approaches to internalization are often seen as necessary even within a single country or smaller area, where an elaborate system of taxes and payments is available to modify the distribution of income and consumption. In the global community, where differences between rich and poor are so much larger, there is no overall redistribution mechanism comparable to that applied within most individual countries, whether rich or poor. The international distribution of costs associated with protecting global commons therefore becomes an important consideration in policy design. In the highly improbable event that all can agree on the monetary equivalent of social costs and benefits, poorer countries with more immediate problems are likely to apply much higher discount rates to future benefits. Thus, even disregarding the very real uncertainty about future outcomes, the set of environmental objectives seen as worth pursuing from a social perspective will be nonetheless be smaller for poorer countries than for wealthy ones. For this reason, efforts to reach agreement on environmental objectives and on measures to achieve them will likely fail unless poorer countries are compensated for their participation—or threatened with possible consequences of their non-participation (e.g., trade sanctions or worse). In the *Shrimp-Turtle* case, the country most interested in the relevant environmental issue (the United States) eventually agreed to pay at least part of the cost entailed in addressing the underlying problem.[93] Outside the GATT/WTO system, debt-for-nature swaps are an example of international compensation used to achieve environmental objectives. In recent years, financial assistance from the World Bank has sometimes been conditional on implementation of environmental safeguards.

Unfortunately, the WTO system relies on voluntary exchanges of trade concessions and lacks an explicit compensation scheme to facilitate cross-country bargaining. Except for perhaps the most politically sensitive sectors in developed countries (agriculture, textiles, steel), tariff barriers have been negotiated to very low levels, making it increasingly difficult to find mutually acceptable trade concessions needed to strike bargains between countries over future trade, environmental or any similar issues. The current sole alternative to additional trade liberalization—compensation in the form of tariff retaliation—is both inefficient and a contributor to the perception that the GATT/WTO system is based on "power" relationships. We return to the idea of achieving more internalization of global externalities via international compensation in Part VI.

VI. Conclusions and Future Directions

Many environmentalists see the GATT/WTO system as a significant obstacle to progress on environmental issues. However, our review of recent high-profile cases finds that actual panel and Appellate Body decisions have had the effect of encouraging international

[93] Press release, United States Trade Representative, June 15, 2001 <http://www.ustr.gov/releases/2001/06/01-40.pdf> (accessed 7/22/02).

cooperation to achieve environmental goals. It is true that decisions in the *Tuna-Dolphin* and *Shrimp-Turtle* cases limited the ability of the United States to require trading partners to adopt U.S.-style environmental safeguards. These decisions discourage powerful countries with large markets from the use of unilateral trade restrictions to force adoption of a preferred environmental safeguard, rather than pursuing the same objective via negotiation among interested parties. In the *Shrimp-Turtle* case, the Appellate Body report explicitly reaffirmed that WTO rules do not prevent members from taking unilateral trade action to protect the environment if international cooperative efforts fail, but also that unilateral measures may not be applied in a way that discriminates between WTO members. The *Shrimp-Turtle* case is also significant as an example of negotiated compensation (in the form of U.S. technical and financial assistance) to defray the cost to lower-income countries of conforming to the U.S. standard of sea-turtle protection.[94]

The primary goal of the GATT/WTO system is to expand global trade. While economists generally argue that more trade is likely to improve environmental conditions, environmentalists fear that the opposite will be true. Recent contributions to the economic analysis of the trade-environment nexus help to untangle the complex relationship between environmental standards and trade. One clear implication from this literature is that trade expansion *is* likely to affect the environment. Via the scale effect and perhaps also the composition effect, increased trade will—other things equal—lead to additional pollution and a dirtier environment. The upward adjustments in domestic and global environmental policies necessary to offset the scale effect from higher production activity are often a response to rising incomes, but this effect should not be regarded as automatic.

Along with most free traders, WTO officials tend either to minimize the importance of the link between trade and environment or to emphasize the evidence of a favorable net effect. Instead, WTO experts should alert national policy makers to the likely impact of liberalized trade on pollution and other environmental damage in the absence of stronger safeguards, and encourage members to use trade-induced increases in GDP partly to facilitate the upward adjustments in national standards needed to ensure that freer trade will also mean more environmental protection. Under current GATT rules, policy makers may be discouraged from making optimal adjustments in national standards because of their impact on trade competitiveness. However, our review of the literature indicates that a minor modification of current rules would allow individual nations to use trade policy to neutralize such competitive effects.

Although measures implemented at the national or sub-national level are sufficient to produce socially optimal outcomes with regard to localized environmental effects, optimizing solutions to some problems require international coordination. However, it is far from obvious that a global forum is best for tackling all or even most of these problems. Many examples of transboundary environmental impacts involve just a few countries, often only two. For these, direct negotiations, possibly entailing compensation or issue linkage, may be more productive than efforts coordinated by a global environmental organization.[95] Even for a "global" issue such as carbon-dioxide emissions, concerted

[94] Providing financial compensation to developing countries in return for action to safeguard global commons is central to the Whalley and Zissimos, *supra* note 10, proposal for a World Environmental Organization, which we discuss below.

[95] A possible danger is that new arrangements in which richer nations compensate poorer ones for improved environmental policies might result in foot-dragging on needed policy improvements or even threats of new environmentally damaging actions in the hope of extracting greater compensation from other nations.

action at the OECD level alone could achieve important benefits. Still, environmentalists and an increasing number of international economists see a role for a specialized international organization dedicated to safeguarding the global environment. Existing institutions, such as the United Nations Environmental Programme ("UNEP") and the newer United Nations Commission on Sustainable Development, are largely advisory bodies with "narrow mandates, small budgets, and limited support."[96] These coexist with hundreds of organizations and treaties that address specific environmental concerns ranging from climate change to coral reefs. But no current organization has the authority to coordinate ongoing efforts at the national level and to develop general principles to guide such efforts.

Esty[97] makes the case for a GATT-inspired Global Environmental Organization ("GEO") that would centralize development and implementation of environmental standards and resolve environment-related disputes.[98] Interestingly, the first candidate for a basic principle to guide such a GEO is "universal acceptance of the polluter pays principle—forcing governments, industry, and individuals alike to bear the full costs of the environmental burdens they impose on society."[99] Above we have discussed the problems likely to arise when the polluter-pays principle is applied in an international context. Without transfers to alleviate the financial burdens imposed when poor countries adopt the higher standards usually preferred by richer ones, such an approach is likely to increase North-South tensions without achieving much cooperation.

Whalley and Zissimos[100] address this problem directly in their proposal for a World Environmental Organization ("WEO"). The WEO would seek internalization of environmental externalities at the international level though Coasian[101] bargaining (and trading) over environmental objectives. They favor a property-rights approach to clarifying and confronting the issue of global externalities and environmental protection. Because the "environmental assets" highly valued by citizens of developed countries are often owned by citizens of developing countries, an internalization-based WEO would entail the exchange of environmental protection commitments for direct cash transfers from developed countries.[102] To avoid problems of time-inconsistency, the WEO would use an escrow account to administer these commitments.

Although the concept of explicit compensation for commitments to protect environmental assets is important, establishment of such a WEO would face formidable obstacles. One initial problem concerns acceptance of existing property rights. Some environmentalists question whether a unique global environmental asset such as the Amazon rainforest should be considered the property only of the countries that contain it. Even granting this, government ownership and control of such land is often contested (legally and/or de facto) by indigenous residents and other groups. Environmental bargains of

[96] Esty, *supra* note 2, at 78.

[97] *Id.* at 78–83.

[98] Although the proposal initially attracted little support from international economists, subsequent disruption of the Seattle ministerial and other WTO meetings underlined immediate practical benefits from shifting the locus of environmental debate into another body.

[99] Esty, *supra* note 2, at 80.

[100] Whalley and Zissimos, *supra* note 10.

[101] Coase, *supra* note 56, argues that, under certain conditions, contracting among affected parties can establish a socially efficient allocation of resources in the presence of an externality. In such cases, no government action is needed to "internalize the externality." Required conditions include well-defined property rights and low transactions costs.

[102] They also argue that the agreement could be expanded to allow for the exchange of environmental protection commitments for trade concessions.

the kind proposed by Whalley and Zissimos cannot proceed without agreement on the initial allocation of the relevant property rights.

A separate problem is that, given their experiences with World Bank and International Monetary Fund conditionality, developing countries may be hesitant to participate in such an arrangement if they perceive it as being forced on them by developed countries. To the extent that environmental cash payments are seen as replacing other aid, what Whalley and Zissimos present as a carrot will look like just another stick. Furthermore, Newell[103] foresees strong opposition to the implication that protection of environmental assets is worth only as much to the global community as OECD countries are willing to pay. Finally, the very long time-span suggested by Whalley and Zissimos (twenty to forty years) between commitment and receipt of payment poses special problems. Are the governments representing today's poor amenable to measures that impose costs now and promise financial benefits that will be reaped only by future governments and citizens? Unless countries have a way to take financial commitments to the bank and turn them into cash today, the line of interested southern countries is likely to be a short one.[104] But to the extent that cash is delivered in advance of performance, the problem of time-inconsistency returns. Adherence to commitments could, of course, be monitored on an ongoing basis, but this approach is likely to be costly, intrusive, and controversial.

In the near term, given the absence of a GEO or a WEO, is there a consensus role for the WTO to play with respect to safeguarding the global environment—something that does not interfere with its primary trade-liberalization mandate? As we have suggested above, an important first step—and one closely related to the WTO's core mission—is to improve countries' understanding of trade-induced environmental changes and to emphasize the need to adjust domestic environmental policies accordingly. Economic research has shown that many aspects of globalization can affect both the level and the types of environmental damage experienced by any given country. One possible role for the WTO, perhaps in cooperation with an environmental organization such as UNEP, is in tracking the pattern of trade in specific pollution-intensive industries, identifying how industry production and trade are changing across countries, and thus keeping a special eye on the composition effect discussed in Part IV above.

Ultimately, favorable changes in production technique are what allow trade-induced economic growth to be accompanied by improvements in environmental quality, but these favorable changes do not occur automatically. Governments liberalizing trade may need assistance in determining when and how to adjust environmental policies in response to the resulting changes in production and the environment. The WTO can provide technical assistance on trade-related environmental concerns that would be similar in spirit to assistance offered to developing countries by the recently established Advisory Center on WTO Law to improve their understanding of their WTO rights and obligations.[105]

Finally, what should the WTO *not* do, with respect to the trade-environment nexus? Members' increasingly resort to the use (and abuse) of WTO-legal antidumping and countervailing duties and safeguards measures means that trading countries now face substantial uncertainty as to whether their negotiated market access rights will actually

[103] Peter Newell, *A World Environment Organization: The Wrong Solution to the Wrong Problem,* 25(5) THE WORLD ECONOMY 659 (2002).

[104] Newell, *supra* note 103, at 664, points to the very modest results achieved through debt-for-nature swaps, which already offer deals somewhat parallel to what Whalley and Zissimos envision.

[105] Website. <http://www.acwl.ch/> (accessed 29 July 2002).

be realized. The WTO should not add to the problem of discretionary administered protection by allowing members to restrict trade for reasons of alleged eco-dumping.

BIBLIOGRAPHY

Advisory Centre on WTO Law. 2002. Website. <http://www.acwl.ch/> (accessed 29 July 2002).

Anderson, Kym, and Richard Blackhurst. 1992. *The Greening of World Trade Issues.* Ann Arbor: University of Michigan Press.

Andreoni, James and Arik Levinson. 2001. "The Simple Analytics of the Environmental Kuznets Curve," *Journal of Public Economics*, 80(2): 269–286.

Antweiler, Werner, Brian R. Copeland, and M. Scott Taylor. 2001. "Is Free Trade Good for the Environment?" *American Economic Review*, 91(4): 877–908.

Bagwell, Kyle, and Robert W. Staiger. 1990. "A Theory of Managed Trade," *American Economic Review*, 80(4): 779–795.

Bagwell, Kyle, and Robert W. Staiger. 1999. "An Economic Theory of GATT," *American Economic Review*, 89(1): 215–248.

Bagwell, Kyle, and Robert W. Staiger. 2001a. "Domestic Policies, National Sovereignty, and International Economic Institutions," *Quarterly Journal of Economics,* 116(2): 519–62.

Bagwell, Kyle and Robert W. Staiger. 2001b. "The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues," *Journal of Economic Perspectives*, 15(3): 69–88.

Bhagwati, Jagdish N., and T. N. Srinivasan. 1963. "Domestic Distortions, Tariffs, and the Theory of the Optimum Subsidy," *Journal of Political Economy,* 71(1), 44–50.

Bhagwati, Jagdish N., and T. N. Srinivasan. 1996. "Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?" in Jagdish N. Bhagwati and Robert Hudec, eds., *Fair Trade and Harmonization—Volume 1: Economic Analysis*. Cambridge, MA: MIT Press, 161–221.

Charnovitz, Steve. 2000. "World Trade and the Environment: A Review of the New WTO Report." <http://www.gets.org/pages/steve.charnovitz.cfm> (accessed 29 July 2002).

Coase, Ronald. 1960. "The Problem of Social Costs," *Journal of Law and Economics* 3: 1–44.

Copeland, Brian and M. Scott Taylor. 1994. "North-South Trade and the Environment," *Quarterly Journal of Economics*, 109(3): 755–87.

Copeland, Brian and M. Scott Taylor. 1995. "Trade and Transboundary Pollution," *American Economic Review*, 85(4): 716–737

Copeland, Brian and M. Scott Taylor. 1999. "Trade, Spatial Separation, and the Environment," *Journal of International Economics,* 47(1): 137–168.

Copeland, Brian and M. Scott Taylor. 2004. "Trade, Growth and the Environment," *Journal of Economic Literature* 42(1): 7–71.

Destler, I.M., and Peter J. Balint. 1999. *The New Politics of American Trade: Trade, Labor, and the Environment.* Policy Analyses in International Economics 58. Washington, D.C.: Institute for International Economics, October.

Ederington, Josh. 2001. "International Coordination of Trade and Domestic Policies," *American Economic Review*, 91(5): 1580–1593.

Ederington, Josh, and Jenny Minier. 2003. "Is Environmental Policy a Secondary Trade Barrier? An Empirical Analysis," *Canadian Journal of Economics,* 36(1): 137–154.

Esty, Daniel C. 1994. *Greening the GATT: Trade, Environment, and the Future.* Washington, D.C.: Institute for International Economics, July.

Esty, Daniel C. 1996. "Greening World Trade," in Jeffrey J. Schott, ed., *The World Trading System: Challenges Ahead.* Washington, D.C.: Institute for International Economics, December.

Esty, Daniel C. 2001. "Bridging the Trade-Environment Divide," *Journal of Economic Perspectives*, 15(3): 113–130.

GATT (1947). General Agreement on Tariffs and Trade 1947, as amended, including notes and supplementary provisions. Geneva: GATT.

Grossman, Gene M. and Alan B. Krueger. 1993. "Environmental Impacts of a North American Free Trade Agreement," in Peter Garber, ed. *The U.S.—Mexico Free Trade Agreement*. Cambridge, MA: MIT Press.

Grossman, Gene M. and Alan B. Krueger. 1995. "Economic Growth and the Environment," *Quarterly Journal of Economics*, 110(2): 353–377.

Harbaugh, William T., Arik Levinson, and David Molloy Wilson. 2002. "Reexamining the Empirical Evidence of the Environmental Kuznets Curve," *Review of Economics and Statistics,* 84(3): 541–551.

Johnson, Harry G. 1960. "The Cost of Protection and the Scientific Tariff," *Journal of Political Economy*, 68(4): 327–345.

Karp, Jonathan, and Miriam Jordan. 2002. "U.S. Ports Hold On to Brazilian Mahogany," *The Wall Street Journal*, March 29.

Kindleberger, Charles P. 1953. *International Economics.* Homewood, IL: Richard D. Irwin, Inc.

Krist, William. 2001. "Multilateral Environmental Agreements and the World Trade Organization," discussion paper, Woodrow Wilson Center, March <http://wwics.si.edu/tef/wtoconfpap.htm> (accessed 9 August 2001).

Newell, Peter. 2002. "A World Environment Organization: The Wrong Solution to the Wrong Problem." *The World Economy* 25 (5): 659–671.

Nordström, Håkan, and Scott Vaughan. 1999. *Trade and Environment.* Special Studies 4. Geneva: World Trade Organization.

Ostry, Sylvia. 2001. "The WTO After Seattle." Paper prepared for presentation at the American Economic Association annual meeting, New Orleans, January.

Petersmann, Ernst-Ulrich. 1997. *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*. London: Kluwer Law International.

Porter, Michael E., and Claas van der Linde, "Toward a New Conception of the Environment-Competitiveness Relationship," *Journal of Economic Perspectives* 9(4): 97–118.

Pugel, Thomas A., and Peter H. Lindert. 2000. *International Economics (eleventh edition)*. Boston: Irwin McGraw-Hill.

Runge, C. Ford. 1994. *Freer Trade, Protected Environment*. New York: Council on Foreign Relations.

Staiger, Robert W., and Guido Tabellini. 1987. "Discretionary Trade Policy and Excessive Protection," *American Economic Review*, 77(5): 823–37.

Stilwell, Matthew. 2001. "Protecting GMO Labeling from a WTO Challenge." Center for International Environmental Law. <http://www.cid.harvard.edu/cidtradeissues/biotechnologypaper.html> (accessed 19 April 2003).

Trebilcock, Michael J., and Robert Howse. 1999. *The Regulation of International Trade* (second edition). New York: Routledge.

United States Trade Representative. October 22, 2001. "USTR on WTO Decision Supporting U.S. on Shrimp-Turtle Law." <http://usinfo.state.gov/wto/01102201.htm> (accessed 1 January 2002).

Unteroberdoerster, Olaf. 2001. "Trade and Transboundary Pollution: Spacial Separation Reconsidered." *Journal of Environmental Economics and Manangement*, 41(2): 269–285.

U.S. General Accounting Office. 2001. "International Trade: Concerns Over Biotechnology Challenge U.S. Agricultural Exports." Report to the Ranking Minority Member, Committee on Finance, U.S. Senate (GAO-01-727), June.

Weinstein, Michael M., and Steve Charnovitz. 2001. "The Greening of the WTO," *Foreign Affairs*, 80(6): 147–156.

Whalley, John and Ben Zissimos. 2002. "An Internalisation-based World Environmental Organisation," *The World Economy*, 25(5): 619–642.

CHAPTER 44

LABOR STANDARDS

Charles Pearson*

TABLE OF CONTENTS

I. Introduction 172
II. Evolution of the Labor Standards Issue 173
III. Arguments for Inclusion 177
A. Efficiency in World Production 177
B. Grossly Inadequate Labor Standards Promote Unfair Trade 177
C. Regulatory Race to the Bottom 178
D. Humanitarian Concerns 178
E. Accelerate Growth in Poor Countries 178
IV. Theory and Evidence 179
A. Do Grossly Inadequate Labor Standards Improve International Competitive Position? 179
B. What Does the Evidence Concerning Grossly Inadequate Labor Standards and Trade Competitiveness Show? 180
C. How Robust is the Regulatory Race to the Bottom Theory? 181
D. Can the WTO Protect Child Labor? 183
E. Other More Practical Considerations 185
V. Conclusions 186
Bibliography 187

* Johns Hopkins University SAIS-Washington.

I. Introduction

The WTO is virtually silent on labor issues. The single exception is article XX (e) of the GATT which permits but does not require countries to exclude goods made by prison labor.[1] Should this silence be broken? In recent years there has been increasing pressure to extend WTO obligations to include minimum labor standards in some form. The idea is extremely controversial, with fault lines between North and South, between business and labor, and between advocates of free trade and groups with humanitarian and human rights interests.[2] This chapter attempts to sort out the issues and analyze the merits of including labor standards in the WTO. To accomplish this Part II provides a brief description of the evolution of the issue and the types of labor standards that might be included. Part III presents five arguments for inclusion. Part IV explores the economics of labor standards should they find their way into the WTO, and Part V elaborates on certain practical difficulties. Part VI draws conclusions. To anticipate, I find the case for inclusion of labor standards in the WTO to be dubious, and suggest that other avenues for labor protection would be more productive.

Before starting, however, I wish to comment on the similarities and differences between labor and environmental standards as they relate to trade. They are often analyzed together under the (ill-defined) rubric of "social dumping". There are many similarities. In both cases enforcement of strict standards is thought likely to increase production costs and to affect international competitive position. Both generate a concern for a "race to the bottom" in regulatory competition. Both labor and environmental standards can be used for covert protectionist purposes. And in both cases proponents of stronger standards often view the trade system as a convenient instrument for promoting their (non-commercial) interests internationally.[3]

But there are also significant differences that need to be kept in mind. First, deficient labor standards do not create transnational pollution. The superficial attraction of using trade measures for managing transnational pollution and international environmental resources adds a complexity to the trade environment debate that is absent in the labor standards trade case[4]. Second, there is no parallel in the labor standards debate to the issue of environmentally-related product standards. Whereas there is a reasonable case for restricting imports of products whose use might damage the health, safety, or environment of the importing country, one cannot argue that imports of products from countries that fail to adhere to minimum labor standards directly damage the importing country. Third, while there is a legitimate concern that trade can lead to environmental degradation in countries with weak standards, it seems less likely that trade will *worsen* labor conditions

[1] The original motivation was apparently protection from unfair competition, not ethical concerns. A 1930 law in the United States banned imports made from "forced" labor or "indentured labor under penal sanctions", but exempted items if U.S. production was insufficient to satisfy consumption. Steve Charnovitz, *The Influence of International Labor Standards on the World Trading Regime*, 126 INTERNATIONAL LABOR REVIEW 565, 569–70 (1987).

[2] This is a great generalization with many crossovers and shades of opinion. Virtually all commentators agree, however, that some labor in some countries experience dreadful working conditions.

[3] In technical terms this maybe defended as a second-best response to an international market failure. Labor or environmental conditions in country A may enter the utility of country B's residents but they have no effective "market" to buy improvements abroad.

[4] While there are no tangible international externalities, one can argue that for humanitarian reasons the worldwide welfare of workers enters utility functions in industrial countries. In that case deficient labor standards *may* be thought to create "costs" outside the country's borders. Of course it does not follow that trade measures are necessarily the appropriate response.

in countries with weak labor standards.[5] Finally, the institutional setting is different in the two cases. The International Labor Organization ("ILO") is a mature institution with a rich if not totally successful history of establishing and monitoring international labor norms. There is no equivalent International Environment Organization dedicated to setting international environmental standards.[6] The first two differences suggest that the fair labor standards issue, while equally controversial and emotional, may be somewhat more tractable to analyze. The last difference, an institutional alternative to the WTO, is also significant.

II. Evolution of the Labor Standards Issue

The connection between regulations to protect labor and international competitive position can be traced to the first half of the Nineteenth Century and humanitarian efforts in Europe to moderate the harsh working conditions of the early years of the Industrial Revolution.[7] The issue then as now was whether international competition undercut a country's ability to legislate costly labor protections with regard to working hours, child labor, and safety measures. The suggested solution, then as now, was to reach international agreement on common, or at least minimum, labor standards. But in the early years of the debate trade sanctions supporting this objective were not contemplated. Progress in harmonizing labor regulations among industrial countries was slow and spotty but ultimately culminated in the establishment of the ILO immediately following World War I. The ILO's principal approach has been to promote international labor conventions and work for their ratification and implementation. After World War II the ILO moved beyond conventions centering on quite specific working conditions, for example the length of the workweek. Consistent with the emphasis on universal human rights, it took up newer issues—the right of collective bargaining, discrimination in the workplace, and pay equality. Morici and Schulz[8] describe enforcement procedures in the ILO.

The nexus between labor standards and trade was also considered in the aborted International Trade Organization in the immediate post World War II period.[9] The relevant provision recognized the connection between labor standards and trade, called on members to take "appropriate and feasible" actions to eliminate unfair labor conditions within their territory, and acknowledged the role of the ILO should trade-labor disputes arise. These provisions did not survive in what was then considered an interim commercial agreement, the GATT.

[5] The common argument is that trade with weak labor standard countries will harm labor interests in importing countries. It is possible of course to construct a model in which labor conditions are especially poor in the export sector and trade will move workers from the (relatively) better-protected sectors to the export sector.

[6] The United Nations Environment Program established in 1972 and the UN Commission on Sustainable Development established two decades later function quite differently from the ILO.

[7] Virginia Leary, *Workers Rights and International Trade: The Social Clause*, in FAIR TRADE AND HARMONIZATION PREREQUISITES FOR FREE TRADE? (Jagdish Bhagwati and Robert Hudec eds. 1996); Charnovitz, *supra* note 1.

[8] Peter Morici and Evan Schulz, *Labor Standards in the Global Trading System*, ECONOMIC STRATEGY INSTITUTE (2001).

[9] The ITO was to have been the third pillar of the triumvirate of international institutions, along with the International Monetary Fund and the World Bank, all designed to remedy the pernicious economic nationalism and beggar-thy-neighbor policies of the inter-war period. The ITO allowed too much interventionism and loss of sovereignty for the U.S. Congress to stomach, and the so-called Havana Charter was withdrawn by President Truman before a ratification vote was taken. *See* WILLIAM DIEBOLD, THE END OF THE ITO (1952).

The issue of labor standards arose in the Uruguay Round negotiations (1986–1994) along with the environment trade issue but nothing concrete concerning labor emerged.[10] At a subsequent WTO ministerial meeting in Singapore (1996) the labor-trade connection was again raised, but rejected with the statement that the ILO was the competent body to deal with labor standards. This treatment was reconfirmed in the Doha Declaration (2001) launching the delayed Millennium Round, "We reaffirm our declaration made at the Singapore Ministerial Conference regarding recognized core labor standards". As background it should be remembered that any serious attempt at inserting labor standards in the WTO was and is strongly opposed by developing countries, who consider it a ploy to limit their comparative advantage in labor intensive products. The support of fair labor standards by organized labor in industrial countries does nothing to allay that suspicion. Developing countries are also sensitive to infringements on their national sovereignty, as indeed are all countries.

United States policy during this period is of some interest. A loose coalition between human rights groups and elements of organized labor was successful in introducing labor conditions into the Caribbean Basin Initiative ("CBI") in 1983, the renewal of the Generalized System of Preferences ("GSP") in 1984, and revisions of Section 301 of the Trade Law in 1988.[11] There was also Congressional pressure, expressed through House resolutions, for consideration of labor standards in the Uruguay Round, but as noted above these were unsuccessful.

The real test for a labor-trade linkage was NAFTA. In the background was a widely held concern that with free trade and a secure investment climate, a significant portion of U.S. industry would migrate southward to Mexico seeking low wage low cost production. Weak enforcement of otherwise adequate labor and environmental standards in Mexico would facilitate the relocation. Thus the interest of environmentalists concerned with the creation of pollution havens, humanitarian groups concerned with abusive exploitation of Mexican labor, and organized labor concerned with protecting jobs, wages, and labor rights, were joined. While old-fashioned protectionism played an important role, there was also a concern that as a result of competition with Mexico, labor and environmental standards in the United States would be eroded, the "race to the bottom" concept discussed below.[12] This was not totally idle speculation. The maquiladora program was firmly established and Mexican wages in manufacturing were less than twenty percent of U.S wages.[13]

Faced with the need to overcome opposition in Congress and a desire to differentiate his approach to NAFTA from his predecessors, President Clinton decided to negotiate two side agreements, one concerning environmental protection and the other labor, the North American Agreement on Labor Cooperation ("NAALC"). Two features of these agreements are significant. First, there was a deliberate effort to hive off the two contentious issues into separate agreements and to keep the basic NAFTA agreement "clean" of labor and environmental strictures. Second, both agreements deliberately avoided any serious

[10] The Uruguay Round agreements did call for the establishment of a Committee on Trade and Environment but its accomplishments have been modest.

[11] The CBI and the GSP offer preferential access to the U.S. market. As unilaterally conferred benefits CBI and GSP could contain whatever conditions the U.S. wished to impose. Section 301 of U.S. Trade Act has been the principal instrument for pursuing alleged foreign "unfair" trade practices.

[12] Interestingly, the race to the bottom concern played a significant role in Canada during the debate over the US-Canada FTA. (Brian Alexander Langille, *General Reglections on the Relationships of Trade and Labor*, in FAIR TRADE AND HARMONIZATION: PREREQUESITES FOR FREE TRADE?, Volume 2 (Jagdish Bhagwati and Rober Hudec eds. 1996).

[13] Charles Pearson, U.S. TRADE POLICY: A WORK IN PROGRESS (2003).

attempt to harmonize labor and environmental standards among the three countries, and in the case of labor, there was no attempt to condition trade rights on adherence to internationally recognized labor standards. Instead NAFTA members pledged to promote effective compliance with their own labor (and environmental) laws. NAALC does contain a dispute settlement mechanism for controversies involving worker health and safety, child labor, and minimum wages, but not for disputes involving freedom of association and collective bargaining. The latter are widely considered the heart of internationally-recognized labor rights. The dispute mechanism itself sets out a convoluted and time-consuming procedure. In the end a persistent pattern of labor law violations might result in fines, and if the fines were ignored, limited trade sanctions could be imposed. But the clear intention was to settle or dismiss disputes before they reach the point of sanctions.[14] In any event, fines were limited to .007 percent of total bilateral trade. If trade sanctions are employed they can only raise duties to the lower of the MFN rate or the pre-NAFTA rate, and are further limited to the amount of the (ignored) fine.

The fallout from the bitter NAFTA fight has been extensive and prolonged. One result was that fast track authority (now known by the more upbeat "Trade Promotion Authority" or "TPA") was withheld from President Clinton for the remainder of his terms in office, in large part due to the unresolved labor and environmental standards issues. In December 2001 TPA passed the House by a paper-thin margin of one vote. The bill sets as negotiating objectives: "to promote respect for worker rights and the rights of children consistent with core labor standards of the International Labor Office," and to seek provisions in trade agreements that countries "do not weaken or reduce the protection afforded in domestic environmental and labor laws as an encouragement for trade". Note that 1988 trade legislation also had as a principal negotiating objective respect for workers' rights.[15]

It is perhaps time to be more specific about the labor standards and workers rights that are being proposed for inclusion in the WTO. We do so without speculating as to their prospects in negotiations, but rather to tease out economic implications. We divide them into two groups, the first of which might be considered internationally recognized labor standards.[16] The distinction between the two groups is a bit artificial but essentially rests on the contention that certain rights are universal and should be protected regardless of the level of economic development (the first group), and that another group of labor standards may appropriately vary with the level of income of the country (the second group). There are four elements to the first group:

Group One Standards:

1. Freedom from forced labor.
2. Abolition of child labor, or the less-demanding prohibition of exploitative forms of child labor.
3. Freedom from discrimination in employment.
4. Freedom of association and of collective bargaining.

[14] Kimberly Ann Elliot, *Finding Our Way on Trade and Labor Standards?*, INSTITUTE FOR INTERNATIONAL ECONOMICS, INTERNATIONAL ECONOMICS POLICY BRIEFS (2001) has proposed fines rather than trade sanctions to resolve the trade-labor impasse. See also Mary Jane Bolle, *NAFTA Labor Side Agreement: Lessons for the Worker Rights Fast Track Debates*, CONGRESSIONAL RESEARCH REPORT 97-861 (2001).

[15] Bolle, *supra* note 14.

[16] These parallel the ILO's 1998 *Declaration of Fundamental Principles and Rights at Work* Significantly the United States has not ratified ILO conventions dealing with discrimination, forced labor and free association, and collective bargaining (Drusilla Brown, *Labor Standards: Where Do They Belong on the International Trade Agenda?*, 15(3) JOURNAL OF ECONOMIC PERSPECTIVES 89 (2001)).

The first three elements in this group can be thought of as fundamental human rights, and the last as an element of civic rights. The argument has been made that this group of labor standards, in contrast to the group discussed below, is or should be independent of the level of economic development. Three aspects of this group stand out. First, the full implementation of these rights would be felt throughout the economy and not limited to the tradable goods sector or to the export industries. The notion of 'trade-related' labor standards makes little sense. This contrasts with the two WTO agreements on trade-related investment measures ("TRIMs") and trade-related intellectual property ("TRIPS"), where it is conceptually and empirically possible to consider the direct trade aspects of these subjects. While it might be possible to initiate complaints of a violation of these standards in specific export products, the prospect of enforcing labor standards only when they affect exports suggests an undesirable two-tiered labor standard regime. In practical terms, fully enforcing these four labor standards would have impacts throughout the economy, magnifying their economic impact.[17]

Second, in general it would be analytically difficult to quantify in trade or monetary terms the effects of violating one or more of these standards. If such violations were alleged to provide an implicit (and illegal) subsidy to exports, and if traditional WTO/GATT procedures were to be followed, any countervailing duty or sanction by an importing country would have to be commensurate with the implicit subsidy margin, an extremely difficult and contentious calculation. It has proved difficult enough to calculate subsidy margins in simple tax subsidy cases. Of course if the purpose of retaliation is not to restore "fair" competition but to coerce the country into improved labor standards, then there would be no need to calculate implicit margins. Any severe sanctions would do.[18]

Third, as considered below, one can argue that two and possibly three of these labor standards might actually improve the efficiency and competitive position of the offending industry.[19] This view is put forward by Martin and Maskus[20] and is considered in the theory section below.

The second group of labor standards is more specific, and focuses on wages, workplace regulations, and other general conditions of labor. This group of standards includes minimum wages, workplace health and safety regulations, hours of employment, and vacation/retirement rights. These standards are not thought to be universal, and it is appropriate that rich countries aspire to higher standards than poor countries. The economics of these regulations are somewhat easier to analyze and in most cases are likely to increase production costs.[21] At the same time however these more specific labor regulations are

[17] It is of course possible that violation of one or more of these standards is concentrated in the export sector. But as cited by Keith Maskus, *Should Core Labor Standards be Imposed Through International Trade Policy?*, WORLD BANK POLICY RESEARCH WORKING PAPER 1817 (1997), Mita Aggarwal, *International Trade, Labor Standards, and Labor Market Conditions: an Evaluation of Linkages*, US INTERNATIONAL TRADE COMMISSION WORKING PAPER 95-06-C (1995), finds labor standards to be lower in less export-oriented and non-tradable goods sectors than in export-oriented industries.

[18] Theodore Moran, BEYOND SWEATSHOPS: FOREIGN DIRECT INVESTMENT AND GLOBALIZATION IN DEVELOPING COUNTRIES (2002) makes the interesting point that retaliation might involve more sophisticated manufacturers that compete directly in industrial country markets. If so it discourages the upgrading of the labor intensive export sector and delays the normal progression to higher labor standards.

[19] Discrimination and forced labor; perhaps collective bargaining.

[20] Will Martin and Keith Maskus, *Core Labor Standards and Competitiveness: Implications for Global Theory*, 9(2) REVIEW OF INTERNATIONAL ECONOMICS 317 (2001).

[21] Some of the regulations may improve productivity and efficiency and lower production costs. A similar argument that strict environmental standards can improve competitiveness has been made (Michael Porter and Claas Van der Linde, *Toward a New Conception of the Environment—Competitiveness Relationship*,

the least likely candidates for inclusion in the WTO, precisely because they can legitimately vary among countries. This point is also made by Burtless,[22] who concludes that the case for enforcing labor standards through trade measures is strongest when such standards involve basic human rights, and weakest when the standards involve specific conditions of employment (e.g., pay, working hours, etc).

III. Arguments for Inclusion

Five arguments of varying quality have been advanced for including labor standards in the WTO. In discussing these we assume it is possible to identify situations in which countries permit or encourage egregious failures to maintain minimum labor protection standards. We call such situations "grossly inadequate labor standards" or GILS. Adequacy in some cases, especially for Group 2 standards, implies measuring standards against the level of economic development of the country. Low wages are not GILS *per se.* Whether in practice GILS can be unambiguously identified is another matter and discussed in Part V below.

Please note that none of the five arguments for inclusion contends that inadequate labor standards creates a trade balance problem for importing countries. In a floating exchange rate world, cost differentials arising from labor standard differentials are accommodated through exchange rate movements, so that effects on the aggregate trade balance are not relevant. The competitiveness concern is only of concern as it affects individual industries.

A. Efficiency in World Production

GILS, and especially discrimination and forced labor, suggest distortions or inefficiencies in labor markets and hence distortions in the pattern of international trade. Just as the WTO restricts two other distorting practices, subsidies (and especially export subsidies) and dumping, this argument asserts it would be logical to work toward the elimination of trade- and production-distorting GILS. Viewed in this light, GILS are an implicit or regulatory subsidy.

B. Grossly Inadequate Labor Standards Promote Unfair Trade

This argument asserts that it is unfair to expect labor and industry in importing countries to compete with products made under GILS. The WTO and the GATT before it is concerned with fairness as well as efficiency. Both the anti-dumping and the countervailing duty provisions of the WTO are grounded in notions of fairness (albeit fairness for producers not consumers) as well as efficiency. Just as these provisions help restore a level playing field, eliminating GILS would contribute to fair trade. Moreover, the group most likely to benefit from eliminating GILS, low-skill, low-wage labor in industrial countries, is perhaps the most deserving. In a larger sense, public support for liberal trade is contingent on a perception of fairness.

9(4) JOURNAL OF ECONOMIC PERSPECTIVES 97 (1995)), but is disputed (Karen Palmer, Wallace Oates, Paul Portney, *Tightening Environmental Standards: The Benefit-Cost or the No-Cost Paradigm?*, 9(4) JOURNAL OF ECONOMIC PERSPECTIVES 114 (1995)).

[22] Gary Burtless, *Workers Rights*, 19(4) BROOKINGS REVIEW 10 (2001).

C. Regulatory Race to the Bottom

A third reason for including labor standards in international trade rules is to prevent a regulatory race to the bottom. The logic of the argument invokes strategic behavior and a variation of the prisoners' dilemma game. It starts by asserting that there is an "inequity of bargaining power" between firms and workers in unregulated labor markets.[23] Government response is twofold—to establish and protect the right to association and collective bargaining, indirectly redressing the inequality, and to intervene in labor markets with substantive regulations concerning child labor, minimum wages, discrimination etc, thus offering more direct protection. The next point is that governments compete to capture productive activity by advancing their trade interests and by attracting foreign investment. The tools for doing so are well known and include favorable tax treatment, subsidized infrastructure, and direct subsidies. Labor policy is part of the tool chest. Thus "regulatory competition" among countries results. Unlike product competition, which generally results in higher quality and lower prices, regulatory competition tends to lower labor (and other) standards. The third part of the argument is now obvious—countries are in a prisoners' dilemma. While it is in the collective interest of all countries to maintain appropriate labor standards, the rational strategy for a single country is to "defect", lower its standards, attract investment, and enhance its competitive position. All countries recognize this dilemma and either for defensive and offensive reasons a regulatory race to the bottom results. If the logic of this argument is accepted it follows that an international regime capable of sanctioning defectors is needed to provide the collective good, appropriate labor standards. The WTO with its ability to authorize trade sanctions becomes an obvious candidate.

D. Humanitarian Concerns

The fourth argument for including labor standards in the WTO is ethical—it is the right thing to do. To the extent possible the international community wishes to reduce or eliminate slave labor, child labor, racial and gender discrimination, dangerous labor, sexual exploitation in the workforce, monopsonistic power, and a host of other practices that offend our sense of equity and justice. Our humanitarian concerns do not stop at our borders. Proponents of this argument often point out that the ILO has had indifferent success in eliminating these practices. The WTO, with its ability to authorize sanctions, becomes the default enforcement institution. This argument does not pretend that trade causes exploitative labor practices or indeed that trade in GILS goods is necessarily extensive. It merely views the trade system as a convenient tool for accomplishing good in the world. In the pure version of this argument there is no need to link trade sanctions to any particular implicit subsidy—the mere existence of GILS would trigger restrictive trade measures sufficient to alter practices in the target country. Viewed in another light and to use an unpleasant term, trade would be an instrument of international coercion.[24]

E. Accelerate Growth in Poor Countries

The final argument for including labor protection obligations in the WTO is that it would accelerate growth in developing countries. The logic is that in many (not all) instances

[23] Note that it is logically difficult to simultaneously maintain arguments B and C. If there is in race a race to the bottom the unfair competition is erased, or at least canceled.

[24] Economic sanctions to promote noncommercial objectives are common and increasing. *See* Pearson, *supra* note 13.

GILS work against long-term development. For example child labor stunts educational achievement and may slow the shift to a more sophisticated pattern of production. Gender discrimination reduces the efficient supply of labor. For whatever reason—ignorance, cupidity, government failure—countries need to be nudged into adopting better labor protection, a win-win situation.

There are problems with all of these arguments. The alleged trade-distorting effects of GILS need empirical demonstration. And trade sanctions to remove GILS may simply introduce additional distortions and inefficiency. The antidumping and countervailing duty provisions of the WTO have been much abused, and to pattern a labor standard obligation on current unfair trade rules is problematic. Covert protection through labor standards cannot be dismissed. The race to the bottom argument also has weaknesses. One can question the premise of inequality of bargaining power. Labor has options. If exploited it may move to other employment. And firms have an interest in recruiting, training and maintaining their workforce. Countries also have options. They may choose not to trade off labor standards but to compete for productive activity on the basis of stable macro policies, education policy, clean government, etc. As noted below it is not clear that GILS are a powerful attraction for foreign investment or give a boost to trade. The literature on the efficient wage hypothesis also casts doubt on the ability of GILS to bolster economic activity. The humanitarian argument also raises questions. Would the threat of trade sanctions be a form of labor market imperialism, akin to allegations of eco-imperialism, in which the values of the North are forced on the South? Would the coercive use of trade measures actually improve the lot of labor in poor countries? Is the liberal trade system robust enough to use as a tool for noncommercial humanitarian objectives?

IV. Theory and Evidence

The multiplicity of arguments for melding labor standards in the WTO complicates analysis. But a start can be made. We examine four questions.

A. Do Grossly Inadequate Labor Standards Improve International Competitive Position?

Would trade sanctions reduce "unfair" competition? A surprising number of models suggest that eliminating GILS would either increase competition and work against the interests of low-wage, low-skill labor in industrial countries, or undermine humanitarian objectives of improving the lot of labor in poor countries. We provide intuitive expositions of several of these models.

Consider first a monopsonistic employer in the export sector of a developing country.[25] By controlling labor demand the firm restricts hiring to the point where marginal expenditure on labor equals the marginal revenue product of the last worker. At this point the wage is somewhere below the marginal revenue product of the last worker—a classic example of exploitation. Now assume a complaint is filed with the WTO and a trade sanction (tariff) results. This shifts the labor demand curve in the export industry inwards, depressing the output, employment, and the (exploitative) wage. While this may offer some protection against "unfair" competition in importing countries, it also implies lower employment and lower wages in the export industry.[26]

[25] Will Martin and Keith Maskus, *Core labor Standards and Competitiveness: Implications for Global Theory*, 9(2) REVIEW OF INTERNATIONAL ECONOMICS 317 (2001)

[26] The displaced workers will also tend to depress wages elsewhere in the economy.

Suppose instead the threat of sanctions results in granting the right to collective bargaining and an effective union emerges. In that event the monopsonistic market power may be broken and wages rise to their competitive levels. The result would be an increase in employment, output and competitive pressure—an outcome that may please humanitarian interests, but displeases producers and workers in importing countries that had complained of unfair competition from unfairly exploited labor.[27]

Corden and Vosden[28] arrive at a similar conclusion—policy results that may please humanitarians may displease those that seek protection from unfairly produced imports and *visa versa*—but they do so with a somewhat different model. They work with a two-sector model and assume quite reasonably that costly labor protection regulations can only be effectively imposed in one sector (the informal, non-regulated, non-tradable goods and services sector becomes the residual employment sector). If there is a monopsony in the export sector and if costly labor standards are imposed, real wages might increase without decline in employment, pleasing humanitarians but disappointing protectionists as there is no decline of employment, output or competitive pressure (labor to this sector inelastically supplied over the relevant range). In effect the stronger labor regulations represent an increase in the real wage, "paid" for by squeezing the monopsonist's profits (which might be foreign MNCs). In contrast if monopsony in the regulated sector is absent, costs rise and employment, output and competitive pressures fall. This suits protectionist interests, but creates a two-tiered wage structure, with real wages falling in the informal, unregulated sector as it absorbs the displaced workers. The informal, unregulated sector is likely to experience the deepest levels of poverty.

The effects of linking labor standards to trade depends in part on whether the target country changes its policy or absorbs the trade sanctions. Consider for example gender or racial discrimination, which is prevalent in many countries rich and poor, and which is a target for labor standards. Suppose the export sector discriminates against females resulting in lower employment and lower wages. Now suppose this results in a complaint in the WTO and a tariff is levied. The effect of the tariff is to shift down the demand for female labor but will have no effect on employment and wages unless it brings the equilibrium wage below the original, discriminatory wage. Thus the results will either be no improvement in female wages and no relief from "unfair competition" in importing countries or, at the extreme, lower female wages in the export sector.[29] If instead the country responds to the threat of trade sanctions and eliminates discrimination, female wages and employment and output in the export sector will rise, pleasing humanitarian interests but again displeasing producers in importing countries that had complained of unfair competition arriving from exploitation of female workers.

B. What Does the Evidence Concerning Grossly Inadequate Labor Standards and Trade Competitiveness Show?

A comprehensive review by the OECD in 1996 found no evidence that countries with weak core labor standards had better export performance than high standard countries.

[27] Other outcomes are possible. A union intent on maximizing (union) wages could restrict output and employment below the original position.

[28] W. Max Corden and Neil Vosden, *Paved with Good Intentions: Social Dumping and Raising Labour Standards in Developing Countries*, in GLOBALIZATION UNDER THREAT, (Zdenek Drabek ed. 2000)

[29] Martin, *supra* note 25.

An update of that study published in 2000 reached the same conclusion.[30] The latter study also concluded that there is "no robust evidence that low standard countries provide a haven for foreign firms", undercutting the notion that exploitation of labor drives foreign direct investment. The failure to find an empirical link between labor standards and export performance cuts two ways. On the one hand it weakens the claim that firms and workers in industrial countries face a flood of unfairly traded products. But it also weakens the argument that stronger labor standards would harm developing countries' export prospects. Also to be fair not everyone accepts the OECD's conclusions. For example Morici and Schulz[31] estimate that manufacturing labor costs per worker are reduced by $6000 per year in economies where freedom of association and child labor are not well protected (after adjusting for national differences in productivity). If correct, the trade-competitiveness affects would be substantial.

The weak link between labor standards and trade competitiveness casts light on another controversy—whether trade is responsible for increasing wage inequality between skilled and unskilled workers in the United States in recent decades. This question has generated a large literature[32]. The two contending explanations for rising inequality are trade, especially trade with low wage countries, and technological changes that biases labor market demand toward skilled workers. We need not review that controversy but simply note that if GILS have minimal effects on competitiveness, it is difficult to implicate them in wage suppression in the United States. This works against the second argument for including labor in the WTO.

C. How Robust is the Regulatory Race to the Bottom Theory?

The answer is ambiguous and depends on how policy is modeled. Bagwell and Staiger present a sophisticated analysis of the links between labor standards and the WTO based on a reinterpretation of role of the WTO in the liberal trade system. Their analysis can be summarized as follows. In their view the WTO (and the GATT before it) exists to facilitate the negotiation of property rights for export market access. Governments are willing to make "concessions" on import barriers to gain secure export market access. The concessions imply an adverse movement in their terms of trade but improved export market access offsets this[33]. Through successive tariff negotiations a balance of market access concessions is achieved (not necessarily equivalent levels of access). Now consider labor (or environmental) standards that increase the cost of production. Bagwell and Staiger argue that *if* property rights over market access are secure (cannot be infringed upon) and *if* the WTO is given the task of preventing a regulatory race to the bottom, then tariff negotiations under WTO auspices will not trigger a race to the bottom or a "regulatory chill".[34] For example if a developed country exporter wishes to tighten its

[30] OECD, TRADE, EMPLOYMENT, AND LABOR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (1996); OECD, INTERNATIONAL TRADE AND CORE LABOR STANDARDS (2000).

[31] Morici and Schulz, *supra* note 8.

[32] *See* for example the collection of articles in the Spring 1997 issue of *The Journal of Economic Perspectives* (Volume 11 (2)), and FEENSTRA, THE IMPACT OF INTERNATIONAL TRADE ON WAGES (2000). By and large Europe has escaped increasing inequality, but trade may have contributed to stubbornly high unemployment rates (PAUL BRENTON AND JACQUES PELKMAN, GLOBAL TRADE AND EUROPEAN WORKERS (1998)).

[33] This implies that countries are "large" and can affect international prices.

[34] The chill is an unwillingness to tighten standards out of concern for adverse trade consequences.

standards without harming its import-competing firms, it would be permitted to raise tariffs. The combination of tighter domestic standard and higher tariff would maintain the same level of foreign access to its market, thus preserving foreigners' secure market access.

Alternatively if a developed country sees its export market access threatened by a reduction in developing country standards, it could initiate a complaint under GATT's nullification and impairment provisions (Article XXIII). The trade partner would then either offer a compensating trade concession on another product or relinquish a previous trade concession that it had gained earlier. This would again restore the balance of market access commitments. In essence tariffs and standards become substitutes in establishing market access.

The race to the bottom and the regulatory chill problems arise when market access commitments are not secure. In that event a country might lower a labor standard, impairing market access opportunities of its trade partners. This would be more likely if the partners were limited by trade rules in their ability to retaliate or if they could not use the nullification and impairment provisions. *Insecure* market access sets the stage for a race to the bottom. While the analysis is undoubtedly clever, the prospect of permitting tariff increases to offset loss of market access due to domestic regulatory changes make one nervous. What regulatory changes would be fair game? Would this new tool for trade restrictions be captured by protectionist interests? Would a developed country carry out its obligation and reduce import barriers if a poor country tightened its labor standards?[35]

Brown, Deardorf, and Stern,[36] and Brown[37] also consider the race to the bottom question. They reach the surprising conclusion that trade may encourage excessively strong labor standards in developing countries, and that coordination (not harmonization) of standards may increase world welfare. This result hinges on the terms of trade effects of standards. If standards are labor using, and if they are tightened in labor-abundant developing countries, the supply of labor for conventional output fall, wages rise, the price of labor intensive goods for export rises, and developing country terms of trade improve. ("labor using" standards means that they are expected to contract world labor supply). As Brown puts it, "developing countries, as a group, have an incentive to *overprotect* labor"[38].

In contrast, in this model labor-scarce rich countries will tend to set unduly low standards, not for race to the bottom reasons, but to improve their own terms of trade. With both sets of countries potentially mis-setting their standards, and with the terms of

[35] A practical question in all this is whether the market access consequences of a labor or environmental standard can be measured. Unlike tariffs that are stated in quantitative terms, standards do not easily translate into quantitative measures of market access. But unless they can be measured there is a serious potential for endless squabbling. Recall for example the bitter argument between the United States and the EC over the loss of U.S. market access in agriculture when Spain and Portugal joined the EC and its Common Agriculture Policy. More recently, determining compensation due to the EC as a result of U.S. export subsidies under its Foreign Sales Corporation tax scheme was in dispute. In the end the WTO authorized the EC to impose punitive duties of $4 billion on U.S. exports, although the United States. argued for a $1 billion cap.

[36] Drusilla Brown, Alan Deardorff, and Robert Stern, *International Labor Standards: A Theoretical Analysis*, in FAIR TRADE AND HARMONIZATION PREREQUISITES FOR FREE TRADE?, (Jagdish Bhagwati and Rober Hudec eds. 1996).

[37] Brown, *supra* note 16.

[38] *Id.*, at 102. Whether higher labor standards are labor using or labor saving is not settled. For the most part Maskus, *supra* note 17, and Martin and Maskus, *supra* note 25, view GILS as reducing labor supply, and higher standards as increasing supply. Ingo Walter, *International Trade and Resource Diversion: The Case of Environmental Management*, 110 WELTWIRTSHCAFTLICHES ARCHIVE 482–93 (1974) was the first to examine the factor intensity of environmental regulations and their implications for trade.

trade effects canceling at the global level, some coordination of labor standards would improve world welfare.[39]

D. Can the WTO Protect Child Labor?

The elimination of abusive child labor practices occupies a central place in efforts to extend WTO's scope to labor conditions. What does theory say? By and large theory suggest that the use of coercive trade measures to improve the lot of child labor will not work, and may cause it to worsen. This is not surprising. At a general level the theory of domestic distortions[40] shows that the use of trade measures to solve what are essentially domestic distortions is problematic. At a more specific level one reason is that a tariff on exports produced with child labor reduces price and output in that sector of the poor country, reducing the equilibrium child wage and displacing some child workers to informal sector activities where conditions may be even worse. If the exporting country responds to the threat of a tariff by, say, enforcing a minimum age limit, and the child labor market is initially competitive, wages may rise but some displacement of children to an unregulated informal sector would still result.[41] If the child labor market were monopsonistic the restriction would tend to depress an already exploitative child wage, again with some displacement to an unregulated informal sector.[42]

A second problem stems from the different preferences for child labor in rich and poor countries.[43] Suppose the existence of child labor in poor countries has a negative effect on utility functions in rich countries, a sort of negative international externality or spillover. Suppose the rich country imposes a tariff on the import of products made with child labor sufficient to bring employment of children to a level it, the rich country, considers acceptable. In addition to the normal inefficiencies of a tariff, this would depress the wage of the remaining child workers. In effect they would bear part of the burden of the tariff and part of the cost of satisfying rich country preferences, an inequitable outcome. A lump sum transfer targeted to lowering the cost of education, an alternative for child workers, or for increasing adult incomes, would probably be more efficient at reducing child labor.

Some of the difficulties with policies to reduce child labor are expounded in models presented by Basu and Van.[44] Their analysis accommodates multiple equilibria in the labor market—one equilibrium in which both children and adults work, and one in which adult wages are sufficiently high that children do not work. Starting from the "bad" equilibrium in which children work, a ban on child labor could push adult wages up and bump the economy to a new equilibrium in which only adults work (and the ban becomes redundant). But if the increase in adult wage is insufficiently large, the ban reduces household welfare and the new equilibrium is not attained. Poor families are worse off.

[39] John Krutilla, *Environmental Regulation in an Open Economy*, 20 JOURNAL OF ENVIRONMENTAL ECONOMICS AND MANAGEMENT 127–42 (1991) investigates a parallel situation in which optimal environmental standards interact with terms of trade tariffs.

[40] Max W. Corden, TRADE POLICY AND ECONOMIC WELFARE (1997).

[41] This is an example of the theory of the second best, which states that correcting one distortion while leaving others uncorrected (i.e., conditions in the informal labor market) may or may not improve welfare.

[42] In a more sophisticated version the supply of child labor would be made a negative function of adult wages. Children displaced from an export sector would tend to depress adult wages, shifting out the supply of child labor unless children were withdrawn from the labor market entirely.

[43] Maskus, *supra* note 17.

[44] Kaushik Basu and Pham Hoang Van, *The Economics of Child Labor*, 88(3) AMERICAN ECONOMIC REVIEW 412 (1998).

This conclusion might be modified if, as a result of the ban, school enrollments increase and over time human capital increases. But in practice the result might be unemployed children without funds for school fees or illegal employment of children. Basu and Van also consider a partial ban on child labor, recognizing that governments are often unable to control labor market conditions in all sectors. The results depend on the relative size of the sector in which child labor is banned. If it is relatively small the policy is a failure, and child labor conditions and household welfare falls[45]. If the sector is large the economy may again be bumped up to the new equilibrium in which only adults work. Although Basu and Van do not explicitly model trade sanctions in response to child labor exports the analysis of bans is indirectly useful for those situations in which the *threat* of sanctions results in a partial or full ban on child labor.[46]

Still, as in many second-best situations, theoretical conclusions are sensitive to modeling assumptions. It is possible for example to use a specific factors-type model, with child labor specific to the export sector. In such a model a tariff imposed on the export good would lower export price and by lowering returns to child labor, change the relative returns to child labor vs. continued education in favor of schooling, thereby reducing child participation in the labor market. With these somewhat ambiguous theoretical conclusions it is useful to seek empirical studies relating child labor and international product prices. Edmonds and Pavcnik in their study of Vietnam use variations among regions and over time in the price of rice, a major export crop, and data drawn from household surveys on child labor.[47] In the period considered, 1993–98, the average real price of rice rose 29 percent, in part due to phasing out an earlier rice export quota scheme. They find that a thirty percent increase in rice prices is associated with a ten percentage point decrease in the child labor force participation rate, with the largest decrease for girls of secondary school age. Presumably higher rural incomes reduced the supply of child labor. Interestingly, the much smaller group of child workers living in urban households showed an increase in child labor participation rates. The explanation may be that as consumers, not producers, of rice, the price increase reduced urban household incomes, pushing more children into the workforce. This study did not directly address child labor in factories, but in Vietnam, as in many poor countries, child labor is concentrated in the agricultural sector (for some reason factory sweatshops have captured more attention in the North than farm sweatshops). The tentative conclusion is that if trade restrictions lowering Vietnam's rice export price had been in effect, some or all of the reduction in child labor in the rural sector would not have occurred. In a more positive vein, we may conclude that improved market access for developing country agricultural exports may be a significant force for reducing child labor in poor countries. If so the appropriate role for the WTO would be to strive for trade liberalization and to resist requests for inclusion of "fair" labor standards.

We summarize the answers to the four questions posed in this section as follows. First, many models suggest a conflict between the objective of reducing alleged unfair competition and the humanitarian objective of improving labor conditions in poor

[45] This may be important. A 1994 U.S. Department of Labor study estimated that only five percent or fewer of child workers were employed in export industries in manufacturing or mining.

[46] In commenting on this analysis Kenneth Swinnerton and Carol Ann Rogers, *The Economics of Child Labor: Comment*, 89(5) AMERICAN ECONOMIC REVIEW 1382 (1999), show that inequality in income distribution lies behind the multiple equilibria in the Basu-Van analysis, and that under certain conditions redistribution of income and wealth could eliminate child labor.

[47] Eric Edmonds and Nina Pavcnik, *Does Globalization Increase Child Labor? Evidence from Vietnam*, NBER WORKING PAPER 8760 (2002).

countries. Second, the empirical evidence that weak core labor standards improve a country's competitive position is itself weak. Furthermore, if weak standards do not confer a competitive advantage, the race to the bottom argument loses force, and it is unlikely that weak standards *per se* have caused wage suppression in the United States and other industrial countries (note—this does not absolve trade with low wage countries, only GILS). Third, while not conclusive, theory and empirical evidence tends to argue against using or threatening restrictive trade measures to reduce child labor.

It may be useful to close this part with a few broader theoretical considerations. First, it is well established that care for free trade does not require harmonization of labor standards affecting production costs. Indeed if standards accurately reflect social and economic status, harmonization of standards decreases world welfare.[48] Diversity of standards in itself is not a justification for coercive policy. Second the powerful theory of domestic distortions concludes that if distortions exist, the first best policy is directed toward the distortion itself.[49] Using trade tools to correct domestic labor market failures in developing countries is clearly second best policy. Third, international coercion can create a "forced rider" situation in which the benefits of a policy are enjoyed by one group of countries and the costs by another. In the labor standards context this implies that if sensitivities in the North requires assurance that the products they consume are produced under "fair" labor conditions, they should be prepared to compensate countries in the South for the costs of this policy. Fourth, the argument that public support for liberal trade can be shored up by assurances of fair labor standards is suspect. While support in the North may strengthen, support in the South may weaken as they perceive bullying through coercive trade measures.

E. Other More Practical Considerations

Should there be agreement to include labor standards in the WTO a number of practical questions arise. We discuss three very briefly. The first question is where in the WTO/GATT structure should provisions concerning labor standards be lodged. Three candidates are Article XVI dealing with subsidies and the related Agreement on Subsidies and Countervailing Measures; Article XX, the general exceptions clause; and Article XXIII. The logic of the subsidy article is that failure to maintain adequate labor standards can be viewed as an implicit subsidy creating unfair trade conditions. The logic of using Article XX is that it already provides blanket authority to restrict or ban products made by prison labor, and certain labor standards, at least, for example a prohibition on bonded labor or other forms of forced labor, would be a relatively minor extension. On closer inspection neither is attractive.[50] The principal objection is that both Articles XVI and XX allow countries to unilaterally restrict trade based on their own assessment. While it is true that the target country could lodge a complaint with the WTO and, if found valid, could retaliate, the serious potential for abuse and covert protection inherent in labor standards suggest that unilateral initiation of trade restrictions is not desirable. This

[48] Jagdish Bhagwati, *The Demands to Reduce Domestic Diversity among Trading Nations*, FAIR TRADE AND HARMONIZATION PREREQUISITES FOR FREE TRADE (Jagdish Bhagwati and Robert Hudec eds. 1996).

[49] Corden, *supra* note 40.

[50] Article XX (h) contains an exception for normal GATT obligations for certain international commodity agreements. While it may be useful to also make exceptions for international environmental agreements with trade measures, it seems inappropriate for labor standards, as the latter would not rest on explicit trade measures incorporated in a freestanding international agreement.

leaves Article XXIII, the nullification and impairment provision, which at least has the virtue of providing multilateral consideration of violations. If adherence to certain labor standards were made a WTO obligation, and if Article XXIII were invoked, the allegation of violation would be subject to more impartial multilateral scrutiny. As an alternative to expanding one of these three articles, a new multinational accord might be negotiated as was done for intellectual property protection in the TRIPS agreement.

A second question is what in fact constitutes a GILS? Take freedom of association and right to collective bargaining for example. Countries differ in the level at which labor is organized—the firm, the industry and nationally. Are all equally acceptable? Systems also differ with respect to right to work versus closed shop laws. Are both acceptable? Are "lockout" and replacement of striking workers acceptable practices? Most countries forbid strikes in critical or sensitive sectors but the limitations are by no means uniform. At what point does a restriction on strikes in particular sectors move from the acceptable to the unacceptable category? A simple listing of these variations in the right to association and collective bargaining reveals that practice can vary widely, and that international uniformity in a single standard may not be feasible. While it may be possible to identify a few countries that expressly prohibit *any* type of worker association or *any* effort at collective bargaining, the more common situation is likely to involve a disagreement over how a standard is being implemented. Deciding such cases will be problematic.

A third practical question, referred to earlier, will be devising a trade response that is proportional to the subsidy implicit in the violation of the standard. This is an important point. The GATT has never been a coercive system. If a country violates a GATT provision, say a subsidy or through dumping, or by increasing a bound tariff, members may if they wish retaliate by withdrawing prior trade concessions, assuming that the offending country does not provide compensation in the form of tariff concessions on other products. But the retaliation is limited to the amount by which the monetary value of their trade rights were nullified or impaired.[51] As Hudec points out, retaliation in GATT has traditionally been employed to maintain a balance of reciprocity and not to coerce change in trade partners' economic systems.[52] Adherence to this sensible practice would appear to limit the effectiveness of labor standards in the WTO to accomplish sweeping changes in labor practices. Punitive trade sanctions would be a novel and potentially damaging change in GATT practice.

V. Conclusions

The case for including labor standards in WTO obligations is weak. When viewed in the light of theory, empirical evidence, and practical difficulties the most frequently cited arguments for inclusion lose considerable force. At the most fundamental level there is a confusion of purpose as between protecting against "unfair" competition and improving labor conditions in poor countries. Moreover, the potential for subverting labor standards to protectionist purposes in industrial countries, and the real possibility of harming workers in poor countries, argue for caution. Even if the use of trade sanctions were

[51] Countries are of course free to ban the import of products whose imports threaten their domestic healthy and safety without calculating the trade value, but this is irrelevant to the labor standards question.

[52] Robert Hudec, *GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices*, in FAIR TRADE AND HARMONIZATION PREREQUISITES FOR FREE TRADE (Jagdish Bhagwati and Robert Hudec eds. 1996).

rare, labor standards could create considerable mischief through harassment of trade. Nevertheless the long history of attempts to link trade and labor standards suggests the issue will not soon disappear. If left unaddressed it will fester and corrode support for a liberal trade system.

Fortunately there are alternatives to trade sanctions enforced through the WTO. These include strengthening the ILO's monitoring and technical assistance programs, expansion of voluntary commitments not to derogate from domestic labor standards for competitiveness purposes (as in NAFTA), a more prominent mechanism to shine light on alleged violations, and carrots for improved performance in the form of trade incentives as are found in the U.S and EU GSP schemes and in the CBI. Private sector initiatives can also help. Labeling and certification schemes, in which consumers with adequate information can demonstrate their humanitarian concerns in the marketplace, and industry level codes of conduct with regard to their overseas operations and those of their suppliers and subcontractors, such as the 1998 Apparel Industry Initiative in the United States, are examples. In the long run of course rapid economic growth in poor countries offers the best prospect for curbing abusive labor practices.

BIBLIOGRAPHY

Aggarwal, Mita. "International Trade, Labor Standards, and Labor Market Conditions: an Evaluation of Linkages" Washington D.C.; US International Trade Commission, Working Paper 95-06-C (1995)

Basu, Kaushik and Pham Hoang Van. "The Economics of Child Labor" *88(3) American Economic Review 412* (1998)

Bhagwati, Jagdish. "The Demands to Reduce Domestic Diversity among trading Nations" in Jagdish Bhagwati and Roben Hudec (eds) *Fair Trade and Harmonization Prerequisites for Free Trade?* Vol. 1, Cambridge Mass, MIT Press (1996)

Bolle, Mary Jane. "NAFTA Labor Side Agreement: :Lessons for the Worker Rights Fast Track Debates" Washington D.C., Congressional Research Report 97–861 (2001)

Breton, Paul and Jacques Pelkmans. *Global Trade and European Workers* 1998. London: MacMillan Press.

Brown, Drusilla. "Labor Standards: Where Do They Belong on the International Trade Agenda?" 15(3) *Journal of Economic Perspectives* 89 (2001)

Brown, Drusilla, Alan Deardorff, Robert Stern. "International Labor Standards: A Theoretical Analysis" in Jagdish Bhagwati and Rober Hudec (eds) *Fair Trade and Harmonization Prerequisites for Free Trade?* Vol 1, Cambridege Mass, MIT Press (1996)

Burtless, Gary. "Workers Rights" 19(4) *Brookings Review* 10 (2001)

Charnovitz, Steve. "The Influence of International Labor Standards on the World Trading Regime" 126 *International Labor Review* 565 (1987)

Corden, W. Max and Neil Vosden. "Paved with Good Intentions: Social Dumping and Raising Labour Standards in Developing Countries" in Zdenek Drabek (ed) *Globalization under Threat* Cheltenham UK; Edward Elgar (2000)

Corden, W. Max. *Trade Policy and Economic Welfare* 2nd ed., London Oxford University Press (1997)

Diebold, William. *The End of the ITO* Princeton Essays in the International Finance No.16 (1952)

Edmonds, Eric and Nina Pavcnik. "Does Globlization Increase Child Labor? Evidence from Vietnam" NBER Working Paper 8760 (2002)

Elliot, Kimberly Ann. "Fin(d)ing Our Way on Trade and Labor Standards?" Washington D.C.; Institute for International Economics, International Economics Policy Briefs (2001)

Feenstra, Robert. (ed.) *The Impact of International Trade on Wages* Chicago: University of Chicago Press (2000)

Hudec, Robert. "GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices" in Jagdish Bhagwati and Rober Hudec (eds) *Fair Trade and Harmonization Prerequisites for Free Trade?* Vol 2, Cambridge Mass, MIT Press (2006)

Kurtilla, John. "Environmental Regulation in an Open Economy" 20 *Journal of Environmental Economics and Management*, 127 (1991)

Langille, Brian Alexander. "General Reflections on the Relationships of Trade and Labor" in Jagdish Bhagwati and Rober Hudec (eds) *Fair Trade and Harmonization Prerequisites for Free Trade?* Vol 2, Cambridge Mass, MIT Press (1996)

Leary, Virginia. "Workers rights and International Trade: The Socal Caluse" in in Jagdish Bhagwati and Rober Hudec (eds) *Fair Trade and Harmonization Prerequisites for Free Trade?* Vol 2, Cambridge Mass, MIT Press (1996)

Martin, Will and Keith Maskus. "Core Labor Standars and Competitiveness: Implications for Global Theory", 9 (2) *Review of International Economics* 317 (2001)

Maskus, Keith. "Should Core Labor Standards be Imposed Through International Trade Policy?" Washington D.C.; World Bank Policy Research Working Paper 1817 (1997)

Moran, Theodore. *Beyond Sweatshops: Foreign Direct Investment and Globalization in Developing Countries.* Washington D.C.: Brookings Institution (2002)

Morici, Peter and Evan Schulz. "Labor Standards in the Global Trading System" Washington D.C.: Economic Strategy Institute (2001)

Organization for Economic Cooperation and Development. *Trade, Employment, and Labor Standards: A Study of Core Workers' Rights and International Trade*, Paris, OECD (1996)

Organization for Economic Cooperation and Development. *International Trade and Core Labor Standards* Paris: OECD (2000)

Palmer, Karen, Wallace Oates, Paul Portney. "Tightening Environmental Standards: The Benefit-Cost or the No-Cost Paradigm?" 9 (4) *Journal of Economic Perspectives* 114 (1995)

Pearson, Charles. *U.S. Trade Policy: A Work in Progress* (2003)

Porter, Michael and Claas Van der Linde. "Toward a New Conception of the Environment—Competitiveness Relationship, 9 (4) *Journal of Economic Perspectives* 97 (1995)

Swinnerton, Kenneth and Carol Ann Rogers. "The Economics of Child Labor: Comment" 89 (5) *American Economic Review* 1382 (1999)

U.S. Department of Labor. *The Use of Child Labor in U.S. Manufactured and Mixed Imports* Vol. 1 of *By the Sweat and Toil of Children* Washington D.C.: U.S. Department of Labor (1994)

Walter, Ingo. "International Trade and Resource Diversion: The Case of Environmental Management" 110 *Weltwirtshcaftliches Archive* 482 (1974)

CHAPTER 45

SERVICES: THE CASE OF POSTAL VERSUS EXPRESS DELIVERY SERVICES

Michael G. Plummer*

What is important about these [services] negotiations . . . is that they offer vast potential for raising living standards globally but especially in developing countries, many of which stand to benefit the most from further opening of services markets. In fact, 25 developing countries earn more than half of their total export income from services.

Mike Moore, WTO Press Release, 28 June 2002 (www.wto.org).

TABLE OF CONTENTS

I. Introduction 190
II. Services Liberalization and the Stakes for Economic Development 191
III. The Case for Separating Postal from Express Delivery Services in GATS . . 196
A. The General Problem 197
B. Current Classifications 197
C. Existing Positions Regarding Liberalization 199
D. Conclusions 200
IV. Summary 201
Charts and Tables
Chart 1 World Trade in Commercial Services by Selected Region, 1993–00 193
Table 1 World Exports of Services by Selected Region and Economy, 1980–2001 194
Bibliography 201

* Johns Hopkins University SAIS-Bologna.

I. Introduction

In developed countries, services continue to constitute by far the largest share of national economies. For example, in the EU and the United States, approximately seventy and eighty percent, respectively, of the economy falls under the general rubric of services. Services have also increased in importance in trade: in the year 2000, the share of services in total exports came to approximately 28 percent in the United States and 22 percent in the EU, with an average for the entire OECD coming to about 19 percent.[1]

The same trend is observable in developing countries. During the development process, it is typical that: (1) agriculture falls as a percentage of GDP; (2) manufacturing first rises and then falls as the economy matures; but (3) services continue to grow throughout the development process. As a percentage of trade, services exports of developing countries have risen from nine percent in 1980 (approximately half the share of developed countries) to about eighteen percent in 2000, on a par with that of the developed countries.[2]

While this process has been constant throughout history, services take on a special importance in the 21st Century. This is due to a number of factors, including: (a) consumer tastes have become increasingly sophisticated: a good share of the growth in consumer spending is in the general area of "high tech," including such services areas as computer software, internet-related services, and telecommunications innovations; (b) production processes have become more complicated, sophisticated, and international in scope, with global competition increasing substantially; and (c) inputs under the general area of "services" tend to be essential to industrial and enterprise growth and competitiveness.[3] Indeed, businesspeople, scholars, and policymakers are increasingly appreciating the strong link between the competitiveness and efficiency of the services sectors and that of the economy as a whole. The links between the two are pervasive.

Hence, it was a high priority of member-states to extend the auspices of the GATT to include services during the Uruguay Round, which led to the creation of the General Agreement on Trade in Services ("GATS"). GATS continues to take form, and issues such as market access in various commercial services will no doubt play a critical role in the Doha Trade Agenda.

Given the complicated and diverse nature of trade in services, liberalization at the global level can be more delicate and in many ways more difficult than trade in goods. Services can be high tech or low tech; inputs and/or final products; privately-provided or publicly-provided; and closely related to other areas, such as foreign direct investment ("FDI"). Trade in goods internationally tends to be almost always privately provided, with strong GATT/WTO controls on state intervention, including the technical prohibition against state subsidies and constraints in the form of state-owned enterprises having to abide by market principles (GATT Article XVII). Many services areas, however, still include government involvement, and state prerogatives in certain areas are recognized by the GATS. Moreover, trade in goods tends to be separate from FDI, though clearly there exist indirect links between trade and FDI.[4] In the area of services, however, trade in services can be intricately linked to FDI; in some sectors, trade in services is impossible *without* FDI.

[1] OECD, GATS: THE CASE FOR OPEN SERVICES, 20–21 (2002)

[2] OECD, *supra* note 1

[3] OECD, *supra* note 1.

[4] Trade can either cause or be caused by FDI. That is, a firm might set up a plant in country X; intra-firm trade will then show up as international trade. However, it may also be that a company might begin to establish its brand in a foreign market through exports before following up with investment in a plant. In the first case, the data would suggest that FDI causes trade; in the second case, trade "causes" (or at least precedes) FDI.

The OECD (2002) defines four "modes" of trade in services: (1) cross-border supply, in which a company exports the service from home, e.g. by fax or email; (2) consumption abroad, in which the user of the service consumes it outside his/her home country, e.g. tourism; (3) commercial presence, in which a company directly supplies the service to foreign customers (this involves establishment of an affiliate abroad and constitutes over three-fourths of all trade in services); and (4) presence of natural persons, in which the service-exporting country sends personnel abroad to supply services.

In this chapter, we will focus on the need for services liberalization in the global economy, with a focus on developing countries. Moreover, we will use the process and complications associated with the liberalization of express delivery services as a case study. This area is particularly interesting because: (a) it is an industry that has become highly international; (b) it has become an important input to a variety of emerging industries and a key ingredient in the competitiveness of firms and countries; (c) liberalization runs up against various competition policy issues, especially since it potentially affects private and public services[5]; and (d) it is exactly the type of industry where greater international access created through global agreements can produce major benefits to developed and developing countries alike.

Part II of this chapter discusses the main economic issues associated with liberalization of trade in services, and makes the case for reform especially in developing countries. Part III considers the case of express services, including the existing situation and an analysis of what the optimal approach might be. Part IV provides some concluding remarks and recommendations.

II. Services Liberalization and the Stakes for Economic Development

A series of multilateral negotiations under the auspices of the GATT/WTO have been very successful in bringing down barriers to trade in manufactured goods. Once Uruguay Round tariff cuts are fully implemented (generally by the end of 2005), the average tariff on manufactures for the United States, EU, and Japan will be approximately four percent, four percent, and two percent, respectively. While there do exist numerous "spikes" (that is, sectors in which protection continues to remain quite high), by and large trade in manufactures is fairly free in the developed country markets, with the notable exceptions of textiles, clothing and steel. Developing country tariffs are, in general, much higher than in the developed world, but a large majority of developing countries has liberalized substantially trade in manufactures over the past fifteen years. In fact, most of the benefits that would accrue to global free trade would go to developing countries, according to various computational general equilibrium models that have been used to estimate such effects.[6]

Given the political sensitivities associated with trade in agricultural goods, much less has been accomplished under the GATT/WTO framework. Indeed, agricultural trade continues to be highly distorted, and while some positive trends are in evidence (e.g., Japan's

[5] A excellent example of unfair competition that potentially exists in this context can be found in the March 2001 European Commission case against the German state postal service provider, Deutsche Post AG. In its ruling, the European Commission agreed that Deutsche Post AG had abused its monopoly position in letter services to cross-subsidize its business parcel services through a system of fidelity rebates and predatory pricing (see: http\\europa.eu.int\comm\competition\citizen\citizen_dominance.html). Deutsche Post was fined €24 million.

[6] See, of example, Robert Scollay and John Gilbert, an Asian Trade bloc? (2001).

"tariffying" its rice imports, occasional proposals by the EU Commission to liberalize EU agriculture) problems seem to be emerging elsewhere (e.g., the US Farm Bill passed in 2002, which will increase subsidies to an already heavily subsidized sector by some $170 billion over the next 10 years). In fact, agriculture has often been the most difficult sector for trade negotiations and almost undermined the Uruguay Round itself. Still, while agriculture will no doubt continue to be a difficult sector to liberalize, it is not nearly as important as the manufacturing sector and is dwarfed by the services sector in the developed world (agriculture constitutes less than three percent of GDP in the United States and five percent in the EU).

The developing world is a different story. Agriculture continues to play an important role in the economy in general and in trade in particular in the least-developed countries and in many middle-income countries. In order to be successful, the Doha Round will have to include at least some agricultural liberalization if the developing countries are going to agree to any accord. Still, as the development process unfolds, manufactures and, especially, services will become increasingly important. As noted above, services have been growing rapidly in importance and already constitute eighteen percent of developing-country exports. Some developing countries, like Turkey and India, have shares that are even greater than those of the United States and the EU.[7] According to Dee and Hanslow [8], of the $260 billion increase in global income that would be generated from global free trade, fully half would accrue because of services-related liberalization. Given the spill-over effects of greater efficiency in the services sector (from more efficient infrastructure-related services, including transport, to financial services), the health of any economy, developed or developing, is intricately linked to the development of its services sector.

Chart 1 shows growth in services trade by region and globally over the 1993–2000 period. Growth in Asia, which has been by far the most successful region in terms of economic development in the developing world, is particularly impressive, with the exception of the Asian Crisis years (when output also collapsed). In all regions, services trade has grown faster than the economy as a whole for most years.

Moreover, as can be seen from Table 1, the share of global services trade by country may not have changed much in terms of developing-developed countries (North American and the EU continue to constitute almost two-thirds of global trade in services) but the distribution between countries in the developing world has changed substantially, with the successful countries increasing their shares significantly. For example, Africa and Latin America have seen their shares generally stagnate (or fall) to approximately two percent and four percent, respectively, whereas Asia increased its share from about twelve percent to sixteen percent (excluding developed-country Japan, which actually saw its share drop). China, which achieved the highest real economic growth of major economies over this time-span, saw its share in trade in services expand the most rapidly, actually tripling over this period. It is no coincidence that China also received the most FDI in the developing world.[9]

An association between rapid real economic growth and rapid growth in services trade does not mean that the latter caused the former. Such estimation is much more

[7] OECD, *supra* note 1, p. 21.

[8] P. Dee and K. Hanslow, *Multilateral Liberalization of Services Trade,* CANBERRA, AUSTRALIAN PRODUCTIVITY COMMISSION (as cited in OECD*, supra* note 1)

[9] According to preliminary estimates by UNCTAD, China may have actually received more FDI in 2002 than the United States.

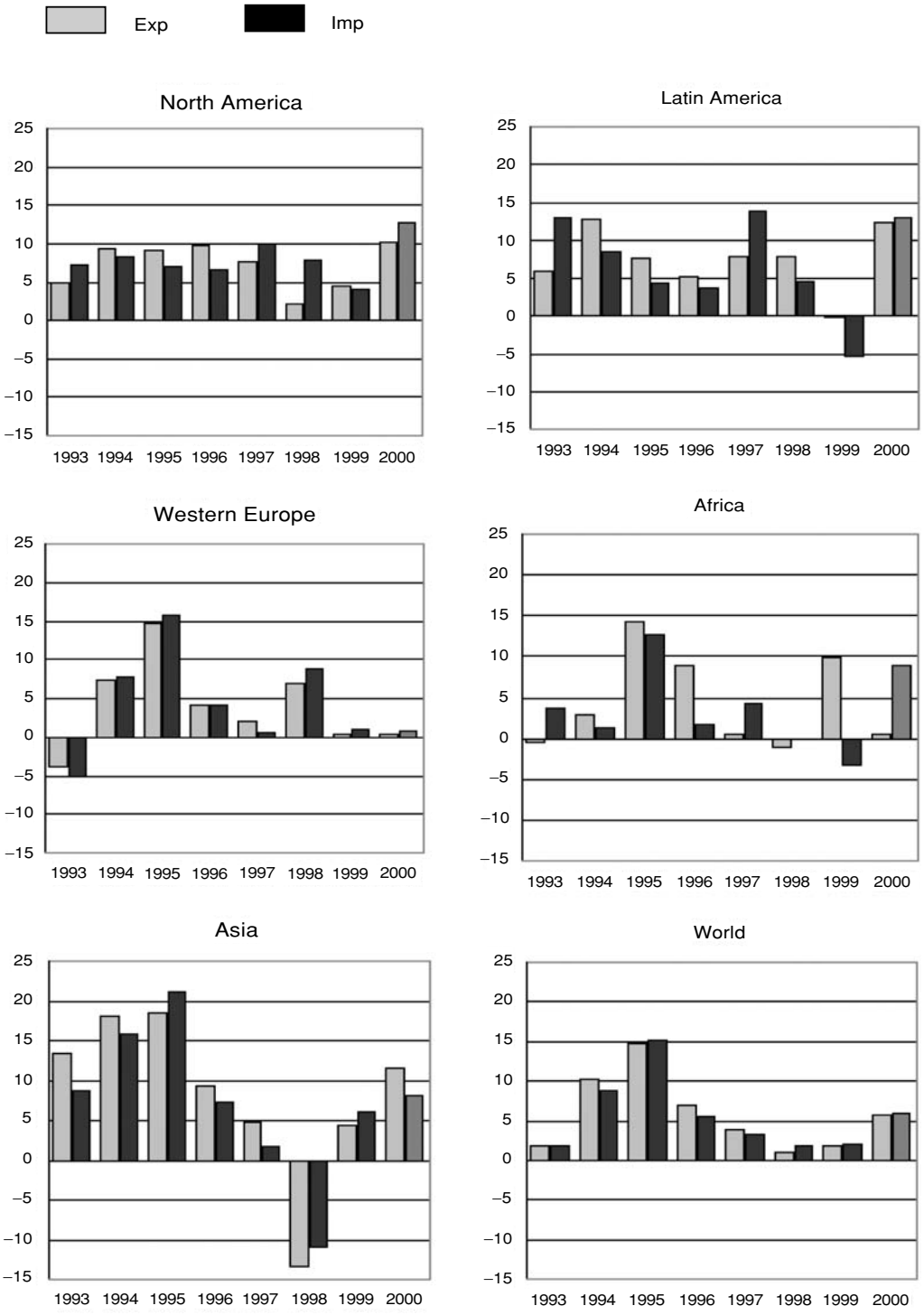


Chart 1: World trade in commercial services by selected region, 1993–00 (Annual percentage change in value)
Source: World Trade Organization, http://www.wto.org, June 2002

Table 1: World exports of services by selected region and economy, 1980–2001 (percentage)

	Share				
	1990	1995	1999	2000	2001
World	100.00	100.00	100.00	100.00	100.00
North America	19.31	18.81	20.63	21.16	20.68
Canada	2.34	2.14	2.47	2.49	2.41
United States	16.97	16.68	18.17	18.67	18.27
Latin America	3.79	3.72	3.92	4.11	4.00
Argentina	0.29	0.30	0.31	0.30	0.28
Brazil	0.47	0.50	0.50	0.61	0.61
Chile	0.23	0.27	0.27	0.26	0.27
Mexico	0.92	0.80	0.84	0.93	0.87
Western Europe	53.06	47.57	47.97	45.95	46.54
France	8.46	6.98	5.94	5.57	5.49
Germany	6.59	6.31	6.00	5.52	5.54
Italy	6.20	5.14	4.22	3.81	4.13
United Kingdom	6.87	6.43	8.16	7.92	7.53
European Union (15)	47.18	42.58	43.27	41.20	41.96
Central and Eastern Europe, the Baltic S	...	...	...	...	...
Czech Rep.	–	0.56	0.49	0.46	0.48
Hungary	0.34	0.43	0.41	0.43	0.53
Poland	0.41	0.89	0.61	0.71	0.83
Russian Fed.	–	0.89	0.66	0.66	0.70
Africa	2.37	2.14	2.24	2.12	2.10
Algeria	0.06	0.06	0.08	...	...
Egypt	0.61	0.69	0.67	0.66	0.66
Kenya	0.10	0.07	0.05	0.05	...
Morocco	0.24	0.17	0.20	0.20	...
Nigeria	0.12	0.05	0.07	...	...
South Africa	0.42	0.37	0.36	0.34	0.33
Tunisia	0.20	0.20	0.20	0.18	0.19
Middle East	...	...	...	...	...
Israel	0.58	0.65	0.79	0.98	0.78
Saudi Arabia	0.39	0.29	0.39	0.33	...
Asia	16.79	22.00	19.75	20.84	20.69
Australia	1.26	1.32	1.24	1.23	1.10
China	0.73	1.55	1.90	2.07	2.15
Hong Kong, China	2.31	2.88	2.70	2.89	2.99
India	0.59	0.57	1.02	1.21	1.39
Indonesia	0.32	0.45	0.32	0.35	...
Japan	5.28	5.37	4.38	4.69	4.40
Korea, Rep. of	1.17	1.86	1.87	1.98	1.97
Malaysia	0.48	0.96	0.86	0.93	0.95
New Zealand	0.31	0.37	0.31	0.29	0.27
Philippines	0.37	0.78	0.35	0.28	0.23
Singapore	1.62	2.48	1.74	1.85	1.83
Taipei, Chinese	0.89	1.25	1.25	1.39	1.45
Thailand	0.80	1.23	1.06	0.95	0.89

Source: World Trade Organization, http\\:www.wto.org, June 2002

complicated; indeed, there exists a chicken-and-egg simultaneity problem here. However, regardless of which causes which, the development of the services sector is clearly an important part of the development process. As noted by the OECD, there is a very close relationship between the share of services in output and *per capita* GDP: the correlation coefficient is 0.80 (where 1.0 would imply a perfect correlation).[10]

Beginning in the 1950s and continuing arguably through the 1970s, there was a strong debate in economics over the usefulness of economic liberalization in developing countries. One school embraced what came to be known as the "import substitution" model, which argued that developing countries would best develop on their own rather than integrating with the developed world; otherwise, they would be marginalized, exploited, and condemned to perpetual economic under-development. Another school, known as "export promotion," argued that economic liberalization, both domestically and in terms of external commercial policies, was not only desirable but actually necessary if countries are to develop.

These schools of thought are developed more thoroughly in Chapter 37 of this book. Suffice it to note here that development experience—as well as the sheer power of the economic logic behind the export-promotion model—essentially settled the debate in the 1980s: countries that were outward-looking, particularly in Asia, did far better than countries espousing an import-substitution strategy. Indeed, in the 1980s, Latin America, which for most of the decade remained fairly closed, actually experienced a "lost decade," in which economic growth was stagnant, while outward-looking Asia grew by leaps and bounds. Some scepticism re-emerged during the Asian Crisis of 1997–1999, but the origins of the crisis were arguably not found in an overly-outward orientation, but rather a range of other issues.[11] In fact, it is possible to argue that countries most affected by the crisis were not liberal enough. For example, there was a strong negative relationship between the openness of the financial-services sector in Asian economies to competition from foreign financial companies and the severity of the financial crisis (Singapore, for example, which was generally quite open to foreign banks, was not severely affected by the financial crisis, despite being closely integrated with heavily-affected economies in Southeast Asia). The response of the Asian economies to these problems has generally been to speed-up their economic liberalization and strengthen their outward-oriented policies, while at the same time making sure that the legal, infrastructural, and corporate-governance context is appropriate. The heavily-affected Asian economies experienced a strong rebound in 1999–2000 and, while 2001 saw a slowdown due to sluggish demand in the developed world, economic growth in 2002 was fairly strong and forecasts for 2003 continue to be bright, though somewhat dimmed due to the effects of the war in Iraq and the SARS outbreak.

Today, there exists an anti-liberalization campaign that, rather than finding its roots in an economic model like import-substitution, ostensibly endeavors merely to critique economic integration. This approach, sometimes referred to as the "No Global" movement,

[10] OECD, *supra* note 1.

[11] While the sources of the Asian Crisis are many and complicated (*see, for example*, various publications of the Asian Development Bank at www.adb.org) they include: premature liberalization of financial markets (without sufficient monitoring mechanisms), which led to abuse; corporate governance problems; overly-rigid commitments to fixed exchange rates; "double mismatches" in terms of maturity and denomination of debt (that is, banks increasingly financed activities by borrowing short-term in foreign currency while having long-term domestic loans in home.currency); and excessive current account deficits financed increasingly by foot-loose capital rather than FDI. *See also,* Chapter 71 of this book, discussing Indonesia's experience with the GATT and the WTO, and analysing the reasons for its financial problems in the 1990s.

does not seriously challenge the export-promotion model intellectually, but has criticized the results of liberalization (often out of context) and raised a number of issues that have been embraced by certain policymakers (in developed countries) to further their own political ambitions. The OECD does an excellent job of exposing many of the shortcomings of this approach.[12] But, in reality, the no-global *zeitgeist* has not really affected the liberalization trend in developing countries. The failure, for example, to launch a new round of trade negotiations at Seattle in December 1999 was not due to anti-capitalism demonstrations but, rather ironically, to the resistance on the part of *developing* countries to adopt many of the issues that they seem to be advocating, for example, in areas such as labor-organization and environmental protection.

The case for economic reform and liberalization is just too strong. Countries that have sustained economic liberalization have prospered; the ones that have not prospered generally do not have outward-oriented policies to blame but rather other economic-contextual problems, such as macroeconomic instability (e.g., Latin America) or political instability (e.g., Africa). It is hard to promote growth—let alone long-term development—in an atmosphere of hyper-inflation or civil war. China has used economic reform to transform the world's most populous country from a least-developed, autarkic economy into an outward-oriented economic powerhouse; Vietnam's reforms over the past fifteen years have cut poverty rates from one-half to one-fifth of the population.

However, the process of economic liberalization in developing countries has generally left the services sector for last. Many developing countries have been reluctant to liberalize the services area for a variety of reasons, mostly political in nature. But there is a strong sense among developing countries that services can be neglected no longer, both because of the strong spill-over effects that services have on the entire economy and the need to bring in FDI. Recognizing this, the Association of Southeast Asian Nations ("ASEAN") has agreed to a regional services framework compatible with the GATS. Vietnam, in its recent bilateral trade agreement with the United States (October 2001), has already generally committed itself to various WTO conventions, including GATS and other services-related areas, even though its services sector has remained to date almost completely closed. MERCOSUR has even proposed a plan (as noted below) for express delivery services under the WTO/GATS. The economic models focusing on economic liberalization cited above lend further credence to the potential benefits of future liberalization of the services sector in developing countries.

III. The Case for Separating Postal from Express Delivery Services in GATS

Express delivery services constitute an interesting case study in service-sector liberalization. Their importance in the day-to-day activities of firms has increased substantially over the past fifteen years, as evidenced by rapid growth in the industry. Indeed, express delivery services have now become an essential "infrastructure" to doing business for many companies, as well as being an increasingly important service for individuals. Moreover, express delivery services are particularly necessary for multinationals and, hence, easy access to markets by express delivery providers is important in attracting FDI inflows, particularly in developing countries. These services are critical in the least-developed countries and other developing countries with an under-developed infrastructure. As express delivery services operate in a very different way—and are geared to

[12] OECD, GATS: THE CASE FOR OPEN SERVICES MARKETS (2002).

different markets—than traditional postal services, it is important to stress their distinct nature and, indeed, their complementarity.

A. The General Problem

This is where the difficulty lies: express delivery services are often considered a competitor to postal-service providers, which are almost invariably state-owned. Hence, liberalization in this area has been tricky, constrained by competing interests from both developed and developing countries and based on a misunderstanding of the market in which basic postal services are confused with express delivery services (we argue below that they are related but distinct). It will be argued in this chapter that existing realities emphasize the need to separate express delivery services from postal activities, as this would be in the interest of all parties involved. Otherwise, successful liberalization at the GATS in this area will likely be impossible in the short- to medium-term and all countries will miss an important opportunity to improve efficiency and customer satisfaction, while at the same time preserving the basic domain of national postal services and, consequently, that of their employees.

In fact, under the GATS framework member states have tended to reserve the right to organize postal services as they see fit. However, the motivations for liberalizing express delivery services internationally are independent of the fundamental interests of the postal services sector, at least as defined under Article I(3)(c) of the GATS. Indeed, liberalization of express delivery services could actually be beneficial to national postal services; a clear separation will help the incumbent in fulfilling its universal services obligations (discussed below). Also, it would reassure postal users, who could (and should) be concerned that postal-service providers might lose their focus and efficiency in providing basic postal services. In addition, separation would reinsure postal-service employees that they will not be threatened by liberalization of express delivery services.

Thus, express delivery services need to be thoroughly differentiated from traditional postal services, both because of the clear substantive differences between the two and the defined purview of GATS. Failure to do so will lead to mixing apples and oranges to the detriment of member states, be they developed or developing countries. It could also thwart progress in Doha Agenda negotiations.

B. Current Classifications

Express delivery services are currently classified by the WTO Services Classification List (W/120), under both "postal" and "courier" services. The only distinction between postal and courier services is that the former refer to public-sector offered services, whereas the latter are private. Hence, it has to do with ownership rather than product, which is unusual in the area of international trade. This type of classification leads to a great deal of confusion of the issues, as well as complications regarding competition policy. In particular, when reforms are proposed under the current framework, the potential effects not only relate to businesses and consumers, as is usual within any economic reform framework under the WTO, but also the public sector. This renders such liberalization much more controversial, particularly in developing countries, as it brings into the formula sensitive and essential public services. Postal services are generally associated with the idea of Universal Services Obligations ("USO") and are viewed as "an element of a

core of services that contribute to the cohesion and well being" of nations.[13] The concept of USO, therefore, should not be construed to include express delivery services, as it does not fit into the definition.

A typical problem in this regard is found in the EU. The European Commission has suggested that an ownership-based definition be replaced by an activity-based classification, a refinement that would help clarify issues. This move reflects the current situation in the market whereby formerly state-owned postal operators have been transformed into multi-service, privately-owned groups. These organisations offer numerous services, ranging from basic mail services to express delivery, logistics-related, and even financial services. At the same time these entities might be the universal postal service provider. A clear distinction between postal services and express services would not result in an advantage for private express companies, given the fact that the classification would no longer be ownership-based but rather activity-based. Express services provided by former national postal operators could benefit equally from such a distinction.

The EU had originally intended to complete liberalization of mail services in 2007 but now the Commission has only committed itself to study the process in 2006 to consider whether full liberalization might be feasible by 2009, or if an additional step will be necessary.[14] In any case, monopolies will continue to dominate the sector. The Commission acknowledges that the 1997 Postal Directive has not provided much, if any, competition in the market.[15] From a practical point of view, the confusion of postal services with express delivery services has led to a great deal of apprehension and hesitation among the EU's postal services employees, who number approximately 1.7 million.[16] This confusion is exacerbated by the inclusion of express delivery and postal services under one heading, in particular for the developing countries.

The US Postal Service is an independent government organization that essentially has a monopoly on delivery of letters and other activities. In the United States, like other countries, the postal service area is dominated by domestic issues rather than international ones. Hence, in the United States as well, it is important that USO services be separated from the new express-delivery market, that is, there is a clear need to separate the domestic (USO-related postal services) from the international (express delivery services in terms of international trade). Otherwise, if liberalization is thought to impinge upon USO services—and, therefore, sovereign prerogative protected by the WTO/GATS—no liberalization will take place.

But, while the United States and EU have much at stake, failure to separate clearly USO-related from express-delivery services would be even more to the disadvantage of developing countries. This is because, as noted above, infrastructure in developing countries tends to be less reliable and efficient; if a country wishes to attract FDI—and a strong majority of developing countries has placed a high priority on attracting FDI, due to its inherent benefits to the domestic economy—express delivery services are particularly important, as they reduce considerably intra-firm transaction costs in multinational corporations. By allowing for rapid and reliable means of communication and exchange both within multinational corporations and between these firms and their suppliers, express delivery services lower the costs associated with a presence in a foreign country

[13] Asian Development and the OECD, *Liberalization and Competition in the Service Sector: Experiences from Europe and Asia,* EIGHTH INTERNATIONAL FORUM ON ASIAN PERSPECTIVES 47 (June 2002)
[14] *Id.*
[15] *Id.*
[16] ADB/OECD, *supra* note 10

and raise the prospects for establishing and expanding foreign-affiliate operations. In other words, express delivery services have become part of the essential infrastructure of globalization; countries that fail to recognize this could be left behind. Thus, in many ways, inclusion of express delivery services liberalization as a separate item from postal services under the Doha Trade Agenda will be more important to developing than to developed countries.

Barriers affecting the express-courier services include (in no particular order)[17]:

1. Limitations on ownership, control and management;
2. Restrictions on geographic scope of operations;
3. Denial or national treatment access to essential infrastructure;
4. Lack of transparency with respect to rules and regulations;
5. Discrimination according to size, location of terminals, etc.;
6. Lack of consumer choice with respect to delivery services; and
7. Administrative delays.
8. Arbitrary levies and license fees
9. Abuse of dominant position by the incumbent operator
10. State aid provided to express activities

Hence, the express-services industry is limited by a number of non-tariff as well as tariff barriers, making it an especially attractive candidate for trade facilitation and liberalization measures under the WTO/GATS.

C. Existing Positions Regarding Liberalization

As the WTO begins its preparations for the Doha Trade Agenda, express delivery services will likely play a greater role than they ever have in the past. The industry has been growing rapidly and has become very international, even without GATS-related liberalization helping to foster it. It has grown because the world has been much more internationalized and, as noted above, express services are an important "lubricant" to this process. Many barriers to trade, such as postal taxes, licensing schemes, preferential customs treatment, and the like, need to come down in order to facilitate the industry's growth and enhance efficiency.

The inclusion of services will be important to developing countries, since: (a) services are becoming more important in most developing economies; (b) there is a growing recognition in developing countries of the key role that services play in the globalization process, that is, in making them part of the global production chain; and (c) the other two sectors that are high priorities for developing countries in the next round, textiles and agriculture, will likely make little progress.[18] Services liberalization may be one area in which some credence would be given to the sobriquet "Development Round".

While financial services and telecommunications are among the services areas that will receive the most attention in the Doha negotiations, postal/courier services, and express-delivery services in particular, will be an important area of negotiation with a

[17] Part of this list is found in: Ascher, Bernard, *Postal Services and Express Delivery in Trade Negotiations*, paper prepared for the World Mail and Express Americas Conference, Orlando, Florida, December 10, 2001

[18] Recent developments suggest some cause for optimism, however. As of early 2003, the United States began to demonstrate a surprising willingness to liberalize its textile sector, as well as fresh proposals to cut agricultural subsidies. While the latter proposals have been met with cool responses, especially by the EU and Japan, it appears as though the United States is increasingly dedicated to a effective, comprehensive Doha Round, which is essential for ultimate success.

great deal of potential if handled properly. At present, the situation does not lend itself to too much optimism, as a number of proposals that have been tabled thus far are conservative and will probably do little—if anything—to create a more global, barrier-free market for express delivery services. This is unfortunate, especially given the stakes to developing countries noted above. However, it is useful to evaluate existing proposals from an economic perspective to gauge which approaches offer the most potential. It is hoped that such analysis will give some light as to which direction the Doha negotiations should take; it is useful to consider what is the best-practice approach, whether or not WTO member-states decide to take advantage of it.

Thus far, there have been a number of proposals tabled in the general area of postal and courier services, made by developing (MERCOSUR, Bolivia, and Hong Kong) and developed (EU, US, New Zealand) economies. One approach[19] involves eliminating a distinction between postal services and courier services (under W/120) and substitute for them an individual heading titled, "services relating to the handling of postal items," having eight sub-items. One of these sub-items is express delivery services and its definition is relegated to a footnote. It appears to invite member-states to make specific recommendations for all eight sub-items, including express-delivery services.

Another approach defines express delivery services specifically as being separate from courier and postal services and having a single heading.[20] Under this approach, then, member-states would be able to propose liberalization of express delivery services directly. This heading could then become part of a broader range of transportation activities in the globalization of the supply-chain management.

D. Conclusions

In a nutshell, the key difference between the two approaches discussed above is that this latter approach allows negotiators to circumvent the mixing of issues pertaining to competitive delivery services issues and those affecting USO services. Under this approach, member-states would be able to avoid implicitly and explicitly infringement upon postal services provided by the public sector, but would also allow the liberalization of express delivery services. We have argued in this chapter that such a separation is essential to reform and would be in the interest of all parties.

The stakes are actually quite high for developing countries in this area. As was noted earlier, impediments to express delivery services in developing countries are especially detrimental to international competitiveness. In particular, by their very nature, multinational corporations have generally come to rely on express delivery services as part of their intra-firm production process, and inefficient postal communication (including express delivery services) serves essentially as a "tax" on globalization—a tax that multinationals are highly reluctant to pay in such a competitive global economy. Hence, they will have an incentive to go where this input "tax" is lowest, that is, developed countries. Lack of liberalization of express delivery services, therefore, at the margin could threaten FDI flows into developing countries, at a time when FDI is acknowledged to be of great important to economic development.

[19] Some of these positions are spelled out in the IECC Position Paper, *The Global Express Industry and the U.S. and EC Approaches to the Classification of Express Delivery Services*, 4 July 2002.

[20] These approaches are summarized in Ascher, *supra*, note 16, and are available at the WTO homepage (www.wto.org).

IV. Summary

The salient results of this study can be summarized as follows:

- Services in general and trade in services in particular have become increasingly important to developed and developing countries, both as final products and as inputs to other productive activities.
- The relationship between services and FDI (under mode 3) is extremely strong; hence, services liberalization is important as a means of attracting FDI, which has proven to be a key catalyst in the development process.
- Developing-country stakes are, therefore, particularly high in global services liberalization, as efficient services are necessary in order to help these countries compete internationally and attract foreign firms as partners in the development process. Studies have shown that approximately half of all gains that will accrue to global free trade would stem from services liberalization. Much of the gain in this area would favor developing countries.
- GATS has taken on great significance in the 21st Century, particularly for developing countries, and successful liberalization of services under the Doha Trade Agenda will be extremely important in setting the course for the future. This is especially true since the other sectors of great interest to developing countries, namely labor-intensive goods such as textiles and clothing and agricultural products, will be very difficult to liberalize under Doha, as they have been under preceding rounds.
- We have used the express delivery services case as an example of how this process plays out in the complicated political economy of services liberalization. We have stressed that it is imperative to separate postal services from express delivery services, as they are separate sectors and reform of the latter can actually help promote the former through its complementarity and general enhancement of efficiency. It is in the interest of all parties to do this. However, if a separation is not clearly made, progress in the Doha Round is unlikely, given political realities and probable misunderstandings.

BIBLIOGRAPHY

Ascher, Bernard, *Postal Services and Express Delivery in Trade Negotiations*, paper prepared for the *World Mail and Express Americas Conference*, Orlando, Florida, December 10, 2001

Asian Development and the OECD, *Liberalization and Competition in the Service Sector: Experiences from Europe and Asia*, Eighth International Forum on Asian Perspectives, June 2002 (draft monograph).

Dee, P. and K. Hanslow, *Multilateral Liberalization of Services Trade*, Canberra, Australian Productivity Commission. (as cited in OECD 2002)

OECD, *GATS: The Case for Open Services Markets* (OECD, 2002).

Robert Scollay and John Gilbert, *An Asian Trade Bloc?* (Institute of International Economics, 2001).

B. Regional Issues

CHAPTER 46

REGULATING REGIONAL TRADE AGREEMENTS—A LEGAL ANALYSIS

Robert E. Herzstein and Joseph P. Whitlock*

TABLE OF CONTENTS

I. Introduction 205
II. The Recent Proliferation of RTAs 206
A. The Size of the Phenomenon 206
B. Overview of RTAs by Region 208
1. Europe 208
2. Western Hemisphere 208
3. East Asia and the Pacific Region 210
4. Mediterranean Region 211
5. Africa 211
C. Innovations Found in Recent RTAs 212
1. Expansion of the Scope of Coverage of RTAs 212
2. Innovations in Dispute Settlement Procedures 213
3. Innovations in the Area of Trade Facilitation and Harmonization of Domestic Regulations 214
III. Overview of Arguments Made About RTAs 215
A. Arguments Made in Favor of RTAs 215
B. Arguments Made Against RTAs 218
IV. Legal and Institutional Regulation of RTAs under the WTO 219
A. The WTO Legal Framework for Regulation of RTAs 219
1. The Most Favored Nation Principle 219
2. History of GATT Article XXIV 222
3. Current WTO Disciplines Governing RTAs 222
4. Evaluation of WTO Legal Disciplines Governing RTAs 227
B. The WTO Institutional Framework for Regulation of RTAs 228
1. Examination of RTAs under the GATT System 228
2. Examinations of RTAs under the WTO System 229
3 Evaluation of the WTO Examination Process for RTAs 231
C. Regulation of RTAs through WTO Dispute Settlement 234
1. WTO Panel and Appellate Body Rulings Involving RTAs 234
2. Evaluation of Dispute Settlement as a Means of Regulating RTAs ... 240
V. Regulating RTAs in the Interest of the WTO System 241
A. Independent Committee made up of Neutral Experts 242
B. Phase-in Periods for RTAs Under Examination 243

* Messrs Herzstein and Whitlock are attorneys at the law firm of Miller & Chevalier, Washington, D.C.

C. Systematic Investigation of Hidden Discrimination Within RTA Provisions 243
D. Expedited Recourse to Dispute Settlement Procedures 244
VI. Conclusion 245

I. Introduction

Recent years have witnessed a remarkable increase in the number of Free Trade Agreements ("FTAs") and Customs Unions (often collectively referred to as "Regional Trade Agreements" or "RTAs") entered into by countries that are members of the World Trade Organization ("WTO").[1] The consequences of this recent and unprecedented increase in RTAs on the world trading system are likely to be significant, although they are not yet fully understood.[2] RTAs, which by their very nature discriminate against non-signatories, are a derogation from the Most-Favored Nation ("MFN") principle, one of the fundamental guides for national government behavior the world trading system was intended to establish. While RTAs have the potential to undermine the MFN principle through discriminatory application of tariffs and regulatory barriers, they also have the potential to advance trade liberalization through duty-free trade among signatories, and by allowing the participating nations to integrate their economies more thoroughly than they could through WTO agreements.

Because RTAs violate the MFN principle, WTO legal texts (specifically, GATT Article XXIV, the Enabling Clause and GATS Article V) place restrictions on the circumstances under which a WTO member may enter an RTA. The texts permit four permutations: Customs Unions, FTAs, Agreements under the Enabling Clause, and Agreements under GATS Article V. GATT Article XXIV permits WTO members to enter Customs Unions and FTAs so long as the internal preferences are applied to "substantially all" of the trade among themselves, and certain other conditions are met. Under the so-called "Enabling Clause"[3], developing country members may enter arrangements among themselves for the mutual reduction of tariffs under less stringent conditions than those imposed by Article XXIV, and may also be accorded preferential duty reductions by developed country members. Finally, under GATS Article V, WTO members may enter Economic Integration Agreements (or "Services Agreements") eliminating barriers to trade in services, provided that "substantially all" trade among the members is covered.

This basic classification of four types of regional arrangements oversimplifies the great variety of legal innovations occurring in RTAs. There are diverse reasons for entering RTAs and a wide range of forms that RTAs can take, and there is widespread disagreement about the effects of RTAs. In light of this background, a methodical examination—not only of economic effects, but also of possible institutional and legal responses—is

[1] Many "regional" trade agreements are not literally "regional," because they involve countries that are located great distances from each other. Although some RTAs are determined in part by geographic proximity and various related efficiencies, such as transportation and distribution costs, other RTAs are better explained by political considerations (e.g., EC FTAs with former colonies, or the U.S.-Israel and U.S.-Jordan FTAs) or considerations of cultural affinity (e.g., the British Commonwealth Preferences of the early Twentieth Century). For a range of explanations why countries enter RTAs, *see,* Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism,* 42 HARV. INT'L L. J. 419, 423–26 (2000) (summarizing theories advanced by political scientists and economists to explain the growth of regionalism.)

[2] There is considerable uncertainty regarding the degree to which RTAs are harmful, benign or helpful to the world trading system. *See e.g.,* THE WORLD BANK, TRADE BLOCS (2000) (remarking on the lack of evidence that RTAs either aid or impede WTO multilateral liberalization.); *See also* Committee on Regional Trade Agreements, *Note on the Meeting of 2–3 July 1996,* WT/REG/M/2, ¶ 82 (Aug. 14, 1996) ("*Second Session of CRTA*") (in which the EC warned against "partial and pre-conceived ideas about the relationship between regionalism and the multilateral trading system.").

[3] *See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries,* Decision of November 18 1979, BISD 265/203 (1979). One-way preferential arrangements, where developed countries give preferred treatment to imports from developing countries but not *vice versa,* are discussed in Chapter 34 of this book.

urgently needed. Economic analyses[4] and initial suggestions for reform made by commentators[5] and WTO members[6] can and should be further bolstered through a discussion of how WTO institutions can most effectively channel the RTA phenomenon to ensure the maximization of global welfare. Such a discussion is important and timely in light of the generally acknowledged inadequacy of GATT and WTO supervision over the establishment of RTAs, as well as the adoption of Article 29 of the Doha Ministerial declaration, which calls for "negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements."[7]

This Chapter aims to provide an initial analysis of the adequacy of current WTO mechanisms governing RTAs, as well as some suggestions for future WTO regulation of RTAs. It bears noting that these suggestions are not intended as a detailed prescription to be carefully followed, but rather are intended to stimulate new thinking about the WTO regulation of RTAs. The proposed reforms are aimed at improving the fidelity of WTO members to the principles set forth in GATT Article XXIV and GATS Article V by improving the procedures for determining whether the limitations on discriminatory arrangements set forth in those articles have been met. We suggest (i) the creation of an independent committee of neutral experts to examine RTAs, (ii) waiting periods during which RTAs are examined before their adoption by national legislatures, and (iii) expedited access for adversely affected third parties to review by the WTO Appellate Body of the adequacy of an RTA under WTO standards.

After an initial introduction to the diversity and scope of RTAs (Part II), as well as the standard arguments made about them (Part III), the following discussion will outline the current WTO legal framework governing RTAs, as set forth in the GATT and WTO Agreements (Part IVA). We will then examine the WTO institutional response to RTAs, by reviewing the activities of the Committee on Regional Trade Agreements ("CRTA") (Part IVB), as well as Panel and Appellate Body reports (Part IVC). The Chapter will conclude by examining the adequacy of the current WTO approach, and suggesting possible modifications to enhance its effectiveness (Part V). Those readers who are familiar with the legal and institutional background may wish to focus their attention on the recommendations set forth in Section V.

II. The Recent Proliferation of RTAs

The recent proliferation of RTAs is remarkable, not only for its size and speed, but also for the diversity of participants and the variety of legal innovations adopted.

A. The Size of the Phenomenon

The number RTAs being concluded has greatly accelerated over the past decade. During the first forty-three years of the GATT's existence (until 1990) only thirty RTAs that are still in force today were notified to the GATT, of which the majority (eighteen) involved

[4] For an economic analysis of the RTA phenomenon, *see* Scott Baier and Jeffrey Bergstrand, ON THE ECONOMIC DETERMINANTS OF FREE TRADE AGREEMENTS (June 2001).

[5] *See infra* notes 186–7 and accompanying text.

[6] Individual WTO member governments have articulated proposals for gaining a better grasp of the RTA phenomenon and helping to ensure that it develops in a manner complementary to the multilateral trading system. *Id.*

[7] *See Doha Ministerial Declaration* (reproduced in the Appendix to this book and also available at www.wto.org), Article 29. Four WTO meetings on the subject of RTAs had been completed by mid-December 2002. Negotiations on clarifying and improving the WTO's regulation of RTAs are scheduled to be completed by January 1, 2005.

European countries.[8] By contrast, 132 RTAs that are still in force today were notified to the GATT and WTO between 1990 and 2002, with countries in all regions of the world participating.[9]

Because many RTAs have not been notified to the WTO, the true number of RTAs is greater than the number notified. Some commentators estimate that the number of RTAs currently in force that have not been notified to the WTO is as high as 119, excluding an additional 87 RTAs that are currently under negotiation and likely to be in force by 2007.[10] Additional details are provided in the following chart prepared by Jeffrey Schott of the Institute for International Economics.

Free trade agreements in effect or under negotiation (as of May 2003)

	Notified to the WTO[a]	Concluded but not notified to the WTO	Under negotiation	Grand Total	Share (%)
Total agreements	**155**	**83**	**46**	**283**	**100**
of which:					
USA is a partner	3	2	6	11	4
Canada is a partner	4	0	5	9	3
EU or EFTA is a partner	59	6	6	71	25
Japan is a partner	1	0	1	2	1
Intra-F.S.U./C.I.T.	41	48	6	95	34
Intra-LDCs	27	26	23	76	27

Notes: LDCs = Developing countries; FSU/CIT = Former Soviet Union and other "countries in transition".
a) Agreements are counted only once, even if they are notified to the WTO under both GATT Article 24 and GATS Article 5. However, NAFTA is counted twice, as US-NAFTA and Canada-NAFTA.
b) Current negotiations on a FTAA are counted twice as US-LDC and Canada-LDC; similarly the Canada-EFTAFTA is counted under Canada and under EFTA.

Sources: WTO (http://www.wto.org/english/tratop_e/region_e/region_e.htm) and unpublished data sheets from the WTO Secretariat.

[8] *See* Committee on Regional Trade Agreements, *Basic Information on Regional Trade Agreements: Agreements Notified to the GATT/WTO and in Force as of 31 January 2002,* WT/REG/W/44 (Feb. 7, 2002) ("*Basic Information on Regional Trade Agreements*"). Please note that this figure of twenty-five RTAs excludes five notifications of accessions by new members to the European Communities or to the European Free Trade Association.

By November 2002, there had been a total of 255 notifications (including accessions and including RTAs no longer in force) to the GATT/WTO since 1947. *See* Committee on Regional Trade Agreements, *Draft Report (2002) to the General Council,* WT/REG/W/47 (Nov. 4, 2002) ("*Draft Report (2002) to the General Council*").

[9] An initial surge in the number of RTAs entered into in the early 1990s has been attributed to European integration efforts after the collapse of the COMECON block and uncertainty over the outcome of the Uruguay Round. *See,* Clemens Boonekamp, *Regional Trade Integration under Transformation,* Seminar on Regionalism and the WTO, (Apr. 26, 2002), http://www.wto.org./English/tratop_e/region/sem_april02_e/clemens_boonekamp.doc.

With the establishment of the WTO in 1995, countries began entering into RTAs at an even faster pace. Of the 132 RTAs in force which were notified between 1990 and 2002, the overwhelming majority were notified after 1995. *See Draft Report (2002) to the General Council, supra* note 8. The United States provides a good example of the recent acceleration of interest in RTAs. Although the United States entered only three RTAs between 1947 and 1994 (the U.S.-Israel FTA in 1985, the U.S.-Canada FTA in 1988, and the NAFTA in 1994), it entered into two FTAs on January 1, 2004 (with Singapore and Chile), and—by mid-2004—had concluded negotiations on five additional FTAs (Australia, Bahrain, Dominican Republic, Morocco, and the Central American countries) and had entered into negotiations for additional FTAs (Panama, Thailand, the Andean countries and the countries of the South African Customs Union). It is also negotiating the Free Trade Area of the Americas, and has also proposed in general terms an FTA with an unspecified group of Middle Eastern Countries.

[10] *See,* Boonekamp, *supra* note 9, at ¶ 7. Jeffrey F. Schott, *Free Trade Agreements: Boon or Bane for the World Trading System*, Presentation Made at IIE Conference (May 7, 2003) (providing chart below).

In terms of trade coverage, it is estimated that regional preferential trading arrangements, which currently account for 43 percent of world trade, will account for 55 percent by 2005—assuming that all currently planned RTAs come into effect.[11]

B. Overview of RTAs by Region

The following analysis provides an overview of RTAs around the world, but does not attempt to catalogue all RTAs.[12]

1. Europe

European nations have been extremely active in pursuing RTAs. Indeed, the process began with the creation of the European Economic Community ("EEC") in 1958 (which itself was preceded by the European Coal and Steel Community), and much recent activity in the RTA arena is attributable to the efforts of European nations. In addition to the European Communities' ("EC") policy of enlarging and improving the world's largest customs union, the EC has adopted a policy of entering Free Trade Agreements with countries outside its Customs Union. There are many FTAs among neighboring Eastern European nations, and between the EC and Eastern European and Mediterranean nations.[13] This picture is further complicated by more than a dozen FTAs between the European Free Trade Association ("EFTA") and Eastern European and Mediterranean nations.[14]

2. Western Hemisphere[15]

The NAFTA[16] and the MERCOSUR[17] are the two most significant RTAs in this region, but recent years have seen an increase in the number of smaller groupings and bilateral

[11] *See* Ken Heydon, *Regulatory Provisions in Regional Trade Agreements: "Singapore" Issues,* WTO Seminar on Regionalism and the WTO, at 3 (Apr. 26, 2002), at http://www.wto.org./English/tratop_e/ region/sem_april02_ e/ken.heydon.doc.

[12] *See* World Trade Organization, *Regionalism and the World Trading System,* 29–38 (1995) (classifying major RTAs entered into until 1995 according to region.) ("*Regionalism and the World Trading System*").

[13] Prior to the accession of Eastern European countries to the EC, the EC's members were Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. The EC has notified the WTO of FTAs with its Overseas Countries and Territories (1971), as well as with Malta (1971), Switzerland and Liechtenstein (1971), Iceland (1973), Cyprus (1973), Norway (1973), Algeria (1976), Egypt (1977), Jordan (1977), Lebanon (1977), Syria (1977), Andorra (1991), Czech Republic (1992), Slovak Republic (1992), Hungary (1992), Poland (1992), Romania (1993), Bulgaria (1993), Lithuania (1995), Estonia (1995), Latvia (1995), Faroe Islands (1997), Slovenia (1997), the Palestinian Authority (1997), Tunisia (1998), South Africa (2000), Morocco (2000), Israel (2000), Mexico (2000) and Macedonia (2001). These agreements represent only FTAs, and do not account for other Customs Unions or Services Agreements. *See, Basic Information on Regional Trade Agreements, supra* note 8, at 2–9.

[14] The EFTA signatories are Iceland, Norway, Switzerland and Liechtenstein. The EFTA has notified the WTO of FTAs with Turkey (1992), the Czech Republic (1992), the Slovak Republic (1992), Israel (1993), Bulgaria (1993), Romania (1993), Hungary (1993), Poland (1993), Slovenia (1995), Estonia (1996), Latvia (1996), Lithuania (1996), the Palestinian Authority (1999), Morocco (1999), Macedonia (2001), Mexico (2001), Jordan (2002) and Croatia (2002). Each of the EFTA signatories has entered into an FTA with the EC. Austria, Finland and Sweden ceased to be parties to the EFTA following their withdrawal from the EFTA Convention and subsequent accession to the EC on Jan. 1, 1995. *See Basic Information on Regional Trade Agreements, supra* note 8, at 2–9.

[15] The Organization of American States has compiled a complete list of all RTAs entered into by all countries in the Western Hemisphere. *See,* SICE, Foreign Trade Information System, *Trade Agreements Sorted by Signatory Country*, *at* http://www.sice.oas.org/acuerdoE.ASP.

[16] The signatories to the North American Free Trade Agreement (1994) are Canada, Mexico and the United States.

[17] MERCOSUR is a Customs Union entered into pursuant to the Enabling Clause. MERCOSUR's signatories are Argentina, Brazil, Paraguay and Uruguay. MERCOSUR has reportedly been negotiating the terms of an FTA with the Andean Community, as well as the EC. *See, e.g.,* Gustavo Bizai, *Trade*

FTAs involving Western Hemisphere countries.[18] Chile and Mexico have been particularly active in entering into agreements with other American, European and Asian nations.[19] Negotiations for a Free Trade Area of the Americas ("FTAA") involving 34 countries are currently underway.[20]

Following the breakdown of multilateral negotiations at the Cancun Ministerial in September 2003, renewed attention has focused on regional initiatives, including the Free Trade Area of the Americas ("FTAA") negotiations. However, the results of the Miami Ministerial, as reflected in the November 20, 2003 Declaration, raise questions about the ability of regional initiatives to advance free trade in a vigorous and principled manner, as contemplated by GATT Article XXIV. For example, paragraph 7 of the Declaration states that,

> Taking into account and acknowledging existing mandates, Ministers recognize that countries may assume different levels of commitments. We will seek to develop a common and balanced set of rights and obligations applicable to all countries. In addition, negotiations should allow for countries that so choose, within the FTAA, to agree to additional obligations and benefits. One possible course of action would be for these countries to conduct plurilateral negotiations within the FTAA to define the obligations in the respective individual areas.

The Miami Ministerial declaration reflects a political compromise struck among competing trade interests, most prominently the United States and Brazil. Because the negotiating countries were ultimately unable to agree of a fixed agenda that would result in rights and obligations binding on all parties, the Declaration instead focuses on the right of countries to assume "different levels of commitments," and to "allow for countries that so choose . . . to agree to additional obligations and benefits." Although the ability of the countries to make real progress will not be clear until the close of negotiations (scheduled for January 2005), the Ministerial Declaration strongly suggests that countries have so far avoided committing to undertake the political and social costs that would be entailed in comprehensive trade liberalization.

In these circumstances there will be strong temptations to depart from the disciplines of Article XXIV. Will the United States, for example, refuse to eliminate barriers to

Liberalisation Negotiations between the European Union and MERCOSUR, 6 INT'L TRADE L. & REG. 35 (2000).

[18] The United States, for example, is a signatory to FTAs with Chile, Singapore, Jordan and Israel, in addition to the NAFTA. U.S. and Australian lawmakers approved an FTA between the countries in mid-2004. In mid-2004, U.S. lawmakers also approved an FTA with Morocco. Implementation is expected by January 1, 2005. FTA negotiations with the Dominican Republic, Bahrain and the countries of the Central American Economic Integration System (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) were completed during 2004. Additionally, negotiations were begun in 2004 with Thailand, Panama, the Andean countries (Columbia, Peru and Equador) and the countries of the South African Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland).

[19] Chile has either entered or is considering FTAs with Canada, Colombia, Ecuador, the EC, Japan, Mexico, Singapore, the United States, and Venezuela, among other countries.

Mexico has either entered or is considering FTAs with Bolivia, Brazil, Chile Costa Rica, the EC, the EFTA, El Salvador, Guatemala, Honduras, Israel, Nicaragua, Panama, Uruguay, Japan, Korea, Singapore and the MERCOSUR Customs Union.

See Sergio Lopez-Ayllon, *Mexico's Expanding Matrix of Trade Agreements: A Unifying Force?,* 5 NAFTA L. & BUS. REV. 241, 257 (1999) (describing intra-regional integration in Latin America, with a focus on Mexico); *see also* Website of Mexican Secretary of the Economy *available at* http://www.economia.gob.mx/?P=39 for a complete list of Mexican RTAs, either completed or under negotiation.

[20] *See generally* Rossella Brevetti, *Ambitious Schedule for Market Access Talks is Backed by FTAA Trade Ministers,* 19 INT'L TRADE REP. 1915 (2002); for a comprehensive discussion of FTAA negotiations through March 25, 2000, *see* Sherry Stephenson, *The Current State of the FTAA Negotiations at the Turn of the Millennium,* 6 NAFTA L. & BUS. REV. 317 (2000).

Brazilian orange juice if Brazil does not agree to the intellectual property protections sought by the United States? Or will U.S. unwillingness to end domestic subsidies for agricultural products mean that other countries will refuse to eliminate all their barriers to these products? In either case, the agreement would probably fall short of the Article XXIV standard.

Paragraph 3 of the Declaration states that, "[w]e also reaffirm that the FTAA will be consistent with the rules and disciplines of the World Trade Organization (WTO)." In order to achieve this goal, the FTAA parties will need to eliminate duties and other restrictive regulations on substantially all their trade in *goods,* and hope to accommodate "different levels of commitments" only with regard to subjects not covered by the Article XXIV discipline, such as intellectual property and services. Thus far there has been no detailed analysis of the consistency of the proposed FTAA with applicable international legal constraints.

3. East Asia and the Pacific Region

Although not RTAs in strict terms, the Asia Pacific Economic Cooperation ("APEC")[21] and the Association of South East Asian Nations ("ASEAN")[22] are the two main institutions that have encouraged regional economic integration in the Asia-Pacific region. In addition, the individual nations in this area, including Australia,[23] New Zealand,[24] Japan,[25] Korea and Singapore,[26] have actively adopted a policy of entering RTAs. Taiwan

[21] It should be noted that APEC cannot be considered an FTA or Customs Union within the terms of the GATT/WTO. This is because APEC—founded on a philosophy of "open regionalism"—neither covers 'substantially all the trade' among its member states, nor requires specific tariff reduction commitments from its members. Instead, APEC is a forum that tries to build economic, political and institutional ties among its members. Many of APEC's activities involve education and trade facilitation. For an overview of APEC, its history and future direction, *see* Andrew Faye, *APEC and the New Regionalism: GATT Compliance and the new WTO,* 28 L. & POL'Y INT'L BUS. 175, 184–201 (1996); Lorraine C. Cardenas and Arparon Buranakatis, *The Role of APEC in the Achievement of Regional Cooperation in Southeast Asia,* 5 ANN. SURV. OF INT'L & COMP. L. 49 (1999); For an overview of the economic implications for APEC of the recent proliferation of RTAs, S*ee* Robert Scollay and John P. Gilbert, *New Regional Trading Arrangements in the Asia Pacific* ? INST. INT'L ECON. (2001); for an overview of all FTAs either completed or under consideration among APEC members, *see* Tim Martyn, *A Complete Guide to the Regional Trade Agreements of the Asia-Pacific*, Australian APEC Study Centre (March, 2001).

[22] For background discussion regarding ASEAN, *see, e.g.,* George White, *Trying to Compete in a Global Marketplace: The ASEAN Free Trade Area,* 8 TULSA J. COMP. & INT'L L. 177 (2000); Mary Hiscock, *Changing Patterns of Regional Law Making in Southeast Asia,* 39 ST. LOUIS U. L. J. 933 (1995).

[23] New Zealand and Australia have entered into an FTA called the Australia—New Zealand Closer Economic Relations ("ANZCER"). *See* Martyn, *supra* note 21, at 17; Joan Fitzhenry and David Robinson, *Australia-New Zealand Closer Economic Relations Trade Agreement,* 7 INT'L TRADE L. & REG. 136 (2001); Australia is considering further FTAs with Asian and American nations.

[24] In addition to the ANZCER, New Zealand has also entered into an FTA with Singapore. *See Basic Information on Regional Trade Agreements, supra* note 8, at 9. Like Australia, New Zealand is considering further FTAs with Asian and American nations.

[25] Japan entered into an FTA with Singapore in 2002, and has reportedly completed negotiations on a Japan-Mexico FTA, which is to become effective in 2005. Japan has also stated its intention to enter into FTAs with Thailand, the Philppines, Malaysia, South Korea, Australia, Indonesia, Vietnam and perhaps India and China. *See* Toshio Aritake, *Japan Targets Trade, Partnership Pacts with More Than 10 Countries on PM's Trip*, BNA Daily Report for Executives (Sept. 9, 2004). Japan has also discussed the option of a trading bloc consisting of some combination of East Asian countries. *See generally*, Japanese Ministry of Foreign Affairs, *Japan Outlines Strategy Behind Push for Bilateral FTAs*, ECONOMIC AFFAIRS BUREAU, MINISTRY OF FOREIGN AFFAIRS (Oct. 2002).

[26] Singapore has entered into FTAs with New Zealand, Japan, Australia, the United States, and the European Free Trade Association. Singapore is currently negotiating or considering FTAs with Canada, Korea, Mexico, India and ASEAN and the People's Republic of China. *See, generally* Martyn, *supra* note 21, at 47–9;

has expressed interest in an FTA with the United States,[27] while the People's Republic of China has expressed interest in an FTA with Japan and South Korea,[28] has signed a framework agreement with ASEAN to create an FTA by 2012,[29] and has announced an FTA with the Customs territory of Hong Kong.

4. Mediterranean Region

Several regional arrangements already exist in this area (such as the Gulf Co-operation Council, the Arab Maghreb Union and the Arab Co-operation Council). More recently, the members of the Arab League have committed to implementation of a Greater Arab Free Trade Agreement ("GAFTA") by 2008.[30] In addition to the pre-existing FTAs that the EC and EFTA have entered in this region, Arab nations and the EC have agreed to establish an FTA by 2010.[31] The United States has either already entered or is planning to enter FTAs with individual Middle Eastern nations, and the Bush administration has also suggested the possibility of a broad-based FTA with the region as a whole.

5. Africa

The Organization of African Unity/African Economic Community has made a proposal for an Africa-wide Customs Union, the African Economic and Monetary Union, to take effect by 2028.[32] Various countries are also working toward smaller RTAs, such as the Central African Economic and Monetary Community ("CEMAC"),[33] the West African Economic and Monetary Union ("WAEMU"),[34] and the Common Market for Eastern and Southern Africa ("COMESA").[35] Members of the South African Development Community ("SADC") are working toward a goal of creating an FTA by 2004.[36] Additionally, RTAs between African nations and non-African nations are also in place or under negotiation, as in the case of the proposed FTA between the South African Customs Union and the United States.

Development Bank of Japan, *ASEAN Free Trade Area and Bilateral Free Trade Pacts: Singapore's Perspective* (2001) *at* http://www.dbj.org.sg/PDF/512e.pdf.

[27] *See generally*, Noah J. Smith and Christopher S. Rugaber, *USTR Holds Intellectual Property Talks with Taiwan, Setting Off Talk of Possible FTA*, 19 BNA Int'l Trade Rep. 41 (Oct.17, 2002).

[28] *See* Jonathan Hopfner, *China Broaches Idea of Free Trade Area with Japan and South Korea,* 19 BNA Int'l Trade Rep. 1908 (Nov. 7, 2002).

[29] *See* Jonathan Hopfner, *China, 10 ASEAN Members Sign Framework of Pact for Free Trade Area within 10 years,* 19 BNA Int'l Trade Rep. 1908 (Nov. 7, 2002).

[30] *See* Euro-Arab Management School, *Arab Commercial and Economic Co-operation: The Greater Arab Free Trade Area*, 3 (May 2001), *available at* http://www.eams.fundea.es/research/AFTArea.pdf.

[31] *See id.* at 4.

[32] For a detailed history of the negotiations and a timetable of commitments, *see* Department of Foreign Affairs of Zambia, *African Economic Community: History and Present Status* (May 28, 2001), *available at* http://www.dfa.gov.za/for-relations/multilateral/aec.htm; s*ee also* Olufemi Babarinde, *Analyzing the Proposed African Economic Community: Lessons from the Experience of the European Union,* (Sept. 1996), *available at* http://www.ecsanet.org/conferences/babarinde.htm.

[33] The membership of CEMAC is Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon. *See* USTR, *2000 National Trade Estimate Report on Foreign Trade Barriers* 25 (2000).

[34] The membership of WAEMU is Benin, Burkina Faso, Cote d-Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo. *See* West African Economic and Monetary Union website, http://www.dfa.gov.za/for-relations/multilateral/waemu.htm.

[35] The membership of COMESA is Angola, Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. *See generally* COMESA Free Trade Area website, http://www.comesa.int/trade/Ftaindx.htm.

[36] The membership of SADC is Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Nambia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe. *See generally* Southern African Development Community website, http://www.sadc.int/English/memberstates/index.html.

C. Innovations Found in Recent RTAs

Recent RTAs are also distinguished by the variety of legal innovations they incorporate. These innovations address new subject areas and apply a variety of innovative legal standards and trade facilitation mechanisms largely unforeseen by the WTO.[37]

These innovations can be classified into three general areas: expansion of coverage into non-traditional areas; innovations in dispute settlement procedures; and trade facilitation measures.

1. Expansion of the Scope of Coverage of RTAs

One of the most noticeable features of recent RTAs is their extension to cover substantive areas that had hitherto not been the province of RTAs. Traditionally, RTAs were concerned largely with the preferential reduction of tariffs and quantitative restrictions on trade in goods between RTA signatories. However, recent RTAs have also included financial services, investment protection, environmental protection, labor rights, government procurement, international trade regulation, and competition law issues, among other topics. This extension is a natural response to the relative greater importance—in the face of rapidly falling border restrictions—of internal laws and regulations affecting international trade and investment.

The way in which environmental and labor standards should be incorporated into RTAs has been an intensely debated topic in the United States. A politically acceptable formula appears to have emerged in the US-Jordan, US-Singapore and US-Chile FTAs. In these agreements, as in the NAFTA, an FTA signatory obligates itself to enforce its own labor and environmental laws, but does not have to adopt higher environmental protection standards than those already in place.[38]

This approach has met with approval among labor and environmental protection groups because the countries involved in these agreements had regulatory standards in place that were viewed as roughly equivalent to—and in some cases better than—those in the U.S., the only concern being effective enforcement. However, when the United States negotiates RTAs with countries that do not have legal standards of protection that are considered adequate, the formula used in U.S. RTAs to date will not be likely to satisfy U.S. legislators concerned with labor and environmental impacts.[39] The United States may well insist that such countries enact higher standards before the agreements take

[37] *See* Boonekamp, *supra* note 9, at ¶ 9 (describing a "new generation of RTAs" that "include more and more regional rules on investment, competition and standards; in a few cases, they also contain provisions on environment and labour.").

[38] The NAFTA created two side agreements outside the NAFTA: the North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation, which are supported by institutional mechanisms to aid in the enforcement of relevant obligations. Similar undertakings have been included directly in the Jordan, Singapore and Chile agreements, rather than in separate side agreements.

[39] *See* Sander M. Levin, *Address to Institute for International Economics ("IIE") Conference on FTAs*, May 7, 2003, p. 4:

> Conditions as to labor markets are vastly different in most of Central America from those in Chile and Singapore. In Central America, unlike Chile and Singapore, domestic laws do not come close to incorporating the five ILO core labor standards, especially the right of workers to assemble and collectively bargain. According to our own State Department and ILO reports, even the highly flawed laws that exist are not enforced, but indeed flagrantly violated. The proof is in the results—in the vast garment maquila industry of the three Central American nations I visited, there is not a single collective bargaining agreement; while in Chile and Singapore, workers rights have increasingly helped grow a middle class.

effect, or within a specified time thereafter. It is also likely that some practical evidence of adequate enforcement resources will be demanded. A "capacity building" effort, with U.S. assistance, might accompany the negotiations.[40]

2. Innovations in Dispute Settlement Procedures

A number of recent RTAs have incorporated innovative dispute settlement provisions. Many RTAs contain several procedurally distinct provisions covering different substantive areas.

The NAFTA, for example, provides a broad range of dispute settlement procedures.[41] Chapter 20 provides a general procedure for settling disputes between the member countries relating to the agreement.[42] The agreement also contains six sector-based procedures, each with its own institutional and procedural characteristics. These involve investment disputes between investors and signatory states,[43] government procurement disputes,[44] antidumping and countervailing duty disputes,[45] financial sector disputes,[46] environmental disputes,[47] and labor disputes.[48]

[40] *See, e.g.,* United States Trade Representative, *Request for Submissions to Volunteer Trade Capacity Building Assistance,* 68 Fed. Reg. 24531 (May 7, 2003).

[41] *See generally* Denis Lemieux and Ana Stuhec, REVIEW OF ADMINISTRATIVE ACTION UNDER NAFTA, (Carswell, 1999) (examining all NAFTA dispute settlement procedures); William Merritt, *A Practical Guide to Dispute Resolution under the North American Free Trade Agreement,* 5 NAFTA L. & BUS. REV. 169 (1999) (discussing four different dispute settlement procedures); Michael Gordon, *Forms of Dispute Resolution in the NAFTA,* 13 FLA. J. INT'L L. 16 (2000) (discussing five of the dispute settlement procedures).

[42] *See generally* Vibysoun Loungnarath and Céline Stehly, *The General Dispute Settlement Mechanism in the NAFTA and the WTO System,* 34 J. WORLD TRADE 39 (2000) (introducing NAFTA Chapter 20 and criticizing its tendency to become politicized); Sidney Picker, *NAFTA Chapter 20: Reflections on Party-Party Dispute Resolution,* 14 ARIZ. J. INT'L & COMP. L. 465 (1997) (comparing main features of Chapter 20 with predecessor provisions under Chapter 18 of the Canada-U.S. Free Trade Agreement.); LEMIEUX AND STUHEC, *supra* note 41 at 99–116 (discussing procedure and precedent under NAFTA Chapter 20.).

[43] NAFTA Chapter 11, which enables investors of one member to bring cases against the government of another member, has been actively used and engendered some controversy. *See generally* JOSEPH MCKINNEY, CREATED FROM NAFTA: THE STRUCTURE, FUNCTION AND SIGNIFICANCE OF THE TREATY'S RELATED INSTITUTIONS (M.E. Sharpe, 2000). (introducing key provisions and case law); David Gantz, *Potential Conflicts between Investor Rights and Environmental Regulation under Chapter 11,* 33 GEO. WASH. INT'L L. REV. 651 (2001); Joseph de Pencier, *Investment, Environment and Dispute Settlement: Arbitration under NAFTA Chapter Eleven,* 23 HASTINGS INT'L AND COMP.L. REV. 409 (2000).

[44] NAFTA Chapter 10, which deals with government procurement, also provides for dispute resolution of related disputes. *See* LEMIEUX AND STUHEC, *supra* note 41, at 59–79 (analyzing the text of Chapter 10 and practice thereunder).

[45] NAFTA Chapter 19 permits parties to antidumping and countervailing duty proceedings to appeal the decisions of the national tribunals to special binational panels instead of the domestic courts. *See generally* Patrick Macrory, *Dispute Settlement in the NAFTA* (C.D. Howe Inst. Commentary, 2002, available at www.cdhowe.org); Richard Cunningham, *NAFTA Chapter 19: How Well Does it Work?* 26 CAN-U.S. L. J. 79 (2000); Homer E. Moyer, *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort,* 27 INT'L LAW. 707 (1993).

[46] NAFTA Chapter 14, which deals with financial services, refers relevant disputes to the dispute resolution provisions of either Chapter 11 or 20, with some procedural variations. *See* Constance Wagner, *The New WTO Agreement on Financial Services and Chapter 14 of the NAFTA,* 5 NAFTA L. & BUS. REV. 5, 75–78 (1999).

[47] *See* LEMIEUX AND STUHEC, *supra* note 41, at 121–39 (providing overview of the North American Agreement on Environmental Cooperation ("NAAEC") and its dispute resolution procedures); MCKINNEY, *supra* note 43, at 90–117, 123–222 (analyzing history, institutions and procedures related to the NAAEC.).

[48] *See* Robert E. Herzstein, *The Labor Cooperation Agreement Among Mexico, Canada and the United States: Its Negotiation and Prospects,* 3 U.S.-MEX. L.J. 121 (1996). *See also* MCKINNEY, *supra* note 43, at 33–89 (providing overview of the North American Agreement on Labor Cooperation, and discussing its history, institutions and procedures.).

Another innovation beyond the scope of the WTO is the payment of a monetary assessment by a party to resolve a dispute in certain circumstances, rather than the usual trade agreement remedy of compensatory tariff changes (generally referred to as "withdrawal" or "suspension" of tariff concessions).[49] This new remedy was introduced in the NAFTA Supplemental Agreements on Labor and Environment, and has subsequently been included in the labor and environment provisions of the U.S. FTAs with Jordan, Chile and Singapore.[50]

3. Innovations in the Area of Trade Facilitation and Harmonization of Domestic Regulations

Other innovations that have characterized RTAs include the harmonization by RTA signatories of a wide range of regulations, beginning with customs procedures and sometimes extending to a wide range of internal measures.[51] The RTAs have gone well beyond border measures, to harmonization of sanitary and phytosanitary ("SPS") rules and certification procedures and other technical and safety standards.[52] There is also some evidence that RTAs provide a useful forum for similarly situated countries to formulate innovative ways of harmonizing other legal measures, such as the complex and sensitive rules governing intellectual property rights and competition law.[53] The NAFTA, for example, contains provisions on intellectual property rights and competition policy. As part of its NAFTA-era reforms, Mexico completely revamped its IP laws and established a competition commission. The European Community is reportedly strengthening the IP component of its FTAs by *inter alia* requiring co-signatory nations to agree to accord protection to a long list of geographical indications. As regards competition law, Australia and New Zealand used the so-called "Australia-New Zealand Closer Economic Relations" agreement to improve binational cooperation. Although the agreement came into effect in 1983, the parties agreed in 1988 to study further cooperation in business laws. As a result of this study, both countries undertook significant legislative reforms, under which dumping laws were replaced with symmetrical competition law provisions.[54]

[49] Although there have been WTO dispute settlement cases in which the parties agreed upon the payment of monetary compensation instead of "retaliation" in the form of increased tariffs, such cases are not the norm. *See, e.g., United States—Section 110(5) of the Copyright Act,* Recourse to Arbitration under DSU Article 25, WT/DS160/ARB25/1 (Nov. 9, 2001).

[50] *See* McKinney, *supra* note 43, at 106–109 (discussing the procedures according to which monetary penalties may be imposed against a NAFTA party found to have engaged in a persistent pattern of failure to enforce its own environmental laws); *See also, Gary* G. Yerkey, *U.S. to Propose Use of Fines to Settle Disputes in FTA Talks with Chile, Singapore,* 19 BNA Int'l Trade Rep. 1857 (Oct. 31, 2002).

[51] Harmonization of customs and other border procedures is among the activities generally referred to as "trade facilitation." As defined by the WTO, trade facilitation consists of the simplification and harmonisation of international trade procedures, including activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade. *See* WTO website, *Overview of Trade Facilitation Work* (Dec. 11, 2002), http://www.wto.org/english/tratop_e/tradfa-e/tradefae2_e.htm

[52] *See, e.g.,* Jonathan Hopfner, *Japan, ASEAN Set Base for Future FTA, Forge 'Comprehensive Economic Partnership,'* 19 BNA Int'l Trade Rep. 1907 (Nov.7, 2002).

[53] *See* Boonekamp *supra* note 9, (noting that, "[t]here is also a general feeling that complex policy issues of commercial significance in economic relations (notably services, investment, intellectual property protection, cooperation on competition policy, technical standards and government procurement) can better be managed amongst a limited circle of 'friends'. These motivations act as an incentive to regulate on such issues through RTAs, even if it is generally recognized that RTAs are a second-best option to MFN trade liberalization.").

[54] *See, e.g.,* Brian Cassidy, *Can Australian and US Competition Policy be Harmonised?* (June 21, 2001), avail at: http://www.apec.org.au/docs/Cassidy.PDF

III. Overview of Arguments Made About RTAs

Although the economic and political implications of RTAs have been debated for many years, the arguments made have become more nuanced and complex over time. Traditionally, the debate focused on the economic welfare effects of preferential tariff reductions (balancing "trade creation" against "trade diversion"), and on political economy issues.[55] Political economy concerns included doubts regarding the wisdom of favoring certain trade partners with RTAs, thereby automatically disfavoring others, as well as fears that proliferating RTAs would quickly degenerate into antagonistic trading blocs, thus reducing international stability. The experience with a greatly increased number of RTAs has allowed for better identification of their potential costs and benefits than was possible fifteen years ago. Experience may have reduced the sense that RTAs are threatening because they could result in mutually antagonistic blocs. It has also led to an appreciation of problems and opportunities that were not part of the earlier discussion. Today, the political and economic aspects of RTAs are more likely viewed as closely intertwined issues, and not discrete matters to be regarded in isolation.

It is now widely appreciated that economic assessment of RTAs requires more than a basic analysis of tariff shifts, but also an analysis of the "dynamic effects" of the RTA, which include efficiencies of scale and scope, and efficiencies resulting from legal reforms, better understanding between the RTA signatories, and deeper integration of their economies. RTAs can also serve in the right circumstances as effective tools in strengthening international relationships, stimulating and "locking in" domestic legal reforms, providing both an impetus and a model for multilateral trade negotiations, and advancing economic and structural reform objectives in developing countries.

A. Arguments Made in Favor of RTAs

Advocates of RTAs have emphasized the following arguments, among others:

- RTAs can result in trade creation and thereby be beneficial. Trade creation occurs if overall global efficiency is enhanced through an RTA, such as when the RTA permits relatively more efficient producers to gain market share in the markets covered by the RTA at the expense of relatively less efficient producers. Global welfare is ensured through optimal allocation of global resources only if trade creation outweighs trade diversion.
- Recent arguments build upon these economic arguments, noting that RTAs are beneficial to the extent that they produce "dynamic effects,"—i.e., efficiencies gained by economic players within the larger market created by the RTA as a result of increased investment and trade. Depending on the particular RTA, such efficiencies can result from economies of scale and specialization,[56] reforms in laws governing business transactions, increased transparency in legal

[55] *See* Cho, *supra* note 1, at 429 (arguing that "socio-political concerns" are as important as trade-creation and trade-diversion concerns.).

[56] For an explication of the argument that RTAs engender "dynamic effects," *see, e.g.,* Colin L. McCarthy, *Regional Integration of Developing Countries at Different Levels of Economic Development: Problems and Prospects,* 4 TRANSNAT'L L. & CONTEMP. PROBLEMS 1 (1994) (noting that under a dynamic effects theory, "the focus shifts from the static effects of integration to the dynamic effects found in a larger market with its opportunities for the economies of scale and specialization that do not exist in a small, low-income domestic market.")

and governmental matters, regulatory harmonization, even increased cultural rapport among business managers in the larger market. RTA advocates argue that the benefits of such reforms and harmonization of standards are enjoyed by RTA signatories and non-signatories alike.[57]

- Closely related to an appreciation of the range of RTAs' "dynamic effects" is an appreciation of their political usefulness. In some cases, such as the NAFTA, RTAs result in a more stable international environment—economically and politically—to the extent that signatory nations become increasingly aware of their common interest in a cooperative environment in which to conduct trade.[58] At least some of the impetus for the NAFTA can be explained in these terms: the U.S. Government hoped—among other things—that the NAFTA would help stabilize Mexico economically and politically, creating a more prosperous neighbor and reducing the incentive for illegal immigration, while the Mexican Government perceived NAFTA—in part—as an opportunity to advance and "lock in" its own economic reforms. Other RTAs containing a strong political motivation include the US-Jordan and US-Morocco FTAs, in which the United States may view as supporting "friendly" nations and the political and economic systems they have adopted.[59]
- As a result of recent experience, RTAs are beginning to be used as a tool for promoting economic development and political reforms in developing countries. Open markets and sound economic and democratic institutions reinforce each other, so that a developed country with a market that is attractive to a developing country can use a free trade agreement as an incentive, or a lever, for achieving institutional reform. The developed country can offer access to its large market through an RTA, as part of a package in which it receives commitments for economic and political reforms in the developing country. The promise of new markets can help business and political leaders in the developing country secure support for the reforms. And both countries can work together to secure economic assistance for the developing country (from sources such as USAID, the World Bank, and regional development banks) to help make the reforms a success. The

[57] *See, e.g.,* Heydon, *supra* note 11, at ¶¶ 53, (noting that—as a result of harmonization of standards—third parties enjoy the same rights as signatories, and adding that, "RTA provisions on trade facilitation help foster convergence of modes of operation within regional groupings. Moreover, to the extent that they draw on international agreements related to trade facilitation, regional initiatives also serve to foster moves towards wider harmonisation.").

[58] *See* Dunn and Mutti, INTERNATIONAL ECONOMICS (2000) (noting the view that RTAs result in greater international stability). The desire for peaceful international relations cannot be overemphasized as a motivating factor in many RTAs. One of the clearest articulations of this notion can be found in the Preamble to the Treaty Establishing the European Coal and Steel Community, in which the signatories state their resolve,

> to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared.

See, Preamble, Treaty Establishing the European Coal and Steel Community (1951), at http://www.eurofer.org/legislation/index.htm

[59] The US-Jordan FTA and the US-Morocco FTA under negotiation, as well as the proposed FTAs with other countries in the Middle East—such as Bahrain, Egypt and other areas—are arguably less important to the United States in terms of economics and trade flows than they are politically.

combination of an open market, sound democratic institutions, and prospects for economic growth can then make the developing country an attractive destination for new private capital investment, which is a key element in economic development.

- RTAs are more attainable than multilateral trade agreements, because it is easier to reach compromises and consensus in negotiations among two or more like-minded countries than among the nearly 150 countries of the world trading system. When global negotiations are stalled or stalemated, countries wishing to move forward may do so through RTAs.
- According to the "competitive trade liberalization" view, countries independently pursuing RTA programs stimulate others to do the same, and the result is fewer trade barriers worldwide.[60] RTAs can also provide an impetus for multilateral trade negotiations, as in the case of the NAFTA, which, during 1993 and 1994 helped motivate and guide Uruguay Round negotiators in their final deliberations over the WTO agreements.
- RTAs also can provide a roadmap for the negotiation of new disciplines: Through innovative treatment of intellectual property, investment, environment and labor issues, for example, RTAs can provide a proving ground for regulatory and treaty innovations that may later be adopted on a multilateral level.[61]
- RTAs can promote multilateral trade liberalization when they facilitate the formulation of unified negotiating positions among RTA signatories. An RTA may yield improvements in relations among RTA signatories and greater appreciation of common areas of interest. The result can be closer cooperation among the RTA signatories when they enter multilateral negotiations, enabling them to unify or reduce the number of negotiating positions they present. Sometimes countries are so small that they are perceived as non-entities by other parties. By forming groupings with like-minded countries, they can help ensure that their concerns are heard, helping to produce a result that all the countries will support and implement.[62]
- RTAs allow domestic firms to adjust gradually to foreign competition, first adjusting to competition with intra-RTA companies, and becoming more prepared for competition of a worldwide scope. By permitting companies to adjust incrementally to worldwide competition, governments can effectively soften the opposition of such companies to trade liberalization.[63]

[60] *See* Fred Bergsten, *Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century*, Working Paper 96–15, Inst. Int'l Ec. (1996).

[61] *See* Cho, *supra* note 1, at 432–434 (noting that "one of the most powerful arguments for RTAs stems from their experimental or laboratory effect vis-à-vis multilateral trade liberalization.")

[62] The argument is that increased numbers of RTAs will aid multilateral trade negotiations because RTA members are able to present a unified negotiating position, which reduces the number of outstanding negotiating topics and results in smaller, leanly staffed negotiating teams. *See, e.g.,* Jeffrey Schott and Jayashree Watal, *Decision-making in the WTO,* INTERNATIONAL ECONOMIC POLICY BRIEFS, INSTITUTE FOR INTERNATIONAL ECONOMICS, 6 (2000) (noting that the Mercosur countries have pooled resources and shared representation in preparation for the Doha Round. According to Schott and Watal, blocs of countries with common negotiating positions will likely seek out and find other blocs with similar objectives, which will further rationalize the negotiating process. The Caribbean trading bloc, Caricom, is an example of this phenomenon.)

[63] *See Second Session of the CRTA*, *supra* note 2, at ¶ 85 (in which a representative of the Secretariat articulated this argument and others, such as the argument that, if RTAs create an environment in which inefficient firms are allowed to go out of business gradually, protectionist sentiment opposing multilateralism also wanes.)

B. Arguments Made Against RTAs

Opponents of RTAs have traditionally made the following arguments:

- RTAs reduce global welfare by diverting trade and investment from the world's most efficient producers to less efficient producers within the bloc. This misallocation of resources occurs when less efficient producers benefit from advantages of preferential tariffs and non-tariff barriers at the expense of producers in non-signatory countries.[64]
- RTAs reduce global welfare because their proliferation results in a complex of overlapping rules of origin. This "spaghetti bowl" of diverse and often inconsistent rules increases transaction costs and diverts resources from other uses.[65] Furthermore, the complexity of rules of origin provides a temptation for parties to create special, narrowly defined preferences for certain industries. At least in certain circumstances, the description of rules of origin as a "playground for protectionist interests" appears quite apt.[66]
- RTAs that incorporate dispute settlement provisions may undermine the WTO's dispute settlement system because the former may result in "jurisprudence conflicting with that of the WTO."[67]
- "Harmonization" of trade facilitation measures and internal regulations under RTAs can reduce global welfare if such harmonization is actually a form of "covert protectionism," designed to increase transaction costs that must be factored into

[64] *See* DUNN AND MUTTI, *supra* note 58, at 206 (noting that "discriminatory tariff cuts mean that the non-member country loses sales to less efficient producers in a member country, thus reducing world efficiency. Trade is diverted from low-cost to higher-cost sources, and world efficiency suffers.")

[65] *See* SCOLLAY AND GILBERT, *supra* note 21, at 13 (noting that, "the fragmentation of the regional economy may intensify if the SRTAs begin to overlap, and if they each also adopt complex, mutually inconsistent rules of origin, so that a particular product may be imported into or exported from a given country under a range of different rules, and even tariffs, depending on its origin or destination."); Jagdish Bhagwati, *Preferential Trade Agreements: The Wrong Road,* 27 LAW & POL'Y INT'L BUS. 865, 866–68 (1996) (remarking on inefficiencies created by complex rules of origin regimes required under RTAs). Rules of origin are included in RTAs in order to prevent producers in non-signatories from taking advantage of the duty-free tariff rates by exporting a nearly finished product to producers in one signatory, performing minimal processing, and thereafter shipping the product within the RTA duty-free. Bhagwati also argues that diverse RTAs, with complex and inconsistent provisions, make negotiation of a multilateral agreement more difficult.

[66] *Comments by Professor Richard Cooper,* Conference at Institute for International Economics on Regional Trade Agreements (May 7, 2003). *See* Cho, *supra* note 1, at 430–31 (explaining that, "RTAs provide abundant opportunities for local interest groups, such as producers of sensitive products, to manipulate both the design and operation of RTAs. The eventual effect of such lobbying efforts is to distort the efficient flow of interstate commerce.")

[67] *See* WTO Negotiating Group on Rules, *Compendium of Issues Related to Regional Trade Agreements,* TN/RL/W/8/Rev. 1, ¶ 120 (Aug. 01, 2002) ("*Compendium of Issues Related to Trade Agreements*") (noting that, "[t]his issue has been raised in particular with respect to RTA clauses providing that, in the event of inconsistency, RTA rules prevail over WTO rules. It has been argued that this could result in a diminution of the rights that the parties had under the WTO in relation to their trade with one another."). *See also,* David A. Gantz, *Dispute Settlement under the NAFTA and WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties,* 14 AM.U.INT'L L.REV. 1025 (1999). While there is a risk that dispute settlement alternatives might result in the development of inconsistent standards, these dispute settlement alternatives may also have beneficial side effects, such as reducing the pressure on the already over-taxed WTO system. It is conceivable, for example, that at least some of the disputes being resolved under NAFTA Chapters 19 and 20 could have been brought under the WTO system.

the price of products from non-signatory nations.[68] Specifically, "streamlined procedures for RTA-originating goods" can simply mean "more burdensome procedures for third-party goods" in cases in which an RTA provides signatories—but not non-signatories—with lower customs processing fees, simplified labeling requirements or immediate recognition of SPS or TBT standards by virtue of a Mutual Recognition Agreement.[69]

- RTAs hinder multilateral trade liberalization because they create new economic stakeholders that profit from the special access an FTA gives them to a foreign market and are therefore motivated to exert political pressure against multilateral trade concessions that would confer the same access on their competitors based in other countries. In effect, each RTA creates vested interests in maintaining the RTA's discriminatory tariff and NTB regime. Similarly, member governments in a large regional trade area may lose interest in their multilateral negotiations, which would require producers in their countries to share the market with competitors based outside the region.[70]
- In the long run, the proliferation of RTAs may have a negative impact on global and regional security if regional blocs with politically and economically conflicting interests arise.[71]

The foregoing provides only a brief introduction to arguments made on both sides of the debate over RTAs. Given the range of their potential impacts, good and bad, it does not seem possible to reach a conclusion on the merits of RTAs in general. It would seem that each RTA must be evaluated in its operational setting. And in this evaluation, as recent economic research has indicated, the welfare gains or losses associated with any given RTA must be judged by looking not just at the changes in tariff levels but also at their non-tariff provisions, their "dynamic" effects and their political import.

IV. Legal and Institutional Regulation of RTAs under the WTO

A. The WTO Legal Framework for Regulation of RTAs

1. The Most Favored Nation Principle

One of the fundamental principles of the GATT/WTO system is the Most Favored Nation ("MFN") rule, enshrined in GATT Article I and GATS Article II. GATT Article I obliges WTO members to provide equal treatment to imports of products from all "other"

[68] *See* John McGinnis and Mark Movsesian, *The World Trade Constitution,* 114 HARV. L. REV. 550–52 (2000) (explaining that the WTO is forced to address environmental, health and safety issues because of the risk that individual nations will employ environmental, health and safety regulations in order to discriminate against outsiders—a logic that clearly can also apply to the "harmonization of standards" agreed to by countries entering an FTA.).

[69] *See* Heydon, *supra* note 11, at ¶ 61 (alleging that "[m]easures of simplification of international trade procedures undertaken at the regional level rarely have a preferential effect," while acknowledging certain exceptions to that rule).

[70] *See Second Session of the CRTA*, *supra* note 2, at ¶ 85 (in which a representative of the Secretariat articulated this argument against RTAs).

[71] A somewhat apocalyptic scenario is found in MICHAEL J. TREBILCOCK AND ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 130 (1995), where the authors assert that regional blocs "necessarily entail playing favourites and risk reducing international relations to mutually destructive factionalism of the kind that was so dramatically evidenced in the 1930s."

members.[72] GATS Article II requires WTO members to provide equal treatment to the services and service suppliers of all other members.[73]

Although MFN clauses have existed in commercial treaties since the sixteenth century,[74] these clauses generally provided for "conditional" MFN treatment.[75] Conditional MFN clauses demand the receipt of equivalent concessions from a second country as a condition of conferring on that country the advantages already given to a third country. The use of conditional MFN clauses resulted in a complex network of trading relationships in which a given country could have negotiated an entirely unique set of concessions and obligations vis-à-vis each of its trading partners. Conditional MFN clauses also meant that countries commonly "played favorites," reserving preferential treatment to those countries deemed to be politically important, and discriminating against those countries deemed to be competitors—politically or economically. It can be argued that, in the context of widely held mercantilist trade policies, conditional MFN clauses exacerbated tensions and rivalries among trading partners.

Unconditional MFN clauses, which automatically confer on each treaty partner all the advantages already accorded to other trading partners, gained prominence around the beginning of the twentieth century.[76] In 1922 the United States adopted a policy of pursuing trade agreements incorporating unconditional MFN clauses.[77] International acceptance of the unconditional MFN principle enshrined in GATT in 1947 was closely tied to a recognition that, under the previous practice, international economic and political relations were being impaired by mercantilist trade policies that discriminated against trading partners in varying degrees.

(a) Disillusionment with Discriminatory Trading Blocs as one Major Impetus for Multilateral Trading System. Key to the development of the unconditional MFN principle

[72] GATT Article I provides that,

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

See also, TREBILCOCK AND HOWSE, *supra* note 70, at 114 (noting that, "[t]he MFN principle protects expectations of participants in multilateral bargaining by forbidding subsequent more favourable treatment of other participants and avoids the dead-weight loss of trade diversion, but at the cost of preventing nations from discriminating when it might be valuable to benefit certain politically powerful producer interests, and a cost of substantial incentives for participants in multilateral negotiations to attempt to free ride").

[73] GATS Article II:1 provides that: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." WTO members were permitted to take exceptions to the MFN principle during the negotiation of GATS. *See* GATS Article II:2 and Annex on Article II exceptions. Such exceptions are in principle supposed to remain in effect for no more than ten years.

[74] *See Regionalism and the World Trading System, supra* note 12, at 5.

[75] *See* John H. Jackson, THE JURISPRUDENCE OF THE GATT AND WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 58 (2000).

[76] *See generally id.* at 58–59.

[77] *See* Alfred E. Eckes, Jr., OPENING AMERICA'S MARKET: U.S. FOREIGN TRADE POLICY SINCE 1776, 90–93 (1995) (noting that U.S. State Department officials supported unconditional MFN clauses based on a view that conditional MFN clauses led to U.S. trade policies based on "special concessions to some instead of equal treatment for all," and that unconditional MFN clauses would more effectively support U.S. exports.).

and the multilateral trading system was U.S. opposition to discriminatory trading blocs not entirely dissimilar to some present-day RTAs. Examination of the pre-GATT history suggests the U.S. drive to gain international acceptance for the unconditional MFN principle[78] was based in large part on U.S. suspicion of discriminatory trading blocs, such as the Commonwealth system of trade preferences.[79] Thus, at least in part, the impetus for a multilateral trading system was a desire to scrap the discriminatory trading regimes that—in the form of unregulated RTAs—may pose a threat to the system today.

(b) Principles underlying the GATT MFN Rule. The MFN rule quickly gained preeminence in the aftermath of World War II, and was considered by many as a key element in building a post-war architecture that minimized the risk of war.[80] By the time that the GATT was founded in 1947, the Contracting Parties agreed to put the MFN rule first and foremost among all the rules of the GATT system. The rationale underlying the GATT MFN rule is both economic and political. Among the reasons underlying MFN are the following basic notions:

- The MFN rule helps to minimize international tensions and bolsters the negotiating position of less influential nations, because it obliges "strong" nations to treat all trading partners equally. Because "strong" nations are not allowed to confer special benefits on preferred trading partners, the risk of resentment and anger on the part of otherwise disfavored nations is reduced.[81]
- The MFN rule increases global welfare by minimizing the transaction costs associated with complex and non-transparent import regulations;[82]
- The MFN rule ensures global efficiency by securing the preeminence of the most efficient producers, and by precluding the sheltering of inefficient producers through discriminatory tariff and NTB arrangements;[83]
- The MFN rule gives all trading partners the benefit of bilateral concessions, thus dramatically expanding the scope of trade liberalization.[84]

[78] Along with the National Treatment principle of GATT Article III, the MFN principle should be considered a *fundamental* principle of the GATT, because the GATT system was conceived in part in reaction to the negative effects of preferential trading regimes, especially the high tariffs maintained by British Commonwealth countries against imports from non-Commonwealth countries. The Roosevelt Administration's push for lower tariffs abroad, for international acceptance of an unconditional MFN principle, and ultimately, for a multilateral trading institution was grounded in a view that trade rivalries and discriminatory trading regimes had contributed to the Great Depression and, ultimately, World War II. *See* Thomas W. Zeiler, FREE TRADE, FREE WORLD: THE ADVENT OF GATT, 8–9, 30–36 (1999); *See also,* ECKES, *supra* note 77, at 140–66 (quoting Cordell Hull: "to me, unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war.").

[79] *See* ZEILER, *supra* note 78.

[80] For a detailed discussion of the negotiations crucial to securing worldwide support for the MFN principle, *see* ZEILER, *supra* note 77 (describing U.S. efforts during the early 1940s to persuade Great Britain to give up its trade preferences for certain trading partners, and detailing later modifications made to the MFN principle insisted on by different Contracting Parties.).

[81] *See id.*

[82] For a more detailed discussion, *See,* JACKSON, Davey and Sykes, INTERNATIONAL ECONOMIC RELATIONS, 436–37 (3d Ed. 1995). *See also* JACKSON, *supra* note 75, at 60–61.

[83] *See Regionalism and the World Trading System supra* note 12, at 5 (1995) (explaining that "equal treatment of imports from different origins helps ensure that these are purchased from the lowest-cost foreign suppliers, thereby reinforcing comparative advantage in the world market and minimizing the cost of protection at home.").

[84] *See* JACKSON, DAVEY AND SYKES , *supra* note 83, at 436–37.

2. History of GATT Article XXIV

The original drafters of the GATT contemplated only a few exceptions to the fundamental MFN rule. One of these exceptions was a provision found in GATT Article XXIV permitting the creation of Customs Unions and Free Trade Areas, so long as certain strict criteria were fulfilled.[85] Unfortunately, there is little recorded negotiating history dealing with Article XXIV. The lack of negotiating history reflects the reality that GATT drafters viewed RTAs as "a minor element in world trade relations."[86]

What little negotiating history has been recorded, however, reflects the intention of the original GATT drafters to design Article XXIV as a narrow exception to the MFN principle. The text of Article XXIV originally proposed by the United States in 1945 permitted only customs unions, and subjected them to strict conditions.[87] The inclusion of provisions on Free Trade Agreements and Interim Agreements occurred on the basis of a proposal introduced by Syria and Lebanon, and supported by other developing countries.[88] Developing countries considered that FTAs were suited to the interests of countries with relatively limited resources because negotiating a common external tariff was costly, time-consuming, and politically difficult.[89] Developed countries, in turn, supported developing country demands for an FTA provision "as a means of blunting developing-country demands for a legitimization of preferences."[90]

Another aspect of the negotiating history that reflects the GATT drafters' intention to limit the scope of the Article XXIV exception from the MFN rule was their rejection of a proposal during the Havana conference to weaken the discipline governing RTAs. The proposal would have replaced the relatively rigorous requirement that "substantially all" trade be covered by the RTA, with a less demanding requirement that only "a substantial part" of trade be covered by the RTA.[91]

3. Current WTO Disciplines Governing RTAs

(a) Overview. The disciplines governing RTAs under the WTO are largely identical to those established by the GATT drafters. The most important difference is that the original GATT rules are bolstered—procedurally and substantively—by the Understanding on GATT Article XXIV issued in 1994.[92] The WTO provides a legal framework for four different types of RTAs, namely Customs Unions, Free Trade Agreements, Services Agreements, and Agreements among Developing Nations.[93] A detailed examination of the rules governing Services Agreements and Agreements among developing nations

[85] John Jackson has provided a concise explanation for the practical reasons why RTAs—to be effective—need to be permitted as an exception to the GATT MFN principle: "The establishment of a customs union or free trade area requires a departure from the MFN principles. If there were no such exception to the MFN principle, the elimination of custom duties between the participants would have to be generalized to all contracting parties to GATT with no *quid pro quo.*" *See* Jackson, *supra* note 75, at 64.

[86] *See Regionalism and the World Trading System*, *supra* note 12, at 11.

[87] *See Regionalism and the World Trading System*, *supra* note 12, at 8 (noting that, despite its central desire to create a multilateral trading system based on MFN, the United States acknowledged the necessity of customs unions, based on the political importance of creating a unified Western Europe after World War II. However, the United States did not recognize the necessity of Free Trade Areas or Interim Agreements. (Interim Agreements are the legal mechanisms under which parties gradually align their economic systems in preparation for their entry into a Customs Union or Free Trade Area.).

[88] *See id.*

[89] *See id.*

[90] *Id.*

[91] *See,* General Agreement on Tariffs and Trade, GUIDE TO GATT LAW AND PRACTICE, 739 (1994).

[92] *See* discussion, *infra* at text accompanying notes 111–118.

[93] The latter agreements are governed by provisions set forth in the Enabling Clause. *See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries,* Decision of 28 November 1979.

is beyond the scope of this chapter. For present purposes, it is sufficient to understand that the rules governing Services Agreements essentially track the provisions of GATT Article XXIV,[94] while the rules governing preferential arrangements among (or for the benefit of) developing nations are less rigorous than the provisions of GATT Article XXIV.[95] In particular, such agreements are not required to cover "substantially all" trade between the parties.

(b) Article XXIV Disciplines on Customs Unions and FTAs. To date, WTO jurisprudence has focused on Customs Unions and FTAs, both addressed in GATT Article XXIV.[96] In essence, Article XXIV permits WTO members to accord favorable tariff treatment to each other, but only when they agree to eliminate tariffs and other restrictions on substantially all trade with co-signatories of the RTA at the end of a phase-in period. Article XXIV:4 articulates the general principle that RTAs should facilitate trade between the signatories, yet not raise barriers to third parties.[97]

Three basic rules apply to both Customs Unions and FTAs. First, Article XXIV:8 requires that "substantially all trade" be covered, although it does not define "substantially all".[98] In addition, Article XXIV(5)(c) requires that both FTAs and Customs Unions be

[94] Article V of the General Agreement on Trade in Services provides that WTO Members may enter into agreements liberalizing trade in services, provided that such agreement (a) have substantial sectoral coverage, and (b) eliminate substantially all current and future discriminatory measures in the covered sectors. To date, twenty-two agreements have been notified under this provision. *See* Article V, General Agreement on Trade in Services, Apr. 15, 1994, art. V, Marrakesh Agreement Establishing the World Trade Organization ("*WTO Agreement*"), Annex 31, I.L.M. 44 1B, RESULTS OF THE URUGUAY ROUND MULTILATERAL TRADE NEGOTIATIONS Vol. 31 (GATT Secretariat 1994).

[95] *See* Chapter 19 and for further discussion.

[96] For an introduction to Customs Unions and RTAs under the GATT and WTO, *see,* John Jackson, *Perspectives on Regionalism in Trade Relations,* 27 LAW & POL'Y INT'L BUS. 873, 875–77 (1996) (explaining the relationship between GATT Article XXIV and the Uruguay Round's Draft Understanding on Interpreting Article XXIV).

[97] This principle is found not only in GATT Article XXIV:4, but also in the Preamble to the Understanding on the Interpretation of Article XXIV of the GATT 1994; paragraph 3(a) of the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; and GATS Article V:4.

GATT Article XXIV:4 provides that,

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

[98] GATT Article XXIV(8) provides that,

> (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
>
> (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to *substantially all the trade* in products originating in such territories, and,
>
> (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
>
> (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on *substantially all the trade* between the constituent territories in products originating in such territories. (*emphasis added*).

GATT Art. XXIV(8)(b).

completed (i.e. all duties and other restrictions on substantially all trade among the parties must be eliminated) within a "reasonable length of time," a term that as discussed below has been defined in an Uruguay Round understanding on RTAs.

Third, the rules applicable to the effect of the RTA a non-participants differ as a result of the Customs Union requirement for a common external tariff. In the case of FTAs, "duties and other regulations of commerce" applied to non-signatories must not be "higher or more restrictive" than those applied to non-signatories before the FTA came into effect.[99] A similar requirement exists in the case of Customs Unions, but because some at least of the individual tariffs of the members will inevitably rise in the conversion to a common external tariff, the requirement here is that the "duties and other regulations of commerce" applied to non-signatories are not "on the whole" higher or more restrictive than the "general incidence" of the duties that existed vis-à-vis non-signatories before the Customs Union came into effect.[100]

The exact manner in which the "general incidence" of duties in the customs territory were to be measured was oft-debated in the GATT. For example, the appropriate level of compensation to be made to the United States (which was negatively affected by the introduction of the EEC's Common External Tariff) was at issue in the so-called US-EEC "Chicken War."[101] Also, the Working Party report dealing with the 1988 accession of Portugal and Spain to the EC supported—over U.S. objections—the EC's use of a "trade coverage" methodology that took into account relative trade volumes in comparing

[99] *See, id.,* which provides in relevant part, [T]he provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement . . . *Provided* that: . . .

> (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each if the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be.

[100] *See,* GATT Article XXIV(5),which provides that,

> [T]he provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:
>
> (a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be.

[101] *See US/EEC—Negotiation on Poultry,* Conciliation, 12 S/65 (Nov. 21, 1963) This dispute arose out of the withdrawal of West German tariff bindings at the time of the imposition of an EEC Common External Tariff ("CET") on poultry products. The United States not only claimed that this change resulted in a higher and more restrictive tariff level on its products than had existed before introduction of the CET, but also claimed that illegal German quantitative restrictions in force immediately before the advent of the CET had kept U.S. exports at an artificially low level, a factor that should be considered in establishing the appropriate level of compensation. The Panel agreed with the United States, and examined the level of poultry sales in a surrogate country—Switzerland—in order to estimate what U.S. exports would have been in the absence of the quantitative restrictions.

decreases in tariffs applied to some products vis-à-vis increases in tariffs applied to other products.[102] The negotiation of the 1994 Understanding of the Interpretation of Article XXIV ("1994 Understanding"), which is discussed in the following section, resolved some of the aforementioned issues. The 1994 Understanding specified—among other things—that the evaluation of the pre- and post-Customs Union general incidence of *duties* "shall . . . be based upon an overall assessment of weighted average tariff rates and of customs duties collected,"[103] while the evaluation of the general incidence of *other regulations* of commerce may require "examination of individual measures, regulations, products covered and trade flows affected."[104]

(c) 1994 Understanding on the Interpretation of Article XXIV of GATT. The 1994 Understanding represents an attempt by the negotiating parties to the WTO to increase the rigor and consistency of the legal disciplines that govern RTAs. Although the 1994 Understanding did successfully resolve certain disputed matters, it is widely considered to have failed to address some of the most contentious issues involving RTAs.[105] An overview of the 1994 Understanding's treatment of certain substantive and procedural aspects of Article XXIV follows. The 1994 Understanding:

- Reaffirms the principle that RTAs should "facilitate trade between the constituent territories and not . . . raise barriers to the trade of other Members . . . "[106]
- Recognizes the increased significance of RTAs in light of their proliferation, and notes that RTAs will contribute the expansion of world trade if-
  - accompanied by closer integration between RTA-signatory economies;
  - duties and other restrictive regulations are eliminated on all trade; and
  - all major sectors are included within the RTA's coverage.[107]

[102] *See* Working Party Report, *Accession of Portugal and Spain to the European Communities,* 35 GATT BISD 295–96 (1989) (In the EC's view, "Article XXIV:5 only required an examination on the broadest possible basis. The task was general, namely to reach a view on whether the general incidence of customs duties and regulations after enlargement was on the whole more or less restrictive than before. Even if a negative incidence were shown to be the case for certain items, such as when duties were increased or replaced by variable levies, one had to consider whether these effects were not balanced by the effects of other changes in the tariff sector taken as a whole.").

[103] The 1994 Understanding further specifies that, "this assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin." *See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994,* ¶ 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 31 (GATT Secretariat 1994) ("1994 Understanding").

[104] *Id.*

[105] *See* World Trade Organization, *Regionalism and the World Trading System,* 20 (1995)(noting that, "while the purpose of the Understanding on Article XXIV is to clarify certain of the areas where the application of Article XXIV had given rise to controversy in the past, and particularly as regards the external policy of customs unions, it fell short of addressing most of the difficult issues of interpretation . . . For example, no consensus emerged . . . concerning proposals . . . to clarify the substantially-all-trade requirement.").

[106] *See 1994 Understanding, supra* note 103, Preamble.

[107] *See 1994 Understanding*, Preamble. Commentators, the WTO Appellate Body and the WTO Secretariat have laid emphasis on the preamble's final clause, which states that RTAs contribution to the expansion of world trade is "diminished if any major sector of trade is excluded." This focus is understandable in light of the desire of some countries to exclude politically sensitive sectors—such as agriculture—from RTAs. It remains contentious today whether an RTA can exclude an entire sector, notwithstanding the 1994 Understanding's preamble. *See* discussion *infra* at 30–31. *See generally* Negotiating Group on Rules, *Compendium of Issues Related to Regional Trade Agreements,* TN/RL/W/8/Rev.1, ¶ 68 (2002).

- Defines "duties and other regulations of commerce" to be the applied rates of duty and other measures and regulations.[108]
- States that the "reasonable length of time" within which RTAs must be completed "should exceed ten years only in exceptional cases."
- Explains that, especially in the case of non-tariff barriers that are difficult to quantify, it may be necessary to examine "individual measures, regulations, products covered and trade flows affected."[109]
- Clarifies that all notified RTAs are to be examined by a working party, thus formalizing a practice that had developed during the RTA examination process in GATT[110] (this function is performed by the Committee on Regional Trade Agreements ("CRTA") today).[111]
- Requires Customs Unions and signatories of FTAs to periodically report to the Council for Trade in Goods on "the operation of the relevant agreement" and of "any significant changes and/or developments . . . as they occur."[112]
- Makes WTO dispute settlement provisions applicable with respect to any RTA-related matters arising from GATT Article XXIV.[113]

(d) Procedural Rules Governing the CRTA. The CRTA issued a special set of rules regulating the conduct of its meetings ("CRTA Rules of Procedure").[114] These are significant additions to the general oversight mechanism established in the WTO texts. For example, the CRTA Chairman's clarification (during negotiation of the CRTA Rules of Procedure) that documentation underlying a notified RTA must be circulated at least four weeks before the examination meeting[115] supports the GATT Article XXIV requirement that countries deciding to enter into RTAs shall circulate information pertinent to the RTA. Similarly, Rule of Procedure 23, which exhorts examining Members to circulate written statements to be incorporated into the examination report, provides guidance on the conduct of the RTA examination process.[116]

[108] *See 1994 Understanding*, ¶ 2.
[109] *See 1994 Understanding*, ¶ 2.
[110] *See 1994 Understanding,* ¶ 7 (also specifying that the working party prepare a report and submit it to the Council for Trade in Goods, which may make such recommendations to the Members as it deems appropriate.).
[111] The CRTA was not created pursuant to any of the Uruguay Round agreements. Instead, the General Council created the CRTA in a February 6, 1996 Decision. *See Committee on Regional Trade Agreements,* Decision of 6 February 1996, WT/L/127 (1996).
[112] *See 1994 Understanding*, ¶ 11. These requirements are also emphasized in the WTO's Procedures on Reporting on Regional Trade Agreements. *See,* World Trade Organization, *Procedures on Reporting on Regional Trade Agreements,* G/L/286 (Dec. 16, 1998).
[113] *See 1994 Understanding*, ¶ 12 (providing that "the provisions of Articles XXI and XXII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of . . . Article XXIV."). This provision of the Understanding is significant, because during the GATT era, it was disputed whether a Contracting Party that was not party to an RTA could invoke dispute settlement proceedings against an RTA signatory on the grounds that the RTA was inconsistent with Article XXIV or other relevant disciplines. For a discussion of the history and effect of the dispute over the applicability of dispute settlement provisions to RTAs, *see* Cho, *supra* note 1, at 437–38.
[114] Committee on Regional Trade Agreements, *Rules of Procedure for Meetings of the Committee on Regional Trade Agreements,* WT/REG/1 (Aug. 14, 1996) ("*CRTA Rules of Procedure*").
[115] *See* Committee on Regional Trade Agreements, *Draft Rules of Procedure for Meetings of the Committee on Regional Trade Agreements,* WT/REG/W/2, at 2 (1996).
[116] *See CRTA Rules of Procedure*, Rule 23.

4. Evaluation of WTO Legal Disciplines Governing RTAs

Even with the added detail in the 1994 Understanding and the CRTA's rules, the legal disciplines set forth in the GATT/WTO texts are widely regarded as insufficiently precise.[117] The vagueness in the legal framework is regarded as one of the main causes of the failure of the WTO system to regulate the current proliferation of RTAs in an effective manner.[118] Although there are several other provisions that have created interpretive difficulties in light of the ambiguity of the language contained therein,[119] two key legal provisions that have proved particularly contentious are:

- *Article XXIV, ¶ 4: "not to raise barriers to the trade of other contracting parties"*
  GATT Contracting Parties and WTO Members have differed on the significance of paragraph 4 generally, and this language specifically. Some argue that the provision informs other Article XXIV provisions, ultimately rendering them more rigorous than they would otherwise be;[120] others argue that the provision is merely hortatory and entirely self-contained, and thus does not modify any other Article XXIV provisions.[121]
- *Article XXIV, Paragraph 8: "substantially all the trade"*
  GATT Contracting Parties and WTO Members have differed and continue to differ on the significance of this language.[122] Some WTO members take a quantitative approach, arguing that the Article XXIV:8 obligation to remove barriers on "substantially all trade" requires only that a certain percentage of trade (e.g., eighty percent) be covered by an RTA; other WTO members insist on a qualitative

[117] *See e.g.,* Cho, *supra* note 1, at 436 ("Though the rationale of Article XXIV is quite understandable and idealistic in light of its legislative background, the text itself is so nebulous as to leave many important issues open to wide speculation. Consequently, actual applications of the black letter law were neither clear nor resolute, rendering Article XXIV a virtual dead letter from its inception.") JACKSON, *supra* note 74, at 64–5 ("The GATT language is unfortunately ambiguous, and the GATT has allowed some very loose preferential arrangements to exist without effective challenge in the context of GATT. Article XXIV has become, some say, the most significant loophole to the MFN obligation.").

[118] *See* Cho, *supra* note 1, at 436–43 (discussing provisions of Article XXIV that—because of their wording—have engendered controversy, specifically in regard to their application to certain allegedly trade-distorting measures.).

[119] *See* Cho, *supra* note 1, at 439–443 (discussing five Article XXIV concepts and textual provisions subject to contention during the GATT.); *Compendium of Issues Related to Regional Trade Agreements*, *supra* note 66, at ¶¶ 66–84, 85–113 (discussing contentious aspects of GATT Article XXIV and GATS Article V.); *Regionalism and the World Trading System*, *supra* note 12, at 13–15 (discussing two contentious Article XXIV provisions.). Among the other provisions which often receive attention is the provision stating that "other regulations of commerce . . . shall not on the whole be higher or more restrictive." For documents devoted specifically to discussion of this language, *see* Committee on Regional Trade Agreements, *Communication from Japan,* WT/REG/W/28 & WT/REG/W/29 (July 28, 1998); Committee on Regional Trade Agreements, *Systemic Issues Related to "Other Regulations of Commerce"* WT/REG/W/17 (Oct. 31, 1997) & WT/REG/W/17/Add.1 (Nov. 5, 1997).

[120] *See* Cho *supra* note 1, at 447 (noting that the Appellate Body and Panel in *Turkey—Restrictions on Imports of Textile and Clothing Products* (WT/DS34/AB/R & WT/DS34/R) both agreed that GATT Article XXIV obligations must be read in light of Article XXIV:4, which forms part of their context.).

[121] *See* Cho, *supra* note 1, at 439–440 (reciting the EC position during the accession of Portugal and Spain to the EC that RTA signatories "can introduce new barriers . . . if the net impact is less than what had prevailed before" the RTA's inception.). As discussed *infra* at pages 42–45, Turkey made a similar argument with regard to its Customs Union with the EU in *Turkey—Restrictions on Imports of Textile and Clothing Products, infra,* note 165.

[122] Evidence of the contentious debate of the precise meaning of this language is seen in the sheer number of WTO member submissions and CRTA official documents that have been issued in conjunction with this phrase. *See e.g.,* Committee on Regional Trade Agreements, *Systemic Issues Related to "Substantially All the Trade,"* WT/REG/W/21 (Nov. 28, 1997) and WT/REG/W/21/Add.1 (Dec. 2, 1997).

> approach, arguing that the Article XXIV:8 obligation requires that no major sector be excluded from coverage. Those who insist on a qualitative approach have vigorously objected to RTAs that essentially exclude agriculture from their coverage, including the Japan-Singapore Economic Partnership Agreement or Sweden's FTAs with Baltic states.[123]

B. The WTO Institutional Framework for Regulation of RTAs

1. Examination of RTAs under the GATT System

Prior to the 1994 Understanding and the 1996 advent of the CRTA, examinations of RTAs under the GATT were performed on an *ad hoc* basis by working parties. The main features of the RTA examination process under GATT were:

- The signatories to the RTA notified the RTA to the GATT Council;
- The Council mandated a working party to examine the RTA, and invited contracting parties to issue questions;
- Once the working party collected all questions and replies, it drafted a compendium thereof;
- The working party would then meet for oral question and reply sessions, which were often accompanied by written submissions of statistical or other information;
- The working party drafted an examination report, and transmitted it to the GATT Council for adoption;
- All examinations were confidential, with the exception of circulated documents and reports;
- Each working party determined its own rules of procedure;
- Recommendations or critiques by individual contracting parties were duly recorded, sometimes briefly and sometimes at length.[124]

The GATT RTA examination process was criticized because of its inconsistency and its ineffectiveness. There was no standard format for the submission of information, each working party created its own rules for the conduct of examinations, and each working party drafted its report in a different way, with only some working parties rigorously examining the consistency of RTA provisions with GATT disciplines. Many RTAs were not notified, and Contracting Parties made no apparent efforts to amend RTA provisions criticized in examination reports, perhaps because the reports lacked legitimacy in light of their inconsistent styles. Although twenty-seven Working Party Reports on RTAs were adopted under the GATT system,[125] the reports merely articulated issues raised by the Contracting Parties without arriving at any firm conclusions.[126] Furthermore, even at the time of the GATT, there were concerns about the efficacy of the review process. For example, in a November 1992 General Council meeting devoted to discussion of the Canada-United States Free Trade Agreement, the Chairman noted that:

> [O]ver fifty previous working parties on individual Customs unions or free-trade areas had been unable to reach unanimous conclusions as to the GATT consistency of those agreements. On the other hand, no such agreements had been disapproved explicitly.[127]

[123] *See Regionalism and the World Trading System, supra* note 12.

[124] *See Compendium of Issues Relating to Regional Trade Agreements, supra* note 66, at Annex, p. 32 (2002)(comparing RTA examination under GATT and under the WTO.).

[125] *See* WTO Secretariat, *Regional Trade Agreements Notified to the GATT/WTO and in Force,* (Jan. 24, 2003) (avail. at. http://www.wto.org/english/tratop_e/region_e/status_240103_e.xls)

[126] *See* JACKSON, DAVEY & SYKES, *supra* note 82, at 471.

[127] *See* Meeting of the General Council, p. 25, C/M/253 (1992), *cited* in General Agreement on Tariffs and Trade, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, 760 (6th ed. 1994)

The need to remedy the lack of discipline and consistency that marred GATT examinations ultimately led to the 1994 Understanding,[128] the creation of the CRTA[129] and the promulgation of various procedural rules governing the examination process[130] and related reporting requirements.[131]

2. Examinations of RTAs under the WTO System

(a) Overview. The current examination process attained its current form with the creation of the CRTA in 1996 pursuant to a General Council decision made under Article IV of the Agreement Establishing the WTO.[132] The CRTA's Terms of Reference, as determined by the General Council, are as follows:

(a) to carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services or the Committee on Trade and Development, as the case may be, and thereafter present its report to the relevant body for appropriate action;
(b) to consider how the required reporting on the operation of such agreements should be carried out and make appropriate recommendations to the relevant body;
(c) to develop, as appropriate, procedures to facilitate and improve the examination process;
(d) to consider the systemic implications of such agreements and regional initiatives for the multilateral trading system and the relationship between them, and make appropriate recommendations to the General Council; and
(e) to carry out any additional functions assigned to it by the General Council.

In practice, the first step of the examination process is the notification by the RTA signatories reporting on their agreement to the Council for Trade in Goods ("CTG"). The Council then informs the CRTA of the RTA notification. After notification and submission of information, the CRTA calls meetings at which other WTO members orally question the RTA signatories about the RTA.[133] There is also an opportunity for the exchange of written questions and replies between the examining Members and the RTA signatories. After the oral and written examinations have concluded, the WTO Secretariat drafts an examination report for circulation among WTO members. Once the draft report has been circulated, WTO members conduct several rounds of informal

[128] *See, infra* notes 105–113 and accompanying text. As discussed above, the 1994 Understanding clarified rules governing RTAs in several key respects.

[129] *See,* World Trade Organization, *Regionalism and the World Trading System,* 63–5 (1995)(suggesting the establishment of a single body to examine regional trade agreements.); *See also Second Session of the CRTA*, *supra* note 2, at ¶ 87 (discussing the decision of the WTO membership to create the CRTA.).

[130] *See, CRTA Rules of Procedure, supra* note 114.

[131] *See,* Committee on Regional Trade Agreements, *Checklist of Points on Reporting on the Operation of Regional Agreements,* WT/REG/W/3 (June 20, 1996)(acknowledging that the *ad hoc* GATT working party approach "led to a lack of consistency in the reporting procedure," which resulted—in 1971—in the Contracting Parties' adoption of a Decision to require the submission of biennial reports.). Other clarifications of the reporting process were set forth in the 1994 Understanding. *See,* discussion, *infra* footnotes 111–118 and accompanying text.

[132] The CRTA was created in February 1996 pursuant to a Decision of the General Council. *See Committee on Regional Trade Agreements,* Decision of 6 February 1996, WT/L/127 (1996).

[133] All WTO members are invited to participate in meetings of the CRTA. The CRTA's mandate is set forth in its Terms of Reference. The CRTA elects a Chairperson and a Vice-Chairperson from among the Member representatives. The Chair- and Vice-Chairpersons hold office for one-year terms. *See CRTA Rules of Procedure, supra* note 114, at Rule 12.

discussions in an effort to reach consensus on a text acceptable to all WTO members. To date, no examination reports have been adopted under the consensus rule, as required under the WTO process.

(b) Notification. Provisions of the GATT,[134] the 1994 Understanding,[135] the GATS[136] and the Enabling Clause[137] require that any WTO member deciding to enter into an RTA must promptly notify and provide relevant information to other WTO members. Technically, notification of RTAs falling under Article XXIV is made to the Council for Trade in Goods ("CTG"), which automatically issues a mandate for the examination and puts the examination on the CTG agenda.[138] Authority over the examination then passes to the CRTA.[139] Notification requirements for Services Agreements and agreements falling under the Enabling Clause are slightly different.[140]

Although the text of the RTA is usually provided at the time of notification, the RTA signatories also distribute a summary of key information in a standardized format[141] to other WTO members at least four weeks before the first meeting scheduled to discuss

[134] *See,* GATT Article XXIV:7, which provides that:

> (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.
> (b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (*a*), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.
> (c) Any substantial change in the plan or schedule referred to in paragraph 5(c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

[135] *See, 1994 Understanding*, ¶¶ 7–11 (setting forth detailed procedures for notification and provision of information.).

[136] *See,* GATS Article V:7(a).

[137] *See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries,* Decision of 28 November 1979, ¶ 4.

[138] *See Compendium of Issues Related to Regional Trade Agreements*, *supra* note 66, at 32.

[139] Specifically, the following items are distributed to the WTO members at this stage: (1) an "airgram" announcing the upcoming meeting; (2) an agenda for the meeting; and (3) any necessary documentation (such as information supplied in the standard format). *See,* Committee on Regional Trade Agreements, *Draft Rules of Procedure for Meetings of the Committee on Regional Trade Agreements, Statement by the Chairman,* WT/REG/W/2 (June 13, 1996) ("*CRTA Draft Rules of Procedure*").

[140] It should be noted that RTAs falling under the Enabling Clause are notified to the Committee on Trade and Development ("CTD"), while RTAs covered by the GATS are notified to the Council for Trade in Services ("CTS"). The CTD does not generally refer RTAs falling under its purview to the CRTA for in-depth review. Similarly, it is within the discretion of the CTS to refer Services Agreements to the CRTA for review: Unlike FTAs and Customs Unions, Services Agreements are not subject to a mandatory review in the CRTA. *See Committee on Regional Trade Agreements,* Work of the Committee on Regional Trade Agreements, at www.wto.org/English/tratop_e/region_e/regcom_e.htm

[141] The CRTA has developed a standard format for the submission of information relating to trade agreements covering goods and a standard format for agreements covering services. *See,* WT/REG/W/6 and WT/REG/W/14, respectively.

the RTA.[142] The standard format requires the submission of four major categories of information: Background Information on the Agreement, Trade Provisions, General Provisions, and Other.[143]

(c) Oral and Written Examinations. During the meetings that follow notification, WTO members pose questions orally to the RTA signatories, who either respond at that time or in writing at a later time.[144] In addition to this oral examination, WTO members may also deliver written questions to the RTA signatories, to which written answers are provided.[145] The written examination format is most appropriate for complex questions requiring extensive research and compilation of statistics by the responding parties.

The number of meetings devoted to examination of a particular RTA is determined largely by the complexity and importance of the RTA in question. A complex agreement like the Free Trade Area of the Americas is likely to require multiple and extensive meetings, while examination of a less far-reaching RTA might be concluded in a single meeting. Detailed minutes of each meeting are produced and published.[146]

(d) Issuance of the Examination Report. Once the oral and written examination process is complete, the drafting and review process for the examination report begins. The WTO Secretariat drafts a report based on the issues covered in the oral and written examinations.[147] This draft report is then circulated among the WTO members in "open-ended informal CRTA meetings."[148] Once the WTO members have agreed on the terms of the examination report, the report is put into final form and transmitted to the Council for Trade in Goods. The Council, which "may make such recommendations to Members as it deems appropriate,"[149] must adopt the report by consensus in order to complete the RTA examination process.

(e) Further Reporting Obligations. Even after a final examination report has been adopted, signatories remain subject to two reporting requirements: biennial reports and reports of any "significant changes and/or developments."[150]

3. Evaluation of the WTO Examination Process for RTAs

(a) Notification and Submission of Information: Timing Issues. Confusion over the timing of notification stands out as the most troublesome issue at this stage in the examination

[142] *See CRTA Draft Rules of Procedure*, *supra* note 113, Statement by the Chairman.

[143] *See* Committee on Regional Trade Agreements, *Standard Format for Information on Regional Trade Agreements,* WT/REG/W/6 (Aug. 15, 1996)(I. Background Information includes (1) membership, dates of signature, ratification and entry into force; (2) type of agreement; (3) scope; and (4) trade data. II. Trade Provisions include (1) import and (2) export restrictions, such as duties and charges, as well as quantitative restrictions; (3) rules of origin; (4) standards; (5) safeguards; (6) anti-dumping and countervailing measures; (7) subsidies and state-aid; (8) sector-specific provisions; and other measures. III. General Provisions include (1) exceptions and reservations, (2) accession provisions; (3) dispute settlement procedures; (4) relation with other agreements; and (5) institutional framework. IV. Other is a basket provision for all other information required for the sake of transparency.).

[144] *See Compendium of Issues Related to Regional Trade Agreements*, *supra* note 67, at 32.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.,* at 6–7.

process.[151] There is disagreement among WTO members as to when such notification must be made.[152] In light of the number of RTAs in existence that have not yet been notified, it is not even clear that all parties agree that notification should be made by the time an RTA comes into force.[153] Indeed, some parties may view the notification process as optional, or may simply be refraining from notification in the belief that they will probably not suffer any sanction for their non-compliance.

On the other hand, the establishment of the "standard format" constitutes a positive achievement of the CRTA in this area. Transmission of information in a standard format provides RTA signatories with guidelines regarding their submissions, and allows other WTO members to identify quickly potential areas of concern without first having to parse hundreds of pages of the agreement text.

(b) Oral and Written Examinations: The Only Functional Part of the RTA Examination Process. The most important role of the CRTA is probably monitoring of reporting requirements and conduct of RTA examinations. The examinations, in particular, provide a forum in which members must explain and justify controversial features of their proposed RTAs. Under current practice, the examining members make sustained and pointed inquiries (whether orally or in writing) about all aspects of a proposed RTA, focusing in particular on any features that appear to be inconsistent with WTO disciplines.[154] The intense scrutiny characteristic of CRTA meetings may promote compliance with WTO rules in the spirit of Justice Brandeis' comment that "[s]unlight is said to be the best of disinfectants."[155] However, although exposure in CRTA meetings may serve to restrain the most egregious violations of WTO provisions, there is a danger that many trade-distorting features will nonetheless persist. The large number of RTAs that the CRTA must examine, the large amount of complex data involved, and the multitude of issues facing national delegations at the WTO make it less likely that exposure of a defect in an RTA will, in itself, result in strong pressure to correct it.

[151] For a discussion of other issues raised in connection with the GATT Article XXIV obligation to notify RTAs and submit information, *See Second Session of the CRTA*, *supra* note 2.

[152] *See,* Committee on Regional Trade Agreements, *Synopsis of "Systemic" Issues Related to Regional Trade Agreements,* WT/REG/W/37, ¶ 13 (March 2, 2000) ("*Synopsis of Systemic Issues*") (noting that some members maintain that notification should be made "before entry into force" of the RTA. Other members respond that the imprecision regarding notification procedures "reflects the 'pragmatism' necessary to address complex negotiations for the formation of an RTA, a particularly relevant matter in the case of large agreements in which the bulk of concessions are made at the last minute.").

[153] Because of the disagreement over notifications, some WTO members have proposed that a means of gathering information on non-notified RTAs be developed. One proposal suggests a so-called "counter-notification" procedure, whereby a member having reason to believe that another member has entered into an RTA notifies the WTO of the basis for such belief; the WTO would then solicit comments and information from the members believed to have concluded an RTA. This proposal has been rejected by those WTO members who believe that it is not authorized under the WTO agreements. *See, id.,* at ¶ 16.

[154] The minutes of the examination meetings for NAFTA provide an example of a particularly sustained and thorough RTA examination. The NAFTA came into force before the advent of the WTO, and thus it was examined under the GATT RTA examination procedures. Nonetheless, the acute interest of WTO members in the NAFTA strongly influenced the examination of the NAFTA, as is reflected in the probing questions in the referenced documents. *See* World Trade Organization, *Working Party on the North American Free Trade Agreement: Questions and Replies,* WT/REG4/1 (June 25, 1995), WT/REG4/1/Add.1 (July 22, 1996) and WT/REG4/1/Add.2 (Oct. 15, 1996).

[155] Justice Brandeis emphasized the importance of transparency in his 1933 publication on the securities industry, *Other People's Money:* "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis Brandeis, OTHER PEOPLE'S MONEY, 62 (1933).

(c) Examination Reports: Complete Failure of the System. The total shutdown of the examination report component deprives the WTO of a considerable measure of its sanctioning power over countries that flaunt the rules governing RTAs. Failure to adopt by consensus any examination report essentially means that the WTO is incapable of judging or making recommendations about the consistency of RTA provisions with WTO obligations.

The absence of examination reports can be attributed to several possible causes: (1) Because of the requirement that WTO members adopt the examination report by consensus, when an RTA becomes subject to serious criticism, the signatories to the RTA simply block adoption of the report; (2) because of the vigorous activity of the WTO Dispute Settlement Body, many WTO members are loathe to adopt an examination report containing statements or recommendations that could be construed by a Panel or the Appellate Body to the detriment of a WTO members' RTA; and (3) because of the controversy surrounding certain key provisions, such as "substantially all the trade," many members are unable to agree when a given RTA violates a key substantive provision of Article XXIV.[156]

(d) Further Reporting Obligations: Late Reports and Those Never Submitted. The draft 2002 CRTA Report to the General Council noted that in 2001 almost all biennial reports required by the 1994 Agreement were submitted late, and had to be considered in 2002.[157] And biennial reports were not submitted at all for six RTAs.[158] This CRTA Report also notes that other required information is generally being submitted late or not at all, as reflected in "a considerable time-lag for the first round of examination for an increasing number of RTAs" and "a gap between the number of agreements notified to the WTO and those actually in force."[159]

(e) Conclusion. It seems evident that the RTA examination system is not achieving the level of scrutiny of RTAs anticipated by GATT Article XXIV, the 1994 Understanding or the CRTA Rules of Procedure. The record of the RTA examination process is mixed at best. Although a reasonable number of notified RTAs have been subjected to some examination, systemic problems have prevented the adoption of any examination reports. Examinations either are in progress or have been completed for 118 of the 162 notified RTAs in force,[160] but not a single examination report has been adopted since the advent of the WTO.

[156] It should also be noted that even if WTO members were able to adopt examination reports by consensus, serious questions would remain as to whether the RTA signatories would readily comply with recommendations in the report. Domestic and international political considerations may render compliance difficult. It would be extremely difficult, if not impossible, to "rewrite" a given RTA, because the RTA represents a delicate balance of negotiating concessions, made sometimes after high-level political compromises. In some cases, a re-calibration of that balance—after the conclusion or negotiations and passage by national legislatures—could threaten to unravel the entire agreement. And since the examination reports consist of the commentary of the representatives of the various members, there may be a perception that some criticisms are partisan, designed to gain negotiating leverage, or simply impractical, unreasonable or unrealistic.

[157] *See,* Committee on Regional Trade Agreements, *Draft Report (2002) of the Committee on Regional Trade Agreements to the General Council,* WT/REG/W/47, ¶ 6 and Attachment 3 (Nov. 4, 2002); *See also,* Committee on Regional Trade Agreements, *Reporting on Regional Trade Agreements—Recommendations by the CRTA to the Council for Trade in Goods,* WT/REG/4 (March 11, 1998)(setting forth detailed reporting requirements regarding RTAs.).

[158] *See,* Committee on Regional Trade Agreements, *Draft Report (2002) of the Committee on Regional Trade Agreements to the General Council,* Attachment 3, WT/REG/W/47 (Nov. 4, 2002).

[159] *Id.,* at ¶¶ 8 and 9.

[160] *See, Basic Information on Regional Trade Agreements, supra* note 8. This information has been updated in some respects in the 2002 Draft Report to the General Council. *See,* Committee on Regional Trade Agreements, *Draft Report (2002) of the Committee on Regional Trade Agreements to the General Council,*

The non-functionality of the procedures for the adoption of examination reports does not mean that the CRTA is totally ineffectual in promoting compliance with WTO rules. The CRTA has issued reports on systemic problems that have come out in the RTA examination process,[161] and it has organized seminars analyzing the implications of the recent surge in RTAs.[162] Through those activities the CRTA serves an educational function by increasing the level of awareness about the opportunities and risks posed by RTAs.

The CRTA also serves as a forum for WTO members to discuss systemic issues and even circulate proposals for more effective regulation of RTAs. In this way, the CRTA is promoting the exchange of views, consensus building and even the diplomatic resolution of disputes. In its current form, then, the CRTA may help define the issues relating to RTAs that need to be addressed during the Doha Round.

On balance, however, it appears that the weaknesses of the current RTA examination system exceed its strengths. The absence of clear rules and strong institutions for the regulation of RTAs undermines CRTA's usefulness as a forum for information exchange, negotiation, and consensus-building, on the one hand, and as a forum for the detailed and intense review of new RTAs. Most importantly, the failure to adopt any examination reports since 1995 has robbed the CRTA of its most effective enforcement tool against RTAs with trade distorting features that weaken the multilateral system. The CRTA's effectiveness is also impaired by its inability to ensure that notification requirements are met, that complete answers are provided during the oral and written examinations, and that periodic reporting requirements are satisfied.

Because the RTA examination process has failed to require rigorous compliance with WTO disciplines, the only recourse remaining to members harmed by the trade-distorting effects of a given RTA is to invoke WTO dispute settlement procedures.[163] As discussed below, however, this is an imperfect alternative to a systematic and meaningful examination process performed at the inception of a given RTA.

C. Regulation of RTAs through WTO Dispute Settlement

1. WTO Panel and Appellate Body Rulings Involving RTAs

As of the date of writing (September 2004), five WTO dispute settlement cases have implicated RTAs, but—generally speaking—only in a tangential manner.[164] Two disputes

WT/REG/W/47 (Nov. 4, 2002)(recording 125 actively under examination, of which 27 are in the midst of the examination process, with the other 74 having completed the examination process, but not having resulted in the issuance of a report.).

[161] *See, e.g.,* Committee on Regional Trade Agreements, *Coverage, Liberalization Process and Transition Provisions in Regional Trade Agreements,* WT/REG/W/46 (April 5, 2002); Committee on Regional Trade Agreements, *Rules of Origin Regimes in Regional Trade Agreements,* WT/REG/W/45 (April 5, 2002).

[162] *See,* World Trade Organization, *Seminar on Regionalism and the WTO,* (April 26, 2002)(containing links to papers presented by panelists), avail. at. www.wto.org/English/tratop_e/region_e/sem_april02_e/background_obj_e.htm

[163] *See 1994 Understanding*, at ¶ 12.

[164] *See*

(1) Report of the Appellate Body, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea,* WT/DS202/AB/R (2002);

(2) Report of the Appellate Body,*United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the E.C.,* WT/DS166/AB/R (2001);

(3) Report of the WTO Panel, *Canada—Certain Measures Affecting the Automotive Industry,* WT/DS139, 142/R (2000);

addressed the question of whether GATT violations could be justified by the existence of a Customs Union or FTA. Three disputes have involved the specific question of whether it is permissible to accord preferential treatment to a co-signatory of an FTA or Customs Union in the application of a safeguard measure.[165] Although all five disputes are discussed below, the discussions are limited to legal matters that directly impact Article XXIV disciplines.

(a) Turkey—Restrictions on Imports of Textile and Clothing Products. The most significant of all WTO cases involving GATT Article XXIV is *Turkey—Restrictions on Imports of Textile and Clothing Products* ("*Turkey—Textiles*"). In this case, the Appellate Body developed a legal formula according to which it would be determined whether derogations from WTO disciplines could be justified under Article XXIV as "necessary" to the formation of a Customs Union. The Appellate Body ultimately found that certain quantitative restrictions imposed by Turkey on textile imports could not be justified under GATT Article XXIV.

(i) Factual Background As one phase of its proposed accession to the EC, Turkey entered into the EC-Turkey Customs Union, under which Turkey committed to harmonizing its external customs tariff with that of the EC.[166] Part of this external tariff harmonization process required Turkey to adopt the EC's import regime for textiles, which included quantitative restrictions on Indian textile imports.[167] Previously, Turkey had much lower restrictions on textiles from India.

(ii) Panel Proceedings India initiated panel proceedings against Turkey claiming that the new quantitative restrictions violated *inter alia* GATT Articles XI and XIII.[168] Turkey responded that measures (adopted in connection with a Customs Union) that derogate from other GATT obligations are permitted so long as a WTO Member complies with the requirements of GATT Article XXIV. The Panel ruled against Turkey, holding that, although the Turkey-EC arrangement was a Customs Union, nothing in Article XXIV justified Turkey's adoption of quantitative restrictions that violated its various GATT obligations toward India.

(iii) Turkey's Article XXIV Arguments Upon Appeal Turkey appealed this finding to the Appellate Body. Turkey argued that the Panel had erred because—among other reasons—its analysis ignored the Chapeau of Article XXIV:5(a), which provides that GATT provisions "shall not prevent" the formation of a Customs Union so long as the conditions set out in Article XXIV:5(a) are satisfied. Turkey argued that the Panel—by ignoring this Chapeau language—came to the erroneous conclusion that Article XXIV did not authorize or permit the quantitative restrictions.

(4) Report of the Appellate Body, *Turkey—Restrictions on Imports of Textile and Clothing Products,* WT/DS34/AB/R (1999);

(5) Report of the Appellate Body, *Argentina—Safeguard Measures on Imports of Footwear,* WT/DS121/AB/R (1999).

[165] *See United States—Line Pipe, Argentina—Footwear,* and *United States—Wheat Gluten, supra* note 164.

[166] *See* Report of the WTO Panel, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS139,142R, ¶¶ 2.15–2.16

[167] *See id.,* at ¶ 2.10–2.20, 2.33–2.35

[168] *See id.,* at ¶ 1.3

Turkey also argued that the Panel had incorrectly viewed Article XXIV as an "exception" to a limited set of GATT obligations, whereas in fact Article XXIV accorded WTO members an autonomous right to enter into Customs Unions, thus permitting WTO members to derogate from any GATT obligations so long as they do so consistently with the strictures of Article XXIV. Accordingly, Turkey argued that any regulations of commerce (such as the quantitative restrictions at issue) adopted in the context of the Customs Union were permissible under GATT Article XXIV:5(a) so long as such regulations were not on the whole more restrictive than previous regulations of the constituent members of the Customs Union.

Additionally, Turkey submitted that if it were unable to harmonize its textile import regulations with the EC by imposing quantitative restrictions on Indian textiles, the EC would impose those same quantitative restrictions on Turkish exports, thus excluding 40 percent of Turkey's exports from the EC-Turkey Customs Union, which would necessarily violate the GATT Article XXIV:8(a)(i) requirement that the Customs Union cover "substantially all" trade between its members.

(iv) Appellate Body Report Although the Appellate Body ultimately rejected Turkey's arguments, it criticized the Panel's reasoning on several grounds. First, it agreed with Turkey that the Chapeau to GATT Article XXIV:5 is a central provision for the analysis of the WTO-consistency of any measure that a WTO member seeks to justify under an RTA. The Appellate Body then examined the text of the Chapeau in light of its context, first examining paragraph 8 (defining "Customs Union") and the 1994 Understanding (setting standards for comparing the general incidence of duties and other regulations before and after the Customs Union), and then turning to paragraph 4 (which stresses that "the purpose of a customs union . . . should be to facilitate trade . . . and not to raise barriers to the trade of other contracting parties.") In light of this context, the Appellate Body held that Article XXIV could justify measures inconsistent with other GATT measures provided that it could make two showings:

> First, the party claiming the benefit of this defense must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.[169]

In applying this test to Turkey's quantitative restrictions, the Appellate Body noted that other means of regulating imports than quantitative restrictions (e.g., rules of origin) were available to Turkey to the extent that it needed to act in a manner compatible with the EU textiles regime.[170] For this reason, the Appellate Body concluded that Turkey had failed to meet the burden of defending its quantitative restrictions under GATT Article XXIV, and that the restrictions violated GATT Article XI and XIII.[171]

(v) Significance of Turkey—Textiles Case The Appellate Body's discussion is significant for several reasons. Most importantly, it articulates a standard for the WTO compatibility of RTAs, pursuant to which WTO members have a clear right to enter RTAs and institute measures (even measures inconsistent with other WTO obligations), so long as such measures are (1) necessary to the formation of an RTA, and (2) the least

[169] *Turkey—Restrictions on Imports of Textile and Clothing Products,* WT/DS34/AB/R, ¶ 58 (1999).
[170] *See id.,* ¶ 62.
[171] *See id.,* ¶ 63.

restrictive measures available. It is also significant that the Appellate Body—in the first prong of its test—also held that Panels must establish that an RTA within the meaning of GATT Article XXIV exists before evaluating whether particular challenged measures are justified by the GATT exception set forth in Article XXIV.

This holding is significant because it indicates that the Appellate Body has sanctioned increased scrutiny of whether purported RTAs actually meet the requirements of GATT Article XXIV. As a result of this ruling, WTO members wishing to find an Article XXIV-related justification for a derogation from WTO disciplines must ensure that their Customs Unions or FTAs fully comply with GATT Article XXIV, the 1994 Understanding and applicable GATT and WTO practice. Thus, the Appellate Body has contributed—in a limited way—to establishing incentives for strict compliance with WTO rules governing RTAs.

(b) Canada—Certain Measures Affecting the Automotive Industry. Canada—Certain Measures Affecting the Automotive Industry, involved Canadian measures that gave duty preferences to a limited class of automobile imports pursuant to the Agreement Concerning Automotive Products Between the Government of Canada and the Government of the United States (the "Auto Pact"), a treaty between Canada and the United States concluded in January 1965.[172] The eligibility criteria for the exemptions effectively limited the duty-free preferences to vehicles made by General Motors, Ford and Chrysler—even if the vehicles were not produced in the United States or Mexico. The European Communities and Japan asserted that these preferences violated Canada's GATT and WTO obligations, including its MFN obligation under GATT Article I. Canada claimed, *inter alia,* that the duty exemptions accorded to U.S. and Mexican originating vehicles was justified under Article XXIV because the duty exemptions were "necessary" to the formation of the NAFTA.

(i) The E.C.'s Article XXIV Arguments The European Communities' response to this argument had several facets. The EC claimed *inter alia* that: (1) because Canada-Mexico trade was still subject to duties, there was no FTA but rather an interim agreement between the two countries;[173] (2) even if the NAFTA qualified as an FTA, the import duty exemption was illegal because only those measures "inherent" to an FTA could be justified under Article XXIV, yet the Auto Pact and its duty exemptions were "neither part of nor required by NAFTA;"[174] (3) contrary to the requirement in Article XXIV that FTAs lead to trade liberalization, the duty exemption actually hindered trade liberalization because it *de facto* discriminated against all imported vehicles (even U.S. and Mexican-produced vehicles) other than those produced by General Motors, Ford and Chrysler, and thus prevented "NAFTA from displaying all its potential trade creating effects."[175]

(ii) Canada's Article XXIV Arguments Canada's responses to the E.C.'s arguments were as follows: (1) NAFTA clearly constituted an FTA among Canada, Mexico and the United States, as defined by Article XXIV, because Article XXIV did not require

[172] *See, Canada—Certain Measures Affecting the Automobile Industry,* ¶ 2.3.
[173] *See id.,* ¶ 6.108.
[174] *See id.,* ¶ 6.109–111 (arguing that—while certain measures may be justifiable under Article XXIV if they are "necessary" to the formation of the FTA, no provision of the NAFTA "required" the duty exemptions established by the Auto Pact.).
[175] *Id.,* ¶ 6.115.

the immediate and absolute elimination of all duties among all members of an FTA; (2) It is incorrect to claim that the Auto Pact duty exemptions are not part of NAFTA as the NAFTA specifically provides for the continuation these exemptions; (3) Even if the Auto Pact was not technically "part of" the NAFTA, Article XXIV does not require duty-free treatment be "part of" or "required by" "the principal agreement establishing the [FTA]."[176]

(iii) The Panel Report The Panel ultimately ruled that GATT Article XXIV did not provide a defense for Auto Pact duty exemptions that violated GATT Article I, because the exemptions were not guaranteed to all products of NAFTA countries, nor were they necessarily denied to products of non-NAFTA countries. As the Panel stated,

> In our view, Article XXIV clearly cannot justify a measure which grants WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade agreement. . . . We further note that . . . in practice the import duty exemption does not apply to some products that would be entitled to duty-free treatment if such treatment were dependant solely on the fact that the products originated in the United States or Mexico. We thus do not believe that the import duty exemption is properly characterized as a measure which provides for duty-free treatment of imports of products of parties to a free-trade area.[177]

(c) WTO Disputes Involving the Relationship Between the WTO Agreement on Safeguards and GATT Article XXIV. Three WTO cases involved the specific question of whether it is permissible for an FTA signatory country or Customs Union member state to include imports from other countries within the territory of the FTA or Customs for purposes of establishing "serious injury" in a safeguards investigation, yet exclude those countries from the application of the safeguard measure. In all three cases, the WTO Appellate Body held that such an approach was impermissible under the Agreement on Safeguards.

These cases are important to GATT Article XXIV jurisprudence because of the range of defenses raised under that Article. Notwithstanding variations in the arguments made by the parties in each case, the basic legal issue involved was similar in all three. For this reason, we treat only the first of these cases, *Argentina—Footwear*, in detail. The other cases are *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Pipe from Korea*[178] and *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the E.C.*[179]

The *Argentina—Footwear* case is relevant to WTO regulation of RTAs because in it the Appellate Body further clarified the relationship between Article XXIV only and

[176] *Id.,* ¶ 10.54.

[177] *Id.,* ¶¶ 10.55–56. The panel decision was not appealed.

[178] This is the most recent case to examine the relationship between Article XXIV and the Agreement on Safeguards. In it, the Appellate Body held that the United States had violated its obligations under the Agreement on Safeguards by including imports from Canada and Mexico in the determination regarding injury to the U.S. industry, but excluding these imports from the application of duties. *See United States—Line Pipe from Korea, supra,* note 154. This U.S. methodology resulted in application of safeguard duties to non-NAFTA countries beyond "the extent necessary to prevent or remedy serious injury and to facilitate adjustment." *Id*., ¶ 197. The Appellate Body suggested that the non-application of duties to Canada and Mexico might have been permissible if the U.S. International Trade Commission had provided "a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources by themselves satisfied the conditions for the application of a safeguard measure." *Id.,* at ¶ 197.

[179] *Supra*, note 154.

the Agreement on Safeguards, while also reaffirming the principle that Article XXIV provides a defense to an otherwise WTO-inconsistent measure in very limited circumstances.

(i) Factual Background and Arguments of the Parties In this case, the Argentine trade authorities considered imports from MERCOSUR countries in their determination of serious injury, but did not apply the safeguard measure to MERCOSUR countries. The European Communities argued that this methodology violated Article 2.2 of the Agreement on Safeguards, which requires that safeguard measures be applied "to a product being imported irrespective of its source."[180] Exclusion of MERCOSUR from application of the safeguard would only be appropriate, the European Communities argued, if Argentina had excluded MERCOSUR-origin products for purposes of the investigation as well.[181]

Among its responses, Argentina argued that GATT Article XXIV:8 prohibited it—as a member of MERCOSUR—from maintaining barriers (e.g., safeguards) to trade with the other MERCOSUR members. In support of this argument, Argentina first cited the footnote of Article 2.1 of the Safeguards Agreement, which permits Customs Unions to apply safeguard measures "as a single unit or on behalf of a Member State" yet explicitly provides that, "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT."[182] Argentina also called the Panel's attention to the fact that the MERCOSUR members had explicitly agreed not to apply safeguard measures against each other.

(ii) The Panel Report Although the Panel acknowledged that neither the text of Article XXIV nor GATT practice were conclusive on the permissibility of safeguard measures among FTA or Customs Union signatories,[183] the Panel ultimately held that Argentina could legally apply a safeguard measure against other MERCOSUR members because (1) the MERCOSUR was in a transitional phase during which some restrictive regulations were allowed, and (2) even if the constituent member States of a Customs Union had agreed not to apply safeguard measures against each other, the footnote to Article 2.1 of the Safeguards Agreement allowed the Customs Union itself to apply a safeguard "on behalf of" its members States.[184] The Panel concluded by stating:

[180] *See* Report of the Panel, *Argentina—Footwear,* ¶¶ 5.67–5.76, 8.74, *supra* note 163.

[181] *See, id.*

[182] *See, id.,* ¶ 8.93. Argentina noted that the last sentence of the footnote to Article 2.1 explicitly stated there to be no consensus on the relationship between Articles XIX and XXIV of GATT. Argentina noted that although Article XXIV:8 specified some exceptions from the requirement to abolish all duties and other restrictive regulations on substantially all trade within a Customs Union, GATT Article XIX (on safeguards) was not one of those enumerated exceptions. Thus, Argentina claimed that Article XXIV:8 (not to mention MERCOSUR legislation) explicitly prohibited it from imposing safeguard measures against imports from other MERCOSUR countries.

[183] *See id.,* ¶ 8.96 (The Panel noted that Article XIX is not one of the restrictive regulations enumerated in Article XXIV:8 as one of those that must be eliminated within the territories of a Customs Union. Furthermore, the Panel found the practice of GATT Contracting Parties and WTO Members to be "inconclusive on the issue of the imposition or maintenance of safeguard measures between the constituent territories of a customs union or an [FTA]." Finally, the Panel accepted that, "[i]t is a matter of fact that many agreements establishing [FTAs] . . . or customs unions allow for the possibility to impose safeguard measures on intra-regional trade, while few regional integration agreements explicitly prohibit the imposition of intra-regional safeguard measures once the formation of such an integration area is completed."

[184] *See, id.,* ¶ 8.98.

> we do not agree with the argument that in the case before us Argentina is prevented by Article XXIV:8 of GATT from applying safeguard measures to all sources of supply, i.e., third countries as well as other member States of MERCOSUR. . . . [I]n the light of Article 2 of the Safeguards Agreement and Article XXIV of GATT, we conclude that in the case of a customs union the imposition of a safeguard measure only on third-country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union.[185]

(iii) The Appellate Body Report Although the Appellate Body agreed with the Panel's conclusion, it disagreed with the Panel's analysis. The Appellate Body first rejected the Panel's conclusion that the footnote to Safeguards Agreement Article 2.1 was applicable in this case, noting that Argentine authorities—not MERCOSUR authorities—conducted the investigation and applied the safeguard measures at issue. The Appellate Body then rejected the Panel's conclusion that Article XXIV had any application at all to this case. In support of this conclusion, the Appellate Body noted the rule it enunciated in *Turkey—Textiles* that measures derogating from WTO disciplines can be justified under Article XXIV only if "the measure at issue is introduced upon the formation o f a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV" and only if "the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue." Noting that Argentina had proffered none of these arguments in its discussion of Article XXIV, the Appellate Body concluded that Article XXIV was not relevant to the current dispute. Instead, the Appellate Body found that Argentina's decision to exempt imports from MERCOSUR countries from its safeguard measure, while applying that measure to imports from non-signatories of MERCOSUR violated certain provisions of the WTO Agreement on Safeguards.

2. Evaluation of Dispute Settlement as a Means of Regulating RTAs

The *Turkey—Textiles* Appellate Body decision raises the question whether the threat and exercise of WTO dispute settlement procedures can place sufficient discipline on the activities of members entering RTAs to ensure the WTO-consistency of those agreements. Although the Appellate Body in *Japan—Alcoholic Beverages* stated that WTO reports do not have precedential effect,[186] each report adopted by the Dispute Settlement Body adds to the corpus of *de facto* WTO precedent, as shown by the Appellate Body and Panels' continual references to prior standard-setting cases.[187] To the extent that WTO members who are also signatories to an RTA are concerned about being brought before a WTO Panel by WTO members alleging harm from "impermissible" features of an RTA, the RTA signatories are likely to craft provisions that are consistent with WTO disciplines.

However, it does not appear that the threat of being brought before a WTO panel is a sufficient deterrent to constrain RTA signatories from entering RTAs that violate GATT/WTO disciplines, for example, by failing to cover "substantially all the trade" between the signatories.

[185] Panel Report, ¶ 8.102.

[186] Report of the Appellate Body, *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996).

[187] Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANS NAT'L L. & POL'Y 1, 3–4 (1999) (arguing that the Appellate Body is in the process of establishing binding principles with the effect of Stare Decisis).

Several important provisions of GATT Article XXIV contain ambiguous language, which blurs the boundary between permissible and impermissible action.[188] It is not possible to clarify these ambiguous provisions through resort to historical sources as a means of divining the intent of the drafters of the GATT, because the drafters did not foresee the vast number and far-reaching and varied provisions of RTAs being signed today. Thus, in light of the ambiguities found in GATT Article XXIV, it is possible that WTO panels and the Appellate Body would find that the text of GATT Article XXIV provides insufficient guidance to permit a ruling on some difficult issues. Should the Appellate Body draw its own conclusions about disputed language within Article XXIV, it might be accused of overstepping its mandate, which would damage its credibility and the WTO dispute settlement system.

Strong and far-reaching rulings would be necessary to bring clear and consistent standards, and a measure of discipline, to the hodge-podge of RTAs that members have entered and are negotiating. The agreements are popular and politically important to the countries that enter them—often more important for their political significance than their potential economic benefits. Thus, the Appellate Body's task of giving overall impact to the unclear standards of Article XXIV is all the more daunting.

V. Regulating RTAs in the Interest of the WTO System

Although the CRTA and Dispute Settlement Body do inject a measure of discipline into WTO member practice regarding RTAs, the two institutions seem to have only a limited ability effectively to ensure that RTAs comply with the requirements they are supposed to meet under the WTO. Some of the limits on the ability of the CRTA and the DSB to respond to the RTA phenomenon derive from ambiguities in the text of GATT Article XXIV and related provisions.[189] However, even in cases where the obligations of WTO members are clear, the CRTA and DSB have been unable to enforce compliance with them. For example, WTO members have failed to fulfill their reporting requirements in the CRTA, and consequently some examinations have been delayed and others have failed to take place altogether.[190] More importantly, WTO members have failed to adopt a single RTA examination report since the advent of the WTO, so a potentially effective enforcement tool against RTAs that violate WTO disciplines remains unused.[191]

For this reason, it is worth considering institutional reforms that would bring a greater measure of discipline to WTO member practice regarding RTAs. Over the last seven years,

[188] As noted by the CRTA, not only is key language in Article XXIV disputed, but the relationship between Article XXIV and other WTO provisions is also unclear. The following list of questions raises issues that WTO members consider to be unanswered by the relevant provisions of the GATT and WTO Agreements:

> — Is the introduction of new quantitative restrictions justifiable in the context of GATT Articles XXIV:5 and XXIV:8(a)(ii) in the case of a customs union?
> — How should antidumping/safeguard measures already in place within an RTA be applied by new parties to that RTA?
> — Since no multilaterally agreed methodology exists, how should individual Members' reduction commitments on domestic support and export subsidies be translated into common commitments when a customs union is established or enlarged?

Synopsis of Systemic Issues, supra note 131, at ¶ 30.

[189] *See* discussion in Part IV.A above.

[190] *See* discussion in Part IV.B.2.b above.

[191] *See* discussion in Part IV.B.2.d above.

WTO members[192] and commentators[193] have suggested a range of possible changes, some more ambitious than others. We suggest several reforms, including the creation of an independent oversight committee made up of neutral experts and the introduction of a phase-in period for RTAs during which signatory nations are encouraged to bring their RTAs into compliance with WTO and GATT obligations. It may also be useful to reform the RTA examination process to permit a more thorough and systematic inquiry into facially neutral measures that in fact discriminate against non-members of the RTA. The achievement of such a systematic examination process could pave the way for a more expedited review of RTA-related complaints by the Dispute Settlement Body than is currently possible.

A. Independent Committee made up of Neutral Experts

The CRTA could be reformed to incorporate examinations by an independent oversight committee comprising neutral experts drawn from a roster created by the WTO members. This committee would receive information submitted by parties to an RTA, would make requests for further information, and would issue a report on whether the subject RTA complied with WTO and GATT requirements. Independent committees made up of a small number of experts would be able to focus on the most significant potential WTO violations, work effectively within set timelines, and add discipline and credibility to the RTA examination process. Examinations by the independent committee need not replace, but rather could complement the current examinations performed by representatives of WTO member states in the CRTA. The current system for the issuance and adoption of examination reports by all WTO members entails a relatively lengthy timeline; the independent committee's report would have the advantage of being issued on a much more expedited basis.

The report issued by the independent committee would probably have a greater degree of credibility and respect than the reports that currently issue from the CRTA, because there would be less perception that political and economic rivalries played a role in the independent committee report. If the independent committee reports did gain a higher level of legitimacy and support from WTO member states, there would be a greater likelihood of compliance with recommendations contained within them. Although the

[192] *See, e.g.,* Committee on Regional Trade Agreements, *Communication from the Republic of Korea,* WT/REG/W/4, ¶ 9 (June 27, 1996) ("*Communication from the Republic of Korea*") (proposing that, during the first WTO Ministerial Conference the General Council work:

> (a) To identify elements of regionalism which may conflict with the objectives of the [multilateral trading system ("MTS")] . . . and to explore ways and means of addressing such elements;
> (b) To explore creative means of capturing trade liberalizations advanced by regional initiatives and incorporating them into the MTS;
> (c) To review the validity of the WTO's current legal regime on regionalism, embodied in Article XXIV of GATT 1994 and Article V of GATS, in light of its relevance in the vastly changed global trade environment;
> (d) To redefine . . . RTAs' proper relationship with the MTS, and to explore ways and means by which to ensure that regionalism complements and reinforces the objectives of the MTS . . .

Over six years later, it cannot be stated unequivocally that all—or even any—of these objectives has been met. However, as countries enter RTAs at an increasing rate, it becomes increasingly urgent for WTO members to reach some agreement on appropriate rules to ensure the complementarity of the RTA phenomenon with the multilateral trading system).

[193] *See e.g.,* Cho, *supra* note 1, at 430–37 (outlining several "legal solutions" to systemic problems associated with regionalism.); *See also* Jackson, *supra* note 75, at 80.

exact procedures for the panel of independent experts would have to be further elaborated, several useful models already exist, such as the panel selection procedures used in the WTO or NAFTA dispute settlement systems.

B. Phase-in Periods for RTAs Under Examination

A set of phase-in periods would address the criticism that notifications currently occur so late (i.e., after negotiations have been completed and the RTA has been passed by the national legislatures) that it is practically impossible for countries that have entered an RTA to respond to the CRTA's suggestions regarding it. Under this proposal, countries would refrain from presenting RTAs to their respective legislative bodies for a given period (perhaps nine months or a year) after completing negotiations with co-signatories. During this interim "phase-in" period, the proposed RTA would be reviewed in the CRTA by national representatives and by the independent oversight committee proposed above. The CRTA examination would proceed according to a strict timeline leading to the timely issuance of a report. This system would allow the signatories to consider the suggestions contained within the report, and take steps to bring their proposed RTA into compliance with WTO and GATT obligations.[194]

If adopted, this system of phase-in periods and strict timelines would promise considerable advantages over the current CRTA examination process, in which the few RTAs that are actually notified to the WTO are subjected to an examination process that lacks fixed timelines and very often fails to produce a report at all.

C. Systematic Investigation of Hidden Discrimination Within RTA Provisions

The advent of RTAs covering new substantive areas outside the traditional scope of RTAs is accompanied by both risks and opportunities. On the one hand, there is a chance that new agreements developed in the financial, environmental, labor and other areas, as well as measures that harmonize standards and certification procedures among RTA signatories will also yield benefits for non-signatories, leading to increased global efficiency.[195] On the other hand, there is the risk of discrimination—in aim and effect—in the proliferation of overlapping and inconsistent RTA-specific standards, not to mention RTA "trade facilitation" measures that create disadvantages and costs for non-signatories of the RTAs.

The abuse of WTO principles of non-discrimination through such measures is a threat against which the CRTA examination process should guard. In order to do so effectively, it is important that WTO members develop a checklist of the areas in which such abuses are most likely to appear, and the forms that they are most likely to take. Such a checklist could be negotiated informally among WTO Members participating in the CRTA.[196] The checklist should be subject to easy revision to account for novel forms of potential discrimination that show up in future RTAs. When the independent committee of neutral

[194] Although this suggestion would create some pressures on RTA signatories to reform the agreement to bring it in line with WTO disciplines, it must be acknowledged that it would remain difficult for the countries involved to re-negotiate many politically sensitive, hard-fought issues.

[195] Efficiencies created by harmonization would be generally enjoyed by all WTO members so long as the harmonization of procedures was not designed to have the "incidental" effect of increasing transaction costs for non-signatories.

[196] There is at least one precedent for negotiations of "informal guidelines" in the CRTA, namely the formulation of the Standard Format for submission of information on RTAs. This initiative, which was successful in harmonizing and streamlining information submission practices, may provide lessons for other parts of the CRTA's activities.

experts (proposed above) and national delegates review RTAs, such a checklist will provide a useful reference, and will help establish a standard for appraising RTAs.

The checklist would serve as a basic agenda for the independent committee's work in a specific case. But it should not be regarded as a limit or jurisdictional boundary on the committee's authority to prove, and appraise, problems it discovers in an RTA that are not on the checklist. The successive reports of independent committees can serve to expand and enrich the checklist so it increasingly becomes a better guidebook for parties undertaking new RTA negotiations.

Finally, it would be useful for WTO members to formulate such a checklist, because it would provide additional guidance to WTO dispute settlement panels and the Appellate Body, when these institutions are called upon to adjudicate rights and obligations in an area in which the GATT and WTO Agreements provide sparse guidance.

D. Expedited Recourse to Dispute Settlement Procedures

Another drawback of the current WTO regulatory structure governing RTAs is the extended delay in relief for non-signatory members who are adversely affected by discriminatory RTA provisions. Such a member may make objections to such a provision during the CRTA examination process. However, under the current examination process the adoption of the CRTA report takes years (if it occurs at all). Even if an examination report is adopted, an RTA signatory could simply refuse to make the changes necessary to bring the measure into conformity with WTO and GATT requirements.

The other procedure available to adversely affected parties—WTO dispute settlement procedures—also involves a protracted and costly litigation process prior to any relief. As soon as the RTA is enacted in a member's domestic legislation, an adversely affected member can request consultations, and then establishment of a panel to adjudicate the consistency of the disputed measure under the WTO and GATT Agreements. However, it can take three years or more to receive authorization to suspend concessions. Thus, in effect, a WTO member faced with a another member's RTA provision that impermissibly discriminates against products or producers of the complaining WTO member must wait for years before receiving authorization to suspend concessions in an amount equivalent to the adverse effect of the discriminatory RTA provision.

In light of the vast number of RTAs that are being negotiated and will presumably soon be notified to the WTO, and the pressure and delays that numerous complaints about these RTAs could create for the dispute settlement system, it is advisable to examine the possibility of special, expedited procedures to address allegedly discriminatory measures found in RTAs.

One possible improvement would be to dispense with the panel process in the case of complaints about RTAs that have been examined and reported upon by the CRTA and its independent committee of neutral experts. In such cases, complaints could be taken up immediately in the Appellate Body.

The Appellate Body would have the benefit of the extensive factual and legal examination set forth in the CRTA's report. Immediate recourse to the Appellate Body would not only offer expedited relief to adversely affected parties, but would also give signatories to an RTA a greater incentive to act upon the suggestions made by the national delegates and the independent committee of neutral experts in their reports. In short, making the threat of adjudication and retaliation by adversely affected parties more imminent would motivate countries negotiating RTAs to take more seriously their obligations under the GATT and WTO Agreements.

VI. Conclusion

The WTO is a community-building effort, through which nations seek to achieve a common interest in market-based commercial exchange. The instrument for building co-operation is a set of rules that help to provide security against government interference in open markets. One of the most fundamental rules is that of non-discrimination embodied in the most-favored-nation principle.

But communities exist and can be built at diverse levels of human connection—families, civic groups, towns, states, nations, regions, and across regions. And in fact the trust that underlies community building exists or can be established more readily in smaller groups than large ones. It would make no sense to limit local collaboration that goes beyond what can be achieved comprehensively.

As recognized by those who wrote the GATT, there can be economic value for all the members in allowing smaller groups of countries to liberalize their trade more rapidly and more completely than is possible for all the member countries. But, unless regulated, the preferential treatment enjoyed exclusively by countries within these sub-groups would render meaningless the overall nondiscrimination rule of Article I, which is an important part of the glue that holds the multilateral community together.

After more than half a century, the trading nations have yet to find a satisfactory way to distinguish between those regional arrangements that are beneficial to the global trading system (or are at least neutral) and those that are harmful. The current proliferation of regional arrangements makes it increasingly important to establish a practical way of making this decision.

Ideally, the WTO would have a mechanism for making an informed and scientific decision in each case as to whether a given regional agreement increases or decreases the welfare of the WTO community. But such a determination involves so many unknowns and so much complexity that the results would be subject to continuing dispute. It seems unlikely that a determination would have the clarity and legitimacy needed to maintain the respect of affected WTO members.

Alternatively, a test for determining whether an RTA fits or does not fit into the WTO system can be based on the quality of the RTA—i.e. whether it evidences a serious commitment of the parties entering into a high level of economic cooperation with each other, and within the broader open market system, or whether it evidences an opportunistic effort to gain certain trade-distorting benefits by departing from MFN requirements, at the expense of the rest of the WTO members.

Article XXIV, effectively administered, can provide such a test. By requiring that an RTA eliminate barriers to substantially all trade among the parties, it can limit the use of RTA's to countries that have or are willing to establish a high level of cooperation. The theory of Article XXIV is therefore sound: It seeks to protect the community-building effort of the WTO members by limiting divergence from the MFN rule; and it seeks to allow smaller groups of members to establish closer collaboration when they are serious about it.

The problem with Article XXIV is in its administration. There has been effectively no surveillance. Two or more WTO members can enter what they designate as a Free Trade Agreement and refer to it as justification for exclusive benefits they extend to each other. In all likelihood, no WTO official body will hold them accountable for failing to implement their FTA in accordance with the requirements of GATT Article XXIV. Neither of the usual sources of accountability—administrative oversight or judicial review—is effective.

The WTO's version of administrative oversight is found in the Committee on Regional Trade Agreements, established in 1996. It examines an RTA that has been "notified" to the WTO by the parties to it. But a significant number of countries have failed to comply with the obligation to notify their agreement. And the experience to date indicates that when an agreement is notified, the CRTA becomes bogged down in a lengthy inquiry and is unable to reach the consensus required for issuing a report on whether the agreement complies with the standards set forth in Article XXIV.

Accountability to the WTO's judicial authority is similarly weak. The handful of cases on RTAs decided by the Appellate Body have only addressed tangential issues rather than the central question whether an RTA meets the standards of Article XXIV or, failing to do so, extends trade preferences that violate Article I. Negotiating and signing an RTA normally calls for a good deal of political will on the part of national political leaders, and the results can be politically important. Since the political stakes are high, the WTO's Dispute Settlement Body might well be reluctant to rule than an RTA is not in compliance with the standards of Article XXIV—especially since the facts regarding RTAs are normally complex and there is room for argument about the precise meaning of the standards. It would not necessarily be easy for the WTO's Dispute Settlement Body to rule that an RTA is not in compliance with the rather imprecise standards of Article XXIV.

Several changes in the administrative review of RTAs and the way they are handled by the Dispute Settlement Body would improve the prospects that the limits on RTAs set forth in Article XXIV will be enforced—and therefore given greater respect by parties negotiating RTAs. Among the changes (discussed in Part V above) two are key:

- Administrative review of RTAs would be more rigorous and timely if the CRTA established an independent oversight committee of neutral experts to examine each RTA and issue a report on whether it complies with WTO requirements, and what needs to be done to bring it into compliance. Properly executed, these reports would have a good deal of credibility, and would encourage compliance with their recommendations. The reports would also provide a clear factual record that would assist the Dispute Settlement Body in reviewing whether the FTA complies with WTO requirements.
- Because administrative review of RTAs will be more thorough and systematic, review by the Dispute Settlement Body could then be improved by eliminating review by a dispute resolution panel and allowing complaints about compliance of an RTA with WTO requirements to go directly to the Appellate Body, for decision on the record established by the CRTA and its independent committee of experts.

The continuing proliferation of regional trade agreements is helping to expand the reach of open market practices and enriching the rule-based system established in the WTO. At the same time, in the absence of effective regulation, these agreements can damage the WTO system by undermining the most-favored-nation principle that is crucial for its legitimacy. The improvements in legal process suggested above offer the opportunity to regulate the regional agreements, so as to protect the foundations of the WTO system while not discouraging the energetic and creative development of regional trading arrangements.

CHAPTER 47

THE ECONOMIES IN TRANSITION, THE WTO AND REGIONALISM

Richard Pomfret*

TABLE OF CONTENTS

I. Introduction 248
II. Centrally Planned Economies and GATT 248
III. The Transition Economies and Regionalism 251
IV. Transition Economies and the WTO 256
V. Conclusions 259
Tables
Table 1 European and Asian Economies in Transition (1992 and 1999) 249
Table 2 Economies in Transition and the European Union 252
Table 3 WTO Status of Former CMEA Members 257
Bibliography 261

* University of Adelaide, Australia

I. Introduction

When the World Trade Organization ("WTO") opened its doors in 1995, its members contained just over two thirds of the world's population. The biggest challenge to becoming a truly global organization lay in incorporating the formerly centrally planned economies. China, still a Communist country, had applied for membership in 1986 but negotiations dragged on for political reasons, and more fundamentally because of the non-transparency of its still only partially market-based economy.[1] Most of the former members of the Council for Mutual Economic Assistance, which contained half a billion people (Table 1), were outside the WTO and during the 1990s had plausible regional alternatives to multilateralism, either with neighbouring established market economies or with fellow transition economies.

This chapter analyses the progress of the reintegration of the formerly centrally planned economies into the global trading system, focusing on the relationship between multilateral processes and regional integration schemes. Part II provides relevant background of the relations between centrally planned economies and the WTO's predecessor, the General Agreement on Tariffs and Trade ("GATT"). Part III analyses the various attempts by countries in transition from central planning to join or form regional trading arrangements during the 1990s. Part IV describes the progress made by formerly centrally planned economies towards joining the WTO and analyses the most important benefits to transition economies from WTO membership. Part V draws some conclusions.

II. Centrally Planned Economies and GATT

The General Agreement on Tariffs and Trade established rules for government policies which would allow a liberal international trade system to function. The GATT rules, essentially encouraging governments to use border taxes (tariffs) rather than quantitative restrictions to regulate international trade and to treat trade with all other GATT contracting partners equally when imposing such restrictions, presuppose a liberal economic order in which foreign trade decisions are made by individual buyers and sellers in response to price signals. There were, of course, exceptions both in principle and in practice, but the GATT rules were not designed to deal with economies in which resources were allocated by command rather than in response to prices.

Czechoslovakia had been a founding signatory of the GATT in 1947, and Cuba and Myanmar (then Burma) had joined in 1948, but in all three cases obligations and benefits ceased to be observed after the countries moved to planned economies. Similarly, China's GATT membership fell into abeyance after the 1949 Revolution, and neither the government in Beijing nor that in Taipei was allowed to assume the membership status.

During the late 1960s and early 1970s several eastern European states were allowed to become contracting parties to GATT under *ad hoc* conditions: Poland in 1967, Romania in 1971 and Hungary in 1973. These decisions were driven by political rather than economic considerations, as the leading market economies tried to hasten détente with favoured

[1] Little will be said in this chapter about China's WTO accession negotiations or their expected consequences, which are discussed in Chapter 67 of this book. There is already a huge literature; see, for example, Kym Anderson, *Complexities of China's WTO Accession*, 20(6) THE WORLD ECONOMY 749 (1997); Willem van der Geest, *Bringing China into the Concert of Nations: An Analysis of its Accession to the WTO*, 32(3) JOURNAL OF WORLD TRADE 99 (1998); Zhao Wei, *China's WTO Accession Commitments and Prospects*, 32(2) JOURNAL OF WORLD TRADE 51 (1998).

Table 1: European and Asian economies in transition (1992 and 1999)

	Population (million) mid-1992	GNP per capita (US$) 1992	Population (million) mid-1999	GNP per capita (US$) 1999
Central Europe				
Slovenia	2	6,540	2	9,890
Hungary	10	2,970	10	4,650
Estonia	2	2,760	1	3,480
Czech Rep.	10	2,450	10	5,060
Latvia	3	1,930	2	2,470
Slovak Rep.	5	1,930	5	3,590
Poland	38	1,910	39	3,960
Lithuania	4	1,910	4	2,620
German Dem. Rep.	17	LM	n.a.	n.a.
Eastern Europe				
Belarus	10	2,930	10	2,630
Russia	149	2,510	147	2,270
Ukraine	52	1,820	50	750
Balkan & Caucasus				
Bulgaria	9	1,330	8	1,380
Moldova	4	1,300	4	370
Romania	23	1,130	22	1,520
Georgia	6	850	5	620
Armenia	4	780	4	490
Azerbaijan	7	740	8	550
Albania	3	LM	3	870
Croatia	5	LM	4	4,580
Macedonia FYR	2	LM	2	1,690
Yugoslavia	11	LM	11	LM
Bosnia & Hercegovina	4	L	4	LM
Asia				
Kazakhstan	17	1,680	15	1,230
Turkmenistan	4	1,230	5	660
Uzbekistan	22	850	25	720
Kyrgyz Rep	5	820	5	300
Mongolia	2	LM	3	350
Tajikistan	6	490	6	290
Vietnam	69	L	78	370
Non-CMEA				
China	1,162	470	1,250	780
Laos	4	250	5	280
North Korea	23	LM	23	L
Afghanistan	22	L	26	L
Cambodia	9	L	12	260
Myanmar	44	L	45	L

Source: World Bank data from *World Development Report 1994*, 162–3 & 228, and *World Development Report 2000/2001*, 274–5 & 316.

Notes: n.a. = not available in the source; since 1990 the German Democratic Republic forms the eastern Länder of Germany; in 1992 lower income (L) is less than $675 and lower middle income (LM) $676 to $2,695; in 1998 L is $755 or less, LM is $756 to $2,995.

Communist countries.[2] Bulgaria and the Soviet Union, which sought similar status, were barred, and Czechoslovakia's role remained passive despite its formal membership.

The acceptance of favoured non-market economies was a low point for GATT. The new members' trade with other GATT signatories was subject to *ad hoc* arrangements which were quantity- or results-oriented rather than rules-based. The special protocols were difficult to enforce as circumstances changed, and non-fulfilment was difficult to punish. Yet, the countries were now inside GATT and the membership decision was not easily reversed. This flaw was recognized by the early 1990s and lay behind subsequent insistence that new members must adhere to GATT rules, based on principles of individual traders' freedom to act within transparent policy environments, which were only really compatible with a market-based economy. There was, of course, a grey area because in all GATT members state trading and public procurement were facts of life, but the degree mattered.

China was a crucial test case, after it lodged a formal application for accession to GATT in 1986. China had started to open up its previously closed economy in 1978, and its foreign trade was growing rapidly during the 1980s. Nevertheless, the economy remained only partially reformed, with many non-transparent features affecting its import regime. Especially after the June 1989 Tiananmen events the negotiations became highly politicized, but well-founded concerns about non-transparency were the fundamental stumbling block in the 1980s and 1990s. A request by the Soviet Union to participate in the Uruguay Round of multilateral trade negotiations which began in 1986 was turned down by the GATT contracting parties.

The situation changed dramatically in the late 1980s with the end of central planning, often dated in the USSR from the 1988 Law on State Enterprises, and the collapse of Communist regimes in Eastern Europe during the second half of 1989. The Malta summit between George Bush and Mikhail Gorbachev in December 1989 signalled the end of the Cold War, and ushered in a new era for trade relations. President Bush announced his support for the USSR being granted observer status at GATT, and this was echoed a few days later by the European Community. The USSR lodged a formal application for observer status in March 1990, which was approved in May 1990.[3]

The critical years for the emergence of economies in transition from centrally planned to market-based economies were 1989–91. All of the Communist regimes in Eastern Europe collapsed in the second half of 1989. In 1991 the Council for Mutual Economic Assistance ("CMEA"), which had managed trade between those countries and the USSR, was finally closed down. In 1991 the partition of Yugoslavia began. More surprisingly, the Soviet Union dissolved peacefully in December 1991.

This was not an auspicious time for addressing the role of the transition economies in the global trading system. The European Union was concentrating on its 1992 program for completing the internal market. In the Americas, the United States and Canada were about to extend their free trade arrangement to include Mexico in a North American Free Trade Area ("NAFTA") and the Mercosur treaty was signed in the South in 1991. In Asia pressures for regionalism were weaker, but the ASEAN Free Trade Area was about

[2] Leah Haus, Globalizing The GATT: The Soviet Union's Successor States, Eastern Europe, and the International Trading System (1992)

[3] The United States initially expressed reservations to the formal application, apparently as a consequence of inter-agency fighting, but the U.S. opposition was quickly withdrawn. Japan opposed the Soviet application due to its dispute with the USSR over the status of the Kuril Islands. The application was, however, approved, and was subject to review in April 1992. By that date, the USSR no longer existed.

to be launched and Asia-Pacific Economic Cooperation ("APEC") members discussed open regionalism. The Uruguay Round had several times come close to breaking down, and the GATT's very existence seemed in doubt as the world economy looked on some occasions poised to split into regional trading blocs.

III. The Transition Economies and Regionalism

In 1989 the CMEA included the USSR, the centrally planned economies of Eastern Europe, Mongolia, Vietnam and Cuba. The CMEA planned international trade among its members, whose economies were largely insulated from the market-driven international economy. Albania, whose membership became inoperative in 1961, and Yugoslavia as an associate member, did not participate in the planned trade.[4] None of these countries was interested in retaining membership in the CMEA after the abolition of central planning within their domestic economies. They were, however, attracted to new or alternative regional trading arrangements.

The most developed European transition economies formed their own trade bloc. Czechoslovakia, Hungary and Poland signed the Central European Free Trade Agreement ("CEFTA") in 1992. Half of intra-CEFTA trade was made tariff-free in 1994 and subsequent negotiations aimed at a full free trade area by 2002. Slovenia joined CEFTA in 1996, and Bulgaria and Romania joined later. CEFTA was, however, always viewed as a second-best alternative to integration into the European Union.

Many east Europeans welcomed the collapse of Communism as an opportunity to re-establish their position as citizens of normal democratic European countries. Poland, the Czech Republic, and Hungary, already GATT contracting parties, joined the Organization for Economic Cooperation and Development ("OECD") and the North Atlantic Treaty Organization ("NATO") during the 1990s, but most of all they aspired to membership in the European Union. The twelve EU members were initially slow to respond to these aspirations. The seventeen million people in the German Democratic Republic were automatically absorbed into the EU with German reunification in 1990, but the prospect of over a hundred million new EU citizens in the ten applicant transition countries was more difficult to digest. Moreover, in the early 1990s the EU was absorbed by the single market project, the 1992 crisis in the European Monetary System and subsequent moves towards the common currency, and expansion to include three established market economies (Austria, Finland and Sweden) as new members in 1995. Association agreements were signed with transition economies and these were transformed into so-called Europe Agreements in 1994–5 (Table 2), but they fell far short of the would-be members' aspirations.

At the June 1993 meeting of the EU Council in Copenhagen, the heads of state agreed that the associated countries could join the EU once they had achieved institutional stability (guaranteeing democracy, the rule of law, human rights, and respect for protection of minorities), a functioning market economy, and ability to take on the obligations of EU membership. Between 1994 and 1996 ten transition economies lodged formal applications for EU membership, and negotiations began in 1998 and 2000. The path is fairly clear because the EU has established that, although there may be some limited room for negotiation over transition periods to full membership, any new member must accept the already established institutions and policies (the so-called *acquis communautaire*).

[4] Richard Pomfret, The Economics of Regional Trading Arrangements 115–6 (1997)

Table 2: Economies in Transition and the European Union

Country	Europe agreement signed	Europe agreement came into force	Official application for EU membership
Bulgaria	March 1993	February 1995	December 1995
Czech Republic	October 1993	February 1995	January 1996
Estonia	June 1995	—	November 1995
Hungary	December 1991	February 1994	March 1994
Latvia	June 1995	—	October 1995
Lithuania	June 1995	—	December 1995
Poland	December 1991	February 1994	April 1994
Romania	February 1993	February 1995	June 1995
Slovakia	October 1993	February 1995	June 1995
Slovenia	June 1996	February 1999	June 1996

Source: From the European Union's webpage (on 22nd. September 2000) at http://europa.eu.int/comm/enlargement/intro/index.htm

The current position is that there will not necessarily be waves of enlargement and that candidates will be admitted, as they are ready, after the end of 2002.[5]

Although the EU was seen by some of the more impatient candidates, notably Poland, as dragging its collective feet during the 1990s, the decade was not wasted time because the leading candidate countries were able to implement the time-consuming measures necessary as prerequisites for accession. By 2000 the ten applicants were all WTO members or close to being so, and all ranked highly on the various liberalization or "good institutions" indices published by international organizations such as the European Bank for Reconstruction and Development (in its annual *Transition Report*) or the International Monetary Fund (in its September 2000 *World Economic Outlook*). Meanwhile the CEFTA has become more like a fifth wheel as the EU car gathers speed, although there may be some complications as some CEFTA members accede to the EU before others.

EU membership is now a matter of when rather than if for most European transition economies. Some may balk at the conditions or wish to remain independent, so that the EU's eastern border will remain in flux for some time. For those who do join, EU membership will not conflict much with integration into the global as well as the regional economy. The EU has long been accepted as a single unit for the purposes of international trade negotiations and, with the deepening of the euro arrangements, notably the withdrawal of national currencies in 2002, most EU members will operate as a common currency area. Despite some illiberal practices, the EU is generally an open trading bloc, and membership is more likely to cement liberal policies than non-membership.[6]

[5] The "first wave" of applicants with whom the EU opened negotiations in March 1998 included the Czech Republic, Estonia, Hungary, Poland and Slovenia, together with Cyprus. The second wave of EU candidates, containing Bulgaria, Latvia, Lithuania, Romania, Slovakia and Malta, began negotiations in February 2000. Developments up to 2000 are described in the IMF's September 2000 *World Economic Outlook*, Box 4.1. Heliodoro Temprano-Arroyo and Robert Feldman, *Selected Transition and Mediterranean Countries: An Institutional Primer on EMU and EU Accession,* 7(3) ECONOMICS OF TRANSITION 741 (1999) review the institutional requirements of EU membership. Since the EU's 2001 Nice summit, it is clear that for the leading candidate countries membership is now a matter of when rather than whether. The EU website http://europa.eu.int/comm/enlargement provides progress reports, including a table of specific negotiation hurdles and whether they have been overcome by each applicant.

[6] Examples of the illiberal policies emerged during WTO accession negotiations when Estonia chose to bind its tariffs on some agricultural goods above the current applied tariffs solely to allow scope for adoption of the EU common external trade policy. Nevertheless, the EU common commercial policy and EU policies

Vietnam, Laos and Cambodia have taken an ostensibly similar stance with respect to the Association of Southeast Asian Nations ("ASEAN"). The six ASEAN members were thriving market economies, whose historic economic links to the southeast Asian centrally planned economies had been broken amid the military conflicts of the 1960s and early 1970s. The ASEAN six, like the EU twelve, were preoccupied with their internal regionalism projects in the late 1980s and early 1990s when their neighbours were initiating the transition to a market economy, but the ASEAN Free Trade Area ("AFTA") which began operation in 1992 was a much weaker form of regionalism than the EU common market and ASEAN was far from accepting the political integration which underlay the EU project for many Europeans.

The looser organization meant less stringent admission criteria, with nothing like the Copenhagen Criteria to prevent non-democracies with imperfect market economies from joining ASEAN. Vietnam joined ASEAN in July 1995, and Laos and Myanmar in July 1997, when Cambodia was also scheduled to join, but Cambodia's formal accession was delayed for a year after the anti-democratic coup. Despite this gesture, none of the four new members is a democracy, and the admission of Myanmar (Burma) in the face of strong disapproval by the United States and EU provided a clear-cut signal of the lack of political prerequisites. The enlargement to ten members completed ASEAN's "natural" geographical expansion to include all Asian countries south of China and east of Bangladesh and India, but left the association as a disparate group with little prospect of pursuing common policies in the near term.[7]

Joining ASEAN has few direct policy implications, but it has been a non-trivial signal on the part of the southeast Asian transition economies. As ASEAN stands at the start of the twenty-first century, membership is not a commitment to regionalism. There is no formal commitment to introduce liberal trade policies, because ASEAN has neither a common external commercial policy nor internal free trade, let alone uniform measures in areas such as currency convertibility or capital flows. Progress on AFTA has been sporadic, and the four newest members of ASEAN are explicitly allowed to move at a slower pace than the other ASEAN members. The extent to which Vietnam, Laos, Cambodia and Myanmar reform their formerly planned economies to become open economies integrated into the global system remains a matter of domestic decision-making.[8] Nevertheless, the new members have signalled that they belong in a group of market economies, and they will be under pressure within ASEAN to liberalize their intra-regional trade. Given that the new members are unlikely to want to discriminate in favour of their ASEAN partners, such pressures if effective will lead to multilateral trade liberalization.

The successor states to the Soviet Union have made some attempts to maintain existing trade relations through regional arrangements, but these have been feeble measures with little practical impact. In 1992–3 the main concern was to retain a common currency in

in other areas such as capital flows are more liberal and far more conducive to integration into the global economy than are the more restrictive policies of some of the southeast European transition countries, not to mention those of CIS members such as Belarus or Ukraine.

[7] Richard Pomfret, *ASEAN: Always at the Crossroads?*, 1(3) JOURNAL OF THE ASIA PACIFIC ECONOMY 365 (1996); Richard Pomfret, *Enlargement to Include Formerly Centrally Planned Economies: ASEAN and the European Union Compared*, in THE EUROPEAN UNION AND ASEAN: TRADE AND INVESTMENT ISSUES 225(Roger Strange, Jim Slater and Corrado Molteni eds. 2000)

[8] An important element for Cambodia, which also applies to some of the other smaller and poorer transition economies, is that, although the government professes a desire to liberalize the economy through reduction of trade barriers, it is dependent on tariffs for some three-quarters of government revenue so that trade liberalization is connected to fiscal reform.

order to minimize payments problems, but the ruble zone had collapsed by November 1993. Since then, post-Soviet trade patterns have diversified continuously, and no serious attempt to stop this trend by introducing regional trading arrangements has been implemented.

The twelve non-Baltic successor states to the USSR formed the Commonwealth of Independent States ("CIS"), but that organization has never had any serious economic content. In September 1993 Armenia, Azerbaijan, Belarus, Kazakhstan, the Kyrgyz Republic, Moldova, Russia, Tajikistan and Uzbekistan signed an agreement to set up an economic union; Georgia signed some of the provisions, and Ukraine became an associate member.[9] Thus, eleven of the twelve non-Baltic Soviet successor states indicated commitment to some form of regional economic arrangement, but neither this nor any subsequent proposal involving a majority of CIS members made any progress.[10]

On a political level, the CIS became fractured in the second half of the 1990s. In January 1995 Belarus, Kazakhstan and Russia signed a customs union agreement, which the Kyrgyz Republic also signed in March 1996 when it became known as the Union of Four.[11] With Russia clearly the dominant partner, Russia's tariff presumably would be the putative common external tariff, but apart from preliminary steps towards a Belarus-Russia economic union nothing has been implemented. The tariff bindings in the Kyrgyz Republic's 1998 WTO accession agreement are in conflict with the would-be customs union because it is difficult to imagine Russia agreeing to such a liberal external trade policy and the Kyrgyz Republic is no longer able to raise its tariffs to the Russian level.[12]

In late 1996 and 1997, Azerbaijan, Georgia and Ukraine, later joined by Moldova, began to coordinate their strategies in security negotiations, and this became formalized in a joint communiqué in October 1997. In April 1999 Uzbekistan became the fifth member of the alignment, which became known as GUUAM. Although not having any economic content beyond coordination of infrastructure plans, the GUUAM grouping (Georgia, Ukraine, Uzbekistan, Azerbaijan and Moldova) is operating explicitly as a counter to Russian hegemony.[13] Thus, the CIS has split into two groups of five, plus two floaters (Armenia and Turkmenistan).

The five Central Asian successor states have drawn up many plans for regional cooperation among themselves. They inevitably must cooperate on some non-trade matters such as the desiccation of the Aral Sea and on developing transport and pipeline routes, but attempts to set up a regional trading agreement have had little impact. In April 1994

[9] Georgia and Turkmenistan only formally joined the CIS in December 1993. Turkmenistan's main foreign policy principle has been strict neutrality, which it has interpreted as allowing only limited cooperation with the CIS, even to the extent of not supplying statistics to the CIS statistical agency.

[10] Richard Sakwa and Mark Webber, *The Commonwealth of Independent States, 1991–1998; Stagnation and Survival*, 51(3) EUROPE-ASIA STUDIES 386 (1999)

[11] Tajikistan became the fifth member of the Union in February 1999. On the Union of Four, or Five, see Constantine Michalopoulos and David Tarr, *The Economics of Customs Unions in the Commonwealth of Independent States*, POLICY RESEARCH WORKING PAPER 1786, WORLD BANK (June 1997); and Vyachaslau Paznyak, *The Customs Union of Five and the Russia-Belarus Union*, in BUILDING SECURITY IN THE NEW STATES OF EURASIA: SUBREGIONAL COOPERATION IN THE FORMER SOVIET SPACE at 57 (Renata Dwan and Oleksandr Pavliuk eds. 2000)

[12] A similar conflict could arise from Kazakhstan's WTO negotiations. According to Webber (1997, 56), Kazakhstan's President Nazarbayev indicated in September 1996 that Kazakhstan would leave the customs union when it acceded to the WTO.

[13] Oleksandr Pavliuk, *GUUAM: The Maturing of Political Grouping into Economic Cooperation*, in BUILDING SECURITY IN THE NEW STATES OF EURASIA: SUBREGIONAL COOPERATION IN THE FORMER SOVIET SPACE at 33 (Renata Dwan and Oleksandr Pavliuk eds. 2000)

Kazakhstan, the Kyrgyz Republic and Uzbekistan signed a treaty for the establishment of an integrated economic space. In March 1998 Tajikistan, which had previously had observer status, became a full participant in the scheme which became known as the Central Asian Economic Community ("CAEC"). Trade within the CAEC, however, declined over the 1990s, and in most areas the members pursued independent policies without regard to intra-CAEC cooperation and at times in contradiction to stated CAEC policies and goals.[14]

The only significant attempt by CIS countries to form a regional trading arrangement with neighbouring market economies has been the accession of the Islamic former Soviet republics to the Economic Cooperation Organization ("ECO"). Plans for regional cooperation among ECO's three founding members, Iran, Pakistan and Turkey, had made little progress before 1992. The May 1991 Protocol on Preferential Tariffs covered few goods and offered small preferential margins. The dissolution of the USSR breathed new life into ECO when six former Soviet republics plus Afghanistan joined ECO in November 1992, forming a bloc of the non-Arab Islamic countries west of Bangladesh, with a combined population of over 350 million.[15]

Despite attempts to improve infrastructure and transit arrangements, ECO did little during the 1990s beyond acting as a regional talking shop In this regional confidence-building respect ECO has had some similarity to ASEAN, and like the ASEAN countries ECO's members were unwilling to match declarations of intent to have a preferential trading arrangement with actual trade liberalization measures.[16] A major reason for this failure has to do with the three founding members, who have acted more like competitors in Central Asia than cooperative partners playing a positive-sum game; all three viewed a putative customs union in terms of extending the size of the protected market for their own industries. In addition, the similarity of the ten ECO members' export mixes has limited intra-ECO trade flows (as it has done in ASEAN), and reinforced the lack of will for discriminatory trade liberalization.

There are also problems of overlapping arrangements which hinder ECO's ability to progress along the route of preferential trading arrangements. In January 1996 Turkey formed a customs union with the EU, which limits Turkey's ability to alter its tariff rates and Turkey notified the ECO Secretariat that its obligations to the EU would override any ECO commitments. Since then, Turkey's relationships with the EU have fluctuated, but the legal situation remains unchanged. Pakistan faces a potential conflict between commitments under the preferential agreements reached within the South Asian Association for Regional Cooperation ("SAARC") and any made within ECO, but in practice SAARC tariff preferences are as innocuous as those within ECO. For much progress towards an ECO regional trading arrangement, a greater obstacle is probably the Kyrgyz Republic's tariff bindings agreed to during the country's WTO accession negotiations. These tariff rates limit the Kyrgyz Republic's freedom to offer substantial tariff preferences to

[14] Richard Pomfret, *Trade Initiatives in Central Asia: The Economic Cooperation Organization and the Central Asian Economic Community*, in Building Security in the New States of Eurasia: Subregional Cooperation in the Former Soviet Space, *supra* note 13 at 11; Bakhtior Islamov, The Central Asian States Ten Years After: How to Overcome Traps of Development, Transformation and Globalisation? 163–89 (2001)

[15] The six countries were Azerbaijan, Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan. The Turkish Muslim Community of Cyprus is not an ECO member, but its representatives often attend ECO meetings. Afghanistan has been represented by forces in opposition to the Taliban, which is a source of tension between Iran and Pakistan.

[16] Richard Pomfret, Central Asia Turns South? Trade Relations in Transition (1999)

partners in a preferential trading arrangement and, as in the Union of Five, put low limits on any common external tariffs.

The Baltic countries, which kept outside the successor organization to the Soviet Union, the Commonwealth of Independent States ("CIS"), discussed regional integration proposals but they never progressed far. More important, especially for Estonia, was the opening up of links to their Nordic neighbours, which provided them with advocates for EU membership once Finland and Sweden were inside the EU club.

In sum, the formerly centrally planned economies were not immune from the early 1990s trend towards regionalism, although they were happy enough to allow the old organization, the CMEA, to fade away after 1989 and formally dissolve in 1991. Attempts to partially reconstruct old trading patterns on a regional basis were made by the former Soviet republics and by some east European countries, but these were half-hearted and always secondary to other trade policy strategies. Much more important were attempts by the countries in transition to a market economy to link themselves to neighbouring market economies. This was especially true for the European transition economies, and to a lesser extent for the southeast Asian transition economies and for the Islamic transition economies of Central Asia and the Caucasus, but the temptations of the EU, ASEAN and ECO pose little threat to adherence to multilateralism, albeit for different reasons. Transition economies joining the EU will have discriminatory trade policies, but within a basically liberal common trade policy, while members of ASEAN and ECO are in organizations whose regional integration remains weak. The other formerly centrally planned economies have shown little interest in regionalism in their external economic relations. China is an APEC member, but its post-1978 trade policies have clearly been based on multilateralism, with WTO membership as the top priority since the mid-1980s. Since Mongolia emerged from the Soviet sphere of influence in 1990, after having become so closely integrated that it was often referred to as the sixteenth Soviet republic, it has shown no interest in preferential bilateral economic relations. The Balkan countries which are not (yet?) EU applicants have been too embroiled in regional problems to give much attention to the matter. Overall, the potential danger of regionalism proving more attractive than multilateralism has not eventuated.

IV. Transition Economies and the WTO

In 1994 the Uruguay Round was successfully concluded, and among its consequences was the superseding of GATT by a new World Trade Organization ("WTO"). All GATT contracting parties became WTO members at the start of 1995.[17] Once in place, the new organization took up outstanding and new applications for membership. For the first few years, however, it appeared difficult for countries with economies in transition from central planning to get through the admission process. Michalopoulos[18] argues

[17] Hungary, the Czech and Slovak republics (which had divorced in 1993), and Poland and Romania (who renegotiated the special protocols under which they had entered GATT in 1967 and 1971) were charter members of the WTO. Yugoslavia in 1992 applied to become a WTO member as successor state to the GATT-Yugoslavia, but this application was turned down because the United Nations had determined that, after Slovenia, Croatia, and Bosnia and Herzegovina declared independence and split from the Yugozlav Federation, the "new" Yugoslavia (Serbia and Montenegro) could not claim successor status. Slovenia and Bulgaria, whose GATT applications had been relatively straightforward and were far advanced, became WTO members in 1995 and 1996.

[18] Constantine Michalopoulos, *The Integration of Transition Economies into the World Trading System*, World Bank Working Paper WPS 2182 (1999).

Table 3: WTO status of former CMEA members

	WTO status
Central & Eastern Europe	
Czechoslovakia (Czech Rep. & Slovakia after 1993)	Original GATT signatory
Poland	Joined GATT 1967
Romania	Joined GATT 1971
Hungary	Joined GATT 1973
Slovenia	Joined WTO 1995
Bulgaria	Joined WTO 1996
Albania	Joined WTO 2000
Croatia	Joined WTO 2000
Macedonia FYR	Joined WTO 2003
Yugoslavia	negotiating
Bosnia & Herzegovina	negotiating
Former USSR	
Kyrgyz Republic	Joined WTO 1998
Latvia	Joined WTO 1999
Estonia	Joined WTO 1999
Georgia	Joined WTO 2000
Lithuania	Joined WTO 2001
Moldova	Joined WTO 2001
Armenia	Joined WTO 2003
Azerbaijan	negotiating
Belarus	negotiating
Kazakhstan	negotiating
Russia	negotiating
Tajikistan	negotiating
Ukraine	negotiating
Uzbekistan	negotiating
Turkmenistan	
Asia	
Mongolia	Joined WTO 1997
Vietnam	negotiating

Note and Source: up-to-date membership information is provided on the WTO website www.wto.org

that the procedure was too complex, and exceeded the administrative capacities of the applicants, as well as of the WTO Secretariat. Langhammer and Lücke[19] question this interpretation, and point to substantive issues which needed to be resolved before a transition economy could reasonably be admitted to the WTO. With the hindsight of just a few extra years, however, the pace of WTO accession looks more impressive, with Mongolia, the Kyrgyz Republic, Latvia, Estonia, Georgia, Albania, Croatia, Moldova and Lithuania all completing the formalities between 1998 and 2001 (Table 3), not to mention the long-awaited breakthrough in China's accession negotiations.

Why does WTO membership matter? Membership guarantees rights as well as imposing obligations. Most of the transition economies have been unilaterally granted the main right of members, MFN treatment by all other members, and in many cases they

[19] Rolf Langhammer and Matthias Lücke, *WTO Accession Issues*, 22(6) THE WORLD ECONOMY 837 (August 1999).

benefit from the lower Generalized System of Preferences ("GSP") tariff rate. WTO membership does, however, ensure MFN treatment as a right rather than a unilaterally granted privilege. As a GATT/WTO member China would have avoided having to face the hurdle of annual renewal of MFN status by the USA during the 1980s and 1990s, and as a WTO member Azerbaijan should gain MFN treatment from the USA, where this status has been blocked by the Armenian lobby.

More importantly, WTO membership should provide some protection against imposition of non-tariff barriers, although in the controversial area of anti-dumping formerly centrally planned economies have failed to receive full protection of their WTO rights even after becoming members. During the 1990s transition economies suffered especially from anti-dumping actions, where they faced a double penalty of not having WTO protection and being treated as non-market economies.[20] The latter actually seems to have been the more severe handicap because "surrogate" or "analogue" countries' costs and exchange rates are used, somewhat arbitrarily, in calculation of dumping margins.[21]

The WTO provides legal justification for special treatment of non-market economies under anti-dumping laws. Article 2.7 of the Anti-dumping Agreement refers to the second Supplementary Provision in paragraph 1 of Article VI in Annex 1 to GATT 1994, which permits different treatment "in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State" and which was interpreted in the original Polish and Hungarian accession negotiations to permit a surrogate country methodology.[22] It continues to be invoked even though by the late 1990s in very few countries were all prices fixed by the state and, as Palmeter stresses, "the word "all" with regard to control over domestic prices is quite specific". Although the presence of market institutions has become an important prerequisite for admission and their extent a major negotiating point, WTO membership is still not considered sufficient evidence that a country has a market economy.[23]

Nevertheless, given the obvious contrast between the legal basis and actual conditions for treating the transition countries differently in anti-dumping cases, WTO membership does offer prospects for fairer treatment and for some remedy under dispute resolution mechanisms. In other areas of non-tariff barriers without the anti-dumping history of special treatment, these benefits should be clearer. One specific area where being inside the

[20] Michalopoulos, *supra* note 18 at 20, shows that in the first three years of the WTO's operation (1995–7) both non-WTO and non-market economies were more likely to be subject of anti-dumping actions and were more likely to be the targets of definitive anti-dumping duties.

[21] The practice dates back to differential treatment of the non-market economies which joined the GATT in the 1960s and 1970s. A landmark case involved a 1975 antidumping action against Polish golf carts imported into the USA. In that case the constructed values, based on Spanish costs, led to a determination that the golf carts were not being sold below fair value, but in subsequent cases exporters complained that the surrogate was chosen after the case was opened and the choice was biased towards a ruling of unfair trade.

[22] David Palmeter, *The WTO Antidumping Agreement and the Economies in Transition*, in STATE TRADING IN THE TWENTY-FIRST CENTURY at 116 (Thomas Cottier and Petros Mavroidis eds. 1998)

[23] The EU publishes annually a list of non-market economies for the purpose of antidumping and safeguard actions, and the 1999 list included Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, the Kyrgyz Republic, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam. The United States has no formal list and proceeds on a case by case basis, but seems in practice to consider the same list of countries to be non-market economies. The Kyrgyz Republic and Mongolia were already WTO members in 1999.

WTO may make a difference is the Uruguay Round Agreement on Textiles and Clothing, by which all import quotas under the Multifibre Arrangement are to be eliminated by 2005. A new round of multilateral negotiations would benefit transition economies which have already acceded to the WTO, although in many respects these would be benefits also accruing to other middle-income members rather than specific to transition economies.

WTO membership also operates as a signalling device, or to provide a road map for reform and legally bind governments to liberal policies. For the European transition economies aspiring to EU membership, WTO membership is an essential way station, and the ten countries which have formally applied for EU membership have all completed their WTO accession negotiations. WTO membership proves intent to create a market economy and to abide by international trade law.

Elsewhere, transition economies generally show a desire for WTO membership, but have been less willing to pursue policies which will ensure an easy passage. The exceptions (Mongolia and the Kyrgyz Republic) are small countries committed to liberal policies, in part because they have been major aid recipients from donors which require such policies. Other small economies (Albania, Georgia, Croatia and Moldova) have passed through the admission process because there has been little concern over their impact on the world trading system. On the other hand, the existing WTO members have been stricter towards larger applicants, and some of the larger or more cautious transition economies may have been deterred by the hard line taken by the existing WTO members.[24] Nevertheless, even the act of negotiating signals to potential foreign investors, international financial institutions and others that a country is contemplating acceptance of WTO conditions and is committed to a market-based economy. Only Turkmenistan has shown no formal interest in WTO accession.[25]

V. Conclusions

When the Council for Mutual Economic Assistance dissolved in 1991, its member states contained half a billion people—more than either the European Union or NAFTA today—and these countries were largely insulated from the market-driven international economy. This chapter analyses the progress of the reintegration of the formerly centrally planned economies into the global trading system, focusing on the relationship between multilateral processes and regional integration schemes. Almost all the countries in transition from central planning have accepted the WTO rule-based system in principle, and the potential danger of regionalism proving more attractive than multilateralism has not eventuated.

[24] Existing WTO members have taken a strict position towards transition countries insisting on fulfilment of conditions that many existing members do not fulfil and on meeting all commitments before entry. It is generally believed that the transition applicants are expected to offer an average bound tariff on industrial imports of ten percent, which is double the OECD average, but well below that of many existing WTO members, eg. India's average bound rate is 34 percent (Langhammer and Lücke, *supra* note 19). The hard line may have been counterproductive in some cases, with Belarus, Russia and Ukraine stalling or even back-tracking on commitments made at a previous stage in the negotiations.

[25] Tajikistan's transition process was delayed by the 1991–6 civil war, but it applied for WTO membership in 2001. Turkmenistan has adopted a policy of positive neutrality, which the government views as inconsistent with WTO membership. Among non-CMEA countries, Myanmar, like Cuba, is a WTO member because it had been a GATT contracting party, China, Laos and Cambodia are negotiating WTO accession, and Afghanistan and North Korea have shown no interest in WTO membership.

In the 1960s and 1970s the GATT diverged from a rule-based approach and established precedents of differential treatment of some centrally planned economies. These precedents have become embodied in practices, especially with respect to antidumping actions, which discriminate against non-market economies and which continue to be applied to economies in transition from central planning even after becoming market-based economies. Nevertheless, the general picture is of the transition economies accepting WTO principles and preferring to work within rather than outside the Organization. By 2001, sixteen transition economies were WTO members, and all but one of the remainder were at some stage in the negotiating process.

Regional trading arrangements could have posed a major challenge to the multilateral trading system because the big shift from central planning to market economies in 1989–91 coincided with a surge in popularity for regionalism and of doubts about multilateralism. China led the way against regionalism by pursuing and sticking with a multilateral approach,[26] even though China's bid for accession to the World Trade Organization was an arduous process from the initial application in 1986 to the conclusion of negotiations in 2000. The other large transition economy, Russia, has adopted a similar approach, although WTO membership is further away and Russia has flirted with regional arrangements with other former Soviet republics.[27]

By contrast, most of the Central and Eastern European transition economies, including the Baltic countries, have oriented their external economic policies towards the ultimate goal of joining the EU. Vietnam, Cambodia, Laos and Myanmar have also pursued regionalism, but in practice the situation is very different from that of the European transition economies because ASEAN is a far looser organization than the EU and still effectively leaves members scope to pursue their own national trade policies, as well as independent polices in all other areas.

In sum, despite potential hurdles of reintegrating the formerly centrally planned economies into the global trading system, the process went fairly smoothly in the final decade of the twentieth century. The effects of WTO accession are difficult to quantify, because the new members are small and the turmoil of transition makes with and without comparisons particularly difficult. The important point is a systemic one; transition economies have accepted rather than challenged the existing principles of the world trading system embodied in the GATT/WTO, and have generally pursued multilateral non-discriminatory trade policies. The only serious exceptions to this last generalization are the ten EU candidates, for whom EU accession should be a guarantee of accepting WTO norms rather than a source of negative regionalism. The fairly smooth reintegration of formerly centrally planned economies is significant for people beyond these countries' borders. The global trading system should include as much of the world's population as possible, and the effective absence of China and the CMEA countries was a big gap from the 1940s until the 1980s.

[26] Richard Pomfret, *Regionalism in Asia and its Impact on Sino-European Trade*, in TRADE AND INVESTMENT IN CHINA: THE EUROPEAN PERSPECTIVE at 81–97 (Roger Strange, Jim Slater and Limin Wang eds. 1998) analyses the absence of regionalism in Asia, and particularly China's constancy to the non-discrimination principle.

[27] Both Russia and China, together with North Korea, have been involved in the Tumen River project which in some guises hopes to establish a sub-regional economic zone where the three countries borders meet and in other guises envisages wider economic cooperation to include Mongolia, South Korea and Japan. The Tumen scheme, however, holds out no serious prospect of discriminatory trade policies and its implications for the global economy are minimal, see Richard Pomfret, ASIAN ECONOMIES IN TRANSITION: REFORMING CENTRALLY PLANNED ECONOMIES 130–42 (1996).

BIBLIOGRAPHY

Anderson Kym, 20(6) *Complexities of China's WTO Accession*, 10(6), THE WORLD ECONOMY 749 (1997)

Haus, Leah, GLOBALIZING THE GATT: THE SOVIET UNION'S SUCCESSOR STATES, EASTERN EUROPE, AND THE INTERNATIONAL TRADING SYSTEM (1992)

Islamov, Bakhtior THE CENTRAL ASIAN STATES TEN YEARS AFTER: HOW TO OVERCOME TRAPS OF DEVELOPMENT, TRANSFORMATION AND GLOBALISATION (2001)

Langhammer, Rolf, and Matthias Lücke, *WTO Accession Issues*, 22(6) THE WORLD ECONOMY 837 (August 1999).

Michalopoulos, Constantine, *The Integration of Transition Economies into the World Trading System*, World Bank Working Paper WPS 2182, September, 1999.

Michalopoulos, Constantine, and David Tarr (1994). *Trade in the New Independent States*, Studies of Economies in Transformation 13, (World Bank 1994)

Michalopoulos, Constantine, and David Tarr, *The Economics of Customs Unions in the Commonwealth of Independent States,* World Bank Policy Research Working Paper 1786 (June 1997).

Palmeter, David, *The WTO Antidumping Agreement and the Economies in Transition,* in STATE TRADING IN THE TWENTY-FIRST CENTURY at 115 (Thomas Cottier and Petros Mavroidis eds 1998).

Pavliuk, Oleksandr (2000), *GUUAM: The Maturing of Political Grouping into Economic Cooperation* in BUILDING SECURITY IN THE NEW STATES OF EURASIA: SUBREGIONAL COOPERATION IN THE FORMER SOVIET SPACE at 33 (Renata Dwan and Oleksandr Pavliuk eds.).

Paznyak, Vyachaslau (2000): *The Customs Union of Five and the Russia-Belarus Union*, in BUILDING SECURITY IN THE NEW STATES OF EURASIA: SUBREGIONAL COOPERATION IN THE FORMER SOVIET SPACE at 57 (Renata Dwan and Oleksandr Pavliuk eds.)

Pomfret, Richard, ASIAN ECONOMIES IN TRANSITION: REFORMING CENTRALLY PLANNED ECONOMIES (1996)

Pomfret, Richard, *ASEAN: Always at the Crossroads?,* 1(3) JOURNAL OF THE ASIA PACIFIC ECONOMY 365 (1996).

Pomfret, Richard, THE ECONOMICS OF REGIONAL TRADING ARRANGEMENTS (2001).

Pomfret, Richard, *Regionalism in Asia and its Impact on Sino-European Trade*, in TRADE AND INVESTMENT IN CHINA: THE EUROPEAN PERSPECTIVE at 81 (Roger Strange, Jim Slater and Limin Wang eds. 1998).

Pomfret, Richard, CENTRAL ASIA TURNS SOUTH? TRADE RELATIONS IN TRANSITION (1999).

Pomfret, Richard, *Enlargement to Include Formerly Centrally Planned Economies: ASEAN and the European Union Compared,* in THE EUROPEAN UNION AND ASEAN: TRADE AND INVESTMENT ISSUES AT 225(Roger Strange, Jim Slater and Corrado Molteni eds. 2000)

Pomfret, Richard, *Trade Initiatives in Central Asia: The Economic Cooperation Organization and the Central Asian Economic Community,* in BUILDING SECURITY IN THE NEW STATES OF EURASIA: SUBREGIONAL COOPERATION IN THE FORMER SOVIET SPACE at 11 (Renata Dwan and Oleksandr Pavliuk eds. 2000)

Sakwa, Richard, and Mark Webber, *The Commonwealth of Independent States, 1991–1998; Stagnation and Survival,* 51(3) EUROPE-ASIA STUDIES 379 (1999).

Temprano-Arroyo, Heliodoro, and Robert Feldman, *Selected Transition and Mediterranean Countries: An Institutional Primer on EMU and EU Accession,* 7(3)ECONOMICS OF TRANSITION 741 (1999).

Willem van der Geest, *Bringing China into the Concert of Nations: An Analysis of its Accession to the WTO*, 32(3) JOURNAL OF WORLD TRADE 99 (1998).

Zhao Wei, *China's WTO Accession Commitments and Prospects*, 32(2) JOURNAL OF WORLD TRADE 51 (1998).

CHAPTER 48

RULES OF ORIGIN AND RULES OF PREFERENCE AND THE WORLD TRADE ORGANIZATION: THE CHALLENGE TO GLOBAL TRADE LIBERALIZATION

William E. James*

TABLE OF CONTENTS

I. Introduction 264
II. Rules of Origin in the GATT/WTO System 264
A. Determination of Origin of Products by Contracting Members of the GATT: From Anarchy to First Principles 265
B. The Kyoto Convention: Substantial Transformation 266
C. The Uruguay Round Agreement on Rules of Origin 269
D. WTO Harmonization of Non-Preferential Rules of Origin 270
III. Economic Theory and Rules of Origin 273
A. Customs Unions and Free Trade Agreements: Trade Deflection Prevention 274
B. Rules of Origin, Antidumping and Voluntary Restraints 277
C. The Problem of Rules of Origin in an Economically Integrated World 277
D. Local Content Protection: A Value-Added Tariff as an Alternative to Rules of Origin 278
IV. Empirical Analyses of the Impact of Rules of Origin 280
A. The Cost to Firms of Compliance with Rules of Origin 280
B. Trade Diversion and Economic Costs of Protective Rules of Origin 280
C. Product-Specific Rules of Origin and Investment Distortion 282
V. Proliferation of Preferential Trading Arrangements 282
A. Hub and Spoke Systems and Rules of Preference: the "Spaghetti Bowl" Problem 283
B. The New Asian Regionalism and Rules of Origin 284
C. The FTAA and Rules of Origin 285
D. The EU Expansion and Rules of Origin 286
VI. Rules of Origin and Services 286
VII. Conclusion 287
Table
Table 1 How is Origin Determined? 267
Bibliography 289

* William E. James is Senior International Economist Growth through Investment, Agriculture and Trade (GIAT), Nathan Associates, Inc. GIAT is a USAID-funded cooperative project with the Government of Indonesia. The views expressed herein are those of author and not of USAID or the Government of Indonesia.
The author acknowledges the comments and suggestions of Michael Plummer.

I. Introduction

Rules of origin are the criteria used to determine the source country or territory of an imported product. The determination of origin is important where tariffs or other trade barriers differ depending on the source of imports. This is the case in the implementation of various trade restrictions and preferences. Rules of origin, for example, are a necessary accompaniment of commercial policy instruments such as country-specific import quotas as under the Multi-Fibre Arrangement, anti-dumping measures, safeguards, government procurement and quarantine restrictions implemented for reasons of health, safety or environmental protection. Rules of origin are also used in compilation of trade statistics and in the application of labeling and marking requirements. Rules of origin are used in determining whether or not a good is eligible for preferential treatment under the generalized system of preferences and other preferential trade arrangements. In particular, rules of origin have become critically important in the implementation of discriminatory regional and cross-regional trading arrangements such as free trade agreements, customs unions and common markets.[1]

The purpose of this chapter is to provide the reader with an appreciation of the potentially serious threat of misuse that a seemingly innocuous yet necessary set of rules governing product origin may pose for the free flow of goods, services and investment, and of the complexities that face negotiators and policymakers in decisions regarding disciplines over such rules. Following this introduction, Part II provides an historical overview of how the multilateral system has gradually evolved in addressing the issue of rules of origin, the principles and agreements that have been reached, and the present work program of the World Trade Organization with regard to harmonization of non-preferential rules of origin. Part III provides a discussion of how economists and economic theory have come to view the issue of rules of origin in the context of international commercial policy, preferential trading arrangements, and the tendency towards global economic integration. Part IV reports on the available empirical studies of the economic costs of rules of origin, particularly trade diversion in the context of free trade areas but also upon firms' decisions. Part V examines the recent upsurge in notifications of regional preferential trading agreements to the WTO and the plans for even more proliferation of such agreements in the three major hubs of world trade—East Asia, the Americas and Europe. Part VI considers the problems surrounding setting rules for determination of the origin of commercial services that entail international transactions. Finally, Part VII concludes with some discussion of the WTO agenda regarding rules of origin in the context of a new round.

II. Rules of Origin in the GATT/WTO System

Under the 1947 General Agreement on Tariffs and Trade, Contracting Parties were unencumbered by any regulation governing rules of origin. The absence of any specific GATT regulation covering rules of origin is perhaps surprising as such rules are essential in implementing non-MFN tariffs, quotas and other forms of import restrictions and preferences. Reference is frequently made to the problem of determination of origin of goods entering international trade of Contracting Parties in several GATT Articles (including Articles I, II, III, VIII, IX, XI, XIX and XXIV) as well as in some side agreements of

[1] Indeed, Gary. N. Horlick and Michael A. Meyer, *Rules of Origin from a Policy Perspective*, in RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE SURVEY 403 (E. Vermulst, P. Waer and J. Bourgeois eds. 1994) have referred to rules of origin as "stepchildren of other discriminatory devices."

the GATT. For example, the Agreement on Government Procurement concluded during the Tokyo Round establishes that Contracting Parties should not create rules of origin for purposes of government procurement that differ from the rules applied in the normal course of trade.

In 1953, the International Chamber of Commerce attempted to persuade the GATT to adopt a common definition of origin but no agreement resulted.[2] The inability of the Contracting Parties to reach agreement was the result of the recognition by several countries that the issue of rules of origin was not merely a technical one, but was intimately bound up with commercial policy. Hence, until the Uruguay Round negotiations, the GATT was all but silent on the issue.

A. Determination of Origin of Products by Contracting Members of the GATT: From Anarchy to First Principles

The "perfect liberty" enjoyed by Contracting Parties in setting rules of origin has resulted in a system of complex, overlapping and often conflicting rulings regarding product origin. For example, in the United States, numerous court rulings, intricate administrative decisions by the Customs and occasional Congressional interventions through legislation have resulted in a complex and confusing law on rules of origin.[3] U.S. case law on rules of origin dates back to 1907 but became increasingly important following the passage of the infamous Smoot-Hawley Tariff Act of 1930 .[4] U.S. anti-dumping law has also heightened the importance and use of rules of origin, although between 1921 and 1967 of 706 anti-dumping investigations only 75 led to definitive measures.[5] By the 1980s, the number of anti-dumping investigations began to increase and a very significant proportion resulted in voluntary restrictions or in definitive measures (estimated together to be 68 percent of cases investigated[6]). Subsequently, use of restrictive rules of origin to enforce penalties or export restraint agreements rose.[7]

The EC has taken advantage of the absence of discipline over the determination of origin to design product-specific rules of origin for purposes of implementation of anti-dumping measures that can only be described as instruments of protection.[8] As in the

[2] A working party on the issue was formed and was supported by a majority in submitting a text that proposed use of the principle of substantial transformation in determination of the origin of a good which has resulted from materials or labor of more than one country or that undergoes specific defined processes that alter the individual character of the good (see Edurne Navarro Varona, *Rules of Origin in the GATT*, in RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE SURVEY, *supra* note 1, at 359).

[3] N. David Palmeter, *Rules of Origin in the United States*, in RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE SURVEY, *supra* note 1.

[4] Palmeter, *supra* note 3, at 27 cites the "marking statute" of this law noting that it requires that foreign goods have a label identifying the country they originated from either on the good itself or on the container carrying the good.

[5] J. MICHAEL FINGER (ed.), ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 26 (1993)

[6] J. Michael Finger and Tracy Murray, *Antidumping and Countervailing Duty Enforcement in the United States*, in ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT, *supra* note 5, at 52.

[7] Palmeter, *supra* note 3, at 50–53, notes that regulation of steel imports in the United States has been implemented through very restrictive and complex rules of origin. Steel is the leading industry user of anti-dumping as a trade remedy in the United States but also all around the world (Jorge Miranda, Raul A. Torres and Mario Ruiz, *The International Use of Anti-Dumping*, 32(5) JOURNAL OF WORLD TRADE 5 (October 1998)).

[8] Edwin Vermulst and Paul Waer, *European Community Rules of Origin as Commercial Policy Instruments*, 24(3) JOURNAL OF WORLD TRADE (June 1990); Paul Waer, *European Community Rules of Origin*, in RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE SURVEY, *supra* note 1, at 85.

U.S. case, the EC anti-dumping regime has become increasingly active in recent decades and has traditionally been second only to the United States in use of definitive measures.[9]

Following the establishment of the GATT, successive multilateral negotiating rounds led to the overall reduction of quantitative restrictions and tariffs. However, beginning in 1961, trade in textiles and apparel came under increasing regulation and restriction with the establishment of the Multi-Fibre Arrangement ("MFA"). The MFA quota regime was adopted at the behest of importing countries including Australia, New Zealand, Canada, Norway, the European Communities, and the United States. Implementation of the system of bilateral quotas covering trade in textiles and apparel necessitated adoption of rules of origin. Not surprisingly these rules of origin have tended to be quite restrictive and have been adapted over time to protect domestic producers in these markets. For example, U.S. rules of origin governing textiles and apparel trade under the MFA were changed by administrations seeking to afford greater protection to U.S. producers in 1984 and again in 1996, both on the occasion of elections.

The Generalized System of Preferences ("GSP"), under which preferences were to be extended from developed to developing countries on a non-reciprocal basis, provided a further boost to the global use of rules of origin beginning in the late 1960s. Criteria had to be established in order to determine which goods would be eligible for preferential tariff treatment. Japan, for example, had refrained from joining the MFA and had remained abstinent in its use of antidumping measures and so had little use for restrictive non-preferential rules of origin. However, as it decided to implement GSP, Japan was forced to adopt rules of origin for that purpose.

Similarly, the use of rules of origin has been boosted by the proliferation of reciprocal preferential trading arrangements, permitted under GATT Article XXIV as well as under the Enabling Clause in situations involving developing countries. In the European Communities not only were intra-EC rules of origin necessary to implement the common market, additional rules regarding eligibility of goods for preferential treatment had to be established with the European Free Trade Agreement and with the numerous association agreements between the EC and nearby developing countries. This increasing proliferation of overlapping and often conflicting systems of rules of origin was of course most noticeable to customs authorities and related organizations, as well as by traders and businesses engaged in international trade.[10]

The absence of regulation pertinent to rules of origin was looking increasingly less like "perfect liberty" and more like anarchy. The tendency for customs authorities to interpret and administer rules of origin in a manner favorable to particular domestic producer interests also resulted in inconsistency and uncertainty for importers. The Customs Cooperation Council ("CCC") stepped into the breach left by the failure of GATT to regulate rules of origin.[11]

B. The Kyoto Convention: Substantial Transformation

The International Convention on the Simplification and Harmonization of Customs Procedures was held in Kyoto, Japan in 1973. The Kyoto Convention dedicated part of its

[9] Jorge Miranda, Raul A. Torres and Mario Ruiz, *supra* note 7; William E. James, *The Rise of Anti-Dumping: Does Regionalism Promote Administered Protection?*, 14(2) ASIAN-PACIFIC ECONOMIC LITERATURE 14 (November 2000). Recently, however according to WTO statistics, India has overtaken the United States in its use of anti-dumping measures. *See* Chapter 1 of this book.

[10] Vermulst (1994) cites three factors in the rise in importance of rules of origin: 1) increased use of contingent forms of protection; 2) increased incidence of regional trading arrangements; and 3) establishment of various non-reciprocal ("positive") discriminatory measures like the Generalized System of Preferences.

[11] The CCC was formed in Brussels in 1950 and is now known as the World Customs Organization ("WCO").

Table 1: How is origin determined?

Type of tradable	Principle/Criteria
PRIMARY:	Wholly produced or Obtained within a single country
Agricultural goods	unprocessed and harvested within
Marine Fisheries	ownership of vessel and means of catch
Forestry products	unprocessed and harvested within
Mineral products	extracted within territory or seabed
Scrap/Waste products	derived from manufactured products
	Collected within and fit only for recovery of raw materials
PROCESSED or MANUFACTURED:	Last Substantial Transformation
	Change in tariff heading Test
	Specified Process Test
	Value-added or Percentage Test
	Mixed Tests
SERVICES:	Nationality of Service Provider or Owner of Service-Providing Entity
	Residency Test
	Value-added or Percentage Test
	Ownership Test
	Intellectual Input Control Test
	Mixed Tests

Source: Author's compilations.

proceedings to an effort to establish the basis of standard practices for determination of product origin and for application of rules of origin, both non-preferential and preferential. The Kyoto Convention attained general agreement on application of the rules of origin regarding goods (mainly primary products) "wholly obtained" in one country.[12] However, instead of establishing one general rule for processed primary products and manufactured goods with components or labor input from more than one country, the Convention set out the principle of substantial transformation in determining the origin of such complex products and made recommendations for three tests or criteria for satisfying this principle.[13] The three tests include: 1) a change in tariff heading; 2) a percentage or value-added test; and 3) a specified manufacturing process test. Examples of the application of these tests have been provided in detail elsewhere.[14]

The principles and criteria or tests used to verify the origin of tradable goods and services are delineated in Table 1. Examples of the application of the three types of

[12] Varona discusses Rule 2, which covers goods wholly produced in one country. In addition to primary goods, which include minerals, vegetable (including forestry) products, live animals and animal products, and fish or marine products, scrap and waste products suitable only for recovery of raw materials are included in the rule. *See* Varona, *supra* note 2, at 361n.

[13] Normally the principle of *last substantial transformation* is used, however there are cases where the origin of a complex manufactured good, such as a semi-conductor or a photocopying machine is determined by the place of *most substantial transformation* (see Waer, *supra* note 7, at 139–141 and Varona, *supra* note 2, at 376–377).

[14] *See* Chapter 15 of this book. *See also*, RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE SURVEY, *supra*, note 1; Gary C. Hufbauer and Jeffrey J. Schott, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS (1992); N. David Palmeter, *Rules of Origin in Customs Unions and Free Trade Areas*, in REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM, (K. Anderson and R. Blackhurst eds. 1993); N. David Palmeter, *Pacific Regional Trade Liberalization and Rules of Origin*, paper presented at the PACIFIC ECONOMIC COOPERATION COUNCIL TRADE POLICY FORUM VII (June 1993)

tests governing the origin of processed and manufactured tradables are provided for clarification but also to illustrate to the reader the discretion and inconsistency with which such rules may be applied.

First, the *CTH* (*change in tariff heading*) test: canned tomato paste from Chile is imported by a Canadian catsup manufacturer. The tomato paste enters Canada under HS code 2002.90, the Canadian firm processes the paste into catsup which is exported to the United States under HS code 2103.20. Under the Canada-United States Free Trade Agreement using the CTH test, the catsup is assigned Canadian origin and is eligible to enter under the preferential tariff. However, a few years later, under the NAFTA agreement (involving Mexico, Canada and the United States) an exception (among many others) to the CTH test was inserted so that processing tomato paste into catsup was not regarded as sufficient to confer NAFTA origin. This exception was aimed at forcing catsup manufacturers to use tomato paste produced in one of the three countries rather than from Chile. Given an MFN tariff of 13.6 percent on tomato paste in the United States, one could almost certainly expect this change to result in trade diversion in tomato paste.

Second, the *specified manufacturing process* test: a product-specific rule that establishes specified manufacturing operations that do or do not confer origin upon the product. Japanese manufacturers of dynamic random access memories (DRAMs—a type of integrated circuit semiconductor) were investigated by the EEC in 1989 for alleged dumping. A ruling on product origin was necessitated by the fact that the Japanese manufacturers performed only certain operations within Japan and others in factories established within the EEC or in third countries, such as Malaysia. The EEC, using the specified process test, ruled that only the process of diffusion (performed by the manufacturers in Japan) could confer origin upon the DRAMs. This ruling disqualified DRAMs assembled and tested in Japanese-owned factories in the EEC from enjoying EC preferences and also applied antidumping tariffs to DRAMs that were assembled and tested by Japanese firms in Malaysian factories. This decision was taken even though the value-added in assembly and testing (both which are relatively labor-intensive) was thought to be higher than that of the diffusion process.[15]

Third, the *value-added* or *percentage* test is a test that requires a certain percentage of the value-added of a final good to be from within a country or region in order to obtain its origin from that country or region. The percentage test may also state that import (non-originating) content may not exceed a certain threshold or may be based upon physical criteria (minimum local components' percentage or maximum imported components' percentage). Under the Canada-United States FTA, for automobiles to qualify for preferential treatment, a fifty per cent value-added (using the net cost method) rule was adopted. Honda Civic sedans were assembled in Canada using engines produced in engine plants in Ohio that contained both U.S. and Japanese parts. Honda Canada estimated that 69 per cent of the value-added of each sedan originated in North America. However, the U.S. Customs Service used a set of rulings based on "the plain language" of the agreement to disallow most of the North American content of the engines and the labor used in assembling the sedans.[16] The Honda case revealed how a determined customs authority could turn aside logic in interpreting the value-added criteria. Add to that the uncertainty over the price of materials, exchange rate fluctuations and the lengthy and complex audits required and one can appreciate the possibilities for inconsistent and unpredictable rulings using this test.

[15] Waer, *supra* note 7, at 140

[16] Palmeter, *supra* note 3, at 68–73

The Kyoto Convention adopted a very flexible approach in attempting to start movement towards greater order and harmony in the area of rules of origin. It did not select one of the three tests as the basis for a harmonized system of rules of origin, reflecting the prevailing view that each has strengths and weaknesses and that no single test may be appropriate for all manufactured products. This is consistent with practice as countries often use mixed tests to determine product origin, particularly in the context of free trade agreements. It also left it to the discretion of national governments to select among alternative accepted methods used to calculate value-added for purposes of implementing the percentage test. Finally, it was recognized that the Convention was a starting point in moving towards harmonized rules of origin rather than being the last word.[17] While the Kyoto Convention was concluded in 1973, it was not until the Uruguay Round was concluded more than twenty years later that a concrete work program for harmonization of rules of origin was put in place.

The GATT Secretariat issued a note on rules of origin in 1981 and the Ministers agreed to a study of the subject. However, it was not until the Uruguay Round negotiations began in 1986 that serious attention was paid to the issue in the GATT.

C. The Uruguay Round Agreement on Rules of Origin

Article 9.2 of the Uruguay Round Agreement on Rules of Origin established the work program for harmonization of non-preferential rules of origin. Preferential rules of origin were excluded at the insistence of the EC.

A WTO Committee on Rules of Origin ("CRO") was established in 1995 with the mandate to achieve the harmonization program within three years, a fairly ambitious timetable. Technical support for the rules of origin negotiations was to be given the CRO by a Technical Committee on Rules of Origin ("TCRO") set up by the World Customs Organization ("WCO"), formerly the CCC. The TCRO was a necessity, given the complex issues facing the negotiators and the importance of familiarity with the intricacies of the Harmonized System ("HS") nomenclature. The coverage of non-preferential rules of origin includes those used to enforce all non-preferential commercial policy instruments (e.g., anti-dumping, countervailing duties and safeguards), marking and labeling requirements, discriminatory quantitative restrictions and tariff quotas, government procurement, and in the collection of trade statistics.

The Preamble to the Agreement on Rules of Origin states that the purposes of the Agreement include ensuring that the rules themselves "do not create unnecessary obstacles to trade", and that they are to be prepared and applied "in an impartial, transparent, predictable, consistent and neutral manner." The harmonization program called for by the Agreement instructs the CRO (assisted by the TCRO) to define goods "wholly obtained" from a single country as well as minimal operations or processes that do not confer origin. Rules of origin for ten categories of goods wholly obtained in one country were spelt out in the Kyoto Convention.[18]

The principle of "substantial transformation" is applicable to all other categories of goods (i.e., products that are processed or manufactured with input from more than one country). The decision to use a change in tariff classification of the product in question as the guiding criterion in determining the origin of goods produced in more than one

[17] The United States in its law ratifying the Kyoto Convention excluded the section on rules of origin.

[18] Varona provides a list of the ten categories of such wholly obtained goods as stated in the Kyoto Convention. Varona, *supra* note 2, at 361n.

country was a significant advance.[19] However, where the CTH or a change in tariff subheading ("CTSH") criterion was inapplicable, supplementary criteria would also be permitted. These supplementary criteria may include an *ad valorem* (percentage) test or a manufacturing operations or a specific process test. However, the Agreement requires that the percentage test be accompanied by the method of calculation and that the processing test be accompanied by a precise specification of the processing operation required to confer origin.[20]

The Agreement specifies that the TCRO will develop the harmonized definitions of goods wholly obtained in a single country in as much detail as possible as well as those of the minimal operations not conferring origin. In addition, the TCRO was directed to develop the rules of origin for goods produced in more than one country based upon the change in tariff classification test and, where necessary, supplementary criteria, and to work with the CRO in solving technical issues pertinent to non-preferential rules of origin.

Unfortunately, the negotiations of the CRO on non-preferential rules of origin have been extremely complex and progress has been exceedingly difficult,[21] to the extent that some experts have questioned the utility of the effort towards harmonization.[22] The CRO failed in any case to meet its targeted completion date in 1998 and negotiations continue to drag on several years later.[23] This is not to say that progress has not been made in the negotiations.

D. WTO Harmonization of Non-Preferential Rules of Origin

The progress of the negotiations in harmonization has been slow not only because of technical difficulties but also because rules of origin are closely connected to commercial policy in the Contracting Parties.[24] The embedded relationship between restrictive trade policies and rules of origin can be clearly seen in the implementation of antidumping measures, quota restrictions under the MFA, and in the very decision to exclude preferential rules of origin from the negotiations. The decision of the United States to change its rules of origin for textiles and apparel in 1996 in a manner that appears to

[19] As Sherry M. Stephenson, *Multilateralizing Harmonized Rules of Origin: Is It a Realistic Option?*, ORGANIZATION OF AMERICAN STATES 7 (July 1998) notes, this was the first time a specific method was so designated by the Contracting Parties.

[20] The Agreement permits use of rules that describe processes or operations that do *not* confer origin if they are a clarification of a positive standard or in cases where a positive determination of origin is unnecessary.

[21] *See* Chapter 15 of this book for a detailed description of the work of the CRO to date.

[22] Wim Keizer, *Negotiations on Harmonized Non-Preferential Rules of Origin: A Useless Task from a Trade Policy Perspective*, 31(4) JOURNAL OF WORLD TRADE 145 (1997) argues that the negotiation of harmonized non-preferential rules of origin is perhaps a: *"useless task from a trade policy perspective."*

[23] Philippe G. Nell, *WTO Negotiations on the Harmonization of Rules of Origin: A First Critical Appraisal*, 33(3) JOURNAL OF WORLD TRADE, 45–72 (June 1999) provides a first review of the negotiations progress. Also see the WTO homepage for updated information on the harmonization program.

[24] Stephenson, *supra* note 19; Sherry M. Stephenson and William E. James, *Rules of Origin and The Asia Pacific Economic Cooperation*, 29(2) JOURNAL OF WORLD TRADE 77 (April 1995); William E. James, *APEC and Preferential Rules of Origin: Stumbling Blocks for Liberalization of Trade?*, 31(3) JOURNAL OF WORLD TRADE 113 (1997); and Vermulst, *supra* note 10, discuss the embedded relationship between restrictive trade policies and rules of origin. For example, antidumping measures (either penalty duties or price undertakings) require very specific application of restrictive rules of origin in order to prevent circumvention of the measures through third countries. Similarly, application of country-specific quota restrictions also must be enforced by restrictive rules of origin.

contradict the purposes of the Agreement is a further demonstration of the intention of the members to retain their use as protectionist devices.[25]

The very logic of attempting to assign origin to modern manufactured goods is questionable. Hocking states:

> "... it appears indisputable that the nature of the trading environment is very different from that of a century ago. The globalization of production now means that it is virtually impossible to identify in a meaningful sense the origins of a given product. Cars, computers, household electronic goods, each are sourced from components across the world and may be produced in a variety of locations." [26]

Despite the ambiguity of the actual origin of goods produced in more than one country or customs territory, governments appear to have a strong preference to retain their own discretion in conferring origin. Given the revealed preference of contracting parties to preserve the discretionary use of rules of origin as instruments of commercial policy it is not surprising that much of the provisional text in the harmonization program is in square brackets.[27]

The nature of the negotiations is that until everything is agreed upon, nothing is agreed upon. Even if the complex technical issues in determining product origin could be overcome by patient effort, there is no guarantee that at the end of the day a consensus will be achieved.

In the case of *products wholly obtained*, the CRO has been able to reach a broad consensus with two exceptions: parts and raw materials recovered from articles that can no longer serve their original purpose or otherwise be used, and products of sea-fishing. In the former case a problem arises as many spare parts may not contain origin markings and, thus, origin is conferred on the country where the parts are recovered and, further, recovery of some parts may involve environmentally hazardous or toxic waste. Some countries for reasons of environmental protection have indicated at the CRO that they wish to insert a clause that allows them to regard parts recovered that involve no such waste to be different from those that do. The CRO has resisted because of the requirement for uniform and consistent application of rules of origin. In the latter case there is general agreement that the origin of fish caught in territorial waters is based on the country concerned while for those caught in international waters origin is conferred upon the flag of registration of the ship or vessel used. There is disagreement, however, upon whether to use most or least restrictive definitions of territorial waters (twelve vs. two hundred miles) in defining a country's territorial waters and upon where to confer origin in cases where countries allow foreign vessels to fish in their territorial waters.[28]

[25] The U.S. decision to confer origin to where garments are cut rather than sewn was specifically intended to crack down on apparel exports of China but had adverse consequences for other trade partners. In particular, the change denied EU origin to a number of textile products that incorporated textile materials such as silk, grey cloth and cotton from China, including Italian scarfs. This meant that these products became subject to U.S. quota restrictions. The EU Commission challenged the change in the WTO (Nell, *supra* note 23). A compromise solution between the European Commission and the United States was notified to WTO in July 2000 (downloaded from: http://docsonline.wto.org).

[26] Brian Hocking, *Trade Politics: Environments, Agendas, and Processes*, in TRADE POLITICS: INTERNATIONAL, DOMESTIC AND REGIONAL PERSPECTIVES (B. Hocking and S. McGuire eds.1999) 1, 6.

[27] Stephenson, *supra* note 19; Nell, *supra* note 23

[28] Nell, *supra* note 23, elaborates on the rather significant economic issues involved in the alternative definitions. Countries with large exclusive economic zones may wish to use as broad a definition of territorial waters as possible to retain their fishing rights whereas other countries want to use a more restrictive definition in order to expand the international fishing area.

Closely related to the issues surrounding the origin of goods wholly obtained in a single country are those concerning minimal processes that do not confer origin. These are not expected to be stumbling blocks for the overall harmonization program but will not be adopted until final agreement is reached.

Nell[29] reported that the harmonized work program ("HWP") after four years of negotiations had reached significant results in approximately one-third of the HS tariff lines (35 chapters). Progress was made in agricultural goods and mineral products, both of which involve products wholly obtained in one country. However, progress was not confined to such goods. Cement, paper and printing, chemicals and pharmaceutical products are examples of processed and manufactured products for which negotiations also advanced. However, for many manufactured goods there was no consensus in the TCRO.

A sample of the so-called "big problem areas"[30] reveals once again that it is the use of rules of origin as policy instruments rather than the technical difficulties of determining product origin that has made progress most difficult. Processed agricultural items, textiles and apparel, transportation equipment, and electrical and non-electrical machinery top the list of problem sectors. Among the other types of products over which there has been disagreement are plastics, rubber, leather, footwear and iron and steel products. These sectors are among those with generally high levels of protection (processed agricultural products, textiles and clothing, leather, footwear) or that are subject to intensive use of antidumping or other safeguard measures (iron and steel, rubber and plastic products) or are regarded as "strategic industries" (transportation equipment, electrical and non-electrical machinery).

In the case of processed agricultural goods (HS Chapters 1–24), over one hundred issues were handed over to the TCRO.[31] The TCRO has provided input on substantive technical issues, indicating whether or not a manufacturing process was substantial or whether or not the character of a good obtained was substantially different from the inputs used. However, negotiators of countries resisting conferring origin have largely chosen to ignore the technical input. As of July 2000 (Committee on Rules of Origin, Minutes, June 23, 2000) no consensus was reported in ninety instances and for only eleven items was a consensus or near consensus reached for the processed agricultural goods.[32]

The TCRO has also provided input for consideration by CRO negotiators for 38 issues in chemical processes (HS Chapters 28–40) and 86 issues in machinery (HS Chapters 84–90). The input provides options for determining if certain processing or assembly activities constitute a last substantial transformation. For machinery, unassembled parts and components are found under the same chapter heading as more complete components or final products and this gives rise to the question of whether or not assembly constitutes a last substantial transformation. The TCRO provides options where the CTH test could be replaced by a CTSH test, that is a change in tariff sub-heading. The 86 issues in machinery are only the tip of the iceberg as the negotiating text is extremely long and complex. Obtaining consensus is made difficult by the absence of clear trade-offs and the fact that the interests of the thirty most active countries in the negotiations vary broadly across sectors.[33]

[29] Nell, *supra* note 23.

[30] *Id.*

[31] *Id.*

[32] *See* Chapter 15 of this book for a more updated account of progress.

[33] Nell, *supra* note 23, at 68–69 points out that the inconsistency of positions among the countries in these negotiations makes it nearly impossible to form alliances. Furthermore, the negotiations aim to achieve a harmonized single result applicable to all contracting parties and this makes it all but certain that residual rules will be important in finally attaining a consensus.

Other outstanding and controversial issues involve so-called "residual rules" made necessary because items undergoing a process regarded as a last substantial transformation do not meet the requirement for a change in tariff heading, or where there are one or more exceptions noted to an otherwise origin-conferring change, or when an item has minimum operations not conferring origin. These residual rules may involve a value-added or percentage test or a specified process test. The more restrictive the primary rules are, the greater the need there will be for such residual rules and the larger the stakes will be in setting such residual rules.

These complications make it very likely that the negotiations over non-preferential rules of origin will drag on for some time. The fact that every five years the HS classifications are modified, coupled with the on-going changes in technology and production processes resulting from these changes, means that the task of setting rules of origin that meet consensus may be one for Sisyphus. And even if the negotiations succeed, the large amount of preferential trade will still not be covered. Yet it is the rules of origin governing preferential trade that has attracted the most interest and concern among economists. Annex II to the Agreement on Rules of Origin contains a non-binding "Common Declaration with Regard to Preferential Rules of Origin". As Stephenson points out:

> "The distinction drawn in the WTO Agreement on Rules of Origin between non-preferential and preferential rules of origin, and the limitation of the Agreement to harmonize only those non-preferential rules, clearly indicates the importance attached by governments to their ability to design preferential rules without multilateral interference. Moreover, this distinction between non-preferential and preferential rules, and the different treatment accorded respectively, implicitly recognizes that rules of origin serve as commercial policy instruments and have trade policy objectives."[34]

The remainder of this chapter focuses on the economic analysis of rules of origin and, in particular, how rules of origin are, in the context of preferential trading arrangements, in reality rules for determining the eligibility of tradables for preferential treatment—rules of preference. The growing importance attached to preferential trading arrangements can be seen in the expansion of the European Union, the effort in the Americas to establish a hemisphere-wide free trade area, and in the new regionalism emerging in East Asia. Whether or not (and under what conditions) these arrangements will improve economic welfare for members and non-members is an important question for economic theory and empirical analysis.

III. Economic Theory and Rules of Origin

Economic analysis of preferential trade agreements involving reciprocal exchange of tariff reductions amongst members was initially focused solely on the question of a customs union ("CU").[35] Economic analysis of regional or preferential trading agreements has until recently been known as the "theory of the customs union." The dominance of the CU over other forms of preferential arrangements, including the free trade agreement ("FTA"), is a venerable tradition in economics that goes back to Viner (1950).[36]

[34] Stephenson, *supra* note 19, at 9

[35] In contrast to standard models of international trade that feature two countries and two goods, analysis of preferential arrangements requires more complex models (James, *supra* note 23). RICHARD POMFRET, THE ECONOMICS OF REGIONAL TRADING ARRANGEMENTS (1997) summarizes the theoretical literature in this regard.

[36] Jacob Viner, THE CUSTOMS UNION ISSUE (1950). *See* POMFRET, *supra* note 32 for a thorough discussion of CU dominance over the FTA. Robert Mundell, *Tariff Preferences and the Terms of Trade*, SCHOOL OF ECONOMIC AND SOCIAL STUDIES 1–13 (1964) explores how formation of a CU may influence the

Shibata's[37] seminal article drew attention to the relative neglect of forms of preferential union other than the CU, and particularly of the lack of analytical writing on free trade agreements. His focus was on the use of rules of origin in enforcing free trade agreements (as opposed to customs unions), that is, the rules used in deciding whether goods entering the member countries were eligible or ineligible for preferential treatment. In doing so, Shibata warned that such rules of preference could turn out to have protectionist effects. Why rules of origin are important in a free trade agreement is elaborated upon in the following section.

A. Customs Unions and Free Trade Agreements: Trade Deflection Prevention

The key difference between a CU and an FTA is that the CU sets a common external tariff whilst an FTA allows its members to set external tariffs independently. The central importance of rules of origin in enforcing tariff preferences and in blocking "trade deflection" in a Free Trade Area is elaborated upon in Shibata.[38] In essence, any FTA without rules of origin would in effect become a CU with the external tariff being that of lowest-tariff member. All imports from outside the FTA would initially enter through the port of the lowest-tariff member in order to evade the higher tariffs in the other members' ports. Hence, for example, without a rule of origin the ASEAN Free Trade Agreement would become a CU with Singapore's zero tariff becoming the effective external tariff.[39] Thus, rules of origin become necessary in order for member countries to set external tariffs (and non-tariff barriers) vis-à-vis non-members independently, whilst allowing goods from member countries in under preferential treatment. This enforcement function of rules of origin is referred to as "prevention of trade deflection."

One of the implications of the economic theory of Preferential Trading Arrangements is that in an FTA as opposed to a CU, members would be concerned with the implications of trade deflection for their industrial and trade policies and would, therefore, be inclined to frame rules of origin with commercial policy objectives in mind.[40] Krueger argues that a CU will always be superior to an FTA, largely because of the trade-diversion brought

terms of trade of member and non-member countries. Anne O. Krueger, *Free Trade Areas Versus Customs Unions*, 54 JOURNAL OF DEVELOPMENT ECONOMICS 169 (1997) continues in the tradition of finding the CU superior to the FTA. However, various authors in Jefferey J. Schott, FREE TRADE AREAS AND U.S. TRADE POLICY (1989) assert that under certain circumstances an FTA can be superior to a CU. The renewal of interest in the FTA is reflected in the most recent thorough survey of preferential trade liberalization (Arvind Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, 38 JOURNAL OF ECONOMIC LITERATURE 287 (June 2000)). He pays close attention to the FTA and its enforcement mechanism—the rules of origin.

[37] Hirofumi Shibata, *The Theory of Economic Unions: A Comparative Analysis of Customs Unions, Free Trade Areas and Tax Unions*, in FISCAL HARMONIZATION IN COMMON MARKETS, VOL. 1, THEORY (C. Shoup ed. 1967)

[38] *Id.*

[39] Various official and business interests within ASEAN have expressed concern over Singapore's tilt towards numerous free trade agreements. Prime Minister Mahathir of Malaysia expressed the fear that Singapore will become "an open backdoor" that will flood the region with duty-free imports from the various non-ASEAN FTA partner countries. For discussion of Singapore's strategy see Linda Low, *Singapore's RTA Strategy*, paper presented at the PACIFIC ECONOMIC COOPERATION COUNCIL(PECC) TRADE POLICY FORUM AND THAI MINISTRY OF COMMERCE ON REGIONAL TRADING ARRANGEMENTS: STOCKTAKE AND NEXT STEPS (June 12–13 2001).

[40] Robert Mundell, *The Theory of Tariffs and Monetary Policies*, in PROTECTIONISM AND WORLD WELFARE, 244 (1993) finds that a customs union is likely to alter the terms of trade in favor of member countries (and against the rest of the world) compared with a free trade agreement in the presence of trade deflection.

about by discriminatory tariffs and rules of origin.[41] However, as Vermulst[42] and Vermulst and Waer[43] have demonstrated, customs unions also make use of restrictive rules of origin in the context of enforcing antidumping measures.[44] Indeed, one of the problems facing the EEC as a customs union was that, while it had a common external tariff, it lacked a common commercial policy. The proliferation of non-tariff barriers within the EEC threatened an increasing segmentation of its market. Hence, the members recognized the importance of the Single Market Program and the establishment of a common market.

Rules of origin impose real costs on firms in member countries that engage in trade and seek to gain from preferential tariffs.[45] Hence, overly restrictive or complex rules of origin necessarily involve high costs and present firms with a trade-off between complying and receiving the preferential treatment or not complying and so avoiding the costs imposed (but losing the advantage of preferential tariff treatment). This trade-off is graphically analyzed in Stephenson and James[46] and James[47]. The basic point that emerges is that more restrictive and complex rules of origin reduce the expansion of intra-union trade relative to the potential, since highly restrictive rules of origin are costly for firms in member countries to comply with. Firms within the union choose to comply or not to comply based on their evaluation of the benefit they receive from preferential tariffs versus the costs they incur in meeting the rules of origin.

Article XXIV of the GATT constrains members of preferential trade arrangements ("PTAs") from raising external barriers to non-members. In this context, successive multilateral negotiation rounds have served to lower MFN tariffs and, thus, to erode the margin of preference ("MOP") that can be offered by PTAs. This lowering of the MOP offered by PTAs, coupled with increased globalization of production, may have led to efforts to impose tighter rules of origin in order to preserve preferential market access to the intended beneficiaries.[48] However, it may be the case that as multilateral liberalization occurs and MFN tariffs close in on zero, firms and other producers will have less incentive to lobby for restrictive rules of origin. The problem is that without progress at the multilateral level, where negotiations are cumbersome to say the least, there may be increasing trade discrimination as the tendency to negotiate bilateral FTA-type arrangements gains momentum.

The lowering of traditional tariff and non-tariff barriers on a most favored nation basis has led GATT Contracting Parties to substitute new forms of protection for the

[41] Krueger, *supra* note 34.

[42] Vermulst, *supra* note 10.

[43] Vermulst and Waer, *supra* note 7.

[44] France maintained a highly restrictive quota on autos manufactured in the U.K. by Japanese affiliates, arguing that the cars were of Japanese and not EU origin. This restriction was maintained for over a decade even though it was in violation of EU law. Ultimately, the restriction on vehicles produced by affiliates in the UK was overturned, although the quota on autos produced in Japan continued to be maintained by France (Ian Forrester, *The Economics of Rules of Origin*, in RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE SURVEY, *supra* note 1, at 7.

[45] For example, analysis of the cost of border formalities to comply with EC-EFTA preferential tariffs is at least three percent of the value of the goods being traded (Jan Herrin, *Rules of Origin and Differences in Tariff Levels in EFTA and in the EC*, OCCASIONAL PAPER NO. 13, EUROPEAN FREE TRADE ASSOCIATION (February 1986)). Firms exporting goods from Norway to France would thus only seek to comply if the margin of preference were greater than three percent of the value of the goods exported, and would otherwise pay the MFN tariff. Hence, stringent rules of origin may vitiate the purpose of the FTA.

[46] Stephenson and James, *supra* note 24.

[47] James, *supra* note 24.

[48] This seems to underlie the development of product-specific rules of origin as instruments of commercial policy in the EU (Vermulst and Waer, *supra* note 7, and Vermulst, *supra* note 10).

old forms. For example, antidumping investigations and measures have proliferated in recent decades[49] and have become especially prevalent in seeking to restrict imports from East Asian countries.[50] As antidumping measures are inherently discriminatory in nature, they also require rules of origin to be made effective against offending exporters and to prevent "dumpers" from circumventing the measures in force by transshipment or by assembly in third countries or the country of importation.

The proliferation of free trade agreements that has occurred in recent decades has magnified the importance of rules of origin in international trade and this has rekindled the interest of economists, particularly theorists, in developing models that examine firm behavior under preferential tariffs enforced by rules of origin. Tariff revenue redistribution effects are another focus of theoretical analysis[51]. In cases where there is asymmetry in tariff levels (and, presumably, in dependence on tariff revenue) between partners (as is the case between Mexico and its NAFTA partners) it can be shown that the member with high tariffs may lose from the FTA[52].

Most analysis of PTAs has been done under the assumption of perfect competition and those that deviate from the assumption by introducing imperfect competition such as Mundell[53] and Krishna[54] do not include intermediate inputs and so exclude analysis of the impact of rules of origin.[55] An article by Krishna and Krueger[56] considers rules of origin in the presence of imperfect markets.

Consider the case with a monopolist producing a final good from components produced in two other countries. Suppose the final good producing country and one of the component-supplying countries form a free trade agreement. The monopolist producing the final good produces enough to supply all the imports demanded by the partner country once the two countries implement preferential tariffs. The reduction in the tariff on the final good in the partner country leads to lower prices and expansion of the output of the monopolist. However, if rules of origin force the foreign monopolist to purchase components from the partner and the partner is a high-cost producer, the monopolists cost function shifts upwards, and may offset the effect of the tariff reduction on the price of the final good. Once again, the result of the FTA on welfare within the FTA is ambiguous. And from the standpoint of the non-member country (the rest of the world), under imperfect competition there is even more reason to be concerned about the rules of origin and their protective impact than under perfect competition.

New applications to investment, including foreign investment, and plant location decisions are in the works as part and parcel of this effort. However, this literature is relatively new and not well developed.[57] Still, there are other pressing areas of current commercial policy interest that intimately are concerned with rules of origin and, to some of these, the chapter now turns.

[49] Finger, *supra* note 5; Miranda, Torres and Ruiz, *supra* note 6. *See also*, Chapter 11 of this book.
[50] James, *supra* note 8
[51] Pomfret, *supra* note 33.
[52] Panagariya, *supra* note 34.
[53] Mundel, *supra* note 34.
[54] Krishna (1988).
[55] Panagariya, *supra* note 34, reviews these models.
[56] Kala Krishna and Anne O. Krueger, IMPLEMENTING FREE TRADE AREAS: RULES OF ORIGIN AND HIDDEN PROTECTION (1994)
[57] Kingston (1994) refers to investment distortion as being one possible unintended result of restrictive rules of origin. Local content and origin requirements in protected markets may encourage otherwise uneconomic investments.

B. Rules of Origin, Antidumping and Voluntary Restraints

The increased use of antidumping in restricting international trade necessarily increases the importance of rules of origin. This is not only the case when antidumping investigations lead to definitive measures such as antidumping duties but also in cases that are resolved through "voluntary restraint agreements." Rules of origin aimed at preventing the "dumped" items being transshipped through third countries are necessary in such cases. Indeed, according to Pearson[58], both the United States and the EU have imposed antidumping duties on such third parties found to be assembling products similar to those upon which antidumping measures had previously been imposed without even investigating if the products in question were being dumped and have caused injury to domestic producers.

Voluntary restraint agreements ("VRAs") were made illegal by Article 11 of the Uruguay Round Agreement on Safeguards (but only between Members), and existing ones were required to be phased out over time. However, VRAs continue to be used as an alternative to antidumping duties in cases involving countries that are not WTO members.[59] For example, Russian steel is subject to "voluntarily" agreed-upon import quotas, negotiated in 1998 with the United States. While no exact estimate of the amount of world trade that is subject to non-preferential trade restrictions is currently available, the percentage is likely to be substantial.[60] Recent estimates of the amount of world trade subject to discriminatory preferential tariffs are as high as 42 percent, with substantial regional variations.[61] The rules of origin associated with discriminatory policies tend to be stricter than for normal trade under MFN tariffs. This is true even when the intent of the policies is positive as in promotion of trade of less-developed countries under various programs such as the Generalized System of Preferences ("GSP"), the Africa, Caribbean, and Pacific ("ACP") scheme, the Andean Pact, the Caribbean Basin Initiative ("CBI"), among others.[62] Typically, the rules of origin in such non-reciprocal preferential trading schemes include a value-added requirement which includes credit for inputs from the country giving the preference—or what Japan has called the "Preference-Giving Country Principle."[63]

C. The Problem of Rules of Origin in an Economically Integrated World

With the rise of the multinational enterprise, intra-firm and intra-industry trade has expanded and foreign direct investment has spawned international production networks

[58] Brendan Pearson, *Rules of Origin*, 7(2) ASIAN-PACIFIC ECONOMIC LITERATURE 14 (November 1993).

[59] Voluntary Export Restraint agreements could be governmental (as in the Japan-Korea Textile VER) or private (as in the Taiwan Textile VER with Japan). See Norio Komuro, *Japanese Rules of Origin*, in RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE SURVEY, *supra*, note 1, at 313.

[60] Michel M. Kostecki, *Marketing Strategies and Voluntary Export Restraints*, 25(4) JOURNAL OF WORLD TRADE (August 1991) for example, estimated that fifteen percent of world trade was affected by "voluntary restraints" on exports.

[61] *See* Jean-Marie Grether and Marcelo Olarreaga, *Preferential and Non-Preferential Trade Flows in World Trade*, WORLD TRADE ORGANIZATION, STAFF WORKING PAPER ERAD-98-10, (September 1998), who report that in 1993–97 preferential trade as a share of total trade was seventy percent in Western Europe, twenty-five percent in the Americas, but only four percent in Asia and Oceania.

[62] See for example, Komuro, *supra* note 59, on Japan's GSP rules of origin.

[63] Also referred to as the "donor country content principle." Japan is not alone in applying this "principle." However, Japan excludes so-called sensitive finished products that are likely to be important exports of less developed countries meant to benefit from the preferences (textiles, footwear, toys and leather goods). See Komuro, *supra* note 59, at 324–5.

with specialized facilities in a variety of locations. The so-called "internationalization" of production, particularly of machinery, makes identification of a country of origin of many such products difficult or even arbitrary. In this context, the principle of "last substantial transformation" becomes relevant in assigning product origin. However, with increased use of contingent protection in the form of antidumping measures and countervailing duties, and the explosion of preferential trading agreements, there has been intensive political pressure to require more than a change in tariff heading test to satisfy the principle.[64]

In particular, the act of assembly of many products (apparel, footwear, television sets, radios, semi-conductors, etc.) is frequently referred to in "screwdriver provisions" in antidumping laws and free trade agreements as being insufficient to confer origin even in cases where there is clear economic advantage in conducting such assembly operations in countries with comparative advantage in labor-intensive activities.[65] The use of value-added requirements in rules of origin tend to make it more difficult for countries that specialize in labor-intensive activities to qualify for tariff preferences.[66] Stephenson and James[67], for example, point out that, all other things equal, for any required value-added percentage, origin and preference eligibility will be conferred more readily on a country with higher wage operations than to a country with lower wage operations. The use of a value-added rule in determining preferences in situations of divergent levels of economic development may distort investment and harm economic efficiency.

Rules of origin used to enforce preferential trading arrangements often appear to conflict with the objective of trade-creation. Waincymer states:

> "... the rules are too often designed to take back with one hand the preference given in the other. Making the rules more rigid as the level of preference diminishes in the face of overall reductions in tariff rates is surely not protected by Article XXIV."[68]

D. Local Content Protection: A Value-Added Tariff as an Alternative to Rules of Origin

There are some important economic implications of using value-added requirements in assigning product origin. A minimum value-added requirement is technically equivalent to a maximum import content rule. For example, a 55 percent value-added test is the same as a 45 percent import content test. It must noted, however, that precise definitions of numerator and denominator in calculating the import content ratio or the equivalent value-added ratio are necessary for this equivalence to hold in practice. Consistency in definitions of what constitutes originating value-added for purposes of constructing such ratios is, unfortunately, exceptional.

[64] A value-added rule is most often favored by politicians even though such a rule imposes costs on firms that are not present with a CTH-based rule (Horlick and Meyer, *supra* note 1).

[65] The CTH test needs to be supplemented by a change of tariff sub-heading test ("CTSH") where six-digit HS codes do not distinguish between parts and final assembled products. Instead of such a liberal rule of origin, however, politicians favor use of high value-added rules in conferring origin (see Horlick and Meyer, *supra* note 1).

[66] Horlick and Meyer, *supra* note 1.

[67] Stephenson and James, *supra* note 24, at 87.

[68] Jeffrey Waincymer, *Comment* in RULES OF ORIGIN IN INTERNATIONAL TRADE (E. Vermulst, P. Waer, and J. Bourgeois eds. 1994) at 414.

In recent preferential trade agreements definitions of originating value-added have become increasingly restrictive.[69] Moreover, discretion in selecting the formula to be used in calculating value-added has been used to exclude some products from preferential tariff treatment. Meeting the value-added requirement also implies a substantial amount of documentation and subsequent costs to firms seeking to comply with preferential rules of origin.[70] Moreover, the higher the value-added requirement to satisfy a preference in tariff treatment, the more likely is trade diversion to occur.[71]

A feature of rules of origin that emerges from the preceding analysis is their all-or-nothing nature.[72] That is, products that are imported into a member country of an FTA are either judged to be eligible for preferential treatment under the rules of origin or not. Given the internationalization of production, such judgements can easily be arbitrary in nature. For example, under NAFTA rules, an automobile with less than 62.5 percent North American content is judged to be ineligible, but footwear with 55 percent local content is eligible. For other products, only fifty percent local content is required to satisfy NAFTA's rules of origin.

Such arbitrary differences can and will introduce distortions into firms' decisions regarding purchases of production inputs. The application of local content requirements creates a bias in technological effort towards the saving on foreign or imported inputs and against saving on domestic or PTA-originating inputs.[73] Furthermore, the interpretations of customs authorities may also introduce additional uncertainty regarding application of tariff preferences.[74] Differences in accounting practices and in the definition of local content can also result in unexpected problems in compliance.

Lloyd[75] has proposed a value-added based tariff alternative to rules of origin based on a certain fixed minimum value-added or maximum import content ratio. The *ad valorem* tariff would vary inversely with the ratio of PTA-originating value added, thus eliminating the inefficiencies associated with the all-or-nothing rules of origin. The major drawback of Lloyd's proposal is the cost involved in documentation of value-added or import content ratios. Implementation of such a weighted tariff scheme would require governments to address underlying problems of inconsistent accounting practices and varying definitions of what constitutes local content. As the Honda case discussed in Part II above demonstrates, achieving agreement on actual value-added percentages is no simple matter and even the most precise calculations can be upset by fluctuating exchange rates and prices of intermediate components and materials.

[69] The NAFTA definition of value-added is more restrictive than that of the Canada-United States FTA, which, in turn is more restrictive than that of the United States-Canada Auto Pact (Horlick and Meyer, *supra* note 1).

[70] Horlick and Meyer, *supra* note 1 and Herrin, *supra* note 43, report that the potential savings from FTA tariff reductions may be completely offset by the administrative costs of complying with a value-added requirement, particularly in small and medium sized firms.

[71] William E. James and Masaru Umemoto, *NAFTA Trade with East Asia: Rules of Origin and Market Access in Textiles, Apparel, Footwear and Electrical Machinery*, 17(3) ASEAN ECONOMIC BULLETIN (June 2000).

[72] Peter Lloyd, *A Tariff Substitute for Rules of Origin in Free Trade Areas*, in THE WORLD ECONOMY (November 1993).

[73] Michael Mussa, *The Economics of Content Protection*, in PROTECTIONISM AND WORLD WELFARE 266 (D. Salvatore ed. 1993), demonstrates how protection of domestic content can bias technological effort.

[74] Honda Motors Canada experienced difficulties in this regard following the implementation of the Canada-United States FTA in 1989.

[75] Lloyd, *supra* note 72.

IV. Empirical Analyses of the Impact of Rules of Origin

In contrast to the growing theoretical analysis of rules of origin, there presently exist few empirical studies of the impact of rules of origin on trade flows or upon firms' investment and plant location decisions. This is not surprising given the computational requirements for precise empirical estimates of trade creation and trade diversion in an FTA.[76] The studies that have been conducted are indicative of the costs that rules of origin place on firms seeking to take advantage of tariff preferences and on the overall potential trade diversion that may be caused by restrictive rules of origin in the context of FTAs and various forms of contingent protection.

A. The Cost to Firms of Compliance with Rules of Origin

Surveys of companies engaged in imports and exports in the United States and the European Free Trade Area to ascertain the administrative cost burdens imposed by rules of origin applied in the European Union reveal that such costs are frequently significant. For example, the U.S. International Trade Commission reported that U.S. companies suffered from large sales volume losses and administrative costs averaging between $30,000 and $100,000 per firm as a result of complex and inconsistent rules of origin.[77] Similarly, Herrin[78] found that firms in the EFTA encountered costs of at least two to three per cent of export values in complying with the rules of origin necessary to enjoy EU tariff preferences. Both studies report that paperwork and record-keeping required for compliance was one major burden. In particular, the documentation of value-added was particularly burdensome for small and medium enterprises engaged in trade.[79]

These studies confirm that FTA rules of origin impose a trade-off between beneficial expansion of trade and costs imposed on firms through efforts by authorities to prevent trade deflection. Overly restrictive rules of origin therefore may vitiate the gains from preferential trade liberalization. As will be seen below, they may also shift the balance in such agreements away from trade creation towards trade diversion.

B. Trade Diversion and Economic Costs of Protective Rules of Origin

Trade diversion occurs when formation of a preferential trade arrangement ("PTA") results in purchases of imports by member countries shifting from a low-cost non-member producer to a higher-cost member producer. On the other hand, trade creation occurs when a member's high-cost production is substituted for by lower-cost production (imports) from the other member country. The analytical framework for evaluation of welfare effects (trade creation vs. trade diversion) of a PTA is necessarily more complex than for

[76] In contrast, quite a few simulations of the impacts of FTAs on trade and investment flows have been conducted using computable general equilibrium models. Sherman Robinson and Karen Thierfelder, *Trade Liberalization and Regional Integration: The Search for Large Numbers*, TMD DISCUSSION PAPER 34, IFPRI (January 1999) survey this literature. These models are not discussed in this chapter as they do not focus on the role of rules of origin in affecting trade and investment flows.

[77] United States International Trade Commission, The Impact of Rules of Origin on U.S. Imports and Exports (1985).

[78] Herrin, *supra* note 43.

[79] Horlick and Meyer, *supra* note 1, at 405.

the evaluation of non-discriminatory trade policies, in that three countries rather than two must be included in the model.[80] A further distinction required for meaningful analysis of rules of origin used to enforce the PTA is that between final and intermediate goods.[81]

For example, a simple model of trade in intermediate goods under varying rules of origin is developed in order to demonstrate the potential trade diversion caused by restrictive rules of origin in a free trade agreement[82] involving trade in final and intermediate goods. Models such as these provide a theoretical justification for the assertion that restrictive rules of origin are likely to be trade-diverting in perfectly competitive markets with non-zero tariffs.

An example of the use of rules of origin in a manner that is very likely to divert trade involving intermediate and final goods is found in the NAFTA treatment of textiles and apparel. The NAFTA combines restrictive rules of origin with a high margin of preference in textiles and apparel.[83] In essence, NAFTA requires under the "yarn-forward" or "triple-transformation" rule of origin, that one hundred per cent of the content used in textile and apparel originate in North America.[84]

Empirical verification of the trade-diverting impact of rules of origin is difficult, to say the least. However, James and Umemoto[85] make an *ex post* assessment of NAFTA rules of origin and the potential impact on trade flows in textiles, apparel, footwear and electronics. Under the assumption of constant import market shares, they estimate that up to $7.4 billion (in constant 1990 prices) of textiles and apparel exports from ten East Asian developing economies may have been diverted annually from the NAFTA textiles and apparel markets.[86]

The capture of the NAFTA negotiations over rules of origin by industry lobbies has been carefully documented. Cameron and Tomlin state:

> "The reason Sorini (the US negotiator in the textiles group) was so confident that quotas could be eliminated was that the industry had already identified its price: the creation of highly restrictive rules of origin. This trade-off was repugnant to the NAFTA negotiators in the rules of origin working group, but the textile negotiators—unlike those working in autos—had won the right to negotiate their own rules of origin. The role of industry was critical in this textiles deal . . . the idea of restrictive rules of origin was discussed as a price for eliminating quotas . . . The Mexicans argued . . . it was better to lose textile jobs to a country like Mexico that imported from the United States than to low-wage Asian countries . . . "[87]

[80] Robert Mundell, *supra* note 34.

[81] Lloyd, *supra* note 72.

[82] James and Umemoto, *supra* note 71.

[83] *Id.*; Maxwell A. Cameron and Brian W. Tomlin, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE (2000)

[84] The United States-Canada FTA did not require the yarn to be produced in member countries (Cameron and Tomlin, *supra* note 83). However, the United States insisted on a yarn-forward requirement in order for apparel to originate in NAFTA and "bribed" Mexico to accept this with an offer to eliminate quotas on apparel products produced there. *Id.*

[85] James and Umemoto, *supra* note 71.

[86] Japan, a non-quota market for textiles and apparel, is used as a control country and footwear and electronics products are used as control sectors. Import market share in NAFTA textiles and apparel for the ten East Asian economies contracts sharply after formation of NAFTA but continues to increase in Japan. In contrast, East Asia's share of NAFTA's import market of footwear remains constant, and for imports of electronics increases.

[87] Cameron and Tomlin, *supra* note 83, at 137.

C. Product-Specific Rules of Origin and Investment Distortion

Rules of origin can be used to influence investment and location of plants but, paradoxically, can also be used as instruments to prevent affiliates of non-member based multinationals from taking advantage of preferential tariffs even after they have established facilities within a member of the union.[88] Restrictive origin and anti-circumvention rules, as in the EU and U.S. decisions, have had the unintended effect of attracting inward investment, creating stiff competition for established local producers. In the cases of Japanese slide-fasteners and semiconductors, special product-specific rules of origin have been designed following Japanese investments in the EU to take back preferences.[89]

The NAFTA negotiations also provide some insight on the use of rules of origin to influence investment decisions. In the case of automobiles, the Big Three auto companies pressed for a highly protective value-added requirement as the rule of origin for NAFTA.[90] Negotiators from Canada were strongly opposed to changing the rule of origin from the fifty per cent content rule of the United States-Canada FTA and those from Mexico were initially also opposed, since they wanted to attract investment in auto assembly from Japan and Korea. However, following a compromise, the Big Three won a 62.5 per cent rule of origin (negotiated in the rules of origin committee rather than the auto working group). Mexico went along in order to protect its own domestic auto parts industry.[91] The NAFTA auto rules of origin also were meant to improve upon the somewhat ambiguous rules in the United States-Canada pact that contributed to the Honda impasse.[92] The "success" of NAFTA in creating very detailed rules of origin may be difficult to replicate and, in the end, may set a bad precedent if parties to future FTAs negotiate numerous sets of overlapping and inconsistent rules of origin.

V. Proliferation of Preferential Trading Arrangements

"Regionalism" in the form of preferential trading arrangements has displayed explosive growth since the early 1990s.[93] The number of agreements notified to the GATT/WTO exceeded two hundred as of March 2001 and includes 159 agreements in force. Since 1995

[88] Negotiators on investment in NAFTA were in an awkward position because of the opposition of labor and populist politicians such as H. Ross Perot ("the giant sucking sound"). The negotiators were tasked with getting the most open and liberal investment environment possible. Hence, the better the agreement on investment from the standpoint of achieving open investment, the worse the negotiators looked (Cameron and Tomlin, *supra* note 83, at 101).

[89] Waer, *supra* note 7, at 113, 140. In the case of semiconductors, exports from third countries such as Malaysia and Thailand were ruled to have Japanese origin since the specific process of diffusion was done in Japan. In still another case involving photocopy machines (anti-circumvention) from Japan, the EU designed a product-specific origin rule in order to find that exports of Ricoh photocopiers from an affiliate plant in California had Japanese origin, and so were subject to antidumping duties (*id.* at 140).

[90] Cameron and Tomlin, *supra* note 83, at 134.

[91] Cameron and Tomlin, *supra* note 83, at 136.

[92] This comment is based upon personal communication as to the reason NAFTA rules of origin are spelt out in detail with Matthew Rohde at the Office of the U.S. Trade Representative.

[93] For discussion see Jagdish Bhagwati and Arvind Panagariya, *Preferential Trading Areas and Multilateralism: Strangers, Friends or Foes*, in THE ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS 1 (J. Bhagwati and A. Panagariya eds. 1996); James, *supra* note 23; and Arvind Panagariya, REGIONALISM IN TRADE POLICY: ESSAYS ON PREFERENTIAL TRADING (1999). Of the 159 agreements in force in 2001, 129 were notified under GATT Article XXIV, 18 under the Enabling Clause and 12 under GATS Article V (www.wto.org). The Enabling Clause, part of the Tokyo Round agreement, permits developing countries to form preferential trade arrangements without complying with all the GATT Article XXIV requirements.

over one hundred new agreements have been notified to the WTO and presently almost all 140 WTO Contracting Parties are members of at least one PTA.[94] The overwhelming majority of agreements in force are FTAs rather than CUs, implying an important role for rules of origin or what may equivalently be referred to as the rules of preference.[95] The literature is divided on whether these agreements are "building blocks" or "stumbling blocks" for multilateral open trade.[96] The inability of the Contracting Parties to agree to the launch of a new round at the Seattle Ministerial in 1998 appears to have given new momentum to the drive towards more discriminatory preferential trade agreements.

A. Hub and Spoke Systems and Rules of Preference: the "Spaghetti Bowl" Problem

Hub and spoke systems arise when a "central" hub country or region (e.g., the EU) undertakes bilateral free trade agreements with "peripheral" spoke countries.[97] The hub country gains preferential access to all the spoke countries but the spokes do not gain such access to one another. Thus, the hub country can use its advantageous position to attract investment that might otherwise go to spoke countries. The spoke countries obtain preferential access to the large hub country market, but only firms in the hub country can import duty-free intermediate inputs and materials from the spoke countries.[98]

Rules of origin are critical in regulating preferential access between the hub and the various spokes. The hub country will have an incentive to dictate rules in a manner that protects sectors that are sensitive to competition from domestic producers in the spokes. This may result in a complex system of tariff discrimination and may lead to additional investment diversion towards the hub. The spoke countries may seek to counter this possibility through free trade agreements amongst each other. Negotiating numerous

[94] Panagariya (1998) states that Hong Kong and Japan are the only exceptions. Japan began negotiating a FTA with Singapore and studying similar agreements with other countries after 1998. At the time of writing Hong Kong was negotiating an agreement with New Zealand. See Low, *supra* note 37, and James, *Case Studies on RTA Developments: A U.S. Perspective*, paper presented at the PACIFIC ECONOMIC COOPERATION COUNCIL TRADE POLICY FORUM AND THAI MINISTRY OF COMMERCE ON REGIONAL TRADING ARRANGEMENTS: STOCKTAKE AND NEXT STEPS (2001).

[95] Stephenson and James, *supra* note 24. N. David Palmeter, *Rules of Origin or Rules of Restriction? A Commentary on a New Form of Protectionism*, 26 FORDHAM INTERNATIONAL LAW JOURNAL 1 (1987) goes further and refers to "rules of restriction."

[96] Panagariya, *supra* note 34, provides a survey of the theoretical literature in this regard and comes down largely for the "stumbling blocks" point of view. See Fred C. Bergsten, *Globalizing Free Trade*, FOREIGN AFFAIRS 105–20 (May/June 1996) and Lawrence Summers, *Regionalism and the World Trading System*, SYMPOSIUM ON POLICY IMPLICATIONS OF TRADE AND CURRENCY ZONES (1991) for the building blocks point of view. The literature also uses the phrase "friends or foes" of multilateral trade openness (Panagariya, *supra* note 94, at 93).

[97] Peter Lloyd, *The Changing Nature of Regional Trading Arrangements*, in REGIONAL INTEGRATION IN THE ASIA PACIFIC (B. Bora and C. Findlay eds. 1996)

[98] For in depth assessments of hub and spoke trading arrangements see Richard Snape, *Trade Discrimination-Yesturday's Problem?*, 219 THE ECONOMIC RECORD 72, 381–96 (December 1996); Paul Wonnacott, *Beyond NAFTA – The Design of the Free Trade Agreement of the Americas*, in THE ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS (J. Bhagwati and A. Panagariya eds. 1996); Richard Snape, Jan Adams and D. Morgan, REGIONAL TRADE AGREEMENTS: IMPLICATIONS AND OPTIONS FOR AUSTRALIA (1993); Kym Anderson and Richard Snape, *European and American Regionalism: Effects on and Options for Asia*, 8(4) JOURNAL OF THE JAPANESE AND INTERNATIONAL ECONOMICS 454 (1994); and Christopher Findlay and Mari Pangestu, *Regional Trade Arrangements in East Asia: Where Are they Taking Us?*, paper presented at the PACIFIC ECONOMIC COOPERATION COUNCIL TRADE POLICY FORUM AND THAI MINISTRY OF COMMERCE ON REGIONAL TRADING ARRANGEMENTS: STOCKTAKE AND NEXT STEPS (2001).

agreements may be costly and may lead to the hub retaliating with more restrictive rules of origin or even with antidumping measures.[99]

Membership of new spoke countries in hub and spoke systems may have additional costs that may adversely affect the competitiveness of new member's firms in non-preferential trade. Existing spokes may also seek to limit the benefits of new member spokes, reinforcing the overlapping system of discriminatory tariffs and rules of origin.[100] One of the largest hub and spoke systems involves the EU. A developing country that chooses to integrate with the EU will need to switch input sources in textiles and apparel from low-cost Asian producers to high-cost sources within the EU and will therefore become less competitive in non-EU markets. An example of such trade diversion is found in Egyptian textiles and apparel under the rules of origin governing preferential access to the EU apparel markets.[101]

Bhagwati warned that the large and increasing number of FTAs is likely to result in a "spaghetti bowl" of varying preferential tariffs, implying varying degrees of tariff discrimination enforced by overlapping sets of rules of origin.[102] As Panagariya[103] notes, such an outcome flies in the face of global production and distribution networks that multinational enterprises are forging. The insistence on "local content" in satisfying preference-conferring rules of origin represents a backward step in this context. The prevalence of tariff discrimination and the increasing share of global trade that is preferential may ultimately undermine the fundamental WTO principle of non-discrimination. The development of preferential trade links between the EU and MERCOSUR (a CU grouping Argentina, Brazil, Paraguay and Uruguay), between the EU and Mexico, and the possibility of more cross regional FTAs is cause for concern in this context.

B. The New Asian Regionalism and Rules of Origin

After the United States opted for preferential trade beginning in 1985 (with an FTA with Israel) and then in 1989 (with Canada), Asia remained the last bastion of what might be called a "pure multilateral" approach to international trade. Japan, Korea, Hong Kong, Taiwan and mainland China are five major global trading economies that remained outside preferential trading agreements after the conclusion of the Uruguay Round Agreement. Singapore, as a member of the Association of Southeast Asian Nations ("ASEAN"), was involved in a PTA since 1977 but one that has been notified under the Enabling Clause rather than GATT Article XXIV. The ASEAN Free Trade Agreement, similarly, was notified under the Enabling Clause in 1992. Intra-ASEAN trade comprises roughly twenty per cent of ASEAN members' global trade, so the ASEAN free trade agreement ("AFTA") can hardly be viewed as having a large potential for trade diversion (or trade creation). The Asian financial and currency crisis that spread through the region in 1997,

[99] The members of a customs union (like the EU) do not use antidumping against one another, but this is not the case in most free trade agreements (the Australia-New Zealand FTA is an exception as the countries have managed to harmonize their competition policies).

[100] Findlay and Pangestu, *supra* note 98.

[101] Nihal El-Megharbel, THE ECONOMIC EFFECTS OF RULES OF ORIGIN: THE CASE OF THE EGYPTIAN-EU PARTNERSHIP AGREEMENT (forthcoming) reports that EU rules of origin will require Egyptian clothing exporters to purchase textile fabric that is 25 percent more costly than Asian textile fabric in order to enjoy preferential access to the EU market.

[102] Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS (J. Bhagwati and A. O. Krueger eds. 1995)

[103] Panagariya, *supra* note 94.

however, has led Singapore to reconsider its strategic position in the global economy and to opt for a more aggressive approach in seeking PTAs with major trading partners outside ASEAN. Singapore concluded its first cross-regional FTA with New Zealand in 1999 and at the time of writing was actively negotiating agreements with the United States, Japan and the EU among others.[104]

Japan's decision to enter into negotiations with Singapore marks a sharp break with its past practice of pure multilateral non-discrimination.[105] Japan has also been studying the possibility of closer economic relations with South Korea, as well as FTAs with Mexico, Chile and New Zealand. Korea has followed suit with proposals for FTAs with Singapore, New Zealand, Chile, Mexico and Japan.[106] The possibility of numerous new cross-regional FTAs in Asia has given rise to what Bergsten has called the new Asian regionalism.[107] The momentum of the trend towards preferential trade in Asia appears to be driven by the expansion of preferential trade in Europe and the Western Hemisphere. In the area of rules of origin, Asian trade agreements may be crafted so that they avoid creation of a spaghetti-bowl. Keeping rules relatively simple and general across products and services would be in keeping with the spirit of the declaration in the annex to the Uruguay Round Agreement Final Act on preferential rules of origin.

The Singapore-New Zealand FTA is a model of apparent simplicity in its rules of origin. Instead of hundreds of pages of detailed product specific rules, the agreement adopts the principle of goods wholly obtained in either country as sufficient to confer origin in the case of primary, unprocessed goods and scrap. For goods processed or manufactured in either country it uses a minimum value-added test of forty per cent. The rule allows accumulation of value-added between the two countries and also provides for partial preferential tariff treatment to the extent of local value-added if the product has undergone a last manufacturing process in either country. Goods with no local content but that undergo quality control and product testing may also qualify if expenditures on such operations are not less than fifty per cent of the ex-factory price of the product. If East Asian bilateral preferential agreements are to be compatible with broader regional initiatives for economic integration, such as a free trade area encompassing ASEAN, China, Japan and Korea, then it will be important to see that rules of origin are kept simple and consistent between bilateral agreements. Otherwise the "spaghetti bowl" phenomenon may arise.

C. The FTAA and Rules of Origin

The 34 states of the Organization of American States decided in 1995 to launch negotiations for a Free Trade Area of the Americas ("FTAA") with a target date of completion in 2005. A hemispheric free trade agreement with a single system of rules of origin would be vastly better for global trade openness than a hub and spoke system with complex

[104] *See* Chapter _ of this book.

[105] William E. James, *Trade Relations of Korea and Japan: Moving from Conflict to Cooperation*, in KOREA AND THE ASIAN-PACIFIC REGION (L.J. Cho, M.K. Park and C.N. Kim eds. 2001). Japan has participated in the GSP scheme since 1971. Japan's non-reciprocal tariff preferences are ostensibly in support of industrialization and economic development in the beneficiary developing countries.

[106] The possibility of a Japan-Korea FTA receded with the publication of a controversial new history textbook in Japan that fails to mention Japan's atrocities during the Second World War and the visit of Prime Minister Koizumi to the Yasukini Shrine on August 14, 2001.

[107] C. Fred Bergsten, *East Asian Regionalism: Towards a Tripartite World*, THE ECONOMIST, July 15, 2000, at 20–22.

and overlapping rules of origin centering on large countries as hubs. Such an agreement linking the entire Western Hemisphere (excluding Cuba) is a hugely ambitious negotiation and it is by no means certain that it will succeed. The difficulties currently facing Argentina and Brazil have put enormous pressure on their political leaders to increase protection and to delay or roll back MERCOSUR commitments. It is not easy to see how they could agree to a hemispheric FTA under the difficult economic conditions likely to prevail in the next few years as they struggle to restore fiscal discipline and reduce the burden of debt. Hence, it is still possible that a hub-and-spoke system will eventually emerge involving the southward expansion of NAFTA or northward expansion of MERCOSUR or of bilateral FTAs. There are also transatlantic agreements like the Mexico-EU FTA to further complicate matters.

D. The EU Expansion and Rules of Origin

The single most ambitious program for expansion of preferential trade outside of the FTAA, is in Europe. The negotiations for enlargement of the fifteen-member EU to thirteen additional countries that have already made applications were officially launched in March 1998 and are still in process.[108] The enlargement will mean a 34 percent increase in the EU area and the addition of over 105 million people to the single market. The European Commission asserts that the enlargement will benefit third parties by bringing these countries into the EU fold with a single set of trade rules, a common tariff, and uniform administrative procedures. However, the enlargement is likely to be uneven and will no doubt take some countries longer than others. In the meantime, the EU hub will gain still more spokes and more complex sets of rules of origin. In addition to the enlargement, the EU is negotiating new association agreements with nine Middle Eastern countries and with five Southeastern European countries.[109] This will also reinforce the hub-and-spoke nature of preferential trade in regions contiguous to the EU. Unless some discipline is brought to bear on preferential rules in the WTO, there is serious potential that third countries will be put at a commercial disadvantage in these markets.

VI. Rules of Origin and Services

Services trade was brought under multilateral disciplines for the first time with the coming into force of the Uruguay Round Final Act in 1995. The General Agreement on Trade in Services ("GATS") attempts to apply key GATT principles to international trade in services. For example, GATS enshrines the most favored nation principle, although permitting members to list exceptions that are to be phased out over a ten-year period.[110] Part VI of the GATS takes a very rudimentary approach to rules of origin, but it fails to elaborate upon the basic way in which to distinguish whether or not a particular service

[108] The thirteen countries are: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic, Slovenia, and Turkey.

[109] The EU has already concluded the negotiations with Tunisia, Israel, Morocco, the Palestinian Authority, Algeria, Syria, Egypt, Jordan and Lebanon. It is exploring association agreements (FTAs) with Bosnia-Herzegovina, Croatia, Yugoslavia, Macedonia and Albania (see the European Commission homepage: http://europa.eu.int/comm/enlargement).

[110] Michael J. Trebilcock and Robert Howse, THE REGULATION OF INTERNATIONAL TRADE (1999) and Geza Feketekuty, *Improving the Architecture of the General Agreement on Trade in Services*, in SERVICES TRADE IN THE WESTERN HEMISPHERE: LIBERALIZATION, INTEGRATION, AND REFORM (S. Stephenson ed. 2000), provide interpretations of the GATS.

is provided by a member or non-member. Article XXVII allows Contracting Parties to withhold benefits under GATS to services determined to be supplied from the territory of a non-member or by a corporate entity deemed to not be a service supplier of a member.[111] Unlike the case of goods, the test in determining the origin of a service supplier is not specified. The application of a percentage test to services is difficult given the paucity of data on services trade. Other tests of the nationality of corporate ownership might be applied but are also difficult to implement given the vagaries of determining who owns multinational enterprises that supply internationally-traded services.[112] And in cases where a service supplier is operating in a member country but is incorporated or owned by a non-member the rules are vague.

Four "modes of supply" are identified in the GATS: 1) direct cross-border transactions (as in long-distance international telephone calls); 2) consumption abroad (as in tourism services); 3) consumption at an establishment supplying the service (as in a foreign-owned bank); and 4) consumption through the presence of natural persons (as in a consultation with a foreign accountant in one's own office). Interpretation of the origin of services under these four modes of supply can be complicated. For example, if a Japanese tourist in Bali visits a Citibank branch in order to withdraw funds from his account in Citibank in Tokyo, should origin be assigned to Japan or the United States (where Citibank's headquarters is)?

Information and communications technology services also present complications in identification of origin. For example, call-back services owned by a European telecommunications company used by a customer in Australia receiving a call from the United States may route the call through operators in India or the Philippines. What then is the proper country of origin of this service?

Another problem arises because of the proliferation of preferential trading agreements that incorporate liberalization of services. Such regional integration agreements that provide for preferential liberalization of services are permitted under GATS Article V (modeled after GATT Article XXIV).[113] The "spaghetti bowl" problem discussed above for rules of origin in preferential trade in goods also applies to the case of overlapping regional agreements in the area of services. With contracting parties involved in membership in more than one such agreement, the rules for enforcing preferences in services may be difficult to administer and may raise the costs facing services suppliers. Stephenson concludes that:

> ". . . Article V is at present a weak and ineffective discipline. Its weaknesses may undermine the trading system in the future if it is not strengthened . . . "[114]

VII. Conclusion

This chapter has not argued that any one of the three criteria of last substantial transformation is preferable over the others in all circumstances, which is why we observe residual rules becoming important in the context of the harmonization work program at

[111] Trebilcock and Howse, *supra* note 110, at 291

[112] One might apply a formal criterion such as location of the corporate headquarters or place of incorporation but this may prove unsatisfactory.

[113] Sherry M. Stephenson, *Regional Agreements on Services in Multilateral Disciplines: Interpreting and Applying GATS Article V*, in SERVICES TRADE IN THE WESTERN HEMISPHERE: LIBERALIZATION, INTEGRATION, AND REFORM (S. Stephenson ed. 2000), elaborates upon the challenges in interpreting GATS Article V.

[114] *Id.* at 104.

the WTO. The choice of a CTH or CTSH rule however, appears to offer the broadest scope for harmonization of non-preferential rules of origin. The lack of progress in the work program is principally due to the revealed preference of governments to retain rules of origin as commercial policy instruments rather than to technical issues. Stronger political will is needed to break the logjam. In the area of preferential rules of origin there is no discipline, only a non-binding declaration.

The chancellor of the exchequer of the UK, Gordon Brown, has called for elimination of tariffs on trade in industrial products between the EU and the United States[115], a proposal that echoes that of a Transatlantic Free Trade Agreement. Such an agreement would have to cover agriculture and other sensitive areas and would not be able to gloss over the serious trade disputes that have arisen in these sectors between the United States and the EU. The proponents of a "building blocks" point of view argue that by expanding free trade agreements such as NAFTA, the EU, MERCOSUR and AFTA (each covering a significant proportion of global trade), global free trade can be gradually achieved. However, each of these agreements is enforced by different sets of rules of origin and harmonizing them would be perhaps an even more difficult task that has been the case with non-preferential rules of origin.

The presumption that Free Trade Agreements or Customs Unions necessarily reduce barriers for non-members has been challenged[116]. Moreover, there is no doubt that in particular sectors, including those of key importance to less developed countries, barriers have been raised rather than lowered (textiles and clothing) or adverse consequences have resulted for third parties in export markets (agriculture). Rules of origin have been of particular concern in textiles and clothing trade, both in the context of preferential agreements (as in NAFTA) but also in administration of MFA quotas (as shown by the fact that the EU has brought a WTO challenge to the textile rules of origin promulgated by the United States in 1996). The proliferation of antidumping measures, enforced by the application of still another set of rules of origin, further underscores the significance of discriminatory protection in global trade.

The surest and safest way to ensure that these agreements are benign is to move ahead with another WTO round that significantly reduces MFN protection, including tariffs in industrial and agricultural products, non-tariff barriers in agriculture, and that substantially opens up services.

The share of world trade that is covered by preferential trading arrangements was recently estimated to be 42 per cent.[117] Given the share of world trade affected by various forms of contingent protection, particularly antidumping, that must be enforced by rules of origin, it is plausible that one-half or more of world trade flows are now subject to varying sets of rules of origin. In the context of a new round of multilateral trade negotiations, it is recommended that efforts be made to make rules of origin more transparent and consistent. Launch of a new round might also dispel some of the posturing by Contracting Parties that has held up the harmonization program over rules of origin that are non-preferential.

In the context of the prospects for a new trade round, the following specific recommendations are offered:

[115] *See* Malcolm Rifkind, *Toward an Atlantic Free Trade Area*, THE ASIAN WALL STREET JOURNAL, (August 22, 2001)

[116] Panagariya, *supra* note 94

[117] Grether and Olarreaga, *supra* note 59.

First, the consistency of existing and new preferential trading arrangements with the two key conditions under Article XXIV should be rigorously assessed. The Committee on Regional Trade Agreements (CRTA) should adopt a strict interpretation of the two key conditions, that: 1) agreements must cover "substantially all trade" between constituent members; and 2) that barriers to imports facing non-members shall not be increased. In fact, it would be desirable to insist that, on average, barriers to non-members be lowered. Second, the new round must also tighten discipline over rules of origin used in prevention of circumvention in antidumping. In particular, contracting parties should not be permitted to use rules of origin to extend antidumping measures to third parties that have neither been shown to have been dumping nor of causing injury. Third, the new round should seek to strengthen international discipline over preferential trade rules of origin. In particular, turning the non-binding declaration on preferential rules of origin into a binding work program would be desirable. Fourth, new preferential trade agreements should be encouraged to adopt simple and transparent rules of origin and to avoid inconsistency in rules of origin between agreements. Fifth, agreements that incorporate services, should likewise be scrutinized under a strengthened GATS Article V. Finally, a liberal approach to rules of origin that extends benefits of reduced barriers to all modes of supply and all service providers regardless of corporate nationality would be the simplest and most comprehensive approach.

Reducing the margins of preference between preferential and non-preferential trade will render rules of origin much less harmful to global trade than would otherwise be the case. A new multilateral round is the one of the surest means to assure that preferential agreements become building blocks rather than stumbling blocks for overall global trade liberalization.

BIBLIOGRAPHY

Anderson, Kym and Richard Snape, "European and American Regionalism: Effects on and Options for Asia," 8(4) *Journal of the Japanese and International Economies*, 454 (1994).

Bergsten, C. Fred, "East Asian Regionalism: Towards a Tripartite World," *The Economist*, July 15, 2000, 20–22.

Bergsten, C. Fred, "Globalizing Free Trade," *Foreign Affairs*, May/June, 1996, 105–20.

Bhagwati, Jagdish, "U.S. Trade Policy: The Infatuation with Free Trade Areas," in J. Bhagwati and A. O. Krueger (eds.), *The Dangerous Drift to Preferential Trade Agreements* (1996) Washington, D. C.: American Enterprise Institute for Public Policy Research.

Bhagwati, Jagdish and Arvind Panagariya, "Preferential Trading Areas and Multilateralism: Strangers, Friends or Foes?" in J. Bhagwati and A. Panagariya (eds.), *The Economics of Preferential Trade Agreements*, Washington, D. C. : AEI Press: 1–78 (1996).

Cameron, Maxwell A. and Brian W. Tomlin, *The Making of NAFTA: How the Deal was Done*, Ithaca and London: Cornell University Press (2000).

El-Megharbel, Nihal, Forthcoming *The Economic Effects of Rules of Origin: The Case of the Egyptian-EU Partnership Agreement*, Ph.D. Thesis, Department of Economics and Political Science, Cairo University.

Feketekuty, Geza, "Improving the Architecture of the General Agreement on Trade in Services," in S. Stephenson (ed.), *Services Trade in the Western Hemisphere: Liberalization, Integration, and Reform*, Washington, D.C.: Brookings Institution Press and Organization of American States (2000).

Findlay, Christopher and Mari Pangestu, "Regional Trade Arrangements in East Asia: Where Are they taking us?" Paper presented at the Pacific Economic Cooperation Council Trade Policy Forum and Thai Ministry of Commerce on Regional Trading Arrangements: Stocktake and Next Steps, Bangkok, Thailand, June 12–13, 2001.

Finger, J. Michael, (ed.), *Antidumping: How it Works and Who Gets Hurt*, Ann Arbor: University of Michigan Press (1993).

Finger, J. Michael and Tracy Murray, "Antidumping and Countervailing Duty Enforcement in the United States," in J. M. Finger (ed.), *Antidumping: How it Works and Who Gets Hurt* (1993) Ann Arbor: University of Michigan Press: 241–54.

Forrester, Ian, "The Economics of Rules of Origin," in E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin in International Trade*: *A Comparative Survey* (1994) Ann Arbor: University of Michigan Press: 7–25.

Grether, Jean-Marie and Marcelo Olarreaga, "Preferential and Non-Preferential Trade Flows in World Trade," World Trade Organization, Staff Working Paper ERAD-98-10, Geneva, September 1998.

Herrin, Jan, "Rules of Origin and Differences in Tariff Levels in EFTA and in the EC," Occasional Paper No. 13, European Free Trade Association, February, 10 (1986).

Hocking, Brian, "Trade Politics: Environments, Agendas, and Processes," in B. Hocking and S. McGuire (eds.), *Trade Politics: International, Domestic and Regional Perspectives* (1999) London and New York: Routledge: 1–20.

Horlick, Gary N. and Michael A. Meyer, "Rules of Origin from a Policy Perspective," in E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin in International Trade*: *A Comparative Survey* (1994) Ann Arbor: University of Michigan Press: 403–8.

Hufbauer, Gary C. and Jeffrey J. Schott, *North American Free Trade: Issues and Recommendations* (1992) Washington, D. C.: Institute of International Economics.

James, William E., "Case Studies on RTA Developments: A U.S. Perspective," Paper presented at the Pacific Economic Cooperation Council Trade Policy Forum and Thai Ministry of Commerce on Regional Trading Arrangements: Stocktake and Next Steps, Bangkok, Thailand, June 12–13, 2001.

James, William E., "Trade Relations of Korea and Japan: Moving from Conflict to Cooperation," in L. J. Cho, M. K. Park and C. N. Kim (eds.), *Korea and the Asian-Pacific Region* (2001) Honolulu and Seoul: East-West Center and Kyung Hee University: 405–53.

James, William E., "The Rise of Anti-Dumping: Does Regionalism Promote Administered Protection?" 14(2) *Asian-Pacific Economic Literature* 14 (2000).

James, William E. and Masaru Umemoto, "NAFTA Trade with East Asia: Rules of Origin and Market Access in Textiles, Apparel, Footwear and Electrical Machinery," 17(3) *ASEAN Economic Bulletin* 293 (2000).

James, William E., "APEC and Preferential Rules of Origin: Stumbling Blocks for Liberalization of Trade?" 31(3) *Journal of World Trade*, 113 (1997).

Keizer, Wim, "Negotiations on Harmonized Non-Preferential Rules of Origin: A Useless Task from a Trade Policy Perspective?" 31(4) *Journal of World Trade*, 145 (1997).

Komuro, Norio, "Japanese Rules of Origin," in E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin in International Trade*: *A Comparative Survey* (1994) Ann Arbor: University of Michigan Press: 301–54.

Kostecki, Michel M., "Marketing Strategies and Voluntary Export Restraints," 25(4) *Journal of World Trade* (1991).

Krishna, Kala and Anne O. Krueger, *Implementing Free Trade Areas: Rules of Origin and Hidden Protection*, Centre for International Economic Studies, University of Adelaide, Seminar Paper 94-09, September, 1994.

Krueger, Anne O., "Free Trade Areas Versus Customs Unions," 54 *Journal of Development Economics*, 169 (1997).

Lloyd, Peter, "The Changing Nature of Regional Trading Arrangements," in B. Bora and C. Findlay (eds.), *Regional Integration in the Asia Pacific* (1996) Melbourne: Oxford University Press.

Lloyd, Peter, 1993. "A Tariff Substitute for Rules of Origin in Free Trade Areas," *The World Economy* 699 (November 1993).

Low, Linda, "Singapore's RTA Strategy," Paper presented at the Pacific Economic Cooperation Council (PECC) Trade Policy Forum and Thai Ministry of Commerce on Regional Trading Arrangements: Stocktake and Next Steps, June 12–13, 2001 Bangkok.

Miranda, Jorge, Raul A. Torres, and Mario Ruiz, "The International Use of Anti-Dumping," 32(5) *Journal of World Trade*, 5 (1998).

Mundell, Robert, "The Theory of Tariffs and Monetary Policies," in D. Salvatore (ed.), *Protectionism and World Welfare* (1993) Cambridge: Cambridge University Press: 244–65.

Mundell, Robert, "Tariff Preferences and the Terms of Trade," *Manchester School of Economic and Social Studies*: 1 (1964).

Mussa, Michael, "The Economics of Content Protection," in D. Salvatore (ed.), *Protectionism and World Welfare* (1993) Cambridge: Cambridge University Press: 266–89.

Nell, Philippe G., " WTO Negotiations on the Harmonization of Rules of Origin: A First Critical Appraisal," 33(3) *Journal of World Trade* 45 (1999).

Palmeter, N. David, "Rules of Origin in the United States," in E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin in International Trade*: *A Comparative Survey* (1994) Ann Arbor: University of Michigan Press: 27–84.

Palmeter, N. David, "Rules of Origin in Customs Unions and Free Trade Areas," in K. Anderson and R. Blackhurst (eds.), *Regional Integration and the Global Trading System* (1993) London: Harvester Wheatsheaf.

Palmeter, N. David, "Pacific Regional Trade Liberalization and Rules of Origin," Paper presented at the Pacific Economic Cooperation Council Trade Policy Forum VII, June, 1993.

Palmeter, N. David, "Rules of Origin or Rules of Restriction? A Commentary on a New Form of Protectionism," 1 *Fordham International Law Journal* 26 (1987).

Panagariya, Arvind, "Preferential Trade Liberalization: The Traditional Theory and New Developments," 306 *Journal of Economic Literature*, 287 (2000).

Panagariya, Arvind, *Regionalism in Trade Policy: Essays on Preferential Trading* (1999).

Pearson, Brendan, 1993. "Rules of Origin," 7(2) *Asian-Pacific Economic Literature* 14 (1993).

Pomfret, Richard, *The Economics of Regional Trading Arrangements* (1997) Oxford: Clarendon Press, Oxford University.

Rifkind, Malcolm, "Toward an Atlantic Free Trade Area," *The Asian Wall Street Journal*, August 22 (2001).

Robinson, Sherman and Karen Thierfelder, "Trade Liberalization and Regional Integration: The Search for Large Numbers," TMD Discussion Paper 34, IFPRI, Washington, D.C., January, 1999.

Schott, Jeffrey J., *Free Trade Areas and U.S. Trade Policy* (1989) Washington, D.C. : Institute of International Economics.

Shibata, Hirofumi, "The Theory of Economic Unions: A Comparative Analysis of Customs Unions, Free Trade Areas and Tax Unions," in C. Shoup (ed.), *Fiscal Harmonization in Common Markets, Vol. 1, Theory* (1967) New York: Columbia University Press.

Snape, Richard, "Trade Discrimination—Yesterday's Problem?" 72 *The Economic Record*, 381 (1996).

Snape, Richard, Jan Adams and D. Morgan, *Regional Trade Agreements: Implications and Options for Australia* (1993) Canberra: Australian Department of Foreign Affairs.

Stephenson, Sherry M. (ed.) *Services Trade in the Western Hemisphere: Liberalization, Integration, and Reform* (2000) Washington, D.C.: Brookings Institution Press and Organization of American States.

Stephenson, Sherry M., "Regional Agreements on Services in Multilateral Disciplines: Interpreting and Applying GATS Article V," in S. Stephenson (ed.) *Services Trade in the Western Hemisphere: Liberalization, Integration, and Reform* 2000 Washington, D.C.: Brookings Institution Press and Organization of American States: 86–104.

Stephenson, Sherry M., 1998. "Multilateralizing Harmonized Rules of Origin: Is It a Realistic Option?" Washington, D.C.: Organization of American States (1998).

Stephenson, Sherry M. and William E. James, "Rules of Origin and The Asia Pacific Economic Cooperation," 29(2) *Journal of World Trade*, 77 (1995).

Summers, Lawrence, "Regionalism and the World Trading System," Federal Reserve Bank of Kansas City, *Symposium on Policy Implications of Trade and Currency Zones* (1991).

Trebilcock, Michael J. and Robert Howse, *The Regulation of International Trade*, (1999) 2nd Edition, London and New York: Routledge.

United States Congress, *Congressional Record* S 8803 and 8814 (1983).
United States International Trade Commission, *The Impact of Rules of Origin on U.S. Imports and Exports*, Washington, D.C. (1985)
Varona, Edurne Navarro, " Rules of Origin in the GATT," in E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin in International Trade*: *A Comparative Survey* (1994) Ann Arbor: University of Michigan Press: 355–91.
Vermulst, Edwin, "Rules of Origin as Commercial Policy Instruments—Revisited," 26(6) *Journal of World Trade* (1992).
Vermulst, Edwin and Paul Waer, "European Community Rules of Origin as Commercial Policy Instruments," 24(3) *Journal of World Trade* (1990).
Viner, Jacob, *The Customs Union Issue* (1950) New York: Carnegie Endowment for International Peace.
Waer, Paul, "European Community Rules of Origin," in E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin in International Trade: A Comparative Survey* (1994) Ann Arbor: University of Michigan Press: 85–194.
Wonnacott, Paul, "Beyond NAFTA—The Design of the Free Trade Agreement of the Americas," in J. Bhagwati and A. Panagariya (eds.), *The Economics of Preferential Trade Agreements*, (1996) Washington, D. C. : AEI Press.
World Trade Organization, Committee on Rules of Origin, *Minutes of June 23, 2000, Meeting*, Geneva: downloaded from www.wto.org
World Trade Organization, Uruguay Round Final Act, *Agreement on Rules of Origin* (1995)

CHAPTER 49

SERVICES IN REGIONAL TRADING ARRANGEMENTS

Christopher Findlay, Sherry Stephenson, and Francisco Javier Prieto*

TABLE OF CONTENTS

I. Introduction 294
II. The Dimensions of Regional Agreements 295
A. Coverage 295
B. Liberalizing Principles 296
C. Liberalising Approaches 297
D. Depth of Commitments 298
III. Opportunities and Challenges in the Regional Approach 300
IV. The Uruguay Round and Regionalism 302
V. Issues 304
A. Evaluating the Impact of Regional Agreements 305
B. The Path to Global Free Trade? 307
1. Incentives 307
2. Overlapping Fora 308
3. Compatibility 309
VI. Policy Conclusions 310
Table
Table 1 Notification of Agreements to the WTO under GATS Article V 304
Bibliography 311

* Christopher Findlay is Professor of Economics in the Asia Pacific School of Economics and Government at the Australian National University in Canberra; Sherry Stephenson is Deputy Director of the Trade Unit, Organization of American States, Washington DC; and Francisco Prieto is Advisor to the Ministry of Trade and Economy, Santiago, Chile. Christopher Findlay's contribution was supported in part by a grant from the Australian Research Council. The views expressed in this chapter are those of the authors alone. This version of the chapter was presented to the Australian Conference of Economists, Adelaide, October 2002.

I. Introduction

WTO members have continued to work at service sector liberalisation in regional and preferential frameworks, despite the development of the General Agreement on Trade in Services ("GATS") in the Uruguay Round, despite the negotiations since then, and despite the start of a new round of GATS negotiations in January 2000. Singapore's Minister for Trade and Industry George Yeo announcing his interest in a Free Trade Agreement with Japan, which has since been signed, said:

> As Singapore and Japan are already relatively open economies with regards to trade in goods, the focus of the FTA will likely be on investments and further integration in the services sectors. That is why we hope to go beyond a traditional FTA to a "new-age" FTA focussing on liberalisation and cooperation in the high-growth services sectors of the future, such as the transport, financial, and information and communication technology sectors. Such a forward-looking FTA will enhance and strengthen the competitiveness and capabilities of both our countries.[1]

As this remark suggests, a number of factors contribute to the interest in a regional approach to services trade liberalisation. Yet there are also significant constraints on progress. Some of these apply as well at the multilateral level and others are peculiar to regional arrangements.

While a number of motivations for a preferential approach can be identified, its long-run effects are less clear. Will it lead to a greater level of liberalisation than might otherwise be observed? Negotiating preferential arrangements with respect to services is costly, in terms of time and resources. Are they worth the effort?

We discuss these questions in this chapter. We present material on the following issues of relevance:

a) a definition of how services are traded and how this differs from the way goods are traded;
b) the dimensions of regional agreements in services: what these cover and what type of approaches members of such agreements have adopted to liberalise services;
c) opportunities and challenges in the regional approach to services liberalisation;
d) an outline of the GATS requirements for regional agreements in services (compared to the treatment of regional agreements under the GATT);
e) issues in the assessment of the economic impact of regional agreements in services on trade and welfare;

The chapter examines these issues in this order. We conclude with comments on three sets of issues involved in the question of whether regional agreements are building rather than stumbling blocks to wider liberalisation, namely incentives, architecture, and overlapping agendas.

In this chapter, we refer to regional trading arrangements on the understanding that this term refers to preferential reductions in protection that are the result of formal negotiation. In some cases currently under discussion, the members of potential agreements lie in

[1] From http://www.mti.gov.sg/public/FTA/frm_FTA_Default.asp?sid=28&cid=745 (accessed 14 February 2002)

different regions of the globe. However we retain the use of 'regional' in the description of the agreements of interest here.[2]

The chapter is framed in the context of viewing trade in services as inherently more complex than trade in goods, both due to the characteristics of services as well as to the numerous ways in which services can be traded. Service activities are intangible and non-storable on the whole, often require the proximity of consumers and producers in their trade, demonstrate both capital and labour mobility associated with their forms of trade, and show a high prevalence of regulatory intervention to counteract market failure and achieve non-economic social objectives.

The simultaneous nature of services transactions affects the conduct of services trade. Services can be traded in four ways, or modes of supply, as defined for the purpose of the Uruguay Round negotiations and set out in the WTO General Agreement on Trade in Services.[3] These are: cross-border trade, similar to trade in goods (mode 1); consumption abroad, where the service consumer moves to another country to purchase the services (mode 2); commercial presence, or foreign direct investment where the service activity is exchanged within one national territory between a foreign investor and a local consumer (mode 3); and movement of natural persons, where the service suppliers move to another country to supply the service (mode 4).

Barriers to trade in services take the form of regulations, laws, decrees and administrative practices, and are not usually found at the border. These measures are much less transparent than tariffs and quotas that affect trade in goods, and their impact is more difficult to assess. Moreover, there is not always a clear line between a "measure affecting trade in services" and a "barrier affecting trade in services". Some domestic regulations of a non-discriminatory nature may nonetheless have a 'de facto' restrictive impact on services trade and impede market access. For all of these reasons the liberalisation of services trade, in either a multilateral or regional context, is more challenging and complex than liberalisation of goods trade.

II. The Dimensions of Regional Agreements

In this section, we organise the various options for liberalisation regarding the structure and contents of agreements on services into the topics of coverage, liberalisation principles and approaches, and depth of commitments.

A. Coverage

The first issue that needs to be defined in any agreement on services is the coverage of the liberalising commitments—which activities are subject to the disciplines of the agreement? In the context of services trade, the term "coverage" is three-dimensional

[2] Our focus in this chapter is on negotiated regional agreements. Cooperative arrangements such as APEC are not considered here in detail. For more commentary on the contribution of APEC to the liberalisation of services trade and investment, *see* Christopher Findlay and Tony Warren, *Services Issues in APEC*, in IMPEDIMENTS TO TRADE IN SERVICES: MEASUREMENT AND POLICY IMPLICATIONS (Christopher Findlay and Tony Warren eds. 2000).

[3] *General Agreement on Trade in Services*, Article I.2 on "Scope and Definition". The first definition of services trade by four modes of supply was made by Gary Sampson and Richard Snape in *Identifying Issues in Trade in Services,* 8 (2) THE WORLD ECONOMY 171 (1985). See Chapter 19 of their book for a detected discussion of the GATS.

and comprises the four modes of supply as defined above, the number of service sectors included under the trade disciplines on the other, and the universe of the measures affecting trade in services.[4] In some cases, there may be only one option for the mode of supply so only measures affecting that mode are relevant. In other cases, the measures applying to different modes affect the substitution between them.

B. Liberalizing Principles

Liberalizing principles can be established as general obligations (as is the case of the NAFTA-type agreements) or as part of the specific negotiated commitments. In the case of GATS, some of the obligations, including MFN, are of a general nature, whereas others (such as national treatment) are part of the specific commitments.

Four principles for liberalising trade in services are usually taken into consideration in developing an agreement:

i) Most-favoured nation. This principle obliges member countries to extend the most favorable treatment that is accorded to any of their trading partners to all the other members immediately and unconditionally. Many countries accord preferential treatment to some of their commercial partners in certain sectors such as transportation, telecommunications, recognition of professional qualifications and other services. Exemptions to the MFN requirement might be included within the provisions of the agreement.

ii) No local presence requirement. Many countries frequently require a local presence (that is, an established trade presence) as a condition for foreign individuals or juridical persons wishing to provide services within their territory. This is usually the case with services that require close supervision to guarantee better consumer protection. This requirement may hinder international trade because it may impose higher costs to foreign service suppliers who are not allowed to use the other modes of supply. Thus, allowing service providers to choose their preferred mode of supply can be expected to lower their costs and stimulate trade.

iii) National treatment. This principle stipulates that services and service providers from another country be accorded treatment no less favorable than that accorded to like services and service providers of national origin. Violations to national treatment in the area of trade in services include a wide variety of situations ranging from nationality or permanent residence requirements to discriminatory practices with regard to fiscal measures, access to local credit and foreign exchange practices, limitations of the type of services which may be rendered by foreign suppliers and many others.

iv) No quantitative non-discriminatory restrictions. Technical considerations or market size may induce governments to establish quantitative non-discriminatory restrictions on the rendering of certain services. Such is the case in the allocation of radio and television frequencies, the number of banks allowed to operate in a given market, or the number of telecom companies authorized to provide cellular and basic telephony services in a given region within the country. Technology and other technical considerations

[4] With regard to the number of sectors included in services agreements, the approach predating the GATS was focused on individual sectors within which commitments to liberalise are limited to specific sectors or subsectors of an industry, mutually agreed upon by countries that are party to the agreement. Sectoral agreements with regard to air, land and sea transportation are typical examples of this approach. It should be noted that agreements on specific service sectors would not meet the conditions set out in Article V of the GATS, particularly with respect to the necessity for any preferential agreement to include "substantially all sectors," and thus probably would not be deemed compatible with WTO requirements. These criteria are discussed further below.

permitting, a gradual elimination of these measures is a prerequisite for full liberalisation of trade in services.

C. Liberalising Approaches

There are two mechanisms or modalities by means of which the liberalisation commitments may be met. Under a 'positive list' approach, countries subscribe to national treatment and market access commitments specifying the type of access or treatment offered to services or service suppliers in scheduled sectors. The alternative top-down approach to services trade liberalisation is based upon a 'negative list' approach, whereby all sectors and measures are to be liberalised unless otherwise specified in annexes containing reservations, or non-conforming measures. Non-conforming measures in the annexes are then usually liberalised through consultations or periodic negotiations. This is the approach adopted by the NAFTA and similar agreements and also by the Closer Economic Relations Trade Agreement ("CER") between Australia and New Zealand.[5]

Services negotiations carried out under the positive listing modality are focused on the inclusion of commitments in national schedules and on the need to determine their broad equivalency for the purpose of reciprocity. This is much more difficult to do for services than for goods, because barriers to foreign service providers are often not quantifiable border measures such as tariffs and quotas, but take the form of discriminatory elements contained in national laws, decrees, and regulations. Under the negative-listing modality, negotiations focus on the content of the lists of reservations, or non-conforming measures, to ensure that these do not excessively compromise the liberalising objective of the agreement.

In terms of the economics of the two approaches to services liberalisation, it has been argued that neither modality guarantees open markets and, under certain conditions and hypotheses, both would lead to an equivalent result. Nonetheless in the view of the authors, the negative list approach is preferable because of the transparency and legal stability that is generated under such an approach.

The quantitative and even qualitative evaluation of concessions made under a positive list approach is limited by the lack of adequate statistics on services.[6] A related disadvantage of this approach is the non-uniform and highly opaque way in which commitments by members are listed. This situation adds to the difficulty of documenting the actual liberalisation achieved under these agreements. Also, in the absence of an adequate and commonly-agreed sectoral classification list, there is rarely homogeneity in the way that commitments are recorded. Two perhaps even more detrimental limitations of positive listing are its hindrance to future liberalisation and its lack of transparency. Because the positive list approach promotes the binding of existing restrictions in the early stages of negotiation, acceleration of prompt and deep future liberalisation is unlikely. Such has

[5] Stephenson notes that the exceptions listed in the CER annexes have been reduced considerably over the 1990s. Sherry Stephenson, *A Comparison of Existing Services Trade Agreements within APEC*, in Impediments to Trade in Services: Measurement and Policy Implications (Christopher Findlay and Tony Warren eds. 2000) at 289. However, this outcome is rare in other agreements of the same type and the NAFTA members, for example, have not carried out significant additional liberalisation in services since the agreement has been in force (January 1994). Other variables also affect the pace of liberalisation.

[6] This is the problem being faced by WTO Members as they have tried to carry out the assessment of trade in services as it has evolved since the GATS came into force in January 1995. The lack of empirical data makes such an evaluation nearly impossible to do, particularly over time.

been the experience in the GATS, under which the majority of the specific commitments have been limited to binding the prevailing regulatory situation. Finally, lack of transparency in this approach is an impediment to international business. Information is lacking on restrictions in sectors not included in the lists of specific commitments, and even in those sectors bound by specific commitments, unrepresentative ceiling bindings may limit the accuracy of information provided.

A top-down negotiating approach under a negative listing modality offers possibilities for more complete and timely liberalisation. The initial contractual obligation incorporates the bulk of service sectors (in principle, universal coverage is targeted with limited exceptions) and binds all reservations or non-conforming measures through a 'stand-still'. Future liberalisation is then achieved through negotiations on progressive elimination of the reservations listed by each member. This approach sends clear messages to other member countries and the international community in general about the objectives and commitments of members to such services agreements. Since the core obligations enter into force at the beginning, members must make a clear commitment to both the depth of commitments and the pace of liberalisation. Considerably greater transparency is generated by the obligatory setting-out of comprehensive information on all reservations in the form of non-conforming measures. The obligation to be completed in the listing and binding of all discriminatory regulatory measures, as well as in the listing of all non-discriminatory quantitative restrictions, not only contributes to transparency but also prompts government officials and negotiators to consult with regulators in order to review the desirability of maintaining existing restrictions.

To summarise, agreements based on a negative listing provide information in a transparent form on the existing barriers to trade in services (in the reservations or non-conforming measures set out in the annexes), thus giving service providers precise knowledge of foreign markets. In agreements based on a positive listing the sectoral coverage of commitments as well as the type and comprehensiveness of information provided on the commitments may vary significantly between the members. Moreover, the type of conditions and limitations on market access and national treatment set out in national schedules are often listed as ceilings or more restrictive levels of treatment than actual regulatory practice. As a result, the level of transparency for service providers is reduced and there is less legal and economic certainty regarding market access.

Neither modality guarantees open markets. The establishment of an agreement might be easier using a positive list approach, because of the degree of flexibility and options it provides to participants in the negotiating process. But once in place, our expectation is that the negative list is the superior method for carrying out liberalisation because of the higher degree of transparency and lower level of uncertainty that it provides.

D. Depth of Commitments

The depth of the commitments undertaken in a trade agreement on services may vary substantially. An important determinant of the depth of commitments is the extent to which an agreement is binding.

Members of an agreement have at their disposal several instruments to achieve different levels of commitments. The most important of these are presented below and organized from lower to higher levels of commitments:

i) Transparency. This is normally the most basic or minimal level of commitment within a services trade agreement. It requires all members to the agreement to either directly inform the other parties of, or set up national "enquiry points" to facilitate access to, all the existing measures, at the level of the central or federal government and of state, provincial or local governments, that may affect trade in services with respect to the disciplines developed for purposes of liberalisation.

Lack of transparency in the design and enforcement of regulations constitutes one of the main impediments to services trade. Foreign investors, particularly those that are seeking to establish a commercial presence in the domestic market, are unlikely to commit resources in countries where it is unclear how the design and enforcement of regulation will affect their business activities.

ii) Ceiling Binding. A long established practice in merchandise trade agreements, the setting of a ceiling binding is also sometimes used for the adoption of commitments on trade in services. For instance, as in the GATS schedule of commitments, countries may set up or indicate conditions and limitations to market access and national treatment that are not part of the existing legal or regulatory measures within the respective country. An example of such binding could involve setting up maximum screening quotas for foreign audiovisual programs, expressed as a cap on the daily percentage of programs, where the country involved reserves the freedom to operate below the quota.

The practice of binding above the regulatory 'status quo' introduces a significant degree of uncertainty into the decisions by foreign service providers to supply a foreign market through cross-border trade or commercial presence. At the same time, governments engage in this practice because it provides them not only with the flexibility to adjust their regulatory frameworks in the event of unforeseen circumstances (e.g. financial crises), but also with significant negotiating coinage in future services negotiations.

iii) "Freeze" or "standstill" on existing non-conforming measures. This commitment involves freezing the existing regime and measures up to a given date. It involves an undertaking not to make those measures more restrictive in the future. This commitment, known as a "grandfather" clause, is used in agreements on trade in goods and in some agreements on trade in services (as in NAFTA, at federal and provincial levels, and in GATS with regard to MFN).

iv) Ratcheting. In addition to the commitment to freeze existing measures, a moving floor of commitments can also be established. Such a mechanism prevents countries from "backsliding" with respect to any preferential commitments implemented after the effective date of the freeze. If a given sector has been liberalised after the freeze date, any country party to the agreement cannot revert to a less liberal state for trade in the respective sector. This type of commitment, present in NAFTA- type agreements (at federal and provincial levels), is likely to have a positive effect on trade and investment in the economies adopting it. The reason is that it signals to eligible foreign service providers the commitment of the members not to introduce sudden regulatory changes that reverse previous liberalisation initiatives.

v) "List or Lose." This type of commitment supplements the "transparency" commitment and speeds up the process of liberalisation. In the context of a negative list or top-down approach, the parties undertake the obligation to list all non-conforming measures to the agreed provisions of the agreement. Failure to include any restrictive measure in the list is understood to eliminate the measure in question with respect to the

other parties to the agreement. This is the approach adopted by NAFTA members with regard to the existing non-conforming measures at federal or national level.[7]

III. Opportunities and Challenges in the Regional Approach

A number of factors contribute to the interest in the use of a regional approach to cover services liberalisation. One is an assessment that faster progress is possible in a regional agreement if the range of issues over which negotiations take place can be extended. In other words, an agreement with greater scope and fewer members can mobilise a wider range of political interests that offset the resistance to reform in some sectors that perceive they will lose from such an agreement.[8] It pays, in other words, to have services on the negotiating table. Interest groups in favour of liberalisation of this sector may emerge for a number of reasons. For example, they may expect the efficiency of firms in the service sector to increase and the cost of their purchased services inputs to fall. The competitiveness of their sectors of the economy could therefore increase following a measure of liberalisation in the service sector.

Other interest groups in favour of including services in a regional agreement may seek to gain from the higher level of market access that the negotiations provide. Furthermore, preferential access to protected services markets may be sought in anticipation of the rents that can be captured in foreign markets in the process. In many service sectors, 'first mover' advantages are extremely important—even if others are provided access to markets later, incumbents may expect to have a stronger competitive position. Alternatively, the prospective entrants might be seeking guarantees on competition policy issues to reduce some of the risks of initiating competition with local incumbents. Meanwhile, from the importing country point of view, it might be hoped that a regional approach can provide an environment of greater predictability in which local firms can adjust, perhaps by consolidating, before they have to face global competition.

Political objectives could be paramount in seeking a regional agreement. By selecting the sequence of trading partners with whom liberalisation is organised, a greater level of control might be expected over its effects. For example, a developed country might prefer to reach agreement with another who was less threatening in terms of competitiveness or other issues. This question of sequencing might be more relevant to services than to some goods because of the variety of modes of delivery of services, including commercial establishment or foreign direct investment. Liberalisation therefore involves a higher degree of direct contact with foreign suppliers.

Finally, services transactions often raise new and complicated issues associated with liberalisation, including dealing with the impact of domestic regulation, and it might be expected that these issues could be resolved in a small group setting, whereas it may be more difficult to do so in a multilateral process.

There are also challenges in attempts to liberalise the service sector in a regional approach. The negotiation of the arrangements may seem 'easy' from the point of view of the bureaucracies involved and the preferential route seen as a quicker way of getting results. However this route is not necessarily easy for two reasons. While the number of parties involved is small, the issues under discussion retain the same degree of complexity.

[7] One glaring weakness in NAFTA however is that all measures applied at the level of the state governments were grandfathered.

[8] Sherry Stephenson, *Regional Versus Multilateral Liberalization of Services,* 1 (2) WORLD TRADE REVIEW (July 2002).

Much time could be spent thrashing out a solution that suits the parties involved, only to have the next set of negotiations lead to a different outcome, and for both outcomes to contradict principles established at the multilateral level. Likely areas where differences might occur include the treatment of safeguards or government procurement. We comment on this problem in more detail below.

The second difficulty is that, as some bilateral negotiations now in progress in East Asia suggest, negotiation can be easily derailed. There may be less sectoral coverage in a bilateral approach. Violent objection by one sensitive sector can stop the negotiations since the countervailing forces are insufficient. In that case, either the agreement fails to be signed, or else an exclusion of some sectors from the agreement might be accepted. But these exclusions inhibit the ability to combine the individual agreements into a more inclusive structure that is closer to achieving global free trade in services.

A number of other factors impede service sector liberalisation in all forums, including the regional one. One is the problem of the assessment of impediments and the gains from reform. Considerable time and effort is required to characterise and assess various types of impediments. As a result it is also difficult to assess the extent of change that has occurred and to associate the outcomes observed in trade, investment, and competition in the service sector with the reform that has taken place. This in turn makes it more difficult to build a constituency for policy reform.

Domestic laws and regulations represent another major challenge to successful liberalisation in all forms. The service sector is often governed by many sets of rules and regulations, and these pose limitations to the scope of commitments negotiators are able to make. The implementation of international commitments that are in contradiction with domestic laws would require new domestic legal commitments. Therefore, domestic consensus on proceeding with regulatory reform that can be adopted in the form of new or amended laws, decrees or regulations is required before any bold movements can be expected.

The complicated domestic rules and regulations that affect services trade come under the purview of many departments and ministries. Sector-specific regulations are the responsibilities of the respective ministries. With the multitude of government authorities involved, co-ordination of a national position for negotiations as well as for the implementation of negotiated agreements is indeed extremely challenging. The same challenge applies in the GATS but in that case the commitments made and arrangements adopted apply to all Members. The preferential approach, when effective, may add to the diversity in the application of regulation, unless the reforms adopted in the regional context are applied 'de facto' on an MFN basis. In such cases, the degree of preference that can be applied may also be very limited or non-existent.

Much negotiating effort is being put into many regional agreements that appear to be liberalising on paper but are not yet implemented. For example, in the Western Hemisphere, the Protocol of Montevideo covering trade in services for MERCOSUR members has not yet been ratified, though the agreement was signed in December 1997. The jury is still out on the Andean Community agreement (adopted in June 1998) and on Protocol II of the CARICOM Agreement (adopted in 1998 as well) where members have only just now begun the process of trying to lift the restrictions in place that have been identified in national inventories. A few bilateral NAFTA-type free trade agreements do not contain the annexes that provide lists of non-conforming measures or reservations. The reason is that the parties were not able to agree on this aspect at the time they completed negotiating the overall agreement, and therefore the annexes, when and if completed, appear elsewhere in local, obscure publications. This lack of fulfillment of a basic obligation

contributes little to transparency of policy and its review and reform in these regional agreements.

IV. The Uruguay Round and Regionalism

It is useful to compare the requirements set out for regional agreements on services reached during the Uruguay Round to the requirements for the treatment of goods under those agreements. GATT Article XXIV specifies that members of a customs union or free trade area (or any interim agreement leading to these arrangements) should not impose 'higher or more restrictive' duties and 'other regulations of commerce' on trade with non-members. Furthermore, the article requires that 'duties and other restrictive regulations of commerce . . . are eliminated on substantially all trade'. A definite timetable for implementation is supposed to be provided and the rule of thumb adopted through an understanding of members is that the time limit is ten years. Crawford and Laird[9] provide a detailed discussion of the lack of clarity in this article. Examples of the problems, to name just a few, are:

- the interpretation of the term 'substantially all trade' (for example, does this mean relative to the share of trade or the coverage of sectors?);
- the definition of the term 'other regulations of commerce';
- the issue of special treatment of developing countries; and
- the allowance for transition periods and different time frames for implementation.

In comparison, Article V of the GATS states that groups of members can enter into an agreement to liberalise trade in services between or among themselves as long as the agreement:

- has substantial sectoral coverage; and
- provides for the absence or elimination of substantially all discrimination between or among the parties in the sectors covered through a) elimination of existing discriminatory measures and/or b) prohibition of new or more discriminatory measures.

There is also a requirement that the agreement should not raise the 'overall' level of barriers to trade in services with non-members. Developing countries that are members of an agreement are given a more flexible timetable to meet the conditions on sectoral coverage.

This Article also suffers from lack of clarity and some difficulty in interpretation. There are questions about what is meant by substantial coverage. A footnote to the article specifies that this requirement should be interpreted in terms of the number of sectors, the volume of trade affected and the modes of supply, and stresses that arrangements should not provide for the *a priori* exclusion of any mode of supply. Even if potential members are able to agree on the parameters of an agreement on services, the lack of data on trade and investment in services will make it difficult to implement. In a review of

[9] Jo-Ann Crawford and Sam Laird, *Regional Trade Agreements and the WTO*, 12 (2) NORTH AMERICAN JOURNAL OF ECONOMICS AND FINANCE 193 (July 2001). Paragraph 29 of the Doha Ministerial statement (reproduced in the Appendix to this book) that there should be "aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements." The negotiations are supposed to be completed by January 1, 2005.

Article V, Stephenson concludes that it is a "very weak and ineffective discipline".[10] Apart from the question of coverage, she notes a number of other issues. These include how to measure the elimination of substantially all discrimination, the lack of notifications (discussed further below), and the legal status of various stand-alone sectoral agreements. Another matter is the strategy of claiming regional agreements as MFN exemptions to the GATS rather than having such agreements notified to the WTO and examined under its Committee on Regional Trade Agreements.

There are two types of approaches to presenting agreements on services. For some agreements which are customs unions (for example, the Andean Community, CARICOM, MERCOSUR), the approach has been to negotiate a Protocol (latter two groupings) or a Decision (first grouping) on services which is then signed and ratified separately but is understood to form a part of the basic integration agreement. For the Andean Community these decisions, once signed by Heads of State, carry with them supranational power and override national law. For MERCOSUR and CARICOM, each separate Protocol must be ratified and incorporated into national law, as there is no effective element of supranationality. The ASEAN members also have followed this approach, in negotiating separate Agreements on issues that are then understood to form a part of the basic ASEAN agreement (such as the ASEAN Free Trade Agreement or the ASEAN Framework Agreement on Services).

In the second approach, everything is negotiated and completed at the same time. The NAFTA and all of the NAFTA-type agreements (of which there are now at least ten in the Western Hemisphere) exemplify the second type of approach to negotiating agreements on services. Here the services chapter, the investment chapter and a chapter on the temporary movement of business persons form a part of an integral agreement. The treaty is then signed as a whole and ratified by national governments in order to be incorporated into national law. In these cases, services negotiations would not proceed on a separate track but would be part of the whole outcome. This approach is also being followed in the FTAA negotiations.

Table 1 shows the regional agreements that have been notified to the WTO under GATS Article V. The notification process for regional agreements under the WTO is divided into two parts—one for goods and one for services—because of the legal structure of the WTO Agreement under which the GATT 1994, the GATS, and TRIPS Agreement are all separate parts, connected only by the Dispute Settlement Understanding. Regional agreements on goods are therefore to be notified under Article XXIV of the GATT 1994 and those on services under Article V of the GATS. This means that the notifications with respect to goods and with respect to services can be done at different points in time, even if they form a part of an integral agreement (as was done by both the EU and NAFTA). However, the practice is now to have the agreements which are notified to the WTO and cover both goods and services examined together, as a matter of convenience.

All regional agreements on services should have been notified to the WTO under GATS Article V. However, only a few agreements have been notified to date.[11] There is no legal way to oblige the parties to regional agreements to notify them and there is no currently no counter-notification procedure envisaged under the WTO. A striking feature of Table 1

[10] Sherry Stephenson, *Regional Agreements on Services and Multilateral Disciplines: Interpreting and Applying GATS Article V*, in THE GATS 2000 NEGOTIATIONS: NEW DIMENSIONS IN SERVICES TRADE LIBERALIZATION (Pierre Suave and Robert Stern eds. 2000)

[11] Of the fifteen regional agreements covering services and negotiated in the Western Hemisphere, only two have been notified. The ASEAN Framework Agreement on Services has not been notified.

Table 1: Notification of agreements to the WTO under GATS Article V*

Agreement	Entry into force	Notification	Stage of examination process as at September 2001
EC (Treaty of Rome)	1-Jan-58	10-Nov-95	Under factual examination
CER	1-Jan-89	22-Nov-95	Consultations on draft report
EEA	1-Jan-94	10-Oct-96	Examination not requested
EC—Hungary	1-Feb-94	27-Aug-96	Consultations on draft report
EC—Poland	1-Feb-94	27-Aug-96	Factual examination concluded
NAFTA	1-Apr-94	1-Mar-95	Consultations on draft report
EC accession of Austria, Finland and Sweden	1-Jan-95	20-Jan-95	Consultations on draft report
EC—Bulgaria	1-Feb-95	25-Apr-97	Examination not requested
EC—Czech Republic	1-Feb-95	9-Oct-96	Examination not requested
EC—Romania	1-Feb-95	9-Oct-96	Examination not requested
EC—Slovak Republic	1-Feb-95	27-Aug-96	Factual examination concluded
Canada—Chile	5-Jul-97	13-Nov-97	Examination not requested
New Zealand—Singapore	1-Jan-01	4-Sep-01	Examination not requested
EFTA—Mexico	1-Jul-01	25-Jul-01	Examination not requested

Source: WTO (downloaded from http://www.wto.org/english/tratop_e/region_e/region_e.htm)

* Membership in the various regional agreements cited above is as follows:

EC (European Communities): Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom

EEA (European Economic Area): Members of the EC and the EFTA

CER (Closer Economic Relations): Australia, New Zealand

EFTA (European Free Trade Area): Iceland, Liechtenstein, Norway, and Switzerland.

is that all the agreements listed include a developed-country member. At the same time, surprisingly, the EU-Mexico agreement has not been notified but the EFTA-Mexico agreement has been. There thus appears to be no consistency in approaches to notification, and this fact considerably weakens the multilateral surveillance function of the WTO and its role of ensuring that regional agreements are compatible with multilateral rules.

V. Issues

A series of studies have been undertaken which analyze the arrangements in which services have been included. Stephenson and Prieto[12] have reviewed the experience of the regional approach in the Americas, Nikomborirak and Stephenson[13] have examined the experience in East Asia in particular within ASEAN, comparing it with that in the Americas, Stephenson has compared agreements in the Western Hemisphere and in APEC[14],

[12] Sherry Stephenson and Francisco Javier Prieto, *Evaluating Approaches to the Liberalization of Trade in Services: Insights from Regional Experience in the Americas*, in TRADE RULES IN THE MAKING (Patrick Low, Barbara Kotschwar and Miguel Rodriguez eds. 2000). *See also*, Sherry Stephenson, *Multilateral and Regional Approaches to Services Liberalization by America and the Caribbean*, OAS TRADE UNIT STUDY (March 2001)

[13] Deunden Nikomborirak and Sherry Stephenson, *Liberalisation of Trade in Services: East Asia and the Western Hemisphere*, in SERVICES TRADE LIBERALISATION AND FACILITATION (Sherry Stephenson, Christopher Finlay, and Soonhwa Yi eds. 2002)

[14] Sherry Stephenson, *Services*, in TOWARDS FREE TRADE IN THE AMERICAS (Jose Manuel Salazar and Maryse Robert eds. 2001); and Sherry Stephenson, *A Comparison of Existing Services Trade Agreements within APEC*, in IMPEDIMENTS TO TRADE IN SERVICES: MEASUREMENT AND POLICY IMPLICATIONS (Christopher Findlay and Tony Warren eds. 2000)

and a number of papers have been written on the impact of NAFTA.[15] A theme amongst these evaluations is that while the regional agreements are often consistent with the principles outlined above, their actual contribution to liberalisation over and above that already achieved in the GATS commitments is often in doubt. Some key constraints are likely to be the trade and investment diverting effects of the preferential agreements and also the difficulty of reaching consensus at the domestic level.

In the next section we summarise the various options for the use of regional approaches, based on the results of these reviews. We propose not to provide a comprehensive summary of each agreement but to note the key elements and to illustrate their application where that is advantageous.

A. Evaluating the Impact of Regional Agreements

Liberalisation of services trade must be evaluated quite differently from that of trade in goods. In the case of goods, tariff levels before and after the formation of a preferential trading arrangement can be compared. In the case of services it is the degree of application of the national treatment principle, or the extent to which discriminatory treatment has been removed among members, that must be compared with the type of treatment that is accorded service providers from non-member countries.

The problems in the assessment of agreements on services include lack of statistical data on services trade at the disaggregated or sectoral level and the nature of the regulatory barriers in place for services. One way to carry out such a comparative analysis is through the examination of the content of the commitments made at the regional level as compared with the commitments made at the multilateral level under the GATS (in the case of arrangements adopting a "positive list" approach). In the case of arrangements adopting a "negative list" approach, it is necessary to examine the content of the annexes containing the lists of reservations with commitments made in these sectors at the multilateral level under the GATS.

As noted above, it may be difficult to apply laws and regulations in a differential manner to different service suppliers. But in other cases, it is possible to apply measures in a discriminatory fashion. For example, if the form of restriction is a quantitative constraint (a rule which limits the number of entrants through a licensing system), then a preferential policy can be implemented. Eligibility for subsidies (eg, in the education sector) can also be restricted to particular firms from other members of an agreement. Even rights to appeal to local competition authorities on anti-competitive behaviour could in principle be limited to firms from member countries to a preferential agreement. The evaluation of agreements should therefore include their discriminatory impact.

Little work has been done on the assessment of regional arrangements in trade in services.[16] One exception is modeling work on a proposed amalgamation between the ASEAN Free Trade Area and the CER between Australia and New Zealand, in the context of all members' commitments to the non-discriminatory APEC process. This case is reported in Box 1, along with some comments on the value of the modeling approach.

[15] *See* Mary Burfisher, Sherman Robinson and Karen Thierfelder, *The Impact of NAFTA on the United States*, 15(1) JOURNAL OF ECONOMIC PERSPECTIVES 125-144 (Winter 2001) and other papers in the same issue on the impact of NAFTA on other members.

[16] *See* Arvind Panagariya, *Preferential TradeLiberalization: the Traditional Theory and New Developments*, 38(2) JOURNAL OF ECONOMIC LITERATURE 287 (June 2000), and Sherman Robinson and Karen Theirfelder, *Trade Liberalization and Regional Integration: the Search for Large numbers*, TMD DISCUSSION PAPER 34, IFPRI (January 1999) for a review of empirical work.

Box 1 The Gains From Reform: the Case of AFTA and CER

Computable general equilibrium models have the advantage over other methods of assessing preferential arrangements since they have more options for good choices of base scenarios and they can capture more of the detail of the preferential policies. The models are now able to incorporate the effects of a larger market on the scope to capture economies of scale and the effects of market opening in cases of imperfect competition. They can also capture the effects of trade agreements in flows of capital between countries and on accumulation of capital within countries. The conclusion of the review of work in this field by Srinivasan, Whalley and Wooton[17] is that the welfare effects of preferential agreements (applying to goods) have probably been positive but not necessarily very large. They suggest vigorous proponents of arguments either in favour or in opposition to preferential agreements are probably overstating the quantitative assessments in support of their case (p. 74).[18]

Krueger[19] reports larger estimates of positive effects from more recent studies that are based on models whose specifications permit the identification of more of the dynamic gains. An example of this approach is the work by Davis, McKibbin and Stoeckel[20] who simulate the effects of a free trade area involving AFTA and CER, using the APG-cubed model.[21] They allow for allocative efficiency effects, terms of trade changes, endogenous productivity effects and capital accumulation in a model of trade in goods and services. They find positive effects from a joint AFTA-CER FTA (of an extra $US25.6b GDP in net present value terms in AFTA and $US22.5b for CER[22]). These gains are nearly three times as great as those obtained in an earlier study by the same authors which excluded services liberalisation and which excluded the productivity effect. These data refer to a scenario in which there is complete liberalisation within the group by 2005 of both goods and services. An important result stressed by Davis, McKibbin and Stoeckel is that if the non-discriminatory program of liberalisation in APEC proceeds on schedule (to achieve free trade and investment by 2010 for developed economy members in the region and by 2020 for developing economy members), then the additional gains from the earlier negotiation of the AFTA-CER arrangement are relatively small. The gain to AFTA members of an FTA with CER falls to just over $US10b and those to CER members fall to just under $US2b. The reasons, as they point out, are that the AFTA-CER trade is relatively small compared to their members' trade with APEC as a whole, and because APEC is not preferential. The authors identify a number of implications of these results. One they stress is that some of the APEC gains could in fact be attributable to the AFTA-CER connection, to the extent that it encouraged further liberalisation in the larger group (p. 40). However, as discussed in the main part of this chapter, preferential arrangements could have the opposite effect. A set of preferential commitments, if they could be reached, could slow down a non-discriminatory program.

[17] T.N. Srinivasan, John Whalley and Ian Wooton, *Measuring the Effects of Regionalism on Trade and Welfare*, in REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM (Kym Anderson and Richard Blackhurst eds. 1993).

[18] Panagariya, *supra* note 16 also identifies a number of problems in the modeling approaches.

[19] Anne O. Krueger, *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?*, JOURNAL OF ECONOMIC PERSPECTIVES, Vol. 13, No. 4, 105–25 (1999)

[20] Lee Davis, Warwick McKibbin and Andrew Stoeckel, *Economic Benefits From an AFTA-CER Free Trade Area: Year 2000 study*, CENTRE FOR INTERNATIONAL ECONOMICS (2000)

B. The Path to Global Free Trade?

1. Incentives

With respect to the effects on the world trading system, there are a number of arguments both for and against preferential arrangements. Krueger[23] reviews these arguments, finding no strong support for the view that preferential arrangements are building blocks of the multilateral system, and indeed 'grounds for concern' that they may weaken it.

Recent research[24] has identified one set of circumstances in which a preferential path might lead to global free trade. Suppose policymaking is driven solely by firm profits and consumers have no influence. There is only one service sold in oligopolistic and segmented markets in identical economies (with one firm in each economy). Global free trade emerges when there is one bloc, membership of which is considered sequentially, and where the rules of the bloc say that any country that wants to join has to be allowed to do so. In that case, outsiders will always want to join and the incumbents cannot stop them. Clearly, however, this outcome depends on the specification of the constitution of the bloc, especially the rule on accession.

In other circumstances the outcome will not be free trade. Profits per firm reach a maximum before membership is universal. So if the incumbents are given discretion, they will deny further entry to the bloc after some point. This outcome is not the end of the game. The countries excluded could then form their own arrangement. The further implication is that the first bloc would then have an incentive to increase the size of its membership. The emergence of the second bloc therefore makes the first bigger.

What incentives exist to merge the smaller blocs? Imagine a situation in which each economy forms a bloc with one neighbour. In the next stage, the members of one agreement merge with those of one other agreement. And so on. Could this process of consolidation continue until free trade is reached, or is there a circumstance in which it will stop before then? The research shows that free trade is possible but only if the inter-bloc tariff equivalents of impediments are low enough (in this case, the oligopolistic firms in the model can make greater profits with unrestricted access to all markets).

The political economy effects of the preferential route to reform are important. Export interests would normally be in favour of, or at least able to mobilised in to be in favour of, multilateral change. They do not want to give up the rents to which they now have access, and they cannot be compensated by the move to even freer trade. As a consequence, the risk is that liberalisation gets 'suspended'.

Another consideration is that the negotiation of a preferential agreement uses up scarce policy making and negotiating capacity, and diverts attention in the policy-making system. For example, in the lead-up to the Seattle WTO Ministerial meeting, some economies normally expected to be stalwarts of the multilateral process were marketing their regional initiatives, at the cost of effort that might otherwise have gone into building

[21] This model provides disaggregated results for six sectors and eighteen countries or regions with a focus on the Asia Pacific region. A feature is that the Asia Pacific G-Cubed Model models the links between economies in both trade and financial markets. See www.msgpl.com.au.

[22] The real consumption gain allowing for the ability to shift spending through time is 1 percent by 2005 for AFTA as a whole and 0.6 percent for CER.

[23] Krueger, *supra* note 19. See also Stephenson, *supra* note 8 and Mattoo and Fink, *Regional Agreements and Trade in Services: Policy Issues*, WORLD BANK POLICY RESEARCH WORKING PAPER 2852 (June 2002) for further discussion of preferential approaches to services sector reform.

[24] Soamiely Andriamananjara, *On the Size and Number of Regional Integration Arrangements: A Political Economy Model*, WORLD BANK POLICY RESEARCH WORKING PAPER 2117 (May 1999).

the multilateral agenda. It is important therefore to establish institutional arrangements to capture any economies of scope that arise from running preferential negotiations alongside the multilateral ones.

A regional approach provides experience in working in multilateral settings and helping participants to understand complex negotiating issues. The net benefit of starting a regional level before proceeding to the global level is a topic for further consideration, especially given the resource constraints in developing economies. Work in this environment also provides non-WTO members with a framework within which to participate in work bearing on WTO services negotiations and to help channel their reform efforts in advance of WTO membership. For example, the recent US-Vietnam bilateral free trade agreement will help Vietnam to adhere to the WTO and to the GATS in a shorter period of time than it might otherwise have taken, having already taken on some key disciplines in the services area and begun the reform process to open services markets. This has proven to be the case for several East European countries who have taken on associate membership in the EU and have adopted strict disciplines for services as well as opened key service sectors to investment and cross-border trade in the regional context. This should help them in taking on more extensive commitments under the GATS in the current negotiating round. The Central Asian countries are the next in line for EU association and will likewise benefit from being exposed to principles of services and investment liberalisation in a regional context.

2. Overlapping Fora

In making a decision to devote resources to a regional and negotiated approach, governments must also answer the question of whether it makes sense from an economic point of view to liberalise services on a preferential basis. The question of the choice of competing fora is relevant and important.

Answering this question is necessarily tied to a consideration of the nature of service activities themselves. Infrastructure or network-type services (financial, telecoms, energy, transport, and possibly distribution), to be supplied efficiently, require large amounts of capital to operate and offer significant economies of scale. The optimum level for liberalisation of such services is the largest market possible, in order to attract investment and generate output from the most efficient service operators. A preferential liberalisation of these particular activities would limit the ability of a country to draw upon the most efficient suppliers and thus maintain a higher-cost, less efficient national market for such critical services. This effect is especially important when incumbents have advantages over potential entrants in imperfectly competitive markets[25].

The world or global market is the logical forum to target for the liberalisation of infrastructure services. Regional negotiations and agreements play a role in this process as long as they both a) allow for the binding of liberalising commitments that have not yet been undertaken under the GATS and b) extend those commitments 'de facto' to other WTO members on an MFN basis. These conditions have been met in sectors of this type among the NAFTA members (with the exception of certain financial services commitments on the part of Mexico) as well as by members of the European Communities.

Commercially-oriented services include distribution, business services, professional services, tourism, construction/ engineering services, environmental services and certain categories of specialized health and educational services. Several of these sectors (tourism and business services in particular) are already quite open in most countries, and it would

[25] Mattoo and Flik, *supra* note 23.

make little sense to think of restricting open markets to a regional level. Discussion at a regional level might be useful for identifying commitments in these sectors which could be carried over into the GATS for subsequent application on an MFN basis.

Other sectors such as construction/engineering and professional services are subject to strictly regulated national standards. Regional agreements could have a useful role to play. It should be easier to develop a common set of criteria for the recognition of the equivalence of standards and/or the equivalence of diplomas and educational and professional training for the granting of licenses to practice various professional services when this is carried out among a small or smaller sub-set of member countries. Similar national educational and legal systems that are often found in countries of the same geographic region or those of the same legal/cultural background facilitate such recognition agreements.

Apart of the question of coverage, and the compatibility with GATS rules on regional agreements (discussed above), an important issue in this case is the additional conditions that might be applied to increase the likelihood that any agreement leads to further liberalisation. Relevant conditions[26] include the reference to existing international standards as a benchmark, plus a commitment in the agreement to permit accession by others on the same terms as the foundation members of the agreement. There should also be a mechanism for review of this process. All potential participants should have an opportunity to comment on the architecture proposed even if they do not expect to join the arrangement immediately. The definition of these principles and the implementation of the monitoring process could be a role of higher level organisations, in particular, the WTO but with support from other regional structures in which current and prospective members participate: APEC, for example, could provide this service to its members.

3. Compatibility

A key issue in achieving convergence is the compatibility of the architecture of the agreements. One important difference between existing sub-regional agreements is how their disciplines are designed to deal with investment and with other areas such as government procurement, monopolies and restrictive business practices, technical regulations, dispute settlement and temporary movement of business persons. In these areas, some agreements contain separate chapters that are pertinent not only to services but to goods (and intellectual property) as well. NAFTA and the NAFTA-type agreements thus deal with goods and services in an integral manner. Other regional arrangements have elaborated parallel agreements in these areas, separating out the disciplines for goods and for services and keeping all four modes of supply within the services chapter. This is done rather than allowing the services component of investment (mode 3), temporary movement of persons (mode 4), procurement and competition policy to be covered by the respective chapters in these areas. The resulting architecture of agreements under these two alternatives is quite different.[27]

Separate from the design of the architecture, or the structure of a regional agreement, is the choice of a liberalising modality or mechanism. A decision on the negative list

[26] *See* Richard Snape, *Which Regional Trade Agreement?*, in REGIONAL INTEGRATION AND THE ASIA PACIFIC (Bijit Bora and Christopher Findlay eds. 1996) for a discussion of these conditions in the articles on recognition in the GATS and Peter Drysdale, Andrew Elek and Hadi Soesastro, *Open Regionalism: the Nature of Asia Pacific integration*, EUROPE, EAST ASIA AND APEC: A SHARED GLOBAL AGENDA? (P. Drysdale and D. Vines eds. 1998) for further discussion of 'open clubs'.

[27] CER has no separate chapter on investment and it applies 'subject to the foreign investment policies of the Member States'.

('top down') or the positive list ('bottom up') approach will determine the liberalising modality. Although this could be viewed as a more technical question, nonetheless this choice will have serious implications, for example, with respect to the greater or lesser transparency that an agreement will provide to service providers.

The contribution of agreements on services to global free trade also depends on the nature of the origin requirements that apply. In services it is far more difficult to design complicated origin requirements than it is to design complex rules of origin for goods. The question is how to identify a services supplier who is eligible for preferential treatment. In most regional agreements, the rules are extremely liberal and allow for any foreign service supplier to benefit from the preferential agreement as long as it is a legally incorporated juridical person which shows 'substantial business activities' in one of the member countries. Some agreements also require that the activity be majority-owned and/or controlled by nationals of that member, as is often found in the GATS schedules of commitments.

VI. Policy Conclusions

In summary, we see four sets of issues related to the question of whether regional approaches lead to more wide-ranging reform. These relate to incentives, to architecture, to the appropriate forum for liberalisation, and to the economic impact of preferential agreements in services.

A regional and preferential approach runs the risk of the loss of momentum for further liberalisation. The likelihood of this problem depends on a number of conditions, one of which is the set of multilateral rules for the formation and oversight of preferential arrangements. Another determinant is the extent of remaining impediments among the member groups. Both factors point to the value of the contribution from the multilateral system, especially the rules and expectations that it creates for the formation of regional structures. The current GATS rules on regional agreements are not sufficiently demanding to ensure the liberalising content of regional agreements. There is even greater uncertainty about the application of the GATS rules than there is in the application of the respective GATT rules. The resolution of this problem and the consideration of additional requirements, related for example to accession or to commitments to schedules of MFN liberalisation, as has been proposed for merchandise trade, are both valuable.

The chapter also noted some of the architectural issues in the service sector and the challenge of ensuring that different types of agreements are compatible. The adoption of a negative or a positive list approach to scheduling commitments is one example. Our conclusion on that question was that a negative list approach is better for the pace of liberalisation, but the main hurdle is to have it taken on board in the first place. As illustrated in the chapter in the case of negotiations on standards, a solution to some architectural issues could be reference to a set of principles developed at a higher level. These principles might be negotiated in the WTO process, or developed in, and their application monitored by, other regional bodies that sit above the smaller formal agreements. The nature of the relationship between APEC and the agreements among its constituent members would support this practice.

Liberalisation with respect to the global market is the first-best option for the services sector reform. Regional agreements with similar negotiating agendas may contribute if they stimulate the awareness of participants of the value of services liberalisation and reform, and if they serve as vehicles for binding commitments on a non-discriminatory basis that have not yet been undertaken at the multilateral level. In the chapter, we divided services into three types—infrastructure services, other commercial sectors which are

already relatively open, and those which are subject to regulated national standards. We saw scope for regional agreements to contribute to reform in the third area, but subject to conditions on the reference to international standards, on the process of accession and on wide participation at the establishment phase of the preferential agreement.

The economic impact of preferential agreements in services is a topic for further empirical work. The difficulty of applying some domestic regulation in a discriminatory manner and the relatively liberal origin requirements that have been adopted in most regional agreements on services contribute to wider liberalisation. Certain instruments can nonetheless be applied in a discriminatory manner. A number of key variables will most likely determine the extent of liberalisation under a preferential agreement including: a) the modality of liberalisation and the architecture of the agreement (we stressed the value of a negative list) ; b) the coverage of the agreement (in terms of sectors and modes of supply, especially with respect to the treatment of foreign investment); c) the range of policies which it is expected will be applied in a preferential fashion (mfn application is preferred); and e) the definition of the origin requirement (a less demanding rule is preferred).

BIBLIOGRAPHY

Abugattas, Luis and Sherry Stephenson, *Liberalization of Trade in Services: Options and Implications for Latin American and Caribbean Countries,* in THE PROMISE AND PROBLEMS OF TRADE NEGOTIATIONS IN LATIN AMERICA (Diana Tussie ed. 2002).

Andriamananjara, Soamiely, *On the Size and Number of Regional Integration Arrangements: A Political Economy Model,* World Bank Policy Research Working Paper 2117 (May 1999).

Burfisher, Mary, Sherman Robinson and Karen Thierfelder, *The Impact of NAFTA on the United States*, 15(1) JOURNAL OF ECONOMIC PERSPECTIVES 125 (2001).

Crawford, Jo-Ann and Sam Laird, *Regional Trade Agreements and the WTO,* 12(2) NORTH AMERICAN JOURNAL OF ECONOMICS AND FINANCE 193 (July 2001).

Davis, Lee, Warwick McKibbin and Andrew Stoeckel, *Economic Benefits from an AFTA-CER Free Trade Area: Year 2000 Study* (Centre for International Economics, Canberra and Sydney, June 2000).

Drysdale Peter, Andrew Elek and Hadi Soesastro, *Open Regionalism: the Nature of Asia Pacific Integration*, in EUROPE, EAST ASIA AND APEC: A SHARED GLOBAL AGENDA? (P. Drysdale and D. Vines eds.1998).

Findlay, Christopher and Tony Warren, *Services Issues in APEC*, in IMPEDIMENTS TO TRADE IN SERVICES: MEASUREMENT AND POLICY IMPLICATIONS (Christopher Findlay and Tony Warren eds. 2000).

Krueger, Anne O., *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist*? 13(4) JOURNAL OF ECONOMIC PERSPECTIVES 105 (1999).

Mattoo, A. and C. Fink, *Regional Agreements and Trade in Services: Policy Issues*, World Bank Policy Research Working Paper 2852, June 2002.

Nikomborirak, Deunden and Sherry Stephenson (2002*), Liberalisation of Trade in Services: East Asia and the Western Hemisphere*, in SERVICES TRADE LIBERALISATION AND FACILITATION (Sherry Stephenson and Christopher Findlay with Soonhwa Yi eds. 2002)..

Panagariya, Arvind,*Preferential Trade Liberalization: the Traditional theory and new developments*, 38(2) JOURNAL OF ECONOMIC LITERATURE 287 (June 2000)

Prieto, Francisco (2000), 'The GATS, Sub-Regional Agreements and the FTAA: How Much is Left to be Done', in Sherry Stephenson (ed.), *Services Trade in the Western Hemisphere: Liberalization, Integration and Reform,* Brookings Institution Press.

Robinson, Sherman and Karen Theirfelder, *Trade Liberalization and regional integration: the search for large numbers*, TMD DISCUSSION PAPER 34, IFPRI (January 1999)

Sampson, Gary and Richard Snape,*Identifying Issues in Trade in Services,*8 (2) THE WORLD ECONOMY171 (1985).

Snape, Richard, *Which Regional Trade Agreement?*, in REGIONAL INTEGRATION AND THE ASIA PACIFIC (Bijit Bora and Christopher Findlay eds. 1996).

Srinivasan, T.N., John Whalley and Ian Wooton, *Measuring the Effects of Regionalism on Trade and Welfare*, in REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM (Kym Anderson and Richard Blackhurst eds. 1993).

Stephenson, Sherry, *Regional Agreements on Services and Multilateral Disciplines: Interpreting and Applying GATS Article V*, in THE GATS 2000 NEGOTIATIONS: NEW DIMENSIONS IN SERVICES TRADE LIBERALIZATION (Pierre Suave and Robert Stern eds. 2000).

Stephenson, Sherry, *A Comparison of Existing Services Trade Agreements within APEC*, in IMPEDIMENTS TOTRADE IN SERVICES: MEASUREMENT AND POLICY IMPLICATIONS (Christopher Findlay and Tony Warren eds. 2000)

Stephenson, Sherry (2001a), 'Deepening Disciplines for Trade in Services', *OAS Trade Unit Study*, OEA/Ser.D/XXII,SG/TU/TUS-8. March. Also available at www.sice.oas.org, Trade Unit Studies.

Stephenson, Sherry, *Multilateral and Regional Approaches to Services Liberalization by America and the Caribbean*, OAS TRADE UNIT STUDY (March 2001) Also available at www.sice.oas.org.

Stephenson, Sherry, *Services*, in TOWARDS FREE TRADE IN THE AMERICAS (Jose Manuel Salazar and Maryse Robert eds. 2001)

Stephenson, Sherry, *Regional versus Multilateral Liberalization of Services,*1 (2) WORLD TRADE REVIEW (July 2002).

Stephenson, Sherry and Francisco Javier Prieto, *Evaluating Approaches to the Liberalization of Trade in Services: Insights from Regional Experience in the Americas*, in TRADE RULES IN THE MAKING (Patrick Low, Barbara Kotschwar and Miguel Rodriguez eds. 2000).

WTO (1999), *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge, Cambridge University Press.

CHAPTER 50

RULES FOR FOREIGN DIRECT INVESTMENT AT THE WTO: BUILDING ON REGIONAL TRADE AGREEMENTS

Michael Gestrin* and Alan Rugman**

TABLE OF CONTENTS

I. Introduction 314
II. The Investment-Related Provisions in the WTO 314
A. General Agreement on Trade in Services 314
B. Agreement on Trade-Related Investment Measures 315
C. Agreement on Trade-Related Aspects of Intellectual Property Rights ... 315
D. Agreement on Government Procurement 315
E. Agreement on Subsidies and Countervailing Measures 316
III. Investment Provisions in RTAs 316
A. Rules on Right of Establishment and Free Movement of Capital 316
B. Rules Building on Treatment and Protection Principles of Bilateral Investment Treaties 318
C. Rules that Distinguish Between Local and Third-Party Investors 320
D. Rules on Regional Enterprises 321
IV. Conclusions 322

* Senior Economist, Investment Division, OECD, Paris. The views expressed in this chapter are those of the authors and do not necessarily reflect those of the OECD or any of its Member States.
** L. Leslie Waters Chair in International Business, Professor of Management, Professor of Business Economics and Public Policy, Indiana University, Kelley School of Business.

I. Introduction

The purpose of this chapter is to survey investment provisions in Regional Trade Agreements ("RTAs") and to highlight how these have gone beyond World Trade Organization norms on investment. It is generally acknowledged that the Uruguay Round of GATT negotiations went further than any previous round in placing investment issues on the multilateral trade agenda. Concurrently, the pace of developments with respect to the negotiation of rules on investment at the sub-multilateral level also accelerated during the early 1990s.

This dual evolution of the international policy framework for international investment reflects the growing recognition of the role investment has come to play in international economic development and integration. Just as trade was perceived as one of the key drivers of global economic growth during the post-World War II decades, since the 1980s foreign investment has come to be perceived as an important 'new' mode of global economic linkage. Statistics indicating that flows of foreign direct investment began outstripping both global trade and GDP growth rates in the 1980s only reinforced the perception that it was time for the international policy framework to catch up with the new international economic landscape.

Investment rules can be crafted and scaled to address a range of different objectives, including;

- Promoting a more secure, predictable and transparent environment in which to plan and operate cross-border investment;
- Ensuring greater protection for investors and their investments;
- Promoting the progressive liberalisation of barriers restricting the entry and conduct of foreign firms in domestic markets;
- Reducing or eliminating measures that distort trade and investment decisions and reduce allocative efficiency; and
- Developing credible institutions and rules for solving potential disputes[1].

II. The Investment-Related Provisions in the WTO

Foreign investment issues are dealt with in several WTO Agreements. The General Agreement on Trade in Services ("GATS"), the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs") and the plurilateral Agreement on Government Procurement include provisions relating to the entry and treatment of foreign enterprises and the protection of certain property rights. The Agreement on Trade-Related Investment Measures ("TRIMs") and the Agreement on Subsidies and Countervailing Measures ("ASCM") circumscribe the ability of WTO members to apply certain kinds of measures to attract investment or influence the operations of foreign investors.

A. General Agreement on Trade in Services

Of all the agreements in the WTO, the GATS deals most directly with investment issues. It does so by defining four modes of supply that are covered by the agreement, one of which, mode three, consists of the provision of services through an established presence in a foreign territory. General obligations are contained in Parts I and II of the framework.

[1] Pierre Sauvé, *Scaling Back Ambitions on Investment Rule-Making at the WTO*, 2(3) THE JOURNAL OF WORLD INVESTMENT 529 (2001)

The most important of these are Articles I and II. Article I, on scope and definition, stipulates that the GATS applies to measures by members affecting trade in services, defined as including any service in any sector delivered via any of the four modes, with the exception of those supplied in the exercise of governmental functions. Article II codifies the unconditional most-favoured-nation treatment principle, making it one of the agreement's core general obligations. Under the MFN rule, members of the GATS are committed to treating services and service providers from one member in the same way as services and service providers from any other member, although countries were permitted to derogate from the commitment during the GATS negotiations. Unlike the GATT, the GATS does not enshrine the right to national treatment, which is a matter for negotiated commitments.

B. Agreement on Trade-Related Investment Measures

The TRIMs Agreement recognizes that certain investment measures restrict and distort trade. It provides that no contracting party shall apply any TRIM inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT. To this end, an illustrative list of TRIMs agreed to be inconsistent with these articles is appended to the agreement. The list includes measures which require particular levels of local procurement by an enterprise ("local content requirements") or which restrict the volume or value of imports such an enterprise can purchase or use to an amount related to the level of products it exports ("trade balancing requirements").

C. Agreement on Trade-Related Aspects of Intellectual Property Rights

The TRIPs Agreement builds upon the existing framework of intellectual property conventions (i.e. the Berne Convention, 1971, the Paris Convention, 1967 and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, 1989, among others). The agreement imposes national treatment and MFN, and establishes substantive standards for the protection of specific categories of intellectual property, as well as requiring domestic enforcement procedures and providing for international dispute settlement. The importance of the agreement in the context of investment relates to the increasingly important share of multinational enterprise ("MNE") assets accounted for by intangible assets. Furthermore, virtually all modern investment agreements which lay down standards for the promotion and protection of foreign investment include intellectual property within the definition of investment.

D. Agreement on Government Procurement

The plurilateral Agreement on Government Procurement requires not only that there be no discrimination against foreign products, but also no discrimination against foreign suppliers and, in particular, no discrimination against locally-established suppliers on the basis of their degree of foreign affiliation or ownership. Another investment-related aspect of this Agreement is the provision in Article XVI that procuring entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets, defined as ". . . measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, countertrade or similar requirements".

E. Agreement on Subsidies and Countervailing Measures

The ASCM defines the concept of "subsidy" and establishes disciplines on the provision of subsidies. The relevance of the ASCM to investment issues is that a number of investment incentives fall under the definition of a subsidy and are either prohibited or are subject to the disciplines of the ASCM if they cause "adverse effects" to other WTO Members. Subsidies contingent upon the exportation of goods produced are prohibited. Adverse effects are defined in terms of distortions to the trade flows of subsidised goods.

III. Investment Provisions in RTAs

At the sub-multilateral level, investment issues have been addressed through RTAs, bilateral investment treaties ("BITs") and a range of plurilateral arrangements specifically aimed at dealing with investment issues. In fact, where investment protection is concerned, RTAs are not typically the main vehicle for negotiating international investment rules. Rather, BITs constitute the most popular instrument in this regard. Whereas the number of BITs is estimated to have reached 1941 in 2000, an estimated 172 RTAs are currently in force and only a small (albeit growing) minority of these deal with investment issues. Given the focus of this survey on how RTAs have dealt with investment issues, it is important to keep in perspective that these only represent one of several institutional settings at the sub-multilateral level in which investment-rule making has taken place.

Rules on investment have been linked to wider processes of trade and economic integration and cooperation in various ways. The following sub-sections deal respectively with: i) agreements that focus on the right of establishment and the free movement of capital, ii) agreements that build upon treatment and protection principles typically found in BITs, iii) agreements that distinguish between the rights accorded to local and third-party investors and iv) agreements that include provisions on the status of regional enterprises.

This classification of RTAs according to general characteristics is imperfect insofar as the complexity of many agreements means that they could be included in several categories. Indeed, the only perfectly exclusive categorisation of agreements is at the level of the individual agreements themselves since no two agreements are exactly alike. However, in order to give the discussion some structure and to avoid simply listing agreements and their investment provisions it was felt that a rough characterisation according to broad objectives would render the discussion more reader-friendly.

Finally, all of the agreements discussed below constitute examples of efforts to go beyond existing provisions on investment at the WTO, either in terms of substance or objectives. In this sense, all of the RTAs surveyed here are WTO-plus. Indeed, even the most modest rules on investment found in RTAs usually contain some sort of provisions on the right of establishment, something that does not exist in any WTO agreement.

A. Rules on Right of Establishment and Free Movement of Capital

Early efforts at introducing rules on investment at the regional level emphasised the issues of establishment and the free movement of capital. One of the most comprehensive examples of this approach was the *Treaty Establishing the European Community* (1957) (revised by the Treaty of Amsterdam which entered into force on 1 May 1999). The EC

Treaty addresses investment primarily through provisions on freedom of establishment and free movement of capital. Article 52 of the original treaty prohibits restrictions on the freedom of establishment of nationals of a member State in the territory of another member State and on the setting up of agencies, branches or subsidiaries by nationals of any member State established in the territory of any member State.[2] Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its nationals by the law of the country where such establishment is effected. By virtue of (original) Article 58[3], this right of establishment applies to companies or firms formed in accordance with the law of a member State and having their registered office, central administration or principal place of business within the Community.

Since the end of the transitional period on 31 December 1969, (original) Article 52[4] has been directly applicable in the sense that it can be invoked by individuals before the national courts of member States. EC Treaty rules on freedom of establishment are not only addressed to the member States but also require the adoption of measures by the Community institutions with respect to a wide range of matters specified in (original) Articles 54 and 57 in order to facilitate the implementation of the freedom of establishment.[5] Pursuant to these provisions, directives have been adopted *inter alia* with respect to standards in specific sectors, company law, government procurement, and the mutual recognition and acceptance of diplomas, certificates and other evidence of formal qualifications.

With respect to movement of capital, Article 73(b) of the EC Treaty, which was added by the 1992 Treaty on European Union, provides for the prohibition as of 1 January 1994 of restrictions on movements of capital and payments between the member States and between the member States and third countries.[6] Capital movements covered by this provision include direct investments, defined as investments of all kinds which serve to establish or to maintain lasting and direct links between the person providing the capital and the undertaking to which the capital is made available in order to carry on an economic activity. This general prohibition is subject to "grandfather" and transition clauses in respect of certain existing restrictions, exceptions (e.g. relating to taxation and prudential measures) and a safeguard clause applicable in case of difficulties for the operation of economic and monetary union caused by capital movements to or from third countries.

Agreements involving countries that have historically restricted capital movements have also tended to emphasise establishment and capital movement issues but much less comprehensively than the EC Treaties. For example, the *Europe Agreements* concluded in the early and mid-1990s between the European Community and Central and Eastern European countries, also focus primarily upon establishment issues by providing for national treatment with regard to the establishment and operation of companies and nationals. The term "establishment" is defined in each of these Agreements as meaning the right to take up and pursue economic activities by means of the setting up and management of subsidiaries, branches and agencies.

[2] The reference in the original text to the progressive abolition of restrictions on the right of establishment in the course of the transitional period was deleted and replaced by the concept of prohibition in amendments made by the recent Treaty of Amsterdam, Article 43. *Official Journal of the European Communities*, No. C 340, 10 November 1997, at 61.

[3] *Treaty of Amsterdam*, Article 48.

[4] *Id.*, Article 43.

[5] *Id.,* Article 48.

[6] *Id.,* Article 56.

The *Treaty Establishing the Caribbean Community* (1973)[7], as amended by a Protocol adopted in July 1997, prohibits the introduction by member States of any new restrictions relating to the right of establishment of nationals of other member States (Article 35b). Member States are also required to remove restrictions on the right of establishment of nationals of other member States, including restrictions on the setting up of agencies, branches or subsidiaries by nationals of a member State in the territory of another member State (Article 35c).

Likewise, the *Treaty Establishing the African Economic Community* (1991)[8] and the *Treaty Establishing the Common Market for Eastern and Southern Africa* ("COMESA") (1993)[9] include among their objectives the removal of obstacles to the free movement of capital and the right of residence and establishment.[10] Finally, the *Revised Treaty of the Economic Community of West African States* ("ECOWAS") (1993)[11] includes among its objectives the establishment of a common market involving, *inter alia*, the removal of obstacles to the free movement of persons, goods, services and capital and obstacles to the right of residence and establishment (Article 3(2)). *The Treaty Establishing the Economic and Monetary Union of West Africa* (1996)[12] provides for freedom of nationals of one member State to provide services in the territory of another member State and proscribes restrictions on movement of capital.

B. Rules Building on Treatment and Protection Principles of Bilateral Investment Treaties

A number of RTAs have gone beyond issues relating to establishment and the free flow of capital. For example, the *North American Free Trade Agreement* ("NAFTA") (1994) contains generic provisions on investment in Chapter 11[13]. "Investment" is defined in Article 1139 through a broad list of assets along with a negative list of certain claims to money, including claims arising from commercial transactions, which are not considered to be investments. Each Party is required to accord the better of national treatment and MFN treatment to investors of another Party, and to investments of investors of another Party, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments (Articles 1102–1104).[14]

[7] Member States are Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago.

[8] Signatories are the members of the Organization of African Unity.

[9] The signatories of the COMESA Treaty are Angola, Burundi, Congo, Democratic Republic of, Comoros, Eritrea, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Tanzania, Uganda and Zimbabwe. The COMESA Treaty has superseded the Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern Africa concluded in 1982. It entered into force in December 1994.

[10] See, respectively Article 4(2)(i) of the Treaty Establishing the African Economic Community and Article 4(4)(c) and 4(6)(e) of the COMESA Treaty.

[11] Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.

[12] Member States are Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo.

[13] In addition to Chapter 11, separate provisions on investment are contained in Chapter 14 on financial services, Chapter 15 on competition, monopolies and state enterprises, and Chapter 16 on temporary entry for business persons.

[14] The NAFTA adopts the negative list approach such that the actual coverage of the agreement's investment provisions is determined by the exceptions and reservations contained in the annexes to the agreement. For analysis of NAFTA's investment policies *see* Michael Gestrin and Alan M. Rugman, *The North American Free Trade Agreement and Foreign Direct Investment,* 3(1) TRANSNATIONAL CORPORATIONS 77 (1994). *See also* FOREIGN INVESTMENT AND NAFTA (Alan Rugman ed. 1994).

The provisions of the NAFTA concerning performance requirements apply to both investments of investors of a Party and investments of investors of a non-Party. Article 1106(1) proscribes the imposition or enforcement of mandatory requirements and the enforcement of any undertakings or commitments: (1) to export a given level or percentage of goods or services; (2) to achieve a given level or percentage of domestic content; (3) to purchase, use or accord a preference to goods produced or services provided in the territory of a Party or to purchase goods or services from persons in its territory; (4) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investment; (5) to restrict sales of goods or services produced or provided by an investment in a Party's territory by relating such sales to the volume or value of exports or foreign exchange earnings of the investment; (6) to transfer technology, a production process or other proprietary knowledge; and (7) to act as the exclusive supplier of the goods produced or services provided by an investment to a specific region or world market. With the exception of the first and the last two requirements, these requirements are also prohibited if applied as conditions for the receipt of an advantage (Article 1106(2)).

NAFTA Articles 1115–1138 provide for international arbitration of disputes between a Party and an investor of another Party. An investor may submit to international arbitration a claim that another Party has breached an obligation under Chapter 11 or under certain provisions of the chapter on monopolies and state enterprises and that the investor has incurred loss or damage by reason of, or arising out of, that breach. Article 1122 contains the unconditional consent of the Parties to the submission of a claim to arbitration. The investor can elect to proceed under the International Centre for Settlement of Investment Disputes ("ICSID") Convention, the Additional Facility Rules of ICSID or the United Nations Commission of International Trade Law "(UNCITRAL") Arbitration Rules. Detailed rules are contained in these provisions on matters such as the constitution of arbitral tribunals, consolidation of claims, applicable law, nature of remedies, and finality and enforcement of arbitral awards.

A number of more recent RTAs (and proposed RTAs), especially those involving NAFTA signatories, have been broadly modelled after the NAFTA with respect to investment rules. This is the case, for example, in the *Canada-Chile Free Trade Agreement* (1997), the *Mexico-Singapore Free Trade Agreement* (2000) and in the draft text for the *Free Trade Area of the Americas*. A structure and content broadly similar to that found in the NAFTA investment provisions is also reflected in the Vaduz Convention, the revised Convention establishing the *European Free Trade Association (2001)*.[15] Likewise, the *Japan-Singapore Free Trade Agreement (2002)* contains rules on investment similar to those found in NAFTA. One interesting point to note is that some recent bilateral RTAs do not cover investment for the stated reason that a BIT already exists between the signatories. This is the case with the *US-Jordan Free Trade Agreement* (2000) and the *Canada-Costa Rica Free Trade Agreement* (2000), to mention but two examples.

Other RTAs have sought to incorporate BIT-like provisions on investment but have eschewed the strict enforcement standards (e.g. binding dispute settlement mechanisms) and the levels of protection and liberalisation found in agreements like the NAFTA. In the context of the *Asia-Pacific Economic Cooperation* ("APEC"), norms of a legally non-binding nature relating to the admission, treatment and protection of foreign investment have been adopted in the *APEC Non-Binding Investment Principles* (1994). Principles

[15] The original Stockholm Convention was signed in 1960.

of a general nature state that Member economies will ensure transparency with respect to laws, regulations and policies affecting foreign investment; extend MFN treatment to investors from any economy with respect to the establishment, expansion and operation of their investments; and accord national treatment to foreign investors in relation to the establishment, expansion, operation and protection of foreign investment, with exceptions as provided for in domestic laws, regulations and policies. More specific principles provide that Member economies will not relax health, safety and environmental regulations as an incentive to encourage foreign investment; minimise the use of performance requirements that distort or limit expansion of trade and investment; and permit the temporary entry and sojourn of key personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations.

A number of regional and plurilateral agreements exist which, instead of directly incorporating the full range of investment protection and dispute settlement provisions typically found in bilateral investment treaties, envisage the conclusion of such bilateral treaties between the parties. Although not part of the RTAs themselves, these 'side-BITs' are explicitly recognised as contributing to the wider process of liberalisation between the parties. An example of this approach is the *Fourth ACP (Lomé) Convention*. Chapter 3 of this Convention, which is part of Title III on development finance co-operation, sets forth general principles regarding the treatment of foreign investment, such as the requirement to accord fair and equitable treatment, and envisages that more specific regulation of policies on foreign investment will be dealt with through the negotiation of bilateral agreements between the Contracting Parties. With a view to facilitating the negotiation of such agreements, a Joint Declaration in Annex LIII of the Convention provides that the Contracting Parties will undertake a study of the main clauses of a model bilateral investment agreement.[16] Various recent agreements of the European Union with third countries also refer to the possible conclusion of bilateral investment treaties between member States of the European Union and the third countries in question.[17]

C. Rules that Distinguish Between Local and Third-Party Investors

Investment rules on establishment, the free flow of capital and those that build upon issues usually covered in BITs all have as their underlying purpose the promotion of a more efficient international allocation and use of capital. However, not all investment rules in RTAs have economic efficiency as their prime objective. Some agreements contain investment provisions whose aim is more developmental in nature. For example, in August 1994, Member States of MERCOSUR adopted a *Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR*. The signatories to the Protocol undertake not to accord to investments of investors of third countries more favourable treatment than that provided for in the Protocol. In respect of the treatment of established

[16] In this connection, a statement on Investment Protection Principles in the ACP States was adopted by the European Community in November 1992.

[17] In addition to the Europe Agreements and the Partnership and Cooperation Agreements, references to the future conclusion of bilateral investment treaties appear in, for example, the Cooperation Agreement between the European Community and the Kingdom of Nepal (1995), Article 10; the Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part (1995), Article 12, and the Framework Cooperation Agreement leading ultimately to the establishment of a political and economic association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (1996), Article 15.

investments, the Protocol lays down general standards of treatment which are similar to those contained in the Colonia Protocol[18], except that the parties to the agreement enjoy discretion to decide whether or not to accord national treatment and MFN treatment to established investments of investors of third countries. The *Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR* contains no provisions on performance requirements.

Other agreements dealing with investments from third countries have sought to reduce restrictions traditionally aimed at these. For example, in the context of the Andean Community[19] rules aiming at the harmonisation of investment policies of member countries towards investment from third countries were first adopted in 1970. The currently applicable regime appears in *Decision 291 of the Commission of the Cartagena Agreement—Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licences and Royalties* (1991). This Decision provides that foreign investors shall have the same rights and obligations as national investors, except as otherwise provided in the legislation of each member country, and eliminates the previously existing requirement to subject foreign investment to an authorisation procedure. It also removes restrictions contained in the previous rules on the transfer of funds by obligating member countries to permit foreign investors and sub-regional investors to remit abroad in convertible currency the verified net profits derived from foreign direct investment and the proceeds from the sale or liquidation of such investment. A third important change effected by the Decision is the removal of restrictions on access of products produced by foreign enterprises to the benefits from the trade liberalisation under the Cartagena Agreement. Prior to the adoption of this Decision, such products could benefit from this trade liberalisation only if the foreign enterprise undertook to convert into a joint or national enterprise. Aside from these provisions on rights and obligations of foreign investors, the Decision contains rules requiring the registration of contracts for imports of technology and prohibiting the inclusion of certain kinds of restrictive clauses in such contracts.

D. Rules on Regional Enterprises

Several regional agreements aim at fostering co-operation between firms of member States by establishing a special legal regime for the formation of a regional form of business enterprise. For example, the *Uniform Code on Andean Multinational Enterprises* established by Decision 292 of the Commission of the Cartagena Agreement provides for the formation of Andean Multinational Enterprises. One of the conditions for the creation of such an enterprise is that capital contributions by national investors of two or more member countries must make up more than 60 per cent of the capital of the enterprise. Among the privileges which the Decision requires member countries to grant to such enterprises are national treatment with respect to government procurement, export incentives and taxation, the right to participate in economic sectors reserved for national companies, the right to open branches in any member country, and the right of free transfer of funds related to investments. Likewise, the *Basic Agreement on the ASEAN Industrial Cooperation Scheme* (AICO Scheme) was concluded by members of ASEAN in 1996 to promote joint manufacturing industrial activities between ASEAN-based companies.

[18] The Colonia Protocol governs the treatment of regionally based investors and their investments.
[19] Member States are Bolivia, Colombia, Ecuador, Peru and Venezuela.

IV. Conclusions

This analysis of investment provisions in RTAs reveals that one of the attractive features of negotiating investment rules at the sub-multilateral level is the flexibility and selectivity that countries with historically similar approaches to investment issues can apply to the various goals mentioned above. This is an important point because it suggests that any negotiation of investment rules at the multilateral level (if such a negotiation ever takes place at the WTO) will have to take into account the diversity of experience with and practice of international investment policy that has evolved at the regional level.

Several themes emerge from this analysis of investment provisions in RTAs. First, the extent to which signatories to an RTA attempt to establish ambitious investment rules, with a broad definition of investment, disciplines on TRIMs that go beyond the illustrative list in the WTO agreement, and binding dispute settlement mechanisms, *inter alia*, are to be largely a function of the countries' previous experience with a liberal investment regime. Most countries that have entered into agreements containing high-standard rules on investment had either already been liberalising their investment regimes unilaterally or had experimented with investment rules in prior agreements. For example, a number of bilateral agreements recently negotiated by the NAFTA signatories (such as Canada-Chile, Mexico-E.U., United States-Jordan) contain provisions almost identical to NAFTA Chapter 11. Where countries have only recently begun to liberalise their investment regimes and where these have traditionally been highly restrictive, the preference has been for less encompassing agreements covering limited rights of establishment and the movement of capital. In other words, the negotiation of investment rules in RTAs could be characterised as taking place at the investment policy margin. Countries at similar levels on the investment liberalisation 'trajectory' can scale their investment rule-making ambitions in line with historical local norms on international investment.

A related point concerns the objectives of investment rules. In most cases these are aimed at improving economic efficiency. This is the purpose of investment rules at the WTO and in most RTAs. However, some provisions in RTAs are more oriented towards development issues, especially as concerns the promotion of local firms. This is the case in both agreements that distinguish between the rights of local and third-party investors as well as those agreements that provide incentives and preferences for regional enterprises.

Another theme to emerge from this analysis concerns the apparent convergence of investment provisions in RTAs towards what might be described as a implicit international standard. This convergence is taking place through two channels. The first channel is through 'side-bilateral investment treaties', separate agreements on investment, but nonetheless in the context of wider processes of trade and economic integration and co-operation. What this suggests is that the perceived role of BITs is shifting beyond the protection of FDI from developed to developing countries to complementing broader and deeper liberalisation initiatives.

The second channel is through RTAs that closely resemble or build upon NAFTA investment provisions. Indeed, just as most BITs are based upon model BITs, the NAFTA investment provisions have in many instances become a 'model RTA investment chapter'. The trend therefore seems to be towards a more consistent treatment of investment in RTAs, both in terms of the tendency of RTAs to include rules on investment (or side-BITs) and in terms of their content.

This apparent convergence is especially significant to the extent that most BITs and NAFTA-based RTA investment provisions do not result in the sort of preferences that RTAs give rise to with respect to trade. Third party investors typically enjoy the same

rights as investors based in the RTA area. To the extent that BITs and RTA investment provisions have increasingly come to reflect similar (high) standards, the spread of such agreements results in the *de facto* plurilateralisation of investment rules—as long as these do not discriminate or create preferences vis-à-vis third party investors. Furthermore, while concerns have been raised over the potential negative effects associated with treaty congestion, there is little indication to date to suggest that the rapid proliferation of BITs and RTAs with investment provisions has given rise to such problems, at least where foreign investment is concerned. Whether this plurilateralisation through regionalism might eventually obviate the need for multilateral rules on investment or could form the basis for the eventual multilateralisation of the standards found in RTAs is an open question.

CHAPTER 51

REGIONAL TRADING ARRANGEMENTS AND DEVELOPING COUNTRIES

Maurice W. Schiff* and L. Alan Winters**

TABLE OF CONTENTS

I. Introduction 326
II. Member Countries 326
A. Trade Effects 326
B. The Parameters of RTAs 327
C. Investment 330
D. Industrial Location and Growth 331
E. Domestic Policies 332
F. Politics 334
III. Non-Member Countries and the Trading System 334
A. Excluded Countries 335
B. Stepping Stones, Dominoes and Open Regionalism 325
C. Trade Negotiations 336
D. Depth and Breadth in Integration 337

* Maurice Schiff is Lead Economist in the Trade Section of the Development Research Group of the World Bank.

** L Alan Winters was manager of that Section and is now Director of the Development Research Group at the World Bank and Professor of Economics at the University of Sussex. The work described in the paper is based on a major World Bank project led by the authors. This project underpinned the Bank's publication WORLD BANK, TRADE BLOCS—A POLICY RESEARCH; REPORT (2000) and is presented in more detail in MAURICE W. SCHIFF AND L. ALAN WINTERS, REGIONAL INTEGRATION AND DEVELOPMENT (Oxford University Press 2003).

I. Introduction

The growth of regional trading arrangements ("RTAs") has been one of the major developments in international relations in recent years. Virtually all countries are members of a trade bloc and many belong to more than one; more than one third of world trade takes place within such agreements; and regional trade is often advanced as a route to development.

This paper discusses the main arguments that have been advanced for and against regionalism as a tool of development policy. It considers not only the 'traditional' economic issues such as trade creation and trade diversion, but also more recent economic arguments such as whether regionalism stimulates investment and growth. It also discusses a broader set of issues such as whether regional trading arrangements promote economic and political credibility, peace and stability. Since this book is about the global trading system, the chapter also includes a more extended discussion of the economic connections between regionalism and the world trading system.

The analysis is presented in two parts referring, first, to the direct implications of RTAs for their members, and, second, to their effects on the world trading system. We do not discuss directly the rules of the GATT and the GATS rules about regionalism or their application—which are the subject of chapter XX of this book—but the analysis provides a basis on which these rules might be assessed. Regionalism is highly *sui generis*, so that simple unambiguous policy recommendations are simply not feasible. However, drawing on economic theory, empirical evidence and case studies, we propose some reasonably robust rules of thumb and identify a number of questions that policy makers should ask themselves about their own and others' regional arrangements. These are not inviolable rules for economic policy but rather norms from which policy-makers should deviate only when they have established an explicit case for doing so. There is no alternative to considering regional arrangements case-by-case, for idiosyncratic elements of any arrangement can always off-set any of the more general results available. However, we hope that following the analysis offered here will help policy makers to formulate their own analyses of their own circumstances.

II. Member Countries

A. Trade Effects

The basic economic analysis of tariff preferences is fifty years old,[1] but it is central enough to be re-iterated here. Forming a regional trading arrangement by removing barriers to trade between members of the RTA but not on trade with third countries almost always increases trade between the members. The issue, however, is whether it "creates" trade by allowing cheaper products from other bloc members to substitute for more expensive domestic production, or "diverts" it by substituting intra-bloc imports for imports from outside the group. The latter can happen when 'outside' goods would be cheaper if all suppliers faced equal tariffs, but the fact that 'inside' goods no longer face tariffs gives them a competitive edge. In that case, the preference-granting country ends up paying more for the imports, the increase being financed by monies that were initially going to the government in tariff revenues now accruing to producers in the partner countries. Part of this extra cost is a simple transfer from the taxpayers in the importing partner to producers in the exporting partner, but because the real cost of imports has risen (the partner is less efficient than 'outside' producers), real resources are also wasted by the

[1] J. Viner, The Customs Unions Issue (1950).

diversion. When all the commodities covered by the RTA are considered together, if trade diversion predominates, an RTA can reduce all or some of the welfare of the member countries.

Identifying and distinguishing between trade creation and trade diversion is not straightforward empirically. The greatest difficulty is deciding what trade would have looked like if no RTA had been formed—the counterfactual or what the Europeans refer to as the *anti-monde*. This is more a matter of judgement than of science, particularly when it comes to considering whether regionalism is central or incidental to the general liberalisation of trade with all countries. The evidence on the balance between trade creation and diversion in trade blocs is mixed, but recent research –shows that, contrary to what was becoming received wisdom, diversion can be quite significant.[2] Often, however, as with the recent Latin American RTAs, trade diversion has been dominated by the positive effects of the partners' reductions of barriers against imports from non-partners that have accompanied the RTA[3]. Thus, whether this multilateral liberalization is or is not part of the process of regionalism is critical to our view of it.

The traditional analysis of trade creation and diversion is based on a view of the world in which inter-country trade is driven entirely by differences in productivity and factor endowments. In fact trade can also arise from product differentiation and economies of scale, which reduce costs as production grows. Import barriers in such worlds are additionally costly because competition between firms is weakened and consumers lose from the resulting cuts in output and increases in price. International trade offers an important means of increasing competition by allowing new suppliers to enter markets. RTAs can generate such benefits by fostering trade between members, combining larger firm sizes (which increases economies of scale) with competition between larger numbers of firms (which increases competition). This is possible because by combining several national markets, the number of producers in each country might fall, while the number of sellers with reasonable access to each market rises (because producers from partner countries now have access).

These so-called pro-competitive effects are believed to have been strong during the course of European economic integration, but the empirical evidence that developing countries will be able to reap them in large amounts is currently rather weak. Partly that reflects the latter's production structure, with fewer goods in which differentiation and economies of scale are important, and partly the fact that significant increases in competition eventually depend on far more than merely removing tariffs and import quotas. Also, of course, if the aim is large markets and buying from firms that supply large markets, no market is larger than the world as a whole. That is, pro-competitive effects will be larger from non-discriminatory trade liberalisation than from discriminatory or restricted liberalisation.

B. The Parameters of RTAs

Why is regionalism so popular if it is just a pale imitation of non-discriminatory free trade? This sub-section briefly considers the basic international trade aspects of the question, and then asks how various design features of an RTA might affect its net benefits.

[2] Tamim Bayoumi and Barry Eichengreen, *Is Regionalism Simply a Diversion? Evidence from the Evolution of the EC and EFTA*, in NBER East Asia Seminar on Economics, Vol. 6: Regionalism versus Multilateral Trade Arrangements (T. Ito and Anne O. Krueger eds. 1997).

[3] See for example, Isidro Soloaga and L. Alan Winters, *Regionalism in the Nineties: What Effect on Trade?*, 12(1) North American Journal of Economics and Finance 1 (2001).

Among the trade reasons advanced for RTAs, are that members might:

- be better able to exploit market power against outsiders by co-ordinating their trade policies.
- place a very high value on access to partners' markets and feel that this is better assured by making access to their own conditional on reciprocation and that they prefer preferential access to non-preferential access.
- want to exploit the regional market as a basis for protected industrialisation.

These arguments are not very convincing, especially as the basis of global policy positions. The first is exploitative, the second amounts to trading inefficient market access with each other, and the third is refuted by experience.

Clearly, the benefits of regionalism are likely to depend on finding the best partners. However, the popular notion of a 'natural' trade partner is not useful in this regard. Neither large existing trade volumes nor low transportation costs are good reasons for artificially favouring a particular trade flow.[4] Amjadi and Winters show that while trade costs are high for Latin America's extra-continental trade, the conditions necessary to reap any benefits from switching to lower-cost intra-continental structure are absent.[5] Bond also neatly points out that there is no presumption that infrastructure investment in Latin America should be devoted to facilitating intra-continental trade.[6] RTAs might stimulate intra-continental flows, but because it is subject to higher policy barriers, it is extra-continental trade that offers the bigger returns to expansion. Thus reducing the cost of the latter via investment is likely to be more useful than increasing the capacity for intra-bloc trade. Besides, ports devoted to trade with the world are inherently more flexible than roads or bridges devoted to local trade.

There are, however, several reasons behind the obvious tendency for trade blocs to form between neighbouring countries (i.e. for regionalism to be regional): for example, to reduce trade costs by relaxing or abolishing border formalities or to assist in the collection of tax revenues.

Though the welfare implications of RTAs are ambiguous in general, one general result is that small countries (for which world prices are given) are likely to lose from a RTA between themselves unless they lower trade barriers with respect to excluded countries[7]. Moreover, if such trade barriers are not reduced, not only is the bloc as a whole likely to lose, but the distribution of benefits is likely to be highly asymmetric, with the more developed members gaining at the expense of the poorer, less developed, ones (because access to the latter's market for the former's manufacturing exports has become free). Examples of such problems include the East African Community in the 1960s, where Kenya gained at the expense of Uganda and Tanzania, and the Central American Common Market where El Salvador gained at the expense of Honduras.

This is essentially the reasoning behind an interesting recent result that if two countries form an RTA, the one whose pattern of factor endowments is more similar to the world

[4] *See* Maurice Schiff, *Will the Real 'Natural Trading Partner' Please Stand Up*?, 16(2) J. OF ECONOMIC INTEGRATION 245 (2001).

[5] Azita Amjadi and L.Alan Winters, *Transport Costs and 'Natural' Integration in Mercosur*, 14 J. ECONOMIC INTEGRATION 497 (1999).

[6] Eric Bond, *Transportation Infrastructure Investments and Regional Trade Liberalization*, POLICY RESEARCH WORKING PAPER, NO. 1851, THE WORLD BANK (1998).

[7] Maurice Schiff, *'Small is Beautiful' Preferential Trade Agreements and the Impact of Country Size, Market Share, and Smuggling*, 12(3) J. OF ECONOMIC INTEGRATION, 359 (1997); MAURICE W.SCHIFF AND L.ALAN WINTERS, REGIONAL INTEGRATION AND DEVELOPMENT (2003).

average will tend to gain more than the one which is less similar[8]. If the two countries have above average incomes, this tends to lead to convergence between the two partners, but if they have below average incomes (i.e. the RTA is between developing countries), it causes divergence.

One of the recurring themes of our work in the World Bank[9] is a preference for North-South over South-South RTAs for developing countries. If a developing country is going to pursue regionalism, it will almost always do better to sign up with a rich and large country than a small and poor one. In trade terms, this is manifest in the fact that a large rich country will tend to be a more efficient supplier of most goods and a source of greater competition.

Many countries are members of several RTAs. If they are all compatible this may be beneficial—it implies free trade with more countries[10]. But there are also dangers. For example, the several RTAs may imply conflicting policies vis-à-vis third countries, they may have different regulations governing imports of the same commodity from different sources, or they may imply different technical standards. All of these increase the complexity, cost and uncertainty of trade. There is also a danger in hub and spoke arrangements, as discussed below. An important distinction is between free trade areas ("FTAs") which have free trade between members, and customs unions ("CUs") which have that plus a common external tariff or, strictly, common trade policy towards third countries. FTAs are easier to create and can be institutionally very light, whereas CUs require the negotiation of the common external tariff and co-ordination of all future trade policy changes. FTAs, however, face the danger of trade deflection—goods entering the member with the lowest tariff and transferring tax-free to other members from there. Except for the extra transportation cost, this is efficient economically because it lowers the effective tariff, but it undermines the protective effect of members' own tariff structures. Therefore, governments seek to prevent it by imposing rules of origin ("RoOs") to ensure that only locally produced goods get tariff exemption. Such rules are often cumbersome and protectionist and can greatly reduce the value of the FTA. CUs, if they avoid this problem, can induce a greater degree of integration[11].

Another important difference between FTAs and CUs lies in the incentives they create for operating a liberal (i.e. low barrier) trade policy towards non-members; it has been argued that there is a tendency for FTAs to be more liberal than CUs. They have less market power and members might compete with each other to reduce tariffs and so enlarge their share of the RTA's imports and hence tariff revenue. Once we recognise that lobbying influences tariffs, it becomes plain that it will afflict FTAs and CUs too. For both, there is a presumption that the exceptions to internal free trade negotiated as the RTA is formed will tend to reduce the degree of trade creation, and so reduce the potential benefits. Olarreaga and Soloaga, and Olarreaga, Soloaga and Winters show the importance of these political factors in the determination of the internal and external trade policies of Mercosur countries[12]. And in the case of CUs, the RTA will change

[8] Anthony J. Venables, *Regional Integration Agreements: A Force for Convergence or Divergence?*, PROCEEDINGS OF WORLD BANK ABCDE CONFERENCE, PARIS (1999).

[9] WORLD BANK, *supra* note 1; Schiff and Winters, *supra* note 7

[10] Glenn W. Harrison, Tom Rutherford and David T. Tarr, *Trade Policy Options for Chile: The Importance of Market Access*, 16 THE WORLD BANK ECONOMIC REVIEW 49 (2002).

[11] Anne O. Krueger, *Free Trade Agreements versus Customs Union*, 54 J. OF DEVELOPMENT ECONOMICS 169 (1997).

[12] Marcelo Olarreaga and Isidro Soloaga, *Explaining Mercosur's Tariff Structure: A Political Economy Approach, 12(2)* THE WORLD BANK ECONOMIC REVIEW 297 (1998); Marcelo Olarreaga, Isidro Soloaga and

the environment for future lobbying, although whether this will be towards or away from greater protectionism, however, is impossible to say *a priori.* Clausig discusses the trade-off between RoOs and external tariff levels in the FTA versus CU debate[13].

If countries have to use tariffs for revenue purposes, then forming a RTA may be more difficult as it will entail a loss of revenue, unless co-operation improves collection rates or member countries raise tariffs on imports from excluded countries. In the latter case, the RTA is likely to reduce welfare of its members both because of trade diversion at existing external tariffs, and because of the increased protection against excluded countries. Moreover, there are other potentially complex revenue issues to consider: e.g. how to avoid fiscal competition between members reducing taxes below optimal levels.

C. Investment

Raising investment is a prominent objective of many regional agreements. The logic is that larger markets, greater competition and improved policy credibility will increase the incentives for investment and so raise incomes. The argument applies to all investment, but is most explicitly applied to regionalism as a means of attracting foreign direct investment. Ethier composes a paean to regionalism on this basis, although expresses some serious reservations about his model[14].

Early Latin American RTAs were interventionist, co-opting regional integration into import substitution at a regional level. Such policies almost completely failed and have now been superseded by a much more market-friendly approach. Part of the latter has been a greater emphasis on policies guaranteeing the fair treatment of investment. These guarantees are often embodied in Bilateral Investment Treaties ("BITs"), or, where they exist, the investment chapters of RTA agreements. BITs typically contribute to negative integration—i.e. precluding certain policies rather than requiring policies to actively encourage investment—but they may play an important facilitating role in investment flows.

Far more positive in intent is the common argument that RTAs add credibility to government policies in general and thus help to raise investment and attract foreign direct investment ("FDI"). But contrary to the prevailing enthusiasm, South-South RTAs are unlikely to do this and may, in fact, hinder investment if they are not accompanied by trade liberalization with the rest of the world. North-South RTAs, on the other hand, can enhance a Southern country's credibility, but typically, only if the RTA is likely to enhance economic performance in its own right and if the large Northern partner is willing to enforce investment-encouraging "club rules". The latter is more likely to be true if the policies on which a developing country wants to gain credibility are specified explicitly in the agreement and if the Northern partner has an identified interest in the Southern partner's success—e.g. alleviating pressure to migrate.

Recent analysis holds that the rate of return on capital (and investment) could well rise in all members of an RTA regardless of their capital abundance[15]. For example, if tradables are more capital-intensive than non-tradables, opening up boosts the demand for capital;

L. Alan Winters, *What's behind Mercosur's Common External Tariff?*, CEPR Discussion Paper, No. 2310 (1999).

[13] Kimberly Clausig, *Customs Unions and Free Trade Areas*, 15 J. of Economic Integration 418 (2000).

[14] Wilfred J. Ethier, *Regional Roads to Multilateralism*, in International Trade Policy and the Pacific Rim (John Piggott and Alan Woodland eds. 1998).

[15] Richard E. Baldwin and Elena Seghezza, *Growth and European Integration: Towards an Empirical Assessment*, Centre for Economic Policy Research, Discussion Paper No. 1393 (1995).

lower tariffs and trading costs for capital equipment might reduce the price of investment goods; and creating a more efficient financial sector could reduce borrowing costs.

Unfortunately there are few empirical studies of the impact of RTAs on investment—most trade blocs are so new that the data are simply not there. Where we do have evidence, it tends to suggest mild positive effects on investment, but there is no evidence that this translates into higher economic growth. Firmer evidence is available that RTAs boost FDI, however, especially inflows of investment from non-member countries. In Latin America, both Mexico and Mercosur illustrate this. In Mexico, most FDI has been going to exportable sectors and seems to have generated large benefits. In Mercosur, most FDI seems to have gone to protected (and thus inefficient) import-competing sectors, and protection has even been increased to attract FDI in some sectors (e.g., automotive sector). In these cases factors of production are drained out of efficient sectors into the protected ones, with greater wastage the greater the FDI flow. Thus in the presence of protection, FDI can be harmful.

The real key to investment is the general policy stance in areas such as sound macroeconomic policies, well-defined property rights, and efficient financial and banking sectors. Regional integration may foster investment if it significantly raises policy credibility and market size, but it needs to be accompanied by good policy overall.

Investment patterns can be seriously affected by the so-called hub-and-spoke phenomenon. This occurs when a country (the hub) signs FTAs with various countries (the spokes) which do not sign FTAs among themselves. Other things equal, investors will prefer to invest in the exporting sectors of the hub than in those of the spokes, because they can reach all the spokes from the hub but cannot do so from one of the spokes. For instance, the EU has signed FTAs with Mediterranean countries (Euro-Med Agreements), Central and Eastern European countries (Europe Agreements), South Africa and Mexico, and is negotiating with MERCOSUR and Chile. These are all spokes of the EU hub. One way to minimize the potential negative FDI effect is for a spoke to sign FTAs with other countries (e.g., Mexico in NAFTA).

D. Industrial Location and Growth

While economists have long been aware that industry tends to cluster into particular locations, they have only recently learned to model the phenomenon formally and thus to start to identify precisely the combinations of conditions that must be satisfied for it to occur. The theory arose from attempts to understand the possible effects of the enlargement and deepening of the European Union and so lends itself directly to the consideration of RTAs[16]. The theory is, however, very young; the models do not yet appear to be very realistic and have not yet been accompanied by much empirical evidence. Thus they are more parables than forecasts. However, they do shed light on qualitative factors and they address such a major concern of policy makers that it is useful to explore their implications for developing countries.

Creating an RTA is likely to affect the incentives for industry to agglomerate, usually to increase them because it increases market size and allows more effective exploitation of the links between firms[17]. An RTA may attract industry into member countries at the

[16] Paul Krugman and Anthony J. Venables, *Integration and the Competitiveness of Peripheral Industry*, in UNITY WITH DIVERSITY IN THE EUROPEAN COMMUNITY (Christopher Bliss and Jaime De Macedo eds. 1990).
[17] *See* MASAHISA FUJITA, MASAHISA, PAUL KRUGMAN AND ANTHONY VENABLES, THE SPATIAL ECONOMY: CITIES, REGIONS, AND INTERNATIONAL TRADE (1999) for a comprehensive coverage.

expense of non-members, although if the RTA is small, such effects will also be very small. RTAs will also frequently cause industry to relocate between the members. For RTAs between poor countries this seems likely to increase inter-member inequalities because it makes it easier for firms to agglomerate in the more prosperous countries while still selling in the others. For RTAs involving richer members, on the other hand, the results are less clear-cut, and it is quite possible that poorer members will experience strong industrialization following an RTA. For developing countries, integration with richer neighbors (North-South RTAs) looks far better from an agglomeration point of view than does South-South integration.

The same preference for North–South over South-South RTAs arises from the discussion of long-run growth. Modern growth theory—the theory of endogenous growth—stresses the role of knowledge in fostering productivity and growth. It also stresses that knowledge can be effectively transferred from one country to another through international contact and trade. Rich countries are knowledge-rich and so are likely to provide far more access to technology than are poorer trading partners: RTAs that switch imports from richer to poorer sources are very likely to have a perverse effect on countries' growth rates[18]. RTAs might also help countries boost their growth rates by supporting institutional reform, and again this effect seems likely to be stronger for developing countries joining with richer partners than with poorer ones.

The direct evidence on trade and growth has been subjected to some serious methodological reservations by Francisco Rodriguez and Dani Rodrik[19]—but that on RTAs and growth is actually pretty consistent. There is little evidence that RTAs between developed countries stimulate growth, and absolutely none that RTAs between developing countries do so[20]. Given that one needs long runs of data to explore economic growth, we do not have any sound empirical evidence on North-South RTAs. Casual consideration of the recent performances of, say, Portugal and Mexico, however, suggests that serious North-South integration may foster the Southern partners' growth, reinforcing the views above about the relative merits of the two types of partners for developing countries. As discussed above, however, there are formidable problems in defining an *anti-monde* to underpin such statements.[21]

E. Domestic Policies

The discussion so far has concentrated just on trade and investment policies, the standard building blocks for analysing international intercourse. But as trade barriers have come down policy makers have started to understand the very important role that domestic regulation plays in economic integration. Cooperation on domestic policies can

[18] This is an implication of David T. Coe, Elhanan Helpman and Alexander. W. Hoffmaister, *North-South R&D Spillovers*, 107 ECONOMIC JOURNAL 134(1997) although not one the authors bring out. The issue is explained more fully in Emiko Fukase and L. Alan Winters, POSSIBLE DYNAMIC BENEFITS OF ASEAN/AFTA ACCESSION FOR THE NEW MEMBER COUNTRIES (1999).

[19] Francisco Rodriguez and Dani Rodrik, *Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-national Evidence*, NBER MACROECONOMICS ANNUAL 2000 (2001).

[20] *See*, most tellingly, Athenasios Vamvakidis, *Regional Trade Agreements Versus Broad Liberalisation: Which Path Leads to Faster Growth? Time Series Evidence*, 46 IMF STAFF PAPERS 1 (1999).

[21] EU-Portugal and USA-Mexico are effectively North-South arrangements because of the large differences in incomes per head between the members. It is true, however, that similar sized differences could have quite different implications at much lower incomes levels for both partners—e.g. Vietnam-Malaysia in AFTA.

substantially increase the gains from forming a trade bloc. It can lift barriers that insulate national markets for similar goods and services and deliver economic benefits many times larger than those available from mere trade agreements. Inter-governmental cooperation in designing and applying domestic policies such as taxes, health and safety regulations, environmental standards—so-called policy integration—can increase competition in domestic markets by reducing transaction costs and allowing new suppliers to enter markets. Cooperation on domestic policies can also help to overcome market failures and help to ensure that trade restrictions are not re-imposed through the back door.

However, most RTAs have only "shallow" policy integration aims. Their objective is not economic union (which requires institution-building and which we would term "deep integration"), but to increase competition through inter-governmental cooperation to reduce market segmentation. The FTAA is discussing policy integration, and some existing Latin American agreements also speak of pursuing it further. However, without specific timetables for progress and further negotiation, none is likely to make great progress. Experience suggests that negotiated policy integration is very demanding both politically and technically. Moreover, RTAs are not the only game in town. Indeed, independent decisions to adopt policies used elsewhere and to pursue multilateral efforts on international technical and regulatory standards have been more common than regional efforts. Developing countries can do much to achieve the benefits of policy integration unilaterally by adopting international standards and recognizing the regulatory norms of their major markets, such as the EU and the United States.

One puzzle is 'why combine policy integration and trade integration into the same institution?' The trade component of an RTA can provide negotiating chips to help overcome opposition to institutional and domestic policy reforms, and policy integration can assist the implementation and enforcement of RTA trade policies. Of course, such linkage does not excuse selecting sub-optimal trade and domestic reforms, but if both are desirable in their own right, combining them might be politically efficient. Fundamentally, there is no technical reason why integrating domestic policies should require trade preferences. The EU and the United States have, for instance, drawn up a series of mutual recognition agreements for sectoral product standards completely outside an RTA context. To date, however, developing countries have been entirely excluded from such initiatives. Wherever possible policy integration that reduces regulatory costs should extend beyond RTA partners to non-members—so that the increase in competition is maximized and policy integration benefits all trading partners. Formal inter-governmental agreements—such as mutual recognition arrangements for product standards and testing—may be necessary for policy integration, but special efforts should be made to ensure that these do not perpetuate or increase discrimination. Discriminatory policy integration—such as including preferential rules of origin in mutual recognition agreements—should be resisted.

Competition between regulatory regimes coupled with mutual recognition is often the most efficient route to policy integration. Some element of harmonization may be called for if there are spillovers—such as a threat that the competitive relaxation of merger regulation will lead to a "race to the bottom"—or to safeguard public health or safety. These are generally best limited to minimum standards based on global norms. RTAs can serve as focal points for adopting and enforcing global minimum standards, but regional standards that diverge from global norms will be optimal only if there are region-specific characteristics.

F. Politics

Countries sometimes form trade blocs for so-called non-economic reasons, such as national security, peace, and help in developing political and social institutions. These are public goods, and so are unlikely to be efficiently provided in the absence of some form of intervention—of which creating an RTA is one. Such political objectives can be important for RTAs, sometimes overwhelmingly so, but it is still desirable that they be achieved efficiently and that policy makers pay heed to their economic cost.

Political benefits such as peace and security can sometimes swamp the simple material considerations that usually determine economic policy. Moreover, since such benefits are typically shared by only a limited number of countries—usually neighbors— they are likely to be better sought on a regional basis than multilaterally. Thus this issue forms a relatively more important part of the analysis of RTAs than of some other international issues. We have shown that under some circumstances, the formation of an RTA may be an effective way to deal with security tensions between neighbouring countries; the argument is essentially that mutual trade fosters peace between countries and regionalism fosters trade[22]. They show that for such a 'political' RTA, the optimum tariff on imports from non-members declines over time, and also as integration deepens. Mercosur may have experienced such political benefits on relations between its two major members.

Joining an RTA with large democratic countries can help a developing country to achieve or uphold democracy if the RTA imposes "club rules" such as democracy and civil rights on its members. This assistance is likely to be more effective if the other members are large economically because larger partners are generally able to impose greater costs on (withdraw greater benefits from) recalcitrants than are smaller ones. It is also likely to be more effective if the developing country in question is of a reasonable size, and if its potential partners are close by. A partner country is likely to be far more concerned about possible spillovers from events in a significantly sized and nearby developing country than elsewhere. Mexico may be one example of this sort of effect; Mercosur's role in deflecting a coup in Paraguay in 1996 is another.[23]

A concern in many RTA members is whether increased regional integration will weaken the nation-state. On the contrary, pooling sovereignty and undertaking collective action can enhance the effectiveness of the state in small or even medium-sized nations. They can assist in solving economic problems, strengthen countries against third-country security threats, and increase international influence by lowering negotiation costs and/or increasing bargaining power in dealings with the rest of the world. Caricom is the archetypal success in negotiating terms[24]. As we argued above, however, cooperation of this kind does not usually require trade preferences.

III. Non-Member Countries and The Trading System

This section considers how regionalism affects the interactions between countries within the international economy and community. Regrettably, many of the arguments are only theoretical, for we do not have enough observations of long-lived regionalism to make empirical judgements, and as we enter the twenty-first century, we are dealing with a

[22] Maurice Schiff and L. Alan Winters, *Regional Integration as Diplomacy*, 12(2) THE WORLD BANK ECONOMIC REVIEW 271 (1998).

[23] *See, e.g.,* THE ECONOMIST, October 12, 1996.

[24] See Soamiely Andriamananjara and Maurice Schiff, *Regional Groupings among Microstates*, 9(1) REVIEW OF INTERNATIONAL ECONOMICS 42–51 (2001).

completely new world of many active trade blocs as opposed to the twentieth century model of a multilateral world with a few blocs.

A. Excluded Countries

RTAs are, by nature, exclusive. After all every country in the world is excluded from nearly every RTA in the world, and every RTA excludes nearly every country. Their discrimination against excluded countries is real and, according to the latest evidence, causes significant trade diversion in some cases. Trade diversion is mainly a cost to the partners who pay more for their imports, but in two sets of circumstances, it can be costly to the excluded countries which lose exports[25].

First, if exports generate super-normal profits, losing them is costly because the income lost exceeds the value of the resources freed up by not having to produce them any more. One example would be if the exporter could charge monopoly prices. A second, more important one, is where exports are taxed, because the tax-inclusive price received for them exceeds the cost of the resources used up in production. Export taxes are rare, but trade theory teaches us that import taxes are export taxes—it is the act of trading (turning exports into imports) that is taxed and it does not matter which side of the transaction formally faces the tax. Thus, any of the many countries with significant tariffs will lose welfare if its exports fall because of others' RTAs.

The second case where trade diversion hurts exporters is if the decline in demand forces down export prices—i.e. worsens the exporter's terms of trade. Chang and Winters present new evidence that this is significant empirically for Brazil's imports of goods following the creation of Mercosur[26]. The prices of US exports **fell** so far that the USA could have lost over half a billion dollars per year in economic welfare via this route.

B. Stepping Stones, Dominoes and Open Regionalism

Possibly even more important than the static losses suffered by excluded countries is the issue of whether RTAs are stepping stones toward the long-run goal of globally freer trade, or millstones slowing progress towards it. The world of many trade blocs is still too new to allow a definitive empirical answer to this question, and economic theory is not completely clear on the matter, but our reading of the case is that there are significant dangers that regionalism could start to undermine the multilateral trading system[27]. Certainly, it hits at one of the corner stones of procedural multilateralism—the equal treatment of all.

In terms of outcomes, the majority of analyses of the effects of bloc-formation on the tariffs that non-co-operating governments would charge each other suggest that tariffs tend to increase with the spread of regionalism[28]. In some cases regionalism has been

[25] Won Chang and L. Alan Winters, *Preferential Trading Arrangements and Excluded Countries: Ex-Post Estimates of the Effects on Price*, 24(6) THE WORLD ECONOMY 797 (2001).

[26] Won Chang and L. Alan Winters, *How Regional Blocs Affect Excluded Countries: The Price Effects of MERCOSUR*, CENTRE FOR ECONOMIC POLICY RESEARCH, DISCUSSION PAPER SERIES, NO. 2179(1999).

[27] L. Alan Winters, *Regionalism versus Multilateralism*, in MARKET INTEGRATION, REGIONALISM AND THE GLOBAL ECONOMY (Richard E. Baldwin, Daniel Cohen, Andre Sapir and Anthony J. Venables, eds. 1999).

[28] An early proof of this proposition is in Paul Krugman, *Is Bilateralism Bad?*, in INTERNATIONAL TRADE AND TRADE POLICY (Elhanan Helpmann and Assaf Razin eds. 1991) and in Paul Krugman,, *Regionalism versus Multinationalism: Analytical Notes*, in NEW DIMENSION IN REGIONAL INTEGRATION, (Jaime De Melo and Arvind Panagariya eds. 1993). Although much of Krugman's modeling has proved fragile to small changes in assumptions his basic insight has remained untouched.

argued to bring other countries to the negotiating table to agree a new round of multilateral trade liberalisation—e.g. the formation of the EEC and the Kennedy Round—but we would argue that this is far from certain and that using such coercive tactics to get others to reduce their tariffs is extremely dangerous.

It is also possible that one act of regionalism would be met by another—giving rise to Richard Baldwin's so-called 'domino regionalism'[29] This seems to lie behind much of the spread of regionalism over the 1980s and 1990s—for example, when Canada sought access to the US-Mexican talks that eventually created NAFTA, and with several Latin American and Caribbean countries seeking accession afterwards. It is important to note, however, that under such conditions one cannot infer that, because regionalism is spreading, it is benign. If everyone is in a gang, you may want to belong to one yourself, but that does not make gangs a good thing.

One of the analytical problems with domino regionalism is that although enlarging an RTA might increase the incentives for new members to join, it does not correspondingly increase the incentives for existing members to let new ones in. Given that RTAs discriminate against excluded countries, insiders will want to stop expansion well short of the whole world—there is no point being on the inside if there is no one on the outside to exploit. For example, NAFTA has rejected overtures from many countries, and APEC had a moratorium on accession from 1993 to 1996, although in fairness, these instances were probably more to do with avoiding the strains of additional adjustment for members (especially the United States) than any exploitative intent. Whether to let more countries in or not, and how many, also depends on the entry conditions, i.e., whether it is free, whether existing members require payment for the benefits that accrue to the new member, whether they require compensation for any losses they may incur[30].

It is sometimes argued that one way around the problem of blockaded entry would be to insist on open access to all RTAs—i.e. that any country that could adhere to the rules of an RTA could join it and reap its benefits. In theory, this may be true, but in practice, given that accession has to be negotiated because the rules of nearly all RTAs entail more than just tariff reductions, there is no operational way to insist on such access. The concept of 'open regionalism', which has several definitions, is related to this[31]. We see this as more a slogan than an analytical tool, for, according to the definition, it either reduces to something else (e.g. multilateralism) or it does not separate 'good' RTAs from 'bad'.

C. Trade Negotiations

If RTAs made trade negotiations easier, perhaps they would help the world evolve toward freer trade. Co-ordinated coalitions may have greater negotiating power than their members individually, and such coalitions may facilitate progress just by reducing the number of players represented in a negotiation[32]. But the gains from having fewer players in the last stage of a negotiation are offset by the complexity of agreeing joint positions in the first phase. The difficulties of achieving a European position on agriculture and cultural protection in the Uruguay Round are well known, and formulating EEC positions in the

[29] Richard E. Baldwin, *A Domino Theory of Regionalism*, in EXPANDING MEMBERSHIP OF THE EUROPEAN UNION (Richard E. Baldwin, P. Haaparanta and J. Kiander eds. 1995).

[30] Andriamananjara and Schiff, *supra* note 25.

[31] Fred Bergsten, *Open Regionalism*, 20 WORLD ECONOMY 545 (1997).

[32] Paul Krugman, *Regionalism versus Multilateralism: Analytical Notes*, *supra,* note 29; MILES KAHLER, INTERNATIONAL INSTITUTIONS AND THE POLITICAL ECONOMY OF INTEGRATION (1995)

Tokyo Round proved complex[33]. Moreover, two-stage negotiations need not be more liberal than one-stage ones[34]. To be sure, Germany and the United Kingdom pressured France to agree to the agricultural deal in the Uruguay Round, but the liberalizers had to make potentially trade-restricting concessions on "commercial defense instruments" to clinch the deal.

The CUs that attend the next round of global trade talks will need to establish procedures for determining their negotiating positions. SACU's previous practice of delegating all responsibility to South Africa begins to look less tenable as divisions emerge between members, and Mercosur has yet to devise really robust internal decision-making capacity. Thus, at least into the foreseeable future, RTAs do not seem likely to facilitate even a traditional trade negotiation.

Moreover, as the WTO has extended its reach, it has embraced subjects in which most central CU authorities have no mandate to negotiate. Mixing national and CU responsibilities seems unlikely to simplify matters, and it is not realistic to expect member countries to surrender sovereignty on sensitive issues to regional bodies just because trade negotiations are in train.

D. Depth and Breadth in Integration

RTAs are also suggested as ways of developing blueprints for technically complex issues before they come to the global level, or as ways of tackling politically difficult issues that can not yet be agreed globally. In fact, this is not as widespread as is sometimes thought—RTAs often avoid difficult issues. Moreover, is regionalism actually more effective in liberalizing deeply than multilateralism? Has global liberalization actually been ruled out or, if RTAs were not an option, would a little more time and effort yield global progress? Having got the ball rolling, will RTAs later slow it down for the reasons discussed above? On a prescriptive note, to the extent that RTAs are justified in terms of opening up otherwise closed sectors, it is important to ensure that the subsequent switch from regionalism to the multilateral track is managed effectively. The necessity for, and the means to achieve, this switch should be written into the initial terms of RTAs.

One danger of the regional approach is that the major powers seek to use RTAs to reinforce their initial positions in future multilateral negotiations. If major players have greater politico-economic power within their own regions than in the world in general, it is easy to imagine their building up coalitions for their own policies before taking issues into a multilateral round. Sylvia Ostry has argued that the United States used approaches by potential partners in the Americas and Asia to broaden the negotiating agenda for its relations with Europe[35], while Europe did the same with the EEA and its Europe Agreements.

The benefits of developing regional blueprints depend heavily on whether they are liberalizing and whether they are otherwise well suited to developing country needs and capacities[36]. Major powers already use access to the Generalised System of Preferences

[33] GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATIONS. (1986)

[34] Giorgio Basevi, Flavio Delbono and Marco Mariotti, *Bargaining with a Composite Player: An Application to the Uruguay Round of GATT Negotiations*, 3 J. OF INTERNATIONAL AND COMPARATIVE ECONOMICS 161(1994)

[35] Sylvia Ostry, *Presentation to the First Academic Colloquium of the Americas, Costa Rica* (1998)

[36] *See,* for example, Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in NEW DIMENSIONS IN REGIONAL INTEGRATION (Jaime De Melo and Arvind Panagariya eds. 1993).

("GSP") to impose environmental and labour conditions on developing countries; the EU looks for action in such areas and on intellectual property in the Europe Agreements, and the United States has used NAFTA as a tool for enforcing Mexican labor and environmental standards. By undermining the natural cohesion of developing countries on these topics in the WTO, RTAs could lead to very different outcomes than will straight multilateralism. It is likely that the outcome will suit developing countries less well, and may be less open and liberal as well.

Moreover, there are dangers in such tactics. First, even if the majors' aspirations are desirable in their own terms, building up rival teams can make final negotiations more, rather than less, difficult. Second, even when only one regional bloc is advocating a policy, other countries might sufficiently resent the pressure to adopt it that they pull back. Developing country *de facto* rejection of the OECD draft Multilateral Agreement on Investment in 1998 contains at least elements of this. Third, the time it takes to build regional coalitions can delay multilateral talks. Fourth, coalitions rooted in formal RTAs are here to stay, so that if multilateral processes fail, the blocs remain. This is quite different from a negotiating coalition, which dissolves if it fails to gain its objectives.

To be sure, progress is required in "new" areas such as standards, but it is frequently better pursued independently of tariff preferences. Thus, while we may as well learn from RTAs about how to tackle particular aspects of liberalization, this is not a convincing reason for pursuing regionalism per se.

C. Developing Country Perspectives

CHAPTER 52

LDCs IN THE MULTILATERAL TRADING SYSTEM

Ratnakar Adhikari*

TABLE OF CONTENTS

I. Background 343
II. LDCs and the Multilateral Trading System: A Historical Perspective 344
A. The Post-War Period 345
B. The Uruguay Round 346
C. First WTO Ministerial Conference 347
D. The High Level Meeting 348
E. The Second Ministerial Conference 348
III. Weaknesses Plaguing the LDCs 349
A. Competitive Ability 349
B. Supply-Side Constraints 350
C. High Export Concentration Ratio 350
D. Implementation Problems 351
E. Lack of Capacity 352
F. The Tortuous Accession Process 354
G. Exclusion From the "Knowledge-Based Economy" 356
H. Other Weaknesses 358
IV. A Brief Overview of Efforts by the International Community 359
A. Market Access 360
B. Special and Differential Treatment 363
C. Integrated Framework 365
V. Achievements of Recent International Conferences 367
A. Third United Nations Conference on LDCs 367
B. Fourth WTO Ministerial Conference (Doha) 369
VI. What Should the LDCs Do? 371
A. Striving to Become a Part of the Knowledge-Based Economy 371
B. Mainstreaming Trade with Development Strategies and Processes 371
C. Building Capacity 372
D. Developing Human Resources 372
E. Diversification of Export Profile 373
F. Promoting Accountable Governance 374
G. Macro-Economic Reforms 374

* Excecutive Director, South Asia Watch on Trade, Economics & Environment (SAWTEE), Katmandu, Nepal

H. Compensating the Losers 375
I. Use of Safeguards 376
J. Improving Communications Between Government and Non-Government Sector 376
K. Building Credible Alliances 377
VII. Conclusion 377
Bibliography 378

I. Background

In 1971, the poorest countries of the world were designated by the United Nations as the least developed countries ("LDCs").[1] Based on the criteria established at that time 25 countries fell into this category. However, over the period of last three decades, the number of countries falling into this category continued to grow, with only one country, Botswana, so far having been able to graduate to developing country status. At present there are 49 LDCs in the world.[2]

In its latest triennial review of the list of Least Developed Countries in 2000, the Economic and Social Council of the United Nations ("ECOSOC") used the following three criteria for determining the new list, as proposed by the Committee for Development Policy: low income, human resource weakness and economic vulnerability.[3] In the 2000 review of the list, a country qualified to be added to the list if it met the above three criteria and did not have a population greater than 75 million. Application of this rule resulted in the inclusion of Senegal.[4]

According to the UNCTAD Least Developed Countries Report for 2000 ("UNCTAD LDC Report 2000"), if the present trend of economic growth and/or recovery continues, only one country (Lesotho) will be able to graduate to developing country status by 2015.[5] At their current growth rates only four countries (Bhutan, Laos, Lesotho and Sudan) are likely to reach the threshold for graduation by 2025. At least seventeen LDCs, all from Africa, are either facing negative growth rates or are stagnant, such that they are not likely to be graduated to developing country status even after a hundred years.[6] Real GDP per capita in LDCs grew by only 0.9 percent per annum during 1990–98, and excluding Bangladesh by only 0.4 percent per annum.[7] An important feature of the performance of most LDC economies is the significant degree of income instability, with periods of slow growth followed by sharp declines in *per capita* incomes. Most of the LDCs are characterized by a low level of human development indicators. LDCs account for 32 of the 35 countries in the lowest category of the UNDP's Human Development Index.

LDCs have, for decades, been striving to find the right development strategy to enable them to reduce the economic disparities between them and more advanced economies. Over the past two decades an increasing number of LDCs have placed their hopes on

[1] UNCTAD website http://www.unctad.org/ldcs/, accessed on June 3, 2002

[2] These include 34 countries in Africa (Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Rep., Chad, Comoros, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome & Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, Zaire, Zambia); nine in Asia (Afghanistan, Bangladesh, Bhutan, Burma, Cambodia, Laos, Maldives, Nepal, Yemen), five in the Pacific (Kiribati, Samoa, Solomon Islands, Tuvalu, Vanuatu) and one in the Caribbean (Haiti).

[3] The low-income criterion is based on a three-year average estimate of the gross domestic product per capita (under $900 for inclusion, above $1,035 for graduation). The human resource weakness criterion involves a composite *Augmented Physical Quality of Life Index (APQLI)* based on indicators of: (a) nutrition; (b) health; (c) education; and (d) adult literacy. Finally the economic vulnerability criterion involves a composite *Economic Vulnerability Index (EVI)* based on indicators of: (a) the instability of agricultural production; (b) the instability of exports of goods and services; (c) the economic importance of non-traditional activities (share of manufacturing and modern services in GDP); (d) merchandise export concentration; and (e) the handicap of economic smallness (as measured through the population in logarithm). *See* UNCTAD, *supra* note 1

[4] There were 48 LDCs in the world for a long time. Inclusion of Senegal increased the number to 49.

[5] *The Least Developed Countries, 2000 Report*, at XXX (3) UNCTAD/LDC/2000 E.00.II.D.21 (December 10, 2000)

[6] *Id.*

[7] *Id.* at 3

a development strategy based on increased participation in the world economy, through exports and inward foreign investment.[8] Indeed, according to the UNCTAD LDC Report 2000, trade liberalization in the LDCs has actually proceeded further than in other developing countries. In 1999, sixty percent of the 43 LDCs for which data is available had average tariff barriers below twenty percent and non-tariff barriers that covered less than 25 percent of production and trade. Similarly, UNCTAD data on foreign investment regimes in the late 1990s shows that out of a sample of 45 LDCs, only nine maintained strict controls on the remittance of dividends and profits and capital repatriation.[9] However, their success in both increasing their trade and attracting FDI has remained marginal. It is worrisome to note that the LDCs, despite serious efforts to integrate themselves into the multilateral trading system, are being marginalized from the system.

Against this background, the objectives of this chapter are to analyze the factors responsible for the marginalization of LDCs from the multilateral trading system and to propose policies for the LDCs themselves and for the international community as a whole on how to prevent (and if possible reverse) this process. The chapter is organized as follows: Part II outlines the historical background of the participation of the LDCs in the multilateral trading system up to the second Ministerial Conference of the WTO. Part III analyzes the weaknesses plaguing the LDCs and the reasons for their persistence. Part IV presents a critical appraisal of the efforts made so far to integrate LDCs into the multilateral trading system and the reasons for their failure. Part V deals with the outcomes of the two major international conferences held in 2001 and attempts made (or lack of them) during those conferences to integrate LDCs into the multilateral trading system. Part VI provides a policy prescription for the LDCs. Finally, Part VII provides some concluding thoughts.

II. LDCs and the Multilateral Trading System: A Historical Perspective

The 49 LDCs, which collectively are home to 10.7 percent of the global population, have a 0.5 percent share in global GNP.[10] Their collective share in global trade is rapidly falling and it now stands at 0.4 percent.[11] While the decade of 1980s was dubbed the "lost decade" for developing countries in general, the 1990s became the decade of increasing marginalization, inequality, poverty and social exclusion for the LDCs.[12] If the present trend continues, the decade of the 2000s may well become a decade of rhetoric and inaction. The experience of many LDCs during the 1990s show that despite massive economic liberalization, the overall progress in increasing real incomes, combating poverty, and achieving human development has remained disappointing.[13] The efforts made at the international level to integrate these countries into the multilateral trading

[8] UNCTAD and Commonwealth Secretariat, DUTY AND QUOTA FREE MARKET ACCESS FOR LDCS: AN ANALYSIS OF QUAD INITIATIVE 1 (2001)

[9] *See* John Cuddy, *The State of Development in Least Developed Countries*, BRIDGES MONTHLY REVIEW, Year 5, No 4, 3 (May 2001)

[10] UNCTAD, STATISTICAL PROFILES OF THE LEAST DEVELOPED COUNTRIES 4 (2001).

[11] While the share of LDCs in global trade declined from 0.48 percent in 1990 to 0.4 percent in 1999, exports nevertheless now represent 49 percent of their gross domestic product, compared with 35.8 percent a decade ago, thus signifying increased openness to trade. *See*, International Centre for Trade and Sustainable Development ("ICTSD"), *Least-Developed Countries: No New Trade Concessions Before Doha,* in BRIDGES MONTHLY REVIEW, Year 5, No. 4, at 2 (May 2001).

[12] Cuddy, *supra* note 9 at 4.

[13] Hiramani Ghimire, *Least-Developed Countries in Search of Identity in the WTO*, in SALVAGING THE WTO'S FUTURE—DOHA AND BEYOND 350 (Amit Dasgupta and Bibek Debroy eds. 2001).

system so far have largely failed. With this background, we now discuss the history of participation of the LDCs into the multilateral trading system.

A. The Post-War Period

Prior to the Uruguay Round ("UR"), the preoccupation of the LDCs had been mainly with preserving and improving the preferential trade liberalization they received from major trading partners through various programs, paying little if any attention to the multilateral trade negotiations conducted under the auspices of the GATT, which were traditionally confined to the reduction of tariff and non-tariff barriers to trade. The perceived limited interest in the GATT trade liberalization process could partially be explained by the inability of the LDCs to supply foreign markets on a competitive basis, and thus their limited capacity to take advantage of global trade liberalization on a most-favored-nation ("MFN") basis.[14]

During the post-war period (or post-colonial period for some), it was the view of a number of prominent development economists that the quickest way for developing countries to achieve industrial status was through the adoption of import substitution policies.[15] This prescription led a number of developing countries to adopt an import substitution industrialization strategy, little realizing that this would only breed vested interest groups, requiring perpetual protection, taxing efficiency, and creating massive rents.[16] The market failure justification for infant industry protection did not work for the LDCs, despite the fact that it worked quite well in some East and South East Asian countries.[17] While developing countries in East Asia were quick to abandon such a strategy in favor of an open trade and investment regime, and were followed by countries in Latin America, the LDCs took a long time to come out of the vicious circle of protectionism, low income, low saving, low investment and limited investment in the creation of social and physical capital.

The 1960s witnessed the entry of a number of LDCs into the GATT system. Myanmar (formerly Burma), was the only LDC to be a founding member (Contracting Party) of the GATT, while Haiti was the first non-founding LDC to join the club, in 1950. This was followed by the entry of Tanzania and Sierra Leone in 1961. A large number of African LDCs entered the GATT between 1963 and 1965. Only two Asian LDCs entered the club, but much later than their African counterparts. While Bangladesh joined GATT in 1972, the Maldives did not join until 1983.[18] No other LDCs from the Asia-Pacific region are Members of the GATT/WTO. They have been unable to secure accession to the GATT/WTO, for various reasons discussed in Part III.F of this chapter.

At the insistence of the developing countries that they be provided special treatment within the GATT system, Part IV titled "Trade and Development" was added to the

[14] Rubens Ricupero, *Foreword* in FUTURE MULTILATERAL TRADE NEGOTIATIONS: HANDBOOK FOR TRADE NEGOTIATORS FROM LEAST DEVELOPED COUNTRIES vii (1999).

[15] Edwin Kwame Kessie, *Developing Countries and the World Trade Organization: What Has Changed*, 22 WORLD COMPETITION 2, 86 (1999)

[16] The Import Substitution Industrialization strategy, defined as "the strategy of encouraging domestic industry by limiting imports of manufactured goods", is now completely discredited and abandoned. This strategy was chosen by the developing countries and LDCs based mainly on the theories of *infant industries* and *market failure*. For further details, *see* PAUL R. KRUGMAN AND MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY 255–261 (2000)

[17] Notable examples are South Korea and China. *See* Dani Rodrik, *Trading in Illusion,* FOREIGN POLICY, March-April 2001.

[18] The list of GATT Members which had joined the GATT by 1994 and their date of accession can be found at http://www.wto.org/english/thewto_e/gattmem_e.htm, accessed on June 3, 2002

GATT text in 1964. The next major GATT event from the perspective of developing countries was the introduction by most advanced economies of the Generalised System of Preferences ("GSP"), granting them preferential market access. The European Union and Japan introduced their GSP programs in 1971, Canada in 1974, and the United States in 1976.[19] Since these tariff preferences were inconsistent with the general most favored nation ("MFN") principle embodied in GATT Article I, the GSP programs required a GATT waiver. Initially, in 1971, a ten-year waiver was granted, but this was superseded in 1979 by the so-called Enabling Clause[20], making the GSP a permanent feature of the multilateral trading system.[21] However, the "concessions" granted to developing countries such as the inclusion in the GATT of Part IV on Trade and Development and the Tokyo Round Enabling Clause on special and differential treatment were mostly rhetorical, and others, such as the GSP, were always heavily qualified and quantitatively small. In sum, the GATT was indifferent, if not actively hostile, to the interests of the developing countries.[22]

B. The Uruguay Round

Viewed from the perspective of the developing countries in general and the LDCs in particular, the Uruguay Round was a disaster. This was mainly due to lack of preparedness on their part. However, towards the end of the Round, they managed to secure some special arrangements as well as the continuation of previous arrangements. This was possible because of their market conditions, the weakness of their institutions, and their relative lack of capacity.[23]

Acknowledgement of the difficulties which the developing countries, particularly the LDCs, are likely to encounter in fulfilling their obligations under the UR was expressed through the continuation of the special and differential ("S&D") provisions of the GATT in various WTO agreements. These provided for: (i) a lower level of obligations; (ii) more flexible implementation schedules; (iii) best endeavor commitments by developed countries; (iv) more favorable treatment for least-developed countries; and (v) technical assistance and training.[24]

Meanwhile, between 1988 and 1993, while the UR negotiations were in progress, the terms-of-trade of the LDCs fell on average by about twelve percent, although in 1994–95

[19] The GSP is defined in UNCTAD Resolution No. 21/1968. The main principles underlying the GSP programs are: i) Generality (all developing countries and beneficiaries); ii) non-reciprocity (no obligation of developing countries to reciprocate); and iii) non-discrimination among beneficiaries. *See* UNCTAD AND COMMONWEALTH SECRETARIAT, *supra* note 8, at 9.

[20] The official name of the Enabling Clause is the *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of the GATT Contracting Parties of November 28, 1979.

[21] UNCTAD AND COMMONWEALTH SECRETARIAT, *supra* note 8, at 8.

[22] T.N. Srinivasan, *Developing Countries in the World Trading System: From GATT, 1947 to the Third Ministerial Meeting of WTO,* a revised version of the Keynote Speech delivered at the HIGH LEVEL SYMPOSIUM ON TRADE AND DEVELOPMENT, World Trade Organization, 10 (1999)

[23] These included the *Decision on Measures in Favour of Least-Developed Countries, the Decision on Measures Concerning the Possible Negative Effects of Reform Program on Least-Developed and Net Food-Importing* Developing Countries, and the Declaration on the Contribution of the WTO to Achieving Greater Coherence in *Global Economic Policy Making* reproduced in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL NEGOTIATIONS 384, 386, 392 (1999). *See* DEBAPRIYA BHATTACHARYA AND MUSTAFIZUR RAHMAN, *The Least Developed Countries in The WTO: Strengthening Participation Capacities*, paper prepared for the MEETING OF SENIOR OFFICIALS ON FUTURE WTO TRADE AGENDA AND DEVELOPING COUNTRIES, organized by U.N.-ESCAP, Bangkok, 23–25 August, 3 (1999)

[24] *Id.* at 3–4

there was an upturn that was sustained until 1997. However, there was a precipitous decline in the exports of major commodities by the LDCs during 1998 and 1999. Over the last four decades their share in world exports decreased more or less constantly from 3.06 percent in 1954 to 0.42 percent in 1998,[25] even though their volume of global trade has increased in absolute terms.

Even after the conclusion of the UR and the establishment of the WTO, the overall level of participation of the developing countries in general and the LDCs in particular remains limited. This is largely the result of their limited financial and human resources, as well as institutional weaknesses. Strengthening the capacities of the developing countries generally, and the LDCs in particular, to participate not only in the institutional structures of the WTO but also in the global market place has now been widely accepted as one of the fundamental prerequisites for the success of the WTO as a system.[26] In the case of developing countries, there has been a marginal increase in participation because they are able to make themselves heard loudly and clearly at the various international fora, including the WTO. However, in the case of the LDCs even that has not been possible (as will be explained later).

C. First WTO Ministerial Conference

The problem of marginalization of certain developing countries, in particular the LDCs, figured prominently in the First Ministerial Conference of the WTO held in Singapore in December 1996. The participating Ministers in the Declaration of the Conference acknowledged that developing country members had undertaken significant new commitments, both substantive and procedural, and recognized the range and complexity of the effort that they were making to comply with these commitments. In order to assist them in these efforts, including those with respect to notification and legislative requirements, it was decided that the WTO would improve the availability of technical assistance to the developing countries.[27]

Regarding the LDCs, the Singapore Conference agreed to:

- Develop a Plan of Action, including provisions for taking positive measures, for example duty-free access, on an autonomous basis, aimed at improving their overall capacity to respond to the opportunities offered by the trading system;
- Seek to give operational content to the Plan of Action, for example, by enhancing conditions for investment and providing predictable and favorable market access conditions for the products of LDCs, to foster the expansion and diversification of their exports to the markets of all developed countries; and in the case of relevant developing countries in the context of the Global System of Trade Preferences; and
- Organize a meeting with UNCTAD and the International Trade Center as soon as possible in 1997, with the participation of aid agencies, multilateral financial institutions and least-developed countries, to foster an integrated approach to assisting these countries in enhancing their trading opportunities.[28]

[25] UNCTAD AND COMMONWEALTH SECRETARIAT, *supra* note 8, at 3

[26] Bhattacharya and Rahman, *supra* note 23, at 3

[27] *Id*. at 4

[28] WTO, *Singapore Ministerial Declaration*, adopted on 13 December, WT/MIN(96)/DEC (1996), reproduced in the Appendix to this book

D. The High Level Meeting

Following up on the mandate contained in the Singapore Ministerial Declaration, a High Level Meeting on the Integrated Initiatives for Least-Developed Countries' Trade and Development ("HLM") was held at the WTO on October 27–28, 1997, with the main objective of devising a mechanism for arresting the marginalization of the LDCs from the multilateral trading system. One of the major achievements of the HLM was that it endorsed an Integrated Framework ("IF") for Trade-Related Technical Assistance, discussed in Part IV.C of this chapter. It was reported that initially forty LDCs expressed interest in the IF exercise.[29]

Offers announced or proposed to be adopted during the meeting by a group of developing countries (including Egypt, India, Korea, Mauritius, Morocco, Malaysia, Singapore, South Africa, Thailand and Turkey) and countries in transition were particularly noteworthy. Some countries such as Indonesia and Chile indicated that they were considering new initiatives, but were not yet ready to announce them at the Meeting.[30]

While there was a great deal of interest in market opening, it emerged very clearly during the HLM that market access was a necessary but not sufficient condition to guarantee more exports for the LDCs, let alone broad-based development. Improved and predictable access to the markets of both developed and developing countries would become even more crucial when actions to address supply-side constraints in least-developed countries started to bear fruit.

The LDC representatives welcomed the market access packages announced but felt that more needed to be done. They indicated that the least-developed countries were asking for a change in the legal rules as well as in discretionary actions. They believed that Part IV of the General Agreement, Articles XXXVI to XXXVIII, should commit Members to removing all of the market access problems of least-developed countries rather than leaving this to their own discretion.[31] Moreover, the Plan of Action for Least-Developed Countries, which Ministers had agreed on in Singapore, provided for WTO Members to individually open up their markets to products from least-developed countries.[32]

E. The Second Ministerial Conference

The Declaration of the *Second Ministerial Conference* of the WTO, which was held in Geneva on May 10, 1998, recommended follow-up on the decisions of the HLM on LDCs. However, the work program of the Second Ministerial was more ceremonial than substantive in nature as it was scheduled to coincide with the fiftieth anniversary of the establishment of the GATT.[33]

[29] These countries were: Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Ethiopia, the Gambia, Guinea, Guinea Bissau, Haiti, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao-Tome and Principe, Solomon Islands, Sudan, Tanzania, Togo, Uganda, Vanuatu and Zambia.

[30] WTO, *High Level Meeting on Integrated Initiatives for Least Developed Countries' Trade Development*, WT/LDC/HL/M/1, 26 November, 17 (1997)

[31] The GSP program, discussed earlier, was optional, not mandatory, for the developed countries, which could therefore impose any conditions they wished upon it, such as limiting the eligible products and countries. The United States, for example, excludes a number of "import-sensitive products", such as textiles and footwear, as well as countries that fail to provide internationally-recognized worker rights or engage in a variety of activities considered inimical to U.S. interests.

[32] WTO, *supra* note 30, at 18

[33] Bhattacharya and Rahman, *supra* note 23, at 5. The Declaration is reproduced in the Appendix to this book.

Other initiatives taken in various international conferences and the fourth Ministerial Conference of the WTO are discussed separately in Part V of this chapter.

III. Weaknesses Plaguing the LDCs

The LDCs continue to suffer from serious social, economic, political and structural weaknesses which are responsible for their exclusion from the global economic mainstream. Some of these are due to their specific geographical location (such as land-lockedness), some are political (such as civil strife), some are economic (such as macroeconomic instability), some are social (such as poor health and education), while some others are structural (lack of required infrastructure). However, all these factors are inextricably intertwined. A short description of the weaknesses is thus in order.

A. Competitive Ability

In the era of global competition, it is not sufficient for LDC enterprises to be locally competitive. They need to be globally competitive, for which they should possess some competitive advantage such as economies of scale, cutting-edge technology, marketing strengths, efficient production and distribution systems, and/or cheap labor.[34] The LDCs do not generally have comparative advantage in any one of these areas except for the availability of cheap labor. However, because of the low productivity of such labor, resulting mainly from lack of education and skills and poor health, even this comparative advantage of the LDCs has not been fully exploited.

The precarious socio-economic situation and structural weaknesses inherent in the economies of the LDCs relegate these countries to a weak competitive position in the current global economic setting.[35] However, unless the competitive ability of businesses in the LDCs is improved, they will not be able to achieve any significant success in integrating themselves into the multilateral trading system. As a UNCTAD LDC Report succinctly put it:

> Developing and sustaining competitiveness and productive capacities, like all other aspects of development, is a long, difficult and often frustrating process, but one which must be confronted by the Governments of LDCs and their development partners with unwavering resolve in a renewed spirit of solidarity and shared responsibility.[36]

What makes the matter more complicated is the fact that there are stark differences even among the LDCs in terms of competitive ability and resulting trade performance. For example, in the year 2000, aggregate merchandise exports from the LDCs reached a record level (US$ 34 billion), while at the same time more than one-third of the LDCs saw their exports decline.[37]

[34] Ratnakar Adhikari and Hiramani Ghimire, INTEGRATING LDCs INTO THE MULTILATERAL TRADING SYSTEM: RHETORIC GALORE 7 (2001).

[35] UNCTAD, *Integrating Least Developed Countries into the Global Economy: Proposal for a Comprehensive New Plan of Action in the Context of the Third WTO Ministerial Conference*, adopted at THE CHALLENGE OF INTEGRATING LDCs INTO THE MULTILATERAL TRADING SYSTEM: COORDINATING WORKSHOP FOR SENIOR ADVISORS TO MINISTERS OF TRADE IN LDCs, Sun City, South Africa (June 21–25, 1999)

[36] UNCTAD, THE LEAST DEVELOPED COUNTRIES REPORT 1999 at 4 (1999)

[37] Pradeep Mehta, *Follow-up to the Fourth Ministerial Conference in Doha: Market Access—the Major Roadblocks*, UNCTAD-CIVIL SOCIETY DIALOGUE ON SELECTED DEVELOPMENT ISSUES BEING ADDRESSED BY THE UNITED NATIONS SYSTEM, UNCTAD/ISS/Misc. 385 at 130 (2002)

B. Supply-Side Constraints

In the LDCs, lack of linkage between production facilities, service and infrastructure facilities limits their potential to specialize in crucial productive sectors and to reap the benefit of productivity gain. While poorly developed human resources have led to a paucity of managerial, entrepreneurial and technical skills, ability to conduct adaptive research is severely constrained by lack of incentive and entrepreneurial zeal. Similarly, poorly developed infrastructure (e.g., transport, power and storage facilities) and support services (e.g telecommunications, financial services and other technical support service institutions) limit their ability to supply even otherwise competitively produced goods to the international market. In the face of poor infrastructural services and administrative inefficiencies resulting from cumbersome bureaucratic procedures, many LDCs are creating specially designed export processing zones ("EPZs") and providing support services to industries. These mechanisms are worth emulating by other LDCs.

Trade facilitation services such as access to business information (particularly on rules and procedures of export markets), use of information technology, development of new products, advice on standards, packaging, quality control, marketing and distributional channels, and functioning of trade promotion organizations are virtually non-existent in the LDCs. They also lack the capacity and resources to modernize and reform customs and other government agencies participating in trade transactions and simplifying export and import procedures.[38]

Access to finance is a major problem facing exporters in the LDCs. This can, in part, be ascribed to the virtual absence of capital market in some LDCs and high interest rates on credit charged by financial institutions reflecting high risk.[39] Labour productivity is another major problem. Besides lack of skills and poor health, due to generally high degree of politicization of labour, industrial enterprises in LDCs continue to lose to their competitors from more advanced countries.[40]

C. High Export Concentration Ratio

The LDCs have not been able to diversify their domestic production structures, not only with regard to manufactured goods, but even with respect to their primary commodities. This renders them especially vulnerable to international market volatility. Of the 4,162 products exported by LDCs to thirty major trading partners in 2000, 127 accounted for ninety percent of their total export trade. On an average, the top three commodities exported by each LDC usually account for over seventy percent of its total exports.[41] The export concentration ratios (defined as the share of the principal export product in the total export value) have remained high and largely unchanged since 1980 for all LDCs. Several countries greatly depend on particular primary commodity exports, especially in sub-Saharan Africa.[42] What makes the situation even worse for many LDCs is that,

[38] *See* Bhattacharya and Rahman, *supra* note 23, at 7

[39] For example, spread (defined by the difference between the cost of credit and deposit) of financial institutions in Tanzania in 1999 was fourteen percent. *See* Flora Musonda, Wilfred Mbowe and Faye Sampson, *The Competition Regime in Tanzania*, COMPARATIVE STUDY OF COMPETITION LAW REGIMES OF SELECT DEVELOPING COUNTRIES (7-UP PROJECT), 2001

[40] *See generally* ADHIKARI AND GHIMIRE, *supra* note 34, at 9

[41] WTO Sub-Committee on Least-Developed Countries, *Market Access Conditions for Least Developed Countries* (WT/LDC/SWG/IF/14), (2000).

[42] For example, coffee occupies 82.7 percent, 69.4 percent and 63.6 percent of the share of total export value of Uganda, Rwanda and Ethiopia respectively. *See* C.P Chandrasekhar and Jayati Ghosh, *WTO and Poor Countries* CUTS-CITEE BRIEFING PAPER, 3. (2000).

while exports of a single product may constitute a large share of their export basket, they count for relatively little in terms of the international supply, so that they are unable to influence world prices in a way that is beneficial to them.[43]

Another analysis conducted by UNCTAD and the Commonwealth Secretariat calculates export concentration indices and the number of exported products for selected LDCs. According to this study, despite sustained efforts to diversify their export base, the number of products exported by LDCs is very small (especially for Pacific LDCs) while for others it is well below the 1998 non-LDC world average. Also, for certain LDCs, the export concentration index is close to one and much higher than the average of non-LDC countries.[44]

As discussed above, this poor trade performance of LDCs also results from domestic factors, such as structural rigidities and bottlenecks that hamper the transition to manufactured and processed products (associated with insufficient human capital, absence of capital markets, lack of infrastructure, etc.). Given the long-run tendency for relative commodity prices to deteriorate, the terms of trade of LDCs will continue to worsen if they remain locked in primary sector export production.[45]

D. Implementation Problems

For a variety of reasons, many LDCs have not been able to fully implement several WTO agreements. At the time of signing of the UR accord, it was decided that the LDCs (as well as, to a lesser extent, other developing countries) would be given certain transitional periods for implementation of some of the agreements, such as TRIPS and TRIMs. However, arguing for the need to extend the transitional periods for the LDCs, an UNCTAD report states that such "time-bound transitional periods" given to the LDCs have serious shortcomings. The report further says:

> Because of their limited duration, the transitional periods have limited impact on capacity creation for trade and production. . . . Such time-bound derogation from obligations also assumes the existence of both institutional and resource capacities in LDCs to take maximum advantage of the relevant provisions. For most LDCs these capacities do not exist.[46]

LDCs are also required to bring their trade policy regimes in line with the WTO rules. This requires new laws, new institutions, and skilled human resources. Even the administrative machinery has to undergo a significant change. In the LDCs, where the salary structure for civil servants is extremely low, these changes are difficult to implement.[47] This is particularly true in the case of Trade Related Aspects of Intellectual Property Rights ("TRIPS"). Many LDCs have very limited experience in many areas of the TRIPS Agreement. This renders the implementation of the Agreement a very costly exercise. According to Finger and Schuler,

[43] *Id.* at 4.

[44] Export concentration index is numbered between 0 and 1, where 0 represents the lowest concentration and 1 represents the highest. While the non-LDC world average is 0.2 for the 1990s, Kiribati had a concentration index of 0.73 and Zambia had a concentration index of 0.83 in 1995. *See* UNCTAD AND COMMONWEALTH SECRETARIAT, *supra* note 8, at 5–6

[45] UNCTAD AND COMMONWEALTH SECRETARIAT, *supra* note 8, at 4

[46] *Cf.* SUNS, *LDCs To Lose* $ *3 Billion from Uruguay Round, Says UNCTAD*, in SOUTH-NORTH DEVELOPMENT MONITOR (SUNS) No. 3620, 2 (n.d)

[47] Hiramani Ghimire, *Integrating LDCs into the Multilateral Trading System: Need for a Bond Between Promise and Performance,* SAWTEE BRIEFING PAPER 5 (2000)

> Least developed country institutions in these areas are weak, and would benefit from strengthening and reform. However, our analysis indicates that the WTO obligations reflect little awareness of development problems and little appreciation of the capacities of the least developed countries to carry out the functions that SPS, customs valuation, intellectual property, etc. regulations address.[48]

They estimate that the cost of implementing three of the Uruguay Round Agreements (TRIPS, SPS and Customs Valuation) for an advanced developing country like Mexico amounts to around $130 million.[49] This cost is more than the entire annual budget of many LDCs. They further warn: "The experiences we have reviewed were in the more advanced developing countries; the costs could be higher in the least developed countries who will begin further from the required standards."[50]

Non-compliance of notification obligations has been yet another obvious weakness. The WTO system puts great emphasis on transparency, which requires Members to notify the WTO about their trade policy measures. Altogether there are 215 notification obligations.The LDCs have lagged far behind other countries in meeting these obligations, with a compliance rate of less than sixteen percent.[51] These problems will be exacerbated if new areas come within the WTO ambit as a result of the Doha Round.

E. Lack of Capacity

Strengthening the capacities of developing countries in the area of international trade is of crucial importance, both for the countries themselves and for their partners, in view of the number of international trade negotiations, both ongoing and forthcoming. Developing countries in general and LDCs in particular find it increasingly difficult to cope with the commitments they have made under the WTO. An analysis of the lack of capacity reveals that three issues figure prominently. The first issue relates to the capacity to implement the WTO Agreements, which has been discussed above. A second issue relates to the capacity to understand the texts of the Agreements and their implications for the country. A third relates to the capacity to negotiate effectively in the increasingly loaded agenda items of the WTO. The latter two issues will be discussed in this part.

Most WTO Agreements reflect the tough negotiations that went on during the drafting process. Most of these negotiations took place between the developed countries, although some developing countries played a role. The final agreements are highly legalistic.[52] It takes a well-trained trade lawyer to understand these agreements and interpret them. However, most LDCs do not have such lawyers. The officials at the commerce ministries, who have in most cases received no other exposure than attending a training course on trade policy offered by the WTO Secretariat, are not likely to be able to understand some of the provisions relating to such complicated Agreements of the WTO as the Agreement on Agriculture, SPS, TBT, TRIPS or the Antidumping Agreement.

[48] MICHAEL FINGER AND PHILLIP SCHULER, IMPLEMENTATION OF URUGUAY ROUND: THE DEVELOPMENT CHALLENGES 1 (1999)

[49] *Id.* at 25

[50] *Id.*

[51] Ghimire, *supra* note 47, at 5

[52] This has become evident from the recent decisions of the Dispute Settlement Panel and Appellate Body, which indicate a major shift from the diplomatically-driven conciliatory dispute settlement mechanism of the GATT towards the legally-driven adjudicative system of the WTO. *See* John H Jackson, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 109–111 (1997)

For example, interpreting some of the most convoluted provisions of the TRIPS Agreement, e.g., Article 27.3 (b)[53] is a hugely difficult task. Some members view the term "effective *sui generis*" system for the protection of plant varieties as meaning protection through any mechanism which does not impair the ability of the farmers to save, exchange or sell seeds on a non-commercial basis.[54] Other countries are of the view that the International Union for the Protection of New Varieties of Plants ("UPOV") 1991 model is the *only* effective *sui generis* model of plant variety protection (other than patents).[55] Similarly, multiple interpretations of other provisions of TRIPS Agreement such as those relating to compulsory licensing and parallel imports have generated a great deal of controversy. Thanks to the Doha Declaration on TRIPS and Public Health, this issue has been settled with respect to pharmaceuticals, at least for the time being.[56]

The capacity of the representatives of the LDCs to participate in the regular negotiation process that takes place at the various Committees of the WTO on a regular basis and to negotiate the built-in-agenda items and new issues is severely restricted for a number of reasons. The first one again relates to the lack of understanding of the issues at stake. The second one, which is more of an institutional nature, is the fact that some eleven LDCs do not have a resident mission in Geneva. Geneva Week[57] has helped to some extent in that it at least provides a platform for the LDC delegations to express themselves, but this is no substitute for having a permanent mission in Geneva, which would allow the delegates to remain in permanent touch with the issues being discussed at the WTO and to participate effectively in the negotiation process. It is quite certain that the LDCs will face serious difficulties when negotiations on a whole range of new issues like competition policy, investment, government procurement, environment and trade facilitation begin.[58] One commentator has noted that "LDCs, many of which do not have permanent missions in Geneva, will not be able to keep up with all these additional issues for negotiation and run the risk of having to make commitments at the end of the new cycle of trade negotiations, without knowing what impact they would have on their economies."[59]

[53] This Article in relevant part states: "However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof."

[54] This is the position taken by many developing countries. India, for instance, has implemented its Plant Variety Protection and Farmers' Rights Act, 2001, with this understanding. However, lawyers are skeptical that this will survive the scrutiny of the Dispute Settlement Body, should a dispute arise.

[55] This position is advanced by the developed countries, which are the Members of the UPOV. Under this position, the rights of the farmers to save, exchange or sell proprietary seeds would be severely circumscribed.

[56] *See* WTO, *Declaration on TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, November 20, 2001, reproduced in the Appendix to this book.

[57] Geneva week refers to the meeting organized by the WTO Secretariat every year for the trade officials of the countries not having resident missions in Geneva to help them come to grips with the issues being discussed at the WTO.

[58] These are issues to be discussed as part of the Doha Round. While some of the issues will be negotiated before the Fifth Ministerial Conference of the WTO, some will be discussed after the Conference. A least ten Agreements/issues were supposed to be negotiated (some in parts and some in full) prior to the Fifth Ministerial Conference in Canada, Mexico, in September 2003. They include the Agreement on Agriculture ("AOA"), the Agreement on Subsidies and Countervailing Measures ("ASCM"), the Agreement on Anti-dumping or Agreement on Implementation of Article VI of the GATT 1994 ("AAD"), the Agreement on Textile and Clothing ("ATC"), the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") Agreement, the Agreement on Trade-Related Investment Measures ("TRIMS"), The Agreement on Safeguards ("AS"), the Agreement on Sanitary and Phytosanitary Measures ("SPS"), the Agreement on Technical Barriers to Trade ("TBT"), and Special and Differential Treatment ("S&DT"), *See* European Centre for Development Policy Management, ICTSD and Overseas Development Institute (ODI), 1 (1) TRADE NEGOTIATIONS INSIGHTS 8 (2002).

[59] Celine Charverait, *The New Cycle of WTO Negotiations as an Opportunity to Fulfill Promises Made at the U.N. LDC-III Conference: The View of Oxfam International* in UNCTAD-CIVIL SOCIETY DIALOGUE ON

F. The Tortuous Accession Process

Of the 49 LDCs, thirty are WTO members and nine are observers, of which six are in the process of accession (Cambodia, Lao Peoples Democratic Republic, Nepal, Sudan, Samoa, and Vanuatu). Thus, for as many as thirteen LDCs, the question of whether to become a member of the WTO and to begin the accession process will have to be addressed sooner or later. The first step in integrating LDCs into the global economy and the international trading system is their institutional integration into the WTO system. This should be among the first actions to be undertaken to stem and reverse the marginalization of the LDCs.[60]

The WTO accession process is governed by Article XII of the Agreement Establishing the WTO (the Marrakesh Agreement), which states: "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations or for the other matters provided for in this Agreement and the Multilateral Trade Agreement may accede to this Agreement, on terms to be agreed between it and the WTO".

Since the WTO is a unique intergovernmental organization, having no power of its own to negotiate accession agreements with the acceding countries, it is the existing Member States that dictate the terms and conditions for such entry. The accession process to the WTO is akin to membership of a club where the existing members decide the terms and conditions. Those members who agree to comply with the requirements will be admitted to the club and those who cannot do so will never be admitted.[61]

During the accession negotiations the objectives of the existing Members will be to extract the maximum concessions from any new applicant. This is done for two reasons. First, it will help the existing members set a precedent for extracting higher concessions from other applicants in the queue. Second, it provides them benefits without their having to reciprocate. It is a harsh reality that countries applying for WTO membership *do not get what they deserve but what they negotiate.*[62] This is a single of the reasons why not one LDC has been able to enter the WTO since its inception, despite the fact that twenty new Members have been admitted to the WTO over the past six years.

The pain and suffering that Vanuatu, a small island LDC, was subjected to is a good example of this problem. During the accession process, Vanuatu was asked by the United States to join the Agreement on Government Procurement and the Agreement on Civil Aircraft, both plurilateral agreements, which it was under no obligation whatsoever to sign according to the WTO rules. Moreover, LDCs that are already members of the WTO are not required to comply with the requirements of the TRIPS Agreement before 2006. However, the United States even refused the request by Vanuatu for a two–year transitional period for the implementation of the TRIPS Agreement.[63] This means that Vanuatu would be required to comply with the requirements of TRIPS immediately upon its entry into the WTO.

Similarly, Vanuatu was asked to make an explicit commitment not to use the Special Safeguard ("SSG") Provisions despite the fact that, as per the Agreement on Agriculture,

SELECTED DEVELOPMENT ISSUES BEING ADDRESSED BY THE UNITED NATIONS SYSTEM, UNCTAD/ISS/Misc. 385, 110 (2002)

[60] UNCTAD, FUTURE MULTILATERAL TRADE NEGOTIATIONS: HANDBOOK FOR TRADE NEGOTIATORS FROM LEAST DEVELOPED COUNTRIES, 282 (1999)

[61] Ratnakar Adhikari, *Birth Defects of the WTO Accession Process,* THE KATHMANDU POST, March 27, 2002, at 4.

[62] Bhattacharya and Rahman, *supra* note 23, at 15

[63] Roman Grynberg and Roy Mickey Joy, *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, 34 (6) JOURNAL OF WORLD TRADE 116 (2000).

WTO members which have been through the "tariffication" process are allowed to maintain the same. It was also asked to commit not to use export subsidies on Agricultural products, despite the fact that the Agreement on Agriculture permits LDCs to continue to use export subsidies. Likewise, in the services area, Vanuatu was asked to make offers in eighteen areas. This is more than four times the average for LDCs that are WTO members and twice that of Solomon Islands, which is the most obvious case for comparison.[64]

These examples reinforce the notion that the developed Member Countries of the WTO, especially the powerful ones, are determined to impose so-called "WTO-plus" conditions on the new Members. Grynberg and Joy argue: "While it remains one of the enduring convenient clichés of the multilateral trading system that the WTO is a 'rule-based system', the actuality is that accession is inherently power-based and the very antithesis of the WTO's credo."[65] Therefore, it is clear that the WTO accession process has serious defects.

The most depressing aspect, however, is that these defects are not likely to be removed in the foreseeable future. The reasons are simple. First, the beneficiaries of the reforms, those who are applying for WTO access, have no voice in the WTO as they are by definition outside the multilateral trading system. Once they become members they rarely wish to discuss what is an embarrassing and highly intrusive process. Second, those who would have to pay for the reforms would be the WTO proponents, who gain nothing and have to expend scarce political capital.[66]

Developed Member Countries of the WTO justify their stand by stating that the existing rights and obligations emanating from WTO Membership are the result of hard bargaining among the existing Members during the various negotiating rounds, in which the new members did not participate. Therefore, the argument goes, newcomers should not be allowed to enter the WTO "free of charge" because they will be entitled to receive the same treatment as any other WTO Members under the MFN principle. However, countries making this argument choose to remain oblivious of the fact that LDCs have either taken autonomous liberalization measures or were subjected to the World Bank and/or International Monetary Fund's conditionalities, which included, *inter alia*, opening up their economy to foreign goods, services and investment. Therefore, they have already sufficiently liberalized their trade and investment regime. Indeed, as J. Michael Finger argues, "... trade reforms under IMF and World Bank programs liberalized more developing countries than had the Uruguay Round."[67]

Article III:5 of the Marrakesh Agreement states: "With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies." However, when it comes to providing credit for trade liberalization, existing WTO Members chose not to talk about coherence. Therefore, Ahn remarks:

> [T]rade liberalization is often a high, if not top, priority for IMF stabilization programs or World Bank Development loan programs. Such political concerns for trade negotiation [holding back on unilateral trade liberalization waiting for reciprocal bargaining], however, lead a country to avoid unilateral liberalization... Therefore, a mechanism to "credit" such

[64] *Id*. at 166
[65] *Id*. at 159
[66] *See* Adhikari, *supra* note 61, at 4
[67] *See* Bernard Hoekman and L. Alan Winters, *A Tribute to J. Michael Finger* in DEVELOPMENT, TRADE, AND THE WTO, xiv (Bernard Hoekman, Aaditya Mattoo, and Philip English eds. 2002)

> liberalization, particularly those adopted as parts of IMF or World Bank programs, in future trade negotiations should be established in the context of the WTO to facilitate trade liberalization for developing countries. In addition, in order to assure such mechanism, the trade reform and liberalization must be permanent in character and in conformity with the GATT obligations, i.e., "GATTable" in nature.[68]

Byung-il takes the same view in the context of services liberalization. According to him a provision for "crediting" countries for autonomous liberalization measures already exist in GATS Article XIX:3. However, since no modalities have been established for providing Member Countries with credit for autonomous liberalization as provided for by Article XIX:3, Members are reluctant to make commitments prior to the formal negotiations.[69]

These points were made in the context of unilateral trade liberalization measures to be taken by existing WTO Members. However, there is no reason why the same logic should not apply in the context of acceding countries.

G. Exclusion From the "Knowledge-Based Economy"

One of the major factors of production in the New Economy is knowledge. It is the only production factor that multiplies and expands when used. The level of knowledge in a given society is reflected in its technological capacity. In today's society, information technology ("IT") plays an important role in achieving one's competitive advantages.[70] In the era of globalization, the information and communication technologies ("ICTs") revolution offers genuine potential, but also presents the risk that a significant portion of the world will lose out.[71] Applied to commercial needs, IT can enhance foreign export marketing, improve the access of exporters and importers to foreign market information, establish and sustain linkages between buyers and suppliers, and facilitate access to training and technical assistance. ICTs can also strengthen trade-related development co-operation by increasing the flexibility and reach, enhancing the content and reducing the cost of many kinds of technical assistance.[72] Since LDCs are largely excluded from the digital global economy, a sharp digital divide has been created in an already divided world. As indicated in the 2001 ILO Employment Report:

> Despite the phenomenal growth of ICT in the industrialized world and its increasing penetration into developing countries, "vast swathes" of the globe remain "technologically disconnected" from the benefits of the electronic marvels that are revolutionizing life, work and communication in the digital era.[73]

The Report further highlights the very real constraints facing developing countries in their capacity to join the communications revolution. Those countries and regions that fail to make the "technological leap" not only risk missing out on the large and growing trade in ICT products, but will be unable to profit from the economic efficiency and productivity gains that derive from these industries, the Report states. Such a development

[68] Durken Ahn, *Linkages between International Financial and Trade Institutions: IMF, World Bank and WTO*, 34 (4) JOURNAL OF WORLD TRADE 26 (2000)

[69] Byung-il Choi, *Treatment of Autonomous Liberalization in the WTO New Service Round –To Give Credit is to Get More*, 35(2) JOURNAL OF WORLD TRADE 364 (2001)

[70] Ghimire, *supra* note 13, at 360

[71] *Cf.* UNNGLS (United Nations Non-governmental Liaison Service), GO BETWEEN 30, at 84 (January-February, 2001)

[72] OECD, THE DAC GUIDELINES: STRENGTHENING TRADE CAPACITY FOR DEVELOPMENT 50 (2001)

[73] *Cf.* UNNGLS, *supra* note 71, at 30

has created, by implication, additional barriers to the LDCs for their integration into the global economy. Access to these technologies will continue to be extremely restricted mainly because a vast majority of LDC institutions and individuals cannot afford to buy them. The following figures show how backward LDCs are in terms of harnessing the potential of ICT.

- In LDCs telephone density is 0.59 percent compared to ten percent in the developing countries.
- There is less than one Internet user per thousand people, against one user per 36 people in the developing countries.
- By April 2002, estimated number of Internet users in the world (population 6 billion) was 360 million, or six percent. In the corresponding period, the number of Internet users in the LDCs (population 680 million) was estimated at 0.58 million, or less than 0.1 percent, and representing 0.13 percent of the global Internet users.[74]

Recognizing the urgent need to harness the potential of the knowledge and technology for promoting the goals for the United Nations Millennium Declaration and to find effective and innovative ways to put this potential at the service of development for all, the Fifty-sixth Session of the United Nations General Assembly adopted a resolution on a World Summit on the Information Society. This resolution endorses the resolution adopted by the Council for the International Telecommunication Union to hold a World Summit on Information Society at the highest possible level in two phases, the first in Geneva from December 10 to 12, 2003, and the second in Tunis in 2005.[75]

Similarly, the poor performance of LDCs in stimulating research and development and developing innovations that suit their productive needs has resulted in their continued marginalization from the global economy. One measure of innovation is the number of patent applications filed in each country. Very few patent applications are filed in the LDCs. For example, only 44 patents are registered in Nepal 36 years after enactment of intellectual property legislation (the Patent, Design and Trademark Act 1965). Of these, only seventeen patents are of domestic origin, while 27 are of foreign origin.[76] Even the non-LDC developing countries are lagging far behind in terms of patent applications. For example, in 1996 a total of 401,261 patents applications were filed in Japan, 223,432 in the United States, and 114,021 in Korea. On the other hand, India only received 8,292 patent applications, and Malaysia, Indonesia and Thailand together received only 12,832 applications.[77]

This shows that developing countries in general and LDCs in particular continue to be overwhelmingly net importers of technology and new products. This puts them in an extremely disadvantageous position in the global economy where the issue of technology transfer has not moved beyond rhetoric.[78] Their distance from the knowledge-based

[74] Claudia Sarrocco, *Improving IP Connectivity in the Least-Developed Countries*, BACKGROUND STUDY, Strategy and Policy Unit, International Telecommunications Union, 12 April 2002, available at http://www.itu.int/osg/spu/ni/ipdc/workshop/presentations/Sarrocco.ppt, accessed on September 15, 2002.

[75] United Nations, *Resolution Adopted by the General Assembly,* Fifty-fifth session, A/RES/56/183, 1–2 (January 31, 2002)

[76] *See* Ratnakar Adhikari, Rajesh Khanal and Navin Verma, *National Study on TRIPS Agreement and Its Implications for Nepal*, REPORT SUBMITTED TO THE NEPAL ACCESSION TO WTO 22 (2001)

[77] *See* Keith E. Maskus, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 68 (2000)

[78] For example, Article 66:2 of TRIPS Agreement reads: "Developed country Members *shall* provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members in order to enable them to create a sound an viable

economy is exacerbated by the fact that this segment of the economy is increasing more rapidly than others.

H. Other Weaknesses

This analysis of the weaknesses plaguing the LDCs would not be complete without addressing the problems endemic to LDCs, about which the international community can do virtually nothing. These problems are related mostly to political and governance issues in the LDCs. Some LDC economies have been marred by continued war and civil strife for decades. It would be absurd to blame globalization in general and trade liberalization in particular for the marginalization of countries like Sierra Leone, Haiti, the Democratic Republic of Congo, Somalia and Afghanistan.

Similarly, the lack of democratic culture and pluralism is the major cause of the failure to achieve sustained economic growth in many LDCs, a fact which the anti-globalization movement has chosen to ignore so far. Economic openness and democratic pluralism can and should complement each other. However, this is the major missing link in the case of LDCs.

Likewise, openness to trade and investment and leaving everything at the mercy of market mechanism do not guarantee economic growth. Institutions guaranteeing, *inter alia*, adequate protection of property rights, regulation to prevent fraud and deceptions, macroeconomic stabilization, social insurance and conflict management are necessary to fully reap the benefit of openness. As Rodrik argues, "All well-functioning market economies are 'embedded' in a set of non-market institutions without which markets cannot perform adequately."[79] However, such institutions are either non-existent or non-functional in almost all the LDCs.

Bribery and corruption in high offices, which is a recurrent phenomenon in most LDCs, has contributed significantly towards holding back the development prospects of these economies. According to the Corruption Perception Index produced by Transparency International[80], three LDCs figure among the top ten countries with massive corruption. It is no surprise that in the year 2001, Bangladesh—a longtime leader of the LDC camp in the WTO—figured on the top of this list, and Tanzania—the current leader of the LDC camp in the WTO—is the tenth on the list.[81] This problem is exacerbated by the fact that LDCs lack credible institutions to tackle corruption issues.

technological base" (emphasis added). Despite the use of word "shall" as opposed to "may" in this Article, developed countries have not done anything in this regard. The realization that developed countries have not done enough to facilitate transfer of technology to the LDCs led the Trade Ministers at Doha to include the following requirement on the Paragraph 11.2 of Implementation Related Issues and Concerns: "Reaffirming that provisions of Article 66.2 of the TRIPS Agreement and mandatory, it is agreed that TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementations of obligations in question. To this end developed country Members shall submit prior to the end of 2002 detailed reports of the functioning in practice of the incentives provIded to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. The submissions shall be subject to a review in TRIPS Council and information shall be updated by Members annually." At the time of writing, it seems that only Canada and New Zealand have formally submitted reports on how they implement this Article.*See* Jonathan Hepburn, *Negotiating Intellectual Property: Mandate and options in the Doha Work Programme*, OCCASIONAL PAPER 10, Friends World Committee for Consulation, Quaker United Nations Office—Geneva, 4 (2002)

[79] Dani Rodrik, *Trade Policy Reform as Institutional Reform* in DEVELOPMENT, TRADE, AND THE WTO, 4 (Bernard Hoekman, Aaditya Mattoo, and Philip English eds. 2002)

[80] A Berlin-based international anti-corruption non-governmental organization. *See* http://www.transparency.org for further details.

[81] http://www.globalcorruptionreport.org/download/data_and_research.pdf

It will be in the interest of the LDCs, saddled with corruption, to cooperate fully to conclude an Agreement on Transparency in Government Procurement ("ATGP") at the WTO[82], if not agreeing to join the Agreement of Government Procurement.[83] This will be an important step forward in controlling bribery and corruption. If the discretion of procurement officers in achieving the goals of the procurement process is structured and subject to formal rules, the opportunities for corrupt decisions, as well as the possibility of errors of judgment, would be greatly reduced.[84] This is one of the agenda items to be negotiated in accordance with the Doha mandate, and LDCs need to consider it as a part of the package they are going to negotiate under the Doha Declaration. They should also start preparing for the negotiations on this issue and use them as an opportunity to trade concessions in other areas (perhaps market access on agriculture and labour intensive products).

IV. A Brief Overview of Efforts by the International Community

The credibility of the multilateral trading system lies in its ability to ensure the full participation of the LDCs in particular and of the developing countries as a whole both in the rule-making process and in deriving an equitable share of the benefits from global trade liberalization. Integration into the trading system and preventing further marginalization of the LDCs—and indeed their continued faith in the system—mean nothing less.[85] Integration in the global economy is indeed of paramount importance to LDCs: Through international trade and foreign direct investment they can increase their access to technology and capital, learn new ways of doing business, and enhance their capacity to compete on a global basis.[86]

Recognition of the problems inherent in the LDCs and their realization of the need to integrate into the world economic system have led their development partners to make some genuine (some not so genuine) efforts to assist in this process. Such attempts have mostly failed; this chapter concentrates only upon some of the major efforts undertaken.

[82] As mandated by the Singapore Ministerial Conference (Paragraph 21 of the Ministerial Declaration, reproduced in the Appendix to this book) it was declared to " establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement." Further, Paragraph 26 of the Doha Declaration, also reproduced in the Appendix to this book, declared:

> Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. . . .

[83] The Agreement on Government Procurement is one of the plurilateral Uruguay Round agreements, binding only on those Members who sign it. It requires signatories to open up specified areas of government procurement to competition from other signatories, as well as requiring transparent government procurement procedures. The proposed multilateral agreement, on the other hand, would only require transparency. *See* Chapter 23 of this book.

[84] Sue Arrowsmith, *National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict* in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 19 (Sue Arrowsmith and Arwel Davis eds. 1998)

[85] Ricupero, *supra* note 14, at ix.

[86] Jan Pronk, *Chairman's Opening Statement at the High Level Meeting, High Level Meeting on Integrated Initiatives for Least Developed Countries Trade Development*, NOTE ON THE MEETING, WT/LDC/HL/M/1, at 25 (26 November, 1997)

A. Market Access

Improved market access is key to any effective policy to integrate least-developed countries into the world trading system and to ensure their participation in international trade and investment flows.[87] However, the experience of recent years has shown that one must get the basics right, in terms of sound domestic macro-economic policies, a good infrastructure, well-developed human and institutional capacities, and a vibrant entrepreneurial sector. Without this, no amount of market access or well-meaning technical assistance programs can make a significant long-term difference to the performance of structurally weak developing countries.[88]

The marginalization of the LDCs in world trade justifies extraordinary efforts and actions on the part of the major beneficiaries of the global trading system. Moreover, the circumstances of the LDCs warrant exceptional treatment. Existing preference schemes have not been effective because they are complex, temporary in nature, and contain numerous exclusions in areas of key interest to the LDCs. In addition, LDCs find it difficult to compete with more advanced developing countries which are also eligible for preferential treatment. In the United States, for example, only around one percent of imports entering under the Generalized System of Preferences come from the LDCs.[89]

Market access opportunities of the LDCs are not only impeded by tariff barriers, but also by non-tariff barriers. Among the tariff barriers the most pernicious one is tariff escalation, which discourages LDCs from advancing along the processing chain, where much of the added value of a product is realized. FAO studies have shown that tariff escalation even in the post-UR era has averaged seventeen percent in Europe, the United States and Japan, and in many products of interest to LDCs it has been much higher (e.g., 85 percent on second-stage fruit products entering the EU, 82 percent on first-stage sugar products entering Japan and 28 percent on second-stage sugar products entering the United States).[90] Tariff peaks are also a major problem for LDCs. The bound tariffs on certain agricultural products in the Quad countries are as follows:

Canada:	Butter (360 percent), cheese (289 percent), eggs (236.3 percent)
EU:	Beef (213 percent), wheat (167 percent), sheep meat (144 percent)
Japan:	Wheat products (388.1 percent), wheat (352.7 percent), barley products (361 percent)
United States:	Sugar(244.4 percent), peanuts (173.8 percent), milk (82.6 percent)[91]

Total LDC exports in 1999 were US$ 22.7 billion, of which US$ 17 billion went to Quad economies. More than half of the exports to the Quad countries were affected by tariff peaks—US$ 5.5 billion of LDC exports to Canada,[92] more than US$ 3 billion to

[87] WTO *High Level Meeting on Integrated Initiatives for Least Developed Countries Trade Development*, NOTE ON THE MEETING at2, WT/LDC/HL/M/1 (November 26, 1997).

[88] Rubens Ricupero, *Address to the High Level Meeting, High Level Meeting on Integrated Initiatives for Least Developed Countries Trade Development*, NOTE ON THE MEETING, WT/LDC/HL/M/1,31 (November 26, 1997)

[89] Shigemitsu Sugisaki *Trade and Development*, ADDRESS TO WTO HIGH LEVEL SYMPOSIUM ON TRADE AND DEVELOPMENT (March 17 1999)

[90] Cuddy, *supra* note 9, at 4

[92] Canada seems to be the worst offender in terms of keeping exports from the LDCs out of its market despite having a seemingly generous GSP scheme. *However*, Canada recently announced that it would provide duty-free access to products originating in 48 LDCs (excluding Myanmar) starting January 1, 2003. However, Canada, like the EU has not included three products on the list of offer. They are dairy, poultry and eggs. Canada's inclusion of textile and garments on the list of duty-free items is likely to have a positive impact on the market access of the 48 LDCs. *See* ICTSD, *Canadian LDC Initiative to Free up Entry of Goods from World's Poorest* in BRIDGES WEEKLY TRADE NEWS DIGEST, Vol. 6, No. 29 (August 6, 2002)

the United States, about US$ 500 million to Japan and about US$ 800 million to the EU.[93] It is no surprise that a study by Hoekman, Ng and Olarreaga reached the following conclusion:

> Although average tariffs in Quad markets are very low, tariff peaks and tariff escalation have a disproportional effect on exports by least developed countries (LDCs). Tariff peak products tend to be heavily concentrated in agriculture and food products and in labor intensive sectors such as apparel and footwear. Full duty and quota free access for LDCs in the Quad for tariff peak products would result in a 11 percent increase in their total exports—on the order of $2.5 billion. Exports to Quad countries of tariff peak products would expand by 30 to 60 percent. Given that LDC exports of tariff peak items account for only a small share of total developing country exports, granting LDCs duty free access has a negligible impact on other developing countries. For the same reason, Quad imports increase only marginally, suggesting that this should not be a factor constraining implementation of duty free access for the poorest countries.[94]

Quoting the US Department of Commerce, Hoekman states: "In 1999, in the US alone, imports originating in least developed countries (LDCs) generated tariff revenue of $487 million, equal to 11.6 percent of the value of their exports to the US, and 15.7 percent of dutiable imports."[95] These figures illustrate the benefits that LDCs could derive from duty-free access to the markets of the industrialized countries.

The prevalence of tariff peaks and tariff escalation on products emanating from LDCs is one of the great scandals of our time. The idea of providing zero tariff access for LDCs was conceived at UNCTAD VIII, held in Cartagena in 1992, but nothing concrete has been done so far in this direction in order to positively influence the trade performance of the LDCs. The reason for the reluctance is simple, as UNCTAD Secretary-General Ricupero explains:

> At UNCTAD VIII, the Cartagena Commitment urged exports from LDCs should be granted duty free access to major markets. This proposal was simple, entirely practical and morally unarguable. In the bigger picture, the costs of importing countries would have been miniscule, and the benefits to 600 million inhabitants of the 48 LDCs potentially enormous. But too many vested interests in particular sectors—most of them sunset industries in Western Countries—would have been hurt.[96]

As mentioned earlier, zero tariff market entry is a necessary, but not a sufficient condition for the better integration of LDCs into the multilateral trading system, but this idea has been used and abused over the years, more for political purposes than for economic reasons. The idea was reborn in the Singapore Ministerial Meeting of the WTO, when the then Director-General of the WTO made a plea to the Members of the WTO to consider the proposal seriously, but the response to his proposal was lukewarm.

During the preparation for the Third Ministerial Conference in Seattle, the European Union formally launched a proposal directed at "entering into a commitment to ensure duty-free market access not later than at the end of the new round of negotiations for essentially all products exported by the LDCs". Following the failure of the Seattle Ministerial Conference, the proposal for granting duty-free and/or quota-free access for

[93] Details can be found in Olarreaga, Marcelo and Ng., *Tariff Peaks and Preferences* in DEVELOPMENT, TRADE, AND THE WTO 109 (Bernard Hoekman, Aaditya Mattoo, and Philip English eds. 2002)

[94] Bernard Hoekman; Francis Ng; and Marcelo Olarreaga, ELIMINATING EXCESSIVE TARIFFS ON EXPORTS OF LEAST DEVELOPED COUNTRIES (2001)

[95] Bernard Hoekman, STRENGTHENING THE GLOBAL TRADE ARCHITECTURE FOR DEVELOPMENT 5 (2002)

[96] *See* http://www2.cid.harvard.edu/cidtrade/Issues/ricupero2.pdf

"essentially all" products was discussed in the context of various international forums and included in the UNCTAD X Bangkok Plan of Action.[97]

Finally, just two months before the U.N. LDC-III Conference in May 2001, the EU made its "Everything But Arms" ("EBA") proposal, which proposed duty-free treatment for all imports from LDCs except arms, and, for the time being, rice, sugar, bananas. The LDCs were jubilant, thinking of better market access opportunities, but little realizing that rules of origin requirements and non-tariff barriers could still hamper their trading prospects.[98]

A study conducted by UNCTAD and the Commonwealth Secretariat in 2001 on the possible effects of duty- and quota-free market access for LDCs should that be undertaken by all the Quad Member Countries reaches the following general conclusions:

> The result that emerged throughout the study was that duty- and quota-free market access will benefit LDCs. The sources of the benefits to LDCs are both improved terms of trade (associated with higher export prices in donor countries' markets) and improved allocation efficiency. The study also shows that the potential benefits to LDCs in terms of export diversification may be important. Taking advantage of the enhanced market access will require restructuring in beneficiary countries. This is an inevitable consequence of any trade policy initiative. As a consequence of the EU EBA, some agricultural sectors such as rice and sugar will expand significantly in LDCs. If the remaining Quad countries also grant duty- and quota-free access to LDC exports, not only will the expansion of LDC agricultural exports be broader and more diversified, but textiles and apparel exports will also be stimulated significantly. This should result in the movement of resources in LDCs out of manufactures production.[99]

However, looking at the utilization rates of the existing preferences granted by various developed countries, one finds that the LDCs still face a host of tariff barriers on exports that are supposed to be covered by the "preferential" arrangements. According to Inama:

> If one considers that a major part of current LDC exports still face MFN duties in spite of the available preferences, action should be taken to eliminate the remaining obstacles to full access by expanding product coverage and increasing utilization rates of available trade preferences.[100]

Inama further maintains that the four major factors that affect the utilization of unilateral trade preferences are:

- Lack of security of access, due to the unilateral and optional nature of preferences, which can be eliminated at the discretion of the providers.

[97] Stefano Inama, *Market Access for LDCs: Issues to be Addressed,* 36 (1) JOURNAL OF WORLD TRADE 85 (2002)

[98] *See id*. at 92–94 for a detailed exposition on how rules of origin and non-tariff barriers have hampered the trade prospects of the LDCs.

[99] However, this study has some limitations, which are admitted by the report itself. Firstly, the results obtained from Computable General Equilibrium ("CGE") analysis may overestimate the actual extent of sectoral reallocation in LDCs—supply rigidities and bottlenecks associated with a poor working of factor markets are relevant in these economies, which are neglected in CGE analysis. Secondly, even admitting full sectoral adjustment in LDCs, an overestimation of the sectoral effects of preferential market access may be associated with the presence of complex rules of origin. Sometimes the utilization rates of preferential schemes may be low or very low, because of problems in compliance with the rules established by the donor country—CGE modeling neglects such problems. *See* UNCTAD AND COMMONWEALTH SECRETARIAT, *supra* note 8, at 11

[100] Inama, *supra* note 97, at 114

- Insufficient product coverage, due to exclusion of certain "sensitive" sectors from the preference scheme by the providers.[101]
- Rules of origin that are excessively stringent in light of the industrial capacity of LDCs.
- Lack of understanding or awareness of the preferences available and the conditions attached thereto, leading to the application of MFN rates rather than preferential ones.[102]

B. Special and Differential Treatment

Analysts are divided on whether or not special and differential treatment is the right policy to facilitate the integration of developing countries and LDCs into the multilateral trading system. According to Srinivasan, the continued insistence of developing countries on special and differential treatment and their reluctance to take part in the GATT negotiations as equal partners was the main reason for their marginalization from the global economy.[103] However, developing countries, as a group, insisted on special and differential treatment, asserting that applying the same rules to unequal trading countries could be disastrous. It is certainly true that countries that have achieved long-term economic growth have usually combined the opportunities offered by world markets with a growth strategy that mobilizes the capabilities of domestic institutions and investors.[104] Therefore, well-designed, effective, enforceable and time-bound special and differential treatment is necessary for the successful integration of the LDCs into the multilateral trading system. Some developing economies which are now well integrated into the global economy, were major users of the preferential market access opportunities in the past and some of them (such as Thailand, South Korea and Brazil) have been reluctant to 'graduate' to a higher status.

The preamble to the WTO Agreement recognizes the special needs of developing countries for positive efforts designed to ensure that they secure a share in the growth in international trade commensurate with their economic development needs. The preambles to many of the Uruguay Round agreements contain similar language. The references to LDCs are more generous. It is stipulated that LDCs will only be required to undertake commitments and concessions to an extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities. However, there are few provisions attempting to translate these broad objectives into concrete action.[105]

The Enabling Clause of 1979 provided the basis for "special treatment of least developed countries (LDCs) in the context of any general or specific measures in favor of

[101] For example, the United States and Canada exclude all textile and clothing products from their GSP programs, Japan excludes some agricultural and fishery products, and until the EBA initiative came into existence, European Union granted only selected preferences under the previous Lome Convention for agricultural products covered by the Common Agriculture Policy, and even fewer under the past European GSP schemes for LDCs. Even the EU "Everything But Arms" initiative for he time being excludes rice, bananas and sugar from the tariff- and quota-free scheme offered to the LDCs.

[102] Inama, *supra* note 97, at 92–94

[103] *See* Srinivasan, *supra* note 22, at 11

[104] Rodrik, *supra* note 17

[105] South Center, *Special and Differential Treatment Under the WTO* at www.southcenter.org/publications/s&d/s&d-04.htm

developing countries".[106] The Uruguay Round Agreements contain seventeen provisions that apply specifically to LDC Members, in addition to those that are applicable to all developing Members.[107] These include provisions for more extended transitional periods than those applicable to developing countries, in the TRIPS, TRIMS, and Sanitary and Phyto-sanitary Measures agreements. The Agreement on Agriculture exempts LDCs from all reduction commitments, while the Agreement on Subsidies and Countervailing Measures places no restriction on the ability of LDCs to grant export subsidies (though it does require them phase out import substitution subsidies, but over a longer period of time than that for other developing countries). The GATS Annex on Telecommunications contains a provision seeking to encourage private suppliers to transfer technology and training to LDCs with a view to developing the telecommunications sector.[108]

The key issues that need to be addressed in the context of the special provisions for the LDCs are much the same as in the case of developing countries as a whole: are the commitments for preferential market access and treatment offered by developed countries meaningful relative to the constraints these countries face in integrating in the world trading system? Is the international technical assistance in support of these countries adequate and effective? And does the flexibility offered to these countries in meeting their WTO commitments contribute to their long-term trade and development objectives?[109]

In spite of the "special and differential" provisions contained in various WTO Agreements, the LDCs are being increasingly marginalized. The "measures" in favor of LDCs have not been of much help to them. There has been a gap between prescription and practice. There is also a strong case for extending transition periods in areas where LDCs face real difficulties in meeting the deadline for reforms called for by the Uruguay Round Agreements. In fact, a number of measures supposed to have been adopted for the LDCs have remained unimplemented. There are three main reasons for this. First, developed countries have not shown a willingness to meet their obligations because these provisions are not legally binding and are mainly "best endeavor" clauses. Second, the LDCs have remained too weak to implement their side of the program. And finally, developed countries and multilateral agencies have, by and large, failed to come together to rescue the LDCs.

Kessie analyses five sets of special and differential treatment provided to the developing countries and LDCs in the Uruguay Round and comes to the conclusion that the provisions permitting longer implementation periods and the assumption of lesser obligations are the only enforceable provisions that are being applied in practice.[110] The other provisions are nothing more than loosely drafted "best endeavor" clauses.

[106] Art. 2 (d), Enabling Clause, *Supra* note 20. This 1979 decision by the GATT signatories allows derogations to the most-favored nation (non-discrimination) treatment in favor of developing countries.

[107] WTO, *Background Document*, HIGH LEVEL SYMPOSIUM ON TRADE AND DEVELOPMENT, Geneva, at 39–48 (March 17–18, 1999)

[108] Constantine Michalopoulos, TRADE AND DEVELOPMENT IN THE GATT AND WTO: THE ROLE OF SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES 23 (2000)

[109] *Id.*, at 23

[110] The five types are: i) provisions aimed at increasing trade opportunities; ii) provisions that require WTO Members to safeguard the interests of developing countries; iii) provisions permitting developing countries to assume lesser obligations; iv) provisions relating to transitional time periods; v) provisions relating to technical assistance. *See* Edwini Kessie, *Enforceability and Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements*, 3(6) THE JOURNAL OF WORLD INTELLECTUAL PROPERTY RIGHTS 965 (1999)

C. Integrated Framework

The Integrated Framework ("IF") was "endorsed" at the HLM in October 1997 essentially as the institutional mechanism for the delivery of trade-related technical assistance to LDCs by the six core participating Agencies—the International Trade Center ("ITC"), the IMF, UNCTAD, the United Nations Development Program ("UNDP"), theWorld Bank and the WTO. The IF has been in operation since October 1997.[111]

As defined in the Integrated Framework document, the IF aims to:

- Ensure that trade-related technical assistance activities are demand-driven by the least-developed countries and meet their individual needs effectively
- Enhance ownership by each least-developed country over the trade-related technical assistance activities being provided
- Enable each agency involved to increase its efficiency and effectiveness in the delivery of trade-related technical assistance activities
- Keep under review trade-related technical assistance activities in individual least-developed countries, evaluate periodically their success in meeting the country's needs, review how those needs change, and adapt the program of activities accordingly
- Provide comprehensive information about the specific needs of each least-developed country and about the trade-related technical assistance activities of the six Agencies involved to other relevant multilateral and regional intergovernmental organisations, to bilateral development partners and to the private sector.[112]

Despite the noble intentions of the IF it has not so far achieved its intended goals. Hoekman and Kostecki comment;

> The IF did little to address the underlying causes of the implementation problems of LDCs. In part this was because it did not address the disconnect between a number of the WTO agreements and the development priorities of low-income countries and in part it reflected the lack of adequate funding.[113]

The review of the Integrated Framework, pursuant to paragraph 6 of the Framework document that emerged from the 1997 High Level Meeting, was initiated in November 1999 by the six core Agencies, in consultation with LDCs and their development partners. Prior to consideration by the Agencies, an independent review team was appointed to make its own assessment. The objective of the exercise was to review the three-year operation of the IF in the light of experience that urgently required the agencies to respond to a number of issues and to improve the IF as a vehicle for delivering trade-related technical assistance.[114] The report of the independent review of the IF provided the following recommendations for the improvement of the IF, both in terms of its design and its delivery mechanism:

[111] WTO, *Progress Report on the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries*, REPORT BY THE DIRECTOR-GENERAL, WT/LDC/SWG/IF/17/REV. 1, (April 17, 2001)

[112] *Id.* at 2–3

[113] Bernard M. Hoekman and Michel M. Kostecki, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND 399 (2001)

[114] Problems and challenges facing the IF are well documented. *See* for example, WT/MIN(99)/7, WT/COMTD/LDC/W/18 and WT/LDC/SWG/IF/1.

1. *Clarify Policy Objectives*: Clarify the objectives of the IF by restricting it to technical assistance for trade-related development, to support, *inter alia*, policy reforms, manpower and human resources development, customs reforms, institutional change and legal environment reforms.
2. *Prioritise and Link to Overall Development Assistance Architecture*: In the future most development assistance strategy issues are likely to be developed through participatory processes, in the context of such exercises as the Poverty Reduction Strategy Papers ("PRSPs"), the Comprehensive Development Framework ("CDF") and the United Nations Development Strategy Frameworks ("UNDAF"). In all such endeavours, country strategy will define the role of trade development and related technical assistance. The IF will then be linked to the priorities established through the formulation of country development strategies.
3. *Give Ownership to the LDCs*: Make the IF process more demand-driven and country-owned by requiring LDCs to prioritise their specific needs from the list of trade-related technical assistance activities listed in the Needs Assessments.
4. *Strengthen Governance and Administration*: The review considered two options: (i) strengthening the Administrative Unit to the point that it can manage the IF while continuing to be located at the ITC in Geneva, and (ii) moving the responsibility for managing the IF to WTO (where the Administrative Unit would be integrated).
5. *Coordination Issues*: Once governance is strengthened along the lines of the foregoing recommendation, coordination can be better assured, as the WTO will be the designated clearinghouse for inter-agency coordination issues.
6. *Funding the IF*: First, the Inter-agency Working Group ("IAWG") agencies and donors will need to ensure that they budget their administrative costs related to the IF while providing whatever other incentives are needed for a better recognition of the responsibilities which they undertook when the IF was created. Second, when it comes to the financing of trade-related technical assistance projects, one approach would be for WTO, as the managing agency for the IF, to set up and manage a Trust Fund to finance such technical assistance projects. All donors, including multilateral agencies, would contribute (on a voluntary basis) to the Trust Fund as an expression of their commitment to the IF.
7. *Monitor Trade-Related Technical Assistance Performance*: As trade development activities are brought into the mainstream by including them in the overall assistance process, they will be monitored and evaluated along with the progress of other programs in the countries. However, these reviews should go beyond the review of consistency with trade rules to assess how well trade regimes and trade-related technical assistance are contributing to the integration of LDCs into the global trading environment.
8. *Enlarging the IF to Other Countries and Agencies*: This review recommends that the question of enlarging the IF be revisited in the future, after the new recommended arrangements are in place for about three years. At that time a review could be undertaken to see what progress had been made since 1997 to advance the objectives established for the IF.[115]

Based on the review report, it was decided that a pilot scheme would be initiated. The IF Steering Committee also agreed to proceed with the implementation of the IF Pilot

[115] WTO, *supra* note 111, at 7.

Scheme based on the Pilot Phase Work Program prepared by the World Bank, on behalf of the IAWG. The Work Program sets out the stages for implementing the trade integration strategy chapters, and lists the cluster of possible countries in the Pilot scheme on the basis of which the mainstreaming of trade integration analysis into PRSPs would proceed.[116] A typical pilot project begins with diagnostic trade studies that assess the external competitiveness of the LDC. The studies present recommendations for enhancing trade capacity and undertaking pro-poor reforms, and it is anticipated that these will inform the PRSP process.

To date, integration studies for three pilot LDCs (Cambodia, Madagascar and Mauritania) have been completed and submitted to respective government authorities. Diagnostic studies for Lesotho, Malawi and Senegal are now being prepared and it is expected that a total of eight such studies will be implemented during the course of 2002.[117] Based on the successful implementation of the Pilot Scheme, it will be replicated in other LDCs. However, it must be pointed out that without the commitment of the donors to commit funds for building capacity of the LDCs to enhance their trade performance, the efforts are likely to be futile.

V. Achievements of Recent International Conferences

Of late there has been a growing recognition of the need to prevent the marginalization of LDCs from the multilateral trading system, due to the untiring efforts made by United Nations bodies such as UNCTAD and UNDP, coupled with the increase in the size and influence of pro-LDC constituencies in the developed countries—mostly civil society organizations, development agencies and media. This realization is reflected in the commitment made by the global leaders at a number of international conferences. However, one needs to recognize the fact that commitments made during these conferences do not serve any useful purpose if they are not implemented in practice. To further complicate the matter, some of the commitments made during the international conferences do not have any more than moral value—they are only a reflection of the admittance of the fact that problems do exit and that they need to be corrected. However, commitments made in some of the Conferences such as the WTO Ministerial Conferences are binding to a large extent.

In the recent past, five major conferences have made some reference to the marginalization of LDCs and drawn the attention of the international communities of the need to reverse this trend.[118] However, this paper only analyzes the impacts of two of these conferences, both held in 2001, which have a direct bearing on the topic being discussed here. They are: the Third United Nations Conference on LDCs; and the Fourth Ministerial Conference of the WTO.

A. Third United Nations Conference on LDCs

The Third U.N. Conference on LDCs held in Brussels in May 2001 provided one more opportunity to the international community to identify ways of integrating the LDCs

[116] *Id*., at 9

[117] *See* http://www1.worldbank.org/wbiep/trade/Integrated_framework.html.

[118] They are: the United Nations Millennium Summit held in New York in September 2000; the Third United Nations Conference on LDC ("UNLDC III") held in Brussels in May 2001; the Fourth Ministerial Conference of the WTO held in Doha in November 2001; the Financing for Development Conference held in Monterrey in March 2002; and the World Summit on Sustainable Development held in August-September 2002 in Johannesburg.

into the world economy. Its main focus was the *Paris Declaration* and *the Programme of Action for the Least Developed Countries for the 1990s.* In this Declaration, the international community had committed itself to urgent and effective action, based on the principle of shared responsibility and strengthened partnership, to arrest and reverse the deterioration in the socio-economic situation of the LDCs and to revitalize their growth and development.

The Conference focused on making objective assessments with regard to commitments made in the areas of Official Development Assistance ("ODA"), debt relief, investment promotion, and international trade. The Conference agreed on seven areas of commitment, in which both the international community and national governments would work together: a people-centered policy framework, good governance, capacity building, productive resources, trade and development, environmental protection, and mobilization of financial resources.[119]

The Conference recognized the need to transform trade into a powerful engine for growth and poverty alleviation in LDCs. The role of trade in generating resources for financing growth and development as a complement to ODA and FDI was fully underscored. Accordingly, the international community has undertaken to assist LDCs in capacity building in trade policy and related areas, developing human and institutional capacities for meaningful participation in multilateral trade negotiations, and removing procedural and institutional bottlenecks that increase transaction costs. Similarly, LDCs have been assured of assistance, *inter alia*, in the areas of trade diversification, infrastructure development and regional/sub-regional cooperation.

The Conference also underlined the need for improving preferential market access for LDCs, full implementation of special and differential treatment measures contemplated by the WTO system, simplified accession procedures, and due representation of LDCs in international standards organizations. In the area of market access, however, the Brussels Program of Action cautiously states that development partners will 'aim at' (rather than 'commit to') enhancing LDC participation in the multilateral trading system. In their declaration, trade, finance and development cooperation ministers resoundingly underscored their belief that increased trade was "essential for the growth and development of LDCs", but they only committed themselves "to seizing the opportunity of the fourth WTO Ministerial meeting in Doha to advance the development dimension of trade, in particular for the development of LDCs".[120] For example, paragraph 68 (h) of Commitment 5 (enhancing the role of trade in development) reads:

> "Development partners will aim at. . . (h) Improving preferential market access for LDCs by working towards the objective of duty-free and quota-free market access for all LDCs' products."

This contrasts with earlier draft language that would have committed the partners to aiming a little higher, i.e., "removing all trade barriers facing LDC exports in the markets of developed trade partners in the shortest possible time, and in any case no later than 2003."[121] Similarly, the aim to make technical assistance for "the implementation of multilateral trade agreements mandatory and an integral part to be undertaken in

[119] UNCTAD, *Programme of Action for the Least Developed Countries adopted by the Third United Nations Conference on Least Developed Countries in Brussels on 20 May*, A/CONF. 191/11 (2001)
[120] ICTSD, *Least Developed Countries: No New Trade Concessions Before Doha*, BRIDGES MONTHLY REVIEW 1 (2001)
[121] *Id.*

future trade agreements" emerged in the adopted action program as "strengthening, as required, technical assistance for the implementation of multilateral trade agreements and considering making such technical assistance an integral part of commitments to be taken in future trade agreements."[122]

Despite the use of 'soft' language, the Conference emphasises effective implementation of the Integrated Framework and encourages new and additional contributions to the Trust Fund created under the Framework. Importantly, the Conference requested developed countries and multilateral agencies to provide assistance to LDCs in their efforts to develop infrastructure for tradable services in which they have comparative advantage.[123]

The Brussels Conference outcome could still be considered as a major breakthrough in overcoming the semantic barriers. However, if past experience is any guide, at best it provides a basis for further talks on the possibility of implementing Conference decisions. As mentioned above, what is intriguing is the language in which these decisions are presented. They are expressed as being "commitments" on the part of the respective governments/agencies. However, the Program of Action adopted at the Conference uses recommendatory language. In fact, the so-called "commitments" are even weaker than recommendations. Reviewing the text of the Program, one gets the impression that participants of the Conference wanted to present to the international community an ideal situation without bothering about how this could be realized. In other words, this is again simply "best-endeavour" language, not a series of binding commitments.[124]

B. Fourth WTO Ministerial Conference (Doha)

Despite their meager achievements at the Brussels Conference, the LDCs were of the opinion that whatever little had been achieved should be reviewed in the Doha Ministerial Conference (November 2001) in order to ensure that "commitments" could be made binding. In fact, one of the purposes of the Zanzibar Meeting of the LDC Trade Ministers (July 2001) was to achieve the same objective. This Meeting did conclude with a number of concrete proposals, not only on the Brussels issues, but also on other fundamental issues, including, but not limited to, the development agenda. The Meeting called upon the Doha Ministerial Conference, among other elements, to agree upon:

- A binding commitment on duty- and quota-free market access for all the products from LDCs on a secure long-term and predictable basis, with realistic and flexible Rules of Origin to match the industrial capacity of LDCs
- A binding and full implementation of the provisions of Special and Differential Treatment, including the adoption of new Special and Differential Measures to take into account problems encountered by LDCs in implementation
- A future work program manageable in scope and size and agreed by all WTO Members by consensus and future negotiations based on an agenda that would accommodate LDC interests
- Meaningful support from development partners to provide assistance to upgrade the trade-related infrastructure of LDCs, cancel debts and strengthen UNCTAD's technical assistance and capacity-building programs on multilateral trade negotiation issues.[125]

[122] *Id.*
[123] Ghimire, *supra* note 13, at 355
[124] *Id*. at 356–7
[125] Charverait, *supra* note 59, at 107

However, the momentum gained during the Zanzibar Meeting could not be sustained in Doha for several reasons. First, developed countries may have considered that there were many other more pressing needs during the Doha Conference than fulfilling the demands of the LDCs. Second, LDC issues became diluted because of the fight between developed and developing countries on implementation issues versus a new round of negotiations, which also implies the possibility of inclusion of new issues. Third, LDCs, as a group, despite being generally cohesive, could not create the required impact on the Conference. Although there was some mention of the LDC concerns in the final Ministerial Declaration, the imperatives of effective participation of the LDCs in the multilateral trading system could not, and did not, receive due consideration from the ministers with many diverse interests.

The Doha outcomes do not meet even a fraction of the expectations of the LDCs, particularly in relation to the so-called "confidence-building measures", devised by WTO Director-General Mike Moore. The initiative, at least in theory, included: a) a proposal for an expanded WTO technical assistance program; b) enhanced market access for LDCs; and c) consultations between the WTO and other organisations on trade-related capacity building.[126]

The Doha Ministerial Declaration recognized the particular needs, interests and concerns of the LDCs in 21 different paragraphs. These references fall into two broad categories: first, broad, systemic issues; second, part of the negotiating mandate of particular WTO Bodies.[127] These are related to, *inter alia*, marginalization, accession, services negotiations, industrial tariff negotiations, investment, competition policy, trade facilitation, environment, debt and finance, technical cooperation and capacity building, and special and differential treatment.

The single major achievement for LDCs is probably best expressed in the following sentence in paragraph 42 of the final Doha Declaration reproduced in the Appendix to this book:

> "We commit ourselves to the objective of duty-free, quota-free market access for products originating from LDCs. In this regard, we welcome the significant market access improvements by WTO Members in advance of the Third UN Conference on LDCs (LDC-III), in Brussels, May 2001. We further commit ourselves to consider additional measures for progressive improvements in market access for LDCs."

This is a much better formulation than paragraph 68 of the Brussels Program of Action, even though the developed countries might still be reluctant to act concretely in this regard. Having realized that the prevailing attitude of both the ministers of developed Member countries as well as of the WTO secretariat was to provide "lip service", the LDC ministers insisted on a time-bound action program for use by the Sub-Committee for Least Developed Countries to design a work program concerning trade-related elements of the Brussels Declaration and Program of Action, and to report on the agreed work program to the WTO General Council at its first meeting in 2002. Similarly, the following sentence is contained in paragraph 43 of the Declaration related to the Integrated Framework:

> "We request the Director-General, following coordination with heads of the other agencies, to provide an interim report to the General Council in December 2002 and a full report to the Fifth Session of the Ministerial Conference on all issues affecting LDCs."

[126] *See* OECD, *supra* note 72, at 24

[127] WTO, *WTO Work Programme for the Least Developed Countries (LDCs) Adopted by the Sub-committee on Least Developed Countries*, WT/COMTD/LDC/11 (February 13, 2002)

To some extent, the Doha Conference can be considered as an attempt to bridge the gap between the developed and the developing as well as least-developed countries. However, a number of proposals made by the LDCs after the Zanzibar meeting were not included in the text. For example, the LDCs were resolutely opposed to the launching of the new WTO round—for a multiplicity of reasons, including the possibility of the expansion of the jurisdiction of the WTO into the areas in which they have no expertise, and the imperative of not diverting attention from the earlier commitments made (but as yet unimplemented) in favor of LDCs.[128] Similarly, the market access text does not cover most of the decisions of the Zanzibar meeting. Nonetheless, on the whole, the Doha Declaration can be considered as a positive step towards realizing the concerns of the LDCs.

VI. What Should the LDCs Do?

Having discussed how some of the well-meaning efforts made so far at the international level to integrate LDCs into the MTS have failed to produce noticeable impact, it is also necessary to see what LDCs have done for themselves in the past three decades or so to become a part of the system and protect their interest within it. It appears that LDCs have failed to make serious efforts towards this end. This author believes that it is also necessary for them to make some of their own endeavors in this direction, which can be complemented and supplemented by international efforts. The major initiatives have to come from the LDCs themselves, since the international assistance only fills in around the edges. The following represent a non-exhaustive list of what LDCs should be doing in this respect.

A. Striving to Become a Part of the Knowledge-Based Economy

There is no shortcut to becoming part of the knowledge-based economy. One way of doing so would be to compel the advanced economies to transfer technology at favorable terms and conditions. However, given the fate of the mandated requirement contained in Article 66:2 of TRIPS Agreement[129] resulting from the notoriously apathetic attitude of the industrialized countries, the LDCs should at least start working proactively towards promoting technologies in their own countries or obtain help from their regional trading partners to gain access to modern technologies.

It is well known that the developing countries in general and the LDCs in particular are strongly opposed to the TRIPS Agreement. However, they have no choice but to accept it as a *fait accompli* and a mechanism to spur innovation in their respective countries. In order to do so, they need to enact legislation and set up institutions to promote innovation and protect intellectual property rights. The sooner they do it, the better. Similarly, in the areas of promoting information technology some LDCs have already established information technology parks and others have incubator facilities in place to attract private sector investment. These useful initiatives can be replicated by other LDCs.

B. Mainstreaming Trade with Development Strategies and Processes

Despite the fact that there is no clear linkage between trade and growth because of the difficulty in disaggregating the impact of trade openness and other policy reforms

[128] Hiramani Ghimire, *The WTO at a Crossroads: Implications of Doha Meeting for LDCs*, SAWTEE NEWSLETTER 22, 9 (2001).
[129] *See supra* note 78.

undertaken by countries, more open economies have grown faster than closed economies over the last four decades or so. While this chapter makes it clear that many LDCs have done their utmost to open their economies, some of them could not produce beneficial results because of a lack of coherence between trade policies and other development policies. It is in this context that mainstreaming trade with development strategies and process is being advocated. Mainstreaming has been defined as involving the process and methods for identifying priority areas for trade and integrating them into the overall country development plan.[130]

The vehicle for mainstreaming trade into comprehensive development frameworks and for ensuring more effective implementation of the Integrated Framework, will be the World Bank/IMF Poverty Reduction Strategy Papers and the United Nations Development Assistance Framework, with the World Bank taking the lead. In order to ensure that LDCs do follow this process, the six core agencies of the IF program have made it a major requirement for eligibility for support from the IF program.

C. Building Capacity

Integration of the LDCs into the multilateral trading system has been hampered by a serious lack of capacity, whether in terms of being able to trade or to participate in the trade negotiating process or in terms of implementation of the commitments assumed by them in multilateral fora. At the domestic level, LDCs should make efforts to develop the core competencies of their trade officials and promote specialization. The frequent transfer of staff who have been well trained on trade matters to other ministries and departments should be avoided. When there is a training opportunity for the officials, it should be provided to the official handling the relevant program rather than to the official who is the favored candidate of the secretary or the minister.

While donors can help to some extent by providing resources and skills, the initiative for such capacity-building exercises must come from the concerned LDC itself. A number of international and bilateral donors have come forward to help build the trade capacity of the developing countries and LDCs. However, most of them require such technical assistance to be demand-driven—i.e., demand for such technical assistance should come from the country concerned. This effectively means that unless and until LDCs request such assistance, it is unlikely to be given. The LDCs that have not even been able to identify their needs and priorities are likely to be in a disadvantageous position. Therefore, they should at least start these processes and do their utmost to tap into the international resources for building their trade capacity.

D. Developing Human Resources

Developing skilled human resources is the key to success in seizing opportunities of market opening. The emphasis placed by East Asian countries on this aspect of social development provides an outstanding example of a success story, which is worth emulating by the LDCs. Human resources are becoming key to success in international trade. From an LDC perspective, three areas of interest could be identified. First, capacities need to be developed in product innovation. Second, promotion of marketing skills should be stressed. These qualities are needed basically in private-sector enterprises. The third area of interest could be the workforce in the public sector, especially institutions dealing

[130] OECD, *supra* note 72, at 29

with trade and commerce. Deficiencies in trade-related expertise, analytical skills and negotiating skills are a product of small staff, limited resources for hiring and training, inadequate experience, and high turnover. Most African LDCs, for example, have fewer than five officials assigned to work on trade policy issues on a full-time basis.[131]

There is a striking dearth in the LDCs of trade personnel ranging from trade lawyers to trade diplomats. Again here, there are two challenges. First, the general competence of personnel has to be enhanced, which is easier. The more difficult part of the job is to develop a "flair" for trade among those who are supposed to handle trade issues.[132]

Finally, LDCs have been raising the issue of a more liberal framework for the movement of natural persons in developed countries under GATS. Though negotiations have stalled on the issue, recent "invitations" in some countries to IT professionals from the developing world shows that quality labour does find markets.[133] The LDCs should not only recognize this potential, but also aim at utilizing it by investing in education, training and skill development.

E. Diversification of Export Profile

High dependence on limited export items such as commodities (agricultural and mineral) and low-value products (textiles and apparel) act as a major stumbling block in enhancing trading opportunities for the LDCs. However, few if any efforts have been made so far by the LDCs either to reduce their export concentration ratio or to develop into new areas of products or services which could be exported into the international market. Therefore, it is necessary for the LDCs, first and foremost, to recognize whatever comparative advantages they may possess.

The fact that most LDCs have been dependent on exporting primary products does not mean that they should only concentrate on exporting them. The success story of Bangladesh, which used to be an exporter of primary commodities and which has now become a major LDC exporter of valued-added products (such as apparel), provides an outstanding example.[134] Moreover, there are some service sectors in which LDCs are more competitive than in any other areas, such as tourism (Bhutan, Burma, Cambodia, Nepal and Tanzania) and hydroelectricity (Bhutan[135] and Nepal). However, these sectors cannot develop unless and until LDCs recognize their comparative advantages and devote their resources towards harnessing their potential both for the domestic as well as international market.

[131] OECD, *supra* note 72, at 34

[132] Ghimire, *supra* note 13, at 359

[133] In fact due to the shortage of IT manpower in the United States, high-technology companies are lobbying their government to relax visa restrictions to facilitate temporary entry of IT professional into the country. *See* World Bank, GLOBAL ECONOMIC PROSPECT AND THE DEVELOPING COUNTRIES 2002, 87 (2002)

[134] Apparel exports of Bangladesh have increased at an average rate of 19.39 percent during the period 1990–2001, starting at the comparatively modest level of US$ 866.82 million in 1990 and reaching US$ 4,860 million in 2001. *See* Bangladesh Garment Manufacturers and Exporters Association website at http://www.bgmea.com/data.htm, accessed on 9 June 2002

[135] Indeed the export profile of Bhutan has been radically altered after it started exporting hydroelectricity to its Southern neighbor, India. Power generation contributes 41.7 percent (1998–99 revenue data) of the country's total revenue generation. The power sector's contribution to GDP was about ten percent. Its contribution to the national economy will be tripled after the commissioning of the Tala Hydropower project. *See* Consumer Unity and Trust Society, CONSUMER PROTECTION IN BHUTAN: PAST, PRESENT AND FUTURE, REPORT PREPARED FOR THE ROYAL GOVERNMENT OF BHUTAN (2001)

F. Promoting Accountable Governance

Misgovernance, particularly corruption in high offices and an utter disregard for transparency norms and the rule of law are major problems in the LDCs, which the politicians of these countries often refuse to acknowledge. Corruption is a tax on the capacity of a country to trade because it creates distortion and results in cost escalation of otherwise competitive exports, rendering them uncompetitive in the global market. A predictable business environment, for example, is a precondition for attracting foreign direct investment and enhancing trade opportunities. However, frequent changes in decisions based on the whim of politicians or pressures from vested interest groups , as well as political instability, are major impediments to the growth of trade and investment.

LDCs like Bangladesh, Tanzania, Uganda being on the list of highly corrupt countries shows that they have a long way to go before uprooting corruption. Their ability to counter corruption is hampered, *inter alia*, by: a) lack of credible state commitment to rule of law; b) desire of political parties to stick to power by whatever possible means and their patronage to the corrupt officials[136]; c) lack of effective legal and institutional mechanism; d) questionable efficacy of anti-corruption agencies;[137] and e) low moral standards and social prestige associated with wealth, irrespective of the means used to generate it.

Intuitively one can argue that there is a positive correlation between openness and lack of corruption—more open economies are less corrupt than their closed counterparts. Not surprisingly, there is some empirical support for this view.[138] According to the Corruption Perception Index produced by Transparency International for the year 2001, some of the open developing economies like Singapore, Hong Kong, and Chile figure among the top twenty least corrupt countries (even ahead of some OECD countries), whereas relatively closed economies like Bangladesh, Nigeria, Russia and Ukraine are among the top twenty most corrupt countries.[139] Promoting good governance through administrative reform, reduction in discretionary authority and a sound economic system based on competition and rule of law is therefore a vital component of trade and economic growth. If LDCs themselves do not have the political will to uproot corruption from their society, no amount of international support is likely to produce positive impact in the areas of trade and investment.

G. Macro-Economic Reforms

Since the late 1980s most LDCs have initiated macro-economic reforms. In fact 33 LDCs have undertaken policy reforms under the IMF-financed Structural Adjustment Facility or Enhanced Structural Adjustment Facility program since 1988. Available evidence

[136] In Nepal some of the bureaucrats pay huge amounts to politicians to get transfers to "lucrative" departments such as the revenue department, and some of them promise continued streams of benefits to the politicians during their tenure.

[137] In Uganda, for example, anti-corruption agencies are often doled out large sums of money as a part of the government's patronage. They have turned into bodies managing public relations, not for combating graft. *See* Charles Obbo-Onyango, *The NRM Factor in Uganda's Corruption" in The East Africa*, available at http://www.charlesobbo.com/article134.htm, accessed on 18 September 2002

[138] A "naturally more open economy"—as determined by its size and geography—devotes more resources to building good institutions and displays less corruption. *See* Shang Jin Wei, NATURAL OPENNESS AND GOOD GOVERNMENT at http://econ.worldbank.org/docs/1166.pdf

[139] Transparency International (2001), *Corruption Perception Index* at http://www.transparency.org/cpi/2001/cpi2001.html#cpi, accessed on 9 June 2002.

suggests that LDCs have kept up with other developing countries in the process of structural reform in all areas except financial sector reform and the reform of the public enterprises sector, and they have gone further than other developing countries in the area of pricing and marketing reform.[140] However, the stability of the macro-economic environment and sending the right signal to the market players require much more than what most LDCs have been able to achieve so far.

Trivial though this may sound, economic analysis and interviews with entrepreneurs inevitably lead to the conclusion that obstacles to trade itself are dwarfed by the constraints stemming from the macro-economic environment.[141] No amount of trade liberalization, export orientation or trade capacity development could help a country enhance its trade performance if it has a wrong macro-economic policy such as an overvalued exchange rate. In fact, an overvalued exchange rate is often the root cause of protection, and the country will be unable to return to the more liberal trade policies that allow growth without exchange rate adjustment.[142] The CFA countries provide one of the most striking examples of the impact of exchange rate overvaluation on growth and the gains from improved exchange rate policies. The currencies of CFA countries (Burkina Faso, Cameroon, Central African Republic, Chad, Ivory Coast, Gabon, Mali, Niger, Senegal and Togo) are tied to the French franc, and at various times appreciation of franc, deterioration in the terms of trade, and higher inflation in CFA countries contributed to a highly appreciated currency that tended to depress export and GDP growth, the latter to 0.7 percent for 1986 to 1993. The CFA franc was devalued in 1994, and GDP growth accelerated to 4.7 percent per year during 1994–1998. Similarly, exports grew from—4.8 percent per year in 1986–93 to 7.8 percent per year in 1994–98.[143]

H. Compensating the Losers

International trade scholars have long understood that although for small countries, trade interventions are generally inefficient and wasteful, their inefficiency is usually dominated quantitatively by their re-distributive effects. Although removing interventions will generally be income enhancing overall, it is likely to generate both winners and losers.[144]

In part countries are reluctant to take trade liberalization measures because of the fear of huge adjustment costs they could impose on the economy. Protectionist lobbies in many countries are more vocal and powerful than the lobby in favor of trade liberalization. Protectionists often make the case that possible downsides such as increase in poverty is a strong reason to oppose reforms. While it is true that poverty may be accentuated in the short run, the long run impact of trade liberalization is often found to be income enhancing. What is therefore required is a transitional compensatory and adjustment mechanism to overcome the problem of temporary poverty. However, the adjustment process is glacially slow in some countries as compared to others. LDCs in particular find it impossible to make necessary adjustment without external assistance.

[140] UNCTAD, *supra* note 7, at 13

[141] Lecomte H.B Slignac, *Building Capacity to Trade: A Roadmap for Development Partners—Insights from Africa and the Caribbean*, European Centre for Development Policy Management, DISCUSSION PAPER 33 (2001)

[142] Harward J Shatz and David G. Tarr, *Exchange Rate Overvaluation and Trade Protection* in DEVELOPMENT, TRADE, AND THE WTO 17 (Bernard Hoekman, Aaditya Mattoo, and Philip English eds., 2002)

[143] *See* World Bank, GLOBAL ECONOMIC PROSPECTS AND DEVELOPING COUNTRIES 2001, 13 (2001)

[144] L. Alan Winters, *Trade Policies for Poverty Alleviation*, in Hoekman, Mattoo, and English, *supra* note 142, at 28.

According to Bhagawati: "We need adjustment assistance programs to take care of these adverse effects when they arise. In some poor countries, the ability to provide such adjustment assistance, which requires budgetary support, may be strictly circumscribed. In that case, it should be precisely the role of Bretton Woods agencies to provide grant funds to make possible a welfare-enhancing, poverty-reducing transition to free trade."[145] However, one must also admit that adjustment process should begin at home. Unless and until potential losers from trade reform are assured of due compensation they are likely to oppose any reform process. Therefore, it is the duty of the State to ensure that they are provided with appropriate compensation.

I. Use of Safeguards

It is well established that openness in general is preferable to protectionism. However, unfettered free trade without any checks and balances can be an open invitation to disaster, as has been made clear by the Asian crisis and the ongoing crisis in Argentina. It is therefore necessary to create space for policy manoeuvres, especially in the economically sensitive sectors. It is in this sense that safeguard arrangements are recommended. The purposes of safeguards include the promotion of self-reliance, especially in critical areas such as food security, the protection of natural resources, and the arrest of capital flight.[146]

There may be scope for retaining and utilizing domestic measures selectively and in a transparent manner that is not in contradiction with the multilateral obligations (such as WTO rules) of the countries concerned, in order to foster industries that make a strong contribution to overall export growth and competitiveness in the economy. A liberal trade regime, which provides vital access to competitive imports and is supplemented by selective and relatively moderate domestic safeguard measures is a surer way to achieve openness and reduce poverty than a complicated system of taxes and subsidies.[147]

J. Improving Communications Between Government and Non-Government Sector

Mechanisms for consultation on trade policy among governments, the private sector and civil society are weak or non-existent in most LDCs. In addition, the lack of competent enterprise sector and civil society interlocutors is an impediment to policy dialogue.[148] Involvement of private sector and civil society is crucial in three of the following four stages in the policy cycle: a) formulation of trade policy and strategy; b) preparation of negotiating positions and strategy; c) implementation of agreements; and d) monitoring and evaluation of policies and agreements. The participation of these stakeholders is of vital significance in each of these except stage (c).[149]

This is more a matter of culture and ethos in the LDCs and has nothing to do with the way the global trading system functions. No amount of market access or special and differential treatment could help LDCs improve the process of consultation. Technical assistance provided by some agencies is specifically targeted to improve communication between government on the one hand and non-governmental actors such as private sectors and civil society organizations on the other. However, the process should begin at home.

[145] Jagdish Bhagwati, FREE TRADE TODAY, 90 (2002)
[146] Ghimire, supra note 13, at 361
[147] OECD, *supra* note 72, at 27
[148] OECD, *supra* note 72, at 34
[149] OECD, *supra* note 72, at 42

While it is true that private sector and civil society organisations are poorly funded and do not clearly understand the issues at stake in order to be able to make informed contributions to the policy dialogue, and therefore may require some form of technical assistance and capacity building exercise, this should not preclude the LDC governments from at least initiating the process of consultation with the key stakeholders.

K. Building Credible Alliances

Forty-nine LDCs, which collectively account for 0.42 percent of the world trade, cannot produce any noticeable impact at the international fora, including the WTO, unless and until they become a part of larger alliances.[150] One of the most difficult choices for the LDCs is whether they should all form an LDC alliance or make their positions known through the regional integration agreements to which they belong.

LDCs belong to different categories of groupings with varied interests. Therefore, when it comes to preparing one position for international meetings, they have usually failed to come up with a unified position because of their inherent propensity to splinter for reasons of narrow self-interest or because they have been swayed by other interest groups. It is understandable why it is often impossible for them to make issue-based alliances, because they have different priorities. For example, the Asian LDCs may be more interested in an extension of the apparel quota system after its planned demise at the end of 2004, while African LDCs, which are primarily dependent on exports of primary agricultural products, may be more interested on lowering of trade barriers in agricultural products. However, when it comes to key policy issues such as providing zero tariff access to the OECD market, they could take a firm stand and should not be swayed by the arguments of other groups.

VII. Conclusion

Reversing the appalling trend of marginalization of the LDCs within the global trading system, despite their relative openness to international trade, will not be an easy task. Some of the genuine efforts by various multilateral, bilateral and intergovernmental agencies to achieve such a reversal have not produced desired results. Clearly, there is a need to arrest this adverse trend by moving beyond rhetoric. This is not only necessary for helping LDCs overcome the vicious circle they are faced with, but also for the very survival of the multilateral trading system. However, the LDCs are equally to be blamed for the continuation of the *status quo*.

At the same time the international community must show solidarity with the poorest of the world, guaranteeing open markets for all products exported by the LDCs. This would be in the enlightened self-interest of the developed countries as it would be creating markets for increased imports from their countries in the long run. If the marginalization of LDCs continues unabated, it would not only threaten to derail the process of trade liberalization achieved through several rounds of acrimonious multilateral trade negotiations, but also imperil the prospect of global peace and security.

As time goes by and the international community becomes increasingly aware of the need to better integrate LDCs into the multilateral trading system, things seem to be moving in the right direction. The LDCs have been gaining incremental support or commitments from their development partners. There is a growing realization that

[150] *See* H.B Slignac, *supra* note 141

industrial countries must open their markets for the products of the LDCs—not only in letter but also in spirit—to help the LDCs come out of the present trap they have fallen into.

Starting from the Marrakesh Ministerial Conference, and traversing through Singapore, Geneva and Brussels, the Doha Ministerial Conference too did recognize the special problems facing the LDCs. However, Doha Declaration has fallen far short of the expectation of the LDCs. Considering the attitude of the developed countries, and taking their past record of fulfillment as a guide, even the few commitments made during the Doha Conference should also be closely monitored by the LDCs to ensure that they are translated into reality. As a priority the LDCs should focus on operationalizing Paragraph 42 of Doha Declaration.

Finally, it is necessary for the LDCs to understand that they need to keep their own house in order, so as to reap the benefits of improved market openings. If they continue to blame the international community for their failure to correct the problems they have created for themselves, they will not be taken seriously.

Taking account of the lack of sincere commitment and paucity of efforts on the part of various actors and tendency of pointing fingers on one another for the lack of progress in terms of integrating LDCs into the MTS, it is necessary to set *time tables* and *targets* with the binding commitment on the part of the key actors to fulfill them. However, the exercise of setting the timetable requires further research and assessment (which is beyond the scope of this chapter) without which it would be as arbitrary as the transitional timetables agreed during the UR.

BIBLIOGRAPHY

B.L Das, The World Trade Organisation: A Guide To The Framework For International Trade, 232 (1999)

Bernard Hoekman and L. Alan Winters, *A Tribute to J. Michael Finger* in Development, Trade, AND THE WTO, xiv (Bernard Hoekman, Aaditya Mattoo, and Philip English eds. 2002)

Bernard Hoekman, Francis Ng, and Marcelo Olarreaga, Eliminating Excessive Tariffs ON Exports Of Least Developed Countries (2001)

Bernard Hoekman, Strengthening The Global Trade Architecture For Development, 5 (2002)

Bernard M. Hoekman and Michel M. Kostecki, The Political Economy Of The World Trading System: The WTO And Beyond, 380 (2001)

Byung-il Choi, *Treatment of Autonomous Liberalization in the WTO New Service Round—To Give Credit is to Get More*, 35 Journal Of World Trade 2, 364 (2001)

C.P Chandrasekhar and Jayati Ghosh, *WTO and Poor Countries* CUTS-CITEE Briefing Paper 3. (2000)

Celine Charverait, *The New Cycle of WTO Negotiations as an Opportunity to Fulfill Promises Made at the U.N. LDC-III Conference: The View of Oxfam International* in UNCTAD-Civil Society Dialogue On Selected Development Issues Being Addressed By The United Nations System UNCTAD/ISS/Misc. 385, 110 (2002)

Charles Obbo-Onyango, *The NRM Factor in Uganda's Corruption" in The East Africa*, available at http://www.charlesobbo.com/article134.htm

Constantine Michalopoulos, Trade And Development In The Gatt And WTO: The Role Of Special And Differential Treatment For Developing Countries 23 (2000)

Consumer Unity And Trust Society, Consumer Protection In Bhutan: Past, Present And Future, Report Prepared For The Royal Government Of Bhutan (2001)

Dani Rodrik, *Trade Policy Reform as Institutional Reform* in Development, Trade, AND THE WTO, 4 (Bernard Hoekman, Aaditya Mattoo, and Philip English eds. 2002)

Dani Rodrik, *Trading in Illusion,* FOREIGN POLICY, March-April 2001

Debapriya Bhattacharya and Mustafizur Rahman, *The Least Developed Countries in The WTO: Strengthening Participation Capacities*, paper prepared for the MEETING OF SENIOR OFFICIALS ON FUTUR WTO TRADE AGENDA AND DEVELOPING COUNTRIES, organized by U.N.-ESCAP, Bangkok, 23–25 August, 3 (1999)

Durken Ahn, *Linkages between International Financial and Trade Institutions: IMF, World Bank and WTO*, 34 JOURNAL OF WORLD TRADE 4, 26 (2000)

ECDPM, ICTSD AND ODI, TRADE NEGOTIATIONS INSIGHTS, Vol. 1, Issue No. 1, 8 (2002)

Edwin Kwame Kessie, *Developing Countries and the World Trade Organization: What Has Changed*, 22 WORLD COMPETITION 2, 86 (1999)

Edwini Kessie, *Enforceability and Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements*, 3 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY RIGHTS, 6, 965–74 (1999)

Flora Musonda,, Wilfred Mbowe and Faye Sampson *The Competition Regime in Tanzania*, COMPARATIVE STUDY OF COMPETITION LAW REGIMES OF SELECT DEVELOPING COUNTRIES (7-UP PROJECT), 2001

Harward J Shatz and David G. Tarr, *Exchange Rate Overvaluation and Trade Protection* DEVELOPMENT, TRADE, AND THE WTO, 17 (Bernard Hoekman, Aaditya Mattoo, and Philip English eds., 2002)

Hiramani Ghimire, *Integrating LDCs into the Multilateral Trading System: Need for a Bond Between Promise and Performance,* SAWTEE BRIEFING PAPER, 5 (2000)

Hiramani Ghimire, *Least-developed Countries in Search of Identity in the WTO*, in SALVAGING THE WTO'S FUTURE - DOHA AND BEYOND 350 (Amit Dasgupta and Bibek Debroy eds. 2001).

Hiramani Ghimire, *The WTO at a Crossroads: Implications of Doha Meeting for LDCs*, SAWTEE NEWSLETTER 22, 9 (2001).

http://www.bgmea.com/data.htm

http://www.globalcorruptionreport.org/download/data_and_research.pdf

http://www.transparency.org

http://www.unctad.org/ldcs/

http://www.wto.org/english/thewto_e/gattmem_e.htm

http://www1.worldbank.org/wbiep/trade/Integrated_framework.html

http://www2.cid.harvard.edu/cidtrade/Issues/ricupero2.pdf

ICTSD, *Canadian LDC initiative to free up entry of goods from world's poorest* in BRIDGES WEEKLY TRADE NEWS DIGEST, Vol. 6, No. 29, 6 August (2002)

ICTSD, *Least Developed Countries: No New Trade Concessions Before Doha*, *Bridges Monthly Review*, Year 5, No. 4, 1 (May 2001)

Jagdish Bhagwati, FREE TRADE TODAY, 90 (2002)

Jan Pronk, *Chairman's Opening Statement at the High Level Meeting, High Level Meeting on Integrated Initiatives for Least Developed Countries Trade Development*, NOTE ON THE MEETING, WT/LDC/HL/M/1, 25 (26 November 1997)

John Cuddy, The State of Development in Least Developed Countries, BRIDGES MONTHLY REVIEW, Year 5, No 4, 3 (May 2001)

John H Jackson, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS, 109–111 (1997)

Jonathan Hepburn, *Negotiating Intellectual Property: Mandate and options in the Doha Work Programme*, OCCASIONAL PAPER 10, Friends World Committee for Consulation, Quaker United Nations Office—Geneva, 4 (2002)

KEITH E MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY, 68 (2000)

L. Alan Winters, *Trade Policies for Poverty Alleviation,* DEVELOPMENT TRADE AND THE WTO, 28 (Bernard Hoekman, Aaditya Mattoo, and Philip English eds. 2002)

Least-Developed Countries: No New Trade Concessions Before Doha, in BRIDGES MONTHLY REVIEW, 2, Year 5, No. 4, 1 May 2001.

Lecomte H.B Slignac, *Building Capacity to Trade: A Roadmap for Development Partners—Insights from Africa and the Caribbean*, European Centre for Development Policy Management (ECDPM), DISCUSSION PAPER 33, (2001)

Michael Finger and Phillip Schuler, IMPLEMENTATION OF URUGUAY ROUND: THE DEVELOPMENT CHALLENGES, (1999)

OECD, THE DAC GUIDELINES: STRENGTHENING TRADE CAPACITY FOR DEVELOPMENT 50 (2001)

Olarreaga, Marcelo and Francis Ng. "Tariff Peaks and Preferences" in DEVELOPMENT, TRADE, AND THE WTO, 109 (Bernard Hoekman, Aaditya Mattoo, and Philip English eds., 2002)

PAUL R. KRUGMAN AND MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY 255–261 (2000)

Pradeep Mehta, *Follow-up to the Fourth Ministerial Conference in Doha: Market Access—the Major Roadblocks*, UNCTAD-CIVIL SOCIETY DIALOGUE ON SELECTED DEVELOPMENT ISSUES BEING ADDRESSED BY THE UNITED NATIONS SYSTEM, UNCTAD/ISS/Misc. 385, 130 (2002)

Ratnakar Adhikari And Hiramani Ghimire, INTEGRATING LDCS INTO THE MULTILATERAL TRADING SYSTEM: RHETORIC GALORE, 7 (2001).

Ratnakar Adhikari, *Birth Defects of the WTO Accession Process,* THE KATHMANDU POST, 27 March, 4 (2002)

Ratnakar Adhikari, Rajesh Khanal and Navin Verma, *National Study on TRIPS Agreement and Its Implications for Nepal*, REPORT SUBMITTED TO THE NEPAL ACCESSION TO WTO, 22 (2001)

Roman Grynberg and Roy Mickey Joy, *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, 34 JOURNAL OF WORLD TRADE, 6, 116 (2000).

Rubens Ricupero, *Address to the High Level Meeting, High Level Meeting on Integrated Initiatives for Least Developed Countries Trade Development*, NOTE ON THE MEETING, WT/LDC/HL/M/1, 26 November, 31 (1997)

Rubens Ricupero, *Forewords* in FUTURE MULTILATERAL TRADE NEGOTIATIONS: HANDBOOK FOR TRADE NEGOTIATORS FROM LEAST DEVELOPED COUNTRIES, vii (1999).

Sarrocco, Claudia (2002). *Improving IP Connectivity in the Least-Developed Countries*, BACKGROUND STUDY, Strategy and Policy Unit, International Telecommunications Union, 12 April 2002, available at http://www.itu.int/osg/spu/ni/ipdc/workshop/presentations/Sarrocco.ppt

SHANG JIN WEI, NATURAL OPENNESS AND GOOD GOVERNMENT at http://econ.worldbank.org/docs/1166.pdf

Shigemitsu Sugisaki (1999), *Trade and Development*, ADDRESS TO WTO HIGH LEVEL SYMPOSIUM ON TRADE AND DEVELOPMENT, March 17 (1999)

SIMON J. EVENETT AND BERNARD M. HOEKMAN, GOVERNMENT PROCUREMENT DISCRIMINATION AND MULTILATERAL TRADE RULES, (2000).

South Center, Special and Differential Treatment Under the WTO at www.southcenter.org/publications/s&d/s&d-04.htm

Stefano Inama, *Market Access for LDCs: Issues to be Addressed,* 36 JOURNAL OF WORLD TRADE 1, 85 (2002)

Sue Arrowsmith, *National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict* in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 19 (Sue Arrowsmith and Arwel Davis eds. 1998)

SUNS, *LDCs to lose* $ *3 billion from Uruguay Round, says UNCTAD* in SOUTH-NORTH DEVELOPMENT MONITOR (SUNS) No. 3620, 2 (n.d)

T.N. Srinivasan, *Developing Countries in the World Trading System: From GATT, 1947 to the third Ministerial Meeting of WTO,* a revised version of the Keynote Speech delivered at the HIGH LEVEL SYMPOSIUM ON TRADE AND DEVELOPMENT, World Trade Organization, 10 (1999)

The Least Developed Countries, 2000 Report, XXX, UNCTAD/LDC/2000 E.00.II.D.21 (December 10, 2000)

Transparency International, *Corruption Perception Index* at http://www.transparency.org/cpi/2001/cpi2001.html#cpi

UNCTAD and Commonwealth Secretariat, DUTY AND QUOTA FREE MARKET ACCESS FOR LDCS: AN ANALYSIS OF QUAD INITIATIVE: 1 (2001)

UNCTAD, FUTURE MULTILATERAL TRADE NEGOTIATIONS: HANDBOOK FOR TRADE NEGOTIATORS FROM LEAST DEVELOPED COUNTRIES, 282 (1999)

UNCTAD, *Integrating Least Developed Countries into the Global Economy: Proposal for a Comprehensive New Plan of Action in the Context of the Third WTO Ministerial Conference*,

adopted at THE CHALLENGE OF INTEGRATING LDCS INTO THE MULTILATERAL TRADING SYSTEM: COORDINATING WORKSHOP FOR SENIOR ADVISORS TO MINISTERS OF TRADE IN LDCS, Sun City, South Africa: 21–25 June, 1 (1999)

UNCTAD, *Programme of Action for the Least Developed Countries adopted by the Third United Nations Conference on Least Developed Countries in Brussels on 20 May*, A/CONF. 191/11, (2001)

UNCTAD, STATISTICAL PROFILES OF THE LEAST DEVELOPED COUNTRIES 4 (2001).

UNCTAD, THE LEAST DEVELOPED COUNTRIES REPORT 1999, 4 (1999)

United Nations, *Resolution adopted by the General Assembly, Fifty-fifth session*, 31 January, A/RES/56/183, 1–2 (2002)

UNNGLS (United Nations Non-governmental Liaison Service), GO BETWEEN 30, January-February, 84 (2001)

World Bank, GLOBAL ECONOMIC PROSPECT AND THE DEVELOPING COUNTRIES 2002, 87 (2002)

World Bank, GLOBAL ECONOMIC PROSPECTS AND DEVELOPING COUNTRIES 2001, 13 (2001)

World Trade Agenda, *Doha ministerial breaks the WTO logjam and successfully launches a new round . . . agenda . . . work programme*, November 26, No. 01/21, 8 (2001)

WT/MIN(99)/7, WT/COMTD/LDC/W/18 and WT/LDC/SWG/IF/1.

WTO (*High Level Meeting on Integrated Initiatives for Least Developed Countries Trade Development*), NOTE ON THE MEETING, WT/LDC/HL/M/1, 2 (26 November, 1997).

WTO Sub-Committee on Least-Developed Countries, *Market Access Conditions for Least Developed Countries* (WT/LDC/SWG/IF/14), (2000).

WTO, *Background Document*, HIGH LEVEL SYMPOSIUM ON TRADE AND DEVELOPMENT, Geneva, 17–18 March, 39–48 (1999)

WTO, *Declaration on TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, 20 November 2001

WTO, *High Level Meeting on Integrated Initiatives for Least Developed Countries' Trade Development*, WT/LDC/HL/M/1, 26 November, 17 (1997)

WTO, *Progress Report on the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries*, REPORT BY THE DIRECTOR-GENERAL, WT/LDC/SWG/IF/17/REV. 1, 17 April (2001)

WTO, *Singapore Ministerial Declaration*, adopted on 13 December (1996)

WTO, *WTO Work Programme for the Least Developed Countries (LDCs) Adopted by the Subcommittee on Least Developed Countries*, WT/COMTD/LDC/11, 13 February (2002)

CHAPTER 53

TEXTILES AND DEVELOPING COUNTRIES

Magda Shahin*

"The Textiles Arrangements are legitimate opportunism that avoided something worse, it would be unrealistic not to recognize the violence they have done to the GATT concepts."[1]

TABLE OF CONTENTS

I. Introduction 385
A. The Importance of Textiles in International Trade 385
B. The Era of Restrictions 386
C. The Uruguay Round and Beyond 387
II. Textiles and Clothing as an Exception to the GATT System 390
A. The Short-Term and Long-Term Arrangements 391
B. The Multi-Fiber Arrangement 395
C. A Comparison of the GATT and the MFA 398
D. The Objectives and Impact of the MFA 399
III. The Agreement on Textiles and Clothing: Unbiased Policies or Undermining Principles 401
A. Punta del Este Preparations 401
B. The Uruguay Round Negotiations 403
C. The Agreement on Textiles and Clothing 404
1. The Liberalization and Integration Process 405
2. The Transitional Safeguard Mechanism 407
3. The Disputed Balance of Rights and Obligations 408
4. The Textiles Monitoring Body 410
IV. Implementation of the Agreement 410
A. Inherent Weaknesses of the Agreement 411
B. Analysis of the Integration Program 412
V. Dispute Settlement in Textiles and Clothing 413
A. United States—Shirts and Blouses 414

* Magda Shahin, Assistant Minister for International Economic Relations, is a Member of the Egyptian Foreign Ministry. She served as a Deputy Head of Mission in Geneva and Egypt's Representative to the WTO during 1992–1997. She was also a member on an *ad personam* basis of the WTO's Textiles Monitoring Body ("TMB") during her posting in Geneva. As of December 2003, she was Egypt's Ambassador to Greece. The opinions expressed in this Chapter are personal.

[1] Claudia Jimenez Cortes, GATT, WTO AND THE REGULATION OF INTERNATIONAL TRADE IN TEXTILES 64 (1997) (quoting a Director General of the GATT in 1973 who participated directly in the LTA negotiations).

B. EC—Bed Linen 415
C. United States—Underwear 415
D. United States—Cotton Yarn 416
VI. Conclusion 417

I. Introduction

This chapter analyses the historical development of the textiles negotiations that eventually led to the WTO Agreement on Textiles and Clothing ("ATC"), one of the Uruguay Round Agreements on Trade in Goods. It reviews prior arrangements governing the sector and illustrates how and why this sector remained outside the disciplines of the GATT multilateral trading system for so long. The paper then examines the ATC and assesses the way it has been implemented during the first three stages of the integration process. It also looks at the impact of the Agreement on exporting developing countries and discusses some of the disputes that have arisen since the Agreement was put into place. Textile and clothing disputes are examined in greater detail in another chapter in this book.[2]

A. The Importance of Textiles in International Trade

The textiles and clothing sector is one of the most important sectors of international trade. In 1997 it accounted for nine percent of world exports in manufactured products.[3] It is a significant contributor to many national economies, providing 142 million jobs (formal and informal) around the world.[4] In the European Community, it accounts for nine percent of all jobs in the manufacturing sector.[5] Textile and Apparel industries in the United States are expected to continue to provide more than 1.3 million jobs in 2005 or nearly eight percent of all projected jobs in manufacturing.[6] For developing countries, its importance is much higher. As one of the important sources of export earnings, textiles and clothing accounted for approximately twenty percent of total exports of manufactures by developing countries and 15.5 percent of their total merchandise exports.[7] Some of these countries are extremely dependent on the textiles and clothing industry for their export earnings. For example, 73 percent of Pakistan's overall merchandise exports is in textiles and clothing. The share of textiles and clothing in the export trade of many least developed countries is even larger.

The textiles and clothing sector often plays an important role in the early stages of the industrial development process, because it is labor-intensive and requires little capital. However, as industrialization takes place there has historically been an outsourcing stage in related sub-sectors, brought about by a loss of competitiveness in the face of new exporters.[8] More specifically, as industrialization takes place, the lower-level technology sectors in the textiles and clothing industries, e.g., grey fabrics (and related sub-sectors) are pushed outward, i.e., to the developing countries when the developed country industries lose in competitiveness to new developing country exporters.

What we see today is that in the developed countries it is only these so-called low-tech sub-sectors that are being discarded since much of the textiles and clothing industry

[2] *See* Chapter 9.

[3] Wenguo Cai, *Impact of the WTO Agreement on Textiles and Clothing: An International Perspective,* in CHALLENGES AND OPPORTUNITIES OF WTO FOR ESCWA MEMBER COUNTRIES IN SELECTED SECTORS 125, 4 ESCWA, UNCTAD/ITD/17 (1999)

[4] *Id.*

[5] *Id.*

[6] Mark Mittelhauser, *Employment Trends In Textiles and Apparel, 1973–2005*, Monthly Labor Review (August 1997), at 33.

[7] Submission by the International Textiles and Clothing Bureau to the CTG, *Implementation Issues and Concerns: The Agreement on Textiles and Clothing*, IC/W/251/REV.1, March 1, 2002, para. 4.

[8] Jimenez Cortes, *supra* note 1, at 21.

in the developed countries is no longer a low-tech industry. A clear division of labor has arisen in the textiles industry, with a highly developed, sophisticated and expensive design industry in the developed countries and independent production in certain low-tech sub-sectors in the developing countries. The highly automated textile industry in the developed countries is leading to increased productivity in this sector, in addition to the outsourcing of the operations involved in making apparel to take advantage of lower labor costs while continuing to control most production and distribution decisions.[9] The essence is that a large part of the textile and apparel industry continues to remain in the developed countries.

It is during this transition stage that conflicts between groups with different vested interests in protectionism and liberalization begin to emerge. These vested interests make the sector highly sensitive to change, and for this reason, trade in textiles and clothing has been particularly difficult to liberalize.

Moreover, it is difficult to draw the line between the policies of the developed countries as a group in the textiles and clothing industry. We continue to see U.S. intransigence to the opening of its market for textiles and clothing. While some European countries seem more flexible in this regard, this may soon change with the expansion of the European Union to encompass the lower-income countries of Eastern Europe. The result may be that European textiles, just like European agriculture, could become another sector in need of protection.

B. The Era of Restrictions

Trade in textiles and clothing has been subjected to a large variety of protective measures since the early 1960s. Because developing countries were not treated as full-fledged members in the GATT, they were easy targets for such measures. Developed countries chose to deal with textiles and clothing as an exception to the GATT. As a result the textiles and clothing sector was removed from the purview of GATT rules and disciplines and placed under extended special arrangements that allowed developed countries to restrict trade in textiles and clothing, and to apply a wide range of discriminatory actions, particularly against developing countries.

Initially, restrictive arrangements were instituted cautiously and were justified as short-term adjustment measures in the cotton industry. Restrictive measures gradually expanded and eventually encompassed virtually all of the textiles and clothing industry, covering nearly all types of cloth, including man-made fibers, wool, and silk blends. The result was the corruption of the original objective of these arrangements, which eventually became purely protectionist measures rather than a means of helping industries in developed countries to adjust to changing circumstances. In its last years of existence, the Multi-fiber Arrangement ("MFA") even permitted importing countries to apply import restrictions on products that they did not produce domestically.[10]

The textiles and clothing sector was essentially withdrawn from the GATT system in the early 1960s. During the Tokyo Round in the 1970s,[11] developed countries were

[9] Mittelhauser, *supra* note 6 at 26.

[10] *Agreement on Textiles and Clothing,* in UNCTAD, THE OUTCOME OF THE URUGUAY ROUND: SUPPORTING PAPERS, THE TRADE AND DEVELOPMENT REPORT: CHAPTER V, AGREEMENT ON TEXTILES AND CLOTHING 108, UNCTAD/TDR/14 (Supplement) (1994).

[11] The Tokyo Round was the sixth round of multilateral trade negotiation. It lasted from 1973–1979. Around 100 countries participated in the Tokyo Round as compared to 45 in the previous Round.

feeling increased pressure from recently independent developing countries that wanted additional market access in textiles and clothing, but it was not until the early 1980s that exporting developing countries made their first serious attempt to change the system. By this time, developing countries were becoming conscious of their strengthened status in the international arena, and they began to act more uniformly, pushing for the tabling of the textiles and clothing sector in the new round of trade negotiations.

The textile-exporting developing countries realized that the aim of developed countries in general, and the United States in particular, was to negotiate a round in which "free-riders," as they labeled developing countries, would be integrated on the basis of the reciprocity principle. In other words, the developing countries would be required to make concessions in order to obtain trade benefits. In addition, the philosophy of free trade was gaining clout among developing countries, and it became evident that developed countries could no longer afford to be exposed as countries with double standards in trade negotiations.

The developed countries knew that eventually they would have to agree to the application of the normal GATT rules to textiles and clothing. From the very beginning of the Uruguay Round, however, they managed to do so at their own pace. Developing countries used the textiles and clothing sector as one of their major bargaining chips in the Uruguay Round in return for the inclusion of two new areas—services and trade related-intellectual property rights. Newly established but strong interest groups from the services and intellectual property sectors outweighed the influence of the textiles and apparel lobby groups in the developed countries. They played a pivotal role in softening the position of the developed countries in general and the United States in particular, so ensuring that concessions would be made with respect to textile and apparel trade.

As a result, the developed countries saw their opportunity to extract a large number of concessions from the developing countries reach its zenith, in return for what was assumed by many developing countries to be the inclusion of the textiles sector. Developed countries knew that the liberalization of trade in textiles and clothing was one of the few enticements that could be offered to developing countries for their participation in a new Round and, albeit reluctantly, the developed countries agreed to pay this price—opening their textile and clothing sectors, in order to entice developing countries to enter into new commitments in other sectors, in particular intellectual property and services. The developed countries were "shamed" into making concessions with regard to this sector.[12] Developed countries nevertheless succeeded in attaching a myriad of caveats and conditions to the liberalization of this sector. Nowhere have developed countries manipulated the GATT system as in the textiles and clothing sector.

C. The Uruguay Round and Beyond

It was the promise that liberalization of textile trade would lead to greater foreign earnings and a significant increase in domestic employment that motivated many developing countries to participate in the Uruguay Round negotiation of the Agreement on Textiles and Clothing.[13] The 1998 WTO Annual Report concluded that if the Uruguay Round Agreements are fully implemented, world income would grow by up to one percent per

[12] Marcelo Raffaelli and Tripti Jenkins, THE DRAFTING HISTORY OF THE AGREEMENT ON TEXTILES AND CLOTHING 10 (International Textiles and Clothing Bureau 1995).

[13] *Agreement on ATC: Evaluation of Implementation,* Communication by ITCB Members to the General Council of the WTO", WTO Document WT/GC/W/283 (August 3, 1999) at 3.

year, or by U.S. $200–500 billion, and world trade would increase by 6–20 percent. More specifically, "more than one-third of the benefits were expected to derive from liberalization of textiles and clothing and another one-third from liberalization of other manufactures".[14] When one realizes that in 1996 approximately 59 percent of world textiles exports came from developing countries, while their share of clothing exports was 73 percent of the world's total,[15] it becomes clear that developing countries would gain considerably from the liberalization of this sector.

Unfortunately, although the developing countries were promised an opening of markets with an increase in trade and gains in textiles and clothing exports, nothing has materialized from these promises. This reality is lost on neither the pundits nor politicians, nor is it lost on diplomats in Geneva who debated the launch of a new round of WTO trade negotiations. It is also not lost on developing countries which feel they have been hurt the worst. Why? Because while the GATT and the WTO aim at liberalizing trade, agreements on textiles and clothing do just the opposite. The Multi-Fiber Agreement ("MFA") and the Agreement on Textiles and Clothing ("ATC") undermine the integrity of both the GATT and the WTO, and threaten the credibility of negotiations in other sectors.

The ATC undermines the GATT/WTO trading system since it grants the developed countries treatment analogous to the special and differential treatment provided to the developing countries throughout the Uruguay Round agreements, i.e., a longer time for implementation. Portions of the ATC amount to a ten-year extension of the MFA. According developed countries such privileges weakens the GATT/WTO Agreements and disadvantages many developing country Members. Assuming that the ATC is faithfully implemented, the ATC will have added another ten years of protection to a sector that has already received forty years of protection. The WTO is further undermined by the fact that the negotiation and implementation of the ATC took place behind the scenes, thus allowing special interests to protect their advantages.

In the lead up to the November 2001 Doha WTO Ministerial Meeting, there were many speeches and calls for developing countries to endorse a new round of negotiations on liberalization in new sectors. Many references were made to the benefits of reducing industrial tariffs and trade barriers in agriculture, services, finance, and telecommunications, but there was conspicuously no mention of trade in textiles or of the ATC.

This is no surprise. Textiles agreements not only inflict "violence" on the very concepts of the GATT system, they jeopardize the framework upon which trade liberalization is built. It is no exaggeration to say that what we see today in terms of mistrust and the hardening of positions of some major developing exporting countries is a backlash from a badly negotiated agreement and, even worse, a badly implemented agreement. In sum, credibility in multilateral trade negotiations has always been important, but it is now more critical than ever, because the WTO works by consensus and developing countries are likely to block an agreement that does not adequately satisfy their interests. The Seattle Ministerial failed in part due to opposition to a new Round by the developing countries.[16] The MFA and the ATC are thus not models to be used when

[14] *Id.* at 2, ¶ 4.

[15] WTO Secretariat, *Background Statistical Information with Respect to Trade in Textiles and Clothing,* WTO Document G/L/184 (Sept. 30, 1997) at 5, 31.

[16] The developing countries were not ready to start a new Round when so many issues of importance to them remained hanging, and when the developed countries had failed to address developing country issues adequately. Developed countries overburdened the agenda with issues of interest to them. Seattle also failed because the EU overburdened the agenda with new issues, such as investment, competition and the

considering new sectors in future trade negotiations. Indeed, textiles agreements have undermined trade liberalization and feed widening divisions in the perceptions of developed and developing countries about the benefits of participation in the multilateral trading system.

It is vital to realize that competing trade agendas drive negotiations, the outcome of which can cause political change and social upheaval, and even conflict.[17] In Europe and the United States stakeholders have formed powerful political interest groups. The stakeholders in the textiles and clothing industries in the developing countries are less organized, but the impact of changes in textile trade rules is often more important. This is especially true for developing countries that depend heavily on textiles, such as Pakistan. It has been the political strength of key stakeholders in the developed countries and not the relative economic needs of countries that has kept textiles outside the purview of the GATT-based trading system for thirty years.

When textiles and clothing are fully incorporated into the international trading system, beginning in 2005, there will be an employment shift in this sector from Canada, the United States and Europe, to Asia, Africa and Latin America. In the former countries, greater employment in services and high technology will absorb many of the lost jobs. In the latter regions, the move from basic fiber production to finished fabrics and clothing will enable skill development, assist poverty reduction, and lead to technology transfer and industrialization. For example, the successful development of textiles industries in several of the Asian Tigers has led to significant foreign investment and technology transfer. More recently, foreign aid has played a similar role. For example, in Vietnam (which is not yet a WTO Member), foreign aid has promoted textiles production as a basis for economic expansion and skills development. This has led to increased foreign investment and technology transfer.[18]

Since industrialized countries still have significant vested interests in textiles and clothing production, it should therefore come as no surprise that they have sought to avoid effective liberalization of this sector, meaning that in the post-Uruguay Round era tariffs on imported textiles and clothing will remain the highest of all major industrial products. Average tariffs in developed countries on imported textiles and clothing products will be 12.1 percent in the final stages of the ATC reduction commitments, while the average rate for all industrial products will be 3.8 percent.[19] Whereas in the Uruguay Round the average tariffs in textiles and clothing were reduced by only 22 percent (from 15.5 percent to 12.1 percent) industrial tariffs on average were reduced by 40 percent. In addition, only four percent of tariff lines of imported textile and clothing imports were duty-free in developed countries; 27 percent were in the range of 15 to 35 percent.[20] The corresponding figures for all manufactured products were 49 percent and one percent respectively.[21]

environment, and was not willing to move on agriculture. The EU, however, was shrewd enough to push the blame for the failure of Seattle on the United States (as a result of "bad organization") and present itself as the guardian of developing country interests.

[17] *See generally,* J.W. Wright, Jr., THE POLITICAL ECONOMY OF THE MIDDLE EAST: THE IMPACT OF COMPETING TRADE AGENDAS (1999).

[18] Lynn Mytelka, Dieter Ernst and Tom Ganiatsos, *Learning, Technological Capability Building and Sustainable Export Growth,* in TECHNOLOGICAL CAPABILITIES AND EXPORT SUCCESS IN ASIA 324–335 (L. Mytelka, D. Ernst and T. Ganiatsos eds. 1998).

[19] WTO SECRETARIAT, NOTES ON WTO AGREEMENTS 47–49 (1997); WTO SECRETARIAT, THE WORLD TRADE ORGANIZATION: A TRAINING PACKAGE, Table II.1, at E1-81 (December 15, 1998).

[20] *Id*. at 47–49.

[21] *Id.*

Textiles and clothing is a highly sensitive sector and remains, as shall be demonstrated throughout this chapter, full of controversies and conflicts. Although many view the meager results of more than eight years of ATC implementation with disappointment, many also view the future of this sector with a feeling of hope, and the ardent expectation that this sector will continue to be the backbone of their industrialization. For developed countries the liberalization of this sector will continue to be a measure of their sincerity regarding trade liberalization and openness.

II. Textiles and Clothing as an Exception to the GATT System

The roots of the current textiles and clothing regime date back to the 1930s and grew out of highly restrictive measures later to be known as "voluntary export restraints" ("VERs"). At that time Japanese exports were beginning to out-compete the traditional British textiles and clothing industry, as well as that of the United States. In response to complaints by the United Kingdom and the United States, in 1936 Japan agreed to limit its exports through self-imposed restraints.[22] In 1937, an agreement formalizing these constraints was signed between the United States and Japan in Osaka.[23] The United States, then in the midst of a depression, sought a transitional period during which jobs would be protected. Japan decided that agreeing to a system of voluntary restraints was preferable to stricter unilateral measures that could be invoked, such as higher duties and quantitative restrictions on textile and clothing exports.

Unlike agriculture, the GATT 1947 did not treat trade in textiles and clothing as an exception to the normal rules.[24] Yet, it became evident early in the trade liberalization process that, like agriculture, the textiles and clothing sector was prone to capture by protectionist interests. This became the basis for the exceptional protectionist treatment of this sector by the most outspoken proponents of free trade.

One of these proponents, the United States, was reluctant to request a GATT Article XXV:5 waiver with respect to textiles and clothing for fear of negatively affecting its stature as an advocate of trade liberalization, already tarnished by the waiver it obtained in 1955 with respect to trade in agricultural products.[25] As a result, although the textiles and clothing sector was seemingly included in the GATT system, it became an area prone to secretive deals between importers and exporters.

As Bagchi notes, by the end of December 1956, after protracted bilateral negotiations, an agreement was struck between Japan and the United States, where Japan agreed to restrain its exports for five years with an aggregate ceiling covering its entire cotton textile exports. The aggregate ceiling was divided into five broad groups consisting of cotton cloth, made-up goods, woven apparel, knitted goods and miscellaneous textiles. There were further specific limits for particular products, which could be increased up to ten percent by borrowing from unused quotas. This structure of restrictions, with some modifications, became the model for subsequent bilateral agreements that have continued ever since. Perhaps inspired by the Japan/United States Agreement, Britain reached agreements with three Commonwealth countries, India, Hong Kong and Pakistan, to limit their exports of cotton products for three years beginning February 1, 1959 for

[22] This was first known voluntary export restraint ("VER") in textiles. John H. Jackson, William Davey, Alan Sykes, Jr., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1184 (1995).

[23] Jimenez Cortes, *supra* note 1, at 21.

[24] GATT Article XI (General Elimination of Quantitative Restrictions) and Article XVI (Subsidies) contained significant exceptions with respect to agricultural products. *See* Chapter 6 of this book. By contrast there were no specific exclusions for textiles and clothing.

[25] See Chapter 6 of this book.

Hong Kong, and January 1, 1960 for India and Pakistan. However, the United States failed in its attempt to reach a bilateral agreement with Hong Kong similar to the one it had concluded with Japan, which led the United States to drop the bilateral overtures and to seek a multilateral solution (initially) in the GATT.[26] A new framework for managing trade in textiles and clothing was emerging.

Parallel negotiations on textiles and clothing began in 1960 in the Dillon Round of trade talks[27] where negotiators attempted to restructure the system of bilateral arrangements that was emerging. The eventual result was the Short-term Arrangement Regarding International Trade in Cotton Textiles ("STA") and the Long-term Arrangement Regarding International Trade in Cotton Textiles ("LTA"), which led to the Arrangement Regarding International Trade in Textiles, known as the Multi-Fiber Arrangement ("MFA").[28] These arrangements (discussed in the following section) were primarily the result of the concern of developed importing countries that the GATT Article XIX Safeguard provision was inadequate to protect their textile industries. These special arrangements, initially meant to allow industries in the United States and Europe to adjust over a one year period to market shocks, were expanded in coverage and extended in time for over thirty years.

The textile and clothing sector has always been considered as fertile ground for imaginative protectionist policies. Under the STA, LTA, and MFA it became a web of Voluntary Export Restraints ("VERs"), price undertakings, and "gray area measures", the net effect of which has been significant trade restrictions and protectionism. These measures, which found their roots in the textiles and clothing trade, started to be used in other sectors in the 1970s and 1980s, such as the automobile, iron and steel industries. They eventually posed a threat to the entire GATT system. Out of fear that they would gradually permeate the system, the elimination of gray area measures became a necessary condition for the successful conclusion of the Uruguay Round.[29]

A. The Short-Term and Long-Term Arrangements

The Kennedy Administration found itself facing a difficult predicament in its first year in office. On the one hand, the United States faced mounting criticism from developing

[26] Sanjoy Bagchi, INTERNATIONAL TRADE POLICY IN TEXTILES; FIFTY YEARS OF PROTECTIONISM 27–29 (2001).

[27] The Dillon Round was the fifth round of multilateral trade negotiations. It was held in Geneva from 1960–1961.

[28] *See* GATT, GUIDE TO GATT LAW AND PRACTICE, ANALYTICAL INDEX 320–497 (6th ed., 1994), which notes that:

> The Short-term Arrangement Regarding International Trade in Cotton Textiles (STA/10S/18) came into force on 1 October 1961 for a twelve-month period pending a long-term solution. A year later, the STA was superseded by the Long-term Arrangement Regarding International Trade in Cotton Textiles (LTA/11S/25) which came into force on 1 October 1962 for a five-year period and continued into force until 31 December 1973. The stated objectives of the LTA, as of the STA, were two-fold: to promote the economic progress of developing countries by providing larger opportunities for exchange earnings, while ensuring that cotton textiles trade developed in such a way as to avoid disruptive effects in individual markets. . . .
>
> . . . [T]he arrangement regarding international trade in textiles, commonly known as the Multi-fiber Arrangement or "MFA" (21S/3), covering textile products of man-made fiber and wool as well as cotton, entered into force on 1 January 1974 for a period of four years. . . . The MFA, as extended by various Protocols, allowed for various quantitative restrictions among participating countries but states in paragraph 6 of Article 1 that: "The provisions of this arrangement shall not affect the rights and obligations of the participating countries under the GATT."

The MFA was extended a number of times and expired on December 31, 1994.

[29] *See* Article 11:1(b) of the *Agreement on Safeguards*, discussed in Chapter 18 of this book.

countries, notably Korea, Taiwan, Hong Kong and Brazil, who were resisting repeated U.S. requests to restrict their textile exports. On the other hand, the Administration faced growing domestic pressure by textile lobbies that wanted additional restrictions placed on textile imports. In response to pressure from both sides, the United States orchestrated the creation of the STA, which was presented as a formal means of striking a textiles deal with the exporting countries, thereby legitimizing restrictive actions and helping to restore the image of the United States as a bastion of free trade. This interim arrangement reduced domestic pressure on the Kennedy administration, and was seen as a payback for textile industry support during the election campaign. It also helped secured the United States administration the necessary negotiating authority in the Congress prior to the Round.

The STA was signed in July 1961 at which time it had nineteen participating countries: Australia, Austria, Belgium, Chinese Taipei, Canada, France, Germany, Hong Kong, India, Italy, Japan, Korea, the Netherlands, Pakistan, Portugal, Spain, Sweden, United Kingdom and the United States. It was a short document, containing two articles based on a U.S. proposal.[30] The primary objective was the entitlement of Members to impose quotas on countries whose imports caused market disruption. Article I enabled a country to restrain imports from a source, with or without its consent, at specified levels. It also obliged countries maintaining restrictions to increase access to their markets significantly. Article II established a Cotton Textiles Committee to find a long-term solution to the problems in the trade of cotton textiles.

The STA was confined to cotton and cotton textiles, and covered 64 categories of products, subjecting them to a wide range of quantitative restrictions on exports and imports. The short-term arrangement would permit the United States to control and regulate imports of cotton textiles from sources perceived to be responsible for market disruption. It was, however, stated that this procedure would be used "sparingly"—a phrase that was to recur repeatedly in the textile agreements.[31] It shortly became clear that the transitional character of the STA was an illusion, and that the Agreement contained the seeds of a perpetual "special" system for textiles and clothing.

The key to the new system was the concept of "market disruption,"[32] defined as "instances of sharp import increases associated with low import prices not attributable to dumping or foreign subsidies".[33] This concept and the provisions that grew out of it

[30] *See* GATT: BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 10S/18.

[31] BAGCHI, *supra* note 26, at 41.

[32] The concept was introduced by the United States and was developed in GATT textile discussions held in 1959 and 1960.

[33] *Decision on the Avoidance of Market Disruption*, GATT Document 9S/26, 26–27, adopted November 19, 1960 (reproduced in GUIDE TO GATT LAW AND PRACTICE, *supra* note 27, at 496). The Decision recognizes that:

> (a) In a number of countries situations occur or threaten to occur which have been described as 'market disruption'.
>
> (b) These situations generally contain the following elements in combination:
>
> (a) a sharp and substantial increase or potential increase of imports of particular products from particular sources;
> (b) these products are offered at prices which are substantially below those prevailing for similar goods of comparable quality in the market of the importing country;
> (c) there is serious damage to domestic producers or threat thereof;
> (d) the price differentials referred to in paragraph (ii) above do not arise from governmental intervention in the fixing or formation of prices or from dumping practices. . . .

went beyond the general safeguard provision of GATT Article XIX.[34] For example, under the concept of "market disruption" there was no need to show a link between increased imports and any injury or even threat of injury being experienced by the domestic industry, and relief could be applied on a non-MFN basis. Although the original 1960 Decision[35] adopting the concept of market disruption was not limited to textiles and apparel, use of the concept did not spread to other sectors during the GATT era.[36]

The greatest benefits of the STA for the United States were that (1) the STA institutionalized restrictive actions within a multilateral setting outside the rules and procedures of the GATT, and (2) it obtained wide-ranging support from U.S. producers, as well as support from exporting countries, since it allowed regular exports without disruption from many kinds of unilateral protectionist measures. The stand-alone system for trade in textiles formalized a "special system" that both accommodated the U.S. situation and was internationally acceptable. Many, however, saw this special carve-out as the thin end of the wedge, opening the door to broad exceptions to the established trade rules. They saw the STA as a real threat to the entire GATT system, undermining the credibility of the GATT negotiating framework.

It was not long before the STA, initially negotiated for a one-year period, became the Long-term Arrangement ("LTA"). The LTA was agreed on October 1, 1962 and was renewed several times. Renewal of the LTA became a condition for the grant of negotiating authority by the U.S. Congress, and thus allowed the Administration to enter into the Kennedy Round of multilateral trade negotiations (1964–67). Like the preceding arrangements, the LTA only covered cotton textiles.

The LTA was considered to be a solution for emerging conflicts in the area of textiles and clothing. Even before the expiration of the STA and the establishment of the Cotton Textiles Committee on November 16, 1961, the LTA had emerged from the deliberations in the Committee.

The LTA started with 24 members, and expanded over the years to include all exporting and importing countries that had an interest in the cotton textile trade. At its height the members were Australia, Austria, Belgium, Brazil, Canada, China, Colombia, Denmark, Egypt, France, Finland, Germany, Greece, Hong Kong, India, Israel, Italy, Jamaica, Korea, Luxembourg, Mexico, the Netherlands, Norway, Pakistan, Portugal, Spain,

(c) These situations have often led governments to take a variety of exceptional measures. In some cases importing countries have taken or maintained discriminatory measures either outside the framework of the General Agreement, or contrary to the provisions of the General Agreement. In some other cases exporting countries have tried to correct the situation by taking measures to limit or control the export of the products giving rise to the situation.

(d) Such measures, taken unilaterally or through bilateral arrangement, may in some cases tend to cause difficulties in other markets and create problems for other contracting parties.

[34] GATT Article XIX (Emergency Action on Imports of Particular Products) requires that all safeguard actions should be non-discriminatory in application (i.e., applied on an MFN basis) and temporary in duration, and it provides the right to equivalent compensation for the loss of markets suffered by the affected parties, failing which the affected parties are entitled to retaliate. Article XIX is an exceptional remedy designed to allow industries time to adjust to unforeseen crises where serious harm is caused by increased imports. *See* Chapter 18 of this book.

[35] *Decision on the Avoidance of Market Disruption*, *supra* note 33.

[36] *See generally,* William R. Cline, *The Evolution of Protection in Textiles and Apparel*, in INTERNATIONAL ECONOMICS AND INTERNATIONAL ECONOMIC POLICY: A READER(1990). In June 1960 a working party on "Avoidance of Market Disruption" was established. In November 1960, a decision was adopted (*see supra* note 33) that provided for a work program. This work program did not lead to the elaboration of any generally applicable solutions, but indirectly to the negotiation of a special safeguard clause relating to a single industrial sector—cotton textiles. *See* GUIDE TO GATT LAW AND PRACTICE, *supra* note 28, at 535.

Sweden, Chinese Taipei, Turkey, United Kingdom, United States, and Yugoslavia. Non-member countries were under constant threat from the United States which had made clear that no country outside the new framework would benefit "... and have unlimited access to the United States market while cooperating nations were held down".[37]

The LTA was based on the above-mentioned definition of "market disruption", and its stated objective was the "reasonable and orderly" expansion of trade. The LTA was designed to permit the continuation of existing discriminatory restrictions on developing countries, and, upon insistence of the EC Member States, the introduction of new ones where none existed.[38]

It was clear from the beginning that exporting developing countries were left with little choice—if any. The importing developed countries, led by the United States, set the tone. The use of the above-mentioned definition of "market disruption" by importing countries was the centerpiece of this parallel trading system, and remained the basis for the imposition of quotas and other restrictions. Article 3 of the LTA entitled an importing country, when it "believed" it was facing a situation of market disruption to limit its imports from the exporting country in question, if agreement failed to be reached within sixty days of bilateral consultations between them.

The United States refused to grant any power of arbitration to the Cotton Textiles Committee that would "impair or diminish the right of any country to unilaterally (to) interpret and apply the agreement".[39] Thus determination of the existence of "market disruption" continued to be left solely to the discretion of the importing country.

The irony of the situation is that while Article I of the LTA stipulated that "special practical measures of international cooperation" would not affect participants' rights and obligations under the GATT, the Agreement called upon developing countries to restrain their exports, thus implicitly forcing them to curtail their GATT rights. As Sanjoy Bagchi, a long term veteran in the area of textiles and clothing, put it in his book, "with the LTA entering into force on 1 October 1962 ... [t]hus began an institutionalized form of protection that continued to provide legal cover for the GATT inconsistent restrictions up to the end of the century".[40]

After twelve years of application, the LTA was deemed inadequate by developed countries. Exporting developing countries, finding their exports of cotton and cotton textile products "restrained", had shifted production to other materials, in particular artificial fiber. The accelerated growth of non-cotton fiber exports that flooded into developed country markets produced a reaction similar to that in the 1950s with respect to cotton fiber exports.

Prior to the launch of the Tokyo Round negotiations (1973–1979), domestic political lobbies in the United States and Europe began to push for broadening the coverage of the LTA. The increased competitiveness of Japan and developing countries in synthetic fiber products outside the scope of the LTA led to the negotiation of the Multi-fiber Arrangement.

Controversies concerning the STA and the LTA created wide rifts between supporters and critics. Even today, as the so-called Doha "Development Round" commences, the protracted debates in other areas are affected by the questions and difficulties inherent in

[37] Bagchi, *supra* note 26, at 46 (*citing* Statement by George Ball, U.S. Undersecretary of State).
[38] GATT Document L/1659, December 5, 1961, para. 41.
[39] GATT Document Spec (62) 58, February 1, 1962 at 7 (*citing* Statement by W. Willard Wirtz, U.S. Undersecretary of Labor to Cotton Textiles Committee).
[40] Bagchi, *supra* note 26, at 48.

the arrangements on textiles and clothing. Have the textiles and clothing arrangements aided trade liberalization and assisted developing countries to grow? Have they assisted the textiles and clothing industries in general, and those in developing countries, in particular? Or have they better served the interests of special interest groups in the industrialized nations? Would it have been better to avoid these arrangements due to their systemic implications for the GATT-based trading system? Would it have been better for the developing countries had the most ardent proponents of the GATT-based trading system treated textiles and clothing in a fairer manner? Many of these questions do not have easy answers.

B. The Multi-Fiber Arrangement

In the Tokyo Round the United States, as the strongest trading power, manipulated the system in order to make it responsive to domestic special interest groups. The Nixon Administration had made electoral promises to the textiles and clothing lobbies, most of whom wanted to widen the coverage provided in the LTA. A new wave of protectionism had surfaced with the Nixon administration and its pre-election pledges to extend LTA-type trade restrictions to man-made fibers and wool production. The then Commerce Secretary, Maurice Stans, strived to fulfill the promise that the "Nixon Administration [would] do for synthetics and wool producers what Kennedy had done for cotton manufacturers"[41]. In 1971 the Nixon Administration forced so-called "voluntary" aggregate ceilings, and the imposition of product-specific quotas, on the export of man-made fiber and wool products from Japan, Hong Kong, Korea, and Chinese Taipei.

It was the cumbersome nature of bilateral negotiations, and the desire for equity in case other countries swiftly acted to fill the space in the U.S. market left by the restraints on Japan, Hong Kong, Korea and Chinese Taipei, that prompted the negotiation of a new multilateral framework. The result was a negotiation that led to "The Arrangement Regarding International Trade in Textiles", also known as the Multi-fiber Arrangement ("MFA"). The MFA was initially a four-year agreement. It was signed on December 20, 1973 and came into force on January 1, 1974. The MFA had 44 signatories,[42] among them approximately 31 exporting developing country members. It included China, even though China was not a GATT Contracting Party. The MFA stands in sharp contrast to the 1961 STA which only had India and Pakistan as developing country members. This is testament to the fact that developing countries felt a strong need to be a part of the MFA in order to promote their positions in the marketplace. This was not without cost. The MFA permitted importing countries to apply import restrictions on products in which there was no domestic production.[43] Also, excessive protection in developed countries, and the additional restrictions on products that were not yet produced domestically, discouraged innovation by developing country producers who were sure that any new

[41] *Id.* at 74 (*quoting* DAVID YOFFIE, POWER AND PROTECTIONISM 133 (1983)).

[42] These included: Argentina, Austria, Bangladesh, Brazil, Canada, China, Colombia, Costa Rica, Czech Republic, Dominican Republic, the European Community, Egypt, El Salvador, Fiji, Finland, Guatemala, Honduras, Hong Kong, Hungary, India, Indonesia, Jamaica, Japan, Lesotho, Macao, Malaysia, Mexico, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Republic of Korea, Romania, Singapore, Slovak Republic, Sri Lanka, Switzerland, Thailand, Turkey, the United States and Uruguay. GATT Document COM.TEX/75/Rev. 1, November 26, 1993.

[43] *Agreement on Textiles and Clothing,* in THE OUTCOME OF THE URUGUAY ROUND, *supra* note 10, at 107–111.

products they developed would also be refused entry by the developed countries or be subject to new restrictions.

The most significant change in the MFA was tightening the use of the concept of "market disruption" by establishing the requirement of a causal link between the disrupting imports and the existence of serious damage to the domestic industry.[44] The earlier definition referred to the simultaneous existence of an increase in low-priced imports and of serious damage to the domestic industry, without linking the two.[45] Another important change, which was due to the active participation of exporting developing countries in the negotiations, was a reference to consideration of the interests of the exporting country when taking into account the question of "market disruption".[46] This issue had previously been ignored, but its addition did not remove the biases inherent in the concept of "market disruption".

The MFA provided that when textile imports from a particular country caused "market disruption" and the exporting and importing countries could not reach an understanding with respect to export restraints, the importing country was entitled to take unilateral action for up to one year in order to prevent import surges.[47] In addition the MFA stipulated that:[48]

1) If an importing country wished to impose new quotas, the new quotas sought should be large enough to accommodate the actual trade level reached during the twelve-month period ending two or three months prior to holding consultations.[49]
2) When a restraint was renewed, the new quota should not be lower than the previous one. In the case of continuing quotas, the annual growth rate should not be less than six percent.[50]
3) The growth rate of a particular quota could exceed seven percent provided there was a corresponding reduction in another quota, referred to as the "swing provision".[51]
4) Up to ten percent of the unused portion of the previous year's quota could be "carried over" to the following year, e.g., up to five percent of the following year's quota could be combined with any carry-over in order to maintain a ten percent carry-over of the quota.[52] Annex B, para. 5 provides that:

> Where restraints are established for more years than one, the extent to which the total of the restraint level for one product or product group may, after consultation between the parties concerned, be exceeded in either year of any two subsequent years by carry forward and /or carry over is 10 percent of which carry forward shall not represent more than 5 percent.

This flexibility was introduced to partially offset the rigidities of the quota system and to increase the extent to which exporters could respond to changing market conditions. The swing provision together with the "carry overs" and "carry forwards" were additional flexibilities brought from bilateral agreements and added to the multilateral quota system.

[44] *See Arrangement Regarding International Trade in Textiles* ("MFA"), Annex A, para. I.
[45] Bagchi, *supra* note 26, at 81.
[46] MFA, Annex A, III.
[47] MFA, Article III.
[48] MFA, Annex B. Pursuant to Article 17, the Annexes are an integral part of this Arrangement.
[49] MFA, Article III (3); Annex B, paragraph 1(a).
[50] MFA, Annex B, para. 2. After almost twelve years of LTA implementation, the rate of increase in the renewed quotas was one percent higher than the LTA rate of five percent.)
[51] MFA, Annex B, para. 5.
[52] MFA, Annex B, para. 5.

They were not a part of the LTA. Exporting developing countries wanted to avoid or decrease the proliferation of bilateral agreements to the largest extent possible. They were unsuccessful. Bagchi notes that throughout the life of the MFA bilateral agreements were the chosen mode of restriction. All restraining countries made lavish use of such agreements.[53]

The MFA was administered by the Textiles Surveillance Body ("TSB"). The Board of the TSB was selected by MFA members and its function was to ensure the smooth functioning and implementation of the general obligations, rules, and regulations of the MFA. The MFA was supposed to provide a means to assure minimum guarantees for "orderly" market penetration, to track the products being traded, and to report on the volumes of trade to which annual growth rate restrictions would be applied. The TSB was to be notified if the terms of unilateral and bilateral measures were changed. Its working guidelines were grafted into the Agreement on Textiles and Clothing during the Uruguay Round negotiations.

The MFA was renewed three times prior to the Uruguay Round. During the Uruguay Round negotiations, it was extended four more times on a yearly basis.[54] One problem with these renewals was that they were not automatic, but were based on consultations, thereby opening the sector to debate with each renewal. New restrictions were introduced during each consultation. Product and country coverage were increased. Importing countries continued to resort to additional restrictive measures on top of quota restrictions under existing arrangements.[55]

MFA II, which entered into force in January 1978, resulted in a significant tightening of the developed countries' restrictions on imports from developing countries. The developed countries successfully pushed for a modification of the rules to make it much easier for them to avoid the requirement that quotas be increased six percent per year. The key to this change was a provision for "jointly agreed reasonable departures" from the MFA's rules, which themselves are a jointly agreed departure from the rules of the General Agreement. The Protocol of MFA III, which entered into force in January 1982 for a period of four years and seven months, involved a further tightening in the application of restrictions. Its main addition became known as the "anti-surge" provision[56] governing the use of unutilized quotas carried over from the previous year.[57] Also the unilateral one-year application of quantitative restrictions in situations of market disruption was extended to a second year to be applied unilaterally if the restricting country faced special difficulties.[58] The MFA itself was a departure from the GATT, and the renewed MFA was labeled a "departure from the departure".[59]

[53] Bagchi, *supra* note 26, at 87.

[54] The extensions took place in 1974, 1978, 1982, 1991, 1992, 1993, and 1994.

[55] According to the 1998 UNCTAD TRADE AND DEVELOPMENT REPORT (UN Publication, Sales No.1998, II, D.8) about one-half of the imports of textiles and clothing in developed countries are subject to non-tariff measures, both within and outside the MFA. In the textiles and clothing sector the ratio of imports into major developed countries from developing countries affected by non-tariff measures exceeds seventy percent.

[56] The anti-surge mechanism came into effect as a result of an internal EC debate between the protagonists of liberalization, led by Germany, which insisted that the quota levels for 1983 be related to the 1982 quota levels, and a protectionist group that wanted to use 1980 as the base year. As a compromise, the EC put forward an "anti-surge mechanism" that allowed for suspending flexibility in whole or in part to prevent a sharp and substantial increase of imports of highly sensitive products covered by underutilized quotas. *See* BAGCHI, *supra* note 25, at 131 (*referring* to the EC's elaboration of the anti-surge mechanism found in para. 53, COM.TEX/26, March 4, 1982).

[57] Jackson, Davey and Sykes, s*upra* note 22, at 1186.

[58] 1986 Protocol of Extension, ¶ 8.

[59] Quoting from Bagchi *supra* note 26, at 118 (*citing*UNCTAD document TD/B/C2/192, International Trade in Textiles and Developing Countries, March 23, 1978, at 24).

Discriminatory treatment was directed solely at developing countries, with the exception of Japan. Only on rare occasions did developed countries take action against one another outside the MFA. Moreover, quotas and growth rate restrictions were usually determined by reference to historical import levels. This method of calculation put new textile producers at a further disadvantage, and tightened the reins on existing producers in developing countries with a history of export growth.

The MFA, unlike its sister agreements the STA and the LTA, was more closely linked with the GATT system. A peculiar and non-conventional relationship developed between the MFA and the GATT. Although the GATT Council had the role of overseeing the operation of the MFA since the Textiles Committee, an MFA body, was part of the GATT's hierarchy; the Council, did not have the power to question any of the derogations inherent in the MFA, which became GATT *acquis*. Moreover, the MFA was serviced by the GATT's Secretariat, whose Director General was at the same time the Chairman-elect of the Textiles Committee.

Developing countries continued to believe that these special measures would be limited since developed countries had asked for a dispensation from the normal GATT regime on a temporary basis to allow time for domestic industries to adjust to their declining competitiveness. They expected that foreign investment would move in their direction during the adjustment period. However, like the earlier arrangements, the MFA was repeatedly extended, thus entrenching existing investment patterns. The negotiation process institutionalized discriminatory behavior and further circumvented GATT rules and disciplines.

C. A Comparison of the GATT and the MFA

In order to provide insight into the MFA and other arrangements which served as a basis for the Agreement on Textiles and Clothing, this section compares the mechanisms and legal frameworks embodied in the GATT and the MFA. Supporters of the MFA emphasized its focus on transparency and its enforcement mechanisms. They also emphasized its multilateral framework of agreed rules and disciplines that were aimed at the orderly liberalization of trade in textiles and clothing. However, those overseeing the evolution of the MFA found it difficult to implement "orderly" market penetration, preferring instead to rely on the term "orderly" as a pretext for "restricting" access to developed country markets.

MFA critics argued that the MFA contradicted certain core aims of the GATT system, i.e., promoting consistent treatment between various goods sectors and promoting trade liberalization. These critics recognized that the MFA was antithetical to the GATT's core principles since it permitted import restrictions based on "market disruption" (a much lower standard than the "serious injury" required under Article XIX of the GATT). The MFA inhibited market penetration resulting from comparative advantage, and it developed as a stand-alone agreement. Some checks and balances were attempted in MFA Articles 1 and 4.[60] However, in the end restrictive measures far outweighed liberalization measures.[61]

[60] Article 1 stipulated that the basic objectives of the MFA were to achieve the expansion of trade, the reduction of barriers and the progressive liberalization of world trade in textiles. Article 4 allowed for bilateral agreements consistent with the basic objectives and principles of this Arrangement—reinforcing the expansion and orderly development of trade in textiles.

[61] By removing the textiles and clothing sector from the GATT, the developed countries believed, or at least argued, that they were serving the GATT system well. They saw this as a purification of the GATT

With respect to transparency, it is generally accepted that bound tariffs, which are quantifiable, controllable, and allow no backtracking, are a key element of a transparent trade system. However, there was little transparency in the MFA framework, given that the MFA tolerated exceptions based on bilateral agreements that permitted discriminatory treatment through the use of quotas and gray area measures. It is difficult to envisage complete transparency and the non-discriminatory application of customs duties within a "multilateral" system dominated by bilateral exceptions.

As already noted, discrimination in textiles and clothing came about, in part, as a result of the dissatisfaction of the importing countries with the safeguard mechanism provided by GATT Article XIX. Like safeguards, the apparent reason for the development and extension of the textiles and clothing arrangements was to allow industries to adjust to import competition. Unlike safeguards, however, "flexibility" rather than "exceptional regulations" were at the heart of the textile arrangements. The MFA remained in existence for nearly twenty-five years, which is considerably more than is necessary for adjustment purposes.[62] The net result was perennial protection rather than temporary safeguards.

D. The Objectives and Impact of the MFA

Like its predecessor arrangements, the MFA has been justified on a number of grounds. Its proponents claimed that sustainable liberalization of trade in textiles and clothing depended on the orderly growth of trade and minimal market disruption, because of the fact that developed and developing countries both had significant producer interests. This meant that success in controlling trade liberalization was a *sine qua non* for trade expansion, and minimizing market disruption a necessary condition for industrialized countries to accept the agreement. By failing to mount strong and effective opposition to it, the exporting developing countries acquiesced in the repeated extension of the MFA.

The MFA was praised for its use of consultations and its transparency provisions. But the MFA contained many caveats and reservations, and allowed for many exceptions. This meant that although bilateral consultations took place, the industrialized importing countries maintained effective control over the rules, since if consultations were ineffective the importing country could impose unilateral restraints. In this way developed countries evaded having to demonstrate the existence of market disruption. By the time the MFA expired, three of the Quad countries, Canada, the EC and the United States, had resorted to this subterfuge extensively. Their argument in the TSB was that two sovereign governments had entered into an agreement whose contents cannot be challenged by others. That the two governments were not equal and one of them had exercised its economic power to extract an irregular benefit was overlooked.[63] Moreover, because Europe and the United States did not apply the MFA to one another, it became a *de facto* arrangement for discriminating against developing countries.

system since removal of the textiles and clothing sector removed the inherent inconsistency of the MFA with basic GATT principles. They believed, or at least argued, that this treatment avoided a double standard within the GATT, when in reality removal of the textiles and clothing sector, and subjection of this sector to discriminatory treatment, created a double standard.

[62] Under Article 7 of the *Agreement on Safeguards*, safeguard action can remain in place for no more than eight years (ten years in the case of developing countries). *See* Chapter 18 of this book.

[63] Bagchi, *supra* note 26, at 167.

Although trade in textiles has increased,[64] the MFA has had a significant adverse impact on developing country exports. Without the MFA, developing country exports of textiles and clothing to developed countries would have been significantly greater. Several studies have found that the MFA reduced export opportunities for developing countries. For example, a 1989 study by the U.S. International Trade Commission showed that the value of textile and clothing exports to the U.S. market would have been 20.5 and 36.5 percent higher respectively if MFA restrictions had not been imposed.[65] Another study estimated that without MFA restrictions the United States would have increased its textile imports by ten percent and clothing imports by 26 percent.[66] The World Development Report published by the World Bank in 1987 estimated that protectionism in the textiles and clothing sector raised consumer prices by billions of dollars and cost developing countries billions of dollars in lost income.[67]

There was too little opposition to the MFA to prevent its repeated renewal. Some exporters felt that the relatively "bad rules" that guaranteed minimum market access were better than "no rules" in a global multilateral framework. Some exporter proponents also felt they would have more influence if negotiations took place in a multilateral setting and that this would lead to developed country acceptance of a gradual, although belated, liberalization process. Despite increased costs to consumers, developed importing countries, notably the European Community, favored a restrictive system, in part because they feared that without such a system the United States would unilaterally close its textiles market to imports. The result would have been devastating to EC producers. They would probably have faced a serious increase in low cost textile and clothing imports from developing countries as a result of diversion from the U.S. market.

Assessments of the effect of the MFA on textiles and clothing industries differed from one developing country, or group of countries, to another. The more competitive developing countries felt that the MFA was implemented solely to protect against imports from developing countries. Other exporting developing countries which supported the successive extensions believed that the MFA provided them with a guaranteed "niche" in developed country markets that would otherwise have been difficult to acquire. When the MFA terminated on December 31, 1994, upon entry into force of the WTO Agreement, the United States, Canada, the European Community, Norway, Finland, and Australia had a total of ninety bilateral restraint agreements with exporting countries. In addition, there were more than thirty non-MFA agreements or unilateral measures that imposed restrictions on textile imports.

There have been many empirical studies demonstrating the MFA's adverse effects on both the exporting restrained countries and importing restraining countries. As for the former, the MFA has negatively affected their exports, even if some major exporting

[64] Researchers in the IMF had estimated in 1984 that the trade of the developing countries into the main OECD markets would rise by 82 percent in textiles and 93 percent for clothing in the absence of restrictions. This estimate had been based on the assumption of infinitely elastic supply. A couple of years later, UNCTAD had estimated an increase of 78 percent in textiles and 135 percent in clothing in the exports of developing countries if complete liberalization on a non-discriminatory basis took place. N. Kirmani, *Effects of Increased Market Access on Exports of Developing Countries*, IMF Staff Papers, December 1984, at 661–684; Bagchi, *supra* note 26, at 210 (*citing* UNCTAD, "Protectionism and Structural Adjustment", TD/B/1081 (1986)).

[65] *See* generally USITC, *The Economic Effects of Significant U.S. Import Restraints*, ITC Publication 2222 (October 1989).

[66] Y. Yang, The Impact of MFA Phasing Out on World Clothing and Textile Markets, (1993).

[67] *See generally*, World Bank, World Development Report 1987.

countries were able to extract large quota rents on their sales, e.g., Hong-Kong (China). With respect to the importing restraining countries, almost all of the studies have stressed the considerable welfare losses incurred by these countries as a result of the MFA. Most such studies were conducted in the importing countries themselves[68] and by their highly renowned institutions. This leaves little doubt that the MFA is an agreement of a purely political nature, without regard to economic parameters or welfare gain. Powerful lobbies in the restricting, as well as in some of the restrained countries, pulled the strings and found common interests, which they—strangely enough—mutually defended. The MFA thus became a *modus vivendi* between different groupings, including producers and labor unions in the developed countries, and large as well as small exporters. They found their interests intertwined and stuck together to preserve the quota system.

III. The Agreement on Textiles and Clothing: Unbiased Policies or Undermining Principles

The first serious attempt by developing countries to bring the textiles and clothing sector under the umbrella of GATT disciplines was made in the early 1980s in the aftermath of the Tokyo Round. The frustration of the exporting developing countries had its origin in the belief that the MFA had (1) failed to rectify the imbalances inherent in textiles and clothing trade, and (2) had not allowed for a sufficient "orderly" expansion of such trade. Exporting countries also became increasingly aware that certain "improvements" that were negotiated during MFA renewals were detrimental to their interests. Despite strong resistance, exporting developing countries eventually had to accept two concepts, "reasonable departures" and the "anti-surge clause" that were introduced by the European Commission in the 1977 and 1981 Protocols of Extension of the MFA.[69] These two concepts were portrayed as a way of easing restrictions, but in reality they gave impetus to the continuation and even increase of restrictions. Irritated by the prevailing injustices in the system and the lack of progress, exporting developing countries made the integration of the textiles and clothing sector into the GATT regime their most important priority.

A. Punta del Este Preparations

At a meeting held in November 1980 in Bogota, a group of exporting developing countries clarified their position in a communiqué:

[68] Bagchi, *supra* note 26, at 199 notes that "These estimates were certainly not accurate to the last decimal or even in rounded figures. They merely showed the range and extent of the costs. There should never be any doubt, however, that the welfare costs of the MFA quotas, in their magnitude, far outweighed the possibilities of any gains for the restraining countries".

[69] As the EC industry wanted to adopt an even more restrictive position for the second and third extensions of the MFA, it bluntly conditioned its acceptance of any extension on satisfactory bilateral agreements with major suppliers. Thus, upon the EC's insistence, the protocol of MFA extension contained a provision indicating that consultations and negotiations should be conducted in a spirit of equity and flexibility with a view to reaching a mutually acceptable solution, including the possibility of jointly-agreed "reasonable departures" from particular elements in particular cases. This was a major dilution of the MFA. The changes introduced in MFA II and subsequently MFA III were considered to be "jointly agreed reasonable departures" from the MFA's rules, which themselves are a jointly agreed departure from the rules of the GATT. *See supra* note 56 on the roots of the anti-surge mechanism. The anti-surge provision was introduced in MFA III to govern the use of unutilized quotas carried over from the previous year, and was agreed that consideration should be given to the removal, upon request, of under-utilized quotas.

> For more than two decades, developing countries have faced an increasingly discriminatory and restrictive regime that has derogated the normal rules and practices of the GATT. This regime has been renewed repeatedly and expanded in scope despite the original and specific understanding that it would be temporary. The perpetuation of this discriminatory and restrictive regime is unacceptable to exporting developing countries. World trade in textiles and clothing must be liberalized in real terms by means of a gradual return to free trade in conformity with normal GATT rules and practices."[70]

Following the issuance of the communiqué, the exporting countries succeeded in generating sufficient momentum to place the textiles and clothing sector on the negotiating table during the 1982 GATT Ministerial Meeting that took place in Geneva. The proposal by the developing countries, which was substantially diluted by the developed countries in the course of negotiation, was finally included in the GATT Ministerial Declaration of 1982 and in the work program that resulted.[71] As a result of the strenuous efforts of the exporting countries, the first "Working Party on Textiles and Clothing" (1984–1986) was established.

A difficult debate took place in the Working Party between exporting and importing countries about how to achieve liberalization of the textiles and clothing sector. Although the debate achieved little, its seriousness indicated that this sector would stay on the negotiating agenda. It did however not prevent developed importing countries from extending the MFA for the third time in 1986, while preparations were ongoing for the launching of the Uruguay Round of trade negotiations. In spite of this extension, it seemed beyond doubt that the textiles sector would eventually be brought under GATT rules.

Aware of divergent interests and conflicting views, the textile-exporting developing countries were determined to develop an effective common position. They succeeded in doing so within the framework of the International Textiles and Clothing Bureau ("ITCB"),[72] which was established for that purpose in 1985 in preparation for the next round of multilateral trade negotiations.

A GATT preparatory committee met from January to July of 1986 to prepare for the new round of negotiations. This committee succeeded in forcing the "restraining" countries to come into the open. A group of exporters[73] argued forcefully for a "rollback commitment" on textiles and clothing, and pushed for an ambitious three-year phase-out program, under which all restricting measures incompatible with the GATT system would be withdrawn.[74]

On the other side, the European Community argued against the integration of the sector, stating that until the conditions which had necessitated the creation of the LTA, and subsequently the MFA, were eliminated, an ill-prepared return to GATT rules would cause problems. The EC maintained that as long as the original imbalance of rights and obligations in this sector had not been corrected,[75] abandoning a regime that had enabled

[70] *Bogota Declaration* (November 1980).

[71] THE OUTCOME OF THE URUGUAY ROUND, *supra* note 10, at 111.

[72] The ITCB was established in 1985 as an independent inter-governmental organization with the aim of strengthening the process of cooperation and coordination among developing countries in the field of textiles and clothing. The Bureau acts, *inter alia*, as a forum where members exchange views in order to develop a common position in the textile negotiations. Its present members are Argentina, Bangladesh, Brazil, China, Colombia, Costa Rica, Egypt, El Salvador, Hong Kong, India, Indonesia, Jamaica, Macao, Maldives, Mexico, Pakistan, Peru, Republic of Korea, Sri Lanka, Turkey, Uruguay and former Yugoslavia.

[73] The group consisted of Argentina, Brazil, Egypt, India, Nigeria, Pakistan, Peru, and Tanzania.

[74] The GATT Preparatory Committee on Textiles and Clothing, PREP. COM (86) GATT Document W/3/Rev.1 (1986).

[75] Both the Cotton and the Multi-fiber Arrangements were based on the concept of market disruption, and not, as suggested by the EC representative in 1986, on an "imbalance of rights and obligations in this sector".

members to manage the expansion of trade, first in cotton textiles and then in all fibers, would merely lead to a recurrence of market disorder. The EC also argued that the MFA had enabled a number of exporting countries to avoid tough competition and to begin production of textile products, something they could not have accomplished without market access guarantees.[76]

After a protracted and often intense debate between the restricting and restricted countries, a joint proposal was put forward by Colombia and Switzerland to the Preparatory Committee that found its way unaltered into the Punta del Este Declaration that launched the Uruguay Round. It provided that:

> Negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines ("SGRAD"), thereby also contributing to the objective of further liberalization of trade.[77]

This same text, which unaltered became the first paragraph of the ATC's preamble, was subject to much controversy and attracted harsh criticism during the Uruguay Round negotiations. While India and Pakistan emphasized that liberalization of textiles and clothing should be pursued independently and not be contingent on other agreements, it was obvious that consensus on this very sensitive subject would only be possible if it formed part of an overall trade agreement. This was evidenced by the firm conviction of both the European Commission and the United States that a close link had to be made between the progressive elimination of quantitative restrictions on textiles and the application of strengthened GATT rules and disciplines generally, to which they gave the highest priority. In addition, it became evident that all participants, developed and developing countries alike, would be required to make contributions in other negotiating areas, particularly those concerning tariffs, non-tariff measures, balance of payments, and infant industry protection.

The result was that for the first time the textiles and clothing sector was included as a subject in the multilateral trade negotiations, in sharp contrast to earlier GATT rounds in which the textiles and clothing sector was either dealt with before the negotiations began, or handled in negotiations that ran parallel to the rounds.

B. The Uruguay Round Negotiations

The Negotiating Group on Textiles and Clothing was established in February 1987, a few months after the launch of the Uruguay Round in September 1986. It was entrusted with the task of examining the techniques and modalities for the liberalization and eventual integration of the textiles sector into the GATT/WTO system. The negotiations were cumbersome and in many instances highly politicized. It was only towards the end of 1990, after the failed mid-term review in Montreal, that the negotiations started to take shape. Four issues remained highly controversial:

1) Product coverage under the agreement,
2) The percentage for the integration of products in each stage ("staged integration"),
3) Increases in the MFA quota growth rates for products not yet integrated, and
4) The duration of the agreement.[78]

[76] The GATT Preparatory Committee on Textiles and Clothing, PREP. COM (86) SR/3, at 29 (1986).
[77] GATT Document MIN.DEC, September 20, 1986.
[78] GATT Document MTN.TNC/W/89/Add.1, November 7, 1991.

C. The Agreement on Textiles and Clothing

The ATC was drafted by experts who had the MFA negotiations very much in mind. These experts formed what can be viewed as an exclusive club in which everyone was cognizant of the maximum political limits of their negotiating partners. This was clearly reflected in the ATC, which came out as a highly sensitive "deal" between exporting and importing country negotiators.

The ATC calls for the integration of the textiles and clothing sector over a ten-year period that is explicitly non-renewable.[79] Some see the Agreement as a delicate compromise between the competing interests of importing developed and exporting developing countries, and as representing an essential step towards achieving trade liberalization in a sector that has served as the engine of growth for many developing countries. Others view the ATC, with all its inherent weaknesses, as asymmetrical since the overall balance of the Agreement tilts very much in favor of the developed restricting countries. This is so to the extent that the ATC allows developed countries extra time for protection and only provides "the appearance" of special and differential treatment for cotton producers, small suppliers and LDCs.

The ATC is a relatively short agreement, containing nine articles, and an Annex[80] entitled "List of Products Covered by this Agreement". The Annex lists approximately 800 HS tariff lines, including all textiles and clothing products, whether subject to existing MFA restrictions or not. The tacit purpose of the developed countries in including such an extensive list was to "inflate" the product coverage with a view to slowing down the integration process.

The Agreement operates on the basis of three essential principles. These principles are: (1) the flexibility provisions adopted from the MFA, (2) the "integration" process, and (3) the "liberalization" process. The "flexibility" provisions permit an exporting country to maintain existing rights under the MFA with respect to products under MFA quota and not yet integrated. Accordingly, an exporting country is entitled to trade off part of a quota on one product against the quota on another product, or to use part of one year's quota for a particular product in either the preceding or subsequent year.[81] The "integration" process manages the gradual removal of existing quotas and the inclusion of products into the GATT system. This process is compounded by what is known as the "liberalization" process or "growth-on-growth." "Growth-on-growth" is intended to increase the rate of integration of non-integrated quotas thereby producing additional growth in textiles and clothing trade.

Textiles and clothing is a highly politicized sector, in which manufacturers and lobbies, particularly in developed countries, have high economic stakes. As a result, WTO Members realized that bringing this sector under GATT discipline would require time. This was evident in numerous proposals from developed countries tabled during the Uruguay Round that supported integration of this sector over a long transition period. Many small developing country exporters, fearing fierce competition from larger developing countries, were also more comfortable extending the quota system. They found that they

[79] ATC Article 9.

[80] The Annex, which constitutes the basis for the integration of products into GATT during the transition period, includes all items defined by HS codes at the six-digit level in Chapters 50–63 of the Harmonized System, plus various textile and clothing products listed in Chapters 30–49, and 64–96.

[81] This provision is found in ATC Article 2.16. Article 2.16 provides: "Flexibility provisions, i.e. swing, carryover and carry forward, applicable to all restrictions maintained pursuant to this Article, shall be the same as those provided for in MFA bilateral agreements for the 12-month period prior to the entry into force of the WTO Agreement. No quantitative limits shall be placed or maintained on the combined use of swing, carryover and carry forward."

had certain common interests with importing developed countries. It was therefore agreed that the integration must be gradual, and must be implemented pursuant to a timetable that would avoid too much disruption in the early years of liberalization, as well as too much back-loading during the final stage of the phase-out.

The division and classification of exporting developing countries into a number of groupings, each with its specific characteristics and interests, adds to the uniqueness of the ATC. These divisions are characteristic of the textiles and clothing sector, and are rooted in the bilateral quota restrictions negotiated in the 1960s to avoid market disruptions resulting from import surges. The ATC differentiates between small suppliers, new entrants, cotton suppliers, wool producers, as well as the least-developed countries, and calls for special and differential treatment for each group with respect to the application of transitional safeguards.[82] Such a categorization implies the continuation of covert deals, even if within a multilateral setting. Nevertheless, the ATC would not have been agreed to without the acceptance of preferential treatment for these groups.

In the first major review of the ATC, which occurred in 1998, these sub-groups were highly critical of the lack of benefits accruing to them from the preferential treatment accorded by the ATC. They were successful in persuading the Council for Trade in Goods to reiterate the importance of the full implementation of the ATC's Preamble, Article 1, and Article 6(6)(a) and (c).[83]

1. The Liberalization and Integration Process

One point that distinguishes the ATC from the MFA is that the ATC was negotiated and is being implemented within the framework of the rules and disciplines of GATT 1994. The ATC also embodies a gradual, progressive, time-limited phase-out of all MFA restrictions and the integration of all textile and clothing trade into the general disciplines of GATT 1994. While the ATC focuses largely on the phase-out of MFA restrictions, it also deals with non-MFA restrictions on textiles and clothing products, including "all unilateral quantitative restrictions, bilateral arrangements, and other measures having a similar effect."[84] All GATT-inconsistent, non-MFA restrictions were to be notified and brought into conformity with GATT 1994 within one year of its entry into force, or otherwise phased out progressively before January 1, 2005 when the ATC terminates.[85] Any new restrictions must be in accordance with GATT 1994,[86] i.e., safeguards may only be imposed in accordance with Article XIX of GATT 1994 and the Agreement on Safeguards.[87] Any restrictions that were not notified were required to be terminated forthwith.[88]

[82] The ATC differentiates between the developing countries based on their interests and needs, as well as the special treatment they are granted. Distinctions are made between small suppliers, new entrants, cotton-producing exporting countries and wool-producing developing country members. Special and Differential Treatment is referred to in ATC Article 1.2 (small suppliers and new entrants), Article 1.4 (cotton producing exporting Members), Article 2.18 (small suppliers) and Article 6.6(a)–(d) (transitional safeguards vis-à-vis a variety of disadvantaged Members).

[83] *Major Review of the Implementation of the Agreement on Textiles and Clothing in the First Stage of the Integration Process,* Council for Trade in Goods, GATT Document G/L/224, February 19 1998, at 55 ("*ITCB First Major Review*").

[84] ATC Article 3 note 4.

[85] ATC Article 3.1–3.2.

[86] ATC Article 2.4.

[87] Pursuant to Article 6.4 of the ATC, the transitional safeguard mechanism is only applicable to products not yet integrated into the GATT.

[88] ATC Article 2.4.

This dual process of liberalization and integration, the heart of the ATC, is set forth in the 21 paragraphs that make up ATC Article 2. Article 2 incorporates the elements designed to bring this sector, progressively and in stages, under the rules and disciplines of the trading system. Article 2 provides clear procedural and substantive guidance as to how the textiles and clothing products listed in the Annex to the Agreement are to be integrated.

The integration program is the main pillar of the ATC, and has four stages.[89] Members are required to integrate products from four product groups—tops and yarns, fabrics, made-up textile products, and clothing—in each stage. Unlike the MFA, however, no prior consultations are envisaged before each stage of integration. It is left entirely to each importing country to decide upon the most suitable way to integrate each of the four groups of products, both in terms of the percentage of integration and the combination of products.

Article 2.6 required each WTO member to integrate sixteen percent by volume of its 1990 imports of the products listed in the Annex on the date the WTO Agreement entered into force (January 1, 1995). Article 2.8 covers the three additional stages of integration. It required integration of an additional seventeen percent at the end of the third year (January 1, 1998), an additional eighteen percent at the end of the seventh year (January 1, 2002), and integration of the remainder at the end of the tenth year (January 1, 2005), at which point Article 9 specifies that the textiles and clothing sector will be fully integrated into GATT 1994, and the ATC "shall stand" terminated. Article 9 explicitly provides that: "There shall be no extension of this Agreement."

The negotiators were aware of the possibility that importing developed countries would back-load ATC commitments, i.e., would integrate products not subject to MFA restrictions first, leaving integration of the restricted products until as late as possible.[90] As a result, an additional instrument for increased market access was provided in the ATC. Articles 2.13 and 2.14, providing for "integration" and "liberalization", grant increased access for restricted products throughout the transition period. Under this "growth-on-growth" principle, additional growth rates beyond those agreed in the MFA are required for restricted products. Such products are to have their quota increased by an additional 16 percent in the first stage, 25 percent in the second stage, and 27 percent in the third stage. Small suppliers are to be accorded "advancement by one stage" in the growth rates.

The interpretation of this last provision has been the subject of considerable debate. "Advancement by one stage" was generally interpreted by major importing countries to mean the substitution of the second stage growth rate for the first stage growth rate. In other words beneficiaries would see an increase in their quotas of 25 percent in the first stage compared with 16 percent for other countries, followed by a 27 percent increase in the subsequent two stages. Such a view was criticized by the beneficiaries, which understood "advancement by one stage" to mean adding the growth rates of the first and second stages to allow for a cumulative effect. This view was strengthened by the methodology used by the European Community. The European Community viewed

[89] ATC Articles 2.6–2.8.

[90] Despite the fact that back-loading was foreseen, many developing countries have cried foul with regard to the implementation of the ATC. Those who have objected the most are large exporters such as India, Pakistan, and Hong-Kong/China. They were hoping for a more meaningful implementation consistent with the spirit of liberalization and integration present in the ATC. In addition, they had hoped for more value-added products to be integrated in the first and second stages. This is one of the inherent weaknesses of the ATC—it maintained the balance in favor of the restraining countries for as long as possible.

"growth-on-growth" as the only way to deliver "meaningful improvement" for small suppliers in conjunction with the full and faithful implementation of Article 2.18.[91]

2. The Transitional Safeguard Mechanism

An examination of the transitional safeguard mechanism will help to better understand the various checks and balances built into the ATC. Pursuant to Article 6 of the ATC, which was agreed to after lengthy and tedious negotiations, and in response to strong protectionist pressure from producers, transitional safeguards can be invoked if an importing country can demonstrate that increased quantities of imports of a product that has not yet been integrated into the GATT system are causing serious damage to its domestic industry or threaten to cause such damage.[92] This mechanism can be viewed as an "intermediate" measure, stronger than the safeguard measure provided in GATT Article XIX, but weaker than the protection obtained through the application of the "market disruption" principle in the STA.

Aware that gray area measures outside the GATT system could no longer be used, but responsive to the concerns of their textile and clothing industries, developed countries favored this "intermediate" form of protectionism. Exporters however expressed concern with the maintenance of restrictions, and the introduction of restrictions on products that not been under restraint when the phase-out process began. Exporters feared that the transitional safeguard mechanism would delay the reintegration process, or in the worst case, replace one selective safeguard mechanism (MFA) with another.[93]

To convince exporters to accept such a mechanism, strings had to be attached. Not only does the verb "may" dominate the first two paragraphs of ATC Article 6, denoting a lack of enthusiasm for the too frequent application of the transitional safeguard mechanism, exporters were also able to include language stating that the mechanism "should be applied as sparingly as possible".[94]

Clear guidance on the use of transitional safeguards by importing countries is provided in the ATC. An importing country is first required to prove that the serious damage to its industry was caused by a sharp and substantial increase of imports from the individual country or countries concerned.[95] Furthermore, the importing country must examine the effect of the increased imports based on a number of relevant economic variables, such as "output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment".[96] Lastly, the specific transitional safeguard mechanism is only applicable to products not yet integrated into the GATT.[97]

[91] The provision for "advancement by one stage" was implemented in different ways on the two sides of the Atlantic. Canada and the United States applied the factor of 25 percent on the prevailing growth rates in stage one. The EC, on the other hand, first applied the normal factor of 16 percent and then raised it further by 25 percent. A comparison of the two methods showed that, during the first two stages, the additional access granted in North America was less than half of that in west Europe. It was 0.5 percent and 1.2 percent during the two stages respectively in North America compared with 1.7 percent and 3.5 percent in Europe. This minuscule benefit was provided by Canada to sixteen small suppliers and by the United States to 22 small suppliers. Compared with the much larger number of small suppliers restricted in North America, there were only two (Peru and Sri Lanka) restricted by the EC, based on the definition contained in ATC Article 2:18. *See* Bagchi, *supra* note 26, at 240 (*quoting Agreement on Textiles and Clothing: Evaluation of Implementation*, WTO Document WT/GC/W/283, August 3, 1999, at 3, table 1.

[92] ATC Article 6.2

[93] Raffaelli and Jenkins, *supra* note 12, at 34–40.

[94] ATC Article 6.1.

[95] ATC Article 6.4.

[96] ATC Article 6.3.

[97] ATC Article 6.4.

Cortes has stated that the difference between ATC Article 6 and the MFA is not to be found in the model chosen, but rather in the way its application is controlled.[98] Pursuant to Article 6, a showing of real harm, and not mere "market disruption", is required. In addition, the measure solicited will have to be fully justified, an aspect that will remain under the supervision of the Textiles Monitoring Body ("TMB"), which will make the recommendations that it considers appropriate.[99] Moreover, use of transitional measures is subject to WTO dispute resolution, and several such measures have in fact been successfully challenged.[100]

3. The Disputed Balance of Rights and Obligations

Although loose, a link between the integration of textile and clothing trade into the multilateral trading system, and the fulfillment of certain commitments, including commitments made by developing countries, appears to be established in ATC Article 7. This provision provides that all Members are required to:

1) Achieve improved market access for textiles and clothing products by tariff reductions and bindings, or through liberalization or other non-tariff measures;
2) Ensure the application of policies relating to fair and equitable trading conditions regarding textiles and clothing in such areas as anti-dumping, subsidies, and countervailing duties; and
3) Avoid discrimination against textiles and clothing imports when taking measures for general trade policy reasons.[101]

In this regard, Members are obliged to notify to the TMB actions which have a bearing on the implementation of the ATC, including the items set forth in Article 7. Members may also make "reverse notifications", thereby notifying the TMB when a Member is harmed by actions mentioned above and no notification has been made.[102] This procedure is intended to aid developing countries in making sure that the above commitments are implemented. In the event of a dispute arising from an imbalance between the integration process and the requirements of Article 7, Members may bring the dispute before the relevant WTO bodies and so inform the TMB.[103] Any subsequent findings or

[98] Jimenez Cortes, *supra* note 1, at 278. By this it is meant that the model for safeguard measures was more or less the same but stronger criteria governed their application under the ATC. In both the MFA and the ATC the measures are applied on a member-by-member basis in order to assist the adjustment process required by the changes in the pattern of world trade in textile products. (*Compare* ATC Article 6.4 with MFA Article 1.5.) However, as opposed to the MFA, the ATC safeguard measure has a series of requirements and conditions. The most important of these is that the harm or the risk must be genuinely demonstrable, i.e., real effective harm and not mere "disruption" is required. Also the Textiles Monitoring Body has been stricter in monitoring and controlling the application of the ATC and that has forced the United States to refrain from recourse to the transitional safeguard mechanism after its excessive use of this mechanism in the first year of its operation. Conditions and criteria for the application of safeguard measures in the MFA and the ATC are nevertheless weaker than the disciplines present in the safeguards provision of GATT Article XIX, as amplified by the *Agreement on Safeguards.*

[99] ATC Article 6.8; Jimenez Cortes, *supra* note 1, at 278.

[100] *See e.g.*, *United States—Restrictions on Imports of Cotton and Man-Made Fiber Underwear*, Report of the Panel, WT/DS24/R, and Report of the Appellate Body WT/DS24/AB/R, adopted February 25, 1997; and *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Report of the Panel WT/DS33/R, and Report of the Appellate Body WT/DS33/AB/R, adopted May 23, 1997.

[101] ATC Article 7.

[102] ATC Article 7.2.

[103] ATC Article 7.3.

conclusions by the WTO bodies shall form part of a comprehensive report to be made by the TMB.[104]

ATC Article 7 was a difficult article to negotiate and continues to be the subject of much controversy in the framework of the TMB review process, as well as in regard to the implementation of the ATC. The European Community, which basically negotiated Article 7 on its own,[105] intended to set forth the inherent balance in the Agreement. The European Community felt that exporting developing countries should be obligated to remove trade barriers on their textiles and clothing imports as a *quid pro quo* for the integration of this sector into GATT rules and disciplines and the reduction of developed country quotas on sensitive products. Developing countries were, however, not ready to pay again for concessions that they viewed as legitimately owed to them. They first argued that including textiles and clothing in the multilateral trade negotiations was part of the overall framework of the system and should be granted in return for the many concessions they were already making in the Round, e.g., on services and intellectual property rights. Moreover, as a matter of principle, the developing countries did not want to "pay" for the abolition of what was in reality a derogation from GATT principles.

During the negotiations, as a result of the insistence of the importing countries, India safeguarded its interests by linking its tariff reductions on textiles and clothing products to the ATC integration program. India's tariff schedule provides that if the integration process envisaged in ATC Article 2.6–2.8 does not materialize in full or is delayed, its duties will revert to the level prevailing on January 1, 1990. This may be the first time that a developing country has used a "snap back" clause in multilateral trade negotiations, thereby linking its tariff concessions to the commitments of developed countries.[106]

Some major importing countries have linked the integration process and increases in growth rates for MFA quotas to the further opening of developing country markets for textiles and clothing. The United States emphasized that the concessions it provided on all textiles and clothing products were based upon an understanding that the maintenance of the balance of rights and obligations, particularly as set forth in ATC Article 7, means that Members will provide effective market access to textiles and clothing entering their territory from the United States. Such reasoning, which is the thrust of Article 7 in the minds of the major importing countries, has its origins in the "strengthened GATT rules and disciplines" ("SGRAD") of the Punta del Este Declaration, where it was agreed that better import access should be provided by all Members, including developing countries. The European Community and the United States, along with other importing countries, were firm that the exporting developing countries must become fully involved in the integration process by contributing their part to SGRAD. Developing countries rejected this demand for reciprocity. They argued that since they were not responsible for keeping the textiles and clothing sector outside GATT rules for more than thirty years, and since they were not beneficiaries of the MFA, they should not be required to pay twice. However,

[104] ATC Article 7.3.

[105] Jimenez Cortes, *supra* note 1, at 291, note 54. The United States, which at the time was seeking to establish a system of global quotas, did not support this provision.

[106] *See* UNCTAD Secretariat, *The Implementation of the Uruguay Agreement on Textiles and Clothing: Some General Issues* in HARMON THOMAS AND JOHN WHALLEY, URUGUAY ROUND RESULTS AND THE EMERGING TRADE AGENDA: QUANTITATIVE-BASED ANALYSES FROM THE DEVELOPMENT PERSPECTIVE 291 (UNCTAD 1998).

as already noted, it would appear that developing countries did indeed pay too much for the ATC.

4. The Textiles Monitoring Body

From the outset of the Uruguay Round, it was clear to the negotiators of the ATC that a surveillance body, designed along the same lines as the MFA's Textiles Surveillance Body, needed to be established. Differences existed among the negotiators concerning the function of the Textiles Monitoring Body ("TMB"). The United States was of the view that it should operate as a mere notification entity, lending the needed transparency to the implementation of the ATC. The International Textiles and Clothing Bureau, on the other hand, as well as the European Community, favored the establishment of a body that would monitor transparency and the phase-out process, supervise the implementation of the ATC, and act as a dispute settlement body.[107]

The latter view prevailed. Article 8.1 of the ATC provides for the establishment of the TMB, consisting of a Chairman and ten members serving in their personal capacity, to supervise the implementation of the ATC and to examine the conformity of measures taken under the Agreement.

The TMB has succeeded in defusing many disputes, thus avoiding the need to take them to the Council for Trade in Goods. It has also managed to make recommendations by achieving a consensus among its members. Many view decision-making by consensus as weakening the TMB's decision-making ability. However, because the TMB is limited to issuing recommendations, majority decisions risk not being implemented by the country concerned.

As discussed below, the considerable success of the TMB has not prevented Members from invoking the Dispute Settlement Mechanism to hear certain ATC disputes. Nor has it kept Members from occasionally exposing the wide differences between the exporting developing countries and the developed importing countries before the Council for Trade in Goods. Such occurrences usually arise during the ATC review process, prior to the implementation of a new stage of commitments, or during the preparation for Ministerial Conferences.

IV. Implementation of the Agreement

Whereas the developed importing countries maintain their position that they have faithfully implemented the ATC, exporting developing countries now realize that the ATC has intrinsic deficiencies, as discussed below. The implementation of the first three stages of the ATC has led to little meaningful integration of the textiles and clothing sector into GATT rules and disciplines, because of the practice of back-loading, i.e., the delaying by the major importing countries of integration of products subject to MFA quotas for as long as possible. Although they negotiated the ATC in good faith, exporting developing countries did not fully realize that importing countries would postpone integration of more sensitive products as long as possible. Their legitimate expectation of increased access to the markets of exporting developing countries, in accordance with the progressive integration process, has failed to materialize. This has led exporting developing countries to conclude that while the letter of the ATC may have been implemented, the spirit has not.

[107] This idea was proposed prior to the establishment of a strong dispute settlement mechanism in the WTO.

A. Inherent Weaknesses of the Agreement

Because of the inherent weaknesses of the ATC, there has to date been no significant elimination of MFA restraints by the major importing countries. There are two problems. First, under Article 2.6 and 2.8 of the ATC, the bulk (49 percent) of imports do not have to be integrated until the final stage, on January 1, 2005. Second, although the Agreement requires the items integrated at each stage to include some products from each of the four categories of tops and yarns, fabrics, made-up textile products, and clothing, it does not specify any particular percentage of each. These two weaknesses have permitted the importing developed countries to "back-load" integration of the products subject to MFA restriction. In a statement circulated by the ITCB on November 10, 2001,[108] commending Norway for its elimination of all quota restrictions by the third stage of integration on January 1, 2002, the United States, the EU, and Canada were reproached for their inadequate implementation of the ATC. In the case of the United States, 701 out of 757 MFA quotas will remain in effect until January 1, 2005. The corresponding figures for the EU and Canada are 167 out of 219 and 239 out of 295.[109]. Moreover, most of the products integrated to date have been those with little value-added, such as tops, yarns and fabrics. Few higher value-added products, such as made-up textile products and clothing, have been integrated so far.[110] Thus, in the first two stages of integration the United States had integrated only 17.35 percent of imports by value compared with 33.24 percent by volume.

In the third stage of integration, despite the fact that all three trading entities were careful to implement the percentages agreed pursuant to the ATC, only a small degree of liberalization has resulted and it has been concentrated in low-value added products. Using the integration program of the United States as an example, eighty percent of its restrained products will remain restricted until the last day of the Agreement. By December, 2002, the United States had liberalized only 56 quotas out of a total of 757 quotas in existence at the start of the ATC. Whereas in stage one the United States technically integrated 16.21 percent of its textile imports, that did not result in the liberalization of any of its restricted imports. With respect to stage two and stage three, the United States integrated 17.03 percent and 18.11 percent respectively; this resulted in the liberalization of 2.13 percent and 9.61 percent of its restricted imports. That means that out of the required 51.35 percent integration, the effective U.S. liberalization of quotas was only 11.74 percent. Moreover, out of the 51.35 percent of products integrated, only six percent covered clothing. The rest was concentrated in low-value added products, i.e., yarns, fabrics and made-ups.[111]

Neither the EU nor Canada has done better in their implementation of the first three stages. On the contrary, the similarities in the features of their integration programs with those of the United States are striking, having only liberalized small percentages of their restricted products, leaving the bulk to the last day and concentrating on less value-added

[108] ITCB, *Statement Circulated by the ITCB*, Doha Ministerial Conference, WT/MIN(01)/ST/27 November 10, 2001.

[109] *Second Major Review of the Implementation of the Agreement on Textiles and Clothing by the Council for Trade in Goods*, Communication from Uruguay (on behalf of the members of the ITCB), (G/C/W/304), September 26, 2001, at ¶ 25 ("*ITCB Second Major Review*").

[110] "The above numbers will look even worse after quotas on China and Chinese Taipei are also taken into account. These two have joined the WTO only recently and complete notifications with respect to their quotas have not yet become available". ITCB; IC/W/251/Rev.1, March 1, 2002, at ¶ 6 (i).

[111] Statement made on September 27, 2001 by Mr. William Ehlers, Acting Chairman ITCB, at the Meeting of the Council for Trade in Goods, G/C/W/325, October 22, 2001, at 6 (Table 3 Observations).

products in the first three stages of integration, in which clothing amount to nine percent and seven percent of the products integrated for the EU and Canada respectively.

B. Analysis of the Integration Program

In expressing disappointment with the outcome of the first two stages of integration, the ITCB's Council of Representatives pointed out three major deficiencies: (1) The weaknesses in the implementation of the integration process; as discussed above; (2) The European Community's misuse of antidumping investigations and actions for protection purposes, and (3) the use by the United States of rules of origin to pursue restrictive trade objectives.[112]

The findings in WTO dispute settlement proceedings confirm that the EU has abused antidumping investigations and actions. The EU has not shied away from invoking and imposing antidumping duties even on products that have been under quota restrictions. The ITCB has also denounced repeated antidumping investigations by the EU, most of which, it said, were based on unsubstantiated claims. Despite being unsubstantiated, these investigations affected imports to the detriment of the exporting countries in question, causing losses in their market share which are difficult to recapture. The TMB acknowledges this, stating its view that "... protracted or repeated investigations (into alleged dumping), even if they do not result in the imposition of provisional or final antidumping duties, create uncertainties to the exporters of the products in question".[113]

The United States has been more cautious in invoking antidumping actions. However, in the first year it made excessive use of safeguard measures, invoking unilateral measures 24 times. It gave this up under after severe criticism from the TMB and the exporting countries. Manipulation of rule of origin requirements, and its visa requirement remain barriers that serve to restrict exports from the developing countries.

With respect to U.S. safeguard measures, invoked by the United States under Article 6 of the ATC, not only were they not justified, in most cases they were found by the TMB to be in violation of the U.S. obligations. Furthermore, the ITCB has shown that the U.S. actions on safeguard measures affected over $1 billion worth of exports from developing countries.[114] The U.S. actions reflect a pattern of providing protection to domestic industry by "exploiting" the lengthy process of the TMB, dispute settlement panels and the Appellate Body. Under the ATC, a safeguard action can be taken for a maximum of three years. The TMB process, and recourse to panels and the Appellate Body unavoidably take about two years to complete. During the period, U.S. industry benefits from unfair protection when the measures are ultimately found to be invalid.

Not only has the United States shown reluctance to make meaningful integration in the third stage, it attempted to maintain its visa requirements for the integrated products

[112] *See generally ITCB Second Major Review*, *supra* note 109.

[113] *ITCB Second Major Review*, *supra* 109 (referencing the review of the TMB, G/L/459). The report lists the antidumping proceedings "initiated in 1998, 1999 and 2000". The EU has had repeated recourse to antidumping investigations and/or measures on already restricted imports of bed linen, also on cotton fabrics and man-made fiber fabrics from several countries. The EC action on bed linen was against India, which took the case to the DSB. *See* note 126 *infra* and accompanying text. The antidumping measures on bed linen involved imports from Egypt and Pakistan. The action on cotton fabrics involved imports from Egypt, India, Indonesia, Pakistan, Turkey and China. The action on man-made fiber and fiber fabrics involved exports from India, Indonesia, Pakistan and Thailand. *Id.* ¶ 108.

[114] *Id.* ¶¶ 79–86.

in spite of the fact that they were challenged during the second stage.[115] The ITCB stated to the CTG during its second major review of ATC implementation,[116] that unless the United States confirmed the withdrawal of its visa arrangements, it should not be deemed to have complied with its obligation to fully integrate the relevant products.[117] In December 2001 the United States agreed to drop the requirement.[118]

The U.S. changes in rules of origin for the textiles and clothing sector, which went into effect in July 1966, have also been inconsistent with U.S. obligations under the ATC,[119] and have had a discriminatory effect on imports from developing countries. These changes were specifically undertaken for trade policy reasons, targeting only the textiles and clothing sector. The main challenges to these modifications came from the EU, which threatened to invoke the DSU procedures against the United States for violating Article 2.4 of the ATC. However, under a clandestine agreement between the two entities the United States agreed to partially reinstate the pre-ATC rules. This agreement may have satisfied the EU, but it did not nothing to facilitate exports from developing countries. On the contrary it continued to impede their access to the U.S. market, in particular for cotton products.[120]

V. Dispute Settlement in Textiles and Clothing

The bulk of textiles and clothing imports remain subject to stringent quota restrictions. In spite of this, and the fact that all commitments made under the ATC are not yet in place, importing countries have not shied away from protectionist actions. Although the disputes brought to the Dispute Settlement Body ("DSB") are few in number, they are revealing. In addition, numerous disputes dealt with in the TMB did not find their way to the DSB. These disputes were significant in their own right in rectifying actions by the major importing countries that some developing country exporters considered tantamount to trade harassment.[121]

The importance of ATC disputes brought to the DSB should not be underestimated. The dispute settlement system has given developing countries new leverage in trade negotiations involving this highly sensitive sector. Developing countries scored victories in four cases involving textiles and clothing.[122] These cases are described in detail in another chapter,[123] so will not be discussed in detail here. Instead, a few points of particular importance to developing countries will be mentioned.

[115] *Id.*

[116] *Id.* ¶ 78

[117] *Id.* ¶ 75. The ITCB explains that visas are a requirement additional to normal shipping documents. They were devised as an administrative arrangement to help control and monitor the exports of textiles and clothing products under quota restriction with a view to keeping these exports within the applicable quantitative limits.

[118] *Amendment of Export Visa Requirements for Textiles and Textile Products Integrated into GATT 1994 in the Third Stage,* 66 Fed. Reg. 63225 (2001).

[119] *Id.* ¶¶ 87–93.

[120] *Id.*

[121] *ITCB First Major Review*, *supra* note 83, at ¶ 37.

[122] *United States—Cotton Underwear, supra* note 100; *United States—Shirts and Blouses, supra* note 100, *European Communities—Antidumping on Imports of Cotton-type Bed Linen from India*, Report of the Appellate Body (WT/DS141/AB/R), adopted March 12, 2001; and *United States—Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan*, Report of the Appellate Body (WT/DS192/AB/R), adopted November 5, 2001.

[123] *See* Chapter 9 of this book.

Two complaints by India, one against the United States concerning transitional safeguard measures, and the second against the European Community concerning an antidumping measure, appear to have been filed in an attempt to demonstrate the repeated abuses of the rules in this sector by the United States and the EU. India is one of the developing countries that is most aware of its rights and obligations under the WTO and of the opportunities that the dispute settlement system offers.

A. United States—Shirts and Blouses[124]

When the TMB examined this dispute between India and the United States, it concluded that the U.S. transitional safeguard action was in conformity with the ATC, whereupon India invoked its right in the DSB to establish a panel to examine the legality of the U.S. action.

Although the United States announced its withdrawal of its transitional safeguard measure on wool shirts and blouses from India in November 1996 before the panel ruling was due, India nevertheless wanted the Panel to rule on the legality of the U.S. measure. Furthermore, in spite of a clear finding by the Panel that the United States had violated the provisions of Articles 2 and 6 of the ATC when imposing its transitional safeguard measure, India appealed certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. Included in the appeal by India were three important issues: (a) the issue of the burden of proof, (b) the relationship between the TMB and the DSU and the legal role of the former, and lastly (c) the question of judicial economy—whether a panel must examine all claims submitted.

With respect to judicial economy, India submitted that the Panel's application of the notion of judicial economy undermined the objectives of the DSU, as set forth in Article 3.2 of the DSU and in India's view, included both dispute resolution as well as dispute prevention. India maintained that these objectives could only be achieved if panels resolved both the dispute over the particular contested measure and the issues of interpretation arising from all legal claims made in connection with that measure.[125]

The Appellate Body disagreed and upheld the application of judicial economy.[126] A lesson to be learned from the case is that one cannot expect too much "rule making" from the WTO dispute settlement system. As "adjudicatory" organs, both panels and the Appellate Body tend to exercise judicial restraint and limit their rulings to issues that are absolutely necessary for bringing the dispute to a satisfactory conclusion. While it remains important to seek clarifications of existing rules from panels and the Appellate Body, the Dispute Settlement Mechanism should not be viewed as a substitute for the role of negotiators in resolving systemic issues.[127] However, as the ATC demonstrates, developing countries must be very much on guard in the negotiation process.

[124] *U.S.—Shirts and Blouses*, *supra* note 100.

[125] *Id.* at 5–8.

[126] *Id.* at 17–20.

[127] *See generally,* The South Center, Issues Regarding The Review Of The WTO Dispute Settlement Mechanism, *Trade-Related Agenda Development and Equity* ("TRADE"), Working Paper 1, February 1999. *Cf. United States—Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Appellate Body (WT/DS58/AB/R), adopted November 6, 1998, where arguably the Appellate Body failed to exercise judicial restraint and moved into the area of rule making, which is the mandate of the WTO membership only.

B. EC—Bed Linen[128]

India's case against the European Community, involving an EC antidumping measure on bed linen from India, demonstrates that developing countries are not powerless to challenge abusive antidumping measures taken against textiles and clothing products. Antidumping measures had become a standard EC tool to protect its textiles and clothing manufacturers, even before the creation of the WTO. Counting on the relatively high cost of dispute settlement proceedings for developing countries, as well as the low probability of winning antidumping cases as a result of the restrictive standard of review established in the Antidumping Agreement,[129] the European Commission applied excessive dumping margins. The use of antidumping actions against products under quota, and repeated actions against the same products, ran counter to the objective of liberalization of this sector that the ATC was meant to achieve.[130] The findings and conclusions of the Panel, in which Egypt participated as a third party, criticize the European Commission's calculation of dumping margins. The Panel found that the method applied (the practice of "zeroing") by the European Commission was inconsistent with Article 2.4.2 of the Antidumping Agreement, and the Appellate Body affirmed the Panel's decision in this regard.[131]

An interesting feature of the case is that India was the first Member to invoke Article 15 of the Antidumping Agreement ("Developing Country Members"), insisting that as a developing country Member it was entitled to special treatment by the European Community in the application of antidumping measures. The Panel supported India's position, finding that the European Communities had acted inconsistently with its Article 15 obligations by failing to explore constructive remedies before applying antidumping duties.[132]

Another more general lesson to draw from this case is the apparent reluctance of developed countries to implement a provision designed to help developing country Members level the playing field. This reluctance raises fundamental questions of good faith. Developing countries should not have to undertake expensive dispute settlement proceedings just to procure the benefits accorded to them in the negotiations. This reticence on the part of developed countries to implement their side of the bargain compelled developing countries to bring up the issue of "Implementation,"[133] and to push for it prior to the initiation of new round of negotiations.

C. United States—Underwear[134]

Costa Rica's dispute against U.S. restrictions on imports of cotton and man-made fiber underwear was also significant for developing countries. It has become a frequently cited

[128] *European Community—Bed Linen*, *supra* note 122.

[129] *Agreement on Implementation of Article VI of the GATT*. Article 17.6 (ii) sets out the standard of review for cases arising under the this agreement.

[130] *ITCB First Major Review*, *supra* note 83, at 37.

[131] *See European Communities—Bed Linen, supra* note 122, ¶ 66.

[132] *European Communities—Antidumping on Imports of Cotton-type Bed Linen from India*, Report of the Panel, WT/DS141/AB/R, ¶¶ 62–64.

[133] Developing countries were inspired by UNCTAD's "Positive Agenda" Program, developed at UNCTAD IX (1996) which urged developing countries to develop their own agenda and participate actively in the framework of a new round of negotiations. As a result, developing countries decided to push for the so-called "implementation" issues. In December 1999 in Seattle, developing countries conditioned any new round of trade negotiations on a prior satisfactory response to the implementation issues, among which is to address the imbalances inherent in the Uruguay Round Agreements, a highly controversial topic.

[134] *United States—Cotton Underwear, supra* note 100.

example for the effectiveness of the WTO's Dispute Settlement Understanding ("DSU"). It was the first challenge under the DSU in the textiles and clothing sector. As a result of losing this case, and its portrayal in the TMB and the Council for Trade in Goods for using transitional safeguards to an excessive degree during the first year of the ATC, the United States began to restrain its use of the transitional safeguards mechanism.

After having unilaterally invoked the transitional safeguards 24 times in the first year of implementation, the United States, under constant criticism from developing countries, stopped its use of these actions altogether. The 24 safeguard measures taken by the United States in 1995 involved nine product groups. Of the nine, the TMB did not find any evidence of serious damage in five categories. In regard to actual threat of serious damage, the TMB's findings were positive with respect to one category and negative with respect to two categories. The TMB was unable to reach consensus in the two other categories. The excessive use of transitional safeguards by the United States prompted the exporting countries to contest the U.S. claims of serious damage, and to use the good offices of the DSB to redress their complaints. The strict requirements of Article 6 were upheld by the DSB and "this played an important role in the decline in U.S. actions".[135]

D. United States—Cotton Yarn[136]

This dispute involved a typical case of an abusive measure by a major importing country and the clear exploitation of the dispute settlement procedures.

Already in April 1999, one month after the measure became effective on March 17, 1999, the TMB ruled on the matter and asked the United States to rescind its measure. The TMB found that the United States was unable to demonstrate serious damage or any threat thereof to its industries by the imports of yarn from Pakistan. The matter was examined in June for the second time by the TMB, which did not alter its first recommendation. Refusing to heed the recommendation of the TMB, and with the failure to reach a mutually agreed solution through consultations, Pakistan had recourse to the DSU and requested the establishment of a Panel on April 3, 2000. In its Report on May 31, 2001, the Panel concluded that the transitional safeguard measure imposed by the United States on imports of yarn from Pakistan was inconsistent with the provisions of Article 6 of the ATC. Without further ado, the Panel suggested that the United States bring its safeguard measure into conformity with its obligations under the ATC and that this could best be achieved by the prompt removal of the safeguard measure.

The United States, however, decided to file an appeal and request the Appellate Body to reverse the Panel's findings, in particular with regard to Article 6.4 of the ATC, which concerns the attribution of serious damage or actual threat thereof. The Appellate Body upheld the Panel's main findings and requested the United States to bring its measure into conformity with its obligations in the Agreement.[137]

Despite the fact that both the TMB and a Panel found against the United States, the United States chose to buy more time by taking this dispute to the Appellate Body. The result was that the United States was able to impose its safeguard measure from March 17, 1999 until after the Appellate Body's ruling against the United States in October 2001.

[135] Bagchi, *supra* note 26, at 248 and 250 respectively (*quoting* Kenneth Reinert, *Give us Virtue, But Not Yet: Safeguard Actions Under the Agreement on Textiles and Clothing*, Paper presented at a WTO seminar (1998)).

[136] *United States—Cotton Yarn*, *supra* note 122.

[137] *Id.* ¶ 129.

This tactic suggests that there is a serious flaw in the dispute settlement understanding, which seems to countenance such delay. It also raises questions about the good faith of the developed countries who are willing to preserve their upper hand in this highly sensitive and vital sector through delay, and once delay is no longer possible, through the imposition of new measures, such as rules of origin and visa requirements.

VI. Conclusion

Labeling the new round of negotiations "The New Development Agenda" was an attempt to lure developing countries into the next round of trade talks. Nevertheless, the fate of textiles and clothing in the lead up to, and at Doha, remained unclear. At no stage in the Doha preparations did the sector have the potential to be a "make or break" issue. Intellectual property rights ("IPR"), agriculture and the environment were far thornier issues. Few exporting developing countries tried to table textiles and clothing in the framework of the so-called Implementation issues. In the Doha Ministerial Meeting (November 9–13, 2001) India demanded that the pace of liberalization in the textiles and clothing area be quickened, and it held up the negotiations on this issue until the eleventh hour.

Although textiles and clothing were a lower priority issue in Doha, their importance has not diminished. The next few years will see more aggressive bargaining in this vital sector. One need only remember that textiles and clothing were among the problem sectors that led to the extension of the negotiations in the Uruguay Round. With a prolonged and difficult round of trade negotiations in sight, textiles and clothing are likely to surface once again as a principal bargaining chip for an increasing number of developing countries.

In this context, the smoothing out of tariff peaks and the reduction of tariff escalation in the area of textiles and clothing will become even more important as a negotiating chip in return for developing countries agreeing to negotiate on a reduction of their industrial tariffs. Although some already speculate that the ATC will be replaced by some new form of agreement, I believe that developing exporting countries will not allow tariffs on textiles and clothing to be considered separately or governed again by a separate agreement.

My view is that the low priority given textiles and clothing could well change as negotiations proceed in the new round. The subject will be pushed forcefully not only by the traditional proponents of liberalization in this sector, such as India and Pakistan, but also by countries like Egypt, Indonesia and Malaysia, who want something in return, perhaps in the textiles and clothing sector, if they are to lower their industrial tariffs. Furthermore, my expectation is that negotiations on textiles and apparel will go beyond traditional borders and encompass negotiations among developing country exporters themselves, based on their desire:

a) To open up each other's markets in addition to the markets of the expected newcomers from Africa and the LDCs;
b) To prepare for the possible outcome of additional regional integration which, with more modern machinery and better quality products, may facilitate the relocation of industries such as textiles and clothing from the North to the South; and
c) To develop new markets in preparation for new types of restrictions in the developed importing countries, perhaps based on more stringent environmental standards.

To many, including this author, the ATC is and remains a ten year "quasi-extension" of the MFA. This is undoubtedly contrary to the perception of many others, notably among the exporting country negotiators who like to view the ATC as a full-fledged, stand-alone agreement.[138] Whichever view is correct, the ATC has failed, after more than seven years of implementation, to further the liberalization of trade in textiles and clothing, or to provide greater market access. Spinanger notes that "It was indeed a masterpiece of watering down and postponing."[139] It "watered down" the liberalization process by including a far wider range of textiles and clothing products than necessary. It "postponed" any significant liberalization until the final stage in January 1, 2005 ("back-loading"). The integration to date has concentrated on products of less export interest to developing countries, and only a few quota restrictions have been removed, leaving the bulk in place. The additional access provided through increases in quota growth rates during the transition period has not significantly lessened the restrictive nature of the quotas. Developing countries, including their small suppliers, as well as least-developed countries, have not received any "meaningful" increase in their access possibilities. It remains to be seen what will happen between now and January 1, 2005.

[138] Raffaelli and Jenkins insist that the ATC should not be considered as a mere extension of the MFA. Raffaelli and Jenkins, *supra* note 12, at 88.

[139] Dean Spinanger, *Textiles Beyond the MFA Phase Out*, paper presented at the GATT/WTO Fiftieth Anniversary Conference at the University of Warwick (July 17–18, 1998) and on file with the author.

CHAPTER 54

THE TRIPS AGREEMENT AND DEVELOPING COUNTRIES

Carlos M. Correa*

TABLE OF CONTENTS

I. Introduction 420
II. TRIPS Disputes 424
A. The Decisions 424
1. Mailbox Cases 425
2. Canada—Term of Patent Protection 425
3. Canada—Patent Protection for Pharmaceutical Products 425
4. United States—Section 110(5) of the US Copyright Act 426
5. United States—Section 211 Omnibus Appropriations Act of 1998 (also known as the "Havana Club" case) 426
B. Interpretation of the TRIPS Agreement 427
1. Relationship Between the TRIPS Agreement and the GATT 428
2. Principles of Interpretation 429
3. Object and Purpose of the Agreement 431
4. Interpreting Domestic Law 434
5. Deference to National States 435
6. Contemporaneity 435
7. Mandatory vs. Discretionary Provisions 437
III. Some Contentious Issues 437
A. Exceptions 438
1. GATT Jurisprudence 438
2. The TRIPS Agreement 440
B. Compulsory Licenses for Non-Working of the Invention 442
C. Parallel Imports 446
IV. The Doha Declaration on Public Health 452
V. Conclusion 455

* Professor, University of Buenos Aires.

I. Introduction

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") brought about a very important change in international standards relating to intellectual property rights.[1] Because of its far-reaching implications, particularly with respect to developing countries, the agreement has been one of the most controversial components of the WTO system. Strong disagreements on the scope and content of the Agreement emerged during the Uruguay Round negotiations, both between developed and developing countries and among developed countries themselves. Implementation of the Agreement and its review under the "built-in agenda" have also been contentious with regard to many aspects.

The developed countries (notably the United States) insisted upon the negotiation and adoption of standards on intellectual property rights ("IPRs") in the Uruguay Round, based on the argument that strengthened protection of IPRs would promote innovation as well foreign direct investment ("FDI") and technology transfer to developing countries.[2] Although the TRIPS Agreement only became effective in advanced developing countries on January 1, 2000, meaning that there has not been much time to assess its impact, most developing countries seem to remain unconvinced about the benefits that they will obtain from the implementation of the new IPR standards. Moreover, many of them fear that the costs to be paid may be too high, particularly in critical areas such as public health. Essentially, many developing countries feel that despite the balance sought in some provisions, the Agreement mainly benefits technology-rich countries. There are a number of reasons for these concerns.

First, higher levels of IPR protection do not appear to lead to tangible increases of FDI in or technology transfer to developing countries. The evidence on the relationship between IPR protection on the one hand and FDI and technology transfer on the other continues to be inconclusive.[3] In addition, the share of developing countries in world research and development expenditures remains very low (only four percent of the total).[4] Certainly, IPRs may promote innovative activities to the extent that they offer the promise of extraordinary benefits based on the temporal exclusion of competitors. But in order for those benefits to be realized, an adequate industrial and technological infrastructure must exist at the national level, which is not the case in most developing countries. There is also strong evidence suggesting that most of the rewards from innovation are reaped by a small minority of successful companies, while the majority of innovative efforts confer

[1] *See, e.g.*, United Nations Conference on Trade and Development, THE TRIPS AGREEMENT AND DEVELOPING COUNTRIES 18 (1996).

[2] The U.S. government has stated that:

> apart from stimulating innovation, however, a strong IPR regime—particularly a strong patent regime—can also produce other benefits for countries, regardless of whether the countries are developed or developing. For example, countries that have strong patent regimes are more effective in attracting investments and market entry by innovative companies. The reasons for this are fairly simple—patents provide a greater capacity for the innovator to compete based on the innovation. If the innovator cannot use the innovation to provide a market advantage, there is a disincentive to enter the market, particularly where others in that market can charge lower prices because they do not need to recover the costs of research and development, nor invest in new research and development.

TRIPS Council, *Special Discussion on Intellectual Property and Access to Medicines*, IP/C/M/31, at 35 (July 10, 2001).

[3] *See, e.g.,* Keith Maskus, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 87–141(2000).

[4] United Nations Development Program, HUMAN DEVELOPMENT REPORT 67 (1999).

only modest benefits, in addition to the fact that, because of the high cost of litigation, IPR enforcement is biased in favor of large organizations.[5]

Second, in some sectors IPRs appear to act as a powerful barrier to access to technologies and products, particularly by the poor. This is notably the case in relation to pharmaceuticals. By their very essence, patents enable pharmaceutical manufacturers to charge higher prices than those that would have existed in a competitive environment. While the high prices are said to be justified by the need to recover costly investments in R&D, the magnitude of such investment, as well as the pricing of drugs in developing countries, has been strongly contested.[6]

The AIDS crisis in Africa, and growing evidence about the negative implications of patents for access to medicines by the poor, have brought the relationship between TRIPS and health to the forefront. With more than thirty million people living with HIV, most of them in the poorest regions of the world, the need to address the problem of access to patented medicines has emerged as a global priority. While it is true, as argued by the pharmaceutical industry, that other factors such as infrastructure and professional support play an important role in determining access to drugs,[7] it is also true that the prices that result from the existence of patents ultimately determine how many will die from AIDS and other diseases in the years to come. It is important to note that the problem of access to medicines is not limited to anti-retrovirals, but involves all kinds of medicines that may fall under patent protection.

Some recent WHO-sponsored studies provide an indication of the potential effects of the TRIPS Agreement in the area of pharmaceuticals. A study undertaken in Thailand on the impact of that country's 1992 revised patent law, which essentially applies the same standards as those required by the TRIPS agreement, found that there had been no significant increase in transfer of technology or foreign direct investment, and that spending on pharmaceuticals had increased at a higher rate than overall health care spending.[8]

Another study on the implications of the new Industrial Property Code (1996) on local production and access to medicines in Brazil revealed *inter alia* that:

- Only 36 (2.6 percent) of the 1387 drug patent applications filed since 1996, when the new Brazilian Industrial Property Act was signed into law, were filed by residents of Brazil. More than five hundred of the filings were made by U.S. residents.
- While Brazil's total imports roughly doubled during the period 1982–1998, pharmaceutical imports increased over 47 times.

The study concluded that "the greatest beneficiaries of recent changes in Brazilian legislation and the implementation of the World Trade Organisation's TRIPs Agreement have not been Brazilian companies or institutions, but transnational companies. . . ."[9]

[5] F.M. Scherer, *The Innovation Lottery*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY. INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 15, 21 (Rochelle Dreyfuss, Diane Zimmerman, and Harry First eds. 2001).

[6] OXFAM, CUT THE COST—FATAL SIDE EFFECTS: MEDICINE PATENTS UNDER THE MICROSCOPE 31 (2000).

[7] International Intellectual Property Institute, PATENT PROTECTION AND ACCESS TO HIV/AIDS PHARMACEUTICALS IN SUB-SAHARAN AFRICA 23 (2001).

[8] Siripen Supakankunti, *et al*., STUDY OF THE IMPLICATIONS OF THE WTO TRIPS AGREEMENT FOR THE PHARMACEUTICAL INDUSTRY IN THAILAND 82 (1999).

[9] Jorge Bermudez, Ruth Epsztejn, Maria Auxiliadora Oliveira and Lia Hasenclever, *The WTO TRIPS Agreement and Patent Protection in Brazil: Recent Changes and Implications for Local Production and Access to Medicines* 95 (MSF/DND Working Paper 2000), available at http://www.neglecteddiseases.org/4-4.pdf.

More generally, Maskus has noted the scarcity of data on price elasticities and market-structure parameters, and the uncertainty about the potential effects of patents on prices, profitability and innovation. However, based on available literature, he found that "the preponderance of conclusions is pessimistic about the net effects of drug patents on the economic welfare of developing countries (or, more accurately, of net importers of patented drugs)."[10]

Some of the concerns of developing countries about the implications of the TRIPS Agreement on public health were reflected in the negotiation and adoption of the "Doha Declaration on the TRIPS Agreement and Public Health"[11], at the Fourth WTO Ministerial Conference (November 9–14, 2001). WTO Members took the unprecedented step of adopting a special declaration[12] on this controversial matter. Discussion of the declaration was one of the major issues at the Conference[13], and was the first outcome of a process that started in early 2001 when, upon the request of the African Group and other developing countries, the Council for TRIPS agreed to deal specifically with the relationship between the TRIPS Agreement and public health[14].

Third, the adoption of the TRIPS Agreement as a component of the WTO system[15] means that any controversy relating to compliance with the minimum standards established by the Agreement should be resolved under the multilateral procedures of the WTO. The adoption by another Member of unilateral trade sanctions would be incompatible with the multilateral rules. Any complaint should be brought to and settled according to the rules of the Dispute Settlement Understanding ("DSU")[16].

Despite this, many developing countries have continued to be pressured by unilateral demands by some developed countries, notably the United States and the EU, in the area of IPRs, aiming not only at the implementation of the TRIPS Agreement standards, but often asking for " TRIPS-plus" protection, that is, levels of protection beyond the minimum standards required by the TRIPS Agreement. A telling case that received

[10] MASKUS, *supra* note 3, at 160.

[11] WT/MIN(01)/DEC/W/2, November 14, 2001, ("the Doha Declaration".) The text of the Declaration is reproduced in the Appendix to this book.

[12] Paragraph 17 of the general Ministerial Declaration states: "We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate Declaration".

[13] The Director General of WTO emphasized the importance of this issue on the opening day of the Conference, indicating that agreement on public health and TRIPS was the "deal breaker" of the new round. Pascal Lamy, the EU Commissioner for Trade, stated at the Conference that ". . . we must also find the right mix of trade and other policies—consider the passion surrounding our debate of TRIPS and Access to Medicines, which has risen so dramatically to become a clearly defining issue for us this week, and rightly so".

[14] The Council for TRIPS convened special sessions (which were held in June, August and September 2001) to deal with the relationship between health and TRIPS. *See* the submissions made by the European Communities and their Members States on *The Relationship Between the Provisions of the TRIPS Agreement and Access to Medicines*, IP/C/W/280 (June 12, 2001); the paper submitted on the same issue by the African Group, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela, *TRIPS and Public Health*, IP/C/W/296 (June 29, 2001). *See also, Special Discussion on Intellectual Property and Access to Medicines,* IP/C/M/31, (July 10, 2001).

[15] The TRIPS Agreement is contained in Annex 1C to the Marrakesh Agreement Establishing the WTO.

[16] However, a WTO panel in a case initiated by the EC and their Member States that examined the consistency with WTO obligations of the authorization given to the U.S. government to retaliate under several provisions (such as "Special 301") of the U.S. Trade and Tariff Act of 1984 (19 U.S.C § 2114c(2)(A)) did not find—based on a commitment by the U.S. government not to apply sanctions without WTO authorization—a violation of WTO obligations. *See* Report of the WTO Panel, *United States—Section 301–310 of the Trade Act of 1974*, WT/DS152/R (2000). *See also* Part III.B.7 *infra*.

considerable public attention was the attempt by the U.S. government and pharmaceutical industry to block the use of parallel imports and compulsory licenses by the South African government to obtain access to cheaper HIV/AIDS drugs[17]. In other cases, developing countries were persuaded to adopt " TRIPS-plus" standards in order to benefit from other trade concessions under bilateral agreements.[18]

In addition, nothing seems to prevent WTO Members from applying unilateral pressure, for instance, by threatening the removal of trade preferences that go beyond WTO commitments or cuts in development aid, or through simple moral persuasion. As noted by Primo Braga and Fink:

> The United States has continued to put unilateral pressure on countries where it felt that weak IPR systems disadvantaged U.S. companies. The two most prominent cases in this context were the dispute with Argentina on pharmaceutical patents, which in 1997 led to the removal of 50 per cent of Argentina's benefits under the generalized system of preferences (GSP); and the dispute with South Africa, also on pharmaceutical patents, where the U.S.A reached a 'joint understanding' with South Africa in late 1999. The U.S. government did not initiate settlement proceedings under the WTO in these cases, partly because both countries were still under transition with regard to their TRIPS obligations and partly because some aspects of these disputes related to matters where the TRIPS Agreement has no specific obligation (e.g. parallel imports) or where the outcome of WTO arbitration would be highly uncertain (e.g. compulsory licenses).[19]

Fourth, Article 66.2 of the TRIPS Agreement establishes an outright obligation on developed countries "to provide incentives to enterprises and institutions" in their territories for the transfer of technology to least-developed countries. Though Article 66.2 leaves a great deal of leeway to developed countries to determine what kind of incentives to provide, it does require the establishment of a system to encourage technology transfer (including technology protected under intellectual property rights) to least-developed countries. The provision also provides a general standard to judge the appropriateness of such incentives, i.e., that they should enable least developed countries "to create a sound and viable technological base". This obligation remains unfulfilled.

In sum, developing countries generally feel that the concessions they made during the Uruguay Round with respect to IPRs are not providing them with significant benefits. Strong asymmetries in the development of and access to technologies remain or are even

[17] An estimated twenty percent of South Africans are infected with HIV. A very minor portion of these have access to AIDS drugs. South Africa law established provisions that were challenged by the pharmaceutical manufacturers trade association and 39 pharmaceutical companies before the South African Supreme Court. U.S. development aid to South Africa was also conditioned on the withdrawal of the provisions (see US Public Law 105–277 (105th Congress, 1999). After a global NGO campaign, in which activists from the U.S., Africa and Asia opposed the U.S. government and commercial sanctions, the legal action was withdrawn. Several pharmaceutical companies offered to provide AIDS drugs at a discounted price (60–85 percent off the price charged in the U.S. or Europe) See, e.g., Marie Byström and Peter Einarsson, *TRIPS—Consequences for Developing Countries: Implications for Swedish Development Cooperation* 38 (2000), Consultancy Report to the Swedish International Development Cooperation Agency, available at http://www.grain.org/docs/sida-trips-2001-en.PDF.

[18] For example, the bilateral agreements entered into between the EC and their Member States and South Africa (1999), Tunisia (1998) and the Palestinian Authority (1997) require the latter to ensure adequate and effective protection of intellectual property rights "in conformity with the highest international standards". *See*, e.g. Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting* 14–18 (2002), study prepared for the UK Commission on Intellectual Property Rights, available at www.iprcommission.org.

[19] Carlos Primo Braga and Carsten Fink, *Trade-related Intellectual Property Rights: From Marrakech to Seattle*, in THE WORLD TRADE ORGANIZATION MILLENNIUM ROUND 192(Klaus Günter Deutsch and Bernehard Speyer eds. 2001).

growing. Though developing countries still expect to derive some benefits from certain types of IPRs (such as geographical indications), so far they are bearing the costs of a system of reinforced IPR protection under the WTO, while enjoying few of the potential advantages.

Part II of this chapter examines some of the principles of interpretation that may be derived from TRIPS-specific WTO jurisprudence, as well as from other GATT/WTO cases, which may be relevant for the implementation and interpretation of the TRIPS Agreement. This part does not attempt to analyze the TRIPS disputes in particular, but simply tries to draw some general conclusions for the future. Part III considers some important issues for developing countries in the light of national practice and GATT/WTO jurisprudence. Such issues—exceptions to patent rights, compulsory licenses and parallel imports—are of crucial importance for the design of a pro-competitive intellectual property system and, in particular, to attain public health objectives as specifically recognized (in relation to two of such issues) by the Doha Declaration. Part IV includes a brief commentary on the latter Declaration, which is referred to in other parts of the Chapter as well. Part V provides some conclusions.

II. TRIPS Disputes

A. The Decisions

The TRIPS Agreement has been one of the most controversial components of the WTO system. It has given rise to a large number of proceedings under the Dispute Settlement Understanding, involving alleged violations by developing and developed countries, even before January 1, 2000 when the core of the obligations imposed by the Agreement entered into force in the advanced developing countries. Twenty-four complaints have dealt with the TRIPS Agreement (as of June 30, 2002), most of them initiated by the United States and the EC Communities and their Member States.

Six cases involving the TRIPS Agreement have already been decided by panels or the Appellate Body.[20] Three of these cases dealt with issues relating to transitional provisions, two concerning the implementation of Article 70.8 (the "mailbox" provision) by India.[21] The third, brought by the United States against Canada with respect to the extension of the term of patents granted before the entry into force of the Agreement (Article 70.2), found Canada to be in violation to the Agreement.[22] There were two other cases between developed countries, in which the issues of exceptions to patent rights (brought by the EC and their Member States against Canada[23] and copyright (brought by the EC and

[20] The Agreement was also incidentally invoked in the *Indonesia-Autos* case, in relation to the protection of trademarks. The panel, however, found that the United States had not demonstrated that Indonesia was in breach of its TRIPS obligations (Report of the WTO Panel, *Indonesia—Certain Measures Affecting The Automobile Industry,* WT/DS 54/R, WT/DS 55/R, WT/DS 59/R, WT/DS 64/R (1998), ¶¶ 11.1–11.43). It is also to be noted that in an arbitration decision (Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU,* WT/DS27/ARB/ECU, March 24, 2000) Ecuador was authorized to suspend its obligations under the TRIPS Agreement as retaliation against the EC for not complying with the panel and Appellate Body rulings in the Bananas dispute (*see* Report of the Appellate Body, *European Economic Community-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R(1997)).

[21] *See* Report of the Appellate Body, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products,* WT/DS50/AB/R (1998), and Report of the WTO Panel, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (1998).

[22] *See* Report of the Appellate Body, *Canada—Term of Patent Protection*, WT/DS170/AB/R (2000), ¶ 7.1.

[23] *See* Report of the WTO Panel, *Canada—Patent Protection for Pharmaceutical Products*, WT/DS114/R (2000).

their Member States against the United States[24] were considered. The last case, brought by the EC and their Member States against the United States,[25] involved the protection of trademarks.

The issues in these cases were as follows:

1. Mailbox Cases[26]

The United States and the EC and their Member States argued in two separate complaints that India had failed to provide a mechanism for implementing the "mail box" to be established in accordance with Article 70.8 of the TRIPS Agreement.[27] India was found to have failed to comply with its obligations under this provision, since there was no legal basis—procedural or substantive—for the grant of exclusive marketing rights when a product that was the subject of a patent application under Article 70.8 became eligible for protection under Article 70.9 of the TRIPS Agreement.[28]

2. Canada—Term of Patent Protection[29]

The United States challenged Section 45 of Canada's Patent Act. It claimed that the patent protection term of seventeen years (counted from the date of grant) accorded to patent applications filed before October 1, 1989, often ended before twenty years from the date of filing. The United States argued that pursuant to Articles 33 and 70.2 of the TRIPS Agreement, Canada was obligated to make available a term of protection that lasted at least twenty years from the date of filing to all inventions which enjoyed patent protection on January 1, 1996—the date on which the TRIPS Agreement went into effect for developed countries—including those protected by the old Patents Act. Inventions enjoying protection under that Act were covered by Article 70.2 of the TRIPS Agreement (protection of "subject matter" existing on the date of application of the TRIPS Agreement). The Canadian law was found inconsistent with the Agreement in this respect.

3. Canada—Patent Protection for Pharmaceutical Products[30]

This case addressed the TRIPS-consistency of Section 55(2)(1) and (2) of the Canadian Patent Act, as revised in 1993. Section 55(2)(1), the "early working", "regulatory review" or "Bolar" exception, permitted the use of a patented invention, without the consent of the patent holder, for testing required for the submission of data to obtain marketing approval

[24] *See* Report of the WTO Panel, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

[25] Report of the Appellate Body, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (2002).

[26] *Supra,* note 21.

[27] Article 70.8–9 of the TRIPS Agreement required members that did not grant patent protection for pharmaceutical and agricultural chemical products as of the date of entry into force of the WTO Agreement (under Article 65.4 of the Agreement, a developing country Member could delay providing patentability to products not then patentable in the country for ten years) to provide a means of filing patent applications (the "mailbox") and up to five years of exclusive marketing rights.

[28] In order to comply with Article 70.9, the President of India, on December 31, 1994, promulgated an Ordinance (the Patents Amendment Ordinance 1994) so as to provide a means for the filing and handling of patent applications for pharmaceutical and agricultural chemical products, and for granting of exclusive marketing rights. The Ordinance was issued on the basis of the President's constitutional powers to legislate when Parliament is not in session but, without Parliament's confirmation, it lapsed on March 26, 1995. The "exclusive marketing rights "were later implemented by the Patents (Amendment) Act, 1999.

[29] *Supra,* note 22.

[30] *Supra,* note 23.

for pharmaceutical or other products. Section 55(2)(2) allowed potential competitors of the patent holder to manufacture and stockpile pharmaceutical products covered by the patent during the six months immediately prior to the expiry of the twenty-year patent term. The panel found that Section 55(2)(1) was consistent with the TRIPS Agreement but that Section 55(2)(2) was not.

4. United States—Section 110(5) of the US Copyright Act[31]

Upon a complaint brought by the EU, the panel found that Section 110(5)(b) of the U.S. copyright law[32]—relating to the enjoyment of nondramatic musical works by customers in business premises, such as food service and drinking establishments under a certain size limit—was inconsistent with Article 13 of the TRIPS Agreement.

5. United States—Section 211 Omnibus Appropriations Act of 1998 (also known as the "Havana Club" case).[33]

A panel considered the consistency of Section 211 of the U.S. Omnibus Appropriation Act of 1998 which deals with trademarks, trade names, and commercial names that are the same as or substantially similar to trademarks, trade names, or commercial names that were used in connection with businesses or assets that were confiscated by the Cuban Government on or after January 1, 1959. The panel was requested to examine the consistency of that provision with Articles 2.1, 3.1, 4, 16.1 and 42 of the TRIPS Agreement, in conjunction with the relevant provisions of the Paris Convention (Articles 2 (1), 6 *bis*, 6 *quienquies*, and 8). The panel also considered whether the Agreement was applicable to trade names (as argued by the EC), but concluded that trade names were not a category of IPR covered by the Agreement. The panel found that the EC had not proven the inconsistency of the U.S. law, except with regard to Article 42 of the TRIPS Agreement. The AB reversed several findings of the panel; in particular, it considered that trade names were covered by the TRIPS Agreement since it incorporates the obligations under the Paris Convention.

Two consultations, settled before the establishment of a panel, involved developing countries' compliance with the TRIPS Agreement. Consultations were requested by the United States (joined by the EC and Switzerland) on various aspects of the Argentine patent and confidentiality laws.[34] The issues in contention included, *inter alia,* compulsory licenses to remedy anti-competitive practices, importation of patented products, reversal of the burden of proof, preliminary injunctions, and the protection of data submitted for the approval of pharmaceutical and agrochemical products. On the latter issue, the United States and the EC and their Member States have argued that Article 39.3 of the TRIPS Agreement requires the granting of a certain period of exclusivity (the term of which is to be determined by national law) after the first commercial authorization of a pharmaceutical (or agrochemical product). No such exclusivity is granted in Argentina. The Argentine law[35] protects such data against unfair commercial

[31] *Supra,* note 24.

[32] *United States Copyright Act of 1976*, as amended, Pub. L. 94-553, 90 Stat.2541.

[33] *Supra,* note 25.

[34] *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals,* WT/DS171, May 6, 1999, and*Argentina—Certain Measures on the Protection of Patents and Test Data,* WT/DS196, May 30, 2000.

[35] *See* Argentine Law 24766, "Confidencialidad sobre información y productos que estén legítimamente bajo control de una persona y que se divulgue indebidamente de manera contraria a los usos comerciales honestos", *Boletín Oficial*, 30 December, 1996.

practices in the framework of unfair competition as regulated by Article 10 *bis* of the Paris Convention.[36]

In January 2001, the United States launched a challenge against Brazilian legislation that authorizes the granting of compulsory licenses and parallel imports in instances when patents are not worked.[37] The dispute ended several months later, when the U.S. complaint was withdrawn.[38] In a separate case Brazil asked the United States for consultations with regard to provisions of a U.S. patent law that limits the right to use or sell any federally-owned invention only to a licensee that agrees that any products embodying the invention or produced through the use of the invention will be manufactured substantially in the United States.[39]

Though with the exception of the "mail box" cases, the panel and Appellate Body decisions relate to disputes involving developed countries only, they are certainly relevant to developing countries, since they provide an indication of the interpretive patterns that panels and, particularly, the Appellate Body, have developed in relation to the TRIPS Agreement. The analysis of the principles applied and arguments made may be important for the implementation of the Agreement by developing countries in a manner that maximizes the use of the flexibilities allowed by the Agreement while ensuring consistency with its obligations. Of course, while recognized that the reports are not, strictly speaking, precedential, this analysis is also important for the defense of national interests in possible future disputes involving developing countries.

B. Interpretation of the TRIPS Agreement

The rulings in the six cases discussed above, as well as other WTO jurisprudence, allow one to draw some lessons on the interpretation of the TRIPS Agreement. Though panels and Appellate Body reports are not strictly precedential in the sense that they do not bind future opinions on the same matter,[40] they do provide guidance to both governments and the DSU bodies as to how future cases are likely to be decided.

Given that developing countries undertook the heaviest burden in terms of the modifications to their IPR laws necessary to comply with the obligations of the TRIPS Agreement, they are also most exposed to possible complaints by other members, notably industrialized countries. The analysis of GATT/WTO jurisprudence may provide developing countries with some useful elements for the design of their intellectual property laws, as well as to respond to demands of changes in legislation based on grounds of

[36] A mutually agreed solution was notified to the DSB on 20 June, 2002. However, the parties did not reach a common understanding on the interpretation of Article 39.3 of the TRIPS Agreement, nor on the application of Article 70.7. *See Notification of Mutually Agreed Solution According to the Conditions Set Forth in the Agreement (*IP/D/18/Add.1, IP/D/22/Add.1).

[37] *See Brazil—Measures Affecting Patent Protection*, Request for the Establishment of a Panel by the United States, January 9, 2001, WT/DS199/3. On February 1, 2001, the DSB authorized establishment of a panel, although no panel members had been appointed by the time the complaint was withdrawn. Cuba, the Dominican Republic, Honduras, India and Japan reserved third party rights.

[38] Without prejudice to their respective positions, the United States and Brazil have agreed to enter into bilateral discussions before Brazil makes use of Article 68 against a U.S. patent holder. *Brazil—Measures Affecting Patent Protection,* Notification of Mutually Agreed Solution, WT/DS199/4, G/L/454, IP/D/23/Add.1, July 19, 2001.

[39] *United States—US Patents Code*, WT/DS224/1, February 7, 2001. This case was not pursued.

[40] Decisions under the DSU only benefit or affect the parties to the dispute, and need not be followed by subsequent decisions on the same matters. John H. Jackson, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 83 (1998)

possible inconsistency with the Agreement. Needless to say, such analysis would be essential if a case were formally brought under the DSU.

1. Relationship Between the TRIPS Agreement and the GATT[41]

The panel in *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* held that the TRIPS Agreement has a "relatively self-contained, *sui generis* status within the WTO"[42]. However, it also held that the Agreement is "an integral part of the WTO system, which itself builds upon the experience of over nearly half a century under the GATT 1947."[43] In *United States—Section 110(5) of the U.S. Copyright Act*, the panel noted that caution was required when interpreting the TRIPS Agreement provisions in the light of precedents developed in GATT dispute settlement practice. It stated however that

> "given that the agreements covered by the WTO form a single, integrated legal system, we deem it appropriate to develop interpretations of the legal protection conferred on intellectual property right holders under the TRIPS Agreement which are not incompatible with the treatment conferred to products under the GATT, or in respect of services and service suppliers under the GATS, in the light of pertinent dispute settlement practice".[44]

The panels and the Appellate Body have, in practice, applied previous GATT and WTO jurisprudence extensively in cases involving the TRIPS Agreement. They have used the same method of interpretation applied to cases involving other WTO Agreements, i.e., the customary rules of treaty interpretation contained in Article 31 and Article 32 of the Vienna Convention on the Law of Treaties. No consideration has been given to the fact that while IPRs constitute private rights,[45] the other components of the WTO system deal with restrictions imposed on governments.

The clarification of the relationship between the TRIPS Agreement and the GATT/WTO may be crucial for the interpretation of several aspects of the Agreement, such as the permissibility of banning parallel imports, the extent to which exceptions can be established under Article 8.1, and, more generally, the criteria to be applied to the interpretation of exceptions provided under the TRIPS Agreement. Under GATT/WTO jurisprudence the exceptions to the obligations of states have been generally construed narrowly.[46] This also applies to the case of TRIPS as illustrated by the panel's opinion in *Canada—Patent Protection for Pharmaceutical Products* on the exceptions to exclusive patent rights conferred by Article 30 of the TRIPS Agreement.[47] However, IPRs themselves constitute exceptions in terms of the GATT—authorized by GATT Article

[41] This section is partially based on a paper prepared by the author for the Quakers United Nations Office, *TRIPS Disputes—Implications for the Pharmaceutical Sector* (2001), available at http://www.geneva.quno.info/main/search_publication.php?loop= 0.

[42] *Supra,* note 21, ¶ 7.19.

[43] *Id*.

[44] *Supra*, note 24, at ¶ 6.185.

[45] *See* the Preamble to the TRIPS Agreement, fourth paragraph.

[46] *See* Carlos Correa, *Implementing National Public Health Policies in the Framework of the WTO Agreements*, 34 (5) JOURNAL OF WORLD TRADE 92 (2000).

[47] "As long as the exception is confined to conduct needed to comply with the requirements of the regulatory approval process, the extent of the acts unauthorized by the right holder that are permitted by it will be small and narrowly bounded. Even though regulatory approval processes may require substantial amounts of test production to demonstrate reliable manufacturing, the patent owner's rights themselves are not impaired any further by the size of such production runs, as long as they are solely for regulatory purposes and no commercial use is made of resulting final products". *Canada—Patent Protection for Pharmaceutical Products, supra* note 23, at ¶ 7.45.

XX (d)—since by their very nature such rights restrict trade.[48] In applying the exceptions under TRIPS, therefore, panels and the Appellate Body should carefully consider the trade *restrictive* effects of IPRs and the need to ensure as much competition and free trade as possible. The purpose and effects of IPRs should be appraised in the light of the general principles and objectives of the WTO system and, in particular, the objectives of the TRIPS Agreement as stated in Article 7[49].

2. Principles of Interpretation

As mentioned above, GATT/WTO panels and the Appellate Body have interpreted the WTO Agreements in accordance with the principles contained in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties. In accordance with Article 31(1) of the Convention, "a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Convention also admits as an element for interpretation the "subsequent practice" by the parties to a treaty,[50] as well as certain "Supplementary Means of Interpretation".[51]

A corollary of these rules of interpretation, addressed in several GATT/WTO cases,[52] is the concept of "effective interpretation" (or *"l'effet utile"*), which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. Accordingly, whenever more than one interpretation is possible, preference should be given to the interpretation that will give full meaning and effect to other provisions of the same treaty.

The "effective interpretation" principle has been applied by the Supreme Court of Argentina in a case concerning the application of TRIPS Articles 70.7 and 70.8. The Court dismissed the plaintiff's request (which had been upheld by the lower court) of acquiring product patent rights based on a patent application originally filed in 1986 on the basis, *inter alia*, that Article 70.7 could not be interpreted in isolation from other TRIPS provisions, particularly Article 70.8 which established a regime with specific implications for pharmaceutical products (which were not patentable before the implementation of the TRIPS Agreement in Argentina)[53]

Panels and the Appellate Body have used the negotiating history of the TRIPS Agreement to confirm the literal interpretation of particular provisions. In *India—Patent*

[48] *See also* the Preamble of the TRIPS Agreement, first paragraph.

[49] *See* sub-section 3 below.

[50] The Appellate Body ruled in *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS 10/AB/R, and WT/DS11/AB/R 11 (1996), at p. 7: "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts . . . which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation."

[51] Article 32 of the Vienna Convention provides that:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscurè; or
> (b) leads to a result which is manifestly absurd or unreasonàble."

[52] *See*, e.g., Report of the Appellate Body, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (2000) at ¶ 88. *See also*Paolo Mengozzi, *The World Trade Organization Law: an Analysis of its First Practice*, in INTERNATIONAL TRADE LAW ON THE 50TH ANNIVERSARY OF THE MULTILATERAL TRADE SYSTEM 26(Paolo Mengozzi ed. 1999).

[53] Corte Suprema de Justicia, *Pfizer Inc. c/ Instituto Nacional de la Propiedad Industrial s/ denegatoria de patente*, May 21, 2002.

Protection for Pharmaceutical and Agricultural Chemical Products, for example, the panel used the negotiating history of the TRIPS Agreement to confirm its interpretation of Article 70.8:

> The findings above can be confirmed by the negotiating history of the TRIPS Agreement. We note that in the negotiation of the TRIPS Agreement the question of patent protection for pharmaceutical and agricultural chemicals products was a key issue, which was negotiated as part of a complex of related issues concerning the scope of the protection to be accorded to patents and some related rights and the timing of the economic impact of such protection. A critical part of the deal struck was that developing countries that did not provide product patent protection for pharmaceutical and agricultural chemicals were permitted to delay the introduction thereof for a period of ten years from the entry into force of the WTO Agreement. However, if they chose to do so, they were required to put in place a means by which patent applications for such inventions could be filed so as to allow the preservation of their novelty and priority for the purposes of determining their eligibility for protection by a patent after the expiry of the transitional period. In addition, they were required to provide also for exclusive marketing rights in respect of the products in question if those products obtained marketing approval during the transitional period, subject to a number of conditions.[54]

One interesting feature is that the negotiating history may include not only the negotiating history of the TRIPS Agreement as such but also the history of the Conventions that are specifically referred to by the TRIPS Agreement, such as the Paris Convention and the Berne Convention. Therefore, a negotiation that took place more than one hundred years ago, such as in the case of the Paris Convention, may be used as a supplementary means of interpretation of the TRIPS Agreement.

Thus in *Canada—Patent Protection for Pharmaceutical Products,* the Panel noted that in the framework of the TRIPS Agreement, which incorporates certain provisions of the major pre-existing international instruments on intellectual property, the context to which the Panel may have recourse for purposes of interpretation of specific TRIPS provisions is not restricted to the text, Preamble and Annexes of the TRIPS Agreement itself, but also includes the provisions of the international instruments on intellectual property incorporated into the TRIPS Agreement,[55] as well as any agreement between the parties relating to these agreements within the meaning of Article 31(2) of the Vienna Convention on the Law of Treaties. Also, in *United States—Section 110(5) of the U.S. Copyright Act*, the panel supported its interpretation by reference to the negotiating history of the Berne Convention that has become part of the TRIPS Agreement.[56]

In *United States—Section 211 Omnibus Appropriations Act of 1998 (Havana Club),* the panel had used the preparatory work of the Paris Convention (1967). The EC argued that such an invocation was erroneous under Article 32 of the Vienna Convention, since none of the conditions for the application of that rule were present in this case and the history of the Paris Convention failed to provide a clear indication of the intentions of

[54] *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, *supra* note 21, at ¶ 7.40. The panel also stated: "The observation above can be confirmed by the drafting history of the TRIPS Agreement. Exclusive marketing rights were a *quid pro quo* for the delay of the availability of product patents for pharmaceutical and agricultural chemical products until 1 January 2005, based on a careful balancing of obligations between interested parties during the Uruguay Round negotiations". *Id.* at ¶ 7.72.

[55] In that case, the panel considered the negotiating history of Article 9(2) of the Berne Convention, from which part of the text of Article 30 of the TRIPS Agreement was drawn. *See Canada—Patent Protection for Pharmaceutical Products, supra*note 23, at ¶¶ 7.70–72.

[56] *See United States—Section 110(5) of the U.S. Copyright Act*, *supra* note 24, at ¶ 6.18. The panel held that the "minor exceptions" doctrine—not formally incorporated either in Berne or in the TRIPS Agreement—was part of the "Berne *acquis"* (¶¶ 6.60–6.66)

the negotiators. The Appellate Body, however, relied on the negotiating history of the Paris Convention in order to confirm its own interpretation of Article 6quinquiesB of the Convention.[57]

This jurisprudence indicates a clear inclination by panels and the Appellate Body to firmly consider the obligations emanating from the IPR conventions incorporated in the TRIPS Agreement as forming part of the set of Members' obligations under the Agreement, as well as to have recourse to the negotiating history of the conventions to confirm their own interpretations. This approach may put an unexpected burden on developing countries, since many of them were not parties to the conventions at the time of the adoption of the Agreement, or were not familiar with developments with respect to the conventions. The full integration of the obligations imposed by the conventions may however in some cases support developing country claims, such as in the case of Article 5A of the Paris Convention, often quoted as a basis for permitting the granting of compulsory licenses for the lack or insufficient local working of a patented invention.[58]

There has so far been no formal recognition of state practice subsequent to the adoption of the Agreement as an element for interpretation of the TRIPS provisions. However, in *Canada—Patent Protection for Pharmaceutical Products,* the panel considered comparative law in order to determine whether the interest claimed as "legitimate" by the EC was a "widely recognized policy norm" (¶ 7.77).[59] As mentioned below (Part III.6), the panel also examined the status of the legislation at the time of the negotiation of the Agreement to determine the interpretation of one of the key concepts in Article 30. In *United States—Section 110(5) of the US Copyright Act*, the panel confirmed its conclusion with reference to examples of "state practice" of members of the Berne Union and WTO, but it warned that it "did not wish to express a view on whether these are sufficient to constitute 'subsequent practice' within the meaning of Article 31(3)(b) of the Vienna Convention"[60].

3. Object and Purpose of the Agreement

The panel report in *Canada—Patent Protection for Pharmaceutical Products* (involving the "Bolar" exception) was particularly important in clarifying the weight to be given to the "Objectives" (Article 7) and "Principles" (Article 8) of the Agreement in the interpretation of the Agreement's provisions. The panel stated that

> Article 30's very existence amounts to a recognition that the definition of patent rights contained in Article 28 would need certain adjustments. On the other hand, the three limiting conditions attached to Article 30 testify strongly that the negotiators of the Agreement did not intend Article 30 to bring about what would be equivalent to a renegotiation of the basic balance of the Agreement. Obviously, the exact scope of Article 30's authority will depend on the specific meaning given to its limiting conditions. The words of those conditions must be examined with particular care on this point. Both the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when doing so as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes[61].

[57] *See United States—Section 211 of the Omnimbus Appropriations Act of 1998*, *supra* note 25, at ¶¶ 145–146.

[58] *See TRIPS and Public Health*, *supra* note 14, at ¶ 31.

[59] The panel concluded that the extension of the term of patent protection in the case of pharmaceuticals to compensate for delays in obtaining marketing approval "has not been universal". *Canada—Patent Protection for Pharmaceutical Products*, ¶ 7.79.

[60] *See United States—Section 110(5) of the U.S. Copyright Act*, *supra* note 24, ¶ 6.55, n. 68.

[61] *See Canada—Patent Protection for Pharmaceutical Products*, *supra* note 23, ¶ 7.26.

Although the literal interpretation is the necessary starting point for an interpretation exercise under Article 31 (1) of the Vienna Convention, this provision refers to the application of contextual and teleological as well as literal methods. While some reports of the Appellate Body have stressed the importance of the literal interpretation, this cannot be seen as a total rejection of teleological interpretations. It is difficult to think of judgments that are absolutely neutral in terms of policy objectives.

There is no universally accepted philosophy on the role and objectives of IPRs, and there is still much debate on their impact on welfare, economic growth and equity.[62] The "purpose" of the Agreement may be differently understood depending on the perspective from which it is examined. Thus, while the goals of developed countries are presumably to provide maximum protection against infringement and to maximize royalty payments for their technologies, developing countries are looking for an application of the TRIPS Agreement that is as pro-competitive as possible, in order to enhance the affordability of protected products and to promote local development through the dissemination and transfer of technology.[63]

Panels may be tempted to introduce their own policy views on IPRs and the TRIPS Agreement. In *Canada—Patent Protection for Pharmaceutical Products*, despite the clear reference to Articles 7 and 8.1 noted above, the panel advanced its own conception of the "policy" of patent laws, relying on its understanding of the intent and practical effect of those laws rather than on the referenced provisions of the Agreement[64]. It stated:

> The normal practice of exploitation by patent owners, as with owners of any other intellectual property right, is to exclude all forms of competition that could detract significantly from the economic returns anticipated from a patent's grant of market exclusivity. . . Patent laws establish a carefully defined period of market exclusivity as an inducement to innovation, and the policy of those laws cannot be achieved unless patent owners are permitted to take effective advantage of that inducement once it has been defined.[65]

Though this statement—developed in the context of a discussion of the concept of "normal exploitation" of a patent—is too simplistic and does not provide a serious discussion of the justification and objectives of the patent system, it does hint at the panel's own view of a matter that raises considerable debate—especially among economists—and on which different positions and theories have been elaborated.[66] The panel's view, while emphasizing stimulation to innovation, failed to consider other equally essential objectives of the patent grants, thereby concluding with an interpretation of Article 30 that essentially reflects the perspective of patent owners. Like other IPRs, patents are granted in the public interest, and not merely to allow the patent owners to obtain the "economic returns anticipated from a patent's grant of market exclusivity". The diffusion

[62] *See, e.g.*, Christopher May, A Global Political Economy of Intellectual Property Rights—The New Enclosures? (2000) at 95–97.

[63] *See, e.g.*, *Communication From India*, IP/C/W/196, July 12 2000, at 1.

[64] *See, e.g*, Sara Williams, *Developing TRIPS Jurisprudence—The First Six Years and Beyond,* 4(2) The Journal of World Intellectual Property 191(2001). For a criticism of the panel's failure to take the wording of Article 7 into account and reducing the range of regulatory diversity permitted under the TRIPS Agreement, *see also* Robert Howse, *The Canadian Medicine Panel: A Dangerous Precedent in Dangerous Times*, Bridges: Between Trade and Sustainable Development, Year 4, No. 3, at 3.

[65] *Canada—Patent Protection for Pharmaceutical Products, supra* note 23, at ¶ 7.55.

[66] *See* Alan Gutterman, Innovation and competition policy: a comparative study of regulation of patent licensing and collaborative research & development in the United States and the European Community 36–70 (1999).

of knowledge and its continuous improvement are equally important objectives of the system.[67]

The interpretation of provisions affecting health-related issues, in particular, cannot be based on such a simplistic vision of the patent system as expressed by the panel, but, as required by the Doha Declaration, should be firmly grounded in the objectives and principles of the Agreement as stated in Articles 7 and 8[68]. Access to health is a major public policy concern, to the point that the right of everyone to the enjoyment of the highest attainable standard of physical and mental health is deemed to be a human right.[69] Moreover, on April 23, 2001, the United Nations Commission on Human Rights issued a resolution calling on governments to ensure the accessibility of pharmaceuticals and medical treatments used to treat pandemics such as HIV/AIDS, as well as "their affordability for all, " in accordance with international law and international agreements.[70] The resolution also calls on governments "to safeguard access to such preventive, curative or palliative pharmaceuticals or medical technologies from any limitations by third parties."[71]

If the commercial interests of the patent owner were the only ones to be considered, the interpretation of the Agreement would in practice defeat its intended objectives. Patents—like other intellectual property rights protected under the TRIPS Agreement—are means for the realization of the public interest via the "inducement to innovation" *and* access to the results thereof by those who need them. In other words, the objectives of the patent system would not be fulfilled if it served to benefit only those who control the innovations.[72]

The "purpose" of the Agreement is clearly stated in Article 7, which should be read jointly with Article 8.1. This is the guidance that panels and Appellate Body should apply. According to Article 7:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and *in a manner conducive to social and economic welfare, and to a balance of rights and obligations*[73]

An important development was the Appellate Body's unambiguous rejection of the panel's opinion in the *U.S. India Mailbox* case,[74] relating to the "reasonable expectations" of the parties. The panel had concluded that the complaining party—in this case the United States—had reasonable expectations that were not fulfilled by the Indian legislation, thus relying on the doctrine applied in the few non-violation cases decided under the GATT dispute resolution system.[75] The Appellate Body correctly reversed this aspect

[67] *See* P. Welfens, J. Addison, D. Audretsch, T. Gries, and H. Grupp, GLOBALIZATION, ECONOMIC GROWTH AND INNOVATION DYNAMICS 138 (1999).

[68] *See* ¶ 5 (a) of the Doha Declaration, *supra* note 11.

[69] *See* Article 12 of the International Covenant on Economic, Social and Cultural Rights.

[70] Resolution 2001/33 of the 57th Session of the United Nations Commission on Human Rights.

[71] *See also* the Doha Declaration, *supra*note 11, particularly ¶¶ 1 and 5(c).

[72] *See*, *e.g*., Frederick Abbott, *The TRIPS-Legality of Measures Taken to Address Public Health Crises: a Synopsis* 14 (paper presented at the MSF Working Group on IP and Access to Medicines, New Delhi, June 5–6, 2001). Abbott notes that, in relation to public health issues: "the TRIPS Agreement is not *only* about protecting pharmaceutical industry profits. It is also about the health of the global economy, and about the health of individuals*". Id.* at 32.

[73] Emphasis supplied.

[74] *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, supra* note 21.

[75] On the application of this doctrine, *see* Note by the WTO Secretariat, *Non-violation Complaints and the TRIPS Agreement,* IP/C/W/124, January 28, 1999. *See also* Chapter 29 of this book.

of the panel report, stating that the "reasonable expectations" of the Members were already contained in the TRIPS provisions, so that it was not the task of the panel or the Appellate Body to find other expectations outside the text of the Agreement itself:

> The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.[76]

It is important to note, finally, that Paragraph 5(a) of the Doha Declaration has unambiguously confirmed the importance of TRIPS Articles 7 and 8 in the interpretation of the Agreement, without overlooking the fact that other provisions of the Agreement, as well as the preambular provisions, also contribute to the determination of its object and purpose.

4. Interpreting Domestic Law

In *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*,[77] the panel and the Appellate Body were confronted with the issue of whether a panel could interpret national law in order to determine whether or not it was consistent with the TRIPS Agreement. The Appellate Body stated that there was simply no way for the Panel to make a determination without engaging in an examination of Indian law, and that the Panel was not interpreting Indian law "as such", but only for the purpose of determining whether India had met its obligations under the TRIPS Agreement:

> To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India's obligations under the WTO Agreement.[78]

Though the Appellate Body approach was correct, many questions arise in connection with the interpretation, not of a particular provision as such, but of that provision in the context of a particular legal system. For instance, what would be the situation in a case where, according to the legal system of a particular country, the TRIPS Agreement was deemed to be self-executing and binding on domestic courts, but the domestic law failed to adequately incorporate certain of the standards required by the Agreement? Since under Article 1 of the TRIPS Agreement, Members can determine for themselves the means of implementing their obligations, any inconsistency with the Agreement in such a situation would be *de jure* cured by the direct application of the Agreement. Therefore, the panel or Appellate Body should decide on the basis of how the legal system effectively operates, and not on the basis of an isolated provision. This consideration is particularly important for many Latin American countries, where international treaties are deemed self-executing and can be directly invoked by private parties. Thus, in cases where the national law is silent or inconsistent with the treaty obligations, a Member may still be

[76] *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, *supra* note 21 at ¶ 45.
[77] *Supra* note 21.
[78] *Id.* at ¶ 66. India was found in violation of the TRIPS Agreement because, according to the Appellate Body, there was no legal basis—procedural or substantive—under the Indian legislation for the grant of exclusive marketing rights when a product which is the subject of a patent application under Article 70.8 (commonly called a "mailbox" application) becomes eligible for protection under Article 70.9 of the TRIPS Agreement.

deemed to be in compliance with the TRIPS obligations if the courts can directly apply the treaty provisions[79], as already decided by some national courts[80].

5. Deference to National States

A very important question is the degree of deference given to national states in cases in which different interpretations of particular obligations are involved. As mentioned, the TRIPS Agreement contains a number of gaps and ambiguities and these were, in most cases, deliberate.

The basic question is the extent to which a panel or the Appellate Body can make a choice when a particular provision is subject to two or more permissible interpretations.[81] For example, the TRIPS Agreement requires Members to protect inventions, but does not define what an "invention" is. This definition differs quite significantly among different jurisdictions. Under U.S. law, for example, a microorganism that has merely been isolated and whose function has been identified is patentable, i.e., it may be treated as an "invention". This concept, however, is not shared by other countries. For instance, the legislation of Brazil only allows for the patenting of a genetically modified microorganism. If merely found in nature (even if isolated) it cannot be deemed an "invention", but only a "discovery". This means that subject matter (e.g. an isolated natural gene) that may eligible for protection under U.S. law would not be protectable in Brazil. Both interpretations are reasonable under patent law and admissible under the Agreement.

It would not be within the authority of the panel or the Appellate Body to decide in a case like this which of these permissible and reasonable interpretations is the "correct" one under TRIPS. As stated in *Canada—Patent Protection for Pharmaceutical Products*, they should not "decide, through adjudication, a normative policy issue that is still obviously a matter of unresolved political debate".[82] More generally, panels and the Appellate Body may not fill in the gaps or cure the ambiguities of the Agreement. Their only competence is to "clarify the existing provisions, " and "[r]ecommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements".[83]

6. Contemporaneity

Another question relates to the weight that may be given in future cases to changes in intellectual property law, which continues to evolve, in particular to adapt to new

[79] According to the doctrine of "consistent interpretation", where national law permits different interpretations, the one in accordance with the treaty obligations is to be applied. *See,* e.g, THOMAS COTTIER, *The Impact of the TRIPS Agreement on Private Practice and Litigation*, in DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION (James Cameron and Karen Campbell eds.1999), at 124.

[80] See, for instance, the decisions of the Argentine Supreme Court of Justice in *Unilever NV c/Instituto Nacional de la propiedad Industrial s/denegatoria de patente* of 24 October 2000, and *Dr. Karl Thomae Gesellscaht mit Beschränker Haftung c/Instituto Nacional de la propiedad Industrial s/denegatoria de patente* of 13 February 2001.

[81] The WTO Dispute Resolution Understanding does not specify a standard of review as such, but merely directs panels to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. . . ." (DSU Article 11). The only specific "standard of review" provision in a WTO agreement is Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping). *See* Chapter 11 of this book.

[82] *See Canada—Patent Protection for Pharmaceutical Products*, *supra* note 23 at ¶ 7.82.

[83] Article 3.2 of the DSU.

technological developments such as digital technology[84]. Would the panels and Appellate Body be authorized to apply an evolutionary interpretation of TRIPS rules in the light of such developments? If so, there is a risk that higher standards of protection adopted in response to demands from industries from developed countries become part of the interpretive framework for the TRIPS Agreement.

Article 71 of the TRIPS Agreement specifically provides for the TRIPS Council to review the Agreement "in the light of any relevant new developments, which might warrant modification or amendment of this Agreement". This makes clear that amendments or adaptations cannot be made via interpretation. The panels and Appellate Body should confine themselves to the meaning of the terms as understood at the time of their adoption.[85]

In *Canada—Patent Protection for Pharmaceutical Products,* the panel examined the status of the legislation *at the time of the negotiation* of the Agreement to determine the concept of "legitimate interest" as contained in Article 30. In the panel's opinion, on balance:

> the interest claimed on behalf of patent owners whose effective period of market exclusivity had been reduced by delays in marketing approval was neither so compelling nor so widely recognized that it could be regarded as a "legitimate interest" within the meaning of Article 30 of the TRIPS Agreement, notwithstanding the number of governments that had responded positively to that claims. Moreover, the Panel believed that it was significant that concerns about regulatory review exceptions in general, although well known at the time of the TRIPS negotiations, were apparently not clear enough, or compelling enough, to make their way explicitly into the recorded agenda of the TRIPS negotiation. The Panel believed that Article 30's "legitimate interests" concept should not be used to decide, through adjudication, a normative policy issue that is still obviously a matter of unresolved political debate.[86]

However, in the report in the *United States—Section 110(5) of the US Copyright Act* case, the panel stated that the WIPO Copyright Treaty of 1996 should be viewed as "relevant to seek contextual guidance . . . when developing interpretations that avoid conflicts within the overall multilateral copyright framework. . . "[87]. Although the panel cautioned that the statement concerning WCT Article 10 adopted by the signatory parties did not fall under the Vienna Convention rules on a subsequent treaty on the same matter or subsequent practice[88], the recourse to a post-TRIPS treaty—not even in force—constitutes a troubling precedent[89] as long as it may lead to interpretations of the TRIPS Agreement well beyond its own boundaries.

[84] For instance, in 1996, very shortly after the adoption of the TRIPS Agreement, two new treaties were adopted by the World Intellectual Property Organization ("WIPO") relating to copyright and related rights: the WIPO Performances and Phonograms Treaty ("WPPT"), December 20, 1996 and The WIPO Copyright Treaty ("WCT"), December 20, 1996.

[85] However, the Appellate Body has held that certain terms in the WTO Agreements are not "static" but evolutionary (in relation to the term "exhaustible natural resources" as it appears in GATT Article XX(g), adopted more than fifty years ago). Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998), at ¶¶ 127, 130.

[86] *Canada—Patent Protection for Pharmaceutical Products*, *supra* note 23, at ¶ 7.82. This approach is consistent with the general principle of treaty interpretation requiring that the meaning of the terms of a treaty be considered at the time of its signature. On the importance of the principle of "contemporaneity" in treaty interpretation, *see* Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 627(1998).

[87] *United States—Section 110(5) of the U.S. Copyright Act*, *supra* note 24, at ¶ 6.70.

[88] *Id*. ¶ 6.69.

[89] According to Sara Williams, this was one of the panel's "most adventurous remarks" and "an aberration from the Panel's otherwise constructionist approach", *supra* note 64, at 203.

7. Mandatory vs. Discretionary Provisions

Another important issue relating to the interpretation of the TRIPS Agreement relates to the mandatory or discretionary nature of a disputed national rule. Based on GATT/WTO jurisprudence a panel or the Appellate Body would generally conclude that a law or regulation violates a WTO provision "as such" if it *mandates* WTO-inconsistent behavior. If, instead, the government or the court has the *discretionary* power to apply such law or regulation in a TRIPS-consistent manner, no violation would be found.

This interpretive principle was invoked by the United States and applied by the panel in *United States—Section 301–310 of the Trade Act of 1974*.[90] The EC and their Member States had complained about the application of several sections of the U.S. law that authorized the U.S. Government to retaliate against countries which, *inter alia*, did not provide an adequate level of IPR protection. According to one commentator:

> Without overruling the general principle of the mandatory-discretionary distinction, the panel found that U.S. Section 301 mandated U.S.T.R. to make a critical determination as to the WTO-consistency of the acts of other WTO members prior (in some cases) to the completion of a decision by the WTO Dispute Settlement Body. Even though U.S.T.R. was not bound to make an adverse determination, the fact that the determination needed to be made was inconsistent with the terms of the WTO DSU.[91]

However, the panel did not find the United States in violation of the WTO rules based on an assurance given by the U.S. Government that the relevant provisions of Section 301 would be administered consistently with the WTO DSU. This commitment was considered by the panel as a sufficient basis on which to find that there had not been a violation of WTO rules.

III. Some Contentious Issues

The TRIPS Agreement only incorporates *minimum standards* for the protection of intellectual property; and constitutes neither a uniform law nor an exhaustive codification of IPR law. It deals with *some* issues relating to intellectual property, but leaves out many others on which it was not possible to reach consensus or which were deemed inappropriate for standardization.[92] In addition to these deliberate "gaps", there are many ambiguities in the text that were the result of difficult compromises reached during the negotiations. These gaps and ambiguities mean that Members have been left a certain amount of room for maneuver at the national level which should not be limited by interpretations that may eventually be provided by panels or the Appellate Body.[93]

Maintaining the flexibility allowed by the TRIPS Agreement is an important objective for developing countries. Thus, in relation to health issues, the African Group and other developing countries have indicated that:

> Some provisions of the TRIPS Agreement may elicit different interpretations. The room for maneuver left serves the purpose of accommodating different positions held by Members

[90] Report of the WTO Panel, *United States—Section 301–310 of the Trade Act of 1974*, WT/DS152/R (2000), ¶¶ 7.51–.54 and n. 675.

[91] Abbott, *supra* note 72, at 13.

[92] For example, in the area of patents, the issue of the "first to file" or "first to invent" principle was not resolved; the national treatment principle does not apply to the distribution of levies on blank tapes as applied in European and other countries; there is no protection for program-carrying satellite signals as well as for utility models (granted in some countries to protect incremental innovations, mainly in the mechanical field); and there are no specific standards for the protection of plant varieties.

[93] John H. Jackson, THE JURISPRUDENCE OF GATT AND THE WTO 184, 186 (2000).

> at the time of negotiations of the Agreement. We strongly believe that nothing in the TRIPS Agreement reduces the range of options available to Governments to promote and protect public health, as well as other overarching public policy objectives.[94]

The EU and its Members States have also accepted the existence of such flexibility:

> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which emerged from the Uruguay Round negotiations has, however, sometimes been criticized as limiting policy options in relation to public health concerns. In the view of the EC and their member States, the Agreement's objectives, principles and purpose (set out in Articles 7 and 8), special transitional arrangements and other provisions give these countries a sufficiently wide margin of discretion in implementing it. This margin enables them to set up an intellectual property regime that meets their policy needs and is capable of responding to public health concerns.[95]

The extent of the flexibility allowed by the Agreement will ultimately depend upon the interpretation given to particular provisions by panels and the Appellate Body, which are expressly prohibited by DSU Article 3.2 from adding rights and obligations when adjudicating disputes. However, "the line between interpretation and providing clearer parameters of the rights and obligations of Members under these agreements is often very fine."[96]

The following discussion examines more in detail three of the areas where such flexibility is crucial for developing countries. The Doha Declaration has confirmed that flexibility in relation to two of them (compulsory licenses and parallel imports), while it has clarified the interpretation principles to be applied in relation to other areas[97].

A. Exceptions

1. GATT Jurisprudence

The GATT 1947 provides for various circumstances under which the Members may ignore their general obligations under the GATT.[98] Article XX specifically provides for exceptions to GATT/WTO obligations, including national treatment.[99]

In *United States—Standards for Reformulated and Conventional Gasoline*[100] —the first case to be considered by the WTO Appellate Body ("AB")—the panel had accepted that a policy to reduce air pollution was consistent with measures for the protection of human, animal or plant life or health. It did not accept, however, that the measures in question were "necessary", because there were measures available to the United States—for instance a single statutory baseline covering both domestic and foreign refiners or a

[94] *TRIPS and Public Health, supra* note 14 at 3.

[95] *The Relationship Between the Provisions of the TRIPS Agreement and Public Medicine*, *supra* note 14 at 2.

[96] Gabrielle Marceau and Peter Pedersen, *Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non-governmental Organizations and Civil Society's Claims for more Transparency and Public Participation*, 33 (1) JOURNAL OF WORLD TRADE 33 (1999).

[97] *See* Part V below.

[98] Correa, *supra* note 41, at 91.

[99] John Jackson, THE WORLD TRADING SYSTEM—LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 23 (1999)

[100] *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS4, April 12, 1995. The case involved gasoline programs established by the United States under the auspices of the Clean Air Act, which provided that in specific high pollution areas as measured by ozone concentration, only "clean" reformulated gasoline could be sold, which meant that it had to be blended with ethanol. An interim standard was allowed over a five-year period, which was calculated using a formula for U.S. producers that began with

more detailed examination of the production of foreign refiners—that would be consistent (or at least less inconsistent) with the GATT, and that would have achieved the same objective.

In reviewing the panel decision, the AB stated that the exceptions listed in Article XX "relate to all of the obligations under the General Agreement", and not only the national treatment and the most-favored-nation clause[101]. The AB held that any Article XX analysis is two-tiered. The first question is whether the measure is provisionally justified under the specific exception invoked; if the answer to this question is affirmative, the same measure must be further appraised under the introductory clauses (or "chapeau") of Article XX.[102] The AB accordingly stated that:

> The purpose and object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions of (what was later to become) Article XX. This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement.[103]

The AB added that the burden of demonstrating that a measure falling within one of the specific Article XX exceptions does not constitute abuse under the chapeau in its application rests on the party invoking the exception.[104]

Article XX of GATT has been interpreted narrowly[105], even in the context of public health issues. For instance, in the *Thai Cigarette case,*[106] decided under the GATT dispute resolution system, the panel applied the "less trade restrictive"[107] test and held that other measures (not simply banning the imports of cigarettes, as the Thai government had done) that were less incompatible with the GATT were available to achieve the intended public health objectives.

This extreme interpretation of exceptions has been somewhat qualified by the doctrine established in the *EC Measures Concerning Meat and Meat Products (Hormones)* case, in which the Appellate Body held that

> "merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of the provisions than would be warranted by

a company-specific 1990 baseline and would reduce the amount of olefines yearly on a percentage basis. Foreign producers, however, were required to use a statutory baseline rather than their own 1990 baseline, which often imposed a stricter burden on them. Venezuela and Brazil filed complaints claiming that the regulation violated Article III of the GATT.

[101] Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WR/DS2/AB/R (1996) ("*United States—Gasoline")*, at p. 24.

[102] The chapeau language had received little consideration in earlier GATT cases falling under Article XX. The new significance attributed to this language may make it more difficult for a Member to justify a trade restrictive measure than under previous jurisprudence.

[103] *United States—Gasoline, supra* note 101, at p. 22.

[104] *See also,* Edwin Vermulst, Petros Mavroidis, and Paul Waer, *The Functioning of the Appellate Body after Four Years—Towards Rule Integrity*, 3(2) JOURNAL OF WORLD TRADE 22 (1999).

[105] *See, e.g*., Ernst-Ulrich Petersmann, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM—INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 100 (1998); Michael Trebilcock and Robert Howse, THE REGULATION OF INTERNATIONAL TRADE 135–165 (1999); Correa, *supra* note 41 at 92–96.

[106] *See* Report of the Panel (adopted), *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes* (DS 10/R), BISD 37th Supp. 200 (1990).

[107] The panel applied the interpretation of "necessary" as developed in *United States—Section 337 of the Tariff Act of 1930* (adopted), BISD 36th Supp. 393 (1989), ¶ 5.26, in relation to Article XX(d) of GATT.

> examination of the ordinary meaning of the actual treaty words, viewed in context and in light of the treaty's object and purpose..."[108]

This clarification may contribute to rectify the trend towards narrow interpretation emerging from previous jurisprudence[109], thereby facilitating the adoption by Members of measures required to protect public health or the environment that do not comply with some of the basic GATT/WTO obligations.

2. The TRIPS Agreement

Article 8.1 of the TRIPS Agreement provides that:

> Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Some developing countries, notably India, have expressed concerns about the implications of the phrase "provided that such measures are consistent with the provisions of the TRIPS Agreement", since it might be interpreted as not allowing any derogation from the obligations of the Agreement'. If this were the case, public interest factors (including human health) would receive less protection under the TRIPS Agreement than under GATT, SPS or TBT.[110] In order to be meaningful at all, the consistency test of Article 8.1 should be assessed in the light of Article 7 which defines the "Objectives" of the Agreement and of the Preamble, i.e., taking social and economic welfare into account. In particular, nothing in the TRIPS Agreement should be read as preventing Members from adopting measures to protect public health, as well as from pursuing the overarching policies defined in Article 8.[111]

The "consistency" requirement may permit, for example, patentability exclusions in cases of distinct public health emergencies as defined by the national government, and as distinct from ordinary or everyday health and nutrition measures.[112] Emergency cases could trigger the application of a different test of "inconsistency" (as provided for under Article 8.1) or qualify as a situation not "conducive to social and economic welfare" (as provided for under Article 7). In such a case, a suspension or exclusion

[108] Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (1998), ¶ 104.

[109] In *European Communities-Measures Affecting Asbestos and Products Containing Asbestos,* WT/DS135/AB/R (2001), a trade restriction based on Article XX (b) was upheld, but it is debatable whether this ruling may be read as relaxing the "necessity test" as previously developed in GATT/WTO jurisprudence.

[110] In the case of the SPS Agreement, Members have the right to take measures they deem appropriate to protect human, animal or plant life or health, but must ensure that they are "not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility" (Article 5.6). The Preamble of the TBT Agreement recognizes that "no country should be prevented from taking measures necessary . . . for the protection of human, animal or plant life or health . . . ". Article 2.2 allows to authorities to consider, in assessing the risks ". . . available scientific and technical information, related processing technology or intended end-uses of products". In the case of a dispute, the complaining country may have to provide *prima facie* evidence that there is an unnecessary obstacle to trade, and the defending country may have to give evidence that the adopted standard is not more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks that non-fulfillment would create (Article 2 of the TBT Agreement).

[111] *See*, *e.g*., the position of the developing countries in *TRIPS and Public Health, supra* note 14 at 5.

[112] Carlos M. Correa, *Integrating Public Health Concerns into Patent Legislation in Developing Countries*13 (2000), available at http://www.southcentre.org/publications/publichealth/publichealth.pdf.

from patentability[113] might be linked to and justified by a specific emergency. Once the emergency subsides, the TRIPS requirement of patentability could be restored.

The Doha Declaration established in paragraph 5 (b) that

> "Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency".

This paragraph confirms what is an unquestionable right of Members States: the right to determine "what constitutes a national emergency or other circumstances of extreme urgency". Such determination may be relevant for the establishment of exceptions under Article 30, the granting of compulsory licenses, or the adoption of other measures permitted under Article 8.1 of the Agreement[114].

This provision is important for three reasons. *First*, it clarifies that "public health crises" can represent "a national emergency or other circumstances of extreme urgency", thereby allowing for the granting of compulsory licenses when provided for under national law and, pursuant to TRIPS Article 31 (b), without the obligation for prior negotiation with the patent owner.

Second, the reference to "HIV/AIDS, tuberculosis, malaria and other epidemics" indicates that an "emergency" may be not only a short-term problem, but a long lasting situation, as is the case with the epidemics specifically mentioned for illustrative purposes. This recognition may be deemed an important achievement for developing countries in the Doha Declaration, since it implies that specific measures to deal with an emergency may be adopted and maintained as long as the underlying situation persists, without temporal constraints.

Third, if a Member complains about the qualification of a specific situation by another Member as a "national emergency or other circumstances of extreme urgency", the language of paragraph 5 (c) places the burden on the complaining Member to prove that such emergency or urgency does *not* exist. This represents an important difference with respect to earlier GATT/WTO jurisprudence outside of the TRIPS context that, under the "necessity test", put the burden of proof on the Member invoking an exception to its obligations[115].

A key consideration is clearly the purpose for which any subject-matter exclusion was to be adopted and the proportionality of the adopted measure. If, for example, the same objective could be obtained by imposing permissible compulsory licenses under TRIPS

[113] It is debatable whether an exception to patentability may be justified under the general GATT exception to trade disciplines, when the exception is necessary to protect human health. Article XX(b) has been interpreted and applied rather narrowly in GATT/WTO case law. In addition, it is doubtful whether GATT Article XX(b) would apply in the TRIPS context, since the TRIPS Agreement constitutes the *lex specialis* in the WTO system to deal with intellectual property issues. *See India—Patent Protection for Agricultural and Chemical Products*, *supra* note 21, at ¶ 7.19.

[114] In May 2002, the Minister of Justice, Legal and Parliamentary Affairs of Zimbabwe issued a Declaration of Period of Emergency (HIV/AIDS Notice, 2002). In view of the rapid spread of HIV/AIDS among the population of Zimbabwe, the Minister declared "an emergency for a period of six months, with effect from the date of promulgation of this notice, for the purpose of enabling the State or a person authorized by the Minister under Section 34 of the Act (a) to make or use any patented drug, including any antiretroviral drug, used in the treatment of persons suffering from HIV/AIDS or HIV/AIDS related conditions; (b) to import any generic drug used in the treatment of persons suffering from HIV/AIDS or HIV/AIDS-related conditions". A Declaration of Sanitary Emergency—until 31 December 2002—was also issued by the Executive Power of Argentina (Decree 486, 12 March, 2002), but it does not make explicit reference to patent law provisions.

[115] *See* Correa, *supra* note 41, at 96.

Article 31, an exclusion of patentability could be seen as an attempt to circumvent the preconditions of Article 31, in contradiction with the last sentence of Article 8.1. If, instead, local situations posed such unusual problems as to merit a public interest exception, these problems might also justify overriding or limiting other Articles, such as Article 31, in favor of some non-permanent exclusion of subject matter, if that exclusion was necessary to solving the problem.

Another important issue is the extent of the exceptions to exclusive rights allowed under the TRIPS Agreement. The panel in *Canada—Patent Protection for Pharmaceutical Products*[116] took a narrow approach to this issue in relation to Article 30 (exceptions to patent exclusive rights). It made a detailed analysis of some of the elements in Article 30 and held that the exceptions must be read narrowly. It failed to adequately consider the principles and objectives of the Agreement as set forth in Articles 7 and 8, thereby arriving to an interpretation that disregarded the broad economic and social interests that patents are intended to serve. As noted by Howse, in making such analysis the panel ignored the provision of Article 7 "about balance and mutual advantage, interpreting the patent provisions of the TRIPS Agreement primarily from the perspective of intellectual property rights holders, largely dismissing competing social interests, and reducing considerably the range of regulatory diversity permitted under TRIPS"[117].

A similar line was followed in *United States—Section 110(5) of the US Copyright Act* case, where Article 13 of the Agreement was examined. The panel reasoned that whether a limitation or exception conflicts with the normal exploitation of a copyrighted work is to be judged for each exclusive right separately[118], that the "legitimate interests of the right holder" were not necessarily limited to the economic value of exclusive rights, and that an "unreasonable" prejudice to such interests existed when an exception caused or had the potential to cause an unreasonable loss of income to the copyright owner[119]. Again the panel missed an opportunity to introduce a more balanced approach in its reasoning as required by the terms of Article 7 of the TRIPS Agreement, and limited its superficial analysis on the "crucial question" of unreasonable prejudice to the economic impact of the exception on right-holders' profit, without any consideration to the possible impact on consumers or the society as a whole[120].

B. Compulsory Licenses for Non-Working of the Invention

Many national laws require that the compulsory licensee undertake the *production* of the patented invention in the country where the license is to be granted. However, not all developing countries possess either the entrepreneurial and technical capabilities necessary to permit the local production of inventions or the markets large enough to justify it.

Nothing in the TRIPS Agreement prevents a Member from establishing that a compulsory license be worked through importation rather than local production. However, it may not be possible to find independent foreign sources for the importation of a protected product other than the patent owner or its voluntary licensees, meaning that a compulsory license would be *de facto* impracticable. The only alternative source of supply might be another compulsory licensee for the same patent in a foreign country, but this approach

[116] *Supra* note 23, at ¶ 4.37.
[117] Howse, *supra* note 64, at 3.
[118] *United States—Section 110(5) of the US Copyright Act, supra* note 24, at ¶¶ 6.173 and 6.174.
[119] *Id.* at ¶ 6.229.
[120] *Id.* and n. 205.

also has a limitation: a compulsory license must be granted, in accordance with Article 31(f) of the TRIPS Agreement, to supply "predominantly" the domestic market.

The European Commission has pointed to another possible interpretation of the Agreement that would allow a Member to issue a compulsory license to a manufacturer in another country, provided that the government of that other country recognized the license (which it would not be obliged to do under the Agreement), and provided that all the goods manufactured under the license were exported to the country granting the license.[121] It is, however, far from certain whether such a reading of the Agreement would withstand scrutiny by a panel or the Appellate Body.

This suggestion seems to ignore the basic principle of independence of patents, as enshrined in Article 4*bis* of the Paris Convention. In the ultimate case, the validity of the proposed scheme would depend on the national law of the exporting country, which may exempt under Article 30 of the Agreement the exploitation of an invention solely for export purposes. In this case, there would be no need to grant a compulsory license in the exporting country.

If exports were made under a compulsory license, the importation may also be deemed covered under the "exhaustion principle". If so, it would not be necessary to issue a compulsory license in the importing country (since "parallel imports" would be legitimate). As discussed below, however, the application of the exhaustion principle when the product has been commercialized in a foreign country without the *consent* of the patent owner is controversial, and would need to be clarified by a ruling under the DSU, or an authoritative interpretation by the TRIPS Council.

Another very controversial issue has been the extent to which a compulsory license may be granted based on the failure to work a patent. The obligation to "work" a patent—understood as the local manufacture of the patented product or use of the patented process—was established in the United Kingdom in the Sixteenth Century, and was incorporated in many national laws during the Nineteenth and Twentieth Centuries.[122]

The U.S. government and some commentators have argued that the mere importation of a patented product (or of a product made with a patented process) constitutes the "working" of a patent.[123] They have also argued that Article 27.1 of the Agreement effectively outlaws compulsory licenses based on non-working of the invention, since that would constitute discrimination between imported and locally manufactured products. This is not the view, however, that prevails among developing country Members of the WTO,[124] nor is it reflected in the national laws of many Members who have adopted local working obligations.[125] The Uruguay Round records also reveal that during the

[121] *The Relationship Between the Provisions of the TRIPS Agreement and Access to Medicines*, *supra* note 14, at ¶ 13.

[122] Edith Penrose, La economía del sistema internacional de patentes 131 (1974); Carlos Correa and Salvador Bergel, Patentes y competencia 59 (1996).

[123] Michael Halewood, *Regulating Patent Holders: Local Working Requirements and Compulsory Licences at International Law*, 35 (2) Osgoode Hall Law Journal 243 (1997).

[124] *See TRIPS and Public Health*, *supra* note 14, at 7–8.

[125] A draft review of comparative law conducted by Oxfam found working obligations in the patent laws and regulations of Indonesia and Cuba (similar to Brazil); Ghana, Ireland, South Africa, Sudan and Zimbabwe (based on former United Kingdom laws); Greece and Lesotho (compulsory licensing linked to local working); Turkey, Spain and Portugal (certificate of working required); Sweden, Norway, Finland and Iceland (local working tied to reciprocity); India; Israel; Zaire; Thailand; Pakistan; Liberia. Oxfam, *Local Working Requirements and the TRIPS Agreement: Using Patent Law as a Means of Ensuring Affordable Access to Essential Medicines. A Case Study from the U.S.-Brazil Dispute (draft)* (2001), available at http://www.field.org.uk/papers/pdf/twrta.pdf.

negotiations several developing countries argued for the right to impose working requirements.[126] It would be an incorrect interpretation of the negotiating history of the TRIPS Agreement to consider that those countries withdrew their position when they accepted the ambiguous text adopted in Article 27.1 of the Agreement.

As mentioned in Part III.A above, the United States initiated a case against Brazil arguing that Article 68 of the Brazilian patent law[127] was inconsistent with the TRIPS Agreement. That provision authorizes the government to grant a compulsory license if the patent owner fails to work the subject matter of the patent in Brazil. A critical issue in addressing the consistency or not of working obligations is whether the non-discrimination clause in TRIPS Article 27.1 governs Article 31 (conditions for the granting of compulsory licenses). Developing countries have expressed the concern that Article 27.1 may be read in a way that restricts the use of compulsory licenses, for instance, on the grounds of non-working. The non-discrimination clause may be also used to challenge compulsory licenses specifically dealing with certain sectors, such as pharmaceuticals. Developing countries have argued in this respect that:

> As regards the relationship of the provisions related to compulsory licenses with Articles 27.1 and 28 of TRIPS, we believe that both set of provisions address different matters and circumstances. In no way do Articles 27.1 and 28 limit the right of Members to issue compulsory licenses[128].

The "patent rights" referred to in Article 27.1 are defined in Article 28.1, which only requires the granting of *negative* rights with regard to the exploitation of the invention, that is, the right to prevent third parties from using (without authorization) the patented invention. According to Article 28.1:

[126] *See, e.g.*, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, *Meeting Of Negotiating Group Of 2, 4 and 5 April 1990,* Note by the Secretariat MTN.GNG/NG11/20, April 24, 1990, ¶ 34; Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, *Existence, Scope And Form Of Generally Internationally accepted And Applied Standards/Norms For The Protection Of Intellectual Property,* Note Prepared by the International Bureau of WIPO, MTN.GNG/NG11/W/24, May 5, 1988, p. 2; Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, *Meeting Of Negotiating Group Of 11, 12 And 14 December 1989*, Note by the Secretariat, MTN.GNG/NG11/17, January 23, 1990, ¶ 41; Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, *Meeting Of Negotiating Group Of 11–12 May 1989,* Note by the Secretariat, MTN.GNG/NG11/12, June 13, 1989, ¶ 5; Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, Meeting *Of Negotiating Group Of 11–12 May 1989*, Note by the Secretariat, MTN.GNG/NG11/12, June 13, 1989, ¶ 36; Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, *Meeting Of Negotiating Group Of 30 October—2 November 1989*, Note by the Secretariat, MTN.GNG/NG11/16, December 4, 1989, ¶ 24; Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, *Meeting Of Negotiating Group Of 12–14 July 1989,* Note by the Secretariat, MTN.GNG/NG11/14, September 12, 1989, ¶¶ 75, 83.

[127] Article 68 (1) of the Brazilian Industrial Property Code (Law 9.279) provides as follows:

> Art. 68. A patent shall be subject to compulsory licensing if the owner exercises his rights therein in an abusive manner or if he uses it to abuse economic power under the terms of an administrative or judicial decision.
>
> (1) The following may also be grounds for compulsory licensing:
>
> I. Failure to work the subject matter of a patent on the territory of Brazil, failure to manufacture or failure to completely use a patented process, except for failure to work due to the lack of economic viability, in which case importing shall be admitted; or
>
> II. Marketing that does not satisfy the needs of the market.

[128] *TRIPS and Public Health*, *supra* note 14, at 8.

A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing 6 for these purposes that product;
(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

An interpretation of Article 27.1 read in conjunction with Article 28.1, based on the rules of the Vienna Convention, suggests that the products mentioned in Article 27.1 are *infringing* products, not the products of the patent owner itself, since patents only confer exclusionary rights in relation to the former. In other words, Article 27.1 forbids discrimination between *infringing* imported and *infringing* locally-made products, but it does not prevent the establishment of differential obligations with regard to non-infringing imported and locally-made products (i.e., products made or imported by the patent owner or with his/her consent).

The non-discrimination clause of Article 27.1 may apply, for instance, to a case in which the rights enjoyed by patent owners who import legitimate products are different (substantially or procedurally) from the rights of patent owners who domestically manufacture them. For instance, Section 337 of the U.S. Tariff Act was found inconsistent with the GATT in *United States—Section 337 of the Tariff Act of 1930*,[129] since it accorded less favorable treatment to imported products challenged as infringing U.S. patents than the treatment accorded to similarly challenged products of United States origin.[130]

It should also be noted that Article 5(A)(2) of the Paris Convention provides that each party to the Convention "shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, *failure to work*." (Emphasis supplied). Article 8..1 of the TRIPS Agreement expressly contemplates that Members may adopt necessary measures "consistent with" the Agreement to address "the public interest in sectors of vital importance". Would it be possible to establish specific types of compulsory licenses for, e.g., pharmaceuticals or products needed to remedy environmental damages? In *Canada—Patent Protection for Pharmaceutical Products* the panel held that Articles 30 (exceptions) and 31 (compulsory licenses) of the TRIPS Agreement were subject to Article 27.1 of the Agreement.[131] However, the factual and legal basis for this finding are unconvincing, since it would seem logical to limit certain exceptions or modalities of compulsory licenses to certain fields of technology, rather than being forced to apply them to fields where such measures are not required.

[129] *Supra,* note 107.
[130] The USA "hesitantly effected an amendment of Sec. 337 in 1994 in order to improve the position of foreign respondents, but left the substance of the proceedings unchanged". Maximilian Haedicke, *U.S. Imports, TRIPS and Section 337 of the Tariff Act of 1930*, 31 (7/8) INTERNATIONAL REVIEW OF INDUSTRIAL PROPERTY AND COPYRIGHT LAW 1774 (2000). Although the express maximum time limits of twelve and eighteen months were abolished, the Section 337 proceedings still needed to be concluded by the International Trade Commission (ITC) "at the earliest practicable time", and within 45 days after the initiation of the proceedings the ITC had to establish a target date for its final determination. If the complainant requested an exclusion order during the investigation, a determination with regard to that petition had to be made within the relatively short period of ninety days.
[131] *Canada—Patent Protection for Pharmaceutical Products, supra,* note 23.

The panel in fact clarified that the conduct prohibited by Article 27.1 is "discrimination" as to the field of technology, that "discrimination" is not the same as "differentiation", and that WTO members can adopt different rules for particular product areas, provided that the differences are adopted for *bona fide* purposes. The panel held that:

> Article 27 prohibits only discrimination as to the place of invention, the field of technology, and whether products are imported or produced locally. Article 27 does not prohibit *bona fide* exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than frustration of purpose.[132]

The Doha Declaration seems to confirm that differentiation in intellectual property rules may be legitimate in the WTO system. It singles out public health and, in particular, pharmaceuticals (paragraphs 6 and 7), as an issue needing special attention in TRIPS implementation.

France provides one example of a patent law that differentiates the treatment of pharmaceutical products on public health grounds. The French patent law provides that:

> Where the interest of public health demand, patents granted for medicines or for processes for obtaining medicines, for products necessary in obtaining such medicines or for processes for manufacturing such products may be subject to*ex officio* licenses in accordance with Article L. 613–17 in the event of such medicines being made available to the public in insufficient quantity or quality or at [abnormally high prices] by order of the Minister responsible for industrial property at the request of the Minister responsible for health.[133]

Finally, it is pertinent to recall that the Preamble to the TRIPS Agreement, as well as Articles 7 and 8, make it clear that one of the important objectives of the Agreement is to promote technology transfer, which may be ensured in some circumstances by means of compulsory licenses for nonworking.

C. Parallel Imports

Parallel imports involve the importation and resale in a country, without the consent of the patent holder, of a patented product that was put on the market of the exporting country by the title holder or in another legitimate manner. The underlying principle on which parallel imports are allowed is that since the inventor has been rewarded through the first sale or distribution of the product, he has no right to control the further use or resale of goods put on the market. In other words, the inventor's rights have been "exhausted".[134]

Members choose whether or not to allow for parallel imports. Allowing for such imports permits any person in its territory to purchase products protected under IPRs in the exporting or importing country, wherever such products are cheaper. In particular cases, such as in the case of health-related products, allowing for parallel imports might be an important public health policy.

[132] *Id.*at ¶ 7.92.

[133] 1 Loi No. 92–597, Code de la Propriété Intellectuelle (Law No. 92–597) of 1 July, 1992, Article L. 613–16).

[134] The doctrine of "exhaustion of rights" may be applied at the national level (rights are deemed exhausted domestically and commercialization in foreign countries is not deemed to have exhausted the patentee's rights), at the regional level (exhaustion is deemed to have occurred if commercialization took place in a country member of a regional agreement), as in the case of the EC, or at the international level. The discussion in the text refers to this latter case.

Despite some dissenting views,[135] it seems clear that parallel imports, based on the principle of exhaustion of rights, are allowed under the TRIPS Agreement. According to Article 6:

> For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

In the submission to the Council for TRIPS referred to above, a number of developing countries stated that:

> Article 6 of the TRIPS Agreement is extremely relevant for Members, especially developing countries, and particularly the least developed and smaller economies among them. Article 6 provides that Members are free to incorporate the principle of international exhaustion of rights in national legislation. Consequently, any Member can determine the extent to which the principle of exhaustion of rights is applied in its own jurisdiction, without breaching any obligation under the TRIPS Agreement.[136]

A similar interpretation was given by the Swiss Federal Supreme Court in *Kodak v. Jumbo-Markt,*[137] where the Court persuasively argued that:

> Pursuant to Art. 28 of the TRIPS Agreement, the patent holder has *inter alia* the right to prevent third parties selling patented objects and importing such for this purpose. This provision with its protection of imports merely lays down that the import of products that infringe the patent must be prohibited, without itself laying down a prohibition on parallel imports. This follows not only from Art. 6 of the TRIPS Agreement but is also clarified in a reference to Art. 6 in a footnote to Art. 28 of the Agreement (GATT Message 1, 1994 Federal Gazette IV, p. 301/2; cf. also Bollinger, Die Regelung der Parallelimporte im Recht der WTO, sic! 1998, p. 548; Alesch Staehelin, Das TRIPS-Abkommen, 2nd ed., Berne 1999, p. 57 et seq. and 148/9; Cottier & Stucki, loc. cit., p. 52; Cohen Jehoram, International Exhaustion versus Importation Right: a Murky Area of Intellectual Property Law, 1996 GRUR Int., p. 284). The claim expressed occasionally in the literature that the substantive protection of importation practically requires national exhaustion through the TRIPS Agreement is not, on the other hand, convincing (argued by Straus, Bedeutung des TRIPS für das Patentrecht, 1996 GRUR Int., p. 193/4); for the attempt to derive the exclusive application of national exhaustion from this agreement ignores and misinterprets the objectives of the agreement to establish the World Trade Organisation dated April 15, 1994, one element of which is the TRIPS Agreement, namely to eliminate all kinds of trade restrictions. On the contrary, TRIPS is intended to balance two sets of interests, namely the demand for the freedom of trade on the one hand and an increased protection of intellectual property rights on the other hand (Bronckers, The Exhaustion of Patent Rights under WTO Law, Journal of World Trade 1998, p. 144). Exhaustion, and hence the question of whether in particular parallel imports can be prohibited by the party entitled to the patent, is not, however, regulated by Art. 28 of TRIPS, but expressly reserved to national law pursuant to Art. 6 of the Agreement (cf. also Kunz-Ballstein, Zur Frage der Parallelimporte im internationalen gewerblichen Rechtsschutz, 1998 GRUR, p. 269/70).

[135] "There is no question that Article 6 denies Members the ability to avail themselves of dispute settlement in relation to questions involving parallel imports, except when those questions involve failure to provide national or most-favored-nation treatment. However, Article 6 of the TRIPS Agreement does not, in our view, authorize parallel imports. Members must remember that Article 6 does not alter the substantive obligations of the TRIPS Agreement, particularly those contained in Part II of the Agreement" (Delegation of the United States, Council for TRIPS Meeting of June 1822, 2001, JOB(01)/97/Add.5, Council for TRIPS, June 28, 2001.)

[136] *The Relationship Between the Provisions of the TRIPS Agreement and Access to Medicines*, *supra,* note 14, at 6.

[137] *Kodak SA v. Jumbo-Markt AG*, 4C.24/1999/rnd, December 7, 1999.

The right of any Member to allow for parallel imports has been clearly confirmed by the Doha Declaration, which includes the principle of exhaustion of rights as one of the "flexibilities" incorporated by the Agreement:

> 5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:
> . . . .
>
> d. The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.[138]

Though this paragraph does not add substantively to the TRIPS Agreement, it certainly reassures Members wishing to apply an international exhaustion principle that it would be legitimate and fully consistent with the Agreement to do so.

Some national laws permit parallel imports on relatively broad terms.[139] However, parallel imports are not permitted under many national laws,[140] or they are only allowed under quite restrictive conditions. Thus, parallel importation is permitted in the Andean Group countries when the product was sold by the patent owner or by another party with his/her consent or by a party economically linked to the patent owner.[141] In Brazil, parallel importation is permitted only if the products are sold with the consent of the owner and provided that the invention is not exploited locally.[142] In Argentina, only a local voluntary licensee is authorized by regulations to engage in parallel importation.[143]

In the case of South Africa, the scope for parallel importation is also quite limited, since it is subject to a Ministerial order (by the Minister of Health) and only applies to medicines if they were put on the market by the patent owner or with his consent.[144] Despite this narrow scope, the provision of the South African law was vigorously challenged by large pharmaceutical companies, as mentioned above.[145]

[138] *Supra,* note 11.

[139] *See, e.g*., Article 8 of the Kenya Industrial Property Act, 2001.

[140] Many laws do not clarify whether parallel imports are permitted or not. In the absence of a specific rule allowing them, imports are likely to be subject to the patent owner's exclusive rights.

[141] Article 54, Decision 486 (*Common Industrial Property Regime*) of the Andean Community, available at www.comunidadandina.org/ingles/treaties/dec/dec.htm.

[142] Article 68.4 of the Brazilian Industrial Property Code Law 9.279, 1996, available at www.sice.oas.org

[143] Article 36 (c) of the Argentine Decree 260/96, 1996.

[144] Article 15C, Medicines Act, Section 15C of the South African Medicines and Related Substances Control Amendment Act, No. 90 of 1997, provides as follows:

> Measures to Ensure Supply of More Affordable Medicines
>
> 15C. The Minister may prescribe conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public, and in particular may—notwithstanding anything to the contrary contained in the Patents Act, 1978 (Act. No. 57 of 1978), determine that the rights with regard to any medicine under a patent granted in the Republic shall not extend to acts in respect of such medicine which has been put onto the market by the owner of the medicine, or with his or her consent; prescribe the conditions on which any medicine which is identical in composition, meets the same quality standard and is intended to have the same proprietary name as that of another medicine already registered in the Republic, but which is imported by a person other than the person who is the holder of the registration certificate of the medicine already registered and which originates from any site of the manufacture of the original manufacturer as approved by the council in the prescribed manner, may be imported; prescribe the registration procedure for, as well as the use of, the medicine referred to in paragraph (b).

[145] The pharmaceutical industry also argued that the authorization given to the Health Minister was too broadly drafted and unconstitutional. The legal action was withdrawn in April 2001.

The pharmaceutical industry's strong objection to parallel imports[146] does not seem to be supported by the current situation in the trade of pharmaceuticals. It has been argued that the export of drugs sold at low cost in developing countries to higher-priced markets would affect the industry's ability to fund future R&D.[147] This might be true if parallel trade reached a significant dimension, but there is no indication that this is likely to happen, at least in the short term.

Trade in medicines is in fact subject to quite stringent national regulations that erect effective barriers to market access. Moreover, parallel imports would only take place where significant price differentials exist. Pharmaceutical firms may reduce such differentials or sell the patented products under different trademarks or packaging in major markets, in order to make parallel importation difficult or unattractive.[148] Further, any country may adopt measures to prevent parallel imports (provided that such restrictions are not found inconsistent with WTO obligations).[149] Some countries have suggested that, in order to keep a system of tiered pricing and to prevent low-priced medicines in developing countries flowing to developed countries, the former should adopt measures to prevent their exportation.[150] Export restraints of this kind may however be inconsistent with WTO rules, especially Article XI of the GATT.

Parallel imports increase static efficiency, that is, the allocation of products at the lowest possible price. Like the availability of compulsory licenses, parallel imports provide an important device to discipline markets and to induce suppliers to commercialize their products on reasonable conditions. Parallel imports from compulsory licensees may provide in some instances (particularly after the TRIPS Agreement becomes fully operative in all countries) the only way to get access to low-priced medicines.

Some national laws and jurisprudence[151] stipulate that in order for parallel imports to be admissible, the product must have been put on the market in a foreign country by or with the *consent* of the patent owner. Therefore, the supply by a compulsory licensee,

[146] *See, e.g.*, Harvey Bale, *TRIPS, Pharmaceuticals and Developing Countries: Implications for Drug Access and Drug Development,* paper presented at the WHO Workshop on the TRIPS Agreement and its Impact on Pharmaceuticals, IFPMA, Jakarta, May 2–4, 2000.

[147] Another argument against parallel trade is that it will increase opportunities for "counterfeit and substandard products to enter the market" (Bale, *supra* note 146 at 18), but this is a essentially a problem of law enforcement that can be addressed under normal procedures.

[148] Jayashree Watal, P*harmaceutical Patents, Prices and Welfare Losses: a Simulation Study of Policy Options for India Under the WTO* TRIPS *Agreement,* 23(5) The World Economy 733 (2000).

[149] *See* Carlos Correa, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES 82 (2000).

[150] The U.S. delegation stated at the Council for TRIPS Special Session of June 21, 2001, that "In our view, advocates of parallel importation overlook the fact that permitting such imports discourages patent owners from pricing their products differently in different markets based upon the level of economic development because of the likelihood that, for example, products sold for a low prices in a poor country will be bought up by middle men and sent to wealthiest country markets and sold at higher prices, for the benefit primarily of the middle men. The lack of parallel import protection can also have significant health and safety implications. Our law enforcement and regulatory agencies, especially FDA, have commented on how very difficult it is for them to keep counterfeit and unapproved drugs out of our country even with the strong parallel import protection provided in the United States. Advocating parallel imports, therefore, could work to the disadvantage of the very people on behalf of whom the advocates purport to be speaking. As Dr. Brundtland in Oslo recently noted, 'For differential pricing to work on a large scale, I think we can all agree that there must be watertight ways of preventing lower priced drugs from finding their way back into rich country markets.'" *Special Discussion on Intellectual Property and Access to Medicines*, *supra* note 14, at 40.

[151] *See, e.g.*, several decisions by the European Court of Justice, which has held that the application of the doctrine of exhaustion is conditional upon the existence of the right holder's consent to putting its products on the market (e.g. *Pharmon v Hoechst,* Case 19/84, 1985 ECR 2281; *Merck & Co. v Primecrown Ltd,* joined cases C-267/95 and C-268/95).

or even by a voluntary licensee who is not authorized to parallel export, would not be legitimate.[152]

In some jurisdictions, the sale of goods by an intellectual property owner carries with it an implied license that the purchaser may use the goods for reasonable contemplated purposes. Exhaustion of the exclusive rights is presumed if the owner of the IPR abstained from imposing restrictions in the sales contract with regard to the use, sale or distribution of the product by the acquirer.[153] In the United States, for instance, the doctrine of exhaustion has been accepted as a basis for parallel importation, but the patentee may impose contract limitations to avoid the effects of the doctrine. In other words, parallel importation is authorized in the absence of enforceable contractual restrictions.[154]

Under the "implied license" theory, the exhaustion of IPRs ultimately rests on the discretion of the title-holder. This is well illustrated by a case decided by the High Court of Kenya and described in Box 2.[155]

Box 2 Parallel Imports under the Implied License Theory

In *Beecham Group v. International Products Ltd*[156] the High Court of Kenya ruled against the importation of the product into Kenya by a local distributor based on territorial restrictions imposed by a U.K. patentee on a U.S. licensee from whom the local distributor bought the product. The plaintiffs (Beecham Group) licensed the Bristol-Myers Company of New York to sell a new penicillin drug, under the name Pembritim, throughout the world, except in the British Commonwealth. The defendant, a Kenyan distributor, purchased Pembritim directly from the U.S. licensee in New York. The defendant maintained that the Beecham Group's rights were exhausted when they placed the goods in the U.S. market through a licensing agreement. Therefore, although the licensee was not authorized to sell in Kenya, the goods on which a royalty had once been paid were thereafter free in the hands of the purchaser to be sold anywhere in the world.

The Court held, however, that when a patented product is sold, it is free in the hands of the purchaser only from such monopoly rights as the vendor possesses. Therefore, a sale by a patentee, in the absence of any specific reservation, frees the article from the patentee's agents anywhere in the world, and a sale by the patentee's agent confers on the purchaser the same rights as a sale by the patentee. However, in the case of a sale by licensee, the extent to which the article is released from the patentee's rights depends on the extent of the authority conferred and Bristol-Myers had no authority to sell goods in infringement of the Kenyan patent. Hence, the Kenyan distributor could not acquire any better rights than those possessed by Bristol-Myers (the U.S. licensee)[157].

[152] *See, e.g.*, *Pharmon v Hoechst, supra*note 151, and INGE GOVAERE, THE USE AND ABUSE OF INTELLECTUAL PROPERTY RIGHTS IN E.C. LAW 161–162 (1966).

[153] Abdulqawi Yusuf and Moncayo Von Hase, *Intellectual Property Protection and International Trade-Exhaustion of Rights Revisited*, 16(1) WORLD COMPETITION 118 (1992).

[154] Margreth Barrett, *The United States Doctrine of Exhaustion: Parallel Imports of Patented Goods*, 27(5) NORTHERN KENTUCKY LAW REVIEW 984 (2000).

[155] This decision preceded an amendment to the Kenya patent law in 2001 which introduced a provision allowing for parallel imports in broader terms.

[156] Quoted by D. Gladwel, *The Exhaustion of Intellectual Property Rights*, 12 European Intellectual Property Review 368 (1986).

[157] Yusuf and Moncayo von Hase, *supra* note 153, at 118–119.

The requirement of the right-holder's consent is grounded on the assumption that the patent owner enjoys a *positive* right to the first sale of a protected product, as is the case under the "consent theory" developed in Europe.[158] The right of "first sale" or "first publication" is established in some countries in the copyright field, as a means of allowing authors control over their works.[159]

Under the "consent theory", exhaustion can only take place when the product was put on the foreign country market by or with the consent of the patent owner. This would exclude a compulsory licensee as the source of legitimate parallel imports. In contrast, according to the "reward theory",[160] when selling the patented product in a foreign country, the patent owner is obtaining, as part of the product's price, compensation for the protected technology[161] (when the product is sold by a licensee, either voluntary or compulsory, the patent owner receives a royalty payment). Hence, parallel importation does not deprive the patent owner of contributions to future R&D.[162]

There is no basis for considering that the "consent theory" has been incorporated into the TRIPS Agreement for all types of IPRs. Patents, in particular, according to Article 28 of the Agreement, only grant *negative* rights, that is, the legal ability to exclude competition by infringers, but no positive rights.[163] In other words, the Agreement does not assure the patent owner a positive right of first marketing, as is often the case under copyright law.[164]

In addition, TRIPS Article 31(f) allows a compulsory license to be granted "predominantly" for the domestic market, thereby permitting at least part of the production under license to be "parallel exported".[165] Such exports may take place to countries where there is or where there is no patent protection; the referred provision does not make any distinction in this regard. Excluding parallel exports from a compulsory

[158] However, some decisions by the European Court of Justice have permitted parallel imports originating from a country where no patent protection was granted. *See, e.g*., the *Merck v. Primacrown* and *Beecham Group v. Europharm* cases, ECJ, 5 December 1996, joined cases C 267/95 and C-268/95.

[159] Jack Cline, *Moral Rights: the Long and Winding Road Toward Recognition,* 14 NOVA L. REV.121 (1990). In some countries, this right is provided for in the framework of the recognition of the "moral rights" of authors.

[160] The reward theory was first formulated by the U.S. Supreme Court which held in *Adams vs. Burke,* 84 U.S. 453 (17 Wall.) (1873) that "[W]hen the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The Article . . . passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentee".

[161] Yusuf and Moncayo von Hase, *supra*note 153 at 117; Govaere, *supra* note 152, at 80.

[162] No economic analysis on this issue has been made. The net impact of parallel importation on contributions to R&D will depend, among other things, on the price differentials and volumes of sales, as well as on price elasticity in the importing country.

[163] See the unambiguous wording of Article 28 of the TRIPS Agreement, and the interpretation given by the WTO Secretariat in *TRIPS and Pharmaceutical Patents—Fact Sheet*, April 2001; *see also* Govaere, *supra* note 152 at 80–81.

[164] *See, e.g.,* Anthony D'Amato and Doris Long, INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 113–118 (1966).

[165] A restrictive interpretation of the scope of Article 6 of the TRIPS Agreement has been suggested, according to which the patent owner's consent will be required as a condition for the legality of parallel imports. This interpretation has been grounded on the footnote to TRIPS Article 51 and on the approach adopted by the Treaty on Intellectual Property in Respect of Integrated Circuits, Washington D. C., on May 26, 1989. However, Article 51 only applies to trademarks and copyrights and the Treaty only deals with semiconductors.

licensee[166] to a country where there is patent protection would deprive Article 31 (f) of its full meaning. There is no basis to assume that Article 31 (f) would only apply when the product produced under the compulsory license is not protected in the importing country.

If parallel imports were outlawed in cases where there is remuneration of, but no consent by the patent owner (as in the case of compulsory licenses), the usefulness of parallel imports as a pro-competitive mechanism would be seriously curtailed, since in most instances the patent owner may attach sale limitations to the products that he puts on the market, or impose contractual limitations on his licensees not to export without the patent owner's authorization.

In sum, whenever the patent owner receives adequate remuneration in the country from which a product is imported, he should be deemed to have exhausted his rights over that product. The "reward theory" provides a solid basis for the application of the exhaustion principle under the TRIPS Agreement, and allows full meaning to be given to all its relevant provisions.

IV. The Doha Declaration on Public Health[167]

The Doha Declaration includes preambular provisions (paragraphs 1 to 4), a provision aimed at confirming the interpretation of certain rules of the TRIPS Agreement (paragraph 5), and two operative provisions requiring action by the Council for TRIPS in relation to countries with no or insufficient manufacturing capacity in pharmaceuticals (paragraph 6), and for the extension of the transitional period for LDCs in relation to the protection of pharmaceutical products (paragraph 7).

While some developed countries attempted to limit the scope of the Declaration to the HIV/AIDS crisis, the adopted text recognizes the "gravity" of the public health problems afflicting many developing countries and LDCs, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics. Access to medicines certainly was the main preoccupation that led to the Doha Declaration, but it covers not only medicines, but any health care product, method or technology.

Paragraph 4 of the Doha Declaration was one of the most controversial provisions of the document and the subject of intense negotiations during the preparations for and at the Ministerial Conference in Doha. The negotiating target of the developing countries was to obtain recognition that nothing in the TRIPS Agreement should be interpreted as preventing Members from adopting measures necessary to protect public health. After intense negotiations a compromise text was reached which apparently satisfied all parties:

> 4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.
>
> In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

[166] Any compulsory licensee will be bound—according to TRIPS Article 31(h)—to pay "adequate remuneration" to the patent holder, "taking into account the economic value of the authorization". This means that the patent holder will be rewarded whenever his/her patent is exploited.

[167] The text of the Declaration is reproduced in the Appendix to this book.

Though interpretations on this paragraph are likely to differ, it seems clear that the intention of the Members was to indicate that in cases where there is conflict between intellectual property rights and public health, the former should not be an obstacle to the realization of the latter[168]. The realization of public health becomes, with the Doha Declaration, a clearly stated *purpose* of the Agreement. In affirming that the TRIPS Agreement, "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all", paragraph 4 gives guidance to panels and the Appellate Body for the interpretation of the Agreement's provisions in cases involving public health issues. In doing so, Members have developed a specific *rule of interpretation* that gives content to the general interpretive provisions of the Vienna Convention on the Law of the Treaties (hereinafter "the Vienna Convention") on which GATT/WTO jurisprudence has been built up.

The confirmation that the TRIPS Agreement has left room for flexibility at the national level in certain areas, as noted above, has important political and legal implications. It indicates that the pressures to impede the use of available flexibilities run counter to the spirit and purpose of the TRIPS Agreement, especially in the light of the recognized "gravity of the problems" faced in the area of public health by developing countries and LDCs. In legal terms, such confirmation means that panels and the Appellate Body must interpret the Agreement and the laws and regulations adopted to implement it in light of the public health needs of individual Members States. Therefore, in cases of ambiguity, or where more than one interpretation is possible, panels and the Appellate Body should opt for the interpretation that is effectively "supportive of WTO Members' right to protect public health"[169].

In paragraph 6 the Doha Declaration instructed the Council for TRIPS to address a delicate issue: how can Members lacking or with insufficient manufacturing capacities make effective use of compulsory licensing. The Declaration requests the Council for TRIPS "to find an expeditious solution to this problem and to report to the General Council before the end of 2002". In order to be effective such a solution should be economically viable, and not only legally acceptable.[170]

Finally, the Doha Declaration agreed that LDCs should be granted an extension until 2016 of the transitional period provided for under Article 66.1 of the TRIPS Agreement with respect to pharmaceutical patents (TRIPS Section 5) and protection of undisclosed information relating to pharmaceuticals (TRIPS Section 7). Paragraph 7 constitutes a

[168] The Brazilian delegation pointed out at the Doha Ministerial Conference that "in the area of intellectual property, different readings of the TRIPS Agreement have given rise to tensions. To a certain extent, it is natural that conflicts of interests should reflect themselves in divergent interpretations of common rules. But the commercial exploitation of knowledge must not be valued more highly than human life. There are circumstances in which the conflict of interests will require that the State exercise its supreme political responsibility . . . Brazil promotes and upholds intellectual property rights . . . However, if circumstances so require it, Brazil, like many other countries, will not hesitate to make full use of the flexibility afforded by the TRIPS Agreement to legitimately safeguard the health of its citizens" (WT/MIN(01)/ST/12, November 10, 2002).

[169] *See* Carlos Correa, *Implications of the Doha Declaration on the TRIPS Agreement and Public Health 26*, World Health Organization (2002).

[170] *See id.,* at 33. Despite considerable efforts, the Council for TRIPS was unable to agree (as of 16 February 2003) on a solution on paragraph 6 of the Declaration. Consensus on a compromise text proposed by the Council's Chairman was broken due to the US insistence on limiting such a solution only to HIV/AIDS, malaria and tuberculosis. This limitation—allegedly aimed at protecting the global interests of the US pharmaceutical industry—was found inacceptable by developing countries, as it would narrow down the agreed scope of the Doha Declaration.

"duly motivated request"—in the terms of Article 66.1 of the TRIPS Agreement[171]—on the basis of which the Council for TRIPS must give effect to that extension. LDCs do not need to individually follow the procedure provided for under Article 66.1 to obtain the extension. The Declaration, however, explicitly preserves the right of LDCs to request extensions for other matters (not related to pharmaceutical patents) in accordance with the Article 66.1 procedure[172], without diminishing their right to request further extensions for pharmaceutical patents after 2016[173].

It is implicit within the Doha Declaration that differentiation in patent rules may be necessary to protect public health. The singling out of public health, and in particular pharmaceuticals (paragraphs 6 and 7), as an issue needing special attention in TRIPS implementation constitutes recognition that public health-related patents deserve to be treated differently from other patents.

A "declaration" has no specific legal status in the framework of WTO law[174]; it is not strictly an authoritative interpretation in terms of Article IX.2 of the Marrakesh Agreement Establishing the WTO. However, given the content and mode of approval of the Doha Declaration, it can be argued that it has the same *effect* as an authoritative interpretation. In particular, in providing an agreed understanding on certain aspects of the TRIPS Agreement in paragraph 5, Members have created a binding precedent for future panels and Appellate Body reports. According to the European Commission,

> "in the case of disputes (e.g. in the context of WTO dispute settlement procedures) Members can avail themselves of the comfort provided by this Declaration. Panelists are likely to take account of the provisions of the TRIPS Agreement themselves as well as of this complementary Declaration, which, although it was not meant to affect Members' rights and obligations, expresses the Members' views and intentions. Hence, the Declaration is part of the context of the TRIPS Agreement, which, according to the rules of treaty interpretation, has to be taken into account when interpreting the Agreement"[175].

[171] TRIPS Article 66.1. "In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period".

[172] In fact, it would have seem more logical to extend the transitional period for all fields of technology since, unless individual extensions are accorded, LDCs would be required anyway to bear the costs of granting patents in other sectors.

[173] In pursuance to paragraph 7 of the Doha Declaration, on June 27, 2002, the Council for TRIPS agreed to extend the transitional period for LDCs to introduce pharmaceutical patent protection until 2016 (Decision on the Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with respect to Pharmaceutical Products (IP/C/25)The General Council also granted a waiver (adopted in its meeting of 8th and 31st July 2002) to such countries with regard to the granting of exclusive marketing rights (provided for under Article 70.9 of the TRIPS Agreement) during that period (available at www.wto.org)

[174] The WTO adopted several "declarations" at the Marrakesh Conference that adopted the WTO Agreement, e.g.: *Declaration on the Contribution of The World Trade Organization to Achieving Greater Coherence In Global Economic Policymaking*; *Declaration on the Relationship of the World Trade Organization with the International Monetary Fund*; *Declaration on the Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*.

[175] European Commission, *WTO Ministerial Declaration on the TRIPS Agreement and Public Health,* Brussels, November 19, 2001, at 2.

Moreover, the Declaration can be regarded as a "subsequent agreement" between the parties regarding the interpretation of a treaty or the application of its provisions, under Article 31.3 (a) of the Vienna Convention on the Law of the Treaties.

V. Conclusion

The WTO dispute settlement system faces a very complex and delicate task in the area of the TRIPS Agreement, perhaps more difficult than with respect to other WTO agreements. The great sensitivity of the issues involved, both for developing and developed countries, suggests that opinions on the matter will be subject to very strict scrutiny and may significantly influence future developments in the area of IPRs.

An "activist" approach by panels and the Appellate Body in the interpretation of the TRIPS Agreement would be likely to imperil the dispute settlement system. The Agreement has neither addressed nor resolved all issues in IPR law. Its gaps and ambiguities were the unavoidable result of difficult negotiations. If the panels or Appellate Body try to make expansive interpretations or to make choices which the Members did not make during the negotiations, the credibility of the dispute settlement system will be seriously undermined.

If confronted with the task (in applying the rules of Article 39(1) of the Vienna Convention on the Interpretation of Treaties) of defining the "purpose" of the treaty in relation to a disputed provision, panels and the Appellate Body should be aware that the role of the TRIPS Agreement is not merely to guarantee the commercial interests of IPRs holders, but also to further the public interest.

Panels and the Appellate Body should recognize that there are fundamental differences among the WTO members in relation to the role of intellectual property and, in particular, on how it can affect the realization of basic human rights as well as the development prospects of developing countries. Decisions on TRIPS matters should be adopted having in view the objectives and principles set forth in Articles 7 and 8 of the TRIPS Agreement.

The adoption of the Doha Declaration has represented an important step in recognizing the flexibilities permitted by the TRIPS Agreement, and the right of Members to adopt measures to protect public health. The Declaration not only has political value, but legal effects, equivalent to those of an authoritative interpretation under WTO rules.

Finally, due attention should be given to the fact that one of the principal objectives of the GATT/WTO system is to expand the production of and trade in goods and services by reducing barriers to trade and ensuring the realization of competitive opportunities on a non-discriminatory basis. The TRIPS provisions should therefore be interpreted bearing in mind that it is the promotion rather than the restriction of competition that is the foundation of the international trade system.

CHAPTER 55

TRADE-RELATED TECHNICAL COOPERATION AND CAPACITY BUILDING

Esperanza Durán*

TABLE OF CONTENTS

I. Introduction: The Importance of Definitions 458
II. Recent Evolution of Trade-Related Capacity Building: The Basis for its Increasing Importance 460
III. The Geneva Three-Pronged Approach 462
IV. Technical Assistance in the Uruguay Round Agreements 464
V. Conclusion 467
Bibliography 468

* Executive Director of the Agency for International Trade Information and Cooperation (AITIC). The views expressed in this article are the responsibility of the author and should not be taken as those of AITIC.

I. Introduction: The Importance of Definitions

During the last fifty or so years international trade has been a powerful engine of growth and trade has become a key component of the economic strategies of all major countries. This statement, apart from being evident, is uncontroversial. What is not so evident, and may prove contentious, is how to make it possible for all countries to share the benefits of trade and to ensure that the developing and least-developed countries do not become casualties of the globalisation process. Some may argue that trade-related capacity building is a *sine qua non* condition to achieve this end.

It is also indisputable that not all countries have participated either in international trade or in the rules-making body, the World Trade Organization ("WTO") and its predecessor, the General Agreement on Tariffs and Trade ("GATT"). The GATT, which came into force in 1948, was set up to create a stable and predictable environment for liberalising international trade and undoing the results of the tide of protectionism that had exacerbated the effects of the Great Depression and had contributed in no small part to the second global armed conflict. Subsequently, after eight rounds of multilateral trade negotiations under the GATT that had greatly advanced trade liberalisation, the WTO was established in 1995, after the completion of the Uruguay Round negotiations. The Uruguay Round was the most ambitious of all of the GATT negotiating rounds. It resulted in agreements on disciplines on issues that went far beyond cross-border trade and gave the new organisation a greatly expanded scope, not only by bringing textiles and clothing into the regime and eliminating the exceptions that applied to agricultural trade, but by broadening the coverage of the rules to other areas, including trade in services and trade-related aspects of intellectual property rights.

After the successful completion of the Uruguay Round, it was clear that membership in the WTO—which had by April 2003 had expanded to 146, compared with the 23 original Contracting Parties to the GATT—did not by itself entail full involvement in the system, either measured by contribution to global trade or involvement in the activities and negotiations of the WTO. A wide gap existed between the active participation of a select few, mostly the OECD countries, and the scant contribution of most developing countries, with a few exceptions, such as Brazil and India.

In the fifty odd years since the GATT came into being and multilateral trading rules were established, integration of developing countries into the multilateral trading system has been an important objective of the more active traders. However, despite much lip service paid to "integrating the developing countries into the multilateral trading system", the definition of what this means and the ways of achieving it have not been clearly formulated. It can be assumed that integrating countries with a low level of participation in international trade implies that they will genuinely become part of the global trading system by increasing their exports and their contribution to overall trade. Similarly, and a logical conclusion, is that their increased involvement and contribution to the global expansion of trade will lead them to a more active participation in the activities of the rules-making body, the WTO, and in the negotiations that take place under its aegis. The reverse, i.e. that a better understanding of the rules will lead them to be more active traders is not so evident. To be able to export, countries need to produce something that is exportable, quite apart from having an understanding of the trade-related multilateral rules. Those potential traders that have traditionally been inactive also need to overcome the supply-side constraints that have made it difficult for them to achieve efficient production for export.

Another basic term that is in need of an agreed definition is "trade related technical cooperation and capacity building" ("TRTCCB") for developing countries.[1] It is surprising to note that, although TRTCCB has acquired such overwhelming importance, a clear, explicit definition of what it is, and what its components are, is rarely found. A few attempts have been made to define TRTCCB, but they are usually either vague or elusive. The OECD has examined this issue and has provided a definition that focuses on differentiating trade-related capacity building today from that of the past. From the OECD viewpoint, capacity building in the past was synonymous with institution–building, whereas "today is synonymous with building systems or networks . . . often across borders to achieve common objectives. The network promotes a critical mass of human and institutional resources that can overcome the limits inherent in the old approach"[2]. At present, according to the OECD, capacity building for trade involves mobilising participatory approaches to deal with the trade agendas, thus developing expertise of policy-makers, the private sector and civil society. This expertise in turn would contribute to a number of objectives, including: formulation and implementation of a trade development strategy, firmly placed in the broader national development strategy; diversifying and increasing the value-added of exports and creating foreign investment regimes through reforming import regimes and strengthening trade policy and institutions; and participating in and benefiting from the institutions and negotiations and processes that conform national trade policy and the rules of international trade[3]. A crisper definition, adapted from the OECD Guidelines[4]. views TRTCCB as a "broad range of activities" aimed at effective participation in the global trading system and helping countries exploit their comparative advantage[5].

So, simplifying this attempt at a broad definition of TRTCCB, there are at least two distinct components of TRTCCB: one, general and systemic, views technical assistance and capacity-building in a wide sense, to consist of a "domestic" and "concrete" approach that would provide assistance to acquire the know-how to design policies conducive to including trade in overall policy-making, to reform the trade policy regime to facilitate export diversification and expansion, and although not explicitly included in the OECD definition, to provide financial and other means to overcome problems related to supply-side constraints. A second component of TRTCCB relates to an "international" and more "abstract" approach, that focuses on assisting developing country officials to participate in (and benefit from) the institutions and negotiations relating to the rules of international trade, i.e. assistance to acquire a better understanding of the WTO Agreements to ensure compliance, as well as more effective participation in WTO activities, including negotiations.

The two components of TRTCCB described above, namely assistance to trade more and assistance to understand international trade rules better are two sides of the same coin: real integration into the multilateral trading system necessitates a holistic approach that would include capacity to produce exportable goods or services and to develop

[1] For brevity's sake, in this article, the term "developing countries" refers to different groups of resource-constrained countries or customs territories that are members of or observers to the WTO, including the 49 least-developed countries ("LDCs") as designated by the UN, small island developing and land-locked countries, small and vulnerable economies and several transition economies, mostly those in Central Asia.

[2] OECD, *Trade and Development in the New Global Context: the Capacity Dimension*, in www.oecd.org.

[3] *Id.*

[4] OECD, *Strengthening Trade Capacity for Development. The DAC Guidelines* (2001).

[5] Federico Boinaglia and Kiichiro Fukasaku, *Export Diversification in Low-Income Countries: An International Challenge after Doha,* OECD Development Centre, Technical Papers 209 (2003) at 9.

adequate physical infrastructure (roads, ports, customs facilities) on the one hand, and on the other the training of government officials to enable them to understand, implement and negotiate internationally-agreed rules.

However, the attention—and resources—committed to TRTCCB is not in direct relation to the time and effort devoted to giving thought to what it consists of, what are the concrete objectives pursued through it (apart from the triteness of "closer integration into the multilateral trading system"), what are the best means to deliver it, and how best to evaluate its results. It would seem logical that more consideration should be given to these matters prior to making TRTCCB such an important constituent part of development cooperation plans in general and of the Doha Work Programme of the WTO in particular. A more systematic approach to TRTCCB seems necessary to make the most of the vast resources that have been made available for TRTCCB.

Without well-defined objectives, specific deadlines and means of assessing results, the extent of the resources available for TRTCCB is of no consequence. Several bilateral donors concerned with TRTCCB and the multilateral institutions that provide it have realised this need. Indeed there have been some noteworthy attempts to try to rationalise TRTCCB and to foster inter-agency and donor coordination. However, in view of the enormous needs, of the multiplicity of areas to be covered, and of the bilateral, multilateral, regional, official and non-governmental institutions involved, it is a tall order to instil a measure of coherence and effectiveness into TRTCCB.

The main objective of this chapter is to provide an inventory and analysis of the resources available for TRTCCB offered to developing countries, concentrating on the more restrictive interpretation, i.e. TRTCCB that refers to improving the understanding of multilateral trade rules and achieving greater participation in negotiating them. Part II of the chapter traces how and why TRTCCB has evolved to acquire the prominent place within trade and development agencies it has today. Part III sets the framework by a brief description of the "core" TRTCCB resources within the three trade-related Geneva-based organisations—the WTO, the United Nations Conference on Trade and Development ("UNCTAD") and the International Trade Centre ("ITC")—and their mandate. To complement this section, Part IV provides an overview of which Uruguay Round Agreements have TRTCCB built in, and what kind of TRTCCB is contemplated in them. An illustration of how TRTCCB as foreseen in the Uruguay Round Agreements has fared in practice is given through a couple of examples of TRTCCB: in TRIPS, which exemplifies the wide spectrum of institutions that have taken initiatives to provide TRTCCB, and Dispute Settlement, which demonstrates in practice the limitations of the WTO Secretariat in providing TRTCCB, due to its obligation to remain neutral and its frequent administrative changes regarding TRTCCB.

II. Recent Evolution of Trade-Related Capacity Building: The Basis for its Increasing Importance

The importance of TRTCCB has been growing, first gradually, then exponentially, particularly after the WTO was established in 1995. At the first Ministerial Conference of the new organisation held in Singapore in December 1996 a momentous decision was taken: a Plan of Action for the Least-Developed Countries which sought to render operational the *Decision on Measures in Favour of Least-Developed Countries* (an integral part of the results of the Uruguay Round Negotiations) through a series of "actions," such as improving their capacity to meet their notification obligations, assisting in trade-related institutional capacity building by a comprehensive approach with a division of

labour between the relevant organisations: UNCTAD, ITC, the World Bank, the International Monetary Fund ("IMF"), the United Nations Development Programme ("UNDP"), and regional development banks, with the participation of the OECD's Development Assistance Committee ("DAC"), and in cooperation with the WTO. The Decision also called for improved market access through preferential access with the possibility of granting duty- free access.[6]

The implementation of this Decision took place in October 1997, with the launching of the Integrated Framework for trade-related technical assistance for Least-Developed Countries ("IF"), which was a joint programme of six agencies: the IMF, the ITC, UNCTAD, UNDP, the World Bank and the WTO. It focused attention on the importance of TRTCCB and the desirability of rationalising it. Donors and recipients, aware of the lack of coordination of inter-governmental organisations ("IGOs") that accounted for a certain inefficiency in the provision of TRTCCB, sought to create a framework that would coordinate TRTCCB activities between the concerned IGOs, avoid duplicative activities and render TRTCCB more effective.

TRTCCB thus became firmly established as a prime objective. Following the Second Ministerial Conference of the WTO held in Geneva in 1998, which was mostly a celebratory occasion marking the fiftieth anniversary of the multilateral trading system, the importance of TRTCCB began to acquire increasing visibility and political importance. Most of the speeches from developed country representatives applauded the launching of the IF at the High-Level meeting that had taken place in October 1997. Developed countries' enthusiasm is illustrated by the announcement of the UK Prime Minister, Tony Blair, at the Geneva Ministerial that Britain would contribute £6 million ($10 million) to help developing countries participate in the multilateral trading system.

Since then, the importance of TRTCCB has soared. At present, it is not a deficit of resources devoted to TRTCCB that is the problem. The difficulty at present relates more to a surplus of TRTCCB, at times uncoordinated and without a well-defined focus or goal, as well as a waning absorptive capacity on the part of TRTCCB recipients. However, little has been done to assess and evaluate what has worked and what is leading to waste resources without achieving clear results. There has been no evaluation of the modes of delivery for TRTCCB to help make it more effective.

The realisation that during the most ambitious round of multilateral trade negotiations developing country participation had been scarce, led several of the developed country members to seek to correct this imbalance. Despite the growth in the number of WTO members, mostly from the developing world, in the wake of the completion of the Uruguay Round, few developing countries had a clear idea of what were the commitments they had signed on to and what rights they had achieved in return. As the scope of international trade rules broadened to cover issues beyond cross-border trade and extended to other areas of economic activity, developed countries realised that only if developing countries received assistance to understand the new rules would they be able to comply with them.

At the same time, developing countries became aware of the gap that existed between them and the developed countries, particularly as they began to face the difficulties of implementing the Uruguay Round Agreements. This awareness became more acute as the transition periods drew to a close. To be able to take advantage of the special conditions granted to developing countries under the special and differential treatment provisions, developing countries became convinced of the need to achieve a more thorough

[6] WT/MIN(96)/14, *Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries*, January 7, 1997.

understanding of the WTO Agreements and international trade rules. Indeed, part of this special and differential treatment took the form of TRTCCB. Finally, if new negotiations were to take place, developing countries grasped the importance of TRTCCB as a means of improving their negotiating skills, increasing their bargaining power and ultimately defending their interests effectively. However, there was another side to this: TRTCCB could be used as a bargaining chip by developed countries to nudge developing countries into agreeing to begin negotiations on new areas that developing countries were not certain it was in their interest to negotiate.

Interestingly, in the last fifty years the position of TRTCCB in the scale of priorities has dramatically changed: in the GATT 1947 (and 1994) there is not a single article that refers to technical cooperation. In contrast, several of the Uruguay Round Agreements have not only references, but also full articles devoted to technical assistance, at times making its provision legally binding, as will be seen below. Naturally, as mentioned above, the recognition that to be able to comply with the agreements, developing countries needed technical cooperation, the Uruguay Round Agreements that include the granting of technical cooperation within their provisions relate to the more "technical" subjects or the new issues.

The Doha Ministerial Declaration moved much further ahead on the recognition of the importance of TRTCCB, recognising that "sustainably financed technical assistance and capacity-building programmes have important roles to play" in ensuring that developing countries "secure a share in the growth of world trade commensurate with the needs of their economic development".[7] There is a sharp contrast between the GATT 1947, where technical assistance is not mentioned even once in a 28,000-word document and the Doha Ministerial Declaration, a five thousand-word document, where technical assistance is mentioned nineteen times.

III. The Geneva Three-Pronged Approach

Three closely related institutions dealing with trade issues in Geneva (i.e. the WTO, UNCTAD and the ITC) have substantial programmes of trade-related technical cooperation. However, problems of overlapping, duplication and effective use of resources have become apparent. Member countries, particularly bilateral donors, have shown an interest in instilling some order in what is perceived as a somewhat anarchic web of TRTCCB programmes, whose usefulness did not always seem to match the expectations. One course of action was to call for closer integration of TRTCCB. Cases in point are the *Joint Integrated Technical Assistance Programme to Selected Least Developed and Other African Countries* ("JITAP"), jointly sponsored by the WTO, UNCTAD and the ITC, and the *Integrated Framework for Trade-Related Technical Assistance* ("IF"), in which six international organisations participate, the three Geneva-based ones plus the World Bank, the IMF, and UNDP.

Each of the Geneva-based organisations has a specific and complementary mandate, although they are not the exclusive providers of TRTCCB. Other intergovernmental organisations, whose mandate is related to the subject of a particular WTO Agreement, provide TRTCCB to WTO members (and each has important technical cooperation programmes). With the risk of oversimplification, this is in essence the mandate of the Geneva-based trade-related IGOs:

The WTO is the rules-making body. It is also a forum for negotiations for the liberalisation of trade among its member countries and for resolution of trade disputes. Its

[7] WT/MIN(01)/DEC/W/, November 14, 2001, ¶ 2.

technical cooperation focuses on its own areas of competence. However, given that the Secretariat cannot interpret the Agreements, a prerogative of the Members, and in view of the requirement that the Secretariat maintains its neutrality, the role of the WTO in TRTCCB is confined to assisting Members to understand the agreements or to assist in their implementation. The Secretariat is not authorised to give policy advice or to touch on the implications of the agreements for the economic and development policies of the TRTCCB recipients. These limitations, of which members receiving TRTCCB have become increasingly aware, has led some developing country members to demand a TRTCCB which is more related to their needs. They also stressed the "value of quality over quantity", and proper auditing and evaluation of the WTO's TRTCCB were signalled as indispensable elements for accountability and transparency[8].

UNCTAD is a permanent conference[9] whose aim is to promote economic development, originally through trade. It has evolved to become the focal point within the UN for the "integrated treatment of development and interrelated issues in the areas of trade, finance, technology, investment and sustainable development". Its technical cooperation covers the four areas of its work programme[10] and thus is more diffuse than in the other two institutions. UNCTAD's "portfolio" of subjects goes beyond trade matters, and on trade the number of subjects is vast. Developing countries have come to regard UNCTAD as their own forum and have counted on this institution for providing the policy advice that WTO cannot give. Indeed, UNCTAD has provided valuable inputs for developing countries on most of the trade subjects under negotiation at the WTO. It is worthwhile mentioning the *Positive Agenda and Future Trade Negotiations*[11], which emerged after the first WTO Ministerial Conference in Singapore and assisted developing countries in preparing for the Ministerial Conference at Seattle and for the negotiations that were finally agreed to at Doha. Its focus was formulating proposals and counterproposals for actions in their interest, instead of the usual opposition to including certain subjects in the multilateral negotiating agenda. Similarly its Commercial Diplomacy Project has been active in providing TRTCCB to developing countries.

The International Trade Centre ("ITC"), the "daughter" organisation of the WTO and UNCTAD, based in Geneva, is "the focal point in the UN system for technical cooperation with developing countries in trade promotion". Its mission is to support developing and transition economies, and particularly their business sectors, to develop their export potential and improve import operations. It "is responsible for implementing UNDP-financed projects in developing countries and economies in transition related to trade promotion". The ITC is the only one of the three organisations that has technical cooperation as its mandate. ITC and UNCTAD depend to a large extent on UNDP and bilateral donors (Canada, Netherlands, Norway, Germany, Switzerland, Japan, the UK, etc.) for finance to back TRTCCB activities.

A preliminary impression—although this may be corrected after acquiring more familiarity with the institutions concerned—is that the organisations in Geneva, although paying lip service to closer coordination, in fact go their own way in the design and development of their technical cooperation activities. An example of this is the fact that

[8] WT/COMTD/43, *High Level Briefing Meeting on Technical Co-operation and Capacity Building for Capital-Based Senior Officials*, September 20, 2002.

[9] Although it started out as a UN Conference, UNCTAD evolved into a fully-fledged organisation, with its own programmes and secretariat.

[10] (i) Globalisation and development; (ii) investment, enterprise development and technology; (iii) international trade in goods and services and commodity issues; and (iv) services infrastructure for development and trade efficiency.

[11] UNCTAD/ITCD/TSB/10, July 1, 2000.

collaboration with other organisations does not figure as a criterion for evaluation of the WTO TRTCCB activities, as illustrated in the Technical Cooperation Audit Report for 2002[12]. The advisory services and group training activities of UNCTAD's International Trade in Goods and Services and Commodities programme have greatly overlapped with those of the WTO in areas such as assisting countries to understand the multilateral trading system and the WTO; options in the post-Uruguay Round framework; accession to the WTO, etc.

At times, the TRTCCB programmes, as presented by the organisations themselves, give the impression that some TRTCCB activities are conducted randomly (often on the back of activities already being organised by national institutions), dependent on fund-availability and justified as "demand-driven". To determine the extent to which TRTCCB activities are integrated between the different entities would require finding out what is the framework for joint TRTCCB, and the mechanism devised to formulate collaborative projects and strategies, ultimately resulting in joint activities and coordinated missions. Has any effort to create such a mechanism been made? *A priori,* isolated activities with participation of the three trade-related institutions do not necessarily reflect an integrated approach, nor do missions that include staff members of the three organisations.

IV. Technical Assistance in the Uruguay Round Agreements

As has already been mentioned, the stated objective of the provision of technical assistance in the Uruguay Round Agreements is mostly to facilitate implementation and enforcement of the Agreements by developing countries. Technical assistance is also understood to mean not only training of officials, but has wider connotations, including the provision of finance (credits, donations) and know-how, as well as assistance with building up infrastructure (equipment, laboratories). Furthermore, although the WTO Secretariat is mandated explicitly in the General Agreement on Trade in Services and in the Dispute Settlement Understanding to provide assistance, the Secretariat also provides TRTCCB with respect to all of the WTO agreements.

What follows is an inventory of TRTCB measures in the various WTO Agreements. This will give an idea of the enormity and complexity of the spectrum that TRTCCB is mandated to cover. It is also worth mentioning that apart from the explicitly stipulated provision of TRTCCB, there are other areas where TRTCCB is provided, including important areas such as the "new" areas, including those of the Singapore issues: trade and investment, trade and competition, transparency in government procurement, trade facilitation, as well as trade and environment, market access, rules, etc.

Article 9 of the Agreement on **Sanitary and Phytosanitary Measures** ("SPS") specifies that the members of the WTO will provide technical assistance to developing countries to allow them to adjust and comply with the SPS measures and to achieve appropriate protection in their export markets. The areas where technical assistance would be granted include processing technologies, research, and infrastructure to enable the setting up of national regulatory bodies. This assistance would be granted either bilaterally or through the appropriate international organisation, i.e. either one of the "three sisters" referred to in the Agreement, namely the three standard-setting organisations, the FAO/WHO Codex Alimentarius Commission, the International Animal Health Organization, and the FAO's Secretariat of the International Plant Protection Convention. The form that technical cooperation takes includes advice, credits, donations and grants, training and

[12] WT/COMTD/W/111, March 28, 2003

equipment. Furthermore, in the cases significant investments would be needed for an exporting developing country to fulfil the SPS measures of an importing member, the importing member "shall consider"[13] granting technical assistance to permit the developing country to maintain and expand its exports of the product involved.

Article 11 of the **Technical Barriers to Trade** ("TBT") Agreement is comprehensive in requiring developed country members to provide technical assistance on "mutually agreed terms and conditions", if so requested, to developing country members (and others) and giving priority to the LDCs on a number of issues: on establishing the institutions and legal framework which would enable them to fulfil the obligations of membership; to advise them on the preparation of technical regulations and the establishment of national standardizing or regulatory bodies and participation in them; for facilitating their participation in technical systems for conformity assessment. Technical assistance is stipulated also for developing country producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies of the member they wish to export to.

Another technical agreement that has a section devoted to technical assistance is the **Customs Valuation Agreement** (the Agreement on Implementation of Article VII of the GATT 1994), in Part III, Article 20, under special and differential treatment. It states that developed countries have the obligation to provide technical assistance to those countries that so request and, on the basis of the requests, are to design programmes of technical assistance that would cover training of personnel, assistance in preparing implementation measures, information on customs valuation methodology, and how to apply the provisions of the Agreement. The implementation of the Customs Valuation Agreement by developing countries has been a main concern of developed countries.

Article 3.3 of the **Agreement on Pre-Shipment Inspection** also contains a clause specifying that, in order to assist in the achievement of the Agreement's objectives, exporter members "shall offer to provide" technical assistance.

Through Article 67 of the **Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"),** WTO Members from developed countries commit themselves to the provision of technical and financial assistance to developing countries to facilitate implementation of the Agreement, through the preparation of laws and regulations for the enforcement of intellectual property rights and to prevent their abuse. The wide scope of the TRIPS Agreement has led a number of intergovernmental organisations to join the WTO in the intellectual property technical assistance and capacity building efforts. The World Intellectual Property Organization ("WIPO") has been active in this respect, in particular in assisting countries to draft legislation on intellectual property protection. WIPO and WTO signed an agreement for legal and technical assistance to developing countries that came into force on January 1, 1996.[14]

Article XXV of the **General Agreement on Trade in Services** is devoted to technical cooperation. It covers two kinds of technical assistance: bilateral and multilateral. With respect to bilateral assistance, it states that suppliers of services of Members that are in need of assistance shall have access to "contact points" established by developed country Members within two years of the entry into force of the WTO Agreements. The purpose of these points is to facilitate access of the developing country suppliers

[13] The word "shall" in WTO Agreements has a legally binding connotation.

[14] WIPO/TRIPS/2001/1*, WIPO's Legal and Technical Assistance to Developing Countries For the Implementation of the TRIPS Agreement From January 1 1996 to December 31 2000*", WIPO, Geneva.

to information on the commercial and technical aspects of the supply of services; the registration, recognition and obtaining of professional qualifications; and the availability of services technology.

At the multilateral level, technical assistance is entrusted to the WTO Secretariat, upon the decision of the Council for Trade in Services. This is in contrast to the TRIPS Agreement, on which other intergovernmental organisations, although not specifically mentioned in the Agreement, have been active in the provision of technical cooperation, in particular, WIPO. Through its Cooperation for Development Program, WIPO assists in the establishment or modernisation of intellectual property systems of developing countries, in particular of LDCs. Also, a bilateral donor organisation, the UK's Department for International Development ("DFID") established a Commission on Intellectual Property Rights to investigate how intellectual property rights "might work better for poor people and developing countries"[15].

A number of non-governmental organisations are also active in undertaking research and providing technical assistance to developing countries. On TRIPS, for example, the Quaker United Nations Office ("QUNO") in Geneva organises seminars for government delegates and staff of NGOs, corporations and IGO's, including the WTO, on subjects related to intellectual property rights, including the implications of the TRIPS Agreement for developing countries. QUNO has established a programme to support developing country negotiating capacity with the objective of avoiding the requirement of full patent coverage in the WTO rules.

The **Dispute Settlement Understanding** ("DSU") is the second Agreement that specifically mandates the Secretariat to offer technical assistance. Indeed, Article 27.2 stipulates that, as developing country Members may need legal advice and assistance with respect to dispute settlement, "the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests."

In accordance with this mandate, the Technical Cooperation Division set up a unit on Legal Advice to Developing Countries, also in charge of coordinating four-day dispute settlement courses at the headquarters of the WTO in Geneva. These courses are open to delegations and participants from all WTO Members. The unit was staffed with one or two junior legal affairs officers. These officers were always the first contact for delegations of developing countries wishing to raise any matter related to the DSU, including general information on its functioning, technical legal advice on the feasibility of potential cases, and in the end, referral to outside legal experts for specific advice. These outside legal experts work with the WTO on a consultancy basis. Two outside senior legal experts were under contract with the Secretariat on a part-time basis (one day per week) to assist developing countries bringing cases to the DSB. In 1998, the Budget, Finance and Administration Committee of the WTO decided, in keeping with the priorities of the Director General, to include in the 1999 Budget proposals three additional professional staff for the provision of legal expertise, at a cost of almost 500,000 Swiss Francs.

However, although in 1999 senior management of the WTO considered the provision of legal assistance as a priority, two years later, the unit on Legal Advice to Developing Countries disappeared from the new Technical Cooperation Division[16], the coordination of the Dispute Settlement courses was turned over to the Training Division and the legal advice work continued on an ad hoc basis through the regional coordinators.

[15] http://www.iprcommission.org.

[16] *See* organisational chart adopted in June 2001.

An important point that emerges from the DSU-related technical assistance that has a bearing on the global provision of TRTCCB by the WTO is related to the question of why did the negotiators of the DSU decide to place the legal advice activity within the technical cooperation services of the Secretariat? The answer is the requirement of the "continued impartiality of the Secretariat", specified by the last sentence of Article 27.2 of the DSU. Placing the responsibility for legal advice in the Legal Division would probably have impaired this impartiality, so that a firewall had to be set up between the legal servicing responsibilities of the Legal Affairs Division to the DSU and the legal advice services provided as technical assistance to developing countries.

The illustration of how many official and non-official organisations are involved in providing TRTCCB on the specific subject of TRIPS, as seen above, can be extended to the rest of the Agreements. Thus, if each area was to be researched and the resources available for TRTCCB on each of them calculated, the figures would be staggering. This is illustrated by a WTO and the OECD report, issued in December 2002. This report provides a database of the TRTCCB activities related only to the Doha Work Programme in 2001. It indicates that there were around 4500 different activities provided by 28 multilateral donors. The baseline for 2001 reveal over 1200 commitments to activities identified with the Doha Declaration, amounting to US$466 million, and a further 1300 activities related to trade development for a total of US$1.02 billion[17].

The modes of delivery of building capacity in resource-constrained countries are also worth considering. Most trade-capacity building activities are delivered through seminars and workshops. However, although the limitations of this mode of delivery are well known, more effective alternatives are still to be implemented. Long-term training and capacity building are costly and not practical for officials who have routine responsibilities that make it impossible for them to engage in full-time training. However, other alternatives would include private sector involvement, in modalities yet to be determined. Finally, academic programmes in universities and institutions of higher education are also viable options to consider, although these would require a longer time perspective than the short- to medium term urgency imposed by the negotiating programme. In any case, further discussion on effective means of providing capacity building on trade and investment seem essential if TRTCCB are to improve the effective participation of developing countries in any future trade negotiations and assist them in implementing the Agreements and benefiting from multilaterally agreed trade rules.

V. Conclusion

The brief overview of the resources available for TRTCCB, the subjects that it covers and the actors involved in providing it, may lead to some frustration on how to begin tackling the challenging task of assessing whether or not efforts relating to TRTCCB are efficient and effective. It is extremely difficult to measure the effectiveness of something as abstract as TRTCCB. Although answers to these questions are not likely to be arrived at easily, at least donors and recipients of TRTCCB and the institutions themselves are posing the questions. The OECD's Development Assistance Committee has provided the first such answer by the way of the guidelines for TRTCCB[18]. This has been the first step, although more reflection is needed to achieve concrete results from TRTCCB. Some

[17] WTO/OECD, *First Joint WTO/OECD Report on Trade-Related Technical Assistance and Capacity Building*, Geneva/ Paris, November/December 2002.

[18] *Supra,* note 3.

thought should be given of the modes of delivery. Seminars and workshops that account for the lion's share of the TRTCCB's budgets are useful, but other more effective means of delivery should be found.

Coherence has been often mentioned, and it is indeed a key concept in all trade (and other) policy formulation, both at the international as well as the domestic level. The need for greater international policy coherence was among the significant results of the Uruguay Round. Coherence must surely involve not only international organisations but should also be part of the donor community's efforts regarding technical cooperation. Effective coordination amongst donors should become a permanent feature of TRTCCB.

BIBLIOGRAPHY

Bonaglia, Federico and Kiichiro Fukasaku, *Export Diversification in Low-Income Countries: An International Challenge after Doha,* OECD Development Centre, Technical Papers 209, Paris, June 2003.

DFID, *Eliminating World Poverty, Making Globalisation Work for the Poor, White Paper on International Development*, London, 2000.

Japan International Cooperation Agency, *Japanese Approach for WTO Capacity Building Cooperation—Basic Concept and Measures,* JICA, Tokyo 2003.

Luke, David, *Rethinking the Poverty Reduction Strategy Paper (PRSP) as an Instrument of Mainstreaming Trade Capacity Development,* Paper presented at the OECD Regional Workshop on Trade Capacity Building, Mombasa, Kenya, 26–27 August 2002.

OECD, *Strengthening Trade Capacity for Development. The DAC Guidelines*, Paris, OECD, 2001.

Pallangyo, Abraham, *Integrated Approaches to Trade Capacity Building Lessons from the JITAP*, Paper presented at the OECD Regional Workshop on Trade Capacity Building, Mombasa, Kenya, 26–27 August 2002.

UNCTAD, *Positive Agenda and Future Trade Negotiations*, (UNCTAD/ITCD/TSB/10), 1 July 200.

UNDP, *Making Global trade Work for People*, London, Earthscan Publications, 2003.

WTO/OECD, *First Joint WTO/OECD Report on Trade-Related Technical Assistance and Capacity Building*, Geneva/ Paris, November/December 2002.

World Intellectual Property Organization, *WIPO 's Legal and Technical Assistance to Developing Countries For the Implementation of the TRIPS Agreement From January 1 1996 to December 31 200*", WIPO, Geneva

CHAPTER 56

TRADE AND ELECTRONIC COMMERCE

Stewart Baker and Maury Shenk*

TABLE OF CONTENTS

I. Introduction 470
II. History of Electronic Commerce at the WTO 470
A. Basic Telecommunications Agreement 470
B. Work Programme on Electronic Commerce 471
C. Seattle Ministerial 472
D. Doha Round 472
III. Current Issues at the WTO for Electronic Commerce 472
A. The Classification Debate—Goods vs. Services 472
1. Theoretical Principles 474
2. Basic Trade Principles 475
3. Practical Considerations 476
B. GATT Issues 476
1. Customs Duty Moratorium 477
2. Information Technology Agreement 477
C. GATS Issues 478
1. E-Commerce Infrastructure Services 478
2. E-Commerce End-User Services 479
3. Classification Issues 480
4. New Commitments 481
D. TRIPS Issues 481
E. Trade and Development 483
F. Taxation 484

* Stewart Baker and Maury Shenk are partners in the Technology Group of the law firm Steptoe & Johnson LLP. Mr. Baker is based in Washington, D.C. and Mr. Shenk is based in London.

I. Introduction

Much of electronic commerce (or "e-commerce") is governed by the same basic principles of GATT, GATS, TRIPS and other WTO agreements that apply to offline commerce. For example, it should not matter for purposes of trade analysis if a physician delivers cross-border medical advice by letter, by telephone, or via the Internet. And a book that is ordered online from Amazon.com is still subject to ordinary GATT principles when it is delivered internationally. However, in important respects the WTO system must adapt to e-commerce—both through changes to existing rules and adoption of new rules. This chapter considers the new WTO issues presented by e-commerce.

II. History of Electronic Commerce at the WTO

A. Basic Telecommunications Agreement

The first significant negotiations at the WTO in which e-commerce was explicitly discussed were the 1995–1997 negotiations of the Basic Telecommunications Agreement, which involved commitments on basic telecommunications (*i.e.*, services for transmission of electronic communications without alteration of the information transmitted)—an area on which agreement had not been reached at the time GATS was initially agreed and which until the negotiations remained outside the most-favored nation obligation of GATS.[1] While basic telecommunications services are not typically considered to be "e-commerce", basic telecommunications provide the transmission infrastructure of the Internet, which was rapidly entering the global consciousness at the time that the Basic Telecommunications Agreement was being negotiated.

The Basic Telecommunications Agreement involved 69 countries representing over 95 percent of the global market for basic telecommunications services,[2] and a number of countries have made subsequent commitments on basic telecommunications through WTO accession.[3] Fifty-five of the countries joining the Basic Telecommunications Agreement (and others later joining through accession) adopted a "Reference Paper" setting out regulatory commitments for basic telecommunications.[4] There is a significant amount of variation among the scope of commitments under the Basic Telecommunications Agreement, with developed countries generally guaranteeing much more open markets than developing countries. Given the nascent nature of the Internet at the time of the Basic Telecommunications Agreement negotiations, the negotiations did not resolve any of the key issues for e-commerce—although the negotiating parties discussed some of these issues and recognised that significant questions regarding the Internet and e-commerce were left on the table. Therefore, the commitments under the agreement address e-commerce only to the limited extent discussed in Part II.C.1 below—*i.e.*, to the extent that basic telecommunications services supply the infrastructure for e-commerce.

[1] *See* GATS, *Annex on Negotiations on Basic Telecommunications*; Fourth Protocol to the General Agreement on Trade in Services, WTO Doc. S/L/20 (April 30, 1996).

[2] *See id.*; *Basic Telecom Negotiations, Statement of Ambassador Charlene Barshefsky* (Feb. 15, 1997), available at http://www.ustr.gov/releases/1997/02/barshefsky.pdf.

[3] *See, e.g.,* Republic of Estonia, Schedule of Specific Commitments, WTO Doc. GATS/SC/127 (Oct. 5, 1999); Oman, Schedule of Specific Commitments, WTO Doc. GATS/SC/132 (Dec. 22, 2000); Republic of Croatia, Schedule of Specific Commitments, WTO Doc. GATS/SC/130 (Dec. 22, 2000).

[4] *See, e.g.,United States of America, Schedule of Specific Commitments*, WTO Doc. GATS/SC/90/Suppl.2 (Apr. 11, 1997).

B. Work Programme on Electronic Commerce

At the Second Ministerial Meeting held in Geneva in May 1998, the WTO adopted a Declaration on Global Electronic Commerce, which stated:

> The General Council shall, by its next meeting in special session, establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, including those issues identified by Members. The work programme will involve the relevant World Trade Organization ("WTO") bodies, take into account the economic, financial, and development needs of developing countries, and recognize that work is also being undertaken in other international fora.[5]

The General Council formally established the Work Programme on Electronic Commerce ("Work Programme") on September 30, 1998.[6]

The most important products of the Work Programme so far are four interim reports issued in mid-1999 by the Council for Trade in Goods,[7] the Council for Trade in Services,[8] the Council for Trade-Related Aspects of Intellectual Property Rights,[9] and the Committee on Trade and Development.[10] These reports sought to identify broad issues for e-commerce and the positions of WTO Members on such issues, but did not engage in extensive substantive analysis. For example, both the Council for Trade in Goods and of the Council for Trade in Services set out the various viewpoints on the "classification debate" discussed below, without attempting to resolve the issue.[11] Likewise, the Council for Trade in Services identified the ambiguity regarding modes 1 and 2 for delivery of services (which is discussed in Part II.C.3 below), "but no conclusion was reached as to how to clarify the matter."[12] The Council for Trade-Related Aspects of Intellectual Property Rights and the Committee on Trade and Development both noted that bodies other than the WTO play a major substantive role in formulating rules for e-commerce.[13]

A striking aspect of the Work Programme, and of the four interim reports, is that in 1998 and 1999 e-commerce was clearly one of the major items on the WTO agenda. Nevertheless, other than providing a forum for discussions on trade issues for e-commerce, the Work Programme did not make significant progress in any of the relevant substantive areas—other than the agreement to maintain the moratorium on customs duties on electronic transmissions (discussed below). Therefore, although e-commerce is now lower on the WTO agenda, much work in the area remains to be done.

[5] *Declaration on Global Electronic Commerce,* WTO Doc. WT/MIN(98)/DEC/2 (May 20, 1998) ("*Second Ministerial E-Commerce Declaration"*), text reproduced in the Appendix to this book.

[6] *Work Programme on Electronic Commerce*, WTO Doc. WT/L/274 (Sept. 20, 1998).

[7] *Interim Review of Progress in the Implementation of the Work Programme on Electronic Commerce*, WTO Doc. WT/GC/24 (Apr. 12, 1999) ("*Work Programme Goods Report"*).

[8] *Work Programme on Electronic Commerce, Progress Report to the General Council*, WTO Doc. S/L/74 (July 27, 1999) ("*Work Programme Services Report"*).

[9] *Work Programme on Electronic Commerce, Progress Report to the General Council*, WTO Doc. IP/C/18 (July 30, 1999) ("*Work Programme TRIPS Report"*).

[10] *Contribution by the Committee on Trade and Development to the WTO Work Programme on Electronic Commerce*, WTO Doc. WT/COMTD/19 (July 15, 1999)("*Work Programme Development Report*").

[11] *Work Programme Goods Report*, *supra* note 7, ¶¶ 2.3–2.11; *Work Programme Services Report*, *supra* note 8, ¶ 6.

[12] *Work Programme Services Report*, *supra* note 8, ¶ 5.

[13] *Work Programme TRIPS Report*, *supra* note 9, ¶¶ 6–7 (noting role of WIPO*); Work Programme Development Report*, *supra* note 10, ¶ 17 (noting role of UNCTAD and other organizations).

C. Seattle Ministerial

E-commerce remained high on the WTO agenda at the time of the Third Ministerial Meeting in Seattle in late 1999. Sources within the U.S. government believed that e-commerce was a leading issue on which meaningful agreement was possible in Seattle. For example, it was expected that progress could be made on the "classification debate" (discussed below) and on expansion of GATS commitments for e-commerce. However, as is well known, for a variety of reasons the Seattle Ministerial ended without agreement on these and other issues.

D. Doha Round

By the time of the November 2001 Fourth Ministerial Meeting in Doha, Qatar, e-commerce had assumed a much lower profile at the WTO—as a result of the collapse of the "dotcom" bubble, the substantial contraction in the e-commerce-based "new economy", and the emergence of other priorities in the work programme of trade negotiations initiated at the meeting (*e.g.*, developing country issues; environment, labour and health issues; investment; government procurement). However, e-commerce remains on the agenda and received some new attention during the preparations for the Doha Round. In June 2001 and June 2002, the WTO General Council held discussions on e-commerce that addressed, among other things, the classification debate, development issues and fiscal implications of e-commerce.[14]

In Doha, the WTO has explicitly decided to continue the Work Programme. The Doha Ministerial Declaration states:

> *Electronic Commerce*
>
> 34. We take note of the work which has been done in the General Council and other relevant bodies since the Ministerial Declaration of 20 May 1998 and agree to continue the Work Programme on Electronic Commerce. The work to date demonstrates that electronic commerce creates new challenges and opportunities for trade for Members at all stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic commerce. We instruct the General Council to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference. We declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.[15]

The activities of the Work Programme are continuing as the Doha Round begins.[16]

III. Current Issues at the WTO for Electronic Commerce

A. The Classification Debate—Goods vs. Services

An important background for e-commerce issues under GATT and GATS is the "classification debate" at the WTO regarding whether products sold through e-commerce should

[14] *Dedicated Discussion of Electronic Commerce Under the Auspices of the General Council 15 June 2001*, WTO Doc. WT/GC/W/436 (July 6, 2001) ("*2001 Discussion"*); *Second Dedicated Discussion on Electronic Commerce*, WTO Doc. WT/GC/W/475 (June 20, 2002) ("*2002 Discussion*"); *see also Communication from Switzerland*, WTO Doc. IP/C/W/286 (June 22, 2001) (addressing TRIPS issues for e-commerce).

[15] *Ministerial Declaration*, WTO Doc. WT/MIN(01)/DEC/1 (Nov. 20, 2001) ("*Fourth Ministerial Declaration*"), reproduced in the Appendix to this book.

[16] *See, e.g., Work Programme on Electronic Commerce in the Committee on Trade and Development*, WTO Doc. WT/COMTD/35 (Dec. 19, 2001) ("*2001 CTD Report*").

be treated as goods or services (or some hybrid of the two).[17] There is consensus that goods ordered electronically but delivered in physical form are subject to GATT and the other Multilateral Agreements on Trade in Goods, and that "real world" services that are delivered online (*e.g.*, medical or legal services) are subject to GATS.[18] The debate centers around content-based "digitized products", including music, books and video, that can be delivered either in physical or electronic form.

The classification debate is important because of the greater trade protections that are available under the long-established GATT rules for trade in goods than under the much newer GATS rules for trade in services.[19] The United States has been the primary advocate of the position that digitized products should be treated as goods and benefit from GATT protections:

> While some have suggested that all commerce based on electronic transmission is a service, this conclusion needs further examination. . . . While the transmission of these products can certainly be characterized as a service, the products themselves are not consumed in their transmission, but rather retain a permanence analogous to the goods world. . . . The United States is not arguing that intangibles should be classified as "goods" in the traditional sense. Given the broader reach of WTO disciplines accorded by the GATT (i.e. market access and national treatment are not dependent on specific commitments) there may be an advantage to a GATT versus GATS approach to such products which could provide for a more trade-liberalizing outcome for electronic commerce.[20]

The U.S. position gained some support from Japan,[21] but was at least initially a clear minority view at the WTO. However, the U.S. position has been much more seriously discussed in the beginning of the Doha Round.[22]

At the other end of the spectrum, the EU contends categorically that digitized products should be treated as services:

[17] *See, e.g.,* Council for Trade in Goods, *Work Programme on Electronic Commerce, Information Provided to the General Council*, ("wide range of opinions and questions regarding the characterization of the content of electronically transmitted digitalized data"); *Work Programme Services Report*, *supra* note 8, at ¶ 6. It is generally agreed that in order to avoid the need to develop an entirely new trade regime, e-products should not be classified as "something else" other than goods or services.

[18] *See*, *e.g.*, United Nations Conference on Trade and Development, *E-Commerce and Development Report 2001*, at 126 (Nov. 2001) ("*UNCTAD E-Commerce Report*") ("a number of commodities . . . traditionally have been shipped physically and been subject to border tariffs, but which today can be transformed into a digitized format and sent through the Internet").

[19] Under Articles I and III of the GATT, all goods imported from WTO Members must receive MFN and National Treatment. Under the GATS, by contrast, Members could take an exception from the MFN requirement for particular service sectors at the time of negotiation, and National Treatment is only provided for sectors with respect to which a Member has made a positive commitment. See Chapter 19 of this book.

[20] *Work Programme on Electronic Commerce*, Submission by the United States, WTO Doc. WT/GC/16, at 5 (Feb. 12, 1999) ("*U.S. Submission*").

[21] *See Preparations for the 1999 Ministerial Conference, Electronic Commerce,* Communication from Japan, WTO Doc. WT/GC/W/253, at 1 (July 14, 1999) ("With respect to the treatment of digital contents transmitted electronically, it is appropriate to examine the issue further so that the principles stipulated under GATT, namely the most-favoured-nation treatment, national treatment and the general elimination of quantitative restrictions, can be applied to such contents.").

[22] *See* 2002 Discussion, *supra* note 14 ("Many delegations highlighted the classification issue as a key element in the Work Programme, and felt that it was not desirable to try to seek a definitive determination of the classification of digital products in their entirety as either goods or services."); *see also* 2001 Discussion, *supra* note 14, at 1–2; *Discussion Paper: The Classification of Software Delivered Electronically*, Non-Paper from Canada (Apr. 29, 2002).

Electronic commerce involves two types of deliveries:

— goods delivered physically, while ordered electronically, which fall within the scope of the GATT;
— electronic deliveries, which consist of services and therefore fall within the scope of the GATS.[23]

The EU position commands fairly substantial support among WTO Members. This support appears to be due to a number of factors, including the practical considerations described in Part II.A.3 below, and the fact that a services classification offers more scope for protection of national service providers from competition by the powerful e-commerce companies of the United States.

Other WTO Member countries have taken a moderate approach, focusing on the principle that WTO rules should not discriminate between digitized products and their physical analogues. For example, Indonesia and Singapore have stated:

> The advent of digitized products however has blurred the boundary between goods and services. . . . Whatever the classification, the basic principles of MFN and national treatment have to apply in order to ensure fair, open and transparent market access for e-commerce.[24]

We consider the classification debate under three general frameworks: theoretical principles regarding the nature of goods and services; certain basic WTO trade principles; and practical considerations of whether trade in digitized products is best administered under GATT or GATS.

1. Theoretical Principles

It has been argued that essential characteristics of goods are that they possess value which can be owned, exist independently of their owners, and can be traded.[25] Services, by contrast, involve some desired change caused by the service provider to something owned by the consumer or to the physical or mental state of the consumer himself. The delivery of a service requires a relationship between the service provider and consumer.[26] Under this analysis, digitized products that can be owned, including books, music and video, constitute goods, even though they do not have tangible form. Increasingly however, suppliers are offering such products in forms that look more like services (*e.g.*, streaming audio, video on demand).

Another approach is that a good is tangible while a service is an intangible, a distinction that played a role in the WTO Appellate Body decision in *Canada—Certain Measures Concerning Periodicals*.[27] In that case, Canada argued that a tax on periodicals applied to advertisements and was thus subject to GATS rules. The Appellate Body found that

[23] *Preparations for the 1999 Ministerial Conference, Work Programme on Electronic Commerce*, Communication from the European Communities and their Member States, WTO Doc. WT/GC/W/306, at ¶ 1 (Aug. 9, 1999).

[24] *Preparations for the 1999 Ministerial Conference, Work Programme on Electronic Commerce*, Communication from Indonesia and Singapore, WTO Doc. WT/GC/W/247, at 2–3 (July 9, 1999); *see also* 2001 Discussion, *supra* note 14, at 2 ("It was suggested that certain products now categorized as goods and enjoying national treatment and duty-free access under the ITA and GATT should continue to be given similar treatment if it were agreed that they should be classified as services.").

[25] Peter Hill, *Tangibles, Intangibles and Services: A New Taxonomy for the Classification of Output*, 32 CANADIAN J. ECON. 426, 437–41 (1999).

[26] *Id.* at 441–43.

[27] Report of the Appellate Body, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R, at 3–4 (1997).

while advertising and editorial content had "service attributes," they formed a "physical product" in the periodical itself.[28]

Finally, it is possible that digitized products could be treated as *both* goods and services, and that trade in digitized products could be governed by both GATT and GATS.[29] The WTO Appellate Body most recently considered this issue in the *EC Bananas* case:

> Certain measures . . . could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good . . . However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different . . . Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.[30]

While classification of digitized products as both goods and services is thus theoretically possible, such a classification would likely produce substantial confusion regarding which trade rules to apply to particular types of transactions.

In sum, there is no clear principle that establishes whether the essential nature of digitized products is that of goods or of services.

2. Basic Trade Principles

Under the basic WTO principles of national and most-favored nation treatment, imported products from one Member must be treated identically with imports of like products from other Members, and "no less favorably" than like domestic products.[31] Because digitized products demonstrably are substitutable with their physical analogues,[32] these principles appear to indicate that digitized products should be treated no less favorably than the equivalent physical products and enjoy the full protections of GATT. Although the principles of national and most-favored nation treatment generally apply only where products are "like"—and one might argue that digitalized products and their physical analogues are not "like", even if they are substitutable—the fundamental principle of non-discrimination that inheres in the principles of national and most-favored treatment militates in favour of equality of treatment.

A closely related (and newer) principle is that of technology neutrality[33]—*i.e.*, that a change in delivery technology should not change applicable trade protections.[34] Likewise,

[28] *Id.* at 17.

[29] *See generally* John P. Gaffney, *The GATT and the GATS: Should They Be Mutually Exclusive Agreements?*, 12 LEIDEN J. INT'L L. 135 (1999); *see also UNCTAD E-Commerce Report*, *supra* note 18, at 125 ("Or should there be a third category of electronic transmissions, some mixture of goods and services—but in that case, which would be the governing multilateral rules?").

[30] Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, at ¶ 221 (1997).

[31] *See* GATT, Articles I, III; GATS, Articles II, XVI-XVIII.

[32] *See, e.g.,* Ludger Schuknecht & Rosa Pérez-Esteve, *A Quantitative Assessment of Electronic Commerce,* WTO Economic Research and Analysis Division Staff Working Paper ERAD-99-01, at 5–6 (Sept. 1999).

[33] *See* 2001 Discussion, *supra* note 14, at 2, for a brief discussion of the interaction of like product and technology neutrality issues for e-commerce.

[34] In particular, GATS commitments apply to services "provided through any means of technology (e.g., cable, wireless, satellites)." Group on Basic Telecommunications, *Notes for Scheduling Basic Telecom Services Commitment*, WTO Doc. S/GBT/W/2/Rev.1, ¶ 1(c) (Jan. 16, 1997) ("*GBT Scheduling Note*").

under this principle, a digital book or record should not benefit less from liberalized trade than if it were delivered on paper or vinyl.

A final bedrock WTO principle is that of progressive trade liberalization. Under both GATT and GATS, withdrawal of commitments requires compensation to affected countries.[35] Giving digitized products only the lesser trade protections of GATS (rather than the GATT protections applicable to their physical analogues) would be a step backward in trade protection, and would therefore appear to contravene the principle of progressive liberalization.[36] In sum, traditional principles of trade analysis indicate that digitized products should receive the full protections available under GATT to their physical analogues.

3. Practical Considerations

Classification of digitized products as goods presents two significant practical problems. First, a line-drawing problem arises because, as even the U.S. recognizes, "[m]ost market access commitments for electronic commerce activities fall under Members' service commitments."[37] If both goods and services can be delivered online, there will be persistent and difficult questions regarding which e-commerce activities are subject to GATT and which to GATS. Second, there is an enforcement problem, because customs duties are the primary national measures affecting trade in goods; and it may be nearly impossible reliably to assess customs duties on digitized products, given the nature of the Internet.

It may ultimately be necessary for the WTO Dispute Settlement Body to resolve the classification debate. On the other hand, a possible negotiated solution would be for WTO Members to agree to treat digitized products as services in exchange for GATS commitments to give such products trade benefits reasonably equivalent to comparable physical goods. This approach was advanced in a recent WTO General Council report that "suggested that certain products now categorized as goods and enjoying national treatment and duty-free access under the ITA and GATT should continue to be given similar treatment if it were agreed that they should be classified as services."[38] However, a potential problem is that this approach is premised on substantial elimination of the disparity between GATT and GATS protections for digitized products—*i.e.*, exactly the disparity that led to the classification debate. Nevertheless, a solution along these lines may be possible in the Doha Round.

B. GATT Issues

Aside from the difficulties surrounding the classification debate, e-commerce presents relatively few difficult issues under GATT. The primary reason is that ordinary GATT rules apply to goods that are ordered or traded electronically but are delivered in physical form. However, two GATT issues that appear to be of particular relevance to e-commerce are (1) the moratorium on customs duties on e-commerce, and (2) the possibility of broadening of the Information Technology Agreement regarding customs duties on information technology goods.

[35] GATT, Article XXVIII; GATS, Article XXI.

[36] *See 2001 Discussion*, supra note 14, at 2 ("It was also suggested that the most favourable approach to classification would be the least trade restrictive one.").

[37] *U.S. Submission, supra* note 20, at 3.

[38] 2001 Discussion, *supra* note 14, at 2.

1. Customs Duty Moratorium

In February 1998, the United States proposed to the WTO General Council that WTO Members agree not to impose duties on electronic transmissions.[39] At the May 1998 Second (Geneva) Ministerial Meeting, the WTO decided that "[w]ithout prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, . . . Members will continue their current practice of not imposing customs duties on electronic transmissions."[40] Again at the November 2001 Fourth (Doha) Ministerial Meeting, the WTO "declare[d] that Members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth [Ministerial Meeting]."[41]

However, the value of this moratorium is open to question. First, the moratorium is irrelevant if digitized products are classified exclusively as services, since services are not subject to customs duties. Second, it is not clear that any WTO Members have ever tried to assess customs duties on electronic transmissions—or that they could do so successfully if they were to try. Indeed, one might argue that in pursuit of a meaningless "photo-op" agreement, the proponents of the moratorium sowed the seeds of future discord, since the moratorium is now viewed as something that developed e-commerce countries must make concessions to maintain. As if in confirmation of this view, the United Nations Conference on Trade and Development ("UNCTAD") in late 2001 published a detailed calculation of the "tariff revenue losses" from the moratorium that would occur if digitized products both are treated as goods, and largely replace their physical analogues in international commerce.[42]

2. Information Technology Agreement

The Information Technology Agreement ("ITA")[43] was concluded at the First WTO Ministerial Conference (Singapore) and as of late 2001 covered more than 40 countries (including some that are not yet WTO Members) representing approximately 93 percent of world trade in information technology ("IT") products.[44] The ITA eliminated all customs duties on a wide variety of IT products, including computers, monitors and flat panel displays (but not televisions); computer network equipment and storage devices; telephones, wireless telephones and pagers; photocopiers; semiconductors, printed circuits and electronic components; semiconductor manufacturing equipment; capacitors; and a significant number of other products. Duties were eliminated in four steps ending on January 1, 2000, although certain developing countries are permitted to extend duty reductions through as late as 2005.

Although the ITA does not directly involve e-commerce transactions, the IT products that it covers are fundamental to e-commerce. In order to promote the continued growth of e-commerce, it will be important to expand the number of countries participating in the ITA, to add new products (including those for wireless and multimedia applications) to its coverage, and to ensure that the scope of the tariff categories covered by the ITA is clear. A Committee of Participants on the Expansion of Trade in IT Products (the "ITA

[39] *Global Electronic Commerce*, Proposal by the United States, WTO Doc. WT/GC/W/78 (Feb. 9, 1998).
[40] *Second Ministerial E-Commerce Declaration*, *supra* note 5.
[41] *Fourth Ministerial Declaration*, *supra* note 15, ¶ 34; *see also* 2002 Discussion, *supra* note 14.
[42] *See UNCTAD E-Commerce Report, supra* note 18, at 125–132.
[43] *Ministerial Declaration on Trade in Information Technology Products*, WTO Doc. WT/MIN96/16 (December 13, 1996).
[44] *See Report (2001) of the Committee of Participants on the Expansion of Trade in Information Technology Products*, WTO Doc. G/L/484 (Oct. 2, 2001) ("*ITA 2001 Report"*).

Committee") during 1997 and 1998 negotiated, fairly intensively regarding expansion of the product coverage of the ITA, but these negotiations were unsuccessful.[45] Negotiations in the ITA Committee have since continued at a less intense level.[46]

Disputes related to the ITA can arise if similar IT products are subject to different customs duties. This was the case in the WTO dispute between the United States and the European Communities regarding certain computer equipment with multimedia capabilities.[47] Furthermore, the removal of tariffs under the ITA has not eliminated non-tariff barriers to trade in IT products, a problem which could be addressed in further negotiations under the GATT and the TBT Agreement, either in the Doha Round or otherwise.

C. GATS Issues

GATS is by far the most important piece of the WTO framework for e-commerce. Whatever the outcome of the classification debate discussed above, it is clear that a very substantial portion of e-commerce involves services that are subject to the GATS. This section proposes a division of the e-commerce services covered by GATS into "infrastructure services" and "end-user services", and then considers certain classification issues applicable to e-commerce services, as well as the nature of new GATS commitments that would promote the growth of e-commerce trade.

1. E-Commerce Infrastructure Services

E-commerce "infrastructure services" are the services that provide the infrastructure for delivery of e-commerce to end-users. At a minimum, these include telecommunications services, other electronic communications services, and computer services. Commitments for basic telecommunications services and computer and related services, which provide the physical infrastructure for e-commerce, are covered by Sections 2.C.a-g and 1.B of GATS schedules respectively. Commitments for value-added telecommunications services (*e.g.*, Internet access, e-mail), which provide the platform over which e-commerce applications are delivered, are covered by Section 2.C.h of GATS schedules. And commitments for audiovisual services, which involve content transmitted over the Internet and other networks are covered by Section 2.D of GATS schedules.

U.S. submissions to the WTO in December 2000 illustrate the potential overlap of basic telecommunications services, value-added telecommunications services and audiovisual services with respect to the Internet. In a submission on telecommunications services, the United States noted:

[45] *See ITA Expansion Talks Suspended as New Dispute Prevent Final Deal*, INSIDE US TRADE (July 24, 1998); *WTO Members Headed for Final Showdown on ITA Expansion Agreement*, INSIDE US TRADE, (Nov. 27, 1998); *US Informally Backs Off Demands for Seattle Action on ITA II*, INSIDE US TRADE, (Oct. 15, 1999).

[46] *See Report (1999) of the Committee of Participants on the Expansion of Trade in Information Technology Products*, WTO Doc. G/L/332 (Oct. 14, 1999); *Report (2000) of the Committee of Participants on the Expansion of Trade in Information Technology Products*, WTO Doc. G/L/420, (Dec. 4, 2000) ("*ITA 2000 Report"*); ITA 2001 Report, *supra* note 45.

[47] *See European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1997). See also the discussion of "classification divergences" in ITA 2001 Report, *supra* note 44, ¶5, and ITA 2000 Report, *supra*note 46, ¶6.

> market access commitments for services enhanced through use of networks stimulate growth both of the underlying networks and the services that 'ride' over them. This is most obvious in value-added telecommunications services such as Internet-based services, which provide a layer of functionality above basic telecom services, and which in turn are the vehicle for delivering other services.[48]

Likewise, in a contemporaneous submission on audiovisual services, the United States included various "transmission services", including "'converged' transmission services which also transmit other forms of data, voice or other communications services" in a "Summary List of Audiovisual and Audiovisual Related Service Activities."[49]

A longer list of infrastructure services could be developed, incorporating financial services relevant to payment and certain distribution services. The EU has proposed such a list and argued that it is necessary "to facilitate the availability of the e-commerce critical services".[50] There may be a case for development of pro-competitive principles tailored to infrastructure services considered "e-commerce critical". Such a proposal has been made by a group of developing countries in respect of services, such as computer reservation services, which they consider to be essential for the development of their tourism industry.[51] Likewise, Cuba has called more generally for priority to be given to liberalisation of infrastructure and finance-related services, arguing that such services must be made available to developing country service suppliers if the so-called "digital divide" between rich and poor nations is to be reduced.[52]

2. E-Commerce End-User Services

In contrast to e-commerce "infrastructure" services, most e-commerce services that are delivered to business and consumer end-users are analogous to services that may also be delivered offline (*e.g.*, financial services, medical services, legal services, engineering services, etc.), and are covered by the same GATS commitments that apply to their offline analogues.

There is a tremendous amount of variation among WTO Members in the extent of their GATS commitments of market access and national treatment for such e-commerce services. The substantial majority of existing commitments were made when the WTO agreements were finalized in 1994, a time when the potential of e-commerce had hardly been identified. In many cases, the result is a lack of specificity of commitments, which can present a hurdle to enforcement[53]—either because the rapid development of e-commerce has meant that the relevant commitments did not anticipate the development of e-commerce (*e.g.*, where it is unclear whether a commitment for an offline service also extends to its online analogue) or because commitments are insufficiently specific in a sector in which technological specificity can be critical.

[48] *Communication from the United States, Market Access in Telecommunications and Complementary Services: the WTO's Role in Accelerating the Development of a Globally Networked Economy*, WTO Doc. S/CSS/W/30, ¶ 12 (Dec. 18, 2000).

[49] *Communication from the United States, Audiovisual and Related Services*, WTO Doc. S/CSS/W/21, Annex A (Dec. 18, 2000).

[50] *E-Commerce Work Programme*, WTO Doc. S/C/W/183 (Nov. 30, 2000).

[51] Communication from Bolivia containing a proposal for a Draft Annex on Tourism, WTO Doc. S/CSS/W/107 (Sept. 26, 2001).

[52] WTO Doc. WT/GG/W/435 (May 2001).

[53] To the extent a WTO Member has made GATS commitments for e-commerce services, the commitments may be enforced in state-to-state dispute resolution under the WTO Dispute Settlement Understanding, which is discussed in detail in Chapters 25 *et seg.* of this book.

These difficulties are somewhat mitigated by the principle of "technology neutrality", which was first recognized in the 1996–1997 negotiations of the Basic Telecommunications Agreement, under which commitments apply to services "provided through any means of technology (e.g., cable, wireless, satellites)."[54] This principle has become widely accepted at the WTO as generally-applicable to services delivered by technological means, including e-commerce services.[55] Continued careful application of this principle is critical if GATS commitments are to provide real trade protections as e-commerce continues to develop, since the technological developments of e-commerce move much faster than trade negotiations. The basic alternative to application of the principle of technology neutrality is negotiation of detailed commitments specific to e-commerce. But application of technology neutrality to existing commitments and negotiation of e-commerce-specific commitments are not mutually exclusive alternatives.

For example, in the case of financial services—which are one of the most important potential examples of e-commerce end-user services—the WTO has been actively considering the impact of e-commerce. In a detailed issues paper released after the December 1997 conclusion of the WTO Financial Services Agreement, the WTO raised a number of questions regarding the extent to which technological change affects trade rules for financial services:

> What are the implications of technological innovations on the structure of financial services industries and markets? How will such changes affect financial services trade? . . . How will developing countries be affected by the technological changes taking place in the sector? What conditions may be required for developing-country Members to be able to benefit from the opportunities provided by the new technologies?[56]

More recently, recognizing distance-selling opportunities provided by e-commerce, the financial services industry has called for financial services trade liberalization without the need for establishment.[57] As a practical matter, it is likely that many other service sectors will also require such a two-faceted approach to application of GATS commitments to e-commerce—involving both the principle of technology neutrality and the consideration of e-commerce-specific issues.

3. Classification Issues

There can be difficult line-drawing issues regarding GATS commitments for e-commerce services, in at least the three respects discussed below. Resolution of such classification ambiguities is an important issue regarding application of GATS to e-commerce services.

First, GATS schedules categorize services according to the Service Sectoral Classification List,[58] a document developed in 1991 which is largely based on the UN Central Product Classification ("CPC") and which does not include categories for most e-commerce services. The difficulty in using CPC codes to specify GATS classifications

[54] *GBT Scheduling Note, supra* note 34.

[55] *See Work Programme Services Report,supra*note 8, ¶ 24 ("Delegations endorsed the view that all services, whether supplied electronically or otherwise, are covered by the GATS, and that the GATS makes no distinction between services provided electronically or by other means.").

[56] *Financial Services,* Background Note by the Secretariat, WTO Doc. S/C/W/72 (Dec. 2, 1998).

[57] *Press Release by Financial Leaders Group* (Sept. 24, 2001).

[58] WTO/GATT Doc. MTN.GNS/W/120 (July 10, 1991); *see also Uniform Classification Systems,* WTO Doc. GPA/W/17 (May 15, 1996).

presented particular problems as WTO Members submitted requests for detailed bilateral negotiations under GATS in June 2002.[59]

Second, there can be ambiguity regarding what category of GATS commitments applies to particular e-commerce services.[60] For example, Internet access services appear to implicate the commitments for basic telecommunications services (*i.e.*, telecommunications circuits for delivering Internet communications to end-users), value-added telecommunications services (*i.e.*, software and related services to handle Internet content, such as web pages and e-mail), and audiovisual services[61] (*i.e.*, the content itself).

Third, GATS schedules for each service include separate commitments for four "modes" of service delivery, and commitments can be different for different modes.[62] There is substantial ambiguity whether certain e-commerce services involve mode 1 (cross-border delivery—*i.e.*, supply of a service "from the territory of one Member into the territory of any other Member") or mode 2 (consumption abroad—*i.e.*, supply of a service "in the territory of one Member to the service consumer of any other Member").[63] That is, the question becomes whether (a) the Japanese consumer is "traveling" abroad to visit a U.S.-based website (*i.e.*, Mode 2), (b) the U.S. website is providing medical advice across borders (*i.e.*, Mode 1), or (c) the two are meeting in some no-man's land called cyberspace.[64]

4. New Commitments

Because GATS is by far the most important WTO agreement governing e-commerce, WTO Members can substantially promote the growth of trade in e-commerce by expanding their GATS commitments for both e-commerce infrastructure services and e-commerce end-user services. As discussed above, it appeared not long ago that extension of commitments for e-commerce was likely to be a primary focus of the current round of trade negotiations. Although this is no longer the case, the Doha Round continues to present huge opportunities for new commitments on e-commerce. There are also many powerful interests pushing for liberalization of e-commerce trade; and compared to many other sectors, there is a relative lack of entrenched industries that seem likely to oppose trade liberalization. Accordingly, significant expansion of trade protections for e-commerce in the Doha Round remains quite likely.

D. TRIPS Issues

E-commerce is widely recognized as raising new issues for the international intellectual property system, bringing challenges for the balanced protection of creative content and commercial brands, as well as the technologies facilitating access to them, on digital networks.[65] As stated above, however, very little of substance has been accomplished

[59] These proposals are available at http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm.

[60] *See Classification of New Services Non-Paper*, Contribution of Japan (May 13, 2002).

[61] GATS commitments for audiovisual services are covered by Section 2.D of GATS schedules. There has been significant debate over whether and how the GATS should apply to audiovisual services, and audiovisual service commitments under the GATS are very limited.

[62] *See* Chapter 19 of this book.

[63] GATS, Art. I(2)(a), (b).

[64] Emad Tinawi & Judson O. Berkey, *E-Services and the WTO: The Adequacy of the GATS Classification Framework*, at 3 (1999) (available from OECD at http://www.oecd.org/pdf/M000014000/M00014377.pdf).

[65] *See Primer on Electronic Commerce and Intellectual Property Issues*, WIPO Doc. WIPO/OLOA/EC/Primer (May 2000).

by the WTO in this area since the Work Programme commenced in September 1998.[66] At that time, the Council for TRIPS was charged "to examine and report on the intellectual property issues arising in connection with electronic commerce," including the protection and enforcement of trademarks, copyright and related rights, and impact of new technologies and access to technology.[67] A Background Note prepared by the WTO secretariat in February 1999 observed that the question in this context "is whether the norms contained in the TRIPS Agreement provide 'effective and adequate protection of intellectual property rights' in respect of the new forms of exploitation made possible by means of interactive digital networks.[68] At the same time, however, the Note advanced the preliminary view that "given the technologically neutral language used in the TRIPS Agreement, its provisions are generally relevant also in the digital network environment."

In a July 1999 report, the TRIPS Council indicated that, given the novelty and complexity of trade-related intellectual property issues, further study was required to better understand them and the Council would continue to consider developments in this area. The Council also acknowledged the role of the World Intellectual Property Organization ("WIPO") undertaking significant work in this area. In particular, the TRIPS Council noted the adoption by WIPO in December 1996 of two new copyright treaties—the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT")—intended to respond to the impact of the convergence of information and communication technologies on copyrighted works and performances. The Council also reviewed WIPO's work in relation to trademarks and domain names, including the WIPO Internet Domain Name Process.[69]

Leading into the Seattle Ministerial, the intellectual property aspects of e-commerce were included on the Ministerial Agenda, and there were at least some discussions in particular about the implementation of the two WIPO treaties (WCT and WPPT) either as part of the TRIPS Agreement or as additional TRIPS-related agreements (*i.e.*, with or without re-opening the TRIPS Agreement itself).[70] At the same time, however, there was an emerging concern expressed by certain industry sectors that, given new pressures particularly from developing countries to "re-balance" TRIPS in favor of developing countries, any re-opening of TRIPS could prove counterproductive.

By the time of the Doha Ministerial, the focus in the international intellectual property community was squarely on the concerns being raised by developing countries.[71] Access to medicines and the relationship to patent rights, new norms of protection for traditional knowledge and folklore, and concerns by least-developed country Members in meeting

[66] Indeed, Member State representatives have expressed the view that it is curious, in light of the significant developments of electronic commerce, that the TRIPS Council had been virtually silent on the substance of this issue, with the exception of a very general interim report sent to the General Council in 2000, and that it is incumbent on the TRIPS Council, under Article 71, to take account of the enormous impact of technological developments on the legal and administrative framework of intellectual property protection.

[67] *Work Programme TRIPS Report, supra* note 9, at ¶ 1.

[68] Background Note by the Secretariat, *Work Programme on Electronic Commerce*, WTO Doc. IP/C/W/128 (February 1999).

[69] *Id.; see also* WIPO's e-commerce web site at http://ecommerce.wipo.int.

[70] *See* Daniel J. Gervaise, *The TRIPS Agreement After Seattle, Implementation and Dispute Settlement Issues*, 3 J. World Intellectual Prop. 509, 522–23 (2000).

[71] *See, e.g., TRIPS Council Meeting on Access to Medicines: WTO Members to Press on Following 'Rich Debate' on Medicines*, WTO Press Release 233 June 22, 2001); *Poor Countries Raise Hurdle at WTO*, Financial Times, November 9, 2001 (developing countries' demand a clear statement that WTO's agreement on trade-related intellectual property rights ("TRIPS") should not prevent them from importing and licensing medical supplies to meet public health needs).

existing TRIPS deadlines for implementation, were being raised with some urgency.[72] In light of this climate of views, e-commerce-related intellectual property issues no longer appeared on the radar screen—despite the fact that the WIPO Copyright Treaties were both very close to achieving the 30 ratifications each required to enter into force.[73]

It is therefore unsurprising that the Doha Ministerial Declaration does not speak directly about the intellectual property dimensions of e-commerce. Instead, the Declaration refers to intellectual property and public health issues, work on geographical indications (which was previously envisaged in TRIPS Article 23), and continuing implementation of the TRIPS Agreement, which is to include an examination of the protection of folklore and traditional knowledge, as well as the relationship between TRIPS and the Convention on Biological Diversity.[74]

As noted above, however, the Doha Declaration does reaffirm the Member countries agreement "to continue the Work Programme on Electronic Commerce".[75] Among the elements of this Work Programme is the work of the TRIPS Council in this area. In addition to the points reviewed above, the Declaration instructs the TRIPS Council to examine, *inter alia,* "other relevant developments raised by Members pursuant to Article 71.1.[76] Commentators have emphasized that this language serves as a placeholder to permit the WTO, during the next several years of negotiations, to return to issues such as e-commerce-related intellectual property issues. Others would view the incorporation of the WIPO 1996 copyright treaties as a logical and virtually inevitable element to be considered in this regard.[77]

E. Trade and Development

The role for the WTO on development issues relating to e-commerce is not yet well-defined. Many countries are uncertain where their interests lie. On the one hand, there is reason to believe that expanded e-commerce will greatly improve the competitiveness of poor countries with skilled service workers; for these workers, once forced to emigrate if they wanted to participate in the markets of the developed world, e-commerce opens new economic opportunities while allowing them to live and pay taxes at home. Despite this possibility, some spokesmen for the developing world have been hostile to open e-commerce markets. The 2001 *UNCTAD E-Commerce Report* illustrates this ambivalence: as discussed above the report identifies certain negative effects of e-commerce trade, but overall it takes a very positive view of the effect of

[72] Subsequently, the WTO Member states agreed upon a separate, political *Declaration on the TRIPS Agreement and Public Health*, which reaffirmed that "the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."

[73] The WCT entered into force on March 6, 2002 and the WPPT entered into force on May 20, 2002, in each case three months after the 30th ratification was achieved.

[74] *WTO Fourth Ministerial Declaration, supra* note 15, ¶¶ 17–19.

[75] *Id.*, ¶ 34.

[76] *Id.,*¶ 19. Article 71.1 of the TRIPS Agreement provides that the TRIPS Council may undertake reviews of the Agreement "in the light of any relevant new developments which might warrant modification or amendment of this Agreement."

[77] For example, the Swiss Government in June 2001 motioned the TRIPS Council to produce a report to ascertain how the Agreement should be amended to incorporate the 1996 WIPO treaties. *Communication from Switzerland, supra* note 15. Further, at recent meetings of the TRIPS Council concerning the impact of electronic commerce, a number of Member States and the European Union have expressed the view that work should be done to consider means to recognize the WCT and WPPT in the context of the TRIPS Agreement. *See TRIPS Council December 2000 Meeting Minutes*, WTO Doc. IP/C/M/29 (June 3, 2001).

e-commerce on the developing world:

> In the end it will be as the efficiency gains derived [e-commerce related] changes in the business processes seep into the productive tissue of the developing countries that ICT [information and communication technologies] and the Internet will contribute most to global economic growth and improved living standards. Indeed, it is because the Internet revolution is relevant not just to the high-tech, information sensitive sectors but also to the whole organization of economic life that its positive effects are spilling over more quickly into most sectors of the economy and that developing countries stand a better chance of sharing in its benefits earlier that in previous technological revolutions.[78]

The Committee on Trade and Development is one of the four primary WTO bodies that have participated in the Work Programme. In its report as part of the Work Programme, the Committee noted the potential importance of e-commerce to developing countries and focused in particular on the importance of developing physical telecommunications infrastructure in developing countries in order to promote the growth of e-commerce.[79] However, the Committee did not define a clear role for the WTO in the process. It noted that "aspects of electronic commerce are being addressed in a number of multilateral or plurilateral fora", and suggested that "it would be useful for WTO to cooperate much more closely with other international organizations working in these areas, such as UNCITRAL and UNCTAD, and to identify a particular role for the WTO.[80] Because developing country issues are high on the agenda for the Doha Round (the Doha Ministerial Declaration states that "[t]he work to date demonstrates that electronic commerce creates new challenges and opportunities for trade for Members at all stages of development"[81]) it is likely that the WTO will ultimately take on some role in trade and development issues for e-commerce. The Committee on Trade and Development took this process forward in a December 2001 report proposing that the Committee make e-commerce a regular agenda item and that the Committee sponsor a series of seminars on e-commerce and development.[82]

F. Taxation

E-commerce presents a variety of complex taxation issues, most of which are not directly related to the WTO and are therefore beyond the scope of this chapter. Furthermore, because many countries are still in the process of deciding how to apply tax rules to e-commerce, it is difficult to judge whether e-commerce taxation will ultimately present significant WTO issues.[83] The most likely context in which such issues may arise is that of tax rules that discriminate against e-commerce. In *Japan—Taxes on Alcoholic Beverages*, the WTO Appellate Body made clear that taxes that have discriminatory effect, even if not facially discriminatory, violate WTO rules.[84]

For example, the European Union recently decided to amend its value-added tax ("VAT") rules to provide that foreign-based suppliers of services (including digitzed

[78] *UNCTAD E-Commerce Report, supra* note 18, at xxv.
[79] *See Work Programme Development Report, supra* note 10.
[80] *Id.*, ¶¶ 17, 25.
[81] *WTO Fourth Ministerial Declaration, supra* note 15, ¶ 34.
[82] 2001 CTD Report, *supra* note 16.
[83] A good recent summary of e-commerce taxation issues is provided at pages 119–25 of the UNCTAD E-Commerce Report, *supra* note 18.
[84] Report of the Appellate Body, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996).

products) to the EU must charge VAT at the rate applicable in the country of consumption, while EU-based suppliers will continue to be permitted to charge VAT at the rate applicable in the country in which they are established.[85] Depending upon how these new VAT rules are implemented (likely in 2003), this differential treatment may violate the WTO national treatment requirement.[86] Similarly, if the classification debate is resolved in favor of treating certain digitized products as goods, a WTO national treatment claim could be presented by national law that applies differential tax rates to digitized products and their physical analogues (so long as it can be established that the products are "like or directly competitive")[87]

[85] *See Council Directive 2002/38/EC* (May 7, 2002).

[86] EU Internal Market Commissioner Frits Bolkestein has publicly recognised that there may be WTO concerns with VAT rules that place greater burdens on foreign suppliers. *See* Stewart Baker et al., *E-Products and the WTO,* 35 THE INTERNATIONAL LAWYER 5, 17 n. 62 and accompanying text.

[87] GATT, Art. III:2 and Ad Article III, paragraph 2.).

CHAPTER 57

TRADE AND COMPETITION POLICY

Merit E. Janow*

TABLE OF CONTENTS

I. Introduction 488
II. Why is Competition Policy Relevant to Trade Policy? 489
III. Coverage of Private Restraints and Competition Issues under International Trade Organization Regimes 493
A. The International Trade Organization and Other Early Efforts 493
B. GATT Deliberations and Rule Coverage 494
C. UNCTAD 497
D. OECD 497
E. Bilateral Cooperation Arrangements and Experiences 497
F. Regional Arrangements 499
IV. The Uruguay Round Agreements and the WTO 499
V. Competition Policy and the Next Round of Multilateral Trade Negotiations 501
A. European Union 502
B. The U.S. Government 503
C. Other Views 504
VI. Is There a Need for a New Global Competition Forum? 505
VII. Summary and Perspective of Key Issues for the WTO 506
VIII. Final Observations 508

* Professor in the Practice of International Economic Law & International Affairs and Director, Masters Program in International Affairs, Columbia University. From 1997–2000, Professor Janow served as Executive Director of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, US Department of Justice.

I. Introduction

Competition policy[1] and trade policy can be mutually reinforcing policy tools, working in tandem to foster markets that are contestable and competitive to the benefit of foreign and domestic interests alike. In some ways, these two policy instruments are flip sides of a coin—competition policy addresses private restraints of trade, whereas trade policy focuses on governmental restraints of trade. In the absence of effective competition policy, private restraints of trade can nullify the benefits of negotiated trade liberalization measures, reducing the benefits of the negotiated trade bargains such as tariff reductions and perhaps even public support for liberalization of trade.

Although trade and competition policy objectives are complementary along some dimensions, they are significantly different in emphasis and application. Competition policy is enforced at the national level by domestic authorities, and the history of international and especially multilateral cooperation in competition policy is limited. Much of the international cooperation and discussion that has taken place has occurred in bilateral settings. In contrast, while nations pursue their own trade policies, a defining development in trade policy in the postwar period has been the gradual expansion of multilateral trade laws, embodied in the rules of the GATT and now the WTO. Even aside from level of application, the substantive features of trade and competition policy have both areas of overlap and divergence. Under U.S. antitrust law, for example, the legal tests for injury and the pricing standards differ greatly from those found under trade remedies.[2]

At various points since the 1940s, experts and governments have considered how competition policy could be globalized. Although international consideration of competition policy is thus not new, the spread of competition law and policy around the world is. Over the last decade many countries have shown a growing interest in using competition policies as a means of bolstering the role of market-based competition in their economies. Since 1980 many developing countries and economies in transition have enacted new antimonopoly laws or strengthened existing laws and policies to facilitate the transition from planning to markets.

Multilateral consideration of the relationship between competition and trade policy moved a significant step forward in December 1996 when the world's trade ministers agreed at the WTO's Singapore Ministerial meeting to establish a working group to study and discuss the relationship between trade and competition policies. It was agreed from the outset that the initiation of the working group did not mean that international negotiations in the area of competition policy were a foregone conclusion. The Ministerial Declaration stated plainly that the work undertaken in the competition policy arena (and other areas) "... shall not prejudge whether negotiations will be initiated in the future ..."[3] Now, nearly seven years later, and particularly in the aftermath of the Doha Trade Summit

[1] This discussion uses the term competition policy to encompass those national laws (such as U.S. antitrust laws) and policies designed to promote competition in the marketplace and to deter and punish restrictive or abusive business practices. The main concern of competition law and policy is therefore private firm actions.

[2] The antidumping laws require a showing that the dumping contributed to material injury, which is defined as harm that is not "inconsequential, immaterial or unimportant." Section 771(7)(A) of the Tariff Act as amended, 19 U.S.C. §1677 (7)(A) (2001). US antitrust laws, however, have a higher standard of injury and causation and tend to require a showing of a substantial lessening of competition or unreasonable restraint of trade. Moreover, price discrimination in the context of the Robinson Patman Act provides certain defenses which are unavailable in the antidumping context, such as meeting competition. For an excellent comparison of antitrust and trade remedies and standards, see Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust laws*, 6 Geo. Mason L. Rev 479 (1998).

[3] *See* PWT/MIN (96) Dec., ¶ 20.

of 2001, there is serious debate as to whether competition policy should come under WTO rules in some fashion and what such global rules or principles should encompass.

This chapter starts by examining the function of the competition and trade policy tools and some possible links and tensions. It then briefly considers the postwar efforts to expand international discussion and cooperation on competition policy matters. The chapter then examines the Uruguay Round Agreements and evaluates those features that contain some fragmentary competition policy elements as well as recent efforts by governments and private groups to consider a role for the WTO. Finally, the chapter evaluates arguments for and against formal linkage of competition policy under the aegis of the WTO.

II. Why is Competition Policy Relevant to Trade Policy?

Competition law and policy is centrally concerned with the exclusionary conduct of *corporations* that restrict the operation of markets and raise costs to consumers. Trade policy, in contrast, is centrally concerned with measures taken by *governments* that restrict foreign access to markets and discriminate against foreign market participants. The effect of these two types of problems however are the same—less competition and higher costs for consumers.

Firms, governments, or some combination of the two, can impose anticompetitive or exclusionary restraints on trade. Exclusionary practices on the part of private firms can adversely affect competition in a relevant market and raise costs not only for domestic consumers, but also for foreign firms and consumers as well. Such arrangements may be between local firms, or they may be transnational in nature, taking the form of market allocation agreements, cartels with boycott arrangements, and other restrictive business arrangements across national boundaries.

Government policies or practices can support exclusionary business practices in many ways. Governments can act *affirmatively* to distort the operation of private markets and provide advantages to local firms. Examples include discriminatory enforcement of competition policy; government-authorized exemptions to national competition laws; the use of competition laws to advance industrial policy objectives, such as national champions; or trade policy measures that directly affect cross-border sales, such as anti-dumping measures and voluntary export restraint arrangements.

Alternatively, government practices can affect competition through *acts of omission*, by tolerating anticompetitive arrangements, for example, or failing to enforce competition laws if such laws are in place. Further, markets can be formally liberalized by privatizing monopolies, but privatization might not augur any change in access for new entrants, foreign or domestic, in the absence of a functioning competition policy regime. Both of these prototypes—exclusionary or anticompetitive business practices, and government practices that affirmatively or through inaction undermine competition among firms—have been largely outside the reach of international trade or antitrust rules.

Trade and competition policies are two methods of addressing such problems. Traditionally, enforcement of competition policy has been considered primarily the responsibility of national competition authorities concerned about anticompetitive effects on markets and consumers on their soil. In addition, some jurisdictions, notably the United States, have at times applied their antitrust laws (or at least asserted their willingness to apply their law) extraterritorially in an attempt to remedy such practices.

Some nations also have provisions whereby domestic trade laws are applied extraterritorially to reach certain market access restraints. For example, U.S. trade law, under

Section 301 of the Trade Act, as amended, can apply to some offshore anticompetitive business practices that are affirmatively supported or tolerated by a national government.[4]

Trade and competition policies are designed to look at restraints that come from different sources. Nondiscrimination, transparency, most-favored-nation, and national treatment have all been central pillars of the liberal trading system and the GATT. Government actions that undermine these principles present broader and different concerns than the more technical analysis of competition in a market and market entry barriers, which are typically the focus of competition authorities. Each set of policy tools also has its limitations in the international context.

To highlight some differences in focus and application of the two sets of policy tools, consider three examples that illustrate the internationalization of competition problems.

First, international enforcement of competition policy has long presented problems. History shows that international cartels and other abuses of international markets do occur and that these can be longstanding anticompetitive arrangements, detrimental to firms and consumers in multiple markets, whether located in developed or developing countries, across many different industries.[5] The recent record of U.S. international cartel cases demonstrates that sizable volumes of commerce are affected by international cartels. Some investigations have involved more than one billion dollars a year of trade in the United States alone, and in more than half of the recent criminal investigations, the volume of affected commerce has exceeded $100 million.[6]

Uncovering such abuses is itself difficult. Additionally, enforcement or litigation of international cases often raises substantial procedural and evidentiary challenges, particularly when evidence and parties are located in multiple jurisdictions. Unilateral competition policy enforcement actions occur against a backdrop of longstanding tensions surrounding extraterritorial application of national competition (or antitrust) laws.

[4] In Section 2411(d)(3)(B)(i)(IV) of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S. C. Section 2901(d)(3)(B)(i)(IV), Congress clarified that the "toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market" constitutes an "unreasonable" practice, actionable under Section 301 of the Trade Act of 1974, 19 U.S.C. §2411–2420. The Senate Finance Committee Report describes the inclusion of this "toleration" claim as stemming from the "growing conviction . . . that anti-competitive, market-restrictive behavior on the part of private firms, when coupled with the failure of a foreign government to intervene to eliminate such behavior, can act as a barrier to market access, which is as great as any formal government act, policy or practice alone." *See*, S. Report No. 167, 100th Cong., 1st Sess. 85 (1987). Section 301 of the Trade Act of 1974, as amended, is the statutory basis by which the U.S. government initiates a trade case *vis-à-vis* a foreign government for possible violation of a trade agreement (e.g., a GATT or WTO commitment) or with respect to foreign governmental practices that are deemed unreasonable or discriminatory and that burden or restrict US commerce. This provision also provides the legal framework by which private parties, such as corporations, can petition the US government to investigate, and if necessary, take trade action against such governmental practices.

[5] A recent study undertaken at the behest of the World Bank presents interesting new evidence regarding the adverse impact of international cartels on developing nations. *See* Margaret Levenstein and Valerie Suslow, *Private International Cartels and Their Effect on Developing Countries*, Background Paper for the World Bank's World Development Report 2001, January 9, 2001. *See also*, Simon J. Evenett, Margaret C. Levenstein & Valerie Sulsow, *International Cartel Enforcement: Lessons from the 1990s*, 24 (9) *World Economy* 1221 (2001).

[6] There have been a number of major international cartel cases prosecuted by the Antitrust Division, Department of Justice in the lysine, citric acid, vitamins and graphite electrodes industries. There are also numerous historical examples, such as in the heavy electrical machinery sector, For additional details see International Competition Policy Advisory Committee ("ICPAC"), FINAL REPORT, March 2000, U.S. Department of Justice, at 168. ("*ICPAC Final Report"*).

U.S. actions have been especially controversial in this regard. U.S. case law at the turn of the century suggested that the reach of U.S. antitrust law extended no further than the water's edge. By the mid-1940s, however, U.S. case law had established that the Sherman Act applied to conduct occurring abroad when the participants intentionally and adversely affected U.S. commerce and the effects were deemed to be more than minor. This came to be called the "effects" test.[7]

Currently there is little dispute that U.S. antitrust laws reach foreign business practices perceived as having adverse consumer effects in the United States. What distinguishes U.S. antitrust law from competition law in many countries, however, is that it carries both civil and criminal penalties, high fines, and private rights of action, which permit the award of treble damages. In years past, several countries introduced so-called "blocking" and "claw-back" statutes, their specific *raison d'être* being to thwart U.S. discovery practices and to ameliorate the effects of treble damages. While the US was once the only OECD country to apply some form of the effects test, now most industrialized countries apply some form of effects test.[8]

More recently, the locus of controversy has been the reach and application of U.S. antitrust laws with respect to foreign private practices seen as limiting U.S. exports and hence principally harming U.S. *producers* as distinct from U.S. consumers. In such "market access" cases, the competitive harm is experienced by consumers in the foreign market as well as by the would-be entrant to the foreign market. To date, few U.S. antitrust cases have been brought under this theory.[9] Nonetheless, officials from several governments have expressed their strong objections to the application of U.S. antitrust laws to offshore competitive harm. As a result, this policy tool appears to be one that could result in political or trade friction.

A second example of the internationalization of competition issues stems from trade tensions arising from perceptions that nations are not enforcing their competition laws, are enforcing them in a discriminatory fashion, or are otherwise tolerating private, exclusionary practices by domestic businesses to the detriment of foreign market entrants. This type of barrier to market access is often cited as one example of the way a host government may foster private restraints of trade.[10]

Private restraints of trade that restrict market access and in which governments have been implicated have created trade and economic tensions among several countries. The suspect practices include non-enforcement of rules prohibiting vertical distribution restraints, the governmental use of industrial policies that have the effect of blocking

[7] *See United States* v. *Aluminum Co. of America*, 148 F.2d, 416, 443 (2d. Cir. 1945).

[8] *See* American Bar Association, *Report of the Special Committee on International Antitrust,* September 1, 1991.

[9] The International Competition Policy Advisory Committee, ICPAC, which this author directed, was able to find only five cases since 1978 that involved export restraint allegations. The most recent case, *United States v. Pilkington PLC* is the only case involving export restraint allegations since the Department of Justice eliminated footnote 159 of its enforcement guidelines that had suggested that the Department would not make it a priority to pursue export restraint cases. In this 1994 case, the DOJ charged the UK firm Pilkington with entering into unreasonably restrictive patent and know-how licensing agreements with its likely competitors for the manufacture of flat glass using a proprietary process. The Department alleged that the territorial and use limitations in the agreements precluded Pilkington's licensees in the United States from competing for business to design, build or operate flat glass plants in other countries. The case was settled by consent decree. *See* 1994–2 Trade Cas. (CCH) at ¶ 70,842. For additional examples and discussion of the same, *see ICPAC Final Report*, Annex 5-A.

[10] This is the type of problem that the feature of Section 301 of the 1974 Trade Act, discussed in note 4, *supra,* was designed to reach.

access, overly broad governmental exemptions or immunities from national competition laws, and discriminatory regulatory practices, among other measures.[11] Allegations of trade-restrictive private restraints have clouded U.S.-Japan trade and economic relations for much of the 1980s and 1990s. Those two governments entered into several bilateral trade accords that included some undertakings by the Government of Japan to enforce its competition laws (called the Anti-Monopoly Act) in a more vigorous fashion. Many of the challenged business practices focused on distribution (or vertical) business practices, where U.S. and other firms alleged that unilateral and joint activities of Japanese producers foreclosed foreign firms and other new entrants from using existing or developing new distribution channels.[12]

A third source of international economic tension emanates from those legal conflicts that have arisen in the context of multi-jurisdictional review of mergers. Large international mergers typically require review by competition authorities in several different countries. Disclosure requirements, timetables, and legal standards differ a great deal, depending on the jurisdiction. The proposed merger of McDonnell Douglas and Boeing in 1997 made these points in a dramatic fashion. In that case the U.S. Federal Trade Commission decided to approve Boeing's proposed acquisition of McDonnell Douglas, concluding after an investigation that the acquisition would neither substantially lessen competition nor tend to create a monopoly in either the defense or the commercial aircraft markets.[13] The European Commission took issue with the merger, raised concerns about the effect of the merger on Boeing's dominance, and threatened to reject the merger and impose large fines unless some specified adjustments were made by Boeing. Boeing made the requested adjustments.[14]

Although neither of the two merging firms had production assets within the European Union, few competition law experts took issue with the EU's assertion of authority to review the proposed merger, given the global commercial aircraft market. Instead, the issue involved the different legal conclusions reached by U.S. and European authorities. This case generated a great deal of political heat on both sides of the Atlantic, with both sides charging that the other side's competition authorities were informed, not so much by competition law, as by national champions and trade policies hiding behind competition law.

This case demonstrated that in a global economy, two or more nations can lay jurisdictional claim to the same business transaction. It also showed that major competition authorities could come to sharply different substantive legal conclusions, even when they had the same transaction before them. Moreover, the European Union demonstrated that,

[11] *See* Merit E. Janow, *Public and Private Restraints that Limit Access to Markets*, in MARKET ACCESS AFTER THE URUGUAY ROUND (OECD, 1996).

[12] For a period of time during the late 1980s and early 1990s, a particular set of problems was thought to be presented by the Japanese *keiretsu*, groups of companies with cross-ownership of shares and established patterns of doing business with other members of the group. As discussed in the section that follows, a major US-Japan trade dispute involving allegations of discriminatory access to distribution channels was the *US Film* case, often referred to as Kodak-Fuji since it was first brought to the attention of the U.S. government by Kodak Photo Film Company. *See* Report of the WTO Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper,* W/DS44/R (1998) *("Japan—Film").*

[13] *See* Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney *in The Matter of The Boeing Company/McDonnell Douglas Corporation*, File No. 971-0051, available at http://www.ftc.gov/opa/1997/9707/boeingsta.htm.

[14] For a more complete discussion of this case, *see* Merit E. Janow, *Unilateral and Bilateral Approaches to Competition Policy: An Analysis Drawing Lessons from the Trade Experience*, in BROOKINGS TRADE FORUM 1998 (Robert Z. Lawrence ed. 1999) at 253.

like the United States, it is fully prepared to apply its own laws when a foreign transaction is thought to affect its interests.

Some of these same lessons arose in the 2001 GE/Honeywell merger case,which was cleared by U.S. authorities but prohibited by the EU. And, unlike the Boeing/McDonnell Douglas transaction, the parties in GE/Honeywell were unable or unwilling to make the necessary adjustments in the transaction to obtain EU clearance. Hence, this transaction represents one of the few instances of direct conflict in substantive law between the United States and the EU, resulting in the termination of a major U.S. merger.[15]

Current trade and antitrust policy tools do not provide complete solutions to the international tensions that emanate from global competition problems or those problems that reflect a mix of governmental and private restraints. And no internationally agreed-upon set of competition or trade rules directly addresses business practices. For some, this situation is a call to create new multilateral rules and consultation mechanisms in the WTO. Others see the WTO as ill suited for that purpose and call instead for expanded competition initiatives outside the WTO. This chapter examines both sides of that debate. Wherever one lands on the question of the appropriate policy response for the WTO, it is certainly the case that the reduction of governmental trade barriers has brought into sharper relief the negative effects of internal practices, both public and private, on competition and access to markets. Concerns about access to markets are now almost universal—even countries with large domestic markets have come to rely on international trade sourcesas major sources of economic growth.

III. Coverage of Private Restraints and Competition Issues under International Trade Organization Regimes

Before turning to the pros and cons of possible approaches to international competition policy, let us review multilateral and other experiences with this issue.

A. The International Trade Organization and Other Early Efforts

Some of the early U.S. and U.K. architects of the International Trade Organization ("ITO") were concerned about the pernicious effects that international cartels and other private restraints of trade could have upon the world trading system. As a result, the draft Havana Charter included a chapter on restrictive business practices. Ironically, while it was U.S. negotiators that had sought to identify and proscribe certain business practices within the ITO charter, these provisions generated considerable opposition within the United States and contributed to the quiet demise of the ITO.[16] There was considerable suspicion in the United States that other countries were more tolerant of cartels and other industrial agreements and that therefore competition law and policy provisions would result

[15] *See* Press Release, July 3, 2001 Department of Justice, Antitrust Division. In this press release, Assistant Attorney General Charles James states that the Antitrust Division reached "a firm conclusion that the merger . . . would have been pro-competitive and beneficial to consumers. Our conclusion was based on findings, confirmed by customers worldwide, that the combined firm could offer better products and services at more attractive prices than either could offer individually . . . the EU however apparently concluded that a more diversified, and thus more competitive, GE could somehow disadvantage other market participants . . . Clear and longstanding U.S. antitrust policy holds that the antitrust laws protect competition, not competitors. Today's EU decision reflects a significant point of divergence".

[16] *See* Clair Wilcox, A CHARTER FOR WORLD TRADE 105 (1949).

in external scrutiny of U.S. practices without serious enforcement of anticompetitive practices within the home jurisdictions of the other ITO members.[17]

After the ITO charter failed, the United Nations Economic and Social Counci in 1953 endorsed a draft convention that would have established a new international agency to receive and investigate complaints of restrictive business practices.[18] The United States rejected the draft convention, arguing that differences in national policies and practices were so large that they would make the new international organization ineffective.[19] Concerns were also expressed that the one nation, one vote provision would allow nations hostile to the United States to instigate harassing complaints.

B. GATT Deliberations and Rule Coverage

The issue of multilateral coverage of private anticompetitive business practices did not die with the ITO. In the late 1950s, a group of twelve experts was convened at the GATT to take another look at this question, but was unable to reach a consensus opinion. The majority opinion recommended that business practices be left outside of dispute settlement (in particular, GATT Article XXIII) and advised that parties in competition disputes should enter into bilateral consultations. The majority contended that the absence of consensus and experience in this policy area made it unrealistic to try to arrive at any multilateral agreement concerning the control of international restrictive business practices. One way of remedying this deficiency, they argued, would be to develop a supranational body vested with broad powers of investigation, but this option was seen as unrealistic since many countries had not yet addressed the problem at the domestic level through a domestic enforcement agency.[20] In contrast, the minority view argued that Article XXIII of the GATT should be an available tool and that it was imperative that some measures be taken to counteract restrictive business practices having harmful effects upon international trade.

One consequence of this expert report was a 1960 GATT resolution calling for the GATT to provide a forum in which contracting parties could consult as to restrictive business practices, on an *ad hoc* basis and upon request. This provision was invoked only once, in 1996.[21]

In practice, litigation of disputes in the GATT/WTO centering on private business practices restricting access to markets that are supported by governments has been rare and difficult. Some experts have argued that GATT rules can apply to claims based on competition policy; however, the complaint would have to be based upon some measure applied by a government in contravention of an existing GATT obligation regarding national treatment, or a quantitative restriction. For example, if a government measure

[17] William Diebold, *The End of the ITO,* 16 INTERNATIONAL FINANCE 18 (1952).

[18] The draft convention included the same list of restrictive practices as the Havana Charter, with one exception relating to technology agreements. *See* Diane P. Wood, *The Impossible Dream: Real International Antitrust*, U. CHI. LEGAL F. 277, 284 (1992). For details of the draft convention, see F. M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY 39 (1994).

[19] Wood, *supra* note 18, at 284–85.

[20] *See* GATT BISD 7th Supp. 29 (1960).

[21] Specifically the recommendation states that ". . . the party addressed should accord sympathetic consideration to and should afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory consultations, and if it agrees that such harmful effects are present it should take such measures as it deems appropriate". *See*, GATT BISD 9th Supp. 28 (1961). This resolution existed in relative obscurity until it was invoked in 1996 by the United States in the context of a film dispute with Japan. See discussion later in this section.

affirmatively created conditions by which business interests discriminated against foreign goods and services, such a set of facts could give rise to a violation claim.

GATT's nonviolation provisions provide some scope for a complaint of competitive foreclosure of a market, if for example, non-application of national antitrust or competition laws were adjudged to be a "government measure".[22] Still, at least two other conditions would have to be satisfied: the measure would need to have altered the competitive conditions established by other GATT undertakings, and the government measure taken would have to be one that could not reasonably have been anticipated at the time that the tariff or other concession was made. Each of these conditions is a high hurdle that has rarely been brought to the test.

Two GATT/WTO cases have considered actions of governments that were alleged to affirmatively promote exclusionary conduct on the part of private firms.

Semiconductors: In a 1988 case involving the Japanese semiconductor industry, a GATT panel held that even nonbinding administrative guidance by the Government of Japan could constitute a "government measure" if certain criteria were met.[23] In that case, which involved restraints on exports of semiconductors by the Government of Japan,[24] the specific criteria identified by the panel included (1) that reasonable grounds exist for believing that the government measures created sufficient incentives to persuade private parties to conform their conduct to the nonmandatory measures, and (2) that the effectiveness of the private conduct was "essentially dependent" on the nonmandatory actions taken by the government.

Film: In 1995 Eastman Kodak Company filed a Section 301 petition with the United States Trade Representative ("USTR") alleging private and government barriers to the sale and distribution of consumer photographic film in the Japanese market. It based an important part of its initial legal argument on the provision of Section 301 prohibiting governments from tolerating private restraints of trade.[25] This was the first petition accepted by the USTR that was based primarily on the "toleration of systematic anticompetitive practices "feature of Section 301.[26] In summary, it was argued in the original petition that as formal barriers to imports and investment were gradually removed, the Government of Japan implemented "liberalization countermeasures" that were designed to and did create a market structure in Japan that blocked Kodak's sales and market

[22] The GATT provided legal remedies for government actions that had the effect of nullifying and impairing the benefits that another GATT member received as part of the market access it was promised in its *quid pro quo* for the market access that it provided. The GATT also recognized there could be measures or developments that were not a direct violation of agreed-upon commitments but which nevertheless had the effect of nullifying or impairing the intended benefits of the liberalization measures. For additional discussion of this subject *see* Bernard M. Hoeckman and Petros C. Mavroidis, *Competition Policy and the GATT*, 17 THE WORLD ECONOMY 141 (1994).

[23] *See* Report of the GATT Panel (adopted), *Japan-Trade in Semiconductors*, BISD 35th Supp. 116, at 155 (1988).

[24] The Japanese Government had restrained exports of semiconductors at below-cost prices in order to settle a trade dispute with the United States.

[25] *See* Dewey Ballantine for Eastman Kodak Company, *Privatizing Protection: Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper* (May 1995). The facts in this case are well known and exhaustively documented. For purposes of this discussion, I shall highlight some of the policy and procedural consequences of the case. Relevant background writings include: James Durling, ANATOMY OF A TRADE DISPUTE: A DOCUMENTARY HISTORY OF THE KODAK-FUJI FILM DISPUTE (2001) ; John Linarelli, *The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak-Fuji Dispute*, 31 LAW AND POLICY IN INT. BUSINESS 2 (2000); Sara Dillon, *Fuji-Kodak, the World Trade Organization and the Death of Domestic Political Constituencies,* 8(2) MINNESOTA JOURNAL OF GLOBAL TRADE 197 (1999).

[26] *See supra,* note 4. One earlier petition, which involved amorphous metal transformers, had focused on this provision but was ultimately withdrawn and negotiated bilaterally without invoking Section 301.

presence and whose structure continues to act as an effective barrier to Kodak's access to that market.[27] The Japanese Government refused an U.S. request to hold formal bilateral trade consultations, even after a finding of unfairness by the USTR. Instead, the Japanese Government insisted that the proper forum in which to air the governmental aspects of the complaint was the WTO and that the issue of allegedly anticompetitive business practices fell solely within the jurisdiction of Japan's Fair Trade Commission (JFTC). For its part, the JFTC surveyed conditions in the consumer photographic film sector and found no violations of domestic law.[28]

The United States took the case to the WTO, focusing on those aspects of the complaint that implicated Japanese government policies, and argued that Japan's actions violated GATT provisions regarding nullification and impairment (Article XXIII), national treatment (Article III), and transparency (Article X), as well as the General Agreement on Trade in Services (GATS). In addition, the United States called for consultations on restrictive business practices under the little-used 1960 GATT decision, but these never got off the ground.[29] The WTO panel held against the United States on the facts of that case, both with respect to the non-violation and violation claims.[30] On the general question of actionable government measures, however, the panel built upon the semiconductor case to argue that analysis of alleged "measures" must "proceed in a manner that is sensitive to the context in which these governmental actions are taken and the effect they have on private actors."[31] The Panel looked also to the semiconductor report for the proposition that, "where administrative guidance creates incentives or disincentives largely dependent upon government action for private parties to act in a particular manner, it may be considered a government measure".[32]

Whatever the legal possibility of such mixed public-private claims under GATT rules, the record shows that the GATT did not serve as a forum either for the negotiation of

[27] *See* Dewey Ballantine, *supra* note 25. This paper also argues that an anticompetitive market structure operated in Japan in violation of Japan's Antimonopoly Act, and that the Japan Fair Trade Commission had acted indirectly to support it, allegedly by suppressing promotional activity in the consumer photographic film and paper industry through the Government of Japan's laws against premiums and other marketing restraints.

[28] Japan Fair Trade Commission (JFTC), *Survey of Transactions Among Firms Regarding Photographic Color Film for General Use*, July 23, 1997. Available at http://www.ftc.go.jp/e-page/press/1997/film1/film1.htm

[29] The reasons for this are not entirely clear, but it appears that the Japanese Government insisted that if the United States was intending to focus on Japanese government practices that it believed were responsible for facilitating private anticompetitive conduct, the Japanese Government should be at liberty to raise issues regarding U.S. Government practice.

[30] The US argued that certain distribution-related measures, restrictions on large stores and promotional measures resulted in a GATT Article XXIII:1(b) non-violation nullification or impairment of benefits accruing to the United States based on tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds. The Panel rejected these claims, relying in part on the fact that many of the challenged measures were relatively old, and that the causality between the measure and the distribution system was not well established. The Panel also rejected the U.S. violation claims, which included an argument that the JFTC and certain fair trade council's failure to publish certain enforcement actions were a violation of GATT Article X: 1. *See Japan—Film, supra* note 12, ¶¶ 10.390–393.

[31] *Id.* at ¶ 10.389. The Panel found that "government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner can potentially have adverse effects on competitive conditions of market access." *Id.* at ¶¶ 10.389–90.

[32] *Id.* at ¶¶ 10.43–46

common rules pertaining to business practices or for the resolution of disputes that arose out of some mix of private and governmental practices. In other words, the GATT was used neither as a sword to reach private anticompetitive business practices, nor as a shield to protect private restraints from the unilateral reach of foreign competition laws.[33]

C. UNCTAD

In 1973, at the instigation of the developing nations, negotiations on restrictive business practices were initiated in the United Nations Conference on Trade and Development (UNCTAD). In 1980 the U.N. General Assembly adopted UNCTAD's Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.[34] The rules are nonbinding, however, and they have not become a source of international law.[35] Although UNCTAD has an extremely broad membership base, it has not evolved into a dynamic organization for the consideration of competition policy issues.

D. OECD

Although no binding multilateral agreements on competition policy have been adopted, a variety of consultative mechanisms have been established, most notably at the Organization for Economic Cooperation and Development ("OECD"). At the forefront of efforts to consider the international dimensions of competition policy, the OECD has served as an important consultative body for countries with competition regimes as well as a source of technical assistance to many jurisdictions introducing competition laws and policies. Two different OECD bodies have engaged in serious work on competition policy: the Competition Law and Policy Committee ("CLP"); and the Joint Group on Trade and Competition. The CLP is a venue where enforcers can meet and discuss competition issues, and its work has encouraged greater substantive and procedural convergence among participating countries. More formally, the OECD has produced non-binding recommendations, including a 1998 recommendation condemning hard-core cartels and a 1995 recommendation on international cooperation among competition authorities. The OECD's Joint Group on Trade and Competition has also pursued a work program to increase members' understanding of issues relevant to the interface of trade and competition policy. The OECD has established a new series of international conferences on competition policy in a global economy, called the Global Competition Forum, which includes representatives from both developed and developing nations.

E. Bilateral Cooperation Arrangements and Experiences

International cooperation in competition policy, to the extent that it has occurred and been formalized, has tended to occur mostly on a bilateral basis. Over more than two

[33] For a more complete discussion of this potential application of GATT rules, *see also* Merit E. Janow, *Competition Policy and the WTO,* in THE URUGUAY ROUND AND BEYOND (Jagdish Bhagwati and Mathias Hirsch eds. 1998).

[34] This voluntary code contained several provisions calling for special concern to the problems facing developing nations. The code's substantive provisions condemn collusive anticompetitive actions such as price-fixing, collusive tendering, market or customer allocations, sales, or production quotas and various kinds of concerted refusals to deal. The Code also condemns abuses of dominant position such as predatory behavior, discriminatory commercial terms and anticompetitive mergers. Wood, *supra* note 18, at 286.

[35] Wood, *supra* note 18, at 28. *See also*, GLOBAL FORUM ON COMPETITION AND TRADE POLICY, HARMONIZATION OF INTERNATIONAL COMPETITION LAW ENFORCEMENT 15, n. 73 (1995).

decades, the United States has developed and entered into several generations of international antitrust arrangements. The early competition undertakings were contained within bilateral Friendship, Commerce and Navigation treaties. Later, the United States entered into several types of bilateral antitrust cooperation agreements. These agreements have become more detailed and comprehensive over time.

The first generation of cooperation agreements essentially provided that each party notify the other of a pending enforcement action that could impact upon important interests of the other party; the notification procedure implied a willingness to take the views of the other party into account. The 1995 Canadian-U.S. mutual legal assistance treaty ("MLAT") goes substantially further, in that it permits the use of formal investigative powers in criminal matters if requested by the MLAT partner.

In 1991, the United States and the European Union entered into an agreement that facilitates discovery and implements the notion of "positive comity."[36] In competition cases where both parties believe themselves to have an interest in pursuing enforcement actions, the agreement identifies comity factors to be considered in any effort to accommodate the claims of rival interests. The notion of positive comity not only seeks to ease or at least to manage tensions with respect to extraterritorial enforcement efforts, but also raises cooperation to a new level. A main contribution of the U.S.-E.U. agreement is the identification of a set of positive and negative comity principles that can guide both parties as they decide whether or not to exercise or to forgo jurisdiction over a case.[37]

Another milestone in international cooperation occurred in 1994 when the U.S. Congress passed a statute authorizing U.S. antitrust enforcement agencies to share confidential information and evidence, on a reciprocal basis, with foreign enforcement authorities[38] In 1997 the United States concluded its first comprehensive bilateral accord under this statute with Australia; the accord covers both civil and criminal matters.[39]

In sum, the United States and a number of other competition agencies (e.g., the EC and some member states, Canada, Australia, Japan, Mexico, Israel, Brazil, among others) are developing closer working relations and a measure of mutual confidence that appears to be yielding more cooperation on actual cases. Although still at an early stage, recent bilateral accords represent a further step toward making the compulsory process of one jurisdiction available for use by another requesting jurisdiction. These accords do not seek to achieve substantive legal harmonization, nor do they contain binding dispute settlement mechanisms. As a result, policy conflicts stemming from differing legal standards and national competition policy priorities are not necessarily resolved by virtue of such accords. This reality was demonstrated by the 2001 proposed GE/Honeywell merger,

[36] *See Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of the Competition Laws*, September 23, 1991, available at: http://www.usdoj.gov/atr/public/international/docs.

[37] This agreement contained six comity principles that would be considered by the parties in seeking an appropriate accommodation of the competing interests. These include factors such as the relative importance of the activities involved within the enforcing party's territory; the presence or absence of a purpose to affect consumers, suppliers or competitors within the enforcing Party's territory; the relative significant of the effects of the anticompetitive activities on the enforcing jurisdiction; the existence or absence of expectations that would be furthered or defeated; the degree of conflict or consistency between the enforcement activities and the other party's laws; and the extent to which the enforcement activities of one party would impact the other jurisdiction. For additional detail *see*, Agreement, *supra* note 36, Article VI.

[38] Pub. L. No. 103-438, 108 Stat. 4597, 15 U.S.C. §§6200–6212.

[39] *Agreement between the Government of the United States of America and the Government of Australia, A Mutual Legal Antitrust Enforcement Assistance Agreement*, available at: http:www.usdoj.gov/atr/public/international

which the United States cleared but the EU did not.[40] The contribution of bilateral accords in structuring communication and to some degree managing tension is also limited by the fact that only a small number of countries have such bilateral arrangements in place.[41]

F. Regional Arrangements

Over the past two decades, regional organizations have become actively engaged on issues of competition law and policy. The resulting arrangements range from formal cooperation agreements, such as that introduced between Australia and New Zealand as part of its treaty to establish closer economic relations; to more informal and *ad hoc* consultative mechanisms, such as those efforts undertaken by the organization for Asia-Pacific Economic Cooperation ("APEC"). Cooperation in competition policy is now under active consideration in the context of the Free Trade Agreement of the Americas involving the United States and the nations of Latin America. And indeed, many of the bilateral free trade agreements now under negotiation by Japan, the United States and the European Union include some consultation mechanism on competition policy matters.[42]

IV. The Uruguay Round Agreements and the WTO

As noted above, very few cases in the GATT/WTO dispute settlement system have considered whether and to what degree governments should be held accountable for fostering or tolerating anticompetitive private restraints of trade. This did not change fundamentally with the expansion of commitments that came as part of the Uruguay Round, and which led to the establishment of GATT's successor organization, the World Trade Organization, in 1995. However, in a limited fashion, a few provisions of the WTO agreements implicate private practices that are seen as trade-restricting and hold governments responsible to some degree for those practices. And, quite apart from coverage in specific agreements, core GATT provisions are supportive of an effective competition policy regime. A few examples are illustrative:

- The WTO's *basic nondiscrimination principles* of national treatment, most-favored-nation treatment, and transparency, which form the foundation of the WTO, are also essential features of an impartial competition policy regime. The national treatment requirement of Article III of the GATT has long been used to

[40] *See* discussion of the matter in Part II *supra.*

[41] For a more detailed assessment of bilateral antitrust cooperation agreements, *see* Janow, *supra* note 14 and *Transatlantic Cooperation on Competition Policy* in ANTITRUST GOES GLOBAL (Simon J. Evenett, Alexander Lehman and Benn Steil eds. 2000).

[42] A brief elaboration of several examples may be helpful. Australia and New Zealand entered into a comprehensive cooperation agreement in 1994 that requires the two competition agencies to exchange and provide information in relation to investigations and research; speeches, compliance education programs; amendments to relevant legislation; and human resources. The agreement allows information in the files of one agency to be requested by another agency. It also provides for the coordination of enforcement activities when the Agencies agree that this would be beneficial in a particular case. A far more limited instrument is Chapter Fifteen of the North American Free Trade Agreement, which establishes a Working Party and contains certain general undertakings. The provisions do not attempt to harmonize procedural or substantive rules, to provide for the exchange of confidential information, or to articulate general standards. Work on competition policy in the APEC context has taken the form of a series of annual workshops on competition policy and deregulation issues held under the aegis of the Committee on Trade and Investment. At their meeting in September 1999, APEC Leaders endorsed a set of nonbinding principles developed by this workshop that are intended to act as "benchmarks" for member economies in their efforts to design and implement competitive markets.

challenge not only border barriers but internal practices as well—indeed one of the first GATT cases of *de jure* discrimination involved a domestic credit scheme that applied only to purchasers of domestically produced tractors.[43] Determining whether a measure is discriminatory can turn on whether the affected products are "like," and analytically, the question of determining "likeness" of products can resemble the product and geographic market definition that is central to a competition analysis. Moreover, there is a tendency now in some WTO Article III:2 national treatment/nondiscrimination cases to consider whether products are directly competitive or substitutable.[44] This approach also reflects the influence of economic analysis, which has had an even greater influence on competition policy analysis, especially in the United States.

- The WTO *Basic Telecommunications Services Agreement*, officially known as the "Fourth Protocol to the General Agreement on Services", requires countries to liberalize market access and national treatment restrictions and to implement regulatory principles intended to guide domestic regulatory practices.[45] These principles are not intended to serve as a comprehensive competition policy code for the telecommunications sector. They are selective, yet bespeak a recognition that telecommunications remains a heavily regulated sector and that in many jurisdictions regulatory authorities are not independent of telecom providers. Domestic suppliers usually are dominant suppliers, whether they are private or public entities, and if left free to make decisions about how to treat other suppliers, these suppliers would be capable of thwarting the market access and national treatment commitments made by governments. The principles seek to support competition in the telecommunications sector by means of competitive safeguards designed to prevent major suppliers from engaging in anticompetitive practices.
- The *General Agreement on Trade in Services* also contains several provisions that implicate anticompetitive practices as exercised by domestic service providers. For example, the GATS provides that monopoly service suppliers must not act in a fashion inconsistent with the most-favored-nation obligation under the agreement or with their scheduled commitments.[46] Further, the GATS requires WTO member governments to ensure that domestic monopolists do not abuse their monopoly positions.[47] The accord requires mandatory consultation on alleged restrictive business practices, if requested by another WTO member.[48]
- Competition policy arises indirectly in Article 9 of the *Agreement on Trade-Related Investment Measures,* which requires the Council for Trade in Goods to review the operation of the agreement and to propose necessary amendments to it by the end of 1999.[49] The Council was directed in Article 9 to consider whether those amendments should include provisions on competition policy.

[43] *See* Report of the GATT Panel (adopted), *Italian Discrimination Against Imported Agricultural Machinery* BISD 7th Supp. 60 (1958).

[44] *See*, for example, the discussion of these concepts in Report of the WTO Panel, *Korea-Taxes on Alcoholic Beverages,* W/DS75/R and W/DS84/R (1998), ¶¶ 10.95–10.97 and 10.44–10.45. The Appellate Body upheld the Panel's decision. Report of the Appellate Body, *Korea-Taxes on Alcoholic Beverages,* W/DS75/AB/R and W/DS84/AB/R (1999).

[45] *See Fourth Protocol to the General Agreement on Services* (April 30, 1996) S/L 20, available at http:www.wto.org/services

[46] *See* Article VIII:1 of the GATS.

[47] *See* Article VIII:2 of the GATS.

[48] *See* Article IX(2) of the GATS.

[49] As of this writing, no comprehensive set of recommendations has been released.

An additional WTO agreement—the TRIPS accord—is notable in that it probably offers the closest existing model for competition rules and suggests an alternative "architecture" for competition policy provisions under the WTO. Historically, the GATT focused on limiting distortions introduced by governments; these limits informed governments what they *could not do* rather that setting out a set of affirmative obligations that they *were* required to undertake. The TRIPS accord introduced an entirely different construct by obliging countries to introduce intellectual property laws that contained specified minimum levels of protection to intellectual property rights. The TRIPS agreement requires nondiscriminatory treatment, and it also requires member countries to introduce effective national enforcement systems, the precise structure and design of which are left in the hands of national authorities but which must provide effective measures for both private and governmental enforcement.

The WTO has also attempted to develop various "framework" agreements that serve as non-binding guidance to members on matters of domestic regulation or oversight. These too, could offer an architecture or template for linking competition policy to the WTO. For example, in December 1998 the WTO Council on Trade in Services adopted the WTO Disciplines on Domestic Regulation in the Accountancy Sector. These are nonbinding principles that WTO members are exhorted to follow.[50]

Finally, the Singapore Ministerial Meeting in 1996 set up the WTO Working Group on the Interaction of Trade and Competition Policies. This Working Group has considered a very broad set of issues, such as the relationships among the objectives, principles, scope, and instruments of trade and competition policy; the types and effectiveness of existing instruments, standards, and activities used or undertaken by trade and competition policy; the relationship between competition policies and industrial policies; and the interaction between trade and competition policy.[51] It has held numerous formal meetings and received hundreds of written contributions from a multitude of sources, including developing and transition countries and international organizations. The Working Group has issued detailed reports that chronicle not only a very broad range of issues examined, but many areas where WTO members disagreed.

V. Competition Policy and the Next Round of Multilateral Trade Negotiations

Little, if any, substantive discussion of competition policy occurred among WTO ministers at the failed December 1999 Trade Summit in Seattle.[52] The issue was actively considered at the Doha Ministerial in Qatar on November 9–14, 2001, and WTO members agreed that "negotiations will take place after the Fifth Session of the Ministerial Conference . . . on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations." The Doha Declaration states that in the period before the Fifth Session (due to be held in Cancun, Mexico, in September 2003), the Working Group on the Interaction between Trade and Competition Policy "will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and

[50] *See* WTO, *Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector*, S/WPPS/4 (December 10, 1998).

[51] *See Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council,* WT/WGTCP/2 (December 8, 1998).

[52] Former U.S. Trade Representative Charlene Barshefsky suggested that the EU was virtually alone in its interest in global negotiations on competition policy. *See* 17 INSIDE U.S. TRADE, No. 51, at 3 (December 24, 1999). This appears to be less the case today than when that statement was made.

support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them."[53] There appears to have been some controversy as to whether this language in the Ministerial Declaration reflects an expectation that negotiations will commence following the Fifth Session of the Ministerial Conference, or whether that is the point in time when WTO members will decide whether or not to commence negotiations. This was clarified, to some degree, by the Chairman of the Conference, in a statement that the requirement for explicit consensus on the modalities for negotiations "gave each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join an explicit consensus."[54]

While this fundamental issue of whether a formal negotiation will commence remained unsettled until July 2004, the Working Group continued in its consultations, seminars and other preparatory activities on the specific procedural and substantive areas outlined in the Declaration.

The most intensive debate at the government level about the role of the WTO in the area of competition policy has taken place between U.S. and EU officials. Let us briefly outline the main arguments that each government has advanced, recognizing that even official positions continue to evolve and change.

A. European Union

EU officials have been forceful advocates of expanded multilateral rules on competition policy, including at the WTO. While stressing the importance of effective bilateral cooperation as a foundation, the last two Commissioners for the Competition Directorate, Sir Leon Brittan and Karel Van Miert, along with the current Commissioner Mario Monti, have each called for expanded WTO rules on competition policy.

The EU proposal has gone through some modifications from that first advanced by Sir Leon Brittan in the mid-1990s. Initially, the EU seemed to support the negotiation of substantive competition rules and suggested it was willing to have actual domestic competition or antitrust cases subject to review and challenge under the rules of the Dispute Settlement Body of the WTO.[55] Since then the EU appears to have scaled back its expectations on coverage and on panel review. At one point, for example, the Commission argued that negotiated rules should be subject to dispute settlement only for alleged "patterns of failure to enforce competition law in cases affecting the trade and investment of other WTO members". Individual cases would not be examined, according to this position.[56]

The EU argued in support of a multilateral framework on competition policy in the WTO that would include core principles comprising transparency, non-discrimination and procedural fairness in the application of competition law and/or policy, and the taking of measures against hardcore cartels; the development of modalities for cooperation;

[53] World Trade Organization, *Ministerial Declaration* (Fourth Session of the Ministerial Conference, Doha), WT/MIN(01)/DEC/1, November 9–14, 2001, ¶¶ 23–25.

[54] Robert D. Anderson and Frederic Jenny, *Current Developments on Competition Policy in the World Trade Organization*, ANTITRUST MAGAZINE, Fall 2001.

[55] This would not be unique. Individual domestic antidumping, countervailing duty, and safeguard decisions can be challenged in the WTO dispute settlement system if they violate the relevant agreements.

[56] *See* K. Mehta, The *Role of Competition in a Globalized Trade Environment*, Speech to the Third WTO Symposium on Competition Policy and the Multilateral System, Geneva, (April 7, 1999).

and enhanced support for technical assistance and institution building,[57] over time the EC retained some ambiguity as to whether the framework must be part of the WTO and a requirement of all of its members, or a separate plurilateral agreement signed by interested nations.[58]

At various times, the EU position appears to have some support from several other governments including the governments of Canada, Japan, Korea and several of the Latin American countries.

B. The U.S. Government

The U.S. Government, while actively supporting the deliberations of the WTO Working Group, has generally taken a cautious tone regarding the WTO's role as a forum for the negotiation of rules governing competition policy. This was particularly the case during the Clinton Administration. Former Assistant Attorney-General for Antitrust Joel Klein often argued that he saw greater practical value in bilateral cooperation arrangements, such as those the United States has entered with Australia, Canada, and the European Union, than in negotiating general competition rules at the WTO. This network of bilateral arrangements, coupled with technical assistance to new regimes and dialogue at the OECD, WTO, regional groupings, and other international forums, have been the core policy elements of U.S. international antitrust policy.[59]

In the Bush Administration, U.S.Trade Representative Robert Zoellick has indicated somewhat greater receptivity to some WTO treatment of competition policy than his predecessor.[60]

U.S. antitrust officials routinely raise several different types of concerns about the WTO venturing into the terrain of competition policy.[61] WTO oversight of antitrust actions taken by governments could, in Joel Klein's words, "involve the WTO in second-guessing prosecutorial decision-making in complex evidentiary contexts in which the WTO has no experience and for which it is not suited," and would inevitably politicize international antitrust enforcement in ways that are not likely to improve either the economic rationality or the legal neutrality of antitrust decision making. He further argues that the global community does not yet fully know what key trade and competition questions may benefit from binding international agreements, let alone whether there is any possibility of developing a consensus on these issues.[62]

[57] *See Communication from the European Community and its Member States,* WT/WGTCP/W/152.

[58] At a regional WTO workshop in Capetown, South Africa, an EU official clarified that the EU thought there was significant interest around the world in entering into a multilateral agreement at the WTO. However, if at the conclusion of negotiations, there were still developing countries that were hesitant and not convinced that such an agreement was in their interest, they should have the possibility to opt out of it. *See Informal Report on Workshop Proceedings*, WTO Regional Workshop on Competition Policy, Economic Development and the Multilateral Trading System, organized by the WTO Secretariat in Cooperation with the Governments of South Africa and the United Kingdom (February 22–24, 2001).

[59] *See,* e.g., Joel Klein, *A Note of Caution with Respect to a WTO Agenda on Competition Policy* (Remarks to the Royal Institute of International Affairs, Chatham House, November 1996).

[60] *See* "USTR Zoellick outlines US efforts to promote growth and development by launching new trade round; US-EU effort directed at expanding and strengthening global trading system", http:www.ustr.gov/releases/2001/07/01-54.pdf. This statement contains the following language, "The United States can see merit in adherence to core principles of transparency, non-discrimination and procedural fairness. We can also support consultative and capacity building efforts to help countries develop modern competition policy that promotes efficient, effective and dynamic markets."

[61] *See* Joel Klein, *A Reality Check on Antitrust Rules in the World Trade Organization, And a Practical Way Forward on International Antitrust,* Address before the OECD Conference on Trade and Competition. (Paris, June 30, 1999).

[62] *Id.*

C. Other Views

There is no unified position on competition policy among developing countries although several developing countries expressed repeated doubts about the value of negotiations on competition policy. For example, Kenya, on behalf of the African Group, has noted that only a limited number of African countries have domestic legislation on competition policy and even fewer African countries have effective enforcement agencies. At one point in 1999, the African Group advocated continuation of the educational, exploratory, and analytical work of the Working Group on the Interaction between Trade and Competition Policy with increased technical assistance to developing countries.[63] At one point, South Africa proposed a thorough educational process that would take place before any negotiations commence and would span several years and take into account the huge analytical demands on developing countries related to the preparation of the next round.[64]

Apart from official governmental discussion, the debate in the private sector and among experts on what role the WTO should have with respect to competition policy is robust and diverse. Let us mention several different approaches that have surfaced.

The most ambitious proposal, which appears to have a very limited following, calls for the establishment of some kind of supranational antitrust authority with agreed-upon substantive rules. In 1993 a private group of twelve scholars and other experts meeting in Munich (the so-called "Munich Group") proposed an International Antitrust Code, which would set out minimum standards to be incorporated into the WTO. It proposed that those standards in turn would be enforceable in domestic jurisdictions by national enforcement agencies. Disputes would be adjudicated by a permanent international antitrust panel, operating as part of the WTO's dispute settlement regime.[65]

A second approach is the call to develop a set of competition principles. For example, a former Deputy Secretary-General of the OECD, Joanna Shelton, suggested that the WTO could develop a set of core principles, both procedural and substantive, upon which there could be broad agreement. Parties would bind themselves to abide by the core principles, but the specific rules that they adopt for doing so would not be subject to dispute settlement. The multilateral approach should provide some non-binding suggestions about possible common approaches to aid nations in designing and enforcing substantive criteria, such as the tests to assess the legality of core competition problems such as horizontal agreements, vertical restraints, abuse of dominance and proposed mergers. This second approach has more of a following and there are a variety of proposals under debate with different specific principles included in the mix. Structurally, this approach attempts to integrate antitrust into a larger market access framework rather than trying to maintain a strict boundary between private and public restraints.

There have also been two influential reports, one in Europe and one in the United States, that have served to underpin the respective official approaches of their nations on the subject. A group of leading European experts issued an influential report in 1995 supporting the EU approach and called for movement on two fronts: first, a further

[63] *See The Interaction Between Trade and Competition Policy,* Communication from Kenya on behalf of the African Group, Preparations for the 1999 Ministerial Conference, WT/GC/W/300, August 6, 1999.

[64] *See Communication from the Republic of South Africa*, WT/WGTCP/W/138, October 11, 1999, pp. 2, 4. In recent years, South Africa has introduced an active competition law and policy regime. Perhaps as a result, South African trade and competition officials have indicated a certain receptivity to some WTO rules in this policy area.

[65] For a reprint of the Code developed by the Munich Group, *see:* 64 Antitrust & Trade Reg. Rep (BNA), August 19, 1993.

deepening of existing forms of bilateral cooperation; and second, the gradual construction of a plurilateral agreement that includes a dispute settlement procedure based on a set of jointly determined competition rules.[66]

The group argued in favor of establishing minimum rules and then gradually expanding the number of countries signing on to those rules. It suggested using common principles in some instances, such as the prohibition of cartels (building from the OECD recommendation in this area), and the rule of reason in other instances (such as vertical restraints). The report argued for harmonization of procedures in the merger field to give authorities sufficient time to consult each other. It also recommended that state trading enterprises be subject to the same competition rules as commercial enterprises. At the international level, the group suggested that the WTO serve as a forum or analyzing and possibly extending the principles, registering anticompetitive practices, and providing for dispute settlement procedures.

In the United States, the International Competition Policy Advisory Committee (ICPAC) to the Attorney-General and Assistant-Attorney General for Antitrust undertook an extensive outreach effort over a two-year period to solicit private sector and official views on international competition law and policy matters and issued a major report of its findings and recommendations in March, 2000. ICPAC was charged with focusing on global competition policy matters generally—including multi-jurisdictional merger review, international enforcement cooperation vis-a-vis cartels, and the interface of competition and trade policy. As part of that effort, it sought views on the possible future role for the WTO as a forum for the negotiation of global competition rules subject to dispute settlement.[67]

The majority of ICPAC members recommended in the Final Report that the primary focus of the WTO and its area of core competence remain as an intergovernmental trade forum focusing on governmental restraints. The report argued that the WTO had a constructive role to play regarding competition policy, but that this role should be to support capacity building and cooperation between authorities, rather than the negotiation of procedural or substantive rules.

The ICPAC Final Report identified no influential U.S. business group that was in favor of WTO rules on competition policy. For example, the Business Roundtable has consistently held that competition policy negotiations at the WTO are both "unnecessary and potentially counterproductive." The Roundtable has argued that negotiations should not proceed in the absence of an international consensus on competition policy, uncertainty about the WTO's institutional competence on competition policy matters, and the possibility that developing countries might use the negotiations to "disturb the carefully crafted multilateral balance embodied in the WTO Antidumping Code."[68] Similarly, both the U.S. Council for International Business (U.S.CIB) and the International Chamber of Commerce believe that a basis has not yet been established for international agreement in the WTO on competition principles or rules.[69]

VI. Is There a Need for a New Global Competition Forum?

Quite apart from a role for the WTO, the last several years have also seen active consideration of the merits of establishing an altogether new forum to consider global competition

[66] *See* Report of the Group of Experts, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules* (July 1995)

[67] *See ICPAC Final Report, supra* note 6.

[68] *Id.* at 268

[69] *Id.*

matters. The concept of establishing a new forum, initially dubbed the Global Competition Initiative, was proposed by ICPAC in its Final Report. The rationale for establishing a separate forum devoted to international competition matters hinged on the view that in a world of expanding global markets, a widening array of competition policy problems are unlikely to be resolved through national legal responses alone. Addressing international competition policy problems requires more cooperation between competition authorities, more international discussion of problems with trans-border consequences, and new and expanded international arrangements. Competition policy problems with a global or transnational nature were not limited to matters implicating access to markets and international trade. For this reason, ICPAC urged that a new inclusive forum be established that would routinely include representatives from developed and developing economies, government officials, and other experts.

The concept received a first boost when Former Assistant Attorney General Klein said in September 2000 that he thought that the Global Competition Initiative warranted serious consideration whatever happens on antitrust at the WTO. Subsequently, the EC Competition Commissioner Mario Monti has repeatedly indicated his strong support for such an initiative and advanced a number of specific details for organizing such a forum. This idea was bolstered when in February 2001, at a meeting organized by the International Bar Association, a group of 43 senior competition law officials and professionals gathered at Ditchley Park in England to discuss the possible design and activities for the proposed Initiative or Forum.[70] This was the first "brainstorming" session on this proposed global forum among leading figures in the competition law and policy community worldwide.

Several months later, in the fall of 2001, the formation of the International Competition Network ("ICN") was officially announced. Now, more than 75 jurisdictions have joined this informal network. The ICN is designed as an informal, project oriented network of antitrust agencies from developed and developing countries. The purpose of the network is to consider antitrust enforcement and policy issues of common interest and to "formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure".[71] The ICN distinguishes itself from the WTO by virtue of its project-orientation, diverse membership (including the participation of experts and non-governmental representatives), specific work program and governance structure. At this early stage, the ICN has established working groups on multi-jurisdictional merger review and competition advocacy.[72]

VII. Summary and Perspective of Key Issues for the WTO

This last part considers most directly the pros and cons of linking competition policy to the WTO: What would it mean to have competition policy integrated, in some fashion, into the World Trade Organization? What are the principal arguments in support of and in opposition to moving in this direction?

Let us start with arguments in favor of an expanded international arrangement at the WTO. As outlined at the start of this chapter, private restraints of trade can impose strains on the international trading system and frictions between nations and firms. So

[70] *See* Merit E. Janow, *The Initiative for a Global Competition Forum: A Report on a Meeting Convened and Hosted by the IBA and Held at Ditchley Park,* BUSINESS LAW INTERNATIONAL, Issue 2 (2001).

[71] *See About the ICN*, available at: http://www.internationalcompetitionnetwork.org.

[72] *Id.*

far, disputes have been handled in an *ad hoc* fashion. Many nations do not have effective remedies to address impediments to offshore market access or more traditional competition problems under national laws. Moreover, there are no meaningful international rules or institutions that deal with these problems. This lack of an international context for resolving international competition problems with market access implications can fall disproportionately on developing nations that do not have the expertise, resources, and established forms of bilateral cooperation to address competition problems that are occurring offshore. But such transborder enforcement problems are felt by many nations across the development spectrum.

As formal governmental barriers to trade and investment have been reduced or eliminated, policymakers around the world have begun to focus their attention and concern on internal practices of nations that impact global trade and investment. And, since many more countries now have a degree of experience with competition policy, the time has come to develop ways of addressing internal business practices that thwart the free flow of commerce. Failure to address such underlying restraints of trade and investment could erode public confidence in the international trading system. And, in this period where there is considerable antipathy to globalization, every effort should be made to instill greater confidence in the world trading system.

Why turn to the WTO? The core nondiscrimination principles of the GATT and now the WTO are compatible with competition policy objectives, and the development of principles or rules at the WTO holds at least the potential of containing the intergovernmental and commercial frictions that result from the absence, ineffectiveness, and perhaps heterogeneity of national competition rules with adverse transnational consequences. Moreover, for some countries, international rules can help to support the development of domestic policy systems. Developing countries and economies in transition are increasingly interested in establishing more open and contestable markets. Competition policy can help in this pursuit, and international agreements can sometimes be used to complement or reinforce domestic policies.

Further, the WTO has shown itself capable of addressing trade-restricting and discriminatory government practices and of serving as a forum for negotiating the reduction and elimination of such trade distortions. With its wide membership, including both developed and developing economies, enhanced dispute settlement capabilities since the creation of the WTO itself, and broad coverage of issues, the WTO is becoming a credible institution for considering and solving difficult problems in international commerce.

The precise architecture within the WTO is, of course, another important consideration. The TRIPS agreement is probably the most directly analogous model, in that it sets forth a set of affirmative core requirements (countries must have a domestic intellectual property protection scheme, it must be enforced, etc.) This model could be adapted for competition policy, with room for varying degrees of generality or specificity, depending on where consensus can be reached. Of course, the WTO members could also chose to develop a looser less binding "framework" agreement of some kind or establish an ongoing deliberative committee on competition issues.

These positive arguments notwithstanding, the integration of competition policy into the WTO gives rise to certain questions. While the benefits of formal harmonization of competition laws have long been debated, neither the need for that step nor the requisite trust to undertake that step has shown itself to be evident. The reasons for this are various: competition laws and policies are not uniform across countries and embed different analytical approaches, values and procedural characteristics. If such harmonization is unlikely, one must ask whether it is possible (or desirable) to have general rules or

principles in the absence of agreement on underlying law? The considerable variation that exists among even facially similar national competition laws is likely to mean that a new overarching set of binding rules might have to be drafted at such a level of generality as to make the effort of questionable value. For example, there may be broad agreement in many OECD jurisdictions regarding the impermissibility of horizontal agreements among competitors to fix prices, engage in group boycotts, and allocate markets. And yet, once outside the narrow area of hardcore offenses, differences in national standards as to permissible business practices become substantial. As recent merger disputes have illustrated, in some key areas of law (such as abuse of dominance and monopolization matters) U.S. and EU laws diverge. Hence, although some degree of "soft harmonization" is occurring as a result of increased interaction between firms and legal regimes, formal harmonization, especially by means of a set of international rules, seems problematic and unlikely to be productive.

The case for an international body reviewing international merger cases under binding dispute settlement procedures raises other problems. The concerns raised by the majority opinion in the 1960 GATT expert study group remain alive today: there is likely to be considerable objection in some countries to the idea of an international body attempting to sit in judgement of the fact-specific decisions rendered by national competition authorities and courts.

If competition policy disputes were to become subject to WTO dispute settlement, what standard of review would be applied by a dispute settlement panel? Some argue that a WTO panel could apply the law of the jurisdictions whose practices are at issue. This step, while logical, goes far beyond current WTO practice, which limits panels to simply reviewing the consistency of national measures with established WTO rules. Surely, a number of areas that could potentially be integrated into the WTO's agenda would involve an expansion of international rules into areas of national policy. Hence, although this question of standard of review is not confined to competition policy, it is particularly critical for competition policy given the evolving legal doctrine in the field. In the competition policy context, this bespeaks a need to accord a high degree of deference to the decisions of national authorities. (This point of view has been stressed in the EU expert report and emphasized in the earlier 1960 GATT expert committee report).

Furthermore, the WTO itself as an institution has some obvious limitations when applied to competition law and policy matters. As noted earlier, the goals of competition and trade policy are not identical, and it is not clear whether the negotiation of competition rules within the context of a multilateral trade negotiation will result in the codification of the most politically feasible as opposed to the economically most efficient or the most consumer welfare-enhancing outcomes.[73] It is possible that multilateral negotiations could, over time, ratchet up an improved appreciation for competition policy and its enforcement, but this is uncertain.

VIII. Final Observations

This complex landscape suggests to this author the following: first, that the next steps at the WTO are likely to be fairly modest. The more general and less binding the framework, the more support there appears to be for it. Indeed, in this sense the discussion of

[73] *See* Remarks by Assistant Attorney-General Joel I. Klein, Antitrust Division, Department of Justice, Presented at Fordham Law Institute, 24th Annual Conference on International Antitrust Law and Policy (New York, October 16, 1997).

competition policy and the WTO is somewhat akin to the curious paradox occurring in other areas of domestic economic regulation. For example, countries around the world have unilaterally liberalized their investment regimes to attract foreign capital and much of the antipathy to foreign investment that characterized the 1960s and 1970s appears to have vanished. At the same time, many countries have been willing to do far more by way of liberalization of their domestic investment regimes than they have been willing to commit to in binding international agreements. Similarly, many countries have introduced competition laws in the last decade. Both mature systems, such as the United States, and some new systems are worried about the potentially intrusive consequences of WTO rules in this policy area. For a number of developing countries, there appears to be concern that the introduction of WTO competition principles or rules will constrain developing countries in their ability to utilize infant industry policies, social policies, or other development tools. This anxiety also translates into a call for long-phase ins or other ways of giving developing countries the equivalent of special and differential treatment should some new rules or principles be developed.

Second, if this first somewhat cautious assessment of the next steps proves accurate, it may suggest that the more general the framework, the less useful it is likely to prove with respect to particular disputes between nations. For example, transparency and nondiscrimination are useful and important underpinnings to a competition policy regime, but one is still left asking whether embedding procedural screens of that sort at the WTO are likely to be truly useful in the competition policy context? Do market access tensions stem from facially discriminatory competition policies? One suspects the numbers are limited. Moreover, there are situations where the legal and institutional competition policy infrastructure is in place, largely transparent, and reasonably well funded, but the end result is not a well-functioning or effective enforcement regime. Is this a problem that could be challenged effectively at the WTO? Importantly, are WTO members prepared to take additional steps, in the form of supporting capacity building in this policy area, and use the WTO as a forum for supporting the development of sound competition policy regimes around the world? If so, then the consequences of general undertakings on competition policy could, over time, prove useful.

Currently, there is no agreement that the WTO should become an instrument for full market integration. Instead, the WTO is only tugging gently, and with no shortage of opposition, in that direction. Its main focus remains on trade-distorting governmental practice—which in the competition policy context would be a narrow slice of global competition policy challenges.

How issues are linked will also prove important. For example, some may favor the inclusion of competition policy into the WTO as a way of limiting, over time, the scope for antidumping measures. But in this author's view, the linkage of competition policy commitments to antidumping reform has only served to chill and further politicize multilateral discussion of competition policy.

Third, and more positively, even if one has some skepticism about the practical utility of WTO rules on competition policy, for the foreseeable future there is both a need and apparently some international interest in further developing effective competition laws, policies, and enforcement capabilities at the national level. For some countries, bilateral cooperation agreements are realistic next steps, and an expanding web of these arrangements seems to hold few, if any, dangers to the international trading system. Additional bilateral or even regional cooperation agreements may be constructive incremental steps for addressing practical enforcement problems and building a degree of trust across agencies.

Fourth, a host of global competition issues are not trade issues, but are perceived as costly and burdensome to firms involved with international commerce. It seems unlikely that the WTO can do much to advance procedural harmonization of merger practices, but these soft convergence and best practices efforts are now underway in multiple fora such as the ICN and the OECD. A soft convergence framework does not necessarily mean talk without progress.

As the recent record suggests, an active and public dialogue about the general internationalization of competition law and policy is now well under way. This degree of international engagement on the subject is both new and in my view, constructive. Yet, improvements in competition rules and their enforcement may be a necessary but insufficient condition for effective market access; many areas will require additional initiatives in terms of trade liberalization and regulatory reform. Some experts argue that it is important for the WTO to create new rules and institutional frameworks that allow for democratic experimentalism at the domestic level with new institutional structures and approaches at the international level. This viewpoint suggests that any resulting arrangements at the WTO may not be rules-based but could, for example, be an analytical exercise, plurilateral in membership, subject to opt-in provisions, and so forth.[74] This conceptualization of a possible architecture for integrating competition policy into the WTO is in fact a systemic question for the WTO itself, and it will surely be an important part of the post-Doha Agenda.

It is now obvious that all roads do not lead to the World Trade Organization as the forum for settlement of competition-related disputes or negotiation of rules. Indeed, at the Cancun Ministerial Conference in September 2003, the majority of developing countries objected to the launching of formal negotiations on a multilateral framework on competition as proposed by the European Union. The reasons appeared to be various but included concerns about capacity constraints in the developing world, uncertainty about the benefits of multilateral rules, and concerns that negotiated rules might impose constraints on other economic policies that developing countries might pursue. These concerns then translated into an agreement among the WTO Members in the summer of 2004 that no work towards negotiations on competition policy will take place within the WTO during the Doha Round. Thus, current conditions suggest that substantial public and private engagement on competition law and policy matters is well underway in various international settings but multilateral negotiations at the WTO are unlikely for the foreseeable future.

[74] *See* Robert Howse *From Politics to Technology—and Back Again: The Fate of the Multilateral Trading Regime,*96 American Journal of International Law 94 (2002).

CHAPTER 58

TRADE AND THE ENVIRONMENT

Matthew Stilwell and Jan Bohanes*

TABLE OF CONTENTS

I. Introduction 513
II. The WTO, Environment and Sustainable Development 513
A. Relevant WTO Agreements 513
1. The Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement") 513
2. The General Agreement on Tariffs and Trade ("GATT") 514
3. The Agreement on Technical Barriers to Trade ("TBT Agreement") 514
4. The Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") 515
5. The Agreement on Subsidies and Countervailing Measures ("SCM Agreement") 516
6. The Agreement on Agriculture 516
7. The General Agreement on Trade in Services ("GATS") 517
8. The Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS Agreement") 517
9. The Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") 518
B. Relevant WTO Disputes 519
1. United States—Gasoline 519
2. United States–Shrimp and United States-Shrimp 21.5 (implementation decision) 521
3. The SPS "Trilogy"—European Communities Hormones, Australia-Salmon, and Japan-Varietals 523
4. EC—Asbestos 527
C. Committee on Trade and Environment 529
D The WTO's Fourth Ministerial Mandate on Trade and Environment 531
III. Placing the Trade and Environment Debate in Context 532

* Matthew Stilwell serves as Managing Director of the Program on Governance for Sustainable Development at the Bren School of Environmental Science and Management, University of California, Santa Barbara, and as Legal Counsel to the UN Environment Program's Economics and Trade Branch in Geneva, Switzerland. Jan Bohanes is Legal Affairs Officer at the World Trade Organization. The views expressed in this article are strictly personal and do not bind or necessarily reflect the views of their respective organizations. The cut-off date for this article is September 1, 2002. We are grateful to Arthur E. Appleton, James Bacchus, Valerie Hughes, Gabrielle Marceau, and Alice Palmer for their comments, advice and assistance. All errors, or course, remain our own.

IV. Material Linkages—Economic, Social and Environmental 535
A. Nature of Material Linkages 535
B. Positive and Negative Linkages 535
C. Direct and Indirect Linkages 536
V. Legal and Policy Issues 536
A. Process and Production Methods 538
B. Labeling 540
C. Scientific Uncertainty and Precaution 544
D. Market Access 547
E. Subsidies 548
F. Biosafety 550
G. Agriculture 552
H. Services 554
I. Intellectual Property 555
J. Multilateral Environmental Agreements ("MEAs") 558
VI. Organizational Issues 561
A. Assessment 561
B. Transparency and Public Participation 562
C. Information Exchange and Observer Status 565
D. Compliance, Enforcement and Dispute Settlement 566
VII. Looking Forward 568

I. Introduction

This chapter provides an overview of a broad range of issues that arise at the interface of trade and the environment. After this introduction, Section II considers trade and environment in the context of the WTO, by examining relevant WTO agreements, recent trade disputes with environmental implications, the WTO's Committee on Trade and Environment ("CTE"), and relevant mandates resulting from the recent WTO Fourth Ministerial in Doha, Qatar. Section III then seeks to place the traditional issues of trade and environment in the broader context of sustainable development, a concept that connotes a development path that optimizes human activities within economic, social and environmental spheres, and that meets the needs of present generations without compromising the ability of future generations to meet their own needs. This is followed in subsequent sections by a thematic discussion of the main trade and environment issues, organized according to three main categories: 1) issues arising from *material linkages* between trade and other facets of the world we live in (Section IV); 2) *legal and policy-related issues* arising between trade and other fields of law and policy (Section V); and 3) *organizational issues* arising between the WTO and other institutional arrangements (Section VI). Section VII concludes with some thoughts on the future development of international economic law and policy as it applies to the environment and sustainable development. The scope, diversity and complexity of this field prevent a single chapter from covering the subject in detail; this chapter, consequently, is designed to provide a sketch of some of the main issues of trade and environment and to complement the discussion of related issues as they are addressed in other chapters of this work.

II. The WTO, Environment and Sustainable Development

A. Relevant WTO Agreements

The WTO legal system does not address the relationship between trade, environment and sustainable development in one comprehensive document. Rather, issues relating to the environment are scattered through many of the agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization. The main ones are described below, with an emphasis on those obligations and exceptions that are especially relevant in the field of trade and environment.

1. The Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement")

The WTO Agreement establishes the WTO as the preeminent international institution governing international trade. It encompasses the original GATT 1947, augmented by the amendments of the past fifty years, as well as the other agreements negotiated during the Uruguay Round of trade talks. Its preamble includes reference to the objective of sustainable development and the need to protect and preserve the environment. It states in the relevant part:

> *Recognizing* that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a*

manner consistent with their respective needs and concerns at different levels of economic development.[1] (emphasis added)

To achieve these objectives, WTO rules are directed at the "substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."[2] In addition, the WTO Agreement recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."[3]

2. The General Agreement on Tariffs and Trade ("GATT")

The GATT sets down the original framework for the liberalization of trade in goods, a framework that has been augmented by subsequent agreements such as the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement")[4] and the Agreement on Technical Barriers to Trade ("TBT Agreement").[5] Through its two most fundamental principles, the GATT seeks to reduce trade protectionism and liberalize trade by obliging its signatories to avoid discrimination between "like" foreign products ("most favored nation" obligation or "MFN", contained in Article I), and between "like" foreign and domestic products ("national treatment obligation", contained in Article III). These and other GATT obligations are qualified by an exception in Article XX, which allows WTO Members to derogate under certain conditions from their obligations for certain non-trade policy reasons. Measures covered by Article XX include those "necessary for the protection of human, animal or plant life or health" (Article XX(b)) or "relating to the conservation of exhaustible natural resources" (Article XX(g)). The chapeau to Article XX provides that these measures may not, however, be applied in a manner that causes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "disguised restrictions on international trade." The GATT formed the backbone of the multilateral trading system for over half a century, and these provisions have been interpreted and applied in a number of GATT/WTO disputes, some of which are discussed below.

3. The Agreement on Technical Barriers to Trade ("TBT Agreement")

The TBT Agreement is among the most important WTO agreements from an environmental perspective. It augments the GATT by providing more specific disciplines

[1] *Agreement Establishing the World Trade Organization, Preamble*, Reprinted in WORLD TRADE ORGANIZATION, THE LEGAL TEXTS—THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 3-14 (1999), ("WTO AGREEMENT"). The WTO Appellate Body has referred to the Preamble of the WTO Agreement in several disputes. In the Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (1997), at 28, the Appellate Body emphasized the importance of the objective of environmental protection, as contained in the preamble; in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 159, the Appellate Body referred to the Preamble as support for its evolutionary interpretation of the term "exhaustible natural resources", stating that in view of the current state of ecological management, the term could not be understood as comprising only non-living natural resources. The Preamble to the WTO Agreement also reflects the extent to which the GATT/WTO system has developed to encompass environmental objectives in addition to its originally exclusively economic purpose. The Preamble to the GATT 1947 did not refer to the protection of the environment; rather it recommended the "full use of the resources of the world".

[2] WTO AGREEMENT, Preamble, *supra* note 1.

[3] *Id.*

[4] *Reprinted in* WTO AGREEMENT, *supra* note 1, at 59–72.

[5] *Id.*, at 121–142.

regarding two categories of national rules: *technical regulations*, which are mandatory rules establishing the characteristics that products or their related processes and production methods must have; and *standards*, which are non-mandatory rules, guidelines or characteristics for products or related processes and production methods.[6] These include a range of national measures designed to protect the environment, such as certain efficiency standards, eco-labeling schemes, laws for waste management, energy conservation, and natural resource preservation, as well as a variety of measures designed to implement multilateral environmental agreements ("MEA"s). The TBT Agreement requires Members to ensure that these standards and regulations are non-discriminatory, and are not more trade restrictive than necessary to achieve a legitimate objective, such as protection of human health or safety, animal or plant life or health, or the environment.[7] The TBT Agreement also seeks to improve market access by encouraging harmonization of the regulations used by different countries. Members must use international standards "as a basis for their technical regulations" unless they can demonstrate that the relevant international standard "would be an ineffective or inappropriate means for the fulfillment of a legitimate objective".[8]

4. The Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement")

The SPS Agreement applies to a variety of national measures that are designed to protect human, animal and plant life or health within a WTO Member's territory. It covers measures that are designed to ensure that food is free of risks due to contaminants, additives, toxins or disease-causing organisms; to prevent the spread of animal, plant and other disease-causing organisms; and to control pests. The SPS Agreement requires Members to ensure that their SPS measures are "based on scientific principles . . . [and] sufficient scientific evidence" and are applied "only to the extent necessary to protect human, animal or plant life or health".[9] As a further requirement, SPS measures are not to be "applied in a manner which would constitute a disguised restriction on international trade"[10] and must display a certain degree of consistency in the stipulated levels of protection in comparable situations.[11] The principle that SPS measures must be consistent with ("based on") scientific evidence permeates the entire SPS Agreement; measures which "conform to international standards, guidelines or recommendations shall be . . . presumed to be consistent with the relevant provisions of this Agreement and of the GATT 1994",[12] while the scientific basis of SPS measures which do not conform to international standards must be established in every individual case. However, in cases where "relevant scientific evidence is insufficient", the Agreement allows Members to "provisionally adopt measures on the basis of available pertinent information, including that from the relevant international organizations as well as from measures applied by other Members".[13] The SPS Agreement is important from both environmental and health perspectives. While the Agreement covers measures designed to protect human, plant and animal *life and health*, these measures will often be broad enough to acquire general

[6] *See TBT Agreement*, Annex 1.
[7] *TBT Agreement*, Articles 2.1 and 2.2
[8] *Id.,* Article 2.4.
[9] *SPS Agreement*, Article 2.2.
[10] *Id.,* Article 2.3.
[11] *Id.,* Article 5.5.
[12] *Id.,* Article 3.2.
[13] *Id.,* Article 5.7.

environmental significance. The SPS Agreement, for example, covers measures to control invasive species and could also cover measures regulating certain aspects of trade in genetically modified organisms. At a general and systemic level, the SPS Agreement is an attempt to balance Members' rights to set and effectively enforce their own levels of protection, including in situations of scientific uncertainty, and the need to ensure that measures are not used as disguised protectionist restrictions by ensuring, among other things, that SPS measures are supported by scientific evidence.

5. The Agreement on Subsidies and Countervailing Measures ("SCM Agreement")

The SCM Agreement[14] imposes disciplines both on trade distorting subsidies, and on the countervailing measures that may be taken by individual countries in response to them. As subsidies can cause over-production and environmental degradation, their removal can bring both trade and environmental benefits. At the same time, some environmental subsidies are necessary to address market failures and to protect the environment. The SCM Agreement divides subsidies into three main categories along a spectrum according to their effect on trade. At one end of the spectrum are *prohibited ("red light") subsidies,* which are the most problematic from a trade perspective and so are subject to special dispute settlement procedures, and must be withdrawn immediately if identified. At the other end of the spectrum are *non-actionable ("green light") subsidies* (i.e., subsidies that are non-specific and certain defined specific subsidies), which were protected from challenge through 2000 and included certain subsidies to encourage environmental improvement. These provisions were not extended by WTO Members upon their expiry in 1999. Between these extremes are *actionable ("yellow light") subsidies* (i.e., those that are neither prohibited nor non-actionable), which are permissible, but may be challenged in WTO dispute settlement if they cause adverse effects to the interests of other WTO Members.

6. The Agreement on Agriculture

The Agreement on Agriculture[15] embodies a move towards increased market orientation in agricultural trade. It seeks to liberalize trade in agricultural products and to reform certain domestic agricultural policies. In relation to trade liberalization and market access, the Agreement requires Members to replace non-tariff border measures with tariffs ("tariffication"), and to reduce these tariffs over time. It also requires Members to reduce export subsidies. In relation to domestic agricultural policies, it provides for a reduction of so-called Aggregate Measures of Support ("AMS"), a matrix embodying a large part of domestic support granted to the agricultural sector. The Agreement on Agriculture contains several references to environmental protection: the preamble states that the commitments made under the Agreement should have regard for the environment, and Article 20 links the continued negotiations toward further agricultural reform to non-trade concerns, including the environment. These references, however, merely hint at the complex set of ecological implications arising from agricultural liberalization. Broadly speaking, there are concerns, on one hand, that liberalization of agricultural trade may have implications for food security and increase pressure on traditional farming practices, leading to a loss of agricultural biodiversity. In other cases, however, extensive subsidization of the agriculture sector contributes to agricultural overproduction and excessive use of soil, water and other natural resources. Consequently, a reduction of

[14] *Reprinted in* WTO AGREEMENT, *supra* note 1, at 231–274.
[15] *Reprinted in* WTO AGREEMENT, *supra* note 1, at 33–58.

certain agricultural subsidies may have positive environmental effects. The Agreement on Agriculture aims to reduce domestic agricultural subsidies substantially, but seeks to provide for environmentally beneficial support by including within the so-called "green box" subsidies for research, infrastructure and food security, making them exempt from the reductions commitments.[16]

7. The General Agreement on Trade in Services ("GATS")

The GATS[17] establishes binding rules to liberalize international trade in services. While not always immediately apparent, the ecological implications of services liberalization are potentially significant. On one hand, liberalization of environmental services such as sewage, refuse and sanitation services may reduce environmental pressures (e.g., due to efficiency or knowledge gains); on the other hand, liberalization of transportation, mining or energy services, in the absence of adequate regulation, may increase environmental pressures (e.g., it may increase the level or intensity of such activities).

Services are covered by a series of GATS disciplines and commitments designed to liberalize their trade. These services are, according to the GATS, traded through four "modes of delivery": cross-border delivery, consumption abroad, foreign direct investment, and movement of natural persons supplying the service. The GATS includes basic principles of national treatment, most favored nation treatment, market access, and transparency. Most favored nation treatment and transparency apply "horizontally" to all services sectors except those specifically exempted at the time the Agreement was negotiated. National treatment and market access, by contrast, apply only to the specific services sub-sectors as well as modes of supply that a Member agrees to liberalize. The GATS includes a general exception to these and other GATS obligations in Article XIV, which is similar to Article XX of the GATT (except that it includes no provision explicitly protecting exhaustible natural resources similar to GATT Article XX(g)). The GATS also includes provisions requiring an assessment of the application of the agreement, which some WTO Members have proposed should include an assessment of the agreement's economic, social, and environmental implications.[18]

8. The Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS Agreement")

The TRIPS Agreement [19] establishes uniform minimum standards for the protection and enforcement of intellectual property rights by all WTO Members. According to its preamble, it is designed to "promote effective and adequate protection of intellectual property rights" and to "reduce distortions and impediments to international trade" that result from the enforcement of intellectual property rights. The TRIPS Agreement's stated objectives include "the promotion of technological innovation and . . . the transfer and dissemination

[16] The "green-box" subsidies are set out under Annex 2 of the Agreement on Agriculture. Article 13 of the Agreement stipulates that such subsidies cannot be challenged in the WTO dispute settlement system and that they are non-countervailable. It may be noted that the term "green-light" subsidy does not refer to the ecologically friendly nature of the subsidies; rather, it signals, according to the "traffic-light" approach adopted also by the SCM Agreement, that these subsidies can be used freely, as long as they qualify for the "green box". The common link between the various types of green box subsidies is that they are "decoupled" from production decisions. In addition to the "green box", so called "blue box" payments are exempt from reduction commitments. This category comprises direct payments to agricultural producers under production limiting programs. These payments are only partially decoupled.

[17] *Reprinted in* WTO AGREEMENT, *supra* note 1, at 284–319.

[18] GATS, Article XIX:3.

[19] *Reprinted in* WTO AGREEMENT, *supra* note 1, at 321–353.

of technology, to the mutual advantage of the producers and users of technological knowledge. . . "[20] The TRIPS Agreement covers a broad range of intellectual property rights, such as copyright, trademarks, geographical indications, trade secrets, and patents. A number of these forms of intellectual property rights have implications for environmental management. For instance, Article 27.3(b) requires WTO Members to offer patents on certain elements of life (e.g., micro-organisms), and to protect plant varieties through either patents or *sui-generis* systems. The TRIPS Agreement's provisions on technology transfer are also relevant to efforts to transfer and disseminate environmental technology, including in the context of MEAs.[21] The TRIPS Agreement allows Members to exclude inventions from patentability where such exclusions are necessary to protect human, animal or plant life or health. However, unlike WTO agreements governing trade in goods and services, the TRIPS Agreement includes no general exception for the protection of health and the environment.

9. The Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")

The DSU[22] sets out detailed procedures for the settlement of disputes arising out of the implementation of WTO agreements. As it provides the framework within which WTO adjudication bodies balance trade and non-trade issues, including environmental matters, it is important in the context of trade and environment discussions. In addition to setting forth the rules governing the conduct of adversarial inter-governmental dispute resolution at the WTO, the DSU includes provisions for a minimum period of pre-litigation consultations and for good offices, mediation, and/or conciliation, which may be used to prevent tensions—including those relating to trade and the environment—from escalating into full trade disputes. The DSU establishes a two-tiered dispute settlement system to address issues that are not resolved through consultations. The first tier is comprised of panels, which have the responsibility of fact-finding, determining the applicability of and conformity with relevant WTO agreements, and making findings to assist WTO Members acting collectively as the Dispute Settlement Body ("DSB"). If a disputing party is not satisfied with the legal interpretation of the panel, it may appeal to the Appellate Body, which, however, is limited to making findings of law. An Appellate Body or panel report will be adopted by the DSB, the political organ of the dispute settlement system, unless all WTO Members agree by consensus to reject it.[23]

At the panel level, the DSU also empowers panels to seek information and technical advice from any individual or body, and to establish expert review groups to offer advisory opinions on specific issues (this latter possibility may be relevant in environmental-related WTO disputes as a means of obtaining information from scientists and relevant environmental organizations). As discussed in Section IV below, provisions of the DSU

[20] *TRIPS Agreement*, Article 7.

[21] For a general discussion of MEAs and their relation to WTO law, *see* section V(J).

[22] *Reprinted in* WTO AGREEMENT, *supra* note 1, at 354–379.

[23] DSU, Art. 17.14. Once the Appellate Body has rendered its decision, it "shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members". If a Member fails to bring into compliance a measure found to be inconsistent with a covered agreement, then the complaining Member may seek to negotiate mutually acceptable compensation, failing which the DSB may authorize the complaining Member to suspend concessions or other obligations to the Member that is contravening WTO rules. (DSU, Art. 22.2).

have recently been interpreted by the Appellate Body to allow both panels and the Appellate Body to accept non-requested information such as *amicus curiae* (or friend of the court) briefs from non-governmental sources.

In addition to the WTO agreements discussed above, a number of other WTO agreements may have important implications for environment and sustainable development, including the Agreement on Government Procurement,[24] and the Agreement on Trade-Related Investment Measures.[25]

B. Relevant WTO Disputes

Since its inception, the WTO's dispute settlement system has adjudicated a number of disputes that touch directly on issues of trade and environment. The principal cases are considered below.

1. United States—Gasoline

United States—Gasoline[26] involved a challenge by Venezuela and Brazil to a U.S. regulation designed to address air quality problems in urban areas by reducing emissions of toxic and smog-causing agents from motor vehicles. Among other things, the regulation required domestic and foreign petroleum refiners to establish baselines against which the "cleanliness" of fuels could be measured. These baselines treated domestic and foreign refiners differently. Domestic refiners were permitted to set their baselines against either a statutory level, or against actual 1990 gasoline quality. Foreign refiners, due to perceived difficulties in monitoring and enforcing rules abroad, were permitted only to use the more onerous statutory baselines. These regulations were challenged by Venezuela and Brazil, who argued that the rules discriminated against gasoline from their refineries, were inconsistent with GATT provisions, and were not justified in the light of Article XX. Their complaint was ultimately upheld by the Appellate Body, which agreed that while the U.S. measure satisfied Article XX(g), it failed to satisfy Article XX's introductory paragraph or "chapeau".[27]

The Appellate Body commenced by examining Article XX(g)'s requirement that measures must "relat[e] to the conservation of exhaustible natural resources". The U.S. measure satisfied this requirement as clean air was identified by the Appellate Body as a "natural resource" that could be depleted, there was a "substantial relationship" between the baseline establishment rules and the conservation of clean air in the United States, and, finally, the measure was not merely "incidentally or inadvertently" aimed at that end.[28] In examining this requirement, the Appellate Body established a number of important propositions. One is that WTO agreements are "not to be read in clinical isolation from public international law" recognizing the importance of coherence between WTO and

[24] Available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf (last visited February 28, 2003).

[25] *Reprinted in* WTO AGREEMENT, *supra* note 1, at 143–146.

[26] *United States—Standards for Reformulated and Conventional Gasoline, supra* note 1.

[27] The U.S. regulations could also have been challenged on the grounds of the so-called product-process distinction, a subject-area of great interest for the trade-environment agenda. *See* section V(A) dealing with process and production methods ("PPMs"). For a more detailed discussion of the product-process doctrine in the context of *United States—Standards for Reformulated and Conventional Gasoline, see* Robert E. Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 187, 207–211 (Bronckers and Quick eds. 2000).

[28] *United States—Standards for Reformulated and Conventional Gasoline, supra* note 1, at 19.

certain other sources of international law.[29] The Appellate Body also identified the need to read GATT provisions in their context, and to strike a careful balance between rights and obligations. Consequently, "the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies."[30] The Appellate Body also established that Article XX paragraphs (a) to (j) were not intended to establish the same kind or degree of connection between the measure and the policy sought to be realized, and consequently that Article XX(g)'s "relating to" test sets a different threshold than does the "necessary" test elsewhere in Article XX.[31]

After determining that the U.S. measure was one "relating to" the conservation of exhaustible natural resources, the Appellate Body examined the U.S. measure in light of Article XX(g)'s requirement that measures are "made effective in conjunction with restrictions on domestic production or consumption", which it characterized as a "requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."[32] The U.S. measure satisfied this requirement as it affected both domestic and imported gasoline, and restrictions on the consumption or depletion of clean air by regulating the domestic production of "dirty" gasoline were established jointly with corresponding restrictions with respect to imported gasoline.[33]

Following its examination of Article XX(g), the Appellate Body examined the U.S. measure in light of Article XX's "chapeau", which requires measures not to be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". The Appellate Body noted that the "chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied",[34] and that "measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[35] In applying the chapeau, the Appellate Body "located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines."[36] Accordingly, the "resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable" and constituted "unjustifiable discrimination" and a "disguised restriction on international trade."[37] In its consideration of the U.S. measure, the Appellate Body emphasized the importance of international

[29] *United States—Standards for Reformulated and Conventional Gasoline, supra* note 1, at 17. For an excellent discussion of the relationship between WTO law and other sources of international law, *see* Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions. The Relationship between the WTO Agreement and MEAs and Other Treaties*, 35 JOURNAL OF WORLD TRADE 6, 1081–1131 (2001).

[30] *United States—Standards for Reformulated and Conventional Gasoline, supra* note 1, at 19.

[31] *Id.*

[32] *Id.,* at 20.

[33] *Id.,* at 22.

[34] *Id.*

[35] *Id.*

[36] *Id.,* at 29.

[37] *Id.*

cooperation in resolving environmental problems, without foreclosing the possibility that in some cases unilateral measures may find justification under Article XX.

2. United States–Shrimp and United States-Shrimp 21.5 (implementation decision)
The second WTO decision to consider the provisions of Article XX was *United States–Shrimp.*[38] This case involved a challenge by India, Pakistan, Malaysia and Thailand (the Complainants) to a ban by the United States on imports of shrimp harvested with equipment that kills sea turtles, an endangered marine species. The ban was imposed pursuant to a 1989 amendment to its Endangered Species Act (known as "Section 609"), which requires exporting countries, as a prerequisite for access to the U.S. market, to certify that their shrimp fisheries do not threaten endangered sea turtles. In practice the law required foreign fishing fleets to equip their trawling gear with "turtle excluder devices", a mechanism allowing turtles to escape from shrimp nets without any significant loss of shrimp.

The Complainants successfully challenged the U.S. measure arguing that it was inconsistent with GATT obligations. The Appellate Body commenced by examining and upholding the U.S. measure under the three main elements of Article XX(g). First, it agreed that endangered sea turtles are "exhaustible natural resources". According to the Appellate Body, sea turtles constitute "natural resources" which are threatened with extinction and therefore "exhaustible".[39] Notably, the Appellate Body determined that the term "natural resources" should be read in an "evolutionary" manner (i.e., it is a term that cannot remain unaffected by the subsequent development of law) and so should be interpreted in light of the term's use in other international conventions and declarations such as the Convention on Biological Diversity.[40] The Appellate Body did not rule on the jurisdictional application of Article XX, and thus upon whether the United States was permitted to use trade measures to protect natural resources located outside its territorial limits. It stated:

> We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).[41]

Second, the Appellate Body determined that the U.S. measure was one "relating to the conservation of" exhaustible natural resources. It stated that:

> In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609 . . . is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States—Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.[42]

[38] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, supra* note 1, ¶ 159.
[39] *Id.*, ¶ 132.
[40] *Id.,* ¶ 109.
[41] *Id.,* ¶ 133.
[42] *Id.,* ¶ 141.

Third, the Appellate Body agreed that the U.S. measures "were made effective in conjunction with restrictions on domestic production or consumption". The Appellate Body determined that this requirement of "even handedness" was satisfied as the U.S. requirements on imported shrimp were also imposed in respect of shrimp caught by U.S. shrimp trawl vessels.[43]

After determining that the U.S. measure satisfied each of Article XX(g)'s requirements, and that it was therefore eligible for provisional protection under Article XX(g), the Appellate Body went on to examine the measure under Article XX's chapeau. According to the Appellate Body, the chapeau:

> . . . embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.[44]

The U.S. measure failed, according to the Appellate Body, to meet the chapeau requirements. Among other things, the measure's "intended and actual coercive effect on the policies of other governments",[45] the U.S. failure to "have prior consistent recourse to diplomacy as an instrument of environmental protection policy",[46] and the absence of predictable procedures (including opportunities for hearing, written reasons for decisions, and opportunities for review and appeal)[47] were identified by the Appellate Body as reasons the U.S. measure constituted "arbitrary and unjustifiable discrimination" for the purposes of Article XX. Additionally, the United States had negotiated seriously with some, but not with other WTO Members that export shrimp to the United States—a discriminatory practice the Appellate body determined was "unjustifiable", as it resulted in a unilateral rather than a negotiated solution, in shorter time for "phase in" of the requirements, and in reduced efforts by the United States to transfer TED technology.[48]

In addition to the above findings, the Appellate Body made a number of comments that are relevant when considering the relationship between trade, the environment and sustainable development. First, it established that the WTO Agreements' preambular reference to *sustainable development* "must add colour, texture and shading" to the interpretation of the WTO agreements.[49] This statement, in conjunction with its statement in *United States-Gasoline* that the agreements cannot be read in "clinical isolation", may provide the basis for a coherent interpretation and application of WTO rules and other international rules that seek to promote sustainable development. Second, the Appellate Body considered whether panels could receive non-requested *amicus curiae* ("friend of the court") briefs from non-WTO Members. Finally, the Appellate Body's decision seems to retain room for the use of measures based on the process and production methods used in an exporting country (in this case turtle excluder devices); a conclusion bolstered by the Appellate Body's subsequent implementation decision in *United States-Shrimp 21.5*. The extent to which such measures are permissible remains to be developed in future cases. A number of these issues are considered further in Sections IV and V.

[43] *Id.,* ¶ 145.
[44] *Id.,* ¶ 156.
[45] *Id.,* ¶ 161.
[46] *Id.,* ¶ 167.
[47] *Id.,* ¶ 180.
[48] *Id.,* ¶¶ 172–176.
[49] *Id.,* ¶ 153.

In *United States-Shrimp 21.5*, Malaysia challenged the implementation of the Appellate Body decision in *United States-Shrimp* by the United States. This case was brought under Article 21.5 of the DSU, on the basis that the United States had failed to bring its measures into conformity with WTO rules as recommended by the Appellate Body. Malaysia argued that the United States had failed to satisfy the requirements of the Article XX chapeau, including its obligation to pursue international cooperation for the protection of sea turtles. The Appellate Body considered the nature and extent of the U.S. duty to pursue international cooperation, and found that, in view of the "serious, good faith efforts made by the United States to negotiate an international agreement, Section 609 is now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination".[50] Consequently, the U.S. measure "as applied so far" is justified under Article XX "as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied."[51]

3. The SPS "Trilogy"—European Communities-Hormones, Australia-Salmon, and Japan-Varietals

Since the SPS Agreement establishes disciplines for national measures taken to protect human, animal, and plant life and health, its interpretation and application may have implications for certain measures designed to protect the environment. At the time of writing, the Appellate Body has considered three cases that directly apply the SPS Agreement: *European Communities-Hormones*,[52] *Australia-Salmon*,[53] and *Japan-Varietals*.[54]

(a) European Communities—Hormones ("EC-Hormones"). The first case to consider the SPS Agreement, *EC—Hormones,* involved challenges by the United States and Canada to the European Union's ban on the import of meat from cattle to which bovine growth hormones ("BGH") had been administered for the purpose of promoting the animals' growth. The import ban was an integral part of an EC directive that also prohibited the use of hormones for domestic growth promotion and the domestic sale of any meat products from animals so treated.

The Appellate Body found that the EC's measure was inconsistent with WTO law as it was not sufficiently "based on" a risk assessment, as required by Article 5.1 of the SPS Agreement. In the course of its ruling, the Appellate Body made several important interpretations of key provisions of the SPS Agreement and began to define the equilibrium of rights and obligations established in the SPS Agreement, the role of international standards, and the degree of flexibility that WTO Members retain when defining their national SPS measures. First, the Appellate Body confirmed that the burden of proof under both Articles 3.1 and 3.3 is on the Member challenging another Member's SPS measure.[55] Thus, even if a Member establishes a level of (health or environmental) protection that is higher than that contained in an international standard, another Member

[50] *See United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 by Malaysia, WT/DS58/AB/RW (2001), ¶ 152.
[51] *Id.,* ¶ 153.
[52] Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (1998).
[53] Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R (1998).
[54] Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R (1999).
[55] *European Communities—Measures Concerning Meat and Meat Products (Hormones), supra* note 52, ¶¶ 102, 104, and 108.

challenging this measure must still make a *prima facie* demonstration of inconsistency with the SPS Agreement.[56]

Second, the Appellate Body held that Members are not obliged by Article 3.1 to conform their domestic regulations to standards enacted by international standard setting bodies.[57] The view of the Appellate Body is that, although the SPS Agreement seeks to *promote* international harmonization, it does not create an *obligation* for Members to abide by such international standards.

Third, as a consequence and corollary of the previous finding, the Appellate Body held that Members have a right under Article 3.3 to depart from levels of protection established by international standards and to establish their own levels of protection, in accordance with their societal preferences and usage.[58] The SPS Agreement recognizes the prerogative of Members to establish levels of protection higher than those reflected in relevant international standards.[59]

Fourth, the Appellate Body stressed the obligation of Members to base their SPS measures on a risk assessment, and interpreted Articles 5.1 and 5.2 as an obligation of Members to demonstrate a "rational relationship" between (scientific) risk assessment and the SPS measures.[60] The Appellate Body described this requirement as a "counterbalancing element" to Member's freedom to establish their own levels of protection under Article 3.3.[61] Nevertheless, the Appellate Body stated that where scientific opinion is not unanimous and where diverging risk assessments exist, Members have significant discretion as to which risk assessment should be the basis of their regulation, and may rely on "a divergent opinion coming from qualified and respected sources".[62]

Fifth, the Appellate Body also provided useful clarification of Articles 5.5 and 5.6. According to these provisions, Members may not establish arbitrarily different levels of protection in situations involving the same or similar types of risk so as to create disguised restrictions to international trade. While setting an appropriate level of protection under Article 3.3 remains a fundamental sovereign prerogative, the SPS Agreement requires Members to maintain a degree of consistency in the choice of levels of protection across comparable situations. Nevertheless, arbitrarily different levels of protection across comparable situations do not *automatically* imply a disguised restriction on trade.[63]

Finally, although the EC had not explicitly relied on Article 5.7, the Appellate Body discussed the relationship of the precautionary principle and the SPS Agreement in the context of Article 5.7. It recognized that Article 5.7 was a reflection of the precautionary principle, but held that the principle could not override other explicit provisions of the SPS Agreement, in particular Article 5.1's requirements that a Member's SPS measures

[56] This seemingly technical finding is of significant importance. Although standards for a *prima facie* case may vary from one international tribunal to another, in international law a not insignificant number of cases are essentially decided by the allocation of the burden of proof.

[57] *European Communities—Measures Concerning Meat and Meat Products* (*Hormones*), *supra* note 52, ¶ 166.

[58] *Id.,* ¶ 177.

[59] This is in line with an economic approach that regulatory diversity at the national level, in light of diverse preferences, can be an important tool of overall welfare maximization.

[60] *Id.,* ¶ 193.

[61] *Id.,* ¶ 177.

[62] *Id.,* ¶ 194. The Appellate Body added that this is true "... especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety." *Id.*

[63] *European Communities—Measures Concerning Meat and Meat Products* (*Hormones*), *supra* note 52, ¶¶ 239–246.

be based on a risk assessment.[64] Consequently, WTO Members must comply with the risk assessment requirement contained in Article 5.1 of the SPS Agreement, an interpretation that was largely the basis for the ultimate finding that the EC's measure was inconsistent with the SPS Agreement.

(b) Australia—Salmon. In *Australia—Salmon*,[65] the second case under the SPS Agreement, Canada challenged Australia's prohibition on the importation of uncooked salmon. The Australian measure was based on studies of several fish disease agents that were found in uncooked salmon of Canadian (and U.S.) origin, and that were considered a risk to Australian salmon populations.

The central issue of this case was whether the Australian measure was "based on a risk assessment" as required by Article 5.1 of the SPS Agreement. The Appellate Body first determined that risk assessment in relation to animal life or health consists of three elements: 1) identification of the diseases a Member seeks to prevent within its territory as well as the potential biological and economic consequences of their entry of the pests or diseases; 2) evaluation of the likelihood of entry and of the consequences of entry in the absence of the SPS measure; and 3) evaluation of the likelihood of entry if the SPS measure were applied.[66] The Appellate Body then held that Australia's import ban failed to meet the second and third of these elements.[67] In essence, the Appellate Body interpreted "risk assessment" as a quantitative (and to some extent also qualitative) statement of probability, resulting from the application of scientific methodology, and added that the "risk" evaluated in a risk assessment must be an ascertainable risk and must be sufficiently specific to the subject matter at hand. The Appellate Body reiterated its finding in *EC—Hormones* that theoretical uncertainty is "not the kind of risk which, under Article 5.1, is to be assessed."[68] The systemic implication of this finding is that Members must follow strictly scientific criteria and methodology in the context of a risk assessment.[69] The Appellate Body stated that Members have the right to choose the level of protection they consider appropriate and stated that Members may legitimately follow a policy of zero risk. Nevertheless, balancing this discretion is the requirement that Member's health measures must be based on sufficient scientific evidence. In *Australia–Salmon*, the Appellate Body tightened the methodological requirements for risk assessments necessary to satisfy the SPS Agreement.

Next, the Appellate Body found that Australia violated Article 5.5 of the SPS Agreement, because it applied a different, higher level of protection to imports of salmon than to imports of other fish species; this difference was arbitrary and unjustifiable; and it resulted in a disguised restriction on international trade. The Appellate Body's decision confirms the approach adopted under *EC—Hormones* that an arbitrarily different level of protection applicable in similar or comparable situations does not of itself violate Article 5.5. While the Appellate Body in *EC—Hormones* had not found a violation of Article 5.5, in *Australia-Salmon* it held that Australia's measure resulted in a disguised restriction on international trade based on: (1) the extent of the differential treatment,

[64] *Id.,* ¶¶ 124–125.
[65] *Australia—Measures Affecting Importation of Salmon, supra* note 53.
[66] *Id.,* ¶ 121.
[67] *Id.,* ¶¶ 126–35.
[68] *Id.,* ¶ 125.
[69] Although risk assessment will have to fulfill different criteria based on whether the national measure in question is designed to protect plant or animal life or health on the one hand and human life or health on the other, it is clear that a risk must always be scientifically ascertainable and quantifiable.

(2) the fact that the measure was not based on a risk assessment, and (3) the significant difference between the draft and the final version of the Report which served as the basis for the Australian measure. The Appellate Body reasoned that the third factor might have been "inspired by domestic pressures to protect the Australian salmon industry".[70]

The findings in the *Australia—Salmon* case suggest that the Appellate Body is likely to follow a case-by-case balancing approach when applying Article 5.5 of the SPS Agreement. If applied flexibly, this approach would appear to leave room (albeit with respect to Article 5.5 only) for *bona fide* health protection measures. This approach also provides room for the upward revision of protection, reflecting the reality that national policymakers often cannot address uniformly all similar situations at one time, and so different levels of protection in comparable situations may provide evidence of piecemeal, upward revision of protection, rather than evidence of protectionist behavior. To avoid creating a chilling effect on environmental and health standards, Article 5.5 should arguably continue to be read flexibly to retain the right of Members to harmonize their health protection measures upwards over a period of time.

(c) Japan—Varietals. In the *Japan—Varietals*[71] case, the United States challenged a Japanese prohibition on the import of apples, cherries, and six other orchard crops, which was established on the ground that the imports could carry pests (codling moths) that could damage Japanese fruit crops. The Japanese law allowed the importation of fumigated products if exporters demonstrated that fumigation is effective to eliminate the risk of carrying the pest; however, this demonstration had to be effectuated on a variety-by-variety basis for each crop. The United States argued that it was sufficient to demonstrate the effectiveness of the fumigation for one variety per crop.

The Appellate Body first determined that the Japanese measure violated Article 2.2's requirement that SPS measures not be maintained without "sufficient scientific evidence".[72] The Appellate Body interpreted this requirement to mean that there must be a rational and objective relationship between the SPS measure and scientific evidence, and found no such relationship between scientific evidence and the Japanese measure. As the scientific underpinnings of the Japanese measure were indeed limited, it is unclear what the Appellate Body would consider to be a "rational and objective relationship" in more complex and nuanced cases. Guidance might be obtained from the Appellate Body's Article 5.1 finding in *EC—Hormones* that responsible governments may reasonably base decisions on minority scientific opinion.

Next, the Appellate Body found that Japan failed to satisfy the requirements of Article 5.7 which, as already noted, sets forth the precautionary approach under the SPS Agreement.[73] The Appellate Body identified four cumulative requirements under Article 5.7.[74] First, provisional measures must be imposed in respect of a situation where "relevant scientific information is insufficient." Second, provisional measures must be adopted "on the basis of available pertinent information." Third, provisional measures may not be maintained unless Members "seek to obtain the additional information necessary for a more objective assessment of risk". Finally, the Member invoking Article 5.7 must demonstrate that it has reviewed the measure within a reasonable period of time.

[70] *Australia—Measures Affecting Importation of Salmon, supra* note 53, ¶ 170.
[71] *Japan—Measures Affecting Agricultural Products, supra* note 54.
[72] *Id.,* ¶ 85.
[73] *Id.,* ¶ 94.
[74] *Id.,* ¶ 89.

The Appellate Body's analysis focused only on the third and fourth requirements and concluded that Japan had failed to fulfill both of these requirements.

The Appellate Body's report in *Japan-Varietals* is the first to examine in detail the elements of Article 5.7, and thus provides important guidance from the Appellate Body on the types of provisional or "precautionary" measures that are permitted under the SPS Agreement. The Appellate Body focused on the requirements of Article 5.7 relating to the concept of a "reasonable period of time" (which in this case was approximately four years, but will likely vary on a case-by-case basis). It was not asked, however, to provide a detailed analysis of the first two elements of Article 5.7, which determine the circumstances under which precautionary action is permissible under the SPS Agreement. The questions associated with these two requirements—namely, the situation in which scientific information can be regarded as "insufficient", and the precise nature of the "available pertinent information" upon which precautionary measure are to be adopted—have yet to be examined by the Appellate Body.

4. EC—Asbestos

The *EC—Asbestos* case[75] involved a challenge by Canada to a French ban on the manufacture, sale, and import of asbestos fibers and any product containing asbestos fibers. The statutorily stated purpose of this ban was the protection of the health of workers and consumers, in the light of the carcinogenicity of asbestos fibers. The decree provided for certain limited exceptions to the ban on chrysotile asbestos fibers (also called white asbestos). Canada claimed that the French measure was discriminatory, in that it accorded less favorable treatment to imported (Canadian) asbestos and asbestos-containing products than to domestic (French) "like" products, namely substitute fibers and products containing these fibers, thereby violating GATT Article III:4's non-discrimination requirement.

The Appellate Body first examined whether the French decree at issue fell within the purview of the TBT Agreement. For this purpose, the Appellate Body examined the definition of "technical regulation" under Annex 1.1 of the TBT Agreement, and noted that a technical regulation must lay down, on a mandatory basis, "product characteristics" of an identifiable product or a group of products. The Appellate Body noted that the French decree prescribed certain characteristics of all products, in the sense that it required that "all products" not contain asbestos fibers.[76] Consequently, the French measure fell within the definition of a technical regulation. The Appellate Body therefore reversed the panel's finding that the TBT Agreement did not cover the French measure. Nevertheless, given the specifics of the case, the Appellate Body felt that it did not have an "adequate basis" to complete the analysis and to examine Canada's substantive claims under the TBT Agreement.[77]

Subsequently, the Appellate Body examined whether asbestos fibers and certain less hazardous substitute fibers are "like products" for the purposes of Article III:4 of the GATT 1994 (a question which the panel had answered in the affirmative). The Appellate Body found that "like products" are products in a competitive relationship, since imported products which are in a competitive relationship with domestic products can conceivably

[75] Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001).

[76] *Id.,* ¶ 72.

[77] *Id.,* ¶ 84.

be subject to "less favorable" treatment.[78] The Appellate Body referred extensively to GATT/WTO precedents and noted that in the past, four broad criteria had been used to determine "likeness": (1) physical properties of the products, (2) their end-uses, (3) consumers' tastes and habits, their perceptions and behavior, and (4) tariff classification. However, the Appellate Body stated that these four categories are not the only criteria that could be relevant. Contrary to the panel, the Appellate Body found that the health "risk" associated with a product (in the specific case, the carcinogenicity of asbestos fibers) is a relevant physical property to be taken into consideration under the analysis of "likeness".[79] The Appellate Body also critiqued other aspects of the panel's findings and repeatedly referred to the focus of Article III:4 as one of "competitive relationships in the marketplace". After considering the evidence on record, the Appellate Body concluded that Canada had not demonstrated that the two sets of products were "like" and therefore had not proven that the measure was inconsistent with Article III:4.[80]

The Appellate Body also examined whether the French ban was justified by Article XX(b) as a measure "necessary" for the protection of human life or health. Canada argued that the panel had erred in finding that "controlled use" was not a reasonably available alternative to the outright ban imposed by the French decree. The Appellate Body referred to its report in *Korea—Beef*[81] and the GATT *Thailand—Cigarettes*[82] case and recalled the "necessary test" under Article XX(b) involves an examination of whether there is an alternative measure consistent with the GATT (or less inconsistent with it) that a Member could be reasonably expected to employ to achieve its objectives. In this context, the Appellate Body stated that the more important the policy question at issue, the easier it will be for a Member to demonstrate that a measure is indeed necessary to achieve these objectives. The Appellate Body then stated that the preservation of human life and health is a value that is important "to the highest degree".[83] With these statements in mind, the Appellate Body determined that "controlled use" had not been demonstrated to be a reasonably available, less trade-restrictive alternative measure able to achieve the same result as the measure at issue.[84]

The significance of the *Asbestos* case in the fields of environmental and health protection lies in the Appellate Body's confirmation that toxicity and other risks associated with a product are relevant when considering its likeness to other products.[85] Another important result is the consideration of reasonably available alternatives under Article XX(b). The Appellate Body noted that the more important the policy objective pursued,

[78] *Id.,* ¶ 99.

[79] *Id.,* ¶¶ 114–116.

[80] It is important to note that the Appellate Body did *not* state that the two sets of products at issue were "not like". In a "concurring statement", one Member of the Appellate Body stated that the Appellate Body rather should have found expressly that the sets of products at issue were not like and expressed his reservation towards the "'fundamentally' economic interpretation" of the term "like products" under Article III:4.

[81] *Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (2000).

[82] GATT Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, BISD 37th Supp. 200 (1990).

[83] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, supra* note 75, ¶ 172.

[84] *Id.,* ¶ 174.

[85] Whether health risk is considered for the purpose of "likeness" under Article III:4 or under Article XX(b) is of potentially great significance to the Member whose measure is under challenge. Whereas under the affirmative defense of Article XX(b), the burden of proof is on the defending Member, under Article III:4 the burden of proof for establishing "likeness" and less favorable treatment rests upon the complaining Member.

the easier it will be to prove that a measure is "necessary" to meet those objectives and that alternatives are not reasonably available. Specifically, the Appellate Body stated that the preservation of human life or health by eliminating a known and grave risk is a value that is "vital and important" to the "highest degree".[86] Finally, the Appellate Body may have broadened the "like products" test under Article III:4 by moving an additional step towards determining "likeness" from the perspective of the market place and the consumer.[87] The implications of the Appellate Body's views on "like products" for certain environmental measures are discussed in Section V(A).

C. Committee on Trade and Environment

The traditional trade and environment debate is largely reflected in the agenda of the WTO's Committee on Trade and Environment ("CTE"). The CTE was established under the Marrakesh Ministerial Declaration with a broad mandate to examine the relationship between trade and environment in all areas of the multilateral trading system, including goods, services and intellectual property. Pursuant to the Decision on Trade and Environment, the CTE has the twofold responsibility to:

> (a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
> (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
>
> — the need for *rules to enhance positive interaction between trade and environmental measures*, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
> — the *avoidance of protectionist trade measures*, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
> — *surveillance of trade measures used for environmental purposes*, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures. . . .[88]

As set forth in the Decision on Trade and Environment, the CTE's agenda comprises the following ten items:

[86] *European Communities—Measures Concerning Meat and Meat Products (Hormones), supra* note 52, ¶¶ 169–172.

[87] Robert Howse and Elisabeth Tuerk, *The WTO Impact on Internal Regulations: A Case-study of the Canada-EC Asbestos Dispute,* in THE EU AND THE WTO: CONSTITUTIONAL AND LEGAL ASPECTS (BÚRCA AND SCOTT eds., 2001). This is significant for the so-called PPM issue (*see infra* Section V(A)). Conceptually, determining "likeness" through substitutability in the market place—as opposed to the physical characteristics of a product—would make it easier for national regulation based on non-product related PPMs to survive a challenge under Article III:4. However, it has to be noted that the Appellate Body did not consider PPM issues in the *EC—Asbestos* case.

[88] *Decision on Trade and Environment, reprinted in* WTO AGREEMENT, *supra* note 1 (emphasis added).

- [1] The relationship between trade provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;
- [2] the relationship between environmental policies that are relevant to trade and environmental measures and that have significant trade effects, and the provisions of the multilateral trading system;
- [3] the relationship between the provisions of the multilateral trading system and:
  (a) charges and taxes for environmental purposes;
  (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling and recycling;
- [4] the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and requirements that have significant trade effects;
- [5] the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
- [6] the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and the environmental benefits of removing trade restrictions and distortions;
- [7] the issue of the exports of domestically prohibited goods;
- [8] that the Committee on Trade and Environment will consider the work program envisaged in the Decision on Trade in Services and the Environment and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights as an integral part of its work, within the above terms of reference;
- [9] that, pending the first meeting of the General Council of the WTO, the work of the Committee on Trade and Environment should be carried out by a Sub-Committee of the Preparatory Committee of the World Trade Organization (PCWTO), open to all members of the PCWTO;
- [10] to invite the Sub-Committee of the Preparatory Committee, and the Committee on Trade and Environment when it is established, to provide input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO.

The CTE's work on these agenda items is to be given careful consideration when exploring the field of trade and environment. At the same time, this work does not delimit the scope of future discussions of trade and environment, and the field will continue to develop and evolve as new issues arise and old ones are resolved. While the documents issued by the CTE are not binding, they nevertheless constitute an important contribution to the on-going debate on the relationship between trade and environment.

The CTE and the parallel committee for development, the Committee on Trade and Development, were given a mandate by WTO Members at the Fourth WTO Ministerial Meeting (held in Qatar from November 9–14, 2001) to act as fora to identify and debate environmental and developmental aspects of upcoming WTO negotiations, in order to help achieve the objective of having sustainable development appropriately reflected in those negotiations.

D. The WTO's Fourth Ministerial Mandate on Trade and Environment

In addition to these specific mandates for the Committee on Trade and Environment and the Committee on Trade and Development, WTO Members agreed at the Fourth Ministerial (Doha) to a range of elements and mandates relating to trade, environment and sustainable development. The Ministerial Declaration includes:

- "Negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs);"[89]
- Negotiations on "procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for granting observer status;"[90]
- Negotiations on "the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services;"[91]
- Negotiations on subsidies which "aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries;"[92]
- Establishment of "a Working Group under the auspices of the General Council to examine the relationship between trade and transfer of technology, and of any possible recommendations on steps that may be taken within the mandate of the WTO to increase flows of technology to developing countries;"[93]
- Instruction to the TRIPS Council to examine "the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge, and other relevant new developments. . . ";[94]
- Encouragement "that expertise and experience be shared with Members wishing to perform environmental reviews and assessments at the national level;"[95] and
- Recognition of "the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular to the least developed among them."[96]

In addition to these elements, the CTE was instructed in paragraph 32 of the Ministerial Declaration to give particular attention in pursuing its work to "the effect of environmental measures on market access, especially in relation to developing countries", "the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights" and "labelling requirements for environmental purposes". Finally, the WTO's mandate on trade and investment may have significant implications for environment and sustainable development.[97]

These references in the Ministerial Declaration reflect the belief by a number of WTO Members that more can be done within the context of the WTO to promote a mutually supportive relationship between trade and the environment. While celebrated by some NGOs and governments, the addition of new negotiating mandates on trade and environment mandates has not been universally welcomed. Some developing countries,

[89] *WTO Fourth Ministerial Declaration*, WTO Doc. WT/MIN(01)/DEC/1 (November 20, 2001), ¶ 31(i).
[90] *Id.,* ¶ 31(ii).
[91] *Id.,* ¶ 31 (iii).
[92] *Id.,* ¶ 28.
[93] *Id.,* ¶ 37.
[94] *WTO Fourth Ministerial Declaration, supra* note 89, ¶ 19.
[95] *Id.,* ¶¶ 6 and 33.
[96] *Id.,* ¶ 33.
[97] *Id.,* ¶¶ 20–22.

for example, have expressed concern that new negotiations will increase the burden on their already limited resources. Whatever view is adopted of these aspects of the Ministerial Declaration, the implications of these elements are significant and are thus examined in further detail as appropriate in Sections V and VI.

III. Placing the Trade and Environment Debate in Context

The relationship between international trade and the environment raises a complex and interrelated web of issues that cut across the various WTO agreements, as well as the work of the committees and councils responsible for administering them. Before examining the principal trade and environment issues, this section offers some comments to place the trade and environment debate in the broader context of sustainable development, a concept that connotes identifying development paths (at all levels, from the local to the global) that balance and optimize the economic, social and environmental aspects of human behavior, and that meet the needs of present generations without compromising the ability of future generations to meet their own needs.

First, issues of trade and environment are part of and should be considered together with the broader economic, social and environmental challenges facing humanity. The last few decades have seen a significant expansion in international economic activity. This expansion has been driven, at least in part, by the removal of barriers to the trans-border movement of goods, services and capital, and has contributed to a significant increase in the wealth and well-being of many, but not all, segments of human society. The same period, however, has seen rapidly growing pressure on the life-support system that sustains human activity—the environment. Human behavior is heralding a wave of mass extinctions; by some estimates the world is losing 27,000 species a year (i.e., 27 a day, three every hour) at a rate more than a thousand times faster than the natural rate as determined through the fossil record.[98] Eighty percent of the forests that originally covered the Earth have been cleared, fragmented or otherwise degraded, and of the remaining twenty percent, about two fifths are threatened by logging, mining and other large-scale development projects.[99] Approximately sixty percent of the Earth's fisheries are depleted, and many local communities have suffered catastrophic reductions in annual harvests.[100] Human behavior is changing the global climate with potentially profound implications for weather systems, ecosystems and human well-being.[101] In the last seventy years, the world's population has tripled, and is projected to peak at around 9 billion people in 2050.[102] At the dawn of a new century, humanity is faced with an unparalleled challenge: How to continue to raise the material well-being of a growing population while respecting the constraints of the Earth's biosphere? The lessons of the previous century include the

[98] Edward O. Wilson, THE DIVERSITY OF LIFE 280 (1992). In 1996, 25 percent of mammal species and 11 percent of bird species were assessed as at significant risk of total extinction, and countless other species now exist in reduced numbers and fragmented populations. *See also*, UNEP, GLOBAL ENVIRONMENT OUTLOOK 39 (2000).

[99] UNEP, GLOBAL ENVIRONMENT OUTLOOK 38 (2000).

[100] *Id.,* at 45.

[101] The Intergovernmental Panel on Climate Change ("IPCC") has concluded that "recent regional climate changes, particularly temperature increases, have already affected many physical and biological systems", for example, by causing shrinkage of glaciers, thawing of permafrost, delayed freezing of ice on rivers and lakes, pole-ward shifts in plants and animal ranges, a decline of some plant and animal populations, and earlier flowering of trees, emergence of insects and egg-laying birds. The Intergovernmental Panel on Climate Change, *Summary for Policymakers of the Third Assessment Report of Working Group 1 of the IPCC* (Climate Change 2001: The Scientific Basis 1–8 (2001)).

[102] *See* UN Population Fund, *State of the World Population* (2001).

realization that the various spheres of our activity—economic, social, environmental and others—are intimately related. Achieving a minimum level of well-being for all humans in a 2050 world, and avoiding serious environmental and social dislocation, will require a highly sophisticated and integrated approach that is implemented through a coherent and balanced architecture of laws, policies and other institutional arrangements across different jurisdictions and levels of governance. The laws, policies and institutions governing international trade, and environmental management, form an essential part of this coherent architecture.

Second, the trade and environment debate should be considered in light of its historical context. Historically, the contours of the trade and environment debate were influenced by a number of factors that defined the positions of its parties, and the lines of their disagreement. Among these factors were two disputes between Mexico and the United States, known as the *Tuna-Dolphin* disputes,[103] which polarized discussions and helped to establish the commonly held perception that the trade and environment debate is a North-South battle, pitching Southern economic development against the protection of Northern environmental concerns. In reality, however, the debate is more complex. In some cases developed rather than developing countries have collectively promoted a strong environmental agenda in trade. Developing countries have, for example, championed the cause of the Convention on Biological Diversity at the TRIPS Council. In other cases, mixed North-South coalitions promote or oppose environmental issues. In the debate about trade in genetically modified organisms and biosafety, for instance, the coalitions of developed and developing countries that promote (or oppose) strong biosafety rules, are similar to those that oppose (or promote) strong proposals to liberalize agricultural trade at the WTO. Agricultural importing countries want the security of international rules on biosafety, whereas agricultural exporting countries want a laissez-faire system for their agricultural exports that does not have to contend with biosafety rules. The relative positions of developed and developing countries should thus be examined carefully, on a case-by-case basis, for each trade and environment issue, including those addressed below.

Third, as the number of economic sectors covered by the multilateral trading system has expanded during the last decade, so too has the number and diversity of non-economic, social, environmental, and other issues that must be considered by the trading community. Trade liberalization is no longer confined to the relatively technical task of removing tariffs and ensuring non-discrimination between goods, as it was in the early days of the GATT. Rather, the trading system has expanded to reach deep into the territory of national governance to promote economic liberalization, with the potential to affect many national policy areas. Indeed, the term "trade" seems no longer adequate to describe the breadth of issues covered by the multilateral trading system, which includes not only rules regarding trade in goods, but also address the areas of intellectual property, services, investment, government procurement, and so on. Similarly, the term "environment" does not seem broad enough to cover the diversity of non-economic issues often considered in the context of the WTO under the trade and environment banner. Some of these issues—such as scientific uncertainty and precaution—span the environmental field and other fields, leaving the "trade and environment" rubric as an insufficiently broad framework within which to examine the issues holistically. And other issues arise that are closely linked to, but are not primarily, environmental issues, including food safety, consumer's right to know, human rights, and the protection of traditional knowledge. As yet many of these

[103] Report of the GATT Panel, *United States—Restrictions on Imports of Tuna*, Complaint by Mexico, BISD, 39th Supp. 155 (1993) (unadopted).

issues—which would be better subsumed under a broader "sustainable development" banner—do not have a formal institutional home within the WTO.

Fourth, the role of key players in the debate is changing. One source of change is the increasing congruence in the interests of developing countries and many civil society organizations, illustrated by common calls by developing countries and NGO coalitions to reform the TRIPS Agreement to promote access to drugs and protect biodiversity, to comprehensively assess the impact of the Services agreement, and to delay consideration by the WTO of additional issues such as investment, competition and government procurement. The importance of this shift in alliances, evident particularly since the WTO's Third Ministerial Meeting in Seattle, remains to be seen, but could prove significant in future discussions about trade, environment and sustainable development.

Finally, the linkages between trade and the environment are complex, and should be examined carefully on a case-by-case basis. These relationships can also be explored in a variety of ways and from a variety of perspectives. In the following sections of this chapter, we explore some of the principal issues in the context of three main categories: 1) material; 2) legal and policy-related; and 3) organizational.[104] We emphasize that this is not the only or even necessarily the best approach to these issues. Nevertheless, we consider it one useful framework by which the issues can be examined. As these categories provide the organizing framework for discussions in the remainder of this chapter, we explain them briefly here before elaborating on them in Sections IV–VI.

At the level of the material or physical world, international trade can have both positive and negative economic, social and environmental effects. These effects arise because the economic and social systems, and the ecosystems upon which they rely, are linked in the material world through a complex web of inter-relationships. As a result of these *material linkages*, trade liberalization may change the pattern or nature of activity in one sphere, with resulting implications for the pattern or nature of activity in another sphere.

Responding to these material linkages and regulating human activity accordingly to maximize long-term welfare is one of the key roles of law and policy. Just as linkages exist in the material world, linkages arise among the different systems of law and policy that are responsible for promoting trade and managing the environment across different levels of governance—local, national, regional and international. These relationships between different fields of law and policy give rise to a range of *legal and policy issues* discussed below. Some of these arise between rules at the international and national level (for example, between international trade rules and domestic environmental policies), and others arise at the international level among different trade rules and rules for environmental management (such as multilateral environmental agreements or MEAs).

Legal and policy issues are for the most part created and ultimately resolved by institutions. *Organizational issues* arise between the different bodies responsible for developing, interpreting and executing law and policy at the trade and environment interface. The institutions responsible for economic, social and environmental policy are related, giving rise to a complex web of organizational linkages. In the following three sections, respectively, we examine a selection of issues arising from relationships in the

[104] These categories—material, legal/policy, and organizational—are not mutually exclusive, and many trade and environment issues will exhibit a mixed character; they will arise in the material world, raise questions of law and policy, and/or require action by organizations or other institutional arrangements for their resolution. Here we use the framework to offer generic comments on the nature of trade and environment issues, and to structure discussions by organizing issues according to their primary character, with an emphasis on the legal and policy aspects of trade and environment issues. A similar framework was adopted in the United Nations Environment Programme/International Institute for Sustainable Development, ENVIRONMENT AND TRADE—A HANDBOOK 50 (2000).

material world, from relevant laws and policies, and between the institutions responsible for trade, environment and sustainable development.

IV. Material Linkages—Economic, Social and Environmental

We live in a highly interdependent world. Trade and trade liberalization are closely tied to numerous other economic and social aspects of human behavior. These, in turn, are intimately connected to each other, and to the natural environment. As a result of these material linkages between the economy, society and the environment, changes in trade and or trade policy may have significant economic, social and environmental effects. The goal of policy-makers should be to understand these linkages and to act in a manner that maximizes positive impacts and minimizes negative impacts by adjusting both proposed trade policy and other associated policies as part of an integrated package of measures to maximize the net gains from trade liberalization.

A. Nature of Material Linkages

As with any set of complex systems, the material linkages between trade liberalization (and associated economic activity), society and the environment are not easily reducible to a set of simple categories or relationships. While a number of analytic frameworks are available, a frequently used framework suggests that trade may affect society and the environment by introducing new *products*; disseminating new *technologies*; affecting the *structure of economic activity*; or increasing the *scale* of impacts on the environment.[105] *Product effects* are related to the flow of products or services between countries, and will depend both on the nature of products (which may be environmentally benign or environmentally risky) and on the volume of trade.[106] *Technology effects*, which are closely related to product effects, arise from the transfer and dissemination of environmentally sound or hazardous production technologies between countries.[107] *Structural effects* arise as trade liberalization often affects the underlying composition of economic activity both within and between countries—for example, between primary secondary or tertiary production—with associated implications for the environment.[108] *Scale effects* arise as trade liberalization may spur an increase in the volume of goods and services consumed, with resulting implications for the amount of material and energy required by the economy.[109] By increasing aggregate consumption it may increase pressure on environmental "sources" (e.g., natural resources that provide an input into the human economy) and/or "sinks" (e.g., the assimilative capacity of air, land or water to absorb the outputs and waste of the human economy).

B. Positive and Negative Linkages

Across each of these categories, trade liberalization may have positive or negative (or neutral) effects. In many cases, both positive and negative effects of some kind and degree will occur simultaneously. Positive effects will arise when trade liberalization causes changes in economic activity that, in turn, reduces pressure on the environment.

[105] *See* OECD, Methodologies for Environment and Trade Reviews, OECD/GD(94) 103 (1994). *See also* UNEP, Reference Manual for the Integrated Assessment of Trade-Related Policies (2001).
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*

Positive *product effects*, for example, may arise where environmentally benign substitutes replace more harmful products (such as polluting automobiles, inefficient electric goods, or high-sulfur coal). Positive *technology effects* arise from the transfer of more efficient or environmentally sound technologies. *Structural effects* may be positive where trade provides opportunities for countries to re-orient their economic activity towards less resource-intensive or polluting industries (for example, away from certain primary industries into services sectors). Finally, positive *scale effects* may arise from three main sources: allocative efficiency may arise as a country specializes according to its comparative advantage; competitive efficiency may arise as competition forces firms to become more efficient and innovative; and production efficiency may arise as firms benefit from economies of scale.[110] In addition, in some cases, an increased scale of economic activity may be accompanied by rising incomes and an associated higher level of demand for environmental protection.

While trade liberalization may in some cases strengthen environmental protection, it may also have significant negative impacts, especially when national regulatory frameworks are inadequately developed or enforced. Negative *product effects* might include the damage associated with transboundary movement of dangerous products such as hazardous wastes or chemicals. Negative *technology effects* may arise where obsolete or inappropriate technology is transferred through international trade. Negative *structural effects* may include shifts into resource intensive sectors or highly polluting sectors. And negative *scale effects* will often accompany an increase in the volume of traded goods, although these may be at least partially offset by the potential positive scale effects mentioned above.

C. Direct and Indirect Linkages

These positive and negative material linkages may also be more or less direct. In some cases, small changes in trade policy may have major implications for social and environmental welfare. In other cases, the positive or negative impacts of trade liberalization may be less direct, or may take longer to materialize. In designing policy, it is important for policy-makers to understand not only the nature of linkages, but also their degree. The degree of interdependence will depend in many cases on the particular sector being liberalized. Liberalization of some services sectors, for example, may have only indirect implications for the environment. But the liberalization of energy or mining services is likely to have greater environmental implications than the liberalization of accountancy services. Liberalization of trade involving environmentally sensitive sectors (such as agriculture, fisheries, forestry and mining) is likely to have considerable implications for environmental protection. Ensuring that trade liberalization maximizes its contribution to human welfare and to national development objectives requires a careful evaluation of the complex linkages between trade, the economy, society and the environment, on a sector-by-sector basis, before liberalization takes place.

V. Legal and Policy Issues

Addressing the material linkages between trade, the economy, society and the environment, and regulating human activity accordingly in order to maximize long-term welfare,

[110] *See* UNEP, *supra* note 105, at 26. Under this classification, the categories of structural and scale effects are not mutually exclusive; allocative efficiency leading to positive scale effects, for example, may arise through structural changes in an economy.

is a key role of law and policy. Laws and policies play an important role in shaping the nature and pattern of economic activity, and consequently on a range of important factors including employment, social standards, resource use, and environmental protection. Just as linkages exist in the material world, linkages arise among different systems of law and policy, across different jurisdictions, and between different levels of governance—local, national, regional and international—giving rise to a range of legal and policy issues at the interface of trade and environment.

Many trade and environment debates center on legal and policy linkages. One set of linkages arises "horizontally" across the international level between WTO rules and the rules established in other fields of international law, such as those embodied in multilateral environmental agreements. In many cases legal and policy issues arise because the same underlying issues or activities are addressed by more than one field of international law. For example, transboundary movement of certain hazardous waste has both trade and environmental effects, giving rise to efforts to ensure its coverage by international rules in the fields both of trade and the environment. Linkages between MEAs and the WTO also arise in areas as diverse as depletion of the ozone layer, biodiversity conservation and intellectual property rights, trade and trade-related measures in MEAs, and approaches to scientific uncertainty and precaution.

Another important set of linkages arises "vertically" between international trade law and the national laws and policies to which it applies. International trade rules often seek to promote trade and to reduce protectionism by delimiting the kinds of rules national regulators may use to protect social and environmental assets. In certain cases, the "liberalizing tendency" of trade rules operates in tension with the need to ensure that governments retain regulatory authority to protect health, safety and the environment; policy areas whose management presupposes the existence of effective regulation. Trade rules, unless carefully defined, interpreted and applied, may operate in tension with national rules designed to protect health or environment, affecting the scope of government discretion to adopt regulations tailored to existing social preferences.

WTO rules thus seek to define a careful line of equilibrium that, on one hand, promotes trade and, on the other, preserves the ability of governments to protect health, safety and the environment through rules at the national and international level. This balance is inherent in the substantive rules of the WTO agreements, and in the exceptions to these rules. As noted by the WTO Appellate Body in relation to the GATT Article XX(g) exception, the appropriate balance will depend on the measure under consideration and the circumstances of the case.[111] Such a case-by-case approach may ensure the needed flexibility in a particular dispute, but it does vest WTO adjudication bodies with significant discretion.

Ensuring a coherent and balanced architecture of rules to realize the benefits of trade liberalization while protecting social and environmental capital—at each level of governance and between levels of governance—remains a major challenge; one that will likely increase as the economic, social, environmental and other interdependencies between

[111] *See United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 1, ¶¶ 119–120. The Appellate Body, discussing the introductory paragraph of the Article XX exceptions to the GATT 1994, stated: "The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ" (¶ 159).

States increase. In this section, we provide a brief overview of the legal and policy aspects of ten of the most prominent trade and environment issues, as they are presently defined, with a focus on discussions that have taken place within the WTO's formal institutions such as the Committee on Trade and Environment. Where appropriate, we also offer some preliminary thoughts on areas where the debate about trade, environment and sustainable development could be advanced.

A. Process and Production Methods

Among the first and most fundamental issues is whether importing countries should be entitled to ban or regulate products based on how they are produced in an exporting country. This issue—known as the *process and production methods* or the "*PPM*" issue—has been at the forefront of the trade and environment debate. In many ways, it epitomizes the challenge of striking a balance between the right of governments to regulate in order to protect health and the environment, and the need for international trade law and policy to ensure that such regulations are not used for protectionist purposes.

From a trade perspective, allowing importing countries to treat products differently because of how they are produced in an exporting county threatens to allow the former to impose their environmental and social standards on the latter, and/or to use such standards as a pretext for protectionism. From the perspective of many environmentalists, by contrast, regulators should encourage the consumption of environmentally- and socially-friendly products by distinguishing between products according to their impact over a product's life cycle—its production, use and disposal—including certain transboundary impacts, and impacts in exporting countries.

This debate has played out in discussions of the term "like product" included in WTO non-discrimination obligations (Notably Article III GATT). The term "like products" was interpreted restrictively by GATT panels, which generally required likeness to be determined not by reference to the *processes* by which products were made, but by reference to other factors, including their *physical* characteristics. Under this approach, products were "like products" if they were physically similar, even though they were produced using more or less environmentally friendly processes or production methods.[112] While these decisions provided a bright line for the trading community, for some environmentalists they lacked the flexibility required to strike an appropriate balance between economic, social and environmental factors in different cases.

The PPM distinction has not been directly addressed by the WTO's Appellate Body. Although three cases since 1995 have touched on the issue,[113] the Appellate Body has

[112] *See* Report of the GATT Panel *United States—Restrictions on Imports of Tuna*, Complaint by Mexico, BISD, 39th Supp. 155 (1993) (unadopted). The PPM distinction was first formulated in the *Tuna/Dolphin* case in the context of GATT Article III and *Ad* Note to Article III. Although the precise legal basis for the PPM distinction was not spelled out clearly in this report, it rested on several suppositions; that the *Ad* Note to Article III and Article III did not cover regulations which did not apply to "products as such" and that the "like product" distinction under Article III does not permit distinction based on non-product related characteristics, i.e., on process-related matters. Upon closer analysis, the latter argument seemed to be the most convincing as the basis for the PPM theory and was confirmed in subsequent GATT jurisprudence. *See* Report of the GATT Panel, *United States—Measures Affecting Alcoholic and Malt Beverages*, Complaint by Canada, BISD, 39th Supp. 208 (1993). (adopted June 19, 1992). *See also* Report of the GATT Panel, *United States—Taxes on Automobiles*, Complaint by the European Community, DS31/R (1994). The question therefore became whether otherwise similar products are rendered "unlike" because of how they were produced and processed, and therefore can be the subject of different treatment. For a comprehensive critique of the legal basis of the PPM doctrine, *see* Hudec, *supra* note 27, at 193–200.

[113] *United States—Standards for Reformulated and Conventional Gasoline, supra* note 1; Report of the WTO Panel, *Canada—Certain Measures Concerning Periodicals*, (WT/DS31/R (1997) and Appellate Body

not definitively expressed its agreement with the distinction. A leading scholar has questioned whether the distinction was actually being adopted by the Appellate Body.[114] While not addressing the PPM distinction as such, recent Appellate Body decisions have clarified the scope and content of key WTO obligations including GATT Articles III and XX, both of which are likely to be considered when determining whether and how WTO Members can ban or regulate products based on their process and production methods.

In *EC-Asbestos*, the Appellate Body acknowledged the value of the traditional "like product" test established by the Report of the Working Party on *Border Tax Adjustments,* which consists of "employing four general criteria in analyzing 'likeness': (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits—more comprehensively termed consumers' perceptions and behavior—in respect of the products; and (iv) the tariff classification of the products. . . ".[115]

According to the Appellate Body, however, these general criteria are neither treaty-mandated nor are they a closed list of criteria, and their use "does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence."[116] The Appellate Body stated:

> . . . the kind of evidence to be examined in assessing the "likeness" of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are "like" in terms of the legal provision at issue. We have noted that, under Article III:4 of the GATT 1994, the term "like products" is concerned with competitive relationships between and among products. Accordingly . . . it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are—or could be—in a competitive relationship in the marketplace.[117]

While the *EC-Asbestos* case did not directly address PPM-based measures, the Appellate Body's approach to "like product" requires consideration of "all the relevant evidence". In a future case it is at least conceivable that this may comprise non-product-related or non-trade concerns (including those arising out of a product's process or production methods), at least to the extent they relate to elements of the traditional test—such as consumer's perceptions and behavior—or to the nature and extent of a competitive relationship between and among products.[118]

Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R (1997); Report of the WTO Panel, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54, DS55, DS59, DS64/R (1998).

[114] Hudec, *supra* note 27, at 207.

[115] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, supra* note 75, ¶ 85.

[116] *Id.,* ¶ 102.

[117] *Id.,* ¶¶ 101–103.

[118] From an economic standpoint, if PPMs issues are significant in consumers' perceptions such that they reduce the substitutability and thus the cross-price elasticity between products, then such products are clearly less "like". Thus, an economic, market-oriented approach to the "like product" question, taking into account consumers' perceptions, could arguably—at least in theory—accommodate very well a differentiation between products based on PPMs. However, it could be argued that there is an in-built limit to this "marketization" or "economization" of the "like product" concept—GATT Article III:2 clearly differentiates between "like" and "directly competitive" products, such that a more "market competition-based" approach to the "like products" issue could arguably not cross a conceptual line which would blur the distinction between "like" and "directly competitive" products—this would largely deprive Article III:2 of meaningful legal effect.

Even in the event that a PPM-based measure is struck down under Article III's "like product" test, it may still be allowed under the more permissive standard embodied in the GATT Article XX exception. The Appellate Body has established that Article XX addresses a higher degree of discrimination between domestic and imported products than does Article III:4.[119] A question nevertheless arises regarding the conditions under which a Member may be permitted to condition market access based on PPM requirements. The recent decisions in *United States—Shrimp* and *United States—Shrimp 21.5* suggest that PPM-based measures may, under certain circumstances, be permissible under Article XX. In those cases, the U.S. measure effectively required exporting countries to use a production method involving "turtle excluder devices" as a precondition to market entry for their shrimp products. Effectively, the Appellate Body's decision in *United States—Shrimp 21.5* permits the United States to retain its PPM-based measure as long as it continues to satisfy the requirements set out by the Appellate Body, including the requirement to seek a negotiated solution.[120]

It is important to note that a distinction has been made between two kinds of PPMs. Those discussed above are PPMs that do not affect the physical properties of the final product (for instance, where paper is produced from timber which is managed in accordance with sustainable forestry policies). Because they do not affect the product, these PPMs are known as non-product-related PPMs or "NPR-PPMs". In contrast, some PPMs do affect the physical characteristics of the product (and so are known as product-related PPMs). Product-related PPMs do not raise significant concerns under the GATT, and have traditionally been considered as a possible basis for distinguishing between otherwise "like products". This distinction has been important in some WTO discussions, including those about labeling.

B. Labeling

Labeling, including labeling for environmental purposes, has featured prominently in trade law.[121] Labeling for environmental purposes (also referred to as "eco-labeling") may be defined as product labeling that provides consumers with ecological information about a product's characteristics or life-cycle.[122] Eco-labeling is an important

[119] *United States—Standards for Reformulated and Conventional Gasoline, supra* note 1, at 22, *stating*: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified".

[120] Although it flows from the obligation to avoid "arbitrary and unjustifiable discrimination between countries where the same conditions prevail", the Appellate Body has not yet offered a clear and textually-based rationale for the implied obligation to seek a negotiated solution.

[121] The relationship between labeling requirements and free trade is somewhat ambiguous. Labeling has traditionally been regarded as a less restrictive alternative to many other types of regulatory measures. *See* for instance GATT Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, *supra* note 82. On the other hand, far-reaching and varying labeling requirements can impose high compliance costs upon a producer and prevent market access. Even if market access is not foreclosed, labeling requirements varying from jurisdiction to jurisdiction can, like all other technical regulations, prevent a producer from taking advantage of economies of scale.

[122] *See* Arthur E. Appleton, ENVIRONMENTAL LABELING PROGRAMMES: INTERNATIONAL TRADE LAW IMPLICATIONS 1 (1997). Some studies refer to "environmental labeling" as labeling of any type pertaining to environmental concerns, while taking the term "eco-labeling" to refer to labels awarded on the basis of a life-cycle analysis. *See* for instance GATT Document No. TRE/W/12 (June 14, 1993), at 1.

tool of sustainable development policy, providing an effective market-based instrument to assist consumers to make environmentally sound purchasing decisions, and to create an incentive for the production of environmentally sound products and production technologies.

Labeling has potential implications for consumer demand, market access and thus trade. For some WTO Members, particularly developing countries, eco-labeling schemes have raised trade concerns. They note the potential for labeling schemes to create multiple, different requirements for their producers and distributors that limit their effective market access. Many labeling schemes are based on PPM considerations[123] or other criteria that reflect the environmental conditions, preferences and priorities of importing countries, but not necessarily those of exporting countries.[124] Some developing countries are also concerned about the potential for labeling to be used as a form of green protectionism and trade discrimination.[125]

These concerns have stimulated discussion about a number of related issues at the WTO, such as which of the WTO agreements apply to labeling schemes, how these agreements apply to mandatory and voluntary labeling schemes, and how they apply to labels based on product characteristics or their related process and production methods (PPMs) (e.g., labels referring to food content), and to labels based on non-product related PPMs (e.g., labels referring to whether a product is produced sustainably or humanely where that production process has no effect on the final product).

First, a question arises about how the various WTO agreements apply to labeling. The main WTO agreement to cover labeling is the TBT Agreement, which applies disciplines to both mandatory "technical regulations" and to non-binding "standards" (both of which are defined to include "packaging, marking or labeling requirements as they apply to a product, process or production method").[126] The SPS Agreement, similarly, applies to "packaging and labeling requirements directly related to food safety".[127] Accordingly such schemes must comply with the SPS Agreement's rules regarding risk assessment and sufficient scientific evidence. The precise relationship between the SPS and TBT disciplines on labeling remains unclear, and has not been the subject of a WTO dispute at the time of writing. Consequently, it is unclear whether some labels (for example those relating to levels of fat, or cholesterol, or genetically modified content) would fall under the SPS Agreement as labels "directly related to food safety" or under the

[123] *See supra* section V(A) for a discussion of PPMs. In practice, the distinction between PPM regulations and purely product-related regulations may not always be clear. For example, when comparing a certain quantity of organically produced vegetables with conventionally-produced vegetables, the first category will, on the average, contain a lower concentration of, say, pesticide residues. An eco-label attached to each individual organically-grown vegetable in this situation would signal physical differences with respect to the conventionally produced vegetable. However, *each single* piece of organically-grown vegetable does not necessarily contain a lower concentration of such substances; in this situation, an eco-label attached to *each single* product would seem to refer, at least partially, also to a production method. *See* WTO Docs. No. WT/CTE/W192 and G/TBT/W/162 (June 19, 2001).

[124] *See Trade and Environment in the GATT/WTO*, Background Note by the Secretariat (1999), WTO Special Studies No. 4, Annex I, ¶ 58; WT/CTE/W/101, *Technical Barriers to the Market Access of Developing Countries*, Background Note by the Secretariat (January 25, 1999), ¶¶ 4–15.

[125] *See, e.g.,* Marwa J. Kisiri, *International Trade and Environment: An Additional Non-Tariff Barrier Against the Developing Countries' Trade*? 15 WORLD COMPETITION 75 (1992); C. Ford Runge, *Trade Protectionism and Environmental Regulations: The New Nontariff Barriers,* 11 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 47 (1990).

[126] *TBT Agreement*, Annex 1.

[127] *SPS Agreement*, Annex A.

TBT Agreement as relating to a "product, process or production method".[128] Based on discussions in WTO Committees and notifications pursuant to both agreements, however, it is very probable that most labeling issues will fall under the TBT Agreement. Finally, the GATT, in particular Articles III:4 and XX, will also apply to labeling to the extent that its provisions do not conflict with those of the SPS and TBT Agreements.

Second, to the extent they are covered by the TBT Agreement, eco-labeling schemes may be classified as either mandatory technical regulations or voluntary standards. Labeling schemes that fall under the definition of technical regulations will be covered by requirements relating to, among other things, non-discrimination,[129] least trade restrictive measure,[130] preferential use of international standards,[131] notification requirements,[132] transparency,[133] technical assistance,[134] and special and differential treatment.[135] In practice, however, most eco-labeling schemes are the result of voluntary programs enacted by governmental standardizing bodies or private institutions. Voluntary schemes that fall within the Agreement's definition of "standards" will be considered under the Code of Good Practice for the Preparation, Adoption and Enforcement of Standards. The Code largely mirrors the Agreement's requirements for technical regulations, and may be adopted by governmental and non-governmental bodies enacting voluntary standards.[136] Member States are required to take "such reasonable measures as may be available to them" to ensure that their local- and non-governmental bodies do in fact adopt the Code.

Third, broadly speaking, both mandatory and voluntary eco-labeling schemes based on product characteristics or product-related PPMs are covered by the TBT Agreement.[137] In the case of voluntary programs, the applicability of the TBT Agreement would additionally depend on whether the body administering such program has adopted the Code of Good Practice. While Members must ensure that central government standardizing bodies adopt the Code, it is not entirely clear how much due diligence Members would have to exercise with respect to local and non-governmental standardizing bodies. Furthermore, apart from the non-discriminatory character of the criteria set forth for the granting of a label, questions may arise about the implementation and management of eco-labeling programs, for example, issues of transparency and technical support for developing countries.

Finally, with respect to measures based on non-product related PPMs (such as labeling schemes relating to child labor or to sustainable forest management, where these practices do not affect the physical characteristics of the final product), it is unclear from the

[128] The TBT Agreement states in Article 1.5 that its provisions "do not apply to sanitary and phytosanitary measures as defined in Annex A of the [SPS Agreement]". The SPS Agreement provides in Article 1.4 that "[n]othing in this Agreement shall affect the rights of Members under the [TBT Agreement] with respect to measures not within the scope of this Agreement".

[129] *TBT Agreement*, Article 2.1.

[130] *Id.,* Article 2.2.

[131] *Id.,* Article 2.4.

[132] *TBT Agreement*, Article 2.9.

[133] *Id.,* Article 10.

[134] *Id.,* Article 11.

[135] *Id.,* Article 12.

[136] The difference between mandatory regulations and voluntary standards may of course become largely theoretical in a context where compliance with a standard (e.g., qualifying for an eco-label) becomes such an important competitive factor in the market-place that from a business perspective the voluntary standard in fact becomes binding.

[137] *See* Appleton, *supra* note 122, at 94–132.

language of the TBT Agreement whether such regulations and standards fall under the scope of the TBT Agreement.

Some WTO Members and some scholars are of the view that measures based on non-product related PPMs do *not* fall within the purview of the TBT Agreement, emphasizing the definition of the term "technical regulation" in Annex 1 to the TBT Agreement and the expression "product characteristics or *their related* processes and production methods" (emphasis added).[138] Some other WTO Members, by contrast, have expressed the contrary view that such measures are covered on the basis that the definition of technical regulations in the second sentence of Annex 1 paragraph 1 does not contain the word "related" and merely speaks about "requirements as they apply to a product, process or production method".[139]

It is unclear from this controversy what consequence the exclusion of such PPM-based measures from the purview of the TBT Agreement would have for their permissibility under other provisions of WTO law. In other words, if the TBT Agreement does not apply, then which other covered agreement, if any, would govern non-product related PPMs and would such PPMs be permissible under that agreement?

In this regard, it has been claimed by some developing countries that non-product related PPMs fall outside the scope of coverage of WTO law *altogether*.[140] Others Members are of the view that PPMs falling outside the scope of the TBT Agreement *are* covered by the GATT 1994, a view also shared by some commentators.[141] If the GATT 1994 should be found to apply, would non-product related PPMs be consistent with its provisions? Certain WTO Members are of the view that non-product related PPMs are inconsistent with Articles I and III of the GATT 1994.[142] However, the issue remains open, as neither a WTO panel nor the Appellate Body have ruled on this question.

If Articles III:1 and III:4 of the GATT 1994 do apply, then an examination of eco-labeling schemes would necessitate the examination of the "like product" and "no less favorable treatment" criteria. It also remains unclear whether Article III:4 can apply to *voluntary* labeling schemes because they are voluntary and may conceivably fall outside the definition of "laws, regulations and requirements" contained in Article III:4, and which WTO agreement should apply where an eco-labeling scheme falls partly within the ambit of the TBT Agreement and partly outside.[143] Eco-labeling schemes found to be in violation of Article III:4 would have to be justified under the affirmative defense of Article XX, most likely under paragraph (g). Under the Article XX chapeau, a key question would be whether an eco-labeling scheme was applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

[138] *Id.,* at 52, with further references. This view is also shared by most developing country Members of the WTO; *See, e.g.,* Statement by India, contained in WTO Doc. G/TBT/M/5 (September 19, 1996), ¶ 78; and Statement by Egypt, *id.,* ¶ 79.

[139] *See, e.g.,* Statement of the EC, contained in WTO Doc. WT/CTE/M/26 (March 30, 2001), ¶ 104; Statement by Switzerland, contained in WTO Doc. G/TBT/M/5, (September 19, 1996), ¶ 84.

[140] *See, e.g. ,* Statement of Korea, contained in WTO Doc. G/TBT/M/4 (June 10, 1996), ¶¶ 102 and 104; and Statement of Egypt, *id.,* ¶ 117. Among developed country Members, *see* the Statement of Norway, *id.*, ¶ 112.

[141] *See, e.g.,* Statement of Canada, *id.,* ¶ 80; *see also* Statement by ASEAN, *id.*, ¶ 107. *See also* Appleton, *supra* note 122, 147–158; *see also* the discussion of Article III of GATT 1947 and environmental regulations by Ernst-Ulrich Petersmann, *International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT*, 27 Journal of World Trade 43 (1993).

[142] *See, e.g.,* Statement of Canada, WTO Doc. G/TBT/M/4 (June 10, 1996), ¶ 80; *see also* Statement by ASEAN, *id.*, ¶ 107.

[143] *See* Appleton, *supra* note 122, at 124, 153. *See also* WTO Doc. G/TBT/M/4, ¶ 91 (June 10, 1996).

C. Scientific Uncertainty and Precaution

Scientific uncertainty is endemic. In many cases, threats to health and environment are too complex to be resolved scientifically in time to take effective policy action, yet their potential consequences may be too great to defer policy action until clear scientific evidence emerges. Consequently, policymakers are regularly required to make important policy decisions in the absence of clear scientific evidence. At the same time, governments may abuse the existence of scientific uncertainty to justify unwarranted restrictions on their trading partners' market access. Consequently, requiring a sound scientific basis for national measures offers an important safeguard against protectionism. Balancing these two priorities—making decisions under conditions of scientific uncertainty, and preventing protectionist abuse by requiring measures to be based on science—is a complex and often controversial task.

The need to make decisions under conditions of scientific uncertainty is addressed by the precautionary principle. The principle's most commonly cited formulation is found in the Rio Declaration, which states:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[144]

The precautionary principle addresses the relationship between the quest to reduce scientific uncertainty and the need to make policies in light of incomplete scientific information. The principle has a scientific basis—to the extent that scientific data on a given subject does exist, such data should be taken into account, and further efforts should be made to improve scientific knowledge. Nevertheless, the principle acknowledges that consideration of the soundest science currently available does not obviate the need for decision-makers to make decisions under conditions of uncertainty. While the concept of precaution appeals to common sense and is present in many policy areas, its operational requirements and implications are difficult to state in the abstract, and will depend on the specific circumstances. Like other principles, precaution is designed to provide a guide to policy-makers. Consequently, the precise threshold level of scientific knowledge or evidence of harm necessary to invoke the principle, as well as the specific steps that should be undertaken once the principle has been identified as relevant, must be identified by policy makers in view of the particular risks and possible responses.[145] While the precautionary principle appears to be a well-accepted tool in the field of environmental management, its application to issue of food safety has proven more controversial due generally to its potential implications for trade in agricultural products, and due in particular to its potential impact for trade in genetically modified food products.

Notions of precaution give rise to a number of interrelated issues in the context of the multilateral trading system. First, to what extent is the precautionary principle reflected in existing WTO rules? According to the Appellate Body in *Hormones "*the precautionary principle has been incorporated in, *inter alia*, Article 5.7 of the *SPS Agreement",*[146] which addresses the right to take provisional SPS measures where "relevant scientific information is insufficient", and "in the sixth paragraph of the preamble and in

[144] *Rio Declaration on Environment and Development*, Principle 15 (June 14, 1992), UN Doc. A/Conf. 151/5/Rev. 1 (1992), *reprinted in* 31 I.L.M. 876 (1992).

[145] Jan Bohanes, *Risk Regulation in WTO Law: A Procedure-based Approach to the Precautionary Principle*, 40 Col. J. Trans. L 323, 333 (2002); Steve Charnovitz, *The Supervision of Health and Biosafety Regulation of World Trade Rules*, 13 Tul. Envtl. L. J. 271, 291 (2000).

[146] *EC-Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 52, ¶¶ 124 and 253.

Article 3.3".[147] The Appellate Body stated that:

> . . . a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.[148]

The Appellate Body noted that the precautionary principle "does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e., customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*."[149] The Appellate Body has not been requested to explore the extent to which precaution is reflected in other WTO agreements.

A second and closely related issue is how WTO rules (including those that "reflect" precaution and others) apply to national measures that are based on notions of precaution. A brief discussion of the SPS Agreement's provisions requiring measures to be based on scientific principles and not maintained without sufficient scientific evidence, for example, are included in Section II above, and in more detail in the SPS chapter of this work.[150] How these rules apply to individual measures will require a case-by-case analysis, and will have important implications for the balance between national discretion to take measures under conditions of scientific uncertainty, and oversight by the multilateral trading system to prevent protectionist abuse of such measures. In this context we merely note that the precautionary principle now provides the basis for many domestic measures that are covered by WTO rules. References to precaution are now found in the laws of both developed and developing countries, and in countries representing the major legal systems and the major regions of the world.

A third issue is whether the precautionary principle can itself influence how WTO rules are interpreted and applied. The role of this principle will depend, in part, on its status in international law. In dispute settlement, some WTO Members have argued that the principle has fully crystallized as a principle of customary international law and therefore constitutes a relevant "rule of international law applicable in the relations between the parties" that must be used to interpret WTO agreements.[151] Other Members,

[147] Similar provisions are found in the TBT Agreement's preamble, which provides that:

> . . . no country should be prevented from taking measures . . . for the protection of human, animal or plant life or health [or] of the environment, . . . at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

[148] *See EC-Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 52, ¶ 124.

[149] *Id.,* ¶ 124.

[150] *See* Chapter 7.

[151] *See EC-Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 52, ¶ 16, where the Appellate Body notes that "[t]he precautionary principle is already, in the view of the European Communities, a general customary rule of international law or at least a general principle of law, the essence of which is that it applies not only in the management of a risk, but also in the assessment thereof." *See also Japan—Measures Affecting Agricultural Products*, *supra* note 54, ¶ 10, where the Appellate Body notes that "[i]n Japan's view, the Panel failed to give due regard to the precautionary principle, which was recognized in both *European Communities—Measures Concerning Meat and Meat Products (Hormones)* and *Australia—Measures Affecting Importation of Salmon*. Having lawfully established a prohibition on the importation of host plants of codling moth, Japan submits that it is in a position which warrants a precautionary approach and that Japan's varietal testing requirement, therefore, needs to be understood in the context of the precautionary principle, a principle which is echoed by the practice of Member States and reflected in the *Codex Alimentarius* and the *FAO Guidelines for Pest Risk Analysis*." (citations omitted).

by contrast, have argued that the precautionary principle is not a customary rule of law, and is thus not relevant to the interpretation of WTO provisions.[152] The Appellate Body has not offered a definitive ruling on this issue.[153] In *EC-Hormones*, under the heading "*The Relevance of the Precautionary Principle in the Interpretation of the SPS Agreement,*" the Appellate Body referred to the question of whether the precautionary principle constitutes a principle of customary international law that should be taken into account in the interpretation of WTO agreements, but felt that it was unnecessary to take a position on this question.[154]

Finally, issues of precaution also arise in the relationship between the trading system and MEAs. Many obligations in MEAs—including those that directly affect international trade—are based on the precautionary principle. The principle is embodied explicitly in preambular language and provides the basis for a range of substantive obligations that address issues as diverse as biodiversity conservation, climate change, management of hazardous waste and chemicals, protection of the seas, management of fisheries, and prevention of air and water pollution. The recently concluded Cartagena Protocol on Biosafety goes further and includes explicit reference to precaution in its operative text. In the event of a trade dispute regarding trade in genetically modified agricultural products, the meaning of the Protocol's provisions permitting precautionary trade restrictions, and

[152] *See EC-Measures Concerning Meat and Meat Products (Hormones)*, *supra* note 52, ¶ 43, where the Appellate Body notes: "In the view of the United States, the claim of the European Communities that there is a generally-accepted principle of international law which may be referred to as the 'precautionary principle' is erroneous as a matter of international law. The United States does not consider that the 'precautionary principle' represents a principle of customary international law; rather, it may be characterized as an 'approach'—the content of which may vary from context to context. The *SPS Agreement* does recognize a precautionary approach; indeed, Article 5.7 permits the provisional adoption of SPS measures even where the relevant scientific evidence is insufficient. Thus, the United States believes that there is no need to invoke a 'precautionary principle' in order to be risk-averse since the *SPS Agreement*, by its terms, recognizes the discretion of Members to determine their own level of sanitary protection." *See also id.,* ¶ 122, where the Appellate Body notes that "Canada, too, takes the view that the precautionary principle has not yet been incorporated into the corpus of public international law; however, it concedes that the 'precautionary approach' or 'concept' is 'an *emerging* principle of law' which may in the future crystallize into one of the 'general principles of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the *Statute of the International Court of Justice*."

[153] *Id.,* ¶ 123: "The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question." (citations omitted).

[154] The Appellate Body seems to have defined two points on a continuum. On one hand, it has stated that the precautionary principle "finds reflection" in certain *existing* WTO provisions (*European Communities—Measures Concerning Meat and Meat Products (Hormones)*), *supra* note 52, ¶ 124). On the other hand, it has stated "the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e., customary international law) principles of treaty interpretation". *Id*. Thus, according to the Appellate Body "the precautionary principle does not override" specific WTO provisions. Whereas the Appellate Body has stated that the principle may find reflection in, but may not override, specific provisions, it seems to have left open the question of whether, and, if so, to what extent, the principle may be used to *interpret* specific WTO rights and obligations in order to clarify how they should be applied on a case-by-case basis. *See also Japan—Measures Affecting Agricultural Products*, *supra* note 54, ¶ 81. "We note Japan's argument that the requirement in Article 2.2 not to maintain an SPS measure without sufficient scientific evidence should be interpreted in light of the precautionary principle. In our Report in *EC—Hormones*, we stated that the precautionary principle finds reflection in the preamble, Article 3.3 and Article 5.7 of the *SPS Agreement* and that this principle:

> . . . has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement.

their relationship to the provisions of relevant WTO agreements, would probably require clarification.

In each of these cases, science and precaution play a role in determining both when and how policy-makers should act, and the distribution of the benefits and burdens of action and inaction among different interests, both within and between countries. Faced with uncertainty, those who benefit most from the status quo will generally prefer inaction by policy-makers, thereby avoiding immediate and known costs, and imposing unknown future costs on others. By contrast, those who benefit most from change will generally prefer action by policy-makers, thereby avoiding unknown future costs, and imposing immediate known costs on others. Caught between these different interests, science and uncertainty regularly become tools of political influence. The challenge for policy-makers is to identify specific principles and criteria upon which national laws and policies can be evaluated, and to identify mechanisms to reduce scientific uncertainty more rapidly. In an integrated international economy, where the benefits and burdens of risk and uncertainty and of regulatory action and inaction are distributed across national borders, it is likely that issues of science and precaution will remain hotly contested for the foreseeable future.

D. Market Access

Improving market access through the reduction of both tariff and non-tariff trade barriers (such as tariff peaks, tariff escalation, export restrictions and subsidies) has the potential to yield economic, environmental and other benefits. At a general level, secure and predictable market access can provide WTO Members with the trading opportunities that allow them to generate income, reduce poverty, and obtain resources to implement and enforce effective environmental policies.[155] In the long-run, improved market access has the potential to foster economic development and growth in developing countries, and may provide increased resources to address environmental and social concerns.

The environmental benefits of enhancing market access are particularly clear where products, technologies or services are themselves environmentally friendly. In these cases, market access may improve the state of the environment in both importing and exporting countries. Importing countries may benefit from new products and technologies whose use and disposal require fewer environmental resources (e.g., energy, other inputs, and sinks to absorb pollution and waste). Exporting countries may benefit by exporting products whose production involves lower environmental costs (e.g., organic products that avoid extensive fertilizer use and/or maintain soil quality).

Improving market access may also have benefits in specific sectors. In the agriculture sector, for example, improving market access opportunities for developing countries may have trade and environment benefits due to the small initial size of environmental niche markets, and limited use of harmful chemicals in many developing countries. Similarly, environmentally friendly services, such as eco-tourism, carbon sequestration and, biodiversity protection also hold promise for some developing countries. The benefits of liberalizing market access for "environmental goods and services" were recognized in the Fourth Ministerial Declaration, which provides for negotiations for the "reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and

[155] *See, e.g.,* James Andreoni and Arik Levinson, *The Simple Analytics of the Environmental Kuznets Curve,*NBER Working Paper No. W6739 (1998). Elisabetta Magnani, *The Environmental Kuznets Curve, Environmental Protection Policy and Income Distribution*, XXXII Ecological Economics 431 (2000).

services". The Ministerial Declaration does not define the term "environmental goods and services", and at the time of writing no definition has been agreed by WTO Members. The precise scope of the negotiation therefore remains largely undefined.

Improving market access is, of course, not necessarily consistent with strengthening environmental protection (see Section IVB above). Many legitimate environmental measures may themselves limit market access, and increasing market access for environmentally harmful products may have serious adverse effects. Legal and policy tensions between environmental protection and market access may also arise where regulations—for example those applying to eco-labeling or to conservation of water resources—may restrict trade in certain products.[156]

The net effect of these environmental measures is often difficult to ascertain as the lost benefits of market access for less environmentally-friendly products (e.g., income and related demand for environmental protection) may, at least in part, be compensated for by the creation of new niche markets for environmental goods. In empirical terms, the extent to which domestic environmental requirements will act as market entry barriers for overseas goods will vary from sector to sector. Trade-related environmental requirements in developed countries are often sector-specific, affecting products from specific industries such as fisheries and forestry.[157] Several studies argue that existing environmental policies of developed countries on the whole do not have widespread negative effects on market access for developing countries.[158] To minimize the potential negative impact of environmental measures on market access, a cooperative and transparent approach, coupled with technical support for developing countries to enable them to maintain market access while complying with non-protectionist environmental regulations, appears essential.

E. Subsidies

Subsidies are broadly-speaking state-sponsored benefits to businesses. They have mixed blessings, both economic and environmental. Economically, subsidies can distort otherwise efficient markets, or they can correct existing market failures to enhance efficiency. Environmentally, subsidies can encourage overuse of scarce environmental resources, or they can provide incentives for environmentally sound behavior.

Inspired by neo-liberal economics, trade law generally views subsidies with suspicion on the grounds that they distort product prices, production costs, and the allocation of resources and, by creating an artificial comparative advantage, distort trade flows. The regulation of subsidies under international trade rules is contained in the SCM Agreement and in Articles VI and XVI of GATT 1994.[159] From the standpoint of the SCM Agreement, the fact that a particular state action is classified as a subsidy does not *per se* imply anything about its compatibility with international trade law.[160] The SCM

[156] *See, e.g.,* the study on Colombian-grown flowers, WTO Doc. G/TBT/W/60 (March 9, 1998).

[157] Veena Jha, Anil Markandya & René Vossenaar, RECONCILING TRADE AND ENVIRONMENT (1999).

[158] *See* references in WTO Doc. WT/CTE/W/101, *Technical Barriers to the Market Access of Developing Countries*, Background Note by the Secretariat (January 25, 1999), ¶¶ 19–23. This Note also states that studies suggesting the contrary exist, but concludes that the overall effect is not negative.

[159] The provisions of the GATT and the SCM Agreement apply cumulatively. *See* Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (1997), at 17–20.

[160] The Appellate Body has expressly stated in Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft* (Recourse by Brazil to Article 21.5 of the DSU), WT/DS70/AB/RW (2000), ¶ 47, that "[t]he universe of subsidies is vast. Not all of them are incompatible with the SCM Agreement."

Agreement prohibits two types of subsidies: those contingent upon export performance or on the use of domestic over foreign products ("import-substitution" subsidies), and those which are granted specifically to certain firms or industries and which have an adverse effect on another Member State.[161]

From the standpoint of environmental management, subsidies are widely considered to have the potential for both good and bad outcomes. On one hand, subsidies may be required to address insufficient incentives to protect the environment due to market failures arising from externalities, the treatment of resources as public goods, or other spill-over effects. On the other hand, certain domestic subsidies—including some provided to fishing, fossil fuel and agricultural industries—can promote environmental harm (often referred to as "perverse subsidies"). Due to this complex relationship between subsidies and environmental management, the application of trade rules to remove subsidies may produce both ecologically desirable and deleterious results.

Desirable results—from both a trade and environmental perspective—arise from the removal of "perverse subsidies". For instance, if subsidies to fishing industries are held incompatible with WTO law or reduced in the framework of negotiations, ecologically harmful over-fishing is likely to be reduced. The importance of tackling environmentally and economically perverse fishing subsidies was emphasized in the WTO's Fourth Ministerial Declaration. Similarly, if trade law were to limit the extent to which WTO Members subsidized their coal industries, then alternative renewable energy generation may become more competitive and, as a result, carbon dioxide emissions may be reduced. Nevertheless, the ability of trade law to regulate such harmful subsidies is limited. For instance, where harmful subsidies are not contingent on export, or on the use of domestic goods (under Article 3 of the SCM Agreement), or are not granted "specifically" to an export-oriented industry (within the meaning of Article 2 of the SCM Agreement), WTO law would not apply to prevent a Member State from granting such subsidies.[162]

Deleterious environmental effects may arise where trade law stands in the way of subsidies that provide an efficient and effective environmental policy tool. For instance, a State may decide to grant subsidies to firms that invest in "cleaner" production technologies, or to subsidize the production of renewable energy. If such subsidies are held to be specific within the meaning of the SCM Agreement, they could violate WTO law.[163] Prior to 2000, the SCM Agreement established an automatic exemption for limited government subsidies to industries for the purpose of adapting existing facilities to new environmental requirements.[164] However, the exemption for these and the other categories of

[161] The latter group are so-called actionable subsidies. Unlike export and import-substitution subsidies, the harmful effect of such domestic subsidies on international trade flows is not immediately discernable. As a result, the SCM Agreement requires evidence of harmful effects is required before such subsidies can be found to be inconsistent with the Agreement. This is in contrast to export subsidies, where such a trade-distorting effect is assumed.

[162] This can happen for instance if energy itself is not traded and the subsidization of one particular type of energy occurs across the board in the domestic economy. In these circumstances, the lack of specificity of this energy subsidy excludes the application of the SCM Agreement. Even if a subsidy is specific, it still has to be shown that it has adverse effects, i.e., causes injury to a trading partner within the meaning of Article 5 of the SCM Agreement.

[163] Again, however, this would be contingent on finding that such subsidies cause adverse effects within the meaning of Article 5 of the SCM Agreement. On the link between subsidies and differential taxation, *see* Ole Kristian Fauchald, Environmental Taxes and Trade Discrimination (1998).

[164] *SCM Agreement*, Article 8. Other green-light subsidies were subsidies granted for research purposes and for regional development.

"green-light" subsidies had an initial duration of five years and was not extended.[165] Furthermore, the SCM Agreement does not have a provision on subsidies designed to offset positive externalities. For instance, a State may want to promote programs in order to increase "carbon sequestration" (i.e., the removal of carbon dioxide from the atmosphere).[166] Carbon sinks and other measures to promote carbon sequestration are endorsed in the UN Convention on Climate Change and its Kyoto Protocol.[167]

So far disputes under the SCM Agreement have involved only export subsidies and subsidies contingent upon the use of domestic over imported goods. At the time of writing, no environmentally motivated domestic subsidy has been challenged under the WTO Dispute Settlement Understanding. The absence of disputes, however, does not necessarily mean that further clarification of the Agreement's application would not help to increase certainty and protect subsidies granted for sound environmental purposes. At the same time, the lack of disputes may mean that, among other things, WTO Members consider environmental subsidies as legitimate, or are aware of the legal and political difficulties such challenges might cause.

F. Biosafety

Considerable controversy exists among WTO Members on the subject of biotechnology, biosafety and trade in genetically modified organisms ("GMO"). Some Members have voiced concerns about the risks associated with the introduction of genetically modified organisms into the food chain and the environment. Other Members, by contrast, have emphasized the potential benefits of the production of and trade in genetically modified organisms. This debate has raised a range of issues, and is likely to remain among the most controversial questions in international trade law and policy for the foreseeable future.

Issues of biosafety and trade in genetically modified organisms reach across various areas of the WTO's work-program. They may arise under the SPS Agreement, which covers certain national measures protecting human, animal or plant life or health from risks relating to genetically modified organisms. They may arise under the TBT Agreement, which covers national technical regulations and standards, including those requiring the labeling of genetically modified organisms. They may arise under the TRIPS Agreement, which requires WTO Members to offer intellectual property protection over certain plant genetic resources. They may arise under the Agreement on Agriculture, which addresses both market access and non-trade concerns arising from trade in agricultural products. And issues of biosafety may arise under the GATT, which will govern trade in genetically modified organisms to the extent that its obligations do not conflict with those in other WTO agreements.[168]

[165] *See SCM Agreement*, Article 31.The green-light exemption was not extended due to the uncertainty surrounding the period prior and subsequent to the failed Seattle Ministerial Conference, as well as opposition by many but not all developing countries. *See* Minutes of the November 1–2, 1999, Meeting of the Committee on Subsidies and Countervailing Measures, WTO Doc. G/SCM/M/24.

[166] *See, e.g.,* the 1992 European Commission Proposal for a Council Directive, *Introducing a Tax on Carbon Dioxide Emissions and Energy*, COM (92) 226 final, at 21 (1992), noting that forests are CO_2 sinks since they absorb CO_2 via photosynthesis and thus decrease the greenhouse effect.

[167] *See Framework Convention on Climate Change*, Art. 4(2)(a), U.N. Doc. FCCC/1992 (1992), *reprinted in* 31 I.L.M. 854 (1992) (entered into force Mar. 21, 1994); *Kyoto Protocol*, Art. 2(1)(a)(ii), UN Doc. FCCC/CP/1997/L.7/Add.1 (1997), *reprinted in* 37 I.L.M. 22 (1998). For a discussion, *see* Hyung-Jin Kim, *Reflections on the Green Light Subsidy for Environmental Purposes*, 33 JOURNAL OF WORLD TRADE 167–175 (1999).

[168] *See Interpretative Note to Annex 1A of the WTO Agreement.*

Biosafety has also proved an important issue in other international forums, including the UN Food and Agriculture Organization, the Codex Alimentarius Commission, the Organization for Economic Cooperation and Development ("OECD"), and the UN Conference on Trade and Development ("UNCTAD"). Among the most comprehensive frameworks to address issues arising from trade in certain types of genetically modified organisms is a protocol to the Convention on Biological Diversity, the Cartagena Protocol on Biosafety.[169]

The Cartagena Protocol on Biosafety seeks to protect biological diversity from the potential risks posed by certain genetically modified organisms resulting from modern biotechnology (defined in the Protocol as "living modified organisms" or "LMOs"). It establishes an "advanced informed agreement" ("AIA") procedure to ensure that countries are provided with the information necessary to make informed decisions before agreeing to the import of such organisms into their territory. In both its preamble and its operative provisions, the Protocol refers to a precautionary approach and reaffirms the language of Principle 15 of the Rio Declaration. The Protocol also establishes a Biosafety Clearinghouse to facilitate the exchange of information on living modified organisms and to assist countries to implement the Protocol.

Potential for tension between the Protocol and the WTO regime (particularly the SPS Agreement) arises from a number of sources. First, the Protocol and the SPS Agreement adopt somewhat different approaches to risk assessment: whereas the Protocol explicitly permits importing countries to require exporters to carry out risk assessments,[170] the SPS Agreement makes no such explicit provision. Second, the Protocol and the SPS Agreement use different language regarding decisions under conditions of scientific uncertainty: whereas the Protocol explicitly states that countries may decide to prohibit the import of certain LMOs,[171] the SPS Agreement in Article 5.7 only allows Members to "provisionally adopt sanitary or phytosanitary measures", and requires them to "review the sanitary or phytosanitary measure accordingly within a reasonable period of time". Third, issues may arise over measures regarding a specific category of LMOs (known as LMOs "intended for direct use as food or feed, or for processing"): the Protocol does not explicitly note the right of countries to prohibit the import of such LMOs, but rather states that they may make "a final decision regarding domestic use, including placing on the market, of a living modified organism".[172] In the event of a trade ban, an exporting Member may conceivably challenge the measure under the SPS Agreement's requirements, which would require an examination of the provisions of, and relationship between, the two agreements. Finally, in the event of a dispute regarding trade in LMOs, a question may arise about whether the Convention on Biological Diversity or the WTO is the appropriate forum for addressing the dispute.

There are a number of possible approaches to reducing these potential tensions. Could, for example, the Protocol be considered as an international standard for the purposes of WTO agreements? The SPS Agreement in Article 3.1 states that Members are generally to base their sanitary or phytosanitary measures on international standards, in order "to harmonize sanitary and phytosanitary measures on as wide a basis as possible."[173]

[169] The Cartagena Protocol on Biosafety (adopted January 29, 2000), is available on the website of the Convention on Biological Diversity http://www.biodiv.org/biosafety/protocol.asp.

[170] *Id.,* Article 15.

[171] *Id.,* Article 10.3.

[172] *Id.,* Article 11.1.

[173] Use of the Biosafety Protocol as an international standard for the purposes of the SPS Agreement would require it to fall within the definition of "international standards, guidelines and recommendations" included in Annex A of the SPS Agreement.

A second approach might be for each agreement to be interpreted in light of the other, in accordance with the international law presumption against conflicts.[174] In *United States—Shrimp*, for example, the Appellate Body interpreted the term "natural resources" in light of obligations imposed by international environmental law. Third, "fact-finding" under the Protocol could be used by panels if called upon to determine whether scientific evidence is insufficient within the meaning of Article 5.7 of the SPS Agreement.[175] Finally, one author has suggested that if both parties to a WTO dispute are signatories of the Protocol, the theory could be followed according to which an "*inter se*" agreement between WTO Members would supersede, in their mutual relationship, their WTO obligations.[176]

G. Agriculture

Agriculture is intimately related to many aspects of the human and natural world. In many countries it affords income and livelihoods, provides food and sustenance, supports social values and culture, and is deeply linked to environmental resources such as the earth, water, air and ecosystems. Consequently, liberalizing trade in agricultural products, and moving to a more market-based international agricultural system, raises a constellation of non-trade issues for many WTO Members, including poverty alleviation, rural development, food security, food safety, consumer protection, animal welfare, and conservation of the environment.

Reducing barriers to trade in agricultural products is one of the goals of the WTO's Agreement on Agriculture. The international trade system gives trade in agricultural products a special status, allowing protection of domestic agricultural producers and export subsidization to a greater extent than in other domains.[177] The Agreement on Agriculture initiates a process of successive reductions of protection and subsidization, and provides a framework for future commitments.[178] The three main areas of commitments are market access (import limitations and high tariffs), domestic support, and export subsidies.

The Agreement on Agriculture includes reference to the importance of non-trade concerns including the environment. The preamble states that commitments made under the reform program should have regard for the environment,[179] and Article 20 requires negotiations for further liberalization commitments to take account of non-trade concerns. Non-trade concerns, including protection of the environment, ensured that agriculture was a contentious element of the Fourth Ministerial Declaration, which calls for a phasing out of export subsidies for agricultural products.

[174] *See* Barbara Eggers and Ruth MacKenzie, *The Cartagena Protocol on Biosafety*, 3 JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW, 525, 541 (2000) for an excellent discussion of the relationship between the two agreements.

[175] *Id.* at 542.

[176] *See* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 535, 547–550 (2001).

[177] *See* Chapter 6 of this work addressing the Agreement on Agriculture. For an overview of the history of protection of agriculture under GATT, *see* William J. Davey, *The Rules for Agricultural Trade in GATT*, in GATT AND TRADE LIBERALIZATION IN AGRICULTURE 4–55 (Masayosi Homna, Ako Shimizu & Hideki Funatsu eds., 1993).

[178] In some areas, the Agreement establishes a more stringent regime for agricultural products than is applied by other WTO agreements to non-agricultural products; the agreement requires Members to bind *all* tariffs, and requires quantitative commitments on the reduction of domestic as well as export subsidies. *See* BHAGIRATH LAL DAS. THE WORLD TRADE ORGANIZATION—A GUIDE TO THE FRAMEWORK FOR INTERNATIONAL TRADE 227 (1999).

[179] *Agreement on Agriculture*, ¶ 6 of the Preamble.

Improving market access for agricultural products requires the reduction of the unusually high tariffs in this sector, as well as the reduction of tariff escalation. SPS measures are also important: while food safety concerns are high on the political agenda in many developed countries, many developing country producers are finding it difficult and costly to comply with the high SPS standards imposed by developed countries. However, as the three cases so far decided under the SPS Agreement have demonstrated, market access issues linked to SPS measures are very contentious even among developed countries.[180] Reconciling improved market access with robust national food safety policies and environmental management will require increased transparency in the promulgation of health standards, a reasonable degree of harmonization of international standards (which must, nevertheless, leave enough space for countries to establish the risk management policies they deem most appropriate), and financial and technical assistance to developing countries.

Another element of the Agreement on Agriculture is the removal of production subsidies and other forms of support linked to production. In some cases, subsidies encourage overproduction and thus exacerbate many of the ecological problems linked to agricultural production, such as excessive use of water resources for irrigation and of inputs like pesticides and fertilizers.[181] Their reduction is thus a shared area of interest for trade and sustainable development advocates. By contrast, subsidies not related to production (known as "decoupled support" to agricultural producers) are afforded some protection under WTO law, as are certain payments linked to research and structural adjustment programs (green box)[182] and, in a less privileged manner, payments for production limiting programs (blue box).[183]

An emerging concept in the subsidies debate is "multifunctionality"—the notion that agriculture not only produces food, but fulfills a variety of other purposes, such as protecting biodiversity, conserving soil, ensuring self-sufficiency and national food security and preserving landscapes.[184] Some countries would like to see these benefits paid for by the State and be exempted from international trade rules by placing such payments in the "green box" (which would make these subsidies non-countervailable); other countries reject these considerations as another form of protectionism.

The environmental implications from a reduction of export subsidies are likely to follow the same pattern as the elimination of domestic support. A reduction in export

[180] For a summary of the SPS cases, *see supra* Part II(B)(3).

[181] *Trade and Environment in the GATT/WTO*, Background Note by the Secretariat (1999), WTO Special Studies No. 4, Annex I, ¶ 99.

[182] Annex 2 of the Agreement on Agriculture provides a very detailed set of criteria for determining which subsidies are exempt from the requirements of the Agreement. One of the fundamental requirements common to all green-box subsidies, however, is that they may not have any, or at most minimal, trade distortion effects or effects on production. Article 13 of the Agreement stipulates that such subsidies are non-countervailable and may not be challenged under WTO dispute settlement procedures.

[183] Unlike measures falling into the "green box", these measures are not completely exempt from challenge in the WTO dispute resolution system, nor are they exempt from countervailing measures, however, WTO Members are enjoined to exercise "due restraint" in the initiation of countervailing investigations against blue box subsidies, which fall under Article 6.5 of the Agreement on Agriculture. *See Agreement on Agriculture*, Article 13.

[184] Yet another claimed benefit is the preservation of a traditional way of life, an aspect particularly difficult to capture in economic terms. For a summary of these and related claims, *see* B. Wilson and Peter Finkle, *Is Agriculture Different? Another Round in the Battle Between Theory and Practice*, in AGRICULTURAL TRADE: DOMESTIC PRESSURES AND INTERNATIONAL TENSIONS 17 (Grace Skogstad and Andrew F. Cooper eds., 1990). For a useful clarification of the terms "multifunctionality" and "non-trade concerns" and their relation, *see* Fiona Smith, "*Multifunctionality*" *and* "*Non-trade Concerns*" *in the Agriculture Negotiations*, 3 JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW 707–713 (2000).

subsidies has the potential to decrease the incentives for overproduction and decrease the concomitant strain on the environment. Moreover, by reducing the dumping of agricultural products on world markets and artificial price wars, the reduction of export subsidies may contribute to ensuring viable agricultural markets in developing countries and to avoiding some of the social and ecological problems associated with the decline of rural communities in these countries.

H. Services

Many services are linked closely to environmental resources. Some services—such as waste treatment, sewage, and sanitation services—play an important role in mitigating humanity's impact on the environment. Other services—such as mining, transportation and energy services—can have negative consequences for the environment, and must be carefully regulated to ensure a balance between environmental and other objectives.

The relationship between services and the environment has been on the WTO agenda since the conclusion of the Uruguay Round, and discussed in the negotiations carried out under the General Agreement on Trade in Services ("GATS"). During the Uruguay Round, a number of governments expressed concern about whether the general exceptions contained in Article XIV of the GATS are sufficient to address the agreement's environmental implications. At the first meeting of the Council for Trade in Services, a Ministerial Declaration on Trade in Services was adopted acknowledging that "measures necessary to protect the environment may conflict with the provisions of the Agreement" and noting that "since measures necessary to protect the environment typically have as their objective the protection of human, animal or plant life or health, it is not clear that there is a need to provide for more than is contained in paragraph (b) of Article XIV."[185]

WTO Members also agreed that the Committee on Trade and Environment should examine the relationship between services trade and the environment in two main areas. The first area for examination is whether any modification of Article XIV is required to protect the environment. The CTE was required to "report, with recommendations if any, on the relationship between services trade and the environment including the issue of sustainable development".[186] The second area for examination is the "relevance of inter-governmental agreements on the environment and their relationship to the Agreement. . . "[187]

Progress at the CTE on the issue of services trade and the environment has been relatively slow. The 1996 CTE Singapore Report stated that the GATS is a new agreement which is still evolving and includes concepts which are not contained in the GATT. It stated that preliminary discussions have not led to the identification of environmental protection measures that would not be adequately covered by Article XIV. However, it acknowledged that further work by the CTE on this item "is necessary before it could be in a position to draw any conclusions on the relationship between services trade and the environment, or on the relevance of inter-governmental agreements on the environment and their relationship to the GATS in the context of sustainable development."[188]

Since the Singapore meeting WTO Members have discussed the potential environmental benefits of liberalizing trade in environmental services, but little emphasis has been given to the potential environmental effects of liberalizing trade in other services

[185] S/L/4 (April 4, 1995).

[186] Council for Trade in Services, *Decision on Trade in Services and the Environment*, WTO Doc. S/L/4 (adopted March 1, 1995).

[187] *Id.*

[188] Committee on Trade and Environment, *Report (1996) of the Committee on Trade and Environment*, WTO Doc. WT/CTE/1 (adopted November 12, 1996).

sectors such as mining, transportation or tourism. Recently, some WTO Members have called for a more comprehensive assessment of the GATS to examine the potential impacts of liberalization on the standards of services provided, especially to populations that are poor, vulnerable or socially disadvantaged.[189] It is hoped that such an assessment if undertaken would also consider the potential environmental impacts of the GATS, both positive and negative.

In such an assessment, at least two areas of law and policy stand out as requiring further examination. One is the possible environmental implications of future negotiations under Article VI. Article VI(4) includes a mandate to negotiate additional disciplines on certain national regulations to ensure they do not "constitute unnecessary barriers to trade in services" and are "not more burdensome than necessary to ensure the quality of the service". At the time of writing the scope and content of these proposed future obligations remain undefined. What, in practice, would be considered "more burdensome than necessary"? Is the "quality of services" the only legitimate objective of such measures, and should other non-trade justifications be considered? If so, how could this be achieved?

A second area for further inquiry is the relationship between GATS and MEA rules. Although these linkages remain largely unexplored, it is possible that both services liberalization and GATS disciplines may influence the successful implementation of MEAs. For example, liberalization of waste management services may affect the transboundary movement and disposal of hazardous waste covered by the Basel Convention; liberalization of tourism or mining services may affect the conservation of biodiversity as required by the Convention on Biological Diversity; and liberalization of energy or transport services may affect global warming, the subject of the UN Framework Convention on Climate Change and its Kyoto Protocol. Similarly, GATS disciplines—including those negotiated under Article VI—may define and delimit the domestic legal and policy measures available to implement MEAs. To ensure that MEAs and the GATS are mutually supportive, WTO Members may wish to examine these and other areas of overlap as part of the mandated assessment of the GATS, with input from national environmental policy-makers and Secretariats of the MEAs.[190]

I. Intellectual Property

Intellectual property protection affects the process of innovation, the development and use of technology, and the patterns of economic development, and as a result may have significant implications for environment and sustainable development. Forms of intellectual property protection, such as patents, may influence the development of new environmentally friendly (or harmful) technologies; and intellectual property protection over plant varieties may influence the development of crops, with implications for agriculture, food security and biodiversity. The importance of the relationship between intellectual property rights and the environment is reflected in Item 8 of the CTE's agenda (see above).

Among the main international agreements establishing minimum standards for the protection and enforcement of intellectual property rights is the WTO TRIPS Agreement. Arising from the TRIPS Agreement is a range of issues concerning the relationship

[189] *See Communication of Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe*, WTO Doc. S/CSS/W/114 (October 9, 2001).

[190] Discussion on these issues is also underway in the CTE, where under Agenda Item 9, the WTO Secretariat has been asked to conduct a literature survey on the environmental impacts of services liberalization with a focus on tourism, transport, energy and the environmental services sector. While these efforts are to be welcomed, it is crucial to conduct a comprehensive assessment of trade in services and its liberalization in the Council on Trade in Services ("CTS"), the main services negotiating body, to ensure that any results are adequately fed into the negotiating process.

between intellectual property rights and the environment. Prominent among these environmental issues are the development, transfer and dissemination of new technologies and products; and the relationship between the TRIPS Agreement and the Convention on Biological Diversity.

The development, transfer and dissemination of technology is widely recognized as a critical determinant of sustainable development. Agenda 21 affirms that ". . . access to and transfer of environmentally-sound technology are essential requirements for sustainable development".[191] Technology transfer is an important aspect of the TRIPS Agreement. Article 7, entitled *Objectives,* states that "the protection and enforcement of intellectual property rights should contribute to the . . . transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations". Article 8, entitled *Principles,* notes that abuse of intellectual property rights may adversely affect the international transfer of technology.

These general provisions are complemented by specific obligations to assist least-developed countries. Article 66.2 requires developed country Members to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base". This article reflects that, unless the price of the technology can be brought within manageable limits, the cost of technology may impose a burden on the development of least-developed countries.

Despite these references, many developing countries remain unconvinced that the Agreement's substantive provisions in fact promote technology transfer.[192] Empirically the relationship between intellectual property rights and technology transfer remains unclear.[193] To explore the relationship between technology transfer and other aspects of the WTO's mandate, WTO Members have established a Working Group under the auspices of the General Council to examine the relationship between trade and transfer of technology, and of "any possible recommendations that might be taken within the mandate of the WTO to increase flows of technology to developing countries."[194]

Ensuring a positive relationship between intellectual property and technology transfer would be helped by more targeted analyses of the relationship between trade rules and technology transfer in specific sectors and regions. One such area that WTO Members may wish to consider is the relationship between relevant WTO processes (including the TRIPS Council, CTE and the Working Group on Technology Transfer), and discussions in the international environmental system. Recent UNEP-sponsored meetings, for example, have noted the potential for synergies in the implementation of the TRIPS Agreement's technology transfer obligations, and the technology transfer provisions in selected MEAs.[195] Similarly, technology transfer is likely to remain an important issue in

[191] *Agenda* 21, ¶ 34.7. Agenda 21 is available on the website of the United Nations Division for Sustainable Development http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm. It was adopted at the United Nations Conference on Environment and Development, held in Rio de Janeiro from June 3–14, 1993.

[192] *See, e.g., Communication from India*, WT/GC/W/147 (February 18, 1999).

[193] *See, generally, UNCTAD, The TRIPS Agreement and Developing Countries,* UNCTAD/ITE/1 (1996); and UNCTAD, World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy(1997).

[194] *WTO Fourth Ministerial Declaration, supra* note 89, ¶ 37.

[195] *See Chairman's Summary*, UNEP Meeting on Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements and the World Trade Organization, October 23, 2001, www.unep.ch, *stating*, in relation to technology transfer, that "there are significant synergies to be realized in the implementation of these measures in MEAs and the WTO, including in relation to technology transfer."

the implementation of Agenda 21, and at future meetings in the Rio process. To maximize their benefits from future negotiations, WTO Members wishing to promote technology transfer may consider exploring the linkages between technology transfer issues as they arise on the WTO's agenda, and in international environmental forums.

A second area of law and policy where intellectual property rights and the environment intersect is the relationship between the TRIPS Agreement and the Convention on Biological Diversity. The importance of this relationship was highlighted in the WTO's Fourth Ministerial Declaration, which called on the TRIPS Council to "examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity" ("CBD").[196] The TRIPS Agreement includes a number of forms of intellectual property protection of relevance to the conservation of biodiversity. Patents and *sui generis systems* for plant variety protection are relevant to the implementation of the CBD because they play a key role in defining what technologies are developed and transferred, how genetic resources are conserved and used, and how the benefits of use are shared (including with traditional communities).

The conservation and use of genetic resources may be affected by intellectual property rights in a number of ways. On one hand, intellectual property rights may provide an incentive for the conservation of certain kinds of genetic resources. For example, patents or geographical indications may provide a financial incentive to conserve commercially valuable plant or animal species. On the other hand, there is concern that intellectual property rights may also operate in tension with attempts to conserve biodiversity. For example, some governments and non-governmental organizations are concerned about the patenting by Northern companies of genetic resources taken from countries of the South. In the TRIPS Council, a number of developing countries have raised concern that intellectual property rights may affect the objectives of the CBD. Brazil, for example, has stated that "... patents over a Member's genetic resource, but granted outside its territory raises the issue of potential conflict with the principle of the sovereignty of the Contracting Parties of the CBD over their own genetic resources" and that "amending Article 27.3(b) of TRIPs to accommodate principles of the CBD will be a necessary outcome of the review of that Article. Failure to clarify this relationship may turn out to be detrimental to both instruments."[197] Other WTO Members, by contrast, have argued that changing patent procedures is unnecessary, and that a more effective system of contracts between the users and custodians of genetic resources would address the concerns of developing countries.[198] The need for international cooperation to resolve issues of this type is recognized in the Convention on Biological Diversity, which states that:

> The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.[199]

[196] *See WTO Fourth Ministerial Declaration, supra* note 89, ¶ 19. *See also,* www.wipo.org for an overview of the work of the World Intellectual Property Organization's ("WIPO") Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, which is discussing models for intellectual property-related provisions in access contracts, the possibility of a requirement for the disclosure of origin of biological resources in patent applications, and methods for defensive and positive *sui generis* protection of traditional knowledge.

[197] *See Communication from Brazil*, WTO Doc. IP/C/W/228, ¶¶ 21–22 (November 24, 2000).

[198] *See Communication from the United States*, WTO Doc. IP/C/W/209, at 5–6 (October 3, 2000).

[199] Article 16.5, *Convention on Biological Diversity*, June 5, 1992, UNEP/Bio.Div./N7-INC5/4; 31 I.L.M. 818 (1992).

Closely related to issues of biodiversity protection are questions concerning the relationship between intellectual property rights and the protection of traditional knowledge. Article 8(j) of the CBD requires Parties to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity". Again, the relationship between intellectual property rights and the protection of traditional knowledge is complex. On one hand, IPRs may provide some local and traditional communities with a tool to protect their traditional knowledge. On the other hand, western-style intellectual property systems may prove too expensive for poor communities, and fail to recognize community rights, as opposed to individual rights. There is also the additional concern of free riding on, and misappropriation of, knowledge across national borders. Some developing countries have noted in the TRIPS Council that innovations based on the traditional knowledge of communities in the South are patented in the North without any effort to share the benefits with the source communities or countries.[200] The importance of addressing these issues was emphasized in the Doha Ministerial Declaration, which called on the CTE to "examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore".[201]

These issues are likely to remain a subject of controversy in the WTO's discussions of intellectual property. Making progress will require a well-defined agenda and a clear division of competence between the relevant reviews of the TRIPS Agreement (including the Article 27.3(b) and Article 71.1 reviews), among relevant WTO bodies (including the TRIPS Council, CTE, and Working Group on Technology Transfer), and between the WTO other international bodies such as the CBD, the World Intellectual Property Organization and UNCTAD.

J. Multilateral Environmental Agreements ("MEAs")

MEAs are agreements among states to address shared environmental problems. The importance and scope of MEAs has increased dramatically as the international community struggles to address growing global environmental problems. They provide the preferred way to deal with transboundary and global environmental problems such as climate change, biodiversity loss and ozone depletion. From an economic perspective, MEAs may also help reduce unnecessary economic and trade effects by harmonizing measures and preventing a proliferation of different national rules. Compared to unilateral measures, they also embody cooperative approaches that reflect an equitable sharing of the benefits and burdens of environmental protection.

The policies and rules embodied in MEAs and the WTO Agreement intersect in a number of ways. They apply to many of the same issues, products and parties, albeit from different perspectives. Individual MEAs and WTO agreements may simultaneously touch on issues of scientific uncertainty and precaution, intellectual property protection, biodiversity protection, and the transboundary movement of living modified organisms, endangered species, invasive species, and hazardous waste, to name a few issues. In some cases, these linkages may give rise to unrealized synergies and in others to unresolved tensions. Identifying ways to realize synergies, resolve tensions and maximize the supportiveness of these rapidly evolving regimes would make an important contribution to a

[200] *See, e.g., Communication from Brazil, supra* note 197.
[201] *Ministerial Declaration, supra* note 89, ¶ 19.

coherent intellectual architecture for sustainable development. One of the primary sets of linkages—those arising out of the relationship between trade-related measures in MEAs and WTO rules—is addressed in this section.

Trade-related measures are used in over twenty MEAs including those addressing the transboundary movement of hazardous waste (Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal),[202] genetically modified organisms (Cartagena Protocol on Biosafety),[203] ozone depleting substances (Montreal Protocol on Substances that Deplete the Ozone Layer),[204] persistent organic pollutants (Stockholm Convention on Persistent Organic Pollutants),[205] and endangered species (Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)).[206] Among other things, trade-related measures serve to regulate trade in environmentally harmful products, remove the economic incentives that encourage environmental destruction, ensure compliance with an MEA's provisions, and encourage broad country participation, thereby reducing the potential for non-parties to undermine a treaty's objectives. (See Box 1).

Box 1 Trade-related measures serve a variety of purposes. They may:

- *Ban transboundary movement*: Where the threat posed by a product or substance to the environment is significant, trade-related measures may prohibit trade in the product altogether. The Basel Convention, for example, bans trade under conditions where the importing country lacks the capacity to manage the waste in an environmentally sound manner;
- *Remove market incentives that promote environmental harm:* In some cases, access to foreign markets through trade provides an incentive for environmentally harmful activity. Trade-related measures may reduce or remove these incentives. CITES, for example, bans trade in endangered species thereby removing the economic incentive to kill them;
- *Encourage compliance:* As is the case with the non-compliance with WTO obligations, some MEAs permit targeted trade-related measures as a response to non-compliance. The Montreal Protocol, for example, allows the meeting of the parties to use trade-related measures to address non-compliance by a party to the Protocol; and
- *Promote broad participation:* In relation to global environmental problems, broad membership may be critical to the success of an MEA. Trade-related measures may be used to create incentives for non-parties to join the agreement, or to establish a comparable bilateral, multilateral or regional agreement. Bans on trade with non-parties remove incentives to remain outside the Montreal Protocol and have increased its coverage, and prevented its goals from being undermined by the actions of non-parties.

[202] *Reprinted in* 28 I.L.M. 657 (1989), entered into force May 5, 1992.
[203] *Reprinted in* 39 I.L.M. 1027 (2000), not yet in force.
[204] *Reprinted in* 26 I.L.M. 1550 (1987), entered into force January 1, 1989.
[205] *Reprinted in* 40 I.L.M. 531 (2001). The Convention has not yet entered into force but is being applied on a voluntary basis in the meantime.
[206] *Convention on Trade in Endangered Species of Flora and Fauna* ("CITES"), March 3, 1973, 993 U.N.T.S. 243, 12 I.L.M. 1085 (1973), in force since July 1, 1975.

The relationship between MEA trade-related measures and WTO rules was identified by WTO Members at the end of the Uruguay Round in Items 1 and 5 of the CTE's mandate.[207] This mandate was augmented at the WTO's Fourth Ministerial where Members agreed to negotiations on the "relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)".[208]

Although there has been no formal WTO dispute directly involving an MEA, the potential for a WTO dispute has arguably increased as a result of the decision by some States not to join key conventions such as the Convention on Biological Diversity, the Cartagena Protocol on Biosafety, the UN Convention on the Law of the Sea, and the Kyoto Protocol. While the WTO has stated a preference for multilateral solutions to environmental problems, it remains unclear whether trade-related measures involving non-parties to an MEA are consistent with the WTO.[209] Particularly at risk are trade-related measures that apply to non-parties to an MEA, as these are more likely to contravene the WTO's non-discrimination requirements, and would likely fall within the ambit of the WTO's (rather than an MEA's) dispute settlement system.

Clarifying the relationship between trade-related measures in MEAs and WTO rules is an important step towards promoting a coherent framework of international rules and institutions. WTO negotiations under paragraph 31(i) of the Doha Ministerial Declaration will likely raise some complex issues regarding what constitutes "specific trade obligations" and an "MEA" for the purposes of the negotiating mandate. Developing countries may seek to keep the mandate narrow by limiting the scope of these terms; while the proponents of the negotiations seem likely to seek to broaden the mandate to protect not only the trade-related provisions embodied in the MEAs, but also national measures taken pursuant to them. Both the *form* of any outcome to the negotiations (e.g., ranging from a simple political declaration to a legally binding amendment of WTO rules) as well its *content* will likely be hotly debated by WTO Members. As they continue discussions in the CTE, WTO Members can take note of and build on past statements by relevant WTO bodies, including the Ministerial Council and relevant Committees. Among other things, they could conceivably seek to build on the CTE's 1996 joint statement that "if a dispute arises between WTO members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA."[210]

[207] *See Decision on Trade and Environment, supra* note 88 and accompanying text.

[208] WTO *Fourth Ministerial Declaration, supra* note 89, ¶ 31(i).

[209] Non-parties to an MEA may file a complaint in the WTO. In such a case, the WTO would be required to hear the dispute and to apply the WTO rules. Recent WTO cases have interpreted Article XX—especially its chapeau—as restricting the extent to which countries may use trade measures to pressure other countries to change their environmental policies. The Appellate Body in *United States—Shrimp, supra* note 1, stated that, "the policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX." (¶ 149). In *United States—Shrimp 21.5*, the panel stated:

> The Appellate Body Report [in the *Shrimp* case] found that, while a WTO Member may not impose on exporting Members to apply the same standards of environmental protection as those it applies itself, this Member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory program deemed comparable to its own. . . .

While these statements may go some way in creating policy space for certain MEA measures that are aimed at non-Parties, the situation remains unclear.

[210] Committee on Trade and Environment, *supra* note 188, ¶ 178.

VI. Organizational Issues

Many of the legal and policy issues such as those discussed above are created and ultimately resolved by organizations, and other institutional arrangements. Organizations perform the function of developing, interpreting and executing rules to achieve agreed objectives. Where more than one body is responsible for defining objectives and related laws and policies in a particular arena—such as trade and the environment—then an examination of organizational or institutional linkages and issues is required.

Organizational linkages exist at a number of levels. At the national level, relationships exist among trade and non-trade ministries. At the international level, relationships exist among formal bodies of trade and non-trade international organizations. They also exist among the secretariats of international organizations. This section examines a selection of these institutional relationships, focusing on those that are particularly important for ensuring that the multilateral trading system is able to maximize its contribution to sustainable development.

A. Assessment

Integrated sustainability assessments provide a powerful tool for examining the material effects of trade liberalization on economic, social and environmental systems; for exploring the legal and policy implications of trade rules for other sub-systems of law and policy at the local, national, regional and international level; and for identifying opportunities to increase the cooperation of institutions at and between all levels. According to UNEP, "an integrated assessment considers the economic, environmental and social impacts of trade measures, the linkages between these effects, and aims to build upon this analysis by identifying ways in which the negative consequences can be avoided or mitigated, and ways in which positive effects can be enhanced."[211]

Integrated assessments may be conducted prior to, concurrently with, or subsequent to trade negotiations. They can focus on implications for a particular sector (such as agriculture, forestry, fisheries or mining), across a particular country or geographic region, or for a particular social or environmental structure or system. The ultimate goal of integrated assessments is to maximize the net benefits of trade and trade liberalization, by enabling countries to design and implement integrated policies that minimize associated social and environmental problems.

The importance of assessing the impacts of trade rules and liberalization was recognized in the WTO's Fourth Ministerial Declaration, which notes the role of technical assistance and capacity building in the field of trade and the environment, and encourages "expertise and experience [to] be shared with Members wishing to perform environmental reviews at the national level".[212] Such expertise and experience has been gained through recent national level assessments conducted in a number of countries. These studies, conducted with the assistance of UNEP's methodology for integrated assessment of trade-related policies, took place in countries including Argentina, China, Ecuador, Nigeria, Senegal and Tanzania, and in relation to sectors including agriculture, fisheries and forestry. According to UNEP's summary report, the studies revealed significant positive and negative linkages between trade liberalization, society and the environment, and underpin the importance of integrated policy-making.[213]

[211] *See* UNEP, *supra* note 105, at iii.

[212] WTO *Fourth Ministerial Declaration, supra* note 89, ¶ 33.

[213] UNEP, *Integrated Assessment of Trade and Trade-Related Policies: UNEP Country Projects-Round II, A Synthesis Report* (2002).

Just as there is value in assessment at the national level, so there is also value in the collective assessment of trade rules and policies at the multilateral level. Assessments, of one form or another, are mandated in the provisions of a number of WTO agreements. GATS Article XIX, for example, calls on future negotiation of specific commitments to be guided by negotiation guidelines which themselves are prepared in light of "an assessment of trade in services in overall terms and on a sectoral basis with references to the objectives of this Agreement." WTO Members have subsequently agreed that the "Council for Trade in Services in Special Sessions shall continue to carry out an assessment of trade in services in overall terms and on a sectoral basis . . . and negotiations shall be adjusted in the light of the results of the assessment."[214] Similarly, in relation to the Agreement on Agriculture, WTO Members agreed to continue negotiations, taking into account "the experience . . . from implementing reduction commitments; the effects of the reduction commitments on world trade in agriculture; non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system . . . ".[215] These assessments provide WTO Members with a valuable opportunity to examine the effects of existing policies, and to design future trade policies to maximize the welfare of WTO Member countries and their citizens.

As with assessment of the existing agreements, assessment of proposed negotiations (for example, on investment, government procurement and market access for non-agricultural products) could help to refine negotiating positions and to ensure that future negotiations maximize their contribution to WTO Members' sustainable development objectives. In the longer term, WTO Members may wish to consider ways to institutionalize procedures for assessment, in order to examine more systematically the impacts of past liberalization, and to ensure that proposed future liberalization supports the WTO preamble's commitment to ensuring that trade occurs in "accordance with the objective of sustainable development".

B. Transparency and Public Participation

The CTE is mandated under Item 10 of its agenda to "provide input to the relevant bodies in respect of appropriate arrangements for relations with inter-governmental and non-governmental organizations referred to in Article V of the WTO".[216]

To what extent should the public have access to and participate in WTO processes? On one hand, it is clear that the WTO is an intergovernmental organization and so its decisions should be made by Member governments on behalf of their citizens. On the other hand, WTO processes increasingly reach beyond traditional trade issues (such as reduction of tariff barriers) into the domestic policymaking territory of national parliaments. Many NGOs, and some governments, have therefore argued that greater openness and transparency is required to ensure that WTO decision-making is legitimate and accountable, and reflects an appropriate balance between trade and other goals, including the need to protect the environment. Indeed, NGOs representing many different perspectives—environment, development, consumer, gender, indigenous and others—have claimed that

[214] *See, Guidelines and Procedures for the Negotiation on Trade in Services*, adopted by the Special Session of the Council for Trade in Services on March 28, 2001, paragraph 14, (S/L/93). *See also* Communication from Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe to the Council for Trade in Services, *supra* note 189, calling for assessment of the economic and social impacts of the GATS.

[215] *See Agreement on Agriculture*, Article 20.

[216] WTO *Decision on Trade and Environment*, *supra* note 88.

the interests of citizens could be better reflected in WTO decision-making procedures, and have thus demanded greater opportunities for "public participation".

The WTO has taken some steps towards improving transparency and public participation. The WTO's General Council is empowered by Article V of the WTO Agreement to make arrangements with other organizations.[217] In 1996, the General Council adopted Guidelines for Arrangements on Relations with Non-Governmental Organizations, which recognized the role of NGOs in the relationship between the WTO and the broader public, and agreed to improve transparency and develop better communications with NGOs.[218] One practical implication has been that WTO documents are now derestricted earlier than in the past.[219] At the same time, however, the guidelines state "there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings"[220] and note that "the primary responsibility for closer consultation and cooperation [lies] at the national level."[221]

This view is repeated in the Doha Ministerial Declaration, which stresses the "intergovernmental character of the organization", while reaffirming the Members' commitment "to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public."[222] Despite the formal view of WTO Members, some non-state actors already participate indirectly in WTO dispute settlement proceedings. For example, governments often initiate disputes in close collaboration with—and frequently at the initiative of—private firms,[223] and NGOs participate in WTO-organized symposia and meetings.

Some observers claim that the real question is not whether public participation should occur, but rather in which way it should be formalized and institutionalized.[224] Calls for strengthened participation by NGOs are based on the view that NGOs can provide new perspectives, know-how and values that national governments do not adequately supply.[225] Discussions of enhanced public participation can be divided into two main

[217] Article V of the WTO Agreement, entitled "*Relations with Other Organizations*", stipulates in paragraph 1: "The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO." Paragraph 2 authorizes the General Council to "make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."

[218] *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WTO Doc. WT/L/162 (July 23, 1996).

[219] Decision adopted by the General Council, *Procedures for the Circulation and Derestriction of WTO Documents*, WT/L/160 (July 18, 1996).

[220] *Guidelines for Arrangements on Relations with Non-Governmental Organizations, supra* note 218, ¶ 6.

[221] *Id. See also Trade and Environment in the GATT/WTO*, Background Note by the Secretariat (1999), WTO Special Studies No. 4, Annex I, ¶ 69. In the scholarly debate, an expression of this argument is that NGOs should not have "two bites at the apple", signifying that private parties should (as they already do) participate in policy-making at the national level and should not get an opportunity to intervene again at the international level. *See, e.g.,* Jeffrey Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW 433, 434 (1998).

[222] WTO *Fourth Ministerial Declaration, supra note 89, ¶ 10.*

[223] *See, e.g.,* the Report of the WTO Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (1996), involving a dispute between Kodak and Fuji, and *United States—Standards for Reformulated and Conventional Gasoline, supra* note 1, which involved major U.S. and Venezuelan oil corporations.

[224] *See* Dunoff, *supra* note 221, at 433–456.

[225] *See, e.g.,* Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW 123–147 (1998). FOR AN ALTERNATIVE VIEW, *see* ANDREA KUPPER SCHNEIDER, *Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WIDENER LAW SYMPOSIUM JOURNAL 88, 93 (2001); *see also* GREGORY C. SHAFFER, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1 (2001).

areas, which give rise to distinct but related issues: participation in WTO meetings and decision-making processes; and participation in dispute settlement.[226]

Should WTO Members decide to enhance public participation in WTO meetings, this could occur in a variety of ways. A minimal level of participation could involve passive observer status in selected WTO meetings (such as the CTE). The public could also be offered limited rights to comment after governments have made statements, as is the case in some international environmental negotiations. Whereas some other international bodies, such as the International Labor Organization, include direct participation by non-governmental actors, it seems unlikely that the WTO can or would adopt such an approach.

Participation in WTO dispute settlement raises an additional set of issues. The expansion in the coverage of trade policy culminating with the conclusion of the Uruguay Round has increased the number and scope of disputes involving trade and other policy considerations, notably health and environmental protection.[227] In these disputes, participation by affected NGOs, if desired, could provide factual information and know-how ensuring that WTO adjudication bodies have access to all relevant facts and arguments (including those not put forward by governments).[228] It could also enhance the persuasive authority of the WTO by making dispute settlement proceedings more transparent and dispelling their aura of secrecy.

The debate about public participation in dispute settlement has focused on the issue of *amicus curiae* (or friend of the court) briefs.[229] The Appellate Body has stated that both panels and the Appellate Body have the right to consider unsolicited *amicus* briefs. The Appellate Body in *United States—Shrimp* stated that "[a] panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not".[230] In relation to *amicus* briefs submitted to the Appellate Body, the Appellate Body has stated that Article 17.9 of the DSU gives it "legal authority . . . to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so."[231] It is equally within the discretion of adjudicating bodies to adopt procedures governing the submission of such briefs.[232]

Amicus briefs have met with protest from many WTO Members, who feel that participation by non-state actors changes the inter-governmental character of the organization.[233] Some developing countries have expressed concern that commercial interests from developed countries may gain an additional avenue through which to influence WTO

[226] *See* Schneider, *supra* note 225, 93–95. A third possible area related to the "public participation issue" would be to give private actors legal standing, e.g., to bring claims under the WTO Dispute Settlement. *See, e.g.,* Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INTL. ECON. L. 331 (1996).

[227] Esty, *supra* note 225, at 127. *See also* Jan Bohanes, *supra* note 145. Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes*, 15 MICH. J. INTL LAW 1043 (1994). Gabrielle Marceau and Matthew Stilwell, *Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW (2001).

[228] *See, e.g.,*Rule 37.1. of the United States Supreme Court, which states that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court."

[229] Marceau and Stilwell, *supra* note 227, footnote 4.

[230] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 1, ¶¶ 108–110.

[231] Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (2000), ¶ 42.

[232] *See* the Additional Procedures adopted by the Appellate Body in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 75, ¶ 52.

[233] *See* Minutes of the DSB Meeting held on November 6, 1998, WT/DSB/M/50, 1–13.

processes.[234] Some others have noted that, while WTO Members must fulfill procedural conditions to participate as third parties (e.g., time limits, involvement at the panel stage to be eligible as participant at the Appellate level, etc), no such requirements exist for the filing of *amicus* briefs.[235] A few other WTO Members, by contrast, support the Appellate Body's approach to *amicus* briefs. Regardless, it seems from the decision of the Appellate Body that both panels and the Appellate Body itself may accept and consider *amicus* briefs. In the absence of explicit guidance by WTO Members (for example, in the form of criteria or other procedures) it will be left to WTO adjudicating bodies to develop procedures for the use of *amicus* briefs on an *ad hoc* basis.

C. Information Exchange and Observer Status

To promote cooperation, the WTO Secretariat is regularly invited to attend the meetings of UNEP and MEA Secretariats. UNEP and MEA Secretariats may, in turn, participate as observers in selected WTO forums such as the Committee on Trade and Environment. An interest in streamlining observer status for environmental organizations in WTO bodies, as well as delays in the granting of some requests, however, gave rise at the Doha Ministerial to a mandate for negotiations on "procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for observer status".[236]

In future negotiations, procedures for regular information exchange between MEA Secretariats and relevant WTO Committees could be developed to build on existing informal practices. WTO Members may wish to consider discussing ways to encourage the two regimes to notify each other about any work programs and projects of mutual interest; to exchange technical documents; to share draft documents for comment; to provide national legislation notified to the WTO or an MEA Secretariat upon request; to give access to relevant computerized databases; and to exchange information concerning scientific and technical experts. Criteria for observer status could also build from a baseline of existing practice by examining the membership and geographical coverage of existing observer organizations, the nature and scope of their interests and activities, and the degree of connection between these interests and activities and those of the WTO. Given the acknowledged need to improve cooperation among trade and environment institutions, criteria for observer status should presumably be negotiated with the goal of expediting requests for observer status, and providing new opportunities for environmental organizations to participate as observers in relevant WTO Committees and Councils.

When exploring ways to expand institutional cooperation between the WTO and MEA Secretariats, trade and environmental policy-makers may wish to draw on the models of cooperation developed between the WTO and other international organizations. The most informal of these are the memoranda of understanding signed between the WTO and other international agencies to promote their mutual work on technical cooperation. These agreements are often developed by individual WTO Divisions, and describe areas of intended cooperation and a framework for carrying out joint activities.

Another model of inter-institutional cooperation is the agreement between the WTO and the United Nations. This agreement involves an exchange of letters among chief

[234] *Id.*

[235] *See* Daniel Pruzin, *Key WTO Members Score Appellate Body for its Decision to Accept Amicus Briefs*, 17 Int'l Trade Rep. (BNA), No. 24, at 924 (June 15, 2000).

[236] *WTO Ministerial Declaration, supra* note 89, ¶ 31(ii).

executive officers, and reflects the pre-existing relationship of cooperation between the GATT and the United Nations. While it is still relatively informal, this model has provided a useful basis for cooperation between the WTO and UN organizations, especially UNCTAD. Cooperation with UNCTAD has included exchange of information, reciprocal representation in accordance with decisions of competent bodies of both organizations, participation by the WTO in various UNCTAD Committees, and cooperation among secretariats. Paralleling the exchange of letters between the UN and the WTO is an exchange of letters between the WTO and UNEP. [237] This sets out a number of areas of mutual cooperation, and could be augmented and strengthened as part of an effort to improve cooperation among MEAs (many of which are UNEP-administered) and the WTO.

More detailed than the letters between UN organizations and the WTO is the formal agreement between the World Bank and the World Trade Organization, which establishes a High Level Working Group on Coherence to oversee cooperation between the three organizations and prepare joint reports.[238] This agreement promotes a range of cooperative activities, including the participation at meetings, information sharing, and contacts between staff on specific projects. The WTO also has formal agreements with the World Intellectual Property Organization, and the International Telecommunications Union,[239] which may provide useful models for future frameworks for cooperation between environment and trade institutions.

D. Compliance, Enforcement and Dispute Settlement

Another set of linkages among institutions arises out of the provisions for compliance, enforcement and dispute settlement included in MEAs and the WTO. Generally, *compliance* refers to measures designed to assist parties to honor their treaty obligations, and would include technical cooperation and technology transfer. *Enforcement* may be used to refer to multilateral measures designed to respond to a party's failure to comply, and would include suspension of certain rights and privileges or trade-related measures. And *dispute settlement* may be used to refer to procedures designed to address bilateral (or plurilateral) disputes between parties, and would include provisions for consultation, good offices, mediation, arbitration or judicial settlement. In each of these areas there are overlaps between the institutional mechanisms in MEAs and the WTO, giving rise to the potential for synergies and conflicts. Joint technical cooperation, for example, has been identified at recent meetings as an area of mutually supportive cooperation between MEAs and the WTO.[240]

The area most likely to give rise to challenges to institutional coherence, however, is dispute settlement. The provisions of MEAs and the WTO may apply simultaneously

[237] *See* WTO Press Release 154 (1999), available at www.wto.org/english/news_e/pres99_e/pr154_e.htm, (last visited March 2, 2003).

[238] *Agreement between the International Bank for Reconstruction and Development, the International Development Association and the World Trade Organization*; and the Agreed Commentary thereto, WT/GC/W/43 (28 April 1997).

[239] *Agreements between WTO and WIPO*, WIPO Publication No. 223(E), (January 1, 1996); Agreement between WTO and ITU, on file with the authors (October 10, 2000).

[240] *See Chairman's Summary*, UNEP Meeting on Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements and the World Trade Organization, October 23, 2000, www.unep.ch, *stating* "Technical cooperation and capacity building were identified as areas requiring the enhanced and concerted efforts of UNEP, MEAs and the WTO. The UNEP-UNCTAD Capacity Building Task Force on Trade, Environment and Development was identified as being able to make an important contribution in this context."

to the same countries and activities. In the event a dispute arises—over, for example, transboundary movement of genetically modified organisms or hazardous chemicals—different parties may seek to have the dispute resolved in different fora, according to different rules, with potentially different results. A lack of clarity about the relationship between dispute settlement systems gives rise to the risk of forum shopping, and for the potential for uncoordinated, inconsistent or conflicting outcomes.

The importance of coherence between MEA and WTO dispute settlement systems was recognized by WTO Members in Item 5 of the CTE's agenda, which empowers the Committee to examine and make recommendations on the "relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements". A joint UNEP-WTO paper on compliance and dispute settlement mechanisms in MEAs and the WTO notes "the two regimes emphasize different approaches to securing compliance with their respective agreements":

> The WTO system, while encouraging Members to resolve their disputes through consultation, focuses on a legalistic approach to resolving conflicts. MEAs, on the other hand, have concentrated on developing measures to promote compliance . . . and rely on a process of facilitation, not adjudication.[241]

While the two regimes emphasize different approaches, the potential for overlapping jurisdiction does arise. For example, in a trade/fisheries dispute between the European Union and Chile over swordfish, a last-minute settlement narrowly averted parallel proceedings at the WTO and the International Tribunal on the Law of the Sea. The potential for overlapping jurisdiction raises a series of interesting legal and practical issues, including which forum should be primarily responsible for resolving a dispute.[242]

Determining which forum should decide which matter requires an examination of a number of factors. Explicit treaty language on dispute settlement may help to clarify the relationship between dispute settlement forums. The SPS Agreement, for example, provides that "nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organization or established under any other international agreement."[243] More general treaty language on the relationship between treaties may also exercise some influence on choice of forum. The Convention on Biological Diversity, for example, provides that "the provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."[244] Finally, general principles of law, such as the duty of good faith and *res judicata* (the principle that the same matter cannot be decided twice), might require consideration in a case of overlapping jurisdiction. In the absence of explicit guidance by governments, dispute settlement bodies will be required to answer these questions on an *ad hoc* basis. How these different factors play out in a particular dispute will require an analysis of all relevant rules and evidence.

[241] *See* Joint Paper by WTO and UNEP Secretariats, entitled *Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements*, WTO Doc. WT/CTE/W/191 (June 6, 2001), ¶ 140.

[242] Different dispute settlement bodies may be responsible for addressing different aspects of a dispute. Nevertheless, the resolution of one overarching dispute by two dispute settlement bodies, in the absence of some coordination mechanism, raises considerable challenges.

[243] DSU, Article 11.3.

[244] DSU, Article 22.1.

While explicit guidance by governments is preferable, there are less direct approaches to reducing the potential for conflict. According to the joint UNEP-WTO paper strengthening compliance mechanisms in MEAs would "enhance the effective implementation of MEAs, and . . . prevent MEA-related disputes from arising in the WTO dispute settlement system".[245] Additionally, the WTO could "put less focus on judicial settlement of disputes, and more on mediation and conciliation combined with technical assistance and capacity building for implementation."[246]

In the event an MEA-related dispute does arise at the WTO, the DSU also includes a number of mechanisms that allow the dispute settlement system to consider environmental factors. These include the use of procedures for good offices, mediation and consultation (Article 5) to encourage dispute avoidance and to ensure participation by MEA Secretariats and other experts; use of experts on an *ad hoc* basis under Article 13(1); establishment of Expert Review Groups under Article 13(2) and Appendix 4 to provide non-binding advisory opinions; and increased use of environmental experts as panelists.

VII. Looking Forward

This chapter has examined a range of issues arising at the interface of trade and the environment. It has sketched the WTO agreements, disputes, institutional forums and new negotiating mandates that we believe are most relevant to trade and environment discussions, and it has examined a range of issues that arise from the relationships between trade and environment at the levels of the real or material world, laws and policies, and institutions.

The linkages within and across each of these areas are complex. An understanding of them, however, is central to any effort to ensure trade liberalization maximizes its contribution to the well-being of individuals and communities, and to the economic and social development of any nation. We believe that, until now, too little attention has been paid to the real-world intersection between trade and other areas of human activity. Indeed, despite years of successive rounds of liberalization the impact of past liberalization has not been comprehensively assessed by many WTO Members. The increasing emphasis given by some countries and international organizations to assess the impacts of both current and proposed future trade liberalization and trade policies is therefore to be welcomed.

Trade liberalization is potentially a powerful tool. Yet, the goal of the WTO as set out in its preamble is not merely the liberalization of trade. Liberalization is not an end in itself. As recent studies have shown, inappropriate liberalization may lead to economic de-industrialization, social dislocation and/or environmental damage.[247] On the other hand, conducted under the right conditions, at the right pace, and accompanied by the right policy measures, liberalization may yield significant economic, social and environmental benefits. A major challenge facing all WTO Members is thus to encourage trade that promotes their national developmental goals; to increase the *quality* of trade, and not merely its volume.

[245] Joint Paper by WTO and UNEP Secretariats, *supra* note 241, ¶ 141.

[246] *Id.*

[247] *See, e.g.*, UNEP country study entitled "Integrated Assessment of Trade Liberalization and Trade-Related Policies: A Country Study on the Fisheries Sector in Argentina", available at http://www.unep.ch/etu/publications/CSII_Argentina.pdf, which documents that unchecked trade expansion in Argentina, combined with an absence of appropriate fisheries policies in the 1990s had a *net economic cost* of about US$ 500 million for one fish species (hake).

Institutions grow and change over time. We believe that in the longer term the goal of the WTO must be explicitly one of promoting a human-centered development process that meets the needs of current generations—especially the poorest individuals, communities and countries—without compromising the capacity of future generations to meet their needs. Such an approach is at least partially reflected in the WTO's preamble, which identifies trade liberalization as a means to the end of "raising standards of living . . . in accordance with the objective of sustainable development, seeking both to protect and preserve the environment" with "positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."

Truly achieving these goals—and realizing the benefits for all people and countries rather than for a privileged few—will require a deeper effort to understand the linkages between the social, environmental and economic aspects of human life on a sector-by-sector, country-by-country, region-by-region basis across countries at vastly different levels of development, and with different social, cultural and environmental attributes. As WTO Members adopt policies and rules that more deeply affect the lives and aspirations of people and communities around the world, they must also assume the responsibility to measure the performance of the multilateral trading system against the standard established in the WTO Agreement's preamble.

CHAPTER 59

TRADE AND LABOR I

Friedl Weiss*

TABLE OF CONTENTS

I. Introduction and Background 572
A. Preliminary Remarks 572
B. Themes and Issues 572
C. International v. Fair Labor Standards 573
D. From Marrakesh to Singapore 574
II. Evolution of the Link Between Trade and Labor Rights 575
A. From Integrated to Segregated Standards and Back? 575
B. The Impact of Globalization 575
C. The Link: ILO, GATT and Unilateral State Practice 576
III. The Changing Framework 578
A. Integrating Separate Concerns 578
B. Historical Antecedents 579
1. From Linkage to Social Policy Conditionality 579
2. The ITO Connection 580
C. Labor in GATT Practice 581
1. Proposals by Contracting Parties 581
2. The Request of the United States for a Working Party 582
3. Deliberations in GATT Councils 583
IV. GATT Panel Practice 584
A. Adjudication Without Law? 584
B. Protection of Domestic Labor 584
C. Protection of Foreign Labor 587
1. Potential Legal Bases in GATT/WTO Law 587
2. The Implications of *United States*—Reformulated Gasoline 587
V. Standard Setting 590
A. Merits and Demerits of the Incorporation of Standards 590
B. Selection of Standards for a Social Clause 590
C. Supervision of Compliance 591
VI. Beyond Singapore? 592
A. WTO Ministerial Meetings 592
B. Using Multilateral and Bilateral Agreements as a Model for WTO Action 592
VII. Concluding Remarks 595

* Professor of International Economic Law and International Organizations at the University of Amsterdam; Visiting Professor, International Law Department, Catholic University of Louvain-la-Neuve; former Consultant, Legal Affairs Division, GATT Secretariat.

I. Introduction and Background

A. Preliminary Remarks

During the closing stages of the Uruguay Round of multilateral trade negotiations, the question was raised as to whether the rules governing international trade should include provisions in the social field. The ensuing debate has not been limited to trade ministers and scholars, but has spilled onto the streets in sometimes-violent protests, first at the 1999 Third World Trade Organization Ministerial Conference in Seattle, and later at subsequent international conferences covering a variety of topics all over the world. While such protests may have sharpened police crowd control methods and made the prospect of hosting international conferences a double-edged sword for municipal officials hungry for international prestige, the World Trade Organization ("WTO") position on social issues, especially those related to international labor standards, has remained the *status quo* established at the First WTO Ministerial conference at Singapore in 1996. The challenge to labor leaders and others who hope to bring the social field into the trade regime is to reinvigorate the debate to create some movement on the trade-labor front. Those who wish to keep trade rules free of environmental and labor concerns need to demonstrate that increased trade will improve overall social welfare leading to improved regulation and enforcement of environmental and labor standards.[1]

B. Themes and Issues

Some have referred to the trade connection of both environmental and labor standards as "social issues".[2] This term, undoubtedly, has a certain evocative resonance. But by attempting to map out an area for discourse that appears separate from, if not antagonistic to that of trade, the term risks further polarizing these mono-dimensional constituencies and obscuring the need for their reconciliation. Defining labor standards as a social issue may frame the debate in a perspective favorable to those trade purists who eschew any connection between trade rules and labor standards. Labor advocates may be well advised to focus their efforts on reconnecting labor with trade the same way that capital is connected with trade. Given the centrality of low labor costs to the workings of comparative advantage, one could argue that labor standards are more relevant to trade than intellectual property rights, which the United States successfully brought into the trade regime through the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").[3] Placing labor standards within the framework of comparative advantage has the advantage of framing the debate in a context already envisioned by the International Labor Organization's ("ILO") Declaration on Fundamental Principles and Rights at Work, which "[s]tresses that labor standards should not be used for protectionist

[1] The author would like to thank James Chalker for his research assistance. Portions of this essay are drawn from a chapter by the author entitled *International Recognized Labor Standards and Trade*, INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE 79–115 (Friedl Weiss, Erik M.G. Denters and Paul J.I.M. de Waart eds., 1998).

[2] S. Charnovitz, *The World Trade Organization and Social Issues*, 28(5) JOURNAL OF WORLD TRADE 17–33 (1994); S. Charnovitz, *Fair Labor Standards and International Trade*, 20(1) JOURNAL OF WORLD TRADE 61 (1986).

[3] For an argument as to why both labor standards and TRIPS do not belong in the WTO, *see* Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 126 (2002) (stating that, "[b]y putting TRIPS into the WTO, in essence we legitimated the use of the WTO to extract royalty payments").

trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up."[4] Can advocates of the trade-labor link define comparative advantage in such a way as to legitimate the role of labor standards in assessing the relevant advantage, or does comparative advantage hold such an esteemed place in the international trade regime that discussion of labor standards is foreclosed? By affirming its support for the notion of comparative advantage in almost the same breath as it warns against the use of labor standards for protectionism is the ILO signaling a reluctance to see comparative advantage connected with labor standards?[5]

Since the relevant substantive standards involved are not in question, whether for the conduct of multilateral trade or the protection of fundamental human rights pertaining to working conditions, the central issue revolves around the suitability of using trade measures as a means of enforcing international labor standards. This, then, is primarily an institutional and procedural matter. However, while the case for global environmental protection can be based to some extent on the survival of humanity at large, backed up to a degree by objective scientific evidence, it has been far more difficult to strike a balance between the trade and labor standards constituencies. There is little common ground between countries which advocate the effective enforcement of recognized international labor standards and those countries that see such concerns as merely a facade for protectionism.

C. International v. Fair Labor Standards

Confusingly, the proximate yet distinct concepts of "international labor standards" and "fair labor standards" have often been used interchangeably. The former concept refers to international agreements and instruments based on values widely shared in the international community. All countries, whether bound by these instruments or not, are encouraged to accept and respect them. In dealing with countries unable or unwilling to incorporate such international standards in their own social legislation, the ILO's distinctive tripartism has relied on consensus and persuasion rather than on sanctions or penalties.[6] This much criticized "lack of teeth" is exactly the reason why the United States previously sought the inclusion of a social clause in the WTO framework, "policed" by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). However, no concerted efforts were made by the United States to introduce a "social clause" in the Doha Negotiations. By contrast, labor standards are only considered fair by particular countries which seek to use their own "fair" standards as the socially correct yardstick for unilateral coercive action in an attempt to raise their competitors' production costs.[7] It is pursuant to such a "domestic" perspective that the United States has persistently attempted to internationalize its own national "fair labor standards" and to justify economic or trade sanctions in case of their breach. More recently, the United

[4] International Labor Organization, *Declaration on Fundamental Principles and Rights at Work*, ¶ 5 (1998), http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm (visited November 14, 2003).

[5] My thanks to Janelle M. Diller, the author of another chapter on labor issues in this book, for drawing my attention to the Declaration's comments in this regard and for other helpful comments on this essay.

[6] The International Labour Conference, one of the principal organs of the ILO, as well as committees established by it, are tripartite in composition. That is to say, two delegates from each member state represent the government, and one each employers and workers.

[7] B. Streil, *Social Correctness is the New Protectionism*, 73 Foreign Affairs 19 (1994).

States has pursued the inclusion of core international labor standards into its bilateral and multilateral trade agreements.[8]

D. From Marrakesh to Singapore

At the Ministerial Conference held at Marrakesh on April 15, 1994, the United States, supported by France and a few other countries, requested that a reference be made to internationally recognized workers' rights in the Final Ministerial Declaration.[9] The United States also requested the establishment of a WTO Committee on Labor Standards similar to the Committee on Trade and Environment. Both requests were rejected, but it was agreed that the issue of the "social clause" or "trade-labor link", *i.e.*, that of "the relationship between the trading system and internationally recognized labor standards" should be made a new agenda item for future consideration by the WTO.[10] Similarly, the issue of a social clause appeared dormant in the ILO after inconclusive debates on the constitutionality of a "trade-labor link" during the 1994 International Labor Conference and in its Governing Body.[11] Since then, however, there was a remarkable resurgence of interest in international labor standards and in their role in an open trading system, as reflected in a considerable amount of academic writing on the subject.[12] The Final Declaration of the First WTO Ministerial Conference held in Singapore in December 1996 signaled the reemergence of this issue when it devoted a paragraph to the subject. It stated:

> We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.[13]

Those who wanted the WTO to stay out of labor standards found this provision's acknowledgment of the primacy of comparative advantage supportive of their position.

[8] 19 U.S.C.A. § 3813 (6).

[9] *Marrakesh Ministerial Declaration of April 15, 1994*, 33 ILM 1263 (1994).

[10] *See* ¶ 8(c)(iii) of the Decision on the Establishment of the Preparatory Committee for the WTO.

[11] In 1994 the Governing Body established a Working Party on the Social Dimension of the Liberalization of International Trade.

[12] *See* J.M. Diller and D.A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law,* 91 AMERICAN JOURNAL OF INTERNATIONAL LAW 663 (1997); B.A. Langille, *General Reflections on the Relationship of Trade and Labor (or: Fair Trade is Trade's Destiny?,* in FAIR TRADE AND HARMONIZATION-PREREQUISITES FOR FREE TRADE 231 (J. Bhagwati and R.E. Hudec eds., 1996); P. de Waart, *Minimum Labor Standards in International Trade,* in CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 245 (P. van Dijck and G. Faber eds., 1996); J. de Castro, *Trade and Labor Standards*, 34 UNCTAD BULLETIN 9 (Nov.–Dec. 1995); V.A. Leary, *The WTO and the Social Clause,* 1 EUROPEAN JOURNAL OF INTERNATIONAL LAW 118–122 (1997); J.A. Canela-Cacho, The *Social Dimensions of the Liberalization of World Trade and Trade and Labor Standards: Can Common Rules be Agreed?: The View from the ILO*, in REGIONALISM AND MULTILATERISM AFTER THE URUGUAY ROUND (Bellis Demaret and Garcia Jiménez eds., 1998); John W. Head, *Throwing Eggs at Windows: Legal and Institutional Globalization in the 21st Century Economy*, 50 UNIVERSITY OF KANSAS LAW REVIEW 731 (2002); Ajit Singh and Ann Zammit, THE GLOBAL LABOR STANDARDS CONTROVERSY: CRITICAL ISSUES FOR DEVELOPING COUNTRIES (2000); José E. Alvarez and David W. Leebron, *Linkages*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 5 (2002).

[13] Singapore Ministerial Declaration, Article 4 (December 13, 1996), http://www.wto.org/english/thewto_Pe/minist_e/min96_e/wtodec_e.htm (visited November 14, 2003), reproduced in the Appendix to this book.

Others, however, considered it an important first step towards such standards. To date, the interpretation of the former has prevailed; leaving those who wondered what form WTO support for the ILO might take, still wondering.

II. Evolution of the Link Between Trade and Labor Rights

A. From Integrated to Segregated Standards and Back?

Human welfare derives from peace as well as socio-economic and cultural well-being.[14] As a complex, pluri-dimensional concept it also encompasses labor standards and a range of human rights, including the right to development. This matrix of complex issues was recognized after the Second World War, when international economic and social co-operation tackled unemployment and trade barriers simultaneously.[15] Thus, the abortive Havana Charter, once described as "the high watermark in the post-1945 world of liberal and social democratic thinking in the field of international economic relations,"[16] was a multilateral agreement on trade and employment. It was a comprehensive instrument designed for the implementation of one of the objectives of the United Nations, the attainment of higher standards of living, full employment, and conditions of economic and social progress and development.[17] Since then, various regulatory regimes governing trade, human rights and labor standards co-existed in "splendid isolation", supposedly as self-contained regimes, without being attuned to one another. In the free-wheeling debate over globalization, however, attempts are being made to integrate these separate but related concerns by such methods as bringing labor rights within the competence of the trade regime, matched by equally determined forces committed to keeping such concerns segregated.

B. The Impact of Globalization

Under the neoliberal model, which has been in the ascendancy since the collapse of the Soviet Union, it is common to speak of the "global market place" and the "global economy". Neoliberals argue, *inter alia*, that the globalization of markets, the internationalization of investment, production and distribution is the key to economic dynamism and growth, competitiveness and wealth. Integral to the globalization of markets is the removal

[14] *Preamble to the Charter of the United Nations*; Article2(1)(iii) European Bank for Reconstruction and Development: "(. . .) raising (. . .) the standard of living and conditions of labor"; the objective of the NAFTA Side Agreement on Labor Cooperation: improving working conditions and living standards, promoting compliance with and effective enforcement of labor laws.

[15] Article 1 of the Havana Charter for an International Trade Organization; Preamble and Article 1 of the Charter of the United Nations; preamble to OEEC Convention, of April 16, 1948; Convention on the Organization of European Economic Cooperation and Development ("OECD") of 1960, 888 UNITED NATIONS TREATY SERIES 179–199 (1973). For a summary of these antecedent debates, *see* F. Weiss, *The GATT 1994: Environmental Sustainability of Trade or Environmental Protection Sustainable by Trade?*, in SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE 382, 391–393 (K. Ginther, E. Denters & P.J.I.M. de Waart eds., 1995).

[16] G. Schwarzenberger, *The Principles and Standards of Internationa1 Economic Law*, 89 RECUEIL DES COURS 89 (1966).

[17] Article 55(a) UN Charter; discussion of the Interim Report of the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment (doc. E/469), Official Records of the Economic and Social Council, Second year, Fifth session, 96th Meeting, at 78–79. *See also* W.M. Scammell, *International Economic Co-operation and the Problem of Full Employment*, 6 YEARBOOK OF WORLD AFFAIRS 222–245 (1952).

of barriers to the transnational movement of capital and goods. The internationalization and free movement of labor is not on the neoliberal agenda, however.[18] Globalization's detractors warn of economic dislocation, unemployment, and environmental degradation and of the risk of friction or conflict between states due to the divergence of their regulatory systems and standards and to competition between them.[19] This is because economic and trade policy-making are no longer matters self-contained within a "national jurisdiction", but are part of the "global economy" where developments in major economies are significantly reflected in others. Yet national governments and international institutions continue to work mostly within traditional, fragmented jurisdictional frameworks and, as a result, have to deal with difficulties arising from such fragmentation. For example, unemployment is often seen as a trade problem caused by import competition from low wage economies with little or no social regulation affecting the price of labor. At the height of protectionism in the 1930s, Keynes saw the trade link clearly and offered a prescription which would make a neoliberal blanch:

> If nations can learn to provide themselves with full employment by their domestic policy (. . .) there need be no important economic forces calculated to set the interest of one country against that of its neighbors. There would still be room for international division of labor (. . .). International trade would cease to be what it is, namely, a desperate expedient to maintain employment at home (. . .), but a willing and unimpeded exchange of goods and services in conditions of mutual advantage.[20]

European and U.S. trade barriers against *e.g.*, Japanese imports constitute governmental action against trade-induced unemployment.[21] While economists admit that the pursuit of private interests in the market does not lead automatically to a socially acceptable outcome,[22] some doubt that trade policy is the right way to create jobs.[23]

C. The Link: ILO, GATT and Unilateral State Practice

A link between labor rights and trade is certainly not a recent issue, neither in the ILO nor even the GATT itself. From its inception, the ILO promoted international labor legislation—a certain equalization of levels of social protection between countries—so

[18] For two different perspectives on the neoliberal recipe for Latin America, *see* Paul Craig Roberts and Karen LaFollette Araujo, THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPAL PROBLEMS (1997); and María Eugenia Padua, *Mexico's Part in the Neoliberal Project*, 8 UNIVERSITY OF CALIFORNIA DAVIS JOURNAL OF INTERNATIONAL LAW & POLICY 1 (2002).

[19] D. Charney, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARVARD INTERNATIONAL LAW JOURNAL 423, 430–431 (1991).

[20] John Maynard Keynes, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 382 (1936), cited by Arthur Smithies, *Effective Demand and Employment*, in THE NEW ECONOMICS, KEYNES' INFLUENCE ON THEORY AND PUBLIC POLICY 558, 567 (1948); for critical discussions of labor market developments and protectionism to save jobs, *see also*, R. Blackhurst, N. Marin and J. Tumlir, *Adjustment, Trade and Growth in Developed and Developing Countries*, 6 GATT STUDIES IN INTERNATIONAL TRADE (1978); and GATT, TRADE POLICIES FOR A BETTER FUTURE, PROPOSALS FOR ACTION (1985) (the "Leutwiler Report").

[21] M. Hudson, *Trade, Development and Foreign Debt*, I INTERNATIONAL TRADE 143 (1992).

[22] *See, e.g.*, E. Matzner, *Policies, Institutions and Employment Performance*, in BEYOND KEYNESIANISM. THE SOCIO-ECONOMICS OF PRODUCTION AND FULL EMPLOYMENT 231, 252 (E. Matzner, and W. Streeck eds., 1991).

[23] A.K. Dixit, *Trade Policy: An Agenda for Research*, in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 283, 295 (P.R. Krugman ed. 1993).

as to provide a remedy for what became later known as "social dumping", *i.e.*, the risk of unfair competition based on the exploitation of workers.[24]

In the GATT, which unlike the Havana Charter made no reference to workers' rights,[25] the issue was discussed under labels such as "social dumping",[26] "social clause" and "workers or labor rights". Such debates past and present reflect a common fear that wages in developed countries are being forced down in a "race to the bottom" by unfair competition from countries with much lower labor costs. In the developed countries of the "North", the issue has normally manifested itself in the form of pressure by interest groups, often trade unions, on their governments to use market access as a lever for improving labor conditions in developing countries in the "South". Hitherto, a variety of strategies, including penalties and incentives, have been used to that end. Thus, unilateral trade measures resorted to in the past included antidumping duties[27] and countervailing duties.[28] More recently, import prohibitions were sought under unfair competition legislation[29] and under suspension of the MFN clause,[30] and preferences accorded under the Generalized System of Preferences ("GSP"), and other preferences made conditional upon the recognition by beneficiary countries of internationally-recognized workers rights. Thus, under the U.S. Trade Promotion Authority Act 2002 ("TPA")[31] it is envisaged that future TPA agreements should ensure that trading partners do not systematically fail to enforce their labor laws in a manner that affects their trade with the United States. It also includes provisions designed to promote the ability of trading partners to enforce, and raise their labor standards. Likewise, under the Andean Trade Preference Act ("ATPA") as amended by the US Andean Trade Promotion and Drug Eradication Act ("ATPDEA")[32] benefits for beneficiary countries depend, *inter alia*, on the extent to which the country provides internationally recognized workers rights, including whether it has implemented its commitments to eliminate the worst forms of child labor. Similarly

[24] F. Maupain, *Trade and Core Labor Standards*, 44, 6 WIRTSCHAFTSPOLITISCHE BLÄTTER 582 (1997); Jackson sees in "social dumping" the exploitation of prison or "sweated labor" (forms of forced labor including child labor), JACKSON, WORLD TRADE AND THE LAW OF GATT § 16.02 (1969).

[25] The GATT preamble merely mentions "raising standards of living" and "ensuring full employment"; Article XX (general exceptions) permits restrictive measures relating to the production of prison labor.

[26] The problem was considered as early as 1927 at the League of Nations World Economic Conference. It is based on the idea that lower wages paid to poorer workers in developing countries means that firms are able to compete unfairly against employers in more advanced countries, who must provide more benefits for their workers; the underlying reasoning is flawed because it undermines the very foundation and essence of free trade based on competition according to comparative advantage and because it tends to make things worse for poorer countries.

[27] For example, in 1924 Austria authorized penalty duties of up to 1/3 of the statutory rate on goods produced by labor working excessive hours. *See* ¶ 4(c) of the Federal Law of September 5, 1924 (Tariff Act, BGBl. No. 4 as amended), cited in Annex 4 to GATT Study on "Anti-Dumping and Countervailing Duties", Study of the GATT Secretariat, GATT July 1958, at 153.

[28] In 1926 the CSSR authorized countervailing duties on goods produced under "unfavorable social conditions of labor" that threatened domestic production.

[29] A 1980 action by a German asbestos producer under the German Unfair Competition Act for an import prohibition of Korean asbestos and a mandatory information of potential buyers failed because the court considered that unethical conditions of production even if in breach of an ILO Occupational Cancer Convention was not of essential importance to buyers.

[30] Uruguay, Colombia and Mexico unsuccessfully proposed amendments to the Havana Charter so as to permit "reasonable and equitable measures to protect its industry from the competition of like products produced under substandard conditions of labor and pay". The United States suspended Poland from MFN treatment in 1982 *inter alia* because of the outlawing of the independent trade union Solidarity.

[31] The Trade Act of 2002 (Pub.L.107210) was enacted on August 6, 2002.

[32] 19 U.S.C.3201, *et seq*.

the U.S. African Growth and Opportunity Act, as amended by the Trade Act of 2002 ("AGOA II"),[33] includes these conditions as best practice criteria. More recently, the bilateral Textiles Agreement between the Governments of the United States of America and the Socialist Republic of Vietnam stipulated that the Parties:

> reaffirm their commitments as members of the International Labour Organization (ILO), and agree to further cooperation with the ILO . . . [to] support the implementation of codes of corporate social responsibility by enterprises on a voluntary basis and in compliance with domestic laws and regulations, as a means to improve working conditions in the textiles sector.[34]

Reference is also made to a November 2000 Memorandum of Understanding between their respective Labor Ministries in accordance with which they are mandated to consider a cooperative program to improve working conditions in the textiles sector in Vietnam.[35]

Occasionally, boycotts were used to keep imports out.[36] Such international coercive reactions are spasmodic and, above all, primarily unilateral. Besides, it only provides temporary relief from import competition. Sadly, it is true that internationally recognized labor standards are disregarded, that children perform hazardous jobs, that labor laws are not enforced and, that trade union activists are harassed, jailed, disappear and are murdered.

Discussions of a "social clause" have been protracted, fraught with controversy and are replete with economic and political complexity and conflicting value systems. However, social issues are accepted as part of the global agenda which must be addressed by means of international cooperation, as was made clear, most recently, at the Johannesburg World Summit on Sustainable Development.[37] It is also clear that so called "social dumping" cannot be assessed on the basis of national "fair labor standards" of particular countries, but only with reference to international labor standards.

III. The Changing Framework

A. Integrating Separate Concerns

Globalization and related "one-world" views signal a new intellectual climate that appears to favor integrating the interdependent sectoral world orders of economic, trade and monetary relations.[38]

The WTO is mandated to "provide the common institutional framework for the conduct of trade relations among its Members (. . .)."[39] But it is also deemed well suited for wider economic, legal and political cooperation and for the development of "an integrated, more

[33] *See Section* 3108 of the Trade Act of 2002 on trade benefits under the African Growth and Opportunity Act, www.sice.oas.org/Trade/tradeact/act10.asp#SEC.%203108 visited November 25 2003).

[34] Article17(A) of the Agreement Relating to Trade in Cotton, Wool, Man-Made Fibre, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products Between the Governments of the United States of America and the Socialist Republic of Vietnam of July 17, 2003, *see* http://web.ita.doc.gov/Otexa/OTEXAGRE.NSF/5b1ca13778763be9852564740064905 3/ac51417721ec6b3885256d6b00481c00! OpenDocument (visited November 16, 2003).

[35] *Id.* Article17(B).

[36] In 1976 Scandinavian transport unions objected to practices of ships flying "flags of convenience". In 1985 violent incidents in South Africa triggered boycotts of Royal Dutch Shell which maintained coal and oil investments in South Africa.

[37] *The Johannesburg Statement on Sustainable Development* (September 4, 2002), http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.doc (visited November 14, 2003).

[38] The three guiding principles are: freedom, equality and reciprocity and values derived from principles of market economies, in particular private ownership, competitive enterprise and free trade.

[39] Article II(1) of the Agreement Establishing the WTO.

viable and durable multilateral trading system."[40] Some have argued that, as a matter of law, such integration must take place in harmony with peremptory norms and fundamental human rights and labor standards.[41] There is also the view that full respect for a minimum core content of universal and inalienable human rights for every person is essential for the implementation and enforcement of economic, social and cultural rights.[42] These views point to the relatively new concepts of "sustainable development"[43] and "good governance"[44] which evidently seek to reconcile civil and political human rights with economic, social and cultural rights.

However, governments will probably continue to use protectionist measures when these are deemed necessary, fair and reasonable, *e.g.*, for environmental reasons, or to uphold fair labor standards as originally envisaged in the Havana Charter.[45] The question then arises whether these measures will be employed unilaterally or in accordance with WTO disciplines interpreted in the light of their "social dimension".[46] Realistically, unilateral action is only within the arsenal of economically powerful nations and its use by such nations at the expense of economically vulnerable developing countries, even when deemed necessary, fair and reasonable by the former, will be perceived as protectionist by the latter. Turning to the multilateral approach, the critical issue is not primarily a formal but improbable link between the respective complaint procedures of the ILO and the WTO, it is instead the emerging consensus on the necessity of introducing "social aspects" into the multilateral trade regime or "economic aspects" into the setting and the supervision of international labor standards, as was clearly identified by the ILO in 1994.[47] Three options remain, leaving aside the punitive element inherent in the intermittent use or threat of unilateral trade restrictions to sanction or "enforce" certain labor standards.[48] One somewhat haphazard and slow approach could be based on case law from relevant domestic and international litigation, especially the GATT/WTO mechanism of dispute settlement.[49] A second approach could involve the insertion of references to relevant labor standards into various trade agreements. The third approach could involve the obverse inclusion of a "trade liberalization dimension" into the ILO's multilateral labor standards.

B. Historical Antecedents

1. From Linkage to Social Policy Conditionality

A linkage between labor rights and standards and multilateral trade rules has been proposed repeatedly in multilateral GATT negotiation rounds, but was consistently opposed

[40] ¶ 4 of the preamble to the WTO Agreement.

[41] Diller and Levy, *supra* note 12, at 664.

[42] De Waart, *supra* note 12, at 247; Article 28 of the Universal Declaration of Human Rights; ¶¶ 8 and 10 of the 1993 Vienna Declaration and Programme of Action, adopted on June 25, 1993 at the Vienna World Conference on Human Rights, June 14–25, 1993, 32 ILM 1661 (1993).

[43] *See* ¶ 1 of the preamble to the WTO Agreement.

[44] ¶ 11 of the 1993 Vienna Declaration and ¶¶ 66–67 of the Programme of Action, adopted at the Vienna World Conference on Human Rights; M.J. Kane, *Promoting Political Rights to Protect the Environment*, 18, YALE JOURNAL OF INTERNATIONAL LAW 389 (1993).

[45] Article 7 of the Havana Charter.

[46] On this *see further*, Weiss, *supra* note 15, at 382–401.

[47] ILO Governing Body, *Social Dimensions of the Liberalization of World Trade*, GB. 261/WP/SLD/1, of November 1994.

[48] Charnovitz analyzed four tracks: multilateral rules, unilateral action, bilateral conditionality and regional agreements, S. Charnovitz, *Environmental and Labor Standards in Trade*, 15 THE WORLD ECONOMY 335, 348 (1992).

[49] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), 33 ILM 1226 (1994).

by developing countries suspecting a protectionist ploy. The regular rejection of such a linkage prompted U.S. statutory actions in the 1980s,[50] some of which link trade and investment policies to performance with respect to U.S. labor standards,[51] some providing for unilateral trade sanctions against countries that violate basic workers' rights.[52]

More recently, various trade agreements contain provisions on "social policy conditionality". For instance, some refer to the improvement of living standards or employment or working conditions,[53] or even full employment[54] or generally to the need to uphold labor standards.[55] Some agreements require labor cooperation in a broad range of areas,[56] and others explicitly require coordination of policies on labor relations in accordance with ILO conventions and recommendations.[57] Such "linkage" discussions are therefore not new. To date, however, they have yet to result in the integration of carefully selected minimum international labor standards into the multilateral trading system, using the WTO as a permanent negotiating forum.

2. The ITO Connection

Member states of the League of Nations agreed to "endeavor to secure and maintain fair and humane conditions of labor for men, women and children, both in their own countries

[50] Five U.S. laws explicitly link worker rights and trade: the GSP, 19 U.S.C. §§ 2461–2467; the Overseas Private Investment Corporation(OPIC) Act, 22 U.S.C. §§ 2191–2200; the Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2701–2706; the Agency for International Development (AID) Program, 22 U.S.C.§ 2151 *et seq*.; section 301 of the Omnibus Trade and Competitiveness Act 1988, 19 U.S.C. §§ 2411–2420. *See also*, the Acts referred to *supra* notes 31 and 32.

[51] On issues of extraterritoriality of jurisdiction and on the inconsistency of U.S. standards with the principle of equal treatment in U.S. bilateral FCN treaties, *see* J.M. Zimmerman, *International Dimension of U.S. Fair Employment Laws: Protection or Interference?,* 131(2) INTERNATIONAL LABOR REVIEW 217, 225 *et seq.* (1992); on the 1984 re-authorization of GSP which turned its use into a bargaining chip, *see* R.E. Hudec, *Developing Countries in the GATT Legal System*", 50 THAMES ESSAY 115 (1987).

[52] For an overview *see* L. Compa, *Labor Rights and Labor Standards in International Trade,* 25 LAW & POLICY INTERNATIONAL BUSINESS 165, 182 (1993); Section 304(a)(2) and (3) of the U.S. Omnibus Trade and Competitiveness Act of 1988 vests discretionary authority in the U.S.T.R. to "suspend, withdraw, or prevent the application of, benefits of trade concessions (. . .)" to retaliate against "unreasonable", not necessarily unlawful, foreign trade practices including denial of foreign workers' right of association, and of the right to organize and bargain collectively; forced or compulsory labor; failure to provide minimum age for the employment of children; or failure to provide standards for minimum wages, hours of work, and occupational health or safety of workers. *U.S. Omnibus Trade and Competitiveness Act of* 1988, 28 ILM 15 (1989).

[53] Article 1(2)(a), *Central European Free Trade Agreement* ("CEFTA") 1992; Articles 3(b), 143(1)(a) *Treaty Establishing the Common Market for Eastern and Southern Africa 1993*.

[54] *Preamble to the GATT*; Article 2, *Stockholm Convention Establishing the European Free Trade Association 1960.*

[55] *See, e.g.,* the International Commodity Agreements on Natural Rubber (1987), Article 53; and successive International Sugar Agreements, Article 63; Article 64 of the 1986 Cocoa Agreement, J.-M. Servais, *The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?*, 128(4) INTERNATIONAL LABOR REVIEW 423 (1989).

[56] *Annex 1 on Labor Principles to the North American Agreement on Labor Cooperation* ("*NAFTA Labor Side Agreement*") between the United States, Canada and Mexico of 1993 contains a list of eleven such principles, 32 ILM 1499, 1515 (1993); *NAFTA Comes into Force-with a Glimmer of a Social Clause,* 133 INTERNATIONAL LABOR REVIEW 113 *et seq.* (1–1994); *see also,* the *Maastricht Protocol on Social Policy* of 1992 which expanded the European Union's legislative capacity by stipulating majority voting on a number of legislative issues; B. Bercusson, *The European Community's Charter of Fundamental Social Rights of Workers*, 53 MONTHLY LABOR REVIEW 624 (1990); for a comparative study of the NAFTA and the EU approaches, *see* K. van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICHIGAN JOURNAL OF INTERNATIONAL LAW 987, 997 *et seq.* (1995).

[57] Article 20 of the *Treaty on the Creation of Economic Union of the Commonwealth of Independent States*, 1993, 34 ILM 1298 (1995).

and in all countries to which their commercial and industrial relations extend (. . .).”[58] After the Second World War, the ITO—which of course failed to come into being—was mandated to curtail unemployment and eliminate trade barriers, thereby implementing one of the objectives of the United Nations.[59]

The Havana Charter, the ITO’s constituent treaty, would have revolutionized international trade relations by prohibiting, restricting or controlling the right of governments to interfere with the free flow of private trade, thereby curbing potential misuse or arbitrary use by states of their monopoly of regulation.[60] However, developing countries pointed out at that time “the apparent equality of the procedure can involve the most tremendous and unjust inequalities”[61] and that “free trade means free competition” which “implies the elimination of those who find themselves in less favorable conditions.” Consequently, “a policy of trade freedom should be developed in harmony with the peculiar conditions prevailing in industrially backward countries.”[62] In the end, Article 7(1) of the Havana Charter on “Fair Labor Standards” required Members to recognize that all countries have a common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit, and that unfair labor conditions, particularly in production for export, create difficulties in international trade. Such conditions had to be eliminated by appropriate action within the territory of each Member.[63] In cases of dispute settlement regarding complaints relating to labor standards, the ITO was required to consult and cooperate with the ILO.[64] Such implicit hedging of free trade ideology reflected the views of Keynes and Robbins on the eve of the creation of the Bretton Woods institutions.[65]

C. Labor in GATT Practice

1. Proposals by Contracting Parties

Already in 1953 the United States unsuccessfully proposed a provision declaring that unfair labor standards “create difficulties in international trade which nullify or impair benefits under this Agreement”.[66] Unfair standards were defined broadly, and vaguely, as the “maintenance of labor conditions below which the productivity of the industry and the economy at large would justify”. The United States also contended that trade problems attributable to unfair labor standards were actionable under Article XXIII GATT. A 1955 Working Party rejected New Zealand’s proposal for a GATT article on full employment,

[58] Article 23(a), *Covenant of the League of Nations.*

[59] Article 55(a) *UN Charter*, *see also, supra* note 14.

[60] K.W. Dam sees in the Charter a “codification” reflecting the U.S. view that its provisions constitute legally enforceable rules, but not that they amount to customary international law, *see* K.W. Dam, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 10 (1970).

[61] Colombian representative at first session of the ECOSOC, Church House, Westminster, London, (Doc.E/4, Annex 1a), at 74.

[62] *Id.* at 75.

[63] Havana Charter for an International Trade Organization, March 24, 1948, U.N.Doc.E/Conf.2/78.

[64] Article 7(2) Havana Charter.

[65] *See also* P.R. Krugman, *Introduction: New Thinking about Trade Policy*, in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 15 (P.R. Krugman ed. 1993); for an analytical framework on a measurable correlation, if not causality between economic freedom and prosperity, *see* J. Gwartney, R. Lawson, W. Block, ECONOMIC FREEDOM AND WORLD: 1975–1995 (1995).

[66] P.S. Watson, *The Framework for the New Trade Agenda*, 25(4) LAW & POLICY OF INTERNATIONAL BUSINESS 1237, 1253 (1994).

inter alia, on the ground that "the interest of every member-country to seek to maintain the highest possible level of productive employment and growing demand in its own territory was so obvious that an international commitment on this point would add little if anything to this already compelling incentive."[67] Likewise, during the mid-fifties the British Government was urged by the British Trade Union Congress to press for a fair labor clause in GATT and to use Article XXIII GATT "to impose sanctions on countries which did not take steps to eradicate unfair labor standards". Suggestions of that kind were probably made in contemplation of the possibility of a non-violation complaint[68] claiming "nullification or impairment" of tariff concessions in cases where the competitive position of an imported product had been upset by a subsequent domestic measure, which could not have reasonably been anticipated by the complaining party at the time it negotiated the tariff concessions on the imported product. Similar suggestions were made by other bodies from time to time.[69]

2. The Request of the United States for a Working Party

In June 1986 the issue was raised again in GATT when the United States attempted to inscribe "workers' rights" on GATT's agenda, a term later changed to "labor standards". In April 1987 the U.S. House of Representatives defined as one of the U.S. Uruguay Round negotiating objectives the adoption "as a principle of GATT, that the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade."[70] In July 1987, the United States formally requested the establishment of a Working Party to discuss the issue of the relationship of internationally recognized worker rights to international trade.[71] This led to some polarization amongst GATT contracting parties, some giving cautious support (Nordic countries, the European Communities, Japan and Israel), others, mainly the developing countries, either doubting GATT's competence in the matter, or reserving their position[72] or considering the ILO to be the proper forum for the issue.[73]

In support of their formal request, the United States invoked Article XXIX GATT according to which the contracting parties undertake to observe the general principles of certain chapters of the Havana Charter (I to VI & IX), including Article 7(1) of Chapter II relating to "Fair Labor Standards".[74] In requesting a Working Party the U.S. government attempted to prevent the adoption of protectionist U.S. legislation after the ILO's

[67] BISD 3S/231, at 240–241, ¶ 28.

[68] Article XXIII:1(b) GATT. *See* Chapter _ of this book.

[69] For more detail see F. Weiss, *Internationally-recognized Labor Standards and Trade*, 1 LEGAL ISSUES OF ECONOMIC INTEGRATION 161–178 (1996).

[70] S. Charnovitz, *The Influence of International Labor Standards on the World Trading Regime: A Historical Overview*, 126 INTERNATIONAL LABOR REVIEW 565 (October 1987).

[71] C/M/212, 6.8.1987, at 32. The five basic international labor standards—freedom of association, freedom to organize and bargain collectively, freedom from forced or compulsory labor, a minimum age for the employment of children, and minimum standards in respect of conditions of work—were essentially those contained in the U.S. Generalized System of Preferences Renewal Act of 1984.

[72] *Id.* Mexico, Brazil, Colombia, Cuba, Yugoslavia, Tanzania, Malaysia, Chile, Singapore, Philippines, Indonesia, Hong Kong, Nigeria, Thailand and Czechoslovakia.

[73] Nicaragua, Mexico and Cuba.

[74] When, in September 1948, Article XXIX GATT on the relation of this Agreement to the Havana Charter was redrafted by a Working Party on Modifications to the General Agreement it stated that "by virtue of the Final Act signed at Havana, the contracting parties must regard themselves *morally bound* not to go back on the principles evolved at Havana" (emphasis added), Analytical Index, 2 GUIDE TO GATT LAW AND PRACTICE 996 (1995); see also WTO Analytical Index, 1st edition (2003).

refusal to consider the matter on the ground that it belonged to the GATT.[75] The United States also indicated that it was ready to exclude from discussion in GATT any issues related to *comparative advantage*. This stance shows awareness beyond tactical calculation that comparative advantage crucially reflects differences of economic development, including "cheaper" labor which does not necessarily mean ill-treated or oppressed labor. Nonetheless, its request for a Working Party was repeatedly rejected. Lastly, it should be noted that pursuant to the 1988 U.S. Omnibus Trade and Competitiveness Act, worker rights became a principal U.S. objective for the Uruguay Round negotiations.[76]

3. Deliberations in GATT Councils

Informal consultations in search of a consensus on the Working Party continued.[77] In seeking to win broader support, the United States stressed that the purpose of the Working Party would be to examine the "possible relationship" of internationally recognized labor standards to trade, without prejudice to the position of any country as to whether such a relationship would be found to exist. The United States also offered other reassurances: it was not seeking to impose its own labor standards on the world, nor to negotiate an international minimum wage. It also recalled that workers' rights were not a new issue in GATT, making reference to its Preamble,[78] as well as to Articles XX(e),[79] and XXIX.[80] However, Mexico and many other contracting parties, considered internationally-recognized labor standards to be those found in numerous ILO Conventions, rather than in legislation or domestic practices of some countries. These countries also argued that the GATT and the ILO should not get involved in matters of each other's competence.[81] Pakistan, echoing the anxieties of others, thought the request for a Working Party motivated by protectionist considerations and ultimately designed to neutralize whatever comparative advantage developing countries had. In that context, it recalled the bitter experience of developing countries with the establishment of the Working Party on Market Disruption in the 1950s, which had culminated in the imposition on developing countries of the Multifibre Arrangement.[82]

In re-submitting to the GATT Council of October 3, 1990 its request in slightly amended form, the United States sought to dispel two types of concerns: the issue of GATT relevance, and the possible misuse of GATT discussions of this matter toward protectionist ends. Once again the United States stressed that the very issue of GATT relevance was without prejudice to any delegation's view of the matter and that, like other

[75] The proposed terms of reference were: "to examine the possible relationship of internationally-recognized labor standards to international trade and to the attainment of the objectives of the GATT". *See* GATT/CP.2/22/Rev.1, BISD II/39adopted on September 1 and 2, 1948.

[76] Section 1101(b)(14); the Act also envisages a review of their relationship to GATT articles, objectives, and related instruments with a view to ensuring that the benefits of the trading system are available to all workers as well as the adoption as a principle of the GATT that the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade.

[77] *See, e.g.*, C/M/217, 8.3.1988, at 32.

[78] ¶ 1 of the preamble requires trade and economic relations to be conducted with a view to raising "standards of living".

[79] Article XX(e) GATT permits contracting parties to prohibit imports of "products of prison labor".

[80] Article XXIX(1) GATT stipulates: "The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures." This incorporation by reference includes the Havana Charter's provisions on internationally-recognized labor standards; C/M/220, 8.6.1988, at 26.

[81] *Id.* at 27.

[82] *Id.* at 30; *see also*, C/M/234, July 31, 1989, at 74–76.

delegations, it was determined to prevent misuse of the discussion of internationally recognized labor standards as a justification for protectionist measures. Therefore, the proposed Working Party should not put into question *legitimate* comparative advantage or limit the range of internationally-recognized labor standards to only a select few.[83]

IV. GATT Panel Practice

A. Adjudication Without Law?

As mentioned above, one of several approaches to the integration of separate concerns extrinsic to the WTO into the WTO framework might consist of WTO panel adjudication as between competing regulatory standards of WTO Members. However, in the absence of a "social clause" in the WTO framework and of an express general exception in the GATT, on what legal basis could a WTO panel seek to reconcile protecting "free trade" with trade restrictions? For instance, could a panel condone restrictions on the basis that they are used against products supposedly made in breach of international labor standards?

As to the approach itself, it might be instructive to consider relevant WTO practice with proximate "trade and environment" issues. It is noteworthy that while these issues have been discussed extensively in the WTO Committee on Trade and Environment, considerably more progress was made in the Dispute Settlement Body ("DSB") administering the DSU and the panel process, than at the political level. This is not surprising. On the contrary, there would seem to be an emerging pattern according to which WTO panels, by default of WTO Members, have virtually exercised law-making power delegated by WTO Members unable or unwilling to take decisions on new standards. For the time being, interests and positions of WTO Members engaged in the debate on a social clause in trade agreements are simply too far apart for such an agreement to be reached. On the other hand, while the panel process might in certain instances yield "markers" for the ongoing debate, it is, nonetheless, restricted to preserving the rights and obligations of Members and to clarifying the existing provisions of covered agreements in accordance with customary rules of interpretation of public international law. It should be recalled that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[84]

B. Protection of Domestic Labor

A 1960 GATT Report of Experts on "Anti-Dumping and Countervailing Duties"[85] discussed "labor" as a factor of production in connection with dumping and noted "(. . .) that the term "production costs" covered all those items involved, directly or indirectly, in the cost of producing an article" including labor. However, measures seeking to improve domestic labor or employment conditions, directly or indirectly, have not been accepted as justifying exemptions from the prohibition of import restrictions. A 1958 Panel Report examined the alleged inconsistency with GATT Article III:4 of an Italian law which provided special credit facilities to some categories of farmers for the purchase of

[83] Relevant but not exhaustive standards included the freedoms of association, organization and collective bargaining, and from forced or compulsory labor nor should it attempt to interject the GATT into the process of establishing labor norms. C/M/245, November 1, 1990.

[84] Article 3.2 DSU.

[85] L/1141, BISD 9S/194, adopted on May 27, 1960.

agricultural machinery produced in Italy. Italy's defense was that the law only concerned the improvement in the employment of labor and was not, therefore, related to the matters covered by Article III:4, namely the sale, purchase or transportation of imported and domestically produced products. The Panel, however, rejected this defense, and observed that while the GATT does not limit the right of contracting parties to adopt measures for improving the conditions of employment, or to protect a domestic industry, it will not condone discriminatory measures which might adversely modify the conditions of competition between the domestic and imported products on the internal market.[86]

Similarly, a Working Party was not swayed by Italy's argument that it needed import restrictions against potassium sulphate imported from Israel because it wanted to establish a domestic industry in areas of high unemployment and, consequently, urged Italy to dismantle them.[87]

Another Panel held Japanese import restrictions, quotas and import licenses on leather products, to be contrary to Article XI:1 GATT, even though Japan had claimed that they operated for the benefit of a distinct underprivileged population, the Dowa people. That Panel narrowly adhered to its terms of reference under which it was required to examine the matter "in the light of the relevant GATT provisions." It pointed out that Japan had failed to invoke any provision of the GATT to justify the import restrictions, and therefore declined to take the special historical, cultural and socioeconomic circumstances into account, deciding that it was not for the Panel to establish whether the present measures would be justified under any of the GATT provisions.[88]

Similarly, the European Community failed to persuade another Panel that Article XI GATT did not constitute an absolute prohibition of quantitative import restrictions and that it should not, therefore, be applied in an absolute and legalistic manner. Again the Panel rejected both the EC's defense that the relevant import restrictions were necessary to deal with economic and social problems, and its contention that historical and general factors must be taken into account, as well as the specific economic and social situation in each sector, such as the threat of serious injury to domestic production and employment through increases in imports and competition with lowpriced foreign products. As the European Community did not claim any GATT justification for these arguments, the Panel considered such matters to be outside the purview of Articles XI and XIII of the GATT and, therefore, outside its consideration.[89]

In the course of the proceedings of the *First Tuna Panel*, Venezuela as an interested third party submitted that the U.S. import prohibition was inconsistent with Article XI:1 of the GATT and not covered by any of the exceptions in Article XI:2. It also observed that to allow a country to impose a non-discriminatory ban on the sale of both domestic and imported goods because their production causes harm would potentially allow any nation to justify unilaterally imposing its own social, economic or employment standards as a criterion for accepting imports. If that were accepted, it would mean that influential contracting parties could effectively regulate the internal environment of others simply by

[86] Report of the GATT Panel, *Italian Discrimination against Imported Agricultural Machinery*, BISD 7S/60, adopted on October 23, 1958.

[87] Report of the GATT Working Party, *Italian Restrictions Affecting Imports from Israel*, BISD 10S/130, adopted on December 9, 1961.

[88] Report of the GATT Panel, *Japanese Measures on Imports of Leather*, BISD 31S/94, adopted on May 15/16, 1984.

[89] Report of the GATT Panel, *EEC—Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, BISD 30S/129, adopted on July 12, 1983.

erecting trade barriers based on unilateral environmental policies which was, of course, contrary to the fundamental premises of the GATT.[90]

The Panel Report also determined that while contracting parties are free to adopt environmental policies to any standard of their own choice, they must not in so doing either prohibit imports from countries with lower standards nor expect that their unilateral higher standards will be accepted as being higher to and exempted from their GATT obligations by virtue of the general exemptions laid down in Article XX GATT. The Panel further concluded that the concerns of the drafters of Article XX(b) GATT had focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.[91] It also indicated ways in which the Contracting Parties could establish trade restrictions considered desirable beyond those limited by Article XX GATT, namely either by amending that article, or by waiving GATT obligations, or indeed by developing standards on a case-by-case basis or through multilateral standard setting for instance under the auspices of the United Nations.

In the *Second Tuna Panel* case[92] the EC and the Netherlands contended, contrary to the view of the United States, that when interpreted contextually, the provisions of paragraphs (b) and (g) of Article XX GATT, as indeed those of other paragraphs of Article XX GATT, were subject to a jurisdictional limitation. Consequently, the exception in paragraph (e) in respect of the products of prison labor was not intended to eliminate prison labor practices in other contracting parties, because paragraph (e) was not conceived as a humanitarian provision. Virtually all contracting parties operated systems of prison labor, not necessarily forced or hard labor. Contracting parties simply wanted to be able, if necessary, to protect themselves against the "unfair competition" resulting from the low cost labor employed in the production of products of prison labor. Nevertheless, the Panel observed that the example of Article XX(e) GATT relating to products of prison labor showed that the GATT did not proscribe in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure.[93]

Another Panel found Canada's export restrictions of unprocessed herring and salmon contrary to Article XI:1 GATT and neither justified by Article XI:2(b) nor by Article XX(g) GATT.[94] However, the Panel did not directly endorse the U.S. argument that the purpose and effect of the export restrictions was not the conservation of resources but the protection of Canadian processors and the maintenance of employment for Canadians in British Columbia.

All the aforementioned Panel Reports clearly show that GATT Panels have not condoned trade restrictions as a means of enforcing domestic legislative or regulatory standards, unless these can be justified under specific provisions of the GATT.

While panels under the WTO DSU have not abandoned the requirement that trade restrictions be justified under specific provisions of the GATT, they have signaled a

[90] Report of the GATT Panel, *United States—Restrictions on Imports of Tuna,* BISD 39S/155, ¶ 4.27, circulated September 3, 1991 (unadopted); note that Venezuela was more sympathetic to an exception to Article XI for agreed compliance measures taken under an international environmental treaty regime.

[91] *Id.* ¶ 5.26.

[92] *United States—Restrictions on Imports of Tuna: Reports of the Panel,* DS29/R, dated June 16, 1994 (unadopted).

[93] For a discussion of this Panel, *see* F. Weiss, *The Second Tuna GATT Panel Report*, 8(1) LEIDEN JOURNAL OF INTERNATIONAL LAW 135–150 (1995).

[94] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98, ¶¶ 3.11 and 5.1, adopted on March 22, 1988.

willingness to allow such restrictions if they are implemented in a non-discriminatory manner. The Appellate Body in *US—Shrimp*, held that U.S. trade restrictions on the importation of shrimp fell within the exception offered by Article XX(g) GATT, but they were "applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX."[95] Confirming the suitability of unilateral trade restrictions that meet the requirements of both the chapeau and a specific provision of Article XX GATT, a later Appellate Body ruling found that the United States had brought its application of its *s*hrimp regulations into compliance with its GATT/WTO obligations.[96] The original Appellate Body *US—Shrimp* decision did not decide the question of whether there was any implied territorial limitation to jurisdiction under Article XX(g) GATT, deciding that since all five species of sea turtles protected by the U.S. regulation passed through U.S. territorial waters, there was a sufficient "nexus" between the United States and the sea turtles.[97] The issue of an implied territorial limitation to jurisdiction under Article XX GATT may prove of primary importance should a Member implement trade restrictions to protect the life or health of workers in other Members under Article XX(b) GATT.

C. Protection of Foreign Labor

1. Potential Legal Bases in GATT/WTO Law

In view of the apparent readiness of WTO panels to address the growing interface between trade and other issues within the existing GATT/WTO legal framework, it might be interesting to survey GATT provisions that could serve potentially as a legal basis for trade restrictions against imports produced in violation of workers' rights or other international human rights standards. Not surprisingly, a recent study concluded that "little support exists for interpretations permitting such restrictions on imports" based on rules governing antidumping, subsidies, safeguards and general exceptions for restrictions relating to the products of prison labor.[98]

Last but certainly not least, there is Article XX(b) GATT under which measures restrictive of trade could be adopted or enforced provided they can be shown to be "necessary to protect human, animal or plant life or health." The critical question is whether it can be interpreted in such a way that domestic regulations adopted pursuant to international standards protecting workers rights may be relied upon to restrict imports of products made under conditions of production which fall short of those international standards. Panel case law to date holds little promise in that respect.

2. The Implications of United States—Reformulated Gasoline

The Panel Report on *United States—Standards for Reformulated and Conventional Gasoline* of 1996 ruled that regulations of the U.S. Environmental Protection Agency adopted

[95] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (1998), ¶ 186

[96] Report of the Appellate Body, *United States—Import Prohibitions of Certain Shrimp & Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001), ¶ 154.

[97] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (1998), ¶ 133.

[98] Diller and Levy, *supra* note 12, at 695–96; Article VI GATT and Agreement on Implementation of Article VI GATT 1994; Agreement on Subsidies and Countervailing Measures; Article XIX and Agreement on Safeguards; Article XX(e) GATT.

under the 1990 Clean Air Act Amendments (P.L.101–549 §219) unlawfully assigned different methods for measuring emission standards for "reformulated" and "conventional" gasoline to domestic and foreign refiners respectively. The Panel found that the U.S. regulations "are not consistent with Article III:4 of the GATT, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the GATT."[99] The Panel rejected the general exemption invoked by the United States under Article XX(b) GATT, taking the view that the contested measure was not necessary for the protection of human life or health as required by that Article because alternative measures "less inconsistent" with the GATT were "reasonably available".

The Appellate Body partly upheld the appeal of the United States by reversing the Panel's main legal conclusion.[100] However, the Appellate Body also examined a question that was not addressed by the first-instance panel: whether the regulations also meet the requirements of the introductory provisions of Article XX GATT, its head note or "chapeau". According to that "chapeau", all exceptions under Article XX GATT are only available on condition that the qualifying measure is not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or [be] a disguised restriction on international trade."

The Appellate Body found that provision to be aimed at preventing abuse or misuse of the exceptions contained in Article XX GATT in the sense that "the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned." But the Appellate Body neither clarified the notion of "legal rights of the other parties concerned", a notion which may well hold the key to future interpretations of Article XX GATT, nor whether due regard for those rights would have to involve some balancing of interests. The Appellate Body also criticized the United States for its failure to pursue the possibility of cooperative arrangements with the governments of the complainants, Venezuela and Brazil. Again, the Appellate Body failed to indicate whether by describing the non-pursuance of cooperative arrangements as an omission, it meant to establish a legal requirement that negotiations be sought as a condition for invoking Article XX GATT. Picking up this thread, the *United States—Shrimp* Appellate Body report found that the United States' unilateral attempts to protect sea turtles via trade restrictions amounted to unjustifiable discrimination under the chapeau.[101] More pertinently, the Appellate Body in the *Gasoline* report also censured the failure of the United States "to count the costs for "foreign refiners" resulting from the use of a different method",[102] but again did not explain why regulators have a legal obligation to take foreign costs into account, nor how this should be done. Could these reasons, placed in the context of labor standards, justify resort to the exception of Article XX(b) GATT, at least *vis-à-vis* a defendant Member who has accepted relevant international labor standards, but has failed to implement them effectively? Would prior cooperative arrangements need to involve assistance toward such implementation? Could it be argued that governments must henceforth weigh the regulatory impact of their measures on foreigners, and if so

[99] *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Panel, WT/DS2/R (1996), ¶ 8.1.

[100] Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (1996).

[101] Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (October 12, 1998), ¶ 172.

[102] *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 101.

could a ban on products made for instance with child labor ever succeed,[103] considering that throughout WTO panel proceedings special consideration is to be given to the interests of developing countries?[104] How are these interests defined? Even in the face of mounting evidence of the long-term damage done to developing countries by the use of child labor, the interests of developing countries may continue to be defined by trade ministers in such a way that any restriction on their trade may be viewed with hostility.

However, despite present doubts about the suitability of the WTO's case-by-case approach for the reconciliation of trade rules and labor standards, there are also more hopeful developments. Although leaving many of the questions raised by the Appellate Body in *United States—Reformulated Gasoline* unanswered, subsequent Appellate Body decisions have addressed the necessity requirement of XX(b) GATT. In a case involving France's prohibition of the import of certain asbestos containing products, the Appellate Body held that the restrictions were "necessary to protect human life or health within the meaning of Article XX(b) of the GATT."[105] Drawing from the *Korea—Beef* case, the Appellate Body reasoned that a trade restrictive measure cannot be deemed "necessary" if there is "an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it." If such a measure is not available, a Member "is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[106] Such an interpretation of Article XX(b) GATT offers the possibility that a trade restrictive measure designed to combat child labor would be tenable if it were shown that alternative measures, not inconsistent with GATT had failed and no reasonable alternative remained. In determining the appropriateness of trade restrictive measures the record of U.S. actions to promote the abolition of child labor, within the ILO and elsewhere would no doubt be integral.

Another hopeful sign is that panels increasingly invoke general principles of international law and have always extensively used the Vienna Convention on the Law of Treaties, at least for purposes of textual interpretation.[107] Such relatively greater openness to international law has been confirmed by the Appellate Report in *United States—Standards for Reformulated and Conventional Gasoline*. In that case, the Appellate Body not only observed that the "GATT is not to be read in clinical isolation from public international law", but also cited decisions of the International Court of Justice, the European Court of Human Rights and of the Inter-American Court of Human Rights.[108] In *United States—Shrimp*, the Appellate Body looked to the United Nations Convention on the Law of the Sea and other international agreements to determine that sea turtles constituted an exhaustible natural resource.[109] Such efforts to interpret GATT provisions in light of other principles of international law may bode well for those who advocate the use of unilateral trade restrictions to promote respect for international labor standards, which are highly codified within international law.

[103] S. Charnovitz rhetorically raised the question whether future panels might require this for a ban on elephant ivory or a pesticide residue restriction, S. Charnovitz, *New WTO Adjudication and its Implications for the Environment,* 19 INTERNATIONAL ENVIRONMENT REPORTER 851–856 (September 18, 1996).

[104] *See* Articles 3.2, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8 and 27.2 of the DSU.

[105] Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS 135/AB/R (2001), ¶ 175.

[106] *Id*. at para 171.

[107] *See* Article 3.1 of the DSU which recognizes that panels may wish "to clarify (. . .) provisions of (. . .) agreements in accordance with customary rules of interpretation of public international law".

[108] *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 101, at p. 17.

[109] Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998), ¶¶ 130–134.

V. Standard Setting

A. Merits and Demerits of the Incorporation of Standards

In view of the restrictive interpretation of Article XX GATT in GATT panel practice, and of the limited scope within the dispute settlement mechanism for integrating some kind of social clause in the multilateral trading system, it is necessary to consider alternative approaches. Based on the integrative objective of "sustainable development" laid down in the preamble to the Agreement Establishing the World Trade Organization,[110] such an alternative approach might consist of introducing labor standards either by reference to the ILO or other conventions, or by the insertion of appropriate language in the WTO Agreement. The terms of the preamble are wide enough to permit action pursuant to a social clause in the sense of a "floor" governing working conditions everywhere. But should there be such a clause in the multilateral trading system? The supporters of a social clause have argued, *inter alia*, that it would promote fair competition between exporters of developing countries while ensuring that those respecting minimum labor standards are not penalized for their efforts to promote social development; that it would prevent increased international competition from leading to a destructive "race to the bottom" in the conditions of work and life of workers worldwide; that it would prevent industrialized countries from collaborating in the exploitation of workers in developing countries if they failed to press for the adoption of universal minimum labor standards; and above all that it would strengthen the resolve to resist pressures for increased protectionism.

Developing countries on the other hand oppose such a clause because they view it as disguised protectionism potentially obstructing their industrial development and depriving them of their key comparative advantage which is the productive use of low-cost labor; and because they resent interference in their domestic affairs as well as being asked for reciprocity in social obligations in return for trade concessions.

Whatever the merits of any of these points of view, much will depend on agreement being reached as to the standards to be included in a social clause.

B. Selection of Standards for a Social Clause

The first question is whether ILO Conventions should be used; secondly, whether all or most of them should be selected; and thirdly, on what basis such a selection should be made?

If ILO Conventions are to be chosen, the standards concerned would have to be both fairly precise to be enforceable and reasonably flexible to secure worldwide acceptance by countries with different social structures, climates and cultures at different stages of economic development.[111] Thus, reference could be made in the WTO Agreement to certain ILO minimum standards which command widespread respect, do not appreciably impact on developing countries competitive position in world trade, and are subject to monitoring and enforcement by appropriate machinery. The approach would be reminiscent of the

[110] The Parties recognize, *inter alia*, that "their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment (. . .) and expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development (. . .)"; see N. Schrijver and I. Weiss, INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT, PRINCIPLES AND PRACTICE (2004).

[111] For a review of different proposals see, G. van Liemt, *Minimum Labor Standards and International Trade: Would a Social Clause Work?*, 128 (4) INTERNATIONAL LABOR REVIEW 433, 436 *et seq.* (1989).

debate concerning TRIPS which originated in a desire, mostly on the part of the United States, to use the "teeth" of the GATT dispute settlement system to enforce existing standards of intellectual property rights.[112]

Relevant minimum labor standards would have to include the Freedom of Association and Protection of the Right to Organize Convention 1948 (Nr.87),[113] the Right to Organize and Collective Bargaining Convention 1949 (Nr.98), the Convention concerning Forced or Compulsory Labor 1930 (Nr.29), the Convention concerning the Abolition of Forced Labor 1957 (Nr.105), the Discrimination (Employment and Occupation) Convention and Recommendation 1958 (Nr.111), which promotes equality of opportunity and treatment in respect of employment and occupation.[114] To these must be added the Worst Forms of Child Labor Convention (Nr.182). At present, however, it must be doubted that the WTO could become an enforcement agency in respect of social standards evolved by the tripartite ILO and under its supervisory machinery. The WTO obviously lacks competence and experience in the matter, not to mention a tripartite structure. Moreover, developing countries might feel that rich countries police poor countries, using trade restrictions to penalize them for falling below certain human rights standards. Such an approach would also involve the risk of being extremely divisive and contrary to the spirit of Article 14 of the Charter of Economic Rights and Duties of States.[115] For these reasons, institutional collaboration between the ILO and the WTO, if any, should be established on "ILO turf", for instance by introducing some kind of trade liberalization component. On the other hand, existing flexibilities built into the WTO's system of dispute settlement which benefit developing countries might yet induce them to accept the enforcement of agreed standards in accordance with the provisions of the DSU.

C. Supervision of Compliance

The United States pushed TRIPS into the Uruguay Round of multilateral trade negotiations, *inter alia*, so as to secure compliance with a future TRIPS Agreement in accordance with the planned WTO dispute settlement mechanism. For the same reason the United States and other developed WTO Members prefer the WTO forum.

A broad approach to "enforcement" of labor standards would grant a large number of people and institutions some supervisory role, as is the case, for instance, in the United States where organizations and individuals have standing to request the President each year to review the status of labor rights within the GSP, or the system of written communications by individuals to the UN Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. A narrow approach to "enforcement" would restrict complaints to those brought against governments, as is

[112] *See* F. Weiss, *Trade Related Intellectual Property Rights and the Uruguay Round Negotiations*, in LIBERALIZATION OF SERVICES AND INTELLECTUAL PROPERTY IN THE URUGUAY ROUND OF GATT 87–113 (Georgio Sacerdoti ed. 1990).

[113] *See also*, *The Universal Declaration of Human Rights*; *The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; The American Convention on Human Rights ("Pact of San Jose"); The Banjul Charter on Human Rights and Peoples' Rights of the Organization of African Unity; The European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter.*

[114] International Labor Organization, 1 INTERNATIONAL LABOR CONVENTIONS AND RECOMMENDATIONS 1919–1991 (1992); Van Liemt, *supra* note 112; *see also* H.K. Nielsen, *The Concept of Discrimination in ILO Convention No. 111,* 43 *ICLQ* 827 *et seq.* (1994); for a survey of these standards, *see* Compa, *supra* note 52, at 169 *et seq.*

[115] *UN General Assembly Resolution 3281* (XXIX).

currently the case under the ILO and WTO regimes which exclude complaints against individual companies. However, states are notoriously reluctant to act against each other in the labor field as this is seen as an unfriendly act involving risks of counter-claims, and small economies feel particularly vulnerable to retaliation.[116] Techniques such as consultation, negotiation and conciliation should be given priority. The withdrawal of trade advantages—always amounting to some contraction of free trade—should only be used as a last resort.

VI. Beyond Singapore?

A. WTO Ministerial Meetings

Since Singapore there have been four WTO ministerial meetings, but there has been no progress on labor standards. Although the 1999 Seattle Ministerial sparked street protests, there was little movement inside the ministerial itself. The United States and the European Union came to Seattle armed with trade-labor working group proposals, but the divisions and tensions between developed and developing country delegates were as deep as those between protestors and police out on the streets. The ministers left Seattle with no declaration. Two years later, the WTO ministers sidestepped the issue, suggesting that those who interpreted the Singapore Declaration as removing labor issues from the competence of the WTO may have been correct. The Doha Declaration states, "[w]e reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labor standards. We take note of work under way in the International Labor Organization on the social dimension of globalization." Reference to the ILO's ongoing investigative work into the social dimension of globalization doubly reaffirms the interpretation of the Singapore Declaration that the ILO, not the WTO is the correct arena for international labor standards. For its part, it is doubtful that the ILO is going to advocate that states be granted the weapon of unilateral trade sanctions to further workers' rights.[117] One wonders how long the WTO can keep pushing the trade-labor debate onto the ILO.

B. Using Multilateral and Bilateral Agreements as a Model for WTO Action

The lack of progress since Singapore has not dampened U.S. support for bringing labor standards into the WTO, but the United States has adopted a new approach to further the attainment of this goal. In recently enacted legislation granting the U.S. President "trade promotion authority", which limits Congress' ability to consider trade agreements piecemeal, the Congress reiterated its support for the inclusion of labor standards in trade agreements.[118] This legislation requires U.S. trade negotiators to pursue as "principal negotiating objectives" assurances that trade agreement partners enforce their labor laws, strengthen their respect for core labor standards, and that labor "policies and practices of the parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against [U.S.] exports or serve as disguised trade barriers." Core labor standards are identified as, "the right of association[,] the right to organize and bargain collectively[,] a prohibition on the use of forced or compulsory labor[,] a minimum age

[116] *See* S. Leckie, *The Inter-state Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, 10 HUMAN RIGHTS QUARTERLY 249 (May 1988).
[117] International Labor Office, *ILO Activities on the Social Dimension of Globalization: Synthesis Report*, (July 12, 2002) http://www.ilo.org/public/english/wcsdg/docs/synthesis.pdf (visited November 16, 2003).
[118] 19 U.S.C.A. § 3802 (b) (11) *et seq*.

for the employment of children[,] and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[119]

The United States has shifted its focus from bringing workers' rights into the WTO to reaching bilateral and multilateral trade agreements that incorporate core labor standards into their regimes. Washington hopes that such agreements can serve as models for the WTO and "contribute to the WTO system by introducing innovation and strengthened disciplines."[120] Among the regional trade agreements that the United States is trumpeting with regard to promoting labor rights is the North American Agreement on Labor Co-operation ("NAALC"), a side agreement accompanying the North American Free Trade Agreement ("NAFTA"). The United States is negotiating similar multilateral agreements and bilateral trade pacts throughout the globe. One such bilateral agreement with Jordan includes an article on labor standards. Each nation pledges to enforce its labor laws and offers a set of core labor standards, which are the same five standards enunciated in the aforementioned trade promotion authority legislation.[121] The agreement also sets up a dispute resolution process which, after a panel and conciliation process, allows for an aggrieved party "to take any appropriate and commensurate measure."[122]

Although it remains to be seen how bilateral arrangements like that with Jordan will play out and if they will have a didactic effect on the WTO, it is questionable if many labor rights advocates would join the U.S. government in offering the NAALC as a possible model for the WTO. A recent Human Rights Watch report found the NAALC's protections of workers rights somewhat wanting.[123] Labor organizations have even embarked on inter-American cooperation as a new range of trade agreements are negotiated. The AFL-CIO and the Central Unitaria de Trabajo ("CUT"), a Chilean labor organization, have issued joint declarations regarding trade negotiations between their respective countries calling for the inclusion of labor protection in any final agreement.[124] There have also been specific campaigns targeting countries for their failure to live up to their obligations to respect international labor standards. For example, a recent Human Rights Watch Report on child labor in the Ecuadorian banana industry called upon international trade agreements to include fundamental workers' rights provisions and recommended that "failure to effectively enforce or progressively implement such standards should trigger the same dispute settlement, enforcement procedures, or penalties available to other issues covered by these agreements."[125] Perhaps the most aggressive campaign is that of the International Confederation of Free Trade Unions ("ICFTU"), which is endeavoring to hold WTO Members accountable for their statements made in Singapore and reiterated at Doha regarding their "commitment to the observance of internationally recognized core labor standards." To date the ICFTU has issued over seventy country reports in which it examines a WTO Member's respect for and enforcement of international core labor

[119] 19 U.S.C.A. § 3813 (6).

[120] WTO, *Trade Policy Review*, Report of the United States Government to the Trade Policy Review Body, WT/TPR/G/88 (August 20, 2001).

[121] WTO, *Free Trade Area Between the United States and Jordan*, WT/REG134/1 (March 13, 2002), Article 6.

[122] *Id.* at Article 17 (2)(b).

[123] Human Rights Watch, *Trading Rights Away: The Unfulfilled Promise of NAFTA's Labor Side Agreement* (April 2001) http://www.hrw.org/reports/2001/nafta.

[124] *The Declaration of the CUT/Chile and the AFL-CIO Concerning the Proposed Free Trade Agreement Between Chile and the United States*, (August 26, 2002), www.union-network.org/uniflashes.nsf/2c8c0184e55e3d98c1256872003e613e/173a99c02ce845edc1256c2100584054?OpenDocument (visited November 28, 2003).

[125] Human Rights Watch, *Tainted Harvest: Child Labor and Obstacles to Organizing Ecuador's Banana Plantations*, (April 2002) http://hrw.org/reports/2002/ecuador/ (visted November 16, 2003).

standards.[126] The reports are issued at the same time as the WTO General Counsel's review of the trade policies of the subject country, which is not to suggest that the reports are part of the WTO trade policy review process. Not surprisingly the reports often demonstrate the links between trade and workers' rights violations. For example, the ICFTU report on India highlights the direct link between trade and poor working conditions, such as the absence of trade union rights in special export processing zones.[127]

The efforts of human rights and labor groups are going to have to be sustained and imaginative if they are going to bring the protection of labor rights into the competence of the WTO. The AFL-CIO/CUT joint campaign may signal the increase of meaningful collaboration between trade organizations in the developed and developing worlds, which could go a long way toward easing the criticism of poor countries that talk of labor standards is really just disguised protectionism. NGO reporting processes like that being used by the ICFTU could provide weighty evidence to trade ministers, if not WTO panels, that WTO compliant measures like those offered by the ILO are not solving the worst problems of labor rights violations and that WTO Members are not meeting their oft-stated commitments to observe internationally recognized core labor standards. Such and similarly inspired campaigns could ultimately prod a WTO Member into instituting unilateral trade restrictions against another WTO Member as "a measures necessary to protect human life or health", under Article XX(b) GATT. However, it remains questionable whether such an attempt would survive the WTO panel process. In addition to the previously discussed potential pitfalls under Article XX(b) GATT, there is the remaining difficulty of getting evidence from NGOs, like that gathered by the ICFTU, before a WTO panel.[128]

[126] *See* http://www.icftu.org/list.asp?Language=EN&Order=Date&Type=WTOReports&Subject=ILS&start=0&finish=19 where these reports are available (visited November 16, 2003).

[127] International Confederation of Free Trade Unions, *Internationally Recognized Core Labor Standards in India*, Report for the WTO General Council Review of Trade Policies of India (June 2002).

[128] There are a variety of initiatives attacking the labor-trade issue from outside the multilateral and bilateral trade frameworks. One, the social labeling movement seeks to empower consumers to make informed choices about the products they buy, but at least some critics have found such initiatives ineffectual. *See* Alakh N. Sharma, Rajeev Sharma and Nikhil Raj, *The Impact of Social Labelling on Child Labor in India's Carpet Industry*, 78 ILO/IPEC Working Paper, (2000) at http://www.ilo.org/public/english/standards/ipec/publ/policy/papers/india/india.pdf (visited November 14, 2003). Another tactic used of late by numerous human rights groups to try to hold multinational corporations liable for human rights abuses, including workers' rights violations, which occur in their operations in developing countries, is the United States Alien Tort Claims Act. In one such case a U.S. Federal Circuit Court of Appeals held that plaintiffs, villagers who were subjected to forced labor in Myanmar (a/k/a Burma), could proceed with their claims against multinational energy corporation Unocal. Although the court split as to the grounds on which Unocal could be held liable for the forced labor practices of the Myanmar military units providing security and construction services for the pipeline project of a Unocal joint venture, all three judges agreed that Unocal could be held liable either under international law or under federal common law. *John Doe I v. Unocal Corp.* 2002 WL 31063976. *See also, John Doe etc., et al. v. Unocal Corp.,* 110 F.Supp.2d 1294 (C.D. Cal. 2000); *John Doe etc., et al. v. Unocal Corp.,* 963 F.Supp. 880 (C.D. Cal. 1997). Reader may also wish to consult an excellent overview of the legal analysis in the BNA Overview, Daily Labor Report No. 187, at A-1, *International Labor Ninth Circuit Lets Burmese Citizens Bring ATCA Suit Against Unocal for Forced Labor,* at A-1 (September 26, 2002); *see also,* Tam, *Myanmar Human-Rights Suit Against Unocal Is Reinstated*, Wall Street Journal, September 19, 2002; Girion, *U.S. Ruling Says Firms Liable for Abuse Abroad*, Los Angeles Times, September 19, 2002; Kravets, *Court Reinstates Suit Against Unocal*, Washington Post, September 19, 2002. It remains to be seen what role, if any, such initiatives may play in prompting WTO action on labor standards. On February 14, 2003, the Ninth Circuit granted the motion for rehearing en banc and ordered that the panel decision could not be cited as precedent within the Circuit. (*Doe v. Unocal Corp*., Nos. 00-56603, 00-57197 (9th Cir. February 14, 2003); Girion, *U.S. Court Will Rehear Case Against Unocal*, Los Angeles Times, February 15, 2003; Tam, Appeals Court Will Revisit Ruling in Suit Against Unocal, Wall Street Journal, February 14, 2003.)", *see* www1.umn.edu/humanrts/intlhr/supp-chapter14.html (visited November 28, 2003).

VII. Concluding Remarks

The Uruguay Round Ministerial Declaration on the contribution of the WTO to achieve greater coherence in global economic policymaking recognized that the globalization of the world economy has led to ever-growing interactions between the economic policies pursued by individual countries, including interactions between the structural, macroeconomic, trade, financial and development aspects of economic policymaking.[129] Labor standards are necessarily part of this panoply of economic policies.

Since the end of the process of decolonization there has been a remarkable and somewhat paradoxical shift in international standard setting. For a period of time after the influx of developing countries into the United Nations, it was the diversity of the (largely developing country) UN membership, rather than the globalization of markets and economic processes that demanded additional standard setting. At first it was the developing countries who fought, *inter alia*, for the replacement of "international standards" governing the adequacy of amounts of compensation to be paid in cases of nationalization.[130] At present it is overwhelmingly developed industrialized countries which display regulatory zeal in respect of globalized markets, whether for trade, services, intellectual property, investment, environmental protection or labor standards.

There is growing concern about the appalling conditions of work in many places in the world. However, before a multilateral social clause can be established, several issues need to be addressed.

In the first place, to operate fairly such a clause would have to reflect a balance of principles and interests and of degrees of trade dependence and hence vulnerability to sanctions. Secondly, a social clause would need to give special consideration to the interests of small and weak economies and, where poor labor conditions are attributable to a low level of development additional financial, economic and technical assistance should be provided. Thirdly, if surveillance of worldwide labor standards is to be linked to sanctions, it would be necessary to assess case-by-case whether sanctions (loss of trade preferences) are appropriate at all, given that poor working conditions may also be attributable to factors such as high levels of indebtedness, low world market prices for primary commodities or difficulties in securing market access for developing countries' exports.

The ILO and the WTO share a common interest in eliminating unfair labor conditions, the former by vocation, the latter in the interest of free trade based on common labor standards rather than on the parochial standards of certain countries. The WTO to some extent embraces policies and goals that reflect the internationalization of production. The unreformed ILO on the other hand has become a constraint upon social change rather than an accelerator of it because it is still steeped in the ideology of tripartism rooted in industrial organization that pre-dates that internationalization.[131] At its core, the idea of international fair labor standards is not protectionist. On the contrary, agreed minimum standards, establishing a floor for workers' rights, potentially remove one of the chief justifications for import restrictions. In the final analysis, of course, the best way to disprove the charge of protectionism would be to couple a social clause with reduced trade barriers for complying countries. It seems probable that the issue of a social clause in multilateral trade will remain on the agenda for the foreseeable future. However, as a highly complex and controversial issue it is unlikely to be resolved anytime soon.

[129] 33 ILM 1249 (1994).

[130] Article 2, ¶ 2(c) of the Charter of Economic Rights and Duties of States, UNGAOR 3281 (XXIX) of 1974.

[131] R.W. Cox, *Labor and Employment in the Late Twentieth Century*, in THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE 525, 542 (R. St. John Macdonald, D.M. Johnston and G.L. Morris eds., 1978).

CHAPTER 60

TRADE AND LABOR II

Janelle M. Diller*

TABLE OF CONTENTS

I. Introduction: Trade and Labor in a Broader Context 598
A. The Apartheid of Labor and Trade 599
B. The Unfulfilled Promise of Liberalized Trade 601
II. Values in Markets and the Workplace 604
III. Discovering Shared Values 606
A. Values Instruments 606
B. Values as Over-Arching Objectives 607
C. Values as Normative Principles 609
D. Values as Instrumental Tools 610
IV. Normative Implications of a Values Framework for Trade and Labor 611
A. Toward the Internationalization of Values 611
B. Ordering Priorities 612
V. Institutional Implications of a Cohesive Framework 615
A. Coherence among National Policies in Trade and elsewhere 615
B. Coordination of Mandates among International Organizations 617
C. Beyond Coherence to Accountability 618
VI. Conclusion 621

* International Labour Office, Geneva, Switzerland. This chapter was written while on leave at the University of St. Thomas School of Law (Minneapolis), and the author is grateful to the law school and Caitlin Firer, in particular, for their valuable research support. Any opinions herein are solely attributable to the author and do not represent the views or endorsement of the ILO.

I. Introduction: Trade and Labor in a Broader Context

We live in times that challenge multilateral approaches to resolving persistent global problems like poverty and conflict. The unilateral exercise of economic and military power threatens the international system of co-operation as we know it. However, notwithstanding their sharp divergence in method, proponents of both unilateral and multilateral approaches often invoke similar ultimate aims as their motivation. Their common aims reflect values[1] that are shared at a very fundamental level—values such as peace, justice, and human dignity and security. The means for achieving these basic objectives are collectively valued as well; these include poverty reduction, economic development, and conflict resolution. Progress toward these common goals necessarily involves the markets and workplaces of the world, and the rules and relationships that govern economic and social transactions within and across borders.

For most people, a sustainable job is the only secure way out of poverty. In principle, economic growth and enterprise development, fueled by trade and market access, bring more jobs.[2] Multiplied many fold, decent jobs raise standards of living and contribute to a universal and lasting peace based on social justice.[3] Yet, the evident interaction between promoting jobs and freer trade has failed to diminish the labor-trade debate at international level. Many questions remain on how application of the principles of "decent work"[4] and "free trade"[5] could be better coordinated to more effectively bring

[1] In this chapter, the term "values" connotes the beliefs and perspectives of individuals, groups or communities that certain goals and ways of behaving are important. For further detail, *see infra* notes 38, 42 and accompanying text.

[2] See *infra* Part B discussing trade, growth and poverty.

[3] *International Labor Organization Constitution*, June 28, 1919, preamble, 49 Stat. 2712, 15 U.N.T.S. 35 ("ILO Constitution").

[4] The International Labor Organization's ("ILO") mission, defined as "decent work" in modern terms, is to find sustainable opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity. *See, e.g., Report of the Director General, Decent Work: International Labor Conference,* ILO, 87th Session, 3ff (1999). Four pillars support the objective of decent work according to the ILO and are informed by international labor standards: rights at work; employment protection; security and social protection; and representation and dialogue. The interconnected dimensions of decent work are central to whether that work meets social goals, including peoples' needs for livelihood, dignity and poverty elimination. The term "rights at work" refers to four categories of core labor standards: freedom of association and effective recognition of the right to collective bargaining, elimination of discrimination in employment and occupation, elimination of all forms of forced or compulsory labor, and effective abolition of child labor. *Id.* at 14. These enabling rights have achieved global scope through the acceptance at the 1995 United Nations ("UN") Copenhagen Social Summit, *Copenhagen Declaration on Social Development*, U.N. Doc. A/CONF/.166/9 (1995), (adopted by the World Summit for Social Development, March 6–12, 1995) ("*Copenhagen Declaration*") and subsequently the ILO Declaration of Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233 (1998) ("*ILO Fundamental Principles*").

[5] The principle of "free trade" or "liberal trade" motivates the international trading rules though the terms themselves are not explicitly used in the WTO Agreement itself. See *generally Marrakesh Agreement Establishing the World Trade Organization*, April 15, 1994, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125, 1146 (1994) ("*Uruguay/WTO Agreement*"). Trade flows between countries with a minimal amount of restrictions by governments are often described by reference to their benefits to individual economies and the society of nations. As stated by the leading economist Paul Samuelson, "there is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe." Paul Samuelson, ECONOMICS 651 (11th ed., 1980). Given a fixed stock of productive resources, free trade in principle permits the consumption possibilities available to the economy to expand beyond the economy's production possibilities; in contrast, in an isolated economy without trade, domestic consumption is limited to production. Melvyn Kraus, THE NEW PROTECTIONISM: THE WELFARE STATE AND INTERNATIONAL TRADE, 2–4, 6 (1978).

economic growth, jobs, and development as well as decreased poverty and ultimately justice, peace, and dignity.

This chapter examines the quest for coherence in the global governance of work and trade.[6] I use the term "global governance" to refer to the system of international institutions, rules, and processes that guide the conduct and relations of states and non-state actors across borders.[7] I first review the origins and effects of the current deficit of coherence within the global governance system. I consider the extent to which the growing cohesion among universally-accepted values offers a means for building normative and institutional coherence between the WTO and the ILO in the context of other international institutions and actors. In pointing out the resulting sense of "shared responsibility" among those concerned, I propose that such values should continue to inform the development of governance and accountability mechanisms to guide international organizations, States, and non-state actors in more effectively co-ordinating their policies and practices in the market and the workplace.

A. The Apartheid of Labor and Trade

For more than half a century, the institutions mandated to facilitate international relations and cooperation in trade and labor have operated largely in isolation from each other. The International Labor Organization ("ILO") and World Trade Organization ("WTO") and its predecessor Secretariat for the General Agreement on Tariffs and Trade ("GATT"),[8] have functioned in large part like two productive units side by side, with chimneys pumping outputs into a common space yet leaving the air-quality effects unmeasured. No inter-institutional agreement governs their relationship, and ad hoc consultations, while increasing in frequency, remain irregular.[9]

[6] Coherence does not mean harmonization or standardization; it contemplates a sufficient coordination of effective governance which, *inter a lia*, is marked by plurality of participation and an appropriate balance of national and international levels of jurisdiction. See, e.g., *infra* note 101 and accompanying text. Applying the principle of subsidiarity in allocating jurisdiction helps ensure effective governance and the achievement of common ultimate goals. *Cf.* Katharina Pistor, *The Standardization of Law and Its Effect on Developing Countries*, 50 Am. J. Comp. L. 97 (2002).

[7] The term "state actors" includes national and local governments and inter-governmental organizations. The term "non-state actors" encompasses multinational and local enterprises, trade unions and business associations, consumer, investor and other civic organizations, religious and ethnic groups, and the media, among others; and in the private sector.

[8] The ILO was created in 1919 with functions defined in its Constitution, *supra* note 3. The General Agreement on Tariffs and Trade (GATT) 1947, 55 U.N.T.S. 194, as amended and in force as the General Agreement on Tariffs and Trade 1994, Annex 1A to the WTO Agreement, was a provisional agreement designed to cover the period prior to entry into force of the Havana Charter, *infra* note 10. Upon the latter's stillbirth, the GATT, serviced by a Secretariat, remained in force as the forum for multilateral trade negotiations until the vacuum was filled by the WTO Agreement, *supra* note 5, and the World Trade Organization formally came into being on January 1, 1995.

[9] The World Trade Organization ("WTO") General Council is to make appropriate arrangements for cooperation with international organizations that have "responsibilities related to those of the WTO." *Uruguay/WTO Agreement*, *supra* note 5, Article V(1). According to guidelines on observer status of international governmental organizations, participation in WTO proceedings can be obtained by request or by invitation. However, the ILO has no observer status permitting participation at WTO General Council meetings. The WTO, for its turn, has participated in public meetings of the ILO Governing Body and other ILO bodies. In a discussion held with the Governing Body Working Party on the Social Dimension of Globalization, the then Director-General of the WTO, Mr. Mike Moore, emphasized the role of values such as universalism and solidarity in putting into place redistributive mechanisms to assist workers displaced by trade-related shifts in labor demand. *E.g., Report of the Working Party on the Social Dimension of Globalization*, ILO Doc. GB.283/15, at ¶ 2 (March 2002). The ILO Director-General further reported that the Director-General

The current deficit in coherence developed following the demise of the integrated vision expressed in the Havana Charter for an International Trade Organization of 1947.[10] In the Havana Charter, fifty-three States devised an interdependent approach to international cooperation in fields including employment, development and trade.[11] Their purpose was to realize the aims envisaged in Article 55 of the UN Charter, notably higher standards of living, full employment, and conditions of economic and social progress and development.[12] In pledging national and international action, individually and collectively, to realize these aims, Havana Charter aspirants sought to "foster and assist industrial and general economic development," and "further the enjoyment by all countries, on equal terms, of access to markets, products and productive facilities which are needed for their economic prosperity and development."[13] Chapter II stressed the centrality of employment to the achievement of these general purposes and objectives and the need for concerted action within the UN, in collaboration with the appropriate inter-governmental organization, to supplement domestic measures to avoid unemployment.[14] The parties recognized that fair labor standards were a matter of common interest among all countries and that "unfair labor conditions, particularly in production for export, create difficulties in international trade."[15]

Since its failure to enter into force, no institutional project to integrate the global governance of trade, labor, and development as ambitious as the Havana Charter has been attempted.[16] The ILO, which was created several decades before the United Nations and the attempted Havana Charter,[17] supervises a singular remnant of the quest for coherence from that era. The 1944 Declaration of Philadelphia, incorporated as an annex to the ILO Constitution, calls for prioritizing the pursuit of the conditions necessary for social justice as a central policy objective, both in national and international policies and measures, and in particular those of an economic and financial character.[18] Along

of the WTO, Mr. Supachai Panitchpakdi, had held discussions with the ILO-convened World Commission on the Social Dimension of Globalization. *E.g., Report of the Working Party on the Social Dimension of Globalization*, ILO Doc. GB.285/16, at ¶ 34 (March 2003). The World Commission is an independent body with a mandate to review the implications of globalization for economic and social progress, and to recommend innovative ways to respond to the needs of people ; a final report is to be released in early 2004. http://www.ilo.org/public/english/wcsdg/index.htm, accessed on May 9, 2003.

[10] *UN Conference on Trade and Employment: Final Act and Related Documents*, March 24, 1948, U.N. Doc. E/CONF 2/78, U.N. Sales No. 1948.II.D.4 (1948) ("*Havana Charter*"), never entered into force.

[11] *See, e.g.*, *id,* Chs. II (employment), III (development), IV (tariffs, quotas, subsidies, etc.),

[12] *Id*., Chapter I, Article 1. The first two aims are re-articulated in the preamble to the WTO Agreement, *supra* note 5.

[13] *Id.* Chapter I, arts. 2 (economic development) and (3) (equal access). These goals do not appear in the preambular principles and objectives of the WTO Agreement, which recognizes in pertinent part "the need for positive efforts designed to ensure that developing countries . . . secure a share in the growth in international trade commensurate with the needs of their economic development". *WTO Agreement, supra* note 7, preamb. ¶. 2.

[14] *Id*. Chapter II, Article 2(1) and (2).

[15] *Id*. Chapter II, Article 7.

[16] The Havana Charter never entered into force, a development precipitated by the failure of the U.S.Senate to ratify. John Jackson, The World Trading System: Law And Policy Of International Economic Relations 38 (2002).

[17] The ILO was created in 1919. ILO Constitution, *supra* note 3.

[18] *Declaration Concerning the Aims and Purposes of the International Labor Organization* (May 10, 1944), ILO Constitution, *supra* note 3, at Annex, Article II (revised 2001) ("*Declaration of Philadelphia*"): "Believing that experience has fully demonstrated the truth of the [1919 constitutional premise] that lasting peace can be established only if it is based on social justice, the International Labour Conference affirms that (a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and

with national level commitments, the governmental and social partner representatives of the ILO Member States conferred upon the Organization itself the responsibility "to examine and consider all international economic and financial policies and measures" in the light of "the fundamental objective" of achieving lasting peace based on social justice, and to "include in its decisions and recommendations any provisions which it considers appropriate".[19] They further pledged "the full cooperation of the ILO with such international bodies as may be entrusted with a share of the responsibility" in the fields of international trade, development, and financial stability.[20] While no direct constitutional mechanism for implementation of the entire Philadelphia Declaration exists,[21] its call for coherence is reflected in ILO instruments and mechanisms relating to employment policy[22] and fundamental principles and rights at work,[23] and in a complaints mechanism relating to freedom of association.[24]

B. The Unfulfilled Promise of Liberalized Trade

The growing disparity in ownership of the gains of trade, both within and between countries, demonstrates the gaps in fulfillment of the promise of a better life for all through liberalized trading rules, both in principle and practice. As a system based on and designed to exploit inequalities among states, international trade, in theory, promises to benefit a particular country when its "peculiar powers bestowed by nature" are put to the

equal opportunity; (b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy; (c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective . . . "

[19] *Id*, Article II (d), (e).

[20] *Id*., Article IV.

[21] ILO constitutional principles have inspired the development of follow-up reporting involving fundamental principles and rights at work, *infra* notes 37, 100–101, and complaints procedures on freedom of association, *infra* note 24.

[22] States parties to the Employment Policy Convention assume an obligation to promote full and free employment "within the framework of a co-ordinated economic and social policy". *Employment Policy Convention*, ILO Convention No. 122 (1964), arts. 1, 2. The preamble to the Convention recalls the relevant provisions of the Philadelphia Declaration. Two non-binding recommendations further instruct ILO Members on how to co-ordinate the social objectives of employment policy with other measures of economic and social policy, including fiscal, monetary, and trade policies, at both national and international levels. *Employment Policy (Supplementary Provisions) Recommendation*, ILO Recommendation No. 169 (1984), Article IX; *Annex to Employment Policy Recommendation*, ILO Recommendation No. 122 (1964), Article I(2).

[23] All ILO member states share a commitment to a minimum social floor of fundamental principles and rights at work by virtue of obligations arising from the ILO constitution, including the Declaration of Philadelphia. The four categories of fundamental principles and rights are recognized in the 1998 Declaration of Fundamental Principles and Rights at Work, *supra* note 4.

[24] Two mechanisms permit complaints concerning infringement of constitutionally-based freedom of association principles in respect of countries which have ratified the freedom of association Conventions and, contingent upon consent of the country concerned, those which have not. In 1950, the Philadelphia Declaration's emphasis on freedom of expression and of association as a fundamental principle provided constitutional inspiration for creating an independent Fact-Finding and Conciliation Commission on Freedom of Association (FFCC), created by agreement with ECOSOC. Composed of nine independent members, the body examines complaints of infringement of trade union rights. In 1951, a tripartite Committee on Freedom of Association of the ILO Governing Body was established which has examined nearly 2000 cases to date. See http://www.ilo.org/public/english/standards/norm/enforced/foa/index.htm, visited May 13, 2003. The relevant fundamental conventions on freedom of association and collective bargaining are *Freedom of Association and Protection of Right to Organize Convention*, ILO Convention No. 87 (1948), 68 U.N.T.S. 17 and *Right to Organize and Collective Bargaining Convention*, ILO Convention No. 98 (1949), 96 U.N.T.S. 257.

most efficacious use.[25] Moreover, economic growth supported by trade is recognized, in theory, as a key determinant of levels of employment and working conditions, including enhanced wage equality, income distribution, and poverty reduction.[26]

Yet, in practice, the application of the principle of comparative advantage is complicated by a number of intervening variables, including levels of development and technological capacity, foreign direct investment, skills and adaptability of work forces, and multinational enterprise global strategies.[27] Trade liberalization in some developing countries, especially those less advantaged, appears to be producing exactly the opposite of the promised gains: marginalization, de-industrialization, and increasing wage inequality and poverty within and between countries.[28] Developing countries, civil society organizations, trade unions, and local businesses adversely affected by export competition have expressed growing discontent with the effects of a liberalized trading regime. Empirical studies on the impact of trade on real income, poverty reduction and development have sought positive correlations but the conclusions have faced challenges on grounds of limited evidence and methodological shortcomings.[29] Developing countries

[25] The theory of comparative advantage is based on the presumption that, under a system of perfectly free commerce, each country naturally devotes its capital and labor to such employments as are most beneficial to each, admirably connecting the pursuit of individual advantage with the universal good of the whole. David Ricardo, *On Foreign Trade*, in On the Principles of Political Economy and Taxation, *reprinted in* George T. Crane and Abla Amawi, The Theoretical Evolution of International Political Economy, 74–75 (1991).

[26] Under the Heckscher-Ohlin model, in a two-factor world comprising capital and labor as the only factors of production, comparative advantage would turn on either capital or labor abundance; the Stolper-Samuelson theorem extended this model to predict that free trade would increase the demand for unskilled labor in labor-abundant countries and raise wages once any labor surplus is eliminated. *See, e.g.*, *Trade Liberalization and Employment,* ILO Doc. GB.282/WP/SDG/2, ¶¶ 15–19 (Nov. 2001). Global systems encouraging liberalization of trade and, in many applications, development policy reflect similar presuppositions. *Cf.* J. Jackson, The World Trading System 11–25 (2000).

[27] The economic vulnerability of developing countries in the context of a trading system dominated by industrialized states intensified during colonization and post-war decolonization periods, even as developing countries sought U.N. alternatives to post-Havana GATT frameworks. *See, e.g.*, Frank Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 Mich. J. Int'l. L. 981–985 (2000). Deterioration associated with trade imbalances may be attributable to a confluence of factors, including the marginalization of low-income countries due to debt burdens, commodity price fluctuation, lower skills levels of work forces, and environmental degradation. Some observers have noted that trading between unequal size economies creates heightened vulnerability for less dominant trading partners due to such factors as the relative openness of small economies to external transactions in relation to total economic activity, and the relatively undiversifed economic base and heavy reliance on primary product exports of small economies *See, e.g. id.* at 987.

[28] Observers have blamed trade liberalization for employment ills within advanced and developing countries alike, although empirical research has cast doubt on some such views. *See generally,* ILO Doc. GB.282/WP/SDG/2, *supra* note 20. In advanced economies, rising unemployment and wage inequality have been linked to the perceived exodus of low-skilled jobs due to the lifting of import barriers, resulting in increasing imports from low-wage economies, together with the relocation of labor-intensive industries to those countries. *Id*. ¶ 9. In developing economies, the liberalization of trade has been perceived as stimulating a "race to the bottom" in exercising a low-wage comparative advantage, and at the root of increased exploitation of workers in developing countries, deteriorating working conditions and labor standards. For a review of such perceptions, see Kimberley Elliott and Richard Freeman, Can Labor Standards Improve under Globalization?, 17–22 (2003).

[29] *See, e.g.,* P. Agenor and J. Aizenman, *Trade Liberalization and Unemployment,* 5 J. Int'l Trade & Econ. Dev., 265 (1996); D. Greenaway, *Liberalizing Foreign Trade Through Rose-Tinted Glasses*, 103 Econ. J. 208 (1993). *questioning* D. Papageorgiou et al., *Liberalization of Foreign Trade in Developing Countries: The Lessons of Experience* (World Bank, 1990). See also *Coherence in Global Economic Policymaking and Cooperation between the WTO, the IMF and the World Bank*, WTO Doc. WT/TF/COH/S/7, 29 April 2003 (*Coherence Note*), ¶ 36 ("the links between trade liberalization and poverty reduction are complex, and

confront inequitable trade-offs in allocation of fiscal and administrative resources to local needs, on the one hand, or international institutional requirements, on the other hand.[30]

Left unmoored from an integrated social and economic framework, the system of international trade cooperation is being challenged as unfair in outcome and process.[31] Limited resources and know-how hinder developing countries in making effective use of dispute settlement mechanisms and of trade policy tools designed to provide preferential access and special protection to their markets.[32] In principle, the legal right to retaliation provides recourse in the face of inadequate compliance but, in practice, economic inability significantly reduces the value of this right for those with less economic "staying power".[33]

Experience illustrates that the rules for integration within the world economy do not present economically sustainable propositions for all, even when trade openness is coupled with institutional reforms like social safety nets and labor market adjustments.[34] While "the mutually profitable division of labor" plays a central role in trade theory,[35] the interaction between trade undertakings and working conditions, wages, and levels of employment is left largely unaddressed in international policy and practice. In 1997, the WTO Ministerial Conference expressed a desire to maintain "existing collaboration" at Secretariat level between WTO and ILO.[36] Within the ILO, the 1998 Declaration of

in some respects controversial. While it is well-established that trade openness and growth are mutually supportive, and that poverty reduction requires economic growth, the direct impact of trade liberalization on different groups among the poor can vary").

[30] Trade-offs have been noted in the area of legal reforms, public health, industrial strategy, economic policy transparency. In each area, reforms may serve more the interests of foreign investors and markets rather htan building capacity to meet local needs. *See* Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered*, 30 (UN Development Programme, 2001); Ben Thirkell-White, *The IMF, Good Governance and Middle-Income Countries*, 15 EUR. J. OF DEV. RSCH. 99, 118–19 (2003).

[31] Critics have claimed that issues in trade negotiating rounds are set for discussion without transparency or consensus and conclusions arrived at without the effective participation of all. *E.g.*, Deepak Nayyar, *The Existing Systems and the Missing Institutions*, in GOVERNING GLOBALIZATION 377–78 (Deepak Nayyar ed. 2002). The greatest fissure in the multilateral trading system has been identified as that between developed and developing countries. Raj Bhala, *Assessing the Modern Era of International Trade*, 21 FORDHAM INT'L L. J. 1647, 1658 (1998). The inconclusive results of the fifth WTO Ministerial Conference, particularly the lack of consensus on "Singapore" issues (investment, competition policy, transparency in government procurement), reflect a new filibustering power on the part of developing countries. Ministerial Conference, Fifth Sess. (cancan) *Ministerial Statement*, WT/MIN(03)/20, Sept. 23, 2003, reproduced in the Appendix to this book.

[32] *See, e.g.*, Gerry Helleiner, *Global Economic Governance,* in Nayyar, *supra* note 31, at 323–26.

[33] For the use of retaliatory measures for lack of full compliance, *see generally* the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*DSU*"), Article 22.

[34] *See, e.g.,* Rodrik, *supra* note 30, at 31. "WTO rules on anti-dumping, subsidies and countervailing measures, agriculture, textiles, TRIMS, and TRIPs are utterly devoid of any economic rationale beyond the mercantilist interests of a narrow set of powerful groups in the advanced industrial countries." Id. *See also* Thirkell-White, *supra* note 30. Critics claims that the so-called "enlightened standard view", which augmented the Washington Consensus by espousing the need for more than simply removal of trade and investment barriers, further burdened developing countries by requiring a full complement of other institutional reforms to ensure favorable economic outcomes. Those included tax reforms, policies to enhance labor mobility across industries, technological assistance to upgrade domestic firms affected by import competition, training programs to ensure skilled labor market for export-oriented firms, etc. *See, e.g.,* Rodrik, *supra* note 30, at 29.

[35] See *supra* notes 5 and 25.

[36] The relationship of labor to trade was addressed in brief at the Singapore Ministerial Conference of WTO: "We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization ("ILO") is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe economic growth and development fostered

Fundamental Principles and Rights at Work committed all Member States to a minimum social floor of fundamental principles and rights at work reinforced by a follow-up procedure that combines reporting and technical cooperation, and affirming the premise that adherence by all to this floor will preclude any principle effect on comparative advantage.[37]

II. Values in Markets and the Workplace

Values play an important role in markets and at work that offers an opportunity for bridging the current gaps in the governance of trade and labor to seek higher standards of living for all. At local and national levels, values shared across society[38] serve to shape the social institutions and customs which, to a large extent, organize work and trading activities. By nature, markets and workplaces are embedded in society and operate on the basis of social expectations. How well they function depends in part on the level of shared attitudes and expectations that build trust between people.[39] The greater the coherence of moral norms or values, the more common interests generate the confidence that facilitates market transactions and approaches to negotiating and resolving differences.[40] This sort of dynamic in the workplace, fostered by commonly agreed expectations, is at the heart of industrial relations systems based on social dialogue and freedom of association for workers and employers.[41]

by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration." Ministerial Conference, *Singapore Declaration*, WTO Doc WT/MIN/96/DEC, Dec. 13, 1996, ¶¶ 4, 13 I.L.M. 220, 221 (1997), reproduced in the Appendix to this book.

[37] See discussion *infra* at notes 96–97, 100–101 and accompanying text. While not directly addressing the Declaration's premise, empirical and economic analyses on the interaction of trade, labor, and globalization have informed policy-level discussions in the ILO Governing Body. *E.g., Country Studies on the Social Impact of Globalization: Final report*, ILO Doc. No. GB.276/WP/SDL/1 and Add.1; GB.283/15, ¶¶ 10–15 (2002) (panel discussion of paper: *Trade Liberalization and Employment*, ILO Doc. GB.283/WP/SDG/1 (2002)). The results of a recently-convened independent World Commission on the Social Dimension of Globalization, mandated by the ILO to prepare a Report on related issues, are pending at date of writing. *See supra* note 9.

[38] For a working definition of values, *see supra* note 1. Values common to a society may be reflected in social contracts or customs, or expressed through behavioral patterns at individual or societal level. Philip Nichols, *Trade Without Values,* 90 NW. U. L. Rev. 658 (1996). Values theory distinguishes various perspectives on values: contractarian (social contracts embodying behavioral norms which derive from shared perspectives); utilitarian (promoting self or societal interest), skeptic individualism (matter of personal taste) and universalism (values founded on universal truth). *Id.* at note 72 and accompanying text.

[39] *See, e..g.*, Hazel Henderson, Beyond Globalization: Shaping A Sustainable Global Economy (1999).

[40] Shared values breed predictability of expectation and, in optimal situations, trust. *See, e.g.,* F. Fukuyama, Trust, The Social Virtues And Creation Of Prosperity (1995). According to some analysts, it is possible to economize substantially on transaction costs in a modern market-oriented economic system if market institutions are supplemented by social capital and trust. In this view, trust is understood to be the expectation that arises within a community from regular behavior based on commonly shared moral norms or values. *Id*. at 26; K. A. Elliott, *The Role of Incentives, Trust, and Institutions in Sustainable Single Markets*, prepared for "Lessons for a Globalizing World? Historical Experiences of Europe and the United States in Market Integration", sponsored by the European Union Center, Maxwell School, Syracuse University, N.Y. (2002) (unpublished manuscript on file with author).

[41] *See, e.g., Your Voice at Work: Global Report on Freedom of Association and Effective Recognition of the Right to Collective Bargaining,* ILO (2000). Social dialogue is defined by the ILO to include all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy. The

At international level, the expanded reach of communications networks has increasingly linked the global and the local, raising public awareness of the imbalance in resources and power between haves and have-nots within and across countries, businesses, and communities. The emerging conscience is building a consensus on core values and commitments to common goals. Expectations and goals common both to open markets and to decent work and life are converging from a wide range of State and non-state actors across different cultures, beliefs, and economic contexts.[42] At the heart of this advance is a conviction that solidarity must accompany individual gain; the world's markets must incorporate morals to sustain themselves and to function effectively in the workplace and in society.[43] There is a recognition that market forces alone cannot guarantee equity, freedom, or human dignity and diversity, nor can they alone produce the enabling conditions for development like sustainable and decent work.[44] Rather, the co-ordinated commitments of public, market and social actors signal a new process for implementing common goals through the sharing of responsibility in respective spheres of competence.[45] In a manner akin to local interactions, the sharing of universal values is critical to building trust and allocating responsibility for achieving common goals

definition and concept of social dialogue varies from country to country and from region to region and it is still evolving. http://www.ilo.org/public/english/dialogue/ifpdial/sd/index.htm, visited January 24, 2004. Respect for freedom of association rights is considered by the ILO as essential to social dialogue, which in turn is a vital component of "decent work", *See supra* note 3. For economic analyses of such systems, *see, e.g.*, Toke Aidt and Zafiris Tzannatos, UNIONS AND COLLECTIVE BARGAINING: ECONOMIC EFFECTS IN A GLOBAL ENVIRONMENT, 14–16 (World Bk., 2002); David Kucera, *Core Labour Standards and Foreign Direct Investment*, 141 INT'L LABOUR REV. 1–2, 31 (2002).

[42] Values that are shared at some fundamental level, across cultures and peoples, provide a common threshold for identifying commitments to certain objectives and expectations of certain conduct. As in the context of individual societies, values shared across societies may result in widespread customs or expectations that, over time, create a mutual trust strengthening economic, social and cultural exchanges across the groups involved. Between countries, some of these values may find official expression in treaties or other agreements, or even trading and security alliances. When values are shared on a widespread, or global scale, their strength or primacy in guiding the conduct and objectives of multinational relations may be embodied in multilateral treaties, declarations and other sources of international law or political commitments.

[43] For an approach to understanding the causal links between institutional market arrangements and the realization of fundamental social values of well-being, freedom, and justice, *see* Amartya Sen, *The Moral Standing of the Market*, in ETHICS AND ECONOMICS (Ellen Frankel Paul *et al*., eds. 1985). A more recent political effort within the United Nations itself, the Global Compact, seeks to promote universal values for global markets through learning, policy, and active partnerships among business, labor, civil society, and the public sector. *See* www.unglobalcompact.org. The three categories of universal values consists of human rights, the environment, and labor; the labor category is comprised of the fundamental principles and rights at work found in the ILO Declaration of the same name. *See* ILO Fundamental Principles, *supra* note 4 and accompanying text. Among relevant international organization initiatives, the Multilateral Investment Guaranty Agency of the World Bank Group excludes support for projects that use forced labor or harmful child labor. *See* Multilateral Investment Guarantee Agency: *Operational Regulations*, June 22, 1988, ¶ 3.08, 27 I.L.M. 1227 (1988); *Standard Contract of Guarantee and General Conditions of Guarantee for Equity Investments*, Jan. 27, 1989, at Schedule A, Articles 10.1, 32, 28 I.L.M. 1233 (1989).

[44] *See, e.g.*, *Universal Declaration on Cultural Diversity*, United Nations Educational, Scientific and Cultural Organization ("UNESCO"), Article 11 (2002), (market forces need public policy and partnership with private sector and civil society to ensure diversity). *Prague Declaration*, approved by the Fifth Forum 2000 Conference, at Section 2, Prague, Czech Republic, 17 Oct. 2001, available at www.forum2000.cz/2001/declaration, ("effective policies for the global economy have to be addressed by social and political institutions . . . [to increase] social capital and develop human capacities and opportunities").

[45] *See, e.g.*, *UN Millennium Declaration*, GA Resolution 55/2, UN Doc. A/RES/55/2, Sept. 18, 2000 ("*Millennium Declaration*"), Article I(6) (shared responsibility is a fundamental value essential to international relations in the 21st century); *Copenhagen Declaration*, *supra* note 4, ¶¶. 26, 27 (while States have primary responsibility of social development, we acknowledge the interdependence of public and private spheres of activity).

through agreed methods. Through this dynamic, a growing framework of globally-shared values essential to a balanced operation of trade and labor offers a platform for coherent governance at international level.

III. Discovering Shared Values

Examining the values common to trade and labor requires looking at the surrounding context of international cooperation. Trade and work function in markets and society together with other international efforts to achieve global public goods, including social and economic development, monetary stabilization, democratic governance, and public health.[46] Because the various regimes governing international cooperation operate interdependently, the relationship between trade and labor is only effectively addressed within this larger "community" of global actors which includes states, international organizations, business and worker associations, and civil society organizations. Shared values, discernible across these public and private spheres, are the starting point for a system to manage trade and labor at global level.

A. Values Instruments

At local and national levels, shared values may be expressed through unwritten customs in socio-economic relationships and structures, or in written texts like popular manifestos and official laws and regulations.[47] At international level, values shared across borders may find expression in international customary or conventional law, in general principles of international law or in political resolutions of international and regional organizations.[48] Such "values channels" vary in their binding or authoritative character. Internationalized values are also found in influential popular declarations and collective statements of business and civil society groups, scholars, and global commissions. While these commitments may have no direct legal force, they sometimes lead to the adoption or more effective recognition of officially-endorsed values.[49]

A common core of shared values connects official and popular declarations at international level.[50] One key element is the call to balance the pursuit of private gain

[46] Relevant institutions that manage international cooperation in these areas include the World Bank Group, the International Monetary Fund, World Health Organization, and a number of UN bodies and agencies.

[47] In the case of official instruments, fuller meaning may be given the underlying values by structures and people that interpret or apply the legal regimes. Nichols, *supra* note 38, at note 72 and accompanying text. Law's relationship to values may be in serving as a "tool for arranging today's social relations and expressing today's social values." Alex Aleinikoff, cited in *id.* note 70.

[48] *See Statute of the International Court of Justice*, June 26, 1945, 1977 UN Yearbook 1190, Article 38.

[49] In the context of global commissions of eminent persons, the principles annexed to the report of the Brundtland Commission on Environment and Development laid the foundation for the Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. 1) (1992). Summary of Proposed Legal Principles for Environmental Protection and Sustainable Developed adopted by the WCED Experts Group on Environmental Law, Our Common Future, Report of the World Commission on Environment and Development, Annexe I (1987). One example of the influence of non-governmental scholars is found in the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, *infra* note 52, initially adopted by a group of legal scholars, which has grown in authoritative recognition within UN bodies themselves. *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

[50] The "essential values" proclaimed by the UN Millennium General Assembly, and the resulting Millennium Development Goals derived from it, provide an authoritative model for building a universally-recognized

with collective effort to enhance the common good.[51] This general directive embodies a fledgling mandate for governing the markets and workplaces of a globalizing world. The balance sought is reflected in three types of common values: over-arching objectives, and applied through normative principles and instrumental rules for working, trading, and living together. The following sections examine these three types of common values that help to build the framework for international governance in the fields of work and trade.

B. Values as Over-Arching Objectives

The specialized frameworks governing labor and trade, along with other regimes, are based upon ultimate objectives that guide international cooperation. These overarching *objectives* of the world community echo the intrinsic desires of humanity that reflect our longings for freedom, dignity, equity and peace.[52]

The objectives underlying the international labor regime encompass such aims in striving for conditions of decent work[53] that are essential to achieving social justice, or equity. The ILO Constitution recognizes social justice as the foundation for universal

values framework that encompasses public and non-state actors in trade and labor. *See Millennium Declaration, supra* note 45, Sec. 6..For other declarations on point, see *infra* note 52.

[51] A wide range of texts reflect consensus in calling for balance, including treaties that use the language of obligation, and political or civil declarations and statements of public and private actors that employ the language of commitment. These articulations have originated in the course of dialogue within multilateral forums, UN-led world conferences, independent global commissions, and gatherings of civil society, labor, business, and religious leaders. While the values-based expressions may not yet be fully put into practice, the various sources do reflect a solemn and consistently-expressed commitment to achieve ultimate objectives through the use of agreed principles and means.

[52] *See, e.g., Charter of the United Nations*, June 26, 1945, 59 Stat. 1031 (1945); *Universal Declaration on Human Rights*, Dec. 10, 1945, UN GA Resolution 217 (A)III, GAOR, 3d. Session, UN Doc. A/810 (1948) *("UDHR"); International Covenant on Civil and Political Rights ("ICCPR")*, Dec. 16, 1966, 999 U.N.T.S. 171 (1966); *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3 (1966); *Copenhagen Declaration supra* note 3; *Vienna Declaration and Programme of Action for Human Rights*, UN Doc. A/CONF.157/23, as adopted by the World Conference on Human Rights (1993); *Cairo Report of the International Conference on Population and Development*, UN Doc. A/CONF.171/13 (1994); *Beijing Declaration and Plan of Action on the Advancement of Women*, A/CONF.177/20 (1995); *Final Outcome of the International Conference on Financing for Development*, A/CONF/198/3 (2002) ("*Monterrey Consensus*"); *Report of the World Summit for Social Development, Johannesburg Plan of Implementation*, A/CONF.199/20 (2002) ("*Johannesburg Declaration*"); *Global Compact*, *supra* note 43. The charters of various specialized agencies, including the WTO, *supra* note 5, and ILO, *supra* note 3, reflect the determination of the global community to cooperate together in advancing progress and resolving challenges in trade, labor and other international spheres of activity. For popular declarations reaffirming the fundamental principles of the global constitutional order and echoing the calls of the UN Charter, International Bill of Rights, Millennium Declaration, and cooperative treaty systems, *see, e.g., Our Global Neighborhood*, The Report of Commission on Global Governance (1995); *The Earth Charter*, www.earthcharter.org/earthcharter/charter.htm, ("Earth Charter"); *Prague Declaration, supra* note 44; *Private Sector Declaration*, The World Economic Forum available on-line at www.weforum.org/pdf/Latin_America/Private_Sector_Declaration.pdf; *World Social Forum Charter of Principles*, approved and adopted by the World Social Forum Organizing Committee in Sao Paulo on April 9, 2001, as modified by the World Social Forum International Council on June 10, 2001; *The Principles for Business*: Caux Round Table (1994) at www.cauxroundtable.org; OUR COMMON FUTURE, *supra* note 49; OUR CREATIVE DIVERSITY, World Commission on Culture and Development (1995). While the ethical framework of the emerging global community is not yet fully put in practice, the values and principles do reflect a solemn commitment, repeatedly expressed by states, public organizations, and non-state actors, to adhere to a core of ultimate objectives, and principles and means for achieving them.

[53] *Id.*, preamb. ¶ 2. "Decent work", a term adopted by the ILO to refer to work performed under standards, terms and conditions that affirm respect for the dignity of the human being, *See also supra* note 4 defining "decent work".

and lasting peace.[54] Freedom is vital to improving conditions of labor and establishing peace, particularly freedom of association.[55] In the family and society, the opportunity for a decent job represents a source of human dignity and identity as well as livelihood; for the individual, decent jobs contribute to material well being, fulfill human rights, and enable spiritual development.[56] At a macro level, decent work promotes a more equitable distribution of resources and opportunities within and among countries and people.[57]

Ultimate objectives of like nature underlie the multilateral trade regime. The act of trading itself is an exercise in freedom—freedom of commerce within and between countries.[58] While such freedom is itself beneficial, the purpose of the multilateral trading system is deeper: the system is to serve as a means for a better life, developing the conditions necessary for people and countries to improve their livelihoods and live in dignity. Parties to the WTO Agreement recognize that their relations in the multilateral trading system are to be conducted with a view to raising standards of living, ensuring full employment and growth of real income and effective demand, and expanding the production of and trade in goods and services while allowing for use of the world's resources in accordance with the objective of sustainable development.[59] Security and predictability are acknowledged pre-requisites for the durable and viable functioning of the trading system, and they account for the centrality of the dispute settlement mechanism in the system.[60] Trade rules designed to secure for developing countries a share in the growth in international trade commensurate with their economic development needs reflect the value of equity between nations, at least in principle, though not always in outcome.[61]

[54] *ILO Constitution, supra* note 3, at preamb. ¶ 1. Conditions of work involving injustice, hardship and privation to large numbers of people produce unrest so great that the peace and harmony of the world are imperiled; for this reason, improvement of those conditions is urgently required through regulation of working terms and conditions, and provision for old age and injury, as well as recognition of fundamental principles and rights at work. See ILO Constitution, *supra* note 3, preamble.

[55] *ILO Convention 87, supra* note 24, at preamble.

[56] *See, e.g., ILO Declaration of Philadelphia, supra* note 18, Articles II and III; *ILO Fundamental Principles, supra* note 4, Article 2(b); *UDHR, supra* note 52, Articles 22 and 23.

[57] The guarantee of fundamental principles and rights at work links social justice with economic growth, ILO Fundamental Principles *supra* note 4, at preamble, and informs the proportional balance of rights and freedoms with other common goods. *See, e.g.*, ICCPR, *supra* note 52, Article 19(3), ICESCR, *supra* note 52, Article 4, and *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/CN.4/1987/17, ¶¶ 46–69 (1987).

[58] Freedom of commerce is a general principle of international economic law recognizing "the right—in principle unrestricted—to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale goods, or whether it be concerned with industry, and in particular the transport of business; or, finally whether it is carried on inside the country or, by the exchange of imports and exports, with other countries." *Oscar Chinn Case*, P.C.I.J. (Ser. A/B) No. 63 (1934). *See also* Georg Schwarzenberger, I Recueil De Cours 47–48 (1966). The related principle of freedom of contract is of paramount importance in the context of international trade. International Institute for Unification of Private Law ("UNIDROIT"), *Principles of International Commercial Contracts*, Article 1.1 Commentary, ¶ 1, 33 I.L.M. 1395 (1994). On the interdependence of economic, political and social freedoms and capacities, *see* generally Amartya Sen,Development As Freedom. 35–41 (1999).

[59] *WTO Agreement, supra* note 5, at preamb. ¶ 1. With several notable exceptions, the goals specified in the WTO preamble parallel those of the original GATT 1947, *supra* note 8. New provisions within the preambular framework include the referenced proviso regarding sustainable development, and a paragraph addressing the need for positive efforts to ensure that developing countries secure a share in the growth in international trade commensurate with their needs for economic development. For a development-oriented perspective on trade, see Rodrik, *supra* note 30.

[60] *DSU, supra* note 33, Article 3(2). See also *WTO Agreement, supra* note 5, preamb. ¶ 4.

[61] *WTO Agreement, supra* note 5, at preamb. ¶ 2. Part IV of the GATT on "Trade and Development" (Articles XXXVI, XXXVII and XXXVIII) establishes the principle of non-reciprocity in trade negotiations between developed and developing countries, and provides for developed countries to adopt special measures to

C. Values as Normative Principles

Normative principles are essential building blocks in reaching the over-arching objectives grounding international cooperation. They include human rights; equality among states and among individuals; full, productive and freely-chosen employment; higher standards of living and economic development; and respect for the environment. Treaties and political declarations across general and specialized fields of international law, including in trade and labor, reflect a broad consensus on this level of values.[62]

International labor law is built upon values-based normative principles. The ILO is founded on the development-oriented premise that decent work must be made available in every nation because "poverty anywhere is a threat to prosperity everywhere."[63] Core international labor standards focus on fundamental human rights and equality as enabling pre-requisites to claiming one's fairshare of the fruits of labor.[64] The promotion

promote the expansion of imports from developing countries. Various provisions, including the special and differential treatment provisions, exempt developing countries from aspects of such basic trading principles as Most-Favored-Nation treatment for all (GATT, Article I), tariff bindings (Article II), national treatment (Article III), and non-tariff barriers (Articles X and XI). A waiver from Article I(1) for example was granted the members of the African, Caribbean, and Pacific States-European Economic Community under the now-expired ACP-EEC Convention of Lomé, Dec. 15, 1989, 29 I.L.M. 783 (1990), to permit preferential treatment for products originating in ACP states as required by that Convention, noting that the parties to the convention consider that it is compatible with obligations under Article XXIV in view of Part IV. For a critique of the results of the "special treatment" principle, see Peter Lichtenbaum, *Special Treatment vs. Equal Participation: Striking a Balance in the Doha Negotiations*, 17 Am. U. Int'l L. Rev. 1003 (2002). Action on the mandate to review the S&D provisions agreed in the Doha Ministerial Declaration (¶ 44) and its Decision on Implementation-related Issues and Concerns (¶ 12) remained pending as of date of writing. For an analysis of the impact of other GATT rules on "late industrializing countries" *see* Alice H. Amsden, *Industrialization under New WTO Law*, UN Doc. No. TD(X)/RT.1/7, paper presented at UNCTAD X, High-level Round Table on Trade and Development, Directions for the Twenty-first Century, Bangkok, Feb. 12, 2000, available on-line at http://www.unctad-10.org/pdfs/ux_tdxrt1d7.en.pdf.

[62] For human rights, *see generally UN Charter, supra* note 52, Articles 1(3), 55(c); *UN Millennium Dec., supra* note 45, Article I(4); UDHR, *supra* note 52; *ICCPR, supra* note 52; ICESCR, *supra* note 52; *Earth Charter, supra* note 52. For equality among states, *see, e.g., UN Charter, supra* note 52, at Article 2(1); *Declaration on Principles of International Law Friendly Relations and Cooperation Among States in Accordance with the UN Charter*, UN GA Resolution 2625, UN Doc. A/55/L.56/Rev.1 (1970); *Millennium Dec., supra* note 45, Article I(6). Equality among individuals is a fundamental value essential to international relations in the 21st century. Millennium Dec., *id.,* Article I(6). It is recognized within the UN Charter, *supra* note 52, Article 1(2) and in a number of general and specific human rights treaties and declarations as well as labor law conventions. *E.g.*, ICCPR, *supra* note 52, Article 2; ICESCR, *supra* note 52, Article 2(2), and *generally International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD")*, March 7, 1966, 660 U.N.T.S. 195, I.L.M. 352 (1966); *Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")*, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980). Special measures to ensure equality are called for in various contexts. *E.g., ICERD, id.*, Article 1(4), 2(2); *CEDAW*, at Article 4. Democracy involves a comprehensive set of rights to government by the will of the people. *E.g., UDHR, supra* note 52, Article 21; *Respect for the principles of national sovereignty and non-interference in the internal affairs of States in electoral processes as an important element for the promotion and protection of human rights, UNGA Resolution 56/154*, UN Doc. A/RES/56/154 (2001), preamble; *ICCPR, supra* note 52, Article 25. The principle of development entitles individuals and peoples to the process and results of States' efforts, individually and collectively, to promote economic and social progress and solve related problems. *E.g., Vienna Dec., supra* note 52, Article I(10); *Declaration on the Right to Development*, UNGA Resolution 41/128, UN Doc. A/RES/41/28 (1986), Article 1. Environmental respect is an essential value leading to the sustainability of healthy and productive human life and economic and social activity in harmony with nature and the environment. *E.g., UN Millennium Dec., supra* note 45, Article I(6), *Johannesburg Declaration, supra* note 52, Chapter IV. For labor, *see infra* notes 63–65; for trade, *see infra* notes 66–71.

[63] *Philadelphia Declaration, supra* note 18, Article I(c).

[64] *See ILO Fundamental Principles, supra* note 3, Article 2; *Equal Remuneration Convention*, ILO Convention No. 100 (1951); *Discrimination in Employment and Occupation Convention*, ILO Convention No. 111 (1958); *Workers with Family Responsibilities Convention*, ILO Convention No. 156 (1981). Special measures

of full employment, decent working terms and conditions, and income security are all rights-based development objectives of the ILO.[65]

International trade rules correspondingly reflect normative principles common to the international system. The principle of equality in principle among states underlies the obligation of non-discrimination in most-favored nation ("MFN") and national treatment principles,[66] and in the right to take sanitary and phyto-sanitary measures necessary to protect human, animal or plant life or health.[67] In turn, the pursuit of equality in effect can be seen in the commitment to reciprocity *subject to mutuality of advantage*, and in special clauses for more favorable treatment of developing countries with a view to their fuller participation in international trade.[68] The principle of development has become increasingly recognized at political level in calls for positive efforts to ensure that developing countries secure a share in the growth of world trade and to improve effective participation of least-developed countries in the multilateral trading system.[69] The value of preserving the world's resources is reflected in the WTO Agreement preamble; this pledge was not part of the earlier GATT framework.[70] Various exceptions to protect "legitimate objectives" in the areas of human life, health, and safety, and environmental resources, also implicate WTO Members' commitments to human rights and the environment.[71]

D. Values as Instrumental Tools

The means by which countries put shared values into practice differ depending upon circumstances and local preferences. While maintaining the necessary freedom of choice for differing situations, certain common approaches are evolving that form patterns of consultation, negotiation, and the settlement of disputes at both national and international levels. These *instrumental values* guide the way actors in the international community relate, individually and collectively. They address methods of conduct like

to ensure equality are called for in the Indigenous and Tribal Peoples Convention, ILO Convention No. 169 (1989).

[65] *ILO Constitution, supra* note 3, preamble. *See, e.g., Employment Policy Convention, supra* note 22; *Protection of Wages Convention*, ILO Convention No. 95 (1949); *Minimum Wage Fixing Convention*, ILO Convention No. 131 (1970); *Occupational Safety and Health Convention*, ILO Convention No. 155 (1981); *Vocational Rehabilitation and Employment (Disabled Persons) Convention*, ILO Convention No. 159 (1983).

[66] E.g., *GATT, supra* note 8, Articles I and III.

[67] E.g., *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)*, Article 2.1.

[68] E.g., *DSU, supra* note 33, Articles 3.2 and 19.2 (rights and obligations); Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT, BISD (1980).

[69] *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, Nov. 20, 2001, ¶¶ 2, 3, *passim* reproduced in the Appendix to this book); *see also* Monterrey Consensus, *supra* note 52. Concrete steps include duty-free and quota-free access for LDC exports; conducting a work program and negotiating process with a view to development needs including on agriculture, trade in services, intellectual property rights, and a review of all S&D treatment provisions; and supporting technical cooperation and capacity building in coordination with other agencies as core elements of the development dimension of the multilateral trading system. *See also Johannesburg Declaration, supra* note 52, Chapters V, IX (supporting Doha and Monterrey work programs for action to address needs and interests of developing countries).

[70] *See, e.g., WTO Agreement supra* note 5, preamble (expanding the production of and trade in goods and services while allowing for use of the world's resources in accordance with the objective of sustainable development).

[71] E.g., *GATT, supra* note 8, Article XX; *Agreement on Technical Barriers to Trade (TBT Agreement*), Article 2.2. See also *Decision on Trade and Environment*, Ministerial Decision adopted by Ministers at the Meeting of the Trade Negoitations Committee in Marrakesh (14 April 1994) (establishing Committee on Trade and Environment); *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB (1998) ("*Shrimp*"), ¶¶ 129–31, 152–53.

transparency, participatory decision-making, and accountability.[72] Such "process values" underlie international relations in various fields, including the labor and trade regimes.

In the labor sphere, consultative decision-making is at the heart of the way decent work is promoted and sustained, and underlies central ILO standards.[73] At the international level, by constitutional mandate, the Organization's decision-making is shared by representatives of governments, employers and workers organizations.[74] Other members of the international community, such as non-governmental international organizations and official international organizations, when accredited as observers, have the right to participate and take the floor under certain circumstances.[75] Documents for discussion at the ILO Governing Body are, as a rule, made public in advance, a transparency which aids meaningful consultation.[76]

In the multilateral trade regime, transparency operates as a motivating principle in a number of contexts. The Trade Policy Review Mechanism is mandated to use greater transparency in WTO Members' trade policies and practices as the primary means to contribute to improved adherence to WTO rules, disciplines, and commitments.[77] Transparency is at the heart of public notice and comment rules for national level decision making on technical regulations with trade effects.[78] Recent steps have been taken to achieve more participation as well as transparency in trade negotiations[79] and in dispute settlement procedures.[80]

IV. Normative Implications of a Values Framework for Trade and Labor

A. Toward the Internationalization of Values

The drive for a values-based mandate to balance the power of trading with the pursuit of public good resembles in some ways the movement toward internationalization of human

[72] The responsibility for implementing good governance rests with states. UN Commission on Human Rights, *The Role of Good Governance in the Promotion of Human Rights*, UN Doc. E/CN.4/RES/2002/76, CHR Resolution 2002/76 (2002). Attributes of good governance are a "transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people" *Id.* at ¶ 1; see also ILO Governing Body, *Policies and Social Partnerships for Good Governance*, ILO Doc. GB.288/WPSDG/2 (Nov. 2003). Good governance also rests on the rule of law and democracy. *Copenhagen Declaration, supra* note 4, at Commitment 18(f) and Copenhagen Programme of Action, ¶ 14(b); *Johannesburg Declaration, supra* note 52, ¶ 31. Economic systems are "based on the principles of . . . democracy . . . participation, transparency, accountability and inclusion. *Monterrey Consensus, supra* note 52, Article I(9). Therefore, both trade and labor have intersecting interests in the enabling conditions of good governance: the rule of law and democracy, transparency, accountability, and participation in the government, promoting universal values and open markets. *See UN Global Compact, supra* note 43. Important in the concept of good governance and accountability is the right of redress for personal and economic injury. *See, e.g., UDHR, supra* note 52, Article 12, *ICCPR, supra* note 52, Article 2.

[73] *ILO Tripartite Consultation (International Labour Standards) Convention* No. 144 (1976).

[74] *ILO Const., supra* note 3, Article 3 (General Conference), Article 7 (Governing Body). Established procedures permit examination of the credentials of delegates and their advisers to the International Labour Conference and of any objection thereto. *Standing Orders of the International Labour Conference LC*, adopted by ILC, 1st Sess. (1919) ("*ILC Standing Orders*") (as amended), Articles 5, 26.

[75] *ILO Const., supra* note 3, Article 12; *ILC Standing Orders*, Articles 14, 56.

[76] *Standing Orders of the Governing Body* (adopted 1920, as amended), Article 14.

[77] *WTO Agreement, supra* note 5, Annex 3 (Trade Policy Review Mechanism), § A(i).

[78] *E.g.,, TBT Agreement, supra* note 71, Article 2.9.

[79] At the Doha Ministerial Conference in 2001, a Trade Negotiations Committee was established to supervise trade negotiations under the authority of the General Council. *Doha Declaration*, *supra* note 69, ¶ 46, reproduced in the Appendix to this book. Explicit directives that negotiations shall be open to all WTO members and "shall be conducted in a transparent manner among participants in order to facilitate the effective participation of all." *Id*., ¶¶ 48–49.

[80] *Shrimp, supra* note 71, ¶¶ 79–91.

rights of the past century. Like its earlier counterpart, this modern-day movement seeks to empower the weak and vulnerable.[81] However, the human rights movement grew in response to the abuse of public power, while the values movement of today seeks to address imbalances in economic power associated with the globalization of markets and workplaces. Today's movement seeks to ensure that needy individuals, peoples, and countries are not only protected from market abuses, but affirmatively benefit from market gains.

The normative framework of the new movement builds upon human rights law yet differs in its orientation and effect. Human rights law has traditionally focused upon State obligation, in both negative and positive terms, with relatively recent attention to the roles of non-state actors.[82] In contrast, the emerging framework of values for governing trade and labor activities stresses shared responsibility among public and private actors for the processes and outcomes of globalization in markets and society. While the primary responsibility of States, and state actors, is still recognized, the new system calls for commitment and effort by the entire international community. This community, which is voluntarily coming together on the basis of common values, includes a wide variety of actors, from international and regional public organizations and local authorities to businesses, unions, the media, and religious and other civil society groups.

The shared responsibility of all actors that marks today's movement reflects the distinctive premise that everyone in society and the market stand to benefit from a values-based governance of economic activity. In this respect, the focus on intended beneficiaries of the human rights system and the modern approach differs. While both systems seek to benefit individuals and peoples, today's quest for values in globalization aims at strengthening the governance of States themselves as well as the effective functioning of markets. This approach draws upon emerging norms of accountability in international law in aiming to transform the relationships, rules and systems that dominate the worlds of work and trade.

B. Ordering Priorities

The emerging values-based foundation for international cooperation encourages interdependence and coherence among trade, work and other economic and social activities

[81] Responding to unprecedented abuses of public power in World War II, the human rights movement recognized and applied the basic values of humanity in establishing a universal, rules-based framework to protect individuals and peoples from the State, and from each other. *See, e.g.*, P.H. Kooijmans, *Human Rights—Universal Panacea?* 37 NETHERLANDS INT'L L. REV. 315 (1990).

[82] State obligations in human rights law are commonly understood as a multi-faceted commitment to respect, protect and fulfill human rights. Asbjorn Eide, *Economic, Social and Cultural Rights as a Human Right* in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A TEXTBOOK 21–40 (A. Eide, Catarina Kraus, and Allan Rosas eds., 1995). Human rights theory has expanded the focus on the role and responsibility of non-state actors in a duties-based approach. UDHR, *supra* note 52, Article 29. *See also* Erica Daes, *Status of the Individual and Contemporary International Law*, UN Doc. E/CN.4/Sub.2/1989/40; Andrew Clapham, HUMAN RIGHTS IN THE PRIVATE SPHERE 343–56 (Ian Brownlie, ed., 1993); *Duties sans Frontiéres: Human Rights and Global Social Justice* (Int'l. Council on Human Rights Policy, 2003) available on-line at www.ichrp.org/ac/excerpts/137.pdf Nonetheless, enforcement mechanisms for holding non-state actors directly accountable for commission of human rights abuses are found primarily in international criminal law. "Since the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals." Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 565 (1998). A recent effort within the UN human rights system to broaden enforcement to civil responsibility remains controversial and, to date, inconclusive. *See Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12 (2003).

of a globalizing world. In cases of conflict or trade-off, a balancing of the competing priorities based on universally-recognized social expectations and needs leads to greater synergy between international requirements and local needs. Applying a shared values framework contributes to resolving conflicts over social values in trade negotiations, international economic policy making, and the trade disputes.

The mandate for coherence finds support in a growing presumption that there need be no policy contradiction between an open, non-discriminatory and equitable multilateral trading system, on the one hand, and contemporary non-trade-specific concerns of the international community on the other. At the WTO policy level, the importance and legitimacy of strategies of development and poverty reduction beyond trade openness have been explicitly acknowledged. Ministerial Decisions and Appellate Body rulings have highlighted the social values enshrined in the WTO Agreement Preamble relating to the environment and sustainable development.[83]

Further support for the use of a values framework is found in the interpretation of trading rules. Obligations under the international trade regime are to be clarified "in accordance with the customary rules of interpretation of public international law".[84] The modern international conventions and declarations giving expression to international social values are thus considered a relevant part of the broader legal context for interpretation of the treaty rules which embody these concepts.[85] Indeed, application of a framework of shared values has proved dispositive in some cases and has encouraged predictability and fairness in determining when a State may autonomously pursue a policy choice subject to challenge as inconsistent with trade rules. In the *Asbestos* case, for example, a challenged measure was considered, in purpose and application, to be consistent with commonly agreed values that informed trade rules, and the measure at issue was considered sustainable.[86] However, as demonstrated in the *Shrimp* case, if a

[83] E.g., *Shrimp, supra* note 71, ¶ 129. A similar presumption is reflected in the mandate of the Committee on Trade and the Environment. Decision on Trade and Environment, supra note 71, preamble, also noting *Rio Declaration, supra* note 49, *cited in Shrimp, supra* note 71, ¶ 151, note 146 (""[c]onsidering that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environemtn, and the promotion of sustainable development on the other").

[84] *DSU, supra* note 33, Article 3(2). That provision is seen as a measure of recognition that the General Agreement on Tariffs and Trade is not to be read in clinical isolation from public international law. For an application of the mandate, *see, e.g., United States—Standards for Reformulated and Conventional Gasoline ("Gasoline")*, Report of the Appellate Body (WT/DS2) (1996), at 15–16 (turning to a basic principle of treaty interpretation based in customary and treaty law to analyze Article XX in context and the meaning of specific provisions of Article XX (g)). *See* also *Shrimp*, *supra* note 71, ¶¶ 158, 131, applying the principle of good faith and effectiveness in treaty interpretation, respectively.

[85] Where concepts embodied in a treaty are "by definition, evolutionary" their interpretation requires resort to modern international conventions and declarations. *Shrimp, supra* note 71, ¶ 130, applying the principle to interpret GATT, The reference in Article XX(g) to "natural resources", *quoting Namibia (Legal Consequences) Advisory Opinion* (1971), I.C.J. Rep., at 31: "An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".

[86] This type of result occurred in the Asbestos case, which reviewed a challenge against France's public health measure which targeted an objective that was higher than relevant international requirements. *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R (2001) ("Asbestos"). The measure was deemed, in relevant part, to not be a disguised protectionist measure since it had been taken at the insistence of the public in democratic fashion. *E.g., id*., ¶ 8.238. Critical to the analysis was the panel's decision that it could not question France's autonomy in setting this objective by democratic process. See *id*., note 176 and accompanying ¶ 8.210 (XX(b) of GATT does not impose same constraints as Article 3.3 of SPS Agreement on Members wishing to apply measures that involve a level of protection higher than that obtained by basis on relevant international standards).

measure conforms with commonly agreed values in one respect but not another, it may still be found objectionable.[87]

While environmental and social values have been the subject of dispute settlement, no disputes have squarely turned specifically on labor or employment values. None has invoked the only explicit reference to labor found in the Article XX exceptions.[88] Yet the approach that has been adopted, one in which evolving concepts embodied in trading obligations are interpreted consistently within the broader legal context, logically lends itself to giving priority to internationally-agreed goals of decent work when conflicts arise.[89] The major planks of the social floor of decent work qualify for such prioritization as they reflect commonly-agreed ethical values of widespread application[90] as may even be said to contribute to the evolution of obligations *erga omnes*[91] Other pillars of decent work, such as promoting full employment and raising standards of living through social protection, are recognized as explicit policy objectives in the WTO Agreement itself.[92] While these objectives have not been the subject of dispute settlement to date, there is no evident reason to treat them differently than those objectives involving protection of the environment and sustainable development.

[87] In *Shrimp*, a measure was found consistent with universal values in purpose, but not in application. Shrimp, *supra* note 71, ¶¶ 166–72. The U.S. measure at issue in *Shrimp* was consistent on its face with the international community's value expressed in a number of international instruments calling for environmental respect and conservation of nature, yet its application was found inconsistent with the value placed by the international community on bilateral or multilateral cooperation in achieving the substantive objective. The Appellate Body reasoned in part that, although the measure itself fell within the exception of Article XX(g), the highly selective pursuit by the United States of negotiations to establish consensual means of protecting and conserving the marine resources at issue constituted unjustifiable discrimination against excluded WTO members that exported shrimp to the United States.

[88] *See GATT, supra* note 8, Article XX(e) (measure relating to the products of prison labor).

[89] For a discussion of decent work, see *supra* note 4.

[90] The fundamental principles and rights at work apply at constitutional level across all ILO member states, *see supra* note 2, and share common ground with human rights imperatives of the UN chapter, *supra* note 52, at Arts. 55 and 56, This broad-based consensus within and across countries offers additional weight to a challenged State measure that is consistent with the Declaration's expression of the international community's values.

[91] Obligations *erga omnes* arise from fundamental principles necessary for humanity and concern the universal enforceability of norms of international law, the violation of which is deemed to be an offence not only against the state directly affected by the breach, but also against all members of the international community. P. Malanczuk, Akehurst's Modern Introduction To International Law 58–59 (1997), noting that the ICJ has so far not addressed the legal consequences of breach of such obligations. *Erga omnes* obligations, such as those bearing on human rights, have been viewed as more compelling for multilateral enforcement than those that would involve responsibility to other states seeking to espouse commercial rights, for example, of foreign investors. *See, e.g.*, C. Wilfred Jenks, *The General Welfare as a Legal Interest* in Jus Et Societas: Essays In Tribute To Wolfgang Friedmann 151–58 (1979). For ICJ dictum on the subject, *see Barcelona Traction. Light and Power Co., Ltd.*, (Belgium v. Spain), Judgment, I.C.J. Reports, 1970, at 3. Such rules rest upon general principles of international law calling for the primacy of *erga omnes* obligations in cases of conflict. For example, peremptory norms of international law prevail over conflicting treaty provisions. *Vienna Convention on the Law of Treaties*, May 23, 1969, Article 53, 1155 U.N.T.S. 331, U.N.Doc. A/CONF.39/27 (1969) (a treaty is void if, at time of conclusion, it conflicts with peremptory norm; such norms are accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted). *See* IV Encyc. of Public International Law 938 (1999); *UNIDROIT Principles, supra* note 49, at Article 1.1, Comment, ¶¶ 2, 3 (both public and private law rules of mandatory character enacted by States may prevail over contracting principles).

[92] *WTO Agreement, supra* note 5, at preamb. ¶ 1 ("with a view to raising standards of living and ensuring full employment"). See *supra* notes 71, 86 and accompanying text, discussing *Asbestos* and *Shrimp* cases.

V. Institutional Implications of a Cohesive Framework

In practice as well as principle, placing the goal of decent work in a central position in international economic policy making will serve to discipline and guide the growth that trade generates in the direction of more and better jobs as well as other conditions necessary to eliminate poverty. It also expands the openings for policy space at local levels to democratically pursue domestic economic and social strategies with the public good in mind.[93] Doing so requires normative innovations toward greater coherence in the governance and accountability of the three main types of actors: international organizations, states and non-state actors.

A. Coherence among National Policies in Trade and elsewhere

The structure of the multilateral trading regime presupposes a world in which trading activities are one part of a larger set of national policies in which, under certain safeguards, social or other policies may take priority over the fundamental principles governing trading obligations.[94] Yet the various interpretations applying these provisions are as yet unpredictable, reflecting the fact that few agreed standards exist at global level to govern the processes by which States exercise discretion in setting and applying the non-trade related objectives of Article XX.[95] Similarly, little guidance exists on how to apply

[93] *See generally* John Jackson, *Sovereignty*, *Subsidiarity, and Separation of Powers* in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW, 13–31 (Daniel L. M. Kennedy and James D. Southwick eds. 2002); Rodrik, *supra* note 30. Recently debate has arisen regarding trade rights and the rights of WTO Members to refuse genetically modified organisms ("GMOs"). For example, the Cartagena Protocol to the Convention on Biological Diversity allows for countries to refuse genetically altered food for a variety of reasons, including safety and the value of biological diversity to indigenous and local communities. *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, Jan. 29, 2000, Articles 1, 2, and 26, 39 I.L.M. 1027 (2000). Another important aspect of the debate centers on intellectual property rights and the obligations of states to respect, preserve and maintain collective knowledge of indigenous peoples and developing countries. *See, e.g., International Treaty on Plant and Genetic Resources for Food and Agriculture and the Convention on Biological Diversity*, Nov. 3, 2001, Article 1.1, <www.fao.org/Legal/TREATIES/033s-e.htm> (not yet entered into force); *Convention on Biological Diversity*, June 5, 1992, Article 8(j), 31 I.L.M. 818 (1992). Autonomy over matters in the public interest is also important for developed countries who have worked to pass stricter food safety and public health rules. *See generally* SPS Agreement, *supra* note 67.

[94] Consider, for example, the balance between trade and non-trade related policies in Article XX of the GATT, *supra* note 8. *See, e.g., Asbestos, supra* note 86 (asbestos-related prohibitions qualified under Article XX(b) as exception). *Accord, United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, Report of the Appellate Body, WT/DS58/AB/RW (2001), ¶ 153 (compliance merited exception for measure, particularly on-going serious good faith efforts to reach a multilateral agreement). *Cf. United States—Restrictions on Imports of Tuna* (*Tuna II*), DS 29/R, June 10, 1994 (not adopted), ¶ 5.42 (sustainable development, though a widely recognized goal shared among parties, was insufficient to qualify trade embargo as an exception under Article XX). *See* Article XX cases discussed generally in Raj Bhala, *The Jurisprudence of GATT Article XX: (B) and (G)*, in INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 2091 (2001); *Paul de Waart, Quality of Life at the Mercy of WTO Panels: GATT's Article XX an Empty Shell?* in INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE, 109–30 (Friedl Weiss, Erik M.G. Denters, Paul J.I.M. de Waart eds. 1998) ("HUMAN FACE").

[95] A number of decisions demonstrate that at the heart of the matter is the Organization's concern with the governance of State discretion over non-trade related objectives that may have trading effects. This concern for the scope and conditions under which governmental discretion is exercised underlies the analytical emphasis restricting the application of the "necessary to" or "relating to" prongs of the Article XX tests. *E.g., Thailand—Restrictions on Importation of and International Taxes on Cigarettes*, BISD 37 S/200–228, November 7, 1990 ("*Thai Cigarettes*") ("necessary to" requirement is only met if no other reasonable alternative is available). Similar concerns underlie analyses under Article XX chapeau provisions. In these cases, the Dispute Settlement Body has sought to avert measures that are applied in a manner constituting arbitrary or

or interpret the provision in the ILO Fundamental Principles and Rights Declaration, which states that "labor standards should not be used for protectionist trade purposes, and . . . nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up."[96] Read *in pari materia*, the references would appear to underscore the coherence between principles in trade and labor regimes. The first reference affirms the general principle against protectionism in the context of labor standards, as reflected in the WTO Singapore Declaration, while the second reference could be interpreted as emphasizing the fact that the commitments of the Declaration, which arise from the constitutional obligations of each Member State, represent a global social floor which is not to be subject to cross-border competition inherent in comparative advantage.[97]

The experiences above illustrate the need for clarifying international expectations on State responsibility for national policymaking in areas that are likely to have cross-border effects within the nexus between labor and trade. Responsible exercise of this type of autonomy depends largely upon effective governance structures within each Member State and extends beyond any one international organization's mandate.[98] While the outcomes of effective governance differ across national contexts, generally-established principles of State responsibility and effective governance help to enable participatory and accountable systems for using public resources, including labor, fiscal, and trading policies.[99]

unjustifiable discrimination between countries where the same conditions prevail, or to prevent a disguised restriction on international trade. *Shrimp, supra* at ¶ 145 ("close and real" relationship between means and ends found to satisfy "relating to" prong of Article XX (g)). Reflecting similar concerns, applications of the Article XX chapeau provisions have sought to "maintain a balance of rights and obligations between the right of a Member to invoke one . . . of the exceptions of Article XX . . . and the substantive rights of the other Members under [the trading system]." *Shrimp, supra* note 71, at ¶ 160. In seeking this balance, the standards of the chapeau are considered to be "*necessarily broad in scope and reach"* and, "when applied in a particular case, the actual contours and contents of [the chapeau] standards will vary as the kind of measure under examination varies." *Shrimp, supra* note 71, at ¶ 123 (emphasis supplied) (explaining *e.g.*, that the standard of arbitrary discrimination could be different for a measure involving public morals than for one involving products of prison labor). Several cases have involved the definitional boundaries of the objectives themselves, *e.g., Shrimp, supra* note 71 (clarifying meaning of "exhaustive natural resources" under Article XX(g)). Formally, no challenges have been filed involving measures relating to products of prison labor under Article XX(e).

[96] See Article 5, *ILO Fundamental Principles, supra* note 4. While no mechanism for formal challenges under Article 5 exists, perceived risks to comparative advantage may influence, in certain cases, governmental decisions concerning relevant law and practice, and negotiation of bilateral and other economic treaties.

[97] *WTO Singapore Declaration supra* note 36, reproduced in the Appendix to this book. The Fundamental Principles Declaration "[d]eclares that all Members, even if they have not ratified the Conventions in questions, have an obligation arising from the very fact of membership in the Organization to respect, to promote and realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions." *Id.* at Article 3.

[98] A cohesive framework for sharing responsibility based on universal values incorporates expectations for such governance among State actors, built upon mechanisms for transparency, participation and accountability. See *supra* note 72.

[99] Effective governance of states is a process based on transparent, responsible, accountable and participatory government operating under the rule of law. *E.g., CHR Resolution* 2002/76, *supra* note 72; *Copenhagen Dec., supra* note 3, at ¶ 26(n), and *Programme of Action*, ¶ 14(b). *See also* OUR COMMON FUTURE, *supra* note 49, at Annexe, Principle 6; *The Earth Charter, supra* note 52, at Principle 13. Institutions of effective governance include, but are not limited to, electoral systems for periodic and genuine elections, an independent judiciary, a transparent and accessible legislature, and participatory systems for effective management of public resources. *See, e.g., Monterrey Consensus, supra* note 52, at I (9); II (15) *Vienna Dec., supra* note 52, at I (27); and *UDHR, supra* note 52, at preamb. ¶ 3.

B. Coordination of Mandates among International Organizations

Rarely is coordination with other specialized regimes mandated expressly within an international organization's charter.[100] In this regard, WTO and ILO are no exception. As international organizations, their governance, based on the rule of law, comprises interconnected domains including relationships with Member States, third/external parties, and each other. While the charters of the two organizations bear no express mandates for coordination with each other, such mandates can arguably be implied, particularly in the context of relationships with other international economic institutions. WTO has the duty to pursue consistent and mutually supportive policies with other international institutions responsible for monetary and financial matters through cooperation with them.[101] While follow-up of this mandate delivered at Marrakesh has focused primarily on WTO's relationship with IMF and the World Bank,[102] the coherence mandate more broadly targets the need for complementary and supportive policies to strengthen the relationship between trade liberalization as an engine for growth, and other economic policies affecting growth and development.[103] The development dividends of national and international economic policies that promote employment, transferable skills and other conditions for decent work are vital to making market access meaningful as well as distributing market gains more broadly.

In turn, the ILO possesses a mandate to examine and consider all international economic and financial policies and measures in light of the fundamental objective of attaining conditions necessary for social justice.[104] As with WTO's coherence mandate, ILO responsibility is presumably exercised in accordance with the subsidiarity principle

[100] International organizations exercise authority effectively when they operate within the powers and responsibilities granted to them. The functions and powers, express or implied, of international organizations are limited; they are defined by constituent instruments, decisions and resolutions adopted in accordance with them, and established practices. The Organization has an obligation to carry out its functions and exercise its powers in accordance with the rules set down under this authority. *E.g., Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations*, March 21, 1986, Article 1(j), 25 I.L.M. 543; *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Advisory Opinion) ("*Reparations Case*"); *International Status of Southwest Africa*, 1950 I.C.J. 128 (Advisory opinion); *Certain Expenses of the United Nations*,1962 I.C.J. 151 (Advisory Opinion) ("*Certain Expenses*"). *See also* International Law Association, Committee on Accountability of International Organizations, Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices (New Delhi Conference, 2002), Section I, available on-line at http://www.ila-hq.org/pdf/Accountability/Accountability%20Of%20International%20Organisations%202002.pdf ("*Accountability of Int'l Orgs. Third Report*").

[101] *Declaration of the World Trade Organisation to Achieving Greater Coherence in Global Economic Policymaking*, Ministerial Decisions and Declarations adopted by the Trade Negotiations Committee on 15 December 1993, reprinted in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 386 (WTO, 1999) ("*WTO Coherence Declaration*"), ¶ 5. The Declaration recognizes that international coherence is subsidiary to national-level pursuit of harmony between economic policies. *Id.*, ¶¶ 1–4. This coherence is to be achieved under the subsidiarity principle with deference to national jurisdiction: "While the task of achieving harmony between these policies is seen to fall primarily on governments at the national level, their coherence internationally is an important and valuable element in increasing the effectiveness of these policies at national level." *Id.*, ¶ 1.

[102] See *Coherence Note*, *supra* note 29 (cooperation in policy, research, and technical assistance).

[103] Punta del Este Mandate, Preamble and Part A (Objectives) (20 September 1986), cited in *Coherence Note, supra* note 29, at Annex 1, ¶ 4.

[104] *Declaration of Philadelphia, supra* note 18, Article II. The ILO is mandated to cooperate fully with international bodies entrusted with a share of the responsibility for international and national action to secure fuller use of the world's productive resources necessary to achieve social justice and peace, including measures to expand production and consumption, avoid severe economic fluctuations, and assure greater stability in world prices of primary products and promote international trade. *Id*. at Article IV.

granting to national jurisdiction a primary role in achieving harmony in economic and social policymaking.[105] Follow-up to this mandate within ILO has involved research cooperation,[106] participation in the World Bank process of Poverty Reduction Strategy Papers,[107] and development of the follow-up to the Declaration on Fundamental Principles and Rights at Work.[108] The terms of reference of the ILO-convened World Commission on the Social Dimension of Globalization further this mandate to seek ways to make economic and social policies and goals mutually reinforcing.[109]

In addition to implied mandates for coherence, general rules of international law also support a level of policy and operational consistency between WTO and ILO. As subjects of international law,[110] both organizations operate under general rules of international law that recognize the principle of internal coherence within public international law, and the particular priority to be given to obligations involving fundamental human and workers' rights.[111]

C. Beyond Coherence to Accountability

Beyond coherence in principle, mechanisms are needed in practice to ensure the accountability of international organizations, including WTO and ILO, to each other, their Member States, and third parties to operate consistently with common underlying global values. Evolving recommended rules and practices for the effective governance of international organizations contemplate transparent, participatory and rules-based decision making, procedural attributes which help to secure participation by Member States on

[105] *Compare, e.g., WTO Coherence Declaration*, *supra* note 101, with *Employment Policy Convention, supra* note 22, Article 2(a). Article 2 of the Employment Policy Convention directs States Parties to adopt measures to promote full, productive and freely chosen employment "within the framework of a co-ordinated economic and social policy".

[106] *See, e.g., Country Studies on the Social Dimension of Globalization: Final Report*, ILO Doc. No. GB.276/WP/SDL/1 (Nov. 1999); *Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives Addressing Labour Issues*, ILO Doc. No. GB.273/WP/SDL/1 (Nov. 1998).

[107] *E.g., Poverty Reduction Strategy Papers (PRSPs), An Assessment of the ILO's Experience*, ILO Doc. No. GB.283/ESP/3 (March 2002).

[108] See *supra* notes 9, 37, 100–101.

[109] The objectives of the Commission are to identify policies for globalization which reduce poverty, foster growth, employment and development in open economies, and widen opportunities for Decent Work; to identify policies which can make globalization more inclusive, in ways which are acceptable and seen to be fair to all, both between and within countries; and to assist the international community forge greater policy coherence in order to advance both economic and social goals in the global economy. See *Enhancing the Action of the Working Party on the Social Dimension of Globalization: Next Steps*, ILO Doc. No. GB.282/WP/SDG/1 (Nov. 2001), ¶¶ 9–11; *Report of the Working Party on the Social Dimension of Globalization: Report by the Chairperson of the Working Party, Ambassador Jean-Jacques Elmiger of Switzerland*, GB.282/12 (Nov. 2001), ¶¶ 11, 13.

[110] The legal personality of an international organization depends upon its constituent treaty, and exists with the limits of the Organization's purpose and functions. Once international legal personality is conferred, the Organization enjoys specific rights and exercises certain obligations. *E.g.*, *Reparations Case*, *supra* note 67. *See also* II ENCYCL. PUBLIC INT'L LAW, *supra* note 61, at 1299.

[111] Authoritative expert declarations have confirmed the priority of human rights in the conduct of international organizations. *Maastricht Guidelines on Economic, Social and Cultural Rights*, 15 NETH. QUARTERLY OF H. RTS., 244–52 (1997); 20 H. RTS. QUARTERLY 3, ¶ 19 (1998) (crucial for international organizations to correct their policies and practices so that they do not result in deprivation of ESC rights). *See also UDHR, supra* note 52, at Article 28 (everyone is entitled to a social and internal order in which the rights and freedoms set forth in this Declaration can be fully realized).

the basis of functional equality and, as possible, participation by non-state actors.[112] Sound governance procedures encourage meaningful access and participation by both state and private actors within the international community. They help to guide the policies and practices of international organizations such as ILO and WTO consistently with the emerging framework of common values developed by the international community, even in areas of accountability beyond legal responsibility.[113]

The accountability of the ILO and WTO directly to the people whom their mandates are intended to serve is essential to coordinating labor and trade with other economic policies and practices at global and local levels. International organizations with international legal personality exercise certain rights and responsibilities that are reasonably well-settled in the contexts of internal accountability and responsibility for binding acts.[114] However, the responsibility of international organizations to third parties is not subject to judicial review in national or international courts absent consent to be sued, as in treaties or arbitral clauses of agreements, or in keeping with the rules of international law for internationally wrongful acts.[115] In practice, certain international institutions are developing self-governance mechanisms that permit claims by people directly and adversely affected by the organization's operations. The most long-standing practice in this regard—still only a decade old—involves the operation of independent inspection mechanisms by the World Bank and several regional multilateral development banks.[116] In some instances, these types of mechanisms have encouraged greater public participation in decision-making and administration, and greater respect for human and peoples' rights.[117]

A further frontier for ensuring accountability among global actors involves the responsibility of member States to protect the rights of third parties in situations where the States act collectively through international organizations. Whether States have concurrent or

[112] *Accountability of Int'l Orgs. Third Report, supra* note 100. *See also* Christian Dominicé, *Organisations Internationales et Démocratie* in THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY / L'ORDRE JURIDIQUE INTERNATIONAL, UN SYSTÈME EN QUETE D'ÉQUITÉ ET D'UNIVERSALITÉ, LIBER AMICORUM GEORGES ABI-SAAB 731–743 (L. Boisson de Chazournes and V. Gowlland-Debbas eds. 2001).

[113] *See discussion infra* notes 114–117 and accompanying text.

[114] The legal responsibility of an international organization with international legal personality encompasses internal accountability and judicial review for binding acts. On internal accountability to its staff and member states, *see generally Certain Expenses, supra* note 67. On judicial review, *see, e.g.*, Elihu Lauterpacht, *Judicial Review of the Acts of International Organizations* in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 92–102 (L. Boisson de Chazournes and Philippe Sands eds. 1999).

[115] Legal responsibility to third parties for internationally wrongful acts is based upon the fact that international organizations are, by their very nature, subjects of international law. II ENCY. OF PUBLIC INT'L LAW, *supra* note 90, at 1318 ff. Legal responsibility to external third parties to ensure compliance with principles and rules, and in cases of liability for damage caused by its own acts, is commonly accepted to be governed as agreed by treaty and without prejudice to the rules of international law. *See, e.g., Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, Jan. 27, 1967, Article VI, 610 U.N.T.S. 205 ("*Outer Space Treaty"); United Nations Convention on the Law of the Sea*, December 10, 1982, Article 139, 1833 U.N.T.S. 3 (responsibility to ensure that the activities of international organizations are conducted in conformity with the treaty is on the organization and member states).

[116] In the World Bank Inspection Panel, complaints are received from one or more persons who claim to be directly and adversely affected by Bank-supported projects on grounds of the Bank's failure to abide by its own binding policies and procedures in design appraisal and implementation of projects it finances. Resolution 93–10 IBRD and Resolution 93–6 IDA, The World Bank Inspection Panel, Sept. 22, 1993.

[117] *See, e.g., Annual Report*: August 1, 2001 to June 30, 2002, Vol. I (Inspection Panel, IBRD and IDA, 2002).

subsidiary liability for fulfillment of international organization's obligations due solely to their membership is a matter of international law, to be determined by reference to rules of the Organization.[118] States' accountability for their own actions through international organizations is limited by the presumption against derivative liability of member States for the actions of the organization, members of an organization may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence, or abuse of rights.[119] Practice in organizations administering common spaces may lend relevant analogies for the WTO and ILO. Expressly agreed by treaty in those instances, the organization and member States share collective responsibility to ensure compliance with governing principles and rules for cooperation in managing the resources of common spaces, and liability under certain conditions for damages due to non-compliance.[120] While neither WTO nor ILO operate within such frameworks of collective responsibility, these types of cooperative arrangements could ultimately offer a way to share responsibility with accountability across international organizations and States in managing the practical effects on growth, employment, income equity, and poverty related to the implementation of their mandates.

The theory of shared responsibility focuses not only on accountability of international organizations and States but also on the duties of non-state actors. Non-state actors bear duties to respect the rule of law and deal in good faith in a manner that facilitates market and workplace environments based on freedom and dignity.[121] These duties reflect the starting point for pursuit of new horizons in developing effective means for non-state actor accountability to shared global value systems. Dialogue among States, international organizations and market and workplace actors represents a first step toward the effective functioning of internationally-accepted social values in a trading world.

[118] The responsibility of an international organization is exercised separately from that of its Member States in the absence of express or implied consent to collective responsibility. *See* Brownlie, *supra* note 82, at 686–88.

[119] Annuaire de l' Institut de Droit International, *The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties* 449, Vol. 66-II, Article 5 (1996).

[120] The collective responsibility extends to liability for damage caused by non-compliant activities, provided that the organization has declared that it accepts the rights and obligations of the relevant Liability Convention and that the majority of its members are parties to both the liability Convention and the underlying treaty. *See Convention on International Liability for Damage Caused by Space Objects*, March 29, 1972, Article XXII, 961 U.N.T.S. 187, referencing responsibility for activities under *Moon Treaty and Outer Space Treaty, supra* note 115.

[121] Well-functioning markets depend for success on respect for the rule of law, good faith dealings, absence of corruption and presence of transparency and accountability, and a culture of decent work. On respect for law, *see Copenhagen Programme of Action, supra* note 4, ¶ 14(b); *Johannesburg Declaration*, ¶ 29 and *Organization for Economic Cooperation and Development Declaration on International Investment and Multi-National Enterprises* ("OECD Guidelines on MNEs"), June 21, 1976 ¶ II(5), DAFFE/IME(200) 20; ILO *Tripartite Declaration of Principles Concerning MNEs and Social Policy* (adopted 1977 and amended November 17, 2000), ¶ 8, 41 I.L.M. 186 (2000). On good faith dealings, *see, e.g., UN Sales Convention*, A/CONF.97/19, Article 8 (1980); *UNIDROIT Principles of International Commercial Contracts, supra* note 58, at Article 1.3; II Encycl. of Public Int'l Law 1995, *supra* note 90, at 599. On corrupt practices, *see* prohibitions in OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, Nov. 21, 1997, OECD/IME/BR(97)20; *OECD Guidelines on MNEs*, Chapter VI, OECD/GD(97)40 (1997); *UN Convention Against Transnational Organized Crime*, Jan. 8, 2001, Articles 7, 9, A/RES/55/25. Supportive rules-based relationships, built on public law and policy and on partnerships across public and private sectors, help markets operate for public good and achieve fairer distribution of resources and benefits. *See also* Oscar Schacter, *The Erosion of State Authority and its Implications for Equitable Development*, in Human Face, *supra* note 94, at 36–38.

VI. CONCLUSION

The long-standing deficit in coherent governance of international economic activities has provoked calls for improved coordination across international trade, financial, development and labor regimes, as envisioned at the outset of the modern multilateral system. The dislocation has left unfulfilled, particularly in developing countries, the promise that liberalized trading systems will lead to more productive employment and higher standards of living. Social values contribute to cohesion by building common expectations and priorities in markets and the workplace, both nationally and increasingly at global level. International instruments reflect a broadening consensus that markets must incorporate shared values that enable progress toward fundamental objectives like freedom, dignity, equity and peace.

The emerging values-based foundation for international cooperation offers a means for developing interdependence and coherence among labor, trade and other economic and social priorities of a globalizing world. A growing presumption that trade and non-trade related aims need not be contradictory is evident in specific instances of policy making and dispute settlement. While environmental, health and development-based values have led the way, the prioritization of labor rights and decent work policies is likewise merited in cases where globally-shared values are implicated. In practice, giving equal priority to labor and employment values will help guide the growth that trade generates in the direction of more and better jobs, and contribute to eliminating poverty. Recent trends in policy negotiation and dispute settlement have invoked shared values in opening necessary policy spaces at national level for the democratic pursuit of economic and social strategies with particular local needs in mind.

While coordination of national policies and international organization mandates appears feasible in principle, more and better accountability mechanisms are required to bring the international system, including labor and trade regimes, into harmony with the globally-declared values that the system is intended to serve. Market and social actors, along with public authorities, will need to be held accountable for their influence and conduct among each other and with States and international organizations. While a coherent system of global governance is still evolving, the time for interdependence is approaching as widely-shared social values inform policy making, dispute settlement, and private transactions within markets, workplaces and society.

CHAPTER 61

TRADE AND HUMAN RIGHTS I

Ernst-Ulrich Petersmann*

TABLE OF CONTENTS

I. Introduction: A "Human Rights Approach" to International Trade? 625
II. Human Rights Obligations of WTO Members as Part of the Context for the Interpretation of WTO Rules 628
A. Human Rights Obligations of WTO Members 628
B. Limited WTO Jurisdiction and Customary International Law Rules for the Interpretation of WTO Law 629
C. Diversity of National and International Implementation of Human Rights 632
D. Constitutional Primacy of Human Rights in International Law? 633
E. Indivisibility and Incomplete Enumeration of Specific Human Rights? 634
F. Obligations by Governments and Intergovernmental Organizations to Respect, Protect and Promote Human Rights 636
G. Principles for the Mutual Balancing of Human Rights: Non-Discrimination, Rule of Law and Necessity Principles 637
1. Are the Balancing Principles of Human Rights Law Relevant for the Interpretation of WTO Rules? 637
2. Legal Consequences of a "Human Rights Approach to International Trade" 638
H. Human Rights as Institutional and Constitutional Guarantees: The Example of the Human Right to Health 641
III. Human Rights as Constitutional Restraints on the Powers of WTO Bodies? 642
A. Due Process of Law in the WTO: The Controversy over Amicus Curiae Briefs 643
B. Substantive Restraints: The Example of the Human Right to Health and Access to Medicines 645
1. Trade-Related Aspects of the Right to Health: General Comment No. 14 645
2. WTO Practice on Access to Medicines 647
C. Judicial Deference vis-à-vis Democratic Legislation: The Example of the Hormone Beef Dispute 648

* Joint Chair Professor for Public Law and Policy at the European University Institute and its Robert Schuman Center in Florence, Italy. Former Professor at the University of Geneva and its Graduate Institute of International Studies, and former legal advisor in the German Ministry of Economic Affairs, GATT and the WTO.

IV. "Human Rights Functions" of WTO Rules: Promotion of Human Rights in Domestic Legal Systems by Means of WTO-Consistent Interpretations of Domestic Law 650
A. WTO Guarantees of Freedom, Non-Discriminatory Conditions of Competition, Necessity and Proportionality 650
1. WTO Dispute Settlement Practice Relating to Protection of Health and Environment and to the Necessity, Proportionality and Non-Discrimination Principles in GATT Article XX 651
2. Balancing of Economic and Non-Economic Values in WTO Dispute Settlement Practice Relating to GATT Article III 653
3. Primacy of Non-Economic Values in WTO Dispute Settlement Practice Relating to the WTO Agreement on Sanitary and Phyto-Sanitary Measures ("SPS") 654
B. WTO Guarantees of Property Rights: WTO Disputes over TRIMS and TRIPS 656
C. WTO Legal Restraints on Discrimination and Trade Sanctions for Political Ends 657
V. The Future of the WTO Constitution: Explicit Recognition of Human Rights so as to Better Protect Social Welfare and Democratic Governance in the WTO? 659
A. Formal and Substantive "Multi-Level Constitutionalism" in WTO Law 659
B. Explicit Recognition of Human Rights in WTO Law so as to Promote Social Welfare and Democratic Governance in the Trade Policy Area? 660

I. Introduction: A "Human Rights Approach" to International Trade?

From the 1648 peace treaties of Westphalia to the 1945 U.N. Charter, public international law has evolved as a system of reciprocal rights and obligations among states based on sovereign equality and non-intervention into the internal affairs of states.[1] The state-centered U.N. Charter, and its collective security system established by the victorious powers of World War II,[2] assert legal priority over other conflicting international treaties.[3] The one-sided focus of the traditional "international law of states" on the freedom and power of governments, rather than on the human rights of their citizens is, however, increasingly challenged by national parliaments and civil society groups as being incompatible with the universal recognition of inalienable human rights and with the need for democratic legislation protecting human rights and "democratic peace".[4]

From the perspective of human rights and constitutional democracies, the validity of inalienable human rights no longer depends on the consent of the rulers; democratic legitimacy of all governments and of intergovernmental organizations derives from the consent of their citizens and from respecting and promoting their "constitutional contracts" and universally recognized, inalienable human rights. In case of conflicts, the inalienable core of human rights—especially in so far as they have become recognized as *ius cogens*—must be given priority over intergovernmental power politics, as acknowledged in Article 53 of the Vienna Convention on the Law of Treaties ("VCLT"). Citizens and civil society groups increasingly claim that, similar to the regional integration law in Europe and North America, the democratic legitimacy and effectiveness of the global integration law of the World Trade Organization ("WTO") could be enhanced by interpreting WTO rules as part of a democratic "international law of peoples",[5] and of a cosmopolitan "integration law of citizens",[6] rather than only as "international law among states".

The Agreement establishing the WTO establishes rights and obligations for states and other "members" (like the EC) to liberalize market access barriers and market distortions "with a view to raising standards of living, ensuring full employment, and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development" (Preamble). As goods and services are produced and consumed by individuals, WTO dispute settlement panels have emphasized that "one of the primary objects of the GATT/WTO . . . is to produce certain market conditions which would allow . . . individual activity to flourish" by protecting the international division of labor against discriminatory

[1] Article 2 U.N. Charter.

[2] Chapter VII, U.N. Charter.

[3] Article 103 U.N. Charter.

[4] On the emerging "human right to democratic governance" *see, e.g.,* T.M. Franck, *The Emerging Right to Democratic Governance*, 86 American Journal of International Law ("AJIL") 46–91 (1992); E. Stein, *International Integration and Democracy: No Love at First Sight*, 95 American Journal of International Law 489–532 (2001). On empirical evidence that democracies very seldom fight each other, and on the reasons why constitutional democracy and accountability tend to limit abuses of foreign and military policies, *see, e.g.,* P.K. Huth and T.L. Allee, The Democratic Peace and Territorial Conflict in the 20th Century (2002).

[5] *Cf., e.g.,* J. Rawls, The Law of Peoples (1999).

[6] *Cf., e.g.,* E.U. Petersmann, *Human Rights in European and Global Integration Law: Principles for Constitutionalizing the World Economy*, in Festschrift für C.D. Ehlermann 383–402 (A. Bogdandy, P. Mavroidis and Y. Mény eds. 2002).

trade restrictions and other distortions.[7] Yet, the same dispute settlement panel also emphasized that "(n)either the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect", *i.e.*, creating rights and obligations not only for WTO members but also direct individual rights for traders, producers and consumers.[8] In accordance with these intergovernmental structures and functionally limited economic objectives of GATT and the WTO, the words "human rights" are nowhere mentioned in the text of GATT 1947 and in the WTO Agreement. WTO obligations have been recognized as an "integral part of the Community legal order" inside the EC and have been incorporated into the domestic laws of many WTO members. But the EC Court of Justice—like the domestic courts of some other WTO members—has concluded from the intergovernmental structures and reciprocity principles of WTO law that the "purpose of the WTO agreements is to govern relations between States or regional organizations for economic integration and not to protect individuals" which, as a consequence, "cannot rely on them before the courts and . . . any infringement of them will not give rise to non-contractual liability on the part of the Community."[9]

All 146 WTO Members have accepted obligations to respect, protect and fulfill human rights under international law as well as under their respective domestic laws. All WTO Members have also recognized, for instance in various U.N. resolutions like the 1948 Universal Declaration of Human Rights ("UDHR"), that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".[10] If, as universally recognized in Principle 1 of the "Stockholm Declaration" of the U.N. Conference on the Human Environment of 1972, "(m)an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", such rights and "sustainable development" must be protected in international relations no less than inside states.[11] Hence, the U.N. resolutions on the "right to development" define development in terms of fulfillment of basic needs and of human rights.[12] U.N. human rights bodies increasingly insist that all WTO Members should adopt a "human rights approach to trade" which:

(i) sets the promotion and protection of human rights as objectives of trade liberalization, not exceptions;
(ii) examines the effect of trade liberalization on individuals and seeks to devise trade law and policy to take into account the rights of all individuals, in particular vulnerable individuals and groups;

[7] *See United States—Sections 301–310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R, (2000), ¶¶ 7.73 *et seq*.

[8] *Id.* ¶ 7.72. The Panel makes the following important reservation: "The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudge any decisions by national courts on this issue."

[9] According to the same judgment, "it is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions in the WTO agreements, that it is for the Community judicature to review the legality of the Community measure in question in the light of the WTO rules", *cf. Etablissement Biret SA v. EU Council,* EC Court of Justice, Case T-210/00, 31 COMMON MARKET LAW REPORTS, 787 808 (2002), (¶¶ 71–73).

[10] Article 28 UDHR.

[11] *Cf.* M. Pallemaerts, *The Human Right to a Healthy Environment as a Substantive Right*, in HUMAN RIGHTS AND THE ENVIRONMENT 11–21 (M. Déjeant-Pons and M. Pallemaerts eds., 2002).

[12] *See, e.g.,* U.N. General Assembly Declaration 41/128 of December 4, 1986 on the "Right to Development".

(iii) emphasizes the role of states in the process of liberalization—not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearers of human rights;
(iv) seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
(v) requires a constant examination of the impact of trade liberalization on the enjoyment of human rights;
(vi) promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization.[13]

This chapter shows that—as a result of the universal recognition of human rights in international treaty law and in general international law—human rights are relevant for the interpretation and application of WTO rules, especially for WTO guarantees of freedom, non-discrimination, rule of law, private property, access to courts, due process of law, and for the numerous WTO exceptions that permit restrictions of freedom of trade so as to protect human, animal or plant life or health, public morals and other "human rights values". Just as human rights law recognizes the need for protecting and mutually balancing human rights through non-discriminatory democratic legislation, international trade law, e.g., in the WTO Agreements Preamble, acknowledges its instrumental function for the promotion of non-economic policy goals, such as "raising standards of living", promoting "sustainable development" and "preserv(ing) the environment". The "balancing principles" in the "exception clauses" in international trade law—such as non-discrimination, necessity and proportionality of restrictions of individual freedom,[14] and rights of individual access to courts,[15] are similar to the "balancing principles" in the "exception clauses" in human rights treaties;[16] from a human rights perspective, both serve complementary functions for protecting individual freedom, non-discrimination and rule of law. Human rights and the corresponding obligations accepted by all WTO members require to interpret and design national and international trade rules—like other democratic legislation—as instruments for the promotion and protection of human rights, with due respect for the broad regulatory discretion of democratic legislatures and governments regarding the domestic implementation and balancing of human rights and of related WTO rules for the protection of freedom and non-discrimination in the international division of labor among producers, traders and consumers.

This contribution focuses on *international* human rights rather than on *domestic* human rights guarantees that may provide for additional obligations and legal requirements to take into account human rights in the domestic interpretation and application of WTO rules. Even though parliaments in constitutional democracies, such as the U.S. Congress, and civil society groups increasingly insist that WTO decision-making processes must become more transparent and, as expressed in the U.S. Trade Act of 2002, must respect the legislative intent of parliaments when they ratify WTO agreements, this chapter does not discuss the legal and political implications of the emerging "human right to democracy"

[13] Report of the High Commissioner for Human Rights on *Liberalization of Trade in Services and Human Rights*, document E/CN.4/Sub.2/2002/9, p. 2.
[14] *Cf.* Articles XX GATT, XIV GATS.
[15] *Cf., e.g.*, GATT Article X.
[16] *Cf., e.g.*, the indirect references to the principles of non-discrimination, necessity and proportionality in Article 4 of the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR"): "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

for the WTO, such as the need to promote transparent discussion and decision-making, more effective parliamentary control and democratic participation in WTO matters.[17]

II. Human Rights Obligations of WTO Members as Part of the Context for the Interpretation of WTO Rules

A. Human Rights Obligations of WTO Members

There exist today more than one hundred multilateral and bilateral international treaties on the protection of human rights.[18] For instance, as of 2002, 112 WTO member states had ratified the 1966 U.N. Covenant on Economic, Social and Cultural Human Rights ("ICESCR"), and all but the United States had ratified the 1989 U.N. Convention on the Rights of the Child. There are also hundreds of unanimous U.N. Resolutions, such as the Universal Declaration on Human Rights ("UDHR") and the 1993 Vienna Declaration on Human Rights, in which all U.N. member states have committed themselves to protect inalienable human rights as part of *general international law*. In addition, most states and some international organizations[19] recognize human rights in their respective constitutional laws as constitutional restraints on government powers, sometimes with explicit references to human rights as legal restraints also on the collective exercise of government powers in international organizations.[20]

The International Court of Justice ("ICJ") has recognized that all U.N. member states have legal obligations to respect human rights under the U.N. Charter and under general international law, and that at least some human rights constitute not only *individual rights* but also, in the case of universally recognized human rights, *erga omnes* obligations of governments.[21]The quasi-universal ratification of some human rights treaties, such as the U.N. Convention on the Rights of the Child ratified by 190 states, and the recognition in these treaties "of the equal and inalienable rights of all members of the human family" as set out in the UDHR,[22] reflects a worldwide *opinio iuris* on the *inalienable erga omnes* character of certain core human rights.

This *opinio iuris* on essential and inalienable core human rights is not contradicted by the diversity of views on the precise scope, meaning and *ius cogens* nature of many specific human rights whose legal definition in domestic constitutions, and implementation through democratic legislation and international agreements may legitimately differ from country to country and from treaty to treaty. In contrast to the EC Court of Justice which construed the common human rights guarantees of EC member states as constituting general constitutional principles limiting the regulatory powers also of the EC,[23]

[17] *Cf.* E.U. Petersmann, *European and International Constitutional Law: Time for Promoting Cosmopolitan Democracy in the WTO*, in THE EU AND THE WTO 81–110 (G. de Burca and J. Scott eds., 2001); S. Charnovitz, *WTO Cosmopolitics*, 34 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 299–354 (2002).

[18] *See, e.g.,* Council of Europe, HUMAN RIGHTS IN INTERNATIONAL LAW (2000).

[19] *Cf.* Article 6 of the EU Treaty.

[20] *See, e.g.,* Article 23 of the German Basic Law and Article 11 EU Treaty.

[21] *See, e.g., The Barcelona Traction* judgment, ICJ REPORTS 32 (1970), and the *Nicaragua* judgment, ICJ REPORTS 114 (1986).

[22] The quoted words are from the preamble to the 1989 U.N. Convention on the Right of the Child and, arguably, confirm the universal recognition of rights set out in the UDHR. *See* HUMAN RIGHTS IN INTERNATIONAL LAW, *supra* note 18, at 169.

[23] In *Internationale Handelsgesellschaft* (Case 11/70, ECR 1970, 1125,1134), the ECJ held that respect for human rights forms an integral part of the general principles of Community law: "the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community" (¶¶ 3–4).

the ICJ has not yet specified to what extent human rights entail constitutional limits also on the U.N., *e.g.*, the Security Council, and on Specialized U.N. Agencies. Likewise, the WTO jurisprudence has not yet clarified the impact of human rights, including the right to human health and food, on the interpretation of, for example, the intellectual property rights guaranteed in the WTO Agreement on Trade-Related Intellectual Property Rights ("TRIPS"), or on the numerous WTO exceptions protecting national policy autonomy for non-trade concerns. Closer cooperation between the WTO and U.N. Specialized Agencies could facilitate clarification of the extent to which human rights recognized in the law of the International Labor Organization ("ILO") and of the World Health Organization, and other international organizations, are relevant also for the interpretation and application of WTO rules.

As a result of the universal recognition of human rights, international law is increasingly confronted with the "constitutional problems" addressed in the human rights jurisprudence of the EC Court of Justice: What is the essential core of human rights that must be recognized today as *erga omnes* obligations and *ius cogens*? Can governments evade their human rights obligations by exercising government powers collectively in specialized international organizations? Can the legal supremacy of international law over national law remain effective and be judicially enforced if human rights are not effectively protected in all fields of international law? Can international courts ignore the worldwide experience of states that seems to demonstrate that the protection of human rights risks to remain ineffective without respect for complementary due process guarantees and other "constitutional principles" of rule of law, democratic governance and judicial review? How are we to interpret and, in case of conflict, reconcile "state sovereignty", "popular sovereignty" and "individual sovereignty" in a manner respecting the constitutional primacy of "inalienable" human rights?[24]

B. Limited WTO Jurisdiction and Customary International Law Rules for the Interpretation of WTO Law

Articles II and III of the WTO Agreement emphasize the limited jurisdiction of the WTO. Article II:1 provides:

> The WTO shall provide the common institutional framework for the conduct of trade relations among Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

Article III:1 provides:

> The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

Article III:2 authorizes the WTO to "provide the forum for negotiations among its Members concerning their multilateral trade negotiations", and Article III:5 authorizes the WTO to "cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies". Article V:1 further requires "the General Council [to] make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO". Yet, notwithstanding the few explicit references in

[24] *Cf.* E.U. Petersmann, *From State Sovereignty toward "Popular Sovereignty" and "Individual Sovereignty" in the International Relations Law of the EU?* in SOVEREIGNTY IN TRANSITION (N. Walker ed., 2003).

WTO provisions to other international organizations and international agreements concluded outside of the WTO, the jurisdiction of WTO bodies is essentially limited to the application and implementation of WTO rules. This is confirmed by Article 3.2 of the WTO Dispute Settlement Understanding ("DSU") which "serves to preserve the rights and obligations of Members under the covered agreements", and Article 7.1 DSU which limits the jurisdiction ("terms of reference") of dispute settlement panels to the examination "of the relevant provisions in . . . the covered agreement(s) cited by the parties to the dispute".

Government representatives in specialized international organizations sometimes appear to believe that governments retain sovereign powers to exclude human rights from the law of specialized agencies, for example from the interpretation of the "covered agreements" of WTO law. Despite the *lex posterior* and *lex specialis* rules for the relationships between successive international treaties[25] states cannot derogate from the *ius cogens* nature of the obligation of all national and international governments to respect the "inalienable" core of human rights.[26] The U.N. Charter likewise prescribes human rights obligations for all 197 U.N. member states, for example in Articles 55 and 56 which, in case of conflict, assert legal primacy over other international treaties.[27] The precise scope of the "inalienable" core of universally recognized human rights obligations remains controversial. U.N. human rights law,[28] and the jurisprudence of the EC Court of Justice and the European Court of Human Rights,[29] explicitly recognize that human rights entail obligations also for intergovernmental organizations. From a human rights perspective, all national and international rules—including economic agreements like the International Monetary Fund ("IMF") and WTO agreements that protect liberty, non-discrimination, property rights and other "human rights values" in transnational economic relations—derive their democratic legitimacy from protecting human rights which today constitutionally restrain all governmental and intergovernmental powers. Arguably, universally recognized "inalienable" human rights limit the powers not only of WTO members but also of intergovernmental WTO bodies.

General international law, as codified in Article 31.3 of the VCLT, requires interpreting international treaties "in their context", including "any relevant rules of international law applicable in the relations between the parties" such as universal human rights. Article 3 of the DSU imposes the requirement "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". Universally recognized human rights can be applied by WTO dispute settlement bodies as a relevant context for the interpretation and application of WTO rules, yet not as separate legal claims independent from applicable WTO rules.[30] They may be important for interpreting not only "general exceptions" such

[25] As laid down in Articles 30, 41 and 58 of the 1969 VCLT.

[26] *See* Article 53 VCLT.

[27] *Cf.* Article 103.

[28] *See, e.g.*, Article 28 of the UDHR, quoted in the introduction above.

[29] *Cf.* E.U. Petersmann, *Time for Integrating Human Rights into the Law of Worldwide Organizations*, Jean Monnet Working Paper 7/2001 (Harvard Law School), at 24–25.

[30] This follows from the limited terms of reference of WTO dispute settlement panels as stipulated in the DSU (*e.g.*, Article 7). *Cf.* G. Marceau, *The WTO Dispute Settlement System and Human Rights*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 753–814 (2002), who rightly emphasizes that human rights and WTO rights and obligations are cumulatively binding on states, but are enforceable under different and complementary rules and procedures. Mainstream human rights specialists often overlook the limited scope of jurisdiction of WTO dispute settlement panels and misinterpret calls for interpreting WTO rules with due respect for

as GATT Article XX, but also the "objective of sustainable development" found in the WTO Agreement's Preamble, the basic guarantees of freedom found in GATT Articles I-XI, the WTO rules on non-discrimination, property rights, and individual access to courts, and the WTO's "necessity" requirements for safeguard measures restricting individual freedom of trade so as to protect "public interests" such as the respect for human rights.

The text of the WTO Agreement offers no indication of an intention of WTO Members to deviate from their human rights obligations. A good faith interpretation of WTO rules leads to a legal presumption that all WTO rules must be legally interpreted and applied consistent with the human rights obligations of WTO members. This is in line with the welfare-creating function of WTO rules, *i.e.*, to prohibit welfare-reducing trade restrictions and discrimination, subject to broad discretionary WTO exceptions designed to safeguard the sovereign rights of WTO members to "protect human, animal or plant life or health" and adopt other "measures necessary to protect public morals" or other public interests.[31] Both the welfare-increasing function of WTO rules and the numerous WTO exceptions suggest that, just as GATT dispute settlement practice has never identified a conflict between GATT rules and the human rights obligations of GATT contracting parties, conflicts between WTO obligations and human rights can and must be avoided by interpreting WTO rules and WTO decisions in conformity with the human rights obligations of WTO Members. The Doha Declaration on the TRIPS Agreement and Public Health of November 2001 illustrates the commitment of all WTO members to ensuring that the rules-based trading system remains compatible with public health interests and universally recognized human rights.[32]

The generously drafted "exceptions" in global and regional integration law, and the usually deferential jurisprudence of international dispute settlement bodies vis-à-vis national restrictions necessary for protecting public interests—such as import restrictions on asbestos and other products endangering human health,[33] confirm that, in cases of conflict, the essential core of human rights must prevail. As in EC law, the obligations of states to respect, promote and fulfill human rights must be recognized as extending also to their participation in worldwide organizations like the WTO. Neither the "progressive realization" commitment in Article 2 of the ICESCR,[34] nor the proviso in its Article 24 that "[n]othing in the present Covenant shall be interpreted as *impairing* the provisions of the Charter of the United Nations and of the constitutions of the specialized

universally recognized human rights as a "proposal for the enforcement of human rights through the WTO", *e.g.*, P. Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law,* 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 815 (2002).

[31] *See* Article XX GATT and Article XIV GATS.

[32] For the text and a discussion of the Doha Ministerial Declaration on the TRIPS Agreement and Public Health *see, e.g.,* WHO and WTO Secretariat,WTO AGREEMENTS AND PUBLIC HEALTH (2002), reproduced in the Appendix to this book.

[33] *See, e.g., EC—Import Restrictions Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R (2001).

[34] *Cf. General Comment No.3 on The Nature of States Parties Obligations (Art.2, ¶ 1 of the Covenant*), adopted by the U.N. Committee on Economic, Social and Cultural Rights in 1990 and reproduced *e.g.*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 442–445 (A. Eide, C. Krause and A. Rosas eds., 1995). The fact that the ICESCR formulates some rights in terms of *principles* rather than precise *rules* only indicates that some economic and social human rights, like certain civil and political rights (such as the right to vote), need to be concretized through implementing legislation and administrative or judicial decisions. On the distinction between *principles* and *rights see, e.g.,* R. DWORKIN, TAKING RIGHTS SERIOUSLY 23 *et seq*. (1977).

agencies" (emphasis supplied), can serve as pretexts for non-compliance by governments and international organizations with their human rights obligations.

C. Diversity of National and International Implementation of Human Rights

Human rights protect individual and democratic diversity, such as human dignity in the sense of the moral, rational and legal autonomy of individuals. This diversity of individual preferences, of "constitutional contracts" and human rights traditions at the national and international level, and of national forms of democracy, confirm that democratic legislatures must enjoy a broad "margin of appreciation" in regulating and mutually balancing human rights. International human rights jurisprudence, including that of the European Court of Human Rights, emphasizes the need to respect the regulatory discretion of domestic democratic institutions.[35]

The scarcity and uneven distribution of resources entail that protection of individual liberty, property and of other human rights inevitably gives rise to competition among utility-maximizing individuals (*e.g.*, producers and consumers in economic markets, politicians and citizens in political markets), as well as among groups (*e.g.*, competition among "rent-seeking" interest groups, "regulatory competition" among states so as to attract mobile international financial and other resources). The resulting conflicts of interests require a "limiting constitution" to limit abuses of power so as to protect human rights, as well as an "enabling constitution" to enable the individual and collective supply of private and public goods and services, in the economy no less than in the polity. Effective protection of human rights in, and of democratic control over, bi-level rule-making and policy-making at national and international levels requires constitutional limitations on abuses of private and public power not only inside states but also in international organizations.[36]

At the international level, the human rights guarantees in the six major worldwide U.N. human rights treaties,[37] and in the regional human rights treaties in Europe, Africa and in the Americas, differ from treaty to treaty. Each human rights treaty has set up its own institutions and its separate monitoring and implementation procedures, with at present inadequate coordination among these treaty systems.[38] The EC Treaty provides for comprehensive legal and judicial protection of fundamental individual "market freedoms", non-discrimination and social rights. Other regional integration agreements, such as NAFTA, and worldwide economic agreements, including the WTO Agreement, do not link their legal protection of market access and economic freedom to protection of human rights. Yet, as explained in Part III, the international guarantees in NAFTA and

[35] On the "margin of appreciation" doctrine in the case-law of the European Court of Human Rights *see* H.C. Yourow, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996).

[36] This dependence of effective protection of human rights on national as well as "international constitutionalism" tends to be ignored by many human rights specialists, *e.g.*, Alston, *supra* note 30, and is explained in Petersmann, *Human Rights and International Economic Law in the 21st Century*, 4 (3) JOURNAL OF INTERNATIONAL ECONOMIC LAW 39 (2001).

[37] The 1966 Covenants on Civil and Political Rights ("ICCPR"), Economic, Social and Cultural Rights ("ICESCR") and on Elimination of all Forms of Racial Discrimination ("ICERD"), the 1980 Convention on the Elimination of all Forms of Discrimination against Women ("ICEDAW"), the 1984 Convention against Torture ("ICAT"), and the 1989 Convention on the Rights of the Child ("ICRC").

[38] *Cf.* C. Scott, *Institutional Integration of the Core Human Rights Treaties*, in GIVING MEANING TO ECONOMIC SOCIAL AND CULTURAL RIGHTS (I. Merali and V. Osterveld eds., 2001).

WTO rules of freedom of trade across frontiers, non-discrimination and rule of law can serve "human rights functions" by protecting individual freedom, non-discrimination, legal security and social welfare across frontiers. Economics demonstrates that "individual rights are a cause of prosperity";[39] economic welfare can be increased by the "successful struggle for rights of which the right to property is the most fundamental";[40] and "almost all of the countries that have enjoyed good economic performance across generations are countries that have stable democratic governments".[41] The U.N. Development Program[42] likewise emphasizes that national human rights and international legal protection of individual rights establish incentives for people to become not only "better democrats" but also to save, invest and become "better economic actors".

As long as so many areas of human rights, such as the nature and contents of economic and social human rights, and their interrelationships with other fields of international law which historically evolved without reference to human rights, remain controversial, any examination of the legal relevance of human rights for the law of the WTO risks being influenced by the particular human rights perspectives and "constitutional premises" of the interpreter (*e.g.*, as regards the "inalienable character" of core human rights). This entails legal uncertainty and suggests that WTO dispute settlement bodies must respect the diversity of human rights traditions and interpret the relevance of trade-related human rights with due deference to agreed U.N. human rights practice and to the margin of discretion of democratic legislatures.

D. Constitutional Primacy of Human Rights in International Law?

Numerous regional and worldwide human rights treaties and other human rights instruments, like the December 2000 Charter of Fundamental Rights of the EU,[43] commit states to "recognition of the inherent dignity and of the equal and inalienable human rights of all members of the human family [as] the foundation of freedom, justice and peace in the world".[44] Most national human rights instruments likewise recognize inalienable "birth rights" of every human being which precede and constitutionally limit government powers. Human dignity, in the sense of respect for the moral, rational, personal and legal autonomy of each individual to decide on one's personal goals in life, has become the common value premise of national and international human rights law.[45]

Human rights need to be legally specified, mutually balanced and implemented by democratic legislation which tends to vary from country to country. Their inalienable core, however, is "acknowledged" rather than "granted" by governments, as recognized

[39] M. Olson, POWER AND PROSPERITY 43 (2000).

[40] *See* R. PIPES, PROPERTY AND FREEDOM 291 (1999).

[41] Olson, *supra* note 39, at 187. *See, e.g.,* the annual reports on "Economic Freedom in the World" published by the Fraser Institute in Vancouver, which emphasize the empirical correlation between economic freedom, economic welfare, relatively higher average income of poor people and, with a few exceptions (such as Hong Kong), political freedom. Already Adam Smith's inquiry into the NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) concluded that the economic welfare of England was essentially due to its legal guarantees of economic freedom, property rights and legal security for investors, producers, traders and consumers.

[42] *Cf.* UNDP, HUMAN DEVELOPMENT REPORT 2000: HUMAN RIGHTS AND HUMAN DEVELOPMENT (2000).

[43] Reproduced in OFFICIAL JOURNAL OF THE EC, C 364/1 of December 18, 2000.

[44] Preamble of the UDHR.

[45] *See, e.g.,* Council of Europe, THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY (1999); HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS (A. Henkin ed., 1979).

in national as well as international legal practice: "Human dignity is inviolable. It must be respected and protected".[46] U.N. human rights conventions are explicitly based on "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as a] foundation of freedom, justice and peace in the world", and emphasize—like many national constitutions—that human rights "derive from the inherent dignity of the human person."[47] In U.N. practice, the "right to development" and the corresponding government obligations are defined in terms of the realization of all human rights.[48]

The legal consequences of the universal recognition of an "inalienable core" of human rights as, arguably, part of international *ius cogens* remain to be clarified. International legal practice, such as the 1998 ILO Declaration on Fundamental Principles and Rights at Work, confirms an increasing *opinio iuris* that membership in the U.N. and ILO entails a legal obligation to respect core human rights.[49] Dictatorial governments can no longer freely "contract out" of their human rights obligations by withdrawing from U.N. human rights covenants or ILO conventions.[50] Legal practice suggests that not only the prohibitions of genocide, slavery and apartheid, but also the core of other human rights must be respected even "in time of public emergency"[51] and have become *erga omnes* obligations of a *ius cogens* nature.[52]

E. Indivisibility and Incomplete Enumeration of Specific Human Rights?

Human rights instruments recognize an ever larger number of specific "civil", "political", "economic", "social" and "cultural" human rights in response to changing civil society demands and human rights problems. How can this dynamic evolution and diversity of human rights law be reconciled with the "inalienable" character of human rights? For instance, does the non-ratification by the United States of the ICESCR mean that economic and social human rights cannot be part of the legal context relevant for the interpretation of the WTO obligations of the United States? Does the non-ratification of the ICCPR by China have similar consequences for the interpretation of its WTO

[46] Article 1 of the Charter of Fundamental Rights of the European Union. Similar statements are to be found in many U.N. human rights instruments (*e.g.*, Article 1 of the UDHR: "All human beings are born free and equal in dignity and rights") as well as in national constitutions (*e.g.*, Article 1 of the German Basic Law: "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority").

[47] The quotations are from the preambles of the ICCPR and of the ICESCR of 1966. Article 1 of the German Basic Law of 1949 states in a similar manner: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world" which "shall bind the legislature, the executive and the judiciary as directly applicable law".

[48] *See* U.N. General Assembly Declaration 41/128 of December 4, 1986 on the "Right to Development".

[49] ILO, The ILO Declaration on Fundamental Principles and Rights at Work (1998) at 7, adopted by the International Labour Conference on June 18, 1998, recognizes in ¶ 2 "that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation".

[50] *See* General Comment 5 on Article 4 of the U.N. Covenant on Civil and Political Rights, adopted by the Human Rights Committee on July 31, 1981 and recently revised. *Cf.* D. GOLDRICK, THE HUMAN RIGHTS COMMITTEE 315 (1994).

[51] *Cf.* Article 4 of the ICCPR, Article 15 of the European Convention on Human Rights ("ECHR").

[52] For detailed references to state practice *see* I. SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW (2001).

obligations? Are only universally recognized human rights part of the "relevant context" for the interpretation of WTO rules? Or can regional human rights treaties be part of the relevant context for the interpretation of WTO rules among WTO members that are parties to the human rights treaty concerned?

Several human rights treaties recognize that "[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent".[53] The enumeration of specific human rights in international legal instruments is thus recognized as incomplete and without prejudice to more comprehensive human rights guarantees in domestic laws. All U.N. member states have also acknowledged in numerous U.N. resolutions that "all human rights are universal, indivisible and interdependent and interrelated."[54]

Just as Article 6 of the EU Treaty, and the Charter of Fundamental Rights of the EU, recognize human rights as general constitutional principles limiting the powers of the EU and of all EU member states, the universal recognition of the "inalienable nature" and "indivisibility" of human rights can be interpreted to imply that international human rights treaties recognize the existence of "inalienable human rights" as general principles of national and international law.[55] Recognition of core human rights as general "constitutional principles" reduces the dangers of a "positivist" reliance on separate "civil", "political", "economic", "social" and "cultural" human rights that were acknowledged by governments at particular times in particular human rights instruments, such as the risk of leaving non-enumerated "inalienable" human rights without legal protection. Treating separate human rights treaties as mutually agreed codifications of how inalienable core human rights should be understood in relations between the contracting states better protects the diversity and holistic nature of human personality and helps to overcome partial human rights perspectives, such as the widespread resistance to protecting human rights in "economic markets" no less than in "political markets." Human liberty rights, property rights, non-discrimination rights, social rights, and procedural and democratic rights can be protected more effectively if they are understood as part of national and international constitutional law that dynamically evolves in particular national and international contexts, in response to new human rights preferences and challenges, for example those formulated in the December 2000 EU Charter of Fundamental Rights.

The universal recognition of the indivisibility of civil, political, economic, social and cultural human rights has contributed to increasing jurisprudence by national and international courts that economic and social rights, such as the EC Treaty guarantees of

[53] *See, e.g.*, Article 5.2 ICCPR.

[54] Vienna Declaration of the U.N. World Conference on Human Rights (1993), section I.5, *cf.* U.N., THE UNITED NATIONS AND HUMAN RIGHTS 1945–1995 450 (1995). On the interdependence, indivisibility and "justiciability" of economic and social "core human rights" and "core obligations", such as the rights to food and to education, *see, e.g.,* K. Arambulo, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL HUMAN RIGHTS—THEORETICAL AND PROCEDURAL ASPECTS (1999), Chapter IV.

[55] *Cf.* E.U. Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously*, in 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 845, 851 (2002). *See also* C. Scott, *supra* note 38, at 7, 8, who argues for a "radical breaking down of the normative boundaries among the categories framed by each of the human rights treaties", and recommends to the six U.N. human rights committees to "consider their six treaties as interconnected parts of a single human rights constitution and thereby consider themselves as partner chambers within a consolidating supervisory institution".

freedom of trade and non-discrimination against women, may be no less justiciable than civil and political rights.[56]

F. Obligations by Governments and Intergovernmental Organizations to Respect, Protect and Promote Human Rights

U.N. human rights practice, such as the "General Comments" and "Concluding Observations" adopted by U.N. human rights treaty bodies, emphasizes that human rights entail obligations to *respect* human rights (*e.g.*, by not interfering with human rights), to *protect* human rights (*e.g.*, by means of implementing legislation, administrative and judicial protection), and to *fulfill* human rights (*e.g.*, by making available essential goods and services necessary for the survival and personal development of human beings).[57] The U.N. High Commissioner for Human Rights[58] and the U.N. Committee on Economic, Social and Cultural Human Rights[59] have endorsed calls for developing human rights approaches to the interpretation and application of WTO rules,[60] taking into account the human rights obligations of all WTO members to respect, protect and fulfill human rights at home and abroad. Some U.N. Specialized Agencies, such as the U.N. Educational, Scientific and Cultural Organization ("UNESCO") and the ILO, explicitly commit themselves to the promotion of human rights, such as the right to education and to core labor standards. Other U.N. Specialized Agencies, like the IMF and the World Bank, have so far avoided explicitly recognizing that international organizations are legally bound by universally recognized international human rights.[61] A few organizations—like the World Bank, the Organization for Economic Cooperation and Development ("OECD") and the EU Commission—have committed themselves to "principles of good governance", including transparency, participation, accountability, effectiveness and coherence, so as to legitimize their "international governance" and "integration law".[62] But such commitments to often vague "good governance principles", without clarification of

[56] European jurisprudence, by the EC Court of Justice and the European Court on Human Rights, has long since recognized that obligations to respect, protect and fulfill economic and social human rights may be "justiciable" even if they entail not only "negative" but also "positive" obligations (*e.g.*, to promote non-discriminatory access to education). On the particular problems of "welfare rights" (such as indeterminacy of redistributive rights, their dependence on personal responsibility), the distinction between social rights in welfare states and social human rights, and the need for constitutional safeguards against abuses of welfare institutions, *see, e.g.*, K. ARAMBULO, *supra* note 54. Many civil and political human rights (like the right to vote) also imply not only "negative" but also "positive obligations" (*e.g.*, to render the right effective through legislation and administrative procedures).

[57] *Cf., e.g., Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Document HRI/GEN/1/Rev.5 of April 26, 2001. *See also e.g.*, K. Arambulo, *supra* note 54, Chapter IV, and B.C.A. Toebes, THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW (1999), Chapters III, IV and VI.

[58] *See, e.g.*, the report submitted by the High Commissioner for Human Rights to the U.N. Commission on Human Rights on *Globalization and its Impact on the Full Enjoyment of Human Rights* (E/CN.4/2002/54 of January 15, 2002), ¶¶ 9–17, 40–54.

[59] *See, e.g.*, the Statement by the Committee on Economic, Social and Cultural Human Rights on *Human Rights and Intellectual Property* (E/C.12/2001/15 of December 14, 2001).

[60] *See, e.g.*, E.U. Petersmann, *Constitutionalism and WTO Law—From a State-Centered Approach Towards a Human Rights Approach in International Economic Law*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW—*LIBER AMICORUM* ROBERT E. HUDEC 32–67 (D.L.M. Kennedy and J.D. Southwick eds, 2001).

[61] *Cf.* S.I. Skogly, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE IMF (2001).

[62] *See, e.g.*, World Bank, GOVERNANCE AND HUMAN RIGHTS (1995); OECD, PARTICIPATORY DEVELOPMENT AND GOOD GOVERNANCE (1995); EUROPEAN COMMISSION, GOVERNANCE IN EUROPE—A WHITE BOOK (2001).

their human rights implications, offer no effective legal and judicial protection of human rights and constitutional democracy.

G. Principles for the Mutual Balancing of Human Rights: Non-Discrimination, Rule of Law and Necessity Principles

Human rights treaties and the jurisprudence of human rights bodies emphasize that governmental limitations on human rights are subject to requirements of non-discrimination, necessity and proportionality. Non-discrimination requirements are to be found in all human rights instruments.[63] The numerous provisions on restrictions and limitations of human rights often state that such limitations must be "prescribed by law",[64] and must be "necessary" or "proportionate" to the legitimate aim pursued.[65] Article 29:2 of the UDHR, for instance, states:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

In Article 4 of the ICESCR, for instance, the:

> States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the Sate in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

1. Are the Balancing Principles of Human Rights Law Relevant for the Interpretation of WTO Rules?

The "exception clauses" in regional and worldwide economic integration agreements[66] often provide for similar "balancing principles" limiting the right to restrict imports or exports for non-economic public policy purposes. The non-discrimination, "necessity" and "proportionality" requirements in the "general exceptions" of WTO law[67] may raise legal questions similar to those that arise from the corresponding requirements of non-discrimination, necessity and proportionality in human rights treaties. WTO law gives clear priority to the sovereign right to restrict trade if this is necessary for the protection of life, health and other human rights objectives. The WTO panel and Appellate Body reports in *United States—Import Restrictions of Shrimps* confirmed that import restrictions may be justifiable under WTO law for protecting non-economic values, not only inside the importing country but also in other countries and on the High Seas.[68] WTO jurisprudence has progressively relaxed the traditionally strict interpretation of some of the "necessity"

[63] For a list of such non-discrimination requirements, *see, e.g.*, P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS (1983), Chapter 7.

[64] *Cf.* Articles 9–11 ECHR.

[65] For a list of such limitations clauses, and of the pertinent jurisprudence, see SIEGHART, *supra* note 63, Chapter 8.

[66] *See, e.g.*, GATT Article XX and GATS Article XIV.

[67] *See, e.g.*, in GATT Article XX and GATS Article XIV.

[68] *See United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *Recourse to Article 21.5 by Malaysia,* Report of the Appellate Body, DS58/AB/RW (2001), with references to the earlier WTO panel and Appellate Body reports. The restrictions at issue were aimed at protecting endangered species of sea turtles.

requirements in WTO law (*e.g.*, in the sense of requiring the "least-trade restrictive measure") so as to permit more policy discretion in balancing legitimate trade and non-trade concerns.[69] For example, in the *Korea Beef case*, the Appellate Body bifurcated the necessity test by distinguishing (1) situations where the claim may be that a measure is indispensable, *i.e.* where the measure is the only available; and (2) situations where a Member may be able to justify its measure as "necessary" within the meaning of Article XX, even if there would be other measures available. For the second situation, the Appellate Body adopted the following approach:

> A measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effects.[70]
>
> [. . .] [D]etermination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case *a process of weighing and balancing a series of factors* which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[71]

If human rights, the customary international law rules on treaty interpretation, and WTO law[72] require interpreting WTO rules "in their context", with due regard to the human rights obligations of WTO members which may be applicable "in the relations between the parties" in the sense set forth in Article 31:3(c) of the VCLT, does this imply that the general principles for the balancing of the rights and obligations under human rights law may be legally relevant also for the interpretation of the corresponding "balancing principles" when reconciling rights and obligations under WTO law? For instance, does the universal recognition of the right to liberty and of other human rights, such as the protection of human health, call for an interpretation of the numerous public interest clauses in WTO law in conformity with the human rights requirement that personal freedom and other human rights "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant" (*e.g.*, Article 12:3 ICCPR)? How are we to construe human rights concepts, such as "the right to liberty", non-discriminatory treatment, "necessity", the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health", and similar WTO concepts, for instance those regarding non-discrimination, "necessity" and protection of "public health" in GATT Article XX, in a mutually consistent manner?

2. Legal Consequences of a "Human Rights Approach to International Trade"

From a state-centered perspective, the traditional "international law of states" serves the "sovereign equality" of states and of their governments. In view of the intergovernmental structures of GATT and WTO law, it is hardly surprising that in GATT and WTO practice

[69] The quotations are from the Appellate Body report on *Korea—Various Measures on Beef*, WT/DS161/AB/R (2002), ¶ 164. For a survey of the WTO jurisprudence, *see* GATT/WTO Note by the WTO Secretariat, *Dispute Settlement Practice Relating to GATT Article XX*, of March 8, 2002 (WT/CTE/), at 14–16, which concludes from the evolution in the judicial interpretation of the necessity requirement of GATT Article XX (b) and (d) "that there might be differing levels of scrutiny applicable to the analysis of the necessity text, depending on the importance of the 'interests or values' it served".

[70] *Korea Beef*, *supra* note 69, ¶ 163.

[71] *Id.* ¶ 164.

[72] *See, e.g.*, Article 3:2 of the DSU.

governments have only very rarely referred to human rights in their invocations of the "general exceptions"[73] and other safeguard clauses in GATT and WTO law so as to justify measures "necessary to protect human, animal or plant life or health."[74] There appears to be no evidence, however, that past GATT practice under Article XX has been inconsistent with human rights. GATT dispute settlement jurisprudence, for instance, has never challenged the legality of non-discriminatory and "necessary" safeguard measures under GATT Article XX. Also WTO practice seems to be consistent so far in interpreting the "general exceptions" in WTO law[75] in conformity with human rights.[76]

The "human rights approach to international trade" advocated by U.N. human rights bodies "sets the promotion and protection of human rights as objectives of trade liberalization, not exceptions."[77] Human rights instruments emphasize that protection of "human dignity" and of inalienable rights to liberty and to other human rights are the ultimate objective and source of legitimacy of national and international law. Legal respect for "human dignity" requires legal protection of moral, rational, and personal liberty and individual responsibility,[78] with due regard to the scarcity and uneven distribution of the economic and other resources necessary for the enjoyment of human rights. Especially in England where liberty of the person has been constitutionally guaranteed since the Magna Carta of 1215,[79] the right to liberty is often construed narrowly as protecting the physical liberty and freedom from arrest and detention. In the constitutional democracies that emerged from anti-colonial struggles, like the United States and India, Supreme Courts have interpreted and protected rights to liberty in a much broader manner to encompass

[73] *See, e.g.*, GATT Articles XX and XXV. The recent "waiver" granted by the WTO Council for Trade in Goods for the "Kimberley Process Certification Scheme for Rough Diamonds" justifies the need for regulating trade in "conflict diamonds" by, *inter alia*, "recognizing the extraordinary humanitarian nature of this issue and the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts". *Cf.* WTO document G/C/W/432/Rev.1 of February 24, 2003.

[74] For an exception, *see* the submission from Mauritius in WTO document G/AG/NG/W/36/Rev.1 of November 9, 2000, which claims that Article 20 of the Agreement on Agriculture (regarding the taking into account of "non-trade concerns") should be read in conjunction with Article 11 of the ICESCR recognizing the right of everyone to adequate food.

[75] *See, e.g.* , Article XIV GATS and Article 8 TRIPS Agreement.

[76] A computer search of references to human rights in WTO panel and Appellate Body reports indicates ten reports between 1996 and 2001 where parties, third parties, experts, panelists or the Appellate Body referred to human rights. In the negotiations for the WTO Ministerial Declaration of November 2001 on access to medicines and review of Article 27.3(b) of the TRIPS Agreement, the "Africa Group", for instance, referred explicitly to human rights as criteria for interpreting the TRIPS Agreement. The WTO Secretariat actively contributed to the discussions leading to the report of the U.N. High Commissioner for Human Rights on *The Impact of the TRIPS Agreement on Human Rights* (UN document E/CN.4/Sub.2/2001/13 of June 27, 2001) and to Resolution 2001/21 by the U.N. Sub-Commission on Human Rights on "Intellectual Property and Human Rights" (E/CN.4/Sub.2/RES/2001/21 of August 16, 2001).

[77] *Cf. supra* note 13 and the accompanying text.

[78] Whereas most courts have avoided legal definitions of the concept of "human dignity", such as whether "human dignity" should be understood as an "intrinsic value" inherent to personhood or as an "extrinsic value" dependent on merit or achievement, the German Federal Constitutional Court has determined human dignity not only in negative terms (*i.e.*, by deciding case-by-case on infringements) but also by adopting the "object formula": "it contradicts human dignity to turn man into an object within the state". 27 BUNDESVERFASSUNGSGERICHT ENTSCHEIDUNGSSAMMLUNG 1, at 6: "The maxim 'man must always be an end in itself' applies without limitation for all areas of law; for the dignity of a human being as a person, which cannot be lost, exists precisely in the fact that he continues to be recognized as an autonomous personality." *Cf.* D. Ullrich, *Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany*, in 3 GLOBAL JURIST FRONTIERS 1–103 (2003).

[79] "[N]o freeman shall be taken or imprisoned . . . but . . . by the law of the land".

additional rights and liberties that are essential to the orderly pursuit of happiness by free men, including freedom of contract, liberty to pursue any livelihood or lawful vocation, and the right to travel abroad.[80] German constitutional law and European Community law have reacted to the historical experiences of abuses of economic and regulatory powers, such as the cartelization of German industries under the Hitler dictatorship, by extending constitutional protection of liberty rights[81] to professional and economic liberties across frontiers, subject to democratic legislation.[82]

If constitutional protection of "personal liberty" is extended to mutually beneficial private cooperation across frontiers, then international government obligations in, for example, EC, GATT and WTO law, to protect freedom and non-discrimination among citizens across frontiers can serve "constitutional functions" for limiting welfare-reducing abuses of government powers and for reinforcing judicial protection of individual rights.[83] Legal and judicial protection of the rights to equality of liberty and of non-discriminatory treatment across frontiers enables a higher degree of legal autonomy, empowerment and responsibility of individuals, without unduly limiting the regulatory discretion of democratic legislatures and governments, than does a state-centered reliance on foreign policy discretion of governments without legal and judicial protection of individual freedom and non-discrimination across frontiers (as in many foreign policy areas).[84] For example, the GATT and WTO prohibitions of discriminatory and protectionist abuses of trade policy powers offer precise legal criteria for reconciling freedom of trade with the "human rights functions" of the various GATT and WTO exceptions for the protection of human rights and social security in the importing country. In such legal and judicial balancing processes, human rights may be relevant for interpreting not only the WTO's "exceptions" and safeguard clauses; they may also be relevant for the interpretation of the basic WTO guarantees of freedom, non-discrimination, property rights and rule of law which protect the corresponding human rights guarantees of individual liberty, non-discrimination, private property and access to courts. For instance, the recent statement by the U.N. Committee on Economic, Social and Cultural Rights on "Human Rights and Intellectual Property"[85] has been criticized for interpreting the TRIPS obligations too one-sidedly in the light of social human rights without recognizing that property rights, including the "moral and material interests" of the holders of intellectual property rights, are protected as human rights themselves.[86] The rights and obligations of the importing country to protect the human rights of its citizens

[80] *See* the texts and jurisprudence referred to in SIEGHART, *supra* note 63, Chapter 14.2.

[81] *See, e.g.*, the individual right to general freedom of action and free development of a person's personality in Article 2.1 of the German Basic Law which has been recognized by the courts to protect also individual rights *e.g.*, to import and export goods and services subject to democratic legislation. On the legal and procedural advantages and problems of such a broad constitutional guarantee of general individual freedom *see, e.g.*, Robert Alexy, THEORIE DER GRUNDRECHTE (1994), Chapter 7.

[82] For a comparative analysis of protection of economic liberties in federal states and in the EC, *see* E.U. PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991), Chapters VIII and IX.

[83] For an explanation of these "constitutional functions" *see id*. Chapter VII.

[84] *Cf*. Petersmann, *supra* note 55, at 850.

[85] *See supra* note 59, notably ¶ 12: "The Committee wishes to emphasize that any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the State party."

[86] *Cf., e.g.*, Article 17 of the UDHR ("Everyone has the right to own property") and Article 15 UNCESCR, together with Article 27 of the UDHR, requiring "the protection of the moral and material interests resulting from any scientific, literary or artistic production" of authors.

also need to be balanced with the corresponding rights and obligations of the exporting country, as well as with the economic insight that trade restrictions are only rarely an efficient instrument for correcting "market failures" and supplying "public goods."[87]

An explicit recognition of universally recognized human rights as part of the legally relevant context for the interpretation of WTO rules could enhance the legitimacy of WTO decision-making processes and WTO law. Yet, in view of the numerous WTO exceptions and safeguard clauses and the regulatory discretion of WTO Members regarding their legislative implementation and administrative protection of international human rights obligations, WTO decisions and dispute settlement rulings explicitly referring to human rights would presumably remain rare. It is illustrative in this respect that, even though the EC has insisted on including explicit "human rights clauses" into its international economic agreements with more than one hundred countries, such human rights provisions have been used only rarely as a legal justification for the adoption of trade restrictions in response to foreign human rights violations.[88] Although European Community law explicitly commits the EC institutions to respect for human rights,[89] there appears to have been not a single judgment by the EC Court invalidating an EC measure on human rights grounds.

H. Human Rights as Institutional and Constitutional Guarantees: The Example of the Human Right to Health

U.N. human rights law and practice emphasize that human rights need to be protected and mutually balanced through legislation, administrative and judicial protection. For example, General Comment No.14 (2000) by the U.N. Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health states that "the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health"; the obligations to protect and fulfill this human right should be implemented "preferably by way of legislative implementation, and . . . a national

[87] In its Resolution 1999/30 of August 26, 1999 on *Trade Liberalization and its Impact on Human Rights*, the Sub-Commission (of the U.N. Commission on Human Rights) on the Promotion and Protection of Human Rights declared "that sanctions and negative conditionalities which directly or indirectly affect trade are not appropriate ways of promoting the integration of human rights in international economic policy and practice." *See also* Resolution 1998/12 on *Human rights as the Primary Objective of Trade, Investment and Financial Policy* adopted by the U.N. Sub-Commission on the Promotion and Protection of Human Rights, and Resolution 1999/30 on *Trade Liberalization and its Impact on Human Rights* adopted by the same U.N. Sub-Commission in 1999.

[88] The EC's suspension of trade preferences for Yugoslavia in November 1991, for instance, was initially motivated by the military hostilities in the former Yugoslavia rather than by human rights violations. In the context of the Lomé Convention, the EC reacted to human rights violations (*e.g.*, in Rwanda) by suspension of financial and technical assistance rather than trade restrictions. The EC's Generalized System of Tariff Preferences ("GSP") offers additional preferences to developing countries which respect basic ILO guarantees (such as freedom of association and minimum age for admission to employment); temporary withdrawal of GSP benefits by the EC in response to violations of human rights have been rare (*e.g.*, in the case of Myanmar). It is difficult to find an empirical basis for the criticism (*e.g.*, by P. Prove, *Human Rights at the WTO* ? in HUMAN RIGHTS AND ECONOMIC GLOBALISATION 32 (M. Mehra ed., 1999) of an alleged "bias of the WTO" because "the primary entry point for human rights concerns would be as justifications for sanctions and trade conditionalities".

[89] *Cf.* Article 6 EU Treaty.

health policy with a detailed plan for realizing the right to health."[90] General Comment No.14 further recognizes that "any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels."[91] "Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required."[92] As the essential medicines, food (including drinking water) and health services are tradable, the U.N. Commission on Human Rights has emphasized that WTO rules on access to such goods and services may be of direct relevance for the protection and fulfillment of the human right to health.[93]

International human rights instruments provide for numerous specific obligations to protect human rights through implementing legislation and through judicial or other effective remedies.[94] Some of these rights include institutional guarantees, for example to "periodic and genuine elections . . . by universal and equal suffrage and . . . held by secret vote",[95] and to representative legislatures and independent judicial institutions. Such human rights obligations may be of relevance for the interpretation of corresponding WTO obligations, for instance the obligation in Article X:3 GATT to "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings" and "maintain, or institute . . . judicial, arbitral or administrative tribunals or procedures".

III. Human Rights as Constitutional Restraints on the Powers of WTO Bodies?

In Europe, human rights have become recognized as "constitutional restraints" on government powers, not only at the national level but also at the level of international organizations which exercise government powers collectively through intergovernmental, parliamentary or judicial organs.[96] The European Court of Human Rights has likewise held:

> Where States establish international organizations, or mutatis mutandis international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the (European Convention on Human Rights) if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[97]

[90] *See General Comment No.14*, ¶¶ 9, 36, in COMPILATION OF GENERAL COMMENTS, *supra* note 57, at 90.
[91] *Id*.
[92] *Id*. ¶ 39.
[93] *See* Resolution 2002/32, ¶ 1 of the U.N. Commission on Human Rights and the Report by its Special Rapporteur on *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, document E/CN.4/2003/58 of February 13, 2003. For a comprehensive survey and discussion of health-related WTO provisions see the joint study by the WHO and WTO on WTO AGREEMENTS AND PUBLIC HEALTH, *supra* note 32.
[94] *See, e.g.*, Article 2 ICCPR, and C. Harlow, *Access to Justice as a Human Right: The European Convention and the European Union*, in THE EU AND HUMAN RIGHTS 187–214 (P. Alston, M. Bustelo and J. Heenan eds., 1999).
[95] Article 21 UDHR.
[96] *See supra* note 20 and accompanying text.
[97] European Court of Human Rights, Application No. 43844/98, *T.I. vs. United Kingdom*, Admissibility Decision of March 7, 2000, 4 EUROPEAN HUMAN RIGHTS LAW REVIEW 429–430 (2000). In *Matthews v. UK*, the European Court of Human Rights found the United Kingdom in violation of the human right to participate in free elections of the legislature even though the law which denied voting rights in Gibraltar implemented a treaty concluded among EC member states on the election of the European Parliament: "there is no difference

Other international courts, like the ICJ, and quasi-judicial bodies, like the WTO Appellate Body, might follow the example of the EC Court of Justice and of the European Court of Human Rights and recognize that human rights, such as due process of law and judicial protection, bind not only *national governments* but also collective rule-making and decision-making in international organizations. The U.N. Commission on Human Rights has called upon all states parties to the ICESCR to "ensure that the Covenant is taken into account in all of their relevant national and international policy-making processes."[98]

A. Due Process of Law in the WTO: The Controversy over Amicus Curiae Briefs

According to Article 3:2 of the DSU, the "dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system", and "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Article 31 of the VCLT gives priority to the "ordinary meaning" of the terms of the treaty "in their context and in the light of its object and purpose". The ICJ has, however, made clear that "... an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[99]. The universal recognition of human rights, including procedural guarantees of access to courts and due process of law, may therefore be part of the relevant "context" for the interpretation and progressive development of the dispute settlement procedures set out in the DSU. The differences of view regarding the WTO Appellate Body findings on admissibility of *amicus curiae* (friend-of-the-court) briefs in panel and appellate proceedings illustrate the potential legal relevance of human rights considerations for the interpretation of DSU rules.

The DSU contains no provision on the admissibility of *amicus curiae* briefs. In *United States—Shrimp*, the Appellate Body decided that panels have the right to accept *amicus* briefs based on a broad interpretation of the panels' right in Article 13 of the DSU to seek information.[100] As for the three briefs that had been attached to the appellant's submission of the United States, the Appellate Body found that they had become part of the U.S. submission and were therefore no longer *amicus curiae* briefs.[101] This interpretation of Article 13 of the DSU, and the acceptance by the Appellate Body itself of an unsolicited *amicus curiae* brief by the Center for International Environmental Law ("CIEL") without providing any reasons, were criticized by several WTO Members. In

between European and domestic legislation, and no reason why the United Kingdom should not be required to 'secure' the rights (under the ECHR) in respect of European legislation in the same way as those rights are required to be 'secured' in respect of purely domestic legislation". *Cf.* European Court of Human Rights, judgment of February 18, 1999 on complaint No. 24833/94, *see* EUROPÄISCHE GRUNDRECHTSZEITSCHRIFT ("EUGRZ") 200 (1999).

[98] Resolution 2002/24, ¶ 7, quoted by the Special Rapporteur on *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* whose report likewise emphasizes "the fundamental principle that international human rights law, including the right to health, should be consistently and coherently applied across all relevant national and international policy-making processes" (*supra* note 93, ¶ 8).

[99] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), ICJ Reports 1971, at 31, ¶ 53.

[100] *United States—Shrimp, supra* note 68, ¶¶ 100–110.

[101] *Id.* ¶ 89.

United States—British Steel,[102] the Appellate Body confirmed its own right, without any duty, to consider *amicus* briefs based on Article 17.9 of the DSU.[103] This provision gives the Appellate Body the authority to adopt procedural rules, which do not conflict with any rules and procedures in the DSU or the covered agreements. The Appellate Body also held that Rule 16(1) of the Working Procedures allows it to fill gaps in the Working Procedures by adopting new rules.[104]

In the Appellate Body decision in *EC—Asbestos*,[105] the Appellate Body established special rules applicable to *amicus* briefs based on Rule 16(1) of the Working Procedures.[106] In these rules the Appellate Body stated specific requirements that *amicus* briefs were expected to meet and posted them on the WTO website. At an extraordinary meeting of the General Council, many WTO member countries expressed their concern about these legal interpretations and activities of the Appellate Body. The additional rules were criticized as a legislative act that exceeded the Appellate Body's competence and granted non-governmental third parties access to the intergovernmental dispute settlement process. As most NGOs come from developed countries, and the "friends of the court" might turn out to be no friends of the governments concerned, less-developed WTO members, in particular, expressed concern that *amicus curiae* briefs might render their complaints and defenses in WTO dispute settlement proceedings more burdensome. The General Council meeting ended with the chairman asking the Appellate Body to approach the issue of the admissibility of *amicus* briefs with "*extreme caution*" in the future. In addition, it was agreed that the chairman would lead informal discussions with the member countries on formulating rules for the consideration of *amicus curiae* briefs.

The text of Articles 13 and 17.9 of the DSU does not mention *amicus curiae* briefs. The national legal and judicial systems of most WTO member countries do not appear to recognize a right of domestic courts to accept such briefs. The different interpretations of the "ordinary meaning" of the terms of Articles 13 and 17.9 DSU—by the Appellate Body *in favor* of the admissibility of *amicus curiae* briefs, and by most WTO Members *against* their legal admissibility—are to be explained in terms of divergent interpretations of "their context" and of the "object and purpose" of these WTO provisions. Human rights considerations were neither mentioned in the extremely scant reasoning by the Appellate Body, nor in the debates among WTO Members in the General Council. Yet, human rights considerations—such as the human rights guarantees of due process of law,[107] and the universal commitment[108] to incorporate human rights into the policies of international organizations[109] so as to promote participation of individuals and civil society organizations in the work of international organizations[110]—could offer legal arguments to dispute

[102] *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R (2000), ¶¶ 36–42.

[103] *Id.* ¶ 39.

[104] For a more detailed discussion, *see* Gabrielle Marceau and Matthew Stilwell, *Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 155 162–163 (2001).

[105] *European Communities—Asbestos, supra* note 33.

[106] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, Communication from the Appellate Body (Additional Procedures), WT/DS135/9 (November 8, 2000).

[107] *Cf., e.g.,* C. Harlow, *Access to Justice as a Human Right*, *supra* note 94.

[108] *See, e.g.*, in the U.N. resolutions on the right to development.

[109] *Cf.* in this context the commitment to "sustainable development" in the Preamble to the WTO Agreement.

[110] *See e.g., Report of the Intergovernmental Group of Experts on the Right to Development*, U.N. Doc. E/CN.4/1998/29 of November 7, 1997.

settlement bodies to construe WTO rules, including the due process guarantees of the DSU, in favor of the admissibility of *amicus curiae* briefs by those private citizens who are affected by the administration, judicial application and implementation of WTO rules.

It is characteristic in this respect that the common law concept of *amicus curiae* briefs has become accepted only in international dispute settlement proceedings directly affecting individuals, notably in international human rights courts, international criminal courts, WTO and NAFTA dispute settlement bodies, but neither in the ICJ nor in intergovernmental arbitration. In the *Asbestos Case*, the conditions imposed by the Appellate Body for application for leave to file *amicus curiae* briefs made it clear that the Appellate Body was prepared to authorize the submission of *amicus curiae* briefs only if the brief was likely to promote due process of law and proper administration of justice in the dispute at hand. Unfortunately, the Appellate Body did not adequately explain how admission of *amicus curiae* briefs with new legal arguments could be reconciled with protection of the rights of the parties to the dispute (*e.g.*, rights to control the "legal claims", rights to defend themselves against legal arguments in *amicus curiae* briefs within the strict time-limits) and of third WTO Members intervening in the dispute (*e.g.*, their interest in being treated no less favorably than *amici curiae*).

B. Substantive Restraints: The Example of the Human Right to Health and Access to Medicines

According to the Constitution of the World Health Organization ("WHO"), "(t)he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." In Article 12.1 of the ICESCR, the so far 146 ratifying "States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Article 12:2 adds:

The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.
(b) The improvement of all aspects of environmental and industrial hygiene.
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases.
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

1. Trade-Related Aspects of the Right to Health: General Comment No. 14

In its General Comment No. 14 (2000), the U.N. Committee on Economic, Social and Cultural Rights has emphasized that the human right to health is recognized in numerous worldwide, regional and national human rights instruments and "includes certain components which are legally enforceable."[111] Moreover, the "right to health is closely related to and dependent upon the realization of other human rights . . . , including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral

[111] *See* General Comment No. 14, *supra* note 90, ¶ 1.

components of the right to health."[112] "The right to health contains both freedoms and entitlement", such as "the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health",[113] and the "right to the enjoyment of a variety of facilities, goods,services and conditions necessary for the realization of the highest attainable standard of health."[114] The right to health is thus interpreted as:

> an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.[115]

The right to health thus depends upon the availability, acceptability, quality and non-discriminatory, physical as well as economic accessibility of health goods and health services which are tradable and subject to legal regulation and liberalization in WTO law. General Comment No. 14 confirms this potentially transnational legal effect of the human right to health: "States parties have to respect the enjoyment of the right to health in other countries"; depending on the availability of resources, "States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required."[116] More generally:

> [t]he right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect, protect* and *fulfill.* In turn, the obligation to fulfill contains obligations to facilitate, provide and promote. The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with Article 12 guarantees. Finally, the obligation to *fulfill* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.[117]

While Article 2 of the ICESCR provides for progressive realization and acknowledges the constraints due to limits of available resources, General Comment No. 14 recalls that the Covenant:

> imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (Art.2:2) and the obligation to take steps (Art.2.1) towards the full realization of Article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.[118]

As regards governmental limitations of human rights, General Comment No. 14 infers from the limitation clauses in Articles 4 and 5 of ICESCR that:

[112] *Id.* ¶ 3. On national and international jurisprudence relating to the right to health, *see also* TOEBES, *supra* note 57.
[113] *See* General Comment No. 14, *supra* note 90, ¶ 8.
[114] *Id.* ¶ 9.
[115] *Id.* ¶ 11.
[116] *Id.* ¶ 39.
[117] *Id.* ¶ 33.
[118] *Id.* ¶ 30.

> such limitations must be proportional, *i.e.* the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review.[119]
>
> States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure.[120]

2. WTO Practice on Access to Medicines

The expanding subject matters and "universalization" of both human rights and intellectual property law have prompted negotiations in various U.N. bodies, and also in the WTO, on the clarification of the complex interrelationship between the TRIPS Agreement and human rights. The advantages of intellectual property as both a reward and an incentive for research and development, for example in the area of new pharmaceuticals products, are no longer contested.[121] However, the proper balancing between the social objectives of the TRIPS Agreement,[122] its "regulatory exceptions",[123] and the appropriate scope of intellectual property protection, for example for genetic and other living materials, or the protection of rights of indigenous peoples, raise numerous controversial questions.[124]

There seems to be broad agreement so far that the TRIPS provisions are flexible enough to permit necessary health protection measures so as to ensure access to affordable medicines to treat AIDS and other pandemics.[125] In the WTO Ministerial Declaration on "The TRIPS Agreement and Public Health" of November 2001, all WTO Members "affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all". WTO Members also "reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose."[126] Rather than granting a general waiver from WTO law in favor of the human right to health, WTO members preferred to specify those TRIPS provisions which they understand to grant sufficient flexibility for promoting public health and access to medicines for all. This approach seems consistent with the general principle that human rights must be legally implemented through legislative measures taking into account all other human rights.

Paragraph 6 of the Doha Ministerial Declaration on TRIPS and Public Health reads:

> We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing

[119] *Id.* ¶ 29.

[120] *Id.* ¶ 41. In this regard, the Committee recalls its position, stated in General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

[121] *Cf.* WTO AGREEMENTS AND PUBLIC HEALTH, *supra* note 32, at 91–93.

[122] *See* Articles 7 and 8 TRIPS.

[123] *See, e.g.*, Article 6 TRIPS regarding "parallel imports", Article 31 TRIPS regarding "compulsory licensing", and Article 40 concerning abuses of intellectual property rights.

[124] *See, e.g.*, G. DUTFIELD, INTELLECTUAL PROPERTY RIGHTS, TRADE AND BIODIVERSITY (2000).

[125] *See also* the Report of the Joint WHO/WTO Workshop on Differential Pricing and Financing of Essential Drugs of April 8–11, 2001 (which notes that about 95 percent of the WHO list of "essential drugs" are not or no longer patented, and differential pricing and international financing of essential drugs are consistent with the TRIPS Agreement).

[126] *See* WTO document WT/MIN (01)/DEC/W/2 of November 14, 2001, ¶ 4.

> under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.[127]

Similar technological, financial and trade problems may exist in case of exports of healthcare technologies, lack of know-how or trade secrets necessary for manufacturing medicines or other medical devices, or if a compulsory license for the production of an expensive drug for one single market would not justify the production costs without authorization of exports to third markets. For example, while countries may authorize, pursuant to Article 31 of the TRIPS Agreement, non-voluntary and non-exclusive uses of inventions, Article 31(f) stipulates that "any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use", subject to certain exceptions.[128] Some controversial Canadian practices designed to speed up introduction of generic drugs following the expiration of patents were reviewed in the WTO dispute settlement ruling on the EC's complaint against Canada's use of Article 30 of the TRIPS Agreement to permit "pre-expiration testing" and warehousing of generic drugs before the expiry of the patent.[129] Various proposals to permit the use of Article 30 of TRIPS for exports of medicines needed to address public health emergencies and necessary for achieving economies of scale continue to be under negotiation in the WTO.

As of April 2003, the United States and the U.S. pharmaceutical industry continued to block consensus on a WTO decision clarifying the rights of WTO Members (*e.g.*, under Articles 30 or 31 of the TRIPS Agreement) to authorize exportation of the predominant part of medicines produced under compulsory license to other WTO member countries that lack sufficient pharmaceutical manufacturing capacities. In view of paragraph 4 of the Doha Ministerial Declaration ("the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health") and the necessity (recognized in paragraph 6 of the Doha Declaration) to address the health problems of WTO Members without adequate domestic manufacturing capacities, the human right to health may be invoked as relevant legal context for interpreting the TRIPS Agreement (*e.g.*, Articles 30 or 31) in a manner also enabling less-developed countries to address public health emergencies effectively.

C. Judicial Deference vis-à-vis Democratic Legislation: The Example of the Hormone Beef Dispute

The European Court of Human Rights and other international human rights bodies have emphasized the "margin of appreciation" which democratic governments enjoy in implementing and mutually balancing different human rights. In the U.S. complaint in *EC—Import Restrictions on Meat and Meat Products*, involving restrictions that the EC adopted under the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action,[130] the panel report found that the EC ban on

[127] *See note* 90, ¶ 6. At a Ministerial Meeting of 25 WTO members at Sidney in November 2002, agreement was reached on further relaxing TRIPS rules for poor countries' access to patented drugs and to cheap generic copies so as to address public health emergencies (*cf.* FINANCIAL TIMES, November 16–17, 2002). Yet, neither the TRIPS Council nor the WTO's General Council could reach agreement, by the end of 2002, on additional WTO rules as envisaged in paragraph 6 of the Doha Declaration.

[128] *See, e.g.*, Article 31(k) TRIPS.

[129] Report of the WTO Panel, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (2000).

[130] EC Council Directives 81/602, 88/146 and 88/299 were replaced by Council Directive 96/22 of April 29, 1996, Official Journal of the EC, No. L 125, May 23, 1996, p. 3.

imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent with Articles 3.1, 3.3, 5.1 and 5.5 of the WTO Agreement on Sanitary and Phytosanitary Measures ("SPS"). The Appellate Body upheld the Panel's finding that the EC import prohibition was inconsistent with Articles 3.3 and 5.1 of the SPS Agreement, but reversed the Panel's finding that the EC import prohibition was inconsistent with Articles 3.1 and 5.5.[131]

Article 3.1 of the SPS Agreement provides:

> To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, wherever they exist, except as otherwise provided for in this Agreement, and in particular paragraph 3.

The Appellate Body disagreed with the Panel's interpretation that "based on" should be construed in the sense of "conform to":

> The Panel's interpretation of Article 3.1 would . . . transform those standards, guidelines and recommendations into binding *norms*. But . . . the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance* with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary.[132]

The Appellate Body referred, in this context, to the interpretative principle of interpreting treaties in deference to the sovereignty of states ("*in dubio mitius"*). This objective of protecting domestic sovereignty is similar to the objective of the "margin of appreciation doctrine" to protect the legitimate discretion of democratic legislatures. The Appellate Body emphasized that the right of a WTO Member to determine its own appropriate level of sanitary protection pursuant to Article 3.3 of the SPS Agreement is an important "autonomous right and not an 'exception' from a 'general obligation' under Article 3.1".[133] "The object and purpose of Article 3 is to promote the harmonization of SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people."[134]

The concern to take into account "not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also the risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die",[135] permeates numerous findings of the Appellate Body in favor of domestic regulatory discretion to protect "the ordinary lives of people."[136] This functional interpretation of WTO rules coincides with the objective of a "human rights approach" according to which all national and international law must be designed and applied so as to promote human rights (*e.g.*, to

[131] *See* Report of the Appellate Body, *EC—Import Restrictions on Meat and Meat Products*, WT/DS26/AB/R (1997).
[132] *Id.* ¶ 165.
[133] *Id.* ¶ 172.
[134] *Id.* ¶ 177.
[135] *Id.* ¶ 187.
[136] *Id.* ¶ 221.

life, food and health), including the human right to democratic legislation implementing and mutually balancing human rights.[137]

IV. "Human Rights Functions" of WTO Rules: Promotion of Human Rights in Domestic Legal Systems by Means of WTO-Consistent Interpretations of Domestic Law

Most national legal systems and domestic courts recognize a legal obligation to construe domestic law in conformity with the international legal obligations of the country concerned. The WTO guarantees of freedom of trade, non-discrimination, rule of law and access to courts can thereby reinforce corresponding legal guarantees in the domestic laws of WTO member countries and protect individual freedom of choice (*e.g.*, of traded goods, services, related professions and investments), non-discrimination and the rule of law for the benefit of individual traders, producers, investors and consumers. For instance, many national constitutions,[138] the EU Charter of Fundamental Rights,[139] and human rights instruments[140] guarantee "everyone . . . the right to liberty" subject "only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".[141] Especially in the increasing number of countries where such personal liberty rights are construed as protecting not only physical liberty (*e.g.*, in the sense of freedom from arbitrary arrest and detention) but personal liberty in a wide sense covering also economic and social dimensions of personal self-development (*e.g.*, freedom of contract, freedom of movement, freedom of occupation), the WTO guarantees of freedom, non-discrimination and rule of law may reinforce the corresponding guarantees in constitutional law and human rights law.

A. WTO Guarantees of Freedom, Non-Discriminatory Conditions of Competition, Necessity and Proportionality

The WTO prohibitions of tariffs, non-tariff trade barriers, trade discrimination and trade distortions protect freedom (*e.g.*, market access) and non-discriminatory conditions of competition in international trade for the benefit of traders, producers, investors and consumers. In EC law, the EC Treaty prohibitions of tariffs, non-tariff trade barriers and trade discrimination—notwithstanding their formulation in terms of rights and obligations of governments—have long been construed by the EC Court as directly applicable *individual freedoms* of trade that must be protected by national and EC courts in conformity with "freedom of trade as a fundamental right"[142] and "freedom to conduct a

[137] On the gradual emancipation of the individual, and the emergence of a human right to democracy in national and international law see above note 4 and *e.g.*, T.M. Franck, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM (1999).

[138] *See*, *e.g.*, Article 2 of the German Basic Law.

[139] *See id.*, Article 6.

[140] *E.g.*, Article 3 UDHR, Article 9 ICCPR.

[141] Article 29 UDHR, Article 4 ICESCR.

[142] *See, e.g.*, Case 240/83, *ADBHU*, ECR 1985 531, ¶ 9: "the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance." Especially the freedom of movements of workers and other persons, access to employment and the right of establishment have been described by the EC Court as "fundamental freedoms" (Case C-55/94, *Gebhard*, ECR 1995, I 4165, ¶ 37) or "a fundamental

business in accordance with Community law and national laws".[143] By contrast, the corresponding GATT and WTO prohibitions of tariffs, non-tariff trade barriers and trade discrimination continue to be construed by most WTO Members as rights and obligations of governments without corresponding rights and obligations of their citizens.

In spite of the intergovernmental legal structure of many WTO rules, the parallels between WTO guarantees and corresponding national and international constitutional guarantees of liberty, non-discrimination, "necessity", and "proportionality" of government restrictions remain evident. This is particularly so in national and international legal systems which—like German and European constitutional law and U.N. human rights law—recognize that all legislative, executive and judicial government measures must aim at promoting "human dignity" by empowering individuals and protecting their human rights.[144] Similar to domestic legislation implementing human rights obligations, WTO rules and their domestic implementation can serve mutually reinforcing "human rights functions" for the benefit of individual freedom, non-discrimination and the welfare-increasing division of labor among citizens across frontiers. This can be illustrated by the numerous general and specific exceptions in WTO law, for example in GATT Articles XX and XXI, that recognize the comprehensive right of governments to restrict trade so as to protect non-economic values considered by WTO Members to be more important than access to foreign markets.

1. WTO Dispute Settlement Practice Relating to Protection of Health and Environment and to the Necessity, Proportionality and Non-Discrimination Principles in GATT Article XX

The increasing number of national and international laws and agreements establishing individual rights to a clean environment, often formulated in terms of human rights,[145] are not referred to in WTO law. Yet, the WTO Agreement contains an explicit commitment to "the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so".[146] Prior to April 1, 2003, there have been six GATT panel proceedings, and three WTO panel and appellate proceedings, involving an examination of environmental measures or human health-related measures under GATT Article XX (b), (d) or (g). They have made it clear that, in the words of the Appellate Body, "WTO Members have a large measure of autonomy to determine their own policies

right which the Treaty confers individually on each worker in the Community". *Heylens*, Case 22/86, ECR 1987, 4097, ¶ 14. The ECJ avoids "human rights language" for the "market freedoms", the right to property and the freedom to pursue a trade or business in EC law, and some of these "market freedoms" (*e.g.*, for free movement of persons) are limited to EC citizens. Yet, such "fundamental rights" and "citizen rights" remain functionally linked to broader human rights.

[143] *See* Article 16 EU Charter of Fundamental Rights.

[144] For references to the relevant guarantees of human dignity and human rights in German, EU and U.N. law, *see supra* notes 45–47 and 78 and accompanying text. This author's long-standing arguments, *cf.* E.U. Petersmann, *Application of GATT by the Court of Justice of the EC*, 20 COMMON MARKET LAW REVIEW 397–437 (1983), in favor of "direct application" by domestic governments and courts of precise and unconditional GATT/WTO guarantees of freedom, non-discrimination, "due process" and rule of law for the benefit of traders, producers, investors and consumers have always been primarily motivated by the human rights objective of empowering individuals and treating citizens as legal subjects rather than mere objects of public law, *cf. supra* note 78, on the "object formula" used by the German Constitutional Court for defining and protecting "human dignity".

[145] *Cf., e.g.,* M. Déjeant-Pons and M. Pallemaerts, *supra* note 11; HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (A. Boyle and M. Anderson eds., 1998).

[146] *Preamble to the WTO Agreement.*

on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement."[147] None of the panel and Appellate Body reports questioned the environmental or health policy choices made by the government parties. Already in the 1990 *Thailand—Cigarettes* case, the "Panel noted that this provision [Article XX] clearly allowed contracting parties to give priority to human health over trade liberalization."[148] In the *EC—Asbestos* case, the Appellate Body likewise confirmed each WTO Member's "right to determine the level of protection of health that [it] considers appropriate in a given situation."[149]

According to WTO jurisprudence, GATT Article XX requires a two-tiered test: the defending party has the burden of proving that the measure (i) falls under at least one of the ten exceptions listed under Article XX paragraphs (a) to (j), and (ii) satisfies the requirements imposed by the opening clause of Article XX, *i.e.*, is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and is not "a disguised restriction on international trade." The provisional justification of the measure as falling under one of the exceptions must precede examination of the conditions of the introductory clause which, according to the Appellate Body, is "but one expression of the principle of good faith"[150] aimed at prevention of "abuse of the exceptions of Article XX".[151]

The judicial interpretation of the necessity requirement of Article XX(b) and (d) has evolved from a "least-trade restrictive" to a "less-trade restrictive" standard, supplemented by a proportionality test:

> determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a *process of weighing and balancing a series of factors* which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[152]

In the *Asbestos* case, the Appellate Body observed that "the more vital or important [the] common interests or values" pursued (as the preservation of human life and health through import restrictions on asbestos), the easier it would be to accept the measures designed to achieve those ends as "necessary".[153] Again, this balancing among competing values recognized in WTO law is similar to, and influenced by, the mutual balancing of human rights principles.

Another important evolution in the judicial application of Article XX has been the justification of import restrictions to protect non-economic values, not only inside the importing country, but also on the High Seas and inside the exporting countries through measures differentiating among countries. In *United States—Tuna (Mexico)*, a GATT panel found that Article XX(b) did not justify unilateral import restrictions designed to protect human, animal or plant life or health outside of the jurisdiction of the country taking the measure; even if Article XX(b) were interpreted to apply "extrajurisdictionally", the United States had failed to demonstrate that it had exhausted all options reasonably

[147] *United States—Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, in WTO DISPUTE SETTLEMENT REPORTS 1996 (1998), at 28.
[148] *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200 (1990), ¶ 73.
[149] *EC—Asbestos, supra* note 33, ¶ 168.
[150] *United States—Shrimp, supra* note 68, ¶ 158.
[151] *United States—Gasoline, supra* note 147, at 21.
[152] *Korea—Various Measures on Beef*, Report of the Appellate Body, WT/DS/161/AB/R (2001), ¶ 164.
[153] *EC—Asbestos*, *supra* note 33, ¶ 162.

available to it to pursue its dolphin protection objectives through measures consistent with the GATT, such as the negotiation of an international cooperative agreement which seemed desirable in view of the fact that dolphins roam the waters of many states and the High Seas.[154] This narrow interpretation of Article XX was partly corrected in *United States—Tuna (EEC)* where the GATT panel held that Article XX(b) and (g), and the jurisdiction over nationals and national vessels, could also justify policies related to the protection of human, animal or plant life, or health or to the conservation of natural resources, located outside the territory of the contracting party.[155] In *United States—Shrimp*, the Appellate Body confirmed that the U.S. measures for the protection of sea turtles in U.S. territorial waters and on the High Sea qualified for provisional justification under Article XX(g); however, the import restrictions were found to discriminate, in violation of the chapeau of Article XX, among WTO Members exporting shrimp to the United States.[156] In *United States—Shrimp (Article 21.5)*, the Appellate Body upheld the panel's finding that, in order to implement the dispute settlement rulings, the United States had made serious good faith efforts to negotiate an international agreement on the protection and conservation of sea turtles and was entitled under Article XX to condition market access on the adoption by the exporting country of a program comparable in effectiveness to the sea turtle protection measures of the importing country.[157]

WTO dispute settlement practice thus seems to confirm that import restrictions may be inconsistent with WTO law if they do not take into account legitimate rights of exporting countries (*e.g.*, their regulatory sovereignty over production methods in their own country, rights to market access and to non-discriminatory treatment), and that protection of human rights may be an important criterion in the process of balancing the respective rights of exporting and importing WTO member countries.

2. Balancing of Economic and Non-Economic Values in WTO Dispute Settlement Practice Relating to GATT Article III

The *Asbestos* case illustrates that human rights considerations may be legally relevant for the interpretation not only of the exception clauses in WTO law, but also of the basic WTO guarantees of freedom and non-discrimination in the economic area. Even though the Appellate Body did not refer to the human right to health, it emphasized the relevance of health risks associated with the physical properties of products in the examination of "like products" and regulatory distinctions made under Article III GATT.

The Panel had found that chrysotile asbestos fibers and synthetic fibers that can be substituted for them, as well as asbestos-cement products and fibro-cement products, were "like products" within the meaning of GATT Article III:4, and that the health and safety objectives leading to the regulatory distinction among like products could only be taken into account in the analysis under Article XX, *not* in the analysis under Article III:4 where the "likeness" of products had to be determined solely on the basis of commercial factors.[158]

The Appellate Body rightly disagreed and concluded "that, given the textual difference between Articles III:2 and III:4, the 'accordion' of 'likeness' stretches in a different way in

[154] *United States—Restrictions on Imports of Tuna*, DS 21/R, (1991), (unadopted), ¶¶ 5.26–5.28.
[155] *United States—Restrictions on Imports of Tuna* (EEC), DS 29/R (1994), (unadopted), ¶¶ 5.16–5.33.
[156] *United States—Shrimp, supra* note 68, ¶¶ 165–166.
[157] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 by Malaysia, WT/DS58/AB/RW (2001), ¶ 144.
[158] *EC—Import Restrictions Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, WT/DS135, (2001), ¶¶ 8.132, 9.1.

Article III:4. . . . "[159] A "determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products", and "evidence relating to the health risks associated with a product may be pertinent in an examination of 'likeness' under Article III:4 of the GATT 1994".[160] As "carcinogenicity, or toxicity, constitutes . . . a defining aspect of the physical properties of chrysotile asbestos fibers", the Appellate Body could "not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of 'likeness' under Article III:4 of the GATT 1994."[161] As the Appellate Body could "not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994", it found "that the Panel erred . . . in excluding the health risks associated with chrysotile asbestos fibers from its examination of the physical properties of that product."[162] The Appellate Body reversed the "like product" findings of the panel and concluded that—in view of their different properties and end-uses—the products concerned were not "like products" for the purposes of Article III:4 of GATT 1994 and, hence, the different regulatory treatment applied to these products was not in violation of Article III:4.

The *Asbestos* case illustrates the potential relevance of the human right to health for the interpretation of apparently "technical" trade law concepts such as "like products". Even though the Appellate Body did not refer to human rights as part of the relevant legal context for determining the treatment of toxic products, trade law must be construed in a manner consistent with effective protection of universally recognized human rights. The *Asbestos* case further demonstrates the legal relevance of trade law for non-economic human rights objectives: Division of labor through trade and trade law not only enable each trading country to increase resources necessary for the enjoyment of human rights, they may also require trade regulations restricting dangerous products and protecting human rights in exporting and importing countries.

3. Primacy of Non-Economic Values in WTO Dispute Settlement Practice Relating to the WTO Agreement on Sanitary and Phyto-Sanitary Measures ("SPS")

GATT Articles II and III imply a large degree of national sovereignty to decide on the level of tariff protection for domestic import-competing producers, on national taxes, product and production regulations, consumer protection, and other domestic laws, provided they do not treat imported products less favorably than competing domestic products. The border adjustment rules in GATT Articles II, III and VI likewise protect broad government discretion on how to respond to "regulatory competition", for example by exempting exported products from domestic taxes and regulations, or by applying domestic taxes and regulations to imported products. By contrast, the WTO rules on technical barriers to trade, phytosanitary standards, services and trade-related intellectual property rights have introduced far-reaching new obligations on the "necessity", mutual recognition and harmonization of domestic regulations. WTO jurisprudence has so far interpreted these rules in favor of national policy autonomy to decide, *e.g.*, on the national level of health protection measures and to deviate from

[159] *EC—Asbestos*, Report of the Appellate Body, *supra* note 33, ¶ 96.
[160] *Id.* ¶¶ 99, 113.
[161] *Id.* ¶ 114.
[162] *Id.* ¶ 116.

relevant international standards in favor of stricter domestic health, environmental, security and other standards.

In the disputes over the complaints by the United States and Canada against the EC's import restrictions on meat and meat products (the *Hormones* cases), the two panel reports reached the same conclusion that, *inter alia*, the EC, "by maintaining sanitary measures which are not based on existing international standards without justification under Article 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures, has acted inconsistently with the requirements of Article 3.1 of that Agreement."[163] The Panel noted that "Article 3.2 . . . equates measures *based on* international standards with measures which *conform to* such standards", and concluded that "based on" and "conform to" are identical in meaning also in Article 3.1. As already mentioned above,[164] the Appellate Body disagreed that "based on" could be equated with "conform to". It found instead that a measure "based on" an existing relevant international standard could "adopt some, not necessarily all, of the elements of the international standard", and that the "right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an autonomous right and *not* an "exception" from a "general obligation" under Article 3.1."[165] Moreover, to:

> the extent that the Panel purported to require a risk assessment to establish a minimum magnitude of risk, we must note that imposition of such a quantitative requirement finds no basis in the SPS Agreement . . . the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die. [166]

As regards the SPS requirement that "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment . . . of the risks to human, animal or plant life or health",[167] the Appellate Body found that "'based on' a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment."[168]

The Appellate Body jurisprudence so far suggests that, in the interpretation of WTO rules, WTO dispute settlement bodies will respect the broad discretion of governments to restrict trade by means of non-discriminatory domestic rules necessary for the protection of human health and other human rights values. As human health can be perceived as a "primary good"[169] that is a condition of "dignity" (in terms of the philosopher Immanuel Kant) rather than a matter of "price", the Appellate Body's reasoning could also have been supported by human rights arguments to the effect that the rights and obligations of WTO Members to protect human health must rank higher than their sovereign rights to regulate merchandise trade and "instrumental freedoms" (*e.g.*, to buy and sell commercial goods).

[163] *EC—Import Restrictions on Meat and Meat Products*, Report of the Panel, WT/DS26/R/USA and WT/DS26/R/Canada (1997), ¶ 9.1.
[164] *See* Part II(C) of this chapter.
[165] *EC—Import Restrictions on Meat and Meat Products,* Report of the Appellate Body, WT/DS26,48/AB/R (1998), ¶¶ 171,172.
[166] *Id.* ¶¶ 186–187.
[167] Article 5.1. of the SPS Agreement.
[168] *Id.* ¶ 193.
[169] As defined by JOHN RAWLS, A THEORY OF JUSTICE 62 (1973).

B. WTO Guarantees of Property Rights: WTO Disputes over TRIMS and TRIPS

The WTO rules on pre-shipment inspection, government procurement, services trade, intellectual property rights and trade-related investment measures reflect an increasing trend to go beyond the traditional scope of GATT rules by protecting, albeit in an indirect manner, also private rights, for instance rights of "service suppliers",[170] holders of intellectual property rights, exporters subject to pre-shipment inspection, bidders in government procurement proceedings, or foreign investors subjected to purchase and sales "requirements" in terms of GATT Article III:4. The frequent characterization of intergovernmental WTO disputes by referring to the names of the company interests involved (*Kodak/Fuji, Bacardi/Pernod-Ricard*) illustrates that, notwithstanding the intergovernmental structures of WTO dispute settlement proceedings, the underlying conflicts often relate to private operators and to their private rights (*e.g.*, Pernod-Ricard's rights in the trademark *Havana Club*). The proposals to negotiate, in the Doha Development Round, additional WTO rules on the protection of international competition and investment are likely to lead to further WTO rules protecting the private rights of traders and investors, for example "due process rights" during the investigations of domestic competition authorities and in the proceedings of domestic investment authorities screening the admission of foreign direct investments.

The 1999 complaint by the EC against Section 110(5) of the U.S. Copyright Act illustrates that WTO dispute settlement proceedings can be used as a basis for WTO arbitration proceedings leading to financial compensation of private holders of intellectual property rights. The Panel report, adopted on July 27, 2000, found that the "business exemption" provided for in Section 110(5)—which allows the amplification of music broadcasts, without authorization and a payment of a fee, by certain food service and drinking establishments—did not meet the requirements of Article 13 of the TRIPS Agreement and was thus inconsistent with Articles 11 and 11*bis* of the Bern Convention on Copyright (1971).[171] In July 2001, the United States and EC pursued arbitration pursuant to Article 25 of the DSU that led to an award in November 2001 which determined the level of EC benefits being nullified or impaired as a result of Section 110(5) to be Euro 1,219,900 per year.[172] The U.S. administration subsequently requested Congressional approval to set up a compensation fund for adversely affected holders of property rights until the U.S. legislation can be brought into conformity with WTO law.

Most WTO Members recognize the domestic legal right of private actors to invoke WTO rules as a means to demonstrate the relevant legal context for interpreting domestic laws and regulations in conformity with the international legal obligations of the country concerned. Yet, in most WTO member countries, domestic courts deny private rights to invoke WTO rules to override subsequent domestic laws; they also deny granting individuals direct rights to challenge domestic laws that are inconsistent with WTO obligations in domestic courts. Under both Section 301 of the U.S. Trade Act as well as under the EC Trade Barriers Regulation, however, private economic operators can request domestic governments to introduce GATT and WTO dispute settlement proceedings against perceived violations of GATT and WTO rules by other WTO Members.[173] There

[170] *Cf.* Article XXVIII GATS.

[171] *United States—Section 110(5) of the U.S. Copyright Act*, Report of the Panel, WT/DS160/R (2000).

[172] *United States—Section 110(5) of the U.S. Copyright Act*, Report of the Appellate Body, WT/DS160/ARB/25/1 (2001).

[173] *Cf.* C.T. Garcia Molyneux, Domestic Structures and International Trade: The Unfair Trade Instruments of the United States and the EU (2001). Out of nineteen private complaints submitted under

are numerous GATT and WTO dispute settlement proceedings that were initiated at the request of private exporting industries or foreign investors and resulted in dispute settlement findings protecting private rights.

For example, the 1984 GATT panel proceeding in *Canada—Administration of the Foreign Investment Review Act of Canada* was initiated at the request of U.S. investors in Canada and, following a GATT dispute settlement ruling that "requirements to purchase from Canadian suppliers . . . are contrary to Article III:4" of GATT,[174] led to the cancellation of these discriminatory purchase requirements adversely affecting the property rights of the U.S. investors concerned. Similarly, the panel report, adopted in July 1998, examining the complaints by the EC, Japan and the United States in *Indonesia—Certain Measures Affecting the Automobile Industry* upheld prior complaints by automobile producers that Indonesia granted discriminatory benefits to "national vehicles" and components thereof in violation of, *inter alia*, its national treatment obligations under Article 2 of the WTO Agreement on Trade-Related Investment Measures ("TRIMS").[175] In a communication dated July 15, 1999, Indonesia informed the WTO that its new automotive policy had effectively implemented the dispute settlement rulings and recommendations.

As explained by economic theory, trade and investments, and their legal protection through national and international guarantees of freedom of trade and property rights, are preconditions for creating the resources necessary for realizing human rights and democratic self-government. Human rights, trade law and investment law condition each other: Human rights protect individual demand for, and supply of, scarce goods and services and, at the same time, require legal limitations on "market failure" as well as on "government failure".[176] In order to maximize the benefits from trade and investments for the enjoyment of human rights, and minimize the potential risks of unregulated market competition for human rights, trade and investment law, including WTO law, must be interpreted and applied in conformity with human rights law. For example, intellectual property rights and other trade and investment rules (*e.g.*, for the private supply of drinking water and essential health services) must be legally protected as well as limited by human rights law. What is expressed as a right to regulate under WTO law may be a duty to regulate under human rights law. The less effective international legal and judicial remedies in U.N. human rights conventions than those existing in WTO law illustrate that the needed "balancing" and mutual coherence between trade law and human rights law continue to be inadequate in many ways.

C. WTO Legal Restraints on Discrimination and Trade Sanctions for Political Ends

The WTO rules on non-discriminatory conditions of trade and competition (*e.g.*, the prohibitions of discrimination among "like products", "like service suppliers" and among

the EC's Trade Barriers Regulation (until summer 2002), eight led to the initiation of WTO dispute settlement proceedings by the EC.

[174] *Canada—Administration of the Foreign Investment Review Act of Canada,* BISD 30S/140, 159–161, ¶ 5.11.

[175] *See Indonesia—Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54,55,59,64/R (1998). In the three other WTO dispute settlement proceedings in which the complainants claimed violations of the TRIMS Agreement (*EC-Bananas III*, WT/DS27/R; *Canada-Auto Pact*, WT/DS139 and 142/R; *India-Autos,* WT/DS146 and 175/R), the panels did not consider it necessary to examine the consistency of the contested measures with the TRIMS Agreement after having found violations of GATT Article III:4.

[176] *Cf.* E.U. Petersmann, *Constitutional Economics, Human Rights and the Future of the WTO*, 58 AUSSENWIRTSCHAFT 49–91 (2003).

WTO Members) act as legal constraints on the use of trade restrictions as instruments for discrimination among WTO member countries for political ends (*e.g.*, so as to impose the labor, environmental or human rights standards of the importing country as preconditions for the admission of "like products" from exporting countries with different production standards). Yet, WTO law[177] admits production and consumption subsidies that may prove necessary for fulfilling the non-discrimination requirements of human rights law as well as other social human rights (*e.g.*, so as to ensure non-discriminatory individual access to drinking water and to essential health services if their deregulation and privatization entail commercial prices that are not affordable for poor people). The GATT and the WTO Agreement also include numerous "general exceptions"[178] and "security exceptions"[179] that grant WTO members broad governmental discretion to restrict trade and introduce "justifiable discrimination" for non-economic reasons.

According to GATT Article XXI(c) and GATS Article XIV *bis*:1(c), "[n]othing in this Agreement shall be construed . . . (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security." As, "(i)n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail",[180] economic sanctions based upon Chapter VII of the U.N. Charter have never been challenged in GATT and WTO dispute settlement proceedings.[181] The very broad formulation, in paragraph (b) of these "security exceptions", that "[n]othing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests". . . , has prompted most GATT and WTO members to take the view that, as expressed many times in GATT practice, "every country must be the judge in the last resort on questions relating to its own security."[182] Thus, the human rights obligations to protect the life and security of domestic citizens clearly prevail over conflicting WTO obligations to promote non-discriminatory conditions of trade and competition.

In the dispute between the EC and the United States over the economic sanctions applied by the United States against Cuba pursuant to the "Cuban Liberty and Democratic Solidarity Act",[183] the DSB established a dispute settlement panel in November 1996 so as to examine the EC claims that the U.S. trade restrictions on goods of Cuban origin, as well as the refusal of visas and the exclusion of non-U.S. nationals from U.S. territory, were inconsistent with U.S. obligations under the WTO Agreement.[184] Following the invocation by the United States of the security exceptions in GATT Article XXI and GATS Article XIV *bis* and a bilateral EC-U.S. agreement on the settlement of this dispute, the panel suspended its work at the request of the EC in April 1997 without deciding on the U.S. claim that the United States alone had the right to decide on

[177] *See, e.g.*, GATT Articles III:8, XVI and the WTO Agreement on Subsidies.
[178] *See, e.g.*, GATT Article XX and GATS Article XIV.
[179] *See, e.g.*, GATT Article XXI and GATS Article XIV *bis*.
[180] Article 103 U.N. Charter.
[181] For example, sanctions imposed by U.N. members against Rhodesia, South Africa and Yugoslavia.
[182] For an overview of GATT practice relating to GATT Article XXI *see*: I WTO, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 600–608 (1995). On the various kinds of trade sanctions in response to foreign human rights violations, and on their respective GATT consistency, *see* S.H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 JIEL 133–189 (2002).
[183] Pub. L. No. 104–114, 110 Stat. 785 (1996), *reprinted in* 35 INTERNATIONAL LEGAL MATERIALS 357 (1996).
[184] *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38 (1996).

U.S. security interests.[185] Similarly, the joint WTO panel established in October 1998 to examine complaints by the EC and Japan that an act adopted by Massachusetts restricting state contracts with companies doing business with Burma (Myanmar) violated U.S. obligations under Articles III, VIII(b), XIII:4(b) and XXII.2 of the WTO Agreement on Government Procurement, suspended its work at the request of the complainants after the dispute had been settled based on a U.S. Supreme Court decision finding the legislation by Massachusetts to be in violation of the U.S. Constitution.[186] Due to the scarcity of GATT and WTO jurisprudence in this field, it remains controversial whether it is legally consistent with WTO law, more specifically the Government Procurement Agreement of 1994, to limit government contracts with companies that deal with non-democratic governments engaged in human rights violations, or to impose other trade sanctions as a means to promote respect for human rights and ILO labor standards abroad.[187]

V. The Future of the WTO Constitution: Explicit Recognition of Human Rights so as to Better Protect Social Welfare and Democratic Governance in the WTO?

The WTO Agreement and the related implementing legislation of WTO Members include formal as well as substantive "constitutional principles" limiting welfare-reducing abuses of policy powers to tax and restrict producers, traders and consumers.

A. Formal and Substantive "Multi-Level Constitutionalism" in WTO Law

The WTO Agreement asserts legal priority over the multilateral trade agreements listed in its Annexes,[188] and over certain domestic "laws, regulations and administrative procedures" of WTO Members.[189] It establishes intergovernmental, administrative and quasi-judicial organs with limited legislative, administrative and quasi-judicial powers to adopt amendments to WTO rules, authoritative interpretations, "waivers" from WTO obligations, and dispute settlement rulings binding on WTO members. The intergovernmental rule-making by WTO Members, regular review of domestic legislation and trade policies in WTO bodies, *ad hoc* decisions on matters such as "waivers", panel and Appellate Body reports, and their review and adoption by the Dispute Settlement Body have evolved into a dynamic system of mutual "checks and balances" where, for instance, the legal interpretations by the "judicial branch" (for example on the admissibility of *amicus curiae* briefs in panel and Appellate Body proceedings) have been criticized and challenged by the "administrative branch"—*e.g.*, the chairman of the WTO General Council, and

[185] WTO Document, WT/DS/OV/9 (October 2002), at 151.

[186] *Id.* at 152. The U.S. Supreme Court judgment in *Crosby v. National Foreign Trade Council* of June 19, 2000 is reproduced in 39 INTERNATIONAL LEGAL MATERIALS 1234 (2000).

[187] *Cf., e.g.*, C. McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement*, in: 2 JIEL 3–48 (1999); S. Griller, *International Economic Law as a Means to Further Human Rights: The WTO Agreement on Government Procurement*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS (S. Griller ed. 2003). As Article VI of the Government Procurement Agreement permits technical specifications of the contract based on process and production methods, and the "public order exceptions" in WTO law may justify safeguard measures to prevent human rights violations, non-discriminatory human rights considerations may be lawful criteria also under the Government Procurement Agreement, especially if human rights clauses are included into the procurement documentation.

[188] *Cf.* Article XVI:3.

[189] *Cf.* Article XVI:4.

have prompted suggestions for new authoritative interpretations or formal amendments of WTO rules by the WTO's "legislative branch" pursuant to Articles IX or X of the WTO Agreement.

As illustrated by the U.S. "fast track legislation" of 2002, granting a limited mandate to the U.S. government for multilateral negotiations in the Doha Development Round, the intergovernmental decision-making processes in the WTO are subject to parliamentary and political control in WTO Members. This results in interrelated "bi-level negotiations" at national and international levels, and in additional constitutional constraints on national and international trade policy-making. For instance, the periodic WTO "rounds" of multilateral rule-making depend on prior mandates by domestic legislatures and on subsequent domestic legislation approving and implementing newly agreed WTO rules in domestic legal systems. By committing WTO member governments to international legal obligations to protect freedom of trade, non-discrimination and the rule of law among producers, traders and consumers across frontiers, the legal and judicial guarantees of the WTO Agreement serve "constitutional functions" by limiting abuses of foreign policy powers and by protecting individual freedom of choice and the welfare-increasing division of labor across frontiers for the benefit of domestic citizens.

The legal obligations of all WTO member states, under general and conventional human rights law, to respect and promote human rights in all national and intergovernmental activities form part of the legal context of the "WTO constitution."[190] As subjects of international law, international organizations have obligations under international human rights law and have no mandate for undermining the human rights obligations of their member states. The comprehensive agenda of the Doha Development Round reflects the increasing agreement among WTO Members that further liberalization of international trade needs to be supplemented by multilateral regulation of trade and by multilateral adjustment assistance for less-developed WTO member countries. Future WTO negotiations risk failure unless their legitimacy and respect for human rights are recognized by civil society and by parliaments through democratic deliberation and parliamentary ratification of future WTO agreements.

B. Explicit Recognition of Human Rights in WTO Law so as to Promote Social Welfare and Democratic Governance in the Trade Policy Area?

In the process of European integration, the institutions of the EC committed themselves to respect for human rights long before the incorporation of explicit human rights clauses into the EC Treaty.[191] A similar commitment by WTO bodies—for instance in a WTO Ministerial Declaration—could enhance the democratic legitimacy of WTO law and the WTO decision-making process. By acknowledging the constitutional limits of WTO law and of WTO bodies, such a WTO declaration could make it more evident that the WTO objective of promoting "sustainable development" through non-discriminatory trade liberalization and trade regulation, and WTO law in general, must be construed with due regard to the universal human rights obligations of WTO members. Although such a declaration would neither change the existing legal rights and obligations of WTO Members nor enlarge the powers of WTO bodies, it could enhance public understanding of the WTO and facilitate the successful conclusion and parliamentary ratification of future WTO agreements.

[190] On these "multi-level constitutional constraints" on trade policy-making *see, e.g.*, E.U. Petersmann, *The WTO Constitution and Human Rights*, 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 19–25 (2000).
[191] *Cf., e.g.*, L. BETTEN AND N. GRIEF, EU LAW AND HUMAN RIGHTS LAW (1998).

In contrast to the anti-market bias of earlier U.N. reports that condemned the world trading system as a "nightmare" for less-developed countries,[192] the recent reports by the U.N. High Commissioner on the human rights dimensions of WTO rules acknowledge the constitutional significance of a rules-based trading system for producing and supplying the goods and services demanded by consumers.[193] The reports rightly emphasize that poverty, in the sense of deprivation of human capacities resulting from "transformation of a person into a being incapable of satisfying his minimum needs for survival", is often due to inadequate local, regional, national and international rules, governance systems and policies.[194] Human rights offer legal incentives for the personal self-development of individuals, and for private savings, investment, and the division of labor among free citizens, by empowering individuals, limiting abuses of powers, and by defining the welfare objectives of governments in a non-discriminatory manner that promotes the general interests of citizens and consumer welfare.[195] Explicit recognition of the human rights dimensions of WTO law could reinforce rights-based struggles against unnecessary poverty, and strengthen legal incentives for creating the economic goods and services needed for the enjoyment of human rights and for the satisfaction of consumer demand.[196]

Mainstream human rights specialists often perceive creation of welfare as a legislative and administrative task of "benevolent governments" and neglect the constitutive function of human rights for empowering individuals and for protecting their dignity, self-development, private division of labor and common social interests in economic markets no less than in "political markets."[197] As in European integration law, the protection of human rights in WTO law can make citizens not only "better democrats" but also "better economic producers and consumers", and more vigilant guardians against the abuse of government power at national and international levels, such as the centuries-old practice of "rent-seeking" rulers to discriminate, tax and restrict foreign goods, foreign services, foreign traders and foreign producers in a manner that reduces the welfare of domestic consumers.

[192] *Cf. Globalization and its Impact on the Full Enjoyment of Human Rights* (E/CN.4/Sub.2/2000/13 of June 15, 2000), ¶ 15: "for certain sectors of humanity—particularly the developing countries of the South— he WTO is a veritable nightmare."

[193] In addition to the reports mentioned *supra* notes 13, 58, and 76, *see also* the report by the High Commissioner on the WTO Agreement on Agriculture and Human Rights (E/CN.4/2002/54).

[194] *Cf. Poverty and Human Rights* (E/CN.4/Sub.2/2002/15 of June 25, 2002), *e.g.*, ¶¶ 9 and 14.

[195] *Cf.* also Petersmann, *Constitutional Economics, Human Rights and the Future of the WTO, supra* note 176.

[196] On the contribution of the international division of labor and trade to poverty reduction, *see, e.g.*, D. Ben-David, H. Nordström and I.A. Winters, Trade, Income Disparity and Poverty (2000). The report on *Poverty and Human Rights, supra* note 194, at 2 states: "While it can be said that poverty in general violates the enjoyment of economic, social and cultural rights in many ways, extreme poverty is a gross violation of the right to life and human dignity and thus strikes at the heart of the human rights system, which is the foundation of world peace, security and human society."

[197] See the careless accusations invented by Alston, *supra* note 30, and refuted by Petersmann, *supra* note 55. The "Alston/Petersmann debate" in 13 EJIL 815 and 845 (2002) illustrates the difficulties that some human rights specialists have in understanding and discussing the need for protecting human rights, "normative individualism" and "constitutional democracy" in economic markets no less than in political markets.

CHAPTER 62

TRADE AND HUMAN RIGHTS II

Sheldon Leader*

TABLE OF CONTENTS

I. Introduction 664
II. The Challenge 664
A. Navigating Among Rival Political Philosophies 665
B. Institutional Identity 666
III. A Closer Look at Human Rights 666
A. Selecting and Balancing the Basic Rights 667
IV. Linking the WTO's Objectives to Human Rights 668
A. Embedded and Imported Rights 669
B. Techniques of Interpretation: (I) Institutional Purpose and Founders' Intentions 671
C. Techniques of Interpretation (II): Functional versus Civic Inclusion 672
D. Two Types of Market Integration 674
E. Human Rights from the Center: Positive Integration 674
F. Human Rights, Refusals to Trade, and the Discipline of Negative Integration 676
G. Human Rights and Trade with Developing Countries: A Special Case? 679
H. Taking Stock 682
V. Putting the System to Work in a Cosmopolitan Democracy 682
A. The Problem of Collateralism 683
B. From Collateralism Towards an Impartial Order for Trade Relations 684
C. Approaching the Balance between Trade and Non-Trade Interests 685
D. Rethinking the Directions of Adjustment between Trade and Non-Trade Interests 689
E. Factoring in Trading Interests 691
F. Cosmopolitan Democracy, Political Impartiality, and the WTO 691
VI. Conclusion 694
Bibliography 695

* Professor, Dept of Law and Centre for Human Rights, University of Essex. My thanks to Paul Hunt, Director of the Essex Centre for Human Rights for valuable assistance with sources, and to Alexis Kontos, Sabine Michalowski, Steve Peers, and the editors for their careful review of and insightful comments on drafts of this chapter.

I. Introduction

What difference do human rights potentially make to the logic and practice of international trade; and—running in the opposite direction—what difference does trade make to the way in which human rights are understood and deployed? The importance of these questions is highlighted by the fact that, as one authority has recently observed, the relationship between these two domains "... is one of the central issues confronting international lawyers at the beginning of the twenty-first century."[1] The challenge, of course, reaches well beyond lawyers to all of those individuals and institutions ultimately responsible for pulling these two domains into a viable relationship.

There is mutual suspicion on both sides of the divide between the practices of trade and human rights, manifested both by the heat of recent academic debate and by confrontations on the street. Each side worries that the other might sabotage its best-laid plans. Yet the international community has less and less tolerance for this standoff. It demands an effective and workable synthesis, allowing the two disciplines to widen and to coordinate their agendas. This chapter is concerned with this prospect. It raises two broad issues: which, if any, human rights have a relevant role to play in shaping the rules of trade; and how should we understand the relative priority among, and balances between, rights in trading relations? If analysis can provide an appropriate map for working out the problem of priorities and balances, then it might be possible to see respect for human rights as being—as the United Nations puts it—the objective of international trade, while at the same time preserving the ability of a robust system of trade to pursue, within that framework, many of its traditional goals as well.[2]

The focus here is on the existing framework of WTO rules. It does not follow existing interpretations of the rules that make up this framework, but looks closely at alternative ways of construing them. There is, in these constructions, potential for including a wide range of human rights within the work of the WTO, extending from entitlements that run with the grain of widening trading relationships, through to those that cut across and limit the reach of such trading relationships. The prospect for such a wide inclusion depends on a choice from among foundation principles that are at once political and legal.

The chapter proceeds by first setting out fundamentals. It aims to show how the different ways of understanding the WTO's mandate have an effect on deciding which human rights should be linked to the work of the institution. It also sketches some features of the integration of markets, both within the developed world and between it and the developing world, that affect the exercise of human rights. With these pieces of the picture in place, the chapter then considers some of the problems of priority and balance among rights and other interests in the global trading system.

II. The Challenge

If it is to be successful, this enquiry will have to follow certain background principles.

[1] P. Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13(4) European Journal of International Law 815 (2002).

[2] J. Oloka-Onyango and Deepika Udagama, *Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice*, a paper submitted in accordance with U.N. Sub-Commission Resolution 1998/12 E/CN.4/Sub.2/1999/11; U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Liberalization of Trade in Services and Human Rights*, E/CN.4/Sub.2/2002/9, June 25, 2002, ¶ 7; *cf*. U.N. Commission On Human Rights, Fifty-Ninth Session, *The Fundamental Principle of Non-discrimination in the Context of Globalization*, E/CN.4/2003/50, December 2002.

A. Navigating Among Rival Political Philosophies

The international trading system should be able to plausibly link regimes animated by different and sometimes incompatible foundation principles. Even were all Members to subscribe to the same set of international human rights instruments, they are often deeply divided over the way these instruments integrate social values and economic relations. How should international norms regulate a world in which some societies assign priority to market-oriented liberty and property rights, with a relatively lower rank given to any human rights that would limit market freedom; while others arrange their priorities in the opposite way—along with many other different solutions located in between? Can a trading system bring these actors together in an impartial way? The system aspires to bridge these differences while avoiding, in principle, a structure in which the values of the strong Members dominate those of the weak. It may well fall far short of this ideal as things stand, but that criticism tacitly endorses the benchmark of political impartiality as one way of measuring progress by the system. It is this benchmark that is our concern here, for there is more to it than meets the eye.

In part, one can achieve the objective of impartiality in the regulation of trade by seeing where the traps lie. For example, the advocates and skeptics of free trade argue about whether or not the practice benefits the poorest parts of the world's population. The WTO has published work aimed at showing that the opening of markets in goods and services to international competition serves the interests of more than the richer parts of the world, also having a good deal to offer the least well-off.[3] Critics of the WTO look at the same opening of markets and find damage rather than gains for the poorest.[4] In part, this is a difference over the facts and in part a difference over principles: the latter guiding views about what *counts* as benefiting the least well-off. It pits advocates of competitive individualism against those who favor various species of communitarian position; or those who believe that political liberalism requires market liberalism against those who believe the latter works against the former. The result, in this portion of the confrontation, appears to be an intense disagreement over the relationship between trade and human rights, but it is not at bottom a disagreement about that at all. It is instead a conflict between visions of society and of social justice. As such, this ought ideally to be the province of Member states, each with their local mandate to further one or another of these social ideals.

We can properly focus on the relationship between trade and human rights only if we try to follow the approach taken by the U.N. Committee charged with interpreting the International Covenant on Economic, Social and Cultural Rights. In deciding whether or not one of the rights has been violated, the Committee insists that the Covenant "... cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach."[5] This does not mean that we can shelve the politically divisive issues in working out the proper relationship between international trade and human rights. Some such issues have to be confronted. However, as this chapter will try to illustrate, we can be optimistic about reaching consensus on them only if we can build on a platform that gives all participants—the weak as well

[3] *See e.g.* DAN BEN-DAVID, HAKEN NORDSTROM, AND LALAN WINTERS, TRADE, INCOME DISPARITY AND POVERTY (WTO Special Studies 2001).

[4] *See e.g.* MICHEL CHOSSUDOVSKY, THE GLOBALIZATION OF POVERTY 35 ff. (1997).

[5] Committee on Economic, Social and Cultural Rights, *General Comment 3, Concerning the Nature of States Parties' Obligations Under Art*. 2, ¶ *1 of the Covenant*. ¶ 8, U.N. Doc. HRI\GEN\1\Rev.1 at 45 (1994).

as the strong—the conviction that their priorities have the chance of making an impact on trading rules. There is a difference between forcing a compromise onto a trading partner, and forcing that partner to abandon a set of priorities among values it thinks are fundamentally important to its social health. The trading system must navigate in this terrain. It is here that new strategies for assigning priorities to and adjusting conflicts between basic rights can make a difference.

B. Institutional Identity

We must not blur the line between the WTO and a state. The trading body has a specific and distinct role in international society. When it is called on to conform to international human rights requirements, this does not mean that it must do so in the same way that its Members do. The rights must be fitted to its distinct and defining purpose, which is set out in the preamble to its constitution. However, although the WTO is different in kind from a state, it pools the power of states into rules and policies of greater impact than most states can wield singly. In turn, these impacts have the potential to affect the ability of any one of its Members to pursue policies that their own human rights obligations might call for. If the WTO is asked to move away from what it sees as its core mission, easing the pressure it exerts on some of its members because of its respect for human rights standards, then there is a problem of translation. How is it possible to take rights standards fitted to the work of states and transfer them to a non-state actor with a specialized mission that seems at first glance to have nothing to do with human rights?

III. A Closer Look at Human Rights

Before we go any further, it is important to fix some fundamental points about the nature of human rights. As a working definition we shall say that "human" rights are those entitlements that people have, anywhere in the world, by virtue of their being human beings. That starting point is in turn built on the perception that certain basic human needs are the same, whatever the society is in which one is located. There are also sets of needs that are more variable, being dependent on the culture in which one is located. However, traversing all cultures is this set of common requirements. They are divided into two categories. First, there are needs to be protected from the wrongful use of coercive power, underpinning the civil and political rights to freedom of expression; the right to a fair trial; the right not to be tortured; the right to freedom of association; and others. A second category of rights is labeled economic and social. They have to do with the basic needs for fair access to all to the basic goods that society produces. Here we find the rights to an adequate education; health protection, and others.

The initial source to which those linking global trade and rights often make reference is the Universal Declaration of Human Rights.[6] In turn, we find the two categories of rights just mentioned in two legal instruments: the International Covenant on Civil and Political Rights ("ICCPR")[7] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[8] This second set of rights has an evolutionary side to it: parties to the Covenant are obligated not simply to refrain from reducing the provision

[6] U.N. Doc A/810 at 71 (1948).
[7] *International Covenant on Civil and Political Rights*, U.N. Doc A/6316 (1966)
[8] *International Covenant on Economic, Social and Cultural Rights*, U.N. Doc A/6316 (1966)

of basic goods and services that they guarantee, but are also required progressively to improve on their provision insofar as their resources permit.[9]

The WTO is not a party to either of the international covenants (nor, indeed, to any other), although most of the states that are its Members adhere to them. Nevertheless, there are two ways in which these rights could affect the organization's work. First, there are some basic rights that are considered to be so firmly established that they do not need to be formally placed in any treaty. They occupy a place as part of what is known as customary international law, and arguably bind both states and non-state actors such as the WTO. The list of these rights is not firmly established, but a core of understanding covers matters such as the right not to suffer discrimination on grounds of race.[10] Secondly, as has been mentioned, WTO rules and their interpretation have the potential for placing Member states in the position of not satisfying human rights requirements themselves.[11] To the extent that this is so, the way is open to the WTO to decide to give direct attention to these standards as it goes about its work. While the WTO is not in a position to force Members to obey human rights norms, it is in a position to interpret its own rules in a way that gives different degrees of room for Members to satisfy those norms themselves.

A. Selecting and Balancing the Basic Rights

It is tempting to resolve different views about the proper relation between trade and human rights by filtering out the particular rights to be taken into account. Some authors argue, for example, that the rights associated with freedom to trade do not fall within the range of recognized human rights.[12] Others are firmly of the view that the rights do have this quality.[13] There is something to be said for both positions, but there is also a trap for those who put too much store in ultimately deciding who is right. For it is tempting to allow an answer to the question of whether or not a given right exists tacitly to decide the question of what priority that right should have. Even if the exercise of the right to freedom of trade qualifies as fundamental in the international system, it does not follow that the WTO should give it systematic priority over other rights. In this chapter, we want to focus on the issue of priorities, and so will be relatively accommodating on the issue of whether or not a given candidate for consideration qualifies as a human right *per se*. This will allow us to concentrate on the next steps: working out the basis on which the list

[9] This is a feature, *inter alia*, of ICESCR Article 11, the "... right to an adequate standards of living ... including adequate food, clothing and housing, and to the *continuous improvement* of living conditions." For the implications of this principle as it might or might not apply to the IMF and World Bank, *See* S. Skogly, The Human Rights Obligations of the World Bank and International Monetary Fund (2001); and the review by Leader, Kings College Law Journal forthcoming (2003).

[10] On human rights as part of customary international law *see* Restatement (Third) of Foreign Relations Law of the United States, ¶ 102 (1986) cited in R. Howse, and M. Mutua, *Protecting Human Rights in the Global Economy: Challenges for the WTO*, Rights and Democracy (www.ichrdd.ca) (2000). For an argument linking human rights to trade *see* Ernst-Ulrich Petersmann, *Time for Integrating Human Rights into the Law of Worldwide Organizations*, Working Paper 7/01 Jean Monnet Program, Harvard Law School (2001)

[11] Examples are to be found in several UN reports on trade and human rights, considered in various places in the text to follow, and cited *supra*, note 2

[12] See e.g. Alston, supra note 1.

[13] *See e.g.* Petersmann, *supra* note 10. Recent support for such a right can be found in *Biret International SA and Etablissements Biret et Cie. SA v Council of the European Union* Cases C-93/02 P and C-94/02 P, Opinion of Advocate General Siegbert Alber, 15 May 2003

of human rights is properly brought within the ring of WTO concerns; and then looking at the priorities among those rights that are included.

Consequently, the important question for us is not whether human rights *per se* are to be linked to the global trading regime, but rather how extensive that linkage is to be. The real choice is between alternative clusters, or sets, of rights, and between alternative weightings of elements within a cluster. We will examine a position that draws the WTO into the terrain of norms about human health, education, and environment, and we will contrast this with a position in favor of a narrow range of commitments, keeping the organization on the more familiar ground of human rights focused on secure and stable commercial relations and the protection of property.

When we come to the principles governing priorities within the group of rights that a trading system should respect, we are forced to deal with a problem that occupies human rights lawyers whatever the context is in which they work. Few, if any, human rights have absolute priority, such that they should not be partly compromised in order to satisfy another right. Some highly abstract rights might have this absolute status, such as the right of one person to be treated as the equal of another.[14] However, when they are brought down to concrete inclusion in human rights law and policy, they often enter into mutual conflict, making it impossible to completely satisfy the demands of one without limiting the satisfaction of another. Some of these conflicts are between individuals or groups holding the same right, as when two or more vie, in the name of freedom of expression, for the chance to speak at a public meeting; or two or more vie for scarce resources in the name of the right of access to adequate protection of health. There may also be conflict between holders of different rights, as when the right to freedom of expression for demonstrators competes with the right to freedom of movement by normal users of the highway; or the right to adequate protection of health is in competition with the right to respect for one's intellectual property.[15] Since these fundamental competitions for priority take place in all human rights regimes, there is no reason to think that the conflicts would be less acute when these regimes are linked to trading relations. Does this mean that even if their place was made secure within the working of the WTO, we must nevertheless expect to see the promise of human rights diluted or diverted as the disputes mechanism and policy makers administering trade go about the work of balancing one right against another? That depends on how the objectives of the organization are located within a wider set of basic principles, which is investigated in the following discussion.

IV. Linking the WTO's Objectives to Human Rights

The stated goals of the WTO can be found in its preamble, which provides a useful source for both lawyers and non-lawyers wanting to see what the Members of the organization have committed themselves to achieve. There is room for debate over the best way to interpret these paragraphs, and this difference of view can affect the potential entry points for, and character of, the human rights that can be recognized by the institution. There are seven overlapping goals within the preamble. While they are run together in the text, it is useful to separate them as commitments to:

[14] This was made famous in the work of the legal philosopher Ronald Dworkin as the "right to equal concern and respect". *See* R. DWORKIN, SOVEREIGN VIRTUE 1 ff (2000).

[15] The right to intellectual property is recognized in Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (1966). For this distinction between types of conflict among basic rights, *See* Jeremy Waldron, *Rights in Conflict* 99 (3) ETHICS 503, 509–512; 516–18 (1989); and S. Leader, *Integration, Federation, and Rights* in MORALE ET POLITIQUE DES DROITS DE L'HOMME (Monique Costillo ed. 2003) at 63.

1) Raising standards of living,
2) Ensuring full employment,
3) Ensuring a large and steadily growing volume of income and effective demand,
4) Expanding the production of, and trade in, goods and services,
5) Allowing the optimal use of the world's resources in accordance with the objective of sustainable development,
6) Seeking both to protect and preserve the environment, consistent with the contracting parties respective needs and concerns at different levels of economic development, and
7) Assure developing countries, especially the least developed, a share in the growth in international trade commensurate with the needs of their economic development.

In addition, the preamble describes a particular objective, which serves the others.

8) The Members aim at "contributing to these objectives by reciprocal and mutually advantageous arrangements directed to substantial reduction of tariffs." It will do this by developing ". . . an integrated, more viable and durable multilateral trading system. . . ".

The first thing to note about these objectives is that they can and often do complement one another, and are sometimes furthered by the kind of market integration addressed in the preamble. The U.N. Commission on Human Rights has published a series of recent reports on the impact of international trade on intellectual property rights,[16] agriculture,[17] and the provision of services.[18] In each of these reports, which are considered later, the beneficial effects of free trade for some parts of the population are described. However, the reports then go on to indicate areas in which trade can damage other parts of the population. At this point, a tension arises between the latter's entitlement under human rights standards, and the central mission of the WTO to sustain and encourage trade.

A. Embedded and Imported Rights

Human rights are not explicitly mentioned in the preamble of the WTO Agreement. However, they can be linked to the text, depending on how it is read. Some of the rights are embedded in some of the objectives, as necessary for their attainment. Take, as an example, the commitment to "sustainable development". As a report from the United Nations Development Program argues:

> Development is unsustainable where the rule of law and equity do not exist; where ethnic, religious or sexual discrimination are rampant; where there are restrictions on free speech, free association and the media; or where large numbers of people live in abject and degrading poverty.[19]

That is, societies must be in a position to remove internal obstacles to their ability to renew themselves. If the least well-off are provided with these rights, then the U.N. argues

[16] U.N. Commission on Human Rights, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, E/CN.4/Sub.2/2001/13.

[17] U.N. Commission on Human Rights, *Globalization and its Impact on the Full Enjoyment of Human Rights*, E/CN.4/2002/54.

[18] *See* E/CN.4/Sub.2/2002/9, *supra* note 2.

[19] UNDP, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT Section C (Nov. 1997), http://magnet.undp.org/e-list/hr.htm#N1C.

that they will be less likely to deplete their own key resources such as land, water, or human capital, in the effort to survive.[20] Certain rights are therefore embedded in the goal of sustainable development.

While important, this way of picking out certain rights that the WTO must respect has its limits. It treats human rights as means to ends rather than as goals worth of pursuit in their own right. To continue with our example, if a commitment to give effect to certain human rights is grounded on and flows from a particular feature of development—its sustainability—then before the WTO was to take seriously any given right it would have to be convinced that it plays a demonstrable role in helping a society to renew its basic resources, both material and non-material. That does not fully cover the wider goals of a human rights agenda, such as that of the ICESCR, which is aimed at progressively improving access to certain basic social goods because of their intrinsic worth, quite apart from their ability to contribute to a society's ability to husband and renew its resources.[21]

For several other objectives announced in the preamble, it is not possible to find human rights embedded in them. Any connection to such rights therefore has to come from importing the relevant guarantees into the text. For example, the institution can pursue the first item on the list, raising aggregate or even average standards of living, without necessarily satisfying the right of *all* relevant portions of society to an adequate standard as would be called for by the ICESCR.[22] It is notoriously possible to increase the average standard while allowing the level enjoyed by the least well-off to fall. Any concern for the least well-off engages entitlements to distributive justice. *Prima facie,* this falls within the province of Members' domestic policy, and is not the business of the WTO. However, the trade treaties draw a balance between objective of furthering trade and various permissions given to member states to refuse to trade. In the latter case, the member might be motivated by a concern that the terms on which a good or service are entering the country might damage the well being of the least well-off. The question that then arises is, to what extent do the trade treaties have to be sensitive to the demands of social and economic rights as part of the legitimate reason that Members can have for the refusal to trade? That is, to what extent is it appropriate to take the rights standards that bind Members and import them into the legitimate concerns of the WTO as it interprets the relevant treaties? Is it possible to go further and call on the WTO itself to formulate policies with the avowed intention of actually facilitating (rather than simply not obstructing) the task of Members in meeting their required social and economic targets?

Would it be necessary to amend the organization's Articles in order to open up these possibilities? That depends on how the Articles are interpreted.[23]

[20] E. Barbier, *The Concept of Sustainable Economic Development*, 14 Environmental Conservation 101 (2–1987) ("... the primary objective is reducing the absolute poverty of the world's poor through providing lasting and secure livelihoods that minimize resource depletion, environmental degradation, cultural disruption and social instability"); R. Goodland and G. Ledoc, *Neoclassical Economics and Principles of Sustainable Development*, 38 Ecological Modelling. 38 (1987) ("Sustainable development is a policy which optimizes the economic and societal benefits available in the present, without jeopardizing the likely potential for similar benefits in the future.") All citations drawn from *Definitions of Sustainable Development*, collected by Jennifer DuBose, http://www.srl.gatech.edu/education/ME4804/definitions.html. *See also* United Nations Development Programme, *Integrating Human Rights with Sustainable Human Development: A UNDP Policy Document* (1998).

[21] This freestanding quality of the right can be seen in ICESCR Article 11.

[22] *Id.* Art 11.

[23] For an excellent consideration of the interpretive options, *see* Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) European Journal of International Law 753, 814 (2002)

B. Techniques of Interpretation: (I) Institutional Purpose and Founders' Intentions

The U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, has declared that "the full and indivisible range of human rights should be the 'primary objective' of trade, investment, and financial policy."[24] As attractive as this might sound in general terms, it is an opening that will make sense to a lawyer—and to others interpreting WTO rules—only if certain fundamental options are chosen when it comes to working with the Articles.[25] The first involves an approach whereby an international organization is understood to have not only those powers and competence which are explicitly conferred upon it but also those powers and competences which may reasonably be inferred from inspection of the purposes and functions of the organization.[26] One is not bound by the literal words in the body of the instrument if they are manifestly inadequate to achieve the relevant purposes and functions.[27]

How should content be given to these purposes and functions? When lawyers answer this question, they sometimes add what they call a teleological element to this principle of interpretation.[28] According to this element, the significance to be attached to the organization's statement of its goals is not limited by what its founders happen to intend at the time they set up the institution. It is instead also to be interpreted in the light of wider understandings of those purposes held by the community on whose behalf the institution acts—be that community global or local. The content of this wider understanding can be seen in other basic commitments that the community has made, such as those found in its formulation of human rights norms. As one legal philosopher put it, one does not look at what the founders of the institution said, but at what they did.[29] What they did is properly subject to changing interpretations, and properly brought into line with the evolution of the wider community's basic understanding of what makes any exercise of institutional power legitimate. Human rights norms therefore form a central part of this wider foundation, even if their inclusion was not intended by the founders of the WTO. On this approach, they should be read into the existing preamble, without needing to amend it, and in turn should inform a reading of all of the detailed provisions in the remainder of the Articles.

This view of interpretation can be contrasted with one which is not necessarily hostile to incorporating human rights norms into the WTO mandate, but admits them on a more restrictive basis. It takes as its point of departure a quite different protocol, according

[24] Resolution of September 4, 1998 (http://www.pdhre.org/involved/uncommission.html) See also the seminal work of Ernst-Ulrich Petersmann, *Time for Integrating Human Rights into the Law of Worldwide Organizations*, WORKING PAPER 7/01 Jean Monnet Program, Harvard Law School (2001); R. Howse, and M. Mutua, *Protecting Human Rights in the Global Economy: Challenges for the WTO, Rights and Democracy* (www.ichrdd.ca) (2000); J. Oloka-Onyango and Deepika Udagama, *supra* note 2; *cf*. Caroline Dommen, *Raising Rights Concerns in the WTO*, 24 HUMAN RIGHTS QUARTERLY 1 (February 1, 2002).

[25] For the particular principles applicable to the interpreting of constituent instruments, *see* P. Sands and P. Klein, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS ¶ 14–023 (2001).

[26] H. G. Schermers & N. M. Blokker, INTERNATIONAL INSTITUTIONAL LAW (3rd ed) 141–2, (1997), Kelsen, PRINCIPLES OF INTERNATIONAL LAW 284–5, 833–4 (1966). For similar possibilities in the interpretation of the powers of the World Bank and IMF, *see* Skogly, *supra* note 9, at 72.

[27] Sands and Klein, *supra* note 25, ¶ 14–023. This approach "... looks to the object and purpose of the organization, rather than adopt a literal (and therefore restrictive) approach to what the constituent instrument does or does not say". It is an approach that takes "... into account the object pursued by the organization rather than the text of its constituent instrument".

[28] *Id*. ¶ 14–021. "There is some authority for the proposition that a treaty of a constitutional character should ... allows for the 'intrinsically evolutionary nature of a constitution"'.

[29] Ronald Dworkin, LAW'S EMPIRE, Chapter 10 *passim* (1986).

to which an international organization may only perform such acts as are expressly laid down in the statutes of the organization, and any acts that are not mentioned there will be outside the scope of the organization's range of maneuver. On this basis, the only human rights the WTO is bound to respect are those that the contracting parties agreed to respect when they came together and formulated the objectives of the organization in the Articles.[30]

The difference between the teleological approach and that rooted in the intentions of the contracting parties is fundamental in any project connecting the WTO and human rights. Both approaches are open to such rights, but in very different ways. The latter starts from within the organization, and looks to the moment of its foundation. The former starts from outside the organization, and looks to the way in which it fits into wider and evolving understandings of what makes power—both of states and of organizations transcending states—legitimate.

C. Techniques of Interpretation (II): Functional versus Civic Inclusion

A teleological approach to the interpretation of WTO treaties, with its eye on the evolution of standards, can itself develop in two distinct directions. One of these takes a functional view of power, and another takes what can be called a civic view.[31] The difference can best be appreciated by going back to the eight objectives in the WTO Agreement's preamble. The first seven are general goals: they are shared by a number of other national and international organizations along with the WTO. The eighth is a special objective. That is, it specifies the particular way in which the WTO is meant to pursue its general objectives: its commitment to achieve a "substantial reduction of tariffs" and "an integrated, more viable, and durable multilateral trading system". Now, according to the functional approach, it is the special and not the general objectives of the institution that fix the appropriate scope of its responsibilities. Its duties are, for the functionalist, to the actors who are directly involved in the process of this movement to integrated trade, and no further. Thus, even if it could be shown that opening markets to certain goods and services damages the prospects of certain local populations, the functionalist claims that this is not enough to attach the responsibility for those effects to the WTO. The proper concern of the organization, from this perspective, is not to achieve *comprehensive* fairness, but only to achieve the limited sorts of fairness that its commitment to non-discrimination among goods and service providers involves. Debra P. Steger, former Director of the WTO Appellate Body Secretariat, has recently articulated this view. She refuses to include concerns about users of services or of goods within the scope of WTO responsibility, confining herself to their producers. "The WTO's mandate," she says:

> is to promote freer trade and market access through the application of the principles of non-discrimination. Although I would equate the principle of non-discrimination with the fight against protectionism, nowhere in the GATT is the term "fairness" used. That does not mean that the GATT is "unfair"; it simply means that "fairness" in trading relations is not a GATT principle or norm—non-discrimination is.[32]

[30] Sands and Klein, *supra* note 25, at 450 (2001).

[31] The functional outlook described here is different from functionalism as it normally figures in the literature on trade. See e.g. Ernst-Ulrich Petersmann, *supra* note 24, text associated with his footnote 6. Compare this with the distinction between civic and functional approaches in S. Leader,*Three Faces of Justice and the Management of Change*, 63 MODERN LAW REVIEW 55–83 (January 2000) passim.

[32] Debra P. Steger, *The "Trade and . . . ." Conundrum—A Commentary*, 28 AMERICAN JOURNAL OF INTERNATIONAL LAW 135, 139 (2002)

This is a position standing in sharp contrast with that which embraces users; producers; as well as potential beneficiaries and victims of both. Several recent reports by the U.N. take this wider view, as do commentators such as Steve Charnovitz and Ernst- Ulrich Petersmann.[33] They implicitly endorse what can be called a civic approach. This does not tie the WTO's responsibility to its special objectives, but roots these objectives within wider concerns. To illustrate this difference, consider the WTO rules that affect access to education or health, or affect the full range of labor rights. Based on the civic approach, if those effects are significant then the organization is responsible for them. Based on the functional approach, the organization might not be responsible for these same effects. For the functionalist, there is an additional issue of institutional identity at stake: the special mission of the WTO distinguishes it from a state, and in turn from the International Labor Organization, the World Health Organization, etc. A *Member* may well be responsible for implementing policies that violate its own commitments to basic rights, but it does not follow for the functionalist that the WTO is therefore also responsible.[34]

Even if the Members, working collectively as the WTO, make demands on one of their number to open its markets, the way in which the latter then copes with any negative effects of such an opening is, for the functionalist, not the proper concern of that organization. It is an issue that calls on the state's particular range of responsibilities that are wider than those of the trading body. It may, for example, be appropriate that the Member seek the international assistance to which the ICESCR refers so as to obtain the technical advice, and possibly the resources necessary, to protect any human right that would be jeopardized as a by-product of opening its markets.[35] This would call, *inter alia*, for contributions from specialized agencies of the U.N. to provide the requisite assistance—to fill the gap that might be opened up by market integration. The civic approach is fundamentally different. It is not primarily concerned with the distinct or special *roles* of states and other institutions, but instead focuses on their overlapping *power*. If the policies of a given Member, and those of all Members working as the WTO, have equivalent effects on a population, then on applying the civic view the responsibility of each member singly, and their responsibility collectively could well be similar.

This is one of the fundamental points of division in the free trade / fair trade debate. The parties to that confrontation are not, whatever the appearances, divided about whether "fairness" as a value does or should form part of the WTO's existing principles. This is true despite the way in which Steger has expressed her point. For the principle of non-discrimination to which she refers is itself a species of fairness—and as Brian Languille

[33] *See* Steve Charnovitz, *Triangulating the World Trade Organization*, 28 AMERICAN JOURNAL OF INTERNATIONAL LAW 28, 41 (2002): "The capacity of horrendous working conditions to render trade unfair was acknowledged by the parties to the Covenant of the League of Nations . . . Whether the addition to the WTO Agreements of a provision on workers' rights would enhance fairness or erode it depends upon what that provision would require. Yet it can hardly be doubted that the labor issue fits the trade fairness frame." Petersmann, *supra* note 24, text associated with his fn 16.

[34] For this approach in international economic law,*see* FRANCOIS GIANVITI, *Economic, Social and Cultural Rights and the International Monetary Fund* WORKING PAPER FOR THE U.N. COMMITTEE ON ECONOMIC AND SOCIAL AND CULTURAL RIGHTS, E/C 12/2001/WP.5, para 6 ff. (2001). *See* also the discussion of functionalists in Charnovitz, *supra* note 33 at 48.

[35] ICESCR, *supra* note 9, Article 2, ¶ 1: "Each state party to the present Covenant undertakes to take steps, individually and *through international assistance and cooperation* . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . . ." For an example of such damage as a by-product, consider the U.N.'s analysis of the possible effects of trade policy on the ability of the least well off to gain access to education and health facilities. See *Liberalization of Trade in Services*, *supra* note 3, ¶ 60

has pointed out, some degree of concern for fairness is therefore built into the very fabric of free trade.[36] The real clash between the fair trade and free trade advocates is over the *scope* of the demand for fairness.

Telling against the civic view of appropriate scope is the fact that the WTO is clearly not a state, and therefore would not seem to have the same range of responsibilities as a state. But telling against the functional alternative is the possibility that Member states may be caught between the twin pressures of market integration and human rights concerns, each sometimes pointing in opposite directions. It does not seem right, or realistic, to offload the negative affects of trade onto other international organizations meant to assure respect for labor, health or environmental standards. That creates tension and rivalry among international organizations that should be complementing the work of one another. A clash of international demands becomes particularly aggravated when a state finds that the steps it takes to satisfy a requirement of one of the trade treaties places it in possible violation of one of the human rights treaties. While all sides—within and outside the WTO—would deplore this situation, the devil lies in the detail: as will be explored in Part V.

D. Two Types of Market Integration

These legal concerns have to be placed alongside the concrete work of the WTO as it gives daily effect to the development of an integrated trading system. Here, it is important to note the difference between "positive" and "negative" integration of markets, and the potential effect of each on a human rights policy.[37] A negative strategy requires that a Member of a trading system not use domestic policy to erect undue barriers to trade. Market integration in this mode happens via a series of prohibitions of such obstacles. Examples include the prohibitions against discrimination among sources of imports; against discrimination in favor of domestic producers; and against unjustified non-tariff barriers to trade. A positive strategy takes the demand for market integration a step further, requiring that the terms on which goods, services, or people are allowed to penetrate the borders of another country should be based on common standards fashioned through a policy set by the institution administering trade. The distinction is between the different degrees of centralization required to implement the integration sought. Speaking of the European Community, for example, Nicholas Bernard says that:

> Negative integration leaves instruments of policy, such as regulatory powers or fiscal powers, at the national level, although the use of those instruments is prohibited when it creates or maintains impediments to trade between Member states. On the other hand, positive integration entails the centralization of policy instruments at Community level.[38]

E. Human Rights from the Center: Positive Integration

When they are linked to positive market integration, human rights are a potentially critical tool deployed at the center. At the moment they play no such role, and exploring their

[36] A point ably demonstrated in Brian A. Languille, *Labour Standards in the Globalised Economy and the Free Trade/Fair Trade Debate*, in INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE 329–339 (W. Sengenberger and D. Campbell eds, 1994).

[37] *See* the seminal work of Prof. Petersmann on this point, Petersmann, *From Negative to Positive Integration in the WTO: Time for Mainstreaming Human Rights into WTO Law?*, 37 COMMON MARKET LAW REVIEW 1363 (2000).

[38] Nicolas Bernard, *The Future of European Economic Law in the Light of the Principle of Subsidiarity*, 33 COMMON MKT. L. REV. 633, 636 (1996)

potential takes us into an area of possible reform. The changes could come at several levels of strength. One could imagine making the WTO a party to the several international human rights covenants, including the ICCPR and ICESCR. This would require it to make and to interpret the agreements it administers such that they have no effects that violate such rights. Less radically, the WTO could, without becoming a party to the covenants, voluntarily incorporate their standards into its own internal order. A further mode of linking human rights to a positive integration strategy would involve not simply looking at the internal order of the WTO, but outwards to the Members themselves. One could imagine a fresh agreement demanding that each Member adopt adequate human rights standards as a condition of it engaging in international trade. Here, we have a partial analogy in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). TRIPS takes a step towards a human rights demand: that the contracting parties implement adequate protection for intellectual property entitlements.[39] The right to this species of property has also acquired a place in the ICESCR's declaration that everyone is entitled "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[40]

Is this overlap between the demand made by TRIPS and the demand made by the Covenant enough for us to say that the former is requiring Member states to respect a human right? If so, we already have an example of the WTO including respect for human rights as part of its mission. But TRIPS is not making a human rights demand, and the reasons for reaching this conclusion are instructive. It is certainly calling for the protection of an interest that overlaps with the interest that the ICESCR is protecting. However, more is needed for this to overlap to turn into a human rights approach. The difference lies in the gap between a functional and a civic outlook. The functionalist approach, which is popular in interpretations of the agreement, focuses on one of what we have called the special objectives in the preamble of the WTO: the aim of developing an integrated, more viable, and durable multilateral trading system. It ties TRIPS to this objective. The agreement is thereby predominantly focused on the need to create an integrated system by protecting a producer's intellectual property. Those applying the agreement do not consider it appropriate to *demand* that Member states provide a fair balance between those producer needs and the needs of local populations for e.g. the adequate provision of health protection. That is, the TRIPS agreement does not require that other interests be protected alongside the protection given to producer interests. True, Member states are given a certain margin of *liberty* to protect the latter. But this margin is seen as derogation from a core requirement of the agreement, with a presumption against it. It is a presumption that can be rebutted, but the protection of non-producer interests has to swim against the tide: it faces a burden of justification, as going against the spirit of the agreement.

A civic approach to the interpretation of TRIPS comes closer to capturing what is characteristic of a human rights approach. It would focus on the terms of Article 7 of TRIPS, which provides that:

> The protection and enforcement of intellectual property rights should contribute to . . . the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

[39] On the ability of this portion of the TRIPS Agreement to fit human rights criteria, see the discussion in the text accompanying notes 41 to 43 *infra*

[40] ICESCR, *supra* note 8, Article 15.

Article 7 could be taken as establishing a wider objective for the protection of intellectual property than that which would be established by the functionalists. The TRIPS agreement can be understood, on this approach, as inducing countries to adopt an intellectual property regime that provides both protection of intellectual property and room for overriding that protection, where both are on an equal footing.[41]

In both its strengths and its weaknesses, the TRIPS example provides several lessons. The TRIPS regime has spawned confrontation on its own terrain: having taken the step to demand a property right on behalf of one set of actors in the trade relationship, what about other actors wanting to enjoy potentially competing basic rights, such as the right to adequate protection of health? A human rights approach demands that any instrument that starts by focusing on one right, must tacitly make room for other basic rights and allow them to be brought into a fair balance.

But there is something more: the balances sought by Article 7 of TRIPS open further questions about what it is for the agreement to operate in the spirit of human rights protection. Does the concern for users' rights extend to contributing to the progressively greater levels of welfare that the ICESCR calls for, or is the system at most required to refrain from pulling the least well-off further down? When we observe the decision by the TRIPS Committee to extend to the least developed countries ("LDC's") an additional period of time before they will be required to comply, it is useful to consider what the benchmarks for their progress should be.

Should their obligations arise once it becomes clear that no significant part of their populations will be made substantially worse off by adhesion; or is it appropriate to apply the more ambitious principle that application of the TRIPS will actually give them enough control over their domestic policy so as to progressively improve basic social, economic, and cultural goods? In considering these questions, it is important to note the dual emphasis in the Doha Declaration on the TRIPS agreement. In part the Declaration highlights the importance of interpreting the agreement so as not to *prevent* Members from taking measures to protect public health, and it also emphasizes the more dynamic need to *assist* them in their effort to promote greater access to medicines for all. This could be interpreted as incorporating the positive obligation to gradually improve certain health protection standards as required by the ICESCR, Arts 2(1) and 12.[42]

F. Human Rights, Refusals to Trade, and the Discipline of Negative Integration

In this portion of the chapter we enter a different domain, one in which there is a greater prospect for seeing human rights brought to bear within the existing trade rules, because they can be initiated by one particular WTO Member rather than depending on achieving

[41] This is a central point about TRIPS made by the U.N. Sub-Commission on the Promotion and Protection of Human Rights. It argues that as presently implemented (not as presently formulated) the agreement "does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress . . . (and) the right to health . . . " *Intellectual Property Rights and Human Rights,* Sub-Commission Resolution 2000/7, ¶ 2. August 16, 2001

[42] WTO, *Ministerial Declaration on the TRIPS Agreement and Public Health*, 2001 WT/MIN(01)/DEC/2, ¶ 4, reproduced in the Appendix to this book. On the extra time given for compliance to LDCs the Declaration says, "We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until January 1, 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement." *Id*. ¶ 7.

a new consensus among all.[43] The GATT, GATS and TRIPS all create space within which a Member can refuse to accept a given good or service, or can override a claim of intellectual property, because of the demands of its domestic policy.[44] Depending on how the existing rules are read, human rights can figure as acceptable reasons for such a refusal to accept market integration.

There are two possible scenarios, which we shall illustrate by focusing on the GATT. In one, prompted by what can be called outwardly-directed concerns, country X refuses to import goods or services from country Y because it is concerned that Y is violating the human rights of its own population. In another, prompted by inwardly-directed concerns, X refuses to import from Y because it is concerned about the effect that the entry of such goods and services might have on the human rights of its, X's, population.

As an example of the outwardly-directed concern, Y might have acted so abusively that it is considered by the U.N. Security Council to be a threat to international peace and security, as South Africa was when it practiced apartheid. If so, Article 41 of the U.N. Charter provides for the legitimate use of economic sanctions. Article XXI(c) of the GATT in turn permits Members to refuse to import goods from that country for reasons of international peace and security. Similarly, objections to the importing of products that have been made by prison labor might overlap with human rights concerns, and this refusal is permitted under Article XX(e).[45] What about objections that X might raise to Y's non-respect of the basic trade union rights of its labor force? What about its objections to abuses of other human rights?[46] While these fall outside the explicit grounds mentioned in the treaties, there is potential room within their more general terms. For example, Article XX(a) of GATT permits refusals to trade when this is "necessary to protect public morals." Steve Charnovitz has suggested that, under suitable constraints, this clause could accommodate refusals to trade based on human rights violations, given the centrality of such standards at the core of the moral standards of many societies.[47]

There is a danger in this outwardly-directed strategy, however. One country, particularly if it is powerful, might be able to unilaterally impose its own understanding of human rights requirements on another. It might do this for protectionist reasons, or for reasons that arise from a good faith interpretation of the importance of a given right with which its trading partner disagrees. Given free reign, refusals to trade for such reasons would cause the system to fragment. The WTO decisions show some sensitivity to this possibility. While, as was said, human rights issues have not yet been directly raised in past cases, decisions have made it clear that WTO will allow a Member to refuse to import from another because of outwardly—directed concerns about issues such as the protection of

[43] Note that decisions reached by panels or the Appellate Body no longer need a consensus for adoption. Instead a consensus is required to block a decision. The losing party therefore no longer has the power to block the adoption of a decision of the Dispute Settlement Body, as was the case under the GATT dispute settlement system. DSU Article 17 ¶ 14

[44] *See inter alia* GATT, Article XX; GATS, Article XIV; and TRIPS, Article VIII.

[45] Concerns about prison labor and about human rights potentially overlap. Note, however, that other chapters in the book make it clear that the original purpose of this provision was protection, not respect for human rights. Many countries which take human rights seriously, including the United States, produce prison goods

[46] An example is the abuse of human rights in Myanmar, and the reaction of Massachusetts with the "Burma" law. The law restricts the authority of the Commonwealth to buy goods and services from companies that do business with Burma/Myanmar. Mass. Gen. Laws Ann. Ch. 7, §§ 22G–22M (West 1998 Supp.). The matter was not dealt with by a panel, but it is not difficult to imagine circumstances in which an issue like this would reach that stage.

[47] *See* Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW 689 (1998).

endangered species, and not simply because of concerns about its own domestic situation. However, the Appellate Body in the famous *Shrimp-Turtle* litigation has also made it clear that before a country can refuse to trade on such Article XX grounds, it must have made good faith efforts to negotiate with other countries a common understanding of the content of any such standard. The negotiation need not be with all interested parties, and indeed it might not result in an agreement before the embargo is imposed, but the coverage of parties must be substantial enough to be convincingly multilateral, and the efforts to reach agreement must be made in good faith.[48]

Turning to inwardly-directed concerns, the Member refusing to accept a WTO demand for entry into its market, or a demand for shaping its intellectual property rights, can also rely on the same provision in the GATT and its equivalent in GATS and TRIPS. It is worth noting in particular the scope for inwardly-directed human rights concerns potentially available in Article 8 of TRIPS. As they give effect to the agreement's core provisions, Members may adopt measures "... necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic ... development.... Provided that such measures are consistent with the provisions of this Agreement."[49] The Doha Declaration on TRIPS and Public Health gave added emphasis to the need to interpret the Agreement such that it gives scope to Members' "... right to protect public health and ... to promote access to medicines for all".[50] If there is room for a Member's *right* to protect public health, then there must equally be room for a Member's *obligation* to protect public health—an obligation arising, *inter alia*, from the ICESCR.[51]

At this stage, we can see why the trading system is likely to have a built-in resistance to a human rights claim, when these claims prompt Members to refuse to accept goods, services, or the recognition of intellectual property rights. As was true of the earlier example of derogations from TRIPS, they are all claims to carve out an exception to demands that a trading partner go along with market integration.[52] As a result, the system looks at human rights much as it does other non-tariff barriers. It may reluctantly admit them but on condition that, like other barriers, they do "least damage" to the core objective to free trade from among alternatives available. In other words, when they prompt refusals to trade, human rights demands face the rigors of a policy of negative integration. Quite apart from any views trade officials or adjudicators might have about the proper place for such rights in a trading system, this is an institutional influence on the way in which they see the problem. The result might radically shrink the force of any

[48] For a statement of these principles, see the views of the Appellate Body in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ("*Shrimp-Turtles I*"), WT/DS58/AB/R (1998), followed by *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia* ("*Shrimp-Turtles II") WT/DS58/AB/RW* (2001). *See also* Joanne Scott, *On Kith and Kine (and Crustaceans)*, in THE EU, THE WTO AND THE NAFTA 162 ff (J. Weiler ed. 2000).

[49] In the same spirit, though with different detail, are Article XX(b) of the GATT and Article IV (b) of GATS.

[50] *WTO Ministerial Declaration on the TRIPS Agreement and Public Health*, *supra* note 42.

[51] *Id.*

[52] When a refusal to import a good is accompanied by local production of the same or a similar good, then there is *prima facie* a violation of the ban by Article III:4 on according domestic goods better treatment than is given to imported goods. This can happen in the situations we are considering, since the country refusing an import because of the policies or conditions surrounding the production of a good in another country, or because of its impact on the basic rights of its own citizens, might not have the same objections to similar goods produced in its own borders. At that point, while the Member might look benignly on local producers, there is a case to answer under Article III: 4. The Member will only be able to overcome the presumption against such differential treatment by relying on one of the Article XX or XXI exceptions.

given human right—taking it well below the promise it offers in other quarters, where it does not have to be provided in a version that is the least trade restrictive. This is one factor that fuels the feeling of many skeptics that international trade is inherently corrosive of social standards. It is a product of a functionalist vision of the mission and responsibility of the WTO. We shall explore more of the civic alternative in a moment.

G. Human Rights and Trade with Developing Countries: A Special Case?

This is a further part of our map, raising some of the most politically-charged issues about the place of human rights in a trade regime. Some developing country Members have been called on to respect certain human rights demands as a condition of their enjoying certain special trading advantages. The demands concerning the rights do not come from the WTO itself but from certain countries that are developed country Members.[53] In return for preferential access to their markets—that is, a degree of access that is not granted to other WTO Members—these richer partners demand in return that the recipients of the preference accept certain conditions. The European Community, for example, splits its preferential treatment into several tiers, and offers what it calls "special incentive arrangements" if the recipient country incorporates into its national legislation the substance of the standards laid down in key ILO conventions, including those on forced labor and on freedom of association, and the right to collective bargaining.[54] The special inducements take the form of additional tariff reductions at twice the level of the basic preferences accorded.[55] It offers similar incentives for measures to protect the environment and to control drug trafficking.[56] Under the U.S. Generalized System of Preferences ("GSP") scheme, all eligible items are duty-free. The main conditions attached to granting this eligibility to particular countries relate to protection of intellectual property, the respect of labor rights (including the elimination of the worst forms of child labor), and the resolution of investment disputes. No specific mention is made of ILO Conventions or TRIPS, but these standards have been referred to in decisions about non-compliance.[57]

These arrangements have been the subject of a debate that raises many of the headline items in the politics of trade, about which feelings run strongly. It is a debate that is fundamental to the future role for human rights in this portion of the trading regime. On one side, there are those who argue that the conditions attached to preference are objectionable because they are often prompted by protectionist motives; are impositions by the powerful on the sovereignty and distinct values of weaker countries; and that some of the conditions erect obstacles to developing countries' ability to pursue economic growth.[58] On the other side, defenders of the system deny each of these points, and they sometimes add the argument that the GSP scheme is entirely voluntary. Developing

[53] Or groups of countries, such as those belonging to the European Union.

[54] *Council Regulation Applying a Scheme of Generalized Tariff Preferences for the Period January 1, 2002 to December 31, 2004* [12732/4/01 REV 4] Preamble, ¶ 19; and Title III.

[55] *Id. Preamble*, ¶ 16.

[56] *Id. Section* IV

[57] *A Preliminary Analysis of the GSP Schemes in the Quad,* Note by the Secretariat, WT/COMTD/W/93. For a reference to ILO standards in US decisions, see the report on Indonesia's worker rights laws in 1992 *GSP Annual Review*, Case 007-CP-92, July 1993. The original authority for the U.S. GSP scheme is Title V of the Trade Act of 1974 (19 USC 2461 et seq.). The scheme was originally introduced in January 1976 for a ten-year period and has since been renewed at various times.

[58] *See e.g.* the complaint brought by Brazil in 1987, *U.S. Actions On GSP Assailed In GATT,* discussed in http://www.sunsonline.org/trade/process/during/uruguay/gsp/05160087.htm. The dispute never reached the hearing stage.

countries, they say, make the choice to opt for the extra margin of reduced tariff that carries the conditions to which they object. If they are unhappy, they could simply decide to choose the basic amount of reduction in the core of the EC's preferential scheme and forego the additional special incentive of doubling the tariff reduction that is offered. In the case of the U.S. system, they could give up any preference at all.[59]

This series of disputes expresses some classic stand-offs in political economy. One side is claiming that labor rights impede wealth creation, while the other side denies that; one side claims that there is an imbalance of power that vitiates developing countries' free consent to conditions attached to preferences, while the other side insists that the consent is freely given. However, and this is of central importance in drawing our map, the clash also raises a fundamental structural issue. Alongside the question about which strings are legitimately attached to the grant of preferences, runs the fundamental question about power: who is, and who should be, entitled to affix the strings in the first place? Core WTO law, as we have seen, does allow Members to attach conditions to their willingness to trade, but at the same time does not allow those Members a free hand in deciding the exact nature of those conditions, even when these are prompted by their strong convictions on matters of social or environmental ethics. They have to meet the requirement that the conditions be negotiated with a significant number of affected partners[60], and that they satisfy other elements of the requirement of "necessity" in e.g., Articles XX of the GATT and Article IV of the GATS, examined more fully below.

The programs set up under GSP, for the moment, contain none of these restraints. Trading partners granting preferential terms of access to developing countries do so at their own initiative, and are entitled to pick and choose the terms on which the grant will be made or withheld. True, the international benchmark of ILO standards for labor rights is contained in the EC scheme, and is also followed by others, but this reference is the free choice of those setting the standards, and in all cases it is for the trading partners granting the preference to decide unilaterally whether or not those standards have been violated.[61] It is therefore not surprising that GSP schemes are often political tools. That is, the grant and refusal to trade on the terms contained in a particular GSP scheme are linked to a calculation that takes into account which developing countries a particular Member can or cannot afford to alienate; which local industries a Member wants to protect; and so on.[62] Indeed, the European Court of Justice has recently acknowledged this role for politics in the EC scheme.[63]

Whatever the bill of health this structure might have received from certain WTO Members, the political confrontation that it engenders continues to smolder. Those who

[59] For example, the United States responded to the Brazilian complaint with the claim that it was fully entitled to do what it had done under its "autonomous" GSP scheme. *See*.

[60] *See*, for example, the requirement of good faith attempts to reach agreement on shared standards with a significant number of potentially affected trading partners in *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia ("Shrimp-Turtles II")* WT/DS58/AB/RW (2001). ¶ 123 ff.

[61] Compliance is determined by committees designed to monitor compliance established by each of the GSP grantors.

[62] For the political factors influencing GSP decisions, *see* J. H. JACKSON ET AL, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS § 24.3 (1995).

[63] *See DuPont Teijin Films Luxembourg SA v. Commission of the European Communities* ECJ, Court of First Instance, September 12, 2002, Case T-113/00, ¶ 85, "... the decision to withdraw the benefit of the preferential arrangements is pre-eminently a political issue concerning the Community and the beneficiary countries." This is the view taken by the ECJ in administering its scheme within the terms of its own GSP regulation. A WTO panel could well take a view that gives less discretion in a decision to withdraw preference, as discussed *infra*.

defend the imposition of conditions, as a *quid pro quo* for preferences accorded, consider GSP essentially to be an autonomous set of arrangements, lying outside the purview of WTO regulation.[64] On this view, two types of decisions might be thought to be voluntary, and therefore to be left alone: that of the developed country to offer preference, and that of the developing country to accept the offer. These voluntary choices should, on this view, seal off these arrangements from regulation by the rest of the trading world.

Developing countries are not convinced. India has taken steps toward a legal challenge of the EC GSP scheme before the WTO and, if it is successful, such schemes could become less of a discretionary political tool in the hands of the developed world.[65] The challenge is based on the terms of the agreement between GATT contracting parties that authorizes these schemes to be set up, known informally as the "Enabling Clause".[66] This instrument states that if one of their Members decides to offer certain developing countries special and more favorable access to their markets than other trading partners enjoy, then the grantor will not be in violation of the most favored nation requirement of Article I of the GATT, which would otherwise apply. The Clause also makes it clear that any conditions attached to the grant of preferential access must be focused on the development needs of the recipient.[67] India's complaint is that this latter demand is not met by the EU. The conditions attached to the preference granted which require protection of labor rights; protection of the environment; and the elimination of drug trafficking are, it is argued, either unrelated to or actually damage those development needs. If this claim were ever to be successful, then the EU scheme could fall outside the terms of the special permission given by the Enabling Clause. In turn, when the EU uses such conditions to differentiate among those developing countries that receive preferential treatment and those that do not, then those who lose out would have grounds for a complaint of discrimination based on Article I of the GATT.

It remains to be seen whether the Enabling Clause is to be given a status that raises issues for a WTO panel of such a fundamental and politically divisive nature. However, the legal terms in which the challenge is framed express the political issue with which the organization will have to grapple in any event, and which is central to our concerns in this chapter. India's claim is that the permission to engage in preferential treatment given by the WTO is not a blank check, but a partial opening: any conditions attached to trade preferences must be focused on the development needs of the recipients. Any given condition must, on this view, be matched against the requirements of the Clause. There could be two consequences if this argument were to succeed, either as a matter of legal or of political principle: one would be that the trading partners would not be able to use GSP schemes with as free a hand as they have hitherto. Conditions attached to preferential access to markets would still be possible, but they would need policing to see if in any given case they satisfy development needs. The second consequence takes us back to the divisive issue of voluntary choice. What looks to powerful countries like voluntary acceptance of their offer of preference with conditions attached, looks to some Members in the developing world like forced imposition. However, looked at through the lens of

[64] *Cf* the U.S. response to Brazil's 1987 complaint *supra* note 59.

[65] *India Seeks WTO Talks With EU Over Labor, Drugs Clauses in GSP Program*, 19 INTERNATIONAL TRADE REPORTER 456, (Number 11, March 14, 2002). As of the time of going to press, it has been announced on 28 October 2003 that a WTO panel has upheld India's complaint. See BRIDGES: WEEKLY TRADE NEWS DIGEST—Vol. 7, Number 37, 5th. The panel report will be released in early December, 2003

[66] *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries,* GATT No. L/4903, Decision of November 28, 1979.

[67] *Id*. ¶ 3(c)

the Enabling Clause, the question of voluntary choice is *irrelevant*. If any given condition attached to preferential access does not fall within the opening for differential treatment of trading partners allowed by the Clause, then it does not matter that the condition was freely accepted. The Member setting the condition had no power to make that demand in the first place.[68] The Clause grants a special permission to a developed country to do something that would otherwise be illegal: to give a degree of special access to certain less developed trading partners. If country X grants less developed country Y preferred access to its markets which it denies to similarly situated country Z, because the former is willing but the latter is not to comply with a given condition, then Z can complain of a violation of the requirements of GATT Article I *if* that condition does not fall within the limited permission given by the Clause. Once it is clear that the boundaries set by the Clause have been exceeded by a particular condition attached to market access, then it is not relevant to Z's complaint that the condition is voluntarily accepted.

The scope for attaching conditions to the granting of GSP might therefore shrink. However, that does not mean that a Member could not impose a larger set of human rights concerns on those countries wanting access to its markets. Now, however, its refusal would fall within the principles governing what was earlier called 'outwardly directed' refusals to trade, as permitted *inter alia* by GATT Article XX.

H. Taking Stock

Before moving on, it is useful to stand back and briefly summarize the points made in Parts III and IV, since they will figure in what follows. We have been primarily concerned to see which pieces belong in the puzzle. This involved a look at the candidates for the group of human rights that the global trading system should respect and further. We then explored different possible linkages: prospects for linking trade to different sets of rights are affected by ideas about the WTO's institutional responsibility. We sketched two possible foundations for such responsibility: functional and civic principles. In turn, these distinct notions of the basis of the WTO's responsibility affect the approach to positive and negative integration of markets, as well as relations with the developing world. In Part V we will move from a static to a dynamic picture. We now look more closely at the priorities and balance between competing rights. This is a set of issues faced both by the WTO and by Member states. As the national and international systems interact, we will investigate the reasons for which free trade is condemned for wrongly imposing on national priorities, and where it has the potential to be—and be seen to be—impartial between the rival visions of the good society and of social justice held by trading partners.

V. Putting the System to Work in a Cosmopolitan Democracy[69]

As we watch the trading system relate to national priorities—moving in the same direction of some and upsetting others—it is important to see where this influence fits. Does the system of trade law stand a chance of being seen as an extension of the mandates of all of

[68] It is also irrelevant, from this perspective, that a system of preferences is left to developed countries to institute or not, as they see fit. It is *once* they decide to extend this benefit that they should then be required not to discriminate in its implementation. The requirement is similar to the one most national systems place on employers, who freely choose whether or not to create a type of employment, but once they do are required to offer it on a basis that does not discriminate on grounds of gender, race, etc.

[69] See S. Leader, *The Reach of Democracy and Global Enterprise*, 8 (4) CONSTELLATIONS 538 (2001).

its Members towards their citizens, or are there in-built features that risk pulling it away from that democratic ideal as a benchmark for measuring progress?

The political theorist David Held argues that the promise and challenge that globalization presents lies in its potential for bringing forth what he calls "cosmopolitan democracy". This he defines as an order in which there is ". . . the increasing diffusion of responsibility for the maintenance of human rights, or the defense of cosmopolitan rights and duties, across different agencies at different levels of governance."[70] It is democracy protected by supra-national human rights organs which are also sensitive to layers of power and authority, both state and non-state, aiming to move in the direction of global standards of social justice.[71] If the general idea of cosmopolitan democracy is to assist us, we need to face up to a fundamental threat to it. Alongside questions about unilateralism and multilateralism in the worlds of trade and of human rights, there is what can be called the issue of "collateralism".

A. The Problem of Collateralism

If and when the protection of human rights becomes a concern of bodies such as the WTO, the form of protection offered to them risks undergoing change of focus. Whereas many states aim to hold the whole range of such rights in an equitable balance with one another—limiting the exercise of some so as to make room for others—this balance can lose a central place in the work of certain international organizations: organizations that have the most power to influence the domestic policies of those same states. In place of the sort of equilibrium among rights that democratic states seek, we find that some rights receive automatic preference over others in some international organizations: the latter becoming collateral concerns of the organization, while the former are deemed to lie at the core of its objectives.

If the WTO is thought to draw its legitimacy from its particular mandate to promote an integrated trading system—what was identified earlier as item 8 in the preamble—then it can seem reasonable to conclude that this core function should generate the basic rights that deserve its prior attention. Others will become collateral concerns. However seriously human rights are taken by an organization such as the WTO, they are easily prone to being filtered through this perspective. Thus, those who make and interpret the norms of the organization might fully accept that they should respect the obligations on member states arising from social, economic and cultural rights. However, they might also insist that while these ICESCR rights constrain what the WTO does, they cannot constrain it in the way they would constrain a state. When a hard choice has to be made between the objectives of market integration and concerns to protect those who might lose out from such integration, then on this view the WTO must stick by its special function and shape the rights involved so as to impede as little as possible its central mission.

True, the rules of the various agreements managed by the WTO do build in room for allowing its Members to assign ultimate priority to certain non-trade concerns, as we have seen. However, this deference to national priorities is sometimes accorded at a price. The Member might be required to compromise on their preferred content and method of achieving those non-trade objectives more than it would in other settings. This downward pressure on certain human rights standards may well occur even if one were

[70] Interview with Montserrat Guibernau, 8 (4) CONSTELLATIONS 427, 432 (2001).
[71] *Id*.

to place the objectives of the WTO on a human rights foundation. This link does not alter the fact that, as was seen at the outset, the particular means by which the WTO is committed to achieving those objectives is via the instruments of the mutual reduction of tariffs, and the development of an integrated multilateral trading system. This is a way of reaching its fundamental goals that distinguishes the WTO from the ILO, WHO, World Bank, and other international bodies that share many of the same general objectives such as the promotion of sustainable development and the raising of standards of living.

The result of this reasoning is not that human rights are compromised *per se*, but that particular priorities within the cluster of relevant rights will be established in advance of any given situation to which trading rules are applied. Those human rights that complement the goal of market integration will be given priority over those human rights that cut across the aim of such integration. As a result, when hard choices have to be made between the protection of economic freedoms that animate the goals of free trade, as against the protection of other welfare rights involving health, labor standards, and the environment—where the latter cause a Member to derogate from free trade principles—then, from the perspective offered by what we are calling collateralism, the WTO must shape the welfare rights so as to do least damage to economic liberties. The social and economic rights in the ICESCR are seen as incapable of rising to more than a secondary concern in a body that defines its tasks in what was earlier called functionalist terms.

The result is what we are familiar with: the perceived bias towards market liberalism in WTO policies. This priority flows as much from the institutional constraints faced by the organization as it does from deeper convictions on matters of political economy in the hearts of those running it. The price paid is a high one, since the system loses its ability to show Members that, while it might put pressure on their domestic agenda, it does so in a politically impartial way, and in doing so truly respects their other international human rights commitments. Things could conceivably be different.

B. From Collateralism Towards an Impartial Order for Trade Relations

It is possible to frame the work of the WTO in a way that reduces the damage done by collateralism. States are certainly not forbidden by their entry into the organization to pursue a strong domestic human rights agenda. Yet, this is a permission that is more formal than real for many weaker states and economies. It can be turned into a live option by appropriate balances within the trade treaties. These balances would carve out greater space for human rights in the pursuits of both positive and negative integration explored in Part IV. That is, the treaties could give greater priority to human rights in framing the demands for engaging in trade; and also in framing the terms on which trade can be refused or diminished so as to protect other non-trading interests.

In order to explore these possibilities, we can draw on our earlier distinction between civic and functional principles.[72] These, we saw, provide fundamentally different starting points in deciding on the standards that should guide the formulation and interpretation of trading rules. Those different starting points in turn lead to two distinct ranges of human rights that the organization might respect. A civic order incorporates a wide range, since it looks for continuity in regulating principles across a large spectrum of different institutions, from the nation state through to international bodies. A functional order—which

[72] For these distinctions, *see* S. Leader, *supra* note 69, at 538–553; S. Leader, *Three Faces of Justice and the Management of Change*, 63 MODERN LAW REVIEW 55–83 (January 2000); S. Leader, *Integration, Federation, and the Ethics of Rights* in MORALE ET POLITIQUE DES DROITS DE L'HOMME (Monique Costillo, ed., Zurich: Olms Verlag, 2003).

underpins collateralism—is different in that it divides up the terrain, looking for unique matches between particular organizations and their particular domains of responsibility. We can now go further with this distinction, using it to see the different ways of balancing disparate concerns in a trading regime.

C. Approaching the Balance between Trade and Non-Trade Interests

As indicated in Part III of this chapter, we will assume that respect for *some* human rights calls for the opening up of markets to trading relations, while respect for *other* human rights calls for closing or limiting access to those markets. Everything turns on the balance between the two sets of considerations. How does a civic order approach such a balance? Whereas in a functional order the special, defining objectives of an organization fix priorities among rights, in a civic order human rights are assigned priorities for reasons that are independent of the specific functions assigned to the organization. Even if the WTO has the special objective of promoting free trade this does not, on civic principles, dictate the relative weight of rights that the organization must respect. There is no reason for trading rules to give priority to a service provider's claim for market access over a state's claim to close its markets to such a service in order to protect a competing and fundamentally important priority. Instead, a civic order calls—in a distinctive way—for mutual adjustment between the rights.

We can see what is distinctive in a civic approach by comparing it with the functional approach to the well-known "necessity" requirement in the balance between trade and non-trade interests. When systems are confronted by competing rights, calling for their impartial adjustment, they often resort to the device of saying that one right may be limited if doing so is necessary for the fair exercise of the other. For example, the International Covenant on Civil and Political Rights ("ICCPR") requires respect for the right to freedom of expression, and then permits the right to be restricted if doing so is necessary for achieving, *inter alia*, respect of the rights of others and the protection of public morals.[73] Similar phrases also figure in the structure of the GATT, the GATS and TRIPS, as a qualification to their ability to protect public health, public morality, and other fundamental interests. In all such treaties, "necessary" does not mean what it seems to. That is, one does not have to show that any given measure is indispensable to the protection of the countervailing objective, such that there is no alternative measure that would protect it. There are usually several such routes available to protecting something like public morality, each sufficient to yield the result while none is literally the only way to go about it. Instead, the notion of necessity points at something quite different: it identifies the core objectives of the treaty in question, and then asks whether a Member state's overriding of those objectives by its domestic policy does the least damage to that treaty commitment, as compared with alternative possible domestic measures. The implicit question is not, "do you need to protect e.g., your public morality?", but rather "is this the way of protecting public morality that imposes the least cost on the ability of the treaty to do what it is designed to do?" We can call this the "least impact" feature of necessity.

Along with the requirement of least impact, there is sometimes a requirement of proportionality. Even if a particular policy has the least impact on a core value advanced by a trading system, that may not be enough to justify the policy since its impact on the core value may be deemed disproportionate. For example, a state might begin with a particular

[73] ICCPR, *supra* note 8, Article 19(2) and (3).

level of commitment to consumer protection, or a level of commitment to access by the least well-off to health or education. The state might have adopted means to achieve these ends that have the least impact on trade, from among reasonably available alternatives. Nevertheless—to take the example of consumer protection—its decision to pursue a particular *level* of commitment to such protection in the first place might be considered as imposing a disproportionately heavy burden on trade. As an example of this thinking in the analogous setting of the European Community, there is the *Danish Bottles* case. Here, the European Commission challenged a Danish environmental protection regulation that restricted the use of certain drink containers by imposing two requirements: a deposit and return scheme, and a ceiling on the total number of containers each firm could use. The European Court of Justice found this second element to be an illegal quantitative restriction.[74] It said that the deposit and return scheme would be enough by itself to render the containers environmentally friendly. The Court was aware that the full set of Danish restrictions achieved a higher level of protection for the environment than would the pared-down set, but was tacitly prepared to sacrifice this extra margin in order to allow an extra margin of access to markets for foreign goods. In the name of proportionality, the Court was willing to frustrate the country in question in its choice of level of commitment to a non-trade objective.[75]

In a functional order, these two parts of the necessity requirement—least impact and proportionality—receive an interpretation that is familiar, but of which many are suspicious. It demands that domestic priorities protecting public morals, and human, animal, plant life or health, all be pursued in a way that does least damage to international trade. There is clear room in the trade agreements for domestic priorities to prevail, but this is a potential that is largely lost—say the critics—when the Member state is forced to select that version of its priorities that is most friendly to the commercial interests of international providers of goods and services.[76] As Esty puts it, "... a policy approach that intrudes less on trade is almost always conceivable and therefore in some sense 'available'." As a result the non-trade exception is eviscerated.[77] In considering this critique, we should notice that the "least trade restrictive" demand does not necessarily flow from the fact that these agreements place the intrinsic merits of free trade above the protection of morals or human life. Instead, this priority is a result of a functional reading of the agreements. As was indicated in the earlier discussion of functional interpretation in Part IV, it is the special and not the shared general objectives of WTO that set the priorities among the interests the organization is to satisfy. That is, the market integration goals that give the institution its particular role among international organizations are primary, and any other interests that are contained in the shared, general objectives—which the WTO pursues along with many other organizations—are to be given a place that does least to upset the special objectives. It follows, based on this approach, that the shared, general aim of promoting, say, sustainable development, to which the WTO is committed along with other international bodies, should be interpreted so as to least trouble the special objective of market integration via free trade. Shared, general objectives are to be adjusted in favor of special ones and not vice versa, says the functionalist.

[74] *Commission of the European Communities v Denmark* Case 302/86 [1988 E.C.R. 4607]. It was held to be inconsistent with Article 28 (ex Article 30) of the Treaty Establishing the European Community. *See especially* ¶¶ 17 ff.

[75] *See* M. J. Trebilcock, and R. Howse, THE REGULATION OF INTERNATIONAL TRADE 153 (2001).

[76] *See e.g.* Michael Albert, *A Q&A on the WTO, IMF and World Bank and Activism* (2000) (www.zmag.org/Zmag/articles/jan2000albert.htm.

[77] D. Esty, GREENING THE GATT 48 (1994) *cited* by M. J. Trebilcock, and R. Howse *supra* note 75, at 140.

Before looking further into the civic alternative, notice that the direction in which functional adjustment moves can cut quite deeply into domestic priorities. This is because functional alternatives do not just put pressure on the means selected to achieve certain policy goals; they can—as in *Danish Bottles*—also affect the content of those goals. We can see this by contrasting two WTO cases, *Thai Cigarettes*[78] and *Asbestos*[79].

In the *Thai Cigarettes* case, Thailand limited imports of tobacco while permitting their domestic manufacture and sale. The limitation partly took the form of a refusal to grant licenses to import, raising a complaint under GATT Article XI(1); and partly a tax regime favoring local manufacturers, raising complaints of a violation of the national treatment provisions of GATT Article III:4. Thailand sought to defend the measures, *inter alia*, as necessary for the protection of human health within the terms of GATT article XX(b). It claimed to be concerned to keep domestic demand from growing beyond its present level.[80] The entry of foreign producers would, it argued, lead to expertly targeted marketing that would increase consumption among parts of the population who smoked far less than their foreign counterparts.[81] This result, it said, would damage the GATT's own objectives as set out in its preamble. For, smoking "... lowered the standard of living, increased sickness and thereby led to billions of dollars being spent every year on medical costs, which reduced real income and prevented an efficient use being made of resources, human and natural."[82] The Thai Government also claimed to be concerned about harmful ingredients in the imported cigarettes. The United States countered that these reasons were a thinly disguised attempt to carve out special protection for Thai producers.[83] It also argued—and this is central for our purposes—that Thailand would be able to protect public health by less trade restrictive methods: there were other ways of limiting consumption, and regulations could require requiring that the potentially harmful ingredients in different sorts of cigarettes, domestic or foreign, be clearly indicated to the consumer.[84] The panel decided in favor of the US. It found that labeling and ingredient disclosure regulations, as well as price rises induced by non-discriminatory taxation strategies, were less trade restrictive methods of reducing domestic demand.[85] Thailand's measures were therefore not necessary for the protection of public health.[86]

Of interest here is the *character* of the non-trade objective that a member state can pursue, such as the protection of public health or the environment. Objectives such as these do not stand on their own. The level at which they are pursued domestically is tied up with other social values demanding satisfaction. One society, placing a high value on consumer sovereignty, will also accept the greater risks to public health that go with allowing people to make up their own minds about a product. Another society will aim at a higher level of health protection because it feels less constrained by the value placed on informed consumer choice. The second was true of Thailand. Assuming for these purposes their bona fides when they denied protectionist motives, they did not trust the

[78] Report of the GATT Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT No. DS10/R, BISD 37S/200, adopted on November 7, 1990.
[79] *European Communities—Measures Affecting Asbestos and Asbestos—Containing Products* Appellate Body WT/DS135/11
[80] *Id*. ¶ 28.
[81] *Id.*¶ 54
[82] *Id.* ¶ 21.
[83] Id ¶ 23
[84] Id ¶ 23
[85] Id. ¶ 77, 78
[86] Id. ¶ 75—setting the issue in terms of 'necessity'

average consumer to react appropriately to warning labels on cigarette packages, nor to price increases. In short, they took a paternalist approach to the proper balance between achieving certain health objectives and respecting freedom of consumer choice.

The GATT panel did not reject this paternalist approach as a matter of ethical principle. That would not be within its brief. It rejected the approach because of the need to find the solution with least impact on trade. The effect—if not in intention—substituted a different weighting for the value of free consumer choice, and this in turn yielded a different level of health protection that would probably be attained. Labeling requirements place public health objectives more in the hands of individuals deciding the level of risk they will run. Within a population, the pattern of choice is likely to result in more smoking related illness than would an outright ban on imports. It is a lesser level of protection, but one that gives greater place to other important values in keeping with what was identified earlier as the proportionality element, rather than the 'least impact' element, in the requirement that a measure must be necessary for the promotion of a non-trade objective.

From a functionalist perspective, this decision makes sense. If one's point of departure is that the WTO's distinctive mission is to bring about "... an integrated, more viable and durable multilateral trading system ...", then this is the dominant concern, and the panel should require Members to arrange their local values so as to do least damage to that objective.

A different approach can be seen in the more recent *Asbestos* case.[87] There, the Appellate Body was willing to allow France to ban imports of asbestos and products containing asbestos. It found, *inter alia*, that the prohibition was 'necessary' to protect human life or health within the terms of GATT Article XX(b). It specifically said, "WTO members have the right to determine the *level* of protection of health that they consider appropriate in a given situation."[88] [SL's emphasis] Canada had argued that the French could not unilaterally fix the level of risk to health to be avoided, but this was precisely what the Appellate Body said did fall within the prerogative of a WTO member.[89]

The approach to levels of health protection in *Asbestos* certainly gives more room to domestic priorities than does the approach taken in *Thai Cigarettes*. However, this result might be thought to have gone too far in the opposite direction. For if, as Prof. Petersmann argues,[90] the objective of free trade is thought to be underpinned by a fundamental 'right to freedom of economic activity', then it is not clear that a member state should be able to pitch the level of protection it seeks at just the level it desires. That would fly in the face of other fundamental rights jurisprudence. By way of analogy, the international human rights system sets itself to protect freedom of expression, and the system allows that right to be balanced against a member state's need to protect national security.[91] If the state were allowed to unilaterally set the level of national security it wanted, and then to fix restrictions on speech that were necessary to attain *that level*, the result of fixing the ultimate objective so high could easily shrink freedom of expression to a vanishing point.

An impasse threatens here. Too little deference to the priorities of WTO Members risks unduly shrinking the room for them to make basic value choices; and too great a deference to those priorities risks unduly shrinking the place of the right to freedom of

[87] Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/11 (2001)

[88] Id ¶ 165, 168

[89] Id. ¶ 168

[90] Petersmann supra note 24

[91] ICCPR, Arts 19(2) and (3)

economic activity, insofar as this is considered to be a fundamental right. Both of these are routes that this chapter has set itself to avoid, for the sake of an approach that is not a hostage to the sometimes deep political cleavages among trading partners. An impartial solution might lie in looking more closely at the proper adjustments between trade and non-trade interests.

D. Rethinking the Directions of Adjustment between Trade and Non-Trade Interests

Elements of a different approach can be borrowed from the constitutional traditions of modern democracies, though they do require some alteration in this context, since we need to keep in mind the fundamental differences between an organization like the WTO on the one hand, and the state on the other. On a functional approach to the balance between trade and non-trade interests, as has been seen, the basic rights located in the shared, general objectives of the WTO—such as those embedded in the promotion of sustainable development—must always be adjusted so as to have least impact on the rights furthered by its unique, special objective: the promotion of free trade. In a civic order, the adjustment runs in the opposite direction. It is the general objectives that are primary, even if they are widely shared with other institutions, and the special objectives that must be read so as to do least damage to them. Respect for the human rights furthered by free trade, as well as for those potentially damaged by free trade, are all to be shaped in the light of the general objectives, with no automatic priority for one set over the other. Instead, any one of the basic rights can be adjusted in favor of any of the others. This is so even if, once mutual adjustment is accomplished, one of the rights does take ultimate priority.

To draw an analogy from another constitutional domain, the preservation of life is ultimately more important than is the interest in freedom of movement along the highway. But it is not true that each and every level of risk of death is more important to prevent than is any given level of freedom of movement. Evidence shows that the death rate on highways is reduced by a significant but decreasing number for every mile per hour of reduction in permitted speed. Assume that the reduction in a given country is 10,000 deaths in a given population for every mile of reduction between 100 and 90 mph; 1000 from 50 to 40 mph; and 100 from 40 to 20, and 10 between 20 and 10. Even though the preservation of life is more important than is freedom of movement along the highway, it does not follow that the right to freedom of movement must always be adjusted downwards so as to have the least impact on the death rate. At a certain point a polity may, and sometimes must, *reverse the direction of compromise*, limiting the attention paid to the risk of death in favor of the right to freedom of movement, however clearly a certain number of deaths is linked to a further reduction in speed.[92]

Looking at the same point in a trade setting, consider the example of a country that wants to ban imports of a certain product on grounds of risk to health, but allows local producers to manufacture and market a like product. Assume that it wishes to exclude the imports because their pricing and packaging will substantially increase their consumption per person. Now consider two such products: the higher *per capita* consumption of one carries a marginally higher risk of threat to life-threatening illness, and another that carries a substantially higher risk of a life threatening illness. An example of the former could be a food that, beyond a certain level of consumption, tends to cause obesity which in turn can marginally increase the incidence of certain diseases such as cancer;

[92] This argument builds on some points made by Waldron, *supra* note 15, at 503, 509–512, 516–18 (3-1989)

and an example of the latter could be another food which, beyond a certain level of consumption, radically increases the incidence of that cancer. Assume finally that, as in *Thai Cigarettes*, it is not practical or desirable for a country to totally ban the domestic consumption of these products, the local variety of which is much less attractive to the population.

In the first situation, if the local production and sale of such food is allowed then it seems appropriate for the WTO to demand that all regulations aimed at controlling level of its consumption be effected in the least trade-restrictive way: such as by non-discriminatory labeling requirements that carry appropriate warnings. Leaving the choice of the imported product up to the consumer—where it and its domestic cousin carry the appropriate warning label—would be likely to yield a greater number of cases of obesity, than would an outright ban of the import. Nevertheless, it would be an equitable way of balancing the two competing concerns of sustaining non-discriminatory access to markets and protecting this domain of public health. There would be compromise on the level at which the non-trade objective could be pursued.

In the second situation, if the state allows increased consumption of a product which leads to a substantial threat to life, it might be in violation of relevant international conventions for a failure to act.[93] How should the trading system approach the options in front of it? Once again, the options range from labeling requirements through to outright bans on imports. Here, it is submitted, the state should be allowed to choose the import-reducing measure that will do most to reduce the risk to life which it is obliged by other international conventions to pursue. The direction of adjustment is reversed: rather than finding a method of protecting human life that has the least negative impact on trade; the state would be allowed here to adjust the flow of trade in a way that has the least impact on human life.

It is, of course, not easy to draw lines between degrees of risk of harm arising from the import of different sorts of goods and services, and hence to know when it would be appropriate to alter the direction of adjustment between trading and non-trading interests in the light of human rights requirements. However, the bodies charged with the primary duty of interpreting the meaning of these basic rights do provide us with guidelines: either in the form of guidelines coming from organizations that specialize in a particular domain, such as the ILO or WHO; or from bodies with a more general mandate, such as the Committee on Economic Social and Cultural Rights, General Comments and Statements on the meaning of provisions in the ICESCR. These can be drawn upon by WTO panels in order to see when a Member should be given the scope by the trading treaties to adjust the requirements of trade so as to do least damage to a non-trading interest, and when it should be required to adjust the non-trading interest to the requirements of trade.

The important thing is to move away from a *blanket* commitment to a 'least trade restrictive' reading of the 'necessity' requirement. There are indeed principles established in some WTO cases that take us in this direction, acknowledging the right of a state to restrict imports in order to meet its international obligations, and allowing the level at which that commitment is to be fixed to flow from that undertaking rather than be

[93] For a recent example in which the failure by the state to secure individuals against a reasonably apprehend danger to health and safety that was so grave as to amount to a violation of the right to life under Article 2 of the European Convention on Human Rights, *see Oneryildiz v Turkey* No 48939/99 Judgement of 18 June 2002

compromised by the 'least trade restrictive' demand. [94] Unless this is done, a commitment to the least trade restrictive solution can sit like a lid on top of a wide range of states' engagements to their subjects. The result is something we are familiar with: the world wide complaint that the WTO weakens the ability of Member states to pursue policies that are valuable in themselves, but which when pursued might make the promotion of free trade more difficult. The approach considered here aims to keep an equitable balance of the full range of basic rights at stake in trading relations. This is the approach called for by civic principles of interpretation.

E. Factoring in Trading Interests

It is important that we not lose sight of our initial willingness to place human rights on both sides of the divide between trade and non-trade interests, as indicated in Part III. Those offering goods and services, as well as those potentially damaged by the terms on which those offers are made, have fundamental rights potentially at stake. This means that when a WTO panel is considering, for example, whether or not a Member state has violated TRIPS by refusing to grant a local patent to the inventor of an important drug, as is normally required by Article 27 of the TRIPS Agreement, then the panel should take into account the inventor's fundamental property rights as provided for by Article 15 (1) (c) of the ICESCR. However, as was argued earlier, the inventor's property right under TRIPS will also count as a property right in the human rights instrument only if it is brought within the full set of other relevant rights, and adjusted against them. Sometimes, as was argued above, the direction of adjustment must be from the dominant objective of the treaty towards having least impact on an objective lying outside the treaty. If these balances are made part of the approach, then the U.N. Sub-Commission on the Promotion and Protection of Human Rights is likely to conclude that all facets of the applicable intellectual property rights have been respected.[95]

This cannot be adequately done in the functionalist mode, requiring as it does that those who might suffer from an abuse of intellectual property rights should have their own rights regularly adjusted so as to do least damage to the interests of those who claim their property rights under TRIPS. The Member is allowed by the WTO administered treaties to give ultimate priority to certain non-trade interests, including the space provided by Article 8 of TRIPS. Mutual compromise among rights, along the lines sketched in the previous section, would be the better route.

F. Cosmopolitan Democracy, Political Impartiality, and the WTO

Recall the element of global democracy that can be potentially enriched by world trade. These are what David Held calls the "... the increasing diffusion of responsibility for the maintenance of human rights ... across different agencies at different levels of governance."[96] We have seen how the WTO has a role to play as one of these levels of governance. It can be one of a handful of international bodies that have the power to

[94] See the "*Shrimp/Turtle*" litigation, supra note 48.

[95] The Sub-Commission's report "... affirms that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is a human right, subject to limitations in the public interest, in accordance with Article 27, ¶ 2, of the Universal Declaration of Human Rights and Article 15, ¶ 1 (c), of the International Covenant on Economic, Social and Cultural Rights", *Sub-Commission on Human Rights Resolution 2000/7* ¶ 1.

[96] See 8(4) *Constellations, supra* note 70, at 432.

make human rights meaningful. However, the "diffusion" of responsibility for human rights can lead international society in one of two directions. It will either move towards a fragmented set of interpretations of the meaning and force of these rights, with the nation state giving one result; the WTO another; and specialist international human rights bodies yet another—or there can be an attempt towards greater coherence and integrity in the system. If the former is the course taken, then the WTO is likely to collide with its Members, as well as with bodies such as the U.N. commission on Human Rights—not because it ignores human rights, but because it interprets them in its own way. It is this suspicion that has led Philip Alston to want to prevent what he calls the "merger and acquisition" of human rights by trade law.[97] He does not want to see the cluster of values around market liberalism being considered the only appropriate way of spelling out the impact of human rights on trade relations, leading to pressure on nation states to adopt such values at the core of their policies.

This facet of the problem emerges most clearly from a clash of political philosophies that often divides national policy makers: individualist, choice-based approaches on the one hand, and strategies of social solidarity on the other. Some authors seem to think international trade carries within it an inevitable bias in favor of the former. For example, writing about labor rights, Christopher McCrudden and Anne Davies argue that some, but only some, of the core labor rights ". . . are not only theoretically consistent with the ideology of free trade, but [are] also required by it." These are, they say, those rights that serve to increase individual freedom of choice and freedom of contract.[98] If this is correct, then those who are concerned that national political will is undermined when their country signs up to a free trade regime would indeed have reason to worry. For individualist values are by no means the necessarily dominant ones in the core of fundamental labor rights. Many rights related to trade union organization and collective bargaining are based precisely on a rejection of individualist solutions. The ILO provides a large menu of such rights, and states configure them in a variety of ways, reflecting their different commitments to values of individual choice, social solidarity, or a particular mixture of the two.[99] At certain crucial points, the international trading system overreaches itself when it delves so deeply into domestic political preferences that it effectively bars one or another of these options. This is a particular problem when a human right protecting a non-trading interest is at stake, as has been seen. If an interpretation of the WTO administered treaties forces on a Member one route rather than another in trying to satisfy that right, then the WTO is moving beyond the boundary of impartiality that we saw the Committee on Economic, Social and Cultural Rights fix itself as it interprets the relevant human rights.[100]

This danger of unintentional bias is vivid when we turn to national policies that favor cross-subsidies. A recent U.N. report highlights the importance of these strategies, as well as their vulnerability to certain incursions of trade policy. It points out that:

> . . . cross-subsidization, such as government schemes ensuring that wealthy people subsidize access to health care for the poor or maintaining lower interest rates for loans in rural as

[97] Alston, *supra* note 1, at 815 ff

[98] C. McCrudden and A. Davies, *A Perspective on Trade and Labor Rights,* in F. FRANCIONI (ED.), ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 187 (2001).

[99] Thus the ILO Committee on Freedom of Association says that Member states are allowed to make their own adjustments between free choice of union Membership and the demands unions make that Membership be a condition of having a job. *See* DIGEST OF DECISIONS, Number 323. *Cf* S. L. Leader, FREEDOM OF ASSOCIATION (1992)

[100] *Supra* note 8.

> compared to urban areas, can be a means of reducing poverty, assisting the development of local infant service suppliers, increasing universal access to essential services and thus promoting human rights.[101]

Cross-subsidization can also operate within the group of the least well-off: it does not only run from rich to poor. Sometimes such subsidies involve a transfer from the young and healthy to the old and vulnerable or from the old to children needing health care that will help their access to education. It sometimes reaches across the various institutions providing for the distinct human rights needs of these groups, and demands that there be compromises, or trade-offs among them. When this course is taken, some of those previously high in order of priority of need might then legitimately find themselves lowered on the scale in order to account for a cross-cutting set of needs that come from the right to a decent education. In such situations, institutions vary their priorities in order better to serve a basic right that does not fall strictly within their purview.

What exactly is it about the push towards free trade that can cause such policies of cross-subsidy to break apart? The Report considers the point in the framework of the provision of services, and points out that:

> GATS subjects the grant of subsidies to the trade principle of non-discrimination. According to the non-discrimination (national treatment) principle, where a Government has made commitments in a particular service sector in its schedule under national treatment, GATS requires subsidies to national service suppliers or services to be available to like foreign service providers and services, unless an exception is specifically made in the national schedule. Thus, for example, where commitments were made in the education sector, the Government that provides a subsidy to a domestic not-for-profit education service provider might have to provide the same subsidy to foreign for-profit service providers.[102]

The result, says the Report, is that governments might withdraw their subsidies to this sector altogether, due to lack of resources, with consequent damage to universal access.[103] Apart from this, we can add the observation that when for-profit providers are brought in, they will avoid a strategy of cross-subsidy within a given population, since it costs more. As explained by the World Bank:

> . . . rural borrowers may pay lower interest rates than urban borrowers, and prices of local telephone calls and public transport may be kept lower than the cost of provision. This structure of prices is often sustained through cross-subsidization within public monopolies, or through government financial support. Liberalization threatens these arrangements.[104]

[101] *Liberalization of Trade in Services and Human Right*, *supra* note 2, ¶¶ 60 ff. For further criticisms of current WTO policy, arguing that because of it "The long tradition of European welfare states based on solidarity through community risk-pooling . . . is being dismantled." *See* Albert *supra* note 76, in section entitled 'When and why is trade harmful?'

[102] *Liberalization of Trade in Services*, *supra* note 2, ¶ 60.

[103] *Id*.

[104] *Id.* ¶ 61 n.66 *quoting* World Bank, GLOBAL ECONOMIC PROSPECTS 80 (2001). *See also* Perrine Lhuillier, *The Impact Of The Privatization Of Water And Sanitation Services On The Implementation Of The Child's Rights To Drinking Water And Sanitation*, (Master's Thesis, University of Essex 2002) at 22, drawing on oral evidence presented to the Committee on the Rights of the Child, Sept 20, 2002 "Governments . . . tend to promote an integrated approach of service delivery that is lost when the service is privatized. It has been pointed out, for instance, that the privatization of the healthy system in the UK resulted in the breaking up of service delivery, resulting in the abolition of risk sharing strategies such as cross-subsidization and in the collapse of the planning system. (S)tates being legally accountable with respect to human rights results in children's rights being more likely to figure among the items of the agenda when the delivery of public services is envisaged."

As with earlier examples, this impact on local policy does not simply emerge from enthusiasm about the virtues of market liberalism among those setting trading rules. Whatever the inherent merits or demerits of such a set of values, it is more likely that alternative positions will take hold because of something quite distinct: it arises from the functional way in which an international organization such as the WTO structures its priorities. Where a civic order integrates institutional responsibilities in civil society, a functional order tends to separate them. Each institution, based on the latter view, has its specialized role and must remain faithful to its organizing objective. A civic perspective widens the scope of interests that should be within the WTO's mandate. It places providers alongside users of services, and the two are often in tension: the more a system aims at fairness towards providers, putting the for-profit and not-for-profit service providers on a par, the less it may be possible to achieve fairness towards users, yielding a distribution of the service that skews access towards the better off. If domestic priorities of a Member state are aimed at giving priority to fairness to users over fairness to providers, in those situations where it is impossible to achieve both, then a politically impartial WTO should avoid forcing the Member into the opposite position: making it give fairness to providers systematic priority over fairness to users. It can do this if it abandons a functionalist outlook.

VI. Conclusion

What has been discussed in this chapter is the need to give concrete meaning to the U.N.'s claim that human rights should be the "primary objective" of trade, investment, and financial policy.[105] In doing so, we have tried to navigate between two poles of a dilemma. On the one hand, it is essential to respect the fact that the WTO is qualitatively different from a state: it has a mandate to promote free trade that is stronger and more narrowly focused than are the agendas of its constituent Members, while its Members have an obligation to further values such as the right to freedom of expression that the WTO as an organization does not have. On the other hand, if the WTO is encouraged to focus too narrowly on its particular mandate, this can disrupt the wider domestic agendas of its Members, so pulling them away from their attempt to achieve a fair balance of all relevant human rights. We have tried to reconcile these two elements by insisting that there is one thing that the trading body and Member states have in common: they must both respect the *relationships of equitable balance* among human rights in the same way. This need for a fair balance means several concrete things. It means that the Members of the organization should consider a wider range of rights than allowed by a functional understanding of the WTO's powers. It also means that none of these rights, including trade-related rights, is to be given systematic priority over other rights. Instead, the priorities to be achieved are more varied, depending on the rights concerned and on the circumstances surrounding their realization—a variety of solutions that a civic outlook encourages.

The civic approach might also permit the trading system to respond to the criticism that it is only willing to take account of non trade interests as exceptions to its core objectives.[106] The argument here is designed to move the system beyond this occasional

[105] U.N. Human Rights Commission, *Resolution of September 4, 1998*. (http://www.pdhre.org/involved/uncommission.html

[106] "The fundamental nature of these entitlements as rights requires an approach that sets the promotion and protection of human rights as objectives of trade liberalization, not as exceptions." *Liberalization of Trade in Services*, *supra* note 2, para 7

and exceptional status for such values. It calls for two possible directions of adjustment—shaping trading rules to be least restrictive of non-trading interests in some cases, and shaping the protection of non-trading interests to be least trade restrictive in others.

The civic rather than the functional approach to human rights can make a concrete difference to the possible inclusion of concern for these rights in the positive and negative integration of markets; in working out the place of conditions on preferential market access for developing countries; and in understanding the necessity and proportionality principles by which trade and non-trade interests are brought into balance. This might make it possible to move beyond some of the traditional rhetoric in debates. There is, for example, the fear that linking human rights to trade is a protectionist ploy designed by strong Members to filter out inconvenient demands from weaker Members. In response, we have seen how it might be possible to be attentive to this worry while also preserving a major role for rights as conditions attached to trade: by removing the ability of richer countries to unilaterally dictate the terms of GSP schemes and placing the schemes under the jurisdiction of the WTO's disputes settlements mechanism.

There is also the fear that linking trade to a human rights agenda will wrongly mix politics and economics. For some, this translates into a worry that the economic agenda at the centre of the WTO will dominate the domestic political agendas of Member states. We have considered how it might be possible to avoid this result, while preserving a distinct and robust role for the WTO as a trade body. There are also those who fear that linking trade and human rights draws the WTO into politics, and that this is to be avoided. However, there is no such thing as a free trade agenda that does not carry within it some priorities with political significance. Whichever way the WTO turns, its decisions will have an affect on available political options. The same is true for international human rights: however they are interpreted, they will also have an impact on political choices. What we need in both cases is a way of setting an international benchmark for what is minimally acceptable in the relationship between the two domains. We can no longer allow the standards set by international trade and those set by international human rights to function separately. Human rights can frame world trade, so that trade can in turn be a motor for bringing about what these rights promise.

BIBLIOGRAPHY

Note: In addition to the works cited in the text, the following books and articles are useful. Where they do not directly mention human right, they are nevertheless important for a background understanding of various facets of the linkage between rights and trade.

Books

Francesco Francioni (ed) Environment, Human Rights, and International Trade (Hart Publishing, 2001)

Lance Compa and Stephen Diamond (eds) Human Rights, Labor Rights, and International Trade (U Penn Press, 1996)

W. Sengenberger and D. Campbell (eds) International Labour Standards and Economic Interdependence, (Geneva: International Institute for Labour Studies, 1994)

R. Siegel, Employment and Human Rights: The International Dimension (U Penn Press, 1994)

Jean-Louis Bianco et Jean-Michel Severino, Une Politique Economique Globale Pour Les Defis Mondiaux: Un Autre Monde Est Possible (Paris: Notes De La Fondation Jean-Jaures n° 20, 2001)

Articles

Democratising International Trade Decision-Making, Robert F. Housman, Symposium on *'Greening the GATT* 27 CORNELL INTERNATIONAL LAW JOURNAL 699 (1994)

"Trade and . . . .": Recent Developments in Trade Policy and Scholarship—and Their Surprising Political Implications.' Jeffrey L. Dunoff, 17 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 759 (Winter-Spring 1996–1997)

Trade and Justice: Linking the Trade Linkage Debates, Frank J. Garcia, Symposium: *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW 391 Summer (1998)

The Global Market and Human Rights: Trading Away the Human Rights Principle Frank J. Garcia, 25 BROOKLYN JOURNAL OF INTERNATIONAL LAW 51 (April, 1999)

Globalization and the Convergence of Values, Alex Y. Seita 30 CORNELL INTERNATIONAL LAW JOURNAL 429 (1997)

Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy, Laurence R. Helfer 39 HARVARD INTERNATIONAL LAW JOURNAL 357 (Spring 1998)

Trade Without Values, Philip M. Nichols, 90 NORTHWESTERN UNIVERSITY LAW REVIEW 658 (Winter, 1996)

Protecting Human Rights in a Globalized World, Dinah Shelton, *Symposium: Globalization & the Erosion of Sovereignt*, 25 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 273 (Spring, 2002)

The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters, Gregory C. Shaffer, 25 HARVARD ENVIRONMENTAL LAW REVIEW 1 (2001)

Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization, G. Richard Shell, 44 DUKE LAW JOURNAL 829 (March, 1995)

CHAPTER 63

TRADE AND GENDER

Eugenia McGill

TABLE OF CONTENTS

I. Introduction 699
II. Relevance of Gender to International Trade and Investment 699
A. Gender Concepts and Terms 699
B. Gender Differences and Trends in Global Economic Activity 702
C. International Attention to Gender and Trade Liberalization 703
D. Socioeconomic Approaches to Gender, Trade and Investment 708
E. Legal Analysis of Gender, Trade and Investment 711
III. Gender Analysis of Selected Trade Agreements and WTO Processes 716
A. Manufacturing and Trade in Goods 717
1. General Agreement on Tariffs and Trade 1994 717
2. Agreement on Textiles and Clothing 719
3. Agreement on Subsidies and Countervailing Measures 720
4. Agreement on Trade-Related Investment Measures 723
B. Agriculture Trade and the Agreement on Agriculture 723
C. Services Trade and the General Agreement on Trade in Services 726
D. Trade-Related Areas 729
1. Investment 729
2. Intellectual Property 729
3. Domestic Regulation 732
4. Labor Standards 734
5. Human Rights 736
6. Environment 737
E. WTO Processes 738
1. Trade Negotiations 738
2. Dispute Settlement 739
3. Trade Policy Review 740
4. Trade-Related Capacity Building 741
IV. Conclusions and Recommendations 743
Bibliography 744

Overall, globalization to date has done too little to minimize gender inequalities. While in some circumstances it may have decreased them (particularly in countries where it [has] led to an unprecedented employment of female labour), in other cases it has intensified them.[1]

Men and women are affected differently by globalization because of their different social positions and command over resources. An assessment of these issues is needed, in order to identify ways of promoting gender equality in the process of globalization.[2]

Trade falls in the intersection between economics and law, both of which are very mysterious fields . . . that claim to be gender-neutral.[3]

[1] Rubens Ricupero, Secretary General of the United Nations Conference on Trade and Development, Foreword to Trade, Sustainable Development and Gender, Papers Prepared for Pre-UNCTAD Expert Workshop on Trade, Sustainable Development and Gender, Geneva, July 12–13, 1999, U.N. Doc. UNCTAD/EDM/Misc. 78 (1999) ("UNCTAD").

[2] World Commission on the Social Dimensions of Globalization, *Cross-Cutting Themes*, *at* http://www.ilo.org/public/english/wcsdg/policy/topic7.htm.

[3] International Gender and Trade Network, *Summary of Workshop from International Forum on Re-inventing Globalization*, organized by the Association for Women's Rights in Development, Guadalajara, Oct. 3–6, 2002, *at* http://www.awid.org/article.pl?sid=02/12/12/2038259&mode=nocomment.

I. Introduction

The gender dimensions of international trade and investment, and the related fields of trade economics and international trade law, are attracting increasing attention from academic and policy researchers, policymakers and civil society groups. While these issues are now on the agendas of United Nations bodies, some international financial institutions and development organizations, they are still at the periphery of international trade negotiations and World Trade Organization ("WTO") operations. However, the gender-differentiated effects of trade liberalization and other trade-related processes are extremely relevant to the mandate and operations of the WTO, particularly in the context of the Doha Development Agenda.[4] This chapter provides an overview of current research, policy analysis and advocacy on gender, trade and investment issues; preliminary gender analysis of selected WTO agreements and processes; and suggestions for integrating a gender perspective in future trade negotiations and implementation of trade commitments.

Part II of the chapter includes an introduction to gender concepts and their relevance to international trade and investment; activities of international organizations, regional bodies, bilateral agencies and civil society groups related to gender, trade and investment; and gender-aware empirical research, economic modeling and legal analysis related to trade and investment. Part III highlights gender issues in trade and investment agreements related to key economic sectors and trade-related areas, and in WTO processes such as trade negotiations, dispute settlement, trade policy review and trade-related capacity building. Part IV includes recommendations for integrating a gender perspective in trade policy formulation, trade negotiations and implementation of trade commitments within the WTO and other trade fora.

II. Relevance of Gender to International Trade and Investment

A. Gender Concepts and Terms

Gender as an analytical concept originated in the social sciences and quickly crossed over into other fields, including law, and into national, regional and international policy. The Development Assistance Committee of the Organization for Economic Cooperation and Development ("OECD"), for example, defines gender as

> The economic, social, political and cultural attributes and opportunities associated with being male and female. In most societies, men and women differ in the activities they undertake, in access and control of resources, and in participation in decision-making. In most societies, women as a group have less access than men to resources, opportunities and decision-making. These inequalities are a constraint to development because they limit the ability of women to develop and exercise their full capabilities, for their own

[4] The Doha Development Agenda refers to the agenda outlined in outcome documents of the Fourth WTO Ministerial Conference held in Doha, Qatar in November 2001. This chapter also refers to "developed," "developing" and "least-developed" countries, mindful that these terms are contested, and that countries' self-categorization in terms of "development" can vary from one context to another. *See, e.g.*, ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (1995) (critiques "development" as an "historically produced discourse" rooted in particular Western concepts of tradition, modernity and progress); WTO, *Who Are the Developing Countries in the WTO?,* at http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (WTO agreements do not define "developed" and "developing" countries; a new member's status depends on the outcome of accession negotiations with existing members; however, WTO recognition of "least-developed" countries is based on designation as such within the United Nations system).

> benefit and for that of society as a whole. The nature of gender definitions (what it means to be male and female) and patterns of inequality vary among cultures and change over time.[5]

As the OECD definition implies, the concept of gender is closely related to normative goals such as *gender equity* or *gender equality*.[6] As the definition also suggests, gender is an extremely fluid and dynamic concept. In any gender analysis, attention needs to be paid to differences and disparities among groups of women and men, even within the same country or community, which may be related to age, race or ethnicity, citizenship, class, religion, marital status, geographic location, individual characteristics, or other factors.[7] Gender roles and relations are also subject to change, most noticeably in times of rapid social change, economic growth, or economic or political crisis.

In this regard, economists have noted a two-way interaction between gender and economics: on the one hand, economic change can affect groups of women and men differently, for example, because of their different access to employment and resources; on the other hand, because gender assumptions and relations influence the division of labor, distribution of work, income, wealth, education levels, access to public goods and services, and other aspects of economic life, these gender differences can influence the outcome of economic policy changes, such as agriculture reform or the promotion of particular industries.[8] The interactions between gender and economics, including trade economics, are discussed further in Part II.D of this chapter.

[5] Organization for Economic Cooperation and Development ("OECD"), *DAC Guidelines for Gender Equality and Women's Empowerment in Development Co-operation* (1998), at 10, *available at* http://www.oecd.org; *see also* INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT ("WORLD BANK"), ENGENDERING DEVELOPMENT THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES AND VOICE, World Bank Policy Research Report (2001), at 34–35; CANDIDA MARCH ET AL., A GUIDE TO GENDER-ANALYSIS FRAMEWORKS, Oxfam GB Publication (1999), at 18.

[6] Although these terms are sometimes used interchangeably, they can be distinguished. For example, the United Kingdom Department for International Development ("DFID")makes a distinction between *equality of opportunity* and *equity of outcomes*: "equality of opportunity . . . means that women should have equal rights and entitlements to human, social, economic and cultural development, and an equal voice in civic and political life; equity of outcomes . . . means that the exercise of these rights and entitlements leads to outcomes which are fair and just." DFID, *Gender Manual: A Practical Guide for Development Policy Makers and Practitioners* (2002), at 7, *available at* http://www.dfid.gov.uk. Similarly, the World Bank defines *gender equality* in terms of "equality under the law, equality of opportunity—including equality in access to human capital and other productive resources and equality of rewards for work—and equality of voice." WORLD BANK, *supra* note 5, at 35. The World Bank stops short of defining gender equality in terms of outcomes for several reasons, including the possibility that different societies may pursue gender equality through different means, and the need to allow for women's and men's individual preferences and goals, which may lead to different outcomes. *Id.* In international law, the concept of *equity* has been used to justify positive measures to overcome structural inequalities or to achieve *substantive* (rather than *formal*) *equality*, for example, between women and men, or between differently situated women. However, it has been argued that the term *gender equity* can also be misused to dilute the principle of *gender equality* and thereby diminish women's status and possibilities. *See* Dianne Otto, *Holding Up Half the Sky, But for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women*, 6 AUSTL. FEMINIST LAW J. 7, 14–15 (1996).

[7] In the context of international development, for example, Chandra Mohanty has cautioned against generalizations about "women" or "gender relations" in "the Third World", or even within a particular country. Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in THE WOMEN, GENDER AND DEVELOPMENT READER (N. Visvanathan ed. 1997).

[8] *See, e.g.*, NILÜFER ÇAĞATAY, TRADE, GENDER AND POVERTY, United Nations Development Programme ("UNDP") Background Paper (2001), at 14; LORRAINE CORNER, WOMEN, MEN AND ECONOMICS: THE GENDER-DIFFERENTIATED IMPACT OF MACROECONOMICS, United Nations Development Fund for Women ("UNIFEM") Publication (1996).

In international policy, attention to "gender issues" can be traced to the 1970s, when the United Nations ("UN") General Assembly made the integration of women into development efforts an objective of its International Development Strategy for the Second United Nations Development Decade (1971–1980), and the First World Conference on Women was held in Mexico City in 1975, launching the UN Decade for the Advancement of Women.[9] In the area of human rights, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") was adopted by the UN General Assembly in 1979 and entered into force in 1981.[10] The focus of early "women in development" programs was on increasing women's participation in economic activities in developing countries. However, many of these initiatives were structured as small, stand-alone "women's projects", and were evaluated to have had only marginal impact on women's lives. Moreover, it became apparent that an "add women and stir" approach did not address structural barriers to women's fuller involvement in social, economic and political life.

By the time of the Fourth World Conference on Women in Beijing in 1995, most international and bilateral development agencies and national machineries for women's affairs had shifted from a "women in development" to a "gender and development" approach. In principle, this policy change signaled a greater attention to differences in power relations between women and men (and among groups of women and men based on other social factors), and also to ways that gender assumptions influence social, political and economic institutions and policies.[11] The shift to a "gender and development" approach was accompanied by the introduction of various methodologies for gender analysis—geared originally to the planning, implementation and evaluation of externally-funded development projects in sectors such as agriculture, education and health.[12] These methodologies reflected a number of goals, including improved welfare, efficiency, equity and empowerment. Some of these methodologies also lent themselves to the "mainstreaming" of gender concerns in planning, budgeting and other institutional processes. "Gender mainstreaming," which was promoted at the Fourth World Conference on Women in 1995, was adopted by the UN Economic and Social Council ("ECOSOC") in 1997 as an operative goal for the entire UN system.[13] It was subsequently endorsed by the UN General Assembly in 2000,[14] and is being implemented by a large number of international and bilateral development agencies and national governments. Within the UN system,

[9] United Nations "UN"), 1999 World Survey on the Role of Women in Development: Globalization, Gender and Work (1999), at viii. By the end of this decade, 127 countries had established national institutions to promote women's advancement and participation in development, and UNIFEM and the International Research and Training Institute for the Advancement of Women had been established within the UN system. *Id*. During the same period, "women in development" units were established in a number of UN and bilateral development agencies, and several international networks of women's organizations were formed.

[10] *Convention on the Elimination of All Forms of Discrimination Against Women* ("CEDAW"), Dec. 18, 1979, 1249 U.N.T.S. 13.

[11] UN, *supra* note 9, at viii–ix. In practice, however, many development agencies and national women's machineries continue to follow more of a "women in development" approach.

[12] *See, e.g.,* Candida March et al., *supra* note 5; Caroline Moser, Gender Planning and Development: Theory, Practice and Training (1993); Carol Miller and Shahra Razavi, *Gender Analysis: Alternative Paradigms* (1998), *available at* http://www.undp.org/gender/resources/mono6.html.

[13] UN, *supra* note 9, at ix.

[14] G.A. Res. S-23/2, U.N. GAOR, 23rd Special Sess., Agenda Item 10, Annex, para. 8, U.N. Doc. A/RES/S-23/2 (2000).

> Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.[15]

B. Gender Differences and Trends in Global Economic Activity

In 1999, the UN Secretariat published an analysis of statistics on women's participation in the global economy. This analysis confirmed a number of trends that highlight some of the "gendered" aspects of international trade and investment:

- In newly industrializing countries, the share of women workers in export manufacturing—including labor-intensive industries located in export-processing zones established to attract foreign investors—has increased substantially, although the demand for women's labor in some middle-income countries weakened starting in the late 1980s as export production became more capital- and skill-intensive;
- The rapidly expanding international services sector—including tourism, finance and information processing—also employs a high proportion of women;
- In some regions, export crop expansion has displaced women from permanent, subsistence agriculture to seasonal work on export crops, including non-traditional agricultural exports;
- For every formal sector job created by trade and foreign direct investment, it is believed that several jobs are created in the informal sector (for example, through subcontracting chains), where workers are predominantly women;
- On the other hand, there is evidence that the expansion of certain *imports* under trade liberalization has had a *negative* multiplier effect on women's employment in the informal sector, as local producers lose market share to cheaper imports;
- Despite the global increase in women's paid employment, labor markets continue to be segregated by sex; women continue to be employed in a narrower range of occupations than men; and in general "women's jobs" pay less, and have lower status and opportunities for advancement;
- Women's employment in export industries in developing countries tends to be concentrated in lower-paying, labor-intensive work involving little or no training, poor working conditions and high turnover;
- Evidence is mixed as to whether female-male pay differentials (the "gender wage gap") are diminishing as more women enter the paid workforce;
- Full-time formal sector employment in both developed and developing countries is giving way to more irregular types of employment, including part-time work, home-based work and other informal sector activity. While these "flexible" jobs can allow women to juggle paid work with childcare and other responsibilities, many of these jobs are also characterized by low pay, few or no benefits, little training, insecurity and few opportunities for advancement; and

[15] U.N. ESCOR, 1997 Sess., 33rd mtg, Agreed Conclusions 1997/2, in *Official Records of the General Assembly, Fifty-second Session, Supplement No. 3*, ch. IV, para. 4, U.N. Doc. A/52/3.

- Women comprise an increasing proportion of migrants, particularly in the categories of temporary and irregular migrants.[16]

Based on these trends, the UN Secretariat found that "[g]lobalization has given rise to ambiguous and at times contradictory effects on gender equality."[17] It concluded that "[t]rade policy initiatives need to identify their likely social impact beyond producer interests and to include broadly conceived welfare support measures."[18]

More recently, the UN reported that women now represent nearly half of the total number of people infected with the HIV virus. However, in Sub-Saharan Africa, close to 60 percent of HIV-positive adults are women and about twice as many young women as men are infected.[19] Women's risk of HIV infection from heterosexual contact is estimated to be two to four times that of men, with girls and young women at the highest risk. Research has also found that gender roles and relations affect exposure to (and infection from) a number of tropical diseases, as well as influencing access to prevention and treatment programs.[20] These facts underscore the gender dimension of current debates about the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights and similar agreements on access to patented, life-saving drugs in developing countries.

C. International Attention to Gender and Trade Liberalization

Reflecting growing concern about potential negative aspects of trade liberalization for women, particularly in developing countries, a number of commitments have been made at international and regional levels to address these concerns. The Beijing Platform for Action, which was adopted unanimously at the Fourth World Conference on Women in 1995, called on governments to "ensure that national policies related to international and regional trade agreements do not have an adverse impact on women's new and traditional economic activities," and called on the UN General Assembly to "give consideration to inviting the World Trade Organization to consider how it might contribute to the implementation of the Platform for Action, including activities in cooperation with the United Nations system."[21] In its review of progress in implementing the Beijing Platform in 2000, the UN General Assembly found that

[16] UN, *supra* note 9, at 8–36; *see also* UN, THE WORLD'S WOMEN 2000: TRENDS AND STATISTICS (2000) ("UN 2000"), at 109–50; UN INTERAGENCY TASK FORCE ON GENDER AND TRADE, TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES (Ang-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., 2004), U.N. Doc. UNCTAD/EDM/2004/2 ("G&T Task Force"), pp. 1–37. Marzia Fontana et al., *Global Trade Expansion and Liberalisation: Gender Issues and Impacts*, BRIDGE Report No. 42 (1998), *available at* http://www.ids.ac.uk/bridge; Martha Chen et al., *Counting the Invisible Workforce: The Case of Homebased Workers*, 27 WORLD DEV. 603 (1999); Susan Horton, *Marginalization Revisited: Women's Market Work and Pay, and Economic Development*, 27 WORLD DEV. 571 (1999); Rekha Mehra and Sarah Gammage, *Trends, Countertrends, and Gaps in Women's Employment*, 27 WORLD DEV. 533 (1999); Guy Standing, *Global Feminization Through Flexible Labor: A Theme Revisited*, 27 WORLD DEV. 583 (1999); Zafiris Tzannatos, *Women and Labor Market Changes in the Global Economy: Growth Helps, Inequalities Hurt and Public Policy Matters*, 27 WORLD DEV. 551 (1999).

[17] UN, *supra* note 9, at 58.

[18] *Id.* at 61.

[19] Joint United Nations Programme on HIV/AIDS, United Nations Population Fund and United Nations Development Fund for Women, *Women and HIV/AIDS*: *confronting the crisis* (2004).

[20] UN 2000, *supra* note 16, at 68–69 & 74.

[21] *Report of the Fourth World Conference on Women, Beijing, Sept. 4–15, 1995*, Annex II (Beijing Platform for Action), U.N. Doc. A/CONF.177/20 (1995), ¶¶ 165(k) & 343.

> Globalization has presented new challenges for the fulfillment of the commitments and realization of the goals of the Fourth World Conference on Women. . . . Although in many countries the level of participation of women in the labour force has risen, in other cases the application of certain economic policies has had such a negative impact that increases in women's employment often have not been matched by improvements in wages, promotions and working conditions.[22]

The General Assembly followed the recommendation of the Fourth World Conference on Women and called on the WTO, as well as the Bretton Woods institutions, UN organizations, and other international and regional intergovernmental bodies, to "support government efforts and, where appropriate, develop complementary programmes of their own to achieve full and effective implementation of the Platform for Action."[23]

The UN Commission on the Status of Women ("CSW") and the CEDAW expert committee have also addressed gender issues related to increased global trade and investment. In considering the challenges of reducing poverty and empowering women in a globalizing world, the CSW has urged governments, international organizations and other stakeholders to mainstream a gender perspective in development, trade and financial institutions; to enhance market access for developing countries and transitional economies, particularly in sectors that provide greater employment opportunities for women; and to help women-owned businesses benefit from international trade and investment.[24] In its concluding comments on the reports submitted by state parties to CEDAW, the CEDAW expert committee has also expressed concern about some of the negative aspects of increased integration in global markets. Recently, for example, the committee noted the poor working conditions of women in export-processing zones in Fiji, Guatamala, Mexico and Sri Lanka, and urged governments to more effectively enforce their labor laws and to require foreign investors to adhere to codes of conduct. The committee also expressed concern about the increased incidence of trafficking of women and girls related to the expansion of tourism in Barbados and Saint Kitts and Nevis.[25]

Other UN bodies have also identified gender issues in their work on trade and investment. For example, in 1999 the UN Conference on Trade and Development ("UNCTAD") organized an expert workshop on trade, sustainable development and gender, which made a number of recommendations for mainstreaming the consideration of gender issues in its activities and publications.[26] A subsequent expert meeting made further recommendations to UNCTAD and governments for mainstreaming gender concerns in the areas of commodities, trade in services, foreign direct investment policy, enterprise development,

[22] G.A. Res. S–23/3, U.N. GAOR, 23rd Special Sess., Agenda Item 10, Annex, para. 35, U.N. Doc. A/RES/S-23/2 (2000).

[23] *Id*., ¶ 49.

[24] Commission on the Status of Women, Report on the Forty-Sixth Session, Ch. I.A., Draft Resolution III.A, para.5, in *Economic and Social Council Official Records 2002, Supp. No. 7*, U.N. Doc. E/2002/27-E/CN.6/2002/13.

[25] Committee on the Elimination of Discrimination against Women, Reports of the Twenty-Sixth, Twenty-Seventh and Exceptional Sessions, in *Official Records of the General Assembly, Fifth-seventh Session, Supplement No. 38, Parts I–III*, U.N. Doc. A/57/38. Other UN human rights bodies, such as the Committee on Economic, Social and Cultural Rights ("CESCR") and the Sub-Commission on the Promotion and Protection of Human Rights ("Sub-Commission"), have raised similar concerns. *See* Beth Lyon, *A Post-Colonial "Agenda" for the United Nations Committee on Economic, Social and Cultural Rights Through the Post-Colonial Lens*, 10 Am. U.J. Gender Soc. Pol'y & L. 535, 566–67 (2002) (cites CESCR comments on country reports related to NAFTA and WTO trade commitments); Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. Int'l & Comp. L. Rev. 273, 294–315 (2002) (surveys comments, resolutions and commissioned studies of the CESCR, Sub-Commission and other UN bodies related to trade, operation of multinational companies and globalization generally).

[26] UNCTAD, *supra* note 1, at 445–451.

and information and communication technologies. Based on the outcomes of this expert meeting, UNCTAD's Commission on Enterprise, Business Facilitation and Development recommended a number of actions by governments, the international community and UNCTAD, including that UNCTAD should appoint focal points on gender in each of its divisions to integrate a gender dimension in all substantive areas.[27] In 2003, a UN inter-agency task force on gender and trade was created, headed by UNCTAD, to coordinate research, capacity building and advocacy activities within the UN system. Gender and trade was also a cross-cutting issue considered at UNCTAD XI, which took place in Sao Paolo, Brazil in 2004.[28]

Regional trade bodies have also taken steps to mainstream gender concerns in trade policy. In 1997, the Southern Common Market ("Mercosur") initiated broad consultations to decide on a mechanism for integrating a gender perspective in its activities, resulting in the establishment of a gender advisory unit within Mercosur.[29] In 1999, members of the Asia-Pacific Economic Cooperation ("APEC") forum endorsed a Framework for the Integration of Women in APEC.[30] APEC's Second Ministerial Meeting on Women, held in September 2002 in Guadalajara, recommended that APEC and the APEC economies intensify their work on gender analysis, collection of sex-disaggregated data and inclusion of more women in all APEC activities. APEC ministers also recommended that APEC economies take account of the gender-differentiated impacts of trade liberalization in the design of trade policies, and address the negative impact on women workers of industry restructuring resulting from trade liberalization. The ministers also endorsed the establishment of an APEC Gender Focal Point Network, which began activities in 2003.[31] Other regional bodies that have taken steps to mainstream gender concerns in their trade-related work include the Caribbean Community (CARICOM), the Pacific Islands Forum and the Southern African Development Community (SADC).[32] The Commonwealth Secretariat is also promoting gender mainstreaming more generally in trade and industry.[33]

[27] *Report of the Expert Meeting on Mainstreaming Gender in Order to Promote Opportunities, Geneva, Nov. 14–16, 2001,* U.N. Docs. TD/B/COM.3/40, TD/B/COM.3/EM.14/3 (2001); Commission on Enterprise, Business Facilitation and Development, 6th Sess., Agenda Item 5, *Mainstreaming Gender in Order to Promote Opportunities: Agreed Recommendations,* U.N. Doc. TD/B/COM.3/L.22 (2002).

[28] UNCTAD, *Meeting of the UN Inter-Agency Task Force on Gender and Trade*, Geneva, July 17–18, 2003 ("G&T Task Force Meeting"), *available at* http://www.unctad.org/Templates/Meeting.asp?m=7308&intItemID=1942&lang=1; UNCTAD, *First Session of the Preparatory Committee for UNCTAD XI*, Trade and Development Board, Geneva, Oct. 15, 2003, *available at* http://www.unctad.org/Templates/Webflyer.asp?docID=4214&intItemID=2068&lang=1.

[29] Maria Alma Espino, *Women and MERCOSUR: The Gendered Dimension of Economic Integration*, in WOMEN'S EMPOWERMENT AND ECONOMIC JUSTICE: REFLECTING ON EXPERIENCE IN LATIN AMERICA AND THE CARIBBEAN, UNIFEM Publication, at 21–22 (Liliana De Pauli ed. 2000); *but see* KAMAL MALHOTRA ET AL., MAKING GLOBAL TRADE WORK FOR PEOPLE (2003), at 95–96 (some believe gender unit has had limited impact on negotiations within Mercosur).

[30] Ad Hoc Advisory Group on Gender Integration, *Report to the Ministers on the Implementation of the Framework for the Integration of Women in APEC* (2002), at 1, *available at* http://www.apecsec.org.sg/apec/documents_reports/ministerial_meeting_on_women/2002.html.

[31] *Joint Ministerial Statement*, APEC Second Ministerial Meeting on Women, Guadalajara, Sept. 28–20, 2002, *available at* http://www.apecsec.org.sg/apec/documents_reports/ministerial_meeting_on_women/2002.html; APEC, *Gender Focal Point Network, available at* http://www.apecsec.org.sg/apec_groups/other_apec_groups/gender_focal_point_network.html.

[32] MARIAMA WILLIAMS, GENDER MAINSTREAMING IN THE MULTILATERAL TRADING SYSTEM: A HANDBOOK FOR POLICY-MAKERS AND OTHER STAKEHOLDERS, Commonwealth Secretariat New Gender Mainstreaming Series on Development Issues (2003), App. 3.

[33] LOUISE O'REGAN-TARDU, GENDER MAINSTREAMING IN TRADE AND INDUSTRY: A REFERENCE MANUAL FOR GOVERNMENTS AND OTHER STAKEHOLDERS, Commonwealth Secretariat Gender Management System Series (1999); WILLIAMS, *supra* note 32.

Several international agencies have commissioned research and policy analysis on gender and trade issues. Even before the establishment of the WTO, the United Nations Fund for Women ("UNIFEM") commissioned a background paper on the implications of the WTO and other trade initiatives for women.[34] More recently, the United Nations Development Programme ("UNDP") commissioned a background study on gender, trade and poverty for a publication on trade and human development.[35] The International Monetary Fund ("IMF") and World Bank are also beginning to consider gender implications of trade liberalization through their poverty and social impact analyses of macroeconomic policy changes in certain countries.[36] A World Bank research project currently under way is also examining the gender dimensions of trade liberalization through cross-country analysis and country-level studies in Latin America and Asia.[37] Similar studies and policy briefs have also been prepared for bilateral development agencies.[38]

Civil society organizations and networks have also been extremely active in raising gender concerns related to trade liberalization and foreign direct investment at international and regional levels, and with national governments. Women's organizations from several regions organized a Women's Caucus at the First Ministerial Conference of the WTO in Singapore in 1996, where they issued a press statement calling on the new WTO to adopt gender-aware policies and procedures. The Women's Caucus evolved into an Informal Working Group on Gender and Trade ("IWGGT"), which met with WTO officials in 1997 to discuss opportunities for addressing gender issues within the WTO, for example, through the work of the Trade Policy Review Body. IWGGT members subsequently produced briefing papers on gender and trade and participated in civil society activities around the Second Ministerial Conference in Geneva in 1998 and the Third Ministerial Conference in Seattle in 1999.[39] A second network, the International Gender and Trade Network (IGTN) was formed in early 2000, and includes seven regional networks of women involved in research, economic literacy and advocacy on trade and investment issues. IGTN members participated in civil society activities around the Ministerial Conferences in Doha and Cancún, and are also engaged in regional and bilateral trade developments.[40] Many members of the IWGGT are also active in the IGTN.

[34] SUSAN JOEKES AND ANN WESTON, WOMEN AND THE NEW TRADE AGENDA, UNIFEM Publication (1994). UNIFEM has continued to support a variety of research and capacity-building activities related to gender and trade. *See* http://www.unifem.org/economic_security/gender_trade.html.

[35] ÇAGATAY, *supra* note 8; MALHOTRA ET AL., *supra* note 29.

[36] *See* Caroline M. Robb, *Poverty and Social Analysis—Linking Macroeconomic Policies to Poverty Outcomes: Summary of Early Experiences*, IMF Working Paper, WP/03/43 (2003), at 27–30.

[37] Telephone interviews with Andrew Mason (Sept. 20, 2002), Susan Razzaz (Sept. 25, 2002) and Nayantara Mukerji (Oct. 23, 2003); *see, e.g.,* Günseli Berik et al., *International Trade and Wage Discrimination: Evidence from East Asia*, World Bank Policy Research Working Paper 3111 (2003), *and* Alessandro Nicita and Susan Razzaz, *Who Benefits and How Much? How Gender Affects Welfare Impacts of a Booming Textile Industry*, World Bank Policy Research Working Paper 3029 (2003), *available at* http://econ.worldbank.org.

[38] *See, e.g.*, Canadian International Development Agency ("CIDA"), *Gender Equality and Trade-Related Capacity Building: A Resource Tool for Practitioners* (2003), *and* Angela Keller-Herzog, *Globalisation and Gender—Development Perspectives and Interventions*, CIDA Discussion Paper (1996), *available at* http://www.acdi-cida.gc.ca; *see also* Cathy Blacklock, *Women and Trade in Canada: An Overview of Key Issues* (2000), *and* Soraya Hassanali, *International Trade: Putting Gender into the Process: Initiatives and Lessons Learned* (2000), Status of Women Canada Discussion Papers, *excerpts available at* http://www.swc-cfc.gc.ca.

[39] Jo Brew, *WTO, European Union Trade Policy and Women's Rights—A Review*, in GENDER, TRADE AND RIGHTS: MOVING FORWARD (Benedicte Allaert and Nicole Forman eds. 1999), at 3; Janice Goodson Foerde, *Current Concerns on the Interrelationship Between Trade, Sustainable Development and Gender*, in UNCTAD, *supra* note 1, at 61.

[40] *See* International Gender and Trade Network website, *at* http://www.igtn.org.

Several of these organizations have also participated in civil society activities related to other international conferences, where they have raised trade-related concerns.[41] Geneva Women in International Trade, a professional association, also organized programs on women as economic players in sustainable development and international trade as part of the June 2003 and 2004 public symposia hosted by the WTO in Geneva.[42]

The IWGGT originally called on governments and WTO officials to collect sex-disaggregated data and undertake gender impact assessments of trade policies, and to develop in-house capacity to undertake gender analysis in all trade sectors and trade-related areas.[43] Several women's organizations and researchers are now working to develop gender-and-trade indicators and other tools for carrying out gender assessments of existing or proposed trade commitments.[44] Women's organizations are also calling for greater attention to gender issues in the sustainability impact assessments of trade that are being carried out, for example, within the European Union.[45] Recommendations have also been made to establish "gender desks" within national trade ministries;[46] and to establish an independent focal point to monitor the coherence between policies and practices of the WTO and international financial institutions and the operations of UN programs and specialized agencies, as well as coherence between WTO agreements and other international instruments such as the Universal Declaration of Human Rights, CEDAW and the Convention on Biological Diversity.[47] The IGTN's current advocacy

[41] *See, e.g.*, WOMEN'S ENVIRONMENT AND DEVELOPMENT ORGANIZATION ("WEDO") AND UNIFEM, WOMEN CHALLENGING GLOBALIZATION: A GENDER PERSPECTIVE ON THE UNITED NATIONS INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT, MARCH 18–22, 2002, MONTERREY, MEXICO (2002); WEDO, Rede de Desenvolvimiento Humano and UNIFEM, *Women's Action Agenda for a Healthy and Peaceful Planet 2015: A Decade of Women's Advocacy for Sustainable Development* (agenda presented by international coalition of women's organizations at the World Conference on Sustainable Development, held in Durban in August–September 2002), *available at* http://www.wedo.org.

[42] *See* WTO, *Symposium Program: "Challenges Ahead on the Road to Cancún,"* at http://www.wto.org/english/tratop_e/dda_e/symp_devagenda_prog_03_e.htm; WTO, *Symposium Program*: "Multilateralism at a Crossroads," at http://www.wto.org/english/tratop_e/dda_e/symp_devagenda_prog_04_e.htm

[43] Brew, *supra* note 39.

[44] *See, e.g.*, SARAH GAMMAGE, HELENE JORGENSEN, EUGENIA MCGILL AND MARCELINE WHITE, FRAMEWORK FOR GENDER ASSESSMENTS OF TRADE AND INVESTMENT AGREEMENTS (2002); GENDER, TRADE AND RIGHTS: MOVING FORWARD, Women in Development Europe Publication (Benedicte Allaert and Nicole Forman eds. 1999), at 43–46 (includes checklists for gender and trade analysis); WILLIAMS, *supra* note 32 (includes situation analysis of women and trade policy and identifies key sectoral issues); Pamela Sparr, *Basic Building Blocks for a Gender and Trade Analysis* (2002), *available at* http://www.igtn.org/EconoLit/Literacy.html; Irene van Staveren, *Gender and Trade Indicators: A Contribution to a Sustainability Impact Analysis for EU Trade* (2001), *available at* http://www.eurosur.org/wide/Globalisation/Gender_indicators.htm. *See also infra* text accompanying notes 63–66.

[45] *See, e.g.,* Maria Karadenizli, Meeting on Sustainability Impact Assessments (SIAs) with DG Trade (2001), *at* http://www.eurosur.org/wide/PROJECTS.htm#ALter%20Eco. The importance of including gender considerations in the development of trade policy and in trade impact assessments was also raised at the fourth informal consultation between the OECD Trade Committee and civil society organizations. *See Summary of the 4th Informal Consultation between the OECD Trade Committee and Civil Society Organisations, Oct. 28, 2002*, at http://www.oecd.org/EN/document/0,, EN-document-24-nodirectorate-no-20-37454-24,00.html. Some sex-disaggregated indicators are included in the guidelines prepared by the United Nations Environment Programme ("UNEP") for carrying out "integrated assessments" of trade-related policies, which are intended to consider economic, environmental and social effects. *See* UNEP, REFERENCE MANUAL FOR THE INTEGRATED ASSESSMENT OF TRADE-RELATED POLICIES, U.N. Doc. UNEP/01/4 (2001), at 20 & 55–57.

[46] Maria S. Floro, *Gender Audit of the Facilitator's Draft Outcome Document of the International Conference on Financing for Development* (2001), at 5, *available at* http://www.undp.org.unifem.

[47] Mariama Williams, *Globalisation of the World Economy: Challenges and Responses*, Statement to the Enquete/Commission of the German Parliament, Feb. 18, 2002, at 11, *available at* http://www.igtn.org/Research/GenderTrade.htm.

position is that thé comprehensiveness of the Uruguay Round agreements interferes with governments' responsibilities to ensure food security, protect public health and determine their own development agendas. The IGTN therefore has opposed the introduction of new issues into the WTO agenda, and believes that the scope of WTO rules should be scaled back essentially to the regulation of trade in goods.[48]

D. Socioeconomic Approaches to Gender, Trade and Investment

A growing number of economists are now studying international trade and foreign direct investment from a gender perspective. Their work, which includes empirical research, economic modeling and policy analysis, draws on several related areas of study: the gender biases in economic development programs; the gender dimensions of the international division of labor; gender-differentiated impacts of structural adjustment programs; and gender analysis of macroeconomic policies.

Since the early 1970s, economists and other social scientists have documented the ways in which development programs financed by external agencies have ignored the important economic activities of women in developing countries, and even undermined their position, for example, through the introduction of land-titling systems that ignored women's traditional land use rights.[49] Research since the 1980s has also documented the evolution of an "international division of labor", as manufacturing firms in industrialized countries have relocated or subcontracted more labor-intensive production processes to countries with lower labor and other costs, and developing countries have established duty-free zones to attract more of these firms. This research also has highlighted the preference of many firms operating in duty-free zones to employ young women workers for labor-intensive tasks—arguably on the grounds of their greater "manual dexterity," but also implicitly based on assumptions about their "docility" and willingness to accept lower wages than men.[50] As a consequence, the "international division of labor" has been observed to be highly "gendered," with significant job segregation on the basis of sex and age.[51]

The macroeconomic stabilization and structural adjustment policies promoted by the IMF and World Bank for developing countries have also attracted considerable attention from economists, social scientists and policy analysts. A collection of studies commissioned by the United Nations Children's Fund ("UNICEF") was among the first to highlight the social costs of adjustment.[52] A large number of studies followed which highlighted the adverse impacts of adjustment policies on poor households, and particularly

[48] *See* International Gender and Trade Network ("IGTN"), *IGTN at Doha*, Position Paper on the WTO (2001), and *IGTN at Cancún and Beyond*, Advocacy Document (2003), *available at* http://www.igtn.org/WTO/WTOResources.htm.

[49] *See, e.g.,* ESTER BOSERUP, WOMEN'S ROLE IN ECONOMIC DEVELOPMENT (1970); MALE BIAS IN THE DEVELOPMENT PROCESS (Diane Elson ed. 1991).

[50] *See, e.g.*, SUSAN P. JOEKES, WOMEN IN THE GLOBAL ECONOMY—AN INSTRAW STUDY (1987); WOMEN, MEN AND THE INTERNATIONAL DIVISION OF LABOR (June Nash and Maria Patricia Fernandez-Kelly eds., 1983); Diane Elson and Ruth Pearson, *Nimble Fingers Make Cheap Workers: An Analysis of Women's Employment in Third World Export Manufacturing*, 7 FEMINIST REV. 87 (1981); Linda Y.C. Lim, *Women's Work in Export-Oriented Industries: The Politics of a Cause*, in PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT (Irene Tinker ed. 1990); Guy Standing, *Global Feminization Through Flexible Labor*, 17 WORLD DEV. 1077 (1989).

[51] This research has been updated more recently to take account of gender differences and trends in employment in export agriculture and cross-border services, as well as manufacturing. *See supra* note 16; *see also* UNIFEM, PROGRESS OF THE WORLD'S WOMEN 2002, VOL. 2 (2002), at 30–39.

[52] ADJUSTMENT WITH A HUMAN FACE, UNICEF Publication (Giovanni Andrea Cornia et al., eds., 1987).

on women and girls. Among the impacts noted were the layoffs of women from formal sector jobs due to industry restructuring and public sector downsizing; women's increased employment in the informal sector; and women's and girls' reduced access to education and health services due to cutbacks in social services and the imposition of "cost recovery" measures in schooling and health services.[53] Gender-differentiated impacts have also been identified in countries in transition from planned to market economies[54] and in countries affected by financial crises.[55]

In the field of economics, a gender perspective was first introduced at the micro and meso levels, to explain the allocation of roles, income and resources within households and the pervasive segregation and wage discrimination between women and men in labor markets.[56] However, the stabilization and adjustment policies of the IMF and World Bank prompted a number of economists in the 1990s to begin examining macroeconomics as well from a gender perspective. At a conceptual level, these economists identified several levels of "gender blindness" in mainstream macroeconomic theory and modeling. First, they noted that assessments of macroeconomic performance based on conventional indicators such as Gross Domestic Product ("GDP") are incomplete because the national accounts on which GDP measures are based generally ignore or undercount home-based production carried out primarily by women.[57] Second, they pointed out that the macroeconomic models used to formulate stabilization and adjustment policies ignore women's unpaid labor in reproductive and care-giving activities, and therefore fail to recognize that reductions in basic services, such as health care, effectively shift the related costs from the public sector to the "reproductive" or "care" sector. Third, they noted that mainstream macroeconomics fails to recognize that labor markets are dependent on the "reproductive" or "care" sector, and therefore that cutbacks in basic services such as education and health care can have a negative effect on the welfare of the future labor force, and thus on future economic performance.[58]

[53] *See, e.g.,* COMMONWEALTH SECRETARIAT, ENGENDERING ADJUSTMENT FOR THE 1990S (1989); GITA SEN AND CAREN GROWN, DEVELOPMENT, CRISES AND ALTERNATIVE VISIONS: THIRD WORLD WOMEN'S PERSPECTIVES (1987); MORTGAGING WOMEN'S LIVES: FEMINIST CRITIQUES OF STRUCTURAL ADJUSTMENT (Pamela Sparr, ed., 1994); UNEQUAL BURDEN: ECONOMIC CRISES, PERSISTENT POVERTY AND WOMEN'S WORK (Lourdes Beneria and S. Feldman eds. 1992); *see also Special Issue on Gender, Adjustment and Macroeconomics* (Nilüfer Çağatay et al. eds.), 23 WORLD DEV. 1825 (1995); WORLD BANK, *supra* note 5, at 211–215 (summarizing the literature on the costs and benefits of adjustment for gender equality).

[54] *See, e.g*., WORLD BANK, *supra* note 5, at 219–222.

[55] *See, e.g.,* Maria Floro and Gary Dymski, *Financial Crisis, Gender, and Power: An Analytical Framework*, 28 WORLD DEV. 1269 (2000); Joseph Y. Lim, *The Effects of the East Asian Crisis on the Employment of Women and Men: the Philippine Case*, 28 WORLD DEV. 1285 (2000); Ajit Singh and Ann Zammit, *International Capital Flows: Identifying the Gender Dimension*, 28 WORLD DEV. 1249 (2000).

[56] *See, e.g.,* JOYCE P. JACOBSEN, THE ECONOMICS OF GENDER (1998).

[57] Established by the United Nations in 1953, the System of National Accounts ("SNA") is intended to provide a consistent basis for calculating national income. In its earliest formulations, the SNA excluded most forms of subsistence production and other household activities such as cooking, cleaning and care of children and elders—tasks carried out primarily by women in most societies. However, statisticians who advised developing countries such as Papua New Guinea and Jamaica on setting up their SNAs did make adjustments to include subsistence production and other unpaid work performed (or assumed to be performed) by men. MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS (1988), at 103–111. The most recent version of the SNA methodology now recommends counting a variety of tasks related to subsistence production. However, these tasks are still "undercounted" because of weaknesses in data-gathering. Unpaid work such as cooking, cleaning and childcare is still considered outside the "production boundary" of the SNA. UNIFEM, PROGRESS OF THE WORLD'S WOMEN 2000 (2000), at 22–24.

[58] Nilüfer Çağatay et al., *Introduction to Special Issue on Gender, Adjustment and Macroeconomics*, 23 WORLD DEV. 1827, 1828–29 (1995); *see also* CORNER, *supra* note 8; THE STRATEGIC SILENCE: GENDER AND ECONOMIC POLICY (Isabel Bakker ed. 1994); Ingrid Palmer, *Social and Gender Issues in Macro-Economic Policy Advice*, GTZ Social Policy Series No. 13 (1994).

Based on these insights, several economists began developing approaches to integrate gender in macroeconomic modeling. Initial approaches included the disaggregation of key variables by gender; the introduction of gender as an additional variable; the use of a two-sector or two-system approach, for example, to model interactions between the "paid" and "unpaid" economies; and combinations of these methods.[59] More recently, economists have begun applying these methods to topics in international economics, including the relation between gender inequality and trade liberalization in manufacturing and agriculture, and the gender-differentiated impacts of financial liberalization and financial crises.[60] They are also integrating gender in a wider range of economic models, including computable general equilibrium models.[61]

One of the key insights from this work is that there is a two-way interaction between gender and macroeconomic or trade policy: on the one hand, macroeconomic and trade policies are likely to have different impacts on women and men (and within groups of women and men) because of different access to resources, different household responsibilities, gender segregation and discrimination in labor markets, and other gender-related factors; on the other hand, these gender differences can influence the outcome of macroeconomic and trade policies, for example, by affecting the "supply response" to the liberalization of a particular sector.[62] Stated differently, to the extent women and men in a particular country or locality face different opportunities and constraints, this may influence their ability to benefit from trade liberalization and also to adjust to any adverse changes that result from it.

Nilüfer Çağatay, one of the leading economists working on the gender dimensions of trade and trade policy, has suggested that a comprehensive assessment of the gender-related impacts of a particular trade reform should consider

- changing patterns and conditions of work, including paid and unpaid work;
- changes in gender gaps in wages, earnings, patterns of ownership and control over assets;

[59] Çağatay et al., *supra* note 58, at 1830–31. While these economists believe it is important to introduce gender into formal economic modeling, they also emphasize the limitations of economic models and their underlying assumptions. Therefore, they stress the importance of seeing models as complements—not substitutes—for other types of analysis. *Id*. at 1829.

[60] Caren Grown et al., *Introduction to Special Issue on Growth, Trade, Finance, and Gender Inequality*, 28 WORLD DEV. 1145, 1149–1153 (summarizing articles included in the special issue). For information on current research in these areas, see the website of the International Working Group on Gender, Macroeconomics and International Economics (http://www.genderandmacro.org). The extension of gender analysis from macroeconomic policy to international trade and investment was a logical one, particularly since the stabilization and structural adjustment policies that first attracted the attention of gender-aware economists frequently included measures to liberalize trade and attract foreign direct investment. *See* Anne O. Krueger and Sarath Rajapatirana, *The World Bank Policies Towards Trade and Trade Policy Reform*, 22 WORLD ECON. 717, 718–20 (1999); World Bank, *World Bank Support for Developing Countries on International Trade Issues*, DC/99–19 (Sept. 14, 1999) (between 1990 and 1998, 68 percent of World Bank adjustment loans included support for trade and exchange rate policy reforms).

[61] *See, e.g*., Channing Arndt and Finn Tarp, *Agricultural Technology, Risk and Gender: A CGE Analysis of Mozambique*, 28 WORLD DEV. 1307 (2000); Marzia Fontana and Adrian Wood, *Modeling the Effects of Trade on Women, at Work and at Home*, 28 WORLD DEV. 1173 (2000) (using gendered social accounting matrix for Bangladesh, model covers all market sectors plus social reproduction and leisure activities); Marzia Fontana, *Modeling the Effects of Trade on Women, at Work and at Home: A Comparative Perspective*, International Food Policy Research Institute TMD Discussion Paper No. 110 (2003) (compares gendered computable general equilibrium simulations for Bangladesh and Zambia with econometric and qualitative approaches), *available at* http://www.ifpri.org/divs/tmd/dp/tmdp110.htm.

[62] ÇAĞATAY, *supra* note 8, at 15.

- changes in consumption patterns and use of technology by men and women;
- changes in public provisioning of services and their gendered impacts; [and]
- the gender-differentiated empowerment implications of trade flows.[63]

Other "transmission channels" that could be examined include the impact on the government budget of lost tariff revenues (in the case of tariff liberalization) and the implementation costs of the trade reform;[64] the social and economic impact of changes in migration patterns attributable to the trade reform;[65] and the impact of the trade reform on existing laws and regulations.[66] The scope of such a gender assessment depends on the availability of relevant statistics, disaggregated by sex, age, ethnicity and other relevant categories, and including baseline data against which to measure changes. It may also be difficult methodologically to distinguish the effects of a particular trade reform from the effects of other economic policies and global or regional events and trends.

To date, most of the research and analysis related to gender, trade and investment has focused on the positive employment and income effects of export promotion. Much less work has been done on the displacement effects of trade liberalization in import-competing sectors, and on the impact of trade liberalization on consumption patterns. In terms of sectors, most of the research thus far has focused on export manufacturing, including in particular duty-free zones, and traditional export crops. Relatively less work has been done on non-traditional agricultural exports (such as specialty vegetables and flowers) and services. Because of the difficulty of obtaining relevant data, little research has been done on trade links with the informal and reproductive sectors.[67] New areas covered by international trade rules, such as intellectual property protection, are also just beginning to be analyzed.

E. Legal Analysis of Gender, Trade and Investment

As trade agreements expand into new sectors such as services and into "trade-related" areas such as intellectual property rights, and as greater attention is paid to "behind-the-border" issues, "the central domain of 'trade' policy is increasingly domestic regulation and legal systems."[68] However, domestic laws and regulations are also critical tools for redressing discrimination and structural disadvantages experienced by women and other groups (including indigenous people and ethnic minorities), and many countries have enacted laws to fulfill international obligations under treaties such as CEDAW and

[63] *Id*. at 19. *See also* GAMMAGE ET AL., *supra* note 44 (gender assessments of trade agreements should consider likely effects on prices, employment, wages, consumption, access to public goods and services, laws and regulations important to women and other disadvantaged groups, unpaid household and community work, and migration trends, as well as implementation costs); Fontana et al., *supra* note 16 (effects of trade policy reform on income distribution are typically analyzed in terms of effects on employment, relative prices and government expenditure); Sparr, *supra* note 44 (gender analysis of trade or investment policy could start with study of gender-differentiated impacts on "reproductive" and "productive" work at the family/household and community levels; or gender differences in employment and consumption patterns within a tradeable sector).

[64] *See infra* text accompanying notes 100–104.

[65] *See infra* text accompanying notes 83 and 84.

[66] Legal and regulatory impacts are discussed in Part II.E of this chapter.

[67] *See* ÇAĞATAY, *supra* note 8, at 20–27; UN, *supra* note 9; Fontana et al., *supra* note 16; Susan Joekes, *A Gender-Analytical Perspective on Trade and Sustainable Development*, in UNCTAD, *supra* note 1, at 33.

[68] Jeffrey L. Dunoff, *The WTO in Transition: Of Constituents, Competence and Coherence*, 33 GEO. WASH. INT'L L. REV. 979, 1004 (2001).

other international commitments such as the Beijing Platform for Action.[69] Therefore, policymakers, academics, practicing lawyers and activists interested in gender equality and women's rights have become increasingly concerned about the implications of trade liberalization and specific trade and investment agreements for national and subnational laws that benefit women and other historically disadvantaged groups. A number of critical approaches to international economic law have also pointed to ways in which specific trade and investment agreements, and related institutions and processes, may themselves be "gender-biased," or at least "gender-blind."

In recent years, a number of "new approaches" to international law have been extended to international economic law, and specifically trade law.[70] Several of these new approaches are multidisciplinary, including international law and international relations[71] and law and economics.[72] The new approaches also include a variety of critical perspectives on legal norms, rules and institutions, sometimes described as "critical jurisprudence."[73] The earliest of these perspectives, referred to as "Third World," "Southern" or "postcolonial" critiques of international law, emerged in the 1970s and highlighted the Western origins and biases in international legal principles, as well as the dominance of European and North American countries in the international law-making processes and international institutions.[74] Other critical perspectives—sometimes referred to as "new-stream" approaches—challenge the neutrality, objectivity and coherence of international law rules, and emphasize the extent to which they are grounded in substantive political values.[75] A third set of critical approaches to international law has emerged from the

[69] UNIFEM, BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (Ilana Landsberg-Lewis ed. 1998); UNIFEM, *supra* note 57, at 38–60; WEDO, MAPPING PROGRESS: A WEDO REPORT ASSESSING IMPLEMENTATION OF THE BEIJING PLATFORM (1998) (survey found that over 130 governments have drafted national action plans to address women's needs and priorities, and 64 countries have enacted laws and adopted policy measures to address the 12 critical areas of concern identified in the Beijing Platform for Action); WORLD BANK, *supra* note 5, at 107–146.

[70] Joel R. Paul, *The New Movements in International Economic Law*, 10 AM. U.J. INT'L L. & POL'Y 607, 609 (1995); *see also* David Kennedy and Chris Tennant, *New Approaches to International law: A Bibliography*, 35 HARV. INT'L L.J. 417, 417–20 (1994); Steven R. Ratner and Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 293–95 (1999).

[71] *See, e.g.,* Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998).

[72] *See, e.g.*, Jeffrey L. Dunoff and Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999).

[73] William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 304 (2001).

[74] *See, e.g.*, R.P. ANAND, INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES: CONFRONTATION OR COOPERATION (1987); MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979); THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW: AN INTRODUCTION (Frederick E. Snyder and Suraklart Sathirathai, eds., 1987); Aceves, *supra* note 72, at 302–303; Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT'L L.J. 1 (1999); Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 IND. J. GLOBAL LEGAL STUD. 79 (1999); James Thuo Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 HARV. INT'L L.J. 263 (2000) (notes evolution of Third World scholarship and interaction with other critical discourses); James Thuo Gatthi, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184 (1998); Beth Lyon, *supra* note 25; Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353 (1998); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001); Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L.J. 529 (2000); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000).

[75] *See, e.g.,* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989); Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law,* 2 EUR. J. INT'L L. 66 (1991); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS.

various strands of feminist theory.[76] While reflecting diverse viewpoints and drawing on a variety of disciplines, feminist and other gender-aware approaches to international law highlight the ways in which international legal norms, rules and institutions tend to reflect predominantly Western "male" perspectives and experiences, and ignore or stereotype the roles and experiences of women.

Gender-aware approaches to international law have increasingly focused on international economic law and institutions, including the policies and practices of the IMF and World Bank,[77] the WTO[78] and regional trade agreements,[79] and international commercial

INT'L L.J. 1 (1988); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991); Phillip Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811 (1990).

[76] HILARY CHARLESWORTH AND CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000), at 38–48; *see also, e.g.,* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda Dallmeyer, ed., 1993); THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM (Chandra Talpad Mohanty et al., eds., 1991); Penelope E. Andrews, *Globalization, Human Rights and Critical Race Feminism*, 3 J. GENDER, RACE & JUS. 373 (2000); Penelope E. Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855 (2000); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379 (1999); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Claire Moore Dickerson, *Feminism and Human Rights*, 22 WOMEN'S RIGHTS L. REP. 139 (2001) (discussing critical feminist perspectives on business law, including international business law); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002); Celestine Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimation of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381 (2000); Anne Orford, *Contesting Globalization: A Feminist Perspective on the Future of Human Rights*, in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS (Burns H. Weston and Stephen P. Marks, eds., 1999) ("Orford 1999"); Anne Orford, *Feminism, Imperialism and the Mission of International Law*, 71 NORDIC J. INT'L L. 275 (2002) ("Orford 2002"); Sundhya Pahuja, *Trading Spaces: Locating Sites for Challenge Within International Trade Law*, 14 AUSTL. FEMINIST LAW J. 38 (2000); Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7 (1996) ("Sassen 1996"); Saskia Sassen, *Women's Burden: Counter-Geographies of Globalization and the Feminization of Survival*, 71 NORDIC. J. INT'L L. 255 (2002); Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT'L L. 503 (2000); Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U.J. INT'L L. & POL'Y 861 (1995).

[77] *See, e.g.,* Orford 1999, *supra* note 76, at 165–68; Anne Orford and Jennifer Beard, *Making the State Safe for the Market: The World Bank's World Development Report 1997*, 22 MELBOURNE U. L. REV. 195 (1998); Nandini Gunewardena, *Reinscribing Subalternity: International Financial Institutions, Development and Women's Marginality*, 7 UCLA J. INT'L L. & FOREIGN AFF. 201 (2003); Sundhya Pahuja, *Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide*, 13 LEIDEN J. INT'L L. 749 (2000); Wright, *supra* note 76, at 876–83.

[78] *See, e.g.,* Liane M. Jarvis, *Women's Rights and the Public Morals Exception of GATT Article XX*, 22 MICH. J. INT'L L. 219 (2000); Orford 1999, *supra* note 76, at 168–75; Pahuja, *supra* note 76.

[79] *See, e.g.,* Kate E. Andrias, *Gender, Work and the NAFTA Labor Side Agreement*, 37 U.S.F. L. REV. 521 (2003); Catherine Barbieri, *Women Workers in Transition: The Potential Impact of the NAFTA Labor Side Agreements on Women Workers in Argentina and Chile*, 17 COMP. LAB. L.J. 526 (1996); Laurie Bremer, *Pregnancy Discrimination in Mexico's Maquiladora System: Mexico's Violation of its Obligations under NAFTA and the NAALC*, 4 NAFTA L. & BUS. REV. AM. 567 (1999); Joshua Briones, *Paying the Price for NAFTA: NAFTA's Effect on Women and Children Laborers in Mexico*, 9 UCLA WOMEN'S L.J. 301 (1999); Ruth Buchanan, *Border Crossings: NAFTA, Regulatory Restructuring, and the Politics of Place*, 2 IND. J. GLOBAL LEGAL STUD. 371 (1995); Nicole L. Grimm, *The North American Agreement on Labor Cooperation and Its Effects on Women Working in Mexican Maquiladoras*, 48 AM. U. L. REV. 179 (1998); A. Maria Plumtree, *Maquiladoras and Women Workers: The Marginalization of Women in Mexico as a Means to Economic Development*, 6 SW. J. OF L. & TRADE AM. 177 (1999); Renee G. Scherlen and Ruth Ann Strickland, *The NAFTA(ization) of Sexual Harassment: The Experience of Canada, Mexico, and the United States*, 3 NAFTA L. & BUS. REV. AM. 96 (1997); Michelle Smith, *Potential Solutions to the Problem of Pregnancy Discrimination in Maquiladoras Operated by U.S. Employers in Mexico*, 13 BERKELEY WOMEN'S L.J. 195 (1998); Griselda Vega, *Maquiladora's Lost Women: The Killing Fields of Mexico—Are NAFTA and NAALC Providing the Needed Protection?*, 4 J. GENDER RACE & JUST. 137 (2000).

arbitration.[80] Jurists have also examined the impact of globalization on women, and the inadequacy of state-centered human rights law to address the conduct of non-state actors such as the IMF, World Bank, WTO and multinational companies.[81] In the areas of trade liberalization and foreign direct investment, gender-aware scrutiny has been applied to the conditions of women workers (particularly those working in duty-free zones),[82] the precarious circumstances of women migrants[83] and the increased trafficking of women and girls (linked to regional economic integration, improved transport systems and expansion of tourism).[84] Gender analysis has also been applied to specific aspects of WTO agreements, including the Agreement on the Application of Sanitary and Phytosanitary Measures[85] and the Agreement on Subsidies and Countervailing Measures.[86]

Hilary Charlesworth and Christine Chinkin, two of the first international jurists to apply feminist analysis to international law, have suggested several possible levels of analysis to uncover gender biases or "silences" in particular areas of international law. These include inquiries about the relative presence of women and men in international legal institutions; the vocabulary used in international law instruments (such as the use of the term "security" to refer to military security, rather than food, health, livelihood or other forms of "human" security); and underlying concepts of international law (including the use of dichotomies such as public/private, economic/political, and binding/non-binding).[87] In the area of trade law, commentators have also noted how the links made to the "neutral science" of

[80] *See, e.g.*, Ruth Buchanan, *Constructing Virtual Justice in the Global Arena*, 31 LAW & SOC'Y REV. 363 (1997).

[81] *See, e.g.*, CHARLESWORTH AND CHINKIN, *supra* note 76, at 243–45; Alfred C. Aman, Jr., *Introduction to Symposium Issue on Feminism and Globalization: The Impact of the Global Economy on Women and Feminist Theory*, 4 IND. J. GLOBAL LEGAL STUD. 1 (1996) (overview of other symposium articles); Andrews, *supra* note 76; Lucy B. Bednarek, *The Gender Wage Gap: Searching for Equality in a Global Economy*, 6 IND. J. GLOBAL LEGAL STUD. 213 (1998); Orford 2002, *supra* note 76; Orford 1999, *supra* note 76; Sassen, *supra* note 76; Stark, *supra* note 76; Wright, *supra* note 76.

[82] *See, e.g.,* Theresa A. Amato, *Overview of Symposium on Women at Work, Rights at Risk—Toward the Empowerment of Working Women*, 17 YALE J. INT'L L. 139 (1992); Barbieri, *supra* note 79; Jennifer Bol, *Using the Inter-American System to Pursue International Labour Rights: A Case Study of the Guatemalan Maquiladoras*, 55 U. TORONTO FAC. L. REV. 351 (1997); Bremer, *supra* note 79; Briones, *supra* note 79; Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT'L L. 151 (1992); Grimm, *supra* note 79; Plumtree, *supra* note 79; Sherrie L. Russell-Brown, *Labor Rights as Human Rights: the Situation of Women Workers in Jamaica's Export Free Zones*, 1 BERKELEY J. EMP. & LAB. L. 179 (2003); Scherlen and Strickland, *supra* note 79; Smith, *supra* note 79; Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 173 (1992); Vega, *supra* note 79; Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1 (2001).

[83] *See, e.g.*, Joan Fitzpatrick and Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47 (1998); Donna Maeda, *Agencies of Filipina Migrants in Globalized Economies: Transforming International Human Rights Discourse*, 13 LA RAZA L.J. 317 (2002); Young, *supra* note 82.

[84] *See, e.g.*, Nancy Beyer, *The Sex Tourism Industry Spreads to Costa Rica and Honduras*, 29 GA. J. INT'L & COMP. L. 301 (2001); Katrin Corrigan, *Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Flow of Traffic*, 25 FORDHAM INT'L L.J. 151 (2001); Fitzpatrick and Kelly, *supra* note 83; Emma Goldman, *The Traffic in Women*, 13 HASTINGS WOMEN'S L.J. 9 (2002); Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN'S L.J. 31 (2002); Kathryn E. Nelson, *Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches*, 24 HOUS. J. INT'L L. 551 (2002); *but see* Kapur, *supra* note 76 (critiquing "victim" images in anti-trafficking discourse);

[85] Orford 1999, *supra* note 76, at 169–75.

[86] Pahuja, *supra* note 76, at 48–51.

[87] CHARLESWORTH AND CHINKIN, *supra* note 76, at 49–50; Charlesworth, *supra* note 76, at 381–85.

economics and the increasingly technical nature of trade discourse both contribute to the appearance of trade rules as neutral and objective.[88]

One way to analyze particular trade or investment agreements from a gender perspective would involve consideration of (1) the text of the agreement; (2) related implementation and enforcement mechanisms; and (3) possible interactions with the various laws and norms that influence gender roles and women's opportunities and constraints within a particular country.[89] This analysis should also be informed by an understanding of the social, economic and political context in which the relevant trade or investment activity is taking place, including the opportunities and constraints facing women and other disadvantaged groups.

Under this approach, a trade or investment agreement would first be examined to identify any overtly "gender-biased" provisions, or apparently "gender-neutral" provisions that might have a disparate effect on women and men (or on groups of women or men) in light of their different social and economic circumstances. Second, the related implementation and enforcement mechanisms would be considered, including the gender composition and gender awareness of the decision-making bodies involved. Finally, the agreement would be analyzed in terms of its possible interactions with domestic laws and regulations, taking into account the range of laws and norms that influence women's and men's status and rights in a particular country, the different circumstances of women within the same country (which could be related to age, ethnicity, religion or other factors), and institutional and practical constraints on the enforcement of laws and access to justice.[90]

More specifically, a trade or investment commitment could be examined to determine whether it supports or conflicts with any of the following:

(1) The country's international commitments relevant to gender equality and human rights;[91]

[88] Sara Dillon, *A Farewell to "Linkage": International Trade Law and Global Sustainability Indicators*, 55 RUTGERS L. REV. 87, 110–12 (2002); Pahuja, *supra* note 76, at 44–47. As discussed in Section II.D, there is a growing body of literature that identifies and addresses gender biases in economic concepts, indicators, research and models. *See supra* text accompanying notes 56–61.

[89] This approach to legal/regulatory analysis is based on GAMMAGE ET AL., *supra* note 44, at 23–27.

[90] The legal framework shaping gender relations and women's rights in a particular country includes the country's international treaty commitments, such as CEDAW and International Labour Organization ("ILO") conventions, international consensus documents such as the Beijing Declaration and Platform for Action, and its national constitution, statutes, regulations and judicial rulings. WORLD BANK, *supra* note 5, at 113. In federal systems, state or provincial laws, regulations and judicial decisions may also need to be considered. In many countries, religious, traditional or customary laws—which may be interpreted and enforced by a separate system of courts—will also be relevant. Taken together, this web of laws and norms may either support or undermine a country's international commitments to gender equality and rights. CHRISTINE CHINKIN, GENDER MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS: A REFERENCE MANUAL FOR GOVERNMENTS AND OTHER STAKEHOLDERS, Commonwealth Secretariat Gender Management System Series (2001), at 14–15. Institutional, cultural and practical factors can also influence the rights and opportunities of women and other disadvantaged groups. For example, beneficial laws may not be vigorously enforced because regulatory agencies are underfunded and understaffed. Judges and government officials may be insensitive or biased toward women (or other groups) in their interpretation and enforcement of laws. In many countries, women also are not aware of their rights, or may be reluctant or unable to assert them for financial or other reasons. GAMMAGE ET AL., *supra* note 44, at 24–26.

[91] These could include CEDAW, the Convention on the Rights of the Child and other human rights treaties; ILO conventions related to discrimination and equal pay, child labor, freedom of association and the right to organize, part-time and home work, and occupational health and safety; environmental treaties such as the Convention on Biological Diversity; regional human rights conventions; and international undertakings such as the Beijing Declaration and Platform for Action.

(2) The country's constitution;[92]
(3) National and subnational laws and regulations that benefit women and other disadvantaged groups, in particular:
  (a) non-discrimination and equal treatment laws;[93]
  (b) affirmative action and other laws providing special treatment;[94] and
  (c) gender-neutral laws such as those pertaining to fair wages, food labeling, and health and safety;[95]
(4) Gaps or biases in the application or enforcement of laws that benefit women and other vulnerable groups, such as labor laws;[96] and
(5) Religious, traditional or customary laws and practices, especially those relating to land and other assets.[97]

This approach to gender-aware legal analysis is used in the following Part to analyze selected WTO agreements and processes from a gender perspective.

III. Gender Analysis of Selected Trade Agreements and WTO Processes

This section is intended to provide an overview of gender issues in trade and investment agreements related to key economic sectors and trade-related areas, as well as gender issues in trade-related processes such as trade negotiations, dispute settlement, trade policy review and trade-related capacity building. The main focus of discussion is on the Uruguay Round agreements, although some reference is made to regional and bilateral agreements. The approach is multidisciplinary, and draws on social, economic and legal/regulatory research and analysis. The approach also considers a range of gender-related impacts, including direct and indirect effects of changes in cross-border trade and investment, government spending and other activities influenced by trade and investment agreements; direct or indirect effects of specific provisions in trade or investment agreements; and gender biases in trade-related processes. This discussion is selective and reflects current limitations in data-gathering and gaps in research and analysis. The

[92] Many countries' constitutions include broad protections of civil, political, economic, social and cultural rights, and may include specific commitments to gender equality. *See* CHINKIN, *supra* note 90, at 48–49.

[93] These include laws that prohibit discrimination against women or other social groups in education, employment, ownership of assets and other activities, or that mandate equal payment and equal treatment.

[94] These include laws and programs that address serious gender disparities by setting targets or quotas for women's or girls' participation (including small business assistance and government procurement set-asides), or by providing subsidies or other benefits (such as reduced fees, lower borrowing rates or training) to encourage their participation. Such "special measures aimed at accelerating de facto equality between men and women" are expressly authorized under CEDAW. *See* CEDAW, *supra* note 10, art. 4.1. Also included in this category are laws that directly address women's reproductive role, such as maternity leave legislation.

[95] These could also include gender-neutral laws granting parental leave, or mandating or subsidizing childcare in the workplace.

[96] For example, the labor laws and regulations in most countries extend primarily to formal sector workers in defined "workplaces", and therefore generally do not protect domestic, home-based or agricultural workers. Gaps in legal protections can also be created when national or local governments grant exemptions—e.g., from applicable labor or workplace safety regulations—to firms operating in duty-free zones. Facially neutral laws can also be applied in a discriminatory manner (e.g., land titling, tax and social security laws that assign all rights to the "head of household", usually presumed to be a male household member). Facially neutral laws can also disadvantage women because of their more limited access to assets and employment opportunities (e.g., banking regulations that require loans to be secured by land or other traditional forms of collateral). Laws can also be overtly discriminatory (e.g., laws requiring a spouse or male guardian to countersign contracts and other loan documents). *See generally* CHINKIN, *supra* note 90, at 14–19, 34–36 and 50–60; WORLD BANK, *supra* note 5, at 107–146.

[97] GAMMAGE ET AL., *supra* note 44, at 26.

treatment of particular agreements and issue areas is not exhaustive, but is intended to complement the fuller discussion of these topics in other chapters.

A. Manufacturing and Trade in Goods

1. General Agreement on Tariffs and Trade 1994

A growing body of research indicates that liberalization of trade in goods has had a number of gender-differentiated effects within trading countries, including effects on employment. In particular, the growth of export industries in many newly industrializing countries has increased wage employment opportunities for women, although women's employment has been concentrated in labor-intensive industries characterized by low wages and poor working conditions compared to more capital-intensive industries.[98] Most of the research to date has focused on positive employment effects (i.e. "job gains") in export sectors. Less data are available on displacement effects (i.e. "job losses") in import-competing sectors, although there is some evidence of gender-differentiated effects, for example, in labor-intensive industries in African countries that have been hurt by increased imports of lower-cost products from Asia.[99] Trade theory suggests that trade liberalization would also have an effect on consumption of traded goods (and domestically-produced substitutes), through changes in relative prices, and principles of gender analysis suggest that these consumption effects are likely to be "gendered," for example, because of women's and men's different household responsibilities and access to cash income. However, relatively little research has been done in this area.

Another recognized impact of liberalized trade in goods is the reduction of government revenue resulting from progressively lower tariffs. This impact is felt most strongly by developing countries, which historically have relied on tariffs to provide a substantial portion of their revenues.[100] Indeed, recent research has found that developing countries since 1970 have suffered declining tax revenues due to tariff reductions, which have not been adequately offset by increases in income and other taxes.[101] Recent work on gender analysis of government budgets suggests that the "government revenue" effects of tariff reductions also are likely to have a gender dimension.[102] For example, if tariff

[98] Mehra and Gammage, *supra* note 16, at 540–41; UN, *supra* note 9, at 9–20.

[99] UN, *supra* note 9, at 9–13.

[100] Developing countries' dependence on tariff revenues is acknowledged in the General Agreement on Tariffs and Trade, as amended ("GATT"). *See* GATT, Art. XXVIII bis. 3(b). One recent study found that tariff revenue represents 35 percent of low-income countries' total revenue, compared to one percent for high-income countries. Barsha Khattry and J. Mohan Rao, *Fiscal Faux Pas?: An Analysis of the Revenue Implications of Trade Liberalization*, 30 WORLD DEV. 1431, 1437 (2002).

[101] Kattry and Rao, *supra* note 100. The authors note that tariffs are considerably easier to assess and collect than other taxes, particularly for countries with limited capacity to administer taxes and where corruption and tax evasion are common. Other commentators have noted that the economic models used to project impacts of trade liberalization typically make the unrealistic assumption that tariff revenues will be replaced by non-distortionary lump sum taxes; in fact, any domestic tax introduced to offset lost tariff revenue would lead to some economic distortion. *See* Mark Weisbrot and Dean Baker, *The Relative Impact of Trade Liberalization on Developing Countries* (2002), *available at* http://www.cepr.net/relative_impact_of_trade_liberal.htm.

[102] *See, e.g.*, UNIFEM, GENDER BUDGET INITIATIVES: STRATEGIES, CONCEPTS AND EXPERIENCES (2002); Debbie Budlender, *The Political Economy of Women's Budgets in the South*, 28 WORLD DEV. 1365 (2000); Helena Hofbauer Balmori, *Gender and Budgets: Overview Report*, BRIDGE Publication (2003), *available at* http://www.ids.ac.uk/bridge. Although most work to date has focused on public expenditures, new tools are being developed to analyze the gender dimensions of revenue collection and other economic policies. Kathleen Barnett and Caren Grown, *Gender Impacts of Government Revenue Collection: The Case of Taxation*, Commonwealth Secretariat Publication (2004); *See also* MALHOTRA ET AL., *supra* note 29, at 164, Box 7.4 (trade taxes and spending policies can have significant impact on human development and poverty reduction efforts).

reductions are not offset by increases in government revenue from other sources, government expenditures are likely to be cut. Research on the impact of reduced social spending under structural adjustment programs in many developing countries, for example, has found a disproportionate negative impact on poor women. There could also be a gender-differentiated impact depending on the taxes or other charges that are introduced to make up for lost tariff revenue. For example, consumption-based taxes such as sales taxes, and user charges on basic services, are regressive and would disproportionately affect lower-income households, and particularly women who are responsible for basic household expenditures.

There is also increasing recognition that the General Agreement on Tariffs and Trade ("GATT") and other trade agreements entail substantial implementation costs, particularly for developing countries. For example, a widely-circulated study by World Bank economists estimated that implementation of only three of the Uruguay Round agreements had cost more advanced developing countries on average about $150 million, and that the costs for least-developed countries could be greater.[103] Notification procedures alone can impose a financial and administrative burden, particularly on least-developed countries. One commentator, for example, estimates that the Uruguay Round agreements impose a total of 215 different notification requirements on WTO members.[104] These implementation costs can have gender implications for developing country governments, if they absorb a substantial portion of the national budget and reduce the amounts available for social and other developmental expenditures.

The text of the GATT also includes provisions that reflect a "gender-blind" approach to development and other domestic policy goals on the part of the original GATT contracting parties. For example, Article XVIII addresses the issue of government assistance for development in terms of "programmes and policies of economic development designed to raise the *general* standard of living," and therefore permits flexibility "to grant tariff protection required for the establishment of a particular *industry*."[105] Similarly, Part IV on trade and development emphasizes developing countries' need to expand export earnings as a means to achieve economic development. These provisions reflect an understanding of development as essentially an economic process to be pursued through promotion of particular industries, especially export industries. This concept of development is far narrower than the approaches more recently followed by international and bilateral development agencies and reflected in many countries' national development plans, which also emphasize the importance of human development, poverty reduction, gender equality and other social goals.[106]

[103] J. Michael Finger and Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, 23 WORLD ECON. 511 (2000) (study examined implementation costs of the Agreements on Implementation of Article VII of the GATT 1994 [Customs Valuation], the Application of Sanitary and Phytosanitary Measures, and Trade-Related Aspects of Intellectual Property Rights).

[104] Yash Tandon, *Evaluation of WTO and Other Forms of Technical Assistance to Developing Countries in the Context of the Uruguay Round of Agreements* (2002), at 2, *available at* http://www.ileapinitiative.com/pages/events.htm.

[105] GATT, Art. XVIII.2 (emphasis added).

[106] *See, e.g.*, UNDP, Development Policy, *at* http://www.undp.org/policy (UNDP supports countries' development agendas in the areas of democratic governance, poverty reduction, crisis prevention and recovery, energy and environment, information and communications technology and HIV/AIDS, and promotes gender equality in all activities); World Bank, About Us: What Is the World Bank?: At a Glance, *at* http://www.worldbank.org (World Bank supports investment in basic health and education; social development, inclusion, governance and institution building for poverty reduction; strengthening governments' ability to deliver quality services; protection of environment; private business development; and reforms for a stable macroeconomic environment). .

Article XX of the GATT, which sets out the non-trade policy areas that may provide a basis for exceptions from GATT disciplines, is also "gender-blind." The article recognizes the legitimacy of certain measures taken to protect "public morals", "human, animal or plant life or health," "protection of national treasures," "conservation of exhaustible natural resources," and laws and regulations in a variety of areas such as customs enforcement, intellectual property protection and prevention of deceptive practices.[107] However, Article XX does not refer to government measures taken to ensure equal treatment and non-discrimination, to promote gender equality or to redress historical disadvantages suffered by women and other social groups.[108] While one commentator has argued that the "public morals" exception in Article XX might be construed to cover measures to promote women's rights, she acknowledges that this argument is novel and untested.[109] The exception for "human, animal or plant life or health" could arguably apply to a variety of laws and regulations that are beneficial to women, including health regulations. However, as discussed extensively elsewhere, GATT and WTO dispute panels and the WTO Appellate Body have interpreted this and other Article XX exceptions quite narrowly.[110]

2. Agreement on Textiles and Clothing

Textile and clothing manufacturers in many countries employ predominantly women, at least in the more labor-intensive processes,[111] and therefore trade arrangements relating to textiles and clothing ("T&C") have a strong gender dimension. While the discussion here relates primarily to the Uruguay Round Agreement on Textiles and Clothing ("ATC"), similar issues can arise in the context of regional and bilateral agreements on T&C trade.

As discussed elsewhere in this book, the ATC provides for the staged phase-out of bilateral quotas on T&C imports and exports that had been in place since 1974 under the Multi-Fibre Agreement.[112] Over a five-year period, T&C that were previously subject to import quotas were to be "integrated" into the GATT in four phases. While the ATC was expected to result in a significant increase in T&C exports from developing countries, where T&C manufacturing operations are increasingly located, these benefits

[107] GATT, Art. XX(a)–(g).

[108] The absence of such provisions in the original text of Article XX is not surprising, since gender equality and women's rights became prominent international and national policy goals only in the 1970s (although the principles of equality and non-discrimination were already embedded in the United Nations Charter signed in 1945 and the Universal Declaration of Human Rights adopted in late 1948). Moreover, even general principles of human rights and labor rights were not included in the original Article XX text, although the ILO predated the GATT by several decades and the Universal Declaration of Human Rights was drafted concurrently with the GATT.

[109] *See* Jarvis, *supra* note 78. This proposal is limited to "outwardly-directed" trade measures, such as measures to restrict imports from countries where discriminatory or abusive practices against women are sanctioned. The proposal does not consider measures that a government might take to promote gender equality domestically, such as assistance programs for businesses owned by women, which might have effects on trade. *See infra* text accompanying notes 213–18. A number of other commentators have debated the possible use of the "public morals" exception as a basis for imposing trading sanctions on countries that violate fundamental human rights, for example, by permitting or promoting the use of slave labor. *See, e.g.*, Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62 (2001); Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1 (1999); Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1998); Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principles*, 25 BROOK. J. INT'L L. 1 (1999).

[110] *See, e.g.*, Bal, *supra* note 109; Blackett, *supra* note 109 (finds evidence of more flexible interpretation in recent Appellate Body decisions); Garcia, *supra* note 109.

[111] Mehra and Gammage, *supra* note 16, at 540.

[112] *See* Chapters 9 and 53 of this book.

have generally not been realized for several reasons. Observers have noted two major loopholes in the ATC text itself. First, since the phase-out schedule for import quotas is "back-loaded," a large proportion of the expected increases in market access may not be realized until the end of the implementation period.[113] Second, the phase-out schedule is structured in terms of percentages of total T&C imports, and therefore importing countries have had considerable leeway in selecting goods to be freed from quotas. As a result, many key categories of T&C exports from developing countries have not yet been released from quotas by the major importing countries.[114] Importing countries have also made heavy use of the transitional safeguard provision of the ATC, as well as antidumping procedures, to restrict T&C imports.[115]

Trends in global T&C trade have had several gender-specific effects. First, the relocation of T&C manufacturing operations from industrialized to developing countries effectively moved a large number of manufacturing jobs employing women from industrialized to developing countries.[116] Second, the slow implementation of the ATC, together with the recent global economic slowdown, have resulted in the creation of fewer new T&C manufacturing jobs—most of which would likely have been filled by women—in developing countries than would have been expected. Third, the lifting of country-specific import quotas is leading to greater competition among developing countries in the T&C sector, with gains and losses for women workers in different developing countries. Full implementation of the ATC, for example, is expected to benefit larger exporting countries such as China at the expense of smaller countries such as Bangladesh, where the garment industry employs about 1.4 million, mostly female, workers. Finally, the expansion of the T&C sector in developing countries will not necessarily narrow existing gender wage gaps if women are hired primarily for low-skilled factory work with little opportunity for training or advancement.[117]

3. Agreement on Subsidies and Countervailing Measures

The Uruguay Round Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), which strengthened the disciplines on subsidies contained in the Tokyo Round Subsidies Code, has been critiqued from a variety of perspectives. While disciplines on subsidies have been justified as necessary to minimize "distortions" in trade flows, the treatment of subsidies in the SCM Agreement has been criticized by one prominent economist as "utterly devoid of any economic rationale beyond the mercantilist interests of a narrow set of powerful groups in the advanced industrial countries."[118]

[113] *See* WORLD BANK, GLOBAL ECONOMIC PROSPECTS IN THE DEVELOPING COUNTRIES 2002 (2001), at 51; WTO, ANNUAL REPORT 2002 (2002), at 31 ("notification of products to be integrated under the third stage of the [ATC] suggests that a significant number of quantitative restrictions . . . may not be removed until the end of 2004").

[114] WORLD BANK, *supra* note 113, at 52.

[115] Kenneth A. Reinert, *Give Us Virtue, But Not Yet: Safeguard Actions Under the Agreement on Textiles and Clothing*, 23 WORLD ECON. 25 (2000); WTO, *supra* note 113, at 31.

[116] However, the evidence is mixed as to whether this trend led to an overall decline in the female share of manufacturing jobs in industrialized countries. *See* UN, *supra* note 9, at 12.

[117] GAMMAGE ET AL., *supra* note 44, at 41; *see also* MALHOTRA ET AL., *supra* note 29, at 169–82; G & T Task Force, *supra* note 16, at 141–74; C.A.F. Dowlah, *The Future of the Readymade Clothing Industry of Bangladesh in the Post-Uruguay Round World*, 22 WORLD ECON. 933, 934 (1999); Razzaz, *supra* note 37 (analysis of Madagascar's expanding T&C sector estimated that male workers would benefit substantially more than female workers because of gender discrimination in the sector).

[118] DANI RODRIK, THE GLOBAL GOVERNANCE OF TRADE: AS IF DEVELOPMENT MATTERED, UNDP Background Paper (2001), at 27.

Another prominent economist has noted that, notwithstanding the "disciplines" of the SCM Agreement, "developed countries make use of a whole variety of other, hidden subsidies under the rubric of 'defence'."[119] In a similar vein, some commentators have found a strong bias toward industrialized countries in the hierarchy of subsidies outlined in the SCM Agreement: while the agreement treats subsidies that are more likely to be used by industrialized countries (such as those for research and development, and environmental upgrades of facilities) as "non-actionable," it categorizes export subsidies that developing countries are more likely to use as "prohibited."[120]

Commentators have also critiqued the general concept of "subsidy" reflected in the SCM Agreement. While the SCM Agreement is intended to restrict forms of government assistance that "have the effect of distorting world trade and depriving other countries of legitimate trade opportunities,"[121] one commentator notes that "[e]ven economically speaking, [some] subsidies can be rationalized not only as socially imperative deviations from principles of economic efficiency but also as correctives for distortions from other sources." She concludes that "the absence of international consensus on the use of subsidies is nothing less than a reflection of the varying views on the proper role of government in economic affairs."[122] Critical commentators have also noted various types of assistance that are *not* recognized as "subsidies" in the SCM Agreement. For example, the deregulation of labor markets could be viewed as providing a benefit to exporting firms akin to a negative subsidy.[123] Other unrecognized "subsidies" include the financial benefits provided to households by unpaid workers in family businesses and unpaid caregivers, who are usually women.[124]

A gender-aware reading of the SCM Agreement suggests a more specific way in which the agreement is "gender-blind." The "non-actionable" subsidies listed in Article 8—which lapsed in January 2000—included, among others, "assistance to disadvantaged regions . . . given pursuant to a general framework of regional development."[125] However, Article 8 did not provide similar treatment for "assistance to disadvantaged groups," such as women and ethnic minorities. Thus, a government program to assist women or minority entrepreneurs in a particular manufacturing industry—for example, through low-interest loans, tax credits or training—could conceivably be challenged under the SCM Agreement. More specifically, it might be characterized as a "prohibited" subsidy if the program were tied to export goals or domestic content requirements, or as an "actionable" subsidy if the scheme could be shown to injure a domestic industry in another

[119] Joseph E. Stiglitz, *Two Principles for the Next Round or, How to Bring Developing Countries in from the Cold*, 23 World Econ. 437, 451 (2000).

[120] *See, e.g.*, Third World Network, The Multilateral Trading System: A Development Perspective, UNDP Background Paper (2001), at 41–42; Michael H. Davis and Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 U. Mo. K.C. L. Rev. 733, 767–771 (2001). However, Article 8 of the SCM Agreement, relating to non-actionable subsidies, lapsed on January 1, 2000 because of a lack of consensus in the Committee on SCM to extend these provisions, as provided in Article 31. WTO, *supra* note 113, at 67 n.10. In addition, Article 27 of the SCM Agreement provides special and differential treatment for least-developed and developing countries, including a complete exemption from the prohibition on export subsidies for least-developed countries.

[121] Paul C. Rosenthal and Robert T.C. Vermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives During the Uruguay Round?,* 31 Law & Pol'y Int'l Bus. 871, 891 (2000) (quoting from the report of the GATT Director-General on the Tokyo Round).

[122] Pahuja, *supra* note 76, at 50.

[123] *See, e.g.*, Blackett, *supra* note 109, at 52–53; Pahuja, *supra* note 76, at 50.

[124] Blackett, *supra* note 109, at 23–24.

[125] *Agreement on Subsidies and Countervailing Measures*, Art. 8.2(b).

WTO member country, or to otherwise cause "nullification or impairment of benefits" or "serious prejudice" to that country.[126] It would be more difficult to challenge such a program if it were sponsored by a least-developed or developing country government, in light of the special and differential treatment accorded to them under Article 27 of the agreement. Nonetheless, the failure to acknowledge this type of government assistance program in Article 8 suggests a lack of awareness on the part of trade negotiators about the existence of these programs (which are not limited to developing countries), or perhaps a conclusion that since these programs generally apply to small and medium-sized businesses, they are unlikely to cause sufficient harm to competing businesses in other countries so as to trigger provisions of the SCM Agreement.

At the Fourth Ministerial Conference in Doha, developing countries proposed to treat a number of development-related measures as non-actionable subsidies under the SCM Agreement. The Ministerial Conference agreed that this proposal would be considered further within the WTO.[127] In this regard, the Committee on SCM could also consider an exemption for government assistance to enterprises owned by women and other historically disadvantaged groups. This would complement CEDAW's provision on "special measures aimed at accelerating de facto equality between men and women."[128] It would also further the recommendations of UNCTAD's Commission on Enterprise, Business Facilitation and Development and of the Commonwealth Secretariat to governments to address the needs of women entrepreneurs, for example, through special credit lines.[129]

The disciplines on subsidies contained in the SCM Agreement are closely related to the treatment of countervailing measures in the same agreement and anti-dumping rules contained in the Uruguay Round Agreement on Implementation of Article VI of GATT 1994 (Antidumping). The use of subsidies, as well as the imposition of countervailing duties and the institution of antidumping proceedings, can have indirect, gender-differentiated effects on workers in the affected industries. For example, in the T&C sector, government assistance to manufacturers in small exporting countries to upgrade their facilities could stem the layoffs of predominantly female workers that have already taken place—for example, in Bangladesh[130]—due to increased competition from other countries and other factors. The use of countervailing duties and antidumping proceedings, while intended to protect domestic firms and their workers from the competition of cheaper imports, restricts imports and therefore could lead to hiring freezes, wage cuts and layoffs in the T&C sectors of exporting countries, with a disproportionate impact on women workers. Similar effects could also be expected as a result of "safeguard" actions taken by importing countries in compliance with the Uruguay Round Agreement on Safeguards. However, the gender dimensions of subsidies, countervailing duties, antidumping and safeguard actions have not been systematically studied, due in part to the lack of sex-disaggregated data on employment in the relevant industries.

[126] *Id*., Part II (prohibited subsidies) & Part III (actionable subsidies). *See* GAMMAGE ET AL., *supra* note 44, at 51.

[127] WTO, *Implementation-Related Issues and Concerns*, Decision of Nov. 14, 2001, Ministerial Conference, Fourth Session, Doha, Nov. 9–14, 2001, WT/MIN(01)/17 (Nov. 20, 2001) (reproduced in the Appendix to this book), ¶ 10.2.

[128] CEDAW, *supra* note 10, art. 4.1

[129] UNCTAD, *Mainstreaming Gender in Order to Promote Opportunities: Agreed Recommendations*, Trade and Development Board, Commission on Enterprise, Business Facilitation and Development, 6th Sess., Agenda Item 5, U.N. Doc. TD/B/COM.3/L.22 (2002); O'REGAN-TARDU, *supra* note 33, at 6–9.

[130] ASIAN DEVELOPMENT BANK, ASIAN DEVELOPMENT OUTLOOK 2002 (2002), at 85 ("Between July and December 2001, about 1,200 garment factories closed and an estimated 350,000 workers in the garment industry lost their jobs").

4. Agreement on Trade-Related Investment Measures

The gender-differentiated effects of foreign direct investment ("FDI") have not been extensively studied to date. However, some economists have used theoretical and computable general equilibrium models to examine the possible gendered effects of increases in foreign capital inflows on a country's manufacturing sector.[131] While global FDI flows expanded rapidly beginning the 1970s, they have been heavily concentrated in a small number of industrialized and developing countries. In addition, research on duty-free zones, where foreign-owned firms predominate, shows strong gender segregation in employment, with concentrations of male workers in capital-intensive processes and female workers in more labor-intensive processes.[132] Therefore, the gendered effects of FDI could be expected to vary widely across countries, industries and even stages of production.

The gender-differentiated impacts of the Uruguay Round Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), and investment agreements at the regional and bilateral levels, are also not well understood. The TRIMs Agreement and other investment agreements could lead to increased foreign investment and the creation of new jobs for women. On the other hand, the elimination of domestic-content requirements as mandated under the TRIMs Agreement[133] could negatively affect particular groups of women, for example, if they own or work for local input suppliers. As workers, women can also be directly affected by investment incentives that a host government may offer to foreign investors, such as exemptions from local labor laws, health and safety standards, and environmental regulations.[134]

In addition, where an investment agreement permits the arbitration of disputes between foreign investors and the host country, as under the North American Free Trade Agreement ("NAFTA") and a large number of bilateral investment treaties, claims brought by foreign investors against the host state can raise gender issues. In one NAFTA investor-state dispute, for example, a U.S. corporation, Crompton Corp., challenged a decision of the Canadian government to phase out the use of lindane, a pesticide manufactured by Crompton, which has been linked to breast cancer.[135]

B. Agriculture Trade and the Agreement on Agriculture

A majority of the female labor force in developing countries is engaged in agriculture—62 percent in 1990.[136] As in manufacturing, researchers have identified gender divisions of

[131] *See, e.g.*, Elissa Braunstein, *Engendering Foreign Direct Investment: Family Structure, Labor Markets and International Capital Mobility*, 28 WORLD DEV. 1157 (2000); Fontana and Wood, *supra* note 59.

[132] WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 2003 (2002), at 46–49; Mehra and Gammage, *supra* note 16, at 540–41.

[133] *Agreement on Trade-Related Investment Measures*, Annex, para. 1(a).

[134] These and other concerns have been raised by the UN High Commissioner for Human Rights (UNHCHR). *See generally* UNHCR, *Economic*, *Social and Cultural Rights*: *Human Rights*, *Trade and Investment*, Report of the High Commissioner for Human Rights, U.N. Doc. E/CN.4/sub.2/2003/9 (2003). Mariama Williams has also noted possible indirect impacts of FDI on gender equality, including effects on tax revenue (and related implications for social expenditures), availability of various types of infrastructure and social services, exchange rates and balance of payments, and local finance markets. WILLIAMS, *supra* note 32, at 128.

[135] International Centre for Trade and Sustainable Development, *Latest NAFTA Investor-State Claim Launched*, BRIDGES WEEKLY TRADE NEWS DIGEST, Dec. 20, 2001, *available at* http://www.ictsd.org; *see also* GAMMAGE ET AL., *supra* note 44, at 52.

[136] Mehra and Gammage, *supra* note 16, at 538.

labor in agriculture, with men and women assuming responsibility for growing different crops, or carrying out different cropping tasks.[137] Although women are involved in production of both cash and subsistence crops, research indicates that they are primarily responsible for household food production in several regions—70 to 80 percent in Sub-Saharan Africa and 65 percent in Asia.[138] However, extensive literature documents the constraints that women farmers face due to limited access to and rights over land, limited access to credit and other inputs, and neglect by agricultural extension services.[139]

Market liberalization and promotion of export crops have had ambiguous employment effects on women farmers. For example, in some regions, women's representation in the agricultural labor force has increased as more men migrate to jobs in manufacturing or other off-farm work.[140] However, expansion of export crops has also displaced women farmers from land they had used for subsistence farming, and many of these displaced women have taken seasonal jobs as a agricultural workers. In Africa and Latin America, women make up the large majority of the workforce in non-traditional agricultural exports, such as flowers and specialty vegetables. While these jobs provide cash income, they are also characterized by low wages, health hazards and seasonality.[141] Market liberalization has also created new opportunities for women involved in food processing and trading, although they tend to be concentrated in small-scale operations. In general, the liberalization of agriculture markets has benefited mainly medium and large-scale commercial producers and traders. Women farmers and traders, who generally operate on a smaller scale, have been found less likely to benefit. It is especially difficult for small farmers, including women, to compete with heavily subsidized agricultural imports.[142]

Gender-aware economists are examining ways in which gender roles and disparities in access to resources can affect household and sector-wide responses to changes in agriculture policy.[143] For example, James Warner and D.A. Campbell have constructed a model to explain the weak "supply response" to liberalization of agriculture markets that has been observed in several countries, particularly in Africa. This analysis notes that, where women are primarily responsible for household food production but also help with cash crop production as unpaid family laborers, they are likely to realize little or no direct benefit from programs to increase production of cash crops for export. In many cases, they may be required by male family members to give up part of their subsistence farmland for cash crop production, which further weakens their property rights and may also threaten their family's food security if they are no longer able to grow subsistence

[137] *See, e.g.*, Cheryl R. Doss, *Designing Agricultural Technology for African Women Farmers: Lessons from 25 Years of Experience*, 29 WORLD DEV. 2075, 2077–78 (2001). Doss emphasizes, however, that gender roles in agriculture are dynamic and context-specific.

[138] Lynn R. Brown et al., *Generating Food Security in the Year 2020: Women as Producers, Gatekeepers, and Shock Absorbers*, International Food Policy Research Institute 2020 Vision Brief 17 (1995), *available at* http://www.ifpri.org/2020/briefs/number17.htm.

[139] *See, e.g.*, Mehra and Gammage, *supra* note 16, at 539; Doss, *supra* note 137; WORLD BANK, *supra* note 5, at 51–52 and 120–22.

[140] Mehra and Gammage, *supra* note 16, at 539.

[141] UN, *supra* note 9, at 11–121.

[142] Sally Baden, *Gender Issues in Agricultural Liberalization*, BRIDGE Report No. 41 (1998), at ii, *available at* http://www.ids.ac.uk/bridge; *see also* MALHOTRA ET AL., *supra* note 29, at 133–35; G&T Task Force, *supra* note 16, at 77–140; WILLIAMS, *supra* note 32, at 62–68.

[143] *See, e.g.*, Arndt and Tarp, *supra* note 61; Baden, *supra* note 142; William Darity, Jr., *The Formal Structure of a Gender-Segregated Low-Income Economy*, 23 WORLD DEV. 1963 (1995); James M. Warner and D.A. Campbell, *Supply Response in an Agrarian Economy with Non-Symmetric Gender Relations*, 28 WORLD DEV. 1327 (2000).

crops. Women farmers may therefore resist or undermine male family members' efforts to expand production of export crops.[144]

On its face, the Uruguay Round Agreement on Agriculture does not display overt gender bias. The agreement extends "special and differential treatment" to developing countries in several respects. Moreover, a number of its "green box" exemptions from aggregate limits on domestic supports—for example, for extension services, food security stocks, domestic food aid and disaster relief—would seem likely to benefit women farmers in developing countries.[145] However, the underlying objective of the agreement is to facilitate agricultural exports. As noted above, women farmers in many developing countries are primarily responsible for household food production, and therefore household food security and sufficiency are high priorities.[146] The Agreement on Agriculture does include a domestic support exemption for "food security" stocks. However, the agreement treats food security in terms of government (or international) support rather than household self-sufficiency.[147]

At the Fourth Ministerial Conference in Doha, one of the proposals put forward by developing countries, with the support of civil society groups, was for the creation of a "development box." Among other things, this proposal would allow developing countries to exclude certain staple crops from their tariff reduction commitments and also allow governments to provide greater support to poor farmers. Similar proposals were floated at the Fifth Ministerial Conference in Cancún for a "special products" category and a "special safeguard mechanism" to address the food security and rural development needs of developing countries.[148] These proposals address the general bias of the Agreement

[144] *See* Warner and Campbell, *supra* note 143; *see also* Baden, *supra* note 142. A recent assessment of Uganda's Strategic Export Initiative also concluded that insufficient attention had been paid to the gender aspects of micro-level supply constraints in the coffee and fish sectors. Based on Ugandan case studies, the researchers warned that "women may withhold their labour or sabotage cash crops in several subtle ways because they know they will not benefit from the income earned." David Booth et al., *The Strategic Exports Initiative in Uganda: Poverty and Social Impact Analysis* (2003), at 25–26, *available at* http://lnweb18.worldbank.org/ESSD/sdvext.nsf/81ByDocName/CountryExperienceUgandaexportpromotionprogram. The researchers also observed that, because of men's spending priorities, "improvements in incomes controlled by men . . . might not significantly enhance welfare for other household members, especially women and children." *Id*. at 26. For example, in the export fishing sector, increased cash income to many fishermen appeared to be "fuelling greater recreational expenditure by men, with reported increases in alcoholism and prostitution, rather than income sharing that might moderate the negative impacts on women and children." *Id*. at 27. *See also* Robb, *supra* note 36.

[145] *Agreement on Agriculture*, Annex 2 (bases for exemptions from commitments to reduce domestic supports).

[146] Food security is not only a fundamental public policy concern, but a fundamental human right, reflected in Article 25 of the Universal Declaration of Human Rights, Article 11 of the International Covenant on Economic, Social and Cultural Rights, and Article 14 of CEDAW (which addresses the situation of rural women). UNHCHR recently analyzed the liberalization of agriculture trade and the Agreement on Agriculture from a human rights perspective, taking into account the right to food and the right to development. *See* UNHCHR, *Globalization and Its Impact on the Full Enjoyment of Human Rights*, Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights resolution 2001/32, U.N. Doc. E/CN.4/2002/54 (2002).

[147] *See Agreement on Agriculture*, Annex 2, para. 3 (exemption from domestic support commitments for accumulation of public food stocks).

[148] *See, e.g.*, *ACP Declaration on the Fourth Ministerial Conference, Communication from Kenya*, WT/L/439 (Nov. 9, 2001) ("*ACP Declaration*"), para. 20; *Declaration of the Group of 77 and China on the Fourth WTO Ministerial Conference at Doha, Communication from Cuba*, WT/L/424 (Oct. 24, 2001) ("*Group of 77 Declaration"),* para. 9; FAO, *Some Issues Relating to Food Security in the Context of the WTO Negotiations on Agriculture* (2001), *available at* http://www.fao.org/trade/docs/; Duncan Green and Shishir Priyadarshi, *Proposal for a "Development Box" in the WTO Agreement on Agriculture*, CAFOD Policy

on Agriculture toward agricultural exports. They would need to be complemented by gender-sensitive agricultural policies and targeted resources in order to benefit women farmers, who have historically been excluded from agricultural extension services, credit programs and other support.[149]

C. Services Trade and the General Agreement on Trade in Services

Over the past decade, services were the fastest growing sector in the global economy,[150] and significant proportions of services jobs are now occupied by women in both industrialized and developing countries. However, patterns of gender segregation are found here as in manufacturing. In developing countries, for example, women tend to be concentrated in lower-paying jobs in trade, restaurants and hotels and community, social and personal services, with only a small percentage employed in higher-paying subsectors such as finance, insurance and business services. Women are well-represented in professional and technical jobs, but are heavily concentrated in teaching, nursing and other traditional "women's" occupations.[151] While the public service sector historically provided more skill-intensive, waged jobs for women in many countries, public sector downsizing in connection with structural adjustment programs in many developing and transitional countries has eliminated or outsourced many of these jobs.[152]

It is difficult to generalize about the gender-differentiated impacts of services trade agreements, given the wide range of subsectors covered and the potential application of services trade agreements to public/private service providers as well as "pure" private providers. Moreover, women as well as men participate in services not only as consumers, but also as employees and owners of service providers. However, a number of gender-related concerns have been raised about the Uruguay Round General Agreement on Trade in Services ("GATS"). Some of these concerns relate to the potential impact on women of liberalizing particular services subsectors. For example, in connection with tourism, evidence indicates that the vast majority of jobs filled by women are in less stable and lower-paying areas such as housekeeping, food preparation, reception and petty trading, as well as sex work.[153] In connection with financial sector liberalization, it is not clear that liberalization has had direct, positive effects on small-scale borrowers and savers, including particularly women.[154] Moreover, financial sector liberalization frequently accompanies capital account liberalization; as demonstrated in the Asian

Paper (2001), *available at* http://www.cafod.org.uk/policy/devbox.htm; International Centre for Trade and Sustainable Development, *Agriculture Negotiations at the WTO: Post-Cancún Outlook Report* (2003), *available* at http://www.ictsd.org; Oxfam International, *Harnessing Trade for Development* (2001), *available at* http://www.oxfam.org/eng/policy_pape.htm; *see also* MALHOTRA ET AL., *supra* note 29, at 138–41; American Lands Alliance et al., Collective Comments re: Doha Ministerial Declaration (Oct. 25, 2002), *available at* http://www.ciel.org; Tim Ruffer and Paolo Vergano, *An Agriculture Safeguard Mechanism for Developing Countries* (2002), *available at* http://www.dfid.gov.uk.

[149] GAMMAGE ET AL., *supra* note 44, at 39; *see also* WILLIAMS, *supra* note 32, at 68–74. Although the Doha Ministerial Declaration did not endorse the "development box" proposal, it did include a commitment "to enable developing countries to effectively take account of their development needs, including food security and rural development." WTO, *Ministerial Declaration*, Adopted on Nov. 14, 2001, Ministerial Conference, Fourth Session, Doha, Nov. 9–14, 2001, WT/MIN(01)/DEC/1 (Nov. 20, 2001), para. 13.

[150] WORLD BANK, *supra* note 113, at 69.

[151] Mehra and Gammage, *supra* note 16, at 543.

[152] GAMMAGE ET AL., *supra* note 44, at 61–63.

[153] *See* WILLIAMS, *supra* note 32, at 110–15.

[154] *See* Sally Baden, *Gender Issues in Financial Liberalisation and Financial Sector Reform*, BRIDGE Report No. 39 (1996), at iv–v, *available at* http://www.ids.ac.uk/bridge.

financial crisis, these combined liberalizations can increase an economy's vulnerability to external shocks, which in turn can disproportionately affect women.[155]

Since WTO members' commitments under the GATS can extend to basic services such as education, health care and water supply, the GATS touches on a number of human rights and related development priorities, which also have gender dimensions.[156] For example, in a recent report, the UN High Commissioner for Human Rights noted the possibility that liberalization of basic services such as health could lead to a two-tiered supply of health services, with private providers (including foreign providers) catering to the "healthy and wealthy" and underfinanced public health care providers treating the "poor and sick."[157] Poor women who depend on public health services for reproductive care and medical care of children would be particularly affected under this scenario.

Even within the same services subsector, different gender issues may arise depending on the "mode" of services involved. In the health sector, for example, potential gender-related impacts have been identified under each of the four modes of supply specified in the GATS: cross-border supply, consumption abroad, commercial presence and movement of natural persons.[158] In each of these cases, impacts may vary depending on the country's level of development, health care policies, health insurance schemes and other factors. The issues related to Mode 3 (commercial presence), for example, are similar to those raised with regard to the TRIMs Agreement.[159] In the case of Mode 3 supply of basic services such as health care, there are also the concerns noted above about the implications of a two-tier system for health service delivery to poor and vulnerable groups, including women.[160]

The issues related to Mode 4 (movement of natural persons) are complex, especially in relation to critical services such as health care. On the one hand, liberalization of this mode (much of which predates the GATS) has opened up opportunities for many nurses and other health care providers, particularly from developing countries, to take better paying jobs in other countries. On the other hand, there is the risk of a "brain drain" of health care professionals from developing countries, leaving fewer qualified health care providers in the "services-exporting" country. Nevertheless, developing countries have called for further liberalization of Mode 4, particularly by industrialized countries, to expand opportunities for workers to migrate legally to those countries.[161] This could have beneficial gender impacts if Mode 4 liberalization takes place in subsectors were women are active. Increased opportunities for regular migration would also help to stem some of

[155] *See, e.g.*, Floro and Dymski, *supra* note 55; Singh and Zammit, *supra* note 55; G&T TASK FORCE, *supra* note 16, at 175–213.

[156] *See, e.g.*, *Universal Declaration of Human Rights*, Art. 25 (right to health) and Art. 26 (right to education); International Covenant on Economic, Social and Cultural Rights, Art. 12 (right to health) & Art. 13 (right to education); CEDAW, Art. 10 (equal access to education), Art. 12 (equal access to health care services) and Art. 14.2(h) (equal enjoyment of adequate living conditions, including water supply). *See also* WILLIAMS, *supra* note 32, at 87–109; Lyla Mehta and Birgit La Cour Madsen, *Is the WTO After Your Water?: The GATS and the Basic Right to Water*, Paper for Globalisation and Poverty Research Programme, Institute of Development Studies, University of Sussex (2003), *available at* http://www.gapresearch.org/about/index.htm; Alexandra Spieldoch, *GATS and Healthcare—Why Do Women Care?* (2001), *available at* http://www.igtn.org.

[157] UNHCHR, *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights*, Report of the High Commissioner for Human Rights, at 3, U.N. Doc. E/CN.4/Sub.2/2002/9 (2002).

[158] WILLIAMS, *supra* note 32, at 90–106; Spieldoch, *supra* note 156; *see also* UNHCHR, *supra* note 157 (raising more general human rights concerns related to the GATS' four modes of services supply).

[159] *See supra* Section III.A.4.

[160] *See supra* note 157 and accompanying text.

[161] *See, e.g., ACP Declaration, supra* note 148, para. 21.

the flow of irregular migrants from developing countries. Since undocumented female workers are particularly subject to abuse by agents and employers, increased opportunities to migrate legally—even under temporary work visas—would be beneficial.[162]

There are a number of uncertainties relating to the GATS that also have gender implications. These include the prospect of new, stringent disciplines on subsidies, domestic regulations and government procurement. Regarding subsidies, for example, WTO members already must disclose the subsidies they provide on services in their commitment schedules for the relevant services subsectors.[163] This imposes a burden on countries, especially developing countries, to make sure they list every conceivable subsidy or other "preference." It may also discourage countries from introducing new programs—such as small business assistance to women and minority entrepreneurs in a particular subsector, such as travel services—which might be characterized as new subsidies under the GATS. Article XV, which provides for negotiations to develop "disciplines" on subsidies in the services sector, poses a risk of further restricting governments' latitude to introduce assistance programs to domestic service providers that are owned by women or other historically disadvantaged groups.[164]

Another concern relates to the possibility of stricter disciplines on domestic regulation of services, based on Article VI of the GATS, which calls for the development of rules to ensure that qualification and licensing requirements, and technical standards, are "not more burdensome than necessary to ensure the quality of the services."[165] In particular, questions have been raised about the potential application of this "necessity" test. For example, would consumer protection, worker safety or environmental regulations qualify as "necessary to ensure the quality of services"?[166] Responding to these concerns, the Fourth Ministerial Conference in Doha reaffirmed the right of WTO members under GATS to "regulate, and introduce new regulations on, the supply of services."[167] However, a country could still be required to make a "compensatory adjustment" under Article XXI of the agreement if a new regulation of services effectively modified the country's market access commitments under the GATS. This compensation requirement could impose a serious financial burden on developing countries, and therefore would effectively discourage developing countries from making certain regulatory changes in sectors that they have committed to liberalize under the GATS.

Article XIII of the GATS, which provides for future multilateral negotiations on government procurement of services, has also raised concerns from a gender perspective. Specifically, there is a worry that the application of most-favored-nation and national treatment principles to government procurement could conflict with governments' pursuit of social and environmental goals through their procurement policies, such as "green procurement" requirements and programs designed to help women, ethnic minorities, and other groups to obtain an equitable share of government contracts. This concern is based

[162] At the same time, it should be noted that even workers with visas may be subject to abuse. *See, e.g.*, Human Rights Watch, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States* (2001).

[163] *See General Agreement on Trade in Services* ("GATS"), Art. XVII (WTO members must accord national treatment to services and service providers of any other member in the sectors for which specific commitments have been made, subject only to the conditions and qualifications set out in the specific commitment schedule).

[164] *Cf. supra* text accompanying notes 125–29 (gender analysis of SCM Agreement, applicable to subsidies related to trade in goods).

[165] *Id.,* Article VI.4(b).

[166] *Cf. infra* text accompanying notes 185–96 (gender analysis of Agreements on the Application of Sanitary and Phytosanitary Measures and Technical Barriers to Trade, applicable to food safety and health regulations on traded goods); *see* GAMMAGE ET AL., *supra* note 44, at 61.

[167] WTO, *supra* note 149, ¶ 7.

on a critical reading of the plurilateral Agreement on Government Procurement ("AGP") and comparable provisions in other trade agreements such as NAFTA. Article XXIII of the AGP, for example, includes a blanket exception for products and services of handicapped persons and philanthropic institutions. However, procurement preferences for businesses owned by women, ethnic minorities and other marginalized groups are not generally protected under the AGP. Parties to the AGP have claimed exemptions for such programs in their annexes to the agreement.[168] However this "bottom-up" approach of claiming exemptions for preferential procurement schemes in countries' commitment schedules rather than including general exemptions in the text of the trade agreement can inhibit countries from introducing new programs to assist women and minority business owners in the future (unless the scheduled exemptions are sufficiently broad), for fear of inviting claims from other countries for compensatory adjustment, on the basis that the procurement preferences discriminate against foreign bidders or create unnecessary obstacles to international trade.[169]

D. Trade-Related Areas

1. Investment

The gender dimensions of international agreements related to FDI are discussed elsewhere in this chapter, in relation to the TRIMs Agreement for FDI in manufacturing,[170] and in relation to the GATS for FDI in commercial services.[171]

2. Intellectual Property

Perhaps the most controversial trade-related area in which international trade rules have been introduced is intellectual property protection ("IPP"). Much of the current debate revolves around the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs Agreement"),[172] although similar concerns have also been raised with regard to regional and bilateral agreements on IPP. As discussed extensively elsewhere, the TRIPs Agreement has been roundly criticized on economic,[173] human rights[174] and development[175] grounds. These critical perspectives—in particular,

[168] For example, in the "General Notes" included in its annex, the United States asserts that its commitments do not apply to "set asides on behalf of small and minority businesses." Women-owned businesses are not specifically mentioned in these notes, but they are expressly excluded from the commitments of state governments listed elsewhere in the annex.

[169] *See* GAMMAGE ET AL., *supra* note 44, at 63–65.

[170] *See supra* Section III.A.4.

[171] *See supra* text accompanying notes 159 and 160.

[172] For a detailed analysis of the Agreement, *see* Chapters 22 and 54 of this book.

[173] *See, e.g.*, COMMISSION ON INTELLECTUAL PROPERTY RIGHTS ("CIPR"), INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY (2002), at 15 (summarizing economists' critiques of IPP regimes in terms of economic costs of monopoly privileges and high implementation costs of IPP regimes); Finger and Schuler, *supra* note 103 (analyzing survey results on implementation costs of TRIPs Agreement and two other Uruguay Round agreements); Rodrik, *supra* note 118, at 27 (TRIPs Agreement is "utterly devoid of any economic rationale . . . "); WORLD BANK, *supra* note 113, at 129–39 (summarizing econometric and other studies of impact of TRIPs Agreement and IPP regimes on trade, FDI, administrative costs, rent transfers from technology importers to technology developers, prices of patent drugs, agricultural inputs and use of plant genetic materials).

[174] *See, e.g.*, UNHCHR, *Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, Report of the High Commissioner, U.N. Doc. E/CN.4/Sub.2/2001/13 (2001).

[175] *See, e.g.*, CIPR, *supra* note 173 (extensive critical analysis of TRIPs Agreement from development perspective, and recommendations for reform, in relation to health, agricultural and genetic resources, traditional knowledge, computer software and Internet use, and IPP policy and implementation); MALHOTRA

those raising human rights and development concerns—have both explicit and implicit gender dimensions. The objective of this section is to highlight some of the more specific gender issues raised by the TRIPs Agreement and similar regional and bilateral agreements.

A gender-aware analysis of the TRIPs Agreement recognizes that women, as well as men, are both producers and users of intellectual property. For example, female subsistence farmers both use seeds and contribute to the development of new plant varieties. Women are the primary consumers of reproductive health services and related medicines, and in most societies, women are primarily responsible for the health care of children and other dependents within households. In many societies, including indigenous communities, women also serve as traditional health care providers and are primary sources of knowledge on the use of medicinal plants. These multiple roles point to the gender dimensions of the TRIPs Agreement's provisions on patents (particularly relating to pharmaceutical drugs and plant varieties), and its relation to other international instruments such as the Convention on Biological Diversity, the International Convention for the Protection of New Varieties of Plants ("UPOV Convention"), and the International Treaty on Plant Genetic Resources for Food and Agriculture.

Some general observations can be made about the gender-differentiated effects of the TRIPs Agreement. First, IPP generally results in income transfers from consumers of protected goods to the owners of the intellectual property content in those goods (usually through licensing fees or royalty payments from the manufacturer to the intellectual property owner). Because women are predominantly consumers rather than licensed producers, they are likely to be net "losers" in economic terms under the TRIPs Agreement, which requires WTO members to significantly expand and strengthen their IPP regimes. As producers of intellectual property—including artists, craftspeople, scientists, farmers and indigenous experts on plant varieties—women in theory have an equal opportunity to seek protection of their creations, inventions and specialized knowledge under the IPP regimes required under the TRIPs Agreement. However, for various reasons, many women are unlikely to benefit from conventional IPP regimes.

First, women often have limited access to resources, and therefore may not have the financial means to apply for and defend a copyright, trademark or patent. Second, in societies where women have limited property rights, they may be unable to assert their rights over an innovation or artistic work, which might instead be claimed by other family members or community leaders. Third, much of the technical knowledge and artistic or cultural work developed by women, particularly as small farmers and members of indigenous communities, is collectively owned and accumulated over time. This sort of knowledge therefore does not lend itself easily to protection under conventional intellectual property rules. Therefore, the standards for IPP set out in the TRIPs Agreement provide few benefits to these innovators.[176]

As noted earlier, women represent half of the total number of people worldwide who are infected with the HIV virus, and the percentage is much higher in Sub-Saharan Africa, particularly among young women.[177] These statistics have caused the UN Secretary

ET AL., *supra* note 29, at 205–23; THIRD WORLD NETWORK, *supra* note 120, at 43–44; WORLD BANK, *supra* note 113, at 139–49 (recommendations for reform of TRIPs Agreement and other initiatives to ensure that IPP regimes benefit developing countries).

[176] GAMMAGE ET AL., *supra* note 44, at 77; MALHOTRA ET AL., *supra* note 29, at 217; G&T TASK FORCE, *supra* note 16, at 251–85; WILLIAMS, *supra* note 32, at 139–46.

[177] *See supra* text accompanying note 19.

General to observe that "in Africa, AIDS has a woman's face."[178] Therefore, the *Declaration on the TRIPs Agreement and Public Health* adopted at the Fourth Ministerial Conference in Doha—specifically its directives on the use of compulsory licenses by developing countries and extension of least-developed countries' exemption from the requirement to provide patent protection for pharmaceutical drugs—and subsequent decision of the WTO General Council on compulsory licenses, are directly relevant to women, particularly women in Sub-Saharan Africa and other regions with increasing HIV/AIDS infections.[179] However, it has been pointed out that the emphasis placed on increasing governments' flexibility to issue compulsory licenses in cases of "national emergency," including "public health crises . . . related to HIV/AIDS, tuberculosis, malaria and other epidemics,"[180] excludes consideration of life-threatening, gender-specific medical conditions and life-threatening illnesses prevalent in specific ethnic groups. Thus, if patented drugs were available to treat any of these conditions, but were prohibitively expensive for a developing country subject to the TRIPs Agreement, it could be more difficult for the country to use the full flexibility of Article 31 of the agreement on compulsory licenses because these conditions are not a health risk to the entire population and therefore would not be considered "epidemics" or "national emergencies".[181]

The UN Food and Agriculture Organization has observed that

> In many areas, the majority of smallholder farmers are women. They are largely responsible for the selection, improvement and adaptation of plant varieties. In many regions, women are also responsible for the management of small livestock, including their reproduction, and they often have a more highly specialized knowledge of wild plants used for food, fodder and medicine than men.[182]

Women in many countries therefore play critical roles not only in ensuring food security for their households and communities, but in preserving biological diversity. However, the TRIPs Agreement does not include any provisions on the protection of traditional knowledge. Moreover, to the extent that WTO members choose to protect plant varieties—as required by Article 27 of the TRIPs Agreement—by extending patent protection or adopting the most recent version of the UPOV Convention, and patented or UPOV-protected varieties of staple crops are introduced in developing countries, small farmers' traditional practice of saving seeds may be challenged. This would have a disproportionate impact on women farmers in these countries, since they have relatively less access to credit to purchase seeds and other inputs.

At the Fourth Ministerial Conference in Doha, WTO members directed the Council for TRIPs "to examine, inter alia, the relationship between the TRIPs Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by the Members . . . "[183] In reviewing

[178] Kofi Annan, UN Secretary General, *In Africa, AIDS Has a Woman's Face*, N.Y. TIMES and INT'L HERALD TRIBUNE, Dec. 29, 2002, at Op-Ed Pages, *available at* http://www.un.org/News/ossg/sg/stories/sg-29dec-2002.htm.

[179] *See* WTO, *Declaration on the TRIPs Agreement and Public Health*, Adopted on Nov. 14, 2001, Ministerial Conference, Fourth Session, Doha, Nov. 9–14, 2001, WT/MIN(01)/DEC/2 (Nov. 20, 2001) ("Doha Public Health Declaration"); WTO, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Decision of the General Council of Aug. 30, 2003, WT/L/540 (Sept. 1, 2003).

[180] Doha Public Health Declaration, *supra* note 179, ¶ 5.

[181] *See* WILLIAMS, *supra* note 32, at 142–44.

[182] Food and Agriculture Organization ("FAO"), *FAO Gender and Development Plan of Action (2002–2007*), para. 41, *available at* http://www.fao.org/docrep/meeting/003/Y1521e.htm.

[183] WTO, *supra* note 127, ¶ 19.

these areas, the TRIPs Council was further instructed to "take fully into account the development dimension."[184] The gender issues noted above, which are especially relevant to developing countries, could be taken into account in the TRIPs Council's ongoing work program.

3. Domestic Regulation

With the increasing focus on "behind-the-border" issues affecting international trade, there is a general trend in WTO and other trade agreements to "discipline" domestic regulations that affect trade. As noted earlier, the GATS provides for the negotiation of rules on qualification and licensing requirements and technical standards in the services sector.[185] The trend is reflected most prominently in the Uruguay Round Agreements on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") and Technical Barriers to Trade ("TBT Agreement"), both of which apply to regulations on traded goods.

Several concerns have been raised by developing country governments, civil society groups and academic commentators about the growing impact of trade rules on the regulatory function of governments. Some commentators have argued, for example, that the standard for review of technical regulations in the TBT Agreement—"not more trade-restrictive than necessary to fulfill a legitimate objective"[186]—tips the balance of factors to be considered by government regulators too heavily in favor of trade, and away from other legitimate goals such as public health, consumer protection, and protection of the environment.[187] The requirement in the SPS Agreement that SPS measures be "based on scientific principles and . . . not maintained without sufficient scientific evidence"[188] has also been critiqued as inherently biased against regulation, since data on the health risks of a particular substance may not become available for a considerable period of time and, in any case, scientific research sets a higher standard to prove that a particular substance has harmful effects than that it does not.[189]

On the other hand, many developing countries have become extremely concerned about the cost of complying with the SPS Agreement, since they view SPS measures imposed by importing countries as a major impediment to their agricultural and food exports.[190] Both developing countries and civil society groups have also been critical of the presumptions created in both the SPS and TBT Agreements in favor of standards set by international bodies such as the Codex Alimentarius Commission ("Codex"), in which they argue that their interests are not adequately represented. In response to these concerns, the Fourth Ministerial Conference in Doha urged WTO members to provide

[184] *Id.*

[185] *See supra* text accompanying notes 166 and 167.

[186] *Agreement on Technical Barriers to Trade*, Art. 2.2

[187] *See, e.g.,* Carlos M. Correa, *Implementing National Public Health Policies in the Framework of WTO Agreements,* 34 J. WORLD TRADE 89 *(2000); see also* Bal, *supra* note 109; Garcia, *supra* note 109.

[188] *Agreement on the Application of Sanitary and Phytosanitary Measures,* Art. 2.

[189] Some commentators have noted that "[s]cientific research begins with the premise that there is no effect, referred to as the 'null hypothesis.' The task of statistical analysis is to examine, based on available data, whether the null hypothesis can be rejected with a certain level of confidence. However, because of small sample size, measurement problems and model specification issues, the scientific research may not be able to reject the null hypothesis, even where a true relationship exists between variables." GAMMAGE ET AL., *supra* note 44, at 89.

[190] S. Henson and R. Louder, *Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements*, 29 WORLD DEV. 85 (2001) (results of survey conducted by researchers at University of Leeds).

technical assistance to help least-developed countries respond to new SPS and TBT measures imposed by importing countries, and called on the WTO Director General to facilitate greater participation of developing countries in international standard-setting organizations.[191]

These concerns also have gender dimensions. For example, as noted above, some international standard-setting bodies referred to in the SPS and TBT Agreements, such as Codex, have longstanding ties to industry members and associations, and have not historically been open to consumer and other citizens' groups.[192] It is therefore possible that the standards set by these bodies may not reflect the concerns of women, particularly from developing countries. In addition, until recently, less medical research was devoted to women's health issues, and therefore less data may be available on the long-term effects on women of exposure to certain pollutants or other harmful substances.[193] Thus, should a country choose to regulate a particular substance more stringently than the applicable international standard in order to address health risks to women, it could be more difficult to establish a sufficient scientific basis for the regulation under the SPS Agreement.

Finally, concerns have also been raised about the sensitivity of GATT/WTO panels and the WTO Appellate Body to women's health issues in their reviews of particular health-based regulations. Both the WTO Appellate Body and the roster of panelists available to consider disputes under WTO agreements include primarily international law experts, and more specifically, experts in international trade law. WTO dispute panels also have considerable flexibility to engage experts to advise on scientific and other technical matters.[194] There is no assurance that these experts will be aware of the gender-differentiated health effects of particular substances as they review regulations intended to restrict their use. Commentators have noted, for example, that arguments regarding gender-specific health hazards were not received favorably by the GATT panel in the *Thailand-Cigarettes* case brought by the United States in the late 1980s to challenge the Thai government's import ban on cigarettes,[195] or in the WTO Appellate Body's more recent review of the panel report in the *European Community-Hormones* case challenging the European Union's ban on the sale of beef from cattle treated with artificial growth hormones.[196]

[191] WTO, *supra* note 127, ¶ 3.5–3.6 and 5.3–5.4.

[192] *See* D.G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. Int'l L. & Pol. 865 (2000).

[193] Gammage et al., *supra* note 44, at 93; World Health Organization ("WHO"), *Gender and Health*, WHO Technical Paper, WHO/FRH/WHD/98.16 (1998), *available at* http://www.who.int/reproductive-health/publications; *see also* Olga Ohanjanyan, *Persistent Organic Pollutants and Reproductive Health*, WECF Background Document (1999), *available at* http://www.earthsummit2002.org; Pamela Ransom, *Women, Pesticides and Sustainable Agriculture*, CSD NGO Women's Caucus Position Paper (2001), *available at* http://www.earthsummit2002.org.

[194] *See* C. Thorn and M. Carlson, *The Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade*, 31 L. & Pol. Int'l Bus. 841 (2000).

[195] *See* Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 Am. U. Int'l L. Rev. 1129, 1141–45 and n. 54 (1999) (GATT panel rejected evidence put forward by the WHO that American cigarettes presented a public health risk for Thai women because they were perceived as safer and more socially acceptable than locally-made cigarettes, and that some American brands were specifically packaged and marketed to Thai women); *see also* Correa, *supra* note 187.

[196] *See* Steve Charnovitz, *The Supervision of Health and Biosafety Regulation by World Trade Rules*, 13 Tulane Env't L.J. 271 (2000) (WTO Appellate Body dismissed testimony from an expert from the U.S. National Institute of Environmental Health Sciences regarding the increased risk of breast cancer from eating meat produced with growth hormones); *see also* Orford 1999, *supra* note 76.

4. Labor Standards

As discussed elsewhere,[197] the only express reference to labor issues in the GATT is the exception included for goods and services made with prison labor.[198] The Fourth Ministerial Conference in Doha confirmed that a majority of WTO members continue to believe the ILO rather than the WTO is the appropriate international forum in which to address labor issues related to the trade in goods and services.[199] However, labor issues in the global economy are being addressed in a number of other settings, including regional and bilateral trade agreements, the ILO and the World Commission on the Social Dimensions of Globalization for which it acts as secretariat, various UN bodies, and private sector initiatives to develop corporate codes of conduct. This section is intended to identify some of the gender issues that can arise in the application of labor standards to the trade in goods and services.

Much of the current debate about the impact of trade liberalization on conditions of work has focused on industries in which women are widely employed, typically in low-skilled, low-wage jobs or under subcontracting arrangements, such as textile and clothing manufacturing and menial work in hotels and other "hospitality" businesses. Historically, international labor standards and national labor laws have been framed to protect full-time workers in formal business establishments. Therefore, they have provided little benefit to the women in many countries who work in agriculture or are involved in part-time work, home-based work and small-scale trading. Over time, however, the ILO and some national governments have begun to address the needs of part-time and informal sector workers, as reflected in new labor standards and laws developed to protect these workers. The ILO, for example, has adopted the Part-Time Work Convention, 1994; the Home Work Convention, 1996; and the Safety and Health in Agriculture Convention, 2001, which includes provisions on women workers and temporary and seasonal agricultural workers.

Another gender issue arises from the definition of "core" or "fundamental" labor standards. Among the core standards included in the ILO's Declaration on Fundamental Principles and Rights at Work are the elimination of discrimination in employment and equal pay for equivalent work, which are particularly important for women workers.[200] These standards are reflected in two fundamental ILO conventions: the Discrimination (Employment and Occupation) Convention, 1958, and the Equal Remuneration Convention, 1951. However, the core principles of non-discrimination and equal pay have secondary status, or are excluded altogether, from the labor provisions in some trade agreements. For example, under the North American Free Trade Agreement ("NAFTA"), these principles are included in the North American Agreement on Labor Cooperation ("NAALC"). However, they are "second-tier" rights that can be the subject of country consultations and study by an expert committee, but cannot be the basis for convening an arbitration panel or withdrawing trade benefits.[201] These labor principles are also excluded from the

[197] *See* Chapters 59 and 60 of this book.

[198] GATT, Art. XX(e); *see also Agreement on Government Procurement*, Art. XXIII(2).

[199] *See* WTO, *supra* note 149, ¶ 8.

[200] International Labour Organization ("ILO"), *ILO Declaration on Fundamental Principles and Rights at Work* (1998), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc86/con-dtxt.htm; *see also* ILO, *Time for Equality at Work: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2003).

[201] *See North American Agreement on Labor Cooperation,* signed on Sept. 13, 1993 and entered into force on Jan. 1, 1994, *available at* http://www.naalc.org/english/infocentre/NAALC.htm; HUMAN RIGHTS WATCH, TRADING AWAY RIGHTS: THE UNFULFILLED PROMISE OF NAFTA'S LABOR SIDE AGREEMENT (2001).

definition of "internationally recognized labor rights" in the labor provisions of recent US trade agreements with Chile, Jordan and Singapore, as well as from the definition of "international worker rights" that forms a basis for granting preferential trade status to developing countries under the U.S. Generalized System of Preferences ("GSP") and other preferential trade arrangements between the United States and developing countries.[202] In contrast, the ILO conventions on non-discrimination and equal pay are specifically included in the special incentive arrangements for the protection of labor rights under the European Community's current GSP scheme.[203]

Although non-discrimination and equal pay principles have "second-tier" status under NAFTA, the NAALC has provided a vehicle for addressing some gender issues in employment. For example, the Secretariat of the Commission for Labor Cooperation produced a comprehensive report on women's employment in the NAFTA countries between 1984 and 1996, including a comparative study of the legal rights of women workers in the three countries.[204] As contemplated in the NAALC, the national administrative offices ("NAOs") of the three countries have also processed a number of submissions from labor and civil society groups relating to alleged violations of labor laws and regulations in workplaces that employ large numbers of women.

These submissions include one filed in 1996 by Human Rights Watch and two Mexican nongovernmental organizations, alleging that *maquiladora* employers in Mexico regularly discriminated against pregnant job applicants and employees. Following a review that included consultation with a Mexican labor law expert and a public hearing, the U.S. NAO reported that the submission raised serious issues regarding the treatment of women workers in Mexico's *maquiladora* sector, and recommended consultations between the U.S. and Mexican Secretaries of Labor.[205] The consultations resulted in the holding of workshops and conferences, and some companies with assembly factories in Mexico have since changed their policies on pregnancy-testing of job applicants. However, much of the academic commentary on the case has been critical of the outcome as not going far enough to address the practice.[206]

[202] *Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*, signed on Oct. 24, 2000, Art. 6.6; *United States—Chile Free Trade Agreement*, signed on June 6, 2003, Art. 18.8; *United States—Singapore Free Trade Agreement*, signed on May 6, 2003, Art. 17.7; Office of the United States Trade Representative, *U.S. Generalized System of Preferences Guidebook* (1999), at 24, *available at* http://www.ustr.gov. The labor cooperation mechanisms established under the US trade agreements with Chile and Singapore do mention the possibility of cooperative activities to eliminate employment discrimination, but the dispute settlement procedures of the agreements apply only to allegations that a state party has failed to effectively enforce its labor laws directly related to "internationally recognized labor rights," which are defined in the agreements to exclude non-discrimination and equal pay. *See also* Travis, *supra* note 82; *see generally* Blackett, *supra* note 109, at 22.

[203] *Activities of the European Union: Scheme of Generalised Tariff Preferences from 2002 to 2004, at* http://europa.eu.int/scadplus/leg/en/lvb/r11015.htm.

[204] Commission for Labor Cooperation Secretariat, *The Employment of Women in North America* (1998), *available at* http://www.naalc.org/english/publications/ewna.htm.

[205] United States National Administrative Office, North American Agreement on Labor Cooperation ("NAALC"), *Public Report of Review of NAO Submission No. 9701*, Jan. 12, 1998, *available at* http://www.dol.gov/dol/ilab/public/media/reports/nao/public-reports-of-review.html. The report concluded that, while pregnancy discrimination against *existing* employees clearly violates Mexican law, there were differing views within the Mexican government on the legality of pregnancy screening of *prospective* employees. (Mexico's Human Rights Commission took the view that pregnancy testing violates the Mexican Constitution, but the Mexican NAO under the NAALC took a different view.)

[206] *See, e.g.*, Andrias, *supra* note 79; Bremer, *supra* note 79; Briones, *supra* note 79; Grimm, *supra* note 79; Plumtree, *supra* note 79; Scherlen and Strickland, *supra* note 79; Smith, *supra* note 79; Vega, *supra* note 79; *see also* Human Rights Watch, *supra* note 201.

Finally, it should be noted that women's organizations have advocated strongly for adherence by governments and private sector firms to the ILO's core labor standards, and for attention to the particular needs of women workers, including maternity leave and childcare arrangements. However, they have mixed views about the appropriateness of using trade sanctions to address violations of labor standards in particular countries. The IGTN and its members, for example, share the concerns of other civil society groups in developing countries and developing country governments about the potential abuse of a "labor" or "social clause" by importing countries. They are also concerned about further expansion of the mandate of the WTO or other trade bodies into areas beyond their expertise.[207]

5. Human Rights

Since the conclusion of the Uruguay Round, there has been increasing concern about the implications of liberalized trade and investment and specific trade agreements for the promotion and protection of human rights.[208] This is reflected, for example, in reports of the UN High Commissioner for Human Rights regarding the Agreement on Agriculture, the GATS, the TRIPs Agreement, trade and investment, and non-discrimination principles in human rights and trade law,[209] and in statements of UN human rights treaty bodies.[210] As noted in previous sections, these human rights concerns have strong gender dimensions.[211] In addition, the expert CEDAW committee has raised specific human rights concerns related to women working in export-processing zones and in tourism in its concluding comments to country reports submitted by state parties to CEDAW.[212]

The human rights concerns raised within the UN system and by many civil society groups have related mainly to the potential impact of liberalized trade and compliance with particular trade agreements on the ability of countries to fulfill their commitments under human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights and CEDAW, through legislation and other domestic measures. Much of the general academic debate surrounding trade and human rights, however, has concerned the potential use of trade rules as sanctions to protest violations of the human rights of people in other trading countries. In this respect, the discussion dovetails closely with the trade-labor debate, since the human rights that are typically at issue are labor rights. One focus has been on the feasibility and desirability of interpreting Article

[207] *See IGTN at Doha*, *supra* note 48; *see also* WILLIAMS, *supra* note 32, at 35–36 and 171–72. Mariama Williams notes that the problem often is not so much the lack of labor standards as the lack of effective enforcement, and that the areas most in need of improvement in a particular country may not be export manufacturing industries.

[208] *See* Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753 (2002), n. 1–6 and accompanying text (concise overview of current trade/human rights debates).

[209] *See supra* note 134 (UNHCHR report on human rights issues in investment liberalization), note 146 (UNHCHR report on human rights implications of the Agreement on Agriculture); note 157 (UNHCHR report on human rights aspects of trade in services, specifically under the GATS); note 174 (UNHCHR report on the TRIPs Agreement and human rights).

[210] *See* Shelton, *supra* note 25 (surveys comments and resolutions of the CESCR and Sub-Commission related to trade and human rights). *see also* UNHCHR, *Economic, Social and Cultural Rights*: *Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Non-discrimination in the Context of Globalization*, Report of the High Commissioner for Human Rights, U.N. Doc. E/CN.4/2004/40 (2004); Paul Hunt, *Economic Social and Cultural Rights: the Right of Everyone to the Enjoyment of the Highest State of Physical and Mental Health–Mission to the World Trade Organization*, Report of the Special Rapporteur, Addendum, U.N. Doc. E/CN.4/2004/49/Add.1 (2004) (analysis of the right to health and selected trade issues including gender and trade).

[211] *See supra* notes 145–47, 156–57 and 172–84 and accompanying text.

[212] *See supra* note 25 and accompanying text.

XX(a) of the GATT—the "public morals" exception—to sanction trading countries that violate fundamental human rights.[213] Another approach has been to restrict government procurement of goods and services from companies doing business in countries where there are widespread human rights violations.[214] At another level, there is vigorous ongoing debate about the appropriate role of the WTO in taking into account the human rights concerns and treaty commitments of member countries.[215]

As noted earlier in the chapter, there has been some discussion of the possibility of interpreting Article XX(a) of the GATT to justify trade sanctions against countries where discriminatory or abusive practices against women are permitted.[216] However, most of the academic commentary on gender, trade and human rights has focused on the impacts of liberalized trade, specific trade agreements and international economic institutions such as the IMF, World Bank and WTO on women's human rights, particularly in developing countries.[217] In general, many of the commentators view international trade rules, not as tools for promoting women's rights, but as potential obstacles to their realization. Another theme in much of their writing is the inadequacy of state-centered human rights law to address the conduct of non-state actors, including both international economic institutions and multinational companies.[218] These concerns are also shared by many women's organizations. As in the case of labor standards, however, there is concern about the use of trade sanctions to protest human rights violations—including violations of women's rights—in other countries, because of the fear of protectionist motivations in the sanctioning country and the potential negative impact of trade sanctions on women and other vulnerable groups in the targeted country.

6. Environment

Although often underestimated, women play a critical role in the sustainable use of natural resources, particularly in rural societies, where they are generally responsible for providing water, food, fuel, clothing and health care for their households. As noted earlier, women contribute substantially to the preservation of biodiversity as subsistence farmers and users of medicinal plants and other forest products.[219] The degradation and depletion of environmental resources therefore can disproportionately affect women in many countries. Moreover, research indicates that exposure to pesticides and other pollutants can have a variety of negative impacts on reproductive health.[220] Women and women's

[213] *See supra* note 109 and accompanying text.

[214] *See, e.g.*, Robert Stumberg, *Preemption and Human Rights: Local Options After Crosby v. NFTC*, 32 L. & POL'Y INT'L BUS. 109 (2000).

[215] *See, e.g.*, Ernst-Ulrich Petersmann, *Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002); Robert Howse, *Human Rights in the WTO: Whose Rights? What Humanity? Comment on Petersmann*, 13 EUR. J. INT'L L. 651 (2002); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815 (2002); Ernst-Ulrich Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston,* 13 EUR. J. INT'L L. 845 (2002).

[216] *See* Jarvis, *supra* note 78; *see also supra* text accompanying note 109.

[217] *See supra* notes 77–84 and accompanying text.

[218] *See supra* note 81 and accompanying text.

[219] *See supra* text accompanying note 182; *see also* Janet N. Abramovitz, *Biodiversity and Gender Issues: Recognizing Common Ground*, in FEMINIST PERSPECTIVES ON SUSTAINABLE DEVELOPMENT (Wendy Harcourt ed. 1994), at 201–02; Vandana Shiva, *Women's Indigenous Knowledge and Biodiversity*, in ECOFEMINISM (Maria Mies and Vandana Shiva eds. 1993), at 164–69.

[220] *See, e.g.,* Ohanjanyan, *supra* note 193; Ransom, *supra* note 193; *see also* MALHOTRA ET AL., *supra* note 29, at 320.

organizations therefore have been active in national movements on environmental issues,[221] as well as at international environmental conferences such as the UN Conference on Environment and Development held in Rio de Janiero in 1992, and the recent World Summit on Sustainable Development held in Johannesburg in 2002.[222]

Some of the gender dimensions of environmental issues related to the Agreement on Agriculture, and the TRIPs, SPS and TBT Agreements have been discussed in previous sections.[223] Consideration of gender roles in natural resource management and biodiversity conservation, and the gender-differentiated impacts of environmental degradation and pollution, are also relevant to the ongoing work of the WTO Committee on Trade and Environment. This includes, in particular, the directive from the Ministerial Conference in Doha to examine the relationship between WTO rules and trade-related provisions of multilateral environmental agreements such as the Convention on Biological Diversity, as well as environmental labeling.[224]

E. WTO Processes

The governance structure of the WTO, although in place for less than ten years, has been scrutinized extensively by academic commentators, policy analysts and civil society groups.[225] In particular, commentators have noted that, despite the WTO's one-country, one-vote system, the GATT legacy of informal, "green room" negotiations and decision-making works to the disadvantage of smaller, developing country members, many of which do not have the resources to maintain permanent WTO missions in Geneva. Parliamentarians and civil society groups have also sought to participate more directly in trade negotiations, dispute settlement, trade policy review and trade-related capacity building. This section highlights some of the gender issues related to these key WTO processes.

1. Trade Negotiations

The gender composition of professional staff in the WTO secretariat is more balanced in the aggregate than that of the IMF, World Bank or United Nations.[226] However, as in those other international organizations, the representation of women at senior levels is quite low.[227] Moreover, unlike the World Bank, regional development banks and the United Nations system, the WTO secretariat staff does not include gender specialists. The WTO secretariat therefore has little capacity to identify and analyze the gender dimensions of current WTO rules and proposals for new negotiations.

Issues of gender balance and gender awareness are also relevant to the work of country delegations to the WTO in Geneva and trade ministries and negotiating teams more generally. While information is not readily available on the gender composition of country

[221] *See, e.g.*, Maria Mies and Vandana Shiva, *Introduction* to ECOFEMINISM, *supra* note 219, at 3–5; Vandana Shiva, *The Chipko Women's Concept of Freedom*, in ECOFEMINISM, *supra* note 219, at 246–50.

[222] *See, e.g.*, WEDO et al., *supra* note 41.

[223] *See supra* text accompanying notes 143–47 (Agreement on Agriculture), notes 182–84 (TRIPs Agreement), and notes 192–96 (SPS and TBT Agreements).

[224] WTO, *supra* note 149, paras. 31–32.

[225] *See, e.g.*, MALHOTRA ET AL., *supra* note 29, at 82–90; THIRD WORLD NETWORK, *supra* note 120, at 77–78; UNDP, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD (2002), at 112 & 118; Sabrina Varma, *Improving Global Economic Governance*, South Centre T.R.A.D.E. Occasional Paper No. 8 (2002).

[226] WEDO, *The Numbers Speak for Themselves*, Fact Sheet No. 1 (2002), *available at* http://www.wedo.org (women represent over fifty percent of all professional WTO staff, compared with less than forty percent at the IMF and World Bank, and 31 percent at UNCTAD).

[227] *Id.*

missions to the WTO, it has been reported that less than ten percent of the country representatives at the Fourth Ministerial Conference in Doha were women.[228] Only three of twenty-one chairpersons of WTO bodies in 2004 are women.[229]

Serious gender imbalances also exist in many national trade ministries and offices, where clerical and administrative employees are usually women, and senior trade officials are predominantly men. Moreover, there is little evidence of training in gender awareness or gender mainstreaming within trade ministries and offices. While business associations often play an important role in shaping national trade policy, most of the participants in these associations are men, and gender issues are not central to their trade agendas.[230] In many countries, labor unions and civil society organizations are increasingly active in national debates about trade policy, but women are not always well represented in these organizations, and gender concerns are not raised consistently in these debates. It is not surprising, then, that the gender dimensions of trade and trade policy are rarely reflected in the negotiating positions of national trade representatives.

As noted earlier, UNCTAD and other UN bodies, the Commonwealth Secretariat, and several regional bodies have taken steps to integrate gender awareness and gender analysis in their trade-related activities.[231] Similar steps that could be taken by the WTO and WTO members are discussed further in Part IV.

2. Dispute Settlement

There are also significant gender imbalances within the WTO dispute settlement mechanism. In November 2003, the first woman was appointed to the WTO Appellate Body.[232] Of the individuals appointed to the indicative list of panelists to hear WTO trade disputes in the first instance, there has been some improvement in the gender composition, from about seven percent women in the original list approved in 1995, and about 8.5 percent women in the updated list approved in 2000, to around eleven percent women in the cumulative list approved in early 2003.[233]

The qualifications for both Appellate Body and dispute panel members emphasize expertise in trade law and trade policy,[234] and therefore there is no assurance that these

[228] WEDO, *supra* note 226.

[229] WTO, Press Release No. 371 (Feb. 11, 2004).

[230] O'Regan-Tardu, *supra* note 33, at 21–23. However, there are a growing number of women's business associations in many countries. *Id.* at 23. The Organization of Women in International Trade ("OWIT"), with local affiliates in several countries, also provides networking and educational opportunities for women and men working in international trade and investment. *See* OWIT website (http://www.owit.org).

[231] *See supra* text accompanying notes 26–33.

[232] WTO, Press Release No. 364 (Nov. 7, 2003) (announcing appointment of Ms. Merit Janow to the Appellate Body); *see also* WTO, Press Release No. 32 (Nov. 29, 1995) (announcing appointment of seven original Appellate Body members); WTO, Press Release No. 179 (May 25, 2000) (announcing appointment of three replacement members of Appellate Body); WTO, Press Release No. 246 (Sept. 25, 2001) (announcing appointment of additional three replacement members of Appellate Body), *available at* http://www.wto.org.

[233] WTO, *Indicative List of Governmental and Non-Governmental Panelists,* WT/DSB/2 (Oct. 6, 1995) (8 of 115 individuals in list approved by the Dispute Settlement Body on September 27, 1995 were women); WTO, Indicative List of Governmental and Non-Governmental Panelists, WT/DSB/19 (March 29, 2000) (19 of 224 individuals on updated list approved through March 20, 2000 were women); WTO, Indicative List of Governmental and Non-Governmental Panelists, WT/DSB/33 (March 6, 2003) (33 of 293 individuals on updated list approved through February 19, 2003 were women).

[234] *See Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Art. 17.3 ("Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally); DSU, Art. 8.1 ("Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a [WTO] Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its

individuals will be aware of, or sensitive to, gender issues related to WTO rules and the subject matter of trade disputes. As noted earlier, GATT and WTO panels have not responded favorably to gender-related concerns that have been raised in some specific trade disputes.[235] However, some individuals appointed to the Appellate Body and indicative list of panelists have broad backgrounds in international law and international development, which would suggest greater awareness of the social dimensions of trade and trade rules, including gender concerns.[236] More formal steps to ensure that gender issues are considered in WTO dispute settlement processes are discussed in Part IV of this chapter.

3. Trade Policy Review

The Trade Policy Review Mechanism ("TPRM"), which was established provisionally in 1989 and was made permanent in the Uruguay Round, is intended to "examine the impact of a Member's trade policies and practices on the multilateral trading system" through periodic assessments carried out jointly by the relevant WTO member and the WTO secretariat.[237] Notably, the TPRM exercise focuses on the impact of a WTO member's trade policies and practices on the multilateral trading system, but not the impact of multilateral trade rules, and the policies and practices of other WTO members, on that country. However, the TPRM does authorize consideration "to the extent relevant, . . . of the wider economic and development needs, policies and objectives of the Member concerned, as well as of its external environment."[238]

There is growing recognition of the need to expand the scope of trade policy assessments, particularly in the case of least-developed countries, for example, to give greater consideration to their needs for trade-related technical assistance.[239] Recently, Germany has provided trust funds to better adapt the TPRM to the situation of developing countries.[240] The WTO Secretariat's report to the Trade Policy Review Body ("TPRB") on Zambia, for example, which was prepared with German trust fund support, includes discussion of Zambia's Poverty Reduction Strategy, government programs to support micro and small enterprises, the application of labor laws to export processing zones, and various implementation concerns.[241] However, the report does not include any sex-disaggregated data—for example, on employment in export industries—or gender analysis. Nonetheless, gender issues have been raised in some country reports to

predecessor agreement, or in the [WTO] Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member").

[235] *See supra* text accompanying notes 194–96.

[236] For example, on the Appellate Body, Georges Michel Abi-Saab, a professor of international law, has consulted for the United Nations on human rights issues in armed conflict, and served in the Appeals Chamber of the International Criminal Tribunals for the former Yugoslavia and Rwanda; John Lockhart, another Appellate Body member, served previously as an executive director of the Asian Development Bank. *See* WTO, Press Release No. 179 (May 25, 2000); WTO, Press Release No. 246 (Sept. 25, 2001), *available at* http://www.wto.org.

[237] *Marrakesh Agreement Establishing the World Trade Organization*, Annex 3, ¶ A(ii).

[238] *Id.*

[239] *See* WTO, *Appraisal of the Operation of the Trade Policy Review Mechanism*, WT/MIN(99)/2 (Oct. 8, 1999), ¶ 6.

[240] WTO, *Report of the Trade Policy Review Body for 2002*, WT/TPR/122 (Oct. 11, 2002), ¶ 5. The German trust fund also supported the WTO Secretariat's 2003 reviews of Niger and Seuegal. WTO, *Report of the Trade Policy Review Body for 2003*, WT/TPR/140 (oct. 31, 2003), ¶ 5.

[241] *See* WTO, *Trade Policy Review: Zambia—Report by the Secretariat*, WT/TPR/S/106 (Sept. 25, 2002), at 26–29 (human and financial resource limitations, and other implementation concerns), 45 (regulation of export processing zones), 47 (government support to micro and small enterprises), and 59 (agriculture as leading sector under Poverty Reduction Strategy).

the TPRB,[242] and in comments of TPRB members on the trade policy reviews of other members.[243]

Civil society groups, commentators and UN bodies have called for gender assessments to be included systematically in the TPRM.[244] Specific recommendations have been made to expand the scope of both the WTO Secretariat reports and country reports to include sex-disaggregated data and findings from gender-aware case studies and other research, with assistance from international institutions, national women's ministries, researchers and women's organizations.[245] National governments could also advance the "domestic transparency" goals of the TPRM by initiating "domestically oriented" trade policy reviews, which could focus on the impacts of WTO rules on women, poor households, and other constituencies.[246]

4. Trade-Related Capacity Building

Since the 1970s, international, regional and bilateral agencies have provided various types of trade-related support to developing countries, in the areas of export marketing, trade liberalization, trade facilitation and "trade capacity development," which the OECD defines as "building capacity by facilitating a country-driven participatory trade policy process as part of a comprehensive approach to overall development goals and poverty reduction strategies."[247] Trade-related capacity building took on heightened importance at the Fourth Ministerial Conference in Doha, where WTO members confirmed that "technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system" and they called for "effective coordinated delivery of technical assistance" to developing countries, involving international and

[242] *See, e.g.*, WTO, Trade Policy Review Body ("TPRB") Press Release No. 89 (Nov. 13, 1998) (Burkina Faso's report to the TPRB notes that one of the government's principal policy objectives for 1998–2000 is to strengthen the role of women in development); WTO, TPRB Press Release No. 170 (July 20, 2001) (Cameroon's report to the TPRB states that the government's Strategic Framework for Poverty Reduction aims to "create conditions for strong, sustainable growth with the potential to curb the poverty currently affecting over 50 percent of the population, predominantly women").

[243] *See, e.g.*, WTO, TPRB Press Release No. 4 (Feb. 17, 1995) (in review of Pakistan's trade policies and practices, TPRB members drew attention to the low participation rate of women in the economy; Pakistan's representative acknowledged that women had historically lagged behind men in the country's development, and reported that current government policies and programs aimed to remove discrimination against women in education and employment); WTO, TPRB Press Release No. 16 (Oct. 23, 1995) (during review of Mauritius' trade policies and practices, in response to questions from TPRB members regarding women's rights, the representative of Mauritius noted that new legislation had been introduced to ensure equal treatment and employment opportunities for women); WTO TPRB Press Release No. 54 (April 10, 1997) (in reviewing Fiji's trade policies and practices, TPRB members raised issues concerning the gender and ethnic composition of employment).

[244] *See supra* text accompanying note 39; *see also* WILLIAMS, *supra* note 32, at 172–74; Barbara Evers, *Linking Trade and Poverty: Reinventing the Trade Policy Review Mechanism*, Paper for Globalisation and Poverty Research Programme, Institute for Development Studies, University of Sussex (2003), *available at* http://www.gapresearch.org/about/index.htm; UN Interagency Meeting on Women and Gender Equality—Taskforce on Financing for Development, *Mainstreaming Gender Perspectives in Issues Addressed in the Preparations for the International Conference on Financing for Development: An Initial Analysis*, Issue III: Trade (2001) (recommends incorporation of social development perspectives, including gender perspectives, in the TPRM, especially related to key development indicators such as impacts on employment patterns and income generation), *available at* http://www.wedo.org/ffd/kitmain3.htm.

[245] WILLIAMS, *supra* note 32, at 172–74.

[246] Evers, *supra* note 244.

[247] OECD, *DAC Guidelines: Strengthening Trade Capacity for Development* (2001), at 23, *available at* http://www.oecd.org.

regional institutions and bilateral donors.[248] This mandate resulted in the creation of a new technical assistance fund, the Doha Development Agenda Global Trust Fund, and expanded use of two existing funds, the Joint Integrated Technical Assistance Programme and the Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries, as well as increased commitments by international and bilateral development agencies to support trade-related capacity building through their own assistance programs.[249]

A survey of the Doha Development Agenda Trade Capacity Building Database maintained by the OECD and WTO shows that some trade-related capacity building activities already address gender issues, particularly the needs of women entrepreneurs in developing countries.[250] Other gender-related activities include analysis and advice to government planners on gender and social issues posed by accession to the WTO, and pilot-testing of training and social protection measures to deal with potential layoffs of female garment workers in smaller developing countries resulting from the lifting of country-specific quotas under the ATC.[251]

The new UN inter-agency task force on gender and trade, the OECD and bilateral donors have recognized the benefits of incorporating a gender perspective more broadly and systematically in trade-related capacity building programs, particularly in light of concerns about the social and poverty impacts of trade liberalization.[252] The OECD has outlined several areas for support:

- Expanding assessments of proposed trade programs to include their impact on social development indicators;
- Removing gender-biased barriers to growth, including absence of property rights and disparities in education;
- Strengthening capacity to collect gender-related data at national and regional levels; and
- Including gender impacts in monitoring and evaluating the effects of trade policies.[253]

Training in gender analysis would also be useful in programs to strengthen the capacities of government agencies and civil society groups to undertake poverty and social impact assessments of trade and other macroeconomic policy changes.[254]

[248] WTO, *supra* note 149, paras. 38–39.

[249] WTO and OECD, *Second Joint WTO/OECD Report on Trade-Related Technical Assistance and Capacity Building* (2003), *available at* http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm.

[250] WTO and OECD, *Doha Development Agenda Trade Capacity Building Database*, *at* http://tcbdb.wto.org/index.asp?lang=ENG. *See also* G&T TASK FORCE, *supra* note 16, at 455–88 (survey of International Trade Centre, UNCTAD and United Nations Industrial Development Organization programs to assist women entrepreneurs.)

[251] *See, e.g.*, UNDP and UNIFEM, *China's Accession to WTO: Challenges for Women in Agriculture and Industry,* CPR/01/409, *at* http://tcbdb.wto.org/trta_project.asp?ctry=135&prjcd=CPR/01/409 (WTO/OECD database entry); Asian Development Bank, *Technical Assistance to Cambodia for Preventing Poverty and Empowering Female Garment Workers Affected by the Changing International Trade Environment*, R121–03 (July 1, 2003), *available at* http://www.adb.org.

[252] *See* G&T Task Force Meeting, *supra* note 28; OECD, *supra* note 247, at 26; CIDA, *supra* note 38.

[253] OECD, *supra* note 247, at 26.

[254] *See* WORLD BANK, A USER'S GUIDE TO POVERTY AND SOCIAL IMPACT ANALYSIS (2003). *See also* Eugenia McGill, *Poverty and Social Analysis of Trade Agreements: A More Coherent Approach*?, 27 B.C. INT'L & COMP. L REV. 371 (2004).

IV. Conclusions and Recommendations

There is increasing recognition that liberalized trade and trade agreements can affect women and men differently, and that gender differences in access to resources and employment, household responsibilities and other factors in turn can influence the outcome of trade policies. The gender-differentiated effects of increased trade and cross-border investment vary between countries, and within countries based on other social factors such as age, race or ethnicity, citizenship, class, religion, marital status and geographic location. However, gender-aware research is still needed in a number of areas, including the impact of liberalized trade in non-traditional agricultural exports and services, the impact of trade on the informal and reproductive sectors, and the gender implications of international rules governing trade-related areas such as intellectual property protection and investment.

A growing number of international and regional bodies are taking steps to address gender issues more systematically in their trade-related activities, and these efforts will be reinforced by the new UN inter-agency task force on gender and trade. Similarly, the WTO and its members could take steps to integrate gender considerations in the negotiation, implementation and review of multilateral trade rules. These include:

- Systematic collection and analysis of sex-disaggregated data, and monitoring of gender-related indicators, relevant to trade (which could include use of data and analysis generated by other international and regional organizations);
- Provision of staff training in gender analysis, establishment of a gender unit, and designation of gender focal points in each department of the WTO secretariat and national trade ministries;
- Affirmative steps to increase the number of women in senior positions in the WTO secretariat and national trade ministries;
- Inclusion of women in national trade negotiating teams and trade advisory panels, and inclusion of women's organizations in national consultations on trade policy;
- Gender analysis of proposed trade commitments, periodic gender impact assessments of existing trade obligations, and inclusion of gender assessments in WTO trade policy reviews;
- Affirmative steps to include women and men with expertise in gender and human development on the WTO Appellate Body and the indicative list of experts for WTO dispute settlement panels;
- Establishment of an expert panel on gender, human development and trade, which could serve as a resource for the WTO secretariat, WTO bodies (including the Appellate Body and the TPRB), and individual dispute settlement panels; and
- Inclusion of training in gender analysis and gender impact assessments in trade-related capacity building programs for developing and least-developed countries.

As discussed earlier, gender considerations could also be integrated in the current work programs of WTO bodies, in particular the mandates from the Doha Ministerial Conference relating to food security concerns under the Agreement on Agriculture; development-related measures under the SCM Agreement; health, environmental and traditional knowledge issues under the TRIPs Agreement; and further services liberalization and consideration of disciplines on regulations, subsidies and government procurement under the GATS. Consideration could also be given to establishing an expert group, with links to both the WTO Committee on Trade and Development and the UN inter-agency task force on gender and trade, to examine the coherence between

WTO rules and international commitments to gender equality, such as CEDAW, the Beijing Platform for Action and the Millennium Declaration and Millennium Development Goals.[255]

Increased gender awareness within the WTO, particularly relating to the gender dimensions of trade and investment in developing countries, would enhance the credibility of the Doha Development Agenda. Measures to increase the representation of women in WTO processes would also further the collective goal of WTO members to see that "all our peoples . . . benefit from the increased opportunities and welfare gains that the multilateral trading system generates."[256]

BIBLIOGRAPHY

Allaert, Benedicte, and Nicole Forman, eds. 1999. *Gender, Trade and Rights: Moving Forward*. Brussels: Women in Development Europe.

Baden, Sally. 1996. *Gender Issues in Financial Liberalisation and Financial Sector Reform*. BRIDGE Report No. 39. (http://www.ids.ac.uk/bridge)

———. 1998. *Gender Issues in Agricultural Liberalisation*. BRIDGE Report No. 41. (http://www.ids.ac.uk/bridge)

Blackett, Adelle. 1999. "Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation." *Columbia Human Rights Law Review* 31: 1.

Çağatay, Nilüfer. 2001. *Trade, Gender and Poverty*. Background Paper for Trade and Sustainable Human Development Project. New York: United Nations Development Programme.

Çağatay, Nilüfer, Diane Elson and Caren Grown, eds. 1995. *World Development* 23 (11). Special Issue on Gender, Adjustment and Macroeconomics.

Charlesworth, Hilary, and Christine Chinkin. 2000. *The Boundaries of International Law: A Feminist Analysis*. Manchester, U.K.: Manchester University Press.

Canadian International Development Agency. 2003. *Gender Equality and Trade-Related Capacity Building: A Resource Tool for Practitioners*. Gatineau, Quebec: CIDA.

Durano, Marina Fe B. *Gender Issues in International Trade*. (http://www.igtn.org/Research/GenderTrade.htm)

Fontana, Marzia, Susan Joekes and Rachel Masika. 1998. *Global Trade Expansion and Liberalisation: Gender Issues and Impacts*. BRIDGE Report No. 42. (http://www.ids.ac.uk/bridge)

Gammage, Sarah, Helene Jorgensen, Eugenia McGill and Marceline White. 2002. *Framework for Gender Assessments of Trade and Investment Agreements*. Washington, D.C.: Coalition for Women's Economic Development and Global Equality, Inc. (http://www.womensedge.org)

Grown, Caren, Diane Elson and Nilüfer Çağatay, eds. 2000. *World Development* 28 (7). Special Issue on Growth, Trade, Finance and Gender Inequality.

International Bank for Reconstruction and Development. 2001. *Engendering Development Through Equality in Rights, Resources and Voice*. World Bank Policy Research Report. New York and Oxford, U.K.: Oxford University Press.

International Gender and Trade Network. 2001. *International Gender and Trade Network at Doha*. Position Paper on the WTO. (http://www.igtn.org/WTO/WTOResources.htm)

———. 2003. *International Gender and Trade Network at Cancún and Beyond*. Advocacy Paper. (http://www.igtn.org/WTO/WTOResources.htm)

Joekes, Susan and Ann Weston. 1994. *Women and the New Trade Agenda*. New York: United Nations Development Fund for Women.

Malhotra, Kamal, Chandrika Bahadur, Selim Jahan and Mumtaz Keklik. 2003. *Making Global Trade Work for People*. London and Sterling, Virginia: Earthscan Publications, Ltd.

[255] United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., 8th plen. mtg., Agenda Item 60(b), U.N. Doc. A/RES/55/2 (2000).

[256] WTO, *supra* note 149, ¶ 2.

Mehra, Rekha, and Sarah Gammage, eds. 1999. *World Development* 27 (3). Special Section on Women Workers in a Globalizing Economy.

O'Regan-Tardu, Louise. 1999. *Gender Mainstreaming in Trade and Industry: A Reference Manual for Governments and Other Stakeholders*. Gender Management System Series. London: Commonwealth Secretariat.

Orford, Anne. 1999. "Contesting Globalization: A Feminist Perspective on the Future of Human Rights." In *The Future of International Human Rights*, Burns H. Weston and Stephen P. Marks, eds. Ardsley, New York: Transnational Publishers, Inc.

Pahuja, Sundhya. 2000. "Trading Spaces: Locating Sites for Challenge Within International Trade Law." *Australian Feminist Law Journal* 14: 38.

Tran-Nguyen, Anh-Nga and Americo Beviglia Zambetti, eds. 2004. *Trade and Gender: Opportunities and Challenges for Developing Countries*. United Nations Inter-Agency Network on Women and Gender Equality – Task Force on Gender and Trade Publications. U.N. Doc. UNCTAD/EDM/2004/2. New York and Geneva: United Nations.

United Nations. 1999. *World Survey on the Role of Women in Development: Globalization, Gender and Work*. New York.

———. 2000. *The World's Women 2000: Trends and Statistics*. New York.

United Nations Conference on Trade and Development. 1999. *Trade, Sustainable Development and Gender*. Papers Prepared for Pre-UNCTAD X Expert Workshop on Trade, Sustainable Development and Gender, Geneva, July 12–13, 1999. U.N. Doc. UNCTAD/EDM/Misc. 78.

United Nations Development Fund for Women. 2000. *Progress of the World's Women 2000*. UNIFEM Biennial Report. New York.

———. 2002. *Progress of the World's Women 2002, Volume 2*. UNIFEM Biennial Report. New York.

Williams, Mariama. 2003. *Gender Mainstreaming in the Multilateral Trading System: A Handbook for Policy-Makers and Other Stakeholders*. Commonwealth Secretariat New Gender Mainstreaming Series on Development Issues. London: Commonwealth Secretariat.

Wright, Shelley. 1995. "Women and the Global Economic Order: A Feminist Perspective." *American University Journal of International Law and Policy* 10: 861.

CHAPTER 64

TRADE AND CULTURE

Ivan Bernier*

TABLE OF CONTENTS

I. Introduction: A Brief History of the Trade and Culture Debate 748
II. Cultural Goods and Services in the WTO 753
A. Trade in Cultural Goods 753
1. GATT 1994 753
2. The Agreement on Subsidies and Countervailing Measures 760
3. The Anti-Dumping Agreement 764
4. The Agreement on Safeguards 765
B. Trade in Cultural Services 767
1. The General Agreement on Trade in Services ("GATS") 767
2. Basic Telecommunications 771
C. Investment 774
1. The WTO Agreement on Trade-Related Investment Measures (TRIMS) 774
2. Investment Liberalization Through GATS 775
D. Intellectual Property Rights 777
III. The Trade and Culture Debate: Basic Issues and Solutions 778
A. The Basic Issues 778
1. The Dual Nature of Cultural Products: Entertainment Products or Vectors of Cultural Identity? 778
2. The Nature of the Concern: From the Treatment of Cultural Goods and Services to the Preservation of Cultural Diversity 780
3. The Diversity of Treatment: the Cultural Goods and Cultural Services Dilemma 781
B. Possible Solutions 783
1. The "Do Nothing" Approach 783
2. The Cultural Exception Approach 785
3. The New International Instrument Approach 787
IV. Conclusion 789
Bibliography 791

* Professor of International Law, Laval University, since 1969; Dean of the Faculty of Law from 1981 to 1985; Director of the Quebec Centre of International Relations 1986 to 1993.

I. Introduction: A Brief History of the Trade and Culture Debate

Although the relationship between trade and culture has been described as one of those new issues that pose "serious practical and theoretical challenges . . . to present understanding of the trade regime,"[1] trade conflicts concerning cultural goods and services are not in fact a new phenomenon. Such conflicts go back to the 1920's when European countries, following the First World War, began resorting to screen quotas in order to protect their film industry from a sudden influx of American films that was perceived as a threat to their cultural expression.[2] The American motion picture industry responded by developing closer relations with the U.S. government. After the Second World War, through governmental arrangements such as the Blum-Byrnes agreement of 1946 which granted generous import quotas to American films as part of the settlement of the French war debt, or arrangements negotiated directly between the Motion Picture Export Association of America and various governments, it succeeded in reversing the tide.[3] In 1947, a compromise solution appeared to have been reached with the inclusion of Article IV in the *General Agreement on Tariffs and Trade* (GATT) which recognized the specificity of cultural products, at least in the case of films, without removing them from the disciplines of the agreement.[4] However, in the early 1960s, the dispute resumed when the United States asked the GATT to investigate the restrictions imposed on its television programs by a number of countries, including Canada. A special group was constituted to look at the matter but was unable to reach an agreement.[5]

Again in the early 1970s, the United States complained in the Tokyo Round catalogue of non-tariff barriers about the subsidies employed by not less than twenty countries in order to protect their cinema and television industries.[6] A new conflict arose between the United States and Europe towards the end of the 1980s concerning the EC directive "Television Without Frontiers," which stipulates in its Article 4 that "Members States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works . . . a majority proportion of their transmission time".[7] The United States requested GATT consultations with the European Community. After a lively exchange of views in the consultations, the matter was later dropped to

[1] Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 European Journal of International Law 733 (1998)

[2] Film quotas were adopted by Austria, Czechoslovakia, Denmark, France, Germany, Hungary, Italy and the United Kingdom.

[3] On this development between the two wars, *see* Film Europe and Film America: Cinema, Commerce and Cultural Exchange 1920–1939, 346–385 (eds: Andrew Higson and Richard Maltby, 1999); see also T. Guback, *Non Market Factors in the International Distribution of American Films*, in 1 *Current Research in Films: Audiences, Economics and Law* 111, 114–115 (1985); Laurent Burin des Roziers, *Du cinema au multimedia. Une brève histoire de l'exception culturelle*, Institut français des relations internationales, Notes de l'IFRI No 5, (1998).

[4] Article IV of GATT, as explained below, specifically authorizes screen quotas but also makes them subject to negotiations.

[5] GATT Doc. L/1741 (1962).

[6] GATT, Doc. MTN/3B1. The countries in question were Germany, Argentina, Austria, Belgium, Brazil, Canada, Chile, Denmark, Egypt, France, Greece, Indonesia, Israel, Italy, Japan, the Netherlands, Norway, Pakistan, Portugal and the United Kingdom.

[7] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *Official Journal* L 298, 17/10/1989, 0023–0030.

become part of a wider debate in the context of the Uruguay Round negotiations on services.[8]

In 1990, a working group was set up in the context of the negotiations on services to consider the feasibility of having a specific annex on audiovisual services.[9] Two conflicting views characterized the discussions, that of the United States and some other countries completely opposed to any kind of exception for audiovisual services, and that of the EEC, willing to make a commitment itself in that area only if a cultural exemption clause, more or less along the lines of what Canada had obtained in the FTA, was included.[10] After a few sessions, the group discontinued its activities for lack of agreement on the content of the proposed annex.

The question of audiovisual services was then largely ignored until 1993, when it took a new turn, with a much greater degree of visibility, with the involvement of artists from all over Europe which culminated in the simultaneous publication, on September 29, of a declaration in favour of a cultural exception in five of Europe's most prominent newspapers.[11] In the early autumn, the issue had reached such proportions that the then Director- General of the GATT, Peter Sutherland, felt obliged to respond publicly, arguing in essence that even if a general cultural exception had been considered in the negotiations and rejected, nothing in the services agreement required the deregulation of any services sector and nothing prevented governments from funding audio-visual projects.[12] The question remained unresolved until the very end of the Uruguay Round negotiations when the EC, after unsuccessfully proposing a cultural specificity clause that would have (a) accommodated exemptions from the most-favoured-nation treatment beyond the ten-year limit established in the GATS Annex on Article II Exemptions, (b) permitted the continuance and extension of public aid and operational subsidies, (c) allowed screen time to be reserved for indigenous production of films and TV programmes, and (d) permitted the regulation of existing and future broadcasting technologies and transmission techniques, finally announced that it would make no specific commitments with regard to the audiovisual sector.[13] The question having been put on the back burner, the debate remained completely open.

Unexpectedly, the debate, far from subsiding following the entry into force of the World Trade Organization in 1995, rapidly reached a new level of intensity. One only has

[8] For a detailed analysis of this exchange of views, *see* Jon Filipek, *'Culture Quotas': The Trade Controversy over the European Community's Broadcasting Directive*, 28 STANFORD JOURNAL OF INTERNATIONAL LAW 323, 340–342 (1992). *See also* Laurence G.C. Kaplan, *The European Community's Television Without Frontiers Directive: Stimulating Europe to Regulate Culture,* 8 EMORY INTERNATIONAL LAW REVIEW 225, 311–318 (1994).

[9] *GATT Focus*, No. 73 (1990), p. 10–11.

[10] John Peterson, *International Trade in Services: The Uruguay Round and Cultural and Information Services,* NATIONAL WESTMINSTER BANK QUARTERLY REVIEW 62 (August 1989). Under the first paragraph of Article 2005 of the Canada-U.S. Free Trade Agreement, "cultural industries are exempt from the provisions of this Agreement except as specifically provided . . . "; however, the second paragraph adds that "a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1".

[11] The declaration in question, signed by a large number of authors, actors and producers, appeared in Le Monde (September 29, 1993, 12–13), as well as in The Independent, El Païs, Die Frankfurter Algemeine Zeitung and Le Soir.

[12] *Peter Sutherland Responds to Debate on Audiovisual Sector*, NEWS OF THE URUGUAY ROUND, NUR 069, October 14, 1993, available on the WTO website: Documents on line, symbol NUR 069.

[13] *See Audiovisual Services,* Background Note by the Secretariat, June 15, 1998, Doc. S/C/W/40, note 27: http://www.wto.org/english/tratop_e/serv_e/w40.doc. See also INSIDE U.S. TRADE, Nov. 19, 1993, at 1.

to consider the number of conflicts about cultural industries that have arisen since 1995, the growing number of articles published on the subject, and the numerous conferences organized around that theme, to realize that we are now faced with what a 1998 book described as a "culture/trade quandary"[14]. At the end of that same year, former Under Secretary for Commerce and Dean of the Yale School of Management Jeffrey Garten, in an Article entitled "Cultural Imperialism is no Joke" went as far as to suggest that the United States should be "more sensitive to fears abroad that U.S. exports of movies, music, software, and broadcasting are harmful".[15] By then, however, the debate had taken a new direction: from a discussion strictly about the treatment of cultural goods and services in trade agreements, it had become one about the impact of trade liberalization on cultural identity and cultural diversity.

The importance of this new development did not escape the attention of the Director-General of the new WTO, Mr. Renato Ruggiero. In June 1997, in a speech that may be considered as the first public expression of concern within the new World Trade Organization regarding the cultural impact of trade liberalization, he declared before the Common Market Council of the MERCOSUR that "[m]anaging a world of converging economies, peoples and civilizations, each one preserving its own identity and culture, represents the great challenge and the great promise of our age".[16] Less than a year later, in May 1998, he warned the Member States that they "should not underestimate the growing pressure on the multilateral system to give answers to issues which are very real public concerns, but whose solution cannot rely on the trading system alone"; among such issues, he expressly mentioned that of cultural diversity.[17] As if to confirm his warning, 1998 witnessed the failure of the OECD to conclude a multilateral agreement on investment for reasons not unrelated to the question of cultural diversity.[18] In April 1999, in his last public speech as WTO Director-General, Renato Ruggiero came back to the subject, declaring:

> More and more, we are facing issues and concerns which go beyond the parameters of trade. More and more, globalization is raising a whole new set of questions about how to manage interdependence. Can we have an open world economy without a stable financial system? How to protect endangered species and promote sustainable development? Should trade be linked to labour standards and human rights? Can we preserve cultural identities in an age of borderless communications?[19]

Subsequent events have confirmed the validity of his analysis regarding the issue of cultural identity. Although the failure of the 1999 WTO ministerial meeting in Seattle cannot be related in any way to the issue of culture as such, the noisy protests that disrupted

[14] *See* Ivan Bernier, *Cultural Goods and Services in International Trade Law,*in THE CULTURE/TRADE QUANDARY: CANADA'S POLICY OPTIONS 108 (ed.: Dennis Browne, 1998).

[15] Jeffrey Garten, *Cultural Imperialism is no Joke,* BUSINESS WEEK, November 30, 1998

[16] WTO, Press/74, 19 June, 1997

[17] Opening statement by the Director-General, Mr. Renato Ruggiero, Ministerial Conference, Geneva, May 18, 1998: http://www.wto.org/english/thewto_e/minist_e/min98_e/anniv_e/dg_e.htm

[18] France, in the context of the MAI negotiations, had proposed a clause preserving the competence of the state to intervene in favour of cultural and linguistic diversity. Canada has even been accused of having sabotaged the MAI negotiations with its cultural network by creating "a cultural exchange blockade, a front for trade barriers that constitute a form of trade protectionism". *See Cultural Protectionism and the Multilateral Trade Agreement on Investment*, INTERNATIONAL ECONOMIC REVIEW, June-July 1998, Pub. 3128 1 (Office of Economics, United States International Trade Commission).

[19] *Beyond the Multilateral Trading System,* Address by Renato Ruggiero, Director-General of the WTO, 20th Seminar on International Security, Politics and Economics, Institut pour les hautes études internationales, Geneva, April 12, 1999

the meeting have been interpreted by a number of commentators as the expression of a cultural reaction to globalization, the explanations given in that respect ranging from growing insecurity about a loss of cultural references[20] to alarm about a more standardized culture[21]. In a speech given before the Trilateral Commission in Tokyo on May 9, 2000, Fred Bergsten, former U.S. Assistant Secretary of the Treasury for International Affairs, referring to the demonstrations in Seattle, Davos, Bangkok and Washington which he considered as the superficial signs of a very real issue, remarked: "The world economy today faces a more fundamental set of challenges because the backlash against globalization is much more than economics. . . . [T]here is also a huge cultural dimension which raises a mass of contentious and difficult issues of its own".[22]

More recently, Jeremy Rifkin, in a commentary published in the Los Angeles Times in anticipation of the G-8 Summit of July 2001 in Genoa, Italy, wrote:

> Protests are becoming a familiar part of world political and economic forums. But, although the attention often goes to the relatively few violent protesters, there is a bigger message worth listening to. The fact is we are witnessing the first stirrings of a cultural backlash against globalization whose effects are likely to be significant and far-reaching.[23]

The G-8 Tokyo Summit of July 2000 itself acknowledged, in its final communiqué, the importance of preserving cultural diversity "as a source of social and economic dynamism which has the potential to enrich human life in the 21st century, as it inspires creativity and stimulates innovation."[24]

The concern regarding the impact of globalization on culture has also attracted the attention of international cultural organizations such as UNESCO, the Council of Europe, and the Organisation Internationale de la Francophonie, which have all adopted declarations on cultural diversity[25]. The texts in question share the same perception regarding the need to adopt measures to respond to global market influences on culture and cultural exchange. For example, the preamble of the Council of Europe Declaration on Cultural Diversity, adopted by the Committee of Ministers on 7 December 2000, recognizes "that the development of new information technologies, globalisation and evolving multilateral trade policies have an impact on cultural diversity".[26]

Within the WTO itself, cultural identity and cultural diversity concerns are now being voiced and discussed more and more in the context of the present GATS negotiations, in effect resuming the cultural exception debate from the Uruguay Round. Although these negotiations are far from over, at least four distinct positions have been expressed on the subject so far.

[20] *See* David Postman and Lynda V. Mapes, *Why WTO United so Many Foes*, SEATTLE TIMES, December 6, 1999.

[21] *See* Paul Van Slambrouck, *There is More Diversity but Less . . . Diversity,* THE CHRISTIAN SCIENCE MONITOR, February 8, 2000.

[22] Institute for International Economics, http://www.iie.com/papers/bergsten0500.htm, accessed July 12, 2001

[23] Jeremy Rifkin, *World Culture Resists Bowing to Commerce*, LOS ANGELES TIMES, July 2, 2001, reproduced in the MONTREAL GAZETTE under the title *Cultural Backlash against Globalization*, July 4, 2001.

[24] For the text of the communiqué, *see*: http:// usembassy.state.gov/Tokyo/ wwwhg8ko.html

[25] UNESCO's "Universal Declaration on Cultural Diversity " was adopted by the General Assembly on December 2nd, 2001 ; see UNESCOPRESS 02/11/2001. The Council of Europe adopted its own "Declaration on Cultural Diversity" on December 7, 2000 ; for the text of the declaration, see http://culture.coe.fr/Infocentre/txt/eng/edecldiv.htm. The Organisation Internationale de la Francophonie also adopted a declaration on cultural diversity (Déclaration de Cotonou) in June 2001 ; for the text, see http://www.francophonie.org/oif/publications/evenements/declaration_Cotonou.doc

[26] Council of Europe, DECLARATION ON CULTURAL DIVERSITY, 2000: http://culture.coe.fr/Infocentre/txt/eng/edecldiv.htm

- Canada has stated in its initial negotiating proposals that it would not make any commitment that restricts its ability to achieve its cultural policy objectives "until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established".[27]
- Switzerland considers that the audio-visual sector represents both an important field of commercial activity and a vector of cultural identity, and therefore identifies the challenge for trade policy as being to reconcile these two views within a balanced solution that satisfies both sensibilities. Such a solution, in the Swiss view, could take the form of an Annex to the GATS or of any other suitable instrument, but the work to be undertaken would have to take into account any relevant development outside the WTO framework on the issue of audio-visual regulation, in particular developments relating to cultural diversity.[28]
- Brazil, whose position is close to that of Switzerland, first rejects the radically conflicting views that characterized the discussions in the audiovisual sector during the Uruguay Round; on the one hand the view that the sector should be completely excluded from trade rules because of the role of audiovisual services in the promotion and preservation of cultural identity and cultural diversity, and on the other the view that rejects any special treatment of the sector because of the entertainment and commercial nature of audiovisual products and services. Instead, Brazil affirms, the question that should be considered is "how to promote the progressive liberalization of the sector in a way that creates opportunities of effective market access for the exports of developing countries in this sector without affecting the margin of flexibility of governments to achieve their cultural policy objectives as they find appropriate".[29]
- The United States argues that existing trade rules are sufficient to take into account the special cultural qualities of the sector and goes on to say that "[t]he choices are not, nor have they ever been, a choice between promoting and preserving a nation's cultural identity and liberalizing trade in audiovisual services. Especially in light of the quantum increase in exhibition possibilities available in today's digital environment, it is quite possible to enhance one's cultural identity and to make trade in audiovisual service more transparent, predictable, and open".[30]

As can be seen from this brief historical review of the policy debate about trade and culture, the issue has taken a new dimension in recent years. From an issue that until 1995 revolved almost exclusively around the treatment of cultural goods and services in international trade agreements, it has now become one that is more generally concerned with the preservation of cultural identity and cultural diversity. This last development, however, raises problems whose solution, to borrow again the words of Renato Ruggiero, "cannot rely on the trading system alone". The fact is that the WTO is poorly equipped to assess what is required to insure the preservation of cultural identity and cultural diversity: culture is simply not one of its fields of competence. As a trade organization, on the other hand, it remains competent to determine the treatment to be granted to

[27] WTO Council on Trade in Services, Communication from Canada,*Initial Canadian Negotiating Proposals*, ¶ 9, 14 March 2001: Doc. S/CSS/W/46.

[28] WTO, Council for Trade in Services, Communication from Switzerland, *GATS 2000 Audiovisual Services*, ¶ 9, 04 May 2001: Doc. S/CSS/W/74

[29] WTO, Council for Trade in Services, Communication from Brazil, *Audiovisual Services,* ¶ 7, 09 July 2001: Doc. S/CSS/W/99.

[30] WTO, Council for Trade in Services, Communication from the United States,*Audiovisual and Related Services*, ¶ 9, 18 December 2000: Doc. S/CSS/W/21.

cultural goods and services from a trade perspective. It is precisely at the intersection of these two concerns that the new issue of trade and culture arises. A prerequisite for its solution, therefore, is that both concerns be clearly articulated. Only then does it become possible to understand the exact nature of the issue and to envisage possible solutions.

The first part of this paper attempts to provide a global picture of the way in which cultural goods and services are presently dealt with under the WTO and of the types of problems that they raise or might raise. To do so, the paper looks successively at the treatment of cultural goods under the multilateral agreements on trade in goods, cultural services under the *General Agreement on Trade in Services* (GATS), and finally cultural goods and services under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). The second part of the paper will focus on the basic elements of the trade and culture issue and on the solutions that have been proposed to resolve that issue.

II. Cultural Goods and Services in the WTO

A. Trade in Cultural Goods

In examining the treatment of cultural goods under the WTO multilateral agreements on trade in goods, we will proceed under the assumption that such goods are covered except as otherwise provided. For each of the agreements to be examined, therefore, we shall first consider whether there are indications that cultural goods warrant specific treatment, then look at the basic rights and obligations of the parties under the agreement, and finally, with respect to such rights and obligations, consider the problems that may have arisen in relation to cultural goods. The question of whether one is dealing with a good or a service and the significance of that distinction for the choice of the applicable instrument will be examined as a separate issue in the second part of this paper.

Not all the agreements included in Annex I A (Multilateral Agreements on Trade in Goods) of the WTO Agreement apply in practice to trade in cultural goods. Some deal with specific sectors of economic activity that have nothing to do with culture, such as textiles and clothing, agriculture, and sanitary and phytosanitary measures; others deal with problems that are not normally associated with culture, such as technical barriers to trade, licensing procedures and pre-shipment inspection. The agreements that are of interest, either because they clearly apply or could apply to cultural goods, or because they have been invoked in relation to cultural goods, are first and foremost the *GATT 1994*, followed by the *Agreement on Subsidies and Countervailing Measures*, the *Agreement on the Implementation of Article VI of GATT 1994* (Anti-dumping Agreement), and the *Agreement on Safeguards.*

1. GATT 1994

(a) Article IV—Cinematographic Films. Two Articles in the *GATT 1994* specifically refer to cultural goods. The first one is Article IV which is made an exception to the requirement of national treatment through Article III:10. It provides that a member may maintain or establish screen quotas requiring the exhibition of films of national origin during a specified minimum portion of the total screen time in the commercial exhibition of all films of whatever origin; such screen quotas, however, are subject to negotiations for their limitation, liberalization or elimination.[31]

[31] In the Torquay Round of negotiations of 1951, Germany did include in its list of concessions a commitment regarding screen quotas which provided among other things that if it decided to establish a screen quota for the exhibition of films of foreign origin, this would not exceed 27 percent ; but this concession was later withdrawn pursuant to negotiations under Article XXVII in 1956. *See* GATT, GUIDE TO GATT LAW AND PRACTICE (1994) 192.

Article IV reproduces in essence Article 19 of the Havana Charter which was inserted, according to Clair Wilcox,

> upon a recognition of the fact that motion picture production is as much entitled to protection against foreign competition as any other industry and that such protection, in this case, cannot be provided effectively by imposing duties on imported rolls of films. The screen quota, therefore, has been accepted as the counterpart of a tariff and every other method of protection (except tariff duties) has been banned.[32]

In the summary analysis of the Havana Charter provided by the U.S. Department of State in 1950, however, the explanation given by the U.S government differs substantially; it says that movies are distinguishable because "their value is not in the film itself, but in its earning power".[33]

During the negotiation of the General Agreement on Tariffs and Trade itself, yet another explanation for the insertion of what was to become Article IV was put forward by the United Kingdom, Norway and Czechoslovakia, which particularly advocated the film exception; in their view, in the case of films, important cultural considerations entered into consideration, which was not the case for other goods.[34] This explanation was adopted by John Jackson who wrote, in his seminal 1969 work entitled *World Trade and the Law of GATT*, that the cinema exception was accepted because it was "more related to domestic cultural policies than to economics and trade".[35] It is also the interpretation that prevails in the historical review of Article IV prepared by the GATT Secretariat in 1990 for the Uruguay Round Working Group on Audiovisual Services.[36]

Recently, the United States has come up again with a new explanation for Article IV of GATT. In its communication on Audiovisual and Related Services of December 18, 2000, to the WTO Council for Trade in Services, it stated:

> GATT Article IV provides a special, and unique, exception for cinematographic films to GATT national treatment rules. In 1947, in recognition of the difficulty that domestic film producers faced in finding adequate screen time to exhibit their films in the immediate post-World War II period, GATT founders authorized continuation of existing screen-time quotas.[37]

There is no further evidence of such negotiations taking place in the context of multilateral trade negotiations. However, pressures to have screen quotas eliminated in the context of bilateral negotiations are not unheard of. In 1998–1999, a vigorous debate emerged in Korea following the decision of the government to gradually phase out the local screen quota which the U.S. government, in the context of ongoing Seoul-Washington investment negotiations, had described as a protectionist policy. See "Korean Film industry's plea for screen quota turns emotional", *Korea Herald*, June 18, 1999. The debate was still going on in early 2002 as evidenced by an article published in the *Korea Herald* entitled "Film industry leaders protest gov't bid to ease screen quota regulations" on January 29, 2002. It is interesting to contrast the attitude of the U.S. government in this instance with the position taken in its communication of December 2000 to the Council on Trade on Services regarding audiovisual and related services, where it presents Article IV of GATT as an example of the flexibility of the WTO regime in cultural matters: see supra, note 30.

[32] Clair A. Wilcox, CHARTER FOR WORLD TRADE 77 (1949). Clair Wilcox represented the United States during the Havana Charter and GATT negotiations.

[33] *See* U.N. Doc. EPCT/C.II/W.5, at p. 3.4: *see* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 293, n. 1 (1969).

[34] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development (Geneva 1947), Doc. EPCT/TAC/SR/10

[35] Jackson, *supra* note 33, at 293. *See also*, to the same effect, Robin L. Van Harpen, *Mamas, Don't Let Your Babies Grow Up to Be Cowboys: Reconciling Trade and Cultural Independence,* 4 MINNESOTA JOURNAL OF GLOBAL TRADE 167 (1995)

[36] GATT, Doc. MTN.GNS/AUD/W/1 October 4, 1990.

[37] *See supra*, note 30.

It is interesting to note how from the outset and right up to today Europe has insisted that Article IV was based on cultural grounds, whereas the United States claims that it was founded on economic principles.

An important question that arises in connection with Article IV is whether its language, which refers exclusively to cinematographic films, can be extended to cover television programs recorded in video format. This is the specific issue that was raised by the United States before the GATT in 1961.[38] It stated then that "restrictions against the showing of television programs were technically a violation of the principles of Article III: 4, but that some of the principles of Article IV might apply to them."[39] Canada for its part took the position that Article IV covered the issue, even though the article did not mention television programs as such, because this was a development that could not have been foreseen in 1947. Unfortunately, the working group set up to examine the question was unable to reach a consensus on the subject.[40] In 1991, during consultations concerning restrictions on the showing of non-European films on television, the United States, while recognizing the existence of the Article IV exception, pointed out that it applied exclusively to cinematographic films.[41] Certain authors, such as Chi Carmody, have suggested that the restricted nature of the exception "should not imply that the exclusion of cinematographic film necessarily meant GATT coverage for other media" because "the form of Article IV was shaped by the awareness of its time".[42] For the moment, however, the most that can be said is that the scope of Article IV has not yet been settled.

To conclude on Article IV, it is interesting to note that one of the most common restrictions appearing in the schedules of the WTO members that have undertaken commitments in the audiovisual sector during the Uruguay Round GATS negotiations concerned restrictions on the share of screening time allotted to foreign film and television productions.[43] The preoccupation that justified the insertion of Article IV seems to still be very much present.

(b) Article XX(f)—Exception for National Treasures. The other provision of GATT 1994 that specifically refers to cultural products is Article XX(f), which includes among the general exceptions measures which are imposed for the protection of national treasures of artistic, historic or archeological value, provided they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade, as specified in the first paragraph (or chapeau) of Article XX. Article XX (f) is interesting in that it clearly recognizes the relationship between culture and national identity. It no doubt facilitated the conclusion of the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,*[44] many signatories of

[38] *See supra*, note 5.
[39] *See GATT Analytical Index 1994*, at 192.
[40] Id.
[41] *Id.*
[42] Chi Carmody, *When 'Cultural Identity Was not at Issue': Thinking About Canada—Certain Measures Concerning Periodicals*, 30 LAW AND POLICY IN INTERNATIONAL BUSINESS 231, 255 (1999). *See also* Michael Brown and Leigh Parker, *Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul*, 22 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 155, 170 (1993).
[43] WTO, Council on Services, *Audiovisual Services*, Background Note by the Secretariat, ¶ 29, Doc. S/C/W/40, 15 June 1998: http://www.wto.org/english/tratop_e/serv_e/w40.doc
[44] *See* for the text of the convention: http://www.unesco.org/culture/laws/1970/html_eng/page1.shtml

which have effectively adopted legislation authorizing controls on the import and export of heritage products.

Leaving aside Article IV and Article XX(f), cultural goods are subject to all the usual GATT disciplines, the most important of which are the MFN treatment required by Article I, the national treatment requirement of Article III, the anti-dumping and countervailing duties provisions of Article VI, the prohibition against quantitative restrictions of Article XI, and the safeguards provisions of Article XIX. We will consider the Article I, III, and XI provisions in this section. The anti-dumping and countervailing duties provisions of Article VI will be examined in the context of the Anti-dumping Agreement and the Subsidies and Countervailing Duties Agreement, and the safeguards provisions of Article XIX will be examined in the context of the Agreement on Safeguards.

(c) Article I.1—Most Favored Nation. Under Article I:1 of the GATT 1994 "... any advantage, favour, privilege or immunity granted by any contracting party [now Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". Cultural goods, although subject to this most favoured nation clause like any other goods, do raise a particular problem with respect to the like product requirement: they are difficult to compare because they are characterized less by their material components than by their intellectual content.[45] This issue, which has never been examined by a panel in the context of Article I, will be discussed more fully in the context of GATT Article III where the question was explicitly raised in the case of *Canada—Certain Measures Concerning Periodicals.*[46] The fact that it has never been raised in the context of Article I, however, does not mean that the problem is purely theoretical. An example of a situation where it could be raised is that of measures that provide an advantage to cultural goods that are produced in a given language, such as a subsidy program for the acquisition of books and magazines in French by public libraries. To the extent that they provide a *de facto* advantage to those States that share the same language, they could be seen as a violation of Article I. In such a situation, far from uncommon, the question of whether cultural goods produced in a given language are "like" cultural goods produced in a different language would undoubtedly be raised. The answer to that question, as will be seen now in the context of Article III, is far from obvious.

(d) Article III—National Treatment. The most relevant provisions of Article III of GATT 1994 are Paragraph 2, which deals with discriminatory taxes, Paragraph 4, which concerns laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of goods, and Paragraph 8 (b) which exempts from the application of Article III "the payment to subsidies exclusively to domestic producers". To the extent that most States intervene in the cultural sector and do this through a variety of means such as tax measures, domestic content requirements and regulatory requirements, the opportunities for conflict with the provision of Article III are numerous. The WTO decision in *Canada—Certain Measures Concerning Periodicals*, referred to

[45] In an article entitled *Mamas, Don't Let Your Babies Grow to Be Cowboys: Reconciling Trade and Cultural Independence*, Robin Van Harpen writes: "For the purpose of this Note, it is assumed that cultural products of the same type, such as movies, but which are from different countries are 'like' products", but then immediately adds "the accuracy of this assumption is debatable". *See* 4 MINNESOTA JOURNAL OF GLOBAL TRADE 165 n. 130 (1995).

[46] *See* the discussion in Subsection (d) below concerning "like products" in the case of *Canada—Certain Measures Concerning Periodicals*.

above, is particularly instructive with regard to the application of these provisions to cultural goods.[47]

The facts of the case are as follows. In 1965, Canada adopted Tariff Code 9958 which prohibited the importation into Canada of split-run magazines (defined as Canadian editions of foreign magazines that contain advertising directed at the Canadian market and include little or no Canadian editorial content), the objective of the measure being to reserve to Canadian periodicals the Canadian advertising market considered essential to their survival. Nearly thirty years later, in 1993, *Sports Illustrated*, owned by Time Warner, found a way to circumvent Tariff Code 9958 by electronically transmitting the content of its magazine to a printer in Canada. Canada reacted by imposing an eighty percent excise tax on the value of all advertisements in split-run magazines. As a result, *Sports Illustrated* withdrew its split-run edition and the U.S. government launched a challenge before the WTO regarding not only the new tax but also Tariff Code 9958 and two other measures affecting periodicals, one concerning the imposition of higher postal rates on imported magazines, the other concerning a postal subsidy programme for Canadian magazines.

In response to the US argument that the new provision of the *Excise Tax Act* introduced by Canada in support of its periodical industry was a discriminatory tax applying to "like" products contrary to Article III: 2, first sentence, Canada had submitted that this provision could not apply because imported split-run periodicals containing foreign content and Canadian magazines developed specifically for a Canadian readership were not "like" products:

> Content for the Canadian market will include Canadian events, topics, people and perspectives. The content may not be exclusively Canadian, but the balance will be recognizably and even dramatically different from that which is found in foreign publications which merely reproduce editorial content developed for and aimed at a non-Canadian market.[48]

Unfortunately, the Panel completely skirted the issue by using a hypothetical example where it compared two editions of the same magazine, both imported products, which could not have been on the Canadian market at the same time. On the basis of that mistaken example, it considered it most likely that periodicals would have been designed for the same readership with the same tastes and habits and concluded therefore that split-run periodicals and domestic non-split run periodicals could be like products. Although the Panel recognized that a determination of "like product" for the purposes of Article III:2, first sentence, had to be construed narrowly, on a case-by-case basis, by examining relevant factors including the product's end-uses in a given market, consumers' tastes and habits and the product's properties, nature and quality,[49] it failed to analyse these criteria in relation to imported split-run periodicals and domestic non-split-run periodicals. Having found a violation under the first sentence, it abstained from considering the matter under the second sentence.

[47] For the Panel decision, *see* WT/DS/31/R, March 14, 1997; for the Appellate Body decision, see WT/DS31/AB/R, June 30, 1997.

[48] WT/DS31/AB/R, June 30, 1997, Sec. II.A.2.

[49] As explained in *Japan—Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996), Sec. H. Article III:2 of the GATT reads as follows: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

The Appellate Body did not accept the Panel's finding that imported split-run magazines and Canadian magazines were "like products". It found that "as a result of the lack of proper legal reasoning based on inadequate factual analysis . . . the Panel could not logically arrive at the conclusion that imported split-run periodicals and domestic non-split-run periodicals can be 'like"'.[50] Lacking an adequate factual analysis to review the decision on the basis of Article III: 2, first sentence, it decided to proceed on its own to examine whether these two products could be considered as "directly competitive or substitutable products" under the second sentence of Article III:2. As a result, the "like product" issue was never resolved. This is particularly unfortunate because the factors to be taken into consideration under the first sentence of paragraph 2 (end uses, consumers' tastes and habits and product's properties, nature and quality) arguably provided the basis for Canada's best arguments.[51]

Essentially on the basis of an admission by Canada that English-language consumer magazines faced significant competition from U.S. magazines in Canada, the Appellate Body found that imported split-run periodicals and domestic non-split-run periodicals were directly competitive or substitutable products in so far as they were part of the same segment of the Canadian market for periodicals.[52] Having established that, it went on to answer the question of whether periodicals could be distinguished on the basis of their intellectual content, as argued by Canada. The answer was as follows:

> Our conclusion that imported split-run periodicals and domestic non-split-run periodicals are 'directly competitive or substitutable' does not mean that all periodicals belong to the same relevant market. A periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess, sports, music or cuisine. But newsmagazines, like *Time, Time Canada* and *Maclean's*, are directly competitive or substitutable in spite of the 'Canadian' content of *Maclean's*.[53]

However, the Appellate Body did not explain why domestic as opposed to foreign content in the particular case was not a distinguishing factor. Was this because it considered that domestic content in general was not a significant factor in the choice of a newsmagazine, so that Canadian consumers, or for that matter Italian or Japanese consumers would not mind substituting an American or a German newsmagazine for one of their own country? Would the Appellate Body have similarly found that American newspapers and Canadian newspapers are "directly competitive or substitutable products"? Was it because of the admission by Canada that American and Canadian news magazines were in competition on the Canadian market? Using the same type of reasoning, one would be justified in concluding that foreign films and American films are not "directly competitive or substitutable products" on the American market, because it is widely recognized that there is no real competition between the two on that market, but are "directly competitive or substitutable" on the French market, on the German market etc., because they are in competition on those markets. The truth of the matter is that the Appellate Body, instead of addressing squarely the issue of the specificity of cultural products as vehicles of information, has simply applied to news periodicals the same type of reasoning as was applied in the Japanese Alcohols case to foreign vodka and Japanese vodka.[54]

[50] WT/DS31/AB/R, sec. VI.B.1.

[51] *See* Richard L. Matheny III, *In the Wake of the Flood: 'Like Products' and Cultural Products after the World Trade Organization's Decision in Canada—Certain Measures Concerning Periodicals*, 147 University of Pennsylvania Law Review, 245, 264 (1998).

[52] WT/DS31/AB//R, Sec. VI.B.1.

[53] *Id.*

[54] *Japan—Taxes on Alcoholic Beverages*, WT/DS8R, WT/DS10/R, WT/DS11/R, 11 July 1996 (Panel), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996 (Appellate Body).

The second question of particular interest with regard to the interpretation of Article III had to do with the use of funded postal rates to support domestic periodicals. The Appellate Body, reversing the decision of the Panel in favour of Canada, held that the "funded postal rates" maintained by Canada could not be justified by Article III: 8(b) of GATT 1994, which provides that the provisions of Article III "shall not prevent the payment of subsidies exclusively to domestic producers". Relying on a textual as well as a contextual interpretation of that provision, and taking into account its object and purpose as confirmed by its drafting history, the Appellate Body found that Article III:8(b) was "intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government".[55] And it went on to extract with approval the following comments of the Panel in *United States—Measures Affecting Alcoholic and Malt Beverages*:

> Article III:8(b) limits, therefore, the permissible producers subsidies to "payments" after taxes have been collected or payments otherwise consistent with Article III. This separation of tax rules, e.g. on tax exemptions or reductions, and subsidy rules makes sense economically and politically. Even if the proceeds from non-discriminatory product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the taxes due. The separation of tax and subsidy rules contributes to greater transparency.[56]

Seeing no reason to distinguish a reduction of tax on a product from a reduction in transportation or postal rates, the Appellate Body finally concluded that the postal subsidy was incompatible with Canada's obligations under Article III of GATT 1994.

It is difficult to quarrel with this decision from a purely legal point of view.[57] However, the interpretation of Article III does mark the triumph of form over substance.[58] The view that virtually any form of subsidy that is not granted directly in the form of payments to domestic producers is not compatible with GATT Article III: 8 (b) means that a serious look will have to be taken at the way financial help is granted to producers of cultural goods. Tax remittance and similar programs are frequently used as a means of subsidizing cultural producers not only in Canada[59] but elsewhere. According to a OECD publication made public in 1998, "OECD governments are increasingly relying upon policies aimed at indirectly stimulating domestic content creation through tax breaks or increased contributions from the private sector or non-profit organizations, rather than direct funding measures"[60]. No matter how the program operates, if it entails some form of discrimination against foreign cultural goods and it is not paid directly in the form of payments to domestic producers, it runs the risk of being challenged on the basis of Article III of GATT 1994.

[55] *Canada—Certain Measures Concerning Periodicals*, *supra* note 50, sec. VII.

[56] DS/23/R, BISD, 39S/206, ¶ 5.10, (June 1992).

[57] This is also the view expressed in Trevor Knight, *The Dual Nature of Cultural Products: An Analysis of the World Trade Organization's Decisions Regarding Canadian Periodicals*, 57 UNIVERSITY OF TORONTO FACULTY OF LAW REVIEW 165, 179–80 (1999).

[58] For a similar assessment, *see* Aaron Scow, *The Sports Illustrated Canadian Controversy: Canada 'Strikes Out' in Its Bid to Protect Its Periodical Industry from U.S. Split-Run Periodicals*, 7 MINNESOTA JOURNAL OF GLOBAL TRADE 245, 277 (1998), who writes: "It is clear that the Panel and not the Appellate Body rendered the more viable solution to the postal rate subsidy issue. Allowing the postal rate subsidy makes sense from both a cost-effectiveness standpoint and a policy-based standpoint".

[59] *See* for instance, for a Canadian program, *Income Tax Act*, Chap. 1, (5th Supp.) RSC 1985, as amended, Art. 125.4 and *Income Tax Regulations*, 1978, C. 945 as modified; for a provincial program, see Income Tax Act, Lois refondues du Québec, C. I-3, Art. 1029.8.34 to 1029.8.36

[60] OECD, *Policy and Regulatory Issues for Network-Based Content Services*, Doc. DSTI/ICCP/IE(96)9/FINAL, p. 16

Article III of GATT 1994 was at the root of another complaint in the cultural sector brought before the WTO by the United States in June 1996. The complaint concerned Turkey's imposition of a tax on the showing of foreign films that was not imposed on the showing of domestic films.[61] Following unsuccessful consultations, a panel was constituted in February 1997 to hear the case. Canada reserved its third-party rights to the dispute. However, on July 14, 1997, both parties notified the DSB of a mutually agreed solution,[62] the United States having decided to drop the matter after Turkey agreed to equalize any box office tax on the showing of domestic and foreign films. On December 16, 1997, the Turkish Council of Ministers published a regulation which lowered the tax on foreign films from twenty-five per cent to ten per cent, while raising the tax on domestic films from zero to ten per cent.[63] This mutually agreed solution is not without interest. It gives support to closely-related schemes used by a number of European countries whereby a non-discriminatory tax is raised at the point of exhibition and is paid into the budget of a national public funding agency for the development of cinema production.[64] The French version of that type of policy was the subject of discussion until the very end of the Uruguay Round negotiations.[65]

(e) Article XI—Quotas. With regard to Article XI of GATT 1994, the Split-Run Periodicals Panel found that a prohibition on the importation of special edition periodicals, including split-run or regional editions, that contain advertisements primarily directed to a Canadian market was a clear violation of Article XI:1 that could not be justified under any of the general exceptions of Article XX. Canada had argued that the import prohibition under Tariff Code 9958 could be justified under Article XX (d) of the GATT, which concerns measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement", as a measure intended to secure the attainment of the objectives of Section 19 of the Income Tax Act, which allows for the deduction of expenses for advertising directed to the Canadian market on condition that the advertisements appear in Canadian editions of Canadian periodicals. But the Panel found that the measure was not necessary to secure compliance with the Act in question because the two pursued different objectives.[66] This finding was not appealed by Canada.

2. The Agreement on Subsidies and Countervailing Measures

Even if a subsidy is compatible with Article III of GATT 1994, it remains subject to the provisions of the *Agreement on Subsidies and Countervailing Duties* ("SCM Agreement") which supplements Articles VI and XVI of GATT 1994 by providing more

[61] *WTO Focus*, no. 16, February 1997, p. 6.

[62] *Turkey—Taxation of Foreign Film Revenues*, complaint by the United States, (WT/DS43), June 1996: *Overview of the State-of-Play of WTO Disputes, Settled or Inactive Cases*: http://www.wto.org/english/tratop_e/dispu_e/stplay_e.doc

[63] *See* Office of the United States Trade Representative, *Press Release 97–108*, December 19, 1997: "U.S. Trade Representative Charlene Barshefsky Announces Resolution of WTO Dispute with Turkey on Film Taxes".

[64] *See* European Audiovisual Observatory, *Public Aid Mechanisms for the Film and the Audiovisual Industries in Europe*, section 1.2.2: http://www.obs.coe.int/oea_publ/funding/00002095.html. The countries in question are Norway, Sweden, Finland, France, Germany, Greece and Italy.

[65] The United States had asked that some of the revenues coming from France's eleven percent box-office tax should go to American film makers. This request was rejected. *See*: THE NEW YORK TIMES, *Europeans Reject U.S. Movie Compromise* (Roger Cohen), p. 1, December 14, 1993.

[66] WT/DS31/R, ¶¶ 5.4 to 5.11.

detailed rules and procedures. Article 1.1 of the Agreement contains a detailed definition of the term "subsidy" that leaves very few financial contributions by a government or public body outside of the scope of the Agreement, provided that they are, in law or in fact, specific.[67] Subsidies subject to the Agreement fall into one of three categories, that is prohibited subsidies (export subsidies and subsidies contingent upon the use of domestic over imported goods), non-actionable subsidies (subsidies that are not specific or relate to research, regional development and environmental requirements and meet certain criterion specified in the Agreement),[68] and actionable subsidies, which are not prohibited but can be challenged in the WTO dispute settlement system if they have an adverse effect on the interests of another Member (basically all other subsidies).

Three types of adverse effect are envisaged in the category of actionable subsidies. First, injury to a domestic industry caused by subsidized imports in the territory of the complaining Member. Second, serious prejudice, which usually arises as a result of adverse effects (e.g., export displacement) in the market of the subsidizing Member or in a third country market. Finally, nullification or impairment of benefits accruing under the GATT 1994, which arises most typically where the improved market access presumed to flow from a bound tariff reduction is undercut by subsidization.

Part V of the SCM Agreement deals with countervailing measures. It sets forth substantive requirements that must be fulfilled in order to impose a countervailing measure, as well as detailed procedural requirements regarding the conduct of a countervailing investigation and the imposition and maintenance in place of countervailing measures.

It is quite possible that subsidies on cultural goods could be challenged under this Agreement. The fact is that in many countries cultural goods in general benefit from a wide variety of subsidy programs. In many instances, however, the programs in question would be considered as non-specific or, if specific, not important enough to create serious prejudice to the domestic industry, which minimizes the risk of a challenge. But this might not be true in the case of the book industry, and above all in the case of the film industry where the amounts given are often quite large and benefit a limited number of producers.[69] It will be remembered in that respect that the United States complained in the 1970 GATT Catalogue of Non-Tariff Barriers about the subsidies granted by various States to their national film industries.[70] More recently, in December 2001, the Film and Television Action Committee, the Screen Actors Guild and a number of other American film and television unions filed a petition with the U.S. Department of Commerce and the International Trade Commission asking that they investigate whether Canada was subsidizing U.S. film production in Canada through tax credit and other incentives and, in the affirmative, asking that they consider imposing countervailing tariffs on such U.S.

[67] The term "specificity" is defined in Article 2 of the SCM Agreement, and essentially means that the subsidy is restricted, in law or in fact, to a limited number of enterprises or to a particular region of the country. For more detail, *see* Chapter 16 of this book.

[68] The category of non-actionable subsidies no longer exists, since the relevant provision in the Agreement had a five-year term and was not renewed. *See id.*

[69] It would not be true also in the case of export subsidies since they are presumed specific and are totally prohibited without regard for their importance: *see* Articles 2.3 and 3 of the SCM Agreement. There is disagreement regarding the extent to which trade in films should be treated as trade in goods as opposed to trade in services. This makes it all the more important to determine whether the subsidy program in question concerns goods or services since, as we shall see, there are no constraints yet on subsidies in the General Agreement on Trade in Services, save if a national treatment commitment has been given in the cultural sector, in which case subsidies will have to respect the national treatment obligation: *see* the discussion of GATS in Part B.1 below.

[70] *See supra*, note 6.

films produced in Canada [71]. Despite the opposition of the major producers, of independent producers, and of the Motion Picture Association of America to the initiative[72], the petitioners went ahead claiming to represent the majority of the approximately 270 000 people employed in the television and film production industry in the United States and asked the U.S. Department of Commerce and the U.S. International Trade Commission to investigate whether Canadian federal and provincial governments were subsidizing film production in Canada through tax credits and other incentives. However, establishing that a sufficient proportion of the industry supports a countervailing duty enquiry proved more difficult than expected and on January 11, 2002, the petition was temporarily withdrawn in order to strengthen it[73]. In June 2002, the Film and Television Action Committee released a legal memo prepared by a leading law firm which outlined the various international trade remedy actions that members of the U.S. industry could take in response to film and television subsidies provided by the Canadian federal and provincial governments and announced by the same occasion its intention to launch a Section 301 petition with the U.S. Trade Representative in the very near future.[74] Whether the petition on countervailing duties will be filed again in light of that development remains to be seen. But if countervailing duties were to be imposed on American films produced in Canada, it could have considerable implications in view of the fact that many States (Australia, South Africa, Ireland, Great Britain among others) offer similar incentives and that a large number of State governments within the United States equally offer a broad range of incentives to the film production industry[75]. More importantly, it would tend to support the view that trade in cinematographic films comes under trade in goods, a view that a number of countries are not ready to accept.

A challenge to a cultural subsidy program could be mounted in the WTO under Part III (actionable subsidies) of the SCM Agreement, or under a domestic countervailing law (which must comply with Part V (countervailing measures) of the SCM Agreement). In both instances, it would be necessary to demonstrate that the subsidized products and the affected products are "like products", which is not particularly obvious in the case of cultural products.[76] According to Article 15.1, footnote 46, the expression "like

[71] The petition was filed on December 4, 2001. *See Petition on 'Runaway' Productions Filed*, Los Angeles Times, December 5, 2001; for the text of the petition, see the site of the International Trade Commission: http://www.usitc.gov/, Dockets, no 701-TA-427 (prelim)

[72] The Motion Picture Association, through its President and CEO Jack Valenti, even claimed that the petition on countervailing duties was a "direct incentive to a trade war": see Jack Valenti Press Releases, December 4, 2001, http://www.mpaa.org/jack/

[73] *Runaway Productions Petition to be Withdrawn*, Los Angeles Times, January 11, 2002.

[74] For the content of that memo, see the site of the FTAC: < http://www.ftac.net/html/2-ftacstewart.html>. In essence, the memo describes the three basic remedies available to the FTAC which are a Section 301(a) investigation by filing a petition with the Office of the United States Trade Representative ("USTR"), a Section 301(b) investigation by filing a similar petition with the Office of the USTR and finally a petition with the U.S. Department of Commerce and the U.S. International Trade Commission under U.S. domestic law, requesting the initiation of an investigation that could lead to the imposition of offsetting tariffs on imports of Canadian film and television productions. Regarding this last remedy, the memo recognized that that the difficulties encountered in defining the industry for "standing" purposes were not trivial but could be overcome. As for the petitions with the USTR, it expressed a preference for a Section 301 (a) investigation rather that a Section 301 (b) investigation.

[75] See Martha Jones, *Motion Picture Production in California,* California State Library, California Research Bureau, CRB 02–001 (2002) (http://www.library.ca.gov/html/statseg2a.cfm). See also *The Migration of U.S. Film and Television Production,* United States Department of Commerce, International Trade Administration, January 2001, 89.

[76] *See* Article 6.3 and 15.1 of the SCM Agreement.

product" is to be interpreted throughout the Agreement to mean "a product that is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". The notion of "like product" in the context of the SCM Agreement was examined in the report of the panel in *Indonesia—Certain Measures Affecting the Automobile Industry* where it was found to be quite narrow: "It is not enough that the products have characteristics which resemble the [domestic product]; rather they must have characteristics which "closely" resemble [it]".[77] The Panel added:

> Although we are required in this dispute to interpret the term "like product" in conformity with the specific definition provided in the SCM Agreement, we believe that useful guidance can nevertheless be derived from prior analysis of "like product" issues under other provisions of the WTO Agreement. Thus, we note the statement of the Appellate Body in Alcoholic Beverages (1996)731 that, in this context as in any other, the issue of "like product" must be considered on a case-by-case basis, that in applying relevant criteria panels can only use their best judgement regarding whether in fact products are like, and that this will always involve an unavoidable element of individual, discretionary judgement.[78]

The Panel relied on the physical characteristics of the different types of cars, on the industry-recognized system of market segmentation and on its own analysis of the facts to conclude that certain cars were like products and others were not. Although the Panel made only passing references to substitutability as a test, Edmond McGovern considers that de facto it placed most emphasis on the competitiveness and substitutability of products in its analysis.[79]

In the case of cultural goods, an analysis such as that made by the Panel would raise particular difficulties. Because they are characterized not so much by their physical characteristics than by their artistic and intellectual content, they cannot easily be compared one to another. In *Canada—Certain Measures Relating to Periodicals*, the Appellate Body found that "a periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess, sports, music or cuisine".[80] A similar process of distinguishing between categories of cultural goods appears even more warranted in a situation where a "like products" test applies, considering that "like products" should be viewed as a subset of "directly competitive or substitutable" products and interpreted as a consequence more narrowl*y*.[81] Thus, in the case of books, using the industry-recognized system of market segmentation, distinctions might have to be made according to the form of expression (poetry, theatre, essays, novels, criticism), according to the subject matter (history, biographies, arts, architecture and photography, children, home and garden, cooking, mystery and thrillers, reference, religion, romance, science and nature, science fiction, fantasy and horror, self improvement and inspiration, sports and adventure, travels, etc.). Even within a given category, further distinctions might have to be made according to the language of the book (French, Swedish, Japanese, Spanish, Arab, etc.)[82] or to the nationally defined content of the book

[77] WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 1998, ¶ 14.172

[78] *Id.*

[79] Edmond McGovern, *International Trade Regulation*, §12.42–1 (1995)

[80] *See supra*, note 47.

[81] As established in *Japan—Taxes on Alcoholic Beverages*: *see supra* note 54, ¶ 14.175

[82] In *Canada- Certain Measures Concerning Periodicals*, the Appellate Body decided that imported American split-run periodicals and Canadian periodicals were 'directly competitive or substitutable' essentially on the basis of a Canadian admission that English-language consumer magazines faced significant

(American history books, Canadian history books, etc.). Sorting out which categories of books could be considered as like products, as can be seen, might well entail some delicate decision-making on the part of the Panel.

3. The Anti-Dumping Agreement

Paradoxically, whereas most types of goods can be the object of an anti-dumping proceeding, it appears to be difficult to challenge cultural goods on this basis. The fact is that accusations of dumping in the cultural sector have been made on a number of occasions in the past but none have lead to an inquiry. Thus, one of the arguments put forward by the Canadian Magazine Publishers Association in support of the Canadian prohibition on the importation of split-run editions of foreign magazines was precisely that American publishers could engage in editorial "dumping" of content whose costs had already been recovered in the United States, providing them with an unfair advantage over Canadian magazines competing in the same market.[83] The same argument has also been made regarding American film producers who are often accused of dumping their films in foreign markets.[84]

Whether such situations can really be described as dumping has been questioned by many commentators. Hoskins, Finn, and McFadyen, for instance, argue from an economic point of view that in matters of dumping, "the relevant reference cost is not the production cost of the original but the incremental cost of supplying the additional market, but having said that, they immediately add: "For most traded products, this is not an important distinction, but for audiovisual products, it is crucial. The production cost extractd is always for the first copy, but the relevant cost is the low replication cost . . . plus the distribution cost"[85] Another author, W. Ming Shao, equally questions to what extent, "if at all, conventional notions of dumping apply to goods like films and television programs that possess strong public good characteristics."[86] Whatever the explanation given for the peculiar nature of audiovisual products (and of cultural goods in general), be it their public good characteristics or what has been called the "cultural discount"[87] that characterizes trade in such products, the fact remains that cultural goods appear to be different from other goods in this context.

competition for sales from imported U.S. consumer magazine: *supra,* note 52. But it did not examine the question whether French language periodicals in Canada where "directly competitive or substitutable" with American split-run periodicals.

[83] *See* Canadian Magazine Publishers Association, *Split-Run Editions: The Danger to the Canadian Magazine Industry and the Implications of Tariff Item 99* 58, September 19, 1992, p. 3. *See also* Val Ross, *Sports Illustrated Tackles Canada: Time Warner Plan Assailed as 'Dumping',* THE GLOBE AND MAIL, January 13, 1993, pp. C1–C2.

[84] *See* W. Ming Shao, "*Is There No Business Like Show Business? Free Trade and Cultural Protectionism*", 20 Yale Journal of International Law, 105, 121–122 (1995).

[85] Colin Hoskins, Adam Finn, and Stuart McFadyen, *Television and Film in a Freer International Trade Environment: US Dominance and Canadian Responses*, in MASS MEDIA AND FREE TRADE—NAFTA AND THE CULTURAL INDUSTRIES 63, 70 (eds. Emile G. McAnany and Kenton T. Wilkinson 1996). But it must be pointed out that under U.S. law, dumping analysis is based on fully-allocated costs and that Article 2.2.1 of the Anti-dumping Agreement itself refers to "all costs".

[86] W. Ming Shao, *supra* note 84, 123, (1995).

[87] The notion of cultural discount "captures the notion that a particular program (or feature film) rooted in one culture and thus attractive in that environment, will have diminished appeal elsewhere as viewers find it difficult to identify with the styles, values, beliefs, institutions and behaviour patterns being portrayed": Colin Hoskins and Stuart McFadyen, *Guest Editors' Introduction*, 16 CANADIAN JOURNAL OF COMMUNICATION 186 (1991).The notion was originally developed in Colin Hoskins and Rolf Mirus, *Reasons for the US Dominance of the International Trade in Television Programmes*, 10 MEDIA, CULTURE AND SOCIETY 499–515 (1988).

If an antidumping investigation involving cultural goods was nevertheless launched, it would be necessary to establish first that dumping is effectively taking place and second to what extent dumped products are causing injury to domestic products. The basic definition of dumping in the WTO Anti-Dumping Agreement is the sale for export at a price lower than the comparable price, in the ordinary course of trade, of the like product when destined for consumption in the exporting country.[88] In the case of films, it would not be difficult to establish that they are often sold abroad at a price substantially lower than the comparable price in the exporting country since this is a common practice. What significance must be attributed to such differences in prices, however, needs to be considered in light of the previous remarks of Ming Shao. Once dumping is established, it must be shown that the dumped imports are, through the effects of dumping, causing injury to the domestic production of like products.[89] As in the SCM Agreement, the notion of "like products" is defined to mean "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product another product which, although not alike in all respects, has characteristics closely resembling of those of the product under consideration."[90] It would not be surprising therefore to see the same type of difficulties as discussed in connection with the application of the SCM Agreement to cultural goods arise in the case of the AD Agreement.

4. The Agreement on Safeguards

The notion of adapting the safeguards clause of Article XIX of GATT 1947 to fit the particular case of cultural goods is not new. In a protocol annexed to the UNESCO's *Convention on the Importation of Educational, Scientific and Cultural Goods* (Florence Agreement), the United States, as a condition of its signature, effectively obtained for itself a safeguard clause that was in essence a reproduction of article XIX of GATT, but without any explicit reference to compensation.[91]

The *Agreement on Safeguards* does not treat cultural goods differently from other goods, and should not be overlooked as a means of helping cultural industries seriously

[88] *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Article 2.1

[89] *Id*., Article 3.5 and 3.6.

[90] *Id., Article 2.6*

[91] UNESCO, *Protocol annexed to the Convention on the Importation of Educational, Scientific and Cultural Goods,* 1950. The first paragraphs read as follows: "The contracting States, in the interest of facilitating the participation of the United States of America in the Agreement on the Importation of Educational, Scientific and Cultural Materials, have agreed to the following: 1. The United States of America shall have the option of ratifying this Agreement, under Article IX, or of accepting it, under Article X, with the inclusion of the reservation hereunder. 2. In the event of the United States of America becoming Party to this Agreement with the reservation provided for in the preceding paragraph 1, the provisions of that reservation may be invoked by the Government of the United States of America with regard to any of the contracting States to this Agreement, or by any contracting State with regard to the United States of America, provided that any measure imposed pursuant to such reservation shall be applied on a non-discriminatory basis". The reservation itself reads in part as follows:

"(a) If, as a result of the obligations incurred by a contracting State under this Agreement, any product covered by this Agreement is being imported into the territory of a contracting State in such relatively increased quantities and under such conditions as to cause or threaten serious injury to the domestic industry in that territory producing like or directly competitive products, the contracting State, under the conditions provided for by paragraph 2 above, shall be free, in respect of such product and to the extent and for such time as may be necessary to prevent or remedy such injury to suspend, in whole or in part, any obligation under this Agreement with respect to such product".

injured by the importation of like or directly competitive products.[92] It is the new vehicle through which measures may be applied pursuant to Article XIX of GATT 1994 and the basic conditions for its applications are essentially those of that Article (an increase of imports of any product which is causing, or which is likely to cause, serious injury to the industry), except for requirements that the injury should occur "as a result of unforeseen developments and of the effect of the obligation incurred . . . under this agreement" which has not been repeated in Article 2.1 of the Safeguards Agreement. But the Appellate Body, in *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ruled that Article XIX had to be read together with the Agreement so that the requirements in question remain effective.

To see how the Safeguards Agreement would apply in the case of cultural goods, let us assume that as a result of the WTO decision in *Canada—Certain Measures Concerning Periodicals*, serious injury, understood in the sense of Article 4.1 (a) of the Agreement as "a significant impairment in the position of the domestic industry", is caused to the Canadian periodical industry. Canada, arguably, could consider that such injury occurs as a result of an unforeseen development and of the effect of an obligation incurred under the Agreement and consider that it is justified under the Safeguards Agreement in suspending a GATT obligation in whole or in part for such time as may be necessary to prevent or remedy such injury. Before doing so, however, Canada would have to demonstrate that the injury is the result of an increase in quantities of imports, absolute or relative to domestic production, as prescribed in Article 2.1. Unfortunately, it is sometimes impossible to prove such increase in view of the fact that the intellectual content of magazines (and of most cultural goods for that matter) can easily be separated from their material support for the purpose of import. In the actual facts at the origin of the Periodicals case, the intellectual content of *Sports Illustrated* was imported electronically into Canada and printed there with the result that there was no imports of goods actually taking place. As we shall see later in discussing the distinct treatment of cultural goods and services, this particular problem has taken a new dimension with the transmission of "digitized products such as music, films, software or 'books' on the internet.

Even if it was possible to have recourse to the Agreement because evidence of an actual increase of imported split-run periodicals exists, Canada would still have to offer adequate trade compensation to the United States in the form of reduced tariffs on other products, as it would have a duty to maintain a substantially equivalent level of concessions and other obligations; in the absence of an agreement, the United States could suspend substantially equivalent restrictions.[93] But if the safeguard measure conforms to the Agreement and results from an absolute increase in imports, the compensation requirement does not apply for the first three years.[94] Whether Canada would be interested in following such a course of action remains to be seen in view of the limited protection offered by the Safeguards Agreement and of the relative complexity of the procedure regarding compensation; but the possibility is there.

[92] Stacie I. Strong makes this suggestion in *Banning the Cultural Exclusion: Free Trade and Copyrighted Goods*, 4 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL *Law* 93, 105 (1993). Laurence G.C. Kaplan, discussing the possible use of Article XIX by the European Community to justify the *Television Without Frontiers* directive, mentions that this possibility was examined by Hollywood lobbyists at the end of the 1980s. *See The European Community's 'Television Without Frontiers' Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INTERNATIONAL LAW REVIEW 255, 314 (1994).

[93] *Agreement on Safeguards*, Article 8.1, .2.

[94] *Id,* Article 8.3.

B. Trade in Cultural Services

Apart from the European Union with its rules regarding the free movement of services dating back to the Treaty of Rome of 1958, trade in services has only recently become the object of compulsory agreements. The OECD does have a *Code on Current Invisible Transactions*, but it is not compulsory.[95] The *Canada–US Free Trade Agreement*, concluded in 1988, was in effect the first international trade agreement to include specific, fairly detailed and compulsory provisions concerning trade in services. The two governments agreed in essence to extend the principle of national treatment to the providers of a list of commercial services established in an annex to the Chapter on services ; this obligation was prospective in this sense that it did not required either government to change anything to existing laws and practices.[96] These were further developed in the *North American Free Trade Agreement* of 1992, which draws, for its Chapter 12 on services, on the experience of the Uruguay Round negotiations on services. Chapter 12 of NAFTA establishes a set of basic rules and obligations (national treatment, most-favoured-nation treatment, prohibition to impose a local residency requirement) aimed at facilitating trade in services between the Parties. It applies to all measures affecting cross-border trade in services not otherwise excluded from coverage; furthermore, each Party can lodge reservations aimed at maintaining non-conforming measures or preserving the ability to enact new non-conforming measures in specific sectors.

1. The General Agreement on Trade in Services ("GATS")

Contrary to what was suggested in Europe and even in Canada immediately after the conclusion of the Uruguay Round negotiations, GATS does not contain a cultural exception clause.[97] Early in the negotiations, Canada argued in favour of the inclusion of such a general clause that would have covered all cultural services, but dropped the idea for lack of support. The proposal made by the EC in the last days of the negotiations concerned only audiovisual services and did not fare better. The proposal in question, described during the negotiations as a "cultural specificity clause" instead of a "cultural exception clause," envisaged three different modifications or additions to the text of the agreement. The first would have specified that in future negotiations on services, the specific needs of the member States concerning the preservation of their national culture would be fully recognized. The second would have amended GATS Article XV to provide explicitly that the negotiations to be undertaken on subsidies following the entry into force of the Agreement would take into consideration the flexibility necessary for the member States to pursue their national goals with respect to culture. Finally, an interpretative note added to the Annex to Article II of the GATS would have specified that co-production agreements could be maintained beyond the maximum period of ten years envisaged in the Annex. None of these suggestions was discussed in detail, and the proposal was quickly dropped.[98] In the end, the EC simply decided not to include audiovisual services in its list

[95] For the text of the Code, *see*: http://www1.oecd.org/daf/investment/legal-instruments/invisibe.pdf. The OECD codes are implemented through policy reviews and country examinations, relying on "peer pressure" to encourage liberalisation.

[96] *Canada—U.S. Free Trade Agreement*, Chapter 14.

[97] *See* R. Conlogue, *Taking a Stand for the Cinematic National Soul,* THE GLOBE AND MAIL (Toronto), 21 December 1993, p. A-12, where the author writes: "There is a general rejoicing among European and Canadian Film Makers about the French triumph at the GATT negotiations last week".

[98] *See* Ivan Bernier, *Commerce international et cultures nationales: le débat sur la clause d'exception culturelle dans les négociations de l'Uruguay Round*, in Mario Beaulac and Francois Colbert, INDUSTRIES CULTURELLES NATIONALES ET MONDIALISATION DES MARCHES, 45, 60–61 (1994).

of specific commitments, and Canada did the same for cultural services in general. At first sight, therefore, no distinction is made between cultural services and other services in the GATS. However, looking at the fundamental obligations contained in the Agreement, one immediately realizes that enough room was left for those members willing to limit their undertakings in the cultural sector to allow them to do so; and in the end, a good many did exactly that.

The first basic obligation of Members of the GATS is that of Article II, paragraph 1, which provides for the granting of most-favoured-nation treatment to all services and service suppliers of all Members, whether specific commitments have been made or not. The pertinence of this provision in the field of culture is well illustrated by the 1998 EU complaint against Canada concerning film distribution services which was based to a large extent on GATS Article II:1.[99] However, under paragraph 2 of that same Article, a "Member may maintain a measure inconsistent with paragraph 1 provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions." The conditions in question provide that all exemptions granted for a period of more than five years should be reviewed and that in principle exemptions should not exceed a period of ten years. A large number of MFN exemptions have been taken in regard to audiovisual services. Counting the European Community as a single entity, a total of 33 MFN exemptions[100] specifically applying to the audiovisual sector are in place, most of which concern cinema and television co-production agreements and regional funding arrangements inscribed in the Annex on Article II, for reasons having to do essentially with national and regional cultural identity.[101]

An interesting question that arises with regard to co-production agreements exemptions is whether they cover only the agreements in force before January 1, 1995, or whether they cover all co-productions agreements including those concluded after January 1, 1995. According to Article 2 of the Annex on Article II Exemptions, " [a]ny new exemption applied for after the date of entry into force of the WTO Agreement shall be dealt with under paragraph 3 of Article IX of that Agreement". Depending on the interpretation given to the term "exemption", one might be justified in considering, in light of that provision, that post-January 1, 1995, co-production agreements constitute new exemptions. But in practice, quite a number of such agreements have been concluded since January 1, 1995. In some instances, the exemptions covering those agreements are described in a language which explicitly indicates that they apply to existing as well as to future co-production agreements ; in other instances, the language of the exemption

[99] *Canada—Measures Affecting Film Distribution Services*, WT/DS117/1 (1998). The complaint was dropped a few months later when the company at the origin of the case, Polygram, was bought by a Canadian company.

[100] The 33 exemptions covering audiovisual services are by: Australia, Austria, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, Columbia, Cuba, Cyprus, Czech Republic, Ecuador, Egypt, European Community, Finland, Hungary, Iceland, India, Israel, Liechtenstein, New Zealand, Norway, Panama, Poland, Singapore, the Slovak Republic, Slovenia, Sweden, Switzerland, Tunisia, United States and Venezuela. The eight general MFN exemptions potentially impacting audiovisual services are by: El Salvador, Malaysia, Peru, Philippines, Sierra Leone, Thailand, Turkey and the United Arab Emirates. WTO, Council on Services, Audiovisual Services, *supra*, note 43, ¶ 31.

[101] For examples of specific exemptions see GATS/EL/82 and GATS/EL/33 for Sweden and Finland, and GATS/EL/92 for Venezuela. The member states of the EC are also covered by the broader exemptions taken by the EC which include not only co-production agreements and financial support programs (such as the Media and Eurimages programmes and the Nordic Film and TV fund) but also the EC Television Broadcasting directive (Television Without Frontiers) and which specify that the exemptions in question cover existing and future measures of that type. *See* GATS/EL/31.

is less clear and only a mention that the exemption applies to all countries suggests that it covers new agreements.[102]

But the most important provisions of GATS are to be found in Part III of the Agreement which deals with the specific commitments of members. Following the pattern originally developed in the GATT for trade in goods, GATS provides that its members, beyond the general commitment of Part II (MFN treatment, transparency, etc.) should negotiate with other members specific commitments in sectors of their choice concerning national treatment and market access. In practice, few states have made such commitments in the cultural sector. A WTO document mentions in this respect that only nineteen members (thirteen at the conclusion of the Uruguay Round negotiations, six more as a result of accession) have made market-opening commitments in the audiovisual sector, including four developed countries (the United States, Japan, New Zealand and Israel) and fifteen developing countries, and that many of these commitments include various types of limitations.[103] India, for instance, included motion picture and video tape distribution services, but only one hundred titles could be imported per year, and the designated authority had to certify that the motion pictures in question had either won an award in an international film festival, participated in any of the official sections of the specified film festivals, or received favourable reviews in prestigious film journals.[104] Canada, as mentioned above, made no market-access or national-treatment commitments on any cultural services. It even went to the extent of excluding musical scores, audio and video recordings, books, magazines, newspapers, journals, and periodicals from its commitments in the sector of wholesale trade services.[105] Clearly there is some reluctance on the part of GATS members to undertake obligations in this area.[106] The fact is that once a Member has made a commitment with regard to a particular category of services, it cannot easily withdraw the commitment.[107] New Zealand, which had committed in 1993 not to have recourse to quantitative restrictions in the audiovisual sector, was reminded of this fact in no uncertain terms following its Government's pledge in 2001 to introduce format-specific quotas for local content for radio and broadcast television.[108] The Office

[102] The EC (GATS/EL/31), Chile (GATS/EL/18) and the Czech Republic (GATS/EL/26) are examples of Members whose exemption explicitly refers to existing and future agreements. Canada, who has signed no less than 21 co-production agreements since January 1, 1995, provides an example of a Member whose exemption does not refer to future agreements but is described as being applicable to all countries (GATS/EL/16). For the text of those agreements, *see* http://www.telefilm.gc.ca/04/43.asp. A situation less than clear is that of those nineteen states that have signed and ratified the European Convention on Cinematographic Co-production (under the auspices of the Council of Europe) after January 1, 1995 (see Convention 147: http://conventions.coe.int/Treaty/EN/cadreprincipal.htm). The Convention provides in its Article 4 that: "European cinematographic works made as multilateral co-productions and falling within the scope of this Convention shall be entitled to the benefits granted to national films by the legislative and regulatory provisions in force in each of the Parties to this Convention participating in the co-production concerned".

[103] *See supra*, note 43, ¶¶ 24–26 and Table 9.

[104] GATS/SC/42, p. 8. Most of these limitations, however, have subsequently been dropped by India.

[105] GATS/SC/16, p. 47

[106] Christopher Arup, in *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property*, 2000, writes in this regard: "The GATS has added to the pressure on those national measures which were designed to ensure that less powerful and mainstream voices, particularly local ones, enjoyed access to distribution channels. Nevertheless, for the time being, many countries have availed themselves of the opportunities inherent in the GATS itself to maintain limitations on their exposure to the open-trade and free-market norms of the WTO" (p. 301).

[107] Article XXI admittedly provides for modification or withdrawal of any commitment in a member's schedule but subject to compensation.

[108] New Zealand, Ministry for Culture and Heritage, Department Forecast Report 2001, p. 9: http://www.mch.govt.nz/publications/dfr2001/MCH 2001 DFR.pdf. A study conducted in New Zealand

of the United States Trade Representative, in its *National Trade Estimate Report on Foreign Trade Barriers 2001*, pointed out that such an action would violate New Zealand's commitments under the GATS.[109]

With respect to subsidies, Article XV of the GATS simply recognises that, in certain circumstances, subsidies may have distortive effects on trade in services, and asks that members enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such distortive effects. According to Dr. Mario Kakabadse of the WTO Secretariat, "[t]here is no presupposition as to what [the disciplines] will contain or how different they will be from rules on subsidies in the goods area. Like all GATT/WTO negotiations, they will take place on the basis of consensus and it would seem unlikely that governments would abandon their explicit right to support film production."[110] In view of the substantial financial support given by many governments to their cultural industries, these negotiations should obviously be followed with care.[111] However, because of the inherent complexity of developing guidelines in this area, the negotiations in question have progressed very slowly since their beginning, in 1995, in the context of the Working Party on GATS Rules.[112] it remains unclear for the moment to what extent there is a real consensus on the need for such guidelines.

Even though there are currently no multilateral disciplines on subsidies as such in the GATS, subsidies are not totally beyond the reach of the Agreement. The Agreement does apply, for instance, in a situation where access to domestic subsidies is granted to certain States and not to others. A concrete example of this in the cultural sector is that of cinema and television co-production agreements and regional support arrangements which provide preferential access to funding: but for the exemption regime of Article II, paragraph 2, of GATS, as we have seen, those agreements would clearly have been in violation of the MFN obligation of Article II, paragraph 1. The Agreement also applies to subsidies when members list a sector in their Schedule of commitments without any limitation concerning national treatment. National treatment then requires governments providing subsidies to domestic services suppliers to make equivalent subsidies available to foreign services providers operating in the country. This explains why the United States,

had shown in that respect that the proportion of local content relative to total schedule time had diminished since 1995 and that when compared with ten other countries, New Zealand stood at the bottom end of the spectrum with only 24 percent. New Zealand On Air, *Broadcasting And Cultural Issues At The Start Of The New Millennium*: http://www.nzonair.govt.nz/media/policyandresearch/otherpublications/issues.pdf

[109] Office of the United States Trade Representative, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 2001, under New Zealand. Had New Zealand abstained from taking market access commitments in the audiovisual sector during the Uruguay Round negotiations and put in place quotas, as envisaged in 2001, they could have benefited from the position adopted by the United States in its July 1, 2002, Proposals for Liberalizing Trade in Services, where it simply "requests countries to schedule commitments that reflect current levels of market access in areas such as motion picture and home video entertainment production and distribution services, radio and television production services, and sound recording services". *See* United States Mission—Geneva, Press-2002: http://www.us-mission.ch/press2002/0702liberalizingtrade.html.

[110] Mario A. Kakabadse, *The WTO and the Commodification of Cultural Products: Implications for Asia*, 22(2) MEDIA ASIA 71–77 (1995).

[111] In a 1998 background note prepared by the Secretariat for the Working Party on GATS Rules which analyzes, on the basis of information provided in the Trade Policy Reviews, subsidies for services sectors, aids to the audiovisual industries are the most frequently mentioned type of subsidies: see doc. S/WPGR/W/25 (26/01/98).

[112] *See* the note on conceptual issues relating to subsidies prepared by the Secretariat: Doc. S/WPGR/W9. For the most recent report of the Working Party on GATS Rules, dated October 4, 2001, *see* doc. S/WPGR/6. *See also* Gilles Gauthier, with Erin O'Brien and Susan Spencer, *Déjà Vu or New Beginning for Safeguards and Subsidies Rules in Services Trade*, in *GATS 2000* : NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION, 165, 176–181(eds. Pierre Sauvé and Robert M. Stern 2000).

in one of its few limitations on specific commitments in audiovisual services, explicitly mentioned grants from the National Endowment for the Arts that are only available for individuals with US citizenship or permanent resident alien status, a clear indication that in its view such grants, in the absence of a limitation, would be incompatible with national treatment.[113] New Zealand has similarly indicated in its list that assistance to the film industry through the New Zealand Film Commission is limited to New Zealand films as defined in Section 18 of the *New Zealand Film Commission Act 1978*.[114] In practice, the majority of members have included limitations to their national treatment commitments that apply to all subsidy practices.[115]

With regard to emergency safeguard measures, Article X of the GATS calls for negotiations on the subject based on the principle of non-discrimination. It is more explicit than Article XV as to the time frame for such negotiations, declaring that the results "shall enter into effect on a date not later from three years from the date of entry into force of the WTO Agreement," i.e. January 1, 1998. However, negotiations on safeguards proved more complex than expected, and on December 1, 2000, the Council for Trade in Services adopted a decision stipulating that such negotiations were to be completed by March 12, 2002.[116] This deadline unfortunately could not be met and on July 25, 2002, the Working Party on GATS Rules decided to postpone to March 15, 2004, the finalization of the negotiations under Article X of the GATS.[117] The problems encountered includes such questions as the significance of the concept of imports in a context where services can be delivered in four different modes (cross-border trade, commercial presence, consumption abroad, and presence of natural persons), and the question of what constitutes the domestic industry providing like or directly competitive services, necessary to establish a causal link between the imported service and the injury suffered by the domestic industry.[118] This last question is particularly important for cultural services, which, as we have seen in the case of cultural goods, are inherently difficult to compare. It remains to be seen therefore whether the new emergency safeguard measures that are envisaged for services will truly be helpful in answering the problems of cultural industries in difficulty as a result of the obligations assumed under the Agreement.

2. Basic Telecommunications

This survey of the cultural impact of the GATS would not be complete without a word about the GATS Annex on Telecommunications, the Ministerial Decision on Basic Telecommunications, and the Fourth Protocol to the GATS with its commitments in basic telecommunications. Under the GATS Annex on Telecommunications, host governments undertake to provide foreign companies with access to, and the use of, public telecommunications networks and services on reasonable and non-discriminatory terms for the provision of scheduled services such as banking services, computer services, and enhanced telecommunications. Most telecommunications commitments contained in the 1994 Schedule covered "value-added" services rather than "basic" services, as

[113] GATS/SC/90, p. 46.

[114] GATS/SC/62, under audiovisual services

[115] *See* Gauthier, O'brien and Spencer, *supra*, note 112, p. 177

[116] WTO News, Press 217, 2 April 2001: *WTO Services Talks Press Ahead*. For an overall view of the evolution of these negotiations, *see* the Reports of the Working Party on GATS Rules. In the Report dated October 4, 2001, differing views continued to be expressed regarding the desirability and feasibility of an emergency safeguard mechanism (ESM) in services; see Doc. S/WPGR/6.

[117] GATS, Doc. S/WPGR/7, 25/07/2002

[118] For a detailed discussion of these problems, *see* Gauthier *et al., supra* note 112, at 166–176.

negotiations on the latter, according to the *Decision on Negotiations on Basic Telecommunications* of December 15, 1993, were to continue up to April 1996.[119] Interestingly, measures affecting the cable or broadcast distribution of radio or television programming were excluded under Paragraph 2(b) of the Annex.

The negotiations on basic telecommunications, after an extension of the deadline of April 1996 in the hope of reaching a "critical mass" of sufficient offers from the key telecom markets, eventually led to the tabling, in February 1997, of 55 offers covering 69 governments, with enough substance in the eyes of the U.S. Government to constitute an agreement. These commitments are annexed to a one-page Protocol to the General Agreement on Trade in Services, the Fourth Protocol on basic telecommunications. The formal entry into force of the commitments was scheduled for January 1, 1998,[120] but where a participant's commitments for particular services are to be phased in, the actual implementation would take place on the date specified in the schedule. Generally speaking, participant governments have made commitments to allow competitive supply (defined as permitting two or more suppliers) on voice telephone service, on data transmission services, in leased circuit services, have granted access for cellular/mobile telephone markets, and included various other commitments in areas such as satellite-related communications or regulatory disciplines.

What kind of impact could the Annex on Telecommunications and the Fourth Protocol on basic telecommunications have on trade in cultural goods and services? Two consequences are immediately apparent, one concerning content requirements, the other investment controls. Though the question of content requirements was not on the agenda of the negotiations that led to the Annex on Telecommunications and the Fourth Protocol, it is clear that in the U.S. view, the next step in the gradual opening of national markets to foreign telecom service suppliers will touch directly upon that question. The *US–Mexico DBS Protocol* of November 1996, annexed to the *US–Mexico Satellite Agreement*[121] signed earlier in April 1996, as well as the *U.S.–Argentina Framework Agreement and Protocol for Direct-to-Home Satellite Services and Fixed-Satellite Services*[122] of June 5, 1998, can be seen from that point of view as a prototype of things to come. Significantly, the two Protocols limit domestic content restrictions either side can place on satellite programming to only a "modicum" of total programming, "thereby increasing opportunities for U.S. program content producers".[123] More importantly, the new U.S. approach regarding the treatment of electronic commerce in bilateral and multilateral trade negotiations, as it emerges concretely from its free trade agreements with Chile and Singapore, establishes a clear link between a pro-competitive and fully liberalized telecommunications sector and the development of electronic commerce. It asserts, as one of its basic

[119] *Decision on Negotiations on Basic Telecommunications*, December 15, 1993, Article 5. For the text of the decision, *see*: http://www.wto.org/english/docs_e/legal_e/50-dstel.pdf

[120] *See WTO Focus*, no. 16, February 1997, p. 1–2 for an account of what is described as a "historical agreement."

[121] *Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception of Signals from Satellites for the Provision of Satellite Services to Service Users in the United States of America and the United Mexican States*, signed April 28, 1996, and *Protocol Concerning the Transmission and Reception from Satellites for the provision of Direct-to-Home Satellites Services in the United States of America and the United Mexican States*, signed November 8, 1996.

[122] Federal Communications Commission (FCC), Report No. IN 98–27, *International Bureau Announces Conclusion of U.S–Argentina Framework Agreement and Protocol for Direct-to-Home Satellite Services and Fixed-Satellite Services,* June 5, 1998.

[123] *Id.*

principles, that trade barriers to the free flow of content in digital products do not exist today and should not be created in the future. These two agreements are the first ones to be signed by the United States to include chapters on electronic commerce, which is described as "a breakthrough in achieving certainty and predictability in ensuring access for products such as computer programs, video images, sound recordings and other products that are digitally encoded".[124] Similarly, with regards to investment controls, the pressure exerted by the United States during the basic telecommunications negotiations for the elimination of investment controls in the telecommunications sector, although it did not lead to a result that was entirely to the its satisfaction, has nevertheless forced a country such as Canada to increase substantially the level of foreign investment allowed into Canada in that sector. That in turn will make it definitely more difficult to maintain the existing controls over foreign investment in the communications sector, particularly in a situation where a domestic telecommunication concern is itself involved in the area of communications. It is noteworthy from that point of view that in its July 1, 2001 proposals for liberalizing trade in services, the United States, in addition to the sectoral requests, has made selective requests that countries remove unclear, discriminatory, or market-restricting procedures and investment barriers.[125]

The pressure to eliminate content restrictions and investment control restrictions is not however tied exclusively to actions undertaken by the United States and various other countries at the international level. Technological development, convergence, and the globalization of the economy, more than anything else, are at the root of this movement towards the opening of national telecommunication and communication markets and, as shown by the incredible development of the Internet, it will be difficult to stop that movement. This has led certain Canadian observers to declare, perhaps a little prematurely, that the notion of "Canadian content" is something of the past.[126] In the US–Mexico DBS Protocol and the U.S.–Argentina DBS Protocol, there is still room left for domestic program content requirement; and in Europe, the quotas of the "Television Without Frontiers" directive, notwithstanding some acrimonious debates on the subject, are still in place. Even the recently concluded *Chile–U.S. Free Trade Agreement* (2002) and the *U.S.–Singapore Free Trade Agreement* (2003) include reservations that make room for content requirements in broadcasting services.[127] What could happen, however, is a gradual switch, over a period of time and taking into account the particular situation of each State, from the content requirement approach to an approach making use of a variety of

[124] United States Trade Representative, Summary of U.S.-Chile FTA Electronic Commerce Chapter: [http://www.ustr.gov/new/fta/Chile/summaries/Chile%20Ecommerce%20Summary.PDF]. For the text of the *Chile–U.S. Free Trade Agreement*, see [http://www.chileusafta.com/] or [http://www.ustr.gov/new/fta/Chile/text/index.htm] and for the text of the *U.S.–Singapore Free Trade Agreement*, see [http://www.ustr.gov/new/fta/Singapore/consolidated_texts.htm] or [http://www.mti.gov.sg/public/FTA/frm_FTA_Default.asp?sid=36]. In their chapters on electronic commerce, these two agreements provide in essence (1) that the supply of a service using electronic means (defined as means using computer processing) benefit from the obligations in the service chapter (MFN treatment, national treatment and market access) subject to reservations; (2) that the Parties do not apply customs duties on digital products transmitted electronically (digital products being defined as "computer programs, text, videos, sound recordings and other products that are digitally encoded and transmitted electronically, regardless of whether a Party treats such products as a good or a service under its domestic law"); (3) and that trade in such digital products benefit from MFN treatment and national treatment.

[125] United States Mission—Geneva, Press Releases 2002, *U.S. Proposals for Liberalizing Trade in Services", under "Commercial presence".*

[126] *See* for instance Jonathan Bestinger, *The Electronic Highway, A Survey of Domestic and International Law Issues*, 29 UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW 199 (1995).

[127] *See supra,* note 124

financial and regulatory incentives in order to preserve a national presence in the cultural field.

C. Investment

The Uruguay Round did not yield a genuine agreement on investment. There is, to be sure, the *Agreement on Trade-Related Investment Measures ("TRIMs"),* but it is limited strictly to a narrow range of trade-related investment measures affecting goods only, in effect clarifying Articles III and XI of the GATT. Furthermore, in the context of GATS, a number of countries have undertaken commitments that affect foreign investment in services.

A number of important States, including the United States, maintain various forms of controls over investment in the cultural sector (mostly in relation to ownership of radio and television stations). One only has to look at the compendium of bilateral investment treaties concluded by Western Hemisphere countries that was prepared by the Organization of American States (OAS) Trade Unit,[128] or at the similar instrument prepared for the members of APEC,[129] to realize the extent of the practice. But there is growing pressure, particularly on the part of the United States, to have such controls abolished. For example, the *Investment Canada Act* and the *Canadian Broadcasting Act* have been identified by the United States as barriers to U.S. exports.[130]

Following the failure of the OECD negotiations on a multilateral agreement on investments ("MAI"), a number of States suggested that the negotiations in question should be transferred to the WTO for inclusion in the Millenium Round agenda. Whether it would have become part of the Seattle agenda considering the lack of consensus on the subject and the outright opposition of the United States is a moot question. The Doha Ministerial Conference, as we know, has decided that it could become part of the agenda of the new round of negotiations after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.[131] Meanwhile, however, the possibility that new commitments regarding investment will be made in the context of the GATS negotiations is not to be discarded, which, if it happens, could interfere with the negotiations of the new instrument on investment.[132]

1. The WTO Agreement on Trade-Related Investment Measures (TRIMS)

Notwithstanding its limited scope, the WTO *Agreement on Trade-Related Investment Measures* could be used to challenge investment measures related to trade in cultural goods that are inconsistent with the national treatment obligation of Article III:4 of GATT 1994, or with the Article XI:1 requirement to eliminate quantitative restrictions. An illustrative list of such measures, annexed to the TRIMS Agreement, includes

[128] Organization of American States, Trade Unit, *Bilateral Investment Treaties in the Western Hemisphere*, A Compendium prepared for the Free Trade Area of the Americas Working Group on Investment (1996).

[129] APEC, *Survey of Impediments to Trade and Investment in the APEC Region*, A Report by the Pacific Economic Cooperation Council for APEC (1995).

[130] Office of the United States Trade Representative, 2001 NATIONAL ESTIMATE OF FOREIGN BARRIERS, Canada, Investment.

[131] WT/MIN(01)/DEC/W/1, 14 November 2001: http://www-chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf

[132] This possibility is discussed by Pierre Sauve in an article entitled *Scaling Back Ambitions on Investment Rule-Making at the WTO*, 2 JOURNAL OF WORLD INVESTMENT 529 (2001).

1 [. . .] those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
   (a) the purchase or use by an enterprise of products of domestic origin or from any other domestic source, whether specified in terms of particular products, in terms of volume or value of products or in terms of a proportion of volume or value of its local production [. . .]
2 [. . .] those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:
   (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports [. . .]

An investment measure concerning cultural goods that incorporated performance requirements would be particularly vulnerable to an attack under the TRIMS agreement. Such requirements are to be found, for instance, in the *Investment Canada Act* and the *Investment Canada Regulations*. An investment subject to review under the *Investment Canada Act* may not be implemented unless the Minister responsible advises the applicant that the investment is likely to be of net benefit to Canada. Among the factors to be taken into consideration for that purpose are "the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, on the utilization of parts, components and services in Canada and exports from Canada."[133] Requirements of this type that affect trade in cultural goods could potentially be challenged under TRIMS.

2. Investment Liberalization Through GATS

A large number of WTO members have made commitments with regard to investment in the context of the GATS. This has been done through the liberalization commitments of members under mode 3 of the supply of services, that is, the supply of a service through commercial presence. The majority of the 29 States that have made commitments concerning market access in the audiovisual sector indicated that they had no restrictions with regard to the supply of services through commercial presence; however, for those which had made their commitments subject to restrictions, one of the most common restrictions appearing in their schedules of commitments, other than those concerning natural persons, concerned limits on foreign shareholdings.[134]

The process of investment liberalization through the GATS was successful enough to suggest to Pierre Sauvé and Christopher Wilkie that for the time being, "GATS may well offer the only serious vehicle to strengthen the WTO's existing investment-related rules and achieve a greater number of bound liberalization commitments."[135] Through a pragmatic and incremental approach, they suggest, "there are useful things to be done within the multilateral system to improve and sustain investment as a force of integration among nations."[136] Among other possibilities, they mention clarifying the definition of

[133] *Revised Statutes of Canada*, Chap. 28 (1st Supp.), Art.20
[134] WTO, Doc. S/C/W/40, ¶ 29.
[135] Pierre Sauve and Christopher Wilkie, *Investment Liberalization* in SAUVE and STERN, *supra* note 86, at 346
[136] *Id.*

commercial presence so as to expand the scope of covered investments, strengthening the investment protection features of GATS, and promoting greater transparency on investment incentives. But can such an approach be applied in the case of cultural services? Interestingly, Pierre Sauvé and Karsten Steinfatt, in a recent paper, suggest in that regard that

> [. . .] the time may be near when members of the international community have to contemplate more seriously the scope for, and the content of, a WTO-anchored set of disciplines aimed at striking a balance between the potentially competing logics of trade and investment liberalisation on the one hand, and of cultural diversity on the other.[137]

The lessons from the MAI negotiations from that point of view are interesting. Views diverged on how to address cultural matters in the MAI. Two distinct approaches had been proposed, the first one through a general exception for cultural measures, and the second through country-specific reservations. France had proposed a text arguing in favour of an exception clause and provided a draft that read as follows:

> Nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activities of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity.[138]

A number of other countries, including Australia, Belgium, Canada, Ireland, Italy, Portugal and Spain, indicated some degree of support for the idea of a cultural exception clause. However, in view of the strong opposition of the United States and some other countries to any form of cultural exception, the chances of success of the French proposal would have been slim had the MAI negotiations continued.

Another way of dealing with cultural products would have been to permit existing non-conforming measures to be maintained, or certain types of activities to be excluded, provided that they were covered by country-specific reservations. This approach, used in the GATS and NAFTA, appeared to have a greater chance of success, although it remained to be seen whether the United States would have accepted country-specific reservations that excluded cultural services altogether. All delegations involved in the OECD negotiations had already submitted a preliminary list of specific reservations. Although a majority had not submitted reservations which directly affected culture, most of them, including the United States, Italy, Turkey, the United Kingdom and the Netherlands, did reserve the right to maintain foreign investment restrictions in the media and broadcasting sectors, and four countries had submitted substantial lists of culture-related reservations. Canada, as well as Australia and Korea, stated that they had prepared their list on the assumption that there would be a general exemption for culture.

What this suggests is that further investment liberalization through GATS could prove a difficult task in the cultural sector to the extent that Members who were not ready to make concessions in that regard in the MAI negotiations retain in the GATS negotiations both the possibility of excluding the sector in question altogether, or, if they make commitments, make them subject to reservations.

[137] *See* Pierre Sauve and Karsten Steinfatt, *Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?,* in PRODUCTIVITY COMMISSION AND AUSTRALIAN NATIONAL UNIVERSITY 2000, ACHIEVING BETTER REGULATION OF SERVICES, AusInfo, Canberra, 2000.

[138] OECD, Doc. DAFFE/MAI/NM(98) 126

D. Intellectual Property Rights

Intellectual property rights and cultural products are closely associated, so much so that cultural products have sometimes been described as essentially copyrighted goods.[139] The fact is that the remuneration of cultural creators and producers depends largely on the recognition of intellectual property rights and that a lack of implementation of those rights will immediately affect them. Both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights explicitly recognize the close relationship between the protection of copyright and culture. Article 27 of the Universal Declaration of Human Rights reads for example as follows:

1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author

It does not come entirely as a surprise therefore to find that national copyright protection measures are covered by an express mention in GATT Article XX (d). Notwithstanding the fact that such measures act as a restraint on trade, they are specifically included within the reference to measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provision of this Agreement".

Until recently, most of the attention in the intellectual property rights field was devoted to the search for common approaches and to the adaptation of basic principles to new situations. Such concerns were mostly addressed in the context of organizations such as the World Intellectual Property Organization (WIPO) and UNESCO. But a growing concern over an apparently uncontrollable flood of illegal copies has prompted the intervention of other international organizations in the field of intellectual property rights, a concern centred on the implementation of property rights. The Uruguay Round *Agreement on Trade-Related Aspects of Intellectual Property Rights* addresses in particular this concern.

The *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPs") consolidates the disciplines of the *Berne Convention* (literary and artistic works), the *Geneva Convention* (phonograms) and the *Rome Convention* (neighbouring or related rights), the Paris Convention (industrial property) into a single undertaking, backed up by enforceable dispute settlement measures. Members are free to determine the appropriate method of implementing the TRIPs agreement within their own legal system, but they must give to the nationals of other members the national treatment required in the Paris, Berne and Rome conventions, subject to the national treatment exceptions contained in these same treaties. Article 9 of the TRIPS agreement is of particular interest because while it requires compliance with the substantive obligations of the Berne Convention, it makes an exception for moral rights, which are not recognized by the United States.

As far as concerns neighbouring or related rights, they are subject to the conditions, exceptions and limitations authorized by the Rome Convention.[140] If this raises no particular problems for most States in so far as concerns the rights that are explicitly recognized, it does seem to raise a difficulty, at least in the eyes of the United States, in the case of

[139] *See* Stacie I. Strong, *supra* note 92. For a recent study of the place of copyright industries in the U.S. economy prepared for the International Intellectual Property Alliance, *see* STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY—THE 2002 REPORT (2002)

[140] Article 14 of the Convention.

copying. The U.S. Government has repeatedly asserted its right under the national treatment obligation to share in the benefits of programs (usually taking the form of a levy on blank audio cassettes) put in place by various governments to compensate for private copying, even though nothing similar is offered in the United States.[141] Whether such programs could effectively be challenged under TRIPS remains to be seen, as the Rome Convention explicitly authorizes reciprocity,[142] and as Article 4 (b) of TRIPS authorizes reciprocity in the case of privileges or immunities granted by a Member in accordance with the provisions of the Bern or Rome conventions.

The importance of TRIPS as an instrument to protect intellectual property rights in the cultural sector is evidenced by the number of complaints brought before the WTO in that regard. As of September 2002, no fewer than nine complaints had been formally notified to the Dispute Settlement Body, seven of them by the United States,[143] and two by the EC.[144] Most of them have been settled at the consultation level, the only exception being the complaint of the EC against the United States. In most cases, the basis for the complaint was failure to grant the required copyright and neighbouring rights protection under domestic law.[145]

III. The Trade and Culture Debate: Basic Issues and Solutions

A. The Basic Issues

1. The Dual Nature of Cultural Products: Entertainment Products or Vectors of Cultural Identity?

Two radically opposed views regarding cultural products underpin the culture and trade debate.[146] One approach sees cultural products as entertainment products that are similar, in commercial terms, to any other product and therefore completely subject to the rules of international trade. The other view is that cultural products are essential instruments of social communication which convey values, ideas, and meaning, and thus contribute to fashioning the cultural identity of a given community. As such, they should be excluded from the reach of international trade agreements. Neither extreme is satisfactory.

When considered as commercial goods, cultural products are difficult to exclude from the scope of trade agreements, although this is probably more true in the case of multilateral agreements than in the case of bilateral agreements.[147] To the extent that cultural products are exchanged with financial gain in mind, they bring into question

[141] *See* Office of the United States Trade Representative, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, 2001, http://www.ustr.gov/html/2001_eu.pdf

[142] Article 15(1) of the Convention.

[143] The complaints in question concerned Japan (WT/DS28/1), Ireland (WT/DS82/1), the EC (WT/DS124/1, WT/DS115/1) Denmark (WT/DS83/1), Sweden (WT/DS86/1) and Greece (WT/DS/125/1).

[144] One complaint was against the United States (WT/DS160/1) and one against Japan (WT/DS42/1)

[145] The exception being the complaint of the EC against the United States which concerned the interpretation of the TRIP's Agreement.

[146] *See,* e.g., Judith Beth Prowda, *U.S. Dominance in the 'Market Place of Culture' and the French Cultural Exception*, 29 JOURNAL OF INTERNATIONAL LAW AND POLITICS (1996–1997) 193,198; Knight, *supra* note 58, at 167–169; Glen M. Secor, "*Cultural Industries in United States-Canada Free Trade: The Canadian Book Publishing Industry as a Case Study"*, 11 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 299, 302 (1993)

[147] The free trade agreements between Canada and Chile, between Canada and Israel and between Canada and Costa Rica for example, are not applicable to measures adopted or maintained with respect to cultural industries. The Free Trade Agreement between the European Union and Mexico and between the European Union and Chile totally exclude for their part audiovisual services from the Services Chapter: see below notes 176 and 177.

various and competing interests which can only be reconciled within an appropriate legal framework. Not only would leading exporters of cultural products be opposed to any exclusion of the latter from the legal framework of international trade (among the countries that have made commitments in the audiovisual sector in GATS, one predictably finds the United States, India, Japan, Mexico and Hong Kong), but also countries that are beginning to develop or want to develop a presence on that market could be concerned at such a trend. Totally excluded from the multilateral trade regime, cultural products would be left without protection in the face of discriminatory or retaliatory measures from foreign countries.[148]

If, however, exclusion of cultural products from multilateral trade agreements does not constitute a realistic solution, it does not necessarily mean that they should be considered like any other product. To the contrary, it seems that refusal to recognize the particular nature of cultural products and their special role in adapting cultures to change will only lead to increased tension within the trade regime itself and give rise to a growing number of disputes in the cultural sector. As we have seen before, the lack of success of the European Community with its proposal for a cultural specificity clause at the end of the Uruguay Round did not put an end to the trade and culture debate. Quite the contrary: cultural conflicts increased in the following years, and the trade and culture debate itself took a new dimension.[149]

Not surprisingly, there is a growing tendency now to consider that this debate on the nature of cultural products needs to be concluded. As Switzerland stated in its communication to the Council for Trade in Services in the context of the present GATS negotiations:

> In fact, none of these two positions reflects the whole reality. For Switzerland, the audiovisual sector represents both an important field of commercial activity as well as a vector of cultural identity. The challenge for the trade policy consists therefore in reconciling these two views within a balanced solution that satisfies both sensibilities.[150]

Brazil, as we have seen previously, has expressed a similar view.[151] Even the United States accepts that the "all-or-nothing" approach to the audiovisual sector in the WTO should be rejected, but in its view the trade rules are flexible enough to take into account the special cultural qualities of the sector.[152] Within the European Union, the new Article 151, paragraph 4, of the consolidated text of the *Treaty Instituting the European Community*, which provides that "[t]he Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures", has opened the door to the recognition of the dual nature of cultural products. Not only has it become part of the official discourse but it has also been applied to the solution of concrete problems. Thus, in its *Resolution of 12 February 2001* on the application of national fixed book-price systems, the Council, after "recognizing the dual character of books as the bearers of cultural values and as merchandise and the need for a balanced assessment of the cultural and economics aspects of books", invites the Commission

[148] *See* Franklin Dehouse and Françoise Havelange, *Aspects Audiovisuels des Accords du GATT. Exception ou Spécificité Culturelle?* in Carine Doutrelepont, L'EUROPE ET LES ENJEUX DU GATT DANS LE DOMAINE DE L'AUDIOVISUEL 117 (1994).

[149] *See* Part I above.

[150] *See supra*, note 28

[151] *See supra*, note 29

[152] *See supra,* note 30

> . . . when applying competition rules and rules on the free movement of goods, to take account of the specific value of the book as a cultural object and the importance of books in promoting cultural diversity, and of the cross-border dimension of the book market.[153]

International organisations with an explicit cultural mandate such as UNESCO and the Francophonie have also acknowledged in recent years the dual nature of cultural products.[154]

The apparent consensus on the subject seems to justify at first sight the conclusion that recognition of the dual nature of cultural goods is no longer an issue. The problem is that there is no agreement on the concrete implications of such a recognition. Between the "do nothing" approach and the cultural exemption approach, as we shall see below, the full range of options remains open. This is where a better understanding of the exact nature of the WTO's concern with regard to culture becomes important.

2. The Nature of the Concern: From the Treatment of Cultural Goods and Services to the Preservation of Cultural Diversity

As pointed out previously,[155] in the last five years there has been a significant change of perception within the WTO concerning the trade and culture debate. From an issue that revolved almost exclusively around the treatment of cultural goods and services in international trade agreements, it has now become one that is more broadly framed in terms of the preservation of cultural identities and cultural diversity. This development in a sense was predictable. Trade liberalization effectively fosters new forms of social organization that call into question existing values, lifestyles, and ways of doing things or, to put it differently, cultural identity. When these changes upset people, trade liberalization itself comes under pressure.[156] In this sense, it was inevitable that the further development of trade liberalization would raise the question of the impact of such a process on cultural identity and cultural diversity. What is less clear is whether this new concern displaces the previous concern with the treatment of cultural goods and services in trade agreements.

The fact that trade liberalisation has an impact on national cultures does not mean that any trade initiative that might influence these cultures in one way or another should be rejected. To assert the contrary would be to attempt to freeze culture and national identity and lend them a meaning that would only benefit those people who hope to turn them into instruments of political control. Any national culture that is to remain vibrant and alive must adapt over time to a variety of changes, both internal and external. The real issue that trade liberalization poses for national cultures is whether the changes that it brings about in values, lifestyles, and ways of doing things detract from the opportunity to "promote and maintain a pluralistic public space where citizens can access and participate in cultural life, which is itself necessary for public life".[157] In other words, it is not so much a question of whether the liberalization of trade, with its underlying commercial concerns, affects values and traditional lifestyles, but whether this liberalization is understood and accepted and whether it leaves enough space beyond the simple producer-consumer

[153] *Official Journal* no C 073 of 06/03/2001, p. 0005–0005

[154] *See supra*, note 25.

[155] *See* Part I, *supra*.

[156] *See* Mary E. Footer and Christoph Beat Graber, *Trade Liberalization and Cultural Policy*, 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 115, 134–135 (2000).

[157] *See* Marc Raboy, Ivan Bernier, Floran Savageau, and Dave Atkinson, DEVELOPPEMENT CULTUREL ET MONDIALISATION DE L'ECONOMIE 77(1994).

relationship for the cultural expression of citizens, itself an essential element of the democratic process.[158]

Unfortunately, it is not clear whether trade liberalization is having on balance a positive effect on the maintenance of a public space for the cultural expression of citizens when the issue is considered from the standpoint of the national production of cultural goods and services. There are at least three reasons for concern. The first, somewhat older but still very present concern is related to the influx of foreign cultural products (films, television programs, compact discs, books etc.), which in certain circumstances may stifle domestic cultural production, thereby depriving the affected communities of the symbolic discourse essential for their own development. The second concern has to do with the concentration of production and the marketing of cultural products by large industrial groups, and the consequent standardization of cultural expression under the influence of basically commercial imperatives. Independent production is often put at risk in such a context. The third, more recent concern, is with exclusion from the international cultural space as it is currently being constructed with the new information technologies (the Internet, etc.). Despite all the opportunities that these new technologies provide to express the diversity of cultures, there is a very real danger of a deep digital divide between those countries that have access to these technologies and those that do not. In all three cases, it is the basic right to cultural expression that is at stake. This is all the more alarming in that the creators of culture and cultural intermediaries play a key role in adapting cultures to change since they create a space where national values and foreign values can confront one another, as can the values and behaviours of the past and those of the future.

So in the end, the new concern of the WTO with the preservation of cultural diversity does not displace the previous concern with the treatment of cultural goods and services. On the contrary, it places it in a broader context where the issue of the treatment of cultural goods and services is considered in its relationship to the goal of preserving cultural identities and cultural diversity. What has changed is the perspective from which the issue is considered. Whereas the former perspective was essentially negative in the sense that its main concern was to find ways of excluding cultural goods and services from trade agreements, the new perspective puts the emphasis on a positive goal which is that of preserving cultural diversity, with the understanding that cultural diversity entails, on the one hand, the preservation of existing cultures and, on the other, the greatest possible openness to other cultures. This new perspective excludes *a priori* any solution to the trade and culture debate that is based either on the total exclusion of cultural goods and services from the scope of trade agreements or their total assimilation to other goods and services.

3. The Diversity of Treatment: the Cultural Goods and Cultural Services Dilemma

Another issue that has considerably gained in importance in recent years is that of the distinct treatment of cultural goods and services in the WTO. To say that certain agreements are applicable to cultural goods as opposed to cultural services implies that there is a clear distinction between cultural goods and cultural services. Unfortunately, that

[158] Footer and Graber, *supra*, note 156, write in this respect : "In our view, certain forms of media like art films and public service television programs have a key role to play in the fight against political fragmentation, as identified by Habermas, or in developing adequate responses to nondivisible conflicts, as identified by Hirschman" *See also* Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 733 (1998).

is not always the case. Thus, although films are specifically mentioned in Articles III and IV of GATT 1994 and duty concessions have been made in relation to films, the fact is that cinema has been considered as a service in the General Agreement in Trade in Services ("GATS"), in the OECD *Code on Invisible Current Transactions* and in *the United Nations Central Products Classification.*[159] The same ambivalence is reflected in dispute settlement procedures. In *Turkey—Taxation of Foreign Film Revenues,*[160] the U.S. complaint against Turkey was based on Article III of the GATT, but in *Canada—Measures Affecting Film Distribution Services,*[161] the EC complaint against Canada was based on Article II and III of GATS.

The possibility of conflict in the application of GATT and GATS raises a fundamental problem that was first examined in the WTO decision of June 1997 in *Canada—Certain Measures Relating to Periodicals*. The finding of the Panel that "[t]he ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that the obligations under GATT 1994 and GATS can co-exist and that one does not override the other" was supported by the Appellate Body.[162] Specifically with respect to periodicals, the Appellate Body went as far as to say that "a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product—the periodical itself."[163]

Barely two months later, in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the Appellate Body attempted to explain more fully its view on the subject of potential conflicts between trade agreements. It wrote:

> Given the respective scope of the two agreements, they may or may not overlap, depending on the measure at issue. Certain measures could be found to fall exclusively within the scope of GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or of the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.[164]

[159] *United Nations Central Products Classification Version 1.0, Code 96* (Doc. ST/ESA/STAT/Ser.M/77/Ver. 1.0)

[160] Doc. WT/DS43 (1996)

[161] *See supra*, note 99.

[162] Doc. WT/DS31/AB/R, June 30, 1997 Sec. 4. Canada was arguing in that case that the provision of the *Excise Tax Act* challenged by the United States was not a measure regulating trade in goods but rather a measure regulating trade in services (access to the advertising market).

[163] *Id.*

[164] Report of the Appellate Body, *European Communities—Regime for the Importation, Distribution and Sale of Bananas*, AB-1997–3, WT/DS27/AB/R (1997), ¶¶ 221–222. In 1998, by the Panel in *Indonesia—Certain Measures Affecting the Automobile Industry*, the same reasoning was extended by the panel to a situation which involved an apparent conflict between the Agreement on Subsidies and Countervailing Measures and the Agreement on Trade-Related Investment Measures. WT/DS54/R, WT/DS55/R, WTDS59/R, WT/DS64/r, 2July 1998, ¶¶ 14.52–14.53.

But this still leaves open the possibility that the exercise of a right under one agreement becomes the negation of a right under the other. This is what would have happened, for example, if India's limitations on film distribution in its specific commitments under GATS, although in full conformity with the agreement and accepted by all the parties to it, had been successfully challenged under GATT as a restriction on the import of a good.[165] Unless a line is traced somewhere between what pertains to trade in services and what pertains to trade in goods, conflicts of this nature appear inevitable.

The possibility that measures which involve a service supplied in conjunction with a particular good (or conversely a good supplied through a service[166]) might be scrutinized under both the GATS and the GATT 1994 is still questioned by many Members in view of the difference of obligations between the two agreements. In a 1999 document entitled "Digital Products: the Case for Services," which was prepared in anticipation of the GATS negotiations of 2000, the European Commission explained its position on digital products as follows:

> The legal nature of 'digitised products' (music, films, software or 'books' on the internet) is still under discussion in the WTO. We argue that all electronic deliveries—including digitised products'—are services and therefore the GATS applies. This is also the view of most other WTO Members and the WTO Secretariat. On the contrary, the US and to a certain extent Japan argue that while the transmission of those 'products' is a service, the 'products' themselves are analogue to goods and therefore fall under the GATT.[167]

The document replies to the U.S. argument that "there may be an advantage to a GATT versus GATS approach, since the former may provide for a more trade-liberalising outcome for electronic commerce," with the assertion that this remains a matter for discussion and that it is simply too early to decide whether members prefer GATT or GATS.[168] This document of the European Commission illustrates perfectly well the difficulty of using a criteria such as the good or service nature of a product in order to resolve a difference of views regarding the legal treatment of the product in question. In the field of culture, where many products have both goods and services components, the temptation to rely on the difference in the treatment of goods and services to solve immediate problems could be great. If such a development was to happen, it could, as we shall see now, complicate singularly the search for a long term solution to the trade and culture debate.

B. Possible Solutions

The possible solutions can be grouped in three distinct categories that can be described as the "Do Nothing" approach, the "Cultural Exception" approach, and the "New International Instrument" approach.

1. The "Do Nothing" Approach

This is the solution traditionally defended by the United States but it also has the support of some other WTO Members including Japan. It is based on the view that cultural goods and services are essentially entertainment products and as such should be treated just like any other products. It has been reiterated most recently in the communication of the United States concerning Audiovisual and Related Services in the context of the GATS

[165] Concerning the Indian exceptions in the film distribution sector, *see supra*, note 104.
[166] For example, a magazine provided through customers via Internet. *See* SCOW, note 58, *supra,* at 278.
[167] *See*: http://europa.eu.int/comm/trade/services/ecommerce/digi.htm at 1. *See also* Chapter 57 of this book.
[168] *Id*., at 3.

2000 negotiations.[169] In the section of that document which deals with "Trade Rules and the Audiovisual Sector", the U.S. Government observes first that the debate over the audiovisual sector in the WTO

> has sometimes been framed as an "all-or-nothing" game. Some argue as if the only available options were to exclude culture from the WTO or to liberalize completely all aspects of audiovisual and related services. Presenting such stark options obscures a number of relevant facts.[170]

It goes on to assert that "[t]he all-or-nothing approach to the audiovisual sector in the WTO implies that trade rules are somehow too rigid to take into account the special cultural qualities of the sector. This is not the case."[171] To illustrate the flexibility of the system, reference is made to Article IV of GATT 1994, to the possibility of making full or partial commitments in the context of GATS, to the general exceptions of Article XIV of GATS and Article XX of GATT 1994 concerning measures necessary to protect public morals, and finally to the fact that GATS does not presently prevent governments from funding audiovisual services[172]. The obvious message behind these remarks is that the special cultural qualities of the audiovisual sector are adequately taken care of in the existing WTO regime. But interestingly, the U.S. Government for the first time also opens the door to some form of recognition of the need of each nation to foster its cultural identity:

> In conjunction with negotiated commitments for audiovisual services, Members may also want to consider developing an understanding on subsidies that will respect each nation's need to foster its cultural identity by creating an environment to nurture local culture. To this end, many Members subsidize theatrical film production. There is a precedent in the WTO for devising rules which recognize the use of carefully circumscribed subsidies for specifically defined purposes, all the while ensuring that the potential for trade distortive effects is effectively contained or significantly neutralized.[173]

Whether one can speak of a change of mind on the part of the United States on the sole basis of this proposal appears doubtful considering the well-entrenched position of the U.S. Government on the subject and the very restrictive terms used to describe the proposal itself. What it seems to indicate, however, is that the U.S. Government now recognises the existence of a problem.

A variant of this "do nothing" approach is the strategy that was adopted by a surprising number of countries during the GATS negotiations of not making any commitments in the audiovisual sector. This kind of passive resistance to the opening up of national audiovisual markets beyond the general disciplines and obligations of the GATS may at first glance appear to offer a simple solution. Indeed, it can be claimed that it is the only solution that remains realistically available in the context of the WTO for those States which consider that cultural services should not be treated as other services. To this day it remains the basic strategy of the European Union as well as of a number of other Members in the audiovisual sector[174]. But it is essentially a passive strategy that can be

[169] *See* note 30 *supra*.
[170] *Id*. at 2
[171] *Id.*
[172] *Id*. at 2–3.
[173] *Id*. at 3.
[174] *See* Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age*, Doc. COM(1999) 657 final.

rapidly overtaken by events as the number of members willing to make liberalization commitments in the field of culture increases and with the development of horizontally-applicable disciplines in areas such as those of domestic regulation and subsidies.[175] Pressure along these lines will only mount with each passing negotiation. Already in the service negotiations currently underway, Switzerland has suggested that "possible solutions to the audio-visual issue could take the form of an Annex to the GATS on audio-visual services, or of any other suitable instrument, depending of the nature of the solutions to be elaborated."[176]

The "do nothing" approach does not really offer a long term solution to the trade and culture issue. In both variants, the refusal to take specific actions amounts in practice to a denial of the dual nature of cultural goods and services. In the first variant, it is their cultural nature that is denied, whereas in the second variant, it is their commercial nature.

2. The Cultural Exception Approach

The second type of approach raises at the outset a conceptual problem that needs to be clarified. In the trade and culture debate, reference is often made to cultural exceptions as a generic expression encompassing not only cultural exceptions as such but also cultural exemptions, cultural reservations and cultural waivers, as if these expressions were more or less synonymous. In fact, while they each convey the same basic idea that cultural goods and services should receive distinct treatment, they differ in the way in which they operate. Exemption clauses exclude purely and simply the goods and services covered from the scope of the agreement; exception clauses provide that certain goods and services will be exempted from the obligations and disciplines of the agreement provided they meet certain conditions; reservation clauses allow a member to maintain in existence clearly identified measures in force at the date of entry into force of an agreement notwithstanding the fact that that they do not conform to the obligations and disciplines of that agreement; waivers are granted in exceptional circumstances and usually for a limited period of time in order to except certain activities from an obligation imposed on a member.

(a) Cultural Exceptions. The only examples of cultural exceptions that are operational in the WTO context are Article IV and XX (f) of GATT 1994, both of which have been discussed previously. During the Uruguay Round, the European Commission did consider the possibility of having a cultural exception included in the general exceptions of Article XIV of GATS, which would have automatically made it subject to the requirements of paragraph (1) "that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services". But the idea was abandoned for lack of sufficient support within the European Community itself. At the end of the negotiations, the refusal of the European Community to make commitments in the audiovisual sector was erroneously described as a cultural exception by a number of

Within the framework of the preparations for the WTO Millennium Round, the principle of cultural diversity was consecrated in the Council of Ministers Conclusion of 26 October 1999, stating that "the European Union will ensure, that as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural audiovisual polices for the purpose of preserving their cultural diversity."

[175] For the last report of the Working Party on Domestic Regulation and the minutes of the last meeting, see WTO, Doc. S/WPDR/3 (2001-10-04) and S/WPDR/M8 (2001-10–02).

[176] *See supra*, note 28.

commentators in Europe, but the truth of the matter is that there is no cultural exception in the GATS.[177] There are also very few examples of cultural exceptions in regional trade agreements. It is definitely not a formula that has met with success.

(b) Cultural Exemptions. The best-known example of a cultural exemption is the one contained in the North American Free Trade Agreement ("NAFTA").[178] This clause stipulates that cultural industries are exempt from the provisions of the Agreement, except for certain limited exceptions. However, this exemption is only a partial one in that resorting to it opens the doors to retaliatory measures of equivalent commercial effect. As drafted, in fact, it does not constitute a true cultural exemption clause: all it says is that a party can, if it is willing to pay the price, maintain provisions on cultural industries that are inconsistent with its commitments. Examples of true cultural exemption clauses can be found in Canada's free trade agreements with Israel, Chile and Costa Rica, as well as in the bilateral investment agreements Canada has signed since 1995.[179] These clauses simply stipulate that the provisions of these agreements do not apply to either party's measures respecting cultural industries. Other examples are the *EU-Mexico Free Trade Agreement*, entered into force on July 1, 2000 (according to a decision of the EC/Mexico Joint Council dated February 27, 2001, the provisions of the agreement dealing with services do not cover audiovisual services) and Article 95 of the *Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part* (which explicitly excludes audiovisual services from the scope of the Chapter dealing with services).[180] The concrete impact of these examples remains limited, however, in the sense that these clauses have been negotiated within an exclusively bilateral context. There is nothing to indicate that they could easily be transposed, as is, into a multilateral context like the WTO. To the contrary, there is every reason to consider that a complete exemption of cultural products within such a context would be virtually impossible to achieve in view of the clearly expressed opposition of the United States.[181]

(c) Cultural Reservations. Cultural reservations, strictly defined, are not frequent in trade agreements.[182] A rare example is Canada's reservation concerning films in the OECD *Code of Liberalisation of Current Invisible Transactions*: as explained under item

[177] Dehousse and Havelange, *supra*, note 148 at 125.

[178] Article 2106 and Annex 2106 of the *North American Free Trade Agreement.*

[179] *Free Trade Agreement Between Canada and Chile* (entered into force July 5, 1997), Article O-06 and Annex O–06; *Free Trade Agreement between Canada and Israel* (entered into force January 1, 1997) Article 10.5; *Canada-Costa Rica Free Trade Agreement* (entered into force November 1, 2002), Article XIV.6. For the texts of those agreements and the list and the main elements of the bilateral investment agreements, see: http://www.dfait-maeci.gc.ca/tna-nac/reg-e.asp

[180] *See* for the agreement with Mexico: http://europa.eu.int/comm/trade/bilateral/mexico/fta.htm, and for the agreement with Chile: http://europa.eu.int/comm/external_relations/chile/assoc_agr/agrment.pdf

[181] In a study released in January 2001 by the International Trade Administration under the title *Impact of the Migration of U.S. Film and Television Production,* one can read the following assertion which clearly reveals the U.S. viewpoint on the subject: "At the same time, at UNESCO headquarters in Paris, efforts by France and Canada to create support for a proposal to remove cultural issues from the WTO and place them in a 'new instrument,' possibly UNESCO, found little support. The United States, although not a UNESCO member, made an intervention strongly opposing this idea".

[182] Under Article 21 of the Vienna Convention on the Law of Treaties, a reservation that is established with regard to another party "(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and (b) modifies those provisions to the same extent for that other party in its relations with the reserving State".

H of Annex A of the Code, which mentions films among the covered transactions, "the provisions of this item do not apply to Canada, which, accordingly, has neither obligations nor rights thereunder".[183] But cultural reservations, understood in the sense of specific exceptions, are more frequent. In the *North American Free Trade Agreement*, for instance, Mexico has listed 3 cultural reservations in Annex I and II of the Agreement and Canada has lodged 1. In the *Chile–U.S. Free Trade Agreement* concluded on December 11, 2002, Chile lists five cultural reservations in Annex I and II of the Agreement and in the *U.S.–Singapore Free Trade Agreement* concluded in substance on January 16, 2003, Singapore lists two cultural reservations in Annex II of the Agreement.[184] In the OECD *Code of Liberalisation of Capital Movements*, not less than 15 members have lodged reservations concerning direct foreign investment in the cultural sector (audiovisual sector in particular) and in the *Code of Liberalisation of Current Invisible Transactions*, 7 members have lodged reservations concerning films.

(d) Cultural Waiver. Notwithstanding the possibility offered by Article XXV: 5 of the *GATT 1947*, and since 1995 by Article IX, paragraphs 3 and 4, of the *World Trade Organization Agreement*, no waiver for cultural products has ever been asked for to this day. However, in an article published in 1999, the suggestion has been made that recourse to the waiver provisions of Article IX, paragraphs 3 and 4, of the World Trade Organization Agreement, supplemented by the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, could prove a more workable proposition than a cultural exception to resolve the trade and culture issue.[185] According to the author, Chi Carmody, "[e]xceptions, being difficult to implement and interpreted restrictively, appear to be inadequate tools to safeguard culture in a living, expansive manner."[186] In the scheme that she proposes, the waiver would be of a general application, somewhat along the lines of the Enabling Clause for developing countries. Members would be entitled to invoke the waiver to derogate from certain key WTO Agreement obligations (national treatment and general elimination of quantitative restrictions) with respect to cultural industries, with the proviso that the measures be taken only after a risk assessment conducted by an objective and impartial body and notification[187]. Whether such a scheme is realistic, however, remains to be seen. A serious obstacle as the author itself recognizes, is obviously the formal voting requirement of three-quarters of the entire WTO membership for a waiver, higher than the two-thirds majority now needed to add an exception to the WTO. Furthermore, the waiver in question, if adopted, would be for a fixed period of time and subject to revision not later than one year after it is granted and then reviewed annually until the waiver terminates.

3. The New International Instrument Approach

A last approach that is gaining support internationally is that of a new international instrument on cultural diversity. This solution was initially proposed by an advisory group set up by Canada's Department of Foreign Affairs and International Trade and composed of representatives of Canada's cultural industries. This group publicly released a report in February 1999, which recommended that Canada should pursue a New International

[183] OECD/C(61)89 of 12th December 1961 and C(63)154/FINAL of 3rd March 1964
[184] For the text of these two agreements, including the reservations, *see supra,* note 124
[185] *See* Chi Carmody, note 42, supra at. 309–320
[186] *Id.*, at 309–310.
[187] *Id.*, at 312–313

Instrument on Cultural Diversity (NIICD).[188] The recommendation was based in part on an assessment that a set of clear rules on measures that could and could not be used to promote cultural diversity was preferable to a policy of exempting culture from trade rules, because technological change and the "convergence" of industries in the cultural sector were creating uncertainty. The proposal has since then become the object of extensive discussion in various forums including non-governmental and governmental organizations. The hypothesis of an international instrument on cultural diversity is now mentioned as a legitimate objective and as a solution to be further explored in the Declaration on Cultural Diversity adopted by the Third Ministerial Conference on Culture held under the auspices of the Organisation Internationale de la Francophonie in Cotonou on June 15, 2001[189] and in the Action Plan attached to the Universal Declaration on Cultural Diversity adopted by the General Conference of UNESCO on November 2, 2001.[190]

At the close of its 166th session on April 11, 2003, the UNESCO Executive Board unanimously decided, at the request of some of its members[191], to add the question of "a preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity" to the agenda of the 32nd session of UNESCO's General Conference, set to begin on September 29, 2003.[192] On October 16, 2003, the General Conference unanimously requested that UNESCO prepare an international standard-setting instrument on cultural diversity. At the end of a long debate on the subject, delegates agreed that "cultural diversity, as regards the protection of the diversity of cultural contents and artistic expressions shall be the subject of an international convention." They asked the Director-General to undertake consultations on the subject with the World Trade Organization, the United Nations Conference on Trade and Development and the World Intellectual Property Organization. The resolution invites the Director-General to submit a first draft convention on the protection of the diversity of cultural content and artistic expression to the next session of the General Conference.[193]

The exact nature and content of the proposed convention are still a matter of discussion. However, on the basis of the work already done by the International Network on cultural Policy, some basic characteristics of that convention are beginning to emerge. Thus,

[188] NEW STRATEGIES FOR CULTURE AND TRADE, Canada, Department of Foreign Affairs and International Trade, Cultural Industries Sectoral Advisory Group on International Trade—Cultural Industries, Ottawa, February 1999, p. 33.

[189] International Organisation of the Francophonie, Declaration of Cotonou, III Ministerial Conference on Culture, Cotonou, June 15, 2001: http://www.france.diplomatie.fr/francophonie/actualite/decla_cotonou.pdf. The pertinent text reads as follows (author's translation): "We also agree that the Francophonie must support the principle of an international regulatory framework of a universal character for the promotion of cultural diversity. This international instrument would establish the legitimacy of governmental intervention in favour of the maintenance, establishment and development of cultural diversity."

[190] UNESCO, Press Release no 2001–120–6, *General Conference Adopts Universal Declaration on Cultural Diversity*, November 2, 2001. Article 1 of the Action Plan attached to the Declaration mentions among other objectives to be pursued by the Members: "Deepening the international debate on questions relating to cultural diversity, particularly in respect of its links with development and its impact on policy-making, at both national and international level; taking forward notably consideration of the opportunity of an international legal instrument on cultural diversity".

[191] Germany, Canada, France, Greece, Morocco, Mexico, Monaco and Senegal. See: http://www.unesco.org/exboard/fr/166ex1provf.pdf

[192] UNESCO—Executive Board, 166th session, Paris, April 4–16, 2003. Decisions Adopted by the Executive Board, item 3.4.3: "Preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity," doc. 166 EX/SR.10 (May 14, 2003).

[193] UNESCO, General Conference, 32nd Session, Press Release No. 2003–83, Paris, October 17.

although the possibility that it could take the form of an annex to the GATS on audiovisual services has been invoked[194], the prevailing view seems to be that the new international instrument should be negotiated outside of the WTO so as to provide a much-needed cultural viewpoint on the trade and culture issue. There also appears to be a consensus that the new instrument should be legally binding. It is symptomatic from that point of view that both the Cotonou Declaration on Cultural Diversity and the Action Plan annexed to the UNESCO Universal Declaration on Cultural Diversity, which do not constitute themselves legally binding instruments, refer to the opportunity of "an international legal instrument on cultural diversity". Regarding the normative content of the instrument, there is a widely held view that it should establish as a fundamental principle the right of States and governments to promote and preserve cultural diversity while maintaining an access as large as possible to other cultures[195]. This principle would itself be made explicit in rules dealing with various aspects of governmental intervention in the cultural sector. The instrument from that point of view, would provide a framework of reference for all those States that are concerned about the preservation of cultural identities and cultural diversity.

It is obviously difficult to evaluate at this stage the chances of success of the new international instrument approach as an answer to the trade and culture issue: too much remains uncertain about it. One thing that is unclear is how the new instrument might relate to the WTO legal regime. Nevertheless, the very idea of having an instrument on cultural diversity negotiated outside of the WTO could contribute to alleviating the concerns of former Director General Renato Ruggiero that the WTO might be called upon "to give answers to issues which are very real public concerns, but whose solution cannot rely on the trading system alone"[196] The fact is that in the absence of a clearly articulated cultural perspective on the subject, it is hard to see how the WTO could by itself come up with an adequate answer to the trade and culture issue.

IV. Conclusion

This survey of the treatment of cultural goods and services in international trade law has shown that there is still a good deal of ambivalence concerning the way they should be treated. The texts themselves, except for Article IV and Article XX (f) of GATT 1994, have little to say on the subject: cultural goods and services, apparently, are to be treated exactly like any other goods and services. But the actual practice within the WTO tells a different story. Upon closer examination, it appears that cultural goods do not always benefit from the same treatment as other goods. For instance, it is not easy to apply Agreements such as the Subsidies and Countervailing Measures Agreement, the Antidumping Agreement and the Safeguards Agreement to cultural goods because the value of such goods lies in their intellectual content rather than in their material content. More importantly, the WTO practice, as we have seen, provides ample evidence

[194] *See* for instance the Swiss communication to the Council on Trade in Services, supra, note 28, at ¶ 19. The Swiss suggestion, it should be pointed out, does not exclude the possibility of a distinct instrument that would be negotiated outside of the WTO.

[195] As was made explicit in the Cape Town meeting of the International Network on Cultural Policy. *See* Canadian Heritage, News Release, *Sheila Copps Participates in the Fifth Meeting of the International Network on Cultural Policy in South Africa,* Capetown, October 15, 2002: (http://www.canadianheritage.gc.ca/newsroom/news_e.cfm). For the text of the proposed convention that was adopted at the Sixth meeting, *see* the site of the International Network on Cultural Policy: http://206.191.7.19/meetings/2003/index_e.shtml

[196] *Supra*, note 17.

of a resistance to the assimilation of cultural goods and services to other goods and services.

Behind this ambivalence lies a fundamental question which is that of the specificity of cultural products. For some countries, cultural products do not differ from other products and therefore should receive exactly the same treatment. But other countries consider that they are fundamentally distinct and therefore should not be treated as other products. Recent developments, particularly in the context of the GATS negotiations on audiovisual services, suggest that this "all-or-nothing" approach to the problem is no longer acceptable. What is needed is a more balanced approach that would take into consideration the double nature of cultural products and contribute thereby to the preservation of distinct cultural expressions and identities

The search for an answer to the trade and culture issue has taken a new dimension in recent years with the realization that the development of new information technologies, globalization and evolving multilateral trade policies could have a damaging impact on cultural identities. As pointed out by Faouzia Zouari, "[translation] the precedence that economic imperatives take over social and political values, backed by the prodigious expansion of the information highway, is challenging national identities, sometimes driving them into retreat and even into aggressively asserting counter-models."[197] Since Seattle, it has become obvious that the cultural and social dimension of trade liberalization had to taken into account. Creators of culture and cultural intermediaries, from that point of view, play a key role in adapting cultures to change. That is why preserving diverse cultural expressions and cultural diversity more generally can be seen as an essential component of further trade liberalization.

Unfortunately, up until now the search for a balanced solution to the trade and culture quandary has centred for the most part around various forms of cultural exceptions designed to accommodate particular cultural concerns. This approach, to the extent that it gives priority to trade over culture, cannot be considered as a satisfactory solution. To address the question of the relationship between culture and trade exclusively from the standpoint of trade is to subject culture to commercial imperatives and thereby prevent it from playing its role. A satisfactory solution requires recognition of the fact that the multilateral trade regime cannot on its own provide answers to non-trade concerns. There is a growing literature nowadays that criticizes the tendency of the multilateral trade regime to get involved in non-trade matters and various ways of approaching that problem have been proposed, using concepts such as those of "subsidiarity" and "coherence", that suggest in general greater deference to outside expertise, whether national or international[198].

[197] Agence intergouvernementale de la Francophonie, Conférence des ministres de la culture de Cotonou, Travaux préparatoires, *Synthèse des travaux et des contributions*, by Fawzia Zouari, 2001, 7: http://confculture.francophonie.org/TrvxPrep/pdf/Synthese.pdf.

[198] *See* Gabrielle Marceau, "*A Call for Coherence in International Law. Praises for the Prohibition Against 'clinical isolation' in WTO Dispute Settlement*", 33(5) JOURNAL OF WORLD TRADE 87 (1999); Jeffrey L Dunoff, *The Death of the Trade Regime*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 733 (1998); Robert Howse and Kalypso Nicolaïdis, "*Legitimacy and Global Governance: Why Constituonalising the WTO is a Step Too Far*", in EFFICIENCY, EQUITY, LEGITIMACY THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM 227 (R.B. Porter, P. Sauvé, A. Subramanian and A. B. Zampetti eds. 2001); Stephan Ohlhoff and Hannes L. Schloemann, *Rarional Allocation of Disputes and 'Constitutionalisation: Forum Choice as an Issue of Competenc*e, in DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION 302–329 (James Cameron & Karen Campbell eds. 1998); P. Sauvé and A. B. Zampetti, "*Subsidiarity Perspectives on the New Trade Agenda*", 3JOURNAL OF INTERNATIONAL ECONOMIC LAW 83 (2000); AMERICAN JOURNAL OF INTERNATIONAL LAW, *Symposium: The Boundaries of the WTO*, Volume 96 (1), 2002

If the solution to the cultural diversity issue cannot come from the trading system alone, then obviously a contribution coming from outside that system is essential. The declarations on cultural diversity that have been adopted in the last few years may be considered as a first step in the right direction but they are not sufficient. What is needed is an international legal instrument that would articulate from a cultural perspective the basic requirements for the preservation and promotion of cultural identities and cultural diversity. As Howse and Nicolaïdis put it, "instead of looking primarily within the WTO for the relevant structural principles", consideration could then be given to the "importance of non-WTO institutions and norms in treaty interpretation that represent values other than free or freer trade."[199] But until the principles and norms in question are clearly expressed in a multilateral cultural agreement, the risk remains that cultural considerations will continue to be addressed within the WTO from a strictly trade perspective and on a piecemeal basis, which will amplify the existing problems rather than help to solve them.

BIBLIOGRAPHY

Acheson, Keith, Maule, Christopher J., *Canada's Cultural Exemption—Insulator or Lightning Road ?* 20 World Competition (1996)

Atkinson, Dave, Mondialisation culturelle et accords commerciaux internationaux: un enjeux démocratique, in Bellavance, Guy, ed., Démocratisation de la culture ou démocratie culturelle?, Institut québécois de recherche sur la culture, Québec, 113 (1999)

Baker, Edwin, C., *An Economic Critique of Free Trade in Media Products*, 78 North Carolina Law Review 1358 (2000)

Bernier, Ivan, Lamoureux, Jean-François, *Les politiques du Canada et du Québec, l'Organisation mondiale du commerce (OMC) et l'Accord de libre-échange nord-américain (ALENA),* in Sauvageau, Florian, ed., Les politiques culturelles à l'épreuve. La culture entre l'État et le marché, Institut québécois de recherche sur la culture, Presse de l'Université Laval, 1996, p. 13

Bishop, Thomas, *France and the Need for Cultural Exception*, 29 Journal of International Law and Politics 187 (1997

Browne, Dennis, ed., *The Culture/Trade Quandary: Canada's Policy Options* (1998).

Carmody, Chi, *When 'Cultural Identity Was not at Issue': Thinking About Canada—Certain Measures Concerning Periodicals*, 30 Law and Policy in International Business 231, 255 (1999).

Carlson, Andrew M., *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 30 Law and Policy in International Business 585 (1997).

Cone, Sidney, *The Appellate Body and Harrowsmith Country Life*, 32 (2) Journal of World Trade 103 (1998)

Eberschlag, Robert, *Culture Clash: Canadian periodical Policies and the World trade Organization*, 26 Manitoba Law Journal 65 (1998)

Ezetah, Chinedu R., *Canadian Periodicals: Certain Measures Concerning Periodicals II. Review of the Case*, 9 European Journal of International Law (1998)

Filipek, Jon, *Culture Quotas: The Trade Controversy over the European Community's Broadcasting Directive*, 28 Stanford Journal of International Law 323, 340–342 (1992).

Gottselig Glen A., *Canada and Culture: Can Current Cultural Policies be Sustained in the Current Trade Regime?*, 5 International Journal of Communications Law and Policy 1 (2000)

Graber, Chistoph Beat, *Handel und Kultur im Audiovisionsrecht der WTO.* Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung, Stämpfli Verlag, Bern, 2003.

[199] *Supra*, note 198, at 219.

Grant, Peter and Wood, Chris, *Blockbusters and Trade Wars*, *Popular Culture in a Globalized World*, Douglas & McIntyre, Vancouver, 2004.

Kakabadse, Mario A., *The WTO and the Commodification of Cultural Products: Implications for Asia*, 22(2) MEDIA ASIA 71–77 (1995)

Hahn, Michael J., *Eine kulturelle Bereichausnahme im Recht der WTO?*, 56 Zeitschrift für ausländisches und öffentliches Recht und Volkerrecht 315 (1996)

Higson, Andrew and Maltby, Richard, eds. "FILM EUROPE" AND "FILM AMERICA": "CINEMA, COMMERCE AND CULTURAL EXCHANGE 1920–1939" (1999)

Hyun-Kyung, Carolyn Kim, *Building the Korean Film Industry's Competitiveness: Abolish the Screen Quota and Subsidize the Film Industry*, 9 Pacific Rim Law and Policy Journal 71 (2000).

Hubin, Cécile, *Politique culturelle et GATT. À propos des mesures canadiennes en faveur de l'industrie des périodiques*, 2 Revue de droit des affaires internationales 245 (1998)

Kaplan, Laurence G.C., *The European Community's Television Without Frontiers Directive: Stimulating Europe to Regulate Culture,* 8 EMORY INTERNATIONAL LAW REVIEW 225, 311–318 (1994).

Knight, Trevor,*The Dual Nature of Cultural Products: An Analysis of the World Trade Organization's Decisions Regarding Canadian Periodicals*, 57 UNIVERSITY OF TORONTO FACULTY OF LAW REVIEW 165, 179–80 (1999).

Landsman, Michael L., *Restricting Foreign Television Programming in Europe: The European Community's Television Quota Reappraised*, 8 Media Law and Policy 29 (1999).

Lehman, Amy E., *The Canadian Cultural Exception Clause and the Fight to Maintain an Identity, 23 Syracuse Journal of International Law and Commerce* (1997)

MacMillan, Joanne, *Trade and Culture: Conflicting Domestic Policies and International Trade Obligations*, 9 Windsor Review of Legal and Social Issues 5 (1999)

Matheny III, Richard L., *In the Wake of the Flood: 'Like Products' and Cultural Products after the World Trade Organization's Decision in Canada—Certain Measures Concerning Periodicals*, 147 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 245, 264 (1998).

Ming Shao, W. "*Is There No Business Like Show Business? Free Trade and Cultural Protectionism*", 20 Yale Journal of International Law, 105, 121–122 (1995)

Murray, Thomas M., *The U.S. French Dispute Over GATT Treatment of Audiovisual Products and the Limits of Public Choice Theory: How an Efficient Market Solution was "Rent-Seeking*", 21 Maryland Journal of International Law and Trade203 (1997).

0'Keefe, R., *The Right "to Take Part in the Cultural Life" under Article 15 of the ICESCR*, 47 International and Comparative Law Quarterly 904 (1998)

Paul, J.R., *Cultural Resistance to Global Governance*, 22 Michigan Journal of International Law 82 (2000–2001)

Polka, S.E., *Canada's Cultural Industries, the United States and Trade Law: tensions, conflicts and possibilities*, 10 Windsor Review of Legal and Social Issues 105 (2000)

Prowda, Judith Beth, *U.S. Dominance in the "Market Place of Culture" and the French "Cultural Exception*", 29 New York University Journal of International Law and Politics 193 (1997)

Puentes, A.T., The Politics of Music and Film: the Validity of a Local Government Embargo on Cuba, 31 Miami Inter-American Law Review 253 (2000)

Ragosta, John, *The Information Revolution—Culture and Sovereignty—A U.S. Perspective*, 24 Canada–U.S. Law Journal 155 (1998)

Raboy, Marc, Bernier, Ivan, Sauvageau, Florian and Atkinson, Dave, *Cultural Development and the Open Economy: A Democratic Issue and a Challenge to Public policy*, 19 Canadian Journal of Communication 291 (1994)

Rothkopf, David, *In Praise of Cultural Imperialism*, 107 Foreign Policy 38 (Summer 1997)

Sauvé, Pierre and Steinfatt, Karsten, *Towards multilateral rules on trade and culture: protective regulation or efficient protection?,* in Productivity Commission and Australian National University, Conference on Achieving Better Regulation of Services, Canberra, 2000: http://www.pc.gov.au/research/confproc/abros/paper13.pdf

Schwanen, Daniel, *A Room of Our Own: Cultural Policies and Trade Agreements*, 7(4) Choices IRPP, Institute for Research on Public Policy, Montreal, 2001

Scow, Aaron,*The Sports Illustrated Canadian Controversy: Canada 'Strikes Out' in Its Bid to Protect Its Periodical Industry from U.S. Split-Run Periodicals*, 7 MINNESOTA JOURNAL OF GLOBAL TRADE 245, 277 (1998)

Sinclair, John, *Culture and Trade: Some Theoretical and Practical Considerations*, in McAnany, Emile G. and Wilkinson, Kenton T., Mass Media and Free Trade—NAFTA and the Cultural Industries, University of Texas Press, 30 (1996)

Van Harpen, Robin L., *Mamas, Don't Let Your Babies Grow Up to Be Cowboys: Reconciling Trade and Cultural Independence,* 4 MINNESOTA JOURNAL OF GLOBAL TRADE 167 (1995).

Venturelli, Shalini, *FROM THE INFORMATION ECONOMY TO THE CREATIVE ECONOMY; Moving Culture to the Centre of International Public Policy,* Washington DC, Centre for Arts and Culture, 2001, 40 p.

Warnier, Jean-Paul, *La mondialisation de la culture*, Éditions La Découverte, Paris, 1999.

WTO (World Trade Organization) 'Audiovisual services, Background note by the Secretariat', Sectoral Paper S/C/W/40, Council for Trade in Services, WTO, Geneva, 1998.

Author Biographies

Ratnakar Adhikari is the Executive Director of South Asia Watch on Trade, Economics and Environment (SAWTEE), Kathmandu, an organization he co-founded in 1994. Prior to joining this organization full time in 1999, he was working with Nepal Indosuez Bank Ltd. (a Member of the Credit Agricole Group) as Credit Manager. He served as a lecturer of Marketing Management and Managerial Economics at Tribhuvan University, Kathmandu. He is also the Vice-president of Forum for Protection of Public Interest (Pro Public), a public interest research and advocacy organization based in Kathmandu, which was co-founded by him in 1991. He served on the Program Advisory Board of the International Center for Trade and Sustainable Development (ICTSD), Geneva between 1997 and 2000. Mr. Adhikai has written extensively on trade policy, food security, consumer protection, competition policy, environment and sustainable development and livelihood issues. He has edited and written numerous trade-related publications and is currently co-editing a volume on the protection of farmers' rights in the Himalayas. He has represented his organization and presented papers at various national, regional and International seminars and conferences. Mr. Adhikari holds a Master of Commerce (M.Com) degree from Delhi School of Economics, and a Master in International Law and Economics (MILE) from the World Trade Institute, Bern.

Kym Anderson is Professor of Economics and Associate Dean (Research) in the School of Economics and foundation Executive Director of the Centre for International Economic Studies at the University of Adelaide, where he has been affiliated since 1984. From mid-2004 he has been an extended leave at the Development Research Group of the World Bank in Washington DC, as Lead Economist (Trade Policy). Previously he was a Research Fellow in Economics at ANU's Research School of Pacific and Asian Studies (1977–83), following undergraduate studies at the University of New England in Armidale (1967–70), part-time Masters studies at the University of Adelaide (1971–74) and doctoral studies at the University of Chicago and Stanford University (1974–77). During periods of leave he has spent time in Korea (1980–81), Stockholm (1988) and at the GATT (now WTO) Secretariat in Geneva (1990–92). His research interests and publications are in the areas of international trade and development, agricultural economics, and environmental and resource economics in addition to the economics of wine. He has published twenty books and about two hundred articles in journals and other books. He has been a Research Fellow of Europe's London-based Centre for Economic Policy Research since 1992, a Fellow of the Academy of Social Sciences in Australia since 1994, a Fellow of the American Agricultural Economics Association since 2004, and a Distinguished Fellow of the Australian Agricultural and Resource Economics Society since 2002. He was the first economist to serve on a series of dispute settlement panels at the World Trade Organization (concerning the EU's banana import regime), 1996–2000. In 1996–97 he served on a panel advising the Ministers for Foreign Affairs and Trade in their preparation of Australia's first White Paper on Foreign and Trade Policy. Since the late 1970s he has been a consultant with all the major international economic agencies including the World Bank, OECD, UN and ADB.

Stewart A. Baker is a partner with the Washington, D.C., law firm of Steptoe & Johnson. His practice includes issues relating to privacy, national security, computer security, electronic surveillance, encryption, digital commerce, and export controls. He has advised hardware and software companies on U.S. export controls and on foreign import controls on encryption. He also represents major telecommunications equipment manufacturers and carriers in connection with the Communications Assistance for Law Enforcement Act (CALEA) and law enforcement intercept requirements. Mr. Baker is the former

General Counsel of the National Security Agency (1992–1994) and the author of a book and several publications and articles on electronic commerce and international trade. Mr. Baker has been named to numerous US government and international bodies dealing with electronic commerce and related topics, including: Defense Science Board's Task Force on Information Warfare (1995–1996; and 1999–2001); Federal Trade Commission's Advisory Committee on Online Access and Security (2000); President's Export Council Subcommittee on Encryption (1998–2001); Free Trade of the Americas Experts Committee on Electronic Commerce (1998-present); UNCITRAL Group of Experts on Digital Signatures (1997–2001); OECD Group of Experts on Cryptography Policy (1995–1997); International Telecommunication Union Experts Group on Authentication (1999); American Bar Association Task Force on International Notarial Issues (1996–1998); International Chamber of Commerce Working Party on Digital Authentication.

Ivan Bernier is a Professor at the Faculty of Law, Laval University, Quebec City. Ph.D. in Law, London School of Economics, 1969. Dean of the Law Faculty, Laval University, 1981–1985. Director, Quebec Centre for International Relations, 1986–1993. Since 1998, he is a member of a Sectoral advisory group on cultural industries which reports to the Canadian Department of Foreign Affairs and International Trade. He has taught and done research on GATT/WTO, NAFTA and international cultural relations. On the roster of panelists for dispute settlement under NAFTA and the WTO, he has sat on two FTA cases. He is the author and co-author of a number of books and articles dealing with the topic of trade and culture. More recently, he has acted as consultant for the Working Group on Cultural Diversity of the International Network on Cultural Policy, the Department of Canadian Heritage and the Quebec Department of Culture and Communications.

Jan Bohanes holds a Master of Laws and a Doctor of Laws degree from the Law Faculty of the University of Vienna, as well as a Master's degree in International Relations from the Fletcher School of Law and Diplomacy. He is currently Legal Affairs Officer in the Appellate Body Secretariat of the World Trade Organization in Geneva. Formerly, he has held positions of researcher with the Trade Law Center for Southern Africa (TRALAC) in Stellenbosch, South Africa and legal clerk in the Austrian judiciary. His areas of interest include WTO dispute settlement, trade and environment as well as the concerns of developing countries in the global trading system.

Chad P. Bown is an Assistant Professor in the Department of Economics and International Business School at Brandeis University. Professor Bown received his PhD in economics from the University of Wisconsin-Madison, and he has been a Visiting Fellow at the Center for European Integration Studies (ZEI) in Bonn (Germany). Dr. Bown has had his research funded by grants from the Mellon and Schulhof Foundations, and has published extensively on trade-related issues.

Drusilla K. Brown is an Associate Professor of Economics at Tufts University. She was first appointed as a lecturer in 1983, was promoted to Assistant Professor in 1985 and Associate Professor in 1991. She received her Ph.D. in Economics from the University of Michigan in 1984, under the direction of Alan V. Deardorff and Robert M. Stern. Her research focuses primarily on the use of Applied General Equilibrium Models to evaluate preferential trade agreements. In addition, Professor Brown has worked on the theoretical issues concerning international labor standards and child labor. Recent publications include, "International Labor Standards: Where do they belong on the International Trade Agenda?" JOURNAL OF ECONOMIC PERSPECTIVES," Summer 2001, "Child Labor In Latin America: Policy And Evidence," 24(6) WORLD ECONOMY (2001), and "Measurement and

Modeling of the Economic Effects of Trade and Investment Barriers in Services," with R. Stern, 9(2) REVIEW OF INTERNATIONAL ECONOMICS (2001).

Carlos M. Correa is a Professor and the Director of the Center for Interdisciplinary Studies of Industrial Property Law and Economics, University of Buenos Aires as well as of the Post-graduate Courses on Intellectual Property and of the Masters Program on Science and Technology Policy and Management of the same University. He has been a visiting professor in post-graduate courses of the Universidad Carlos III (Madrid, Spain), Tulane University (New Orleans, U.S.A.), Universidad del Externado (Colombia), UNAM (Mexico), Universidad Nacional de Ingeniería (Peru), among others. He has also taught international trade law at the University of Toronto. He has been a consultant to UNCTAD, UNIDO, WHO, FAO, Inter American Development Bank, INTAL, World Bank, SELA, ECLA, UNDP and other regional and international organizations in different areas of law and economics, including investment, science and technology and intellectual property. He has advised several governments on those issues and has been a consultant to the Rockefeller Foundation. He was a member of the UK International Commission on Intellectual Property, established in 2001. He is the author of several books and numerous articles on law and economics, particularly on investment, technology and intellectual property. His recent publications include works on intellectual property and international trade; integrating public health concerns into patent legislation; policy options for intellectual property legislation on genetic resources; international investment regimes; and competition law and development policies.

Meredith Crowley is an economist in the research department at the Federal Reserve Bank of Chicago. Ms. Crowley provides research and analysis on the international economy. Her research interests include theoretical and empirical models of international trade, political economy, special forms of import protection, and technology adoption. Ms. Crowley received a bachelor's degrees in Asian Studies and chemistry from Bowdoin College (Brunswick, ME), a master of public policy degree in international trade and finance from Harvard University, and a master's and doctorate degrees in economics from the University of Wisconsin-Madison.

Alan V. Deardorff is John W. Sweetland Professor of International Economics and Professor of Economics and Public Policy at the University of Michigan. He received his Ph.D. in economics from Cornell University in 1971 and, since 1970, has been on the faculty at the University of Michigan where he served as Chair of the Economics Department from 1991 to 1995. He is co-author, with Robert M. Stern, of *The Michigan Model of World Production and Trade* and *Computational Analysis of Global Trading Arrangements* and has published numerous articles on aspects of international trade theory and policy. His work on international trade theory has dealt primarily with theories of the patterns and effects of trade. With Professor Stern and with Professor Drusilla K. Brown he has developed a series of computable general equilibrium models of world production, trade, and employment that have been used to analyze the effects of both multilateral and regional initiatives for trade liberalization. Professor Deardorff's current research interests include: the role of trade costs in determining patterns of international trade, the causes and effects of fragmentation, and the appropriate use of trade policies for issues of economic inequality, including labor standards and child labor.

Janelle M. Diller is Policy Adviser in the Employment Sector of the International Labour Office, with a focus on integrating international labor standards into technical and advisory activities. Ms. Diller has worked with the ILO since 1998, as director of the ILO Multinationals Enterprises Programme, legal officer in the Office of the Legal Adviser,

and adviser to the Secretariat for the World Commission on the Social Dimension of Globalization. On leave in 2002–03, she was Associate Professor of international law at the University of St. Thomas School of Law (Minneapolis). Prior to ILO, she taught as adjunct professor at Georgetown University Law Center and the University of Virginia School of Law. From 1990–1995, Ms. Diller was Legal Director/Advisor with the International Human Rights Law Group in Washington, D.C. Her previous work included U.S. federal appellate law practice and a judicial clerkship in the US District Court for the District of Puerto Rico. She completed the Bachelor of Arts in Religious Studies (magna cum laude) at Wheaton College, an M.A. (Journalism) at Syracuse University, and the J.D. degree (cum laude) at Georgetown University.

Esperanza Durán is the founding Director of the Agency for International Trade Information and Cooperation (Geneva, Switzerland). She has wide experience in the field of international trade and development and has numerous publications on international economics, particularly on trade and development. In addition to her research and teaching in institutions on both sides of the Atlantic (in particular at the Colegio de México, the Royal Institute of International Affairs (Chatham House) in London and the London School of Economics; at the Johns Hopkins School of Advanced International Studies (SAIS), in Washington, D.C) she has held posts of responsibility in intergovernmental organizations, such as Senior Economist at the International Monetary Fund and the World Gold Council and economist, and country officer at the World Bank. She holds an M.A. from Stanford University and a D. Phil. from St. Antony's College, Oxford.

Christopher Findlay is a Professor of Economics in the Asia Pacific School of Economics and Government at the Australian National University. Prior to that he was Associate Professor of Economics at the University of Adelaide. Professor Findlay is a principal researcher in a major research program on impediments to services trade and investment. Professor Findlay is the Chair (from April 1998) of the Pacific Economic Cooperation Council's Coordinating Group (CG). From September 1998 to December 2003, Professor Findlay was responsible for the Secretariat services provided to the Australian members of the APEC Business Advisory Council (ABAC). Professor Findlay has a Ph.D. and M.Ec. from the ANU and an Honors degree in economics from the University of Adelaide.

Michael Gestrin is currently a Senior Economist at the Investment Division of the OECD in Paris where the focus of his work is on international investment in developing countries. He is currently responsible for a project to develop a Policy Framework for Investment, a voluntary guide to help countries attract more investment and a key element of the OECD Initiative on Investment for Development. Previously he worked as an economist for the Trade Directorate of the OECD, as a research associate at Templeton College, University of Oxford, and as an economist at UNCTAD in Geneva. He has a DPhil from the University of Oxford, the focus of which was the profitability of FDI, and an MA in economics from the University of Toronto.

Robert Herzstein was lead counsel to Mexico in negotiating and implementing the NAFTA, and previously served as counsel to Israel and to Canada as they negotiated free trade agreements with the U.S. He was the first Under Secretary for International Trade, U.S. Department of Commerce and head of the International Trade Administration. He has taught at Harvard Law School on "NAFTA and Lawmaking in the Global Economy." He has practiced law in Washington regarding international trade, investment, and regulatory issues for over 30 years, and is currently with Miller & Chevalier.

William E. James is presently Senior International Economist, International Trade Group, Nathan Associates, Inc. and is serving as an advisor to the government of Indonesia, under the USAID-funded Growth through Investment, Agriculture and Trade (GIAT) Project. He has also served as advisor to the Ministry of Industry and Trade, and the central bank, Bank Indonesia, government of Indonesia. Dr. James has held positions as a member of the graduate faculty of the University of Hawaii and Kyushu University in Fukuoka, Japan. He has been Chief, Research Division of the International Centre for the Study of East Asian Development in Kitakyushu, Japan. He has also been a Senior Fellow and Assistant Director of the Institute for Economic Development and Policy at the East-West Center, Honolulu, Hawaii. Dr. James has published numerous books, book chapters and scientific papers on Asian Economic problems. His published works include: Indonesia: Deregulation and Development (2002); Public Policies in East Asian Development (1999) and Asian Development (1989).

Merit E. Janow is Professor in the Practice of International Trade at Columbia University's School of International and Public Affairs (SIPA). Professor Janow is also Director of the International Economic Policy concentration at SIPA and Co-Director of Columbia's APEC Study Center. Professor Janow teaches graduate courses in international economic and trade policy at SIPA and international trade law and comparative/international antitrust at Columbia Law School. For two years, ending in March 2000, Professor Janow served as Executive Director of a new International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust at the Department of Justice, Washington D.C. Before joining Columbia University from 1990–1993, Professor Janow served as a Deputy Assistant U.S. Trade Representative for Japan and China at the Office of the U.S. Trade Representative, Executive Office of the President in Washington D.C. At USTR, she negotiated over a dozen trade agreements with Japan and several with the PRC. Prior to her tenure in government, she was an Associate at Skadden, Arps, Slate, Meagher & Flom, specializing in international corporate mergers and acquisitions. She is the author of numerous articles and several books on international economic law and policy matters and on US-Japan/China trade and economic issues. Professor Janow has served as a panelist in a dispute before the WTO and serves on the board of directors of several global mutual funds. She received a B.A. in Asian Studies from the University of Michigan and a J.D. from Columbia Law School.

Mordechai Kreinin is a University Distinguished Professor of Economics at Michigan State University and past President of the International Trade and Finance Association. He is the author of about two hundred articles and nine books in economics, including the widely used text, INTERNATIONAL ECONOMICS, now in its ninth edition. Professor Kreinin has been a consultant to numerous international and national (U.S.) organizations in both the public and private sectors. He is the recipient of numerous awards. Professor Kreinin has been visiting professor at ten universities in the United States, Canada, Europe and Australia, and has also lectured to both professional economists and lay audiences (business, government and other groups) in the United States and many foreign countries, including fifteen around-the-world or regional lecture tours. He works extensively with both the print and electronic media. He has also been very active in University governance, and in the 1980s developed University-wide plans to deal with financial exigencies that were adopted at Michigan State and several other universities throughout the U.S.

Sheldon Leader is a graduate of Yale and Oxford Universities, and is a member of the UK Bar. He is Professor, Department of Law and Centre for Human Rights, University

of Essex. He works on developing practical links between trade, investment and human rights as a legal advisor to Amnesty International's Business and Human Rights section, and has recently helped formulate a legally binding human rights undertaking for the Baku-Ceyhan pipeline. Leader teaches a course on international trade and human rights; as well as jurisprudence; corporate law; and labor/employment law. His current research is into the extension of fundamental rights as constraints on, and guarantees to, non-state actors. Some relevant publications are; *Human Rights on the Line: the Baku-Ceyhan Pipeline*, Amnesty International UK, 2003 (with A. Shemberg); "*The Reach of Democracy and Global Enterprise*" in *Constellations*, Vol. 8, No. 4 (2001) pp. 538–553; "*Three Faces of Justice and the Management of Change*": 63 *Modern Law Review* (2000) *p.* 55–83; "*Integration, Federation, and the Ethics of Rights*" in *Morale et politique des Droits de l'homme* ed. Monique Costillo (Georg Olms Verlag: 2003).

Peter John Lloyd is an Emeritus Professor of Economics at the University of Melbourne. His main areas of specialization are international economics and microeconomics. He is an author or an editor of ten books and has written nine monographs and over one hundred articles in refereed journals or chapters in books. He has been a consultant to the OECD, the GATT, WTO, UNCTAD, the World Bank and a number of government departments and authorities in Australia and New Zealand. He was the joint editor of the Journal of the Economic Society of Australia, *The Economic Record*, for five years and has served on numerous committees for the Economic Society, the International Economic Association, the Academy of the Social Sciences of Australia and other bodies. He is a Life member of the Victorian Branch of the Economic society. He was Dean of the Faculty of Economics and Commerce at the University of Melbourne from 1988 to 1993.

Rachel McCulloch is the Rosen Family Professor of International Finance at Brandeis University. Prior to joining the Brandeis faculty in 1987, she taught at the University of Chicago, Harvard University, and the University of Wisconsin-Madison. Dr. McCulloch serves on the Academic Advisory Council of the Federal Reserve Bank of Boston and the Advisory Committee of the Institute for International Economics, Washington, D.C. She was also a member of the Technology Assessment Advisory Council of the U.S. Congressional Office of Technology Assessment (1979–87), the President's Commission on Industrial Competitiveness (1984–85), and the Committee on International Relations Studies with the Peoples Republic of China (1984–92). Dr. McCulloch has published extensively on economic issues.

Eugenia McGill is an international lawyer and gender specialist, and consults with international and nongovernmental organizations on law and human development issues. In the area of international trade and investment, she recently collaborated with two economists on a framework for assessing trade and investment agreements from a gender perspective, commissioned by the Coalition for Women's Economic Development and Global Equality (Women's EDGE) with support from the Rockefeller Foundation. She worked previously as counsel and senior administrative/policy officer for the Asian Development Bank, based in Manila, and as an international finance lawyer with Cleary, Gottlieb, Steen and Hamilton in New York City and Hong Kong. She has a law degree from the University of Pennsylvania (1984), a masters in international affairs from Columbia University (2000) and an undergraduate degree from Williams College.

Charles Pearson is Professor and Director of the International Economics Program at the School of International Studies at the Johns Hopkins University. His areas of expertise

include international economics, economic development, energy and environment, and multinational corporations. He served as a senior staff economist for the Commission on International Trade and Investment Policy and as a consultant to the World Bank, the U.S. Department of Commerce and other organizations; and has been an adjunct senior associate at the World Resources Institute and at the East-West Center. He received his Ph.D. in economics from Cornell University. Publications include: ECONOMICS AND THE GLOBAL ENVIRONMENT (2000); FREE TRADE, FAIR TRADE? THE REAGAN RECORD (1989); DOWN TO BUSINESS: MULTINATIONAL CORPORATIONS, THE ENVIRONMENT AND DEVELOPMENT (1985); and ENVIRONMENT: NORTH AND SOUTH (1978).

Ernst-Ulrich Petersmann is Professor of International and European Law at the European University Institute (EUI) at Florence and Academic Director of the EUI's Transatlantic Program at the Robert Schuman Centre for Advanced Studies. He previously taught at the Universities of Geneva, Lausanne, Fribourg, St. Gallen (Switzerland), Saarland, Heidelberg and Hamburg (Germany), as well as visiting professor in the Americas, Africa and Asia. He worked as legal adviser in the World Trade Organization, GATT and the German Ministry of Economic Affairs, as German representative in numerous international organizations, and as secretary, member or chairman of numerous GATT and WTO dispute settlement panels. His publications include twenty books and more than two hundred articles and book contributions.

Michael G. Plummer is Professor of International Economics, Johns Hopkins University SAIS-Bologna. He was previously Associate Professor of Economics with tenure (1998–2001) and Assistant Professor of Economics (1993–1998), Brandeis University; and Reseach Fellow, East-West Center (1988–1993). His main fields of interest are international economic integration and Asian economic development. He received his Ph.D. and M.A. in Economics from Michigan State University and holds a BA in Economics and French from the University of Michigan. Academic honors and positions include: Fulbright Chair in Economics, Viterbo (2000); Pew Fellow in International Affairs, Harvard University (1994–95); research professor, Kobe University (1996–97); Editorial Board, *World Development* and *Journal of Asian Economics*; visiting scholar, International Center for Study of South East Asian Development (2002), University of Auckland (1999), and Institute of Southeast Asian Studies (1997); and faculty member, Summer Macroeconomic Policy Program, Harvard Institute of International Development (1995–1997). He is consultant to numerous international and official organizations, and has published extensively in the general areas of international economics and Asian economic development. He is a Co-editor of this book.

Richard Pomfret is Professor of Economics at Adelaide University. Before coming to Adelaide in 1992, he was Professor of Economics at the Johns Hopkins University School of Advanced International Studies in Washington DC, Bologna (Italy) and Nanjing (China). In 1993 he was seconded to the United Nations for a year, acting as adviser on macroeconomic policy to the Asian republics of the former Soviet Union, and he has since then been a consultant to the World Bank, UNDP and Asian Development bank on Central Asian issues. He has written seventeen books, including books on China, Central Asia, Regional Trading Arrangements, as well as textbooks on Canadian economic development, international trade theory and policy, and development economics.

Francisco Javier Prieto is former chair of the Free Trade Area of the Americas (FTAA) Working Group on Services and a consultant on services to the Ministry of Foreign Affairs, Chile. Previous positions include work with the UNCTAD Secretariat in Geneva,

Switzerland and with the ECLAC Secretariat in Santiago de Chile. He was responsible for negotiating services for the Chilean Government in the US-Chile Free Trade Agreement, concluded in 2002.

Alan M. Rugman has published widely, appearing in leading refereed journals that deal with economic, managerial and strategic aspects of multinational enterprises, and with trade and investment policy. His recent books include: *Multinationals as Flagship Firms* (co-author) (Oxford University Press 2000); *International Business* (FT/Prentice Hall 2003); *The End of Globalization* (Random House 2000; 2001); (co-ed) *The Oxford Handbook of International Business* (Oxford University Press 2001) and, forthcoming, *The Regional Multinationals* (Cambridge University Press 2005).

Professor Rugman is one of the world's leading researchers in multinational business. An International expert on free trade among nations, he has served as a consultant to major private sector companies, research institutes, government agencies, and served as an outside advisor on free trade, foreign investment, and international competitiveness to two Canadian Prime Ministers.

Professor Rugman was Thames Water Fellow in Strategic Management at Templeton College, University of Oxford, where he remains an Associate Fellow. Dr. Rugman previously served as Vice-President of the Academy of International Business is now President-Elect, and beginning August 2004 will serve as President until 2006.

Maurice Schiff is a Lead Economist in the International Trade Unit, Development Research Group, World Bank. He obtained a B.A. and M.A. from the Hebrew University and a Ph.D. from the University of Chicago in 1983. Before joining the World Bank, he was Research Director in the Faculty of Economics and Management at the University of Concepcion, Chile. He is currently doing research on regional integration and on trade and technology transfers. He has published some ten books and a large number of articles in the areas of agriculture and the macroeconomy, regionalism, trade and migration, social capital, international knowledge diffusion, nutrition, and commodity trade policy. His work has included policy analysis and advice in Sub-Saharan Africa, Latin America, the Middle East, North Africa and Central Asia.

Magda Shahin, who holds a Ph.D. in Economics from Cairo University, is Ambassador of Egypt to Greece (2001). She served previously as Assistant Minister of Foreign Affairs for International Economic Relations. Parallel to her diplomatic function, Dr. Shahin was Professor of Economics at the American University in Cairo (AUC) teaching on selected topics, notably the Multilateral Trading System (GATT/WTO) and the Developing countries (1997–2001). She was a Counselor at the Egyptian Mission to the United Nations in New York (1984–1989), as well as Deputy Chief of Mission at the Egyptian Mission to the United Nations – Geneva (1992–1997). She has served as a member of the WTO Textiles Monitoring Body during her tenure in Geneva and is on the WTO's Indicative List of Panelists. Mrs. Shahin has also served as a Consultant and an expert in various seminars, symposiums and workshops organized by UNCTAD/UNDP, ESCWA, and the Islamic Development Bank (IDB). She has written and published numerous articles in Arabic and English.

Maury Shenk is managing partner of the London office of Steptoe & Johnson. His practice focuses on the international aspects of electronic commerce and telecommunications. Mr. Shenk advises frequently on the WTO issues facing e-commerce and telecommunications companies, and was actively involved as a representative of US industry in the negotiations of the WTO Basic Telecommunications Agreement.

Sherry M. Stephenson is Deputy Director of the Trade Unit of the Organization of American States. Her responsibility includes overseeing the role of the OAS in providing analytical support to the majority of the negotiating groups in the Free Trade Area of the Americas (FTAA) negotiations as well as providing direct support to the FTAA Negotiating Group on Services and technical assistance to the countries participating in the FTAA process. She received a Ph.D. in International Economics from the Graduate Institute of International Studies, University of Geneva, Switzerland in 1986, and an M.A. in Economics from New York University. Prior to her position with the OAS, Dr. Stephenson was an Advisor to the Ministry of Trade, Government of Indonesia, Jakarta, for three years. Previous positions have been with the GATT and UNCTAD Secretariats in Geneva and with the Trade Directorate of the OECD in Paris. She has also done consulting work. Dr. Stephenson has taught within the Masters of Arts Program in International Commerce and Policy at George Mason University, Virginia. She is a member of the International Trade Policy Forum of the Pacific Economic Cooperation Council (PECC) and of the Inter-American Dialogue. Dr. Stephenson has written extensively on trade policy issues, particularly in the area of services and standards.

Robert M. Stern is Professor of Economics and Public Policy (Emeritus) in the Department of Economics and the Gerald R. Ford School of Public Policy at the University of Michigan and is also a Faculty Associate of the William Davidson Institute at the University of Michigan Business School. He received his PhD in Economics from Columbia University. He has published numerous papers and books on a variety of topics including international commodity issues, the determinants of comparative advantage, price behavior in international trade, balance-of-payments policies, the computer modeling of international trade and trade policies, trade and labor standards, and services liberalization. His current research interests include applications of the Michigan Model of World Production and Trade for the computational modeling and analysis of multilateral trade negotiations and regional trading blocs (jointly with Professor Deardorff and Professor Drusilla Brown of Tufts University), issues in U.S.-Japan international economic relations, international labor standards, and the political economy of U.S. trade policy.

Matthew Stilwell serves as a Senior Attorney at the Center for International Environmental Law's (CIEL) European Office and as Managing Director of the Program on Governance for Sustainable Development at the Bren School of Environmental Science and Management, University of California, Santa Barbara. Based in Geneva, he supports a range of governments, intergovernmental and non-governmental organizations on issues of international economic and environmental law. He teaches a Summer Program entitled *Institutions for Sustainable Development Governance* in Geneva and Paris on behalf of the American University and CIEL, and serves on UNEP's Working Group on Economic Instruments, and Working Group on Integrated Assessment. He holds a Masters Degree in Law from Columbia University's School of Law, and a Bachelor of Economics and Bachelor of Laws with Honors from the University of Tasmania.

Alan Sykes is the Frank & Bernice Greenberg Professor of Law at the University of Chicago. He received his J.D. from Yale in 1982 and a Ph.D., in economics from Yale in 1987. From 1982–1986, he was in private practice in Washington, D.C. at the firm of Arnold & Porter, specializing in international trade cases. He joined the Chicago faculty in 1986, and has served as Visiting Professor at New York University and Harvard Law Schools. He was editor of the Journal of Law and Economics from 1990–2000, and

currently serves as editor of the Journal of Legal Studies, as an associate editor of the Journal of International Economic Law, and as a reporter for the American Law Institute project on Principles of Trade Law.

Friedl Weiss studied law at the Universities of Vienna, Brussels and Cambridge and is Professor for International Economic Law and International Organizations at the University of Amsterdam and Visiting Professor at the University of Louvain-la-Neuve. Friedl Weiss is member and rapporteur for trade and investment of the International Trade Law Committee and of the Committee on the Law of Foreign Investment of the International Law Association, as well as a member of the American, Austrian, German, Dutch and French Societies of International Law. He has worked as legal adviser in the EFTA Secretariat and as a legal consultant in the GATT. His research interests encompass public international law, especially international economic law, international organizations, including those of international economic governance (trade and monetary relations) and European Community law. His Recent Publications include: INTERNATIONAL LAW OF SUSTAINABLE DEVELOPMENT: PRINCIPLE AND PRACTICE (ed. with N. Schrijver) (2004); Free Movement of Persons Within the European Community, 30 EUROPEAN MONOGRAPHS (with Frank Wooldridge, 2001); IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES. ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS (ed.), (2000); and INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE, (with Paul de Waart and Eric Denters, eds., 1998).

Joseph P. Whitlock is an associate attorney at Miller & Chevalier Chartered. He focuses his practice on trade policy, Customs and intellectual property issues. In the trade policy area, he advises foreign Governments and private parties on trade negotiations, WTO and NAFTA disputes, and the interrelationship of national and multilateral trading rules. He also advises clients on a wide range of Customs issues, including classification and valuation matters, ruling requests, administrative settlements and Customs security programs. Finally, he helps clients enforce their intellectual property rights at the border through the U.S. Customs Service and advises clients on the TRIPs Agreement and Section 337 of the Tariff Act of 1930. Mr. Whitlock is a frequent contributor to U.S. and foreign trade-related publications.

L. Alan Winters is Professor of Economics at the University of Sussex. He is a Research Fellow of the Centre for Economic Policy Research (CEPR, London), and a Senior Visiting Fellow of the Centre for Economic Performance, at the London School of Economics. He was formerly Research Manager for International Trade in the World Bank and has worked at the Universities of Cambridge, Bristol, Wales and Birmingham. In addition he has advised, *inter alia*, the World Bank, OECD, the European Commission, the European Parliament, UNCTAD, the WTO, DfID and the Inter-American Development Bank. L. Alan Winters specializes on empirical and policy analysis of international trade. His one hundred and seventy published books and articles cover areas such as regional trading arrangements, non-tariff barriers, European Integration, East-West trade, global warming, agricultural protection, trade and poverty, and the world trading system.

INDEX

A380 Super Jumbo project, I:1191
AB. *See* Appellate Body
abandoning reciprocity (under Telecommunications Services commitments), I:1025–8
  bypass subsidization problem, I:1025–6
  cross-subsidization problem, I:1025–6
accession. *See also* World Trade Organization Membership
  Accession Protocol, WTO, I:75
  of least-developed countries, I:78
  of New Members in WTO, I:74
  to GATT/WTO
    China, I:76–7, III:61–4
    Egypt, III:93
    Japan, III:172
    Mexico, III:217–27
    Mongolia, III:250–54
    Russia, III:289–91, 321–331
    Singapore, III:336–7, 341
  WTO decision making and, I:70
accountancy disciplines, I:943
ADA. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement)
advertising, tender notices. *See* tender notices publicity under GPA
AFL-CIO, II:593, 594
African Growth and Opportunity Act (AGOA), II:578
AFTA. *See* ASEAN Free Trade Area
Agenda 2000 reforms of CAP, I:203
aggregate measurement of support (AMS), I:207–8; II:115
AGOA. *See* African Growth and Opportunity Act
AGP. *See* Agreement on Government Procurement
Agreement on Agriculture, II:97, 98, 723–6
  Article 4.1, I:205
  Article 4.2, I:203
  Article 5, I:205–6
  Article 5.1(b), I:206–7
  Article 5.4, I:205
  Article 5.5, I:205
  Article 5.6, I:206
  Article 6 [exemptions]
    Article 6.2 [Developing Country Exemptions], I:208
    Article 6.4 [De Minimis Exemptions], I:208
    Article 6.5 [Blue Box Exemptions], I:208–9
    Green Box Exemptions, I:209
  Article 20, I:217
  CAP and, I:201–3
  Cancun and
    cotton reference, I:227
    domestic support provisions, I:226
    export subsidies provisions, I:226
    market access provisions, I:225
  contracting parties
    EC, I:201–2
    US, I:202
  developing countries, provisions for
    Net Food-Importing Developing Countries Decision, I:215–17
    special and differential treatment, I:215, 1549
  Doha and, I:217
    Article 5, I:218
    Article 20(c), I:223–4
    domestic support provisions, I:220
    EC proposal, I:218
    export subsidies provisions, I:221
    Framework for Establishing Modalities in Agriculture (August 2004), I:224; text III:517–23
    market access provisions, I:218–19
    non-trade concerns provisions, I:223
    S&D provisions, I:222
    US proposal, I:218
  domestic support provisions
    AMS, I:207–8
    Annex 2(1), I:209
    Annex 3, I:207
    Article 1(a), I:207
    Article 6 [exemptions], I:208
    dispute settlement, I:209–10
    market price support, I:207
    non-exempt measures, I:207–8
    total AMS, I:208
  export subsidies provisions
    anti-circumvention provisions, I:211
    Article 3.3, I:210, 213
    Article 8, I:210
    Article 9.1, I:210
    Article 9.1(a), I:212
    Article 9.1(b), I:212
    Article 9.1(c), I:212, 213
    Article 9.1(d), I:213
    Article 9.2, I:211
    Article 10, I:211
    Article 10.1, I:213
    Article 11, I:211
    dispute settlement, I:211
    reduction commitments, I:210
  GATT
    Article XI:2(c), I:206
    Article XX, I:206
  LDC development and, I:1563
  market access provisions, I:202
    dispute settlement, I:206
    general exceptions, I:206
    special safeguard measures, I:205
    tariff reductions, I:205
    traffication, I:203, 204
  Modalities Agreement, I:203
    Annex 2, I:203
    Annex 3, I:203
    Annex 3B, I:204
    Annex 5, I:204
    Annex 5B, I:204
  negotiations
    Blair House agreement, I:202
    Marrakesh Declaration, I:202
    Tokyo Round, I:201
    Uruguay Round, I:200, 202, 205
  Peace Clause

Agreement on Agriculture (*cont*.)
Article 13, I:214
domestic and export subsidies, I:214–15
SCM measures and, II:97–8
SPS Agreement relationship with, I:254
trade and environment, II:516
URAA, II:110, 112–15, 119, 124, 125, 126, 127
Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement). *See also* *Australia-Salmon* case; *EC-Hormones* case; SPS measures
agriculture issues in, II:122
application related issues
Article 13 of (Applicability to Bodies Other than Central Government Bodies), I:248
GATT violation proofs, nonrequirement of, I:248–9
temporal application scope, I:249–50
Article 1.1, I:244–7
Article 2 [Basic Rights and Obligations]
Article 2.1 [Right to Take SPS Measures], I:254–5
Article 2.2, I:255–64
Article 2.3, I:264–6
Article 2.4, I:251
Precautionary Principle for Article 2.2, I:261
relationship with Articles 5.1 and 5.2, I:263–4
Article 3 [Harmonization], I:266–7
Article 3.1, I:268–9, 272–3, 275
Article 3.2, I:268, 275–6
Article 3.3, I:268, 275–8
Article 3.4, I:269
Article 3.5, I:269
Article 4 [Equivalence], I:324–5
ad-hoc recognition of equivalence, I:324–5, 328–9
Article 4.1 [Acceptance of Equivalence], I:326
Article 4.2 [Agreements on Recognition of Equivalence], I:326–7
conditions, I:326
Equivalence Decision, I:331–3
examples, I:329
implementation problems, I:330
international guidelines on equivalence, I:331
notification, I:328–9
procedure, I:327–8
Article 5.1, I:263–4, 279, 281, 288, 294–7
Article 5.2, I:263–4, 279, 292–3
Article 5.3, I:279, 292, 294
Article 5.4, I:309
Article 5.5, I:265, 266, 309–18
relationship with Article 2.3, I:319
Article 5.6, I:319
challenged under
no alternative measure achieves appropriate level of protection, I:321–3
no alternative measure significantly less restrictive to trade, I:323–4
no alternative measure that is reasonably available, I:320–21
Article 5.7, I:257, 262–3
available pertinent information and, I:304
insufficiency of relevant scientific evidence and, I:302–3
necessary information and, I:305–6
relationship with Article 2.2, I:308
relationship with Precautionary Principle, I:297–9, 301
review within reasonable period and, I:306–7
Article 5.8, I:336, 339
Article 6 [Adaptation to Regional Conditions], I:333
Article 6.1, I:334
Article 6.2, I:334–5
Article 6.3, I:335
regionalization work and, I:335–6
Article 7, I:336
Article 8, I:340–41
Article 9 [Technical Assistance]
Article 9.1, I:356
Article 9.2, I:356
Article 10 [Special and Differential Treatment]
Article 10.1, I:358
Article 10.2, I:358
Article 10.3, I:358
Article 10.4, I:358
Article 11 [Dispute Settlement]
Article 11.1, I:345
Article 11.2, I:349–51
Article 11.3, I:345
Article 12
Article 12.1, I:342
Article 12.2–12.6, I:343
Article 12.7, I:343
Article 14 [Transitional Periods], I:359
Article XX exception and, I:159–60
clarifications or amendments possible in, I:365–6
control, inspection and approval procedures
Annex C, I:340–41
Article 8, I:340–41
developing countries and, I:355
Doha Decision on implementation, I:360–61
implementation problems, I:360
reasonable adaptation period (Annex B, paragraph 2), I:359
S&D treatment (Article 10), I:358
special provisions on notification (Annex B, paragraphs 8 and 9), I:359
technical assistance (Article 9), I:356
transitional periods (Article 14), I:359
dispute settlement, I:345
burden of proof, I:346–9
consultation with experts (Article 11.2), I:349–51
overview, I:354–5
review standard, I:351–3
environmental issues, II:150, 151
evaluation, I:362–4
features, I:242
procedural rules, I:244
scientific disciplines, I:243
future key issues, I:366–70
GATT 1994
Article XI, I:253
Article XX(b), I:251–3
gender analysis of trade agreement and, II:732–3
human rights and, II:654–5
international trade, effect on, I:247
LDC development and, I:1564
least trade restrictive measure requirement, I:319
risk assessment
Annex A, paragraph 4, I:280

Article 5.1–5.3, I:279–85, 294–7
Article 5.1, I:288–90
specificity elements, I:286–7
Article 5.2, I:292–3
Article 5.3, I:292, 294
"based on" requirement, I:294–7
borrowed risk assessments, I:290
risk management aspects, I:291–2
risk management
Annex A, paragraph 5, I:308
Article 5.3–5.6, I:308
Article 5.4, I:309
Article 5.5, I:309–19
Article 5.6, I:319–20
SPS Committee
composition, I:342
consultations forum, I:342
functions, I:342
harmonization monitoring and encouraging (Article 12.2–12.6), I:343
overview of work (1995–2002), I:344–5
periodic review of SPS Agreement operation and implementation (Article 12.7), I:343
SPS Measure definition (Annex A, paragraph 1), I:245–7
technical assistance in Uruguay Round Agreements, II:464
trade and environment, II:515
transparency provisions
Annex B.1, I:337
Annex B.5, I:337–8
Annex B.6, I:338
Annex B.10, I:340
Article 5.8, I:336, 339
Article 7, I:336
infrastructure for transparency, I:340
notification procedure, I:338–9
scope of notification obligation, I:336
Uruguay Round Negotiations, I:239
Cairns Group proposal, I:241
developing countries, role of, I:242
EC proposal, I:241
trading nations position, I:240
US proposal, I:241
WTO Agreements, relationship with, I:250
Agreement on Agriculture, I:254
GATT 1994, I:251–3
TBT Agreement, I:251
Agreement on Customs Valuation. *See* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
Agreement on Government Procurement (GPA)
Appendix I (Annex 1–5), I:1137
Appendix II–IV, I:1137
bid challenge procedures and dispute resolution, I:1154
dispute settlement, I:1157–8
private bid challenge, I:1155–7
contract award procedures, I:1141
advertising, transparency and information requirements, I:1149–54
contract awarding (Article XIII:4), I:1148–9
qualification (Articles VII and Article IX), I:1146–7
technical specifications, I:1154
tender documentation (Articles VII and XII), I:1146
tender receipt (Article XIII:1), I:1147–8
tendering procedures (Article VII:3), I:1142–5
gender analysis of trade agreement, II:729
history of, I:1125
ITO discussions, I:1125
GATT negotiations and Tokyo Round, I:1129
OECD, I:1126–9
investment-related provisions in, II:315
principles (Articles III and XVI), I:1141
scope and coverage, I:1137
entity coverage, I:1138
exclusions (Article XXIII), I:1140
scope, I:1139
threshold values (Article II), I:1140
special and differential treatment for developing countries, I:1156, 1158–60
Tokyo Round Code, I:1129
improvements following (Article IX:6), I:1133–4
issues arising from (Article I:1), I:1130–31
Tokyo Round negotiations and
dispute resolution (Articles VI:6 and VII), I:1132–3
procedural rules (Articles II and V), I:1131–2
Uruguay Round and, I:1134–7
way forward, I:1160
GATS negotiations, I:1162
GPA ongoing review, I:1161
Working Group on transparency, I:1161
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement or ADA) I:487; II:764
Article 1 [Principles], I:500
Article 2 [Determination of Dumping]
Article 2.1, I:501, 503, 507
Article 2.2 [cost determinations], I:501, 503
Article 2.2.1 [sales below cost], I:502
Article 2.2.1.1, I:504
Article 2.2.2 [SG&A expenses, determination of], I:504
Article 2.3 [constructed export price], I:505
Article 2.4 [fair comparison], I:505
Article 2.4.1 [currency conversion], I:506
Article 2.4.2 [price averaging], I:507
Article 2.5 [transshipment], I:508
Article 2.6 [like product], I:508
Article 2.7 [non-market economies], I:508
Article 3 [Determination of Material Injury], I:508
Article 3.1, I:737
Article 3.2, I:739
Article 3.3, I:740
Article 3.4, I:742
Article 3.5, I:743
Article 3.6, I:745
Article 3.8, I:747
Article 3.7, I:746
Article 4 [Definition of Domestic Industry], I:508
Article 4.1, I:509
Article 4.2, I:509
Article 5 [Initiation and Subsequent Investigation]
Article 5.4 [support for application], I:510
Article 5.5 [publicizing of petition], I:511
evidence required for initiation
Article 5.2, I:510
Article 5.3, I:511

Agreement on Implementation of Article VI (*cont.*)
time limits for investigation and immediate termination
Article 5.8, I:512
Article 5.10, I:512
Article 6 [Evidence], I:512
Article 6.5 [confidential information], I:514
Article 6.8 [facts available], I:515–16
Article 6.9 [informing parties of essential facts], I:516
Article 6.10 [individual margins], I:516–17
Article 6.12 [consumers and industrial users], I:517
Article 6.13 [small companies], I:517
submission of evidence and time limits
Article 6.1.1, I:513
Article 6.1.2, I:513
Article 6.1.3, I:513
verification
Article 6.6, I:514
Article 6.7, I:514
Article 7 [Provisional Measures], I:517
Article 7.1, I:518
Article 7.3, I:518
Article 7.4, I:518
Article 8 [Price Undertakings]
Article 8.2, I:518
Article 8.3, I:518
Article 8.4, I:518
Article 8.5, I:518
Article 8.6, I:519
Article 9 [Imposition and Collection of Anti-Dumping Duties]
Article 9.1, I:519
Article 9.2, I:519
Article 9.3, I:519
Article 9.4, I:520
Article 9.5, I:520
Article 10 [Retroactivity], I:520
Article 10.3, I:521
Article 10.7, I:521
Article 11 [Duration and Review of Anti-Dumping Duties and Price Undertakings], I:521
Article 11.1, I:522
Article 11.2, I:522
Article 11.3, I:522–3
Article 11.4, I:523
sunset reviews, I:522–3
Article 12 [Public Notice and Explanation of Determinations]
Article 12.1, I:523
Article 12.2, I:524
Article 12.2.1, I:524
Article 12.2.2, I:524
Article 13 [Judicial Review], I:524
Article 14 [Anti-Dumping Action on Behalf of a Third Country]
Article 14.1, I:524
Article 14.4, I:524
Article 15 [Developing Countries], I:525
Article 16 [Committee on Anti-Dumping Practices], I:525
Article 17 [Consultation and Dispute Settlement]
Article 17.4, I:525–6
Article 17.5, I:526
Article 17.6, I:526–7
Article 18 [Final Provisions]
Article 18.1, I:527
Doha Development Agenda, I:528–9
LDC development and, I:1564
S&D treatment of developing countries (Article VI of GATT 1994), I:1550
transparency provisions in, I:139
Uruguay Round Negotiations and, I:498–500
Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement or CVA), I:534
administration and dispute settlement, I:540–41
Article VII of GATT 1994, I:537
implementation of, I:538
relationship with, I:541–2
confidential information (Article 10), I:565–6
currency conversion, I:563
customs authorities powers, I:564
general introductory commentary, I:539
history of
from GATT 1947 to Tokyo Round, I:534–5
from Tokyo Round to WTO, I:536
implementation related issues, I:568
developing countries' systemic and structural problems, I:571
Doha implementation-related issues, I:569–70
importers' rights, I:564–5
LDC development and, I:1564
Method 1 (transaction value of goods), I:543
price paid or payable adjustments (additions), I:547
assist value, I:548–9
packing costs, I:548
proceeds of any subsequent resale, disposal, and use of merchandise, I:550
royalties or license fee (Article 8.1), I:549
selling commission and brokerage, I:547
price paid or payable adjustments (deductions)
cost of international transportation and related charges (Article 8.2), I:552
costs accruing after importation, I:550–51
interest charges treatment under financing arrangement, I:551
storage costs, I:552–3
TV definition (CVA Article 1.1), I:544–6
Method 2 (TV of identical goods), I:556, 557
Method 3 (TV of similar goods), I:556, 557
Method 4 (deductive value), I:558
DV calculation, basis for, I:558–9
unit price, adjustments to, I:559
Method 5 (computed value), I:559
access to necessary information, I:561
CV calculation, I:560–61
Method 6 (fallback method of valuation), I:561
prohibited methods, I:562
requirements for applying, I:562
Preamble, I:539
principles
fairness, I:539
neutrality, I:539
uniformity, I:539
scope of Agreement, I:540
special and differential treatment, I:567
of developing countries (Article VII of GATT 1994), I:1554

reservations regarding DV and CV methods, I:568
technical assistance, I:568
transitional periods, I:567
substantive provisions (Annex I), I:540
technical assistance in Uruguay Round Agreements, II:465
transparency (Article 12), I:566
TV, departure from
absence of sale or price for export, I:553
data unavailable to make appropriate adjustments under Article 8, I:556
goods disposal or use restrictions, I:553
proceeds of subsequent resale accrue to seller, Article, I:1 (c), I:555
related parties, I:555
sale or price subject to conditions cannot be determined (Article 1.1), I:554
Agreement on Import Licensing Procedures (AILP), I:592–3
Article 1 [General Principles]
Article 1.1, I:595
Article 1.2, I:595
Article 1.3, I:595
Article 1.5, I:596
Article 1.6, I:596
Article 1.7, I:596
Article 1.8, I:596
Article 1.9, I:596
Article 2 [Automatic Import Licensing]
Article 2.1, I:597
Article 2.2, I:597
Article 3 [Non-Automatic Import Licensing]
Article 3.4, I:597
Article 3.5, I:597–8
Article 4, I:598
Article 5, I:599
Article 6, I:599
Article 7, I:599
recommendations for change, I:599
S&D treatment of developing countries, I:1555
Tokyo Round Code, I:594
Uruguay Round Negotiations on, I:594
Agreement on Preshipment Inspection (API), I:574. *See also* Preshipment Inspection
Article 1 [Definitions]
Article 1.1, I:575
Article 1.2, I:575
Article 1.3, I:576
Article 1.4, I:576
Article 2 [Obligations of User Members]
Article 2.1 [Non-Discrimination], I:576
Article 2.2 [Governmental Requirements], I:577
Article 2.3 [Site of Inspection], I:577
Article 2.4 [Standards], I:577
Article 2.5–2.8 [Transparency], I:578
Article 2.9–2.13 [Protection of Confidential Business Information], I:579–80
Article 2.14 [Conflicts of Interest], I:580
Article 2.15 [Time for Inspection], I:580
Article 2.16 [Issuance of Report], I:580–81
Article 2.17 [Preliminary Price Verification], I:581
Article 2.18, I:581n.
Article 2.20 [Price Verification], I:582–3
Article 2.21 [Appeals Procedures], I:583
Article 2.22 [Derogation], I:583
Article 3 [Obligations of Exporter Members], I:584
Article 4 [Independent Review Procedures], I:584
Article 5 [Notification], I:585
Article 6 [Review], I:585
Article 7 and 8 [Consultation and Dispute Settlement], I:585
assessment of, I:587
Preamble, I:575
technical assistance in Uruguay Round Agreements, II:465
Agreement on Rules of Origin (ARO), I:603. *See also* Committee on Rules of Origin; harmonized non-preferential rules of origin architecture; Technical Committee on Rules of Origin
Article 1.1, I:610
Article 1.2, I:610
Article 2, I:610
Article 3, I:610
Article 4.1, I:611
Article 4.2, I:611
Article 5, I:611
Article 6, I:611
Article 6.3, I:640
Article 7, I:611
Article 8, I:611
Article 9, I:611
dispute settlement
Article 2 interpretation, I:612–14
Chile-Taxes on Alcoholic Beverages case, I:612
United States-Rules of Origin for Textiles and Apparel Products case, I:612
Harmonization Work Programme, I:614, 615
HRO implementation, implications of, I:657, 658
Article 1.2, I:658–660
CRO Chairman, report by, I:660–61
Agreement on Safeguards, I:764. *See also* safeguard measures
Article 1 [General Provision], I:765
Article 2 [Conditions], I:765
Article 2.1
imports increase, I:765
like or directly competitive products, I:767
Article 2.2 [MFN application of safeguards], I:768
other provisions in Article 2, I:769
unforeseen developments, I:768
Article 3 [Investigations]
Article 3.1, I:769
Article 3.2 [confidential information], I:770
inclusion of reasoning in reports, I:769
selective analysis of domestic industry, I:770
Article 4 [Serious Injury]
Article 4.1 [determination of serious injury], I:771
Article 4.2(a) [factors to be considered], I:771; II:50
Article 4.2(b) [causation], I:772
threat of injury, I:772
Article 5 [Application of Safeguard Measures], I:774
Article 5.1
adjustment plans, I:776
extent of measures, I:774
form of measures, I:775
Article 5.2 [quota allocation], I:776; II:49
Article 6 [Provisional Safeguard Measures], I:776
Article 7 [Duration and Review of Safeguard Measures]
Article 7.1, I:776; II:50
Article 7.2, I:776

Agreement on Safeguards (*cont.*)
Article 7.3, I:777; II:50
Article 7.4, I:777; II:50
Article 7.5, I:777
Article 7.6, I:777
Article 8 [Compensation or Retaliation]
Article 8.1, I:777
Article 8.2, I:778
Article 8.3, I:778
Article 9 [Developing Countries]
Article 9.1, I:779; II:49
Article 9.2, I:779
Article 10 [Termination of Pre-Existing Safeguard Measures], I:779
Article 11 [Elimination of Gray-Area Measures], I:780; II:48
Article 11.1, I:780
Article 11.3, I:780
Article 12 [Notification and Consultation], I:781; II:50
Article 12.1 [consultations], I:782
Article 12.2 [contents of notifications], I:782
Article 12.3 [timing of notifications], I:781
Article 13 [Surveillance], I:783
GATT
Article XIX, II:44t., 45–8
Article XXIV (RTA regulation aspects), II:238
issues in application of, I:784
burden of proof, I:788
GATT Article XIX, relationship between, I:784
prohibition of "gray-area measures", I:792
standard of review, I:789
US Steel Safeguard case, I:793
Japan, III:175
S&D treatment, I:1552
trade and culture, II:765
Uruguay Round reforms affecting safeguards, II:48–51
Agreement on Subsidies and Countervailing Measures (ASCM), I:681, 686, 1174
Civil Aircraft Agreement and
ambiguities and problems in, I:1176
relevance to Civil Aircraft Trade, I:1174–5
environmental issues, II:152
GATT Subsidies Code (1979) and, I:682, 683
GATT Subsidy Discipline (1947) and, I:681
injury determinations under
Article 15.1, I:737
Article 15.2, I:739
Article 15.3, I:740
Article 15.4, I:742
Article 15.5, I:743
Article 15.6, I:745
Article 15.7, I:746
Article 15.8, I:747
gender analysis of trade agreement, II:720–22
investment-related provisions in, II:316
LDC development and, I:1564
Part I (General Provisions), I:687
Article 1 [Definition of a Subsidy], I:688
Article 1.1(a) [Financial Contribution], I:689
Article 1.1(b) [A Benefit is Conferred Thereby], I:692
Article 2 [Specificity], I:694
Article 2.1 [Subsidies Limited to Certain Enterprises], I:694
Article 2.2 [Regional Subsidies], I:695
Article 2.3 [Export and Import Substitution Subsidies], I:696
Article 2.4, I:696
Part II (Prohibited Subsidies), I:696
Article 3 [Prohibition], I:696
Article 4 [Remedies for Prohibited Subsidies], I:699
Part III (Actionable Subsidies)
Article 5 [Adverse Effects], I:701
Article 6 [Serious Prejudice], I:701
Article 7 [Remedies], I:703
Part IV (Non-Actionable Subsidies)
Article 8 [Identification of Non-Actionable Subsidies], I:704
Article 9 [Consultations and Authorized Remedies], I:706
Part V (Countervailing Measures), I:707
Article 10 [Application of Article VI of GATT 1994], I:707
Article 11 [Initiation and Subsequent Investigation], I:708
Article 11.1 and 2 [Application for Imposition of Countervailing Measures], I:708
Article 11.3 [Obligation to Review Evidence Prior to Initiation], I:709
Article 11.4 [Standing], I:710
Article 11.5–11.11 [Initiation and Subsequent Investigation], I:711
Article 12 [Evidence], I:712
Article 13 [Consultations], I:715
Article 14 [Calculation of Amount of a Subsidy], I:716
Article 15 [Determination of Injury], I:717
Article 16 [Definition of Domestic Industry]
Article 16.1, I:717
Article 16.2, I:718
Article 16.3, I:718
Article 16.4, I:718
Article 17 [Provisional Measures], I:718
Article 17.3, I:719
Article 17.4, I:719
Article 18 [Undertakings], I:719
Article 19 [Imposition and Collection of Countervailing Duties], I:720
Article 20 [Retroactivity], I:721
Article 21 [Duration and Review of Countervailing Duties and Undertakings], I:722
Article 21.2, I:722, 723
Article 21.4, I:724
Article 22 [Public Notice and Explanation of Determinations], I:724
Article 23 [Judicial Review], I:725
Part VI (Institutions), I:725
Article 24 [Committee on Subsidies and Countervailing Measures and Subsidiary Bodies], I:725
Part VII (Notification and Surveillance), I:726
Article 25 [Notifications], I:726
Article 26 [Surveillance], I:727
Part VIII (Developing Country Members), I:727
Article 27 [Special and Differential Treatment of Developing Country Members], I:727
Part IX (Transitional Arrangements), I:729
Article 28 [Existing Programmes], I:729
Article 29 [Transformation into a Market Economy], I:730

Part X (Dispute Settlement), I:730
Article 30 [Dispute Settlement], I:730
Part XI (Final Provisions), I:731
Article 31 [Provisional Application], I:731
Article 32 [Other Final Provisions]
Article 32.1, I:731, 732
Article 32.3, I:686
S&D treatment of developing countries, I:1551
subsidization and, I:148
trade and culture, II:760
TRIMs Agreement, dispute settlement relationship with, I:469
Uruguay Round Negotiations, I:684, 685
Agreement on Technical Barriers to Trade (TBT Agreement), I:107, 125. *See also EC-Asbestos* case; *EC-Sardines* case
applicability at governmental and non-governmental levels, I:385
Article 1.3, I:381
Article 1.4, I:381
Article 1.5, I:381
Article 2, I:385
Article 2.2, I:390–92, 394, 399
Article 2.3, I:394
Article 2.4, I:384–5, 396, 398
Article 2.5, I:396, 399
Article 2.9, I:138
Article 3, I:385–6
Article 3.1, I:386
Article 4 [Code of Good Practice], I:386
Article 5 [Central Government Bodies], I:387
Article 5.1.2, I:391
Article 5.2.7, I:394
Article 6 [Central Government Bodies], I:387
Article 7 [Local Government Bodies], I:387
Article 8 [non Government Bodies], I:387
Article 9 [International and Regional Application], I:388
Article 11 [Technical Assistance], I:402–3
Article 12 [Special and Differential Treatment], I:403–5
Article 12.10, I:407–8
Article 13, I:407
Article 14 [Consultations And Dispute Settlement], I:405
Article 14.1, I:405
Article 14.2, I:405
Article 14.4, I:405
Article 15.3, I:407
Article 15.4, I:407
Article XX exception and, I:159, 160
Civil Aircraft Agreement and, I:1178–80
conformity assessment procedure (Annex 1 Paragraph 3), I:380
conformity assessment procedures (Articles 5–9), I:386
central government bodies (Articles 5 and 6), I:387
international and regional application (Article 9), I:388
local government bodies (Article 7), I:387
non government bodies (Article 8), I:387
consultations and dispute settlement provision (Article 14), I:405
EC-Asbestos, I:406
EC-Sardines, I:406
environmental issues, II:150, 151
GATT 1947 overview and, I:374
gender analysis of trade agreement and, II:732–3
import prohibitions applicability (Annex 1), I:383
institutional considerations
built-in reviews of Agreement, I:407
Doha Program work, I:408
TBT Committee work, I:407
Web resources, I:408
LDC development and, I:1564
Preamble, I:373, 374
principles applicable under
equivalence and mutual recognition, I:400–401
harmonization, I:395–400
non-discrimination principle, I:388
prevention of unnecessary obstacles to international trade, I:390–94
transparency, I:401–2
transparency, derogations from, I:402
relationship with SPS Agreement, I:251
retroactive application of, I:384
special and differential treatment (Article 12), I:403–5, 1553
standard (Annex 1 Paragraph 2), I:379
standards (Article 4), I:386
structure and scope of, I:380
inapplicability to NPR-PPM (Annex 1), I:382
not applicable to trade in services (Annex 1A), I:381
TBT vs. GPA, I:381
TBT vs. SPS, under Annex A(1), I:381
technical assistance
in Uruguay Round Agreements, II:465
provisions (Article 11), I:402–3
technical regulation
Annex 1 Paragraph 1, I:376–8
Articles 2 and 3, I:385
Tokyo Round Standards Code overview and, I:375
trade and environment, II:514
Agreement on Textiles and Clothing (ATC), I:412, 418
accelerated implementation related issues, I:433, 434
Article 1.1, I:418
Article 1.7, I:427
Article 2
Article 2.1, I:419
Article 2.4, I:419
Article 2.6, I:420
Article 2.8, I:420
Article 2.9, I:421
Article 2.13, I:420
Article 2.14, I:420
Article 3.1, I:419
Article 3.2, I:420
Article 5, I:427
Article 6 [Special Safeguard Mechanism]
Article 6.1, I:421
Article 6.3, I:424
Article 6.4, I:426
Article 6.7, I:421
Article 6.10, I:423, 427
Article 8, I:427
Article 8.1, I:426
Article 8.5, I:426
Article 8.9, I:426
backloading integration issues, I:430, 431
circumvention, I:427
GATT 1947 Textiles Trade regulation, I:412
Long-Term Arrangement (LTA), I:413

Agreement on Textiles and Clothing (*cont*.)
Multi-Fiber Arrangement (MFA), I:414
Short-Term Arrangement (STA), I:413
GATT 1994 provisions and, I:419
gender analysis of trade agreement, II:719
integration of products into GATT 1994, I:420
jurisprudence, I:427–9
LDC development and, I:1564
MFA restrictions, I:419, 420
Preamble, I:418
product coverage, I:427
S&D treatment of developing countries, I:1554
Special Safeguard Mechanism, I:421, 422
procedural steps, I:423
substantive requirements, I:424
textiles and developing countries aspects of
analysis of integration program, II:412
disputed balance of rights and obligations, II:408–10
implementation of, II:410
inherent weaknesses of, II:411
liberalization and integration process, II:405–7
Punta del Este Preparations, II:401–3
Textiles Monitoring Body, II:410
transitional safeguard mechanism, II:407
Uruguay Round Negotiations, II:403
Textiles Monitoring Body, I:418, 426
trade liberalization and UR-1 Scenario, II:26
US rules of origin requirements issues, I:432, 433
Uruguay Round Negotiations and, I:415
linkage to other GATT Rules, I:418
monitoring body, role of, I:417, 418
quota growth rates, I:416
scope of products to be integrated, I:417
special safeguard mechanism development, I:417
speed of integration, I:416
Agreement on Trade in Civil Aircraft, I:1167
Aircraft Code
application and institutions, I:1168
government assistance, I:1168
other provisions, I:1169
rectification, I:1176–8
Bilateral Agreement (US-EU 1992), I:1172
background, I:1172
elements of, I:1172–4
dispute settlement (GATT), I:1170
1991 Case, I:1171
German Exchange Rate Case, I:1170
dispute settlement (WTO), I:1184
Brazil-Aircraft: Impact on Export Credit Programs, I:1187
material advantage, I:1187–9
OECD Safe Harbor, I:1189–90
Canada-Aircraft case, I:1184
"matching", I:1185–7
royalty-based financing, I:1184–5
France-Flight Management System Subsidy case, I:1190
future scope, I:1190
government assistance tensions, I:1191
Airbus "A380 Super Jumbo" Project, I:1191
Airbus restructuring, I:1192
Brazil-Canada dispute, I:1193
indirect supports for Boeing, I:1192
inducements, I:1194
Tokyo Round, I:1167
Aircraft Code, I:1168
Subsidies Code, I:1169–70
WTO and, I:1174
Aircraft Code rectification, I:1176–8
GATS, I:1180–84
SCM Agreement, I:1174
ambiguities and problems in, I:1176
relevance to Civil Aircraft Trade, I:1174–5
TBT Agreement, I:1178–80
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), I:1043
Agreement interpretation and disputes, II:427
agreement object and purpose of, II:431–4
contemporaneity, II:435–6
deference to national states, II:435
interpreting domestic law, II:434
mandatory vs. discretionary provisions, II:437
principles of interpretation, II:429–31
relationship with GATT, II:428
competion policy and, II:507
contentious issues, II:437
compulsory licenses, II:442–6
GATT Jurisprudence exceptions, II:438–40
parallel imports, II:446–52
TRIPS Agreement exceptions, II:440–42
developing countries and. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights and developing countries
Doha Declaration on Public Health, I:1078, 1096, 1113; II:452–5, 647
text, III:492–502
EC Law and
Article 133 EC, I:1472–4
implied competence under, I:1475–6
electronic commerce issues, II:481
taxation, II:484
trade and development, II:483
environmental issues, II:151
EU and, III:122
foundations and origins of
from tariffs to intellectual property, I:1054–7
functions of IP, I:1046
impact of, I:1056
IP as international system, I:1047–50
IP protection and trade link prior to TRIPS Agreement, I:1050–1
Uruguay Round negotiations, I:1055
gender analysis of trade agreement, II:729–32
human rights and trade, II:656, 675–8, 691
interpretation
questions of law and fact, I:1065
textual interpretation and good faith, I:1064
investment-related provisions in, II:315
LDC development and, I:1565
Mexico and, III:231
Mongolia and, III:264
Part I [General Provisions and Basic Principles], I:1067
development and social policy goals, I:1077–80
Article 7 [objectives], I:1077, 1078–79
Article 8, I:1078, 1079
Article 8.1 [principles], I:1077
Article 67 [technical cooperation], I:1079

technology transfer (Articles 7 and 66.2), I:1079
exhaustion of rights (Article 6), I:1069–71
parallel trade regulation (Articles 16 and 28.1), I:1071–7
most-favored-nation treatment (Article 4), I:1068
national treatment (Article 3), I:1067
security exceptions, I:1080
transparency and good governance (Article 63), I:1080
Part II [Standards Concerning Availability, Scope and Use of IPR], I:1081
anti-competitive practices in contractual licenses controlling (Article 40), I:1101
copyright and related rights, I:1081–7
geographical indications (Article 22–24), I:1088–91
industrial designs (Article 25), I:1091
layout-designs (topographies) of IC (Articles 35–38), I:1098
patents (Articles 27–31, 33–34, and 70), I:1091–8
trademarks (Articles 15–16 and 18–21), I:1087
undisclosed information protection (Article 39), I:1099–1101
Part III [Enforcement of Intellectual Property Rights], I:1102
civil and administrative procedures and remedies, I:1104
Article 42, I:1104
Article 43, I:1105
Article 44, I:1105
Article 45, I:1105
Article 46, I:1105
Article 47, I:1106
Article 48, I:1106
Article 50, I:1105
criminal procedures (Article 61), I:1109
general obligations (Article 41), I:1104
provisional measures (Article 50), I:1106
border measures, I:1107–08
Article 51, I:1108
Article 52, I:1108
Article 53, I:1109
Article 54, I:1108
Article 55, I:1109
Article 56, I:1109
Article 57, I:1109
Article 58, I:1109
Article 59, I:1109
Article 60, I:1109
Part IV [Acquisition and Maintenance of Intellectual Property Rights and Related Inter Partes Procedures]
Article 62.1, I:1109
Article 62.2, I:1109
Article 62.3, I:1110
Article 62.4, I:1110
Article 62.5, I:1110
Part V [Dispute Prevention and Settlement]
non-violation complaints (Article 64.2), I:1112
recourse to dispute settlement (Article 64.1), I:1110–12
Part VI [Transitional Arrangements]
Article 65.1, I:1113
Article 66, I:1113
Part VII [Institutional Arrangements and Final Provisions], I:1113
Amendments (Article 71), I:1114
reservations (Article 72), I:1115
TRIPS Council (Articles 68 and 71), I:1114
public health and, I:1078, 1096, 1113; II:452–5, 647
text of Doha Declaration on, III:492–502
rights and obligations, I:1059
incorporation by other Agreements reference, I:1063
interpretation of, I:1064
minimum and maximum standards, I:1061–3
private rights and direct effect, I:1059–61
relationship to GATT and GATS, I:1066
S&D treatment of developing countries, I:1555
scope and subject-matter of
subject matter and inter-temporal application (Article 70), I:1058
survey of protected rights, I:1057
Singapore and, III:342t
strade and environment, II:517
technical assistance in Uruguay Round Agreements, II:465
text of Doha Declaration, III:492–502
TRIPS disputes, II:424
Canada-Patent Protection for Pharmaceutical Products, II:425
Canada-Term of Patent Protection, II:425
Mailbox Cases, II:425
US-Section 110(5) of US Copyright Act, II:426
US-Section 211 Omnibus Appropriations Act of 1998, II:426
WTO Practice on Access to Medicines, II:647–8
Agreement on Trade-Related Investment Measures (TRIMs Agreement), I:123, 125
Article 1 [Coverage], I:449
Article 2 [Basic Obligations]
Article 2.1, I:449
Article 2.2, I:449
Article 3 [Exceptions], I:450
Article 4 [Developing Countries], I:451
Article 5 [Notification and Transitional Arrangements]
Article 5.1, I:451
Article 5.2, I:451
Article 5.3, I:451, 455
Article 5.4, I:452
Article 5.5, I:452
Article 6 [Transparency]
Article 6.1, I:138, 452
Article 6.2, I:452
Article 6.3, I:452
Article 7 [Committee on Trade-Related Investment Measures], I:452
Article 8 [Consultation and Dispute Settlemen], I:453
Article 9 [Review by Council for Trade in Goods], I:453
Article 9 [Review], I:472–3
Colombia, III:82
competition policy and, II:500
current debate and prospects, I:472
dispute settlement cases involving, I:458–9
Canada-Auto Pact dispute, I:462–3
EC-Bananas III dispute, I:460

Agreement on Trade-Related Investment (*cont.*)
India-Measures Affecting Automotive Sector, I:464–5
Indonesia-Autos dispute, I:461–2
dispute settlement relationship with GATT 1994
Article III:4, I:466–9
Article XI:1, I:468–9
dispute settlement relationship with SCM Agreement, I:469
economic rationale of, I:440
EU and, III:122
FIRA Panel Case, I:444
gender analysis of trade agreement, II:723
general features, I:448
human rights dispute over, II:656
illustrative list, I:449
Paragraph 1(a), I:450
Paragraph 1(b), I:450
Paragraph 2(a), I:450
Paragraph 2(b), I:450
Paragraph 2(c), I:450
implementation issues, I:473–5
investment-related provisions in, II:315
LDC development and, I:1564
Mexico, III:231, 235
notification obligations
Article 5, I:454
Article 5.1, I:454
Article 5.2, I:454
Article 5.5, I:454
performance requirements of, I:440
developing countries, I:441
export performance, I:441, 442
multinational enterprises, I:441, 442
Preamble, I:449
prospects of, I:478–80
S&D treatment, I:476, 1553
trade and culture, II:774
Transition Periods, Extension of, I:456, 458
"2 + 2 formula", I:457
Article 5.3, I:455–7
Uruguay Round negotiations on, I:445–7
Working Group on relationship between trade and investment, I:476–7
agriculture. *See also* Agreement on Agriculture; agriculture under GATT; tariff-rate quotas
agricultural subsidies, II:97
Argentina, agricultural protectionism in
costs of agricultural protectionism, other, III:21
proposal for, III:21
protectionism and financial costs, III:19–21
China's Accession to WTO, agriculture challenges after, III:61
Colombian concerns, III:81, 82, 85
decline, Uruguay Round Negotiation launching and, I:10, 11
developing country
interests, II:110–12
options for, II:127–9
Egypt negotiations on, III:102
EU and, III:118–20, 125
Framework for Establishing Modalities in Agriculture (August 2004) (Text), III:518–523
global free trade and, III:442–5
issues ('new' trade), II:121
agriculture's so-called multifunctionality, II:124–7
technical standards, including SPS and food safety measures, II:122–4
issues (traditional)
agricultural reform process, II:118–20
agriculture needs and WTO Round, II:120–21
potential gains from further trade policy reform, II:116–18
URAA, II:112–15
Japanese concerns, III:174
Korean concerns, III:204
liberalization, II:32, 33, 121, 127
Mexican concerns, III:228
New Zealand concerns, III:280–82
OECD
MFN tariff rates, II:111
Russian WTO accession impact on, III:322
SCM measures and, II:105–6
trade and environment issues, II:552–4
under HWP, I:654
agriculture under GATT. *See also* Agreement on Agriculture
Contracting Parties
EC, I:191–2
US, I:190–91
exceptions under GATT 1994, I:129–30
Haberler Report, I:192–3
Havana Charter and, I:189–90
multilateral trade negotiations
Kennedy Round, I:193–5
Tokyo Round, I:195–6
trade disputes under GATT
Article XI(2) [Import Restrictions], I:196–7
Article XVI [Export Subsidies], I:197–8
AILP. *See* Agreement on Import Licensing Procedures
Air Transport Services (under GATS), Annex on, I:909–10, 937, 938
Airbus "A380 Super Jumbo" Project, I:1191
Aircraft Code. *See under* Agreement on Trade in Civil Aircraft
ALADI. *See* Asociación Latinoamerican de Integración
American Selling Price (ASP), I:535
amicus curiae briefs and dispute settlement, I:1429. *See also under* Appellate Body
AB proceedings, I:1433
Door Breached in (*Sardines* case), I:1438
Door Deliberately Left Open (*EC-Asbestos* case), I:1437
Door Left Ajar (*Shrimp-Turtle* case), I:1433–5
Door Left Firmly Open (*US-Carbon Steel* case), I:1436
consequences of admitting *amicus curiae* briefs, I:1442
governments' position, I:1447–51
legal issues
AB authority, I:1451
Panel's authority, I:1451
procedural guarantees offered to Members, I:1452–4
political implications, I:1454–6
practical problems, I:1456
private parties (involved cases), I:1442
factual and/or legal aspects, I:1441

GATT/WTO approach to *amicus curiae* briefs
admissibility in panel proceedings, I:1430–33
origins, I:1430
Shrimp-Turtle case, I:1431
human rights concerns, II:643–5
EC-Asbestos, II:644, 645
US-British Steel, II:644
US-Shrimp, II:643
private parties', admissibility consequences for
Australia-Salmon case, I:1442
EC-Asbestos case, I:1437, 1444
EC-Cotton Linen case, I:1444
Sardines case, I:1438, 1447
Shrimp-Turtle case, I:1431, 1433–5, 1442
Thailand-Antidumping Duties case, I:1446
US-Carbon Steel case, I:1436, 1443
US-Copyright case, I:1443
AMS. *See* aggregate measurement of support
Andean Community, Colombia, III:88
Andean Trade Preference Act (US) (ATPA), II:577
Andean Trade Promotion and Drug Eradication Act (US) (ATPDEA), II:577
anti-competitive practices in contractual licenses (Article 40 of TRIPS), I:1101
Article 40:2, I:1101
Article 40:3, I:1102
Article 40:4, I:1102
anti-dumping. *See also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Anti-Dumping Code (Tokyo Round), II:70, 71
Article VI of GATT [Antidumping and Countervailing Duties], I:140, 141, 142; II:69–72, 74, 78
Article VI:1, I:141
Article VI:2, I:141
Article VI:3, I:141
Doha Ministerial Declaration, II:78, 79
GATT litigation and, I:497–8
global free trade and, III:447
history of
Article VI of GATT, I:494
enforcement origins, I:493
Kennedy Round International Anti-Dumping Code, I:494–6
Tokyo Round Anti-Dumping Code, I:496
in WTO
brief history of, II:69–72
problems of, II:68–9
international trade and competition law, II:72–7
Japanese concerns on, III:175
Korean concerns on, III:205
laws, I:490–91
principal targets of, I:488
principal users of, I:488
sectors affected by, I:489
Mexican concerns on, III:229
proposals for reform, II:77–80
rules of origin and, II:274–6, 277
safeguard measures and, II:51, 52
United States-Anti-Dumping Act of 1916, I:141, 493
Uruguay Round, II:71
Anti-Dumping Act of 1916, I:141, 493
Anti-Dumping Agreement. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
antitrust law and competition policy, II:489
APEC. *See* Asia Pacific Economic Cooperation
API. *See* Agreement on Preshipment Inspection
Appellate Body (AB), I:1279, 1390. *See also* dispute settlement
appeal process mechanics, I:1291–4
appellate process, reform of, I:1401
dissenting opinions, I:1401
exchange of views, I:1396
institutional aspects, I:1281
Appellate Body members, I:1284–91
governing instruments, I:1281
covered agreements, I:1282
Rules of Conduct, I:1284
Working Procedures, I:1282–4
jurisdiction, I:1391
appellate review, scope of, I:1392
question of facts and question of law, I:1391
remand power, I:1394
Members
Appellate Body Secretariat, I:1290
Chairman, I:1290
individual members, I:1289
legal framework and appointment procedures (Article 17 of DSU), I:1284–9
Appellate Review cost, I:1289
appointment processes, I:1287–8
conditions of employment of members, I:1288–9
qualifications (Article 17.3 of DSU), I:1285–6
representativeness, I:1285
terms of offices (Article 17.2 of DSU), I:1286–7
oral hearings, I:1315–16, 1395
related issues
AB reports precedential value
"Res judicata", I:1330
"Stare decisis", I:1329
additional written memoranda, I:1319
amicus curiae briefs, I:1321–4
appeal initiation, I:1296
appeal standard of review, I:1302
appellants/other appellants/appellees, I:1305
Appellate Body appraisal, I:1332
appellate review scope, I:1300–02
business confidential information, I:1310
circulation of report, I:1329
conditional appeals, I:1325
confidentiality, I:1309
conflicts of interest, I:1307
costs, I:1326
deadlines and time-limits in appeals
calculating dates, I:1295
ninety day limit for completion, I:1328
sixty-day deadline to initiate appeal, I:1295
decision-making
opinions, I:1325
collegiality, I:1326
divisions, I:1303
ex parte communication, I:1308
experts, I:1320
failure to appear or file a timely submission, I:1326
joint submissions, I:1317
multiple appeals, "joinder" of cases on appeal, joint hearing, I:1316
notice of appeal, I:1296
objections, I:1318

Appellate Body (AB) (*cont.*)
oral hearing, I:1315–16
panel record/evidence on appeal, I:1320
participants and parties, I:1306
presiding member, I:1304
private counsel, I:1318
requests for preliminary ruling, I:1310–13
right to appeal, I:1294
submission
failure to appear or file timely, I:1326
joint submissions, I:1317
written submission, I:1313–14
third parties, third participants and passive observers, I:1306
withdrawal of appeal, I:1327
working procedures interpretation, I:1326
written submission, I:1313–14
RTAs and, II:234–40
transparency and access issues
amicus curiae issue, I:1398–1401
transparency, I:1398
Uruguay Round negotiations, I:1279–81
Vienna Convention on the Law of Treaties
Article 31 of, I:1397
Article 32 of, I:1397
Working Procedures, I:1282–4, I:1326
Rule 3(1), I:1325
Rule 4, I:1326
Rule 4(3), I:1396
Rule 5, I:1290
Rule 5(2), I:1284
Rule 6(3), I:1304
Rule 7, I:1304
Rule 13, I:1304
Rule 16(1), I:1283, 1310, 1321, 1323
Rule 16(2), I:1313, 1315
Rule 17, I:1295
Rule 17(1), I:1295
Rule 17(2), I:1296
Rule 18(2), I:1314
Rule 18(3), I:1314
Rule 19, I:1308
Rule 20, I:1296, 1298
Rule 20(2), I:1296
Rule 20(2)(d), I:1296–1300, 1312
Rule 23(1), I:1305, 1306
Rule 23(4), I:1305, 1306
Rule 23(5), I:1305, 1316
Rule 24, I:1306
Rule 24(1), I:1314
Rule 27, I:1316
Rule 28(1), I:1319
Rule 29, I:1326
Rule 30, I:1328
Rule 30(1), I:1327
Rule 32(2), I:1283
Argentina
agricultural protectionism
other costs of agricultural protectionism, III:21
proposal for, III:21
protectionism and financial costs, III:19–21
Multilateral Trade Round prospects, III:25–6
patents for pharmaceutical drugs case
concessions value estimation in patents
impact on FDI and trade, III:11
transfer of rents, III:9–11
pharmaceutical drug companies, rent-seeking by, III:7–9
regional trade negotiations between MERCOSUR and EU
background, III:22
differing negotiating goals and strategies, III:22
EU proposal, III:23–4
role in International Trade and in GATT, III:5
services
concessions value estimation in services, III:13
privatization of Argentina's service industries, III:12
services-related inflows of FDI, III:15–16
trade in services, III:14
trade in goods
agriculture, III:18
manufacturing, III:17
Uruguay Round Negotiations, III:6
intellectual property rights (patents for pharmaceutical drugs), III:7–12
services, III:12–16
trade in goods, III:17–18
Argentina-Footwear case
Agreement on Safeguards, I:766, 772, 773, 786
RTA regulation aspects (GATT Article XXIV), II:238–9
ARO. *See* Agreement on Rules of Origin
ASCM. *See* Agreement on Subsidies and Countervailing Measures
ASEAN. *See* Association of South East Asian Nations
ASEAN Free Trade Area (AFTA), II:253
Indonesian concerns and, III:163
RTA impact evaluation, II:306
rules of origin and, II:284
Singaporean concerns and, III:345
Asia Pacific Economic Cooperation (APEC), II:210, 256
Canada, III:38
Mexico and, III:238
New Zealand, III:275–7
trade and gender, II:705
Asociación Latinoamericana de Integración (ALADI), III:88, 227
ASP. *See* American Selling Price
Association of South East Asian Nations (ASEAN), II:210
double density measures of trade intensity, II:20t
Indonesia, III:162, 163
RTA impact evaluation, II:305
rules of origin, II:284
Singapore, III:345, 346
transition economies and, II:253, 255, 256
Uruguay Round and regionalism, II:303
ATC. *See* Agreement on Textiles and Clothing
ATPA. *See* Andean Trade Preference Act
ATPDEA. *See* Andean Trade Promotion and Drug Eradication Act
Australia-Salmon case, I:246, 253, 263
amicus curiae briefs admissibility consequences in, I:1442
SPS Agreement
Article 2.3, I:264–266
Article 3, I:271

Article 4, I:328
Article 5.1, I:288–290, 297
risk assessment concept, I:281–287
risk management concept, I:309
Article 5.5, I:312–317
Article 5.6, I:320–324
trade and environment, II:525–6
automatic licensing system. *See also* non-automatic import licensing
defined, I:592
import licensing, I:597
GATT Article XIII and, I:593
under AILP (Article 2), I:597
automotive, challenges after China's Accession to WTO, III:62
autonomous liberalization under GATS, I:897–900
Award of contracts under GPA. *See also* Agreement on Government Procurement; United Nations Commission on International Trade Law
Article XIII:4(a), I:1149
Article XIII:4(b), I:1148

backloading integration issues (textiles & clothing), I:430, 431. *See also* Agreement on Textiles and Clothing
Bagwell-Staiger analysis. *See under* environmental issues
balance-of-payments
Committee, I:65
exception, I:131
Korea and BOP consultations, III:189
Mexico and BOP exceptions, III:230
Balance of Payments Manual (5th ed) (IMF) (BPM5), III:14
Bank of International Settlement (BIS), III:145
banking, Russian WTO accession impact on, III:299, 327
banking services (excluding insurance), national treatment and market access commitments, I:974, 987
Basic Telecommunications Agreement, electronic commerce and, II:470. *See also* Telecommunications Services
BDV. *See* Brussels Definition of Value
Beecham Group v. *International Products Ltd*, II:450
Beef Hormone case. *See EC-Hormones* case
bid challenge procedures (under GPA), I:1154. *See also* tendering procedures
available remedies, I:1156–7
challenges, I:1155
independent review bodies, I:1155
private bid challenge, I:1155
bilateral investment treaties (BIT), II:318–20, 516
biosafety, II:550–52. *See also* environment issues
BIS. *See* Bank of International Settlement
Blair House agreement, I:8, 202; III:415. *See also* Peace Clause
Blue Box Exemptions (under Agreement on Agriculture), I:208, 209. *See also* Green Box Exemptions
Blue Box policies, I:220
BOP. *See* balance-of-payments
Border Tax Adjustments report, I:118
BPM5, *see* Balance of Payments Manual (5th ed)
Brazil, argument on trade and culture and, II:752
Brazil-Aircraft case. *See also Canada-Aircraft* case
Appellate Body and, I:1309–11, 1317
Article 21.5, I:1354
Article 22.6, I:1354
consultations and, I:1218, 1220
DSU
decision implementation and enforcement, I:1350
disproportionate effect of retaliation, I:1363
under Civil Aircraft Agreement, I:1187, 1193
material advantage, I:1187–9
OECD Safe Harbor, I:1189–90
Brussels Definition of Value (BDV), I:534–6
Brussels Draft, US, 412
burden of proof
dispute settlement under SPS Agreement, I:346–9
under Agreement on Safeguards, I:788
under ATC Jurisprudence, I:428
business services
computer and related services, I:913 923, 924
legal services, I:922
professional services, I:913
R&D services, I:913
bypass subsidization, I:1025–6

CAC. *See* Codex Alimentarius Commission
CAEC. *See* Central Asian Economic Community
Cairns Group proposal (agriculture)
domestic support provisions, I:219–20
export subsidies provisions, I:221
special and differential treatment provisions, I:222
SPS Agreement and, I:241
Canada, III:30–37
argument on trade and culture, II:752
as QUAD member, I:815–817
choices and opportunities for, III:37–40
trade policy making in, III:40–46
formal consultative mechanisms, III:43
informal consultative mechanisms, III:44–6
Canada-Aircraft case, I:692, 697, 1309–11, 1317. *See also Brazil-Aircraft* case
consultations and, I:1218, 1220
DSU
Article 21.5, I:1354
Article 22.6, I:1354
under ASCM, I:692, 697
under Civil Aircraft Agreement
impact on export credit programs, I:1184–7
"matching" concept, I:1185–7
royalty-based financing, I:1184–5
Canada-Automotive case
RTA regulation aspects (GATT Article XXIV), II:237, 238
TRIMs Agreement
dispute settlement under, I:462–3
TRIMs and GATT 1994 relationship, I:467
under ASCM, I:690, 697
under GATS, I:884–890
Article I [Measures Affecting Trade in Services], I:886
affects trade in services, I:887–8
trade in services, I:887
Article II:1, I:888–9
Article XVII [Import Duty Exemption and CVA Requirements], I:889–90

Canada-Patent Protection of Pharmaceutical Products, I:1079, 1094, 1097, 1358
DSU decision implementation and enforcement, I:1359
under TRIPS Agreement, I:1065–6; II:425, 445
contemporaneity, II:436
deference to national states, II:435
exception, II:442
object and purpose of, II:431, 432
principles of interpretation, II:430, 431
relationship with GATT, II:428
Canada-Periodicals case, I:121, 122
AB jurisdiction, I:1301, 1391
trade and culture concerns
ASCM, II:763, 766
GATT, II:756
under GATS, I:875–8
Canada-United States Free Trade Agreement, I:809–10. *See also* North American Free Trade Agreement
Canadian-US Mutual Legal Assistance Treaty (MLAT), II:498
Cancun Ministerial Conference, III:432–4
and Agreement on Agriculture, I:224
Ministerial Statement (text), III:512–19
CAP. *See* Common Agricultural Policy
capacity building. *See also* trade related technical cooperation and capacity building
LDCs in multilateral trading system, II:372
trade related, II:460
Carribean Community (CARICOM), II:303
cashmere. *See under* Mongolia
Cassis de Dijon case, I:808
CEDAW. *See* Convention on the Elimination of All Forms of Discrimination Against Women
Central Asian Economic Community (CAEC), II:255
Central European Free Trade Area (CETA), II:251, 252
central government bodies, TBT Agreement and, I:387
Central Unitaria de Trabajo (CUT), II:593
centrally planned economies and GATT, II:248. *See also* transition economies
CER. *See* Closer Economic Relations
CG-18. *See* Consultative Group of Eighteen
CGE simulation model. *See* computable general equilibrium simulation model
Change in Tariff Heading (CTH), I:607–8; II:268. *See also* percentage criterion test; technical test
child labor, II:183–5. *See also* labor standards
China
accession protocol, I:76–7
accession to WTO, challenges after
agriculture, III:61
automotive, III:62
financial services, III:64
petrochemicals, III:63
pharmaceuticals, III:62
telecommunications, III:63
economic challenges and opportunities, III:56
Japan's example, III:57
opportunities arising from WTO Membership, III:57–61
legal system
reforms during its bid for Membership, III:55–6
WTO Membership effect on, III:64–6
participation in GATT and WTO, III:49–51
reforms (economic) during its bid for WTO Membership
equal treatment of foreign and domestically-owned enterprises, III:53
import barriers reduction, III:52
increased market access, III:54
new laws, III:54
particular problem areas, III:51
price reforms, III:54
reforms (legal) during its bid for membership
initial attempts at reform, III:55
post-1992 reforms, III:56
strategies after joining "Club", III:66
additional research and training on WTO, III:68
economic restructuring, III:67
globalization encouragement for Chinese enterprises, III:67
position in next MTN Round
electronic commerce, III:68
trade and competition, III:69
trade and environment, III:69
trade and labor standards, III:69
taking advantage of S&D treatment for developing countries, III:67
WTO Membership, opportunities arising from
access to WTO Dispute Settlement System, III:60
discriminatory treatment elimination, III:59
domestic enterprises benefits, III:61
FDI inflow improvement and improved investment environment, III:58
multilateral economic policymaking participation and international trade rules development, III:60
optimal resource reallocation achievement and market economy promotion, III:57
CIRR. *See* Commercial Interest Reference Rate
CIS. *See* Commonwealth of Independent States
CITES. *See* Convention on International Trade in Endangered Species
Civil Aircraft Agreement. *See* Agreement on Trade in Civil Aircraft
Clean Report of Findings (CRF), I:580, 581
Closer Economic Relations (Australia and New Zealand) (CER)
RTA and, II:297
RTA impact evaluation, II:306
CLP. *See* Competition Law and Policy Committee
CMEA. *See* Council for Mutual Economic Assistance
Code of Good Practice. *See under* Agreement on Technical Barriers to Trade
Codex Alimentarius Commission (CAC), I:269
Codex Standard 94 (under Agreement on Technical Barriers to Trade)
as EC regulation basis, I:397, 398
characterization as relevant international standard, I:396
COECE. *See* Coordinadora de Organismos Empresariales de Comercio Exterior
collateralism problem, trade and human rights and, II:683
Colombia
Doha Ministerial Declaration, III:85–8
agriculture, III:85
decision on implementation, III:85
domestic support, III:85
export subsidies, III:85
intellectual property, III:86

market access, III:85–6
services, III:86
trade and environment, III:86
WTO norms, III:86
GATT/WTO participation
economic effects, III:82–3
agriculture, III:82
dispute settlement, III:83
services, III:82
subsidies, III:82
TRIMs Agreement, III:82
historical background, III:74
legal effects, III:83
observer status, III:74
post Tokyo Round period, III:76–7
social effects, III:83
Tokyo Round, III:74–6
UNCTAD III, III:74
RTA participation
Agreements Under ALADI, III:88
Andean Community, III:88
FTA of Americas, III:89
Group of Three, III:89
trade policy development, III:89
Uruguay Round participation
negotiations objectives, III:79
negotiations results
agriculture, III:81
textile and clothing, III:81
tropical products, III:80
Punta del Este Declaration, preliminary negotiations for, III:79
services, III:78
WTO
attitude of citizens, businessmen, and political leaders towards, III:84
Colombian perspective on strengths and weaknesses of, III:84–5
COMECON. *See* Council for Mutual Economic Cooperation
COMESA. *See* Common Market for Eastern and Southern Africa
Commission on Status of Women (CSW), II:704
Commercial Interest Reference Rate (CIRR), I:1189
Committee on Customs Valuation, I:540
Committee on Regional Trade Agreements (CRTA), I:835; II:226, 229, 230, 232, 234, 241–4
GATT Article XXIV Rules Governing, II:226
Committee on Rules of Origin (CRO), I:611, 616. *See also* Technical Committee on Rules of Origin
CRO (after June 1999), I:618–19
wholly-obtained goods definition, I:651–3
Uruguay Round Agreement on Rules of Origin, II:269, 270
Committee on Trade and Development (CTD), I:367
Committee on Trade and Environment (CTE), II:529–30
Common Agricultural Policy (CAP), I:191–2, 201, 203; III:113, 119, 120, 124. *See also* agriculture
Common Market for Eastern and Southern Africa (COMESA), III:104, 108
Commonwealth of Independent States (CIS), II:254
communication services, I:914, 924–5
compensation, safeguard measures and
compensation and retaliation, II:49
compensation versus no-compensation, II:62–64
competence. *See under* EC Law and WTO Agreement
Competition Law and Policy Committee (CLP), II:497
competition law, international trade and (anti-dumping action), II:72–7
competition policy, II:488
antitrust laws and, II:489
Competition Law and Policy (CLP) Committee, II:497
Doha Ministerial Declaration, II:501–2
final observations, II:508–10
GATT deliberations and rule coverage, II:494–7
Japan-Trade in Semiconductors case, II:495
Kodak-Fuji dispute, II:495
global competition forum, need for, II:505–6
Indonesia, III:157, 158
International Competition Network, II:507
International Competition Policy Advisory Committee (US), II:505–6
internationalization issues concerned with, II:490, 491
key issues for WTO, II:506–8
Korea, III:206
MLAT, II:498
multilateral trade negotiations, II:501
EU, II:502
other views, II:504–5
US Government, II:503
private restraints and competition issues under ITO, II:493
bilateral cooperation arrangements and experiences, II:497
GATT deliberations and rule coverage, II:494–7
ITO and other early efforts, II:493
OECD, II:497
regional arrangements, II:499
UNCTAD, II:497
relevance to trade policy, II:489–93
trade and competition policies
China, III:69
Egypt, III:104
global free trade and, III:450
Korea, III:206
Uruguay Round Agreements and WTO
basic nondiscrimination principles, II:499
GATS, II:500
Singapore Ministerial Meeting (1996), II:501
Telecommunications Services Agreement, II:500
TRIMs Agreement, II:500
complaint types
non-violation, I:1237
situation, I:1238
violation, I:1236
compulsory licenses (TRIPS Agreement), II:442–6
computable general equilibrium simulation model, II:24
computational analysis and trade liberalization
implications, II:40
Michigan CGE Model, II:24–5
of Doha Development Round, II:34t
aggregate results, II:33
data, II:32
sectoral results, II:38t., II:40
of Uruguay Round Liberalization, II:25, 27t
aggregate results, II:31
computational results, II:26
sectoral results, II:29t., II:31

computed value (Method 5), I:559. *See also* Agreement on Implementation of Article VII of the General Agreement on tariff and Trade 1994
  access to necessary information, I:561
  CV calculation, I:560–61
consensus and voting aspects in WTO decision making, I:67–8
consensus rule making, WTO and, I:43–5
conservation, natural resources, I:162
construction services, I:915, 927
consultations. *See also* Panel process
  adequacy of consultations, I:1222–4
  confidentiality of proceeding (Article 4.6 DSU), I:1226
    settlement offers made during consultations, I:1227
    third parties and information acquired during consultations, I:1228
    use of facts and evidence obtained during consultations before Panel, I:1226
  consultations request (DSU Article 4.4), I:1215
    duty to consult in Compliance Review Proceedings (DSU Article 21.5), I:1221
    issues not raised in consultations request but actually discussed, I:1220
    substantive requirements and consultation request role, I:1215–20
  developing countries, Article 4.10 DSU, I:1229
  GATT 1947 and, I:1200–02
  GATT/WTO disputes settlement, I:1203
  objectives and nature of, I:1203
    dispute settlement by way of satisfactory adjustment, I:1204
    information gathering, clarification and shaping of substance, I:1205
  parties to consultations (under DSU Article 4.11)
    direct proceeding to panel for joining parties, I:1214
    multiple consultations, I:1213
    plurilateral and private consultations, I:1212
  preparation and logistics, I:1228
  principle of good faith
    DSU Article 4.3, I:1224
    further elements of (DSU Article 21.5), I:1225
    litigation strategies, I:1224
  right to consultations and duty to consult, I:1206
  time periods and deadlines, I:1207–9
  urgency cases
    reduced time frame consultations aspects (DSU Articles 4.8 and 4.9), I:1210
    urgency invoked in consultations (DSU Articles 4.8 and 4.9), I:1209
    within 20 days Panel establishment request (DSU Article 6.1), I:1211
  Uruguay Round negotiations and, I:1202
Consultative Group of Eighteen (CGE) (GATT), I:804
consumer interests, trade policy development and, I:32
contract award procedures. *See under* Agreement on Government Procurement 1994
contractual licenses, anti-competitive practices in (Article 40 of TRIPS Agreement), I:1101
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), II:701, 704, 736
Convention on International Trade in Endangered Species (CITES), I:164; II:146
Coordinadora de Organismos Empresariales de Comercio Exterior (COECE), III:239, 240
copyright and related rights under TRIPS Agreement, I:1081–1087
  Article 9.1, I:1083
  Article 9.2, I:1083
  Article 10, I:1083
  Article 11, I:1084
  Article 12, I:1084
  Article 13, I:1084
  Article 14, I:1085
  Inter-Temporal Application
    Article 70.2, I:1085, 1086
    Article 70.5, I:1087
  negotiating process, I:1081
  TRIPS Agreement and WIPO, relationship between, I:1085
Council for Mutual Economic Assistance (CMEA), II:250, 251
Council for Mutual Economic Cooperation (COMECON), III:251, 252, 253
Council for Trade in Goods (CTG), II:229–30
countervailing duties, II:103–5. *See also* Agreement on Subsidies and Countervailing Duties
country of origin, I:626
countries of origin, multiple, I:627–8
CRF. *See* Clean Report of Findings
CRO. *See* Committee on Rules of Origin
cross-subsidization, I:1003, 1025–6
CRTA. *See* Committee on Regional Trade Agreements
CSW. *See* Commission on Status of Women
CTD. *See* Committee on Trade and Development
CTE. *See* Committee on Trade and the Environment
CTG. *See* Committee on Trade in Goods
CTH. *See* change in tariff heading
CU. *See* customs unions
Cuban Democracy Act of 1992, I:167
culture. *See* trade and culture
CUSFTA. *See* Canada-United States Free Trade Agreement
customs duties
  assessing of, I:533
  principle functions of, I:534
customs unions, II:9. *See also* free trade areas, regional trade arrangements
  GATT Article XXIV, II:223, 224
    criteria for establishing RTA, I:172
    Uruguay Round Understanding on, I:176
  RTA and developing countries, II:329, 330
  RTA types, I:175
  rules of origin and, II:274–6
Customs Valuation Agreement. *See* Agreement on Implementation of Article VII of the General Agreement on Tariff and Trade 1994
Customs Valuation Code (Tokyo Round), I:537
  actual value, I:537–8
  Article VII:2(a), I:537
  Article VII:2(b), I:538
  Article VII:2(c), I:538
  Article VII:5 [transparency], I:538
  implementation and CVA, I:538
CUT. *See* Central Unitaria de Trabajo
CVA. *See* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement)

Danish Bottles case, human rights and trade, II:686, 687
de facto
discrimination under GATS, I:882
specificity, I:695
de jure specificity, I:695
Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries (Uruguay Round), I:1547
Decision on Measures in Favor of Least-Developed Countries (Uruguay Round), I:1546
deductive value (DV). *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DV calculation, basis for, I:558, 559
unit price, adjustments to, I:559
deregulation, Uruguay Round Negotiation and, I:17
developed countries. *See also* least-developed countries
SPS measures and international trade rules for, I:234
Uruguay Round negotiation launching and, I:12, 13
developing countries. *See also* special and differential treatment of developing countries
Agreement on Agriculture
Net Food-Importing Developing Countries Decision, I:215–17
S&D treatment provisions, I:215
agricultural interests of, II:110, 111
Agreement on Safeguards and, I:764, 779
ASCM and, I:727
CVA implementation related issues, I:571
definition, I:1525
EU and, III:123
FDI in, I:1567–9
GATS and, I:817–18, 832–3
GATT-WTO System, I:1525
human rights and trade with, II:679–82
MNE in, I:1569
RTA and
member countries, II:326–34
non-member countries, II:334–7
special provisions under GATT, I:180
SPS Agreement and, I:242, 355
Doha Decision on implementation, I:360, 361
implementation problems, I:360
reasonable adaptation period (Annex B, paragraph 2), I:359
S&D (Article 10), I:358
special provisions on notification (Annex B, paragraphs 8 and 9), I:359
SPS measures and international trade rules for, I:235, 236
technical assistance (Article 9), I:356
transitional periods (Article 14), I:359
textiles and. *See* textiles and developing countries
TRIPS Agreement and. *See* Agreement on Trade-related Aspects of Intellectual Property Rights and developing countries
TRTCCB for, II:459
"two-track approach to trade" (UNCTAD), I:1528–30
DFA. *See* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations
Dillon Round, Japan participation in, III:172
direct effect, I:1062
direct effect and EC Community legal order
Advocates-General opinions, I:1487, 1488
direct effect doctrine, I:1482, 1483
Portugal v *Council*, I:1489
denial of direct effect for private parties, I:1491, 1493, 1494, 1496, 1497
ECJ judgement, I:1489, 1490
possibility of community financial liability for WTO breaches, I:1493
potential issues of, I:1481
disassembly of goods into parts/components
negative rule for disassembly, I:641
origin of disassembled (used) parts/components, I:641, 642
dispute resolution participation
Mexico, III:232–4
South Africa, III:370
dispute settlement. *See also* Appellate Body; Dispute Settlement Understanding; World Trade Organization law
amicus curiae briefs and
AB proceedings, I:1433
Door Breached in (*Sardines* case), I:1438
Door Deliberately Left Open (*EC-Asbestos* case), I:1437
Door Left Ajar (*Shrimp-Turtle* case), I:1433–5
Door Left Firmly Open (*US-Carbon Steel* case), I:1436
consequences of admitting *amicus curiae* briefs, I:1442
governments' position, I:1447–51
private parties (involved cases), I:1442
problems raised, I:1451–7
factual and/or legal aspects, I:1441
GATT/WTO approach to *amicus curiae* briefs admissibility in panel proceedings, I:1430–33
systemic approach, I:1429
ADA (Article 17), I:525
Agreement on Agriculture, I:206
API (Article 7 and 8), I:585
ARO
Article 2 interpretation, I:612–14
Chile-Taxes on Alcoholic Beverages, I:612
US-Rules of Origin for Textiles and Apparel Products, I:612
China, III:60
Colombia, III:83
consultations contribution to
GATT/WTO disputes, I:1203
settlement by way of satisfactory adjustment, I:1204
CVA, I:540
Egypt, III:99
EU, III:128–31
GATT
Article XXII [Consultation], I:169
Article XXIII [Nullification or Impairment], I:169
gender analysis of trade and, II:739
global free trade and, III:453–55
GPA, I:1157–1158
human rights
GATT Article III, II:653–4
GATT Article XX, II:651–3
Hormone Beef dispute, II:648–50
under SPS Agreement, II:654–5

dispute settlement (*cont.*)
implementation and enforcement. *See* dispute settlement decisions, implementation and enforcement of
Japan, III:177
Korea
as complainant, III:201, 202t
as defendant, III:202, 203t
nonviolation complaints re-appraisal, I:1372, 1374–82
under GPA, I:1378
non-WTO rules application in, I:1406–1409
International Law referred to in the process of "interpreting" WTO terms, I:1411
International Law referred to outside the process of Treaty interpretation, I:1412–17
WTO/Public International Law interaction, I:1417–23
RTA regulation (WTO based), II:213
evaluation of, II:240
expedited recourse to dispute settlement procedures, II:244
WTO Panel and AB rulings involving RTAs, II:234–40
Telecommunication Services and
remedies for injury to domestic market, I:1017–9
remedies for difficulties on foreign markets, I:1020
WTO Dispute Settlement System and, I:1020
TBT Agreement (Article 14), I:405, 406
TRIMs Agreement, I:458, 459
Article 8, I:453
Canada-Auto Pact dispute, I:462, 463
EC-Bananas III dispute, I:460
India-Measures Affecting Automotive Sector dispute, I:464, 465
Indonesia-Autos dispute, I:461, 462
under ASCM Agreement (Article 30), I:730
under Civil Aircraft Agreement
1991 Case, I:1171
Brazil-Aircraft case, I:1187–90
Canada-Aircraft case, I:1184–7
France-Flight Management System Subsidy case, I:1190
GATT dispute settlement, I:1170–71
German Exchange Rate case, I:1170
WTO dispute settlement, I:1184–90
under GATS
Article XXIII
non-violation complaints, I:868
violation complaints, I:867
Canada-Certain Measures Affecting Automotive Industry case, I:884
Canada-Periodicals case, I:875–8
EC-Bananas III case, I:878
Japan-Photographic Film and Paper (Kodak-Fuji) case, I:890
Mexico-Telecommunications Services case, I:891
under TRIPS
non-violation complaints (Article 64.2), I:1114
recourse to dispute settlement (Article 64.1), I:1112–14
Dispute Settlement Body (DSB), I:64, II:54
dispute settlement decisions, implementation and enforcement of, I:1342
DSU limitations, I:1353
ambiguity in process (DSU Articles 21.5 and 22), I:1353–5
disproportionate effect of retaliation, I:1362–1364
incentives for unilateral sanctions (DSU Article 23.1), I:1361
"reasonable period of time" for implementation, I:1355–61
developing countries (DSU Article 21.2), I:1360
particular circumstances, I:1358–9
potential abuse of (DSU Article 21.3), I:1361
prompt compliance (DSU Article 21.3), I:1355–8
DSU structure
compensation and suspension of concessions (DSU Article 22.6), I:1352
implementation surveillance (DSU Article 21.3), I:1351
panel and Appellate Body recommendations, I:1350
enforcement devices, improvements suggested to, I:1364
emphasizing compensation over retaliation (DSU Article 22.2), I:1365
enforceable settlement agreements, I:1364
interim relief, I:1364
retroactive remedies, I:1367
European Community model, I:1367–9
implementation and enforcement provisions, I:1350
implementation in International Law, I:1346–50
WTO and, I:1344–6
Dispute Settlement Understanding (DSU)
Article 1.1, I:1206, 1409
Article 3:2, I:1397
Article 3.2, I:168, 1271, 1411, 1421–3
international law rules, I:1407–8
prompt settlement, I:1343
Article 3.6, I:1364
Article 3.7, I:1204
Article 3.10, I:1224
Article 4, I:1206
Article 4.3, I:1207, 1222, 1224
Article 4.4, I:1215–16
Article 4.5, I:1204, 1223
Article 4.6, I:1226–8
Article 4.8, I:1209–10
Article 4.9, I:1209
Article 4.10, I:1229–31
Article 4.11, I:1213
Article 6.1, I:1211
Article 6.2, I:1216, 1245
Article 7, I:1411
Article 7.1, I:1409
Article 9, I:1247
Article 11, I:428, 1264–6, 1441
Article 12.1, I:1256
Article 12.7, I:1269, 1303
Article 13, I:349, 1260, 1441, 1451
Article 13.1, I:1263, 1442
Article 16.4, I:1296
Article 17, I:1320
Article 17.1, I:1303
Article 17.2, I:1286
Article 17.3, I:1285–6, 1307, 1441
Article 17.6, I:1300, 1320, 1391
Article 17.9, I:1451, 1396
Article 17.10, I:1309–11, 1398, 1446
Article 17:11, I:1401
Article 17:13, I:1302, 1394
Article 18, I:1255
Article 18.2, I:1311, 1446

Article 19.1, I:1350
Article 19.2, I:1421–3
Article 21, I:1364, 1414
Article 21.2, I:1360
Article 21.3, I:1348, 1351, 1360
Article 21.3(b), I:1358
Article 21.3(c), I:1355, 1359
Article 21.5, I:212, 1221, 1257, 1351, 1353, 1354
Article 22, I:1364, 1414
Article 22.2, I:1365
Article 22.4, I:1350
Article 22.6, I:1351–4
Article 23.1, I:1361
Article 24.1, I:1348
Article 25, I:1364
Article 25.4, I:1364
Article 26.1, I:172
implementation and enforcement of dispute settlement decisions and
DSU limitations, I:1353–64
DSU structure, I:1350–53
S&D treatment of developing countries, I:1555
technical assistance in Uruguay Round Agreements, II:466–7
trade and environment, II:518
distribution services, I:915, 927
Doha Declaration on the TRIPS Agreement and Public Health, I:1080, 1098, 1115; II:452–5; III:510–12
Doha Development Agenda, III:234
Anti-Dumping Agreement, I:528, 529
Colombia, III:85–8
computational analysis of trade liberalization II:34t
aggregate results, II:33
agricultural liberalization, II:32, 33
data, II:32
sectoral results, II:38t., II:40
Doha launch and US, III:426–32
Doha Ministerial Declaration (text), III:492–502
Doha Work Programme (August 2004) (text) III:523–4
Egypt issues, III:101–7
electronic commerce and, II:472
EU and, III:134–5
global free trade and, III:455–6
Implementation Issues and Concerns (text), III:503–9
Japan, III:178
agriculture, III:178
developing countries, III:179
issues, III:179
Mexico
Built-in Agenda, III:235
other issues, III:236
Singapore issues, III:235
UR Agreements implementation, III:235
New Zealand's multilateral liberalization concerns
agriculture, III:280–82
non-agricultural products, III:282
rules, III:283–5
services, III:283
sustainable development, III:285–6
postal and express delivery services in GATS, II:199
Services Recommendation of the Special Session for Trade in August 2004 (text), III:527
South Africa, III:371
TBT Agreement and, I:408
Doha Ministerial Declaration, I:62
antidumping action and, II:78, 79
competion policy and, II:501, 502
CVA implementation-related issues, I:569, 570
Financial Services and, I:978
national treatment and market access, I:979
nondiscriminatory structural barriers, I:980–84
new Agreement on Agriculture, I:217
domestic support provisions, I:220
EC proposal, I:218
export subsidies provisions, I:221
market access provisions, I:218, 219
US proposal, I:218
on geographical indications, I:1091, 1092
on SPS Agreement implementation, I:360, 361
text, III:492–502
domestic agricultural subsidies, Peace Clause and, I:214
domestic industrial tariffs issues, Egypt, III:107
domestic labor protection, II:584–7
domestic regulation, gender analysis of trade and, II:732–3
domestic support provisions. *See also* Agreement on Agriculture
Colombia, III:85
under Doha Development Agenda, I:226
EC proposal, I:220
US proposal, I:220
Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (DFA), I:7; III:412
DSB. *See* Dispute Settlement Body
DSU. *See* Dispute Settlement Understanding
Dunkel Draft. *See* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations
DV method. *See* deductive value

EC. *See* European Community
EC-Asbestos case
amicus curiae briefs, I:1400, 1437, 1444; II:644–5
human rights concerns, II:644–5, 688
nonviolation complaints experience under WTO Agreements, I:1379–82
TBT Agreement, I:377–8, 389, 393
applicability of, I:406
import prohibitions applicability aspects of, I:383
trade and environment, II:527–9, 539
WTO Dispute Settlement Practice Relating to Protection of Health and Environment, II:652
EC-Bananas III case, I:133; III:129
AILP and, I:595
Appellate Body and, I:1298, 1311, 1313, 1317
consultations and, I:1216, 1223
dispute settlement under TRIMs Agreement, I:460
DSU
Article 21.5, I:1353
Article 22.6, I:1353
Article 23.1 (incentives for unilateral sanctions), I:1362
decision implementation and enforcement, I:1350
disproportionate effect of retaliation, I:1363
relationship between TRIMs and GATT 1994, I:466

EC-Bananas III case (under GATS), I:878–84
Article II (*de facto* discrimination), scope of, I:882
EC licensing procedures
activity function rules, I:884
hurricane licenses, I:884
operator category rules, I:883
effective date of GATS obligations, I:879
GATS application, I:880–81
service suppliers, I:881–2
EC-Bed Linen case
ADA, I:507
Article 5.3, I:511
Appellate Body and, I:1313
textiles and developing countries, II:415
EC-Cotton Linen case
amicus curiae briefs admissibility consequences in, I:1444
EC-Hormones case, I:244, 1358; II:163; III:129
AB jurisdiction, I:1300, 1303, 1317, 1392
DSU
Article 21.3 (Reasonable Period of Time), I:1361
Article 22.2 (Emphasizing Compensation Over Retaliation), I:1366
environmental issues, II:151
GATT Jurisprudence exception, II:439
human rights concerns, II:648, 649
SPS Agreement and
Article 2, I:256, 260, 262
Article 3, I:267, 268, 270
Article 3.2, I:276
Article 3.3, I:276, 277
Article 5.7, I:298–301
dispute settlement aspects
Article 11.2, I:349
burden of proof, I:346, 348
standard of review, I:351–3
risk assessment concept, I:280, 282–4, 286–7
Article 5.1, I:288, 291, 294–6
Article 5.2, I:292
risk management concept, I:309
Article 5.4, I:310
Article 5.5, I:310–11, 313–15, 318–19
trade and environment, II:523
EC-Import Restrictions on Meat and Meat Products. See *EC-Hormones* case
EC Law and WTO Agreement
Article 133 EC, I:1464
Article 133 Committee, I:1519–20
GATS and, I:1471–2
TRIPS and, I:1472–4
Article 230 EC, I:1489
Article 232 EC, I:1484
common commercial policy, I:1464
competence and Community, I:1465
exclusive competence, I:1465–8
consequences of exclusive Community competence existence, I:1468
determining of (Opinion 2/91), I:1465
express power in internal measure (Opinion 1/94), I:1467
express Treaty provisions (Article 133 EC), I:1465
external powers complement internal powers (Opinion 1/76), I:1467
internal measures adopted by Community (ERTA principle), I:1466
express competence (common commercial policy), I:1464
Article 3(b) EC, I:1464
Article 131 EC, I:1464
Article 133 EC, I:1464
implied competence, I:1464, 1474–6
shared competence, I:1468
GATT 1947, community status under, I:1461
Community Law, I:1462
International Law, I:1462
Opinion 1/94 and WTO Agreement, I:1469
Article 133 and GATS, I:1471
Article 133 and TRIPS Agreement, I:1472–4
GATS and, I:1474
multilateral agreements on trade in goods, I:1470
TRIPS and, I:1475–6
Opinion 1/94, International Law and Responsibility, I:1476
areas within Community competence, I:1478–9
areas within Member state competence, I:1479–80
law and competence, I:1476–8
Opinion 2/91 (exclusive competence), I:1465
shared competence, I:1468–70
WTO Agreement, community status under
GATS, I:1463
TRIPS Agreement, I:1463
WTO and legal order of Community
"direct effect" and Community legal order, I:1481–4, 1487–98
FEDIOL Doctrine, I:1507
GATT 1947 and, I:1485–7
Nakajima Doctrine, I:1504–7
WTO consistent interpretation of EC legislation and measures, I:1498
WTO in EC legal system, procedural routes for invoking, I:1484
WTO obligations, EC conformity with, I:1499–1504
WTO obligations and EC complaints procedures for obligations enforcement, I:1507
Article 133 Committee, I:1519–20
"Market Access Strategy", I:1508
TBR (Council Regulation 3286/94), I:1508
permitted subject matter of TBR complaints, I:1509–13
post complaints procedure, I:1513
procedure outcome (termination, suspension or WTO dispute settlement), I:1514
scope of, I:1509
WTO proceedings initiation, I:1514
EC-Sardines case, I:396, 399–400
AB, I:1299, 1312, 1322, 1326
amicus curiae briefs admissibility consequences in, I:1438, 1447
TBT Agreement, I:377, 378
applicability of, I:406
retroactive application of, I:384
Economic Cooperation Organization (ECO), II:255
economic integration, under GATS, I:833–5
economic principles of international trade. *See* international trade, economic principles of
economic reform
deregulation, I:17
liberalization, I:16, 17
economies in transition. *See* transition economies
educational services, I:915, 928

EFTA. *See* European Free Trade Association
Egypt
  GATT accession aspects, III:93
  GATT/WTO Membership and Uruguay Round Agreements on, III:96
    economic effects, III:96–7
    legal effects, III:98
    political effects, III:97
    social effects, III:98
  issues in forthcoming negotiations (Doha), III:101
    agriculture negotiations, III:102
    domestic industrial tariffs, III:107
    electronic commerce, III:106
    labor standards, III:107
    services negotiations, III:103
    Singapore issues, III:104
    trade and competition policies, III:104
    trade and environment, III:106
    trade and investment, III:104
    trade facilitation, III:105
    transparency, III:106
    Uruguay Round Agreements implementation, III:101
    view toward a new round of negotiations, III:101
  RTAs effect on, III:108
  strategy for objectives accomplishment, III:108
  trade policy development, III:109
  Uruguay Round participation, III:93
    WTO establishment, work after, III:94
    WTO Ministerial Conferences participation, III:95
  WTO
    accession aspects, III:93
    attitude towards, III:98
    Membership effects on Egypt, III:96–8
    participation in WTO Dispute Settlement Process, III:99
    strengths and weaknesses, Egyptian perspective on, III:98–9
electronic commerce. *See also* Telecommunications Services
  Chinese issues, III:68
  classification issues (goods vs. services), II:472
    basic trade principles, II:475
    practical considerations, II:476
    theoretical principles, II:474
  Egyptian issues, III:106
  GATS issues, II:478
    classification issues, II:480
    e-commerce end-user services, II:479
    e-commerce infrastructure services, II:478
    new commitments, II:481
  GATT issues, II:476
    Customs Duty Moratorium, II:477
    Information Technology Agreement, II:477
  Geneva Declaration on (Text), III:491
  global free trade issues, III:453
  TRIPS issues, II:481
    taxation, II:484
    trade and development, II:483
  WTO history, II:470
    Basic Telecommunications Agreement, II:470
    Doha Round, II:472
    Seattle Ministerial, II:472
    Work Programme on Electronic Commerce, II:471
Endangered Species Act (US), Section 609 of, I:163
energy services, I:939–41
environmental issues, II:138. *See also* trade and environment
  background, II:139–149
  Bagwell-Staiger analysis, II:159, 160
  economic theory and empirical evidence, II:152
    economic growth and environment, II:154
    environmental externalities and economic policy, II:153
    trade agreements and environment, II:158
    trade and environment, II:155–8
  GATT and WTO, II:141
    multilateral environmental agreements conflicts, II:148
    national environmental protection restraints, II:145–8
  gender analysis of trade and, II:737
  GEO (Global Environmental Organization), II:167
  internalization versus polluter pays, II:164
  process and production methods, II:162–4
  "trade and environment" concept, II:142
    avenues for further research, II:158
    environmental policies as international competitiveness determinant, II:144–8
    green cover for protectionism, II:149
    trade as threat to environmental quality, II:143
    trade sanctions and eco-imperialism, II:148–9
    trade's impact with local pollutants, II:155–7
    trade's impact with transboundary pollutants, II:157
    WTO as self-enforcing agreement, II:160–61
    WTO rules to accommodate environmental safeguards, II:158–60
  UNEP (United Nations Environmental Programme), II:167
  Uruguay Round Agreements, II:149
    intellectual property, II:151
    services (GATS and GATT 1947), II:152
    standards (TBT and SPS), II:150
    subsidies (SCM), II:151
  WEO (World Environmental Organization), II:167
environmental services, I:915, 928–30
Equivalence and Mutual Recognition principle (under TBT Agreement), I:400–401
Equivalence Decision, I:331–3. *See also* Agreement on Application of Sanitary and Phytosanitary Measures
ERA. *See* Export Restraint Agreement
ERG. *See* Expert Review Group
ERTA principle, I:1466
European Community (EC)
  agriculture trade and, I:201, 202
  agriculture under GATT and
    Article XXIV of GATT, I:191
    CAP, I:191, 192
  export subsidy system, I:198, 199
  NAFTA and, I:807
    Cassis de Dijon case, I:808
    EC Treaty Article 43, I:808
    EC Treaty Article 49, I:808
    EC Treaty Article 50, I:808
    EC Treaty Article 52, I:809; II:317
    EC Treaty Article 58, I:809
    EC Treaty Article 73(b), II:317
    Säger case, I:808
  QUAD member, I:814–15
European Free Trade Association (EFTA), II:208

European Union (EU), III:112. *See also* Russia; United States
CAP, III:113, 119, 120, 124
competition policy negotiations, II:502
double density measures of trade intensity, II:18t
EU and MERCOSUR, regional trade negotiations between
background, III:22
differing negotiating goals and strategies, III:22
EU proposal, III:23–4
expansion and rules of origin, II:286
GATT
Article XIX, III:121
Article XXIV:6, III:112, 113
trade policy decision-making, III:113–15
Uruguay Round
European "overall approach", III:116–18
European results in, III:123–5
lessons from, III:127
origin of, III:115
Uruguay Round, decisive European factors in
agriculture pre-eminence, III:125
bilateralization of negotiations, III:125
time importance, III:126
Uruguay Round European issues
agriculture, III:118–20
developing countries, III:123
market access for goods, III:120
multilateral disciplines strengthening, III:118
services, III:121
TRIPS, TRIMs and restrictive business practices, III:122
WTO and
Doha, III:134–5
EU associations and enlargements in WTO, 131
one more Round, III:132–4
WTO Dispute Settlement, III:128–31
Excise Tax Act, *See Canada-Periodicals* case
exclusive competence. *See under* EC Law and WTO Agreement
Exhaustible Natural Resources conservation, I:162
exhaustion of rights under TRIPS Agreement, I:1069–77
Article 6 scope, I:1070–1
doctrine, I:1069
international exhaustion, I:1070
national exhaustion, I:1070
regional exhaustion, I:1070
Expert Review Group (ERG), I:1261–3
express competence. *See under* EC Law and WTO Agreement
export licensing, Mongolian sector, III:257
Export Restraint Agreement (ERA), II:47. *See also* Orderly Marketing Agreement; Voluntary Export Restraint
export subsidies, II:90, 91. *See also* Agreement on Subsidies and Countervailing Measures; import subsidies
Colombia, III:85
red light, II:99
export subsidies provisions (Agreement on Agriculture)
anti-circumvention provisions
Article 10, I:211
Article 11, I:211
developing countries provisions, I:215
dispute settlement, I:211
Article 3.3, I:213
Article 9.1(a), I:212
Article 9.1(b), I:212
Article 9.1(c), I:212–13
Article 9.1(d), I:213
Article 10.1, I:213
Doha Development Agenda
Cairns Group proposal, I:221
EC proposal, I:221
Peace Clause and, I:215
reduction commitments
Article 3.3, I:210
Article 8, I:210
Article 9.1, I:210
Article 9.2, I:211
express delivery services. *See* postal and express delivery services in GATS

FAIR (Federal Agricultural Improvement and Reform) Act of 1996 (US), II:118
fallback method of valuation (Method 6), I:561. *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
prohibited methods, I:562
requirements for applying, I:562
farm export subsidies, II:118
FATS. *See* Foreign Affiliates Trade in Services
FDI. *See* foreign direct investment
FEDIOL Doctrine, I:1507. *See also* Nakajima Doctrine
Financial Services, I:915, 931, 956
Annex on Financial Services, GATS
dispute settlement expertise, I:968
financial services definition and coverage, I:968
prudential carve-out, I:964–6
prudential measures recognition, I:966–8
banking services, I:974
commitments, I:969, 985
additional, I:976–977
national treatment and market access, I:971–5
Doha Round and beyond, I:978
national treatment and market access, I:979
nondiscriminatory structural barriers, I:980
"effective market access", I:982
prudential measures, I:983
regulatory transparency, I:981
GATS Framework Agreement, I:962
Annex on Financial Services, I:964–9, 987
liberalization of capital movements, I:962–4
insurance services, I:975
MFN exemptions, I:977–8
national treatment and market access (Doha Round), I:979
national treatment and market access commitments, I:971
commercial presence establishment (Mode 3), I:971
cross-border services (Modes 1 and 2), I:973
temporary presence of natural persons (Mode 4), I:975
Uruguay Round Negotiations, I:958
"Free-Rider" issue, I:959–60

Interim Agreement on, I:960
1997 Agreement, I:961
WTO accession impact on
China, III:64
Russia, III:299, 327, 328
FIRA. *See* Foreign Investment Review Act
FMS (flight management system), I:1190
FOGS Group and WTO institutional issues, I:55
Foreign Affiliates Trade in Services (FATS), I:825
foreign direct investment (FDI), I:18, 20, 439. *See also* global finance transactions; investment-related provisions
Argentina
concessions value in patents, impact on FDI and trade, III:11
services-related inflows of FDI and, III:15–16
in developing countries, I:1567–9
postal and express delivery services in GATS, II:198
RTA and developing countries, II:330–31
services liberalization and, II:190
stages
1950s, I:21
1985–1990 boom, I:21
early 1970s, I:21
mid-1980s, I:21
foreign exchange trading, I:19
Foreign Investment Review Act (FIRA)
GATT panel case, I:123
GATT Article III:4, I:444
GATT Article XI:1, I:444
GATT Article XVII:1(c), I:445
foreign labor protection
potential legal bases in GATT/WTO Law, II:587
US-Reformulated Gasoline case implications, II:587–9
Fourth Protocol commitments under GATS. *See also* Telecommunication Services
market access and national treatment commitments, I:998
Reference Paper on regulatory principles commitments, I:999
allocation and use of scarce resources, I:1010
assessment, I:1010–13
competitive safeguards, I:1003–1006
interconnection, I:1006–1008
legal nature, I:1000
licensing, I:1009
"major suppliers" regulation, I:1001
regulatory authority independence, I:1010
scope, I:1001
universal service, I:1008
residual importance of Annex on Telecommunications and, I:1013
Framework for Establishing Modalities in Agriculture (August 2004) (Text), III:518–23
Framework for Establishing Modalities in Market Access for non-agricultural products (August 2004) (Text), III:524–6
"Free-Rider" issue, Financial Services and, I:959–60
free trade areas (FTAs), I:172, 173, 175; II:9. *See also* customs unions; regional trade arrangements
Canada, III:43
Colombia, III:89
GATT Article XXIV, II:223, 224
Korea, III:208, 209, 210
Mexico, III:237
New Zealand, III:277
rules of origin, II:274–6, 280, 282
Singapore, III:347
Singapore-New Zealand, II:285
RTA and developing countries, II:329, 330
Free Trade Area of the Americas (FTAA), II:209; III:238
Argentina and, III:22
Canada, III:38
rules of origin and, II:285
Uruguay Round and Regionalism, II:303
"friends of the court" in WTO's dispute settlement mechanism, I:1429. *See also amicus curiae* briefs and dispute settlement

GAFTA. *See* Greater Arab Free Trade Agreement
GATS. *See* General Agreement on Trade in Services
GATT. *See* General Agreement on Tariffs and Trade
GATT 1947. *See* General Agreement on Tariffs and Trade 1947
GATT 1994. *See* General Agreement on Tariffs and Trade
gender analysis. *See* trade and gender
General Agreement on Tariffs and Trade (GATT)
accession aspects
Egypt, III:93
Japan, III:172
Korea, III:185
Mexico, III:217–27
Russian, III:289–91, 321–331
Singapore, III:336–7, 341
anti-dumping action under, II:69–72, 74, 78
Argentina role in international trade and, III:5–6
Article I [Unconditional Most-Favored-Nation Obligation], I:99, 100
Article I:1, I:102
conditional vs. unconditional MFN treatment, I:101–2
"like products" definition, I:103–5
MFN antecedents, I:101
MFN commitments (additional), I:105
overview of, I:102
Article II [Tariff Bindings]
Article II:1(a), I:107
Article II:3 [valuation of imports], I:111
Article II:4 [import monopolies], I:112
Marrakesh Protocol, I:112–14
other duties or charges
Article II:1(b), I:111
Article II:2 [other duties or charges], I:111
tariff classification
Article II:1, I:112
Article II:5, I:112
tariff modification and withdrawal, I:109–10
tariff negotiations, I:108–9
Article III [National Treatment Obligation], I:114, 375
additional commitments, I:124–5
Article III:1, I:115, 116, 120
Article III:2, I:116
first sentence, I:117
internal taxes and other charges, I:116
second sentence, I:120–22

General Agreement on Tariffs and Trade (*cont.*)
Article III:4, I:374
internal regulations affecting imports, I:122–4
"like product" determination, I:118–19
internal regulations affecting imports
Article III:4, I:122–5
Article III:5, I:125
national treatment exceptions, I:125–7
Article III:8(a), I:125
Article III:8(b), I:126
Article III:10, I:127
Article IV [Cinematograph Films], I:753–54
Article V [Freedom of Transit]
Article V:2, I:140
Article V:5, I:140
Article V:6, I:106, 140
Article VI [Antidumping and Countervailing Duties], I:140, 142, 1550
Article VI:1, I:141
Article VI:2, I:141
Article VI:3, I:141
Article VII [Customs Valuation], I:172, 1554
actual value, definition, I:537–8
Article VII:2(a), I:142, 537
Article VII:2(b), I:142, 538
Article VII:2(c), I:538
Article VII:3, I:538
Article VII:5 [transparency], I:538
implementation and CVA, I:538
relationship with CVA, I:541–2
Article VIII [Fees and Formalities Connected with Importation]
Article VIII:1(a), I:143
Article VIII:1(c), I:143
Article VIII:3, I:143
Article IX [Marks of Origin]
Article IX:1, I:106, 144
Article IX:2, I:144, 145
Article IX:3, I:144
Article IX:4, I:144
Article IX:5, I:145
Article IX:6, I:145
Article X [Publication and Administration of Trade Regulations], I:134
Article X:1, I:136
Article X:2, I:135
Article X:3, I:136
Article XI [Elimination of Quotas], I:127
allocation of quotas, I:132
balance-of-payments exception, I:131
exception for agricultural products
Article XI:1, I:128–30
Article XI:2, I:129
Article XI:2(b), I:129
Article XI:2(c), I:129–31
Article XII [Balance-of-Payments Exception], I:131–2
Article XIII [Administration of Quantitative Restrictions]
Articles XIII:1, I:106
Article XIII:2, I:132–3
Article XIII:3, I:134
Article XIII:4, I:134
Article XIV [Exchange Controls and Exchange Arrangements], I:146
Article XIV:1, I:147
Article XIV:2, I:147
Article XV [Exchange Controls and Exchange Arrangements], I:146
Article XV:4, I:147
Article XV:5, I:147
Article XVI [Subsidies], I:148
Article XVII [State Trading Enterprises], I:148
Articles XVII:1, I:106
Article XVII:1(a), I:149
Article XVII:1(b), I:149
Article XVII:1(c), I:149
Article XVII:2, I:150
Article XVIII, I:106
balance-of-payments restrictions (Article XVII1:B), I:65, 84, 131
governmental assistance to economic development, I:180
Article XIX [Emergency Action on Imports of Particular Products] of GATT 1994, I:151–3
Article XX [General Exceptions], I:106
Article XX(b) [Measures Necessary to Protect Human, Animal or Plant Life or Health], I:154, 157–9, 236, 237, 251, 252, 253, 375
Article XX(d) [Measures Against Deceptive Practices and to Protect Intellectual Property], I:160–62
Article XX(g) [Measures to Conserve Exhaustible Natural Resources], I:162–5, 375
chapeau (Preamble), I:155–6
other exceptions, I:165
public morals exception, I:157
Article XXI [Security Exceptions], I:1572–8
Article XXI(b)(iii), I:166, 167
Article XXI(c), I:168
Article XXII [Consultation], I:169, 1200–1202
Article XXIII [Nullification or Impairment]
Article XXIII.1, I:169
Article XXIII:1(a) [violation complaints], I:127, 170
Article XXIII:1(b) [nonviolation complaints], I:126, 170–71, 1379–82
Article XXIII:1(c) [situation complaints], I:172
Article XXIII.2, I:170
Article XXIV
Article XXIV:4, I:176
Article XXIV:6, I:177–8
Article XXIV:8, I:172
Article XXIV:12, I:126
RTA establishing criteria, I:172–4
Uruguay Round understanding on, I:176–8
Article XXVIII
Article XXVIII:1, I:111
Article XXVIII:2(a) *bis*, I:109
Article XXVIII:4, I:110
Article XXIX, I:91, 92n.
Article XXX:2, I:70
Article XXXV, I:78, 79, 179
Articles XXXVI–XXXVIII [Trade and Development], I:181
balance-of-payments
Article XII, I:131–2
Article XVII1:B, I:65, 84, 131
Canada, III:30–35
centrally planned economies and, II:248
Colombia participation in
economic effects of, III:82–3

post Tokyo Round period, III:76–7
Tokyo Round, III:74–6
UNCTAD III, III:74
competition policy and, II:494–7
customs unions and FTAs, I:172
Article XXIV, I:172, 176
RTA types, I:175
Customs Valuation and Agreement, I:534
dispute settlement, I:168
Article XXII [Consultation], I:169
Article XXIII [Nullification or Impairment], I:169
EC Law
Community legal order under GATT, I:1485–7
Community status under GATT, I:1461–2
electronic commerce issues, II:476
Customs Duty Moratorium, II:477
Information Technology Agreement, II:477
environmental issues, II:141
Article III, II:160
Article XX, II:146, 149, 150
conflicts with multilateral environmental agreements, II:148
restraints on national environmental protection, II:145–8
exceptions
See Article XX [General Exceptions]
See Article XXI [Security Exceptions]
future aspects of, I:182–184
GATT 1947, Textile trade regulations under
Long-Term Arrangement (LTA), I:413
Multi-Fiber Arrangement (MFA), I:414
Short-Term Arrangement (STA), I:413
transition to GATT 1994, I:96
gender analysis of, II:717–19
Article XVIII, II:718
Article XX, II:719
human rights and trade
Article III, II:653–4
Article XX, II:651–3, 677, 680, 681
Indonesia and, III:146, 152
institutional inadequacies and
ICITO, I:54
ITO, I:53
pragmatic adaptation and its limitations, I:54
institutional provisions under, I:178–180
integration of products (under ATC) into, I:420
jurisprudence exceptions and TRIPS Agreement, II:438–40
Korea and, III:187
Beef Panel, III:191
BOP consultations, III:189
Multifiber Arrangement, III:187
Tokyo Round, III:188
labor in GATT practice, II:576
adjudication without law, II:584
Article XIII, II:185, 186
Article XVI, II:185
Article XX, II:185
contracting parties proposals, II:581
domestic labor protection, II:584–7
foreign labor protection, II:587
Marrakesh Protocol to, I:112–114
MFN commitments (additional)
Article III:7, I:106
Article IV(b), I:106
Article V:5, I:106
Article V:6, I:106
Article IX:1, I:106
Article XIII:1, I:106
Article XVII:1, I:106
Article XX, I:106
MTN rounds, I:92, 93
Tokyo Rounds, I:94
Uruguay Round, I:95
multilateralism, I:94
non-violation complaints experience under, I:1374–82
non-violation nullification or impairment of benefit and tariff classification, Article XXIII:1:(b), I:1597
plurilateralism, I:94
RTA regulation aspects (Article XXIV), II:222–8, 303
Agreement on Safeguards, II:238
Argentina-Footwear case, II:238–9
Canada-Certain Measures Affecting Automotive Industry case, II:237–8
Turkey-Textiles case, II:235–7, 240
rules of origin in, II:264–73
safeguard measures (Article XIX), I:755
compensation and retaliation, I:760
increased imports, I:757
most-favored nation treatment, I:758
preferential arrangements, I:758
procedural requirements, I:759
unforeseen developments and tariff concessions effect, I:757
SCM and, II:95
agricultural subsidies (Article XVI), II:97
Article II:2(b), II:93
Article III:8(b), II:93
Article XVI, II:93, 94
S&D treatment of developing countries
Article XVIII, I:1531
Preamble, I:1532
Section A, I:1533
Section B, I:1533
Section C, I:1534
Section D, I:1535
Part IV of GATT
Article XXXVI, I:1536
Article XXXVII, I:1537
Article XXXVIII, I:1537
services liberalization and economic development, II:191–6
special provisions for developing countries (Article XVIII), I:180
SPS measures
Article III, I:236
Article XI, I:236, 237
Article XX(b), I:236, 237
inefficiency of GATT 1947 rules, I:238
Subsidies Code (1979), I:682–3
Subsidy Discipline (1947), I:681
summary and appraisal aspects of, I:182
textiles and developing countries
MFA comparison with GATT, II:398
MFA objectives and impact, II:399–401
Short-Term and Long-Term Arrangements, II:391–5

General Agreement on Tariffs and Trade (*cont.*)
trade and culture concerns under
Article I.1-Most Favored Nation, II:756
Article III-National Treatment, II:756–60
Article IV-Cinematographic Films, II:753–5
Article XI-Quotas, II:760
Article XX(f)-Exception for National Treasures, II:755–6
trade and environment, II:514
US and
leadership in GATT formation, III:382–3
Tokyo Round (1947–1979), III:389, 392–6
violation claims and tariff classification
Article I:1, I:1592–4
Article II:1, I:1594
Customs Valuation Agreement and, I:534
General Agreement on Trade in Services (GATS), I:802. *See also* services; services in RTAs
Annex on Financial Services, I:964–9, 987
Annex on Telecommunications, I:996, 1013
background, I:803
Built-in Agenda, I:893
Article X [Emergency Safeguard Measures], I:902–4
Article XIII [Government Procurement in Services], I:904
Article XV [Subsidies], I:905
domestic regulation, I:900
regulatory disciplines legal form, I:901
sectoral vs. horizontal disciplines, I:901
emergency safeguards, government procurement and subsidies, I:902
implementation issues, I:911
outstanding issues, I:897
autonomous liberalization, I:897–900
Trade in Services assessment, I:897
sectoral and other annexes, I:906
Annex on Air Transport Services, I:909–10
Annex on Article II Exemptions, I:906–8
Annex on Movement of Natural Persons, I:908–9
Annex on Tourism, I:910
special negotiating sessions, I:894
outstanding issues, I:897
overview, I:894
progressive liberalization and current negotiations, I:896
China and, III:65
classification issues, I:913
cluster and checklist approaches, I:920–21
Committee on Specific Commitments (CSC), I:919
overview, I:918
specific commitments scheduling guidelines, I:919
W/120 classification, I:921–41
competition policy and, II:500
dispute settlement cases, I:874
Canada-Certain Measures Affecting Automotive Industry case, I:884–90
Canada-Periodicals case, I:875–8
EC-Bananas III case, I:878–84
Japan-Photographic Film and Paper (Kodak-Fuji) case, I:890–91
Mexico-Telecommunications Services case, I:891–3
domestic regulation mandate implementation
accountancy disciplines, I:943–4
MRA Guidelines, I:942
Working Party on Domestic Regulation, I:944
Working Party on Professional Services, I:942
EC Law and
Article 133 EC, I:1471
implied competence under, I:1474
electronic commerce issues, II:478
classification issues, II:480
e-commerce end-user services, II:479
e-commerce infrastructure services, II:478
new commitments, II:481
environmental issues, II:152
Framework Agreement (Annex on Financial Services), I:962, 964–9
dispute settlement expertise, I:968
Financial Services definition and coverage, I:968
prudential carve-out, I:964–6
prudential measures recognition, I:966–8
GATT and, I:821
gender analysis of, II:726–9
history and development of, I:803
GATT, I:803
international and national fora, I:805
ICC, I:806
UNCTAD, I:806
regional approaches to regulation
EC, I:807
NAFTA, I:809
investment-related provisions in, II:314
liberalization under, I:820–21. *See also* Part IV. Progressive Liberalization *infra*
Mexico, III:231
Part I. Scope and Definition (Article I), I:822
definition, I:822
scope, I:822
modes of supply
commercial presence, I:825
consumption abroad, I:824
cross border, I:823
presence of natural persons, I:826
Part II. General Obligations, I:826
Article II [Most-Favored Nation (MFN) Treatment], I:827
Article II:1 [basic rule], I:827–9
Article II:2 [MFN exemption], I:829–31
Article II:3 [contiguous frontier zones], I:831–2
Article III [Transparency], I:831
Article III:1, I:831
Article III:3, I:831
Article III:4, I:832
Article III:5, I:832
Article III *bis*, I:832
Article IV [Increasing Participation of Developing Countries], I:832–3, 1555
Article V [Economic Integration], I:833
developing countries, I:835
elimination of discriminatory measures (Article V:1 and V:2), I:834
exemption (Article V:6), I:833
notification and examination (Article V:7), I:834
substantial coverage (Article V:1), I:833
trade creation (Article V:4), I:835
Article V *bis* [Labor Markets Integration Agreements], I:835

Article VI [Domestic Regulation], I:836
conditional obligations (Article VI:1, VI:3 and VI:6), I:837
domestic regulation mandate implementation (Article VI:4), I:839
mandated development of regulatory disciplines (Article VI:4), I:837–8
period pending regulatory disciplines development (Article VI:4 and VI:5), I:838–9
unconditional obligations (Article VI:2 and VI:4), I:836
Article VII [Recognition], I:839–40
Article VIII [Monopolies and Exclusive Service Supplies], I:841
Article IX [Business Practices], I:841
Article XI [Payments and Transfers], I:841
Article XII [Restrictions to Safeguard Balance of Payments], I:842
Article XIV [General Exceptions], I:843–5
Article XIV *bis* [Security Exceptions], I:845–6
Part III. Specific Commitments
Article XVI [Market Access] 846
Article XVI:2, I:847
market access and national treatment, relationship between, I:847–9
overview, I:846
Article XVII [National Treatment], I:849
"like services and service suppliers", I:851–2
national treatment and modes of supply, I:849–51
overview, I:849
Article XVIII [Additional Commitments], I:853
Part IV. Progressive Liberalization
Article XIX [Negotiation of Specific Commitments], I:854
Article XX [Scheduling of Commitments], I:854–64
horizontal commitments, I:856
overview, I:854–6
sectoral commitments, I:856
Article XXI [Modification of Schedules], I:865
Services Classification, I:864
Part V. Institutional Arrangements, I:865
Dispute Settlement Procedures (Article XXII and XXIII), I:866
Article XXII [Consultations], I:866
Article XXIII [Dispute Settlement and Enforcement], I:867–8
GATS, I:866
Specific Service Sectors, I:868–9
Article XXIV [Council for Trade in Services], I:870
Article XXIV:1, I:870
Article XXIV:2, I:871
Article XXV [Technical Cooperation], I:872
Article XXVI [Relationship with Other International Organizations] 872
Part VI. Final Provisions, I:873
Article XXVII [Denial of Benefits], I:873
Article XXIX [Annexes], I:874
postal and express delivery services in, II:196–200
RTAs and
Article V, II:302, 303
ceiling binding commitment, II:299
challenges in, II:300, 301
impact evaluation, II:305
liberalizing principles, II:296
rules of origin and, II:286–7
Russia and, III:298
SCM measures and, II:98
S&D treatment of developing countries (Article IV), I:1555
technical assistance in Uruguay Round Agreements, II:465
trade and culture, II:767, 775–7
trade and environment, II:517
Uruguay Round
goals, I:811
developing countries, I:817
QUAD Members, I:812
negotiations course, I:818–20
results overview, I:820
General Council (WTO governance structure), I:63, 64
Generalized System of Preferences (GSP), I:1538. *See also* special and differential treatment of developing countries
discriminatory preferences problem, I:1540
human rights and trade under, II:680
origin of, I:1539
rules of origin and, II:266
ten-year waiver, I:1539
Tokyo Round Enabling Clause
background, I:1541
problem of graduation, I:1544–6
terms of, I:1542
genetically modified organisms (GMO), II:122, 123, 151, 550
Geneva Ministerial Conference (1998), I:61
Global Electronic Commerce Declaration on (Text), III:491
Ministerial Declaration (Text), III:488–90
Geneva three-pronged approach and TRTCCB, II:462–4
ITC, II:463
UNCTAD, II:463
WTO, II:462
GEO. *See* Global Environmental Organization
geographical indications (under TRIPS), I:1088–91
Article 22, I:1088
Article 22.2, I:145
Article 22.3, I:145
Article 23
Article 23.1, I:146
Article 23.2, I:146
Article 23:4, I:1089
Article 24
Article 24:1, I:1089
Article 24:4, I:1089
Article 24:7, I:1089
Doha Declaration, I:1089, 1090
negotiating history, I:1088
Germany v. Council, EC Law and WTO Agreement, I:1486
GILS. *See* grossly inadequate labor standards
GIR 2(a), I:643, 644. *See also* Harmonization Work Programme
global economic policymaking functions of WTO, I:59
Global Environmental Organization (GEO), II:167
global financial transactions, I:18–20. *See also* foreign direct investment

global free trade
Doha Development Agenda, III:455–6
institutional issues (dispute settlement), III:453–55
market access
agriculture, III:442–5
services, III:445–7
tariffs, III:440–42
rules
anti-dumping and subsidies/countervailing measures, III:447–9
electronic commerce, III:453
non-discrimination, III:451–3
trade and competition, III:450
trade and environment, III:451
trade and investment, III:449
services in RTA and
compatibility, II:309
incentives, II:307
overlapping fora, II:308
Global System of Trade Preferences (GSTP), III:109
Global Trade Analysis Project (GTAP), II:114, 116
globalization. *See also* liberalization
1990s, III:469–72
Chinese enterprises encouragement for, III:67
corporation role, III:461–3
impact on trade and labor, II:575
impact on trade policy, I:22, 33–4
NGOs and WTO, III:463–9
trade and culture issues, II:750, 751
Uruguay Round negotiation and, I:23–4; III:458–61
FDI, I:20, 21, 22
global financial transactions, I:18–20
GMO. *See* genetically modified organisms
government bodies (under TBT Agreement)
central government bodies (Articles 5 and 6), I:387
local government bodies (Article 7), I:387
non government bodies (Article 8), I:387
Government Procurement. *See* Agreement on Government Procurement
GPA. *See* Agreement on Government Procurement
gravity model estimations, II:17, 22t
gray-area measures, I:763. *See also* safeguard measures
elimination of, I:780
prohibition of, I:792
Greater Arab Free Trade Agreement (GAFTA), II:211; III:108
Green Box Exemptions (under Agreement on Agriculture), I:209, 220, 221. *See also* Blue Box Exemptions
green light subsidies (ASCM), I:704–6; II:97, 101. *See also* red light subsidies; yellow light subsidies
grossly inadequate labor standards (GILS)
and international competitive position, II:179–81
efficiency in world production, II:177
promote unfair trade, II:177
Group of Three, Colombia, III:89
GSP. *See* Generalized System of Preferences
GSTP. *See* Global System of Trade Preferences
GTAP. *See* Global Trade Analysis Project
Guidelines for Mutual Recognition Agreements or Arrangements in the Accounting Sector (GATS), I:942

Haberler Report, I:192, 193. *See also* agriculture under GATT
harmonization of non-preferential rules of origin, II:270–3
harmonization principle (under TBT Agreement), I:395
Codex Standard 94, I:396–8
ineffective or inappropriate means, I:398–9
rebuttable presumption favoring, I:399–400
Harmonization Work Programme (HWP) (Rules of Origin), I:614
CRO (after June 1999), I:618, 619
product-specific rules of origin (Appendix 2)
agricultural products (HS Chapters 1 to 24), I:654–5
machinery, transport equipment and photocopying apparatus (HS Chapters 84 to 90), I:656–7
textiles and textile articles (HS Chapters 50 to 63), I:655
Technical Committee on Rules of Origin (TCRO) (July 1995—May 1999), I:615, 616
second examination, I:618
working method, I:616–18
wholly-obtained goods (Appendix 1)
CRO definition, I:651
goods obtained outside country, definition of, I:652–3
preparatory discussion, I:648
TCRO definition, I:649–51
harmonized non-preferential rules of origin architecture
Appendix 1 (wholly-obtained goods), I:622
CRO definition, I:651
goods obtained outside country, definition of, I:652–3
preparatory discussion, I:648
TCRO definition, I:649–51
Appendix 2 rules, I:636
product-specific rules of origin, I:654–6
Rule 4 [intermediate materials], I:637
Rule 6 (putting up in sets [or kits]), I:646–7
Rule 7 [de minimis], I:638
residual rules, I:628–30
Appendix 3 (minimal operations or processes), I:622
background, I:619
basic framework, I:625
country of origin, I:626
disassembly of goods into parts/components
negative rule for disassembly, I:641
origin of disassembled (used) parts/components, I:641–2
General Rules, I:621, 622
General Rule 2, I:639
General Rule 2(a)
assembly of collection of parts, I:644
collection of parts, I:643–4
items presented unassembled or disassembled, I:643
simple assembly issue, I:643
General Rule 3 [Determination of Origin], I:636
General Rule 4 [Neutral Elements], I:636
General Rule 5 [Packing and packaging materials and containers], I:644–5
General Rule 6 [Accessories and spare parts and tools], I:645
issues related to
Article 6.3 of ARO, I:640
harmonized system related issues, I:639
Meech Lake recommendations, I:624
minimal operations or processes
CRO negotiations (after June 1999), I:635

discussions at TCRO's first and second sessions, I:634
origin-conferring rules, relationship with, I:635
placement of, I:634
mixture rules, I:647
multiple country of origin, I:627, 628
Ottawa language, I:623–4
primary rules, I:625–6, 628, 631
residual rules, I:621, 625–6
essential character criterion, I:629–30
Rule 2 (May 1999), Appendix 2, I:630–31
Rule 2 (as of June 2002), I:632
Rule 3 (as of June 2002), I:632–3
Rule 5, I:633
substantial transformation and, I:633
rules for mixtures, I:647
tracing-back approach, I:626–7
harmonized system classification
conversion of GATT tariff schedules to, I:1589–90
nature and purpose of, I:1582–3
harmonized system, Mongolian, III:257
Havana Charter, I:91, 92, 189, 190; II:600
Havana Conference, III:217
health related and social services, I:916, 932
Helms-Burton Act (US), I:167, 1577–8
High Level Meeting
LDCs in multilateral trading system, II:348
hub and spoke systems and rules of preference ("Spaghetti Bowl" Problem), II:283
human rights and trade, II:625, 664
balancing of human rights, II:637, 667
balancing principles relevance for WTO Rules interpretation, II:637–8
legal consequences of human rights approach to international trade, II:638–41
necessity principles, II:637
non-discrimination, II:637
rule of law, II:637
challenge, II:664
institutional identity, II:666
navigating among rival political philosophies, II:665
cosmopolitan democracy and, II:682
adjustment between trade and non-trade interests, II:689–91
balance approaching between trade and non-trade interests, II:685–9
collateralism problem, II:683
cosmopolitan democracy, political impartiality, and WTO, II:691–4
factoring in trading interests, II:691
impartial order for trade relations, II:684
EU Treaty Article 6, II:635
GATS, II:678
GATT, II:677, 678, 681
Article III, II:653–4
Article XX(b), II:688
Article XX, II:638, 639, 651–3, 680
gender analysis, II:736–7
human right to health, II:641
human right to health and access to medicines, II:645
trade-related aspects of right to health (General Comment No. 14), II:645–7
WTO practice on access to medicines, II:647–8
human rights as constitutional restraints on WTO bodies power, II:642
due process of WTO (*Amicus Curiae* Briefs), II:643–5
judicial deference vis-a-vis democratic legislation (*Hormone Beef* dispute), II:648–50
substantive restraints (human right to health and access to medicines), II:645–8
human rights functions of WTO Rules, II:650
WTO guarantees of freedom, non-discriminatory conditions of competition, necessity and proportionality, II:650–55
WTO guarantees of property rights (disputes over TRIMs and TRIPS), II:656–7
WTO legal restraints on discrimination and trade sanctions for political ends, II:657–9
human rights obligations of WTO members, II:628
constitutional primacy of human rights in International Law, II:633
diversity of national and international human rights implementation, II:632
human rights as institutional and constitutional guarantees, II:641–2
indivisibility and incomplete enumeration of specific human rights, II:634–6
limited WTO jurisdiction and customary International Law Rules for WTO Law interpretation, II:629–32
obligations by governments and intergovernmental organizations to respect, protect and promote human rights, II:636
principles for mutual balancing of human rights, II:637–41
ICCPR, II:666, 685
ICESCR, II:628, 666, 670, 675, 676, 691
Article 2, II:646
Article 4, II:637
selecting and balancing basic rights, II:667
Stockholm Declaration, II:626
TRIPS Agreement, II:675, 676, 678
Article 27, II:691
UDHR, II:626, 637
under GSP, II:680
Vienna Declaration on Human Rights, II:628
WTO Constitution future (explicit recognition of human rights so as to better protect social welfare and democratic governance in WTO)
explicit recognition to promote social welfare and democratic governance in trade policy area, II:660–61
formal and substantive "multi-level constitutionalism" in WTO Law, II:659–60
WTO guarantees of freedom, non-discriminatory conditions of competition, necessity and proportionality, II:650
balancing of economic and non-economic values in WTO dispute settlement practice relating to GATT Article III, II:653–4
dispute settlement practice relating to health and environment protection (GATT Article XX), II:651–3
dispute settlement practice relating to SPS Agreement, II:654–5
WTO Law interpretation
Article II:1, II:629

human rights and trade (*cont*.)
Article III:1, II:629
Article III:2, II:629
Article V:1, II:629
WTO practice on access to medicines
SPS Agreement, II:649
TRIPS Agreement, II:647, 648
WTO's objectives linking to human rights, II:668
embedded and imported rights, II:669–70
human rights and trade with developing countries, II:679–82
market integration types, II:674
negative integration aspects, II:676–9
positive integration aspects, II:674–6
techniques of interpretation (functional versus civic inclusion), II:672–4
techniques of interpretation (institutional purpose and founders' intentions), II:671
HWP. *See* Harmonization Work Programme

IAA. *See* International Agreement on Anti-dumping
ICCPR. *See* International Covenant on Civil and Property Rights
ICESCR. *See* International Covenant on Economic, Social and Cultural Rights
ICFTU. *See* International Confederation of Free Trade Unions
ICITO. *See* Interim Commission for International Trade Organization
ICN. *See* International Competition Network
ICPAC. *See* International Competition Policy Advisory Committee
ICT. *See* information and communication technologies
identical goods. *See also* Agreement on Implementation of Article VII of the General Agreement on tariff and Trade 1994; similar goods
definition, I:556
requirements for qualifying as, I:557
IF. *See* Integrated Framework for LDCs
IFIA. *See* International Federation of Inspection Agencies
IGO. *See* intergovernmental organizations
ILO. *See* International Labor Organization
IMF. *See* International Monetary Fund
implied competence. *See under* EC Law and WTO Agreement
import licensing
automatic licensing, I:592, 597
Mexico, III:230
Mongolia, III:257
non-automatic licensing, I:592, 597
Import Licensing Procedures Agreement. *See* Agreement on Import Licensing Procedures
import prohibitions applicability, TBT Agreement (Annex 1), I:383. *See also under* General Agreement on Tariffs and Trade
import risk analyses (IRA), I:297
import subsidies, II:92, 93. *See also* export subsidies
import substitution industrialization (ISI), I:16
importers' rights (under CVA), I:564
right to appeal (Article 11), I:565
right to have goods released (Article 13), I:565
right to request written explanations (Article 16), I:565
imports
internal regulations affecting, I:122
valuation of, I:111
India-Autos case
dispute settlement under TRIMs Agreement, I:464, 465
relationship between TRIMs and GATT 1994, I:468
India-Patent Protection for Pharmaceutical and Agricultural Chemical Products
consultation and dispute settlement, I:1205, 1217, 1218, 1225
under TRIPS Agreement, I:1065
relationship with GATT, II:428
TRIPS interpretation, II:429, 430, 434
Indonesia, III:139
ASEAN and, III:162
changing trade pattern and structure, III:142, 143t, III:144t, III:147t
commodity power (oil and primary commodities), III:142
diversified export base, III:146
post-oil boom, III:143–6
future prospects
nurturing system in 21st century, III:168
proactive participation in multilateral system, III:164
systemic issues (multilateral system integrity), III:165
GATT
Article XI, III:141
Article XVIII, III:152
Article XIX, III:152
Article XX, III:141
GATT/WTO interface and decision-making mechanism, III:146
issues (Multilateral Round), III:154
competition policy, III:157
existing obligations (implementation issues), III:156
investment, III:157
linkage between trade, investment and competition policy, III:158
NGOs emergence, III:155
non-economic issues, III:159
S&D treatment, revisiting of, III:161
technical and trade facilitation rules, III:159
issues (Uruguay Round)
institutional issues, III:153
intellectual property rights, III:151
market access in goods, III:149
S&D treatment, III:153
services, III:150
strengthening GATT rules, III:152
multilateral trading system and (historical perspective), III:140–42
multilateralism versus regionalism, III:162–4
Indonesia-Autos case
human rights and trade, II:657
investment measures, I:470, 471
trade and culture concerns, II:763
TRIMs
dispute settlement under, I:461, 462
measure, I:470
relationship with GATT 1994, I:466
relationship with SCM Agreement, I:469
industrial designs, I:1091
Article 25 of TRIPS Agreement, I:1091
negotiating history, I:1091
industrial goods, Mexico, III:228
industry, Russian WTO accession impact on, III:323–5

information and communication technologies, (ICT) II:356
Information Technology Agreement (ITA), II:477
  text, III:483–7
injury
  under ADA and ASCM
    causation
      Article 3.5 ADA, I:743
      Article 15.5 ASCM, I:743
    cumulation
      Article 3.3 ADA, I:740
      Article 15.3 ASCM, I:740
    domestic industry
      Article 3.6 ADA, I:745
      Article 15.6 ASCM, I:745
    evaluation of economic factors
      Article 3.4 ADA, I:742
      Article 15.4 ASCM, I:742
    in regional markets, I:748
    objective examination of positive evidence
      Article 3.1 ADA, I:737
      Article 15.1 ASCM, I:737
    special care in threat cases
      Article 3.8 ADA, I:747
      Article 15.8 ASCM, I:747
    threat of injury
      Article 3.7 ADA, I:746
      Article 15.7 ASCM, I:746
  under Agreement on Safeguards (Article 4)
    causation, I:772
    determination of serious injury, I:771
    factors to be considered, I:771
    threat of injury, I:772
  volume and effect of imports
    Article 3.2 ADA, I:739
    Article 15.2 ASCM, I:739
institutional framework. *See* World trade organization institutional framework
instrumental values, II:610. *See also* values in trade and labor
insurance, Russian WTO accession impact on, III:299, 328
insurance services, national treatment and market access commitments, I:975, 987
Integrated Framework (IF) for Least Developed Countries, II:365
  clarify policy objectives, II:366
  coordination issues, II:366
  funding of, II:366
  strengthening governance and administration, II:366
Integrated Negotiation Text (INT), I:619
integration. *See also* globalization
  backloading textile integration issues, I:430, 431
  trade and human rights
    negative integration aspects, II:676–9
    positive integration aspects, II:674–6
intellectual property (IP). *See also under* Agreement on Trade-Related Aspects of Intellectual Property Rights
  as international system, I:1047–50
  from tariffs to, I:1052–5
  functions, I:1046
  gender analysis of trade and, II:729–32
  IPR issues
    Argentina (patents for pharmaceutical drugs), III:7–12
    Colombia, III:86
    Egypt, III:97
    Indonesia, III:151
    Japan, III:175
    Mexico, III:235
    Mongolia, III:258
    Russia, III:307
  protection and trade link prior to TRIPS Agreement, I:1050–1
  trade and environment issues, II:555–8
intellectual property rights. *See* Agreement on Trade-Related Aspects of Intellectual Property
intergovernmental organizations (IGO), relations with WTO, I:72
Interim Commission for International Trade Organization (ICITO), I:54. *See also* International Trade Organization
International Agreement on Anti-dumping (IAA), I:494–6
International Competition Network (ICN), II:506
International Competition Policy Advisory Committee (ICPAC), II:505
International Confederation of Free Trade Unions (ICFTU), II:593, 594
International Covenant on Civil and Property Rights (ICCPR), II:666, 685
International Covenant on Economic, Social and Cultural Rights (ICESR), II:628, 666, 670, 675, 676, 691
International Federation of Inspection Agencies (IFIA)
  appeal procedures provisions
    appeals (Section 2.21.2), I:589–90
    complaints (Section 2.21.1), I:589
  confidential business information protection provisions
    office security (Section 2.10.2), I:589
    specific assurances (Section 2.10.3), I:589
    Staff Non-Disclosure Agreement (Section 2.10.1), I:589
International Fruit case
  EC, I:1486
  EC Law and WTO, I:1485
International Labor Organization (ILO), II:173, 576. *See also* labor and trade; labor standards
  gender analysis of, II:734, 735
international law and WTO. *See under* WTO law
International law, constitutional primacy of human rights in, II:633
International Monetary Fund (IMF), I:53
GATT and, I:146
International Office of Epizootics (IOE), I:269, 271, 335
International Plant Protection Convention (IPPC), I:269, 272, 335
International Telecommunications Union (ITU), WTO and, I:1031
international trade and competition law (anti-dumping action), II:72–7
international trade, economic principles of, II:4. *See also* human rights and trade; labor and trade; trade and culture; trade and environment; trade and gender
  empirical examples, II:14
    "double-density" measures of trade intensities, II:15
    econometric gravity approach example, II:17, 22t
    trade-share analysis example, II:15, 18t, 20t, 21t
  modern international trade theory
    alternative theories, II:6–9
    integrated approaches, II:9
    neoclassical trade theory: factor proportions model, II:4–6

international trade, economic principles of (*cont.*)
preferential trading agreements thoery, II:9
dynamic effects, II:11–13
new theories (natural economic bloc), II:13–14, 15
static effects of, II:10–11
International Trade Centre (ITC), II:463. *See also* Geneva three-pronged approach and TRTCCB
International Trade Organization (ITO), I:53, 91, 189, 190
competition policy and, II:493
GATT and, I:53
GPA and, I:1125
trade and labor, II:587–89, 580
investment, I:439
Egypt concerns, III:104
gender analysis of trade and, II:729
global free trade concerns and, III:449
Indonesia, III:157, 158
Korea, III:206
multilateral framework for, I:477–78
RTA and developing countries, II:330–31
trade and culture, II:774–5
Trade & Investment, Working Group on Relationship between, I:476–480
Investment Canada Act, II:775
investment-related provisions
in RTAs, II:316
rules building on treatment and protection principles of BIT, II:318–20
rules distinguishing between local and third-party investors, II:320
rules on regional enterprises, II:321
rules on right of establishment and free movement of capital, II:316–18
in WTO
ASCM, II:316
GATS, II:314
GPA, II:315
TRIMs Agreement, II:315
TRIPS Agreement, II:315
IP. *See* intellectual property
IPPC. *See* International Plant Protection Convention
IPR. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights
IRA. *See* import risk analyses
ISI. *See* import substitution industrialization
Israel, Mexico and, III:237
ITA. *See* Information Technology Agreement
ITC. *See* International Trade Centre
ITO. *See* International Trade Organization
ITU. *See* International Telecommunications Union

Japan
accession to GATT, III:172
as QUAD member, I:815
dispute settlement procedure, III:177
Doha Development Agenda, III:178
agriculture, III:178
developing countries, III:179
issues, III:179
GATT/WTO Membership effects on
economic and political aspects, III:175
GATT accession, III:172
social aspects, III:176
Japan's example taken up by China to counter economic challenges, III:57
participation in
Dillon Round, III:172
Kennedy Round, III:172
Tokyo Round, III:172
RTAs, III:179
trade policy formulation, III:180
Uruguay Round
agriculture, III:174
contingent protection (anti-dumping and safeguards), III:175
intellectual property, III:175
market access, III:174
overall objective, III:173
rules, III:174
services, III:175
WTO
attitude towards, III:176
strengths and weaknesses, III:177
Japan-Agricultural Products case, I:257, 261, 262
consultations and, I:1219
dispute settlement aspects
burden of proof, I:346
SPS Agreement and
Article 3.3, I:278
Article 5.6 (risk management concept), I:320, 321, 323
Article 5.7, I:302, 304–6, 308
Article 11.2, I:350
transparency provisions, I:337
Japan-Alcoholic Beverages case, I:105, 116, 118, 121, 122
DSU Article 22.2 (emphasizing compensation over retaliation), I:1365–6
GATT Article III, I:116, 118, 121, 122
like product analysis, I:105
Japan-Apples case, I:257
Appellate Body and, I:1298
dispute settlement aspects (SPS Agreement)
Article 11.2, I:351
burden of proof, I:347
Standard of Review, I:353
SPS Agreement and
Article 5.7, I:304
Article 5.1, I:289, 290
Article 5.8, I:339, 340
risk assessment concept, I:285, 287–90
transparency provisions, I:338–40
July 2004 Framework (Doha Development Agenda)
Agriculture, I:224
cotton reference in Framework, I:227
domestic support provisions, I:226
export subsidies provisions, I:226
Text market access provisions, I:225

Kennedy Round. *See also* Doha Development Agenda; Tokyo Round; Uruguay Round
agriculture under GATT and, I:193–5
International Agreement on Anti-dumping (IAA), I:494–6
Japan participation in, III:172
US and, III:390–92
knowledge-based economy, II:356–8, 371
Korea
accession to GATT, III:185
Beef Panel, III:191

Doha Development Agenda
agriculture, III:204
anti-dumping, III:205
market access for industrial goods, III:205
RTAs, III:205
services, III:204
trade and competition policy, III:206
trade and environment, III:207
trade and investment, III:206
trade facilitation, III:207
GATT and, III:187
BOP consultations, III:189
Multifiber Arrangement, III:187
Tokyo Round, III:188
RTAs and, III:205, 208
trade policy making, III:210–12
Uruguay Round
background, III:192
impact on Korea, III:197
implementation, III:197
negotiations, III:194
objectives, III:194
participation in, III:194
results, III:195
WTO dispute Settlement System
Korea as complainant, III:201, 202t
Korea as defendant, III:202, 203t
Korea-Beef case, III:191
human rights approach to international trade and, II:638
TBT Agreement and, I:393
Korea-Dairy Products case
Agreement on Safeguards, I:769–70, 774, 776, 782, 784–6, 788–91
trade and culture concerns, II:766
Korea-Government Procurement case
nonviolation complaints experience under
GATT 1994, I:1377–9
GPA, I:1378
Kyoto Convention, rules of origin and, II:266–9

labeling issues (trade and environment), II:540–43
labor and trade. *See also* labor standards
foreign labor protection, II:587
potential legal bases in GATT/WTO Law, II:587
US-Reformulated Gasoline case implications, II:587–89
from Marrakesh to Singapore, II:574
GATT Panel Practice
adjudication without law, II:584
domestic labor protection, II:584–7
First Tuna Panel, II:585
foreign labor protection (Article XX), II:587
Second Tuna Panel, II:586
Havana Charter for ITO, II:600
historical antecedents, II:579
from linkage to social policy conditionality, II:579
ITO connection, II:580
in broader context, II:598
apartheid of labor and trade, II:599–601
unfulfilled promise of liberalized trade, II:601–4
institutional implications of a cohesive framework
beyond coherence to accountability, II:618–20
coherence among national policies in trade and elsewhere, II:615–16
mandates coordination among international organizations, II:617
international v. fair labor standards, II:573
labor in GATT practice, II:581
contracting parties proposals, II:581
GATT Councils deliberation, II:583
US request for Working Party, II:582
labor unions, I:31
links between trade and labor rights, II:575
from integrated to segregated standards, II:575
globalization impact, II:575
ILO, GATT and Unilateral State Practice, II:576–8
multilateral and bilateral agreements as WTO action model, II:592
Russian WTO accession impact on, III:330
separate concerns integration, II:578
shared values
as instrumental tools, II:606, 610
as normative principles, II:609–10
as over-arching objectives, II:607–8
standard setting
merits and demerits of standards incorporation, II:590
standards selection for social clause, II:590
supervision of compliance, II:591
themes and issues, II:572
values framework normative implications
internationalization of values, II:611
ordering priorities, II:612–14
values in markets and workplace, II:604–6
WTO Ministerial Meetings, II:592
labor standards, II:172
GATT/WTO and, II:185
gender analysis of trade and, II:734–6
GILS, II:177, 179–81
Group 1 Standards, II:175
Group 2 standards, II:177
ILO, II:173
inclusion arguments, II:177
accelerate growth in poor countries, II:178
efficiency in world production, II:177
GILS promote unfair trade, II:177
humanitarian concerns, II:178
regulatory race to bottom, II:178
issues
Egyptian, III:107
evolution of, II:173–7
NAALC, II:174, 175
NAFTA, II:174, 175
theory and evidence
GILS and international competitive position, II:179–81
practical considerations, II:185–6
regulatory race, II:181–3
WTO and child labor, II:183–5
TRIPS and, II:186
US policy, II:174
WTO/GATT, II:176
layout-designs of integrated circuits
Articles 35–38 of TRIPS Agreement, I:1098, 1099
negotiating history, I:1098
least-developed countries (LDCs), I:1527, 1528, 1556
accession of, I:78
background, II:343
CVA issues, I:568

least-developed countries (LDC) (*cont.*)
Doha Ministerial Conference and Development Agenda, I:1562
Agreement on Agriculture, I:1563
Agreement on Textiles and Clothing, I:1564
Antidumping Agreement, I:1564
cross-cutting issues, I:1565
Customs Valuation Agreement, I:1564
GATT 1994, I:1563
SCM Agreement, I:1564
SPS Agreement, I:1564
TBT Agreement, I:1564
TRIMs Agreement, I:1564
TRIPS Agreement, I:1565
historical perspective, II:344
First WTO Ministerial Conference, II:347
High Level Meeting, II:348
post-war period, II:345
Second Ministerial Conference, II:348
Uruguay Round, II:346
international community efforts, II:359
integrated framework, II:365–7
market access, II:360–3
special and differential treatment, II:363–4
international conferences achievements
Fourth WTO Ministerial Conference (Doha), II:369–71
Third United Nations Conference on LDCs, II:367–9
must do for, II:371
capacity building, II:372
credible alliances building, II:377
export profile diversification, II:373
human resources development, II:372
improving communications between government and non-government sector, II:376
knowledge-based economy, II:371
losers, compensation for, II:375
macro-economic reforms, II:374
mainstreaming trade with development strategies and processes, II:371
promoting accountable governance, II:374
safeguards use, II:376
weaknesses, II:349
competitive ability, II:349
exclusion from "knowledge-based economy", II:356–8
high export concentration ratio, II:350
implementation problems, II:351
lack of capacity, II:352–3
supply-side constraints, II:350
tortuous accession process, II:354
weaknesses, other, II:358
WTO Assistance to
Committee on Trade and Development, I:1561
Doha Ministerial Conference and Development Round, I:1562–6
High-Level Meeting on Least-Developed Countries, I:1559
Integrated Framework for Trade-Related Technical Assistance, I:1559–61
Plan of Action for Least-Developed Countries, I:1557
Singapore Ministerial Conference, I:1557
liberalization, II:601–4. *See also* computational analysis and trade liberalization; globalization; progressive liberalization under GATS
agricultural, II:32, 33, 121, 127
gender and trade liberalization, II:703–8
integration process and, II:405
Mexico and trade liberalization, III:224
MFA, II:26
New Zealand, III:274
bilateral liberalization (FTAs), III:277
competitive liberalization, III:278–80
multilateral liberalization (Doha Round), III:280–86
regional liberalization (APEC), III:275–7
rules of origin and trade liberalization, II:264
safeguard measures, II:53
services in RTAs and
liberalizing approaches, II:297–8
liberalizing principles, II:296
services liberalization, II:191–6
and economic development, II:191–6
postal and express delivery services in GATS, II:196–200
textiles and developing countries, II:405–7
trade and culture and investment liberalization through GATS, II:775
under GATS, I:820–21
autonomous liberalization, I:897–900
liberalization of capital movements, I:962–4
Uruguay Round Negotiation and, I:16–17
LIBERTAD Act (1996), I:167
licensing system. *See also* Agreement on Import Licensing Procedures
automatic, I:592
Mongolia
export licensing, III:257
import licensing, III:257
non-automatic, I:592
Like-Minded Group (LMG), III:95
like product
Agreement on Safeguards and, I:767
classification in context of, I:1586–7, 1592
definition, I:103–5
under ADA, I:508
under GATT (Article III), I:118
under TBT Agreement, I:389
"like services and service suppliers" under GATS, I:851–2
limited tendering procedures, I:1143–5
LMG. *See* Like-Minded Group
lobbies in trade policy development, I:28
local government bodies
TBT Agreement and, I:387
Long-Term Arrangement (LTA) (textiles and clothing), I:413; II:391–5. *See also* Multi-Fiber Arrangement; Short-Term Arrangement (STA)

Mailbox Cases (TRIPS disputes), II:425, 433
market access
Agreement on Agriculture, I:202
Cancun, I:225
Doha
developing countries proposal, I:219
EC proposal, I:219
dispute settlement, I:206
general exceptions, I:206
special safeguard measures, I:205
tariff reductions, I:205
tariffication, I:203–4
Framework for Establishing Modalities in Agriculture (August 2004) (text), III:518–23
Colombia concerns, III:85, 86

EU and, III:120
Financial Services and, I:971–5, 982
global free trade and, III:440–47
Indonesian issues, III:149
Japanese concerns, III:174
Korean concerns, III:205
Mexico
non-tariff barriers, III:229–30
tariffs, III:228–29
Non-Agricultural Products, Framework for Establishing Modalities for (August, 2004) (text), III:524–6
Singapore commitments, III:339
Telecommunication Services and, I:998
trade and environment issues, II:547
under GATS, I:846
Article XVI:2, I:847
market access and national treatment, relationship between, I:847–9
overview, I:846
WTO obligations and EC Law ("Market Access Strategy"), I:1508
Marrakesh Agreement and WTO establishment
miscellaneous aspects
conflicts resolution between WTO Agreements, I:80
continuation of GATT practices, I:80
reservations, I:81
WTO Agreement Preamble, I:79
organizational issues, I:71
trade and environment, II:513
WTO
decision making, I:67
functions, I:57–60
governance structure, I:60, 63–7
membership, I:73
scope, I:56–7
Marrakesh Declaration on Agriculture Trade, I:202
Marrakesh Ministerial Conference on Trade And Labor, II:574
Marrakesh Protocol to GATT 1994, I:112–14
MEA. *See* Multilateral Environmental Agreements
media, trade policy development and, I:30
Meech Lake recommendations. *See under* harmonized non-preferential rules of origin architecture
membership, WTO. *See* World Trade Organization Membership
MERCOSUR (Southern Common Market), I:175
double density measures of trade intensity, II:21t
RTAs and, II:239
trade and gender, II:705
Uruguay Round and Regionalism, II:303
MERCOSUR and EU, regional trade negotiations between
background, III:22
differing negotiating goals and strategies, III:22
EU proposal, III:23–4
Mexico
accession to GATT
1970s postponement of Mexico's accession to GATT, III:218–23
1980s unilateral trade liberalization and (finally) accession, III:224–7
Havana Conference, III:217
dispute resolution process in GATT/WTO, III:232–4
Doha Development Agenda, III:234
Built-in Agenda, III:235
electronic commerce issues, III:236
industrial goods issues, III:236
labor and environmental issues, III:236
Singapore issues, III:235
UR Agreements implementation, III:235
RTAs
APEC, III:238
current negotiations, III:238
Europe, III:237
FTAs with Latin American countries, III:237
Israel, III:237
NAFTA, III:236
trade policy-making, III:238–41
Uruguay Round, III:227
dispute settlement, III:232
government procurement, III:232
market access (non-tariff barriers)
antidumping and countervailing duties, III:229
BOP exceptions, III:230
import licenses, III:230
rules of origin, III:230
safeguards, III:229
sanitary and phytosanitary measures, III:230
subsidies, III:230
technical barriers to trade, III:230
market access (tariffs), III:228
agriculture, III:228
industrial goods, III:228
textiles and apparel, III:229
RTAs, III:232
state-trading enterprises, III:230
trade in services, III:231
trade-related intellectual property rights, III:231
trade-related investment measures, III:231
WTO, public attitudes towards
business groups opinions, III:241
SMEs and NGOs, III:242–3
Mexico-Telecommunications Services case
consultations and, I:1218
under GATS, I:891–3
anti-competitive practices prevention, I:892
interconnection with major supplier at cost-oriented rates, I:891
public networks and services on reasonable terms and conditions, access to and use of, I:892
MFA. *See* Multi-Fiber Arrangement
MFN. *See* most-favored nation
Michigan CGE Model, II:24–5. *See also* computational analysis and trade liberalization
Ministerial Conferences, WTO
Cancun-September 2003, I:63
Ministerial Statement (text), III:512–19
Doha-November 2001, I:62
Declaration on the TRIPS Agreement and Public Health (text), III:510–11
Implementation Issues and Concerns (text), III:503–9
Ministerial Declaration (text), III:492–502
Geneva-May 1998, I:61
Declaration on Global Electronic Commerce (text), III:491
Ministerial Declaration (text), III:488–90
Seattle-November 1999, I:61–2
Singapore-December 1996, I:60–61
Ministerial Declaration (text), III:475–82
Ministerial Declaration on Trade in Information Technology Products (text), III:483–7

mixtures rules, I:647. *See also* harmonized non-preferential rules of origin architecture
MLAT. *See* Canadian-US Mutual Legal Assistance Treaty
MNE. *See* multinational enterprises
Modalities Agreement (Agreement on Agriculture), I:203–4
  Annex 2, I:203
  Annex 3, I:203
  Annex 3B, I:204
  Annex 5, I:204
  Annex 5B, I:204
Modalities for Negotiations on Trade Facilitation (August 2004) (text), III:528–9
Mongolia, III:250
  accession to WTO, III:250
    accession negotiations initiation, III:251
    old strategy and mentality versus new realities, III:251–2
    time pressure and imagined "deadline", III:253
    unclear objectives, III:253
  should Mongolia remain in WTO?, III:265–7
  WTO commitments implementation, III:255
    cashmere, ban on exports of raw, III:258
    customs valuation, III:256
    evolution from accession-orientation to implementation-orientation, III:258
    harmonized system, III:257
    import and export licensing, III:257
    intellectual property rights, III:258
    internal taxation, III:257
    membership aspects (cashmere and scrap metal examples), III:259–62
    tariff system, III:256
    transparency, III:258
  WTO in operation, III:262
    cashmere and WTO-IMF-World Bank coherence test, III:262
    customs valuation (law v. practice), III:263
    Mongolian Court's TRIPS rights enforcement, III:264
most-favored nation, (MFN), I:105–6
  application of safeguards, I:768
  Financial Services and, I:977–8
  RTA regulation and, II:219–21
  safeguard measures and
    MFN versus discrimination, II:62
    MFN versus specificity, II:48
  tariff classification as disguised discrimination and, I:1587
  Telecommunication Services and, I:1014
  TRIPS Agreement and (Article 4), I:1068
  unconditional MFN obligation, (Article I of GATT 1994), I:99, 100
    Article I:1, I:102
    conditional vs. unconditional MFN treatment, I:101–2
    "like products" definition, I:103–5
    MFN antecedents, I:101
    overview of, I:102
  under GATS (Article II)
    Article II:1 [basic rule], I:827–9
    Article II:2 [MFN exemption], I:829–31
    Article II:3 [contiguous frontier zones], I:831–2
  under GATT
    Article I [Unconditional MFN Obligation], I:99–106
    Article III:7, I:106
    Article IV(b), I:106
    Article V:5, I:106
    Article V:6, I:106
    Article IX:1, I:106
    Article XIII:1, I:106
    Article XVII:1, I:106
    Article XVIII, I:106
    Article XX, I:106
  under GPA, I:1141
MRA Guidelines. *See* Guidelines for Mutual Recognition Agreements or Arrangements in the Accounting Sector
Multi-Fiber Arrangement (textile and clothing)
  Article 1.2 of, I:414
  Korea and, III:187
  rules of origin and, II:266
  textiles and developing countries
    MFA comparison with GATT, II:398
    MFA objectives and impact, II:399–401
  Textiles Surveillance Body (TSB), I:414, 417
  trade liberalization and UR-1 Scenario, II:26
Multilateral Environmental Agreements (MEAs), II:148, 558–60. *See also* environmental issues
multilateral trading system, I:41
  consensus decision-making principle, I:41
  Indonesia, III:140–42, 162–4
    multilateralism versus regionalism, III:162–4
    proactive participation in multilateral system, III:164
    systemic issues (multilateral system integrity), III:165
  Russian WTO accession impact on, III:331
  WTO and, I:40
multinational enterprises (MNE), I:1568, 1569
multinational firms, TRIMs and, I:441–2
multiple countries of origin, I:627–8

NAALC. *See* North American Agreement on Labor Cooperation
NAFTA. *See* North American Free Trade Area
Nakajima Doctrine, I:1504–7. *See also* FEDIOL Doctrine
national security provision (GATT Article XXI), I:166–8
  GATT/WTO Jurisprudence on Article XXI, I:1573–6
    WTO era, I:1577–8
  historical overview of, I:1572
  text of GATT Article XXI, I:1573
national treatment commitments
  Financial Services and, I:971, 979
  Telecommunication Services and, I:998
  TRIPs Agreement and (Article 3), I:1067
  under GATS, I:849
    "like services and service suppliers", I:851–2
    national treatment and modes of supply, I:849–51
    overview, I:849
national treatment obligation (Article III of GATT 1994), I:114
  additional commitments, I:124–5
  Article III:1, I:115, 116, 120
  Article III:2, I:116
    first sentence, I:117
    internal taxes and other charges, I:116
    second sentence, I:120–22
  Article III:4
    internal regulations affecting imports, I:122–4
    "like product" determination, I:118–19

internal regulations affecting imports
Article III:4, I:122–5
Article III:5, I:125
national treatment exceptions, I:125–7
Article III:8(a), I:125
Article III:8(b), I:126
Article III:10, I:127
NATO. *See* North Atlantic Treaty Organization
natural economic bloc (NEB), II:13–14, 15. *See also* preferential trading arrangements
natural resources conservation, I:162
Negotiating Group on Basic Telecommunications (NGBT), I:926
Net Food-Importing Developing Countries, I:215–7
New Partnership for Africa's Development (NEPAD), III:363
New Zealand, III:270
multilateral liberalization (Doha Round), III:280
agriculture, III:280–82
non-agricultural products, III:282
rules, III:283–5
services, III:283
sustainable development, III:285–6
trade liberalization, III:274
bilateral liberalization (FTAs), III:277
competitive liberalization, III:278–80
regional liberalization (APEC), III:275–7
trade policy, III:271
Uruguay Round participation, III:272–4
NFIDC Decision. *See* Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries
NGBT. *See* Negotiating Group on Basic Telecommunications
NGO. *See* non-governmental organizations
NIP. *See* Notice of Intended Procurement
non-automatic import licensing. *See also* Agreement on Import Licensing Procedures; automatic licensing system
defined, I:592
under AILP (Article 3), I:597
non-discrimination
global free trade and, III:451–3
principle under TBT Agreement, I:388
under API (Article 2.1), I:576
WTO and, I:40–41
non government bodies, under TBT Agreement (Article 8), I:387
non-governmental organizations (NGOs)
external transparency issues, I:86
global integration and, III:463–9
Indonesia and, III:155
Mexico, III:242–3
panel process participation of, I:1239
relations with WTO, I:72
role in WTO, I:86–7
trade policy development and, I:31
WTO democratic roots and, I:47
non-market economies, I:77
under ADA, I:508
non-preferential rules of origin, I:604; II:270–3. *See also* harmonized non-preferential rules of origin architecture; preferential rules of origin
non-product-related processes and production methods (NPR-PPM), I:238
TBT Agreement and, I:392
TBT Agreement inapplicability to, I:382
non-tariff barriers to trade (NTB), I:93. *See also* Agreement on Technical Barriers to Trade
in MTN rounds, I:93
in Tokyo Round, I:94
under GATT
Article V [Freedom of Transit], I:140
Article VI [Antidumping and Countervailing Duties], I:140
Article VII [Valuation for Customs Purposes], I:142
Article VIII [Fees and Formalities Connected with Importation], I:143
Article IX [Marks of Origin], I:144
Article XV [Exchange Controls and Exchange Arrangements], I:146
Article XVI [Subsidies], I:148
Article XVII [State Trading Enterprises], I:148
Article XIX [Emergency Action on Imports of Particular Products], I:151
non-violation complaints, I:1237. *See also* situation complaints; violation complaints
under GATT, I:170–71
re-appraisal, I:1372
complaints origins, I:1373
EC-Asbestos case, I:1379–82
GATT 1947, complaints experience under, I:1374–7
Korea-Government Procurement case, I:1377–9
non-violation remedy and TRIPs Agreement, I:1384–7
reflections on non-violation remedy, I:1382–4
WTO Agreement (GATT 1994 and GPA), complaints experience under, I:1377
under GATS (Article XXIII), I:868
under TRIPs Agreement, I:1112
non-WTO rules application. *See under* dispute settlement
non-WTO treaties. *See under* World Trade Organization law
normative principles, II:609–10. *See also* values in trade and labor
North American Agreement on Labor Cooperation (NAALC), II:174, 175, 593
gender analysis of, II:735
North American Free Trade Area (NAFTA), I:175; II:10, 281. *See also* free trade areas
Canada, III:40
CUSFTA and, I:809, 810
dispute settlement procedures innovations, II:213
double density measures of trade intensity, II:20t
EC and, I:807
gender analysis of, II:735
labor standards and, II:174, 175
Mexico and, III:236
RTAs and, II:297
compatibility issues, II:309
investment provisions and, II:318, 319
rules of origin, II:279, 282
trade facilitation and harmonization of domestic regulations, II:214
Uruguay Round and regionalism, II:303
North Atlantic Treaty Organization (NATO), II:251
Notice of Intended Procurement (NIP), I:1149–50
Notice Of Planned Procurement (NPP), I:1150

NPR-PPM. *See* non-product-related processes and production methods
NTB. *See* non-tariff barriers to trade

ODA. *See* Official Development Assistance
OECD. *See* Organization for Economic Cooperation and Development
OECD Safe Harbor (*Brazil—Aircraft* case), I:1189–90
Official Development Assistance (ODA), II:368
OIE. *See* International Office of Epizootics
Oil. *See under* Indonesia
OMA. *See* Orderly Marketing Agreement
Omnibus Trade Act of 1988 (US), II:426, 430; III:400–402
open tendering procedures, I:1142. *See also* tendering procedures under GPA
  time limit concerns, I:1151
Opinion 1/94. *See under* EC Law and WTO Agreement
Orderly Marketing Agreement (OMA), II:47. *See also* Export Restraint Agreement; Voluntary Export Restraint
Organization for Economic Cooperation and Development (OECD), I:66, 1126–9; II:251. *See also* developing countries
  agriculture
    aspects, II:128–9
    interests of, II:110–11
    MFN tariff rates, II:111
    TRQ, II:115t
  agriculture issues, II:116–18, 121
    agriculture's so-called multifunctionality, II:124–7
    technical standards, including SPS and food safety measures, II:122–4
  competition policy and, II:497
  gender definition by, II:699–700
organizational issues and WTO establishment
  WTO relations with IGOs and NGOs, I:72
  WTO Secretariat, I:71
  WTO status, I:71
Origin Project (rules of origin), I:615. *See also* Harmonization Work Programme
Ottawa language, I:622. *See also* harmonized non-preferential rules of origin architecture
  evolution of, I:623
  type rules, I:624

Panel process, I:1235. *See also* consultations; dispute settlement
  burden of proof, I:1258
  complaint object, I:1241
  complaint types
    non-violation, I:1237
    situation, I:1238
    violation, I:1236
  consultation stage, I:1242
  final panel report content, I:1268
    judicial economy, due exercise of, I:1270
    panel findings, basic rationale behind, I:1269
    right to suggest how to implement, I:1271
    rights and obligations of members, not adding to or diminishing, I:1271
  interim review stage, I:1267
  mandate of panels (Article 11 of DSU)
    factual issues, I:1265
    legal issues, I:1264
  multiple panel proceedings, I:1247
  panel establishment and panel terms of reference, I:1244
  panel composition, I:1248
  panel proceedings' participants, I:1238
    legal interest need, I:1240
    NGOs, I:1239
    private counsel, I:1239
  panel proceedings procedural stages
    confidentiality of proceedings, I:1255
    organizational meeting, I:1252
    preliminary issues and procedural objections, I:1253
    written submissions and oral hearings, I:1254
  panel's right to seek information, I:1259
    duty to respond, I:1263
    Expert Review Group, I:1261–3
  third party rights, I:1256
  timing of evidence, I:1259
parallel trade under TRIPS Agreement
  GATS and
    Article V, I:1075
    Article XVI, I:1077
  GATT and
    Article III, I:1074
    Article XI, I:1074
    Article XX, I:1074–7
    Article XXIV, I:1075–6
  GATT 1994 and GATS application, I:1073–5
  parallel imports issues, II:446–52
  related trademark provisions (TRIPS Agreement)
    Article 16, I:1071–2
    Article 28.1, I:1072
patents
  for pharmaceutical drugs (Argentina)
    concessions value estimation in patents
      impact on FDI and trade, III:11
      transfer of rents, III:9–11
    pharmaceutical drug companies, rent-seeking by, III:7–9
  under TRIPS Agreement, I:1091–8
    Article 27:1, I:1092–3
    Article 27:2, I:1093
    Article 27:3, I:1093
    Article 28, I:1094
    Article 29, I:1094
    Article 30, I:1094–5
    Article 31, I:1095–7
    Article 33, I:1097
    Article 34, I:1097
    inter-temporal application, I:1097, 1098
    negotiating history, I:1091–2
Peace Clause (Agreement on Agriculture)
  domestic subsidies, I:214
  export subsidies, I:214–15
percentage criterion test. *See also* change in tariff heading; technical test
  cost of materials, I:605–6
  general overhead expenses, I:606–7
  manufacturing overhead, I:606
petrochemicals, challenges after China's Accession to WTO, III:63
pharmaceuticals
  Argentina and
    rent-seeking by, III:7–9
    transfer of rents, III:9–11
  challenges after China's Accession to WTO, III:62

policy reform, Uruguay Round Negotiation and, I:15, 16
pollutants, trade and, II:157. *See also* environmental issues
Portugal v *Council*, I:1501–2
  consequences
    denial of direct effect for private parties but availability of, I:1491–7
    denial of direct effect to TRIPS, GATT 1994 and TBT Agreements, I:1497
  WTO direct effect and EC Community legal order, I:1489–90
postal and express delivery services in GATS, II:196. *See also* services liberalization
  current classifications, II:197–8
  Doha Trade Agenda, II:199
  existing positions regarding liberalization, II:199–200
  FDI and, II:198
  general problem, II:197
  USO, II:198
PPM. *See* processes and production methods
Precautionary Principle of SPS Agreement
  Article 2.2, I:261
  Article 5.7 relationship with, I:297
preferential rules of origin, I:604. *See also* non-preferential rules of origin
preferential trading arrangements, II:282. *See also* customs unions; free trade areas; regional trade arrangements
  Article XXIV of GATT, II:275, 276
  dynamic effects
    economic development, II:12–13
    economies of scale, II:11
    investment effects, II:12
    x-efficiency, II:12
  new theories (NEB), II:13
  rules of origin and, II:279
    EU expansion and rules of origin, II:286
    FTAA and rules of origin, II:285
    hub and spoke systems and rules of preference ("Spaghetti Bowl" Problem), II:283
    new Asian regionalism and rules of origin, II:284
  static effects of, II:10–11
  trade diversion and rules of origin, II:280
Preshipment Inspection, I:574. *See also* Agreement on Preshipment Inspection
  Uruguay Round negotiations on, I:575
  WTO Working Party Recommendations on, I:585
    December 1997 Report, I:585
    March 1999 Report, I:586
  Zaire program, I:574
price undertakings under Anti-dumping Agreement (Article 8), I:518, 521
principle of good faith and consultations and (DSU Article 4)
  further elements of, I:1225
  litigation strategies, I:1224
privatization of Argentina's service industries, III:12
processes and production methods (PPM), I:247, 382; II:538–40
product-specific rules of origin (Appendix 2), II:282. *See also* Harmonization Work Programme
  agricultural products (HS Chapters 1 to 24), I:654–5
  machinery, transport equipment and photocopying apparatus (HS Chapters 84 to 90), I:656–7
  textiles and textile articles (HS Chapters 50 to 63), I:655
PROEX program, I:1187, 1188. *See also Brazil-Aircraft* case
  PROEX II, I:1189
  PROEX III, I:1189, 1190
professional services, I:913
progressive liberalization under GATS
  Article XIX [Negotiation of Specific Commitments], I:854
  Article XX [Scheduling of Commitments], I:854–64
    overview, I:854–6
    horizontal commitments, I:856
    sectoral commitments, I:856
  Article XXI [Modification of Schedules], I:865
protection of undisclosed information (under TRIPS Agreement), I:1099
  Article 39
    Article 39.2, I:1100
    Article 39.3, I:1101
  negotiating history, I:1099
protective subsidies, II:89, 90
PSI. *See* Preshipment Inspection
public health. *See* Doha Declaration on the TRIPS Agreement and Public Health
publicity of tender notices under GPA, I:1149
  information on award of contracts, I:1152
  NIP, I:1149, 1150
  NPP, I:1150
  statistical and other information (Article XIX), I:1153–4
  time limit concerns (Article XI:1)
    open procedures, I:1151
    selective procedures, I:1151
Punta del Este Declaration
  Colombia, III:79
  textiles and developing countries, II:401–3

QUAD members. *See also* General Agreement on Trade in Services
  Canada, I:815–17
  EC, I:814–15
  Japan, I:815
  United States, I:812–14

red light subsidies (ASCM), I:734; II:96, 99. *See also* green light subsidies; yellow light subsidies
regional trade arrangements (RTAs), I:172–4; II:205. *See also* customs unions; free trade areas; preferential trading arrangements
  APEC, II:210
  arguments made about
    arguments made against, II:218–19
    arguments made in favor, II:215–17
  ASEAN, II:210
  Colombia participation
    Agreements Under ALADI, III:88
    Andean Community, III:88
    FTA of Americas, III:89
    Group of Three, III:89
  CRTA, II:226, 229, 230
  developing countries and (Member countries)
    domestic policies, II:332–3
    industrial location and growth, II:331
    investment, II:330
    politics, II:334

regional trade arrangements (*cont*.)
RTAs parameters, II:327–30
trade effects, II:326
developing countries and (non-member countries), II:334
depth and breadth in integration, II:337
excluded countries, II:335
stepping stones, dominoes and open regionalism, II:335
trade negotiations, II:336
Egypt, RTAs effects on, III:108
examinations under WTO
examination report, II:231
notification provision, II:230
oral and written examinations, II:231
overview, II:229
report obligations, II:231
examinations under WTO, evaluation of
examination report, II:233
notification and submission of information, II:231
oral and written examinations, II:232
FTAA, II:209, 210
GAFTA, II:211
GATT System (Article XXIV), II:222–8
1994 understanding on interpretation of, II:225, 226
Agreement on Safeguards and, II:238
Canada-Certain Measures Affecting Automotive Industry, II:237–8
disciplines on customs unions and FTAs, II:223, 224
evaluation of WTO legal disciplines governing RTAs, II:227
procedural rules governing CRTA, II:226
Turkey-Textiles case, II:235–7, 240
innovations in, II:212
area of trade facilitation and harmonization of domestic regulations, II:214
dispute settlement procedures, II:213
expansion of scope of RTAs coverage, II:212
investment-related provisions in, II:316
rules building on treatment and protection principles of BIT, II:318–20
rules distinguishing between local and third-party investors, II:320
rules on regional enterprises, II:321
rules on right of establishment and free movement of capital, II:316–18
Japan and, III:179
Korea, III:205, 208
MERCOSUR countries, II:239
Mexico, III:232
APEC, III:238
current negotiations, III:238
Europe, III:237
FTAs with Latin American countries, III:237
Israel, III:237
NAFTA, III:236
MFN Principle, II:219, 220
disillusionment with discriminatory trading blocs for multilateral trading systems, II:220
underlying principles of GATT MFN Rule, II:221
proliferation of, II:206
Africa, II:211
East Asia and Pacific region, II:210
European region, II:208
Mediterranean, II:211
phenomenon size, II:206
Western Hemisphere region, II:208–10
regulation in WTO system interest, II:241
expedited recourse to dispute settlement procedures, II:244
independent committee of neutral experts, II:242
phase-in periods for RTAs under examination, II:243
systematic investigation of hidden discrimination within RTA provisions, II:243
Russia and, III:313
services in, II:294
commitments depth, II:298
coverage dimension, II:295
global free trade issues, II:307–10
liberalizing approaches, II:297–8
liberalizing principles, II:296
opportunities and challenges in, II:300–302
regional agreements impact evaluation, II:305–6
Uruguay Round and regionalism, II:302–4
Singapore and, III:345–8
South Africa, RTAs effects on, III:374
types
ASEAN, I:175
EU-Member States, I:175
MERCOSUR, I:175
NAFTA, I:175
WTO dispute settlement based regulations of, II:234
evaluation of, II:240
WTO Panel and AB rulings involving RTAs, II:234–40
WTO institutional framework for regulation of, II:228
evaluation of WTO, II:231–4
RTAs under GATT System, II:228
RTAs under WTO System, II:229–31
WTO legal framework for regulation of
evaluation of, II:227
GATT Article XXIV, II:222–8
MFN Principle, II:219–21
regionalism
Asian rules of origin and, II:284
RTAs
and developing countries, II:335
services in RTAs (Uruguay Round), II:302–4
transition economies and, II:249t., II:251–6
vs. multilateralism, III:162–4
rents (Argentine pharmaceutical drug companies)
rent-seeking, III:7–9
transfer of rents, III:9–11
residual rules. *See under* harmonized non-preferential rules of origin architecture, I:628
Revenue Act of 1916 (US), I:493
risk assessment/management. *See under* Agreement on Application of Sanitary and Phytosanitary Measures
Romania-Wheat and Wheat Flour case, I:1210
royalty-based financing. *See under Canada—Aircraft* case
RTA. *See* regional trade arrangements
rules of origin, I:603; II:264, 267t. *See also* Agreement on Rules of Origin
CTH test, I:607–8; II:268
economic theory and rules of origin, II:273
antidumping and voluntary restraints, II:277
customs unions and free trade agreements, II:274–6

local content protection (value-added tariff), II:278–9
problem in economically integrated world, II:277
empirical analyses of impact of
cost to firms of compliance with rules of origin, II:280
product-specific rules of origin and investment distortion, II:282
trade diversion and economic costs of protective rules of origin, II:280–81
Mexico, III:230
non-preferential, I:604
origin determination by contracting members of GATT, II:265
harmonization of non-preferential rules of origin, II:270–3
Kyoto Convention, II:266–9
Uruguay Round, II:269
Percentage Criterion Test, I:605–7
preferential, I:604
preferential trading arrangements proliferation, II:282
EU Expansion and rules of origin, II:286
FTAA and rules of origin, II:285
hub and spoke systems and rules of preference ("Spaghetti Bowl" Problem), II:283
new Asian regionalism and rules of origin, II:284
requirements, US, I:432
rules of origin and services (GATS), II:286–7
technical test, I:608
WTO Agreement need for, I:609
Russia. *See also* EU; United States
agriculture concerns
accession impact on agriculture, III:322
beef, pork, poultry, sugar, and butter, III:297
domestic support level, III:295–7
wine, spirits, cigars and cigarettes, III:297
energy and gas, domestic price control over, III:301
government involvement in trade, III:308
recognition as market economy, III:309–12
RTAs with CIS countries, III:313
laws conformity with WTO Rules, III:304–7
Russia and WTO members, current situation in negotiations between, III:291
trade in goods concerns, III:292
apparel and footwear issues, III:294
Civil Aircraft (Plurilateral Agreement) issues, III:294
industrial goods negotiations, III:292–4
IT products issues, III:294
trade in services concerns, III:298
banking, III:299
insurance, III:299
telecommunications, III:300
transport, III:301
WTO accession, III:289–91
advantages of, III:314–17
customs issues, III:305
disadvantages of, III:317
IPR protection issues, III:307
quotas and restrictive licensing issues, III:305
Russian business community perception of, III:318–21
TBT and SPS issues, III:306
WTO accession impact on, III:321
agriculture, III:322
financial services
banking, III:327
insurance, III:328
industry, III:323–5
labor market, III:330
multilateral trading system, III:331
other service areas, III:329
services sector, III:325
telecommunications, III:326
transport services, III:328

SAARC. *See* South Asian Association for Regional Cooperation
SACA. *See* Special Agreement on Commodity Arrangements
SACU. *See* South African Customs Union
SADC. *See* Southern African Development Community
safeguard measures. *See also* Agreement on Safeguards; Agreement on Subsidies and Countervailing Measures
antidumping measures, II:51, 52
compensation and retaliation, I:760, 763
compensation versus no-compensation, II:62–4
definition of, I:751; II:44
DSB and, II:54
economic effects, II:52
empirical research on, II:58
frequency and use of safeguards relative to other trade policy instruments, II:57, 60t
import-competing industries assistance, II:5
political-economy motives, II:57
senescent industries, II:56
technological catch-up, II:55
insurance against negative terms of trade shocks, II:54–55
liberalization, II:53
financial crisis and, I:753
justification for, I:752
Mexico, III:229
MFN
MFN treatment under GATT, I:758
MFN vs. discrimination, II:62
MFN vs. specificity, II:48
objections to, I:752
origin of, I:751
reforms to other WTO Agreements, II:64
trade promotion and, I:754
transparency, additional, II:64
under Agreement on Agriculture
price-based safeguard, I:205
volume-based safeguard, I:205
under ATC (Special Safeguard Mechanism)
Article 6, I:421–2
attribution, I:425
causation, I:425
overview, I:421–2
procedural steps, I:423
serious damage, I:424
under GATT Article XIX, I:755
compensation and retaliation, I:760
increased imports, I:757
most-favored nation treatment, I:758
preferential arrangements, I:758
procedural requirements, I:759
unforeseen developments and tariff concessions effect, I:757

safeguard measures (*cont*.)
Uruguay Round Negotiations, I:760; II:48–51
available policy instruments, II:48, 49
compensation and retaliation, I:763
gray-area measures, I:763
MFN versus specificity, II:48
procedural issues, I:764; II:49
selectivity, I:762
special rules for developing countries, I:764
structural adjustment, I:763
Säger case, I:808
sales below cost concept (anti-dumping), I:502. *See also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
sanitary and phytosanitary measures. *See* Agreement on Application of Sanitary and Phytosanitary Measures
Schieving-Nijstad case
EC Law and WTO, I:1499
SCM. *See* subsidies and countervailing measures
SDT. *See* special and differential treatment of developing countries
Seattle Ministerial Conference, I:61; II:472
Section 301 of US Trade Act, II:490
Section 337 of US Tariff Act of 1930, I:160–62
Section 609 of US Endangered Species Act, I:163–5
security exceptions under
GATS (Article XIV *bis*), I:845–6
GATT 1994 (Article XXI), I:154
TRIPs Agreement and, I:1080
S&D treatment. *See* special and differential treatment of developing countries
selective tendering procedures
GPA type, I:1142–3
time limit concerns, I:1151
UNCITRAL type, I:1142–3
selling commission, I:547. *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
services. *See also* General Agreement on Trade in Services
Argentina
concessions value estimation in services, III:13
privatization of Argentina's service industries, III:12
services-related inflows of FDI, III:15–16
trade in services, III:14
Colombia, III:78, 82, 86
Egypt negotiations, III:103
EU and, III:121
global free trade and, III:445–7
Indonesian issues, III:150
Japanese concerns, III:175
Korean concerns, III:204
Mexican, III:235
New Zealand concerns, III:283
Russian WTO accession impact on, III:325
services liberalization
and economic development, II:191–96
postal and express delivery services in GATS, II:196–200
services in RTAs, II:294. *See also* regional trade arrangements
commitments depth, II:298
"freeze" or "standstill" on existing non-conforming measures, II:299
ceiling binding, II:299
list or lose, II:299
ratcheting, II:299
transparency, II:299
coverage dimension, II:295
global free trade issues
compatibility, II:309
incentives, II:307
overlapping fora, II:308
issues, II:304
global free trade, II:307–10
regional agreements impact evaluation, II:305–6
liberalizing approaches, II:297–8
Closer Economic Relations (Australia-New Zealand), II:297
NAFTA, II:297
liberalizing principles
MFN, II:296
national treatment, II:296
no local presence required, II:296
no quantitative non-discriminatory restrictions, II:296
opportunities and challenges in, II:300–302
policy conclusions, II:310
Uruguay Round and regionalism, II:302–4
GATS Article V, II:302
GATT Article XXIV, II:302
shared competence. *See under* EC Law and WTO Agreement
Short-Term Arrangements (textiles and clothing), I:413; II:391–5. *See also* Long-Term Arrangements; Multi-Fiber Arrangements
Shrimp-Turtle case. *See US-Shrimp* case
SGRAD. *See* Strengthened GATT Rules And Disciplines
Significant Market Power (SMP), I:1024
similar goods. *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; identical goods
definition, I:556
requirements for qualifying as, I:557
Singapore
accession to GATT, III:336–7
GATT/WTO Membership and Uruguay Round impact on
economic effects, III:341
legal effects, III:342
political effects, III:341
social effects, III:341
TRIPS Compliance Legislation, III:342t
next Round
principal issues to be taken up in, III:344
strategies to accomplish Singapore's objectives in, III:345
RTAs, III:345–8
trade policy development, III:348–9
Uruguay Round participation, III:338
market access commitments, III:339
market access outcomes, III:339
policy goals, III:338, 340
WTO
attitude of citizens, businessmen, and political leaders towards, III:342
dispute resolution process, III:343
Membership impact, III:341
strengths and weaknesses of, III:343

Singapore Ministerial Conference, I:60
competition policy and, II:501
LDC and, II:347
Ministerial Declaration (text), III:475–82
Ministerial Declaration on Trade in Information Technology Products (text), III:483–7
trade and labor, II:574
single tendering. *See* limited tendering procedures
situation complaints, I:172, 1238. *See also* non-violation complaints; violation complaints
social services, I:932
SOEs. *See* state-owned enterprises
South Africa
Dispute Resolution participation, III:370
Doha Round, III:371
general background, III:352–4
political, constitutional and institutional transition, III:354–6
RTAs effects, III:374
trade policy development, III:376
Uruguay Round participation
objective, III:358
outcomes, III:359
policy, III:356–7
WTO
attitudes towards, III:368
strengths and weaknesses of, III:368–70
WTO Membership effects
international economic legal framework, III:365
legal framework, III:363–5
political and social effects, III:362
trade policy and economic reform, III:360–62
South African Customs Union (SACU), III:376, 377
South Asian Association for Regional Cooperation (SAARC), II:255
Southern African Development Community (SADC), III:104, 109, 359, 376
Southern Common Market. *See* MERCOSUR
Spaghetti Bowl Problem, II:283
Spain-Unroasted Coffee case
tariff classification (GATT Article I:1), I:1592–3
Special Agreement on Commodity Arrangements (SACA), I:190
special and differential treatment of developing countries, I:1530
Agreement on Agriculture
Doha Development Agenda, I:222
domestic support, I:215
export restrictions, I:215
export subsidies, I:215
market access, I:215
CVA, I:567
reservations regarding DV and CV methods, I:568
technical assistance, I:568
transitional periods, I:567
GATT (Article XVIII)
Article XVIII, Preamble, I:1532
Article XVIII, Section A, I:1533
Article XVIII, Section B, I:1533
Article XVIII, Section C, I:1534
Article XVIII, Section D, I:1535
background and overview, I:1531
GATT (Part IV), I:1535
Article XXXVI, I:1536
Article XXXVII, I:1537
Article XXXVIII, I:1537
background and overview, I:1535
Generalized System of Preferences (GATT Article XXV:5), I:1538
background, I:1538
discriminatory preferences problem, I:1540
origin of, I:1539
ten-year waiver, I:1539
Tokyo Round Enabling Clause, I:1541–6
Indonesian issues, III:153, 161
TRIMs Agreement, I:476
Uruguay Round decisions and agreements affecting, I:1546
ADA, I:1550
Agreement on Agriculture, I:1549
CVA, I:1554
Agreement on Safeguards, I:1552
AILP, I:1555
ASCM, I:1551
ATC, I:1554
background, I:1546
Decision on Measures Concerning Possible Negative Effects of Reform Program on Least-Developed and Net Food-Importing Developing Countries, I:1547
Decision on Measures in Favor of Least-Developed Countries, I:1546
DSU, I:1555
GATS (Article IV), I:1555
GPA, I:1556
SPS Agreement, I:358, 1552
TBT Agreement, I:1553
TRIMs Agreement, I:476, 1553
TRIPS Agreement, I:1555
WTO Assistance to
Committee on Trade and Development, I:1561
Doha Ministerial Conference and Development Round, I:1562–6
Plan of Action for Least-Developed Countries, I:1557–61
Singapore Ministerial Conference, I:1557
under GPA, I:1158–60
specificity
ASCM (Article 2), I:694
de facto, I:695
de jure, I:695
MFN versus specificity and safeguard measures, II:48
Sports Illustrated dispute, II:757
SPS Agreement. *See* Agreement on Application of Sanitary & Phytosanitary Measures
SPS measures *see also* Agreement on Application of Sanitary and Phytosanitary Measures
"based on" requirement (Article 3.1), I:272–3
international standards (Annex A, paragraph 3), I:269
nature of obligation under Article 3.1, I:275
conforming to international standards (Article 3.2)
"conform to" requirement, I:275
consistency presumption, I:276
definition (Annex A, paragraph 1), I:245
GATT 1947 rules
Article III, I:236
Article XI, I:236–7
Article XX(b), I:236–7
inefficiency of, I:238

SPS measures (*cont.*)
international trade and
rules for developed countries, I:234–5
rules for developing countries, I:235–6
uneasy relationship, I:233
Mexico, III:230
resulting in high level of protection (Article 3.3), I:276–8
Russian, III:306
Standards Codes, I:236, 238
state-owned enterprises (SOEs), III:51, 53
state trading enterprises (STEs), I:148; III:230
Stockholm Declaration, II:626
Strengthened GATT Rules And Disciplines (SGRAD), II:403, 409
subsidies and countervailing measures (SCM). *See also* Agreement on Subsidies and Countervailing Measures; export subsidies provisions
agricultural, II:97
Colombia, III:82
defined, II:85, 87
economic background, II:84
good and bad subsidies, II:88–92
subsidies effect on producers, II:87–8
subsidy, defined, II:85–7
economic perspective on WTO rules
agriculture sector, II:105–6
bargain protection under GATT and GATS, II:98
countervailing duties, II:103–5
domestic subsidies and definition of subsidy in WTO Law, II:100
red light subsidy (export and domestic content subsidies), II:99
yellow light, green light approach, II:101–3
export subsidies, II:90, 91, 99
global free trade and, III:447
good and bad subsidies, II:88
for export promotion, II:90–92
protective subsidies, II:89–90
green light subsidies, II:97, 101
import subsidies, II:92, 93
in GATT System Prior to Uruguay Round, II:93–5
legal background, II:93–8
Mexico, III:230
red light subsidies, II:96, 99
subsidized imports from importing country's perspective, II:92–3
trade and environment, II:516, 548–50
under GATS (Article XV), I:905
under GATT (Article XVI), I:148
Uruguay Round Agreements
Agriculture Agreement, II:97–8
SCM, II:95–7
yellow light subsidies, II:96, 101, 102
Subsidies Code (Tokyo Round), I:682–4
Civil Aircraft Agreement and, I:1169–70
GATT and, I:682–3
subsidization, I:148
bypass, I:1025–6
countervailing duties and, II:103
cross-, I:1003, 1025–6
GATT and, II:93
subsidy discipline (1947), GATT, I:681
sugar export subsidies, I:198
Sunset Clause, II:71
Sunset Reviews under ADA (Article 11), I:522
sustainable development, New Zealand concerns, III:285–6
Switzerland argument on trade and culture, II:752

Tariff Act of 1930 (US), Section 337 of, I:160
tariff bindings (Article II of GATT 1994)
Article II:1(a), I:107
Article II:3 [valuation of imports], I:111
Article II:4 [import monopolies], I:112
Marrakesh Protocol, I:112–14
other duties or charges
Article II:1(b), I:111
Article II:2 [other duties or charges], I:111
tariff classification
Article II:1, I:112
Article II:5, I:112
tariff modification and withdrawal, I:109–10
tariff negotiations, I:108–9
tariff classification, I:112, 1582
classification purpose, I:1586
customs valuation, I:1586
disguised discrimination, I:1587
"like product" issues context, I:1586–7
origin determining method, I:1586
legal effect, I:1590
nature and purpose of, I:1582
harmonized system (HS), I:1582
origins of HS, I:1583
WCO and WTO, distinction in competence, I:1584
under GATT
Article II of, I:112
Article XXIII:1:(b) [non-violation nullification or impairment of benefit], I:1597
tariff schedules conversion to HS nomenclature, I:1589
violation claims, I:1592
GATT Article I:1 [reclassifications denying MFN treatment to "like products"], I:1592–4
GATT Article II:1 violating reclassification decisions, I:1594
Japan-SPF case, I:1593–4
Spain-Unroasted Coffee case, I:1592–3
WTO rules on, I:1590
WTO/GATT case law relating to, I:1591–7
tariff concessions, I:113. *See also* General Agreement on Tariffs and Trade
tariff-rate quotas (TRQs), I:592, 596, 598, 599; II:130–32, 115t
agricultural aspects and, II:114, 119, 120
tariffication provisions of Agreement on Agriculture
Article 4.2, I:203
current access commitments, I:204
minimum access opportunities, I:204
Modalities Agreement, I:203–4
TBT Agreement. *See* Agreement on Technical Barriers to Trade
TCCV. *See* Technical Committee on Customs Valuation
TCRO, I:609, 611. *See also* Harmonization Work Programme
July 1995–May 1999, I:615–616
Uruguay Round Agreement on Rules of Origin, II:269, 270
wholly-obtained goods definition, I:649–651

technical assistance. *See also* trade related technical cooperation and capacity building
in Uruguay Round Agreements
API, II:465
CVA, II:465, 568
DSU, II:466–7
GATS, II:465
SPS Agreement, I:356; II:464
TBT Agreement, I:402–3; II:465
TRIPS Agreement, II:465
technical barriers to trade. *See* Agreement on Technical Barriers to Trade
Technical Committee on Customs Valuation (TCCV), I:540, 541, 546
Technical Committee on Rules of Origin (TCRO), I:609, 611
July 1995–May 1999, I:615–616
Uruguay Round Agreement on Rules of Origin, II:269, 270
wholly-obtained goods definition, I:649–651
technical cooperation. *See also* trade related technical cooperation and capacity building
under GATS (Article XXV), I:872
under TRIPS Agreement (Article 67), I:1079
technical regulation (under TBT Agreement), I:376–8
Article 2, I:385
Article 3, I:385
technical test. *See also* CTH test; percentage criterion test
advantages, I:608
negative technical test, I:608, 609
technology transfer under TRIPS (Articles 7 and 66.2), I:1079
Telecommunications Services, I:914, 925, 993
Annex on Telecommunications (GATS), I:996
assessment, I:1034–5
bypass subsidization, I:1025–6
commitments in WTO
convergence with media, electronic commerce and, I:1032
GATS obligations, I:1014–17
implementation. *See* WTO commitments implementation *infra*
institutional setting (WTO and ITU) and, I:1031
remedies and dispute settlement, I:1017–20
specific commitments
distinction between basic and value-added telecommunications 994
Fourth Protocol commitments, I:998–1013
GATS commitments at WTO Agreement signature time (1994), I:995–7
competition policy and, II:500
competitive safeguards, I:1003–6
cross-subsidization, I:1003, 1025–6
dispute settlement, I:1017
remedies for difficulties on foreign markets, I:1020
remedies for injury to domestic market, I:1017–19
WTO Dispute Settlement System, I:1020
GATS obligations, I:1014–17
domestic regulation, I:1015–17
government procurement, I:1017
MFN obligation, I:1014
GATS Schedules, I:995
MFN obligation, I:1014
trade and culture, II:771
WTO accession impact on
Chinese, III:63
Russian, III:300, 326
WTO commitments implementation, I:1021
EU, I:1021–5
United States
abandoning reciprocity, I:1025–8
accounting rates, I:1028–31
WTO inclusion of, I:991
WTO Telecommunications Negotiations overview, I:994
1986 to GATS 1994 conclusion, I:994
1996 breakdown, I:993
1997 end game, I:993–4
tender under GPA. *See also* tendering procedures under GPA
documentation
Article VII:2, I:1146
Article XII:3(c), I:1146
receipt, I:1148
Article XIII:1(a), I:1147
Article XIII:1(b), I:1147
tender notices publicity under GPA
information on award of contracts, I:1152
NIP, I:1149–50
NPP, I:1150
statistical and other information (Article XIX), I:1153–4
time limit concerns (Article XI:1)
open procedures, I:1151
selective procedures, I:1151
tendering procedures (under GPA). *See also* bid challenge procedures
competitive negotiation (Article XIV), I:1145
limited tendering procedures, I:1143–5
open tendering procedures, I:1142
selective tendering procedures, I:1142–3
Textiles and Clothing Agreement. *See* Agreement on Textiles and Clothing
textiles and apparel, Mexico, III:229
textiles and developing countries, II:385
ATC
analysis of integration program, II:412
disputed balance of rights and obligations, II:408–10
implementation of, II:410
inherent weaknesses of, II:411
liberalization and integration process, II:405–7
Punta del Este Preparations, II:401–3
Textiles Monitoring Body, II:410
transitional safeguard mechanism, II:407
Uruguay Round Negotiations, II:403
dispute settlement, II:413–16
era of restrictions, II:386
MFA
comparison with GATT, II:398
objectives and impact of, II:399–401
textiles and clothing as exception to GATT system, II:390
GATT and MFA, comparison between, II:398–401
Multi-Fiber Arrangement, II:395–401
Short-Term and Long-Term Arrangements, II:391–5
textiles importance in international trade, II:385
Uruguay Round and beyond, II:387–90

Textiles Monitoring Body (TMB), I:418, 426
ATC Jurisprudence
Turkey-Textiles case, I:429
US-Shirts and Blouses case, I:429
textiles and developing countries, II:410
Textiles Surveillance Body (TSB), I:414
Thai Cigarettes case
GATT Jurisprudence exception, II:439
human rights and trade, II:687, 688
TBT Agreement and, I:393
WTO Dispute Settlement Practice Relating to Protection of Health and Environment, II:652
Thailand-Antidumping Duties case
amicus curiae briefs admissibility consequences in, I:1446
TMB. *See* Textiles Monitoring Body
Tokyo Round. *See also* Doha Development Agenda; Kennedy Round; Uruguay Round
Agreement on Import Licensing Procedures, I:594
agriculture under GATT and, I:195–6, 201
Aircraft Code, I:1168
Anti-Dumping Code, I:496
Customs Valuation Code, I:534, 536
Enabling GSP Clause, I:1541–6
background, I:1541
problem of graduation, I:1544
terms of Enabling Clause, I:1542
Government Procurement
dispute resolution, I:1132–3
procedural rules, I:1131–2
Tokyo Round Code, I:1129–34
NTB Agreements, I:94
participation
Colombia, III:74–6
Japan participation in, III:172
Korea and, III:188
United States, III:389, 392–6
plurilateralism aspects, I:94
Standards Code, I:375–6
inefficiency of, I:238
SPS measures and, I:236–7
Subsidies Code, II:97
total AMS. *See under* aggregate measurement of support
tourism (under GATS), Annex on, I:910
tourism and travel related services, I:916, 932, 933
TPA. *See* Trade Promotion Authority
TPRB. *See* Trade Policy Review Body
TPRM. *See* Trade Policy Review Mechanism
trade and culture
Brazil argument on, II:752
Canada argument on, II:752
cultural goods and services in WTO, II:753
ADA, II:764
Agreement on Safeguards, II:765
ASCM, II:760
Basic Telecommunications, II:771
GATS, II:767, 775–7
GATT 1994, II:753–60
intellectual property rights, II:777
investment, II:774
TRIMs Agreement, II:774
Cultural Exception Approach
Cultural Exceptions, II:785
Cultural Exemptions, II:786
Cultural Reservations, II:786
Cultural Waiver, II:787
GATT 1994
Article I.1-Most Favored Nation, II:756
Article III-National Treatment, II:756–60
Article IV-Cinematographic Films, II:753–5
Article XI-Quotas, II:760
Article XX(f)-Exception for National Treasures, II:755–6
globalization aspects, II:750–51
Sports Illustrated dispute, II:757
Switzerland argument on, II:752
US argument on, II:752
trade and environment, II:513. *See also* environment issues
China, III:69
Colombia issues, III:86
Committee on Trade and Environment (CTE), II:529–30
Egyptian issues, III:106
global free trade and, III:451
Korean issues, III:207
legal and policy issues, II:536
agriculture, II:552–4
biosafety, II:550–52
intellectual property, II:555–8
labeling, II:540–43
market access, II:547
MEAs, II:558–60
process and production methods, II:538–40
scientific uncertainty and precaution, II:544–7
services, II:554
subsidies, II:548–50
looking forward, II:568–9
material linkages (economic, social and environmental)
direct and indirect linkages, II:536
nature of material linkages, II:535
positive and negative linkages, II:535
MEAs, II:558–60
organizational issues
assessment, II:561
compliance, enforcement and dispute settlement, II:566–8
information exchange and observer status, II:565
transparency and public participation, II:562–5
trade and environment debate, II:532–5
WTO disputes, II:519
Australia-Salmon, II:525–6
EC-Asbestos, II:527–9
EC-Hormones, II:523
Japan-Varietals, II:526–7
US-Gasoline, II:519–21
US–Shrimp, II:521–2
US-Shrimp 21.5 (implementation decision), II:523
WTO, environment and sustainable development, II:513
Agreement on Agriculture, II:516
DSU, II:518
GATS, II:517
GATT, II:514
Marrakesh Agreement establishing "WTO Agreement", II:513
SCM Agreement, II:516
SPS Agreement, II:515
TBT Agreement, II:514
TRIPS Agreement, II:517
WTO's Fourth Ministerial Mandate on Trade and Environment, II:531

trade and gender
APEC, II:705
CEDAW, II:701, 704, 736
GATT Article XX(a), II:737
gender relevance to international trade and investment, II:699
gender and trade liberalization, II:703–8
gender concepts and terms, II:699–702
gender differences and trends in global economic activity, II:702–3
gender equality, II:700
gender, trade and investment
legal analysis of, II:711–16
socioeconomic approaches to, II:708–11
Informal Working Group on Gender and Trade (IWGGT), II:706–7
International Gender and Trade Network (IGTN), II:706–8
MERCOSUR, II:705
OECD gender definition, II:699–700
TPRB, II:740
trade agreements, gender analysis of, II:716
GPA, II:729
Agreement on Agriculture, II:723–6
ASCM, II:720–22
ATC, II:719
GATS, II:726–9
GATT 1994, II:717–19
SPS Agreement, II:732–3
TBT Agreement, II:732–3
TRIMs Agreement, II:723
trade-related areas, gender analysis of, II:729
domestic regulation, II:732–3
environment, II:737
human rights, II:736–7
intellectual property, II:729–32
investment, II:729
labor standards, II:734–6
UNCTAD efforts, II:704–5
UNIFEM, II:706
WTO processes, gender analysis of, II:738
dispute settlement, II:739
TPRM, II:740
trade negotiations, II:738
trade-related capacity building, II:741–2
trade and human rights. *See* human rights and trade
trade and labor. *See* labor and trade
trade barriers regulation and EC Law (Council Regulation 3286/94), I:1508. *See also* Agreement on Technical Barriers to Trade
permitted subject matter of TBR complaints, I:1509–13
Community industry complaints against foreign trade practices effects, I:1511
governmental measures, I:1509
individual Community enterprises complaints, I:1512
Member State complaints, I:1511
mixed competence issues and TBR, I:1510
threatened injury, I:1513
post complaints procedure, I:1513
procedure outcome (termination, suspension or WTO dispute settlement), I:1514
scope of, I:1509
WTO proceedings initiation, I:1514
Trade Facilitation, Modalities for Negotiations on (August 2004) (text), III:528–9
trade in goods, III:292
Argentina concerns
agriculture, III:18
manufacturing, III:17
Egypt concerns, III:96
Russian concerns
apparel and footwear issues, III:294
Civil Aircraft (Plurilateral Agreement) issues, III:294
industrial goods negotiations, III:292–4
IT products issues, III:294
trade liberalization. *See* computational analysis and trade liberalization
trade policy development, I:28
business sector and, I:29
Canada, III:40–46
formal consultative mechanisms, III:43
informal consultative mechanisms, III:44–6
Colombia, III:89
consumer interests and, I:32
Egypt, III:109
EU, III:113–15
globalization aspects, I:22, 33–4
Japan, III:180
Korea, III:210–12
labor unions, I:31
legislative level, I:30
lobbies proliferation in, I:28
media and, I:30
Mexico, III:238–41
national interests, I:33
New Zealand, III:271
NGOs and, I:31
Singapore, III:348–9
South Africa, III:376
trade stakeholders interests and, I:32
United States
debate over multilateralism, III:387
President and Congress (constitutional tensions over trade), III:384
trade negotiating authority and "fast-track", III:385–7
USTR, III:388
WTO role in
efficiency increasing mechanisms, I:36–7
Members/delegation, I:35
multilateral perspective, I:37
operations, I:34
Secretariat, I:35–6
Trade Policy Review Body (TPRB), I:59, 64; II:740
Trade Policy review functions of WTO
TPRB, I:59
TPRM, I:58–9
Trade Policy Review Mechanism (TPRM), I:58–9, 136–7; II:740; III:153
Trade Promotion Authority (US), II:175, 577
Trade-Related Aspects of Intellectual Property Rights. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights
trade-related capacity building, gender analysis of trade and, II:741–2
trade-related technical cooperation and capacity building (TRTCCB)
definitions, II:458–60
Geneva three-pronged approach, II:462–4
ITC, II:463
UNCTAD, II:463
WTO, II:462

Trade-Related Aspects (*cont*.)
technical assistance in Uruguay Round Agreements
API, II:465
CVA, II:465
DSU, II:466–7
GATS, II:465
SPS Agreement, II:464
TBT Agreement, II:465
TRIPS Agreement, II:465
trade-related capacity building, II:460–62
trademarks. *See also* Agreement on Trade-Related Aspects of Intellectual Property Rights
Articles 15–16 and 18–21 of TRIPS Agreement, I:1087
negotiating history, I:1087
transaction value definition under CVA
actually paid or payable price, I:545
agreed price, I:544
agreed price, changes in, I:545
identification of targeted transaction, I:546
no time requirement, I:546
price actually paid or payable, I:544
price for goods, I:544
price in this transaction, I:545
transition economies
regionalism and, II:249t
AFTA, II:253
APEC, II:256
ASEAN, II:253, 255–6
CAEC, II:255
CEFTA, II:251–2
CIS, II:254–6
CMEA, II:251, 256
ECO, II:255–6
EU, II:256
NATO, II:251
SAARC, II:255
WTO and, II:256–9, 257t
transparency
AB and, I:1398
API (Articles 2.5–2.8), I:578
commitment in MTAs, I:138, 139
CVA (Article 12), I:566
issues
external transparency, I:86
internal transparency, I:85
Egyptian issues, III:106
GATS (Article III)
Article III:1, I:831
Article III:3, I:831
Article III:4, I:832
Article III:5, I:832
Article III*bis*, I:832
Mongolian issues, III:258
safeguard measures and, II:64
SPS Agreement
Annex B, I:336
Annex B.1, I:337
Annex B.5, I:337–8
Annex B.6, I:338
Annex B.10, I:340
Article 5.8, I:336, 339
Article 7, I:336
infrastructure for transparency, I:340
notification procedure, I:338–9
scope of notification obligation, I:336
TBT Agreement
allowance of time for comments obligation, I:401
creation of inquiry points obligation, I:402
notification obligation, I:401
pre-enactment publication obligation, I:401
provision of copies obligation, I:401
publication of measures obligation, I:402
TRIMs Agreement (Article 6), I:452
TRIPS Agreement and (Article 63), I:1081
transport services, I:917, 935–7, 1472; III:301, 328
transshipment concerns under Anti-Dumping Agreement, I:508
travel and tourism-related services, I:932–3
TRIMs Agreement. *See* Agreement on Trade-Related Investment Measures
TRIPS Agreement. *See* Agreement on Trade-related Aspects of Intellectual Property Rights
TRQ. *See* tariff-rate quotas
TRTCCB. *See* trade related technical cooperation and capacity building
TSB. *See* Textiles Surveillance Body
Turkey-Textiles case (ATC Jurisprudence)
consultations and, I:1224
GATT Article XXIV (RTA regulation aspects), II:240
RTA regulation aspects, II:235–7
TMB role, I:429

UDHR. *See* Universal Declaration of Human Rights
UNCTAD. *See* United Nations Conference on Trade and Development
UNCITRAL. *See* United Nations Commission on International Trade Law
unconditional most-favored-nation obligation. *See under* most-favored nation
undisclosed information protection under TRIPS Agreement, I:1101
UNIFEM, II:706
unilateral trade liberalization, III:224
United Nations Commission on International Trade Law (UNCITRAL). *See also* Agreement on Government Procurement
award contracts by, I:1148
type selective procedure, I:1142–3
United Nations Conference on Trade and Development (UNCTAD), I:1528–30
Colombia, III:74
competition policy and, II:497
conference on LDC, II:361
Geneva three-pronged approach and TRTCCB, II:463
Indonesia, III:148
trade and gender, II:704–5
United Nations Environmental Programme (UNEP), II:167–8
United Nations Fund for Women (UNIFEM), II:706
United States, III:381. *See also* European Union; Russia
1980s (congressional unrest, bilateralism and a globalizing economy)
Congress' restlessness, III:398–9
early 1980s (trade deficits, trade restrictions, breakdown in Geneva), III:396–8
globalizing economy, III:402
Omnibus Trade Act of 1988, III:400–402
agriculture trade and, I:202

agriculture under GATT and, I:191
Agricultural Adjustment Act of 1933, I:190
Article XI:2(c) provisions, I:190
Article XXV:5, waivers under, I:190
argument on trade and culture, II:752
Cancun, III:432–34
Doha launch, III:426–32
in GATT, Tokyo Round (1947–1979)
early years, III:389
Kennedy Round, III:390–92
Tokyo Round, III:392–6
government competition policy and negotiations, II:503
leadership in GATT formation
postwar revival of trading system, III:382
US settles for GATT, III:383
QUAD member, I:812–14
Telecommunications Services commitments implementation and
abandoning reciprocity, I:1025–8
accounting rates, I:1028–31
Trade Act of 2002, III:426, 428
trade policy decision-making in
debate over multilateralism, III:387
President and Congress (constitutional tensions over trade), III:384
trade negotiating authority and "fast-track", III:385–7
USTR, III:388
Uruguay Round
1986–89 (three key pillars building), III:404–8
1993 finishing of Round, III:417–19
Blair House and beyond, III:415–17
from Brussels to Dunkel Draft, III:412–15
importance to U.S. Policy, III:403
mid-term review in Montreal and on to Brussels, III:408–12
Uruguay Round Agreements Act, III:419–22
WTO first seven years (negotiations and implementation)
built-in agenda, III:423
foundations laying, III:422
new initiatives, III:424
WTO in 2005 (challenges ahead), III:434–5
Universal Declaration of Human Rights (UDHR), II:626
Universal Services Obligations (USO), II:197, 198
URAA. *See* Uruguay Round Agreements Act
Uruguay Round. *See also* Doha Development Agenda; Kennedy Round; Tokyo Round
ADA, I:498–500
Agreement on Agriculture, I:200, 202, 205
Agreement on Safeguards, I:760
AILP, I:594
anti-dumping action, II:71, 78, 79
Appellate Body and, I:1279–1281
Argentina
intellectual property rights (patents for pharmaceutical drugs), III:7–12
services, III:12–16
trade in goods, III:17–18
ARO
Article 9.2 of, II:269
CRO, II:269–70
HS nomenclature, II:269
TCRO, II:269–70
ASCM, I:684, 685
ATC, I:415; II:403
linkage to other GATT Rules, I:418
monitoring body, role of, I:417–18
quota growth rates, I:416
scope of products to be integrated, I:417
special safeguard mechanism development, I:417
speed of integration, I:416
chronology
December 1988 to December 1990, I:7
December 1990 to December 1991, I:7
December 1991 to June 1993, I:7
June to December 1993, I:8
pre-negotiation (1981–86), I:6
September 1986 to December 1988, I:7
Colombia participation in
negotiations objectives, III:79
negotiations results, III:80
agriculture, III:81
textile and clothing, III:81
tropical products, III:80
Punta del Este Declaration, preliminary negotiations for, III:79
services, III:78
competition policy and
GATS, II:500
Singapore Ministerial Meeting (1996), II:501
Telecommunications Services Agreement, II:500
TRIMs Agreement, II:500
computational analysis of trade liberalization (UR-1, UR-2, and UR–3 Scenario), II:25, 27t
aggregate results, II:31
computational results, II:26
MFA, II:26
sectoral results, II:29t., II:31
consultation process and, I:1202
developing countries, decisions and agreements affecting, I:1546
Decision on Measures Concerning Possible Negative Effects of Reform Program on Least-Developed and Net Food-Importing Developing Countries, I:1547
Decision on Measures in Favor of Least-Developed Countries, I:1546
developing countries, MTAs providing S&D treatment of, I:1548
ADA, I:1550
Agreement on Agriculture, I:1549
Agreement on Safeguards, I:1552
AILP, I:1555
ASCM, I:1551
ATC, I:1554
CVA, I:1554
DSU, I:1555
GATS (Article IV), I:1555
GPA, I:1556
SPS Agreement, I:1552
TBT Agreement, I:1553
TRIMs Agreement, I:1553
TRIPS Agreement, I:1555
Egypt participation, III:93, 101
environmental issues and, II:149
intellectual property, II:151
services (GATS and GATT 1947), II:152
standards (TBT and SPS Agreements), II:150
subsidies (SCM Agreement), II:151

Uruguay Round (*cont.*)
EU and. *See under* European Union
Financial Services and, I:958–60
GATS and, I:811
goals, I:812–17
negotiations course, I:818
results overview, I:820
GATT 1994
Marrakesh Agreement, I:95
MFN obligation, I:95
MTAs, decisions, and understandings, I:98
transition from GATT 1947 to GATT 1994, I:96–8
GATT Article XXIV, understanding on, I:176–8
globalization impact on, I:23, 24; III:458–61
GPA, I:1134–7
Indonesian issues
institutional issues, III:153
intellectual property rights, III:151
market access in goods, III:149
S&D treatment, III:153
services, III:150
strengthening GATT rules, III:152
Japan participation in, III:172–5
Korea, III:192
economic and political impact, III:197–9
implementation, III:197
negotiations, III:194
objectives, III:194
participation in Uruguay Round, III:194
results, III:195
LDCs in multilateral trading system, II:346, 369–71
Mexico, III:227
dispute settlement, III:232
GATS, III:231
government procurement, III:232
market access (non-tariff barriers), III:229–30
antidumping and countervailing duties, III:229
BOP exceptions, III:230
import licenses, III:230
rules of origin, III:230
safeguards, III:229
sanitary and phytosanitary measures, III:230
subsidies, III:230
technical barriers to trade, III:230
market access (tariffs), III:228–9
agriculture, III:228
industrial goods, III:228
textiles and apparel, III:229
RTAs, III:232
state-trading enterprises, III:230
TRIMs Agreement, III:231
TRIPS Agreement, III:231
New Zealand participation in, III:272–4
overview of, I:4, 5
PSI, I:575
regionalism and, II:302–4
ASEAN, II:303
CARICOM, II:303
FTAA, II:303
GATS (Article V), II:302
GATT (Article XXIV), II:302
MERCOSUR, II:303
NAFTA, II:303
rules of origin and, II:269
safeguard measures and, II:48–51
available policy instruments, II:48
compensation and retaliation, II:49
MFN versus specificity, II:48
procedural reforms, II:49
SCM measures and
Agriculture Agreement, II:97–8
SCM, II:95–7
Singapore
market access commitments, III:339
market access outcomes, III:339
policy goals, III:338, 340
South Africa participation in
objective, III:358
outcomes, III:359
policy, III:356–7
SPS Agreement, I:239
Cairns Group proposal, I:241
developing countries, role of, I:242
EC proposal, I:241
trading nations position in, I:240
US proposal, I:241
technical assistance in
API, II:465
CVA, II:465
DSU, II:466–7
GATS, II:465
SPS Agreement, II:464
TBT Agreement, II:465
TRIPS Agreement, II:465
textiles and developing countries, II:387–90
TRIMs Agreement and, I:445
negotiating positions, I:446–7
outcome, I:447
TRIPs Agreement and, I:1055
United States
1986–89 (three key pillars building), III:404–8
1993 finishing of Round, III:417–19
Blair House and beyond, III:415–17
from Brussels to Dunkel Draft, III:412–15
importance to U.S. Policy, III:403
mid-term review in Montreal and on to Brussels, III:408–12
Uruguay Round Agreements Act (US) (URAA), II:110, 119, 124–8, III:419–22. *See also* Agreement on Agriculture
green box measures, II:127
US-Copyright case
amicus curiae briefs admissibility consequences in, I:1443
US-Gasoline case
AB jurisdiction, I:1393
GATT jurisprudence execption, II:438
trade and environment, II:519–21
trade and labor, II:587–89
US-Restrictions on Imports of Cotton and Man-Made Fibre Underwear case, I:135
ATC Jurisprudence
evidentiary scope of review, I:428
standard of review, I:428
textiles and developing countries, II:415
US-Rules of Origin case
rules for textiles and apparel products, I:612
US-Section 110(5) of U.S. Copyright Act (under TRIPS), I:1089
contemporaneity, II:436

disputes, II:426
exception, II:442
principles of interpretation, II:431
relationship with GATT, II:428
US-Shirts and Blouses case
ATC, I:424, 425, 427
ATC Jurisprudence
burden of proof, I:428
evidentiary scope of review, I:429
TMB role, I:429
textiles and developing countries, II:414
US-Shrimp case, II:163
AB and, I:1297, 1298, 1316, 1322, 1330, 1393
amicus curiae briefs, I:1399
amicus curiae briefs admissibility consequences, I:1431, 1433–5, 1442; II:643
balancing principles of human rights, II:637
consultations and (DSU Article 21.5), I:1225
environmental issues, II:147, 151, 165, 166
human rights concerns, II:643
TBT Agreement and, I:383
trade and environment, II:521–2, 540
trade and labor, II:587
US-Shrimp 21.5 (implementation decision), II:523, 540, 653
US Trade Act of 2002, III:426, 428
US Trade Promotion Authority Act 2002, II:577
US Trade Representatives (USTR), III:388, 389
USO. *See* Universal Services Obligations

values in trade and labor
in markets and workplace, II:604–6
shared values
as instrumental tools, II:606, 610
as normative principles, II:609–10
as over-arching objectives, II:607–8
values framework normative implications
internationalization of values, II:611
ordering priorities, II:612–14
VER. *See* Voluntary Export Restraint
Vienna Convention on the Law of Treaties (VCLT)
Article 2, I:1406
Article 30, I:1415
Article 31, I:1397, 1595–6; II:643
Article 31.1, I:1356
Article 31.3, II:630
Article 31:3(c), II:638
Article 32, I:1397
Article 41, I:1415
Article 53, I:1415
Vienna Declaration on Human Rights, II:628
violation complaints. *See also* non-violation complaints; situation complaints
under GATS (Article XXIII), I:867
under GATT, I:170
volume-based safeguard, I:205. *See also* safeguard measures
Voluntary Export Restraint (VER), I:152; II:47, 49, 390. *See also* Export Restraint Agreement; Orderly Marketing Agreement, Voluntary Restraint Agreement
Voluntary Restraint Agreement (VRA), I:151; II:277

W/120 classification, I:921
air transport services, I:937–8
business services, I:922
computer and related services, I:923–4
legal services, I:922
communication services, I:924–5
construction and related engineering services, I:927
distribution services, I:927
educational services, I:928
energy services, I:939–41
environmental services, I:928–30
financial services, I:931
health-related and social services, I:932
recreational, cultural and sporting services, I:934
telecommunication services, I:925
tourism and travel-related services, I:932–3
transport services, I:935–7
waivers
granted under GATT 1947, I:179
granted under GATT 1994, I:179
WTO decision making and, I:69
WCO. *See* World Customs Organization
WCT. *See* WIPO Copyright Treaty
WEO. *See* World Environmental Organization
WGTI. *See* Working Group on Trade and Investment
wholly-obtained goods (ARO Appendix 1)
CRO definition, I:651
goods obtained outside country, definition of, I:652, 653
preparatory discussion, I:648
TCRO definition, I:649–51
WIPO. *See* World Intellectual Property Organization
WIPO Copyright Treaty (WCT), I:1085
Work Programme on Electronic Commerce, II:471
Working Group on Trade and Investment, I:467, 477
Working Party on Domestic Regulation, I:944
draft disciplines, I:948
equivalence/international standards, I:945
general issues, I:945
necessity, I:945
professional services, I:839, 870, 942, 946
regulatory examples, I:947
transparency, I:945
Working Party on Professional Services, I:942
World Customs Organization (WCO), I:1584; II:269
WCO Origin Project, I:615
World Environmental Organization (WEO), II:167
World Intellectual Property Organization (WIPO), I:72, 1048
World Trade Organization (WTO), I:5. *See also under* Indonesia; Mongolia; Singapore; United States
competition policy and
key issues for, II:506–8
Uruguay Round Agreements and WTO, II:499–501
cultural goods and services in
ADA, II:764
Agreement on Safeguards, II:765
ASCM, II:760
Basic Telecommunications, II:771
GATS, II:767, 775–7
GATT 1994, II:753–60
intellectual property rights, II:777
investment, II:774
TRIMs Agreement, II:774
democratic roots of, I:40–46
consensus rule making, I:43–5
dispute settlement, I:43
MFN obligation, I:40n.

World Trade Organization (*cont.*)
multilateral trading system, I:40, 41
national treatment obligation, I:41n.
negotiating rounds, I:42
NGO involvement, I:47
non-discrimination principle, I:40, 41
environmental issues and, II:141
conflicts with multilateral environmental agreements, II:148
restraints on national environmental protection, II:145–8
WTO as a self-enforcing agreement, II:160–61
WTO Rules to accommodate environmental safeguards, II:158–60
EU and
Doha, III:134–5
EU associations and enlargements in WTO, 131
one more Round, III:132–4
WTO Dispute Settlement, III:128–31
functions under Marrakesh Agreement
dispute settlement, I:58
global economic policymaking, I:59–60
negotiations, I:57–8
Trade Policy review, I:58–9
TPRB, I:59
TPRM, I:58
global integration and, III:463–9
governance structure. *See* World Trade Organization governance structure
human rights and. *See under* human rights and trade
institutional framework. *See* World Trade Organization institutional framework
investment-related provisions in, II:314
Agreement on Government Procurement, II:315
ASCM, II:316
GATS, II:314
TRIMs Agreement, II:315
TRIPS Agreement, II:315
Japan
attitude towards WTO, III:176
WTO strengths and weaknesses, III:177
labor standards and, II:177
LDCs in multilateral trading system, II:347, 348
Membership. *See* World Trade Organization Membership
Mexican public attitudes towards
business groups opinions, III:241
SMEs and NGOs, III:242–3
RTAs under, II:229–31
RTAs regulation
legal framework for, II:219–27
institutional framework for, II:228–34
WTO dispute settlement based, II:234–40
regulation in WTO system interest, II:241–44
rules of origin in, II:264–73
services liberalization and economic development, II:191–6
South Africa
attitudes towards WTO, III:368
strengths and weaknesses of WTO, III:368–70
WTO Membership effects on, III:360–65
tariff classification rules, I:1590
non-violation nullification or impairment of benefit [GATT Article XXIII:1:(b)], I:1597
violation claims (GATT Articles I:1 and II:1), I:1592–7
trade and environment (Fourth Ministerial Mandate), II:531
trade and labor, II:592
trade policy development and
efficiency increasing mechanisms, I:36–7
multilateral perspective, I:37
WTO Members/delegation role, I:35
WTO operations, I:34
WTO Secretariat role, I:35–6
transition economies, II:256–9, 257t
TRTCCB (Geneva three-pronged approach), II:462
WTO Agreement, Preamble, I:79
World Trade Organization governance structure, I:60–67
committees, I:64
Committee on Balance-of-Payments Restrictions, I:65
Committee on Budget, Finance and Administration, I:66
Committee on Regional Trade Agreements, I:66, 67
Committee on Trade and Development, I:65
Committee on Trade and Environment, I:66
General Council, I:63, 64
Meetings, I:67
Ministerial Conference
Cancun (2003), I:63
Doha (2001), I:62
Geneva (1998), I:61
Seattle (1999), I:61
Singapore (1996), I:60
organization of negotiations, I:67
Sectoral Councils and Subsidiary Bodies, I:64
World Trade Organization institutional framework
decision-making
accessions, I:70
amendments, I:70
consensus and voting, I:67–8
interpretations, I:68
waivers, I:69
decision-making difficulties, I:81–4
amendment procedures, I:85
legislative institutions relationship to DSB, I:83
routine decisions, I:81
ICITO, I:54
institutional issues, Uruguay Round Negotiations on
FOGS Group, I:55
new organization creation proposal, I:56
ITO, I:53
Marrakesh Agreement and
conflicts resolution between WTO Agreements, I:80
continuation of GATT practices (Article XVI:1), I:80
decision making in WTO, I:67–70
national laws conformation to WTO rules, requirements to, I:80
organizational issues, I:71–2
reservations, I:81
WTO functions, I:57–60
WTO governance structure, I:60–67
WTO Preamble, I:79
WTO scope, I:56–7
Membership, I:73–9
organizational issues
relations with IGO and NGO, I:72
WTO membership, I:73
WTO Secretariat, I:71
WTO status, I:71
pragmatic adaptation and its limitations

World Trade Organization institutional framework (*cont.*)
decision making process inadequacies, I:55
structural inadequacies, I:54, 55
transparency issues
external transparency, I:86
internal transparency, I:85
World Trade Organization law. *See also* dispute settlement
interaction with international law rules, I:1406, 1417
cautionary concerns, I:1409
"conflict" definition, I:1420
general international law, I:1407
General International Law rules on inter-play of norms, I:1420
non-WTO treaties, I:1408
panels obligation and General Conflict Clause constitution in favor of WTO rules, I:1421–3
WTO Agreement contradicting non-WTO Treaties, I:1418–20
WTO Law "contracting out" of General International Law, I:1418
international law referred to in the process of "interpreting" WTO terms, I:1411
international law referred to outside the process of treaty interpretation, I:1412
cautionary concerns, I:1417
general international law, I:1413
non-WTO treaties, I:1414–17
World Trade Organization Membership
accession of new members
accession approval, I:78
accession protocol and working party report, I:75–7
bilateral negotiations, I:75
Foreign Trade Regime Memorandum, I:74–5
China
challenges after accession to WTO, III:61–64
economic reforms during its bid for, III:51–55
legal reforms during its bid for, III:55–6
legal system, effect on, III:64–6
opportunities arising from, III:57–61
strategies after joining "Club", III:66–9
Egypt
attitude towards WTO, III:98
economic effects, III:96–7
legal effects, III:98
participation in WTO Dispute Settlement Process, III:99
political effects, III:97
social effects, III:98
strengths and weaknesses, Egyptian perspective on, III:98–9
non-application among Members (Article XIII), I:78
original members, I:73
withdrawal, I:79
World Trade Organization Secretariat
organizational issues, I:71
trade policy development and, I:35, 36
world trade regime, Uruguay Round Negotiation launching and, I:14

yellow light subsidies (ASCM), II:96, 101, 102. *See also* green light subsidies; red light subsidies

The World Trade Organization: Legal, Economic and Political Analysis

Volume III

The Editors

PATRICK F. J. MACRORY, Director, International Trade Law Center, International Law Institute, Washington, D.C.

ARTHUR E. APPLETON, Counsel, White & Case (Geneva)

MICHAEL G. PLUMMER, Professor of International Economics, Johns Hopkins University, SAIS-Bologna

Editorial Advisory Board

RICHARD BERNAL, Director General of the Caribbean Regional Negotiating Machinery

RAJ BHALA, University of Kansas Law School

MARICE CREMONA, Queen Mary's and Westfield College, University of London

ESPERANZA DURAN, Agency for International Trade Information and Cooperation, Geneva

ROBERT HERZSTEIN, Miller & Chevalier, Washington, D.C.

GARY HORLICK, Wilmer, Cutler, Pickering, Hale & Dorr, Washington, D.C.

ROBERT LITAN, The Brookings Institution, Washington, D.C.

MITSUO MATSUSHITA, Seikei University, Tokyo

ERNST-ULRICH PETERSMANN, European University Institute, Florence

ALAN SYKES, University of Chicago Law School

The World Trade Organization: Legal, Economic and Political Analysis

Volume III

Editors

Patrick F. J. Macrory
Director, International Trade Law Center, International Law Institute, Washington, D.C.

Arthur E. Appleton
Counsel, White & Case (Geneva)

Michael G. Plummer
Professor of International Economics, Johns Hopkins University, SAIS-Bologna

Springer

INTERNATIONAL LAW INSTITUTE ILI

Library of Congress Cataloging-in-Publication Data

The World Trade Organization : legal, economic and political analysis / editors Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer.
p. cm.
Includes bibliographical references and index.
ISBN 0-387-22685-0 (alk. paper)
1. World Trade Organization. 2. Foreign trade regulation. 3. Labor laws and legislation, International. 4. International trade. I. Macrory, Patrick F. J. II. Appleton, Arthur Edmond. III. Plummer, Michael G., 1959–

HF1385.C654 2005
382′.92—dc22
2004052576

© 2005 Springer Science+Business Media, Inc.
All rights reserved. This work may not be translated or copied in whole or in part without the written permission of the publisher (Springer Science+Business Media, Inc., 233 Spring Street, New York, NY 10013, USA), except for brief excerpts in connection with reviews or scholarly analysis. Use in connection with any form of information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now know or hereafter developed is forbidden.
The use in this publication of trade names, trademarks, service marks and similar terms, even if the are not identified as such, is not to be taken as an expression of opinion as to whether or not they are subject to proprietary rights.

Printed in the United States of America.

9 8 7 6 5 4 3 2 1 SPIN 11055563

springeronline.com

CONTENTS

Table of Cases vii

IV. COUNTRY REPORTS

65. Argentina 01
Julio J. Nogués

66. Canada 29
Michael Hart

67. China 47
Yaotian Wang and Guiquo Wang

68. Colombia 73
Felipe Jaramillo

69. Egypt 91
Adel M. Khalil

70. The European Union 111
Hugo Paemen

71. Indonesia 137
H.S. Kartadjoemena

72. Japan 171
Minoru Endo

73. Korea 183
Chulsu Kim

74. Mexico 215
Antonio Ortiz Mena L.N.

75. Mongolia 249
Damdin Tsogtbaatar

76. New Zealand 269
David J Walker

77. Russia 287
Julia Selivanova

78. Singapore 335
Barry Desker

79. South Africa 351
Gerhard Erasmus

80. The United States 379
Amelia Porges and Daniel M. Price

V. CONCLUDING THOUGHTS—THE WAY FORWARD

81. Pursuing Global Free Trade: A Small Open Economy Perspective 437
David J. Walker

82. Global Integration: Currents and Counter-Currents 457
Sylvia Ostry

APPENDIX—WTO MINISTERIAL DECLARATIONS AND DOHA WORK PROGRAMME DECISION ADOPTED BY THE GENERAL COUNCIL

Singapore Ministerial Declaration (13 December 1996) 475
Ministerial Declaration on Trade in Information Technology (Singapore 13 December 1996) 483
Geneva Ministerial Declaration (20 May 1998) 488
Geneva Declaration on Global Electronic Commerce (20 May 1998) 491
Doha Ministerial Declaration (14 November 2001) 492
Implementation Issues (Doha 14 November 2001) 503
Doha Declaration on the TRIPS Agreement and Public Health (14 November 2001) 510
Cancun Ministerial Statement (14 September 2003) 512
Doha Work Programme (1 August 2004) 513

Author Biographies 531

Index 539

TABLE OF CASES

WTO Decisions

Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil:
Report of the Panel, WT/DS241/R (2003): I:507, I:511, I:512, I:513, I:517, I:523

Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy:
Report of the WTO Panel (not appealed), WT/DS189/R (2001): I:506, I:513, I:514, I:515, I:516, I:517, I:1351

Argentina—Definitive Safeguard Measure on Imports of Preserved Peaches:
Report of the WTO Panel (not appealed), WT/DS238/R (2003): I:755, I:766, I:768, I:772, I:786

Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items:
Report of the WTO Panel, WT/DS56/R (1997): I:143, I:1224
Report of the Appellate Body, WT/DS56/AB/R (1998): I:109, I:111, I:1259, I:1260, I:1273, I:1336, I:1416

Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather:
Arbitration Under Article 21.3(c), WT/DS155/10 (2001): I:1352, I:1356

Argentina—Safeguard Measure on the Imports of Footwear:
Report of the WTO Panel, WT/DS121/R (1999): I:737, I:739, I:740, I:744, I:745, I:755, I:766, I:772, I:773, I:786, I:789, I:795, II:238, II:239, II:240
Report of the Appellate Body, WT/DS121/AB/R (1999): I:147, I:153, I:740, I:745, I:755, I:765, I:768, I:772, I:773, I:786, I:795, I:796, I:1303, I:1307, I:1332, I:1336, II:235, II:238, II:240, II:429

Australia—Measures Affecting the Importation of Salmon:
Report of the WTO Panel, WT/DS18/R (1998): I:246, I:253, I:263, I:266, I:271, I:281, I:284, I:287, I:288, I:289, I:290, I:296, I:307, I:309, I:313, I:314, I:316, I:317, I:320, I:321, I:323, I:324, I:354, I:1273
Report of the Appellate Body, WT/DS18/AB/R (1998): I:264, I:266, I:280, I:281, I:282, I:283, I:284, I:289, I:290, I:309, I:311, I:312, I:314, I:316, I:317, I:318, I:320, I:321, I:322, I:324, I:328, I:353, I:354, I:1216, I:1254, I:1265, I:1270, I:1273, I:1303, I:1336, I:1597, II:523, II:525, II:526, II:545
Arbitration Under Article 21.3(c), WT/DS18/9 (1999): I:1351, I:1356, I:1357, I:1358
Recourse to Article 21.5 by Canada, WT/DS18/RW (2000) I:248, I:265, I:282, I:285, I:297, I:321, I:323, I:324, I:1442, I:1443

Australia—Subsidies Provided to Producers and Exporters of Automotive Leather:
Report of the WTO Panel (not appealed), WT/DS126/R (1999): I:697, I:698, I:699, I:700, I:1175
Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW (2000): I:1345

Brazil—Export Financing Programme for Aircraft:
Report of the WTO Panel, WT/DS46/R (1999): I:1167, I:1187, I:1205, I:1218, I:1220
Report of the Appellate Body, WT/DS46/AB/R (1999): I:699, I:1184, I:1188, I:1205, I:1218, I:1243, I:1256, I:1273, I:1309, I:1310, I:1311, I:1317, I:1325, I:1336
Arbitration under Article 22.6 of DSU, WT/DS46/ARB (2000): I:1354, I:1363
Recourse by Canada to Article 21.5 of the DSU, WT/DS46/RW (2000), I:1189
Recourse by Canada to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS46/AB/RW (2000): I:1336, I:1350, I:1354
Second Recourse to Article 21.5 by Canada, WT/DS46/RW/2 (2001): I:698, I:1187, I:1189, I:1190, III:201
Recourse to Article 22.2 of the DSU, WT/DS46/16 (2000): I:1363

Brazil—Measures Affecting Desiccated Coconut:
Report of the WTO Panel, WT/DS22/R (1996): I:1206, I:1207
Report of the Appellate Body, WT/DS22/AB/R (1997): I:686, I:1066, I:1216, I:1244, I:1273, I:1336, II:548

Canada—Certain Measures Affecting the Automotive Industry:
Report of the WTO Panel, WT/DS139/R, WT/DS142/R (2000): I:458, I:462, I:463, I:467, I:468, I:469, I:483, I:886, I:888, I:890, II:234, II:237, II:238, II:657
Report of the Appellate Body, WT/DS/139/AB/R, WT/DS/142/AB/R (2000): I:463, I:483, I:690, I:697, I:699, I:875, I:884, I:885, I:886, I:888, I:889, I:1270, I:1273, I:1336, III:33, III:201
Arbitration Under Article 21.3(c), WT/DS139/12, WT/DS142/12 (2000): I:1352, I:1357, I:1358, I:1359

Canada—Certain Measures Concerning Periodicals:
Report of the WTO Panel, WT/DS/31/R (1997): I:103, I:875, I:876, I:879, I:881, I:1391, II:538, II:756, II:757, II:759, II:760, II:782
Report of the Appellate Body, WT/DS31/AB/R (1997): I:103, I:119, I:121, I:122, I:875, I:877, I:878, I:879, I:881, I:887, I:1066, I:1301, I:1332, I:1336, I:1391, II:474, II:475, II:539, II:756, II:757, II:758, II:759, II:763, II:764, II:766

Canada—Export Credits and Loan Guarantees for Regional Aircraft:
Report of the WTO Panel (not appealed), WT/DS222/R (2002): I:698, I:701, I:1187, I:1193

Canada—Measures Affecting the Export of Civilian Aircraft:
Report of the WTO Panel, WT/DS70/R (1999): I:1167, I:1175, I:1176, I:1186, I:1218, I:1219, I:1220, I:1397
Report of the Appellate Body, WT/DS70/AB/R (1999): I:689, I:692, I:697, I:699, I:717, I:1184, I:1185, I:1186, I:1256, I:1258, I:1261, I:1262, I:1263, I:1273, I:1301, I:1309, I:1310, I:1311, I:1317, I:1329, I:1336, I:1397
Recourse to Article 21.5 of the DSU, WT/DS70/RW (2000): I:1186, I:1193
Recourse to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS70/AB/RW (2000): I:1186, I:1336, I:1354, II:548

Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products:
Report of the WTO Panel, WT/DS103/R, WT/DS113/R (1999): I:212, I:595, I:1356, III:274

Report of the Appellate Body, WT/DS103/AB/R, WT/DS113/AB/R (1999): I:212, I:699, I:1317, I:1336, I:1351, I:1360, III:274
Recourse to Article 21.5 of the DSU, Report of the Panel, WT/DS103/RW, WT/DS113/RW (2001): I:212, I:213
Recourse to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS103/AB/RW, WT/DS113/AB/RW (2001): I:1336
Second Recourse to Article 21.5, Report of the Appellate Body, WT/DS103/AB/RW2, WT/DS113/AB/RW2 (2003): I:1258, I:1273, I:1336

Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain:
Report of the WTO Panel, WT/DS276/R (2004): I:149, I:150, I:458, I:459

Canada—Patent Protection for Pharmaceutical Products:
Report of the WTO Panel, (not appealed) WT/DS114/R (2000): I:1065, I:1066, I:1079, I:1094, I:1095, II:424, II:425, II:428, II:430, II:431, II:432, II:435, II:436, II:442, II:445, II:446, II:648
Arbitration Under Article 21.3(c), WT/DS114/13 (2000): I:1066, I:1351, I:1356, I:1357, I:1358, I:1359

Canada—Term of Patent Protection:
Report of the WTO Panel, WT/DS170/R (2000): I:1066, I:1097
Report of the Appellate Body, WT/DS170/AB/R (2000): I:1097, I:1320, I:1336, II:424, II:425
Arbitration Under Article 21.3(c), WT/DS170/10 (2001): I:1352, I:1359

Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products:
Report of the WTO Panel, WT/DS207/R (2002): I:203, I:206, I:755, I:766, I:775
Report of the Appellate Body, WT/DS207/AB/R (2002): I:1247, I:1257, I:1264, I:1273, I:1298, I:1307, I:1337

Chile—Taxes on Alcoholic Beverages:
Report of the WTO Panel, WT/DS87/R, WT/DS110/R (2000): I:103, I:1012
Report of the Appellate Body, WT/DS87/AB/R, WT/DS110/AB/R (2000): I:104, I:121, I:612, I:1269, I:1271, I:1273, I:1303, I:1336,
Arbitration Under Article 21.3(c), WT/DS87/15, WT/DS110/14 (2000): I:1351, I:1356, I:1357, I:1359, I:1360

Egypt—Definitive Anti-Dumping Measures on Steel Rebar From Turkey:
Report of the WTO Panel (not appealed), WT/DS211/R (2002): I:513, I:514, I:516, III:100

European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India:
Report of the WTO Panel, WT/DS141/R (2000): I:505, I:511, I:525, I:709, I:743, I:1220, I:1227, I:1239, I:1274, I:1444, I:1551, II:415, III:100
Report of the Appellate Body, WT/DS141/AB/R (2001): I:434, I:505, I:523, I:1260, I:1274, I:1294, I:1313, I:1337, I:1351, II:413, II:415, III:100
Recourse to Article 21.5, WT/DS/141/RW (2002): III:201
Recourse to Article 21.5, Report of the Appellate Body, WT/DS141/AB/RW (2003): I:1274, I:1303, I:1331, I:1337
Agreement under Art. 21.3 (b) of the DSU, WT/DS141/10 (2001): I:1358

European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings From Brazil:
Report of the Appellate Body, WT/DS219/AB/R (1998): I:504, I:1300, I:1337

European Communities—Conditions for the Granting of Tariff Preferences to developing Countries:
Report of the Appellate Body, WT/DS246/AB/R (2004): I:1544

European Communities—Customs Classification of Certain Computer Equipment:
Report of the WTO Panel, WT/DS62, WT/DS67, WT/DS68 (1998): I:1224, I:1375, I:1479, I:1480, I:1584, I:1595
Report of the Appellate Body, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (1998): I:112, I:1245, I:1246, I:1274, I:300, I:301, I:1302, I:1337, I:1411, I:1412, I:1480, I:1584, I:1585, I:1586, I:1589, I:1591, I:1592, I:1594, I:1595, I:1596, I:1597, II:478, III:130, III:201

European Communities—Measures Affecting Asbestos and Asbestos-Containing Products:
Report of the WTO Panel, WT/DS135/R (2000): I:406, I:844, I:1224, , I:1239, I:1375, I:1377, I:1379, I:1380, I:1394, II:653
Communication from the Appellate Body (Additional Procedures), WT/DS135/9 (November 8, 2000): I:1400, I:1444, II:564, II:644, II:645
Report of the Appellate Body, WT/DS135/AB/R (2001): I:83, I:119, I:120, I:171, I:245, I:256, I:377, I:378, I:383, I:389, I:390, I:393, I:395, I:405, I:406, I:409, I:844, I:845, I:1066, I:1237, I:1273, I:1301, I:1302, I:1307, I:1320, I:1323, I:1324, I:1326, I:1328, I:1332, I:1337, I:1380, I:1381, I:1382, I:1394, I:1400, I:1401, I:1437, I:1438, I:1445, I:1450, I:1452, I:1458, I:1586, I:1588, II:440, II:527, II:528, II:539, II:589, II:613, II:614, II:615, II:631, II:644, II:652, II:654, II:687, II:688, III:130

European Communities—Measures Affecting the Importation of Certain Poultry Products:
Report of the WTO Panel, WT/DS69/R (1998): I:134, I:206, I:207, I:592, I:595, I:596, I:597, I:598
Report of the Appellate Body, WT/DS69/AB/R (1998): I:136, I:206, I:207, I:592, I:596, I:598, I:1265, I:1270, I:1274, I:1302, I:1303, I:1320, I:1337, I:1351

European Communities—Measures Concerning Meat and Meat Products:
Report of the WTO Panel, WT/DS26/R, WT/DS48/R (1998): I:244, I:245, I:246, I:248, I:249, I:250, I:252, I:253, I:256, I:263, I:270, I:271, I:272, I:273, I:274, I:278, I:280, I:281, I:286, I:291, I:292, I:293, I:294, I:295, I:296, I:310, I:311, I:312, I:313, I:314, I:318, I:348, I:354, I:1066, I:1256, I:1274, I:1392, I:1402, I:1492, II:150, II:151, II:163, II:655, II:733, III:130
Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R (1998): I:160, I:250, I:256, I:257, I:260, I:261, I:262, I:264, I:265, I:266, I:267, I:268, I:272, I:273, I:274, I:276, I:277, I:278, I:280, I:281, I:282, I:283, I:284, I:286, I:287, I:288, I:290, I:291, I:292, I:293, I:294, I:295, I:296, I:298, I:299, I:301, I:304, I:305, I:307, I:308, I:309, I:310, I:311, I:314, I:315, I:316, I:318, I:319, I:346, I:349, I:351, I:352, I:353, I:354, I:384, I:394, I:399, I:788, I:1066, I:1248, I:1253, I:1254, I:1256, I:1258, I:1261, I:1262, I:1264, I:1265, I:1266, I:1274, I:1300, I:1302, I:1303, I:1317, I:1318, I:1328, I:1337, I:1343, I:1353, I:1392, I:1402, I:1412, I:1492, I:1495, II:142, II:150, II:151, II:163, II:439, II:440, II:523, II:524, II:525, II:529, II:544, II:545, II:546, II:648, II:649, II:655, II:733, III:129, III:130

Arbitration Under Article 21.3(c), WT/DS26/15, WT/DS48/13 (1998): I:1351, I:1356, I:1357, I:1358, I:1361, I:1366
Arbitration Under Article 22.6, WT/DS26/ARB, WT/DS48/ARB (1999): III:130

European Communities—Regime for the Importation, Sale and Distribution of Bananas:
Report of the WTO Panel, WT/DS27/R (1997): I:68, I:69, I:105, I:133, I:204, I:406, I:458, I:460, I:466, I:467, I:468, I:469, I:482, I:875, I:878, I:879, I:880, I:881, I:885, I:886, I:1230, I:1237, I:1239, I:1248, I:1256, I:1273, I:1274, I:1420, I:1486, I:1492, I:1493, I:1494, II:657, III:129, III:132
Report of the Appellate Body, WT/DS27/AB/R (1997): I:133, I:136, I:204, I:460, I:467, I:482, I:592, I:595, I:596, I:875, I:878, I:879, I:880, I:881, I:882, I:883, I:884, I:885, I:886, I:887, I:888, I:1066, I:1213, I:1214, I:1216, I:1230, I:1237, I:1239, I:1241, I:1245, I:1246, I:1248, I:1273, I:1274, I:1298, I:1300, I:1311, I:1313, I:1315, I:1316, I:1317, I:1318, I:1319, I:1320, I:1332, I:1337, I:1343, I:1350, I:1410, I:1492, I:1493, II:424, II:475, II:782, III:65, III:129, III:132
Arbitration Under Article 21.3(c) of the DSU, WT/DS27/15 (1998) I:1351, I:1356
Arbitration under Article 22.6 of the DSU, WT/DS27/ARB (2000): I:134, I:1111, I:1353, I:1354, I:1362, I:1363, I:1376, II:51 (has listed as 1999), II:424, III:129
Recourse to Article 21.5, Report of the Panel, WT/DS27/RW/ECU (2001), I:133, I:1353, I:1354, I:1497, I:1501

European Communities—Trade Description of Sardines:
Report of the Panel, WT/DS231/R (2002): I:377, I:398, I:399, I:406, I:407
Report of the Appellate Body, WT/DS231/AB/R (2002): I:377, I:378, I:384, I:385, I:396, I:397, I:398, I:399, I:400, I:405, I:1240, I:1260, I:1266, I:1268, I:1274, I:1299, I:1300, I:1307, I:1312, I:1320, I:1321, I:1322, I:1323, I:1325, I:1326, I:1327, I:1328, I:1332, I:1333, I:1337, I:1438, I:1439, I:1440, I:1447, I:1453

Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico:
Report of the WTO Panel, WT/DS60/R (1998): I:512
Report of the Appellate Body, WT/DS60/AB/R (1998): I:300, I:430, I:512, I526, I:1236, I:1245, I:1246, I:1274, I:1282, I:1313, I:1337, I:1420

Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico:
Report of the WTO Panel (not appealed), WT/DS156/R (2000): I:511, I:513, I:514, I:515, I:516, I:523, I:524, I:709, I:710, I:712, I:713, I:724, I:1207

India—Measures Affecting the Automotive Sector:
Report of the WTO Panel, WT/DS146/R, WT/DS175/R (2002): I:123, I:128 I:458, I:464, I:465, I:468, I:469, I:483, II:657
Report of the Appellate Body, WT/DS146/AB/R, WT/DS175/AB/R (2002): I:123, I:128, I466, I:483, I:1307, I:1327, I:1328, I:1337, III:201

India—Patent Protection for Pharmaceutical and Agricultural Chemical Products:
Report of the WTO Panel, WT/DS50/R (1997): I:1064, I:1216, I:1224, II:424, II:428, II:429, II:430, II:433, II:434, II:441
Report of the Appellate Body, WT/DS50/AB/R (1997): I:1064, I:1065, I:1205, I:1216, I:1217, I:1218, I:1225, I:1242, I:1245, I:1255, I:1264, I:1274, I:1302, I:1332, I:1337, I:1356, I:1422, II:424, II:433, II:434, II:441

India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products:
Report of the WTO Panel, WT/DS90/R (1999): I:65, I:84, I:595, I:1178
Report of the Appellate Body, WT/DS90/AB/R (1999): I:65, I:1236, I:1259, I:1262, I:1275, I:1303, I:1337, I:1351, I:1534

Indonesia—Certain Measures Affecting the Automobile Industry:
Report of the WTO Panel (not appealed), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (1998): I:103, I:126, I:300, I:440, I:458, I:459, I:461, I:462, I:466, I:467, I:469, I:470, I:471, I:472, I:482, I:702, I:703, I:734, I:1066, I:1178, I:1239, II:424, II:539, II:657, II:763, II:782, III:201
Arbitration Under Article 21.3(c), WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (1998): I:1351, I:1356, I:1357, I:1360

Japan—Measures Affecting Agricultural Products:
Report of the WTO Panel, WT/DS76/R (1998): I:246, I:302, I:306, I:321, I:323, I:324, I:346, I:350, I:351, I:354, I:1219
Report of the Appellate Body, WT/DS76/AB/R (1999): I:257, I:258, I:260, I:261, I:262, I:263, I:264, I:278, I:280, I:282, I:302, I:304, I:305, I:306, I:307, I:308, I:320, I:337, I:339, I:340, I:346, I:347, I:350, I:353, I:354, I:1263, I:1265, I:1275, I:1303, I:1337, I:1351, I:1453, I:1454, II:523, II:526, II:527, II:545, II:546

Japan—Measures Affecting Consumer Photographic Film and Paper:
Report of the WTO Panel (not appealed), W/DS44/R (1998), I:123, I:136, I:171, I:172, I:781, I:875, I:890, I:891, I:1237, I:1238, I:1241, I:1275, I:1375, I:1377, I:1382, I:1510, II:99, II:492, II:495, II:496, II:563

Japan—Measures Affecting the Importation of Apples:
Report of the WTO Panel, WT/DS245/AB/R (2003): I:246, I:257, I:258, I:259, I:285, I:286, I:287, I:289, I:290, I:302, I:303, I:338, I:347
Report of the Appellate Body, WT/DS245/AB/R (2003): I:262, I:280, I:285, I:287, I:303, I:304, I:348, I:351, I:353, I:354, I:1298, I:1303, I:1338,

Japan—Taxes on Alcoholic Beverages:
Report of the WTO Panel, WT/DS8R, WT/DS10/R, WT/DS11/R (1996): I:103, I:121, I:736, I:1588, II:758, II:763
Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996): I:80, I:103, I:105, I:116, I:117, I:118, I:120, I:121, I:122, I:300, I:301, I:315, I:389, I:390, I:877, I:878, I:883, I:1066, I:1178, I:1302, I:1319, I:1329, I:1338, I:1376, I:1422, I:1588, II:240, II:429, II:484, II:757, II:758, II:763
Arbitration Under Article 21.3(c), WT/DS8/15, WT/DS10/15, WT/DS11/13 (1997): I:1351, I:1356, I:1365, I:1366

Korea—Definitive Safeguard Measure on the Imports of Certain Dairy Products:
Report of the WTO Panel, WT/DS98/R (1999): I:755, I:767, I:769, I:770, I:771, I:772, I:774, I:775, I:776, I:781, I:782, I:783, I:784, I:785, I:788, I:789, I:790, I:791, I:795
Report of the Appellate Body, WT/DS98/AB/R (1999): I:153, I:206, I:542, I:755, I:758, I:768, I:774, I:782, I:786, I:787, I:790, I:1245, I:1246, I:1259, I:1265, I:1275, I:1303, I:1318, I:1338, I:1351, II:766, III:203

Korea—Measures Affecting Government Procurement:
Report of the WTO Panel (not appealed), WT/DS163/R (2000): I:1123, I:1130, I:1138, I:1139, I:1157, I:1224, I:1375, I:1377, I:1378, I:1407, I:1408, III:203

Korea—Measures Affecting Imported of Fresh, Chilled and Frozen Beef:
Report of the WTO Panel, WT/DS161/R, WT/DS169/R (2000): I:206, I:209, I:595, I:1275
Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R (2000): I:124, I:206, I:209, I:210, I:256, I:393, I:845, I:1275, I:1338, I:1351, II:528, II:638, II:652, III:203
Agreement under Art. 21.3(b), WT/DS161/12, WT/DS169/12 (2001): I:1358

Korea—Taxes on Alcoholic Beverages:
Report of the WTO Panel, W/DS75/R, W/DS84/R (1998): I:103, I:1012, I:1205, I:1223, I:1224, I:1227, I:1228, II:500
Report of the Appellate Body, W/DS75/AB/R, W/DS84/AB/R (1999): I:103, I:121, I:1265, I:1269, I:1275, I:1300, I:1301, I:1303, I:1338, III:203, II:500
Arbitration Under Article 21.3(c), WT/DS75/16, WT/DS84/14 (1999): I:1351, I:1356, I:1357, I:1358

Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States:
Report of the WTO Panel (not appealed), WT/DS132/R (2000): I:511, I:521, I524, I:709, I:711, I:719, I:724, I:746, I:747, I:1351,
Recourse to Article 21.5, Report of the Appellate Body, WT/DS132/AB/RW (2001): I:1204, I:1221, I:1222, I:1241, I:1243, I:1245, I:1253, I:1269, I:1270, I:1271, I:1275, I:1303, I:1318, I:1331, I:1338,

Mexico—Measures Affecting Telecommunications Services:
Report of the Panel (not appealed), WT/DS204/R (2004): I:874, I:891, I:892, I:893, I:997, I:999, I:1001, I:1002, I:1003, I:1004, I:1005, I:1006, I:1007, I:1013, I:1020, I:1032, I:1033, I:1036, I:1218

Thailand—Antidumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland:
Report of the WTO Panel, WT/DS122/R (2001): I:504, I:505, I:511, I:526, I:527, I:709, I:738, I:739, I:743
Report of the Appellate Body, WT/DS122/AB/R (2001): I:737, I:740, I:743, I:1246, I:1259, I:1262, I:1275, I:1309, I:1310, I:1311, I:1312, I:1320, I:1322, I:1328, I:1338, I:1351, I:1446, I:1447, I:1452

Turkey—Restrictions on Imports of Textile and Clothing Products:
Report of the WTO Panel, WT/DS34/R (1999): I:419, I:429, I:430, I:1224, I:1248, I:1275, II:227, II:235
Report of the Appellate Body, WT/DS34/AB/R (1999): I:1275, I:1338, I:1351, II:227, II:235, II:236, II:240

United States—Anti-Dumping Act of 1916:
Report of the Appellate Body, WT/DS136/AB/R, WT/DS162/AB/R (2000): I:141, I:500, I:510, I:512, I:1242, I:1256, I:1275, I:1317, I:1318, I:1338, I:1410
Arbitration Under Article 21.3(c), WT/DS136/11, WT/DS162/14 (2001): I:1351, I:1356, I:1357, I:1359

United States—Anti-Dumping and Countervailing Duty Measures on Steel Plate from India:
Report of the WTO Panel (not appealed), WT/DS206 (2002): I:516, I:525

United States—Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea:
Report of the WTO Panel (not appealed), WT/DS99/R (1999): I:512, I:522, I:723, I:742, III:202

United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan:
Report of the WTO Panel, WT/DS184/R (2001): I:521, I:526, I:714, I:715, I:745
Report of the Appellate Body, WT/DS184/AB/R (2001), I:501, I:513, I:516, I:520, I:527, I:714, I:737, I:738, I:739, I:745, I:746, I:1265, I:1276, I:1302, I:1325, I:1339, I:1412, III:201
Arbitration under Article 21.3(c) of the DSU, WT/DS184/9 (2001): I:1352

United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel and Strip from Korea:
Report of the WTO Panel (not appealed), WT/DS/179/R (2001): I:506, I:507, I:508, I:1351, III:202
Agreement under Art. 21.3 (b) of the DSU, WT/DS179/5 (2001): I:1358

United States—Continued Dumping and Subsidy Offset Act of 2000:
Report of the WTO Panel, WT/DS/ 217/R, WT/DS/234/R (2003): I:510, I:712, I:732, I:1230, III:202
Report of the Appellate Body, WT/DS217/AB/R, WT/DS/234/AB/R (2003): I:510, I:527, I:528, I:712, I:732, I:1247, I:1248, I:1276, I:1299, I:1300, I:1302, I:1304, I:1310, I:1311, I:1312, I:1317, I:1318, I:1320, I:1339, II:63, III:201, III:202

United States—Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products From Germany:
Report of the WTO Panel, WT/DS213/R (2002): I:742
Report of the Appellate Body, WT/DS213/AB/R (2002): I:512, I:742, I:1260, I:1266, I:1275, I:1298, I:1302, I:1303, I:1329, I:1338

United States—Countervailing Measures Concerning Certain Products from the European Communities:
Report of the WTO Panel, WT/DS212/R (2002): I:693, I:694
AB report: I:693, I:694, I:722, I:723, I:1297, I:1298, I:1299, I:1320, I:1323, I:1329, I:1338

United States—Definitive Safeguard Measures on Imports of Certain Steel Products:
Report of the WTO Panel, WT/DS248∼DS259/R (2003): I:755, I:766, I:767, I:768, I:769, I:770, I:773, I:786, I:787, I:791, I:794, III:202, III:274
Report of the Appellate Body, WT/DS248∼DS259/AB/R (2003): I:153, I:755, I:766, I:769, I:791, I:792, I:794, I:1303, I:1317, I:1318, I:1323, I:1325, I:1339, III:202

United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea:
Report of the WTO Panel, WT/DS/202/R (2001): I:755, I:766, I:768, III:202
Report of the Appellate Body, WT/DS/202/AB/R (2002): I:736, I:755, I:774, I:775, I:783, I:789, I:795, I:1224, I:1327, I:1328, I:1339, II:234, II:235, II:238, III:202

United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities:

Report of the WTO Panel, WT/DS166/R (2000): I:737, I:744, I:745, I:755, I:766, I:768, I:769, I:770, I:772, I:773, I:774, I:781, I:783, I:789, I:791, I:794

Report of the Appellate Body, WT/DS166/AB/R (2000): I:206, I:755, I:772, I:774, I:783, I:791, I:794, I:1263, I:1264, I:1265, I:1276, I:1303, I:1339, I:1351, II:234, II:235, II:238

United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*:*

Report of the Appellate Body, WT/DS257/AB/R (2004): I:690, I:694, I:716, I:1301, I:1304, I:1314, I:1323, I:1327, I:1328, I:1339

United States—Final Dumping Determination on Softwood Lumber from Canada:

Report of the Appellate Body, WT/DS264/AB/R (2004): I:504 I:507

United States—Import Measures on Certain Products from the European Communities:

Report of the WTO Panel, WT/DS165/R (2000): I:565, I:1354, I:1355, I:1361, I:1362

Report of the Appellate Body, WT/DS165/AB/R (2000): I:1271, I:1275, I:1338, I:1355 I:1361, I:1362

United States—Import Prohibition of Certain Shrimp and Shrimp Products:

Report of the WTO Panel, WT/DS58/R (1998): I:844, I:1239, I:1393, I:1399, I:1431, II:147, II:149, II:150, II:151, II:163, II:165, II:166, II:637

Report of the Appellate Body, WT/DS58/AB/R (1998): I:80, I:83, I:154, I:163, I:164, I:165, I:300, I:374, I:383, I:844, I:886, I:1069, I:1075, I:1226, I:1238, I:1239, I:1240, I:1261, I:1276, I:1297, I:1298, I:1307, I:1316, I:1317, I:1320, I:1321, I:1322, I:1332, I:1339, I:1356, I:1379, I:1386, I:1393, I:1399, I:1412, I:1429, I:1430, I:1431, I:1432, I:1433, I:1434, I:1435, I:1436, I:1441, I:1442, I:1443, I:1447, I:1457, II:147, II:149, II:150, II:151, II:163, II:165, II:166, II:414, II:436, II:514, II:521, II:522, II:537, II:540, II:560, II:564, II:587, II:588, II:589, II:610, II:611, II:613, II:614, II:616, II:637, II:643, II:652, II:653, II:678, II:691

Recourse to Article 21.5, WT/DS58/RW (2001): I:165, I:1225, I:1226, I:1330, I:1331, I:1416, I:1421, II:560

Recourse to Article 21.5 of the DSU, Appellate Body Report, WT/DS58/AB/RW (2001): I:165, I:383, I:392, I:1226, I:1307, I:1322, I:1330, I:1331, I:1339, II:523, II:540, II:587, II:615, II:637, II:653, II:678, II:680, II:691

United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom:

Report of the WTO Panel, WT/DS138/R (2000): I:693, I:1276, I:1395, I:1443

Report of the Appellate Body, WT/DS138/AB/R (2001): I:83, I:352, I:692, I:693, I:717, I:722, I:723, I:731, I:737, I:738, I:1276, I:1299, I:1300, I:1304, I:1321, I:1328, I:1332, I:1339, I:1395, I:1399, I:1436, I:1437, I:1439, I1440, I:1441, I:1449, I:1451, I:1452, I:1455, I:1457, II:101, II:564, II:644

United States—Investigation of the International Trade Commission in Softwood Lumber from Canada:

Report of the WTO Panel, WT/DS277/R (2004): I:741, I:746, I:747, I:748

United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services

Report of the WTO Panel, WT/DS285/R (2004): I:874

United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India:
Report of the WTO Panel, WT/DS33/R (1997): I:422, I:424, I:425, I:427, I:428, I:429, II:408, II:413, II:414
Report of the Appellate Body, WT/DS33/AB/R (1997): I:346, I:348, I:422, I:428, I:467, I:864, I:1258, I:1259, I:1270, I:1271, I:1276, I:1302, I:1313, I:1339, I:1410, I:1413, II:408, II:413, II:414

United States—Measures Treating Export Restraints as Subsidies:
Report of the WTO Panel (not appealed), WT/DS194/R (2001): I:688, I:691, I:1190

United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada:
Report of the WTO Panel (not appealed), WT/DS236/R (2002): I:690, I:694, I:719, I:721, I:722

United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear:
Report of the WTO Panel, WT/DS24/R (1996): I:422, I:424, I:425, I:426, I:427, I:428, I:429, I:1224, I:1228, II:408, II:413, II:415
Report of the Appellate Body, WT/DS24/AB/R (1997): I:135, I:422, I:423, I:1319, I:1339, I:1361, II:408, II:413, II:415

United States—Rules of Origin for Textiles and Apparel Products:
Report of the WTO Panel (not appealed), WT/DS243/R (2003): I:433, I:603, I:612, I:613, I:614

United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia:
Report of the WTO Panel, WT/DS177/R, WT/DS178/R (2000): I:755, I:767, I:768, I:771, I:772, I:774, I:786, I:789, III:274
Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R (2001): I:153, I:206, I:428, I:738, I:740, I:743, I:745, I:746, I:755, I:771, I:772, I:774, I:789, I:790, I:791, I:1267, I:1276, I:1307, I:1317, I:1325, I:1339, I:1351, III:274

United States—Section 110(5) of U.S. Copyright Act:
Report of the WTO Panel (not appealed), WT/DS160/R (2000): I:1079, I:1083, I:1084, I:1085, I:1239, I:1276, I:1351, I:1441, I:1443, I:1444, II:425, II:426, II:428, II:430, II:431, II:436, II:442, II:656
Recourse to Arbitration under Article 25 of the DSU,WT/DS160/ARB25/1 (2001): I:1112, I:1342, I:1366, II:214, II:656
Arbitration Under Article 21.3(c), WT/DS160/12 (2001): I:1352, I:1357, I:1358

United States—Section 211 Omnibus Appropriations Act of 1998:
Report of the WTO Panel, WT/DS176/R (2001): I:1063, I:1226, II:430
Report of the Appellate Body, WT/DS176/AB/R (2002): I:1057, I:1063, I:1111, I:1265, I:1276, I:1301, I:1320, I:1339, II:425, II:426, II:431

United States—Section 301–310 of the Trade Act of 1974:
Report of the WTO Panel (not appealed), WT/DS152/R (1999): I:81, I:1224, I:1430, II:422, II:437, II:626, III:201

United States—Standards for Reformulated and Conventional Gasoline:
Report of the WTO Panel, WT/DS2/R (1996): I:103, I:118, I:256, I:394, I:409, I:844, I:1391, II:438, II:587, II:588
Report of the Appellate Body, WT/DS2/AB/R (1996): I:103, I:154, I:155, I:156, I:157, I:162, I:163, I:300, I:315, I:844, I:877, I:886, I:1258, I:1276, I:1302, I:1305, I:1319, I:1330, I:1339, I:1361, I:1393, I:1406, I:1422, II:438, II:439, II:514, II:519, II:520, II:538, II:540, II:563, II:588, II:589, II:613, II:652

United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan
Report of the Appellate Body, WT/DA244/AB/R (2004): I:522, I:1301, I:1338

United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina:
Report of the WTO Panel, WT/DS268/R (2004): I:523

United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan:
Report of the WTO Panel, WT/DS192/R (2001): I:422, I:424, I:425, I:426, I:429
Report of the Appellate Body, WT/DS192/AB/R (2001): I:422, I:426, I:429, I:1259, I:1266, I:1275, I:1302, I:1338, I:1408, I:1412, II:413, II:416

United States—Tax Treatment for Foreign Sales Corporations:
Report of the Appellate Body, WT/DS108/AB/R (2000): I:213, I:689, I:690, I:698, I:699, I:1225, I:1253, I:1275, I:1301, I:1318, I:1325, I:1326, I:1327, I:1328, I:1338, I:1385, I:1412, II:95, III:129, III:130
Arbitration under Article 22.6, WT/DS108/ARB (2002): I:1366, III:129, III:131
Recourse to Article 21.5, Report of the Panel, WT/DS108/RW (2001): III:131
Recourse to Article 21.5, Report of the Appellate Body, WT/DS108/AB/RW (2002): I:698, I:1257, I:1276, I:1279, I:1313, I:1314, I:1320, I:1325, I:1338, III:131

GATT Panel and Working Party Reports

Australian Subsidy on Ammonium Sulphate, BISD, 2nd Supp. 188 (Adopted April 3, 1950): I:103, I:104, I:171, I:1374, I:1375, I:1376

Border Tax Adjustments, Report of the Working Party, BISD, 18th Supp. 97 (Adopted December 2, 1970): I:103, I:104, I:118

Brazil—Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, BISD, 41st Supp. 467 (Adopted by the SCM Committee, April 28, 1994): I:739

Brazilian Internal Taxes, Report of the Working Party, BISD, 2nd Supp. 181 (1949): I:103

Canada—Administration of the Foreign Investment Review Act, BISD, 30th Supp. 140 (Adopted February 7, 1984): I:123, I:154, I:444, I:445, I:464, I:482, II:657

Canada—Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies, BISD, 35th Supp. 37 (Adopted March 22, 1988): I:112, I:150

Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, BISD, 39th Supp. 27 (Adopted February 18, 1992): I:117, I:135, I:149

Canada—Import Restrictions on Ice Cream and Yoghurt, BISD, 36th Supp. 68 (Adopted December 5, 1989): I:129, I:130

Canada—Import Quotas on Eggs, BISD 23rd Supp. 91 (Adopted February 17, 1976): I:197

Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, BISD, 35th Supp. 98 (Adopted March 22, 1988): I:129, I:155, I:162, I:163, I:375, II:586

Canada—Measures Affecting the Sale of Gold Coins, L/5863 (September 17, 1985) (unadopted): I:103, I:126

Canada—Withdrawal of Tariff Concessions, BISD, 25th Supp. 42 (Adopted May 17, 1978): I:109, I:110

Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber, 36th Supp. BISD 167 (Adopted July 19,1989): I:103, I:105, I:1584, I:1587, I:1588, I:1592, I:1593, I:1594, I:1598, I:1599

Canadian Countervailing Duties on Grain Corn from the United States, SCM/140 (Adopted by the SCM Committee, March 26, 1992): I:739, I:740, I:744, I:745

Ceylon—Article XVIII Applications, BISD, 6th Supp. 112 (1957): I:1532

Ceylon—Notifications Under Article XVIII:C, BISD, 6th Supp. 75 (1958): I:1535

DISC—United States Tax Legislation, Report of the Working Party, BISD 23rd Supp. 98 (presented to the Council of Representatives on November 12, 1976): II:95

European Communities—Refunds on Exports of Sugar, complaint by Australia, BISD 26th Supp. 290 (Adopted November 6, 1979): I:198

European Communities—Refunds on Exports of Sugar, complaint by Brazil, BISD 27th Supp. 69 (Adopted November 10, 1980): I:198, I:1536

European Community—Anti-Dumping Duties on Audio Tapes in Cassettes Originating from Japan ADP/136(April 28, 1995) (unadopted): I:498, I:507

European Community—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, BISD 42nd Supp. 17 (Adopted by the ADP Committee, October 30, 1995): I:498, I:525

European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, L/5776 (February 7, 1985) (unadopted): I:171, I:1374, I:1375

European Economic Community—Follow-Up on the Panel Report "Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins", BISD 39th Supp. 91 (March 31, 1992) (unadopted): I:202, I:1375, I:1376, III:416

European Economic Community—Measures On Animal Feed Proteins, L/4599—25S/49 (Adopted March 14, 1978): I:103, I:104, I:122, I:1588

European Economic Community—Member States' Import Regimes for Bananas (Bananas I), DS/32/R (June 3, 1993) (unadopted): III:129

European Economic Community—Member States' Import Regimes for Bananas (Bananas II), DS38/R (February 11,1994) (unadopted): I:460, III:129

European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, BISD, 37th Supp. 86 (Adopted January 25, 1990): I:126, I:128, I:171, I:201, I:206, I:686, I:1237, I:1273, I:1374, I:1377, II:95

European Economic Community—Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, L/5778 (February 20, 1985) (unadopted): I:171, I:1374, I:1375

European Economic Community—Programme on Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables, BISD, 25th Supp. 68 (Adopted October 18, 1978): I:128, I:197, I:593

European Economic Community—Quantitative Restrictions Against Imports of Certain Products from Hong Kong, BISD, 30th Supp. 129, (Adopted July 12, 1983): II:585

European Economic Community—Regulation on Imports of Parts and Components, BISD, 37th Supp. 132, (Adopted May 16, 1990): I:116, I:497, I:499

European Economic Community—Restrictions on Apples from Chile, BISD, 27th Supp. 98 (adopted November 10, 1980): I:197

European Economic Community—Restrictions on Imports of Dessert Apples, complaints by Chile, BISD 36th Supp. 93 (Adopted June 22, 1989): I:130, I:134, I:136, I:197, I:593, I:1536, I:1537, I:1591

European Economic Community—Restrictions on Imports of Apples, complaints by the United States, BISD, 36th Supp. 135 (Adopted June 22, 1989): I:133, I:593

European Economic Community—Subsidies on Exports of Pasta Products, SCM/43 (May 19, 1983) (unadopted): I:199

European Economic Community, Subsidies on Export of Wheat Flour, SCM/42 (March, 21, 1983) (unadopted): I:198, I:199

Exports of Potatoes to Canada, BISD, 11th Supp., at 88 (Adopted November 16, 1962): I:540

France—Assistance to Exports of Wheat and Wheat Flour, Complaint by Australia, BISD, 7th Supp. 46 (Adopted November 21, 1958): I:197

Greece—Special Import Taxes, BISD, 1st Supp. 48 (Adopted November 3, 1952): I:117

Italian Discrimination Against Imported Agricultural Machinery, BISD, 7th Supp. 60 (Adopted October 23, 1958): I:123, I:126, I:880, II:500, II:585

Italian Restrictions Affecting Imports from Israel, BISD, 10 Supp. 130 (Adopted December 9, 1961): II:584

Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD, 34th Supp. 83 (Adopted November 10/11, 1987): I:103, I:117, I:118, I:120, I:145

Japan—Measures on Imports of Leather, BISD, 31st Supp. 94, (Adopted May 15/16, 1984): I:170, I:593, II:585

Japan—Restrictions on Imports of Certain Agricultural Products, BISD, 35th Supp. 163 (Adopted February 2, 1988): I:130, I:135, I:161, I:196, I:197

Japan-Trade in Semi-conductors, BISD, 35th Supp. 116 (Adopted May 4, 1988): I:128, I:171, I:761, I:1374, I:1375, I:1386, II:495

Korea—Antidumping Duties on Imports of Polyacetal Resins from the United States, BISD, 40th Supp. 205 (Adopted by the ADP Committee, April 27, 1993): I:497, I:736, I:746, III:201

New Zealand—Imports of Electrical Transformers from Finland, BISD, 32nd Supp. 55 (Adopted July 18, 1985): I:497

Norway—Restrictions on Imports of Certain Textile Products, BISD, 27th Supp. 119 (Adopted June 18, 1980): I:132, I:758

Norway—Restrictions on Imports of Apples and Pears, BISD, 36th Supp. 306 (Adopted June 21/22, 1989): I:54

Republic of Korea—Restrictions on Imports of Beef, BISD, 36th Supp. 268 (Adopted November 7, 1989): I:150, I:162, I:1534, III:191, III:201

Spain—Measures Concerning Domestic Sale of Soyabean Oil, L/5142 (June 17, 1981) (unadopted): I:103

Spain—Tariff Treatment of Unroasted Coffee, L/5135—28S/102 (Adopted June 11, 1981): I:103, I:103, I:105, I:1589, I:1592, I:1593, I:1594

Swedish Antidumping Duties, BISD, 3rd Supp. 81 (Adopted February 26, 1955): I:141, I:497

Thailand—Restrictions on Importation of and National Taxes on Cigarettes, BISD, 37th Supp. 200 (Adopted November 7, 1990): I:149, I:155, I:158, I:159, I:256, I:391, I:393, I:595, II:439, II:528, II:540, II:615, II:652, II:687, II:688

Treatment by Germany of Imports of Sardines, BISD, 1st Supp. 53 (Adopted October 31, 1952): I:103, I:171, I:1374, I:1375, I:1376, I:1592, I:1597, I:1598

United States—Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico, ADP/82, (September 7, 1992) (unadopted): I:497, I:509, I:510, I:711, I:718, III:233

United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, BISD, 38th Supp. 45 (Adopted July 11, 1991): I:142, I:686, II:95

United States—Customs User Fee, BISD, 35th Supp. 245 (Adopted February 2, 1988): I:102, I:111, I:143

United States—Definition of Industry Concerning Wine and Grape Products, BISD, 39th Supp. 436 (Adopted by the SCM Committee, 28 April 1992): I:103

United States—Denial of Most-favoured-nation Treatment as to Non-Rubber Footwear from Brazil, BISD, 39th Supp. 128 (Adopted June 19, 1992): I:95, I:102, I:103, I:103, I:124, I:683, I:1542

United States—Imports of Certain Automotive Spring Assemblies, BISD, 30th Supp. 107 (Adopted May 26, 1983): I:156

United States—Imports of Sugar from Nicaragua, BISD, 31st Supp. 67 (Adopted March 13, 1984): I:133, I:1575, I:1576

United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, BISD 41st Supp. 229 (Adopted by the ADP Committee, April 28, 1994): I:498, I:507, I:510

United States—Imposition of Anti-dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, ADP/47 (August 20, 1990) (unadopted): I:497, I:510, I:710, I:711

United States—Imposition of Countervailing Duty on Imports of Fresh and Chilled Atlantic Salmon from Norway, BISD, 41st Supp. 2 (Adopted by the SCM Committee, April 27, 1994): I:497, I:711, I:739

United States—Manufacturing Clause, BISD, 31st Supp. 75 (Adopted May 15/16, 1984): I:54

United States—Measures Affecting Alcoholic and Malt Beverages, BISD, 39th Supp. 206 (Adopted June 19, 1992): I:103, I:117, I:121, I:126, II:538, II:759

United States—Measures Affecting Imports of Softwood Lumber From Canada, BISD, 40th Supp. 358 (Adopted October 27, 1993): I:214, I:709, I:710

United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco, DS44/R, 41S/131 (Adopted October 4, 1994): I:117, I:125

United States—Prohibition of Imports of Tuna and Tuna Products from Canada, BISD, 29th Supp. 91 (Adopted February 22, 1982): I:130, I:155, I:156, I:157, I:162, I:163, I:196,

United States—Restrictions on Imports of Tuna, BISD, 39th Supp. 155 ((September 3, 1991) (unadopted): I:144, 1:155, I:162, I:391, II:139, II:147, II:149, II:150, II:151, II:162, II:163, II:166, II:533, II:538, II:585, II:586, II:652, II:653, III:233, III:419

United States—Restrictions on Imports of Tuna, DS 29/R, (June 10, 1994) (unadopted): II:615

United States—Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, BISD, 37th Supp. 228 (adopted on November 7, 1990): I:171, I:1374, I:1375

United States—Section 337 of the Tariff Act of 1930, BISD, 36th Supp. 345 (Adopted November 7, 1989): I:117, I:124, I:154, I:155, I:156, I:158, I:160, I:161, I:1067, II:439, II:445

United States—Taxes on Automobiles, DS31/R (October 11, 1994) (unadopted): I:103, I:391, I:1390, II:538

United States—Taxes on Petroleum and Certain Imported Substances, BISD, 34th Supp.136 (Adopted June 17, 1987): I:103, I:117, I:170, I:868, I:1516, III:233

United States—Trade Measures Affecting Nicaragua, Report of the Panel (unadopted), L/6053, (October 13, 1986): I:1576, I:1577

Uruguayan Recourse to Article XXIII, BISD, 11th Supp. 95 (Adopted November 16, 1962): I:171, I:1374, I:1375

Part IV Country Reports

CHAPTER 65

ARGENTINA

Julio J. Nogués*

TABLE OF CONTENTS

I. Introduction 5
II. The Role of Argentina in International Trade and in the GATT 5
III. The Uruguay Round Negotiations 6
A. Intellectual Property Rights: The Case of Patents for Pharmaceutical Drugs 7
1. Rent-Seeking by Pharmaceutical Drug Companies 7
2. Estimating the Value of Concessions in Patents 9
(a) Transfer of Rents 9
(b) Impact on Foreign Direct Investment and Trade 11
B. Services 12
1. Privatization of Argentina's Service Industries 12
2. Estimating the Value of Concessions in Services 13
3. Trade in Services 14
4. Services-Related Inflows of FDI 15
C. Trade in Goods 17
1. Manufacturing 17
2. Agriculture 18
D. Summing-up 18
IV. Costs of Agricultural Protectionism for Argentina 19
A. Agricultural Protectionism and Financial Costs 19
B. Other Costs of Agricultural Protectionism 21
C. Summing-up with a Proposal 21
V. Regional Trade Negotiations between MERCOSUR and the EU 22
A. Background 22
B. Differing Negotiating Goals and Strategies 22
C. The EU Proposal 23
D. Summary 24
VI. Argentina's Prospects in a New Multilateral Trade Round 25
VII. Concluding Remarks 26
Figures and Tables
Figure 1 Trade Output Rations in a Sample of Countries, 1999 6

* Consultant and Professor, School of Government, Universidad Di Tella, Buenos Aires, Argentina. I appreciate financial support from the World Bank as well as the suggestions made by Mr. Patrick Macrory on a preliminary version of this paper. This paper was drafted before the devaluation of the peso implemented in early 2002 and in the final version I have added some clarifications and references to the current crisis. Nevertheless the essential messages of the paper, such as the fact that weak negotiating countries can end up paying a very high price, are not affected by recent events.

Figure 2 Participation of Foreign Banks in Argentina's Financial System 13
Figure 3 Trade in Services 14
Figure 4 Stock of FDI by Country of Origin, Argentina 1998 16
Figure 5 Country Risk and Interannual GDP growth rate 20
Table 1 Sales of Patented Pharmaceutical Products in Some Developing Countries, 1988 10
Table 2 Stock and Profits of FDI by Economic Sector, Argentina 1992–1998 16
Table 3 Stocks and Profits of FDI by Economic Sector, Argentina 1992, 1995 and 1998 17

I. Introduction

After decades of being marginal players in the multilateral trade negotiations, developing countries, including Argentina, decided to participate actively in the Uruguay Round. The main purpose of this chapter is to measure the imbalance between the concessions given and those received by Argentina in these negotiations. I conclude that the value of the concessions given has been far greater than the value of the concessions that Argentina received. Other subjects discussed in this chapter include an analysis of the economic consequences of this imbalance and the prospects for Argentina in a new multilateral round.

The first message I want to convey is that although there are several factors explaining the unbalanced outcome, Argentina's weak negotiating strategy was an important element. The evidence from Doha indicates that the leadership has not yet understood this point, and the economic analysis presented in this chapter indicates that the costs of a weak negotiating strategy are very high.

The second lesson is that protectionism increases the degree of incoherence between the multilateral trading system and the international financial system in ways that have so far not been studied in depth. The analysis presented here indicates that by reducing the exports of efficient producers, agricultural protectionism worsens their solvency indicators. This in turn, increases the level of country risk and the structure of domestic interest rates, therefore slowing growth and the capacity to service debt.

The chapter is organized as follows. Part II presents a brief description of Argentina's long-run trade performance as well as its role in the multilateral system prior to the Uruguay Round. Part III provides a quantitative measurement of the value of the concessions given and concessions received in the Uruguay Round negotiations, while Part IV analyses the economic effects of this imbalance. Part V offers a preliminary discussion of the interests of Argentina in ongoing regional trade negotiations, particularly between MERCOSUR and the EU. Part VI includes a discussion of the prospects for Argentina in a new round. Finally, I present brief concluding remarks.

II. The Role of Argentina in International Trade and in the GATT

At the start of the twentieth century Argentina was an active participant in the globalization process that was taking place at the time. The economic crisis of the 1930s put an end to this process. The crisis was deepened by the infamous U.S. Smoot-Hawley Tariff Act of 1930, and world trade is estimated to have fallen by around sixty percent between 1929 and 1933.[1]

Argentina suffered the consequences of this crisis, and like other countries, erected high barriers to imports. Unlike many other countries, however, it continued to remain inward-oriented for many decades after the Second World War.[2] Domestically, this ideology and its associated policies were fueled by economic theory and by rent-seeking groups, including the expanding military-industrial complex. With respect to economics, the trade policies of Argentina and most Latin American economies were influenced for decades by Raul Prebisch's famous theories of import-substitution and the secular decline of the terms of trade of primary commodity exporting countries. After World War II, their own domestic policies, coupled with the increasing agricultural protectionism of

[1] JAGDISH BHAGWATI, PROTECTIONISM 21 (1990).

[2] *See* for example the excellent work by CARLOS DIAZ ALEJANDRO, ESSAYS ON THE ECONOMIC HISTORY OF THE ARGENTINE REPUBLIC (1970).

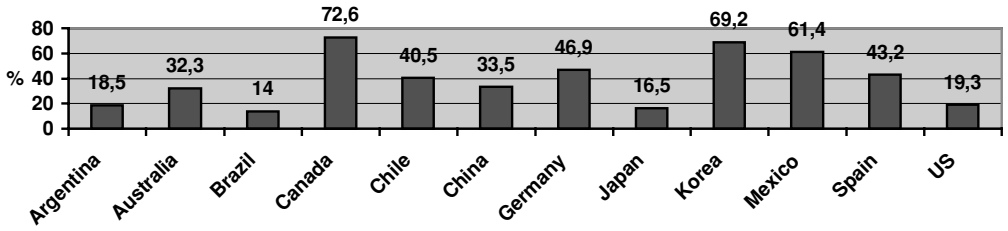


Figure 1: Trade Output Ratios in a Sample of Countries, 1999
Source: Author's elaboration based on World Bank data.

the richer countries, meant that Latin American countries remained quite marginalized from international trade flows. This is one of the most important factors explaining the relatively poor growth performance of the region during the last thirty years.

Argentina's trade-output ratio (ratio of exports plus imports of goods to GDP) declined dramatically as a result of the drastic shift in its trade policies. Thus, while the ratio fluctuated between 35 percent and 45 percent during the 1920s, by the late 1940s it had declined to fifteen percent. From then until the end of the 1980s (in which decade the Government implemented the most protectionist policies for years), the trade-output ratio fluctuated around ten percent.

Inward-looking policies isolated Argentina from the growth of international trade that began in the late 1940s when the GATT was created.[3] Argentina was admitted to the GATT in 1967, but it was not an active participant in the Tokyo Round of multilateral trade negotiations that took place in the 1970s. For example, Argentina had bound only seventeen percent of its tariff lines prior to the Uruguay Round.[4]

As a consequence of its inward-looking policies and accompanying trade-distorting measures, such as the nationalization of public service companies and increasing fiscal deficits, Argentina lost competitiveness and its long-run potential growth rate declined. For example, while the per capita income gap between Argentina and the the richest country at that time (the United Kingdom) in 1900 was forty percent, the difference, this time with the United States, had widened to seventy percent by 1999.

Argentina remains a marginal player in international trade despite the fact that several years ago it completed an important reduction of trade barriers initiated in the late 1980s. Figure 1 shows that the trade-output ratios of Argentina and Brazil are the lowest in a sample of countries. This occurred in spite of the fact that Argentina's reform policies led to a doubling of the value of its exports during the 1990s.[5]

III. The Uruguay Round Negotiations

Both the preamble to the GATT and Article XXVIII bis of the Agreement state that multilateral trade negotiations should be conducted "... on a reciprocal and mutually advantageous basis ...". I show in this part that the results of the Uruguay Round ("UR")

[3] For a discussion of the early years of the GATT and the trade liberalization it led to, *see* Bhagwati, *supra*, note 1.

[4] Michael J. Finger, Merlinda Ingco and Ulrich Reincke, The Uruguay Round: Statistics on Tariff Concessions Given and Received 24 (1996).

[5] It should be said that after the 2002 devaluation, Argentina's dollar-based GDP has fallen, which in turn implies an increase of the trade-output ratio. Eight months after the devaluation, the country is still adjusting to the crisis; in this period exports have declined by eight percent and imports by a staggering sixty percent. Therefore it is still risky to say where the new equilibrium will lie after the adjustment has been completed.

for Argentina are clearly unbalanced in that the concessions it gave to its trading partners, particularly OECD countries, far outweigh those it received from them. I do this by quantifying the economic value of concessions in intellectual property, in services, and in trade in goods.

Argentina is not alone. For many developing countries the UR did not result in a balanced exchange of concessions.[6] Why did this occur and what are the consequences? I believe that one of the underlying reasons for this outcome in the case of Argentina and other countries was that their political leaders used the UR not as an instrument to open foreign markets, but mainly as a means to lock in unilateral economic liberalization policies. There were other factors, including, as I will argue, powerful rent-seeking groups from industrial countries that have undermined the multilateral trading system and forced developing countries to bind concessions against their will. These forces also explain part of the unbalanced outcome.

In quantifying the balance, I start by looking at the concessions given by developing countries with respect to intellectual property rights and trade in services, and then discuss the concessions given and received with respect to trade in goods.

A. Intellectual Property Rights: The Case of Patents for Pharmaceutical Drugs

Despite the resistance of some developing countries, the industrialized countries had sufficient negotiating power to include intellectual property rights in the UR, a new subject which resulted in the Agreement on Trade-Related Intellectual Property Rights ("TRIPS"). As a result, there is now under way a policy reform process that is increasing the strength of intellectual property rights ("IPRs") in many developing countries to a level that is closer to the standards of the industrialized countries. This has occurred despite the lack of any theoretical or empirical analysis to show that policy reforms induced by the TRIPS will increase world welfare, or the welfare of developing countries.[7] Why did this occur? What will be the impact on Argentina?

1. Rent-Seeking by Pharmaceutical Drug Companies

One of the main reasons why the patent section of the TRIPS takes the form that it does can be traced to the power of rent-seeking groups associated with certain forms of innovation and their intellectual protection, including pharmaceutical drugs.[8] Given the size of the pharmaceutical market and the economic interests at stake, I concentrate my remarks on the impact of TRIPS on this sector.[9] Also, for other forms of IPRs such as trademarks and copyrights, the differences in views between industrialized and developing countries on what should be the length and strength of protection are not as significant as they are in the case of pharmaceutical drugs. What was the strategy of the international pharmaceutical drug companies that enabled them to impose their patent policies on developing countries?

[6] Michael J. Finger and Julio J. Nogués, *The Unbalanced Uruguay Outcome: The New Areas in Future WTO Negotiations*, 25(3) THE WORLD ECONOMY 321 (2002).

[7] *See,* in this respect, Chapter 54 of this book.

[8] As I show below, pharmaceutical drug markets in several developing countries generate significant rents.

[9] The pharmaceutical industry is one of the few industries for which patent protection is critical as an incentive for investing in R&D. Pharmaceutical drug companies have one of the highest ratios of R&D to sales and most drug products can be easily copied. Patents are less significant in many other industries in which the incentives to innovate are essentially market-based, such as being the first to market. Richard Levin, Richard, Alvin Klevorick, Richard Nelson and Sidney Winter, *Appropriating the Returns from Industrial Research and Development*, Brookings Papers on Economic Activity**,** No. 3 (1987).

In March 1987, only a few months after the UR had been launched, Gerald Mossinghoff, then President of the U.S. Pharmaceutical Manufacturers Association ("PMA"), declared that the Association was working with the U.S. Congress to get it to enact "... the intellectual property revisions of the Omnibus Trade Bill that would strengthen the hand of the U.S. Government in urging all our trading partners to respect our rights in inventions and trademarks...."[10] Soon afterwards, the U.S. Congress enacted the Omnibus Trade Act of 1988, which among other things amended Section 301 of the 1974 Trade Act so as to make it easier to impose retaliatory trade measures with respect to practices of foreign governments that are "unjustifiable ... unreasonable or discriminatory" and which burden or restrict U.S. commerce.[11]

The law provides that failure to provide fair and equitable IPR protection is a form of "unreasonable" practice.[12] At the request of the PMA, supported now by the newly strengthened hand of the U.S. Government, the U.S. Trade Representative ("USTR") initiated a series of actions against developing countries that did not provide patent protection for pharmaceutical drugs, including Argentina, Brazil, Korea, and India. At the time, according to the World Intellectual Property Organization, 48 countries, most of them developing, did not provide patent protection for pharmaceutical drugs.[13] The PMA and the USTR therefore had fertile ground on which to deploy the strengthened Section 301, and they worked enthusiastically to force developing countries to enact patent protection for pharmaceutical drugs.[14]

Even in the United States, the degree of support for the patent system has fluctuated over time.[15] During the 1980s the U.S. Government favored strong IPR protection. The pharmaceutical industry took advantage of this, first by obtaining reform of domestic patent law, and then by moving aggressively towards forcing developing countries to introduce patent legislation or to reform their existing laws.[16] Clearly, the industry would not had been able to push as successfully at other points in time as it did in the 1980s, and

[10] Gerald Mossinghoff, *Public Policy Challenges to the Pharmaceutical Industry,* PHARMACEUTICAL MANUFACTURERS ASSOCIATION REVIEW (1987).

[11] Section 301(a) and (b) of the Trade Act of 1974, as amended, 19 U.S.C. §2411(a) and (b).

[12] *Id.,*Section 301(d)(3)(B)(i)(II), 19 U.S.C. §301(d)(3)(B)(i)(II).

[13] World Intellectual Property Organization, *Existence, Scope, and Form of Generally Internationally Accepted and Applied Standards/Norms for the Protection of Intellectual Property*, WO/Inf 129, (1988).

[14] For a discussion of these policies and their consequences, *see* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati and Hugh Patrick eds. 1990).

[15] Professor Fritz Machlup, who undertook an evaluation of the patent system for the U.S. Congress in 1958, concluded:

> ... if one does not know whether a system as a whole (in contrast to certain features of it) is good or bad, the safest policy conclusion is to muddle through either with it, if one has long lived with it, or without it, if one has lived without it. If we did not have a patent system, it would be irresponsible on the basis of our present knowledge of its economic consequences, to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible on the basis of our present knowledge, to recommend abolishing it ...

Fritz Machlup, *An Economic Review of the Patent System,* U.S. Congress, Senate Subcommittee on Patents, Trademarks and Copyright, Study No. 15, at 80 (1958). Patent protection for pharmaceuticals has been a controversial subject from time to time in the United States, but those that have confronted the PMA, such as the American Association of Retired Persons, have had limited success in protecting their interests.

[16] Note that the introduction of patents in developing countries provides rents immediately after the policy comes into effect, while extending the patent life in industrial countries, as was done in the U.S. Drug Price Competition and Patent Term Restoration Act of 1984, only provides a higher level of income many years down the road and is therefore, more uncertain.

today some voices are beginning to argue that patent protection may now be too strong, as witnessed by the Doha Declaration on Public Health.[17]

The TRIPS Agreement was drafted at about the same time as these developments, and the patent section (Section 5) was influenced by the PMA. The proposed reforms had the support of the EC and Japan. They were opposed by a number of developing countries, including Brazil and India, but Argentina did not take a position. In the event, all contracting parties to the GATT/WTO signed the WTO Agreement as a single undertaking. It of course included the TRIPS Agreement which stipulated that patents should be available for inventions in all fields of technology, and should last at least twenty years from the date of filing.[18] Previously, the coverage and duration of patents in developing countries varied, and was usually less than twenty years. Countries structured their IPR policies in ways that they determined to be in their national interest. Now the policy is one of stronger and more uniform patent protection; a policy for whose welfare consequences there is no theoretical or empirical evidence.

I want to end these brief comments on rent-seeking with one reflection from history. In the area of pharmaceutical drugs, the available evidence suggests that retaliatory threats and retaliatory actions gained prominence in the late 1980s with the passage of the amendments to Section 301. It is of interest to recall that before then, several industrial countries still did not provide patent protection for pharmaceuticals. For example, France only introduced patent protection for pharmaceutical drugs in 1960, Germany in 1968, Japan in 1976, Switzerland in 1977, and Sweden and Italy in 1978. It would appear that patents were introduced in these countries when the size of their pharmaceutical industry was such as to make the likelihood of drug innovation from investments in R&D high. In other words, patents were introduced somewhere along the path of a market-based growth process. Pharmaceutical companies in developing countries will not have the same opportunity for innovation simply because they have not reached a size where it becomes profitable to invest in R&D in new drugs. The term applied to them is "pirates". Clearly, the development process of this industry in many developing countries has been dramatically changed by the obligation to introduce levels of intellectual property that are not adequate to their stage of development.

2. Estimating the Value of Concessions in Patents

In order to provide a rough estimate of the value of concessions in patents, the following discussion will address the issues of rents, foreign direct investment and trade.

(a) Transfer of Rents. As already discussed, the issue of patent protection for pharmaceutical drugs has to do more with the question of appropriation of the rents generated in developing countries than with concerns regarding innovation and growth potential in these countries. Table 1 shows some economic characteristics of the pharmaceutical drug market in several developing countries in 1988. I used these aggregate sales figures in a 1993 paper to estimate the income gains and rents that would accrue to multinational drug companies upon introduction of patent protection.[19] The estimated income gains

[17] World Trade Organization, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN (01)/DEC/2, (2001). The text of the Declaration appears in the Appendix to this book.

[18] TRIPS Agreement, Articles 27 and 33.

[19] Julio J. Nogués, *Social Costs and Benefits of Introducing Patent Protection for Pharmaceutical Drugs in Developing Countries*, THE DEVELOPING ECONOMIES, at XXXI-1 (March 1993). *See also,* Arvind Subramianan, *Putting Some Numbers on the TRIPS Pharmaceutical Debate*, 10 (2/3) INTERNATIONAL JOURNAL OF TECHNOLOGY MANAGEMENT 252–268 (1995), for additional estimations of rent transfers.

Table 1: Sales of Patented Pharmaceutical Products in Some Developing Countries, 1988[69]

	(U.S.$ million)				
Variables	Argentina	Brazil	India	Mexico	Korea
1. Pharmaceutical Market Size	1,200.0	2,000.0	4,200.0	1,000.0	1,000.0
2. Patented Pharmaceutical Market	771.6	1,750.4	2,546.0	852.5	308.0
2.1 Sales by domestic firms	231.0	93.8	920.0	136.5	188.0
2.2 Sales by patent holders	540.0	1,656.6	1,626.0	716.0	120.0
3. Ratio of (2)/(1) × 100	64.3	87.3	60.6	85.3	30.8

[69] *Source:* Julio J. Nogués, *Social Costs and Benefits of Introducing Patent Protection for Pharmaceutical Drugs in Developing Countries*, THE DEVELOPING ECONOMIES, at XXXI-1 (March 1993).

come from two sources. The first is the assumed transfer to multinational companies of all sales of patented drugs by domestic firms (Line 2.1 in Table 1). The second source of income is derived from greater exploitation of the monopolistic power protected by patents. Since there is no strong evidence on the extent to which firms in the pre-patent situation are behaving competitively, the estimates had to rely on different assumptions of price increases upon introduction of patents.

Additional assumptions on price-cost margins are necessary in order to go from estimated income gains to an estimate of pure rents. For example, it has been reported that for many years Pfizer sold the antibiotic Tetracycline at $30.60 per bottle of 100 capsules.[20] When Pfizer's patent was challenged, competing firms sold the generic product at $2.50 per bottle of 100 units. Scherer also asserts that "... many similar cases of price-cost margins in the order of 90 percent or more for patented drugs have been identified .... "

The market for pharmaceutical products in Argentina has grown since 1988, and sales reached $3.4 billion dollars in 1999. Assuming that: (i) the breakdown between patented products and the participation of foreign and domestic firms is similar to that presented in Table 1; (ii) patents will allow greater exploitation of monopoly power resulting in a thirty percent increase in gross sales; and (iii) the average price-cost margin of patented drugs is fifty percent, then the estimate of rents transferred from domestic to international pharmaceutical companies would be equivalent to $425 million per year.[21]

These are sizable rents, though they will not all be transferred at once. One reason is that there will be a phase-in period during which the number of patented drugs will increase until reaching international levels. Another potential cushioning factor will be the issuance of compulsory licenses in instances where a patent goes unworked for a number of years or where there is abuse of market position. On the other hand, the "strengthened arm" of the U.S. Government will be used to extract the maximum monopoly profits. For example in its 2000 *Special 301 Report,* the USTR states that ensuring "... that developing countries are in full compliance with the [TRIPS] agreement now that the

[20] FREDERICK M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1980).

[21] For details, *see* J. Michael Finger and Julio J. Nogués, *supra* note 6.

transition period has come to an end is one of the Administration's highest priorities . . . ."[22] The Report stated that there are " . . . 59 trading partners that deny adequate and effective protection of intellectual property or deny fair and equitable market access to United States artists and industries that rely upon intellectual property protection", and sixteen of them, including Argentina, were included in the Priority Watch List.[23]

(b) Impact on Foreign Direct Investment and Trade. After patent legislation has been implemented in the developing countries, international drug companies can choose to source from plants in those countries or from their major production sites. In the latter case, domestic production would cease, imports would increase, and employment in the industry would decline. Evidence that reverse foreign direct investment ("FDI") is likely to occur comes from developing countries that have recently introduced and/or strengthened patent protection for pharmaceutical drugs. One example is Chile, which implemented new patent legislation in 1991. Since then most foreign subsidiaries have opted to leave the country and source from abroad.[24] This is a sensitive subject on which more research is needed.[25]

This evidence is in line with the view that FDI inflows to this industry in developing countries were not inhibited by the lack of patent protection.[26] It contradicts the opinions of those who argue that strengthening patent protection in developing countries would attract FDI, particularly in the chemical and pharmaceutical industries.[27]

To sum up, unlike the negotiations on trade in goods, the UR negotiations on patents, particularly patents for pharmaceutical drugs, were conducted with practically no empirical and theoretical analysis to support the different proposals. In this situation, it is not surprising that many of the justifications for promoting a worldwide uniform patent system are either non-existent, or tend to work in the opposite direction to that argued by its supporters. In the case of pharmaceutical drugs, this includes the arguments that patents in this industry in developing countries will: (i) induce a faster transfer of technology, (ii) increase inflows of FDI and, (iii) induce local innovation. It seems clear that the worldwide extension of patent protection to pharmaceutical drugs will result in a

[22] U.S. Trade Representative, *2000 Special 301 Report*, available at http://www.ustr.gov/html/special.html.

[23] *Id.* The Priority Watch List includes those countries that are being closely monitored for eventual retaliation. The 2001 Special 301 Report, available at http://www.ustr.gov/enforcement/special.pdf, identifies 51 countries that deny adequate and effective protection of intellectual property or deny fair and equitable market access to United States artists and industries that rely upon intellectual property protection. Sixteen countries, including Argentina, were again on the Priority Watch List.

[24] According to a personal communication to the author from the Asociación Industrial de Laboratorios Farmaceúticos Chilenos, many foreign companies stopped production in Chile after passage of the patent law.

[25] In conjunction with the World Health Organization ("WHO") and other multilateral organizations including the United Nations Industrial Development Organization, the WTO could monitor carefully the effects of patents for pharmaceutical drugs as they are introduced in developing countries. The introduction of patents on pharmaceuticals has potentially important public health and industrial effects. Countries might need to apply competition policies to soften potential abuses from patent monopolies but have little or no experience in doing so.

[26] *See* Claudio Frischtak, *Harmonization versus Differentiation in International Property Rights Regime*, 10 (2/3) International Journal of Technology Management 200 (1995) (Brazil); A.S. Kirim, *Reconsidering Patents and Economic Development: A Case Study of the Turkish Pharmaceutical Industry* 13 (2) World Development 219(1985); and Julio J. Nogués, *Patents and Pharmaceutical Drugs: Understanding the Pressures on Developing Countries*, 24(6) Journal of World Trade 81(1990).

[27] *See* Chapter 54 of this book, Part I, note 3.

massive transfer of rents from pharmaceutical drug companies in developing countries to international companies.[28]

B. Services

1. Privatization of Argentina's Service Industries

During the 1990s, Argentina significantly liberalized its service industries. The purpose of this liberalization was to modernize the country after years during which inefficient government-owned companies held a monopoly on public services. As the quality of the services they provided deteriorated at an alarming rate, these companies were subject to increasing public criticism. When a new Government took over in mid-1989, the efficiency of these enterprises had reached such low levels that the proposal to privatize them faced no significant opposition.

A sweeping privatization program was implemented over the next few years. Today, ten years after this program was launched, the National Government has practically no stake apart from minority shares in the numerous and economically significant enterprises producing goods and services that used to be publicly owned.[29] Power generation and distribution, communications and telecommunications, gas production and distribution, wholesale and retail trade, banking and insurance, and numerous companies producing tradable goods, such as petroleum, chemicals, and iron and steel, have been privatized. Long-term private concessions have even been granted with respect to water companies, port facilities, railroads, and roads.[30]

While a complete assessment of this privatization program is not available, it has had positive and negative aspects. The performance of the privatized companies has generally been very good in terms of growth and quality of services. During the period 1993 to 1998, the increase in GDP of the services producing sectors was 24 percent against 18 percent in the goods-producing industries. But in the communications industry, where FDI is significant, the increase in value added during the same period was 46 percent. There is no doubt that the liberalization of services explains the growing inflows of FDI which, as a proportion of GDP, have fluctuated between 1.2 percent in 1993 to 3.0 percent in 1997.

Most of the misgivings with the privatization process have to do with the prices at which some of the privatized services are being offered. Some of these excessive prices come from flawed privatizations, including in some instances, the granting of monopoly positions and in others, inadequate formulas for rate adjustments. Basic telecommunications is an example of an initial grant of monopoly rights,[31] while in many other

[28] More recently the outcry from many developing countries led WTO Members to issue the Doha Declaration on Public Health. Furthermore, a number of studies are questioning whether the TRIPS should not be made more flexible. One of these studies, entitled *Integrating Intellectual Property Rights and Development Policy,* was published in 2002 by the Commission on Intellectual Property Rights established by Clare Short, U.K. Minister of Development. This study is available at www.iprcommission.org.

[29] The major exception is Banco Nación which remains the largest single bank in terms of deposits.

[30] The Provinces implemented important privatization programs, but some still own important companies. FDI inflows have also been attracted by the sale of privately-owned enterprises. While this form of investment has been prominent in the manufacturing sector, in some services where private ownership by nationals used to be important, such as banking, FDI inflows have generally not been associated with the privatization process.

[31] The telecommunications industry has been opened to competition only recently, and new companies have already started to contest the monopoly rights that were granted during the initial years to the privatized basic telecommunications enterprises.

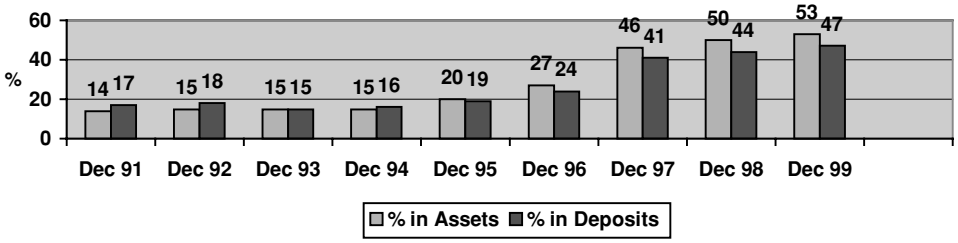


Figure 2: Participation of Foreign Banks in Argentina's Financial System
Source: Based on information provided to the author by the Central Bank.

service sectors the discontent arises from indexation formulas that have resulted in service prices that in some cases are well above international standards. Finally, criticism has also been raised against weak regulators. These regulatory deficiencies can also be attributed to the Government's lack of experience in exercising its new regulatory functions and in managing new competition legislation. Certainly more research has to be undertaken before definite conclusions can be drawn on these sensitive topics, but for the last two or three years as social problems have grown in intensity (high unemployment and increasing income inequality), public support for the privatized companies weakened and, following the devaluation in early 2002, they are suffering massive losses.

2. Estimating the Value of Concessions in Services

Argentina's UR concessions in services were quite significant and the discussion that follows intends to provide an estimate of its economic importance. I first note that for the sectors and subsectors where concessions were bound, there are no limitations on commercial presence or exceptions to the national treatment principle. This is the case with respect to: (a) business services; (b) communication services; (c) construction services; (d) distribution services; and, (e) tourism and travel services. Furthermore, in banking and related services, while trans-border trade was not bound, commercial presence was bound. As shown in Figure 2, foreign banks came to hold almost half of total deposits.[32]

Argentina's concessions with respect to telecommunications have also been important. For example, in the 1997 WTO agreement, Argentina bound commercial presence for the most important forms of telecommunications services and its concessions have been assessed as significant.[33] More recently, in June 2000, a Presidential Decree introduced further deregulation measures. Argentina did not participate in the post-UR financial services negotiations, the reason being that its earlier concessions had been significant.[34]

In sum, Argentina made significant concessions in services sectors in the UR as well as in more recent multilateral negotiations. As a consequence, after decades of inward-looking policies, during the 1990s trade in services and services-related FDI inflows

[32] Following the devaluation of the peso in early 2002, this picture has changed.

[33] Peter Cowhey and Mikhail Klimenko, *The WTO Agreement and Telecommunications Policy Reforms*, Policy Research Working Paper 2601, World Bank (2001).

[34] Several studies show that in the banking industry, Argentina was one of the few developing countries that bound significant concessions in the Uruguay Round. For example, it has been shown that the liberalization index of Argentina for this industry is of a similar order of magnitude to those of the most liberal industrial countries. *See* Aaditya Mattoo, *Financial Services and the World Trade Organization: Liberalization Commitments of the Developing and Transition Economies*, Policy Research Working Paper 2184, The World Bank (1999).

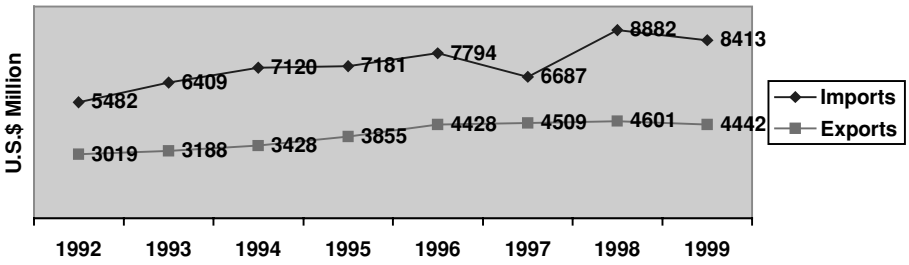


Figure 3: Trade in Services
Source: Ministry of Economy of Argentina.

blossomed. In what follows, we discuss trade effects and inward FDI flows into the services sector that were subject to the liberalization and privatization programs initiated in the early 1990s.

3. Trade in Services

In its successive Balance of Payments Manuals, of which the latest is the Fifth Edition ("BPM5"). the International Monetary Fund ("IMF") has recommended disaggregation of statistics on trade in services. In 1999, the Government of Argentina, which may be one of the few developing countries with complete and revised statistics on services trade,[35] published revised balance of payments accounts following the methodological guidelines indicated in BMP5. The new series start in 1992 and therefore provide valuable information on some of the trade effects following the liberalization of the services industries. What do these figures show?

Figure 3 shows exports, imports and trade balances for the services categories listed in BMP5. The figure shows a trade deficit increasing from $2.5 billion in 1992 to $4.3 billion in 1998.[36] This is in line with other Latin American countries, and contrasts with some Asian economies where trade in services, and exports in particular, is growing faster than trade in goods.

A second aspect worth noting is that this growing deficit is not the result of one or two services showing some unusual trade behavior, but the outcome of a number of categories that deteriorated during the 1990s. The sharpest declines occurred in the following accounts: (i) insurance and reinsurance (where the deficit increased by ten times), (ii) entrepreneurial services, (iii) financial services, and (iv) royalties. These statistics appear to show quite clearly that at the level of aggregation of the accounts indicated in BMP5, Argentina does not have a comparative advantage in services. As we shall see, the picture is even worse if we add commercial presence as a mode of supply, as FDI inflows have grown rapidly.

One final comment. The work program leading to the publication of revised balance of payments accounts in 1999 also uncovered serious errors of measurement. There is no single services account that was being measured with reasonable accuracy and the largest errors appeared on the import side. For example, the previous figures underestimated services imports by $893 million in 1992 and by $2.3 billion in 1998. Clearly Argentina's participation in the UR services negotiations was based on rather poor statistics, and it

[35] Few developing countries, but most industrial countries, show entries on exports and imports for all the service categories listed in BMP5. *See* Obie Whichard, *Measurement, Classification, and Reporting of Services Activities: An International Perspective*, World Bank (1999).

[36] Because of the recession that started in 1999, the deficit in services trade also declined somewhat in that year.

is likely that the accuracy of official statistics is also a serious problem for many other developing countries.

4. Services-Related Inflows of FDI

Trade statistics say nothing about delivery of services under Mode Three (commercial presence) but in Argentina and other developing countries this appears to be the most significant source of supply. At most, balance of payments statistics represent a rough proxy of some of the trade flows under Mode One (cross-border). Again, the work leading to the publication of Argentina's revised balance of payments accounts in 1999 included a major effort to collect data on FDI. These statistics show the growth of inward FDI by economic sector and by country of origin for both stocks and profits/dividends.[37] What do these statistics show?

Following the liberalization of Argentina's trade and capital accounts in the early 1990s, inflows of FDI grew rapidly. In addition to the concessions given in the UR, the incentives for FDI were enhanced by Argentina's very open capital system and the very liberal treatment given to foreign capital. Most FDI inflows come under the umbrella of bilateral investment treaties that generally impose no restrictions in terms of sectors, percentage ownership, capital and profit remittances, or employment conditions.[38]

Between 1992 and 1998, the stock of FDI increased from $15.8 billion to $46.9 billions.[39] Table 2 provides a breakdown of this stock and the associated profits and dividends by economic sector. We see here that profits accruing to FDI enterprises in the services sectors jumped from $243 million in 1992, to $1.6 billion in 1998.

Over this period, the service category that has generated the most important flow of FDI profits has been electricity, gas and water, followed by distribution services. Figure 4 shows the accumulated flows of FDI for the period 1992 to 1998 by country of origin. As expected, Europe (mainly the Netherlands, Spain, France, and the United Kingdom), and the United States are the main sources of FDI inflows. Investors from these regions accounted for 72 percent of the accumulated FDI at the end of this period.

How much of this inflow of FDI can be explained by Argentina's concessions in the UR services negotiations is a difficult question to answer. Let us assume, for the sake of offering a rough estimate of the significance of these concessions, that commercial presence was a significant factor attracting FDI. In the UR Argentina bound commercial presence in all of the subcategories of the following services headings of the UR list where concessions were given: (i) business services, (ii) communication and telecommunications services, (iii) construction and engineering services, (iv) distribution services, (iv) financial services except insurance and reinsurance and, (v) tourism and travel.[40] Table 3 shows the inflows of FDI and associated profits classified according to Argentina's list

[37] Ministry of Economy of Argentina, La Inversión Extranjera Directa en Argentina: 1992–1998. Dirección de Nacional de Cuentas Internacionales, Ministry of Economy of Argentina: 1999.

[38] These treaties generally provide that investment-related disputes would be submitted to the International Center for the Settlement of Investment Disputes.

[39] Because of the sale of the remaining government shares in YPF (Yacimientos Petroliferos Fiscales), the largest petroleum company in Argentina, FDI inflows in 1999 reached the record level of $23.2 billion dollars. This raised the accumulated stock of FDI at the end of that year to $70.1 billion, more than twelve times higher than in 1992. Because of the unusual size of the YPF transaction, the comments in this part are focused on FDI inflows during the period 1992 to 1998.

[40] I am grateful to the Dirección Nacional de Cuentas Internacionales of the Ministry of Economy for providing the data for Table 3.

Table 2: Stock and Profits of FDI by Economic Sector Argentina 1992–1998

	(U.S.$million)						
Sector	1992	1993	1994	1995	1996	1997	1998
I- Stock		**17,392**	**22,319**	**27,828**	**32,609**	**40,929**	**46,858**
A-Goods	8,654	9,354	11,334	13,933	17,159	20,939	22,620
Petroleum	2,634	2,654	3,072	3,504	4,312	4,650	5,159
Mining	83	60	80	113	388	644	912
Manufacturing	5,937	6,640	8,182	10,316	12,459	15,645	16,549
B-Services	7,168	8,578	10,985	13,895	15,450	19,990	24,238
Elec., Gas, Water	2,291	3,229	3,691	4,876	5,286	6,567	7,526
Distribution	576	624	984	1,307	1,850	1,985	2,500
Communications	1,947	1,997	2,397	2,703	3,109	3,771	3,997
Banks	1,393	1,748	1,955	2,528	3,001	4,507	5,671
Others	961	980	1,957	2,481	2,205	3,161	4,544
II-Profits	**1,133**	**1,678**	**1,820**	**1,893**	**1,762**	**2,331**	**2,465**
A-Goods	890	873	1,279	882	909	1,203	908
Petroleum	349	290	430	409	451	363	209
Mining	−1	−10	−3	−4	−12	−4	−4
Manufacturing	452	593	852	477	470	844	703
B-Services	243	805	541	1,011	853	1,128	1.557
Elec., Gas, Water	−13	196	297	422	377	504	563
Distribution	133	163	294	213	189	150	204
Communications	91	92	34	178	113	217	291
Banks	71	204	−151	164	52	122	229
Others	51	149	68	34	122	135	270

Source: National Account Statements.

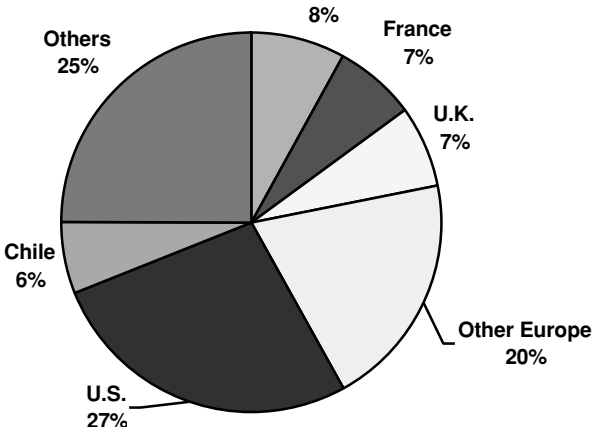


Figure 4: Stock of FDI by Country of Origin, Argentina 1998.
Source: Ministry of Economy of Argentina. (1999).

of concessions in the UR[41] for the categories where commercial presence was bound. According to these figures, the annual value of concessions given by Argentina to its trading partners was equivalent to $917 million of profits in 1998.

[41] Julio J. Nogués, *La Institucionalización de la Globalización*, in La Globalización y la Argentina, Consejo Empresario Argentino (Juan De Pablo, Rudiger Dornbusch and Julio J. Nogués eds. 2001) at 103.

Table 3: Stocks and Profits of FDI by Economic Sector, Argentina 1992, 1995 and 1998

				(U.S.$ thousand)		
	STOCK			PROFITS		
Type of Service	1992	1995	1998	1992	1995	1998
Entrepreneurial	4,694	6,000	16,347	818	480	1,120
Post Office Mail	0	0	310,035	0	0	22,695
Telecommunications	1,947,284	2,618,745	2,553,150	180,482	261,746	342,692
T.V. and Cable	0	50,040	1,474,643	0	5,022	47,788
Construction	171,171	159,043	233,503	14,073	23,637	39,367
Wholesale Trade	292,160	349,782	85,985	79,940	50,168	−31,999
Retail Trade	146,053	485,349	1,689,820	34,675	90,226	146,165
Banks	1,393,000	2,528,000	5,670,939	71,000	163,000	229,000
Other Finance	91,510	156,157	460,482	34,473	11,703	90,918
Hotel and Restaurants	53,519	93,118	96,141	6,921	5,340	11,620
Other Transport	517	34,213	82,998	111	0	17,195
Total	4,099,908	6,480,447	12,674,043	422,493	611,322	916,561
Note Services where commercial presence was not bound:						
Electricity, Gas and Water	2,304,057	4,787,536	8,230,872	−11,916	422,666	568,319
Community Services	9,196	12,381	21,350	4958	1,685	6,818
Health	0	35,000	209,054	0	2,800	5,110
Transport	45,980	166,041	213,936	−71,662	−46,438	−42,130
Total	2,359,233	5,000,958	8,675,212	−78,620	380,713	538,117

Source: Dirección de Nacional de Cuentas Internacionales, Ministry of Economy of Argentina.
Note: Some of the figures in this table do not exactly match those in Table 2 because they come from a different source.

C. Trade in Goods

1. Manufacturing

In the area of trade in goods, probably the most significant concession given by Argentina in the UR was the binding of the maximum tariff rate at 35 percent for all goods. Previously, only seventeen percent of Argentina's tariff lines were bound.[42] In 1985/86, imports were controlled by very high tariffs and surcharges that put the simple average *ad valorem* rate at 39 percent. In contrast, the average MERCOSUR common external tariff ("CET") now stands at around thirteen percent.[43] Likewise, while in 1986, Argentina required advance import licenses for 47 percent of its tariff lines, this requirement no longer existed, at least until 2002.[44] However, other important non-tariff barriers still exist, such as those protecting the automobile sector as well as several antidumping measures.[45]

As a consequence of this trade liberalization program and other structural reforms, Argentina's trade grew quite significantly during the 1990s. In particular, the value of imports, that had stood at $4.3 billion in 1989, increased to $25.5 billion in 1999. Most

[42] Finger, Ingco, and Reincke, *supra* note 4, at 24.
[43] Julio Berlinski, El Sistema de Incentivos en Argentina (1998).
[44] Following the devaluation of early 2002, foreign exchange controls have been reinstituted.
[45] During 2001 increasing macroeconomic divergence from Argentina's attempt to sustain convertibility in the presence of a rapidly depreciating Brazilian "real" led to the implementation of an important number of departures from the CET, particularly by Argentina, Paraguay and Uruguay.

of these imports come from industrialized countries. Of particular interest is the fact that imports of capital goods from OECD countries increased from $745 million in 1989 to $4.2 billion in 1999.

2. Agriculture

Although one of the original objectives of the Uruguay Round was the "... reduction of import barriers..." to agricultural trade,[46] this goal was not met. The inefficient agricultural producers did not bind concessions of significant economic value in any of the major negotiating areas.

It is true that one of the advances achieved in the UR agricultural negotiations was the tariffication of non-tariff barriers, but even this process has been criticized as "dirty" in the sense that the base tariffs declared to the WTO were much higher than they were supposed to be. For example, the following *ad valorem* tariffs were notified by the EU as its UR base rates: rice 361 percent, wheat 156 percent, sugar 297 percent, meat 125 percent and dairy products 288 percent.[47] The sheer magnitude of these numbers is a clear indication of how strong some anti-globalization forces are in industrial countries. Even after reduction of many of these tariffs by 36 percent, which was the obligation undertaken by developed countries in the UR, many agricultural products were protected at a higher level than before the UR.[48]

Three policies were supposed to reduce agricultural protection by the OECD countries: (i) the reduction of tariffs, (ii) the binding of tariffs at the end of the implementation period, and (iii) minimum access commitments. In spite of these important opportunities for liberalization, the conclusion of the assessment of the UR results is that there is "... markedly little liberalization for most products in most countries...."[49] The Agreement on Agriculture appears to be somewhat stronger with respect to the reduction of export subsidies, but overall there has been little progress and in some instances, the results have been retrogressive.[50]

Since the completion of the UR, OECD governmental assistance to agriculture has continued to rise. This assistance reached $336 billion in 1997 and $362 billion in 1998. This increase is partially explained by the reduction of international commodity prices, many of which continued to decline in 1999.[51]

The disappointing results of the agricultural negotiations helps to explain some trade developments. Traditionally, Argentina maintained an overall trade surplus with countries in the EU but during the 1990s this surplus shifted to systematic deficits. The size of these deficits has been influenced by Argentina's liberalization steps as well as by the continued resistance by the EU to liberalize its agricultural policies.

D. Summing-up

For Argentina, the UR resulted in an important imbalance between the concessions that it made and those that it received from OECD countries. First, at the end of the transition

[46] GATT Secretariat, *The Uruguay Round Ministerial Declaration* (1986).

[47] Dale Hathaway and Merlinda Ingco, *Agricultural Liberalization and the Uruguay Round*, in THE URUGUAY ROUND AND THE DEVELOPING COUNTRIESPAGES 30–58 (Will Martin and L. Alan Winters eds. 1995).

[48] *Id.*

[49] *Id.*

[50] Nogués, *supra* note 41, at 136.

[51] OECD, AGRICULTURAL POLICIES IN OECD COUNTRIES: MONITORING AND EVALUATION (This is a yearly report and the reader should consult the volumes for 2001 and 2002).

period, rents of $425 million per year may have been transferred from domestic to international pharmaceutical companies in developed countries. Second, liberalization of trans-border flows was accompanied by a doubling of the services trade deficit as imports, mostly from industrial countries, increased by 62 percent between 1992 and 1998. Third, in the service sectors where Argentina bound commercial presence in the UR, the profits of FDI firms, the majority of which are of OECD origin, reached $917 million in 1998. During these years, the stock of FDI in these sectors tripled. Fourth, Argentina's trade liberalization also resulted in a more than tenfold increase in the annual import bill of capital goods from OECD countries. In short, the concessions given by Argentina in the UR have provided important benefits to foreign companies from the industrialized countries.

On the receiving side, Argentina benefited from tariff reductions in manufactured goods, but as we have seen, it also gave important concessions in these products. As to the negotiations in agriculture, the outcome is certainly not "liberalization".

Summing up, according to the mercantilist equation by which the results of multilateral trade negotiations are assessed, Argentina was a big loser in the UR. This as I argue in the next part, particularly the results of the agricultural negotiations, has had serious negative economic consequences for the country.

IV. Costs of Agricultural Protectionism for Argentina

Argentina's agricultural and agro-industrial exports represent around fifty percent of its total exports of goods. It is not surprising, therefore, that the damage that agricultural protectionism inflicts on Argentina is in the billions of dollars. The social impact is also significant because, while some OECD agricultural producers receive as much as $35,000 dollars of subsidy per year,[52] poverty levels in the countryside of Argentina, as well as migration from rural to urban areas, have continued to rise. In a significant way, rural poverty in Argentina is the mirror image of the riches in the OECD countries.

A. Agricultural Protectionism and Financial Costs

The macroeconomic impact of agricultural protection is also significant. Had the UR Agreement on Agriculture resulted in an increase in Argentina's agriculture exports of say $5 billion, the country's debt service ratio would be lower. This, as I argue below, would reduce the level of country risk and the structure of domestic interest rates.

For example, between 1990 and 1998 Argentina's total exports to the EU increased by only 21 percent. This contrasts with the country's performance of total exports and exports of primary products plus foodstuffs that during the same period increased by 112 percent and 92 percent respectively.[53] As discussed earlier, with this performance, the traditional trade surplus that Argentina used to have with these countries shifted to a systematic deficit.

The imbalance is important; and is likely to have negative macroeconomic effects that go well beyond the direct trade and production effects. To understand this, recall that Argentina is a country with an open capital account and with free capital movements up to the end of 2001. Therefore, since the early 1990s its structure of interest rates has been determined by international risk-free rates plus a domestic risk factor. Since

[52] *Id.*, 2001.

[53] Nogués, *supra* note 41, at 185.

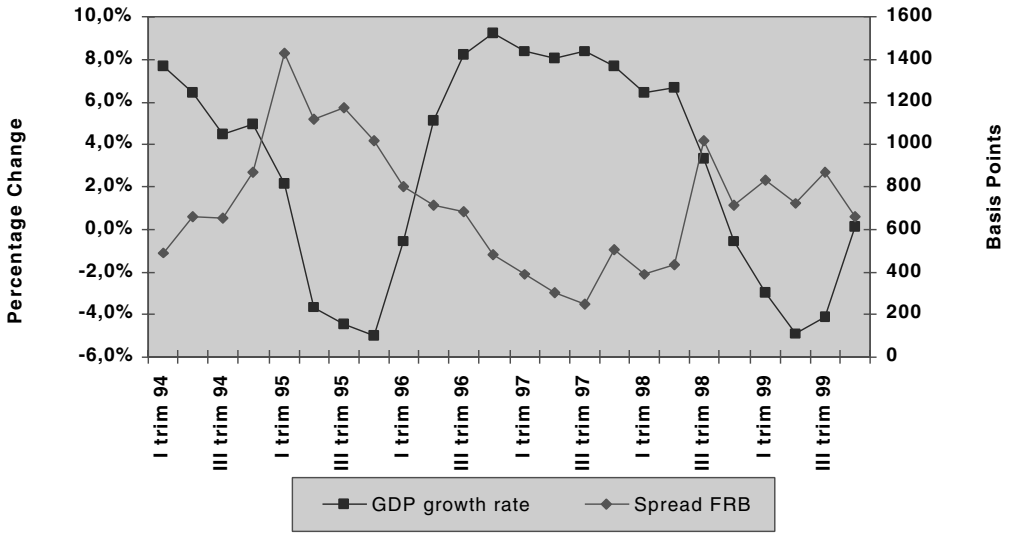


Figure 5: Country Risk and Interannual GDP growth rate
Source: Julio J. Nogués and Martin Grandes, *Country Risk: Contagion, Deficits or Political Noise,* IV(1) JOURNAL OF APPLIED ECONOMICS 125 (2001).

the national Government is by far the major borrower in international markets, the risk implicit in its bonds is a major determinant of domestic interest rates. When foreign investors conclude that the economic outlook of the country is likely to improve, they bring capital into the country, for example by increasing their demand for Government bonds. When this happens, the increase in bond prices result in a reduction in the level of country risk as measured by the interest spreads between domestic and risk-free bonds. In fact, as Figure 5 shows, the level of country risk is inversely correlated with short term economic cycles.

This figure shows year-on-year variation in quarterly GDP and the spread between the returns of Argentina's sovereign bonds and the comparable U.S. Treasury bonds. What determines this spread, usually known as the country risk factor? In recent empirical research, this risk has been found to be a function of a number of economic and political variables, including contagion effects from Mexico's financial markets, growth expectations, fiscal deficits, political noise effects, and solvency indicators such as debt service to exports.[54] This last variable helps to understand how the level of exports may have macroeconomic effects through financial variables. Our findings show that a one percent permanent increase in this variable increases country risk by 0.63 percent. With these results we can simulate what would be the level of country risk for different levels of additional exports.

This exercise is based on recent findings based on a computable general equilibrium model which suggests that the dismantling of OECD agricultural protectionism could have increased Argentina's exports by between 25 percent and 100 percent.[55] Based on these simulations and on the elasticity of country risk with respect to debt service to export ratio, we can conclude that had the level of exports in 2000 been 25 percent higher, the country risk would had been ten percent lower. If lower agricultural protectionism

[54] Julio J. Nogués and Martin Grandes, *Country Risk: Contagion, Deficits or Political Noise,* IV(1) JOURNAL OF APPLIED ECONOMICS 125 (2001).
[55] CARLOS SÁNCHEZ AND GABRIEL CASABURI, LAS DISTORSIONES DE LOS MERCADOS MUNDIALES DE ALIMENTOS Y SU IMPACTO EN LA ARGENTINA (2001).

had enabled Argentina to increase its total exports by fifty percent, the level of country risk would have been 33 percent lower.

Summing-up, in addition to the traditional static welfare losses from agricultural protectionism, the analysis of this part indicates that because agricultural protectionism also increases interest rates in efficient producer countries like Argentina, the cost of this protectionism is higher than what has been traditionally assumed. For example for 2000, the average country risk faced by Argentina' domestic residents was 672 basis points.[56] Had Argentina faced open international agricultural markets, its country risk would have been much lower, saving domestic debtors billions of dollars in interest costs.

B. Other Costs of Agricultural Protectionism

I have argued elsewhere that the higher structure of interest rates caused by higher country risk implies lower growth.[57] In addition, not only the level but also the policies used to implement this protectionism create additional costs for a country like Argentina. This occurs because international price fluctuations are accentuated by the policies of industrialized countries that shelter their domestic farmers from these fluctuations. By increasing the instability of Argentina's terms of trade, the slower growth resulting from higher country risk occurs along a path of widened business cycles.

On a related matter, I hope that this discussion has illustrated the importance of the Marrakesh mandate for the achievement of greater coherence between international financial organizations like the IMF and the World Bank, on the one hand, and the WTO on the other.[58] As long as agricultural protectionism in industrialized countries continues to remain at the very high level of the last decade, there will remain clear opportunities for increasing the "coherence" between international financial markets and the multilateral trading system. A significant decline of agricultural protectionism would facilitate repayment of foreign debt and strengthen the international financial system.

C. Summing-up with a Proposal

This discussion has shown that the increased financial costs faced by countries that are efficient producers as a consequence of protectionism on the part of industrial countries is higher and sometimes much higher than usually thought. Additional dynamic costs of these policies are caused by slower growth rates and magnified business cycles. Both the static and dynamic economic costs faced by Argentina and other efficient developing country producers that can be attributed to agricultural protectionism by industrialized countries are shamefully high.

Unfortunately, there is every indication that this protectionism is becoming more entrenched.[59] My proposal is for the existing Working Group on Trade, Debt and Finance in the WTO to be transformed into a negotiating Body. It is quite incredible that issues

[56] Data provided by Dirección de Cuentas Internacionales of the Ministry of Economy.

[57] Nogués and Grandes, *supra* note 54.

[58] *Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policy making*, in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999) at 386.

[59] The passage of the US Farm Bill of 2002 and the 2002 proposal by the EC to reform the Common Agricultural Policy support this view. A preliminary analysis of these proposals appears in the recent report issued by the World Bank and the International Monetary Fund entitled *Market Access and Developing Country Exports-Selected Issues*, available at www.worldbank.org.

like trade and environment have become negotiating topics and yet the strong link between trade and debt still remains on the sidelines of the multilateral trade negotiations. Including trade and debt as a negotiating topic would change the structure of incentives as it would make more visible the costs of agricultural protectionism and would trigger a debate on who should pay for it.

V. Regional Trade Negotiations between MERCOSUR and the EU

As a member of MERCOSUR, Argentina is participating in several regional trade negotiations, including those with the Andean Group, with the United States (in the Free Trade Agreement of the Americas ("FTAA"), and with the EU. At the time of drafting this chapter (the end of 2001), only the negotiations with the EU had advanced to a stage where some relevant comments on trade negotiating strategies can be offered. The negotiations with the United States had not yet started, and the agenda of the FTAA indicated that these would start in late 2002. Only a preliminary exchange of documents had taken place with the Andean Group, where the goal is a free trade agreement in goods.

A. Background

In December, 1995, MERCOSUR and the EU signed an interregional cooperation agreement that seeks to create a free trade zone. Since then, both regions have held a number of meetings, and in 1999 the Bi-Regional Negotiating EU/MERCOSUR Committee ("BNC") initiated the negotiations. By the end of 2001 the BNC had already met six times, most recently in early July 2001 in Montevideo and in Brussels in late October 2001.

The first three meetings dealt essentially with the exchange of information. The fourth meeting of the BNC ("BNC IV") held in Brussels, was more substantive in character. Here MERCOSUR indicated that it was seeking a free trade agreement. Essentially, MERCOSUR was expressing its aim that the Common Agricultural Policy ("CAP") should not be an obstacle to the establishment of a free trade agreement. In turn, the EU expressed that it was planning to present to MERCOSUR a concrete offer and demand for market access in the next BNC meeting. This proposal would later prove to be far from a free trade agreement.

B. Differing Negotiating Goals and Strategies

The MERCOSUR document, entitled "Modalities for the Tariff Negotiations", demanded, in line with its goal of establishing a free trade area, that " . . . it is necessary to establish a reference tariff on the basis of which liberalization would be negotiated . . . ". It further stated that " . . . specific tariffs, mixed tariffs and any other type of tariffs should be transformed into an *ad valorem* equivalent that for negotiation purposes would be the maximum reference tariff . . . . " MERCOSUR offered to reduce its common external tariff ("CET"), which is defined on an *ad valorem* basis, plus any modifications introduced after its establishment in 1994 to zero over a ten year period, the same period proposed by the EU. Of course, there would be a list of exceptions for sensitive products.

Obviously, the goal of MERCOSUR's demand for *ad valorem* tariffication was to ensure that the many trade measures protecting EU agricultural and agro-industrial products should not be an impediment to the negotiations. In essence, by proposing to base market access negotiations on transparent equivalent *ad valorem* tariffs and to negotiate their

elimination over a ten year period, MERCOSUR was offering full reciprocity. In fact as we shall see, it was in effect offering more as it was not refusing to negotiate other issues put on the table by the EU, some of which appear to be of doubtful economic interest to the region.

In contrast, the EU never agreed to negotiate on the basis of equivalent *ad valorem* tariffs. It argued that this would undercut the CAP, with respect to which it is only prepared to negotiate in a multilateral round (which, as I argue below when discussing the Doha Declaration, is unlikely to occur in a significant way). In response, MERCOSUR argued that its goal was to put the regional negotiations on an equal footing for both sides, and not to challenge the CAP. In fact, so far the EU strategy appears to have been to negotiate specific elements of the CAP on a product-by-product basis. The differences between the MERCOSUR proposal and that of the EU are significant.

C. The EU Proposal

The EU presented its proposal at the July 2001 BNC meeting. In contrast to MERCOSUR's offer for a free trade agreement, it is difficult to see how the EU offer could have been more mercantilist. While the EU proposed that both sides should eliminate *ad valorem* tariffs over a period of ten years, this proposal hides an important imbalance in market access concessions, as now explained:

- The EU proposal would ensure free access to the MERCOSUR market for EU manufactured products, the most protected sector of the economies of the region, in exchange for access to what is already a very open market in the EU.
- The picture is very different with respect to agricultural and agro-industrial products. Except for a few countervailing measures, agricultural protection in MERCOSUR is also based on *ad valorem* tariffs. The EU proposal to dismantle *ad valorem* tariffs would also provide a high degree of access to the MERCOSUR market for EU agricultural products. It would not however provide much access for MERCOSUR agricultural and agro-industrial products to the EU. In addition to *ad valorem* tariffs, the EU imposes seasonal tariffs, specific-rate tariffs, and mixed tariffs, and it also employs export subsidies, budget support, tariff escalation, special agricultural safeguards and quotas.[60] The EU has offered to dismantle only the *ad valorem* tariffs, which would leave a very high degree of protection in place, particularly for products where MERCOSUR has a comparative advantage.
- To compound the problem, the EU agricultural and agro-industry policies provide a high degree of protection administered in a very non-transparent way. It could take the MERCOSUR negotiators several months to gain detailed knowledge of this protection and then they will be faced with the difficulty of deciding how much MERCOSUR should "pay" the EU to eliminate the *ad valorem* tariff or other components of its agricultural protection. The complexity of this problem increases when approached on a product-by-product basis. Different products are protected by different measures in the EU, but in general *ad valorem* tariffs do not provide the bulk of protection to agricultural products.[61]

[60] Some products of significant export value for MERCOSUR, such as beef, also face sanitary and phytosanitary barriers, some of which appear to be supported by weak scientific evidence.

[61] The nature of the complexity of EU agricultural protectionism can be illustrated by two examples. The first is fruits such as pears, apples, and oranges. For specific periods of the year classified by month or

- Furthermore, in contrast to the initial MERCOSUR proposal that covered all products, the EU proposal excludes around one thousand tariff lines of which 781 are products of great export interest for Argentina. Estimates of the *ad valorem* equivalent by the Secretariat of Trade with respect to a sample of the excluded products show a high average level of protection of these products of 36 percent, with a maximum of 463 percent. Exclusion of these products significantly reduces the MERCOSUR export potential of a trade agreement with the EU.
- In addition to full access to the MERCOSUR markets for goods, the EU is demanding: (i) full reciprocity in textiles and footwear, (ii) standstill and rollback, (iii) for fisheries products, liberalization would take into account "access to water resources", (iv) duties on wine would be abolished in the framework of a separate agreement including "protection of geographical indications and traditional expressions." In Argentina textiles and footwear are two "sensitive" labor-intensive sectors. Standstill (no new measures to be introduced) and rollback (of import measures to some specified date) have not been discussed in detail but given the nature of the CAP, there is no way that a realistic rollback by the EU could offer gains in market access that would match a similar reform by MERCOSUR. Details of the proposal on access to water resources and geographical indications have not been specified, but Argentina's national fishing fleet is not significant and, although Argentina has good wines, it has not developed significant geographical indications, so that in these areas too, it may be the loser. In sum, reciprocal concessions in these areas of the expanded negotiating agenda appear to have greater commercial value for the EU.
- The EU has also demanded negotiations on government procurement and services. In both areas, the EU seeks a high degree of access to the MERCOSUR markets. In services, for example, it seeks access to all markets except audiovisual services, national maritime cabotage and air transport services. The proposal clarifies that the "right of commercial presence" does "... not extend to seeking or taking employment in the labor market or confer a right of access to the labor market of another party." [62] Regarding government procurement, the presumption is that EU multinationals are better positioned to sell to MERCOSUR governments than vice versa.

D. Summary

With the available information it is risky to forecast where the regional negotiations between MERCOSUR and the EU will end. One general comment is that the outcome will not be the broad free trade agreement that MERCOSUR countries initially sought. A second general comment is that in agriculture, the outcome will most likely be one of very limited liberalization by the EU. If so, the economic results of these negotiations

consecutive months, fruits are protected by *ad valorem* and specific tariffs. Given the objective of protecting farm incomes, the EU specific tariffs vary inversely with the level of import prices. The result of this is that for pears for example, there are ten rates varying between zero and ten percent. In addition, specific tariffs also vary by time of the year so that the number of possible combinations protecting pears is very high. In simulations performed by Argentina's Secretariat of Trade, the EU *ad valorem* tariff equivalent, including the effects of specific tariffs, protecting pears varies between zero and 77 percent.

[62] *European Union Working Text: Trade in Services,* EU draft, July 2, 2001.

will be of limited value for Argentina. Further discussions will have to take place before a comprehensive assessment can be made of the net benefits that Argentina might derive from a MERCOSUR-EU trade agreement.

VI. Argentina's Prospects in a New Multilateral Trade Round

Argentina failed to defend its interests effectively at the WTO Ministerial Meeting held in Doha in November, 2001. Having been taken in by the UR Agreement on Agriculture, including the dirty tariffication practiced by industrial countries, Argentina should have gone to Doha prepared to say no to a new multilateral round. The prospect of still another negotiation where little agricultural trade liberalization is expected to take place worsens the development prospects of the country. In contrast to the weakness shown by Argentina, the EU hinted at Doha that unless specific language on agriculture was included in the Ministerial Declaration, it was ready to say no to a new round. In particular, the EU went to Doha prepared to stand firm on its objective not to allow specific quantitative targets for agricultural liberalization. For example, the EU strongly objected to the language that suggested an agreement to dismantle export subsidies, and in the end its threats prevailed.

There is little in the Doha Ministerial Declaration to suggest that significant liberalization of the agricultural protectionism practiced by industrial countries will be achieved. The statement in the Declaration that the negotiations should aim to achieve "... substantial improvements in market access; reductions of, with the view to phasing out, all forms of export subsidies; and substantial reductions in trade distorting domestic support..."[63] is not substantially different from the language of the UR Ministerial Declaration that promised significant reductions in import protection. As noted above, OECD agricultural protectionism today is about the same if not higher than what it was before the conclusion of the UR.

The outcome of the new WTO negotiations will depend on the ability of different countries to obtain their goals. Unfortunately, the available evidence suggests that the EU and Japan will most likely prevail. These countries not only convinced other Members to exclude quantitative targets for agricultural trade liberalization from the Ministerial Declaration, but also succeeded in including the statement that "... non-trade concerns will be taken into account in the negotiations...."[64] Another statement included at the behest of the developed countries was that "... under WTO rules, no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate..."[65] This statement refer to sanitary and phytosanitary standards. Emerging evidence suggests that these standards are being used with protectionist intent.[66]

Argentina went to Doha without having prepared a negotiating strategy. Neither the Minister of Foreign Affairs, the country's chief negotiator, nor any other minister attended the meeting. Its deputy chief negotiator arrived late. In contrast to the lack of political

[63] World Trade Organization, *Doha Ministerial Declaration,* WT/MIN(01)/DEC/1, ¶13. The text of the Declaration is provided in the Appendix to this book.

[64] *Id.*

[65] *Id.* at ¶6.

[66] *See, e.g.*, John Wilson, *Standards, Trade, and Development: What is Known and What do We Need to Know,* presented at the World Bank Seminar on Informing the Doha Process: New Research for Developing Countries, Cairo, Egypt, May 20–21, 2002.

importance given to this meeting by Argentina, other developing countries like Brazil and India attended with clear objectives and a strategy that apparently included saying no to a new round if they did not achieve minimum goals. Thus, for example, Brazil played a key role in the Declaration on the TRIPS Agreement and Public Health. Likewise, in his opening statements, India's Minister of Commerce and Industry, its chief trade negotiator, stated that the "... draft Ministerial Declaration is neither fair nor just to the viewpoint of many developing countries ... It is a negation of all that was said by a significant number of developing countries and least developing countries ...."[67] It is therefore not surprising that India played a key role with respect to the Doha Ministerial Declaration on Implementation-Related Issues and Concerns.[68]

In my view, Argentina should had prepared a negotiating strategy that at a minimum included the threat of not supporting a new round if specific agricultural commitments were not included in the Ministerial Declaration. If it had done so, the WTO Members would have witnessed a confrontation between rich protectionist countries and poor but efficient developing countries. I believe this would have benefited Argentina in much the same way as standing firm proved to be a successful strategy for other industrialized and developing countries. As things stand, Argentina is headed towards another multilateral negotiation that will most likely result in an unbalanced outcome and additional net costs to the country. Obviously this can still be corrected during the negotiations but for this to happen, Argentina must develop an aggressive strategy.

VII. Concluding Remarks

At the time of the UR, Argentina and many other developing countries that implemented inward-looking policies for decades, had to show to the globalizing world that they were doing their homework. For many reforming countries, the UR was an instrument to lock-in unilateral liberalization policies while for industrial countries, it was an agreement to sell and export increased quantities. In part because of this but also to a significant extent because Argentina lacked a negotiating strategy, it came out of the round with a clear imbalance between the concessions it gave and those that it received.

The imbalance for Argentina is significant and probably one of the most important of the UR, and I have shown that this outcome entailed very high costs to the country. In spite of this, Argentina has apparently not learned the lesson that in order to increase the likelihood of success in international trade negotiations, it is crucial to draft a strategy and to have the capacity and strength to implement it. My argument in support of this statement comes from Doha. I have presented evidence supporting the argument that in contrast to other industrial and developing countries, Argentina participated in the Doha Ministerial Meeting ready to agree to any language for the agricultural negotiations or, for that matter, on any other topic. Its general stance has been and continues to be that any negotiation, irrespective of its outcome, is better than no negotiation. As long as the Government fails to develop a strategy, the country will continue to sign unbalanced negotiating outcomes and as a consequence, will sacrifice development opportunities.

Finally, the fact that agricultural protectionism in OECD countries remains irresponsibly high is a clear sign of the lack of coherence between the international trading system

[67] World Trade Organization, *Statement by India*, WT/MIN(01)/ST/10, (2001).
[68] WT/MIN(01)/17. (*See* Appendix.)

and the international financial markets. This link has to be studied more carefully with the expectation that more precise and complete awareness of the financial costs of agricultural protectionism will add to the pressures for liberalizing OECD markets during the Doha Development Round. My concrete suggestion is to transform the Working Group on Trade, Finance and Debt into a negotiating group before the conclusion of this round.

CHAPTER 66

CANADA

Michael Hart*

TABLE OF CONTENTS

I. Introduction 30
II. Choices and Opportunities for Canada 37
III. Trade Policy Making in Canada 40
A. Formal Consultative Mechanisms 43
B. Informal Consultative Mechanisms 44
IV. Concluding Observations 45

* Michael Hart is a former Canadian trade official and is now Simon Reisman Professor of Trade Policy in the Norman Paterson School of International Affairs at Carleton University in Canada and a Distinguished Fellow of its Centre for Trade Policy and Law.

"Canadians have multilateralism in their DNA. Canada's contribution to the multilateral principle, whether in economic or political affairs, has been a substantial one."
Renato Ruggiero, the WTO's first elected Director-General

I. Introduction

Canada is a charter member of the World Trade Organization as it was an original contracting party to the General Agreement on Tariffs and Trade. Indeed, it can fairly be said that Canadian officials played pivotal roles at the founding of both, and continued to play significant roles in their operation. Canada's Dana Wilgress chaired the critically important Commercial Policy Committee of the 1947–48 UN Conference on Trade and Employment out of whose deliberations the GATT emerged. Wilgress carried on his leadership role as chair of the first five sessions of the GATT. Three other senior Canadian officials in subsequent years chaired GATT's Contracting Parties.[1] The idea of establishing a multilateral trade body to manage the various agreements emerging from the Uruguay Round of GATT negotiations found its origin in Canadian proposals and suggestions advanced in the FOGS Group,[2] chaired by Canada's John Weekes. Weekes later also served as chair of the WTO's General Council during the WTO's celebration of fifty years of multilateral trade cooperation in 1997.

On each of these occasions, Canadian officials were practicing one of the hallmarks of Canadian tradecraft: using leadership positions and innovative ideas to advance Canadian interests by levering the combined efforts of partners and allies to achieve common objectives. This Canadian way was borne in large measure of necessity: trade officials were often ahead of ministers and their fellow citizens in devising creative ways to realize Canadian trade and economic objectives.

The immediate impact of GATT and WTO negotiations and decisions on Canadian trade interests was often quite marginal, despite claims to the contrary by both proponents and opponents. Their cumulative impact over the past fifty years, however, has been anything but marginal. In the words of Frank Stone, who served as Canada's representative to the GATT in both the 1950s and 1970s, "the multilateral trade system has served well the interests of Canada, as a middle-sized country which has large and diverse trade interests, but whose main trade partners are larger countries; and the GATT system, in particular, has offered a wide range of opportunities to advance and defend Canada's trade-policy interests."[3] When coupled with GATT-consistent bilateral deals with the United States—the 1965 Auto Pact[4] and the 1988 Canada/United States Free-Trade Agreement ("FTA")—the impact has been substantial, particularly over the past decade. Over that period, trade has become ever more important to the daily concerns of Canadians. Exports of goods and services as a share of Canadian economic activity grew from 25 to over 40 percent, and trade issues occupied a growing share of the time and energy of government and business leaders.

[1] A more detailed appreciation of Canada's role in the founding of the GATT and in its subsequent evolution can be found in MICHAEL HART, ALSO PRESENT AT THE CREATION: DANA WILGRESS AND THE UN CONFERENCE ON TRADE AND EMPLOYMENT (1995), and FIFTY YEARS OF CANADIAN TRADECRAFT: CANADA AT THE GATT 1947–1997 (1998).

[2] The "Functioning of the GATT System" or FOGS Group was set up early in the Uruguay Round Negotiations to address issues related to GATT's institutional character. The Group's work was instrumental in the establishment of the WTO as an institution and in designing the Dispute Settlement Understanding.

[3] W. FRANK STONE, CANADA, THE GATT AND THE INTERNATIONAL TRADE SYSTEM 212 (1984).

[4] As explained in footnote 8 below, Canada—unlike the United States—did not seek a GATT waiver with respect to the Auto Pact.

Canada has always been a trading nation, but Canadians have not always been enthusiastic traders. From their earliest colonial days, Canadians have had to struggle with the reality of too much geography and too little demography. They found the answer in trade. Canadians enthusiastically accepted that they would need to export their surplus resources, but they were less sanguine about importing a wide array of manufactures and other goods. Not surprisingly, the trade policy measures adopted by successive governments often suffered from a high level of internal conflict. Until well into the twentieth century, trade policy choices were further complicated by their need to serve both fiscal and economic development objectives.

Over the eight decades from Canada's establishment in 1867 as a self-governing Dominion within the British Empire to the founding of the GATT in 1948, Canadian trade policy was essentially mercantilist in orientation. The government promoted the export of raw materials by negotiating access and supply contracts where it could, subsidized exports through infrastructure and other programs where necessary, and cosseted the import substitution sectors of Eastern Canada with high tariffs and related policies where possible. It proved a politically popular mix. As a result, governments of various political persuasions maintained the pragmatic components of what became known as the National Policy, ensuring that any manufacturer who wanted protection could get it.

In making sure that manufacturers received sufficient protection, Canadian officials became very adept at manipulating their tariff system and related customs administration. Some of the provisions in the GATT were put there to discipline such Canadian innovations and practices as antidumping duties,[5] valuation manipulations, classification fiddles, subsidies, and more. Even after the GATT came into effect in 1947, Canadian officials retained their reputation for inventiveness. They may have been committed to progressive liberalization, but they continued to appreciate that political and business support for a rules-based trading regime required an ability to solve short-term political problems, even if that sometimes required detours that stretched the letter and the spirit of the rules.

These realities conditioned Canadian participation in the planning and negotiations that led to the General Agreement on Tariffs and Trade. Nevertheless, at the initial GATT negotiations in Geneva in 1947, Canada opened its market substantially. Indeed, Canadian Prime Minister Mackenzie King enthusiastically told Canadians in announcing the completion of the GATT negotiations that:

> The General Agreement on Tariffs and Trade . . . is the widest measure of agreement for the freeing of world trade that the nations have ever achieved. Canada has joined with other nations . . . in this great effort to promote peace by prosperity and economic co-operation. The Agreement clearly charts our long-run course. It confirms, on a world scale, the objectives towards which our country's trade policies have been steadily directed . . . The new Agreement contains a firm promise of real reciprocity in tariff reductions. It paves the way for full international co-operation in maintaining high levels of employment and expanding economic activity. It . . . will permit us . . . to concentrate our efforts on the production of those things that we can best produce or manufacture, and so secure the highest level of real national prosperity.[6]

[5] Canada first introduced antidumping duties in 1904; the United States followed suit, first with the Antidumping Act of 1916, and then with a revised system more closely modeled on the Canadian approach in 1921. Canadians have had reason to regret their invention as U.S. zeal for administrative protectionism reached new heights in the 1980s, and US politicians became more and more attached to this politically attractive but economically irrational remedy.

[6] Radio address, *The Geneva Trade Agreements*, London, November 17, 1947. Department of External Affairs, Statements and Speeches 47/20.

In the next four rounds of GATT negotiations, however, Canadian officials were among the sharpest negotiators, seeking much and giving little. They were quick to claim that others were not doing enough to justify better concessions from Canada. This habit of mind was so deeply ingrained by the time of the Kennedy Round negotiations (1964–67) that it could not be reversed. In 1948 Canadian tariffs were on average lower than those of the United States and many European countries. By the end of the Kennedy Round, they were among the highest in the industrialized world. The Canadian economy remained more sheltered than those of the United States and Europe. This strategy may have been good short-term politics, but proved to be poor long-term economics.

Thus, while the Canadian economy grew, it did not become more outwardly oriented and Canada's protected manufacturing sector did not become competitive. For the first three post-war decades, the Canadian economy remained at roughly the same level of international integration. Foreign direct investment in Canada, largely by American firms, helped to ensure that most of the goods Canadians consumed were produced at home, often at inflated prices compared to their American neighbors. Canadian exports continued to be heavily concentrated in the resource sector, although some progress was made in adding value to some of these resources in Canada before exporting them to world markets. Canadians' main source of manufactured goods remained the United States, either as imports or as the products of American miniature replica branch-plants, and Americans became Canada's best customers. The UK's economic decline made it an increasingly unreliable trading partner, while the rest of Europe never developed into the market Canadians had optimistically expected. Similarly, Asian and Latin American markets turned out to be disappointing.

In these circumstances, it is not surprising that Canadian trade policy during the GATT's formative years involved a deft mix of rhetorical adherence to GATT theology and a hard-nosed determination to do what was politically necessary. Canadians did not look to their government to pursue a more open, more internationally competitive economy. Nevertheless, over the years, GATT theology had a continuing impact on Canadian attitudes, values, and even practices. Other countries similarly maintained the faith, even if they did not always practice it. As a result, by the end of the Uruguay Round (1986–94) and with the establishment of the World Trade Organization, the basic faith had not only survived, but had been reinforced by a much stronger, more detailed, and more extensive catechism.

For most of its life, however, the GATT's pragmatic, rules-based system proved ideally suited to the requirements of a medium-sized country like Canada, heavily dependent on trade with larger countries. Canadians may have been prepared for a more demanding regime, but only if it were clear that others, particularly the Americans and Europeans, were similarly prepared to accept such demands. That was not the case. As Canadian historians Robert Bothwell and John English noted, "Canadian policy of necessity was reactive, not creative, and common prudence dictated a policy for each possible circumstance."[7] Canadian officials learned to be wary of the degree of U.S. commitment to the rules. The agricultural sector, for example, a critical component of Canada's export economy, was virtually taken out of the GATT at U.S. insistence. Congressional ambivalence about the GATT further eroded confidence, as did U.S. willingness to resort to power politics through voluntary export restraint agreements and other devices. The U.S. rediscovery of trade remedies in the 1970s and their consolidation into the GATT

[7] Robert Bothwell and John English,*Canadian Trade Policy, 1943–47*, VIII Canadian Review of American Studies 1 (Spring 1977).

codes in the Tokyo Round (1973–79) deepened the conviction that trade relations with the United States could not be managed solely on the basis of the GATT. Canada's most successful trade agreement with the United States to that point, the 1965 Auto Pact, had been negotiated outside the GATT and enjoyed at best an uneasy status under the GATT rules.[8]

Canadian anxiety about the depth of commitment of its principal trading partners to the multilateral system of rules was further complicated by the emergence of the European Economic Community and the subsequent decision by the United Kingdom to cast its lot with Europe rather than remain an independent player. Like the United States, the EC soon exhibited the ambivalence of a large player and was not averse to twisting the rules or helping to shape them to its purpose. Japan, once its economy fully recovered from wartime devastation, found even more ingenious ways to shelter its more vulnerable sectors from GATT-mandated international competition. Many developing countries practiced a form of economic determinism that presaged a wait of many years before their economies might develop into reliable markets.

Nevertheless, by 1980, despite a reluctance to take full advantage of the GATT's opportunities, the value of Canada's merchandise exports had reached more than a quarter of Canada's GDP, including automobiles, trucks, and original equipment parts traded under the terms of the 1965 Canada-U.S. Autopact. An increasing number of firms and sectors were prepared to compete internationally by exporting to foreign markets. Even more firms, however, were finding that they had to compete at home, as tariff and other barriers were reduced to levels that could no longer guarantee them the home market. The trade dependence of the Canadian economy was widening, and the need to adjust was more pressing. Trade policy needed to adapt to these new circumstances.

In response, the government took steps that significantly narrowed the gap between Canadian faith and practice. By accepting that there needed to be serious adjustments in the Canadian economy, government and business cooperated in making the economy more open and more competitive. The government anchored this new orientation in a Canada-U.S. free-trade agreement that provided both the goad of greater competition at home and the reward of more open and secure access to a large market. The foundations laid over the previous decades made this step both politically and economically less risky. The sure knowledge that a structure of rules and procedures guaranteed that there would be profitable returns in other markets if Canada opened its own market generated the assurance that was lacking in earlier years. It made Canadian trade practitioners less cautious and more willing to put their faith into practice. The rewards were also evident. Canada became better placed to compete in a global economy even if it continued to depend more and more on trade with its giant neighbor to the south.

The results exceeded all expectations. Over the course of the 1990s, Canada experienced one of the strongest periods of trade-led growth in its history. Merchandise exports to all sources more than doubled at market prices. Total trade—exports and imports, goods and services—hit C$900 billion, rising from less than fifty to nearly ninety percent as a proportion of GNP. The United States accounted for the preponderance of

[8] U.S. implementation of the Auto Pact was made GATT-consistent by a waiver; Canada took the view that its approach—allowing qualified manufacturers to import cars and parts from any supplier in the world free of duty—did not require a waiver. Implementation of the Canada-US Free Trade Agreement weakened Canada's case and led to a successful WTO challenge of Canada's treatment of imports by non-Autopact importers. *See* Report of the Appellate Body, *Canada-Certain Measures Affecting the Automobile Industry*, WT/DS139/AB/R and WT/DS142/AB/R (2000).

this trade, as it had for most of the postwar years. In 2000, in nominal terms, two-way trade between Canada and the United States reached nearly C$700 billion, the equivalent of almost seventy percent of Canadian GNP. Various factors contributed to this spurt in growth in the external sector, including the pull of the red-hot U.S. economy, and a favorable exchange rate, but the adjustments induced by freer trade in both production and consumption patterns played a significant role.

Behind these aggregate statistics lies the story of an economy becoming more outwardly oriented and diversified. Over the 1990s, Canada became steadily less dependent on exports of resources as knowledge-based sectors grew and penetrated markets in the United States and beyond. By the end of the decade, trade in automotive products accounted for less than a quarter of the total; resource-based products accounted for less than half. Industrial and agricultural machinery, aircraft and other transportation products, and consumer products accounted for nearly thirty percent of Canadian merchandise export sales. Additionally, sales of business services, software, and other knowledge-intensive products added billions to Canada's current account. As a further indication of Canada's growing integration into the North American economy and through that economy into the world economy, Canada was increasing its foreign direct investment abroad, valued in 2000 at over $779.3 billion, with foreign direct investment in Canada reaching a book value of $1,023 billion in 2000.[9]

Over the 1990s, Canadian participation in the global trade regime thus reached a new level of maturity. Canadians became more prepared to pursue opportunities and less reluctant to accept some of the risks of a more open economy. Canadian officials also successfully convinced the global community to adopt a stronger institutional basis for multilateral trade cooperation, and they were at the forefront in ensuring that the WTO evolved into a forum for the governance of a global economy. Nevertheless, for Canada, the trade relationship with the United States is and will remain the most important by a wide margin. A critical factor in any Canadian trade policy decision remains its impact on relations with the United States. Throughout the postwar years, multilateralism provided an efficient means for pursuing Canada's trade policy objectives, but its impact on relations with the United States remained decisive. The importance of that relationship usually determined Canada's strategic choices: any policy course or instrument that advanced Canadian interests in the U.S. market and that strengthened Canada's capacity for managing the U.S. relationship was worthy of pursuit, whether effected bilaterally, regionally, or multilaterally.

For Canadians, the need to be active in the further developments of the multilateral trading system remains clear. Canada depends on and benefits from an effectively functioning trade and payments system. Its ability to play a constructive role is equally clear. But the capacity to ensure that Canadian values and priorities are reflected in the evolving regime requires that Canadians analyze the issues and make their contributions early in the process. As a relatively small player, that is where they are most likely to influence the content and course of a negotiation. In short, Canadians need to be quick, early, and creative. Canada's performance at the WTO suggests that this lesson has not been lost on those charged with this responsibility.

As noted by Canada's first ambassador to the WTO, the WTO remains the "bedrock" of Canadian trade policy, in the sense that it provides the basic framework of rules for the

[9] These figures are extracted from Department of Foreign Affairs and International Trade, TRADE UPDATE 2001: SECOND ANNUAL REPORT ON CANADA'S STATE OF TRADE, available at www.dfait-maeci.gc.ca.

preponderance of Canada's trade relationships, including those governed by complementary regional or bilateral arrangements.[10] Canadian representation at the WTO reflects this reality. As late as the mid-1970s, the government appeared content to be represented at the GATT by an ambassador who had strong credentials in the political dimensions of diplomacy and who devoted most of his energy to the affairs of other multilateral institutions in Geneva, such as the Disarmament Conference or the International Labor Organization. GATT affairs were handled by three other officers in the mission, only one of whom was assigned full-time responsibility for GATT issues. The other two officers divided their energies among the GATT and several other international economic bodies, including the UNCTAD and the UN Economic Commission for Europe.

By the mid-1990s, on the other hand, the Canadian mission in Geneva boasted not only two ambassadors, with the senior ambassador concentrating on economic institutions and the second on political institutions, but also up to eight other officers conversant in trade policy matters and equipped to handle various WTO issues. In addition, Canada had succeeded in placing more Canadians into influential Secretariat positions.

Canada gets good mileage out of this enhanced representation in Geneva in the day-to-day affairs of councils and committees, in the inevitable informal diplomacy that is key to resolving delicate negotiating issues, and in the building of coalitions and alliances so essential in multilateral negotiations. With the support of a much enlarged headquarters staff, Canada gets consistently good marks for the quality of its representation and the ideas it brings to the table, giving it a voice and influence that are often out of proportion to Canada's weight in world trade matters. Canada's share of world trade—about four percent—is not the only basis for Canadian participation in the Quadrilateral Trade Ministers' meetings; the quality of Canadian representation counts as well.[11]

Canada is also actively engaged in the settlement of disputes, both as plaintiff and as respondent.[12] While the media may focus on politically difficult issues such as the U.S. complaint about Canadian measures restricting access for a split-run edition of *Sports Illustrated* or Canadian complaints about U.S. restrictions on imports of softwood lumber, there are many more cases active at any one time. Over the course of the 1990s, for example, Canada also succeeded, either alone or in company with other parties, in removing French restrictions affecting imports of scallops, Australia restrictions on imports of salmon, and Japanese restrictions affecting the sale of alcoholic beverages. Canada is actively pursuing cases involving EU restrictions affecting meat imports and Brazilian export financing programs for aircraft, and has pursued consultations with Hungary regarding export subsidies on agricultural products, with the EU regarding restrictions on imports of grains, and with Korea regarding the treatment of imported bottled water. The long-standing Canada-U.S. soap opera over Canadian exports of "subsidized" softwood lumber exports to the United States has disposed Canada to bring a series of cases challenging U.S. countervailing duty procedures. Only the United States and the

[10] John Weekes, speaking to the Trade Policy Review Body. WTO Press Release TPRB/50, November 19, 1996.

[11] The Quadrilateral meetings of trade ministers bring together the trade ministers of the United States, the EU, Japan, and Canada, who together account for more than sixty percent of world trade. Established in 1982, this informal gathering affords the ministers and their senior officials the opportunity to review the state of play on both bilateral and multilateral trade files and coordinate positions to the extent considered desirable and feasible.

[12] An overview of ongoing dispute settlement cases is maintained by the WTO on its website under *Dispute Settlement.*

EU have been more active users of the system, consistent with the larger volume and more diversified nature of their trade.[13]

On the other side of the ledger, Canada has also been a respondent in a growing number of complaints brought by the United States, the EU, Japan, Brazil, New Zealand, and others involving issues related to Canadian cultural policies, patent protection, dairy policies, aircraft subsidy programs, and more. As has become the general pattern, WTO panels have upheld most of the complaints brought before it, demonstrating that much of the value of dispute settlement lies in giving governments incentives to dismantle programs and policies that may have strong industry support but that run counter to broader interests.

As with all international commitments, WTO dispute settlement can bring both comfort and discomfort to the contracting parties, at least at the political or immediate level. As U.S. analyst Duncan Snidal explains, "Institutions matter. . . . Sometimes they alter state behavior by driving a wedge between what is of immediate interest and what is of interest in some broader sense."[14] WTO dispute settlement provides clear proof of this insight. Governments are prone to defending their short-term policy preferences and do not like to lose. The purpose of dispute settlement, however, is to ensure accountability for those choices and ensure that longer term interests trump short-term political calculations. Outside of the heat of daily politics, Canadian ministers would agree and have thus been among the strongest supporters of binding dispute settlement at the international level.

While Canada has been a strong proponent of the WTO's dispute settlement process, Canadian officials have also been actively engaged in addressing ways and means to make the system more effective. As the trade dispute settlement process has moved further and further away from its diplomatic roots toward a rules-based system of adjudication, Canada has been among those insisting that two further developments are required to make the system fair and effective: developing countries need assistance to ensure they can take full advantage of the system, and appropriate procedural and other safeguards need to be devised to make the system both more transparent and fair to all interested parties. As the new Doha round of negotiations unfold, Canadian voices are likely to figure prominently in efforts to strengthen dispute settlement procedures.

Canada has been an equally active proponent of the deepening of the WTO's rules and of their extension into new areas, particularly into those areas related to the full contestability of markets. Canadian officials have made substantial contributions to the discussion of the interaction of trade and competition policies at the OECD and have been at the forefront of this discussion in Geneva. Traditionally one of the more reluctant participants in the elaboration of multilateral investment disciplines, Canada is now more prepared than other OECD countries to bring this issue to Geneva, preferring the global forum of the WTO to the more specialized arena of the OECD, where negotiations on a Multilateral Agreement on Investment foundered in 1998.[15] The establishment of

[13] The WTO, in its 2001 report on dispute settlement, indicates that through the end of August 2001, Canada had been the respondent in nine requests for consultations, leading to seven requests to establish panels, had been the requesting party in nineteen requests for consultations leading to seven panels, and had joined a further twenty consultations as an interested party. By way of contrast, during the GATT years from 1948 to 1994, Canada was involved in some eleven cases as a respondent and fifteen cases as a complaining party.

[14] Duncan Snidal, *Economic Approaches to International Institutions,* in Economic Dimensions in International Law (Jagdeep S. Bhandari and Alan O. Sykes, eds. 1997) at 491.

[15] *See* W.A. Dymond, *The MAI; A Sad and Melancholy Tale*, in A Big League Player? Canada Among Nations 1999 (Fen Hampson, Michael Hart, and Martin Rudner, eds. 1999).

WTO working groups on investment and competition policy issues at the Singapore Ministerial Conference was in part the fruit of Canadian tradecraft. The subsequent commitment at Doha in 2001 to proceed to possible negotiations within two years reflects Canadian conviction that the governance of the global economy requires a more expansive understanding of international trade and investment disciplines.

In addition to its active participation in the implementation, application, and further negotiation of the WTO's rules, Canada has vigorously advocated the extension of WTO membership. The accession of most applying countries is relatively straightforward, but the extension of membership to the People's Republic of China ("PRC") and to Russia poses major policy challenges. The PRC application was debated for more than a decade, as China was subjected to a barrage of more than 3,500 questions by members skeptical of its ability and willingness to abide by the WTO rules. The absence of China seriously undermined the WTO's credibility as the main forum for the pursuit of global trade issues, as does the continuing absence of Russia and other Soviet successor states, particularly now that they are pursuing market-based policies. China's accession at the end of 2001 fills one large gap; the remaining gaps may now prove easier to fill.

Canada has injected its interests into the accession process at two levels. In Geneva, Canada works with other major players to ensure that the process is both fair and credible. Canada has gone on record as welcoming all those who have applied, including China and Russia, but at the same time has insisted that the accession negotiations lead to commitments that make their accession economically and commercially credible. To that end, Canada has, through the Canadian International Development Agency, organized and funded training programs for officials in acceding countries, funded research projects related to WTO accession, and otherwise extended technical assistance to the governments of those countries, including China, Russia, the Baltic States, Ukraine, Vietnam, and others.

Canada's painfully learned but increasingly effective tradecraft has taught Canadians well and prepared ministers and officials alike for the challenges of a much more integrated and more competitive global economy and for even deeper integration with the United States. The history of the past century and a half suggests that Canada-U.S. trade and investment relations provide the dominant theme in Canada's economic development. It also suggests that Canadians—and Americans—have benefited from joint efforts to find mutually acceptable ways to address how best to share the continent. That is likely to remain a theme and a lesson for the future as well.

II. Choices and Opportunities for Canada

Canadians have a large stake in the success of efforts to further define and elaborate the regime for governing inter-state trade and investment relations. Indeed, as a result of both economic and policy developments in the 1980s and 1990s, their stake has become significantly greater. Trade and related matters now loom larger than ever as determinants of Canadian prosperity. Canadian capacity to contribute to the further evolution of rules and institutions to govern international trade has similarly grown. The lessons learned from more than a century and a half of trying to make the most of their geographic and demographic circumstances should serve Canadians well in the future.

In the opening years of the twenty-first century, even though little substantive progress was being made, governments were experimenting with a wide range of processes to test the scope of and demand for further rules and disciplines and new opportunities to liberalize trade and investment. Canadian participation in the elaboration of a Free

Trade Area of the Americas ("FTAA"), the agenda of Asia-Pacific Economic Cooperation ("APEC"), a new round of WTO negotiations, further Canada-U.S. bilateral or NAFTA trilateral discussions, and bilateral free-trade discussions with newer trading partners may each provide a basis for developing new ideas and proposals faithful to the achievements of the past but attuned to the demands of the future. Some of these initiatives, however, also illustrate well the emergence of trade policy as high policy: political factors frequently outweigh economic and commercial considerations.

For Canada, most of these experiments will prove of limited economic or commercial value. The FTAA discussions, for example, are symbolically important to the nations of the Americas, but they are unlikely to achieve the kind of agreement that early public discussions suggested. Successfully concluding and implementing an FTAA will require that all participants accept obligations that go well beyond their existing WTO obligations. That is a larger step than most of the countries of the region appear ready to take at this time. The absence of U.S. fast-track negotiating authority has invested the discussions with a surreal quality, and the rivalry between competing U.S. and Brazilian visions further underlined their geopolitical nature. Nevertheless, the discussions have been of considerable value in developing and deepening trade and political relations among the nations of the Americas, in providing the Caribbean, Central, and South American participants with a process to deepen their understanding of rules-based trade, and in enhancing their capacity to participate in such a system.

APEC similarly contributes to the intellectual capital and political momentum needed to move the international trade and investment agenda along. Like the FTAA process, discussions in APEC are in many ways the equivalent of discussions among Commonwealth members in earlier decades. They are characterized by a deep spirit of cooperation and a commitment to common objectives. To date, the results have been more modest than some of its more enthusiastic participants had hoped, but they have clearly been positive. Some of APEC's most important work has been to validate and complement the work of other forums. Over time, APEC's contribution is likely to continue to be constructive, adding to the forces leading to a more liberal, rules-based, and better functioning global economy.

For Canada, APEC and the FTAA are not likely to lead to significant new breakthroughs in access to the markets of Asia and Latin America or in negotiating new trade and investment rules. Rather, they will contribute to ensuring that Canadian-based firms can take advantage of the access that exists, to identifying problems in access, and to proposing remedies, most of which will be addressed elsewhere. More importantly, both forums provide unique opportunities to strengthen ties with future trading partners that could contribute to future trade and investment opportunities and growth.

Developing and transitional economy countries may eventually become more important trading partners for Canada. Some will offer very large markets and a capacity to absorb more Canadian goods and services; others will provide Canadians with a range of attractive and competitive products. To reach this stage, however, there need to be many more changes than have been evident to date. Most of these countries are now headed in the right direction; at the same time, many do not have the wherewithal to complete the journey. Canada needs a robust and well-functioning global trade and investment regime. To remain viable, such a regime will require the active and constructive participation of developing and transitional countries. To that end, Canada can usefully place itself at the forefront in helping them gain the capacity to meet this challenge.

Bilateral free-trade discussions with some of the emerging markets, including Chile, Costa Rica, the rest of Central America, Singapore, the remaining members of the European Free Trade Association (Norway, Switzerland, Liechtenstein, and Iceland), and

others serve similar modest, long-term objectives. They expand the reach of freer, rules-based trade on the basis of, by-now, well-established patterns. They foster relationships with countries that offer interesting, if modest, new trade and investment opportunities. They strengthen geopolitical ties that might otherwise remain largely dormant. But they are largely peripheral to the mainstream of Canadian trade and investment interests. These are to be found, as they have been for many years, in relations with the United States and in further elaboration of the multilateral trade and investment regime.

Members of the World Trade Organization at their fourth Ministerial Meeting in Doha, Qatar in November 2001 launched a new round of trade negotiations as well as an ambitious work program. Since the ill-fated Seattle meeting at the end of 1999, governments and their officials had worked diligently to find the basis for renewed commitment and expanded horizons. Preliminary negotiations on agriculture and services, as required by the 1994 Marrakech agreements, helped to clear the way. The final shape and full scope of these negotiations, however, remain obscure, suggesting that they will take many years to define and complete. As during the Uruguay Round, governments need to tackle some of the most difficult issues left over from previous rounds, particularly agriculture, and to find ways and means to address some of the newer issues, from competition policy to environmental protection and labor regulation. In between, there is a full range of other thorny issues.

For Canada, the new round of WTO negotiations will serve a dual purpose. First and foremost, the round should strengthen the systemic base for all of Canada's trade relations, including with the United States. Additionally, it should provide the best basis for pursuing stronger rules and better access commitments for trade with Europe, Japan, and the rest of the world. Canadians have sometimes been tempted to look to bilateral negotiations with the EU and Japan to effect change in these relationships, but experience has demonstrated that the degree of mutual interest in solving bilateral problems is not sufficient to overcome a host of complicating factors, including asymmetry in size and interest, sectoral sensitivities, concern about setting precedents for other relationships, and more. Multilateral negotiations are well suited to building coalitions and finding common cause to overcome some of these problems. Europe and Japan remain large and potentially important markets. They are now marginal trading partners, for reasons of both omission and commission, on Canada's part and theirs. There may be room for some modest initiatives to explore the scope for doing more, but the most important breakthroughs are likely to come through multilateral bargaining.

Canada's first priority remains the United States. That market now represents more than eighty percent of Canada's trade and economic relations. Canada's exports of goods and services to the United States adds up to about a third of its total economic activity while its imports from the United States constitute about a third of Canadians' total consumption. Canadians increasingly accept that living next door to the largest, most dynamic economy in the world is an asset to be nurtured and protected. This means that trade irritants, trade relations, trade promotion, and trade negotiations with the United States will remain at the top of Canada's agenda.

Together with the Mexicans, Canadians have a free-trade agreement with the United States. The reality, however, is that the three countries have reached a level of integration closer to that of a customs union, but without the institutions and rules to make sure that they are getting the full benefits of this level of integration. Given developments in the global economy, the intensification of private-sector led integration in North America, and the stresses created by diverging Canada-U.S. economic performance, a growing number of analysts believe the time has come for Canada and the United States to

consider jointly whether they can take steps to remove or constrain remaining barriers to cross-border trade and investment. The combined success of the FTA, NAFTA, and WTO negotiations has exposed policies and practices that do or might impede further growth in trade and investment. These policies and practices go beyond what can be resolved on a piecemeal, issue-by-issue basis and are of a type and nature unlikely to receive the attention they require in future WTO multilateral negotiations or ongoing regional FTAA or APEC discussions. They are most likely to be resolved on the basis of a comprehensive initiative that can capture the imagination of political leaders on both sides of the border and generate the level of support necessary to overcome narrowly focused opposition.

The tragic events of September 11th fundamentally altered the equation. An issue that needed to be weighed and debated became an issue for early and decisive action. Disruptions at the border rapidly convinced a growing number of Canadians and Americans that their two governments needed to take determined steps to keep the border open as a conduit for trade, tourism, and investment and make it less vulnerable to disruption by terrorist and other threats. On the security side, the crisis of September 11th pointed to the need for an aggressive and cooperative effort by police, intelligence, immigration, and allied enforcement bodies to coordinate their activities, share information, and cooperate along the full spectrum of their common interests. From an economic perspective, it indicated the need for some bold thinking and new arrangements.

Such a comprehensive initiative is most likely to be considered initially on a bilateral Canada-U.S. basis, without prejudice to the advisability or necessity of including Mexico or of incorporating the results of any discussions into the NAFTA framework. The two governments are likely to conclude that it is more important to define the issues and the feasibility of their resolution than to focus on their form or the institutional basis for administering the results of any new commitments. Similarly, they are likely to conclude that it is not necessary in the early stages to determine Mexico's role. That issue is more likely to be addressed later on the basis of the results of preliminary discussions and in light of Mexican interests and capacity.

Over the next decade, therefore, it would not be surprising to find Canada and the United States engaged in efforts to complete the work they started in the early 1980s to achieve a seamless market governed by a single set of rules, implemented and administered by the two governments to achieve their common interest in a well-functioning North American economy. Canadians will be asked to agree that such an initiative represents a prudent way for Canada to manage its deepening economic relations with its giant neighbor to the south. Americans will need to decide whether this is a good way for the United States to demonstrate to its other trading partners that it remains committed to rules-based internationalism and that it is prepared to adapt that system to the challenges and demands of deeper integration. For both, reducing the impact of the border may prove the best way to preserve Canada's status as an independent, reliable, and vibrant partner of the United States in the pursuit of common trade, economic, and security interests.

III. Trade Policy Making in Canada

Canadian ministers have begun to respond to the demands of the new, more complex political economy of trade[16] by committing the government to consultations with all

[16] For discussions of the new political economy of international trade negotiations, see Michael Hart, *The WTO and the Political Economy of Globalization*, 31 JOURNAL OF WORLD TRADE 5 (October 1997), and

sectors of society. Following the federal government's positive experience in the Tokyo Round of GATT negotiations (1973–79) of consulting closely with the provinces and business interests, ministers developed a disposition to consult ever more widely before enunciating Canadian policies and priorities. They also became comfortable with a more transparent process of decision making, prepared to share a wide range of previously restricted information and analysis. The advent of the Internet further allowed governments to shape and share information and analysis on the broadest possible basis. By the turn of the century, virtually every level of government routinely made material available that less than a generation earlier would have been considered sensitive and privileged.

The contours of Canada's trade policy-making process are derived from the parliamentary system of government and the federal-provincial distribution of power. The Canadian parliamentary system provides for a top-down exercise of political authority, which is generally closed to outside influences except to the extent permitted by formal and informal consultative mechanisms. Executive authority for the conduct of international trade policy is vested in the cabinet. When the cabinet holds a majority in parliament, it holds, for all practical purposes, legislative power as well. Canadian ministers and officials conduct trade relations and trade negotiations under explicit or implicit grants of political authority from the cabinet and may conclude *ad referendum* agreements consistent with that political authority. When implementation of such agreements does not require new legislation, reference to parliament is not required, although most agreements are normally tabled in parliament. If new legislation is required, the government majority in parliament virtually ensures that such legislation will be enacted.

Within the cabinet, the Minister of Foreign Affairs is responsible for the conduct of all foreign policy, while international trade policy is the responsibility of the Minister of International Trade.[17] To ensure an integrated approach to Canadian trade and foreign policy, the two ministers are served by a single department. To obtain and maintain cabinet support for international trade policy and negotiations, the Minister of International Trade must necessarily work closely with other ministers and their departments, such as the Ministers of Finance, Industry, Agriculture, and other ministers who have important international trade issues within their portfolios. The Minister of Finance, for example, retains authority over the tariff and trade remedy legislation. Over the years, as trade negotiations have delved ever deeper into domestic policy, the number of ministers—and their officials—with a direct interest in trade negotiations has grown commensurately.[18]

Although the constitution assigns exclusive responsibility for international trade to the federal government, the provinces play an increasingly important role in the formulation and implementation of trade policy. In light of the importance of international trade to Canadian economic performance and the political accountability of provincial governments to their electorates, provincial governments have, over the years, sought and acquired an enhanced role in the formulation of trade policy. Further, modern trade policy issues are beginning to reach into public policy areas under shared federal-provincial jurisdiction or exclusive provincial jurisdiction. Thus, while the federal government

William A. Dymond and Michael Hart, *Post-Modern Trade Policy: Reflections on the Challenges to Multilateral Trade Negotiations After Seattle*, 34 JOURNAL OF WORLD TRADE 3 (June 2000).

[17] An exception is the *Export and Import Permits Act*, which authorizes the Minister of Foreign Affairs to apply import or export controls under certain circumstances, for example, to protect national security.

[18] For example, some 24 federal government departments and agencies were members of the inter-ministerial group which provided advice to ministers on Canadian interests at the Seattle meeting of the WTO.

retains full authority to conclude and sign international trade agreements on any subject, it relies on the provinces to ensure full implementation in areas of provincial jurisdiction.

Similar to the exercise of federal power, political power within the provinces consists of a top-down discharge of authority under the control of the provincial cabinet. The assignment of trade responsibilities varies across the provinces from explicit ministers of trade to ministers of economic development. However, as in the federal arrangement, ministers holding other portfolios such as agriculture, industry, finance, and energy necessarily become involved in the formulation of provincial government positions.

Prior to 1985, a permanent mechanism for consulting with Canadian business and other interests on trade policy matters did not exist in Canada. GATT negotiations in the early years focused on cutting tariffs and, as proposed tariff changes were budgetary secrets, they were not subject to public discussions before being enacted. Trade officials routinely held informal discussions with business representatives but they were not included in the policy process in any formalized way. By the time of the Kennedy Round of GATT negotiations (1964–67), however, the federal government found it useful to establish a more formal mechanism, the Canadian Trade and Tariffs Committee, to receive briefs and hold hearings in preparation for negotiations.

By the time of the Tokyo Round, once most significant tariff barriers had been stripped away and the trade agenda had begun to shift to non-tariff barriers and trade issues with a broader social dimension, the need for regular consultations had also become more pressing. A variety of mechanisms were used, including a Canadian Trade and Tariffs Committee in the early stages to receive briefs and hold hearings, regular consultations with provincial officials, and periodic consultations with business leaders through such vehicles as the C.D. Howe Institute—a think tank—and its various committees, the Canadian Exporters Association, the Canadian Manufacturers Association, and the Chamber of Commerce. As well, the government set up an office of the Canadian Coordinator for Trade Negotiations to facilitate opportunities for business and other interests to inform the government of their views.

By the 1980s, the list of subjects covered by trade agreements had become increasingly complex and the range of interested parties more varied. Trade negotiators required technical input on energy, telecommunications, transportation, food safety, and other issues for which the in-house capacity of the government was not always sufficient. A more interested business community, as well as provincial officials, sought more frequent opportunities to advise the government. To that end, senior officials met periodically with a newly constituted Canadian Business and Industry Advisory Committee (a Canadian offshoot of the OECD Business and Industry Advisory Committee) and with provincial officials. Efforts to include labor leaders in such consultations proved less successful.

The decision to negotiate the Canada-U.S. Free Trade Agreement marked a watershed in the development of formal consultative mechanisms to further the Canadian trade agenda. Public consultation for this agreement was essential, both because of the broad range of subjects under discussion and because broadly-based consultations would enhance support from the various regional and sectoral constituencies required to hold the deal together. The FTA and subsequent North American Free Trade Agreement thus helped to institutionalize mechanisms for consultation with the provinces, business, and other stakeholders. Following the events at the WTO ministerial in Seattle, the Canadian government put its full weight behind its commitment to consultation and transparency, making Canada a world leader in consultative trade policy, both in form and substance.

A. Formal Consultative Mechanisms

The trade policy-making consultative process in Canada today involves a mix of formal and informal mechanisms. The formal mechanism consists of 1) a Continuing Committee on Trade Negotiations, providing for regular consultations between federal and provincial officials; and 2) a consultative framework of business, labor, non-governmental organizations, and academics set up to provide advice to the Minister of International Trade and senior government officials on the conduct of trade negotiations and the management of trade relations. The informal mechanisms include *ad hoc* consultations between interest groups, companies, and organizations and ministers and their officials from a broad range of government departments. Additionally, parliamentary committees regularly hold hearings and report to the government on trade policy developments, trade negotiations, and trade relations.

The International Trade Advisory Committee ("ITAC") and the Sectoral Advisory Committees on International Trade ("SAGITs") were originally formed in order to assist the government in preparing for the bilateral Canada-U.S. Free Trade Agreement ("FTA") negotiations. The Trade Minister appointed all members of the ITAC and SAGITS. Some overlap existed between SAGIT and ITAC membership as the SAGIT chairs usually sat on the ITAC. The original ITAC had about forty members, including business executives, trade union leaders, consumer representatives, and academics. Its mandate was to focus on the larger trade-related economic issues of the nation and its members were expected to serve the broader national interest rather than act strictly as representatives from specific industries and interest groups. The ITAC served as an important vehicle for developing consensus and support for Canada's general approach to trade negotiations.

Differing in scope and approach, the SAGITs were established to provide more narrowly-based input. At the time of the FTA, fifteen SAGITS were formed to cover a range of industrial sectors and interest areas. They provided valuable technical advice to the federal negotiating team on how quickly tariff levels should be reduced to zero in each sector, as well as advice on other issues under negotiation. In effect, the SAGITs provided the government with an important vehicle for two-way information flows. The value of the ITAC and SAGIT advisory role is well illustrated by the fact that the government decided to maintain the framework well after the conclusion of the FTA negotiations.

The SAGIT consultative mechanism is now made up of twelve advisory groups[19] and continues to provide an important source of advice for the government, as well as a means of keeping industry and other interests informed of trade policy and trade negotiation developments. Each SAGIT is comprised of senior business executives and representation from industry associations, labor unions, environmental groups, and academia. Members are selected on the basis of their personal capacity and not as formal representatives of specific entities or interest groups. Members are appointed for a two-year, renewable term and report to the Minister of Trade. Officials from the Trade Consultations and Liaison Planning Division of the Department of Foreign Affairs and International Trade support the SAGIT structure. Efforts are made to ensure regional balance and gender participation. Each SAGIT meets three to four times annually and members serve without remuneration.[20]

[19] Agriculture, Food and Beverage; Apparel and Footwear; Cultural Industries; Energy, Chemicals and Plastics; Environmental; Fish and Sea Products; Forest Products SAGIT; Information Technologies; Medical and Health Care Products and Services; Mining, Metals and Minerals; Services; and Textiles, Fur and Leather.

[20] SAGIT members are reimbursed for economy class travel and meal expenses incurred when travelling to meetings.

The International Trade Advisory Committee has now been replaced by the Team Canada Inc. Advisory Board. It provides the federal government with advice on trade policy and market access questions as well as issues related to trade and investment promotion. Its role and scope has remained largely unchanged over the past fifteen years, but its organization may be overhauled once again to deal with the changing focus and dynamics of WTO and other negotiations.

In addition, other ministers on occasion participate in meetings of SAGITs and the Team Canada Advisory Board and have also set up advisory bodies of their own. Both the Minister of Agriculture and Agri-Food and the Minister of Industry have developed their own advisory structures. Given the importance of international trade to these portfolios, trade policy and trade negotiations form important parts of the agendas of these consultative bodies.

Finally, in 1998 the Deputy Minister of International Trade established an Academic Advisory Committee to the Deputy Minister, made up of fifteen senior academics drawn from a variety of disciplines (e.g., law, economics, political science, commerce, and environmental science) to provide senior officials with a twice yearly opportunity to discuss the full range of trade policy issues with a group of knowledgeable individuals without a direct stake in any of the issues.

B. Informal Consultative Mechanisms

A number of factors set the stage for the consultative turn in Canadian trade policy. The Canada-U.S. negotiations FTA helped to stimulate interest in a more formalized and institutional framework for communicating with stakeholders, mostly from the business community, although organized labor was also invited to participate. At the political level, as part of its 1997 election campaign, the government promised greater transparency and the further democratization of foreign policy based on an even more open process for policy making. In the area of trade policy, this commitment was reinforced by the desire to avoid the public relations difficulties that the government had encountered with the failure of the negotiations at the OECD for a Multilateral Agreement on Investment ("MAI"). Although the claim made by civil society groups that public opposition was responsible for the demise of the negotiations is both misleading and self-serving, the trade minister at that time, Sergio Marchi, responded to the unexpectedly vigorous opposition to the agreement by renewing the government's commitment to consultation in order to avoid being similarly blindsided in the future.

The informal consultative process reaches out to a broad range of Canadian groups and is held together by an eclectic, multifaceted structure that allows for a number of points of contact. Institutional mechanisms such as the Parliamentary Standing Committee on Foreign Affairs and International Trade ("SCFAIT"), the Parliamentary Centre, and the Centre for Foreign Policy Development facilitate the discussion and evaluation of relevant trade policy issues within the broader context of Canadian foreign and domestic policy. Much broader outreach is achieved through the government's commitment to Internet communications, which has significantly opened up the process of information dissemination and dialogue with Canadians. A regularly updated website entitled *Consulting with Canadians* solicits the views of all interested Canadians on a range of trade policy issues and provides access to a wide range of unclassified documents, briefings, and discussion papers.[21]

[21] *See* www.dfait-maeci.gc.ca/tna-nac/consult-e.asp.

In settings that require more structure, such as hearings before the SCFAIT, input from individuals with particular expertise may be solicited, including from representatives of various industries and industry associations, universities and research organizations, and interest groups representing environment, labor, and a broad range of other social concerns. At the other end of the spectrum, participants in the broader-based consultations, for example, those making direct submissions to the trade ministry, are more likely to be self-selecting.

Ironically, as consultations have expanded, they have also became less effective. To re-capture their earlier effectiveness, the government may need to reconsider both the intent and process of consultations. As Denis Stairs has indicated, there are two kinds of consultations: political and bureaucratic.[22] The priority for ministers and parliamentarians is to determine whether Canada *should* negotiate and to what purpose. These are political questions on which only politicians can be fully engaged. Both before and after the government has determined its answer to these questions, a second level of consultations can come into play, focused on how, when, where, and what to negotiate. These are technical questions well suited to the skills and expertise of officials. Confusing the role of politicians and officials can lead to frustration on the part of both those consulted and those doing the consulting. Complexity requires expertise; democratic accountability requires political oversight. Effective consultations in an era of broad public participation and interest, therefore, require a partnership between politicians and experts, each group with important roles to fulfil.

Global economic exchange of goods, services, information, and capital has fuelled the need for multilateral economic regulation. This phenomenon is challenging the ability of governments to regulate in non-economic areas that were formerly and adequately dealt with at the state level such as environmental integrity, core labor standards, and cultural protection. While trade policy for such traditional trade matters as tariff rates could be informed by purely economic calculations of value, trade issues with significant social content must take into account non-economic values as well. The question that emerges is: who is qualified to represent these non-economic values in a public policy forum? Within the old trade policy paradigm, it was much easier to identify key stakeholders (one need not look much beyond the roster of principal business interests). Within the ambit of new trade issues, a much broader constituency is affected. Issues of environmental safety affect all those who live on the planet but who can claim to act as a legitimate representative of environmental integrity? Criteria such as technical expertise, scientific credibility or the appearance of public support have been offered as starting points but much work remains to be done to situate the legitimacy of non-governmental actors within the broader functions of democracies, even democracies such as Canada which place a premium on consultative policy-making.

IV. Concluding Observations

As in the past, Canada remains a firmly committed multilateralist, enthusiastically participating and advancing its interests through WTO negotiations, dispute settlement procedures, and other venues. At the same time, the dictates of geography and consumer and corporate preferences have clearly established the United States as far and away Canada's main trade and economic partner. In the years to come, these twin foundations

[22] *See* Denis Stairs, *Foreign Policy Consultations in a Globalizing World: The Case of Canada, the WTO, and the Shenanigans in Seattle*, 1 IRPP POLICY MATTERS, No. 8 (December 2000).

of Canadian trade policy will continue to mutually reinforce each other as well as create occasional opportunities for conflict and tension. In the WTO, Canada has found a firm framework within which to anchor its global trade and investment ambitions, including the framework within which to pursue its ever-deepening bilateral relationship with the United States.

This chapter was largely written and completed in 2002 and reflects circumstances at that time. My assessment of the issues, and Canada's approach to them, has not changed, but some of the details require updating. The arrival of a new Prime Minister, Paul Martin, in December 2003 resulted in some reorganization of government departments and the appointment of new ministers and deputy ministers. Among the changes was a division of the former Department of Foreign Affairs and International Trade into separate Departments of Foreign Affairs and International Trade. As is not uncommon in such circumstances, the full implications of this change will take some time to work its way through the bureaucracy, including its impact on the various consultative mechanisms. To date, it remains unclear whether the new minister and deputy minister will maintain the formal consultative structures put in place by their predecessors, although it is clear that they remain committed to the objectives served by these mechanisms. Readers who are interested in the latest iterations are invited to visit the website of the Department of International Trade at www.itcancican.gc.ca/menu-en.asp.

CHAPTER 67

CHINA

Yaotian Wang* and Guiquo Wang**

TABLE OF CONTENTS

I. Introduction 49
II. China's Participation in the GATT and the WTO 49
III. Chinese Economic and Legal Reforms During its Bid for Membership 51
A. Particular Problem Areas 51
B. Steps Towards Reform 52
1. Reduction of Import Barriers 52
2. Equal Treatment of Foreign and Domestically-Owned Enterprises 53
3. Increased Market Access 54
4. Price Reforms 54
5. Other New Laws 54
C. Changes in the Chinese Legal System 55
1. The Initial Attempts at Reform 55
2. The Post-1992 Reforms 56
IV. Economic Challenges and Opportunities 56
A. Japan's Example 57
B. Opportunities Arising from WTO Membership 57
1. Achieving Optimal Reallocation of Resources and Promoting a Market Economy 57
2. Improving the Inflow of Foreign Direct Investment as a Result of the Improved Investment Environment 58
3. Eliminating Discriminatory Treatment by Other Countries 59
4. Access to WTO Dispute Settlement System 60
5. Participation in Multilateral Economic Policymaking and Development of International Trade Rules 60
6. Benefits to Domestic Enterprises 61
C. Challenges after China's Accession to the WTO 61
1. Agriculture 61
2. Automotive 62
3. Pharmaceuticals 62
4. Petrochemicals 63
5. Telecommunications 63
6. Financial Services 64

* Chairman of WTO Shanghai Research Centre, Professor of Shanghai Institute of Foreign Trade, Senior Advisor of China International Trade Academy.

** Professor (Chair) of Chinese and Comparative Law, City University of Hong Kong, Member of the International Academy of Comparative Law, Chairman of Hong Kong WTO Research Institute, Vice President of the Chinese Society of International Economic Law, JSD from Yale Law School.

V. Effects of WTO Accession on the Legal System 64
VI. Strategies After Joining the "Club" 66
A. Economic Restructuring 67
B. China Should Take Full Advantage of Special Treatment for Developing Countries 67
C. Encourage Globalization of Chinese Enterprises 67
D. Additional Research and Training on the WTO 68
E. Position in Next MTN Round 68
1. Electronic Commerce 68
2. Trade and Competition 69
3. Trade and the Environment 69
4. Trade and Labor Standards 69
VII. Conclusion 70

I. Introduction

On September 17, 2001, the WTO announced the conclusion of negotiations on "China's terms of membership, paving the way for the text of the agreement to be adopted formally at the WTO Ministerial Conference in Doha, Qatar, in November".[1] Thus the fifteen-year negotiation, originally on China's resumption of GATT status and later on its membership in the WTO, came to an end. Mike Moore, the former Director-General of the WTO, stated: "With China's membership, the WTO will take a major step towards becoming a truly world organization".[2] On September 19, 2001, the then Chinese Premier Zhu Rongji said at the Sixth World Chinese Entrepreneurs Convention in Nanjing, China, that he could not give a detailed account of the challenges that China would face after joining the WTO. He did however say that "the Chinese government is taking measures to reform the electric power, railway, civil aviation and telecommunications sectors which are under monopoly. After assuming its seat in the WTO, China will be more active in implementing the open policy at full scale and at all levels; the sectors that will be opened up include finance, insurance, telecommunications, trade, tourism, etc."[3]

What, then, are the challenges that China must face and what effects will WTO membership have on the country? This chapter will discuss China's participation in the GATT in the early years of the organization, the reform measures, economic and legal, that China took in its bid, first to resume its membership of the GATT and then to join the WTO, as well as the potential challenges and opportunities arising from WTO membership.

II. China's Participation in the GATT and the WTO

China participated in the Havana Charter negotiations designed to establish the International Trade Organization ("ITO"). It also took part, along with twenty-two other countries, in the Geneva Conference that led to the adoption of the General Agreement on Tariffs and Trade ("GATT"). It became a contracting party to the GATT by signing the Protocol of Provisional Application on April 21, 1948.

On March 6, 1950, the Nationalist Government, which had retreated to Taiwan, informed the General Secretary of the United Nations that China was withdrawing from the GATT. The validity of this withdrawal was an issue in China's bid to resume its contracting party status.[4] The issue was directly related to UN Resolution 2758 (XXVI), which was adopted by the General Assembly in 1971 to recognize all rights of China in the UN as belonging to the People's Republic of China and to recognize its representatives as the only legitimate representatives of China to the UN. That Resolution also applied to China's representation in the specialized agencies of the UN. The GATT follows UN decisions in respect of policy and political issues, and thus, after the adoption of General Assembly Resolution 2758 (XXVI), the GATT terminated Taiwan's observer status,

[1] *See WTO News: Press/243*, September 17, 2001(www.wto.org).

[2] *Id.*

[3] *The Speech of Zhu Rongi at the Sixth World Chinese Entrepreneurs Convention* (full transcript), www.peopledaily.com.cn, September 19, 2001.

[4] The question was whether the Taiwanese government had the right to represent China in 1950, as the People's Republic had effective control over the entire mainland by then. The Chinese government has argued that the withdrawal by the Taiwanese government was null and void because it did not originate from the government that was then in control of China. *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 288 (1991). The legal implications of this issue, however, are beyond the scope of this chapter.

which it had obtained in January 1965. However, for many reasons, the PRC Government chose not to re-enter the GATT in 1971.[5]

In the late 1970s, China shifted from a policy that emphasized political struggles to one which put economic development at the forefront. It introduced a policy of domestic economic reform and opened itself to the outside world. China realized that in order to accomplish the goals dictated by this new policy, it would be necessary to absorb foreign capital and advanced technology, and to participate in multilateral organizations which serve as forums for international co-operation. China's interest in resuming its participation in the GATT was therefore inevitable. In 1980, China's representative on the Executive Committee of the Interim Commission for the ITO took part in the election of the Director-General of the GATT. The following year, China became first an observer and then a participant in the negotiations on renewal of the Multi-Fibre Agreement ("MFA").[6] On January 18, 1984, it became a signatory to the MFA.[7]

With its opening to the outside world and the implementation of domestic reforms, China obtained observer status in the GATT in 1984,[8] and then made an official application for the resumption of GATT contracting party status on July 10, 1986. A GATT Working Group subsequently met many times to discuss the way in which China could once again be treated as an original contracting party of the GATT. In the first seven years the efforts in this regard were focussed on examining China's foreign trade regime. The representatives of the GATT and China concentrated their efforts on the Protocol of Accession and the reduction of tariffs.[9] After the Uruguay Round negotiations began in 1986, the negotiations on China's resumption of GATT contracting party status continued in parallel with the multilateral discussions. China participated in the Uruguay Round talks and stated that once its GATT contracting party status was confirmed, it would accept the obligations formulated during this Round, including the General Agreement on Trade in Services ("GATS") and the Agreement on Agriculture.[10] On April 16, 1994, China signed, as an observer, the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ("Final Act") and the Marrakesh Agreement

[5] First, China was in the middle of the notorious "Great Cultural Revolution" which had diverted the government's priorities away from economic development. At the international level, China treated multilateral organizations such as the UN as a forum for the class struggle, an extension of its domestic policy. The obvious economic characteristics of the GATT dissuaded the Chinese government from participating in the work of the organization. Second, China was quite isolated from the rest of the world. It recognized neither the importance of international economic co-operation nor the economic interdependence of nations with divergent economic and political systems. Third, the Chinese government adopted a strict planned economic system, under which foreign trade was totally controlled by the government. Such a system was contrary to the principles of the GATT. Fourth, China's lack of knowledge about the operation of the GATT added to its reluctance to partake in its activities.

[6] As a developing country, China expected to be entitled to treatment equivalent to that accorded to other participating developing countries with a similar level of economic development, as stipulated in Article 6 and other provisions of the MFA.

[7] Yaotian Wang and Hanmin Zhou, A General Introduction to the WTO 138 (1995).

[8] The representative of the Chinese delegation stated that the observer status was a temporary arrangement, without prejudice to the Chinese government's position with regard to its legal status in the GATT.

[9] It was reported that New Zealand, Japan, Canada, Australia, Sweden, Uruguay, Finland, Czechoslovakia and Turkey had either started or were prepared to negotiate tariff reductions with China. *See* Yongjiang Gu, *A Review and Preview of Negotiations on China's Return to GATT,* in Challenges and Opportunities: China's Return to GATT and its Impact on the Hong Kong Economy: Conference Speeches Organized by Kwangtung Provincial Bank, Hong Kong (1993) ("Challenges and Opportunities").

[10] Zhongzhou Li, *GATT and Foreign Trade of China*, in GATT: A Handbook 8 (Department of International Liaison of the Ministry of Foreign Economic Relations and Trade of China 1992).

Establishing the World Trade Organization ("WTO Agreement").[11] Despite these efforts, however, China failed to become an original Member of the WTO, and it was a further six years before it was able to join the organization. This of course does not mean that the GATT and the WTO had no impact on China prior to its joining the WTO. To the contrary, as we now discuss, tremendous changes took place in the country during its efforts first to resume GATT contracting party status and later to join the WTO.

III. Chinese Economic and Legal Reforms During its Bid for Membership

When China formally submitted its application to rejoin the GATT in 1986, China had what was essentially a planned economy. China's trade policy at that time was based on high tariff and non-tariff barrier protection. China's main trading partners at the time were socialist counties such as the Soviet Union, Yugoslavia and Romania. In addition to border protection, import and export rights were largely monopolized by State-Owned Enterprises ("SOEs"), which meant that only a very limited number of companies could engage in import and export business.

The most important task for the Chinese negotiators was to explain the nature of China's economic and trade systems to the GATT. However, as a Chinese negotiator has stated, for six years after China submitted its application for GATT membership, the Chinese government could not explain to the GATT contracting parties how the Chinese economic system was going to develop, nor could it say whether or not the country was going to adopt a market economy. The official position then was that the Chinese economic system was a combination of market and planned economy.[12] That situation continued until early 1992 when China declared its determination to establish a "socialist market economy".[13] As a result, the GATT contracting parties decided that China would be able to fulfil the fundamental obligations of the GATT.

A. Particular Problem Areas

As the Uruguay Round negotiations progressed, it became clear that China would face major difficulties in a number of areas. For example, the extension of the multilateral trading rules to trade in services would impose a great strain on the country. In the 1980s there were no laws governing banking, insurance and securities. Yet China was aware that once it became a member of the new organization, it would have to open its service sectors to foreign competition. It would also have to adopt measures relating to intellectual property protection and foreign investment. At that time, foreign service providers were not encouraged, and those that were operating in China were not treated

[11] *Statement of Mr. Long Yongtu, Assistant Minister of MOFTEC, at the First Meeting of the Working Party on China's Accession to the WTO*, www.china-un.ch/eng/13760.html, March 22, 1996.

[12] Yongtu Long, *Negotiations on Resumption of GATT Contracting Party Status and the Reforms of the Chinese Economic System and Opening Up*, in CHALLENGES AND OPPORTUNITIES *, supra* note 9, at 18.

[13] In early 1992, Deng Xiao Ping visited Southern China to promote further economic reforms and to advocate the establishment of a market economy in China. Soon after, the Chinese Communist Party Central Committee and the National People's Congress formally endorsed the move to build a socialist market economy in China. A socialist market economy is defined as a market economy with public ownership as its main force. This means that except for the fact that State ownership of economic institutions will be maintained, other aspects of the economy are the same as those of other market economies. China's recent securitization of many State-owned companies, however, demonstrates the Chinese government's realization that in order to create an environment for equal competition, it is important to adopt a more flexible attitude in respect of ownership of enterprises.

on the same footing as Chinese service providers. Foreign banks at that time were permitted to establish representative offices throughout China, but foreign bank branches and Chinese/foreign joint banks could only be set up in Special Economic Zones and in Technological Development Zones.[14] Foreign banks were not allowed to conduct Renminbi ("RMB") business,[15] and their operations were restricted to the areas where they were registered.

The securities and insurance industry faced a similar situation. Although the Chinese government allowed the issuance of "B" shares and "H" shares,[16] the access of foreign investors to the Chinese securities market was still limited. The insurance market was even more restricted.

China would also have to consider the implications of the Uruguay Round Agreement on agriculture. Imports of agricultural products were strictly controlled. With the conclusion of the Agreement, China, as an importer of agricultural goods, might face potential dangers, for when a country's food consumption depends (wholly or partly) on foreign supply, the security of the country can be adversely affected. At the same time, the liberalization of agricultural trade would lower the price of farm products and consequently benefit consumers.

While Chinese policy has always been to encourage foreign investment by giving foreign investors preferential treatment in terms of taxation, import and export opportunities, and independent management, Chinese law required foreign investors to give priority to local parts and products in procurement, and linked preferential treatment with export performance. Neither of these policies were consistent with the Uruguay Round Agreement on Trade-Related Investment Measures ("TRIMS"). In addition, only Chinese nationals could serve as chairmen of the board of Chinese-foreign equity joint ventures.

B. Steps Towards Reform

Deng Xiaoping's trip to Southern China in 1992 motivated China to open its door wider. He pointed out that socialist ideology was not necessarily incompatible with a market economy, thereby signaling China's change to market principles.[17] Following this momentous development, China took numerous economic and legal measures designed to comply with the requirements of GATT membership.

1. Reduction of Import Barriers

China substantially reduced its tariffs in 1992 as payment of its "ticket of admission".[18] It also abolished the system of export subsidies and the adjustment tax on imports, and

[14] As of March 1993, there were one hundred and ninety-two representative offices of foreign banks and eighty-nine business establishments in China, of which seventy were foreign bank branches, five were wholly foreign-owned banks, ten were Chinese/foreign joint banks, three were Chinese/foreign joint financial companies and one was a foreign-owned company. *See* Changyao Wang, *The Effect of China's Resumption of GATT Contracting Party Status on the Financial Industry in Hong Kong*, in CHALLENGES AND OPPORTUNITIES, *supra* note 9, at 74.

[15] China operated a dual foreign exchange system prior to 1994. There was an official exchange rate which was applicable to transactions sanctioned by the government and a market rate applicable to transactions conducted by foreign businesses.

[16] "B" shares are shares designated for foreign investors, denominated in RMB, payable in foreign currency, and listed in China. "H" shares are shares floated and listed on the Hong Kong Stock Exchange.

[17] *See* note 13 *supra. See also generally* RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING (1996). (1994).

[18] Yongjiang Gu, *supra* note 9, at 6.

reduced the categories of license and quota requirements. Additionally, in 1993, China ceased to issue directive plans for imports and exports, and tariffs were reduced by an average of 7.3 percent.[19]

2. Equal Treatment of Foreign and Domestically-Owned Enterprises

A salient feature of the Chinese economic system between the late 1970s and the early 1990s was the differential treatment between nationals and foreigners. During this period, there were generally two sets of laws and regulations: one applicable to enterprises with foreign ownership, the other to domestic concerns. Examples were the 1979 China-Foreign Joint Venture Law, the 1988 China-Foreign Contractual Joint Venture Law, the 1986 Wholly Foreign-owned Enterprise Law, the 1985 Foreign Economic Contract Law, and the laws, regulations and rules relating to taxation and commercial dispute resolution. As in the case of other developing countries, the purpose of this differential treatment was to give preferential treatment to foreign investors.[20] The result was to put local enterprises and individuals in a disadvantageous position, lessening the initiative of the enterprises and individuals. It also provided an excuse for SOEs to continue incurring losses.

For example, before 1990, SOEs were required to pay an income tax that was higher than that applicable to foreign companies and enterprises with foreign investment. They were also required to give part of their profits to the government. In fact, even domestic enterprises were taxed at different rates according to the nature of their ownership – State-owned, collectively-owned or privately-owned. Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, wholly foreign-owned enterprises and foreign companies doing business within but established outside China, were all subject to different income tax laws.

Because of the difficulties in managing such a complicated tax system and in pursuance of its bid to resume GATT contracting party status, the Chinese government decided to unify the tax system. In 1991, the Income Tax Law on Enterprises with Foreign Investment and Foreign Enterprises was adopted to replace the Income Tax Law on Chinese-Foreign Equity Joint Ventures and the Income Tax Law on Wholly Foreign-Owned Enterprises. Thereafter, Chinese-foreign equity joint ventures, Chinese-foreign contractual ventures and wholly foreign-owned enterprises were taxed at the same rate under the same law.[21] At the end of 1993, similar measures were taken to unify the tax laws relating to domestic companies. The tax rate that was applicable to state-owned companies, collectively owned enterprises and privately owned enterprises, as well as other entities, were brought into line with that applicable to enterprises with foreign investment.

The Chinese government also reformed its tax turnover system, an equally important initiative,[22] by abolishing the old Regulations on Industrial and Commercial Tax which were applicable exclusively to foreign enterprises and enterprises with foreign investment. At the same time it introduced a value-added tax, a consumption tax and a business tax. These new regulations placed domestic enterprises, foreign enterprises

[19] *See* YANG SHENGMING (ed.) CHINA'S TARIFF REGIME REFORM, (China Social Science Publishing House 1997).

[20] Generally speaking, in the 1980s and prior to China's entry into the WTO, China, like other developing countries, was very reluctant to open its banking and securities sectors to foreign investors. Thus, preferential treatment of foreign investors was confined to sectors which were open to foreigners.

[21] Foreign enterprises, which are defined as enterprises established outside China and generating income from China, are taxed at a different rate depending on the nature of the income.

[22] The Provisional Regulations of the People's Republic of China on Value-Added Tax, the Provisional Regulations of the People's Republic of China on Consumption Tax and the Provisional Regulations of the People's Republic of China on Business Tax all came into effect on January 1, 1994.

and enterprises with foreign investment on the same footing. The unification of the tax system was an important step towards establishing a market economy and an effort to comply with the non-discrimination principles underlying the GATT/WTO.

The 1993 Company Law, the 1994 Arbitration Law, the 1995 Commercial Banking Law, and the 1999 Contract Law also recognize no distinction between nationals and foreigners. Abolition of the differential legal and regulatory treatment between local Chinese and foreigners has encouraged competitiveness among enterprises and is conducive to the establishment of a market economy. It was an important step towards China becoming a Member of the WTO.

3. Increased Market Access

Because all foreign trade companies had been State-owned, the Chinese government essentially regulated foreign trade through administrative orders rather than by issuing laws. This made it difficult for foreign trading partners to become aware of changes in China's trade policies and laws. In order to meet the GATT/WTO transparency requirements, the Chinese government started promulgating legislation in the early 1990s. It amended the Patent Law[23] and the Trademark Law,[24] and enacted the Copyright Law,[25] the Regulations on the Origin of Imported Goods, and the Regulations for the Protection of Computer Software. In March 1993, the State Council decided that one foreign trade company could operate in each of the coastal districts and counties, border counties and cities, and High Technology Development Zones. Specialized foreign trade companies and industrial companies were permitted to establish subsidiary companies. Foreign investors were allowed to set up offices and branches in areas which had formerly been the exclusive domain of domestic investors. The effect of these changes was to give foreign investors and traders easier access to the Chinese market.

4. Price Reforms

China also took measures to reform its price system during the 1980s and 1990s. As a result, only a small proportion of goods which the Chinese government considered crucial to the life of the people or the development of the national economy were subject to government-set pricing. It was reported that by March 1993, market-determined prices accounted for more than eighty percent of the categories of goods in China.[26]

5. Other New Laws

In order to fill the gaps in its developing legal system, China adopted the Commercial Banking Law, the Central Bank Law, and the Foreign Trade Law and Securities Law. It consolidated its former contract laws into a new Contract Law. The Chinese-Foreign Equity Joint Venture Law, the Foreign Capital Enterprises Law, the Chinese-Foreign Contractual Joint Venture Law, the Patent Law, the Trademark Law and the Copyright Law

[23] China's Patent Law underwent substantial revision in 1992. The amendments enlarged the scope of patent protection to cover pharmaceuticals, chemicals, food, beverages and condiments, and extended the protection terms. They also provide protection to imported patented products. These amendments became effective on January 1, 1993. The Chinese Patent Law is in line with international standards.

[24] The amendments of the Trademark Law took effect on July 1, 1993. These amendments have elevated the Chinese standards to the international level by providing for the protection of service marks and well-known marks.

[25] The Copyright Law of China was adopted on September 7, 1990 and took effect on June 1, 1991. A year later, China became a party to the Berne Convention and the Universal Copyright Convention.

[26] *See* Xinkui Wang, *Preparation in Respect of the Chinese Economic System for Returning to GATT, in* CHALLENGES AND OPPORTUNITIES, *supra* note 9.

were amended. Major improvements to the former joint ventures law were the removal of the provisions on "priority of Chinese sources" in purchasing production equipment and raw material, and the "foreign exchange balance" requirement for foreign-invested enterprises. The salient features of the amendments to the intellectual property law of China were the broadening of the scope of protection and the remedies available.

C. Changes in the Chinese Legal System

The Chinese legal system changed and in fact improved greatly as a result of China's efforts to resume GATT contracting party status and later to join the WTO. This was not only because hundreds of laws were introduced, but also because of the quality of the laws as well as their policy and spirit. However, the early efforts to reform the legal system were not entirely successful because of a lack of overall planning and because the laws themselves were skeletal and left too much discretion to administrative officials.

1. The Initial Attempts at Reform

When China began to implement its domestic economic reform policy in the late 1970s and to open its economy to the outside world,[27] the biggest obstacle was the absence of a comprehensive legal system. An effective set of laws was crucial for reforming the economic system and attracting foreign capital and advanced technology. Nevertheless, ideological and technical factors made it impossible to draft detailed laws immediately. The result was that short laws containing skeletal provisions were drafted to meet the changing needs. These laws were difficult to implement without the help of detailed rules and regulations promulgated by the administrative organs. Thus, from the 1970s to the early 1990s, most of China's laws were composed of laws passed by the National People's Congress and its Standing Committee, backed up by administrative regulations passed by the State Council and ministries and commissions. This inevitably had the effect of expanding administrative discretion. The much-criticized corruption in the country is directly related to this practice.

Another feature of the laws passed during this period was the over-emphasis on Chinese characteristics[28] and the lack of overall planning. Many of the laws and regulations of this period were passed hastily to meet immediate needs without systematic organization or advanced planning.[29] For instance, in response to outside criticism of China's investment environment, the State Council passed regulations in 1986 designed to encourage foreign investment, and the ministries and commissions under the State Council enacted detailed rules to implement the State Council regulations. The emphasis on Chinese characteristics in legislation was to some extent affected by those scholars who favored a socialist legal system for China, as well as by the national debate on the differences between socialism and the road China should follow.[30]

[27] E. Elgar, *Economic Reform in China, 1978–1994*, *in* Asian Economies in Transition: Reforming Centrally Planned Economies 12–28 (Richard Pomfret ed. 1996).

[28] In 1992, China declared that it would practise market economy with Chinese characteristics. In essence, this means that unlike in the west, the State will continue to play an important role in the economy.

[29] For a discussion of the characteristics of the Chinese law in that period, see Guiguo Wang, *The Future Trend of Economic Law of the Mainland of China*, paper delivered at the Conference on Opportunities and Challenges under the New Economic Environment in the Mainland of China held on May 5, 1999, in Taibei City, Taiwan.

[30] For a discussion of this topic, see Carlos Wing-hung Lo, China's Legal Awakening: Legal Theory and Criminal Justice in Deng's Era (1995).

2. The Post-1992 Reforms

The resolution adopted by the Chinese Party Central Committee in 1992 to establish a market economy with Chinese characteristics provided a political guarantee for legal reform. Thereafter, the laws of China underwent tremendous changes. The main trend has been to adopt large amounts of foreign legislation, as well as foreign legal concepts and legal values. These laws bore a strong common law influence, perhaps as a result of the large influx of Chinese scholars into countries and regions like the United States, Canada, Australasia and Hong Kong. This does not mean, however, that China abandoned its Chinese legal tradition entirely. To the contrary, another feature of the Chinese legal system has been to study and copy the laws of the continental or civil law countries and regions, including Taiwan. The enactment of the Company Law in 1993, the Securities Law at the end of 1998, and the Contract Law in March 1999, illustrates these two influences. Most of the terms of the Company Law resemble terms used in Common Law jurisdictions like the United States and Hong Kong. However, the provisions for supervisors and a supervisory board was drawn from civil law countries like Germany. The Securities Law was directly influenced by Hong Kong Law but included protective measures to close the legal loopholes and ineffectiveness revealed by the Asian financial crisis. The Contract Law was primarily drafted by scholars and experts who are familiar with the civil law systems, with the result that the first draft had a strong civil law flavor. After several drafts, however, it embodied more common law characteristics. Nevertheless, to a certain extent, the Contract Law has had the effect of revitalizing the Chinese legal tradition. The provisions on offer and acceptance, and on escrow are the same as their counterparts in Taiwan.

Another trend of Chinese legislation in recent years is that the laws are more detailed, specific and, to some extent, forward-looking. The above-mentioned Company Law, Securities Law, Commercial Banking Law, and Contract Law are quite detailed, and reflect the approach of the mainstream international community, especially the developed countries. This is helpful in promoting economic transactions and exchanges between China and other countries. Detailed legislation directly restricts the exercise of administrative discretion and indirectly helps to combat corruption.

It is clear that as a result of China's efforts to become part of the GATT/WTO, the Chinese economic and legal systems have undergone tremendous changes. In the past, it was often said that there was no law in China. Now it is said that there are too many laws in China. One may wonder whether the economic and legal reforms would have been the same without China's efforts to resume its contracting party status in the GATT and to join the WTO. In our judgment the answer is "no".

IV. Economic Challenges and Opportunities

Gaining entry into the WTO has been a major milestone for China towards fulfilling the policy of domestic economic reforms and opening its economy to the outside world that was initiated more than twenty years ago by Deng Xiaoping. However, despite the warm welcome given to this development by the majority of scholars and researchers in China, there was an intensive debate on the issue. Some doubted whether China's transitional economy could withstand the impact of WTO membership.

China's admission to the WTO presents both opportunities and challenges. In our view, the pros outweigh the cons, and some of the cons may become pros. This conclusion is based on the strategies that the Chinese government might adopt and the possible responses from business circles, while taking into account the experience of other countries and the general world trend of economic globalization.

A. Japan's Example

When Japan tried to join the GATT, it was opposed by fifteen contracting parties, including the United States, Britain, Australia, France, Holland, Belgium, Austria, India and New Zealand. Japan therefore joined the GATT on the basis that these contracting parties would apply the "non-application" clause of GATT, Article XXXV.[31] However, these countries eventually dropped their invocation of Article XXXV, and Japan achieved its economic take-off between the mid-1950s and the early 1970s. Analysis of Japan's economic policy during that period shows that after joining the GATT, Japan expanded its exports to the GATT contracting parties and resolved many trade disputes with its trade partners through the GATT system. At about the time of its accession to the GATT, Japan adopted a series of new trade and industrial policies such as enhancing the management of enterprises, promoting large-scale technological renovations, and adjusting industrial structures. These measures not only alleviated the initial impact of trade liberalization after joining the GATT, but also enabled Japanese products to attain international competitiveness. For example, Japan's industrial policy at first emphasized the development of the textile industry. Starting in the 1950s, however, Japan shifted its attention to developing the petrochemical and steel industries, and later the automotive industry. Generally speaking, Japan continually improved its trading conditions after joining the GATT. Korea is another country that owes much of its economic development to its membership of the GATT.

Japan's experience in connection with joining the GATT is important for China, as China also confronted tremendous difficulties in its attempts to resume contracting party status in the GATT and later to join the WTO. The barriers came mainly from the developed countries such as the United States and the EU. Meanwhile, China is at the start of a new stage of economic development and industrial re-structuring.

B. Opportunities Arising from WTO Membership

In our view, there are five major advantages for China in joining the WTO.

1. Achieving Optimal Reallocation of Resources and Promoting a Market Economy

According to Ricardo's theory of comparative advantage, the most important driving force for trade among nations is their relative economic strengths, which reflect their relative economic resources. For instance, the comparative advantages of a country like China include its labor, natural resources, and land, while the comparative advantages of the United States lie in areas such as advanced technology, capital, and farming productivity. Through international trade and cross-border investment, the comparative advantages enjoyed by different countries become exchangeable, and thus the economic resources of different countries can be employed more efficiently on a global basis.[32] Therefore, globalization of trade and investment not only promotes the efficiency of the world economy, but also benefits countries engaged in economic integration.

Having joined the WTO, China will now have to implement its obligations to cut tariffs further. It must also ensure that non-tariff measures are not used to protect domestic industries. China's economy may suffer initially from these tariff concessions, as well as the elimination of non-tariff measures, since Chinese enterprises may be unable to

[31] *See* WANG YAOTIAN & ZHOU HANMIN, SURVEY OF THE GATT 86–87 (1991). *See also,* Chapter 5 of this book.

[32] For a discussion of the Theory of Comparative Advantage, *see* WANG YAOTIAN & ZHANG YURONG: INTERNATIONAL TRADE 414–420, (1993). *See also* Chapter 37 of this book.

compete with foreign companies in the international market or in the domestic Chinese market.[33] However, while China reduces its tariffs and non-tariff barriers, other WTO Members will also be opening up their markets to Chinese goods and services based on the non-discriminatory trade principles exemplified by the requirements of most-favored-nation and national treatment. Therefore, within five to six years, China will be fully engaged in the world market, and there will be far fewer barriers to China's foreign trade and overseas investment.

According to the Economic Research Institute of China, within approximately five years after China's entry into the WTO, WTO membership will help China increase its annual GDP by three to five percentage points, triple the country's foreign trade volume from US$200 billion in 1998 to US$600 billion in 2005, and create millions of new jobs.[34] According to a study by the State Council Development and Research Center, if China had joined the WTO in 2000, the country's GDP would be about US$25 billion (based on 1995 price levels) higher than if China had remained outside the WTO. This would represent 1.5 percent of the country's estimated GDP in 2005.[35] The projected macroeconomic gain was primarily based on the higher economic efficiency that could be assumed to result from the reallocation of resources that should result from China's greater integration into the global economy.

2. Improving the Inflow of Foreign Direct Investment as a Result of the Improved Investment Environment

China's investment environment will be significantly improved after its admission into the world trading system. China is now one of the world's leading "hot spots" for foreign investment. In fact, at present only the United States attracts more direct investment than does China.[36]

In its bilateral agreements and multilateral protocols in connection with its accession to the WTO, China committed itself to open many sectors of its economy that had been closed to foreign investors. These include telecommunications, financial services, and distribution services, as well as a variety of technical and professional services. All of these are areas with enormous potential in China. WTO membership will help to break down restrictive barriers in these areas and open the way for foreign direct investment and technology transfer from the rest of the world.

China is currently launching a legislative campaign with respect to foreign investment. According Mr. Zhang Yuqing, Director General of the Treaties and Law Department of the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"), China plans to abolish 573 laws and regulations (including 114 administrative regulations and 459 ministerial rules), and to amend 120 laws and regulations (including 5 laws, 25 administrative regulations and 90 ministerial rules). By the end of June 2001, China had amended the Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures, the Law of the People's Republic of China on Sino-Foreign Contractual Joint Ventures and the Law

[33] Before the implementation of its open policy, China had a long history of high tariff rates, especially with regard to industrial products. Over the last two decades the Chinese government reduced its tariffs several times. This has caused concern among Chinese enterprises, especially those in the automobile, chemical and pharmaceutical industries, about their ability to compete with foreign enterprises.

[34] Li Shantong, *et al*, *Impacts to China's Economy After Accession into the WTO* (The State Council Development and Research Center Internal Research Report, 2000).

[35] *Id.*

[36] *FDI Inflows, by Host Country and Economy, 1989–2000*, World Investment Report 2001, United Nations, at 291–295.

of the People's Republic of China on Wholly-Foreign-Owned Enterprises. Meanwhile, MOFTEC has promulgated revised implementation rules relating to these investment laws.[37] These are part of the major efforts China has made in connection with its accession to the WTO. Therefore, accession to the WTO presents a great opportunity for China to establish a more unified, fair and transparent legal framework, and foreign direct investment is bound to expand significantly within such a framework.

3. Eliminating Discriminatory Treatment by Other Countries

Before China became a WTO Member, many countries applied discriminatory trade measures to China. Accession into the WTO will enable China to operate in a fair and stable international trade environment, mainly as a result of the non-discrimination principles required by the WTO rules. For example, under the WTO Agreement on Textiles and Clothing ("ATC"), WTO Members must reduce their import quotas and finally eliminate them before 2005.[38] Up until now China's textile exports have been subject to the most serious quota restrictions in the world, but these will gradually be removed under the terms of China's accession.[39]

Another example is anti-dumping. Many of China's most successful export products have been subject to anti-dumping investigations, and as a result China has lost a large volume of exports. Indeed, many more anti-dumping investigations are carried out against China than against any other country.[40] Before China became a Member of the WTO, a country conducting an anti-dumping investigation against Chinese imports did not need to follow the rules set forth in Article VI of the GATT and in the WTO Anti-dumping Agreement. For example, in 1993, the Mexican government imposed anti-dumping duties on all Chinese products and increased its tariffs by between three hundred and one thousand percent.[41] This was done without any consultation with China. Had China been a GATT contracting party at the time, Mexico would have had to consult with China, and would not have been allowed to discriminate against Chinese goods to such a great extent. Having joined the WTO, anti-dumping investigations against Chinese products will now have to be dealt with in accordance with the WTO rules.

However, the situation is not ideal. Under the terms of China's accession to the WTO, other Members can continue to apply the current non-market economy methodology in anti-dumping cases involving imports from China for fifteen years from the date China became a Member of the WTO,[42] although Chinese respondents have the right to request that specific market-oriented sectors be treated under the normal rules.

Another benefit for China as a result of its accession to the WTO will be the elimination of the annual review by the U.S. Congress of China's Most-Favored-Nation ("MFN")

[37] *See* Zhang Yuqing: *Enhancing the Clearance, Amendment and Formulation of Laws and Regulations to Face the Challenges from the WTO*, China International Business Daily, July 15, 2001, at 1.

[38] *See* Article 2 of the ATC.

[39] *See* Cao Jianming and He Xiaoyong: World Trade Organization 414 (1999), and Protocol on the Accession of the People's Republic of China, Annex 7 (WT/ACC/CHN/49).

[40] Between 1995 and June, 2002, 278 anti-dumping investigations were initiated against China, resulting in 196 measures. During the same period Korea, the second most frequently targeted country, was the target of 145 investigations and 74 measures. *See* WTO website, www.wto.org.

[41] *See* Tak Hay Chau, *The Effect of China's Return to GATT on the Economic Development Strategy of Hong Kong, in* Challenges and Opportunities, *supra*, note 9, at 43.

[42] *See* China's Protocol of Accession to the WTO (WT/L/432), Section 15. Under the non-market economy rules, normal value is not based on domestic prices or costs as in the usual case. Instead, the "factors of production" used in producing the goods are valued on the basis of the cost of similar factors in a market economy at a similar stage of development. *See* Chapter 11 of this book. This practice results in unpredictable and often extremely high dumping margins.

status.[43] Although China and the United States signed a bilateral agreement granting each other MFN status as soon as the two governments recognized one another, the U.S. Congress only granted such status to China one year at a time, and each year it reviewed China's human rights and immigration policies before deciding whether to renew it. This created great uncertainty for exporters and importers of Chinese goods, since if MFN had been denied to China, the high non-MFN tariffs would have halted the majority of Chinese exports to the United States. Perhaps as much as ninety percent of total Sino-U.S. trade would have been affected.[44]

No such annual review will take place in the future, since MFN treatment is a fundamental built-in principle for WTO Members. As a result, China's foreign trade and investment environment will be more stable and predictable.

4. Access to WTO Dispute Settlement System

The WTO dispute settlement mechanism is widely viewed as one of the most successful aspects of the new organization. The Dispute Settlement Body ("DSB") of the WTO, established in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), is the central body responsible for administering the dispute settlement rules and procedures. It has authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions or other obligations. The WTO dispute settlement system ensures the primacy of WTO rules over domestic laws in all forms of dispute settlement. Even mutually-agreed solutions and arbitration awards must be notified to the DSB and must be consistent with WTO rules.

After China's accession to the WTO, the country is likely to become a frequent user of the dispute resolution mechanism. In May 2002 China took its first step under the system by requesting a panel in connection with its challenge of the recent U.S. steel safeguard measures.[45] Treatment of China's goods and services that is inconsistent with the WTO rules can be dealt with in the DSB, and the multilateral dispute resolution process is fairer, more transparent and more acceptable than bilateral and unilateral solutions. It is true that China may frequently be the target of complaints by other trading partners. However, the fact that WTO accession exposes China to the dangers of being challenged in the DSB will be an incentive for China to abide by internationally-accepted rules and standards, and will encourage China to become more integrated in the world economy.

5. Participation in Multilateral Economic Policymaking and Development of International Trade Rules

As one of the five Permanent Standing Members of the Security Council of the United Nations which holds veto power, China has considerable influence in the organization. Today, the World Trade Organization is seen as the economic United Nations in this more and more integrated world. By joining the WTO, China's position in the international community will be greatly enhanced. Through its accession to the WTO and participation in the development of multilateral economic and trade rules, China will be able to present its trade philosophy to the international trade forum and to play an important role in

[43] MFN has been renamed "Normal Trade Relations" ("NTR") in the United States. In 2000, the United States Congress passed an act to grant Permanent Normal Trade Relations ("PNTR") status to China after it became a WTO Member. See CHINA: WTO ACCESSION AND PERMANENT NORMAL TRADE RELATIONS(PNTR), Fact sheet released by the Bureau of Public Affairs, U.S. Department of State, May 24, 2000, (http://www.state.gov/www/regions/eap/fs-china_pntr-wto_000524.html).

[44] U.S.-China Business Council, The Implication of Denying China MFN Status (1996).

[45] *See* Inside U.S. Trade, May 31, 2002.

protecting the interests of developing countries. If China's return to the United Nations was a political victory for the developing countries, then China's accession to the WTO should be deemed as a victory for them from the economic perspective.

6. Benefits to Domestic Enterprises

The above discussion deals mainly with the advantages for China of its accession to the WTO from a macro perspective. However, China's domestic enterprises may benefit as well. The advantages lie mainly in the following:

- Exports by domestic enterprises will be encouraged and enhanced.
- The reduction of China's tariffs will facilitate the importation of advanced technology and equipment for domestic enterprises.
- Market access commitments made by other WTO Members, especially developed countries, will make it easier for many large-scale enterprises in China to extend their operations overseas, and will enhance the globalization of Chinese enterprises.
- The competitiveness of China's domestic enterprises will be enhanced as a result of the advanced management skills and knowledge they gain from foreign investors, as well as by the country's fairer and more transparent business environment which will result from its WTO membership.

C. Challenges after China's Accession to the WTO

Despite the advantages that China may enjoy after accession to the WTO, China will also face a number of challenges. From the economic perspective, some of China's industries and services that have been protected by high tariffs and special treatment from the government will suffer losses when facing international competition after China's accession into the WTO.

The losers will undoubtedly include many SOEs. China's SOEs have long enjoyed government protection, and many of them have already been bankrupted as a result of the recent economic structural reforms. As a World Bank report in 1999 stated, "much remains to be done to create profit-oriented corporate governance systems that are independent of government influence [in China]".[46]

More SOEs are likely to go bankrupt after China's accession into the WTO due to lack of capital, human resources, management, technology, etc. Also, many of China's SOEs may come under the control of foreign investors through merger and acquisition. A considerable number of workers in the SOEs will have to be laid off in order to make the enterprises more efficient. China's social security system will come under much pressure in this regard, particularly since it is still in the formation stage, and the social security fund is far from adequate.[47]

Some of the key industries and service sectors that may be adversely affected by China's WTO membership are discussed in the following sections.

1. Agriculture

Various trade barriers, including tariffs, quotas, license requirements, and state trading rights, have been applied by the Chinese government to imports of agricultural products. The WTO Agreement on Agriculture obliges WTO Members to convert all non-tariff

[46] World Bank, China: Weathering the Storm and Learning the Lessons 29–30 (1999).

[47] *See* Donald C. Clarke: *China and the World Trade Organization*, in Doing Business in China 1–11 (Freshfields Asia Group 2000).

barriers into tariffs. China's tariffs will then be reduced gradually, on average from 31.5 percent to 14.5 percent by 2005. Today, however, prices of China's domestic wheat, soybeans, corn and edible oil are twenty to fifty percent above the international market prices. The production cost of grain has risen by ten percent annually for the past ten years. Imports of cheaper wheat, soybeans and edible oil are therefore expected to increase substantially as a result of China's membership in the WTO.[48] In regions where these products are grown (mainly North and Northwest China), farmers will not be able to shift from grain production to more profitable products such as fruits or vegetables because of the cold and dry climate. Consequently, China's agriculture will be seriously affected by China's WTO membership, unless farming technology can be improved and agricultural production can be reformed.

2. Automotive

The automotive sector will be one of the industries most profoundly changed by China's accession to the WTO. Tariffs and non-tariff barriers on imported cars will be drastically reduced. Tariff rates, currently one hundred percent for luxury cars and eighty percent for smaller cars, will be reduced to twenty-five percent by the year 2006. The initial tariff cuts will however have little impact on the volume of car imports because the starting levels are so high. Meanwhile, in order to open the market for imported cars, import quotas will be increased considerably at the beginning and then gradually removed until the system is fully abandoned by the year 2005.

In addition, automotive leasing will be allowed. Even though a lot of practical obstacles remain to be solved, experience in other markets shows that automotive leasing tends to increase competition in a country's automobile market. The increased competition will eliminate many of China's domestic automobile manufactures as a result of their lack of technological innovation and inability to improve their production. Finally, control over the production of automobiles will be further loosened, making it easier for foreign enterprises to obtain licenses to produce locally without local content requirements.

As a result of these changes, importers of automobiles will face a more open market and will be able to expand their sales significantly, and local manufacturers will face fierce competition from their foreign counterparts.

3. Pharmaceuticals

China's pharmaceuticals market is the fourth largest in the world. The age structure of the population, with its growing share of senior citizens, will bring about an increased need for medical care. The potential of the pharmaceutical industry in China is therefore enormous.

China's current average tariff rate on pharmaceuticals is 9.6 percent. Under the bilateral agreement between China and the United States, the tariffs on drugs and medical equipment will be greatly reduced.[49] Moreover, China's commitments with respect to the distribution sector will make it easier for foreign pharmaceutical manufacturers to distribute their products in the country and to gain market share in China. Since the quality of pharmaceutical products manufactured in China (with the exception of those made

[48] *See* EUGENE KELLER, NICOLE MONTER, AND HUBERTUS DRINKUTH, CHINA'S ACCESSION INTO THE WTO—STRATEGIC IMPLICATIONS FOR FOREIGN INVESTORS 16 (2000).

[49] By January 1, 2003, China will have reduced its average tariff on pharmaceuticals by about sixty percent from its current average level of 9.6 percent to 4.2 percent. *See The Impact of Permanent Normal Trade Relations (PNTR) with China and China's WTO Membership on Various Sectors of the U.S. Economy*, www.wcit.org., April 26, 2002.

by foreign-owned drug manufacturers) is still relatively low, foreign pharmaceutical investors and exporters in China will have great opportunities even if their products are more expensive than local products. On the domestic side, the large SOEs manufacturing pharmaceuticals and medical equipment are already under competitive pressure from other domestic manufacturers, and many have already suffered from a sharp decrease of profits and low capacity utilization.

4. Petrochemicals

In 1998, China was the fourth largest producer of petrochemical products. However, little of the technology used in this industry originated in China. The petrochemical enterprises (most of which are SOEs) have virtually no comparative advantage compared with multinational petrochemical corporations. Currently, most of China's fine chemical products are copied from developed countries.[50] Moreover, the share of Chinese enterprises in the domestic petrochemical product market has shrunk significantly in recent years. Foreign crude oil has taken 20 percent of the Chinese market, liquid petroleum gas 50 percent, synthetic rubber 44 percent, and synthetic fiber 53 percent.[51]

In its bid to join the WTO, China undertook to remove non-tariff, barriers, such as quantitative restrictions, on petrochemicals and to significantly reduce tariffs. Most importantly, China has undertaken to grant importers trading rights and distribution rights in this industry.[52] Although China's two biggest players in the petrochemical industry, Sinopec[53] and Petrochina,[54] control almost all of the distribution network in China, their market predominance will be challenged by their foreign competitors as a result of the latter's advanced marketing skills, technology and talents.

5. Telecommunications

China's telecom regime is still a long way from compliance with the WTO agreements, as it is strictly regulated and monopolized by SOEs, with the exception of value-added services and telephone equipment manufacturing. The WTO Basic Telecommunications Agreement, reached in Geneva in February 1997 by 69 Members, and which is aimed at the liberalization of telecom services will place increased pressure on China. The WTO telecom agreement sets a new benchmark against which to evaluate new WTO membership applications.

The pressure on China's telecommunications sector specifically derives from the requirement that it open its domestic and international telecom services markets. China's telecom regulator, the Ministry of Information Industry ("MII"), believes that the market liberalization required by China's WTO accession will bring more disadvantages and risks than benefits to the country's fledging telecommunication and information services sector, even though it may provide more incentives for growth in this sector.

MII and China's domestic IT industry predict that WTO membership may bring two important advantages to Chinese telecommunications equipment manufacturers. First, the current tariff of twelve percent on imported components and parts, on which the Chinese firms depend for production, will be lowered to three percent or less, thus resulting in significantly lower input costs and sales prices. Second, WTO accession will

[50] ZHOU HANMIN, CHINA'S ENTRY INTO THE WTO 95 (2000).

[51] *Id.* at 96.

[52] The State currently has a monopoly on trading rights and distribution rights on petroleum and many other petrochemical products.

[53] The China Petrochemical (Group) Corporation.

[54] The China National Petroleum Co.

remove some of the foreign market barriers that have prevented Chinese enterprises from marketing their products outside China. However, these predicted advantages may disappear if China implements its commitment to reduce tariffs on telecom and IT equipment to zero by the year 2005, and if China ensures that telecommunications equipment purchases are based on technology-neutral and non-discriminatory terms. China's telecom equipment manufacturers will face a difficult situation, as their price advantages and policy support will be undercut, and network service carriers will select equipment vendors based on economic and technological factors that may favor foreign competitors.[55]

6. Financial Services

Compared with China's telecommunications sector, the financial services market, including banking, securities and insurance, is more open to foreign competition, even though China's financial system is more vulnerable to disruption. However, there are limits to this competition. Currently, foreign banks are not permitted to undertake local currency business with Chinese clients, but a few with special licenses are allowed to engage in local currency business with their foreign clients. Furthermore, China imposes severe geographical restrictions on the establishment of foreign banks. The liberalization of China's securities and insurance market for foreign participation has been also very limited.

China did however make drastic accession commitments with respect to financial services, under which China will eliminate both geographical and customer restrictions imposed on foreign-invested banks and insurance companies within five to six years of its accession, and minority foreign-owned joint ventures will be permitted to engage in fund management, and to underwrite domestic securities issues and trade foreign currency denominated securities. These commitments will bring huge changes to China's financial service sectors, because these sectors were almost entirely State-owned until about eight years ago, and were considered as adjustment tools for China's old planned economy.[56] Also, the industry is weak compared to its competitors from the developed countries because of its limited modernization.

V. Effects of WTO Accession on the Legal System

Unlike the GATT, which covers only trade in goods, other WTO Agreements, such as the General Agreement on Trade in Services ("GATS") and the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS") have an important impact on investment and other aspects of the domestic economy. They also impose much more substantive obligations on the Members. For example, the TRIPS agreement contains detailed requirements regarding the standards of acquisition, scope and use of intellectual property rights, which must be enforced by every Member. Any Member that does not enforce these requirements risks contravention of Article 1. The TRIPS agreement also contains detailed provisions regarding the system of domestic legal remedies and the principles of law enforcement that must be adopted by WTO Members. For instance, it requires all Members

[55] *See China's WTO Accession and its Telecom Liberalization, International Communications Studies Program* http://www.csiss.org/iccs/chinawtoaccession.html.

[56] Under China's old planned economy, banks were considered more as tools to implement the government's fiscal policy and to support a large number of inefficient SOEs, than as commercial enterprises. "Commercial" banking in China has existed for less than ten years.

to establish a system to provide effective administrative, quasi-judicial and judicial remedies and to adopt the principles of objectivity, fairness and justice in enforcing their laws.

The WTO agreements not only impose international obligations upon Members with respect to matters within the competence of the WTO, but also affect Members' obligations towards other Members and non-members under other treaties. In other words, by accepting the obligations imposed by the WTO, Members may not be able to perform other international obligations. A case in point is the dispute between the European Union and the United States over banana imports to the European Union which involved an apparent conflict between the EU's obligations under the Lomé Convention and those under Article XIII of GATT 1994.[57] In a similar vein, China's obligations under its bilateral or multilateral agreements with WTO or non-WTO Members will be affected by China's WTO membership.

China's national treatment commitments under the GATS present some challenging issues. For example, the Commercial Banking Law of China sets forth capital adequacy and liquidity requirements in accordance with the Basle Committee standards. In practice, banks in China, especially the State-owned banks, have not yet been able to fulfill such obligations. In the long run, China must solve this problem. China's entry into the WTO will lead to an influx of banks, financial institutions, and insurance companies from other Members, especially those from the developed countries. The home countries of these enterprises usually monitor their banks in accordance with the standards set by the Basle Committee. This influx will pose a problem of how to give no less favorable treatment to foreign enterprises. If Chinese financial institutions continue to be permitted to operate without conforming to international standards, foreign enterprises could also disobey the law. An alternative is to amend the law by reducing the standards to reflect reality. But this might send a message to other Members that Chinese monitoring standards are too low, and other Members may then not permit Chinese banks and financial institutions to operate in their jurisdictions. Thus, WTO membership should encourage China to improve enforcement of the standards, and thus help promote Chinese legal reform and law enforcement.

The transparency requirements of the WTO agreements will have a profound effect on China's legal system. For example, the GATS requires Members to publicize all measures, laws, administrative rules, decisions, administrative decrees, international treaties, international agreements, etc., related to the implementation of GATS obligations.[58] In addition, all Members must report to the GATS Council annually all new laws as well as amendments and annulments of existing laws, administrative rules, and administrative decrees. In order to ensure that service providers, especially those from foreign Members, can legally exercise their rights, all Members must establish a mechanism for answering queries of the service providers. In enforcing the related laws, administrative rules, administrative decrees and other related measures, all Members must strictly observe the principles of reasonableness, objectiveness and fairness. They must also establish judicial procedures, arbitration procedures and administrative remedies so as to handle the complaints of service providers.[59]

After joining the WTO, China will, as a result of its commitments, need to take more active steps to transplant laws, legal concepts and legal values from other Members,

[57] *See* Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB (1997).

[58] GATS Article III.

[59] GATS Article VI:2(a).

especially the developed Members. For example, in its bilateral agreement with the United States, China agreed that the award of licenses for insurance companies will be solely on the basis of prudential criteria, with no economic needs test or quantitative limits on the number of licenses issued. What is the effect of this provision on Chinese law? In the first place, in the absence of the restraints imposed by the international agreements, China's legislative and judicial organs could interpret the term "prudential criteria" in accordance with their own understanding and Chinese culture. With the stipulations of the international agreements, however, the interpretation of the term in Chinese law must take into account the possible reactions of other countries. If the United States considered that the Chinese government had failed to comply with the prudential criteria in its enforcement of the insurance laws, it could invoke the WTO dispute resolution mechanism. If a WTO panel or the Appellate Body were to rule in favor of the United States, China would have no choice but to obey the ruling, i.e., to amend its laws and rectify the defects of its law enforcement mechanisms.

Revision of Chinese legal system to bring it in line with WTO requirements will be a watershed in the country's legal reform. According to a spokesman for the National People's Congress (NPC), 140 domestic laws were scheduled for review, and another 570 slated for abolition.[60] Such measures are only the beginning. After joining the WTO, deeper legal reform is unavoidable. For instance, under WTO rules, a Member's legislative process must meet the transparency standard. This means that all laws and regulations promulgated by all levels of China's government agencies must be made known to the public before they are applied or enforced. Although this standard will be difficult for China's various levels of government to satisfy, China must change its opaque legislative process to avoid criticism from other WTO Members and the WTO Trade Policy Review Body. Immediately after China joined the WTO, MOFTEC established a department to accept complaints from foreign investors and civil communities with respect to China's implementation of WTO commitments. In addition, experts are more and more involved in the process of legislation by China's National People's Congress, and many national laws are drafted or are being drafted by experts instead of government officials.

VI. Strategies After Joining the "Club"

In summary, China will benefit greatly from joining the WTO. The organization provides a multilateral forum for China to discuss economic issues and resolve trade and investment disputes with other WTO Members. By participating in this economic union, China can solidify its international image as a world power. In addition, China can handle trade issues with Taiwan through the WTO. With closer economic and trade relationships, it will be easier to resolve political problems across the Taiwan Strait. On the other side of the coin, China shares some of the fundamental concerns of other developing countries. Many developing countries are still being harmed by trade protectionism on the part of developing countries. Besides, despite the apparent success of the WTO dispute settlement mechanism as compared to the former system under the GATT, enforcement of its decisions against Members, such as the United States and the European Union, remains a major concern of China.

As discussed above, China has undertaken and will continue to undertake drastic reforms of its economic and political systems in order to minimize the harm and to maximize the benefits from its accession into the WTO. Some scholars in China believe

[60] *Legal Reform Must be Led from the Centre*, BUSINESS CHINA, July 30, 2001, at 6.

that accession into the WTO will lead to a new round of reform and opening-up in China. Unlike previous reforms, however, the driving force for these changes will be imposed by international agreements. As a consequence, opening-up will be the dominant factor in China's economic and political reform.[61] We believe that China should carry out the following strategies to make the most of its entry into the WTO.

A. Economic Restructuring

China has traditionally been a labor-intensive exporting country. The country's comparative advantages lie in its huge population and low labor costs. Therefore, in the past two decades, China enjoyed a considerable export surplus with respect to textile and light industrial products. On the other hand, China has been importing technology and seeking foreign direct investment because it has been lacking in its own technology and capital resources. In order to achieve long-term and sustainable development, China must upgrade its economic structure to meet the needs of the "knowledge-based economy" and economic globalization. Japan and Korea are good models for China in this respect. As a result of twenty to thirty years of an export-led economic policy, the economies of Japan and Korea developed rapidly. While China's economic and social characteristics differ from those of Japan and Korea, their strategy of importing knowledge and exporting goods is worth following by China now that it has acceded to the WTO.

B. China Should Take Full Advantage of Special Treatment for Developing Countries

While pursuing its application to join the WTO, China insisted on being treated as a developing country.[62] Developing country status is critical to China.[63] As a developing Member of the WTO, China should be accorded preferential treatment in many respects, such as a grace period for granting market access, technical and financial assistance, and preferential tariff treatment under the Generalized System of Preferences. However, since China's membership status in the WTO is not entirely that of a developing country, much of the preferential treatment available under the WTO rules can only be achieved through negotiation with other WTO Members.

C. Encourage Globalization of Chinese Enterprises

China's "Open-Door" policy has been in place for more than twenty years. Despite the fact that China has achieved great successes in utilizing foreign direct investment and advanced technology, the globalization of Chinese enterprises still has a long way to go. As a result, although China is one of the world's leading exporting countries, very few people outside China recognize Chinese brand names. China's accession into the WTO is a great opportunity for Chinese enterprises to take full advantage of the global market through the MFN treatment and National Treatment offered by other WTO Members. Therefore, China must move to the next stage of international commerce and be more aggressive in globalizing its production and distribution. In this regard, the government will have to give greater freedom to Chinese enterprises to operate in other countries.

[61] Liu Guangxi, *From "Reform and Opening-up" to "Opening-up and Reform"* (World Trade Organization Focus, July 2001), at 1–5.

[62] *See* Long Yongtu, "*Face up to the Opportunities and Challenges in China's Accession into the WTO*", Speech at Shanghai International Industry Fair, 26th October 2000.

[63] *See* ¶8 of *Report of the Working Party on the Accession of China* (WT/ACC/CHN/49).

D. Additional Research and Training on the WTO

Chinese government officials and entrepreneurs must be familiar with the WTO rules, which are complicated and comprehensive, in order to be able to take full advantage of the system and to avoid making mistakes. China must make special efforts to train personnel in this area. A country's ability to train personnel effectively with respect to the WTO appears to be directly related to its WTO research capabilities. China must therefore invest in WTO research so that it can play an active role in the organization and ensure domestic compliance with WTO norms.

E. Position in Next MTN Round

In the immediate future, China must consider what position it should take in future Multilateral Trade Negotiations ("MTN"). At the Fourth WTO Ministerial Conference held in Doha, Qatar from November 9 to 12, 2001, one of the most important tasks was the launching of a new round of negotiations, which for various reasons failed to occur at the Seattle Ministerial. China's admission into the WTO at the Doha Ministerial Conference means that China will be an important participant in the next round of negotiations.

Mr. Long Yongtu, Head of the Chinese Delegation responsible for accession to the WTO, pointed out at a meeting of the China Working Party that China was determined to play a positive and constructive role in the WTO after its accession.[64] While analyzing China's possible interests and positions in the next round of MTN, one must always bear in mind that China has joined the WTO as a developing country Member, at least in part. Therefore, China will be a key member representing the interests of the developing countries in the organization. As Mr. Long stated, China supports the launching of a new round of multilateral trade negotiations in order to establish an open and fair world trading system and an equitable world economic order. China will maintain that position in the new round of negotiations.

China's possible positions on some specific issues in the new round of trade talks are discussed in the following below.

1. Electronic Commerce

Electronic commerce is becoming a new method of business and shows every sign of continuing to expand at a rapid rate. Although electronic commerce may substitute for some traditional international trade activities, it is also a very important tool for the development of traditional trade in general. The emergence of the Internet has facilitated international trade on a large scale, and provides an opportunity for developing countries to develop their international business as well as their trade facilities. E-commerce in China is still at the development stage; most of the country's international trade is still conducted through traditional methods. However, China is actively developing and promoting e-commerce despite the fact that the infrastructure of the country's information technology is still weak. China is therefore likely to take an active part in the forum on international e-commerce organized by the WTO since it will need enhanced international cooperation in order to advance in this field. While promoting this new

[64] *Meeting of the Working Party on the Accession of China—Statement by H.E. Vice Minister Long Yongtu, Head of the Chinese Delegation,* at the sixteenth session of the Working Party on China. WTO 2001 News (July 4, 2001), www.wto.org.

mode of international trade, China also favors government supervision of e-commerce. Although it appears that there is no effective way to control all international trade activities conducted on-line, China is likely to take the view that development of e-commerce and international trade through the Internet should not become a loophole for illegal activities such as tax evasion.

2. Trade and Competition

Chinese competition law is still quite undeveloped. The only nation-wide legislation in this area is the *Anti-Unfair Competition Law*, promulgated in 1993. China does not have an antitrust law nor does it have a workable system, administrative or judicial, for preventing restraints on competition like that which exists in other countries, especially the developed countries. A priority for China after its accession into the WTO will be to promulgate domestic competition laws and regulations. The aim of China's ongoing economic reform is to create a market-oriented socialist economy. A fair, transparent and unified national market is important for China's economic development. Thus, China will be active in respect of trade and competition issues in the new round. Hundreds of multinationals have established a presence in the Chinese market; with their capital strength, many of them will tend to create monopolies in China. This is another reason why China will, together with other developing countries, call for international cooperation within the framework of the WTO to regulate monopolies and other restrictive business practices in the new round of trade talks.

3. Trade and the Environment

In recent years, more and more countries have recognized the importance of the connection between international trade and the environment. As a developing country still in the stage of industrialization, China has encountered significant environmental problems which are beginning to create a bottleneck to the country's economic growth and social development. While initiating legislation and policies to protect China's fragile environment, the Chinese government is also seeking international cooperation on environmental protection. Hence, the new round will provide a useful forum for China to participate in international environmental cooperation. Meanwhile, China is likely to oppose the trade policies of some developed countries that seek to use environmental protection as a subterfuge to bar imports from developing countries. China is likely to maintain that: (1) negotiations on trade and the environment should not include all environmental issues, since the WTO should not be an international environmental forum; (2) there should be coordination between environmental protection and economic growth, and the developing countries should not be forced to accept unreasonably high environmental standards; and (3) there should be some preferential treatment for developing countries on the issue of trade and the environment, and the developed countries should provide technical and capital assistance to the developing countries in this area.[65]

4. Trade and Labor Standards

The linking of trade with labor standards is a sensitive issue for China as well as for many other developing countries. No substantive agreement was reached on this issue at the Singapore or Seattle Ministerial Conferences. Whether it is appropriate to include trade and labor standards as a topic in the MTN has been fiercely debated. Many developing

[65] *See* Cui Shufeng: *The Analysis of Developing Countries' Negotiation Tactics on the Subject of Trade and Environment in the WTO New Round* (World Trade Organization Focus, April 2001), at 24.

countries hold that the issue should not be discussed in the WTO and should not be brought under the legal framework of the organization. However, the United States and some other developed countries insist on including the issue in the multilateral negotiations. They hold that the improvement of labor standards should be included in the goals of the WTO, as it will improve global welfare as well as the employment conditions of WTO Members. Some developed countries also assert that trade sanctions should be used as a means to press for the improvement of core labor standards.[66]

China is a labor-intensive product exporting country, and a large proportion of China's exports are based on China's low labor costs. Although China has promulgated numerous laws and regulations to protect the rights and interests of workers, China's actual labor practices are not satisfactory and are not in compliance with its laws and legislation. The problem is particularly serious in rural areas among China's privately-owned enterprises as well as its enterprises with foreign investors, despite the fact that government authorities at various levels are making great efforts to supervise such enterprises. Nevertheless, China made it clear in the United Nations that it was against the practice of using human rights as a tool to interfere with other countries' internal affairs. It is therefore quite certain that China will also be firmly against bringing trade and labor standards into the MTN. China, together with other developing countries, is likely to take an active role in opposing the developed countries' proposals to discuss and draft agreements on this issue within the framework of the WTO.

VII. Conclusion

In signing the Protocol of Accession to the WTO, China made many concessions so as to integrate the Chinese economy into that of the world. First and foremost, the protocol reiterated the three main underlying principles of the WTO, namely, most-favoured-nation treatment, national treatment and transparency. For instance, China agreed to accord MFN and national treatment to foreign merchants and investors.[67] It committed itself to publish those laws, administrative regulations, and other measures as well as judicial and administrative decisions that are related to China's obligations under the WTO. It also committed itself to enforce such laws and measures.[68] Needless to say, like other Members, China must notify the WTO of adoption and modification of the above laws, regulations and other measures.[69] Under the Protocol, China is obliged to liberalize gradually its trading environment so that foreigners can enjoy the right to trade in all goods within three years of accession. Moreover, China must eliminate and may not reintroduce any non-tariff measures.

With regard to the service sector, China will open the following markets to foreign investors: telecommunications, insurance, banking and securities.[70] Many of the restrictions that were imposed on foreign businesses will be gradually eliminated. Besides, the role of the state in managing the economy will be minimized. State trading companies traditionally played an important role in China's international commerce. Under the

[66] *See* WTO Secretariat: *Trading Into the Future*, available at http://www.wto.org/wto/english/thewto_e/whatis_e/tif_e/tif_e.htm.

[67] *See* Articles 3 and 5 of Protocol on Accession of the People's Republic of China ("the Protocol"), entered into on November 10, 2001.

[68] Article 2C of the Protocol.

[69] Article 14 of the Protocol.

[70] Annex 9 of the Protocol lists the schedule of specific commitments on services.

Protocol, China agreed that state trading will be confined to specified goods.[71] In the areas subject to state trading, China agreed to ensure the transparency of import purchasing procedures and to provide full information on the pricing mechanisms of state trading enterprises for exported goods.[72]

It is important to note that despite China's insistence on being treated as a developing country, in practice it has not been accorded developing member status in all respects. For instance, China agreed, upon accession, to eliminate all subsidies falling within Article 3 of the Agreement on Subsidies and Countervailing Measures, while developing country members enjoyed an exemption for a maximum of five years.[73] China also underook not to maintain any export subsidies on agricultural products upon accession,[74] and to comply with the Agreement on Trade-Related Investment Measures upon accession.[75] It should be noted that developing country members are entitled to special treatment in both Agreements. A detailed analysis will show that almost on no occasion was China given developing country member status under the Protocol.

China has made great economic, legal and political progress during its WTO accession campaign. It is certain that the country will continue to advance in these areas now that it has acceded to the WTO. Although difficulties will arise from WTO membership, short-term dislocation costs can be offset through economic development. We also believe that after joining the organization, China will become fully involved in economic globalization, which will in turn contribute to its establishment of a market economy and the rule of law. WTO membership will also enable China to play a more important role in the world economic community. From the point of view of the WTO, as its Director-General stated, China's membership is also a major step towards fully developing the organization into a truly global trading regime. Prior to China's entry into the WTO, the WTO represented slightly more than two-thirds of the world's population. With China's participation, the WTO represents the interests of nearly ninety percent of the world's population.[76]

[71] Annex 2A1 and 2A2 list the products subject to state trading.

[72] Article 6 of the Protocol.

[73] Article 10 (3) of the Protocol.

[74] Article 12(1) of the Protocol.

[75] Article 7(3) of the Protocol.

[76] According to the 2001 World Population Data Sheet, (http://www.prb.org/Content/NavigationMenu/Other_reports/2000-2002/2001_World_Population_Data_Sheet.htm) as of mid-2001, WTO Members accounted for 66 percent of the world's population. With China's entry in to the WTO, the figure is now 87 percent.

CHAPTER 68

COLOMBIA

Felipe Jaramillo*

TABLE OF CONTENTS

I. Participation of Colombia in the GATT 74
A. Historical Background 74
B. Observer Status 74
C. UNCTAD III 74
D. The Tokyo Round 74
E. The Post Tokyo Round Period 76
II. Colombia's Participation in the Uruguay Round 78
A. Preparatory Steps 78
1. Services 78
2. Preliminary Negotiations for the Punta del Este Declaration 79
B. The Negotiations 79
1. Objectives 79
2. The Result of the Negotiations From Colombia's Perspective 80
C. Effects of Colombia's Participation in the GATT/WTO 82
1. Economic 82
2. Social 83
3. Legal 83
III. Attitude of Citizens, Businessmen, and Political Leaders Towards the WTO 84
IV. Strengths and Weaknesses of the WTO From Colombia's Perspective 84
A. Strengths 84
B. Weaknesses 84
V. The Next Negotiating Round 85
VI. Participation of Colombia in Regional Trade Arrangements 88
A. Andean Community 88
B. Agreements Under ALADI 88
C. Group of Three 89
D. Free Trade Area of the Americas 89
VII. Trade Policy Development in Colombia 89
VIII. Conclusion 90

* Felipe Jaramillo was Colombia's Ambassador to the GATT between 1974 and 1992. He was Chairman of the GATT Council of Representatives during 1984, and Chairman of the Contracting Parties of the GATT in 1985.

I. Participation of Colombia in the GATT

A. Historical Background

Colombia was one of the countries that participated in the establishment of the Bretton Woods institutions after World War II. It subsequently participated actively in the Conference on Trade and Employment, which led to the adoption of the Havana Charter in 1948. Colombia also took part in the second GATT tariff-negotiating round held in Annecy in 1948, with a view to negotiating membership in the GATT. However, the Colombian government decided not to join the organization at that time, so as to be free to protect its developing industrial sector by means of tariffs and other import controls.

B. Observer Status

The Colombian government took a renewed interest in the GATT in the late 1960s and decided to establish more formal relations with the organization by requesting observer status, which it obtained in 1968. Colombia's interest in the GATT stemmed from its belief in the important relationship between trade and development, which had given rise to the creation of UNCTAD in 1964. From the beginning, Colombia played a very active role in all UNCTAD work. At the same time there was domestic support for a strong exchange regime, as well as reform of Colombia's international trade system aimed at promoting and diversifying Colombian exports, in an effort to escape the country's heavy reliance on coffee exports. GATT Membership was seen as a way to diversify Colombia's exports and to obtain better access to foreign markets.

C. UNCTAD III

When the United States, the European Community and Japan suggested a multilateral round of trade negotiations in 1972, the Colombian government followed the initiative closely. It therefore played a very active role in the Third UNCTAD Conference, held in Santiago in early 1973, regarding the participation of developing countries in the proposed trade negotiations. The Conference unanimously approved Resolution 82 (III) which dealt with the Multilateral Trade Negotiations. Part A of the Resolution summarized the principles proposed by developing countries, the most important of which was that all developing countries, whether or not members of the GATT, would have the right to participate in every phase of the negotiations, thus ensuring that their interests would be taken into account.[1]

D. The Tokyo Round

As a result of the UNCTAD Declaration, all developing countries, even those that were not members of the GATT, were invited to participate in the November 1973 GATT Ministerial Conference in Tokyo that initiated the Tokyo Round of Multilateral Trade Negotiations. The Ministerial Declaration in turn invited non-GATT developing countries

[1] Another resolution adopted by the Conference resulted in the "Enabling Clause" (*The Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, BISD, 26th Supp. 203 (1979)), approved at the end of the Tokyo Round. This gave permanent approval to the Generalised System of Preferences, under which developed countries could give preferential tariff treatment to imports from developing countries.

to participate in the Tokyo Round negotiations. The Colombian government took part in the Tokyo Round on this basis.

There were several reasons why Colombia played an active role in the trade negotiations:

- It had considerable experience with regional trade agreements, particularly with the Latin American Free Trade Association ("LAFTA") and the Andean Pact.[2]
- It wished to enhance the political skills of its negotiators, which were based on their active role in negotiating regional trade agreements and in developing trade policy.
- It wished to improve Colombia's bargaining power in bilateral commercial conflicts with other countries, especially those in the developed world.
- It was interested in becoming part of a multilateral agreement that aimed at restricting protectionist trade measures, especially matters related to technical standards, and to maintain the right to continue providing subsidies, as well as to ensure that the United States applied the injury test before applying countervailing duties to imports from Colombia.[3]

As mentioned above, Colombia's main objective in participating in the Tokyo Round was to open new markets for non-traditional Colombian exports—products other than coffee, bananas, petroleum and emeralds—which were mainly tropical products. The third prong of the Ministerial Declaration—that tropical products should be treated as "as a special and priority sector"—was therefore particularly important to Colombia.

Colombia took part in the negotiations just like any other GATT contracting party. The process offered Colombia a unique opportunity, by increasing its exposure to the multilateral trading system (with which few people in the country were familiar), and by helping the government formulate the arguments necessary to recommend eventually joining the Agreement. That is why the government decided in 1974 to begin the formal application process. However, the process had to be slow in order to prevent conflicts with other Andean Pact members, since Peru was the only GATT member in the Pact at the time. Consequently, Colombia decided in 1975 only to request membership on the basis of "Provisional Accession". Under this approach, the country would receive the benefits of the tariff cuts and other advantages that had been previously negotiated by the other contracting parties, as well as the ones that would emerge from the Tokyo Round, without itself having to make any tariff concessions. However, Colombia would not have the right to use the dispute settlement system, nor could it participate in the decision-making process.

The Provisional Accession approach was chosen partly because it was thought prudent to acquire greater knowledge of the GATT system before applying for full membership. Also, domestic interests were demanding the continued use of tariffs as a protectionist measure, as well as a licensing regime to deal with other trade policy issues, such as price instability of imported goods as a result of dumping, especially of manufactured goods such as textiles and clothing and footwear. The licensing regime would protect domestic industries from foreign competition, as well as allocating scarce foreign exchange to pay

[2] The Andean Group, also known as the Andean Pact, was transformed in the late 1990s into the Andean Community. The Andean regional institutions, such as the Andean Court of Justice and the Corporación Andina de Fomento ("CAF"), together with the Andean Community constitute the Andean Integration System. *See* Part VI.A of this Chapter.

[3] *See infra* note 6.

for essential imports. In general, the manufacturing sector regarded the GATT as a form of unilateral commercial liberalization that would dismantle the industrial protection that had resulted from the policy of import substitution, which had played a major role in the country's economic development over the previous decades. In spite of the negative effect of import substitution policies on the healthy growth of the economy, Colombian industry preferred to maintain its small, protected market rather than face international competition.

The results of the Tokyo Round fell far short of expectations, especially the failure to further liberalize trade in tropical products, even though this had been considered as a priority sector, Nevertheless, at the end of the Tokyo Round the Colombian Government decided to seek full membership of the GATT. One of the reasons was that the GATT had broadened its reach with the plurilateral non-tariff barrier codes adopted in the Tokyo Round. The GATT had also advanced its position with regard to the special and differential treatment of developing countries (anticipated with the incorporation of Part IV of the Agreement on Trade and Development in 1965). This included the approval of the Enabling Clause authorizing developed countries to grant favorable tariff treatment to imports from developing countries under the Generalized System of Preferences ("GSP")[4] and ensuring non-reciprocity in tariff negotiations. In the belief that only full GATT membership would allow it to achieve predictable treatment of its exports to the world market, Colombia decided to apply for full membership in late 1979. The process lasted until September 1981, when the ratification instruments were deposited.

GATT membership did not require major changes in the country's trade policy, partly because Colombia's domestic legislation was compatible with the General Agreement. Also, in practice Colombia made tariff concessions only in thirty-five tariff items, three of which were from the agricultural sector, the rest being from the petro-chemical, metal and machinery, and automobile sectors. Colombia was able to made concessions only in those sectors, because they were the three sectors included in the "Industrial Development Programs" within the Andean Pact and hence had an agreed common external tariff. Colombia bound the tariff level of the Common External Tariff. The remaining tariffs were being negotiated within the framework of the Andean "Common External Tariff" or the "Minimum External Tariff", and the Colombian authorities were not able to take any commitment to reduce or to bind them.[5] Colombia negotiated mainly with the United States, the European Community and Switzerland.

E. The Post Tokyo Round Period

Colombia did not sign any of the plurilateral Tokyo Round Codes at the conclusion of the Round. However, in order to be able to benefit from the "injury test" in U.S. countervailing duty investigations, Colombia signed the Code on Subsidies and Countervailing Duties[6] in 1990, and it signed the Antidumping and Bovine Meat Codes in 1991.

[4] When the the GSP program was first introduced after UNCTAD II in 1968, it was necessary to obtain a time-limited waiver from the MFN obligation of GATT Article I. The Enabling Clause made the exemption from Article I permanent.

[5] The Andean Common External Tariff was finally approved in 1994.

[6] At the time the United States joined the GATT its countervailing duty law did not require an injury test. The Protocol of Provisional Application under which the United States and most other countries accepted the GATT allowed countries to maintain existing laws that were inconsistent with GATT provisions, so that the United States was not required to introduce an injury test. However, under the Tokyo Round Code on Subsidies and Countervailing Duties the United States was required to provide an injury test to all other

The GATT Work Program for the 1980s, approved by the Ministers in November 1982, was undoubtedly one of the most important GATT activities developed in its later years. Indeed, the Work Program can be seen as the preparatory phase for the Uruguay Round. Colombia was very active in the 1982 negotiation of the Ministerial Declaration, as a result of its role as Chair of the Informal Group of Developing Countries.

The Informal Group of Developing Countries was the group through which these countries coordinated their positions in all GATT matters.[7] All developing country contracting parties of the GATT, including LDCs, were members of the Informal Group, and at certain times, before their accession to the EEC, countries such as Greece, Spain and Portugal, were also members, as were Turkey and Israel.[8] During the Tokyo Round, both the Informal Group and the Group of 77 were active in the negotiations, in order to permit developing countries that were not GATT contracting parties and therefore not participants in the Informal Group, to be more closely involved in the negotiations. At that time, Yugoslavia chaired the Informal Group and Colombia chaired the Group of 77 for GATT matters.

The Work Program went well, improving on the experiences of the Tokyo Round. Colombia played an active and important role during the development of the Working Program in assuring that access for tropical products was made a priority issue. Another subject that received a great deal of attention was the discriminatory treatment given by developed countries to textile imports from developing countries, mainly through the Multifibre Arrangement.[9] Colombia, acting as President of the Informal Group of Developing Countries from 1979 to 1984, coordinated the action of textile-exporting developing countries, and obtained inclusion of the subject as a priority in the Working Program. The Colombian delegation also succeeded in achieving very close multilateral cooperation in the field, leading to the creation of the International Textiles and Clothing Bureau ("ITCB"), of which Colombia was president for several years.[10] The textiles and clothing sector was, and continues to be, a very important sector for Colombia, since it represents the largest volume of exports of manufactured goods.

Beginning in 1984, Colombia began to comment that the GATT was unbalanced with respect to the scrutiny of the trade policies of the contracting parties. Many developing countries were forced by balance-of-payments crises to impose import measures under GATT Article XVIII, and were therefore subject to very detailed analysis of their trade policies by the GATT. However, there was no mechanism calling for a similar analysis of the trade policies of developed countries, even where they also applied trade restrictions, such as under the MFA or through voluntary export restraints[11] (except of course where they imposed balance-of-payments measures under GATT Article XII). There was a need to agree upon greater transparency to achieve more symmetry.

signatories of the Code. Colombia's delay in signing the Subsidies Code was due to the initial refusal of the authorities to enter into a bilateral agreement with the United States agreeing to eliminate export subsidies. The United States refused to apply the Code to any signatory that had not signed such an agreement with it.

[7] The Group continues to do so in the WTO, but its influence is now less important.

[8] The Informal Group differs from the Group of 77, which does not include the countries named above but does include developing counties that were not GATT contracting parties.

[9] *See* Chapter 9 of this book.

[10] The ICTB became an important voice for the textile-exporti ng developing countries.

[11] So-called "voluntary" export restraints, usually forced on exporting countries by major importing countries such as the United States and the EC, and which violated the spirit if not the letter of the GATT, became a major trade issue in the 1980's. Article 11.1(b) of the WTO Agreement on Safeguards now prohibits them. *See* Chapter 18 of this book.

II. Colombia's Participation in the Uruguay Round

A. Preparatory Steps

Two aspects of the process that led up to the Uruguay Round negotiations are worth discussing: the introduction of the subject of services within the GATT framework, and the genesis of the Punta del Este Ministerial Declaration.

1. Services

This subject was formally introduced by the United States into the GATT agenda at the 1982 Ministerial meeting, after some discussion in the restricted circle of the "Consultative Group of 18".[12] The first reaction from many countries—including many developed ones—was negative, because of the lack of clarity about the subject and its consequences. The strongest opposition came from developing countries, because they believed that the norms included in the General Agreement, aimed at regulating and liberalizing trade in goods, could not be applied automatically to trade in services. Developing countries believed that to achieve a multilateral agreement on trade in services, it would be necessary to convene a specialized Conference, for example in the United Nations.

Trade in services was finally included in the Ministerial Declaration, which also approved the GATT's Working Plan for the 1980s, with three important elements. First, the development of national studies on services; second, the exchange of information through international organizations, such as the GATT; and finally an analysis of the possibility and desirability of multilateral action in the service area, to be decided during the 1984 meeting of the GATT CONTRACTING PARTIES.[13] However, the exchange of information was not effective during 1983, because of the insufficient number of national studies presented and the refusal of the developing countries to participate in meetings to discuss the studies organized by the GATT Secretariat. Colombia's Representative, as Chairman of the Informal Group of Developing Countries, expressed the Group's dissatisfaction with the use of the GATT Secretariat to discuss themes—such as trade in services—that had nothing to do with the General Agreement. In 1984, when the author of this Chapter, then Colombia's representative to the GATT, was elected Chairman of the GATT Council, he took the initiative to normalize the exchange of information, thus reactivating a process that had achieved little to date. Acting on a personal basis, rather than as Chairman of the Council, he was asked to chair and lead an Informal Group on Exchange of Information on Services in order to comply with the Ministerial mandate.

At their 1984 meeting, the CONTRACTING PARTIES considered that there was insufficient information to take a final decision on the appropriate policy regarding multilateral treatment of trade in services, and the decision was postponed for another year. A new round of negotiations was already a matter of discussion in the 1985 meeting of the CONTRACTING PARTIES. It was agreed, not without difficulty, to hold a new Ministerial Meeting in Punta del Este, Uruguay, in September 1986, and to establish a Committee for Trade Negotiations to prepare the Ministerial Declaration. The subject of services was included in the agenda. In addition, the process of exchange of information continued under the Chairmanship of the author, still acting in his personal capacity.

[12] The Consultative Group of 18 was an informal group of eighteen GATT Contracting Parties, with high-level representatives coming usually from capitals. Its composition changed every year, but almost all developed countries were always members of the Group.

[13] The Contracting Parties met once a year, usually in November.

2. Preliminary Negotiations for the Punta del Este Declaration

The Preparatory Committee could not arrive at a consensus regarding the new round because of the opposition of a small group of developing countries. Those countries were opposed to the new round in general, and in particular to the inclusion of the so-called new items, such as services, investment and intellectual property. Nevertheless, many developing countries—Colombia among them—had already accepted the idea of a new round. Since the Preparatory Committee had not reached any agreement on a draft Declaration to present at the Ministerial Meeting in Punta del Este, a group of countries—both developed and developing—informally came together under Swiss and Colombian co-chairmanship, and drafted a document in the summer of 1986 which became the basis of the Punta del Este Declaration, approved in September of that year.

B. The Negotiations

1. Objectives

Colombia's interests in participating in the Uruguay Round were very similar to those that led it to join the GATT, as well as to its interests in the Tokyo Round. The country's goals included the liberalization of trade in agricultural and tropical products, the further restriction of non-tariff measures—particularly subsidies—and the liberalization of tariff barriers on products excluded from the GSP. Colombia was also interested in the elimination of restrictions on exports of textiles and clothing, the elimination of agricultural subsidies and trade barriers to agricultural products, and improved special and differential treatment for developing countries.

Although the "Work Plan for the Eighties" was still in effect, the multilateral trading system remained challenged by protectionist tendencies and the adoption of individual restrictive trade measures by developed countries. The Colombian government was convinced that the system would have to be completely reshaped in order to combat the threats of protectionism and to eliminate unilateral trade restrictions. It believed that active participation in the process could help maintain the stability of the GATT.

It was especially important to have a stable trade environment in which to consolidate Colombian export diversification. In this regard, the GATT was not granting developing countries the security they needed. An example of this was the way described above in which the U.S. Administration applied the Subsidies and Countervailing Duties Code to developing countries, forcing them to sign bilateral commitments to elimination export subsidies in order to be able to benefit from the injury test included in the Code.[14]

The Colombian Government also felt that only through a new negotiating round could the problem of voluntary participation in the Tokyo Round Codes be solved. The voluntary nature of these Codes meant that the GATT no longer provided equal rights and obligations for all its members, but instead had become an agreement offering various different levels of rights and obligations.

The issue of tropical products had yet to be solved, since no progress had been made in the Tokyo Round. It again received priority attention in the Punta del Este Declaration, including the possibility of early application of the results of the negotiations. Tropical products were closely related to the negotiations on agriculture, and Colombia had a very keen interest in achieving concrete results in both sectors. Hence Colombia was especially active in the Cairns Group work on agriculture. Trade on textiles and clothing was another important subject for the Colombian agenda in this new round of negotiations.

[14] *See supra* note 6.

As already noted, textiles and clothing represented the largest proportion of Colombian manufactured exports, and Colombia was seriously affected by the restrictions applied under the Multifibre Arrangement ("MFA"), which was also unresolved in the Work Plan. Colombia viewed dismantling of the MFA as imperative during the new round of negotiations.

Despite the approval of the Enabling Clause in the Tokyo Round, the issue of special and differential treatment of developing countries had remained a marginal subject in the work of the GATT. Colombia, as Chair of the Informal Group of Developing Countries, attempted to improve this situation. As a result, the Group of Developing Countries succeeded in obtaining the inclusion—both in the Objectives as well as in the General Principles of the Punta del Este Declaration—of paragraphs encouraging the participation of developing countries in the negotiations.

The inclusion of a Chapter on Standstill and Rollback was another important item. The Standstill provision stated that each Contracting Party undertook "(i) not to take any trade restrictive or distorting measure inconsistent with the provisions of the General Agreement or the Instruments negotiated within the framework of the GATT or under its auspices"; "(ii) not to take any trade restrictive or distorting measure in the legitimate exercise of its GATT rights, that would go beyond that which is necessary to remedy specific situations, as provided for in the General Agreement and the instruments referred in (i) above"; and "(iii) not to take any trade measures in such a manner as to improve its negotiating positions."[15] The Rollback provision required all GATT-inconsistent trade restrictive or distorting measures to be phased out or brought into conformity.

2. The Result of the Negotiations From Colombia's Perspective

Colombia, like every other GATT Contracting Party, benefited from the creation of the WTO, because it provided the multilateral trade system with a permanent framework and stable, uniform rules, in contrast to the flimsy structure of the GATT with different rules applying to different countries—the result of the optional nature of the Tokyo Round Codes. The multilateral nature of the WTO agreements and their approval by consensus as a "single undertaking" benefited every member.[16]

Colombia had not undertaken any major obligations regarding trade policy prior to its participation in the GATT. Hence, the broadened reach of the WTO to sectors such as services and intellectual property, in addition to the regular Trade Policy Reviews required under the WTO, forced the Colombian authorities to manage policy-making in a more rigorous manner, providing a more secure environment for traders, foreign firms and investors.

Nevertheless, the Uruguay Round did not fulfill all of Colombia's expectations, especially in light of the very active role Colombia had played in creating an appropriate setting for the launching of the Round, as well as in the negotiating process, which led to the approval of the Ministerial Declaration of Punta del Este. Some of the shortcomings, from Colombia's perspective, were the following:

- *Tropical Products.* The first results of the Negotiations—the "package" offered by developed countries that was approved in the Montreal Ministerial Meeting

[15] *Ministerial Declaration on the Uruguay Round*, September 20, 1986.

[16] The only exceptions to the Single Undertaking were the plurilateral agreements on Government Procurement, Civil Aircraft, Bovine Meat, and Dairy.

before the conclusion of the Uruguay Round—failed to include Colombia's major export products. There were no tariff reductions for products such as coffee, flowers or bananas in the list of concessions that were "generously" offered for other tropical products in which Colombia had little interest. Nonetheless, the agreement on trade in bananas reached by the end of the Round with the European Community was an important achievement for Colombian exports. As is known, through Regulation 404 of 1992, the European Community (EC) established a tariff quota and a license procedure that affected Latin American banana prices and supply in that market. Within the agricultural access negotiations in the Uruguay Round, the EC agreed to adjust the quota and to apply a bilateral quota system that recognized the historical participation of bananas coming from Colombia, Costa Rica, Nicaragua and Venezuela in Community imports. In this way, these four countries considered that they had solved the dispute they had with the European Community with respect to the Banana Regime.

- *Textiles and clothing.* In Colombia's view the ten-year period for dismantling the MFA was too long, and contrasted sharply with the shorter periods given to developing countries to eliminate their practices regarding some types of subsidies, trade-related investment measures, and minimum prices for customs valuation.
- *Agriculture.* On the positive side, this was the first time that multilateral disciplines had been agreed in this field, and developing countries obtained better treatment than developed countries with regard to the reduction of tariffs, export subsidies, and domestic support.[17] On the other hand, implementation of the Agreement on Agriculture did not change the existing imbalances in agricultural trade, because the amount of export subsidies and internal support that developed countries continued to apply remained as high as before the Uruguay Round, due in part to extensive use of the so-called "Green Box" exemption set forth in Annex II of the Agreement and the "Blue Box" exemptions under Article 6.5 of the Agreement. Also, import restrictions on agricultural products remained as high as before the Uruguay Round, as a result of "dirty" tariffication.[18]

  Implementation Periods. Although the developing countries were given several years to implement a number of the agreements, experience has showed that the deadlines were too short and that the temporary exceptions should have been permanent.

In brief, despite the benefits explained above, the WTO Agreements do not provide the basis for sustained economic development for developing countries like Colombia. On the contrary, practices used in the past by the developed nations to achieve their current levels of industrialization and to acquire their present degree of competitive advantage are either prohibited for developing countries or are only permitted for a limited time. With the conclusion of the transition periods, the full application of the disciplines on subsidies, TRIMS and customs valuation, the high tariffs imposed on textiles and clothing, and the tariff quotas and high tariffs applied to agricultural products, as well as the maintenance by the developed countries of export subsidies and internal support for agriculture, developing countries have been placed in a worse situation than that existing prior to the implementation of the WTO Agreement.

[17] *See* Chapter 6 of this book.
[18] *Id.*

C. Effects of Colombia's Participation in the GATT/WTO

1. Economic

The WTO multilateral agreements create a wide set of trade policy disciplines whose application has required the modification of many previous policies. Furthermore, they have required the adoption of new domestic and sub-regional disciplines within the Andean Community.

Important issues regarding the application of the WTO Agreements include the following:

- *Subsidies.* The most significant aspect of the Subsidies Agreement, from a Colombian perspective, was the ability to keep export subsidies (generally prohibited under the SCM Agreement) in place for a period of time under Article 27.3 of the Agreement, with the possibility of a further extension. In fact the limited export subsidies that Colombia maintains have little economic effect, because they do not distort prices and they have not caused an increase in Colombia's world market share of the products in question. But they are important to the country's export promotion policy because they are designed to promote export diversification. However, given the tight fiscal situation faced by most developing nations—of which Colombia is no exception—it is very difficult to apply a subsidy policy either on a regional or production basis, as opposed to on exports only. This is why some countries argue that the issue of export promotion by developing countries should be an important element of special and differential treatment.

  Trade-Related Investment Measures. The Andean Automobile Agreement (in which Ecuador and Venezuela also participate) was completely revised to make it consistent with the TRIMs Agreement. Colombia was able to maintain its "Absorption Policy" in the field of agriculture, as a result of the five-year period given to developing countries to phase out TRIMs measures. This period was extended for a further two years with the possibility of an additional two years. The Absorption Policy allows the importation of products only as long as national production is being fully consumed, and it has been a very effective agricultural policy instrument for domestic producers, while at the same time maintaining a supply of imported goods.
- *Agriculture.* The Colombian agricultural crisis is closely related to the existence of the enormous support policies provided by developed countries for their own agricultural industries, through export subsidies and domestic support. The agricultural crisis has also been fueled by the social crisis faced by Colombia –which has hit rural areas especially hard—and by the scarcity of fiscal resources dedicated to production and exports. As a consequence, elimination of the Absorption Policy in a world of unfair competition, such as the use of export subsidies by developed countries, could cause the Colombian agricultural situation to deteriorate.
- *Services.* The GATS commitments given by Colombia in the Uruguay Round framework emphasized trade liberalization. This is consistent with the liberalization process for foreign investment applied by Colombia since 1991. In addition, the Colombian government participated in the financial and telecommunication services agreements adopted in 1997. Colombia was also willing to pursue new negotiations and to accept new commitments in the failed negotiations on maritime services. Colombia has also developed integration negotiations in the field of services, under the provisions of Article V of the GATS. Colombia is currently

engaged in liberalization programs in services under the auspices of the Andean Community in which, in addition of previous Decisions in the services field, such as in transportation, tourism, and telecommunications, a Decision for liberalization of all trade in services was adopted in 1998. In 2001 another Decision incorporating the inventory of restrictive measures, to be liberalized before 2005, was agreed.[19] The Free Trade Agreement of the Group of the Three (Colombia, Mexico and Venezuela), also contains a chapter for liberalization of services trade, and a standstill provision was agreed. Services are included in the Free Trade Area of the Americas ("FTAA") negotiations.

- *Dispute Settlement.* Knowledge of the WTO dispute settlement procedures is considered to be very important, especially after the experience with the restrictions applied by the EC in 1992 on Latin American banana exports. Colombia was the main promoter of the Advisory Center for WTO Law, which was created at the 1999 Seattle Ministerial Conference to provide low-cost legal support for developing countries for WTO dispute settlement proceedings.[20]

2. Social

The requirements of the WTO Agreements, as well as the institutional changes they have generated, are recognized and taken into account both by domestic protectionist lobbies and by Colombian development policy makers. It is clear that for Colombia to improve its situation in the international arena it must increase its exports, rather than apply trade restrictions (whether or not justified). In other words, the country's productive sector will develop more effectively by competing in larger markets through export promotion than by limiting itself to producing essentially for a protected local market. Regional agreements entered into by Colombia have proved to be effective in creating an export culture, as well as in offsetting local market downturns. Likewise, the existence of stable rules through the application of multilateral disciplines with respect to trade with the rest of the world (especially the larger countries) permits the development of long-term business strategies. Regardless of a country's economic situation, protectionist pressures develop against its products when they start to have a significant presence in the international market. Consequently, clear "rules of the game" and an institutional system such as that of the World Trade Organization help to create predictability for businesses and trade relationships.

3. Legal

Colombian laws related to trade policy have been aligned with the international agreements, both multilateral and regional. Colombia has thus proved to be serious and committed to its international obligations. Colombian trade policy development is based on the multilateral trade system as represented by the GATT and more recently the WTO. On this particular aspect, it is important to note that Colombia has never been involved as a complainant or a respondent in a WTO dispute settlement process, although it was involved as a Third Party in the Bananas case. Colombia's direct experience with the dispute-settlement system is therefore very limited. Nevertheless, it is useful to note that the system has shown that it works effectively, and that the consultations stage is a very important means of enabling interested members to resolve their differences. In practice, the weak negotiating power of developing countries has been strengthened by the

[19] Decisions 439 and 511.

[20] The Centre's website address is www.acwl.ch.

dispute settlement system of the WTO, since when they are subject to discriminatory or WTO-illegal trade practices it limits the possibility of pressure from the more powerful countries.

III. Attitude of Citizens, Businessmen, and Political Leaders Towards the WTO

Some important groups of Colombian society, such as professionals, workers, and entrepreneurs, are still highly sceptical about the benefits arising from participation in the WTO. The discrimination existing within the trade globalisation and liberalization process for some of Colombia's important exports such as banana, sugar, rice, meat, tuna fish, textiles and clothing, and footwear, is evident. Colombia's manufacturers and exporters feel greatly disadvantaged by the multimillion-dollar subsidies that larger countries grant, especially those to agriculture, which are supported by a multilateral legal framework.[21] At the same time, these countries vehemently demand that Colombia open its national economy and limit its already modest support programs. However, it is clear that the best way to deal with any activity of the kind regulated by the WTO is to be part of the system. This gives the Colombian government the opportunity to be heard and results in recognition of the country's rights, as well as the acknowledgment of particular characteristics of its trade and development.

IV. Strengths and Weaknesses of the WTO From Colombia's Perspective

A. Strengths

The principal strengths of the WTO system from Colombia's viewpoint are: the growing normative framework relating to trade policies and the needs of the world economy; a dispute settlement mechanism which guarantees the effectiveness of the system; the fact that the multilateral trade system covers almost every country in the world; the more dynamic participation of developing countries in the agenda; and the tendency of regional trade blocks to converge towards the multilateral openness based on WTO principles and disciplines.

B. Weaknesses

There are two main weaknesses. First, permanent Special and Differential Treatment is very limited and is basically limited to slightly larger *de minimis* exceptions, which as a practical matter are inapplicable or insufficient, as in the case of the Subsidies, Antidumping and Safeguard Agreements. Second, long-term discriminatory treatment exists because of the conditions under which subsidies to production and to exports for the agriculture sector are still permitted, which add to the advantage that the developed countries already have, and at the same time constrain the negotiating room for developing countries. The latter not only affects the already important commercial interests of developing countries but also restricts their possibilities for development.

It could be argued that it is the *developed* countries that have received special treatment under the most important WTO disciplines, because it has been impossible to force them to abandon their agricultural subsidies. Furthermore, the developed countries obtained

[21] Similarly, only "substantial suppliers" are entitled to compensation or to retaliate in response to a safeguard action. *See Agreement on Safeguards*, Articles 8.1 and 12.3.

longer periods for dismantling the Multi-fibre Agreement and the exceptions to MFN treatment on trade in services than the implementation periods given to developing countries with respect to the other Uruguay Round agreements. Also, the treatment of merchant marine services foreseen in paragraph 3 of GATT 1994 constitutes a very special, indefinite-term treatment in favor of the most powerful economic and commercial nation in the world.

Developing countries will in fact not be in a better situation once all transition periods provided for in the Uruguay Agreement have passed. To the contrary, the decrease of distortions caused by the elimination of subsidies and greater access to the markets of the larger countries for the exports that interest developing countries have not proved effective in improving their opportunities to participate more fully in trade. The possibility of giving developing countries the permanent right to use such devices as export subsidies and performance requirements, and even to use GATT Article XVIII for the development of their incipient industries, should therefore be considered.

The dispute settlement system does not take into account the small providers who do not have a "substantial interest" in the matter, as required by Article 10.2 of the DSU. These suppliers are not able to participate in disputes as third parties if their average annual participation within the group of exporters to the market under question is lower than ten percent during a three-year period.[22]

The ability to participate as a third party is also lost if the parties to the dispute agree to go directly to Article XXIII of the GATT, without consulting under Article XXII. This occurred in 2001 with regard to a claim that Brazil made against the EU concerning preferential treatment of coffee, and a safeguard applied by Chile to sugar, contested by Argentina.

The dispute settlement system does not help small suppliers who do not have the ability to take advantage of it, because of lack of experience and high cost. At the same time, it has been recognized that the WTO dispute settlement mechanism gives developing countries the opportunity to bring cases against larger and more powerful Members. It is the main guarantee of the effective operation of the multilateral trade system.

Another concern is that further tariff cuts will erode the benefits of the Generalized System of Preferences. There has been no development of alternative mechanisms for providing special and differential treatment for access to the markets of developed economies. Similarly, effective implementation of Article IV of GATS, calling for increased participation of developing countries, is necessary.

V. The Next Negotiating Round

The WTO's Fourth Ministerial Conference held at Doha, Qatar, between November 9 and 14, 2001, ended with a global agenda that tried to take into account, in a balanced fashion, the interests of all countries, both developed and developing. The main issues of the Conference were: Application of the Uruguay Round Agreements; Agriculture; Intellectual Property and Access to Medicines and Public Health; Environment; Issues related to WTO Norms; and issues from the Singapore Ministerial.[23]

The Ministerial Declaration defines the WTO negotiating agenda up to January 1, 2005: a global work program in different areas that had already been under discussion

[22] Similarly, only "substantial suppliers" are entitled to compensation or to retaliate in response to a safeguard action. *See Agreement on Safeguards*, Articles 8.1 and 12.3.

[23] I.e., Investment, Competition Policy, Trade Facilitation, and Transparency in Government Procurement.

since the Singapore Ministerial Conference, and new analytical work on small economies; trade, debt and finance; and trade and technology transfer. The Conference also produced a Political Declaration on the relationship of the TRIPS Agreement and public health.

Another important result was the Decision that adopts concrete measures to respond to the concerns of developing countries with respect to the application of the WTO Agreements and the procedure proposed for the granting of additional time to developing countries for the phasing out of export and import substitution policies foreseen in Article 27.4 of the SCM Agreement. The latter is essential to Colombia's interest in preserving export-supporting instruments.

Doha's Ministerial Declaration[24] establishes or reiterates negotiating objectives in several areas of interest for Colombia. These include:

- The Decision on **Implementation,** in particular the possibility of granting extensions for the phasing out of export and import substitution subsidies under Article 27.4. This would allow the maintenance of incentives for the development of productive activities inside free trade zones and through the importation of capital goods to produce goods for exports for seven more years. Failure to obtain such an extension would be fatal for the development of non-traditional Colombian exports. At the same time, foreign investment flows from and to Colombia would be affected because of possible displacement in favor other Central American and Caribbean countries that enjoy automatic extensions.
- The mandate achieved in **Agriculture** is more ambitious than that provided in Article 20 of the Uruguay Round Agreement on Agriculture and could benefit a developing country like Colombia, which now has to compete in markets that are highly distorted by protection and assistance granted to agriculture, especially by developed countries.
- With respect to **Market Access**, the mandate calls for tariff reductions and the enlargement or elimination of tariff-rate quotas. Colombia now faces tariff-rate quota restrictions on its exports of sugar to the United States. Reduction of high tariffs, tariff peaks, and tariff escalation are also important to improve access for agricultural products with greater value-added. They are also important to preserve the special safeguard, to provide for differentiated commitments on tariff reductions, and to provide for greater access for tropical products and for products that are substitutes for illicit crops.
- The mandate on **Export Subsidies** refers to all forms of subsidies, which would include such instruments as export credits. However, the reference to the progressive removal of subsidies is very weak, particularly in comparison with the objective of Colombia and the Cairns Group of pursuing the elimination of export subsidies in the shortest possible time. Otherwise, the liberalization of market access would lack any sense. Colombia's interest in this respect is in at least preserving the Article 9.4 exemption beyond the implementation period for developing countries with respect to subsidies devoted to reducing export marketing costs and for those associated with favorable rates of internal transportation and freight charges for export shipments.
- The mandate with regard to **Domestic Support** seeks the substantial reduction, but not the elimination; of assistance that causes trade distortion. It excludes domestic support that distorts production such as the Blue Box subsidies, as

[24] Reproduced in the Appendix to this book.

well as several Amber Box measures. In the light of this mandate, the parties that will benefit the most are the United States and the European Union, to the detriment of the developing countries. Colombia is interested in obtaining Amber Box exceptions for the maintenance of assistance programs devoted to the substitution of illicit crops and for rural development and eradication of poverty.

- If the mandate and the guidelines for the negotiations in **Services** are reaffirmed, it is not expected to result in indiscriminate sectoral liberalization in developing counties, which still need to develop their service sectors. At the same time larger countries should make substantial commitments on Mode 4, the presence of natural persons of one member in the territory of any other member, to facilitate trade opportunities, including the temporary entry of natural persons from developing countries. Flexible norms and requirements with respect to professional recognition are needed.
- **Market Access for Non-Agricultural Products**. More than seventy percent of Colombian trade is with countries in the North and South American Continents, which are negotiating the Free Trade Area of the Americas ("FTAA"). Access to these markets will therefore occur regardless of developments in the WTO, assuming that the FTAA goes into effect. The EU, another of Colombia's major trading partners, provides Colombia with extensive trade preferences. However, Colombia is interested in obtaining improved market access for sensitive products such as textiles and clothing and leather products.
- The most significant outcome for developing countries on **Intellectual Property** was the issue related to the relationship between the TRIPS Agreement and Public Health, and the greater flexibility granted for interpretation of the Agreement in face of the need to fight pandemics such as HIV/AIDS, malaria, and tuberculosis. In this respect, the TRIPS Agreement may not be construed as an impediment to measures allowing WTO member countries to protect public health and access to medicines for all in the event of a national emergency.
- **WTO Norms**. Negotiations with respect to the Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures are very meaningful. One of the outcomes with respect to the latter should be that clear and concise norms should avoid and control the indiscriminate use by developed countries of the remedies provided by the Agreement against exports from developing countries.
  - In the case of the Antidumping Agreement, Colombia would like to see the establishment of an appropriate comparison with respect to the dumping margin, particularly for perishable products; an increase in the *de minimis* dumping margin for developing countries from two percent to five percent; and an increase in the exemption for imports from developing countries, from three percent to seven percent.
  - In the case of the Subsidies Agreement, Colombia is interested in: an increase of the *de minimis* level for developing countries from two percent to three percent; an increase in the exemption for imports from developing countries from four percent to seven percent [coming from developing countries]; and the extension of the definition of "input consumed in the production process", to include all inputs, not only those consumed in the production of the exported product.
- Negotiations in **Trade and Environment** might result in onerous burdens being placed on developing countries, not only with respect to the capacity to assume

new obligations, but also the possibility of increases in tariff and non-tariff barriers. Attention is given in this context to issues such as the precautionary principle and the concept of multi-functionality in agriculture. The first, openly defended by the European Union, pursues environmental protection through the application of sanitary and phytosanitary measures and technical regulations without scientific bases or risk analyses. The second, also supported by Europeans and other developed countries as Japan, Korea, Switzerland, Norway and a group of developing countries, seeks to increase protection and support given to agriculture, which may damage the environment in rural areas.

VI. Participation of Colombia in Regional Trade Arrangements

A. Andean Community

The Andean Group was created by the Cartagena Agreement in 1986, and consists of Bolivia, Colombia, Ecuador, Peru and Venezuela. This group has evolved into what is known today as the Andean Integration System, which aims at creating a common market. It is a complex system that, in addition to the Cartagena Agreement, contains a system for the settlement of regional disputes in the Andean Court of Justice (Tribunal Andino de Justicia), a financial support mechanism in the Andean Promotion Corporation (Corporación Andina de Fomento, "CAF"), a Labor Council (Consejo Laboral Andino), and a Business Council (Consejo Empresarial Andino).

The Andean Community is without doubt the most important integration agreement in which Colombia participates. In the trade area, it has managed to create a customs union—of which only Peru is not yet a full member. It has also established mechanisms for liberalization of trade in services.

B. Agreements Under ALADI

The Colombian economic and commercial integration system operates within the legal framework established in the 1980 Montevideo Treaty. It establishes the Latin American Integration Association (Asociación Latinoamericana de Integración ("ALADI")). ALADI is a legal framework that permits individual member countries[25] to enter trade agreements with one or more members without the benefits of such agreements being extended to other ALADI members, except for those considered to be less developed.[26] In this context, a network of preferential agreements has developed in parallel to the growth of regional trade. Colombia, like the other ALADI members, has bilateral trade agreements with most Latin American countries. The capacity to enter such agreements is not restricted to ALADI member countries. Negotiations can be held with other Latin American or developing countries outside Latin America.

There are two types of agreements within the ALADI context—Partial Agreements, which are focused on tariff reductions for a small number of products, and Complementary Economic Agreements—which contain more general trade commitments and can include matters such as investment or services, as opposed to agreements limited to trade in goods.

[25] The members of ALADI are Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

[26] Bolivia, Ecuador and Paraguay.

Most of those agreements are currently being renegotiated by the Andean Community as a group, in order to harmonize trade preferences of its member countries, taking into account the commitments of the Common External Tariff of the Andean Community. This is the case for the agreements with Brazil and Argentina, and the Agreement with the members of the Central American Northern Triangle.[27] Also, a new agreement is being negotiated regarding the formation of a free trade area between the Andean Community and Mercosur.

C. Group of Three

The Group of Three ("G3") was formed in January 1995 and consists of Colombia, Mexico and Venezuela. The G3 seeks to establish a free trade area among its members during the first ten years of its existence. It includes—besides the chapters pertaining to liberalization of trade in goods—chapters setting forth norms related to liberalization of services, treatment of foreign investment, intellectual property, technical standards, and dispute settlement.

The trade liberalization in non-agricultural goods[28] is under way. Tariffs are being reduced by ten percent per year over a ten-year period beginning in July 1995. There has been no liberalization of trade in services since the entering into force of the Agreement in 1995.

D. Free Trade Area of the Americas

The Free Trade Area of the Americas ("FTAA") negotiations started in September 1998 and are supposed to be completed by the end of 2004. Implementation should begin before the end of 2005. The 34 democratically elected governments of the American Hemisphere are participating in negotiations, which aim to create a free trade area between these countries. Besides liberalization of trade in goods, the negotiations cover free trade in services, competition and investment policies, and intellectual property and dispute settlement, among other issues. An important feature of the FTAA is that all existing regional integration agreements like the Andean Community, Mercosur, Caricom or the Central American Market, will remain in effect to the extent that they contain deeper commitments than those agreed to under the FTAA.

VII. Trade Policy Development in Colombia

From 1991, when the Ministry of Foreign Trade was created, Colombian trade policy has been established by the Foreign Trade Supreme Council, led by the President of the Republic. The Foreign Trade Minister, and other ministers whose functions are related to foreign trade and trade policy are also members of the Council. The Mixed Commission on Foreign Trade—which includes the members of the Foreign Trade Supreme Council, as well as the most important producer associations from the manufacturing and agricultural sectors—provide advice to the Supreme Council.

The Foreign Trade Ministry is in charge of implementation of trade policy and has five technical divisions: Bilateral and Multilateral Affairs, Economic Integration, Investment, Competitiveness, Exporting Culture and the General Direction of Foreign Trade. It also

[27] Guatemala, El Salvador and Honduras.

[28] Most agricultural goods are excluded from the liberalization program.

has several related institutions such as PROEXPORT-Colombia, which has as its main responsibility the export promotion of goods and services, and the Foreign Trade Bank, BANCOLDEX, which finances exports.

It was necessary to ensure the participation of the entire Colombian society, both public and private, in the negotiations with respect to the Andean Community and MERCOSUR. This will also be necessary in the FTAA negotiations, as well as negotiations in the WTO and with other countries and regions such as the EU, Canada and Central America. It will therefore be important to publicize these processes, to provide opportunities for discussion, and to prepare the task forces that will need to be created.

VIII. Conclusion

During the development of the multilateral trade system, the economies of developing countries have been significantly transformed; some of these countries, such as Mexico and Brazil have become important industrial and trading centers. Other countries, like Colombia, after the slow process of forming an incipient industrial base and a dynamic internal economy, still suffer from technological lag and weak participation in the world economy. They must overcome many constraints to be competitive on an international basis.

The positive contribution that the existence of multilateral trade rules, such as those of the WTO, makes to the stability of commercial relations is evident. Nevertheless, temporary exceptions to the rules and technical cooperation constitute basic mechanisms for the promotion of development and the greater participation of developing countries in world trade, as stated in the Preamble to the WTO Agreement. The challenge will be to implement mechanisms that will extend export capacity, especially of intermediate and less developed economies among developing countries, based upon, *inter alia*, Article XVIII of GATT 1994, the Enabling Clause, Article IV of the GATS and the adoption of measures that should allow the permanent maintenance of export promotion policies and trade-related investment measures.

At the same time, the adoption of concrete measures regarding the elimination of subsidies in developed countries, as well as the elimination of unilateral measures, the elimination of barriers for textiles and clothing and leather manufactures, and the ability of developing countries to effectively protect their export interests within the dispute settlement system, are urgently needed. Among the new issues, the adoption of disciplines in matters such as competition and investment could favor the liberalization of world trade.

CHAPTER 69

EGYPT

Adel M. Khalil*

TABLE OF CONTENTS

I. Introduction 93
II. Egypt's Accession to the GATT 93
III. Egypt's Participation in the Uruguay Round 93
A. Work After the Establishment of the WTO 94
B. Participation in WTO Ministerial Conferences 95
IV. Effects of GATT/WTO Membership and the Uruguay Round Agreements on Egypt 96
A. Economic Effects 96
1. Trade in Goods 96
2. Trade in Services 97
3. Intellectual Property Rights 97
B. Political Effects 97
C. Social Effects 98
D. Legal Effects 98
V. Egypt's Attitude Toward the WTO 98
VI. An Egyptian Perspective on the Strengths and Weaknesses of the WTO 98
A. Strengths 98
B. Weaknesses 99
VII. Egypt's Participation in the WTO Dispute Settlement Process 99
VIII. Principal Issues for Egypt in the Forthcoming Negotiations 101
A. Egypt's View Toward a New Round of Negotiations 101
B. Egypt's Position on Particular Issues in the Doha Round 101
1. Implementation of the Uruguay Round Agreements 101
2. The Mandated Negotiations 102
(a) Agriculture 102
(b) Services 103
(c) Singapore Issues 104
(i) Trade and Competition Policies 104
(ii) Trade and Investment 104
(iii) Trade Facilitation 105
(iv) Transparency in Government Procurement 106
C New Issues 106
1. Electronic Commerce 106
2. Trade and Environment 106

* Dr. Adel M. Khalil was First Undersecretary of Egypt's Ministry of Economy and Foreign Trade and then Egypt's Representative to the WTO (1996–2000).

3. Labor Standards 107
4. Domestic Industrial Tariffs 107
D. Egypt's Strategy to Accomplish Its Objectives 108
IX. Effects of Regional Trading Arrangements on Egypt 108
X. How Trade Policy is Developed in Egypt 109
XI. Conclusion 110

I. Introduction

Egypt joined the GATT on May 9, 1970, then participated in the Uruguay Round negotiations (1986–1993). On April 15, 1994, Egypt signed the Marrakesh Agreement Establishing the World Trade Organization, and became a full Member of the WTO on June 30, 1995.

Egyptian officials, businessmen, and academics are in agreement that the WTO provides a rule-based and transparent trading system. The WTO also provides a forum for permanent negotiations as well as for settlement of disputes. Developing country interests are preserved through the special and differential treatment accorded to those countries and embodied in the WTO Agreement. However, there is a general feeling in Egypt that WTO rules are complicated. Certain agreements, like those on Agriculture and Textiles and Clothing, stop short from achieving the goal of trade liberalization and adversely affect the interests of developing countries. Also, benefiting from the WTO dispute settlement system requires costly specialized legal expertise.

This chapter describes Egyptian activities and positions with respect to various WTO subjects, including demands of developing countries concerning the effective implementation of existing WTO agreements, views regarding the mandated negotiations on Agriculture and Services, as well as Singapore issues, and the subjects of the new round of trade negotiations ("the Doha Round").

II. Egypt's Accession to the GATT

Egypt joined the GATT on May 9, 1970, after eight years of negotiations. Its principal goal was to benefit from the reduction or elimination of tariffs and non-tariff barriers, to secure liberalization of trade, and to enjoy most-favored-nation ("MFN") treatment from other GATT contracting parties. Egypt participated actively in both the Tokyo Round and Uruguay Round ("UR") negotiations.

III. Egypt's Participation in the Uruguay Round

Egypt's primary goals during the UR were the liberalization of world trade in general without hindering the interests of developing countries, as well as assuring that the negotiations took full consideration of the condition of developing countries. Egypt sought to gain improved market access for its textile and agricultural exports and to increase awareness of the difficulties faced by net food importing developing countries like itself. Both Egyptian officials and businessmen feel that the liberalization of the agricultural and textile sectors did not go far enough, and that the rights of developing countries were not sufficiently safeguarded by the two relevant Agreements, since both agreements maintained high tariffs, quotas, subsidies and many other measures limiting freedom of trade in those items.

In order to prepare itself for the comprehensive and lengthy Uruguay round negotiations, which lasted from 1986 to 1994, in 1988 Egypt established a National Committee presided over by its Minister of Economy and Foreign Trade. Members of that committee were representatives from all concerned ministries and organizations, including those representing the private sector such as the Businessmen's' Association, the Federation

of Chambers of Commerce, and the Federation of Industries. The Committee formed sub-committees to analyze and follow the different subjects of the negotiations and to prepare Egypt's official negotiating positions for guiding the Egyptian negotiating team in Geneva.

On April 15, 1994, Egypt signed the Marrakesh Agreement establishing the World Trade Organization. Despite opposition from certain business groups who believed that membership in WTO would harm local industry, the Egyptian Parliament ratified the Agreement on April 16, 1995. A Presidential Decree[1] was issued in this regard. Egypt officially became a member of the WTO on June 30, 1995.

A. Work After the Establishment of the WTO

When the WTO was established as a permanent forum for negotiations, dispute settlement, and trade policy review, Egypt transformed the National Committee for the Preparation for Uruguay Round Negotiations into a committee to follow up the application of the Uruguay Round agreements under the chairmanship of the Minister of Economy and Foreign Trade. Nine sub-committees were established: Market Access, Services, Trade-Related Investment Measures ("TRIMS"), Agriculture, Textiles and Clothing, Trade and Environment, Protection of Local Production, Technical Specifications, and Trade-Related Aspects of Intellectual property Rights ("TRIPS").

The Committee's mandates and responsibilities included:

- Taking into account the national as well as the sectoral point of view when considering different subjects relating to the WTO;
- Taking measures to maximize the positive aspects of the Agreements and taking full advantage of the special and differential treatment provided by the Agreements for developing countries, such as flexibility measures, transitional periods, as well as technical and financial assistance;
- Suggesting amendments to local laws and decrees to conform to the Uruguay Round Agreement;
- Making sure that the bilateral agreements signed between Egypt and other countries are in conformity with the Uruguay Round Agreement;
- Educating Egyptian Ministries and Organizations concerning various aspects of the Uruguay Round Agreement, including how to benefit fully from its rules, and how to handle its obligations;
- Preparing official Egyptian positions concerning subjects under negotiation in the WTO to guide the Egyptian negotiating team in Geneva.

Not all committees were equally successful. Some Ministries kept changing their representatives in the sub-committees. Many of the representatives were not able to contribute useful information regarding the opinions, needs, plans, and policies of their respective Ministries and Organizations, thus leaving the official representative to the World Trade Organization in a position where he had to suggest Egypt's position concerning many WTO negotiating items then seek the Committee's approval of his suggestions.

[1] No. 72 for the year 1995.

B. Participation in WTO Ministerial Conferences

Egypt participated actively in the four post-Uruguay Round WTO Ministerial Conferences which were held in Singapore (1996), Geneva (1998), Seattle (1999), and Doha (2001). The Egyptian Delegations to the four Conferences contributed both to the preparatory work and during the conferences.

The Egyptian Delegation to the Singapore Ministerial Meeting played an important role in helping to reach an acceptable solution, from the point of view of the developing countries, concerning the paragraph on core labor standards in the Singapore Declaration. The developing countries opposed linking trade to labor standards, and insisted that labor standards should only be discussed in the International Labor Organization ("ILO") which is the competent body to tackle this issue. The Egyptian Delegation also played an important role in formulating many other paragraphs in that Declaration concerning subjects of importance to the developing countries such as: marginalization, regional agreements, accession, implementation, treatment of developing countries, least developed countries ("LDCs"), textiles and clothing, trade and environment, investment and competition, transparency in government procurement, and trade facilitation. The consensus reached on those paragraphs allowed for the issuance of the Singapore Declaration.

In the Geneva Conference, the decision by Egypt to accept the Declaration on Global Electronic Commerce paved the way for its acceptance by many other developing countries.

During the preparatory work for the Seattle Ministerial Meeting, Egypt, together with ten other developing countries in Africa, Asia and Latin America formed a group called the Like-Minded Group ("LMG").[2] This group played a very important role in formulating the position of developing countries with respect to many of the topics under discussion in the preparatory process for the Conference. The role of Egypt was not confined to working through the LMG; it also participated in the African Countries Group and the Committee on Trade and Development in the World Trade Organization.

In Seattle, the Egyptian Delegation was one of the few delegations to attend the "Green Room" meetings where approximately twenty key WTO Members (developing and developed) were invited to discuss and try to reach an acceptable text for the Ministerial Declaration to be issued by the Conference. Egypt tried during those meetings to convey the views of the developing countries to the limited number of delegations attending the Green Room meetings. Though it had been a common practice in the GATT/WTO to try to reach important decisions in small informal groups, the Seattle Ministerial was somehow different as a result of the general view of developing countries that the situation required that the Members hear individual points of view concerning the implementation problems of the existing agreements, as well as the unaffordable burden of adding new areas to the negotiations in a new and comprehensive round of trade negotiations.

The Egyptian Delegation to the Seattle Ministerial Meeting believed that reasons for the failure of the Meeting included: the failure in the preparatory process to agree on an acceptable text that left only a few points of difference of a political nature for

[2] This group consisted of: Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Malaysia, Pakistan, Tanzania, Uganda and Zimbabwe.

the Ministers to settle; the insistence of the developed countries on opening many new subjects for discussion without allowing for the proper implementation of the existing agreements; the short time allowed for meetings of trade ministers as a result of the demonstrations that delayed the start of the meetings; and the fact that very few general meetings were held as a result of the focus on the Green Room meetings, thus excluding the majority of delegations from taking part in the decision-making process when many important issues had been left open for discussion in Seattle.

IV. Effects of GATT/WTO Membership and the Uruguay Round Agreements on Egypt

A. Economic Effects

1. Trade in Goods

Egyptian industry has enjoyed considerable protection since Egypt began to adopt socialist policies in 1961. Most private sector companies were nationalized during that period. Even when Egypt started applying an open-door policy in the mid-seventies and encouraged the private sector to assume a role in the economy, the government chose to provide a good deal of protection to the private sector, including high tariff rates on competitive imported goods, as well as a ban on the importation of certain articles. This structure was progressively reformed when Egypt joined the GATT and later the WTO. Egypt's reform program has and still gives rise to objections from some local industries, in particular producers of textiles, clothing and some agricultural products. The reduction or removal of many tariff and non-tariff barriers in importing countries has helped Egypt little due to its limited capacity to export as a result of high production costs, the low quality of some products, high prices of components and inputs in the Egyptian market resulting from protectionism, the lack of external marketing experience, and strong competition from other WTO Members, in particular Asian countries. The government, in cooperation with business associations, is working hard to improve this situation through programs for restructuring, rehabilitation, training and privatization of industries, as well as reducing tariffs on inputs and improving exporting capacities for producers through market research and regional agreements, especially with Arab, African, and EU/Mediterranean countries', as well as seeking to sign a Free Trade Agreement with the United States.

Other concerns with the impact of the Uruguay Round Agreements include:

- Egypt is a net food importing developing country. The reduction of domestic subsidies pursuant to the WTO Agreement on Agriculture has raised fears that Egypt will have to pay higher prices for many food items that it needs to import, especially wheat, flour, and edible oils. In fact the general reduction in international market prices of those items during the first years of the implementation of the Agreement together with the successful policy of the government to increase production of those crops, has helped Egypt to avoid a difficult situation in this respect.
- Egypt cannot take advantage of Article 27.2(b) of the Agreement on Subsidies and Countervailing Measures that allows some developing country members to continue to provide export subsidies, since its per-capita GNP exceeded US$1,000 in 1998 and it has thus lost the preferential treatment accorded by Annex VII(b) of the Agreement.

- Egypt is not eligible to apply import restraints under GATT Article XVIII and the Understanding on Balance-of-Payments Provisions of GATT 1994, since its balance of payments has been in surplus since 1995, even though the Egyptian balance of trade in goods has and still suffers from a huge deficit. The surplus in the Egyptian balance of payments results mainly from transfers from Egyptians working abroad, tourism receipts and Suez Canal dues.
- The rules of the Agreement on Textiles and Clothing have allowed developed importing countries to continue imposing quotas on clothing and textile imports from developing countries until 2005, thus permitting a continuation of restrictions on clothing and textile imports from developing countries. This quota system, together with the misuse by certain developed countries (especially the EU) of anti-dumping laws, has harmed Egyptian exports of textiles and clothing.

2. Trade in Services

Egypt participated actively in the negotiations on trade in financial services that resumed after the conclusion of the Uruguay Round. Egypt accepted a high level of liberalization for banking, insurance and capital market services. This liberalization was welcomed by the developed country Members, especially the United States and the EU countries.

Egypt will benefit from its decision to encourage foreign investment in its services sector, in particular through access to new technology, since new technology usually accompanies investments in sectors such as financial services, telecommunications and data processing centers. Although Egypt has not signed the Basic Telecommunications Agreement, the government has also taken important steps to liberalize this sector.

Egyptian service providers will also benefit from the increase in foreign market access opportunities in sectors such as construction and engineering, health, education and professional services that will be negotiated in the new round.

3. Intellectual Property Rights

The Agreement on Trade-Related Intellectual Property Rights ("TRIPS"), has provided Egypt with an important means to protect patents, copyrights and neighboring rights, especially in Arab and African markets. Strictly-applied enforcement measures in Member countries have helped Egyptian industries to protect rights in areas like printing, entertainment (audio, video and motion pictures) and broadcasting. However, Egypt has faced great pressure, especially from the United States, to abandon its right to apply a ten-year rather than a five-year transitional period for implementation of the TRIPS agreement with respect to pharmaceuticals. Local industry, government officials and the public oppose abandoning this right because of the expected effect on both local industry and the price of medicine.

B. Political Effects

Views in Egypt differ among political parties and business associations concerning the WTO. Some (the majority party and the Federation of Chambers of Commerce and many economists) believe that Egypt cannot turn its back on the WTO, which is in the best interests of the Egyptian economy. Others (the opposition leftist party and the Federation of Industries) view the WTO as a danger that will ruin the local economy by opening the door to imports of all kinds of goods at a time when most local industries are still unable to compete.

C. Social Effects

Views in Egypt differ concerning the effect of WTO membership on local industry. Some believe that opening the door to imports of foreign goods will harm local industries and deprive many workers of their jobs and benefits. Others believe that the restructuring of the local economy is bound to happen as a result of the government's Economic Reform Program, which included privatizing many important industries. These same people also believe that well-managed privatized industries would be more capable of competing locally and abroad, thus creating the long-term possibility of more employment. The actual effects on the traditional industries of textiles and clothing are not yet clear since Egypt maintained a prohibition on the importation of fabrics until January 1, 1998, and on apparel and made-ups until January 1, 2002. However other new industries like carpets, ceramics, iron and steel and aluminum products have flourished and are witnessing a high export rate.

D. Legal Effects

In order to comply with the WTO Agreement, Egypt changed or promulgated laws in areas such as customs, market access, anti-dumping, services, technical barriers to trade and intellectual property rights. These laws are strictly monitored by the competent authorities. Egypt has also established a new department within the Ministry of Economy and Foreign Trade to handle dumping, subsidies and safeguard matters.

V. Egypt's Attitude Toward the WTO

Some Egyptian citizens, economic writers and industrialists believe that globalization, facilitated by the WTO, is a new form of economic colonialism, and that the economic superpowers are using it to control the economies of developing countries, so that they serve only as markets for developed country products. Other Egyptians (mainly academics and businessmen) believe that Egypt is part of the world economy and should not stay isolated from international developments. According to the latter view, Egypt should maximize benefits from the WTO Agreement, and minimize losses by negotiating better conditions, utilizing the available special and differential treatment for developing countries, as well as modernizing its economy to cope better with developments.

Most Egyptian political leaders were in favor of joining the WTO since this complemented the on-going economic reform program proposed by the International Monetary Fund and the World Bank which was aimed at modernizing local industries and increasing exports.

VI. An Egyptian Perspective on the Strengths and Weaknesses of the WTO

A. Strengths

The WTO provides a rule-based trading system that offers predictability and transparency. This is good for exporters and policy-makers in Egypt. The WTO also provides a forum for settling trade disputes on equal terms for all countries, large or small. The WTO offers a permanent forum for trade negotiations. This forum offers the possibility that better rules can be negotiated and market access conditions improved if Members so agree. Another strength is that WTO decisions are usually taken by consensus. This means that the vote of every Member is, in principle, equally important and the agreement of all

members is essential to adopt a decision. Lastly, Egyptian policy-makers welcome the special rules throughout the WTO Agreement that provide more favorable treatment for developing countries.

B. Weaknesses

WTO rules are not easy to understand for most businessmen and traders, and government needs to make greater efforts to explain trade rules to the public. The Egyptian government does this occasionally in connection with certain measures to be taken, such as lifting the prohibition on importation of ready-made clothes, but not as a permanent educational process for businessmen and the public. Benefiting from the WTO dispute settlement system requires costly specialized legal expertise that is beyond the means of many developing countries. That is why Egypt joined the Advisory Centre on WTO Law, which provides legal services to developing countries at reduced rates.[3]

The need to take decisions by consensus can place smaller WTO Members under great pressure from economically or politically stronger countries to reach a decision. However this system is better than a system that gives the larger countries more voting power.

Rules in favor of developing countries do not always benefit these countries, due either to a lack of expertise or a lack of financial assistance to improve capacity. Egypt was able to benefit from some technical assistance provided by WTO experts, particularly in areas such as customs valuation, competition law, TRIPS, the lifting of the prohibition on textile imports, and notifications under the Agreement on Agriculture.

With regard to agricultural issues, the Agreement on Agriculture does not go far enough to open agricultural markets, especially to developing country products. The Agreement on the Application of Sanitary and Phytosanitary Measures has not caused problems with respect to Egypt's agricultural trade. Even when the EU took measures against the import of Egyptian potatoes, this dispute was settled without having to bring the case to the WTO.

The Agreement on Textiles and Clothing maintains many forms of protection in favor of developed countries until 2005, such as non-tariff barriers, including quotas and restrictions on imports, administrative arrangements, and transitional safeguard measures, thus limiting the market for exports from developing countries.

The WTO Agreement applies to many new areas such as services and intellectual property rights. Many developing countries are not capable of applying all the rules adopted due to lack of experience, the need to revise or promulgate local laws, and the lack of knowledgeable administrative bodies to handle these new subjects.

VII. Egypt's Participation in the WTO Dispute Settlement Process

Since the establishment of the WTO, two Egyptians have served as members of the WTO Appellate Body, Dr. Said Al-Naggar (1995–2000) and Dr. Georges-Michel Abi-Saab (2000-present). This reflects the importance of the WTO to Egypt and its active participation in WTO activities.

The WTO Dispute Settlement Understanding is considered by many Egyptian officials, diplomats and some economic writers as one of the most important achievements of the

[3] *See infra* note 4.

Uruguay Round. Egypt and other developing countries welcome the following special provisions for developing countries:

- Developing countries have a right to at least one developing country panelist;
- Time limits for certain stages of the dispute settlement can be extended if a developing country is the defendant;
- Panel reports involving developing country Member must indicate how special and differential treatment has been taken into account;
- The special situation of the least developing countries is to be taken into account at all stages of a dispute involving these countries.

Egypt's practical experience with the WTO dispute settlement system is limited, having been confined to two cases (discussed below). Among the difficulties faced by developing countries, including Egypt, are:

- A lack of legal expertise required to participate effectively in such a complicated system;
- The high costs involved in pursuing a dispute;
- The length of time taken for the implementation of decisions; and
- The limited effects of the special and differential treatment provided to developing countries by the DSU in view of the lack of resources needed by them to finance comprehensive legal assistance. The establishment of the Advisory Centre on WTO law,[4] of which Egypt is a member, may help to solve some of these problems.

Between 1995 and 2002 Egypt was involved as a party in only two WTO dispute settlement proceedings. In the first, Egypt participated as a third party in the dispute against the European Communities concerning *Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India*.[5] Egypt supported India in this case, filed briefs, participated in oral arguments, and benefited from the panel and appellate body's rulings in this case in favor of India.

The second case was brought by Turkey against Egypt and concerned *Definitive Anti-Dumping Measures on Steel Rebar from Turkey*.[6] This request concerned an anti-dumping investigation by the Egyptian Ministry of Trade and Supply with respect to imports of steel rebar from Turkey, which resulted in the imposition of anti-dumping duties ranging from 22.63–61.00 percent. Turkey challenged the dumping and injury determinations. The Panel Report was adopted by the DSB on October 1, 2002.[7] The Panel found for Egypt on the vast majority of issues, but with respect to the investigation of two of the five firms involved, it found a violation of Article 6.8 of the Anti-dumping Agreement and Annex II(6) concern the Egyptian authority's use of facts available.[8] It also found that the investigative authority had acted inconsistently with Article 3.4 of the Anti-dumping Agreement by failing to evaluate certain factors, including factors related to productivity and cash-flow, in its injury determination.[9]

[4] The Advisory Centre was established in Geneva in 2000, and provides legal services to developing countries that join the Centre at fees that vary with the volume of the trade of the country and that are considerably lower than those charged by private law firms. The Centre's website address is www.acwl.ch.

[5] WT/DS141.

[6] WT/DS211.

[7] Report of the WTO Panel, *Egypt—Definitive Anti-Dumping Measures on Steel Rebar From Turkey*, WT/DS211/R (2002).

[8] *Id.* ¶7.266

[9] *Id.* ¶7.51.

VIII. Principal Issues for Egypt in the Forthcoming Negotiations[10]

A. Egypt's View Toward a New Round of Negotiations

During the preparatory process for the Third WTO Ministerial Meeting (Seattle), developing countries, including Egypt, considered that improved implementation of the existing Uruguay Round Agreements was a prerequisite before becoming involved in any further negotiations on new agreements or new obligations.[11]

The Egyptian position was that it is committed to beginning the mandated negotiations on agriculture and services, and to addressing the other elements of the built-in agenda in accordance with the review provisions of various agreements. Egypt is also committed to continuing the exploratory work on the issues raised in Singapore.[12] The Egyptian Delegation made it clear that Egypt would not accept any commitments to negotiate new issues without considering implementation difficulties in a satisfactory manner and discussing the impact of these new subjects on developing countries.

However, some slight changes in Egypt's position began to emerge before the Doha Ministerial meeting. The press release issued at the end of the consultative meeting attended by Ministers of Economy, Trade and Finance from fourteen Arab Countries[13] held in Cairo on July 17–18, 2001, stated that Arab nations are ready to discuss the possibility of initiating a balanced round of trade negotiations on the condition that all WTO Members agree to establish a mechanism to guarantee that developed countries implement their obligations set forth in the Uruguay Round Agreement, and that a clear vision of the subjects to be included in the new round is established in a way that fulfils the interests and aims of developing countries, and helps to provide wider market access for the products of those countries, as well as maximizing the participation of developing countries in the WTO decision-making process.

During the preparatory process for the Fourth Ministerial Meeting (Doha) developing countries reiterated their position and succeeded in having the Conference issue a separate Decision on Implementation-Related Issues and Concerns.[14] The main Doha Ministerial Declaration[15] refers to this Decision in paragraph12.

B. Egypt's Position on Particular Issues in the Doha Round

1. Implementation of the Uruguay Round Agreements

During the preparatory process of the Third and Fourth WTO Ministerial Meetings many developing countries, Egypt included, demanded that a review of the implementation of the existing Uruguay Round commitments be a prerequisite before commencing negotiations on new agreements or new obligations. These countries made it clear that the implementation review should take into consideration: (1) the overall implementation

[10] This section is drawn from statements and position papers prepared either by the writer of this chapter, who was the Egyptian Representative to the WTO from 1996 to 2000, or by his assistants under his supervision, either separately or in co-operation with other developing countries delegations such as Cuba, Dominican Republic, Honduras, India, Indonesia, Malaysia, Pakistan, Tanzania, Uganda and Zimbabwe.

[11] WT/99/4797/Rev. 3, November 18, 1999 and paragraphs 21 and 22 of the Draft Ministerial Text, WT/99/5868/Rev. 1, October 19, 1999.

[12] Trade and Competition Policy, Trade and Investment, Transparency in Government Procurement, and Trade Facilitation.

[13] Egypt, Jordan, Bahrain, Tunisia, Algiers, Saudi Arabia, Sudan, Oman, Qatar, Kuwait, Libya, Morocco, Mauritania and Yemen.

[14] WT/MIN(01)/W/10, November 14, 2001.

[15] WT/MIN(01)/DEC/W/1, November 14, 2001.

difficulties facing the developing countries; (2) imbalances in some agreements;[16] (3) implementation of some agreements in letter but not in spirit, such as the Agreement on Agriculture and Agreement on Textiles and Clothing,[17] (4) the misuse by developed countries of certain rules in the agreements in a way that limited market access for developing country products, i.e., abuse of the rules on anti-dumping,[18] and (5) a review of the Agreements on *Technical Barriers to Trade* ("TBT")[19] and *Sanitary and Phytosanitary Measures* ("SPS").[20]

As a result of the discussions during the course of preparation for the Third Ministerial Conference, two lists of implementation issues, one for immediate decision and the other for action within one year, were included in paragraphs 21 and 22 of the revised Draft Ministerial Text[21] that was supposed to be agreed upon at the Seattle Ministerial Meeting. The failure of the Ministerial did not stop developing countries from insisting on the discussion of implementation issues during the meetings of the WTO General Council that followed the Ministerial Meeting.

During these meetings, the Council recognized that the implementation of some WTO agreements and decisions had given rise to serious concerns among many developing country Members. The Council also recognized that progress in addressing these implementation concerns would enhance confidence in the multilateral trading system.

Members agreed on December 15, 2000 that the General Council, meeting in special sessions, would address outstanding implementation issues and concerns, particularly those raised during the preparations for the Third Ministerial Conference, and that the process should be completed not later than the Fourth Session of the Ministerial Conference. The Fourth Ministerial reached a decision in this regard[22] that was accepted by Egypt.

2. The Mandated Negotiations

(a) Agriculture. Egypt's general goals with respect to the new negotiations on agriculture can be summed up as follows:[23]

[16] For example, the Agreement on Subsidies and Countervailing Measures, in which subsidies commonly used by developing countries for their industrialization and development have been included in the actionable or banned (prohibited) category, while some of those commonly used by developed countries (certain types of research and development, regional, and environmental subsidy) are in the non-actionable category. *See* Chapter 16 of this book.

[17] For example, the "dirty tariffication" of non-tariff barriers to agricultural imports practised by some developed countries that often resulted in higher effective barriers to trade being in place after the *Agreement on Agriculture* than before, and the "back-loading" with respect to the *Agreement on Textiles and Clothing* that meant that most quotas imposed by the United States and the EU under the *Multifiber Arrangement* were to remain in place until the very end of the ten-year implementation period. *See* Chapters 6 and 9 of this book.

[18] For example, initiating repeated investigations against the same product from the same country within a short period of time.

[19] For example, setting some international standards without the presence of countries at different levels of development and from all geographical regions in a standard-setting organization.

[20] For example, applying rules in favor of developing countries in Article 10.2 concerning period for compliance with a new SPS measure, and paragraph 2 of Annex B concerning intervals between the publication of an SPS regulation and its entry into force.

[21] WT/ 99/5868/Rev. 1, October 19, 1999.

[22] WT/MIN(01)/W/10, November 14, 2001.

[23] This is the official position of the Egyptian Ministry of Agriculture, and the Committee established in the Ministry of Economy and Foreign Trade to follow up the application of the UR Agreements, as conveyed to the Egyptian Delegation to the WTO.

- Achieving a higher level of liberalization in international trade in agricultural goods, and the removal of price-distorting practices and measures facing this trade.
- Enhancing market access opportunities by achieving a real reduction of customs tariffs (especially in light of the reduced tariff rates applied by Egypt), as well as eliminating the impediments facing the exports of developing countries, in particular by reducing tariff peaks and tariff escalation.
- Achieving a significant reduction in the field of domestic support accorded by various countries, especially developed ones, thus allowing developing country exports to achieve a higher degree of competitiveness in developed country markets.
- Eliminating or significantly reducing the export subsidies granted by various countries, mainly developed countries, with the aim of increasing competitiveness of other countries' exports to third country markets.
- According effective and practicable special and differential treatment to developing countries.
- Eliminating non-tariff barriers and formulating a set of rules to eliminate disguised arbitrary or unjustified measures taken by some Member countries, especially developed ones, including in the field of sanitary and phytosanitary procedures, as well as requesting Members applying tariff quota systems for agricultural products to liberalize them and to operate them transparently and fairly.
- Developing a practicable mechanism to implement and render effective the Marrakesh Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net-Food Importing Developing Countries.

Although Egypt cannot deny the importance of non-trade concerns in the field of agriculture (often referred to as "multi-functionality"), including the desire to guarantee food security, rural development, and certain environmental considerations, Egypt stresses the need to achieve consensus on a definition of such concepts, designed to ensure that they will not be used as disguised protectionism.

In his speech to the Fourth Ministerial,[24] the Egyptian Minister of Economy and Foreign Trade summarized the Egyptian position concerning negotiations on Agriculture, stating that WTO Members should aim for its full integration into the WTO framework.

(b) Services. During the preparatory meetings for the mandated negotiations on services, Egypt emphasized that the negotiating guidelines should include the following elements: progressive liberalization, fewer sectors of liberalization for developing country Members, and consideration of national policy objectives and the level of development of individual country Members. Furthermore, negotiations should be conducted under the current principles and existing structure of the GATS, and take into account the unilateral liberalization measures undertaken since the conclusion of the Uruguay Round. In addition, market access negotiations should be conducted on a request-offer basis, and should be supplemented, if necessary, by other approaches on a voluntary basis, to avoid using a rigid framework for negotiations for all countries despite their different levels of development and the different pace of liberalization. Flexibility should be provided

[24] WT/MIN(01)/ST/36, November 10, 2001.

for developing countries in terms of the time limits to submit proposals and requests or offers. The creation of new bodies for services negotiations should be avoided in order not to increase the burden on developing country delegations, usually limited in numbers, when they follow the negotiation process. The importance of increasing participation of developing countries in trade in services, as provided for in Article IV of the GATS, should be emphasized.

In addition, the report of the Trade Ministers of Eastern and Southern Africa following the joint preparatory meeting held in Cairo by the members of the Common Market for Eastern and Southern Africa ("COMESA")[25] and the Southern African Development Community ("SADC") on July 30, 2001 to prepare for the fourth WTO Ministerial Conference (Doha)[26] provides that:

- The existing architecture of GATS, in particular the positive list approach must be maintained (¶29);
- The effective implementation of GATS Article IV and XIX(2) concerning the liberalization of market access for developing countries and LDCs in sectors and modes of supply of export interest to them, are called for (¶30); and
- The liberalization of the movement of natural persons (mode 4) must be undertaken by eliminating barriers to market access (¶31).

In his speech to the Fourth Ministerial,[27] the Egyptian Minister of Economy and Foreign Trade reiterated the Egyptian position concerning negotiations on services stating that WTO Members should aim for the creation of opportunity in a wider spectrum of sectors; with special emphasis on sectors and modes of interest to the less-advantaged Members.

(c) Singapore Issues. Egypt had formulated clear positions regarding the Singapore issues. They are summarized in the following sub-sections.

(i) *Trade and Competition Policies.* In Egypt's view it is important that the Working Group on Trade and Competition Policies pursue its mandate as stipulated in the Singapore declaration, by: (1) Pursuing the analytical and educational work regarding the synergies between trade and competition policies; (2) Studying the effect of the various proposals submitted by developing countries, especially those dealing with the non–competitive practices of the concerned institutions, as well as detecting and reviewing the integration process taking place amongst these institutions, and its effect on international competition; and (3) extending the study to explore the means of coordination between the WTO, and the other relevant intergovernmental organizations, such as UNCTAD and the World Bank, especially with respect to the resources available for technical assistance and capacity-building in the developing and least developed countries.

(ii) *Trade and Investment.* Egypt believes in the importance of pursuing the analytical and exploratory work tackled by the Working Group on Trade and Investment, in particular the need to study the synergies and interaction between trade and investment. The Working Group should, while fulfilling its task, shed light upon issues of importance to developing countries, especially those related to the positive or negative

[25] Egypt is a member of COMESA.
[26] The Report is available at http://www.comesa.int/news/newsdoha.htm.
[27] WT/MIN(01)/ST/36, November 10, 2001.

effects of foreign direct investment upon the developmental goals or objectives of the host countries; the extent of flexibility accorded to the host countries in setting policies to fulfill such objectives; and investors' obligations towards the host countries and vice versa.

In this respect, the Report of the Trade Ministers of Eastern and Southern Africa following the COMESA/SADC meeting held in Cairo, on July 30, 2001 to prepare for the Doha Ministerial mentioned in paragraph 48 that ". . . in any future work in this area, it would be necessary to ensure that the outcome will contribute to facilitating investment flows to their countries while preserving their policy space and flexibility to pursue their national development objectives."[28]

The press release issued at the end of the consultative meeting attended by the Arab Ministers of Economy, Trade and Finance held in Cairo July 17–18, 2001, stated that the participants could look at the possibility of participating in the negotiations on trade and investments if the following considerations are taken into account: (1) any agreement on trade and investment should have a structural framework similar to the GATS agreement; (2) the negotiations should take into account national economic policies and developmental needs; and (3) technical and financial assistance should be provided to developing countries for capacity building; and investments should include transfer of technology, and to increase work opportunities.

In his speech at the Doha Ministerial,[29] the Egyptian Minister of Economy and Foreign Trade summed-up the Egyptian position with regard to Investment and Competition as follows: "[the] study should focus on modalities and processes that improve FDI flows, at the same time maintaining flexibilities for developing and least-developed countries to pursue their national development objectives". The Minister added: "In this regard, before we agree to negotiate, we should agree on what it is we want to negotiate". This position of Egypt, stems from what was agreed upon by the Trade Ministers of Eastern and Southern Africa referred to above.

(iii) *Trade Facilitation.* With respect to trade facilitation, Egypt supports pursuing the analytical and exploratory work tackled within the framework of the Council of Trade in Goods, and utilizing the experience of the relevant international organizations, such as the World Customs Organization ("WCO") and others in the field. While tackling the analytical and exploratory work, problems that confront developing countries in the area of implementation should be explored further and addressed, especially in the field of activating and studying the provisions dealing with special and differential treatment and the technical assistance to be accorded to countries within the framework of the relevant agreements, such as the Agreement on Customs Valuation, Rules of Origin, Technical Barriers to Trade, and Sanitary and Phytosanitary Measures.

It should however be noted that the press releases issued at the end of two separate meetings, the first for the Arab Ministers of Economy, Trade and Finance held in Cairo on July 17–18, 2001, and the second for Trade Ministers of Eastern and Southern Africa held also in Cairo on July 30, 2001, stated that the participants expressed a lack of conviction that, at this stage, WTO rules should be negotiated with respect to trade facilitation.

In his speech at the Doha Ministerial,[30] the Egyptian Minister of Economy and Foreign Trade asked, on the trade facilitation issue, for the following: "a negotiated framework of

[28] *Supra* note 26.
[29] WT/MIN(01)/ST/36, November 10, 2001.
[30] WT/MIN(01)/ST/36, November 10, 2001.

general non-binding guidelines, coupled with a comprehensive and integrated effort in technical cooperation, financial support and human and institutional capacity-building".

(iv) *Transparency in Government Procurement.* With respect to government procurement Egypt seeks to avoid the discussion of matters that go beyond transparency, such as market access or dispute settlement.[31] The scope of any new Agreement on Government Procurement should not cover services. It should be limited to the area of goods and applied only to procurement and tenders allowing for the participation of foreign suppliers. The transparency provisions should take into consideration the level of development in developing countries. Transparency in government procurement should not limit the right of a government to use any kind of tenders including limited tenders. The Government Procurement Agreement should not include any reference to issues falling beyond the WTO mandate, such as corruption or bribery. Lastly, the Agreement should include provisions for technical assistance, special and differential treatment for developing countries, including transitional periods, and higher minimum thresholds for tenders on which the provisions are to be applied.

C. New Issues

1. Electronic Commerce

Egypt would like to see the analytical work mandated to the four relevant WTO bodies[32] pursuant to the *Electronic Commerce* W*ork Program* adopted by the General Council,[33] pursued further, and the educative process accelerated. Egypt believes that the commitment of the Members to continue the current practice of not imposing customs duties on electronic transmissions should be continued until the studies are finalized.

2. Trade and Environment

Before the Seattle and Doha Ministerial, Egypt did not object to discussing trade and environment in the WTO, as long as the discussions did not go beyond the analytical work undertaken by the Committee on Trade and Environment. Egypt also believes that the Committee on Trade and Environment should: (1) take account of the developmental dimension while studying environmental issues, in order to achieve the objective of sustainable development, as well as to guarantee that no unnecessary environmental barriers impede developing country exports; (2) urge developed countries to supply more technical assistance to developing countries as stipulated in the Rio Declaration, before asking those countries to adopt and implement certain standards; and (3) deal cautiously with the concept of "processes and production methods ("PPMs") and eco-labeling programs since they could create unnecessary obstacles to developing country exports, including food items.

In two separate meetings, referred to above, the Ministers of Economy, Trade and Finance from Arab and African countries, meeting in Cairo in July 2001, noted that the issue of trade and environment was not yet ripe for negotiations, that the WTO Committee on Trade and Environment should continue its work program, and that Members should

[31] Egypt is not a signatory to the plurilateral Agreement on Government Procurement.

[32] These are the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS and the Committee for Trade and Development.

[33] WT/L/274, September 25, 1998.

insure that environmental concerns would not be used as barriers to impede the flow of exports from developing countries.

In his statement to the Doha Ministerial,[34] the Egyptian Minister of Economy and Foreign Trade noted that "Environment must not be a tool for protectionism. Any discussions or clarification of existing environmental rules within the WTO must take special care not to provide the opportunity for any member for a return to trade protection".

In Doha the Members agreed[35] to start negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements ("MEAs"). They agreed that the negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question, and that the negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question. Members also agreed that the Committee on Trade and Environment, in pursuing work on its agenda should give particular attention to certain matters, among them the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them.

In the Doha Declaration the Members also recognized the importance to developing countries, in particular the least-developed among them, of technical assistance and capacity building in the field of trade and environment.

3. Labor Standards

Egypt opposes any linkage between trade and labor and is presently against discussing this issue in the WTO. The reason is that labor standards could be used for protectionist purposes to the particular disadvantage of developing countries. Egypt supports the conclusion presented in the Singapore Declaration which states that the International Labor Organization ("ILO") is the competent body to tackle this issue.[36]

In his statement to the Doha Ministerial,[37] the Egyptian Minister of Economy and Foreign Trade reiterated Egypt's position in this regard, noting that "on Labor Standards, we must reject, the use of labor standards for protectionist purposes. Hence, we reiterate the views expressed at the Singapore Conference that the ILO should remain the only organization in charge of this issue".

The Doha Declaration[38] provided as follows with regard to core labor standards: "We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labor standards. We take note of work under way in the International Labor Organization (ILO) on the social dimension of globalisation." Egypt believes that this text maintains the ILO as the only organization in charge of labor standards, and thus this matter will stay outside the Doha Round of trade talks.

4. Domestic Industrial Tariffs

The Egyptian government is aware that the reduction and elimination of tariffs on industrial goods could affect income from customs revenues, while not immediately increasing exports. Economists in Egypt are in agreement that increasing exports requires, in

[34] WT/MIN(01)/ST/36, November 10, 2001.

[35] *Doha Ministerial Declaration*, WT/MIN(01)/DEC/W/1, November 20, 2001, reproduced in the Appendix to this book.

[36] WT/MIN(96)/DEC, December 18, 1996.

[37] WT/MIN(01)/ST/36, November 10, 2001.

[38] WT/MIN(01)/DEC/W/1, November 20, 2001.

addition to the liberalization of trade, improving the quality of local production, reducing its costs, increasing worker productivity, and improving marketing capabilities—thereby enabling Egyptian products to compete abroad. The economists agree that this will require considerable internal effort coupled with sufficient assistance from abroad.

The Egyptian government accepts the fact that the ultimate objective of the WTO is to liberalize international trade. Hence, the government agreed to the initiation of a new round of negotiations on industrial tariffs, provided that any agreement reached should include flexibility provisions for developing countries, such as exemptions of some industrial sectors, longer implementation periods, transitional periods, and lower tariff reductions for developing countries.

The statement of the Egyptian Minister of Economy and Foreign Trade to the Doha Ministerial[39] sums up Egypt's position concerning the subjects of the negotiations. He stated that: "In Non-Agricultural Market Access, tariff peaks, escalation, and non-tariff barriers should take precedence; while maintaining a fair and differentiated treatment for developing and least-developed members".

Egypt accepted the consensus reached and reflected in the text of the Doha Declaration in this regard. Members agreed to negotiations that shall aim to reduce, or as appropriate, eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. The Declaration went on to say that product coverage shall be comprehensive and without *a priori* exclusions. The Declaration also provided that the negotiations shall take fully into accounts the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments.

D. Egypt's Strategy to Accomplish Its Objectives

Egypt is trying to accomplish its objectives relating to the "new issues" by working in cooperation with other Members that hold the same views, especially other developing country delegations and groups, including the Arab countries, African countries, the G-15, the G-77. In fact, the position of Egypt and other developing country members at Doha was more flexible than their positions at Seattle with respect to negotiations on the "new issues". This happened as a result of other efforts to make this Conference successful, including the adoption of the Decision on "Implementation Issues", and the acceptance by developed countries to enhance support for technical assistance and capacity-building wherever needed to insure the full participation of developing and least-developed countries in the negotiations on these new issues.

IX. Effects of Regional Trading Arrangements on Egypt

Egypt welcomes regional trade arrangements to the extent that they help to achieve more trade liberalization. Egypt has trade agreements with Arab countries (the Greater Arab Free-Trade Area or "GAFTA") and some African countries (the Common Market for Eastern and Southern Africa or "COMESA"). It is also a party to the Euro-Mediterranean Agreement with the European Union. It is currently negotiating free trade agreements with the EFTA countries and is seeking a free trade agreement with the United States.

[39] WT/MIN(01)/ST/36, November 10, 2001.

Egypt has also signed a number of bilateral trade agreements to accelerate regional trade liberalization.

Despite the fact that Egyptian–Arab cooperation is the oldest of these agreements, the steps taken are rather limited and implementation of the agreements is slow. Intra-Arab trade in the year 2000 represented only 8.4 percent of total Arab foreign trade in that year. Egyptian membership in COMESA and its agreement with the EU are rather recent and evaluating the results at this early stage is premature.

Egypt is signatory to the Global System of Trade Preferences ("GSTP"), and Egypt exchanges tariff concessions with other signatories on a range of specified products. The members of this system are developing country Members of the G-77. This system has a limited effect on Egypt's trade due to the fact that it involves a limited number of goods enjoying a rather small reduction in tariffs.

Egypt believes that there is a need to adopt better rules and mechanisms to alleviate the adverse effects of regional trade arrangements, mainly potential trade diversion, especially with respect to the exports from non-member developing countries; and to ensure that non-member developing countries benefit to a certain extent from the liberalization of trade resulting from those arrangements.

Paragraph 7(b) of the Report of the Preparatory Meeting of the Trade Ministers of Eastern and Southern Africa (COMESA/SADC), held in Cairo on July 30, 2001 to prepare for the fourth WTO Ministerial Conference, states that the Ministers "agree that regional integration initiatives are compatible with the multilateral trade system. In particular, it is imperative they ensure that there is coherence between commitments in the framework of regional integration and under the multi-lateral trade system".[40]

X. How Trade Policy is Developed in Egypt

Responsibility for trade policy formulation in Egypt rests with the Ministerial Economic Committee, chaired by the Prime Minister, which drafts legislation to be introduced in the People's Assembly (the parliament) for approval. The Ministry of Foreign Trade implements trade policy, and coordinates implementation by other ministries and agencies. Inter-ministerial consultations are also carried out to assess the impact of major policy changes on various sectors of the economy.

The Cabinet Policy Committee, which is headed by the President, establishes and monitors broad economic and social policy issues and sets guidelines for trade policy. The Economic Group of Ministers, which is usually chaired by the Prime Minister, is responsible for the coordination of rules and regulations governing trade and other economic activities.

Informal advice is sought from academia and organized interest groups, including: the General Federation of Chambers of Commerce, the Federation of Egyptian Industries, the Egyptian Businessmen's Association, and trade associations. Other civil society groups in Egypt, which are rather new and have limited membership, are not influential and have a very limited role in formulating Egypt's formal trade policy. However their role in Egypt is increasing slowly.

Political parties, such as the National Democratic Party, which enjoys a large majority in the People's Assembly, and many small opposition parties with limited support, play their role inside the Assembly, discussing and adopting legislation.

[40] *Supra* note 26.

Newspapers, radio stations and T.V. stations, mainly owned and manned by the State although there are a few exceptions in recent years, enjoy a wide range of freedom of expression and are the main vehicles for promoting the views of individuals and groups, including civil society, so that their opinions are known by the public and policy makers.

XI. Conclusion

The multilateral trading system, as given effect by the WTO Agreement, brings many advantages, but also poses some challenges. It provides a predictable, transparent, rule-based trading system where decisions are taken by consensus, and small countries enjoy the same rights as larger ones. However, the scope of coverage of the WTO Agreement is wide and increasing. Complying with the terms of the WTO Agreement requires laborious efforts on the side of developing countries that often exceeds their limited financial, administrative and technical capacities.

Trade is a two-way street. Countries cannot concentrate only on efforts to increase their exports while doing their best to impede imports. Efforts to assist developing countries to improve their production and marketing capacities will result in improving standards of living in those countries and therefore the ability of their people to consume more goods, local and imported.

It will require an honest and serious effort on the part of the Members if an agreement is going to be reached in conformity with the Doha Ministerial Declaration and the Decision on Implementation. It will be necessary to make concessions in favor of all Members, developed and developing, and to rectify the imbalances in the existing agreements in order to achieve success.

CHAPTER 70

THE EUROPEAN UNION

Hugo Paemen*

TABLE OF CONTENTS

I. Introduction 112
II. Trade Policy Decision-Making in the EU 113
III. The Uruguay Round 115
A. Origin of the Round 115
B. The European "Overall Approach" 116
C. The "European" Issues 118
1. Strengthening the Multilateral Disciplines 118
2. Agriculture 118
3. Market Access for Goods 120
4. Services 121
5. TRIPS, TRIMS and Restrictive Business Practices 122
6. Developing Countries 123
D. European Results in the Uruguay Round 123
E. Decisive European Factors in the Uruguay Round 125
1. The Pre-Eminence of Agriculture 125
2. The "Bilateralization" of the Negotiations 125
3. The Importance of "Time" 126
4. The Leadership of the Director-General 127
F. Lessons from the Uruguay Round 127
IV. The European Union in the WTO 128
A. WTO Dispute Settlement 128
B. EU Associations and Enlargements in the WTO 131
C. One More Round 132
D. Doha 134

* Senior Advisor, Hogan & Hartson L.L.P. and The German Marshall Fund; Ambassador of the European Communities to the United States from 1995 to 1999.

I. Introduction

As one of the largest trading entities in the world, the European Community ("EC", now evolved into the European Union, of which it remains the central component)[1] has actively participated in multilateral trade negotiations from the first years of its existence.

When the Rome Treaty, which established the EC, entered into force in 1959, the EC inherited authority for the conduct of trade policy and trade negotiations from its Member States. History shows that over time there has been a fair degree of parallelism between the Community's internal development and its successive enlargements on the one hand, and the worldwide opening of the European market through international negotiations on the other.

This parallelism goes back to the provisions on the Common Commercial Policy laid down in the very first draft of the Treaty of Rome. "By establishing a customs union between themselves, Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers."[2]

The first international trade negotiations under the auspices of the GATT in which the EC participated was the Dillon Round in 1961–62.[3] The establishment of a customs union between the Member States of the European Economic Community was actually a major motivation for the convening of that Round. The Treaty of Rome had set the level of the Common External Tariff for most products as an arithmetical average of duties in force in the existing customs territories on January 1, 1957. Under Article XXIV:6 of the GATT, the EC was obliged to negotiate the release of the bindings on those products for which the duties would increase following the introduction of the new common external tariff. The second purpose was to negotiate a reduction in the new Common External Tariff, in order to alleviate the adverse effect on imports from third countries of the gradual establishment of free trade between the Member States of the Community.

The European Community offered to reduce the common external tariff on industrial products in general by twenty percent if others did likewise. According to one of the main U.S. actors, "... the Dillon Round, where a reduction in the level of the new tariff of the European Economic Community was the most important prize to be achieved, came close to a breakdown because of the inability of the U.S. negotiators to respond favorably to the twenty percent linear offer of the EEC".[4] The same witness said about the outcome of that part of the negotiations: "... there is irrefutable evidence that limits on the President's authority restricted achievement, at least in the negotiation between the United States and the EEC".[5]

To defend its economic interests or because of external pressure, the EC thus seemingly felt obliged to play an active role in multilateral trade negotiations from its very beginning.

[1] The post-Uruguay Round period happened to coincide with the increasing appearance on the world scene of the European Community under the name of the European Union. The more comprehensive "Union" reflects the entity's growing activity in other than the traditional matters of "Community" competence. The appellation "European Union" has also entered "WTO-speak". However, the European Community is still the only European institution with legal personality that can enter into legally binding commitments. It is represented as such in the WTO. In order to avoid confusion using the two names I will exclusively use the term "European Union" for matters of Community as well as of Member States competence when discussing the post-Uruguay Round period.

[2] *Treaty of Rome*, Art. 131, formerly Art. 110.

[3] The Dillon Round, named after its initiator, Douglas Dillon, Secretary of the Treasury in the Kennedy Administration, was the fifth round of multilateral trade negotiations held under the auspices of the GATT.

[4] John W. Evans, The Kennedy Round in American Trade Policy 19 (1971).

[5] *Id*. at 16.

Given its increasing weight, following successive enlargements, it was also bound to become one of the crucial actors on that scene. This also implied that, for the coming years, the international trade negotiations would largely be determined by the U.S.-EC relationship (often referred to as the love-making of two elephants, crushing the minor assistants in the process). The Dillon Round in the meantime only led to a meager 2.4 percent weighted average tariff reduction for dutiable U.S. imports taken as a whole. In order to prevent further argument over its new external tariff in the context of the GATT Art. XXIV:6 consultations, the EC unilaterally reduced its industrial tariffs by twenty percent as initially proposed.

The EC also participated as an entity, in the name of its Member States, in the successive Kennedy, Tokyo, and Uruguay Rounds. Its participation in the Kennedy Round (1964–7) has generally been considered to be its first major successful action on the international scene. In the Uruguay Round the EU was a strong promoter of the creation of a Multilateral Trade Organization and it took an active part in the establishment of the new set of rules for international trade in different sectors.

Foreign trade accounts for around ten percent of the GDP of the EC, which is comparable to the situation in the United States. This degree of dependence on trade with the rest of the world has remained the same despite the ever-growing volume of intra-Community trade. Lacking political clout commensurate with its economic strength, the European interest has been perceived to be on the side of a well-functioning international trading system with transparent rules, especially in light of its own complex internal decision-making process. It would therefore have been disingenuous, and contrary to its fundamental interests, for the EC not to have supported, in the middle of the 1980s, the growing world consensus in favor of a new round of multilateral trade negotiations.

The participation of the EC in the Uruguay Round negotiations, however, was only possible after difficult internal discussions on the definition of a common European negotiating position. These discussions reflected widely divergent economic interests in certain sectors of the economy. But they have also been a stimulus for internal reform in different areas. The EC was often obliged to introduce or to accelerate internal market provisions and regulations, as well as structural adjustments, which otherwise would not have taken place or would have happened much more slowly. The successive phases of the Common Agricultural Policy ("CAP") reform are the most striking example of this interaction between the EC's internal and its external economic development. Politically, the growing performance of the EC as a full-fledged negotiator on the international scene increased its status and credibility as a major trading partner.

As an increasingly active participant in an increasingly interdependent world economy, the EC has, like most of its trading partners, been obliged to constantly consolidate its domestic constituency in favor of trade liberalization and structural reform. Some of the international trading issues raised very serious political concerns among interest groups and citizens, as they were gradually becoming aware of the stakes that were involved in increasingly worldwide discussions (e.g., in the audiovisual, agriculture, services, food, and health sectors).

II. Trade Policy Decision-Making in the EU

From its very beginning the European Community has had a common commercial policy. The relevant articles in the present text of the Treaty of Rome are Articles 131 to 134 (formerly Articles 110–115). The Member States are not competent to act on their own in the fields covered by the common commercial policy. There is however no clear

definition in the Treaty of the common commercial policy. It has developed over the years largely as the external side of the Customs Union and the accompanying Internal Market policy.

Constitutionally, the European Commission is the initiator as well as the negotiator of the common commercial policy. It conducts the negotiations in consultation with a special committee of senior officials from the Member States and reports to the Council of Ministers (where the governments of the Member States are represented at ministerial level). The Council decides on its recommendations by qualified majority voting. Member State governments are represented in the Council by their ministers who have particular responsibility for the subjects under discussion. Ministers of Agriculture meet regularly, as do the ministers responsible for financial and economic affairs, transportation, etc. Ministers of Foreign Affairs traditionally have a coordinating role. They also have, as a group, the sometimes arduous task of arbitrating between conflicting positions taken by meetings of sectoral ministers. This is usually the case in matters with an international dimension like international trade negotiations.

Before the start of the Uruguay Round in 1986, the Member States had left open the decision-making procedures in relation to those sectors of the negotiation that had not traditionally been considered as being covered by the common commercial policy (in particular, services and intellectual property protection). At the end of the Council meeting on September 20, 1986, which approved the Punta del Este Declaration, the Ministers stated: "This decision does not prejudge the question of competence of the Community or the Member States on particular issues".[6]

This ambiguity did not play a role during the negotiations, but led to a very difficult debate at their conclusion, when the results had to be approved at the political level. The European Commission's effort to obtain overall Community competence for the package of results was undercut by an opinion of the European Court of Justice, solicited by the Commission,[7] which largely excluded the decisions on services and intellectual property protection from the common commercial policy competence.[8]

This institutional setback for the Commission was later corrected, at least partially, by an amendment to Article 133, adopted by the Council of Ministers in December 2000. The new text reintroduces, with some reservations, the "implied external powers" doctrine, which the European Court had supported in previous years. The common commercial policy provisions (with majority voting) now apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property. Unanimity however is required if a provision of an agreement requires unanimity in the adoption of corresponding internal decisions (for example, a trade agreement with a chapter on taxation). Article 133 explicitly excludes education, human health, and culture from Community competence.

In addition to mandatory consultations with representatives of the Member States before negotiating positions are established, the Commission also consults with representatives of the business community, the trade unions, trade organizations and, more recently, other interested non-governmental organizations. There are no legal requirements to do so, but the non-governmental interest groups have considerably increased their activities in Brussels over the years.

[6] Minutes of the 1104th meeting of the Council, September 20, 1986.

[7] Opinion 1/94 of the European Court of Justice of November 15, 1994.

[8] Jacques H.J. Bourgeois, *The EC in the WTO and Advisory Opinion I/94: An Echternach Procession*, 32 Common Market Law Review 763 (1995).

These contacts complement similar consultations that take place in the Member States before national positions are decided by the governments. There is no general division of labor in that respect and the way in which such contacts are made differ from one subject or Member State to another. Some major companies or trade associations will be active at both levels. These activities are tending to increase and have become a significant feature of the preparation of the negotiations by the Commission services.

Much to the frustration of the Members of the European Parliament, the Treaty of Rome does not foresee a role for them in the development of trade policy. Member States have resisted initiatives aimed at modifying this "anomaly" when amendments of the Treaty are considered. The European Commission, however, has volunteered to hold regular hearings with the interested Parliamentary commissions on all aspects of its activities in the area of international trade. Representatives of the European Parliament are regular attendants, as observers, of major trade negotiation meetings.

III. The Uruguay Round

A. Origin of the Round

The first efforts to launch a new Round of Multilateral Trade Negotiations only three years after the signing of the Tokyo Round agreements were initiated by the United States. They were, to a large extent, motivated by the profound frustration of that country with the meager results of the previous round with respect to agriculture.[9] American exports of agricultural products (wheat in particular) were going down substantially, stocks were increasing, and budgetary expenses growing to staggering heights. The United States had the full support, based on similar considerations, from the Cairns Group, which had been set up by countries that were major exporters of farm products[10] to defend their interests in the GATT. It would however take five more years and two ministerial meetings in the GATT before the green light for the negotiations could be given at the Punta del Este Ministerial in September, 1986.

The main reasons for this delay were concerns, on the part of the EC, that this time it would be difficult to avoid making concessions on agriculture, and, on the part of the developing countries, the desire to safeguard, again contrary to what happened in the Tokyo Round, their claim for "special and differential treatment" in matters of international trade, and not to be prematurely drawn into negotiations on services.[11]

An additional element was that on January 1, 1986 the European Community would be further enlarged through the accession of Spain and Portugal (Greece had joined on January 1, 1981). Both countries were in the midst of a difficult process of adjustment and added to the number of Member States still harboring misgivings about a new GATT round.

However, the weakening economies of the EC Members, marked by slower growth and rising unemployment, made the European leaders revisit the potential remedial effect of a new effort to open additional markets. The Council of the European Community, under

[9] GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 362 (1986); Clayton Yeutter, *Bringing Agriculture into the Multilateral Trading System*, in THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL 64 (Jagdish Bhagwati and Mathias Hirsch eds. 1999).

[10] Leading members of the Group included Australia, New Zealand, and Argentina. Canada generally supported the aims of the Group.

[11] HUGO PAEMEN AND ALEXANDRA BENSCH, FROM THE GATT TO THE WTO, THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND 32–39 (1995).

growing pressure from the United States and other developed countries, finally accepted the principle of a new round of multilateral trade negotiations at its meeting of March 19, 1985.[12] The ministers explained their motivation in a rather defensive and political text, in which the initial themes of the European approach to the round were referred to along the following lines:

> The ministers considered that a new round would not of itself be sufficient to strengthen the open multilateral trading system and to expand international trade. Other elements had to be taken into consideration: the need to halt protectionist pressures ("standstill"), the need to reduce existing trade restrictions as economic recovery proceeds ("roll-back"). Moreover, monetary and financial imbalances required appropriate and parallel action. Japan in particular should match its exports with increasing imports ("balance of benefits"). A new round would help to promote world economic recovery and growth and would reinforce the multilateral structures and disciplines of the GATT. The Community was ready to work in order to achieve the broad consensus on objectives, participation and timing required prior to the launching of a round. It was however too early to fix the date for the formal opening. Negotiations on agriculture could lead towards improvements within the existing framework of the rules and disciplines of GATT, while safeguarding the fundamental objectives and mechanisms of the CAP. Trade in services, problems of counterfeit goods and the protection of intellectual property rights were possible new topics for negotiation. Parallel negotiations in the different areas should lead to a better balance of rights and obligations ("globality—single undertaking").

B. The European "Overall Approach"

Following the March 1985 meeting, internal discussions took place between the Commission and the Member States on negotiating directives in accordance with the procedures applicable to the common trade policy. These discussions—following a procedure which had been applied at the beginning of the Tokyo Round—led to the establishment of a document, entitled the "Overall Approach", which was finalized on June 18, 1986.[13] The document set forth the European Community's view on the situation in the area of multilateral trade in a more systematic way than had been done in the March 1985 document, and contained a list of general objectives rather than negotiating guidelines.

By its nature, the document was bound to reflect the differing views and objectives of the Member States. Even so the Council of Ministers could not muster a qualified majority in favor of the text. It referred in a statement to the Declaration of March 19, 1985, "which remains, in every particular, the basis of the Community's position on the New Round of Multilateral trade negotiations".[14] Even though the "Overall Approach" was not formally adopted, the Council welcomed it as providing the Commission "with the necessary orientations". During the entire Uruguay Round, with the exception of the last phase of protracted U.S.-EU negotiations on agriculture, when an explicit mandate was drafted, the "Overall Approach" served as a convenient informal mandate for the Commission negotiators.

In the "Overall Approach" the European Commission characteristically warned against "over-ambitious programs accompanied by unrealistic expectations". It referred to the recent unfavorable developments in the world economy "such as sudden and massive

[12] Council Document 5660/85, dated March 21, 1985.

[13] Council Document 7800/86, dated June 18, 1986. The document was regularly referred to in internal EC discussions during the Uruguay Round, despite the fact that it had never been formally adopted by the Council.

[14] *Id*. at 1.

changes in energy prices, imbalance in economic and monetary policy between major trade partners, leading, *inter alia*, to excessive fluctuations in exchange rates, inflation, unemployment and high levels of indebtedness (particularly in the developing world)". It also stated that "the GATT must be modernized".

The major general objectives referred to in the "Overall Approach" were:

— to strengthen the multilateral structure and disciplines of the GATT and to adapt its functioning to new areas relevant to international trade;
— to provide the conditions for further liberalization of trade in goods and to "begin a similar process in the field of services . . . ";
— to conduct the negotiations as one overall operation; and
— to increase access for LDC exports to developed country markets.

The rest of the document was a survey of possible objectives in specific areas without clear guidelines.

"Globality" played a predominant role in the European position on the new round. While the initial approach to a possible trade-off in the negotiations could be summarized as basically two-pronged, concentrated on the topics of agriculture (defensive) and services (offensive), it was strongly backed up by a negotiating doctrine based on the principle of globality. In the March paper the principle was described in the following terms:

> The Council considers that too selective an approach to individual negotiating points should be avoided. A balanced package of topics for negotiation should be agreed upon, in which all participants will find advantages for themselves. In principle items should be negotiated and the results implemented in parallel and not in succession.[15]

At the Ministerial meeting in Punta del Este (September 15–20, 1986), the European Community was largely on the defensive vis-à-vis the exporters of agricultural products (led by the United States and the Cairns group of agricultural exporting countries), and vis-à-vis the developing countries because of their request for liberalization of trade in textiles. However, the EC took the offensive vis-à-vis Japan—which was running a large trade surplus—by claiming that the "balance of advantage" in the international trade situation should be corrected.

The Ministerial Declaration that emerged from the Punta del Este meeting did not reflect many of the Community concerns. Some balance between the diverse interests of the participants had however been achieved. The Council of Ministers therefore approved the Declaration and authorized the Commission to open the negotiations "within the framework of the directives which the Council will issue to it". Because of the wide range of new areas covered by the Declaration, the Council did not want "to prejudge the internal question of the competence of the Community or the (individual) Member States on particular issues".[16]

On the procedural side, however, the European Community was successful in getting the globality approach to the negotiations accepted by the other participants at Punta del Este. It was formulated as follows: "The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking".[17] For the European Community this "philosophy" had a tactical, a structural and a legal

[15] Council Document 5660/85, March 21, 1985, at 3.
[16] Minutes of the 1104th meeting of the Council, September 20, 1986. *See* the discussion of this issue in Part I, *supra*.
[17] GATT Document MIN.DEC, September 20, 1986, at 2.

dimension: nothing would be agreed until everything was agreed. The challenge would be to keep the principle alive later in the negotiations, when the outcome of the entire Uruguay Round seemed to depend on the result of a bilateral dispute between the two major participants on a single issue, agriculture.

C. The "European" Issues

1. Strengthening the Multilateral Disciplines

In March 1985, the Community had accepted the principle of a new multilateral negotiation as a way to prevent protectionist policies in a world economy marked by slow growth. The strengthening of the multilateral structures and disciplines of the GATT was considered to be one of the main general objectives of future negotiations. These negotiations had to demonstrate the continuing vitality and relevance of the General Agreement as compared with bilateral or plurilateral deals between interested parties to the exclusion of others. The major trading nations would have to give firm undertakings to refrain from taking measures inconsistent with the GATT and to resist protectionist pressures.

Discarding a purely defensive stand, the Community insisted on the need for real contributions by its major trading partners. This would require a "fundamental increase in Japan's propensity to import manufactured and processed agricultural products"[18] in order to correct the present imbalance in trade between that country and its partners. For the attention of the United States and other nations, the European Commission stated that "The rights and responsibilities of contracting parties should also be reviewed as regards certain special advantages, particularly those deriving from the use of waivers, recourse to the 'Grandfather' provision in the Protocol of Provisional Application and advantages accruing to federal states".[19]

Initial ambitions with respect to the Dispute Settlement system were not very high. The Community stated its readiness "to participate in the search for more effective procedural formulae . . . based on consensus, it being understood that, in the final analysis, procedural mechanisms on their own cannot ensure the resolution of problems arising out of substantive differences".[20] In the course of the negotiations the Community would become a strong proponent of the new Dispute Settlement system.

At the outset the European Community did not put forward ideas that would lead to the institutional reform of the GATT. While at a later stage of the round it would become one of the main protagonists of the creation of a full-fledged multilateral trade organization, the European Community limited its aims at the start to the modernization of the GATT, the strengthening of the multilateral structures and disciplines, and their adaptation to the new areas relevant to international trade.

2. Agriculture

Agriculture had been the European stumbling block to the launch of a new round of negotiations since the beginning of the 1980s. The European approach to negotiations had to take into account the existence of the CAP, which was, for countries like France, an inherent element of the European integration process. On the other hand, agricultural interests in the European Community were very diversified as far as the different sectors were concerned, as well as their relative importance.

[18] Council Document 7800/85, July 18, 1986, at 8.
[19] *Id.*
[20] *Id*. at 16.

The main instrument of the CAP was the dual-price mechanism, according to which guaranteed prices were fixed for goods sold on the EC market each year while export prices were adjusted downwards to the prevailing world market prices. The price policy involved a system of variable levies and export subsidies to make up the difference between world market prices and EC prices. When market prices fell, the intervention system purchased the excess production at the guaranteed prices. As a result of this policy the EC soon became self-sufficient and even an important exporter of a number of products, such as cereals, dairy products, and sugar. The unlimited intervention mechanism led to surpluses that had to be stored. The costs of the support policy got out of control, and international trade was distorted by the sales of the surpluses and competition with traditional suppliers.

Mainly because of the enormous burden of the CAP on the Community budget, some reform measures were introduced from 1984 on. These were aimed at breaking the automatic link between subsidy and production, especially for those products for which the surpluses were highest (cereals and milk). The basic mechanisms of the system, however, remained untouched. Inevitably, in agriculture during the whole Uruguay Round, the positions taken by the EC in the negotiations—often under external pressure—and the steps taken in the process of its domestic reform would be mutually influential and reflective.

The United Kingdom (more accustomed to direct support to the farmers through a system of deficiency payments) had insisted upon reform of the CAP right from its accession to the EC. The Federal Republic of Germany, with the Netherlands another traditional free-marketer, and a net contributor to the budget despite the fact that it had a large number of small farmers, for a long time took a much more ambiguous position between the canons of free trade and the imperatives of domestic politics. Internal conflicts between the Ministries of Finance and Agriculture were not unusual, as was the case in many other Member States. The reform ideas, and the resulting flexibility in the multilateral negotiations, often encountered more resistance in the Southern countries of the EC. Agricultural lobby groups carried heavy weight in countries like Germany and France as well as at the Community level.[21]

In 1985 the European Commission published a Green Paper in which it pleaded for more responsiveness to market signals, early retirement for farmers, direct income aid and land set-aside schemes.[22] These were elements of a reform movement which, in successive steps and somewhat reluctantly, would steer the CAP more into the direction of what the rest of the world wanted the EC to do: to decouple income support from production volumes.

In a first submission on agriculture in the Uruguay Round, the EC focused on short-term as opposed to long-term reform, which reflected the cautious approach of its internal reform aimed in the first instance at reducing surplus production. It suggested that participants try to deal with the fundamental distortions in supply and demand in the key agricultural sectors.

The initial objectives of the EC were threefold:

- to take credit, at the international level, for the reduction of domestic support, which had been decided in 1988 for the ten years starting in 1986. Other

[21] They were—significantly—best known under their French acronyms COPA (Comité des organisations professionnelles agricoles de l'Union européenne) and COGECA (Comité general de la coopération agricole de l'Union européenne).

[22] Green Europe, 1/88, *Restoring Equilibrium on the Agricultural Markets* (Brussels, EC Commission, 1988).

participants, including the United States, were invited to make a similar effort, which would result in the reduction of export subsidies because the surpluses would be reduced;
- to measure support on a global basis in order to avoid commitments on specific reduction measures (especially on the export side); and
- to re-balance the level of protection between different agricultural sectors (some products, like cereals, were protected by variable levies at the border, while others, like oilseeds and cereal substitutes were unprotected).

The price the EC was prepared to pay as its contribution to this approach was the tariffication of its variable levies. This proposal was soon rejected by the United States and the Cairns group, who wanted to eliminate all border measures and all domestic support over a period of ten years and all export subsidies over a period of five years.

In 1991, after the failure of what was supposed to be the closing session of the Uruguay Round in Brussels (Heysel) in December 1990, the European Community, under great pressure from developed and developing countries, changed its basic approach in various respects. It agreed to discuss specific concessions relating to border measures, domestic support and export subsidies. In addition, it indicated its intention—also for reasons of domestic agricultural policy—to move away from price support policies in favor of direct support of farmers, which it requested be exempted from reduction commitments. This would also make the request for re-balancing the external protection less relevant.

The reasons for this change were essentially:

- increasing external pressure on the European Community and on the CAP (which was also being criticized by some Member States), which were blamed by the non-agricultural constituencies of the Round for blocking the entire negotiation, and
- increasing awareness that the preceding stages of the CAP reform had failed to steer European agricultural policy in the right direction.

It is interesting to note that Commissioner McSharry presented the first draft of the proposals that would lead to the more basic reform of 1992, to his fellow Commissioners on December 6, 1990, while the failing Conference was still going on in Brussels.

3. Market Access for Goods

As a result of tariff reductions in previous GATT Rounds, the role of tariffs in trade policy had diminished considerably before the start of the Uruguay Round. Therefore the EC wanted to focus on the following more specific objectives:

- Reduction of those tariffs that were significantly in excess of the average level of tariffs maintained by most of the developed countries.
- Reduction of tariff escalation (the practice of maintaining higher tariffs on finished goods than on raw materials and components) which particularly affected trade in natural resource products, as well as the trade interests of the developing countries.
- Reduction of tariff bindings that exceeded the currently applied tariff levels.

Within this framework the European Community could start from a fairly aggressive stand with the one important exception of the textiles sector. As an important producer of textiles and of clothing products, it was under enormous pressure to take a defensive attitude, especially from some new Member States like Portugal.

In the eyes of the European trade authorities, the issue of the safeguard provision in GATT Article XIX was closely linked to the discussion on further market opening. It had been on the agenda in Geneva since the end of the Tokyo Round. Many contracting parties were opposed to any change of the existing provisions based on the MFN principle that was assumed to be enshrined in Article XIX. The EC and a minority of other contracting parties thought that more selective application of the safeguard clause would be the best remedy against the conclusion of informal, mostly bilateral, voluntary restraint arrangements outside, and in contradiction with the GATT rules. The EC therefore favored the inclusion in the GATT rules of the possibility of selective action "whilst ensuring an appropriate degree of transparency and international consultation to avoid adverse effects on third parties".[23]

The idea of examining the text of the General Agreement itself came to the fore relatively late in the course of the preparatory phase. It was not mentioned at all in the 1982 work program and made its first official appearance in the Punta del Este Declaration. There the Ministers indicated that the "participants shall review existing GATT Articles, provisions and disciplines as requested by interested contracting parties, and, as appropriate, undertake negotiations".[24] The EC's "Overall Approach" stated that "the GATT must be modernized",[25] with the general objective of "strengthen[ing] the multilateral structure and disciplines of the GATT",[26] but without specifying any particular GATT articles.

With respect to the nine plurilateral Agreements that had been concluded in 1979 at the end of the Tokyo Round,[27] the Community considered that:

> [T]aken as a whole, the MTN Agreements have had a positive influence on the development of international trade. It is clear, however, that their effectiveness has fallen short of expectations in some cases. Therefore, where necessary, ambiguities which have given rise to disputes in the past should be reviewed and clarified. Further development of these Agreements, in such areas as technical barriers to trade, the definition of subsidies, the application of countervailing duties or government procurement is in the Community's trading interest. However, any progress in these fields should adequately reflect policy aims pursued within the Community. Progress should not discourage a greater level of participation in such agreements.[28]

4. Services

It was in the services sector that the Europeans were to play the most pro-active role in the negotiations. At the beginning of the Uruguay Round one of the sharpest divisions between developing and developed countries concerned the desirability of expanding the activities of the GATT beyond the traditional issues relating to international trade in goods. The European Community, an important trader in international services, was of the opinion that "GATT must deal with a changing trade environment to meet the need of the future".[29] This did not mean, however, that new topics should be given precedence at the expense of the traditional ones.

[23] OVERALL APPROACH, *supra* note 13, at 9.
[24] GATT MIN.DEC Document of September 20, 1986 ("Punta del Este Declaration") at 6.
[25] OVERALL APPROACH, *supra* note 13, at 3.
[26] *Id*. at 6.
[27] The most important Agreements (also called "Codes") dealt with: Government Procurement, Anti-Dumping, Subsidies and Countervailing Duties, Technical Barriers to Trade, Customs Valuation, Import Licenses Procedures, and Civil Aircraft.
[28] OVERALL APPROACH, *supra* note 13, at 13.
[29] *Id*. at 4.

The long-term aim of a multilateral agreement negotiated within the GATT would be the liberalization of world markets for the widest possible range of internationally tradable services. In the forthcoming negotiations, the Community would strive for a comparable degree of effective access to the markets of its trading partners, independently of the legal or political structure or regulatory system of the country concerned. This would be achieved through a combination of the following elements:

- Increased transparency in the existing domestic regulations affecting trade in services.
- A framework of principles and rules to be applied to trade in services generally, and specific disciplines for individual service sectors where appropriate.
- The progressive broadening of the application of the framework.

Foreshadowing future discussions in critical sectors like audio-visual, the following general warning appeared in the "Overall Approach": "In extending this process to regulatory practices in individual service sectors, due account should be taken of measures which are the legitimate expression of acceptable policy goals".[30] The Commission also indicated that the Community would also be prepared to consider the specific problems of developing countries in this area, without, however, indicating precisely how this would be done.

5. TRIPS, TRIMS and Restrictive Business Practices

The problem of trade in counterfeit goods had been brought up in the Tokyo Round, but no conclusion was reached. Since then a GATT group of experts had underlined the significant economic and social problems caused by counterfeit trading but had reached no consensus. The Community expressed its interest in an effective agreement on broadly acceptable rules dealing with the international trade aspects of commercial counterfeiting. On the subject of the protection of intellectual property rights the Community was at first not much more ambitious. It asked that the new round "contribute to the definition of a better balance"[31] between the need for an adequate return on investment devoted to developing new goods and services and the need to avoid unreasonable barriers to trade.

However, when the United States managed to widen the debate on this issue in Punta del Este to the "trade-related aspects of intellectual property rights, including trade in counterfeit goods", stating that the aim of the negotiations would be to "clarify GATT provisions and elaborate as appropriate new rules and disciplines",[32] it received the strong support of the EC.

The initial European ambition was even more modest on what came to be called Trade-Related Investment Measures ("TRIMs"). The cause of the EC reticence was a difference of opinion between the Member States, some of whom utilized TRIMs. In an internal work document the Commission stated:

> At the Community level, there is no common policy with regard to investments .... It is clearly in the interests of the European Community to ensure that investments on its territory are not limited to mere assembly plants but contribute actively to the development of industrial structures .... It would not be in the interests of the EC to have more specific criteria with regard to the principle of national treatment in the area of investment.[33]

[30] *Id*. at 14.
[31] *Id*. at 17.
[32] *Punta del Este Declaration*, at 7.
[33] Working Document Art. 113 Committee 24/86, January 23, 1986 (unofficial translation).

By June 1986, in the "Overall Approach", the EC was able to adopt an encouraging but cautious tone:

> National investment policies have as their objectives the realization of a number of economic, social and political goals. The pursuit of some of these goals have harmful effects on international trade, due to the adoption of rules restricting imports or which artificially increase exports. Some of these rules can already be addressed, at least in part, under existing GATT rules, but there may be scope for further clarification. Others, including in particular export requirements, are not directly covered by the General Agreement, and could therefore be addressed.[34]

While the Havana Charter (1948) had devoted a whole chapter to restrictive business practices, the contracting parties of the GATT had not treated the problem as a trade policy matter. The European Commission mentioned only the practice of dual pricing in the field of primary products as a possible area of concern for the Uruguay Round negotiators.

6. Developing Countries

In 1986 more than half of the ninety GATT Contracting Parties were developing countries. Nations like India, Brazil and others had gradually become active participants in the GATT debates. The Community wanted to fully recognize the stake developing countries had in the multilateral trade negotiations, as well as stressing their potential as future markets for exports. It was fully committed to the principle of special and differential treatment.

The special relationship of the European Union with nearly seventy developing countries through the Lomé Association Agreement, which included a generous free trade component, reinforced its special interest in the position of the developing countries. As most of them belonged to the group of least developed nations, their interest and role in the trade talks was however rather limited. Nor would they play any role as strategic partners in the negotiations.

At the same time the Community assumed that the more developed of the developing countries would take on responsibilities and accept obligations of the General Agreement commensurate with the progress they had achieved in terms of their economic, financial and trade conditions.

D. European Results in the Uruguay Round

Overall, the results of the Uruguay Round are considered to have had a positive impact on the European economy. The creation of a strong international trade organization, a reliable dispute settlement system, and clear and predictable rules were major objectives of the EU negotiators. The increased market access offered the European Union, a major exporter, new opportunities for growth and employment. The Agreements on Services and on Intellectual Property protection responded—even if not fully—to its basic interests.

Above all, most Europeans felt that they had emerged fairly unscathed from a negotiation the launching of which they had resisted for a long time but the main elements of which they had been able to keep relatively well under control. The relief was particularly marked as far as agriculture was concerned. Agriculture had been the main obstacle to a pro-active European approach at the beginning of the Round. However, other than being

[34] OVERALL APPROACH, *supra* note 13, at 17.

the principal reason for the Round lasting for nearly three more years than originally scheduled, what sometimes appeared as an agricultural nightmare had in the end failed to inhibit productive negotiations in the other sectors.

The negotiations in the agricultural sector precipitated another "agonizing reappraisal" of the CAP by the European agricultural community. This had led to the so-called McSharry reform. Such a development had been considered inevitable, if not desirable, by most experts for quite some time. The fact that this "next step" had been made—not without some traumatic shocks and political upheaval—in the context of consistency between the internal and external aspects of the policy, while safeguarding the fundamental principles of the CAP, was an unexpected source of satisfaction for most. At the same time it had been recognized that the reforms had not reached their limit. The Agreement on Agriculture provided that one year before the end of the implementation period of the Uruguay Round results—i.e., in 2000—negotiations would be undertaken to continue the reforms.[35]

The domestic part of the new agricultural policy was adopted by the Council of Ministers in May 1992. It was based upon the acceptance of lower domestic prices (closer to the world prices), balanced by a system of agricultural support that would compensate farmers for the loss of revenue through direct payments. It was opposed by an important part of the European agricultural constituency. Without this basic re-orientation of the CAP, however, the agreement concluded during the so-called Blair House discussions between the United States and the EC in 1992, which formed the basis of the ultimate agricultural deal in the Uruguay Round, would not have been possible

The United States was generally pleased with the results. Carol Brookings, a well-known agricultural expert who played an active behind-the–scenes role in the negotiations on behalf of the United States, called them "a remarkable achievement, bringing agricultural trade under the rules and disciplines of the GATT for the first time. No one should underestimate the value of full tariffication, nor the initial steps made towards eliminating export subsidies".[36] Clayton Yeutter, U.S. Trade Representative and later Secretary of Agriculture during the first years of the Uruguay Round, wrote: "The Agreement on Agriculture was a fine achievement."[37]

While representatives of the developing countries had an overall positive view of the results of the Round in agriculture, it was not without reservations. Rubens Ricupero was negotiator for Brazil and, in that capacity, one of the main spokesman for the LDCs. He wrote:

> As a consequence of the Uruguay Round, new export opportunities will arise for all countries, including developing countries . . . The main achievement has been to address those areas and sectors where the absence of international consensus and workable rules had resulted in mounting trade tensions undermining confidence in the system (agreements on safeguards, subsidies, anti-dumping duties, agriculture, and textiles and clothing) . . . . This positive assessment, however, is tempered by a number of caveats . . . . [38]

These countries probably suffered from the bilateralization between the United States and the EC of the agricultural negotiations, which did not allow them to actively plead their interests, as well as from the fact that the Cairns Group (the coalition of agricultural

[35] *See* Article 20 of the Agreement on Agriculture.

[36] Address to the International Agribusiness Management Association, Jakarta, Indonesia, June 1997.

[37] Yeutter, *supra* note 9, at 73.

[38] Ricupero, Rubens, *Integration of Developing Countries into the Multilateral Trading System*, in THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL, *supra* note 9, at 24–5.

exporting countries) was led by developed countries like Australia and New Zealand, predominantly interested in their own product categories.

In terms of market opening for industrial products, the European Community reduced its tariffs on average by 37 percent. The other developed countries made similar or more important efforts. Tariffs were eliminated in important industrial markets, such as civilian aircraft and computers. Improved access for the EC's exports of textiles and clothing to third countries was a necessary counterpart to the global textiles agreement, which calls for the elimination of the Multifiber Agreement quotas over a ten-year transition period. The developing countries, for the first time, took part in this collective step toward liberalization by stabilizing their tariffs at levels compatible with their level of economic development.

The establishment of a multilateral framework of rules and disciplines facilitating the liberalization of trade in services had been one of the major European goals throughout the Round. All service sectors had to be covered and the largest possible number of countries had to be involved. This ambitious goal seemed to have been achieved by the adoption of the GATS.

E. Decisive European Factors in the Uruguay Round

In addition to the basic economic interests and the political objectives a country seeks to pursue in a major negotiation like the Uruguay Round, more specific, circumstantial, and less controllable elements tend to exercise a decisive influence on the way in which the dynamics of the discussions eventually work out. The following were four such elements that applied to the European Community in the Uruguay Round.

1. The Pre-Eminence of Agriculture

The dominant impact of the agricultural discussions on the rest of the negotiations was the direct consequence of the major motivation for the Round on the part of some important trading partners (especially the United States and the Cairns Group). This was reinforced by the European Community's initial, somewhat obsessively defensive attitude towards agriculture. The agricultural negotiations stalled the overall negotiations for many months. It gave the negotiations a political and somewhat passionate dimension. The result was the impression formed by some observers, as well as by participants who were less interested in agriculture, that agriculture was being negotiated against everything else and that the Round had to be saved through concessions in other sectors like industrial products or the rule-making provisions. The notion of a single undertaking, which was one of the organizing principles of the negotiations, could have encouraged this view. However, the separate way in which the negotiations were in fact conducted, would substantiate this notion only in a general political sense.

On the other hand, the case could be made that excessive concentration on the agricultural sector made it possible for the negotiators on other issues to work quietly, undisturbed by media attention, which allowed them to achieve results that otherwise would have been difficult to obtain. Moreover, one should not exclude the possibility that a certain degree of battle fatigue on the agricultural front may have facilitated compromises in other sectors.

2. The "Bilateralization" of the Negotiations

What was supposed to be a multilateral negotiation with nearly one hundred participants was often perceived by many outsiders as a fight between two big elephants. The focus on

agriculture between the United States and the EC certainly enhanced this vision. Together representing about forty percent of world trade, the two quite naturally acted as the main stakeholders in the functioning of the international system. Both had large delegations in Geneva and large support teams at home. With experts at their disposal on each and every subject they often took a natural lead when innovative solutions had to be worked out.

In addition, it was not unusual for third countries with less specific concerns on a given matter to define their position in the light of the discussions between the larger partners. Their motivation could be based as much on trust as on tactical calculus. This positioning did not necessarily lead to the establishment of two camps in other matters than in agriculture (and not even on all agricultural issues). On many problems the developing countries formed a coherent group under competent leadership in defense of their specific interests.

Another formula, which often prevented excessive antagonism between the major partners, consisted of occasional informal meetings of a limited number of delegations, some of them convened by the Director-General of the GATT. They usually took place outside the GATT building in Geneva (at the Director-General's or an Ambassador's residence, unlike the more institutionalized, but still informal, and also restricted "Green Room" meetings). Such regular informal contacts took place, among other groups, between the members of the so-called "Quad" (the United States, Canada, Japan, and the European Community). This happened not only at the level of experts whenever common interests might be transformed into harmonized positions (which was rather infrequent) but, more importantly, at the level of heads of delegations, when matters concerning the general management of the negotiations were at stake.

3. The Importance of "Time"

Quotations referring to the healing power of time could fill a book. One of them might well be: "Time is the best negotiator". In Punta del Este the ministers agreed to organize the next round of multilateral trade negotiations in such a way that it could be concluded within four years. In doing so, they seriously underestimated the adjustment difficulties that the achievement of their goals would entail. They equally underestimated the dynamic forces that the same set of objectives would unleash for the re-ordering of the international trading system. However, it is far from certain that the same results would have been reached if a seven-year timetable had been established at the outset.

In October 1990, forty days before what had been planned to be the concluding session of the Uruguay Round in Brussels, the Director-General of the GATT assessed the state of play for the Trade Negotiations Committee in Geneva. After having identified the sectors in which progress had been made and those where the problems had been narrowed down, he stated that the key subjects of the negotiation (Textiles, Agriculture, TRIPS, Services, Safeguards) could not even be addressed at that stage.

The talks eventually took seventy-five percent more time than originally planned. The Uruguay Round became an element of irritation, frustration and even blackmail at international and European meetings. Negotiators had to be replaced in many delegations. Changes took place in the European Commission and the U.S. Administration. But time also played a decisive role in the inevitable adjustment the European agricultural constituency and its political establishment had to go through in terms of the appropriate domestic reforms to be made before international commitments could be entered into. Similarly, it would have been impossible to have condensed the learning curve of negotiators, interest groups and legislators concerning the arrangements in new sectors like services and intellectual property protection into a shorter time-frame.

4. The Leadership of the Director-General

The nature and history of the GATT have made the role of the Director-General of crucial importance for the achievements of its members. This was particularly true in the Uruguay Round. Arthur Dunkel occupied that position during most of the negotiations. As Ambassador Rubens Ricupero has written: "... there is no denying that Arthur Dunkel's contribution was more crucial and decisive by far than that of any other individual".[39]

Dunkel also knew well the weaknesses and the strengths of the European Community. He had always been a strong supporter of European integration, both for its own sake and because he believed that it benefited the interests of his own country, Switzerland. He was convinced that the CAP could not survive in its present form, and he opposed the Community where he thought it was out of step (e.g., on the selective application of the safeguard clause). He also showed understanding and patience, without giving any preferential treatment on the substantive issues, when the inherent weaknesses of the European institutional arrangements—which required endless internal discussions between the Member States before a Community position could be agreed upon, followed by a rigid negotiating position of the Commission negotiators once they had joined their fellow negotiators in the GATT—were the source of the difficulties.

As Indian Ambassador B.K. Zutshi expressed it: Arthur Dunkel was able to convey "a feeling of singular value to each contracting party and each participant in the Round".[40] Most delegations owed their feeling of satisfaction at the end of the negotiations largely to the leadership of the Director-General of GATT, who was the real manager and animator of the Round. So did the European Community as well as the international trading community.

F. Lessons from the Uruguay Round

From a reluctant participant at the beginning of the Uruguay Round, somewhat obsessed with the potential disasters new talks might bring to its agricultural sector, the European Union managed to gradually develop into a more pro-active and constructive negotiator. This was possible thanks to a number of elements:

- The awareness that a strong multilateral system with predictable rules would favor all trading partners, but particularly the EU because of its wide variety of interests and relatively weak decision-making system.
- The acceptance in the course of the negotiations by the European farming community of the fact that external pressure on the CAP was increasing, and that domestic reform was inevitable and probably easier to obtain in the context of a wide-ranging international negotiation with an overall balanced result.
- The "duration" factor, which, apart from the frustrating effect it inevitably created for negotiators and observers, had a positive influence on the psychological and educational adjustment that policymakers, negotiators and members of the constituencies concerned inevitably had to go through. This was particularly true given the fundamental nature of some of the novel concepts being considered during the negotiations, especially in the "new" sectors. It was quite revolutionary for areas like the protection of intellectual property rights or the establishment of

[39] Ricupero, *supra* note 38, at 9.

[40] In THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL, *supra* note 9, at ix.

rules for basic services or foreign investment to be reviewed in the light of their role in international trade.

- The competent and agile leadership exercised by GATT Director-General Arthur Dunkel, as well as the existence of informal networks of participants who felt a shared responsibility for a positive outcome of the negotiations. The same can be said of the commitment towards European interests but also towards the interests of the global trading system shown by the responsible members of the European Commission.
- The remarkably well-functioning cooperation between the Member States and the European Commission with respect to the common commercial policy during the larger part of the negotiations (which had not always worked as smoothly in other circumstances), and which was the more noticeable as the talks took place without a formal mandate from the political authority of the European Community.

It can be considered as one of the ironies of history that one of the most reluctant participants in the Uruguay Round (the European Union, in the meantime enlarged to fifteen Member States) became the first advocate of a new round of negotiations so soon after the conclusion of the Uruguay Round. Japan came on board at an early stage, but this time the United States and many developing countries took over the role of those who had to be seduced.

IV. The European Union in the WTO[41]

A. WTO Dispute Settlement

The Dispute Settlement System inaugurated by the WTO has generally been heralded as one of the most innovative and positive results of the Uruguay Round. The European Union had been one of the promoters of the new procedures. It was not surprising that the Union, as one of the main trading partners, would also be one of the main participants in the new system, both as defendant and complainant. After having been involved with the Dispute Settlement Understanding for more than seven years, most practitioners in Europe, as elsewhere, seem to have a positive view of the system. Many more cases are being "brought to court" multilaterally than was the case under the previous system, and many more are being resolved. Between 1995 and mid 2002, a total of 262 requests for consultation were introduced. Many of them did not go further than this initial stage. Over the same period, about 65 cases went to completion with adoption of either a panel or Appellate Body report.

Aside from proposals put forward by the EU and other trading partners designed to correct certain procedural shortcomings, the system has sometimes been criticized for having become too prominent in the overall activities of the WTO, to the detriment of the traditional consultation and negotiating practices, which had been the hallmark of the GATT system. This was particularly the case during the period leading to and immediately after the failed Ministerial Meeting in Seattle in December 1999. Fresh hopes were created for a rebalancing between the activities of the institution after the Ministerial Meeting at Doha in 2001 and the decision to open new multilateral negotiations. The launching of

[41] *See supra* note 1 for an explanation of the relationship between the "European Community" and the "European Union".

a new round of negotiations would offer the opportunity to correct the perception of a "rush to litigation".

Dispute settlement cases against the United States represented the vast majority of the overall dispute settlement activity of the European Union. Almost half of the offensive cases related to the steel sector, but, because of their political impact, the media paid particular attention to the early *Banana* dispute,[42] and the *Beef Hormone* dispute,[43] which were decided against the EU. Later on, the *Foreign Sales Corporation* case,[44] which was decided against the United States, received a great deal of attention, because of the huge amount ($4 billion) of retaliatory measures authorised.[45]

The *Bananas* and *Hormones-fed Beef* cases, in both of which the EU was on the respondent side, belonged to the first generation of WTO Dispute Settlement cases. Both originated from EU legislation initiated before the establishment of the WTO. Both reflected specific economic and policy concerns, and both had been approved by the highest EU decision-making bodies (the banana regulation had been upheld in several EU court judgments). This made EU leaders (over?)-confident as far as the international legal merits of the two cases were concerned.

On the complainant's side, i.e. the United States (in the *Bananas* case joined in 1996 by Ecuador, Guatemala, Honduras and Mexico), similarly specific economic interests were at stake, which were important enough to stir the highest domestic policy levels.

Neither the United States nor the EU were significant banana producers. The EU was the largest importer and about eighty percent of these imports already came from American-related producers. However, the European import system, as part of its overall development policy, was based on preferential zero tariff treatment of bananas imported from so-called ACP countries (developing countries in Africa, the Caribbean and Pacific regions, signatories of the Lome Convention). Other importers had to pay a tariff of twenty percent and were subjected to a discriminatory licensing system. Two GATT reports (in 1993 and 1994)[46], four WTO reports (in 1997)[47] and an Appellate Body report (1997)[48] established that the EU banana market regulation violated GATT law. A WTO arbitral decision (in 1999) authorized the United States to suspend tariff and other concessions granted to the EU covering up to US$191.4 million per year of trade.[49] A US-EU compromise was agreed upon on April 11, 2001.[50]

Also in 1999 the Dispute Settlement Body of the WTO authorized the United States to suspend tariff and other concessions up to an amount of US$116.8 million following

[42] Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997).

[43] Report of the Appellate Body, *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R (1998).

[44] *Report of the Appellate Body, United States—Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/RW (2002).

[45] *United States—Tax Treatment for "Foreign Sales Corporations"*, Recourse to Arbitration by the United States under Article 22.6 of the *DSU* and Article 4.11 of the SCM Agreement, WT/DS108/ARB.

[46] *EEC—Member States' Import Regimes for Bananas*, DS/32/R (1993); *EEC—Import Regime for Bananas,* DS38/R (1994).

[47] Reports of the WTO Panels, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/27/R/ECU, WT/DS27/R/GTM and WT/DS27/R/HND (one report), WT/DS27/R/MEX, and WT/DS27/R/USA (1997).

[48] *Supra* note 42.

[49] Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB (1999).

[50] For the text of the compromise, *see* INSIDE U.S. TRADE, April 13, 2001.

the EU's failure to bring its import regime on hormone-fed beef into conformity with WTO obligations.[51] Two panel reports[52] and an Appellate Body report[53] had established inconsistencies of the import restrictions with the EU's GATT obligations. Here the EU confidence in the solidity of its case was based on the non-discriminatory nature of its Directive, which prohibited the sale of hormone-treated beef throughout the EU. Added to this was the general mood of health risk suspicion against any artificial interference in the meat production line provoked by the mad-cow disease syndrome in the UK and other European countries. So confident was the EU that it did not even invoke the possible application of the precautionary principle (recognized in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures). Mainly because of the lack of satisfactory scientific evidence (risk assessment) to back up its measures, however, the panels and the Appellate Body found the EU practices contrary to the EU obligations under the WTO.

On both cases the European political establishment could not easily accept a quasi-judicial decision on the compatibility with WTO rules as a solution to what they perceived as wider socio-political issues. The bilateral US-EU settlement on bananas came after protracted discussions in a conscious effort by both sides to restore a somewhat shaken relationship. Three years after the WTO decisions on the hormone-fed beef case, the WTO retaliation measures are still in place.

While *Bananas* and *Hormones* are illustrative of the first generation of Dispute Settlement cases, in most of which the EU was the defendant, as well as being politically on the defensive, the situation changed later on. The EU became a more pro-active and also a more successful user of the Dispute Settlement System. By the end of 2001 the EU had been involved in 25 cases, nineteen as plaintiff and six as defendant. This compared with the United States, which at the time had been involved in 36 cases, eighteen as plaintiff and eighteen as defendant. Nearly all of the EU plaintiff cases resulted in findings of a violation (seventeen out of nineteen). In two of the six defensive ones the case was rejected.[54] Fifteen out of eighteen American complaints led to findings of violation, as did fifteen out of the eighteen defensive cases.

The most important case in economic terms ever brought before the Dispute Settlement System was undoubtedly the EU complaint (in 1999) against the U.S. tax treatment of Foreign Sales Corporations. The FSC system was condemned by a panel report in 1999, which was upheld by the Appellate Body in 2000.[55] The U.S. Congress moved with remarkable speed to modify the legislation. The new law, called *The FSC Repeal and Extraterritorial Income Exclusion Act of 2000*, remained focused on achieving or maintaining a level playing field in terms of the tax advantages that U.S. exporters should be able to obtain compared with those enjoyed by exporters of other countries and of the EU in particular. The dispute was in fact about what constitutes an export subsidy within the terms of the WTO Agreement on Subsidies and Countervailing Measures

[51] Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)—Original Complaint by the United States—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS26/ARB (1999).

[52] Reports of the WTO Panel, *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/R/USA and WT/DS48/R/CAN (1997).

[53] *Supra* note 43.

[54] Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001) and Report of the Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, and WT/DS68/AB/R (1998).

[55] *Supra* note 44.

and whether payments to (or relief from tax liability granted to) exporting companies contingent upon their export performance could be made consistently with WTO rules. The new panel report and the Appellate Body report supported the general EU position that the United States was responsible for having chosen a tax system that could leave its exporters at a disadvantage and ruled that the new legislation still constituted an export subsidy.[56] The original panel, acting as Arbitrator, concluded on August 30, 2002 that the amount of $4,043 million could be considered to be a reasonable approximation of the actual value of the subsidy for the year 2000.[57]

One of the decisions taken at Doha called for negotiations on improving and clarifying the DSU to be concluded no later than May 2003. The European Union, like other participants, had already made some suggestions in that respect.[58] It recommended that, in the light of the increasing number and complexity of cases, permanent, full-time WTO panelists be appointed to adjudicate disputes instead of their *ad hoc* selection for each case from a roster of trade law experts nominated by member governments. Other ideas concern the right "sequencing" of the procedural steps when retaliation measures have to be decided. On the implementation side, the EU has proposed that trade compensation rather than trade retaliation be given greater emphasis in dealing with non-compliance cases. Among other measures, greater room for WTO guidance has been suggested, notably on decisions relating to the level of trade sanctions a complaining party may impose on a non-complying member before a request for authorization to retaliate is submitted.

B. EU Associations and Enlargements in the WTO

From the very beginning of European integration, the European Community/European Union has developed relationships with other European and non-European countries. These relationships took the forms and names of trade and cooperation agreements or different types of association agreements. Most new Member States were linked to the European institutions through an association agreement before joining. The association agreements always had a substantial trade component that started the process of the gradual establishment of a free trade zone or customs union. More than 95 percent of the countries of the world have some kind of agreement with the EU today.[59] These countries account for about half the total amount of European imports. The largest Association agreement exists with seventy developing countries of Africa, the Caribbean, and the Pacific, most of them having had dependent links with European countries in the past, and for which the Treaty of Rome had provided largely duty-free access to the European market. The provisions of the GATT/WTO do not prevent the formation, between individual Member States, of a customs union or a free trade zone, on condition that they facilitate trade and do not raise new barriers to the trade with Member States that are not part of these initiatives.[60]

The vagueness of the provisions of Article XXIV and the consensus rule in the GATT meant that each initiative to create a customs union or a free trade zone led to endless

[56] Reports of the WTO Panel and the Appellate Body, *United States—Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW (2001) and WT/DS108/AB/RW (2002).

[57] *Supra* note 45.

[58] *See* http://www.europa.eu.int/comm/trade/miti/dispute/dsurev.htm.

[59] Christopher Piening, Global Europe, The European Union in World Affairs (1997), Chapter 1.

[60] *See* Art. XXIV of GATT 1947, discussed in Chapter 5 of this book.

discussions in special *ad hoc* GATT working parties, which never produced decisions. Of the sixty preferential trade agreements referred to GATT working parties between 1947 and 1994, none has been ruled in violation of GATT, nor were any approved, notwithstanding fierce opposition from countries like the United States against every step toward wider integration by the European Community. Each time the discussions were blocked by contradictory assessments of the so-called "credits" and "debits" for third countries resulting from the integration initiative.

The Uruguay Round succeeded in clarifying certain texts and in strengthening the procedures,[61] Under the new procedures the review of new regional initiatives by the WTO should have enhanced the transparency and efficiency of the system. But on one key provision, which was the requirement that such regional pacts must cover "substantially all trade", the negotiators failed to reach a consensus.

The new enlargement of the EU to the countries of Central and Eastern Europe will have to be notified to the WTO. However, the WTO has not delivered what the negotiators of the Uruguay Round had hoped for: since the beginning not one single regional integration initiative has been fully reviewed as provided for in Article XXIV. NAFTA (1994) is still under review eight years after its notification in 1993. In the meantime, most of the notified free trade zones or customs unions have been fully implemented.

The Ministerial meeting in Doha decided to grant a waiver from the MFN obligations under Paragraph 1 of Article I of the GATT to the Members of the ACP-EC Partnership Agreement (Cotonou, 2000), which is the successor agreement of the previous association agreement (Lomé) with the ACP countries. The *Bananas* case was settled in the context of this agreement. Both agreements cover the period until December 31, 2007. By the end of that period the Partnership countries will conclude new trading arrangements, while the Union will install a new EC tariff-only regime for bananas on January 1, 2006.

C. One More Round

The WTO enjoys general support from the European economic constituency. Its basic principles in favor of worldwide, non-discriminatory liberalization of international trade are designed to create an environment in which the European business community sees its future interest. Politically, the European nations have always been strong supporters of the multilateral institutions of the United Nations as the appropriate forums for the defense of the basic principles of democracy, human rights and the peaceful settlement of international disputes. The creation of the WTO had therefore been generally welcomed as the natural complement to the existing multilateral economic institutions, the World Bank and the IMF.

But, as in other countries, the wide-ranging and rapid development of international economic activity, promoted by increasingly powerful multinational groups, without corresponding adjustments in the regulatory and political environment, has created anxieties, uneasiness and even strong opposition in certain parts of the European population against the real and presumed drawbacks of the "globalization" of the economy. The same array of peaceful demonstrations, and the more anarchist acts of violence that took place at the WTO ministerial meeting in Seattle in December 1999, have become part and parcel of the public programs of European Union summit meetings. Unfortunately, the more constructive activities of NGOs relating to concerns about the environment, health and

[61] *See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, adopted as part of the Uruguay Round Agreements.

safety, and other societal developments cannot always be distinguished from the more rebellious and irrational disruptions created by smaller groups of agitators.

Special sensitivity for these developments, combined with the desire to better integrate the developing world into the international economic community, explains, at least partially, the early support by the European Union for a new round of multilateral negotiations some years after the end of the Uruguay Round. Another reason for this support was undoubtedly the feeling that the so-called "built-in agenda", part of the Marrakesh accord, in which agriculture again took an important position, would be easier to handle in a broader context. This was a traditional position taken by the Europeans in previous rounds. It was based on the great diversity of their economic interests in such negotiations as well as on the (mostly illusory) hope of avoiding too prominent a role for the agricultural sector.

For some time the initiative for a new round was met with suspicion by many developing as well as developed countries. The developing countries had come to the conclusion that the Uruguay Round had not treated them well and that the implementation of some of its agreements had created real difficulties, while developed countries like the United States were far from enthusiastic about the prospect of another protracted global negotiation. The latter countries seemed to prefer more clearly targeted discussions starting from the Marrakesh built-in agenda (mainly agriculture and services) along the model of the agreements on financial and telecommunications services, which had been completed in the wake of the Uruguay Round.

The relentless European pleading in favor of a new round gradually seemed to bear fruit with the support of the new Director-General of the WTO and the new U.S. Administration. The worsening of the world economic outlook, starting in mid-2000, probably also played a role. The European proposal for a new round would lead, it was hoped, to a positive decision at the WTO ministerial meeting at Doha, Qatar in November 2001.

Once again, the European concept of a future multilateral trade round is based on a global agenda that would include new trade problems, most of them by-products of the globalization of the world economy, such as protection of the environment, food safety, social conditions, and competition. The EU is also in favor of a comprehensive round because it continues to correspond with its widely diversified interests. In addition, a comprehensive round offers the best way to take into account the diverse trade interests of the broader WTO membership and thus increases the likelihood that a larger number of WTO members would actively participate in the negotiations.

The European Union has made a particular effort in the direction of the developing world in characterizing the next round as a developing country round. More market access for goods and services on an MFN basis remains a primary objective, but it should be associated with special and differential treatment in areas of interest to developing countries, including in areas that are sensitive such as agriculture and textiles. Other developed nations should imitate the European unilateral dismantling of all trade barriers with respect to imports coming from the least developed countries.[62]

On agriculture the European Commission states that it is committed to "more access, less domestic support, less export support". However, in this sector "non-trade concerns will have to be taken into account". The EU now stresses increasingly the concept of "multifunctionality" in agriculture, by which they mean that non-economic

[62] In the so-called "Everything But Arms" initiative the European Commission proposed duty-free and quota-free access to the European market for all products except armaments from the 49 poorest countries. The Council accepted the proposal on February 26, 2001, 2331 Council 6506/01 and 2332 Council 6511/01.

considerations and objectives must play a role in decisions on future agricultural policy. This tendency has to be understood in the context of the wider concept of sustainable development in industrial societies. These discussions should take place as spelled out in Article 20 of the WTO Agreement on Agriculture. This implies:

> "that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reforms is an ongoing process. Moreover, this process is conditioned by other concerns which must also be taken into account, notably: the experience and effects of implementing reduction commitments agreed in 1994, special and differential treatment of developing countries, the objective to establish a fair and market oriented agricultural trading system, and non-trade concerns".[63]

Multilaterally agreed rules, adjusted to the realities and needs of the current economic community, should make it possible to show the way to types of sustainable development based on sound domestic policies. This is, according to the European Commission, the challenge for governments and the WTO: "to develop the multilateral trading system in a way that secures the maximum benefits of globalisation for sustainable development". However, "it is primarily governments who must themselves ensure, through appropriate domestic policies, that the benefits of liberalization are equitably shared, that rapid economic change is successfully managed, and the impact of globalisation, properly addressed".[64] This would make it possible to meet at least some of the valid concerns voiced by NGOs and other representatives of an increasingly vociferous "civil society". The search for a solution to the problem of affordable access to medicines by developing countries is an example of the need to adjust some regulatory agreements.

D. Doha

Until the last day (which had to be added to the initial calendar) of the Fourth Ministerial Meeting of the WTO at Doha, Qatar (November 9–14, 2001), the launching of a new Round of multilateral trade negotiations, and with that a positive outcome of the Meeting was uncertain. The European delegation, which had strenuously campaigned in favor of a new round during the preceding months, was confronted with the traditional requests from the exporters of agricultural products in favor of full liberalization, particularly the elimination of all agricultural subsidies. But the countries most reluctant to launch a new round were some of the developing countries under Indian leadership, which insisted on a preliminary "correction" of the way in which they had been affected by the Uruguay Round results. The European Union had promoted the new round as a "development round", and had already promised a great degree of flexibility and openness to the concerns of the developing countries in order to obtain their support for the idea of a new round. Its room for maneuver was thus substantially reduced in comparison with that of later converts like the United States. On some of the delicate subjects such as the availability of patented medicines in developing countries, it had prepared a conciliatory position. However, its desire to introduce into the negotiations the so-called "new" issues—competition, environment, investment—was greeted with rather passive sympathy from some developing and developed trading partners and open hostility from others.

[63] Conclusions of the 2202nd Council Meeting, AGRICULTURE, Brussels, September 27, 1999, 2209 Council 12121/99.

[64] Communication from the Commission to the Council and to the European Parliament, THE EU APPROACH TO THE MILLENNIUM ROUND, Working Document, European Commission, Brussels, July 1999.

The strong will on the part of most participants to avoid "another Seattle", as well as the constructive cooperation between the United States and the EU, finally produced a Ministerial Declaration in support of a "broad and balanced Work Programme" (¶11), which will go into history as the opening of a new "round" without saying so. The Declaration was generally greeted as a fair compromise between the different aspirations of the participants and a good basis for future negotiations, which were to be concluded within three years. The multiple references to the interests of the developing countries justified the commonly used expression of a "development round".

In his report to the European Parliament, the Commissioner for Trade, Pascal Lamy, stated that the Doha Conference was a success in regard to the objectives of the European Union and the interests of the developing countries, as well as the needs of the world economy and the multilateral trading system.[65] He also stressed that the WTO had become stronger and better balanced in Doha, which he considered to be the central part of the mandate which the European Council and the European Parliament had given to their negotiators.

The European Union also saw "its calls for increased action in the WTO in favour of sustainable development and for the protection of the environment . . . strongly reflected in the Doha Declaration". Satisfaction resulted also from the fact that "The Doha Declaration sets, for the first time ever, the objective of establishing a multilateral framework" on competition policies as well as for improving the conditions for Foreign Direct Investment world-wide.[66]

The agricultural part of the Declaration was one of the most difficult for the European Union. Finally, as Commissioner for Agriculture Fischler sees it, the Europeans "were willing to agree on the direction of the negotiation but not on the results".[67] The direction was: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. The caveat as far as the results are concerned became the expression "without prejudging the outcome of the negotiations", the result of an all-night negotiating session.

A disappointment for the European delegation was the opposition of the developing countries to any mention of a strengthened cooperation between the ILO (International Labor Organization) and the WTO on social matters in international trade. Pascal Lamy promised the European Parliament, however, that he would use all available multilateral, bilateral and unilateral trade policy instruments to further promote the objectives of the Union in that area.

[65] Statement by Pascal Lamy, European Commissioner for Trade, before the European Parliament, Strasbourg, December 11, 2001.

[66] Memorandum published at Doha, November 14, 2001 (http://trade-nfo.cec.eu.int/europa/2001newround/compas.htm).

[67] Franz Fischler, *Agricultural Aspects of the WTO Negotiations and EU Enlargement* (Centre for European Reform, Brussels, December 4, 2001).

CHAPTER 71

INDONESIA

H. S. Kartadjoemena*

TABLE OF CONTENTS

I. Introduction 139
II. Indonesia in the Multilateral Trading System: A Brief Historical Perspective 140
III. Changing Trade Pattern and Structure 142
A. Commodity Power: Oil and Primary Commodities 142
B. Post-oil Boom 143
C. A More Diversified Export Base 146
IV. Evolving Indonesian Interface With GATT/WTO and the Decision-Making Mechanism 146
V. Issues of Concern to Indonesia During the Uruguay Round 149
A. Market Access in Goods 149
B. Services 150
C. Intellectual Property Rights 151
D. Strengthening GATT Rules 152
E. Institutional Issues 153
F. Special and Differential Treatment 153
VI. Issues of Concern for Indonesia in the Multilateral Round 154
A. A New Dimension: The Emergence of NGOs 155
B. Existing Obligations: Implementation Issues 156
C. New Issues 156
1. Investment 157
2. Competition Policy 157
3. Linkage between Trade, Investment and Competition Policy 158
4. Non-economic Issues 159
D. Technical and Trade Facilitation Rules 159
E. Revisiting Special and Differential Treatment 161
VII. Multilateralism versus Regionalism 162
VIII. The Quest for Balance and Systemic Coherence: Future Prospects 164
A. Proactive Participation in the Multilateral System 164
B. Systemic Issues: Helping the Integrity of the Multilateral System 165
C. Nurturing the System in the 21st Century 168

* The author is former Ambassador of Indonesia to the GATT and was the Chief Negotiator in the Uruguay Round from 1987 until the end of the Round in 1994. The opinions expressed in this chapter are entirely his own and do not necessarily reflect the views of any institution with which he is or has been associated.

IX. Conclusion 169
Tables and Chart
Table 1 Major Export Commodities of Indonesia, 1913, 1920, 1925 and 1930 143
Table 2 Major Commodities of Indonesia 1965–1978 144
Table 3 Indonesian Exports by Primary and Non Primary Commodity Groups 1984–1999 147
Table 4 Factors Leading to Increasing Developing Countries' Attention to WTO Technical Facilitation Rules 160
Table 5 Types of Systems Disruptions in the WTO as System 167
Chart 1 Simple Schematics of WTO as System 165

I. Introduction

This chapter examines the role and the significance of the WTO in the context of Indonesia's trade policy. In so doing, it traces the interface between Indonesia's trade structure and the multilateral trading system. It also traces the evolving multilateral system and its substantive coverage as well as the implications of this expansion on the system and on domestic policy. Although the writer examines the subject from the perspective of a developing country, the intention is to look at the multilateral system in its own right. From this perspective, the fragile multilateral system is examined as a system which is potentially endangered by actions that could be inflicted *both* by the developed countries *and* by the developing countries as they pursue their respective interests to the detriment of the system as a whole.

At the time of the writing of this chapter (Fall, 2002), Indonesia is facing what is arguably the most serious multidimensional crisis in its history since independence. There have been many serious crises in the country before. However, at no time has the country been in such a serious state as it is at present. At stake is not only the economy, which is in more serious disarray arising from a financial meltdown than that of any other East- and Southeast Asian countries facing similar problems. At the same time, there is also a broader and multidimensional crisis in Indonesia in governance of the state as well as corporate sectors, major flaws in the legal system, and a threat of national disintegration arising from dissatisfaction and disorder in several regions of the country.

Given this background, it must therefore be stressed that for the time being trade issues and the WTO are relegated into the background in Indonesia. This is unfortunate but it is a reality. Nevertheless, despite the current lack of public and official interest in these issues, it is important to stress to the Indonesian public as well as to officialdom the long-term importance of trade issues and of the WTO for the country, unless of course the country collectively and consciously decides to withdraw from the global system. It is precisely for this reason that a cool assessment of the medium and long-term policy implications of the WTO and the world trading system on Indonesia is greatly needed.

For the professionals in the field of trade policy as well as the economic actors in trade, it is important that efforts continue to be made to stress the need for steps to be taken to ensure that attention is paid and that public discussion is undertaken on these issues. Views may differ on many of the controversial issues in the WTO. Honest differences of opinion need to be aired on the merit or demerits of certain issues, both those that are politically sensitive as well as the more technical issues. It is in this spirit that this chapter has been written.

Looking at the external setting we can note that the international community is now engaging in a new round of WTO multilateral trade negotiations. The WTO Ministerial Conference in Doha, Qatar, in November 2001, the first meeting of trade ministers since the failed Seattle Ministerial Meeting in December 1999, finally led to an agreement to launch the first multilateral trade negotiations after the Uruguay Round. The Conference issued a series of declarations describing the mandate for the new round.

As a member of the WTO, it is in Indonesia's interest to make careful preparations for the new round notwithstanding the current national crisis. To do so, Indonesia needs to look at the exercise in the longer-term perspective. Indonesia needs to look at the next few years of trade negotiations in a post-crisis context and prepare for trade policy that is appropriate for the new century. A more complete assessment of what Indonesia could expect of an open world trading system and what its development goals needs to be undertaken.

It is also important to stress that notwithstanding the difficult situation arising from the crisis, an open world trading system will be an important factor for future growth, both for Indonesia and the regions of East and Southeast Asia as a whole. Higher growth can be expected if the global trading system remains open than if it becomes more closed or fragmented. But to benefit from the open global trading system Indonesia needs to make sure that it takes the appropriate steps to prepare for the new round and to ensure that the rules of the system do not work to its disadvantage.

This chapter attempts to make Indonesia's situation more comprehensible for international readers. It is also a modest attempt to contribute to the process of reassessing how to deal with WTO issues as Indonesia enters the 21st century. In making this assessment it must be remembered that the mood in Indonesia, as well as in many other countries in East and Southeast Asia, is less forthcoming than it was during the Uruguay Round. The crisis has brought about a different perspective.

II. Indonesia in the Multilateral Trading System: A Brief Historical Perspective

Indonesia was an early member of the GATT. However, it was not officially present during the Havana Conference that established the aborted International Trade Organization in 1948, whose failure subsequently led to the creation of the more humble institution, the GATT, as an interim substitute. While Indonesia declared its independence from the Netherlands in August 17, 1945, full transfer of sovereignty did not take place until December 1949. By the time the Havana Conference ended and efforts in Geneva were launched to establish the General Agreement on Tariffs and Trade in 1947, Indonesia was still engaged in the final years of the struggle for independence. Thus, unlike some developing countries that had already achieved independence, and therefore became "founding members" of the GATT system, Indonesia did not.

Nevertheless, members of the Indonesian delegation to the United Nations who attended the UN Security Council debate on Indonesia in the late 1940s were instructed to follow developments in trade issues in Havana and Geneva. And Indonesia participated in the GATT negotiating rounds held in Annecy and Torquay in 1949 and 1951 respectively.

Indonesia joined the GATT through sponsorship by the Netherlands in 1951.[1] In the following years, Indonesia participated in the GATT in the way that many developing countries did, i.e., not too actively. As a country whose export profile was dominated principally by primary products, it was logical that Indonesia's main concern was to ensure the export stability of primary products. Attention had therefore been devoted to efforts to develop commodity stabilization measures. Although as we shall see below, the GATT contains provisions relating to international commodity agreements they are not as extensive as the provisions in the ITO Havana Charter. International commodity agreements, although implicitly tolerated by the GATT system, were operating outside the GATT.[2]

[1] GATT Article XXVI: 5(c) permits a contracting party to the GATT which has accepted the GATT on its behalf as well as other customs territories under its formal possession to sponsor each of those territories when it "... acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement". *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 96–7 (1969).

[2] There was an early debate in the GATT because, unlike the Havana Charter, the GATT did not mention *in specific detail* how international trade in commodities and the international agreements on commodities were to be managed within the system. The conclusion of the debate was that the GATT did have authority to deal with international commodity agreements and that in the absence of objections from the Contracting Parties an international commodity agreement could come into existence. *See* JOHN H. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL

Article XX of the GATT states that " . . . nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conform to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved . . . ." *Note Ad Article XX* (GATT Annex I) explains that "The exception provided for in this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council [of the UN] in its resolution 30(IV) of 28 March 1947". One feature of commodity agreements is that they impose quantitative restrictions that are not consistent with Article XI of the GATT.

In the 1970s, with high oil and commodity prices and the desire to use "commodity power" to change the trading relations between industrialized consuming countries and developing country producers of primary commodities, the relationship between developed and developing countries became more difficult, leading to the need to engage in a "North-South" dialogue if a costly clash was to be avoided. Perceptions differed between the developed North and the developing South on how global economic relations were to be conducted.[3]

Because the GATT was viewed by developing countries as a developed country "club", the forum for trade dialogue and negotiations between North and South shifted from the GATT to UNCTAD in the 1970s.[4] The focus in UNCTAD was on expanding the system of international commodity agreements and the creation of an Integrated Program for Commodities with an integrated buffer stock for commodities, along with a Common Fund to support the financing of the buffer stock.[5] A number of commodity agreements were concluded under the auspices of UNCTAD.[6] Moreover, there was a symbolic concession made to developing countries in the form of the creation of the Common Fund. However, the actual institution, located in the Netherlands, was a pale shadow of what its proponents wanted. In fact it played an insignificant role in commodity stabilization. Neither the political commitments nor the funding were there to even try to make it work as originally intended.

High prices on primary commodities strengthened the negotiating leverage of developing commodity-exporting countries during much of the 1970s. However, this advantage

REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 1174 (1995), and 1 ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 587–91 (1995).

[3] One of the first signs of a shift in the thinking on the part of some developing countries was an initiative launched first in the Special Session of the UN General Assembly in April 1974. Algeria led the more assertive wing of developing countries in the North-South dialogue. A position paper was developed by Algeria which became a reference for the position of many developing countries during the North-South dialogue. *See Petroleum, Raw Materials Development: Memorandum Submitted by the Government of the Democratic Republic of Algeria* (1974).

[4] The Tokyo Round (1973–79) was virtually ignored by developing countries and the results of that GATT Round were generally of limited immediate interest to them. Developing countries gave little and received little at the end of that round. For an account of the negotiating history of the Tokyo Round, *see* GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATIONS (1986).

[5] For a summary of the issues during the UNCTAD North-South commodity negotiations from the perspective of developing countries, see *An Integrated Programme for Commodities: Report by the Secretary General of UNCTAD*, Doc. TD/B/C/166 (1974). For a critical view of the Integrated Programme for Commodities see W.M. CORDEN, THE NEIO PROPOSALS: A COOL LOOK (1979).

[6] *See, e.g.*, INTERNATIONAL RUBBER AGREEMENT 1979, UN Doc. TD/RUBBER /15/Rev.1 (1980), and *UNCTAD: International Natural Rubber Agreement 1979*, 14 JOURNAL OF WORLD TRADE LAW 246 (May-June, 1980). *See also* Thomas L. Galloway, *The International Coffee Agreement* 7 JOURNAL OF WORLD TRADE LAW 357 (May–June 1973).

was relatively short-lived. By the end of the decade prices of oil and other primary commodities had plummeted. As a consequence the position of developing countries in the dialogue became significantly weakened. The dialogue fell into disarray.[7] In the process, the GATT which had been sidelined during the 1970s, was slowly but surely regaining its prominence, and by the second half of the 1980s it had fully regained its former place as the pre-eminent forum for international trade negotiations. In September 1986, during a GATT ministerial meeting at Punta del Este, Uruguay, the Uruguay Round of Multilateral Trade Negotiations was launched. It was to be the most important multilateral trade negotiation since the Havana Conference in 1948 in terms of substantive coverage, and it was the largest multilateral trade negotiation ever conducted in terms of the number of participating countries.[8]

Although Indonesia had been a contracting party to the GATT since 1951, and briefly active during the phase towards accession to the GATT, the Uruguay Round was the first time that developing countries had become active participants in GATT negotiations, and it was also the first time that Indonesia had been an active participant in all issues of a GATT round. Indonesia's changing economic and trade structure lay behind its decision to play an active role. As explained in the next Part, the country had unwittingly experienced a transformation of its domestic economy into a more export-oriented and manufacture-based country, albeit still at a modest level.

III. Changing Trade Pattern and Structure

The logic of a country's approach to trade policy can be conveniently examined by tracing the evolution of its trade structure. As already explained, for much of her modern history, and until relatively recently, Indonesia was principally an exporter of primary commodities. Indeed, in the years before World War II, Indonesia was one of the major exporters of primary commodities. The dependence of Indonesia on primary commodities in the earlier period of Indonesia's commercial history can be seen in Table 1, which shows the pattern of exports in selected years before World War II.

A. Commodity Power: Oil and Primary Commodities

In the post-war years, as has been noted previously, Indonesia's concern in trade policy had been focused on international commodity arrangements. To the extent that GATT permitted the emergence of commodity agreements, Indonesia could continue with its preoccupation with primary commodities. In the 1970s, when activities involving commodity agreements escalated, Indonesia was still almost exclusively an exporter of primary commodities. Oil, which dominated the economy as a whole throughout the decade, was pre-eminent among these primary commodity exports. Table 2 shows the export pattern of Indonesia during that period. Oil took the lion's share of exports. Between 1972 and 1978, it contributed an average of almost seventy percent of total exports. It was also the largest contributor to government revenue. The state oil company PERTAMINA was the dominant corporate entity in the country.

[7] For a description of the sad ending of the entire North-South dialogue as seen by a prominent delegate from a developing country, see Jahangir Amuzegar, *A Requiem for the North-South Dialogue*, 56 FOREIGN AFFAIRS 140 (October 1977).

[8] For a good description of the complex negotiating history leading to the launching of the Uruguay Round up to the completion of that Round, *see generally* JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 5–36 (1995).

Table 1: Major Export Commodities of Indonesia 1913, 1920, 1925 and 1930
(in million guilders and percentage)

	1913	%	1920	%	1925	%	1930	%
Coffee	22.9	3%	52.0	2%	68.2	4%	35.7	3%
Copra	55.0	8%	92.9	4%	102.4	6%	77.2	7%
Rubber	23.9	4%	194.2	9%	582.2	32%	173.3	15%
Sugar	159.7	24%	1,050.1	47%	369.5	21%	254.3	22%
Tea	21.5	3%	39.5	2%	74.1	4%	69.5	6%
Tobacco	90.2	14%	170.2	8%	110.5	6%	58.7	5%
Tin	36.7	4%	64.8	3%	94.2	5%	57.9	5%
Sub-total Traditional Commodity	409.9	61%	1,662.8	75%	1,401.1	78%	726.6	63%
Petroleum	113.4	17%	311.3	14%	173.0	10%	190.1	16%
Other	150.8	22%	253.9	11%	226.9	12%	243.4	21%
Total	671.0	100%	2,228.0	100%	1,801.0	100%	1,160.0	100%

Source: J. S. FURNIVALL, NETHERLANDS INDIA: A STUDY IN PLURAL ECONOMY 336–337 (8th ed. 1944).

B. Post-oil Boom

The sharp drop in oil prices led to a dramatic change in the Government's domestic policy as well as its trade policy. During the period of oil dominance Indonesia pursued an import-substitution policy and the import regime was rather protective. Domestic industry was protected by high tariffs as well as by non-tariff barriers. With the decline of oil prices Indonesia faced severe balance of payments pressure. The Government accordingly took steps to devalue the currency, tightened budgetary expenditures, and imposed a tight monetary policy.[9]

More fundamentally, measures were taken to reduce the excessive dependence on oil earnings and to encourage non-oil exports. It was recognized that to do so a series of steps had to be taken to enable the non-oil sector to be more competitive. The lack of competitiveness of the non-oil sector was caused in part by the excessive regulation and bureaucratic rules that inhibited the non-oil sector from taking advantage of market opportunities.

The first step to make the shift to non-oil exports was therefore to make the economic environment more market-responsive and competitive in the world market. In this connection, the Government undertook a whole series of deregulation and de-bureaucratization measures. It is interesting to note that the first sector to be deregulated and liberalized extensively was the financial sector. Indeed the extent of liberalization in the financial sector went much further than in the "real", i.e. non-monetary sector.

The early liberalization in the banking sector led to a more "benign" view on the part of Indonesian authorities with respect to financial services in the Uruguay Round. In order to dampen inflationary pressure as well as to force the banking sector to be more competitive, easy central bank lending was no longer available to banks, which were instead required to seek their own funds from the public through deposits. Interest rates

[9] For a description of an early attempt to examine the various options in Indonesian trade policy during the transition to a "post-oil" economy in the 1980s, *see* H. S. Kartadjoemena, *Indonesia's Trade Policy: Problems and Options*, in SELECTED KEY POLICY ISSUES IN THE INDONESIAN ECONOMY 171–91 (H.S. Kartadjoemena ed. 1986).

Table 2: Major Commodities of Indonesia 1965–1978
(In Million US$ and Percentages)

	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978
—Palm Oil	27.3	33.4	23.6	19.5	24.0	35.1	44.7	41.3	70.2	157.3	151.6	135.5	183.6	208.8
—Coffee	31.7	32.7	43.8	44.4	59.7	69.2	53.3	77.1	77.6	98.2	99.8	37.5	599.3	491.3
—Tea	16.9	17.2	9.6	17.4	8.0	18.3	28.9	30.6	26.1	46.3	51.5	56.6	118.5	94.7
—Rubber	220.0	223.3	168.5	176.5	225.8	253.4	221.9	189.1	391.4	479.2	358.2	350.8	588.3	716.5
	(31%)	(33%)	(25%)	(24%)	(26%)	(23%)	(18%)	(11%)	(12%)	(6%)	(4%)	(4%)	(5%)	(6%)
Sub-total	295.9	306.6	245.5	247.8	317.5	376.0	348.8	338.1	565.3	781.0	661.1	780.4	1,489.7	1,511.3
Major Trad. Agri-Export Products	(42%)	(45%)	(37%)	(33%)	(37%)	(34%)	(28%)	(19%)	(18%)	(11%)	(9%)	(9%)	(14%)	(13%)
Tin & Ores	37.9	30.7	48.8	26.5	24.9	53.7	51.9	64.2	93.1	175.5	103.1	123.1	249.2	286.0
	(5%)	(7%)	(3%)	(3%)	(3%)	(5%)	(4%)	(4%)	(3%)	(2%)	(2%)	(2%)	(2%)	(2%)
Sub-total														
Trad. Export Products	35.8	337.3	294.3	284.3	342.4	429.7	400.7	402.3	658.4	656.5	764.2	903.5	1,738.9	1,797.3
	(47%)	(50%)	(44%)	(37%)	(40%)	(39%)	(32%)	(23%)	(21%)	(13%)	(11%)	(11%)	(16%)	(15%)
—Timber	2.1	3.6	6.3	11.5	28.6	104.3	161.4	228.7	573.6	724.7	500.0	781.9	915.2	999.0
	(0.2%)	(0.5%)	(1.0%)	(1.5%)	(3.4%)	(9.4%)	(13%)	(13%)	(18%)	(10%)	(7%)	(9%)	(9%)	(9%)
—Petroleum & Products	172.0	203.4	239.6	297.5	382.9	446.3	477.9	913.1	1,608.7	5,211.4	5,310.8	6,004.1	7,297.8	7,438.5
	(38%)	(30%)	(41%)	(45%)	(46%)	(40%)	(39%)	(51%)	(50%)	(70%)	(75%)	(70%)	(67%)	(64%)
Sub-total														
Timber	274.1	207.0	245.9	309.0	411.5	550.6	639.3	1,141.8	2,182.3	5,946.1	5,810.8	6,786.0	8,249.0	8,435.5
Petroleum	(39%)	(30%)	(37%)	(40%)	(48%)	(50%)	(52%)	(64%)	(68%)	(80%)	(82%)	(79%)	(76%)	(72%)
Others	99.8	134.4	125.2	177.4	99.8	127.8	196.6	233.6	370.1	533.7	527.5	857.0	864.7	1,412.4
	(14%)	(20%)	(19%)	(23%)	(12%)	(12%)	(16%)	(13%)	(80%)	(7%)	(7%)	(10%)	(8%)	(12%)
TOTAL	707.7	678.7	770.7	853.7	1,108.1	1,236.6	1,777.7	3,210.8	7,426.3	7,102.5	7,102.5	8,546.5	10,852.6	11,643.2
	(100%)	(100%)	100%)	(100%)	(100%)	(100%)	(100%)	(100%)	(100&)	(100%)	(100%)	(100%)	(100%)	(100%)

Source: CENTRAL BUREAU OF STATISTICS, STATISTICAL POCKETBOOK OF INDONESIA, Jakarta (1971–2; 1974–5; and 1978–9).

were freed from central bank guidelines and banks were free to set their own interest rates for lending and borrowing.[10]

In hindsight, the excessively rapid liberalization of Indonesia's banking and financial sectors, which was not accompanied by appropriate preparation of the regulatory institutions to enable them to supervise the expanded banking and financial institutions, led to poor governance in the banking system. In 1997, the banking system collapsed. It did so not because of foreign competition, but because of inadequate preparation. Unfortunately, whatever its root causes, it led to skepticism toward liberalization in general.[11]

What this experience has shown is that it is important to undertake liberalization with a clear strategy and with appropriate sequencing. It has also shown that liberalization in one sector has an impact on other sectors. Therefore, a clear decision must be made on how to proceed with liberalization if it is to be sustainable. The crisis also tells us about the increasing importance of the WTO secretariat in dealing with financial services, an area that had not been covered by the GATT. For the first time the WTO Secretariat had to deal with ministries of finance and central banks.

Skillful explanations about the WTO commitments and the GATS by the WTO Secretariat to Indonesian Treasury and central bank officials, who had only recently become familiar with the WTO, averted hasty backtracking of WTO commitments in the financial crisis. Worries that government policy might be hampered by the GATS was alleviated because of the provisions in the GATS sectoral agreement on financial services that recognizes the governmental function in the financial sector, as well as the right of financial authorities to undertake any measure for prudential purposes "notwithstanding any provisions of the Agreement".[12]

This situation also highlights the fact that developments in international finance have increasingly become a domain of attention to be shared by three international institutions. The IMF keeps track of developments in so far as they affect the international monetary system. The Bank of International Settlement ("BIS") keeps track of issues dealing with prudential regulation and the stability of banking institutions. The WTO in turn deals with financial issues in connection with trade and trade liberalization in financial services.[13]

Through the reforms of the banking sector, the important message was given that the Indonesian economy will be increasingly forced to respond to market signals and that competition is to become increasingly the order of the day. The message was considered necessary to show that the policy of encouraging the growth of non-oil exports will be the avenue for economic growth, which had up to that time been excessively dependent on oil. In the process new sectors of exports emerged, in particular in manufacturing and processing. It became clear that Indonesia had experienced a gradual and unmistakable shift in its export composition.

[10] For a summary of the extensive reform of the banking sector, *see* the paper prepared by a team from the Economics and Statistics Department of Bank Indonesia, *Interest Rate after the Financial Deregulation in Indonesia: Some Key Policy Issues*, in SELECTED KEY POLICY ISSUES IN THE INDONESIAN ECONOMY, *supra* note 9, at 120–31.

[11] For a helpful discussion on sequencing liberalization of the financial sector *see* SEQUENCING? FINANCIAL STRATEGIES FOR DEVELOPING COUNTRIES 47–51 (Alison Hardwood and Bruce L. R. Smith, eds. 1997). Failure to understand the importance of sequencing led to the type of liberalization that created problems, which in turn impeded the prospects of continuing the process of reforms.

[12] *See* Paragraph 2(a) of the GATS Annex on Financial Services.

[13] The Services Division of the WTO Secretariat has reflected this awareness through its various papers. *See, e.g.*, OPENING MARKETS IN FINANCIAL SERVICES AND THE ROLE OF THE GATS (1997). Another institutional issue that needs to be resolved by the WTO Secretariat is how to maintain active relations with the monetary authorities, ministries of finance, and central banks, which are not accustomed to dealing with the WTO.

These events also tell us that if liberalization and deregulation are to take place on a sustained basis, it is important to carefully set the right pace and the right process. In the long run, continuity is more important than the one-stroke "big bang" approach, which may not be sustainable. Developing countries are right to resist being intimidated by pressures from important and powerful interest groups in major developed countries to undertake thoughtless market opening, without carefully ensuring continuity. Moreover, at each stage, a process of constituency building is needed in order to gain support for continuing reform.

C. A More Diversified Export Base

The reform undertaken in the 1980s to make the economy more competitive, export-oriented and less dependent on oil had succeeded. The dramatic shift in the pattern of export composition after the oil boom can be seen in Table 3. From the 1980s on Indonesia's export composition shifted from heavy dependence on primary commodities to manufacturing. From 1984 to 1999, the share of manufactured products in total exports dramatically increased from a mere ten percent in 1984 to 42 percent in 1999. By contrast, during the same period the share of primary commodities in Indonesia's total exports declined from 84 percent in 1984 to 43 percent in 1999.

Excluding fuels, the share of non-fuel primary commodities in total exports remained around twenty percent. Meanwhile, the share of fuels in total exports declined from a high of 72 percent in 1984 to twenty percent in 1999. The objective of reducing the dependence on fuels in exports and increasing the share of manufactured products has succeeded. Indonesia's exports have become more diversified.

This shift led to increasing attention being paid by the Indonesian authorities to GATT rules, because for the first time market access for manufactured and processed goods became a matter of concern. Tariff levels in the countries of destination became an important factor determining whether or not markets were accessible. Non-tariff measures applied to manufactured and processed goods (but not to primary commodities) became a serious concern. Anti-dumping proceedings against Indonesian exports became a new reality that had to be faced. It was therefore no surprise that Indonesia (and other ASEAN countries which also experienced similar transitions) became more active in the GATT, as demonstrated during the Uruguay Round negotiations.

IV. Evolving Indonesian Interface With GATT/WTO and the Decision-Making Mechanism

The evolution of Indonesia's trade structure led to different phases in the interface between Indonesia and the GATT/WTO system. This evolution was also reflected in the institutional structures in the Indonesian Government. The decision-making process in Indonesian trade policy has also evolved over time. The substantive coverage of the WTO, which has expanded the GATT rules to cover not only trade in goods, but also trade in services and intellectual property, also presents a challenge of coordination.

In the early years of Indonesia's membership in the GATT, the national institution that had been directly involved on a technical level with the GATT was the Ministry of Finance, more specifically the Agency for Customs and Excise, which in the 1950s was a part of the Directorate-General for Revenues. In the GATT Torquay Round (September 1950 to April 1951), which finalized the process of the entry of Indonesia to the GATT, the Indonesian Delegation was led by the Director-General for Revenues of the Ministry

Table 3: Indonesian Export by Primary and Non Primary Commodity Groups 1984–1999 (millions of US$)

	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
PRIMARY COMMODITY	19,537	17,134	11,925	12,643	13,280	13,970	16,266	16,792	17,587	17,204	19,230	22,417	23,167	24,194	19,063	20,913
Food and Beverages	1,592	1,853	2,011	2,054	2,612	2,649	2,849	3,250	3,456	3,971	5,091	5,174	4,580	6,079	5,515	5,719
Raw Materials	1,481	1,112	1,143	1,582	1,988	1,140	1,057	1,147	1,420	1,543	1,957	3,023	2,906	2,468	2,190	1,825
Natural Fertilizer, Metal Ores & other Mineral Materials	290	1,285	327	336	670	742	664	839	1,030	1,004	1,255	2,002	2,170	1,879	1,510	1,550
Fuel	15,683	12,378	8,097	8,259	7,467	8,760	11,241	11,172	11,275	10,390	10,522	11,507	12,845	13,116	9,221	11,099
Non Iron Metal	491	506	347	412	543	679	455	384	406	296	405	711	666	652	627	720
PRINCIPAL MANFACTURES	2,185	3,013	2,851	4,219	5,621	7,930	9,284	12,200	16,221	19,438	20,674	22,957	25,559	22,531	21,761	26,301
Iron & Steel	10	34	68	189	272	409	240	287	414	311	309	377	336	387	614	489
Chemical Materials	536	590	473	579	607	492	598	769	756	830	1,012	1,529	1,744	2,903	2,304	2,476
Semi Industrial Goods	855	1,018	1,253	2,173	2,699	3,721	3,409	3,617	4,295	4,927	4,617	4,270	4,481	4,178	2,771	3,575
Transportation Machinery & other Industrial Products	204	344	66	65	167	694	1,075	1,821	2,294	3,255	3,851	5,574	6,576	5,203	6,434	7,235
Textiles	200	240	307	469	680	838	1,240	1,754	2,836	2,637	2,498	2,713	2,834	2,257	2,360	3,020
Garments	296	339	522	596	797	1,170	1,651	2,266	3,165	3,501	3,206	3,376	3,591	2,903	2,630	3,857
Other Consumer Goods	84	448	162	148	399	606	1,071	1,686	2,461	3,977	5,181	5,118	5,997	4,822	1,600	5,649
UNCLASIFIED	164	31	29	275	318	259	125	150	159	179	147	45	88	6,718	8,023	1,451
TOTAL	21,886	20,178	14,805	17,137	19,219	22,159	25,675	29,142	33,967	36,821	40,051	45,419	48,814	53,443	48,847	48,665
Primary com. As % of Total Exports	(89%)	(85%)	(81%)	(74%)	(69%)	(63%)	(63%)	(57%)	(51%)	(47%)	(48%)	(49%)	(47%)	(45%)	(39%)	(43%)
Fuel as % of total exports	(72%)	(61%)	(55%)	(48%)	(39%)	(40%)	(44%)	(38%)	(33%)	(28%)	(26%)	(25%)	(26%)	(25%)	(19%)	(23%)
Non-fuel Primary com. As % of total exports	(18%)	(24%)	(25%)	(26%)	(30%)	(23%)	(19%)	(19%)	(18%)	(17%)	(22%)	(24%)	(21%)	(20%)	(20%)	(20%)
Principal Manufactures As % of total exports	(10%)	(15%)	(20%)	(25%)	(29%)	(36%)	(36%)	(42%)	(48%)	(53%)	(52%)	(51%)	(52%)	(42%)	(45%)	(54%)

Source: Central Bureau of Statistics, Jakarta.

of Finance.[14] In those early years, the main focus had been tariff negotiations. The agency that had been assigned by statute to deal with tariff issues was and still is the Ministry of Finance. Hence it was the Ministry of Finance that played the leading role in the GATT in those years. Moreover, the representative of the Customs Directorate-General held the position of the Ambassador to the GATT from 1974–78.[15]

In the 1970s, in the light of the negotiations in the Conference of International Economic Cooperation in Paris in 1976 and the negotiations under UNCTAD IV, trade policy and diplomacy were conducted under the direction of the Coordinating Minister for Economics, Finance and Industry who was also the Chairman of the National Planning Agency. Inter-agency coordination was made possible because of the high-level attention being paid to the trade negotiations in UNCTAD.

The task of coordination in dealing with commodity arrangements, both for negotiations and implementation, had been assigned to the Ministry of Trade. In practice, as the coordinating agency, it acted as the principal agency dealing with negotiations for some commodities, notably natural rubber, while specific negotiations in tin had been assigned to the Ministry of Mines. Theoretically, overall trade policy was to be the function of the Ministry of Trade, in UNCTAD, GATT and other fora. The task was simpler then, because in the pre-Uruguay Round days, only trade in goods had been covered by the GATT. Therefore, up to the end of the Uruguay Round in 1994, the Ministry of Trade functioned as the coordinating agency.

The Uruguay Round required the Government to deal with issues that went far beyond what had been traditionally the realm of trade, and extended to trade in services as well as trade-related intellectual property rights. Moreover, the negotiations were expected to take many years. The original timetable specified in the Punta del Este Declaration, which was the official mandate and guideline for the conduct and substantive coverage of the Uruguay Round, was that it would take four years, ending in 1990. In fact the Round lasted until December 1993, and ministers officially finalized the negotiations in April 1994.

The expectation that the negotiations would take a long time led to the need to organize the conduct of negotiations on behalf of the Indonesian Government in Geneva, as well as the mechanism for decision-making in the capital. A special Ambassador was appointed to the GATT to lead the Indonesian delegation for the round. When the Uruguay Round took longer to complete than the scheduled date of 1990, more elaborate machinery was put in place. Presidential Decree No. 47 of 1990 was issued to reorganize the conduct of the negotiations in a more systematic way while at the same time a system was devised to ensure better domestic coordination.[16]

The Minister of Trade chaired the Delegation to Geneva, with two cabinet rank junior ministers (an awkward but formal official title), the Junior Minister of Agriculture and Junior Minister of Industry as Vice-Chairmen. The Ambassador to the GATT was appointed as the Chief Negotiator, with the task of coordinating the country's position at the negotiating table. Members of the Delegation include several directors-general and

[14] Directorate General for Customs and Excise, Ministry of Finance of the Republic of Indonesia, 2 Pertumbuhan Dan Perkembangan Bea Dan Cukai Dari Masa Ke Masa 199 (1995).

[15] Directorate-General for Customs and Excise, Ministry of Finance of the Republic of Indonesia, Pertumbuhan Dan Perkembangan Bea Dan Cukai Dari Masa Ke Masa 88 (1995).

[16] *See* Presidential Decree No. 47 of 1990, Keputusan Presiden Republik Indonesia Nomor 47 Tahun 1990 Tentang Pembentukan Delegasi Republik Indonesia Untuk Tahap Akhir Perudiningan-Perundingan Perdagangan Multilateral Putaran Uruguay (1990).

other senior officials of key ministries. Country positions were developed in the capital with participation of the Ambassador.

In the current round, this mechanism needs to be revised into a more institutionalized mode, although it is not yet clear how this will be done in practice. Moreover, the coordination is more complex, not only because trade in services and intellectual property rights are now a part of the WTO, civil society also needs to be informed by the government of its intentions in a proactive manner. The new mechanism is more centered in the capital with a National Team designated by Presidential Decree, to be led by the Minister of Industry and Trade, and co-chaired by the Director General for Multilateral Trade Relations of the Ministry of Industry and Trade. The Presidential Decree also designated five Advisers to the National Team.[17]

V. Issues of Concern to Indonesia During the Uruguay Round

For the reasons mentioned above, the Uruguay Round negotiations became an important part of Indonesian public policy because the approach of encouraging the development of non-oil exports became an inherent part of the broader growth plan. Access to developed country markets became an area of increasing importance to Indonesia as the export structure gradually shifted to processing and manufacturing.

The Uruguay Round however, covered more than just trade in goods. The two new areas, trade in services and intellectual property rights, were not merely new in the context of the GATT system, but were completely new to developing countries. Indeed, they were even new to many developed country delegations from which the request for negotiations on these subjects originated.

The Punta del Este Declaration, which was the negotiating mandate for the Uruguay Round, called for the entire process of negotiations to be treated as a *single undertaking, i.e.* a complete package whose entire substance must be agreed upon. In dealing with the new issues of services and intellectual property rights, the decisive question for Indonesia as well as for many other developing countries, was how to find a balance between the "concessions" that developing countries were willing to make on those issues with the expected gains to be made in areas of interest to the developing countries.

A. Market Access in Goods

Liberalization and deregulation had begun to free the Indonesian economy of some (but by no means all) of its existing constraints and distortions. The first wave of liberalization and deregulation had led to the emergence of new processing and manufacturing sectors. A notable example was the emergence of textiles, plywood, and processed timber as important new export items. The development of these new sectors and other non-oil manufacturing sectors led to the awareness of the need to safeguard access to the main export markets in the developed world.

Despite the fact that tariff issues were the main focus of attention when Indonesia entered the GATT in the 1950s, Indonesia had not been actively engaged in tariff

[17] For the text of Presidential Decree No. 16 of 2002, *see* KEPUTUSAN PRESIDEN REPUBLIK INDONESIA NOMOR 16 TAHUN 2002 TENTANG PEMBENTUKAN TIM NASIONAL UNTUK PERUNDINGAN PERDAGANGAN MULTILATERAL DALAM KERANGKA *WORLD TRADE ORGANIZATION*, SEBAGAIMANA TELAH DIUBAH DENGAN KEPUTUSAN PRESIDEN NOMOR 18 TAHUN 2001 (2002).

negotiations since then. Market access was not principally a tariff issue as long as the country was an exporter of primary products. However, as the transition to manufacturing progressed, tariffs became important. In the process, significant progress in tariff binding and in lowering of tariffs occurred in the Uruguay Round.

When the Uruguay Round began, only a small percentage of Indonesia's tariff lines were bound. Moreover, there were many surcharges in addition to tariffs. The customs authority was also in the process of shifting to the Harmonized Tariff Nomenclature. When the Round was completed Indonesia complied with the agreed consensus that increased tariff binding was part of the commitment. By the end of the Round 95 percent of all of Indonesia's tariff-lines, representing 92 percent of total imports, were bound at forty percent. In accordance with the Agreement on Agriculture, all restrictions on agricultural imports have been converted to tariffs, with a commitment to reduce the average level by 24 percent within ten years, and a minimum reduction of ten percent on each specific item. Non-tariff barriers have been removed from these tariff lines. This has made Indonesia's tariff structure quite open.[18]

B. Services

It is worth noting that negotiations on services were conducted without a complete understanding of how the services economy worked. Even the data on trade in services was incomplete. Moreover, there were some conceptual problems in the economics of services that had to be clarified in greater detail. Independently, discussions among academics were conducted on these issues. Curiously, this effort had taken place as delegates negotiated the framework agreement that subsequently became the General Agreement on Trade in Services ("GATS"), which meant that for purposes of expediency, governments had decided to proceed with the negotiations even when the economics profession was still groping with how to deal with services intellectually. Countries were willing to proceed with the formulation of the general rules on trade in services before a full academic study on the economics and the statistics were completed. It would have been less curious if governments decided to proceed only after a full study.[19]

The fact that much progress was achieved in the formulation of the conceptual architecture of the framework agreement was due in no small measure to the willingness of developing countries to deal with the subject with an open mind. This was in contrast to the difficult process of negotiating the Textiles Agreement to phase out the Multi-Fibre Arrangement ("MFA"). Although the MFA was clearly inconsistent with GATT rules, its phase-out faced resistance from the developed countries. In textiles the developed countries proved to be less than flexible, to say the least. This inconsistency did not escape the notice of the developing countries. Indeed, part of the problem with implementation of the Uruguay Round Agreements has been the distrust on the part of the developing countries as to whether developed countries would honor their commitment to subject textiles fully to the GATT/WTO regime.[20]

[18] For a brief but complete summary of Indonesia's Uruguay Round Commitments, *see* USAID Trade Implementation and Policy Project Report, THE URUGUAY ROUND AND ITS BENEFITS TO INDONESIA (October 1994).

[19] *See* the symposium papers in SERVICES IN WORLD ECONOMIC GROWTH—SYMPOSIUM 1988 (Herbert Giersch ed. 1988).

[20] For an account of the negotiating history on textiles as seen from the viewpoint of the textile-exporting developing countries, *see* MARCELO RAFFAELI AND TRIPTI JENKINS, THE DRAFTING HISTORY OF THE AGREEMENT ON TEXTILES AND CLOTHING (1995), issued by the International Textiles and Clothing Bureau in Geneva.

After considerable reflection, developing countries felt comfortable enough to deal with trade in services when it was further spelled out how progressive liberalization was to be undertaken. Moreover, there are certain sectors where liberalization could help the development of developing countries, provided that the procedures are sufficiently amenable to "modulation". Foreign investment in telecommunications and financial services can help the modernization of the infrastructure of developing countries so long as the process is made gradual and developing countries undertake domestic arrangements that are suitable for their own needs.[21]

The two sectors in which Indonesia made considerable commitments were indeed in financial services and telecommunications. The authorities recognized the importance of more open and competitive financial and telecommunication services for the modernization of the economy. The central bank governors of Southeast Asian countries had coordinated their position on financial services in the Uruguay Round through the SEACEN (Southeast Asian Central Bank Association, headquartered in Malaysia) and had been fully briefed on the Indonesian position as a contribution to arriving at a coordinated position. The problem of bank supervision, which should have been more actively developed to accompany the liberalization, however, received less attention.[22]

C. Intellectual Property Rights

The problem with regard to intellectual property rights ("IPRs") was more complex. There is no fundamental reason why rules on IPRs should have been included in the WTO system. Some would argue that it has no place in the system. However, developing countries had agreed to negotiate IPRs in the Uruguay Round, knowing that developed countries felt strongly about the subject. This was primarily a political concession to developed counties, although developing countries had a certain amount of self-interest in accepting the agreement, since they recognized that strong national legislation on intellectual property might encourage foreign investors to come in with the kind of technology transfers that they would not be willing to make if effective intellectual property protection did not exist.

Nevertheless, developing countries had to face the problem of enforcement. Enforcing intellectual property rights is an expensive and complex endeavor, requiring new capabilities. Indonesia foresaw how difficult the problem of enforcement would be. Accordingly, during the negotiations, the Indonesian delegation repeatedly stressed the importance of technical assistance in developing the legal infrastructure as well as expertise in the relevant agencies including the courts. Indonesia also emphasized that difficulties faced by developing countries in implementing the TRIPS agreement should

[21] In the case of Indonesia, discussions with trading partners on financial services and telecommunications were more even-handed. Although it was recognized that there are wide differences of views in many aspects of the negotiations with the developed countries, there was a willingness to examine where mutual interests lay. In both sectors, the Indonesian government was less averse to liberalization and the presence of foreign service-providers. It was recognized that their presence were needed for the efficiency of the sectors.

[22] For a discussion on the Indonesian position on financial services, *see* H.S. KARTADJOEMENA, SERVICES AGREEMENT IN THE URUGUAY ROUND: A PRELIMINARY ASSESSMENT OF WHAT COULD BE EXPECTED BY SEACEN COUNTRIES, Keynote Speech by Ambassador H.S. Kartadjoemena on the Occasion of the SEACEN Central Bank Governors Conference, Jakarta, January 30, 1991 (on file with the author). Indonesia's negotiations in telecommunications was ably led by the Secretary-General of the Ministry of Tourism, Post and Telecommunications, Jonathan Parapak.

be considered as a situation requiring technical assistance rather than the basis for a trade dispute.[23]

D. Strengthening GATT Rules

There are some converging as well as diverging interests between developing countries and developed countries with respect to the improving and strengthening of GATT rules. For most countries except for the very large and powerful, loose rules are susceptible to abuse. These countries have a common interest in strengthening the rules.

In the case of anti-dumping, those developing countries that are exporters of manufactured goods are often targeted for anti-dumping measures by developed countries. Significant lowering of tariffs in manufactured products led to the increasing use of other means to restrain imports, most commonly anti-dumping measures. Unlike safeguard measures, as provided for in GATT Article XIX and the Uruguay Round Agreement on Safeguards, which require MFN treatment, anti-dumping proceedings can be targeted at specific countries and specific exporters. In view of the increasing share of manufactures in Indonesia's exports, Indonesia became more interested in dealing with anti-dumping issues.

Developing countries have argued for the tightening of the rules on anti-dumping procedures, while developed countries would like to have a freer hand in instituting anti-dumping measures. However, following the Uruguay Round, developing countries have developed their own anti-dumping legislation, procedures and administrative machinery, and have begun to impose anti-dumping measures.[24] Ironically, officials in charge of this new machinery have come to understand the utility of anti-dumping measures, and have learnt a great deal about their effective use from their counterparts in developed countries. This is also the case with Indonesia.

Many developing countries also feel strongly about the rules on measures to safeguard balance of payments. It has become axiomatic among policy makers in some developing countries that developing countries are prone to face perennial balance of payments difficulties and that shortage of foreign exchange is a cause for concern. Accordingly, there has been a strong desire to retain the right of developing countries to resort to import restrictions when they face balance of payments problems. Given the perennial nature of balance of payments problems in developing countries, they would normally like to have flexibility in the application of emergency trade measures to face balance of payments problems. The developing countries therefore consider the existing rules (GATT Article XVIII) to be appropriate, while the developed countries insist on more discipline. The outcome of the Uruguay Round negotiations is that resort to Article XVIII has been tightened through the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994.

[23] In this connection, it should be noted that two governments, Australia and Japan, have extended technical assistance for capacity building in intellectual property rights to Indonesia. Moreover, the Directorate- General for Intellection Property Rights of the Ministry of Justice and Human Rights, especially the Directorate for Patents, has been considerably strengthened since the Uruguay Round.

[24] Indonesia has developed its own anti-dumping rules and machinery. Government Regulation No. 34 of 1996 has been issued to establish the regulatory framework for the imposition of anti-dumping and countervailing duties. *See* Government Decree No. 34 of 1996, PERATURAN PEMERINTAH REPUBLIK INDONESIA NOMOR 34 TAHUN 1996 TENTANG BEA MASUK ANTI DUMPING DAN BEA MASUK IMBALAN (1996). The institutional machinery has been established through a decree by the Minister of Industry and Trade No. 136/MPP/Kep/6/1996. *See* KEPUTUSAN MENTERI PERINDUSTRIAN DAN PERDAGANGAN REPUBLIK INDONESIA NOMOR 136/MPP/Kep/6/1996 TENTANG KOMITE ANTI DUMPING INDONESIA (1996).

By contrast, many developing countries found it easier to accept the tightening of the rules on subsidies because budgetary constraints would in any case make it difficult for them to resort extensively to such measures. This issue was more critical for countries that could afford to be engaged in a subsidies war. However, developing countries have a keen interest in tightening the rules on subsidies in the developed countries, especially with respect to agriculture, which hamper the ability of developing countries to export agricultural products to the developed countries. Sometimes export subsidies even make it difficult for them to compete in other developing countries and even in their own markets.

E. Institutional Issues

The Uruguay Round also made a significant breakthrough in the institutional sense. For the first time a full-fledged international organization has been created in the field of trade. Unlike its predecessor the GATT, the WTO is an international organization with full international personality and not merely an interim institution. With its new status as an international organization, it stands on a par with the IMF and the World Bank, although it is nowhere near the two Bretton Woods institutions in terms of financial resources.

Some of the consequences connected with these institutional developments are obvious while others are more subtle but not less important. The more obvious consequence is that the WTO itself is a larger organization than GATT with a much wider range of substantive coverage. The first consequence of this organizational expansion is the need for expansion of the Secretariat staff. The GATT Contracting Parties were quite parsimonious about staff expansion.

The broader coverage of the WTO has also a direct implication on the conduct of and the machinery for trade policy in developing countries. The WTO agreements have increasingly affected domestic policy far beyond the cross-border transactions that were the focus of the GATT. Certain domestic policies are covered by the agreements and notifications are required in a number of areas. Interactions with the WTO will therefore expand. The number of national institutions that interact with the WTO has also expanded. In Indonesia, GATT-related issues had been handled almost exclusively by the Ministry of Trade, with the Ministry of Finance dealing with tariffs. During and after the Uruguay Round, the Ministries of Agriculture, Tourism, Communications, Justice, the Central Bank and others agencies suddenly had to be actively involved as well.

This requires adjustments in the conduct of domestic policy-making as well as an increase in the personnel expert on WTO-related issues. Agencies that previously had nothing much to do with the WTO suddenly had to interact more actively in areas of their concern because of the expanded substantive coverage of the WTO. In Indonesia, the process of review under the WTO Trade Policy Review Mechanism ("TPRM"), for example, had forced government agencies to coordinate in the formulating and writing of national reports on overall trade policy and to explain the policy to other WTO Members. Because the TPRM report must also cover the broader aspects of macro-economic policy, inevitably the Ministry of Finance, the Central Bank and the National Planning Agency had to be actively engaged in the process.

F. Special and Differential Treatment

Developing countries have stressed the importance of special and differential treatment ("S&DT") for themselves. Indonesia generally shares this concern and has participated

in initiatives in this area. In the Uruguay Round, developing countries wanted to ensure that special provisions for developing countries were not confined to the type of best-endeavor clauses contained in Part IV of the GATT, which imposed no specific operational obligations, and the infant industry clause in GATT Article XVIII, which has limited application. Instead the developing countries sought more explicit S&DT obligations throughout the Uruguay Round agreements.[25]

This objective was formally achieved to the extent that all the Uruguay Round agreements contain specific provisions calling for special treatment for developing countries. These fall into two categories: (a) the level of the reduction of barriers to market access is less for developing than for developed countries; (b) developing countries are given more time for implementation of specific measures. Moreover, in various Uruguay Round agreements, there are also provisions on technical assistance to developing countries. Indonesia has been particularly eager to obtain technical assistance.

Developing countries may regard many of the explicit provisions to be inadequate. But the objective of creating differential treatment between developed and developing countries had been formally achieved even if the results are not satisfactory to developing countries. In the new round, Indonesia and other developing countries need to take a second look at how to proceed with the idea of S&DT. Some long-term thinking is needed. We shall turn to this subject further below.

VI. Issues of Concern for Indonesia in the Multilateral Round

The new WTO round of multilateral trade negotiations launched in Doha is the first round in the 21st century and the first round to be organized by GATT's successor organization, the WTO. This time around, the developing East Asian and Southeast Asian countries, including Indonesia, are unlikely to be as enthusiastic about engaging in extensive negotiations on trade liberalization and rule-making as they were during the Uruguay Round. The current economic crisis and its political and social consequences have preoccupied most governments in those regions.

However, notwithstanding Indonesia's current preoccupation with the crisis, sooner or later a round of multilateral negotiations must be undertaken because the system inherently requires periodic negotiating rounds. More specifically, there are explicit provisions in various Uruguay Round agreements which require that Members of the WTO revisit certain issues for further negotiations. Some agreements are explicit about when such negotiations must be undertaken, such as agriculture and services. The bottom line is that unless WTO Members collectively choose to renounce their WTO obligations, the system requires negotiations to be conducted sooner or later.

On the whole one can say that the Doha round will be conducted under more complex circumstances and with a far greater divergence of views than was the case during the Uruguay Round. The Doha Ministerial Conference on November 2001 produced three separate but interlinking documents that are intended to provide the mandate for a new round of multilateral trade negotiations. The documents are the *Ministerial Declaration*, the *Declaration on the TRIPS Agreement and Public Health*, and *Implementation-Related Issues and Concerns.*[26] Together they provide the necessary political balance that made

[25] For a discussion on the GATT jurisprudence of special and differential treatment, *see* JOHN H. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 1108 (1995).

[26] *See* the Doha Ministerial documents, *Ministerial Declaration* (November 14, 2001), Doc. WT/MIN/

it possible for governments of developing countries to agree to negotiate in a new round. The negotiations cover a wide range of substantive issues.

Indeed, while there are reasons for narrowing the scope of substantive coverage for negotiations in the next round, there are also strong arguments not to narrow it to such an extent as to make it unattractive to many WTO Members. The size of membership of the WTO has expanded compared with the early days of GATT. With expanded membership the interests of Members also vary considerably. If the agenda for negotiations does not cover a wide enough range of subjects, there will be less support for the round. On the other hand if the agenda is too wide there is a risk that negotiations might not be concluded.

Most developing countries have difficulties with the obligations on trade-related intellectual property rights, the TRIPS agreement, whose obligations are onerous. The TRIPs agreement raises concerns among developing countries with regard to public health. The TRIPS and Public Health Declaration reaffirms the right of developing countries to take measures necessary to ensure public health. The Doha *Declaration on the TRIPS Agreement and Public Health*, while containing no operational provisions with respect to the negotiations, has alleviated some of the sense of imbalance in the TRIPS agreement and allowed greater flexibility for health authorities to deal with intellectual property issues when confronted with major health-related problems.

A. A New Dimension: The Emergence of NGOs

The ongoing WTO round of negotiations will be a round in which civil society will demand the right to participate. The NGO demonstrations during the December 1999 Seattle Ministerial Meeting had shown that public scrutiny is to be expected and that therefore better dialogue and transparency is needed. The violence however was somewhat unexpected. This complexity requires that officialdom take a different approach and become more open to public discussion of policy issues. This may be difficult to do because of the propensity of many bureaucracies to be unnecessarily secretive in the conduct of their business.

Most NGOs active in WTO issues originate in developed countries. They are the most mobile and well-financed. Their focus varies enormously. So do their motives and methods, and, therefore, the way they choose to operate. It is therefore not always easy to accommodate one group in a way that will satisfy the others. What appears clear is that the most vocal of the NGOs have been those who are opposed to the process of globalization at all cost.

There are however also NGOs that do not oppose the multilateral system. However, they wish to stress some aspects of trade that need to be accommodated. The fact that these NGOs have not been much helped in dealing with their concerns may signal that proponents of the multilateral system and their governments have not done their work well enough in ensuring adequate and balanced public participation. In Indonesia, the consumer groups need to be given more attention by the officials. In defending the interest of consumers they must be vigilant to prevent excessive protection designed merely to protect inefficient producers.

(OI)DEC/W/1; *Declaration on the Trips Agreement and Public Health* (November 14, 2001), Doc. WT/MIN/(01)/DEC/W2; and *Implementation-Related Issues and Concerns* (November 14, 2001), Doc. WT/MIN/(01)/W/10, all reproduced in the Appendix to this book.

For those in developing countries, both their governments and NGOs, special attention is needed to ensure that other people do not arrogate their right to speak on their behalf without their consent. Unfortunately, there is a risk that developing countries will find their NGOs mimicking the arguments of NGOs from developed countries. It is important to ensure that what is being argued serves the interests of developing countries. A case in point is in the threat of applying trade sanctions against countries that do not have the same labor standards as developed countries. Although this might suit the interest of established and powerful labor unions in developed countries, it is likely to be disastrous to employment prospects in developing countries. In the new round Indonesia needs to develop a dialogue with civil society to better explain the issues in the WTO.

B. Existing Obligations: Implementation Issues

Given the complexity of the political as well as the technical process to prepare for the current round of negotiations, it is important that governments and the interested public endeavor to group the issues into manageable parts. There is a genuine feeling among many developing countries that they are in reality not quite ready to go through yet another complex round when implementation of the Uruguay Round Agreements is still in progress. Although this may not be sufficient reason to refrain from proceeding with the negotiations, the problem must not be dismissed as irrelevant because it is real.

Addressing the issue directly would help to build confidence where it is now lacking. For many developing countries, including Indonesia, part of the answer lies in developing a credible answer to the question of capacity building to deal with the WTO. While Members of the WTO discuss how to proceed with the ongoing round, efforts to deal with capacity building must also continue independently of the negotiating round. The Doha ministerial document *Implementation-Related Issues and Concerns* attempts to address the concern of developing countries about implementation of the Uruguay Round as they proceed with the new round. The numerous references to capacity building and technical assistance attempt to deal with implementation issues faced by developing countries.

C. New Issues

Two sets of "new" issues are being advanced by developed countries namely: (a) new *economic issues*, i.e., investment and competition policy; and (b) new *non-economic issues*, namely trade- related environmental and labor standards. In the eyes of developing countries, these are highly controversial issues. Tying these issues to trade would, in the eyes of developing countries, become highly disadvantageous to them. Let us examine the issues further.

Developing countries are uneasy about the *new economic issues* of investment and competition policy because of the complex nature of those subjects and the fear that new international rules would be utilized against the interests of developing countries in their pursuit of broader development objectives. This fear is not groundless. Politically, no government of a developing country would be comforted by the existence of international agreements in new areas that could constrain them in pursuing policies which they regard as vital for their development goals.

Developing countries cannot be sure that the specific content of international agreements in those two areas would be compatible with their development goals and domestic

realities as they see them. Faced by the uncertainty on what position to take on those issues and unsure of how to strike a balance, it seems logical not to engage in any official discussion that could lead to negotiations before they are ready.

1. Investment

For Indonesia, which in the past has been a beneficiary of foreign investment, there are difficult choices to be made. On the one hand, it cannot be said that Indonesia is hostile to foreign investment. In fact it has been searching for a way to continue to attract FDI. The question is even more urgent because foreign investment is needed to recover from the current crisis. However, there are two aspects of developing an international agreement on investment that appear worrisome. At the broader level, concepts such as the right of establishment, are alien to a country sensitive about the notion of sovereignty. Establishment, from the national perspective, is a privilege, which, though contractually bound once granted, remains a privilege granted by government. To reverse the concept by making it a right would be viewed as an infringement of the notion of sovereignty, not politically easy to accept.[27]

Secondly, international obligations on investment, to be administered by an international organization in charge of trade, would be perceived as a "threat" because governments do not make policy decisions on investment on the basis of trade considerations alone. In fact, trade considerations may be only a secondary aspect in many investment policy decisions. Therefore, an international agreement administered by a trade organization would threaten to subject investment decisions overwhelmingly to trade considerations. Given these two factors alone, it would appear to be difficult for Indonesia to subscribe to the idea of an agreement on investment.

2. Competition Policy

The area of competition policy is even more uncertain conceptually for many developing countries including Indonesia. The subject is quite new. On the one hand, Indonesia has taken steps to establish its own anti-monopoly legislation modeled after the various agencies in developed countries.[28] However, this is a recent development, and there is as yet insufficient experience in dealing with the subject domestically.

Moreover, conceptually, establishing an anti-trust type of legislation and agency is only one aspect of competition policy, and arguably a limited one. Competition policy can be summarized as the search to ensure that market distortions that lead to inefficiency are eliminated. Anti-competitive behavior by corporate entities is not the only source of distortion. Government actions can also lead to market distortions. Thus competition policy in a full sense would be a policy that is established to limit the distortions to the economy emanating both from the corporate side and the government.[29] The kind of agency that would be able to address such problems is the Australian Productivity

[27] An attempt to deal with Indonesian investment issues related to the WTO was initiated with prominent lawyers in 1995 to develop a coherent approach for dealing with foreign investment and the broader policy implications for Indonesia. *See* the volume of publication of discussion papers by Bank Indonesia, REZIM INVESTASI DI INDONESIA DALAM KAITANNYA DENGAN PERJANJIAN HASIL URUGUAY ROUND 1–234 (H.S. Kartadjoemena ed. 1995).

[28] *See* Law No. 3 of 1999. *See* UNDANG-UNDANG REPUBLIK INDONESIA NO. 5 TAHUN 1999.

[29] For an attempt to approach competition policy within a broader framework beyond the establishment of anti-trust legislation in order to develop a competition-driven public policy has been proposed by an APEC-PECC study group, *see* KERRIN VAUTIER, PECC PRINCIPLES FOR GUIDING THE DEVELOPMENT OF A COMPETITION-DRIVEN FRAMEWORK FOR APEC ECONOMIES (1999).

Commission.[30] Such an agency would evaluate the impact of a measure and an action on the economy and the cost to society. Which aspect is Indonesia's main concern? The answer is not yet clear. It is difficult to deal with the issue internationally, if it is not yet clear domestically.

3. Linkage between Trade, Investment and Competition Policy

The fact that developing countries do not wish to deal with investment and competition policy issues in the WTO at present, specifically in the form of new international agreements to be administered by the WTO, does not mean that those issues are not important to developing countries on their own merits. Calm analysis of the issues is needed for a more complete domestic policy evaluation, even if there is no intention to negotiate the issue internationally in the WTO. At present, the issues have been pitched at such an emotional level that a serious discussion, with all the facts on the table, needs to be undertaken at the national level before proceeding to an international negotiation.[31]

Developing countries may wish to consider an approach that would allow them to deal more systematically with the interface between trade, investment and competition policy. On the one hand, there are intellectually strong arguments to show that there are increasing links between trade, investment and competition policy. The denial of these links by developing countries as a basis for rejecting negotiations on an international agreement for investment and competition policy is weak. More politically valid and therefore legitimate reasons should be offered for rejection. The developing countries should state clearly that they are not politically ready to internationalize their investment and competition policy rules.

The inter-linkages can be summarized through a simple syllogism. First, internationalization of production has led to many companies producing components in different locations. When the components are assembled into a final product for marketing, the companies are engaged in intra-corporate purchases crossing many national frontiers. These activities are trade activities. But they are also investment activities. Therefore, trade and investment activities are linked. Second, when corporate entities engage in investment activities, and attain a certain size, they affect the structure and competitive situation in markets. This is a question of competition policy. Therefore investment and competition policy are linked. By conclusion, if trade and investment are closely connected, and investment and competition policy are also connected, then there are close links between trade, investment and competition policy. Therefore, intellectually it is difficult to deny the existence of a close link between these three issues.[32]

The fact that trade, investment, and competition policy are interlinked does not necessarily lead to the conclusion that international agreements on investment and competition policy, as proposed by some developed countries, are needed. For the time being the developing countries may wish to remain agnostic on the point. Moreover, even if, after

[30] For a description of the function of the Australian Productivity Commission, *see* its website, http://www.pc.gov.au.

[31] The policy implications on Indonesia of these issues are discussed in a monograph published by the Indonesia Forum in Jakarta. *See* H.S. KARTADJOEMENA, ASPEK INTERNASIONAL DARI MASALAH COMPETITION POLICY: MENGHADAPI PERUNDINGAN WTO TAHUN 2000 1–47 (1999).

[32] The use of syllogism as a simplifying argument to illustrate the interconnection between trade, investment and competition policy is borrowed from Mark A. A. Warner, *Private and Public Restraint on Trade: Effects on Investment Decision and Policy Approaches to Them*, in MARKET ACCESS AFTER THE URUGUAY ROUND: INVESTMENT, COMPETITION AND TECHNOLOGY PERSPECTIVE 123 (OECD 1996).

further consideration, developing countries conclude that international agreements are needed, it does not necessarily mean that the WTO is the appropriate forum for those agreements. Developing countries need to be agnostic on that issue as well.

4. Non-economic Issues

On the question of the two non-economic issues of environment and labor standards, there are different approaches to be considered. There are common interests between developing and developed countries with respect to environmental issues. Developing countries do however need to beware of protectionist free riders that would use environmental rules as a pretext for protectionism. Some NGOs are easy and sometimes willing collaborators for this type of activity. A different set of coalitions needs to be constructed between free traders and environmentalists and between developing countries and developed countries. Moreover, Indonesia and other developing countries should be vigilant to prevent the WTO from being used as an enforcement agency for environmental policy.

Developing countries need to reject outright any discussion of labor standards in the WTO. At the same time more active participation in the ILO is needed to ensure that the debate in that forum is meaningful from the point of view of developing countries. The attempt to include labor standards in the WTO is a pretext by labor unions in developed countries to limit trade with developing countries on the basis that wages are lower in developing countries. That is the argument that was used to restrict exports from Japan in the 1930s that contributed to the climate of hostility. This does not mean that developing countries can afford to be relaxed about dealing with major improvements in labor standards. Nevertheless, the WTO is not the place to deal with them.

D. Technical and Trade Facilitation Rules

In the area of trade facilitation rules—which we shall define broadly to be those technical rules which are needed to ensure that trade flows unhampered—there has been increased interest and greater readiness to negotiate on the part of developing countries. However, these rules, when inappropriately applied, could become disguised measures for protection. On the other hand these rules reflect the increasing technical nature of international trade, especially in manufactured products. In many of its aspects, this is associated with the process of modernization of manufacturing.

In this area there are convergences of interest between developed and developing countries. There is however, a divergence in views on the speed of implementation. A much more intensified technical assistance program is needed. Indonesia's attention to this aspect of the GATT rules was not extensive in the Uruguay Round. But the Round provided the opportunity to deal with the subject because these rules become more important for Indonesia as it continues to expand its exports of processed and manufactured goods.

A new set of technical rules had been agreed upon in the Uruguay Round. A companion set of rules on sanitary and phytosanitary measures was formulated in the context of the negotiations on agriculture. An agreement was reached to ensure that sanitary and phytosanitary measures that are needed for the health and safety of the public do not unduly impede the flow of trade. This new set of rules has administrative and budgetary implications both with respect to equipment and for the development of expertise.

These trade facilitation rules are part and parcel of a modern economy. Developing countries have so far largely ignored the technical and trade facilitation rules in their

Table 4: Factors Leading to Increasing Developing Countries' Attention to WTO Technical Facilitation Rules

Domestic	Regional	WTO
—Greater export diversification. More processed and manufactured products. Exports must meet international standards. More attention to, technical, health, customs requirements. —Greater import diversification. More sophisticated imports. Customs verifications, technical standards, valuations, rules of origin, must be applied in conformity to WTO rules. —More sophisticated domestic public. Greater concern for health and safety rules for imports. —Modernization of economic activities requires better rules and better administration. —Pressure for good state and corporate governance to meet international standards on many practices, including technical matters non-trade areas, e.g. accountancy, surveillance, banking and financial prudential regulation. —Technical trade rules upgrading becomes part of modernization as well as good governance reform.	— Increase cooperation among governments in the context of regional trade arrangements. —More trade liberalization leading to free trade area and customs union. Require a whole new aspect in technical rules to implement FTA related to customs, technical and health standards. —In East and Southeast Asia, there are more private-sector driven interdependence and pressure for liberalization. Transparent technical rules are needed. —Pressure for harmonization of practices and greater standardization of technical rules. —Greater incentive to take steps to be in full conformity with WTO rules. —Private-sector-driven liberalization would also emphasize liberalization and harmonization in investment rules.	—Acceptance by developing countries that WTO rules are needed. —Immediate compliance difficult. *Transition* is needed. —Sequence of full-compliance depends on pressure of urgency. Pressure comes from *domestic modernization* and *good governance* as well as regional integration. —Serious *technical assistance* is needed for full implementation of the WTO technical rules. —Technical assistance from programmed and staged implementation must be a part of an overall *capacity-building* exercise to assist developing countries in the implementation of all WTO commitments. —This should be made a part of a *confidence-building* measure for the work towards a balanced agenda of a new round.

dealing with the WTO. In the current round efforts need to be made in this area simply because it is part of the process of modernization, and indeed, part of improving state governance. Accordingly international funding agencies such as the World Bank and the Asian Development Bank should be more involved in providing technical assistance, since the WTO's resources are so limited in this respect. Table 4 summarizes the issues to be dealt with. This area needs to be stressed during the current round of multilateral negotiations.

E. Revisiting Special and Differential Treatment

Developing countries have reason to be concerned about Special and Differential Treatment ("S&DT") for developing countries. It would be inappropriate and unbalanced to belittle the subject simply because it is only of concern to developing countries. On the other hand it may be sterile to remain fixed within the context of simply seeking exceptions. Although the prospects of taking the subject out of the current straight-jacket are limited, some thinking needs to be devoted to the longer-term modification of the approach to it.

Efforts had been devoted in the Uruguay Round to deal with the question in a manner that would not be limited to the non-enforceable "best endeavors" approach of Part IV of the GATT 1994 and the similarly inoperative infant industry provisions of Article XVIII. To some extent, the negotiations in the Uruguay Round have dealt with the problem. Many of the agreements contain operating clauses that accord differential and more favorable treatment to developing countries. Whether or not they are satisfactory depends on the purpose of the S&DT clauses.

In this new round Indonesia and other developing countries are likely to pay more attention to this issue. Although major changes in the approach to S&DT are unlikely in the current round, it is nevertheless important to take a closer look at the premises of S&DT, its relationship to the development process, and whether or not current arrangements would in fact assist developing countries to develop. There is a need to reassess what the S&DT provision should accomplish in the system in the long run. To do so there must be greater clarity about the need for S&DT and what is expected of the trading system concerning broader development goals.

If the S&DT provisions are needed to lessen the full burden of GATT/WTO obligations, then they are merely a transitional arrangement. But to focus on lengthening the transition period is to deal with the peripheral rather than the core issue of development. Moreover, developing countries are unlikely to gain significant impetus for their development simply by the existence of S&DT provisions. It is not argued that developing countries should abandon existing acquired rights under the S&DT provisions. After all, developing countries are not the only beneficiaries of S&DT arrangements. The Multi-Fibre Agreement was a form of S&DT treatment for developed countries. It has taken decades to even begin to dismantle such an anomaly. But one needs to go beyond this level of debate.

What is needed is an approach that is both closer to the core of development issues and acknowledges the limits beyond which S&DT alone cannot go to resolve development problems. Put simplistically, development problems relate to change. And change is fundamentally a question of structural adjustment. And structural adjustments have costs. In a national economy, adjustment costs are shared by society. In the current multilateral system, only those making the adjustments pay for the cost while the beneficiaries are the rest of the world. Hence there is often an incentive to delay.

Which side of the argument Indonesia will take depends on whether its focus is on structural adjustment and enhancing competitiveness, in which case it will opt for a more dynamic S&DT, or on defending existing industries, in which case it will ask for expansion of the current system. Nevertheless, given the impact of the current crisis, it is probably more likely that domestic pressures would lead to a tilt towards the expansion of the current system. It should therefore be of no surprise if Indonesia continues to support many initiatives in the area of enlarging the S&DT provisions, pending a solution to the problem.

To make S&DT provisions more responsive to the needs of developing countries, they must somehow be linked to incentives for structural adjustment. For reason of fairness, these costs must be seen to be shared by the beneficiaries of change, as well as by the losers. The choice is between more international assistance and incentives to structural adjustment or the adamant insistence to delay structural change through S&DT. If there is less incentive to take on the burden of structural adjustment, then there will be more reliance on S&DT.

This raises the fundamental issues of institutional reform of international agencies. The Uruguay Round did in part try to address some of these issues. It did so under a cryptically-described item of "functioning of the GATT system" ("FOGS") and increasing cooperation among international institutions to achieve "greater international policy coherence". It is argued that greater coordination is needed between the WTO, the IMF and the World Bank, to achieve better management of the world economy. This has operational relevance to S&DT. The agencies with the resources to assist structural adjustment are the Bretton Woods institutions, while S&DT is a WTO issue.

At the moment there is a reluctance to allow the WTO, the IMF and the World Bank to coordinate their policies too closely. Developing countries, including Indonesia, worry about the exercise of *cross-conditionality*, under which domestic reform would be imposed by the full weight of pressure from the IMF, the World Bank and the WTO, as well as from major developed countries. But to evade the question of structural adjustment assistance in relation to S&DT is to evade the powerful logic that developing countries fundamentally need some S&DT that addresses the question of adjustment. At a certain point this issue must be faced.

VII. Multilateralism versus Regionalism

Regional trading arrangements, regional free trade areas ("FTAs"), and even trans-regional free trade areas (e.g. the U.S./Israel Free Trade Area) are burgeoning. Whether or not FTAs are detrimental to the multilateral system is an extremely controversial issue. The conventional answer is to refer to Article XXIV of GATT 1994 and Article V of the General Agreement on Trade in Services ("GATS"), which allow free trade areas and customs unions among members in derogation of the MFN principle so long as certain conditions are met.[33]

Indonesia is currently engaged in various groupings which have different objectives. In Southeast Asia, Indonesia is currently proceeding with the creation of a free trade area among the countries of ASEAN (Association of Southeast Asian Nations),with extensive binding commitments. This is a "classical" form of regional economic grouping, loosely modeled after the European Economic Community (before it became the more extensive EU) and the Benelux countries.

Within the broader context of the Pacific region, Indonesia is also a member of APEC (Asia Pacific Economic Cooperation), which professes to practice "open regionalism" but whose scope has yet to be defined. What is clear, however, is that undertakings under APEC are voluntary. However, this does not mean that initiatives in APEC could not subsequently become binding commitments after negotiations in another forum. For

[33] *See* Chapters 5, 19 and 46 of this book. For the GATT jurisprudence on regional free trade area see the section on *Article XXIV: Territorial Application—Frontier Traffic—Customs Union and Free Trade Areas* in 2 Analytical Index: Guide to GATT Law and Practice 789–847 (1995).

example, discussion on the liberalization of trade in information technology in APEC led to the Information Technology Agreement concluded under the auspices of the WTO.

Regional economic cooperation in ASEAN has led to the proposed creation of an ASEAN Free Trade Area ("AFTA"), which is supposed to be operational by 2003. AFTA would cover both trade in goods and trade in services. Given the trade patterns of most of the members of ASEAN, whose volume of trade with the rest of the world is greater than their intra-ASEAN trade, it is legitimate to ask whether the countries see the free trade area as a substitute for or a supplement to multilateral trade. The answer is clearly that intra-regional trade is a supplement to international trade.

In this connection, it is therefore relevant to go one step further and examine how Indonesia might approach the process of regional economic integration of ASEAN within the context of its own set of interests. Assuming that Indonesia would wish to continue to be a part of the multilateral system, from which it has profited, membership in the WTO and expanding trade through the multilateral trading system would be a principal objective. How does the policy of creating a regional trade area square with this global policy? A combination of political and economic considerations is needed to offer a coherent answer.[34]

Unlike the EEC, an entity which eventually became a more powerful and extensive system of European integration in the fullest sense, the European Union, whose *economic* goals were a prelude to a *political* objective (because political peace among Europeans in a post-war world was only possible by creating economic interdependence), ASEAN was a successful regional *political* institution which needed to be strengthened by adding an *economic* element to the successful political process. The fact that AFTA was needed politically to send a strong message that the region intends to proceed with all possible means of strengthening regional interdependence is a good political argument for an FTA. But it needed to be supplemented by a stronger economic argument as well.[35]

The quasi-economic argument for AFTA is that closer interdependence among ASEAN countries could be expected as a result of the behavior of enterprises in the region. As the structure of the national economies evolves towards a greater amount of processing and manufacturing, and as countries reduce tariff levels and liberalize their investment regimes, corporate entities would begin to see the region as a single market for their products. The mechanism that would trigger the move towards greater integration would be the increase in inter-corporate and intra-corporate purchases of affiliated companies operating in the region and pursuing a regional approach in their production and marketing strategies. The finger that pulls the trigger is the implementation of a free trade agreement.[36]

In the meantime, the regional free trade area could act as an insurance policy at three levels. To the extent that Indonesia's trading partners are dispersed globally, the first level of security is to ensure that the world trading system remains open, with fair and predictable rules. For that purpose the WTO remains the primary focus. Should the multilateral trading system begin to falter, APEC would be the second level of insurance.

[34] The author has tried to analyze the argument of multilateralism vs. regionalism in the context of ASEAN. *See* H.S. Kartadjoemena, *ASEAN and the International Trading System: Regional Trade Arrangement vs. the WTO*, in ASEAN BEYOND THE REGIONAL CRISIS: CHALLENGES AND INITIATIVES (Mya Than ed. 2000).

[35] *See* Kartadjoemena, *supra* note 34, at 226–7.

[36] *Id*. at 222–6.

With the presence of major trading countries in APEC, including three of the four Quad countries (the United States, Japan and Canada) and China, initiatives could be taken to reverse backsliding in the multilateral system. Should APEC fail, then ASEAN could be the last insurance policy to enable Indonesia to be engaged in *some* trade, even if the rest of the world becomes closed.[37]

The obstacle to starting the process of negotiating AFTA is the seriousness of the current crisis, which has made governments reluctant to take the bold step of subjecting important sectors to the more open competition that a free trade area implies. But to shy away again from the efforts to establish an ASEAN FTA would send a pessimistic signal about the prospects of growth in the region, especially seen from the perspective of much-needed foreign investment.

VIII. The Quest for Balance and Systemic Coherence: Future Prospects

Indonesia has profited from the open world trading system. The record of export performance in the non-oil sectors from the mid-1980s to the mid-1990s shows that provided that concrete steps are taken domestically to make the economy more responsive to market signals and more competitive internationally, the open world trading environment can provide Indonesia with the markets that are necessary for a trade-based development strategy. It would be inconsistent for Indonesia not to have a view about systemic issues from its own national perspective.

There were many things wrong with the domestic policy environment that made Indonesia unable to deal effectively with the recent financial crisis. However, it is clear that it was not the open global system that caused the crisis. Indeed, international assistance is vital for a speedy recovery from the crisis. But it is the political resolve to implement appropriate domestic policies that will be the most decisive factor in extricating the country from the crisis. However, once the crisis is overcome, growth prospects will be brighter *only* if the global trading system remains open. Cast against this background Indonesia needs to deal with both the broader systemic aspects as well as the details of the system so as not to rely on an *ad hoc* approach to systemic issues.

A. Proactive Participation in the Multilateral System

In the meantime, preparation needs to be made for the country to deal with the challenges of the new century. In the process, Indonesia needs to remain active in multilateral fora to ensure that when recovery takes place, the international system will remain open and able to provide again the opportunity for Indonesia to gain from the openness of the global system. It must also have a clear view on how to deal with the multilateral system. This is not to say that Indonesia might not reverse its attitude towards the multilateral system and turn inward, as indeed it might, if the domestic mood since the crisis has changed the political landscape. But if that doomsday scenario occurs, it is important to demonstrate how much it would cost society in terms of low growth and poverty.

However, if we take the more hopeful argument above as a starting point in dealing with the multilateral system, then Indonesia needs to formulate more clearly its approach to the system. There are a series of systemic issues that need to be addressed in the multilateral system. Systems maintenance is crucial for its functioning. The WTO system has been

[37] *Id.* at 229–30.

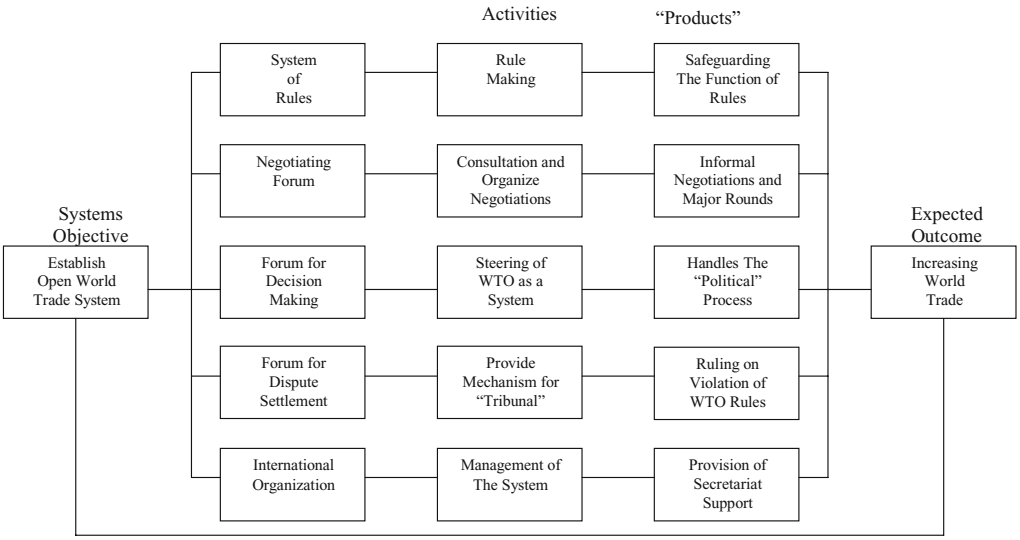


Chart 1: Simple Schematics of WTO as System.
Source: H. S. KARTADJOEMENA, GATT DAN WTO: SISTEM, FORUM DAN LEMBAGA INTERNATIONAL DI BIDANG PERDAGANGAN 80 (1996).

misguidedly criticized and reviled for its alleged power. In reality, it is a fragile system. Balance is needed to safeguard the integrity. The maintenance of this balance should be the concern of all members of the system. However, as each government pursues its national interest within that system, they often act in a manner that inflicts systemic disturbance and disruption.[38]

The system itself needs defending and nurturing if it is to serve its members well. Coherence is necessary for the systems maintenance. Over time, despite its pragmatic beginnings, it has emerged as an elegant architecture, despite its many imperfections. Professor Jackson's notion of the WTO system as a "constitutional system" helps in viewing the subject in a systemic way.[39] The transition from the GATT as an "interim" institution to the WTO helped to focus on what is needed for further systemic consistency. In this broader issue Indonesia has the choice of being actively concerned about the overall system or remaining on the margin. Indonesia would be missing an opportunity if it remains passive.

B. Systemic Issues: Helping the Integrity of the Multilateral System

From the point of view of systems maintenance, there are a number of potential threats to the system originating from different sources that need to be kept in mind. For purposes of abstraction and simplification, Chart 1 depicts in a primitive way the WTO and its sub-components as a system. The chart is intended to demonstrate simplistically that a severe malfunction in any of the sub-systems for any length of time can disrupt the entire system. Accordingly, systems maintenance is a serious business, but may be neglected by Members as they pursue their own specific national interests and respond to their domestic constituencies.

[38] For an analysis of the fragility of the system, *see* JAGDISH BHAGWATI, THE WORLD TRADING SYSTEM AT RISK 3–9 (1991).
[39] JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 18–35 (1990).

Thus the onus is on the owners of the system, i.e. the Members of the WTO, to behave in a manner that safeguards the integrity of the system. The owners are free to behave in a manner that disrupts the system. But if they cause a breakdown, the responsibility is on the Members and not the system. In pursuing its national interest Indonesia needs to be mindful of what it does and what others do to the system. The illustration of the type of threat to damage that could be inflicted on the system can be seen from Table 5.

Looking at the system, we can note that adherence to it calls for balance. If a significant number of Members increasingly feel that the commitments are unbalanced and that there is no politically acceptable solution to rectify the perceived imbalance, then commitment to the system would diminish. Accordingly, a continuous effort to restore perceived imbalances becomes an important aspect of systems maintenance. Periodic rounds of negotiations have functioned to make the necessary adjustments to the system. Indonesia shares the view of many developing countries that there is an imbalance between progress in areas such as textiles and agriculture, which is slower than in services and intellectual property. Indonesia needs to be proactive in rectifying such an imbalance in the current round.[40]

Disruption to the system could also occur because of a systems overload as well as a systems under-load. A systems overload could occur if the institution is assigned to deal with broad economic areas, far beyond the capacity of the organization to deal with them, even if the subjects are relevant to the system. Dealing with competition policy and investment policy in the broader sense would stretch the capacity of the organization, even if one were to agree that the two subjects belong in the WTO, which is still a contested idea. Proponents of those issues implicitly argue for organizational enlargement of the WTO and increase of its power. Given the domestic situation and its experience with the IMF, Indonesia can be expected to be reluctant to support such proposals. So can many developed and developing countries.

A systems under-load could occur, when certain areas which rightfully belong in the WTO, are not properly dealt with for political or internal reasons. A systems under-load would lead to abandonment and desertion by Members who seek recourse elsewhere for those areas that could have been dealt with in the WTO but were not. There were certain periods when countries abandoned the GATT system and resorted to other fora. Indonesia needs to be careful in sponsoring initiatives that would lead to systems under-load. For example, although compliance with technical rules such as technical barriers to trade and sanitary and phytosanitary rules, is expensive, thus requiring technical assistance, opposition to any strengthening of those rules may lead to a systemic under-load, leading others to use other fora to take measures which may be WTO-inconsistent.

Disruption could also occur because of systems dissonance, which can occur when the system tolerates for a long period rules and practices that are clearly in violation of its basic tenets and principles, and does so within the formal setting of an agreement. This is damaging to the system over the long run. Different rules concerning the same issue appearing in different agreements under the auspices of the GATT, e.g. textiles and agriculture, would lead to forum shopping by countries wishing to resolve problems in a manner most favorable for them. Though this is less the case after the Uruguay Round,

[40] The ideas about various systems disruption in the WTO have been first explored in a previous paper by the author on which this section is based. *See* H.S. KARTADJOEMENA, THE WTO SERVICES AGREEMENT AND THE NEW ROUND: POLICY ASSESSMENTS FOR DEVELOPING COUNTRIES. Discussion and lecture paper for Joint CUTS—London School of Economic Regional Training Seminar on Understanding the WTO System, September 4–6, 2000, Jaipur, India. (On file with the author.)

Table 5: Types of Systems Disruptions in the WTO as System

Situation	characteristics	Example
"systems imbalance"	*Systems imbalance* can occur when only part of the substance is fully handled and accommodated while other issues are neglected. This results in some countries having their interest more fully accommodated while the interest of others are almost wholly neglected.	*Systems imbalance* takes place when for example developed countries succeed in getting all they wanted in a round of negotiations while developing countries obtain very little. A situation of systems *imbalance* would lead some Members which are not accommodated to seek satisfaction outside the system. This leads to systems abandonment because of dissatisfaction arising from a sense of *unfairness*.
"systems overload"	*Systems overload* occurs when the WTO is forced to deal with issues which are outside trade, in which the WTO is equipped to deal. If the WTO is forced to deal with additional economic areas not directly related to trade, then sooner or later it would face the danger of being forced to administer all economic issues because they can always be argued to be trade-related.	*Overload* could occur when the GATT/WTO system is forced to deal with economic issues such as investment, competition policy as well as other issues currently under the portfolio of the IMF and the World Bank. While some Members may be politically happy with it the overload can strain the system leading to systemic malfunction arising from an overload.
"system underload"	*Systems underload* can occur when the WTO would systematically deal only with part of the areas under its portfolio while remaining passive on many issues.	*Underload* takes place when the GATT/WTO does not deal with substance which according to the agreement is part of the formal function of the organization. In a situation of *underload* what can occur is that the system would be abandoned by its constituency on grounds of its *inadequacy*.
"systems dissonance" and	*Systems dissonance* occurs surreptitiously when the WTO increasingly accommodates elements outside trade issues leading to decisions not fully compatible with WTO principles and objectives.	Textiles agreement is an example of *systems dissonance. Systems incoherence* occurs when a lobby group in developed countries succeeds in putting non-economic provisions in the WTO leading to decisions incompatible with trade principles. In such a situation the WTO is forced to deal with issues which have nothing to do with trade including boycotts and blockades. Also when developing countries succeed in placing wide exceptions for S & DT on a permanent basis, leading to a violation of MFN because of its permanence. Incoherence could lead to *systems dysfunction.*
"systems-incoherence"	*"Systems-incoherence"* can occur when the WTO whose purpose is to deal with trade issues is forced to deal with issues which are better dealt with by other organizations which have been created to deal with those issues. It leads to *incoherence* between what WTO does and what it has been intended to do.	

textiles rules and agriculture subsidies nevertheless represent a dissonance. Indonesia needs to be clear whether it intends to sponsor or reduce systemic dissonance.

A more serious systemic threat is the threat of systemic incoherence. This can occur when the multilateral trading system is expected to perform functions that are clearly not connected with trade, functions that are better done by other institutions more suitable to those functions. Members of the WTO have the choice of exercising their sovereign rights as owners of the WTO to assign to the organization any task they choose. In so doing, however, if they assign to it tasks that are not systemically coherent with its intended purpose then the risk of systemic failure is great. If that occurs, Members should accept the responsibility of a possible failure of the system and not to blame the system itself for the failure.

For developed countries, it is important to caution against politically expedient compliance with demands of domestic constituencies to assign more tasks to the WTO to deal with non-economic and non-trade issues which deviate from the purpose of creating the WTO. For its part Indonesia (as well as other developing countries) also needs to realize, for example, that in sponsoring initiatives on special and differential treatment, it needs to be sure that such initiatives would not permanently divide the system into two and convert the WTO into a development agency rather than a trade agency. Its developmental role is performed by providing the healthy trade environment that makes it possible for developing countries to develop through trade. It is not in the business of resource transfer, which is the domain of the World Bank.

C. Nurturing the System in the 21st Century

As we enter the 21st Century, the multilateral trading system that has developed since 1947 has evolved successfully, meeting the challenge of the time, despite early skepticism regarding its future prospects. As a system of rules it has evolved over the years from a highly informal but effective arrangement, into an increasingly effective formal system. The strength of the system was the flexibility of the informal approach and its pragmatism.[41] Later critiques of the early system derided the informality of the system, a criticism that contains some strong justification. However, a justifiable criticism of its informality should not be construed as a justified criticism of its other source of strength, namely its pragmatism.[42]

This pragmatism made it possible to make progress where progress was feasible, while waiting for the opportunity to proceed on more controversial issues. It is important to leave the window open to "constructive ambiguity" as we move with greater technicality and precision in reforming and updating the multilateral system.[43] Political factors operating in different countries will enable the system to move only so far, before there is a backlash from domestic constituencies. In some instances this will require self-restraint in initiating

[41] For the pragmatism of the early years of the multilateral system, *see* Olivier Long, Law and its Limitations in the GATT Multilateral Trade System 35–6 (1987).

[42] For a critique of the "power", and hence negotiated, approach to multilateral governance, *see* Ernst-Ulrich Petersmann, the GATT/WTO Dispute Settlement System: International Law, International Organization and Dispute Settlement 66–70 (1997).

[43] I have borrowed this term *constructive ambiguity*, attributed to Ambassador Alan Oxley of Australia, which seems appropriate to describe the flexibility of the system in accommodating difficult situation, provided that the sense of pragmatism continues to be present. Excessive legalism in every instance would hamper solutions while constructive ambiguity might provide an interim solution. *See* John Croome, *supra* note 8, at 147.

litigation in the WTO. In a period ahead that is expected to be increasingly more litigious, a wise degree of balance is needed, although self-restraint will be difficult to practice.

IX. Conclusion

This chapter has attempted to discuss the WTO from the specific perspective of a particular developing country, Indonesia. At present the country is confronted with a serious crisis, perhaps the most serious crisis in its half-century history as an independent nation. Politically, the very existence of the nation-state is at stake. Economically, the crisis that started as a meltdown in its financial system has made the engine of economic activity grind to a halt. Socially, the economic downturn has created hardship that has led to a large number of people falling below the poverty line.

Incorrectly but understandably, the reaction from some quarters to the crisis has been directed against the open trading system. It is equally understandable that reluctance has been shown towards greater engagement in the open trading system. However, there is too much at stake not to continue to pay attention to the international system. Despite the current difficulties, Indonesia needs to continue its engagement in the international system. There is a bleak prospect of achieving growth and development through the road of autarchy.

However, to engage effectively in the international system, there are specific areas of interest to Indonesia that deserve serious attention. This chapter has attempted to outline what they are. These issues, which deserve attention, need to be tackled, not only to face the current round, but also to prepare the country for the challenges and opportunities of an open world trading system in this new century.

CHAPTER 72

JAPAN

Minoru Endo*

TABLE OF CONTENTS

I. Japan's Accession to the GATT 172
II. Japan's Participation in The Dillon, Kennedy, and Tokyo Rounds 172
A. The Dillon Round 172
B. The Kennedy Round 172
C. The Tokyo Round 172
III. The Uruguay Round 173
A. Overall Objective 173
B. Market Access 174
C. Agriculture 174
D. Rules 174
E. Contingent Protection (Anti-Dumping and Safeguards) 175
F. Services 175
G. Intellectual Property 175
IV. Effects on Japan of GATT/WTO Membership and the Results of the Uruguay Round 175
A. Economic and Political Aspects 175
B. Social Aspects 176
V. Attitude of the Japanese Towards the WTO 176
VI. Japan's View of the Strengths and Weaknesses of the WTO System 177
VII. Japan and the Dispute Settlement Procedure 177
VIII. The Doha (Development) Round 178
A. Agriculture 178
B. Developing Countries 179
C. Other Issues 179
IX. Regional Trade Arrangements 179
X. Trade Policy Formulation 180

* Ambassador of Japan to the International Organizations in Geneva (1993–96) and Chairman of the WTO Council of Trade in Goods (1995).

I. Japan's Accession to the GATT

After several years of negotiations Japan acceded to the GATT in 1955, prior to its entry into the United Nations in the following year. This was an event of vital importance to Japan, which was strenuously pursuing the road to economic reconstruction and re-entry into the international economy in the post-war period. Japan desperately needed to increase its exports to enable it to buy food and materials, and it needed to put trade relations with other countries on a stable, Most-Favored-Nation basis.

The United States, which had already accorded MFN treatment to Japan in the Treaty of Friendship, Commerce and Navigation signed in 1953 between the two countries was sympathetic towards Japan's membership. Most European countries, however, were concerned that Japanese products would make inroads into their markets as they had in pre-war days. Even after Japan became a contracting party to GATT, many of them invoked the non-application provision of the GATT, Article XXXV, as a basis for denying MFN treatment to Japan. It was not until 1976 that Article XXXV was disinvoked by all the European countries with respect to Japan.

II. Japan's Participation in The Dillon, Kennedy, and Tokyo Rounds

A. The Dillon Round

Although Japan participated in the tariff negotiations on industrial and agricultural products in the Dillon Round held in 1961–62 following the formation of the European Common Market, it only played a minor role.

B. The Kennedy Round

Japan played a much more active role in the Kennedy Round, which was the first full-scale multilateral negotiation in which a fifty percent across-the-board tariff cut was proposed (the final result was 35 percent). Japan formed a part of the so-called Bridge Club (composed of the United States, the EEC, Japan and the United Kingdom) which virtually led the negotiations. Japan's rapid economic growth was in full swing at the time, although the trade deficit was chronic, and many industrial sectors including heavy and chemical industries, not to mention the agricultural sector, were still considered vulnerable. The auto industry strongly opposed a demand to reduce the existing 35 percent tariff rate on passenger cars by half to 17.5 percent, although this was accepted finally. Paradoxically, the Japanese auto industry began to expand rapidly after the Kennedy Round and grew into one of the country's most powerful export industries with the tariff rate on cars reduced to zero. In criticizing the mercantilist approach to tariff negotiations, I often cite this example, saying "to lose in tariff negotiations is to win the competition". Of course, this is not always true. Duty-free imports of aluminum and soybeans virtually wiped out domestic production in these industries.

C. The Tokyo Round

The world economy in the 1970s was marked by a series of major crises, beginning with the dollar crisis, passing through the first oil crisis and ending with the second oil crisis. At the beginning of the 1970s, an economic recession was already evident and protectionist clouds were developing. In order to head off this ominous trend, the GATT ministerial conference held in Tokyo in 1973 launched a new round of multilateral

negotiations which became known as the Tokyo Round. Progress of the negotiations was delayed by the deepening world economic recession and a series of political crises, and it took six years to reach final agreement amid the second oil crisis.

A host of codes on non-tariff measures were agreed in the Tokyo Round, in addition to the customary tariff reductions. Quantitative restrictions on agricultural products were alleviated only by an enlargement of the quotas, as to which Japan had to make some difficult decisions with respect to sensitive items such as beef and citrus. But the fundamental problems of export subsidies on agricultural products and the Common Agricultural Policy of the EEC were not dealt with.

The most difficult issues for Japan were safeguards (GATT Article XIX) and government procurement. Japan and the EEC disagreed over whether safeguards could be applied on a selective (discriminatory) basis, and no agreement was reached. With respect to government procurement, Japan and the United States were engaged in a hard fight over the procurement of telecommunication equipment by Nippon Telephone and Telegraph ("NTT). Finally NTT started opening its door to foreign suppliers. Another serious problem with government procurement was the question whether the procuring entity should be required to publish a notice of intended procurement in one of the official languages of the GATT. Japan opposed such a requirement up until the last moment, on the ground that it would discriminate against countries whose language happened not to be a GATT official language, but finally acquiesced.

III. The Uruguay Round

Despite the successful conclusion of the Tokyo Round, there was concern in the early 1980s that the results of the Round might become unraveled as a result of the prolonged recession and increased agricultural surpluses in the world. Trade frictions spread worldwide, and the number of so-called "voluntary" export restraints ("VERs") increased. Japan agreed to VERs on automobiles with the United States and the EC. The number of anti-dumping cases soared. Sometimes anti-dumping was used as pressure to enter a VER. And a new type of managed trade emerged, "voluntary" import expansion, an example being the Japan-U.S. semi-conductor agreement which set a Japanese target of a twenty percent market share for imports.

Japan began working with its trading partners to prepare for a new round of negotiations. After a long preparatory process, the Uruguay Round was launched in 1986. The Uruguay Round agenda was comprehensive, and encompassed both traditional items, some of which, such as agriculture and textiles, had been treated as exceptions to the normal GATT principles, and new items such as trade in services and intellectual property. The negotiating process was complex and was interrupted by political upheavals and other distracting events such as the collapse of the Soviet Union, the Gulf War, and the NAFTA negotiations. It took seven years to reach a conclusion.

Japan participated actively in all areas of negotiations. The following is a brief description of Japan's objectives and of the contentious issues with which it was involved.

A. Overall Objective

Japan's most important overall objective was the strengthening of the rules-based multilateral open trading system in a way designed to restrict protectionism of any kind, whether in the form of unilateralism, bilateralism or regionalism. A priority objective was therefore the definition of clear and fair rules governing trade in goods and services.

B. Market Access

Japan was in a strong position to be aggressive with respect to market access for industrial goods, partly because its tariffs on industrial products were already minimal after a series of autonomous tariff reductions. As a result of the Uruguay Round tariff negotiation, Japan's trade-weighted average industrial tariff (bound rate) was reduced in 1999 to as low as 1.7 percent, compared with 3.5 percent for the United States and 3.6 percent for the EC.

C. Agriculture

The focus of the negotiations on agriculture was on export subsidies, domestic support, and market access. Japan provided no export subsidies and considered that they were the roots of all problems in agricultural trade. But Japan was defensive with respect to market access of farm products, its main argument being "food security". Japan's food self-sufficiency ratio was only forty percent, unusually low for any developed country, and Japan was the largest net importer of agricultural products. Rice is the staple food of the Japanese and the only main food product with respect to which Japan is self-sufficient. It was therefore considered a sanctuary and the last bastion of food security. Enormous attention was focused on rice by politicians and in the media, as if it had been the only subject of the Uruguay Round.

The negotiations on rice had begun with the statement of the Japanese minister who said, " Rice is a religion". After a long and difficult negotiation, Japan made the wrenching political decision during the final days of the Uruguay Round to accept a minimum access commitment. Japan did however succeed in avoiding the requirement to "tariffy" its import restrictions on rice by converting them into ordinary tariffs. Many experts, business people, academics and media representatives in Japan would have preferred tariffication, which would have produced a better result so long as the tariff levels were set high enough to check the free flow of imports, and would have helped to accelerate reform of rice farming. Unfortunately, the initial proposal by the Cairns group countries and the United States on the tariffication of agricultural products had been so far-reaching (including the eventual phase-out of tariff protection), that Japanese opposition at any cost to tariffication on rice had been firmly consolidated, and there was no way even to seriously consider that option.

In 1999, after four years of implementation of the minimum access commitment on rice, Japan decided to change its policy and to tariffy its import restrictions, because rice stockpiles were ever increasing due to the minimum import requirement. As a result of this change, the minimum import commitment remains at 7.2 percent of domestic consumption instead of eight percent. If, however, Japan had accepted tariffication in the Uruguay Round the commitment would have remained at five percent of domestic consumption.

D. Rules

By far the most important of Japan's specific objectives in the area of rules was to prevent unilateral action by the United States under Section 301 of the U.S. Trade Act. This objective was achieved to a considerable extent in the Dispute Settlement Understanding. Before taking action concerning matters under the covered agreements, a Member must now first go through the WTO dispute settlement procedures, and its actions are constrained by the specific recommendations of the panel report.

E. Contingent Protection (Anti-Dumping and Safeguards)

Anti-dumping measures were originally conceived of as a means of defense against predatory dumping practices. They have now turned into a tool to protect the interests of particular industries, and have very frequently been abused or misused. In the Uruguay Round Japan sought to tighten disciplines on the use of anti-dumping measures. On balance, however, the results were not satisfactory, since even more room has been left for the arbitrary calculation of dumping margins. Anti-dumping actions taken by WTO Members, developed and developing alike, have proliferated since the Uruguay Round.

The positive aspect of the Uruguay Round agreement with respect to safeguard measures is the prohibition of "gray area" measures, such as VERs. The negative aspect is that the agreement now allows for deviation from the non-discriminatory application of safeguard quotas under limited circumstances (*Agreement on Safeguards*, Article 5.2(b).

It may be noted that until the Uruguay Round negotiations, Japan had rarely imposed anti-dumping measures and had never invoked safeguard measures. Following the Uruguay Round implementing procedures have been put in place, and antidumping and safeguard measures have actually been invoked on a few occasions. These actions were completely in conformity with WTO rules. Yet it is to be hoped that the maximum restraint will be exercised with respect to the use of these measures by a country that has suffered so much pain from their abuse in the past.

F. Services

The Japanese negotiating team made a valuable contribution to the development of the framework of the General Agreement on Trade in Services ("GATS"). Japan offered specific commitments on a wide range of sectors, including financial services. The offers on financial services reflect the outcome of reforms undertaken in Japan in consultation with the United States. But the financial services negotiation was not concluded at the end of the Uruguay Round because of U.S. insistence on a two-tier approach, treating countries with open financial markets differently from those with closed markets. It took several more years to reach agreement in this sector. Negotiations with respect to the maritime transport sector, in which Japan has a strong interest, were left unfinished. It should be noted that Japan did not apply for any exemption from the MFN obligations in the GATS.

G. Intellectual Property

Japan views the TRIPs agreement as on the whole a satisfactory outcome to the negotiations. However, one missed objective was adoption of the "first-to-file" principle for patent applications.[1]

IV. Effects on Japan of GATT/WTO Membership and the Results of the Uruguay Round

A. Economic and Political Aspects

Membership in the GATT/WTO system has enabled Japan to enjoy the benefits of the open multilateral trading regime. Participation in the GATT/WTO negotiation rounds,

[1] The United States still applies the first-to-invent principle.

in particular the Uruguay Round, has given momentum to efforts to promote reform and to enhance the competitiveness of the Japanese economy. It is true that Japan's economy has not been in good shape since before the conclusion of the UR. This was due to mismanagement of macro-economic policies amid drastic realignment of exchange rates in the wake of the Plaza Agreement in 1985, and due to delay in the structural reform of certain sectors (particularly banking). But so far as manufacturing sectors are concerned, the Uruguay Round was instrumental in further streamlining these industries.

One of Japan's hopes was that membership of the GATT would minimize outside political pressures on trade issues. The record is mixed in this respect. The separation of economics from politics worked fairly well in the early days of Japan's GATT membership. As trade frictions intensified in the 1980s and there was a drift towards managed trade, such as the establishment of numerical targets for imports, the GATT was no longer able to provide shelter from overtly political actions. The Uruguay Round, by establishing an effective dispute settlement process, should reverse this trend.

B. Social Aspects

Except for a short period after the oil crisis, Japan's economy continued to grow until the end of the 1980s. The unemployment rate had been extremely low. There was some opposition among farmers when imports of various agricultural products were liberalized, but labor unions were mostly in favor of free trade and the GATT system.

In the wake of the collapse of the bubble economy in the 1990s, the economic recession in Japan has been a very drawn-out affair with unemployment figures above five percent, which is very high by Japanese standards. Deflation is worsening. There are questions about food security. Massive imports from neighboring countries are threatening family farming and small textile mills. However, this has little to do with the WTO or with globalization, of which the WTO has become a symbol. At present, the backlash against globalization is not yet significant in Japan except among environmental activists and some critics of contemporary civilization. If however, economic and environmental degradation continues in Japan, the free trade system may become a target of the anti-globalization movement.

V. Attitude of the Japanese Towards the WTO

Ordinary citizens in Japan have little knowledge of what the WTO is about, and yet the standing of the organization remains high, based on the vague idea that the WTO promotes and safeguards free trade that is the driving force behind prosperity. However, the WTO and the Uruguay Round remains a target of resentment for people engaged in sectors affected by liberalization, such as rice farmers. Apart from a handful of knowledgeable businessmen and political leaders, people show little interest in he WTO as such, partly because the WTO agreements are too complicated for many to understand their implications on daily life. They tend to react to more visible events, such as trade conflicts between Japan and the United States, whether or not they are dealt with under the framework of the WTO.

Trade relations with China have moved to a new dimension. At the time China joined the WTO, imports to Japan from China were rapidly increasing, while Japanese investment in China soared in both number and value of projects. Before China's entry into the WTO in December 2001, Japan invoked provisional safeguard measures in April of the same year for the first time in its history against imports of certain vegetables from

China, and China retaliated by imposing prohibitive tariffs on various Japanese products including automobiles. The difficulty was solved, and now there is great interest in seeing how Japan-China trade relations develop under the WTO umbrella.

VI. Japan's View of the Strengths and Weaknesses of the WTO System

As compared with the GATT, the WTO is an institution with considerably enhanced functions. But the main source of its strength lies in the trust that was built up since the days when the GATT was the custodian of multilateral free trade. The WTO, as a last resort for dispute resolution, is much more powerful than the GATT. The source of its power is the will of its members to sustain the system. Ironically, the very image that the WTO is a power-house has made itself a target of protest by anti-globalization activists on matters that lie outside the purview or responsibility of the WTO.

The weakness of the WTO lies in the fact that, in the absence of global coherence of economic policies, the role and limitations of the trade regime represented by the WTO are not clearly recognized. The problems of developing countries, even trade problems, cannot be solved by the WTO alone. The interface between trade and the environment has not been properly adjusted.

Another weakness is that certain political situations can sometimes erode the credibility of the system. The proliferation of regional arrangements which may not be consistent with GATT Article XXIV has not been adequately curbed. There is also a problem with the laxity of some key disciplines. The trade rules were on the whole strengthened in the Uruguay Round agreements, but in some cases—notably anti-dumping—disciplines are on balance looser with new opportunities for arbitrariness.

People often complain of the slowness and procrastination in the process of decision-making and negotiations in the WTO. To reach consensus on a wide range of complex issues is not an easy task. In terms of efficiency, this is a weakness of WTO, but it is a source of strength if the process can produce an outcome that all Members can live with.

VII. Japan and the Dispute Settlement Procedure

The Japanese are naturally loath to become involved in litigation. Amicable solutions through discussion are preferred to adjudication by the courts. The adversary approach is not part of the national character.

During its forty-year membership of the GATT, Japan brought only three cases to panels as the complaining party. Since the new dispute settlement procedure was instituted in the WTO, Japan has initiated a few cases on a few matters, such as the national car scheme in Indonesia and the antidumping action taken by the United States on hot-rolled steel. Yet Japan is still not a frequent user of the WTO dispute settlement system. It has tended to participate more as a third party in disputes brought by others, rather than initiating cases itself.

Japan recognizes that the dispute settlement procedure in the WTO will constrain the use of unilateral actions. The elements of automaticity incorporated in the proceedings, in terms of the timetable and the adoption and implementation of panel/Appellate Body recommendations, represent fundamental improvements over the old GATT procedures. The GATT/WTO dispute settlement system is a combination of diplomacy and litigation, but under the WTO it has tilted heavily towards litigation. Several points should be noted in this context.

First, there are inevitably ambiguities, lacunas or contradictions in the key rules, which were negotiated and often agreed upon as compromise solutions. Although the panels and the Appellate Body have been trying to establish a jurisprudence, it is obvious that they cannot legislate or change the rules. But they should at least be able to propose or suggest to the General Council, through the Dispute Settlement Body, modification of provisions strictly for purposes of clarification.

Second, the implementation procedures should be more refined and reinforced, particularly with respect to extension of deadlines for implementation, and disputes as to how implementation is to be conducted. There is also a problem with the modality of remedies. In most cases panels simply recommend that the offending Member bring its measures into conformity with the relevant provisions of the agreements. A remedy of damages for the value of lost trade would cause political and administrative difficulties, but improperly collected duties, for example, should be reimbursed.

Finally, a practical problem for Japan is how to develop the legal and financial resources needed to go through the process either as complainant or as respondent. Specialized lawyers and consultants charge large fees. Few government officials and lawyers in Japan are versed in the dispute settlement procedures, which are largely patterned after American legal procedures. Japan urgently needs to train officials and lawyers who are capable of handling cases in the WTO dispute settlement system

VIII. The Doha (Development) Round

The new round was launched in Doha in 2001 to complete the Uruguay Round objective of building a trading system for the Twenty-First Century. Its work program consists of:

- Continued negotiations on the built-in agenda items (agriculture and services)
- Review of some of the trade rules (anti-dumping, subsidies and regional arrangements)
- Focus on the implementation problems of developing countries and cross-cutting issues of special and differential treatment for developing countries
- Limited mandates on environmental issues and dispute settlement procedures.

The new issues (investment, competition policy and two others) are on the waiting list pending the outcome of the 2003 Ministerial Conference in Cancun. At first glance, the agenda appears less ambitious than that of the Uruguay Round. But it became clear from the preparatory work for the Doha Ministerial that, apart from the new areas, the central and most difficult issues will be agriculture and issues related to developing countries.

A. Agriculture

Japan attaches great importance to the concept of the "multi-functionality" of agriculture, which attaches importance to the functions of conservation of the environment, the preservation and revitalization of rural areas, and food security. It is to be hoped that a clear formula is developed to enable this concept to be incorporated into the modalities of negotiation.

Japan is also interested in redressing the imbalance between the obligations of importing countries and exporting countries with respect to agricultural products. It needs to be remembered that after soybean production had been wiped out in Japan, the United States imposed an embargo on the export of soybeans, causing panic in Japan. The supply obligation of exporters should be spelled out more clearly. Article 12(a) of the Agreement

on Agriculture provides that Members instituting export *prohibitions* or restrictions shall give due consideration to the effects of such *prohibitions* or restrictions on importing Members' food security. What does "due consideration" mean when an export prohibition is instituted?

B. Developing Countries

Implementation is not an issue for negotiation (except in the case of alleviation of obligations for developing countries), and should be primarily solved through capacity building to which Japan is ready to contribute. Capacity building includes not only training officials but in many instances helping to set up administrative and economic infrastructure.

The least developed countries not only have difficulties implementing their obligations in the Uruguay Round agreements, but they find some requirements to be contrary to their essential interests. One of the most controversial areas in this respect is the TRIPS agreement. Some advanced developing countries are also concerned about the lack of benefits so far from the Agreements on Agriculture and Textiles, covering products with respect to which they have comparative advantage. But each country or each group of countries has different needs and interests. Therefore Special and Differential Treatment should be negotiated and provided according to the level of development and needs of individual countries or groups of countries.

C. Other Issues

The Anti-dumping Agreement should be clarified and modified so as to prevent abuse or misuse, to eliminate the opportunities for arbitrary determinations of dumping and dumping margin calculations, and to tighten the sunset rules.

Investment is an important element in the promotion of trade and development. In the absence of a multilateral agreement on investment (except for some aspects of trade-related investment measures, covered by the TRIMS Agreement, and the GATS coverage of commercial presence in the case of trade in services), many bilateral agreements for the protection and liberalization of investment with different levels and scope have been concluded, at the risk of distorting the flow of investment and trade.

Together with other countries, Japan has proposed modification of the Dispute Resolution Understanding, *inter alia*, to facilitate implementation of recommendations by panels and the Appellate Body.

The Doha agenda negotiation is revolving on two axes, i.e. Trans-Atlantic conflict and cooperation on the one hand, and the North-South divide on the other. The Trans-Atlantic powers are dominant in the WTO, but they cannot impose their will on other Members. Although the Doha Round has been named the "Development Round", this does not mean that issues can be solved through a simple assumption of a dichotomy between the North and the South, because the interests of every country either in the North or the South are quite different. The problem will be how to find common ground.

IX. Regional Trade Arrangements

Regional trade arrangements of many types have mushroomed in recent years. Japan welcomed the formation of the EEC in 1957, partly for geo-political reasons, since it was hoped that it would create a strong Western Europe opposing the Soviet Union.

On the other hand, there was concern about an ever-expanding economic entity with deepening integration developing into a powerful trading bloc. A series of GATT Rounds were proposed by the United States in order to lower the trade barriers surrounding the EEC.

In the Uruguay Round, Japan attempted to tighten the disciplines on the formation of regional arrangements, by clarifying the meaning of GATT Art. XXIV, and by proposing that multilateral reviews be conducted and its approval required before the entry into force of such arrangements. The attempt was not very successful. When the formation of NAFTA was contemplated, the U.S. stance towards regional trading arrangements, which had favored stronger discipline, apparently softened.

As bilateral and regional free trade agreements proliferated after the conclusion of the Uruguay Round, the Article XXIV exception to the MFN appeared to have become the rule. Japan and Korea, which were not party to any preferential trading arrangement, seemed to become part of an endangered species. Japan and Korea have joined APEC (Asia Pacific Economic Conference), whose objectives include liberalization and facilitation of trade. APEC represents open regionalism and not a preferential regime among members. In the meantime, some Japanese-owned factories based in NAFTA countries (Mexico in particular) have been obliged to abandon production after the lapse of the transition period, as a result of the full application of NAFTA rules of origin.

A long-established trade policy of the Government was to give great priority to multilateralism over bilateralism or regionalism. Given the developments described above, the Government and business leaders have started to seriously consider the possibility of entering free trade agreements. Many debates and studies have been conducted, not only in Japan but also jointly with some countries that are candidates as FTA partners. Japan decided to enter into negotiation of an FTA with Singapore. The Agreement for New Age Economic Partnership between the two countries, which includes preferential trading arrangements, was signed in January 2002. Now several joint study groups, both official and private, are examining the possibility of FTAs with Mexico, Korea, ASEAN, China and others. It is evident therefore that there has been an important shift of policy toward FTAs on the part of Japan. The Government has made it clear, however, that FTAs would remain complementary to the multilateral system.

X. Trade Policy Formulation

The Government, whose highest organ is the Cabinet of Ministers, determines trade policy in Japan. In the process of development and formulation of trade policy, consultations are held among the ministries concerned, between ministries and the political parties, business organizations at national and sectoral level, farmers' associations, etc. Study groups are often organized involving academics, journalists and other knowledgeable people. Most of these are conducted informally. Since the websites of the ministries are open, dialogues with NGOs are conducted on the specific issues of interest to them.

The political parties, particularly the ruling parties, have a final say on the passage of laws and approval of treaties. Under the parliamentary cabinet system, the Government and ruling party are usually in tandem so far as the general orientation of trade policy is concerned. If however, politicians representing different constituencies form special interest groups, they can wield strong influence on the subject of their interest, a typical example being a group of parliamentarians representing rural constituencies.

As for business circles, the Keidanren (Federation of Economic Organizations) and other economic groups from time to time present policy recommendations based on their own studies and on consultations with business people. The ministries concerned consult with different business sectors under their jurisdiction. The Association of Farmers is one of the most powerful groups, with its political connections and its alliance with many consumer groups.

CHAPTER 73

KOREA

Chulsu Kim*

TABLE OF CONTENTS

I. Korea's Accession to the GATT 185
II. Korea in the GATT 187
A. Korea and the Multifiber Arrangement 187
B. The Tokyo Round 188
C. Balance-of-Payment Consultations 189
D. The Beef Panel 191
III. Korea in the Uruguay Round 192
A. Background 192
B. Korea's Participation in the Uruguay Round 194
1. Korea's Objectives in the Round 194
2. Korea in the Negotiations 194
3. The Results of the Uruguay Round for Korea 195
4. Implementation 197
IV. The Impact of the GATT/WTO and the Uruguay Round on Korea 197
A. Economic Impact 198
B. Political Impact 199
V. Korea's Involvement in the WTO Dispute Settlement System 201
A. Korea as a Complainant 201
B. Korea as a Defendant 202
VI. The New Trade Round (Doha Development Agenda) and Korea 204
A. Agriculture 204
B. Services 204
C. Market Access for Industrial Goods 205
D. Anti-dumping 205
E. Regional Trade Agreements 205
F. Trade and Investment 206
G. Trade and Competition Policy 206
H. Trade and Environment 207
I. Trade Facilitation 207
J. Other Issues 208
VII. Regional Trade Agreements and Korea 208
VIII. Trade Policy Making in Korea 210

* President, Sejong University, Former Deputy Director-General of the WTO.

IX. Conclusion 212
Tables
Table 1 WTO Dispute Cases Brought by Korea 202
Table 2 WTO Dispute Cases Brought Against Korea 203
Bibliography 213
I. Books 213
1. In Korean 213
2. In English 213
II. Periodicals 214
1. In Korean 214
2. In English 214
III. Official Papers and Documents 214

I. Korea's Accession to the GATT

Korea joined the GATT in 1967 in the final phase of the Kennedy Round as the 71st Contracting Party. The decision to join the GATT was carefully weighed by the Korean government for several years after it launched the First Five-Year Economic Development Plan (1962–1966). However, once the decision had been made to accede to the GATT, the process was extremely fast. The application was made on May 20, 1966, and after five months of negotiations, from September 1966 to February 1967, the process of accession was completed in April 1967.

Interestingly enough, Korea's introduction to the GATT had come much earlier. Korea, as a newly independent nation after World War II, sent a delegation to Torquay, England in September 1950 to participate in the second trade round under the aegis of the GATT and to seek accession to the GATT. The records show that in Torquay, Korea made tariff offers on 31 items, including bituminous coal, chemical fertilizers, cotton, pesticides, whiskey and champagne. The Korean delegation also signed the Protocol of Accession,[1] which was endorsed by 25 of the 34 Contracting Parties of the GATT at the time. The accession did not materialize as the country, then in the midst of the Korean War, failed to take necessary steps, including the ratification of the Protocol of Accession.[2] As a poor country with hardly any international trade at the time, the decision to seek membership in the GATT in 1950 was primarily motivated by the desire of the Korean government, after gaining independence from Japan after World War II, to receive political recognition in the international community, particularly by seeking membership in any and all international organizations.

Unlike the time of the Torquay Round, Korea's decision to pursue GATT membership in 1966 was much more deliberate and commercially motivated. The new government, which came into power in 1962 through a military coup, had launched an ambitious outward-oriented Five-Year Economic Development Plan that year. Export promotion became one of the central policy thrusts of the Plan. Thanks to these policies, Korean exports began to take off, albeit from a small base. Korean exports grew annually by 45 percent during the first five-year plan, reaching US $250 million in 1966.

In July 1963, the Director General of the GATT sent a letter to the Korean government recommending GATT entry. This put in motion studies in the trade-related ministries about the benefits and costs of entry. On November 15, 1965, President Chung Hee Park instructed his government to officially review the desirability of GATT membership in one of the monthly Export Promotion Council Meetings at the Blue House, the Presidential Office. An inter-ministerial committee composed of the Ministries of Trade, Finance, and Foreign Affairs was created shortly thereafter for this purpose.

For a poor country pursuing an export-oriented development strategy, GATT membership was important in terms of securing most-favored-nation ("MFN") status from all 66 GATT Contracting Parties at the time. Korea had already concluded bilateral trade agreements with the United States (1956), Philippines (1961), Taiwan (1961) and Thailand (1961). As exports grew, more trade agreements were negotiated. However, this was a time-consuming and cumbersome procedure, while GATT membership provided a means of gaining MFN status in overseas markets without engaging in endless bilateral negotiations. GATT membership was also perceived by the Korean policy makers as providing opportunities for cooperating with other developing countries in combating

[1] BISD, Vol II, May 1952, at 33–34.

[2] For a brief description of the Korean participation in the Torquay Round, *see* Korean Customs Association, The History of Tariffs in Korea 354–355 (1969).

discrimination and protectionism against export items of interest to Korea, particularly agricultural and fishery products and cotton textiles.[3] The agricultural and fishery products were exported mainly to Japan and included silk yarn, fresh fish and dry seaweed, all of which were subject to some form of import quota in Japan.

It appears that the ministries concerned with trade policy, such as the Trade, Finance, and Foreign Ministries, had also carefully examined the "cost" of GATT membership in the wake of the government decision to apply. Their main interest was whether Korea as a developing country could, under the existing GATT framework, maintain flexibility in its existing economic and trade policies, which were marked by a high degree of government intervention in all sectors of economic policy. Such questions as whether Korea could pursue its trade liberalization at its own pace and whether industrial subsidies could continue to be provided appeared to have loomed large in the minds of policy makers examining the pros and cons of membership.[4] The addition of Chapter IV to the GATT in 1963, with its "special and differential treatment" for developing countries, was, therefore, an important development in this regard. It convinced the Korean policy makers that GATT membership, while providing substantial benefits to Korea, would not overly constrain Korea's economic and trade policies because of its developing country status. The Korean government thus decided to pursue GATT membership in early May 1966 and on May 20 it notified the GATT of Korea's intention to join the organization and to participate in the Kennedy Round.

The tariff negotiation part of the accession process took place in Geneva from September to December 1966. Korea's strategy was focused on limiting its own tariff concessions, rather than gaining tariff concessions from its trading partners in the GATT. Korea's offer to the seven Contracting Parties[5] that sought bilateral negotiations with Korea was limited in scope and many offers were confined to the binding of the existing tariff levels. These offers were therefore received with little enthusiasm by Korea's trading partners. However, as Korea was still a minor developing country with a small trade volume and a low per capita income, its major trading partners seem to have refrained from making many additional demands. When the negotiations were completed in December 1966, Korea made tariff concessions on sixty items, of which seventeen were tariff reductions, 41 were bindings at the existing tariff levels, and two were ceiling bindings. The combined imports of the seventeen duty reduction items in 1965 were less than $1 million, or about 0.2 percent of Korea's total imports of $463 million that year. The United States sought tariff reductions on several other items, including automobiles, but later relented. Japan withdrew its request for reductions on the condition that Korea would not seek any reciprocal concessions from Japan. New Zealand sought and received a tariff reduction on lamb meat from 35 to 25 percent.[6]

The GATT Working Party on Accession of Korea, composed of fourteen Contracting Parties, met twice, on November 30 and December 6, 1966, to examine the trade policy of Korea and to review Korea's plan to bring its trade regime into conformity with the GATT rules. The Korean delegation assured the Working Party members of its intention

[3] How the Korean government viewed the GATT accession is well explained by the Report to the Economic Ministers Meeting by the Minister of Foreign Affairs in the Proceedings of the Economic Ministers Meeting, No. 138, May 9, 1966.

[4] For the background of Korea's decision to apply for membership, *see* TAE-HYUK HAHM, REFLECTIONS ON THE GATT ACCESSION NEGOTIATIONS (1993).

[5] The United States, Japan, the EC, the United Kingdom, Canada, New Zealand, and Australia negotiated bilateral tariff concessions with Korea in the accession negotiations.

[6] Hahm, *supra* note 4, at 23–25.

to further liberalize trade as Korea's balance of payments situation improved and as its infant industries gained in competitiveness.[7] The Working Party adopted the Protocol of Accession[8] on December 8 and sent its report to the General Council, which adopted the report of the Working Party by consensus a week later. The two-thirds majority required by Article XXXIII of the GATT for accession of new members was achieved by March 1, 1967.

The ratification process in Korea was extraordinarily swift. On March 6, 1967, the GATT Secretariat notified the Korean government that the requirements for accession under Article XXXIII had been fulfilled. On March 8, the joint meeting of the Committees of Finance and Economy, Trade, Industry and Energy, and Foreign Affairs of the Korean National Assembly unanimously approved the country's accession without much discussion. Two days later, on March 10, the Plenary Session of the National Assembly also approved the accession unanimously, again without much discussion. The National Assembly's ratification paved the way for the Korean Ambassador in Geneva to sign the Protocol of Accession on March 15 and Korea became a new Contracting Party one month later, on April 14, 1967. As a new Contracting Party in the GATT, Korea was soon to benefit from the 33 to 35 percent average global tariff cuts on some forty-one thousand items negotiated in the Kennedy Round, which was concluded on May 15, 1967. According to one Korean government estimate, Korea's benefits from tariff concessions of trading partners covered 44 percent of Korea's total exports in 1966.[9]

II. Korea in the GATT

A. Korea and the Multifiber Arrangement

Korea's role in the GATT in the early years of accession was quite marginal. This was natural, as Korea was still a small trading nation. It is perhaps ironic that Korea's first exposure to the GATT involved issues related to managed trade in textiles. Before it joined the GATT, Korea, as a minor cotton textiles exporter, became a signatory to the Long Term Arrangement for Trade in Cotton Textiles ("LTA") in 1964, and after joining the GATT, it took part in the extensions of this arrangement in 1967 and 1970. In the meantime, Korea concluded bilateral cotton textile restraint arrangements under the LTA with the United States, EEC, Canada, United Kingdom, Austria, Sweden, Australia, Denmark and Norway.

With the LTA due to expire on September 30, 1973, the GATT Contracting Parties began to discuss a possible new multilateral trade arrangement on all textile products in May 1972. Korea, as an emerging textile exporter, was opposed in principle to any multilateral arrangement aimed at regulating international trade in textiles. However, the threatened imposition of global quotas by importing countries convinced Korea to take part in the deliberations of the GATT Working Party, created for the purpose of negotiating a multilateral arrangement, which led to the Multifiber Arrangement. Textiles were Korea's single most important export item at the time, representing more than forty percent of total exports in 1972. This experience helped to convince the Korean authorities that the GATT was not an effective instrument against protectionism, which was regarded as one of the major obstacles to Korea's exports. Though international markets remained

[7] *Id.* at 2.

[8] Korea's Protocol of Accession is contained in GATT BISD, 15th Supp. at 44–46 (1968).

[9] Korean Customs Association, The Trade of Korea and the GATT 3 (1967).

open for most other Korean export products at the time, protectionism in the textile sector colored the negative Korean perception of the international trading system represented by GATT during the early years of Korea's membership.

B. The Tokyo Round

Although Korea had participated in the last phase of the Kennedy Round, its participation was quite limited and largely confined to the tariff concession negotiations in connection with Korea's accession to the GATT. In the Tokyo Round, which began in September 1973, Korea participated in the multilateral trade negotiations for the first time as a Contracting Party, but still as a minor player. It played a marginal role in the preparation of the Round, and, as a member of the Group of 77, its views were very typical of developing country positions on international trade at the time. The Korean delegate to the third and final session of the Preparatory Committee for Trade Negotiations on July 4, 1973 urged that the "participation of developing countries should be based on non-reciprocity, non-discrimination and preferential treatment principles", and that "priority should be given to the removal of non-tariff barriers to the products of export interest to developing countries."[10]

The Korean Minister attending the Tokyo Conference launching the new trade negotiations in September 1973 stated that "we are prepared to contribute in what way we can to trade negotiation," but he stressed that "the extent and manner of the contribution by developing countries could be considered only in the light of the additional and special benefits granted by the developed countries in the process of trade negotiations."[11] He went on to emphasize the importance of the Generalized System of Preferences, the need to offset the costs that would be incurred by developing countries as a result of the pending textile arrangements, and the need for differential treatment for developing countries in the new rules for the safeguard mechanism.

The major obstacles facing Korea's trade during the 1970s was protectionism on the part of developed countries. Starting with textiles in the early 1970s, it spread to other light industry products such as footwear, consumer electronics and steel products, and took the form of anti-dumping, countervailing, and safeguard measures, as well as voluntary restraint agreements. With Korea's exports surpassing the symbolic $10 billion mark in 1977, Korea's objective when the Tokyo Round negotiations entered the intensive phase was to roll back protectionism.

Korea made concessions in the tariff negotiations on some 657 items, or ten percent of all tariff lines, involving meat, chemicals, industrial machinery, and parts and components, among others, representing about thirty percent of Korea's total imports. The tariffs on these items were reduced by ten to twenty percentage points. Korea's tariff offer in the Tokyo Round was therefore quite considerable. Korea's request list included many major export items such as textiles, footwear, leather products, steel, and consumer electronic products, but tariff concessions by trading partners on labor-intensive products such as textiles, footwear, and leather products were rather limited.

In the non-tariff barrier negotiations, Korea, as a member of the Group of 77, actively participated in the safeguard negotiations with the objective of removing "selectivity"

[10] Ministry of Foreign Affairs, Materials for the Participation of the GATT Multilateral Negotiations 52–53 (1973).

[11] Statement by Dr. Duck Woo Nam, Minister of Finance, September 13, 1973, in Ministry of Foreign Affairs, The GATT Ministerial Meeting Files (1973).

(i.e., non-MFN application of safeguards) and of dismantling gray-area measures, but without much success. Korea also had important stakes in the negotiation of customs valuations, anti-dumping, and subsidies and countervailing duties, and sided with other countries which had similar positions on these issues. Korea joined several MTN Agreements such as Subsidies and Countervailing Duties (June 1980), Technical Barriers to Trade (September 1980), Customs Valuation (January 1981) and Anti-dumping (February 1986), but never joined the Import Licensing Agreement. It was not until April 1994, in the final phase of the Uruguay Round, that Korea's accession to the Agreement on Government Procurement was finalized, with implementation taking place three years later, in 1997. From the point of view of rolling back protectionism, the Custom Valuation Agreement was probably the most significant result for Korea as it removed the American Selling Price ("ASP") system in the United States. Customs valuation under the ASP system was based on the U.S. wholesale price instead of the FOB price of the imported products, and as such, acted as a substantial tariff barrier to major Korean export items to the United States at the time, such as footwear, canned products, and hand-knit gloves.

C. Balance-of-Payment Consultations

Although unilateral import liberalization policies had been adopted in Korea since the beginning of the 1980s, a substantial number of products, particularly agricultural products, remained on the restricted list subject to import quotas until the late 1980s. Korea's import restrictions had been justified by the balance-of-payments provisions under Article XVIII:B of the GATT since it had acceded to the GATT in 1967. It had numerous consultations with the Committee on Balance-of-Payment Restrictions ("BOP Committee") between 1969 and 1986. In none of these consultations was Korea's right as a developing country to invoke Article XVIII:B restrictions questioned as Korea had been registering substantial trade deficits every year since it joined the GATT.

This situation changed dramatically in the 1987 consultation with the BOP Committee because Korea's current account had registered a surplus for the first time in 1986. The external current account registered surpluses of $5 billion (five percent of GNP) in 1986 and $10 billion (eight percent of GNP) in 1987. Moreover, real GNP grew by twelve percent annually for both years following a year of relative slow growth in 1985.

Korea had undertaken to liberalize its import system unilaterally since 1980, when over thirty percent of all tariff lines were listed as restricted imports. By 1983, this proportion had been reduced to nineteen percent and, starting in 1983, a major new three-year trade liberalization program was launched with the objective of reducing the share of the restricted items to five percent of all tariff lines by 1988. In 1984, a five-year tariff reduction program was also launched with the object of lowering the average tariff from 23.7 percent in 1983 to 18.1 percent in 1988.

When Korea consulted with the BOP Committee in November 1987, the prevailing view of the Committee was that Korea's current economic situation and outlook for the balance-of-payments "was such that import restrictions could no longer be justified under Article XVIII:B." The Committee also stressed the need to establish a clear timetable for the early and progressive removal of Korea's restrictive trade measures maintained for balance-of-payments purposes. The Committee welcomed Korea's willingness to consult with the Committee in the first part of 1989, but "the expectation was expressed that Korea would be able in the meantime to establish a timetable for the

phasing out of balance-of-payments restrictions, and that Korea would consider alternative GATT justifications for any remaining measures, thus obviating the need for such consultations."[12]

In the light of these strong views by its trading partners, the new Korean government, which came into power in February 1988, began to consider seriously how to dismantle BOP restrictions. It expedited import liberalization and tariff reduction programs. In April 1989, the government announced a new three-year program (1989–1991) of liberalization covering 273 products including 237 agricultural items. In the same year, another five-year tariff reduction program (1989–1993) called for the lowering of the average tariff rate from 18.1 percent in 1988 to 7.9 percent in 1993, which, according to the Korean government, was "comparable to levels in OECD countries."[13]

In the meantime, the Korean economy continued to perform well in 1988. Real GDP grew by over twelve percent for the third consecutive year and the current account surplus increased from eight percent of GNP, or $10 billion, in 1987 to 8.5 percent of GNP, or $14.5 billion, in 1988. While labor unrest was widespread and there were substantial inflationary pressures and slower output and export growth, gross official reserves continued to rise, reaching $14 billion by March 1989, equivalent to three months' worth of 1988 imports. Korea's foreign debt also declined.

Under these circumstances, the Korean government decided to disinvoke the BOP restrictions under certain conditions. When the BOP Committee reconvened in June 1989, the IMF Representative stated his preliminary view that in light of Korea's balance-of-payments and reserve position, restrictions on imports could no longer be justified on balance-of-payments grounds. He confirmed this view in October 1989 after the IMF's Article IV consultations with Korea, which were held shortly before the BOP consultation in the GATT. In his opening statement, the Korean representative stated that while Korea believed that "a continued invocation of Article XVIII:B for some time would be most desirable," he did not "foreclose the possibility of discussing disinvocation . . . provided that the BOP Committee recognizes Korea's need for and agrees to a grace period sufficiently long enough for further liberalization and phase-out of the restrictions presently under BOP cover after its disinvocation, and reaches an understanding that Korea will not be subject to any unilateral actions or to multilateral legal challenges in terms of GATT provisions during the agreed grace period."[14]

The negotiations to determine the conditions of disinvocation were difficult and were carried over to another round of consultations in October 1989. For Korea, having a long grace period was important because the bulk of the remaining restrictions were agricultural products. In the October consultation, the Korean representative strongly objected that:

> "[i]f. . . Korea, a developing country experiencing balance-of-payment surplus only for three years in its entire history, were to be completely undressed of all protection of its agriculture and thrown out in the cold with only a nominal grace period, we cannot but express our serious doubt as to the justice and fairness of the GATT system itself."[15]

[12] *Consultation with Korea*, Committee on Balance-of-Payment Restrictions, GATT, BOP/R/171, December 10, 1987.

[13] *Statement by Korea*, June 27, 1987 in Ministry of Foreign Affairs, THE GATT BOP CONSULTATIONS 69 (1989).

[14] *Id*. at 70–71.

[15] *Id*. at 74 (Statement by Korea, October 23, 1989).

The BOP Committee finally agreed on the terms of disinvocation in late October. Korea agreed to disinvoke Article XVIII:B as of January 1, 1990 under the understanding that Korea would phase out its remaining restrictions or bring them into conformity with other GATT provisions by July 1, 1997. The eight-year grace period was in recognition of the flexibility necessary for Korea, particularly in the agricultural sector. It was also decided that Korea could phase out its remaining restrictions in two three-year tranches after the current liberalization program expired in 1991. Korea was also to notify the GATT Council of the three-year programs by March of the year before their introduction. It was also understood that the other Contracting Parties would exercise due restraint in the application of their rights under the General Agreement in relation to products included in the liberalization programs.[16]

Korea's disinvocation of Article XVIII:B in October 1989 was the first case of a developing country losing its BOP cover in the GATT. As a result of this decision, Korea was forced to begin market liberalization in agriculture, which had been the most protected sector in the Korean economy. However, Korea was given an eight-year transition period and the decision of the BOP Committee was superceded by the Agreement on Agriculture in the Uruguay Round four years later.

D. The Beef Panel

Korea's right to maintain import restrictions under the balance-of-payments provisions under Article XVIII:B of the GATT was challenged under the GATT dispute settlement mechanism when Korea prohibited all imports of beef into the country in 1985 because of the sharp decline in domestic beef prices. In October 1984, Korea stopped issuing tenders for commercial imports to the general market, and in May 1985 orders for imports of high quality beef for the hotel market also ceased. No commercial imports of beef took place between May 1985 and August 1988, when Korea partially reopened its market under a quota system. The prohibition of beef imports was challenged by the United States. Korea initially blocked the establishment of a panel after bilateral consultations had failed to produce satisfactory results, but ultimately withdrew its objection.[17]

The Panel found, among other things, that a) import measures introduced in 1984/85 and amended in 1988 were inconsistent with GATT Article XVIII:B;[18] and b) in the light of the continued improvement of the Korean balance-of-payments situation, there was a need for the prompt establishment of a timetable for the phasing out of Korea's balance-of-payment restrictions on beef, as called for by the Contracting Parties in adopting the 1987 Balance-of-Payments Committee report.[19]

Although Korea initially did not agree to the adoption of the panel reports, in the Council meeting held on November 6, 1989, after the BOP Committee had concluded its consultations with Korea and Korea had disinvoked Article XVIII:B, Korea announced that it would not block adoption of the panel reports.[20]

[16] GATT, BOP/R/183/Add.1, October 27, 1989.
[17] GATT, C/M/220, June 8, 1988. Panels were also established at the request of Australia and New Zealand. GATT, C/N/226, November 2, 1988.
[18] Report of the GATT Panel (adopted), *Korea-Restrictions on Imports of Beef* (Complaint by the United States), BISD 36S/268 (1989), at ¶113.
[19] *Id*. at ¶123.
[20] GATT, C/M/237, November 28, 1989.

III. Korea in the Uruguay Round

A. Background

Korea was an active participant in the Uruguay Round. It played a significant role both in launching the round and in the negotiations themselves. The enhanced role of Korea was the result of a number of developments that had taken place in Korea as well as in the international economy in the several years preceding the launching of the round in 1986.

At home, Korea had shifted, at the beginning of the 1980s, from heavily interventionist policies to more market-based policies. It also embarked on an ambitious trade liberalization program. In the previous decade, Korea had experimented with import substitution policies under the Heavy and Chemical Industry ("HCI") policy. Under this policy drive, officially announced in 1973, credit, interest rate, tax, and trade policies were used to promote development of "key" industries, such as iron and steel, non-ferrous metals, shipbuilding, machinery, automobiles, electronics and petrochemicals.[21] While this policy laid the foundation for industrial growth in Korea in the 1980s and beyond, it contributed to serious structural imbalances and inflationary pressures in the Korean economy by the late 1970s. In 1979, the policy was officially abandoned, and the government began to take measures to correct resource misallocation emerging from the HCI policy and to enhance the competitiveness of Korean industries. The Korean government began making trade liberalizing measures in late 1978 and, as described earlier, these trade liberalizing initiatives were strengthened when the government subsequently launched a pre-announced three-year program to expand the scope of automatic import licensing in 1983 and a five-year program to reduce tariffs in 1984. These plans were renewed in subsequent years and continued until the early 1990s. In 1985, industry-specific promotion laws enacted during the late 1960s and the early 1970s were replaced by the Industrial Development Act which was intended to promote restructuring and technological development on an industry-wide basis.

Under the new market-based macroeconomic policies and ambitious trade liberalization programs, the Korean economy regained its competitiveness and performed well in 1985. Under these circumstances and with regained confidence, Korea began to look favorably upon the global effort to launch a new trade round. Another reason why Korea looked favorably toward the new multilateral trade negotiations was the perception in trade policy circles that it might be an answer to a number of challenges facing Korea in the worsening global trade environment. The first of these challenges was the growing protectionism abroad. As Korea's presence in the world markets became more prominent, protectionist measures were imposed with increasing frequency on Korean export products.

According to a study made by the Ministry of Trade and Industry, from 1982 to 1985 some 270[22] of Korea's export items were subject to import restrictions in 21 industrial countries, covering about thirty percent of total exports to these countries. These restrictions took the form of safeguard measures, voluntary export restraints, and the imposition of anti-dumping and countervailing duties. In 1984, Korea concluded a voluntary export restraint arrangement on steel products, another major export item, with the United States. By the end of 1985, many anti-dumping and countervailing duties had been imposed on Korean export products, ranging from photo albums to color television receivers. In

[21] For the HCI policy drive, *see Trade Policy Review of Korea*, GATT, C/RM/S/27A, June 2, 1992, at 9–10.
[22] Based on CCCN 4-digit classification. *See* MINISTRY OF TRADE AND INDUSTRY, FORTY YEARS OF TRADE PROMOTION 573 (1998).

1985 alone, fifteen new anti-dumping and countervailing duty investigations on Korean export products were initiated by Korea's trading partners, ten of them by the United States.

The other challenge was growing market opening pressure from Korea's trading partners. By the mid-1980s, Korea was beginning to face strong market opening pressures from its trading partners, particularly from the United States. Bilateral trade between the two countries expanded rapidly during the 1960s, 1970s and 1980s. The United States was Korea's number one trading partner with a bilateral trade volume of $17 billion in 1985. Korean exporters' dependence on the U.S. market was considerable, with 35.5 percent of Korea's total exports going to that market in the same year. Korea's trade balance with the United States registered a surplus for the first time in 1982, and it expanded to $4.3 billion in 1985.

The United States began demanding market-opening measures in 1983, initially in the form of demanding tariff reductions and removing quantitative restrictions in the goods sector. Later, a full trade offensive involving service sectors and the protection of intellectual property was undertaken, utilizing Section 301 of the U.S. Trade Act of 1974, which authorizes the U.S. government to take trade actions against unfair practices of foreign countries.[23] In September and October of 1985, for example, investigations and subsequent negotiations took place on Korea's insurance market and the protection of intellectual property rights. As a result of these negotiations, Korea promised to partly open its fire and life insurance markets to U.S. firms and to modernize its copyright, software and patent laws. In addition, several patent infringement cases involving Korean products were filed with the U.S. International Trade Commission in the mid-1980s. By the mid-1980s, therefore, the "Regular", "Special",[24] and "Super"[25] 301 negotiations and other trade frictions with the United States dominated Korea's trade policy agenda. In trade policy circles, the new trade round was increasingly seen as a way to counter these unilateral trade offensives by Korea's most important trading partner.

As Korea faced more protectionism abroad and pressure from its trading partners to open its domestic market, it became evident to its policy makers that Korea's overall economic interests were quite consistent with the objectives of the new trade round. Korea therefore became one of the most active supporters of the launching of a new trade round. Korea thus took a very positive stance toward the launching of a new round in Punta del Este, Uruguay in September 1986. The head of the Korean delegation, strongly urging a consensus on launching the new round, advocated that both "old" and "new" issues should be discussed. He stated that Korea attached importance to "tighter safeguard principles, the elimination of non-tariff measures and the strengthening of dispute settlement procedures." As for the new issues, he believed that "the trading nations should recognize that the world economy is constantly evolving and that the trading system needs to be more responsive to this change, "but that the interests and concerns of developing countries should be fully reflected in adapting our trading system to meet new challenges."[26] He supported two other initiatives to strengthen the functioning of the GATT. One was to establish a permanent surveillance body in the GATT to monitor the trade policies

[23] *See* 19 U.S.C. §2411–2419.

[24] The so-called "Special" Section 301 is aimed at actions of foreign governments that deny adequate and effective protection to U.S. owners of intellectual property rights. *See* 19 U.S.C. §2442.

[25] "Super" 301 could be invoked against particularly egregious unfair practices. *See* 19 U.S.C. §2420.

[26] *Korea:* Statement by H. E. Woong-Bae Rha, Minister of Trade and Industry at the Meeting of the GATT Contracting Parties at Ministerial Level, September 15–19, 1986, Punta del Este, Uruguay, GATT, MIN(86)/ST/11, September 16, 1986.

and practices of GATT Contracting Parties. The other was for ministers to become more involved in the decision-making process of the GATT by meeting periodically on a regular basis.[27] Both of these initiatives were later to be realized in the Uruguay Round through the institutionalization of the trade policy review mechanism and the Ministerial Conference as the highest decision-making body of the WTO.

B. Korea's Participation in the Uruguay Round

1. Korea's Objectives in the Round

Korea's objectives in the Uruguay Round were much more clearly defined than in the Tokyo round. The multilateral trading system was seen as providing the best means of resisting bilateral trade pressures and as an important constraint on protectionist pressures as well as on the negative aspects of the trend towards regionalism. Korea was therefore interested in improving the GATT's ineffective dispute settlement procedure, opposing selective safeguards, stopping abuses of anti-dumping measures, and integrating textiles into the GATT. On the other hand, Korea's goals in the round with respect to agriculture were defensive. While supporting progressive liberalization in agriculture, Korea argued strongly that certain agricultural products, including rice, should be shielded from foreign competition.

As far as the new areas were concerned, Korea had neither a strong service sector nor a strong system of protection of intellectual property rights. Therefore, Korea was not in the forefront of those countries which argued strongly for liberalization of trade in services and protection of intellectual property rights. However, Korea supported the inclusion of these sectors in the new round in the name of strengthening and bringing up to date the rules of the multilateral trading system. As for intellectual property rights, Korea had already embarked on the modernization of its laws, partly in response to the bilateral trade pressures of industrialized countries, particularly the United States in the early 1980s. As a result, the new negotiations were not expected to impose overly difficult new obligations to Korea. It was also widely believed that strengthening of intellectual property rights would be an important factor to technological advancement in Korea, and that Korea therefore needed to protect intellectual property rights vigorously.

The service sector in Korea had come to occupy more than fifty percent of Korea's GDP at the beginning of the 1980s and 55.9 percent by 1985. According to GATT statistics, Korea's service exports reached $8 billion and imports $5 billion respectively in 1987, making Korea the fifteenth largest exporter and nineteenth largest importer of services in the world by 1987.[28] Despite the size of the service industry in Korea, however, the industry as a whole lagged behind the manufacturing sector due to the small domestic market, heavy regulation, and low level of productivity and research and development in many service sectors. Therefore the inclusion of services in the negotiation was generally seen as a burden to the Korean economy. On the other hand, Korea was seen to have a comparative advantage in construction services and in the movement of natural persons.

2. Korea in the Negotiations

Korea played a much more important role in the Uruguay Round than in the Tokyo Round. The more important role for Korea in the negotiations was a reflection of Korea's

[27] *Id.*

[28] *See* Taeho Park, *Services Negotiations in the Uruguay Round and Korea's Countermeasures*, in KOREA INTERNATIONAL ECONOMIC POLICY INSTITUTE, SEMINAR ON URUGUAY ROUND AND KOREA'S RESPONSE (1996).

enhanced status as a trading nation. By 1986 Korea had become the thirteenth largest trading nation in the world, with a two-way trade volume of $66 billion. Its industries, such as textiles, electronics, shipbuilding, steel, and automobiles, were already global in scale and in competitiveness. Korea thus had an important stake in the outcome of negotiations, and the Korean government placed a high priority on the round by increasing resources for the negotiations, as well as putting into place a national framework of preparations for the Uruguay Round.

In December 1986, the government created an interagency committee on the Uruguay Round under the Economic Planning Board, which had a coordinating role in domestic and international economic policy matters. The Uruguay Round Committee, as it was called, was composed of high level officials from nearly all economic ministries and the Foreign Ministry. The Committee reported on important matters to the ministerial level International Cooperation Committee headed by the Deputy Prime Minister, who was concurrently the Minister of Economic Planning. The Uruguay Round Committee was also divided into seven subcommittees composed of officials of relevant ministries and experts in the private sector. The positions developed by the subcommittees were screened and coordinated by the Uruguay Round Committee before they were officially communicated to the various negotiating groups created under the Trade Negotiating Committee in Geneva.

Although Korea's experience in multilateral trade negotiations was rather limited, it played a fairly active role in every phase of the Uruguay Round. As a member of the "De la Paix" group, it participated in many useful initiatives that helped to advance negotiations in many areas. Unlike in the previous round, the Korean delegation made many written proposals independently of other countries in nearly every negotiating area of the round. The Deputy Minister of Trade in the Ministry of Trade and Industry was chosen as the Chairperson of NG 8, the Negotiating Group on MTN Agreements.[29] Korea made some twenty-five written proposals during the Uruguay Round, covering issues such as dispute settlement, safeguards, anti-dumping, subsidies, agriculture, services and intellectual property. The most extensive Korean proposal was probably in the area of anti-dumping, where Korea initially proposed renegotiation of at least thirteen aspects of the Anti-dumping Code agreed during the Tokyo Round.[30]

3. The Results of the Uruguay Round for Korea

The Korean reaction to the results of the Uruguay Round was generally favorable except with respect to agriculture. The market access results were seen as creating new export opportunities for Korea in the world market. The 35 percent tariff reductions by industrial countries and the substantial lowering of tariffs and the tariff bindings on the part of developing countries provided significant market access opportunities for Korea. Korea's own market access commitments were considerable. Tariffs were to be reduced from the base level of 18 percent to 8.3 percent by 2004, a reduction of 54 percent. Tariff bindings increased from 24 percent to 90 percent of all tariff lines on industrial products. Korea also participated in zero for zero negotiations initiated by the Quad countries. Out of 75 items, Korea agreed to an immediate zero tariff on fifty items, and an eight to ten-year

[29] Chulsu Kim, the author of this chapter and later the Deputy Director-General of the WTO, was chosen as Chairperson in his personal capacity.

[30] GATT, MTN. GNG/NG8/W/3, May 20, 1987. For the role of Korea in the anti-dumping negotiation in the Uruguay Round, *see* JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 77–84, 209 (1995).

phase-out period for seventeen items. Korea also participated in tariff harmonization on chemical products, making concessions on 193 of 196 items. These substantial tariff commitments, however, did not require a major overhaul in Korea's tariff structure, as many concessions were well within the existing tariff rates resulting from the unilateral reductions that had taken place since the 1980s.[31]

The strengthening of the rules and the dispute settlement mechanism in the round were widely received in Korea as welcome developments as they were expected to reduce unilateral trade pressures on the part of major trading partners. The phase-out of gray area measures and strengthened rules in anti-dumping and countervailing duties, negotiated in the Uruguay Round, were also expected to act as a strong deterrent to protectionism facing Korean exports. With respect to textiles, the reaction to the ten-year phase-out of the MFA under the Agreement on Textiles and Clothing was mixed. It was generally seen as a disadvantage rather than an advantage by the Korean textile industry since the industry's significant global market share accumulated with large quotas was expected to be reduced in the liberalization process as a result of competition from lower-cost suppliers.

In a few cases, the new Uruguay Round agreements imposed new obligations on Korea's trade policy. The Agreement on Subsidies and Countervailing Duties required Korea to phase out some existing export and domestic subsidies. Under the Agreement on Import Licensing, which became a multilateral agreement as a result of the Uruguay Round, Korea was required to phase out an Import Diversification Program that was targeted against Japan. Under this program, which was introduced in 1978, some designated products of Japanese origin were not allowed to be imported into Korea for domestic consumption even when the same product was liberalized and therefore could be imported from all other sources.

Korea's commitments in the new areas were expected to be substantial. In reality, however, they turned out to be only moderate. In services, Korea has assumed commitments in about half of the negotiated service sectors, i.e., 78 out of 155 total service sectors. Korea made full commitments in construction and engineering services, but its commitments in other services, such as financial, telecommunications, and transportation services, were only partial. Korea did not make any commitments in educational, health, and social services nor in recreational, cultural, and sporting services, among others. Korea's commitment also included only one MFN exemption, in computer reservation services, thereby offering non-discriminatory treatment in virtually all service sectors where concessions had been made.

In intellectual property rights, the TRIPS Agreement introduced a high standard of protection. However, Korea had already introduced strong protection in all areas of intellectual property laws, partly due to the bilateral agreements negotiated with major trading partners during the mid-1980s. Korea's new obligations in this area were few, such as the extension of patent and computer software protection periods and the introduction of color trademarks.

Korea's participation with respect to agriculture was defensive and very controversial at home. Korea's negotiations with its trading partners had also been complicated by the recommendation of the BOP Committee in 1989, when Korea agreed to phase out

[31] For a general discussion of Korea's commitment in the Uruguay Round, *see* Choi, Nakgyoon, *Trade Opportunities in the Post-UR Regime* : *Korea's Perspective*, OCCASIONAL PAPERS, No. 19 (Korean Institute for Industrial Economics and Trade). *See also* MINISTRY OF FOREIGN AFFAIRS, THE RESULTS AND ASSESSMENT OF THE URUGUAY ROUND 31–39 (1994).

all quantitative restrictions by July 1, 1997. Korea resisted tariffication of agricultural import quotas without exception until the very last phase of the negotiation. In the end, Korea, like Japan, received special treatment on rice, but as a developing country received more favorable treatment than Japan. Korea was permitted to delay tariffication on rice until 2004, but was required to guarantee minimum market access in the meantime. Quantitative restrictions on other agricultural products, such as beef, chicken, and pork, were to be phased out over shorter periods of time, while tariffs were to be raised.

While Korea had made a very difficult decision in the Uruguay Round with respect to agricultural liberalization, which would require wide-ranging structural adjustments in that sector, the overall assessment of the round by the Korean government was quite positive. The Korean Trade Minister attending the Marrakesh Meeting stated that the "Uruguay Round Agreement has substantially strengthened the principle of multilateralism," and that "it has, *inter alia*, reduced barriers in various sectors, made the rules more transparent and introduced a stronger dispute settlement system." He went on to say that "I am confident that this agreement will go a long way toward helping maintain Korea's development momentum."[32]

4. Implementation

Immediately after the conclusion of the Uruguay Round negotiations in December 1993, the Korean Government began to revise the relevant laws in accordance with the new WTO agreements. As a result, Korea had almost completed the legislative work related to its Uruguay Round obligation by December 1994, before the launching of the WTO. Even in areas where the implementation period had not expired, Korea had revised related laws in advance. By the end of December 1995, Korea had revised a total of 24 laws related to Uruguay Round agreements.[33] No serious slippages relating to Korea's implementation efforts have been pointed out by other Members in the subsequent meetings of the WTO committees, nor has its implementation record been challenged in the dispute settlement process.

IV. The Impact of the GATT/WTO and the Uruguay Round on Korea

The impact of the GATT and the WTO on Korea has been quite considerable since it joined the GATT in 1967. However, this impact was not widely perceived by the general public until the time of the Uruguay Round. The GATT was important only to a handful of trade policy makers in the Economic and Foreign Ministries of the government until the late 1980s. As a country which has relied on trade for economic development, trade was an important matter for many of its citizens, but the GATT seemed to have left few imprints in the minds of the Korean public in the development years. This is probably due to the fact that the GATT was not perceived as a strong international institution effectively addressing the concerns of Korea in the international trading arena. Also, as a poor developing country, Korea's trade policies were little affected by GATT obligations in the early years of association with the organization. For many years, bilateral trade issues were regarded as much more important than multilateral trade issues.

While there is no question that multilateral initiatives in the GATT were important in terms of increasing market access for Korean industrial products in the 1970s and the

[32] Statement by Mr. Chulsu Kim, Minister of Trade, Industry, and Energy, April 12, 1994, GATT, Marrakesh MTN. TNC/MIN(94)/ST/19.

[33] *Trade Policy Review of Korea*, Report by the Government, WT/TPR/G/19, (1996), at 7.

1980s, Korean participation and influence in these initiatives were not significant. Korea reaped benefits from the negotiations, but as a typical developing country it did not have to make similar contributions in return. Moreover, Korean exports boomed after it joined the GATT. In most areas, the security and the predictability of market access provided by the GATT system were essential to Korea's success as a trading nation. However, these benefits were taken for granted. The GATT was also seen by the public as ineffective in addressing the market access concerns of Korea in the 1970s. Soon after it joined the GATT, Korea was forced to accept the MFA regime on one of its then most important export products. Protectionism spread to other areas in the form of safeguard actions, gray-area measures such as voluntary export restraint programs, and anti-dumping and countervailing duties.

Having failed to grapple effectively with these issues, the GATT was not seen in Korea as an effective organization, able to curb the protectionist policies of some of its members. Bilateral trade issues therefore dominated Korea's international trade policy agenda during the 1970s. Korea tried to deal with the protectionist policies of its major trading partners without recourse to the GATT, and negotiated bilateral trade deals with them to ensure continued market access for the affected products.

The bilateral thrust in Korea's trade policy continued through much of the 1980s but with a different emphasis. The emergence of Korea as an advanced developing country and as a major trading nation shifted its trade issues to a different plane. Korea's trading partners, particularly the United States, began to demand greater market access for their products and services and considerable national tensions were created in the process of resolving these bilateral trade frictions. As a result, a greater public awareness and interest developed over trade issues.[34]

The launching of the Uruguay Round in Punta del Este in September 1986 did not attract much public attention in Korea. As the Round proceeded, public interest grew. The balance-of-payments consultations in 1987 and 1989 and the *Beef* panel in the same year demonstrated vividly how the GATT could force Korea to make the difficult decision to open up its agricultural market. As the final phase of the Uruguay Round approached, it was clear to the Korean public that the Uruguay Round would have a significant impact in defining Korea's trade position in the world. The GATT was then in the forefront of public attention in Korea.

The impact of the GATT, the WTO, and the Uruguay Round on Korea have been substantial. Their economic effect should perhaps be considered as the most significant. However, political and social implications have also been considerable, particularly those of the Uruguay Round. An increasing number of Korean NGOs have begun to express views on WTO-related matters since the WTO Ministerial Conference in Seattle in 1999.

A. Economic Impact

Korea has benefited immensely from the GATT/WTO system. The system's open, liberal, and rules-based policies have provided a favorable external environment for the outward development strategy adopted by Korea since the early 1960s. The main features of the multilateral trading system, such as non-discrimination, transparency, and predictability, helped to safeguard Korea's trading interests throughout the crucial development years. The multilateral trading system as represented by the GATT and the WTO must therefore

[34] *See* Chulsu Kim, *Super 301 and the World Trading System: A Korean View*, in JAGDISH BHAGWATI AND HUGH PATRICK, AGGRESSIVE UNILATERALISM 253–255 (1990).

be seen as one of the major contributing factors in the transformation of Korea from one of the poorest agrarian economies to the thirteenth largest trading nation in the world in less than four decades. Peter Sutherland, the former Director General of the GATT stated most clearly the benefits Korea received as a GATT Contracting Party:

> Korea's success has been built with hard work and skillful marketing; but its foundations are the market access opportunities and legal security provided by the GATT. One could almost say that the multilateral system had been tailored to Korea's needs, especially during the period of rapid industrial expansion from the early 1960s. Having secure access to the world market has encouraged the economies of scale and rapid reallocation of resources that have spurred Korea's phenomenal growth.[35]

The benefits of the Uruguay Round were felt mainly by the industrial sector in Korea. With the 38 percent overall reduction agreed in the round, the average tariff rate of industrial countries on manufactured goods has been reduced to four percent, and the proportion of industrial products entering developed countries duty-free has more than doubled, from 20 to 43 percent. At the same time, the overall reductions and the increase in tariff bindings undertaken by developing countries, particularly in Southeast Asia, Latin America and Central/Eastern Europe, were seen as creating new opportunities for Korean exporters. Sectoral tariff cuts negotiated in the chemical, steel and electronic industries were seen as particularly helpful in Korea: the proportion of trade in the chemical sector entering developed country markets duty-free more than doubled; tariffs on steel were to be eliminated in such markets as the United States, Australia, Canada, Japan, the EU and the EFTA countries; and tariffs on electronics were substantially reduced in Korea's major markets.[36]

Another aspect of the Uruguay Round market-access results seen as significant in Korea was the phase-out of gray-area measures such as voluntary export restraints. Korea had been adversely affected by such arrangements in footwear, electronics and steel in several of its major markets. These market-access results have led several research institutes in Korea to predict that the full implementation of the industrial package will add three to five billion dollars to the value of Korea's exports by 2002.[37] An OECD paper assessed the additional effect on Korea's economic growth at 2.3 percent.[38]

The other Uruguay Round results, such as the strengthened rules, the more effective dispute settlement system, and the establishment of the WTO as a stronger institution, were seen by many in Korea as bringing advantages to Korea. The perception was widespread in government, business and academic circles that Korea, as a heavily trade-dependant country, was in need of better protection by multilateral rules, and that the Uruguay Round results in these areas would meet this need.

B. Political Impact

However, these positive evaluations of the GATT and the WTO as well as of the Uruguay Round in general were completely overshadowed by the stormy political reactions in Korea towards the results of the agricultural negotiations, which were concluded in December 1993. While these results were seen internationally as relatively favorable for

[35] *Korea and the New World Trading System*, Address by Peter D. Sutherland, Director-General of the GATT, to the Korea Institute of International Economic Policy, Seoul, July 20, 1994, at 6.

[36] *Id*. at 3.

[37] *See* Choi, Nakgyoon, *supra* note 31, at 13.

[38] *See* Economic Planning Board, *et al*, Policy Responses to the Launching of the WTO 6 (1994).

Korea,[39] they were severely criticized and strongly opposed by well-organized farmer groups and the opposition political parties, both of which demanded renegotiation of the agreement. Violent nation-wide demonstrations by farmers followed.

The most controversial result was the required tariffication of all agricultural quotas. Korea had opposed such a result until the very end of the negotiations, but accepted it when all other countries did so. Korea had succeeded in exempting rice from tariffication until 2004, but agreed to open up the rice market under the minimum market access arrangement. The hostile reaction was so strong that President Kim Yong Sam had to appear before national television to seek support. In his statement of December 9, 1993, the President apologized for the failure of his government to resist opening the rice market in the Uruguay Round negotiations, but said that he had decided, after much soul-searching, that the acceptance of such results was a better alternative for Korea than refusing it and thereby being isolated from the GATT system.[40] The Prime Minister and the Minister of Agriculture subsequently resigned in order to take responsibility for the Uruguay Round results in agriculture.

In the spring of 1994, another domestic political controversy erupted over Korea's Country Schedule on agriculture. Certain aspects of the schedule submitted by Korea in March were rejected by its trading partners as not accurately reflecting the original agreement and as containing undertakings more favorable to Korea. When this became public, political criticism was leveled at the Korean negotiators for ineptness and for failing to have the schedules accepted in their entirety. The Minister of Agriculture and Fisheries was abruptly fired.

Compared to the political backlash from the Uruguay Round results in agriculture, the ratification process for the Marrakesh agreement in late 1994 was relatively smooth. The government introduced the ratification bill in the National Assembly on June 28, 1994. The minority opposition Democratic Party refused to participate in the discussions until late November when it made public four "preconditions" of participation in the ratification procedures. These preconditions called for the passage of special Uruguay Round implementation legislation in the National Assembly, the renegotiation of certain market opening conditions in the Uruguay Round with the United States, a unilateral declaration in the process of ratification to the effect that trade between North and South Korea be treated as internal trade, and finally, that a new economic support policy package for agriculture would be announced by the government.

The ruling party and the government accepted the idea of special implementation legislation as the United States and some other countries had similar legislation in place. The framework of the support package for the agricultural sector had already been announced in June. The government decided to provide 42 trillion Korean won (about $53.2 billion at the 1994 exchange rate) in structural adjustment programs in agriculture through 1998. In addition, 15 trillion Korean won (about $19 billion) would be used to enhance the competitiveness of the agricultural sector and to improve the standard of living in rural areas. The government stated that renegotiation of the Uruguay Round results would be impossible because the Round had ended, and a unilateral declaration on inter-Korean trade, as already agreed between North and South Korea in 1991, would only complicate Korea's WTO obligations.

[39] Charles Carlisle, the late Deputy Director-General of the GATT, who oversaw negotiations in agriculture in the late stages of the Uruguay Round, commented privately to the author that for him the results in agriculture were favorable to Korea. *See also*, Peter Sutherland , *supra* note 35, at 4.

[40] MINISTRY OF FOREIGN AFFAIRS, RATIFICATION PROPOSAL FOR THE WORLD TRADE ORGANIZATION AGREEMENTS at 205–216 (1994).

On December 15, 1994, the Foreign Affairs and Unification Committee of the National Assembly approved the WTO Agreement by eighteen to three. The Special Uruguay Round Implementation Legislation was approved unanimously after the original bill, which contained many provisions that conflicted with the WTO Agreement, was amended to comply with the WTO Agreements. The remaining provisions were mostly statements of principle. One of its provisions stated that "the transactions between North and South Korea are internal transactions, and therefore, are not considered as trade between countries stipulated in the [WTO] Agreement."[41] On December 16, the bill passed the Plenary Session of the National Assembly by 152 to 58, with one abstention. The Special Implementation Law also passed with a greater margin.

V. Korea's Involvement in the WTO Dispute Settlement System

Korea has been involved in a substantial number of disputes in the GATT and the WTO. Two cases were brought against Korea in the GATT, one under Article XXIII, and the other under the Anti-Dumping Code. Korea lost both of these cases.[42] Korea also lodged a complaint against the EEC on non-tariff barriers on television receivers. The case was resolved without a panel decision.

Since the establishment of the WTO, Korea has been a much more frequent user of the dispute settlement mechanism, and Korea's trade laws, regulations, and practices have also been challenged many times by other WTO Members. As of December 31, 2002, Korea had brought seven cases against its trading partners in the WTO dispute settlement process. Twelve cases (nine distinct matters) had been brought against Korea as of the same date. Korea has also participated in nine WTO dispute cases as a third party, and, as of December 31, 2002, Korea was participating as a third party in three additional cases.[43]

A. Korea as a Complainant

Six of the seven cases brought by Korea were against the United States. Three involved anti-dumping cases, two involved a safeguard action, and the sixth involved the U.S.

[41] Article 5, *Special Law Concerning the Implementation of the WTO Agreement*.

[42] The two cases were *Korea-Restrictions on Imports of Beef,* BISD 365/268 (United States), BISD 365/202 (Australia), and BISD 365/235 (New Zealand), (adopted on November 7, 1989); and *Korea-Anti-dumping Duties on Imports of Polyacetal Resins from the United States*, BISD 405/205 (United States), (adopted on April 27, 1993).

[43] The nine cases in which Korea participated as third party are: *Brazil—Export Financing Programme for Aircraft—Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS/46/RW2 (2001); *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS/54/R, WT/DS/55/R, WT/DS/59/R, WT/DS/64/R (1998); *European Communities—Customs Classification of Certain Computer Equipment,* WT/DS/62/AB/R, WT/DS/67/AB/R, WT/DS/68/AB/R (1998); *Canada—Certain Measures Affecting the Automotive Industry,* WT/DS/139/AB/R, WT/DS/142/AB/R (2000); *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India (Article 21.5),* WT/DS/141/RW (2002); *India—Measures Affecting Trade and Investment in the Motor Vehicle Sector,* WT/DS/146/AB/R, WT/DS/175/AB/R (2002); *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS/152/R (1999*); United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS/184/AB/R (2001); and *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS/234/AB/R (2003). The pending or suspended cases where Korea reserved its rights as third party as of December 31, 2002 are: *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe*, WT/DS/214; *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS/244; and *European Communities—Provisional Safeguard Measures on Imports of Certain Steel Products*, WT/DS/260.

Table 1: WTO Dispute Cases Brought by Korea (As of December 31, 2002)

DS No.	Country	Case	Request for Consultation
89	United States	Anti-Dumping Duties on Imports of Color Television Receivers from Korea	July 10, 1997
99	United States	Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea	August 14, 1997
179	United States	Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea	July 30, 1997
202	United States	Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea	July 13, 2000
215	Philippines	Anti-Dumping Measures regarding Polypropylene Resins from Korea	December 12, 2000
217	United States	Continued Dumping and Subsidy Offset Act of 2000	December 21, 2000
251	United States	Definitive Safeguard Measures on Imports of Certain Steel Products	March 20, 2002

Continued Dumping and Subsidy Offset Act.[44] The seventh case was brought against the Philippines and involved an anti-dumping and countervailing law. In two cases the dispute was resolved when the defendant revoked the measures at issue.[45] In three cases the panel ruled in favor of Korea.[46] As of December 31, 2002, one appeal process[47] and one panel process[48] were underway. Table 1 summarizes the WTO dispute cases brought by Korea.

B. Korea as a Defendant

Of the twelve cases against Korea, six were brought by the United States, four by the EC and one each by Canada and Australia. Whereas Korea's cases against other WTO member countries were mainly in the area of import relief measures such as anti-dumping and safeguard measures, the complaints against Korea involved many areas of the GATT 1994 and WTO disciplines, such as the Agreement on Technical Barriers to Trade, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Agriculture, the Agreement on Government Procurement, the Agreement on Safeguards, the Agreement on Import Licensing Procedures, and the Agreement on Subsidies and Countervailing Measures.

[44] This statute, the so-called "Byrd Amendment", passed in late 2000, provides that antidumping and countervailing duties collected by the U.S. Government would be paid to the members of the U.S. industries that had supported the petition. *See* 19 U.S.C.§1675c.

[45] *United States-Anti-Dumping Duties on Imports of Colour Television Receivers from Korea*, WT/DS/89, and *Philippines-Anti-Dumping Measures regarding Polypropylene Resins from Korea,* WT/DS/215.

[46] *United States-Anti-Dumping Duties on Dynamic Random Access Memory Semi-Conductors (DRAMS) of One Megabit or Above from Korea*, WT/DS/99 (1999); *United States-Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel and Strip from Korea*, WT/DS/179 (2001), and *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS/202 (2001). The Appellate Body generally upheld the panel in the latter case. The other two panel decisions were not appealed.

[47] *United States—Continued Dumping and Subsidy Act of 2000,* WT/DS/ 217.

[48] *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS/ 251.

Table 2: WTO Dispute Cases Brought Against Korea (As of December 31, 2002)

DS No.	Complaining Country	Case	Request for Consultation
3	United States	Measures Concerning the Testing and Inspection of Agricultural Products	April 4, 1995
41	United States		May 9, 1996
5	United States	Measures Concerning Shelf-life of Products	May 3, 1995
20	Canada	Measures Concerning Bottled Water	November 8, 1995
40	EC	Laws, Regulations and Practices in the Telecommunication Sector	May 9, 1996
75	EC	Taxes on Alcoholic Beverages	April 2, 1997
84	United States		May 23, 1997
98	EC	Definitive Safeguard Measure on Imports of Certain Dairy Products	August 12,1997
161	United States	Measures Affecting Imports of Fresh, Chilled and Frozen Beef	January 2, 1999
169	Australia		April 13, 1999
163	United States	Measures Affecting Government Procurement	February 16, 1999
273	EC	Measures Affecting Trade in Commercial Vessels	October 24, 2002

Korea resolved three disputes bilaterally with the United States, Canada and the EC.[49] Two cases involving the same matter brought by the United States against Korea were suspended when the United States did not take additional steps after it had requested consultations in 1995.[50] The panel ruled in favor of Korea in one of the remaining seven cases in which panel or Appellate Body reports have been adopted.[51] Five (three distinct matters) were decided in favor of the complainants and Korea fully implemented the DSB's recommendations in all of these cases.[52] In one case, the consultation process was underway at the time of writing.[53] Table 2 summarizes the WTO dispute cases brought against Korea.

The dispute settlement system of the WTO has been perceived as operating fairly in Korea. This is partly due to the fact that many of the cases brought by Korea against its trading partners, as well as one of the cases brought against Korea, were decided in Korea's favor. Even in those cases where the rulings have been unfavorable to Korea, the authority and the impartiality of the panel and/or Appellate Body have been rarely questioned. The *Alcoholic Beverages* case (DS 75 and 84) and the *Beef* case (DS 161), which had been decided against Korea, were high profile cases with significant political implications, but the public debate of these cases in the media and in the National Assembly has been largely confined to how to bring the domestic regulations and policies into conformity with the WTO recommendations, not whether the recommendations were fair.

[49] *Korea—Measures Concerning the Shelf-life of Products* (United States) WT/DS/5; *Korea—Measures Concerning Bottled Water* (Canada) WT/DS/2; and *Korea—Laws, Regulations and Practices in the Telecommunication Sector* (EC) WT/DS/40.

[50] *Korea—Measures Concerning the Testing and Inspection of Agricultural Products*, WT/DS/3 and WT/DS/41.

[51] *Korea—Measures Affecting Government Procurement*, United States, WT/DS/163/R (2000).

[52] *Korea—Taxes on Alcoholic Beverages*, WT/DS/75/AB/R (EC) and WT/DS/84/AB/R (United States) (1999); *Korea—Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS/98/AB/R (EC) (2000) ; *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS/161/AB/R (United States) and WT/DS/169/AB/R (Australia) (2001)

[53] *Korea—Measures affecting Trade in Commercial Vessels*, WT/DS/ 273.

VI. The New Trade Round (Doha Development Agenda) and Korea

Korea has been an unequivocal supporter of a new trade round from the very early stages of the discussions. According to a paper presented by the Ministry of Foreign Affairs and Trade, a new round is necessary "to maintain momentum for market opening, to keep rising protectionism in check, and to make the WTO more relevant to the globalization process."[54] Korea also supports a comprehensive agenda for the new round because it "will promise us a better balance of interests and therefore a better chance for success."[55] For Korea, a comprehensive agenda includes the built-in-agenda (agriculture and services), market access for industrial goods, anti-dumping, investment, competition policy, transparency in government procurement, e-commerce, and trade facilitation, among other matters. As of the end of 2002, the Korean government took the following positions on the various issues discussed in the context of the new multilateral trade negotiations.

A. Agriculture

Korea has taken a defensive position in agriculture as it did in the Uruguay Round. Korea is interested in maintaining the basic framework of the Agreement on Agriculture and supports a flexible gradual approach to liberalization to take into account the special nature of agriculture. It hopes to strengthen non-trade concerns, such as food security, environmental protection and rural development and the principle of special and differential treatment.

Korea's paper submitted in the first stage of negotiation well represented its position on the agriculture negotiation, stating that "a flexible and gradual approach is especially crucial for issues concerning tariff reduction and tariff rate quotas ("TRQs"), reduction of aggregate measurement of support ("AMS") and the criteria and scope of the Green Box."[56] It further stated that "provisions regarding non-trade concerns, including the multifunctionality of agriculture, and special and differential treatment for developing countries need to be revisited."[57] With regard to the market access of agricultural products, it proposed that "the framework of tariffication adopted at the Uruguay Round should be maintained in order to facilitate a consistent reform process." It further proposed that "tariff reduction should be based on the final bound rates of the Uruguay Round commitments so as not to penalize Member countries that have voluntarily reduced tariffs."[58]

B. Services

Korea is in favor of including all services sectors, reducing MFN exemptions in the existing agreement, and promptly concluding on-going work on rule-making in trade in services. Korea's proposal stated that "it is essential that no service sector be *a priori* excluded", and that "the scope of MFN exemptions should be progressively reduced."[59] Concerning rule-making in services, the proposal stated that "the Members should promptly conclude the work on rule making mandated by the GATS in the area of safeguard measures, domestic regulations, subsidies and government procurement."[60]

[54] *New Round and Korea*, Presentation by Ministry of Foreign Affairs and Trade, Korea-France Economic Cooperation Meeting, Seoul, June 14, 2000 (paper).
[55] *Id*.
[56] *Proposal for WTO Negotiations on Agriculture*, G/AG/NG/W/98, January 9, 2001.
[57] *Id.*
[58] *Id.*
[59] *Preparations for the 1999 Ministerial Conference*, Communication from Korea, Services WT/GC/W/169, April 16, 1999.
[60] *Id*.

Based on these objectives, a series of Korea's proposals were followed in the areas of telecommunication, distribution, financial, maritime and construction services, as well as on the principles of negotiation, including MFN exemption and autonomous liberalization. Through the process of exchanging concession requests, Korea requested concessions in various service sectors to 36 countries, and received concession requests from 24 countries, as of December 31, 2002.

C. Market Access for Industrial Goods

Korea supports substantial cuts in tariff rates on industrial goods and the reduction or elimination of non-tariff barriers. It also supports an increase in the number of tariff bindings and a formula approach for tariff reductions, with credits for unilateral tariff cuts. The Korean proposal stated that "the agreed modalities in the Market Access Negotiating Group should deal with the reduction and elimination of both tariffs, including tariff peaks, high tariffs and tariffs escalation, and non-tariff barriers as mandated in the Doha Ministerial Declaration."[61] With regard to the modality of the negotiation, it further stated that ". . . in order to bring about the greatest comprehensive tariff reduction for all Members, Korea prefers pursuing a formula approach, with limited use of the request-offer approach, when necessary."[62]

D. Anti-dumping

As in the Uruguay Round, Korea is in the forefront of those Members who support the inclusion of anti-dumping in the agenda for the new round. Korea is of the view that the Uruguay Round clarified some anti-dumping issues but that more needs to be done. Korea's interest lies in the elimination of ambiguities in the agreement and the stemming of abuse of anti-dumping measures by all countries. Korea proposed that the "negotiations for reviewing the AD Agreement should be conducted in the new round, with a view to preventing abuse of anti-dumping measures, thereby achieving a new balance of interests among all Members."[63] In particular, the Korean proposal calls for further clarification of rules in initiation of investigation and review procedures.[64] During the negotiation, Korea allied with other countries as a group of so-called "Friends of Anti-Dumping Negotiations", submitted several joint proposals for the WTO rules negotiation dealing with the possible clarification and improvement of the current Agreement. Korea and the Friends group countries also endeavor to add political momentum to the anti-dumping negotiation through senior level meetings, and encourage the developing Member countries to actively participate in the negotiation to prevent the proliferation of anti-dumping actions in world trade.

E. Regional Trade Agreements

Korea has a long-standing concern about the proliferation of regional trading agreements.[65] Its long-standing objective has been to ensure that the WTO rules on regional

[61] Negotiating Group on Market Access, *Market Access for Non-Agricultural Products*, Contribution Paper from Korea, TN/MA/W/6, August 5, 2002.
[62] *Id.*
[63] *Preparations for the 1999 Ministerial Conference, Agreement on Implementation of Article VI of the GATT 1994*, Communication from Korea, WT/GC/W/235/Rev.1, July 12, 1999.
[64] *Id*.
[65] However, as discussed in Part VII of this chapter, Korea is beginning to reevaluate its position with respect to regional trade agreements.

trade agreements are clarified in such a way that such agreements become consistent with the WTO and complement the work of the WTO. Korea has proposed that the new round deal with this issue. It has stated that "Article XXIV [of GATT 1994] suffers from a conspicuous lack of clarity that prevents members from reaching a common understanding on their exact meanings,"[66] and that the Committee on Regional Trade Agreements in the WTO " has yet to adopt a single examination report, and the systemic issues discussion has made little progress." Korea thus suggested that "Members review the WTO rules on regional trade agreements in order to clarify and strengthen them as necessary." Korea's "indicative list of particular interest" included, among others: developing yardsticks for "substantially all trade"; establishing the scope of "other regulations of commerce"; developing ways to measure "level of duties and other regulations of commerce," (all these terms are used in Article XXIV of the GATT 1994) and considering the relationship between Article XXIV of the GATT 1994 and Article 5 of the General Agreement on Trade in Services.[67]

F. Trade and Investment

Korea has been an active participant in the Working Group on the Relationship between Trade and Investment. Korea's Ambassador to Geneva was elected Chairman of the Working Group when it was established in 1997. Korea is of the view that negotiations in this area should aim at establishing WTO rules in investment in the form of a stand-alone multilateral agreement. This agreement "should aim at facilitating the flow of international investment through enhanced transparency and predictability." However, "[s]uch a goal should be reconciled with the need to respect the host country's right to set its own policies, in particular development policies of developing countries."[68] Most-favored-nation and national treatment should be adopted as guiding principles. The agreement should also establish a reasonably high standard of investment protection, but it should preserve the host country's right to regulate foreign investment according to its unique economic situation. It also called for consideration of performance requirements and investment incentives with a view to minimizing their distorting effects. As to dispute settlement, state-investor disputes should be excluded and the WTO dispute settlement procedures should be applied. Finally, the agreement should reflect the interests of developing countries.[69] After the negotiation began, Korea submitted proposals on non-discrimination and a GATS-type approach for investment,[70] and on balance-of-payment safeguard provisions in investment agreements.[71]

G. Trade and Competition Policy

Korea has taken the position that the time is ripe to begin negotiations on a multilateral framework on competition policy. A multilateral framework in this area "may provide a level playing field securing legal stability, predictability and transparency in world trade

[66] Preparations for the 1999 Ministerial Conference, *Proposal on Regional Trade Agreements*, Communication from Korea, WT/GC/W/171, April 16, 1999.
[67] *Id*.
[68] Preparations for the 1999 Ministerial Conference, *Trade and Investment*, Communication from Korea, WT/GC/W/267, July 20, 1999.
[69] *Id*.
[70] WT/WGTI/W/123, June 28, 2002.
[71] WT/WGTI/W/143, September 16, 2002.

and foreign investment, thereby helping enterprises to reduce transaction costs."[72] This framework should develop core principles and rules on competition policy and these principles and rules should be confined to areas where international trade and/or foreign investment are affected.[73] The framework should also aim at promoting cooperation among WTO Members in relation to competition cases. It should include modalities for international cooperation, such as prior notification of the enforcement of competition laws which may result in costs for other WTO Members, and coordination among the concerned WTO Members in cases where more than two jurisdictions are engaged in anti-trust investigations. Positive comity could also be incorporated into the framework to impose greater discipline on cross-border anti-competitive practices. Korea has also called for the incorporation of the developmental dimension as an integral part of the framework, and for a special dispute settlement mechanism to reflect the specificities of competition law. After the negotiation began, Korea submitted proposals on Hard Core Cartels and Voluntary Cooperation,[74] and on core principles of competition.[75]

H. Trade and Environment

Korea is in favor of placing trade and environment on the agenda of the new trade round. It believes that the WTO should try to ensure that trade-related environmental measures are implemented in a transparent, fair and non-trade restrictive manner. While Korea believes that the Members should review WTO rules relating to environment, health, and safety and clarify them as necessary, the result should not impede trade liberalization or advance protectionist purposes. Korea also supports the clarification of the relationship between the WTO and multilateral environmental agreements ("MEAs"), to improve the legal stability of the trade-related measures provided for in the MEAs in the context of the WTO legal framework. It also believes that eco-labelling can be useful in the protection of the environment, but that guidelines for its use should be established. Korea's submission to the Committee on Trade and Environment was intended to help facilitate further discussion by making preliminary identification of the Specific Trade Obligations as set out in MEAs and ascertaining some issues for further consideration.[76]

I. Trade Facilitation

Korea has supported the negotiation of trade facilitation issues in the new round. It believes that the WTO has a pivotal role to play in trade facilitation, in particular to coordinate the various efforts exerted by individual Members both at regional and multi-lateral levels. It called for the review of WTO agreements on import licensing and rules of origin in connection with trade facilitation, and hopes to discuss possible new rules in the areas of simplification and modernization, use of electronic media and Electronic Data Interchange, technical assistance to developing countries, and transparency of rules

[72] Preparations for the Ministerial Conference, *Trade and Competition*, Communication from Korea, WT/GC/W/298, August 6, 1999.
[73] *Id*. Korea's general views about core principles and rules are described in its submission to the Working Group on Trade and Competition Policy (WT/WGTCP/W/133).
[74] WT/WGTCP/W/200, August 12, 2002.
[75] WT/WGTCP/W/212, September 24, 2002.
[76] Committee on Trade and Environment, *Specific Trade Obligations (STOs)*, Submission by Korea, TN/TE/W/13, October 8, 2002.

and regulations on trade and custom procedures.[77] Especially, Korea's view is that Article V of the GATT sets out basic principles regarding transit traffic, but it does not provide detailed guidelines for applying these principles in practice. Furthermore, it does not give due consideration to the different risk levels involved in transit traffic, in particular, between transit with and without transshipment. Therefore, Korea is of the view that improving the implementation of Article V of the GATT is a vital component of trade facilitation.[78]

J. Other Issues

Of the other issues that are being discussed as possible subjects in the new round, Korea takes a positive view on electronic commerce. Korea believes that electronic commerce should be promoted through private sector initiatives, that government intervention should be kept to a minimum, and it is in favor of extending the current practice of not imposing custom tariffs on electronic transmissions until an appropriate point in time. Korea, as a new member of the Government Procurement Agreement was one of the early supporters of the Agreement on Transparency in Government Procurement. To facilitate concrete progress, Korea, Hungary and the United States have jointly submitted a draft text to the Chairman of the Working Group on Transparency in Government Procurement.[79] Korea has not spoken officially on trade and labor in the WTO, and is of the view that labor issues should be discussed in the ILO. However, given the political necessity that the industrial countries address this issue in some fashion, Korea appears to go along with the idea of discussing the issue outside the WTO and separately from the new trade round, with other international organizations such as the ILO.

VII. Regional Trade Agreements and Korea

Before a free trade agreement ("FTA") between Korea and Chile was initialed in October 2002, Korea was one of the very few WTO Members that had not entered into regional trade agreements ("RTAs"). This policy was based on the premise that as a nation trading globally, Korea's trading interests would not be promoted by membership in RTAs, and that such arrangements might lead to mutually exclusive trading blocs that could undermine the multilateral trading system. Korea has, however, participated in regional economic cooperation arrangements such as APEC for some time and has taken part in a limited number of preferential tariff arrangements such as the Generalised System of Preferences ("GSP"), Trade Negotiations among Developing Countries ("TNDC"), the Bangkok Agreement among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific, and since 2000, unilateral tariff concessions to least developed countries.

The recent proliferation of RTAs seems to be changing the minds of Korean government policy-makers about membership in RTAs. RTAs are increasingly seen as an effective way of maintaining export markets and for inducing foreign direct investment

[77] Preparations for the Ministerial Conference, *Trade Facilitation,* Communication from Korea, WT/GC/W/309, September 2, 1999.

[78] Council for Trade in Goods, *Trade Facilitation : GATT Article V*, Communication from Korea, G/C/W/423, October 1, 2002.

[79] Preparation for the 1999 Ministerial Conference, *The WTO's Contribution to Transparency in Government Procurement*, WT/GC/W/385 and WT/WGTGP/W/27, November 9, 1999.

into Korea. There is also the growing concern that Korea might be left out of any RTAs altogether. This concern seems to have been reinforced by the decision of Japan to pursue FTAs of its own. The Government Report submitted to the Trade Policy Review of Korea in September 2000 clearly denotes this change in policy:

> As an economy that has benefited greatly from the openness in global trade, Korea has traditionally valued the multilateral trading system and has not supported bilateral or regional free trade agreements. Though its commitment to multilateralism is still firm, Korea has recently begun to be more flexible with regard to the FTAs in the world trading system. Korea is now of the view that FTAs, if properly concluded and managed in accordance with relevant rules, can supplement the multilateral trading system and contribute to market opening in the world through bilateral and regional acceleration of trade liberalization.[80]

The decision to pursue FTAs was made at the International Economic Policy Coordination Meeting chaired by the Prime Minister in November 1998. At this meeting, it was decided to pursue an FTA with Chile and to expand these negotiations on a step-by-step basis with other countries of similar size. The decision to pursue negotiations with large trading partners such as the United States, Japan and China would only be made after a careful study of the implications of such arrangements. A new inter-agency FTA Committee was created to oversee these negotiations.

The decision to pursue an FTA with Chile was taken by consensus in the International Economic Policy Coordination Meeting, but some participants appear to have raised concerns about the inclusion of agricultural products in the scope of the proposed FTA. Others questioned whether an FTA with a minor trading partner like Chile would be meaningful for Korea and urged that the government consider major trading partners like the United States, Japan and China as possible candidates.[81] Bilateral trade between Korea and Chile in 2001 amounted to $1.27 billion, consisting of $572.6 million of Korean exports to Chile and $696.1 million of Chilean exports to Korea.

Several considerations led to the choice of Chile. As a country that had implemented trade and economic reforms earlier than Korea, Chile was regarded as having similar views on matters related to trade liberalization. As a party to many existing RTAs and in the process of negotiating bilateral and regional trade agreements with various Latin American countries, Chile was seen as an ideal bridgehead for Korea into Latin America. The industrial structure of Korea and Chile was also regarded as complementary. Finally, since Chile has concluded or is in the process of negotiating FTAs with many countries, Korea could learn from its experience.[82]

The agreement to begin FTA negotiations between Korea and Chile was made between the two Heads of State in Auckland at the time of the APEC Summit in September 1999. The actual negotiations began in December 1999, and after six rounds of difficult negotiations, a FTA was initialed on October 24, 2002. The two nations concluded a comprehensive FTA with a high level of liberalization, involving not only goods but also a wide spectrum of issues like services, investment, intellectual property rights, and competition policy. The Korea-Chile FTA provides for the full elimination of tariffs on most imported products within ten years, with some exceptions. Depending on the sensitivity of the items, both countries agreed to introduce long-term elimination periods, tariff-rate

[80] *The Report by the Government, Trade Policy Review of Korea*, WT/TPR/G/19, August 28, 1996, at 16.
[81] *Proceedings of the International Economic Policy Coordination Meeting*, November 5, 1998 (paper).
[82] *See* the Opening Statement by Eui-young Chung, Deputy Minister for Trade, in a Seminar, *The Meaning and the Implications of FTA with Chile*, jointly sponsored by Ministry of Foreign Affairs and Trade and Korea Institute for International Economic Policy, October 15, 1999 (paper).

quotas, preferential (seasonal) tariff rates and to leave out some items as exceptions to liberalization. For Korea, rice, apples and pears were set aside as exceptions and quotas are to be applied for beef, chicken and mandarin oranges. For Chile, refrigerators and washing machines were classified as exceptions to liberalization.

As of the end of 2002, a number of countries have been mentioned as additional candidates for FTAs with Korea. Among others, Japan, Australia, Singapore, New Zealand and Thailand have expressed interest in concluding FTAs with Korea or have officially proposed them. With respect to Japan, research on the feasibility of a bilateral FTA has been undertaken by research institutes in both countries.[83] The two countries launched in July 2002 a joint study group to exchange preliminary views on the possible agenda items in the official negotiations toward a bilateral FTA. Korea and Singapore also agreed in November 2002 to assess the feasibility of a bilateral FTA within the first half of 2003. Various research efforts are also being undertaken by research institutes, universities and business organizations in Korea, China and the United States on the impact of Korea-U.S.[84] and Korea-China FTAs,[85] but they have not yet resulted in government-level actions or discussions. As for the possibility of FTAs with Mexico, ASEAN and China, or a trilateral FTA among China, Korea and Japan, the Korean government will conduct a feasibility review through joint studies and other various channels.

VIII. Trade Policy Making in Korea

The executive branch of the Korean government makes most of the non-legislative trade policy decisions. The major trade policies are deliberated at the Economic Ministers' Meeting chaired by the Deputy Prime Minister, who is concurrently the Minister of Finance and Economy. Some policy matters are referred to the State Council presided over by the President, who is the ultimate decision-maker. The major administrative agencies that currently participate in the formulation of trade policy are the Ministry of Foreign Affairs and Trade, the Ministry of Finance and Economy, the Ministry of Commerce, Industry and Energy, and the Ministry of Agriculture.

Aside from the Ministry of Foreign Affairs and Trade, other ministries have domestic policy responsibilities over trade-related issues in various industrial sectors. However, the role and the relative importance of these ministries in trade policy-making have evolved over time in accordance with the changing nature of trade problems faced by Korea. In the early years of economic development, when trade policy issues centered around manufactured products, a major role was played by the Ministry of Trade, Industry and Energy. For many years, the negotiating functions tended to be divided among three ministries. The Foreign Ministry took the lead in multilateral negotiations, with the Trade and Industry Ministry taking the lead on sectoral negotiations, and the Finance Ministry being responsible for tariff policy and negotiations.

When trade talks diversified into other areas, a new institutional arrangement was required. The new International Policy Coordination Office was created in 1986 in the Economic Planning Board with the mandate of formulating long-term international economic policy and coordinating the government's positions on bilateral and multilateral

[83] Inkyo Cheong, *FTA Between Korea and Japan: Evaluation and Prospects*, Korea Institute for International Economic Policy Seminar (2000).

[84] Inbom Choi and Jeffry Schott, *Free Trade Between Korea and the U.S* (Institute for International Economics, 2001).

[85] Hu Angnag, *Proposition for Setting Up Free Trade Agreement (FTA) between China*, *Hong Kong, Japan and Korea*, Korea Institute for Industrial Economics and Trade Seminar, July 3, 2001 (paper).

economic issues.[86] A decision was not taken during the reorganization on who should take the lead in trade negotiations. As a result, the negotiation functions were divided mainly between the Ministry of Foreign Affairs and the Ministry of Trade and Industry (later, the Ministry of Trade, Industry and Energy), with the former usually taking the lead on multilateral trade issues, and the latter on bilateral and sector-specific issues involving manufactured products.

Since the 1980s, the organizational ambiguity concerning trade policy formulation and the Korean government's attribution of negotiating authority has been the subject of much criticism in Korea and the source of much inter-agency rivalry on trade policy questions since.[87] Under the administration of President Kim Young Sam (1993–1998), the name of the Ministry of Trade, Industry and Energy was officially changed to the Ministry of Trade and Industry, but this change did not affect the *status quo* on trade policy functions. Considerable debate and fractious maneuvering normally preceded the decision on which ministry should take the lead in trade negotiations.

Aside from the economic ministries, independent government commissions such as the Fair Trade Commission and the Korean Trade Commission take part in the formulation of trade policies. The Fair Trade Commission regulates unfair business practices. The Korean Trade Commission, established in 1987, independently makes determinations on the existence of injury in safeguard, anti-dumping and countervailing investigations and recommends appropriate remedies to the administration.

After the government of President Kim Dae-jung came into power in early 1998, the trade policy functions of government agencies were again reorganized. The trade policy functions, then dispersed widely in the Ministries of Foreign Affairs, and of Trade and Industry and Finance and Economy were given to the Ministry of Foreign Affairs, which changed its name to the Ministry of Foreign Affairs and Trade. This ministry was given the responsibility over the conduct of overall trade policy, including policy formulation, coordination and negotiation. The trade policy functions are now carried out by the Office of Trade Negotiations established within the ministry, headed by the Minister for Trade. The ultimate coordinating authority was given to the Prime Minister's Office.

In early 2001, in accordance with the reorganization of the administration, the Minister of Finance and Economy was elevated to the status of Deputy Prime Minister as under previous governments. The economic policy coordination functions were re-entrusted to the Deputy Prime Minister, as the Chairman of the Economic Policy Coordination Meeting. In July 2001, the government announced that a special ministerial level meeting dealing with international economic policy would be held under the Chairmanship of the Deputy Prime Minister and composed of the Minister of Agriculture, the Minister of Commerce, Industry and Energy, the Minister of Administrative Coordination, the Minister for Trade, and the Chief Economic Secretary to the President.[88] This meeting will replace the International Economic Policy Coordination Meeting chaired by the Prime Minister. The International Economic Policy Coordination Meeting was to be supported by a vice-ministerial level meeting headed by the Minister for Trade.

The political parties and the NGOs also play an important role in trade policy formulation in Korea. The government and the ruling party consult on major trade policies. The ruling party often provides input on trade policy, particularly in politically sensitive areas, through the Party-Administration Policy Coordinating Meeting. Increasingly,

[86] *See Trade Policy Review of Korea*, Report by the Government, GATT C/RM/G27, June 12, 1992, at 21.
[87] Jung-soo Kim, *Diagnosing the Korean Trade Administrative System*, 3 IRI REVIEW 31–68 (Spring, 1998).
[88] Press Release, Ministry of Finance and Economy, July 17, 2001.

government think-tanks, economic organizations, labor unions and consumer, environmental and farmers' organizations are involved in developing positions on trade-related matters and try to influence the government's position in these areas.

On important trade policy matters, inter-agency committees are formed to develop, coordinate and establish trade policies. One such example is the standing New WTO Round Committee, which was established in 1998. Headed by the Deputy Minister for Trade in the Ministry of Foreign Affairs and Trade, the Committee was created to prepare Korea's positions in the new round. Five subcommittees, on manufactured products, agricultural products, services, rules, and new issues, were also organized to facilitate the work of the Committee. Government officials, economic organization representatives, and trade policy experts are included in these subcommittees. It has organized public hearings for civic, social and economic groups in order to properly reflect their views in the negotiation process.

IX. Conclusion

In its thirty-six year history of membership in the GATT and the WTO, Korea has risen from a minor trading nation to a major one. Concomitantly, Korea's role in the GATT/WTO system has evolved from an obscure to a prominent one. At the same time, Korea has benefited immensely from the international trading system represented by the GATT and the WTO. Although the GATT was often an imperfect system, there is no question that it provided the stability, predictability, and market access that were all crucial in the development of Korea's exports.

As a developing country, Korea's contribution to the GATT system was relatively slight until the mid-1980s when Korea's trading partners began to demand market-opening measures, bilaterally and multilaterally. Korea's decision to disinvoke BOP restrictions in 1989 was an important step to begin the liberalization of hardcore restrictive measures, particularly in agriculture, and the Uruguay Round results a few years later brought about further liberalization of the trade regime in this sector. In non-agricultural areas, Korea's contributions in the Uruguay Round were substantial. Korea played a significant role in the Uruguay Round, commensurate with her status in world trade.

Since the establishment of the WTO, Korea has been an active and prominent player in all aspects of the activities of the organization. It has faithfully implemented its WTO obligations. In the sectoral negotiations during the early years of the WTO, such as in financial services, in basic telecommunications and in information technology products, Korea has been a key player and substantial contributor. Korea has also recently introduced significant tariff concessions towards the Least Developed Countries. Korea has been an active participant in the dispute settlement process of the WTO, and has shown itself to be a responsible WTO Member by implementing all Panel/Appellate Body recommendations. It is also important to note that the WTO system demonstrated its value to Korea during the Asian financial crisis, which engulfed the country in late 1997. The Korean recovery from the crisis was largely trade-driven, and this was possible because the overseas markets for Korean products remained open as Korea's trading partners resisted protectionist measures.

Korea has been a vigorous supporter of a new trade round with a comprehensive agenda. In the on-going trade round known as the Doha Development Agenda, Korea is likely to play an even more active role than in the Uruguay Round. Korea continues to have an important stake in a more open and rule-based international trading system. As Korea's trade regime continues to be more open and liberal, the new WTO round is

unlikely in most areas to create new obligations that will be politically difficult for Korea to bear. In agriculture, however, difficulties remain, and substantial opposition to rapid liberalization in this sector is expected. A delicate balancing act by the government will be required between the need to meet the eventual negotiating objectives in agriculture and the political requirement at home to bring about progressive liberalization. However, even with this caveat, the likelihood is great that Korea will remain a strong guardian of the WTO system and an active supporter and participant in the on-going round of trade talks.

BIBLIOGRAPHY

I. Books

1. In Korean

Economic Planning Board, et al, *Policy Responses for the Launching of The World Trade Organization* (November 1994).

Ministry of Foreign Affairs, *Materials for the Participation of the Gatt Multilateral Trade Negotiations* (August 1973).

—, *Punta del Este Ministerial Meeting* (November 1986).

—, *Guide to The Uruguay Round* (February 1988).

—, *Korea-U.S.Beef Panel* (December 1989).

—, *The Results Of The Trade Policy Review Of Korea* (July 1992).

—, *The Results and Assessment of the Uruguay Round* (April 15, 1994).

—, *The Ratification of the WTO Agrements: The Process of Examination in the National Assembly and Related Materials* (December 31, 1994).

Ministry Of Foreign Affairs And Trade, *The New WTO Trade Round: The Recent Developments and Korea's Response* (May 26, 2000).

—, *Seminar Papers on the New WTO Round* (November 19, 2000).

—, *The Results of the Trade Policy Review of Korea* (December 2000).

Ministry Of Trade And Industry, *Forty Years of Trade Promotion* (December 1988).

—, *The Results of the Marrakesh Ministerial Conference* (May 1994).

—, *Comprehensive Report on the 1996 Trade Policy Review of Korea* (October 1996).

—, *The Uruguay Round and Korea's Response* (April 1990).

Korea Institute For International Economic Policy, *The New International Trading System and Korea* (September 1994).

—, *Implementation of the WTO Agreement and Korea's Response to the New Round*, International Seminar Proceedings (October 14, 1999).

—, *The New WTO Trade Issues: The Impact and the Responses* (December 2000).

Korea Rural Economy Institute, *The White Paper on the Uruguay Round Agricultural Negotiations* (November 1994).

Korean Customs Association, *The History of Tariffs in Korea* (1969).

—, *The Korea's Trade and the GATT* (1967).

Korea Foreign Trade Association, *Trade Annual,* 1960–1990.

Hahm, Tae-Hyuk, *Reflections on the GATT Accession Negotiations*, Ministry Of Foreign Affairs (July 1993).

2. In English

Croome, John, *Reshaping the World Trading System: A History of the Uruguay Round,* World Trade Organization (Geneva, 1995).

Hart, Michael, *Fifty Years of Canadian Tradecraft*, Center For Trade Policy And Law, (Ottawa, 1998).

Kim, Wan Soon And Choi, Nakgyoon, *The Global Trading System And Challenges Ahead—A Korean Perspective*, Institute For Global Economics (Seoul, 1998).

Stewart, Terence (ed), *The GATT Uruguay Round: A Negotiating History*, Vols. I–III, Kluwer Law and Taxation Publishers, Deventer (The Netherlands, 1993).
World Trade Organization, *The Results Of The Uruguay Round Of Multilateral Trade Negotiations: The Legal Texts* (Geneva, 1995).

II. Periodicals

1. In Korean

Kim, Jung -Soo, "Diagnosing The Korean Trade Administrative System", IRI Review, Vol. 3, No.1, Spring (1998).
Kim, Young-Tai, "The Meaning Of The GATT Accession", Trade Monthly (May 1967).
Park, Taeho, *Services Negotiations In The Uruguay Round And Korea's Response*, Korea International Economic Policy Institute Seminar (1996).

2. In English

Cheong, Inkyo, *FTA Between Korea And Japan: Evaluation And Prospects*, Korea Institute For International Economic Policy Seminar (2000).
Choi, Inbom and Jeffery Schott, *Free Trade Between Korea And The U.S.*, I.I.E. Publication (2001).
Choi, Nakgyoon, "Trading Opportunities In The Post-Uruguay Round Regime: Korea's Perspective", *Kiet Occasional Paper*, No. 019, Korea Institute For Industrial Economics And Trade (January 1996).
Hu Angang, "Proposition For Setting Up Free Trade Agreement (FTA) Between China, Hong Kong, Japan And Korea", KIEP Seminar (July 3, 2001) (paper).
Kim, Chulsu, "Super 301 and the World Trading System: A Korean View", in Jagdish Bhagawati and Hugh Patrick, *Aggressive Unilateralism*, University Of Michigan Press, Ann Arbor (1990).

III. Official Papers and Documents

Proceedings of The Economic Ministers Meeting, No. 1966 (May 9, 1966).
Proceedings of The Foreign Affairs Committee, The 60th Session of The National Assembly (March 8, 1967).
Proceedings of the Special Committee on The Uruguay Round, The 165th–169th Session of The National Assembly December 1993 to June 1994.
Proceedings of the Committee on Agriculture, The 165th–169th Session of the National Assembly, 1993–1994.
Ministry of Foreign Affairs, The GATT Ministerial Meeting Files (Seoul, 1973).
Ministry of Foreign Affairs and Trade, *New Round and Korea*, Presented at the Korea-France Economic Cooperation Committee (Seoul, June 14, 2000) (paper).
—, *Korea's Position on Issues Related to A WTO New Round* (July 20, 2000) (paper).
Han, Duk-Soo, *The New Round: Korea's Perspective*, Address to the 33rd International General Meeting, The Pacific Basin Economic Council, (Honolulu, March 20, 2000) (paper).
Sutherland, Peter, *Korea and the New Trading System*, Address to the Korea International Economic Policy Institute (Seoul, July 20, 1994) (paper).

CHAPTER 74

MEXICO

Antonio Ortiz Mena L.N.*

TABLE OF CONTENTS

I. Introduction 217
II. A Long and Winding Road: Mexico's Accession to the GATT 217
A. The Havana Conference 217
B. The 1970s: Postponement of Mexico's Accession to GATT 218
C. The 1980s: Unilateral Trade Liberalization and (Finally) Accession to GATT 224
III. Mexico in the Uruguay Round 227
A. Market Access: Tariffs 228
1. Industrial Goods 228
2. Agriculture 228
3. Textiles and Apparel 229
B. Market Access: Non-Tariff Barriers 229
1. Safeguards 229
2. Antidumping and Countervailing Duties 229
3. Subsidies 230
4. Balance of Payments Exceptions 230
5. Technical Barriers to Trade 230
6. Sanitary and Phytosanitary Measures 230
7. Rules of Origin 230
8. Import Licenses 230
C. State-Trading Enterprises 230
D. Trade-Related Investment Measures 231
E. Trade-Related Intellectual Property Rights 231
F. Trade in Services 231
G. Government Procurement 232
H. Regional Trade Agreements 232
I. Dispute Settlement 232
IV. Mexico and the Dispute Resolution Process in the GATT/WTO 232
V. Mexico and the Doha Development Agenda 234
A. Implementation of UR Agreements 235

* Chair, International Studies Division, Centro de Investigación y Docearia Económicas A.C. (CIDE), Mexico D.F. (www.cide.edu). Dr. Ortiz Mena L.N. would like to acknowledge Luis Bravo Aguilera, Fernando de Mateo, and Dionisio Meade for sharing their experiences regarding Mexico's accession to GATT. He has attempted to represent their views in a faithful fashion, and any misrepresentations thereof are his exclusive responsibility. He would also like to thank Esperanza Duran for her extremely close reading of the text and detailed comments. Eduardo Ramos and Ismael Ortiz patiently endured endless requests for information from the author. Alfonso Martinez provided valuable research assistance.

B. Built-in Agenda 235
C. Singapore Issues 235
D. Other Issues 236
VI. Regional Trade Agreements: NAFTA and Beyond 236
A. NAFTA 236
B. FTAs With Latin American Countries 237
C. Europe 237
D. Israel 237
E. APEC 238
F. Current Negotiations 238
VII. The Politics of Trade Policy-Making in Mexico 238
VIII. Public Attitudes Toward the WTO 241
A. Opinions of Business Groups 241
B. SMEs and NGOs 242
IX. Conclusions 243
Bibliography and References 245
(a) Printed Sources 245
(b) Internet Sources 246
(c) Interviews 247

I. Introduction

Mexico is the world's seventh largest trader and by far the most important in Latin America. It participates actively in multilateral trade negotiations, and has been one of the most dynamic participants in regional trade agreements. Currently, more than seventy percent of the country's GDP derives from trade.[1]

The present situation stands in stark contrast to Mexico's trade policies of relatively recent times. In 1982 it still had a closed economy, and it did not join the GATT until 1986. Even in 1980, during the oil boom, its exports amounted to only US$25 bn. (compared with US$166 bn. in 2000), and they accounted for only thirteen percent of GDP.[2]

This chapter provides an overview of Mexico's role in the multilateral trading system, following its transition from a closed economy to its current status as a leading actor in world trade. Part II covers Mexico's long-delayed decision to join the GATT and Part III deals with its participation in the Uruguay Round. Mexico's experience with dispute settlement under GATT/WTO is addressed in Part IV, and its objectives for the Doha Development Agenda are dealt with in Part V. Part VI covers Mexico's very active participation in regional trade agreements. Parts VII and VIII deal, respectively, with the trade policy formulation process in Mexico and political attitudes toward the WTO. Part IX provides a conclusion.

II. A Long and Winding Road: Mexico's Accession to the GATT

A. The Havana Conference

Mexico followed an activist foreign policy in the aftermath of World War II, becoming a founding member of the United Nations, the IMF and the World Bank. Its participation in the United Nations Conference on Trade and Employment, held in Havana, Cuba, from November 1947 to March 1948 is thus not surprising. It was during the conference that what eventually became known as the Havana Charter, under which the International Trade Organization ("ITO") was to be established, was proposed. The Charter and the ITO never entered into force, largely as a result of lack of support by the United States.

Mexico decided not to ratify the Havana Charter or to participate in the GATT. The reasons for not ratifying the Charter were explained by Mexico's Finance Minister, Mr. Ramon Beteta, in his speech before the Conference on November 26, 1947.[3] Instead of assessing the strengths and weaknesses of the Charter, Mr. Beteta dwelled on its alleged omissions. He argued that the Charter's aim was to foster trade at the cost of ruining many national industries, instead of promoting trade through the harmonious growth of national economies. The Charter did not recognize the different implications of trade restrictions implemented by net debtors which merely wished to protect their currency and overall economic stability, and those imposed by net lenders, which were protecting a strong industry and agricultural sector, making it virtually impossible for the debtors to pay them back. The Charter provided no specific strategies to foster employment growth or economic development in developing countries, nor did it eliminate export subsidies or provide the means for dealing with cartels and oligopolistic practices. It did

[1] World Trade Organization, Trade Policy Review: México-Report by the Government 5, WT/TPR/G/97 (2002).

[2] The World Bank, Global Development Finance CD-ROM (1997).

[3] A summary of the speech is presented in Luis Malpica de Lamadrid, ¿Qué es el GATT? Las Consecuencias Prácticas del Ingreso de México al Acuerdo General 15–17 (1988).

not outlaw dumping and at the same time placed restrictions on anti-dumping actions. The concomitant tariff reductions would make foreign investment in industrializing countries less attractive. The Charter permitted control over prices and supplies of commodities and raw materials and allowed absolute freedom for prices and supplies of manufactured and consumer goods.

In short, Mr. Beteta argued that the Charter favored developed countries at the expense of developing ones, and that under such circumstances it was best for Mexico not to ratify the Charter and join the ITO.

B. The 1970s: Postponement of Mexico's Accession to GATT

Mexico remained a basically closed economy from the post-World War II era up until the mid-1980s. It would take two economic shocks for trade policy to be altered in a significant way: a severe economic downturn in 1982–1983 caused by a drop in the world price of oil and a rise in worldwide interest rates (which put Mexico on the verge of defaulting on its foreign debt), and a second economic downturn in 1986 coupled with a stock market crash and a devaluation of the peso in 1987.

From the late 1940s until the mid 1970s, the basic thrust of trade policy was the use of high tariffs and import licensing requirements for a broad range of products, with the aim of fostering import-substituting industrialization ("ISI").[4] The policy was very successful, especially from the mid 1950s until the early 1970s. Mexico's economy grew at an annual average rate of 6.8 percent from 1958 to 1970, surpassed only by Japan, Singapore and South Korea. In fact, if one were to take the parameters established for membership in the European Monetary Union (the Maastricht convergence criteria), Mexico would have qualified for entry into the Euro zone.[5]

Trade volumes were very low throughout the period, accounting for less than fifteen percent of GDP, and about three-quarters of total exports were made up of agricultural goods and minerals.[6] During that time, however, the government initiated a series of programs that many years later became an integral part of the export-led strategy and contributed to the generation of foreign exchange. The most important programs related to the automobile industry, *maquiladoras* (in-bond processing plants), and investment in infrastructure and regional development to foster international tourism.[7]

The achievements of the 1950s and 1960s provided a firm basis from which to start a gradual process of trade liberalization and export promotion, but the policies followed from the early 1970s to the early 1980s were, at best, contradictory and erratic, plunging the country into economic crisis in 1976 and again in 1982.

[4] ISI was also pursued before that time, but more as a default option resulting from dire international economic circumstances in the 1930s than as a clearly laid-out strategy. *See* Leopoldo Solís, La Realidad Económica Mexicana: Retrovisión y Perspectivas (1991).

[5] Using 1996 figures for targets that depend on the best performers in the European Union, the convergence criteria and Mexico's performance are, respectively, as follows: inflation (2.7 percent vs. 2.5 percent), total debt as a percentage of GDP (60 percent vs. 14.4 percent), public sector deficit as a percentage of GDP (3 percent vs. 2.6 percent), interest rates (9.2 percent vs. 8.2 percent), and exchange rate fluctuation (15 percent vs. 0 percent). Antonio Ortiz Mena, El Desarrollo Estabilizador: Reflexiones Sobre una Época 289 (1998). (Note: Antonio Ortiz Mena is not to be confused with his grandson Antonio Ortiz Mena L.N., the author of this chapter.)

[6] Solís, *supra* note 4, at 92, and Ortiz Mena, *supra* note 5, at 88.

[7] Ortiz Mena, *supra* note 5; Antonio Ortiz Mena, *Política Industrial Durante el Desarrollo Estabilizador: Políticas Llevadas a Cabo y Desempeño Posterior de los Sectores Automotriz y de Autopartes, Maquiladora de Exportación y Turismo* (2002) unpublished manuscript; and Solís, *supra* note 4.

The Echeverria government (1970–1976) decided to give an impetus to exports and to rationalize protection, in order to reduce the anti-export bias of the prevailing export structure. Regarding the latter, the first stage contemplated a reduction in tariff dispersion (i.e., the number of different tariff rates applied, and the range from the lowest to the highest tariff), the second one a reduction of quantitative restrictions, and the third one an eventual reduction of tariffs, including the highest ones covering industrial goods. There was limited success in the areas of tariff dispersion and quantitative restrictions, but the third phase never came into effect.[8]

As for export promotion, in 1971 the Mexican International Trade Institute (*Instituto Mexicano de Comercio Exterior*), an independent government agency, was created and its activities, together with fiscal incentives for exporters, contributed to export growth (an increase of 123 percent from 1970 to 1975)[9] and to a change in the export structure, so that by 1974 fifty percent of Mexico's exports were made up of manufactures, up from only 11.6 percent in 1958.[10]

The experiment with export promotion and the rationalization of protection was short-lived, given that these policies were pursued within a context of erratic macroeconomic management. Between 1971 and 1976, annual inflation rates increased from 5.3 percent to 15.8 percent, the public sector deficit ballooned from 0.9 percent to 7.4 percent of GDP, the current account deficit increased from 2.4 percent to 4.1 percent of GDP, and the public foreign debt grew from US$4.5 bn. to US$19.1 bn.[11] A balance of payments crisis in August 1976 forced the government to devalue the peso, which had remained at a fixed parity with the U.S. dollar since 1954. Stabilization measures included an increase in export taxes, as well as reinstating import permits for products that had previously been liberalized, so that by the end of the Echeverria administration ninety percent of imports were so covered, and the export promotion program started in 1971 was suspended.[12]

Apart from an economic crisis, the Lopez Portillo administration (1976–1982) inherited a commitment with the IMF to stabilize the economy. Under the IMF agreement, Mexico was to receive U.S.$965 million in exchange for reforms aimed at reducing inflation, decreasing the current account deficit, and restoring conditions conducive to a resumption of growth. Among the measures implemented were the imposition of new export taxes (to avoid windfall profits resulting from the peso devaluation), but also the dismantling of certain import licensing requirements. By late 1978 the program seemed to be having a positive effect, with decreasing inflation and a lower current account deficit.

Trade policy reform was spurred by IMF conditionality, increasing U.S. protectionism (which threatened to reduce Mexico's benefits under the Generalized System of Preferences), and the need to have a coherent trade policy after the policy swings of the Echeverria era. The trade reforms pursued from 1977 to 1980 consisted of export promotion through fiscal, financial and energy subsidies, available as a result of the rise in the price of oil, which was becoming increasingly important for the Mexican economy after the discovery of significant reserves in the mid-1970s. There was also some

[8] Aldo Flores, Proteccionismo Versus Librecambismo: La Economía Política de la Protección Comercial en México 1970–1994 (1998) at 179–181.

[9] Solís, *supra* note 4, at 92.

[10] Fernando de Mateo, *Del ¡No! al ¡Sí! Historia de Un Matrimonio por Conveniencia (México Frente al GATT)*, in México en el GATT: Ventajas y Desventajas (1986); the 1958 figure is taken from Ortiz Mena, *supra* note 5, at 88.

[11] Antonio Ortiz Mena L.N., An Inquiry Into the Causes of the 1982 Economic Crisis in Mexico 60 (1987).

[12] Flores, *supra note* 8, at 184–193.

liberalization; import licensing requirements decreased from ninety percent at the end of the Echeverria administration to sixty percent by 1980, and quantitative restrictions were to be completely phased out by 1982.

GATT accession became a key element of trade policy reform. In 1978 the U.S. government, wanting to avoid a permanent trade deficit with Mexico, which it believed would become unavoidable if its southern neighbor continued to increase its oil exports to the United States and maintained a closed economy, issued "emphatic invitations" for it to join GATT before the end of the Tokyo Round (1973–1979) and to open up its economy.[13] The issue had lain dormant since the 1948 decision not to ratify the Havana Charter, but had slowly come back to life. In 1964 the United Nations Conference on Trade and Development ("UNCTAD") was established. It was seen as the natural forum for developing countries, whereas GATT was regarded as a forum where developing countries would be begging for scraps from rich countries.[14]

As a result of the Third UNCTAD meeting in Chile in 1972, there was agreement to allow developing countries to participate in trade negotiations without the need for GATT membership, and Mexico in fact participated in preparatory meetings for the Tokyo Round, as well as in the Round itself. It became increasingly evident that UNCTAD was becoming more of a consultative and research-oriented forum, and that significant trade concessions would be obtained only in the GATT. Accordingly, during the Tokyo Round Mexico assumed certain commitments in principle, and its representatives believed it was only logical for Mexico to negotiate accession in order to receive improved market access as a result of GATT membership.[15]

During the early stages of the Tokyo Round, an Office for Trade Negotiations and Tariffs was established at the Finance Ministry, as well as an inter-ministerial commission dealing with the same topics. The commission was formally presided over by the Finance Minister (Lopez Portillo) but in practice was headed by Hector Hernandez, Director of Financial Studies at the Finance Ministry. The incipient interest in the GATT was maintained when Lopez Portillo became President in 1976. Hector Hernandez was made Deputy Minster for Foreign Trade, and in January 1979 he was finally instructed to begin negotiations for GATT accession. Abel Garrido, as Director of International Affairs at the Trade Ministry, was directly in charge of negotiations, which were successfully completed within a relatively short time span.[16]

In a letter addressed by Mexico's Trade Minister, Jorge de la Vega Dominguez, to Olivier Long, Director-General of the GATT at the time, it was made clear that Mexico would accept accession only insofar as three basic principles were upheld: that it should be recognized as a developing country, that it be allowed to implement the measures required to achieve the aims of its economic and social development policies, and that its commitments during the Tokyo Round be considered part of the concessions given for GATT accession. A Working Group made up of Argentina, Australia, Brazil, Canada, the European Economic Communities ("EC") and its Member States, Egypt, Spain, the United States, India, Japan, New Zealand, Nicaragua, Peru, Romania, Sweden, Switzerland and Uruguay, and presided over by Dr. P. Tomie from Yugoslavia, examined Mexico's request.

[13] FLORES, *supra* note 8 at 203.
[14] Interview with Dionisio Meade, February 12, 2002.
[15] Interview with Fernando de Mateo, January 10, 2002.
[16] Interview with Luis Bravo Aguilera, February 11, 2002.

The Working Group met on five occasions, and on October 26 the Protocol of Accession was ready. It completely fulfilled all of the requirements set out by Mexico in the letter to Mr. Long. Mexico's industrial promotion strategy was left intact, even though it was inconsistent with several of the new GATT Plurilateral Codes of Conduct; it allowed the government to maintain export subsidies for a certain time; it provided ample protection for the agricultural sector and the highly regulated automobile industry; and the oil industry was kept completely out of the Protocol.[17] Mexico granted tariff concessions on three hundred products with an import value of US$504 million at 1976 prices (eight percent of total imports), and bound tariffs at a higher level (fifty percent) than the currently applied ones. In exchange, it received concessions for 373 products with an export value of US$1,916 million and an average tariff reduction of 34 percent.[18] In addition, Mexico could make ample use of GATT safeguard provisions (Articles XII and XVIII) to deal with balance-of-payments problems should the need arise, as India and Brazil had been doing for a long time.[19]

The very successful negotiations, however, were sidelined by an acrimonious debate involving government officials, politicians, academics, public intellectuals, and business leaders, among others, on the merits of GATT accession that continued throughout 1979 and early 1980. The debate went on for a long time without knowledge of the specific conditions for accession that would be requested or the concessions to be gained by Mexico!

In April 1979, during its Third Annual Congress, and in the presence of President Lopez Portillo, the National College of Economists ("CNE") expressed concern over the consequences of Mexico's entry into GATT, chief among them that it would represent a threat to the sovereign management of trade and industrial policy and provoke serious dislocations in the Mexican economy. President Lopez Portillo replied that the economists who had previously criticized the ISI strategy, arguing it had run its course, now opposed policy change. He asked for constructive proposals, rather than mere criticism. In May the CNE replied in the national media, stating that accession to GATT should be postponed indefinitely given that the national economy was not ready for increased foreign competition, and that the existing trade policy instruments were adequate to combat the prevailing anti-export bias. In arguments reminiscent of those used some thirty years earlier by Finance Minister Beteta, the CNE also claimed that the GATT was ineffective in dismantling protectionism and did not deal effectively with the needs of developing countries.[20]

During the following months there was a plethora of meetings, declarations and articles on the relative merits and demerits of GATT accession. Trade policy issues did not make the front pages again until the North American Free Trade Agreement ("NAFTA") negotiations started in the early 1990s.[21]

[17] Flores, *supra* note 8, at 240–241.

[18] De Mateo, *supra* note 10, at 47–48. A comparison between the 1979 and the 1986 Protocols is presented in Gabinete de Comercio Exterior, El Proceso de Adhesión de México al Acuerdo General Sobre Aranceles Aduaneros y Comercio (GATT) 233–241 (1986).

[19] De Mateo, *supra* note 15. Nora Lustig, Mexico: The Remaking of an Economy (1992) notes that at the time Mexico lacked anti-dumping and countervailing duties laws, but in my view those laws could have been enacted without much trouble, given the hold of the ruling Institutional Revolutionary Party ("PRI") over congress, and the President's de facto mandate over PRI issues.

[20] Flores, *supra* note 8, 238–239.

[21] Malpica de Lamadrid provides a good summary of the debate. *See* Luis Malpica de Lamadrid, *La Consulta Nacional 1979–1980: Polémica*, *supra* note 3.

The private sector was not unduly concerned about entry into GATT. The most intense debates occurred among government officials, and they were not really about entry into GATT but about the economic development model in general: whether to stick with state-led interventionism and a relatively closed economy which awarded pride of place to oil, or to start a process of serious economic reform, including privatization and liberalization. Positions were held on principle and there were abstract discussions on national sovereignty; scant attention was paid to the actual Protocol of Accession.[22]

The debate on GATT accession was a "lightning rod" for a much larger and general debate on national development strategies that pitted those favoring a generally interventionist approach within a closed economy, against those favoring economic liberalization. The discussion was very doctrinaire, so that specific issues were rarely examined in a systematic and objective manner.[23]

In an unexpected move right after the successful negotiation of the Protocol, Lopez Portillo decided to initiate a series of national hearings with representatives from trade and industry on the wisdom of ratifying the Protocol. Some people close to the process have ventured that the President had already decided against GATT accession, and that the consultations were window-dressing on a *fait accompli*; that is, the consultation process conveyed legitimacy to the decision, but did not cause it.[24]

The cabinet was divided over economic policy issues, and these divisions became greater as the international price of oil rose. Jose Andres de Oteyza, Secretary of Patrimony and Industrial Development (*Patrimonio y Fomento Industrial*), argued that oil should be used to the country's advantage as bargaining leverage in bilateral trade negotiations. World Bank estimates indicated that the price of oil would continue to rise, perhaps reaching US$50 per barrel in the not too distant future, so at the time the decision to go it alone did not seem as reckless as it turned out to be. More generally, it was thought that with the oil bonanza Mexico need not submit its development plans, which included subsidies for a number of "strategic" sectors, to multilateral trade rules that would have hindered the execution of an activist policy.

The President then decided to put the matter to a vote, in writing, to the eight Ministers who comprised the Economic Cabinet, i.e., Finance, Programming and Budget, Trade, Patrimony and Industrial Development, Foreign Relations, Interior, Labor, and Agriculture. The vote, a non-binding and informal procedure, was cast in March, and the result was 5 to 3 against GATT accession.[25]

On March 18, 1980, President Lopez Portillo made public his decision to postpone GATT accession. He chose a highly symbolic date, the anniversary of the nationalization of the oil industry on March 18, 1938. The implications escaped no one: it was implicit that membership of the GATT would have meant a threat to national sovereignty.[26]

The President stated that it was not the appropriate time to join the GATT. Among the reasons for his decision, he stated that the World Energy Plan proposed by Mexico and under discussion at the United Nations could be incompatible with some GATT

[22] Bravo Aguilera, *supra* note 16.

[23] Meade, *supra* note 14.

[24] De Mateo, *supra* note 15. Flores, *supra* note 8, at 240, concurs with this view.

[25] FLORES, *supra* note 8, at 248. Apparently, Trade, Programming and Budget, Interior and Labor were in favor, while Foreign Relations, Finance, Patrimony and Industrial Development, and Agriculture were against it. According to Bravo Aguilera, *supra* note 16, some ministers that had been in favor of accession changed their minds at the last minute in line with what they surmised were the President's true preferences.

[26] Meade, *supra* note 14, De Mateo, *supra* note 15.

provisions, such as those related to commitments on supply,[27] that trade liberalization did not translate into a fairer world economic order, and that bilateral negotiations were preferable to multilateral ones as a way to start building such an order. He went on to say that the crux of the matter was the "philosophy" of the GATT itself, and not the excellent Protocol obtained by Mexican negotiators.[28]

The date chosen for the speech also meant that oil would maintain pride of place in the national quest for economic development. The oil boom made the government set aside the cautious reforms (including trade policy reform) initiated under IMF conditionality and embark on a strategy for growth whose success depended on the evolution of two key variables that were beyond its control: the persistence of an upward trend in the price of oil (or its stabilization at high levels), and the continued availability of foreign financing at low interest rates.

The 1978–1981 period was one of impressive economic growth based on oil exports: GDP grew at more that eight percent per annum, oil production increased annually at 19.4 percent and oil exports outpaced the increase in production, growing at a 52.7 percent annual rate.[29] The cost of the strategy was extremely high, however, as became all too evident by the summer of 1981.

Instead of addressing severe macroeconomic imbalances (the current account deficit grew by 68.9 percent in 1978 and 80.9 percent in 1979) through exchange rate policy (a devaluation), a tightening of monetary policy or other policy options, the government did not change course. The strategy started to unravel by mid-1981 with a decrease in the price of oil. To make up for the gap in revenue, the government started to take on short-term debt at ever increasing interest rates, so that the debt was in fact fueling a capital flight spiral.

Secretary Oteyza, who supervised oil policy, behaved as if Mexico were a price maker instead of a price taker in the international oil market, and threatened that countries unwilling to buy oil at the previously agreed upon high prices would have their supply contracts rescinded. Several countries were only too glad to end their contracts and to seek suppliers at much lower costs.[30]

The situation became untenable and on February 19, 1982 the President decided to devalue the peso. He arrived at the decision on his own, after the Governor of the Central Bank had insisted on it for months. The devaluation, however, was not accompanied by sensible policies to lessen its costs and make the most of its benefits. It was soon followed by an increase in the minimum wage, which generated inflationary pressures and largely offset the advantages gained by the devaluation. It also created uncertainty and further pressures on the peso. Exchange controls were imposed on September 1, and the banks were nationalized.

President Lopez Portillo bequeathed his successor, Miguel de la Madrid (1982–1988) what he had inherited from Echeverria: an economy in crisis and under IMF surveillance, with many necessary reforms, including trade policy, still pending. A great opportunity had been lost, and now policy change would have to be undertaken under dire economic circumstances.

[27] Lopez Portillo did not make a more explicit reference regarding supply conditions, but he was probably referring to GATT rules against restrictions on exports.

[28] The March 18, 1980 speech by Lopez Portillo is summarized in Luis Malpica de Lamadrid, *La No Entrada de México al GATT en 1980, supra* note 3.

[29] Ortiz Mena L.N., *supra* note 11, at 40.

[30] Bravo Aguilera, *supra* note 16.

C. The 1980s: Unilateral Trade Liberalization and (Finally) Accession to GATT

After the 1982 economic crisis the policy emphasis was on macroeconomic stabilization and later on re-igniting economic growth. Trade policy became an instrument for both goals. By the time Mexico decided to start GATT accession negotiations in late 1985, national economic circumstances had changed drastically from those prevalent in the immediate aftermath of the 1982 crisis, and the country was set on a course of unilateral trade liberalization that dovetailed with the terms of the negotiated GATT accession.[31]

Almost two years of the De la Madrid administration went by until the first significant changes in trade policy were implemented. In December 1984, import licensing requirements were removed for seventeen percent of imports, although that still left 83 percent of imports subject to licensing requirements given the one hundred percent import licensing coverage imposed in 1982. The simple average tariff was reduced by 13.7 percent, and the number of tariff positions was reduced from sixteen to ten. The following year saw a very significant reduction in import licensing requirements, so that only about one-third of imports faced such restrictions. The maximum tariff nevertheless remained at one hundred percent, and the percentage of production covered by reference prices (i.e., official prices set by the government) almost doubled, from 13.4 percent in 1984 to 25.4 percent in 1985. Further liberalization had to await a deepening of the crisis and the long-postponed decision to join the GATT.

The initial stabilization program was not successful insofar as inflation remained high and renewed economic growth was not forthcoming. Further trade reforms were implemented in 1985, in the midst of a balance of payments crisis. The original trade reform program contemplated eliminating import licensing requirements for 35 percent to 45 percent of total imports by the end of 1985, but under the adverse circumstances the government decided to liberalize 64.1 percent of total imports by that date.[32] Protection for domestic producers was secured through an increase in some tariffs.[33]

The situation deteriorated from 1985 to 1986, especially given the drastic reduction in oil prices, which went from US$25.50 a barrel in 1985 to US$10 a barrel in 1986, greatly affecting the ability of the Mexican government to service its foreign debt, given that in 1985 more than two-thirds of total export revenues derived from oil. The government used exchange rate policy to help boost non-oil exports, decreasing the real controlled exchange rate of the peso against the dollar by 46 percent in 1986.

During this time a crucial shift in the composition of exports took place, partly as a result of trade liberalization, partly given the drastic decline in oil prices, and partly due to the new stabilization program that used a strategy of making dollars increasingly more expensive in terms of the peso. In 1985, over two-thirds of export revenues derived from oil exports; by 1986 that figure had been reduced to forty percent. Non-oil exports rose by 41 percent during that same short period.[34]

[31] Lustig, *supra* note 19, provides an excellent overview of Mexican economic reforms during the De la Madrid administration. Regarding trade policy reform, *see* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), TRADE LIBERALISATION POLICIES IN MEXICO (1996). An influential diagnosis of the Mexican economy in the early 1980s and a cogent program for a turn toward renewed growth based on a more open economy and export growth is BELA BALASSA, GERARDO M. BUENO, PEDRO-PABLO KUCKZINSKI AND MARIO HENRIQUE SIMONSEN, TOWARD RENEWED ECONOMIC GROWTH IN LATIN AMERICA (1986).

[32] LUSTIG, *supra* note 19, at 39.

[33] The average tariff increased from 21.8 percent in mid-1985 to 25.2 percent by the end of that year (LUSTIG, *supra* note 19, 118).

[34] LUSTIG, *supra* note 19, 45.

The rapid pace of unilateral liberalization in 1985 led the government to renew actions geared at GATT accession. The argument made by proponents of accession was that, since Mexico was already liberalizing on a unilateral basis, it might as well receive some concessions in return through GATT accession.[35] Accession would also help to give more credibility to the permanent nature of Mexico's economic reforms, much as NAFTA would do later on. Despite these arguments, it would seem unwise for a country to liberalize unilaterally just before it is about to undertake trade negotiations.

While Mexico had twice decided not to join GATT under relatively propitious economic circumstances, it finally decided to do so in the midst of dire economic straits, and as part of an overall economic reform program aimed at stabilizing the economy and introducing reforms to allow the resumption of growth.

The policy shift was the result of a pragmatic decision by the government largely forced upon it by the prevailing economic circumstances; there was no significant business sector pressure in favor of trade liberalization.[36] In fact, in 1987 the government went significantly beyond its GATT commitments when it pursued unilateral liberalization as part of further stabilization efforts, for instance by establishing a maximum tariff of twenty percent (as opposed to the fifty percent GATT binding commitment). Business leaders were not consulted about the 1987 decision, which went against previous commitments made to them in terms of the pace and depth of liberalization. The experience made business representatives extremely wary of government actions in the trade policy arena. When in 1991 the government announced its intention to negotiate a free trade agreement with the United States, business leaders recalled the post-GATT unilateral liberalization and demanded a say in trade policy negotiations and implementation.

The decision to join GATT was not contained in the National Development Plan. However, once the president decided to significantly liberalize the economy in 1985–1986, Trade Minster Hector Hernandez approached him and argued that this would be a good time to finally seek accession to the GATT.[37]

President De la Madrid agreed with the proposal and asked the Senate to organize hearings on GATT accession. The Senate was controlled by the PRI, so the thrust of its recommendations after the hearings was a foregone conclusion.[38] It was a mere formality, which contrasted with President Lopez Portillo's strategy to politicize the decision by fostering discussion in the press and among interest groups.

The hearings took place from late October to mid-November 1985. The Senate's unanimous conclusions and recommendations in favor of GATT accession were published in the official newspaper (*Diario Oficial de la Federación*) on November 22, 1985.

On that same day President De la Madrid instructed Trade Minster Hernandez to begin GATT accession negotiations, and indicated that for the Protocol to be acceptable for Mexico it should allow the full implementation of the National Development Plan, the frame of reference should be the 1979 Protocol, Mexico should be recognized as a developing country, absolute respect for Mexico's sovereignty over its energy resources must be maintained, the special character of the agricultural sector must be recognized, and sensitive agricultural products, such as maize, must be excluded from the negotiations.[39]

[35] Bravo Aguilera, *supra* note 16.

[36] De Mateo, *supra* note 15. FLORES, *supra* note 8, takes a different view, and argues that the shift in trade policy had a significant impetus from business sectors looking for secure access to new markets.

[37] Bravo Aguilera, *supra* note 16.

[38] For an overview of the Mexican political system, *see* WAYNE A. CORNELIUS, MEXICAN POLITICS IN TRANSITION: THE BREAKDOWN OF A ONE-PARTY-DOMINANT REGIME (1996).

[39] GABINETE DE COMERCIO EXTERIOR, *supra* note 18, 106.

Deputy Trade Minister Bravo Aguilera traveled to Geneva shortly before the presidential announcement and met with GATT Director-General Arthur Dunkel. Bravo carried a letter signed by De la Madrid, expressing Mexico's interest in starting negotiations for GATT accession. At this point in time Mexico's Ambassador for Multilateral Organizations, Manuel Tello, had not been informed of the decision. Dunkel looked upon the Mexican proposal very favorably. The GATT was in a political crisis of sorts, and there had been no consensus to start a new round of trade negotiations. He thought that Mexico's proposal might help breathe some life into GATT and help launch a new round.

On November 27 Bravo Aguilera participated in a meeting of the GATT Contracting Parties to announce Mexico's decision to initiate accession negotiations. A working group composed of Argentina, Australia, Austria, Brazil, Canada, Chile, Colombia, Cuba, the EC and its Member States, Korea, Finland, Hong Kong, Hungary, India, Jamaica, Malaysia, Norway, New Zealand, Peru, Sweden, the United States, Uruguay and Yugoslavia, chaired by Mr. George Reisch from Austria, was established. Eight meetings were held, with representatives of the Mexican business sector attending only the last one.[40]

Mexico approached the EC representative and obtained an agreement whereby it would approve Mexico's accession without further ado, automatically acquiescing to MFN treatment under the conditions negotiated by the United States. In essence, the accession negotiations became a bilateral matter between Mexico and the United States

Negotiations with the United States took place in Zihuatanejo, a beach resort on the Mexican Pacific coast. Mexico's first proposal was for the United States to accept the 1979 Protocol, but it rejected the proposal, saying that Mexico had lost its chance when it balked at the last minute, and now it had to negotiate a new and standard protocol. Mexico acquiesced, but asked to include several additional paragraphs in an otherwise standard protocol, covering concerns in areas such as oil, agriculture, industrial programs and development policies.

A negotiation strategy that proved successful was to present the representative of the Agriculture Ministry, Carlos Vidali, as the absolute hardliner within the Mexican team. When the U.S. delegation did not accept certain proposals, Vidali would say that it was exactly what he wanted, for under those conditions Mexico could not join GATT and the Agriculture Ministry was against accession in the first place. With that strategy, the text slowly came into its own in accordance with the basic concerns of Mexico.[41]

After negotiations with the United States concluded, the head of the Mexico delegation met with the EC delegation, but a member of the European delegation attempted to back off from the initial offer, arguing that the EC thought the United States would be a tough negotiator and saying that Mexico got an extremely favorable Protocol of Accession. He even hinted at the need for a secret memorandum involving energy cooperation if it was to get EC support for accession. Mexico steadfastly rejected the proposal and there never was any secret memorandum.

The EC still insisted on some concessions, and Mexico awarded them in several products, such as asparagus. This was a politically-oriented exercise to enable the EC

[40] *Id.* at 11.

[41] Bravo Aguilera, *supra* note 16.

to say that it had obtained something from Mexico, rather than an agreement with far-reaching economic consequences.

As had been the case in 1979, the 1986 Protocol fulfilled basic Mexican requirements. The Presidential conditions were covered in three paragraphs that were appended to the standard accession protocol; a substantial amount of legislation was grandfathered and special provisions were obtained for the automotive, pharmaceutical, and agricultural sectors. Mexico successfully negotiated a fifty percent bound tariff level, higher than the rates it was currently applying, and an eight-year phase-in period during which tariffs could be higher than the bound level for certain products.[42]

It is not widely known that Chile attempted to obstruct Mexico's accession to GATT. The reason was not economic but political, insofar as Mexico had supported the Allende regime and received many political exiles during the Pinochet dictatorship. Mexico turned to the Asociacion Latinoamericana de Integracion ("ALADI"), arguing that trade negotiations among ALADI members should take place in that forum and not in GATT. Chile backed off after the matter was discussed in ALADI.

Another Latin American country that did not support Mexico's accession was Brazil. It looked askance at Mexico being invited to the Green Room and thought that it would have to face competition from another large Latin American country. The excuse for not voting in favor of Mexico's accession was that Itamaraty (the Brazilian Foreign Ministry) was studying the matter and had not sent the necessary reports to its representative in GATT.

Argentina was of two minds regarding Mexico's accession. One deputy foreign minister was pro-Brazilian and did not see accession in a favorable light. Another deputy minister thought that Argentina should not ally itself exclusively with Brazil and argued that closer relations with Mexico were favorable for a diversification of economic and political relations. In the end Argentina voted in favor of Mexico's accession.

The Protocol was signed on July 12, 1986 and approved on July 17 with 63 votes in favor of Mexico's accession. The formal accession took place on August 24, and Mexico became the GATT's 92nd Contracting Party.

The decision to join the GATT had been made at last. When Mexico finally became a Contracting Party, the decision turned out to be "much ado about nothing": the Protocol allowed ample room of maneuver on all areas of economic policy, and the most far-reaching trade policy reforms were ultimately carried out unilaterally and through regional commitments.

III. Mexico in the Uruguay Round

The aggressive unilateral trade liberalization and several regional integration agreements signed during the lengthy road to GATT membership made Mexico's position in the Uruguay Round ("UR") different from that of other developing countries. It was at the forefront in some areas such as investment and intellectual property rights, and gradually softened its position on agriculture, acquiescing to the elimination of export subsidies and the full tariffication and binding of agricultural imports.[43]

Mexico gained improved access for some of its exports while not having to make significant concessions in return, given the large margin that prevailed between its bound

[42] Gabinete de Comercio Exterior, *supra* note 18, 11–23.

[43] Mexico's willingness to eliminate export subsidies may have been partly due to the scarcity of public resources for export subsidies rather than a policy switch on principle.

rate and applied rate levels. In addition, by the end of the Round, most of Mexico's trade legislation was already in compliance with its UR commitments, due to changes in domestic legislation implemented as a result of, or concomitantly with, its NAFTA commitments.[44]

The economic impact of its UR commitments was very limited, as was the legal impact. This was largely due to the fact that NAFTA went into effect on January 1, 1994, and most of the increase in trade flows from that date to the present involved bilateral trade with the United States. Mexico's exports increased from US$60.9 bn. in 1994 to US$166.4 bn. in 2000, by which date 89 percent were destined for the United States.[45]
Mexico's Uruguay Round commitments are described below.[46]

A. Market Access: Tariffs

1. Industrial Goods

Bound tariffs were reduced from fifty percent to 35 percent in a five-year transition period. Mexico's bound tariffs remain higher than many of its applied rates. The differentials between bound and applied rates were considered undesirable and a source of uncertainty by some of Mexico's trade partners.[47] The significant increase in tariffs implemented after the December 1994 peso devaluation shows that their concerns were not groundless.

Mexico proposed that the WTO grant recognition for unilateral tariff reductions, thus providing incentives to decrease the bound rates to the applied rates.

Mexico gained improved access for its exports of beer, rum, tequila, pharmaceuticals, chemicals, furniture, glass, ceramics, some steel products, combustion engines and their parts, computers and vehicle chassis. It received substantial tariff reductions from several countries, with reductions of over forty percent (in terms of weighted tariff averages) from Australia, Austria, the European Union, Japan and New Zealand.[48]

2. Agriculture

As of January 1, 1994, Mexico implemented the tariffication of non-tariff barriers on various agricultural products, including those in sensitive sectors such as maize, beans and dairy products, for its NAFTA partners. It tariffied import licences on an MFN basis as a result of its Uruguay Round commitments. Mexico expressed disappointment in that export subsidies were still allowed under the Uruguay Round Agreement on Agriculture.[49] It proposed, as a second-best solution, that developing countries be allowed to match other countries' subsidies in order to defend certain products in third markets.

The main agricultural exports of Mexico that benefited from Uruguay Round tariff reductions are honey, fresh flowers, avocados, mangos, lemons, coffee, orange juice, oranges, papayas, onions and cantaloupes.[50]

[44] Under Article 133 of the Mexican Constitution, international agreements subscribed by the President and ratified by the Senate have the highest legal status and require no implementing legislation. *See* World Trade Organization, Examen de las Políticas Comerciales: México 1997 WT/TPR/S/29 (1998).

[45] *Mexico y la Organizacion Mundial del Comercio*, Secretaría de Economía (unpublished manuscript. 2002); Banco de México, Informe Anual 2000 (2001).

[46] Unless otherwise noted, the source is Antonio Ortiz Mena L.N., *Mexico and the WTO: A Regional Player in Multilateral Trade Negotiations*, CIDE Working Paper EI-74 (2001).

[47] World Trade Organization, *supra* note 44.

[48] SECOFI, Ronda Uruguay del GATT: Resultados Globales e Implicaciones Para México, unpublished manuscript.

[49] OECD, *supra* note 31, 85.

[50] SECOFI, *supra* note 48.

Regarding price supports, Mexico, along with the other developing countries, agreed to a 13.3 percent reduction in the Total Aggregate Measure of Support.[51] Subsidies for basic foodstuffs (maize, beans and milk) were reduced, and subsidies for tortillas were eliminated in 1999.

As a result of tariffication commitments, tariffs imposed on agricultural imports will decline from an import-weighted base level of 77 percent to an eventual bound level of 67 percent over a ten-year transition period.[52]

Mexico proposed that certain subsidies for environmental protection not be subject to countervailing duties, and the proposal was endorsed during the UR. These subsidies fall within the "Green Box" exception under paragraph 12 of Annex 2 to the Agreement on Agriculture. Even though Mexico did not grant any export subsidies by the end of the Uruguay Round, it reported them for the base period of 1986–1990, at which time it did grant some export subsidies, which was the period used in the Round as the basis for reductions. The products covered were maize, beans, wheat, sorghum and sugar, in order for Mexico to be able to utilize export subsidies for those products, should the need and ability arise.[53]

3. Textiles and Apparel

The textile and apparel sector is extremely important for the Mexican economy in terms of employment. Even though Multi-Fiber Arrangement quotas will be phased out, high tariffs will continue to hinder exports from developing into developed country markets.[54] Although Mexico secured access to the U.S. market for originating goods under NAFTA rules, it will still face high tariffs for non-originating goods, which are significant given NAFTA's extremely restrictive rules of origin for textiles and apparel.[55]

B. Market Access: Non-Tariff Barriers

1. Safeguards

Mexico rarely makes use of safeguards, nor has it been unduly concerned with the use of safeguards by its trade partners. During the Round it supported the stricter disciplines imposed by the UR Safeguards Agreement.

2. Antidumping and Countervailing Duties

Mexico favored stricter disciplines than those ultimately accepted in the UR Agreements, and was among the proponents of substituting competition policy for unfair trade laws. Its antidumping legislation is basically in accord with the UR Agreement.

[51] The Total Aggregate Measure of Support or Total AMS is "the sum of all domestic support measures provided in favour of agricultural producers which are deemed to be more than minimally production and trade distorting (OECD, supra note 31, 89). In the case of Mexico, this translates into a reduction from $29 to $24 billion pesos from 1995 until 2004.

[52] OECD, *supra* note 31, Table 24.

[53] The likelihood of Mexico actually using these export subsidies is remote, given current (and foreseeable) tight budgetary constraints, and the fact that Mexico is actually a net importer of all these products except sugar.

[54] Jeffrey J. Schott and Johanna W. Buurman, The Uruguay Round: An Assessment 59 (1994).

[55] Gary Clyde Hufbauer and Jeffrey J. Schott, NAFTA: An Assessment (Revised Edition) 44 (1993).

3. Subsidies

Mexico's preferences on non-agricultural subsidies were reflected in the SCM Agreement. It requested non-actionable status for certain environmentally-related subsidies, and for regional subsidies aimed at decentralizing production away from large urban centers.[56] It also proposed that countries be given credit for eliminating their export subsidies ahead of the timetable agreed to in the UR.

4. Balance of Payments Exceptions

Since 1982 Mexico has tended to respond to balance of payments imbalances through macroeconomic adjustment rather than via trade restrictions. Given past practice, and the current 35 percent bound tariff level under the WTO, it is not concerned about the Uruguay Round Agreements in this matter or interested in joining the crusade of India and other developing countries against any restrictions on the application of GATT 1994 Article XVIII:B.

5. Technical Barriers to Trade

Mexico was a signatory to the Tokyo Round Agreement on Technical Barriers to Trade,[57] and during the UR supported the position that the Agreement only cover production and processing methods.

6. Sanitary and Phytosanitary Measures

The Mexican regime is largely the result of NAFTA commitments and its practices are similar to those agreed to in the UR.

7. Rules of Origin

Mexico does not apply specific rules of origin to imports from MFN sources; however, it does require certificates of origin when those goods are subject to anti-dumping or countervailing duty actions, especially in certain sectors, such as textiles, apparel and shoes.

8. Import Licenses

Mexico has virtually eliminated its use of import licenses and its practices formally comply with the GATT Import Licensing Code. Nevertheless, some delegations to the WTO have questioned the transparency in the award procedures for import licenses, especially when the fulfillment of compulsory standards is required.[58]

C. State-Trading Enterprises

The state-trading enterprise that raised greatest concerns for foreign exporters was the one dealing with subsidized staple products ("CONASUPO"), because it had a monopoly over powdered milk imports, and the majority of import permits for maize and beans were also given to that state enterprise. In the late 1990s several countries complained

[56] The UR Agreement on Subsidies and Countervailing Measures exempted certain R&D activities, regional assistance, and the adaptation of existing plants to new environmental requirements. However, the exemption has lapsed. *See* Chapter 16 of this book. In contrast, actionable subsidies are those for which the imposition of countervailing duties is legitimate, in the case of subsidies that have certain specified adverse effects; export subsidies are prohibited outright. (SCHOTT AND BUURMAN, *supra* note 54, 88–91).

[57] Mexico ratified the Standards Code on February 9, 1988 and notice was published in Mexico's Federal Register on April 20, 1988.

[58] WORLD TRADE ORGANIZATION, *supra* note 44, at 227.

about the lack of transparency in many dealings of CONASUPO, and of the Mexican government's reluctance to give full and clear information of its practices.[59] CONASUPO has since been dismantled, although its affiliate in charge of milk, LICONSA, is still in operation.

D. Trade-Related Investment Measures

Local content requirements are still prevalent in the auto sector. The aim of Mexican policy is to generate incentives for the use of local auto parts. In the case of small vehicles, the local content requirement is thirty-six percent, and for large vehicles forty percent. While these measures are inconsistent with the UR Agreement on Trade-Related Investment Measures, Mexico, like other developing countries, was allowed to retain them for five years after the entry into force of the UR Agreement.[60] Mexico subsequently obtained an extension until the beginning of 2004. Some countries have made known their opposition to restrictive practices by Mexico in the auto sector.[61]

E. Trade-Related Intellectual Property Rights

Mexico's intellectual property regime was strengthened during the time of the NAFTA negotiations and in theory is close to being state of the art. In terms of exports, Mexico is interested in securing name protection for region-specific products such as *mezcal* and *tequila*.[62]

F. Trade in Services

Mexico made commitments in most areas covered by the negotiations except for environmental services and recreational, cultural and sporting services. Its commitment on the movement of physical persons is limited to intra-corporate transfers and specialists. It maintained limitations on foreign ownership in a number of sectors, among them the financial sector. The cap on foreign ownership of commercial banks was raised by ten percentage points to thirty percent as a result of the GATS negotiations, but that cap has since been lifted.

Foreign investment was limited to 49 percent of the registered capital in accounting, auditing and bookkeeping, certain telecommunications and audiovisual services, construction, private education and health services. Certain professional services and all scheduled distribution services were fully liberalized in terms of caps on foreign ownership.

One of the most contentious issues in Mexico's current trade relations involves its multilateral commitments to liberalize trade in telecommunications services. Mexico was one of the 68 countries that subscribed to the WTO Basic Telecommunications Agreement, which came into force in February 1998, and it also adopted the Reference Paper on Regulatory Principles in all aspects except resale. In July 2000,

[59] *Id.* at 230.

[60] The Uruguay Round Agreements entered into force on January 1, 1995.

[61] WORLD TRADE ORGANIZATION, *supra* note 44, 229.

[62] The only major complaint against Mexico related to this area was a Swiss concern that the new Health Law facilitates imports of pharmaceuticals but at the same time certain regulations generate incentives for the prescription of generic as opposed to brand name drugs, which according to the Swiss is a discriminatory practice against name brands (WORLD TRADE ORGANIZATION, *supra* note 44, 232).

the Office of the United States Trade Representative requested WTO consultations with Mexico regarding alleged barriers to competition. It expressed concern on three issues:

> Lack of effective disciplines over the former monopoly, Telmex, which is able to use its dominant position in the market to thwart competition; failure to ensure timely, cost-oriented interconnection that would permit competing carriers to connect to Telmex customers to provide local, long-distance, and international service; and finally, failure to permit alternatives to an outmoded system of charging U.S. carriers above-cost rates for completing international calls into Mexico.[63]

G. Government Procurement

Mexico did not sign the plurilateral WTO Government Procurement Agreement, and several countries have complained about the apparent unwillingness of Mexico to liberalize this sector.[64]

H. Regional Trade Agreements

As a signatory to several free trade agreements. Mexico is very sensitive about any changes to Article XXIV of GATT 1994. During the UR it argued, together with the European Free Trade Association and the European Union, against the Australian position of requiring that no major sector be excluded from a preferential trade agreement. In the end, the Understanding on Article XXIV made no reference to the need to include all sectors in WTO consistent regional trade agreements.[65]

I. Dispute Settlement

Regarding dispute settlement, Mexico accepted the time limits and the requirement of unanimity to reject the adoption of panel reports, but supported differential treatment for developing countries on certain procedural issues.

IV. Mexico and the Dispute Resolution Process in the GATT/WTO

Mexico regards effective dispute settlement mechanisms as an essential element of the institutionalization of international economic relations and the basis of a rule-oriented system where power disparities are not abused. When President de la Madrid instructed his trade minister to start GATT accession negotiations, one of the reasons used to justify accession was the importance of the GATT's dispute settlement mechanism as a means of defending Mexico's commercial interests and of curtailing the application of unilateral measures by its trade partners.[66]

Mexico's participation in dispute settlement during its first few years of GATT membership was very limited. From its accession in 1986 to 1992, it made only three claims, all of them against the United States, and was not the defendant in any case. Brazil did

[63] USTR, Press Release 00–57 (July 28, 2000). The case is styled *Mexico—Measures Affecting Telecommunications Services*, WT/DS204.

[64] World Trade Organization, *supra* note 44, 232.

[65] Mexico wanted to be able to exclude the oil sector from any regional trade agreements, while EFTA and the EU wanted to retain ample protection for their agricultural sector.

[66] Gabinete de Comercio Exterior, *supra* note 18, 105.

request the initiation of consultations on an anti-dumping matter involving Brazilian textiles, but the matter was resolved at that stage.[67]

Mexico's first claim involved U.S. duties on oil exports and on oil derivatives, in which it was joined by Canada and the EC. The Panel report upheld the complaint with respect to the duties on oil, but rejected it regarding duties on oil derivatives.[68]

The second claim involved U.S. restrictions against Mexican tuna exports, on the basis of the provisions of the U.S. Marine Mammal Protection Act for the protection of dolphins. The Panel report was in Mexico's favor,[69] but both countries agreed not to adopt the report. Mexico's decision was based on the fact that it was negotiating NAFTA at the time, and did not want an adverse reaction by environmental groups.

The third claim involved U.S. anti-dumping duties on imports of cement from Mexico. The Panel held in Mexico's favor,[70] but adoption of the report was blocked by the United States.

Mexico has been more active in the GATT/WTO dispute settlement since 1993, and it has been the subject of claims as well as the source of them.[71] It requested consultations on more than fifty matters regarding sanitary and phytosanitary measures, technical barriers to trade, subsidies and AD/CVD measures.

Between 1995 to October 2002, Mexico was the defendant in seven cases, of which it won three, lost one, and three were pending at the time of writing (late 2002).[72] Most cases involved antidumping practices, technical barriers to trade, and alleged anticompetitive practices. Not surprisingly, because of the huge volume of trade between the two countries, the most intractable issues have been with the United States, as was the case between 1987 and 1992. Two issues stand out: Mexican anti-dumping actions against U.S. exports of high fructose corn syrup, and Mexican measures affecting the provision of telecommunications services.

Despite its increasing participation in WTO dispute settlement, Mexico still resolves most of its disputes through the dispute settlement mechanisms contained in its free trade agreements. The majority of its disputes are with its main trade partner, the United States, and they are mostly addressed *via* NAFTA dispute settlement mechanisms.[73]

Overall, Mexico's experience with WTO dispute settlement has been satisfactory. In terms of improvements it believes that the different stages of the process can and should be expedited and that stricter guidelines are required in that regard. It will also propose a clarification of Articles 21 and 22 of the Dispute Settlement Understanding, to eliminate any possibility of a Member engaging in retaliatory actions without the express approval of the Dispute Settlement Body.

[67] GATT, Examen de las Políticas Comerciales: México 1993 186–188 (1993).

[68] Report of the GATT Panel, *United States—Taxes on Petroleum and Certain Imported Substances*, BISD, 34th Supp. 136 (1987).

[69] Report of the GATT Panel, *United States—Restrictions on Imports of Tuna, Complaint by Mexico*, BISD, 39th Supp. 155 (1991) (unadopted).

[70] Report of the GATT Panel, *United States—Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82 (1992) (unadopted).

[71] The information for the 1993–1997 period is taken from World Trade Organization, *supra* note 44, 191–192.

[72] World Trade Organization, Trade Policy Review: Mexico Report by the Secretariat WT/TPR/S/97, Table II.2 19–21 (2002).

[73] For an analysis of Mexico's use of NAFTA versus WTO dispute settlement, see Linda C. Reif, *NAFTA, the WTO and the FTAA: Choice of Forum in Dispute Resolution*, in NAFTA in the New Millennium (Edward J. Chambers and Peter H. Smith eds. 2002). For an overview of Mexico's disputes in NAFTA see Antonio Ortiz Mena L.N., *Dispute Settlement Under NAFTA*, in NAFTA in the New Millennium. supra., and Antonio Ortiz Mena L.N., *La Solución de Controversias en el Tratado de Libre Comercio de América del Norte: Un Esbozo Sobre su Desempeño y Retos* (2002).

While recognizing the need for dispute settlement procedures to be as transparent as possible, Mexico is opposed to the submission of *amicus curiae* briefs and favors maintaining briefs at the strictly inter-governmental level.

During the Uruguay Round Mexico proposed that, where feasible, competition policy rules should be applied in lieu of anti-dumping measures, for many of the cases in which Mexico is involved, as both defendant and plaintiff, are related to anti-dumping issues. It has ceased to insist on the issue.

V. Mexico and the Doha Development Agenda[74]

Mexico participated in the Fourth WTO Ministerial Conference after an extremely successful decade in terms of trade policy aims and achievements. During that decade it entered a number of free trade agreements, foremost among them NAFTA, and capped them off with its 2000 Association Agreement with the European Union. In terms of trade volumes, exports grew from US$21.8 bn. in 1986, at the time of its GATT accession, to US$166.4 bn. in 2000, an impressive average annual increase of over fifteen percent.[75]

Mexico's overall aim is to contribute to a more open, fair and stable international trading system through the actions of the WTO, and at the same time to ensure that the very significant gains it has made through its FTAs are maintained. Mexico believes that the best way to achieve these objectives is to participate very actively in the WTO. Accordingly, in August 2000 Mexico hosted a preparatory meeting for the Fourth Ministerial Conference, attended by Argentina, Australia, Brazil, Canada, the EC, Egypt, Hong Kong, India, Jamaica, Japan, Malaysia, Pakistan, Singapore, South Africa, Switzerland, Tanzania, the United States and Uruguay. In October 2001 it coordinated the working group on agriculture during the informal meeting of trade ministers in Singapore, and it chaired the intellectual property working group during the Fourth Ministerial Conference. Mexico was due to host the Fifth Ministerial Conference in Cancun in September 2003.

In terms of launching a new multilateral trade negotiation round, Mexico favored a single undertaking given that, in its view, sectoral negotiations make compromise and side bargains difficult. Regarding timelines, Mexico expressed a preference for a negotiation round of approximately three years duration, and in any case no longer than the Uruguay Round. The Doha Agenda is thus in line with its preferences on these issues.

Regarding issue area coverage, it favored addressing the built-in agenda in the next round of negotiations, but regarded it as insufficient. It sought, at a minimum, full binding of the tariff structure for industrial goods. In terms of new issues, its position is that "contamination" of the trade agenda with environmental and labor issues could actually negate the gains made in trade liberalization;[76] likewise, it took the view that it will be difficult for developing countries to address issues such as trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation brought up during the 1996 Singapore Ministerial Meeting.

[74] Unless otherwise noted, the sources for this Part are Ortiz Mena L.N., *supra* note 46, Secretaría de Economía, *México y la Quinta Conferencia Ministerial de la Organización Mundial del Comercio* (2001), unpublished manuscript, and Secretaría de Economía, *México y la Organización Mundial del Comercio* (July 2002), unpublished manuscript.

[75] Secretaría de Economía, *supra* note 74 (2002).

[76] SECOFI, Reunión Ministerial de Seattle y la Posibilidad de una Nueva Ronda de Negociaciones 23 (1999).

Its position regarding the four broad areas contemplated in the Fourth Ministerial Conference are as follows:

A. Implementation of UR Agreements

Mexico believes that the implementation of market access commitments in agriculture and textiles has not translated into improved access for developing country exports, that special and differential treatment for developing countries has not materialized in practice, and that legitimate implementation difficulties faced by developing countries should be recognized and allowed for. Mexico itself has benefited from the implementation of the UR Agreements by other countries, and has upheld its own commitments.[77]

B. Built-in Agenda

AD/CVD rules: Mexico favors rules that allow the legitimate use of AD measures and at the same time curtails their use for strictly protectionist aims.
Agriculture: A priority is the reduction and eventual elimination of export subsidies, and improved market access.
TRIMs: Mexico has to eliminate performance requirements in its automotive industry. It agreed, under NAFTA rules, to eliminate a number of provisions of the auto decree by 2004, but under the TRIMS Agreement it would have been forced to eliminate them by 2001, thus losing important concessions it gained in NAFTA. In July 2001 it requested an additional moratorium to bring its decrees into full compliance with the WTO TRIMs Agreement. An extension was granted, so that Mexico's auto sector decrees must comply with TRIMS by January 1, 2004.[78]
Services: As the most important exporter of services in Latin America, Mexico is interested in as wide a sectoral coverage as possible. It would gain from the negotiations by attaining greater market diversification. It also wants to ensure that there is flexibility for developing countries regarding trade in services negotiations.
IPR: Mexico seeks the establishment of a multilateral system of registry and notification of distinctive products, for wine and spirits. This interest pertains basically to *tequila* and *mezcal*, which are recognized as distinctive products under NAFTA Annex 313. However, it opposes the extensive use of geographical indications, which could constitute a new non-tariff barrier.

Regarding IPR and public health issues, Mexico believes a balance must be struck between the legitimate needs of developing countries and respect of the Trade-Related Aspects of Intellectual Property Rights Agreement. As Chair of the Fourth Ministerial working group on the issue, it believes that the correct balance was struck with the Doha Declaration on the topic.[79]

C. Singapore Issues

Mexico did not request negotiation on the four topics covered by the Singapore Ministerial, although it accepted the agreement to discuss them during the Fifth Ministerial. Its FTAs already cover these issues, so multilateral agreements will probably not imply any significant new commitments for Mexico.

[77] Secretaría de Economía, *supra* note 74 (2002).
[78] World Trade Organization, *supra* note 72, at 71.
[79] Secretaría de Economía, *supra* note 74 (2002).

Regarding foreign direct investment, Mexico takes the view that an eventual multilateral agreement on investment should not be linked with environmental and labor issues, nor inhibit the regulatory faculties of the state. As mentioned, it also wants to incorporate competition policy criteria in the application of anti-dumping laws. Mexico favors transparency in government procurement but has given no indication that it intends to sign on to the WTO Agreement on Government Procurement. Finally, Mexico has made some progress in areas such as customs procedures and is not opposed to their inclusion, but trade facilitation is not an area of paramount concern.

D. Other Issues

Industrial goods: Mexico favors full binding of the industrial goods tariff structure by all WTO Members. It is opposed to a sectoral approach, preferring the inclusion of all sectors so that a more balanced final deal is possible. It believes that a significant reduction and binding of the full tariff structure for industrial goods will improve its market access to countries with which it does not have an FTA.
Electronic commerce: Mexico takes the position that there should be no tariffs on electronic transmissions.
Labor and environmental issues: Mexico accepts the need for their discussion, but is opposed to formal commitments within the realm of the WTO that would result in disguised protectionism by developed countries. It believes that the proper instruments and venues must be used to deal with them, such as the International Labor Organization for trade-related labor issues. It also believes that trade and environmental protection are not mutually exclusive, and that greater economic growth can help protect the environment.[80]

VI. Regional Trade Agreements: NAFTA and Beyond

For Mexico, regional trade initiatives are at least as important as multilateral ones. Mexico now has free trade agreements ("FTAs") with thirty countries, and more than 95 percent of its trade is carried out with its FTA partners.

A. NAFTA

At the time of its accession to GATT, Mexico had several trade agreements with Latin American countries under the aegis of the Asociacion Latinoamerica de Integration ("ALADI"). None of them, however, was of any real economic significance. At the outset of his administration, President Carlos Salinas (1988–1994) tried to diversify Mexico's trade relations, long dependent on its northern neighbor, by attempting to forge closer economic links with the EU. With the fall of the Berlin wall in 1989 the circumstances were not propitious for that undertaking, since the EU was focusing its attention on developments in Eastern Europe, and so in mid-1990 President Salinas proposed the negotiation of a free trade agreement with the United States.

Bilateral negotiations became trilateral once Canada joined, a short time thereafter. The NAFTA was negotiated between 1991 and 1993, the so-called side agreements on labor and environmental cooperation were negotiated in 1993, and the agreement entered into force on January 1, 1994.

[80] *Id.*

The NAFTA was Mexico's first FTA (for a long time it was referred to simply as *the* FTA) and still is by far the most important one in terms of trade and investment volumes, accounting for more than 85 percent of Mexico's exports. Mexico is now the United States's second trade partner, surpassed only by Canada. Mexico-Canada trade, although growing, is insignificant in terms of each country's trade with the United States. NAFTA is, in effect, an agreement encompassing two very intense bilateral economic relations.

B. FTAs With Latin American Countries

Mexico embarked on an assertive policy to secure additional FTAs throughout the1990s. Negotiations started out with Latin American countries, and the concluded agreements are the following: Mexico-Bolivia (1995), Mexico-Costa Rica (1995), G-3 (Mexico-Colombia-Venezuela 1995), Mexico-Nicaragua (1998), Mexico-Chile (1999), and Mexico-Northern Triangle (El Salvador, Honduras and Guatemala 2001).[81]

The agreements are all closely patterned after the NAFTA in terms of the range of issues covered and their institutional structure. They include a broad array of topics, such as trade in goods (including agriculture), trade in services, and investment. They also contain detailed dispute settlement procedures.[82] However, Mexico's trade agreements with other Latin American countries do not contain detailed provisions on labor and the environment.

C. Europe

Apart from the Latin American FTAs, Mexico has entered three extra-hemispheric agreements. The most important of these is the Economic Partnership, Political Coordination, and Cooperation Agreement with the EU (sometimes referred to as the Global Agreement, the Association Agreement, or the Mexico-EU Free Trade Agreement). As its correct and formal name implies, it has three basic components: economic relations (commonly referred to as the Mexico-EU FTA), cooperation, and political dialogue. It is thus very different from NAFTA and the Latin American agreements, which follow a purely economic approach.

The EU Agreement, which entered into force on July 1, 2002, is complemented by an FTA with the European Free Trade Association (Iceland, Liechtenstein, Switzerland and Norway), which entered into force exactly one year after the EU Agreement. Mexico's long-held desire to have a more balanced trade pattern in terms of markets–that is, a reduction of its very strong reliance on the U.S. market–has been given an enormous boost with the privileged access it has gained to Europe, the largest market in the world.

D. Israel

The third extra-hemispheric agreement is an FTA with Israel, which entered into force on the same date as the EU agreement. It is the least ambitious of Mexico's FTAs and does not cover investment, agriculture, or trade in services.

[81] The year reported refers to the entry into force of these agreements.

[82] There are, of course, differences and exceptions. Some of these are noted in ORTIZ MENA L.N., *supra* note 46. An excellent summary of NAFTA's provisions is HUFBAUER AND SCHOTT, *supra* note 55.

E. APEC

Although not an FTA, it is worth noting that Mexico has been a member of APEC since 1993, and hosted the Fourteenth APEC Ministerial Meeting and the Tenth APEC Economic Leaders Meeting in 2002.

F. Current Negotiations

At the time of writing (late 2002), Mexico was negotiating FTAs with Ecuador, Japan, Panama, Peru, Singapore, and Trinidad and Tobago. It concluded an ambitious trade agreement under ALADI with Uruguay in 1999, and is gradually improving its trade relations with Brazil, which were neglected for a long time.[83] It is also participating in the Free Trade Area of the Americas ("FTAA") negotiations, whose secretariat was in Puebla, Mexico.

Mexico is, accordingly, extremely sensitive about developments in the multilateral trading system that might adversely affect its regional preferences. At the same time, it believes that regional and multilateral trade liberalization can be compatible, and that the best way to maintain its regional advantages is to be actively involved in the multilateral process.

VII. The Politics of Trade Policy-Making in Mexico

From the time of Mexico's first overtures to GATT in the post World War II era a single political party, the Institutional Revolutionary Party ("PRI"), controlled the presidency until 2000, and had at least a simple majority in the legislature until 1997. Under the prevailing political system, which relied on strong control of the party and the legislature by the chief executive and was supported by a corporatist mode of interest representation (including not only labor but also business), the chief executive had ample discretion to pursue economic policies, including trade policy.[84] The high degree of power concentrated on an individual often proved disastrous in terms of economic policy, as the 1976 and 1982 crises demonstrate.

During most of the import-substituting industrialization phase, there was close coordination between the public and private sector, both through established institutional channels and through close rapport between political and economic elites.[85] The system began to show signs of strain in the late 1960s, but it was during the Echeverria administration that an open confrontation between the government and business groups took place. During that time, economic policy, including trade policy, was often decided by the president and implemented with relative ease through his control over congress and the PRI.[86]

Lopez Portillo campaigned for the presidency in 1976 without an opponent, for important business groups usually tied to the right-of-center National Action Party ("PAN") boycotted the election as a response to what they regarded as Echeverria's anti-business policies of 1975–1976.[87] Despite the difficult economic and political circumstances, Lopez Portillo managed to regain the favor of the country's economic elite and major business groups. Significant economic policy decisions, such as the

[83] WORLD TRADE ORGANIZATION, *supra* note 72, at 21–27.
[84] *See* CORNELIUS, *supra* note 38, and GABRIEL ZAID, LA ECONOMÍA PRESIDENCIAL (1987).
[85] ORTIZ MENA, supra note 5.
[86] ZAID, supra note 84.
[87] These included, apart from irresponsible macroeconomic management, a series of land expropriations.

postponement of GATT accession were, however, ultimately decided with little influence from business groups.

The same situation prevailed during the De la Madrid presidency. The Senate hearings on GATT accession proved to be a mere formality designed to underpin a decision already taken by the chief executive. Business representatives participated in GATT accession negotiations only during their last phase. Likewise, the government proceeded with unilateral liberalization that went beyond its GATT commitments, despite previous agreements with business groups.[88]

After accession to GATT a novel consultative mechanism came into being. In order to implement a new stabilization program aimed at reducing inflation, which approached 160 percent in 1987, a tripartite consultation mechanism consisting of representatives from government, labor, and business was established. The mechanism was the centerpiece of the Economic Solidarity Pact, a major component of which was further trade liberalization with the aim of reducing inflation through greater competition from imports on traded goods.[89]

However, the real sea change in the trade policy formulation process came with NAFTA. An innovative scheme worked out by government and business representatives permitted an extremely close collaboration between them before, during, and after negotiations. The change was a result of the needs imposed by the sheer complexity of the negotiations, and of the significant impact their results would have on the Mexican economy for decades to come.

The mechanism set up for NAFTA negotiations was used in all subsequent trade negotiations and has survived, with some modifications, up to the present. It consisted of two basic channels of communication for interest groups. The Foreign Trade Business Coordination Council ("COECE") is an umbrella organization encompassing all major business organizations.[90] The other channel is the Free Trade Agreement Advisory Council (*Consejo Asesor del Tratado de Libre Comercio*), designed to represent civil society and comprised of representatives from the public sector (top officials from the Trade Ministry), the labor sector (basically members of pro-government labor unions), the agricultural sector (both PRI-affiliated groupings and private sector groupings representing agribusiness and livestock interests), the business sector, and the academic sector (heads of the nation's top public and private universities). The Council is charged with preparing, coordinating and analyzing reports to aid the negotiations.[91] In practice, the Council was rather passive during NAFTA negotiations but did fulfill a legitimating function in terms of the representativeness of the groups privy to the negotiations; it helped the government receive input from different social groups, and also to distribute information and rally support for the trade negotiations.[92]

[88] De Mateo, *supra* note 15.

[89] The Pacts were reborn under several guises until 1998. *See* Robert Kaufman, Carlos Bazdresch and Blanca Heredia, *Mexico: Radical Reform in a Dominant Party System*, in VOTING FOR REFORM: DEMOCRACY, POLITICAL LIBERALIZATION, AND ECONOMIC ADJUSTMENT (Stephan Haggard and Steven R. Webb eds.1994), and LUSTIG, *supra* note 19, at 50–60.

[90] For an overview of business organizations in Mexico, *see* Matilde Luna, *Entrepreneurial Interests and Political Action in Mexico: Facing the Demands of Economic Modernization*, in THE CHALLENGE OF INSTITUTIONAL REFORM IN MEXICO, (Riordan Roett ed. 1995), and Carlos Arriola, *La Ley de Cámaras Empresariales y sus Confederaciones*, 37 FORO INTERNACIONAL 634 (1997).

[91] Arriola, *supra* note 90.

[92] Carlos Alba and Gustavo Vega, *Trade Advisory Mechanisms in Mexico*, in *The Trade-Policy-Making Process Level One of the Two Level Game: Country Studies in the Western Hemisphere.* Munk Centre, University of Toronto Occasional Paper No. 13 (2002).

COECE was by far the most important of the communication channels during NAFTA and all subsequent trade negotiations. It was divided into six sectors: agriculture, industry, banking, insurance, finance, and commercial and non-financial services. It coordinated a series of highly confidential studies, which were used to help determine negotiating positions. Representatives from COECE formed small groups (4–15 members) to work in tandem with the negotiators in each of the areas into which negotiations were divided, i.e., rules of origin, market access, agriculture, automotive sector, textile sector, energy, procurement, safeguards, unfair trade practices, norms, sanitary and phytosanitary issues, cross-border trade in services, telecommunications, financial services, land transportation, temporary mobility of business persons, investment, intellectual property rights and dispute settlement. These groups were involved in the day-to-day negotiations. They were in close contact with the negotiators throughout the process, and during negotiations participated via the "adjacent room" mechanism (*cuarto de al lado*), whereby they would be close at hand in the negotiating venue so that negotiators could get immediate feedback from the relevant private sector representative. COECE representatives also collaborated with the government during the post-negotiation phase involving implementing legislation in the United States, to ensure that the legislation did not cut back any of the rights granted to Mexico under the agreement. The closeness of collaboration between COECE and the NAFTA negotiators can hardly be overstated; hundreds of meetings had taken place by the time NAFTA entered into force.[93] The system worked remarkably well insofar as it permitted the successful negotiation of a very ambitious and complex FTA between a developing country and the world's foremost economic power.

Nonetheless, several important social groups did not have adequate representation. Although COECE formally ensured wide representation of business interests, in practice this was not always the case. Three limitations stand out: some sectors did not have the human and financial resources needed to undertake detailed studies of their sectors and to propose detailed negotiation objectives; financial limitations also meant that not all representatives could travel in tandem with the negotiators throughout North America during the course of negotiations; and third, small and medium enterprises (SMEs) were not well represented in the process.[94] The last shortcoming stemmed partly from the fact that there was no truly representative organization that could speak on behalf of SMEs, and this difficulty has remained to this day.[95]

Other groups without adequate representation were those that should have had a voice in the Advisory Council. No groups critical of trade liberalization policies were admitted, although it is fair to say that if critical non-governmental organizations are to be admitted, it is not immediately clear how to choose them objectively in terms of representativeness and legitimacy.

At present, the system still works very well in terms of business-government consultations on trade policy, but effective representation of SMEs and a more pluralistic representation of civil society are still lacking.

The Ministry of the Economy (called the Ministry of Trade and Industrial Development until 2001) is still in charge of trade policy, although long-standing intermittent frictions between the Ministry of the Economy and the Foreign Ministry over foreign economic

[93] Alba and Vega, *supra* note 92.

[94] *Id.*

[95] Business groupings were organized on the basis of sector, and not size. The Economics Ministry now has a deputy minister in charge of SMEs.

policy still come to the fore from time to time.[96] A long-standing inter-ministerial commission on trade policy, currently called COCEX, carries out intra-executive coordination.[97]

A challenge that is emerging for trade policy formulation is the role of the legislature, which is becoming increasingly active and assertive in the foreign policy area.[98] With a growing number of actors interested in—and affected by—trade policy, new mechanisms that find an adequate balance between representativeness and efficient policymaking must be designed and implemented.

VIII. Public Attitudes Toward the WTO

In Mexico, public opinion on trade policy matters tends to go in tandem with trade flows. Accordingly, the most salient concern by far is the economic relationship with the United States. Other developments, such as multilateral trade relations and even hemispheric ones, are usually regarded as being of relatively little consequence.

The exception to this general trend was the discussion on Mexico's accession to GATT in 1979–1980, but in fact this was a reflection of domestic political cleavages over economic development strategies; the GATT debates were merely a sounding board for a broader discussion closely linked to domestic politics. Notwithstanding the above, some opinions of business and civil society groups on multilateral trade developments can be ascertained.[99]

A. Opinions of Business Groups

In 2000, business representatives from five sectors (electric and electronics, automobiles, capital goods, textiles and apparel, and foodstuffs), accounting for approximately three quarters of Mexico's trade, had the following opinions on the Uruguay Round results and their relationship with the government on trade policy issues.

The *electric and electronics* sector regards the Uruguay Round as positive, for the Mexican government decided at the time not to join the Ministerial Declaration on Trade in Information Technology Products, which was in line with the preferences of its representative association, CANIETI, the National Chamber of the Electronics, Telecommunications and Computer Industries.[100] The *automobile* sector considers the results of the Round as positive because it had been possible to sidestep full compliance with TRIMs through a series of bilateral deals.[101]

[96] Jorge Schiavon and Antonio Ortiz Mena L.N., *Apertura Comercial y Reforma Institucional en México (1988–2000): Un Análisis Comparado del TLCAN y el TLCUE*, 41 FORO INTERNACIONAL (2001).

[97] WORLD TRADE ORGANIZATION, *supra* note 72, at 12. The COCEX is comprised of the following ministries: Foreign Relations, Finance, Social Development, Economy, Agriculture, Environment and Health. The central bank (*Banco de México*) and the Federal Competition Commission are also represented.

[98] The Senate has the authority to ratify treaties negotiated by the executive, while the Chamber of Deputies has an influence on trade policy through its faculties on fiscal policy, given that tariffs are considered an integral part thereof.

[99] The information on business groups and civil society opinions was obtained by the author through interviews carried out in 2000. The opinions are indicative of the concerns of some business and civil society leaders, and are not necessarily representative. A full account of the interviews is available in Antonio Ortiz Mena L.N., *supra* note 46.

[100] CANIETI, www.canieti.com.mx. In mid-2000 the members of CANIETI finally agreed to support Mexico's joining the ITA.

[101] As mentioned in a previous section, Mexico has to comply with the TRIMs Agreement by January 1, 2004.

The *capital goods* sector considers the Uruguay Round as irrelevant. The view of CANAME,[102] the National Chamber of Electric Manufactures which represents a sizable share of the capital goods sector, is that, since the largest share of trade in the sector is with the United States, most of the relevant liberalization was agreed upon on a regional basis. Its only concern is procurement, and specifically that the Mexican government can decide procurement rules on a unilateral basis for countries with which it does not have an FTA, and has accepted bids from countries that have a closed procurement market for Mexican corporations.

The *textiles and apparel* sector, represented by a specialized office in CONCAMIN, the National Confederation of Industrial Chambers, focused on NAFTA gains, which were considered very good for Mexico in the textile sector.[103] While the phasing out of the MFA was seen as inevitable, the major concern was a possible flood of garments from China into the Mexican market, once it joined the WTO.[104]

The representative of CANACINTRA, the National Industrial Transformation Chamber, a CONCAMIN affiliate, expressed opinions on the *agricultural* sector in general. Like his counterpart from the capital goods sector, the view was that the Uruguay Round Agreements were largely irrelevant for Mexico given the intensity of trade with the United States and the depth of commitments under NAFTA. The assessment of the NAFTA negotiations was extremely critical. The main concerns were alleged dumping practices by U.S. companies in exports of beef and pork meat, the difficulty of access to the U.S. market for Mexican sugar exports,[105] and the breakup of national production chains which has translated into a concentration of producers and retailers. A proposed solution is that many measures that do not require subsidies or other WTO infringing practices should be put in place, foremost among them more investment in R&D, closer working partnerships between universities and business, greater emphasis on the training of mid-level technicians, and a more proactive policy toward SMEs.

All representatives regarded the FTAA with little concern and were sanguine about the prospects of achieving a far-reaching hemispheric FTA.

The general opinion was that government-business relations regarding trade policy were collaborative, and that there was expertise in the government team in charge of trade policy and ample opportunity to be heard.[106] The great majority of concerns expressed are linked to issues that fall within the competence of the Mexican government and do not involve any third parties or the WTO. It seems that if there are good relations, open channels of communication and capable negotiators, the remaining problems have to be dealt with at the domestic political level.

B. SMEs and NGOs

The most vociferous criticism of Mexico's trade policies comes from NGOs rather than business groups. The Mexican Trade Action Network ("RMALC"),[107] established in

[102] CANAME, www.caname.com.mx.

[103] An additional interview with the businessperson responsible for NAFTA textile negotiations was also conducted.

[104] Mexico was the last Contracting Party to approve China's accession to the WTO.

[105] In August 2000 Mexico requested the establishment of a panel under NAFTA Chapter XX rules to settle the dispute over U.S. sugar quotas.

[106] CANIETI did express some concerns over lack of direct communication with negotiators.

[107] RMALC is the acronym in Spanish for the Mexican Trade Action Network, the *Red Mexicana de Acción Frente al Libre Comercio*. Its web site is www.rmalc.org.mx.

1991 at the outset of the NAFTA negotiations, functions as an "umbrella" organization representing the interests of a diverse array of groups involved in different issues such as human rights, labor rights, democracy, the environment and SMEs. RMALC questions the efficiency of the market mechanism in allocating resources and proposes a greater role for the state in ensuring an equitable allocation. It seeks greater participation of civil society in trade policy formulation and implementation, to ensure that it favors sustainable development and better living conditions for Mexicans. This requires, in their view, the establishment of national development programs and the incorporation of a social and political agenda in trade agreements that favor human rights and democracy, and compensate for asymmetries that prevail both within and among nations.

RMALC's proposals include sweeping changes to central elements of trade agreements, such as reinforcing special and differential treatment while relegating national and MFN treatment to relations among developed countries, and substantially modifying investor-state dispute settlement procedures. It also has specific concerns over IPRs in connection with public health issues. So far, its impact on Mexico's trade policy has been minimal, in no small measure as a result of some of its extreme positions, which makes dialogue and negotiation extremely difficult.

ANIT, the National Association of the Transformation Industry, is a breakaway group of CANACINTRA established at the time of Mexico's GATT accession. It is a RMALC member and represents the interests of some 3,000 SMEs. ANIT seeks a share in the procurement market, financing at competitive rates without burdensome guarantee requirements, and a greater say in trade policy formulation. Its partnership with groups within RMALC holding extreme positions has made it difficult for its voice to be heard. As was the case for the opinions of the business groups, most of ANIT's concerns can be answered at the domestic political level rather than through government actions at the multilateral level.

More recently, NGO discussions over economic development strategies have tended to be quite emotional and of very low analytic content. The WTO is sometimes brought up in these discussions without specific references to the Uruguay Round Agreements or the Doha Development Agenda, and is seen as an archetype of organizations that, like the IMF and the World Bank, are supposedly behind the advance of globalization, which is in turn blamed for a vast array of complaints such as low economic growth, environmental degradation, poverty and unequal income distribution. The government, pro free-trade groups and institutions undertaking serious academic studies of trade policy and development have an uphill battle in explaining how the multilateral trading system is not necessarily the cause of these shortcomings and can be part of their solution.

IX. Conclusions

Mexico's entry into the GATT, and its subsequent participation in the WTO, did not have a significant impact on trade composition or volumes, nor on market diversification. Unilateral liberalization and regional initiatives, foremost among them NAFTA, were the main forces behind changes in Mexico's trade regime and performance. The long-delayed decision to join the GATT seems indeed to have been "much ado about nothing."

The country has undergone a significant transformation since the early 1980s. Shortly before it joined the GATT in 1986, it still had a relatively closed economy with low export volumes and a high degree of dependence on oil exports. It managed to diversify its export structure in a very short time span, so that by the end of the 1980s oil accounted for less

than 25 percent of exports, and non-oil exports were mostly made up of manufactures.[108] The change in the composition of exports was associated with the downward evolution of oil prices and an increase in exports to the United States favored by a weak Mexican peso, rather than the effect of GATT membership.

During the 1990s, the most significant evolution in Mexican trade policy was the entry into force of NAFTA and several other FTAs. In terms of export composition there were no significant changes, but export volumes took off dramatically, growing from US$40.7 bn. in 1990 to US$166.4 bn. in 1999. The growth in exports was closely linked to bilateral trade with the United States, whose economy performed extremely well during the second half of the decade. While by 2000, 89 percent of Mexico's exports were destined for its Northern neighbor's market, Mexico's trade with the EU decreased from 11.4 percent of total trade in 1990 to 6.5 percent in 1999.[109]

The WTO is, however, becoming increasingly relevant as its scope and coverage increases and it encompasses issues that were only dealt with at the regional level, such as agriculture and services. The strengthened dispute settlement mechanism in force since 1995 has also made the WTO especially salient in terms of international economic governance.[110] Given that Mexico's FTAs are of a basically static nature in terms of scope and coverage and institutional makeup, while the multilateral trading system is dynamic, Mexico will not be able to rely permanently on regional preferences to deal with its foreign economic relations.

Mexico's first challenge is to reconcile its regional initiatives with multilateral trade developments. It will strive to attain improved market access and foster a stable world trading environment through multilateral initiatives, and at the same time to maintain its regional concessions for as long as possible. The challenge for the WTO is to generate incentives for countries like Mexico, that are keenly playing the regional game, to be involved in the multilateral trading system.

A second, and perhaps more important challenge, is for the Mexican government to establish closer links between its domestic policies and its international economic policies. Trade liberalization has helped the Mexican economy grow and create new employment opportunities. The benefits of increased trade, however, have not been shared equally. SMEs do not have adequate financing or political representation, especially in the area of trade policy. Likewise, they have not been adequately linked to the great opportunities offered by foreign trade, and account for less than seven percent of exports.[111] Regional disparities have also grown, with the Northern part of Mexico benefiting from economic openness while the Southeast has seen few benefits.

Social advocacy groups have noted that there has not been a marked reduction of poverty or a shift toward more equitable income distribution since Mexico embarked on trade liberalization and a series of complementary reforms. While they neglect to take into account what the situation could be if the economy had remained closed and reliant on oil exports, their concerns are legitimate. The onus is on showing that trade openness,

[108] Banco de México, Informe Anual 1989 (1990).

[109] Secretaría de Comercio y Fomento Industrial, El Tratado de Libre Comercio México-Unión Europea (2000); PowerPoint presentation available at www.economia.gob.mx.

[110] It is worth noting that the WTO Dispute Settlement Understanding provides for binding decisions, while NAFTA's general dispute resolution mechanism, contained in Chapter 20, only provides for recommendations. For a comparison between these two mechanisms, *see* Ortiz Mena L.N., *supra* note 73.

[111] Approximately fifty percent of exports are carried out by large corporations, and the remainder is accounted for by *maquiladoras. See* Antonio Ortiz Mena L.N., *Ten Years of NAFTA: A Mexican Perspective*, 60 Voices of Mexico (2002).

and specifically participation in the multilateral trading system, can be an invaluable instrument in helping the country grow and at the same time share the benefits of growth in a more equitable manner. But that is not an automatic process and will take consistent and concerted effort on behalf of the government and social groups. Making openness work is necessary if Mexico is to maintain an open economy and continue to participate in the multilateral trading system.[112]

BIBLIOGRAPHY AND REFERENCES

(a) Printed Sources

Alba, Carlos and Gustavo Vega. "Trade Advisory Mechanisms in Mexico", in *The Trade-Policy-Making Process Level One of the Two Level Game: Country Studies in the Western Hemisphere*. Washington, D.C. and Toronto: Inter-American Development Bank-Institute for the Integration of Latin America and the Caribbean/University of Toronto Munk Centre Occasional Paper No. 13, 2002.

Arriola,Carlos. "La Ley de Cámaras Empresariales y sus Confederaciones." Foro Internacional 37 (1997): 634–660.

Balassa, Bela, Gerardo M. Bueno, Pedro-Pablo Kuckzinski, and Mario Enrique Simonsen. *Toward Renewed Economic Growth in Latin America.* Washington, D.C.: Institute for International Economics, 1986.

Banco de México. Informe Anual 1989. Mexico City: Banco de México, 1990.

Cornelius, Wayne A. *Mexican Politics in Transition: The Breakdown of a One-Party-Dominant Regime.* La Jolla: University of California Center for U.S.-Mexican Studies, 1996.

De Mateo, Fernando. "Del ¡No! al ¡Sí! Historia de Un matrimonio por Conveniencia: México Frente al GATT," in *México en el GATT: Ventajas y Desventajas*. Tijuana: El Colegio de la Frontera Norte, 1986.

Flores, Aldo. *Proteccionismo Versus Librecambismo: La Economía Política de la Protección Comercial en México 1970–1994.* Mexico City: Fondo de Cultura Económica, 1998.

Gabinete de Comercio Exterior. *El Proceso de Adhesión de México al Acuerdo General Sobre Aranceles Aduaneros y Comercio, GATT*. Mexico City: Gabinete de Comercio Exterior, 1986.

GATT. *Examen de las Políticas Comerciales: México 1993.* Geneva: GATT, 1993.

Hufbauer, Gary Clyde and Jeffrey J. Schott. *NAFTA: An Assessment (Revised Edition).* Washington, D.C.: Institute for International Economics, 1993.

Kaufman, Robert, Carlos Bazdresch, and Blanca Heredia. "Mexico: Radical Reform in a Dominant Party System," in *Voting for Reform: Democracy, Political Liberalization, and Economic Adjustment*, edited by Stephan Haggard and Steven R. Webb. New York: Oxford University Press, 1994.

Luna, Matilde. "Entrepreneurial Interests and Political Action in Mexico: Facing the Demands of Economic Modernization," in *The Challenge of Institutional Reform in Mexico*, edited by Riordan Roett. Boulder: Lynne Rienner, 1995.

Lustig, Nora. *Mexico: The Remaking of an Economy*. Washington, D.C.: Institute for International Economics, 1992.

Malpica de Lamadrid, Luis.*¿Qué es el GATT? Las Consecuencias Prácticas del Ingreso de México al Acuerdo General.* Mexico City: Grijalbo, 1988.

Organisation for Economic Co-Operation and Development (OECD). *Trade Liberalisation Policies in Mexico*. Paris: OECD, 1996.

Organización Mundial del Comercio. *Examen de las Políticas Comerciales: México 1997.* Geneva: WTO WT/TPR/S/29, 1998.

[112] For specific policies that can be followed to favor a more equitable distribution of the gains from trade, *see* DANI RODRIK THE NEW GLOBAL ECONOMY AND DEVELOPING COUNTRIES: MAKING OPENNESS WORK (1999).

Organización Mundial del Comercio. *Examen de las Políticas Comerciales: México.* Geneva: WTO WT/TPR/S/97, 2002.
Ortiz Mena, Antonio. *El Desarrollo Estabilizador: Reflexiones Sobre una Época*. Mexico City: Fondo de Cultura Económica, 1998.
Ortiz Mena, Antonio. "Política Industrial Durante el Desarrollo Estabilizador: Políticas Llevadas a Cabo y Desempeño Posterior de los Sectores Automotriz y de Autopartes, Maquiladora de Exportación, y Turismo." Mexico City, 2002. Unpublished manuscript.
Ortiz Mena L.N., Antonio. "An Inquiry Into the Causes of the 1982 Economic Crisis in Mexico." M.A. diss., University of London-Institute of Latin American Studies, 1987.
Ortiz Mena L.N., Antonio. "Mexico and the WTO: A Regional Player in Multilateral Trade Negotiations." Mexico City: CIDE Working Paper EI–74, 2001.
Ortiz Mena L.N., Antonio. "Dispute Settlement Under NAFTA," in *NAFTA in the New Millennium*, edited by Edward J. Chambers and Peter H. Smith. Edmonton and La Jolla: University of Alberta Press-University of California Center for U.S.-Mexican Studies, 2002.
Ortiz Mena L.N., Antonio. "Ten Years of NAFTA: A Mexican Perspective" *Voices of Mexico* 60 (2002):56–59.
Ortiz Mena L.N., Antonio. "La Solución de Controversias en el Tratado de Libre Comercio de América del Norte: Un Esbozo Sobre su Desempeño y Retos." Hamburg: Institut für Iberoamerika-Kunde (IIK) Working Paper, No. 2, 2002.
Reif, Linda C. "NAFTA, the WTO and the FTAA: Choice of Forum in Dispute Resolution," in *NAFTA in the New Millennium*, edited by Edward J. Chambers and Peter H. Smith. Edmonton and La Jolla: University of Alberta Press-University of California Center for U.S.-Mexican Studies, 2002.
Rodrik, Dani. *The New Global Economy and Developing Countries: Making Openness Work.* Washington, D.C.: Overseas Development Council, 1999.
Schiavon, Jorge and Antonio Ortiz Mena L.N. "Apertura Comercial y Reforma Institucional en México 1988–2000: Un Análisis Comparado del TLCAN y el TLCUE." *Foro Internacional* 41 (2001): 731–760.
Schott, Jeffrey J. and Johanna W. Buurman. *The Uruguay Round: An Assessment.* Washington, D.C.: Institute for International Economics, 1994.
SECOFI. "Reunión Ministerial de Seattle y la Posibilidad de una Nueva Ronda de Negociaciones." Mexico City: SECOFI, 1999. Unpublished manuscript.
SECOFI. "El Tratado de Libre Comercio Mexico-Unión Europea." Mexico City: SECOFI, 2000. PowerPoint presentation.
SECOFI. "Ronda Uruguay del GATT: Resultados Globales e Implicaciones Para México." Mexico City: SECOFI, no date. Unpublished manuscript.
Secretaría de Economía. "México y la Quinta Conferencia Ministerial de la Organización Mundial del Comercio." Mexico City: Secretaría de Economía, 2001. Unpublished manuscript.
Secretaría de Economía. "México y la Organización Mundial del Comercio." Mexico City: Secretaría de Economía, 2002. Unpublished manuscript.
Solís, Leopoldo. *La Realidad Económica Mexicana: Retrovisión y Perspectivas.* Mexico City: Siglo XXI, 1991.
USTR. "U.S. to Request WTO Consultations with Mexico Regarding Telecommunications Trade Barriers." Washington, D.C.: USTR press release 00–54, 2000.
World Trade Organization (WTO). Trade Policy Review: México-Informe de Gobierno. Geneva: WTO WT/TPR/G/97, 2002.
World Trade Organization (WTO). Trade Policy Review: Mexico-Report by the Secretariat. Geneva: WTO WT/TPR/S/97, 2002.
Zaid, Gabriel. *La Economía Presidencial.* México City: Vuelta, 1987.

(b) Internet Sources

www.caname.com.mx
www.canieti.com.mx

www.rmalc.org.mx
www.economia.gob.mx

(c) Interviews

Interview with Luis Bravo Aguilera, February 11, 2002. Mr. Bravo Aguilera has had a long and distinguished career in the Mexican government. He was Deputy Minister of Foreign Trade during the De la Madrid administration and head of the Mexican delegation that negotiated GATT accession in 1986.

Interview with Fernando de Mateo, January 10, 2002. Mr. De Mateo is one of the most experienced trade negotiators in Mexico. He was General Coordinator of the Economic and Legal Research Department at the Mexican Foreign Trade Institute, Director General of Economic Studies at the Trade Ministry, Director General of Services Negotiations for NAFTA and the Uruguay Round, General Coordinator of Negotiations with the European Union, and Chief Negotiator for EFTA negotiations. He is the author of many articles on Mexican trade policy.

Interview with Dionisio Meade, February 12, 2002. Mr. Meade graduated from the National University of Mexico in 1968 with a dissertation on Mexico and GATT. He was Technical Secretary of the Inter-Ministerial Trade Negotiations and Tariff Commission during the 1970s and a member of the Mexican delegation to the 3rd UNCTAD meeting in 1972.

CHAPTER 75

MONGOLIA

Damdin Tsogtbaatar*

TABLE OF CONTENTS

I. Introduction 250
II. Mongolia's Accession to the WTO 250
A. Initiation of Accession Negotiations 251
B. Old Strategy and Mentality Versus the New Realities 251
C. Time Pressure and the Imagined "Deadline" 253
D. Unclear Objectives 253
III. Mongolia's Implementation of its WTO Commitments 255
A. Short Review of the Current Situation 255
1. Tariff System 256
2. Customs Valuation 256
3. Internal Taxation 257
4. The Harmonized System 257
5. Import and Export Licensing 257
6. Ban on Exports of Raw Cashmere 258
7. Transparency 258
8. Intellectual Property Rights 258
B. Evolution from Accession-Orientation to Implementation-Orientation .. 258
C. Is Membership Burdensome? 259
IV. The WTO in Operation 262
A. Cashmere and the WTO-IMF-World Bank Coherence Test 262
B. Customs Valuation: Law v. Practice 263
C. Mongolian Court Enforcement of TRIPS Rights 264
V. Should Mongolia Remain in the WTO? 265

* Foreign Policy Advisor to the President of Mongolia. Deputy Director, Multilateral Cooperation Department, Ministry of Foreign Affairs, Mongolia (2000–2002),

I. Introduction

In 1999, the total value of world exports equaled US$5.6 trillion.[1] As a result of the Uruguay Round achievements in liberalizing global trade in goods, world income is expected to increase by US$510 billion (in 1990 dollars).[2] These astronomic figures are alluring for any country, especially one that is in a desperate financial situation.

However, if a country's share in global trade is only 0.01 percent (as in the case of Mongolia) what can it expect to gain from membership in the WTO? Especially given the fact that the WTO advocates free competition, would the participation of such a tiny economy not resemble a rugby match between "elephants" and "mice"? The anti-globalization sentiments so loudly voiced in the recent past in Seattle, and echoed in Davos, Prague, Seoul and New York, appear to make the usefulness of the participation of smaller economies in the WTO even more doubtful. Nevertheless, against all odds Mongolia has been participating in the WTO process. Why is it doing so? Was it indeed attracted by the massive gains expected from trade liberalization, hoping that Mongolia would share in these gains? If Mongolia is to benefit from its membership in the WTO, what measures should it undertake and what constraints must it overcome?

These are some of the legitimate questions raised by many in Mongolia, to which answers will be sought in this chapter.

II. Mongolia's Accession to the WTO

In order to consider how Mongolia has benefited from participation in the WTO, one must ask why Mongolia joined the organization in the first place. The question becomes more relevant in light of the fact that many inside and outside Mongolia believe that the terms of its accession were not optimal, to put it mildly, and set a tough precedent for a number of countries that joined the organization after Mongolia. It is not easy to argue against these opinions when the far-reaching concessions[3] made by Mongolia, as well as the virtual absence of grace periods for implementation that might be thought appropriate for a developing country,[4] are weighed against the serious economic challenges the country was undergoing.

The accession terms were arguably unfavorable because Mongolia's accession took place in a burst of euphoria without serious economic calculations or a solid cost-benefit analysis. At the time of initiating the GATT/WTO negotiations, the Mongolian economy was still a centrally planned and isolated economy with almost every barrier to trade imaginable. Certainly, this system needed to be changed in order for Mongolia to become a member of the WTO. However, it is also worth noting that purely from a negotiating perspective this high baseline seemed to have given Mongolia broad maneuvering room to secure as many developing country benefits as possible. In order to avoid making steep bound concessions across the board, the government and its negotiators could have strived to make as few concessions as possible, in order to secure legitimate "space for maneuver" for the Government if in the future domestic industries suddenly

[1] UNCTAD HANDBOOK OF STATISTICS 2002, at 2 (2000).

[2] Dillon, Thomas J., Jr., The World Trade Organization: A New Legal Order for World Trade? 16 MICHIGAN JOURNAL OF INTERNATIONAL LAW 349–402, at 351 (1995). *See also*, INTERNATIONAL TRADE CENTRE (UNCTAD/WTO) AND COMMONWEALTH SECRETARIAT, BUSINESS GUIDE TO THE URUGUAY ROUND 26 (1995).

[3] Mongolia's commitments under the GATS provide a vivid example of these generous concessions. *See Schedule CXXXIV-Mongolia, Part II—Services*, WT/ACC/MNG/9/Add.2 (1996).

[4] *See in general* WTO, *Report of the Working Party on the Accession of Mongolia ("Working Party Report")*, WT/ACC/MNG/9 (1996).

needed "breathing room" in the form of a level of protection going beyond that which the government considered reasonable at the time of entering the negotiations and to which it bound itself under the WTO. Such a strategy would not have contradicted Mongolia's internal economic liberalization policy, for under the WTO system a country can always liberalize its economy beyond its WTO commitments, while for a small economy like Mongolia, retreating from concessions once made is legally impossible or next to impossible.

Nonetheless, it should be noted that, although from the professional perspective the accession process was far from perfect, so far membership of the WTO *per se* has not impacted the economy negatively, since the Mongolian Government chose to free its economy beyond its WTO commitments.

A. Initiation of Accession Negotiations

Mongolia is the 130th member of the WTO. It became an official member as of January 1997. The negotiations with the GATT began in July 1991.[5]

When Mongolia initiated its negotiations with the then GATT members, of which Australia, the United States, the European Union, Canada, Japan, and Mexico were the most active, it was in a rather peculiar historical period—the beginning of its painful and arduous transition to a market economy. Along with economic reforms, it was simultaneously undertaking far-sweeping democratic reforms. These reforms, coupled with the collapse of the Council for Mutual Economic Assistance ("COMECON") and its market structure, sent the Mongolian economy into a deep crisis.

B. Old Strategy and Mentality Versus the New Realities

Initiating accession into the WTO was apparently among the first genuinely independent foreign political moves made by Mongolia in the multilateral arena. Throughout the Communist era most if not all decisions were politicized and strongly motivated by ideology. In pursuit of the objectives dictated by its rivalry with the West, the Soviet bloc attempted to turn Mongolia into a "showcase" for socialism and therefore gave it large subsidies.[6]

Mongolia's thirty-year-long participation in COMECON ensured Mongolia comfortable trade opportunities such as guaranteed access to the markets of the member economies, "incentive prices" for imports, and a trade deficit financing by the Soviet Union.[7] Consequently, until the early 1980s, despite the distortions and inefficiencies[8]

[5] Ministry of Industry and Trade, *Implementation of the Commitments Undertaken by Mongolia at the Accession to the WTO and Enhancing the Activities of Mongolia in the Organization* (Research Paper, 2001).

[6] David Dapice, *Open Policies in a Closed Country: Making Markets Work in Mongolia*, in TOWARDS ECONOMIC STRATEGIES FOR RAPID GROWTH IN MONGOLIA 3 (Research Paper under the general direction of Jeffrey D.Sachs. 1997).

[7] World Bank, *Mongolia: Toward a Market Economy 3* (World Bank Country Study 1992).

[8] A very vivid example of economic inefficiency could be seen from the experience with the establishment in the 1980s of a footwear factory in Mongolia, which had a capacity to produce 3 million pairs of shoes a year, while the population of Mongolia was a little over 2 million. Given the absence of footwear production experience and expertise in the past this project could not even conquer the sympathy of the internal market, not to mention that of the external. Not surprisingly the factory went bankrupt under the market economy for there was no longer the centralized economic "totalitarian" protectionism in place, which could virtually stop imports and have everyone wear the locally-produced shoes, irrespective of the fact that the factory could supply only a limited variety of designs.

of the centrally planned and ideology-motivated economy, Mongolia enjoyed robust growth.[9] Under the system of "brotherhood" almost any project in Mongolia was doomed to succeed. Therefore, even when economic issues were negotiated, they were eventually decided in the spirit of "brotherly friendship". As a result it was assumed that the larger economies would consider issues relating to the smaller countries favorably in any intra-COMECON dealings. In this environment, which dominated the economic cooperation field for almost thirty years, the instinct of self-interest was arguably weakened a great deal. Hence at the launch of Mongolia's accession process the Mongolian negotiators were apparently not really familiar with the pragmatic, realistic and commercially-driven mentality of the GATT.

However, the countries that negotiated Mongolia's WTO accession played the "game" the usual way, i.e. to gain, regardless of Mongolia's size and experience. The outcome of the negotiations was therefore in a sense predetermined, since they were carried out from such differing perspectives and premises.

In addition to the COMECON mentality, the Mongolian negotiators and decision-makers at the time of initiating the accession process could not rid themselves of the values of the authoritarian past, when the state was seen as the center-point of everything and where the concept of participatory democracy had not yet taken real roots in society. The reforms, whereby the people turned from "something to somebody", began only in the late 1989, whereas the negotiations started in 1991. Consequently, by the start of negotiations the decision-makers and the negotiators simply had not had enough time to change their life-long mentality. As a result there was little consultation with the emerging business community of Mongolia, and limited debate, if any, with the public in general.

The absence at the initial stage of the accession negotiations of a debate with the major national stakeholders who would be directly affected by the WTO rules could also be explained by the fact that there were virtually no private businesses in Mongolia in 1991. The "blue-pink" voucher privatization, i.e. the first wave of privatization of livestock, smaller state-owned factories and government shops began in 1990.[10] Since Mongolia had no private stakeholders operating in the market at the launch of the GATT/WTO negotiations, the objectives identified by the government officials negotiating the GATT/WTO accession arguably reflected the economic interests of the nation as a whole at that time.

However, the nation began to undergo intensive and rapid changes in terms of the private sector share in economic growth. Already by 1995 the private sector was accountable for half of the GDP, and by 1996, the final year of the negotiations, the same indicator stood at over 57 percent.[11] The stake of private entrepreneurs in trade grew even more significantly. The private sector share in trade reached 66 percent and approximately 70 percent in 1995 and 1996 respectively.[12] The bureaucrats could not understand this drastic change and dynamism. If at the beginning of negotiations every commitment made by the negotiators affected the government "pocket", by the end of the negotiations they

[9] For example, between 1960 and 1980 the gross industrial production rose by about seventy percent; the real GDP growth rate in the period between 1981–1986 equaled seven percent. World Bank, *supra* note 7, at 4.

[10] Richard Tomlinson, *From Genghis Khan to Milton Friedman: Mongolia's Wild Ride to Capitalism*, FORTUNE 110 (November 23, 1998).

[11] Ch. Khurelbaatar, *Assessment of Private Sector Development*, in FASTER ECONOMIC GROWTH IN MONGOLIA: PROSPECTS AND POLICY OPTIONS 20 (Report prepared for USAID/DAI Economic Policy Support Project: Dr. Wing Woo, Dr. Stanley Black, *et al.*, September 1998).

[12] *Id.*

were affecting the private "pocket". Thus, the state-centrist premise was failing to fit the new realities, the full comprehension of which required more contacts and surveys at the grassroots level.

One of the reasons why the growing significance of privatization and the growth of the private sector was overlooked in trade negotiations could be explained by the fact that privatization and the multilateral trading system were each subjects complicated enough on their own to comprehend. While the subject of the multilateral trading system received some scrutiny in Mongolia, the domestic economic imperatives were rapidly changing. Hence, understanding all of the changes taking place in a systemic order would have been a daunting challenge for any individual.

Also, under the former regime, when Mongolia was isolated from the rest of the world the trade diplomats were among the elite of the country in terms of pay and education. In the 1990s entrepreneurs had little experience and knowledge of international trade issues and were therefore ignored by the "sophisticated" and COMECON-experienced trade negotiators, who presumed, as under the previous regime, that they "knew" what the entrepreneurs needed without bothering to consult them.

As a result of the above factors, there was a considerable gap between the business community and the trade negotiators, not only at the early stages of the negotiations but throughout their course.

Another problem (insignificant at first sight, but important in the long run) appears to have hurt Mongolia in the negotiations. From the early 1990s the outflow of government personnel due to steady budget cuts and the increasing attractiveness of the emerging private sector degraded the capacity of the government in general.

C. Time Pressure and the Imagined "Deadline"

As a result of the loss of COMECON's support Mongolia was on its own in the globalizing world economy. In order to fill the vacuum Mongolia needed to exploit every possible means to become integrated into the world economy. It therefore resolved to try various activities, including the GATT/WTO accession negotiations. The fact that neither Russia nor China was a member of the GATT gave Mongolia an incentive to join the WTO before its two big neighbors. The imagined race to accession, while both Russia and China were, in fact, not concerned about speedy accession, created a strong sense of time pressure.

Ironically Mongolia's accession to the United Nations, although it did not require any change in the economy, took almost as long as the Chinese accession to the WTO (i.e. fifteen years), while the WTO accession negotiations, which necessitate far deeper and more fundamental changes in the economic structure of the country, took only six years.

D. Unclear Objectives

Because of the factors mentioned above, WTO accession appears to have become a matter of reputation for Mongolia. Accession was seen as a political card that Mongolia could play in order to become integrated into the world economy, and to create a new image and reputation. In pursuit of these objectives the WTO accession seems to have become an end in itself.

However, the GATT/WTO was not the right institution to join with the politicized objective of image-building. The image-building value of entering the WTO was negligible

Matrix 1.

No.	Factor	Status	Negotiation Results
1.	Economy	Constant	Adequate
2.	Interest articulation mechanism	Constant	
3.	Negotiation process	Variable	

compared to the potential price of the concessions Mongolia had to make. Instead of politicized motivation Mongolia needed a sound cost-benefit analysis to demonstrate in numerical terms how easily and to what extent its exports could penetrate the markets of WTO members, or what it could obtain in return for the concessions it made. So far no hard evidence of the existence of this type of analysis has been found.

The strange symbiosis of historical, social, economic and personal factors mentioned above existed during the accession process. Although the WTO accession decision *per se* appears to have been somewhat spontaneous, based on euphoria rather than any economic rationale, there is little doubt that the decision was historically and economically inevitable. However, the accession process following the decision to join the WTO was not flawless as a result of the factors mentioned above.

The following lesson can be drawn from Mongolia's accession experience. In order to ensure adequate results after accession, with which the majority of society can live without raising any post-accession regrets, a country in launching and conducting WTO accession negotiations should examine the status, behavior and co-relationship of at least two factors *vis-à-vis* the negotiation process, i.e. (1) economic stability and (2) institutionalized and mature interest articulation mechanisms. If these two factors are stable *vis-à-vis* the negotiations, which are to bring changes into the existing economic structure, the accession process may produce predictable results, reflecting the realities more adequately. However, if either or both of these factors were unstable, there would be no reliable premise upon which one could project the objectives and benefits of achieving an agreement. For example, if a country at the beginning of negotiations did not have a particular sector in place that could potentially seek protection, the likelihood of setting liberal objectives for imports of the product(s) in question would be high. If however the sector emerges while the accession negotiations are underway, the objectives set at the start of negotiations would not match the new realities. In short, any country seeking adequate results from the negotiations should at the minimum perform an analysis involving a triple-factor matrix, assessing the economic structure, the interest-articulation mechanism and the negotiation process as to their stability and relationship with each other. To obtain adequate results from the negotiations, only the negotiation process should be variable and the other two stable[13] (see Matrix 1).

In the case of Mongolia all three factors were changing: the economy was in the process of restructuring, the interest articulation mechanism was (and still is) being developed, and the accession process was underway. The rushed approach to WTO accession and the lack of multilateral trade negotiation experience, as well as the absence of consultations with the business community and the public in general over the potential repercussions, benefits and other consequences related to the WTO concessions, resulted in tough commitments for Mongolia.

[13] For the purpose of this chapter the words "stable" and "constant" used with regard to the economy means predictable rather than stagnant and non-changing.

III. Mongolia's Implementation of its WTO Commitments

A. Short Review of the Current Situation

Although the accession process of Mongolia was not impressive, as a member of the global organization the country now has other challenges and issues to tackle. Mongolia is legally bound to comply with and implement the rules and requirements of the organization. It will have to learn to play the global game by the rules in order to eventually benefit from WTO membership.

The Government of Mongolia undertook a series of measures aimed at the implementation of its commitments before the WTO. The Working Party Report[14] and the Protocol for Accession of Mongolia to the Marrakesh Agreement Establishing the World Trade Organization[15] may appear to be non-voluminous compared with similar documents of other members, however, for the small economy of Mongolia, the provisions contained therein were substantial.

In the immediate aftermath of Mongolia's accession to the WTO the relevant government institutions had very little, if any, idea about their role in the implementation of the Mongolian commitments. Hence the government passed Resolution No. 14,[16] whereby it allocated the WTO Agreements to the appropriate ministries and agencies. The allocation *per se* could not ensure the implementation of Mongolia's commitments under the Accession Protocol and WTO Agreements because these agreements were alien to the relevant ministries and agencies of the country. Consequently, starting the "implementation-engine" required a strong and unified leadership, as well as Cabinet level guidance. Decree No. 6 by the Prime Minister of Mongolia ("Decree No.6") was an important act because it listed the laws and regulations that had to be modified and amended in order to bring them in conformity with WTO law.[17]

Through Decree No.6, the government sought to introduce comprehensive changes into the trading regime of Mongolia, including, *inter alia*, the development of a double column customs tariff system, review of the customs valuation rules, reform of the internal taxation system, simplification of exportation and importation procedures, elimination of bans on certain products, and modification of the intellectual property protection regime. From the scale of the measures covered by the decree, it appears to have been an ambitious attempt to bring the whole trading regime of the country into conformity with WTO rules in one take on a structured basis. However, in the course of implementing the measures prescribed in the decree it became clear that building a WTO-consistent trade regime is a continuous process, which has a start, but no end.

The actual implementation of Decree No.6 on a planned, coordinated and structured basis with appropriate monitoring proved to be difficult. This was partly due to the fact that a few months before Mongolia officially became a member of the WTO, the Mongolian government was the subject of a major restructuring. In forming their government, the Democratic Coalition, which won the general election in mid-1996, reduced the number of ministries from fifteen to nine. As a result, the trade section of the Ministry of Trade and Industry was merged into the Ministry of External Relations. The newly formed Department of Foreign Trade and International Cooperation ("DFTIC") of the Ministry

[14] *Supra* note 4.

[15] *Protocol for the Accession of Mongolia to the Marrakesh Agreement Establishing the World Trade Organization ("Accession Protocol")*, WT/ACC/MNG/11 (1996).

[16] Government of Mongolia, *Resolution No. 14*, 1 Zasgiin Gazryn Medeelel (Government Bulletin), 74, 1997.

[17] Prime Minister of Mongolia, *Decree No. 6* (1997), Ministry of Foreign Affairs Archives.

of External Relations was appointed as the focal point on WTO matters. The new DFTIC, with a staff of only twenty officers, was also assigned the task of handling official development aid ("ODA") of over US$300 million *per annum* provided to Mongolia by the international donor community. Understandably, in a country suffering from a chronic budget deficit and an overall economic crisis, the management of the ODA was far more significant than WTO compliance. Hence, DFTIC's efforts in coordinating the various ministries and agencies aimed at implementing the Decree No. 6 were not fully devoted and efficient.

Nevertheless, irrespective of the lack of coordination at the inter-agency level, many of the objectives sought through Decree No.6 were achieved rather spontaneously. The country was undergoing a transition to a market economy and the newly elected government was intensively pursuing a policy of liberalizing the economy. Therefore, most of the measures taken in pursuit of such policies ended with good results, which matched or went beyond the objectives of Decree No.6 and the WTO commitments of Mongolia.

1. Tariff System

Although the double column customs tariff system was developed pursuant to Decree No. 6, the need for adopting such a system faded with the nullification of the customs duties by the Parliament in 1997.[18] This move led to liberalization which exceeded the WTO tariff commitments for Mongolia. In acceding to the WTO, Mongolia had agreed to bind its entire tariff schedule at a ceiling rate of twenty percent *ad valorem*, with a few exceptions.[19] The zero-rate tariff regime remained in place for two years. Beginning in July 1, 1999, a general tariff of five percent, with tariff-free access for goods bound to be kept free under the WTO Schedule of Concessions in Goods, was introduced by the Parliament.[20]

2. Customs Valuation

The rules incorporated in the Customs Tariff Law of Mongolia (1996) were developed with the WTO Customs Valuation Agreement[21] in mind. The customs valuation rules are believed to be generally compliant with WTO law,[22] except for some inconsistencies[23] which appear to have stemmed from either the simple misinterpretation of WTO rules or from the state-centrist philosophy of the drafter of the law (i.e. the General Customs Authority), whereby the importers and exporters are presumed to be inclined to avoid customs duties unless thoroughly inspected and controlled. Although the implementation of the Customs Valuation Agreement on the adjudicative level in Mongolia could be argued to be relatively smooth, there remains a lot to be desired at the level of practical field-application of the law by customs inspectors.

[18] Parliament of Mongolia, *Resolution No.4*, April 18, 1997.

[19] *See* WTO, *Schedule CXXXIV-Mongolia: Part I—Goods* ("Schedule of Concessions in Goods"), WT/ACC/MNG/9/Add.1 (1996).

[20] Parliament, *Resolution No. 27* (1999).

[21] *See* the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* in WORLD TRADE ORGANIZATION, LEGAL TEXTS: RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 172–200 (1999).

[22] *See* Mark Ziegrist, REPORT ON THE CUSTOMS VALUATION RULES (1998).

[23] For example, the principle in Article I:2(a) of the Customs Valuation Agreement that the relationship between the buyer and the seller may not be a *prima facie* ground for refusing to accept the transaction value (*See* chapter 12 of this book) is used in the reverse sense in Article 13.4.4, Customs Tariff Law (1996) of Mongolia, i.e., the relationship is viewed to be a *prima facie* ground for non-acceptance.

3. Internal Taxation

The reforms affecting Mongolia's internal taxation system proved to be difficult. The review of the Working Party Report suggests that the sales tax, as well as the discriminatory excise tax imposed on certain products (e.g. alcoholic beverages), were scrutinized by the negotiators in a fairly intensive manner.[24] Although as a result of the WTO accession, the excise and sales taxes were subjected to reforms, the discrimination with regard to spirits and certain types of alcohol still remains intact. The preservation of discrimination may not be justified by a lack of knowledge of WTO discipline. The practice of imposing or lifting new excise taxes evidences that there is awareness about Mongolia's commitment to respect the national treatment principle. The imposition and abolition of the excise tax on beer is a clear example of such awareness. In 1998, when an issue on the excise tax on beer was debated, the first bill provided for the discriminatory treatment of imported beer. However, a US$0.50 excise tax was imposed equally on both domestic and imported beer precisely due to the requirements of Article III, GATT 1994. The abolition of the beer excise tax in 2000 was also effected in a manner consistent with the national treatment principle.[25]

The sales tax was abolished in favor of a value-added tax in 1998. However, the Law on the Taxes on Added Value ("VAT Law") inherited the discriminatory nature existing under the sales tax law, under which a domestic producer was exempt from the tax if its total sales were below five million tugruks *per annum*, but an importer bringing into the country products identical and/or similar to that of the domestic producer was subjected to the sales tax irrespective of its sales turnover.[26] The VAT Law is similarly discriminatory, the only difference being the level of the threshold.[27] Although one may argue that this discriminatory provision in the VAT Law falls outside the scope of GATT Article III, because on its face it discriminates between producers and importers, rather than between domestic and imported products, in practice of course its application does lead to discrimination in a manner that affords protection to the domestic producers.

4. The Harmonized System

The introduction by the Government of the Harmonized System ("HS") marked a serious step forward in the facilitation of trade promotion. The translation of the HS was published in 1998. Currently, the HS is widely applied for such matters as the classification of goods for customs clearance, licensing procedures and other non-tariff measures.[28]

5. Import and Export Licensing

The licensing procedures were also subject to reform. Mongolia undertook to reduce the number of products subject to import and export licensing. Here, the liberalization was carried out during the accession negotiations. The licensing requirements for exports of meat, grain and fodder imposed under Government Resolution No. 86[29] were lifted in 1995. Export licensing for ferrous and non-ferrous metals mandated under the same

[24] *Working Party Report, supra* note 4, ¶¶11–13, 8–10.

[25] Parliament, *Law on the Amendment to the Excise Tax Law* (February 3, 2000).

[26] *Working Party Report, supra* note 4.

[27] Article 9.3, *Law on the Taxes on Added Value of Mongolia.*

[28] *See, e.g.*, Article 5, *Customs Law of Mongolia*, under which the government in introducing trade restrictive measures must indicate the HS code for the goods subject to the restrictions.

[29] *Procedures on Importation and Exportation of Certain Commodities*, Resolution No.86 (1993).

resolution were abolished in 1996. As for the products still covered by the licensing requirements, the term of the licenses were extended from three months to one year.[30]

6. Ban on Exports of Raw Cashmere

During the accession negotiations, Mongolia had a ban on raw cashmere exports in place. Upon entry into the WTO, Mongolia undertook to lift the ban. In pursuit of this commitment, Mongolia abolished the ban and introduced an export duty. As discussed below, the government applied the export duty in a fashion that caused considerable harm to the Mongolian industry.

7. Transparency

Mongolia's efforts to ensure transparency in its laws and regulations had significance for Mongolia because it strengthened democracy and compliance with WTO law. When Mongolia acceded to the WTO, the Parliament and the Government had their own media channels through which to reach the public. However, with further democratic developments, a new law concerning the mass media was passed, allowing the media to become more independent. To facilitate the actual independence of the media, the affiliations of certain media channels with the government were ended. Consequently, there were no media channels required by law to publish new decisions, regulations and laws. This situation has been addressed by a Parliamentary resolution, under which all the decisions and regulations by the legislature and the executive branch of the Government are required to be published officially in the "Government Bulletin".[31]

8. Intellectual Property Rights

In the field of intellectual property rights protection, Mongolia undertook appropriate measures to ensure compliance with the WTO TRIPs Agreement. In this context Mongolia joined the Berne Convention for the Protection of Literary and Artistic Works and amended its Law on Copyrights (1993), as well its Patent Law (1993).[32] In 1998, the TRIPs Council of the WTO reviewed the intellectual property rights regime of Mongolia and recommended that Mongolia focus more on the enforcement mechanism.

B. Evolution from Accession-Orientation to Implementation-Orientation

A review of the WTO accession and implementation shows that the euphoria and rhetoric on the heightened international image of Mongolia ended shortly after the completion of the accession process. As Mongolia became a member of the WTO, it began to face the challenges associated with membership.

Due either to a slightly distorted understanding of the objectives of acceding to the WTO or to the accidental coincidence of legal reform efforts of Mongolia with post-accession measures, Mongolia strongly emphasized the implementation of WTO obligations. Strangely, there was virtually no substantial discourse over the improved market access of Mongolian export products, which could be expected to be the major goal of any developing member state.

[30] Minister for Agriculture and Industry, *Procedures on Licensing the Products subject to the Exportation and Importation under the Government Supervision*, Order No.A-34 (September 30, 1996).

[31] Parliament, *Resolution No.103* (1998).

[32] Mongolia has further been endeavoring to extend its treaty base by recently joining and ratifying (in May 2002) the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty, and the Nairobi Treaty on the Protection of the Olympic Symbol.

The heavy emphasis on implementation is evidenced from the fact that during the first years of membership there were a number of government acts and decisions, such as Decree No.6, adopted to ensure Mongolia's compliance with WTO rules. There were few, if any, decisions or measures calling for an assessment of the prospects of Mongolian export expansion resulting from accession to the WTO.

Nevertheless, the implementation-orientation of the Government did not mean that the WTO issues were constantly high on the agenda. The dramatic economic transition understandably overshadowed participation in the WTO. However, whenever the WTO issues were raised, the implementation of the Mongolian obligations was put on the agenda. This suggests that Mongolia associated WTO membership, first of all, with the implementation of its obligations. This implementation-oriented approach derived from the fact that the Mongolians saw the WTO as the "Gattzilla", which could come down on Mongolia with severe punishment if it did not comply with its obligations However, no one in Mongolia appears to have questioned whether complying with the WTO requirements would bring benefits to Mongolia. The lack of questioning seems to have stemmed from the assumption that this "Gattzilla" somehow was seen at the same time as an organization whose principles could lead to reform of Mongolia's nascent commercial system. Unlike many developed Western countries, in Mongolia the term "international" is frequently viewed as more mature and, thus, better than "local". Indeed, many of the concepts introduced by, or because of, the WTO undeniably improved and made the Mongolian commercial system more mature in many respects, such as the reforms of the customs valuation rules, the introduction of the HS, and the attempts to simplify the licensing procedures. The WTO was considered by the Mongolians as the body combining two controversial images; on one hand, the tough "Gattzilla", if opposed, and the virtuous "Guru", if complied with. The Mongolians took for granted that compliance would benefit Mongolia, although there was no clarity as to how exactly this would occur.

C. Is Membership Burdensome?

Some public figures and economists in Mongolia express concern that for a small developing country like Mongolia, tough commitments and disproportionately few special and differential treatment provisions place a heavy burden on the economy.[33] The concerns are legitimate if one examines the potential impact on manufacturing and processing. In addition, the non-participation in the WTO of Mongolia's two big neighbors, China (up until 2001)[34] and Russia, put great pressure on Mongolian producers. Also, the tariffs maintained by China and Russia were higher than those of Mongolia, which substantially reduced (and for two years even eliminated) import tariffs in the second half of the 1990s. This sort of unilateral liberalization policy can hardly be afforded by major trading nations, let alone Mongolia.

As was mentioned above, Mongolia's entire industrial base was built on the philosophy that there was no place for concepts such as competition or lack of markets. Liberalization hit Mongolian industries hard and international competitive pressure pushed most

[33] *See, e.g.*, statement by S.Oyun (MP), The Globalization, Mongolia and its Foreign Policy, in INTER-POLITICAL PARTY DISCUSSIONS: THE GLOBALIZATION, MONGOLIA AND ITS FOREIGN POLICY NO.5, Gan Print, Ulaanbaatar, at 23–27 (2003) and the intervention by S. Dashzeveg, at 45–48.

[34] Even now that China is a member of the WTO, the positive impact of its membership has yet to be felt in Mongolia.

of the enterprises out of the market both internationally and domestically. However, it is important to note that the WTO-induced liberalization did not cause the economic downturn. The economy had been ailing long before WTO rules became legally applicable in Mongolia. The peak of the crisis occurred in the early 1990s when GDP dropped by 16 percent (1991)[35] and inflation raged at 325.5 percent *per annum* (1992).[36] Moreover, the trade indicators were also unstable in the early 1990s. In 1991, total trade turnover shrank more than twofold from US$1,584.7 million to US$708.9 million.[37] After this sharp decrease, trade turnover began to gradually increase and the trade balance started to recover.

Mongolia experienced these trade fluctuations before its accession to the WTO. Therefore, the downturn in trading terms could not be associated with membership of the WTO. The fact that the trade deficit grew by 520 percent from US$25.4 million to US$ 155.6 million[38] in 1998, the first year after accession to the WTO, was mere coincidence. The major factors causing this were the 1997 Asian crisis,[39] which reached Mongolia a year later, and the aggressive liberalization, which led to a surge of imports.

Consequently, even though WTO accession brought about far-reaching concessions by Mongolia, which under normal circumstances could have put great pressure on the economy, the nation's membership in the organization has not been too painful. The situation may however change with a revival of the industrial sector. It is too early to reach any definite conclusions. Some businesses have already voiced their concern, the most vocal being the cashmere processors.

Two specific examples of industries that faced difficulties as a result of Mongolia's accession to the WTO are cashmere and scrap metal.

Cashmere

Since the cashmere sector is one of the top hard currency earners in the country it clearly deserves special interest. Mongolia is a small economy and has only a few industries that are arguably integrated into the world economy. These few sectors basically set the mood in the industrial sector as a whole. Therefore, these are the primary sectors whose interests should be consistently taken into account in the actions of the Mongolian Government in the global forum. The cashmere sector is not only large in Mongolia, but it is substantial even at the global level. Mongolia accounts for 25 percent of world cashmere production, ranking second after China.[40]

Before Mongolia's accession to the WTO, the cashmere processing industry enjoyed a comfortable business environment as the economy opened up, on the one hand, and the ban on raw cashmere exports was maintained, on the other. According to some sources, the raw cashmere export ban introduced in 1994 laid the preconditions for the inflow

[35] World Bank, *supra* note 7, at ix.

[36] Statement by the Minister of Finance of Mongolia, Mr. Ya. Ochirsukh, *Macroeconomic and Structural Reforms Issues*, in THE MINISTRY OF EXTERNAL RELATIONS, MONGOLIA: SEVENTH ASSISTANCE GROUP MEETING (REPORT OF PROCEEDINGS), at 37 (1999).

[37] Mongolian Chamber of Commerce and Industry, FOREIGN TRADE SURVEY OF MONGOLIA, at 3 (2000).

[38] *Id.*

[39] Statement by Ngozi Okonjo-Iweala, *Mongolia: Seventh Assistance Group Meeting (Opening Remarks)*, Ministry of External Relations, *supra* note 36, at 14.

[40] B.Medree, *Short-and Long Term Lending and the Cashmere Market*, in THE CASHMERE SUMMIT, at 30 (Gobi Regional Economic Growth Initiative, Ministry of Agriculture and Industry, 2000). Some have estimated Mongolia's share of total world production to be as high as forty percent. *See, e.g.*, Myatavyn Tumurjav, *Traditional Animal Husbandry Techniques Practiced by Mongolian Nomadic People*, in MONGOLIA TODAY: SCIENCE, CULTURE, ENVIRONMENT AND DEVELOPMENT (Dendeviin Badarch, Raymond A. Zilinskas, *et.al.* eds 2003), at 95.

of foreign investment into the cashmere processing industry.[41] Foreign investors, a third of whom came from the industrialized countries,[42] realized in making an investment decision that the favorable trade regime fortified by favorable tax treatment could not last too long because it could have a great distorting impact on the economy and simply because it was almost too good to be true. In the course of the WTO accession negotiations, the export ban was replaced by a thirty percent export duty, to be gradually eliminated over ten years.[43] The investors from the industrialized countries with their business mentality formed in economies where a change of a business environment occurs gradually and transparently (often with a noisy debate), were not ready for such an abrupt turn of events, where the government did not even engage in any inquiry into the effects of the change. The investors also apparently knew from the experience of their own countries that tariffying the ban would have a considerable effect. However, going all the way down to thirty percent must have been shockingly unexpected.

To make matters worse, in introducing the export duty the Mongolian authorities did not opt for an *ad valorem* rate, but instead imposed a specific rate of 4,000 tugruks, which was roughly equal to thirty percent of the export value of raw cashmere at the time of introduction.[44] However, with an almost fourfold rise of the world price for cashmere the 4,000 tugruk rate was often equivalent to less than ten percent of the value. The foreign investors, as well as the Mongolian producers, therefore expressed dissatisfaction with the WTO accession results, which were exacerbated by the incompetence or inexperience of the Mongolian authorities.

The above discussion shows that the cashmere industry was hit harder by the Government's implementation of the WTO commitment than by the WTO commitment itself. By introducing a specific rather than an *ad valorem* tariff, the Mongolian Government unintentionally liberalized the cashmere market more than it had committed itself to do.

Scrap Metal

The scrap metal melting plant financed by a Japanese loan serves as an example of a substantial (by Mongolian standards) project affected negatively by WTO membership. In accordance with the feasibility study related to the establishment of the plant, at the initial stage of operations it was supposed to process scrap metal accumulated in Mongolia throughout its pre-reform period. However, with the lifting of the export licensing requirements under a WTO commitment,[45] most of the scrap metal left the country for China. As a result during its start-up phase the plant could not rely upon cheaper local raw material until it became more competitive and mature. The plant survived the struggle, and was subjected to a management buyout in early 2002, since when its business has reportedly stabilized.[46]

An analysis of the WTO commitment implementation process in Mongolia can be characterized, in general, as a process in which Mongolia endeavored to appear as a good student in the eyes of the global "Guru". In other words, the Mongolians put strong emphasis on becoming a WTO-compliant country. Although the first years of

[41] Batj.Batbayar, *The Current Situation for the Cashmere Industry in Mongolia*, in THE CASHMERE SUMMIT, *supra* note 40, at 5.

[42] N. Bataa, *The Present Situation of the Cashmere Processing Sector*, in THE CASHMERE SUMMIT, *supra* note 40, at 8.

[43] Article 3, *Accession Protocol*, *supra* note 15, at 118, and *Working Party Report*, *supra* note 4, ¶24.

[44] N. Bataa, *supra* note 42, at 8.

[45] Article 3, *Accession Protocol*, *supra* note 15, at 118, and *Working Party Report, supra* note 4, ¶24.

[46] Statement by Mr. Ch. Ganzorig, Minister for Industry and Trade, during an interview on Mongolian National Television, November 29, 2002.

Mongolia's membership in the WTO coincided with the economic crisis in the country, the introduction of WTO-based rules in Mongolia, with the exception of a few cases, is not linked to the economic problems in Mongolia, no matter how high the temptation may be to blame WTO rules. Thus, WTO membership has not placed much of a burden on Mongolia's basic economy. However, given the virtual absence of any external gains through, for example, growth of exports, membership may be seen as burdensome to the extent of the internal implementation costs. But these costs are worth bearing since the price of staying out of the WTO would be immeasurably high.

Mongolian trade policy-makers should not relax despite the unquestionable importance of WTO membership. They should always keep in mind the expressions of doubt coming from different corners of society. Especially today, with the recovery of the economy, many tenets of the current trading regime may be subject to compelling criticism.

IV. The WTO in Operation

A. Cashmere and the WTO-IMF-World Bank Coherence Test

Although Mongolia is a small economy, some of the issues debated at the global level have already been tested on Mongolian soil. The WTO-IMF-World Bank complementarity and coherence issue was one such issue. Not surprisingly, in view of its importance to Mongolia's economy, cashmere was the subject over which the substance of the global debate was put to test. After the problem with the export tax discussed above, the cashmere producers, realizing that the reinstatement of the export ban would be inconsistent with Government policy and with Mongolia's WTO commitments, asked the Government to change the export duty from the specific rate to thirty percent *ad valorem*. This would have been consistent with the WTO commitment so long as it was "gradually" reduced over ten years. However, another global institution, the IMF, which has a lead role in facilitating donor community support in Mongolia, opposed this change.

Rather than simply accepting the IMF position, the Mongolian Government, bearing in mind the cooperation agreement between the WTO and the Bretton Woods institutions on achieving greater coherence in the global economic policy-making,[47] raised the issue with the WTO Secretariat.[48] Mongolia argued that both the WTO and IMF were international institutions of equal status. Therefore, in Mongolia's eyes, the legal rights protected under the WTO could not be impaired by a policy position of another international institution of the same caliber. Mongolia argued that since there was an agreement to ensure coherence between the global institutions, changing the specific export duty rate to an *ad valorem* rate within the thirty percent range, as agreed with the WTO, should not be challenged by any international organization. Moreover, the thirty percent *ad valorem* rate was the result of six years of negotiations and, if it was accepted that another international organization could easily prevent the enjoyment of the right, the value, integrity, and reliability of the entire WTO multilateral legal system could be put in question.

The WTO Secretariat responded to the Mongolian arguments positively, but in an evasive manner.[49] It confirmed that Mongolia's Government would indeed be free to

[47] *See, e.g.*, *Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking*, in LEGAL TEXTS: RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 386–387 (1999). *See also, Singapore Ministerial Declaration*, WT/MIN(96)/DEC (18 December 1996), ¶5.

[48] *See* Letter from the Prime Minister of Mongolia, Mr. N. Enkhbayar, to the Director-General of the WTO, Mr. Mike Moore, dated March 20, 2001, Ministry of Foreign Affairs Archives.

[49] *See* Letter from the WTO Director-General to the Prime Minister of Mongolia, dated May 18, 2001, Ministry of Industry and Trade.

apply an export tariff at a rate not exceeding the thirty percent limit. However, it went on to state that this issue could be resolved in the context of Mongolia's consultations with the IMF and the World Bank, thus disassociating the WTO from the debate and leaving Mongolia on its own *vis-à-vis* the IMF. As a result the specific rate is still in place.

B. Customs Valuation: Law v. Practice

The level of the export tax was not the only problem that the cashmere processing industries faced in Mongolia. The cashmere producers also challenged the application of the customs valuation rules to the export tax by the Mongolian Customs authorities. The dispute had been initiated by a cashmere processing company with foreign investments and was supported by a number of other companies. The complaint was that the Customs authorities have been systematically rejecting the prices declared by the exporters and instead applying the highest or close to the highest price registered with the customs authority in the year in question, despite substantial price fluctuations.[50] The authorities claim that this approach was consistent with the Customs Tariff Law of Mongolia and the WTO Customs Valuation Agreement.[51]

The cashmere producers challenged the practice on the grounds that:[52]

i. The Customs authority could not invoke both the Customs Valuation Agreement and the Customs Tariff Law of Mongolia (irrespective of its provision on the export value being the *franco*[53] border of Mongolia price)[54] in defense of the practice, since neither the law nor the Agreement applied to the calculation of export taxes;
ii. Even if the provisions of the Agreement and the Customs Tariff Law on the methods of valuation of imports could be applied to export value on the *mutatis mutandis* principle, the Customs authority could not use the "higher of two alternative values".[55]

Although the exporters carried out fairly intensive consultations with the Customs authorities, the latter never fully accepted the exporters' arguments. Although Customs "conceded" by agreeing to use its database, which would not be too outdated, for determining export value, it still did not eliminate the opportunity to opt for a higher alternative price.

In the course of analyzing the customs valuation dispute, a flaw was identified in Article VII, GATT 1994, and the Customs Valuation Agreement, i.e. that their detailed valuation rules do not apply to export valuation. Although GATT Article VII:1 covers valuation of exports as well as imports, the detailed valuation rules contained in paragraphs 2–5 of

[50] *See* Letter of the Group of Cashmere Producers and Legal Opinion Submitted to the General Customs Authority, of the Group of Cashmere Producers, Mon Forte LLC Archives (2000).
[51] *Id.*
[52] *See* Legal Opinion submitted to the General Customs Authority, *supra* note 50.
[53] Italian term for "free". Although internationally the term "franco" (e.g. "franco [named place]") should be avoided as non-standard, the term remains in use in Mongolian law. For more on this, see, Working Party on Facilitation of International Trade Procedures, Geneva, January 1996, Recommendation No.5, third edition, ECE/TRADE/202 [Edition 96.1].
[54] Article 10.4, Customs Tariff Law of Mongolia, does not provide for specific rules and methods of calculating the *franco* border price.
[55] *See* Article 7.2(b), *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.*

Article VII apply only to imports. Similarly, the Customs Valuation Agreement applies only to imports.

A possible way to solve the flaw might be the development of another instrument on the basis of GATT Article VII that would govern customs valuation for export purposes. The customs valuation rules for exports are needed because there are countries that apply export duties. It should also be remembered that even in countries where there are no export duties at present, there could be a time when they may have to resort to such duties on a temporary basis. Therefore, unless harmonized rules are worked out within the WTO, similar problems to that described above could arise in the future.

C. Mongolian Court Enforcement of TRIPS Rights

Although Mongolia is one of the newer members of the WTO, the WTO rules have already penetrated deeply into the fabric of Mongolian society. A good illustration of this is a recent court case in which a foreign investor successfully invoked the provisions of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and was awarded a judgment by the court. The very fact that a plaintiff resorted to the TRIPs Agreement (the agreement least likely to be understood by the Mongolian business community) suggests that WTO law may be spreading its roots deep into Mongolian society.

The case was brought by The Wagner Asia Equipment, LLC, a company with U.S. investors that has operated in Mongolia since 1996[56] and has firmly established a good image in the Mongolian market. As the reputation of the company grew, so did the popularity of the company's trademark. However, Wagner had failed to register the trademark with the Intellectual Property Office of Mongolia ("IPO"). A Mongolian company, Borogchin LLC, which had subsequently managed to register the trademark, brought a legal action against Wagner in order to prevent it from using the trademark.

In response to the action Wagner sued the IPO based on unlawful registration of its trademark and requested the court to stay its consideration of Borogchin's complaint until the court decision in the case against the IPO was delivered. Its suit against the IPO argued that at the time the trademark was registered, it was already a well-known mark. Therefore, under Article 4.3.6 of the Mongolian Law on the Trademark and the Economic Entity Name ("LTEEN"), it could not be registered.[57]

Although the Mongolian intellectual property law provides for the protection of well-known trademarks, it has a serious deficiency in that it does not provide a mechanism to determine a well-known trademark. Additionally, the IPO did not maintain a database for well-known trademarks. Therefore, under Mongolian national law, it would have been impossible to prove that the trademark used by Wagner had, in fact, become a well-known trademark by the time Borogchin applied for the registration. The court therefore filled the gap by reference to Article 16.2 of the TRIPs Agreement, which provides that "[in] determining whether a trademark is well known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark". Wagner was able to satisfy the court, through means of a survey, that as a result of aggressive marketing and advertising it had made its trademark well known in the

[56] *See* Wagner Application attached to the Sukhbaatar District Court, *Decision No. 452*, May 10, 2001.

[57] Article 4.3.6 provides that designs similar or identical to a well-known trademark owned by one entity may not be registered by the IPO as the property of another entity whether or not the mark was registered with the IPO by the owner.

mining industry of Mongolia and beyond. As a result, the court sustained Wagner's claim and held that the Borogchin trademark registration was void.[58] Although the respondent appealed the district court decision, the Capital City Court upheld the decision.[59]

These examples demonstrate that WTO law is becoming widely known and is spreading within Mongolian society. The WTO has in fact managed to improve the Mongolian commercial legal environment. The examples suggest that Mongolian businesses could reap tangible benefits once they master WTO rules.

V. Should Mongolia Remain in the WTO?

The spread of anti-globalization activities and concerns expressed by certain industries in Mongolia has raised a question as to the rationality of Mongolia's membership in the WTO. Despite the question, no country in this ever-globalizing environment can afford to remain isolated. Globalization is inevitable and is not a matter of choice for states. This is especially the case for small economies, since without the WTO rule-based system small economies are confined to limited markets. The WTO rule-based system creates the opportunity for business entities in small countries to attain economies of scales.

Membership in the WTO is therefore an important goal for small countries. Smaller countries can secure gains through full exploitation of the opportunities offered by the WTO in the global market. The WTO, with its strengthened dispute settlement mechanism, facilitates, or aspires to facilitate, an equal and fair environment for businesses from all member countries. Hence, irrespective of the tough requirements, Mongolia should remain in the WTO and participate actively in future negotiations to ensure that its interests are reflected at the global level.

An assessment of the five-year membership record of Mongolia in the WTO suggests that the tangible membership benefits or challenges Mongolia could have are, to a large extent, still in the realm of "what is possible". Whether these opportunities materialize depends on Mongolia's own efforts. The WTO fundamentally remains an organization focused on sound economic and commercial reasoning, notwithstanding the development provisions in Part IV of GATT 1994, the concept of an integrated framework for technical assistance, or the Doha development agenda. Whether Mongolia manages to secure real benefits out of its participation in the WTO will depend first of all on its economic recovery and its capacity-building activities, aimed at strengthening its government institutions, academia and business community. The Mongolian Government, recognizing the importance of capacity building, together with the GTZ, a German technical cooperation agency, launched a €1.5 million project on trade policy.[60]

The project's objective is to ensure better utilization of the development opportunities available to Mongolia by virtue of its WTO membership. The project aspires to achieve the objective through the realization of the following components:

i. elaboration and implementation of a coherent national trade policy in compliance with WTO commitments and concessions;
ii. strengthening national capacities in trade policy analysis, strategy development, negotiations and implementation; and
iii. improvement of the national legal and institutional framework.[61]

[58] *Decision No. 452*, *supra* note 56.
[59] Capital City Court, *Decision No. 533*, June 18, 2001.
[60] Ministry of Industry and Trade of Mongolia and GTZ, *Understanding and Utilizing the Prospects of the World Trading System* (Project Papers), at 4.
[61] *Id.*

The project demonstrates an interest in benefitting from WTO membership, indicating that Mongolia is on the right track. However, an analysis of the project goals suggests that the Government has not yet overcome its implementation-oriented mentality. Efforts aimed at improving the export capacity of Mongolia are mentioned only marginally and indirectly, if at all, in the description of the project components. In very simplified terms, Mongolia's international trade consists of two elements: imports and exports. Compliance with the WTO commitments and improvement of the internal legal framework will improve the conditions for imports. This is undoubtedly good because these measures, among other benefits, lower the prices of goods (helping consumers), reduce the production costs of import-dependent industries, demand efficiency from domestic producers through increased competition, and improve the regulatory environment for businesses. These are definitely important attributes of WTO membership. However, without an effort to improve the trade deficit through the increase of exports, Mongolia's gains will look extremely one-sided. The vast opportunities open to domestic industries have to be analyzed, measured, and brought home to the national producers, service providers and foreign investors. In the meantime, it also should be made very clear that the WTO is not a donor organization or a development generator. Mongolian trade and development success lies with Mongolia itself; all that the WTO can do is assist through ensuring better market opportunities.

The improved market access opportunities are a great incentive for producers. Although as a result of WTO membership, market access opportunities for Mongolian exports have improved in over 140 countries, access into two of the most important markets for Mongolian products, Russia and China, still has room for improvement. China's accession to the WTO should ameliorate the situation.

For Mongolia, one of the significant advantages of joining the WTO before China and Russia would have been the opportunity to engage in their bilateral accession negotiations as a member of a larger group. Mongolia missed such an opportunity with China. Negotiations are underway with Russia. Mongolia has the backing and sympathy of the global trade organization, and should try its best to strike a good deal with the Russians. The opening of the Russian market for Mongolian products may have a crucial impact on the economy of Mongolia. Also, it may change the attractiveness of the economy for foreign investors as well.

Another important subject that could be discussed between Mongolia, China and Russia within the WTO framework is freedom of transit, critical to Mongolia as a landlocked country. GATT Article V, which covers freedom of transit, has already been scrutinized by some Members, and other international organizations, with a view to improving the provision.[62] In recent years, Mongolia has been negotiating a trilateral framework agreement on transit with China and Russia. UNCTAD has facilitated the negotiation of the agreement.

At present, there are numerous modern regional transit agreements in various parts of the world.[63] However, GATT Article V is based on principles developed in 1921.[64] As a result, Canada's proposed clarifications and improvements of the provisions,[65] and

[62] *See, e.g.*, Communication of Canada, *Trade Facilitation: Article V of GATT 1994 on Freedom of Transit*, G/C/W/424 (October 1, 2002); UNCTAD Communication, *Freedom of Tranzit: Obligations and Implications of Article V General Agreement on Tariffs and Trade*, G/C/W/427 (October 8, 2002).

[63] *Id.*

[64] The Barcelona Convention and Statute on Freedom of Transit. *See* Communication of Canada, *supra* note 62.

[65] *See* Communication of Canada, *supra* note 62.

development of a new general agreement setting forth globally accepted uniform principles based on Article V, may further the trade facilitation efforts of the WTO. This may also consolidate or improve the rights of Mongolia under the pending trilateral transit agreement.

In addition to the above efforts to maximize its benefits, Mongolia should keep in mind one issue, which needs the development of a solid strategy. Ironically, by joining the trade club Mongolia has gained the opportunity to benefit substantially from the restrictions maintained by certain countries in the textiles sector. The quota-free access of textiles from Mongolia to the United States, which Mongolia gained through its accession to the WTO, has given Mongolia a strong competitive advantage over those textile-producing nations that are subject to restrictions. When the Multifibre Arrangement is phased out at the beginning of 2005 and textiles are fully integrated into the WTO regime, the effect on the Mongolian textile industry may be negative. Mongolian policy-makers need to work on designing policies to mitigate the looming change.

In conclusion, it should be observed that, regardless of a certain amount of scepticism and pessimism, Mongolia's overall expectations from its participation in the multilateral trading system appear to be positive and optimistic. However, encouraging critical analysis and questioning within society is essential to secure a healthy policy-making environment.

CHAPTER 76

NEW ZEALAND

David J Walker*

TABLE OF CONTENTS

I. Introduction 270
II. New Zealand's Trade Policy 271
III. New Zealand's Participation in the Uruguay Round 272
IV. Regional and Bilateral Trade Liberalization 274
A. Regional Liberalization—APEC 275
B. Bilateral Liberalization—FTAs 277
C. Encouraging the "Competitive Liberalization" Dynamic 278
V. Multilateral Liberalization—The Doha Round 280
A. Agriculture 280
B. Non-agricultural Products 282
C. Services 283
D. Rules 283
E. Sustainable Development 285

* At the time of writing (May 2003) the author was serving as Deputy Chief of Mission at the New Zealand Embassy to the United States in Washington DC. The views expressed in this chapter are those of the author and should not be taken as necessarily reflecting the views of the New Zealand Embassy to the United States, the New Zealand Ministry of Foreign Affairs and Trade or the New Zealand Government.

I. Introduction

This chapter summarizes New Zealand's experience with the WTO to date, including its participation in the Uruguay Round of multilateral trade negotiations that established the WTO and the benefits New Zealand derived from those negotiations. The broad objectives of New Zealand's trade policy, as pursued through the WTO "Doha Development Agenda" (hereinafter referred to as the Doha Round) and other trade negotiating processes, are briefly outlined together with the domestic economic and political context which underpins that policy. Specific New Zealand negotiating objectives and proposals in the main areas of the Doha Round are summarized.

New Zealand is a founder member of the WTO and has been active in the evolution and governance of the multilateral trading system since the inception of its predecessor organization, the General Agreement on Tariffs and Trade, in 1947.

Much of New Zealand's approach to the WTO can be understood by appreciating what can be termed the "1-2-3" of New Zealand's place in the world. Roughly speaking, New Zealand comprises rather less than 0.1 percent of the world's population, produces 0.2 percent of the world's output—as measured by GDP—and accounts for 0.3 percent of the world's trade. So New Zealand is a small, prosperous country and a relatively large trader. Two-way trade in goods and services represents significantly more than half of New Zealand's GDP. Simply put, trade is vital for New Zealand's prosperity and economic development. New Zealanders could not hope to maintain, let alone enhance, their standard of living without international trade.

The structure of the New Zealand economy is not dissimilar to that of most "developed" economies. By far the majority of activity—almost seventy percent—takes place in the services sector with "goods-producing" industries accounting for 22 percent and "primary industries" just over eight percent.[1]

The pattern of New Zealand's trade, however, both by country and product, is less typical and explains much of its trade policy. New Zealand is a global trader, trading with almost two hundred countries. Its trade is also relatively balanced geographically. Australia is the largest bilateral partner taking around nineteen percent of exports and supplying almost 23 percent of imports. Australia is followed by the European Union (sixteen percent and nineteen percent respectively),[2] the United States (15.5 percent and 13.5 percent), and Japan (twelve percent and twelve percent). The majority of New Zealand's economic interaction is in the Asia Pacific region[3] which comprises over seventy percent of two-way trade and a similar proportion of FDI and tourist flows. Within the APEC region, East Asia accounts for 33 percent of New Zealand's merchandize trade and the Americas seventeen percent.[4]

[1] "Primary industries" comprise agriculture, fishing, forestry, and mining and quarrying. "Goods-producing industries" comprise manufacturing, electricity, gas and water, and construction. Of these agriculture constitutes almost six percent of GDP and manufacturing around seventeen percent. Figures are for the year ended March 31, 2000. Source: NEW ZEALAND OFFICIAL YEARBOOK 2002.

[2] The numbers in each bracket denote respectively the percentage of exports and the percentage of imports.

[3] As defined by the 21 member economies of APEC (Asia Pacific Economic Cooperation). APEC's members are Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, United States, and Vietnam.

[4] Percentage figures in this and the subsequent three paragraphs are from NEW ZEALAND EXTERNAL TRADE STATISTICS, YEAR ENDED DECEMBER 2002, published by the New Zealand Ministry of Foreign Affairs and Trade.

merchandize exports, which totalled NZ $29.8bn in 2002, remain heavily concentrated in agricultural products which continue to face some of the most significant global trade barriers. In aggregate agricultural products comprised 52 percent of New Zealand's total merchandize exports in 2002, compared with the OECD average of around seven percent. Dairy products, at 21 percent of total merchandize exports, were the largest single category followed by meat at fifteen percent.

Among non-agricultural products principal export categories in 2002 were forestry and forestry products, eleven percent of total merchandize exports; machinery, 6.4 percent; metal and metal articles, 6.0 percent; and fish, 4.6 percent.

New Zealand is also a significant services trader with exports of services growing rapidly in recent years. In 2002 services exports totalled just over NZ$11bn, 27 percent of total exports. The largest single services export category is tourism which, in 2002, contributed an estimated NZ$6bn to export receipts. Education of foreign students is another fast growing services export activity contributing more than NZ$1bn in foreign exchange during 2002.

A similar situation exists in respect of capital markets. While New Zealand captures only around 0.8 percent of global FDI (foreign direct investment) flows, imported capital looms large in New Zealand's economic development. Indeed, New Zealand ranks amongst the highest of the OECD economies for the 'significance' of FDI; the index number for New Zealand being 31.8 in comparison with 16 for Australia, 12.5 for the United Kingdom and only 6 for the United States.[5]

The total stock of FDI in New Zealand as of December 2001 was valued at NZ$ 49bn, around 47 percent of GDP, with net annual inflows for the five years from 1997–2001 averaging approximately 5 percent of GDP. Of this stock 35 percent was of Australian origin, 31 percent from the EU (dominated by the United Kingdom) and around 14 percent from the United States. Portfolio investment is also significant with foreigners owning about half of all shares listed on the New Zealand stock market and companies that are at least 25 percent foreign owned earning around 40 percent of business profits. By comparison New Zealand's stock of outward FDI in 2001 stood at less than NZ$ 15bn, with 63 percent of that invested in Australia.[6]

II. New Zealand's Trade Policy

As with other major areas of economic and regulatory policy, trade policy in New Zealand is established and implemented, where necessary through legislation, by the central government. The Ministry of Foreign Affairs and Trade[7] is responsible for the coordination of policy advice and policy delivery through its international representation and negotiation functions.

A range of other government agencies are involved in providing input to policy advice and increasingly to delivery. These include other coordinating agencies such as the

[5] The FDI "significance" index as reported by UNCTAD incorporates FDI inflows as a percentage of gross fixed capital formation, FDI inward stock as a percentage of GDP, value added of foreign affiliates as a percentage of GDP, and employment of foreign affiliates as a percentage of total employment. Figures are based on 1997 data as reported in the UNCTAD World Investment Report 2000.

[6] Investment statistics in this paragraph are sourced from Appendix A of a July 2002 briefing paper on the New Zealand Overseas Investment Commission; *see* www.oic.govt.nz.

[7] As with Australia and Canada, the Ministry of Foreign Affairs and Trade in New Zealand combines the foreign policy and trade policy functions. A separate government agency, New Zealand Trade and Enterprize, is responsible for trade promotion and investment attraction.

Ministry of Economic Development, the Treasury, and the Department of Prime Minister and Cabinet; and a variety of agencies with particular responsibilities such as the Ministry of Agriculture and Forestry, Ministry of Fisheries, Ministry of Transport, Ministry for the Environment, and the Ministry for Maori Development (Te Puni Kokiri). In addition to the official policy coordination apparatus, there is also an active programme of consultation and outreach with non-governmental stakeholders to ensure for example that the perspectives of Maori, business, environment and labor groups are taken into account in the policy formation process.

As with all areas of policy, any commitments the government enters into in the area of trade need to be consistent with the government's obligations under the Treaty of Waitangi, the founding document of the modern state of New Zealand, signed in 1840 between the Crown and Maori, the indigenous people of New Zealand.

Given the composition of New Zealand's merchandize exports, the existence of agricultural trade barriers inhibits New Zealand's ability to grow through trade, as is also the case with many developing countries. Estimates vary widely but some studies suggest that trade barriers globally could cost New Zealand up to nine percent of its GDP annually.[8]

This reality is reflected in the shape of New Zealand's multi-track trade policy and the seriousness with which it has been pursued by successive governments. At the time of the Uruguay Round this policy had four main tracks—domestic or unilateral, bilateral, regional, and multilateral—all directed in pursuit of the first-best policy outcome, complete multilateral free trade.[9]

An extensive programme of domestic economic reform, including liberalization at the border and internal deregulation, was undertaken in New Zealand's self-interest beginning in the early 1980s and continuing through to the late 1990s. The resulting policy settings, which in many areas remain considerably ahead of bindings in the WTO, allowed the government at that point to determine that New Zealand was sufficiently internationally competitive that further liberalization could be pursued primarily on a reciprocal basis.[10] Thus multilaterally in the WTO, regionally in APEC, and bilaterally, New Zealand is prepared to liberalize its remaining barriers to trade on a legally binding basis provided that trading partners are prepared to do the same.

Liberalization opportunities in the bilateral/regional and multilateral contexts are explored in Parts IV and V of this chapter respectively, building on the baseline established by the Uruguay Round as summarized in Part III below.

III. New Zealand's Participation in the Uruguay Round

Reflecting the economic realities described above, New Zealand was an active proponent of and participant in the Uruguay Round with the principal goal of liberalising trade in agriculture. This reflected the failure of the GATT, in previous negotiations, to deal seriously with agricultural trade barriers. In part because of this failure, New Zealand had to that point not been particularly forthcoming in its own GATT commitments. The domestic economic reform of the 1980s and 1990s, however, positioned New Zealand

[8] *See, e.g.*, Philippa Dee, Chris Geisler, and Greg Watts, *The Impact of APEC's Free Trade Commitment*, Staff Information Paper, Industry Commission of Australia (1996).

[9] For a complete exposition of this policy *see New Zealand Trade Policy; Implementation and Directions: a Multi-Track Approach*. New Zealand Ministry of Foreign Affairs and Trade, September 1993.

[10] New Zealand's applied MFN tariff rates were frozen at their July 1999 rates until July 1, 2005. A review is currently underway, to be completed in 2003, to determine the shape of the post-2005 tariff regime.

to take a strong pro-liberalization stance across the board in the Uruguay Round as the best strategy to promote significant liberalization of agricultural trade.

In agriculture New Zealand sought to bring the sector firmly within the scope of the rules applying to other products and to secure significant market opening and reduction of subsidisation, both domestically in major producing countries and in export markets. New Zealand was also a proponent of enhanced market access for industrial products and of bringing services trade and intellectual property under multilateral disciplines. Related to this was the need to guard against the protectionist imposition of offsetting non-tariff barriers through negotiation of disciplines on both sanitary and phytosanitary measures and on technical barriers to trade. New Zealand also sought to negotiate improvements to the GATT's dispute settlement system so that agreements once negotiated could be more effectively enforced. Finally in the knowledge that outcomes in most areas were likely to be partial at best, New Zealand sought to provide a platform for further negotiations.

The results of the Round for New Zealand were described in detail in a series of publications produced by the Ministry of Foreign Affairs and Trade following conclusion of the negotiations.[11]

Reflecting the partial nature of the outcomes, the economic gains were relatively modest. Conservative estimates suggested a total increase of 2–3 percent in GDP phased in over the course of the decade from 1995–2004 as a result of Uruguay Round implementation. In 1994 dollar terms this equated to between NZ$1.5 billion and NZ$2.3 billion, the equivalent of between 20,000 and 30,000 jobs or between 2 and 3 percent of the then workforce.[12]

The farm sector was considered to be a major beneficiary with increased market access and lower tariffs forecast to boost sector revenue by NZ$1.0 billion to NZ$1.5 billion over the same period. A study undertaken by the Ministry of Foreign Affairs in 2002 indicated that duties paid on New Zealand exports were NZ$525 million lower in 2000 than they would have been without the tariff cuts resulting from the Uruguay Round. This includes almost NZ$400 million of duty savings on agricultural exports, with the meat and dairy sectors saving approximately NZ$190 million and NZ$130 million respectively. Significant results in individual markets were NZ$90 million saved on exports to the EU, mainly as a result of zero tariffs on in-quota exports of sheepmeat; and NZ$70 million in savings on in-quota exports of beef to the United States. In aggregate these duty savings translate into an additional NZ$11,500 of income for every sheep, beef and dairy farmer in New Zealand.[13]

Gains also resulted from tariff cuts on industrial products and from commitments secured on New Zealand services exports. Considerable scope for further progress remains, however. Despite the Uruguay Round tariff cuts, import duties paid on New Zealand's exports amounted to NZ$884 million on a total of NZ$17.06 billion of exports to WTO founding nations, an average duty rate of approximately 5.2 percent. Of this NZ$751 million was paid on agricultural exports at an average rate of 7.2 percent.[14]

The other major gain for New Zealand from the Uruguay Round was the improvements made to the dispute settlement system. For a small country with limited bilateral

[11] TRADING AHEAD: THE GATT URUGUAY ROUND: RESULTS FOR NEW ZEALAND, New Zealand Ministry of Foreign Affairs and Trade, April 1994.

[12] *Id.*

[13] Results published in QUESTIONS FOR A TRADING NATION, New Zealand Ministry of Foreign Affairs and Trade, 2002.

[14] *Id.* This average duty paid figure does not account for the trade chilling effect of prohibitively high tariff rates in many of New Zealand's potential export markets.

leverage, the existence of a rules-based trading system is key. But the rules of the system are only as good as members' compliance with them. The usefulness of the GATT dispute settlement system was limited by the fact that redress was subject to veto by the defending party. The Uruguay Round removed that unilateral power of veto, replacing it with a two-stage process. Once judgement is rendered through that process, it automatically applies unless overturned by consensus; in other words the complaining party now effectively holds the veto.

New Zealand has three times successfully used the WTO dispute settlement system to secure removal of measures, found to be WTO-illegal, imposed by the European Union on New Zealand "spreadable" butter,[15] by the United States on New Zealand lamb,[16] and, together with the United States, by Canada on exports of dairy products in contravention of its commitments on dairy export subsidies.[17] At the time of writing (May 2003), New Zealand, along with eight co-complainants, was involved in a dispute with the United States concerning safeguard measures on steel.[18]

New Zealand has also been involved in a number of disputes as a Third Party. To date, New Zealand has not been the subject of any dispute settlement proceedings under the WTO.

IV. Regional and Bilateral Trade Liberalization

New Zealand has long taken a twin-track approach to regional ("RTA") and bilateral ("FTA") trading arrangements: it has supported "genuine" arrangements, and been active in looking to conclude such arrangements; and it has sought to constrain "partial" arrangements.

[15] *European Communities—Measures Affecting Butter Products*, WT/DS72. Consultations were requested in March 1997 and a Panel established in November 1997. New Zealand requested suspension of the panel proceedings in February 1999 and in November 1999 notified the Dispute Settlement Body that a mutually agreed solution had been reached.

[16] *United States—Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb from New Zealand,* WT/DS177. Consultations were requested in July 1999 and a panel requested, together with Australia, in October 1999. The Panel found against the United States in December 2000 and, following an appeal by the United States, the Appellate Body upheld that finding in May 2001. The United States removed the measures as of November 15, 2001.

[17] *Canada—Measures Affecting Importation of Milk and Exportation of Dairy Products*, WT/DS113. Consultations were requested in December 1997 and a panel requested in March 1998. New Zealand's request was joined with that of the United States (WT/DS103). The Panel found against Canada in May 1999 and, following an appeal by Canada, the Appellate Body upheld the finding in October 1999. In implementing the findings Canada introduced new measures on a province-by-province basis. New Zealand and the United States requested Article 21.5 consultations concerning those measures in February 2001 which led to the reconvening of the Panel to consider the measures concerned. The Panel again found against Canada in July 2001, a result which Canada again appealed. The Appellate Body in December 2001 declined to rule on the consistency of the measures in question arguing it was unable to complete analysis of claims made by New Zealand under Articles 9.1(c) and 10.1 of the Agreement on Agriculture. New Zealand sought recourse again to Article 21.5 of the Dispute Settlement Understanding with the panel again finding against Canada in July 2002. Following a further appeal by Canada, the Appellate Body upheld the finding in December 2002. Canada and New Zealand notified a mutually agreed solution to the dispute in May 2003.

[18] *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS258. Consultations were requested in May 2002 and a panel established in July 2002. The Panel, which requested an extension of its work until April 2003, issued its interim findings in late March. These remained confidential to the parties at the time of writing but were widely reported in the media as being against the U.S. measures. Co-complainants are Brazil, China, Chinese Taipei, European Communities, Japan, Korea, Norway and Switzerland.

"Genuine" and "partial" are not intended here as subjective terms, although inevitably a degree of subjectivity is involved. Rather they refer to an assessment of whether the preferential liberalization is likely to have a positive or detrimental effect on the dynamic for liberalization more broadly, and ultimately on the multilateral trading system.

The economist's answer to this question would involve an analysis of whether any particular agreement was primarily trade-creating (adding to overall trade) or trade-diverting (with increased trade inside the preferential arrangement substituting for more efficient exchange with third parties). Just as the "fundamentals" tended to be out of favor in the financial markets for much of the 1990s, it is momentum theory that currently seems to be the vogue in thinking about preferential trading arrangements. Thus well-designed arrangements that drive liberalization further and faster than is possible in broader contexts are seen as having the potential to serve as "building blocks", establishing benchmarks and creating momentum for liberalization efforts more broadly. Conversely partial "arrangements of convenience" which leave aside the more difficult or sensitive sectors or issues can make it more difficult for countries to engage in broader fora and can act as "stumbling blocks," undermining the key principle of most favoured nation ("MFN") non-discrimination.

Accordingly, New Zealand is open to explore options for RTAs/FTAs with any of its significant trading partners on the basis that such arrangements are: outward looking—in the sense of not introducing additional preferences against third countries; open-ended—in the sense of being open to accession by others; reform-friendly—in the sense of not blocking unilateral reform by either party; and comprehensive—in the sense of encompassing all products and all barriers to trade. New Zealand has also sought to ensure its agreements are "Asia-Pacific friendly"—in the sense of contributing towards the achievement of APEC goals; timeframe and comprehensiveness are key components of this.[19] Pursuant to this policy, New Zealand is a member of a number of the better-designed arrangements in existence.

A. Regional Liberalization—APEC

The broadest of these is the Asia Pacific Economic Cooperation ("APEC") forum. For the moment APEC cannot be described as an RTA as such, but it has established the most far-reaching liberalization objectives in existence.[20] These are the so-called "Bogor Goals" agreed in Bogor, Indonesia in 1994, under which all 21 APEC member economies are committed to the achievement of free and open trade and investment no later than 2010 in the case of industrialized economy members and no later than 2020 in the case of developing economy members.[21]

[19] *See* NEW ZEALAND TRADE POLICY 1993.

[20] APEC qualifies ahead of the EU by virtue of relative size, with APEC member economies comprising over 41 percent of the world's population, 60 percent of global GDP (around 55 percent on a purchasing power parity (PPP) basis) and 48 percent of world trade; in comparison with approximately 6, 25 (20 on a PPP basis) and 36 percent respectively for the fifteen-member EU. With the ten new members admitted at the end of 2002, the newly formed EU comprises a little over seven percent of global population and just under thirty percent of global GDP. *See UN Social Indicators Report* at www.unstats.un.org; *UNCTAD Statistics in Brief: International Trade; Value of Exports and Imports of Goods in 2001* at www.UNCTAD.org; and *World Bank Development Indicators Database 2002* at www.Worldbank.org.

[21] Members who have joined after 1994 are similarly pledged through continual reiteration of their commitment by their political leaders, for instance at Auckland, New Zealand in 1999 which saw the most recent admission of members: Peru, Russia and Vietnam.

APEC members are still trying to work out exactly how they will achieve this goal. Establishment of the goal was followed in 1995, in Osaka, Japan by the scoping out of an "Action Agenda" and then in 1996 in Manilla, Philippines by the setting of an initial "Plan of Action". Notably the Osaka Action Agenda reinforced the truly comprehensive nature of the goals which addresses all barriers to the movement of all goods, services and capital—*"The APEC liberalization and facilitation process will be comprehensive, addressing all impediments to achieving the long term goal of free and open trade and investment"*—no room for ambiguity there.[22] The Manilla Action Plan determined that some areas of work would be pursued individually, others collectively. "Concerted unilateral liberalization" was agreed as the overall unifying modality of how APEC members would move forward, each at their own pace, to arrive jointly at the commonly agreed goal.

The APEC lexicon tended to be confused somewhat by the Early Voluntary Sectoral Liberalization ("EVSL") exercise which began in Vancouver, Canada in 1997 and ended in Auckland, New Zealand in 1999, to voluntarily accelerate the Bogor Goal of tariff elimination in selected sectors.[23] Note that agreement to voluntarily curtail some of the timetabling flexibility available to economies under the Bogor Goals, which permitted them to take up to 2010/2020 to eliminate tariffs, should not be confused with the need to eliminate tariffs at that point. The latter is action which is now required to fulfil a solemn commitment voluntarily entered into at Bogor and reiterated by Leaders and Ministers ever since.[24]

With hindsight EVSL was always doomed to failure within APEC because the sectors chosen, while extensive, did not sufficiently encompass the export interests of all APEC members to allow the deal to be self-balancing, and because some APEC members were unable to liberalize these sectors on an MFN basis solely within the APEC context. Given that preferential liberalization on a partial sectoral basis could never be considered to be consistent with WTO rules, the EVSL package could only have been agreed and implemented through the participation of a "critical mass" of WTO members willing to bind the results in their WTO tariff schedules. Indeed, in the run-up to the Seattle WTO Ministerial, APEC WTO members sought to advance a renamed Accelerated Tariff Liberalization ("ATL") initiative for accelerated WTO liberalization in the nine priority EVSL sectors. The results were to have been applied on a provisional basis pending the results of broader WTO tariff negotiations.[25]

Arguably APEC members could have more profitably used the 1997–99 period to engage in a "virtual" negotiation to draw up detailed economy schedules of how they

[22] "Comprehensiveness" principle of the Osaka Action Agenda; from the APEC Economic Leaders' Meeting at Osaka, Japan 1995. *See* www.apec.org.

[23] EVSL covered fifteen sectors. Nine sectors—chemicals, environmental goods and services, energy, fish and fish products, forest products, gems and jewellery, medical equipment and instruments, telecommunications (mutual recognition agreement), and toys—were identified for priority liberalization; with the other six sectors—automotive, civil aircraft, fertilizers, food, natural and synthetic rubber, and oilseeds and oilseeds products—to be considered subsequently. Together the fifteen sectors comprise more than forty percent of merchandize goods trade.

[24] The section of the Osaka Action Agenda that deals with tariffs speaks of achieving free and open trade by "progressively reducing tariffs". It is unlikely the drafters envisaged a requirement for negative tariffs (subsidisation of imports). It can therefore be safely assumed that when tariffs reach zero the Bogor goal, with respect to tariffs, will have been achieved and progressive reduction can be stopped.

[25] *See Strengthening the Foundations for Growth*, APEC Economic Leaders Meeting, Kuala Lumpur, Malaysia, November 1998; and *The Auckland Challenge*, APEC Economic Leaders Meeting, Auckland, New Zealand, September 1999.

would implement the Bogor Goals across the board.[26] The resulting draft tariff, services, and other schedules could then have been taken to the WTO Ministerial in Seattle with the challenge that APEC WTO members would bind them in place if a critical mass of other WTO members would reciprocate. If other WTO members were not prepared to take up that challenge, APEC members would have proceeded to implement free and open trade and investment among themselves on a preferential basis according to the agreed schedules.

Of course it is not possible to rewrite history in this way. As noted in Part IV(B) below, however, this option remains open to APEC as a whole or to an alternative group of countries, both within and beyond APEC, determined to lead the way towards genuine free trade at the multilateral level.

A considerable amount of progress has been made toward achievement of the Bogor Goals, well beyond the implementation of WTO commitments arising from the Uruguay Round (for those APEC members which have such commitments), but much more remains to be done.

While many APEC economies continue to unilaterally liberalize areas of economic activity in their own self-interest, it is increasingly clear that concerted unilateral liberalization alone will not be sufficient for APEC to realise the Bogor Goals. In 1999 APEC made a concerted effort to enlist the support of the multilateral trading system through, unsuccessfully, sponsoring the launch of a WTO Round at Seattle. This was achieved in November 2001 at Doha, but two years of the APEC timetable have been lost. In Auckland in 1999 APEC Leaders agreed that:

> Support for ongoing WTO negotiations will remain a key area of APEC's work throughout the negotiations. In particular, we resolve to work actively in the negotiations to ensure that APEC and the WTO are mutually reinforcing . . . to avoid fragmentation of the international trading system, we need to ensure convergence between regional and multilateral liberalization initiatives.[27]

Looking at the Bogor Goals, this effectively means that APEC economies in the WTO need to work to promote the achievement of free and open trade and investment globally, and in a timeframe which roughly accords with that of Bogor.

B. Bilateral Liberalization—FTAs

Just as APEC and the WTO have the potential to be mutually reinforcing, so too do APEC and sub-APEC liberalization efforts. New Zealand is also active at this level.

Under the CER (Closer Economic Relations) agreement with Australia, New Zealand has had a comprehensive free trade agreement with its largest economic partner since the early 1980s. Full free trade in goods was achieved in 1990 and under the negative list approach on services, introduced in 1988, virtually all of the initially excluded service sectors or sub-sectors have been brought under full coverage of the agreement.[28] With the exception of investment where national policies continue to prevail,[29] Australia and

[26] Such an exercise could have been presented as an intensification, in the degree of detail and depth of coordination, of APEC's "Individual Action Plan" process.

[27] *The Auckland Challenge*; APEC Economic Leaders' Meeting, Auckland, New Zealand, September 1999. *See* www.apec.org.

[28] New Zealand retains only two sectoral limitations: air services and coastal shipping. Australia retains six: air services, broadcasting and television, third party insurance, postal services, and coastal shipping.

[29] New Zealand and Australia both have screening systems that apply to approval of foreign direct investment in certain types of assets (in New Zealand's case this relates mostly to land) and above certain monetary

New Zealand are effectively a single market of over 22 million people with a combined CER economy of US$500bn. A joint food standards authority has been established, anti-dumping has been replaced by mutual application of competition policy, there is mutual recognition of product standards and professional qualifications, essentially free movement of people, and the beginning of business law harmonization.

CER was signed in 1983 and two-way trade has grown every year since at compounding rates of up to twelve percent. As a result bilateral trade in goods has doubled in real terms. In nominal terms, between 1980 and 2000 the value of New Zealand exports to Australia grew by 859 percent from NZ$643 million to NZ$6.08 billion. This increase was 66 percent faster than New Zealand's exports to the rest of the world which grew by just over 500 percent in that time. During the same period Australia's exports to New Zealand grew by 641 percent from $945 million to $7.01 billion.[30]

Both New Zealand and Australia have carried this model of comprehensive liberalization into other bilateral and sub-regional initiatives in which they have engaged. Jointly there is an ongoing dialogue with the economies of the ASEAN Free Trade Area ("AFTA") with the objective of merging the two free trade areas. With CER and AFTA of roughly equal economic size, a combined FTA would encompass US$1 trillion in economic activity giving the region a significant degree of critical mass in broader negotiations.

New Zealand and Singapore concluded a comprehensive FTA in 2000—the first for Singapore. This entered into force on January 1, 2001 with completely free trade in goods and comprehensive free trade in services envisaged according to the 2010 Bogor timeframe. Singapore subsequently entered into negotiations with Australia and the United States.[31] New Zealand has also commenced negotiations with Hong Kong, again a world first; and at the 2002 APEC Leaders' Meeting at Los Cabos Mexico, New Zealand and Singapore jointly announced three-way negotiations with Chile, an innovative approach to link economies across three corners of the Asia-Pacific region.

Australia and New Zealand both are seeking to negotiate free trade with the United States. On November 13, 2002, United States Trade Representative Ambassador Zoellick notified the U.S. Congress of the Bush Administration's intention to initiate negotiations with Australia and to solicit the views of Congress on New Zealand's interest to also negotiate an FTA with the United States.

Whether such negotiations are concluded in parallel or separately remains to be seen. But what is important is that the United States does not seek to conclude an FTA with only one part of the CER single market. FTAs between the United States and both Australia and New Zealand would clearly be in the interests of all three countries. Conversely the United States concluding an agreement with one CER partner but not the other would be economically damaging.

C. Encouraging the "Competitive Liberalization" Dynamic

U.S. negotiations with both Australia and New Zealand, on top of those it has with Singapore (and Chile) would be a significant indication of U.S. interest to engage with

thresholds. Under a recent review of CER these thresholds were increased, in New Zealand's case from NZ$10m to NZ$50m, with the increase applying to investment from all sources rather than just under CER.

[30] Figures sourced from Statistics New Zealand.

[31] Australia and Singapore announced agreement in their negotiations in October 2002. The United States and Singapore announced they had reached "substantive agreement" in November 2002, with the resulting agreement being signed by President Bush and Prime Minister Goh on May 6, 2003. The agreement remains to be approved by the U.S. Congress.

the economies of the Western Pacific to make the Bogor Goals a reality. Such agreements would act as a powerful magnet for other economies in the region. Several of the other ASEAN economies could be expected to want to join in; Thailand for instance, is already showing interest.[32] In North East Asia, Chinese Taipei[33] needs little encouragement, Korea would have a strong incentive to join, and China too could be expected to show interest. At some point in that process, fear of exclusion would compel Japan to engage seriously.

FTAs between Australia, New Zealand and the United States, three of the world's most efficient agricultural producers/exporters, would also represent an ideal opportunity to establish the model of how agriculture should be dealt with in trade agreements.[34] This is significant because with agriculture among the most heavily protected sectors in many economies, particularly in North East Asia, the majority of the "partial" FTAs involve some degree of exclusion of agriculture.[35] In the short term this exclusion might be considered to be to the advantage of efficient third-party agricultural exporters as it avoids potential trade diversion resulting from any preferential access opportunities. In the long run, however, if countries are free to liberalize only those sectors they find convenient, their incentive to engage in broader liberalization processes such as the WTO, where they have to deal with the difficult sectors, is much reduced. Markets remain closed.

The WTO, through GATT Article XXIV on the goods side and GATS Article V on services, does contain provisions designed to minimize the negative impact of preferential trading arrangements on the multilateral trading system. To date, however, the effectiveness of these provisions in constraining members' behavior has been rather mixed. In part this is because of the vagueness of terminology such as the requirement that agreements eliminate duties and other trade restrictions on "substantially all trade".[36] But, as the incidence of sub-optimal preferential agreements spreads, it also reflects a general reluctance to be throwing stones in one's own glasshouse.

The limitations of a containment approach in the current environment suggest that engagement is likely to be a more effective strategy. This entails setting out an alternative competing paradigm in the FTA marketplace. This is what New Zealand has been seeking to do in advancing the truly comprehensive model inherent in the architecture of APEC's Bogor Goals. For a country the size of New Zealand to adopt this approach is one thing. But with some of the world's largest traders on the other side of the argument, the engagement strategy needs a champion of significance if it is to succeed.

The United States is by far the best (and perhaps the only) candidate for this. Only by being prepared to fully engage domestically in a truly comprehensive approach to

[32] Thailand is already in FTA negotiations with Australia and is looking to commence negotiations with the United States. At the APEC Economic Leaders' Meeting in Los Cabos Mexico, the United States announced an "Enterprize for ASEAN Initiative". This provides a pathway towards FTA negotiations for ASEAN member countries. Under the pathway, FTA aspirant countries have to be WTO Members, have a Trade and Investment Framework Agreement ("TIFA") with the United States and be ready to open their economy. Currently Indonesia, the Philippines and Thailand have TIFAs.

[33] The WTO and APEC terminology for Taiwan.

[34] Given the extent of subsidization in agriculture, both in domestic support and export subsidies, the primary focus of a bilateral or regional FTA would have to be on market access. Countervailing duty provisions could be used to protect domestic producers from any highly subsidized competitors within such an agreement. Provisions on non-use of export subsidies within an FTA/RTA have also been contemplated.

[35] This is a feature of many of the agreements concluded by the European Union. It is noticeable that the recently concluded agreement between Japan and Singapore, while covering a relatively high proportion of actual trade, reportedly covers less than eighty percent of tariff lines with the bulk of the exclusions being in agriculture.

[36] *See* GATT Article XXIV:8(a)(i).

liberalization, and then using the power of its market to insist on such an approach being adopted by any of its trading partners who want enhanced market access, can the United States really deliver the "competitive liberalization" dynamic, that U.S. Trade Representative Zoellick advocates, to the benefit of all sectors of the U.S. economy. Ambassador Zoellick is reported as saying: "If you want to negotiate with the U.S. to open markets, we'll negotiate."[37]

If the United States was prepared to champion such an approach, it could quickly become the reality, at least amongst those thirty to forty countries that make up the middle echelon of the world economy and the global trading system. This in turn would energize the WTO as the forum in which the competing market access paradigms between the United States and the EU and Japan, together with the associated rules issues such as disciplines on subsidization, were resolved.

V. Multilateral Liberalization—The Doha Round

New Zealand was among those countries most strongly and consistently advocating the launch of a new round of multilateral trade negotiations. The failure of Ministers to do so at Seattle was a severe disappointment, especially given the energies devoted through the APEC process that year in support of a Round launch. In contrast, the successful launch of negotiations at Doha was regarded by New Zealand as a major achievement. New Zealand played an active part in promoting that result and has since sought to be in the vanguard of those looking to advance an ambitious outcome to the Round.

New Zealand's core interests in the Doha Round were set out in a July 2001 Cabinet paper.[38] These largely flow from the unfinished business of the Uruguay Round and center on further liberalization in agriculture, non-agricultural products (in particular fish and forestry) and services, together with strengthened rules to ensure the effectiveness of negotiated market access and better integration of the work of the WTO with other priority areas of international policy. These negotiating objectives are pursued from a sustainable development perspective and in consultation with stakeholders including business, trade unions, Maori and non-governmental organizations. The sections below examine how New Zealand is looking to progress these objectives in relevant areas of the negotiations.

A. Agriculture

As will be evident from the description of the Uruguay Round outcomes in Part III above, New Zealand's principal focus in the Doha Round is achieving significant further liberalization of agricultural trade.

New Zealand has three main aims in the Doha Round agriculture negotiations: to secure elimination of all export subsidies as soon as possible; to secure significant increases in market access for its agricultural exports, including substantial lowering of tariffs, increases in quantity and quality of access for products covered by tariff quotas, and removal of unnecessary non-tariff barriers; and to secure progressive reductions in, and eventual elimination of, trade-distorting domestic subsidies.

[37] *A Free-Trade Gamble by the U.S.*, WASHINGTON POST, March 29, 2002, pp. E1 and E2.

[38] *See* www.mfat.govt.nz/foreign/tnd/wtonegotiations/cabinet.html. Material in this section draws heavily from this and related issue papers.

These objectives are pursued through membership of the Cairns Group, a group of seventeen countries which together comprise one-third of the world's agricultural exports and which is dedicated to the pursuit of "fair trade" in agricultural products.[39] The Cairns Group has made proposals in each of these three key areas of the negotiations: market access, export competition and domestic support.[40]

On export competition the Cairns Group has proposed the elimination of all forms of export subsidization.[41] Following a fifty percent downpayment cut in the first year of implementation, elimination would be achieved over three years by developed countries and over six years by developing countries. Enhanced disciplines are also proposed on export credits and non-emergency food aid. In addition the Group has advocated improved disciplines on export restrictions and taxes.

The Cairns Group has also called for substantial improvements in agricultural market access.[42] Proposals include the reduction of all developed country tariffs to a maximum of 25 percent or lower, and expansion of developed country tariff quota access by the equivalent of 20 percent of domestic consumption with improved tariff quota administration. Special and differential treatment would be granted to developing countries through requiring a lower tariff reduction—including a maximum 50 percent reduction for all tariffs less than 250 percent, and a lower tariff quota expansion—equivalent to 14 percent of domestic consumption.

For developed countries these changes would be effected over five years with a fifty percent downpayment in the first year of implementation. Developing countries would have nine years to make the required changes. The current special safeguard mechanism would be eliminated for developed countries with developing countries permitted to employ a new targeted additional duty mechanism to deal with subsidized product from developed countries.

On domestic support the Cairns Group has advocated major reductions leading to elimination of all forms of trade a production distorting support, including AMS and "blue box" measures.[43] Specifically the proposals call for the reduction, on a product-specific basis, of bound AMS levels to zero over five years for developed countries and nine years for developing countries, with a fifty percent downpayment by developed countries in the first year of implementation. In addition the "blue box" exemption would be eliminated as would the *de-minimus* provision for developed countries. Developing countries would retain existing de-minimus provisions and least developed countries would be exempt from all reduction commitments. In respect of the "green box" the Cairns Group has proposed a tightening of criteria to ensure that covered measures have no, or at least minimal, trade distorting effects. An overall cap on "green box" expenditure is proposed with enhanced capability for developing countries to maintain measures for food security, rural development and poverty alleviation.

In addition to the proposals advanced by the Cairns Group, New Zealand for its part would have no difficulty signing up to the "triple zero" future for agriculture envisaged by

[39] The Cairns Group comprises Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand and Uruguay.
[40] Full details of all proposals can be found at www.cairnsgroup.org.
[41] *See* G/AG/NG/W/11 of June 16, 2000 and additional input of November 20, 2002. G/AG/NG/W/54 of December 21, 2000 deals with export restrictions and taxes.
[42] *See* G/AG/NG/W/54 of November 10, 2000, Job(02)112 of September 12, 2002, and additional input of November 20, 2002.
[43] *See* G/AG/NG/W/35 of 22 September 2000 and document 7623 of September 27, 2002. In Job(02)209 of December 11, 2002 New Zealand provided further technical elaboration on disaggregation and base periods.

the United States:[44] zero export subsidies; zero tariffs; and zero trade-distorting domestic support.

Outside these three core areas of the negotiation, some countries are seeking to advance a variety of "non-trade concerns" including food security, food safety, animal welfare, regional development, environmental aspects of agriculture, and food geographical indications. Ministers at Doha confirmed that non-trade concerns would be "taken into account" in the negotiations as provided for in the Agreement on Agriculture.[45] New Zealand acknowledges the significance of such "non-trade concerns" but in turn is concerned to ensure they are not used as a means of disguised protectionism. It is clear that many of the concerns advanced can be addressed in ways that do not distort trade.

B. Non-agricultural Products

New Zealand is also concerned to secure the maximum possible improvement in market access and trading conditions for all non-agricultural products.

From the exporting perspective, tariffs on New Zealand non-agricultural exports amount NZ$185m annually. Exporters also frequently face significant tariff escalation, particularly in the fish and forestry industries.

On the importing side, New Zealand is again somewhat atypical of OECD countries. Applied rates are generally low with an average of less than four percent and over ninety percent of imports entering duty free. Tariff peaks in textiles, clothing and footwear range up to nineteen percent ad-valorem (with some alternative specific duties that translate to a higher ad-valorem equivalent on low-value articles), but at an average of seven percent bound tariffs on agriculture are lower than the average bound rate on industrial products of thirteen percent. Since 2001 New Zealand has provided complete duty-free access for all products from the 48 least developed countries, the first country to do so.

Key issues for New Zealand in the negotiation include comprehensiveness—ensuring that all products are included in the negotiation; achieving greater security of access through securing bindings on all tariff lines and which better reflect applied rates—currently only 72 percent of tariffs in developing countries are bound with many bindings at "ceiling" rates; and addressing tariff peaks (very high tariffs), tariff escalation (where tariffs rise as value-added increases) and nuisance tariffs—low tariffs that serve no protective purpose but give rise to unnecessary "red-tape" costs for exporters.

In pursuit of these objectives New Zealand in November 2002 called for the elimination of all non-agricultural tariffs by all WTO members other than the least developed countries.[46] A detailed proposal has yet to be submitted but it is envisaged that all WTO members, other than least developed members, would be required to bind all non-agricultural tariffs at zero by an agreed date. Extended timeframes could be provided for sensitive products and for less developed members. Least developed members could participate on a voluntary basis.

[44] The text of the July 2002 United States proposal on agriculture can be found at www.fas.usda.gov/itp/wto.actual.htm. An overview of the proposal together with related commentary can be found at www.fas.usda.gov/itp/wto.proposal.htm. Phase 2 of the proposal spells out the "triple zero" future for agricultural trade.

[45] *See* paragraph 13 of the Doha Development Agenda, reproduced in The Appendix to this book.

[46] Statement by New Zealand at the meeting of the Negotiating Group on Non-agricultural Market Access, November 3–4, 2002.

C. Services

As noted in Part I, services play an important role in the New Zealand economy comprising more that seventy percent of GDP and almost one-quarter of total exports. Following extensive deregulation and reform throughout the 1980s and 1990s, as with the goods economy, very little residual protectionism remains.

New Zealand is therefore interested in promoting further services liberalization both through deepening of Members' existing commitments and expansion of the scope of commitments by other Members to match the extent of commitments made by New Zealand in the Uruguay Round. These and other objectives for the services negotiations, including the agreeing of enhanced disciplines on domestic regulation under GATS Article VI targeted specifically at potential barriers to trade in services, were outlined in a communication tabled by New Zealand in July 2001.[47]

In addition to making bilateral requests of certain WTO members, New Zealand has also submitted specific negotiating proposals in the areas of education services, air transport services, construction and related engineering services, consulting services, postal and courier services, and sporting services.[48]

New Zealand was also one of those WTO members to submit, in accordance with the established March 31 deadline, an initial offer of further liberalization commitments it is conditionally prepared to make.[49] The offer includes improved commitments in existing sectors included in New Zealand's GATS schedule such as air transport, computer services, construction, engineering, financial services, maritime transport services, and telecommunications. Commitments are also offered in a range of additional sectors including credit reporting and collection agency services, environmental consulting services, integrated engineering, management consulting and postal and courier services. New Zealand has also offered to enhance its horizontal commitments on "Mode 4" movement of persons and to remove two of its five MFN exemptions.[50]

Reflecting the liberalization that has occurred in the New Zealand postal sector, the offer in that sector provides for open access to supply the full range of postal services in New Zealand. This is conditional on others responding to reciprocal New Zealand requests in the sector and caveated by the right to take action against foreign monopoly providers.

As with a number of other countries, a range of services in New Zealand such as health, education, social welfare and water distribution are either wholly or in substantial part funded and supplied publicly. New Zealand has therefore made it clear that in submitting its initial offer it was not limiting the government's right to provide, fund or regulate such services.

D. Rules

In addition to seeking improved market access for exported goods and services, New Zealand is also interested to pursue improvements to WTO trade rules to ensure, through

[47] *See* S/CSS/W/90, *Objectives for Renewed Services Negotiations*, Communication by New Zealand, July 26, 2001.

[48] *See* respectively S/CSS/W/93, S/CSS/W/92, S/CSS/W/91, S/CSS/W/116, S/CSS/W115 and S/CSS/W94. These and other sectoral proposals made in the services negotiations can be found on the WTO website at www.wto.org/english/tratop_ e/serv_ e/s_ propnewnegs_ e.htm.

[49] New Zealand's initial offer (S/CSS/W/NZL) can be found on the Ministry of Foreign Affairs and Trade website at www.mfat.govt.nz/foreign/tnd/wtonegotiations/stagetwoservices/GATS initial conditional offer2.pdf.

[50] New Zealand's existing schedule of specific commitments on services is contained in GATS/SC/62 plus Supp.1 and Supp.2. Current MFN exemptions are listed in GATS/EL/62.

agreed disciplines on anti-competitive and trade protectionist behavior, that commitments made provide for effective market access.

In the area of anti-dumping New Zealand both applies anti-dumping remedies and is subject to anti-dumping orders imposed on exporters in overseas markets. New Zealand is careful to ensure that any anti-dumping actions it takes address real instances of injury caused by dumping. While wishing to retain the ability to take such action, it is therefore also concerned to see that the Anti-Dumping Agreement provides sufficient discipline to guard against New Zealand exporters being faced with measures imposed for other than that reason.

On subsidies New Zealand recognizes that in controlled circumstances subsidies may assist economic development. At the same time there is concern to constrain subsidies granted by other Members that undermine the competitiveness of New Zealand exports.

New Zealand is therefore interested to maintain the "traffic-light" structure of the Agreement on Subsidies and Countervailing Measures—red (prohibited); orange (actionable); and green (non-actionable). Following the lapsing in 1999 of the parts of the agreement that had been applied provisionally,[51] negotiations could usefully reintroduce some "teeth" into the serious prejudice provisions of Article 6 and reinstate some forms of non-actionable subsidies under Article 8.

New Zealand is also a member of the "Friends of Fish" group[52] seeking enhanced disciplines on subsidies in the fisheries sector. Fisheries subsidies are estimated at between US$14bn and US$20bn or some 20–25 percent of global production value, and twice that as a proportion of the value of fish traded internationally. It is estimated that the catch capacity of the global fishing industry is around thirty percent greater than required for sustainable catch levels. Subsidies have been implicated in stimulating this over-fishing.

Communications by members of the Friends of Fish group and separately by New Zealand have sought to identify some of the limitations of current subsidies disciplines in dealing with the particular characteristics of the fisheries sector.[53] With the major subsidizers also being major consumers and thus not significant exporters, the countervailing duty mechanism can exert little discipline on subsidizing behavior. That points in the direction of "serious prejudice" as the main potential constraint, but the heterogeneous nature of fisheries products—whereby products from distinct species can be in direct competition in a market while superficially similar fish from the same family can command distinct prices—means that unsubsidized reference prices are not generally available.

The objective of improved disciplines would be to significantly reduce pressure on world fish stocks and enhance the sustainable economic value of fisheries resources. This would be a clear example of a "win-win" outcome for both the trading system and the environment in pursuit of sustainable development.

Among other rules issues are the so-called "Singapore issues": the relationship between trade and investment; the interaction between trade and competition policy; transparency in government procurement; and trade facilitation. New Zealand is not a demandeur on any of these issues.

[51] *See* Article 31, of the Agreement on Subsidies and Countervailing Measures.

[52] Australia, Chile, Ecuador, Iceland, New Zealand, Norway, Peru, Philippines and the United States.

[53] *See* TN/RL/W/3, *The Doha Mandate to Address Fisheries Subsidies: Issues*, Communication by Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines, and the United States; April 24, 2002; and *Fisheries Subsidies: Limitations of Existing Subsidy Disciplines*, Submission by New Zealand, July 4, 2002.

On investment and competition New Zealand has a more liberal and robust regime than most WTO members. The nature of discussion to date on both issues suggests that New Zealand could easily live with the likely consensus outcome to any negotiations undertaken pursuant to the modality decisions to be taken at the Cancun Ministerial.

On government procurement New Zealand has a fully transparent non-discriminatory regime based on a value-for-money criterion. Greater transparency in the practices of others would be useful for potential New Zealand suppliers, but New Zealand has stood aside from the current plurilateral WTO Agreement on Government Procurement because the highly prescriptive nature of its provisions would introduce costly bureaucratic inefficiencies to the New Zealand procurement environment.

On trade facilitation New Zealand favors the greatest simplification possible in bureaucracy associated with international trade. Costly and inefficient bureaucratic procedures, and the existence of corrupt officials, can be equally chilling of trade as the more visible forms of trade barriers. The WTO already contains a considerable range of provisions relevant to trade facilitation. In any further negotiations, New Zealand is looking for an approach that is enabling rather than prescriptive to allow for innovation rather than reinforcing institutional rigidities.

E. Sustainable Development

New Zealand is also interested to ensure that Doha Round outcomes reflect a sustainable development perspective and that legitimate interests of developing countries are taken into account.

A significant part of this would be achieved through the increased efficiency in resource allocation and utilisation and increased global prosperity resulting from enhanced disciplines on or elimination of current distortions in the international trading system. Beyond that contribution from the WTO's core agenda, New Zealand is also concerned to see greater integration between the trading system and enhancement of environmental and labor objectives.[54] This calls for complementarity in policy design and implementation.

In the area of the environment New Zealand is participating actively in the negotiations on the relationship between WTO rules and specific obligations in multilateral environmental agreements ("MEAs") to ensure the WTO continues to show proper respect for internationally agreed rules for the protection of the environment. New Zealand is also interested to promote greater coherence between MEAs and trade agreements, and greater cooperation between respective institutions.

At the same time, however, it is important to ensure that environmental standards and measures are not used for protectionist purposes. That implies, for instance, that governments should have the right to determine their own domestic environmental regulations where those measures concern only the environment in their own jurisdictions and do not breach internationally agreed rules on environment and trade; that environmental standards should focus on the objective being promoted rather than unnecessarily prescribe the method by which that objective is to be achieved; and that measures which discriminate between products and services on the basis of their national origin are not imposed.

In the area of labor New Zealand is interested to see labor standards better integrated with trade agreements in order to promote decent work and improve living standards

[54] *See Framework for Integrating Environmental Standards and Trade Agreements*; and *Framework for Integrating Labor Standards and Trade Agreements*, www.mfat.govt.nz/foreign/tnd/wtonegotiations/labourframework.html.

in member countries. The aim is to create opportunities for work in which minimum standards are protected and adequate income is generated within a framework which promotes social protection. At the same time developing countries should not be denied the legitimate competitive advantage of lower labor standards provided such advantage is not secured by deliberately neglecting fundamental labor principals.

In pursuing this approach, New Zealand seeks to avoid undermining the status of the International Labor organization ("ILO"). New Zealand therefore looks to the ILO's Fundamental Principles and Rights of Work as an appropriate basis for discussion of labor standards within the context of trade agreements, core principals of which are: freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of forced of compulsory labor; effective abolition of child labor: and elimination of discrimination in respect of employment and occupation. Member countries should be free to implement these principals according to their own laws and practices with dialogue and consensus preferred to penalties or sanctions to progress any issues that may emerge in implementation.

For developing countries liberalizing trade in areas of their comparative advantage, including agriculture and textiles, will create opportunities for sustainable development. In addition New Zealand supports consideration of "special and differential treatment" for less and least developed countries, for instance through longer timeframes in implementing liberalization commitments. A so-called "two-speed" WTO with differing norms and obligations, however, is unlikely to be to the benefit of developing countries. Given the degree and potential for economic linkages between developing countries, and their relative paucity of domestic resources, developing countries need to avoid the waste that results from the protectionist policy choices in which the larger industrialized countries have indulged. Rather it is important to ensure developing countries are provided with capacity-building assistance to allow them to take advantage of the growth and development opportunities that a successful Doha Round outcome should create.

CHAPTER 77

RUSSIA

Julia Selivanova*

TABLE OF CONTENTS

I. The History of Russia's GATT/WTO Accession Negotiations 289
II. Current State of Play and Key Issues 291
A. Current Situation in Negotiations Between Russia and WTO Members . 291
B. Trade in Goods 292
1. State of Play in the Negotiations on Industrial Goods 292
2. Important Issues in the Industrial Goods Negotiations 294
Apparel and Footwear: 294
Information Technology ("IT") Products: 294
Civil Aircraft (Plurilateral Agreement): 294
C. Agriculture 295
1. Level of Domestic Support 295
2. Important Issues in the Agricultural Tariff Negotiations
Beef, pork, poultry and sugar: 297
Butter: 297
Wine, spirits, cigars and cigarettes: 297
D. Trade in Services 298
1. Banking 299
2. Insurance 299
3. Telecommunications 300
4. Transport 301
E. Domestic Price Control Over Energy and Gas 301
F. Other Important Issues and Legislative Developments 304
1. Work on Bringing Russia's Laws into Conformity with WTO Rules . 304
2. Other Important Issues in Russia's Accession Negotiations 305
(a) Customs 305
(b) Quotas and Restrictive Licensing 305
(c) Technical Barriers to Trade ("TBT") and Sanitary and
Phytosanitary Measures ("SPS") 306
(d) Protection of Intellectual Property Rights 307
G. Government Involvement in Trade 308

* Julia Selivanova is an associate working in the WTO Practice Group of Baker & McKenzie. She is based in Geneva. The views expressed in this paper are personal. She wishes to thank Arthur E. Appleton, Raul Torres, Elizabeth Upton, Elena Buranova and Guy Evans for their assistance with this chapter. Any errors that remain are her own. This chapter covers the Russian accession negotiations through September 2003. For an update on Part E see Julia Selivanova, *WTO Rules and Energy Pricing: Russia's Case* 34(4) JOURNAL OF WORLD TRADE 559 (2004), and Melena Sell and Julia Selivanova, *WTO Accession: Russia Secures Deal with the EU*, 8(6) BRIDGES 9 (June 2004).

H. Recognition of Russia as a Market Economy 309
I. Regional Trade Agreements with CIS Countries 313
III. Political Debate 313
A. Advantages and Disadvantages of Russia's WTO Accession 313
1. Advantages 314
2. Disadvantages 317
B. Perception of WTO Accession by the Russian Business Community 318
IV. Expected Impact of WTO Accession on Specific Sectors of the Economy .. 321
A. Agriculture 322
B. Industry 323
C. Services Sector 325
1. Telecommunications 326
2. Financial services 327
(a) Banking 327
(b) Insurance 328
3. Transport Services 328
4. Other Service Areas 329
D. Labor Market 330
V. The Impact of Russia's Membership in the WTO on the Multilateral Trading System 331
VI. Conclusion 332

I. The History of Russia's GATT/WTO Accession Negotiations

The negotiations aimed at the creation of the International Trade Organization ("ITO") coincided with the growing political tension between the Soviet Union and the West which eventually led to the Cold War. The Soviet Union did not respond to the initial proposal to participate in the creation of the ITO due to the prevailing political situation,[1] despite the fact that the parties to the ITO negotiations, notably the United States, attempted to involve the Soviet Union in the negotiations. The attempt to include the Soviet Union in the market-oriented trading system was reflected in the draft ITO Charter prepared by the United States.[2] Due to the failure of the Soviet Union to respond, the merits of the Soviet participation were not formally discussed by the parties to the ITO negotiations.

The ITO never came into existence. The General Agreement on Tariffs and Trade ("GATT"), an interim trade agreement, established the rules that governed the multilateral trading system from 1947, until its successor, the WTO, came into being in 1995. The Soviet Union viewed the GATT with criticism during the GATT's first fifteen years of existence.[3] This unsympathetic stance coincided roughly with the Soviet Union's 1949 launch of the Council for Mutual Economic Assistance ("CMEA"), a socialist alternative to the GATT. The Soviet Union's "strongly critical" approach towards the GATT was gradually relaxed in the 1960s when some CMEA countries joined the GATT.[4] From an economic perspective, the Soviet Union had less need than other socialist countries to join the multilateral trading system as its main exports, energy and minerals, faced few international barriers. This influenced the Soviet Union's decision "not to accept the invitation to participate in the Tokyo Round of trade negotiations".[5]

After decades of isolation from the West, by the 1980s the centrally planned Soviet economy faced severe problems, including a massive misallocation of resources, and a number of large and inefficient industries wielding monopolistic power.[6] Administrative orders rather than commercial considerations dictated what enterprises were to produce. The agricultural sector, which was severely crippled in the course of collectivization in 1930s, never recovered. Exports of mineral resources, such as oil and gas, constituted eighty percent of the Soviet Union's exports.[7] Its deteriorating economic situation caused the Soviet Union to consider establishing a closer relationship with the multilateral trading system. From 1983, the Soviet Union made informal approaches to different GATT contracting parties seeking the possibility to join as an observer.[8] The reaction of the major industrial powers was largely negative. These informal approaches were followed in 1986 by the Soviet Union's official request for GATT observer status, with

[1] The Soviet Union voted initially in ECOSOS in favor of the creation of the ITO.

[2] This proposed U.S. draft of the ITO Charter contained the following provision: "Any Member establishing or maintaining a complete or substantially complete monopoly of its import trade shall promote the expansion of its foreign trade with the other Members in consonance with the purposes of the Charter." Suggested Charter for an International Trade Organization of the United Nations, U.S. Department of State, Pub. No. 2598, Com. Policy Ser. No. 93 (1946).

[3] Peter Naray, Russia and the World Trade Organization 16 (2000).

[4] *Id.* at 2, 16. Yugoslavia joined GATT in 1966, Poland in 1967, Romania in 1971, Hungary in 1973.

[5] *Id.* at 17.

[6] *Id.* at 25.

[7] *Id.* at 25.

[8] South-North Development Monitor, *Soviets Interested in Joining New Trade Round in GATT* (March 25, 1986).

its goal being accession to the GATT as a contracting party and eventual participation in the Uruguay Round launched in September 1986.[9]

The United States was openly opposed to the Soviet Union's participation in the new round of trade talks while the European Communities had publicly taken a somewhat more neutral stance.[10] Even though the rejection of the Soviet application could be explained from a systemic point of view—the Soviet trade regime was incompatible with the GATT[11]—the reasons for this rejection were largely political. As Naray notes, the West did not see at that time that Soviet membership in the GATT would contribute to the liberalization of the Soviet system or provide decisive support to reform-minded forces.[12] As soon as the end of the Cold War was visible, the West's philosophy changed.[13] In December 1989 the United States proposed granting GATT observer status to the Soviet Union. The EU supported this proposal and after the remaining opposition was lifted, the GATT Council approved the Soviet request[14] in May 1990.

The Soviet Union disbanded in December 1991. In June 1993 Russia, as the Soviet Union's successor,[15] filed an application to join the GATT.[16] On July 8, 1993, a GATT Working Party on Russia's Accession ("WP") was established to examine Russia's application.[17] In March 1994 Russia submitted its Memorandum on the Foreign Trade Regime to the GATT contracting parties.[18]

Upon the creation of the WTO in January 1995, the GATT WP was transformed into a WTO WP to consider Russia's WTO accession as a developed country.[19] The WP first considered Russia's Memorandum on the Foreign Trade Regime, and more generally issues related to its trade in goods, economic policies, and the consistency of its foreign trade regime with WTO rules. The negotiations in the 1990s were characterized by their slow speed and lack of substantial progress. In 1998, Russia presented its first tariff proposal and its initial agricultural offer on domestic support. This was followed in 1999 by initial proposals on regional industrial subsidies, services commitments, and a list of exemptions from Most-Favored-Nation ("MFN") treatment. Following the submission of these offers, Russia began a series of bilateral negotiations with members of the Working Party. These discussions showed that opportunities for negotiations on the basis of Russia's initial offers had been exhausted and that new offers had to be made on goods and services. Moreover, Russia had to change its approach on agricultural support.

With the election of Vladimir Putin as Russia's President in 2000, reforms were adopted and WTO Membership began to be viewed as a primary step towards Russia's full integration into the international economy. The government perceived that by remaining outside the WTO the country would lose economic opportunities and not take full advantage of

[9] South-North Development Monitor, *Soviet Application to GATT Aimed at Eventual Accession* (September 11, 1986).
[10] *Id.*
[11] NARAY, *supra* note 3, at 19.
[12] *Id.*
[13] *Id.*
[14] GATT, Union of Soviet Socialist Republic, *Request for Observer Status,* L/6654 (March 12, 1990).
[15] *See* GATT, *Communication from the Russian Federation,* L/6978 (January 28, 1992).
[16] GATT, Accession of the Russian Federation, L/7240 (June 4, 1993).
[17] WTO, *Working Party on Accession of the Russian Federation,* WT/ACC/RUS/1 (May 18, 1995).
[18] GATT, *Accession of the Russian Federation—Memorandum on the Foreign Trade Régime*, L/7410 (March 1, 1994).
[19] WTO, *Accession of the Russian Federation—Additional Questions and Replies*, WT/ACC/RUS/9 (April 23, 1996), at 24; Accession of the Russian Federation—Questions and Replies to the Memorandum on the Foreign Trade Régime, WT/ACC/RUS/2 (June 2, 1995).

its ongoing market reforms.[20] Russia's increased participation in the international trade system and an improvement in its ability to attract foreign investment would enhance its economic growth. As part of Russia's new investment policy numerous changes in Russia's legislation and in its regulatory practices needed to be introduced. These important changes were designed to increase the transparency of administrative procedures and to improve the efficiency of Russia's judicial system. Ambitious domestic reforms were launched in many sectors of the economy. Import duties for some 3,500 items were reduced and a new Customs Code was adopted.[21] Russia's WTO accession negotiations thus serve as an external means to advance reform in sectors of Russia's economy that are reluctant to liberalize. Once Russia accedes to the WTO, it will be more difficult to impose radical domestic reforms.

Although Russia's accession negotiations did not advance rapidly in the 1990s, in 2000 it became clear that Russia had overcome its previous sluggishness and had begun to participate in the negotiations with renewed vigor. Russia's approach to the accession negotiations grew increasingly realistic and honest: acknowledgement, rather than denial of problems in the country and discrepancies in its legislation characterized this new attitude.

Intensified negotiations in 2000–2002 led to an assessment by the WP of the results of the bilateral negotiations as well as Russia's effort to bring its legislation into conformity with WTO norms. In January 2002 the WP decided to prepare its report,[22] and on April 24–25, 2002, in the course of the 14th session of the WP, the first chapter-by-chapter reading of the WP's draft Report took place. The Report summarizes the results of the negotiations and lists the commitments Russia must accept upon completion of the negotiations.[23]

II. Current State of Play and Key Issues

A. Current Situation in Negotiations Between Russia and WTO Members

Russia's accession negotiations are being held in four main areas: access to the goods market, agricultural issues, services market access and systemic issues. There are approximately seventy countries that are Members of the Working Party on Russia's accession, of which more than fifty are participating in the negotiations on market access for goods, and more than thirty in the negotiations for market access for services.[24]

Russia seeks to negotiate transition periods before it must apply the full range of negotiated concessions. However, most WTO Members insist that special transition provisions that were valid for original WTO Members not be applied for newly acceding countries.[25]

[20] Julia Selivanova, *Russia's Accession to the WTO: Multilateral and Domestic Policy Considerations*, 7(2) BRIDGES (March 2003).

[21] Keith Bush, *Russian Economic Survey,* U.S.-RUSSIA BUSINESS COUNCIL (2002), at 22.

[22] Information Office on Accession of Russia to WTO, *Main Stages of Russia's WTO Accession Negotiations*, at http://www.wto.ru/russia.asp?f=etaps&t=10 (visited November 14, 2003).

[23] Currently the WP discusses the third version of the draft Report. *See* Press Release of the Information Office on Accession of Russia to WTO (July 11, 2003), at http://www.wto.ru/ru/news.asp?msg_id=5453 (visited November 14, 2003).

[24] List of Members that participate in the WP is available in English at http://www.wto.ru/russia.asp?f=wrkgrp&t=11 (visited November 14, 2003) in Russian at http://www.wto.ru/russia.asp?f=wrkgrp&t=11 (visited November 14, 2003).

[25] Transition periods have been often the subject of discussions in accession Working Parties of acceding countries. The transition periods granted to original WTO Members have not been automatically granted to governments acceding under Article XII, regardless of their level of development. A few transition

Countries seeking to accede to the WTO now must use the negotiation period to ensure the consistency of their legislation with the provisions of the WTO Agreements.[26] Moreover, it is expected that newly acceding countries will undertake obligations that go beyond the existing WTO provisions (so-called "WTO plus" requirements).[27] Countries with transitional economies are requested to join plurilateral agreements, such as the Agreement on Government Procurement, as well as to undertake obligations that go beyond WTO norms, e.g., in respect of privatization and state trading.[28]

Russia's position is that the terms and conditions of Russia's accession must be based on standard WTO requirements,[29] i.e., the rules and provisions set forth in the Uruguay Round Agreements.

B. Trade in Goods

1. State of Play in the Negotiations on Industrial Goods

The main subject of discussion in the negotiations on goods between WTO Members and Russia is the maximum level of import tariffs that Russia will have the right to apply after accession (the "bound rate"). The primary stumbling block for Russia is the Members' insistence that one hundred percent of tariffs be bound. Moreover, Russia would have to eliminate and bind at "zero", all charges on imports other than tariffs, domestic taxes, and fees applied for services rendered.

Russia initially proposed tariff bindings close to the applied rate for fifty percent of tariff lines. The gap was larger for such products as textiles. Too large a gap between bound and applied tariff rates opens the door for the government's use of protectionist measures under pressure from domestic industry. Too small a gap may be dangerous since the government is left with little maneuvering room to make tariff adjustments in a period of economic restructuring—the result of this could be irreparable economic damage in crucial sectors.[30] Russia's initial proposal foresaw an average level of bound tariffs of 24 percent after accession, which would subsequently be reduced to eighteen percent after a transition period.[31] Members expressed dissatisfaction with this offer[32] and Russia has since revised it three times. Now the average level of bound tariffs in the Russian offer is eleven percent.[33] Current progress in the negotiations on industrial goods

periods have been granted in limited areas and for short periods of time. In general, Members pointed out that there was no provision for the automatic granting of transition periods to acceding governments. The transition periods contained in the WTO Agreements were accorded to original Members to help them become accustomed to their new obligations. Acceding governments were in a different position, as they had known the requirements of the WTO Agreement since the date of its entry into force. Nevertheless, some Members said that they were not, *a priori*, opposed to transition periods, provided that there was a clear justification for them (*Technical Note on Accession Process*, WT/ACC/7 (March 10, 1999), at 3, 6 and 7).

[26] Murray Smith, *Russia and the General Agreement on Trade in Services*, in RUSSIAN TRADE POLICY: REFORM FOR WTO ACCESSION 31, 37 (Harry Broadman, ed. 1999).

[27] *Id.*

[28] *Id.* at 38.

[29] Andrew Gowers, Robert Cottrell and Andrew Jack, Interview with Vladimir Putin, FINANCIAL TIMES, (December 16, 2001). *See also* РИА-Новости, *М. Касьянов: Россия готова принять членство в ВТО лишь на стандартных, общих для всех стран условиях* (24 апреля 2002).

[30] NARAY, *supra* note 3, at 106.

[31] For agricultural goods the rate was 36 and 26 percent respectively. For industrial goods the rate was 20 and 15 percent. *See* NARAY, *supra* note 3, at 105.

[32] *Id.*

[33] Personal interview with a WTO negotiator.

has been substantial[34]—Russia has come to an agreement with Members on most of its tariff positions[35]—whereas in the area of agricultural products the situation remains more complex.[36]

While it is difficult to predict Russia's level of bound tariffs after accession, the bound rates of other acceding countries may offer an indication. In agriculture tariff bindings range from 11.7 to 34.9 percent; for non-agricultural products tariff bindings range from 6.7 to 20.1 percent.[37] The tariff commitments undertaken by new members are rather liberal compared to the ones negotiated by members during the Uruguay Round. Consequently this could lead to the increased requirements for candidates applying for WTO accession.[38]

Russian officials underline that the accession negotiations hinge on two points.[39] *First*, in the period immediately following its accession, Russia wants a transition period, and in the initial stage of this transition period it does not want to reduce existing tariffs on any items.[40] When the transition period expires, applied rates would be slightly lower than the existing tariff levels. Lower rates would primarily be applicable to sectors where the reduction of tariffs is immaterial to Russian manufacturers (e.g., certain types of farm products and industrial raw materials, or semi-finished goods that are unavailable or are in short supply in Russia), or where Russia is interested in importing foreign goods (e.g., advanced process equipment, computers and medical research equipment). *Second*, Russia's acceptance of any non-binding sectoral agreements or initiative cannot serve as a precondition to Russia's accession to the WTO.

Russia conducted trade remedies investigations for several products such as poultry, ball bearings and wallpaper. The Russian government decided to maintain its quota for sugar imports for 2004.[41] The tariff rate on imports of more expensive types of furniture was increased to twenty percent in order to protect domestic producers.[42] In 2003 Russia imposed quotas on poultry,[43] and tariff rate quotas on pork,[44] and beef [45] imports.[46] Arguably, these defensive measures, enacted parallel to the accession negotiations, might add to Russia's bargaining power in other areas since it could use the removal of these measures as a trade-off in the forthcoming negotiations. As one would however expect, the

[34] *See* Frances Williams, *Russia in Push Over WTO Membership*, Financial Times (July 11, 2003).

[35] Константин Смирнов, *Россию в ВТО не ждут. С нынешними ценами на газ*, Коммерсант, 26 марта 2003.

[36] Personal interview with a Russian negotiator. On agriculture, *see infra* Part II(C).

[37] WT/ACC/7, *supra* note 25, at 3.

[38] NARAY, *supra* note 3, at 103.

[39] A.K. Kushnirenko, *Tariff Negotiations of Russia with WTO*, Information Bulletin Russia on the Way to WTO, No. 3 (January–February 2002). *See also* Information Office on Accession of Russia to WTO, Moscow, *On the Current State of Russia's WTO Accession Negotiations, Strategy of Shaping up Tariff Proposals on Market Access for Goods Within the Framework of Russia's Accession to WTO*.

[40] *Id.*

[41] Importers circumvented the quota on sugar by mixing raw sugar with water and importing it as syrop. Recently Russian government started an investigation on imports of sugar syrop. *See* Ринат Сагдиев, Анастасия Онегина, *Бизнес недоволен защитой,* Business News Media-Ведомости (16 июля 2003).

[42] *Id.*

[43] *Resolution of the Russian Government No. 48* (January 23, 2003).

[44] *Resolution of the Russian Government No. 50* (January 23, 2003).

[45] *Resolution of the Russian Government No. 49* (January 23, 2003).

[46] Information on the distribution of quotas can be found on the website of the Russian Ministry of Economic Development and Trade at http://www.economy.gov.ru/merit/preliz_270303.html (visited November 14, 2003).

response among Members to these measures was very negative: Members expressed their disappointment indicating that this was a major step backward from trade liberalization.[47]

2. Important Issues in the Industrial Goods Negotiations[48]

In the area of industrial goods, the most problematic issues relate to Russia's tariffs on cars, furniture, textiles, machinery and civil aviation (which falls under a plurilateral agreement). In 1995 Russia "rationalized" tariffs between 5 and 30 percent on most items.[49] This was done through a simultaneous decrease of tariff peaks and an increase in minimum rates, which before this move were sometimes set at zero.[50] Although in 2001 Russia further reduced maximum tariff rates from 30 to 20 percent for most products that historically faced high protection, the tariff for automobiles was not reduced. Initially Russia sought to negotiate a 25 percent tariff for automobiles, however, the government subsequently made the decision to increase the proposed level of tariff protection to 35 percent.[51] One effect of such a high tariff might be to motivate investors to establish automobile production facilities in Russia. Pursuant to Russia's proposal, further tariff on automobiles would follow a "6+1" formula,[52] in which duties are not reduced gradually, i.e., each year, but abruptly, upon expiry of the final year of the seven year transition period.

Apparel and Footwear: The goal of negotiations in apparel and footwear was to maintain the level of existing rates. However, this goal turned out to be problematic for many Members, therefore, Russia will have to increase concessions and reduce the binding level. Certain modifications in the rates of duties on raw materials and semi-finished items for textile articles are extremely likely.[53]

Information Technology ("IT") Products: Russia made an offer to reduce, after accession, tariffs on IT products gradually over three or four years.[54] This appeared to be insufficient as many Members insisted on Russia's acceptance of the Information Technology Agreement ("ITA") and that all tariffs in this sector be bound at zero. While refusing to sign the ITA,[55] Russia is considering whether to accept zero tariffs on some IT products.[56]

Civil Aircraft (Plurilateral Agreement): Another disputed issue is Russia's participation in the plurilateral Agreement on Trade in Civil Aircraft. This Agreement requires the elimination of tariffs and value added taxes ("VAT") on imported aircraft, with the exception of military aircraft, and products used for the manufacture, repair, maintenance,

[47] Personal interviews with WTO negotiators. *See also supra* note 35.

[48] The information in this part is based on personal interviews with WTO negotiators and materials of the Information Office on Accession of Russia to WTO in Moscow, available at http://www.wto.ru (visited November 14, 2003).

[49] NARAY, *supra* note 3, at 103.

[50] *Id.*

[51] Members requests in this sectors vary from zero to 7–8 percent tariff (Андрей Цыбульский, *Усиливая тарифную защиту отечественных автопроизводителей, правительство не уверено, что те сумеют ей воспользоваться,* Автомобильные Известия (19 октября 2002). *See also* Политком.ру, *Россия—ВТО: отложенный финал* (11 марта 2002).

[52] Information Office on Accession of Russia to WTO, *supra* note 39, at 4.

[53] *Id.*

[54] *Id.*

[55] *See* Inside U.S. Trade, *U.S., Russia Blame Each Other for WTO Accession Delay* (October 11, 2002).

[56] Personal interview with a WTO negotiator.

rebuilding, and modification or conversion of civil aircraft. Article XII of the Agreement Establishing the WTO provides that the procedures for accession to plurilateral agreements are different from accession to the WTO itself.[57] Nevertheless, Russia has experienced significant pressure from the United States[58] and the EU to accept this Agreement.[59] Being a plurilateral agreement, this Agreement was not part of the "single undertaking" of the Uruguay Round and, in line with its strategy of not accepting commitments that go beyond the standard requirements of the single undertaking, Russia refuses to accept it.[60] If Russia joins this Agreement, this would limit Russia's ability to provide government support to its aviation sector.

Russia seeks to maintain a certain level of protection for its aviation industry, a priority sector for development.[61] Russia may eventually agree to lower protection for regional aircraft, aviation industry products not produced in Russia, and/or aviation industry products not used by Russian producers as inputs.[62] If Russian manufacturers can buy imported inputs used in aircraft production at lower prices, particularly when inputs are not produced in Russia, the domestic industry would benefit.[63]

C. Agriculture

1. Level of Domestic Support

The agricultural negotiations are both essential and problematic for Russia. In addition to tariffs, the negotiations include Russia's policy on domestic subsidies, and export subsidies for agriculture products. Russia seeks to develop its agricultural sector to a level that would provide for its food security. Russia is thus trying to negotiate terms of accession that would allow it to provide subsidies and tariff protection comparable to that which the original WTO Members are permitted to provide. However, the agricultural commitments made by countries recently acceding to the WTO reflect the "more stringent ('WTO plus') approach" advocated by the main agricultural exporters.[64]

[57] Article XII states:

> 1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
>
> . . . .
>
> 2. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

[58] Интерфакс, *Торговая палата США поможет России вступить в ВТО—президент палаты Томас Донохью* (24 апреля 2002).

[59] Иван Сас, *Бескрылая строптивость: в интересах отечественного авиапрома Россия готова отсрочить присоединение к ВТО еще на 15–20 лет,* Независимая газета (28 февраля 2002).

[60] The phrase "single undertaking" refers to the Agreements and obligations that all original WTO Members accepted to become Members. *See* Julia Selivanova: *Will WTO Provide Added Thrust for Russian Aviation?* 10(53) AmCham News (May–June 2003), at 9.

[61] Andrew Hurst and Darya Korsunskaya, *Chances of Quick WTO Entry 'Gloomy'*, Moscow Times (April 7, 2003). *See also* Avery Johnson, *In Need of an Overhaul and Not Just for WTO*, Moscow Times (October 16, 2002).

[62] Information Office on Accession of Russia to WTO, *supra* note 39, at 4.

[63] Selivanova, *supra* note 60, at 9.

[64] Naray, supra note 3, at 131.

Russia's agricultural negotiations began in 1998 after Russia made its initial proposal containing commitments on the bound level of domestic support for agricultural production (aggregated measure of support or "AMS"),[65] and export subsidies for agricultural products. Negotiations on the level of amber box subsidies have made little progress. The parties are unable to agree on the level of domestic agricultural support that Russia may maintain after its accession.[66]

The initial binding level is usually calculated based on an annual average value of actual costs over the three latest representative years ("baseline period"). Meaningful calculation of Russia's agricultural support levels is not easy due to the difficulty of choosing representative years. In the three years prior to its application for accession Russia, like many transitional economies, was in the midst of hyperinflation and exchange rate instability.[67] Russia's initial proposals[68] concerning amber box measures and export subsidies were therefore based on pre-crisis figures using a 1989-1991 base period.[69]

The 1998 offer provided an initial AMS level of US$84 billion, and export subsidies of $1.6 billion. Russia twice revised its proposal on domestic support and export subsidies after receiving criticism from many Members, including the United States and the EU.[70] In 2000, Russia proposed two base period options for AMS calculation purposes: (1) 1989–1995, with a $62.4 billion support level, and (2) 1989–1995, minus the minimal and maximal values in the given period (1992 and 1990), equal to $35 billion. On export subsidies Russia proposed a 1988–1995 base period, with a $0.64 billion binding. Russia's March 2001 proposal used the 1991–1993 base period for domestic support and the 1990–1992 base period for export subsidies. With respect to AMS, the March 2001 proposal foresaw a binding of $16.2 billion, which would be phased down to $12.9 billion over six years. In 2001 Russia also proposed $726 million for bound export subsidies, which would be phased down to $464.7 million within six years.[71] Currently the Russian government proposes another reduction in the agricultural support level to $9 billion.[72]

Russia's proposals were opposed by the Cairns group countries, eighteen leading exporters of agricultural products, including Australia, New Zealand and Canada.[73] The Cairns group has proposed that 1997–1999 be used as the representative period. Moreover, the general approach is that newly acceding Members cannot reserve the use of export subsidies for a later date and that new Members should bind these subsidies at zero.[74]

[65] For a discussion of AMS *see* chapter 6 of this book.

[66] Selivanova, *supra* note 20, at 19. *See* Вера Кузнецова, *Партнеры по переговорам хотят оказывать России услуги*, Время Новостей (23 июля 2003).

[67] *See* Constantine Michalopoulos, *The Integration of Transition Economies into the World Trading System*, The World Bank, Policy Research Working Paper Number 2182 (September 1999), at 30.

[68] Information Office on Accession of Russia to WTO, *Negotiations on Agriculture* (April 2003), at 2.

[69] *Id. See also* WTO, *Accession of the Russian Federation—Additional Questions and Replies*, WT/ACC/RUS/23/Add.1 (December 9, 1997), at 1.

[70] *Id.*

[71] *Id.* at 3.

[72] Елена Короп, *Марафон вокруг Женевского озера,* Финансовые Известия (23 июля 2003). *See also* Robert Cottrel, *Lamy Seeks to Salvage WTO Membership Bid by Russia*, Financial Times (October 19, 2002).

[73] Information Office on Accession of Russia to WTO**,** *supra* note 68, at 3.

[74] Екатерина Шохина, *Торг начался: стартовали переговоры о конкретных условиях вступления России в ВТО,* Эксперт (17 декабря 2001), *see also* Зоя Каика, *Разговор о ВТО становится деловым, хотя до всеобщей гармонии еще далеко,* Ведомости (10 декабря 2001).

Due to Russia's unfavorable climatic conditions, transport problems, and the high levels of agricultural support applied by the EC, a potentially important agricultural export market, Russia seeks to reserve the right to provide a reasonable level of agricultural support. Although in recent years Russia's agricultural support has been insignificant—approximately US$2–3 billion,[75] because of the high level of EU agricultural support, Russia wants to reserve the possibility to use comparable subsidies if need arises and its economic situation permits.

The tension over the base period and scope of amber box funding continues. While bound levels of domestic agriculture support are higher than actual government spending on the development of the agricultural sector in most WTO countries, WTO Members continue to criticize the inconsistency of Russia's position: Russia has proposed binding at levels far higher than its current level of expenditure.

2. Important Issues in the Agricultural Tariff Negotiations Beef, pork, poultry and sugar:

Russia would like to reserve the option of applying tariff quotas to certain agricultural products such as beef, pork, poultry and sugar.[76] In 2003, Russia introduced tariff rate quotas on imports of beef and pork, as well as a quota on poultry.[77] There is also a tariff rate quota on sugar that was renewed for 2004. The introduction of quotas on agricultural products has further complicated the accession negotiations, as many Members view such measures as a step in the wrong direction.[78] The USTR, Robert Zoelick, said that "failure to remove the quota on poultry and the tariff rate quotas on beef and pork would risk Russia's WTO Membership."[79]

Butter: The government seeks to negotiate a bound tariff for butter that would secure the interests of Russian producers. Russia proposed a bound tariff 1.5 to 2 times higher than the current applied rate.[80]

Wine, spirits, cigars and cigarettes: A trade-off may be achieved with respect to the final bound tariffs on beer, wine, spirits, cigars and cigarettes.[81] However, Russia does not want to reduce the existing level of tariff protection immediately after accession.[82] Members have requested that Russia liberalize its regime for production and importation of alcoholic beverages.[83] Currently, foreign companies do not produce alcoholic drinks in

[75] Information Office on Accession of Russia to WTO**,** *supra* note 68, at 2.

[76] Information Office on Accession of Russia to WTO, *supra* note 39, at 1.

[77] *See* Part II(B)(2) and *supra* notes 43, 44 and 45.

[78] The United States, Canada, Argentina, Japan, Australia and New Zealand "criticized the quota on poultry and tariff-rate-quota on beef and pork imports, with Australia and New Zealand calling them backward steps that violated an informal standstill principle, under which most countries in the process of acceding agree not to introduce new trade restrictions. This is endangering their efforts to complete their accession and will delay negotiations."(INSIDE U.S. TRADE, *WTO Members Say Russian Import Barriers Set Back Accession Talks* (March 14, 2003).

[79] INSIDE U.S. TRADE, *Zoelick Says Russian Meat TRQs Bad Sign for Commitment to the WTO* (February 28, 2003). Interestingly, a U.S. Department of Agriculture official noted that imposition by Russia of the restrictions "highlights the need to have Russia in the WTO" because it would permit Russia to be held "accountable to international rules" (*Id*.)

[80] Information Office on Accession of Russia to WTO, *supra* note 39, at 2. *See also* РИА-Новости, *Для защиты российских производителей правительство России ввело специальную пошлину на ввозимое в страну сливочное масло* (22 августа 2002).

[81] *Id.* at 3.

[82] *Id.*

[83] Константин Смирнов, *Как Россия будет вступать в ВТО*, Коммерсант (24 апреля 2002).

Russia apart from beer.[84] Spirit production is a state monopoly and it is almost impossible to obtain a license. Russia's alcohol industry is powerful and it will not relinquish its position easily.[85]

D. Trade in Services

In order to accede to the WTO, Russia must undertake obligations to liberalize its services sector pursuant to the terms of the General Agreement on Trade in Services ("GATS"). Russia must also make commitments in accordance with the List of Specific Commitments in Services, in order to assure a certain level of market access for WTO Members.

Russia submitted its original services proposal in October 1999, but the negotiations made little progress due to a sharp divergence between Russia and the Members on the degree of liberalization that Russia should undertake when it accedes to the WTO. A second proposal was presented to the Members in February 2001 and the third proposal in April 2002.

Bilateral talks were held on trade in services throughout 2002 and 2003. The negotiations identified sectors that require additional effort to determine mutually acceptable conditions for access by foreign service providers to the Russian market. The most problematic areas are financial services (insurance, banking and securities), telecommunications and transport services (especially marine and air transport).[86]

Apart from different opinions as to the level of Russian commitments in the services sector, it is important to the Members that Russia guarantee that its concessions will be implemented. Another problem in the services area is related to the economic cooperation agreements that Russia has concluded with other CIS countries, as these agreements must be brought into conformity with Article V of GATS. Furthermore, it is important that Russia provides transparency of its laws and regulations in the services area, such as those related to qualification and licensing requirements, as well as other authorization procedures. Finally it is indispensable that regulating authorities in the services sector be independent from the service suppliers they regulate.

The basis of Russia's protectionist position is a desire to secure the benefits from liberalization on the domestic market and to avoid foreign companies' gathering the "cream" from wealthy Moscow consumers without investing in the provision of services, particularly telecommunications and banking services, in regions that need such investment.[87] Strong domestic pressure from domestic service providers has helped shape this position.

WTO Members currently request from acceding countries more specific commitments on market access than during the Uruguay Round. For instance, WTO Members expect that new Members will undertake broader obligations in telecommunications and financial services.[88] Although countries that recently acceded to the WTO stipulated the same horizontal limitations as original WTO Members (such as restrictions on the acquisition and ownership of real estate, subsidies and limitations on the presence of natural persons), unlike some original Members, the new Members have undertaken specific

[84] *Id.*

[85] *Id.*

[86] Selivanova, *supra* note 20, at 19. Based on personal interviews with WTO negotiators. *See also* Information Office on Accession of Russia to WTO**,** Services Market Access Negotiations at http://www.wto.ru/monitor.asp?f=uslugi (visited November 14, 2003).

[87] Personal interview with a Russian negotiator.

[88] Smith, *supra* note 26, at 37.

commitments in a larger number of sectors.[89] These sectors include professional services (primarily accounting, law, architecture and engineering), business services, communication services, financial services, construction services and distribution services.[90] Some Members have undertaken commitments in environmental, health and social, tourism and transport services.[91] Few Members have undertaken commitments in audiovisual services.[92]

1. Banking

There are numerous regulations governing the establishment of Russian banks and the conduct of banking operations. These regulations became the focus of discussion in the accession negotiations. Stringent currency regulations have also been scrutinized.[93] Russia's position in the beginning was strongly protectionist. Later, the Central Bank and the Ministry of Finance took a more pragmatic approach towards liberalization.[94] In part this is because the banking sector is saturated and foreign banks have already become niche players.

Important questions have arisen in the course of accession concerning the simplification of regulations in the financial sector, including currency restrictions. The ownership by the Central Bank of Russia ("CBR") of two major Russian banks, Sberbank and Vneshtorgbank, poses another contentious issue since the CBR carries out prudential regulation of the banking sector. Moreover, there is concern among Members about state guarantees of household deposits held by Sberbank when deposits held by other banks do not receive the same guarantees.[95] The government is currently devising a new guarantee system that would end Sberbank's monopoly, and which would give other banks much-needed long-term funds for lending.[96] The new law on the CBR provides for CBR's sale of Vneshtorgbank, thereby addressing the potential conflict of interest between CBR's ownership of commercial banks and its prudential function.[97] However, the new law does not require the CBR to sell Sberbank.

2. Insurance

Barriers existing in the Russian insurance sector do not permit foreign insurers to carry out business effectively in Russia since many types of insurance can only be provided by Russian companies. Russia seeks a high level of protection for its insurance sector.[98] It wants to bar foreign insurance companies from operating in Russia through branch offices

[89] WTO, *Technical Note on Accession Process*, WT/ACC/7/Rev.2 (November 1, 2000), at 137.

[90] *Id.* at 138.

[91] Ecuador, Mongolia, Bulgaria, Panama, Kyrgyz Republic, Latvia, Estonia, Jordan, Georgia, Croatia, Albania and Oman. *Id.*

[92] *See*, *e.g.*, the Protocols of Accession of Armenia, China, Chinese Taipei, Panama, Kyrgyz Republic, Jordan, Georgia and Oman that are available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#alb (visited November 14, 2003).

[93] The United States, EU and Japan have presented the most serious demands in this respect. *See* Interview with Maxim Medvedkov, Interfax (July 16, 2003).

[94] Personal interview with a Russian negotiator.

[95] Daniel Pruzin, *WTO Members Surprised by Russian Law On Telecommunications, Interconnection Rate*, 20(29) BNA (July 17, 2003), at 1225.

[96] *See Kozlov: Bank System to be Efficient by 2005*. The Moscow Times (September 9, 2002), *see also* Илья Горбунов, Елена Короп, *Правительство взяло валютный барьер,* Известия (29 ноября 2002).

[97] Federal Law No. 86-FZ *On the Central Bank of Russia* (July 10, 2002 with amendments of January 10, 2003), Article 8.

[98] *See* Hurst and Korsunskaya, *supra* note 61.

and from providing the main types of compulsory insurance.[99] The insurance industry is politically powerful and as a result negotiations in this sector have not advanced quickly.

The EU is strongly opposing Russia's proposed limitations in the ongoing accession negotiations. Russia breached an agreement with the EU whereby in 1999 Russia was to open its insurance market to foreign owned insurers (more than 49 percent foreign owned).[100] The agreement provided that additional limitations would not nullify the removal of the 49 percent ownership limitation.[101] Although Russia did remove the 49 percent ownership cap, it imposed new limitations on the main types of services, including restrictions on the sale of life insurance and compulsory insurance.[102]

The Russian government is now devising a law that would bring the treatment of European insurance companies into conformity with its bilateral agreement.[103] If, however, Russia creates a preferential regime for EU insurance companies, upon accession to the WTO it will be obliged to grant equal treatment on an MFN basis to other foreign insurance companies.

Discussions are also ongoing on whether to allow foreign companies to sell certain insurance products that can now only be sold by Russian companies. Russia does not want to increase the quota for foreign capital on the insurance market. Currently foreign insurance companies represent only seven percent of the capital in the market, i.e., well below the permitted level of fifteen percent.

3. Telecommunications

The main disagreement in the telecommunications sector concerns Russia's plans to introduce a 49 percent cap on foreign ownership of telecommunications companies. This restriction presently does not exist.[104] Russia is also defending the position of Rostelecom, the government controlled telecommunications monopoly in the accession negotiations.[105] Russia seeks to perpetuate Rostelecom's long distance monopoly for at least five years after accession.[106] Recently Members expressed "dismay with a new law which they fear could significantly dampen market access opportunities for their telecommunications firms in Russia."[107] One major concern relates to a significant increase in the interconnection rate paid by foreign telecoms firms to Rostelecom. The law also foresees the establishment of a fund for the support of universal service provision in rural areas. All service providers would be required to contribute. Many Members,

[99] Selivanova, *supra* note 20, at 19. Based on a personal interview with a WTO negotiator.

[100] *Agreement on Partnership and Cooperation Establishing a Partnership Between the European Communities and the Russian Federation*, JOCE L 327 (November 27, 1997).

[101] *See Agreement on Partnership and Cooperation*, *supra* note 100, Annex 7, Article B.2.

[102] *See Law of the Russian Federation No. 4015-I On Organization of Insurance Business in the Russian Federation* (November 27, 1992 with amendments of December 31, 1997, November 20, 1999, March 21 and April 25, 2002), Article 6 (Закон РФ от 27 ноября 1992 г. N 4015-I "Об организации страхового дела в Российской Федерации" (с изменениями от 31 декабря 1997 г., 20 ноября 1999 г., 21 марта, 25 апреля 2002 г.).

[103] Алексей Рожков, *Минфин разработал план либерализациистрахового рынка,* Время новостей (21 марта, 2003). *See also* Ирина Коробкова, *Намерение либерализовать рынок встречено в штыки*, Финансовые Известия (24 марта 2003).

[104] Selivanova, *supra* note 20, at 19.

[105] *See* Press Release of the Information Office on Accession of Russia to WTO (December 27, 2002).

[106] Игорь Седых, *Максим Медведков: Я не думаю, что мы быстро найдем решение,* Коммерсант (14 июля 2003).

[107] Pruzin, *supra* note 95.

including the EU, are insisting on increased liberalization in this important sector and an elimination of Rostelecom's monopoly.

4. Transport

One of the most controversial accession issues is the over-flight fees that foreign airlines must pay Aeroflot when crossing Russian airspace. Since the 1970s, Aeroflot, which is 51 percent state-owned, has been receiving "overflight fees" from all foreign airlines that cross Russian airspace. Russia's trade partners, such as the EU, are requesting the elimination of these charges which they view as an anti-competitive practice.[108]

EU officials, who say the fees violate basic principles of the WTO, are reportedly willing to compromise.[109] They suggest continuing the system for a few more years and using the funds to modernize Russia's antiquated air traffic control system, rather than using the money to subsidize Aeroflot. According to an EU representative in Moscow, Russia refused to discuss modifying the fee system during negotiations in 2002.[110] The Russian transport ministry has however indicated that there could be some changes in the over-flight fee system, and that Russian officials have not told the EU that they are "completely against" the fund to modernize its air traffic control system.[111] Discussions on this topic are continuing.[112]

E. Domestic Price Control Over Energy and Gas

WTO Members have expressed strong concerns about the trade distortions caused by state control over the pricing of energy for domestic consumption (e.g., gas, oil and electricity). The state pricing policy is applied to assure low domestic prices. Its application results in a sizeable price differential between what companies based in Russia pay and the price paid by purchasers abroad.

The main industrial powers are conditioning Russia's WTO accession on its liberalization of energy prices. Russia faces serious demands from the EU[113] and the United States to eliminate state control over prices for energy consumed by domestic industrial users. These demands apply primarily to gas prices, which are imposed by the government, one of the major shareholders in Gazprom, the monopoly dominating the gas market. Foreign purchasers abroad pay up to six times[114] more than what domestic purchasers pay for *natural gas*.[115] Gazprom openly states that it supplies gas to the internal market[116] at a

[108] *See* Daniel Michaels, Guy Chazan and Zach Coleman, *Moscow Pockets Millions In Fees to Fly Over Siberia*, Wall Street Journal (July 1, 2002).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] In 1997, the only year the Association of European Airlines calculated what its Members paid Aeroflot, the total was US $225 million, according to the organizations' annual report. Association officials say the figure was much higher in 2001. The airlines agreed to pay the fees since flying over Siberia produced huge savings compared to flights over the North Pole. *See* Michaels et al. *supra* note 108.

[113] *See* Эл Брич, Маттиас Вестман, *Россия и ВТО: Напрасный страх Европы,* Ведомости (28 апреля, 2003).

[114] Rafael Behr, Andrew Jack, *Russian Talks on WTO Entry Stall Over Energy*, Financial Times (February 18, 2003).

[115] The data from the OECD report show that in 2000 the difference between the average industrial prices for gas in Russia and OECD countries was about eleven times. *See* OECD Economic Surveys, Russian Federation, Volume 2002/5-February, at 118.

[116] According to the OECD report (*supra* note 115, at 105) "almost 40 percent of natural gas supplied domestically goes toward the generation of electricity."

loss, which it compensates through high export prices.[117] Gazprom seeks therefore to increase the prices for gas.[118] The regulation of *electricity* rates has been criticized as allowing domestic companies to receive energy at prices four to five times below the average industrial prices for electricity in the OECD countries.[119] While the oil market is more deregulated, the domestic prices for crude *oil* are four times lower than the world market price.[120] This dual pricing system is viewed by the United States and the EC as a subsidy to Russian industrial producers, as they do not have to pay the full market price for their energy inputs.[121] This situation adversely affects the ability of imported goods to compete on the Russian market. Russian products have also an advantage competing with other countries' products in third-country markets.[122] Therefore, the demands to eliminate its pricing system result primarily from the interests of foreign industries that have energy-intensive production.

Another possible reason for these demands is relatively high price of energy products on the world market. The main Members demanding unification of oil and gas prices in Russia are dependant on oil and gas imports and are primarily interested in a decrease in world prices for gas and oil. If the internal price for Russian oil and gas rose, the demand for these resources would fall within Russia. As a result Russia would export more gas and oil and international prices would fall.[123]

Russia does not accept that Gazprom's practice, imposed by the Russian government, is inconsistent with WTO rules on subsidies.[124] Russia's argument is that WTO rules only cover subsidies specific to a particular enterprise, industry or region.[125] It argues that in this case, the subsidies benefit Russia's entire economy and not specific industries.[126] The availability of gas at lower prices to domestic companies is not contingent on export performance and is in accordance with the non-discrimination principle.[127] Moreover, transportation costs amount to eighty percent of gas prices.[128]

Russia also argues that if its energy prices are to be increased to international market rates, a transition period would be necessary. Domestic prices would have to be increased by five to seven times. Such an increase could lead to widespread economic collapse given that many industrial sectors would be seriously affected.[129]

[117] Игорь Томберг, *Подлинная цена низких тарифов*, Politcom.Ru (July 4, 2002).
[118] Константин Смирнов, Алена Корнышева, *Михаил Касьянов не стал спешить с реформой Газпрома*, Коммерсант (20 марта 2003).
[119] *See* OECD, *supra* note 115, at 119.
[120] Inside U.S. Trade, *New Draft Report Reveals Strong Differences on Russia's Accession* (December 6, 2002).
[121] The OECD report notes: "The large revenues received by Gazprom from exports to Europe represent one major source of finance for these subsidies, part of which are also channeled through RAO UES in the form of cheap gas for electricity generation." OECD, *supra* note 115, at 105.
[122] Selivanova, *supra* note 20, at 19. *See* Константин Смирнов, *supra* note 83.
[123] This assumption is primarily valid for gas exports; the influence of Russia's oil exports on the world price for oil is less significant.
[124] Константин Смирнов, *supra* note 83.
[125] *See* Article 1.2 of the SCM Agreement.
[126] The fertilizer industry enjoyed some benefits in this respect in the past, however the Order of the Federal Energy Commission No. 12/1 of March 24, 1999, which granted a fifty percent reduction in gas prices to producers of chemical fertilizers, was repealed.
[127] The draft law "On State Aid" prohibits state support based on export performance or import substitution.
[128] *See* the interview with the Minister of Economic Development and Trade of Russia, German Gref, Коммерсант (October 28, 2002).
[129] Константин Смирнов, *supra* note 83.

Moreover, Russian officials also state that Russia's abundance of raw materials and energy is a "natural comparative advantage" which results in low prices.[130] However, according to some analysts, the prices for energy are lowered artificially and do not result from a comparative advantage.[131] Most likely, according to Ilia Marshak, a Moscow-based analyst, the government believes that the process of price unification is complicated and it does not want to undertake any additional international obligations in that respect.[132]

Russian negotiators openly state that they consider demands related to equalizing energy prices a test of the strength of their position.[133] Energy pricing will be one of the most important issues in the course of the forthcoming negotiations.[134] Mr. Medvedkov, the Russian chief negotiator, argued that Russia will be fighting for its position regarding energy pricing until the end: "The country that has resources decides on its own at which price and to whom to sell them".[135]

Despite the evident domestic political importance of this issue,[136] it is in Russia's interest to reform its energy sector and ultimately unify its internal and export prices for energy. First, Russia's low domestic energy prices foster the inefficient consumption of energy resources by Russian industry,[137] and give little incentive for Russian industry to adopt energy efficient technology. Second, elimination of the dual pricing system would mean that the Russian energy industry would be able to profit from trade on the internal market.

The Russian government realizes that reform of the energy sector is crucial for its development.[138] Although it has so far refused to accept any binding WTO obligations, the government does have plans for increasing domestic gas and energy prices. It intends to do so gradually and seeks to avoid the imposition of external requirements or a timetable. A plan for the reform of Gazprom was presented in December 2002. Gazprom officials stated that the concept of energy sector development foresees the unification of gas prices on the internal and external market by 2020, taking into account transport costs.[139] The authors of the reform of another firm, RAO UES of Russia,[140] did not propose increasing internal prices all at once either; indeed, such a process would take several years.[141]

[130] Behr and Jack, *supra* note 114. *See also* Константин Смирнов, *Евросоюз нанес России удар под газ*, Коммерсант (10 февраля 2003).

[131] Кирилл Пальшин, *Чистая энергия: газ и свет останутся внутренним делом Росс ии,* Известия (9 апреля 2002).

[132] *Id.*

[133] Константин Смирнов, *supra* note 83.

[134] Алена Корнышева, *Михаил Касьянов дал гарантии российским экспортерам*, Коммерсант (23 июля 2003).

[135] Information agency АК&М (May 17, 2002).

[136] Elimination of the dual price system would have adverse economic effects for industries operating in Russia and might undermine both political and social stability.

[137] Смирнов, Корнышева, *supra* note 117.

[138] The OECD report states in this respect: "The Russian government has come to recognize the existence of serious problems in the gas and electrical power sectors of the economy, and the unsustainability of current trends. Subsidization through cheap energy has encouraged inefficient and wasteful energy consumption. Both the gas and electricity sectors are in need of large fixed investment to continue or expand their current operation, while the burden of administering and financing implicit subsidies has seriously complicated the efforts to accumulate internal or external capital for this purpose." *See* OECD, *supra* note 115, at 106.

[139] *See* Екатерина Кравченко, *Миллер победил Грефа,* Финансовые Известия (25 июня 2003).

[140] Russian Joint Stock Company United Energy System of Russia.

[141] Смирнов, *supra* note 83. *See also* Press Release of the Russian Ministry on the Economic Development

In conclusion, Russia's present strategy is to refuse to make binding commitments on energy pricing, arguing that its current pricing practices are consistent with WTO rules. At the same time, the government is devising plans for restructuring its energy sector,[142] including the elimination of state price controls on the domestic market.[143] However, Russian officials stress that this reform will be gradual and not subject to any binding WTO commitments.

F. Other Important Issues and Legislative Developments

1. Work on Bringing Russia's Laws into Conformity with WTO Rules

In accordance with the conditions of Article XVI of the Agreement Establishing the World Trade Organization, "each WTO Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations". Members are insisting that Russia bring its law, regulations and measures into conformity with WTO rules and consider the completion of this process a prerequisite for accession. Typically, acceding countries are "requested to meet all commitments upon entry" without transition periods and "regardless of whether institutional weaknesses make it difficult for them to fulfill such commitments."[144]

Although much of the required legislative reform serves Russia's long-term economic interests, the requirements to undertake immediate commitments in customs valuation, trade-related intellectual property rights, technical regulations, standards and phytosanitary norms pose problems because Russia lacks the institutional base to implement these commitments.[145] This insufficiency explains some of the delays in the accession process, as numerous laws must be adopted and state agencies created or restructured.[146]

The Russian government has made legislative reform a priority and has launched an ambitious plan to achieve the reform prior to the WTO accession.[147] Among the new laws that have been adopted, or are in an advanced stage of development, are the new Customs Code; the Law on Licensing Fees and the Right of Production and Trade in Ethyl Spirits, Alcohol, and Spirit-Containing Products; the Law on Safeguards, Antidumping and Countervailing Measures; the Law on Licensing of Export and Import of Goods in the Russian Federation; the Law on Currency Regulation and Currency Control; the Law on Government Support; Chapter 27 of the Tax Code of the Russian Federation (regulating customs duties and fees); the Law on State Regulation of Foreign Trade Activity; and the

and Trade regarding the discussion of the government's energy reform (June 19, 2003) at http://www.economy.gov.ru/merit/preliz_190603.html (visited November 14, 2003). More detailed information on the reform of the electricity sector in Russia is available at http://www.economy.gov.ru/merit/onelect.html (visited November 14, 2003) and http://www.rao-ees.ru/en/reform (visited November 14, 2003).

[142] Ксения Нечаева, *Минэкономразвития выступило за свободу на энергорынке*, Коммерсант (8 мая 2003).

[143] Starting January 1, 2004, the wholesale prices for electricity will be increased by 20%. *See* Алена Корнышева, *Председатель правительства взял под жесткий контроль тарифы естественных монополий,* Коммерсант (30 мая 2003).

[144] Michalopoulos, *supra* note 67, at 31.

[145] *Id.*

[146] Institutional changes are not limited to the adoption of the new laws. For transitional economies they often involve the establishment of new administrative capacities and substantial changes in technologies and new investment. *See* Zdenek Drabek, Marc Bacchetta, *Effects of WTO Accession on Policy-Making in Sovereign States: Preliminary Lessons From the Recent Experience of Transition Countries*, WTO Staff Working Paper DERD-2002-02 (April 2002), at 24.

[147] *See Russian Federal Government Decree No. 1054* (August 8, 2001).

Law on the Basis of Technical Regulation in the Russian Federation. The government aims at completing the process of bringing national legislation into conformity with WTO rules in 2003.[148]

2. Other Important Issues in Russia's Accession Negotiations

In the course of accession negotiations Members expressed concerns about Russian customs practices, in particular of customs valuation procedures and rules of origin. Russia must also revise its legislation and practices in the areas of standardization, certification, sanitary and phytosanitary measures, currency control, and the protection of intellectual property rights. Russia will need to give special attention to its implementation of laws, as there is a large gap between law and actual implementation practice. Implementation is complicated by the size of the country and its sophisticated federal system.[149] Specific issues are examined in more detail below.

(a) Customs. Foreign companies have often complained not only about high Russian tariffs on some products, but also the lack of transparency of its tariff regime, arbitrary valuation methods, the arbitrary grant of duty exemptions, and frequently changing and complex customs practices.[150] Some Members have also complained that regulations imposed by Russia on imports of wine, petroleum products, tobacco and chicken constitute a disguised restriction on trade, as do the limited number of authorized check-points to inspect these goods, and the location of these check-points far from the most convenient points of entry.[151]

Russian customs procedures have been inefficient, complicated and often discriminatory. Implementation of these procedures is at the discretion of often corrupt customs officials. Russia's WTO accession is contingent upon reform of its customs system. Reform is under way and a new Customs Code has been adopted.[152] Most provisions of the new Customs Code[153] are directly applicable, meaning they do not require further procedural acts of the Federal Customs Committee. This should limit the issuance of controversial instructions and the exercise of discretion by customs authorities.

(b) Quotas and Restrictive Licensing. WTO Members have asked the acceding countries to accept, from the date of accession, a commitment to eliminate and not introduce, reintroduce or apply quantitative restrictions or other non-tariff measures such as licensing, quotas, bans, permits, prior authorization requirements, licensing requirements and other restrictions having equivalent effects which cannot be justified under the WTO Agreements.[154] Members are concerned about certain Russian quantitative restrictions and non-tariff measures:

[148] Work remains to be concluded on the WTO-consistency of the normative acts of the ministries, regional legislation, and Russia's bilateral and multilateral agreements.

[149] NARAY, *supra* note 3, at 100.

[150] *Id.* at 104.

[151] Personal interview with a WTO negotiator.

[152] Таможенный кодекс Российской Федерации от 28 мая 2003 г. N 61-ФЗ (Customs Code of the Russian Federation No. 61-FZ (May 28, 2003)).

[153] The Customs Code will enter into effect January 1, 2004.

[154] NARAY, *supra* note 3, at 108. The laws and regulations governing the establishment of foreign companies in Russian territory, including the issuance of activity licenses, should not restrict imports in violation of the prohibition of quantitative restrictions under Article XI of GATT. Such regulations must not discriminate against imported goods in violation of Article III of GATT. Finally, the charges and registration fees that companies have to pay should be limited to the cost of services rendered.

- Russia's current system of licensing for the sale of alcoholic beverages discriminates against foreign companies. For example, import licenses are issued only to companies that hold an "activity license".[155] Furthermore, quantitative restrictions exist—the annual volume of imported alcoholic products (except for wines, cognac and beer) cannot exceed ten percent of alcoholic beverages sold in Russia.
- Licensing requirements are applied to the processing, transportation, storage and sale of oil and gas.
- Due to health concerns, licensing requirements exist for the production of pharmaceuticals and medicines.[156] Companies engaged in pharmaceuticals trade need a special license for import of pharmaceuticals.[157] Foreign firms can only obtain such a license after the establishment of a representation office on Russian territory.[158] Some Members demand that Russia commit to the automatic grant of import licenses on pharmaceutical products. Foreign companies complain that the licensing requirements for pharmaceutical products are extremely burdensome,[159] in part because pharmaceutical products must be re-registered once every five years,[160] and such registration can take more than one year.[161]
- Quotas exist for the export of platinum, non-ferrous metals containing precious metals, and uncut natural diamonds. Export licenses are required for the export of these items.

(c) Technical Barriers to Trade ("TBT") and Sanitary and Phytosanitary Measures ("SPS"). Foreign companies doing business in Russia have often criticized Russia's burdensome certification, standards and labeling procedures as being obstacles to trade.[162] Members are concerned that TBT requirements will be applied to nullify Russia's tariff concessions. In particular, this concern is related to labeling (most importantly, the labeling of spirits). One important TBT concern is that regulations are devised and applied in a way that makes it more difficult for foreign companies to comply with them than for their Russian competitors. Russia's technical regulations are extremely broad and complicated and lack systematization and transparency. Currently the Russian government is carrying out an extensive reform of its technical regulations. The government launched a special "Program of Measures to Ensure Compliance with the Requirements of the WTO

[155] An "activity license" means a license that permits an entity or person to carry out a particular type of activity, e.g., insurance, construction, banking, trade in certain products, etc.

[156] Federal Law No. 128-FZ On Licensing of Certain Types of Activity (August 8, 2001), Article 17.

[157] Federal Law No. 86-FZ On Medicines (June 22, 1998, as amended January 2, 2000, December 30, 2001, January 10 and June 30, 2003), Article 20.

[158] *Id.* Article 21.4.

[159] The American Chamber of Commerce in Russia has prepared a report that identifies where existing laws or practices impede trade and restrict market access. This report is a contribution to the Russian American Business Dialogue, initiated by presidents Bush and Putin in 2001. *See* Healthcare Committee of the American Chamber of Commerce in Russia, *Administrative and Regulatory Barriers in the Russian Healthcare Sector* (April 2, 2002) available at http://www.amcham.ru/upload/healthcare.pdf (visited November 14, 2003).

[160] *See* Ministry of Health of Russia, *The Rules for Registration of Medicines* No. 01/29-14 (December 1, 1998, as amended February 23, 2000), Article 13. On governmental control in pharmaceutical sector *see* Топорков А.А. *Государственный контроль в сфере обращения медицинских изделий: государственная регистрация*, at http://www.farosplus.ru/index.htm?/fp/fp_6_20/aipm_6_20.htm (visited November 14, 2003).

[161] *Administrative and Regulatory Barriers in the Russian Healthcare Sector*, *supra note* 159, at 7.

[162] *WTO, Accession of the Russian Federation—Additional Questions and Replies*, WT/ACC/RUS/23 (December 2, 1997), at 19 and 27.

Agreement on TBT and the WTO Agreement on SPS". A new law "On Fundamentals of the Technical Regulation, Standardization and Confirmation of Conformity", which aims at establishing a WTO-compliant framework, was recently adopted. Russian authorities must now review related legislation for conformity with the law and the TBT and SPS Agreements.

Members are demanding that Russia harmonize its technical, sanitary and phytosanitary standards on the basis of international standards, guidelines and recommendations as mentioned in Article 3 of the SPS Agreement. SPS rules must be based on scientific risk assessments when more stringent than international standards.[163] SPS measures must not discriminate in favor of domestic production where identical or similar conditions prevail.[164] In addition, some Members have requested that Russia recognize certificates issued by the competent authorities of WTO Members.[165] Harmonization of Russian standards with European standards is of considerable interest to Russian exporters.[166]

(d) Protection of Intellectual Property Rights. Upon accession to the WTO, Russia must fully apply the provisions of the TRIPS Agreement. Russia has been a Member of the World Intellectual Property Organization since 1970 and is a signatory to the major intellectual property conventions incorporated into the TRIPS Agreement, including portions of the Paris, Berne and Rome Conventions.[167] Russian legislation is generally consistent with the provisions of the 1989 Treaty on Intellectual Property in Respect of Integrated Circuits.[168] In the area of intellectual property rights, problems are not so much associated with the lack of enacting legislation, but rather with Russia's failure to enforce its intellectual property laws. A report by the International Intellectual Property Alliance ("IIPA") pointed out that overall copyright industry losses exceed $1 billion per year.[169] Very high estimated piracy levels in all copyright sectors accompany massive losses: Piracy in Russia accounts for 66 percent of music sales, 80 percent of film sales, 87 percent of business software and 90 percent of entertainment software.[170] The counterfeiting of trademarks is also a large problem. The IIPA insists on more efficient criminal enforcement of IPRs.[171] Such enforcement should also be in the interest of Russia—the report points out that "high piracy levels are costing the Russian economy millions of dollars in lost jobs and lost taxes".[172] For example, "the motion picture industry estimates lost tax revenues on DVDs and videos in Russia was $131 million in 2002."[173]

[163] WT/ACC/RUS/23, *supra* note 162, at 33. *See* SPS Agreement, Article 3.3.
[164] *Id*.; *see SPS Agreement*, Article 2.3.
[165] WT/ACC/RUS/23, *supra* note 162, at 26.
[166] *See infra* part IV(A).
[167] *Berne Convention for the Protection of Literary and Artistic Works* (September 9, 1886); *Paris Convention for the Protection of Industrial Property* (March 20, 1883); *the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, Rome, (October 26, 1961). *See* http://www.wipo.org/treaties/ip/index.html (visited November 14, 2003).
[168] *Treaty on Intellectual Property in Respect of Integrated Circuits*, done at Washington, D.C. (May 26, 1989).
[169] International Intellectual Property Alliance, 2003 Special 301 Report—Russian Federation, at 1, http://www.iipa.com/gsp/2003_Feb14_GSP_Russia.pdf (visited November 14, 2003).
[170] *Id.* at 8.
[171] *Id.* at 10.
[172] *Id.* at 8.
[173] *Id.*

G. Government Involvement in Trade[174]

The history of the GATT/WTO system demonstrates that "economies comprised of privately owned units are far more likely to provide an environment conducive to the full implementation of WTO rules than economies dominated by state-owned enterprises".[175] Issues related to ownership of economic interests, the degree of privatization in the economy, privileges granted to private enterprises involved in import and export activities and the degree of governmental involvement in trade matters have frequently been raised by WTO Members during accession negotiations. Government involvement in the activity of enterprises that dominate key sectors, such as energy and mineral resources, is a tradition in Russia.[176]

While the WTO Agreements do not require "that a Member must have fundamentally a market economy, such a requirement is being imposed *de facto* by existing Members as part of the leverage they have in the accession process."[177] Although the United States and the EC granted Russia market economy status in 2002, issues relating to the treatment of Russia as a market economy remain open.[178]

Furthermore, Article XVII of the GATT requires Members to ensure that state trading enterprises ("STEs") act in a manner consistent with the nondiscrimination principle. Typically, the protocols of accession of economies in transition contain obligations to apply regulations governing the activities of state-owned enterprises, and require that such enterprises act in full conformity with the provisions of the WTO Agreements.[179]

During accession negotiations, Russia changed the list of enterprises subject to notification as STEs several times. This is understandable as the definition of STEs contained in Article XVII and the Understanding on the Interpretation of Article XVII ("Understanding") is not clear. The main criteria for identifying STEs, set forth in Article XVII and the Understanding, is the granting of special or exclusive rights or privileges to an enterprise.

Gazprom's "exclusive privileges" include the control of the transportation network. Gazprom is obliged to grant access to the transportation network to other companies that trade in gas.[180] These currently amount to 10–12 percent of the total gas sales in Russia.[181] The monopoly of Gazprom's affiliate, Gazexport, over gas exports to Europe and non-CIS countries, raises another issue. As gas prices paid by domestic consumers

[174] On the role of the state in the transitional economies *see* Sam Laird, *Transitional Economies, Business and the WTO*, 22(1) WORLD COMPETITION 171–187 (1999).

[175] Naray, *supra* note 3, at 98.

[176] In the early 1990s exports of energy and raw materials were restrained, first through quotas and licenses and, subsequently, by export taxes. A system of centralized exports was operated through foreign trade organizations. The process of nominating special exporters and granting licenses to export within a quota set by the government lacked transparency. However, export quotas and special exporter lists were abolished in 1995. A system of centralized subsidized imports, aimed at solving Russia's food deficit, was also put in place. Such centralized imports accounted for forty percent of total imports in 1992. They were abolished in 1995. *See* Vladimir Drebentsov and Constantine Michalopoulos, *State Trading in Russia*, in STATE TRADING IN THE TWENTY-FIRST CENTURY 303 (Thomas Cottier and Petros C. Mavroidis eds., 1998); *see also* WTO, Accession of the Russian Federation, *Introductory Note to Questions and Replies to the Memorandum on the Foreign Trade Régime*, WT/ACC/RUS/2/Add.2 (June 2, 1995).

[177] Michalopoulos, *supra* note 67, at 28.

[178] *See infra* Part II(H).

[179] NARAY, *supra* note 3, at 125.

[180] There is clearly a competition issue considering that independent companies have to rely on Gazprom, their competitor, for their transportation needs.

[181] Известия, *Александр Рязанов: Реформу газовой отрасли можно начать в этом году* (9 июня 2003).

do not allow Gazprom to profit domestically, some Members question whether Russia's gas pricing policy is consistent with the requirements of Article XVII, which states that policies of STEs be based on commercial considerations.

Four other enterprises indicated by Russia as STEs are RJSC UES (electricity); JSC Rosugol (coal, dissolved in November 1997); JSC ALROSA (raw natural diamonds); and Almazyuvelir (also raw natural diamonds). RJSC UES possesses special or exclusive rights as it owns most power generating facilities in Russia and the entire power grid. Rosugol's special privilege was the distribution of government subsidies for coal mining and it played an important role in determining the rates for the transportation of coal.[182] However, in 1997, Rosugol was dissolved and its administrative functions transferred to the Ministry of Fuel and Energy.[183] Alrosa used to control the export of raw diamonds. Presidential Decree No. 1373, dated November 30, 2002, abolished the exclusive rights of Alrosa.

Responding to the questions posed by Members, Russian officials informed delegations that there are no STEs in the agricultural sector and that the government has no intention of introducing state trading for agricultural products.[184]

There are misconceptions as to the volume of state trading in Russia. The government has reduced the degree of direct state involvement in trade significantly and more rapidly than could be expected for a country with a state monopoly on trade just a decade ago. In 2001, enterprises with 50 percent or more state ownership accounted for only 13.4 percent of the total production of goods and services and 13.2 percent of total agricultural production.[185] As a result of the transition process, trade in Russia is carried out almost exclusively by private enterprises and the participation of the Russian government in the ownership of enterprises continues to diminish.

H. Recognition of Russia as a Market Economy

Although Russia's main trading partners, the United States[186] and the EU,[187] formally declared in 2002 that they would grant, with some reservations, market economy status to Russia, many countries that represent a substantial export interest to Russian producers have not yet done so. Moreover, although the United States and the EU officially recognized Russia's market economy status, some unresolved issues relating to the treatment of Russian products in anti-dumping and countervailing duty investigations remain.

Russia's recognition as a market economy[188] by its trading partners is of major importance to the Russian government and Russian producers. Recognition as a market economy means that Russian companies and Russian products are treated differently in the course of trade remedies investigations. Members consider that there may be problems of

[182] NARAY, *supra* note 3, at 126.

[183] *Id.*

[184] WTO, *Accession of the Russia Federation—Additional Questions and Replies*, WT/ACC/RUS/4 (November 1, 1995).

[185] *Annual Report On Development of State Sectors of Economy in the Russian Federation in 2001*, Goskomstat.

[186] U.S. Department of Commerce, Press Release (June 6, 2002).

[187] Интерфакс, *Евросоюз окончательно признал Россию страной с рыночной экономикой* (10 ноября 2002).

[188] A term, which, for instance, has been defined in Section 771 (18)(A) of the U.S. Tariff Act 1930, as a foreign country that "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise".

price comparability when using the domestic prices of non-market economies' ("NME") to establish a dumping margin. Therefore, the methodology applied to determine the normal value for non-market economies in anti-dumping investigations is not the usual methodology prescribed in Article 2 of the Anti-dumping Agreement. In the case of products originating from non-market economies, many investigating authorities, in order to establish the normal value for these products, use either the price of a like product in a surrogate market economy country or a constructed value methodology based on the factors of production of the non-market economy producer and prices for these inputs from a representative market economy. These alternative methodologies easily lend themselves to abuse and manipulation making it easier to find dumping and calculate inflated dumping margins. Obtaining market economy status for Russia would mean that the domestic prices and costs of Russian producers would be used in calculating the dumping margin rather than surrogate country data.

The recognition of a country as a market economy does not follow *de facto* automatically upon accession to the WTO. The only WTO provision pertaining to non-market economies is found in an interpretative note to GATT Article VI. This provision allows for the use of an alternative non-specified methodology for determining the normal value in investigations of products from a country with a complete, or substantially complete, monopoly of its trade and where all domestic prices are fixed by the state.[189] The language of the Agreement implies that normal value determinations with respect to countries whose economic systems no longer respond to the criteria set forth in the interpretative note must be addressed through the regular provisions of the Anti-dumping Agreement, unless otherwise provided for in the specific country's protocol of accession to the WTO.[190] Nowadays it is very difficult to give an example of a country that meets the conditions set out in Ad Article VI. In any case, the situation in Russia does not correspond to this definition.[191]

Given the ambiguity and inadequacy of the rules on the issue of non-market economies in the WTO, some Members have tried to supplement these rules in their own legislation and regulations. This has resulted in diverse domestic legislative and administrative practices that have generated controversy and frustration on the part of some Russian industries. The practice of some Members has moved towards granting *ad hoc* market-economy status to certain industries in non-market economy countries which can prove that they operate under market conditions. This is done on a case-by-case basis: the investigating authority examines whether the characteristics of a market economy prevail in an importing country in relation to a specific industry. These rules have mostly been applied to those non-market economy countries that are not WTO Members or to WTO-Member countries that have recognized in their Protocol of Accession that issues of price comparability for the determination of dumping margins still exist.[192]

[189] GATT Ad Article VI:2 states:

> It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

[190] *See* Alexander Polouektov, *Non-Market Economy Issues in the WTO Anti-dumping Law and Accession Negotiations. Revival of a Two-tier Membership?* 37(1) JOURNAL OF WORLD TRADE 1 (2002).

[191] On government involvement in trade *see* Part II(G) *supra*.

[192] *See Protocol on the Accession of the People's Republic of China*, WT/MIN(01)/3.

With respect to the reservations that both the United States and the EU made when granting market economy status to Russia, it appears that both Members could apply the same approach—using surrogate country data when establishing the normal value, even after recognizing Russia as a market economy. Indeed, the decision of the U.S. Department of Commerce to grant market economy status to Russia reserves the possibility of not taking into account the costs of production inside Russia.[193] In the case of the EC, the new regulation also provides for the possibility of using cost data from "representative markets", if some conditions regarding the accounting of the investigated company are not met.[194] The non-conformity of Russian accounting standards *vis-à-vis* international standards is one of the reasons cited by investigating authorities in a number of countries for using surrogate country data while conducting investigations on Russian products.[195] In addition, Russian steel and other metallurgical producers fear that the low domestic price for energy inputs might also lead to the non-recognition of costs of Russian companies and the use of prices of a third country representative market. The energy issue was reportedly one of the sticking points in the investigation on market economy status for Russia carried out by the United States Department of Commerce.[196]

Although Russia's government and industries are keen to obtain recognition as a market economy, there is a drawback associated with this new status. The drawback is related to the application of CVD measures to Russian products. When the United States granted market economy status to Russia, Russian exporters became subject to CVD investigations, a possibility that did not exist before.[197]

If the United States were to decide to conduct CVD investigations against Russian companies before Russia accedes to the WTO, Russian companies could lose export

[193] The Decision Memorandum of the Department of Commerce states:

> The Department will examine prices and costs within Russia, utilizing them for the determination of normal value when appropriate or disregarding them when they are not. In this regard, the Department retains its authority to disregard particular prices or costs when the prices are not in the ordinary course of trade, the costs are not in accordance with generally accepted accounting principles, the costs do not reasonably reflect the costs associated with the production and sale of merchandise, or in other situations provided for in the Act or the Department's regulations.

[194] Council Regulation (EC) No. 1972/2002 dated November 5, 2002 amending Regulation (EC) No. 384/96 on the protection against dumped imports from countries not Members of the European Communities states in this respect:

> It is considered appropriate to give some guidance as to what has to be done if, pursuant to Article 2(5) of Regulation (EC) No 384/96, the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, in particular in situations where because of a particular market situation sales of the like product do not permit a proper comparison. In such circumstances, the relevant data should be obtained from sources which are unaffected by such distortions. Such sources can be the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, any other reasonable basis, including information from other representative markets.

[195] *See* the text of the U.S. Decision Memorandum regarding the grant of market economy status to Russia, *supra* note 93.

[196] Moscow Times, *U.S. Grants Russia Market Economy Status* (June 7, 2002).

[197] CVD investigations are directed against subsidized imports. A countervailing duty is imposed to offset a subsidy that harms a domestic industry. When an economy is a non-market economy, the national laws of WTO Members generally consider that there are no valid in-country benchmarks for measuring whether a particular government action created a countervailable subsidy, i.e., there are no market prices that can serve as benchmarks for calculations of the amount of the subsidy. Therefore, when Russia was considered a non-market economy, Russian exporters were not subject to CVD investigations in the United States.

markets much more easily than if anti-dumping measures were applied. This is because, pursuant to U.S. law, in a CVD investigation the investigating authority is not obliged to make a determination that the domestic industry has been injured as a result of the subsidized imports if the investigation involves a non-WTO Member.[198] These injury and causal link determinations are required under the WTO SCM Agreement whenever a Member imposes countervailing measures.

The existing difference in external and domestic prices for energy and other inputs provided by Russia's state-owned enterprises makes CVD investigations particularly problematic.[199] This price differential is perceived by many WTO Members as constituting a subsidy favoring the production of energy-intensive products, such as metals. Although only "specific" subsidies fall under WTO rules, e.g., subsidies paid to a specific industry or company, Russia cannot use arguments related to specificity (or lack thereof) to protect itself from CVD measures until it becomes a WTO Member. When a CVD investigation is conducted and a particular subsidy is found to be specific, the investigating authority may use international prices to establish a benchmark for calculating the amount of the subsidy. This would result in a high countervailing duty rate for a Russian exporter, since energy prices in the international market are several times higher than those on the domestic Russian market. For Russian exporters it is thus important not to be subject to CVD investigations until Russia becomes a WTO Member.

The above considerations regarding the use of trade remedies against Russian exports underline why WTO accession is of critical importance to Russian exporters. The government of Russia and Russian industries want an express recognition of market economy status from WTO Members, and the WTO accession negotiations provide an opportunity to negotiate this recognition. This recognition is not just of practical importance to Russia but would also have moral value, constituting international acknowledgment of the difficult and extensive economic reform process that Russia has undertaken since the collapse of the Soviet Union. Nevertheless, it remains to be seen whether WTO Members would accept such a solution to the legal uncertainty created by the *status quo*,[200] as a formal recognition of Russia's market economy status in its Protocol of Accession may face strong domestic opposition within some Members.

It could be argued that the *status quo* favors Russia as it would be difficult for a Member to prove that the conditions in Ad Article VI apply to the economy of any country, especially Russia.[201] Once Russia accedes to the WTO, were a Member to rely on Ad Article VI for the application against Russia of a dumping margin calculation methodology different from that prescribed in Article 2 of the AD Agreement, Russia could challenge this action before a WTO panel. A panel would find it difficult not to rule in *favor* of Russia, and such a ruling would in effect mean that the negative practical effects of being branded a non-market economy would no longer be an issue.

[198] According to The Tariff Act 1930, Title VII—Countervailing and Anti-dumping Duties, in the case of imports from a country which is not a Subsidies Agreement country (i.e., Agreement on Subsidies and Countervailing Measures ("WTO SCM Agreement"), no determination by the Commission of a reasonable indication of injury is required.

[199] *See supra* Part II(E).

[200] *I.e.*, no mention of the issue in the Protocol of Accession and application of the interpretative note Article VI of GATT.

[201] *See* Part II (H) *supra* on the government's involvement in trade in Russia.

I. Regional Trade Agreements with CIS Countries

In 1992 Russia concluded bilateral free trade agreements with the CIS countries,[202] exempting almost all CIS products from customs duties. On September 24, 1993 the CIS countries signed an Economic Union Treaty aimed at the creation of a common economic space. Later, in 1994, the CIS countries signed an Agreement Establishing a Free Trade Area.[203] The treaty provides for the creation of a common economic space with free movement of goods and future liberalization of services. Several additional agreements were signed by Russia, Belarus, Kazakhstan, the Kyrgyz Republic and Tajikistan aimed at the creation of a customs union.[204] These agreements were transformed into the Agreement Establishing the Eurasian Economic Community.[205] Initially, the parties intended to introduce a common tariff equal to the tariffs applied by Russia, but have so far failed to achieve this goal. It is not clear what approach will be taken regarding the introduction of the common customs tariff. Indeed, it would be difficult to introduce a single tariff in view of the very liberal commitments undertaken by the Kyrgyz Republic when it joined the WTO.[206] GATT Article XXIV:5 provides that:

> the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations applicable in the constituent territories prior to the formation of such union . . . .

Renegotiating the level of concessions with possible compensatory adjustment might not be a viable option.

III. Political Debate

A. Advantages and Disadvantages of Russia's WTO Accession

The additional GDP growth after Russia's accession is forecast at 0.6 percent per annum.[207] This figure, which might not be accurate, does not reflect all the advantages and disadvantages of accession. Advantages and disadvantages and the actual GDP growth rate will depend on the level of concessions undertaken by Russia and the state of the Russian economy at accession.

[202] The Commonwealth of Independent States was created in December 1991 and presently consists of Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine.

[203] *Agreement Establishing Free Trade Area between Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russia and Tajikistan, Turkmenistan, Uzbekistan and Ukraine* (April 15, 1994, with amendments of February 26, 1999). The text of the Agreement is available in Russian at http://www.wto.ru/ru/content/documents/sogl/7zst.doc (visited November 14, 2003).

[204] *Agreement on Customs Union and Common Economic Space, between Belarus, Kazakhstan, Kyrgyz Republic, Russia and Tajikistan* (February 26, 1999). The text of the Agreement is available in Russian at http://www.wto.ru/ru/content/documents/sogl/6custom.doc (visited November 14, 2003).

[205] *Agreement Establishing Eurasian Economic Community between Belarus, Kazakhstan, Kyrgyz Republic, Russia and Tajikistan* (October 10, 2000). The text of the Agreement is available in Russian at http://www.wto.ru/ru/content/documents/sogl/5rus-evr.doc (visited November 14, 2003).

[206] NARAY, *supra* note 3, at 143. *See* WTO, *Protocol of Accession of the Kyrgyz Republic to the Marrakesh Agreement Establishing the World Trade Organization*, WT/ACC/KGZ/29 (October 23, 1998).

[207] ECONOMIC CONSEQUENCES OF ACCESSION OF RUSSIA TO THE WTO FOR THE NATIONAL ECONOMY 8, Russian Investment Council & Academy of Science of Russia (2002).

1. Advantages

One notable advantage of Russia's WTO accession will be improved market access for Russian exports. Although gas, oil and mineral resources account for almost sixty percent of Russian exports and face few trade barriers,[208] other industries have recently begun exporting.[209] Securing non-discriminatory market access for these new exports is important. Once Russia becomes a WTO Member, its exporters will be protected by GATT's non-discrimination provisions (MFN and national treatment). Although many countries have already granted Russia MFN treatment on a bilateral basis, as long as Russia remains outside the WTO, these countries are free to change their policy towards Russia. For example, in the United States, Russia's MFN treatment is subject to annual approval contingent on Russia's adherence to the Jackson-Vanik amendment to The Trade Act of 1974.[210] The revocation of the Jackson-Vanik amendment prior to Russia's WTO accession is desirable.[211]

EU expansion also poses problems for Russian exports. The EU accession of the Baltic and Central and Eastern European countries, some of which are of substantial export interest to Russia, is likely to worsen market access conditions for Russian exports. WTO rules require the EU to negotiate with Members damaged by the expansion of its customs union. Russia, as a non-member, will not be able to participate in such negotiations. Accession may provide the Russian government with a basis for addressing this issue.

Before Russia becomes a WTO Member, its trading partners are free to impose trade measures that are not consistent with prevailing multilateral, bilateral and regional agreements. Russia's trading partners already impose more than ninety discriminatory trade measures against Russia and the direct loss from such measures equals approximately

[208] *Id.* at 8.

[209] Russian exports include metals, timber, chemicals, fertilizers, anti-virus software and computer games, food products and beverages. Detailed information on Russia's exports and imports is available in English and Russian at http://www.russiaexport.net (visited November 14, 2003).

[210] The law, enacted during the Cold War, conditions normal trade relations with the United States on a country's application of a policy allowing the freedom to emigrate. On request from the Bush administration, Congress has recently started working on "graduating" Russia from Jackson-Vanik. *See* Jackson-Vanick amendment, codified at Title 19—Customs Duties, Chapter 12—Trade Act of 1974, Subchapter IV—Trade Relations with Countries Not Receiving Nondiscriminatory Treatment. The amendment states:

> Products from any nonmarket economy country shall not be eligible to receive nondiscriminatory treatment (normal trade relations), such country shall not participate in any program of the Government of the United States which extends credits or credit guarantees or investment guarantees, directly or indirectly, and the President of the United States shall not conclude any commercial agreement with any such country, during the period beginning with the date on which the President determines that such country–
>
> (1) denies its citizens the right or opportunity to emigrate;
>
> (2) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; or
>
> (3) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice.

[211] The MFN treatment extended by the United States to the Kyrgyz Republic after its accession to WTO remained contingent on the Jackson-Vanik amendment. This was possible due to invocation by the United States of Article XIII of the Marrakesh Agreement. *See* Drabek and Bacchetta, *supra* note 146, at 14.

US$3–4 billion per year.[212] WTO membership might reduce this loss by 30–40 percent.[213]

Non-membership exposes Russian exports to greater unpredictability on foreign markets. For example, as noted above, the United States does not apply an injury test in its countervailing duties investigations of non-member products.[214] After accession, trading partners would have to adhere to the rules established in the WTO Agreements relating to trade defenses. In addition, should these rules be violated, Russia would be entitled to launch a WTO dispute settlement proceeding before an independent panel and to appeal the decision of such a panel to the WTO's Appellate Body.

Russian consumers should also gain from Russia's WTO accession. Consumers will be able to obtain cheaper and higher quality products as a result of lower tariffs, greater transparency of laws and an increased inflow of investment, all of which are likely to result from Russia's accession. Related to this point, domestic industries should also gain from lower tariffs on products used as inputs in their production processes. Russia's growing economy requires increased imports of inputs and manufacturing equipment. These imports are necessary for improving the technology and quality of Russian exports. Development of varied and strong export industries is necessary if Russia is to diversify from being largely an exporter of natural resources and raw materials. Since these exports are subject to many external factors, including fluctuations in the international price of oil, the long-term welfare of Russia will not be stable until it diversifies.

For the effective development of competitive export industries it is also crucial that Russia attract investment capital to modernize its infrastructure. Most of Russia's industrial plants, equipment and infrastructure are obsolete.[215] Foreign investment should also mean increased employment, technology transfer, including the transfer of more western expertise and more efficient production and management methods. Although Russia has tried to attract investments through the creation of special economic zones and by offering preferential tax regimes for investors, this alone proved insufficient to attract major foreign direct investment ("FDI").[216] Tax exemptions are not the most effective instrument of investment policy.[217] Economic and political stability, transparency, legislative consistency and an effective dispute resolution system are crucial to attract FDI. Over the past decade, Russian laws and government regulations have been subject to unpredictable and drastic changes. Moreover, local governments have created complicated procedures that pose obstacles to foreign investors. Foreign companies have often complained about the inconsistencies between federal and regional regulations as well as the discretion exercised by local authorities. These factors have impeded Russia's economic development

[212] Информационное бю ро по присоединению России к Всемирной Торговой Организации, Информационный бюллетень №4 *Россия на пути в ВТО* (март-апрель 2002).

[213] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, at 9.

[214] *See supra* Part II(H).

[215] The average age of Russian industrial plants and equipment was 16 years in 1998. Bush, *supra* note 21, at 8.

[216] FDI in Russia between 1991 and April 2002 was approximately US$17.2 billion, compared with over $350 billion in China. FDI in Russia in 2000 was approximately $4.4 billion out of global FDI of $1,270 billion. In 2001 FDI in Russia declined to $4 billion and in first half of 2002 to $1.9 billion. Bush, *supra* note 21, at 6.

[217] Joel Bergsman, Harry Broadman and Vladimir Drebentsov, *Improving Russia's Foreign Direct Investment Policy*, in Russian Trade Policy: Reform for WTO Accession (Harry Broadman ed. 1999), at 67–68.

and impeded foreign investment. Studies show that investors are interested in countries that have a stable legal regime, provide secure market access opportunities and do not discriminate in favor of domestic companies.[218]

By cementing into place a more transparent and stable trade policy, Russia's WTO membership should increase its chances of attracting FDI.[219] Investors will be more willing to invest in Russia when it assumes international economic commitments. Undertaking international obligations provides a much greater degree of security for foreign investors than liberalization within the framework of domestic policy. In the latter case, investors might still be reluctant to invest as the domestic regime can easily be changed.[220]

Liberalization efforts that are not tied to WTO obligations are more susceptible to pressure from domestic commercial interests seeking protection.[221] Upon WTO accession, Russia will lock in a more liberal trade regime—undertaking WTO obligations should provide a first line of defense for the government against domestic protectionist pressure. This should also enhance Russia's economic development since a decrease in the ability of lobbyists to influence domestic policies should stimulate Russian producers to increase competitiveness.

Russia's accession should also result in a revision of its procedures governing registration, licensing, certification, and accreditation of companies. Such procedures now constitute a significant barrier to foreign companies operating in the Russian market. They are ambiguous, non-transparent and applied in an unpredictable manner, thereby leaving substantial discretion in the hands of various officials. Russian companies will also benefit from a streamlined and less arbitrary administrative system.

Russia's accession will also result in the partial liberalization of Russia's service sector. Greater international competition for the provision of services should enhance the competitiveness of Russian service providers, increase their efficiency, and result in an improvement in the scope and quality of services provided. This in turn should result in positive changes for Russian companies that are service consumers. For example, at present, the Russian loan market is not developed and to receive a loan on favorable conditions is difficult for Russian companies. The leasing system also needs to be developed to enable Russian companies to use equipment on favorable terms.[222] Liberalization of Russia's financial service sector should bring about increased competition which in turn should drive down prices and result in a more diversified range of offerings, thus providing additional opportunities for Russia's small and medium-sized businesses.

Accession would also allow Russia to participate in efforts to formulate international trade rules and, consequently, address Russia's interests in the ongoing and future rounds of trade talks. Russia's participation as a WTO Member in international trade talks would reduce the chance of decisions being made that are adverse to Russia's interests. If Russia completes its accession before the end of the Doha Development Round, it would be able to influence the results of this Round of negotiations.

[218] Bergsman, Broadman and Drebentsov, *supra* note 217, at 65, 67.

[219] Drabek notes that "the modest amounts of foreign investments in the Central and Eastern European region are generally attributed to the lack of credibility of trade and investment policies". Zdenek Drabek, *The Stability of Trade Policy in the Countries in Transition and Their Integration in the Multilateral Trading System*, 19(6) WORLD ECONOMY 721, 734 (1996).

[220] David Tarr, *How To Use Accession to the WTO For Economic Development*, Materials of the Seminar organized by the World Bank Institute and the Russian Foreign Trade Academy, Moscow (June 26–30, 2000), at 2.

[221] *Id.* at 2.

[222] См. Биржа, *Нижний Новгород: Чего хотят крестьяне?* (28 *мая* 2002).

In conclusion, the indirect positive effects of accession may be as important as the direct gains in market access for Russian exports. WTO accession is crucial for Russia's overall reform process. In particular accession would advance institutional reforms, including the creation of the legal framework necessary for the further development of Russia's market economy. Equally important, accession would increase stability in Russia's commercial policy—one consequence of adherence to WTO rules and disciplines. Accession is crucial if Russia is to attract much needed investment, both domestic and foreign. Lastly, accession, and the reforms that would follow, would improve the efficiency and productivity of Russia's economy, and at the same time would enhance Russia's integration into the international economic and political system.

2. Disadvantages

While the above advantages certainly speak for Russia's accession to the WTO, there are a number of drawbacks and concerns that the Russian government must address in order to minimize the disadvantages of trade policy liberalization. One problem is that many Russian manufacturers are not ready to compete against cheaper and higher-quality foreign products.[223] In particular, sectors such as food, furniture, pharmaceuticals, metal, chemicals, automobiles and aviation could be hit particularly hard. As competition increases, it is likely that Russian unemployment will rise, due to bankruptcies of a number of companies. The government must determine which sectors are strategically important and merit protection.

Russia needs producers that are competitive on world markets; Russian industries cannot survive by supplying the domestic market alone. Russia's accession will stimulate Russian companies to intensify efforts to restructure and improve efficiency. Deserving industries that have not yet achieved international competitiveness may need initial protection from imports. Protection however cannot be for an indefinite duration. Industries that enjoy excessive government protection tend to be slow to develop and reluctant to forego state aid. Even industries that require a limited period of protection must be pushed to become competitive quickly.

It is wrong to argue that by binding all its tariffs Russia will not be able to protect its producers adequately. Russia is negotiating bindings that are well above applied tariff rates. Finally, in urgent cases, Russia could depart from the "bound"[224] tariff, by paying compensation through the grant of additional concessions in other areas, or by invoking safeguard measures.

One argument against accession is that customs duties, which now constitute a significant part of state revenue, will decrease because tariff rates will be lower and charges other than tariffs will be tightly restricted.[225] This may be true, but an increase in imports after accession should offset some of the revenue loss. Furthermore, an increase in tax proceeds resulting from Russia's continued economic development (which should be spurred by accession) should also offset this revenue loss and would be a more economically beneficial source of government revenue.

[223] Studies show that only 25 percent of producers are now competitive in the domestic market, and that only ten percent are ready for accession. *See* ECONOMIC CONSEQUENCES OF ACCESSION OF RUSSIA TO THE WTO FOR THE NATIONAL ECONOMY, *supra* note 207, at 11.

[224] WTO Members must undertake a commitment not to raise tariffs above certain negotiated levels or "bound rates".

[225] For discussion on effects of the WTO accession of transitional economies on their customs revenues, *see* Drabek and Bacchetta, *supra* note 146, at 19.

The service sector is concerned that in order for Russia to accede, Russia will need to open its service market substantially and that such measures would harm domestic providers. Apart from the fact that the precise level of Russian concessions depends on the result of the negotiations (and Members will not require the full liberalization of Russia's service market), in emergency situations, such as serious balance-of-payment problems or external financial difficulties, Russia would be able to depart from its obligations.

Nor is the argument that Russia would lose sovereignty over its economic policy convincing. Russia is already a signatory of many international and bilateral treaties that it must consider when deciding its economic policy. For example, Russia participates in the Energy Charter[226] and the Agreement on Partnership and Cooperation with the EU,[227] both of which contain provisions that are identical to provisions in the WTO Agreements.

Finally, while it is true that Russia's WTO Membership will require expensive government reforms, much of the needed reform is related to the professional development of Russian government officials.[228] This should have considerable benefit for Russia.

B. Perception of WTO Accession by the Russian Business Community

Although studies show that the Russian economy will gain overall from WTO accession, the position towards accession of particular industries and companies varies.[229] Large companies in developed sectors such as wood and paper and steel do not feel threatened by accession and are interested in the possibility of obtaining improved market access for their products. Many large companies are also interested in improved investment opportunities abroad and the liberalization of Russia's monetary regime which would follow accession. Companies in the energy and raw materials sectors are also in favor of accession, although their products encounter few barriers. For steel producers accession means revision of the existing trade remedy measures imposed on them, such as anti-dumping duties,[230] and stricter rules governing the imposition of future measures.

Russian subsidiaries of foreign companies are important proponents of accession because after commercial establishment in Russia, they continue to experience numerous problems associated with licensing, certification, registration, customs procedures, and foreign currency operations. Russian regulations related to the above procedures are being carefully scrutinized by WTO Members demanding full compliance with WTO norms before Russia becomes a Member. For these companies, accession means the reduction of protectionism, greater transparency and more equal treatment.

WTO opponents among Russian companies include the financial services sector (notably insurance), the telecommunications sector, some agriculture producers, and aircraft, car and television manufacturers. Russian producers in many segments of the food and drinks industry are also suspicious about WTO accession, fearing it would allow foreign suppliers to overwhelm the market with lower-priced products. For example, in spring 2002 Russian poultry producers urged the government to ban imports of American

[226] The Energy Charter Treaty is available on the website of the Energy Charter Secretariat at http://www.encharter.org/upload/1/TreatyBook-en.pdf (visited November 14, 2003).

[227] *See Agreement on Partnership and Cooperation*, *supra* note 100.

[228] Moreover, the WTO provides fully sponsored training programs for government employees.

[229] For detailed discussion of the opposition campaign of 2001, *see* Igor Bunin, *Russia's Accession to WTO: Domestic Policy Aspects*, MATERIALS OF THE 3RD INTERNATIONAL BUSINESS SUMMIT OF THE COMMONWEALTH OF INDEPENDENT STATES "DOING BUSINESS IN THE CIS-IMPLICATIONS OF WTO ACCESSION", EVIAN, FRANCE, (SEPTEMBER 30–OCTOBER 2, 2002), at 39.

[230] Selivanova, *supra* note 20, at 20.

poultry based on sanitary norms. Later in 2002, the poultry industry successfully lobbied the Russian government for a safeguard measure to protect domestic producers against all poultry imports.[231]

However, even in the traditionally protectionist drinks sector, some big companies such as Baltika breweries, are in favor of WTO accession. During a meeting with President Putin, the director of Baltika emphasized that non-membership in the WTO is a growing problem for sizeable Russian food producers.[232] This is because Russian food producers do not have parity in exports market, where otherwise they could be competitive.

Russian manufacturers in the aviation sector want the Russian government to secure a high level of protection for their industry in the accession negotiations. They have established the "International Union of the Aviation Industry" and given it the task of lobbying for the interests of domestic producers domestically and at the international level. Given the importance of this sector, the Russian government will strongly defend the interests of its aviation industry in the negotiations.

However, interested in the promotion of its own products on foreign markets, the Russian aircraft producers are concerned that they cannot compete with foreign manufacturers, even in areas where the technological level of Russian products is comparable, due to weak servicing and maintenance. For example, the director of the Sukhoi factory emphasized that due to the unfavorable conditions of access to foreign countries' markets, it takes Russian producers a month to make deliveries for the maintenance of their products. Therefore, they cannot compete with foreign producers that deliver maintenance services within 24 hours.[233]

As already noted, Aeroflot's status poses another difficult problem. Since the Soviet era, Aeroflot, has been receiving "over-flight fees" from all foreign airlines crossing Russian airspace.[234] In 2001 Aeroflot reported a profit of US$42 million, with income generated by over-flight fees of about $250 million.[235] If not for these charges, Aeroflot would have incurred huge losses. Trade partners such as the EU have used the accession negotiations to demand the elimination of these charges. If the conclusion of the accession negotiations is conditional on an agreement on the over-flight issue, Russia's accession to the WTO might pose severe financial problems for Aeroflot.

The interests of the economic elite will be affected by concessions made in the services sector. Domestic service providers have strong lobbies. These companies do not oppose accession *per se*, but insist on long transition periods for the phase-in of commitments. For example, Rostelecom, a monopoly telecommunications provider enjoys strong support in the Ministry of Communications. It is therefore probable that the Russian government will seek to protect the telecommunications industry in the accession negotiations until the bitter end. Russian insurance companies and some banks are also lobbying for long transition periods. The president of Sberbank supports protecting Russia's banking sector by restricting the activity of foreign banks during a transition period of at least ten years.[236] Moreover, he emphasizes that a decrease in state ownership of Russian banks

[231] *Id. See* Part II(B.1) and *supra* note 43.

[232] Information agency RIA-Novosti (August 2, 2002).

[233] *See* Тимур Хикматов, *Защита с воздуха: авиастроители создали организацию-лоббиста,* Известия (21 августа 2002).

[234] *See* Part II (D.4) *supra.*

[235] Michaels, Chazan and Coleman, *supra* note 108.

[236] Денис Демьянов, *Андрей Казьмин оценивает вступление в ВТО*, Время МН (20 июня 2002).

should not be a goal, as some WTO Members have higher levels of state participation in the banking sector than that of Russia.[237] The Sberbank president is concerned that foreign banks have already managed to attract the "best" Russian clients.[238] Most Russian bankers are against the removal of limitations on the activities of foreign bank branches. The vice-president of the Association of Russian Banks ("ARB") recognizes the necessity of joining the WTO, but he emphasizes that the banking sector would need a five to seven year transition period.[239] He considers it reasonable to allow foreign banks to conduct business only after they establish a legal presence in Russia.[240] He also insists on a 15 percent quota for foreign capital in the banking sector with the option of increasing it to 25 percent.[241] Interestingly, small Russian banks are not opposed to WTO accession. Smaller banks are more concerned that the large banks, supported by the government, are becoming stronger and they see the large Russian banks as their real competitors.[242] Despite the strong interest that some Russian banks may have in protection, the issue may be whether foreign banks would be willing to risk their resources in the high-risk Russian market.

In the insurance sector, protectionist lobbies are even more active than in the banking sector. The general opinion in the industry is that liberalization should be gradual and that a transition period of five to seven years is necessary in order to protect the domestic industry from more powerful foreign companies that may use predatory prices in order to drive Russian insurance companies out of the market.[243] Domestic insurers also insist on reserving certain types of insurance activity for Russian companies, including life insurance, pension, and all types of compulsory insurance, which they view as crucial for Russia's social security system. Moreover, they want to exclude foreign companies from offering insurance related to government procurement activities, and state and municipal projects.[244] The General Director of ROSNO, a leading Russian insurance company, has however expressed a different opinion, stating that he saw no reason to limit foreign ownership of insurance companies or the types of services offered by foreign insurance companies.[245] He argues that even after fifteen years have elapsed, the turnover of Russian insurance companies will not be comparable to that of large foreign insurers such as AIG.[246] He believes that the Russian government should, instead, regulate the transfer of capital abroad by insurers active on the market.[247]

[237] *Id.*

[238] Information Agency AK&M (March 27, 2002).

[239] Information Agency RIA-Novosti, RosBusiness Consulting, *Russian Banking Community Signaled Support of Accession of the Country to the WTO* (February 19, 2002).

[240] Regions.ru (June 18, 2002).

[241] The European Business Club insists on a thirty percent quota for foreign ownership after accession, a fifty percent limitation in five years, and a seventy percent limitation in seven years. *See* Information Agency RIA-Novosti, *supra* note 239.

[242] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, at 65.

[243] *See* Роксана Ахмедова, *Иностранйам откроют страховой рынок только в 2007 году*, Время МН (20 июня 2003).

[244] Information Agency RIA-Novosti (April 15, 2002).

[245] Галина Базина, *Защиту российского сектора страховых услуг надо искать в правилах ВТО—такое мнение компаний с совместным капиталом не разделяет большая часть рынка,* Страна.Ру, (15 января 2002).

[246] *Id.*

[247] *Id.*

The producers of furniture are quite concerned about increased competition and are lobbying for an increase in tariff protection.[248] At the end of August 2002, the Association of Furniture Producers presented to the government proposals related to an increase of tariffs. The proposal is primarily directed against IKEA,[249] which had managed to successfully lobby for a decrease of tariffs and special privileges as a strategic investor. However, Russian producers count strongly on foreign investments that would finance the development of furniture manufacturing. The producers believe they will need several years to attract investments and to start producing competitive products.

Although two years ago many business leaders in Russia were still opposed to WTO accession in general, the opinions expressed by domestic industry representatives show that WTO Membership is widely viewed as an opportunity for many sectors of the economy. While the most eager opponents of WTO accession still insist on prolonged transition periods, few now assert that Russia should not join the WTO at all, as was the case before.[250] However, according to a study carried out by the Russian Academy of Science, only 25 percent of Russian enterprises consider themselves ready to compete on the domestic market, 18 percent on the CIS market, 9 percent on other foreign markets, and only 10 percent of enterprises believe they are ready for WTO accession.[251]

IV. Expected Impact of WTO Accession on Specific Sectors of the Economy

In 2002, the Russian Academy of Sciences and the National Investment Council conducted a study on the impact of Russia's WTO accession on the Russian economy.[252] This study analyzed the consequences of Russia's accession on a macroeconomic as well as sectoral and territorial level. Import tariff changes served as the basis for a quantitative assessment of the accession's impact on the Russian economy. The study recognized that it is difficult to calculate the consequences of Russia's WTO Membership on the Russian economy, as there are many non-tariff methods of regulation that are not subject to quantitative assessment.[253] The study concluded that the optimal economic scenario is based on a smooth transition to liberalization.[254] This strategy lies at the basis of Russia's negotiating position, i.e., that Russia would not be obliged to adopt significantly lower tariffs immediately after accession and would do so only after a transitional period.

[248] *See* Известия, *Повышение таможенных пошлин. Западные мебельщики уходят в леса* (1 ноября 2002).

[249] *See* Александр Гришин, Елена Виноградова, *Мебельщики боятся IKEA. Они лоббируют повышение пошлин*, Ведомости (4 октября 2002).

[250] Selivanova, *supra* note 20.

[251] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, at 11. In 2001, the Ministry of Economic Development had over 260 discussions on the status of Russia's negotiations with numerous unions and producer associations. The Ministry for Economic Development and Trade has organized conferences with the participation of the Committee for Economic Policy and Entrepreneurship of the State Duma, Russian Union of Industrialists and Entrepreneurs, and other organizations. Starting from July 2001, a series of regional conferences "Russia, the WTO, and Interests of the Russian Business Community" have been held in more than twenty Russian cities.

[252] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207. The study is available in Russian on the website of the Russian Investment Council at http://www.rnic.ru/analitics.php (visited November 14, 2003). *See also* A. Daniltsev et al., *Evaluation of Social And Economic Consequences of Russia's Accession to the WTO* available in Russian at http://www.wto.ru/ru/content/documents/docs/StudyD.doc (visited November 14, 2003).

[253] *Id.* at 13.

[254] *Id.* at 8.

In general, the study did not find that any significant changes would take place as a result of Russia's accession. The impact of tariff changes on the economy would not be considerable. The level of tariff protection in many sectors immediately after accession is likely to be higher than the current level.[255] The study also saw a possibility that due to import substitution, GDP growth might be insignificant—only 0.6 percent.[256] Such growth would depend on the final level of tariffs agreed between the parties.[257] The calculations showed possible growth would be in the clothes industry (1.6 percent); shoes (1.3 percent); TV-sets, (1.7 percent); alcohol (11.6 percent); poultry (12.4 percent); and grape production (25 percent).[258] There would not be any significant negative impacts on the macroeconomic dynamics of the country due to changes in import tariffs. Problems are most likely to arise in the food, furniture, pharmaceuticals, chemical, automobiles and aviation industries.[259]

The study also showed that for exports, accession would not have immediate effects, since two-thirds of exports are in the energy sector and do not face any exports barriers.[260] For other exports, the situation would not change dramatically, as Russia already has secured MFN treatment from its major trading partners. Accession will serve simply to ensure stability for Russian exports. One of the benefits for export industries will also be a review of trade remedy measures, first of all, anti-dumping duties, in accordance with WTO rules.[261]

It is much more difficult to calculate the consequences of Russia's WTO accession for its services sector.[262] Most Russian service providers are inferior to foreign service providers in terms of price, quality, diversity, etc. The dynamics of economic development in this sector depends not so much on WTO rules, but on the inflow of capital from both domestic and foreign investors.[263]

The regional benefits from Russia's WTO accession will depend on the involvement of particular regions in export activities. Export-oriented, developed, and frontier regions would be among those that would gain the most from accession.

A. Agriculture

Although Russia has immense land resources, due to its climate the conditions for agriculture are not favorable. In the 1990s, the domestic food industry was incapable of meeting Russia's demand in basic food products. In 1996, agricultural products represented 25 percent of imports and only 4 percent of exports. The share of agriculture in Russia's GDP declined from 15.4 percent in 1990 to 6.5 in 1997.[264] An enormous food deficit characterized those years. At present the biggest factories still depend on

[255] *See* Kushnirenko *supra* note 39, at 2.
[256] ECONOMIC CONSEQUENCES OF ACCESSION OF RUSSIA TO THE WTO FOR THE NATIONAL ECONOMY, *supra* note 207, at 8.
[257] The study took as its basis the level of tariffs proposed by Russia in its third goods offer in 2001.
[258] ECONOMIC CONSEQUENCES OF ACCESSION OF RUSSIA TO THE WTO FOR THE NATIONAL ECONOMY, *supra* note 207, at 9.
[259] *Id.*
[260] *Id.* at 8.
[261] This does not mean that the measures currently applied would be revoked.
[262] *See* ECONOMIC CONSEQUENCES OF ACCESSION OF RUSSIA TO THE WTO FOR THE NATIONAL ECONOMY, *supra* note 207, at 61.
[263] *Id.* at 9.
[264] NARAY, *supra* note 3, at 132.

imported inputs for their finished products.[265] However, the Russian agricultural sector has substantial potential for development. In many regions, agricultural producers already receive profits; some even export their production.

Farm support is one of the most difficult issues in the negotiations and it is crucial in the assessment of the impact of WTO accession on Russia's domestic industry. Given the current level of subsidization, Russian agricultural producers are skeptical that they will receive the amount of support that is being requested by the Russian government in the WTO negotiations, and realize that they will have to cope without large subsidies.[266]

Accession to the WTO is important for the development of Russian agricultural exports. Russian exporters face sophisticated forms of protection in the markets of WTO Members. Producers have expressed interest in receiving governmental support other than subsidies: such as the harmonization of Russian standards with EU standards.[267] Furthermore, effective credit and leasing systems could facilitate a significant increase in exports.

In conclusion, if the final level of liberalization commitments does not differ substantially from those currently proposed by Russia, accession is unlikely to adversely effect the domestic agricultural industry. Accession should also have some positive effects for consumers: the availability and quality of products will increase, and prices are likely to be lower.

B. Industry

The level of tariff protection is crucial for Russia's developing **furniture** industry.[268] Depending on the agreed level of tariff protection, a significant increase of competition is possible in this sector. At the same time, Russian producers count strongly on foreign investments to finance the development of furniture manufacturing in Russia. In this respect WTO accession should be beneficial for Russian producers in this sector as there would be more stability for investors. Moreover, the European Federation of Furniture Manufacturers believes that Russia is one of the most promising countries for furniture production.[269]

The Russian **pharmaceutical** industry increased its market share from 30 percent in 1997 to 50 percent in 2001.[270] The domestic pharmaceutical industry seeks now to increase its share to 70 percent. The negotiations in this sector have slowed due to the contradictory positions of the parties involved. Presumably, Russia will have to lower the level of tariff bindings it has proposed to Members.[271] Therefore, once Russia accedes to the WTO, competition in the pharmaceutical sector is expected to increase, but Russian consumers will benefit from the quality of imported products and they will be able to

[265] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, at 39.

[266] *See* Биржа, *supra* note 222.

[267] *Id.* On the launch of the TACIS program aimed at harmonising Russia's technical standards with EU standards *see* Регионы.Ру, *Россия сблизит технические стандарты с ЕС* (3 июля 2003), at http://www.wto.ru/ru/news.asp?msg_id=5392 (visited November 14, 2003).

[268] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, at 39.

[269] Екатерина Любавина, *Уроссийских мебельщиков появилась идея*, Коммерсант (30 августа 2002).

[270] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, p. 39.

[271] *Id.*

choose between Russian and imported medicines. Competition should also decrease prices.

In the **chemical** industry, competition is likely to increase significantly. Russian producers will probably experience competitive difficulties for products such as paints, polishes, auto-cosmetics and motor oils.[272]

Russia's **steel** industry is one sector that will benefit most from WTO accession due to the expected review of anti-dumping duties imposed on Russian products by WTO Members. However, the managers of Russia's leading steel producers state that accession would not be beneficial if Russia has to increase significantly domestic prices for energy inputs, as some of Russia's counterparts in the negotiations request.[273]

Russian **automobile** producers are not competitive in the world car market and they are among the strongest opponents of WTO membership. In the automobile industry, the situation remains unclear as to what level of tariff protection Russia will be able to negotiate. If Russia manages to negotiate a high level of tariff protection, foreign producers may be better served by producing or assembling their products in Russia rather than importing them.[274] Foreign investment in the automobile industry might further the development of new products by Russian manufacturers. Also an inflow of investment would result in a transfer of technology and know-how. These are reasons why Russia seeks to increase its proposed level of tariff protection.[275]

The technological level of foreign **civil aircraft** manufacturers is deemed to be superior to that of Russian producers. Moreover, Russian-made aircraft do not meet current noise reduction standards imposed by the industrialized countries. Due to the lack of a market for Russian civil aircraft there are no real prospects for the development of new aircraft. The production of new models requires at least 100 orders to be viable.[276] In this respect, WTO accession is unlikely to result in substantial change for this sector.[277] Moreover, due to the global crisis in the aviation industry, prices for leased foreign aircraft are low making it affordable for Russian airlines to lease foreign aircraft.[278]

The experience of developed countries shows that technologically advanced and innovative industries are key elements for a country's successful economic development and growth.[279] Russia has strong potential in some high-tech industries such as space technology, information technology based on complex mathematical methods, computer programming, mineral exploration, atomic energy, and military equipment and machinery.[280] However, these industries have stagnated in recent years due to a decrease in government orders and lack of consumer demand.[281] Development of these sectors should be a priority in Russia which now specializes mostly in the export of resources.

[272] *Id.*

[273] Personal interviews with managers of Russian metallurgic companies. *See* part II(E) *supra*.

[274] General Motors and Ford consider Russia one of most promising markets along with China, Brazil, South Korea, India, Mexico, Poland and Thailand (Финансовые известия, *Россию признали одним из самых перспективных авторынков* (18 марта 2003).

[275] Alexander Gordeev, Interview with German Gref, Russia's Minister of Economic Development and Trade, Vedomosti (July 22, 2003).

[276] Selivanova, *supra* note 60, at 9.

[277] *Id.* (based on personal interviews with Moscow-based aviation analysts).

[278] *See* Алексей Никольский, *Владимир Никитин: А с какой стати перевозчики должны помогать авиапрому?* Ведомости (9 июня 2003).

[279] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, at 74.

[280] *Id.* at 72.

[281] *Id.*

Currently, Russia does not have many possibilities to export high-tech products, due to the inability of Russian-made products to compete on the world market. There is a strong argument that WTO Membership is not beneficial for Russia until such industries have developed to a competitive level. From this point of view, early WTO accession might result in the stagnation or disappearance of industries that are in the initial stages of development, since they might not be able to withstand competition from more technologically advanced and cheaper foreign products.

Russia is insisting on protection for its high-tech industries. Nevertheless, the reduction of import tariffs on machinery using new technologies, innovative products, and services would lower the costs of domestic production of complex technological products, which require the use of imported input and know-how. Finally, accession to the WTO would create improved conditions for the development of cooperation in the form of joint ventures and joint research.[282]

C. Services Sector

Any quantitative assessment of the impact of Russia's accession on the services market is difficult, as the market is subject to the influence of numerous non-price factors.[283] However, "by improving the investment climate and by providing the restructuring of key services sectors, participation in the GATS could make an important contribution to economic growth".[284]

The services sector did not receive sufficient attention under the Soviet system.[285] This sector mostly consisted of "services linked directly to production in industry, agriculture and mining" whereas financial services and professional services have never developed.[286] After the start of reforms, the most rapidly developing services sectors were banking, accounting services and retail services.[287] Since the beginning of the transition process, the services sector has been of growing importance for Russia's economy. The share of services in GDP increased significantly during the 1990s, amounting to 55 percent of Russia's economy in 1998.[288] However, many Russian services sectors are still in their initial stages of development and the industry is in dire need of resources.

The development of a domestic services sector is crucial for the reform process and the construction of a thriving economy. Indeed, an efficient services sector could enhance the competitiveness of Russian goods exports as well as lead to the export of services.[289] Russian hotels, shops and insurance companies, among other sectors, are infamous for their low quality. The Russian services sector is one of the industries where competition is particularly needed to improve quality. Russia's accession would mean that Russian companies would be able to get first-hand experience from developed country service providers which should result in an improvement in the level of domestic Russian services. With the appearance of foreign operators in the services market, there would be an inevitable transfer of technology. This transfer would raise the quality of services provided by Russian companies to international standards. Other positive results from increased

[282] *Id.* at 75.
[283] *Id.* at 61.
[284] Smith, *supra* note 26, at 48.
[285] *Id.*
[286] Drabek, *supra* note 219, at 723.
[287] *Id.*
[288] NARAY, *supra* note 3, at 140.
[289] Smith, *supra* note 26, at 32.

competition are likely to include a better and broader choice of services available to consumers, and a decrease in prices. With more competitive services, Russia's export of services should also increase. Currently, Russia does not export many services; the trade deficit in the services area is around US$7–8 billion.[290]

Domestic service providers fear the dominance of sizeable, experienced and well capitalized foreign service providers. However, the immediate expansion of foreign service operators is unlikely. For companies to start operating in the new market not only the overall trade regime, but also the investment climate and the potential of the market to generate profits are crucial. Improvements in the investment climate and in the predictability of government policy-making will not be immediate. Moreover, in some sectors such as banking, a dramatic increase in foreign competition is unlikely as most important foreign players have already established themselves in the market and the market is already saturated. In general, the services sector is subject to international competition to a lesser degree than the goods industries.[291] Indeed, cultural and language factors, as well as the physical presence of service providers, make it easier for domestic companies to establish themselves in the market. Russian companies have a substantial advantage as they are familiar with the environment and specific conditions of doing business in Russia. While some sectors will experience competitive pressure from the expansion of foreign firms in the Russian market, "in other services industries the impact of foreign competition will be limited."[292] Competitive challenges are more likely in those sectors, where capital requirements are substantial and there are significant economies of scale.[293]

After its accession to the WTO, Russia's services laws and regulations should become more transparent and predictable. Russian companies will benefit from these changes as well. In most services sectors, Russia is trying to obtain a transition period. Gradual liberalization will leave domestic service providers time to become more competitive and to attract more financing. Its services sector should also attract substantial investment.[294] "Infant industries" tend to remain undeveloped if given indefinite transition periods; but if domestic companies know that the transition period is limited they will improve their level of services more rapidly. According to a recent study, the likely positive consequences of Russia's liberalization of its service sector are even larger than those resulting from its liberalization of trade in goods.[295]

The specific situation in various sectors is analyzed below.

1. Telecommunications

Improving the efficiency of the telecommunications sector is important in a growing economy like Russia's. An efficient telecommunications sector is "critical to the competitiveness of industries ranging from petroleum production to financial services to computer software manufacturing."[296] However, weak infrastructure is a problem for this sector and it needs significant investment to upgrade its technological level.

Foreign telecommunications companies are eager to obtain improved market access to the Russian market. The position of the Russian government is to defend the right

[290] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, at 62.
[291] Smith, *supra* note 26, at 32.
[292] *Id.* at 41. This is valid for retail stores and restaurants.
[293] *Id.* These sectors include financial services and telecommunications.
[294] Daniltsev *et al*., *supra* note 252, at 7.
[295] *Id.*
[296] Smith, *supra* note 26, at 44.

to maintain the Rostelecom monopoly for five years after its WTO accession.[297] If, following accession to the WTO, the growth of the Russian economy and business activity increases, there would be a stronger market for telecommunications services. It would thus be beneficial for Rostelecom to keep its monopoly position during the period immediately following accession. Already, the telecommunications market is developing at an extremely fast rate; the potential for future growth is enormous.

The impact of WTO accession on Russia's telecommunications industry, and more specifically the position of the Rostelecom monopoly, depends on the final level of commitments that Russia must undertake. A short transition period preceding the liberalization of the market would force domestic companies to increase their efficiency.

2. Financial services

The financial services sector is "fundamental to Russia's economic performance and growth" and its restructuring is "a critical issue in the economic reform process".[298] Russia's accession to the WTO should stimulate the inflow of investment capital and this will prompt the development of the financial services sector. However, there is a big debate in Russia on the extent to which it should open this sector as the ability of Russian companies to compete with foreign service providers is questionable.

(a) Banking. Presently, the Russian banking sector lacks capital and most Russian banks are incapable of withstanding competition from prominent international companies like Citibank and Deutsche Bank. Perhaps the only banks that would be able to resist such competition are those supported by the government, e.g., Sberbank and Vneshtorgbank.

There exists real potential for the expansion of foreign bank activity in Russia, and such an expansion might undermine the position of Russian banks. Some risks associated with WTO accession include predatory pricing by foreign competitors and a decrease in capitalization due to the transfer of capital abroad. However, the threat from expansion of foreign banks should not be exaggerated. Major foreign banks have been operating in Russia since the mid-1990s. This did not prevent small Russian banks from finding their niche in the market.[299]

One of the indisputable advantages of an increase of activity by foreign banks in Russia is increased access by Russian industries and agricultural producers to the credit resources provided by such banks. Currently, the credit market is underdeveloped in Russia and successfully developing companies experience difficulty finding loans at favorable terms. This problem should not be overestimated since only developed, profitable businesses would be likely to receive loans from foreign banks. Nevertheless, the development of an effective credit market should be perceived as a long-term benefit.

[297] *See* Part II (D.3) *supra*.

[298] Smith, *supra* note 26, at 44.

[299] According to its bilateral agreement with the EU (Agreement on Partnership and Cooperation Establishing a Partnership Between the European Communities and the Russian Federation, *supra* note 100, Annex 7(A)), Russia has granted national treatment to subsidiaries (with up to 100 percent foreign participation) of European banks. Despite this factor, the presence of foreign capital in the market has remained quite limited compared to most countries in Eastern and Central Europe. For instance, in Moscow the share of foreign banks in operations with physical persons is twelve percent, and their share in corporate loans is fifteen percent. These rates may be due to the high risks and unpredictability of the political and economic situation. *See* Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, at 64.

(b) Insurance. The Russian insurance sector is presently heavily protected. The need for such protection is debatable in light of the inferior quality of service provided by domestic companies. In general, this sector does not attract long-term investment and does not accumulate capital inside the country, as Russian insurance companies keep their capital abroad through a reinsurance system.[300] It is also questionable whether foreign providers pose a competitive threat. This doubt is illustrated by the fact that after the removal of the 49 percent limitation on foreign ownership in Russian insurance companies, there has not been any increase in foreign activity in the market. The market share of foreign firms on the Russian market remains at about seven percent.[301] This is partially explained by the introduction of new restrictions on the types of insurance that foreign insurers are allowed to provide.

Foreign insurance companies would most likely not participate in direct insurance in Russia immediately after accession. One study shows that despite its growth, the Russian insurance market is not significant in terms of its share of GDP, capitalization of companies, level of demand for services, and volume of transactions.[302] It cannot be compared with the more developed market of Eastern Europe. The reasons for this underdevelopment are the lack of a tradition of insurance, the low income level of the population, and the low profitability of companies.

Based on the above, it seems possible that a solid deal in the insurance negotiations is not crucial for the expansion of foreign insurance companies into the Russian market.[303] This process is contingent instead on Russia's overall investment climate and economic development. Nevertheless, there are indications that Russia's WTO accession would play a positive role in the long-term development of Russia's insurance sector. It would increase capitalization of the industry; attract new methodologies and know-how, and a more diversified range of services.[304] The liberalization would be positive in terms of the improvement of quality and the reduction of service prices. Currently, Russian companies largely reinsure their risks abroad. Therefore, the arguments regarding lack of capitalization, used by protectionist lobbies, are not persuasive. The government will have to decide on the regulation of reinsurance and the transfer of capital abroad.[305] However, restrictions in this regard would only be possible if an effective credit and fund market develops.[306] Finally, the crucial question for development of this sector will be whether Russia restricts the activity of foreign insurance company branches on its territory. If foreign companies have the possibility to provide services through subsidiaries, the liberalization would result in an increase in investment.

3. Transport Services

Russian transport service providers demand a high level of protection. However, competition from foreign service providers is already high in this sector.

[300] Олег Вьюгин, *Защищаться надо с умом*, Время МН (10 апреля 2002).
[301] Economic Consequences of Accession of Russia to the WTO for the National Economy, *supra* note 207, at 65.
[302] *Id.* at 64.
[303] *Id.* at 66.
[304] Игорь Томберг, *Страхование: либерализация неизбежна и желательна*, Politcom.Ru (31 июля 2002).
[305] Олег Вьюгин, *supra* note 300.
[306] Олег Вьюгин, *Защита для финансистов?* Ведомости (11 марта 2002).

Russian rail transport companies do not provide a high quality of service.[307] Cargo losses and slow service characterize this sector. After accession, there will be a liberalized transport regime and Russian rail transport companies will need to improve the quality of their services to remain competitive. Russian transport companies have an undeniable comparative advantage in terms of the knowledge of country-specific problems and business conditions.[308] Moreover, it is highly likely that foreign service providers will not enter the market immediately after accession.

4. Other Service Areas

Many Russian service providers have developed a level of services that is already competitive by western standards. This is the case for such areas as audits, consulting and computer services. Russian service providers are much less expensive than foreign service companies, and the quality is comparable, and sometimes even higher, as Russian companies know better the Russian-specific conditions of business.[309] In computer services, domestic service providers have found their market niche. They are successfully developing accounting and taxation, education, and search programs, electronic games and anti-virus programs. Some of these products, including electronic games and anti-virus programs, are being exported.[310] For many Russian companies, WTO accession would not have any adverse effects and, on the contrary, would mean improved export market access.

Foreign capital is important for development of the retail services sector. Notably, the industry spans the whole country, while so far only Moscow and St. Petersburg have attracted significant foreign investment in this area. With the entry into the market of foreign service providers, competition will significantly increase and Russian companies will not be able to obtain their current high-profit margins. For instance, the German retailer and wholesaler Metro now sells products with a price mark-up of 8 percent on the wholesale price, whereas Russian medium-sized shops have a 12–15 percent price mark-up.[311] The perception of Russian wholesalers and retailers are different; many Russian companies ask the government for protection, but others think that the market in this sector is huge, and that they will be able to find their niche. With the entry into the Russian market of big foreign wholesalers and retailers, small- and medium-sized Russian shopkeepers will experience problems, as more consumers will turn to large retailers for their shopping needs. This process has already begun.

Russia lacks a developed infrastructure to attract significant tourism. Although many tourist operators are currently on the market, they mostly provide services related to tourism abroad; tourism within Russia is not developed. Russia's accession to the WTO is important for the development of its tourism sector, which has an enormous potential. In 1999 Russia received only US$3.7 billion from tourism, which constitutes only 0.9 percent of the world export of tourism services.[312] Liberalization after WTO accession (bilateral negotiations in this respect are ongoing), will mean that foreign tour operators, most notably from Eastern Europe and the EU, are likely to enter the Russian market. This would result in a significant decrease in prices for tourist services.

[307] ECONOMIC CONSEQUENCES OF ACCESSION OF RUSSIA TO THE WTO FOR THE NATIONAL ECONOMY, *supra* note 207, at 69.
[308] *Id.*
[309] *Id.* at 67.
[310] *Id.*
[311] *Id.* at 68.
[312] *Id.*

However, the threat to domestic service providers is not substantial as the market in this area is quite large and would develop further as more consumers enter the market, which is at this time not possible due to high prices. Tourism is an area that would benefit most from capital inflows. In the past, foreign investors have largely financed the construction of hotels in Moscow and St. Petersburg. So far, this construction has focused on higher-end accommodations. In the future, this process is likely to expand to other regions and also to medium-end hotels.[313] This change would stimulate the development of the tourism sector in Russia, which is now largely limited to Moscow and St. Petersburg.

The threats to the service sector from accession are definitely exaggerated and driven by protectionist lobbies. The development of a competitive services industry is important for the Russian economy. Therefore, although some industries would need a certain degree of protection, this level of protection and the length of an eventual transition period should be carefully balanced against the general development of a services industry.

In the long-term, the services market in Russia would benefit from WTO accession. Capital inflows and increased investment would facilitate its development. As for domestic service providers, they would inevitably face increased competition and many companies would have to increase efficiency or face bankruptcy. Nevertheless, the market is so large that in many areas, domestic service providers will be able to occupy a certain niche.[314]

D. Labor Market

Accession to the WTO and a liberalized regime for foreign companies and products are often associated with increased unemployment due to the bankruptcy of inefficient domestic companies. According to forecasts, the unemployment rate might increase in some sectors by up to twenty percent.[315] Russian officials estimate that its WTO accession might result in unemployment of up to 10 million people.[316] The increase in unemployment due to trade liberalization is difficult to calculate, as many inefficient producers will have to restructure in any event. For instance, it is estimated that the forthcoming restructuring of the steel industry will result in 350,000 job losses.[317] The number of job losses due to companies going out of business is significantly lower than the number of people that will quit voluntarily—due to low salaries which make the economic difference between being employed and unemployed less distinguishable.[318] However, due to an increase in foreign investment and the increase in economic development that should result from Russia's accession, employment opportunities in Russia should, in the long-run, increase. The entry into the market of foreign companies and service providers will also have a positive effect on the labor market in terms of an increase in the pay of Russian employees.

[313] *Id.* at 69.

[314] For instance, currently, in some areas foreign companies specialize in the provision of services to foreign clients and do not work with Russian companies. This situation has however started to change. For example, large Russian companies are now starting to use the services of foreign consultants and law firms.

[315] Эрлен Берштейн, *Безработица*, Время МН (22 августа 2002).

[316] ИТАР-ТАСС, *Российский премьер-министр высказывается за членство в ВТО с определенными оговорками* (25 марта 2002).

[317] Эрлен Берштейн, *supra* note 315.

[318] *Id*.

V. The Impact of Russia's Membership in the WTO on the Multilateral Trading System

The accession of Russia to the WTO would strengthen and further enhance the multilateral trading system, which cannot truly be called "global" whilst Russia remains outside. After the accession of China in 2001, Russia is now the largest country outside the WTO. Apart from the systemic impact Russia's accession to the WTO would have on the whole trading system, many Members view Russia as an export market with significant potential. Over the past decade, companies from different countries around the globe have found Russia to be an attractive market for investment. Many of these companies later withdrew from Russia after experiencing enormous difficulties in doing business there. However, a market of 170 million consumers represents a substantial export market for many companies. Being an extremely large country, and rich in both raw materials and qualified human resources, Russia has substantial potential for attracting both categories of investors: those who are interested in producing goods in Russia and supplying to the Russian market, as well as those intending to export the products they manufacture in Russia. Therefore, changes in Russia's trade regime and economic policy, which will result from its eventual accession are of great significance to many Members.

Bureaucracy, corruption, complicated administrative procedures, a complex tax system, the lack of an effective dispute resolution mechanism and an inefficient judicial system, a lack of stability and predictability within the regime and the ineffective protection of property rights are cited among the problems which limit the flow of foreign investments into Russia. However, over the past few years the international image of Russia has vastly improved. Political stability and the government's emphasis on the need for reform, and ever more concrete actions to implement such reforms, have led to a greater interest in Russia on the part of foreign companies. Russia's effort to accede to the WTO serves as an external mechanism to speed up its reforms and one can already see the positive results of such reforms. However, until its accession process has been completed it is impossible to discuss the security and predictability of Russia's trade regime. Only legally binding international commitments would secure market access for foreign companies.

Foreign companies already operating in Russia are supportive of a speedy Russian accession to the WTO. Evidence of this is shown in the efforts made by foreign companies, presently in Russia to facilitate the accession process, which argue that the EC and the United States should grant Russia market economy status.[319]

Another important benefit for WTO Members is the possibility of lodging complaints before the WTO Dispute Settlement Body about trade restrictive measures taken by Russia. As long as Russia remains outside the multilateral trading system, very little can be done to reverse unfavorable Russian trade practices and policies towards foreign companies within and outside Russia. Of course, a certain degree of political pressure could help in solving trade disputes, but this goal is not easy to achieve if the restrictive

[319] The American Chamber of Commerce in Russia played a significant role in support of Russia's effort to secure for its imports equal treatment with other developed countries. For instance, AmCham filed an extensive legal brief and testified in favor of granting Russia market economy status at the International Trade Administration's public hearing. AmCham works to impress upon the government negotiators that Russia should be treated as fairly as possible. Moreover, Russia may need some form of protection, consistent to that given to other countries in the past, in view of its rapid transition to a market economy over a very short period of time (Interview with Andrew B. Somers, President, American Chamber of Commerce in Russia).

measures are taken by a large economy and a significant player in world politics, like Russia.

VI. Conclusion

Smaller countries usually find the process of WTO accession easier than larger economies.[320] Perhaps this is explained by the fact that, firstly, small countries cannot afford a protectionist regime in the same way as larger countries can;[321] and secondly, that Members tend to make more demands on larger economies acceding to the WTO in order to gain maximum benefit from the liberalization of market access. However, the majority of countries have experienced delays in all stages of the accession process.[322] It is true that in the case of any country's accession to the WTO, especially a large country like Russia, many interests are involved. While generally the accession of a country to the WTO may be of paramount importance to the national interests of WTO Members, and in the case of larger countries to the operation of the international trade system itself, "accession cannot occur until the particular commercial interests in all countries are satisfied."[323]

It is also true that the process of adopting new, WTO-compliant legislation, and the creation of institutional capacities, are the most time-consuming and technically difficult tasks that acceding countries must tackle. However, Russia has already adopted its major legislation in conformity with WTO norms. Now the question lies in the systematization and repeal, where appropriate, of numerous instructions of ministries and other governmental agencies in order to bring these regulations into compliance with new legislative norms.

It is difficult to predict when Russia's accession negotiations will be completed. Russian negotiators have underscored the position that the terms and conditions of Russia's accession must be based on the so-called standard WTO requirements, i.e., only on the rules and provisions of the multilateral trade agreements of the Uruguay Round. Moreover, it has been emphasized that accession terms should be based on a realistic perception of the Russian economic situation, and ensure the necessary protection for national producers while fostering an adequate competitive environment. It is possible that, due to new difficulties which constantly arise in negotiations, the process might be significantly delayed. Russian negotiators claim that new, additional, non-standard requirements, which have never been presented to other countries, continue to appear.[324] Russian officials have asserted that requirements for Russia are much higher than before,

[320] Michalopoulos, *supra* note 67, at 26.
[321] *Id*.
[322] *Id.* at 27.
[323] *Id.* at 32.
[324] Discussions on the accession process were held on a number of occasions, for instance, at the Ministerial Conferences in Singapore in 1996, in Geneva in 1998 and in the General Council on December 10, 1998. The positions of Members on terms of accession differ. Some Members indicate that Article XII placed no limits on the terms, which were to be developed through negotiations with current Members. Many Members say that the accession of new governments should strengthen the system, not weaken it, and that acceding governments must demonstrate their willingness to comply fully with the WTO rules upon accession. Interestingly, some speakers stressed that acceding governments should not be asked to undertake more stringent obligations than present WTO Members (so-called "WTO-plus" obligations) as it would be an abuse of economic power. *See* WT/ACC/7, *supra* note 25.

especially during the Uruguay Round.[325] However, other countries, which have recently joined the WTO faced similar demands. This new situation, however, does not mean that the conditions of accession should not take into account special situations related to the transitional nature of the economy.[326] Time is needed to introduce WTO-consistent economic strategies and implementation mechanisms. Commitments that ignore existing macroeconomic instabilities, and poorly developed economic, legal and social institutions cannot be sustained. It is not in the interest of Members to impose unsustainable obligations on Russia. The objective should be to reach terms of accession that provide for a substantial but sustainable degree of liberalization.[327]

It is in Russia's interest to complete the negotiations as soon as possible in order to participate as a full Member in the Doha Round of negotiations, which encompass many areas of crucial importance to the country. However, the number of outstanding issues remains large and agreement must be reached on the most controversial of them. While in the past Russian politicians specified the timeframes they sought for the conclusion of the negotiations, recently they have put greater emphasis on the acceptable terms of accession, no matter how long it takes to reach agreement on the right conditions. It is possible that this approach is due to the opposition, which still exists from some industries, to Russia's early accession to the WTO, as well as due to the Russian presidential elections to be held in 2004.[328]

Prior to the beginning of the Doha Round it was emphasized that if Russia does not succeed in completing negotiations before the Round begins, its accession might be delayed for several years. The Round has begun and it is still conceivable that Russia could accede during the Round, but it will be difficult, especially since the focus of attention will shift to multilateral negotiations.[329] Therefore, much will depend on the willingness of Members to divert some of their attention to Russia's accession during the ongoing trade talks.

[325] Statement of President Putin, October 2, 2001, PRIME-TASS Information Agency, Brussels: Russia "will accede to the World Trade Organization only on standard conditions and does not agree with the requirements presented that no other candidate-country faced".

[326] During the meeting of the General Council on December 10, 1998 it was generally recognized that "the balance in each accession was to accommodate the special situation of the acceding government on the one hand, and to maintain the credibility of the WTO system on the other". *See* WT/ACC/7, *supra* note 25, at 5.

[327] NARAY, *supra* note 3 at 149, 107 and 150. *See also* Drabek, *supra* note 219, at 743.

[328] Selivanova, *supra* note 20. *See* Игорь Томберг, *Россия и ВТО: риски накануне выборов*, http://www.politcom.ru/2003/analit28.php (visited November 14, 2003).

[329] Michalopoulos, *supra* note 67, at 34.

CHAPTER 78

SINGAPORE

Barry Desker*

TABLE OF CONTENTS

I. Introduction 336
II. Singapore's Accession to the GATT 336
III. Participation in the Uruguay Round 338
A. Background 338
B. Singapore's Policy Goals in the Uruguay Round 338
C. Outcome of Negotiations 339
1. Market Access Commitments 339
2. Market Access Outcomes 339
D. Success in Achieving Uruguay Round Goals 340
IV. Effect of GATT/WTO Membership and the Uruguay Round on Singapore 341
A. Economic Effects 341
B. Political Effects 341
C. Social Effects 341
D. Legal Effects 342
Table
TRIPS Compliance Legislation 342
V. Present Attitude of Citizens, Businessmen, and Political Leaders Towards the WTO 342
VI. Strengths and Weaknesses of the WTO From Singapore's Perspective 343
VII. Singapore's Involvement in the WTO Dispute Resolution Process 343
VIII. Principal Issues Singapore Would Like to see Taken Up in the Next Round 344
IX. Strategies to Accomplish Singapore's Objectives in the Next Round 345
X. Singapore's Involvement in Regional Trading Arrangements ("RTAs") ... 345
XI. Development of Trade Policy in Singapore 348
XII. Conclusion 349

* Barry Desker is the Director of the Institute of Defence and Strategic Studies, Nanyang Technological University, Singapore, and he was the Chief Executive Officer, Singapore Trade Development Board from 1994–2000.

I. Introduction

In a statement at the commemoration of the fiftieth anniversary of the GATT during the Second WTO Ministerial Conference in Geneva on May 19, 1998, Goh Chok Tong, Prime Minister of Singapore stated, "The GATT and an open multilateral trading system have enabled nations to compete peacefully without the need to resort to wars in order to carve out trading empires to keep out economic rivals. The WTO must now carry this responsibility. It can do so successfully if it is clear on what it can and should achieve in pursuing its fundamental objective of multilateral trade liberalization". Singapore has been a strong systemic supporter of the WTO and a consistent advocate of multilateral trade liberalization.

Trade is Singapore's lifeblood. With a tiny domestic market, the world has become Singapore's hinterland and market. Imports and exports account for three hundred percent of Singapore's GDP. Since 1979, total trade has grown approximately seven times, reaching a total of S$470 billion (equal to approximately US$272.6 billion) in 2000. For a country so plugged into the global economy, maintaining an open international trading system is fundamental. Singapore therefore places a high priority on the strengthening of multilateral trading institutions.

II. Singapore's Accession to the GATT

Singapore joined the GATT in 1973. This marked an important point in Singapore's economic development, and the arrival at that decision was due to both political and economic circumstances.

In 1963, the United Nations Bureau of Technical Assistance, which conducted an Industry Survey Mission to assess the economic situation in Singapore, was highly pessimistic about the prospect of an expansion of international trade in meeting Singapore's need for economic growth. Influenced by the Prebisch-Singer hypothesis[1] of the secular decline in the terms of trade of developing countries, the Mission suggested that the Singapore economy could stand on its own. It recommended an expansion in manufacturing to solve the unemployment problem, which arose from a rapidly growing population shaking off the colonial atmosphere marked by financial stringency and decaying infrastructure.

Hence the political leadership in Singapore followed the conventional wisdom among post-colonial states of embarking on an import-substitution strategy to promote industrial development. There was a temporary abandonment of the principle of free trade on which the city's entrepot economy had been based since its foundation, in favor of import tariffs and quotas to provide protection for "infant industries".

This period of import substitution was however, short and mild. Such a policy was obviously constrained by Singapore's entrepot tradition, the high degree of import dependence and the very small size of the domestic market. After political separation from Malaysia in August 1965, the industrialization strategy shifted rapidly to emphasize export development and labor-intensive manufacturing instead of import substitution within a Malaysian common market. A Malaysian hinterland and dependable market was no longer viable as the Malaysian government closed its market to preferential access for Singapore-made goods.

[1] The Prebisch-Singer hypothesis contended that there is a structural tendency for the terms of trade of developing countries to deteriorate because of the concentration of their exports in primary commodities. Advocates of this hypothesis support import-substituting industrialization for the developing countries, with high import tariffs and protection of infant industries.

The only alternative was clear: industrialization aimed at manufacturing for export to world markets. Enterprises producing for export would have to be efficient enough to meet competitive prices in foreign markets. Export-growth strategies were pursued vigorously. It was therefore a matter of pragmatically adapting policy to changing equations. The new outward-looking development philosophy and strategy, conditioned by Singapore's small size, geographical location astride major international shipping and air routes, traditional entrepot role, and historical immigration in response to the free trade opportunities of the nineteenth century and early twentieth century, yielded rewarding results.

This export-led growth was helped by an expanding world economy unfettered by restrictions on trade and investments. Liberalization of trade in the developed countries through the Kennedy Round, and concessions attained as a developing country through the Generalized System of Preferences, also helped to ensure market access of Singapore-made products. Openness to foreign investment and international trade at a time when other developing countries emphasized import substitution, restrictions on foreign investments, and tight foreign exchange controls resulted in Singapore emerging as a favored destination for investment by multi-national corporations.

The 1973 oil crisis however, had a dampening effect on Singapore's rapid economic growth. The GDP growth rate fell from 11.5 percent in 1973 to 4.1 percent in 1975. Singapore's export strategy had made the economy more vulnerable to the worldwide recession. Rising protectionism in the leading industrialized countries, restrictions on imports of textiles, clothing, footwear and electronics (the growth industries for Singapore in the early seventies), and unfavorable changes in Singapore's terms of trade aggravated the problems.

Accession to the GATT was therefore viewed as valuable in ensuring market access into key international markets. It was a brief and relatively painless process—essentially the only Agreement that needed to be implemented was the GATT 1947. Singapore's regime with respect to trade in goods was already liberal, with the general absence of trade restraints or restrictions, so that it had to make few concessions in order to join. Singapore elected to join as a developing country and participated in the Group of 77.

The Tokyo Round was Singapore's first direct (albeit limited) involvement in multilateral trade negotiations. Like other developing countries, Singapore supported the demand for more favorable treatment for developing countries, including an exemption from the need to reciprocate tariff concessions by developed countries. However, this outcome enabled developed countries to entrench GATT-inconsistent policies, for example, in textiles, which discriminated against imports from Singapore and other developing countries. It also allowed the developed countries to maintain higher duties on items of export interest to the developing countries, including Singapore.

Singapore established an office of the Permanent Representative to the United Nations in Geneva in 1973 to handle the UN agenda, multilateral trade negotiations and export promotion. Exposure to the Tokyo Round negotiations demonstrated to Singapore the significance of GATT negotiations and the importance of effective representation in Geneva. It was only at the completion of the Tokyo Round in 1979 and the subsequent implementation of the MTN agreements that Singapore commenced active participation in GATT. By the 1982 GATT Ministerial Meeting in Geneva, Singapore had already gained such respect as a trading nation and as a participant in the GATT negotiating process that Singapore was invited to be a member of the informal "Green Room" consultations. As a member of the Green Room, Singapore was actively involved in the Uruguay Round negotiations.

III. Participation in the Uruguay Round

A. Background

The failure of the 1982 GATT Ministerial Meeting brought on a determined drive by major developed countries to launch a new round of multilateral trade negotiations. The intention was for this new round (the Uruguay Round as it was known subsequently) to include new areas such as services, as well as to bring greater discipline to agriculture. Taken together with the traditional tariff and non-tariff liberalization issues as well as issues of interest to developing countries, the agenda for the proposed new round was more complex than in previous trade rounds, and hence more difficult to agree on. In particular, the inclusion of services, which was pushed by the United States, was seen by many developing countries as a new unexplored area. It was also an area in which developing countries saw little benefit, given their preoccupation with traditional market access for their goods such as textiles. On the other hand, without the inclusion of services, the new round was a non-starter for the United States.

With the expected slowdown in the global economy and possible rise in protectionism in the mid-1980s, Singapore supported a new round of trade negotiations. At that time, Singapore was also experiencing its first post-independence recession. The need to keep the liberalization of trade moving forward was imperative for Singapore whose dependence on trade was substantial. Failure to agree to negotiate was seen as likely to lead to backsliding of market access commitments, especially by the OECD countries.

From Singapore's point of view, the inclusion of services was not a problem *per se*. Their inclusion would be without prejudice to the negotiations, once the new round was launched, and to the position of GATT member countries. The battle would be during the negotiations. This was a different position from that taken by some of the major developing countries which opposed the inclusion of services. On the whole, Singapore considered that the proposed new round, with the inclusion of agriculture, clarifications with respect to trade remedies, and issues of interest to developing countries, would be beneficial to all. The range of issues for negotiation provided opportunities for trade-offs as successful negotiations required a package deal approach.

With this objective in mind, Singapore took the lead in bringing together a small group of developing countries to negotiate a draft Joint Ministerial Declaration with the OECD countries. Active in this group were all the ASEAN countries, as well as the Republic of Korea, Argentina, Colombia, Chile, Uruguay and Mexico. The draft formed the basis for the Uruguay Round Declaration at Punta del Este, Uruguay, where ministers from all the GATT member countries met in September 1986. Several important developing countries such as India and Pakistan were not initially in favor of a new round. However, they eventually joined in the consensus to launch the Uruguay Round.

B. Singapore's Policy Goals in the Uruguay Round

The Uruguay Round ("UR") negotiations were a major exercise aimed at expanding the major provisions of the GATT and the Tokyo Round Agreements, and eradicating the existing shortcomings of the trading system. These shortcomings included continued high tariffs in industrial products, including tariff peaks and tariff escalation, increasing application of non-tariff barriers, the exclusion of agriculture from the GATT disciplines, the exclusion of textiles and clothing from the "normal" GATT rules and the negative impact of the Multi-Fibre Arrangement, and the weak dispute settlement machinery.

The negotiations were also intended to counter growing protectionist pressures in the developed countries, especially in the United States.

Singapore participated with the overall intention of further liberalizing global trade and ensuring strengthened rules governing the conduct of such trade. This was essential to protect Singapore's interests as a small nation heavily dependent on a free, open and stable international trading system, which would prevent unilateral protectionist actions by trading partners. Like other committed free traders, Singapore believed that it was essential to maintain the momentum in favor of further trade liberalization if the multilateral system was to avoid the roll back of concessions because of domestic political pressures.

Singapore's main policy objectives in the UR negotiations were:

- to secure benefits from the market access negotiations
- to enhance transparency in global trade transactions
- to ensure that rules in new areas, i.e. services and TRIPS, would provide a predictable and legal environment conducive to world trade expansion
- to improve the dispute settlement system so that it would become more effective in resolving trade disputes

C. Outcome of Negotiations

1. Market Access Commitments

Singapore committed in the Uruguay Round to increase its tariff bindings from almost none to seventy percent of all tariff lines in the industrial and agricultural sector, binding at zero rate in sectors such as agriculture equipment, construction equipment, steel, pharmaceuticals and furniture and medical equipment. The average bound rate of industrial tariff lines was approximately 5.1 percent. Agriculture tariff lines, with the exception of tobacco and liquor products, were bound at a ceiling rate of ten percent.

In services, Singapore's schedule of commitments covered 61 sectors, including a revised schedule on financial services.

2. Market Access Outcomes

Some of the most significant market-opening measures affecting Singapore resulted from post-UR negotiations. The Information Technology Agreement ("ITA I") was concluded during the first WTO Ministerial Conference held in Singapore in December 1996. ITA I resulted in $1.49 billion of accumulated tariff savings for Singapore-based companies when the elimination of tariffs was fully implemented by January 1, 2000. ITA I covered five main categories of products, namely, computers, telecommunications products, semiconductors, semiconductor manufacturing equipment and scientific equipment. The conclusion of these negotiations at a major conference in Singapore that directly benefited Singapore-based companies reinforced domestic political support for the WTO process. As electronics exports comprised 68 percent of non-oil exports in 1999, Singapore actively supported ITA II negotiations aimed at extending product coverage, given the rapidly changing technologies and the convergence of consumer electronics with other inter-active multi-media products. However, progress in negotiations has been slow. Singapore also played an active role in supporting a political declaration at the second WTO Ministerial Conference in Geneva in May 1998 that provided for zero tariffs on electronic commerce.

At the close of the UR, market access negotiations in four key services areas—financial services, movement of natural persons, basic telecommunications and maritime transport services—were extended as key participants were dissatisfied with the level of market-opening measures. As a demander in the area of maritime transport services, Singapore was disappointed with the decision in June 1996 to suspend negotiations until 2000. However, Singapore demonstrated its commitment by reinstating its 1993 offer, which allows market access to ships calling at Singapore. As the movement of natural persons is a very sensitive domestic issue in most states, there was little progress in this area when the negotiations were concluded in 1995.

The Agreement on Basic Telecommunications entered into force in February 1998. Two key aspects of this agreement are commitments by many participants to (i) allow infrastructure-based international competition, i.e. to allow foreign companies to build and operate their own hard facilities, and (ii) apply pro-competitive rules in their telecommunications markets. Singapore committed to liberalize its local and international basic telecommunications on a facilities basis from April 2000. Singapore also committed to grant two licenses in 1998 for the provision of these services in the year 2000. For Singapore, the liberalization of global telecommunications markets also facilitated the international expansion of Singapore's telecommunications providers.

The Agreement on Financial Services came into force in March 1999. The combined commitments of the seventy participating governments cover an estimated 95 percent of global financial services activities. Singapore's commitments included the relaxation of restrictions on the commercial presence of foreign financial service suppliers, and the reduction of existing limitations on the types and range of services opened to foreign financial service suppliers. The wide coverage of these liberalization measures under the Agreement provides significant overseas market access for Singapore banks and financial institutions.

D. Success in Achieving Uruguay Round Goals

Singapore regards the overall results of the Round and the establishment of the World Trade Organization as positive. The Uruguay Round Agreements have enabled GATT/WTO rules to adapt to changes in the international trading environment, for instance, in setting up the new framework governing the significant expansion of trade in services. The wide-ranging agreements renewed confidence in the multilateral process, fostered the integration of the developing countries in the global trading system and diminished pressures for unilateralism, especially in the United States.

Faithful implementation of WTO commitments by member countries also resulted in improved market access for Singapore's goods and services. The official estimate was that US$333 million of accumulated potential tariff savings would result from Singapore's exports to its major markets. The conclusion of the negotiations in financial services and basic telecommunications reinforced unilateral liberalizing initiatives in Singapore aimed at improving Singapore's global competitiveness.

However, it was observed that there were two drawbacks from the perspective of the multilateral trading system. First, despite expanded rules on trade remedies, there has been an increase in the use of anti-dumping and safeguards measures as additional trade protection instruments. Secondly, a number of developing countries, especially the least developed countries, have yet to derive real economic gains from the UR agreements while facing immediate costs of implementation as a result of the regulatory provisions of the UR agreements.

IV. Effect of GATT/WTO Membership and the Uruguay Round on Singapore

A. Economic Effects

As a small economy highly dependent on trade, the open and rule-based multilateral trading system created by the WTO has contributed vitally to the economic well-being of Singapore. It is the most trade-dependent economy in the world, with a trade to GDP ratio of approximately three to one. Singapore is therefore reliant on the WTO to ensure that sound multilateral rules protect against discriminatory bilateral or unfair unilateral trade measures, such that Singapore's traded goods and services can flow freely with minimum impediment.

Within this necessary stable multilateral framework, Singapore benefited significantly from the reduction in tariff barriers through the numerous GATT rounds, which has provided increased market access and trading opportunities for its goods and services. The existence of a strong legal system and the implementation of WTO agreements on intellectual property rights attracted multi-national corporations specializing in the pharmaceuticals, biotech and electronics industries to develop manufacturing and research platforms in Singapore.

B. Political Effects

Active participation and support of the GATT and WTO has enhanced Singapore's stature as a respected player in these forums. The successful hosting of the inaugural WTO Ministerial Conference in December 1996 also contributed to sealing Singapore's presence in the annals of WTO history. The consultative process adopted by Singapore in preparing for the Singapore Ministerial Conference prepared the way for effective negotiating outcomes during the Conference as a wide range of views were canvassed and likely solutions tested with a range of participants in the WTO. The decision to adopt the logo of the Singapore Ministerial Conference as the logo for the newly established WTO is emblematic of Singapore's role in contributing to WTO processes.

From the GATT/WTO perspective, Singapore was perceived as a strong supporter of the multilateral trading system. Singapore supported the strengthening of WTO institutions, including the creation of an effective secretariat, the enhanced role of the WTO Director-General, the establishment of the General Council with strengthened powers and the establishment of a dispute resolution machinery with effective powers. The Permanent Representative of Singapore, K. Kesavapany, was the first Chairman of the General Council after the establishment of the WTO in 1995 and played an instrumental role in the informal consultations leading to the selection of the first WTO Director-General, Renato Ruggeiro of Italy. Kesavapany also secured the unanimous support of the General Council for Singapore's offer to host the inaugural WTO Ministerial Conference.

C. Social Effects

There were no direct social effects resulting from Singapore's GATT accession. Singapore's economic strategy has never been based solely upon openness to trade, but has encompassed, *inter alia*, the creation of necessary infrastructure and systems and the embracing of technological change to support an overall modern economy. The GATT processes were therefore crucial but not unique to Singapore's economic development. The focus of the Singapore Government was on educating the domestic public and encouraging an adaptation to new international environments. The domestic changes

arising from the implementation of the UR agreements, including the implementation of TRIPs, TRIMs and the Agreement on Textiles and Clothing, was hence never attributed to forced acceptance of GATT/WTO institutions.

D. Legal Effects

Singapore has not encountered much difficulty with bringing its legislation into conformity with the WTO Agreements. The legislative changes were considered necessary to ensure adherence to Singapore's GATT/WTO obligations and responsibilities as a signatory.

The most significant legislative changes for Singapore arising from the Uruguay Round were in the area of the protection of intellectual property. Ten laws were passed covering copyright, trademarks, geographical indications, layout-designs of integrated circuits and test data. With the promulgation of these laws, Singapore fulfilled the commitments that it undertook to implement the WTO Trade-Related Intellectual Property Rights Agreement by January 1, 1999, one year ahead of the WTO deadline.

TRIPS Compliance Legislation

Legislation	Passed as Law on
Medicines (Amendment) Act	February 19, 1998
Copyright (Amendment) Act	February 19, 1998
Copyright (Amendment) Regulations 1998	February 19, 1998
Copyright Tribunal (Procedure) (Amendment) Regulations 1998	February 19, 1998
Copyright (International Protection) (Amendment) Regulations 1998	February 19, 1998
Copyright (Border Enforcement) Regulations 1998	February 19, 1998
Trade Marks Act	November 26, 1998
Trade Marks Regulations	November 26, 1998
Geographical Indications Act	November 26, 1998
Layout Designs of Integrated Circuits Bill	January 15, 1999

V. Present Attitude of Citizens, Businessmen, and Political Leaders Towards the WTO

The WTO is perceived in Singapore as a necessary institution to ensure open global markets. The population has always recognized Singapore's limited resources, which necessitates increased external economic linkages. Because of Singapore's dependence on international trade, openness to foreign investment and commitment to the strengthening of multilateral institutions, there is strong domestic support for multilateral institutions such as the WTO. The openness of Singapore to external influences results in a positive attitude towards the globalization values advanced by the WTO and other international organizations. This positive reaction was seen during the first WTO Ministerial Conference held in Singapore in December 1996, which was successfully organized with the strong backing of its political leaders, businessmen and citizens.

There are no strong institutional interests in Singapore opposed to globalization and the expanded jurisdiction of multilateral economic institutions such as the WTO. Participation in WTO negotiations has not been a domestic political issue. The business

community is closely consulted on developments in the WTO and is represented on the Boards of the major economic agencies such as International Enterprise Singapore (the former Singapore Trade Development Board) and the Economic Development Board. The trade union movement has been supportive of trade liberalization as it recognizes that Singapore has benefited from the expansion of international trade. Unlike trade unions in the West, the National Trade Unions Congress of Singapore has opposed the inclusion of labor standards on the WTO agenda as such measures would undermine the comparative advantage of the developing countries.

VI. Strengths and Weaknesses of the WTO From Singapore's Perspective

Singapore believes that the WTO continues to be an important institution that sets the rules for and enshrines the mandate of ensuring unfettered trade flows, which enhance global prosperity. The multilateral character of the WTO enables trade-offs during negotiations and the crafting of win-win solutions. The GATT/WTO has achieved much in eliminating trade barriers, particularly tariffs. The tremendous challenge for it is to continue to achieve overall trade liberalization, in the light of pressure from increased accessions, socio-political sensitivities and objections, loss of confidence from developing countries, and the consequent difficulty in gaining consensus. There will be increasing pressure on the WTO to fulfill the competing objectives of promoting global trade liberalization and strengthening the global regulatory environment.

From Singapore's perspective, the establishment of the WTO was a major development in the creation of a global economic architecture. While the GATT was a set of rules, the WTO is an institution with a permanent secretariat. While the GATT was applied on a provisional basis, WTO commitments are permanent. They apply to trade in services and trade-related aspects of intellectual property as well as merchandise trade. The "package deal" approach resulted in most commitments involving the entire WTO membership.

A significant innovation of the WTO work program is the Trade Policy Review Mechanism ("TPRM"). Singapore strongly supported the surveillance of national trade policies undertaken in the TPRM and volunteered to be the first developing country to undergo a review. It was believed that such monitoring would increase the transparency of trade policies and practices, create improved public awareness of critical trade policy issues and provide a multilateral evaluation of the impact of domestic policies on the global trading system.

Because of the effectiveness of the WTO dispute settlement machinery, environmental and labor standards activists are attempting to bring these issues within the WTO ambit. The renewed focus in the WTO on issues such as competition policy, creating a level playing field for foreign direct investment, intellectual property rights and trade remedies will make future negotiations more difficult to conclude. Increasingly, the WTO is becoming involved in aspects perceived as falling within the domestic jurisdiction of states rather than cross-border issues. Earlier rounds of negotiation that focused on tariff reduction were easier to conclude than post-UR negotiations with their deeper and wider agenda.

VII. Singapore's Involvement in the WTO Dispute Resolution Process

Singapore has initiated just one dispute action, which was resolved at the consultations stage. Singapore's action against Malaysia arising from Malaysia's Approved Permit Scheme for the import of polypropylene and polyethylene is significant in the history of

WTO dispute settlement jurisprudence as it was the first action initiated under the newly strengthened Uruguay Round rules and it was the first action involving two developing country WTO members.[2]

The dispute resolution process is useful in clarifying and providing interpretative jurisprudence on the WTO Agreements. However, Singapore remains concerned that the increased use of litigation in trade disputes has resulted in the undermining of political support for the WTO, particularly from developing countries who face resource limitations in litigation. In the past, there was merit in the tendency for two parties involved in a dispute to negotiate issues and seek a mutually satisfactory settlement.

Senior representatives of Singapore have served on WTO dispute settlement panels. Ambassador Tommy Koh chaired the panel on the Australia/New Zealand complaint against US safeguards on lamb in 2000 and the panel on Canadian subsidies for milk products in 1998. Ambassador K. Kesavapany chaired the second Banana Panel in 1993 and Ambassador Chew Tai Soo on Korea's restrictions on beef, while Ms. Margaret Liang chaired the panel reviewing the EU's trade description of sardines. Tommy Koh was also a member of the panel which considered the EU's complaint against the United States on the Helms-Burton Act in 1997.

Their participation in these panels reflects Singapore's institutional support for WTO processes and the WTO membership's awareness of Singapore's contribution to the strengthening of the WTO. The nomination of Singapore officials to serve on key panels highlights the emergence of a group of Singapore foreign service and trade officials with an understanding of the WTO and of its emerging jurisprudence.

VIII. Principal Issues Singapore Would Like to see Taken Up in the Next Round

As a major exporter and free trader, Singapore supports comprehensive liberalization of trade in goods. Given the continued existence of tariff peaks and escalation, Singapore wants to see the removal of remaining market barriers in industrial goods (both tariffs and non-tariffs). As a major maritime nation and air communications hub, Singapore would be keen on the establishment of multilateral disciplines for maritime and air services. Singapore also desires strong clarified rules to prevent the protectionist and arbitrary use of trade remedial action (especially anti-dumping and safeguards actions). Rules to ensure simplification of customs procedures are also important to Singapore in promoting trade facilitation.

Singapore supports early action on the built-in agenda of the WTO. The two major sectors mandated by the built-in agenda for negotiations are agriculture and services. These are two major sectors of the global economy and further concessions in these areas would contribute to the process of trade liberalization. The built-in agenda also calls for reviews of TRIPs, TRIMs and Dispute Settlement. Singapore recognizes the concern of the developing countries that the implementation of the UR agreements should be reviewed in the Doha Round, especially those provisions that have disadvantaged developing countries because of the costs of implementation and the need to divert scarce manpower resources to uphold their commitments. However, the resolution of implementation issues should not be a pre-condition for progress in the ongoing negotiations.

Singapore also supports further work in the harmonization of cross-border laws and policies facilitating a conducive international environment. In particular, Singapore is

[2] *Malaysia—Prohibition of Imports of Polyethylene and Polypropylene*, WT/DS1, Request for Consultations Under Article XXIII: 1 of the GATT 1994 by Singapore, January 13, 1995.

keen on establishing a global environment that would allow electronic transactions to flow freely and encourage worldwide growth in electronic commerce.

IX. Strategies to Accomplish Singapore's Objectives in the Next Round

After the successful launch of the new round of negotiations in Doha in December 2001, Singapore wants to see the negotiations concluded successfully as expeditiously as possible. At this point, Singapore sees the need to balance its objectives with the setting of a realistic scope for a new round that is acceptable to all, in particular the developing countries that are concerned about the inclusion of social issues, investment, competition policy and the environment. Singapore therefore participates in groups with common interests, and forms coalitions with other parties that advocate moderation in competing ambitions and encourages the finding of realistic packages acceptable to all.

As a result of its exposure to GATT/WTO negotiating processes, Singapore supports more frequent consultations of capital-based staff at a senior level. From 1995 to 1999, Singapore participated actively in the informal meetings of the unfortunately named Invisibles Group of capital-based representatives comprising fifteen or sixteen key players in the WTO process. It also played a pro-active role in the group of small and medium sized countries supporting the launch of a new round of negotiations. The Friends of the New Round held several meetings that helped to establish a mutual sense of confidence and understanding amongst Ministers from these countries and facilitated their cooperation at the Ministerial Conferences. Singapore hosted an informal Ministerial Meeting in October 2001, just before the Doha Ministerial Conference. This meeting provided a clearer appreciation of the key issues that needed to be resolved at the Doha meeting and helped to galvanize support for compromises and policy shifts which paved the way for the successful launch of the New Round.

As Chairman of the Ministerial-level negotiating group on agriculture at the Seattle and Doha meetings, Singapore's Minister for Trade and Industry, George Yong-Boon Yeo played a key role in reaching compromises and developing forward-looking negotiating proposals. Although agriculture is likely to pose the greatest challenge in the next round of negotiations, George Yeo was the committee chairman who made the most progress in the abortive Seattle meeting. He was therefore approached to handle agriculture in Doha. As Singapore has no significant agricultural sector, the selection of the Singapore representative to chair the most contentious issue at the meeting reflects Singapore's leadership role in the WTO system.

X. Singapore's Involvement in Regional Trading Arrangements ("RTAs")

Unlike Europe and North America, Singapore and other East Asian states focused solely on multilateral trade negotiations through the 1970s and 1980s. Although ASEAN was established in 1967, substantive ASEAN economic cooperation only occurred with the establishment of the ASEAN Free Trade Area ("AFTA"). Singapore participates in AFTA together with its ASEAN counterparts: Brunei Darussalam, Cambodia Indonesia, Laos, Malaysia, Myanmar, Philippines, Thailand and Vietnam. There has been an accelerated increase in the level of total ASEAN trade as well as intra-ASEAN trade since the 1993 launch of the Common Effective Preferential Tariff Scheme for AFTA, the main instrument for realizing AFTA. (To illustrate, ASEAN exports grew by 19.8 percent from 1999 to 2000, and ASEAN imports grew by 22.4 percent in the same period.

Intra-ASEAN exports grew by 27.0 percent while intra-ASEAN imports grew by 26.7 percent in the year 2000, higher than the growth of total world exports and total imports.) At present, 88 percent of all tariff lines currently accounting for 98 percent of intra-ASEAN trade are already in the 0–5 percent category. Intra-ASEAN tariffs on about 20,000 tariff lines from the original six ASEAN members (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand) were eliminated by 2002. This accounts for seventy percent of intra-ASEAN trade.

Apart from the accelerated tariff reductions affecting intra-ASEAN trade, the ASEAN Heads of Government at their Third Informal Summit in Manila in November 1999, committed to achieving total elimination of tariffs by 2010 for the six original members, ahead of the earlier 2015 deadline. For the newer ASEAN members (Cambodia, Laos, Myanmar and Vietnam), the end date for tariff elimination for intra-ASEAN trade was brought forward to 2015, ahead of the earlier 2018 deadline. These deadlines were subsequently revised in September 2004 to 2007 for the six original members and 2012 for newer ASEAN members. However, for selected sensitive products, the end date could remain at 2018.

Today, Singapore has moved from a purist adherence to multilateral approaches to trade liberalization towards a pragmatic recognition that there has been a growing trend towards RTAs and bilateral FTAs, especially during the 1990s. *First*, the expansion of the European Union and the establishment of the North American Free Trade Area concurrently with the ongoing Uruguay Round negotiations demonstrated that regional relationships did not detract from a commitment to the multilateral process. *Second*, the convening of the APEC Leaders' Meeting in Seattle in November 1993 and fears of an Asia-Pacific FTA excluding Europe resulted in the EU's decision to concede to the inclusion of agriculture within the GATT disciplines, enabling the conclusion of the UR. These developments led Singapore to conclude that RTAs could play a positive role, an observation reinforced by the agreement on sectoral liberalization within APEC serving as a model for sectoral liberalization in the WTO. *Third*, the recognition within the WTO that ASEAN represented a successful model of developing country RTA resulted in ASEAN being represented in the major informal caucuses within the WTO. *Fourth*, the East Asian financial and economic crisis of 1997–1998 and the stalemate at the WTO resulting in the failure of the WTO Ministerial Conference in Seattle in December 1999 to launch a new round of global negotiations led to a renewed interest by Singapore and other East Asian states in FTAs. These East Asian states felt that it was possible to reach regional agreements more quickly and over a wider range of issues than seemed possible in the WTO.

Singapore's current approach is to seek "WTO-plus" agreements in its FTA negotiations. While multilateral agreements are Singapore's preferred option, policy-makers regard bilateral and regional FTAs as complementary arrangements that reinforce a commitment to open markets, expanded international trade and the promotion of foreign direct investment.

Singapore believes that FTAs complement the multilateral trading system in several ways. *First*, bilateral and regional FTAs can serve as building blocs towards multilateralism as they are easier to conclude than multilateral agreements involving 144 members. FTAs are perceived as sustaining the momentum of global trade liberalization, allowing WTO members willing to move ahead of their WTO commitments to do so. This creates a strong incentive for the WTO to "catch up". *Second*, FTAs can be a test bed for new and innovative models of rules governing economic activity. Such innovations may subsequently be adapted for global use. FTAs can therefore provide positive complementary

pressures for the evolution of WTO agreements. *Third*, since FTAs are formed between a small number of partners and at a pace that is comfortable to all parties, they are an effective means of preparing societies for greater transborder exposure at the multilateral level. Such FTAs provide an important demonstrative effect of the benefits of trade liberalization.

In pursuit of this new policy, Singapore has concluded negotiations with New Zealand, Japan, EFTA, Australia, Jordan and the United States, and is currently negotiating with Canada, Mexico, Chile, South Korea, India, Sri Lanka, Bahrain, Panama and Egypt. Singapore's first trading arrangement with New Zealand signed on November 14, 2000, has yielded positive results. Two-way trade between Singapore and NZ increased more than twenty percent in the first six months after the arrangement came into effect. These bilateral negotiations exposed the negotiators to the issues involved in such negotiations, even though the direct trade impact is likely to be less significant than other ongoing negotiations. The signing of an Agreement between Japan and Singapore for a New-Age Economic Partnership by the two Prime Ministers on January 13, 2002, broke new ground in the region by promoting paperless trading, competition policy, supporting research and development in science and technology and included cooperation in information and communications technology, financial services and tourism. It also included standard GATT/WTO issues such as tariff reductions, mutual recognition of standards, and expanded opportunities for trade in services, government procurement and investment.

The most significant RTA negotiated by Singapore is the United States-Singapore FTA. It covers a comprehensive range of subjects including trade in goods and services, investment, e-commerce, customs, textiles and clothing, intellectual property rights, rules of origin, government procurement and financial services, and is designed to cover "substantially all trade", consistent with WTO obligations. The United States also proposed an integrated sourcing initiative that would benefit other countries in the region in certain designated sectors. Initially, this initiative will allow more than a hundred information technology products to be exported from Singapore to the United States duty-free without any further fees or paperwork even though much of the manufacturing will be performed in Indonesia.

Singapore's pursuit of free trade arrangements ("FTAs") initially led to regional suspicion, particularly from some of its ASEAN colleagues. Singapore has therefore made concerted efforts to impress upon its neighbors that such suspicions are unfounded, and that FTAs that are WTO-consistent and WTO-plus are actually linchpins linking the region with the rest of the world, creating overall competitive liberalization.

The changing attitude in ASEAN is seen in ASEAN's decision to support negotiations with China for a China-ASEAN FTA. Chinese representatives have proposed a 2010 deadline for the establishment of the FTA, matching the APEC 2010 deadline for free trade and investment for developed country members of APEC. Japan has also called for an East Asian community involving Japan, the ASEAN countries, China, South Korea, Australia and New Zealand as core members. However, Japan's unwillingness to consider significant agricultural liberalization is likely to hinder its efforts to create a broad-based economic partnership and to stake a claim for regional leadership. ASEAN has also been developing proposals for a Closer Economic Partnership with Australia and New Zealand and an FTA with India. At the 2001 ASEAN Summit, President Kim Dae Jung of South Korea agreed to set up a study group to review a possible ASEAN-ROK FTA. Despite the earlier criticisms by some ASEAN countries of Singapore's FTA initiatives, all ASEAN countries have agreed to proceed with these studies.

Singapore also supported trade and investment liberalization in the Asia Pacific Economic Cooperation ("APEC") forum. APEC is significant to Singapore as it accounts for 75 percent of Singapore's trade. Thus the achievement of the 1994 Bogor goals of free and open trade and investment for developed countries by 2010 and for developing countries by 2020 would be a significant milestone for Singapore.

XI. Development of Trade Policy in Singapore

Singapore's trade-to-GDP ratio is the highest in the world. Trade policy therefore attracts close attention at the highest levels of government. Key decisions are made at the Cabinet level. As all Ministers are elected Members of Parliament, political support for critical trade and investment initiatives is factored into decision-making. The Singapore Government attempts to shape domestic public opinion instead of merely responding to a changing policy environment. The political leadership has therefore viewed its task as one of educating domestic opinion on the challenges posed by a rapidly evolving global framework. As a small state, Singapore has always perceived itself as vulnerable and has emphasized flexibility, innovation and change. While Singapore focused on multilateral trade negotiations in the past, it now adopts a flexible and pragmatic policy of seeking bilateral, regional, cross-regional and multilateral negotiations with the objective of ensuring faster trade and investment liberalization. Each of these approaches is seen as a policy tool enabling more effective governance and a more open and competitive international environment.

Trade policy formulation in Singapore is undertaken by the government ministries, with advice and many aspects of policy execution channeled through statutory boards linked to main ministries. These boards include International Enterprise Singapore ("IES"), formerly known as the Singapore Trade Development Board ("TDB"), and the Economic Development Board ("EDB"), which are linked to the Ministry of Trade and Industry ("MTI").

The MTI is mainly in charge of the formulation of trade policy; the IES is responsible for the internationalization of Singapore enterprises, while the EDB implements policies on investment incentives. (When IES replaced TDB in 2002, the function of formulating and implementing trade policy was centralized in MTI). The Department of Customs and Excise, under the Ministry of Finance, administers the collection of duties on international trade and excise duties. Service-related policies are divided among a number of Ministries and statutory boards, although the MTI plays a coordinating role in the development of trade policy in the services sector.

A well-established structure exists for regular consultation on economic and trade policies between the Government and the private sector. In 1995, the EDB established its International Advisory Council, composed of a panel of leading international businessmen, to advise the Government on economic strategy. The newly formed Singapore Business Federation, with a membership comprising of the major domestic and multinational enterprises operating in Singapore, is playing an increasingly active role in commenting on trade policy and interacting with its international counterparts. It recently established an International Trade Committee to provide inputs on issues that are the subject of multilateral, regional and bilateral trade negotiations. The public is also free to comment on trade policy through the media, or directly to the Government.

Since 1973, when Singapore acceded to GATT, there has been an emphasis on domestic capacity building on trade policy issues. Initially, foreign service officers selected on an *ad hoc* basis represented Singapore at GATT meetings. Senior foreign service officers

continue to serve as Permanent Representatives to the United Nations in Geneva and are concurrently accredited to the WTO. Singapore's representation at the WTO also includes staff representing MTI/IES. TDB (now IES) began developing a core group of trade policy analysts and negotiators from 1985 who moved to MTI in 2002. The hosting of the first WTO Ministerial Conference in December 1996 provided the impetus for the strengthening of MTI and TDB's capabilities. In recent years, there has been a noteworthy emergence of a group of lawyers in Singapore specializing in WTO jurisprudence.

Currently, trade negotiations involve close coordination between MTI, the Ministry of Foreign Affairs ("MFA") and other government ministries and agencies. As the WTO has moved beyond tariff issues, issues on the WTO agenda increasingly involve a range of government ministries. There will be an increasing need to consult with domestic industries affected by proposed changes in the WTO regime as well as the opening of markets through bilateral and regional FTAs. Maintaining political support for trade liberalization will be a major task for MTI and MFA as they project Singapore's support for more ambitious objectives in future trade negotiations.

XII. Conclusion

As a small state with an open economy, Singapore has a strong interest in the maintenance of strong multilateral economic institutions and continued liberalization of international trade and investment. Singapore has therefore seen itself as a supporter of the strengthening of the WTO system and has actively supported further rounds of trade negotiations. The recognition that bilateral and regional trading arrangements offer scope for faster trade liberalization has led Singapore in recent years to support such FTAs, in addition to the promotion of global trade negotiations. While Singapore was a passive participant in GATT when it first acceded to the GATT Agreements, it played an increasingly active role and has built-up strong analytical and negotiating capabilities in the last two decades. These capabilities enabled Singapore to play an influential role in various informal caucuses within the WTO as well as a leadership role within the group of countries seeking faster trade and investment liberalization.

CHAPTER 79

SOUTH AFRICA

Gerhard Erasmus*

TABLE OF CONTENTS

I. Introduction 352
A. General Background 352
B. Political, Constitutional and Institutional Transition 354
C. Conclusion: A Changed Society 356
II. South Africa's Participation in the Uruguay Round 356
A. Towards a New Policy 356
B. South Africa's Principal Objective 358
C. The Basic Outcomes 359
III. The General Effects of WTO Membership 360
A. Trade Policy and Economic Reform 360
B. Political and Social Effects 362
C. South Africa's Legal Framework 363
D. South Africa's International Economic Legal Framework 365
IV. South African Attitudes towards the WTO 368
V. A South African Perspective: Strengths and Weaknesses of the WTO 368
VI. South Africa's Participation in the Dispute Resolution System 370
VII. South Africa's Aims for the Doha Round 371
VIII. The Strategy for Achieving these Objectives 373
IX. Effects of Regional Trading Arrangements 374
X. The Development of Trade Policy 376
XI. Conclusion 377

* Professor in the Faculty of Law, University of Stellenbosch and Senior Advisor to the Trade Law Centre for Southern Africa ("TRALAC"). I want to thank Libo van Aswegen, Researcher, TRALAC, who assisted invaluably with the research and interviews. This contribution was made possible by a grant from SECO (the Swiss State Secretariat for Economic Affairs). The opinions expressed here are those of the author.

I. Introduction

A. General Background

South Africa underwent dramatic and fundamental political change in the early 1990s. These developments coincided with the final stages of the Uruguay Round multilateral negotiations establishing the World Trade Organization ("WTO"). This is an important factor in explaining this country's involvement in those negotiations and its present position in the international trading system. There was a direct link between South Africa's international political isolation under the apartheid regime and its former economic and trade policies. Freed from the shackles of apartheid, the state began to address a wide range of political, institutional and structural problems; both domestically and internationally. For the first time it was able to play the regional and international role commensurate to its potential.

What exactly were the changes that occurred in South Africa and why did they happen at that particular moment? What were the major results and direction of the changes? The answers to these questions will shed some light on the rather unique developments of that time and reveal how they impacted on the country's subsequent position in the international trade system. A brief historical overview will provide a necessary perspective on South Africa's internal reconstruction and new international role.

South Africa was a Contracting Party to the General Agreement on Tariffs and Trade of 1947 ("GATT").[1] The conditions under which the Union of South Africa[2] participated in the Bretton Woods negotiations after World War II were quite different compared to those of the 1980s and 1990s. When the GATT was negotiated South Africa was a respected member of the post World War II international community and with its then Prime Minister, Field Marshal Jan Smuts, having been a member of the Allied War Cabinet, it played a prominent role in the formulation and adoption of the United Nations' Charter.

It should also be recalled that practically the whole of the African continent was then still under colonial rule, whereas South Africa had been a fully fledged member of the League of Nations, the mandatory power over South-West Africa (pre-independence Namibia) and a founding member of the political and economic institutions of the post World War II order. It was considered a "western" state and an ally against communism in the subsequent Cold War.

At the time of the Uruguay Round negotiations all this had changed dramatically. Racial discrimination, that serious flaw in the South African political system, had spiraled out of control in such proportions over the following decades that South Africa had became a pariah state. The political order deliberately excluded the black majority from participation. The consequence was domestic destabilization, an inability to function as a normal member of the international community and becoming the prime target for sanctions. Apartheid South Africa did not subscribe to the values of the United Nations Charter. It invoked artificial and ingenuous interpretations of Article 2(7) of the UN

[1] The GATT was approved by an act of the South African Parliament in 1948. It was, however, never incorporated into domestic law and its provisions could therefore not be invoked before South Africa's national courts. *The Republic of South Africa—Report by the GATT Secretariat*, 1 TRADE POLICY REVIEW 2, 39 (1993).

[2] In 1910 the former British colonies and Afrikaner republics were incorporated into a state entity known as the Union of South Africa. The Union was a member of the British Commonwealth. In 1961, when H.F. Verwoerd was the Prime Minister, South Africa became a Republic and left the Commonwealth. This occurred as a result of the mounting pressure against apartheid. South Africa returned as a member of the Commonwealth after the political changes of 1994.

Charter on domestic jurisdiction and self-determination in desperate legalistic efforts to defend its policies. For some time it enjoyed support from certain Western governments as an ally in the Cold War, but even this "support" evaporated as domestic and international opposition strengthened against apartheid.

In 1948 the National Party came to power and apartheid became the "official" policy; resulting in even more discrimination and white privilege. Racial discrimination in South African politics and daily practice did not, however, begin in 1948. It was already part of the colonial history. One of the most controversial earlier laws was the Land Act of 1913. It had devastating consequences for black South Africans and subsequent labor and social practices.[3] One of the major consequences of apartheid was an economy with serious structural imbalances and inherent unfairness. As the rest of the world adopted the Universal Declaration of Human Rights in 1948, the South African government headed in the opposite direction and legally entrenched racial discrimination as its official policy.

South Africa suffered increased isolation and found itself the target of both UN and bilateral sanctions.[4] These sanctions, disinvestment and other punitive measures affected its international political standing, its ability to trade and borrow and its participation in international organizations. Its economic and trade policies reflected this dilemma as the government reacted to its isolation and the sanctions against it. The South African government responded with several counter-strategies; ranging from emphasizing its strategic importance in the Cold War and the importance of its mineral wealth, to expanding its military might (it developed a nuclear capability) and destabilizing its region.

Domestic policies and structures of government became shaped by the implementation of apartheid policies. There was a time when the South African government actively pursued its own version of "self-determination" as the blue print for preserving white rule. This resulted in the establishment of "homelands" for the various black ethnic groups. These territorial units received far-reaching governmental powers (four of them were even granted "independence"), their own budgets and state-like powers; resulting in costly duplication and structural distortions in the economy.

South Africa eventually resolved its domestic political problems through a negotiated settlement, leading to democratic rule and the election of Nelson Mandela as the first President of the new South Africa in April 1994.[5] Several complicated problems now had to be addressed. A priority was to free the economy from the effects and structural distortions of apartheid and its disempowerment of the black majority. In

[3] "The land Act imposed a policy of territorial segregation with a very heavy hand. It aimed specifically to get rid of those features of African land ownership and share-cropping which white farmers found undesirable and at the same time to increase the size of the African reserves for the more convenient recruiting of labour for the mines." DAVENPORT, SOUTH AFRICA—A MODERN HISTORY 259 (1987).

[4] South Africa became the first UN member to face Chapter VII Security Council measures when in 1977, after the death of Steve Biko, Security Council Resolution 418 was adopted and an arms embargo imposed. The drive in the General Assembly for sanctions against South Africa started much earlier. Its racial policies featured on the UN Agenda since 1946 when India complained about the treatment of Indians in South Africa. Since the 1950's several General Assembly resolutions were adopted calling upon South Africa to reconsider its racial policies. In 1962 the GA adopted Resolution 1761 (XVII), requesting members to boycott South Africa and impose sanctions. The list of targets grew over the years to include cultural, sports and educational boycotts, in addition to trade, investment and military co-operation.

[5] For a discussion of the nature of South Africa's negotiated settlement *see*, *inter alia*, EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA (1998), THE SMALL MIRACLE: SOUTH AFRICA'S NEGOTIATED SETTLEMENT (Steven Friedman and Doreen Atkinson eds. 1994) and VAN WYK, RIGHTS AND CONSTITUTIONALISM—THE NEW SOUTH AFRICAN LEGAL ORDER (1994).

addition, the new government had to guide the country towards a constructive international role with special responsibilities in the Southern African region and on the African continent.

To summarize the nature of the change in South Africa: it formally "normalized" the state and society by the establishment of a democratic system and the adoption of a modern and liberal constitution.[6] However, this has created many new challenges, including the need to address the legacy of the past. South Africa is still a society undergoing fundamental transformation.

Why did apartheid end and what forced the change in the early nineties? The brief and simple answer is that the costs of apartheid became unbearable. This can in part be attributed to the sanctions, but the liberation struggle contributed immensely. Other factors include Namibia's peaceful transition to independence in 1990,[7] the end of the Cold War,[8] and changes in the composition and opinions of the then South African political leadership. The latter was of particular importance for the peaceful nature of the transition itself. Under different personalities the struggle and warfare would probably have continued with even greater devastation and polarization. The invaluable personal contributions of Nelson Mandela and F.W. de Klerk were recognized by the international community in the joint-awarding of the Nobel Peace Prize.

B. Political, Constitutional and Institutional Transition

If the extraordinary transition of the early nineties had not taken place, South Africa would not only have remained a country with major internal problems, but would presumably still have been an isolated bystander to the formal international trade structures (and perhaps not even a member of the WTO). The inclusive and peaceful nature of the process leading to majority rule was a catalyst for fundamental change even before the elections of April 27, 1994. The delegation representing South Africa in the final stages of the Uruguay Round negotiations was expanded to include members of the African National Congress (and its alliance partners), the labor movement and the business sector. This had a far-reaching effect on the legitimacy of the South African representation, the negotiating strategies and the content of new trade policies. This far-sighted decision contributed directly to government continuity and a smooth transition in this particular field. It made it unnecessary for the new government of President Mandela to renegotiate international obligations or to redevelop its trade policy positions as his government was informally party to the negotiations during the final stages of the Uruguay Round.

[6] The Constitution of the Republic of South Africa Act, 108 of 1996 is supreme law, contains a comprehensive bill of rights and is fully justiciable. A newly established Constitutional Court rules on its final application and interpretation.

[7] Namibia became independent in 1990 with the implementation of UN Security Council Resolution 435 of 1978 after a protracted political struggle and a liberation war that started in 1967. For a discussion of the Namibian independence process, *see* THE NAMIBIAN PEACE PROCESS: IMPLICATIONS AND LESSONS FOR THE FUTURE (Heribert Weiland and Matthew Braham eds. 1992) and NAMIBIA: CONSTITUTIONAL AND INTERNATIONAL LAW ISSUES UNISA (Dawid van Wyk, Marinus Wiechers and Romaine Hill eds. 1991). The stability of the Namibian transition allayed the fears of many white South Africans about communist takeovers, land expropriation and anti-white retaliation. Reasons and justifications frequently proffered in opposition to Namibian independence now lost their "validity". This added impetus to a process of questioning other official South African policies.

[8] The fear of communism and the feared "total onslaught" (allegedly to be launched via the liberation movements) had always been important ideological arguments of the apartheid government and motivated expensive wars fought in neighboring countries such as Namibia and Angola.

A brief description of the nature of the transition in the early nineties to a democratic system is necessary to understand the current political, economic and legal framework of the new South Africa. The political changes of that time met with enthusiastic international approval and all sanctions were soon lifted. This allowed South Africa to take its rightful place in the international community as a respected and active member and had important consequences for its future role in the WTO as well as in the Southern African region.

The political and constitutional transition was a two stage process. The negotiated settlement involved all South African stakeholders and political parties. Parties that were previously banned could now participate and all political prisoners were released, including Nelson Mandela who had spent 27 years behind bars. A notable feature of the negotiations was that it was conducted by South Africans themselves and not under the control of any international organization. The transition did not lead to the establishment of a new state, only the creation of a democratic and legitimate government. All previous international agreements, including membership of international organizations, therefore remain in effect.

The negotiations resulted in the drafting of an Interim Constitution which came into force on April 27, 1994, the date of the first democratic elections which brought the ANC into power. The Interim Constitution was a comprehensive and modern document incorporating a novel feature: a set of 34 Constitutional Principles. These Principles provided a normative framework for the drafting of a final constitution. This final constitution had to be negotiated by the newly elected parliament which also represented the will of the people as it functioned as a constitutional assembly. In this sense there was a popular mandate. This body had to draft a supreme constitution within the limits set by the 34 Constitutional Principles; in other words all these Principles had to be entrenched in the constitution and nothing in the final document could infringe any of the Principles. Compliance with these Principles was guaranteed by the newly established Constitutional Court which had to certify the text of the final Constitution. This process was accompanied by extended hearings before the Constitutional Court. There was never a formal referendum but this allowed the voice of all South Africans to be heard through public participation in the hearings. The initial text of the new Constitution was indeed not certified by the Constitutional Court but after some amendments it was found to be in conformity with the Constitutional Principles. This certified text became the final Constitution of the Republic of South Africa in 1996.[9]

The new Constitution provides a fundamental shift from the previous doctrinal position and the rules with respect to the foundations of state authority and control of the exercise of power. Whereas the new Constitution provides for the separation of powers and judicial review, under the previous arrangement, South African constitutional law was based on the English common law notion of the sovereignty of Parliament. This also meant the absence of judicial review by invoking the Constitution, as well as a lack of effective protection of human rights. Parliament was sovereign and the courts could not declare an act of Parliament unconstitutional and invalid.[10] Parliamentary sovereignty also influenced the domestic application of international law as acts of parliament could not be tested. International treaties had to be incorporated through legislation in order

[9] The Constitution of the Republic of South Africa Act, 108 of 1996.

[10] The sole exception to this was a limited power of review with respect to certain "manner and form" requirements. *See* in this regard Heinz Klug, *Recent South African Constitutional History* in CONSTITUTIONAL LAW OF SOUTH AFRICA (Matthew Chaskalson *et al*. eds. 1996).

to apply domestically, thereby following a strict dualist approach. The negotiation and ratification of international agreements was the sole prerogative of the executive branch of government. Prerogative powers were considered to be not justiciable. International law could, therefore, not play any meaningful role in the jurisprudence of South African courts.[11]

C. Conclusion: A Changed Society

The many political, economic and structural changes in South Africa during the early nineties set in motion a process that is still continuing. The present government is still developing and implementing policies on black empowerment, deregulation, the adoption of "charters" for specific sectors, opening up the economy, promoting investment, eradicating poverty and pursuing trade liberalization. New trade agreements have been concluded with the EU and Southern African neighbors, while several others are planned.[12]

This process poses many challenges, but also provides opportunities to reconstruct the fragmented society, as well as to normalize relations within the region, the African continent and the rest of the world. This exciting task coincides with major new developments in the multilateral trading system and there is some degree of mutual reinforcement here. The general picture is one of amazing political transformation, bringing peace to a divided society, coupled with far-reaching economic reform. Active participation in the activities of the multilateral WTO is very much part of the policies and actions of the new South Africa.

II. South Africa's Participation in the Uruguay Round

A. Towards a New Policy

Despite a rather slow start as a result of the lingering isolation of the apartheid regime, South Africa developed into quite an active participant towards the end of the Uruguay Round. The informal participation of the ANC in the South African delegation contributing to this new state of affairs.

Officials of the South African Department of Trade and Industry found it difficult to stay abreast of discussions during the early stages of the Uruguay Round as other African governments actively opposed their participation.[13] Although South Africa was not officially kicked out of the GATT it could not actively participate. This pattern was repeated in other international organizations where the credentials of the South African delegation were often refused, thereby preventing delegates from participating despite South Africa remaining a member of the organization.

South Africa's renewed activity in the Uruguay Round can also be ascribed to the positive effect that the GATT Trade Policy Review of South Africa (1993) had on the trade policy liberalization then underway in South Africa. In 1990, prior to the Trade

[11] JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE (2000), Ch 4.

[12] At the time of writing, the Southern African Customs Union ("SACU"), with its members states of Botswana, Lesotho, Namibia, South Africa and Swaziland, was negotiating (or intended to negotiate) free trade agreements with the United States, India, EFTA, China and Mercosur.

[13] For example, certain Anglophone African countries took the initiative to have South Africa excluded from the Ministerial Conference in Punta del Este that launched the Uruguay Round. These efforts were unsuccessful as they did not enjoy the support of some Francophone African countries, and efforts to persuade the Uruguay government to withdraw the visas of the South African delegation failed.

Policy Review, the government had instructed the Industrial Development Corporation ("IDC") to review South Africa's tariff protection policy with a view to moving towards a more liberal system.[14] The Board on Tariffs and Trade ("BTT") acted as advisory body. The combined efforts of the IDC and BTT culminated in South Africa's provisional Uruguay Round tariff offer of 1990. This offer was, however, not received with much enthusiasm. The main areas of concern with South African trade policy were the tariff structure, the high level of customs tariffs, export subsidies, import controls, local content requirements, import surcharges and the fact that South Africa had not acceded to most of the GATT Codes. The offer proposed to bind only approximately 55 percent of South African industrial tariffs. The mean average tariff rate reduction amounted to no more than 23 percent which was well below the GATT goal of 33 percent.

During the GATT Trade Policy Review of South Africa the GATT members urged South Africa to improve its provisional Uruguay Round tariff offer. In response, the South African representatives indicated that South Africa intended to submit a revised tariff offer, in the framework of the Uruguay Round, which would improve the level of bindings, reduce the average rate, improve the duty rebate and drawback system for exporters and the adjustment of the General Export Incentive Scheme ("GEIS") to reduce the anti-import bias. The revised offer was submitted on schedule, after discussion in South Africa's National Economic Forum ("NEF").[15]

The South African delegation met with representatives of South Africa's most important trading partners, as well as with various senior officials of the GATT Secretariat, before its Trade Policy Review hearings. The purpose of these meetings was, first, to obtain an indication of the questions that could be expected during the Policy Review, and, second, to discuss with these representatives and GATT officials the current economic situation in South Africa against the backdrop of the political negotiations and the functioning of the NEF. The meetings provided the relevant trading partners with a better understanding of the South African situation in GATT.

The National Economic Forum was launched on October 29, 1992 to provide a domestic dialogue mechanism for business organizations, labor organizations and government to address economic and socio-economic challenges, particularly during the period of political transition.[16] The NEF was the product of formal dialogue between labor and business begun in the early eighties. Those discussions culminated in an understanding that was subsequently endorsed by the South African cabinet in the *Laboria Minute* of September 14, 1990. This dealt with a range of labor and market issues, and clause 18 of the *Laboria Minute* made provision for an appropriate forum to discuss the economy and labor relations.

Two years passed before the NEF was formally launched. Government and business were concerned about the formal involvement of unions in policy discussions. It was feared that the Congress of South Africa's Trade Unions ("COSATU"), an alliance partner of the ANC, would advocate socialism as an alternative path of development in post-apartheid South Africa.[17] After continued pressure from organized labor, it was agreed to set up the NEF. It was not long before government joined what the former Minister of Finance, Derek Keys, later called the "golden triangle". The Long Term Working

[14] TRADE POLICY REVIEW, *supra* note 1, at 44, n. 72.

[15] The role of this body is discussed below.

[16] Unpublished internal bulletin of the National Economic Forum, ACTIVITY REPORT OF THE NATIONAL ECONOMIC FORUM 1 (June 1, 1993).

[17] M. Monnakgotla, *An Occasional Briefing Paper on The Role of NEDLAC in Trade and Industrial Policy* 4 (1998), accessed at http://www.tips.org.za/papers/list.asp.

Group ("LTWG") of the NEF was tasked with ensuring the successful reintegration of the South African economy into the world economy. The taskforce would address all aspects of trade policy, including tariff policy, phasing and sequencing programs and export incentives.[18] South Africa's undertaking to submit a revised Uruguay Round offer had the LTWG together with the DTI, the BTT and the IDC working to submit a revised tariff offer before the end of August 1993.

B. South Africa's Principal Objective

Coinciding with the end of apartheid, the closing stages of the Uruguay Round provided South Africa with an opportunity to reintegrate with the international system of political and economic cooperation, and so accelerate the liberalization and simplification of its trade regime.[19] South Africa pushed for improved market access for processed mineral products, light manufactures and agriculture.[20] South Africa viewed the Uruguay Round as an avenue for cementing the emerging change in policy direction, particularly with respect to the rationalization and simplification of its customs tariffs and the lowering and binding of customs duties. The government began to move away from a trade and industrial policy that promoted import substitution under the umbrella of extensive protective measures.[21] In the process South Africa was obliged to re-negotiate a number of bound tariffs that carried low or zero rates of import duty. The effect over time of these reforms was not insignificant. In the Trade Policy Review of South Africa of 1998 the following was reported:

> South Africa's simple average MFN import tariff at end-June 1997 was some 15%, with substantial dispersion; because of formula and specific rates the maximum ad valorem rate cannot easily be defined. Duty-free treatment applies to some 44% of all the tariffs, particularly on inputs of capital goods and products that are not manufactured in, and do not have substitutes in, South Africa. About 23% of all lines carry rates above 30%. Sectorally, the highest average tariff was in manufacturing where it was 15.6%, compared with 5.6% in agriculture and 1.4% in mining and quarrying. There is negative escalation in the tariff overall, but this may be misleading in that it mostly reflects the application of zero, or low duties on industrial products that are neither manufactured nor have substitutes in South Africa. The Tariff Rationalization Process should substantially simplify South Africa's tariff structure but it could increase escalation and therefore the effective rate of protection.[22]

In relation to its revised offer on industrial products, South Africa had some success in obtaining improved market access for processed mineral products, light manufactures and agriculture and in re-negotiating its entire schedule of tariff concessions. South Africa, Uruguay, Egypt and Peru were allowed to raise existing zero bindings on certain tariffs. These four countries were deemed to have re-negotiated their obligations in terms of GATT Article XXVIII. South Africa undertook to reduce its tariff level by one third on average over five years commencing in January 1995. Its offer to bind tariffs was also comprehensive, covering 98 percent of all industrial products. In addition, South Africa undertook to implement a process that would result in the tarrification of all remaining import controls. In relation to certain chemicals, clothing and textiles, footwear, motor

[18] Activity Report of the National Economic Forum, *supra* note 16.
[19] Trade Policy Review, *supra* note 1, at 24, n. 23.
[20] *Id*. at 45.
[21] *Id*.
[22] *Trade Policy Review, Republic Of South Africa*, Report by the Secretariat, WT/TPR/S/114, (April 6, 1998), at xi.

vehicles and components, and certain electronic equipment South Africa proposed eight-year phase-in periods. South Africa's accepted transitional needs made it possible to successfully negotiate these longer adjustment periods.[23]

South Africa's agriculture offer called for the tariffication of all import quotas[24] and the bindings of such tariff equivalents. The South African authorities were, however, aware of possible disruptions that the agricultural sector could suffer under this new dispensation. Accordingly, the ceiling rates were calculated to afford the same level of protection as before. Domestic reform of the agricultural sector followed.[25]

South Africa's services offer was among the most comprehensive of the developing countries.[26] As South Africa was not a *demandeur* in these negotiations, its offer proposed the binding or consolidation of the status quo in its service sector at that time.[27] There were minimal practice and policy implications then. South Africa also negotiated two Most-Favored-Nation ("MFN") exceptions, namely for the Common Monetary Area ("CMA"),[28] and had transport preferences extended to certain Customs Union partners.

South Africa's trade liberalization program aimed at reducing the overall level of protection on manufactured and agricultural products, simplifying and rationalizing the tariff structure through the Tariff Rationalization Process ("TRP") and restructuring incentive schemes for local companies. In line with the program, tariffs have been abolished on a number of imported goods not produced, and without substitutes, in South Africa. Import surcharges were eliminated in October 1995, and the General Export Incentive Scheme ("GEIS"), an export subsidy program, was terminated on July 11, 1997.[29]

C. The Basic Outcomes

The former South Africa was an isolated and awkward bystander to many of the main tendencies and international developments of the late 20th century. It was, for example, never part of the formal structures established by the decolonized states of Africa, such as the Organization of African Union ("OAU") and the Southern African Development Coordination Conference ("SADCC"). Both these organizations have in the meantime undergone their own restructuring; to become respectively the African Union ("AU") and Southern African Development Community ("SADC"). South Africa is now a member of both. South Africa also did not fit into the system of classification used for dividing members of international economic organizations into developed, developing and least-developed countries.

[23] For automobiles, South Africa negotiated a reduction of tariffs over a period of eight years with a four-year standstill prior to the start of the reduction. For textile and clothing, it negotiated for a reduction of tariffs over a period of twelve years with a four-year standstill prior to the start of the reduction. Leora Blumberg, *South Africa and the Uruguay Round*, 12 (5) DEVELOPMENT SOUTHERN AFRICA 670 (1995).

[24] Except on black tea (Chapter III(2)(iii)(b)).

[25] The Marketing of Agricultural Products Act was introduced in 1997 to promote the deregulation of the marketing systems. From 1992 to 1997 the number of agricultural control boards had been reduced from 22 to 14. These reforms are continuing.

[26] South Africa sees itself politically and to some extent also economically in the developing countries category. See further the discussion on its status below at the concluding part of this section.

[27] NATIONAL ECONOMIC FORUM, SOUTH AFRICA'S GATT OFFER IN TERMS OF THE URUGUAY ROUND 2 (1993).

[28] In July 1986 the CMA replaced the Rand Monetary Area ("RMA"). Since the Multilateral Monetary Agreement ("MMA") of February 1992, the CMA includes the countries of Lesotho, Namibia, South Africa and Swaziland.

[29] *Trade Policy Review, supra* note 22.

South Africa is an active member of the WTO, has been restored as an acitve member of other multilateral organizations, and now plays a leading role on the African continent. It is considered an "upper-middle-income developing country".[30]

On the domestic front it has embarked on a course of far-reaching economic reform and restructuring,[31] including reforms to allow its products to compete internationally.

In the 1998 Trade Policy Review Report of South Africa by the Secretariat the following general evaluation of the trade reforms is provided. It is a fitting description of the developments since the establishment of the WTO:

> The reintegration of South Africa into the world economy has contributed to an increase in its foreign trade. Merchandise imports have grown faster than exports, leading to a contraction of South Africa's traditional trade surpluses and to external current account deficits since 1994. The rise of merchandise imports also reflects the increase in investment; capital and intermediate goods, particularly machinery and mechanical appliances, represent some 30% of South Africa's total merchandise imports. South Africa is also a net importer of a broad category of services. International reserves (including gold) represented 1.3 months of imports in 1996, compared to 1.9 in 1992.[32]

III. The General Effects of WTO Membership

A. Trade Policy and Economic Reform

The Government's trade and industrial policies since the nineties were a necessary response to the process of integration into the global economy and the need for internal reform. Tariff reform in particular was a response to South Africa's perceived needs. The fact that tariff reform was required by South Africa's international obligations under the GATT and Uruguay Round negotiations gave added impetus to the process.

The South African economy, and consumers generally, experienced positive effects from the tariff reform process, which resulted in an increased awareness of the requirements regarding competition in the global market.[33] This was most clearly shown in trade within Africa. South African retailers, construction firms, mining houses and service providers[34] made major inroads into African markets. The most important markets for South African products remain, however, the EU, the United States, and potentially East Asia. The positive effect of the tariff reform process is also reflected in government policy through the simultaneous recognition of the political importance of the Southern African region and Africa generally, and the link between trade and domestic growth and development. The tariff reform process has not, as some feared, resulted in the "de-industrialization" of the South African economy. Penetration of the local market has occurred, but the net impact from expanding trade has been positive. Certain industries such as textiles and clothing have experienced negative effects but economists emphasize other adjustment pressures such as labor costs and lack of competitiveness.

[30] With a GNP per capita of US $ 3,160 in 1995, according to the World Bank (1997). This figure is, however, misleading as the decades of apartheid rule led to a concentration of economic power and a very distorted and unequal distribution of income. *See Trade Policy Review, supra* note 22, at 2.

[31] In 1994 the government adopted the Reconstruction and Development Programme ("RDP"), followed in 1996 by the Growth, Employment and Redistribution ("GEAR") strategy. These aim at the socio-economic development of the majority of the population, tighten monetary policy, fiscal consolidation and trade reform.

[32] *See Trade Policy Review, supra* note 22, at ix.

[33] Ministry of Trade and Industry, Consideration of Report of Portfolio Committee on Trade and Industry on Tariff Policy in the Context of Industrial Policy, at 170 (February 13, 1997).

[34] Television networks and mobile phone service providers are particularly active.

The joint effects of internal political change and re-integration into the global economy (which goes beyond WTO disciplines) resulted in a number of reform measures and changes. Their content and direction were determined by policy choices designed to reform, modernize and advance South Africa and to make it part of the "real world". They also aim at making South Africa a more fair, just and stable society. The global political and economic changes brought about by the end to the Cold War resulted in their own impetus and constraints; as did the dictates of the new Constitution.

For the majority of South Africans basic needs, poverty alleviation and employment are still priorities. The degree of their buying-in into the liberal-democratic values of the Constitution depends quite directly on how these developmental issues are addressed. Reforms in the area of trade have to take place against a background which will take these aspects into account.

A number of practical changes and innovations have occurred in the South African economy since 1994. Some of them, related to trade, can be mentioned. A new Competition Act (98 of 1998), the Intellectual Property Laws Amendment Act and an International Trade Administration Act (Act 71 of 2002) were, for example, adopted and aim at implementing WTO-related obligations. A number of public enterprises (including iron and steel and telecommunications) have been privatized or commercialized. South Africa has also restructured several state-owned service suppliers, although monopolies or exclusive rights remain in some areas, including port, airport, transport and fixed network telecommunication.[35] Reforms in these areas continue and competition in telecommunication is, for example, actively pursued, but has proven to be a complicated matter. Excepting limitations on the presence of foreign natural persons, services are generally open to foreign investment.[36]

Under its Uruguay Round obligations South Africa bound some 98% of its tariffs at the HS eight-digit level (excluding petroleum products), but its tariffs remain "complex",[37] with a wide variety of duties. Anti-dumping duties are frequently imposed and "trade remedies" are an important policy measure.

The general restructuring and steps toward "normalization" of the South African economy are a natural consequence of the emergence from isolation and sanctions and the establishment of a stable and democratic government based on democratic values and institutions that inspire political and investor confidence. This is accompanied by an expectation that South Africa will play a stabilizing role on the African continent. The changes in South Africa are not only significant because of subsequent development in the country itself, the impact has a broader, regional dimension.

Development coincided with important changes in international affairs after the demise of the Cold War, with a greater emphasis being placed on the link between democratic rule, respect for the rule of law and economic development. The constitutional and political reforms have provided a positive framework for economic reform. Many challenges remain; such as the urgent need to eradicate poverty, to redress imbalances in wealth distribution, and to ensure regional growth and stability. Answers to these problems require well-developed trade policies and active participation in the global economy. Important trade agreements have been concluded[38] and others are being negotiated.[39]

[35] *See Trade Policy Review, supra* note 22, at xiii.

[36] *Id*.

[37] *Id*. at xi.

[38] Such as the Trade, Development and Co-operation Agreement with the EU, South Africa's largest trade partner.

[39] Negotiations on a free trade agreement between SACU and the United States began in May 2003.

If participation in the WTO is viewed as the symbol of South Africa's re-integration into the global economy, it also fortunately coincides with its domestic reforms. This process has generated much change, but the general trend seems to be positive. It must, however, be pointed out that South Africa, as a developing country with peculiar domestic problems related to structural imbalances and urgent poverty alleviation needs, does not escape the constraints of such factors.

South Africa also shares the view that the Uruguay Round has introduced many "disadvantages" for developing countries. "It caused them to open up their markets to industrial goods without them gaining sufficient access for their own products. There was a need to ensure that the same did not happen on agriculture in the Doha Round."[40]

It seems fair to conclude by linking the Uruguay Round results to the promises of the "Development Round" of Doha. The former set in motion a process of major structural reform in the global trade regime. For developing countries that process must be continued and new structural adaptations, addressing their needs, are required. The Uruguay Round was not a final and conclusive stage in global reform.

B. Political and Social Effects

The political agenda in South Africa is not dominated by the WTO as such and the Uruguay Round was overshadowed by the transition to majority rule. Globalization issues such as economic reform and regional relationships have subsequently developed as areas of concern. These are issues that feature on the WTO and Doha agendas and in that sense the WTO is politically relevant to the major economy of Southern Africa which is affected by changes in international trade patterns and law; just as it was affected by the structural changes and logical consequences of the abolition of apartheid rule.

South Africa wants to be an active member of the international community and international organizations. It played host to the World Summit on Sustainable Development in 2002. This provided an opportunity also to focus on local issues such as the impact of poverty on rural environments, urbanization, supply of fresh drinking water and food security within a global context.

AIDS is an area of great concern for South and Southern Africa. The highest infection rates in the world are found in this part of the world. The availability of medicines for the treatment of HIV infected persons, especially pregnant women, has been the subject of controversy. This included a high-profile court case in 2001 when 28 major international pharmaceutical companies challenged proposed legislation to regulate the availability of medicines,[41] but subsequently withdrew because of the negative public image generated by local and international media coverage of the case. The opposition by the international pharmaceutical companies to major reforms in the international legal arrangements which would allow access to vital medicines for poor nations, has not ceased. The reform of the TRIPS Agreement is still a controversial issue on the Doha agenda.

The furor about AIDS continues as the South African government refuses to accept the scientific community's explanations as to the causes of this disease. This negative

[40] Trade and Industry Minister, Alec Erwin, reported in the Business Day (June 18, 2003), at 2.

[41] The main issue in this case focused on an amendment to the Medicines and Related Substances Control Act, 101 of 1965, which provided for parallel imports and related issues. The Minister of Public Health also received powers to authorize the importation of certain medicines on terms not complying with registration requirements applicable to other medicines.

publicity has led to further court cases, this time to force the government to provide free medication to certain categories of patients.

Other important political developments have occurred in regional and pan-African relationships. South Africa has taken up a prominent role on the African continent through "The New Partnership for Africa's Development" ("NEPAD") initiative and the expectation that it will promote similar development, stability and democratic rule in the region.

NEPAD is an ambitious initiative by African leaders[42] to devise a strategy for addressing Africa's acute developmental needs in a manner that will demonstrate a serious commitment by African governments and be sufficiently realistic to attract international support. The link between peace, security, democracy and governance on the one hand, and the various facets of economic development and the need for poverty alleviation and investment on the other, is emphasized. Improving the quality of governance is a priority and in this regard the NEPAD peer review process attracted considerable interest. This involves certain African governments agreeing to performance standards and criteria subject to a process of monitoring and assessment.[43]

Closer to home, the crisis in Zimbabwe has caused considerable local and international concern, especially since African governments have as of yet failed to find a solution for this political and economic disaster.

These are not issues directly related to the WTO, but they demonstrate the inter-related nature of issues on the international trade agenda and their local manifestation in Southern Africa. The increasing importance of institutions of governance and development is recognized and demonstrated by the interest in, and expectations of, NEPAD.

C. South Africa's Legal Framework

By its very nature a rules-based system, such as that of the WTO, will affect national legal systems when member-states have to comply with their obligations. The new disciplines of TRIPS and GATS also require more extensive domestic measures and "positive" obligations for members. The protection afforded to foreign IPR holders and service providers by necessity involves national ("beyond the borders") measures and new legislation.

The legal changes induced by the WTO disciplines had a more radical effect in South Africa's case. The inward-looking protectionist economic system that existed under apartheid had to be dismantled and a new democratic constitution adopted. South Africa's legal system has seen a lot of change since 1994 and although not all of this can be attributed to membership of the WTO, it has become much easier to deal with the legal needs of international trade under the present "international law friendly" Constitution and a legal order based on respect for the rule of law. The new approach to international law is reflected in South Africa's Bill of Rights, in the incorporation of international law into domestic law, the interpretation clause and several other provisions.

The Constitution is the supreme law of South Africa and all law and conduct inconsistent with it is invalid, and all obligations imposed by it must be fulfilled.[44] It also contains a comprehensive Bill of Rights which is justiciable and which the courts have to interpret in a manner that will require respect for and application of international law. For example, Section 39(1) of the Constitution requires a court when interpreting

[42] Presidents Mbeki (South Africa), Obassanjo (Nigeria), Bouteflika (Algeria) and Wade (Senegal).

[43] Stephan Gelb, *The Partnership for Africa's Development (NEPAD): A Brief Overview* , GLOBAL INSIGHT (June 2002).

[44] *Constitution*, Section 2.

the Bill of Rights to consider international law and permits it to consider foreign law.

The Constitution provides the framework for the conclusion and incorporation of international treaties and the role of customary international law in municipal law. Under Section 231(1) all international agreements are negotiated and signed by the national executive. Provinces may, therefore, not conclude international agreements governed by international law.[45]

Domestic procedures may also be necessary before agreements can enter into force. Under Section 231(2) of the Constitution, an international agreement binds the Republic only "after it has been approved" by both the National Assembly and the National Council of Provinces. Certain agreements do not, however, require parliamentary approval. Technical, administrative and executive agreements or those not requiring ratification or accession will enter into force in the manner prescribed by the agreement itself and will bind the Republic without parliamentary approval.[46] The only requirement is that they must have been entered into by the national executive. Bilateral and "technical" trade agreements fall mostly into this category. The classification of these agreements is not explained in the Constitution. The descriptions in section 231(3) of the Constitution are legal and technical terms and their meaning has be ascertained through international and comparative sources[47] and by studying the practice that has developed under the new constitutional order.[48] Ultimately these are legal and constitutional issues that the courts will have to decide and international law will inform the decision of the court.[49]

Agreements not requiring parliamentary approval have to be tabled in Parliament within a reasonable time, but a failure to comply does not affect the validity of the agreement.

The domestic application and enforcement of agreements is a different matter. Section 231(4) requires prior legislative enactment by way of national legislation unless the provision is self-executing and part of an agreement approved by Parliament. National legislation includes subordinate legislation.[50]

Customary international law "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[51] No legislative incorporation is required; thereby reflecting the monist approach. International trade law is, however, for all practical purposes treaty law[52] and this provision is seldom of direct relevance to the application of trade agreements in South Africa.

[45] Provincial governments can, however, enter into arrangements with their counterparts elsewhere on matters such as tourism, cultural affairs, technical cooperation, etc.

[46] *Constitution*, Section 231(3).

[47] *See, e.g.*, Luzius Wildhaber, *Executive Agreements*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 81–86 (1984) and the citations there. "Self-executing" agreements are mostly recognizable from the text and the intention of the parties. The jurisprudence on "direct applicability" of treaties in the EU is quite extensive and carries a similar meaning to "self-executing".

[48] The Department of Foreign Affairs uses a "Manual" for classifying agreements and for deciding whether to submit them to Parliament for approval.

[49] Section 232 of the Constitution provides that customary international law is part of South African law. The Vienna Convention on the Law of Treaties constitutes a codified source of the law on international agreements, their entry into force, interpretation, reservations, consequences of violation, etc. This Convention is, therefore, an important source of law for South African courts for the purposes of interpreting constitutional provisions on international agreements.

[50] *Constitution*, Section 239.

[51] *Constitution*, Section 232.

[52] JACKSON, DAVEY & SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 269 (1995).

South Africa has deliberately chosen to be "international law friendly." Section 233 of the Constitution reads: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

This provision makes international law a legal source to be consulted by the South African courts in contrast to the traditional presumption of statutory interpretation which could only be invoked if the legislation was ambiguous.

South Africa has also moved away from the unitary state approach of the previous system and has adopted a *sui generis* species of federalism. South Africa now has nine provinces with their own legislatures and executives. Their powers are listed and enumerated in separate schedules to the Constitution. The residual powers remain with the national government, including the power to negotiate international agreements. The provinces do not have the power to enter into international agreements and have not had a very active role in their negotiation and conclusion. The Constitution does recognize the principles of "cooperative government"[53] but the provinces' role in international treaty-making is limited. Provinces are, however, part of the national legislature with provincial delegations constituting the "second chamber", the National Council of Provinces, which is constitutionally required to concur in the approval of international agreements.[54]

D. South Africa's International Economic Legal Framework

South Africa is a member of a comprehensive and complex set of international economic arrangements which include bilateral, regional and international agreements. It is not only a member of the WTO but also of the International Monetary Fund and the World Bank, as well as the latter's principal associated organizations: the International Finance Corporation and the International Development Association.[55] South Africa is also party to various protocols to the General Agreement on Trade in Services (notably relating to trade in basic telecommunication and financial services). It is also a member of several international organizations protecting intellectual property rights. The TRIPS Agreement has been largely incorporated into domestic law.

South Africa's regional relationships were complex under apartheid and that too changed after 1994. The country became a Contracting Party to the revised Fourth Lomé Convention concluded between the European Community and the group of African, Caribbean and Pacific states. However, with a more developed economy, South Africa does not benefit directly from this agreement, and a separate Trade Development and Co-operation Agreement was concluded between South Africa and the European Community in 1999.

South Africa is now an active member of the Southern African Development Community ("SADC"), and has remained the dominant player in the Southern African Customs Union ("SACU") Agreement. This Agreement has been in existence since 1910 and was revised in 1969. The political change in South Africa required the SACU Agreement to be renegotiated and the new Agreement entered into force July 15, 2004.

The domestic application of these agreements is not entirely clear. In terms of the Constitution such agreements have to be incorporated into municipal law by way of national legislation in order to have domestic effect. National legislation may include

[53] *Constitution*, Ch 3.
[54] *Constitution*, Section 231(2).
[55] Daniel Bethlehem, *International Economic Relations*, in DUGARD *supra* note 11, Ch 19.

subordinate legislation.[56] With respect to international agreements South Africa therefore still follows the dualist tradition. South Africa's trade, financial and economic agreements have, however, largely not been enacted into municipal law.[57] The WTO Agreement, for example, was approved by Parliament under the Interim Constitution on April 6, 1995, but has not been comprehensively enacted into municipal law. This position is complicated as substantive parts of these agreements have been enacted into national legislation, yet other provisions remain outside of the domestic legal framework.

In the field of intellectual property, South African statutes appear to have been drafted with the TRIPS Agreement in mind.[58] The South African Department of Trade and Industry also seems to adopt an approach that keeps domestic legislative and administrative procedure in line with its WTO obligations. The Department has recently published for public comment new Anti-Dumping Regulations. These Regulations incorporate the Anti-Dumping Agreement of the WTO into national legislation and grant the necessary power to domestic structures to implement the applicable international principles within a South African legal framework.

This particular area of South African law is, however, undergoing a crisis of development. The Supreme Court of Appeal recently rendered an unfortunate decision on the application of international trade agreements domestically in a case on the enforcement of rules of origin in international agreements.[59] The Court held that:

> If there were to be an apparent conflict between the general provisions of the statute and particular provisions of an agreement, difficulties of interpretation might indeed arise. The act must, of course, prevail in such a case: An agreement once promulgated is by definition part of the Act. It must follow that where words which are defined in the Act occur in the Agreement, there must be given the meaning assigned to them by the Act unless the context indicated the contrary.[60]

This is clearly unsatisfactory as the judgment creates an uncertainty with respect to the extent of incorporation of international trade agreements. Hopefully this will change as other structures exist under the current constitutional structure to redress the situation, such as the South African Law Commission, Parliament or the Constitutional Court. The rules-based trading system requires not only inter-state respect for international obligations, but that effect be given to their obligations internally. This is especially true in respect of international agreements on trade in services and the protection of intellectual property rights. International trade law is increasingly involved in domestic areas and beyond border measures, and requires positive legislative and administrative steps by governments. The somewhat awkward result is that South Africa has a comprehensive Constitution, but unfortunately it is not implemented to give full effect to the incorporation of international trade obligations.

Domestic implementation of trade obligations is a serious and burdensome matter common to developing state members of the WTO. In most instances the state is required to adopt new legislation, create new institutions and procedures. Obvious examples are TRIPS and GATS, but even traditional subjects of international trade law such as anti-dumping, safeguards, countervailing duties and customs require extensive

[56] *Constitution*, Section 239.
[57] Bethlehem, *supra* note 55, at 352.
[58] *Id*. at 353.
[59] *A.M. Moolla Group, Ltd* v. *The Commissioner for SARS*, Case No 139/2002, Supreme Court of Appeal (unreported).
[60] *Id.* at 15.

and effective domestic arrangements in order to reap the benefits of these multilateral disciplines.

South Africa has been fortunate to have undergone considerable legislative modernization since the election of its new government; ranging from far-reaching changes to the structure of government, competition legislation, statutes guaranteeing administrative justice and access to information,[61] employment equity and the restructuring of sectors of the economy to promote black empowerment. South Africa has not adopted a radical approach to land redistribution or nationalization of the mining industry. It has dealt with these sensitive issues through restructuring and redistribution policies in partnership with business and labor and in concord with specific growth and employment targets.[62]

With the International Trade Administration Act, South Africa has enacted legislation to directly administer international trade.[63] This Act repeals legislation providing for the Board on Tariffs and Trade and Import and Export Control. It creates a Trade Administration Commission responsible for matters such as anti-dumping, countervailing duties and safeguards.[64] The Commission is further tasked with the implementation of the new SACU Agreement of 2002. Section 15(2) provides that the Commission "must carry out any function that arises out of an obligation of the Republic in terms of a trade agreement, if the Minister [of Trade and Industry] has assigned that function to the Commission."

The Commission is a statutory organ and, as such, has to comply with the principles of administrative justice including transparency, fairness and providing reasons for decisions.

The Constitution further provides for the freedom of trade in section 22 which reads:

> Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

This provision has not yet been interpreted by the courts in the context of international trade. This is one of the few fundamental rights in the South African Constitution which is limited to "citizens"[65] and may pose an obstacle to some of the GATS provisions on mode four as well as the national treatment requirement.

This overview provides a picture of certain aspects of the South African legal landscape and the relationship to international trade. This has not come about as a direct result of WTO membership; but it does reflect the extent of important internal change. This provides an adequate framework for dealing with the new demands related to the domestic implementation of international trade obligations. Actual practice will further the domestic implementation of South Africa's trade obligations. The framework exists, but the necessary understanding and adaptation to the new rules of the game have not yet materialized to the extent required.

[61] The promotion and protection of administrative justice and access to information are constitutional obligations that had specific time periods for legislative enactment under Sections 32 and 33 of the Constitution.
[62] The National Economic Development and Labour Council is the mechanism for these partnerships. For a discussion of the Government's latest strategies on employment and public-private partnerships see the Financial Mail, May 30, 2003, at 26.
[63] Act 71 of 2002.
[64] *International Trade Administration Act*, Section 16.
[65] The other citizen-specific rights are the right to a passport, political rights and citizenship. All other rights in the Bill of Rights are made available "to everyone."

IV. South African Attitudes towards the WTO

The WTO is not a familiar concept to most ordinary South Africans and many will not even know what the acronym stands for. The reason is that there are still more pressing issues, such as the reconstruction and development of society and dealing with the legacy of the apartheid past.

The term "globalization" evokes a more emotional response, and while not always used consistently, is a more familiar term to South Africans. There are a fair number of South Africans who share the view that globalization, trade and multinationals are bad and responsible for environmental degradation and consumer exploitation. This view is not shared by most political and business leaders. There is a clear understanding that South Africa needs growth, development and employment opportunities and that trade and investment are essential prerequisites for achieving government goals. This is reflected in the economic policies of the government, in legislation, active participation in trade negotiations, both in Geneva and regionally, and in actual business practices.

Some sectors maintain a more critical view of the WTO disciplines. Certain trade unions will blame job losses in, for example, the textiles industry, on "unfair trade" instead of other probable factors such as the need to become competitive under global challenges.

Just as there cannot be one single view on the WTO (or globalization), South Africans also have varied opinions. South Africans in general desire the benefits of a prosperous society, the freedom to travel internationally and a clean environment. Those more knowledgeable about international trade (and remembering the effects of isolation under apartheid) will recognise the advantages of active participation in the international economy; without losing sight of the fact that the local economy displays certain peculiar features that require tailor-made solutions. WTO disciplines are not designed to be one-size-fits-all. Many criticisms against unfortunate consequences of international trade regimes, such as the controversy surrounding patents on essential medicines held by pharmaceutical companies in rich countries, will be shared by most South Africans. As the capacity to understand, apply and shape the rules governing international trade increases, adequate responses can be formulated. The new South Africa very much wants to be part of the bigger world, but is also acutely aware of the poverty and deprivation of many in Africa. These unfortunate conditions add to many structural consequences such as weak governments and misery for individuals. These important factors also have direct consequences for the rich and developed nations and their security; the "oneness" of the world makes it impossible for international peace and security to exist alongside pockets of squalor and collapsing governments.

V. A South African Perspective: Strengths and Weaknesses of the WTO

Any evaluation of this kind should start with some identification of possible criteria. What does the WTO purport to be and how does it differ from its predecessor? How has the WTO interacted with South Africa with its peculiar needs and expectations? Where do we stand with the "development agenda"?

An attractive feature of the WTO regime is that it is a rules-based system. This means, in principle, that the typical qualities of law, such as legal certainty and predictability, have replaced strong-arm tactics and reliance on bargaining power. In trade negotiations, power relationships have obviously not disappeared altogether but have been constrained within a legal framework, the justiciability of existing arrangements being a positive

consequence. The fact that the WTO is a single undertaking makes the outcomes of negotiations in principle more balanced and inter-connected.

From a South African viewpoint, a weakness of the GATT system has been retained by the WTO. Developed states that are better at "playing the system" gain advantages over those less able. This may not be conclusive evidence of a systemic bias against developing countries or that the system should be "democratized". An inter-governmental organization of sovereign states is not about democracy in the sense of power legitimated by popular sovereignty and regular elections in the liberal-democratic tradition. It is a forum for states to exercise their sovereign powers to arrange matters of mutual interest.

It is true, however, that a system such as the WTO, which purports to be subject to the rule of law, must face certain logical consequences. One is access to justice. Justice should not be denied to certain members simply because they lack the necessary means or capacity. Just as access to justice is made effective in national systems through the provision of legal aid to indigent individuals where the interests of justice so require, states without funds or the necessary capacity to represent themselves should be assisted. They should be assisted to avail themselves of the protection of the law and the benefit of an impartial forum determining their case. This is hopefully recognized through the contemporary emphasis on "capacity building".

These arguments are to some extent accepted in the WTO and technical assistance is available. The establishment of the Advisory Centre on WTO Law[66] is proof of a commitment to developing countries. However, technical assistance is still too much a matter of theoretical, seminar-based training, as opposed to long-term and effective capacity building through the establishment of suitable and lasting institutions in developing and least-developed member states. There were indications (in the early stages at least) during the Doha "Development Round" that capacity was recognized as a pre-condition for a rules-based system to function with legitimacy. The criticism of a democratic deficit can best be answered by ensuring balance in both the content and enforcement of the law of the WTO.

The WTO is based on a complex set of legal instruments. This may well be inevitable given the nature of the subject matter to be regulated and the intricacies of policy and scientific standards. Yet this is further reason for well-targeted capacity building programs. The law should not become an elitist instrument of obfuscation.

How is the ordinary citizen affected by the practice of the WTO? What is the impact on an average business in a small economy that is eager to experience "growth through trade?" Will it not have to run the gauntlet of scientific standards unfamiliar to the local industry and complex rules of origin that make "trade preferences" meaningless? The attractiveness of a rules-based system is then undermined by its own complicated manifestations.

The private firm cannot directly experience justice in a government-dominated dispute settlement system such as the DSU. Governments may not be the entities actually trading, but they are the only parties that enjoy standing before the DSB. And the possibility of filing *amicus curiae* briefs does not alleviate this deficit as governments must first take up their citizens' complaints.

A possible answer lies in involving the private sector more directly in the various aspects of WTO activities. This is a task for member governments, especially as they are quick to point out that the WTO is a "member-driven organization", a claim enthusiastically echoed by WTO officials in Geneva. Why should civil society be excluded from training programs? Why do only the United States and the EU provide a formal legal

[66] The web site of the Advisory Centre is: www.acwl.ch.

channel for their citizens to redress trade grievances? Private firms or individual complainants do not, as a rule, enjoy standing before international tribunals and cannot bring claims against foreign governments in such fora, despite the fact that they are usually the victims of violations of international trade agreements. In disputes involving foreign governments they have to convince their own governments to take up their claims and pursue the matter via diplomatic channels or institute claims before international dispute resolution bodies. States may exercise diplomatic protection[67] on behalf of their nationals or there may be specific municipal devices for pursuing international claims on behalf of domestic firms and individuals. This latter possibility does not exist in South Africa while the multinational giants of the United States and the European Union enjoy active support from their governments.[68]

There are other popular criticisms that involve other international trade agreements. The policy of the EU and others on highly subsidized farming sectors in rich countries can never be justified. These aberrations in the trade in agriculture are contained in the current law of the WTO. Arguments for "protecting traditional lifestyles" are insults to the millions in poor countries who are prevented from rising to experience a lifestyle of any quality. That is why they should be forgiven the same cynicism when hearing of the sudden upsurge of interest in and revival of geographical indications. South Africa had a particularly rude awakening in this regard when it negotiated its bilateral Trade, Development and Co-operation Agreement with the EU. A refusal to allow Spanish and Portuguese fishing fleets access to South African waters resulted in usage of the terms "port" and "sherry" being denied to a country that has produced these particular elixirs in some cases for over a hundred years.

VI. South Africa's Participation in the Dispute Resolution System

South Africa has not yet been involved in a formal dispute under the DSU. It has welcomed this particular development and outcome of the Uruguay Round, but has not been a complainant, defendant or third party. Why is this so?

A tempting response is that the country has not yet had a serious trade dispute or that it managed to resolve them through consultation. An active litigation strategy is probably not a priority for Pretoria, mirrored by its approach to adjudication in the SADC region where the preference is for direct consultations with trading partners.

This may have to change. Even consultations can be more effective when backed up by an effective dispute resolution system. It is also necessary in the light of the possibility of disputes being brought to the DSB by other developing countries against South Africa. South Africa is an eager practitioner of anti-dumping measures. Exporters from developing countries are increasingly on the receiving end of anti-dumping measures imposed by governments of other developing countries. South Africa has not escaped this trend. In April 2003, Turkey filed a request for consultations with the DSB

[67] On the possible use of diplomatic protection under South African law, see Gerhard Erasmus and Lyle Davidson, *Do South-Africans Have a Right to Diplomatic Protection?* 25 South African Yearbook of International Law 113 (2000).

[68] American citizens enjoy the rather wide protection provided for by Section 301 of the U.S. Trade Act of 1974, as amended. They can petition the U.S. government for assistance against foreign governments that violate trade agreements. Since 1994 the EU has a similar arrangement. *See* Chapter 11 of this book and John H. Jackson, The World Trading System: Law and Policy of International Economic Relations 127–132 (1998).

concerning anti-dumping measures imposed by South Africa on blankets exported from Turkey.[69]

There are several reasons for adopting a more pro-active policy on participation in the DSB. It is not possible for South Africa to effectively prevent claims against it. The development of expertise in this regard may prove to be a valuable asset, not only for defending and instituting claims, but also to enable the government to protect its interests as a third party[70] and be better prepared to assist its own nationals and firms in foreign disputes. It is part of the attractiveness of a rules-based system that decisions by independent fora establish an accepted international content on the meaning of rules. This strengthens the system. No member of the WTO can afford to deny itself this advantage.

VII. South Africa's Aims for the Doha Round

The Doha "Development" Round is an important opportunity to continue a process of global trade reform; started during the Uruguay Round, with the specific aim of addressing a number of issues of particular concern to developing countries.

The South African government views the Doha Round as an opportunity to achieve a fundamental structural adjustment to the development paradigm in international trade. The discussions during this Round concern broader issues and are not only limited to "pure" trade issues. For South Africa the debate is about very crucial issues of statehood and the quality of life of millions of Africans. There are certain aspects of poverty and underdevelopment that can be addressed by a deliberate process of directing resources from the developed to the poor. Such an approach is akin, so it is argued, to the structural developments funds used in, e.g. members of the EU.

The South African Minister of Trade and Industry has summarized the basic point of departure along the following lines:[71]

> The next round of negotiations must ensure structural changes in both the developed world and the developing world. Why is this? In the next decades, in the coming millennium, the impetus for growth in the world economy will not come from the developed countries (the G7) as they cannot attain sufficiently high growth rates. If the developing world wants to penetrate the markets of the G7, we will inevitably end up with zero sum game.
>
> This would impel us toward structural protectionism in the G7. If the developed world is not growing rapidly, if the developing world does not offer a dynamic and growing market, and if the developing world seeks its markets only in the developed world, then we run the risk that developed countries will inevitably, through internal political processes, be pressured into seeking agreements that merely serve their own narrowly defined interests. Their objective will be to create economic space for growth when, in fact, that space for growth will not be achievable within the structure of the world economy I have just described.
>
> In these circumstances, no matter the inherent quality of an agreement (for example, electronic commerce, TRIPS, multilateral investment arrangements), these can easily become mechanisms whereby the developed world seeks to reinforce its own advantages over developing countries at a point in time.
>
> Against this background a number of specific issues can be mentioned that are important to South Africa:

[69] *South Africa—Definitive Anti-Dumping Measures on Blanketing from Turkey*, WT/DS 288/1, April 10, 2003.

[70] The experience of India since 1995 and its very active role in WTO disputes serves as an example.

[71] This summary is taken from a keynote address by the South African Minister of Trade and Industry, Alec Erwin, to the National Consultative Conference on Preparations for the Third Ministerial and the New Round of Multilateral Negotiations.

Negotiations on agriculture should involve structural reforms and the distribution of agricultural production in the world economy as a whole. Negotiations should focus on the structural location of agricultural production. (South Africa has cooperated actively with the Cairns group in developing strategies for this sector.)

South Africa favors a wider category of non-actionable subsidies to promote development goals.

South Africa seeks to ensure that the benefits of intellectual property regimes are equitably shared between the innovators/owners and users/consumers of technology. The protection of intellectual property rights should encourage innovation and technological development whilst being conducive to meeting public and social policy objectives. South Africa requires that the protection of bio-diversity, food security, and access to essential drugs be clarified, as well as the definition, scope and modalities for non-violation complaints. The protection of geographic indications and the protection of other intellectual property rights should not undermine the benefits of a more open and competitive international trading environment.

South Africa favors a comprehensive approach to multilateral trade negotiations that includes industrial tariff negotiations. South Africa's objective is to ensure the reduction and elimination of tariff peaks and tariff escalation on products of export interest and in value-adding sectors that can build upon the comparative advantages of the developing countries.

South Africa recognizes that competition policy and law in developing countries form part of a broader policy framework, including meeting public policy objectives. As these considerations raise a complex set of issues, South Africa attaches great importance to the ongoing "educational" process underway in the Working Group on Trade and Competition Policy. Work in this area should be intensified, with particular emphasis on its developmental dimensions and the financial, human, institutional and juridical implications of competition policy and law should be examined at both national and multilateral levels.

As far as Transparency in Government Procurement is concerned, it is South Africa's view that commitments to transparency will add to the financial, institutional and administrative burdens of developing countries, and that the provision of adequate technical and financial support should be incorporated into disciplines in a meaningful application of special and differential treatment. Measures to improve transparency should not constitute efforts to achieve market access goals nor impinge on practices to address domestic development concerns. Any multilateral arrangement in this area should be in the form of non-binding guidelines that are not subject to the dispute settlement mechanism. Domestic or regional review mechanisms should be employed for any dispute which may arise.

On Trade Facilitation there is agreement that the simplification of trade procedures has the potential to save time, money, human and other resources and could result in substantial benefits for all economies. Efforts to improve security and predictability for traders, including trade facilitation, are welcome, but the realities of trade impediments in many developing regions (underdeveloped and poor customs administration procedures, documentation and infrastructure, etc.) are not best addressed by binding commitments in the WTO subject to dispute settlement. What is required is a comprehensive and integrated effort in technical cooperation, financial support and human and institutional capacity building.

Electronic Commerce, largely a GATS issue, has greatly enhanced the relevance of the cross-border mode of supply of services and has underlined the importance of implementing the commitment to provide developing countries with improved access to technology and information networks to underpin their increased participation in the world trade in services. South Africa supports the continuation of the work program on electronic commerce and calls for technical assistance, training and the development of infrastructure to enable developing countries to participate and benefit from electronic commerce. Extension of the standstill on the non-imposition of customs duties on electronic transmissions should be accompanied by the availability of technical assistance. Infrastructure and capacity constraints, connectivity, and access to hardware and software are critical issues for developing countries.

> South Africa attaches great importance to the ongoing discussions in the Committee on Trade and Environment with a view to resolving the issues related to the interface between trade and environment policies. Given the complexity of the issues and the concerns raised by many members, it is South Africa's view that it is premature to include the issue of trade and environment in the forthcoming negotiations where the prospects for a positive outcome are minimal. It could also undermine progress on the other issues.
>
> South Africa endorses the principle of core labor standards as enshrined in the ILO conventions, but rejects the use of labor standards for protectionist purposes. It is South Africa's view that efforts to bring labor standards under the WTO disciplines, where they would be actionable under the DSU, would fatally undermine any multilateral progress, not only on the issue of labor standards themselves, but also on every other issue under consideration in the WTO. Labor standards should consequently not form part of the proposed negotiating agenda for the New Round.

The above is a comprehensive list that resembles many of the demands of other developing nations. What may be different is the emphasis on the connection between the need for structural adjustment in particular economies and the logic of a global, rules-based trading system. Both rich and poor face the need to adjust, both rich and poor stand to loose from a failure to do so; albeit in different ways. The global system itself will suffer negative consequences if this aspect is not addressed. This is an important implication of the South African argument.

How effective and persuasive are these arguments? Do other leaders share this view? The next section (on strategy) discusses the South African approach, but the validity of the South African views depends on more than their moral quality. They have to persuade the developed world amidst changing perceptions on the role of governments in developing nations, an emphasis on domestic governance and the rule of law.

The benevolence of the post-colonial era has been replaced by the realism underpinning the Washington Consensus and enforcement of rules. This poses challenges for the moral leadership of South Africa's African role, as reflected in the NEPAD initiative. The latter, however, still suffers directly from the perception of the inability of African leaders to solve the present crisis in Zimbabwe.

New perceptions on international security after the terror attacks in the United States on September 11, 2001 and the War in Iraq may result in different considerations and tougher approaches by, for example, the United States. But they also offer scope for the argument on the link between stability and international peace, and the need to halt the wider consequences of poverty and decay of effective government in African states.

Some developed nations will agree with the wider structural implications flowing from the Doha agenda. They will, however, differ on where to put the emphasis. Judging by the debates before Cancun and the lack of progress made so far, most developed countries do not seem to be prepared to accept the structural changes required by the South African vision. The common agricultural policy of the EU and protection of multinational pharmaceutical companies seem, for example, to be no-go areas. Hopefully changes in attitude will follow as the negotiations continue. For this to happen, the negotiation process itself, the necessary momentum and a sense of urgency will have to be advanced.

VIII. The Strategy for Achieving these Objectives

South Africa, as a part of the developing world, supports a broad and balanced agenda for Doha. It favors the "single undertaking" approach where negotiated results should be adopted in their entirety.

Political leadership is an important determinant of South African policy-making. This informs the underlying assumptions of the NEPAD initiative which emphasizes that governments must take responsibility for the future of their states and people. Trade Minister Erwin has, however, also stated the following on the role of leadership as an element of a new strategy:

> I would suggest that the best way of integrating the developing countries into the world trade system is for the developed countries to engage in a serious discussion in their own societies about the structural adjustments that their economies have to undergo.[72]

Solidarity among developing countries in the Doha negotiations is seen as another important strategic advantage. For this they need to develop "a counter-weight capacity to the powerful influence that the G7 has on the world economy."[73] This requires a "capacity to negotiate." Developing countries have to come together and specialize where their strength lies. The WTO system as a complicated international trade arrangement requires expertise to be successfully utilized to maximum advantage. This may be obvious, but is difficult to realise. The developing world displays many divergent needs and preferences.

South Africa favors equity and sustainability in the world economy and supports the protection of the environment and labor rights although not necessarily through the WTO. Different negotiations should be "disentangled" and the relationship between key organizations such as the WTO, UNCTAD, ILO, IMF and the World Bank should be clarified. Environmental protection, sustainability and labor and social rights should receive proper protection, but should not be perceived "to be matters of negotiating advantage for the commercial or economic benefit of a group of countries against another."[74]

The South African government supports the rules-based nature of the world trading systems and seeks to protect and strengthen its integrity. However, a rules-based system is more than a formal structure. If substance, justice and equitable objectives are not part of such a system of law, a dangerous illusion will be the result.

It is imperative that economic interactions in the world economy are governed by a system of rules, not by the interplay of economic or military power. At the same time, it is imperative that rules are designed to achieve clear and equitable objectives. If there is no clarity and agreement on these objectives, and if there is no agreement on the need for the objectives to be equitable, then the very real danger will be that the world system functions on the basis of the interplay of power, under the guise of rules.[75]

IX. Effects of Regional Trading Arrangements

There have been a number of important regional trade developments in Southern Africa since the political changes of 1994. A new Southern African Customs Union ("SACU") Agreement has been concluded and entered into force on July 15, 2004. This agreement reforms the almost century-old customs union[76] and attempts to scale down the dominant role that South Africa played under the 1969 agreement. The preamble recognizes that

[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] SACU came formally into existence in 1910 and includes Botswana, Lesotho, Namibia and Swaziland as the other members. There were also customs arrangements in the late nineteenth century between the former Boer Republics of the Transvaal and the Orange Free State. Some of them included neighboring colonies of that time such as Swaziland.

the 1969 agreement could no longer "adequately cater for the needs of a customs union in the 21st century and should therefore be aligned with current developments in international trade relations." There is now considerable emphasis on common policies and common institutions.[77] They aim to function with greater independence and should ensure that SACU becomes a more balanced member-driven body and an effective vehicle to administer the liberalized common market.

The basic objectives of the Agreement are:

- To facilitate the cross-border movement of goods between the territories of the Member States;
- To create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States;
- To promote conditions of fair competition in the Common Customs Area;
- To substantially increase investment opportunities in the Common Customs Area;
- To enhance the economic development, diversification, industrialization and competitiveness of Member States;
- To promote the integration of Member States into the global economy through enhanced trade and investment;
- To facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States; and
- To facilitate the development of common policies and strategies.[78]

Two specific challenges face the customs union. The first is to administer the Common Revenue Pool[79] under conditions where the tariff revenues of the dominant state party, South Africa, is sharply declining because of its Trade, Development and Cooperation Agreement ("TDCA") with its largest trading partner, the EU, approved in 1999. The second challenge is a consequence of the TDCA, which provides for bilateral trade and development assistance outside the Cotonou Agreement, to which all other SACU and SADC members belong. The common market spreads the impact of the provisions of the TDCA to the other SACU members. These member states were, however, not directly and substantially involved in the negotiations conducted with the EU. The implications have now been acknowledged as SACU, and not just South Africa, is now involved in the negotiation of an FTA between the United States and SACU.

In 1994 South Africa also joined the newly reconstructed Southern African Development Community ("SADC"). The implementation of SADC's trade protocol, together with several other protocols on infrastructural development, addresses the uneven development that characterize the region. A matter of considerable legal interest will be whether the dispute resolution mechanism will be activated and allow for a more comprehensive rules-based approach.

Southern Africa faces the challenges of overlapping membership[80] of different regional organizations and demands for negotiating new Economic Partnership Agreements

[77] Such as the Council of Ministers, the Commission, a Secretariat to be housed in Windhoek, the Tariff Board, Technical Liaison Committees and the Tribunal.

[78] *South African Customs Union Agreement*, Article 2.

[79] For most members except for South Africa, customs revenue is an important source of national revenue.

[80] The five SACU members are all members of SADC, which has fourteen members. All SADC members, excluding South Africa (which has qualified membership), are full partners with the EU under the Cotonou Agreement, while South Africa has concluded a separate bilateral agreement with the EU. All of these states are members of the WTO.

("EPAs") with the EU,[81] as well as an FTA between the United States and SACU. These developments all impact on the multilateral trade framework. Whether Article XXIV of GATT 1994 can in its present form accommodate all the ensuing tensions and systemic implications looks uncertain. Furthermore, the direction of these regional initiatives are influenced not only by trade and economic factors, but are designed to address regional political and security considerations.

A subtle but potentially significant new dimension has entered into the Southern African regional trade arrangements that affects the power relationships. It came about not only as a result of the end of apartheid, but also as a result of the end of tensions between South Africa and its neighbors. The fact that South Africa is now a member of SADC and that a new SACU Agreement is in place, brings it under the disciplines of these arrangements. Southern African trade is now based on a rules-based arrangement; albeit still in its early stages of active implementation. Formal dispute resolution mechanisms exist on paper but are not yet in operation. The SADC Tribunal is, for example, not yet operational and the SACU Tribunal is still to be established.

This passivity may soon change. The logic of a rules-based regional trade system will then result in new practices, formal dispute resolution and different modes of interaction. South Africa will be wise to support such developments; they fit together with the bigger global picture and South Africa's desire for multilateral interaction.

X. The Development of Trade Policy

Trade and industrial policy is primarily formulated within the government. The formal structure for trade policy development is to be found in the relevant constitutional and legislative provisions which provide that the "executive authority of the Republic is vested in the President", who exercises this power together with the Cabinet.[82] This includes "developing and implementing national policy" as is typical of a Cabinet style of government rooted in the British tradition. The responsible government arm is the Department of Trade and Industry ("DTI").

The International Trade Administration Act allocates specific powers to the Minister of Trade and Industry as the "head representative" of the Republic in consultations with other SACU countries. This Minister may also "by notice in the Gazette . . . issue Trade Policy Statements and Directives."[83] The International Trade Administration Commission assists the Minister in this function.

Government is committed to transparency and a process of public participation.[84] The Trade and Industry Chamber of the National Economic Development and Labour Council ("NEDLAC") supports the DTI in formulating South Africa's trade and industrial policy. It serves as a mechanism through which DTI officials can receive input from labor and business constituencies. The consultative process offers an opportunity to test reaction to the DTI's proposed policies.

[81] South Africa will not be involved in the latter as the TDCA is in fact an EPA. The exact format of the proposed EPA is uncertain. There is support for maintaining SADC as a single entity and the party to an EPA with the EU. This will pose major challenges on how to accommodate South Africa, which has already concluded a separate EPA with the EU in 1999.

[82] *Constitution*, Section 85.

[83] *International Trade Administration Act*, Section 5.

[84] Recent examples are the notices published in the official Government Gazette inviting the public to comment on the newly drafted anti-dumping regulations and the content of Doha negotiation positions.

In addition to its representation in NEDLAC, organized business enters the trade and industrial policy debate through the President's Economic Advisory Council. Labor has another route of influence as the ruling party, the African National Congress, the South African Communist Party and the Congress of South African Trade Unions constitute a political alliance.

DTI is in principle receptive to initiatives on trade and investment issues from other departments and agencies, such as the Departments of Finance, Agriculture, National Health, and Mineral and Energy Affairs, and the South African Reserve Bank. Proposals and recommendations to the DTI also come from the former Board on Tariffs and Trade ("BTT") and the Industrial Development Corporation ("IDC"). The IDC, for example, assists the DTI in carrying out periodic reviews and assessments of trade policies. South Africa's trade and industrial policy can be influenced by the work of Parliament and the various Parliamentary Committees where government and opposing political parties engage in debate and where public participation is constitutionally mandated.

A remaining problem is the low level of active involvement of particular sectors in proactive initiatives. It is crucial that the private sector, as the ultimate beneficiary, become involved when government negotiates new FTA's or formulates negotiating positions in the WTO. The outcome of such developments is, as a rule, a binding legal obligation. The private sector will have to live and trade under these agreements, and support and lobby their government when disputes arise with foreign states. It is important to become involved in the early stages when such agreements are still being negotiated. There is wide-spread concern that this is not happening to a sufficient degree.

XI. Conclusion

South Africa has experienced dramatic changes over the last decade. It has undergone fundamental domestic change and reconciliation, as well as a process of re-integration into the world economy. The government began to play a leading role in the Southern African region and on the continent. But leadership brings challenges and difficult choices. South Africa increasingly faces the consequences and tensions that flow from its leadership role, coupled with the demands of its own economy for growth and development.

The South African economy continues with major reconstruction in order to obtain a fairer distribution of ownership and wealth. Unemployment and public health crises remain major difficulties. These constraints make it difficult to take all of the bold initiatives beyond its borders that may be required. It can, however, do considerably more to enhance trade liberalization in the region and to open its market to its neighbors. The adoption of a fair and enlightened regional trade policy is a major challenge for government. The role of South Africa under the new SACU agreement will also be carefully monitored by the other member states. The negotiation of Economic Partnership Agreements between the other SADC members and the EU will focus attention directly on South Africa and on the terms of its support for the SADC trade protocol.

The NEPAD initiative on the African continent further stretches South Africa's political leadership and resources. The next decade may well be the acid test for South Africa's trade policies and its political status will be tested by the extent of economic development, political stability and the movement of people in Southern Africa generally. South Africa, as the region's largest economy, bears the major responsibility and has the most serious interests.

The South African government tackles these challenges with considerable resolve. It will not be able to deliver on its promises and bring about the necessary structural changes unless the multilateral context is fully in tandem with local and regional developments. The WTO is a crucial forum and the Doha Round is a vital opportunity. It will not be in the interest of South Africa, the region or the African continent if it fails in its overall policy or development objectives.

CHAPTER 80

THE UNITED STATES

Amelia Porges* and Daniel M. Price**

TABLE OF CONTENTS

I. Introduction 381
II. U.S. Leadership in Forming GATT 382
A. Postwar Revival of the Trading System 382
B. The United States Settles for GATT 383
III. Trade Policy Decision-Making in the United States 384
A. The President and Congress—Constitutional Tensions over Trade 384
B. Trade Negotiating Authority and "Fast-Track" 385
C. The Debate over Multilateralism 387
D. USTR: The Key Player in U.S. Trade Policy 388
IV. The United States in the GATT: Through the End of the Tokyo Round (1947–1979) 389
A. The Early Years 389
B. The Kennedy Round 390
C. The Tokyo Round 392
V. The 1980s: Congressional Unrest, Bilateralism and a Globalizing Economy 396
A. The Early 1980s: Trade Deficits, Trade Restrictions, Breakdown in Geneva 396
B. Congress Grows Restless, the Administration Responds, and a New Round Begins 398
C. The Omnibus Trade Act of 1988 400
D. The Globalizing Economy 402
VI. The Uruguay Round 403
A. The Importance of the Round to U.S. Policy 403
B. 1986–89: Building the Three Key Pillars 404
C. Mid-Term Review in Montreal and on to Brussels 408
D. From Brussels to the Dunkel Draft 412
E. To Blair House and Beyond 415
F. Finishing the Round, 1993 417
G. The Uruguay Round Agreements Act 419
VII. The WTO's First Seven Years: Negotiations and Implementation 422

* Amelia Porges is Counsel at Sidley, Austin Brown & Wood LLP, and was formerly Senior Counsel for Dispute Settlement and head of enforcement at USTR. During the Uruguay Round, she served as Senior Legal Officer and Counsellor for Legal Affairs at the GATT Secretariat.

** Daniel M. Price chairs Sidley, Austin, Brown & Wood LLP's International Trade and Dispute Resolution Practice, and was formerly USTR Principal Deputy General Counsel. The views expressed herein are personal and should not be read as reflecting the views of any of these organizations. The authors thank Kevin Brosch, Andrew Shoyer, Joel Trachtman, John Weekes and Rufus Yerxa for their comments and criticism.

A. Laying the Foundations 422
B. The Built-in Agenda 423
C. New Initiatives 424
VIII. A New Round again, and the Trade Act of 2002 426
A. The Launch at Doha 426
B. Trade Promotion Authority: the Trade Act of 2002 428
C. And Then Cancún 432
IX. The WTO in 2005: Challenges ahead 434

I. Introduction

Ever since the modern multilateral trading system was established in the early postwar period, the United States has been a central player. At the close of World War II, when the system began to take shape, the United States was the world's preeminent economic power and most influential democracy. U.S. negotiators took a leading role in conceptualizing and negotiating the agreement that became the General Agreement on Tariffs and Trade (GATT). In the fifty-five years since then, the United States has been a sustaining force providing the essential support for trade liberalization to move forward, and yet also at times has been a maddeningly unreliable trading partner, starting with U.S. rejection of the ITO Charter in 1950.[1] U.S. ambivalence about foreign trade and globalization has always been strong.

In the years that followed the creation of the GATT, successive administrations participated as a major player in eight rounds of multilateral trade negotiations, culminating in the Uruguay Round which gave birth to the WTO. Over time, Congress changed from outright hostility, to apathy punctuated with distrust, to broad bipartisan support of trade expansion through multilateral negotiations. The U.S. economy grew more and more globalized, as U.S. manufacturing and jobs became more and more linked to imported inputs and external markets, and the United States became the world's largest per-capita importer. Foreign investors and the jobs they create became as visible a presence in the United States as U.S. investors were in countries abroad. In 1994, Congress voted by a large margin to approve the WTO Agreement. In 2000, the year after the Seattle Ministerial Meeting of the WTO, Congress voted by an overwhelming margin not to withdraw from the WTO.[2]

This chapter presents an account of U.S. participation in the GATT, the Uruguay Round of multilateral trade negotiations, and the WTO. It starts with the U.S. role in the negotiations which led to the GATT, and discusses how trade policy is made, the constitutional basis of trade decision-making and the relative roles of Congress and the executive branch, particularly the Office of the U.S. Trade Representative ("USTR"). It presents an outline history of the U.S. interaction with the GATT from 1949 through the end of the Uruguay Round and the enactment of the legislation implementing the WTO Agreement. The chapter concludes with a brief discussion of the launch of the Doha Development Agenda ("DDA") negotiations, U.S. objectives and negotiating authority, and the situation in the wake of the Cancún Ministerial Meeting of September 2003.

Today, U.S. policymakers face the same challenge as ever: making the case to the public that the national interest is served by open trade, mobilizing support for open trade and gathering the collective political will. Breaking out of years of deadlock, the new Bush Administration successfully cooperated with the EC and others to launch the DDA, and then succeeded in securing Congressional backing for "trade promotion authority" legislation to provide the necessary legal support.

[1] John Odell and Barry Eichengreen, *The United States, the ITO, and the WTO: Exit Options, Agent Slack, and Presidential Leadership*, in THE WTO AS AN INTERNATIONAL ORGANIZATION (A. Krueger ed. 1998) at 181–209; also available at http://www-rcf.usc.edu/~odell/Ito01.PDF.

[2] H.J. Res. 90, a joint resolution *Withdrawing approval of the United States from the Agreement Establishing the World Trade Organization*, sponsored by Representative Ron Paul (R-Texas), with Reps. Chenoweth, Coburn, Duncan, Metcalf, Ney, Norwood, Taylor and Traficant. Introduced March 6, 2000, referred to the House Committee on Ways and Means, considered by the Committee on June 8, 2000 and reported adversely 35–0 by the Committee on June 12, 2000 (H.Rept. 106–672). After two hours of debate the resolution was rejected by a roll-call vote of 56 in favor and 363 against. 146 Cong. Rec. H4793-4814, H4909.

Yet the old ambivalence has not disappeared. Steel, textiles and other import-sensitive industries are as active as always, joined at times by new groups raising new concerns. Each economic downturn means greater pressure against import expansion. And recent years have added a new strain to the policy mix—the possibility that exporting interests can achieve their trade expansion goals outside multilateral trade negotiations, through regional trade agreements. The way in which the United States meets these challenges in the coming years is critical to the success of the DDA and the future of open trade in the world at large. And it will determine whether and how the United States retains a leading role in the trading system in the years after the DDA has been concluded.

II. U.S. Leadership in Forming GATT

A. Postwar Revival of the Trading System

The story of GATT's formation starts from wartime planning by U.S. and UK economic policymakers on collaboration in reviving world trade and employment in the postwar era. In bilateral discussions from 1940 through 1946, they agreed to advance the concept of an international organization for trade to complement international financial organizations; the organization would be linked to multilateral negotiations on reciprocal reduction of tariffs.[3] At its first meeting in February 1946, the new UN Economic and Social Council (ECOSOC) then initiated the preparatory process for a world conference on trade and employment, including negotiation of a draft charter for an International Trade Organization (ITO).[4] ECOSOC invited eighteen key countries to be members of the preparatory committee for the world conference. In September 1946, the United States tabled a draft "Suggested Charter," which became the basis for discussions at the preparatory committee's first session in October–November 1946.[5] The United States also invited members of the preparatory committee to engage in a round of tariff negotiations.[6]

U.S. participation in the ITO negotiations had two bases in domestic law. The ITO Charter would be negotiated like any other international agreement, and submitted for approval afterward to the Congress. Tariff cuts provided in connection with the ITO, on the other hand, fell under the Reciprocal Trade Agreements Act ("RTAA") of 1934, which authorized the President to enter into reciprocal trade agreements and to proclaim tariff cuts to carry them out. The 1945 extension of this tariff-cutting authority, Harry Truman's first legislative success as President, permitted tariff cuts of up to a generous fifty percent from applied rates as of January 1, 1945.[7] Since the ITO could not be completed and ratified before the RTAA again expired on June 30, 1948, the tariff concessions would have to be implemented in advance of the rest of the package. This required a separate legal agreement, the GATT.

[3] THOMAS W. ZEILER, FREE TRADE, FREE WORLD: THE ADVENT OF GATT 20–62 (1999).

[4] GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 3–4 ("ANALYTICAL INDEX"), (revised 6th ed. 1995).

[5] SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, US Department of State Publication 2598, Commercial Policy Series 93 (1946).

[6] State Department Press Release No. 935, Dec. 13, 1945; *Resolution Regarding the Negotiation of a Multilateral Trade Agreement Embodying Tariff Concessions*, Annexure 7 to REPORT OF THE FIRST SESSION OF THE PREPARATORY COMMITTEE OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT, U.N. Doc. E/PC/T/33 (Oct. 1948).

[7] H. Hawkins and J. Norwood, *The Legislative Basis of United States Commercial Policy*, in STUDIES IN UNITED STATES COMMERCIAL POLICY (W. Kelly ed. 1963), at 104.

The first session of the preparatory committee agreed on the outline of a GATT, although the actual tariff negotiations did not take place until 1947, safely after the November 1946 elections.[8] The text of the GATT picked up the commercial policy provisions from the Charter, together with special provisions on tariffs. The negotiations on its text took place during and after the second session of the preparatory committee, culminating in the Final Act adopted at the conclusion of the second session on October 30, 1947.[9]

Then, at the World Conference on Trade and Employment in Havana, the core group that had negotiated liberal and nondiscriminatory rules for trade faced the demands of a wider and more diverse group of countries. The Havana Charter signed on March 23, 1948 included many compromises and exceptions. It satisfied neither U.S. free-trade perfectionists nor U.S. protectionists, and its provisions visibly permitted discrimination against U.S. exports for an indefinite period.[10] The Truman Administration submitted the Charter to Congress for two-house approval early in January 1949.[11] Congress did not hold any hearings on the Charter until April-May 1950. Meanwhile, domestic opposition increased, and the Marshall Plan and the fight against communism displaced the Charter in Administration priorities. When war broke out in Korea, the Administration jettisoned the Charter in favor of the fallback strategy of participation in the GATT. On December 6, 1950, the State Department announced that the Administration would not resubmit the Charter to Congress. The Charter was dead.[12]

B. The United States Settles for GATT

The GATT offered an attractive fallback for trade policymakers in the United States and elsewhere. In hearings in the winter of 1946–47, Congress had criticized the Administration for using reciprocal tariff authority to bootstrap the United States into joining another international organization. State Department negotiators listened and responded.[13] The GATT was consciously designed not to look like an international organization; its participants were described not as "members" but as "contracting parties," and the entity exercising its collective will was described not by any particular name but as the CONTRACTING PARTIES in all capital letters.[14] The Protocol of Provisional Application permitted every contracting party to keep its existing mandatory legislation (avoiding any need for the Administration to ask a hostile Congress to change the law). And as a tariff-cutting agreement the GATT itself fell well within the four corners of the traditional mandate under the Reciprocal Trade Agreements Act. When the State

[8] Zeiler, *supra* note 3, at 63 on linkage to elections.

[9] The Final Act included the GATT, the Protocol of Provisional Application provisionally applying the GATT, and the schedules of concessions of the preparatory committee members.

[10] E.g., Article 23 of the Havana Charter, which permitted the British Commonwealth to discriminate against dollar area exports in applying balance-of-payments restrictions.

[11] The State Department transmitted the Charter as a joint resolution, requiring a simple majority in both houses. In the House, it was referred to the Foreign Affairs Committee, and to the Committee on Ways and Means, which would have had to legislate changes in domestic law required by the Charter rules. Zeiler, supra note 3, at 133–134.

[12] The depositary of the Charter, the UN Secretary-General, did not receive any acceptances of the Charter. *Analytical Index*, *supra* note 4, at 6.

[13] Zeiler, *supra* note 3, at 75–84; Susan Aaronson, Trade and the American Dream: A Social History of Postwar Trade Policy (1996), at 69–72, 82–83.

[14] The inventor of this orthographic device was John Leddy, of the U.S. State Department Trade Agreements Division.

Department's Trade Agreements Division drafted the U.S. Suggested Charter in 1945–46, the drafters based the core substantive trade provisions (later to become the GATT) on the standard draft text used in the U.S. reciprocal trade agreements of 1930–1945.

The Truman Administration decided to support the idea of building the GATT into an effective, functioning arrangement to accomplish at least some of the goals set for the ITO. The GATT, originally just a stopgap, became the basis of an *ad hoc* institution that would have to survive by flexibility, consensus and compromise. Over the next 45 years there were to be many advances and setbacks in the road from that early GATT to today's WTO. Although the GATT quickly became an effective forum for negotiating tariff reductions, it would be years before serious effort went into trying to reduce non-tariff barriers, and longer still before the contracting parties decided to raise their level of ambition, venture into new areas of trade discipline, and construct a stronger rule enforcement mechanism. The United States played a critical role in that evolution, contributing both to the strengthening of the system and to some of its more disappointing failures. On occasion, opposition from powerful U.S. interests contributed to a breakdown in GATT rules and a failure to impose discipline. Yet American leadership also helped to ensure the necessary reforms that have so significantly strengthened the institution and its rules. Despite a grueling domestic debate echoing many of the same sovereignty arguments used against the ITO, the United States was instrumental in finally bringing into existence the more permanent and universal institution now known as the WTO.

III. Trade Policy Decision-Making in the United States

To better appreciate the relationship between the United States and the GATT/WTO system, it is important to understand the process of trade policy decision-making in the United States. The complex (and to outsiders at times baffling) system for negotiating trade agreements and regulating foreign commerce is a product of the distribution of powers in the U.S. Constitution of 1789. As a newly independent nation the United States had many commercial and cultural ties to Europe, but it also possessed a growing internal economy and vast natural resources. Trade concerns were central to the original formation of the United States, and were heavily influenced by a desire to avoid dependency on Great Britain or other European powers. Moreover, customs duties were originally the major source of revenue for the Federal government, a fact that did not change until introduction of the income tax in 1910.[15] As a result of these considerations, the country's original founders devoted much attention to the question of how to regulate foreign commerce.

A. The President and Congress—Constitutional Tensions over Trade

The Constitution's structure reflects the desire of its drafters to maintain a careful balance between competing economic and political interests. The principle of separation of powers was one means of ensuring that balance. This principle is evident in the creation of three distinct branches of government with their different roles and their areas of interdependence clearly spelled out in the Constitution. The role of Congress is primarily to legislate, but it also has certain powers over Presidential appointments. The role of the President is that of a chief executive, but he also has the right to propose and to veto legislation. The role of the judicial branch is *(inter alia)* to provide a check on whether

[15] *See* ALFRED ECKES, OPENING AMERICA'S MARKET: U.S. FOREIGN POLICY SINCE 1776, 49 (1995), table 2.1 on U.S. Customs duties and federal revenue: Customs duties represented 65 percent of total federal revenue in 1860, 41 percent in 1900, 31 percent in 1915, 14.5 percent in 1930, and 1.6 percent in 1992.

the President or the Congress has acted outside the scope of Constitutionally-conferred authority.

The separate but interdependent nature of the two branches is no less evident in the field of foreign trade, where the Constitution draws distinctions between the responsibilities of the two branches. The Constitution grants the President the sole power to make treaties (under Article 2, section 2) and accordingly the President has exclusive authority to *negotiate and conclude* international trade agreements. However, the Congress has plenary power under the Constitution to *regulate* interstate and foreign commerce and to authorize customs duties (under Article 1, section 8). As in the case of many other countries, the U.S. Constitution takes a dualist approach to international treaty obligations: no treaty obligation is directly applicable in domestic law, and generally treaties are carried out in domestic law through enactment of implementing legislation.

This Constitutional separation of powers has had a profound impact on U.S. participation in the GATT/WTO system. The President has been unable to carry out any negotiated tariff reductions or carry out agreements on non-tariff barriers to trade, unless Congress has either granted him in advance the authority to do so, or has approved the agreements afterwards and has passed implementing legislation. Conversely, the Congress cannot enter into negotiations with other governments, and must rely on the President to conduct such negotiations.

In parliamentary systems, the leader of the government is also the leader of the legislative branch, and can insist on support for the government's negotiating position from his or her own ruling majority. The government and the legislative majority are clearly and jointly responsible for trade policy decisions. But the American division of powers, as perfected by various delegations of power from Congress to the executive branch, facilitates the executive-legislative trade policy game so ably characterized by I.M. Destler:[16] Members of Congress can and do give voice to the interests of local industries, labor unions or other organized lobbies in trade policy matters, secure in the knowledge that the executive branch will prevent anything irretrievably bad from happening. As a corollary, many in Congress seek to retain as much domestic control over trade matters as possible, rather than agree to a formal surrender of power to an international body. This group of concerns, often described as relating to "sovereignty," animated the opposition to the ITO and other unhappy episodes, and remained a factor to be dealt with when the Clinton Administration sought approval in 1994 for the WTO.

One more structural feature of American government, the different composition of the two Houses of Congress, has had a profound effect on the politics of trade policy in the United States. The House of Representatives, apportioned by population, represents the populous states and the Rustbelt; for instance, in House debates the interests of energy consumers tend to prevail. But in the Senate, which has two Senators for each of the fifty states, the interests of the West, the Farm Belt and energy and natural resource producers have historically had a strong voice. To start or finish a round of trade negotiations, trade negotiators have had to mobilize broad support from both industry and agriculture—particularly agriculture.

B. Trade Negotiating Authority and "Fast-Track"

The collective memory of the trade policy community locates the zenith of Congressional control over trade policy in the Tariff Act of 1930 (often called the Smoot-Hawley Act after its principal sponsors), the last time that Congress ever crafted a general tariff bill

[16] *See* the classic AMERICAN TRADE POLITICS (1995), and other articles by Destler.

setting tariffs line by line. The Smoot-Hawley Act raised the average tariff on dutiable items to sixty percent and was widely blamed for the worldwide decline in trade in the 1930s. After this embarrassment, Congress periodically enacted statutes delegating to the President the authority (and implicitly the political responsibility) for tariff reduction.

The first delegation occurred through the Reciprocal Trade Agreements Act of 1934,[17] which granted specific authority to the President to negotiate reciprocal trade agreements with other countries and to proclaim reductions of the U.S. most-favored-nation tariff rate to carry out tariff reductions provided for in those agreements. This authority was renewed for varying periods of time, with varying conditions attached. In the postwar period, the duration of U.S. tariff proclamation authority conferred by the Trade Agreements Act extension legislation became the major factor determining how long negotiations would last in each of the GATT tariff rounds, and the depth of cut authorized became the main limiting factor for the extent of tariff liberalization each tariff round would produce.[18] Finally, Congress replaced the 1934 Act with new tariff-cutting authority for what became the Kennedy Round of trade negotiations—the Trade Expansion Act of 1962. Yet when Kennedy Round negotiators agreed to a code on antidumping measures and the Johnson Administration transmitted the code to Congress, Congress explicitly rejected it. With this painful experience in mind, in 1973 the drafters of the legislation to authorize U.S. participation in the Tokyo Round worked out a new formula for balancing the interests and roles of the two branches: "fast-track" implementation of trade agreements on non-tariff barriers.[19]

Under the fast-track procedure provided for in the 1974 Act,[20] the President could present the Congress with draft legislation changing U.S. laws as necessary and appropriate to implement a non-tariff barrier agreement, and could be certain that the legislation would be reported out of committee and would receive an up-or-down floor vote within a fixed period of time. In legal form, "fast-track" consisted of a special standing rule for certain trade agreements, as an exception to the House and Senate Rules that generally govern voting procedures and floor amendments.[21] In effect, it created a self-imposed restraint on the otherwise broad Constitutional right of Congress to regulate foreign commerce.[22] In return, Congress gained the right to influence the negotiating process through consultation procedures set forth in the 1974 Act[23] and to thoroughly review the agreements, as well as the legislation and the required Statement of Administrative Action[24]

[17] P.L. 73–316.

[18] Hawkins and Norwood, *supra* note 7, at 104–114; J. Leddy and J. Norwood, *The Escape Clause and Peril Points under the Trade Agreements Program*, in Kelly, *supra* note 7, at 145–146.

[19] "Fast-track" was invented to handle agreements that dealt with non-tariff barriers and would therefore require changes in U.S. law for their implementation; tariff cuts continued to be provided for by delegating to the President the authority to enter into tariff agreements and implement them by proclaiming tariff changes.

[20] Sections 151–152 of the Trade Act of 1974, 19 U.S.C. 2191–2192.

[21] For this reason, "fast-track" could be granted or denied solely by a vote of either House and such a decision would not be subject to Presidential veto.

[22] Some critics mistakenly argue that fast-track procedures deprived Congress of the right to amend legislation implementing a GATT/WTO agreement. This is far from true. In the two major enactments implementing the Tokyo Round and Uruguay Round agreements, numerous Congressional committees spent up to nine months in negotiations with the Administration to agree upon a vast array of amendments that the President would include in the final introduced bill. However, the amendments were made prior to introduction of the legislation, rather than after introduction as is normally the case.

[23] Section 161 of the Trade Act of 1974 (19 U.S.C. 2211).

[24] The "fast-track" procedures required submission of a definitive Statement of Administrative Action describing any administrative action proposed to implement the agreement, and a description of how such action would affect existing law.

before they were introduced. In 1979, at the close of the Tokyo Round, the Administration and Congressional staff worked together on drafting the implementing bill and determining what administrative action would be taken to implement the agreements. The same process would take place in 1994 after the Uruguay Round.

"Fast-track" greatly enhanced the Administration's ability to negotiate beyond tariffs and to make stable promises that the President could secure Congressional approval of the necessary changes in U.S. law, avoiding endless rounds of Congressionally-demanded renegotiation of deals made in Geneva. "Fast-track" became an indispensable element of U.S. participation in GATT/WTO negotiations, and since 1974 no major GATT/WTO round has moved far unless the U.S. Administration has gained fast-track authority. Yet fast-track (now relabeled as "trade promotion authority") has itself become a source of great controversy. Although the Bush Administration was successful in gaining trade promotion authority in 2002, the mounting opposition and the thin margin (214–215) by which it passed in the House of Representatives are harbingers of difficulties to come.[25]

C. The Debate over Multilateralism

The mainstream of the U.S. business community has for many years accepted the need for reciprocal reduction of barriers with our major trading partners. Yet since the debate over the ITO, some in the business community and outside have questioned whether the GATT/WTO system will effectively advance U.S. interests, arguing that the United States should use its size and commercial leverage to insist on better rules or to ensure greater fairness. They have argued that the system as it exists legitimizes foreign unfair practices while preventing U.S. use of reciprocal market access as leverage: they see the most-favored-nation ("MFN") clause as a "lowest-common denominator" approach that simply invites protectionist free riders abroad.

Supporters of trade see multilateral rules as the best way to ensure more open markets for America's highly competitive multinationals and agricultural producers. They argue that the United States, producing and exporting a diversity of products to many markets, is by far the largest beneficiary of a multilateral system. They point to the impracticability of a strict reciprocity policy, the resistance it would bring abroad, and the collateral damage it would inflict on unrelated commercial and foreign policy interests of the United States. They appeal instead to the virtues of reforming the system and exercising leadership, virtues which did have a measurable positive effect for the United States in the Uruguay Round negotiations.

While this debate has never been fully resolved, the basic compromise between these competing views is embedded in many U.S. laws. On the one hand, these laws (and Congress) presume continued participation in the benefits of membership in the GATT/WTO regime: on the other, they seek to condition access to the U.S. market on reciprocal access to markets abroad, or on a foreign government's non-use of unfair practices. Congress expresses statutorily its concerns about unfairness and lack of access to markets abroad–for instance, through Section 301 of the Trade Act of 1974[26] and the various enhancements to it in 1984, 1988 and 1994, granting the President sweeping powers to address "unreasonable" and "unjustifiable" foreign trade practices including

[25] I.M. Destler, *Executive-Congressional Collaboration for Trade Liberalization, OR Games Legislators Play*, paper for Tulane Univ. volume on the Political Economy of Trade Policy Reform (2002), at 1, 18.
[26] 19 U.S.C. 2411 *et seq.*

denial of reciprocal market access, and authorizing retaliation against countries that fail to remove such barriers. But in the end, Congress delegates the responsibility for taking action to the President.

Some groups in the United States—principally import-competing industry and labor—have consistently opposed trade liberalization. Since the early 1990s, they have been joined by anti-globalization NGOs, who may oppose trade and economic growth as anti-environment or as harming workers' rights, or may oppose foreign rules that would bar denial of market access as leverage to influence the actions of foreign governments on environmental or labor issues. This grouping of interests reached their peak in public effectiveness at the time of the disastrous 1999 WTO Ministerial in Seattle. Although that ministerial failed for a variety of reasons,[27] the media perception created was that global protests against free trade were a major contributor to its failure.

Anti-globalization sentiment has markedly declined from its late-1990s peak. In 2000, Congress voted overwhelmingly not to withdraw from the WTO, and more recently the opposition to globalization has been displaced by public security concerns in the wake of the September 11, 2001 attacks. But the future debate will be far more complex. New agreements to expand or strengthen trade disciplines will be far more difficult, and in the years to come supporters of the WTO must not only prevail against the traditional opponents of trade liberalization, but must also convince skeptical elements of American society that it draws the right balance between economic interests and other societal concerns.

D. USTR: The Key Player in U.S. Trade Policy

As discussed above, the relationship between Congress and the Administration is critical to the successful functioning of U.S. trade policy. For the first fifteen years of the GATT, the Administration's principal spokesman on GATT matters was the State Department. This was a constant source of discord with U.S. industry groups and with their supporters in Congress, due to the persistent belief (based on experience) that the Secretary of State would generally put foreign policy interests ahead of commercial concerns. U.S. efforts to revive the economies of Western Europe and Japan, which in another era might have been motivated by long-run economic interests, took place instead as part of a general East-West struggle in which U.S. producers and exporters saw their own trade concerns as taking second place to alliance diplomacy. The Dillon Round negotiations of 1960–62 were the last straw: the European Economic Community (whose formation had been backed by the United States as a bulwark against communism) succeeded in liquidating its members' agricultural tariff concessions, instituting variable levies, and eliminating U.S. access to agricultural export markets in Western Europe. In 1962, when the Kennedy Administration sought legislation authorizing participation in a new GATT round, it became clear that the negotiator would have to be some other entity, an honest broker for trade policy to be housed somewhere else in the Administration.[28]

That legislation, the Trade Expansion Act of 1962, created a special office in the Executive Office of the President, initially called the Special Representative for Trade

[27] *See*, *e.g.*, the discussion in John Odell, *The Seattle Impasse and its Implications for the World Trade Organization*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC (D. Kennedy and J. Southwick eds. 2002) (also available at http://www-rcf.usc.edu/~odell/pub.html).

[28] *See* discussion in STEVE DRYDEN, TRADE WARRIORS: USTR AND THE AMERICAN CRUSADE FOR FREE TRADE (1995), p. 33–55.

Negotiations and later renamed the United States Trade Representative (USTR).[29] Over time, the USTR would become both the President's chief trade negotiator—both for GATT/WTO matters and for bilateral or regional trade agreements—and the coordinator of trade policy matters within the Administration. Later legislation has progressively enhanced the USTR's authority and role.[30]

In order to ensure adequate private sector input into trade negotiations and trade policy matters, Congress established a system of private sector advisory committees to advise USTR.[31] The principal committee is known as the Advisory Committee for Trade Policy and Negotiations ("ACTPN"), and contains representatives from industry, agriculture, trade unions, environmental and consumer groups, and other interests. A system of sectoral and technical groups below the ACTPN, representing agricultural commodity sectors, industrial sectors, and cross-cutting topical areas such as investment and intellectual property, offers more detailed advice to trade negotiators on specific matters.[32]

IV. The United States in the GATT: Through the End of the Tokyo Round (1947–1979)

A. The Early Years

As noted above, the United States was a leading participant in the seven rounds of GATT negotiations that preceded the Uruguay Round. Indeed, the level of ambition and scope of tariff cuts in these rounds were heavily dependent on the degree of authority granted by Congress to the President to cut U.S. tariffs. In the earliest rounds, U.S. tariff cuts provided the biggest contribution to actual liberalization, because almost all other governments still controlled imports through the use of balance-of-payments restrictions, and under such circumstances, tariff cuts were of little immediate significance.[33] The United States dramatically reduced and bound a large number of tariffs in the first five rounds between 1947 and 1963. Average tariffs on dutiable U.S. imports were cut by forty percent—from 19.3 percent to 11.5 percent—during this period.[34]

The early years of the GATT also saw the first use of the GATT's dispute settlement provisions, and their evolution into a functioning but imperfect system of "diplomat's jurisprudence," as chronicled in Robert Hudec's classic account *The GATT Legal System and World Trade Diplomacy.* The United States was both a user and a target of dispute settlement in these years. U.S. import restrictions on dairy products, enacted in 1950

[29] Trade Expansion Act of 1962, section 241.

[30] Section 141 of the Trade Act of 1974 (19 U.S.C. 2191), and later amendments thereto, required Senate confirmation of the Trade Representative, gave the position Cabinet rank, and gave USTR statutory primacy over trade negotiations in the GATT. In 1994 USTR was given primacy over trade negotiations and dispute settlement in the WTO. *See*, e.g., Section 621(a) ("conforming amendments") of the Uruguay Round Agreements Act of 1994, P.L. 103–465.

[31] Legislative basis: Section 135 of the Trade Act of 1974 as amended (19 U.S.C. 2155).

[32] In response to a GAO report on the advisory committee system, *see* General Accounting Office report GAO-02–876, *International Trade/Advisory System Should Be Updated to Better Serve U.S. Policy Needs* (Sept. 24, 2002, available at http://www.gao.gov), USTR announced on November 25, 2003 a revamping of these committees; *see U.S. Department of Commerce and the U.S. Trade Representative Announce New Industry Trade Advisory Committee Structure*, USTR press release Nov. 25, 2003.

[33] S. Ostry, The Post-Cold-War Trading System: Who's On First? 70 (1997).

[34] U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part 2, at 888 (Table U 207–212) (1975).

over Administration objections, became the subject of the one and only case in which the GATT (with the passive cooperation of U.S. trade negotiators) authorized trade retaliation against a contracting party.[35]

The less-than-perfect compliance of GATT members with the rules became particularly apparent in two sectors: agriculture and textiles. Agricultural producers, protected since the interwar period, secured continued protection postwar through import restrictions in both Europe and the United States. In 1955, the GATT authorized a waiver for U.S. use of import restrictions and import taxes to support the two-price agricultural policy of Section 22 of the Agricultural Adjustment Act, which maintained high domestic prices behind import barriers.[36] On the same day, the GATT authorized waivers for "hard-core" agricultural import restrictions in Europe.[37] Illicit import restrictions and other agricultural protectionism in developed countries became a chronic complaint of the developing country members of GATT.

The next sector to become a zone of departure from GATT rules was textiles and clothing. In 1960, the GATT adopted a decision and report recognizing the existence of a problem described as "market disruption," caused by surges of low-cost imports from particular countries. The decision suggested the "problem" could be addressed by bilateral negotiations outside the GATT, supervised by a GATT body.[38] In 1960, presidential candidate John F. Kennedy promised to take action to control textile imports from the Far East, and after the election, the Kennedy Administration pursued negotiations in the textile sector that led to the Long Term Arrangement on Cotton Textiles.[39] In the wake of similar promises by presidential candidate Nixon in 1968, and difficult negotiations with Japan, U.S. negotiators secured an agreement with Japan broadening restrictions to cover synthetic fibers as well; the U.S.-Japan agreement was then multilateralized as the Multi-Fibre Arrangement in 1974.[40] Under this agreement the United States, the EC, Canada and a few other developed countries would eventually negotiate entire systems of bilateral textile quotas, gaining export restrictions in exchange for quota rents and steady quota growth.

B. The Kennedy Round

By the mid-1960s, the world was changing rapidly and new competitors were emerging on the global scene. The European Economic Community had emerged as a new power and formidable negotiating partner in GATT. Japan was becoming a major exporter, moving up the value chain from textiles to steel, autos and electronics. Some developing countries were also beginning to emerge in global markets and to press their agenda in the GATT and other world economic fora. American economic dominance was giving way to a more complex world economy.

[35] *Netherlands Measures of Suspension of Obligations to the United States*, BISD 1S/32 (1953). The Netherlands never acted on the authorization. *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 96 (1989).

[36] *Waiver granted to the United States in connection with Import Restrictions under Section 22 of the Agricultural Adjustment Act (of 1933) as Amended*, Decision of March 5, 1955, BISD 3S/32.

[37] *Problems Raised for Contracting Parties in Eliminating Import Restrictions Maintained During a Period of Balance-of-Payments Difficulties*, Decision of March 5, 1955, BISD 3S/38.

[38] *Avoidance of Market Disruption: Establishment of Committee*, Decision and Report adopted on Nov. 19, 1960, BISD 9S/26 and 106–110.

[39] Destler, *supra* note 16, at 26.

[40] On the U.S.-Japan negotiations, *see generally* I.M. DESTLER, HARUHIRO FUKUI AND HIDEO SATO, THE TEXTILE WRANGLE (1979).

In the Kennedy Round, the United States began seeking more meaningful tariff reductions from these partners and also pursued other improvements in GATT rules. Recent events had ensured that the major target for U.S. tariff bargaining would be the EEC. The EEC's common external tariff had been formed in 1960–62 on the basis of an arithmetic average of the bound tariffs of the constituent territories, with imports from the colonies and ex-colonies being accorded duty-free entry. As a result, some former low-tariff markets in Europe were closed to imports by tariff increases and variable levies, and exports to Europe from the United States, Latin America and the Commonwealth were displaced by duty-free products from the colonies.[41] The United States had lost important markets for products such as poultry—triggering the "chicken war" of 1962; in return for the loss of valuable concessions on grains, the only recompense gained was a duty-free binding on soybeans, which the EC did not produce.[42] Soybeans would eventually grow to be the largest U.S. agricultural export to Europe.

To gain tariff cuts abroad, the Administration sought and received authority in the Trade Expansion Act to cut U.S. tariffs by up to fifty percent from then-existing levels.[43] A year later, at a Ministerial meeting held in May 1963, the GATT agreed to an action program for trade liberalization benefiting developing country exports, as well as tariff negotiations on all products, including agricultural products. The tariff negotiations would be based on a plan of substantial linear tariff reductions with a bare minimum of exceptions; the trade round would also include, for the first time, not just tariffs but also non-tariff barriers. Also for the first time, Ministers formally stated that developing countries would not be expected to provide reciprocal benefits in return for concessions benefiting them.[44]

The Kennedy Round negotiations concluded in 1967. Formula tariff-cutting on industrial products succeeded in broadening the scope of reductions; the United States cut tariffs on 64 percent of total dutiable imports. The countries participating in linear tariff-cutting made a weighted average cut of 35 percent on dutiable non-agricultural items, with some exceptions in import-sensitive product sectors. After much struggle, the negotiations produced results in agriculture that were deemed passable, but only because initial expectations were so low.[45] Developing country participants offered up few cuts, and for the most part their tariffs remained unbound. The non-tariff barrier negotiations resulted in discussion for the first time of trade issues relating to procurement, customs valuation, standards, *de facto* tax discrimination against imports, illegal quantitative restrictions and antidumping.[46] They produced an international antidumping code, and a second agreement rolling together elimination of the U.S. "American Selling Price" rules for customs valuation of certain products, tariff cuts on chemicals and other products, and

[41] GARDNER PATTERSON, DISCRIMINATION IN WORLD TRADE: THE POLICY ISSUES 234ff. (1966).

[42] The duty-free binding on soybeans was personally negotiated by Howard Petersen, President Kennedy's trade adviser, in bilateral discussions in Brussels in winter 1961–62, according to Dryden, *supra* note 28, at 43. For a snapshot of the agricultural scene at the time, *see* undated paper by Department of Agriculture, reprinted as Document no. 183 in FOREIGN RELATIONS, 1969–1976, VOLUME IV, FOREIGN ASSISTANCE, INTERNATIONAL DEVELOPMENT, TRADE POLICIES, 1969–1972 (available at http://www.state.gov/r/pa/ho/frus/nixon/iv/15576.htm).

[43] Section 201, Trade Expansion Act.

[44] *Ministerial Meeting, May 1963: Conclusions and Resolutions Adopted on 21 May 1963*, BISD 12S/36, including action program and other measures for developing countries and tropical products (at 36–47), and negotiating program for reduction of tariff and non-tariff barriers (at 47–48).

[45] JOHN W. EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY: THE TWILIGHT OF THE GATT? 281–292 (1971).

[46] *Id.* at 256–262.

elimination of European tax discrimination against large cars.[47] Congress reacted negatively to both, and passed legislation explicitly barring domestic implementation of the antidumping agreement.[48] As discussed in Part IIIB above, this led to the development of the "fast-track" procedures governing trade agreement legislation.

C. The Tokyo Round

No sooner was the ink dry on the Kennedy Round than trade negotiators began planning for the launch of a new round. New negotiations would allow them to argue, against Congressional pressure for trade restrictions, that import barriers would undercut U.S. hopes of lowering barriers abroad. The argument was based on the "bicycle theory", that the trade system, like a bicycle, needed to constantly move forward or it would fall over.[49] And in the post-1967 period the risk of falling was substantial. The GATT failed to agree on a new round in February 1970, adopting a preparatory work program instead.[50] Later that year, the House passed overwhelmingly a bill sponsored by Ways and Means chairman Wilbur Mills, calling for quotas on many imports. Meanwhile, in 1971–72, organized labor went all out for the Burke-Hartke bill, which would have imposed quotas on imports and punished U.S. companies that invested abroad.[51] Then in August 1971, the Nixon Administration, under pressure and turning toward economic nationalism, announced a new economic policy, suspended convertibility of the dollar into gold, and imposed a ten percent temporary import surcharge, throwing the rest of the GATT into a spin.[52] The negotiations that followed the surcharge led to agreements with major trading partners on revaluation of their currencies and other measures, including launch of a new round of trade negotiations.[53]

Consensus soon materialized for a launch of a new round in 1973.[54] Meanwhile, work had been going forward on study of the possibilities for further liberalization of tariffs and the non-tariff barrier issues that would form a major topic during the Tokyo Round. The Round was then officially launched at a Ministerial meeting in Tokyo in September 1973.[55]

The Tokyo Round launch coincided with politically and economically challenging times. The expansion of the 1950s and 1960s had given way to "stagflation"—sluggish economic growth and high inflation as oil price increases moved downstream, and the high cost of the war in Vietnam further dragged on the U.S. economy. The Vietnam War and Watergate created a sour atmosphere in Washington, which was accompanied by a general belief that the country was faced with declining trade competitiveness and

[47] *Agreement on Implementation of Article VI of the GATT*, BISD 15S/24; *Agreement Relating Principally to Chemicals, Supplementary to the Geneva (1967) Protocol to the GATT*, BISD 15S/8.

[48] Dryden, *supra* note 28, at 122–124.

[49] Destler, *supra* note 39, at 17–18.

[50] *Programme of Work of the CONTRACTING PARTIES: Expansion of Trade, Conclusions adopted on 27 February 1970*, BISD 17S/18.

[51] On the Burke-Hartke bill, the definitive source is K. HUGHES, TRADE, TAXES, AND TRANSNATIONALS: INTERNATIONAL ECONOMIC DECISION-MAKING IN CONGRESS (1979).

[52] Dryden, *supra* note 28, at 145–146, 151–161 (on the surcharge period). *See also United States Temporary Import Surcharge*, BISD 18S/212 (adopted Sept. 16, 1971), working party report drafted and adopted within a 10-day period less than a month after imposition of the surcharge.

[53] A. Shonfield, *International Economic Relations of the Western World: An Overall View*, in INTERNATIONAL ECONOMIC RELATIONS OF THE WESTERN WORLD 1959–71, Vol. 1, POLITICS AND TRADE (A. Shonfield ed. 1976) at 85; G. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 25 (1986).

[54] *Programme of Work of the CONTRACTING PARTIES: Summing up by the Chairman* (Nov. 14, 1972), BISD 19S/12.

[55] *Declaration of Ministers* approved at Tokyo on September 14, 1973, BISD 20S/19.

unfavorable terms of market access abroad. The growing view among politicians and many industry groups was that the United States had "given away, in purely commercial terms, much more than it has gotten in past trade negotiations," that the United States did not need to help support other industrialized countries by expanding imports from them, and that the United States should insist upon stronger trade rules and greater reciprocity from Europe and Japan.[56]

The first year of the Tokyo Round was taken up by the usual skirmishing among the various players and the decline and fall of the Nixon Presidency. In late 1974, after Gerald Ford took office, Congress finally enacted the Trade Act of 1974, which provided the necessary charter for negotiations in the Tokyo Round, set negotiating goals, and renovated trade policymaking, providing "fast-track" authority and the related machinery for consultation and advice in connection with trade agreements. This software for the new round came bundled with a few extra features: a revised, expanded "escape clause" (Section 201 of the Trade Act), procedures in Section 301 to take action against "unfair trade practices" abroad, authorization of duty-free treatment for certain developing country products under the Generalized System of Preferences,[57] some changes to the antidumping and countervailing duty laws from domestic industry's wish list, and special provisions preventing the Administration from extending MFN treatment to imports from the USSR or other East Bloc countries unless such countries provided freedom of emigration.[58]

The final Tokyo Round negotiations did not really get underway until the inauguration of President Carter in 1977. His new trade negotiator, Robert Strauss, undertook a serious effort to reinvigorate the negotiations. The Tokyo Round agenda had reflected the United States' growing disillusionment with the GATT's non-tariff rules. For the first time in GATT history the negotiations were as much about non-tariff measures ("NTMs") as about tariffs. The NTM negotiations covered subsidies and countervailing measures, import licensing rules, customs valuation procedures, government procurement practices and safeguards. The business community viewed these rules as important because they could help create greater certainty in trade–like the customs valuation agreement, which would address one of the major issues for multinationals that ship goods from one affiliate to another. Improving dispute settlement and rule enforcement also emerged as a major U.S. goal.[59]

Finishing the NTM negotiations was not easy. The ambitious U.S. agenda on agricultural subsidies ran up against the EC's Common Agricultural Policy. Negotiations on a code to discipline "safeguards" under GATT Article XIX failed outright due to fundamental differences over whether contracting parties should be able to impose safeguard measures on a non-MFN basis.[60] Nevertheless, after two further years of hard bargaining, negotiators reached agreement on the texts of a series of "codes," agreements disciplining

[56] Ostry, *supra* note 33, at 85, citing C.F. Bergsten, Toward a New International Economic Order: Selected Papers of C. Fred Bergsten, 1972–74 (1975) at 98–99.

[57] Provided for an initial period of ten years by Title V of the Trade Act of 1974, then renewed for ten years in the Trade and Tariff Act of 1984, then successively renewed from time to time in various legislative vehicles, for periods as short as one year.

[58] The "Jackson-Vanik Amendment," incorporated into Title IV of the Trade Act of 1974, requires the President to deny MFN treatment to goods of any country that does not permit freedom of emigration. This legislation was targeted at a Nixon-era U.S.-Soviet trade agreement, but applied to all East Bloc countries with which the United States did not have normal trade relations as of 1974. The definitive source on Title IV is P. Stern, Water's Edge: Domestic Politics and the Making of American Foreign Policy (1979).

[59] S. Ostry, *supra* note 33, at 86.

[60] GATT, The Tokyo Round of Multilateral Trade Negotiations, Report by the Director-General of GATT (April 1979) at 90–95, Supplementary Report (January 1980) at 14–17.

non-tariff measures. In a delicate compromise between the participants (largely developed countries) and leading non-participant developing countries, the codes were legally structured as interpretations (not amendments) of the GATT, providing obligations which would bind, and be enforceable by, only the countries that accepted them. The codes also included dispute settlement provisions that could only be used by parties to the codes.[61]

The most contentious area of negotiations related to subsidies and countervailing measures. The use of subsidies, and their impact on trade, had risen considerably in the recession-hit 1970s, yet GATT disciplines were inadequate. Export subsidies on industrial products were banned under Article XVI:4, but only for the industrialized countries; there was little discipline on domestic subsidies; and the discipline on subsidies used to boost agricultural exports was weak.[62] The increase in subsidies had led to increasing friction from U.S. use of its (pre-GATT) countervailing duty law, which had no injury test on investigations of dutiable products, and was protected by the "grandfather clause" in the GATT Protocol of Provisional Application.[63] After substantive negotiations started in 1977, U.S. subsidies negotiators worked with the EC, Canada and Japan to evolve a draft outline of an agreement for the 1978 Bonn summit.[64] After further developing the text, they then used the leverage of countervailing duty investigations to persuade Brazil to support the text.[65] The final compromise widened the ban on industrial export subsidies to include minerals, but largely exempted developing countries. It left the agricultural subsidy rules virtually untouched. With the major differences on subsidy policy, this was the most that could be achieved. In exchange, the United States agreed to add an injury requirement to its countervailing duty law.[66]

The other NTM codes were also important to the United States. Some were valuable from an export perspective. The import licensing[67] and customs valuation[68] agreements were important to business as a means to reduce trade barriers created by these procedures, and for the most part they reflected existing U.S. practice. The standards agreement[69]

[61] *See Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations*, Decision of November 28, 1979, GATT BISD 26S/201, the legal instrument that captured this compromise.

[62] GATT Article XVI:3 provided merely that contracting parties "should seek to avoid" export subsidies on primary products, and that subsidies that operate to increase exports of an agricultural product shall not be applied them in a manner that results in the subsidizing contracting party taking "more than an equitable share of world export trade in that product." *See* Chapter 6 of this book. The negotiation of these obligations in 1946–48 and 1954–55 was heavily influenced by U.S. defense of New Deal "two price" agricultural policies based on restricting imports and subsidizing exports. J. Leddy, *United States Commercial Policy and the Domestic Farm Program*, in Kelly, *supra* note 7, at 174–183, 200–202.

[63] *See* discussion of the Protocol *supra* in text at note 14.

[64] G. Winham, *supra* note 53, at 209, 219.

[65] *Id*. at 222; R. Rivers and J. Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 2 LAW AND POLICY IN INTERNATIONAL BUSINESS 1447, 1480–81 (1979).

[66] GATT Report, *supra* note 60, at 57–61. Under U.S. law (section 701 of the Tariff Act of 1930), the executive branch denied the injury test to any country that had not joined the Subsidies Code or had not made a voluntary commitment to limit its export subsidies–in an attempt to avoid the free rider problem posed by the Tokyo Round codes. In 1980, India challenged the legality of this denial under the GATT's most-favored-nation clause through a GATT complaint against the United States, but both parties eventually ducked a confrontation and reached a negotiated settlement. *See Panel on United States Countervailing Duties*, BISD 28S/113 (1981).

[67] *Agreement on Import Licensing Procedures*, GATT BISD 26S/154–161.

[68] *Agreement on Implementation of Article VII–Protocol to the Agreement on Implementation of Article VII*, GATT BISD 26S/116–153.

[69] *Agreement on Technical Barriers to Trade*, GATT BISD 26S/8–32.

similarly was an effort by the United States to export its notions of transparency and fairness to other countries.

Tariff bargaining was also a major theme of the Tokyo Round. In 1977, the EC and the United States agreed to use the "Swiss formula" in formulating their tariff offers, a formula which would make deeper cuts on higher tariffs. The United States presented an ambitious initial offer, to put pressure on its bargaining partners and to take the political heat for liberalization early in the negotiations. But the U.S. offer left out, or made shallower cuts on, high-tariff, import-sensitive products of interest to the EC, such as textiles, chemicals and ceramics.[70] In final bargaining early in 1979, both sides took some offers off the table and closed out the industrial tariff negotiation with an average cut of about 35 percent on each other's trade. The number of U.S. tariff headings subject to duties over twenty percent dropped from 757 to 185.[71] These tariff peaks would remain as targets in the Uruguay Round. For the first time, developing countries participated in tariff negotiations, though only 21 made tariff cuts at all.[72]

The Administration had been consulting with private sector advisory committees and with Congress throughout the negotiations; it notified Congress on January 4, 1979 of its intent to submit the agreements for approval under the fast-track authority granted in the 1974 Trade Act. Through industry briefings, closed-door hearings before Congressional committees, intensive consultations, and legislative drafting, Ambassador Strauss's team dealt with the concerns of all relevant domestic players. In only one case was it necessary for USTR to reopen negotiations in Geneva to meet a Congressional need.[73]

The fast-track provisions of the Trade Act called for the Administration to submit legislation "necessary or appropriate" to implement the Tokyo Round agreements, together with authoritative "statements of administrative action" explaining non-statutory changes (such as regulatory changes) that would be made. The implementing bill submitted on June 19, 1979 included not just "necessary" changes—such as the institution of an injury test for countervailing duty investigations of dutiable products—but also a wholesale remodeling of the U.S. antidumping and countervailing duty laws. The changes shortened deadlines, strengthened preliminary relief, made determinations more automatic, strengthened domestic industry's right to seek judicial review of determinations, and defined injury in a way that blunted the potential impact of the injury test as agreed to in Geneva. The bill, entitled the Trade Agreements Act of 1979, passed the House by 395 to 7, and the Senate by 90 to 4.[74] In connection with its passage, the Carter Administration reorganized trade policymaking, further strengthening USTR and moving antidumping and countervailing investigations from Treasury to the Commerce Department, in response to domestic industry concerns that Treasury had leaned towards import interests.

Eventually, the Tokyo Round results became a victim of the way they had been sold to the public. The boring, low-key negotiations that had received the least press play—on tariffs, and on the new agreement on customs valuation, for instance—proved to be a

[70] G. Winham, *supra* note 53, at 200–201.

[71] *Id*. at 265–268.

[72] *Id.* at 272.

[73] In the Agreement on Government Procurement ("Procurement Code"), the U.S. offer for code coverage did not carve out set-asides for government contracting with minority and small businesses. After a difficult hearing in Congress, Ambassador Strauss instructed his negotiator to return to Geneva and fix the problem. An exception was inserted in the U.S. offer; the price was inclusion of the National Aeronautics and Space Administration in the Procurement Code.

[74] G. Winham, *supra* note 53, at 308.

gift that kept on giving. The highest-profile negotiation, on subsidies, raised exporters' expectations unrealistically and in the end produced few results of immediate commercial utility. Disillusioned U.S. industry and agricultural groups blamed the "à la carte" approach of codes that bound only participants. Instead of focusing on the fact that the codes covered almost all industrialized countries and most of world trade, they focused on the lower level of obligations taken on by developing countries, particularly those in Asia. Agricultural exporters remained unhappy about the lack of discipline on agricultural export subsidies. The weakness of GATT dispute settlement and its failure to ensure rule compliance (by others) were also a focus of chronic discontent.

V. The 1980s: Congressional Unrest, Bilateralism and a Globalizing Economy

The next decade of trade policy debate would be dominated by two major movements, both of which challenged the relationship between the United States and the institutions of the multilateral trading regime. The dance between Congress and the executive branch continued as always, but the tempo accelerated and the music became louder. Pushed by capital inflows and the U.S. budget deficit, the dollar strengthened from 1981 to 1985, leaving in its wake an ever-growing U.S. trade deficit, job losses, and ever-increasing political pressure on trade issues. The political pressure led to increased protection through revision of the trade laws and industry-specific intervention to restrain trade. It also led export-minded members of Congress to blame the deficit on closed markets abroad, and to push for a more unilateral trade policy featuring aggressive use of Section 301. Secondly, in a historic break with U.S. MFN-based trade policy, the Reagan Administration launched the first U.S. free trade area with Israel, to be followed by the U.S.-Canada FTA and, in 1993, the NAFTA. Amid all of this turmoil and weakening support for GATT, however, the Reagan Administration would somehow succeed in launching the Uruguay Round and obtaining Congressional authority to negotiate the Round.

A. The Early 1980s: Trade Deficits, Trade Restrictions, Breakdown in Geneva

In 1981, the newly-elected President Ronald Reagan mobilized his popularity and his electoral mandate to radically change U.S. economic policy by enacting a "supply-side" budget and tax cuts. The resulting fiscal deficit, combined with other factors in the world environment, drove up the dollar; from a low in 1980 to its peak in late February 1985, the dollar rose 70.2 percent on a trade-weighted basis.[75] This misalignment of exchange rates had severe economic and political consequences. The U.S. trade deficit rose to $67 billion in 1983, $114 billion in 1984 and $124 billion in 1985.[76] Global trade stagnated, U.S. exports were level or declining, but imports exploded: by 1985, U.S. imports were 158 percent of the value of U.S. exports.[77]

Major and minor industries campaigned for import relief. In 1981, under pressure from auto industry problems and Congressional proposals to legislate import quotas, the Reagan Administration negotiated a voluntary restraint on Japan's exports of automobiles. In 1982, the steel industry used the trade law provisions revised in 1979 to bring a

[75] Calculations by Institute of International Economics, released Dec. 18, 1985 upon publication of Stephen Marris, *Deficits and the Dollar: The World Economy at Risk* (*Policy Analyses in International Economics* 14, 1985), cited in DESTLER, AMERICAN TRADE POLITICS (1st ed., 1986), at 52.

[76] *Id*. at 54.

[77] *Id.* at 170.

massive group of countervailing duty and antidumping petitions against European suppliers, resulting in another voluntary restraint limiting European carbon steel exports to the United States. A later petition under Section 301 led to a restraint by Japan. In 1984, the steel industry brought a new wave of cases against Brazil, Mexico and Korea. Finally, in response to a 1984 safeguard petition under Section 201 of the Trade Act of 1974, the USITC found injury and recommended relief; in response, President Reagan announced a negotiating program to limit steel imports to 18½ percent of the U.S. market.[78] As of 1985, over one-quarter of U.S. manufactured imports were of products subject to significant quantitative restraint.[79]

At the same time, members of Congress, with the support of the business community, began to push for a more muscular, "results-oriented" trade policy, targeted at "prying open" closed export markets in countries abroad. In early 1982, Senator John Danforth of Missouri introduced a bill modifying Section 301 to authorize denial of market access to products of those countries denying reciprocal market access. Japan was the principal target, as it was the principal target of initiatives by the Ways and Means Committee fighting "industrial targeting." The pressure would continue to escalate through the middle 1980s.

The Reagan Administration's capable USTR, William Brock, fought trade restrictions and tried to deal with the pressures by working hard to start a new round of trade negotiations. He succeeded in getting the GATT to hold its November 1982 annual meeting at the Ministerial level, but the meeting took place in an atmosphere of crisis and produced disappointing results. Still, the near-failure of the 1982 Ministerial convinced many governments that some new initiative was necessary and the trading system could not be left to drift. The 1982 Ministerial Declaration also required the GATT to start work on agriculture, services, trade in counterfeit goods, and other new and old areas. This work proved critical in establishing the knowledge base necessary before governments could agree to include these subjects in a round of multilateral trade negotiations.[80] The agriculture work program set the parameters for later work in the Uruguay Round, and was the springboard for analytical work by OECD economists on measuring and making visible the high cost of agricultural protection.

The Reagan Administration's foreign policy then provided the opening for the first U.S. ventures into bilateral and unilateral trade preferences. The first step was the Caribbean Basin Initiative ("CBI"), proposed by President Reagan in February 1982 and enacted in mid-1983. The CBI provided unilateral duty-free treatment to non-Communist countries in the Caribbean certified as complying with a list of conditions.[81] Next came Israel.

[78] *Id.* at 127–135.

[79] *Id.* at 168.

[80] J. Croome, Reshaping the World Trading System: A history of the Uruguay Round (1995), at 14–16. Ministerial Declaration adopted Nov. 29, 1982, BISD 29S/9. This was the first multilateral endorsement of services as a negotiating topic in the GATT. On the November 1982 Ministerial, *see* Dryden, *supra* note 28, at 283–287.

[81] The conditions bar CBI treatment for any country that has nationalized or expropriated U.S. property without compensation; fails to recognize arbitral awards in favor of U.S. citizens; affords preferential treatment to products of other countries that has a significant adverse effect on U.S. exports; broadcasts U.S. copyrighted material without the owner's consent; has not signed an extradition treaty with the United States; and has not provided (or is not taking steps to provide) internationally recognized rights to workers. These conditions resemble those which applied to U.S. GSP treatment after 1984. The President must also take a number of other factors into account in deciding whether to designate a country for CBI treatment, including its compliance with GATT rules; U.S. access to its market and to its commodity resources; its export subsidies or export performance requirements; whether it provides adequate means for foreign nationals to secure

Israel had proposed negotiation of a free trade area ("FTA") with the United States in 1981. In November 1983, the two countries announced they would negotiate an FTA. Legislation authorizing negotiations with Israel and Canada passed Congress in 1984, and the FTA was negotiated with Israel, approved by Congress and entered into force in 1985.[82] In 1985, U.S. and like-minded negotiators again tried and failed to launch a new round in Geneva. Negotiations with Canada then were launched in December 1985 and were concluded on October 3, 1987. Then, as now, bilateral free trade proved attractive to the business community and to U.S. trade negotiators. For some kinds of business (for instance, services in the Canada-US FTA), FTAs could produce market access unattainable through GATT. For U.S. trade negotiators, FTAs offered both leverage to get better results from GATT trading partners, and a place to innovate in trade liberalization.[83]

B. Congress Grows Restless, the Administration Responds, and a New Round Begins

As the trade deficit continued to mount in 1984–85, pressures for trade restraints grew, and so did discontent with the Administration's failure to take action on the dollar. Over six hundred trade bills were introduced in Congress, 99 of which were directly protectionist.[84] The bills echoed two basic themes: the U.S. economy was the most open in the world, and Reagan Administration trade policy, by giving precedence to foreign policy concerns, was failing to look out for the U.S. national economic interest in fighting unfair trade barriers abroad.[85] The rhetoric escalated into a Senate resolution approved 92–0 in March 1985, denouncing Japan and calling on the President to retaliate against Japanese imports.[86] The Senate Finance Committee then approved a bill making retaliation under Section 301 mandatory.[87] Congressman Dick Gephardt, joined by the chairmen of the House and Senate trade committees, cosponsored a bill calling any country with a high and persistent bilateral trade surplus (Japan, Brazil, Korea, Taiwan) to reduce its surplus or face a 25 percent tariff surcharge. A bill mandating restrictive global quotas on textiles, intended as leverage for the negotiations on renewal of the Multi-Fiber Agreement, passed by 262–159 and was vetoed, and a veto override failed by just eight votes.[88] All of these measures would clearly have violated GATT. The lopsided votes should not be interpreted as a sudden lurch by Congress into the unthinkable, but as Congress sending an unmistakable message to the President. Because the Reagan Administration had made it clear in advance that legislation violating GATT would be vetoed, these votes provided a cost-free opportunity for legislators to express frustrations with foreign trade surplus countries, without any difficult real-world consequences.

The pressure from Congress (with the support of the business community) only lessened when the Administration took action. On September 7, 1985, President

and enforce intellectual property rights; and its self-help efforts. *Caribbean Basin Economic Recovery Act* (CBERA), P.L. 98–67, 19 USC 2701 *et seq*., Section 212.

[82] COMMITTEE ON WAYS AND MEANS, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 2006, (1995).

[83] As an example, the interim panel report procedure invented for the Canada-U.S. FTA was later borrowed for the new WTO dispute settlement procedures (*see* DSU Art. 15).

[84] R. Ahearn, *Protectionist Legislation in 1985*, Congressional Research Service, cited in Destler, *supra* note 75, at 75 n. 24.

[85] S. Ostry, *supra* note 33, at 102.

[86] S. Con. Res. 15, Cong. Rec. S3573 (Mar. 28, 1985).

[87] Destler, *supra* note 75, at 180.

[88] *Id.* at 83–84.

Reagan announced that the Administration would open three new Section 301 cases against Japan, Korea and Brazil, and that the United States would retaliate unless two past GATT cases were settled by December 1. A day later, he announced a massive war chest for export credits and a USTR strike force on trade barriers, stating that "free trade is, by definition, fair trade."[89] Then, on September 22, 1985, Treasury Secretary James Baker and four other finance ministers announced the "Plaza Agreement," declaring their cooperation in an orderly appreciation of non-dollar currencies.[90] Later that fall, the United States self-initiated an antidumping investigation of semiconductors from Japan, a key move in the chain of events that led to a July 30, 1986, bilateral agreement with Japan on measures to expand Japanese imports of semiconductors.[91]

Meanwhile, on the multilateral front, USTR Brock and his negotiators had kept pushing for a new round of negotiations, working in the Quad (the group consisting of the EC, the United States, Japan and Canada) and then building out to a larger group of trade ministers in 1983–84. In April 1985, OECD trade ministers agreed to propose the launch of a new round; Brock became the Secretary of Labor and was replaced by Clayton Yeutter, a veteran trade negotiator who had been Deputy STR in the mid-1970s. In Geneva, developing countries led by India and Brazil continued to resist a new round, arguing that existing trade restrictions had to be reformed first and that any round should be confined to trade in goods, excluding services trade. After the GATT Council was unable to reach consensus for or against a round in July 1985, the United States, believing that the majority of the GATT wanted to launch a new round, called for a special meeting of the CONTRACTING PARTIES.[92] A month later, the necessary votes had been mobilized to call the special meeting, held at the end of September, shortly after the Reagan Administration's announcement of its new trade policy.[93] A Preparatory Committee ("Prepcom") was set up in November to prepare for a meeting of ministers in September 1986. The Prepcom became the formal forum for debate on the subjects that would be negotiated. At this time, the United States first proposed changing the focus of negotiations on trade in counterfeit goods to embrace as well substantive standards for protection of intellectual property, and sold this approach to industrialized countries.[94]

After the Prepcom reached deadlock, an informal parallel process sprang up, leading to the key breakthrough that made it possible to launch the Uruguay Round with the agenda that would lead to the WTO Agreement of today. As Ernest Preeg describes, U.S., EC and Japanese negotiators stood back as smaller industrial countries joined with supporter developing countries. The large countries then rejoined this Group of 48, chaired by Switzerland and Colombia. By early August, the "G-48" had produced a draft declaration for the September Ministerial. The "G-10" led by Brazil and India

[89] S. Dryden, *supra* note 28, at 311.

[90] S. Dryden, *supra* note 28, at 312.

[91] *Id*. at 320, also stating that the July 30 agreement included a side letter recognizing the expectation of the U.S. government that the foreign share of the Japanese market would grow from just above eight percent to above twenty percent in five years.

[92] Account from J. Croome, *supra* note 80, at 23–26.

[93] As John Croome, the Secretariat's historian, recounts, under GATT rules, "the GATT contracting parties could by simple majority 'decide to conduct, sponsor or support multilateral negotiations,' although they could not oblige individual countries to accept new substantive obligations as a result of such negotiations." After the 1985 vote showed the extent of support for a new round, the countries that opposed the round never demanded a vote, and Uruguay Round decisions were made by consensus. *Id.* at 26.

[94] E. Preeg, Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System (1995), at 56, citing GATT doc. Prep.Com(86) SR/3, April 1986, at 10.

then produced their own draft, setting the scene for the Ministerial Meeting. Agricultural exporting countries also formed their own caucus to push for agricultural negotiations, the Cairns Group.[95]

During the last night of negotiations at the meeting in Punta del Este, Uruguay, first the United States and the EC resolved their differences over agriculture, then Yeutter accepted an EC compromise proposal for dual-track negotiations on services and goods. Yeutter then insisted on inclusion of TRIMs in the mandate and Commerce Secretary Malcolm Baldrige obtained agreement to include intellectual property rights protection.[96] With the resulting Ministerial Declaration on the Uruguay Round—universally referred to as the "Punta del Este Declaration"—years of work by U.S. negotiators had finally reached the goal of launching a comprehensive trade round. To actually negotiate, however, Yeutter would need legislation providing fast-track negotiating authority or something like it.

C. The Omnibus Trade Act of 1988

Despite the Reagan Administration's attempt at a more assertive trade policy, tensions with the Democratic Congress continued to rise. The Democratic leadership in the House of Representatives decided in 1986 to enact an omnibus trade bill as showcase legislation with contributions from many committees. The bill would include a renewal of fast-track authority for the new round, a "must-have" to which Congress could attach initiatives less palatable to the Administration. The 1986 version of the trade bill pulled in the "Gephardt Bill" punishing trade surplus countries, proposals on foreign industrial targeting, proposals to tie U.S. trade policy to industrial policy, items from the steel industry's antidumping wish list, sectoral market access provisions in telecom and intellectual property, and other ideas that had been percolating for years. The Ways and Means Committee attacked the Administration as showing "slavish devotion to rules of the GATT which few of our trading partners take as seriously," and pointed to a

> "basic dilemma confronting us in international trade: our competitiveness is being undermined by policies and practices which the rules of GATT and other agreements do not adequately discipline. The United States must play a leadership role in revising and strengthening international trade rules . . . Today, however, we must demonstrate to our trading partners that we will protect our national economic interests until such discipline exists."[97]

In November 1986, the Democrats retook the Senate majority, and in January 1987 the Democratic leadership resubmitted the 1986 trade bill.[98] The bill started in the House and quickly gathered steam, picking up provisions from the Ways and Means and other committees. In a pitched battle on April 27 between labor and business interests during House floor consideration, Gephardt succeeded by a vote of 216–214 in having his original trade surplus proposal attached to the bill, the day before a visit by Japanese Prime Minister Nakasone.[99] Meanwhile, the Senate developed its own trade bill. The

[95] *Id.* at 58. The two chairmen of the G-48 were Ambassador Pierre-Louis Girard of Switzerland (later chair of the Working Party on Chinese WTO accession) and Ambassador Felipe Jaramillo of Colombia (later chair of the Uruguay Group on Negotiations on Services). Ambassador Jaramillo is the author of the chapter on Colombia (Chapter 68) in this book.

[96] *Id.* at 7–8.

[97] House Committee on Ways and Means, Report on H.R.4750, *Comprehensive Trade Policy Reform Act of 1986*, May 6, 1986, Rept. 99–581 Part 1, at 5–6.

[98] H.R.3, 100th Cong. 1st sess.

[99] Preeg, *supra* note 94, at 68; J. Bello and A. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, in AGGRESSIVE UNILATERALISM: AMERICA'S TRADE POLICY AND THE WORLD TRADING SYSTEM (J. Bhagwati and H. Patrick eds. 1990), at 79.

Senate Finance Committee took a different approach to the "surplus country" problem, revamping Section 301 and mandating retaliation in some cases.[100] Then, during the month of floor debate on the bill, the Senate attached a new proposal to the bill, a compromise between the Gephardt and Senate Finance proposals: the systematization of Section 301 that became known as "Super 301."

The conference between representatives of the House and Senate to reconcile the bills started in August 1987 with offers and counteroffers on the easy provisions, went into hibernation with the October 1987 stock market crash, and started up again in February 1988. Intense horse-trading resolved the last provisions of the bill on March 31, as the conferees agreed to drop the Gephardt Amendment, to include Super 301 on a temporary basis, and to moderate the changes to Section 301. The President then vetoed the final bill on May 24 because the conferees had included provisions requiring advance notice for plant closings; after a veto override failed, the trade bill and the plant-closing provisions were reintroduced separately, and each passed again by veto-proof margins. The President signed and enacted the trade bill into law on August 23, 1988.[101]

The Omnibus Trade and Competitiveness Act of 1988 was a grab bag of provisions, including the all-important negotiating mandate for the Uruguay Round, and Super 301 and other provisions that would have unpredicted effects on the negotiating climate. It provided proclamation authority for tariff agreements, and fast-track approval procedures for any trade agreements, entered into before June 1, 1991, if the President notified Congress of his intentions ninety days in advance. As a fallback, the President could seek a two-year extension to 1993 by March 1, 1991, by submitting a request to Congress describing progress and stating why the extension was needed. The extension would then be granted unless vetoed by resolution by either the House of Representatives or the Senate.[102]

The Act ordained ambitious negotiating objectives. The overall goals were to obtain more open, equitable, and reciprocal market access, reduction or elimination of trade barriers, and a more effective system of trade disciplines and procedures.[103] The Act also mandated detailed "principal trade negotiating objectives" in sixteen areas, starting with dispute settlement,[104] institutional expansion of the GATT to new areas of trade,[105] and securing more benefits from developing countries.[106] The trade-surplus concerns of the high-dollar period were reflected in provisions asking negotiators to develop rules requiring countries with "large and persistent current account imbalances" to change their policies to achieve equilibrium, calling for greater trade and monetary coordination, and asking negotiators to reduce barriers to access to foreign high technology and obtain reciprocal market access by resolving identified bilateral trade barriers.[107] The Act also

[100] S. 490, developed by the Senate Finance Committee, which was later assembled with other committee bills into S.1420, an omnibus bill substituted for S.490.

[101] Account based on Bello and Holmer, *supra* note 99, at 54–57, 76–83. The trade bill as reintroduced was H.R.4848.

[102] P.L. 100–418, *Omnibus Trade and Competitiveness Act of 1988*, 102 Stat. 1107, §1103(b) (19 USC 2903(b)).

[103] *Id.* §1101(a) (19 USC 2901)(a)).

[104] *Id.* §1101(b)(1) (19 USC 2901(b)(1)) ("more effective and expeditious dispute settlement mechanims and procedures", more effective resolution of disputes, better enforcement of U.S. rights).

[105] *Id.* §1101(b)(2) (19 USC 2901(b)(2)) (enhancement of GATT's status, extension of coverage to new areas, expansion of country participation in agreements).

[106] *Id.* §1101(b)(4) (19 USC 2901(b)(4) (ensuring that developing countries provide reciprocal benefits and assume equivalent obligations; establishing provisions for graduating advanced developing countries).

[107] *Id*. §1101(b)(5), (6), (15) (19 USC 2901(b) (5), (6), (15)).

provided detailed objectives for the mainstream agenda items of agriculture,[108] intellectual property,[109] services trade,[110] investment,[111] safeguards and unfair trade.[112] A worker rights objective—which U.S. negotiators would pursue doggedly and unsuccessfully—asked negotiators to promote a GATT review of the relationship of worker rights to GATT provisions, and to adopt as a GATT principle that denial of worker rights should not be a means of gaining competitive advantage in trade.[113]

The 1988 Act prompted adverse reactions among most GATT members, and accusations that the United States was abandoning multilateralism. Although the provisions with the biggest symbolic freight, such as the Gephardt Amendment, were dropped in the end, and the revisions to Section 301 left the President with enough discretion in using the statute that he could avoid violating the GATT, Congress had intended many of the provisions in the new law to convey a muscular message of willingness to retaliate. The suspicion in many foreign capitals was that these provisions would herald an increase in unilateral measures and a further departure from reliance on GATT.

D. The Globalizing Economy

As Congress, the Administration and the business community debated what kind of trade policy to have, in those four years between 1984 and 1988, the U.S. economy went through fundamental changes. By 1988, most U.S. companies had gone through major changes, and in many sectors the United States had regained its competitiveness with Europe and Japan. There had been a rebound in the auto industry, but even more impressive was the rapid expansion of the U.S. computer and software sectors, telecommunications, motion pictures and video, recordings and aircraft. U.S. agriculture expanded its foreign markets as well.

But growth in exports and international competitiveness was only part of the story. More importantly, U.S. corporations had become even more globalized, and now viewed the liberalization of the world economy as essential to serving their interests. Fewer and fewer sectors saw pure protectionism as a solution to their needs. Hence, by the time the 1988 Act was completed, American industry was prepared to push hard for trade liberalization. These industries had now become interested in strengthened rules in areas of

[108] *Id.* §1101(b)(7) (19 USC 2901(b)(7)) (developing improved agricultural trade rules including disciplines on trade-distorting import and export practices; increasing U.S. exports by eliminating barriers to trade and reducing or eliminating production subsidies (consistent with U.S. price stabilization policies); "resolving questions" on subsidies, pricing, tariffs, quotas and sanitary and phytosanitary measures; seeking agreements to reduce overproduction of during periods of oversupply).

[109] *Id.* §1101(b)(10) (19 USC 2901(b)(10)) (strengthening foreign intellectual property enforcement, expanding GATT obligations to include adequate substantive requirements to protect intellectual property rights, border enforcement procedures and dispute settlement; strengthening other IP conventions).

[110] *Id.* §1101(b)(9) (19 USC 2901(b)(9)) (developing rules on services, including dispute settlement, and reducing barriers to services trade, taking legitimate regulatory objectives into account).

[111] *Id.* §1101(b)(11) (19 USC 2901(b)(11)) (reducing barriers to investment).

[112] *Id.* §1101(b)12) (19 USC 2901(b)(12)) (improvement of safeguards rules to ensure that safeguards are transparent, temporary and degressive, and terminated when no longer necessary); §1101(b)8) (19 USC 2901(b)(8)) (improving GATT rules to discipline unfair trade including new types such as resource input subsidies, dumped inputs and export targeting; enforcement of GATT rules against performance requirements); and §1101(b)(16) (19 USC 2901(b)(16)) (revising the GATT provisions on border tax adjustments to eliminate the disadvantage to countries relying on direct taxation—a topic that would become again newsworthy in the wake of the Foreign Sales Corporation litigation in the WTO, discussed in Chapter 16 of this book).

[113] *Id.* §1101(b)14) (19 USC 2901(b)(14)).

particular importance to their success. The pharmaceuticals, film and software industries wanted to see intellectual property protection strengthened. The financial services and accounting industries wanted to see GATT rules extended to services. The forest products, chemicals and agricultural sectors wanted to see major tariff reductions. All of them became interested in seeing the 1988 Act serve as a catalyst for market opening rather than a pretext for protectionism. This was to bode well for the GATT and would ultimately provide the necessary political support to fuel the Uruguay Round negotiations.

VI. The Uruguay Round

A. The Importance of the Round to U.S. Policy

Without question, the most ambitious, far-reaching and unexpected transformation of the GATT system occurred in the Uruguay Round. When the Round began in 1986, it was supposed to conclude in 1990 as a package of add-ons to the GATT. By the time it concluded in 1994, the GATT system had been swept into an entirely new context, the WTO Agreement and the World Trade Organization. This institutional change, of which the United States was only a reluctant supporter, made it possible to achieve almost all of the Uruguay Round objectives set by Congress in the 1988 Act.

As we have seen, improvement of the GATT's effectiveness, strengthening of rules on agriculture, and new disciplines on services trade and intellectual property rights protection were key goals for U.S. negotiators going into the Round. Earlier attempts at expanding GATT disciplines were limited to decisions that all contracting parties could agree to, or to the Tokyo Round codes whose membership was mostly limited to a few industrialized countries. The Punta del Este Declaration, which launched the Uruguay Round, included a commitment that the results of the Round would be a "single undertaking" and also provided for negotiations on the new areas of services, intellectual property and trade-related investment measures ("TRIMs"). Yet the Punta del Este Declaration did not mention any WTO, nor any specific institutional agenda other than improving GATT decision-making.

In the end, the Uruguay Round resulted in a great expansion of multilateral trade disciplines. The WTO Agreement retained the original text of the GATT, tied into a network of other obligations including improved rules on trade in goods, a new General Agreement on Trade in Services ("GATS"), a new Agreement on Trade Related Intellectual Property Rights ("TRIPS"), and new, more binding dispute settlement rules contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, or "DSU"). The agreements on trade in goods provided for tariffication of all agricultural import barriers, multilateral discipline on agricultural and other subsidies, enhanced rules on antidumping, safeguard measures, import licensing, customs valuation and numerous other issues, and a phase-out of the Multifiber Agreement.

The new post-Uruguay Round system also met the U.S. goal of a more unified system with more meaningful participation by all. Because the WTO Agreement included the GATT, and because the United States and other leading trading partners announced their intentions to leave the GATT system behind after joining the WTO, all GATT member countries that wished to retain their rights to GATT treatment in the United States had to join the WTO. In joining the WTO, they accepted all of the obligations of every one of the agreements in the WTO system, with the exception of the four so-called Plurilateral Agreements. The Tokyo Round codes with their limited membership were almost all

absorbed into the WTO, and then terminated. The provisions of the GATT 1947 were incorporated into the WTO Agreement and then the GATT 1947 too was terminated, taking with it the Protocol of Provisional Application. In place of the old patchwork was a universal set of rights and obligations, although members still had different levels of obligation reflected in their tariff and services schedules, and the rules provided special and differential treatment for developing countries and the least-developed countries.

Finally, the Uruguay Round represented the most extensive market access agreement ever negotiated in the GATT system. After the Round, almost all developed country imports would benefit from the legal security of tariff bindings; developed countries reduced and bound tariffs on 64 percent of their trade in industrial products. Agricultural non-tariff barriers were converted to tariffs and all agricultural tariffs of all WTO Members were bound. Developing countries participated significantly in industrial tariff cutting as well, reducing and/or binding tariffs on over half of industrial imports.[114] Add to that the market access commitments in the services sector and minimum access commitments in agriculture, and the overall results in terms of market access were truly impressive.

These remarkable new agreements that emerged from the Uruguay Round are thoroughly explained in other chapters of this book. It is not the purpose of this chapter to discuss the agreements or their negotiation in detail. Rather, the purpose here is to examine the U.S. role in the round and the importance of U.S. positions and interests.

As a point of departure, one cannot help but comment on the extent to which the final Uruguay Round agreement reflected U.S. aspirations and negotiating objectives. Agreements on TRIPS, services and agriculture were the three highest priorities of the United States from the very beginning, and each of the three was only accomplished after overcoming initial skepticism and fierce opposition from various participants. Moreover, from the outset the United States had sought to strengthen discipline on subsidies generally, to create a more binding dispute settlement system, and to increase the level of obligations of developing countries (through, for example, more extensive tariff bindings and new commitments on services). By any measure, therefore, the Uruguay Round agreement was a significant policy victory for those in the United States who advocated a more effective and universally binding set of multilateral rules and disciplines. Of course, the final agreement was viewed with disfavor by import-competing groups, such as the textile industry, unions and other heavily protected interests who viewed with alarm the prospect of greater import competition. In addition, a new coalition of interests, composed of environmental groups and other anti-globalization groups, would combine to oppose this new, more powerful international trade regime.

At this point, we will review the U.S. efforts to bring about this landmark agreement, and some of the major events that helped shape the final package from the perspective of the United States. We then shift to the debate over implementation of the agreement by Congress, to illuminate some of the internal tensions created by the new WTO system.

B. 1986–89: Building the Three Key Pillars

The new round, launched against a backdrop of rising U.S. trade deficits and growing U.S. unpredictability in trade matters, represented an important part of the U.S. negotiators' plan to defuse domestic pressures on them. An active trade round would mobilize

[114] GATT Secretariat, *Increases in Market Access Resulting from the Uruguay Round*, NEWS OF THE URUGUAY ROUND No. 85, April 12, 1994 (highlighting gains made in the Round); *see also* WTO Secretariat Special Studies No. 6, MARKET ACCESS: UNFINISHED BUSINESS, 2001 (highlighting work remaining to be done).

pro-trade forces and make multilateral negotiations a viable alternative to Congressional self-help. Agriculture was a key U.S. interest group as always, and internationally it was clear that agriculture would be *the* key issue for many countries. Market access for goods would also provide a motor propelling the talks forward, and a source of negotiating tradeoffs. But in the United States, support for this round was strongest from domestic groups pushing the "new issues" of services, intellectual property and investment.

The Punta del Este Declaration, which provided the Round's official starting point and charter, was a delicately balanced mix. It called for negotiations in fourteen areas plus trade in services. Issues in the fifteen areas fell into three groups: the complex of issues surrounding agriculture; the "new issues" of services, TRIPS and TRIMs; and market access for goods, including textiles, safeguards, antidumping, and other issues relating to trade in goods. The mixture of issues mirrored the mixture of interests in the United States, the EC and other major players. Yet the major players were fundamentally and deeply divided on each of these issue areas.

Agriculture divided the key actors in the Round from the beginning until the very end. On one side, the United States and the Cairns Group sought to negotiate major reductions in export subsidies, domestic support and import protection. Their arguments were strengthened by the years of work that had taken place in the GATT Committee on Trade in Agriculture on non-tariff trade measures, and the OECD's analytical work measuring the costs of agricultural protection–estimated at $177 billion for 1987 for all of the industrialized countries.[115] On the other, the EC sought to protect its Common Agricultural Policy, which was based upon high internal prices, export subsidies and a variable levy on imports. Japan and Korea wanted to avoid liberalization of their high import barriers on rice, beef and citrus products, and Canada wanted to avoid tariffication of its import barriers on dairy and poultry. Some U.S. commodity groups also opposed negotiations on agriculture, particularly those with high levels of domestic protection. But their influence was more than offset by the much larger grains and specialty crops producers, all of whom were large exporters and were directly affected by EC protection and subsidies.

The U.S. view on agriculture was shaped by many forces in the agricultural sector, but reflected most strongly the free-market views of the Reagan Administration, especially those of Clayton Yeutter. Yeutter was an agricultural economist by training and had been President of the Chicago Mercantile Exchange. His eager insistence on a sweeping agreement to eliminate agricultural export subsidies, and his aggressive use of Section 301 against EC export subsidies at the beginning of his term in 1985 testified to his strong desire to take on the Common Agricultural Policy and recapture American leadership in agriculture trade. External policy developments also made the issues more urgent and strengthened Yeutter's hand. The EC had become a major exporter of grains beginning in 1980, with a sharp upward turn in grain export subsidies. Congress reacted with Export Enhancement Program counter-subsidies, straining the budget and squeezing third country exporters.[116]

Yeutter opened with a radical proposal to eliminate all border restrictions on imports, non-decoupled internal price supports and export supports over ten years. This "Zero 2000" proposal was developed by USTR and USDA, with the enthusiastic support of President Reagan. It produced an equally strong reaction from Europe, which argued (correctly) that the U.S. proposal was intended to end the CAP in its current form.

[115] Preeg, *supra* note 94, at 94.
[116] *Id.* at 94–95.

The Yeutter proposal even went beyond what the Cairns Group considered would be realistic. The high ambitions of the United States were blamed at times for the blockage on agriculture that gave the Uruguay Round its start-and-stop quality in Geneva, of periods of intense activity interspersed with long periods of waiting for movement on agriculture issues so that the Round could get going again. Indeed, after a 1988 package of CAP reforms, there was little or no visible movement by the EC until the Blair House agreement of 1992.[117] But while Yeutter's extreme opening position may have made it more difficult to get to the compromise reflected in the Agreement on Agriculture, it also changed the balance of that compromise, and how much Europe moved from its initial position. Making the stakes higher, it changed the final result.

Almost as fundamental were the differences between developed and developing countries on the "new areas" of services, trade-related intellectual property measures and trade-related investment measures. India and Brazil in particular had opposed inclusion of these subjects in the new round, arguing that they would fundamentally alter the entire GATT system and would not serve developing countries' interests. They viewed these proposed agreements as an effort by the United States and other rich countries to bias international rules in their own favor. They argued that only the rich countries conducted enough research and development to generate patents and trademarks, and that developed countries' service sector businesses would overwhelm their developing country competitors, especially in sectors such as banking or telecommunications.

Of course, India and other developing countries did have an affirmative interest in phasing out the Multifiber Arrangement and achieving freer trade in textile products. Brazil very much wanted to see an agriculture agreement, and many Asian exporters wanted to see a much tighter antidumping code to discipline the use of antidumping measures by the United States and the EC. They also wanted a much more meaningful discipline over so-called "safeguard measures" that included clearer restrictions on the use of informal import or export restraints in place of Article XIX safeguards. These negotiations on rules for trade in goods were all problematic for the United States. Although U.S. negotiators agreed in principle that these areas of protection needed to be reined in, they also knew how difficult it would be to create a winning coalition in the face of opposition from U.S. groups supporting import protection. From the U.S. negotiators' viewpoint, it would be necessary to get very strong agreements in agriculture and the new policy areas, in order to overcome opposition by import-competing industries.

In launching the Uruguay Round, the Ministers at Punta del Este also established the Trade Negotiations Committee, or TNC, the body that would move negotiations forward, and under it two separate groups, the Group of Negotiations on Goods and the Group of Negotiations on Services. Back in Geneva, negotiators established fourteen negotiating groups in goods (one for each of the subjects listed in the Punta del Este Declaration), agreed on negotiating plans based on the Punta del Este text, and set dates for the groups to meet. They also adopted a program for the initial phase of the services negotiations and set up a "surveillance body" to oversee standstill and rollback commitments in the Punta del Este Declaration.[118]

The drama of the launch was over, and the painful slog forward had begun. Each of the groups had to work out its own agenda, gather proposals from all sides, and work first toward consensus on the "modalities" or ground rules of how to negotiate. Serious

[117] *Id.* at 96–97.
[118] *Decisions of 28 January 1987*, BISD 33S/31.

negotiations could only begin when agreement had been reached on modalities, but the key role of the modalities meant that agreement on preliminaries would not be easy to reach. Early in 1987, Clayton Yeutter began to push for another Ministerial Meeting to be held after the 1988 U.S. election. The meeting was billed as a midterm review and "early harvest" of results from the Round, including a framework agreement for services and agricultural trade liberalization, serving two key U.S. constituencies for the Round.[119]

As has been seen, 1987–88 was a difficult period for trade policy, with the U.S. omnibus trade bill, many protectionist proposals, and continuing U.S.-EC friction over agricultural trade. But some small progress emerged in the negotiating groups. In agriculture, for instance, although the grand lines of decision remained largely stuck between the U.S. "zero option" proposal, the Cairns Group proposal and the EC, the group made progress on technical issues such as quantifying and measuring support to agriculture, the tariffication concept advanced by the United States, and work on sanitary/phytosanitary barriers.[120] In the services area, negotiators started by discussing the ways services are traded, how to apply concepts of transparency, national treatment and MFN treatment, sectoral coverage of a services agreement, and barriers to trade in services. Many delegations then tabled proposals for a framework on services in 1988, but they had barely begun to engage on negotiations by the time of the Montreal Ministerial.[121]

Modalities took up the first two years of discussions in the negotiating group on tariffs. The question was how to approach the job of negotiating tariffs: line by line or through some variation on a formula approach. U.S. negotiators were faced with U.S. tariff peaks that protected politically powerful import-sensitive industries such as the textile industry of the South and the glass industry of West Virginia. They dug in and resisted pressure from the EC and others for a formula approach that would have targeted those peaks. By the time of the Montreal Ministerial, the impasse over modalities was resolved in favor of a fallback to overall targets for average tariff reductions, to be made in item-by-item negotiations that would start in 1989.[122]

In the rules area, negotiators quickly moved forward with proposals to address the long-standing topics of safeguards, subsidies, the other Tokyo Round agreements, and ways to improve the GATT rules. U.S. safeguards proposals pursued the adjustment concerns seen in the 1988 Act, as negotiators again tried for agreement on a decision interpreting and applying GATT Article XIX. As the Montreal Ministerial approached, negotiators were split on the key issues in the negotiation: whether safeguards could be selective, and how to ban "grey-area measures" (such as selective voluntary export restraints, or "VERs").[123] The subsidies talks started with a review of the rules and their inadequacies, and discussions coalesced around the "traffic light" approach sorting subsidies into "red" (prohibited), "green" (permitted), and "amber" (actionable) categories.[124] In the subsidies and antidumping areas, U.S. negotiators sought to fix the holes in the Tokyo Round Subsidies Code while defending U.S. antidumping and countervailing duty practices. U.S. proposals to punish input dumping, input subsidies, dual pricing of exports, industrial targeting and repeated dumping, and to permit primary agricultural producers to obtain relief against dumped or subsidized imports of their product in processed

[119] Preeg, *supra* note 94, at 69.
[120] *See* Croome, *supra* note, at 110–118.
[121] *See id.* at 122–130.
[122] *See id.* at 42–48.
[123] *See id.* at 65–70.
[124] *See id*. at 70–76.

form, echoed legislative proposals that had surfaced in Congress during the 1980s. In the group reviewing GATT articles, the U.S. offensive agenda included taking on the use of GATT balance of payments provisions as the basis for long-standing import restrictions, and a proposal for tightening GATT rules on state trading (responding to farm sector concerns). The EC targeted the unpopular U.S. "Section 22" waiver with a proposal to require termination dates for all waivers.

The TRIPS negotiations were difficult from start to finish. In the first two years, the trade negotiators in the group learned intellectual property law together. While developing countries argued that the group should only work on trade in counterfeit goods, the United States led developed countries in seeking an agreement to provide minimum standards for intellectual property rights protection and enforcement under domestic law, for patents, trademarks, copyright, trade secrets and semiconductor layout designs–obligations that would be backed up by GATT dispute settlement.[125] The U.S. agenda responded to concerns of major U.S. exporting industries such as chemicals, motion picture, software and pharmaceuticals, concerns strongly supported by the mainstream of the U.S. business community and the Congress.

The United States also took a leading role on the other "new issue" area, trade-related investment measures, tabling an ambitious proposal targeting thirteen types of measures imposed on investors–ranging from local content restrictions to restrictions on what an investor could produce, remittance requirements, technology transfer requirements, export performance requirements and limitations on foreign equity.[126]

The final two negotiating groups, on dispute settlement and on the functioning of the GATT system, dealt with cross-cutting institutional issues that were high priorities for the United States: in the 1988 Act, Congress had mandated a more effective GATT dispute settlement system as its number one specific priority for the Round. The dispute settlement talks, led by Ambassador Julio Lacarte, started quickly and soon reached agreement on a package of procedural improvements, including a right to establishment of a dispute settlement panel to consider a dispute. U.S. negotiators went further, seeking to end the losing party's ability to block adoption of an unfavorable panel report and its ability to block authorization of suspension of concessions if it did not comply with the panel rulings. The EC in return tabled a proposal aimed at Section 301 to require GATT contracting parties to use dispute settlement rather than a unilateral determination of wrongdoing, and to ensure that domestic law would conform to this rule.[127] The EC proposal would gather wide support after Super 301, and become the genesis of Article 23 of the DSU and Article XVI:4 of the WTO Agreement. The group on functioning of the GATT system, led by the late Ambassador Julius Katz, focused its work on review of country trade policies, drawing up the Trade Policy Review Mechanism ("TPRM") procedures that were later adopted in the midterm review. They also agreed that there should be periodic meetings of GATT at ministerial level.

C. Mid-Term Review in Montreal and on to Brussels

The Montreal Ministerial Meeting convened in December 1988, after the U.S. presidential election, for Clayton Yeutter's last meeting as the USTR. The Ministers and their delegations were successful in gathering a small early harvest of decisions on dispute

[125] *See id.* at 130–138.
[126] *See id.* at 138–140.
[127] *See id.* at 147–151.

settlement[128] and on functioning of the GATT system,[129] as well as a package of market access improvements for tropical products. But on agriculture, the United States held firm and the EC did not have a mandate to negotiate the changes demanded by its trading partners. And rather than accept an agreement to disagree on agriculture, the five Latin American members of the Cairns Group[130] blocked any agreement at Montreal. The meeting was suspended until April 1989.

In the early months of 1989, senior officials met informally in Geneva to resolve the four areas that had been unresolved at Montreal: agriculture, textiles, safeguards and TRIPs. They reached agreement on an agriculture framework with something for every group in the negotiations, setting a December 1989 deadline for detailed proposals; the TRIPS text incorporated the U.S. objectives of minimum standards and effective enforcement of intellectual property rights. In April 1989, the TNC then adopted the package of Montreal results with the remaining texts, creating the framework and blueprint for the final negotiations.[131] However, it would be years more before final agreements could be reached. From a U.S. perspective, the mid-term results were only important because they kept alive all the U.S. major priorities, not because they guaranteed success.

The debate over agriculture dominated the eighteen months between April 1989 and the next milestone, the Brussels Ministerial meeting scheduled to close the Round in early December 1990. The participants were still very far apart. The U.S. proposal of December 1989 moved minimally off the initial U.S. position: it demanded tariffication of border barriers without exceptions, with minimum access for imports at five percent of the domestic market; discipline on domestic subsidies based on sorting them into permitted/non-distortive, disciplined, and prohibited categories; and a phase-out of all export subsidies over ten years. The EC in return proposed use of Aggregate Measurement of Support ("AMS") as a tool to limit export and domestic subsidies, and accepted tariffication; the food-security group of Japan and Korea were unwilling to give up border protection or domestic subsidies. From April 1990 onward, eight major participants worked informally to reach agreement, without avail, as Aart de Zeeuw, chairman of the negotiating group, worked on his own synthesis. The de Zeeuw paper, circulated in June, proposed tariffication with special solutions for some products, and safeguards against import surges; phased reduction of all domestic support except that which was not tied to production ("decoupled"), based on the total AMS in 1988; and some reduction in export subsidies.[132]

The final proposals on agriculture before the Brussels meeting doomed any possibility of a successful close to the Round at that time. The EC's proposal took so long to negotiate internally that it was not submitted until November 1990. It proposed thirty percent cuts in domestic support from a base year of 1986, no commitments on export subsidies or import access, and a right to "rebalance" by increasing tariffs and subsidies on some

[128] *Improvements to the GATT Dispute Settlement Rules and Procedures*, *Decision of 12 April 1989*, BISD 36S/61.

[129] *Functioning of the GATT System, Decisions of 12 April 1989 arising from action taken by the Uruguay Round Trade Negotiations Committee*, BISD 36S/403 (including trade policy reviews, an annual report by the Secretariat on trade developments and a decision to hold meetings at Ministerial level at least once every two years). *Trade Policy Review Mechanism (TPRM), Outline Format for Country Reports* (Jul. 19, 1989), BISD 36S/406.

[130] Argentina, Brazil, Chile, Colombia and Uruguay.

[131] *Mid-Term Review Agreements,* GATT doc. NUR/027, April 24, 1989, reprinting MTN.TNC/11, *Mid-Term Meeting*, April 21, 1989.

[132] *See* Croome, *supra* note 80, at 233–235, 238–239.

products as subsidies on other products were reduced. 1986 had been an unusual year, with high subsidy levels, with the result that much of the thirty percent cut in subsidies had already taken place by 1990. In contrast, the United States and Cairns Group sought ninety percent cuts in export subsidies over ten years, 75 percent cuts in domestic support, tariffication with tariffs reduced over time, and different base years (the United States proposed use of 1986–88 averages).[133]

There were also major clashes between the United States and most other players over the services agreement. The April 1989 package of mid-term decisions had agreed to include an MFN clause in the future services framework agreement.[134] By July 1990, agreement had emerged on the "bottom-up/top-down" scheduling formula adopted in the final agreement, in which commitments would cover only the sectors positively listed, but for those sectors would be comprehensive save for explicitly-listed exceptions.[135] The great majority also wanted the framework agreement and its MFN clause to cover all services sectors. Yet U.S. negotiators had learned during negotiation of the free trade agreement with Canada that Congress would veto any commitments on maritime transportation; in air transport, U.S. industry strongly favored the existing bilateral, non-MFN regime; U.S. telecom companies wanted to exclude basic telecommunications services from MFN; and the Treasury Department and the financial services industry wanted to be excluded from the GATS regime, or to reserve the benefits of market opening for like-minded countries.[136] If MFN was a universal obligation and national treatment and market access would have to be negotiated for each country sector by sector, from the U.S. point of view the MFN obligation would lock in its already-open market, and the United States would not have the ability to deny market access to individual countries that had refused to make a national treatment or market access commitment. This, from the U.S. point of view, created an asymmetry that would allow "free riders" and that would make liberalization less likely. The impasse on the framework meant that negotiations on market access commitments would have to be left until after Brussels. Just before the Brussels meeting, the United States hardened its position on excluding sectors and tying MFN treatment to the level of market opening. The text sent to Brussels was full of brackets, indicating a lack of agreement.[137]

In addition, major areas of controversy had erupted between the United States and the EC in the field of TRIPS, prompted largely by major differences between their respective copyright regimes. The TRIPS negotiations had fully engaged, with many concrete proposals from all sides on the full range of issues. By mid-1990 the negotiating group was working on a composite draft text assembled by its chair, Ambassador Lars Anell of Sweden, and the Secretariat. But key issues remained outstanding before Brussels.[138]

In the rules area, 1989–90 saw agreement coalesce in some areas, while others still suffered from deep divisions or no agreement at all. Negotiations on preshipment inspection, rules of origin, and the Tokyo Round codes on customs valuation, licensing, technical barriers to trade, and on the GATT provisions on schedules, state trading, waivers, renegotiation of concessions, non-application, and provisional application, produced texts that

[133] *See id.* at 240–241; Peter Mytri Ungphakorn, *When the European Community's Ambassador Kissed the Malaysian Trade Minister*, 9 *TDRI Quarterly Review* 24–34 (1994), at http://www.info.tdri.or.th/library/quarterly/text/gatt_ec.htm.

[134] *Mid-Term Review Agreements*, *supra* note 131.

[135] *See* Croome, *supra* note 80, at 242–249.

[136] Preeg, *supra* note 94, at 104, 111–112.

[137] *See* Croome, *supra* note 80, at 214–217.

[138] *See id. at 251–256.*

were virtually or completely finished before Brussels. In safeguards, the pre-Brussels text[139] had resolved all issues but a short list including selectivity, now refocused as "quota modulation."

In the subsidies discussions, Michael Cartland, chair of the negotiating group, developed a negotiating draft text which formed the basis of discussions from June 1990 onward, and eventually became the Agreement on Subsidies and Countervailing Measures. The Cartland text adopted the U.S. proposal to ban all export subsidies, including *de facto* export subsidies, as well as subsidies linked to purchases of local products. It defined subsidies as involving a financial contribution by a government, and incorporated proposals on "green light" subsidies which the United States was reluctant to accept. But U.S. negotiators were under pressure politically to deliver: even up to Brussels, the United States continued to push for prohibiting certain types of domestic subsidies seen in the steel sector.[140] In the antidumping area, Asian exporters and developing countries pushed strongly for more discipline, but U.S. domestic political pressure was strong to resist any changes that would make it more difficult for domestic industry or unions to successfully petition for antidumping duties on imports. The United States and EC even proposed extending antidumping remedies to cover circumvention of an antidumping order. After two attempts at pleasing both opposing poles, the Secretariat gave up. Negotiations broke down in mid-October 1990, further attempts at compromise were rejected by the United States, the EC and others, and no text was sent to Brussels.[141]

The United States also found itself isolated in the effort to resolve the methodology for tariff negotiations. While most countries wanted negotiations based on a formula cut in tariffs (although few of them could agree on exactly the same formula) the United States had insisted that it would proceed only in an item by item mode. Tariff negotiations were also held back by linkage to agriculture: until it was clear how agricultural market access would be negotiated, an entire area of tariff bargaining was off the table. The United States offered zero tariffs for agricultural products. In an initiative pushed by U.S. exporters, the United States then made "zero-for-zero" offers for a range of industrial products, conditional on agreement by others also to go to zero.[142] But a perceived gap in offers by developing countries made it difficult politically for U.S. negotiators to offer concessions on import-sensitive products such as textiles and footwear, the products most of interest to developing countries.

The year 1990 also saw the birth of an idea that would travel far, as first the Canadian government tabled an April 1990 proposal to create a new World Trade Organization, and then the EC tabled its own outline proposal for a Multilateral Trade Organization ("MTO"). The United States, seeing an MTO as a distraction from the substantive business of the Round, opposed it consistently up to December 1993. The MTO idea nevertheless made it into the package of texts forwarded to the Brussels Ministerial. Work also advanced on dispute settlement, as the group tackled the issues left unresolved by the mid-term decision—adoption and implementation of panel reports. To address barriers to adoption, the EC proposed appeal procedures for panel reports, with the support of the United States. Spurred on by Super 301, the EC and others made curbs on unilateralism a key priority for the dispute settlement talks; the United States responded that unilateralism included unilateral blockage of the panel process, and could only be

[139] MTN.TNC/W/35/Rev.1 (Dec. 3, 1990), at 183–192.
[140] *See* Croome, *supra* note 80, at 173–179.
[141] *Id.* at 180–183.
[142] *Id.* at 158–161.

addressed when rules would eliminate such blockage. The text that went to Brussels included the creation of an Appellate Body, but was not clear whether the new procedures would also apply to the Tokyo Round codes. Issues left open were automatic adoption of panel reports, anti-unilateralism rules and coverage of non-violation nullification or impairment.[143]

D. From Brussels to the Dunkel Draft

The Brussels Ministerial opened on Monday, December 2, 1990 with vows by all to finish at Brussels. After three days in which the EC repeatedly refused to move from its initial position on agriculture, Swedish Agriculture Minister Mats Hellstrom, chair of the agriculture negotiating group, put forward a tentative compromise "non-paper" on Thursday. On Thursday night, after EC Agriculture Commissioner Ray McSharry refused to accept the Hellstrom non-paper even as a basis for negotiations, Latin delegates started a walkout, first from the agriculture group and then from all groups. On Thursday night, when Ambassador Hills told the assembled representatives of the U.S. business community that the United States had walked away from a bad deal, they gave her a standing ovation.[144]

On Friday morning, the TNC formally suspended the meeting.[145] The Round was extended for a brief period for consultations to be held by Director-General Dunkel in early 1991. Ambassador Hills declared that the United States would return to the negotiating table when a basis existed for successfully concluding the Round—making it clear that the EC would have to be willing to negotiate on the full range of agriculture issues, including export subsidies as well as domestic support and market access.[146]

After Brussels there was a three-month break in official negotiating sessions, the first of the periods of marking time that characterized the last half of the Uruguay Round. In the period between 1988 and 1990, even though some crucial deadlines had been missed, work had moved forward steadily toward meeting the overall deadline of June 1, 1991 for fast-track implementation set by the U.S. 1988 Act.[147] The breakdown at Brussels, soon complicated by the start of the Gulf War, made it clear that the U.S. Administration would have to use the fallback that had been provided in the 1988 Act, and ask Congress by March 1, 1991 to grant a two-year extension on fast-track, to June 1, 1993. Ambassador Hills met with EC Commissioner Andriessen, as the rest of the GATT waited. On February 26, the TNC re-launched negotiations by adopting a work program that included agreement by all-including the EC-to "conduct negotiations to achieve specific binding commitments" in all three agricultural areas—export subsidies, domestic support and market access. The work program provided negotiating plans for all unresolved issues in the Round.[148] In April, the negotiating structure for the Round was consolidated into six groups, on market access, textiles, agriculture, rulemaking, TRIPS and institutions.[149]

[143] *Id.* at 227–231.
[144] S. Dryden, *supra* note 28, at 368.
[145] P. Ungphakorn, *supra* note 133.
[146] Chakravarthi Raghavan, *Uruguay Round Talks Adjourned Indefinitely, But May be Revived*, Dec. 11, 1990, SUNS—South-North Development Monitor, http://www.sunsonline.org/trade/process/during/uruguay/tnc/12110090.htm.
[147] *See* discussion at note 102 *supra.*
[148] *Uruguay Round Back on Track: Negotiations Restart in Many Areas*, NUR 046, Mar. 4, 1991.
[149] *New Negotiating Structure and Chairmen Agreed in TNC*, NUR 047, Apr. 29, 1991.

Extending fast-track would not prove easy for the Bush Administration. In 1990, President Bush had accepted Mexican President Salinas' request to negotiate a free trade agreement. After Canada asked to be included, on February 5, 1991 the three countries announced their intention to pursue a North American free trade agreement.[150] The fast-track extension would apply to the NAFTA talks too, not just the Uruguay Round. Under the 1988 Act, either the House or the Senate had the right to veto an extension of fast-track through a one-house disapproval resolution, which could not be vetoed by the President. Organized labor and environmental groups mobilized to fight free trade with Mexico. The Congressional leadership decided that to retain the credibility of fast-track and the agreements, the resolutions could not be simply killed in committee, and would have to go to floor votes. The same business coalition that had pushed for the 1988 Act came out again, President Bush and USTR Carla Hills lobbied and provided assurances on labor and the environment, and disapproval of the extension was rejected by comfortable, but not overwhelming margins on May 23 and 24.[151] But NAFTA became the catalyst for the formation of a new "anti-trade" coalition in the United States–labor unions, environmental groups, import-sensitive small businesses, populist-oriented family farm groups, and other NGOs—one that was increasingly dissatisfied with a perceived policy bias in favor of trade liberalization over all other policy objectives. This coalition of interests that emerged in the NAFTA debate was to grow in strength throughout the remainder of the Round.

In June and July 1991, negotiating groups began to meet again, and in July delegations agreed to intensive meetings in the late fall, with the objective of finishing in 1991. The Quad worked actively, both at senior level and at the technical level. The negotiations in Geneva began to make quiet progress. Although fundamental blockages still remained on agriculture, services, TRIPS and textiles, the shape of a final agreement began to emerge. The idea of a unified dispute settlement mechanism and a new multilateral trade organization to replace GATT began to take shape. Enormous gaps still remained in the various positions, but U.S. negotiators began to gain more confidence in the prospects for an overall agreement that could be sold at home. The negotiations built to a peak in late November and December, when most remaining issues were resolved in negotiations. The deadline to close out negotiations was midnight December 18, 1991, to enable preparation of a complete draft Final Act for distribution at the TNC meeting on Friday, December 20. On December 19, the chairmen of the six groups made their final cut on the few unresolved issues, filling in the blanks based on their own judgment and knowledge of what delegations would tolerate.

Developments in Europe freed agriculture to move. In July, the EC Commission adopted EC Agriculture Commissioner Ray MacSharry's plan for CAP reform, and in mid-October, the EC negotiating position shifted to embrace the possibility of more reductions in domestic support and specific commitments to limit export subsidies. In meetings with EC Commission President Jacques Delors on November 10, President Bush moderated the earlier U.S. position, arguing for a 30–35 percent cut in export subsidies over five or six years.[152] But two months of intensive meetings did not produce agreement on agriculture, and so the key elements of a deal were left to the judgment

[150] *Joint Statement Announcing Canada-Mexico-United States Trilateral Free Trade Negotiations*, Feb. 5, 1991, text at http://bushlibrary.tamu.edu/papers/1991/91020501.html.

[151] I.M. Destler, *supra* note 16, at 98–103; votes against the disapproval resolution were 231–192 in the House and 59–36 in the Senate.

[152] Preeg, *supra* note 94, at 135–137.

of GATT Director-General Arthur Dunkel, as chairman of the agriculture negotiating group. Dunkel's draft text opted for tariffication of import barriers without exceptions, with 5 percent minimum access staged in, and a 36 percent average reduction in tariffs; "green box" status for decoupled payments to farmers and a 20 percent cut in domestic support from 1986 levels, over the 1993–99 period; and for export subsidies, a 36 percent cut in budgetary outlays and a 24 percent cut in volume of subsidized exports, over the same period.[153]

Services negotiators worked hard throughout 1991 as the negotiating group circulated a series of complete texts and many partial proposals. The United States continued to resist an unconditional MFN obligation because of the free rider concerns discussed earlier. Finance ministry negotiators sought to negotiate a separate annex for financial services that could provide special rights and obligations for a club of the like-minded, richer countries, and a lower level of benefits for those countries not willing to take on more obligations.[154] But at the end of 1991, little of substance remained in the financial services annex to GATS except for a broad carveout for prudential measures. Other delegations had proposed handling the MFN problem through individually-negotiated MFN exemptions for particular national measures. In the Dunkel Draft text, negotiating group chairman Felipe Jaramillo opted to allow any participant to take MFN exemptions on a one-time basis at the entry into force of the GATS, but to have the GATS cover all sectors. This balance suited many participants in the end. The MFN exemptions would prove useful not just for the United States but for others; the coverage decision meant that Europe could not *a priori* exclude the audiovisual sector.[155]

The other difficult areas were antidumping and TRIMs, where no texts had been sent to Brussels, and there was no easy way to restart negotiations. Views in the negotiating group on rules were sharply divided between exporting countries, particularly those in East Asia, and the users of antidumping. Exporters were reacting to a sharp rise in investigations taking place in the early 1990s.[156] On the other hand, negotiators of the United States and the EC, the leading users of antidumping, were beginning to feel intensified pressure from domestic groups as they lost GATT or Code disputes on their antidumping measures. When the Antidumping Code panel in the 1990 *Swedish Steel* case[157] called for the U.S. authorities to revoke the antidumping order at issue and reimburse the duties, the panel recommendation became a lightning rod for U.S. groups. In the absence of agreement, the chairman of the negotiating group stitched together a text on antidumping as a best approximation of a compromise between conflicting positions, and that "chairman's text" appeared in the Dunkel Draft.[158] The TRIMs text was a "chairman's text" as well.[159] By contrast, the TRIPS text came together quickly in December 1991, with its key compromises agreed between negotiators on minimum

[153] Croome, *supra* note 80, at 259.

[154] *Id.* at 273–77.

[155] By the end of the day, of course, the GATS included annexes on air transport and maritime transport, which carved out these sectors from the GATS or from the GATS MFN clause.

[156] M. Zanardi, *Antidumping: What are the Numbers?* Oct. 2002 discussion paper for European Trade Study Group, http://www.gla.ac.uk/Acad/PolEcon/pdf02/2002_15.pdf, Table 3.

[157] *US—Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products From Sweden*, GATT doc. ADP/47, circulated Aug. 20, 1990 (unadopted).

[158] *See* Croome, *supra* note 80, at 304–306.

[159] *See id.* at 308–310. The 1991 TRIMs text went forward into the final Uruguay Round package without any changes of substance.

patent term, extension of patents to all subject areas, transition periods for developing countries, and interim provisions for the transition period. This text essentially completed the TRIPS negotiations.[160] The final text on textiles and clothing came together in a series of all-night negotiating sessions in December.[161]

In hindsight, the most fundamental breakthrough came in the work on institutions. The Quad had already discussed the MTO extensively from 1989 onward. As the negotiating group on institutions deliberated in the fall of 1991, the United States pushed again for a breakthrough against blockage of panel reports, and for the integrated, comprehensive dispute settlement system that would be required in order for the GATS and TRIPS to be effectively enforced. The group began to work on the MTO as well. Just before the deadline, it agreed on a long dispute settlement text incorporating U.S. acceptance of a limited anti-unilateralism commitment, in exchange for agreement that panels would be established, panel and Appellate Body reports would be adopted, and retaliation would be authorized, on request except if there were consensus otherwise (the "negative consensus" approach). Another short text provided for handling of all disputes by a new Dispute Settlement Body and for "cross-retaliation" under carefully-specified conditions. These agreements and a draft MTO text were all included in the Dunkel Draft, providing the first textual basis for knitting the single undertaking of the Punta del Este Declaration into a comprehensive legal structure.[162]

E. To Blair House and Beyond

Reactions to the Dunkel Draft were mixed. The EC immediately rejected the text on agriculture, U.S. agricultural interests criticized it as not going far enough, and the Cairns Group accepted it.[163] Environmental NGOs complained that the agreements would leave no room for environmental regulation. Nevertheless, the text was a watershed moment that did more than any other single event to propel the negotiations towards a final conclusion. In January, the TNC agreed to use the Dunkel Draft as the basis for negotiations, and to move forward on four tracks: one, intensive negotiations on market access in goods; two, intensive negotiations on market access in services; three, work on the legal conformity and internal consistency of the agreements; and four, work at TNC level on "examining whether and if it is possible to adjust the package in certain specific places."[164]

For the rest of 1992, the United States and EC negotiated bilaterally on agriculture, as the rest of the world waited for a breakthrough. In Geneva, the legal drafting group worked on the Dunkel Draft texts from January through early June. The group integrated the two dispute settlement texts into a single Dispute Settlement Understanding ("DSU"), and comprehensively redrafted the MTO Agreement. It edited the Dunkel Draft texts to make them into agreements that would all use the DSU procedures for dispute settlement, would be administered by the MTO and would be attached to the MTO Agreement. But the group could not make substantive changes, and some fundamental issues, such as amendment and waiver provisions, could not be settled. Similarly, the final deals could not be approached in the market access talks for goods and services because a key element,

[160] *See id.* at 278.
[161] *Id*. at 271–273.
[162] *See id.* at 282–285.
[163] *See id.* at 287.
[164] *TNC adopts four-track strategy to conclude the Round*, GATT FOCUS No. 87, Jan-Feb. 1992, at 2.

agriculture, was still unresolved. The United States participated in the "Track Three" talks on the MTO, while withholding its agreement to the MTO in principle. The controversy over NAFTA and the *Tuna-Dolphin* case had alerted USTR to the sensitivities that could be awakened by a new international organization in trade. Keeping focused on their key areas of agriculture and services, U.S. negotiators were also skeptical that arguments over the design of a new organization would distract the Uruguay Round from the real issues of substance.

The EC could not accept the Dunkel Draft because even after the 1991 MacSharry reforms of the CAP, EC payments to farmers were not completely decoupled from production levels and thus did not qualify for "green box" treatment. The draft had also not accepted Europe's desire to raise some tariffs (on oilseeds, for instance) as it cut others. MacSharry also sought explicit recognition of the 1991 reforms in the agriculture text.[165] The long-running dispute between the U.S and EC on oilseeds[166] then came to a boil in 1991–1992. In March, a panel found that the EC's payments on oilseeds, even post-reform, impaired the EC's zero binding by tying payments to the price supports and variable levy for grains.[167] On April 30, the United States announced its intention to suspend concessions on $1 billion in imports from the EC; on June 12 USTR announced a $2 billion list of candidate products to be targeted, and on June 19, the GATT Council authorized the EC to renegotiate the zero binding on oilseeds, precipitating EC-U.S. negotiations on compensation. After the September referendum in France on the Maastricht Treaty on European Union, negotiations could finally engage on the full range of agricultural issues, and for six weeks U.S. and EC negotiators met in different cities to discuss the outlines of a possible deal. Negotiations broke down on November 3; on November 4 the EC blocked a U.S. request to the GATT Council for authorization to suspend $1 billion in concessions, and on November 5, USTR announced $300 million in trade sanctions to apply starting December 5.[168]

Amid rumblings of trade war and calls by the GATT Council for renewed talks, the EC and the United States sat down again in Washington and reached the November 20 Blair House agreements, including an agreement resolving both the oilseeds dispute[169] and an agreed set of changes to the Dunkel Draft agricultural text.[170] The changes reduced the Dunkel cut in subsidized exports from 24 percent to 21 percent. The Blair House changes also created the "blue box," under which some direct payments under production-limiting programs would be excluded from the commitment to reduce domestic support: the "blue

[165] Interview, Kevin Brosch (former U.S. agriculture negotiator), 2003.

[166] In 1962, when the EC liquidated prior European tariff bindings on grains in order to establish its Common Agricultural Policy, the United States had negotiated a tariff binding at zero on non-grain feed ingredients including oilseeds; *see* note 42 *supra*. As the EC livestock industry grew in the following thirty years, so did imports of oilseeds used as ingredients for high-protein feed, vegetable oils and margarine. EC member states and the EC tried various tactics, then subsidized users to buy domestic oilseeds. A 1988 GATT dispute brought by the United States against the subsidies resulted in a panel report, adopted in early 1990, which found that the EC subsidies violated the EC's national treatment obligations and also impaired the zero binding on oilseeds. A new oilseeds payment regime was worked out in 1991 as part of the MacSharry Plan for CAP reform. After bilateral consultations, and under the pressure of Section 301, the EC agreed with the United States to refer the issue of EC compliance back to the original panel.

[167] *Follow-Up on the Panel Report "European Economic Community—Payments And Subsidies Paid To Processors And Producers of Oilseeds and Related Animal-Feed Proteins*," BISD 39S/91 (1992), at ¶ 117–118.

[168] THOMAS BAYARD AND KIMBERLY ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 220–221 (1994).

[169] *Id.* at 222, describing contents of agreement; Blair House also resolved other outstanding bilateral issues such as corn gluten feed and continuation of compensation for the EC enlargement of 1986.

[170] *Id.*; text of changes available at http://www.fas.usda.gov/itp/agreements/oilseeds.html.

box" provisions were crafted to benefit both the EC and the United States.[171] Third, the Blair House changes introduced additional flexibility and "swing" into export subsidy reduction commitments; and fourth, the changes inserted a new "peace clause" into the text. In December 1992, the Bush Administration signed NAFTA, and continued on to try to wrap up the Round with the EC before Bush left office in late January. But the remaining gaps were too large to bridge, and others had agenda items as well. The Round would miss its extended deadline.

F. Finishing the Round, 1993

In 1993, the new Clinton Administration began to get organized to cope with NAFTA and the Round, under the new USTR, Mickey Kantor. The Administration started late and had to expend extra resources on securing Congressional approval of NAFTA, which became the major focus of effort from September until it passed the House on November 17. Meanwhile, Congress passed legislation extending fast-track, providing a deadline of April 15, 1994 for signing the agreement and December 15, 1993 for notifying Congress of the intent to sign.[172] After finally agreeing to EC Council approval of the oilseeds agreement on June 8, the French government, under increasing political pressure, sought to reopen Blair House.[173]

In December 1992, GATT Director-General Dunkel had started to surface delegations' Track Four proposals, to find that the United States wanted to revise the antidumping text, to scrap the MTO in favor of simpler arrangements under GATT, and to gain other changes responding to environmental concerns; the EC, Japan, Mexico, India, Canada and others had their wish lists as well.[174] After marking time in the spring, market access negotiations restarted in the summer. Between September and mid-November the Institutions Group, chaired by Ambassador Julio Lacarte of Uruguay, made the final decisions on the new integrated dispute settlement rules and the MTO, fixing the provisions on MTO decision-making that had been an obstacle to U.S. acceptance.

In meetings starting two days after the NAFTA vote, Ambassador Kantor and EC Commissioner Sir Leon Brittan focused on the Round. In three frantic weeks of nonstop meetings, they settled almost all their outstanding bilateral issues. In a final settlement negotiated in the first week of December in Brussels, the United States agreed to reopen the Blair House Agreement, to postpone cuts in subsidized exports and to extend the peace clause period to nine years. In return, the EC agreed to provide market access for particular agricultural products including binding the margin of preference for grains,[175] to reduce tariffs on electronics and other industrial products,[176] and to support U.S.-backed antidumping and subsidies proposals.[177]

[171] The provisions appearing in Article 6.5(a)(i) of the present Agreement on Agriculture were tailored to shelter the MacSharry payments on fixed areas and fixed yields, and Article 6.5(a)(iii) extended the principle to the livestock area. Article 6.5(a)(ii) sheltered the pre-1996 U.S. deficiency payment program. Brosch interview.

[172] P.L. 103–49, introduced as H.R.1876 on April 28, 1993, enacted July 2, 1993.

[173] *France Allows EC Adoption of Oilseeds Deal, Removing Obstacle to GATT Talks,* INSIDE U.S. TRADE, June 11, 1993.

[174] Croome, *supra* note 80, at 342.

[175] *U.S., EU Agricultural Deal Paves Way For Minimal Market Access Deal*, INSIDE U.S. TRADE Dec. 10, 1993.

[176] *EU-U.S. Electronics Deal Spurs Mixed Industry Reaction*, *U.S., EU Tariff Deal Covers Conditional Zero Tariffs On Wood, Paper*, INSIDE U.S. TRADE, Dec. 10, 1993.

[177] *EU To Support Most U.S. Demands On Changes To Antidumping Text* and *U.S., EU Reach Deal on Research, Development Subsidies*, INSIDE U.S. TRADE, Dec. 10, 1993.

During the last week before December 15, in Geneva, the United States succeeded in negotiating the antidumping changes it had needed to satisfy Congressional critics, talking other delegations into acceptance of special provisions on the standard of review that had been opposed by the great majority.[178] More and more of the texts fell into place, and dramatic tariff cuts finally materialized in the market access talks. In the last three days, the services talks closed out with agreement to postpone the debate on MFN in financial services and basic telecom to separate talks to be held after the Round. The EC withdrew its offers on audiovisual services, and the last adjustments were agreed in the TRIPS Agreement.[179] And the United States finally accepted the MTO framework for putting the Round results into effect, with one demand: that the name be changed to the more euphonious "World Trade Organization."

On December 15, 1993, Director-General Peter Sutherland brought down the gavel at a meeting of the TNC to signal the end to substantive negotiations and a consensus among all of the participants in the Round. The negotiations had taken seven agonizing years, and the agreements put in place represented, without question, the most massive overhaul in the multilateral trading system since the GATT began.

This massive change in the trading system had been the goal of the United States from the beginning of the negotiations, and now, for better or worse, the United States had what it wanted. But the battle for acceptance of the agreement would not be easy. Supporters of the agreement argued that all of the basic U.S. objectives for a strengthened system had been achieved. There was now a more binding and automatic dispute settlement system whereby countries could not block panel decisions. A single undertaking meant that all parties would have to live by roughly the same rules, albeit with special rules and longer phase-ins for developing countries. Services and TRIPS were an integral part of the rules. The United States had achieved much of its objectives for greater market access in the tariff and services negotiations. A much stronger subsidy agreement limited the use of trade-distorting industrial subsidies and went far beyond the weak Tokyo Round agreement. Agriculture rules had been firmly imbedded in the new system, and commitments to tariffication and reduction of subsidy levels and import protection had been achieved, albeit modestly. Although the final agreement on agriculture was nowhere near the initial U.S. position, it was a huge advance over the *status quo ante* and it created a framework for further advances in the years to come.

Many industry groups, multinational companies and agricultural associations were pleased with this sweeping outcome. These groups would, over the following months, form a powerful coalition to lobby for acceptance of the agreement by the Congress. They would argue that the United States was by far the largest beneficiary of an agreement that finally recognized the key strengths of the U.S. economy—its innovation, its productivity and its orientation towards high technology, services and agriculture.

However, there were many divisions within the United States as to the acceptability and wisdom of the final agreement. In order to obtain its goals, the U.S. government had also made concessions in many areas: agreement to phase out textile quotas, elimination of "grey area" measures (e.g., voluntary export restraints), tough new rules limiting the use of antidumping measures, reduction of domestic agricultural supports and protection,

[178] *GATT Partners Work Out Controversial Dumping Issue*, INSIDE U.S. TRADE, Dec. 14, 1993.

[179] *U.S. Accepts Disputes Moratorium To Protect Chips In TRIPS Deal* (U.S. success in obtaining limits on compulsory licensing of semiconductor patents, in exchange for acceptance of Canadian amendment providing temporary moratorium on "non-violation nullification or impairment" cases under TRIPS Agreement), INSIDE U.S. TRADE, Dec. 16, 1993.

reduction of tariffs on a number of import-sensitive products, and a dispute settlement system that would limit the use of Section 301 in cases covered by WTO rules. These changes would surely face opposition from organized labor, import-competing industries and advocates of unilateral trade measures. Many critics of the agreement saw these trade-offs for a more effective multilateral system as unacceptable.

Opposition to the agreement would also come from NGO groups—particularly environmental and labor organizations—who saw multilateralism as a new threat, one that could bring changes in existing regulatory safeguards or limit the ability of Congress to pass new laws using international trade sanctions in defense of labor rights or environmental objectives. This opposition had started with the fight in spring 1991 against fast-track renewal for NAFTA and the Uruguay Round, and the September 1991 GATT panel ruling condemning U.S. "tuna-dolphin" trade sanctions,[180] which was like a spark on dry tinder. The *Tuna-Dolphin* panel ruling galvanized opposition to the GATT and to the WTO in ways that few old trade hands had ever anticipated. It created deep divisions between those groups who supported the philosophy of trade-led growth and those who advocated other social policies, and saw inherent conflicts between enhanced trade and these broader goals. While the latter groups were to remain a minority of public opinion throughout the debate on the Uruguay Round, their vocal condemnation of an agreement that they viewed as eroding U.S. sovereignty aligned them with organized labor and textile and steel executives. In the end, an alliance evolved between liberal social activists and conservative isolationists or unilateralists—an alliance best typified by the many joint appearances by Ralph Nader and Pat Buchanan in opposition to the Uruguay Round. These groups, together with industry and labor groups fighting a loss of protection, would coalesce around an effort to defeat the Uruguay Round implementing legislation in Congress.

G. The Uruguay Round Agreements Act

As 1994 began, the final cleanup of the agreement started in Geneva. A new legal drafting process did a final legal cleanup on the texts in all three languages, and market access negotiators finalized the schedules of concessions; in Marrakesh, Ministers met, made speeches and were photographed at the signing ceremony. Approval of the legislation took almost a year of overcoming obstacles in its path.

The fast-track provisions for the Uruguay Round meant that an implementing bill could not be delayed by a Congressional committee indefinitely, but would have to be reported out within 45 legislative days, and it would be voted on promptly by each House of Congress; the maximum period for consideration would be ninety legislative days. These deadlines would be triggered by submission of the trade agreements, a draft implementing bill, a statement of any administrative action proposed to implement the agreement,[181]

[180] *United States—Restrictions on Imports of Tuna*, BISD 39S/155 (1991, unadopted), regarding the U.S. Marine Mammal Protection Act and the Dolphin Protection Consumer Information Act.

[181] The fast-track authority in Section 1103(a) of the 1988 Act (19 U.S.C. 2903(a)), like the fast-track authority in the Trade Act of 1974, required that the President submit "a statement of any administrative action proposed to implement the trade agreement" with the draft implementing bill for the trade agreement. Section 101(a) of the Uruguay Round Agreements Act (19 U.S.C. 3511(a)) explicitly approved the statement of administrative action submitted with the Uruguay Round agreements. Section 102(d) (19 U.S.C. 3512(d)) provides that this statement of administrative action "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceedings in which a question arises concerning such interpretation or application."

and supporting information (including explanations of how the bill would affect existing law and how it met the objectives specified in the 1988 Act). The implementing bill would be drafted by USTR, negotiating with the Congressional committees of jurisdiction, and would go through sessions just like legislative markups and a conference process between the House and Senate. This drafting process would take place between the date that the United States entered into the agreement (at Marrakesh) and some later unspecified time when the package was submitted to Congress.[182] The Uruguay Round package was not submitted to Congress until September 27, 1994, shortly before Congress was due to adjourn.

Why the delay? I.M Destler's expert account points to the distraction of the larger struggle over the Clinton Administration's health care bill, the weakness of Congressional trade leadership compared to 1988, and the budgetary requirement to find sources of revenue that would pay for the $12 billion in tariff revenue losses resulting from the bill. Destler also points to two factors that were within the Administration's control: the handling of revisions to the antidumping laws, and the Administration's forward-leaning proposal for extending fast-track authority.[183]

Antidumping petitioner interests had opened the year with a wish list of changes to the antidumping laws and how they would be administered,[184] and it was clear to USTR that there would be a price for the Uruguay Round changes. It took months for USTR to negotiate the details. Destler remarked at the time that "supporters of AD laws appear to have won back in Washington most, but probably not all, of the ground lost in Geneva."[185] These changes bought the bill solid support from influential "fair traders" in Congress, but in later years they were the source of many of the WTO disputes brought against U.S. trade remedies.

The Clinton Administration also chose to try to use the implementing bill as a vehicle for a seven-year renewal of fast-track authority for future Clinton trade agreements. Fast-track renewal would be controversial in any event, since the only upcoming trade negotiations were free-trade talks with Chile. To try to persuade Democrats, the proposal tied fast-track to negotiating objectives that included respect for internationally-recognized labor standards, and harmony between trade rules and environmental protection. But the linkage between environment, labor and trade triggered the strong opposition of the business community and Republican supporters of free trade.[186] For every Democrat or union supporter unwilling to open the borders unless trading partners had labor and environmental laws equal to those in the United States, there was a Republican or a business community member totally opposed to having trade agreements that would trade off market opening for social goals, or could result in trade sanctions on the United States if U.S. labor or environmental laws were found to be inadequate. Between June 20 when the proposal was made, and September 12 when it was abandoned, much time and effort was lost.[187] Another Clinton Administration attempt at gaining new fast-track authority in 1997 would also fail, and fast-track would prove elusive until the Trade Act

[182] Section 151 of the Trade Act of 1974 (19 U.S.C. 2191). Legislative days do not include days when the Congress is not in session or the session is recessed; a period of 45 legislative days may be significantly longer than 45 calendar days.

[183] Destler, *supra* note 16, at 238–244.

[184] *U.S. Agencies Wrestle Over Implementation of New GATT AD/CVD Rules*, INSIDE U.S. TRADE, Feb. 18, 1994 (on proposals by Committee to Support U.S. Trade, Laws).

[185] Destler, *supra* note 16, at 243.

[186] Text of Administration proposal in INSIDE U.S. TRADE, Special Report, June 21, 1994, at S-26.

[187] Destler, *supra* note 16, at 245.

of 2002, which would finally provide "trade promotion authority," the new term bestowed by USTR Robert Zoellick.

The central "big picture" issue for the debate on approval of the Uruguay Round was the alleged threat to U.S. sovereignty of U.S. WTO membership and the un-blockable WTO dispute settlement system that U.S. negotiators had worked so hard to bring about. To deal with these issues, the implementing bill included provisions confirming that the WTO agreements do no override Federal or state law, and providing special procedures for coordination with state governments in disputes involving state laws.[188] To satisfy House Minority Leader Newt Gingrich, the bill included a provision providing for an expedited process for Congress to review U.S. participation in the WTO each five years, and vote to revoke approval of the WTO Agreement if it chooses.[189] These provisions require USTR's annual report to Congress to discuss any WTO decision taken by vote.[190] Criticism of the secrecy involved with the panel process led to provisions in the bill requiring USTR to make U.S. dispute settlement submissions public when filed, and to pursue greater transparency in the WTO.[191]

The House and Senate conferees did not finish until September 23, the package was submitted September 27, and on September 28, Senator Ernest Hollings, chairman of the Senate Commerce Committee, announced that he would insist on holding the bill in his committee for the full 45 days, blocking an early vote. The result was to delay the vote until after the November elections, in which Republicans gained majority control of both the House and the Senate. The new majority leader of the Senate, Senator Robert Dole, then announced his support in exchange for a few more concessions. In a letter to Dole, the Administration promised to support legislation in 1995 to establish a Dispute Settlement Review Commission of five Federal appellate judges. The commission would review all panel or appellate reports adverse to the United States, and determine whether the panel had demonstrably exceeded its authority, altered treaty rights and obligations, acted arbitrarily or capriciously, engaged in misconduct or departed from standard procedures; if there were three instances in a five-year period, Congress could vote to withdraw from the WTO.[192] The Uruguay Round bill then went through quickly by a comfortable margin with bipartisan support. President Clinton signed it into law on December 8, 1994.

Also on December 8, the Preparatory Committee for the WTO held the Implementation Conference provided for in the Final Act of the Uruguay Round. The Implementation Conference formally adopted January 1, 1995 as the WTO's start date, and, responding to U.S. plans to withdraw from the GATT as soon as possible, it adopted arrangements to wind up the GATT 1947 and the Tokyo Round Codes.[193] When the WTO era began

[188] Uruguay Round Agreements Act sec. 102 (19 U.S.C. 3521).

[189] *Id.* §125 (19 U.S.C. 3535). The vote would be on a privileged joint resolution which could be vetoed by the President, unless the veto is overridden by a two-thirds majority of each House of Congress.

[190] *Id.* §122 (19 U.S.C. 3532).

[191] *Id.* §§126–127 (19 U.S.C. 3536–3537).

[192] Text: Kantor Letter to Dole on GATT, INSIDE U.S. TRADE, Nov. 25, 1994. Senator Dole submitted legislation to enact this proposal in 1995, as S.15 in the 104th Congress. However, due to opposition in the business community, in the nine years from 1994 to 2003 neither S.15 nor any later proposal on the same theme achieved committee approval in Congress, let alone enactment.

[193] *Transitional Co-Existence of the GATT 1947 and the WTO Agreement*, BISD 41S/5; *Transfer Agreement between GATT 1947, ICITO and the WTO*, BISD 41S/7; *Transitional Co-Existence of the Agreement on Implementation of Article VI of the GATT and the Marrakesh Agreement Establishing the World Trade Organization*, BISD 41S/10; *Transitional Co-Existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT and the Marrakesh Agreement Establishing the World Trade Organization*, BISD 41S/11; *Avoidance of Procedural and Institutional Duplication*, BISD 41S/13; *Consequences*

on January 1, the GATT 1947 quickly became irrelevant, and the new single undertaking negotiated in the Uruguay Round took its place. The GATT, which had never formally entered into force, was terminated at the end of 1995, ending an era in trade.

VII. The WTO's First Seven Years: Negotiations and Implementation

We address now the interaction of the United States with the WTO's negotiating and implementation agenda. U.S. work within the WTO started with the basics: following up to ensure full WTO implementation, carrying out the built-in agenda of negotiations provided for in the WTO Agreement, and actively pursuing accession negotiations with China and other countries seeking to join the WTO. To these were added initiatives seeking to expand the WTO's reach to new subjects and the new economy of the Internet. Carrying out the commitment in the WTO Agreement to ministerial meetings every two years, the WTO held successful ministerial meetings in Singapore in December 1996 and Geneva in May 1998. After an unsuccessful meeting in Seattle in November 1999, the WTO launched a new round of trade negotiations at the Doha Ministerial Meeting in November 2001.

A. Laying the Foundations

During the first years of the WTO, the United States worked with other Members to establish the WTO's institutional machinery, including rules of procedure for WTO bodies, a headquarters agreement and an independent Secretariat. During 1994, one set of waivers and the accession of Ecuador were approved by vote. Soon thereafter, the WTO General Council agreed that waiver and accession decisions would be agreed by consensus unless a Member requested that a vote take place.[194] There have been no votes in the WTO since 1995.

Assuring greater WTO transparency to civil society has been a continuing major U.S. concern. Starting in 1995, U.S. negotiators proposed new rules to eliminate the GATT rule that all documents would be "restricted" and denied to the public until action had been taken to derestrict them. The WTO adopted liberalizing procedures on document access in 1996 and 2002 which have completely reoriented the WTO on the issue of document restrictions, with the result that in principle all WTO documents are unrestricted.[195]

of Withdrawal From or Termination of the Agreement on Implementation of Article VI of the GATT, BISD 41S/16; *Consequences of Withdrawal From or Termination of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT*, BISD 41S/18; all adopted Dec. 8, 1994.

[194] *Decision-making Procedures under Articles IX and XII of the WTO Agreement*, Statement by the Chairman, as agreed by the General Council on November 15, 1995, WT/L/93. "On occasions when the General Council deals with matters related to requests for waivers or accessions to the WTO under Articles IX or XII of the WTO Agreement respectively, the General Council will seek a decision in accordance with Article IX:1. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting under the relevant provisions of Articles IX or XII. The above procedure does not preclude a Member from requesting a vote at the time the decision is taken. Consequently, if any Member has a particular problem with a proposed decision regarding a request for a waiver or an accession to the WTO, it should ensure its presence at the meeting in which this matter will be considered. The absence of a Member will be assumed to imply that it has no comments on or objections to the proposed decision on the matter."

[195] *Procedures for the Circulation and Derestriction of WTO Documents, Decision of 18 July 1996*, WT/L/160/Rev.1, *replaced by Decision on Procedures for the Circulation and Derestriction of WTO Documents, Decision of 14 May 2002*, WT/L/452. The 2002 decision provides that "All official WTO documents [defined as documents in certain WTO series] shall be unrestricted"; certain types of such documents

As mandated under the Uruguay Round Agreements Act, the United States initiated discussions on rules of conduct for panelists and the Appellate Body, which were approved in December 1996.[196] In response to another U.S. initiative, the WTO adopted a decision on relations with non-governmental organizations, adopted in 1996.[197]

The WTO committees administering the agreements spent their first few years actively reviewing implementing legislation notified by Members. The United States reviewed others' legislation and was reviewed itself. The committees, and the other specialized bodies, also took necessary decisions and created necessary institutions to do foundation work for the next round of trade negotiations, and to pursue the "built-in agenda" flowing from the Uruguay Round agreements.

B. The Built-in Agenda

The Uruguay Round negotiations on services and agriculture broke new ground by establishing new frameworks for applying trade rules and making new types of legal commitments in these sectors. But it was clear that only partial results could be achieved before the gavel went down on the Uruguay Round. Further work would need to be done, in new negotiations that the negotiators scheduled to start five years after the entry into force of the WTO Agreement, in the year 2000.

In the services area, the major accomplishment of the negotiations was to establish the GATS itself, but many of the market access commitments made in the Uruguay Round went no farther than binding the status quo. Two sectoral negotiations that took place in 1995–97 would prove important in keeping the support of the U.S. business community for multilateral trade liberalization, by demonstrating that market opening in services could happen in multilateral negotiations.

In December 1993, the U.S. financial services industry's unwillingness to open the U.S. market on an MFN basis triggered a decision by the TNC not to finish negotiations on financial services, but to hold a sectoral negotiation on financial services that would be scheduled to conclude by July 31, 1995. When that deadline arrived, and the United States still believed that offers on the table were inadequate, the deadline was extended and further talks were held. When the negotiation finally concluded in December 1997, it produced agreed commitments covering $18 trillion in global securities assets, $38 trillion in global domestic bank lending, and $2.2 billion in worldwide insurance premiums.[198]

A similar story took place in the basic telecommunications area. Most of the commitments agreed in the Uruguay Round were in value-added telecommunications. Rather than exclude basic telecommunications from the GATS, the TNC agreed to hold a sectoral negotiation in this area to conclude by April 30, 1996. At that deadline, the negotiators decided to recess and reconvene for a month early in 1997. Efforts during the interim

are issued with temporary restricted status but automatically derestricted, and although a government can request that such a document that it submits be given restricted status, the government must positively request continued restriction or the document will be automatically derestricted. Restricted documents still exist, but are simply not issued in the "official" series listed in L/452. However, the share of WTO documents that are restricted now is tiny compared to the share of GATT documents that were restricted as of 1994.

[196] *Decision on Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DSB/RC/1, 11 December 1996.

[197] *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, adopted Jul. 18, 1996, WT/L/162, text at http://www.wto.org/english/forums_e/ngo_e/guide_e.htm.

[198] *See* informal Secretariat summary of financial services commitments agreed in December 1997, at http://www.wto.org/english/news_e/news98_e/finsum.htm.

period resulted in a successful conclusion, with commitments covering more than 95 percent of the global market for telecommunications services. An important U.S. initiative was drafting and advancing a "Reference Paper" of pro-competitive regulatory principles, as a way for individual Members to commit voluntarily to maintaining a regulatory environment conducive to market entry.[199]

Agricultural reform too was only half begun in the Uruguay Round. Article 20 of the Agreement on Agriculture recognized that "the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process" and provided that negotiations for continuing the process would be initiated in 2000. As the year 2000 approached, the WTO Committee on Agriculture began technical work to prepare for the negotiations, and that work continued until the launch of the Doha Round.

C. New Initiatives

As discussed above, the WTO Agreement requires that the WTO meet at Ministerial level each two years, and the agreement itself guaranteed that a new round of negotiations would start around 2000. It was no surprise, then, that the Singapore Ministerial Meeting of December 1996 became the scene of a debate over whether and what items would be added to the agenda in those future negotiations. At Singapore, and in bilateral, Quad and APEC meetings beforehand, the United States pushed strongly for the immediate launch of negotiations to achieve a multilateral agreement on transparency in government procurement (a limited agreement which would not open procurement markets but simply provide notice and transparency on bidding and award of contracts). The Singapore Ministerial Declaration chartered a working group "to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement."[200] The EC had similar success advancing an initiative on trade facilitation, and the Singapore Ministerial Declaration tasked the Council for Trade in Goods "to undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area."[201]

The Clinton Administration also pushed for an opening for future talks on trade and labor rights–an issue of great importance to some in the Democratic party–but could not overcome widespread resistance. The Singapore Declaration renewed the commitment of all to observance of core labor standards–but the Declaration stated that increased trade would contribute to promotion of labor standards, rejected protectionist use of labor standards, and agreed that the competitive advantage of low-wage developing countries "must in no way be put into question."[202]

More controversial were the EC's main wish-list items of trade and investment, and trade and competition. Both were opposed by the United States and even more strongly opposed by developing countries. The U.S. preference (reflecting views of the U.S. business community) was to pursue investment issues in the OECD or bilaterally, not in the

[199] *See* Secretariat history of basic telecom negotiations, at http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_history_e.htm.

[200] WT/MIN(96)/DEC/, text at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm, ¶ 21.

[201] *Id.*

[202] *Id*. ¶ 4.

WTO. U.S. skepticism on trade and competition reflected the opposition of both U.S. antitrust enforcers, and industry voices which sought to avoid displacement of antidumping remedies by competition laws. In the end, the Singapore Declaration launched working groups on both subjects, but at India's insistence, the Declaration text provided that future negotiations, "if any," would only take place after "an explicit consensus decision is taken among WTO Members."[203]

The Singapore Declaration also endorsed the Information Technology Agreement ("ITA"), another key U.S. initiative which served an industry that was a key Clinton constituency and a source of millions of U.S. jobs. During the Uruguay Round, U.S. industry had pushed strongly for "zero-for-zero" tariff elimination in many areas of U.S. strength, including automatic data processing equipment and parts, semiconductors, and other high-technology products. The Uruguay Round implementing legislation provided residual tariff cutting authority to continue tariff elimination in these sectors. In 1995, the Trans-Atlantic Business Dialogue endorsed the concept of continuing tariff elimination in this sector. The next step for U.S. negotiators was to recruit the Quad countries, then obtain the endorsement of APEC in 1996. The ITA then became a major "deliverable" for the Singapore Ministerial Meeting on December 1996, which established a WTO work program for completing the technical arrangements for the ITA. At Singapore, 28 countries committed to the ITA, and others joined later. At present, the ITA covers countries responsible for over 95 percent of world trade in ITA products, including China.

The next Ministerial Meeting took place in Geneva, in May 1998, to celebrate the Fiftieth Anniversary of the GATT. The Geneva meeting was largely celebratory, marked by the WTO's first violent demonstrations and a speech by President Clinton which invited the WTO to hold its next ministerial meeting in the United States. Otherwise, the Ministers agreed to a moratorium on duties on electronic goods and launched a study program on e-commerce. During the next year and a half, Seattle was chosen as the host city, the WTO went through a wrenching and divisive contest for the next Director-General, and the WTO worked in Geneva on preparations for Seattle–where the launching of a new round of trade negotiations would be the major issue for decision.

In the pre-Seattle preparations, developing country opposition to a new round surfaced with the tabling of many "implementation" proposals focused on rebalancing the WTO rules. By the time of the Seattle meeting, a full-blown confrontation had developed between the Cairns Group, insisting on a commitment that the new round would result in elimination of agricultural export subsidies, and the EC, refusing to agree to any such commitment up front. The EC and Japan pressed forward to get negotiations on trade and investment, and trade and competition, added to the negotiating agenda; developing countries pushed back. Asian exporters and others sought further negotiations on disciplines for trade remedies, and the Clinton Administration, pressed by the Democratic Party's labor constituency, sought a working group on trade and labor. The many weeks of discussions in Geneva did not produce resolution on any of the outstanding issues before the ministerial meeting began. The Seattle meeting collapsed spectacularly. The days of street demonstrations, paralyzing the meeting, became the headline that would be remembered, but the meeting would have failed for a number of reasons even without the demonstrations.[204] The launch of a new round would have to await a new President, a new USTR and a different political environment.

[203] *Id*. ¶ 20.
[204] Odell, *supra* note 27.

VIII. A New Round again, and the Trade Act of 2002

A. The Launch at Doha

Two years later, in November 2001 at Doha, the gavel finally came down on a ministerial declaration launching a new round. The setting had shifted from 1999's high-growth high-tech Seattle, to a cooling world economy, developing country demands, and the shadow of September 11. Changes of administration on both sides of the Atlantic had brought a new USTR, Robert Zoellick, and a new EC Commissioner for trade matters, Pascal Lamy, who had worked closely together during the first Bush Administration. Yet as Zoellick and his team at USTR approached the Doha Ministerial, their objectives had a great deal of continuity with U.S. objectives in 1999 and before; U.S. fundamental economic interests remained unchanged.

The U.S. agenda going into the Ministerial was both positive and negative. U.S. agricultural exporters wanted ambitious negotiations that would open markets. The EC wanted the new negotiations not to be tied to elimination of agricultural export subsidies, and as before sought negotiations on protection of appellations of origin for distinctive European products. The EC also pursued WTO negotiations on environment as a must-have, in spite of widespread opposition in the WTO.[205] U.S. food industry groups and their Congressional supporters opposed providing any opportunity for the EC to table proposals on environment that would authorize new market access barriers through food labeling, or introduce the "precautionary principle" into trade agreements to attempt to justify trade-restricting EC regulations based on uncertain science.[206]

The U.S. business community wanted negotiations on market access for services and non-agricultural goods that would open markets both in developed and developing countries, on a timetable responsive to business needs.[207] Congressional interests active on antidumping in 1994, spurred by a string of unfavorable WTO panel decisions on trade remedy cases, opposed any WTO negotiations on antidumping and subsidies, or insisted that negotiations strengthen the effectiveness of the WTO Agreement in fighting dumping. Going into Doha, the United States waged an isolated battle to keep antidumping and subsidies off the negotiating agenda entirely.[208] As for the four "Singapore issues," historically, the only Singapore issue on which the United States had been active was transparency in government procurement, promoted by both business groups and anti-corruption NGOs.[209] U.S. skepticism about WTO investment and competition negotiations had only increased since Singapore. The U.S. business community, mindful of the existing network of bilateral investment treaties, insisted that any WTO investment

[205] *Lamy Says EU Must Have Ability to Negotiate Environment in WTO*, INSIDE U.S. TRADE (Nov. 9, 2001). The EC's interest in environment stemmed in part from the presence of Green parties in governing coalitions in a number of European countries including Germany.

[206] *Zoellick Raises Two Objections to WTO Draft Declaration*, INSIDE U.S. TRADE (Nov. 2, 2001).

[207] Dean R. O'Hare, *The U.S. business community favours a more focused and shorter negotiating round,* WORLD TRADE AGENDA (Jul. 30, 2001), text at http://www.uscib.org/index.asp?documentID=1818.

[208] *U.S. Seeks to Put Hold on Antidumping, Subsidy Negotiations in WTO*, INSIDE U.S. TRADE (Oct. 5, 2001); *U.S. Refuses WTO Trade Law Negotiations under Mounting Pressure*, INSIDE U.S. TRADE (Oct. 26, 2001); *Zoellick Raises Two Objections to WTO Draft Declaration*, INSIDE U.S. TRADE (Nov. 2, 2001), *Steel Allies on Hill Urge U.S. to Fight WTO Trade Remedy Language,* INSIDE U.S. TRADE (Nov. 2, 2001).

[209] *See, e.g.*, US Chamber for International Business Letter to USTR Regarding New Round of WTO Trade Negotiations (May 10, 2001), text at http://www.uscib.org/index.asp?DocumentID=1740; speech by Peter Eigen, chairman of Transparency International, *WTO needs to play a more active role in the fight against corruption* (Sept. 13, 1999), text at http://www.transparency.org/speeches/pe_wto_geneva.html.

talks must pursue high standards and elimination of any barriers to investment.[210] India, Malaysia and others in the developing world opposed the investment and competition initiatives in 2001 as strongly as ever.

In the end, at Doha developing countries took and held center stage for the first time in the WTO. In addition to the Doha Declaration launching the new round,[211] the Ministers at Doha adopted a Decision on Implementation-Related Issues and Concerns,[212] a mechanism for extending the phaseout of export subsidies by developing countries,[213] and a declaration recognizing the flexibility and scope of TRIPS provisions on compulsory licensing of patents in connection with public health crises, such as AIDS.[214] The final text of the Doha Declaration provisions on market access negotiations envisaged full participation in the benefits by developing countries and authorized them to provide less than full reciprocity in market access.[215] Immediately after the ministerial meeting, WTO Director-General Moore dubbed the round the Doha Development Agenda.

The declaration provided the charter for a new round of negotiations as a single undertaking, including core market access areas such as agriculture, services and market access for non-agricultural products. The declaration's provisions on agriculture came to rest at the compromise formula "reductions of, with a view to phasing out, all forms of export subsidies,"[216] allowing all sides to claim victory. In return, Ambassador Zoellick helped Commissioner Lamy to obtain a negotiating mandate for at least a few environmental issues,[217] after Lamy provided a letter promising that the EC would not use the negotiations to alter the balance of WTO rights and obligations on the "precautionary principle," or to justify illegitimate trade barriers under current or future biosafety agreements.[218] After much resistance by the United States, the single undertaking also included talks on clarifying and improving disciplines under WTO rules, including antidumping, subsidies and regional trade agreements.[219] Renewed negotiations on dispute settlement rules were also thrown into the mix, although outside the scope of the single undertaking.

The outcome at Doha on the Singapore issues was more ambiguous. On all four Singapore issues, the Declaration provided that negotiations would take place after the Fifth (Cancun) Ministerial "on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations"—echoing the Singapore Declaration. The

[210] Letter from R. Scott Miller, Chair, USCIB Committee on International Investment, to AUSTR Joseph Papovich, Oct. 19, 2001, at http://www.uscib.org/index.asp?documentID=1856.

[211] *Ministerial Declaration* (adopted November 14, 2001), WT/MIN(01)/DEC/1, November 20, 2001, reproduced in the Appendix to this book.

[212] *Decision on Implementation-Related Issues and Concerns*, WT/MIN(01)/17, November 20, 2001, reproduced in the Appendix to this book.

[213] *Procedures for Extensions under Article 27.4 for Certain Developing Country Members*, G/SCM/39, November 20, 2001.

[214] *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, November 20, 2001, reproduced in the Appendix to this book.

[215] Ministerial Declaration, *supra* note 211, ¶ 16.

[216] *Id.* ¶ 13.

[217] *Id.* ¶ 31; negotiations on the relationship between WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs), as among parties to the MEAs in question; on procedures for information exchange between MEA secretariats and relevant WTO committees; and on reduction of tariff and non-tariff barriers to trade in environmental goods and services.

[218] *WTO Environment Talks Get Mixed Reviews, As Lamy Assures U.S.,* Inside U.S. Trade (Nov. 23, 2001), with text of Lamy letter.

[219] *Ministerial Declaration*, *supra* note 211, ¶¶ 28–29.

declaration also set agendas for interim work, designed to clarify the limitations on the future negotiations and on any resulting agreement. The strategy of deferring the decision for two years had emerged in the pre-Doha process, moderated by General Council Chairman Stuart Harbinson, whose skill was a major factor in the success at Doha. But at the insistence of India, just before adoption of the Ministerial Declaration the meeting chair, Yussef Hussain Kamal, made a statement noting that some delegations had requested a clarification of its references to "explicit consensus." He noted that:

> "it was his understanding that a decision would indeed need to be taken by explicit consensus before negotiations on [any of the four Singapore issues] could proceed. In his view, this would also give each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session until that Member was prepared to join in an explicit consensus."[220]

After the meeting, the EC claimed that in spite of this personal statement, the Ministerial Declaration still committed the WTO to a postponed launch of negotiations on these issues.[221] Three weeks later, governments' interpretations of the Doha texts were so divided that it was still not clear what exactly the Ministers had agreed to.[222] The consequences of this ambiguity would be seen two years later in the impasse and failure of the Fifth Ministerial Meeting in Cancún.

While the Doha Ministerial succeeded in launching the Round, it left critical issues unresolved. The overall deadline of January 1, 2005 for concluding negotiations was clear. Within this envelope, Ministers set a deadline of June 30, 2002 for tabling of requests for commitments in services. The next major deadline was March 31, 2003 for both services offers and agreement on modalities for further commitments in agriculture. May 2003 was the deadline for concluding negotiations on amending the WTO's Dispute Settlement Understanding. By the Fifth Ministerial, in Cancún, participants were to submit comprehensive draft schedules of agricultural trade commitments, and were to decide by "explicit consensus" when (and according to some, whether) to launch negotiations on the Singapore issues.

B. Trade Promotion Authority: the Trade Act of 2002

Even before his confirmation as U.S. Trade Representative, Robert Zoellick started campaigning for Congressional approval for fast-track authority to negotiate trade agreements—which he renamed "trade promotion authority." Yet the issues that had blocked fast-track since 1994 still remained: the deep split between Democrats seeking, and Republicans opposing, provisions that would require that any agreements opening trade had to include binding, enforceable rules on environment and labor.[223] By the end of 2002, the Administration had achieved its goal of a broad grant of trade promotion authority, although by the narrowest of margins in the House, as part of a general movement toward a more partisan Congressional policy process, and with a boost from a budget-busting farm bill and a Presidential grant of import relief for steel. The final fast-track package also took on a new agenda of concerns about foreign challenges to U.S. legislation.

[220] *Summary Record of the Ninth Meeting* (Nov. 14, 2001), WT/MIN(01)/SR/9, p. 2

[221] *Note from Qatar Chairman Yields New Uncertainty on New WTO Issues,* INSIDE U.S. TRADE (Nov. 23, 2001).

[222] *The Doha Declaration's Meaning Depends on the Reader*, BRIDGES (Nov.-Dec. 2001), at 1, text available at http://www.ictsd.org

[223] *Zoellick Pushes for Prompt Revival of Fast-Track Authority*, CQ WEEKLY (Feb. 3, 2001) at 295.

The partisan note was struck in September 2001, when House Ways and Means Chairman Bill Thomas introduced a fast-track bill that was described as a bipartisan compromise, but immediately denounced by Ways and Means Democrats.[224] In October, the Ways and Means Committee reported out a bill with few concessions to the Democratic minority's substantive agenda.[225] The opposition was led by "New Democrats," normally pro-trade, who raised concerns about the effect on U.S. legislation of WTO negotiations on non-tariff barriers. The Republican leadership focused on persuading wavering Republicans from import-sensitive districts. On December 6, the day of the House vote, Rep. Jim DeMint put the bill over the top in return for a letter from the leadership promising to limit Caribbean trade preferences for textiles. The bill passed 215–214, with only 21 Democrats voting in favor.[226]

The Senate Finance Committee quickly approved a bipartisan bill in December, but the proposal then stalled until 2002 over a dispute on safety-net benefits. The House bill had reauthorized the existing program of trade adjustment assistance for workers displaced by trade agreements; Senate Democrats, led by Finance Committee Chairman Max Baucus, insisted on a major expansion of trade adjustment assistance including health care benefits. On May 23, 2002, the Senate passed a fast-track bill with the expanded benefits, including the Dayton-Craig floor amendment which would permit Congress to exclude from fast-track any agreement altering U.S. trade remedy laws.[227] After a short conference, Baucus and Thomas resolved the final details in a three-hour closed-door session on July 25. After more lobbying, the House passed the conference report July 27 by 215–212, the Senate approved it 64–34, and the President signed and approved it on August 6.[228]

The final bill, the Trade Act of 2002, set an ambitious negotiating agenda for the United States. It provided authority to negotiate, and provided fast-track treatment for implementing bills, for the Doha Round, the future Free Trade Area of the Americas, the free trade agreements with Chile and Singapore, and other, future bilateral free trade agreements. The initial grant of authority for non-tariff agreements, including both WTO-based agreements and free trade agreements, applies only to agreements entered into before June 1, 2005, which make progress in meeting the Act's stated negotiating objectives.[229]

The Act specifies a series of procedural conditions that must be met in order for fast-track treatment to be accorded to a trade agreement implementing bill. The President must notify in advance his intention to initiate negotiations[230] and must consult with Congressional trade committees, committees of jurisdiction and a new Congressional Oversight Group.[231] Any proposals that could be in an agreement that would require changes to U.S. trade remedy laws must be reported to Congress at least six

[224] Hal Shapiro and Lael Brainard, *Trade Promotion Authority Formerly Known as Fast-track: Building Common Ground on Trade Demands More Than A Name Change*, 35 GEO. WASH. INT'L L.REV. 1 (2003), at 20.

[225] *Ways and Means Passes Fast-track Bill on Largely Partisan Vote*, INSIDE U.S. TRADE (Oct. 10, 2001).

[226] *House Passes Fast-Track by One Vote on Largely GOP Support*, INSIDE U.S. TRADE (Dec. 7, 2001).

[227] *Daschle Signals Willingness to Kill Dayton-Craig After Bush Warning*, INSIDE U.S. TRADE (May 17, 2002).

[228] Joseph Schatz & Jill Barshay, *Deal Puts Fast-Track On Track*, CQ WEEKLY (Jul. 27, 2002) at 2021; Joseph Schatz, *Bush Wins Key Victory Before Recess: Fast-Track Trade Negotiating Authority,* CQ WEEKLY (Aug. 3, 2002), at 2127.

[229] Trade Act of 2002, P.L. 107–210, Aug. 6, 2002, §2103(b).

[230] *Id.* §2104(a).

[231] In the case of textiles and apparel products, or import-sensitive agricultural products, special advance consultations and assessments are required. *Id*. §2104(b)–(c).

months before the United States would enter into the agreement, and Congress may pass a non-binding resolution whether the proposals are consistent with the Act's negotiating objectives.[232] At least ninety days before the President enters into the agreement, he must notify Congress of his intention to do so.[233] Within sixty days after entering into the agreement, the President must submit to Congress a description of all changes to existing law required to bring the United States into compliance.[234] Finally, at some (unspecified) time after entering into the agreement, the President must submit a draft implementing bill, a statement of administrative action proposed to implement the agreement, and an explanation of how the agreement changes existing rules and how it meets U.S. negotiating objectives.[235] If all of these conditions are met, the implementing bill will receive fast-track, no-amendment treatment. The agreement may enter into force for the United States only after such a bill is enacted into law.[236]

The negotiating objectives in the bill reflect the shift in the U.S. economy and in political concerns since the days of the GATT. The objectives, which apply for all agreements negotiated thereunder, call for market access in goods and services,[237] strong protection for intellectual property rights,[238] and strong protection for investment, including meaningful procedures for resolving investment disputes.[239] Additional objectives include fighting corruption and enhancing transparency,[240] ensuring open trade conditions for e-commerce,[241] and fighting regulatory protectionism and trade barriers that arise from regulatory dissonance.[242] Detailed agriculture objectives call for tariff cuts, subsidy reduction or elimination, and fighting state trading, with an emphasis on biotechnology, ending unjustified barriers not based on sound science, and providing adjustment periods for import-sensitive agriculture.[243] On labor and the environment, the stated negotiating objectives include ensuring that a party to a trade agreement does not fail to effectively enforce its *own* environmental or labor laws in a manner affecting bilateral trade, in a sustained manner; and recognizing that parties to a trade agreement have rights to exercise discretion over their enforcement decisions, and that no retaliation may be authorized based on exercise of these rights, or the right to set domestic labor and environmental

[232] *Id.* §2104(d)(3). In the House-Senate conference, the Dayton-Craig amendment denying fast-track for any agreements changing trade remedy laws was dropped in favor of this provision. Schatz & Barshay, *supra* note 228.

[233] *Id.* §2105(a)(1)(A).

[234] *Id.* §2105(a)(1)(B).

[235] *Id.* §2105(a)(1)(C). The provisions in the implementing bill and the administrative actions, of course, will be negotiated in advance between the Administration and Congress, as happened in the case of earlier fast-track bills on the Tokyo and Uruguay Rounds.

[236] *Id.* §2105(a)(1)(D).

[237] *Id.* §2102(b)(1)–(2).

[238] *Id.* §2102(b)(4).

[239] *Id.* §2102(b)(3). The objective on investment also focuses on U.S. treatment of foreign investors, suggesting that they should not be accorded greater substantive rights with respect to investment protection than U.S. investors in the United States; this reference does not, of course, rule out investor-state dispute settlement *procedures* in U.S. trade and investment agreements. The same paragraph also calls for provision of an appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in free trade agreements.

[240] *Id.* §2102(b)(5)–(6).

[241] *Id.* §2102(b)(9).

[242] *Id.* §2102(b)(8).

[243] *Id.* §2102(b)(10).

standards.[244] The act also sets objectives to protect the ability to enforce trade remedy laws and to reform border tax rules.[245]

The provisions on dispute settlement in the Trade Act of 2002 reflect Congress's perception of how WTO dispute settlement has affected the United States, and set an agenda for the United States in negotiations on dispute settlement rules. One of the three overarching Congressional findings provided as a basis for the Act is that "[s]upport for continued trade expansion requires that dispute settlement procedures under international trade agreements not add to or diminish the rights and obligations provided in such agreements."[246] The Act required the Secretary of Commerce to report to Congress by the end of 2002, setting out a strategy to address Congressional concerns that WTO dispute settlement has altered WTO rules.[247] The negotiating objectives in the dispute settlement area focus both on dispute settlement and on enforcement. They call for enhancing compliance, for adherence by WTO panels and the Appellate Body to the standard of review, for more settlement of disputes through consultations, and for new remedies: trade-expanding compensation, or alternative penalties that avoid damaging bystanders to a dispute.[248] Within a year after a penalty or remedy is imposed by the United States as permitted by any new trade agreement, the President must report to Congress on how effective the penalty or remedy actually was in enforcing U.S. rights.[249]

The Trade Act of 2002 represented a victory for the Bush Administration, USTR Zoellick and the Republican leadership in achieving renewal of fast-track. The bill provided a clear negotiating mandate on trade issues, moving away from the anti-globalization mood and the dominance of concerns on labor and environment that had stymied proposals during the 1990s. But, as observers noted at the time, it came at the cost of some erosion of bipartisanship on trade issues.[250]

[244] *Id.* §2102(b)(11). This formulation reflects the criticism raised by Sen. Gramm and others that trade sanctions for insufficient protection of labor and environment would potentially subject U.S. laws to sanctions. The legislation also calls for capacity-building and greater cooperation between the WTO and the ILO. It also requires the executive branch to seek consultative mechanisms to strengthen respect for core labor standards and compliance with prohibition of the worst forms of child labor; to conduct environmental reviews of future trade and investment agreements; to review the labor impact of future trade agreements; to submit labor rights reports to the trade committees on each negotiating partner; to report on the extent to which each prospective trade agreement partner has laws governing exploitative child labor. §2101(c).

[245] *Id.* §2102(b)(14)–(15). The border tax objective, like similar mandates in earlier legislation, responds to the tax issues underlying the GATT and WTO disputes on the U.S. DISC and FSC tax legislation.

[246] *Id.* §2101(b)(3). The concrete focus of this statement is WTO panel and Appellate Body decisions "to impose obligations and restrictions on the use of antidumping, countervailing, and safeguard measures by WTO members" and application of the standard of review in Article 17.6 of the Antidumping Agreement. *Id.*

[247] *Id.* §2105(b)(3), providing also that fast-track procedures would not apply to any agreement negotiated under WTO auspices if this strategy was not submitted on time. The report to Congress provided a snapshot of U.S. experience with WTO dispute settlement, expresses concern about cases involving U.S. trade remedies, and proposed an executive branch strategy in two parts, led by negotiation in the Doha Round talks. An appendix to the report attached a U.S.-Chile proposal tabled in the Doha Development Agenda negotiations on dispute settlement, suggesting changes to the DSU with the stated objectives of providing greater Member control over the dispute settlement process and greater flexibility to settle disputes. *Executive Branch Strategy Regarding WTO Panels and the Appellate Body*, Report to the Congress Transmitted by the Secretary of Commerce, Dec. 30, 2002, text at http://www.ita.doc.gov/FinalDec31ReportCorrected.pdf.

[248] *Id*. §2102(b)(12). These objectives also call for principal negotiating objectives (e.g., environment and labor objectives as well) to be treated equally in trade agreement dispute settlement procedures and remedies.

[249] *Id*. §2101(c)(11) (apparently reflecting, *inter alia*, dissatisfaction with the *Hormones* case outcome).

[250] Destler, *supra* note, at 16.

The trade issues in the bill reflect the trade issues that matter now to U.S. domestic interests, in an economy increasingly based on services and high-value-added manufacturing, and with an agricultural sector that speaks strongly through the Senate. At the same time, the Act signals Congress' abiding concern with U.S. trade remedy laws. But as I.M. Destler observes:

> [d]evotion to the unfair trade laws has been an important means by which lawmakers have covered or balanced support for mainstream trade liberalization policies. Nor has the pressure of steel and other users of these laws been effectively countered by import-using industries hurt when [antidumping] duties drive input prices up, or export industries hit with the application of mirror-image legislation overseas. But it may become increasingly difficult for the United States to hold to these laws *and* negotiate broad global trade agreements. Members of Congress may have to choose.[251]

Zoellick and USTR immediately took up the challenge, quickly completing negotiations on free trade agreements with Chile and Singapore, and dangling the possibility of additional FTAs in a strategy of "competitive liberalization." The FTAs demonstrated that the WTO was not the only game in town. For services in particular, the FTAs produced new market access, where WTO commitments have largely stopped at legally binding the existing level of trade liberalization. The FTAs also go beyond the WTO, embracing emerging subjects such as labor rights, anti-corruption and trade facilitation, and incorporating investment chapters with a quality of commitments that could never be expected in the WTO.

Yet FTAs have their drawbacks too. Politics and foreign policy tend to dominate when most countries pick their FTA partners. The United States will not enter into an FTA with New Zealand, for instance, because of foreign policy differences.[252] But after the political winds blow in another direction, economic fundamentals will always remain as the bedrock of a sustainable trade policy. It is economics, not foreign policy, that will get business interests to push for Congressional approval of a controversial FTA. FTAs can also be a costly use of negotiating resources and the resources of the business community, and they demand that both business and government maintain a consistent policy line from agreement to agreement. And for some issues such as agriculture, there is no substitute for multilateral negotiations in the WTO—as the November 2003 meeting in Miami of Trade Ministers from the Americas was to demonstrate.

C. And Then Cancún

The core issues for the negotiations launched at Doha concern market access—tariff cuts on agricultural and industrial products, market access commitments for trade in services, and commitments on agricultural subsidies that are individual to each WTO Member. Earlier trade rounds show that market access results tend to come together quickly just before the final deadline, but not until then. But these negotiations will not start until there is agreement on how these negotiations will take place, and on what their objectives are to be. The Doha Ministerial Declaration only determined that negotiations would take place, and postponed decisions on these "modalities" until specified dates in 2003.

In the two years after Doha, delegations tabled proposals on tariff negotiating formulas, frameworks for subsidy reduction, and frameworks for services trade liberalization. The

[251] *Id.* at 12.

[252] *Zoellick Says Relationship with New Zealand Makes FTA a Challenge*, INSIDE U.S. TRADE (May 23, 2003).

United States tabled ambitious market access proposals: a comprehensive proposal on agricultural trade reform,[253] elimination of tariffs on non-agricultural goods by 2015,[254] and requests and offers in the services market access negotiations. But as this work progressed, gaps began to appear between various WTO Members in their level of ambition for the negotiations. Every one of the deadlines set for agreement on modalities was missed. Since all of the negotiations are tied as a single undertaking, and progress in some areas is linked to others, all of the negotiations were not moving forward.

The chairmen of the negotiations on agriculture and on non-agricultural market access continued to consult with delegations on compromise texts regarding modalities, but in early July, Stuart Harbinson, the agriculture chair, reported that agreement on modalities remained elusive.[255] By late July, as the WTO General Council chair unveiled the first draft of a ministerial declaration, U.S. and EC officials were already working to lower expectations for Cancún,[256] and at a mini-ministerial in Montreal, trade ministers asked U.S. Ambassador Zoellick and EU Commissioner Lamy to present a joint text on agriculture modalities by mid-August.[257] On August 13, they tabled a joint framework paper, described by Ambassador Zoellick as an effort to translate the EC's CAP reform of June 2003 into the context of the WTO negotiations. Although the paper was widely criticized, negotiations in Geneva began to take off, with tabling of a new draft ministerial declaration for Cancún. The U.S.-EC paper also sparked formation of the G-21 group of 20-plus developing countries, led by Brazil, India and China, who developed their own text and moved the ministerial draft back toward the original U.S. position. A group of poor West African countries pursued their own proposal on elimination of subsidies to cotton, targeted in particular at subsidies under the U.S. 2002 farm bill.[258] Meanwhile, on August 30, clearing away another piece of unfinished business, the WTO General Council adopted a waiver decision facilitating wider access to medicines for AIDs, tuberculosis, malaria and other epidemics in developing countries.[259]

At Cancún, for the first time in the GATT or WTO, a breakdown in negotiations was not caused by agriculture—unlike the breakdowns at Seattle, Brussels or Montreal. Instead, negotiations broke down over the Singapore issues, advanced by Europe and Japan against the adamant resistance of India, Malaysia and other developing countries. After Commissioner Lamy agreed to give up on including negotiations on investment or competition policy in the single undertaking on September 14, Japan followed suit on investment. At a "green room" informal negotiating meeting held that afternoon by Mexican Foreign Minister Luis Ernesto Derbez, African and other developing countries,

[253] *Administration Unveils Comprehensive U.S. Trade Proposal to Expand American Farmers' Access To Overseas Markets,* USTR Press Release 02–77 (Jul. 25, 2002); text of U.S. proposal and background documents available at http://www.fas.usda.gov/itp/wto/.

[254] *Market Access for Non-Agricultural Goods: Proposal by the United States*, TN/MA/W/18 (Dec. 8, 2002); proposal and additional background materials also available at http://www.ustr.gov/new/Zero_Tariff.htm.

[255] *Negotiations on Agriculture: Report by the Chairman, Mr. Stuart Harbinson, to the TNC*, TN/AG/10 (Jul. 7, 2003).

[256] *U.S., EU Suggest Cancun Will Not Result In Detailed Agreement on Round*, INSIDE U.S. TRADE (Jul. 25, 2003).

[257] *Trade Ministers Urge U.S., EU to Work Out WTO Agriculture Compromise,* INSIDE U.S. TRADE (Aug. 1, 2003).

[258] *WTO Negotiations on Agriculture—Poverty Reduction: Sectoral Initiative in Favour of Cotton—Joint Proposal by Benin, Burkina Faso, Chad and Mali*, TN/AG/GEN/4 (May 16, 2003).

[259] *Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Decision of the General Council of 30 August 2003*, WT/L/540, adopted in the light of chairman's statement recorded in WT/GC/M/82.

unable to achieve a rapid change in position, refused to agree on a compromise launching negotiations only on trade facilitation. Minister Derbez then acknowledged the impasse, and decided to end the conference at that point.[260]

IX. The WTO in 2005: Challenges ahead

Almost a year later, on August 1, 2004, the Round returned to life when the General Council agreed on a framework for negotiations moving forward.[261] The framework definitively launched negotiations on trade facilitation as part of the single undertaking, but also definitively determined that no further work toward negotiations on investment, competition or transparency in government procurement would take place within the WTO during the Doha Round. The center of gravity in the Round thus shifted to the basic market access issues that have always sustained trade negotiations, and to rulemaking efforts closely linked to market access.

The August decision also set the next big deadline, deciding that the next Ministerial Meeting will be held in Hong Kong in December 2005. And the General Council agreed to "continue the negotiations launched at Doha beyond the timeframe" set out in the Doha Declaration, to an unspecified date after January 1, 2005.

As in past rounds, the real deadline for conclusion is likely to be set by the expiration of U.S. fast-track (trade promotion) authority, provided in the Trade Act of 2002. The Trade Act permits extension of fast-track authority for agreements entered into before June 1, 2007. To make it happen, the President must submit a report to Congress by March 1, 2005. The report must contain a request for extension, a description of all agreements negotiated so far under fast-track authority, a description of progress made toward achieving the negotiating objectives set in the Act, a statement that this progress justifies the continuation of negotiations, and a statement of the reasons why the extension is needed. By May 1, 2005, Congress must also receive independent advisory reports from the CEO-level Advisory Committee for Trade Policy and Negotiations, and the U.S. International Trade Commission. Fast-track authority is then extended to 2007 unless either House adopts an extension disapproval resolution by June 1, 2005.[262]

Much hard work will be necessary, in Geneva and in capitals, if negotiators are to meet even the 2007 deadline. The path to the end of the Round will be beset by challenges. The first challenge is rebuilding the U.S.-EC relationship, which—as demonstrated in August 2003—is the motor that will start the Round moving forward again. The Zoellick-Lamy relationship has created much of the momentum since 2001, and Peter Mandelson and his U.S. counterparts will need to find a comparable basis for collaboration. Business on both sides of the Atlantic has a stake in seeing that this collaboration bears fruit. Once these bridges are rebuilt, the developed country *demandeurs* for the Round can reach out to Brazil, India, China and other major emerging powers in the WTO, whose collaboration was essential to the relaunch of the Doha Round in 2004.

[260] *Cancun Ministerial Collapses Over Singapore Issues*, INSIDE U.S. TRADE (Sept. 15, 2003).

[261] The discussion of the WTO in this section is indebted to the insights and analysis of John Weekes of Sidley Austin Brown & Wood, former Ambassador of Canada to the WTO. Any errors are the authors' alone.

[262] Trade Act of 2002, *supra* note 229, §2103(b)(1)(C), §2103(c). These provisions are closely similar to the fast-track extension provisions in the 1988 Omnibus Trade Bill, which were used to extend fast-track authority in 1991 after the failed Brussels Ministerial. Before submitting the report to Congress that requested that extension, USTR Carla Hills achieved agreement from the EC on the point where the Brussels negotiations broke down, that negotiations would deal with all three aspects of agriculture, including export subsidies; *see* text at note above.

The extension process sets March 2005 as the deadline for the U.S. Administration to demonstrate to Congress that it has made concrete progress in the Doha negotiations. By spring 2005, there will be a renewed or new Administration in Washington, a new EC Commission, and new players in other governments and in Geneva. Rather than spend the rest of 2004 marking time, negotiators can work on creating the basis for an agreement with a high level of ambition. The U.S. exporting business community, whose support will be essential to achieving Congressional approval for the Doha Round results, has underlined at every opportunity its interest in such an agreement, and has, for instance, united to resist attempts to lower the level of ambition for the FTAA.[263] The next two years will be crucial for building the right basis for the DDA to realize its full potential to expand trade, re-energize the world economy and lift with it the economies of developing country exporters. The work of business and negotiating governments in the year to come will make all the difference to that result.

[263] *Businesses Call for Ambitious FTAA in Light of Failed WTO Talks*, INSIDE U.S. TRADE (Sept. 19, 2003); *Business Derides Miami Declaration for Creating Weak FTAA*, INSIDE U.S. TRADE (Nov. 21, 2003).

Part V Concluding Thoughts—The Way Forward

CHAPTER 81

PURSUING GLOBAL FREE TRADE: A SMALL OPEN ECONOMY PERSPECTIVE

David J. Walker*

TABLE OF CONTENTS

I. Introduction 440
II. Market Access 440
A. Tariffs 440
B. Agriculture 442
C. Services 445
III. Rules 447
A. Anti-Dumping and Subsidies/Countervailing Measures 447
B. Trade and Investment 449
C. Trade and Competition 450
D. Trade and Environment 451
E. Non-discrimination 451
F. Electronic Commerce 453
IV. Institutional Issues—Dispute Settlement 453
V. "Free Trade"—Putting "Development" in the Doha Development Agenda .. 455

* At the time of writing (May 2003) the author was serving as Deputy Chief of Mission at the New Zealand Embassy to the United States in Washington, D.C. The views expressed in this chapter are those of the author and should not be taken as reflecting the views of the New Zealand Embassy to the United States, the New Zealand Ministry of Foreign Affairs and Trade or the New Zealand Government.

I. Introduction

In Chapter 76 of this book it was noted that the stated objective of New Zealand's trade policy is multilateral free trade.[1] This is a rational economic strategy for a small open economy that lacks global pricing power or a domestic market of sufficient size to generate economies of scale for local producers. This chapter takes this objective as its starting point and examines what that would mean in practice for the outcome of the Doha Round. It is not suggested that these outcomes are actually being pursued by New Zealand either in the Doha Round or in any other trade negotiation. Stated New Zealand negotiating objectives are referenced, as relevant.

In considering what free trade would imply for the negotiations, it is perhaps important to set out what it would not mean, in order to dispel the populist misperceptions that all too frequently seem to be associated with the term. Free trade certainly would not mean trade without rules—complete open slather without any government involvement whatsoever. To function effectively and efficiently "free" markets require a variety of legal support structures. Some, such as medium of exchange and mechanisms for redress of breach of contract, are designed to lower transactions costs. Others, such as market regulation and competition law are designed to deal with situations where markets can fail to deliver socially desirable outcomes. Trade, which simply connects markets across nation-state borders, is no different.

So what would free trade mean? The dictionary defines "free" as "released or exempt from, not subject to tax, duty, trade-restrictions, or fees".[2] The remainder of this Chapter considers what this concept would imply for various aspects of the Doha Round negotiating agenda.

II. Market Access

At the core of the "Doha Development Agenda" ("DDA") is a market access agenda covering three pillars: comprehensive coverage of the goods economy divided into agricultural and non-agricultural products; and, as a result of the expansion of scope of the multilateral trading system established during the Uruguay Round, the services economy also. This section considers free trade negotiating objectives in respect of the traditional market access barrier – tariffs – across the goods economy as a whole; accompanying objectives in agriculture; and a possible free trade agenda for services negotiations.

A. Tariffs

For a start free trade must mean bound zero tariffs on all products, agricultural and non-agricultural. There are those who attempt to argue that any tariff in the range of zero to five percent should be considered to meet the definition of "free". That is like buying a product on-line or from a mail-order catalogue which is advertised as "free shipping and delivery" and then being charged a fee of say three percent on the value of the product when it arrives at the front door. There are not many purchasers who would accept that as being consistent with the meaning of the word "free".

[1] For a complete exposition of this policy, *see* New Zealand Ministry of Foreign Affairs and Trade, *New Zealand Trade Policy; Implementation and Directions: A Multi-Track Approach* (September 1993).
[2] CONCISE OXFORD DICTIONARY (7th Ed., 1982).

The fact that only forty percent of world trade is secured by zero bound tariffs illustrates that there is plenty of work to do in this Round on the traditional market access agenda to achieve free trade. While the pattern of tariff dispersion differs by country, globally and especially amongst the large developed countries, the highest tariffs are typically found in the agriculture and textiles clothing and footwear sectors.

New Zealand has in Geneva proposed the elimination of tariffs on all non-agricultural products,[3] as has the United States,[4] and would have no difficulty also eliminating tariffs on agricultural products as envisaged in the United States agriculture proposal of July 2002.[5]

How zero tariffs across the board are achieved is a matter of detail for any negotiating process. Attention in public debate on tariffs is frequently focussed on high tariffs or "tariff peaks". At the other end of the spectrum, however, many tariffs especially in OECD economies are already at low levels. While in and of itself a tariff of five percent or less is often economically insignificant, being potentially more than offset by productivity changes or modest currency swings, there are a range of costly bureaucratic procedures (such as valuation and rules of origin) surrounding such "nuisance tariffs" which mean that their elimination should also be a priority.

An overall timeframe would need to be established. One possible benchmark for this is the ten year outer envelope for achievement of liberalisation within an FTA under WTO rules.[6] On the basis of the 2005 deadline for conclusion of the Doha Round negotiations this would see tariffs eliminated by 2015. Within that overall timeframe "nuisance tariffs"—assuming they are defined as five percent or less—should be eliminated immediately, with any other tariff line then being eliminated one year after it reaches that level. Tariffs above the defined "nuisance" level would be progressively reduced according to a negotiated formula.

One possible formula, given an x year phase-out, would be to reduce to zero in x equal steps. While giving the appearance of steady adjustment, such a linear approach results in an increase in the percentage decline in residual protectionism over the implementation period with that percentage being maximised in the year of elimination. This should not be a problem with most tariffs. For instance linear reduction of an initial tariff of fifty percent would mean a terminal reduction of five percent, no more than is contemplated with the immediate elimination of "nuisance tariffs". But the higher the initial tariff, the larger the final adjustment; a factor which could complicate the politics of securing implementation.

Another approach, which would deal more aggressively with extremely high tariff peaks but would also allow relatively more time for their elimination, would be to require a halving of the rate each year with the nuisance rule to cut in to achieve final elimination.[7]

[3] A detailed proposal has yet to be submitted but New Zealand foreshadowed such a proposal at the meeting of the Negotiating Group on Non-agricultural Market Access held on November 3–4, 2002. Under the proposal all WTO members, other than Least Developed Members, would be required to bind all non-agricultural tariffs at zero by an agreed date. Extended timeframes could be provided for sensitive products and for Less Developed Members. Least Developed Members could participate on a voluntary basis.

[4] *See* TN/MA/W/18 of December 5, 2002.

[5] The United States (*see* www.fas.usda.gov/itp/wto.actual.htm) proposed that members agree to a specific date for the eventual elimination of all agricultural tariffs. In the interim, it has proposed that agricultural tariffs be reduced to a maximum of 25 percent within five years.

[6] *See* paragraph 3 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

[7] One of the highest tariff rates can be found in Japan: HS Chapter 04 "Dairy produce; bird's eggs; natural honey; edible products of animal origin, not elsewhere specified or included" sets a rate of 1,738.4 percent.

This type of approach front-loads the absolute size of adjustment. Larger absolute cuts, however, may be easier to implement at the start of an adjustment process when higher absolute tariff levels may not be binding on economic decisions at the margin. Moreover as the absolute size of the required annual reduction reduces, the adjustment process is eased over time and the political challenges of securing implementation are likely to diminish.

There are numerous other non-linear possibilities for phased reduction with one of the more commonly used techniques known as the "Swiss formula". The advantage of a formula is that it removes the negotiating complexity and potential back-loading associated with a request/offer process.

For domestic lobbies concerned about loss of protection, generally the more sensitive the product the higher the initial tariff level. This automatically means that such products will be afforded either longer phase-out, higher protection during the implementation period, or some combination of the two depending on the formula used. An end point of zero also avoids the need to apply different modalities across different sectors, although it does not prevent negotiators from agreeing on accelerated elimination in particular sectors. The liberalising effects of a formula approach can also be enhanced through use of specified "down-payments" and by basing reductions on applied rather than bound tariff rates.

While the United States has yet to specify its view on the timeframe for elimination of tariffs on agricultural products, it has built on New Zealand's floating of the concept of tariff elimination on non-agricultural products with a bold proposal that calls for elimination to be achieved by 2015. This proposal, announced on November 26, 2002 by U.S. Trade Representative Zoellick and U.S. Commerce Secretary Evans, incorporates a number of the factors suggested above, in particular the immediate elimination of nuisance tariffs and an aggressive implementation path that would see all tariffs at eight percent or less by 2010.[8]

B. Agriculture

The Uruguay Round made a good start in bringing agricultural trade within the rules of the multilateral trading system and in liberalising markets, but much remains to be done. After more than fifty years of negotiation under the GATT and its successor WTO, industrial tariffs now average 4.7 percent while agricultural tariffs average more than ten times that level. Moreover, this already high average masks some extremely high rates on particular products in particular markets. To note just a few examples, not necessarily including the highest rates: in the United States there is a 244 percent tariff on sugar and a 174 percent tariff on peanuts; in the EU the tariff on beef is 213 percent; wheat in Japan faces a 353 percent tariff; and the tax on butter into Canada is 360 percent.

In addition to these extreme tariffs, agricultural trade is beset by enormous subsidies, on both domestic production and exports. Over the past several years OECD governments paid on average more than US$300 billion in support to their farmers, an amount

(There are a number of tariff rates in other countries' schedules in the range of 500–1000 percent.) Assuming the fifty percent cut rule is applied at the beginning of each year of implementation the following transition illustration (the brackets show the year of implementation and tariff rate respectively, fractions are rounded upwards) shows it would take ten years to eliminate a tariff of this level: (1:870); (2:435); (3:218); (4:109); (5:55); (6:28); (7:14); (8:7); (9:4); (10:0).

[8] Details of the proposal together with accompanying explanatory material are available at www.ustr.gov/new/Zero_Tariff.htm.

equivalent to the GNP of all of sub-Saharan Africa and six times the total of official development assistance aid flows. This vast level of subsidisation totally distorts the operation of the market which, coupled with often prohibitive market access barriers, robs efficient farmers in the developing world and elsewhere of a proper return on their labour and investments. In the words of Nicholas Stern, chief economist at the World Bank, "this kind of protectionism as practiced by the wealthiest industrialised countries is simply indefensible".[9]

For economies such as New Zealand and its Cairns Group partners,[10] dependent on agricultural exports, further agricultural liberalisation is at the core of the Doha Round agenda. Indeed it is no exaggeration to say that there will not be a successful conclusion to the Doha Round without a substantial outcome on agriculture.

Export subsidies on agricultural products are clearly the most pernicious distortion in international markets. It is no accident that export subsidies are subject to the most severe subsidies discipline for non-agricultural products—prohibition—and have been for over forty years.[11] In contrast, export subsidies on agricultural products, as defined by the WTO Agriculture Agreement, averaged around US$7bn per year over the period 1995–98 with ninety percent of this amount granted by the EU.[12] Export subsidies allow a two-tier pricing regime to persist in granting countries. High cost producers in protected markets can produce to excess at the inflated prices which result from the restrictions imposed on imports and then dump the surplus on world markets financed by taxpayer subsidies. Eliminating export subsidies would remove such surpluses from world markets opening up market opportunities for efficient producers and lifting world prices closer to economic levels at the margin.

Eliminating agricultural export subsidies is the first step to put agricultural export trade on the same basis as non-agricultural products. Recognising that domestic subsidies can act to impede access to the market of the subsidiser and can be used to cross-subsidise exports, the WTO Agreement on Subsidies and Countervailing Measures (commonly known as the "Subsidies Agreement") also imposes significant discipline on domestic subsidies for non-agricultural products. The term of existence of the WTO Agriculture Agreement provides an exception for agricultural products from the multilateral disciplines of the Subsidies Agreement, such as they currently are, while the "peace clause" restrains the application of countervailing duties on subsidised agricultural products until its expiration at the end of 2003.[13]

Expiration of the "peace clause" potentially provides the possibility of countervailing relief for producers in importing countries but additional disciplines are required to deal with access-impeding aspects, both in the market of the subsidiser and in third country markets. The latter aspect could perhaps be most simply addressed through the reinstatement and application also to agriculture of paragraph 1 of Article 6 of the Subsidies Agreement which reversed the burden of proof for demonstration of serious

[9] Figures and attributed quotation from *Poor Nations May not Buy Trade Talks: Third World Chafes Over Curbs Imposed by US, EU and Japan*, WASHINGTON POST, May 15, 2001, at E1 and E4.

[10] The Cairns Group comprises Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand, and Uruguay.

[11] *See* GATT Article XVI:4.

[12] *See* World Bank, *Bringing Support to Agriculture and Export Subsidies Under Multilateral Rules: A Long Awaited Endeavour*, in GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES: MAKING TRADE WORK FOR THE WORLD'S POOR 50, Box 2.4 (2002).

[13] The "peace clause" is the name commonly given to the "due restraint" provisions of Article 13 of the Agreement on Agriculture. *See* Article 1(f) for specification of its duration.

prejudice.[14] Given the difficulty associated with demonstration of serious prejudice, the requirement of a subsidising party to demonstrate its absence represented an effective cap on subsidisation at the five percent ad valorem level. Negotiators could productively go further to make this five percent cap explicit, perhaps with some carefully defined policy-related exceptions, while retaining countervail and serious prejudice actionability (without reversal of burden of proof) for subsidies below the five percent threshold.

The outcome of this approach would then be zero bound tariffs, prohibition on export subsidies and domestic subsidisation capped at five percent ad valorem across the goods economy as a whole. Apart from agriculture, given the expiration of textiles quotas in 2005 the transition to this free trade environment is intellectually simple even if politically difficult to negotiate. Under the current agriculture agreement, however, a complex web exists of minimum-access and country-specific tariff rate quotas, detailed rules on levels and types of domestic subsidisation and volume and expenditure caps on export subsidies. This complexity reflects the outcome of Uruguay Round efforts to start untangling the highly distorted nature of agricultural trade while respecting the acquired access rights of efficient producers where they had already managed to build up some pattern of trade.

For agricultural export subsidies the transition mechanism is relatively straightforward to envisage. As with non-agricultural tariffs the simplest approach would be a formula-based phase down, in this case expressed in volume and expenditure terms, with elimination as the defined end point within a specified period of time.[15]

On agricultural domestic subsidies the desirable transition path is less clear. The extent and nature of current subsidies probably requires continued application in some form of the detailed architecture in the Uruguay Round agriculture agreement but negotiated disciplines should be directed at enhancing the transition to the five percent ad valorem product specific cap described above.[16]

On tariffs, the phase-down formula for non-agricultural tariffs should be applied also to agricultural tariffs. As previously noted a "halving approach" affords a relatively longer phase-out for the highest tariff levels. In products where tariff-rate quotas exist, out-of-quota tariff rates remain at such high levels that acquired access rights need continued protection during this transition process. One way to achieve this would be simply to hold in-quota tariff rates constant until the out-of-quota rate falls to the in-quota rate. The quota distinction could then be abolished and the unified tariff phased down until elimination was achieved. Similarly for globally available minimum access tariff rate quotas. The

[14] Pursuant to Article 31 ("Provisional Application") of the Agreement on Subsidies and Countervailing Measures, the provisions of Article 6.1 of the Agreement have currently lapsed.

[15] Both the United States in its July 2002 proposal and the Cairns Group (*see* G/AG/NG/W/11 of June 16, 2000 and additional input of November 20, 2002 at www.cairnsgroup.org) have formally proposed the elimination of export subsidies, the principal difference being that the United States has proposed elimination over five years in equal increments while the Cairns Group proposes elimination for developed country members in three years with a fifty percent reduction in the first year of implementation, and in six years for developing country members.

[16] The United States, in its July 2002 proposal, has proposed a five percent cap on trade-distorting domestic support to be achieved within five years. This cap, however, would be averaged over the total value of agricultural production rather than being applied on a product-specific basis allowing for the continuation of higher support levels on particular products. The United States also proposed that a date be agreed for the eventual elimination of trade-distorting domestic support. The Cairns Group responded to that point in September 2002 (*see* document 7623 at www.cairnsgroup.org) proposing that such domestic support be eliminated within five years by developed countries and within nine years by developing countries.

transition dynamics, however, may also need to deal with the desire of exporting countries to see earlier phase-down of in-quota tariff rates and/or expansion of quotas, particularly in cases where out-of-quota rates remain prohibitive.[17]

C. Services

Having dealt thus far with the goods economy, the other part of a market access agenda to achieve free trade is services. The General Agreement on Trade in Services ("GATS"), which also resulted from the Uruguay Round, represents the first attempt to bring services trade under multilateral disciplines. While the Uruguay Round outcome on services exceeded the expectations of most negotiators, a huge agenda exists to flesh out the existing framework GATS and to extend the scope of bound specific commitments.

GATS country schedules contain commitments on both market access and national treatment. Recognising that many services require the co-location of producer and consumer, commitments on each are made according to four "modes" of possible supply: cross-border (the analogue to goods trade); consumption abroad (where the consumer travels to the "exporting" country where the service is produced, such as a tourist); commercial presence (where the supplier locates a juridical entity in the market of the "importing" country); and movement of natural persons (where an individual travels from the "exporting" country to provide services in the "importing" country).

Within a scheduled service sector or sub-sector this structure produces eight cells where commitments can be made: on each of the four modes with respect to both market access and national treatment separately. An "unbound" entry means no commitment is made in that cell. A partial commitment can be made in one of two ways. An "unbound except for . . . " entry means that a commitment exists only in respect of the measure itemised. The other type of entry is to schedule a limitation on a specific measure (for instance that only four operating licences are issued). This type of entry means that other than the specific measure listed, there are no limitations on the operation of service suppliers within the scope of that cell. A full commitment is shown as "no limitations". Sector specific commitments may also be subject to limitations which apply to all sectors and are listed in the horizontal section at the beginning of a Member's schedule.

Aside from Mode 4 (movement of natural persons), where further definition on what constitutes a service supplier may be required, the services analogue of zero-bound tariffs would be a schedule which contained no horizontal (general) limitations and "no limitations" entries in all cells across all specific sectors. A first step to achieve this would be to require the scheduling of binding commitments across all services sectors which reflect the current state of limitations on market access and national treatment in each WTO member. This would produce a negative list or "standstill" binding at the current state of openness. Negotiations would then establish the transition path to a full "no limitations" binding within a defined timeframe, potentially using formula approaches where applicable.

[17] The United States, in its July 2002 proposal, proposed that all TRQs be expanded by twenty percent with the in-quota tariff rate being eliminated over a five year period. In cases where the quota does not already represent a sizeable proportion of the market, this proposal would not result in a very significant increase in market access. In contrast the Cairns Group (*see* Job(02)112 of September 12, 2002 at www.cairnsgroup.org) has proposed that TRQs in developed countries be expanded by an amount equal to twenty percent of domestic consumption over a five year period with fifty percent of the total increase to be implemented in the first year. Developing countries would be required to expand access by fourteen percent of domestic consumption phased in over nine years. The Cairns Group too advocates the phased elimination of in-quota tariffs.

One services equivalent of the formula approach to tariff liberalisation in goods is that of the "model schedule". A model schedule for a particular service or service sector seeks to establish the pattern of commitments necessary to deliver effective market access for that service or sector. This can be a useful device for service suppliers in ensuring comparability in market access and national treatment conditions across different WTO member jurisdictions but care needs to be taken to avoid the "belts and braces" approach. The temptation to over specify is an understandable impulse which can occur when regulators and/or negotiators are seeking to secure a high degree of certainty in the commitments on offer. But the inclusion of redundant specificity can cast doubt on the extent of treatment afforded by more generally cast commitments where equivalent conditions, though unstated, ought to flow from a proper interpretation of associated GATS rules.

A similar situation can arise in respect of Article XVIII "Additional Commitments". These are commitments that members can register in their schedules on matters not covered under either the market access or national treatment elements of the commitments schedule. Essentially Article XVIII is designed to capture commitments on non-discriminatory aspects of domestic regulation as covered under GATS Article VI. Whereas Article VI takes a broad proscriptive approach, which as noted below is subject to ongoing negotiation, Article XVIII commitments follow a prescriptive approach which then limits regulatory flexibility to a subset of measures which would be permitted under Article VI. Again this can have the perverse effect of calling into question the value of more generally cast commitments that do not contain the degree of explicit specificity of those members following a formulaic Article XVIII approach. The use of Article XVIII in one sector can also lead to demands for similar regulatory harmonisation from other sectoral interests in sectors where such an approach may be neither necessary nor appropriate.

Another potential complication in negotiating services liberalisation is how to achieve an approach of progressive liberalisation within the construct of country schedules as described above. Unlike goods, there is usually no simple quantitative measure of protection such as the tariff. In some instances, a quantitative measure may exist. Thus in the case of the four operating licences measure noted above, a progressive move to say ten licences and then the removal of quantitative licensing altogether, would clearly be continually liberalising. But suppose, for instance, the initial scheduled limitation reflected only the existence of a monopsony purchaser. The introduction of limitations on the behaviour of service suppliers in conjunction with the removal of the monopsony restriction does not unambiguously square with the architecture of the member's schedule. In such situations the Article XXI "modification of schedules" procedure may provide a way to determine whether the proposed change represents an overall liberalisation in operating conditions for service suppliers. If not the procedure could be used to calculate what compensation needs to be provided, if the change is to be made, until such time as further regulatory changes do result in overall liberalisation.

On the GATS framework, negotiations are ongoing on subsidies, safeguards, government procurement and domestic regulation including professional qualifications. On domestic regulation the Technical Barriers to Trade Agreement for goods provides one potential negotiating benchmark which can be coupled with bilateral/plurilateral agreements on mutual recognition and conformity assessment of standards and qualifications. On subsidies, measurement issues aside, it is not clear why a similar architecture to that on goods—prohibition of export subsidies, five percent ad valorem cap on domestic

subsidisation with actionability within that—should not apply also in respect of services.[18]

Safeguards is more complex with respect to services both in terms of measurement and in respect of the type of relief that might be imposed, in particular in distinguishing between resident service suppliers on the basis of ownership. On government procurement the current plurilateral WTO Agreement on Government Procurement is partial at best and focussed on goods.[19] A free trade outcome requires a truly liberalising agreement across both goods and services which grants non-discriminatory market access and national treatment with the minimum procedural requirements necessary to ensure due process.

Two other outcomes are required to secure free trade in services. The first is the elimination of existing exemptions from the GATS non-discrimination (most favoured nation) obligation so that service suppliers are not favoured or discriminated against based on their country of origin. Under current GATS provisions this should be accomplished by the beginning of 2005,[20] but under a "free trade" outcome it is implied in any case as members are to fully bind their services sectors with across the board "no limitations" commitments. The second is to complete sectoral coverage through elimination of the current carve-out for aspects of the air transport sector. This would necessarily entail the registration of initial MFN exemptions to cover the range of existing bilateral/plurilateral preferences. Such preferences would then be phased out as non-discriminatory open access commitments are phased in within the prescribed overall timeframe.

III. Rules

Beyond this market access core the Doha Round also contains elements of various rules issues which can be seen as forming part of a free trade agenda. Some of these are "traditional" issues such as anti-dumping and subsidies and countervailing measures. Others are "new", including those identified at the Singapore WTO Ministerial meeting in 1996, the so-called "Singapore issues". Chief amongst these are trade and investment and trade and competition. The DDA specifies that negotiations on both of these issues will take place after the Fifth Ministerial Meeting (September 2003 in Cancun, Mexico) on the basis of specific decisions on negotiating modalities to be taken at the Ministerial. Negotiations are also specified on elements of the trade and environment agenda and on disciplines and procedures applying to regional trade agreements. Other issues, such as electronic commerce, are handled through on-going work programmes.

A. Anti-Dumping and Subsidies/Countervailing Measures[21]

The Uruguay Round made significant advances in these areas. The previous "Tokyo Round", completed in 1979, had resulted in plurilateral agreements that applied only to those GATT members that specifically signed on. The Uruguay Round negotiations

[18] Note the existence of disciplines on subsidies granted to service suppliers does not necessarily impede the granting of subsidies for provision of a service to nationals—such as education or health—which are available to service suppliers irrespective of source.

[19] *See* David J. Walker, *Government Procurement: A Small Open Economy Perspective*, in LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT (Bernard M. Hoekman and Petros C. Mavroidis eds. 1997).

[20] *See* paragraph 6 of the Annex on Article II Exemptions, General Agreement on Trade in Services.

[21] *See* Chapters 11 and 16 of this book.

both improved substantive provisions and extended obligations to all WTO members. Considerable room for further improvement remains, however, for these agreements to complement a free trade agenda.

On subsidies a key focus of the Uruguay Round was to increase the multilateral disciplines on subsidies injurious to non-subsidised exporters in third markets—the other discipline on subsidising behaviour being the ability to countervail subsidies injurious to import-competing producers in the domestic market. As noted in Part II(B), one of the achievements in that respect, the reversal of the burden of proof contained in Article 6.1 of the Subsidies Agreement on the question of whether certain types of subsidies cause "serious prejudice" to another Member, has lapsed. Beyond simply restoring that provision, negotiators could usefully go further by adding the categories of subsidies enumerated in Article 6.1 to the category of prohibited subsidies under Article 3.[22] That would effectively limit any form of subsidisation to a maximum of five percent ad valorem. Further consideration could then be given to whether any additional forms of subsidisation within the five percent cap should be subject to enhanced disciplines under the effects-based tests of serious prejudice contained in Article 6.3.

Anti-dumping has long been an area of particular controversy in multilateral trade negotiations, and was one of the issues that threatened conclusion of the Uruguay Round. Historically this has reflected a sharp division of interests. At one pole are certain politically influential interests, particularly in the United States, concerned to retain the greatest flexibility possible in the ability to offset what is seen as artificial competition resulting from "unfair" trade practices. At the other pole are exporter interests concerned that resort to anti-dumping measures has become a tool of administrative protectionism as tariffs have been reduced.

In a free trade environment, where zero tariffs have already been achieved, the logical case for an anti-dumping remedy as it currently exists—as distinct from a remedy more rooted in competition policy—is not clear. CER, the bilateral free trade agreement between Australia and New Zealand, provides an example of this. Upon the achievement of free trade anti-dumping was replaced by a competition remedy. This provides each party with standing to bring a predatory pricing action in the other's jurisdiction. The change reflected the economic reality of the integrated market—in terms of the reduced scope for price discrimination—in a completely free bilateral trading environment. As such it may be applicable on a regional or multilateral basis once free trade is achieved in the respective context.

Pending the achievement of a zero-tariff environment, which as is noted in Section I may take a number of years, there are a range of steps which might be taken to guard against the potential for abuse of anti-dumping while still providing for mitigation of the effects of "unfair" competition. A number of these have been proposed in the current initial phase of negotiations. One suggestion is to transform Article 11.3 of the Anti-Dumping Agreement[23] into a true "sunset" provision by limiting all anti-dumping measures to a maximum of five years duration. Others seek to guard against upward bias in the calculation of dumping margins—the so-called "zeroing" issue, to avoid excessive remedy—the so-called "lesser duty" rule, and to make the demonstration of causation more robust. In respect of all these proposals it is interesting to note that the

[22] A proposal to this effect was submitted by the United States. *See Subsidies Disciplines Requiring Clarification and Improvement*, communication from the United States, TN/RL/W/78 of March 19, 2003.

[23] References are to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, commonly known as the "Anti-Dumping Agreement".

full implications of Article 11.1 of the Agreement—that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury"—seem to be little tested.

Such changes have always been perceived as being in the interests of exporters from certain developing countries and others, particularly in East Asia, long subject to numerous anti-dumping orders. In today's increasingly globalized economy this dichotomy of interest may not be so clear cut. It is not impossible, for instance, to envisage a situation where a firm owned by nationals of country A and located in country B petitions to seek an anti-dumping order against the imports of a firm located in County A but owned by nationals of country B. Since the foundation of the WTO statistics show less of a distinction between "users" and "defenders", and an increase in the number of countries resorting to anti-dumping measures, particularly amongst the larger developing countries.[24] When one reflects on these trends, and particularly the latter one, these improvements would also appear to be clearly in the interests of exporters from typically higher priced markets in the larger developed countries.

B. Trade and Investment

It is clear that the capacity to effectively participate in international trade is increasingly determined by access to foreign direct investment ("FDI") or other forms of linkages to transnational firms. It has been estimated that one-third of world exports of goods and services takes the form of intra-firm trade. As trends toward globalisation continue, distinctions between capital importers and capital exporters have become blurred and the role or place of foreign investment vis-a-vis what might previously have been defined as the "domestic economy" has changed.

WTO rules, particularly on goods, considerably lag this economic reality. On goods the rules resulting from the Uruguay Round, most notably the agreement on Trade Related Investment Measures ("TRIMs"), relate mainly to non-discrimination in the availability and/or use of domestic and imported products. In contrast, reflecting the way in which services are supplied, the GATS effectively contains a variety of investment-related provisions through the disciplines on commercial presence noted above. One approach to the inclusion of rules on investment more broadly would be to extend GATS Mode 3 type commitments to cover all goods sectors as well. This would provide commitments on non-discrimination, market access and national treatment for foreign direct investment and other forms of commercial presence by goods producers.[25] Such commitments might usefully be complemented by rules on investor protection. As with GATS, access for and operation of investments would be subject to the host government's right to regulate in support of legitimate domestic policy objectives, such as protection of the environment. Investor protection should be granted on a national treatment but non-preferential basis.

In addition any outcome on investment should also include disciplines on investment incentives. Such subsidies to investors can be seen as the equivalent of export subsidies on goods or services. Their purpose, to the extent they have any effect, is to

[24] *See* www.wto.org/english/res_e/booksp_e/anrep_e/anrep02_e.pdf for illustrative statistics contained in the WTO Annual Report 2002.

[25] "Commercial presence" as defined in GATS does not necessarily correspond with "investment" as typically defined. Ideally if the GATS-type rules/scheduling architecture was to be used, a common definition of covered investment should apply to both goods and services.

influence location decisions or in other words to secure a greater than equitable share of globally available capital than that which would pertain in their absence. Arguably, therefore, investment incentives—defined here as a financial or in-kind benefit granted to a foreign investor contingent on investing in the territory of the granting member—should be subject to the same discipline as export subsidies, prohibition. Note that this would not preclude the granting of regional development payments to both foreign and domestic investors alike on a national treatment basis, subject to such payments being consistent with the subsidies disciplines on the resulting goods and/or services produced.

C. Trade and Competition[26]

Competition appears to be the issue on which Doha Round negotiators have the most difficulty envisaging the appropriate role for the WTO. In some cases this may be related to states of development with a number of developing countries not yet having any domestic competition architecture. In other cases, particularly amongst the larger developed countries, the difficulties seem to revolve more around questions concerning the relationship between market definition and the borders of the domestic economy, and/or the appropriate bureaucratic division between respective arms of government.

The importance of the competitive process for economic welfare, as proxied by aggregate consumer and producer surplus, is a long-held tenet of the economic literature. Thus countries are increasingly introducing measures to safeguard the health of the process of competition, as opposed to the health of individual competitors. Looking within the confines of a domestic economy, while such measures are usually not cast in terms of enhancing the fortunes of a particular competitor, the ability of an individual firm to contest the market may rely on the prevention of anti-competitive behaviour by other market participants.

The process of trade liberalisation in moving to a "free trade" world as described above is about removing government-imposed barriers which act to prevent or frustrate the integration of markets across national boundaries. Thus trade liberalisation itself is a pro-competitive policy. As part of that process any government-mandated limitations on the number of competitors in an industry, including monopoly concessions, would be removed. But, just as in the domestic economy instance cited above, a foreign firm may need to rely on the prevention of anti-competitive behaviour by domestic incumbents to be able to contest the market.

This suggests the existence of a robust domestic competition policy/law framework coupled with a non-discriminatory enforcement regime is an important component of ensuring that effective market access opportunities exist in a "free trade" world. This framework would need, in each country, to be based on a core set of commonly agreed standards with failure to adequately implement/enforce such standards subject to the WTO's dispute settlement mechanism in individual cases.

In a "free trade" world the question of market definition would likely also increasingly arise as an issue between countries; in particular whether use of a market defined within a country's borders distorts the analysis or outcome in a competition action.[27] The longer

[26] *See* Chapter 57 of this book.

[27] *See, e.g.*, the difficulties that have arisen from differing determinations between the United States and the European Union in respect of mergers and acquisitions—the General Electric/Honeywell case being the most high profile example.

term question for negotiators to consider is whether this type of issue could be dealt with solely through mutual cooperation agreements between domestic competition authorities or whether some form of supranational authority may be required.

D. Trade and Environment[28]

Reflecting progress in deliberations on the interrelationship between trade and environment which have been undertaken in the Committee on Trade and Environment over the past ten years, the DDA also provides for negotiations covering specific aspects of that agenda.

It is well understood that trade liberalisation, through its contribution to economic growth and the globally efficient allocation of resources, is a key policy tool in promotion of sustainable development. Thus advancing the core market access agenda of the Doha Round together with the elimination/reduction of trade-distorting subsidies, particularly in resource-based industries such as agriculture and fisheries, will do much to advance environmental objectives.[29]

As a result of the past decade of international deliberations on the relationship between trade and environment, it is also widely understood that WTO rules and their associated exceptions provide broad scope for members to take measures in protection of their domestic environment.

It is also recognised that solutions to environmental problems which range beyond national borders or which relate to the global commons, require international cooperation. The DDA therefore includes negotiations on the relationship between WTO rules and specific trade obligations, as between parties to such agreements, contained in multilateral environmental agreements ("MEAs"). Ministers at Doha declared that these negotiations should ensure that such obligations can be implemented consistent with WTO rules while not compromising the WTO rights of members not party to the MEA in question.

The first part of this proposition reflects both legal and practical commonsense. Countries which have specifically agreed action amongst themselves in one international forum are not about to seek to undermine it in another. The implications of the second part of the proposition are less clear but, as with other areas of public policy it would seem appropriate that WTO rules provide for the taking of measures necessary to achieve the stated policy objective while guarding against disguised protectionism.

E. Non-discrimination

In Chapter 76 of this book it was argued that current WTO rules and procedures have been largely ineffective in acting as a check on the "arrangements of convenience" type of FTA that avoid liberalisation in sensitive sectors such as agriculture.

[28] *See* Chapter 58 of this book.

[29] Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines, and the United States in April 2002 (see *The Doha Mandate to Address Fisheries Subsidies: Issues*, TN/RL/W/3) jointly proposed enhanced disciplines on fish subsidies to deal with the current situation where subsidies of some US$14 bn to US$ 20 bn, which represent between 20 and 25 percent of the total value of global fisheries production and between 40 and 50 percent of the value of trade in fish, are both distorting trade flows and contributing to unsustainable harvest levels.

To remedy this, some have suggested that the "substantially all trade" test[30] should be defined as a percentage of existing trade between the countries concerned; 90 percent or 95 percent are variously mentioned. This type of measure, however, suffers from the weakness that the absence of existing trade may reflect the existence of barriers that are either prohibitive or chilling of trade in affected markets. Under such an interpretation, in the extreme case two countries with a mutual ban on trade (i.e., zero trade between them) could conclude a bilateral "FTA" that did not open up trade in any product and still meet the "substantially all trade" test.

Clearly this is nonsense. A more economically rational approach would focus on potential trade. By definition "trade" is simply the difference between domestic consumption and domestic production. That suggests any good or service that is produced or is producible in one of the countries and consumed in the other is potentially tradeable, with actual trade depending on relative prices. A more meaningful "substantially all trade" test would therefore focus on the sum of all these potentially tradeable products. To avoid a technically complex calculation, however, this could be proxied by the set of all tariff lines. Thus a test of say 95 percent of tariff lines could be combined with a similar threshold on existing trade with an agreement having to satisfy both criteria to pass the "substantially all trade" test.

In the current environment such enhancement to WTO rules on regional trade arrangements would be important to avoid continual undermining of the WTO's fundamental non-discrimination rule.[31] If, however, the Doha Round were to lead to the type of "free trade" environment envisaged earlier in this section, the simplest solution could be to grandparent existing FTAs with their inherent distortions being progressively eliminated during the transition period.

Meanwhile, pending any enhancement to existing rules and in the absence of a clear move to multilateral free trade, it remains to be seen whether any WTO Member will take advantage of the automaticity of the new dispute settlement system to formally challenge one of the more egregious examples of an agreement which arguably falls short of the "substantially all trade" test. There is also a question of whether refusal by a WTO Member, member of an FTA or customs' union, to enter into such an agreement with any other Member on substantially the same terms could be construed as inconsistent with the MFN requirements of GATT Article I.

While that scenario may be something of a stretch, that is not to say there are no remedies available under the WTO to a country that finds itself in such a situation. Take, for instance, the following example of three trading partners—countries A, B and C. Suppose Country A enters into an FTA with Country B and refuses to do so with Country C. Suppose too that the exports of countries B and C overlap to some degree and in those products they are competitors in the market of Country A. Given the resulting margin of preference opened up in favour of Country B, it is likely that import purchase decisions in Country A will be diverted away from the products of Country C and towards those of Country B.

[30] *See* GATT Article XXIV: 8(a)(i).

[31] The general "most favoured nation" tariff rate in a WTO member's tariff schedule has become something of a misnomer. In some cases the plethora of preferential rates, whether through FTAs, the Generalised System of Preferences ("GSP") or other preferential arrangements, has become so pervasive that countries facing the MFN rate are in reality the "least favoured" of nations. It has been estimated that nearly fifty percent of world trade is now conducted on better than MFN terms. *See generally* Chapters 5, 34 and 46 of this book. "Normal" or "standard" may be a more accurate term to apply to members' general tariff schedules where tariff rates are non-zero.

In such a scenario the benefits that accrued to Country C from the relevant bound MFN commitments of Country A are nullified or impaired by the trade differentiation introduced by Country A's FTA policy. While that policy may not be inconsistent with Country A's WTO obligations, Country C should be able to seek redress under the WTO's "non-violation" nullification or impairment provisions.[32]

If found against, Country A would not be required to remove the measure (i.e., revoke the FTA with Country B) but it would be required to compensate Country C for the nullification or impairment suffered. This would most logically take the form of similarly lowering market access barriers to Country C in areas where the products of Country B compete thereby eliminating any margin of preference. The net result would be that Country A's refusal to conclude an FTA with Country C has effectively required it to engage in a one-way market opening to certain of Country C's products. The expectation of such a result could do much to encourage the use of so-called "open accession" clauses in FTA policies thus enhancing the potential of bilateral/plurilateral liberalisation to contribute to the achievement of multilateral free trade.

F. Electronic Commerce

One of the most significant developments to affect international trade that has taken place since the Uruguay Round is the rise of the Internet and the associated opportunity for internet-based commercial transactions collectively known as "electronic commerce". Electronic commerce takes a myriad of forms but generally enables goods to be ordered remotely bypassing traditional distribution channels (an extension of the catalogue model with fulfilment being through some physical transport mode within or across borders) and goods and services which can be digitised to be supplied digitally. This latter aspect has considerably expanded the range of services for which cross-border supply, covered by Mode 1 of GATS, is feasible.

In this sense electronic commerce is primarily a new channel for distribution of goods and services rather than a distinct activity itself—although there are a number of elements which need to be in place to enable electronic commerce transactions to occur. It follows that there are no distinct negotiations on electronic commerce in the DDA. Legal and jurisdictional issues associated with matters such as taxation, liability and intellectual property protection continue to be debated in relevant international fora and in the WTO electronic commerce work programme.

In the absence of market access barriers implied by a free trade environment there would also be no barriers to the conduct of electronic commerce. Meanwhile in the current environment Members agreed, until the Fifth Ministerial Conference in Cancun, to "maintain their current practice of not imposing customs duties on electronic transmissions". To guard against the future imposition of protectionist measures this duty moratorium should be made permanent immediately, or at least extended pending the elimination of duties on other distribution channels.

IV. Institutional Issues—Dispute Settlement

The Uruguay Round resulted in major enhancements to the then existing GATT dispute settlement system. While significantly improved the WTO system, however, remains far

[32] *See* GATT Article XXIII:1(b) and Article 26.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

from perfect. As is evidenced most notably by several high profile cases between the United States and European Communities, procedural problems have been identified at the implementation stage of the dispute settlement process and questions have been raised about incentives for compliance.

There will always be a degree of asymmetry in any system which incorporates members of vastly different size and economic might. But for a rules-based system like the WTO to function sustainably, all members need to have confidence that the contract they enter into will be honoured or that they have the prospect of obtaining redress if it is not. That confidence underpins the "good faith" implementation by all members on which the system rests.

In the initial stages of the new dispute settlement system the omens were good. Cases were settled quickly, some even before running their full course through all stages of the system. More recently, as members have observed the lengthy timeframes inherent in full application of the system, and the difficulties associated with securing compliance, there seems to be an increasing tendency for members to implement measures of questionable WTO validity comfortable in the knowledge that a considerable temporal window of policy flexibility exists before their actions are called to account.

One possible solution to this lies in the nature of available remedies. Currently if a defending member does not bring a violating measure into compliance within the allowed "reasonable period of time",[33] the plaintiff can look to rebalance the contract through being offered equivalent compensation by the defending member or by retaliating against it through withdrawing an equivalent amount of concessions.[34]

Trade compensation is seldom an effective remedy because it is unlikely to provide sufficient offsetting advantage to the injured exporters in the plaintiff member. Note too that in a free trade environment no scope for trade compensation exists. Nor is retaliation attractive, if it actually has to be implemented, as raising trade barriers further damages the economy of the plaintiff and can injure unrelated third parties in the defending member.

Monetary penalties, in the form of fiscal transfer from the defending member to the plaintiff, could provide a more effective solution.[35] Monies received by the plaintiff government could be used to directly compensate the injured exporters. Moreover monetary penalties that either incorporated the notion of damages in addition to offsetting the degree of injury, or which escalated over time, could act to encourage timely compliance.

Even without a punitive element, however, moving to a monetary transfer system would make the costs of non-compliance far more explicit than under the current system. This would facilitate a more informed debate about compliance. If the "benefits" to the defending party of non-compliance are less than the visible cost of the monetary penalty, the likelihood of implementation should increase. Alternatively if a case arises where the benefits of non-compliance exceed the cost of the fine, the defending party could rationally decide to pay the fine. Given that the injured party in the plaintiff member is

[33] *See* Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (commonly known as the Dispute Settlement Understanding) for definition of the "reasonable period of time".

[34] Article 22.1 of the Dispute Settlement Understanding makes it clear that the bringing of measures into conformity with WTO obligations is the preferred outcome to a dispute and that compensation or retaliation are temporary measures pending compliance.

[35] A monetary fine as an alternative to trade compensation or retaliation is included in the FTAs the United States has recently negotiated with Chile and Singapore.

receiving offsetting monetary compensation, even in this case aggregate welfare can be seen to have increased.

The current WTO dispute system is also based on estoppel, with remedies forward-looking from the time relevant rulings are made. A system of monetary penalties could also be made retroactive to the date a dispute was initiated. This could act to encourage a healthy degree of rigour in initial policy design and a heightened sense of timeliness in defending members' willingness to settle disputes. Even in the unusual case where it was welfare-enhancing for a member to pay the fine rather than bring its measure into compliance, a retroactive fine would minimise the loss suffered by injured exporters in the plaintiff member.

V. "Free Trade"—Putting "Development" in the Doha Development Agenda

Looking across the DDA the type of "free trade" outcome described in Parts II–IV is clearly accommodated within the Ministerial Declaration launching the negotiations, but it is not mandated by it in any of the negotiating areas. As noted above, the opening of markets and removal of trade distorting subsidies is key to the advancement of sustainable development. How far the negotiations get towards a free trade outcome will determine the degree to which the DDA really delivers an agenda for development.

The DDA correctly points to the need for technical assistance and capacity building, in conjunction with market liberalisation, to ensure that less developed members can take advantage of the economic opportunities that market opening provides. This is particularly the case in areas where changes in domestic regulatory frameworks and institutions are likely to be required. It is likely too that in some cases less developed economies could benefit from extended transition periods as economic adjustments are made in response to the removal of protection. What is important, however, is that the end point is the same. Differential standards (e.g., on border protection or subsidy levels), which allowed less developed countries to perpetuate the types of policy errors seen in developed economies, would not deliver the promise of sustainable development for all inherent in the DDA.

It is not suggested that free trade is a panacea for sustainable development; many other complementary policy initiatives at both the domestic and international levels are also required. But studies have consistently shown that countries which are more open to international trade grow faster than countries that are less open.[36]

Looking forward, the most recent World Bank study estimates that complete global trade liberalisation by 2015 could, over the ten years from 2005 to 2015, increase global income by $2800bn, with the majority of that going to developing countries.[37] That would lift a further 320m people out of poverty, fifty percent more than the baseline case. Compare the $1500bn net present value benefit for developing countries from trade liberalisation with the little more than $50bn in annual official development assistance aid flows and it is clear that protectionism is a luxury for some that the world can ill afford.

[36] *See, e.g.*, David Dollar, *Globalization, Inequality and Poverty Since 1980* in GLOBALISATION, GROWTH AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY (World Bank Policy Research Report December 2001); *see also* David Dollar and A. Kraay, *Growth is Good for the Poor*, World Bank Policy Department Working Paper No. 2587 (April 2001); and Jeffrey Sachs and A. M. Warner, *Economic Reform and the Process of Global Integration*, *Brookings Papers on Economic Activity* (1) (1995), at 1–118.

[37] World Bank, *Global Economic Prospects and the Developing Countries: Making Trade Work for the World's Poor* (2002).

President Bush correctly concluded that "open trade is not just an economic opportunity, it is a moral imperative."[38] The question is whether WTO members, individually and collectively, have the determination to respond to that imperative and realise the opportunity it offers.

[38] Remarks by the President to the Council of the Americas, May 7, 2001.

CHAPTER 82

GLOBAL INTEGRATION: CURRENTS AND COUNTER-CURRENTS

Sylvia Ostry*

TABLE OF CONTENTS

I. Introduction 458
II. The Uruguay Round: Unintended Consequences 458
III. Counter-Currents: the Corporation 461
IV. NGOs and the WTO 463
V. The 1990s: The Defining Decade? 469

* Distinguished Research Fellow, Centre for International Studies, University of Toronto.

I. Introduction

I have—not altogether successfully—tried to avoid using the word "globalization" because it has no agreed definition even though it first appeared in 1986. Instead I have chosen the term "deeper integration" to refer to the ongoing process of ever-tighter linkages among countries proceeding in stages since the end of World War II, first by trade negotiations beginning in the 1950s, then intensifying with the liberation of capital flows and deregulation of financial markets in the 1970s and 1980s. By the end of the 1980s a new phase of interdependence was launched by a marked increase in foreign direct investment, and the multinational enterprises ("MNEs") became the drivers of integration as they spread their production chains around the world. This third phase was and is closely linked to the revolution in information and communication technology and technological changes in transportation which made it cheaper and easier to manage far-flung production networks. With international rivalry intensifying, a wave of mergers and acquisitions has created an oligopoly of global giants in a number of sectors, as well as increasing flows of highly skilled and educated workers. Moreover, the emergence of E-commerce has, especially, but not only, in the service sectors, in effect, introduced a qualitatively different kind of integration which has been dubbed "fusion". In a world of fusion, which does not, of course, yet exist, the term national policy would be an oxymoron.

Someone (I do not remember who) once said, "give me a metaphor and I will change the world". Despite having no such ambition in my losing battle to avoid the word "globalization", I have become intrigued by the concept of an ever-widening and deepening global current, touching more and more distant shores and moving inland with increasing speed. Inevitably this powerful global current has evoked cries to erect barriers to stop the flooding, and even Canute-like clarion calls to turn back the tide. So this metaphor has provided the title of this Chapter: "Global Integration: Currents and Counter-Currents".

The deepening integration of the global economy is, in part, a "natural" phenomenon, fed and now led by technological changes driving in the direction of a single global market. But, of course, governments have played an important role, and international economic policy has facilitated—or perhaps even catalyzed—the deeper integration momentum. And the "natural" and "policy" forces are interrelated in a complex fashion which reflects the nature of the policy process. This process differs in different policy domains—for example trade versus financial or development policy. Yet it is important to underline that trade policy played a major catalytic role in fostering global integration.

This chapter begins with a brief sketch of the changes initiated by the last round of negotiations—the so-called Uruguay Round which began in 1986 and ended in 1994 with the creation of the WTO. The changes—mostly unintended—have introduced a profound transformation in the political economy of the policy process. This is, of course, a vast subject and I shall deal with only two aspects: the MNEs as drivers of the global current, and the new transnational actors—the NGOs (non-governmental organizations)—skillfully surfing on the counter-current. The last section will deal with the evolving change in the climate of ideas about the economy and society which heighten the uncertainty about the future of global integration and the nation state.

II. The Uruguay Round: Unintended Consequences

It could perhaps be plausibly argued that the unintended consequences of all significant government policies overwhelm the original policy objectives. The Uruguay Round is a particularly striking example of this dictum.

The Uruguay Round was the eighth negotiation under the auspices of the GATT (General Agreement on Tariffs and Trade), created in 1948 as part of the post-war international economic architecture. The primary mission of the GATT was to reduce or eliminate the border barriers which had been erected in the 1930s and contributed to the Great Depression and its disastrous consequences. The GATT reflected its origins in the postwar world in that it provided rules to buffer or interface between the *international* objective of sustained liberalization and the objectives of *domestic policy*, primarily full employment and the creation of the welfare state.

Before the Uruguay Round, the GATT worked very well. Tariffs and (to a lesser extent) non-tariff barriers were significantly reduced and trade grew faster than output as each fed the other. Since the 1960s trade rounds were essentially managed by the European Community and the United States though smaller countries were able to play a useful mediating role. The developing countries were largely ignored as players. Agriculture, the most contentious issue dividing Europe and the United States, was virtually excluded from negotiations so the transatlantic alliance, helped by the Cold War's constraint on trade frictions, was the effective manager of the international trading system.

The Uruguay Round was a watershed in the evolution of that system. For the first time agriculture was at the center of the negotiations and the European effort to block the launch of the negotiations to avoid coming to grips with their heavily subsidized and protected Common Agricultural Policy went on for half a decade. This foot-dragging also spawned a new single-interest coalition—the Australian-led Cairns Group, which included Southern countries from Latin America and Asia determined to ensure that liberalization of agricultural trade would not be relegated to the periphery by the Americans and the Europeans as it always had been in the past.

But the role of a group of developing countries, tagged the G10 hard-liners and led by Brazil and India, was in many ways even more important in the Uruguay Round's transformation of the system. The G10 were bitterly opposed to the inclusion of the so-called "new issues"—trade in services, intellectual property and investment—central to the American negotiating agenda.

Although the "new issues" are *not* identical—obviously negotiations on telecommunications or financial services differ from intellectual property rights—they do have one common or generic characteristic. Thus, they involve not the border barriers of the original GATT, but domestic regulatory and legal systems embedded in the institutional infrastructure of the economy. The degree of intrusiveness into domestic sovereignty bears little resemblance to the shallow integration of the GATT with its focus on border barriers and its buffers to safeguard domestic policy space. Thus, for example, the barriers to access for service providers stem from laws, administrative actions or regulations which impede cross-border trade and investment. Intellectual property negotiations covered not only comprehensive standards for domestic laws, but also detailed provisions for enforcement.

The inclusion of the new issues in the Uruguay Round was an American initiative, and this policy agenda was largely driven by American MNEs who were market leaders in the services and high-tech sectors. These corporations made it clear to the government that without a fundamental rebalancing of the GATT they would not continue to support a multilateral policy but would prefer a bilateral or regional track. But they did not just talk the talk; they also walked the walk, organizing business coalitions in support of services and intellectual property in Europe and Japan as well as some smaller OECD countries. The activism paid off and it is fair to say that American MNEs played a key—perhaps even the key—role in establishing the new global trading system. I will return to this shortly.

By the onset of the 1990s a major change in economic policy was underway. The debt crisis of the 1980s, and thus the role of the IMF and the World Bank, plus the fall of the Berlin Wall—a confluence of two unrelated events—ushered in a major transformation in the economic policy paradigm. Economic reforms—deregulation, privatization, and liberalization—were seen as essential elements for launching and sustaining growth. Economic regulatory reform is at the heart of the concept of trade in services. Even without the thrust from the Uruguay Round, many developing countries began to see reform of key service sectors, such as telecommunications, as essential building blocks in the soft infrastructure underpinning growth, and the GATS (General Agreement on Trade in Services) as a means of furthering domestic reform.

Thus, well before the end of the Round the hard-line coalition opposed to inclusion of the "new issues" had disappeared and coalitions of developing countries concentrated on liberalization of trade in agriculture and textiles and clothing. Many undertook unilateral liberalization of tariffs and other trade barriers, and by the conclusion of the negotiations in December 1993 were among the strongest supporters of the negotiations they had so adamantly opposed in the 1980s. What might be called a "North-South Grand Bargain" was completed and was quite different from old-time GATT reciprocity—I will open my market if you will open yours. It was essentially an implicit deal: the opening of OECD markets to agriculture and labor-intensive manufactured goods, especially textiles and clothing, in return for the inclusion in the trading system of trade in services, intellectual property and (albeit to a lesser extent than originally demanded) investment. Also—as virtually a last-minute piece of the deal—the creation of a new institution, the WTO, with the strongest dispute settlement mechanism in the history of international law. Since the WTO consisted of a "single undertaking" (in WTO legal-ese), the deal was take it or leave it for the Southern countries. So they took it but, it is safe to say, without a full comprehension of the profoundly transformative implications of this new trading system (incomprehension shared by the Northern negotiators as well I might add).

The Northern piece of the bargain consisted of some limited progress in agriculture, with a commitment to go further in new negotiations in 2000; limited progress in textiles and clothing with most of the restrictions to be eliminated later rather than sooner; and a rather significant reduction in tariffs in goods in exchange for deeper cuts by developing countries. On the whole not great but not bad when compared with previous rounds centered on traditional GATT-type market access negotiations. But this was not a GATT negotiation as the Southern piece of the deal so amply demonstrates.

The essence of the South side of the deal—the inclusion of the new issues and the creation of the new institution—requires major upgrading and change in the institutional infrastructure of many or most Southern countries. These changes will take time and cost a great deal of money. The transition periods for implementation for developing countries were arbitrary and not based on any analysis or, indeed on any awareness of the systemic problem. The North's promise to provide technical assistance was not followed up. And the new increasingly litigious and evidentiary-intensive dispute settlement system required a level of legal expertise rare in non-OECD countries, or it required large amounts of money to purchase Northern legal services.

There were two significant unintended consequences to this "Grand Bargain" (or Bum Deal). One is a broad and serious North-South divide in the WTO. While the South is hardly homogeneous there is a broad consensus in the South that the Uruguay Round should be "rebalanced" before any new negotiations are launched. The Seattle meeting in 1999 ended with the walkout of virtually all the developing countries. What is more striking is the proactive role of the South countries both before and after Seattle. They

are far better organized and informed, in part because of the rise of democracy and the growing awareness of trade policy issues among the general public, as well as in political institutions and the business community, but also in part because of the role of a number of NGOs created in developing countries during the 1990s to provide information ranging from technical research to policy strategy papers. And since the mid-1990s the Internet has accelerated the linkages of South NGOs with a number of Northern partners in both Europe and the United States. These NGOs together act, in effect, as a "virtual secretariat". Thus a new proactive South has made some demands for Uruguay Round rebalancing in the discussions in Geneva, but the Northern countries seem to be in disarray. With the end of the Cold War, the Transatlantic Alliance has weakened, strained by significant policy differences that go well beyond agriculture *per se*. (Since the events of September 11 and the forging of a coalition against terrorism perhaps a "new cold war" will change the trade policy template but that remains to be seen. The threat of terrorism is diffuse, diverse and fogged by uncertainty as is the future of the new coalition.)

The other, and equally important, unintended consequence of the Uruguay Round has been the rise in profile of the MNEs, in part due to their role in the round. For the more paranoid the round was simply a conspiratorial collusion between corporations and the U.S. government. In any case, the global current of deepening integration, accelerated by the Uruguay Round, has evoked a counter-current focused both on the MNEs and the WTO. Let me deal first with the MNEs.

III. Counter-Currents: the Corporation

The active role of the corporations in the Uruguay Round certainly raised their profile and made them a magnet for anti-trade advocates. This is evident to anyone who watched on television the battle of Seattle, or the demonstrations in Quebec, or the violence at Genoa. But before discussing those events I want to describe a less well-known but perhaps equally important development—the movement to promote "corporate responsibility".

As an offshoot of the environmental and human rights movements, and greatly facilitated by the IT (Information Technology) revolution, an increasing number of NGOs promote corporate codes of conduct—described by one businessman as "code mania". There are broadly two classes of these codes, one concerning labor standards and the other environmental practices, and they are aimed at both consumers and investors. The movement took off in the second half of the 1990s because of the Internet and increasing media attention. As the NGO that created the first Social Accountability Code (SA 8000) has aptly noted: "with instantaneous media connection and the Internet—today's remote factory scandal can become tomorrow's global headline".[1] SA 8000 was launched in 1998 on the Fiftieth Anniversary of the Universal Declaration of Human Rights (not by coincidence).

This new movement provides a good example of how the Internet has facilitated a market-like approach to the policy process. Information technology shifts power to the consumer and shareholder. Established NGOs act as policy entrepreneurs—or, as in the United States, prompt university students to create their own coalitions, such as the Union of Students against Sweatshops. In the case of consumer goods, where brand names (logos) are the chief asset, consumer and investor pressure will force firms to adopt codes. Often the NGOs work with the corporations at the firm or industry level. And recently governments have launched initiatives involving NGOs, unions and the

[1] SA 8000, *Setting the Standard for Corporate Social Accountability*: http://www.cepaa.org.

corporations such as the United Kingdom's Ethical Trading Initiative. Indeed these and similar developments involving governmental and intergovernmental institutions (such as the UN Environmental Program ("UNEP") and the OECD) have spawned a new term, "hybrid governance".[2]

As codes have proliferated criticism has mounted. Business is complaining of the paperwork burden and the lack of harmonization, although the recent (and amazing) decision by the London index company FTSE to launch a socially responsible index[3] may encourage a move toward greater harmonization. Business complaints aside, the NGOs are becoming divided between the collaborators and the confronters. In the case of the garment industry the difficulties of monitoring the suppliers in developing countries has re-launched the attack on some brand names. Southern NGOs in those countries lack the capacity to participate and argue that "ethical trade" is driven by rich students and Northern NGOs. Some unions fear that the codes could substitute for union action and erode membership. A majority of economists argue that bad jobs at bad wages and working conditions are better than no jobs at all, and that corporate social responsibility distorts the market and is bad for growth and development. Indeed, a recent study sponsored by some corporations argues that this new trend presents a fundamental threat to economic freedom and the capitalist system, and terms the corporations who participate as "collaborators as well as appeasers".[4] This attack from the right echoes that from the left fuming about a "soft counter offensive".

Thus, for every counter-current a counter-counter current surfaces. Emblematic of this phenomenon was the raucous booing by a number of NGOs at the announcement of the Global Compact by UN Secretary-General Kofi Annan. The Compact includes principles in the field of human rights, labor standards and the environment to be voluntarily adopted by multinational corporations. The initiative was attacked as an attempt to "bluewash" the nearly fifty companies who endorsed it on July 26, 2000 at UN Headquarters. While it is true that implementation and monitoring measures need to be spelled out and strengthened, the fury of the attack must have startled the Secretary-General since he has so often praised the work of the NGOs and involved them more actively in UN activities.

Be that as it may, the role of the NGOs with respect to corporate conduct goes well beyond the code movement. One example, still ongoing, is the attack on biotechnology in agriculture first aimed at Monsanto. But the most significant recent example concerns the pharmaceutical industry and the AIDS crisis in Africa. In April 2001, 39 pharmaceutical companies withdrew a lawsuit against the government of South Africa concerning the use of generic drugs. Activists who filled the Pretoria courtroom cheered wildly and the victory was heralded as a triumph of David over Goliath.

This is a stunning example, as *The Economist* noted, of how the companies were caught unaware and had already lost the battle in the "court of public opinion".[5] The campaign mobilized by Oxfam and Médecins sans Frontières was masterful and became a key element in the political agenda, especially in Europe. The framing of the issue was not only price—the costs of patented as compared to generic drugs—but larger questions of global inequality and social justice which resonated with a broader public. What is at stake for the drug companies goes well beyond the lawsuit in South Africa since it involves

[2] *See* Jennifer Clapp, *The Privatization of Global Environmental Governance: ISO 14000 and the Developing World*, 4 GLOBAL GOVERNANCE 295–316 (1998).

[3] The Index is known as the FTSE4Good Index Series. *See* www.ftse.com.

[4] *See* David Henderson, MISGUIDED VIRTUE: FALSE NOTIONS OF CORPORATE SOCIAL RESPONSIBILITY, New Zealand Business Roundtable June, 2001.

[5] *The Economist*, April 21, 2001, p. 59.

important aspects of the WTO agreement or TRIPS (trade-related intellectual property) which could significantly affect the companies' future earnings. Worse still, the NGOs attacked the drug companies' offer to sell drugs to poor countries at discount prices, and the ensuing publicity about differential pricing, a long-standing and quite legal but largely unknown practice of the industry, energized American NGOs to mobilize support for price reductions at home. But since the American market is essential to generating the profits necessary to fund the R & D for new drugs, the full impact of the attacks on Big Pharma, which could be serious for the improvement of human health, are yet to be seen. An article in an NGO publication in Africa was entitled "The AIDS Crisis Could be the Graveyard of the Patent System".[6] That is a bit of a stretch, but there is clearly a crisis not only in AIDS, but in the pharmaceutical industry itself, because there is little incentive to produce drugs for diseases predominant in poor countries since the market is only 4–6 percent of total revenues. The role of the UN in dealing with this broader issue, which involves much more than drug prices since the institutional infrastructure of the poorest countries is woefully inadequate, will be crucial.

One could plausibly argue that the full impact of the NGO campaign could have far-reaching implications both for industry and international governance. Certainly it seems likely to change the nature of the debate on TRIPS in the WTO, as the results in Doha illustrate. Whether these longer-run consequences will be good or bad will depend not only on the corporations and the NGOs, but also on the coordinated policy actions of governments and international institutions.

Perhaps the AIDS crisis and the blundering behavior of the industry—which made it the Pariah du Jour, as the Wall Street Journal put it[7]—is a one-off event and does not signal a new global counter-current aimed at global corporations. But perhaps it does. Recent polls in the United States show that a large majority believe trade and globalization mainly benefits business and the wealthy.[8] *Fortune*'s cover story is entitled "The Great CEO Pay Heist" and eye-catching figures of $100 plus million annual pay are cited.[9] Let us not forget that in 2000 *Erin Brokovitch* won an Oscar! But if that does not convince you that something is happening here, how about John le Carré's latest novel, *The Constant Gardener*, in which the villain is not a Soviet spymaster but a pharmaceutical giant? Big Pharma, the new evil empire?

Speaking of the evil empire brings us to the subject of the WTO, the institution that *unintendedly* became a global magnet for dissent.

IV. NGOs and the WTO

One of the most articulate and eloquent members of the new "globerati", Vandana Shiva, head of an Indian environmental NGO, recently described the present state of the world as follows:

> We thought we had put slavery, holocausts and apartheid behind us—that humanity would never again allow dehumanizing and violent systems to shape the rules by which we live and die. Yet globalization is giving rise to new slavery, new holocausts, new apartheid. It is a war against nature, women, children and the poor. A war which is transforming every community and home into a war zone.[10]

[6] International South Group Network, *Seatini Bulletin*, Vol. 4, No. 5, March 30–April 15, 2001, pp. 9–11.
[7] *Wall Street Journal*, April 23, 2001, p. A1.
[8] *See* especially *Business Week*, April 24, 2000, p. 44.
[9] *Fortune*, June 25, 2001, pp. 64–70.
[10] *The Hindu*, March 25, 2001, http://www.hinduonnet.com/thehindu/2000/03/25.

The counter attack by pundits, economists and government leaders seems rather puny in comparison. Global village idiots; muddle-headed and misguided; millennial collectivists; coalitions to keep poor people poor, etc., etc. But, then as will be emphasized shortly, one of the great assets of the new policy entrepreneurs is their ability to craft a good message for the media. They seem to have the skills of a top-class advertising agency spinning a brand message.

Before expounding on their concerted attack on the WTO, I want to make clear that there is no homogeneous set of institutions called NGOs. Even if we separate out the development groups in poor countries from the advocacy NGOs, whose main objective is to shape policy, one has to divide the latter into several categories. For example, I have already noted the new virtual secretariat for Southern countries, and the groups centered on establishing business codes of conduct, both of which are rather different from what I have termed the *Mobilization Networks*, whose chief objective is to rally support for dissent at a specific event—a WTO ministerial meeting, the Summit of the Americas, a meeting of the World Bank and International Monetary Fund, the G8 Summit and so on.

The main objectives of the mobilization networks are to heighten public awareness of the target international institution's role in globalization and, by doing so, to change its agenda and mode of operation—or, in the case of the more extreme members, to shut it down. While these networks are loosely knit coalitions of very disparate groups, an analysis of the networks at Seattle (in 1999), Washington, Bangkok and Prague (in 2000) and Quebec City (in 2001) show that a significant proportion are environmental, human rights and gender rights NGOs. The G8 Summit in Genoa in July 2001 included these groups but also a number of left-wing political parties from Europe including communists and anarchists. However one must be wary of the view (often stressed by the NGOs themselves) that these loose and diverse coalitions represent a new form of globalized participatory democracy on the Internet or, as one participant has put it, "a movement that doesn't have a leader, a center, or even an agreed-on name".[11] This resembles what the wit, P.J. O'Rourke, has termed (in another context) "a clarion call to whatever". Participatory demonstrations as a form of participatory democracy? O.K, but the most significant development facilitated by the Internet—and vividly demonstrated in Seattle—has been the emergence of a new service industry—the business of dissent. And there is a business center—call it "dissent.com"—very effectively operated by a core group of NGOs headed, as noted, by a new breed of policy entrepreneurs. It is important to stress again that the dissent industry is largely a product of the Internet revolution. Inexpensive, borderless, real-time networking provides advocacy NGOs with economies of scale, and also of scope, by linking widely disparate groups with one common theme. As is the case for all innovations, there are also important positive feedback loops. An NGO Network established at the Rio Summit in 1992 was used by American, Canadian and Mexican anti-NAFTA advocacy groups and this experience was vital to mobilizing the fight against the Multilateral Agreement on Investment ("MAI"). The lessons from the MAI were put to use in preparing for Seattle, and the Seattle experience was helpful to plan for Washington and Prague and Porto Allegre and Davos and Quebec City and Genoa and so on—and on.

The key assets of dissent.com are the ability to use the media to deliver the message. Even when the message and the media are combined with money (from mass mailings and foundations—mainly American) the viability of the new business will depend not

[11] *Globe and Mail*, Toronto, April 25, 2001, p. A15.

only on the 3M's, but ultimately the saleability of its product—anti-globalization, of which, more below.

The core group central to managing the protests at Seattle and subsequent meetings, and for crafting the message and organizing the circulation of "sign on" lists or manifestos included Ralph Nader's Public Citizen and Global Trade Watch in the United States; Corporate Watch and ATTAC (France), Corporate Europe Observatory (Amsterdam), Oxfam (U. K. and Belgium); FOE or Friends of the Earth (in the U.K. and elsewhere) and the Third World Network of Malaysia, the most prominent transnational Southern NGO. A number of other NGOs were involved in facilitating the demonstrations in Seattle, Washington and Prague. Thus the Direct Action Network ("DAN"), with offices in California and New York, began as a coalition of activist groups dedicated to shutting down the WTO Ministerial. (Direct action is a term derived from the anarchist movement in the nineteenth and twentieth century: indeed it was the central ideology of the movement.) DAN was inspired by Peoples' Global Action ("PGA") which was formed in Geneva for the first WTO Ministerial in 1998. PGA was the organizer of the first Carnival against Capitalism in London in June 1999 which almost shut down the City of London's financial district largely as a result of the activities of the anarchist Black Bloc. PGA was also involved in the Quebec demonstrations through its Canadian arm CLAC or Anti-Capitalist Convergence of Montreal. In Prague INPEG was formed to plan and carry out a week of protest from September 18–28, 2000. The European NGOs were anxious to replicate Seattle, regarded as an impressive "model." ATTAC, a French group established in 1998 after the 1997 financial crisis, has vastly expanded since then and organized the anti-Davos demonstrations in Porto Allegre, Brazil, which, in turn, fed into the planning for Quebec City. At Genoa, ATTAC was preeminent, having expanded around Europe and in Latin America. The demonstrations and discussions were coordinated by the Genoa Social Forum, which was not able to plan for or control the violence of both extremist groups and the police—a not new but very much heightened aspect of this form of advocacy (see below).

Coordinating and organizing the demonstrations is only one function of dissent.com. Another, of equal or greater importance, is creating the libretto for the street operas and the television sound bites. Since the networks are so diverse, both in mission and location, the message must carry a simple, common theme: anti-globalization: pro-democracy. The charge is that the WTO (or the IMF, or the World Bank) are dominated by the interests of transnational corporations, while harming the environment and increasing inequality, and that their rules and procedures are undemocratic and kept secret from the public. Examples of sound bite versions at Seattle were "fix it or nix it"; and after Seattle, "shrink it or sink it" and at Washington "De-fund the Fund! Break the Bank! Dump the Debt!" A major theme which could be read on the Internet at least a year before Quebec City was the attack on government secrecy and the demand to release the draft of the FTAA ("Free Trade Area of the Americas"). But it is well to note that even when the message and the media are combined with money (for those NGOs successful at mass mailings and securing funds from Foundations—mainly American) the viability of the new business will depend ultimately on the saleability of its product—dissent. If the brand is tarnished the strategy and/or tactics may have to change, of which more below.

Since the main objective of mobilization networks is to influence public opinion and through that route initiate change in the policy processes of the international institutions, has the dissent industry been successful? In the case of the WTO, I would argue that it is too early to tell. The claim that the protests shut down the Seattle meeting does not stand up to close scrutiny. It was the North-South divide and Clinton's remarks on using

sanctions to enforce labor standards that caused the Southern countries to walk out. The NGOs also claim that Seattle was the "big bang" of a new social movement. It is similar to the claim that the 1997 Asian Crisis was the "Stalingrad of the IMF". Still, there is no question that the WTO and member governments are concerned about the mounting attacks and that they seem to be at a loss to respond.

This evident policy paralysis among the industrialized countries has many causes, but it stands in marked contrast to the activism of the NGOs. Thus a highly coordinated global-regional strategy was evident in the planning for the Quebec Summit of the Americas. While some of the "Seattle plus" core groups were actively involved, the umbrella network for Quebec City—the Hemispheric Social Alliance—was conceived at Belo Horizonte, Brazil, in May, 1997 when 700 activists (many of them part of the anti-NAFTA network) decided to build a hemispheric movement. The Allianza includes Canadian and American mobilization networks, plus Mexican, Brazilian and Chilean NGOs who are building linkages with Andean, Southern Cone and Caribbean groups. The AFL/CIO, the CLC and ORIT (the Western Hemisphere Union Federation) were all deeply involved in the planning process.

This involvement of unions outside Canada and the United States is new, and it is too early to know what it means. While the AFL-CIO played a major role in Seattle, European and many developing country unions have been prominent by their absence in the dissent industry. This was also evident in Genoa where some unionists were involved but the mainline Federations refused to endorse the protests. The International Confederation of Free Trade Unions ("ICFTU") did however hold a steering committee meeting in Genoa (to plan for Doha) and met with Italian Prime Minister Berlusconi. A North-South split is also evident in the environmental movement. Southern NGOs are more concerned with development, and regard the priorities of their Northern cousins as a reflection of their own standard of living and lack of understanding of the poverty of the developing countries. In the muttering in the corridors of the WTO and environmental conferences one often hears complaints that "they" (Northern NGOs) prefer support for elephants over people, and dolphins over children, and development NGOs are often described as "the new missionaries."

So, was Seattle a "big bang" for a new global movement? If so, whom will the movement include? At present, it seems unlikely that workers of the world will unite. They are, at present, competing, and in Southern countries their governments are competing ferociously for foreign investment. So many Southern workers figure that they could have something to lose other than their chains, i.e. their jobs.

Will greens of the world unite? The environmental movement has played an important role in the policy process since the 1970s and was actively involved in the most significant of the 200-plus Multilateral Environmental Agreements of the past decades. They often have more technical expertise than governments or business or intergovernmental institutions. The largest and most active environmental NGOs ("ENGOs") have affiliates around the world although their "home base" or place of origin is or was primarily the United States. A few examples illustrate the point. Greenpeace Amsterdam has organizations in twenty countries; Friends of the Earth in fifty, the World Wildlife Fund in 28. All are expanding rapidly. And they have money, with annual incomes of well over $200 million. As Mike Moore, then head of the WTO, said after Seattle: "the annual budget of WWF ($350 million in 2000) is three times that of the WTO". Most of these ENGOs recognize the need to bridge the North-South divide and to win over other groups, such as women and anti-globalization advocates, and are adapting their strategies to include development, gender and social issues (such as the need to prevent any negotiations on

education and health services in the WTO). This may attract some public service union support in Europe. In terms of strategy they seem to be more perceptive and flexible than the corporations and the governments they attack.

Forging a truly global social movement uniting diverse single-interest NGOs—a coalition of "hedgehogs" in Isaiah Berlin's terminology[12]—would require more than agreement on who is the enemy. It would require some agreement on an alternative. Indeed, since Seattle what one reads on the Internet is a growing and lively debate on this issue of trying to define a systemic alternative to the neo-liberal paradigm. At this point in time—not surprisingly—that goal seems to be a long way off. One idea which is gaining currency is localization. A book now being widely touted is called *Localization: A Global Manifesto* by Colin Hines.[13] While not exactly a yearning for some Edenic past, a close reading raises many more questions than answers. For example, just how would you define local—he has many different suggestions—and how would you get countries to agree to stop all trade except that which involves essential products that are not produced locally? One is reminded of the anarchist writings of the nineteenth and early twentieth centuries and the failed effort to establish an anarchist regime which was destroyed by the Spanish Civil War.[14] The anarchist movement did not have a single, powerful spokesman like their most hated enemies—the Communists—so their ideas are diffuse and somewhat amorphous. But confederal arrangements of small communities with no central or hierarchical authority is a unifying theme. The term anarchy is today associated with violence but the anarchist ethic was libertarian (as extreme as today's right wing) and violence was an individual right. The ideas of "direct action" and "diversity of tactics" are stressed by many of the NGOs today so that the echoes are clear. Be that as it may, the Edenic confederal bottom up model—a model of deglobalization—reminds one of the definition of a romantic: one who prefers to travel hopefully rather than arrive at a destination.

Of course, some alternative must be found, if only because dissent.com is worried about the continued saleability of its product. The violence at Genoa had shaken many of the prominent international groups such as FOE, and most of the development NGOs such as Oxfam. But the extremists are not only left-wing anarchists. As the Southern Poverty Law Center, a U.S. NGO, has documented, neo-fascist groups in Britain, Europe and the United States have also embraced the anti-globalization credo with enthusiasm. In Europe the development of the so-called "International Third Position" created by a breakaway faction of the U.K.'s neofascist National Front and Italian Fascists, has increasingly gained a following among the hard right internationally. The ITP represents a fusion of left and right (including environmentalism, wealth redistribution and workers' cooperatives) but their basic objective is to identify the prime enemies (Jews, blacks and immigrants). The Center underlines, of course, that "left and right did not exactly march arm-in-arm" in Seattle,[15] nor did the neo-nazi skinheads join hands with the development NGOs in Prague or Genoa. Yet the probably inevitable tendency for all demonstrations to attract extremists—a free ride is hard to decline—is generating increasing concern within the more mainline NGO community. Escalating violence generates the need for more police security which likewise generates more violence and attracts more extremists. And, of course, Genoa was hardly the end of the story.

[12] ISAIAH BERLIN, THE HEDGEHOG AND THE FOX (1953).

[13] LOCALIZATION: A GLOBAL MANIFESTO (2000).

[14] For a useful summary of the history and philosophy of anarchism see Richard D. Sonn, *Anarchism*, TWAYNE STUDIES IN INTELLECTUAL AND CULTURAL HISTORY, No. 4 (1992).

[15] Southern Poverty Law Center, *Neither Left nor Right*, INTELLIGENCE REPORT 9–14, Winter 2000.

The terrorist attack of September 11, 2001—while unrelated to the anti-globalization movement *per se*—will greatly add to the pressure to adopt a new strategy, or the dissent industry and dissent.com may prove to be just a bubble like other dotcoms. Indeed there are those who believe that the movement has been decimated. There appears to be a widening split among the NGOs who fear being tarnished by the events of Genoa and, *a fortiori*, September 11 and those more strident and extreme coalitions who regard global capitalism as bereft of all values other than greed (and are trying to mobilize a peace movement). It is interesting to note that even before the Washington annual meetings of the Fund and the Bank were cancelled in September 2001 because of the terrorist attack on Washington, a number of organizations (the AFL-CIO, Friends of the Earth, Sierra Club, Oxfam, for example) announced that they would not join in any protests and were scathingly denounced by others (especially anarchists) as cowardly traitors to a just cause. Whether or not the dissent industry is dead is open to debate but the need to transform strategy seems clear enough. And some innovation is already evident.

Thus to "demonstrate or not to demonstrate" is not the only question facing the mobilization networks. It may be well that the international institutions will be more and more apprehensive about holding meetings for fear of violence and cost. Certainly security measures will be vastly increased. One indication of a possible alternative could be to conference "on-line" as the World Bank did after cancelling a planned meeting in Barcelona in May 2001. The Bank was well aware of another new "global movement"—hacktivism, or the use of computers to organize "electronic civil disobedience" by defacing websites; organizing virtual sit-ins by generating massive electronic traffic to block other users; or creating denial of service. But it hired an outside firm to handle the conference and provide expert anti-hacking protection.[16] The conference went ahead with no glitches (despite threats to "crack the whole event") but the spread of hacktivism has just begun and cannot be dismissed. Some firms are now beginning to set up special units for threat analysis—IBM being a leader since it provides service for corporate systems around the world.[17] Perhaps new security arrangements instituted as a result of September 11 will make hacktivism more difficult but one should not be complacent about the potential for what one anarchist group has termed cyber trench-warfare. As noted earlier the internet was necessary for dissent.com to mobilize *action*: now it could become the *site* for action as hackers become politicized and activists become computerized. Indeed if mainline NGOs decide that demonstrations as a strategy are no longer viable this might make marching in the cyber trenches more attractive for some of the extremists. Nonetheless, whatever emerges from this new phenomenon (and it is both too early to tell and too difficult to obtain information) hacktivism is unlikely to provide an alternative to the major objectives of the mobilization networks, i.e. build a global social movement against corporate globalization.

Finally, how can one sum up the implications of the growing NGO movement, its impact on policy so far, and its future? During the several years in which I have been researching this subject my answer has been based on the 1960s lyrics "Something's happening here; what it is ain't exactly clear". That got a good laugh, especially from baby boomers. But while I still stand by the song title I now believe that something is

[16] Communication to author from mkarlsson@worldbank.org, Sept. 8, 2001.

[17] The IBM unit is called the Threat Analysis Group. Communication to author from sneyd@us.ibm.com. For a useful review of hacktivism see Dorothy E. Denning, *Activisim, Hacktisivm, and Cyberterrorism: The Internet as a Tool for Influencing Foreign Policy* and references cited therein, www.nautilus.org/info-policy/workshop/papers/denning.html.

becoming clearer, i.e., the 1990s was probably a *defining decade*, perhaps a transition to a new political economy of international policy-making. Let me now conclude with a brief review of the defining decade—with a question mark.

V. The 1990s: The Defining Decade?

Some 2,500 year ago Aristotle offered a very useful way of organizing explanations of events or actions. Despite all the recent complex theories of tipping and cascades and the like, I prefer Aristotle's simplicity and clarity. For a development to occur it must be: (1) *possible,* (2) there must be an *incentive*, and (3) there must be a *catalyst* to precipitate the actions.

The element that made the anti-globalization movement *possible* was the Internet. There were anti-WTO demonstrations in Geneva and Washington in the early 1990s where buildings were plastered with posters of a big, ferocious GATTZILLA, but it is far cheaper and more effective to mobilize marches in cyberspace than fly around with posters that manage mainly to irritate the proper burghers of a Swiss canton famed for its squeaky clean appearance.

Of course, the Internet could only serve as an instrument of mobilization if the *incentive* to employ it was shared by a sufficient number of participants. This is a far more complex story, indeed not one but many different stories around the world. But a common theme or trigger is that overzealous proponents of "free trade" or globalization unleashed unrealistic expectations. If you promise but cannot deliver Nirvana it is bound to evoke cries of Armageddon from the disapproving and the disappointed. In many developing countries this anger and disappointment is threatening already fragile democracies. Moreover, increasing inequality, both within and especially among countries, has been highlighted by the media and effectively used by many NGOs. The figures are stunning and many are quoted. For example, today the richest one per cent of the world's population receives as much as the bottom 57 percent.[18] It is not just poverty that marks the increasing marginalization of the poorest, but disease, and not only AIDS, but Ebola, and drug-resistant bacterial infections. But, of course, freer trade did not create the growing inequality in economic and social conditions, nor will blocking trade cure these problems. While the link between trade and growth is complex, trade policy is certainly an ingredient in the policy package and what is quite clear is that growth is essential for the reduction of poverty. But in the absence of the political leadership required to confront the slow, complicated and arduous process of coordinating trade and development policies it is easy for politicians to yield to the temptation of promising simple solutions—trade is the holy grail of growth.

The counter-currents of the 1990s in the industrialized countries reinforce deeper currents that have been flowing silently for several decades. The most ubiquitous trend in all the rich countries is the declining confidence in government which began in the mid-1970s. There are many differing views on the reasons for this striking phenomenon and no doubt different factors are operative in different countries.[19] Nonetheless the similarity in trend cannot be ignored. The disillusionment and decline in deference applies not only

[18] Branko Milanovic, *True World Income Distribution, 1988 and 1993: First Calculations Based on Household Surveys Alone*, World Bank, Development Research Group, Oct. 1999, at 52.

[19] *See* Susan J. Pharr, Robert D. Putnam, and Russell J. Dalton, *A Quarter-Century of Declining Confidence*, II JOURNAL OF DEMOCRACY (April 2000). The "new war" has, at least at present, reversed the trend in the United States. But as unemployment rises and growth slows the relevance of domestic versus security issues is likely to rise.

to all government institutions but also to political parties, i.e., to the political underpinnings of the entire democratic system. Robert Putnam, in his best-selling book *Bowling Alone*, has argued that this growing alienation is also reflected in the United States by the collapse of citizen engagement in voluntary community groups, and that this in turn reinforces the trend toward alienation which has been longer and steeper than in Europe. Interestingly, Putnam notes the rise of advocacy NGOs at the same time as the decline in community activities, but argues that these social movements do not countervail the decline and have no real ties to the people they claim to represent, but rather to consumers of a cause. He argues that this is not participatory democracy but "citizenship by proxy".[20]

While, as noted, there is no agreement on the reasons for this disturbing decline in deference to the democratic political system, among the factors most often cited are the greater importance of information and the role of the media. At the same time, it does not seem entirely coincidental that the spread of the NGO movement, at least in North America, began in the late 1970s with the gender and environmental groups leading the way, and was very much abetted by the media. If the political route to change is increasingly disdained, then the advocacy route may be a better bet. Indeed, in a recent publication, *Strengthening Canadian Democracy*, survey data reveals that in the year 2000, sixty percent of the sample perceived interest groups as more effective than political parties as compared with twenty percent who held the opposite view.[21] This is hardly unique. In a recent global survey carried out by a prominent American public relations firm, the results strongly confirm the low trust / confidence in government and suggest that the NGOs are now Super-Brands which provide a "halo effect".[22]

After this long detour, let us return to Aristotle. The alienation from government and from politics in the industrialized countries opened up a now widening space in the policy arena for the burgeoning NGO movement. They were already active in certain parts of the arena—especially in the environmental parts—in the 1980s, both domestically and internationally. There was thus a strong *incentive* to play a larger role in a wider policy arena. The Internet in the mid-90s made entry into the global arena *possible.* So, what was the *catalyst*—Aristotle's third condition?

I have already suggested my own answer—the Uruguay Round. The move away from the border barriers of the *GATT system,* with more freedom to protect domestic policy space, to a *WTO system* which weakened domestic regulatory policies and domestic institutions, touched the raw nerve of national sovereignty. No discussion took place during the Round about the need to redefine domestic policy space in a world in which the economic regulatory state was to be reformed and the social regulatory state—a feature mainly of the rich countries—was unacceptable to many developing countries, especially if trade sanctions were to be used to enforce, say, labor or environmental standards. The WTO was provided with a pitiful budget for technical assistance and research, and the litigious (and therefore expensive) dispute settlement system has provoked complaints in a number of Northern and Southern countries. Finally, the prominent role of business in defining the new agenda provided an easy and attractive target as public concern over the growing power of corporations began to mount.

[20] Robert D. Putnam, Bowling Alone 160 (2000).

[21] Paul Howe and David Northrup, *Strengthening Canadian Democracy: The Views of Canadians* 1(5), Policy Matters 33 (July 2000).

[22] *Media and the Corporate Sector*, Edelman Public Relations Worldwide, 2001, http://www.edelman.com/edelman_newsroom/ngo/CONBOAR_files/slide0056.htm.

So, Aristotelian logic would support the argument that the last decade of the twentieth century was a defining decade, perhaps signaling a transition to an even more powerful counter-current to the ongoing and accelerating current of global integration. After all, it has happened before. By the end of the nineteenth century international trade and financial flows were actually greater, in relation to production, than they are today. The rise of protectionism, the Great Depression, and the Second World War put an end to that. It is certainly possible—but in my view highly improbable—to turn back the tide.

Even if the Canute school of anti-globalizers does not win, this will not mean that the counter-current will subside. There are a number of other signals worth noting that suggest that while it may take different forms it will not go away. Let me cite a few.

I have been struck in my reading on this subject how often two words appear—*alienation* and *anomie.* The first is from Marx and, as the great biographer of Keynes, Robert Skidelsky, has noted, the idea of alienation, which is essentially a moral critique of capitalism, is all that is left from the debris of his theory.[23] Marx argued that because labor becomes a commodity in the capitalist system, the worker loses all power to control the processes by which decisions are made that affect his life. Fast forward 150 years and think: mindless consumption of the rich; the need for participation; the need to give power to the local community, etc.

The other word now enjoying a revival is *anomie*, as used by the French sociologist Emile Durkheim,[24] writing at the beginning of the twentieth century. Marx and Durkheim agreed on a number of things: most importantly that an individual is a social being and not a cog in a machine. Both agreed that the culprit was utilitarianism, the basis of neo-classical economics. But they strongly disagreed on the consequences. For Marx alienation equaled "exploitation of the working class" which must lead to revolution; for Durkheim, it led to anomie. Anomie is essentially a disconnect between the goals generated by society and the institutional means to achieve them. If winning is the goal most exalted by society and you cannot achieve it by the normal rules of the game, then cheating is the best available option. If money is the only symbol of achievement, and you cannot be certain you will get the right job when you graduate, then cheating is the logical option to ensure success. The idea of anomie was brilliantly captured in David Riesman's *The Lonely Crowd*,[25] published in 1950, which stressed the individual's sense of powerlessness and loss of social cohesion. When anomie is confined to a small number they can form groups—alienated from the rest of society but unified within themselves. The neo-Nazis provide a good example. But if widely dispersed groups can unite around one *theme*—say, feminism or environmentalism—that is a qualitatively different phenomenon, and if facilitated by the Internet could produce a quantum change.

I think anomie is a useful concept to explain the spread of NGOs and their concerted attack on global integration and trade policy. The disjuncture between the goals of free trade—rising living standards for all—and its distributional impact is taken as evidence that international treaties do not deliver. The evidence that over the past fifty years, the period of increasing integration of the global economy, the proportion of the world's population living in poverty has declined more than in the previous 500 years is ignored. Rather than discussing the basic issues of how to cope with poverty—and there are no simple answers—it seems easier to choose the alternative route—to use

[23] Robert Skidelsky, *What's Left of Marx?*, NEW YORK REVIEW OF BOOKS 27 (Nov. 16, 2000).

[24] For a comprehensive review of Durkheim's concept see ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1966). *See also* ANTHONY GIDDENS, EMILE DURKHEIM SELECTED WRITINGS (1972).

[25] DAVID RIESMAN, THE LONELY CROWD (1950).

Durkheim's terminology, *deinstitutionalization.* Because governments are complicit in this disjuncture, their legitimacy must also be rejected.

If anomie and alienation are increasing in the rich democracies, the implications go well beyond the anti-globalization movement. If disillusionment with the political process has facilitated the rise of the advocacy NGOs, what effect will this have on national democracy itself? The continued attack on government, however well-merited, is combined with a rejection of long-established and fought-for political routes to policy reform. Are participatory demonstrations a satisfactory substitute for participatory democracy? If the arguments that capitalism lacks a moral ethos or that the economy must be embedded in society are legitimate—and, indeed, a growing number of economists including the Nobel laureate Amartya Sen are making that case—then domestic reform is essential. Is it not more easily achieved by working *within* the system than *rejecting* it? Rejecting it in favor of what? The concept of an alternative in this domestic context has not even been raised, let alone discussed. Thus the implications of the "counter-current against global integration" for *national democracy* are probably more important than its *international* impact.

I do not wish to conclude on an entirely pessimistic note. Many of the international NGOs have played a singularly important role in highlighting the inadequacies of the new global trading system as well as the international financial system. A number of NGOs, aware of the charge that they are non-transparent and not accountable, are adopting codes of conduct and establishing monitoring mechanisms. Further, the WTO has made an effort to increase access to information and its website today vastly improves accessibility. New consultations with NGOs have been launched and more are likely. But will they achieve their goal of restoring the "legitimacy" of the institution? One can agree with many of the criticisms of the WTO. The institution would benefit from debate and dialogue but has no forum to host such a process. A new round that fails to grapple with institutional reform will accomplish little. But one should keep in mind Churchill's dictum that democracy is the worst form of government—except for all the others. The same is true of the WTO, which is a rules-based system, flawed as it may be. The only alternative on the horizon at present is a power-based system. Who should benefit from such a system? Certainly the powerful countries and the MNEs. Who would lose the most from such a system? Obviously the poorer countries and their poorest citizens. Reform of the WTO will require action by its member governments. Maybe NGO pressure should begin at home.

Appendix
WTO Ministerial Declarations and Doha Work Programme Decision Adopted by the General Council

SINGAPORE MINISTERIAL DECLARATION
Adopted on 13 December 1996

1. We, the Ministers, have met in Singapore from 9 to 13 December 1996 for the first regular biennial meeting of the WTO at Ministerial level, as called for in Article IV of the Agreement Establishing the World Trade Organization, to further strengthen the WTO as a forum for negotiation, the continuing liberalization of trade within a rule-based system, and the multilateral review and assessment of trade policies, and in particular to:

- assess the implementation of our commitments under the WTO Agreements and decisions;
- review the ongoing negotiations and Work Programme;
- examine developments in world trade; and
- address the challenges of an evolving world economy.

Trade and Economic Growth

2. For nearly 50 years Members have sought to fulfil, first in the GATT and now in the WTO, the objectives reflected in the preamble to the WTO Agreement of conducting our trade relations with a view to raising standards of living worldwide. The rise in global trade facilitated by trade liberalization within the rules-based system has created more and better-paid jobs in many countries. The achievements of the WTO during its first two years bear witness to our desire to work together to make the most of the possibilities that the multilateral system provides to promote sustainable growth and development while contributing to a more stable and secure climate in international relations.

Integration of Economies; Opportunities and Challenges

3. We believe that the scope and pace of change in the international economy, including the growth in trade in services and direct investment, and the increasing integration of economies offer unprecedented opportunities for improved growth, job creation, and development. These developments require adjustment by economies and societies. They also pose challenges to the trading system. We commit ourselves to address these challenges.

Core Labour Standards

4. We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be

put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

Marginalization

5. We commit ourselves to address the problem of marginalization for least-developed countries, and the risk of it for certain developing countries. We will also continue to work for greater coherence in international economic policy-making and for improved coordination between the WTO and other agencies in providing technical assistance.

Role of WTO

6. In pursuit of the goal of sustainable growth and development for the common good, we envisage a world where trade flows freely. To this end we renew our commitment to:

- a fair, equitable and more open rule-based system;
- progressive liberalization and elimination of tariff and non-tariff barriers to trade in goods;
- progressive liberalization of trade in services;
- rejection of all forms of protectionism;
- elimination of discriminatory treatment in international trade relations;
- integration of developing and least-developed countries and economies in transition into the multilateral system; and
- the maximum possible level of transparency.

Regional Agreements

7. We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system. In this context, we note the importance of existing regional arrangements involving developing and least-developed countries. The expansion and extent of regional trade agreements make it important to analyse whether the system of WTO rights and obligations as it relates to regional trade agreements needs to be further clarified. We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules. In this regard, we welcome the establishment and endorse the work of the new Committee on Regional Trade Agreements. We shall continue to work through progressive liberalization in the WTO as we are committed in the WTO Agreement and Decisions adopted at Marrakesh, and in so doing facilitate mutually supportive processes of global and regional trade liberalization.

Accessions

8. It is important that the 28 applicants now negotiating accession contribute to completing the accession process by accepting the WTO rules and by offering meaningful market access commitments. We will work to bring these applicants expeditiously into the WTO system.

Dispute Settlement

9. The Dispute Settlement Understanding (DSU) offers a means for the settlement of disputes among Members that is unique in international agreements. We consider its impartial and transparent operation to be of fundamental importance in assuring the resolution of trade disputes, and in fostering the implementation and application of the WTO agreements. The Understanding, with its predictable procedures, including the possibility of appeal of panel decisions to an Appellate Body and provisions on implementation of recommendations, has improved Members' means of resolving their differences. We believe that the DSU has worked effectively during its first two years. We also note the role that several WTO bodies have played in helping to avoid disputes. We renew our determination to abide by the rules and procedures of the DSU and other WTO agreements in the conduct of our trade relations and the settlement of disputes. We are confident that longer experience with the DSU, including the implementation of panel and appellate recommendations, will further enhance the effectiveness and credibility of the dispute settlement system.

Implementation

10. We attach high priority to full and effective implementation of the WTO Agreement in a manner consistent with the goal of trade liberalization. Implementation thus far has been generally satisfactory, although some Members have expressed dissatisfaction with certain aspects. It is clear that further effort in this area is required, as indicated by the relevant WTO bodies in their reports. Implementation of the specific commitments scheduled by Members with respect to market access in industrial goods and trade in services appears to be proceeding smoothly. With respect to industrial market access, monitoring of implementation would be enhanced by the timely availability of trade and tariff data. Progress has been made also in advancing the WTO reform programme in agriculture, including in implementation of agreed market access concessions and domestic subsidy and export subsidy commitments.

Notifications and Legislation

11. Compliance with notification requirements has not been fully satisfactory. Because the WTO system relies on mutual monitoring as a means to assess implementation, those Members which have not submitted notifications in a timely manner, or whose notifications are not complete, should renew their efforts. At the same time, the relevant bodies should take appropriate steps to promote full compliance while considering practical proposals for simplifying the notification process.

12. Where legislation is needed to implement WTO rules, Members are mindful of their obligations to complete their domestic legislative process without further delay. Those Members entitled to transition periods are urged to take steps as they deem necessary to ensure timely implementation of obligations as they come into effect. Each Member should carefully review all its existing or proposed legislation, programmes and measures to ensure their full compatibility with the WTO obligations, and should carefully consider points made during review in the relevant WTO bodies regarding the WTO consistency of legislation, programmes and measures, and make appropriate changes where necessary.

Developing Countries

13. The integration of developing countries in the multilateral trading system is important for their economic development and for global trade expansion. In this connection, we recall that the WTO Agreement embodies provisions conferring differential and more favourable treatment for developing countries, including special attention to the particular situation of least-developed countries. We acknowledge the fact that developing country Members have undertaken significant new commitments, both substantive and procedural, and we recognize the range and complexity of the efforts that they are making to comply with them. In order to assist them in these efforts, including those with respect to notification and legislative requirements, we will improve the availability of technical assistance under the agreed guidelines. We have also agreed to recommendations relative to the decision we took at Marrakesh concerning the possible negative effects of the agricultural reform programme on least-developed and net food-importing developing countries.

Least-Developed Countries

14. We remain concerned by the problems of the least-developed countries and have agreed to:

- a Plan of Action, including provision for taking positive measures, for example duty-free access, on an autonomous basis, aimed at improving their overall capacity to respond to the opportunities offered by the trading system;
- seek to give operational content to the Plan of Action, for example, by enhancing conditions for investment and providing predictable and favourable market access conditions for LLDCs' products, to foster the expansion and diversification of their exports to the markets of all developed countries; and in the case of relevant developing countries in the context of the Global System of Trade Preferences; and
- organize a meeting with UNCTAD and the International Trade Centre as soon as possible in 1997, with the participation of aid agencies, multilateral financial institutions and least-developed countries to foster an integrated approach to assisting these countries in enhancing their trading opportunities.

Textiles and Clothing

15. We confirm our commitment to full and faithful implementation of the provisions of the Agreement on Textiles and Clothing (ATC). We stress the importance of the integration of textile products, as provided for in the ATC, into GATT 1994 under its strengthened rules and disciplines because of its systemic significance for the rule-based, non-discriminatory trading system and its contribution to the increase in export earnings of developing countries. We attach importance to the implementation of this Agreement so as to ensure an effective transition to GATT 1994 by way of integration which is progressive in character. The use of safeguard measures in accordance with ATC provisions should be as sparing as possible. We note concerns regarding the use of other trade distortive measures and circumvention. We reiterate the importance of fully implementing the provisions of the ATC relating to small suppliers, new entrants and least-developed country Members, as well as those relating to cotton-producing exporting Members. We recognize the importance of wool products for some developing country

Members. We reaffirm that as part of the integration process and with reference to the specific commitments undertaken by the Members as a result of the Uruguay Round, all Members shall take such action as may be necessary to abide by GATT 1994 rules and disciplines so as to achieve improved market access for textiles and clothing products. We agree that, keeping in view its quasi-judicial nature, the Textiles Monitoring Body (TMB) should achieve transparency in providing rationale for its findings and recommendations. We expect that the TMB shall make findings and recommendations whenever called upon to do so under the Agreement. We emphasize the responsibility of the Goods Council in overseeing, in accordance with Article IV:5 of the WTO Agreement and Article 8 of the ATC, the functioning of the ATC, whose implementation is being supervised by the TMB.

Trade and Environment

16. The Committee on Trade and Environment has made an important contribution towards fulfilling its Work Programme. The Committee has been examining and will continue to examine, *inter alia*, the scope of the complementarities between trade liberalization, economic development and environmental protection. Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development. The work of the Committee has underlined the importance of policy coordination at the national level in the area of trade and environment. In this connection, the work of the Committee has been enriched by the participation of environmental as well as trade experts from Member governments and the further participation of such experts in the Committee's deliberations would be welcomed. The breadth and complexity of the issues covered by the Committee's Work Programme shows that further work needs to be undertaken on all items of its agenda, as contained in its report. We intend to build on the work accomplished thus far, and therefore direct the Committee to carry out its work, reporting to the General Council, under its existing terms of reference.

Services Negotiations

17. The fulfilment of the objectives agreed at Marrakesh for negotiations on the improvement of market access in services—in financial services, movement of natural persons, maritime transport services and basic telecommunications—has proved to be difficult. The results have been below expectations. In three areas, it has been necessary to prolong negotiations beyond the original deadlines. We are determined to obtain a progressively higher level of liberalization in services on a mutually advantageous basis with appropriate flexibility for individual developing country Members, as envisaged in the Agreement, in the continuing negotiations and those scheduled to begin no later than 1 January 2000. In this context, we look forward to full MFN agreements based on improved market access commitments and national treatment. Accordingly, we will:

- achieve a successful conclusion to the negotiations on basic telecommunications in February 1997; and
- resume financial services negotiations in April 1997 with the aim of achieving significantly improved market access commitments with a broader level of participation in the agreed time frame.

With the same broad objectives in mind, we also look forward to a successful conclusion of the negotiations on Maritime Transport Services in the next round of negotiations on services liberalization.

In professional services, we shall aim at completing the work on the accountancy sector by the end of 1997, and will continue to develop multilateral disciplines and guidelines. In this connection, we encourage the successful completion of international standards in the accountancy sector by IFAC, IASC, and IOSCO. With respect to GATS rules, we shall undertake the necessary work with a view to completing the negotiations on safeguards by the end of 1997. We also note that more analytical work will be needed on emergency safeguards measures, government procurement in services and subsidies.

ITA and Pharmaceuticals

18. Taking note that a number of Members have agreed on a Declaration on Trade in Information Technology Products, we welcome the initiative taken by a number of WTO Members and other States or separate customs territories which have applied to accede to the WTO, who have agreed to tariff elimination for trade in information technology products on an MFN basis as well as the addition by a number of Members of over 400 products to their lists of tariff-free products in pharmaceuticals.

Work Programme and Built-in Agenda

19. Bearing in mind that an important aspect of WTO activities is a continuous overseeing of the implementation of various agreements, a periodic examination and updating of the WTO Work Programme is a key to enable the WTO to fulfil its objectives. In this context, we endorse the reports of the various WTO bodies. A major share of the Work Programme stems from the WTO Agreement and decisions adopted at Marrakesh. As part of these Agreements and decisions we agreed to a number of provisions calling for future negotiations on Agriculture, Services and aspects of TRIPS, or reviews and other work on Anti-Dumping, Customs Valuation, Dispute Settlement Understanding, Import Licensing, Preshipment Inspection, Rules of Origin, Sanitary and Phyto-Sanitary Measures, Safeguards, Subsidies and Countervailing Measures, Technical Barriers to Trade, Textiles and Clothing, Trade Policy Review Mechanism, Trade-Related Aspects of Intellectual Property Rights and Trade-Related Investment Measures. We agree to a process of analysis and exchange of information, where provided for in the conclusions and recommendations of the relevant WTO bodies, on the Built-in Agenda issues, to allow Members to better understand the issues involved and identify their interests before undertaking the agreed negotiations and reviews. We agree that:

- the time frames established in the Agreements will be respected in each case;
- the work undertaken shall not prejudge the scope of future negotiations where such negotiations are called for; and
- the work undertaken shall not prejudice the nature of the activity agreed upon (i.e. negotiation or review).

Investment and Competition

20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs

Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and
- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.

Transparency in Government Procurement

21. We further agree to:

- establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement; and
- direct the Council for Trade in Goods to undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area.

Trade Facilitation

22. In the organization of the work referred to in paragraphs 20 and 21, careful attention will be given to minimizing the burdens on delegations, especially those with more limited resources, and to coordinating meetings with those of relevant UNCTAD bodies. The technical cooperation programme of the Secretariat will be available to developing and, in particular, least-developed country Members to facilitate their participation in this work.

23. Noting that the 50th anniversary of the multilateral trading system will occur early in 1998, we instruct the General Council to consider how this historic event can best be commemorated.

Finally, we express our warmest thanks to the Chairman of the Ministerial Conference, Mr. Yeo Cheow Tong, for his personal contribution to the success of this Ministerial Conference. We also want to express our sincere gratitude to Prime Minister

Goh Chok Tong, his colleagues in the Government of Singapore and the people of Singapore for their warm hospitality and the excellent organization they have provided. The fact that this first Ministerial Conference of the WTO has been held at Singapore is an additional manifestation of Singapore's commitment to an open world trading system.

MINISTERIAL DECLARATION ON TRADE IN INFORMATION TECHNOLOGY PRODUCTS
Singapore, 13 December 1996

Ministers,

Representing the following Members of the World Trade Organization ("WTO"), and States or separate customs territories in the process of acceding to the WTO, which have agreed in Singapore on the expansion of world trade in information technology products and which account for well over 80 per cent of world trade in these products ("parties"):

Australia	Norway
Canada	Separate Customs Territory of Taiwan,
European Communities	Penghu, Kinmen and Matsu
Hong Kong	Singapore
Iceland	Switzerland[1]
Indonesia	Turkey
Japan	United States
Korea	

Considering the key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy,

Recognizing the goals of raising standards of living and expanding the production of and trade in goods;

Desiring to achieve maximum freedom of world trade in information technology products;

Desiring to encourage the continued technological development of the information technology industry on a world-wide basis;

Mindful of the positive contribution information technology makes to global economic growth and welfare;

Having agreed to put into effect the results of these negotiations which involve concessions additional to those included in the Schedules attached to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, and

Recognizing that the results of these negotiations also involve some concessions offered in negotiations leading to the establishment of Schedules annexed to the Marrakesh Protocol,

Declare as follows:

1. Each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products.

2. Pursuant to the modalities set forth in the Annex to this Declaration, each party shall bind and eliminate customs duties and other duties and charges of any kind, within

[1] On behalf of the customs union Switzerland and Liechtenstein.

the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:

(a) all products classified (or classifiable) with Harmonized System (1996) ("HS") headings listed in Attachment A to the Annex to this Declaration; and
(b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A;

through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances.

3. Ministers express satisfaction about the large product coverage outlined in the Attachments to the Annex to this Declaration. They instruct their respective officials to make good faith efforts to finalize plurilateral technical discussions in Geneva on the basis of these modalities, and instruct these officials to complete this work by 31 January 1997, so as to ensure the implementation of this Declaration by the largest number of participants.

4. Ministers invite the Ministers of other Members of the WTO, and States or separate customs territories in the process of acceding to the WTO, to provide similar instructions to their respective officials, so that they may participate in the technical discussions referred to in paragraph 3 above and participate fully in the expansion of world trade in information technology products.

Annex: Modalities and Product Coverage

Atttachment A: list of HS headings [omitted]
Atttachment B: list of products [omitted]

ANNEX

MODALITIES AND PRODUCT COVERAGE

Any Member of the World Trade Organization, or State or separate customs territory in the process of acceding to the WTO, may participate in the expansion of world trade in information technology products in accordance with the following modalities:

1. Each participant shall incorporate the measures described in paragraph 2 of the Declaration into its schedule to the General Agreement on Tariffs and Trade 1994, and, in addition, at either its own tariff line level or the Harmonized System (1996) ("HS") 6-digit level in either its official tariff or any other published versions of the tariff schedule, whichever is ordinarily used by importers and exporters. Each participant that is not a Member of the WTO shall implement these measures on an autonomous basis, pending completion of its WTO accession, and shall incorporate these measures into its WTO market access schedule for goods.

2. To this end, as early as possible and no later than 1 March 1997 each participant shall provide all other participants a document containing (a) the details concerning how the appropriate duty treatment will be provided in its WTO schedule of concessions, and (b) a list of the detailed HS headings involved for products specified in Attachment B. These documents will be reviewed and approved on a consensus basis and this review process shall be completed no later than 1 April 1997. As soon as this review process has been completed for any such document, that document shall be submitted as a modification to the Schedule of the participant concerned, in accordance with the Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (BISD 27S/25).

(a) The concessions to be proposed by each participant as modifications to its Schedule shall bind and eliminate all customs duties and other duties and charges of any kind on information technology products as follows:
   (i) elimination of such customs duties shall take place through rate reductions in equal steps, except as may be otherwise agreed by the participants. Unless otherwise agreed by the participants, each participant shall bind all tariffs on items listed in the Attachments no later than 1 July 1997, and shall make the first such rate reduction effective no later than 1 July 1997, the second such rate reduction no later than 1 January 1998, and the third such rate reduction no later than 1 January 1999, and the elimination of customs duties shall be completed effective no later than 1 January 2000. The participants agree to encourage autonomous elimination of customs duties prior to these dates. The reduced rate should in each stage be rounded off to the first decimal; and
   (ii) elimination of such other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement, shall be completed by 1 July 1997, except as may be otherwise specified in the participant's document provided to other participants for review.

(b) The modifications to its Schedule to be proposed by a participant in order to implement its binding and elimination of customs duties on information technology products shall achieve this result:

(i) in the case of the HS headings listed in Attachment A, by creating, where appropriate, sub-divisions in its Schedule at the national tariff line level; and
(ii) in the case of the products specified in Attachment B, by attaching an annex to its Schedule including all products in Attachment B, which is to specify the detailed HS headings for those products at either the national tariff line level or the HS 6-digit level.

Each participant shall promptly modify its national tariff schedule to reflect the modifications it has proposed, as soon as they have entered into effect.

3. Participants shall meet periodically under the auspices of the Council on Trade in Goods to review the product coverage specified in the Attachments, with a view to agreeing, by consensus, whether in the light of technological developments, experience in applying the tariff concessions, or changes to the HS nomenclature, the Attachments should be modified to incorporate additional products, and to consult on non-tariff barriers to trade in information technology products. Such consultations shall be without prejudice to rights and obligations under the WTO Agreement.

4. Participants shall meet as soon as practicable and in any case no later than 1 April 1997 to review the state of acceptances received and to assess the conclusions to be drawn therefrom. Participants will implement the actions foreseen in the Declaration provided that participants representing approximately 90 per cent of world trade[2] in information technology products have by then notified their acceptance, and provided that the staging has been agreed to the participants' satisfaction. In assessing whether to implement actions foreseen in the Declaration, if the percentage of world trade represented by participants falls somewhat short of 90 per cent of world trade in information technology products, participants may take into account the extent of the participation of States or separate customs territories representing for them the substantial bulk of their own trade in such products. At this meeting the participants will establish whether these criteria have been met.

5. Participants shall meet as often as necessary and no later than 30 September 1997 to consider any divergence among them in classifying information technology products, beginning with the products specified in Attachment B. Participants agree on the common objective of achieving, where appropriate, a common classification for these products within existing HS nomenclature, giving consideration to interpretations and rulings of the Customs Co-operation Council (also known as the World Customs Organization or "WCO"). In any instance in which a divergence in classification remains, participants will consider whether a joint suggestion could be made to the WCO with regard to updating existing HS nomenclature or resolving divergence in interpretation of the HS nomenclature.

6. The participants understand that Article XXIII of the General Agreement will address nullification or impairment of benefits accruing directly or indirectly to a WTO Member participant through the implementation of this Declaration as a result of the application by another WTO Member participant of any measure, whether or not that measure conflicts with the provisions of the General Agreement.

7. Each participant shall afford sympathetic consideration to any request for consultation from any other participant concerning the undertakings set out above. Such consultations shall be without prejudice to rights and obligations under the WTO Agreement.

[2] This percentage shall be calculated by the WTO Secretariat on the basis of the most recent data available at the time of the meaning.

8. Participants acting under the auspices of the Council for Trade in Goods shall inform other Members of the WTO and States or separate customs territories in the process of acceding to the WTO of these modalities and initiate consultations with a view to facilitate their participation in the expansion of trade in information technology products on the basis of the Declaration.

9. As used in these modalities, the term "participant" shall mean those Members of the WTO, or States or separate customs territories in the process of acceding to the WTO, that provide the document described in paragraph 2 no later than 1 March 1997.

10. This Annex shall be open for acceptance by all Members of the WTO and any State or any separate customs territory in the process of acceding to the WTO. Acceptances shall be notified in writing to the Director-General who shall communicate them to all participants.

GENEVA
MINISTERIAL DECLARATION
Adopted on 20 May 1998

1. This Second Session of the Ministerial Conference of the WTO is taking place at a particularly significant time for the multilateral trading system, when the fiftieth anniversary of its establishment is being commemorated. On this occasion we pay tribute to the system's important contribution over the past half-century to growth, employment and stability by promoting the liberalization and expansion of trade and providing a framework for the conduct of international trade relations, in accordance with the objectives embodied in the Preambles to the General Agreement on Tariffs and Trade and the World Trade Organization Agreement. We agree, however, that more remains to be done to enable all the world's peoples to share fully and equitably in these achievements.

2. We underline the crucial importance of the multilateral rule-based trading system. We reaffirm the commitments and assessments we made at Singapore, and we note that the work under existing agreements and decisions has resulted in significant new steps forward since we last met. In particular, we welcome the successful conclusion of the negotiations on basic telecommunications and financial services and we take note of the implementation of the Information Technology Agreement. We renew our commitment to achieve progressive liberalization of trade in goods and services.

3. The fiftieth anniversary comes at a time when the economies of a number of WTO Members are experiencing difficulties as a result of disturbances in financial markets. We take this opportunity to underline that keeping all markets open must be a key element in a durable solution to these difficulties. With this in mind, we reject the use of any protectionist measures and agree to work together in the WTO as in the IMF and the World Bank to improve the coherence of international economic policy-making with a view to maximizing the contribution that an open, rule-based trading system can make to fostering stable growth for economies at all levels of development.

4. We recognize the importance of enhancing public understanding of the benefits of the multilateral trading system in order to build support for it and agree to work towards this end. In this context we will consider how to improve the transparency of WTO operations. We shall also continue to improve our efforts towards the objectives of sustained economic growth and sustainable development.

5. We renew our commitment to ensuring that the benefits of the multilateral trading system are extended as widely as possible. We recognize the need for the system to make its own contribution in response to the particular trade interests and development needs of developing-country Members. We welcome the work already underway in the Committee on Trade and Development for reviewing the application of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members, and in particular the least-developed among them. We agree on the need for effective implementation of these special provisions.

6. We remain deeply concerned over the marginalization of least-developed countries and certain small economies, and recognize the urgent need to address this issue which has been compounded by the chronic foreign debt problem facing many of them. In

this context we welcome the initiatives taken by the WTO in cooperation with other agencies to implement in an integrated manner the Plan of Action for the least-developed countries which we agreed at Singapore, especially through the High-Level Meeting on Least-Developed Countries held in Geneva in October 1997. We also welcome the report of the Director-General on the follow-up of this initiative, to which we attach great importance. We commit ourselves to continue to improve market access conditions for products exported by the least-developed countries on as broad and liberal a basis as possible. We urge Members to implement the market-access commitments that they have undertaken at the High-Level Meeting.

7. We welcome the WTO Members who have joined since we met in Singapore: Congo, Democratic Republic of Congo, Mongolia, Niger and Panama. We welcome the progress made with 31 applicants currently negotiating their accession and renew our resolution to ensure that the accession processes proceed as rapidly as possible. We recall that accession to the WTO requires full respect of WTO rules and disciplines as well as meaningful market access commitments on the part of acceding candidates.

8. Full and faithful implementation of the WTO Agreement and Ministerial Decisions is imperative for the credibility of the multilateral trading system and indispensable for maintaining the momentum for expanding global trade, fostering job creation and raising standards of living in all parts of the world. When we meet at the Third Session we shall further pursue our evaluation of the implementation of individual agreements and the realization of their objectives. Such evaluation would cover, *inter alia*, the problems encountered in implementation and the consequent impact on the trade and development prospects of Members. We reaffirm our commitment to respect the existing schedules for reviews, negotiations and other work to which we have already agreed.

9. We recall that the Marrakesh Agreement Establishing the World Trade Organization states that the WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to the Agreement, and that it may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference. In the light of paragraphs 1–8 above, we decide that a process will be established under the direction of the General Council to ensure full and faithful implementation of existing agreements, and to prepare for the Third Session of the Ministerial Conference. This process shall enable the General Council to submit recommendations regarding the WTO's work programme, including further liberalization sufficiently broad-based to respond to the range of interests and concerns of all Members, within the WTO framework, that will enable us to take decisions at the Third Session of the Ministerial Conference. In this regard, the General Council will meet in special session in September 1998 and periodically thereafter to ensure full and timely completion of its work, fully respecting the principle of decision-making by consensus.

The General Council's work programme shall encompass the following:

(a) recommendations concerning:
  (i) the issues, including those brought forward by Members, relating to implementation of existing agreements and decisions;
  (ii) the negotiations already mandated at Marrakesh, to ensure that such negotiations begin on schedule;
  (iii) future work already provided for under other existing agreements and decisions taken at Marrakesh;

(b) recommendations concerning other possible future work on the basis of the work programme initiated at Singapore;
(c) recommendations on the follow-up to the High-Level Meeting on Least-Developed Countries;
(d) recommendations arising from consideration of other matters proposed and agreed to by Members concerning their multilateral trade relations.

10. The General Council will also submit to the Third Session of the Ministerial Conference, on the basis of consensus, recommendations for decision concerning the further organization and management of the work programme arising from the above, including the scope, structure and time-frames, that will ensure that the work programme is begun and concluded expeditiously.

11. The above work programme shall be aimed at achieving overall balance of interests of all Members.

GENEVA
DECLARATION ON GLOBAL ELECTRONIC COMMERCE
Adopted on 20 May 1998

Ministers,

Recognizing that global electronic commerce is growing and creating new opportunities for trade,

Declare that:

The General Council shall, by its next meeting in special session, establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, including those issues identified by Members. The work programme will involve the relevant World Trade Organization ("WTO") bodies, take into account the economic, financial, and development needs of developing countries, and recognize that work is also being undertaken in other international fora. The General Council should produce a report on the progress of the work programme and any recommendations for action to be submitted at our third session. Without prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, we also declare that Members will continue their current practice of not imposing customs duties on electronic transmissions.

When reporting to our third session, the General Council will review this declaration, the extension of which will be decided by consensus, taking into account the progress of the work programme.

DOHA
MINISTERIAL DECLARATION
Adopted on 14 November 2001

1. The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development. We therefore strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism.

2. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.

3. We recognize the particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy. We are committed to addressing the marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system. We recall the commitments made by Ministers at our meetings in Marrakesh, Singapore and Geneva, and by the international community at the Third UN Conference on Least-Developed Countries in Brussels, to help least-developed countries secure beneficial and meaningful integration into the multilateral trading system and the global economy. We are determined that the WTO will play its part in building effectively on these commitments under the Work Programme we are establishing.

4. We stress our commitment to the WTO as the unique forum for global trade rule-making and liberalization, while also recognizing that regional trade agreements can play an important role in promoting the liberalization and expansion of trade and in fostering development.

5. We are aware that the challenges Members face in a rapidly changing international environment cannot be addressed through measures taken in the trade field alone. We shall continue to work with the Bretton Woods institutions for greater coherence in global economic policy-making.

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system,

and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO's continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.

7. We reaffirm the right of Members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services.

8. We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.

9. We note with particular satisfaction that this Conference has completed the WTO accession procedures for China and Chinese Taipei. We also welcome the accession as new Members, since our last Session, of Albania, Croatia, Georgia, Jordan, Lithuania, Moldova and Oman, and note the extensive market-access commitments already made by these countries on accession. These accessions will greatly strengthen the multilateral trading system, as will those of the 28 countries now negotiating their accession. We therefore attach great importance to concluding accession proceedings as quickly as possible. In particular, we are committed to accelerating the accession of least-developed countries.

10. Recognizing the challenges posed by an expanding WTO membership, we confirm our collective responsibility to ensure internal transparency and the effective participation of all Members. While emphasizing the intergovernmental character of the organization, we are committed to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public. We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system.

11. In view of these considerations, we hereby agree to undertake the broad and balanced Work Programme set out below. This incorporates both an expanded negotiating agenda and other important decisions and activities necessary to address the challenges facing the multilateral trading system.

Work Programme

Implementation-Related Issues and Concerns

12. We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns

in document WT/MIN(01)/17 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.

Agriculture

13. We recognize the work already undertaken in the negotiations initiated in early 2000 under Article 20 of the Agreement on Agriculture, including the large number of negotiating proposals submitted on behalf of a total of 121 Members. We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.

14. Modalities for the further commitments, including provisions for special and differential treatment, shall be established no later than 31 March 2003. Participants shall submit their comprehensive draft Schedules based on these modalities no later than the date of the Fifth Session of the Ministerial Conference. The negotiations, including with respect to rules and disciplines and related legal texts, shall be concluded as part and at the date of conclusion of the negotiating agenda as a whole.

Services

15. The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by Members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with

a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.

Market Access for Non-agricultural Products

16. We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without *a priori* exclusions. The negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII *bis* of GATT 1994 and the provisions cited in paragraph 50 below. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations.

Trade-Related Aspects of Intellectual Property Rights

17. We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate Declaration.

18. With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this Declaration.

19. We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

Relationship Between Trade and Investment

20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced

technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

Interaction Between Trade and Competition Policy

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

Transparency in Government Procurement

26. Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion.

Trade Facilitation

27. Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.

WTO Rules

28. In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

29. We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.

Dispute Settlement Understanding

30. We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and

clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

Trade and Environment

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

32. We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;
(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and
(iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

33. We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them. We also encourage that expertise and experience be shared with Members wishing to perform environmental reviews at the national level. A report shall be prepared on these activities for the Fifth Session.

Electronic Commerce

34. We take note of the work which has been done in the General Council and other relevant bodies since the Ministerial Declaration of 20 May 1998 and agree to continue the Work Programme on Electronic Commerce. The work to date demonstrates that electronic commerce creates new challenges and opportunities for trade for Members at all

stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic commerce. We instruct the General Council to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference. We declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.

Small Economies

35. We agree to a work programme, under the auspices of the General Council, to examine issues relating to the trade of small economies. The objective of this work is to frame responses to the trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading system, and not to create a sub-category of WTO Members. The General Council shall review the work programme and make recommendations for action to the Fifth Session of the Ministerial Conference.

Trade, Debt and Finance

36. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade, debt and finance, and of any possible recommendations on steps that might be taken within the mandate and competence of the WTO to enhance the capacity of the multilateral trading system to contribute to a durable solution to the problem of external indebtedness of developing and least-developed countries, and to strengthen the coherence of international trade and financial policies, with a view to safeguarding the multilateral trading system from the effects of financial and monetary instability. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.

Trade and Transfer of Technology

37. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade and transfer of technology, and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.

Technical Cooperation and Capacity Building

38. We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. We instruct the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction. The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system. Priority shall also be accorded to small, vulnerable,

and transition economies, as well as to Members and Observers without representation in Geneva. We reaffirm our support for the valuable work of the International Trade Centre, which should be enhanced.

39. We underscore the urgent necessity for the effective coordinated delivery of technical assistance with bilateral donors, in the OECD Development Assistance Committee and relevant international and regional intergovernmental institutions, within a coherent policy framework and timetable. In the coordinated delivery of technical assistance, we instruct the Director-General to consult with the relevant agencies, bilateral donors and beneficiaries, to identify ways of enhancing and rationalizing the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries and the Joint Integrated Technical Assistance Programme (JITAP).

40. We agree that there is a need for technical assistance to benefit from secure and predictable funding. We therefore instruct the Committee on Budget, Finance and Administration to develop a plan for adoption by the General Council in December 2001 that will ensure long-term funding for WTO technical assistance at an overall level no lower than that of the current year and commensurate with the activities outlined above.

41. We have established firm commitments on technical cooperation and capacity building in various paragraphs in this Ministerial Declaration. We reaffirm these specific commitments contained in paragraphs 16, 21, 24, 26, 27, 33, 38–40, 42 and 43, and also reaffirm the understanding in paragraph 2 on the important role of sustainably financed technical assistance and capacity-building programmes. We instruct the Director-General to report to the Fifth Session of the Ministerial Conference, with an interim report to the General Council in December 2002 on the implementation and adequacy of these commitments in the identified paragraphs.

Least-Developed Countries

42. We acknowledge the seriousness of the concerns expressed by the least-developed countries (LDCs) in the Zanzibar Declaration adopted by their Ministers in July 2001. We recognize that the integration of the LDCs into the multilateral trading system requires meaningful market access, support for the diversification of their production and export base, and trade-related technical assistance and capacity building. We agree that the meaningful integration of LDCs into the trading system and the global economy will involve efforts by all WTO Members. We commit ourselves to the objective of duty-free, quota-free market access for products originating from LDCs. In this regard, we welcome the significant market access improvements by WTO Members in advance of the Third UN Conference on LDCs (LDC-III), in Brussels, May 2001. We further commit ourselves to consider additional measures for progressive improvements in market access for LDCs. Accession of LDCs remains a priority for the Membership. We agree to work to facilitate and accelerate negotiations with acceding LDCs. We instruct the Secretariat to reflect the priority we attach to LDCs' accessions in the annual plans for technical assistance. We reaffirm the commitments we undertook at LDC-III, and agree that the WTO should take into account, in designing its work programme for LDCs, the trade-related elements of the Brussels Declaration and Programme of Action, consistent with the WTO's mandate, adopted at LDC-III. We instruct the Sub-Committee for Least-Developed Countries to design such a work programme and to report on the agreed work programme to the General Council at its first meeting in 2002.

43. We endorse the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (IF) as a viable model for LDCs' trade development. We

urge development partners to significantly increase contributions to the IF Trust Fund and WTO extra-budgetary trust funds in favour of LDCs. We urge the core agencies, in coordination with development partners, to explore the enhancement of the IF with a view to addressing the supply-side constraints of LDCs and the extension of the model to all LDCs, following the review of the IF and the appraisal of the ongoing Pilot Scheme in selected LDCs. We request the Director-General, following coordination with heads of the other agencies, to provide an interim report to the General Council in December 2002 and a full report to the Fifth Session of the Ministerial Conference on all issues affecting LDCs.

Special and Differential Treatment

44. We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.

Organization and Management of the Work Programme

45. The negotiations to be pursued under the terms of this Declaration shall be concluded not later than 1 January 2005. The Fifth Session of the Ministerial Conference will take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary. When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.

46. The overall conduct of the negotiations shall be supervised by a Trade Negotiations Committee under the authority of the General Council. The Trade Negotiations Committee shall hold its first meeting not later than 31 January 2002. It shall establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations.

47. With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

48. Negotiations shall be open to:

(i) all Members of the WTO; and
(ii) States and separate customs territories currently in the process of accession and those that inform Members, at a regular meeting of the General Council, of their intention to negotiate the terms of their membership and for whom an accession working party is established.

Decisions on the outcomes of the negotiations shall be taken only by WTO Members.

49. The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.

50. The negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions.

51. The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.

52. Those elements of the Work Programme which do not involve negotiations are also accorded a high priority. They shall be pursued under the overall supervision of the General Council, which shall report on progress to the Fifth Session of the Ministerial Conference.

IMPLEMENTATION-RELATED ISSUES AND CONCERNS
Decision of 14 November 2001

The Ministerial Conference,

Having regard to Articles IV.1, IV.5 and IX of the Marrakesh Agreement Establishing the World Trade Organization (WTO);

Mindful of the importance that Members attach to the increased participation of developing countries in the multilateral trading system, and of the need to ensure that the system responds fully to the needs and interests of all participants;

Determined to take concrete action to address issues and concerns that have been raised by many developing-country Members regarding the implementation of some WTO Agreements and Decisions, including the difficulties and resource constraints that have been encountered in the implementation of obligations in various areas;

Recalling the 3 May 2000 Decision of the General Council to meet in special sessions to address outstanding implementation issues, and to assess the existing difficulties, identify ways needed to resolve them, and take decisions for appropriate action not later than the Fourth Session of the Ministerial Conference;

Noting the actions taken by the General Council in pursuance of this mandate at its Special Sessions in October and December 2000 (WT/L/384), as well as the review and further discussion undertaken at the Special Sessions held in April, July and October 2001, including the referral of additional issues to relevant WTO bodies or their chairpersons for further work;

Noting also the reports on the issues referred to the General Council from subsidiary bodies and their chairpersons and from the Director-General, and the discussions as well as the clarifications provided and understandings reached on implementation issues in the intensive informal and formal meetings held under this process since May 2000;

Decides as follows:

1. General Agreement on Tariffs and Trade 1994 (GATT 1994)
   - 1.1 Reaffirms that Article XVIII of the GATT 1994 is a special and differential treatment provision for developing countries and that recourse to it should be less onerous than to Article XII of the GATT 1994.
   - 1.2 Noting the issues raised in the report of the Chairperson of the Committee on Market Access (WT/GC/50) concerning the meaning to be given to the phrase "substantial interest" in paragraph 2(d) of Article XIII of the GATT 1994, the Market Access Committee is directed to give further consideration to the issue and make recommendations to the General Council as expeditiously as possible but in any event not later than the end of 2002.

2. Agreement on Agriculture
   - 2.1 Urges Members to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns.
   - 2.2 Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, and approves the recommendations contained therein

regarding (i) food aid; (ii) technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure; (iii) financing normal levels of commercial imports of basic foodstuffs; and (iv) review of follow-up.

2.3 Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the implementation of Article 10.2 of the Agreement on Agriculture, and approves the recommendations and reporting requirements contained therein.

2.4 Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the administration of tariff rate quotas and the submission by Members of addenda to their notifications, and endorses the decision by the Committee to keep this matter under review.

3. Agreement on the Application of Sanitary and Phytosanitary Measures

3.1 Where the appropriate level of sanitary and phytosanitary protection allows scope for the phased introduction of new sanitary and phytosanitary measures, the phrase "longer time-frame for compliance" referred to in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures, shall be understood to mean normally a period of not less than 6 months. Where the appropriate level of sanitary and phytosanitary protection does not allow scope for the phased introduction of a new measure, but specific problems are identified by a Member, the Member applying the measure shall upon request enter into consultations with the country with a view to finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member's appropriate level of protection.

3.2 Subject to the conditions specified in paragraph 2 of Annex B to the Agreement on the Application of Sanitary and Phytosanitary Measures, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months. It is understood that timeframes for specific measures have to be considered in the context of the particular circumstances of the measure and actions necessary to implement it. The entry into force of measures which contribute to the liberalization of trade should not be unnecessarily delayed.

3.3 Takes note of the Decision of the Committee on Sanitary and Phytosanitary Measures (G/SPS/19) regarding equivalence, and instructs the Committee to develop expeditiously the specific programme to further the implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

3.4 Pursuant to the provisions of Article 12.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures, the Committee on Sanitary and Phytosanitary Measures is instructed to review the operation and implementation of the Agreement on Sanitary and Phytosanitary Measures at least once every four years.

3.5 (i) Takes note of the actions taken to date by the Director-General to facilitate the increased participation of Members at different levels of development in the work of the relevant international standard setting organizations as well as his efforts to coordinate with these organizations and financial institutions in identifying SPS-related technical assistance needs and how best to address them; and

(ii) urges the Director-General to continue his cooperative efforts with these organizations and institutions in this regard, including with a view to according priority to the effective participation of least-developed countries and facilitating the provision of technical and financial assistance for this purpose.

3.6 (i) Urges Members to provide, to the extent possible, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new SPS measures which may have significant negative effects on their trade; and

(ii) urges Members to ensure that technical assistance is provided to least-developed countries with a view to responding to the special problems faced by them in implementing the Agreement on the Application of Sanitary and Phytosanitary Measures.

4. Agreement on Textiles and Clothing

Reaffirms the commitment to full and faithful implementation of the Agreement on Textiles and Clothing, and agrees:

4.1 that the provisions of the Agreement relating to the early integration of products and the elimination of quota restrictions should be effectively utilised.

4.2 that Members will exercise particular consideration before initiating investigations in the context of antidumping remedies on textile and clothing exports from developing countries previously subject to quantitative restrictions under the Agreement for a period of two years following full integration of this Agreement into the WTO.

4.3 that without prejudice to their rights and obligations, Members shall notify any changes in their rules of origin concerning products falling under the coverage of the Agreement to the Committee on Rules of Origin which may decide to examine them.

Requests the Council for Trade in Goods to examine the following proposals:

4.4 that when calculating the quota levels for small suppliers for the remaining years of the Agreement, Members will apply the most favourable methodology available in respect of those Members under the growth-on-growth provisions from the beginning of the implementation period; extend the same treatment to least-developed countries; and, where possible, eliminate quota restrictions on imports of such Members;

4.5 that Members will calculate the quota levels for the remaining years of the Agreement with respect to other restrained Members as if implementation of the growth-on-growth provision for stage 3 had been advanced to 1 January 2000;

and make recommendations to the General Council by 31 July 2002 for appropriate action.

5. Agreement on Technical Barriers to Trade

5.1 Confirms the approach to technical assistance being developed by the Committee on Technical Barriers to Trade, reflecting the results of the triennial review work in this area, and mandates this work to continue.

5.2 Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

5.3 (i) Takes note of the actions taken to date by the Director-General to facilitate the increased participation of Members at different levels of development in the work of the relevant international standard setting organizations as well as his efforts to coordinate with these organizations and financial institutions in identifying TBT-related technical assistance needs and how best to address them; and

(ii) urges the Director-General to continue his cooperative efforts with these organizations and institutions, including with a view to according priority to the effective participation of least-developed countries and facilitating the provision of technical and financial assistance for this purpose.

5.4 (i) Urges Members to provide, to the extent possible, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new TBT measures which may have significant negative effects on their trade; and

(ii) urges Members to ensure that technical assistance is provided to least-developed countries with a view to responding to the special problems faced by them in implementing the Agreement on Technical Barriers to Trade.

6. Agreement on Trade-Related Investment Measures

6.1 Takes note of the actions taken by the Council for Trade in Goods in regard to requests from some developing-country Members for the extension of the five-year transitional period provided for in Article 5.2 of Agreement on Trade-Related Investment Measures.

6.2 Urges the Council for Trade in Goods to consider positively requests that may be made by least-developed countries under Article 5.3 of the TRIMs Agreement or Article

IX.3 of the WTO Agreement, as well as to take into consideration the particular circumstances of least-developed countries when setting the terms and conditions including time-frames.

7. Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
   - 7.1 Agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.
   - 7.2 Recognizes that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision.
   - 7.3 Takes note that Article 5.8 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 does not specify the time-frame to be used in determining the volume of dumped imports, and that this lack of specificity creates uncertainties in the implementation of the provision. The Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to study this issue and draw up recommendations within 12 months, with a view to ensuring the maximum possible predictability and objectivity in the application of time frames.
   - 7.4 Takes note that Article 18.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires the Committee on Anti-Dumping Practices to review annually the implementation and operation of the Agreement taking into account the objectives thereof. The Committee on Anti-dumping Practices is instructed to draw up guidelines for the improvement of annual reviews and to report its views and recommendations to the General Council for subsequent decision within 12 months.

8. Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
   - 8.1 Takes note of the actions taken by the Committee on Customs Valuation in regard to the requests from a number of developing-country Members for the extension of the five-year transitional period provided for in Article 20.1 of Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.
   - 8.2 Urges the Council for Trade in Goods to give positive consideration to requests that may be made by least-developed country Members under paragraphs 1 and 2 of Annex III of the Customs Valuation Agreement or under Article IX.3 of the WTO Agreement, as well as to take into consideration the particular circumstances of least-developed countries when setting the terms and conditions including time-frames.
   - 8.3 Underlines the importance of strengthening cooperation between the customs administrations of Members in the prevention of customs fraud. In this regard, it is agreed that, further to the 1994 Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, when the customs administration of an importing Member has reasonable grounds to doubt the truth or accuracy of the declared value, it may seek assistance from the customs administration of an exporting Member on the value of the good concerned. In such cases, the exporting Member shall offer cooperation and assistance, consistent with its domestic laws and procedures, including furnishing information on the export value of the good concerned. Any information provided in this context shall be treated in accordance with Article 10 of the Customs Valuation Agreement. Furthermore, recognizing the legitimate concerns expressed by the customs administrations

of several importing Members on the accuracy of the declared value, the Committee on Customs Valuation is directed to identify and assess practical means to address such concerns, including the exchange of information on export values and to report to the General Council by the end of 2002 at the latest.

9. Agreement on Rules of Origin
   9.1 Takes note of the report of the Committee on Rules of Origin (G/RO/48) regarding progress on the harmonization work programme, and urges the Committee to complete its work by the end of 2001.
   9.2 Agrees that any interim arrangements on rules of origin implemented by Members in the transitional period before the entry into force of the results of the harmonisation work programme shall be consistent with the Agreement on Rules of Origin, particularly Articles 2 and 5 thereof. Without prejudice to Members' rights and obligations, such arrangements may be examined by the Committee on Rules of Origin.

10. Agreement on Subsidies and Countervailing Measures
   10.1 Agrees that Annex VII(b) to the Agreement on Subsidies and Countervailing Measures includes the Members that are listed therein until their GNP per capita reaches US $1,000 in constant 1990 dollars for three consecutive years. This decision will enter into effect upon the adoption by the Committee on Subsidies and Countervailing Measures of an appropriate methodology for calculating constant 1990 dollars. If, however, the Committee on Subsidies and Countervailing Measures does not reach a consensus agreement on an appropriate methodology by 1 January 2003, the methodology proposed by the Chairman of the Committee set forth in G/SCM/38, Appendix 2 shall be applied. A Member shall not leave Annex VII(b) so long as its GNP per capita in current dollars has not reached US $1000 based upon the most recent data from the World Bank.
   10.2 Takes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed in accordance with paragraph 13 below. During the course of the negotiations, Members are urged to exercise due restraint with respect to challenging such measures.
   10.3 Agrees that the Committee on Subsidies and Countervailing Measures shall continue its review of the provisions of the Agreement on Subsidies and Countervailing Measures regarding countervailing duty investigations and report to the General Council by 31 July 2002.
   10.4 Agrees that if a Member has been excluded from the list in paragraph (b) of Annex VII to the Agreement on Subsidies and Countervailing Measures, it shall be re-included in it when its GNP per capita falls back below US$ 1,000.
   10.5 Subject to the provisions of Articles 27.5 and 27.6, it is reaffirmed that least-developed country Members are exempt from the prohibition on export subsidies set forth in Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures, and thus have flexibility to finance their exporters, consistent with their development needs. It is understood that the eight-year period in Article 27.5 within which a least-developed country Member must phase out its export subsidies in respect of a product in which it is export-competitive begins from the date export competitiveness exists within the meaning of Article 27.6.
   10.6 Having regard to the particular situation of certain developing-country Members, directs the Committee on Subsidies and Countervailing Measures to extend the transition period, under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, for certain export subsidies provided by such Members, pursuant to the procedures set forth in document G/SCM/39. Furthermore, when considering a request for an extension of the transition period under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, and in

order to avoid that Members at similar stages of development and having a similar order of magnitude of share in world trade are treated differently in terms of receiving such extensions for the same eligible programmes and the length of such extensions, directs the Committee to extend the transition period for those developing countries, after taking into account the relative competitiveness in relation to other developing-country Members who have requested extension of the transition period following the procedures set forth in document G/SCM/39.

11. Agreement on Trade-Related Aspects of Intellectua Property Rights (TRIPS)

11.1 The TRIPS Council is directed to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.

11.2 Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed-country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually.

12. Cross-cutting Issues

12.1 The Committee on Trade and Development is instructed:

(i) to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;

(ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and

(iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules.

The work of the Committee on Trade and Development in this regard shall take fully into consideration previous work undertaken as noted in WT/COMTD/W/77/Rev.1. It will also be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees.

12.2 Reaffirms that preferences granted to developing countries pursuant to the Decision of the Contracting Parties of 28 November 1979 ("Enabling Clause")[1] should be generalised, non-reciprocal and non-discriminatory.

13. Outstanding Implementation Issues[2]

Agrees that outstanding implementation issues be addressed in accordance with paragraph 12 of the Ministerial Declaration (WT/MIN(01)/DEC/1).

[1] BISD 26S/203.

[2] A list of these issues is compiled in document Job(01)/152/Rev.1.

14. Final Provisions

Requests the Director-General, consistent with paragraphs 38 to 43 of the Ministerial Declaration (WT/MIN(01)/DEC/1), to ensure that WTO technical assistance focuses, on a priority basis, on assisting developing countries to implement existing WTO obligations as well as on increasing their capacity to participate more effectively in future multilateral trade negotiations. In carrying out this mandate, the WTO Secretariat should cooperate more closely with international and regional intergovernmental organisations so as to increase efficiency and synergies and avoid duplication of programmes.

TRIPS DECLARATION
DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH
Adopted on 14 November 2001

1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.

2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.

4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

(a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

(b) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.

(c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

(d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

6. We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

7. We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to

least-developed country Members pursuant to Article 66.2. We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.

CANCÚN MINISTERIAL STATEMENT
Adopted on 14 September 2003

1. As we conclude our Fifth Ministerial Conference in Cancún, we would like to express our deep appreciation to the Government and people of Mexico for the excellent organization and warm hospitality we have received in Cancún.

2. At this meeting we have welcomed Cambodia and Nepal as the first least-developed countries to accede to the WTO since its establishment.

3. All participants have worked hard and constructively to make progress as required under the Doha mandates. We have, indeed, made considerable progress. However, more work needs to be done in some key areas to enable us to proceed towards the conclusion of the negotiations in fulfilment of the commitments we took at Doha.

4. We therefore instruct our officials to continue working on outstanding issues with a renewed sense of urgency and purpose and taking fully into account all the views we have expressed in this Conference. We ask the Chairman of the General Council, working in close co-operation with the Director-General, to coordinate this work and to convene a meeting of the General Council at Senior Officials level no later than 15 December 2003 to take the action necessary at that stage to enable us to move towards a successful and timely conclusion of the negotiations. We shall continue to exercise close personal supervision of this process.

5. We will bring with us into this new phase all the valuable work that has been done at this Conference. In those areas where we have reached a high level of convergence on texts, we undertake to maintain this convergence while working for an acceptable overall outcome.

6. Notwithstanding this setback, we reaffirm all our Doha Declarations and Decisions and recommit ourselves to working to implement them fully and faithfully.

DOHA WORK PROGRAMME
Decision Adopted by the General Council on 1 August 2004

1. The General Council reaffirms the Ministerial Declarations and Decisions adopted at Doha and the full commitment of all Members to give effect to them. The Council emphasizes Members' resolve to complete the Doha Work Programme fully and to conclude successfully the negotiations launched at Doha. Taking into account the Ministerial Statement adopted at Cancún on 14 September 2003, and the statements by the Council Chairman and the Director-General at the Council meeting of 15–16 December 2003, the Council takes note of the report by the Chairman of the Trade Negotiations Committee (TNC) and agrees to take action as follows:

a. *Agriculture*: the General Council adopts the framework set out in Annex A to this document.

b. *Cotton*: the General Council reaffirms the importance of the Sectoral Initiative on Cotton and takes note of the parameters set out in Annex A within which the trade-related aspects of this issue will be pursued in the agriculture negotiations. The General Council also attaches importance to the development aspects of the Cotton Initiative and wishes to stress the complementarity between the trade and development aspects. The Council takes note of the recent Workshop on Cotton in Cotonou on 23–24 March 2004 organized by the WTO Secretariat, and other bilateral and multilateral efforts to make progress on the development assistance aspects and instructs the Secretariat to continue to work with the development community and to provide the Council with periodic reports on relevant developments.

Members should work on related issues of development multilaterally with the international financial institutions, continue their bilateral programmes, and all developed countries are urged to participate. In this regard, the General Council instructs the Director General to consult with the relevant international organizations, including the Bretton Woods Institutions, the Food and Agriculture Organization and the International Trade Centre to direct effectively existing programmes and any additional resources towards development of the economies where cotton has vital importance.

c. *Non-agricultural Market Access*: the General Council adopts the framework set out in Annex B to this document.

d. *Development*:
Principles: development concerns form an integral part of the Doha Ministerial Declaration. The General Council rededicates and recommits Members to fulfilling the development dimension of the Doha Development Agenda, which places the needs and interests of developing and least-developed countries at the heart of the Doha Work Programme. The Council reiterates the important role that enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity building programmes can play in the economic development of these countries.

Special and Differential Treatment: the General Council reaffirms that provisions for special and differential (S&D) treatment are an integral part of the WTO Agreements. The Council recalls Ministers' decision in Doha to review all S&D treatment provisions with a view to strengthening them and making them more precise, effective and operational.

The Council recognizes the progress that has been made so far. The Council instructs the Committee on Trade and Development in Special Session to expeditiously complete the review of all the outstanding Agreement-specific proposals and report to the General Council, with clear recommendations for a decision, by July 2005. The Council further instructs the Committee, within the parameters of the Doha mandate, to address all other outstanding work, including on the cross-cutting issues, the monitoring mechanism and the incorporation of S&D treatment into the architecture of WTO rules, as referred to in TN/CTD/7 and report, as appropriate, to the General Council.

The Council also instructs all WTO bodies to which proposals in Category II have been referred to expeditiously complete the consideration of these proposals and report to the General Council, with clear recommendations for a decision, as soon as possible and no later than July 2005. In doing so these bodies will ensure that, as far as possible, their meetings do not overlap so as to enable full and effective participation of developing countries in these discussions.

Technical Assistance: the General Council recognizes the progress that has been made since the Doha Ministerial Conference in expanding Trade-Related Technical Assistance (TRTA) to developing countries and low-income countries in transition. In furthering this effort the Council affirms that such countries, and in particular least-developed countries, should be provided with enhanced TRTA and capacity building, to increase their effective participation in the negotiations, to facilitate their implementation of WTO rules, and to enable them to adjust and diversify their economies. In this context the Council welcomes and further encourages the improved coordination with other agencies, including under the Integrated Framework for TRTA for the LDCs (IF) and the Joint Integrated Technical Assistance Programme (JITAP).

Implementation: concerning implementation-related issues, the General Council reaffirms the mandates Ministers gave in paragraph 12 of the Doha Ministerial Declaration and the Doha Decision on Implementation-Related Issues and Concerns, and renews Members' determination to find appropriate solutions to outstanding issues. The Council instructs the Trade Negotiations Committee, negotiating bodies and other WTO bodies concerned to redouble their efforts to find appropriate solutions as a priority. Without prejudice to the positions of Members, the Council requests the Director-General to continue with his consultative process on all outstanding implementation issues under paragraph 12(b) of the Doha Ministerial Declaration, including on issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits, if need be by appointing Chairpersons of concerned WTO bodies as his Friends and/or by holding dedicated consultations. The Director-General shall report to the TNC and the General Council no later than May 2005. The Council shall review progress and take any appropriate action no later than July 2005.

Other Development Issues: in the ongoing market access negotiations, recognising the fundamental principles of the WTO and relevant provisions of GATT 1994, special attention shall be given to the specific trade and development related needs and concerns of developing countries, including capacity constraints. These particular concerns of developing countries, including relating to food security, rural development, livelihood, preferences, commodities and net food imports, as well as prior unilateral liberalisation, should be taken into consideration, as appropriate, in the course of the Agriculture and NAMA negotiations. The trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading system, should also be addressed, without creating a sub-category of Members, as part of a work programme, as mandated in paragraph 35 of the Doha Ministerial Declaration.

Least-Developed Countries: the General Council reaffirms the commitments made at Doha concerning least-developed countries and renews its determination to fulfil these commitments. Members will continue to take due account of the concerns of

least-developed countries in the negotiations. The Council confirms that nothing in this Decision shall detract in any way from the special provisions agreed by Members in respect of these countries.

e. Services: the General Council takes note of the report to the TNC by the Special Session of the Council for Trade in Services[1] and reaffirms Members' commitment to progress in this area of the negotiations in line with the Doha mandate. The Council adopts the recommendations agreed by the Special Session, set out in Annex C to this document, on the basis of which further progress in the services negotiations will be pursued. Revised offers should be tabled by May 2005.

f. Other negotiating bodies:
Rules, Trade & Environment and TRIPS: the General Council takes note of the reports to the TNC by the Negotiating Group on Rules and by the Special Sessions of the Committee on Trade and Environment and the TRIPS Council.[2] The Council reaffirms Members' commitment to progress in all of these areas of the negotiations in line with the Doha mandates.

Dispute Settlement: the General Council takes note of the report to the TNC by the Special Session of the Dispute Settlement Body[3] and reaffirms Members' commitment to progress in this area of the negotiations in line with the Doha mandate. The Council adopts the TNC's recommendation that work in the Special Session should continue on the basis set out by the Chairman of that body in his report to the TNC.

g. Trade Facilitation: taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried out under the auspices of the General Council both prior to the Fifth Ministerial Conference and after its conclusion, the General Council decides by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D to this document.

Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20–22, 23–25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

h. Other elements of the Work Programme: the General Council reaffirms the high priority Ministers at Doha gave to those elements of the Work Programme which do not involve negotiations. Noting that a number of these issues are of particular interest to developing-country Members, the Council emphasizes its commitment to fulfil the mandates given by Ministers in all these areas. To this end, the General Council and other relevant bodies shall report in line with their Doha mandates to the Sixth Session of the Ministerial Conference. The moratoria covered by paragraph 11.1 of the Doha Ministerial Decision on Implementation-related Issues and Concerns and paragraph 34 of the Doha Ministerial Declaration are extended up to the Sixth Ministerial Conference.

2. The General Council agrees that this Decision and its Annexes shall not be used in any dispute settlement proceeding under the DSU and shall not be used for interpreting the existing WTO Agreements.

[1] This report is contained in document TN/S/16.
[2] The reports to the TNC referenced in this paragraph are contained in the following documents: Negotiating Group on Rules—TN/RL/9; Special Session of the Committee on Trade and Environment—TN/TE/9; Special Session of the Council for TRIPS—TN/IP/10.
[3] This report is contained in document TN/DS/10.

3. The General Council calls on all Members to redouble their efforts towards the conclusion of a balanced overall outcome of the Doha Development Agenda in fulfilment of the commitments Ministers took at Doha. The Council agrees to continue the negotiations launched at Doha beyond the timeframe set out in paragraph 45 of the Doha Declaration, leading to the Sixth Session of the Ministerial Conference. Recalling its decision of 21 October 2003 to accept the generous offer of the Government of Hong Kong, China to host the Sixth Session, the Council further agrees that this Session will be held in December 2005.

ANNEX A

FRAMEWORK FOR ESTABLISHING MODALITIES IN AGRICULTURE

1. The starting point for the current phase of the agriculture negotiations has been the mandate set out in Paragraph 13 of the Doha Ministerial Declaration. This in turn built on the long-term objective of the Agreement on Agriculture to establish a fair and market-oriented trading system through a programme of fundamental reform. The elements below offer the additional precision required at this stage of the negotiations and thus the basis for the negotiations of full modalities in the next phase. The level of ambition set by the Doha mandate will continue to be the basis for the negotiations on agriculture.

2. The final balance will be found only at the conclusion of these subsequent negotiations and within the Single Undertaking. To achieve this balance, the modalities to be developed will need to incorporate operationally effective and meaningful provisions for special and differential treatment for developing country Members. Agriculture is of critical importance to the economic development of developing country Members and they must be able to pursue agricultural policies that are supportive of their development goals, poverty reduction strategies, food security and livelihood concerns. Non-trade concerns, as referred to in Paragraph 13 of the Doha Declaration, will be taken into account.

3. The reforms in all three pillars form an interconnected whole and must be approached in a balanced and equitable manner.

4. The General Council recognizes the importance of cotton for a certain number of countries and its vital importance for developing countries, especially LDCs. It will be addressed ambitiously, expeditiously, and specifically, within the agriculture negotiations. The provisions of this framework provide a basis for this approach, as does the sectoral initiative on cotton. The Special Session of the Committee on Agriculture shall ensure appropriate prioritization of the cotton issue independently from other sectoral initiatives. A subcommittee on cotton will meet periodically and report to the Special Session of the Committee on Agriculture to review progress. Work shall encompass all trade-distorting policies affecting the sector in all three pillars of market access, domestic support, and export competition, as specified in the Doha text and this Framework text.

5. Coherence between trade and development aspects of the cotton issue will be pursued as set out in paragraph 1.b of the text to which this Framework is annexed.

DOMESTIC SUPPORT

6. The Doha Ministerial Declaration calls for "substantial reductions in trade-distorting domestic support". With a view to achieving these substantial reductions, the negotiations in this pillar will ensure the following:

- Special and differential treatment remains an integral component of domestic support. Modalities to be developed will include longer implementation periods and lower reduction coefficients for all types of trade-distorting domestic support and continued access to the provisions under Article 6.2.

- There will be a strong element of harmonisation in the reductions made by developed Members. Specifically, higher levels of permitted trade-distorting domestic support will be subject to deeper cuts.
- Each such Member will make a substantial reduction in the overall level of its trade-distorting support from bound levels.
- As well as this overall commitment, Final Bound Total AMS and permitted *de minimis* levels will be subject to substantial reductions and, in the case of the Blue Box, will be capped as specified in paragraph 15 in order to ensure results that are coherent with the long-term reform objective. Any clarification or development of rules and conditions to govern trade distorting support will take this into account.

Overall Reduction: A Tiered Formula

7. The overall base level of all trade-distorting domestic support, as measured by the Final Bound Total AMS plus permitted *de minimis* level and the level agreed in paragraph 8 below for Blue Box payments, will be reduced according to a tiered formula. Under this formula, Members having higher levels of trade-distorting domestic support will make greater overall reductions in order to achieve a harmonizing result. As the first instalment of the overall cut, in the first year and throughout the implementation period, the sum of all trade-distorting support will not exceed 80 per cent of the sum of Final Bound Total AMS plus permitted *de minimis* plus the Blue Box at the level determined in paragraph 15.

8. The following parameters will guide the further negotiation of this tiered formula:

- This commitment will apply as a minimum overall commitment. It will not be applied as a ceiling on reductions of overall trade-distorting domestic support, should the separate and complementary formulae to be developed for Total AMS, *de minimis* and Blue Box payments imply, when taken together, a deeper cut in overall trade-distorting domestic support for an individual Member.
- The base for measuring the Blue Box component will be the higher of existing Blue Box payments during a recent representative period to be agreed and the cap established in paragraph 15 below.

Final Bound Total AMS: A Tiered Formula

9. To achieve reductions with a harmonizing effect:

- Final Bound Total AMS will be reduced substantially, using a tiered approach.
- Members having higher Total AMS will make greater reductions.
- To prevent circumvention of the objective of the Agreement through transfers of unchanged domestic support between different support categories, product-specific AMSs will be capped at their respective average levels according to a methodology to be agreed.
- Substantial reductions in Final Bound Total AMS will result in reductions of some product-specific support.

10. Members may make greater than formula reductions in order to achieve the required level of cut in overall trade-distorting domestic support.

De Minimis

11. Reductions in *de minimis* will be negotiated taking into account the principle of special and differential treatment. Developing countries that allocate almost all *de minimis* support for subsistence and resource-poor farmers will be exempt.

12. Members may make greater than formula reductions in order to achieve the required level of cut in overall trade-distorting domestic support.

Blue Box

13. Members recognize the role of the Blue Box in promoting agricultural reforms. In this light, Article 6.5 will be reviewed so that Members may have recourse to the following measures:

- Direct payments under production-limiting programmes if:
  — such payments are based on fixed and unchanging areas and yields; or
  — such payments are made on 85% or less of a fixed and unchanging base level of production; or
  — livestock payments are made on a fixed and unchanging number of head.

Or

- Direct payments that do not require production if:
  — such payments are based on fixed and unchanging bases and yields; or
  — livestock payments made on a fixed and unchanging number of head; and
  — such payments are made on 85% or less of a fixed and unchanging base level of production.

14. The above criteria, along with additional criteria will be negotiated. Any such criteria will ensure that Blue Box payments are less trade-distorting than AMS measures, it being understood that:

- Any new criteria would need to take account of the balance of WTO rights and obligations.
- Any new criteria to be agreed will not have the perverse effect of undoing ongoing reforms.

15. Blue Box support will not exceed 5% of a Member's average total value of agricultural production during an historical period. The historical period will be established in the negotiations. This ceiling will apply to any actual or potential Blue Box user from the beginning of the implementation period. In cases where a Member has placed an exceptionally large percentage of its trade-distorting support in the Blue Box, some flexibility will be provided on a basis to be agreed to ensure that such a Member is not called upon to make a wholly disproportionate cut.

Green Box

16. Green Box criteria will be reviewed and clarified with a view to ensuring that Green Box measures have no, or at most minimal, trade-distorting effects or effects on production. Such a review and clarification will need to ensure that the basic concepts, principles and effectiveness of the Green Box remain and take due account of non-trade concerns. The improved obligations for monitoring and surveillance of all new disciplines foreshadowed in paragraph 48 below will be particularly important with respect to the Green Box.

EXPORT COMPETITION

17. The Doha Ministerial Declaration calls for "reduction of, with a view to phasing out, all forms of export subsidies". As an outcome of the negotiations, Members agree

to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date.

End Point

18. The following will be eliminated by the end date to be agreed:

- Export subsidies as scheduled.
- Export credits, export credit guarantees or insurance programmes with repayment periods beyond 180 days.
- Terms and conditions relating to export credits, export credit guarantees or insurance programmes with repayment periods of 180 days and below which are not in accordance with disciplines to be agreed. These disciplines will cover, *inter alia*, payment of interest, minimum interest rates, minimum premium requirements, and other elements which can constitute subsidies or otherwise distort trade.
- Trade distorting practices with respect to exporting STEs including eliminating export subsidies provided to or by them, government financing, and the underwriting of losses. The issue of the future use of monopoly powers will be subject to further negotiation.
- Provision of food aid that is not in conformity with operationally effective disciplines to be agreed. The objective of such disciplines will be to prevent commercial displacement. The role of international organizations as regards the provision of food aid by Members, including related humanitarian and developmental issues, will be addressed in the negotiations. The question of providing food aid exclusively in fully grant form will also be addressed in the negotiations.

19. Effective transparency provisions for paragraph 18 will be established. Such provisions, in accordance with standard WTO practice, will be consistent with commercial confidentiality considerations.

Implementation

20. Commitments and disciplines in paragraph 18 will be implemented according to a schedule and modalities to be agreed. Commitments will be implemented by annual instalments. Their phasing will take into account the need for some coherence with internal reform steps of Members.

21. The negotiation of the elements in paragraph 18 and their implementation will ensure equivalent and parallel commitments by Members.

Special and Differential Treatment

22. Developing country Members will benefit from longer implementation periods for the phasing out of all forms of export subsidies.

23. Developing countries will continue to benefit from special and differential treatment under the provisions of Article 9.4 of the Agreement on Agriculture for a reasonable period, to be negotiated, after the phasing out of all forms of export subsidies and implementation of all disciplines identified above are completed.

24. Members will ensure that the disciplines on export credits, export credit guarantees or insurance programs to be agreed will make appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries as provided for in paragraph 4 of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing

Developing Countries. Improved obligations for monitoring and surveillance of all new disciplines as foreshadowed in paragraph 48 will be critically important in this regard. Provisions to be agreed in this respect must not undermine the commitments undertaken by Members under the obligations in paragraph 18 above.

25. STEs in developing country Members which enjoy special privileges to preserve domestic consumer price stability and to ensure food security will receive special consideration for maintaining monopoly status.

Special Circumstances

26. In exceptional circumstances, which cannot be adequately covered by food aid, commercial export credits or preferential international financing facilities, ad hoc temporary financing arrangements relating to exports to developing countries may be agreed by Members. Such agreements must not have the effect of undermining commitments undertaken by Members in paragraph 18 above, and will be based on criteria and consultation procedures to be established.

MARKET ACCESS

27. The Doha Ministerial Declaration calls for "substantial improvements in market access". Members also agreed that special and differential treatment for developing Members would be an integral part of all elements in the negotiations.

The Single Approach: a Tiered Formula

28. To ensure that a single approach for developed and developing country Members meets all the objectives of the Doha mandate, tariff reductions will be made through a tiered formula that takes into account their different tariff structures.

29. To ensure that such a formula will lead to substantial trade expansion, the following principles will guide its further negotiation:

- Tariff reductions will be made from bound rates. Substantial overall tariff reductions will be achieved as a final result from negotiations.
- Each Member (other than LDCs) will make a contribution. Operationally effective special and differential provisions for developing country Members will be an integral part of all elements.
- Progressivity in tariff reductions will be achieved through deeper cuts in higher tariffs with flexibilities for sensitive products. Substantial improvements in market access will be achieved for all products.

30. The number of bands, the thresholds for defining the bands and the type of tariff reduction in each band remain under negotiation. The role of a tariff cap in a tiered formula with distinct treatment for sensitive products will be further evaluated.

Sensitive Products

Selection

31. Without undermining the overall objective of the tiered approach, Members may designate an appropriate number, to be negotiated, of tariff lines to be treated as sensitive, taking account of existing commitments for these products.

Treatment

32. The principle of 'substantial improvement' will apply to each product.

33. 'Substantial improvement' will be achieved through combinations of tariff quota commitments and tariff reductions applying to each product. However, balance in this negotiation will be found only if the final negotiated result also reflects the sensitivity of the product concerned.

34. Some MFN-based tariff quota expansion will be required for all such products. A base for such an expansion will be established, taking account of coherent and equitable criteria to be developed in the negotiations. In order not to undermine the objective of the tiered approach, for all such products, MFN based tariff quota expansion will be provided under specific rules to be negotiated taking into account deviations from the tariff formula.

Other Elements

35. Other elements that will give the flexibility required to reach a final balanced result include reduction or elimination of in-quota tariff rates**,** and operationally effective improvements in tariff quota administration for existing tariff quotas so as to enable Members, and particularly developing country Members, to fully benefit from the market access opportunities under tariff rate quotas.

36. Tariff escalation will be addressed through a formula to be agreed.

37. The issue of tariff simplification remains under negotiation.

38. The question of the special agricultural safeguard (SSG) remains under negotiation.

Special and differential treatment

39. Having regard to their rural development, food security and/or livelihood security needs, special and differential treatment for developing countries will be an integral part of all elements of the negotiation, including the tariff reduction formula, the number and treatment of sensitive products, expansion of tariff rate quotas, and implementation period.

40. Proportionality will be achieved by requiring lesser tariff reduction commitments or tariff quota expansion commitments from developing country Members.

41. Developing country Members will have the flexibility to designate an appropriate number of products as Special Products, based on criteria of food security, livelihood security and rural development needs. These products will be eligible for more flexible treatment. The criteria and treatment of these products will be further specified during the negotiation phase and will recognize the fundamental importance of Special Products to developing countries.

42. A Special Safeguard Mechanism (SSM) will be established for use by developing country Members.

43. Full implementation of the long-standing commitment to achieve the fullest liberalisation of trade in tropical agricultural products and for products of particular importance to the diversification of production from the growing of illicit narcotic crops is overdue and will be addressed effectively in the market access negotiations.

44. The importance of long-standing preferences is fully recognised. The issue of preference erosion will be addressed. For the further consideration in this regard, paragraph 16 and other relevant provisions of TN/AG/W/1/Rev.1 will be used as a reference.

LEAST- DEVELOPED COUNTRIES

45. Least-Developed Countries, which will have full access to all special and differential treatment provisions above, are not required to undertake reduction commitments. Developed Members, and developing country Members in a position to do so, should provide duty-free and quota-free market access for products originating from least-developed countries.

46. Work on cotton under all the pillars will reflect the vital importance of this sector to certain LDC Members and we will work to achieve ambitious results expeditiously.

RECENTLY ACCEDED MEMBERS

47. The particular concerns of recently acceded Members will be effectively addressed through specific flexibility provisions.

MONITORING AND SURVEILLANCE

48. Article 18 of the Agreement on Agriculture will be amended with a view to enhancing monitoring so as to effectively ensure full transparency, including through timely and complete notifications with respect to the commitments in market access, domestic support and export competition. The particular concerns of developing countries in this regard will be addressed.

OTHER ISSUES

49. Issues of interest but not agreed: sectoral initiatives, differential export taxes, GIs.

50. Disciplines on export prohibitions and restrictions in Article 12.1 of the Agreement on Agriculture will be strengthened.

ANNEX B

FRAMEWORK FOR ESTABLISHING MODALITIES IN MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

1. This Framework contains the initial elements for future work on modalities by the Negotiating Group on Market Access. Additional negotiations are required to reach agreement on the specifics of some of these elements. These relate to the formula, the issues concerning the treatment of unbound tariffs in indent two of paragraph 5, the flexibilities for developing-country participants, the issue of participation in the sectorial tariff component and the preferences. In order to finalize the modalities, the Negotiating Group is instructed to address these issues expeditiously in a manner consistent with the mandate of paragraph 16 of the Doha Ministerial Declaration and the overall balance therein.

2. We reaffirm that negotiations on market access for non-agricultural products shall aim to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. We also reaffirm the importance of special and differential treatment and less than full reciprocity in reduction commitments as integral parts of the modalities.

3. We acknowledge the substantial work undertaken by the Negotiating Group on Market Access and the progress towards achieving an agreement on negotiating modalities. We take note of the constructive dialogue on the Chair's Draft Elements of Modalities (TN/MA/W/35/Rev.1) and confirm our intention to use this document as a reference for the future work of the Negotiating Group. We instruct the Negotiating Group to continue its work, as mandated by paragraph 16 of the Doha Ministerial Declaration with its corresponding references to the relevant provisions of Article XXVIII *bis* of GATT 1994 and to the provisions cited in paragraph 50 of the Doha Ministerial Declaration, on the basis set out below.

4. We recognize that a formula approach is key to reducing tariffs, and reducing or eliminating tariff peaks, high tariffs, and tariff escalation. We agree that the Negotiating Group should continue its work on a non-linear formula applied on a line-by-line basis which shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments.

5. We further agree on the following elements regarding the formula:

- product coverage shall be comprehensive without *a priori* exclusions;
- tariff reductions or elimination shall commence from the bound rates after full implementation of current concessions; however, for unbound tariff lines, the basis for commencing the tariff reductions shall be [two] times the MFN applied rate in the base year;
- the base year for MFN applied tariff rates shall be 2001 (applicable rates on 14 November);
- credit shall be given for autonomous liberalization by developing countries provided that the tariff lines were bound on an MFN basis in the WTO since the conclusion of the Uruguay Round;

— all non-*ad valorem* duties shall be converted to *ad valorem* equivalents on the basis of a methodology to be determined and bound in *ad valorem* terms;
— negotiations shall commence on the basis of the HS96 or HS2002 nomenclature, with the results of the negotiations to be finalized in HS2002 nomenclature;
— the reference period for import data shall be 1999–2001.

6. We furthermore agree that, as an exception, participants with a binding coverage of non-agricultural tariff lines of less than [35] percent would be exempt from making tariff reductions through the formula. Instead, we expect them to bind [100] percent of non-agricultural tariff lines at an average level that does not exceed the overall average of bound tariffs for all developing countries after full implementation of current concessions.

7. We recognize that a sectorial tariff component, aiming at elimination or harmonization is another key element to achieving the objectives of paragraph 16 of the Doha Ministerial Declaration with regard to the reduction or elimination of tariffs, in particular on products of export interest to developing countries. We recognize that participation by all participants will be important to that effect. We therefore instruct the Negotiating Group to pursue its discussions on such a component, with a view to defining product coverage, participation, and adequate provisions of flexibility for developing-country participants.

8. We agree that developing-country participants shall have longer implementation periods for tariff reductions. In addition, they shall be given the following flexibility:

a) applying less than formula cuts to up to [10] percent of the tariff lines provided that the cuts are no less than half the formula cuts and that these tariff lines do not exceed [10] percent of the total value of a Member's imports; or
b) keeping, as an exception, tariff lines unbound, or not applying formula cuts for up to [5] percent of tariff lines provided they do not exceed [5] percent of the total value of a Member's imports.

We furthermore agree that this flexibility could not be used to exclude entire HS Chapters.

9. We agree that least-developed country participants shall not be required to apply the formula nor participate in the sectorial approach, however, as part of their contribution to this round of negotiations, they are expected to substantially increase their level of binding commitments.

10. Furthermore, in recognition of the need to enhance the integration of least-developed countries into the multilateral trading system and support the diversification of their production and export base, we call upon developed-country participants and other participants who so decide, to grant on an autonomous basis duty-free and quota-free market access for non-agricultural products originating from least-developed countries by the year [. . .].

11. We recognize that newly acceded Members shall have recourse to special provisions for tariff reductions in order to take into account their extensive market access commitments undertaken as part of their accession and that staged tariff reductions are still being implemented in many cases. We instruct the Negotiating Group to further elaborate on such provisions.

12. We agree that pending agreement on core modalities for tariffs, the possibilities of supplementary modalities such as zero-for-zero sector elimination, sectorial harmonization, and request & offer, should be kept open.

13. In addition, we ask developed-country participants and other participants who so decide to consider the elimination of low duties.

14. We recognize that NTBs are an integral and equally important part of these negotiations and instruct participants to intensify their work on NTBs. In particular, we encourage all participants to make notifications on NTBs by 31 October 2004 and to proceed with identification, examination, categorization, and ultimately negotiations on NTBs. We take note that the modalities for addressing NTBs in these negotiations could include request/offer, horizontal, or vertical approaches; and should fully take into account the principle of special and differential treatment for developing and least-developed country participants.

15. We recognize that appropriate studies and capacity building measures shall be an integral part of the modalities to be agreed. We also recognize the work that has already been undertaken in these areas and ask participants to continue to identify such issues to improve participation in the negotiations.

16. We recognize the challenges that may be faced by non-reciprocal preference beneficiary Members and those Members that are at present highly dependent on tariff revenue as a result of these negotiations on non-agricultural products. We instruct the Negotiating Group to take into consideration, in the course of its work, the particular needs that may arise for the Members concerned.

17. We furthermore encourage the Negotiating Group to work closely with the Committee on Trade and Environment in Special Session with a view to addressing the issue of non-agricultural environmental goods covered in paragraph 31 (iii) of the Doha Ministerial Declaration.

ANNEX C

RECOMMENDATIONS OF THE SPECIAL SESSION OF THE COUNCIL FOR TRADE IN SERVICES

(a) Members who have not yet submitted their initial offers must do so as soon as possible.
(b) A date for the submission of a round of revised offers should be established as soon as feasible.
(c) With a view to providing effective market access to all Members and in order to ensure a substantive outcome, Members shall strive to ensure a high quality of offers, particularly in sectors and modes of supply of export interest to developing countries, with special attention to be given to least-developed countries.
(d) Members shall aim to achieve progressively higher levels of liberalization with no a priori exclusion of any service sector or mode of supply and shall give special attention to sectors and modes of supply of export interest to developing countries. Members note the interest of developing countries, as well as other Members, in Mode 4.
(e) Members must intensify their efforts to conclude the negotiations on rule-making under GATS Articles VI:4, X, XIII and XV in accordance with their respective mandates and deadlines.
(f) Targeted technical assistance should be provided with a view to enabling developing countries to participate effectively in the negotiations.
(g) For the purpose of the Sixth Ministerial meeting, the Special Session of the Council for Trade in Services shall review progress in these negotiations and provide a full report to the Trade Negotiations Committee, including possible recommendations.

ANNEX D

MODALITIES FOR NEGOTIATIONS ON TRADE FACILITATION

1. Negotiations shall aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit.[4] Negotiations shall also aim at enhancing technical assistance and support for capacity building in this area. The negotiations shall further aim at provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues.

2. The results of the negotiations shall take fully into account the principle of special and differential treatment for developing and least-developed countries. Members recognize that this principle should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members. It is further agreed that those Members would not be obliged to undertake investments in infrastructure projects beyond their means.

3. Least-developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

4. As an integral part of the negotiations, Members shall seek to identify their trade facilitation needs and priorities, particularly those of developing and least-developed countries, and shall also address the concerns of developing and least-developed countries related to cost implications of proposed measures.

5. It is recognized that the provision of technical assistance and support for capacity building is vital for developing and least-developed countries to enable them to fully participate in and benefit from the negotiations. Members, in particular developed countries, therefore commit themselves to adequately ensure such support and assistance during the negotiations.[5]

6. Support and assistance should also be provided to help developing and least-developed countries implement the commitments resulting from the negotiations, in accordance with their nature and scope. In this context, it is recognized that negotiations could lead to certain commitments whose implementation would require support for infrastructure development on the part of some Members. In these limited cases, developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation. It is understood, however, that in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required. While every effort will be made to ensure the necessary support and assistance, it is

[4] It is understood that this is without prejudice to the possible format of the final result of the negotiations and would allow consideration of various forms of outcomes.

[5] In connection with this paragraph, Members note that paragraph 38 of the Doha Ministerial Declaration addresses relevant technical assistance and capacity building concerns of Members.

understood that the commitments by developed countries to provide such support are not open-ended.

7. Members agree to review the effectiveness of the support and assistance provided and its ability to support the implementation of the results of the negotiations.

8. In order to make technical assistance and capacity building more effective and operational and to ensure better coherence, Members shall invite relevant international organizations, including the IMF, OECD, UNCTAD, WCO and the World Bank to undertake a collaborative effort in this regard.

9. Due account shall be taken of the relevant work of the WCO and other relevant international organizations in this area.

10. Paragraphs 45–51 of the Doha Ministerial Declaration shall apply to these negotiations. At its first meeting after the July session of the General Council, the Trade Negotiations Committee shall establish a Negotiating Group on Trade Facilitation and appoint its Chair. The first meeting of the Negotiating Group shall agree on a work plan and schedule of meetings.

Author Biographies

Barry Desker is the Director of the Institute of Defence and Strategic Studies, Nanyang Technological University. He was Singapore's Ambassador to Indonesia from 1986 to 1993 and the Chief Executive Officer of the Singapore Trade Development Board from 1994 to 2000. He helped to organize the first WTO Ministerial Conference in Singapore in December 1996 and was Singapore's negotiator for the Information Technology Agreement (1996). Ambassador, Desker was educated at the University of Singapore, the University of London and Cornell University.

Minoru Endo graduated from the University of Tokyo, Law School in 1957. He then entered the Japanese Ministry of Foreign Affairs and since then served in the Ministry and in its Embassies in France, Spain, the United States and the Mission in Geneva. He participated in the Kennedy Round, Tokyo Round and Uruguay Round Trade Negotiations. In 1987–1990 he was the Director-General of the United Nations Affairs Bureau in the Ministry. In 1990–1993 he was Ambassador for International Economic Affairs, and in 1993–1996 the Ambassador and Permanent Representative of Japan to the International Organizations in Geneva. In 1995 Minoru Endo served as the Chairman of the WTO Council on Trade in Goods. In 1997 he retired from the Foreign Service. Since then (1997–2001) he served as a Councilor to the Sakura Bank (later Sumitomo-Mitsui Banking Corporation). In 2002 Minoru Endo was appointed as a Commissioner of the International Civil Service Commission of the United Nations.

Gerhard Erasmus was born in 1949 and grew up in Namibia. He studied law at the University of the Orange Free State, Bloemfontein and in Leiden, Heidelberg, the Fletcher School of Law and Diplomacy and at Harvard. He is at present Professor in International Trade Law at the University of Stellenbosch in South Africa and Senior Research Fellow at the Trade Law Centre for Southern Africa (TRALAC); of which he is a founding member. He has also published and lectured in Constitutional Law and Public International Law. He was involved in the drafting of the Namibian Independence Constitution in 1990 and the new South African Constitution of 1996. He has also worked in several other African countries on matters such as international boundaries, water law, constitutional litigation and the transition to new governments. He is the South African member on the International Trade Law Committee of the ILA.

Wang Guiquo is Professor (Chair) of Chinese and Comparative Law, School of Law, City University of Hong Kong and Chairman of the Hong Kong WTO Research Institute. He holds a JSD degree from Yale Law School and an LL.M. degree from Columbia Law School. Dr. Wang is a Member of the International Academy of Comparative Law and is also: Vice President of the Chinese Society of International Economic Law, and a Guest Professor of Law at Nankai University, Tianjin; Wuhan Unviersity, Wuhan and the People's University of China, Beijing, China. Professor Wang is Senior Advisor to the Shanghai WTO Research Institute, Expert and Arbitrator of the China International Economic and Trade Arbitration Commission, and Advisor to the Shenzhen Municipality on WTO matters. Professor Wang is also an Honorary Advisor to the Ombudsman of Hong Kong and the Country Advisor to Butterworths. Professor Wang has published widely in internationally recognized journals in both Chinese and English. He has visited and lectured in numerous well-known universities and research institutes in Australia, Britain, Canada, France, Germany, Japan, Korea, Switzerland, the United States and Taiwan. He is the author of numerous publications in the international trade field.

Michael Hart is Simon Reisman professor of trade policy in the Norman Paterson School of International Affairs at Carleton University where he teaches courses on the laws and

institutions of international trade as well as advanced seminars on emerging trade issues, comparative trade policy, and the historical development of Canadian trade policy. He is a Professor and a Distinguished Fellow of the Centre for Trade Policy and Law at Carleton University where he provides strategic analysis and advice to governments, international organizations, and businesses on emerging trade policy issues and leads training missions to enhance the skill levels of officials in developing and transitional economies. He has led missions and provided advice to governments in Eastern Europe, Latin America, and Southeast Asia. Over the summer months, he acts as one of the two co-directors of the Center's Certificate Program, a program designed to upgrade the skills and knowledge of trade officials from developing countries and transitional economies. He is a former official in Canada's Department of Foreign Affairs and International Trade, where he specialized in trade policy and trade negotiations. He was involved in the Canada-US Free Trade Negotiations, the North American Free Trade Negotiations and various GATT, textile, and commodity negotiations. He was founding director of the Centre for Trade Policy and Law and stepped down in September 1996 after a second term as director. He holds an MA from the University of Toronto and is the author, editor, or co-editor of more than a dozen books and numerous articles and chapters in books on international trade issues.

Felipe Jaramillo, economist, participated in the work of the GATT between 1974 and 1992 as Ambassador of Colombia to the GATT. He led the Working Parties for the Provisional Accession (1975) and the Final Accession (1979–80) of Colombia to the GATT. He was the head of the Colombian delegation to the Tokyo Round negotiations and also acted as Chairman of the Informal Group of Developing Countries (1979–1984). He was Chairman of the GATT Council of Representatives during 1984, and Chairman of the Contracting Parties of the GATT in 1985. He also led the Colombian delegation to the Uruguay Round, played an important role in the launching of the negotiations, and chaired the Group of Negotiations in Services in the Uruguay Round. After his return to Colombia in 1992, he acted as Director for Trade Negotiations in the Ministry of Foreign Trade, and was Vice-Minister of Foreign Trade in 1998. He is now retired from public service.

Hassan S. Kartadjoemena is former Ambassador of Indonesia to the GATT and was the Chief Negotiator for Indonesia in the Uruguay Round from 1987 to the end of the Round and the signing of the results in Marrakesh in 1994. During that period he was also Chairman of the International Textiles and Clothing Bureau ("ITCB") and served in the GATT Textiles Surveillance Body. He is currently heading a Jakarta-based non-profit think tank on WTO-issues, the Center for Economic and Business Negotiations and Disputes Settlement. He is Chairman of the Management Committee of the Rotterdam-based Foundation for dialogue on trade issues between the EU and developing countries, the EU-LDC Network. At present he also serves as Adviser to the Indonesian National Committee for the Negotiations in the new WTO Round and Technical Adviser to the Ministry of Finance for financial services.

Adel Khalil was born in Egypt on June 1, 1940. He is a specialist with experience in trade promotion, investment promotion, trade policies, and WTO/GATT affairs and Agreements. He graduated from Cairo University (Faculty of Commerce) in 1961. He then obtained a post-graduate diploma in Business Administration (Marketing) in 1967 from the same University, then a M.A. degree in Economics (African Studies) from Howard University in Washington D.C. in 1971, and a Ph.D. degree in Economics with Honors

in 1981 from Cairo University. Dr. Khalil worked for the National Bank of Egypt from 1961–1963. From 1963 until 2000. Dr. Khalil worked in the Government's Trade Representation Department of the Ministry of Economy and Foreign Trade in Cairo, Egypt, and in its offices in Egyptian Embassies abroad, as Commercial Attaché, Counselor, and Minister. He became head (First Undersecretary) of that Department from 1995–1996. Embassies he worked in as commercial Representative were in: Washington, D.C. (1969–1972), Copenhagen (1975–1979), Bonn/Germany (1981–1982), London (1982–1985), Kuwait (1991–1995), and Geneva (1996—2000). After his retirement in September 2000, Dr. Khalil conducted several assignments for the Arab Economic Unity council, the Export Promotion Center of the Ministry of Economy and Foreign Trade in Egypt, the Arab Planning Institute (API) in Kuwait. At present, Dr. Khalil is a full time consultant for the Islamic Development Bank (IDB) in Jeddah, Saudi Arabia for WTO issues. Dr. Khalil has numerous research papers and articles published in Egyptian economic magazines.

Chulsu Kim is President of Sejong University in Seoul. As Deputy Minister of Trade from 1984 to 1990, Dr. Kim was Korea's chief trade negotiator. He chaired the Uruguay Round Negotiating Group on MTN Agreements in his personal capacity from 1987 to 1990. After serving as Korea's Minister of Trade, Industry and Energy from 1992 to 1993, he became the Deputy Director-General of the WTO in 1995 and served in that capacity until 1999. He is a graduate of Tufts University (B.A.) and the University of Massachusetts (M.A. and Ph.D.).

Antonio Ortiz Mena L.N. is Professor of International Relations and Chair of the International Studies Division at CIDE, specializing in international political economy. He received his M.A. in Area Studies (majoring in the Economics of Latin American Development) from the University of London (University College London), and his Ph.D. in Political Science (majoring in International Relations), from the University of California, San Diego (UCSD). He worked six years for the Mexican Government, and was Director of Congressional Relations of the Mexican Ministry of Trade and Industrial Development's NAFTA Negotiation Office from 1991 to 1993.

Julio J. Nogués is Professor of International Trade Institutions and Trade Policies at Di Tella University in Buenos Aires. He is also currently serving as a consultant to several international organizations. Before that he was Deputy Manager at the Central Bank, Senior Economist at the Office of the Chief Economist of the World Bank, Trade Representative of Argentina in the United States, Executive Director at the Board of the World Bank, Undersecretary for Economic Policy, and Undersecretary for Trade Policy at the Ministry of Economy of Argentina. He has published more than seventy chapters and articles.

Sylvia Ostry, Ph.D., is the Distinguished Research Fellow, Centre for International Studies, University of Toronto. She has a doctorate in economics from McGill University and Cambridge University. Dr. Ostry has held a number of positions in the Canadian Federal Government, among them, Chief Statistician, Deputy Minister of Consumer and Corporate Affairs, Chairman of the Economic Council of Canada, Deputy Minister of International Trade, Ambassador for Multilateral Trade Negotiations, and the Prime Minister's Personal Representative for the Economic Summit. From 1979 to 1983 she was Head of the Economics and Statistics Department of the OECD in Paris. Dr. Ostry has written numerous books and articles. She has received 18 honorary degrees from universities in Canada and abroad and, in 1987, received the Outstanding Achievement Award of the Government of Canada. In December, 1990 she was made a Companion

of the Order of Canada, the highest award in the Canadian national system of honors. In June, 1991 she was admitted as a Fellow of the Royal Society of Canada. She is a member of Advisory Group to the Director General, World Trade Organization; member of the Inter-American Dialogue; member of the Advisory Board, Institute of International Economics, Washington. Dr. Ostry is a member of the Group of Thirty, Washington, member of the Academic Advisory Council of the Deputy Minister for International Trade, and a founding member of the Pacific Council on International Policy. In 1992 the Sylvia Ostry Foundation annual lecture series was launched by Madam Sadako Ogata, U.N. High Commissioner for Refugees; 1993 Jacques Delors President of the European Union; 1994 Michel Camdessus, Managing Director, International Monetary Fund; 1996 Renato Ruggiero, Secretary General, World Trade Organization, 1999 Enrique Iglesias, President, Inter-American Development Bank, 2002 Paul Volcker, Chairman of the Board of Governors of the Federal Reserve System from 1979–1987.

Hugo Paemen is currently Adjunct Professor at the BMW Center for German and European Studies of the Edmund A. Walsh School of Foreign Service (Georgetown University). He also serves as Senior Advisor to Hogan & Hartson, L.L.P., and to the German Marshall Fund, and is Co-Chairman of the European-American Business Council (EABC). Previously Ambassador Paemen served as Head of the European Delegation to the United States. His career in foreign service began with several posts in the Belgium diplomatic corps, both overseas and in Brussels. He later served at the European Commission as Chief of Staff for Vice-President Viscount Davignon, as the Spokesman for External Relations, leading the European negotiating team during the multilateral trade negotiations of the Uruguay Round. He also lectured on European Policy and Integration Problems at the College of Europe (Natolin, Poland) and at the Catholic University of Leuven (Belgium), where he continues to be a Member of the Board. He has written and contributed to books and articles relating to current diplomatic and trade issues.

Amelia Porges practices law at Sidley Austin Brown & Wood LLP in Washington, DC, where she advises businesses, trade associations and governments on the use of trade and investment rules to solve market access problems and resolve disputes. Ms. Porges has argued cases in the GATT and WTO, drafted trade agreements, negotiated and advised on U.S. trade legislation, and advised in many bilateral and multilateral trade negotiations. Before entering private practice, she served as Senior Counsel for Dispute Settlement and head of enforcement at USTR, and Senior Legal Officer and Counsellor for Legal Affairs at the GATT Secretariat during the Uruguay Round. She has published extensively on GATT and WTO law.

Daniel M. Price chairs Sidley Austin Brown & Wood LLP's International Trade and Dispute Resolution practice. He counsels multinational companies, financial institutions and trade associations on market access, services, investment and sanctions issues, and matters arising in intergovernmental negotiations. Mr. Price also advises companies and governments in disputes arising under the WTO Agreements, other trade agreements, and investment treaties; he has represented parties in disputes under NAFTA and before the WTO and the International Centre for Settlement of Investment Disputes (ICSID). He has also provided technical assistance to the governments of Bulgaria, China, Colombia and Vietnam on international trade and investment rules. Before joining the Firm, Mr. Price served as USTR Principal Deputy General Counsel, where he negotiated trade and investment agreements with the former Soviet Union, Eastern Europe and Latin

America. He also served as USTR's lead negotiator on investment issues in the NAFTA talks and as legal adviser on the GATT Uruguay Round investment agreement. He is a member of the Department of State's Advisory Committee on International Economic Policy, the Council on Foreign Relations, the Advisory Board of Georgetown University Law Center's Institute of International Economic Law, and the Advisory Board of the Canada-United States Law Institute.

Julia Selivanova, an attorney working in the WTO Practice Group of Baker & McKenzie, is based in Geneva. She has dealt extensively with matters related to the accession of Russia to the WTO and worked as a consultant on WTO accession issues for the United Nations Institute for Training and Research. Ms. Selivanova received her undergraduate degree in law from MGIMO (Moscow State University of International Relations with Ministry of Foreign Affairs of Russia) specializing in international trade law. She received her Masters in International Law and Economics from the World Trade Institute in Bern, Switzerland where her studies focused on international economic law and the World Trade Organization legal system. Currently Ms. Selivanova is researching her doctorate at the World Trade Institute.

Damdin Tsogtbaatar is Foreign Policy Advisor to the President of Mongolia (since February 2002). He also served as the Deputy Director, Multilateral Cooperation Department, Ministry of Foreign Affairs, Mongolia and as a WTO desk-officer, Department of Foreign Trade and Economic Cooperation, Ministry of External Relations, Mongolia. He has a Master of Legal Studies, International Law, School of Law, ANU, Canberra, Australia (1998), and an M.A. Political Science (Hon), Institute of International Relations, Moscow, Russia (1994).

David Walker is Principal Economic Adviser at the New Zealand Ministry of Foreign Affairs and Trade, and APEC Senior Official for New Zealand. In this latter capacity he is responsible for the development of New Zealand's policy objectives for APEC and for representing New Zealand at APEC Senior Officials Meetings. Prior to his current position, Dr. Walker was Deputy Chief of Mission at the New Zealand Embassy to the United States in Washington DC. Dr. Walker was also Director of the Ministry's APEC Division and New Zealand APEC Senior Official during the period New Zealand chaired the APEC process in 1999.

Before that Dr. Walker spent a period on secondment with Telecom New Zealand as Strategic Issues Manager in Telecom's corporate strategy group. He has also served as head of the Ministry's Trade and Economic Analysis Division and has had previous postings in London and Geneva, where he was involved with the Uruguay Round of multilateral trade negotiations. Areas of Uruguay Round responsibility included services, intellectual property, investment, rules, dispute settlement and institutional issues. While in Geneva Dr. Walker served as Chair of the GATT Anti-Dumping Committee and he has also served on two GATT/WTO dispute settlement panels. Prior to joining the Ministry, Dr. Walker taught economics at Canterbury University where he gained a Ph.D. in regulatory economics.

Wang Yaotian is the Chairman of the WTO Shanghai Research Centre, Professor of Shanghai Institute of Foreign Trade, and Policy Advisor of the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China. He was born in Anhui Province, China in 1918. He earned a Bachelor of Arts diploma in economics from Fudan University in 1944. In 1948, Professor Wang earned a Master of Business Administration degree at Washington University in St. Louis, then began to pursue his

Ph.D. in economics at Columbia University in New York. From 1950, he served as the Deputy Director of Foreign Trade Administration Section of the Ministry of Foreign Trade of the People's Republic of China. He is a key drafter of the Import and Export Administration Regulations of the PRC promulgated by China's central government in the 1950s. After his departure from the Ministry of Foreign Trade, he served as a professor in: Beijing Institute of Foreign Trade, Fudan University, Shanghai International Studies University and Shanghai Institute of Foreign Trade. Professor Wang introduced David Ricardo's Comparative Advantage Theory, the General Agreement on Tariffs and Trade and the World Trade Organization systematically to reforming China, thus giving a theoretical root to China's "open-door" policy. In 1992, Professor Wang was selected as one of China's most distinguished professors by the State Council of the PRC. He has published more that thirty books on trade and economics. Professor Wang is the Editor-in-Chief of the Chinese translation of the final legal documents of the Uruguay Round published in 1994, and the Chairman of the Editorial Committee of China's first WTO-related academic journal WTO Focus.

INDEX

A380 Super Jumbo project, I:1191
AB. *See* Appellate Body
abandoning reciprocity (under Telecommunications Services commitments), I:1025–8
  bypass subsidization problem, I:1025–6
  cross-subsidization problem, I:1025–6
accession. *See also* World Trade Organization Membership
  Accession Protocol, WTO, I:75
  of least-developed countries, I:78
  of New Members in WTO, I:74
  to GATT/WTO
    China, I:76–7, III:61–4
    Egypt, III:93
    Japan, III:172
    Mexico, III:217–27
    Mongolia, III:250–54
    Russia, III:289–91, 321–331
    Singapore, III:336–7, 341
  WTO decision making and, I:70
accountancy disciplines, I:943
ADA. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement)
advertising, tender notices. *See* tender notices publicity under GPA
AFL-CIO, II:593, 594
African Growth and Opportunity Act (AGOA), II:578
AFTA. *See* ASEAN Free Trade Area
Agenda 2000 reforms of CAP, I:203
aggregate measurement of support (AMS), I:207–8; II:115
AGOA. *See* African Growth and Opportunity Act
AGP. *See* Agreement on Government Procurement
Agreement on Agriculture, II:97, 98, 723–6
  Article 4.1, I:205
  Article 4.2, I:203
  Article 5, I:205–6
  Article 5.1(b), I:206–7
  Article 5.4, I:205
  Article 5.5, I:205
  Article 5.6, I:206
  Article 6 [exemptions]
    Article 6.2 [Developing Country Exemptions], I:208
    Article 6.4 [De Minimis Exemptions], I:208
    Article 6.5 [Blue Box Exemptions], I:208–9
    Green Box Exemptions, I:209
  Article 20, I:217
  CAP and, I:201–3
  Cancun and
    cotton reference, I:227
    domestic support provisions, I:226
    export subsidies provisions, I:226
    market access provisions, I:225
  contracting parties
    EC, I:201–2
    US, I:202
  developing countries, provisions for
    Net Food-Importing Developing Countries Decision, I:215–17
    special and differential treatment, I:215, 1549
  Doha and, I:217
    Article 5, I:218
    Article 20(c), I:223–4
    domestic support provisions, I:220
    EC proposal, I:218
    export subsidies provisions, I:221
    Framework for Establishing Modalities in Agriculture (August 2004), I:224; text III:517–23
    market access provisions, I:218–19
    non-trade concerns provisions, I:223
    S&D provisions, I:222
    US proposal, I:218
  domestic support provisions
    AMS, I:207–8
    Annex 2(1), I:209
    Annex 3, I:207
    Article 1(a), I:207
    Article 6 [exemptions], I:208
    dispute settlement, I:209–10
    market price support, I:207
    non-exempt measures, I:207–8
    total AMS, I:208
  export subsidies provisions
    anti-circumvention provisions, I:211
    Article 3.3, I:210, 213
    Article 8, I:210
    Article 9.1, I:210
    Article 9.1(a), I:212
    Article 9.1(b), I:212
    Article 9.1(c), I:212, 213
    Article 9.1(d), I:213
    Article 9.2, I:211
    Article 10, I:211
    Article 10.1, I:213
    Article 11, I:211
    dispute settlement, I:211
    reduction commitments, I:210
  GATT
    Article XI:2(c), I:206
    Article XX, I:206
  LDC development and, I:1563
  market access provisions, I:202
    dispute settlement, I:206
    general exceptions, I:206
    special safeguard measures, I:205
    tariff reductions, I:205
    traffication, I:203, 204
  Modalities Agreement, I:203
    Annex 2, I:203
    Annex 3, I:203
    Annex 3B, I:204
    Annex 5, I:204
    Annex 5B, I:204
  negotiations
    Blair House agreement, I:202
    Marrakesh Declaration, I:202
    Tokyo Round, I:201
    Uruguay Round, I:200, 202, 205
  Peace Clause

Agreement on Agriculture (*cont*.)
Article 13, I:214
domestic and export subsidies, I:214–15
SCM measures and, II:97–8
SPS Agreement relationship with, I:254
trade and environment, II:516
URAA, II:110, 112–15, 119, 124, 125, 126, 127
Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement). *See also* *Australia-Salmon* case; *EC-Hormones* case; SPS measures
agriculture issues in, II:122
application related issues
Article 13 of (Applicability to Bodies Other than Central Government Bodies), I:248
GATT violation proofs, nonrequirement of, I:248–9
temporal application scope, I:249–50
Article 1.1, I:244–7
Article 2 [Basic Rights and Obligations]
Article 2.1 [Right to Take SPS Measures], I:254–5
Article 2.2, I:255–64
Article 2.3, I:264–6
Article 2.4, I:251
Precautionary Principle for Article 2.2, I:261
relationship with Articles 5.1 and 5.2, I:263–4
Article 3 [Harmonization], I:266–7
Article 3.1, I:268–9, 272–3, 275
Article 3.2, I:268, 275–6
Article 3.3, I:268, 275–8
Article 3.4, I:269
Article 3.5, I:269
Article 4 [Equivalence], I:324–5
ad-hoc recognition of equivalence, I:324–5, 328–9
Article 4.1 [Acceptance of Equivalence], I:326
Article 4.2 [Agreements on Recognition of Equivalence], I:326–7
conditions, I:326
Equivalence Decision, I:331–3
examples, I:329
implementation problems, I:330
international guidelines on equivalence, I:331
notification, I:328–9
procedure, I:327–8
Article 5.1, I:263–4, 279, 281, 288, 294–7
Article 5.2, I:263–4, 279, 292–3
Article 5.3, I:279, 292, 294
Article 5.4, I:309
Article 5.5, I:265, 266, 309–18
relationship with Article 2.3, I:319
Article 5.6, I:319
challenged under
no alternative measure achieves appropriate level of protection, I:321–3
no alternative measure significantly less restrictive to trade, I:323–4
no alternative measure that is reasonably available, I:320–21
Article 5.7, I:257, 262–3
available pertinent information and, I:304
insufficiency of relevant scientific evidence and, I:302–3
necessary information and, I:305–6
relationship with Article 2.2, I:308
relationship with Precautionary Principle, I:297–9, 301
review within reasonable period and, I:306–7
Article 5.8, I:336, 339
Article 6 [Adaptation to Regional Conditions], I:333
Article 6.1, I:334
Article 6.2, I:334–5
Article 6.3, I:335
regionalization work and, I:335–6
Article 7, I:336
Article 8, I:340–41
Article 9 [Technical Assistance]
Article 9.1, I:356
Article 9.2, I:356
Article 10 [Special and Differential Treatment]
Article 10.1, I:358
Article 10.2, I:358
Article 10.3, I:358
Article 10.4, I:358
Article 11 [Dispute Settlement]
Article 11.1, I:345
Article 11.2, I:349–51
Article 11.3, I:345
Article 12
Article 12.1, I:342
Article 12.2–12.6, I:343
Article 12.7, I:343
Article 14 [Transitional Periods], I:359
Article XX exception and, I:159–60
clarifications or amendments possible in, I:365–6
control, inspection and approval procedures
Annex C, I:340–41
Article 8, I:340–41
developing countries and, I:355
Doha Decision on implementation, I:360–61
implementation problems, I:360
reasonable adaptation period (Annex B, paragraph 2), I:359
S&D treatment (Article 10), I:358
special provisions on notification (Annex B, paragraphs 8 and 9), I:359
technical assistance (Article 9), I:356
transitional periods (Article 14), I:359
dispute settlement, I:345
burden of proof, I:346–9
consultation with experts (Article 11.2), I:349–51
overview, I:354–5
review standard, I:351–3
environmental issues, II:150, 151
evaluation, I:362–4
features, I:242
procedural rules, I:244
scientific disciplines, I:243
future key issues, I:366–70
GATT 1994
Article XI, I:253
Article XX(b), I:251–3
gender analysis of trade agreement and, II:732–3
human rights and, II:654–5
international trade, effect on, I:247
LDC development and, I:1564
least trade restrictive measure requirement, I:319
risk assessment
Annex A, paragraph 4, I:280

Article 5.1–5.3, I:279–85, 294–7
Article 5.1, I:288–90
specificity elements, I:286–7
Article 5.2, I:292–3
Article 5.3, I:292, 294
"based on" requirement, I:294–7
borrowed risk assessments, I:290
risk management aspects, I:291–2
risk management
Annex A, paragraph 5, I:308
Article 5.3–5.6, I:308
Article 5.4, I:309
Article 5.5, I:309–19
Article 5.6, I:319–20
SPS Committee
composition, I:342
consultations forum, I:342
functions, I:342
harmonization monitoring and encouraging (Article 12.2–12.6), I:343
overview of work (1995–2002), I:344–5
periodic review of SPS Agreement operation and implementation (Article 12.7), I:343
SPS Measure definition (Annex A, paragraph 1), I:245–7
technical assistance in Uruguay Round Agreements, II:464
trade and environment, II:515
transparency provisions
Annex B.1, I:337
Annex B.5, I:337–8
Annex B.6, I:338
Annex B.10, I:340
Article 5.8, I:336, 339
Article 7, I:336
infrastructure for transparency, I:340
notification procedure, I:338–9
scope of notification obligation, I:336
Uruguay Round Negotiations, I:239
Cairns Group proposal, I:241
developing countries, role of, I:242
EC proposal, I:241
trading nations position, I:240
US proposal, I:241
WTO Agreements, relationship with, I:250
Agreement on Agriculture, I:254
GATT 1994, I:251–3
TBT Agreement, I:251
Agreement on Customs Valuation. *See* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
Agreement on Government Procurement (GPA)
Appendix I (Annex 1–5), I:1137
Appendix II–IV, I:1137
bid challenge procedures and dispute resolution, I:1154
dispute settlement, I:1157–8
private bid challenge, I:1155–7
contract award procedures, I:1141
advertising, transparency and information requirements, I:1149–54
contract awarding (Article XIII:4), I:1148–9
qualification (Articles VII and Article IX), I:1146–7
technical specifications, I:1154
tender documentation (Articles VII and XII), I:1146
tender receipt (Article XIII:1), I:1147–8
tendering procedures (Article VII:3), I:1142–5
gender analysis of trade agreement, II:729
history of, I:1125
ITO discussions, I:1125
GATT negotiations and Tokyo Round, I:1129
OECD, I:1126–9
investment-related provisions in, II:315
principles (Articles III and XVI), I:1141
scope and coverage, I:1137
entity coverage, I:1138
exclusions (Article XXIII), I:1140
scope, I:1139
threshold values (Article II), I:1140
special and differential treatment for developing countries, I:1156, 1158–60
Tokyo Round Code, I:1129
improvements following (Article IX:6), I:1133–4
issues arising from (Article I:1), I:1130–31
Tokyo Round negotiations and
dispute resolution (Articles VI:6 and VII), I:1132–3
procedural rules (Articles II and V), I:1131–2
Uruguay Round and, I:1134–7
way forward, I:1160
GATS negotiations, I:1162
GPA ongoing review, I:1161
Working Group on transparency, I:1161
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement or ADA) I:487; II:764
Article 1 [Principles], I:500
Article 2 [Determination of Dumping]
Article 2.1, I:501, 503, 507
Article 2.2 [cost determinations], I:501, 503
Article 2.2.1 [sales below cost], I:502
Article 2.2.1.1, I:504
Article 2.2.2 [SG&A expenses, determination of], I:504
Article 2.3 [constructed export price], I:505
Article 2.4 [fair comparison], I:505
Article 2.4.1 [currency conversion], I:506
Article 2.4.2 [price averaging], I:507
Article 2.5 [transshipment], I:508
Article 2.6 [like product], I:508
Article 2.7 [non-market economies], I:508
Article 3 [Determination of Material Injury], I:508
Article 3.1, I:737
Article 3.2, I:739
Article 3.3, I:740
Article 3.4, I:742
Article 3.5, I:743
Article 3.6, I:745
Article 3.8, I:747
Article 3.7, I:746
Article 4 [Definition of Domestic Industry], I:508
Article 4.1, I:509
Article 4.2, I:509
Article 5 [Initiation and Subsequent Investigation]
Article 5.4 [support for application], I:510
Article 5.5 [publicizing of petition], I:511
evidence required for initiation
Article 5.2, I:510
Article 5.3, I:511

Agreement on Implementation of Article VI (*cont.*)
time limits for investigation and immediate termination
Article 5.8, I:512
Article 5.10, I:512
Article 6 [Evidence], I:512
Article 6.5 [confidential information], I:514
Article 6.8 [facts available], I:515–16
Article 6.9 [informing parties of essential facts], I:516
Article 6.10 [individual margins], I:516–17
Article 6.12 [consumers and industrial users], I:517
Article 6.13 [small companies], I:517
submission of evidence and time limits
Article 6.1.1, I:513
Article 6.1.2, I:513
Article 6.1.3, I:513
verification
Article 6.6, I:514
Article 6.7, I:514
Article 7 [Provisional Measures], I:517
Article 7.1, I:518
Article 7.3, I:518
Article 7.4, I:518
Article 8 [Price Undertakings]
Article 8.2, I:518
Article 8.3, I:518
Article 8.4, I:518
Article 8.5, I:518
Article 8.6, I:519
Article 9 [Imposition and Collection of Anti-Dumping Duties]
Article 9.1, I:519
Article 9.2, I:519
Article 9.3, I:519
Article 9.4, I:520
Article 9.5, I:520
Article 10 [Retroactivity], I:520
Article 10.3, I:521
Article 10.7, I:521
Article 11 [Duration and Review of Anti-Dumping Duties and Price Undertakings], I:521
Article 11.1, I:522
Article 11.2, I:522
Article 11.3, I:522–3
Article 11.4, I:523
sunset reviews, I:522–3
Article 12 [Public Notice and Explanation of Determinations]
Article 12.1, I:523
Article 12.2, I:524
Article 12.2.1, I:524
Article 12.2.2, I:524
Article 13 [Judicial Review], I:524
Article 14 [Anti-Dumping Action on Behalf of a Third Country]
Article 14.1, I:524
Article 14.4, I:524
Article 15 [Developing Countries], I:525
Article 16 [Committee on Anti-Dumping Practices], I:525
Article 17 [Consultation and Dispute Settlement]
Article 17.4, I:525–6
Article 17.5, I:526
Article 17.6, I:526–7
Article 18 [Final Provisions]
Article 18.1, I:527
Doha Development Agenda, I:528–9
LDC development and, I:1564
S&D treatment of developing countries (Article VI of GATT 1994), I:1550
transparency provisions in, I:139
Uruguay Round Negotiations and, I:498–500
Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement or CVA), I:534
administration and dispute settlement, I:540–41
Article VII of GATT 1994, I:537
implementation of, I:538
relationship with, I:541–2
confidential information (Article 10), I:565–6
currency conversion, I:563
customs authorities powers, I:564
general introductory commentary, I:539
history of
from GATT 1947 to Tokyo Round, I:534–5
from Tokyo Round to WTO, I:536
implementation related issues, I:568
developing countries' systemic and structural problems, I:571
Doha implementation-related issues, I:569–70
importers' rights, I:564–5
LDC development and, I:1564
Method 1 (transaction value of goods), I:543
price paid or payable adjustments (additions), I:547
assist value, I:548–9
packing costs, I:548
proceeds of any subsequent resale, disposal, and use of merchandise, I:550
royalties or license fee (Article 8.1), I:549
selling commission and brokerage, I:547
price paid or payable adjustments (deductions)
cost of international transportation and related charges (Article 8.2), I:552
costs accruing after importation, I:550–51
interest charges treatment under financing arrangement, I:551
storage costs, I:552–3
TV definition (CVA Article 1.1), I:544–6
Method 2 (TV of identical goods), I:556, 557
Method 3 (TV of similar goods), I:556, 557
Method 4 (deductive value), I:558
DV calculation, basis for, I:558–9
unit price, adjustments to, I:559
Method 5 (computed value), I:559
access to necessary information, I:561
CV calculation, I:560–61
Method 6 (fallback method of valuation), I:561
prohibited methods, I:562
requirements for applying, I:562
Preamble, I:539
principles
fairness, I:539
neutrality, I:539
uniformity, I:539
scope of Agreement, I:540
special and differential treatment, I:567
of developing countries (Article VII of GATT 1994), I:1554

reservations regarding DV and CV methods, I:568
technical assistance, I:568
transitional periods, I:567
substantive provisions (Annex I), I:540
technical assistance in Uruguay Round Agreements, II:465
transparency (Article 12), I:566
TV, departure from
absence of sale or price for export, I:553
data unavailable to make appropriate adjustments under Article 8, I:556
goods disposal or use restrictions, I:553
proceeds of subsequent resale accrue to seller, Article, I:1 (c), I:555
related parties, I:555
sale or price subject to conditions cannot be determined (Article 1.1), I:554
Agreement on Import Licensing Procedures (AILP), I:592–3
Article 1 [General Principles]
Article 1.1, I:595
Article 1.2, I:595
Article 1.3, I:595
Article 1.5, I:596
Article 1.6, I:596
Article 1.7, I:596
Article 1.8, I:596
Article 1.9, I:596
Article 2 [Automatic Import Licensing]
Article 2.1, I:597
Article 2.2, I:597
Article 3 [Non-Automatic Import Licensing]
Article 3.4, I:597
Article 3.5, I:597–8
Article 4, I:598
Article 5, I:599
Article 6, I:599
Article 7, I:599
recommendations for change, I:599
S&D treatment of developing countries, I:1555
Tokyo Round Code, I:594
Uruguay Round Negotiations on, I:594
Agreement on Preshipment Inspection (API), I:574. *See also* Preshipment Inspection
Article 1 [Definitions]
Article 1.1, I:575
Article 1.2, I:575
Article 1.3, I:576
Article 1.4, I:576
Article 2 [Obligations of User Members]
Article 2.1 [Non-Discrimination], I:576
Article 2.2 [Governmental Requirements], I:577
Article 2.3 [Site of Inspection], I:577
Article 2.4 [Standards], I:577
Article 2.5–2.8 [Transparency], I:578
Article 2.9–2.13 [Protection of Confidential Business Information], I:579–80
Article 2.14 [Conflicts of Interest], I:580
Article 2.15 [Time for Inspection], I:580
Article 2.16 [Issuance of Report], I:580–81
Article 2.17 [Preliminary Price Verification], I:581
Article 2.18, I:581n.
Article 2.20 [Price Verification], I:582–3
Article 2.21 [Appeals Procedures], I:583
Article 2.22 [Derogation], I:583
Article 3 [Obligations of Exporter Members], I:584
Article 4 [Independent Review Procedures], I:584
Article 5 [Notification], I:585
Article 6 [Review], I:585
Article 7 and 8 [Consultation and Dispute Settlement], I:585
assessment of, I:587
Preamble, I:575
technical assistance in Uruguay Round Agreements, II:465
Agreement on Rules of Origin (ARO), I:603. *See also* Committee on Rules of Origin; harmonized non-preferential rules of origin architecture; Technical Committee on Rules of Origin
Article 1.1, I:610
Article 1.2, I:610
Article 2, I:610
Article 3, I:610
Article 4.1, I:611
Article 4.2, I:611
Article 5, I:611
Article 6, I:611
Article 6.3, I:640
Article 7, I:611
Article 8, I:611
Article 9, I:611
dispute settlement
Article 2 interpretation, I:612–14
Chile-Taxes on Alcoholic Beverages case, I:612
United States-Rules of Origin for Textiles and Apparel Products case, I:612
Harmonization Work Programme, I:614, 615
HRO implementation, implications of, I:657, 658
Article 1.2, I:658–660
CRO Chairman, report by, I:660–61
Agreement on Safeguards, I:764. *See also* safeguard measures
Article 1 [General Provision], I:765
Article 2 [Conditions], I:765
Article 2.1
imports increase, I:765
like or directly competitive products, I:767
Article 2.2 [MFN application of safeguards], I:768
other provisions in Article 2, I:769
unforeseen developments, I:768
Article 3 [Investigations]
Article 3.1, I:769
Article 3.2 [confidential information], I:770
inclusion of reasoning in reports, I:769
selective analysis of domestic industry, I:770
Article 4 [Serious Injury]
Article 4.1 [determination of serious injury], I:771
Article 4.2(a) [factors to be considered], I:771; II:50
Article 4.2(b) [causation], I:772
threat of injury, I:772
Article 5 [Application of Safeguard Measures], I:774
Article 5.1
adjustment plans, I:776
extent of measures, I:774
form of measures, I:775
Article 5.2 [quota allocation], I:776; II:49
Article 6 [Provisional Safeguard Measures], I:776
Article 7 [Duration and Review of Safeguard Measures]
Article 7.1, I:776; II:50
Article 7.2, I:776

Agreement on Safeguards (*cont.*)
Article 7.3, I:777; II:50
Article 7.4, I:777; II:50
Article 7.5, I:777
Article 7.6, I:777
Article 8 [Compensation or Retaliation]
Article 8.1, I:777
Article 8.2, I:778
Article 8.3, I:778
Article 9 [Developing Countries]
Article 9.1, I:779; II:49
Article 9.2, I:779
Article 10 [Termination of Pre-Existing Safeguard Measures], I:779
Article 11 [Elimination of Gray-Area Measures], I:780; II:48
Article 11.1, I:780
Article 11.3, I:780
Article 12 [Notification and Consultation], I:781; II:50
Article 12.1 [consultations], I:782
Article 12.2 [contents of notifications], I:782
Article 12.3 [timing of notifications], I:781
Article 13 [Surveillance], I:783
GATT
Article XIX, II:44t., 45–8
Article XXIV (RTA regulation aspects), II:238
issues in application of, I:784
burden of proof, I:788
GATT Article XIX, relationship between, I:784
prohibition of "gray-area measures", I:792
standard of review, I:789
US Steel Safeguard case, I:793
Japan, III:175
S&D treatment, I:1552
trade and culture, II:765
Uruguay Round reforms affecting safeguards, II:48–51
Agreement on Subsidies and Countervailing Measures (ASCM), I:681, 686, 1174
Civil Aircraft Agreement and
ambiguities and problems in, I:1176
relevance to Civil Aircraft Trade, I:1174–5
environmental issues, II:152
GATT Subsidies Code (1979) and, I:682, 683
GATT Subsidy Discipline (1947) and, I:681
injury determinations under
Article 15.1, I:737
Article 15.2, I:739
Article 15.3, I:740
Article 15.4, I:742
Article 15.5, I:743
Article 15.6, I:745
Article 15.7, I:746
Article 15.8, I:747
gender analysis of trade agreement, II:720–22
investment-related provisions in, II:316
LDC development and, I:1564
Part I (General Provisions), I:687
Article 1 [Definition of a Subsidy], I:688
Article 1.1(a) [Financial Contribution], I:689
Article 1.1(b) [A Benefit is Conferred Thereby], I:692
Article 2 [Specificity], I:694
Article 2.1 [Subsidies Limited to Certain Enterprises], I:694
Article 2.2 [Regional Subsidies], I:695
Article 2.3 [Export and Import Substitution Subsidies], I:696
Article 2.4, I:696
Part II (Prohibited Subsidies), I:696
Article 3 [Prohibition], I:696
Article 4 [Remedies for Prohibited Subsidies], I:699
Part III (Actionable Subsidies)
Article 5 [Adverse Effects], I:701
Article 6 [Serious Prejudice], I:701
Article 7 [Remedies], I:703
Part IV (Non-Actionable Subsidies)
Article 8 [Identification of Non-Actionable Subsidies], I:704
Article 9 [Consultations and Authorized Remedies], I:706
Part V (Countervailing Measures), I:707
Article 10 [Application of Article VI of GATT 1994], I:707
Article 11 [Initiation and Subsequent Investigation], I:708
Article 11.1 and 2 [Application for Imposition of Countervailing Measures], I:708
Article 11.3 [Obligation to Review Evidence Prior to Initiation], I:709
Article 11.4 [Standing], I:710
Article 11.5–11.11 [Initiation and Subsequent Investigation], I:711
Article 12 [Evidence], I:712
Article 13 [Consultations], I:715
Article 14 [Calculation of Amount of a Subsidy], I:716
Article 15 [Determination of Injury], I:717
Article 16 [Definition of Domestic Industry]
Article 16.1, I:717
Article 16.2, I:718
Article 16.3, I:718
Article 16.4, I:718
Article 17 [Provisional Measures], I:718
Article 17.3, I:719
Article 17.4, I:719
Article 18 [Undertakings], I:719
Article 19 [Imposition and Collection of Countervailing Duties], I:720
Article 20 [Retroactivity], I:721
Article 21 [Duration and Review of Countervailing Duties and Undertakings], I:722
Article 21.2, I:722, 723
Article 21.4, I:724
Article 22 [Public Notice and Explanation of Determinations], I:724
Article 23 [Judicial Review], I:725
Part VI (Institutions), I:725
Article 24 [Committee on Subsidies and Countervailing Measures and Subsidiary Bodies], I:725
Part VII (Notification and Surveillance), I:726
Article 25 [Notifications], I:726
Article 26 [Surveillance], I:727
Part VIII (Developing Country Members), I:727
Article 27 [Special and Differential Treatment of Developing Country Members], I:727
Part IX (Transitional Arrangements), I:729
Article 28 [Existing Programmes], I:729
Article 29 [Transformation into a Market Economy], I:730

Part X (Dispute Settlement), I:730
Article 30 [Dispute Settlement], I:730
Part XI (Final Provisions), I:731
Article 31 [Provisional Application], I:731
Article 32 [Other Final Provisions]
Article 32.1, I:731, 732
Article 32.3, I:686
S&D treatment of developing countries, I:1551
subsidization and, I:148
trade and culture, II:760
TRIMs Agreement, dispute settlement relationship with, I:469
Uruguay Round Negotiations, I:684, 685
Agreement on Technical Barriers to Trade (TBT Agreement), I:107, 125. *See also EC-Asbestos* case; *EC-Sardines* case
applicability at governmental and non-governmental levels, I:385
Article 1.3, I:381
Article 1.4, I:381
Article 1.5, I:381
Article 2, I:385
Article 2.2, I:390–92, 394, 399
Article 2.3, I:394
Article 2.4, I:384–5, 396, 398
Article 2.5, I:396, 399
Article 2.9, I:138
Article 3, I:385–6
Article 3.1, I:386
Article 4 [Code of Good Practice], I:386
Article 5 [Central Government Bodies], I:387
Article 5.1.2, I:391
Article 5.2.7, I:394
Article 6 [Central Government Bodies], I:387
Article 7 [Local Government Bodies], I:387
Article 8 [non Government Bodies], I:387
Article 9 [International and Regional Application], I:388
Article 11 [Technical Assistance], I:402–3
Article 12 [Special and Differential Treatment], I:403–5
Article 12.10, I:407–8
Article 13, I:407
Article 14 [Consultations And Dispute Settlement], I:405
Article 14.1, I:405
Article 14.2, I:405
Article 14.4, I:405
Article 15.3, I:407
Article 15.4, I:407
Article XX exception and, I:159, 160
Civil Aircraft Agreement and, I:1178–80
conformity assessment procedure (Annex 1 Paragraph 3), I:380
conformity assessment procedures (Articles 5–9), I:386
central government bodies (Articles 5 and 6), I:387
international and regional application (Article 9), I:388
local government bodies (Article 7), I:387
non government bodies (Article 8), I:387
consultations and dispute settlement provision (Article 14), I:405
EC-Asbestos, I:406
EC-Sardines, I:406
environmental issues, II:150, 151
GATT 1947 overview and, I:374
gender analysis of trade agreement and, II:732–3
import prohibitions applicability (Annex 1), I:383
institutional considerations
built-in reviews of Agreement, I:407
Doha Program work, I:408
TBT Committee work, I:407
Web resources, I:408
LDC development and, I:1564
Preamble, I:373, 374
principles applicable under
equivalence and mutual recognition, I:400–401
harmonization, I:395–400
non-discrimination principle, I:388
prevention of unnecessary obstacles to international trade, I:390–94
transparency, I:401–2
transparency, derogations from, I:402
relationship with SPS Agreement, I:251
retroactive application of, I:384
special and differential treatment (Article 12), I:403–5, 1553
standard (Annex 1 Paragraph 2), I:379
standards (Article 4), I:386
structure and scope of, I:380
inapplicability to NPR-PPM (Annex 1), I:382
not applicable to trade in services (Annex 1A), I:381
TBT vs. GPA, I:381
TBT vs. SPS, under Annex A(1), I:381
technical assistance
in Uruguay Round Agreements, II:465
provisions (Article 11), I:402–3
technical regulation
Annex 1 Paragraph 1, I:376–8
Articles 2 and 3, I:385
Tokyo Round Standards Code overview and, I:375
trade and environment, II:514
Agreement on Textiles and Clothing (ATC), I:412, 418
accelerated implementation related issues, I:433, 434
Article 1.1, I:418
Article 1.7, I:427
Article 2
Article 2.1, I:419
Article 2.4, I:419
Article 2.6, I:420
Article 2.8, I:420
Article 2.9, I:421
Article 2.13, I:420
Article 2.14, I:420
Article 3.1, I:419
Article 3.2, I:420
Article 5, I:427
Article 6 [Special Safeguard Mechanism]
Article 6.1, I:421
Article 6.3, I:424
Article 6.4, I:426
Article 6.7, I:421
Article 6.10, I:423, 427
Article 8, I:427
Article 8.1, I:426
Article 8.5, I:426
Article 8.9, I:426
backloading integration issues, I:430, 431
circumvention, I:427
GATT 1947 Textiles Trade regulation, I:412
Long-Term Arrangement (LTA), I:413

Agreement on Textiles and Clothing (*cont*.)
Multi-Fiber Arrangement (MFA), I:414
Short-Term Arrangement (STA), I:413
GATT 1994 provisions and, I:419
gender analysis of trade agreement, II:719
integration of products into GATT 1994, I:420
jurisprudence, I:427–9
LDC development and, I:1564
MFA restrictions, I:419, 420
Preamble, I:418
product coverage, I:427
S&D treatment of developing countries, I:1554
Special Safeguard Mechanism, I:421, 422
procedural steps, I:423
substantive requirements, I:424
textiles and developing countries aspects of
analysis of integration program, II:412
disputed balance of rights and obligations, II:408–10
implementation of, II:410
inherent weaknesses of, II:411
liberalization and integration process, II:405–7
Punta del Este Preparations, II:401–3
Textiles Monitoring Body, II:410
transitional safeguard mechanism, II:407
Uruguay Round Negotiations, II:403
Textiles Monitoring Body, I:418, 426
trade liberalization and UR-1 Scenario, II:26
US rules of origin requirements issues, I:432, 433
Uruguay Round Negotiations and, I:415
linkage to other GATT Rules, I:418
monitoring body, role of, I:417, 418
quota growth rates, I:416
scope of products to be integrated, I:417
special safeguard mechanism development, I:417
speed of integration, I:416
Agreement on Trade in Civil Aircraft, I:1167
Aircraft Code
application and institutions, I:1168
government assistance, I:1168
other provisions, I:1169
rectification, I:1176–8
Bilateral Agreement (US-EU 1992), I:1172
background, I:1172
elements of, I:1172–4
dispute settlement (GATT), I:1170
1991 Case, I:1171
German Exchange Rate Case, I:1170
dispute settlement (WTO), I:1184
Brazil-Aircraft: Impact on Export Credit Programs, I:1187
material advantage, I:1187–9
OECD Safe Harbor, I:1189–90
Canada-Aircraft case, I:1184
"matching", I:1185–7
royalty-based financing, I:1184–5
France-Flight Management System Subsidy case, I:1190
future scope, I:1190
government assistance tensions, I:1191
Airbus "A380 Super Jumbo" Project, I:1191
Airbus restructuring, I:1192
Brazil-Canada dispute, I:1193
indirect supports for Boeing, I:1192
inducements, I:1194
Tokyo Round, I:1167
Aircraft Code, I:1168
Subsidies Code, I:1169–70
WTO and, I:1174
Aircraft Code rectification, I:1176–8
GATS, I:1180–84
SCM Agreement, I:1174
ambiguities and problems in, I:1176
relevance to Civil Aircraft Trade, I:1174–5
TBT Agreement, I:1178–80
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), I:1043
Agreement interpretation and disputes, II:427
agreement object and purpose of, II:431–4
contemporaneity, II:435–6
deference to national states, II:435
interpreting domestic law, II:434
mandatory vs. discretionary provisions, II:437
principles of interpretation, II:429–31
relationship with GATT, II:428
competion policy and, II:507
contentious issues, II:437
compulsory licenses, II:442–6
GATT Jurisprudence exceptions, II:438–40
parallel imports, II:446–52
TRIPS Agreement exceptions, II:440–42
developing countries and. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights and developing countries
Doha Declaration on Public Health, I:1078, 1096, 1113; II:452–5, 647
text, III:492–502
EC Law and
Article 133 EC, I:1472–4
implied competence under, I:1475–6
electronic commerce issues, II:481
taxation, II:484
trade and development, II:483
environmental issues, II:151
EU and, III:122
foundations and origins of
from tariffs to intellectual property, I:1054–7
functions of IP, I:1046
impact of, I:1056
IP as international system, I:1047–50
IP protection and trade link prior to TRIPS Agreement, I:1050–1
Uruguay Round negotiations, I:1055
gender analysis of trade agreement, II:729–32
human rights and trade, II:656, 675–8, 691
interpretation
questions of law and fact, I:1065
textual interpretation and good faith, I:1064
investment-related provisions in, II:315
LDC development and, I:1565
Mexico and, III:231
Mongolia and, III:264
Part I [General Provisions and Basic Principles], I:1067
development and social policy goals, I:1077–80
Article 7 [objectives], I:1077, 1078–79
Article 8, I:1078, 1079
Article 8.1 [principles], I:1077
Article 67 [technical cooperation], I:1079

technology transfer (Articles 7 and 66.2), I:1079
exhaustion of rights (Article 6), I:1069–71
parallel trade regulation (Articles 16 and 28.1), I:1071–7
most-favored-nation treatment (Article 4), I:1068
national treatment (Article 3), I:1067
security exceptions, I:1080
transparency and good governance (Article 63), I:1080
Part II [Standards Concerning Availability, Scope and Use of IPR], I:1081
anti-competitive practices in contractual licenses controlling (Article 40), I:1101
copyright and related rights, I:1081–7
geographical indications (Article 22–24), I:1088–91
industrial designs (Article 25), I:1091
layout-designs (topographies) of IC (Articles 35–38), I:1098
patents (Articles 27–31, 33–34, and 70), I:1091–8
trademarks (Articles 15–16 and 18–21), I:1087
undisclosed information protection (Article 39), I:1099–1101
Part III [Enforcement of Intellectual Property Rights], I:1102
civil and administrative procedures and remedies, I:1104
Article 42, I:1104
Article 43, I:1105
Article 44, I:1105
Article 45, I:1105
Article 46, I:1105
Article 47, I:1106
Article 48, I:1106
Article 50, I:1105
criminal procedures (Article 61), I:1109
general obligations (Article 41), I:1104
provisional measures (Article 50), I:1106
border measures, I:1107–08
Article 51, I:1108
Article 52, I:1108
Article 53, I:1109
Article 54, I:1108
Article 55, I:1109
Article 56, I:1109
Article 57, I:1109
Article 58, I:1109
Article 59, I:1109
Article 60, I:1109
Part IV [Acquisition and Maintenance of Intellectual Property Rights and Related Inter Partes Procedures]
Article 62.1, I:1109
Article 62.2, I:1109
Article 62.3, I:1110
Article 62.4, I:1110
Article 62.5, I:1110
Part V [Dispute Prevention and Settlement]
non-violation complaints (Article 64.2), I:1112
recourse to dispute settlement (Article 64.1), I:1110–12
Part VI [Transitional Arrangements]
Article 65.1, I:1113
Article 66, I:1113
Part VII [Institutional Arrangements and Final Provisions], I:1113
Amendments (Article 71), I:1114
reservations (Article 72), I:1115
TRIPS Council (Articles 68 and 71), I:1114
public health and, I:1078, 1096, 1113; II:452–5, 647
text of Doha Declaration on, III:492–502
rights and obligations, I:1059
incorporation by other Agreements reference, I:1063
interpretation of, I:1064
minimum and maximum standards, I:1061–3
private rights and direct effect, I:1059–61
relationship to GATT and GATS, I:1066
S&D treatment of developing countries, I:1555
scope and subject-matter of
subject matter and inter-temporal application (Article 70), I:1058
survey of protected rights, I:1057
Singapore and, III:342t
strade and environment, II:517
technical assistance in Uruguay Round Agreements, II:465
text of Doha Declaration, III:492–502
TRIPS disputes, II:424
Canada-Patent Protection for Pharmaceutical Products, II:425
Canada-Term of Patent Protection, II:425
Mailbox Cases, II:425
US-Section 110(5) of US Copyright Act, II:426
US-Section 211 Omnibus Appropriations Act of 1998, II:426
WTO Practice on Access to Medicines, II:647–8
Agreement on Trade-Related Investment Measures (TRIMs Agreement), I:123, 125
Article 1 [Coverage], I:449
Article 2 [Basic Obligations]
Article 2.1, I:449
Article 2.2, I:449
Article 3 [Exceptions], I:450
Article 4 [Developing Countries], I:451
Article 5 [Notification and Transitional Arrangements]
Article 5.1, I:451
Article 5.2, I:451
Article 5.3, I:451, 455
Article 5.4, I:452
Article 5.5, I:452
Article 6 [Transparency]
Article 6.1, I:138, 452
Article 6.2, I:452
Article 6.3, I:452
Article 7 [Committee on Trade-Related Investment Measures], I:452
Article 8 [Consultation and Dispute Settlemen], I:453
Article 9 [Review by Council for Trade in Goods], I:453
Article 9 [Review], I:472–3
Colombia, III:82
competition policy and, II:500
current debate and prospects, I:472
dispute settlement cases involving, I:458–9
Canada-Auto Pact dispute, I:462–3
EC-Bananas III dispute, I:460

Agreement on Trade-Related Investment (*cont.*)
India-Measures Affecting Automotive Sector, I:464–5
Indonesia-Autos dispute, I:461–2
dispute settlement relationship with GATT 1994
Article III:4, I:466–9
Article XI:1, I:468–9
dispute settlement relationship with SCM Agreement, I:469
economic rationale of, I:440
EU and, III:122
FIRA Panel Case, I:444
gender analysis of trade agreement, II:723
general features, I:448
human rights dispute over, II:656
illustrative list, I:449
Paragraph 1(a), I:450
Paragraph 1(b), I:450
Paragraph 2(a), I:450
Paragraph 2(b), I:450
Paragraph 2(c), I:450
implementation issues, I:473–5
investment-related provisions in, II:315
LDC development and, I:1564
Mexico, III:231, 235
notification obligations
Article 5, I:454
Article 5.1, I:454
Article 5.2, I:454
Article 5.5, I:454
performance requirements of, I:440
developing countries, I:441
export performance, I:441, 442
multinational enterprises, I:441, 442
Preamble, I:449
prospects of, I:478–80
S&D treatment, I:476, 1553
trade and culture, II:774
Transition Periods, Extension of, I:456, 458
"2 + 2 formula", I:457
Article 5.3, I:455–7
Uruguay Round negotiations on, I:445–7
Working Group on relationship between trade and investment, I:476–7
agriculture. *See also* Agreement on Agriculture; agriculture under GATT; tariff-rate quotas
agricultural subsidies, II:97
Argentina, agricultural protectionism in
costs of agricultural protectionism, other, III:21
proposal for, III:21
protectionism and financial costs, III:19–21
China's Accession to WTO, agriculture challenges after, III:61
Colombian concerns, III:81, 82, 85
decline, Uruguay Round Negotiation launching and, I:10, 11
developing country
interests, II:110–12
options for, II:127–9
Egypt negotiations on, III:102
EU and, III:118–20, 125
Framework for Establishing Modalities in Agriculture (August 2004) (Text), III:518–523
global free trade and, III:442–5
issues ('new' trade), II:121
agriculture's so-called multifunctionality, II:124–7
technical standards, including SPS and food safety measures, II:122–4
issues (traditional)
agricultural reform process, II:118–20
agriculture needs and WTO Round, II:120–21
potential gains from further trade policy reform, II:116–18
URAA, II:112–15
Japanese concerns, III:174
Korean concerns, III:204
liberalization, II:32, 33, 121, 127
Mexican concerns, III:228
New Zealand concerns, III:280–82
OECD
MFN tariff rates, II:111
Russian WTO accession impact on, III:322
SCM measures and, II:105–6
trade and environment issues, II:552–4
under HWP, I:654
agriculture under GATT. *See also* Agreement on Agriculture
Contracting Parties
EC, I:191–2
US, I:190–91
exceptions under GATT 1994, I:129–30
Haberler Report, I:192–3
Havana Charter and, I:189–90
multilateral trade negotiations
Kennedy Round, I:193–5
Tokyo Round, I:195–6
trade disputes under GATT
Article XI(2) [Import Restrictions], I:196–7
Article XVI [Export Subsidies], I:197–8
AILP. *See* Agreement on Import Licensing Procedures
Air Transport Services (under GATS), Annex on, I:909–10, 937, 938
Airbus "A380 Super Jumbo" Project, I:1191
Aircraft Code. *See under* Agreement on Trade in Civil Aircraft
ALADI. *See* Asociación Latinoamerican de Integración
American Selling Price (ASP), I:535
amicus curiae briefs and dispute settlement, I:1429. *See also under* Appellate Body
AB proceedings, I:1433
Door Breached in (*Sardines* case), I:1438
Door Deliberately Left Open (*EC-Asbestos* case), I:1437
Door Left Ajar (*Shrimp-Turtle* case), I:1433–5
Door Left Firmly Open (*US-Carbon Steel* case), I:1436
consequences of admitting *amicus curiae* briefs, I:1442
governments' position, I:1447–51
legal issues
AB authority, I:1451
Panel's authority, I:1451
procedural guarantees offered to Members, I:1452–4
political implications, I:1454–6
practical problems, I:1456
private parties (involved cases), I:1442
factual and/or legal aspects, I:1441

GATT/WTO approach to *amicus curiae* briefs
admissibility in panel proceedings, I:1430–33
origins, I:1430
Shrimp-Turtle case, I:1431
human rights concerns, II:643–5
EC-Asbestos, II:644, 645
US-British Steel, II:644
US-Shrimp, II:643
private parties', admissibility consequences for
Australia-Salmon case, I:1442
EC-Asbestos case, I:1437, 1444
EC-Cotton Linen case, I:1444
Sardines case, I:1438, 1447
Shrimp-Turtle case, I:1431, 1433–5, 1442
Thailand-Antidumping Duties case, I:1446
US-Carbon Steel case, I:1436, 1443
US-Copyright case, I:1443
AMS. *See* aggregate measurement of support
Andean Community, Colombia, III:88
Andean Trade Preference Act (US) (ATPA), II:577
Andean Trade Promotion and Drug Eradication Act (US) (ATPDEA), II:577
anti-competitive practices in contractual licenses (Article 40 of TRIPS), I:1101
Article 40:2, I:1101
Article 40:3, I:1102
Article 40:4, I:1102
anti-dumping. *See also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Anti-Dumping Code (Tokyo Round), II:70, 71
Article VI of GATT [Antidumping and Countervailing Duties], I:140, 141, 142; II:69–72, 74, 78
Article VI:1, I:141
Article VI:2, I:141
Article VI:3, I:141
Doha Ministerial Declaration, II:78, 79
GATT litigation and, I:497–8
global free trade and, III:447
history of
Article VI of GATT, I:494
enforcement origins, I:493
Kennedy Round International Anti-Dumping Code, I:494–6
Tokyo Round Anti-Dumping Code, I:496
in WTO
brief history of, II:69–72
problems of, II:68–9
international trade and competition law, II:72–7
Japanese concerns on, III:175
Korean concerns on, III:205
laws, I:490–91
principal targets of, I:488
principal users of, I:488
sectors affected by, I:489
Mexican concerns on, III:229
proposals for reform, II:77–80
rules of origin and, II:274–6, 277
safeguard measures and, II:51, 52
United States-Anti-Dumping Act of 1916, I:141, 493
Uruguay Round, II:71
Anti-Dumping Act of 1916, I:141, 493
Anti-Dumping Agreement. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
antitrust law and competition policy, II:489
APEC. *See* Asia Pacific Economic Cooperation
API. *See* Agreement on Preshipment Inspection
Appellate Body (AB), I:1279, 1390. *See also* dispute settlement
appeal process mechanics, I:1291–4
appellate process, reform of, I:1401
dissenting opinions, I:1401
exchange of views, I:1396
institutional aspects, I:1281
Appellate Body members, I:1284–91
governing instruments, I:1281
covered agreements, I:1282
Rules of Conduct, I:1284
Working Procedures, I:1282–4
jurisdiction, I:1391
appellate review, scope of, I:1392
question of facts and question of law, I:1391
remand power, I:1394
Members
Appellate Body Secretariat, I:1290
Chairman, I:1290
individual members, I:1289
legal framework and appointment procedures (Article 17 of DSU), I:1284–9
Appellate Review cost, I:1289
appointment processes, I:1287–8
conditions of employment of members, I:1288–9
qualifications (Article 17.3 of DSU), I:1285–6
representativeness, I:1285
terms of offices (Article 17.2 of DSU), I:1286–7
oral hearings, I:1315–16, 1395
related issues
AB reports precedential value
"Res judicata", I:1330
"Stare decisis", I:1329
additional written memoranda, I:1319
amicus curiae briefs, I:1321–4
appeal initiation, I:1296
appeal standard of review, I:1302
appellants/other appellants/appellees, I:1305
Appellate Body appraisal, I:1332
appellate review scope, I:1300–02
business confidential information, I:1310
circulation of report, I:1329
conditional appeals, I:1325
confidentiality, I:1309
conflicts of interest, I:1307
costs, I:1326
deadlines and time-limits in appeals
calculating dates, I:1295
ninety day limit for completion, I:1328
sixty-day deadline to initiate appeal, I:1295
decision-making
opinions, I:1325
collegiality, I:1326
divisions, I:1303
ex parte communication, I:1308
experts, I:1320
failure to appear or file a timely submission, I:1326
joint submissions, I:1317
multiple appeals, "joinder" of cases on appeal, joint hearing, I:1316
notice of appeal, I:1296
objections, I:1318

Appellate Body (AB) (*cont.*)
oral hearing, I:1315–16
panel record/evidence on appeal, I:1320
participants and parties, I:1306
presiding member, I:1304
private counsel, I:1318
requests for preliminary ruling, I:1310–13
right to appeal, I:1294
submission
failure to appear or file timely, I:1326
joint submissions, I:1317
written submission, I:1313–14
third parties, third participants and passive observers, I:1306
withdrawal of appeal, I:1327
working procedures interpretation, I:1326
written submission, I:1313–14
RTAs and, II:234–40
transparency and access issues
amicus curiae issue, I:1398–1401
transparency, I:1398
Uruguay Round negotiations, I:1279–81
Vienna Convention on the Law of Treaties
Article 31 of, I:1397
Article 32 of, I:1397
Working Procedures, I:1282–4, I:1326
Rule 3(1), I:1325
Rule 4, I:1326
Rule 4(3), I:1396
Rule 5, I:1290
Rule 5(2), I:1284
Rule 6(3), I:1304
Rule 7, I:1304
Rule 13, I:1304
Rule 16(1), I:1283, 1310, 1321, 1323
Rule 16(2), I:1313, 1315
Rule 17, I:1295
Rule 17(1), I:1295
Rule 17(2), I:1296
Rule 18(2), I:1314
Rule 18(3), I:1314
Rule 19, I:1308
Rule 20, I:1296, 1298
Rule 20(2), I:1296
Rule 20(2)(d), I:1296–1300, 1312
Rule 23(1), I:1305, 1306
Rule 23(4), I:1305, 1306
Rule 23(5), I:1305, 1316
Rule 24, I:1306
Rule 24(1), I:1314
Rule 27, I:1316
Rule 28(1), I:1319
Rule 29, I:1326
Rule 30, I:1328
Rule 30(1), I:1327
Rule 32(2), I:1283
Argentina
agricultural protectionism
other costs of agricultural protectionism, III:21
proposal for, III:21
protectionism and financial costs, III:19–21
Multilateral Trade Round prospects, III:25–6
patents for pharmaceutical drugs case
concessions value estimation in patents
impact on FDI and trade, III:11
transfer of rents, III:9–11
pharmaceutical drug companies, rent-seeking by, III:7–9
regional trade negotiations between MERCOSUR and EU
background, III:22
differing negotiating goals and strategies, III:22
EU proposal, III:23–4
role in International Trade and in GATT, III:5
services
concessions value estimation in services, III:13
privatization of Argentina's service industries, III:12
services-related inflows of FDI, III:15–16
trade in services, III:14
trade in goods
agriculture, III:18
manufacturing, III:17
Uruguay Round Negotiations, III:6
intellectual property rights (patents for pharmaceutical drugs), III:7–12
services, III:12–16
trade in goods, III:17–18
Argentina-Footwear case
Agreement on Safeguards, I:766, 772, 773, 786
RTA regulation aspects (GATT Article XXIV), II:238–9
ARO. *See* Agreement on Rules of Origin
ASCM. *See* Agreement on Subsidies and Countervailing Measures
ASEAN. *See* Association of South East Asian Nations
ASEAN Free Trade Area (AFTA), II:253
Indonesian concerns and, III:163
RTA impact evaluation, II:306
rules of origin and, II:284
Singaporean concerns and, III:345
Asia Pacific Economic Cooperation (APEC), II:210, 256
Canada, III:38
Mexico and, III:238
New Zealand, III:275–7
trade and gender, II:705
Asociación Latinoamericana de Integración (ALADI), III:88, 227
ASP. *See* American Selling Price
Association of South East Asian Nations (ASEAN), II:210
double density measures of trade intensity, II:20t
Indonesia, III:162, 163
RTA impact evaluation, II:305
rules of origin, II:284
Singapore, III:345, 346
transition economies and, II:253, 255, 256
Uruguay Round and regionalism, II:303
ATC. *See* Agreement on Textiles and Clothing
ATPA. *See* Andean Trade Preference Act
ATPDEA. *See* Andean Trade Promotion and Drug Eradication Act
Australia-Salmon case, I:246, 253, 263
amicus curiae briefs admissibility consequences in, I:1442
SPS Agreement
Article 2.3, I:264–266
Article 3, I:271

Article 4, I:328
Article 5.1, I:288–290, 297
risk assessment concept, I:281–287
risk management concept, I:309
Article 5.5, I:312–317
Article 5.6, I:320–324
trade and environment, II:525–6
automatic licensing system. *See also* non-automatic import licensing
defined, I:592
import licensing, I:597
GATT Article XIII and, I:593
under AILP (Article 2), I:597
automotive, challenges after China's Accession to WTO, III:62
autonomous liberalization under GATS, I:897–900
Award of contracts under GPA. *See also* Agreement on Government Procurement; United Nations Commission on International Trade Law
Article XIII:4(a), I:1149
Article XIII:4(b), I:1148

backloading integration issues (textiles & clothing), I:430, 431. *See also* Agreement on Textiles and Clothing
Bagwell-Staiger analysis. *See under* environmental issues
balance-of-payments
Committee, I:65
exception, I:131
Korea and BOP consultations, III:189
Mexico and BOP exceptions, III:230
Balance of Payments Manual (5th ed) (IMF) (BPM5), III:14
Bank of International Settlement (BIS), III:145
banking, Russian WTO accession impact on, III:299, 327
banking services (excluding insurance), national treatment and market access commitments, I:974, 987
Basic Telecommunications Agreement, electronic commerce and, II:470. *See also* Telecommunications Services
BDV. *See* Brussels Definition of Value
Beecham Group v. *International Products Ltd*, II:450
Beef Hormone case. *See EC-Hormones* case
bid challenge procedures (under GPA), I:1154. *See also* tendering procedures
available remedies, I:1156–7
challenges, I:1155
independent review bodies, I:1155
private bid challenge, I:1155
bilateral investment treaties (BIT), II:318–20, 516
biosafety, II:550–52. *See also* environment issues
BIS. *See* Bank of International Settlement
Blair House agreement, I:8, 202; III:415. *See also* Peace Clause
Blue Box Exemptions (under Agreement on Agriculture), I:208, 209. *See also* Green Box Exemptions
Blue Box policies, I:220
BOP. *See* balance-of-payments
Border Tax Adjustments report, I:118
BPM5, *see* Balance of Payments Manual (5th ed)
Brazil, argument on trade and culture and, II:752
Brazil-Aircraft case. *See also Canada-Aircraft* case
Appellate Body and, I:1309–11, 1317
Article 21.5, I:1354
Article 22.6, I:1354
consultations and, I:1218, 1220
DSU
decision implementation and enforcement, I:1350
disproportionate effect of retaliation, I:1363
under Civil Aircraft Agreement, I:1187, 1193
material advantage, I:1187–9
OECD Safe Harbor, I:1189–90
Brussels Definition of Value (BDV), I:534–6
Brussels Draft, US, 412
burden of proof
dispute settlement under SPS Agreement, I:346–9
under Agreement on Safeguards, I:788
under ATC Jurisprudence, I:428
business services
computer and related services, I:913 923, 924
legal services, I:922
professional services, I:913
R&D services, I:913
bypass subsidization, I:1025–6

CAC. *See* Codex Alimentarius Commission
CAEC. *See* Central Asian Economic Community
Cairns Group proposal (agriculture)
domestic support provisions, I:219–20
export subsidies provisions, I:221
special and differential treatment provisions, I:222
SPS Agreement and, I:241
Canada, III:30–37
argument on trade and culture, II:752
as QUAD member, I:815–817
choices and opportunities for, III:37–40
trade policy making in, III:40–46
formal consultative mechanisms, III:43
informal consultative mechanisms, III:44–6
Canada-Aircraft case, I:692, 697, 1309–11, 1317. *See also Brazil-Aircraft* case
consultations and, I:1218, 1220
DSU
Article 21.5, I:1354
Article 22.6, I:1354
under ASCM, I:692, 697
under Civil Aircraft Agreement
impact on export credit programs, I:1184–7
"matching" concept, I:1185–7
royalty-based financing, I:1184–5
Canada-Automotive case
RTA regulation aspects (GATT Article XXIV), II:237, 238
TRIMs Agreement
dispute settlement under, I:462–3
TRIMs and GATT 1994 relationship, I:467
under ASCM, I:690, 697
under GATS, I:884–890
Article I [Measures Affecting Trade in Services], I:886
affects trade in services, I:887–8
trade in services, I:887
Article II:1, I:888–9
Article XVII [Import Duty Exemption and CVA Requirements], I:889–90

Canada-Patent Protection of Pharmaceutical Products, I:1079, 1094, 1097, 1358
DSU decision implementation and enforcement, I:1359
under TRIPS Agreement, I:1065–6; II:425, 445
contemporaneity, II:436
deference to national states, II:435
exception, II:442
object and purpose of, II:431, 432
principles of interpretation, II:430, 431
relationship with GATT, II:428
Canada-Periodicals case, I:121, 122
AB jurisdiction, I:1301, 1391
trade and culture concerns
ASCM, II:763, 766
GATT, II:756
under GATS, I:875–8
Canada-United States Free Trade Agreement, I:809–10. *See also* North American Free Trade Agreement
Canadian-US Mutual Legal Assistance Treaty (MLAT), II:498
Cancun Ministerial Conference, III:432–4
and Agreement on Agriculture, I:224
Ministerial Statement (text), III:512–19
CAP. *See* Common Agricultural Policy
capacity building. *See also* trade related technical cooperation and capacity building
LDCs in multilateral trading system, II:372
trade related, II:460
Carribean Community (CARICOM), II:303
cashmere. *See under* Mongolia
Cassis de Dijon case, I:808
CEDAW. *See* Convention on the Elimination of All Forms of Discrimination Against Women
Central Asian Economic Community (CAEC), II:255
Central European Free Trade Area (CETA), II:251, 252
central government bodies, TBT Agreement and, I:387
Central Unitaria de Trabajo (CUT), II:593
centrally planned economies and GATT, II:248. *See also* transition economies
CER. *See* Closer Economic Relations
CG-18. *See* Consultative Group of Eighteen
CGE simulation model. *See* computable general equilibrium simulation model
Change in Tariff Heading (CTH), I:607–8; II:268. *See also* percentage criterion test; technical test
child labor, II:183–5. *See also* labor standards
China
accession protocol, I:76–7
accession to WTO, challenges after
agriculture, III:61
automotive, III:62
financial services, III:64
petrochemicals, III:63
pharmaceuticals, III:62
telecommunications, III:63
economic challenges and opportunities, III:56
Japan's example, III:57
opportunities arising from WTO Membership, III:57–61
legal system
reforms during its bid for Membership, III:55–6
WTO Membership effect on, III:64–6
participation in GATT and WTO, III:49–51
reforms (economic) during its bid for WTO Membership
equal treatment of foreign and domestically-owned enterprises, III:53
import barriers reduction, III:52
increased market access, III:54
new laws, III:54
particular problem areas, III:51
price reforms, III:54
reforms (legal) during its bid for membership
initial attempts at reform, III:55
post-1992 reforms, III:56
strategies after joining "Club", III:66
additional research and training on WTO, III:68
economic restructuring, III:67
globalization encouragement for Chinese enterprises, III:67
position in next MTN Round
electronic commerce, III:68
trade and competition, III:69
trade and environment, III:69
trade and labor standards, III:69
taking advantage of S&D treatment for developing countries, III:67
WTO Membership, opportunities arising from
access to WTO Dispute Settlement System, III:60
discriminatory treatment elimination, III:59
domestic enterprises benefits, III:61
FDI inflow improvement and improved investment environment, III:58
multilateral economic policymaking participation and international trade rules development, III:60
optimal resource reallocation achievement and market economy promotion, III:57
CIRR. *See* Commercial Interest Reference Rate
CIS. *See* Commonwealth of Independent States
CITES. *See* Convention on International Trade in Endangered Species
Civil Aircraft Agreement. *See* Agreement on Trade in Civil Aircraft
Clean Report of Findings (CRF), I:580, 581
Closer Economic Relations (Australia and New Zealand) (CER)
RTA and, II:297
RTA impact evaluation, II:306
CLP. *See* Competition Law and Policy Committee
CMEA. *See* Council for Mutual Economic Assistance
Code of Good Practice. *See under* Agreement on Technical Barriers to Trade
Codex Alimentarius Commission (CAC), I:269
Codex Standard 94 (under Agreement on Technical Barriers to Trade)
as EC regulation basis, I:397, 398
characterization as relevant international standard, I:396
COECE. *See* Coordinadora de Organismos Empresariales de Comercio Exterior
collateralism problem, trade and human rights and, II:683
Colombia
Doha Ministerial Declaration, III:85–8
agriculture, III:85
decision on implementation, III:85
domestic support, III:85
export subsidies, III:85
intellectual property, III:86

market access, III:85–6
services, III:86
trade and environment, III:86
WTO norms, III:86
GATT/WTO participation
economic effects, III:82–3
agriculture, III:82
dispute settlement, III:83
services, III:82
subsidies, III:82
TRIMs Agreement, III:82
historical background, III:74
legal effects, III:83
observer status, III:74
post Tokyo Round period, III:76–7
social effects, III:83
Tokyo Round, III:74–6
UNCTAD III, III:74
RTA participation
Agreements Under ALADI, III:88
Andean Community, III:88
FTA of Americas, III:89
Group of Three, III:89
trade policy development, III:89
Uruguay Round participation
negotiations objectives, III:79
negotiations results
agriculture, III:81
textile and clothing, III:81
tropical products, III:80
Punta del Este Declaration, preliminary negotiations for, III:79
services, III:78
WTO
attitude of citizens, businessmen, and political leaders towards, III:84
Colombian perspective on strengths and weaknesses of, III:84–5
COMECON. *See* Council for Mutual Economic Cooperation
COMESA. *See* Common Market for Eastern and Southern Africa
Commission on Status of Women (CSW), II:704
Commercial Interest Reference Rate (CIRR), I:1189
Committee on Customs Valuation, I:540
Committee on Regional Trade Agreements (CRTA), I:835; II:226, 229, 230, 232, 234, 241–4
GATT Article XXIV Rules Governing, II:226
Committee on Rules of Origin (CRO), I:611, 616. *See also* Technical Committee on Rules of Origin
CRO (after June 1999), I:618–19
wholly-obtained goods definition, I:651–3
Uruguay Round Agreement on Rules of Origin, II:269, 270
Committee on Trade and Development (CTD), I:367
Committee on Trade and Environment (CTE), II:529–30
Common Agricultural Policy (CAP), I:191–2, 201, 203; III:113, 119, 120, 124. *See also* agriculture
Common Market for Eastern and Southern Africa (COMESA), III:104, 108
Commonwealth of Independent States (CIS), II:254
communication services, I:914, 924–5
compensation, safeguard measures and
compensation and retaliation, II:49
compensation versus no-compensation, II:62–64
competence. *See under* EC Law and WTO Agreement
Competition Law and Policy Committee (CLP), II:497
competition law, international trade and (anti-dumping action), II:72–7
competition policy, II:488
antitrust laws and, II:489
Competition Law and Policy (CLP) Committee, II:497
Doha Ministerial Declaration, II:501–2
final observations, II:508–10
GATT deliberations and rule coverage, II:494–7
Japan-Trade in Semiconductors case, II:495
Kodak-Fuji dispute, II:495
global competition forum, need for, II:505–6
Indonesia, III:157, 158
International Competition Network, II:507
International Competition Policy Advisory Committee (US), II:505–6
internationalization issues concerned with, II:490, 491
key issues for WTO, II:506–8
Korea, III:206
MLAT, II:498
multilateral trade negotiations, II:501
EU, II:502
other views, II:504–5
US Government, II:503
private restraints and competition issues under ITO, II:493
bilateral cooperation arrangements and experiences, II:497
GATT deliberations and rule coverage, II:494–7
ITO and other early efforts, II:493
OECD, II:497
regional arrangements, II:499
UNCTAD, II:497
relevance to trade policy, II:489–93
trade and competition policies
China, III:69
Egypt, III:104
global free trade and, III:450
Korea, III:206
Uruguay Round Agreements and WTO
basic nondiscrimination principles, II:499
GATS, II:500
Singapore Ministerial Meeting (1996), II:501
Telecommunications Services Agreement, II:500
TRIMs Agreement, II:500
complaint types
non-violation, I:1237
situation, I:1238
violation, I:1236
compulsory licenses (TRIPS Agreement), II:442–6
computable general equilibrium simulation model, II:24
computational analysis and trade liberalization
implications, II:40
Michigan CGE Model, II:24–5
of Doha Development Round, II:34t
aggregate results, II:33
data, II:32
sectoral results, II:38t., II:40
of Uruguay Round Liberalization, II:25, 27t
aggregate results, II:31
computational results, II:26
sectoral results, II:29t., II:31

computed value (Method 5), I:559. *See also* Agreement on Implementation of Article VII of the General Agreement on tariff and Trade 1994
  access to necessary information, I:561
  CV calculation, I:560–61
consensus and voting aspects in WTO decision making, I:67–8
consensus rule making, WTO and, I:43–5
conservation, natural resources, I:162
construction services, I:915, 927
consultations. *See also* Panel process
  adequacy of consultations, I:1222–4
  confidentiality of proceeding (Article 4.6 DSU), I:1226
    settlement offers made during consultations, I:1227
    third parties and information acquired during consultations, I:1228
    use of facts and evidence obtained during consultations before Panel, I:1226
  consultations request (DSU Article 4.4), I:1215
    duty to consult in Compliance Review Proceedings (DSU Article 21.5), I:1221
    issues not raised in consultations request but actually discussed, I:1220
    substantive requirements and consultation request role, I:1215–20
  developing countries, Article 4.10 DSU, I:1229
  GATT 1947 and, I:1200–02
  GATT/WTO disputes settlement, I:1203
  objectives and nature of, I:1203
    dispute settlement by way of satisfactory adjustment, I:1204
    information gathering, clarification and shaping of substance, I:1205
  parties to consultations (under DSU Article 4.11)
    direct proceeding to panel for joining parties, I:1214
    multiple consultations, I:1213
    plurilateral and private consultations, I:1212
  preparation and logistics, I:1228
  principle of good faith
    DSU Article 4.3, I:1224
    further elements of (DSU Article 21.5), I:1225
    litigation strategies, I:1224
  right to consultations and duty to consult, I:1206
  time periods and deadlines, I:1207–9
  urgency cases
    reduced time frame consultations aspects (DSU Articles 4.8 and 4.9), I:1210
    urgency invoked in consultations (DSU Articles 4.8 and 4.9), I:1209
    within 20 days Panel establishment request (DSU Article 6.1), I:1211
  Uruguay Round negotiations and, I:1202
Consultative Group of Eighteen (CGE) (GATT), I:804
consumer interests, trade policy development and, I:32
contract award procedures. *See under* Agreement on Government Procurement 1994
contractual licenses, anti-competitive practices in (Article 40 of TRIPS Agreement), I:1101
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), II:701, 704, 736
Convention on International Trade in Endangered Species (CITES), I:164; II:146
Coordinadora de Organismos Empresariales de Comercio Exterior (COECE), III:239, 240
copyright and related rights under TRIPS Agreement, I:1081–1087
  Article 9.1, I:1083
  Article 9.2, I:1083
  Article 10, I:1083
  Article 11, I:1084
  Article 12, I:1084
  Article 13, I:1084
  Article 14, I:1085
  Inter-Temporal Application
    Article 70.2, I:1085, 1086
    Article 70.5, I:1087
  negotiating process, I:1081
  TRIPS Agreement and WIPO, relationship between, I:1085
Council for Mutual Economic Assistance (CMEA), II:250, 251
Council for Mutual Economic Cooperation (COMECON), III:251, 252, 253
Council for Trade in Goods (CTG), II:229–30
countervailing duties, II:103–5. *See also* Agreement on Subsidies and Countervailing Duties
country of origin, I:626
countries of origin, multiple, I:627–8
CRF. *See* Clean Report of Findings
CRO. *See* Committee on Rules of Origin
cross-subsidization, I:1003, 1025–6
CRTA. *See* Committee on Regional Trade Agreements
CSW. *See* Commission on Status of Women
CTD. *See* Committee on Trade and Development
CTE. *See* Committee on Trade and the Environment
CTG. *See* Committee on Trade in Goods
CTH. *See* change in tariff heading
CU. *See* customs unions
Cuban Democracy Act of 1992, I:167
culture. *See* trade and culture
CUSFTA. *See* Canada-United States Free Trade Agreement
customs duties
  assessing of, I:533
  principle functions of, I:534
customs unions, II:9. *See also* free trade areas, regional trade arrangements
  GATT Article XXIV, II:223, 224
    criteria for establishing RTA, I:172
    Uruguay Round Understanding on, I:176
  RTA and developing countries, II:329, 330
  RTA types, I:175
  rules of origin and, II:274–6
Customs Valuation Agreement. *See* Agreement on Implementation of Article VII of the General Agreement on Tariff and Trade 1994
Customs Valuation Code (Tokyo Round), I:537
  actual value, I:537–8
  Article VII:2(a), I:537
  Article VII:2(b), I:538
  Article VII:2(c), I:538
  Article VII:5 [transparency], I:538
  implementation and CVA, I:538
CUT. *See* Central Unitaria de Trabajo
CVA. *See* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement)

Danish Bottles case, human rights and trade, II:686, 687
de facto
discrimination under GATS, I:882
specificity, I:695
de jure specificity, I:695
Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries (Uruguay Round), I:1547
Decision on Measures in Favor of Least-Developed Countries (Uruguay Round), I:1546
deductive value (DV). *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DV calculation, basis for, I:558, 559
unit price, adjustments to, I:559
deregulation, Uruguay Round Negotiation and, I:17
developed countries. *See also* least-developed countries
SPS measures and international trade rules for, I:234
Uruguay Round negotiation launching and, I:12, 13
developing countries. *See also* special and differential treatment of developing countries
Agreement on Agriculture
Net Food-Importing Developing Countries Decision, I:215–17
S&D treatment provisions, I:215
agricultural interests of, II:110, 111
Agreement on Safeguards and, I:764, 779
ASCM and, I:727
CVA implementation related issues, I:571
definition, I:1525
EU and, III:123
FDI in, I:1567–9
GATS and, I:817–18, 832–3
GATT-WTO System, I:1525
human rights and trade with, II:679–82
MNE in, I:1569
RTA and
member countries, II:326–34
non-member countries, II:334–7
special provisions under GATT, I:180
SPS Agreement and, I:242, 355
Doha Decision on implementation, I:360, 361
implementation problems, I:360
reasonable adaptation period (Annex B, paragraph 2), I:359
S&D (Article 10), I:358
special provisions on notification (Annex B, paragraphs 8 and 9), I:359
SPS measures and international trade rules for, I:235, 236
technical assistance (Article 9), I:356
transitional periods (Article 14), I:359
textiles and. *See* textiles and developing countries
TRIPS Agreement and. *See* Agreement on Trade-related Aspects of Intellectual Property Rights and developing countries
TRTCCB for, II:459
"two-track approach to trade" (UNCTAD), I:1528–30
DFA. *See* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations
Dillon Round, Japan participation in, III:172
direct effect, I:1062
direct effect and EC Community legal order
Advocates-General opinions, I:1487, 1488
direct effect doctrine, I:1482, 1483
Portugal v *Council*, I:1489
denial of direct effect for private parties, I:1491, 1493, 1494, 1496, 1497
ECJ judgement, I:1489, 1490
possibility of community financial liability for WTO breaches, I:1493
potential issues of, I:1481
disassembly of goods into parts/components
negative rule for disassembly, I:641
origin of disassembled (used) parts/components, I:641, 642
dispute resolution participation
Mexico, III:232–4
South Africa, III:370
dispute settlement. *See also* Appellate Body; Dispute Settlement Understanding; World Trade Organization law
amicus curiae briefs and
AB proceedings, I:1433
Door Breached in (*Sardines* case), I:1438
Door Deliberately Left Open (*EC-Asbestos* case), I:1437
Door Left Ajar (*Shrimp-Turtle* case), I:1433–5
Door Left Firmly Open (*US-Carbon Steel* case), I:1436
consequences of admitting *amicus curiae* briefs, I:1442
governments' position, I:1447–51
private parties (involved cases), I:1442
problems raised, I:1451–7
factual and/or legal aspects, I:1441
GATT/WTO approach to *amicus curiae* briefs admissibility in panel proceedings, I:1430–33
systemic approach, I:1429
ADA (Article 17), I:525
Agreement on Agriculture, I:206
API (Article 7 and 8), I:585
ARO
Article 2 interpretation, I:612–14
Chile-Taxes on Alcoholic Beverages, I:612
US-Rules of Origin for Textiles and Apparel Products, I:612
China, III:60
Colombia, III:83
consultations contribution to
GATT/WTO disputes, I:1203
settlement by way of satisfactory adjustment, I:1204
CVA, I:540
Egypt, III:99
EU, III:128–31
GATT
Article XXII [Consultation], I:169
Article XXIII [Nullification or Impairment], I:169
gender analysis of trade and, II:739
global free trade and, III:453–55
GPA, I:1157–1158
human rights
GATT Article III, II:653–4
GATT Article XX, II:651–3
Hormone Beef dispute, II:648–50
under SPS Agreement, II:654–5

dispute settlement (*cont.*)
implementation and enforcement. *See* dispute settlement decisions, implementation and enforcement of
Japan, III:177
Korea
as complainant, III:201, 202t
as defendant, III:202, 203t
nonviolation complaints re-appraisal, I:1372, 1374–82
under GPA, I:1378
non-WTO rules application in, I:1406–1409
International Law referred to in the process of "interpreting" WTO terms, I:1411
International Law referred to outside the process of Treaty interpretation, I:1412–17
WTO/Public International Law interaction, I:1417–23
RTA regulation (WTO based), II:213
evaluation of, II:240
expedited recourse to dispute settlement procedures, II:244
WTO Panel and AB rulings involving RTAs, II:234–40
Telecommunication Services and
remedies for injury to domestic market, I:1017–9
remedies for difficulties on foreign markets, I:1020
WTO Dispute Settlement System and, I:1020
TBT Agreement (Article 14), I:405, 406
TRIMs Agreement, I:458, 459
Article 8, I:453
Canada-Auto Pact dispute, I:462, 463
EC-Bananas III dispute, I:460
India-Measures Affecting Automotive Sector dispute, I:464, 465
Indonesia-Autos dispute, I:461, 462
under ASCM Agreement (Article 30), I:730
under Civil Aircraft Agreement
1991 Case, I:1171
Brazil-Aircraft case, I:1187–90
Canada-Aircraft case, I:1184–7
France-Flight Management System Subsidy case, I:1190
GATT dispute settlement, I:1170–71
German Exchange Rate case, I:1170
WTO dispute settlement, I:1184–90
under GATS
Article XXIII
non-violation complaints, I:868
violation complaints, I:867
Canada-Certain Measures Affecting Automotive Industry case, I:884
Canada-Periodicals case, I:875–8
EC-Bananas III case, I:878
Japan-Photographic Film and Paper (Kodak-Fuji) case, I:890
Mexico-Telecommunications Services case, I:891
under TRIPS
non-violation complaints (Article 64.2), I:1114
recourse to dispute settlement (Article 64.1), I:1112–14
Dispute Settlement Body (DSB), I:64, II:54
dispute settlement decisions, implementation and enforcement of, I:1342
DSU limitations, I:1353
ambiguity in process (DSU Articles 21.5 and 22), I:1353–5
disproportionate effect of retaliation, I:1362–1364
incentives for unilateral sanctions (DSU Article 23.1), I:1361
"reasonable period of time" for implementation, I:1355–61
developing countries (DSU Article 21.2), I:1360
particular circumstances, I:1358–9
potential abuse of (DSU Article 21.3), I:1361
prompt compliance (DSU Article 21.3), I:1355–8
DSU structure
compensation and suspension of concessions (DSU Article 22.6), I:1352
implementation surveillance (DSU Article 21.3), I:1351
panel and Appellate Body recommendations, I:1350
enforcement devices, improvements suggested to, I:1364
emphasizing compensation over retaliation (DSU Article 22.2), I:1365
enforceable settlement agreements, I:1364
interim relief, I:1364
retroactive remedies, I:1367
European Community model, I:1367–9
implementation and enforcement provisions, I:1350
implementation in International Law, I:1346–50
WTO and, I:1344–6
Dispute Settlement Understanding (DSU)
Article 1.1, I:1206, 1409
Article 3:2, I:1397
Article 3.2, I:168, 1271, 1411, 1421–3
international law rules, I:1407–8
prompt settlement, I:1343
Article 3.6, I:1364
Article 3.7, I:1204
Article 3.10, I:1224
Article 4, I:1206
Article 4.3, I:1207, 1222, 1224
Article 4.4, I:1215–16
Article 4.5, I:1204, 1223
Article 4.6, I:1226–8
Article 4.8, I:1209–10
Article 4.9, I:1209
Article 4.10, I:1229–31
Article 4.11, I:1213
Article 6.1, I:1211
Article 6.2, I:1216, 1245
Article 7, I:1411
Article 7.1, I:1409
Article 9, I:1247
Article 11, I:428, 1264–6, 1441
Article 12.1, I:1256
Article 12.7, I:1269, 1303
Article 13, I:349, 1260, 1441, 1451
Article 13.1, I:1263, 1442
Article 16.4, I:1296
Article 17, I:1320
Article 17.1, I:1303
Article 17.2, I:1286
Article 17.3, I:1285–6, 1307, 1441
Article 17.6, I:1300, 1320, 1391
Article 17.9, I:1451, 1396
Article 17.10, I:1309–11, 1398, 1446
Article 17:11, I:1401
Article 17:13, I:1302, 1394
Article 18, I:1255
Article 18.2, I:1311, 1446

Article 19.1, I:1350
Article 19.2, I:1421–3
Article 21, I:1364, 1414
Article 21.2, I:1360
Article 21.3, I:1348, 1351, 1360
Article 21.3(b), I:1358
Article 21.3(c), I:1355, 1359
Article 21.5, I:212, 1221, 1257, 1351, 1353, 1354
Article 22, I:1364, 1414
Article 22.2, I:1365
Article 22.4, I:1350
Article 22.6, I:1351–4
Article 23.1, I:1361
Article 24.1, I:1348
Article 25, I:1364
Article 25.4, I:1364
Article 26.1, I:172
implementation and enforcement of dispute settlement decisions and
DSU limitations, I:1353–64
DSU structure, I:1350–53
S&D treatment of developing countries, I:1555
technical assistance in Uruguay Round Agreements, II:466–7
trade and environment, II:518
distribution services, I:915, 927
Doha Declaration on the TRIPS Agreement and Public Health, I:1080, 1098, 1115; II:452–5; III:510–12
Doha Development Agenda, III:234
Anti-Dumping Agreement, I:528, 529
Colombia, III:85–8
computational analysis of trade liberalization II:34t
aggregate results, II:33
agricultural liberalization, II:32, 33
data, II:32
sectoral results, II:38t., II:40
Doha launch and US, III:426–32
Doha Ministerial Declaration (text), III:492–502
Doha Work Programme (August 2004) (text) III:523–4
Egypt issues, III:101–7
electronic commerce and, II:472
EU and, III:134–5
global free trade and, III:455–6
Implementation Issues and Concerns (text), III:503–9
Japan, III:178
agriculture, III:178
developing countries, III:179
issues, III:179
Mexico
Built-in Agenda, III:235
other issues, III:236
Singapore issues, III:235
UR Agreements implementation, III:235
New Zealand's multilateral liberalization concerns
agriculture, III:280–82
non-agricultural products, III:282
rules, III:283–5
services, III:283
sustainable development, III:285–6
postal and express delivery services in GATS, II:199
Services Recommendation of the Special Session for Trade in August 2004 (text), III:527
South Africa, III:371
TBT Agreement and, I:408
Doha Ministerial Declaration, I:62
antidumping action and, II:78, 79
competion policy and, II:501, 502
CVA implementation-related issues, I:569, 570
Financial Services and, I:978
national treatment and market access, I:979
nondiscriminatory structural barriers, I:980–84
new Agreement on Agriculture, I:217
domestic support provisions, I:220
EC proposal, I:218
export subsidies provisions, I:221
market access provisions, I:218, 219
US proposal, I:218
on geographical indications, I:1091, 1092
on SPS Agreement implementation, I:360, 361
text, III:492–502
domestic agricultural subsidies, Peace Clause and, I:214
domestic industrial tariffs issues, Egypt, III:107
domestic labor protection, II:584–7
domestic regulation, gender analysis of trade and, II:732–3
domestic support provisions. *See also* Agreement on Agriculture
Colombia, III:85
under Doha Development Agenda, I:226
EC proposal, I:220
US proposal, I:220
Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (DFA), I:7; III:412
DSB. *See* Dispute Settlement Body
DSU. *See* Dispute Settlement Understanding
Dunkel Draft. *See* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations
DV method. *See* deductive value

EC. *See* European Community
EC-Asbestos case
amicus curiae briefs, I:1400, 1437, 1444; II:644–5
human rights concerns, II:644–5, 688
nonviolation complaints experience under WTO Agreements, I:1379–82
TBT Agreement, I:377–8, 389, 393
applicability of, I:406
import prohibitions applicability aspects of, I:383
trade and environment, II:527–9, 539
WTO Dispute Settlement Practice Relating to Protection of Health and Environment, II:652
EC-Bananas III case, I:133; III:129
AILP and, I:595
Appellate Body and, I:1298, 1311, 1313, 1317
consultations and, I:1216, 1223
dispute settlement under TRIMs Agreement, I:460
DSU
Article 21.5, I:1353
Article 22.6, I:1353
Article 23.1 (incentives for unilateral sanctions), I:1362
decision implementation and enforcement, I:1350
disproportionate effect of retaliation, I:1363
relationship between TRIMs and GATT 1994, I:466

EC-Bananas III case (under GATS), I:878–84
Article II (*de facto* discrimination), scope of, I:882
EC licensing procedures
activity function rules, I:884
hurricane licenses, I:884
operator category rules, I:883
effective date of GATS obligations, I:879
GATS application, I:880–81
service suppliers, I:881–2
EC-Bed Linen case
ADA, I:507
Article 5.3, I:511
Appellate Body and, I:1313
textiles and developing countries, II:415
EC-Cotton Linen case
amicus curiae briefs admissibility consequences in, I:1444
EC-Hormones case, I:244, 1358; II:163; III:129
AB jurisdiction, I:1300, 1303, 1317, 1392
DSU
Article 21.3 (Reasonable Period of Time), I:1361
Article 22.2 (Emphasizing Compensation Over Retaliation), I:1366
environmental issues, II:151
GATT Jurisprudence exception, II:439
human rights concerns, II:648, 649
SPS Agreement and
Article 2, I:256, 260, 262
Article 3, I:267, 268, 270
Article 3.2, I:276
Article 3.3, I:276, 277
Article 5.7, I:298–301
dispute settlement aspects
Article 11.2, I:349
burden of proof, I:346, 348
standard of review, I:351–3
risk assessment concept, I:280, 282–4, 286–7
Article 5.1, I:288, 291, 294–6
Article 5.2, I:292
risk management concept, I:309
Article 5.4, I:310
Article 5.5, I:310–11, 313–15, 318–19
trade and environment, II:523
EC-Import Restrictions on Meat and Meat Products. See *EC-Hormones* case
EC Law and WTO Agreement
Article 133 EC, I:1464
Article 133 Committee, I:1519–20
GATS and, I:1471–2
TRIPS and, I:1472–4
Article 230 EC, I:1489
Article 232 EC, I:1484
common commercial policy, I:1464
competence and Community, I:1465
exclusive competence, I:1465–8
consequences of exclusive Community competence existence, I:1468
determining of (Opinion 2/91), I:1465
express power in internal measure (Opinion 1/94), I:1467
express Treaty provisions (Article 133 EC), I:1465
external powers complement internal powers (Opinion 1/76), I:1467
internal measures adopted by Community (ERTA principle), I:1466
express competence (common commercial policy), I:1464
Article 3(b) EC, I:1464
Article 131 EC, I:1464
Article 133 EC, I:1464
implied competence, I:1464, 1474–6
shared competence, I:1468
GATT 1947, community status under, I:1461
Community Law, I:1462
International Law, I:1462
Opinion 1/94 and WTO Agreement, I:1469
Article 133 and GATS, I:1471
Article 133 and TRIPS Agreement, I:1472–4
GATS and, I:1474
multilateral agreements on trade in goods, I:1470
TRIPS and, I:1475–6
Opinion 1/94, International Law and Responsibility, I:1476
areas within Community competence, I:1478–9
areas within Member state competence, I:1479–80
law and competence, I:1476–8
Opinion 2/91 (exclusive competence), I:1465
shared competence, I:1468–70
WTO Agreement, community status under
GATS, I:1463
TRIPS Agreement, I:1463
WTO and legal order of Community
"direct effect" and Community legal order, I:1481–4, 1487–98
FEDIOL Doctrine, I:1507
GATT 1947 and, I:1485–7
Nakajima Doctrine, I:1504–7
WTO consistent interpretation of EC legislation and measures, I:1498
WTO in EC legal system, procedural routes for invoking, I:1484
WTO obligations, EC conformity with, I:1499–1504
WTO obligations and EC complaints procedures for obligations enforcement, I:1507
Article 133 Committee, I:1519–20
"Market Access Strategy", I:1508
TBR (Council Regulation 3286/94), I:1508
permitted subject matter of TBR complaints, I:1509–13
post complaints procedure, I:1513
procedure outcome (termination, suspension or WTO dispute settlement), I:1514
scope of, I:1509
WTO proceedings initiation, I:1514
EC-Sardines case, I:396, 399–400
AB, I:1299, 1312, 1322, 1326
amicus curiae briefs admissibility consequences in, I:1438, 1447
TBT Agreement, I:377, 378
applicability of, I:406
retroactive application of, I:384
Economic Cooperation Organization (ECO), II:255
economic integration, under GATS, I:833–5
economic principles of international trade. *See* international trade, economic principles of
economic reform
deregulation, I:17
liberalization, I:16, 17
economies in transition. *See* transition economies
educational services, I:915, 928

EFTA. *See* European Free Trade Association
Egypt
  GATT accession aspects, III:93
  GATT/WTO Membership and Uruguay Round Agreements on, III:96
    economic effects, III:96–7
    legal effects, III:98
    political effects, III:97
    social effects, III:98
  issues in forthcoming negotiations (Doha), III:101
    agriculture negotiations, III:102
    domestic industrial tariffs, III:107
    electronic commerce, III:106
    labor standards, III:107
    services negotiations, III:103
    Singapore issues, III:104
    trade and competition policies, III:104
    trade and environment, III:106
    trade and investment, III:104
    trade facilitation, III:105
    transparency, III:106
    Uruguay Round Agreements implementation, III:101
    view toward a new round of negotiations, III:101
  RTAs effect on, III:108
  strategy for objectives accomplishment, III:108
  trade policy development, III:109
  Uruguay Round participation, III:93
    WTO establishment, work after, III:94
    WTO Ministerial Conferences participation, III:95
  WTO
    accession aspects, III:93
    attitude towards, III:98
    Membership effects on Egypt, III:96–8
    participation in WTO Dispute Settlement Process, III:99
    strengths and weaknesses, Egyptian perspective on, III:98–9
electronic commerce. *See also* Telecommunications Services
  Chinese issues, III:68
  classification issues (goods vs. services), II:472
    basic trade principles, II:475
    practical considerations, II:476
    theoretical principles, II:474
  Egyptian issues, III:106
  GATS issues, II:478
    classification issues, II:480
    e-commerce end-user services, II:479
    e-commerce infrastructure services, II:478
    new commitments, II:481
  GATT issues, II:476
    Customs Duty Moratorium, II:477
    Information Technology Agreement, II:477
  Geneva Declaration on (Text), III:491
  global free trade issues, III:453
  TRIPS issues, II:481
    taxation, II:484
    trade and development, II:483
  WTO history, II:470
    Basic Telecommunications Agreement, II:470
    Doha Round, II:472
    Seattle Ministerial, II:472
    Work Programme on Electronic Commerce, II:471
Endangered Species Act (US), Section 609 of, I:163
energy services, I:939–41
environmental issues, II:138. *See also* trade and environment
  background, II:139–149
  Bagwell-Staiger analysis, II:159, 160
  economic theory and empirical evidence, II:152
    economic growth and environment, II:154
    environmental externalities and economic policy, II:153
    trade agreements and environment, II:158
    trade and environment, II:155–8
  GATT and WTO, II:141
    multilateral environmental agreements conflicts, II:148
    national environmental protection restraints, II:145–8
  gender analysis of trade and, II:737
  GEO (Global Environmental Organization), II:167
  internalization versus polluter pays, II:164
  process and production methods, II:162–4
  "trade and environment" concept, II:142
    avenues for further research, II:158
    environmental policies as international competitiveness determinant, II:144–8
    green cover for protectionism, II:149
    trade as threat to environmental quality, II:143
    trade sanctions and eco-imperialism, II:148–9
    trade's impact with local pollutants, II:155–7
    trade's impact with transboundary pollutants, II:157
    WTO as self-enforcing agreement, II:160–61
    WTO rules to accommodate environmental safeguards, II:158–60
  UNEP (United Nations Environmental Programme), II:167
  Uruguay Round Agreements, II:149
    intellectual property, II:151
    services (GATS and GATT 1947), II:152
    standards (TBT and SPS), II:150
    subsidies (SCM), II:151
  WEO (World Environmental Organization), II:167
environmental services, I:915, 928–30
Equivalence and Mutual Recognition principle (under TBT Agreement), I:400–401
Equivalence Decision, I:331–3. *See also* Agreement on Application of Sanitary and Phytosanitary Measures
ERA. *See* Export Restraint Agreement
ERG. *See* Expert Review Group
ERTA principle, I:1466
European Community (EC)
  agriculture trade and, I:201, 202
  agriculture under GATT and
    Article XXIV of GATT, I:191
    CAP, I:191, 192
  export subsidy system, I:198, 199
  NAFTA and, I:807
    Cassis de Dijon case, I:808
    EC Treaty Article 43, I:808
    EC Treaty Article 49, I:808
    EC Treaty Article 50, I:808
    EC Treaty Article 52, I:809; II:317
    EC Treaty Article 58, I:809
    EC Treaty Article 73(b), II:317
    Säger case, I:808
  QUAD member, I:814–15
European Free Trade Association (EFTA), II:208

European Union (EU), III:112. *See also* Russia; United States
CAP, III:113, 119, 120, 124
competition policy negotiations, II:502
double density measures of trade intensity, II:18t
EU and MERCOSUR, regional trade negotiations between
background, III:22
differing negotiating goals and strategies, III:22
EU proposal, III:23–4
expansion and rules of origin, II:286
GATT
Article XIX, III:121
Article XXIV:6, III:112, 113
trade policy decision-making, III:113–15
Uruguay Round
European "overall approach", III:116–18
European results in, III:123–5
lessons from, III:127
origin of, III:115
Uruguay Round, decisive European factors in
agriculture pre-eminence, III:125
bilateralization of negotiations, III:125
time importance, III:126
Uruguay Round European issues
agriculture, III:118–20
developing countries, III:123
market access for goods, III:120
multilateral disciplines strengthening, III:118
services, III:121
TRIPS, TRIMs and restrictive business practices, III:122
WTO and
Doha, III:134–5
EU associations and enlargements in WTO, 131
one more Round, III:132–4
WTO Dispute Settlement, III:128–31
Excise Tax Act, *See Canada-Periodicals* case
exclusive competence. *See under* EC Law and WTO Agreement
Exhaustible Natural Resources conservation, I:162
exhaustion of rights under TRIPS Agreement, I:1069–77
Article 6 scope, I:1070–1
doctrine, I:1069
international exhaustion, I:1070
national exhaustion, I:1070
regional exhaustion, I:1070
Expert Review Group (ERG), I:1261–3
express competence. *See under* EC Law and WTO Agreement
export licensing, Mongolian sector, III:257
Export Restraint Agreement (ERA), II:47. *See also* Orderly Marketing Agreement; Voluntary Export Restraint
export subsidies, II:90, 91. *See also* Agreement on Subsidies and Countervailing Measures; import subsidies
Colombia, III:85
red light, II:99
export subsidies provisions (Agreement on Agriculture)
anti-circumvention provisions
Article 10, I:211
Article 11, I:211
developing countries provisions, I:215
dispute settlement, I:211
Article 3.3, I:213
Article 9.1(a), I:212
Article 9.1(b), I:212
Article 9.1(c), I:212–13
Article 9.1(d), I:213
Article 10.1, I:213
Doha Development Agenda
Cairns Group proposal, I:221
EC proposal, I:221
Peace Clause and, I:215
reduction commitments
Article 3.3, I:210
Article 8, I:210
Article 9.1, I:210
Article 9.2, I:211
express delivery services. *See* postal and express delivery services in GATS

FAIR (Federal Agricultural Improvement and Reform) Act of 1996 (US), II:118
fallback method of valuation (Method 6), I:561. *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
prohibited methods, I:562
requirements for applying, I:562
farm export subsidies, II:118
FATS. *See* Foreign Affiliates Trade in Services
FDI. *See* foreign direct investment
FEDIOL Doctrine, I:1507. *See also* Nakajima Doctrine
Financial Services, I:915, 931, 956
Annex on Financial Services, GATS
dispute settlement expertise, I:968
financial services definition and coverage, I:968
prudential carve-out, I:964–6
prudential measures recognition, I:966–8
banking services, I:974
commitments, I:969, 985
additional, I:976–977
national treatment and market access, I:971–5
Doha Round and beyond, I:978
national treatment and market access, I:979
nondiscriminatory structural barriers, I:980
"effective market access", I:982
prudential measures, I:983
regulatory transparency, I:981
GATS Framework Agreement, I:962
Annex on Financial Services, I:964–9, 987
liberalization of capital movements, I:962–4
insurance services, I:975
MFN exemptions, I:977–8
national treatment and market access (Doha Round), I:979
national treatment and market access commitments, I:971
commercial presence establishment (Mode 3), I:971
cross-border services (Modes 1 and 2), I:973
temporary presence of natural persons (Mode 4), I:975
Uruguay Round Negotiations, I:958
"Free-Rider" issue, I:959–60

Interim Agreement on, I:960
1997 Agreement, I:961
WTO accession impact on
China, III:64
Russia, III:299, 327, 328
FIRA. *See* Foreign Investment Review Act
FMS (flight management system), I:1190
FOGS Group and WTO institutional issues, I:55
Foreign Affiliates Trade in Services (FATS), I:825
foreign direct investment (FDI), I:18, 20, 439. *See also* global finance transactions; investment-related provisions
Argentina
concessions value in patents, impact on FDI and trade, III:11
services-related inflows of FDI and, III:15–16
in developing countries, I:1567–9
postal and express delivery services in GATS, II:198
RTA and developing countries, II:330–31
services liberalization and, II:190
stages
1950s, I:21
1985–1990 boom, I:21
early 1970s, I:21
mid-1980s, I:21
foreign exchange trading, I:19
Foreign Investment Review Act (FIRA)
GATT panel case, I:123
GATT Article III:4, I:444
GATT Article XI:1, I:444
GATT Article XVII:1(c), I:445
foreign labor protection
potential legal bases in GATT/WTO Law, II:587
US-Reformulated Gasoline case implications, II:587–9
Fourth Protocol commitments under GATS. *See also* Telecommunication Services
market access and national treatment commitments, I:998
Reference Paper on regulatory principles commitments, I:999
allocation and use of scarce resources, I:1010
assessment, I:1010–13
competitive safeguards, I:1003–1006
interconnection, I:1006–1008
legal nature, I:1000
licensing, I:1009
"major suppliers" regulation, I:1001
regulatory authority independence, I:1010
scope, I:1001
universal service, I:1008
residual importance of Annex on Telecommunications and, I:1013
Framework for Establishing Modalities in Agriculture (August 2004) (Text), III:518–23
Framework for Establishing Modalities in Market Access for non-agricultural products (August 2004) (Text), III:524–6
"Free-Rider" issue, Financial Services and, I:959–60
free trade areas (FTAs), I:172, 173, 175; II:9. *See also* customs unions; regional trade arrangements
Canada, III:43
Colombia, III:89
GATT Article XXIV, II:223, 224
Korea, III:208, 209, 210
Mexico, III:237
New Zealand, III:277
rules of origin, II:274–6, 280, 282
Singapore, III:347
Singapore-New Zealand, II:285
RTA and developing countries, II:329, 330
Free Trade Area of the Americas (FTAA), II:209; III:238
Argentina and, III:22
Canada, III:38
rules of origin and, II:285
Uruguay Round and Regionalism, II:303
"friends of the court" in WTO's dispute settlement mechanism, I:1429. *See also amicus curiae* briefs and dispute settlement

GAFTA. *See* Greater Arab Free Trade Agreement
GATS. *See* General Agreement on Trade in Services
GATT. *See* General Agreement on Tariffs and Trade
GATT 1947. *See* General Agreement on Tariffs and Trade 1947
GATT 1994. *See* General Agreement on Tariffs and Trade
gender analysis. *See* trade and gender
General Agreement on Tariffs and Trade (GATT)
accession aspects
Egypt, III:93
Japan, III:172
Korea, III:185
Mexico, III:217–27
Russian, III:289–91, 321–331
Singapore, III:336–7, 341
anti-dumping action under, II:69–72, 74, 78
Argentina role in international trade and, III:5–6
Article I [Unconditional Most-Favored-Nation Obligation], I:99, 100
Article I:1, I:102
conditional vs. unconditional MFN treatment, I:101–2
"like products" definition, I:103–5
MFN antecedents, I:101
MFN commitments (additional), I:105
overview of, I:102
Article II [Tariff Bindings]
Article II:1(a), I:107
Article II:3 [valuation of imports], I:111
Article II:4 [import monopolies], I:112
Marrakesh Protocol, I:112–14
other duties or charges
Article II:1(b), I:111
Article II:2 [other duties or charges], I:111
tariff classification
Article II:1, I:112
Article II:5, I:112
tariff modification and withdrawal, I:109–10
tariff negotiations, I:108–9
Article III [National Treatment Obligation], I:114, 375
additional commitments, I:124–5
Article III:1, I:115, 116, 120
Article III:2, I:116
first sentence, I:117
internal taxes and other charges, I:116
second sentence, I:120–22

General Agreement on Tariffs and Trade (*cont.*)
Article III:4, I:374
internal regulations affecting imports, I:122–4
"like product" determination, I:118–19
internal regulations affecting imports
Article III:4, I:122–5
Article III:5, I:125
national treatment exceptions, I:125–7
Article III:8(a), I:125
Article III:8(b), I:126
Article III:10, I:127
Article IV [Cinematograph Films], I:753–54
Article V [Freedom of Transit]
Article V:2, I:140
Article V:5, I:140
Article V:6, I:106, 140
Article VI [Antidumping and Countervailing Duties], I:140, 142, 1550
Article VI:1, I:141
Article VI:2, I:141
Article VI:3, I:141
Article VII [Customs Valuation], I:172, 1554
actual value, definition, I:537–8
Article VII:2(a), I:142, 537
Article VII:2(b), I:142, 538
Article VII:2(c), I:538
Article VII:3, I:538
Article VII:5 [transparency], I:538
implementation and CVA, I:538
relationship with CVA, I:541–2
Article VIII [Fees and Formalities Connected with Importation]
Article VIII:1(a), I:143
Article VIII:1(c), I:143
Article VIII:3, I:143
Article IX [Marks of Origin]
Article IX:1, I:106, 144
Article IX:2, I:144, 145
Article IX:3, I:144
Article IX:4, I:144
Article IX:5, I:145
Article IX:6, I:145
Article X [Publication and Administration of Trade Regulations], I:134
Article X:1, I:136
Article X:2, I:135
Article X:3, I:136
Article XI [Elimination of Quotas], I:127
allocation of quotas, I:132
balance-of-payments exception, I:131
exception for agricultural products
Article XI:1, I:128–30
Article XI:2, I:129
Article XI:2(b), I:129
Article XI:2(c), I:129–31
Article XII [Balance-of-Payments Exception], I:131–2
Article XIII [Administration of Quantitative Restrictions]
Articles XIII:1, I:106
Article XIII:2, I:132–3
Article XIII:3, I:134
Article XIII:4, I:134
Article XIV [Exchange Controls and Exchange Arrangements], I:146
Article XIV:1, I:147
Article XIV:2, I:147
Article XV [Exchange Controls and Exchange Arrangements], I:146
Article XV:4, I:147
Article XV:5, I:147
Article XVI [Subsidies], I:148
Article XVII [State Trading Enterprises], I:148
Articles XVII:1, I:106
Article XVII:1(a), I:149
Article XVII:1(b), I:149
Article XVII:1(c), I:149
Article XVII:2, I:150
Article XVIII, I:106
balance-of-payments restrictions (Article XVII1:B), I:65, 84, 131
governmental assistance to economic development, I:180
Article XIX [Emergency Action on Imports of Particular Products] of GATT 1994, I:151–3
Article XX [General Exceptions], I:106
Article XX(b) [Measures Necessary to Protect Human, Animal or Plant Life or Health], I:154, 157–9, 236, 237, 251, 252, 253, 375
Article XX(d) [Measures Against Deceptive Practices and to Protect Intellectual Property], I:160–62
Article XX(g) [Measures to Conserve Exhaustible Natural Resources], I:162–5, 375
chapeau (Preamble), I:155–6
other exceptions, I:165
public morals exception, I:157
Article XXI [Security Exceptions], I:1572–8
Article XXI(b)(iii), I:166, 167
Article XXI(c), I:168
Article XXII [Consultation], I:169, 1200–1202
Article XXIII [Nullification or Impairment]
Article XXIII.1, I:169
Article XXIII:1(a) [violation complaints], I:127, 170
Article XXIII:1(b) [nonviolation complaints], I:126, 170–71, 1379–82
Article XXIII:1(c) [situation complaints], I:172
Article XXIII.2, I:170
Article XXIV
Article XXIV:4, I:176
Article XXIV:6, I:177–8
Article XXIV:8, I:172
Article XXIV:12, I:126
RTA establishing criteria, I:172–4
Uruguay Round understanding on, I:176–8
Article XXVIII
Article XXVIII:1, I:111
Article XXVIII:2(a) *bis*, I:109
Article XXVIII:4, I:110
Article XXIX, I:91, 92n.
Article XXX:2, I:70
Article XXXV, I:78, 79, 179
Articles XXXVI–XXXVIII [Trade and Development], I:181
balance-of-payments
Article XII, I:131–2
Article XVII1:B, I:65, 84, 131
Canada, III:30–35
centrally planned economies and, II:248
Colombia participation in
economic effects of, III:82–3

post Tokyo Round period, III:76–7
Tokyo Round, III:74–6
UNCTAD III, III:74
competition policy and, II:494–7
customs unions and FTAs, I:172
Article XXIV, I:172, 176
RTA types, I:175
Customs Valuation and Agreement, I:534
dispute settlement, I:168
Article XXII [Consultation], I:169
Article XXIII [Nullification or Impairment], I:169
EC Law
Community legal order under GATT, I:1485–7
Community status under GATT, I:1461–2
electronic commerce issues, II:476
Customs Duty Moratorium, II:477
Information Technology Agreement, II:477
environmental issues, II:141
Article III, II:160
Article XX, II:146, 149, 150
conflicts with multilateral environmental agreements, II:148
restraints on national environmental protection, II:145–8
exceptions
See Article XX [General Exceptions]
See Article XXI [Security Exceptions]
future aspects of, I:182–184
GATT 1947, Textile trade regulations under
Long-Term Arrangement (LTA), I:413
Multi-Fiber Arrangement (MFA), I:414
Short-Term Arrangement (STA), I:413
transition to GATT 1994, I:96
gender analysis of, II:717–19
Article XVIII, II:718
Article XX, II:719
human rights and trade
Article III, II:653–4
Article XX, II:651–3, 677, 680, 681
Indonesia and, III:146, 152
institutional inadequacies and
ICITO, I:54
ITO, I:53
pragmatic adaptation and its limitations, I:54
institutional provisions under, I:178–180
integration of products (under ATC) into, I:420
jurisprudence exceptions and TRIPS Agreement, II:438–40
Korea and, III:187
Beef Panel, III:191
BOP consultations, III:189
Multifiber Arrangement, III:187
Tokyo Round, III:188
labor in GATT practice, II:576
adjudication without law, II:584
Article XIII, II:185, 186
Article XVI, II:185
Article XX, II:185
contracting parties proposals, II:581
domestic labor protection, II:584–7
foreign labor protection, II:587
Marrakesh Protocol to, I:112–114
MFN commitments (additional)
Article III:7, I:106
Article IV(b), I:106
Article V:5, I:106
Article V:6, I:106
Article IX:1, I:106
Article XIII:1, I:106
Article XVII:1, I:106
Article XX, I:106
MTN rounds, I:92, 93
Tokyo Rounds, I:94
Uruguay Round, I:95
multilateralism, I:94
non-violation complaints experience under, I:1374–82
non-violation nullification or impairment of benefit and tariff classification, Article XXIII:1:(b), I:1597
plurilateralism, I:94
RTA regulation aspects (Article XXIV), II:222–8, 303
Agreement on Safeguards, II:238
Argentina-Footwear case, II:238–9
Canada-Certain Measures Affecting Automotive Industry case, II:237–8
Turkey-Textiles case, II:235–7, 240
rules of origin in, II:264–73
safeguard measures (Article XIX), I:755
compensation and retaliation, I:760
increased imports, I:757
most-favored nation treatment, I:758
preferential arrangements, I:758
procedural requirements, I:759
unforeseen developments and tariff concessions effect, I:757
SCM and, II:95
agricultural subsidies (Article XVI), II:97
Article II:2(b), II:93
Article III:8(b), II:93
Article XVI, II:93, 94
S&D treatment of developing countries
Article XVIII, I:1531
Preamble, I:1532
Section A, I:1533
Section B, I:1533
Section C, I:1534
Section D, I:1535
Part IV of GATT
Article XXXVI, I:1536
Article XXXVII, I:1537
Article XXXVIII, I:1537
services liberalization and economic development, II:191–6
special provisions for developing countries (Article XVIII), I:180
SPS measures
Article III, I:236
Article XI, I:236, 237
Article XX(b), I:236, 237
inefficiency of GATT 1947 rules, I:238
Subsidies Code (1979), I:682–3
Subsidy Discipline (1947), I:681
summary and appraisal aspects of, I:182
textiles and developing countries
MFA comparison with GATT, II:398
MFA objectives and impact, II:399–401
Short-Term and Long-Term Arrangements, II:391–5

General Agreement on Tariffs and Trade (*cont.*)
trade and culture concerns under
Article I.1-Most Favored Nation, II:756
Article III-National Treatment, II:756–60
Article IV-Cinematographic Films, II:753–5
Article XI-Quotas, II:760
Article XX(f)-Exception for National Treasures, II:755–6
trade and environment, II:514
US and
leadership in GATT formation, III:382–3
Tokyo Round (1947–1979), III:389, 392–6
violation claims and tariff classification
Article I:1, I:1592–4
Article II:1, I:1594
Customs Valuation Agreement and, I:534
General Agreement on Trade in Services (GATS), I:802. *See also* services; services in RTAs
Annex on Financial Services, I:964–9, 987
Annex on Telecommunications, I:996, 1013
background, I:803
Built-in Agenda, I:893
Article X [Emergency Safeguard Measures], I:902–4
Article XIII [Government Procurement in Services], I:904
Article XV [Subsidies], I:905
domestic regulation, I:900
regulatory disciplines legal form, I:901
sectoral vs. horizontal disciplines, I:901
emergency safeguards, government procurement and subsidies, I:902
implementation issues, I:911
outstanding issues, I:897
autonomous liberalization, I:897–900
Trade in Services assessment, I:897
sectoral and other annexes, I:906
Annex on Air Transport Services, I:909–10
Annex on Article II Exemptions, I:906–8
Annex on Movement of Natural Persons, I:908–9
Annex on Tourism, I:910
special negotiating sessions, I:894
outstanding issues, I:897
overview, I:894
progressive liberalization and current negotiations, I:896
China and, III:65
classification issues, I:913
cluster and checklist approaches, I:920–21
Committee on Specific Commitments (CSC), I:919
overview, I:918
specific commitments scheduling guidelines, I:919
W/120 classification, I:921–41
competition policy and, II:500
dispute settlement cases, I:874
Canada-Certain Measures Affecting Automotive Industry case, I:884–90
Canada-Periodicals case, I:875–8
EC-Bananas III case, I:878–84
Japan-Photographic Film and Paper (Kodak-Fuji) case, I:890–91
Mexico-Telecommunications Services case, I:891–3
domestic regulation mandate implementation
accountancy disciplines, I:943–4
MRA Guidelines, I:942
Working Party on Domestic Regulation, I:944
Working Party on Professional Services, I:942
EC Law and
Article 133 EC, I:1471
implied competence under, I:1474
electronic commerce issues, II:478
classification issues, II:480
e-commerce end-user services, II:479
e-commerce infrastructure services, II:478
new commitments, II:481
environmental issues, II:152
Framework Agreement (Annex on Financial Services), I:962, 964–9
dispute settlement expertise, I:968
Financial Services definition and coverage, I:968
prudential carve-out, I:964–6
prudential measures recognition, I:966–8
GATT and, I:821
gender analysis of, II:726–9
history and development of, I:803
GATT, I:803
international and national fora, I:805
ICC, I:806
UNCTAD, I:806
regional approaches to regulation
EC, I:807
NAFTA, I:809
investment-related provisions in, II:314
liberalization under, I:820–21. *See also* Part IV. Progressive Liberalization *infra*
Mexico, III:231
Part I. Scope and Definition (Article I), I:822
definition, I:822
scope, I:822
modes of supply
commercial presence, I:825
consumption abroad, I:824
cross border, I:823
presence of natural persons, I:826
Part II. General Obligations, I:826
Article II [Most-Favored Nation (MFN) Treatment], I:827
Article II:1 [basic rule], I:827–9
Article II:2 [MFN exemption], I:829–31
Article II:3 [contiguous frontier zones], I:831–2
Article III [Transparency], I:831
Article III:1, I:831
Article III:3, I:831
Article III:4, I:832
Article III:5, I:832
Article III *bis*, I:832
Article IV [Increasing Participation of Developing Countries], I:832–3, 1555
Article V [Economic Integration], I:833
developing countries, I:835
elimination of discriminatory measures (Article V:1 and V:2), I:834
exemption (Article V:6), I:833
notification and examination (Article V:7), I:834
substantial coverage (Article V:1), I:833
trade creation (Article V:4), I:835
Article V *bis* [Labor Markets Integration Agreements], I:835

Article VI [Domestic Regulation], I:836
conditional obligations (Article VI:1, VI:3 and VI:6), I:837
domestic regulation mandate implementation (Article VI:4), I:839
mandated development of regulatory disciplines (Article VI:4), I:837–8
period pending regulatory disciplines development (Article VI:4 and VI:5), I:838–9
unconditional obligations (Article VI:2 and VI:4), I:836
Article VII [Recognition], I:839–40
Article VIII [Monopolies and Exclusive Service Supplies], I:841
Article IX [Business Practices], I:841
Article XI [Payments and Transfers], I:841
Article XII [Restrictions to Safeguard Balance of Payments], I:842
Article XIV [General Exceptions], I:843–5
Article XIV *bis* [Security Exceptions], I:845–6
Part III. Specific Commitments
Article XVI [Market Access] 846
Article XVI:2, I:847
market access and national treatment, relationship between, I:847–9
overview, I:846
Article XVII [National Treatment], I:849
"like services and service suppliers", I:851–2
national treatment and modes of supply, I:849–51
overview, I:849
Article XVIII [Additional Commitments], I:853
Part IV. Progressive Liberalization
Article XIX [Negotiation of Specific Commitments], I:854
Article XX [Scheduling of Commitments], I:854–64
horizontal commitments, I:856
overview, I:854–6
sectoral commitments, I:856
Article XXI [Modification of Schedules], I:865
Services Classification, I:864
Part V. Institutional Arrangements, I:865
Dispute Settlement Procedures (Article XXII and XXIII), I:866
Article XXII [Consultations], I:866
Article XXIII [Dispute Settlement and Enforcement], I:867–8
GATS, I:866
Specific Service Sectors, I:868–9
Article XXIV [Council for Trade in Services], I:870
Article XXIV:1, I:870
Article XXIV:2, I:871
Article XXV [Technical Cooperation], I:872
Article XXVI [Relationship with Other International Organizations] 872
Part VI. Final Provisions, I:873
Article XXVII [Denial of Benefits], I:873
Article XXIX [Annexes], I:874
postal and express delivery services in, II:196–200
RTAs and
Article V, II:302, 303
ceiling binding commitment, II:299
challenges in, II:300, 301
impact evaluation, II:305
liberalizing principles, II:296
rules of origin and, II:286–7
Russia and, III:298
SCM measures and, II:98
S&D treatment of developing countries (Article IV), I:1555
technical assistance in Uruguay Round Agreements, II:465
trade and culture, II:767, 775–7
trade and environment, II:517
Uruguay Round
goals, I:811
developing countries, I:817
QUAD Members, I:812
negotiations course, I:818–20
results overview, I:820
General Council (WTO governance structure), I:63, 64
Generalized System of Preferences (GSP), I:1538. *See also* special and differential treatment of developing countries
discriminatory preferences problem, I:1540
human rights and trade under, II:680
origin of, I:1539
rules of origin and, II:266
ten-year waiver, I:1539
Tokyo Round Enabling Clause
background, I:1541
problem of graduation, I:1544–6
terms of, I:1542
genetically modified organisms (GMO), II:122, 123, 151, 550
Geneva Ministerial Conference (1998), I:61
Global Electronic Commerce Declaration on (Text), III:491
Ministerial Declaration (Text), III:488–90
Geneva three-pronged approach and TRTCCB, II:462–4
ITC, II:463
UNCTAD, II:463
WTO, II:462
GEO. *See* Global Environmental Organization
geographical indications (under TRIPS), I:1088–91
Article 22, I:1088
Article 22.2, I:145
Article 22.3, I:145
Article 23
Article 23.1, I:146
Article 23.2, I:146
Article 23:4, I:1089
Article 24
Article 24:1, I:1089
Article 24:4, I:1089
Article 24:7, I:1089
Doha Declaration, I:1089, 1090
negotiating history, I:1088
Germany v. Council, EC Law and WTO Agreement, I:1486
GILS. *See* grossly inadequate labor standards
GIR 2(a), I:643, 644. *See also* Harmonization Work Programme
global economic policymaking functions of WTO, I:59
Global Environmental Organization (GEO), II:167
global financial transactions, I:18–20. *See also* foreign direct investment

global free trade
Doha Development Agenda, III:455–6
institutional issues (dispute settlement), III:453–55
market access
agriculture, III:442–5
services, III:445–7
tariffs, III:440–42
rules
anti-dumping and subsidies/countervailing measures, III:447–9
electronic commerce, III:453
non-discrimination, III:451–3
trade and competition, III:450
trade and environment, III:451
trade and investment, III:449
services in RTA and
compatibility, II:309
incentives, II:307
overlapping fora, II:308
Global System of Trade Preferences (GSTP), III:109
Global Trade Analysis Project (GTAP), II:114, 116
globalization. *See also* liberalization
1990s, III:469–72
Chinese enterprises encouragement for, III:67
corporation role, III:461–3
impact on trade and labor, II:575
impact on trade policy, I:22, 33–4
NGOs and WTO, III:463–9
trade and culture issues, II:750, 751
Uruguay Round negotiation and, I:23–4; III:458–61
FDI, I:20, 21, 22
global financial transactions, I:18–20
GMO. *See* genetically modified organisms
government bodies (under TBT Agreement)
central government bodies (Articles 5 and 6), I:387
local government bodies (Article 7), I:387
non government bodies (Article 8), I:387
Government Procurement. *See* Agreement on Government Procurement
GPA. *See* Agreement on Government Procurement
gravity model estimations, II:17, 22t
gray-area measures, I:763. *See also* safeguard measures
elimination of, I:780
prohibition of, I:792
Greater Arab Free Trade Agreement (GAFTA), II:211; III:108
Green Box Exemptions (under Agreement on Agriculture), I:209, 220, 221. *See also* Blue Box Exemptions
green light subsidies (ASCM), I:704–6; II:97, 101. *See also* red light subsidies; yellow light subsidies
grossly inadequate labor standards (GILS)
and international competitive position, II:179–81
efficiency in world production, II:177
promote unfair trade, II:177
Group of Three, Colombia, III:89
GSP. *See* Generalized System of Preferences
GSTP. *See* Global System of Trade Preferences
GTAP. *See* Global Trade Analysis Project
Guidelines for Mutual Recognition Agreements or Arrangements in the Accounting Sector (GATS), I:942

Haberler Report, I:192, 193. *See also* agriculture under GATT
harmonization of non-preferential rules of origin, II:270–3
harmonization principle (under TBT Agreement), I:395
Codex Standard 94, I:396–8
ineffective or inappropriate means, I:398–9
rebuttable presumption favoring, I:399–400
Harmonization Work Programme (HWP) (Rules of Origin), I:614
CRO (after June 1999), I:618, 619
product-specific rules of origin (Appendix 2)
agricultural products (HS Chapters 1 to 24), I:654–5
machinery, transport equipment and photocopying apparatus (HS Chapters 84 to 90), I:656–7
textiles and textile articles (HS Chapters 50 to 63), I:655
Technical Committee on Rules of Origin (TCRO) (July 1995—May 1999), I:615, 616
second examination, I:618
working method, I:616–18
wholly-obtained goods (Appendix 1)
CRO definition, I:651
goods obtained outside country, definition of, I:652–3
preparatory discussion, I:648
TCRO definition, I:649–51
harmonized non-preferential rules of origin architecture
Appendix 1 (wholly-obtained goods), I:622
CRO definition, I:651
goods obtained outside country, definition of, I:652–3
preparatory discussion, I:648
TCRO definition, I:649–51
Appendix 2 rules, I:636
product-specific rules of origin, I:654–6
Rule 4 [intermediate materials], I:637
Rule 6 (putting up in sets [or kits]), I:646–7
Rule 7 [de minimis], I:638
residual rules, I:628–30
Appendix 3 (minimal operations or processes), I:622
background, I:619
basic framework, I:625
country of origin, I:626
disassembly of goods into parts/components
negative rule for disassembly, I:641
origin of disassembled (used) parts/components, I:641–2
General Rules, I:621, 622
General Rule 2, I:639
General Rule 2(a)
assembly of collection of parts, I:644
collection of parts, I:643–4
items presented unassembled or disassembled, I:643
simple assembly issue, I:643
General Rule 3 [Determination of Origin], I:636
General Rule 4 [Neutral Elements], I:636
General Rule 5 [Packing and packaging materials and containers], I:644–5
General Rule 6 [Accessories and spare parts and tools], I:645
issues related to
Article 6.3 of ARO, I:640
harmonized system related issues, I:639
Meech Lake recommendations, I:624
minimal operations or processes
CRO negotiations (after June 1999), I:635

discussions at TCRO's first and second sessions, I:634
origin-conferring rules, relationship with, I:635
placement of, I:634
mixture rules, I:647
multiple country of origin, I:627, 628
Ottawa language, I:623–4
primary rules, I:625–6, 628, 631
residual rules, I:621, 625–6
essential character criterion, I:629–30
Rule 2 (May 1999), Appendix 2, I:630–31
Rule 2 (as of June 2002), I:632
Rule 3 (as of June 2002), I:632–3
Rule 5, I:633
substantial transformation and, I:633
rules for mixtures, I:647
tracing-back approach, I:626–7
harmonized system classification
conversion of GATT tariff schedules to, I:1589–90
nature and purpose of, I:1582–3
harmonized system, Mongolian, III:257
Havana Charter, I:91, 92, 189, 190; II:600
Havana Conference, III:217
health related and social services, I:916, 932
Helms-Burton Act (US), I:167, 1577–8
High Level Meeting
LDCs in multilateral trading system, II:348
hub and spoke systems and rules of preference ("Spaghetti Bowl" Problem), II:283
human rights and trade, II:625, 664
balancing of human rights, II:637, 667
balancing principles relevance for WTO Rules interpretation, II:637–8
legal consequences of human rights approach to international trade, II:638–41
necessity principles, II:637
non-discrimination, II:637
rule of law, II:637
challenge, II:664
institutional identity, II:666
navigating among rival political philosophies, II:665
cosmopolitan democracy and, II:682
adjustment between trade and non-trade interests, II:689–91
balance approaching between trade and non-trade interests, II:685–9
collateralism problem, II:683
cosmopolitan democracy, political impartiality, and WTO, II:691–4
factoring in trading interests, II:691
impartial order for trade relations, II:684
EU Treaty Article 6, II:635
GATS, II:678
GATT, II:677, 678, 681
Article III, II:653–4
Article XX(b), II:688
Article XX, II:638, 639, 651–3, 680
gender analysis, II:736–7
human right to health, II:641
human right to health and access to medicines, II:645
trade-related aspects of right to health (General Comment No. 14), II:645–7
WTO practice on access to medicines, II:647–8
human rights as constitutional restraints on WTO bodies power, II:642
due process of WTO (*Amicus Curiae* Briefs), II:643–5
judicial deference vis-a-vis democratic legislation (*Hormone Beef* dispute), II:648–50
substantive restraints (human right to health and access to medicines), II:645–8
human rights functions of WTO Rules, II:650
WTO guarantees of freedom, non-discriminatory conditions of competition, necessity and proportionality, II:650–55
WTO guarantees of property rights (disputes over TRIMs and TRIPS), II:656–7
WTO legal restraints on discrimination and trade sanctions for political ends, II:657–9
human rights obligations of WTO members, II:628
constitutional primacy of human rights in International Law, II:633
diversity of national and international human rights implementation, II:632
human rights as institutional and constitutional guarantees, II:641–2
indivisibility and incomplete enumeration of specific human rights, II:634–6
limited WTO jurisdiction and customary International Law Rules for WTO Law interpretation, II:629–32
obligations by governments and intergovernmental organizations to respect, protect and promote human rights, II:636
principles for mutual balancing of human rights, II:637–41
ICCPR, II:666, 685
ICESCR, II:628, 666, 670, 675, 676, 691
Article 2, II:646
Article 4, II:637
selecting and balancing basic rights, II:667
Stockholm Declaration, II:626
TRIPS Agreement, II:675, 676, 678
Article 27, II:691
UDHR, II:626, 637
under GSP, II:680
Vienna Declaration on Human Rights, II:628
WTO Constitution future (explicit recognition of human rights so as to better protect social welfare and democratic governance in WTO)
explicit recognition to promote social welfare and democratic governance in trade policy area, II:660–61
formal and substantive "multi-level constitutionalism" in WTO Law, II:659–60
WTO guarantees of freedom, non-discriminatory conditions of competition, necessity and proportionality, II:650
balancing of economic and non-economic values in WTO dispute settlement practice relating to GATT Article III, II:653–4
dispute settlement practice relating to health and environment protection (GATT Article XX), II:651–3
dispute settlement practice relating to SPS Agreement, II:654–5
WTO Law interpretation
Article II:1, II:629

human rights and trade (*cont*.)
Article III:1, II:629
Article III:2, II:629
Article V:1, II:629
WTO practice on access to medicines
SPS Agreement, II:649
TRIPS Agreement, II:647, 648
WTO's objectives linking to human rights, II:668
embedded and imported rights, II:669–70
human rights and trade with developing countries, II:679–82
market integration types, II:674
negative integration aspects, II:676–9
positive integration aspects, II:674–6
techniques of interpretation (functional versus civic inclusion), II:672–4
techniques of interpretation (institutional purpose and founders' intentions), II:671
HWP. *See* Harmonization Work Programme

IAA. *See* International Agreement on Anti-dumping
ICCPR. *See* International Covenant on Civil and Property Rights
ICESCR. *See* International Covenant on Economic, Social and Cultural Rights
ICFTU. *See* International Confederation of Free Trade Unions
ICITO. *See* Interim Commission for International Trade Organization
ICN. *See* International Competition Network
ICPAC. *See* International Competition Policy Advisory Committee
ICT. *See* information and communication technologies
identical goods. *See also* Agreement on Implementation of Article VII of the General Agreement on tariff and Trade 1994; similar goods
definition, I:556
requirements for qualifying as, I:557
IF. *See* Integrated Framework for LDCs
IFIA. *See* International Federation of Inspection Agencies
IGO. *See* intergovernmental organizations
ILO. *See* International Labor Organization
IMF. *See* International Monetary Fund
implied competence. *See under* EC Law and WTO Agreement
import licensing
automatic licensing, I:592, 597
Mexico, III:230
Mongolia, III:257
non-automatic licensing, I:592, 597
Import Licensing Procedures Agreement. *See* Agreement on Import Licensing Procedures
import prohibitions applicability, TBT Agreement (Annex 1), I:383. *See also under* General Agreement on Tariffs and Trade
import risk analyses (IRA), I:297
import subsidies, II:92, 93. *See also* export subsidies
import substitution industrialization (ISI), I:16
importers' rights (under CVA), I:564
right to appeal (Article 11), I:565
right to have goods released (Article 13), I:565
right to request written explanations (Article 16), I:565
imports
internal regulations affecting, I:122
valuation of, I:111
India-Autos case
dispute settlement under TRIMs Agreement, I:464, 465
relationship between TRIMs and GATT 1994, I:468
India-Patent Protection for Pharmaceutical and Agricultural Chemical Products
consultation and dispute settlement, I:1205, 1217, 1218, 1225
under TRIPS Agreement, I:1065
relationship with GATT, II:428
TRIPS interpretation, II:429, 430, 434
Indonesia, III:139
ASEAN and, III:162
changing trade pattern and structure, III:142, 143t, III:144t, III:147t
commodity power (oil and primary commodities), III:142
diversified export base, III:146
post-oil boom, III:143–6
future prospects
nurturing system in 21st century, III:168
proactive participation in multilateral system, III:164
systemic issues (multilateral system integrity), III:165
GATT
Article XI, III:141
Article XVIII, III:152
Article XIX, III:152
Article XX, III:141
GATT/WTO interface and decision-making mechanism, III:146
issues (Multilateral Round), III:154
competition policy, III:157
existing obligations (implementation issues), III:156
investment, III:157
linkage between trade, investment and competition policy, III:158
NGOs emergence, III:155
non-economic issues, III:159
S&D treatment, revisiting of, III:161
technical and trade facilitation rules, III:159
issues (Uruguay Round)
institutional issues, III:153
intellectual property rights, III:151
market access in goods, III:149
S&D treatment, III:153
services, III:150
strengthening GATT rules, III:152
multilateral trading system and (historical perspective), III:140–42
multilateralism versus regionalism, III:162–4
Indonesia-Autos case
human rights and trade, II:657
investment measures, I:470, 471
trade and culture concerns, II:763
TRIMs
dispute settlement under, I:461, 462
measure, I:470
relationship with GATT 1994, I:466
relationship with SCM Agreement, I:469
industrial designs, I:1091
Article 25 of TRIPS Agreement, I:1091
negotiating history, I:1091
industrial goods, Mexico, III:228
industry, Russian WTO accession impact on, III:323–5

information and communication technologies, (ICT) II:356
Information Technology Agreement (ITA), II:477
  text, III:483–7
injury
  under ADA and ASCM
    causation
      Article 3.5 ADA, I:743
      Article 15.5 ASCM, I:743
    cumulation
      Article 3.3 ADA, I:740
      Article 15.3 ASCM, I:740
    domestic industry
      Article 3.6 ADA, I:745
      Article 15.6 ASCM, I:745
    evaluation of economic factors
      Article 3.4 ADA, I:742
      Article 15.4 ASCM, I:742
    in regional markets, I:748
    objective examination of positive evidence
      Article 3.1 ADA, I:737
      Article 15.1 ASCM, I:737
    special care in threat cases
      Article 3.8 ADA, I:747
      Article 15.8 ASCM, I:747
    threat of injury
      Article 3.7 ADA, I:746
      Article 15.7 ASCM, I:746
  under Agreement on Safeguards (Article 4)
    causation, I:772
    determination of serious injury, I:771
    factors to be considered, I:771
    threat of injury, I:772
  volume and effect of imports
    Article 3.2 ADA, I:739
    Article 15.2 ASCM, I:739
institutional framework. *See* World trade organization institutional framework
instrumental values, II:610. *See also* values in trade and labor
insurance, Russian WTO accession impact on, III:299, 328
insurance services, national treatment and market access commitments, I:975, 987
Integrated Framework (IF) for Least Developed Countries, II:365
  clarify policy objectives, II:366
  coordination issues, II:366
  funding of, II:366
  strengthening governance and administration, II:366
Integrated Negotiation Text (INT), I:619
integration. *See also* globalization
  backloading textile integration issues, I:430, 431
  trade and human rights
    negative integration aspects, II:676–9
    positive integration aspects, II:674–6
intellectual property (IP). *See also under* Agreement on Trade-Related Aspects of Intellectual Property Rights
  as international system, I:1047–50
  from tariffs to, I:1052–5
  functions, I:1046
  gender analysis of trade and, II:729–32
  IPR issues
    Argentina (patents for pharmaceutical drugs), III:7–12
    Colombia, III:86
    Egypt, III:97
    Indonesia, III:151
    Japan, III:175
    Mexico, III:235
    Mongolia, III:258
    Russia, III:307
  protection and trade link prior to TRIPS Agreement, I:1050–1
  trade and environment issues, II:555–8
intellectual property rights. *See* Agreement on Trade-Related Aspects of Intellectual Property
intergovernmental organizations (IGO), relations with WTO, I:72
Interim Commission for International Trade Organization (ICITO), I:54. *See also* International Trade Organization
International Agreement on Anti-dumping (IAA), I:494–6
International Competition Network (ICN), II:506
International Competition Policy Advisory Committee (ICPAC), II:505
International Confederation of Free Trade Unions (ICFTU), II:593, 594
International Covenant on Civil and Property Rights (ICCPR), II:666, 685
International Covenant on Economic, Social and Cultural Rights (ICESR), II:628, 666, 670, 675, 676, 691
International Federation of Inspection Agencies (IFIA)
  appeal procedures provisions
    appeals (Section 2.21.2), I:589–90
    complaints (Section 2.21.1), I:589
  confidential business information protection provisions
    office security (Section 2.10.2), I:589
    specific assurances (Section 2.10.3), I:589
    Staff Non-Disclosure Agreement (Section 2.10.1), I:589
International Fruit case
  EC, I:1486
  EC Law and WTO, I:1485
International Labor Organization (ILO), II:173, 576. *See also* labor and trade; labor standards
  gender analysis of, II:734, 735
international law and WTO. *See under* WTO law
International law, constitutional primacy of human rights in, II:633
International Monetary Fund (IMF), I:53
GATT and, I:146
International Office of Epizootics (IOE), I:269, 271, 335
International Plant Protection Convention (IPPC), I:269, 272, 335
International Telecommunications Union (ITU), WTO and, I:1031
international trade and competition law (anti-dumping action), II:72–7
international trade, economic principles of, II:4. *See also* human rights and trade; labor and trade; trade and culture; trade and environment; trade and gender
  empirical examples, II:14
    "double-density" measures of trade intensities, II:15
    econometric gravity approach example, II:17, 22t
    trade-share analysis example, II:15, 18t, 20t, 21t
  modern international trade theory
    alternative theories, II:6–9
    integrated approaches, II:9
    neoclassical trade theory: factor proportions model, II:4–6

international trade, economic principles of (*cont.*)
preferential trading agreements thoery, II:9
dynamic effects, II:11–13
new theories (natural economic bloc), II:13–14, 15
static effects of, II:10–11
International Trade Centre (ITC), II:463. *See also* Geneva three-pronged approach and TRTCCB
International Trade Organization (ITO), I:53, 91, 189, 190
competition policy and, II:493
GATT and, I:53
GPA and, I:1125
trade and labor, II:587–89, 580
investment, I:439
Egypt concerns, III:104
gender analysis of trade and, II:729
global free trade concerns and, III:449
Indonesia, III:157, 158
Korea, III:206
multilateral framework for, I:477–78
RTA and developing countries, II:330–31
trade and culture, II:774–5
Trade & Investment, Working Group on Relationship between, I:476–480
Investment Canada Act, II:775
investment-related provisions
in RTAs, II:316
rules building on treatment and protection principles of BIT, II:318–20
rules distinguishing between local and third-party investors, II:320
rules on regional enterprises, II:321
rules on right of establishment and free movement of capital, II:316–18
in WTO
ASCM, II:316
GATS, II:314
GPA, II:315
TRIMs Agreement, II:315
TRIPS Agreement, II:315
IP. *See* intellectual property
IPPC. *See* International Plant Protection Convention
IPR. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights
IRA. *See* import risk analyses
ISI. *See* import substitution industrialization
Israel, Mexico and, III:237
ITA. *See* Information Technology Agreement
ITC. *See* International Trade Centre
ITO. *See* International Trade Organization
ITU. *See* International Telecommunications Union

Japan
accession to GATT, III:172
as QUAD member, I:815
dispute settlement procedure, III:177
Doha Development Agenda, III:178
agriculture, III:178
developing countries, III:179
issues, III:179
GATT/WTO Membership effects on
economic and political aspects, III:175
GATT accession, III:172
social aspects, III:176
Japan's example taken up by China to counter economic challenges, III:57
participation in
Dillon Round, III:172
Kennedy Round, III:172
Tokyo Round, III:172
RTAs, III:179
trade policy formulation, III:180
Uruguay Round
agriculture, III:174
contingent protection (anti-dumping and safeguards), III:175
intellectual property, III:175
market access, III:174
overall objective, III:173
rules, III:174
services, III:175
WTO
attitude towards, III:176
strengths and weaknesses, III:177
Japan-Agricultural Products case, I:257, 261, 262
consultations and, I:1219
dispute settlement aspects
burden of proof, I:346
SPS Agreement and
Article 3.3, I:278
Article 5.6 (risk management concept), I:320, 321, 323
Article 5.7, I:302, 304–6, 308
Article 11.2, I:350
transparency provisions, I:337
Japan-Alcoholic Beverages case, I:105, 116, 118, 121, 122
DSU Article 22.2 (emphasizing compensation over retaliation), I:1365–6
GATT Article III, I:116, 118, 121, 122
like product analysis, I:105
Japan-Apples case, I:257
Appellate Body and, I:1298
dispute settlement aspects (SPS Agreement)
Article 11.2, I:351
burden of proof, I:347
Standard of Review, I:353
SPS Agreement and
Article 5.7, I:304
Article 5.1, I:289, 290
Article 5.8, I:339, 340
risk assessment concept, I:285, 287–90
transparency provisions, I:338–40
July 2004 Framework (Doha Development Agenda)
Agriculture, I:224
cotton reference in Framework, I:227
domestic support provisions, I:226
export subsidies provisions, I:226
Text market access provisions, I:225

Kennedy Round. *See also* Doha Development Agenda; Tokyo Round; Uruguay Round
agriculture under GATT and, I:193–5
International Agreement on Anti-dumping (IAA), I:494–6
Japan participation in, III:172
US and, III:390–92
knowledge-based economy, II:356–8, 371
Korea
accession to GATT, III:185
Beef Panel, III:191

Doha Development Agenda
agriculture, III:204
anti-dumping, III:205
market access for industrial goods, III:205
RTAs, III:205
services, III:204
trade and competition policy, III:206
trade and environment, III:207
trade and investment, III:206
trade facilitation, III:207
GATT and, III:187
BOP consultations, III:189
Multifiber Arrangement, III:187
Tokyo Round, III:188
RTAs and, III:205, 208
trade policy making, III:210–12
Uruguay Round
background, III:192
impact on Korea, III:197
implementation, III:197
negotiations, III:194
objectives, III:194
participation in, III:194
results, III:195
WTO dispute Settlement System
Korea as complainant, III:201, 202t
Korea as defendant, III:202, 203t
Korea-Beef case, III:191
human rights approach to international trade and, II:638
TBT Agreement and, I:393
Korea-Dairy Products case
Agreement on Safeguards, I:769–70, 774, 776, 782, 784–6, 788–91
trade and culture concerns, II:766
Korea-Government Procurement case
nonviolation complaints experience under
GATT 1994, I:1377–9
GPA, I:1378
Kyoto Convention, rules of origin and, II:266–9

labeling issues (trade and environment), II:540–43
labor and trade. *See also* labor standards
foreign labor protection, II:587
potential legal bases in GATT/WTO Law, II:587
US-Reformulated Gasoline case implications, II:587–89
from Marrakesh to Singapore, II:574
GATT Panel Practice
adjudication without law, II:584
domestic labor protection, II:584–7
First Tuna Panel, II:585
foreign labor protection (Article XX), II:587
Second Tuna Panel, II:586
Havana Charter for ITO, II:600
historical antecedents, II:579
from linkage to social policy conditionality, II:579
ITO connection, II:580
in broader context, II:598
apartheid of labor and trade, II:599–601
unfulfilled promise of liberalized trade, II:601–4
institutional implications of a cohesive framework
beyond coherence to accountability, II:618–20
coherence among national policies in trade and elsewhere, II:615–16
mandates coordination among international organizations, II:617
international v. fair labor standards, II:573
labor in GATT practice, II:581
contracting parties proposals, II:581
GATT Councils deliberation, II:583
US request for Working Party, II:582
labor unions, I:31
links between trade and labor rights, II:575
from integrated to segregated standards, II:575
globalization impact, II:575
ILO, GATT and Unilateral State Practice, II:576–8
multilateral and bilateral agreements as WTO action model, II:592
Russian WTO accession impact on, III:330
separate concerns integration, II:578
shared values
as instrumental tools, II:606, 610
as normative principles, II:609–10
as over-arching objectives, II:607–8
standard setting
merits and demerits of standards incorporation, II:590
standards selection for social clause, II:590
supervision of compliance, II:591
themes and issues, II:572
values framework normative implications
internationalization of values, II:611
ordering priorities, II:612–14
values in markets and workplace, II:604–6
WTO Ministerial Meetings, II:592
labor standards, II:172
GATT/WTO and, II:185
gender analysis of trade and, II:734–6
GILS, II:177, 179–81
Group 1 Standards, II:175
Group 2 standards, II:177
ILO, II:173
inclusion arguments, II:177
accelerate growth in poor countries, II:178
efficiency in world production, II:177
GILS promote unfair trade, II:177
humanitarian concerns, II:178
regulatory race to bottom, II:178
issues
Egyptian, III:107
evolution of, II:173–7
NAALC, II:174, 175
NAFTA, II:174, 175
theory and evidence
GILS and international competitive position, II:179–81
practical considerations, II:185–6
regulatory race, II:181–3
WTO and child labor, II:183–5
TRIPS and, II:186
US policy, II:174
WTO/GATT, II:176
layout-designs of integrated circuits
Articles 35–38 of TRIPS Agreement, I:1098, 1099
negotiating history, I:1098
least-developed countries (LDCs), I:1527, 1528, 1556
accession of, I:78
background, II:343
CVA issues, I:568

least-developed countries (LDC) (*cont.*)
Doha Ministerial Conference and Development Agenda, I:1562
Agreement on Agriculture, I:1563
Agreement on Textiles and Clothing, I:1564
Antidumping Agreement, I:1564
cross-cutting issues, I:1565
Customs Valuation Agreement, I:1564
GATT 1994, I:1563
SCM Agreement, I:1564
SPS Agreement, I:1564
TBT Agreement, I:1564
TRIMs Agreement, I:1564
TRIPS Agreement, I:1565
historical perspective, II:344
First WTO Ministerial Conference, II:347
High Level Meeting, II:348
post-war period, II:345
Second Ministerial Conference, II:348
Uruguay Round, II:346
international community efforts, II:359
integrated framework, II:365–7
market access, II:360–3
special and differential treatment, II:363–4
international conferences achievements
Fourth WTO Ministerial Conference (Doha), II:369–71
Third United Nations Conference on LDCs, II:367–9
must do for, II:371
capacity building, II:372
credible alliances building, II:377
export profile diversification, II:373
human resources development, II:372
improving communications between government and non-government sector, II:376
knowledge-based economy, II:371
losers, compensation for, II:375
macro-economic reforms, II:374
mainstreaming trade with development strategies and processes, II:371
promoting accountable governance, II:374
safeguards use, II:376
weaknesses, II:349
competitive ability, II:349
exclusion from "knowledge-based economy", II:356–8
high export concentration ratio, II:350
implementation problems, II:351
lack of capacity, II:352–3
supply-side constraints, II:350
tortuous accession process, II:354
weaknesses, other, II:358
WTO Assistance to
Committee on Trade and Development, I:1561
Doha Ministerial Conference and Development Round, I:1562–6
High-Level Meeting on Least-Developed Countries, I:1559
Integrated Framework for Trade-Related Technical Assistance, I:1559–61
Plan of Action for Least-Developed Countries, I:1557
Singapore Ministerial Conference, I:1557
liberalization, II:601–4. *See also* computational analysis and trade liberalization; globalization; progressive liberalization under GATS
agricultural, II:32, 33, 121, 127
gender and trade liberalization, II:703–8
integration process and, II:405
Mexico and trade liberalization, III:224
MFA, II:26
New Zealand, III:274
bilateral liberalization (FTAs), III:277
competitive liberalization, III:278–80
multilateral liberalization (Doha Round), III:280–86
regional liberalization (APEC), III:275–7
rules of origin and trade liberalization, II:264
safeguard measures, II:53
services in RTAs and
liberalizing approaches, II:297–8
liberalizing principles, II:296
services liberalization, II:191–6
and economic development, II:191–6
postal and express delivery services in GATS, II:196–200
textiles and developing countries, II:405–7
trade and culture and investment liberalization through GATS, II:775
under GATS, I:820–21
autonomous liberalization, I:897–900
liberalization of capital movements, I:962–4
Uruguay Round Negotiation and, I:16–17
LIBERTAD Act (1996), I:167
licensing system. *See also* Agreement on Import Licensing Procedures
automatic, I:592
Mongolia
export licensing, III:257
import licensing, III:257
non-automatic, I:592
Like-Minded Group (LMG), III:95
like product
Agreement on Safeguards and, I:767
classification in context of, I:1586–7, 1592
definition, I:103–5
under ADA, I:508
under GATT (Article III), I:118
under TBT Agreement, I:389
"like services and service suppliers" under GATS, I:851–2
limited tendering procedures, I:1143–5
LMG. *See* Like-Minded Group
lobbies in trade policy development, I:28
local government bodies
TBT Agreement and, I:387
Long-Term Arrangement (LTA) (textiles and clothing), I:413; II:391–5. *See also* Multi-Fiber Arrangement; Short-Term Arrangement (STA)

Mailbox Cases (TRIPS disputes), II:425, 433
market access
Agreement on Agriculture, I:202
Cancun, I:225
Doha
developing countries proposal, I:219
EC proposal, I:219
dispute settlement, I:206
general exceptions, I:206
special safeguard measures, I:205
tariff reductions, I:205
tariffication, I:203–4
Framework for Establishing Modalities in Agriculture (August 2004) (text), III:518–23
Colombia concerns, III:85, 86

EU and, III:120
Financial Services and, I:971–5, 982
global free trade and, III:440–47
Indonesian issues, III:149
Japanese concerns, III:174
Korean concerns, III:205
Mexico
non-tariff barriers, III:229–30
tariffs, III:228–29
Non-Agricultural Products, Framework for Establishing Modalities for (August, 2004) (text), III:524–6
Singapore commitments, III:339
Telecommunication Services and, I:998
trade and environment issues, II:547
under GATS, I:846
Article XVI:2, I:847
market access and national treatment, relationship between, I:847–9
overview, I:846
WTO obligations and EC Law ("Market Access Strategy"), I:1508
Marrakesh Agreement and WTO establishment
miscellaneous aspects
conflicts resolution between WTO Agreements, I:80
continuation of GATT practices, I:80
reservations, I:81
WTO Agreement Preamble, I:79
organizational issues, I:71
trade and environment, II:513
WTO
decision making, I:67
functions, I:57–60
governance structure, I:60, 63–7
membership, I:73
scope, I:56–7
Marrakesh Declaration on Agriculture Trade, I:202
Marrakesh Ministerial Conference on Trade And Labor, II:574
Marrakesh Protocol to GATT 1994, I:112–14
MEA. *See* Multilateral Environmental Agreements
media, trade policy development and, I:30
Meech Lake recommendations. *See under* harmonized non-preferential rules of origin architecture
membership, WTO. *See* World Trade Organization Membership
MERCOSUR (Southern Common Market), I:175
double density measures of trade intensity, II:21t
RTAs and, II:239
trade and gender, II:705
Uruguay Round and Regionalism, II:303
MERCOSUR and EU, regional trade negotiations between
background, III:22
differing negotiating goals and strategies, III:22
EU proposal, III:23–4
Mexico
accession to GATT
1970s postponement of Mexico's accession to GATT, III:218–23
1980s unilateral trade liberalization and (finally) accession, III:224–7
Havana Conference, III:217
dispute resolution process in GATT/WTO, III:232–4
Doha Development Agenda, III:234
Built-in Agenda, III:235
electronic commerce issues, III:236
industrial goods issues, III:236
labor and environmental issues, III:236
Singapore issues, III:235
UR Agreements implementation, III:235
RTAs
APEC, III:238
current negotiations, III:238
Europe, III:237
FTAs with Latin American countries, III:237
Israel, III:237
NAFTA, III:236
trade policy-making, III:238–41
Uruguay Round, III:227
dispute settlement, III:232
government procurement, III:232
market access (non-tariff barriers)
antidumping and countervailing duties, III:229
BOP exceptions, III:230
import licenses, III:230
rules of origin, III:230
safeguards, III:229
sanitary and phytosanitary measures, III:230
subsidies, III:230
technical barriers to trade, III:230
market access (tariffs), III:228
agriculture, III:228
industrial goods, III:228
textiles and apparel, III:229
RTAs, III:232
state-trading enterprises, III:230
trade in services, III:231
trade-related intellectual property rights, III:231
trade-related investment measures, III:231
WTO, public attitudes towards
business groups opinions, III:241
SMEs and NGOs, III:242–3
Mexico-Telecommunications Services case
consultations and, I:1218
under GATS, I:891–3
anti-competitive practices prevention, I:892
interconnection with major supplier at cost-oriented rates, I:891
public networks and services on reasonable terms and conditions, access to and use of, I:892
MFA. *See* Multi-Fiber Arrangement
MFN. *See* most-favored nation
Michigan CGE Model, II:24–5. *See also* computational analysis and trade liberalization
Ministerial Conferences, WTO
Cancun-September 2003, I:63
Ministerial Statement (text), III:512–19
Doha-November 2001, I:62
Declaration on the TRIPS Agreement and Public Health (text), III:510–11
Implementation Issues and Concerns (text), III:503–9
Ministerial Declaration (text), III:492–502
Geneva-May 1998, I:61
Declaration on Global Electronic Commerce (text), III:491
Ministerial Declaration (text), III:488–90
Seattle-November 1999, I:61–2
Singapore-December 1996, I:60–61
Ministerial Declaration (text), III:475–82
Ministerial Declaration on Trade in Information Technology Products (text), III:483–7

mixtures rules, I:647. *See also* harmonized non-preferential rules of origin architecture
MLAT. *See* Canadian-US Mutual Legal Assistance Treaty
MNE. *See* multinational enterprises
Modalities Agreement (Agreement on Agriculture), I:203–4
  Annex 2, I:203
  Annex 3, I:203
  Annex 3B, I:204
  Annex 5, I:204
  Annex 5B, I:204
Modalities for Negotiations on Trade Facilitation (August 2004) (text), III:528–9
Mongolia, III:250
  accession to WTO, III:250
    accession negotiations initiation, III:251
    old strategy and mentality versus new realities, III:251–2
    time pressure and imagined "deadline", III:253
    unclear objectives, III:253
  should Mongolia remain in WTO?, III:265–7
  WTO commitments implementation, III:255
    cashmere, ban on exports of raw, III:258
    customs valuation, III:256
    evolution from accession-orientation to implementation-orientation, III:258
    harmonized system, III:257
    import and export licensing, III:257
    intellectual property rights, III:258
    internal taxation, III:257
    membership aspects (cashmere and scrap metal examples), III:259–62
    tariff system, III:256
    transparency, III:258
  WTO in operation, III:262
    cashmere and WTO-IMF-World Bank coherence test, III:262
    customs valuation (law v. practice), III:263
    Mongolian Court's TRIPS rights enforcement, III:264
most-favored nation, (MFN), I:105–6
  application of safeguards, I:768
  Financial Services and, I:977–8
  RTA regulation and, II:219–21
  safeguard measures and
    MFN versus discrimination, II:62
    MFN versus specificity, II:48
  tariff classification as disguised discrimination and, I:1587
  Telecommunication Services and, I:1014
  TRIPS Agreement and (Article 4), I:1068
  unconditional MFN obligation, (Article I of GATT 1994), I:99, 100
    Article I:1, I:102
    conditional vs. unconditional MFN treatment, I:101–2
    "like products" definition, I:103–5
    MFN antecedents, I:101
    overview of, I:102
  under GATS (Article II)
    Article II:1 [basic rule], I:827–9
    Article II:2 [MFN exemption], I:829–31
    Article II:3 [contiguous frontier zones], I:831–2
  under GATT
    Article I [Unconditional MFN Obligation], I:99–106
    Article III:7, I:106
    Article IV(b), I:106
    Article V:5, I:106
    Article V:6, I:106
    Article IX:1, I:106
    Article XIII:1, I:106
    Article XVII:1, I:106
    Article XVIII, I:106
    Article XX, I:106
  under GPA, I:1141
MRA Guidelines. *See* Guidelines for Mutual Recognition Agreements or Arrangements in the Accounting Sector
Multi-Fiber Arrangement (textile and clothing)
  Article 1.2 of, I:414
  Korea and, III:187
  rules of origin and, II:266
  textiles and developing countries
    MFA comparison with GATT, II:398
    MFA objectives and impact, II:399–401
  Textiles Surveillance Body (TSB), I:414, 417
  trade liberalization and UR-1 Scenario, II:26
Multilateral Environmental Agreements (MEAs), II:148, 558–60. *See also* environmental issues
multilateral trading system, I:41
  consensus decision-making principle, I:41
  Indonesia, III:140–42, 162–4
    multilateralism versus regionalism, III:162–4
    proactive participation in multilateral system, III:164
    systemic issues (multilateral system integrity), III:165
  Russian WTO accession impact on, III:331
  WTO and, I:40
multinational enterprises (MNE), I:1568, 1569
multinational firms, TRIMs and, I:441–2
multiple countries of origin, I:627–8

NAALC. *See* North American Agreement on Labor Cooperation
NAFTA. *See* North American Free Trade Area
Nakajima Doctrine, I:1504–7. *See also* FEDIOL Doctrine
national security provision (GATT Article XXI), I:166–8
  GATT/WTO Jurisprudence on Article XXI, I:1573–6
    WTO era, I:1577–8
  historical overview of, I:1572
  text of GATT Article XXI, I:1573
national treatment commitments
  Financial Services and, I:971, 979
  Telecommunication Services and, I:998
  TRIPs Agreement and (Article 3), I:1067
  under GATS, I:849
    "like services and service suppliers", I:851–2
    national treatment and modes of supply, I:849–51
    overview, I:849
national treatment obligation (Article III of GATT 1994), I:114
  additional commitments, I:124–5
  Article III:1, I:115, 116, 120
  Article III:2, I:116
    first sentence, I:117
    internal taxes and other charges, I:116
    second sentence, I:120–22
  Article III:4
    internal regulations affecting imports, I:122–4
    "like product" determination, I:118–19

internal regulations affecting imports
Article III:4, I:122–5
Article III:5, I:125
national treatment exceptions, I:125–7
Article III:8(a), I:125
Article III:8(b), I:126
Article III:10, I:127
NATO. *See* North Atlantic Treaty Organization
natural economic bloc (NEB), II:13–14, 15. *See also* preferential trading arrangements
natural resources conservation, I:162
Negotiating Group on Basic Telecommunications (NGBT), I:926
Net Food-Importing Developing Countries, I:215–7
New Partnership for Africa's Development (NEPAD), III:363
New Zealand, III:270
multilateral liberalization (Doha Round), III:280
agriculture, III:280–82
non-agricultural products, III:282
rules, III:283–5
services, III:283
sustainable development, III:285–6
trade liberalization, III:274
bilateral liberalization (FTAs), III:277
competitive liberalization, III:278–80
regional liberalization (APEC), III:275–7
trade policy, III:271
Uruguay Round participation, III:272–4
NFIDC Decision. *See* Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries
NGBT. *See* Negotiating Group on Basic Telecommunications
NGO. *See* non-governmental organizations
NIP. *See* Notice of Intended Procurement
non-automatic import licensing. *See also* Agreement on Import Licensing Procedures; automatic licensing system
defined, I:592
under AILP (Article 3), I:597
non-discrimination
global free trade and, III:451–3
principle under TBT Agreement, I:388
under API (Article 2.1), I:576
WTO and, I:40–41
non government bodies, under TBT Agreement (Article 8), I:387
non-governmental organizations (NGOs)
external transparency issues, I:86
global integration and, III:463–9
Indonesia and, III:155
Mexico, III:242–3
panel process participation of, I:1239
relations with WTO, I:72
role in WTO, I:86–7
trade policy development and, I:31
WTO democratic roots and, I:47
non-market economies, I:77
under ADA, I:508
non-preferential rules of origin, I:604; II:270–3. *See also* harmonized non-preferential rules of origin architecture; preferential rules of origin
non-product-related processes and production methods (NPR-PPM), I:238
TBT Agreement and, I:392
TBT Agreement inapplicability to, I:382
non-tariff barriers to trade (NTB), I:93. *See also* Agreement on Technical Barriers to Trade
in MTN rounds, I:93
in Tokyo Round, I:94
under GATT
Article V [Freedom of Transit], I:140
Article VI [Antidumping and Countervailing Duties], I:140
Article VII [Valuation for Customs Purposes], I:142
Article VIII [Fees and Formalities Connected with Importation], I:143
Article IX [Marks of Origin], I:144
Article XV [Exchange Controls and Exchange Arrangements], I:146
Article XVI [Subsidies], I:148
Article XVII [State Trading Enterprises], I:148
Article XIX [Emergency Action on Imports of Particular Products], I:151
non-violation complaints, I:1237. *See also* situation complaints; violation complaints
under GATT, I:170–71
re-appraisal, I:1372
complaints origins, I:1373
EC-Asbestos case, I:1379–82
GATT 1947, complaints experience under, I:1374–7
Korea-Government Procurement case, I:1377–9
non-violation remedy and TRIPs Agreement, I:1384–7
reflections on non-violation remedy, I:1382–4
WTO Agreement (GATT 1994 and GPA), complaints experience under, I:1377
under GATS (Article XXIII), I:868
under TRIPs Agreement, I:1112
non-WTO rules application. *See under* dispute settlement
non-WTO treaties. *See under* World Trade Organization law
normative principles, II:609–10. *See also* values in trade and labor
North American Agreement on Labor Cooperation (NAALC), II:174, 175, 593
gender analysis of, II:735
North American Free Trade Area (NAFTA), I:175; II:10, 281. *See also* free trade areas
Canada, III:40
CUSFTA and, I:809, 810
dispute settlement procedures innovations, II:213
double density measures of trade intensity, II:20t
EC and, I:807
gender analysis of, II:735
labor standards and, II:174, 175
Mexico and, III:236
RTAs and, II:297
compatibility issues, II:309
investment provisions and, II:318, 319
rules of origin, II:279, 282
trade facilitation and harmonization of domestic regulations, II:214
Uruguay Round and regionalism, II:303
North Atlantic Treaty Organization (NATO), II:251
Notice of Intended Procurement (NIP), I:1149–50
Notice Of Planned Procurement (NPP), I:1150

NPR-PPM. *See* non-product-related processes and production methods
NTB. *See* non-tariff barriers to trade

ODA. *See* Official Development Assistance
OECD. *See* Organization for Economic Cooperation and Development
OECD Safe Harbor (*Brazil—Aircraft* case), I:1189–90
Official Development Assistance (ODA), II:368
OIE. *See* International Office of Epizootics
Oil. *See under* Indonesia
OMA. *See* Orderly Marketing Agreement
Omnibus Trade Act of 1988 (US), II:426, 430; III:400–402
open tendering procedures, I:1142. *See also* tendering procedures under GPA
  time limit concerns, I:1151
Opinion 1/94. *See under* EC Law and WTO Agreement
Orderly Marketing Agreement (OMA), II:47. *See also* Export Restraint Agreement; Voluntary Export Restraint
Organization for Economic Cooperation and Development (OECD), I:66, 1126–9; II:251. *See also* developing countries
  agriculture
    aspects, II:128–9
    interests of, II:110–11
    MFN tariff rates, II:111
    TRQ, II:115t
  agriculture issues, II:116–18, 121
    agriculture's so-called multifunctionality, II:124–7
    technical standards, including SPS and food safety measures, II:122–4
  competition policy and, II:497
  gender definition by, II:699–700
organizational issues and WTO establishment
  WTO relations with IGOs and NGOs, I:72
  WTO Secretariat, I:71
  WTO status, I:71
Origin Project (rules of origin), I:615. *See also* Harmonization Work Programme
Ottawa language, I:622. *See also* harmonized non-preferential rules of origin architecture
  evolution of, I:623
  type rules, I:624

Panel process, I:1235. *See also* consultations; dispute settlement
  burden of proof, I:1258
  complaint object, I:1241
  complaint types
    non-violation, I:1237
    situation, I:1238
    violation, I:1236
  consultation stage, I:1242
  final panel report content, I:1268
    judicial economy, due exercise of, I:1270
    panel findings, basic rationale behind, I:1269
    right to suggest how to implement, I:1271
    rights and obligations of members, not adding to or diminishing, I:1271
  interim review stage, I:1267
  mandate of panels (Article 11 of DSU)
    factual issues, I:1265
    legal issues, I:1264
  multiple panel proceedings, I:1247
  panel establishment and panel terms of reference, I:1244
  panel composition, I:1248
  panel proceedings' participants, I:1238
    legal interest need, I:1240
    NGOs, I:1239
    private counsel, I:1239
  panel proceedings procedural stages
    confidentiality of proceedings, I:1255
    organizational meeting, I:1252
    preliminary issues and procedural objections, I:1253
    written submissions and oral hearings, I:1254
  panel's right to seek information, I:1259
    duty to respond, I:1263
    Expert Review Group, I:1261–3
  third party rights, I:1256
  timing of evidence, I:1259
parallel trade under TRIPS Agreement
  GATS and
    Article V, I:1075
    Article XVI, I:1077
  GATT and
    Article III, I:1074
    Article XI, I:1074
    Article XX, I:1074–7
    Article XXIV, I:1075–6
  GATT 1994 and GATS application, I:1073–5
  parallel imports issues, II:446–52
  related trademark provisions (TRIPS Agreement)
    Article 16, I:1071–2
    Article 28.1, I:1072
patents
  for pharmaceutical drugs (Argentina)
    concessions value estimation in patents
      impact on FDI and trade, III:11
      transfer of rents, III:9–11
    pharmaceutical drug companies, rent-seeking by, III:7–9
  under TRIPS Agreement, I:1091–8
    Article 27:1, I:1092–3
    Article 27:2, I:1093
    Article 27:3, I:1093
    Article 28, I:1094
    Article 29, I:1094
    Article 30, I:1094–5
    Article 31, I:1095–7
    Article 33, I:1097
    Article 34, I:1097
    inter-temporal application, I:1097, 1098
    negotiating history, I:1091–2
Peace Clause (Agreement on Agriculture)
  domestic subsidies, I:214
  export subsidies, I:214–15
percentage criterion test. *See also* change in tariff heading; technical test
  cost of materials, I:605–6
  general overhead expenses, I:606–7
  manufacturing overhead, I:606
petrochemicals, challenges after China's Accession to WTO, III:63
pharmaceuticals
  Argentina and
    rent-seeking by, III:7–9
    transfer of rents, III:9–11
  challenges after China's Accession to WTO, III:62

policy reform, Uruguay Round Negotiation and, I:15, 16
pollutants, trade and, II:157. *See also* environmental issues
Portugal v *Council*, I:1501–2
  consequences
    denial of direct effect for private parties but availability of, I:1491–7
    denial of direct effect to TRIPS, GATT 1994 and TBT Agreements, I:1497
  WTO direct effect and EC Community legal order, I:1489–90
postal and express delivery services in GATS, II:196. *See also* services liberalization
  current classifications, II:197–8
  Doha Trade Agenda, II:199
  existing positions regarding liberalization, II:199–200
  FDI and, II:198
  general problem, II:197
  USO, II:198
PPM. *See* processes and production methods
Precautionary Principle of SPS Agreement
  Article 2.2, I:261
  Article 5.7 relationship with, I:297
preferential rules of origin, I:604. *See also* non-preferential rules of origin
preferential trading arrangements, II:282. *See also* customs unions; free trade areas; regional trade arrangements
  Article XXIV of GATT, II:275, 276
  dynamic effects
    economic development, II:12–13
    economies of scale, II:11
    investment effects, II:12
    x-efficiency, II:12
  new theories (NEB), II:13
  rules of origin and, II:279
    EU expansion and rules of origin, II:286
    FTAA and rules of origin, II:285
    hub and spoke systems and rules of preference ("Spaghetti Bowl" Problem), II:283
    new Asian regionalism and rules of origin, II:284
  static effects of, II:10–11
  trade diversion and rules of origin, II:280
Preshipment Inspection, I:574. *See also* Agreement on Preshipment Inspection
  Uruguay Round negotiations on, I:575
  WTO Working Party Recommendations on, I:585
    December 1997 Report, I:585
    March 1999 Report, I:586
  Zaire program, I:574
price undertakings under Anti-dumping Agreement (Article 8), I:518, 521
principle of good faith and consultations and (DSU Article 4)
  further elements of, I:1225
  litigation strategies, I:1224
privatization of Argentina's service industries, III:12
processes and production methods (PPM), I:247, 382; II:538–40
product-specific rules of origin (Appendix 2), II:282. *See also* Harmonization Work Programme
  agricultural products (HS Chapters 1 to 24), I:654–5
  machinery, transport equipment and photocopying apparatus (HS Chapters 84 to 90), I:656–7
  textiles and textile articles (HS Chapters 50 to 63), I:655
PROEX program, I:1187, 1188. *See also Brazil-Aircraft* case
  PROEX II, I:1189
  PROEX III, I:1189, 1190
professional services, I:913
progressive liberalization under GATS
  Article XIX [Negotiation of Specific Commitments], I:854
  Article XX [Scheduling of Commitments], I:854–64
    overview, I:854–6
    horizontal commitments, I:856
    sectoral commitments, I:856
  Article XXI [Modification of Schedules], I:865
protection of undisclosed information (under TRIPS Agreement), I:1099
  Article 39
    Article 39.2, I:1100
    Article 39.3, I:1101
  negotiating history, I:1099
protective subsidies, II:89, 90
PSI. *See* Preshipment Inspection
public health. *See* Doha Declaration on the TRIPS Agreement and Public Health
publicity of tender notices under GPA, I:1149
  information on award of contracts, I:1152
  NIP, I:1149, 1150
  NPP, I:1150
  statistical and other information (Article XIX), I:1153–4
  time limit concerns (Article XI:1)
    open procedures, I:1151
    selective procedures, I:1151
Punta del Este Declaration
  Colombia, III:79
  textiles and developing countries, II:401–3

QUAD members. *See also* General Agreement on Trade in Services
  Canada, I:815–17
  EC, I:814–15
  Japan, I:815
  United States, I:812–14

red light subsidies (ASCM), I:734; II:96, 99. *See also* green light subsidies; yellow light subsidies
regional trade arrangements (RTAs), I:172–4; II:205. *See also* customs unions; free trade areas; preferential trading arrangements
  APEC, II:210
  arguments made about
    arguments made against, II:218–19
    arguments made in favor, II:215–17
  ASEAN, II:210
  Colombia participation
    Agreements Under ALADI, III:88
    Andean Community, III:88
    FTA of Americas, III:89
    Group of Three, III:89
  CRTA, II:226, 229, 230
  developing countries and (Member countries)
    domestic policies, II:332–3
    industrial location and growth, II:331
    investment, II:330
    politics, II:334

regional trade arrangements (*cont*.)
RTAs parameters, II:327–30
trade effects, II:326
developing countries and (non-member countries), II:334
depth and breadth in integration, II:337
excluded countries, II:335
stepping stones, dominoes and open regionalism, II:335
trade negotiations, II:336
Egypt, RTAs effects on, III:108
examinations under WTO
examination report, II:231
notification provision, II:230
oral and written examinations, II:231
overview, II:229
report obligations, II:231
examinations under WTO, evaluation of
examination report, II:233
notification and submission of information, II:231
oral and written examinations, II:232
FTAA, II:209, 210
GAFTA, II:211
GATT System (Article XXIV), II:222–8
1994 understanding on interpretation of, II:225, 226
Agreement on Safeguards and, II:238
Canada-Certain Measures Affecting Automotive Industry, II:237–8
disciplines on customs unions and FTAs, II:223, 224
evaluation of WTO legal disciplines governing RTAs, II:227
procedural rules governing CRTA, II:226
Turkey-Textiles case, II:235–7, 240
innovations in, II:212
area of trade facilitation and harmonization of domestic regulations, II:214
dispute settlement procedures, II:213
expansion of scope of RTAs coverage, II:212
investment-related provisions in, II:316
rules building on treatment and protection principles of BIT, II:318–20
rules distinguishing between local and third-party investors, II:320
rules on regional enterprises, II:321
rules on right of establishment and free movement of capital, II:316–18
Japan and, III:179
Korea, III:205, 208
MERCOSUR countries, II:239
Mexico, III:232
APEC, III:238
current negotiations, III:238
Europe, III:237
FTAs with Latin American countries, III:237
Israel, III:237
NAFTA, III:236
MFN Principle, II:219, 220
disillusionment with discriminatory trading blocs for multilateral trading systems, II:220
underlying principles of GATT MFN Rule, II:221
proliferation of, II:206
Africa, II:211
East Asia and Pacific region, II:210
European region, II:208
Mediterranean, II:211
phenomenon size, II:206
Western Hemisphere region, II:208–10
regulation in WTO system interest, II:241
expedited recourse to dispute settlement procedures, II:244
independent committee of neutral experts, II:242
phase-in periods for RTAs under examination, II:243
systematic investigation of hidden discrimination within RTA provisions, II:243
Russia and, III:313
services in, II:294
commitments depth, II:298
coverage dimension, II:295
global free trade issues, II:307–10
liberalizing approaches, II:297–8
liberalizing principles, II:296
opportunities and challenges in, II:300–302
regional agreements impact evaluation, II:305–6
Uruguay Round and regionalism, II:302–4
Singapore and, III:345–8
South Africa, RTAs effects on, III:374
types
ASEAN, I:175
EU-Member States, I:175
MERCOSUR, I:175
NAFTA, I:175
WTO dispute settlement based regulations of, II:234
evaluation of, II:240
WTO Panel and AB rulings involving RTAs, II:234–40
WTO institutional framework for regulation of, II:228
evaluation of WTO, II:231–4
RTAs under GATT System, II:228
RTAs under WTO System, II:229–31
WTO legal framework for regulation of
evaluation of, II:227
GATT Article XXIV, II:222–8
MFN Principle, II:219–21
regionalism
Asian rules of origin and, II:284
RTAs
and developing countries, II:335
services in RTAs (Uruguay Round), II:302–4
transition economies and, II:249t., II:251–6
vs. multilateralism, III:162–4
rents (Argentine pharmaceutical drug companies)
rent-seeking, III:7–9
transfer of rents, III:9–11
residual rules. *See under* harmonized non-preferential rules of origin architecture, I:628
Revenue Act of 1916 (US), I:493
risk assessment/management. *See under* Agreement on Application of Sanitary and Phytosanitary Measures
Romania-Wheat and Wheat Flour case, I:1210
royalty-based financing. *See under Canada—Aircraft* case
RTA. *See* regional trade arrangements
rules of origin, I:603; II:264, 267t. *See also* Agreement on Rules of Origin
CTH test, I:607–8; II:268
economic theory and rules of origin, II:273
antidumping and voluntary restraints, II:277
customs unions and free trade agreements, II:274–6

local content protection (value-added tariff), II:278–9
problem in economically integrated world, II:277
empirical analyses of impact of
cost to firms of compliance with rules of origin, II:280
product-specific rules of origin and investment distortion, II:282
trade diversion and economic costs of protective rules of origin, II:280–81
Mexico, III:230
non-preferential, I:604
origin determination by contracting members of GATT, II:265
harmonization of non-preferential rules of origin, II:270–3
Kyoto Convention, II:266–9
Uruguay Round, II:269
Percentage Criterion Test, I:605–7
preferential, I:604
preferential trading arrangements proliferation, II:282
EU Expansion and rules of origin, II:286
FTAA and rules of origin, II:285
hub and spoke systems and rules of preference ("Spaghetti Bowl" Problem), II:283
new Asian regionalism and rules of origin, II:284
requirements, US, I:432
rules of origin and services (GATS), II:286–7
technical test, I:608
WTO Agreement need for, I:609
Russia. *See also* EU; United States
agriculture concerns
accession impact on agriculture, III:322
beef, pork, poultry, sugar, and butter, III:297
domestic support level, III:295–7
wine, spirits, cigars and cigarettes, III:297
energy and gas, domestic price control over, III:301
government involvement in trade, III:308
recognition as market economy, III:309–12
RTAs with CIS countries, III:313
laws conformity with WTO Rules, III:304–7
Russia and WTO members, current situation in negotiations between, III:291
trade in goods concerns, III:292
apparel and footwear issues, III:294
Civil Aircraft (Plurilateral Agreement) issues, III:294
industrial goods negotiations, III:292–4
IT products issues, III:294
trade in services concerns, III:298
banking, III:299
insurance, III:299
telecommunications, III:300
transport, III:301
WTO accession, III:289–91
advantages of, III:314–17
customs issues, III:305
disadvantages of, III:317
IPR protection issues, III:307
quotas and restrictive licensing issues, III:305
Russian business community perception of, III:318–21
TBT and SPS issues, III:306
WTO accession impact on, III:321
agriculture, III:322
financial services
banking, III:327
insurance, III:328
industry, III:323–5
labor market, III:330
multilateral trading system, III:331
other service areas, III:329
services sector, III:325
telecommunications, III:326
transport services, III:328

SAARC. *See* South Asian Association for Regional Cooperation
SACA. *See* Special Agreement on Commodity Arrangements
SACU. *See* South African Customs Union
SADC. *See* Southern African Development Community
safeguard measures. *See also* Agreement on Safeguards; Agreement on Subsidies and Countervailing Measures
antidumping measures, II:51, 52
compensation and retaliation, I:760, 763
compensation versus no-compensation, II:62–4
definition of, I:751; II:44
DSB and, II:54
economic effects, II:52
empirical research on, II:58
frequency and use of safeguards relative to other trade policy instruments, II:57, 60t
import-competing industries assistance, II:5
political-economy motives, II:57
senescent industries, II:56
technological catch-up, II:55
insurance against negative terms of trade shocks, II:54–55
liberalization, II:53
financial crisis and, I:753
justification for, I:752
Mexico, III:229
MFN
MFN treatment under GATT, I:758
MFN vs. discrimination, II:62
MFN vs. specificity, II:48
objections to, I:752
origin of, I:751
reforms to other WTO Agreements, II:64
trade promotion and, I:754
transparency, additional, II:64
under Agreement on Agriculture
price-based safeguard, I:205
volume-based safeguard, I:205
under ATC (Special Safeguard Mechanism)
Article 6, I:421–2
attribution, I:425
causation, I:425
overview, I:421–2
procedural steps, I:423
serious damage, I:424
under GATT Article XIX, I:755
compensation and retaliation, I:760
increased imports, I:757
most-favored nation treatment, I:758
preferential arrangements, I:758
procedural requirements, I:759
unforeseen developments and tariff concessions effect, I:757

safeguard measures (*cont*.)
Uruguay Round Negotiations, I:760; II:48–51
available policy instruments, II:48, 49
compensation and retaliation, I:763
gray-area measures, I:763
MFN versus specificity, II:48
procedural issues, I:764; II:49
selectivity, I:762
special rules for developing countries, I:764
structural adjustment, I:763
Säger case, I:808
sales below cost concept (anti-dumping), I:502. *See also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
sanitary and phytosanitary measures. *See* Agreement on Application of Sanitary and Phytosanitary Measures
Schieving-Nijstad case
EC Law and WTO, I:1499
SCM. *See* subsidies and countervailing measures
SDT. *See* special and differential treatment of developing countries
Seattle Ministerial Conference, I:61; II:472
Section 301 of US Trade Act, II:490
Section 337 of US Tariff Act of 1930, I:160–62
Section 609 of US Endangered Species Act, I:163–5
security exceptions under
GATS (Article XIV *bis*), I:845–6
GATT 1994 (Article XXI), I:154
TRIPs Agreement and, I:1080
S&D treatment. *See* special and differential treatment of developing countries
selective tendering procedures
GPA type, I:1142–3
time limit concerns, I:1151
UNCITRAL type, I:1142–3
selling commission, I:547. *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
services. *See also* General Agreement on Trade in Services
Argentina
concessions value estimation in services, III:13
privatization of Argentina's service industries, III:12
services-related inflows of FDI, III:15–16
trade in services, III:14
Colombia, III:78, 82, 86
Egypt negotiations, III:103
EU and, III:121
global free trade and, III:445–7
Indonesian issues, III:150
Japanese concerns, III:175
Korean concerns, III:204
Mexican, III:235
New Zealand concerns, III:283
Russian WTO accession impact on, III:325
services liberalization
and economic development, II:191–96
postal and express delivery services in GATS, II:196–200
services in RTAs, II:294. *See also* regional trade arrangements
commitments depth, II:298
"freeze" or "standstill" on existing non-conforming measures, II:299
ceiling binding, II:299
list or lose, II:299
ratcheting, II:299
transparency, II:299
coverage dimension, II:295
global free trade issues
compatibility, II:309
incentives, II:307
overlapping fora, II:308
issues, II:304
global free trade, II:307–10
regional agreements impact evaluation, II:305–6
liberalizing approaches, II:297–8
Closer Economic Relations (Australia-New Zealand), II:297
NAFTA, II:297
liberalizing principles
MFN, II:296
national treatment, II:296
no local presence required, II:296
no quantitative non-discriminatory restrictions, II:296
opportunities and challenges in, II:300–302
policy conclusions, II:310
Uruguay Round and regionalism, II:302–4
GATS Article V, II:302
GATT Article XXIV, II:302
shared competence. *See under* EC Law and WTO Agreement
Short-Term Arrangements (textiles and clothing), I:413; II:391–5. *See also* Long-Term Arrangements; Multi-Fiber Arrangements
Shrimp-Turtle case. *See US-Shrimp* case
SGRAD. *See* Strengthened GATT Rules And Disciplines
Significant Market Power (SMP), I:1024
similar goods. *See also* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; identical goods
definition, I:556
requirements for qualifying as, I:557
Singapore
accession to GATT, III:336–7
GATT/WTO Membership and Uruguay Round impact on
economic effects, III:341
legal effects, III:342
political effects, III:341
social effects, III:341
TRIPS Compliance Legislation, III:342t
next Round
principal issues to be taken up in, III:344
strategies to accomplish Singapore's objectives in, III:345
RTAs, III:345–8
trade policy development, III:348–9
Uruguay Round participation, III:338
market access commitments, III:339
market access outcomes, III:339
policy goals, III:338, 340
WTO
attitude of citizens, businessmen, and political leaders towards, III:342
dispute resolution process, III:343
Membership impact, III:341
strengths and weaknesses of, III:343

Singapore Ministerial Conference, I:60
competition policy and, II:501
LDC and, II:347
Ministerial Declaration (text), III:475–82
Ministerial Declaration on Trade in Information Technology Products (text), III:483–7
trade and labor, II:574
single tendering. *See* limited tendering procedures
situation complaints, I:172, 1238. *See also* non-violation complaints; violation complaints
social services, I:932
SOEs. *See* state-owned enterprises
South Africa
Dispute Resolution participation, III:370
Doha Round, III:371
general background, III:352–4
political, constitutional and institutional transition, III:354–6
RTAs effects, III:374
trade policy development, III:376
Uruguay Round participation
objective, III:358
outcomes, III:359
policy, III:356–7
WTO
attitudes towards, III:368
strengths and weaknesses of, III:368–70
WTO Membership effects
international economic legal framework, III:365
legal framework, III:363–5
political and social effects, III:362
trade policy and economic reform, III:360–62
South African Customs Union (SACU), III:376, 377
South Asian Association for Regional Cooperation (SAARC), II:255
Southern African Development Community (SADC), III:104, 109, 359, 376
Southern Common Market. *See* MERCOSUR
Spaghetti Bowl Problem, II:283
Spain-Unroasted Coffee case
tariff classification (GATT Article I:1), I:1592–3
Special Agreement on Commodity Arrangements (SACA), I:190
special and differential treatment of developing countries, I:1530
Agreement on Agriculture
Doha Development Agenda, I:222
domestic support, I:215
export restrictions, I:215
export subsidies, I:215
market access, I:215
CVA, I:567
reservations regarding DV and CV methods, I:568
technical assistance, I:568
transitional periods, I:567
GATT (Article XVIII)
Article XVIII, Preamble, I:1532
Article XVIII, Section A, I:1533
Article XVIII, Section B, I:1533
Article XVIII, Section C, I:1534
Article XVIII, Section D, I:1535
background and overview, I:1531
GATT (Part IV), I:1535
Article XXXVI, I:1536
Article XXXVII, I:1537
Article XXXVIII, I:1537
background and overview, I:1535
Generalized System of Preferences (GATT Article XXV:5), I:1538
background, I:1538
discriminatory preferences problem, I:1540
origin of, I:1539
ten-year waiver, I:1539
Tokyo Round Enabling Clause, I:1541–6
Indonesian issues, III:153, 161
TRIMs Agreement, I:476
Uruguay Round decisions and agreements affecting, I:1546
ADA, I:1550
Agreement on Agriculture, I:1549
CVA, I:1554
Agreement on Safeguards, I:1552
AILP, I:1555
ASCM, I:1551
ATC, I:1554
background, I:1546
Decision on Measures Concerning Possible Negative Effects of Reform Program on Least-Developed and Net Food-Importing Developing Countries, I:1547
Decision on Measures in Favor of Least-Developed Countries, I:1546
DSU, I:1555
GATS (Article IV), I:1555
GPA, I:1556
SPS Agreement, I:358, 1552
TBT Agreement, I:1553
TRIMs Agreement, I:476, 1553
TRIPS Agreement, I:1555
WTO Assistance to
Committee on Trade and Development, I:1561
Doha Ministerial Conference and Development Round, I:1562–6
Plan of Action for Least-Developed Countries, I:1557–61
Singapore Ministerial Conference, I:1557
under GPA, I:1158–60
specificity
ASCM (Article 2), I:694
de facto, I:695
de jure, I:695
MFN versus specificity and safeguard measures, II:48
Sports Illustrated dispute, II:757
SPS Agreement. *See* Agreement on Application of Sanitary & Phytosanitary Measures
SPS measures *see also* Agreement on Application of Sanitary and Phytosanitary Measures
"based on" requirement (Article 3.1), I:272–3
international standards (Annex A, paragraph 3), I:269
nature of obligation under Article 3.1, I:275
conforming to international standards (Article 3.2)
"conform to" requirement, I:275
consistency presumption, I:276
definition (Annex A, paragraph 1), I:245
GATT 1947 rules
Article III, I:236
Article XI, I:236–7
Article XX(b), I:236–7
inefficiency of, I:238

SPS measures (*cont.*)
international trade and
rules for developed countries, I:234–5
rules for developing countries, I:235–6
uneasy relationship, I:233
Mexico, III:230
resulting in high level of protection (Article 3.3), I:276–8
Russian, III:306
Standards Codes, I:236, 238
state-owned enterprises (SOEs), III:51, 53
state trading enterprises (STEs), I:148; III:230
Stockholm Declaration, II:626
Strengthened GATT Rules And Disciplines (SGRAD), II:403, 409
subsidies and countervailing measures (SCM). *See also* Agreement on Subsidies and Countervailing Measures; export subsidies provisions
agricultural, II:97
Colombia, III:82
defined, II:85, 87
economic background, II:84
good and bad subsidies, II:88–92
subsidies effect on producers, II:87–8
subsidy, defined, II:85–7
economic perspective on WTO rules
agriculture sector, II:105–6
bargain protection under GATT and GATS, II:98
countervailing duties, II:103–5
domestic subsidies and definition of subsidy in WTO Law, II:100
red light subsidy (export and domestic content subsidies), II:99
yellow light, green light approach, II:101–3
export subsidies, II:90, 91, 99
global free trade and, III:447
good and bad subsidies, II:88
for export promotion, II:90–92
protective subsidies, II:89–90
green light subsidies, II:97, 101
import subsidies, II:92, 93
in GATT System Prior to Uruguay Round, II:93–5
legal background, II:93–8
Mexico, III:230
red light subsidies, II:96, 99
subsidized imports from importing country's perspective, II:92–3
trade and environment, II:516, 548–50
under GATS (Article XV), I:905
under GATT (Article XVI), I:148
Uruguay Round Agreements
Agriculture Agreement, II:97–8
SCM, II:95–7
yellow light subsidies, II:96, 101, 102
Subsidies Code (Tokyo Round), I:682–4
Civil Aircraft Agreement and, I:1169–70
GATT and, I:682–3
subsidization, I:148
bypass, I:1025–6
countervailing duties and, II:103
cross-, I:1003, 1025–6
GATT and, II:93
subsidy discipline (1947), GATT, I:681
sugar export subsidies, I:198
Sunset Clause, II:71
Sunset Reviews under ADA (Article 11), I:522
sustainable development, New Zealand concerns, III:285–6
Switzerland argument on trade and culture, II:752

Tariff Act of 1930 (US), Section 337 of, I:160
tariff bindings (Article II of GATT 1994)
Article II:1(a), I:107
Article II:3 [valuation of imports], I:111
Article II:4 [import monopolies], I:112
Marrakesh Protocol, I:112–14
other duties or charges
Article II:1(b), I:111
Article II:2 [other duties or charges], I:111
tariff classification
Article II:1, I:112
Article II:5, I:112
tariff modification and withdrawal, I:109–10
tariff negotiations, I:108–9
tariff classification, I:112, 1582
classification purpose, I:1586
customs valuation, I:1586
disguised discrimination, I:1587
"like product" issues context, I:1586–7
origin determining method, I:1586
legal effect, I:1590
nature and purpose of, I:1582
harmonized system (HS), I:1582
origins of HS, I:1583
WCO and WTO, distinction in competence, I:1584
under GATT
Article II of, I:112
Article XXIII:1:(b) [non-violation nullification or impairment of benefit], I:1597
tariff schedules conversion to HS nomenclature, I:1589
violation claims, I:1592
GATT Article I:1 [reclassifications denying MFN treatment to "like products"], I:1592–4
GATT Article II:1 violating reclassification decisions, I:1594
Japan-SPF case, I:1593–4
Spain-Unroasted Coffee case, I:1592–3
WTO rules on, I:1590
WTO/GATT case law relating to, I:1591–7
tariff concessions, I:113. *See also* General Agreement on Tariffs and Trade
tariff-rate quotas (TRQs), I:592, 596, 598, 599; II:130–32, 115t
agricultural aspects and, II:114, 119, 120
tariffication provisions of Agreement on Agriculture
Article 4.2, I:203
current access commitments, I:204
minimum access opportunities, I:204
Modalities Agreement, I:203–4
TBT Agreement. *See* Agreement on Technical Barriers to Trade
TCCV. *See* Technical Committee on Customs Valuation
TCRO, I:609, 611. *See also* Harmonization Work Programme
July 1995–May 1999, I:615–616
Uruguay Round Agreement on Rules of Origin, II:269, 270
wholly-obtained goods definition, I:649–651

technical assistance. *See also* trade related technical cooperation and capacity building
in Uruguay Round Agreements
API, II:465
CVA, II:465, 568
DSU, II:466–7
GATS, II:465
SPS Agreement, I:356; II:464
TBT Agreement, I:402–3; II:465
TRIPS Agreement, II:465
technical barriers to trade. *See* Agreement on Technical Barriers to Trade
Technical Committee on Customs Valuation (TCCV), I:540, 541, 546
Technical Committee on Rules of Origin (TCRO), I:609, 611
July 1995–May 1999, I:615–616
Uruguay Round Agreement on Rules of Origin, II:269, 270
wholly-obtained goods definition, I:649–651
technical cooperation. *See also* trade related technical cooperation and capacity building
under GATS (Article XXV), I:872
under TRIPS Agreement (Article 67), I:1079
technical regulation (under TBT Agreement), I:376–8
Article 2, I:385
Article 3, I:385
technical test. *See also* CTH test; percentage criterion test
advantages, I:608
negative technical test, I:608, 609
technology transfer under TRIPS (Articles 7 and 66.2), I:1079
Telecommunications Services, I:914, 925, 993
Annex on Telecommunications (GATS), I:996
assessment, I:1034–5
bypass subsidization, I:1025–6
commitments in WTO
convergence with media, electronic commerce and, I:1032
GATS obligations, I:1014–17
implementation. *See* WTO commitments implementation *infra*
institutional setting (WTO and ITU) and, I:1031
remedies and dispute settlement, I:1017–20
specific commitments
distinction between basic and value-added telecommunications 994
Fourth Protocol commitments, I:998–1013
GATS commitments at WTO Agreement signature time (1994), I:995–7
competition policy and, II:500
competitive safeguards, I:1003–6
cross-subsidization, I:1003, 1025–6
dispute settlement, I:1017
remedies for difficulties on foreign markets, I:1020
remedies for injury to domestic market, I:1017–19
WTO Dispute Settlement System, I:1020
GATS obligations, I:1014–17
domestic regulation, I:1015–17
government procurement, I:1017
MFN obligation, I:1014
GATS Schedules, I:995
MFN obligation, I:1014
trade and culture, II:771
WTO accession impact on
Chinese, III:63
Russian, III:300, 326
WTO commitments implementation, I:1021
EU, I:1021–5
United States
abandoning reciprocity, I:1025–8
accounting rates, I:1028–31
WTO inclusion of, I:991
WTO Telecommunications Negotiations overview, I:994
1986 to GATS 1994 conclusion, I:994
1996 breakdown, I:993
1997 end game, I:993–4
tender under GPA. *See also* tendering procedures under GPA
documentation
Article VII:2, I:1146
Article XII:3(c), I:1146
receipt, I:1148
Article XIII:1(a), I:1147
Article XIII:1(b), I:1147
tender notices publicity under GPA
information on award of contracts, I:1152
NIP, I:1149–50
NPP, I:1150
statistical and other information (Article XIX), I:1153–4
time limit concerns (Article XI:1)
open procedures, I:1151
selective procedures, I:1151
tendering procedures (under GPA). *See also* bid challenge procedures
competitive negotiation (Article XIV), I:1145
limited tendering procedures, I:1143–5
open tendering procedures, I:1142
selective tendering procedures, I:1142–3
Textiles and Clothing Agreement. *See* Agreement on Textiles and Clothing
textiles and apparel, Mexico, III:229
textiles and developing countries, II:385
ATC
analysis of integration program, II:412
disputed balance of rights and obligations, II:408–10
implementation of, II:410
inherent weaknesses of, II:411
liberalization and integration process, II:405–7
Punta del Este Preparations, II:401–3
Textiles Monitoring Body, II:410
transitional safeguard mechanism, II:407
Uruguay Round Negotiations, II:403
dispute settlement, II:413–16
era of restrictions, II:386
MFA
comparison with GATT, II:398
objectives and impact of, II:399–401
textiles and clothing as exception to GATT system, II:390
GATT and MFA, comparison between, II:398–401
Multi-Fiber Arrangement, II:395–401
Short-Term and Long-Term Arrangements, II:391–5
textiles importance in international trade, II:385
Uruguay Round and beyond, II:387–90

Textiles Monitoring Body (TMB), I:418, 426
ATC Jurisprudence
Turkey-Textiles case, I:429
US-Shirts and Blouses case, I:429
textiles and developing countries, II:410
Textiles Surveillance Body (TSB), I:414
Thai Cigarettes case
GATT Jurisprudence exception, II:439
human rights and trade, II:687, 688
TBT Agreement and, I:393
WTO Dispute Settlement Practice Relating to Protection of Health and Environment, II:652
Thailand-Antidumping Duties case
amicus curiae briefs admissibility consequences in, I:1446
TMB. *See* Textiles Monitoring Body
Tokyo Round. *See also* Doha Development Agenda; Kennedy Round; Uruguay Round
Agreement on Import Licensing Procedures, I:594
agriculture under GATT and, I:195–6, 201
Aircraft Code, I:1168
Anti-Dumping Code, I:496
Customs Valuation Code, I:534, 536
Enabling GSP Clause, I:1541–6
background, I:1541
problem of graduation, I:1544
terms of Enabling Clause, I:1542
Government Procurement
dispute resolution, I:1132–3
procedural rules, I:1131–2
Tokyo Round Code, I:1129–34
NTB Agreements, I:94
participation
Colombia, III:74–6
Japan participation in, III:172
Korea and, III:188
United States, III:389, 392–6
plurilateralism aspects, I:94
Standards Code, I:375–6
inefficiency of, I:238
SPS measures and, I:236–7
Subsidies Code, II:97
total AMS. *See under* aggregate measurement of support
tourism (under GATS), Annex on, I:910
tourism and travel related services, I:916, 932, 933
TPA. *See* Trade Promotion Authority
TPRB. *See* Trade Policy Review Body
TPRM. *See* Trade Policy Review Mechanism
trade and culture
Brazil argument on, II:752
Canada argument on, II:752
cultural goods and services in WTO, II:753
ADA, II:764
Agreement on Safeguards, II:765
ASCM, II:760
Basic Telecommunications, II:771
GATS, II:767, 775–7
GATT 1994, II:753–60
intellectual property rights, II:777
investment, II:774
TRIMs Agreement, II:774
Cultural Exception Approach
Cultural Exceptions, II:785
Cultural Exemptions, II:786
Cultural Reservations, II:786
Cultural Waiver, II:787
GATT 1994
Article I.1-Most Favored Nation, II:756
Article III-National Treatment, II:756–60
Article IV-Cinematographic Films, II:753–5
Article XI-Quotas, II:760
Article XX(f)-Exception for National Treasures, II:755–6
globalization aspects, II:750–51
Sports Illustrated dispute, II:757
Switzerland argument on, II:752
US argument on, II:752
trade and environment, II:513. *See also* environment issues
China, III:69
Colombia issues, III:86
Committee on Trade and Environment (CTE), II:529–30
Egyptian issues, III:106
global free trade and, III:451
Korean issues, III:207
legal and policy issues, II:536
agriculture, II:552–4
biosafety, II:550–52
intellectual property, II:555–8
labeling, II:540–43
market access, II:547
MEAs, II:558–60
process and production methods, II:538–40
scientific uncertainty and precaution, II:544–7
services, II:554
subsidies, II:548–50
looking forward, II:568–9
material linkages (economic, social and environmental)
direct and indirect linkages, II:536
nature of material linkages, II:535
positive and negative linkages, II:535
MEAs, II:558–60
organizational issues
assessment, II:561
compliance, enforcement and dispute settlement, II:566–8
information exchange and observer status, II:565
transparency and public participation, II:562–5
trade and environment debate, II:532–5
WTO disputes, II:519
Australia-Salmon, II:525–6
EC-Asbestos, II:527–9
EC-Hormones, II:523
Japan-Varietals, II:526–7
US-Gasoline, II:519–21
US–Shrimp, II:521–2
US-Shrimp 21.5 (implementation decision), II:523
WTO, environment and sustainable development, II:513
Agreement on Agriculture, II:516
DSU, II:518
GATS, II:517
GATT, II:514
Marrakesh Agreement establishing "WTO Agreement", II:513
SCM Agreement, II:516
SPS Agreement, II:515
TBT Agreement, II:514
TRIPS Agreement, II:517
WTO's Fourth Ministerial Mandate on Trade and Environment, II:531

trade and gender
APEC, II:705
CEDAW, II:701, 704, 736
GATT Article XX(a), II:737
gender relevance to international trade and investment, II:699
gender and trade liberalization, II:703–8
gender concepts and terms, II:699–702
gender differences and trends in global economic activity, II:702–3
gender equality, II:700
gender, trade and investment
legal analysis of, II:711–16
socioeconomic approaches to, II:708–11
Informal Working Group on Gender and Trade (IWGGT), II:706–7
International Gender and Trade Network (IGTN), II:706–8
MERCOSUR, II:705
OECD gender definition, II:699–700
TPRB, II:740
trade agreements, gender analysis of, II:716
GPA, II:729
Agreement on Agriculture, II:723–6
ASCM, II:720–22
ATC, II:719
GATS, II:726–9
GATT 1994, II:717–19
SPS Agreement, II:732–3
TBT Agreement, II:732–3
TRIMs Agreement, II:723
trade-related areas, gender analysis of, II:729
domestic regulation, II:732–3
environment, II:737
human rights, II:736–7
intellectual property, II:729–32
investment, II:729
labor standards, II:734–6
UNCTAD efforts, II:704–5
UNIFEM, II:706
WTO processes, gender analysis of, II:738
dispute settlement, II:739
TPRM, II:740
trade negotiations, II:738
trade-related capacity building, II:741–2
trade and human rights. *See* human rights and trade
trade and labor. *See* labor and trade
trade barriers regulation and EC Law (Council Regulation 3286/94), I:1508. *See also* Agreement on Technical Barriers to Trade
permitted subject matter of TBR complaints, I:1509–13
Community industry complaints against foreign trade practices effects, I:1511
governmental measures, I:1509
individual Community enterprises complaints, I:1512
Member State complaints, I:1511
mixed competence issues and TBR, I:1510
threatened injury, I:1513
post complaints procedure, I:1513
procedure outcome (termination, suspension or WTO dispute settlement), I:1514
scope of, I:1509
WTO proceedings initiation, I:1514
Trade Facilitation, Modalities for Negotiations on (August 2004) (text), III:528–9
trade in goods, III:292
Argentina concerns
agriculture, III:18
manufacturing, III:17
Egypt concerns, III:96
Russian concerns
apparel and footwear issues, III:294
Civil Aircraft (Plurilateral Agreement) issues, III:294
industrial goods negotiations, III:292–4
IT products issues, III:294
trade liberalization. *See* computational analysis and trade liberalization
trade policy development, I:28
business sector and, I:29
Canada, III:40–46
formal consultative mechanisms, III:43
informal consultative mechanisms, III:44–6
Colombia, III:89
consumer interests and, I:32
Egypt, III:109
EU, III:113–15
globalization aspects, I:22, 33–4
Japan, III:180
Korea, III:210–12
labor unions, I:31
legislative level, I:30
lobbies proliferation in, I:28
media and, I:30
Mexico, III:238–41
national interests, I:33
New Zealand, III:271
NGOs and, I:31
Singapore, III:348–9
South Africa, III:376
trade stakeholders interests and, I:32
United States
debate over multilateralism, III:387
President and Congress (constitutional tensions over trade), III:384
trade negotiating authority and "fast-track", III:385–7
USTR, III:388
WTO role in
efficiency increasing mechanisms, I:36–7
Members/delegation, I:35
multilateral perspective, I:37
operations, I:34
Secretariat, I:35–6
Trade Policy Review Body (TPRB), I:59, 64; II:740
Trade Policy review functions of WTO
TPRB, I:59
TPRM, I:58–9
Trade Policy Review Mechanism (TPRM), I:58–9, 136–7; II:740; III:153
Trade Promotion Authority (US), II:175, 577
Trade-Related Aspects of Intellectual Property Rights. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights
trade-related capacity building, gender analysis of trade and, II:741–2
trade-related technical cooperation and capacity building (TRTCCB)
definitions, II:458–60
Geneva three-pronged approach, II:462–4
ITC, II:463
UNCTAD, II:463
WTO, II:462

Trade-Related Aspects (*cont.*)
technical assistance in Uruguay Round Agreements
API, II:465
CVA, II:465
DSU, II:466–7
GATS, II:465
SPS Agreement, II:464
TBT Agreement, II:465
TRIPS Agreement, II:465
trade-related capacity building, II:460–62
trademarks. *See also* Agreement on Trade-Related Aspects of Intellectual Property Rights
Articles 15–16 and 18–21 of TRIPS Agreement, I:1087
negotiating history, I:1087
transaction value definition under CVA
actually paid or payable price, I:545
agreed price, I:544
agreed price, changes in, I:545
identification of targeted transaction, I:546
no time requirement, I:546
price actually paid or payable, I:544
price for goods, I:544
price in this transaction, I:545
transition economies
regionalism and, II:249t
AFTA, II:253
APEC, II:256
ASEAN, II:253, 255–6
CAEC, II:255
CEFTA, II:251–2
CIS, II:254–6
CMEA, II:251, 256
ECO, II:255–6
EU, II:256
NATO, II:251
SAARC, II:255
WTO and, II:256–9, 257t
transparency
AB and, I:1398
API (Articles 2.5–2.8), I:578
commitment in MTAs, I:138, 139
CVA (Article 12), I:566
issues
external transparency, I:86
internal transparency, I:85
Egyptian issues, III:106
GATS (Article III)
Article III:1, I:831
Article III:3, I:831
Article III:4, I:832
Article III:5, I:832
Article III*bis*, I:832
Mongolian issues, III:258
safeguard measures and, II:64
SPS Agreement
Annex B, I:336
Annex B.1, I:337
Annex B.5, I:337–8
Annex B.6, I:338
Annex B.10, I:340
Article 5.8, I:336, 339
Article 7, I:336
infrastructure for transparency, I:340
notification procedure, I:338–9
scope of notification obligation, I:336
TBT Agreement
allowance of time for comments obligation, I:401
creation of inquiry points obligation, I:402
notification obligation, I:401
pre-enactment publication obligation, I:401
provision of copies obligation, I:401
publication of measures obligation, I:402
TRIMs Agreement (Article 6), I:452
TRIPS Agreement and (Article 63), I:1081
transport services, I:917, 935–7, 1472; III:301, 328
transshipment concerns under Anti-Dumping Agreement, I:508
travel and tourism-related services, I:932–3
TRIMs Agreement. *See* Agreement on Trade-Related Investment Measures
TRIPS Agreement. *See* Agreement on Trade-related Aspects of Intellectual Property Rights
TRQ. *See* tariff-rate quotas
TRTCCB. *See* trade related technical cooperation and capacity building
TSB. *See* Textiles Surveillance Body
Turkey-Textiles case (ATC Jurisprudence)
consultations and, I:1224
GATT Article XXIV (RTA regulation aspects), II:240
RTA regulation aspects, II:235–7
TMB role, I:429

UDHR. *See* Universal Declaration of Human Rights
UNCTAD. *See* United Nations Conference on Trade and Development
UNCITRAL. *See* United Nations Commission on International Trade Law
unconditional most-favored-nation obligation. *See under* most-favored nation
undisclosed information protection under TRIPS Agreement, I:1101
UNIFEM, II:706
unilateral trade liberalization, III:224
United Nations Commission on International Trade Law (UNCITRAL). *See also* Agreement on Government Procurement
award contracts by, I:1148
type selective procedure, I:1142–3
United Nations Conference on Trade and Development (UNCTAD), I:1528–30
Colombia, III:74
competition policy and, II:497
conference on LDC, II:361
Geneva three-pronged approach and TRTCCB, II:463
Indonesia, III:148
trade and gender, II:704–5
United Nations Environmental Programme (UNEP), II:167–8
United Nations Fund for Women (UNIFEM), II:706
United States, III:381. *See also* European Union; Russia
1980s (congressional unrest, bilateralism and a globalizing economy)
Congress' restlessness, III:398–9
early 1980s (trade deficits, trade restrictions, breakdown in Geneva), III:396–8
globalizing economy, III:402
Omnibus Trade Act of 1988, III:400–402
agriculture trade and, I:202

agriculture under GATT and, I:191
Agricultural Adjustment Act of 1933, I:190
Article XI:2(c) provisions, I:190
Article XXV:5, waivers under, I:190
argument on trade and culture, II:752
Cancun, III:432–34
Doha launch, III:426–32
in GATT, Tokyo Round (1947–1979)
early years, III:389
Kennedy Round, III:390–92
Tokyo Round, III:392–6
government competition policy and negotiations, II:503
leadership in GATT formation
postwar revival of trading system, III:382
US settles for GATT, III:383
QUAD member, I:812–14
Telecommunications Services commitments implementation and
abandoning reciprocity, I:1025–8
accounting rates, I:1028–31
Trade Act of 2002, III:426, 428
trade policy decision-making in
debate over multilateralism, III:387
President and Congress (constitutional tensions over trade), III:384
trade negotiating authority and "fast-track", III:385–7
USTR, III:388
Uruguay Round
1986–89 (three key pillars building), III:404–8
1993 finishing of Round, III:417–19
Blair House and beyond, III:415–17
from Brussels to Dunkel Draft, III:412–15
importance to U.S. Policy, III:403
mid-term review in Montreal and on to Brussels, III:408–12
Uruguay Round Agreements Act, III:419–22
WTO first seven years (negotiations and implementation)
built-in agenda, III:423
foundations laying, III:422
new initiatives, III:424
WTO in 2005 (challenges ahead), III:434–5
Universal Declaration of Human Rights (UDHR), II:626
Universal Services Obligations (USO), II:197, 198
URAA. *See* Uruguay Round Agreements Act
Uruguay Round. *See also* Doha Development Agenda; Kennedy Round; Tokyo Round
ADA, I:498–500
Agreement on Agriculture, I:200, 202, 205
Agreement on Safeguards, I:760
AILP, I:594
anti-dumping action, II:71, 78, 79
Appellate Body and, I:1279–1281
Argentina
intellectual property rights (patents for pharmaceutical drugs), III:7–12
services, III:12–16
trade in goods, III:17–18
ARO
Article 9.2 of, II:269
CRO, II:269–70
HS nomenclature, II:269
TCRO, II:269–70
ASCM, I:684, 685
ATC, I:415; II:403
linkage to other GATT Rules, I:418
monitoring body, role of, I:417–18
quota growth rates, I:416
scope of products to be integrated, I:417
special safeguard mechanism development, I:417
speed of integration, I:416
chronology
December 1988 to December 1990, I:7
December 1990 to December 1991, I:7
December 1991 to June 1993, I:7
June to December 1993, I:8
pre-negotiation (1981–86), I:6
September 1986 to December 1988, I:7
Colombia participation in
negotiations objectives, III:79
negotiations results, III:80
agriculture, III:81
textile and clothing, III:81
tropical products, III:80
Punta del Este Declaration, preliminary negotiations for, III:79
services, III:78
competition policy and
GATS, II:500
Singapore Ministerial Meeting (1996), II:501
Telecommunications Services Agreement, II:500
TRIMs Agreement, II:500
computational analysis of trade liberalization (UR-1, UR-2, and UR–3 Scenario), II:25, 27t
aggregate results, II:31
computational results, II:26
MFA, II:26
sectoral results, II:29t., II:31
consultation process and, I:1202
developing countries, decisions and agreements affecting, I:1546
Decision on Measures Concerning Possible Negative Effects of Reform Program on Least-Developed and Net Food-Importing Developing Countries, I:1547
Decision on Measures in Favor of Least-Developed Countries, I:1546
developing countries, MTAs providing S&D treatment of, I:1548
ADA, I:1550
Agreement on Agriculture, I:1549
Agreement on Safeguards, I:1552
AILP, I:1555
ASCM, I:1551
ATC, I:1554
CVA, I:1554
DSU, I:1555
GATS (Article IV), I:1555
GPA, I:1556
SPS Agreement, I:1552
TBT Agreement, I:1553
TRIMs Agreement, I:1553
TRIPS Agreement, I:1555
Egypt participation, III:93, 101
environmental issues and, II:149
intellectual property, II:151
services (GATS and GATT 1947), II:152
standards (TBT and SPS Agreements), II:150
subsidies (SCM Agreement), II:151

Uruguay Round (*cont.*)
EU and. *See under* European Union
Financial Services and, I:958–60
GATS and, I:811
goals, I:812–17
negotiations course, I:818
results overview, I:820
GATT 1994
Marrakesh Agreement, I:95
MFN obligation, I:95
MTAs, decisions, and understandings, I:98
transition from GATT 1947 to GATT 1994, I:96–8
GATT Article XXIV, understanding on, I:176–8
globalization impact on, I:23, 24; III:458–61
GPA, I:1134–7
Indonesian issues
institutional issues, III:153
intellectual property rights, III:151
market access in goods, III:149
S&D treatment, III:153
services, III:150
strengthening GATT rules, III:152
Japan participation in, III:172–5
Korea, III:192
economic and political impact, III:197–9
implementation, III:197
negotiations, III:194
objectives, III:194
participation in Uruguay Round, III:194
results, III:195
LDCs in multilateral trading system, II:346, 369–71
Mexico, III:227
dispute settlement, III:232
GATS, III:231
government procurement, III:232
market access (non-tariff barriers), III:229–30
antidumping and countervailing duties, III:229
BOP exceptions, III:230
import licenses, III:230
rules of origin, III:230
safeguards, III:229
sanitary and phytosanitary measures, III:230
subsidies, III:230
technical barriers to trade, III:230
market access (tariffs), III:228–9
agriculture, III:228
industrial goods, III:228
textiles and apparel, III:229
RTAs, III:232
state-trading enterprises, III:230
TRIMs Agreement, III:231
TRIPS Agreement, III:231
New Zealand participation in, III:272–4
overview of, I:4, 5
PSI, I:575
regionalism and, II:302–4
ASEAN, II:303
CARICOM, II:303
FTAA, II:303
GATS (Article V), II:302
GATT (Article XXIV), II:302
MERCOSUR, II:303
NAFTA, II:303
rules of origin and, II:269
safeguard measures and, II:48–51
available policy instruments, II:48
compensation and retaliation, II:49
MFN versus specificity, II:48
procedural reforms, II:49
SCM measures and
Agriculture Agreement, II:97–8
SCM, II:95–7
Singapore
market access commitments, III:339
market access outcomes, III:339
policy goals, III:338, 340
South Africa participation in
objective, III:358
outcomes, III:359
policy, III:356–7
SPS Agreement, I:239
Cairns Group proposal, I:241
developing countries, role of, I:242
EC proposal, I:241
trading nations position in, I:240
US proposal, I:241
technical assistance in
API, II:465
CVA, II:465
DSU, II:466–7
GATS, II:465
SPS Agreement, II:464
TBT Agreement, II:465
TRIPS Agreement, II:465
textiles and developing countries, II:387–90
TRIMs Agreement and, I:445
negotiating positions, I:446–7
outcome, I:447
TRIPs Agreement and, I:1055
United States
1986–89 (three key pillars building), III:404–8
1993 finishing of Round, III:417–19
Blair House and beyond, III:415–17
from Brussels to Dunkel Draft, III:412–15
importance to U.S. Policy, III:403
mid-term review in Montreal and on to Brussels, III:408–12
Uruguay Round Agreements Act (US) (URAA), II:110, 119, 124–8, III:419–22. *See also* Agreement on Agriculture
green box measures, II:127
US-Copyright case
amicus curiae briefs admissibility consequences in, I:1443
US-Gasoline case
AB jurisdiction, I:1393
GATT jurisprudence execption, II:438
trade and environment, II:519–21
trade and labor, II:587–89
US-Restrictions on Imports of Cotton and Man-Made Fibre Underwear case, I:135
ATC Jurisprudence
evidentiary scope of review, I:428
standard of review, I:428
textiles and developing countries, II:415
US-Rules of Origin case
rules for textiles and apparel products, I:612
US-Section 110(5) of U.S. Copyright Act (under TRIPS), I:1089
contemporaneity, II:436

disputes, II:426
exception, II:442
principles of interpretation, II:431
relationship with GATT, II:428
US-Shirts and Blouses case
ATC, I:424, 425, 427
ATC Jurisprudence
burden of proof, I:428
evidentiary scope of review, I:429
TMB role, I:429
textiles and developing countries, II:414
US-Shrimp case, II:163
AB and, I:1297, 1298, 1316, 1322, 1330, 1393
amicus curiae briefs, I:1399
amicus curiae briefs admissibility consequences, I:1431, 1433–5, 1442; II:643
balancing principles of human rights, II:637
consultations and (DSU Article 21.5), I:1225
environmental issues, II:147, 151, 165, 166
human rights concerns, II:643
TBT Agreement and, I:383
trade and environment, II:521–2, 540
trade and labor, II:587
US-Shrimp 21.5 (implementation decision), II:523, 540, 653
US Trade Act of 2002, III:426, 428
US Trade Promotion Authority Act 2002, II:577
US Trade Representatives (USTR), III:388, 389
USO. *See* Universal Services Obligations

values in trade and labor
in markets and workplace, II:604–6
shared values
as instrumental tools, II:606, 610
as normative principles, II:609–10
as over-arching objectives, II:607–8
values framework normative implications
internationalization of values, II:611
ordering priorities, II:612–14
VER. *See* Voluntary Export Restraint
Vienna Convention on the Law of Treaties (VCLT)
Article 2, I:1406
Article 30, I:1415
Article 31, I:1397, 1595–6; II:643
Article 31.1, I:1356
Article 31.3, II:630
Article 31:3(c), II:638
Article 32, I:1397
Article 41, I:1415
Article 53, I:1415
Vienna Declaration on Human Rights, II:628
violation complaints. *See also* non-violation complaints; situation complaints
under GATS (Article XXIII), I:867
under GATT, I:170
volume-based safeguard, I:205. *See also* safeguard measures
Voluntary Export Restraint (VER), I:152; II:47, 49, 390. *See also* Export Restraint Agreement; Orderly Marketing Agreement, Voluntary Restraint Agreement
Voluntary Restraint Agreement (VRA), I:151; II:277

W/120 classification, I:921
air transport services, I:937–8
business services, I:922
computer and related services, I:923–4
legal services, I:922
communication services, I:924–5
construction and related engineering services, I:927
distribution services, I:927
educational services, I:928
energy services, I:939–41
environmental services, I:928–30
financial services, I:931
health-related and social services, I:932
recreational, cultural and sporting services, I:934
telecommunication services, I:925
tourism and travel-related services, I:932–3
transport services, I:935–7
waivers
granted under GATT 1947, I:179
granted under GATT 1994, I:179
WTO decision making and, I:69
WCO. *See* World Customs Organization
WCT. *See* WIPO Copyright Treaty
WEO. *See* World Environmental Organization
WGTI. *See* Working Group on Trade and Investment
wholly-obtained goods (ARO Appendix 1)
CRO definition, I:651
goods obtained outside country, definition of, I:652, 653
preparatory discussion, I:648
TCRO definition, I:649–51
WIPO. *See* World Intellectual Property Organization
WIPO Copyright Treaty (WCT), I:1085
Work Programme on Electronic Commerce, II:471
Working Group on Trade and Investment, I:467, 477
Working Party on Domestic Regulation, I:944
draft disciplines, I:948
equivalence/international standards, I:945
general issues, I:945
necessity, I:945
professional services, I:839, 870, 942, 946
regulatory examples, I:947
transparency, I:945
Working Party on Professional Services, I:942
World Customs Organization (WCO), I:1584; II:269
WCO Origin Project, I:615
World Environmental Organization (WEO), II:167
World Intellectual Property Organization (WIPO), I:72, 1048
World Trade Organization (WTO), I:5. *See also under* Indonesia; Mongolia; Singapore; United States
competition policy and
key issues for, II:506–8
Uruguay Round Agreements and WTO, II:499–501
cultural goods and services in
ADA, II:764
Agreement on Safeguards, II:765
ASCM, II:760
Basic Telecommunications, II:771
GATS, II:767, 775–7
GATT 1994, II:753–60
intellectual property rights, II:777
investment, II:774
TRIMs Agreement, II:774
democratic roots of, I:40–46
consensus rule making, I:43–5
dispute settlement, I:43
MFN obligation, I:40n.

World Trade Organization (*cont.*)
multilateral trading system, I:40, 41
national treatment obligation, I:41n.
negotiating rounds, I:42
NGO involvement, I:47
non-discrimination principle, I:40, 41
environmental issues and, II:141
conflicts with multilateral environmental agreements, II:148
restraints on national environmental protection, II:145–8
WTO as a self-enforcing agreement, II:160–61
WTO Rules to accommodate environmental safeguards, II:158–60
EU and
Doha, III:134–5
EU associations and enlargements in WTO, 131
one more Round, III:132–4
WTO Dispute Settlement, III:128–31
functions under Marrakesh Agreement
dispute settlement, I:58
global economic policymaking, I:59–60
negotiations, I:57–8
Trade Policy review, I:58–9
TPRB, I:59
TPRM, I:58
global integration and, III:463–9
governance structure. *See* World Trade Organization governance structure
human rights and. *See under* human rights and trade
institutional framework. *See* World Trade Organization institutional framework
investment-related provisions in, II:314
Agreement on Government Procurement, II:315
ASCM, II:316
GATS, II:314
TRIMs Agreement, II:315
TRIPS Agreement, II:315
Japan
attitude towards WTO, III:176
WTO strengths and weaknesses, III:177
labor standards and, II:177
LDCs in multilateral trading system, II:347, 348
Membership. *See* World Trade Organization Membership
Mexican public attitudes towards
business groups opinions, III:241
SMEs and NGOs, III:242–3
RTAs under, II:229–31
RTAs regulation
legal framework for, II:219–27
institutional framework for, II:228–34
WTO dispute settlement based, II:234–40
regulation in WTO system interest, II:241–44
rules of origin in, II:264–73
services liberalization and economic development, II:191–6
South Africa
attitudes towards WTO, III:368
strengths and weaknesses of WTO, III:368–70
WTO Membership effects on, III:360–65
tariff classification rules, I:1590
non-violation nullification or impairment of benefit [GATT Article XXIII:1:(b)], I:1597
violation claims (GATT Articles I:1 and II:1), I:1592–7
trade and environment (Fourth Ministerial Mandate), II:531
trade and labor, II:592
trade policy development and
efficiency increasing mechanisms, I:36–7
multilateral perspective, I:37
WTO Members/delegation role, I:35
WTO operations, I:34
WTO Secretariat role, I:35–6
transition economies, II:256–9, 257t
TRTCCB (Geneva three-pronged approach), II:462
WTO Agreement, Preamble, I:79
World Trade Organization governance structure, I:60–67
committees, I:64
Committee on Balance-of-Payments Restrictions, I:65
Committee on Budget, Finance and Administration, I:66
Committee on Regional Trade Agreements, I:66, 67
Committee on Trade and Development, I:65
Committee on Trade and Environment, I:66
General Council, I:63, 64
Meetings, I:67
Ministerial Conference
Cancun (2003), I:63
Doha (2001), I:62
Geneva (1998), I:61
Seattle (1999), I:61
Singapore (1996), I:60
organization of negotiations, I:67
Sectoral Councils and Subsidiary Bodies, I:64
World Trade Organization institutional framework
decision-making
accessions, I:70
amendments, I:70
consensus and voting, I:67–8
interpretations, I:68
waivers, I:69
decision-making difficulties, I:81–4
amendment procedures, I:85
legislative institutions relationship to DSB, I:83
routine decisions, I:81
ICITO, I:54
institutional issues, Uruguay Round Negotiations on
FOGS Group, I:55
new organization creation proposal, I:56
ITO, I:53
Marrakesh Agreement and
conflicts resolution between WTO Agreements, I:80
continuation of GATT practices (Article XVI:1), I:80
decision making in WTO, I:67–70
national laws conformation to WTO rules, requirements to, I:80
organizational issues, I:71–2
reservations, I:81
WTO functions, I:57–60
WTO governance structure, I:60–67
WTO Preamble, I:79
WTO scope, I:56–7
Membership, I:73–9
organizational issues
relations with IGO and NGO, I:72
WTO membership, I:73
WTO Secretariat, I:71
WTO status, I:71
pragmatic adaptation and its limitations

World Trade Organization institutional framework (*cont.*)
decision making process inadequacies, I:55
structural inadequacies, I:54, 55
transparency issues
external transparency, I:86
internal transparency, I:85
World Trade Organization law. *See also* dispute settlement
interaction with international law rules, I:1406, 1417
cautionary concerns, I:1409
"conflict" definition, I:1420
general international law, I:1407
General International Law rules on inter-play of norms, I:1420
non-WTO treaties, I:1408
panels obligation and General Conflict Clause constitution in favor of WTO rules, I:1421–3
WTO Agreement contradicting non-WTO Treaties, I:1418–20
WTO Law "contracting out" of General International Law, I:1418
international law referred to in the process of "interpreting" WTO terms, I:1411
international law referred to outside the process of treaty interpretation, I:1412
cautionary concerns, I:1417
general international law, I:1413
non-WTO treaties, I:1414–17
World Trade Organization Membership
accession of new members
accession approval, I:78
accession protocol and working party report, I:75–7
bilateral negotiations, I:75
Foreign Trade Regime Memorandum, I:74–5
China
challenges after accession to WTO, III:61–64
economic reforms during its bid for, III:51–55
legal reforms during its bid for, III:55–6
legal system, effect on, III:64–6
opportunities arising from, III:57–61
strategies after joining "Club", III:66–9
Egypt
attitude towards WTO, III:98
economic effects, III:96–7
legal effects, III:98
participation in WTO Dispute Settlement Process, III:99
political effects, III:97
social effects, III:98
strengths and weaknesses, Egyptian perspective on, III:98–9
non-application among Members (Article XIII), I:78
original members, I:73
withdrawal, I:79
World Trade Organization Secretariat
organizational issues, I:71
trade policy development and, I:35, 36
world trade regime, Uruguay Round Negotiation launching and, I:14

yellow light subsidies (ASCM), II:96, 101, 102. *See also* green light subsidies; red light subsidies